

The Pros And Cons Of Levying Value-Based Fees On Patents

By **Sandip Patel** (September 18, 2025)

The Wall Street Journal recently reported that the U.S. Department of Commerce, through the U.S. Patent and Trademark Office, or USPTO, is exploring a new revenue measure: a recurring, value-based maintenance fee on patents.[1]

Under this process, patent owners would pay fees not just for filing a patent application, for its examination, and subsequent maintenance of the patent — but also an annual fee ostensibly tied to the value of the exclusive rights the patent offers.

As a result, this would move the U.S. away from the long-standing model of predictable, cost-based fees and toward an untested system where patent owners pay the government a percentage of their patents' value, which might be characterized as a tax.

The government has neither disputed the report nor provided any details of a proposal, but even its reported consideration of such a plan raises significant concerns. Such a change would likely ripple across industries, from pharmaceuticals to technology startups to universities, reshaping incentives for filing patent applications (and therefore public disclosure of inventions), commercialization and enforcement.

A value-based fee might better align costs with benefits, promoting fairness among a spectrum of patent owners that include big businesses and independent inventors, while almost certainly reducing the number of patents filed and maintained.

However, despite any potential benefits, there are significant concerns that the plan would likely exceed the USPTO's statutory authority, conflict with the U.S. Constitution's patent clause, impose damaging economic and competitive effects, and incentivize fee circumvention and foreign exploitation strategies.

Applying these types of fees risks unduly burdening innovators and rewarding free riders and putative infringers.

Value-Based Fee System Benefits

Jettisoning a One-Size-Fits-All System

The current fee structure is blunt. Patent owners pay the same flat filing and maintenance fees, whether the patent offers exclusive rights protecting a billion-dollar drug product or a commoditized part among hundreds of others that collectively comprise a smartphone.[2]

The fee structure, therefore, treats patents that generate immense private wealth the same as those that never even become the subject of commercialization.

A value-based fee could make the patent system more equitable. High-value patents would likely contribute more to sustaining the USPTO's daily operations, while lower-value patents would carry lighter burdens, mirroring progressive taxation in other parts of the economy.



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Thinning Thickets

A value-based fee could reduce the number of patents granted. For example, critics of the current patent system complain about "patent thickets," the dense portfolios of patents a business accumulates to block competitors from encroaching on, or even approaching, their commercial endeavors.

To these critics, patent thickets are full of substantively indistinguishable patents that inequitably complicate competition, to the detriment of the relevant consumer. Depending on how the government values each patent, a recurring value-based fee system could prompt these patent owners to reassess their patent filing strategies and ultimately trim their portfolios.

A recurring fee would make U.S. protection relatively less attractive, prompting innovators to be more selective in the number of patents they pursue here — or to pursue narrower coverage in the U.S. That's beneficial to the public and competitors.

Innovators may continue to offer fulsome disclosure of their innovations, particularly for purposes of seeking broader coverage abroad, even if the scope of domestic exclusivity is reduced. Fewer patents and reduced scope of course offer the public and competitors greater freedom to operate in the U.S., while also reducing the prevalence of defensive patent thickets.

On the other hand, for patentees, this means forgoing a well-tested strategy of obtaining broad-scope patents and a large portfolio of patents to more effectively prevent competition. The public gains more unrestricted access to knowledge, but U.S. markets may become less central to global patent strategies.

Increased Revenue

Another potential benefit of the plan is increased revenue, provided it is designed to generate additional income.

Any increased revenue could be further directed, with congressional appropriation, at modernizing the USPTO's operations, e.g., reducing examination backlogs by making the examination process more efficient, which may be aided by hiring more patent examiners and better training them to examine applications, and also aided by improvements in the USPTO's technological infrastructure.[3]

However, Congress has routinely diverted the USPTO's revenue to fund other federal expenses, and the executive branch has been all too willing to use those diverted funds.

While finding other sources of revenue to reduce the deficit or fund spending priorities may be a laudable goal, doing so with what is essentially a tax on innovation could be counterproductive, as it may reduce overall economic growth. Furthermore, such a plan would impose significant burdens on innovators and likely face legal challenges.

Patent Office Statutory Authority

Congress authorized the USPTO to set and adjust fees, but only to recover the costs of examination, issuance and maintenance of patents. The office may charge fees for specific services, and its director may adjust those fees through notice-and-comment rulemaking solely "to recover the aggregate estimated costs" of the office's operations.[4]

The director's authority to do so expires, however, on Sept. 16, 2026.[5]

All fees paid to the USPTO are credited to its appropriation account in the U.S. Department of the Treasury and used exclusively to support the office's operations.[6]

A value-based maintenance fee — untethered to services the USPTO renders, designed to raise revenue beyond cost recovery, and potentially diverted to the general Treasury — does not fit within this statutory framework and could be characterized as a tax. The power to tax resides with Congress, not executive branch agencies, like the USPTO.[7]

Conflict With the Constitution's Patent Clause

The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [8]

Through the Patent Act, Congress devised the patent system offering exclusivity in exchange for a fulsome disclosure of the invention — a quid pro quo or bargain [9] that discourages secrecy. [10]

A recurring value-based fee — in contrast to the periodic flat maintenance fees — undermines this bargain by conditioning exclusivity on payments to the government that are untethered to the USPTO's services in examining patent applications. The fee would effectively transform the patent owner's exclusive right into a right in which the government owns a substantial interest, discouraging disclosure and encouraging secrecy — the antithesis of what the framers likely intended when they wrote the patent clause into the Constitution.

The patent bargain exists, according to the U.S. Supreme Court in 1966 in *Graham v. John Deere Co.*, not necessarily "to reward the individual," but "to promote the progress of science and the useful arts." [11]

A fee that results in encumbering that disclosure may not be reconcilable with that purpose. After all, why disclose an invention and pay a recurring fee if you can cost-effectively maintain its secrecy?

Secrecy is already compelling in industries where reverse engineering is difficult, such as advanced manufacturing processes, algorithms and artificial intelligence models. The more innovators opt for secrecy, the less knowledge enters the public domain. By imposing a recurring, value-based fee on patent ownership, the cost of participating in the patent system is likely to rise significantly.

Meanwhile, maintaining these types of inventions as trade secrets becomes even more attractive as it involves no government-imposed levy.

Patents offer exclusivity but also require full disclosure, providing competitors with a road map to design around or copy once the patent expires. Patents, by teaching how to make and use the invention, also create the risk that the patent owner will have to defend the validity of the patent in expensive litigation aimed at enforcing the patent against infringers.

Trade secrets, by contrast, remain confidential indefinitely as long as secrecy is maintained. By burdening only those who disclose, the government effectively punishes transparency

while rewarding secrecy of certain inventions.

One of the benefits of the patent system is the knowledge spillover: Competitors, researchers and future inventors can build upon patents and published patent applications. A system that drives into trade secrets more details about research and development drains this reservoir of public knowledge, in contravention of the Constitution's patent clause.

Significant Economic Consequences

Successful Innovation

Innovations that lead to revenue are already taxed in the form of income and corporate taxes. To the extent that a value-based fee can be characterized as a tax, there appears to be no economic justification for imposing a double tax on the same source of revenue generation.

Innovation often creates immense value to an economy. Encouraging it through lower taxes is likely a more effective way for the government to raise revenue.

Deterring Innovation

Startups, universities and small businesses would likely bear heavy burdens if a value-based fee is implemented. Unlike larger private entities, these innovators often rely on patents to attract venture funding or partnerships and rarely realize any immediate revenue.[12]

A recurring value-based tax could force these innovators to abandon patents prematurely, claiming inventions that have long-term potential, narrowing the innovation pipeline. Worse, as these innovators are often the primary engines of basic research in the U.S., they may never even seek patents on inventions that are not susceptible to reverse engineering, thereby reducing the disclosure of those inventions and withholding them from the public's knowledge database.

To the extent that such innovators continue to seek patents, their costs will rise, leaving them with fewer funds to invest in further innovation.

Valuation Quagmires

Unlike real estate, patents lack stable market metrics or even consensus methodologies for assessing value. Any concrete proposal to implement a value-based fee will have to choose among disputed valuation methodologies and then choose which factors to weigh within the chosen method.

Value may depend on litigation prospects, projected royalties, guesses about whether an invention will ever be commercialized, and if so, speculative market forecasts. Economic experts may need to be consulted. But any patent litigator who has assessed patent damages knows that valuation by economic experts is always contested by an opposing expert.

While isolated agencies within the government may have experience in negotiating patent licenses and thus assigning monetary value to patents, the government likely lacks the competence to devise and implement a broad program for valuing patents. Regardless, any system built on such assessments would invite chronic disputes, manipulation and costly litigation.

Global Disadvantage

No major jurisdiction — not Europe, Japan or China — imposes a value-based patent fee. That fee could therefore drive early-stage research and development activities that lead to foundational patents abroad.

Instead of reinforcing the U.S.' research and development leadership, a recurring value-based fee may incentivize moving those activities to foreign jurisdictions that do not tax the exclusive rights often necessary to further develop and commercialize the innovation.

The important potential loss is not the potentially fewer number of U.S. patents, but rather the diminished use of the U.S. workforce to conduct the early-stage research and development activities that result in these inventions.

Wealth Transfer From Innovators to Free Riders

Where innovators have commercialized their inventions, a value-based fee would amount to an indirect redistribution of wealth from those innovators to the public, which includes infringers. In that situation, patent owners would shoulder both the new governmental fees and the existing, expensive private costs of enforcement, while infringers exploit disclosed inventions.

Even if the patent owner were to recover monetary damages or monetary settlements from an accused infringer, the recovery would be treated as income subject to yet a further tax.

Complicating Damages Jurisprudence

Monetary damages are statutorily designed to be adequate to compensate, not punitive.[13] Yet if patent owners have already paid recurring taxes to maintain their rights, they may understandably press courts to treat those payments as recoverable damages or as justification for enhanced damages.

That logic risks injecting a punitive flavor into damages jurisprudence that the Supreme Court has expressly sought to constrain.[14]

Incentivizing Circumvention and Foreign Exploitation Strategies

History also suggests that patent owners will not passively accept what will appear to them as a tax. They will adapt, just as corporations have adapted to other unfavorable tax schemes.

Gaming the Valuation Methodology

Given the uncertainties inherent in any established patent valuation methodology, patent owners will be incentivized to adjust their activities to exploit loopholes and uncertainties in whatever method the government chooses.

In addition to lowering the amounts collected through value-based fees, such adjustments create their own economic consequences that can be damaging to the economy and other types of revenue collection by the government.

For example, and as noted above, early-stage research and development activities that

multinational corporations conduct in the U.S. could be moved abroad. That would mean moving high-paying jobs out of the U.S.

Corporate Tax Inversions

In the 2010s, U.S. corporations relocated domiciles abroad to escape uncompetitive tax rates, exemplified by Pfizer Inc.'s attempted inversion with Allergan PLC. Had that deal gone through, Pfizer would have redomiciled its corporate headquarters to Ireland, where Allergan was based, and corporate tax rates were lower.

By inverting through Allergan, Pfizer could significantly reduce its effective U.S. tax burden, retain more of its foreign earnings without triggering U.S. repatriation taxes, and thereby free up significant funding for research and development investments, shareholder returns, and other business goals.

Until the Treasury changed certain tax rules, several other U.S. corporations attempted to do the same thing, and some were successful. Depending on the valuation methodology used, patent owners could similarly transfer valuable assets to offshore affiliates, licensing them back at depressed rates to minimize assessed value.

Conclusion

The government's potential consideration of a recurring, value-based patent fee raises significant legal and economic concerns.

Despite the potential benefits, the scheme would likely: exceed statutory limits; conflict with the Constitution's patent clause; reduce research and development activities in the U.S.; further reduce public disclosure in favor of trade secrecy of certain types of inventions; complicate infringement-damages law; and predictably drive circumvention and foreign exploitation strategies.

Rather than promoting the progress of science, the system would effectively punish those who productively drive that progress. A recurring value-based fee on patents will be a tough sell.

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[1] Amrith Ramkumar, Trump Administration Weighs Patent System Overhaul to Raise Revenue, Wall Street Journal, July 28, 2025 (<https://www.wsj.com/politics/policy/patent-system-overhaul-18e0f06f>); see also, Editorial Board Opinion, And Now a New Tax on Patents?, Wall Street Journal, Aug. 25, 2025, at A16 (<https://www.wsj.com/opinion/and-now-a-new-tax-on-patents-politics-policy-intel-chips-665683e0?>).

[2] Patent owners qualifying as a small entity or micro entity pay step-down, reduced maintenance fees. But the point is that within each step (large, small, micro) all patent owners pay the same fee independent of what the patent is protecting.

[3] See Patent Public Advisory Committee 2024 Annual Report, at 11 (Nov. 1, 2024) (<https://www.uspto.gov/sites/default/files/documents/ppac-2024-annual-report.pdf>) ("While the USPTO is financed 100 percent by its fee collections, Congress must appropriate the fees to authorize the USPTO to spend them.")

[4] 35 U.S.C. § 41(a)-(d) (2023); Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, § 10, 125 Stat. 284, 316–19 (Sept. 16, 2011) (<https://www.congress.gov/112/statute/STATUTE-125/STATUTE-125-Pg284.pdf>).

[5] AIA, Public Law 112-29, §10(i)(2), 125 Stat. 284, 319 (sunsetting the Director's authority upon expiration of the 7-year period beginning on date the AIA is enacted); Study of Underrepresented Classes Chasing Engineering and Science Success Act of 2018, Public Law 115-273, §4, 132 Stat. 4158, 4159 (Oct. 31, 2018) (<https://www.congress.gov/115/statute/STATUTE-132/STATUTE-132-Pg4158.pdf>) (extending the sunset period following the AIA's enactment from 7-years to 15-years).

[6] 35 U.S.C. § 42(b) (2023).

[7] U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes").

[8] U.S. Const. art. I, § 8, cl. 8.

[9] *Pfaff v. Wells Elecs. Inc.*, 525 U.S. 55, 63 (1998).

[10] *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

[11] *Graham v. John Deere Co.*, 383 U.S. 1, 9–10 (1966).

[12] William M. Landes and Richard A. Posner, *The Economics of Patent Law in: The Economic Structure of Intellectual Property Law*, 316 (2003) (quoting a leading economist-skeptic about patents for the proposition that "The collection of small and medium sized firms in the American biotechnology industry is, of course, a striking example of enterprises that would not have come into existence without the prospect of a patent, and which depend on patent protection to make their profits, and to attract capital.").

[13] 35 U.S.C. § 284 (2023).

[14] *Halo Elecs. Inc. v. Pulse Elecs. Inc.*, 579 U.S. 93, 103-05 (2016).