INDEPENDENT INVENTORS of AMERICA

The *Innovation Act* Is Fatal to Inventors and Patent Related Small Businesses, and Completely Unnecessary

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There has not been an "Explosion" in Patent Litigation

The claim that there has been an "explosion" of patent litigation in recent years is simply not true. In 2014, the number of litigants in US patent suits dropped to the lowest level since 2009.[1] Any previous appearance of an undue increase in patent litigation is due to a procedural change from the *America Invents Act* of 2011, wherein similar infringers that used to be able to be sued in one case now have to be sued individually. When you compare the actual number of suits to the number of patents issued, a much higher percentage of litigation occurred in the 1800s than now.

Loser-Pay Greatly Harms Inventors and is Not Needed

The claim is that Loser-Pay is needed to stop an allegedly large amount of frivolous litigation. The truth is that frivolous litigation is no longer occurring without recourse.

In the past, it was difficult for a judge to award attorney fees to the prevailing party in a frivolous case. A case had to be "exceptional," and they were very rarely found to be so. This has changed significantly with the Supreme Court decisions in the *Octane Fitness* and *Highmark* cases. "Exceptional," in patent litigation, is now defined as a case that "…stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." Now, it is very easy for a judge to award fees in a frivolous case.[2] In the 8 months following the Octane Fitness decision, there were 40 district court decisions where attorney fees were awarded to the prevailing party.[3]

Fee shifting is now occurring where it is needed, and bringing a frivolous patent litigation case now is very dangerous to the party bringing it. But the *Innovation Act* includes Loser-Pay language that makes the inventor guilty until proven innocent. A liability of $1,000,000 or more from trying to defend one's patent will stop the vast majority of inventors from being able to defend their patents from theft.

Loser-Pay will Stop Investment in Patent Related Small Businesses

The *Innovation Act* will make investors in a patent related business potentially *personally liable* for Loser-Pay fees if the patent holder does not prevail in the defense of the patent. This liability could easily be over $1,000,000. This greatly changes the risk-reward scenario, and will likely scare away the vast majority of investors. Further, if an investor does not have greater than a 50% interest in the patent, the inventor could

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[1] *The number of litigants in US patent suits drops to lowest level since 2009*, by Richard Lloyd

[2] *Supreme Court Revises Fee-Shifting Rules in Patent Cases: Weeding out Bad Actors in a Level Playing Field*, by Adam Mosoff and Brian O'Shaughnessy

[3] *Attorney fee awards in patent cases after Octane Fitness,* By Andrew S. Baluch, Esq., and Eoin P. Connolly (I can provide this article in .PDF format).

defend the patent without the consent of the investor, still making the investor personally liable. This provision will eliminate many potential future patent related startups in America.

The "Patent Troll" Narrative is Greatly Biased

An inventor who has a patent being infringed and does not have the financial resources to defend it may choose to sell the patent to a Non Practicing Entitity (NPE) that can defend it. Because NPEs are able to defend patents that are being infringed, a tremendous effort has been made by large corporations to paint them as villains. The term "patent troll" was specifically created for use in making a defender of a patent look bad.

While supporters of patent "reform" claim that the target is the bad actor, not the legitimate patent holder, this has been proven to be false. The author attended a luncheon in Washington DC last year where lobbyist supporters of patent "reform" were speaking. One of the speakers said that Eli Whitney (inventor of the cotton gin) was the first "patent troll." Eli Whitney was nothing more than an independent inventor who tried to defend his valuable invention that was being ripped off. Attorneys for a party being sued for infringement will often try to make the opposing party look bad, and the term "patent troll" has been part of a huge public relations campaign to pave the way for legislation that will make it much harder for a legitimate patent holder to defend his property.

The Alleged Damage from "Patent Trolls" Is Highly Questionable and Unverifiable

A common number thrown around regarding how much alleged "patent trolls" cost American businesses is $29 billion. This number is based on private, unverifiable data from entities that have a vested interest in the "patent troll" narrative. But more important is the fact the majority of the number, whether it is $29B or much less, is voluntary and court ordered settlements by those found to be infringing patents. Being able to successfully defend one's intellectual property from theft is one of the most basic rights of an American.

The Innovaton Act Expands "Death Squads Killing Property Rights"

Prior to the passage of the America Invents Act in 2011, the "Junk Patent" narrative alleged that way too many patents of dubious value were being allowed. Proponents of the "Junk Patent" narrative pointed to a few examples of patents that should not have been issued. Fair enough, there have been a few issued, but they have been inconsequential - if a junk patent is litigated, the case will fail. But the *America Invents Act* created new ways to invalidate issued patents to fight this alleged problem, called *Post Grant Opposition Procedures* (PGOs). Now, 75% of patents that these procedures are directed at are invalidated. Former Chief Justice Randall Rader referred to this as "death squads killing property rights."

This rate of patent invalidation is way beyond anything that makes sense. But rather than curtailing these procedures in any way, the *Innovation Act*, H.R.9, actually expands their use. Under current law, a Post Grant Review (one of the new PGOs) requires the petitioner to bring everything he has – he cannot mount additional future Post Grant Reviews on grounds he could have raised initially(referred to as Post Grant Review Estoppel). The Innovation Act eliminates this estoppel, allowing a petitioner mount successive Post Grant Reviews in an effort to deplete an inventor's funds and render him defenseless.

Summary

The *Innovation Act*, H.R.9, will greatly harm independent inventors and patent related small business formation in America. The reasons for this legislation are unfounded. This bill and future efforts to weaken the American Patent System in the name of patent "reform" need to be stopped.