



August 12, 2013

The Honorable Sylvia Mathews Burwell
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

RE: Reconsideration of Whether the U.S. Patent and Trademark Office is Subject to Sequestration

Dear Director Burwell:

I am writing on behalf of Intellectual Property Owners Association (IPO) to express our serious concerns about sequestration of user fees paid to the U.S. Patent and Trademark Office (USPTO) and to ask OMB to reconsider its interpretation of the relevant statutes.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,500 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. Our members span the information technology, pharmaceutical, biotech and traditional manufacturing industries.

The patent system is a critical component of the U.S. economy and contributes greatly to U.S. leadership in innovation and technological advancement. It is imperative that the USPTO, which is fully funded by user fees and uses no taxpayer money, have full access to all of the user fees it collects.

Sequestration Undermines the America Invents Act

The ability of the agency to keep all of its user fees was a cornerstone of the Leahy-Smith America Invents Act (P.L. 112-29) (AIA), legislation that was supported by this Administration and enacted into law last Congress. The implementation of the AIA, which seeks to advance the President's innovation priorities such as improving patent quality and decreasing the time it takes to get a patent, is in its early phases. The June 4, 2013 White House fact sheet1 and report2 on abusive patent litigation recognize the need for patent quality and prompt processing. The USPTO has indicated, however, that in

1 Office of the Press Secretary, Exec. Office of the President, Fact Sheet: White House Task Force on High-Tech Patent Issues, June 4, 2013, available at http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

2 President's Council of Economic Advisers, the National Economic Council, and the Office of Science & Technology Policy, Exec. Office of the President, Patent Assertion and U.S. Innovation, June 2013, available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

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response to the projected sequestration of an estimated \$120 million in patent user fee collections this fiscal year, the agency will have to delay hiring new examiners, delay opening satellite offices, and put off sorely needed improvements to IT. Given that the USPTO still has a backlog of just under 600,000 pending patent applications and average pendency from application filing to final disposition is 29.5 months,³ sequestration of USPTO funding represents a major step back from the commitment of the Administration to the AIA.

The USPTO was given fee-setting authority in the AIA, and earlier this year significantly increased user fees to implement many of the law's provisions. Support for fee increases among USPTO users was grounded in commitments from the Administration and Congress that the agency would have full access to all the user fees it collected. Applying the Budget Control Act of 2011 to sequester USPTO user fees undermines the trust that USPTO stakeholders put in the Administration and Congress when the AIA was enacted.

USPTO User Fees are Voluntary Payments

IPO questions OMB's interpretation that the USPTO is subject to sequestration. The Balanced Budget and Emergency Deficit Control Act of 1985, as amended, exempts from sequestration activities financed by "voluntary payments to the Government for goods or services to be provided for such payments."⁴ User fees collected by the USPTO are voluntary payments made by USPTO users to obtain and maintain patent and trademark protection. Accordingly, the relevant USPTO activities should be subject to the exemption of Section 905(g)(1)(A). We are not aware of any legislative history that suggests any meaning for the word voluntary other than the ordinary meaning of the word.

An interpretation of USPTO user fees as "voluntary payments" under Section 905(g)(1)(A), and therefore exempt from sequestration, is consistent with OMB's apparent classification of voluntary payments collected by numerous other agencies. In September 2012, OMB issued a report that set forth a preliminary classification of budget resources within each budget account as sequestrable or exempt.⁵ Appendix B of the report provides legal citations for each exempt classification (e.g., the Appendix lists the relevant statutory exemption or special sequestration rule).⁶ Numerous entities appear to be at least partially exempt from sequestration because certain accounts are financed by voluntary payments to the government under Section 905(g)(1)(A).⁷ These entities include, among many others, the Copyright Office and the National Forest

³ USPTO Data Visualization Center, August 9, 2013, *available at* http://www.uspto.gov/dashboards/patents/main_dashxml.

⁴ 2 U. S. C. § 905(g)(1)(A) (2012) (emphasis added).

⁵ Office of Management and Budget, OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P.L. 112-155), Appendix B (2012) [hereinafter OMB STA Report], *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/stareport.pdf.

⁶ *Id.*

⁷ *Id.*

System.⁸ In contrast, it is unclear whether OMB has determined that any funding received by the USPTO could be classified as “voluntary payments to the Government for goods or services provided for such payments.”⁹ It is unclear why payments to other agencies are deemed voluntary but payments to the USPTO are not.

User fees received by the USPTO are categorized as “offsetting collections.”¹⁰ Offsetting collections fully fund the USPTO.¹¹ OMB has stated that offsetting collections can result from business-like transactions with the public (e.g., voluntary collections from the public in exchange for goods or services), intragovernmental transactions, or offsetting governmental transactions (e.g., tax receipts, regulatory fees, compulsory user charges).¹² USPTO transactions with users most appropriately fall into the category of “business-like transactions with the public” because users voluntarily pay fees in exchange for services such as examining, issuing, and maintaining patents and trademarks. Furthermore, the immediate benefits of a patent or trademark accrue most directly to the business or individual who obtains the relevant intellectual property. USPTO user fees are clearly not tax receipts. They are not regulatory fees because the patent and trademark laws are not regulatory statutes that require patent and trademark filings. Finally, USPTO user fees are not compulsory, or mandatory, user charges. To create, use, or sell a product, it is not necessary to obtain a patent, register a trademark, or interact with the USPTO. In other words, if an entity decides not to obtain patent or trademark protection on its goods or services, no laws will be broken as a direct result. Accordingly, USPTO activities are most accurately considered business-like transactions with the public that are financed by voluntary payments for goods or services to be provided for such payments.

In the context of Section 905(g)(1)(A), IPO does not see any support for a statutory interpretation that does not classify payment of USPTO user fees as “voluntary.” IPO therefore urges OMB to reconsider its application of Section 905(g)(1)(A) to the USPTO, such that the voluntary user fees received by the USPTO are not subject to sequestration.

OMB Has Determined That Copyright Office Fees are Exempt

As mentioned above, the Copyright Office of the Library of Congress is an example of an entity that is at least partially exempt from sequestration. The Copyright Office received \$51,650,000 in appropriations for fiscal year 2013 (pursuant to a resolution

⁸ *Id.* at 4 and 15.

⁹ *Id.* at 27.

¹⁰ Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 237 (2013) (“That the sum herein appropriated from the general fund shall be reduced as offsetting collections of fees and surcharges assessed and collected by the USPTO under any law are received during fiscal year 2013, so as to result in a fiscal year 2013 appropriation from the general fund estimated at \$0.”), available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ6/pdf/PLAW-113publ6.pdf>.

¹¹ *Id.*

¹² Office of Management and Budget, OMB Circular No. A-11 (2013), Section 20 at 29, available at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s20.pdf.

continuing fiscal year 2012 spending levels).¹³ OMB has determined, however, that only \$16,000,000 of Copyright Office funding is subject to sequestration.¹⁴ The President's Budget for Fiscal Year 2013 provided an estimate of how much money the Copyright Office would receive from user fees.¹⁵ Specifically, the Budget estimated spending authority from offsetting collections at \$36,000,000. Presumably, OMB has determined that offsetting collections received by the Copyright Office are not subject to sequestration.

IPO understands the explanation for this treatment is that the offsetting collections are considered "voluntary payments to the Government for goods or services to be provided for such payments." This interpretation of OMB's application of sequestration to the Copyright Office is supported by the OMB STA Report (Appendix B, p. 4), which classifies at least one budgetary resource of the Copyright Office as exempt under the voluntary payments provision. The distinction between OMB's categorizations of Copyright Office funding and USPTO user fees, both in terms of trademark user fees and patent user fees, is not clear. IPO requests that OMB reconsider whether the USPTO is exempt from sequestration in light of OMB's determination in connection with other entities funded by voluntary user payments.

USPTO Fees Should at Least be Available in 2014

Moreover, if the law does require USPTO funds to be sequestered, we read 2 U.S.C. § 906(k)(6) to require funds sequestered in fiscal year 2013 to be made available to the USPTO in 2014. Section 906(k)(6) states that "[b]udgetary resources sequestered in revolving, trust, and special fund accounts and offsetting collections sequestered in appropriation accounts shall not be available for obligation during the fiscal year in which the sequestration occurs, but shall be available in subsequent years to the extent otherwise provided in law." (emphasis added).

Any funds sequestered from the USPTO should be considered "offsetting collections" because, as explained above, the fiscal year 2013 appropriations act classifies fees and surcharges collected by the USPTO as "offsetting collections."¹⁶ Furthermore, 35 U.S.C. § 42 mandates that "[a]ll fees paid to the Director and all appropriations for defraying the costs of the activities of the Patent and Trademark Office will be credited to the Patent and Trademark Office Appropriation Account in the Treasury of the United States." Therefore, if any offsetting collections received by the USPTO under title 35 are sequestered, they should be considered "offsetting collections sequestered in

¹³ Consolidated and Further Continuing Appropriations Act, 2013, 127 Stat. 412.

¹⁴ Office of Management and Budget, OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013, Appendix at 2, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/fy13ombjsequestrationreport.pdf.

¹⁵ Office of Management and Budget, Budget of the United States Government, Fiscal Year 2013, Appendix at 32, *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-APP/pdf/BUDGET-2013-APP-1-3.pdf>.

¹⁶ Consolidated and Further Continuing Appropriations Act, 2013, 127 Stat. 237.

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appropriation accounts.” Because offsetting collections sequestered in appropriation accounts are subject to the special rule set forth in 2 U.S.C. § 906(k)(6), any sequestered funds in fiscal year 2013 should be made available to the USPTO in fiscal year 2014.

In reality, it costs taxpayers nothing to give the USPTO full access to its fees. It would not add one cent to the deficit. As President Obama has said many times and the White House repeated in its press release of June 4, patents are a key driver of economic growth and good paying American jobs. Trademarks too promote innovation by assuring producers that they will receive the financial and reputational rewards of their investment. We therefore urge you to reconsider whether sequestration should apply to the USPTO and to ensure that any funds sequestered in fiscal year 2013 are made available to the agency in fiscal year 2014.

Sincerely,



Herbert C. Wamsley
Executive Director

cc: Hon. Penny Pritzker

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