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IP Shutdown

You're just a patent attorney. Maybe you're relatively apolitical. You don't care if there's a border wall or not. The United States Patent and Trademark Office (USPTO) remains open. So should you care about the partial Government shutdown?

You better believe it. Here's why:

In addition to the spreading effects on the economy generally (e.g., what is going to happen when Boeing starts laying off workers because airlines, unable to register new airplanes while most of the Federal Aviation Administration (FAA) ?? other than Air Traffic Control ?? is closed, start to refuse delivery of airplanes they've ordered, or cancel those orders altogether?), the USPTO cannot continue to operate through an indefinite shutdown.

The USPTO is funded by user fees. But it is not permitted to simply collect those fees and spend them. Instead, the USPTO transfers fees collected to the Treasury and a budgeted amount is appropriated back to the USPTO, based on a guess at budget time as to how much will be collected in fees. If more is collected than was budgeted, the excess is deposited in a special reserve account, from which the USPTO is permitted to draw, without further appropriation, in subsequent fiscal years only.

Fortunately, the USPTO has collected excess fees in fiscal years prior to the current fiscal year, and is currently operating off that reserve account. The USPTO is being a little cagey about how long it can keep doing that. When the shutdown began, it announced that it could operate on reserves for "a few weeks," and has said nothing since then. But as we approach the end of four weeks of shutdown, one has to wonder how much longer the USPTO will remain open.

If the USPTO has to close, it will continue to accept filings of new applications, and replies to Office Actions previously issued, and will maintain a skeleton staff to keep the computers running. But it will not issue any new Office Actions (and it's not clear whether it will issue patents either, even where the issue fees have been paid). So you will have some work to do ?? on new applications and replies to existing Office Actions, but as the shutdown drags on, and you finish all your replies, you will have less to do.

What happens if the shutdown lasts for "years" as the President has threatened? It's not clear. One could argue that in the absence of a budget, all fees currently being collected are in excess of budgeted amounts and therefore go into the USPTO's reserve account. Then as soon as the next fiscal year begins (in October), the USPTO can spend all those funds without appropriation, and so could reopen. If that actually works, the USPTO could operate that way indefinitely, so if we can survive until October, maybe we'll be okay after all.