# *The Innovation Act*, H.R.9 is Fatal to the American Innovation Ecosystem

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## The Narrative Being Lobbied is False

**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 recent 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 amount of litigation to the number of patents issued, **a higher percentage of litigation occurred in the 1800s than now**.

**The Alleged $29 Billion Cost of "Frivolous Litigation" is Fictitious**

The oft-quoted $29 billion dollar cost of alleged frivolous litigation is from private, unverifiable data provided by an entity that has an incentive to maximize the perceived problem. Any patent holder suing an infringer is assumed to be a bad actor, regardless of the merit of the lawsuit. Even the individuals responsible for reporting the $29 billion figure admit that most of this amount is voluntary and court-ordered licensing agreements with patent holders. **Licensing a patented technology to improve a product or service is not only not a crime, it has been a key part of successful American innovation for a very long time.**

**Frivolous Patent Lawsuits Can No Longer Be Brought With Impunity**

Supreme Court decisions in 2014 including *Octane Fitness* and *Highmark* have made it easy for a judge to award legal fees in a frivolous case.[2] Of 250 cases since these decisions, there have been 50 instances of fee-shifting. Fee-shifting is occurring now at a rate that is 400% greater than in the recent past. **Bringing a frivolous case is now a very risky proposition - doing so to try to "extort" payments from an alleged infringer is no longer a legitimate issue.**

**Legitimate Investors are Being Labeled "Patent Trolls"**

An independent inventor without financial resources with a patent being infringed may have, as his only recourse to the theft of his property, the selling of his patent to a Non Practicing Entity (NPE) that can defend it. Because NPEs have the wherewithal to go against large infringers, a tremendous effort has been made to paint them as villains. What is wrong with an inventor selling his intellectual property to an investor that can realize its rightful value?

The term "patent troll" was specifically created for use in making a defender of a patent look bad, and has been part of a huge public relations campaign to pave the way for **legislation that will make it much harder for legitimate patent holders to stop the theft of their intellectual property.**

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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

# Catastrophic Unintended Consequences to the American Innovation Ecosystem

A key reason that America has out-innovated the rest of the world for 200 years is the way the unique American Patent System has not only encouraged individuals to innovate, it has also **facilitated the flow of capital into the resulting innovations**. A key ingredient in this successful recipe has been the ability to stop the theft of the intellectual property represented by a patent, which results in a valuable patent asset that can be used to attract venture capital and build a successful enterprise. This is what the rest of the world has lacked due to their innovators having weaker patent rights than those originally created by the American Patent System.

Another key ingredient has been the transferability of the rights represented by the patent asset. Traditionally, an entity that purchased a patent had the same rights as the inventor, just like the buyer of an existing house has the same rights of ownership as the original builder/owner. If the buyer of your house could not stop others from living in the house, can you imagine what this would do to the value of your house? This is the Secondary Market for patents, and it has been critical to the flow of investment capital in the American innovation ecosystem.

An early-stage investor in a start-up that fails often ends up with little more than the patent. If he then has limited patent rights and significantly greater risk in defending the patent, as is being proposed, then the patent asset loses significant investment value. In a scenario that is already high in risk, the changes proposed by The Innovation Act will severely reduce investment, and the incentive for American innovation will be lost. **What is being proposed destroys the innovation ecosystem that has enabled America to be the world leader in innovation.**

**<u>Presumptive Loser-Pays = Guilty Until Proven Innocent and Loss of Access to Justice</u>**

With presumptive Loser-Pays, regardless of the merit of any case, the party that does not prevail will automatically owe the other side its legal costs, which could exceed $1,000,000. To avoid this, the non-prevailing party will be forced to re-litigate the case to prove each point objectively reasonable. Patent litigation is already financially out of reach for the typical inventor; now we're adding several hundred thousand dollars in extra litigation expense and a potential liability of millions from Loser-Pays.

The vast majority of inventors only have access to justice through the use of contingency attorneys. Would such an attorney to be willing to re-litigate a case, after losing, for free? This provision will end the independent inventor's access to justice. Most game changing inventions come from independent inventors and small entities. If we eliminate their ability to protect their intellectual property, the consequence to American innovation will be very dire. This dangerous proposal is still being pushed, even though the environment has totally changed and Fee-Shifting is now occurring at a very high rate. **There is no legitimate argument left for instituting any kind of Loser-Pays, much less presumptive Loser-Pays.**

**<u>Joinder Ends Early-Stage Investment and the Secondary Market for Patents</u>**

Investing in start-ups is very risky – most fail. When a significant new financial liability is added, the result will be significantly less investment. If that new risk includes a potential liability that **pierces the corporate veil and puts all of the investor's personal assets at risk**, he will certainly invest elsewhere. Early-stage investment and the Secondary Market for patents, which have been critically important in successful American innovation, will be lost if the current proposals to join investors in the Loser-Pays liability become law.

**Expansion of "Death Squads Killing Patent Rights"**

Post Grant Opposition Procedures (PGOs), instituted by the *America Invents Act*, are invalidating greater than 75% of the patents they are directed at. Former Chief Justice Randall Radar has called this "death squads killing patent rights." Shockingly, The *Innovation Act* actually expands the use of one of these PGOs, Post Grant Review, by **removing a legitimate barrier to its excessive use**.

**Customer Stay Enables Infringers to Avoid Litigation**

The way the bill is written would allow companies selling infringing products to game the system by claiming they are only the customers of other companies that are producing infringing products. **This is an effort to avoid legitimate litigation.**

**Enhanced Pleading and Limited Discovery Further Barrier the Inventor From Justice**

What is being proposed will require the patent holder to often be in a position where he has to plead with more specificity than the amount of information he has allows for. This is **one more way for the largest corporations to make it impossible to be successfully sued** for the theft of the intellectual property of an independent inventor or other small entity.

**Demand Letters**

A major driver of this legislation originally was the prospect of small business owners, facing threats of patent infringement lawsuits, agreeing to settlements rather than fighting due to the cost of litigation. The fact is that post-Octane Fitness and Highmark decisions, fee-shifting is happening at a high rate and the bringing of a frivolous patent suit is now very financially risky. The only other aspect to the above scenario that needs to be handled is the use of questionable demand letters. Care should be taken here because legitimate demand letters are necessary to start a dialogue and avert litigation when patent infringement is suspected. If illegitimate demand letters are curtailed, the original driver of the legislation is handled. **But proponents of *The Innovation Act* continue to push for provisions that are not needed and fatal to American innovation.**

## Summary

There is a reason that hundreds of millions of dollars have been spent promoting a false narrative and lobbying for legislation like *The Innovation Act*. This bill is the ultimate wish-list of the world's largest corporations trying to protect themselves from liability when they unfairly appropriate the intellectual property of independent inventors and other small entities.

The short-sightedness of this effort is almost beyond belief. Many of these companies, at their founding, depended on the very protections provided by American Patent System that they are now seeking to eliminate. To eliminate the key ingredients of the unique American innovation ecosystem is to flirt with unintended consequences of staggering proportions. **This bill is arguably the worst legislation in American history.**