

Innovators might be stifled if fees for patents rise too high

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Innovators might be stifled if fees for patents rise too high. Credit: European Patent Office European Inventor Award/Flickr, CC BY-NC-ND

Patents are instrumental to our current innovation system. They encourage inventors to share their ideas, rather than keeping them

secreted away, by offering the inventor exclusive rights to exploit their idea for a limited period.

Yet they also cost money to administer, and much of this cost is passed on to the inventor. If that cost is too great, then there's a risk the patent system will fail to do its duty.

A 2013 [review](#) of the Australian patent system focused on the importance of patent rights to innovative activity. But little or no attention has been paid to whether patent protection is actually affordable.

For example, fees paid to IP Australia form part of the "[patent bargain](#)" – to provide an incentive to innovate while limiting the social cost of patents – but the revenue generated from the fees goes directly to the running of the [patent office](#), which is a [self-funding agency](#) of the government.

If we want a functional and efficient [patent system](#), one that encourages innovation yet is also self-sustaining, the ultimate questions become: how are the fees set, and what would an optimal fees schedule look like?.

The patent race

If you apply for either a [standard or innovation patent](#), you can expect to [pay](#) around A\$1,000, depending on the type of patent, and before factoring in any attorney fees.

But new users may be surprised to be confronted by additional [renewal fees](#), due after the fourth year of filing a standard patent or two years for an innovation patent. Skip them and the patent holder forfeits all legal protection.

In Australia, we have seen steady increases in renewal fees for standard patents holders. Similar increases in the US have led [some](#) to ask what is the optimal policy towards patenting costs.

Are patentees fee sensitive?

An [emerging issue](#) is how renewal costs affect the demand for patents (known as the [price elasticity of demand](#)).

If inventors regard [patent protection](#) as a necessity, demand could be price-inelastic, meaning an increase in costs will not affect the patentee's propensity to seek legal protection.

But if the cost of patenting is a large share of an inventor's budget and other options are available, such as keeping their inventions a trade secret, patent demand could become sensitive to fee changes, or elastic.

As patent offices rely on filings and renewals as a source of income, this issue should be of particular concern to them, not least because if patent demand is not price sensitive, increases in renewal fees could help raise revenues.

Empirical research to date suggests that patentees *are* sensitive to fee changes and that patents are inelastic goods. As the authors of [this study](#) reveal:

The fact that a patent is an inelastic good does not mean that patent fees are an ineffective policy tool. It does, however, mean that a change in fees must be sufficiently large to have observable effects.

Impact of cost-recovery

IP Australia already operates on a cost-recovery basis by charging fees for its services. This stems from the Productivity Commission's [recommendations](#) in 2001 that government charges should be linked as closely as possible to the costs of activities and products.

Since then, IP Australia's own [listing of fees](#) provides an insight to its approach:

IP Australia charges more for the renewal than the cost of processing it [and] charges less for the application and examination than it costs and seeks to recover those costs across the total life cycle of the IP right.

Negotiations to do with renewal fees have, for the most part, been confined to public servants of the patent office, perhaps in consultation with one or more of the [peak patent bodies](#).

The most recent round of fee increases was preceded by a public consultation process in December 2011, which sought customer feedback, along with the usual stakeholder dialogue. Yet, the subject has been overlooked in recent reforms, including the significant [Raising the Bar](#) legislation.

Perceptions of patent value

[Older research](#) has attempted to link the level of renewal fees with patent renewal data in order to extrapolate a sense of "patent value" to the patent owner. Read simply, the longer a patent is renewed (beyond the first anniversary payment), the greater the perceived value to the patentee.

The converse is, however, more difficult to establish. A lapsed patent may represent a perceived "low-value" to the patentee, even when the patent may be of "high-value". Moreover, other financial or market

factors may account for the decision to not commercialise the invention.

Cometh the hour, cometh the office

Unlike other policy levers, patent offices can influence the life of a patent once it is granted via renewal fees. For example, when renewal fees are increased with the life of the patent, they help [weed out](#) the less valuable patents. These patent owners of less valuable innovations will self-select by not renewing.

More information on the operation of the patent office, and how they administratively set fees, is probably inevitable. This concern was expressed by the Australian Public Service Commission after conducting a [review](#) into IP Australia's operations:

The agency has started to develop an evidence-based narrative of the role of IP in Australia and abroad. Continuation of this work is pivotal for the agency as it seeks to communicate the importance of IP and its impact on and potential for the Australian economy.

Despite the current climate of [falling patenting rates](#), and an apparent decline in patent quality, we should remember that patent fees represent only one policy lever available to the patent office to promote innovation.

If we truly wish to encourage innovation and enable individuals and organisations to protect and exploit their bright ideas, then we need to have a more thorough discussion of patent fees. After all, if we put too high a price on innovation, it'd be like not having a [patent](#) system at all.

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