

A low-angle photograph of a building with large windows and several tall palm trees against a clear blue sky. The building is on the left, and the palm trees are scattered across the right and bottom of the frame.

**SANTA
CLARA
LAW** *est. 1911*

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(1) What about the quality of already-**granted** patents?

(2) Why don't any initiatives use the PTO's **fee-setting authority**?

Examination will never be perfect

- Terms can change meaning over time (Lemley 2005)
- Prior art in nascent, rapidly-evolving fields that lack an indexed literature (Cohen & Lemley 2001)

Approx. 2,500,000 patents currently in force

- Most issued:
 - pre-*Alice*
 - pre-*Myriad*
 - pre-*Mayo*
 - pre-*KSR*
 - pre-*Nautilus* . . .

Patent value = tech value * patent quality

- Those holding (or seeking) weak patents most sensitive to fee changes
- Higher fees → Fewer low value patents → fewer low quality patents

Post Grant Challenges

- Those asserting weak patents benefit most from steep cost of patent suit defense
- Esp against SMEs, non-tech co, tech purchasers
- SMEs & purchasers underrepresented among petitioners (Love 2015)
- PTABs has invalidated patents that earned millions in settlements (Data Treasury, \$350M)
- Lower fees → more challenges → fewer low quality patents

Increase Maintenance Fees

By how much?

- Pigovian formulation:
 - \$10B social cost / 2.5M patent =>
\$4,000 *per year*
- Comparison to EU:
 - To maintain patents in Germany, UK, France, Italy & Spain => **\$2,400 per year**

Today in US: **\$750 per year** (of eff. protection)

Decrease PTAB Fees

Inter Partes Review:

- Petition \$9k, Institution \$14k = **\$23,000**

CBM Review:

- Petition \$12k, Institution \$18k = **\$30,000**

No discount for small, micro entities

Fee to file complaint in a patent suit: \$400

PTO Proposed New Fee Sched. (Nov. 2015)

AIA § 10: PTO “may set or adjust by rule any fee”

- Inter Partes Review: \$23,000 → **\$30,500**
- CBM Review: \$30,000 → **\$38,000**
- Maintenance Fees: no change (**real decrease**)

Easier to maintain, harder to challenge . . .