The USPTO Extends Certain Trademark Deadlines Again, Now Through May

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As first announced in March, the USPTO has provided two avenues for relief to trademark owners impacted by the novel coronavirus (COVID-19) pandemic. These policies have recently been updated and extended through May:

1. CARES Act Relief: Applicants and registrants can claim the benefit of a *grace period* extension on many types of filings with deadlines between, and inclusive of, March 27, 2020 and May 31, 2020.[1] The requesting party must make the late filing or payment by Monday, June 1st with a statement that COVID-19 *materially interfered* with meeting the original deadline. This alert mostly will elaborate on this grace period measure.

2. Other Relief - Petitions: The USPTO will waive its fees for both Petitions to Revive applications abandoned by May 31, 2020 and Petitions to the Director to reinstate registrations that were cancelled or expired within this timeframe.[2]

We recommend trying to meet all trademark deadlines during this time – yet turning to the options explained here if applicable and necessary in your situation. Even if you need not make use of these extension or petition options, these developments may have an impact on your trademark decisions and portfolio, which we discuss further below.

CARES ACT RELIEF

What filings may benefit from a grace period?

The notice applies to an expansive list of trademark filings:

- Priority filings (i.e., filing in the U.S. with a claim of priority date from a foreign application);
- Transformations of extensions of protection (from an International Registration to a U.S. application);
- Statements of Use and Requests for Extension of Time to File Statements of Use;
- Office Action Responses;[3]
- Notices of Appeal from a Final Office Action;
- Section 8 Affidavits of Use or Excusable Nonuse; and
- Renewals.

As for *inter partes* TTAB filings, the notice only applies to Notices of Opposition and Requests for Extension of Time to Oppose.

Unlike several foreign jurisdictions that have implemented blanket extension policies or shut down trademark operations, the USPTO does not provide for automatic granting of extensions or

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suspend any current due dates. The U.S. grace period is only available to applicants, registrants, trademark practitioners, or other individuals who assert that the outbreak materially interfered with a timely filing or payment.

How do you request relief?

To receive the benefit of additional time, those impacted must make the late filing or payment *by Monday, June 1st* [4] and include a statement in the filing that the COVID-19 outbreak caused a material interference leading to the delay.

What qualifies as a material interference?

The USPTO has indicated that at least the following may qualify as a material interference: office closures, cash flow interruptions, lack of access to files or other materials, travel delays, or personal or family illness.

We therefore expect that extensions would be available where, e.g., an applicant cannot obtain a proper specimen image due to a shelter-in-place order, a business makes significant cuts to expenditures and staff, or a business (or its trademark counsel) is otherwise particularly strained due to an inability to fully operate under local or state ordinances.

We do not know how closely the justifications for each delay will be reviewed. In many situations, including less clear ones, the best course of action could be to meet the original deadline. If the pandemic has impacted your trademark budget or your ability to otherwise meet a trademark deadline between, and inclusive of, March 27th and May 31st, we recommend that you contact your trademark counsel for review.

OTHER RELIEF - PETITIONS

The USPTO is waiving the petition fee to revive trademark applications or reinstate registrations that became abandoned, canceled, or expired by May 31, 2020.

The petitioner must explain how the missed deadline “was due to the COVID-19 outbreak.” This is the same “material interference” standard as required for obtaining an extension for certain other trademark filings discussed above. The USPTO has not indicated whether it will be more lenient in granting petitions, though, as compared to petitions pointing to other factors. The petition deadline has not changed; a petition is due two months from notice of abandonment or cancellation, or six months from online USPTO records reflecting the abandonment or cancellation records if the USPTO’s notice was not received.

WHAT ELSE SHOULD BRAND OWNERS THINK ABOUT?

The extension policy, and ability to file petitions without filing fee, has potential impact on issues beyond your own upcoming deadlines:

- Trademark Clearance - In the coming weeks, one should not assume that a third party’s recently missed deadline necessarily will cause its application or registration to lapse. (Yet, note that the deadline for petitions, including Petitions to Revive, is not protected under the USPTO’s notice.)
- Potential Oppositions - The USPTO’s notice effectively extends all opposition windows slated to close between March 27th and May 31st. Do not assume that published applications have

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avoided a notice of opposition or an extension to oppose until at least several weeks after the original deadline has passed.
- Priority Filings - Foreign applications filed as long ago as September 27, 2019, could enable a competitor to jump ahead of your pending application for a confusingly similar mark.

COULD THINGS CHANGE AGAIN?

Yes. The CARES Act has granted temporary authority to Director Iancu to modify USPTO deadlines for up to 30 days after the national emergency declaration terminates, which has yet to occur as of this publication. As a result, the USPTO may very well issue additional notices extending or otherwise modifying trademark deadlines in the coming months.

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[1] The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), at Section 12004, granted USPTO Director Andrei Iancu temporary authority to modify the USPTO's statutory deadlines. In response, Director Iancu issued a notice on March 31st that initially set forth a 30-day grace period exception for certain deadlines through April 30th. Director Iancu issued a new notice on April 28th extending the same deadlines again

[2] This was first announced via a USPTO notice dated March 16th, which declared that the Office considers the effects of coronavirus to be an "extraordinary situation" that justifies the waiving of petition fees for trademark applicants and owners (and certain patent customers). The USPTO's April 28th notice further clarified and extended this relief option.

[3] This presumably includes Requests for Reconsideration, i.e., Responses to Final Office Actions. That especially seems to be the case, as Notices of Appeal from a Final Office Action are also covered by this notice.

[4] May 31st is a Sunday. As a result, the final date to file and take advantage of the extension is moved to Monday, June 1st.

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