

Regulatory Monopoly and Differential Pricing in the Market for Patents

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Patent law is inextricably tied to the economics of monopolies, as patents are legal monopolies awarded to inventors to incentivize innovation. Yet legal scholars have largely ignored another crucial monopoly at the heart of patent law: the monopoly of the U.S. Patent and Trademark Office (PTO) over the granting of patents. The present Article remedies this oversight and introduces the broader concept of a regulatory monopoly - a single governmental actor with the power to set prices in a regulatory area. Using insights from both neoclassical and behavioral economics, the Article explains how regulatory monopolies like the PTO can enhance social welfare via differential pricing - that is, by charging regulated entities differing fees based on their willingness or ability to pay. In particular, the Article shows how the PTO could increase its revenues and promote innovation by charging different patent "prices" for inventions in different industries. Such pricing could also be used to tailor effective patent term across industries, an emergent goal for many patent scholars. The Article discusses how recent empirical and legal developments have made differential patent pricing possible. It then generates differential prices by leveraging new empirical research that measures the relative importance of patent protection across industries. The Article concludes by discussing how recent patent reform (the America Invents Act of 2011) provides the legal basis for the PTO to conduct differential pricing, and estimates the welfare gains from shifting to a differential pricing regime.

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