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Shutdown Puts ITC Patent Cases Into Deep Freeze

By **Ryan Davis**

Law360, New York (October 01, 2013, 12:13 AM ET) -- Patent cases at the U.S. International Trade Commission may face significant disruptions due to the government shutdown that began early Tuesday, intellectual property attorneys say, although business at the U.S. Patent and Trademark Office and U.S. Copyright Office will see less of an impact.

The ITC said Monday that it will entirely halt its investigative activities as a result of the shutdown, putting all pending patent cases at the commission into a holding pattern until further notice. The USPTO, meanwhile, said it has reserve funds that will allow it to keep operating as usual for up to four weeks.

The Copyright Office is also expected to close during the shutdown, although attorneys said filings there are much less time-sensitive than in other offices, so the effect of the closure on businesses and attorneys will be limited.

According to Bert Reiser of Latham & Watkins LLP, an extended shutdown of the ITC will throw patent cases into disarray, delaying deadlines and disrupting expected case schedules.

"It's a hard position to be in," he said. "Everyone is scrambling to figure out what to do."

Impact on the ITC

The ITC said in a statement Monday that if the shutdown cuts off funding to the agency on Tuesday morning, it will "shut down its investigative activities for the duration of the absence of appropriation," including all of its patent cases.

"In terms of deliberative function, those of us who have cases at the ITC should not expect any activity," Reiser said, meaning that administrative law judges won't be deciding motions or issuing initial determinations.

The shutdown will toll the schedules and deadlines for all investigations and proceedings to determine whether to institute an investigation, the ITC said. Nearly all hearings and conferences scheduled for during the shutdown will be postponed, with just a handful of exceptions.

The ITC said that once the shutdown ends, all schedules will resume starting on that day. For instance, it said that if the shutdown lasts four days from Oct. 1 to Oct. 4, any deadline now set for Oct. 4 would be extended four days to Oct. 8.

Gary Hnath of Mayer Brown LLP said that a prolonged shutdown of the ITC "could be devastating to current schedules, given the fast pace of the proceedings there."

"If this is a short thing, for two or three days, there will be issues around the edges, but it wouldn't create any major difficulties for practitioners or the commission," Reiser said. "If it's a week or two weeks or longer, it creates more work for the commission to recover and set things right."

The last government shutdown in the mid-1990s lasted a total of 28 days. After a six-day shutdown in November 1995, the budget impasse continued, leading to a 22-day shutdown from Dec. 16, 1995, to Jan. 6, 1996.

Impact on the USPTO

The USPTO said Monday that it has enough money in a reserve fund made up of fee collection from past years "to operate as usual for approximately four weeks."

As a result, the shutdown should have little impact initially on those who use the USPTO, said Bernard Knight of McDermott Will & Emery LLP.

"I don't think people need to be overly concerned about patent applications moving forward, which is a good thing," said Knight, who was the USPTO's general counsel until earlier this year.

The office said it will continue to assess its fee collections during a shutdown to determine exactly how long it will be able to stay open while the rest of the government is shut down.

If the shutdown lasts longer than four weeks and the reserve fund is exhausted, the office said it will halt operations, and only "a very small staff would continue to work to accept new applications and maintain [information technology] infrastructure, among other functions."

"The excepted employees will ensure the functionality of processes and systems minimally necessary for the preservation of patent rights, to allow compliance with statutory provisions that cannot be waived, and avoid disclosures of information that would be detrimental to the national security," the office said.

Even in if the USPTO closes down, its electronic filing and payment systems will remain up and running because shutting them down "may result in the complete or partial loss of intellectual property," the office said in its official shutdown plan.

Knight said he doubted the USPTO will have to put that plan into effect.

"The government is not going to be shut down for a month, so they're in good shape," he said.

If there is an extended shutdown of the USPTO, it would disrupt the new patent review proceedings created by the America Invents Act, such as inter partes review, said Stuart Meyer of Fenwick & West LLP. The statute mandates that all such proceedings be completed in one year, he noted.

"Depending on how long the shutdown is, it could make it very hard to stay on track for one year," he said.

Impact on the Copyright Office

The Library of Congress, of which the U.S. Copyright Office is a part, said in a statement Monday that if the government shuts down, "all Library of Congress buildings will close to the public and researchers. Also, all public events will be canceled, and websites will be

inaccessible."

A spokesperson for the Copyright Office did not immediately respond on Monday to a request for comment about exactly how a shutdown would impact copyright operations. But attorneys said they are expecting the office to stop operating for the duration of the shutdown.

While that would be an inconvenience, it would be unlikely to cause major problems for practitioners, said Belinda Scrimenti of Pattishall McAuliffe Newbury Hilliard & Geraldson LLP.

"At the Copyright Office, you don't have the deadline pressure you have at the USPTO," so most filings and other business at the office could be put off until it resumes operations, she said.

The closure of the office would cause problems for anyone who needs an expedited copyright registration, Scrimenti said. Since some courts require copyright owners to have a registration in hand to file an infringement suit, the office offers expedited processing within a few days for an added fee.

If that service is unavailable, "some litigants could be without the ability to sue until the office is up and running," said Dyan Finguerra-DuCharme of Pryor Cashman LLP.

Even if it doesn't immediately cause major disruptions for practitioners, the shutdown of the Copyright Office could have lingering effect on its business, she said, since the office is already "understaffed and overwhelmed."

"I'm afraid that if they get a backlog of applications filed during the shutdown, there are going to be delays," she said.

--Editing by Sarah Golin and Katherine Rautenberg.