



# PATENTS: Myths vs. Facts

Patents are the foundation of our innovation economy. By granting inventors exclusive property rights to their inventions, patents provide a critical incentive for innovation, rewarding inventors and investors, and allowing them to recoup their upfront costs and invest in further R&D. The requirement that patent holders publicly disclose the technical details of their inventions enables other inventors to build upon their ideas. This system has been the driving force behind U.S. innovation leadership since our nation's founding.

In fact, strong intellectual property protections, including patents, are vital to economic growth and job creation. IP-intensive industries account for \$6.6 trillion in economic activity annually—more than one third of the total U.S. GDP. These industries also support 45.5 million jobs—approximately 30% of all employment in the United States. Moreover, workers in these industries earn significantly more than workers in non-IP-intensive industries.

Despite these facts, for years, some large technology corporations have been funding a campaign to demonize patent holders and weaken patent protections in the United States. By undermining patent rights, these companies hope to reduce their patent licensing costs and increase profit margins. As part of their campaign, they have promoted a series of myths about patents that have been repeated by press and policymakers. Below, we list some of the most widely repeated myths about patents and the facts that contradict them.

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**MYTH:** Patent lawsuits are a significant and growing problem.

**FACT:** The overall patent litigation rate has been remarkably steady for nearly a century, at less than two litigations per 1000 patents issued. Some of the apparent increase in 2012 through 2015 was attributable to a provision in the 2011 America Invents Act (AIA), which required separate lawsuits for each defendant in a patent case. So while the number of lawsuits reported went up, the amount of litigation remained the same. Since 2015, the number of patent cases has been declining each year.

Patent litigation should not be presumed to be frivolous or abusive. Patent holders, like other property owners, have a right to protect their property from theft. And patents are one of the few types of property not protected by law enforcement. There are no "patent police." Litigation is the only means inventors have of defending their patents.

"A Century of Patent Litigation in Perspective," Ron D. Katznelson, November 17, 2014  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2503140](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503140)

Lex Machina, "Lex Machina Releases its 2020 Patent Litigation Report," February 27, 2020  
<https://lexmachina.com/lex-machina-releases-its-2020-patent-litigation-report/>

**MYTH:** Patent trolls cost the economy \$29 billion each year.

**FACT:** The \$29 billion cost estimate of so-called "patent trolls" by James Bessen and Michael Meurer has been fully debunked. Their estimate was based on deeply flawed assumptions, such as failing to distinguish between valid and frivolous patent lawsuits, and using overly-broad definitions that characterize almost anyone who files a lawsuit to protect their patent who is not a manufacturer as a "troll."

Their assumptions notably count many universities as trolls, since they are not manufacturers. These universities license their innovations to others to develop and sell the finished product and have every right to defend their intellectual property from theft. The fees garnered from licensing are rolled back into the universities to perform more research. Other inventors who license their innovations, including many small businesses and entrepreneurs, are similarly counted as "trolls" under Bessen and Meurer's analysis.

"Analyzing the Role of Non-Practicing Entities in the Patent System," David Schwartz and Jay Kesan.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2117421](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117421)

**MYTH:** An explosion of “bad patents” is harming innovation.

**FACT:** Anti-patent interests cite statistics about the percentage of patents declared invalid in litigation to claim that the United States is in the midst of a patent quality “crisis.” But these statistics involve only the small minority of patents that are reviewed in court and ignore the vast majority of patents that are valid and never seriously challenged. The term “bad patent” or “poor quality patent” is now often used as shorthand to denigrate a patent that may in fact be strong on substance, but that stands in the way of someone who wishes to use the invention protected by the patent without taking out a license to do so.

Testimony of Ron D. Katznelson, Hearing before Senate Judiciary Subcommittee on Intellectual Property, October 30, 2019.

<https://innovationalliance.net/wp-content/uploads/2019/10/Katznelson-Testimony-Senate-Judiciary-Subcommittee-on-IP-Oct-30-2019.pdf>

**MYTH:** The PTAB’s inter partes review (IPR) is working well and is needed to stop “bad patents.”

**FACT:** Congress created the administrative Patent Trial and Appeal Board (PTAB) in 2011 to provide a faster and less costly alternative to district court litigation for challenging the validity of the minority of patents that are questionable. Unfortunately, the PTAB has become a tool for wealthy infringing corporations to delay and repeatedly attempt to kill valid patents in ways not tolerated in district court.

In fact, the PTAB has invalidated patents at an alarmingly high rate. From the PTAB’s inception until July 31, 2019, 80% of PTAB final written decisions resulted in some or all claims being held unpatentable, and in 63% of the PTAB’s final written decisions, all claims were held unpatentable. These extremely high invalidation rates at the PTAB led one former chief judge of the U.S. Court of Appeals for the Federal Circuit to call the PTAB’s administrative judges “patent death squads,” responsible for “killing property rights.”

The PTAB’s IPR system has also been abused by forcing patent owners to defend their patents multiple times in multiple venues, first defending the validity of their patents and then seeking relief for infringement. The infringing companies know that these expenses may be too much for many patent owners, who may relent and drop further efforts to defend their patents, a process known as “efficient infringement.”

“Efficient infringement” of smaller inventor’s innovations has become so commonplace that Apple’s former patent chief said it could “almost be viewed as a ‘fiduciary responsibility,’ at least for cash-rich firms that can afford to litigate without end.”

USIJ, “How ‘One Bite at the Apple’ Became Serial Attacks on High Quality Patents at the PTAB,” October 26, 2018.

<https://www.usij.org/research/2018/serial-attacks>

USPTO, Trial Statistics IPR, PGR, CBM: Patent Trial and Appeal Board, 10 (July 2019).

[https://www.uspto.gov/sites/default/files/documents/Trial\\_Statistics\\_2019-07-31.pdf](https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2019-07-31.pdf)

Brian Mahoney, Software Patent Ruling a Major Judicial Failure, Rader Says (Oct. 25, 2013).

<https://www.law360.com/articles/482264>

The Economist, “The Trouble With Patent-Troll-Hunting,” December 14, 2019.

<https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting>