

U.S. Patent and Trademark Office Appropriations Process: A Brief Explanation

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Summary

The U.S. Patent and Trademark Office (USPTO) examines and approves applications for patents on claimed inventions and administers the registration of trademarks. It also assists other federal departments and agencies to protect American intellectual property in the international marketplace. The USPTO is funded by user fees paid by customers that are designated as "offsetting collections" and subject to spending limits established by the Committee on Appropriations.

Until recently, appropriation measures limited USPTO use of all fees accumulated within a fiscal year. Critics of this approach argued that because agency operations are supported by payments for services, all fees were necessary to fund these services in the year they were provided. Some experts claimed that a portion of the patent and trademark collections were being used to offset the cost of other, non-related programs. Proponents of limiting use of funds collected maintained that the fees appropriated back to the USPTO were sufficient to cover the agency's operating budget.

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The USPTO Appropriations Process

The U.S. Patent and Trademark Office (USPTO) examines and approves applications for patents on claimed inventions and administers the registration of trademarks. It also assists other federal departments and agencies to protect American intellectual property in the international marketplace. The USPTO is funded by user fees paid by customers that are designated as "offsetting collections" and subject to spending limits established by the Committee on Appropriations.

Background

Traditionally, the United States Patent and Trademark Office was funded primarily with taxpayer revenues through annual appropriations legislation. In 1980, P.L. 96-517 created within the U.S. Treasury a "Patent and Trademark Office Appropriations Account" and mandated that all fees collected be credited to this account (which remains in effect today). Subsequently, in 1982, Congress significantly increased the fees charged to customers for the application and maintenance of patents and trademarks to pay the costs associated with the administration of such activities. (Note that fee levels were and are established by Congress.) Funds generated by the fees were considered "offsetting collections" and made available to the USPTO on a dollar-for-dollar basis through the congressional appropriations process. Additional direct appropriations from taxpayer revenues, above the fees collected, were made to support other operating costs.

The Patent and Trademark Office became fully fee funded as a result of P.L. 101-508, the Omnibus Reconciliation Act (OBRA) of 1990, as amended. The intent of the legislation was to reduce the deficit; one aspect of this effort was to increase the fees charged customers of the USPTO to cover the full operating needs of the institution. At the same time, a "surcharge" of approximately 69% was added to the fees the Office had the statutory authority to collect. These additional receipts were deposited in a special fund in the Treasury established under the budget agreement.

Through the appropriations process, the USPTO must be provided the budget authority to spend collected fees. Funds generated through the surcharge were considered "offsetting receipts" and were defined as offsets to mandatory spending. The use of these receipts was controlled by the appropriation acts; the receipts were considered discretionary funding, and counted against the caps under which the Appropriations Committee operated. The funds generated through the basic fee structure continued to be designated as "offsetting collections" and also subject to spending limits placed on the Appropriations Committee.

The surcharge provision expired at the end of FY1998. While OBRA was in force, the ability of the USPTO to utilize all fees generated during any given fiscal year was limited by appropriation legislation that did not allocate the these revenues on a dollar-for-dollar basis. Critics argued that those fees not appropriated to the USPTO were used to fund other, non-related programs under the purview of the appropriators. It has been estimated that during the eight years in which OBRA provisions were in effect, the USPTO collected $234 million more in fees than the budget authority afforded to the Office.[1] Another estimate suggested that between FY1991 and FY1998,

[1] Michael K. Kirk, Executive Director, American Intellectual Property Law Association. Testimony before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, March 9, 2000.

the USPTO collected $338 million more in discretionary and mandatory receipts than the Office had the authority to spend.[2]

Subsequent to the expiration of the surcharge, several times Congress increased the statutory level of the fees charged by the USPTO. Until FY2001, the budget authority provided to the USPTO came from a portion of the funds collected in the current fiscal year plus funds carried over from previous fiscal years. The carry-over was created when the annual appropriations legislation established a "ceiling" and limited the amount of current year collections the U.S. Patent and Trademark Office could spend. Additional funds were not to be expended until following fiscal years. However, in FY2001, this latter provision was eliminated.

Current Practice

The Patent and Trademark Office estimates the amount of fees expected to be generated each fiscal year. Currently, all funds raised by fees are considered "offsetting collections" and are counted against caps placed upon the appropriators. If appropriators choose to provide the USPTO with the budget authority to spend less than the estimated fiscal year fee collection, the excess may be used to offset programs not related to the operations of the USPTO. Between FY1999 and FY2004, the budget authority provided the USPTO was less than the total amount of fees generated within each fiscal year. During this time period, it has been estimated that $406 million in fees collected were not available for use by the USPTO.[3]

Since FY2005, the Office has been provided the budget authority to spend all fees collected. However, one analysis argues that, in total, the USPTO was not permitted to use $680 million in fees generated between FY1990 and FY2004.[4] An additional study found that during this time frame, $747.8 million in fees were "diverted" from the Patent and Trademark Office and used to fund unrelated programs.[5]

Issues

Beginning in 1990, appropriations measures have, at times, limited the ability of the U.S. Patent and Trademark Office to use the full amount of fees collected in each fiscal year. Although over the past several years the Office has been given the budget authority to spend all collected fees, this issue remains an area of controversy. Proponents of the current approach to funding the USPTO claim that despite the ability of the appropriators to impose limits on spending current year fee collections, the Office is provided with sufficient financial support to operate. Advocates of the existing USPTO appropriations structure see it as a means to provide necessary support for

[2] Estimate based on the Presidential Budget Appendices for FY1991 through FY2000.

[3] Intellectual Property Owners Association, 6/27/2007, available at http://www.ipo.org/AM/Template.cfm?Section=Search&Template=/CM/ContentDisplay.cfm&ContentID=15484 and U.S. Court of Appeals, Federal Circuit. Miguel Figueroa V. United States, October 11, 2006, 466 F.3d 1023.

[4] Gerald J. Mossinghoff and Stephen G. Kunin, "Improving the Effectiveness of the U.S. Patent and Trademark Office," *Science Progress*, Fall-Winter 2008/2009, 75, available at http://www.scienceprogress.org/wp-content/uploads/2009/01/issue2/mossinghoff_kunin.pdf.

[5] [5] Intellectual Property Owners Association, 6/27/2007, available at http://www.ipo.org/AM/Template.cfm?Section=Search&Template=/CM/ContentDisplay.cfm&ContentID=15484.

other programs in the relevant budget category given budget scoring and the caps placed upon the Committee on Appropriations.

However, many in the community that pay the fees to maintain and administer intellectual property disagree with this assessment. Critics argue that, over time, a significant portion of the fees collected have not been returned to the USPTO due to the ceilings established by the appropriations process and the inability of the Office to use the fees on a dollar-for-dollar basis. They maintain that all fees are necessary to cover actual, time-dependent activities at the USPTO and that the ability of the appropriators to limit funds diminishes the efficient and effective operation of the Office.

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