

Setting Patent Fees

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The America Invents Act of 2010 fundamentally changed – for a limited period – the way patent-office fees are set in the United States. In the Act, Congress delegated principle responsibility for the choice over what fees are charged, and decisions over what patent-office activities to encourage or discourage to the USPTO. The Act provides the USPTO with general authority to set its own patent fees for the first time, suddenly creating an opportunity for the Office to use patent fees and the price system as a policy instrument, and to set individual fees without strict regard to activity-based cost recovery. Within the USPTO, this opportunity has created a demand for economic evidence and provided the platform for new conversations concerning the economic implications of patent fees as regards patent applicants, their competitors, consumers, and the operation of the innovation system writ large. This Article describes how this fee-setting process was planned, with particular emphasis on how the USPTO's recently-created economics division introduced economic thinking into the USPTO while conducting primary data analysis to inform the policy making process. In this article, we build off our experience by describing the history and institutional context of patent-office fee setting in the United States, and explore how prior economic theory and evidence concerning such fees has been useful to the Office in exercising its new authority. We also describe some of the primary empirical analyses we conducted relating to the application process and what types of activities – and applicants – have been subsidized or have subsidized others under the USPTO's prior fee structures. We use this evidence to explore and comment upon several options available to Agency policymakers in the context of fee setting.