

## Delayed “Power Outage” Filings under a “Holiday Notice”: Authority of the Under Secretary of Commerce

The Patent and Trademark Office recently fell victim to a catastrophic power failure that was responsible for missed electronic filing dates during the period December 22-24, 2015.

Does a paper filed with the PTO on December 28, 2015, with a statutory deadline in the period December 22-24, 2015, meet its deadline on the basis of a “holiday notice” that these three dates are “holidays”? (December 25-27, 2015, are in any event official holidays.) The answer depends upon whether the Under Secretary has a statutory authority for her “holiday notices” under 35 USC § 21 to declare retroactive holidays for work days where the Office was up and functioning with its doors open and Examiners at their desks.

To what extent is there any liability for an incorrect “holiday notice”?

Should the PTO have legislation introduced to retroactively declare each of December 22-24, 2015, a holiday within the meaning of 35 USC § 21(b)?

To what extent is a registered practitioner liable for a missed statutory filing deadline in the period December 22-24, where he could have effected a filing in that period (other than through an electronic filing), but instead chose to wait until December 28, 2015?

A close inspection of Section 21 shows a complete absence of authority for the retroactive action of the Under Secretary. As explained in the practitioners’ procedural “bible” and the principal source of questions for the patent practitioner registration examination, the *Manual of Patent Examining Procedure*, “[a]pplicants are cautioned that the provisions of 35 U.S.C. 21(a) \* \* \* only apply to postal interruptions and emergencies.” MPEP § 511, *Postal Service Interruptions and Emergencies* [R-07.2015].” (The other subsection, § 21(b), applies to “a Federal holiday within the District of Columbia.”)

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As explained in the *Manual of Patent Examining Procedure*: “The provisions of 35 U.S.C. 21(a) \* \* \* do not provide for granting of a filing date \* \* \* other than a [United States Postal System (USPS)] facility. 35 U.S.C. 21(a) requires, in part, that “any paper or fee required to be filed in the Patent and Trademark Office...would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated by the Director.” The statute requires \*\*\* that the correspondence could not have been deposited with the USPS on the requested filing date for the sole reason that the postal service was not available due to the interruption or emergency designated by the Office.” MPEP § 511, *Postal Service Interruptions and Emergencies* [R-07.2015].”

To be sure, 35 USC § 21 also contains a second subsection, subsection 21(b), which excuses a late filing where the original deadline is “a Federal holiday within the District of Columbia” . Nobody has seriously suggested that the Under Secretary of an Agency housed in Virginia has authority to declare “a Federal holiday within the District of Columbia” and, in any event, there is no provision for a *retroactive* designation of a patent “holiday” which was a regular work day with PTO employees present and the doors open for business: “A Federal holiday within the District of Columbia \* \* \* means any [work] day \*\*\* when the Patent and Trademark Office is officially closed for business for the entire day.” 37 CFR § 1.9(h).

Regards,  
Hal

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