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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 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 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.

On September 29, 2016, President Obama signed into law the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act (P.L. 114-223). This act, among other provisions, continues USPTO's budget supported by patent by patent fees at $3.231 billion. For FY2017, the Administration's request for a fee-based budget authority is $3.244 billion.

P.L. 112-29, the Leahy-Smith America Invents Act, keeps the use of fees collected within the congressional appropriations process, but requires that fees generated above the budget authority provided by the Committee on Appropriations be placed in a separate fund within the Department of the Treasury. While use of these "excess" funds still remains under the control of the appropriators, they may only be used for the work of the USPTO.

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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 U.S. 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. 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 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 Budget 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 use all fees generated during any given fiscal year was limited by appropriation legislation that did not allocate 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.

All funds raised by fees were considered "offsetting collections" and counted against caps placed upon the appropriators. If appropriators chose to provide the USPTO with the budget authority to spend less than the estimated fiscal year fee collection, the excess was permitted to 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]

Various calculations have been made of the total amount of fees generated that were withheld from use by the USPTO since the office became fully fee funded. 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 timeframe, $747.8 million in fees were "diverted" from the Patent and Trademark Office and used to fund unrelated programs.[5] While the office was provided the budget authority to spend all fees collected between FY2005 and FY2009, the Intellectual Property Owners Association estimates that $260.7 million in fees collected were not made available to the USPTO in FY2010 and FY2011.[6]

For FY2016, the USPTO budget supported by patent fees is $3.231 billion. The Administration's request for a fee-based budget authority for FY2017 is $3.244 billion.

Leahy-Smith America Invents Act

P.L. 112-29, the Leahy-Smith America Invents Act, makes several changes to the handling of fees generated by the USPTO. Under the new statute, the use of fees generated is still subject to the appropriations process whereby Congress provides the budget authority for the USPTO to spend these fees. However, to address the issue of fees withheld from the office in the past, the America Invents Act creates within the Treasury a "Patent and Trademark Fee Reserve Fund" into which

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

[6] Intellectual Property Owners Association, 10/7/2011, available at http://www.ipo.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=31116.

fee collections above that "appropriated by the Office for that fiscal year" will be placed. These funds will be available to the USPTO "to the extent and in the amounts provided in appropriations Acts" and may only be used for the work of the USPTO.

In addition, the new law grants the USPTO authority "to set or adjust by rule any fee established or charged by the Office" under certain provisions of the patent and trademark laws. This appears to provide the USPTO with greater flexibility to adjust its fee schedule absent congressional intervention. The act requires that "patent and trademark fee amounts are in the aggregate set to recover the estimated cost to the Office for processing, activities, services and materials relating to patents and trademarks, respectively, including proportionate shares of the administrative costs of the Office."

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. Even when the office was given the budget authority to spend all fees, the issue remained an area of controversy. Proponents of the withholding approach to funding the USPTO claimed that despite the ability of the appropriators to impose limits on spending current year fee collections, the office was provided with sufficient financial support to operate. Advocates of this appropriations structure saw it as a means to provide necessary funding for 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 disagreed with this assessment. Critics argued that, over time, a significant portion of the fees collected were not 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 claimed that all fees were necessary to cover actual, time-dependent activities at the USPTO and that the ability of the appropriators to limit funds severely diminished the efficient and effective operation of the office.

Under the America Invents Act, the budget authority to use fees collected by the USPTO remains within the congressional appropriations process. Fees generated above the amount provided in the appropriations legislation are to be put into a special fund and are restricted to use solely by the Patent and Trademark Office. However, the office must still obtain congressional authority to use these "excess" funds. It remains to be seen how this new approach addresses the issues associated with the operations of the USPTO and the use of those fees collected within a given fiscal year.

An additional issue was raised in regard to the FY2013 sequestration of fees paid to the USPTO. According to the Office of Management and Budget (OMB), the fees collected are not considered "voluntary payments" and are therefore subject to sequestration.[7] However, others disagree with this assessment. In a letter to the Director of OMB, the American Intellectual Property Law Association stated:

> we have serious doubts that the USPTO is lawfully subject to sequestration in the first place because it is funded through fee collections, not through government spending. Section 255 of the Balanced Budget and Emergency Deficit Control Act of 1985 ("BBEDCA") (2 U.S.C. 905) provides a list of exemptions from sequestration including "[a]ctivities financed by voluntary payments to the Government for goods or services to

[7] See CRS Report R42050, *Budget "Sequestration" and Selected Program Exemptions and Special Rules*, coordinated by Karen Spar.

> be provided for such payments." 2 U.S.C. 905(g)(1)(a). A plain reading of the statute suggests that this exemption should apply to the fees collected by the USPTO since they are from voluntary users in exchange for patent and trademark examination and review.[8]

Similar concerns have been expressed by other organizations, including the American Bar Association, which stated in another letter to the Director of OMB that the "unique funding mechanism for the USPTO" lends itself to the congressionally mandated exemptions from sequestration for "activities financed by voluntary payments to the Government for goods or services to be provided for such payments."

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[8] American Intellectual Property Law Association, May 21, 2013 letter to The Honorable Sylvia Mathews Burwell, Director, Office of Management and Budget, available at http://www.aipla.org/advocacy/executive/Documents/AIPLA%20Letter%20to%20OMB%20re%20USPTO%20Funding%20-%205-21-13.pdf.