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# Patent Failure in the Digital World

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James Bessen  
Boston Univ. School of Law

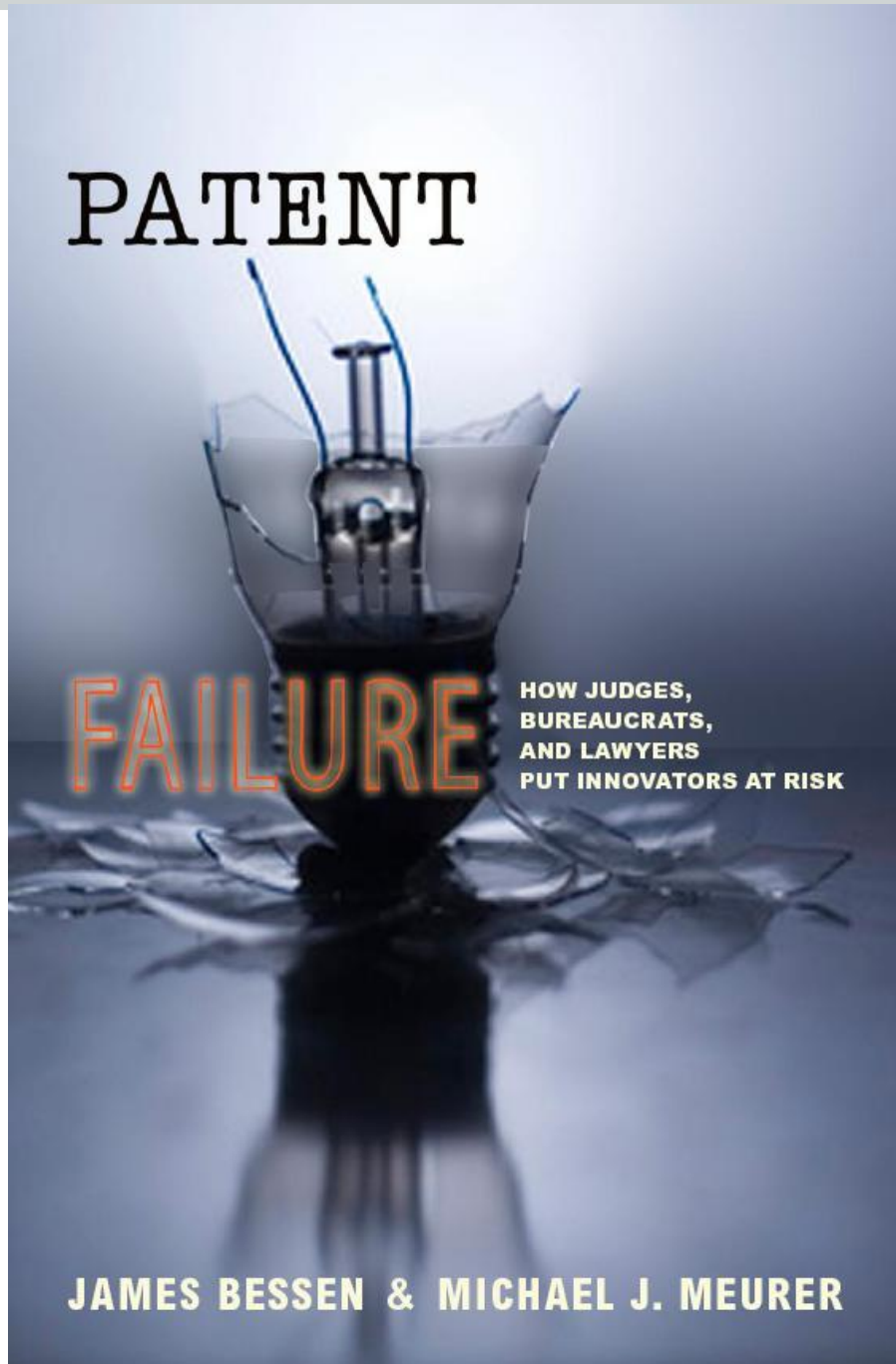
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**PATENT**

**FAILURE**

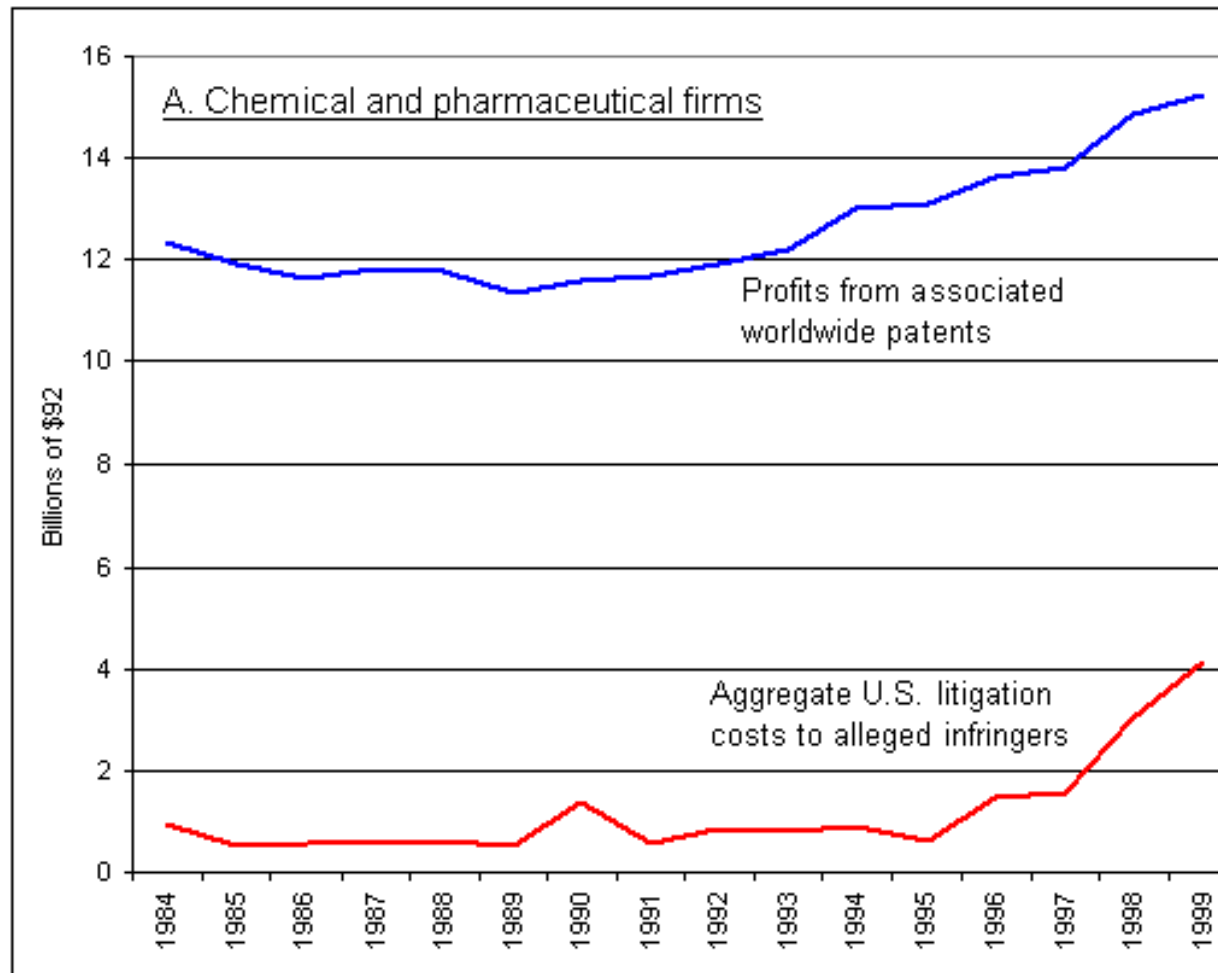
**HOW JUDGES,  
BUREAUCRATS,  
AND LAWYERS  
PUT INNOVATORS AT RISK**

**JAMES BESSEN & MICHAEL J. MEURER**



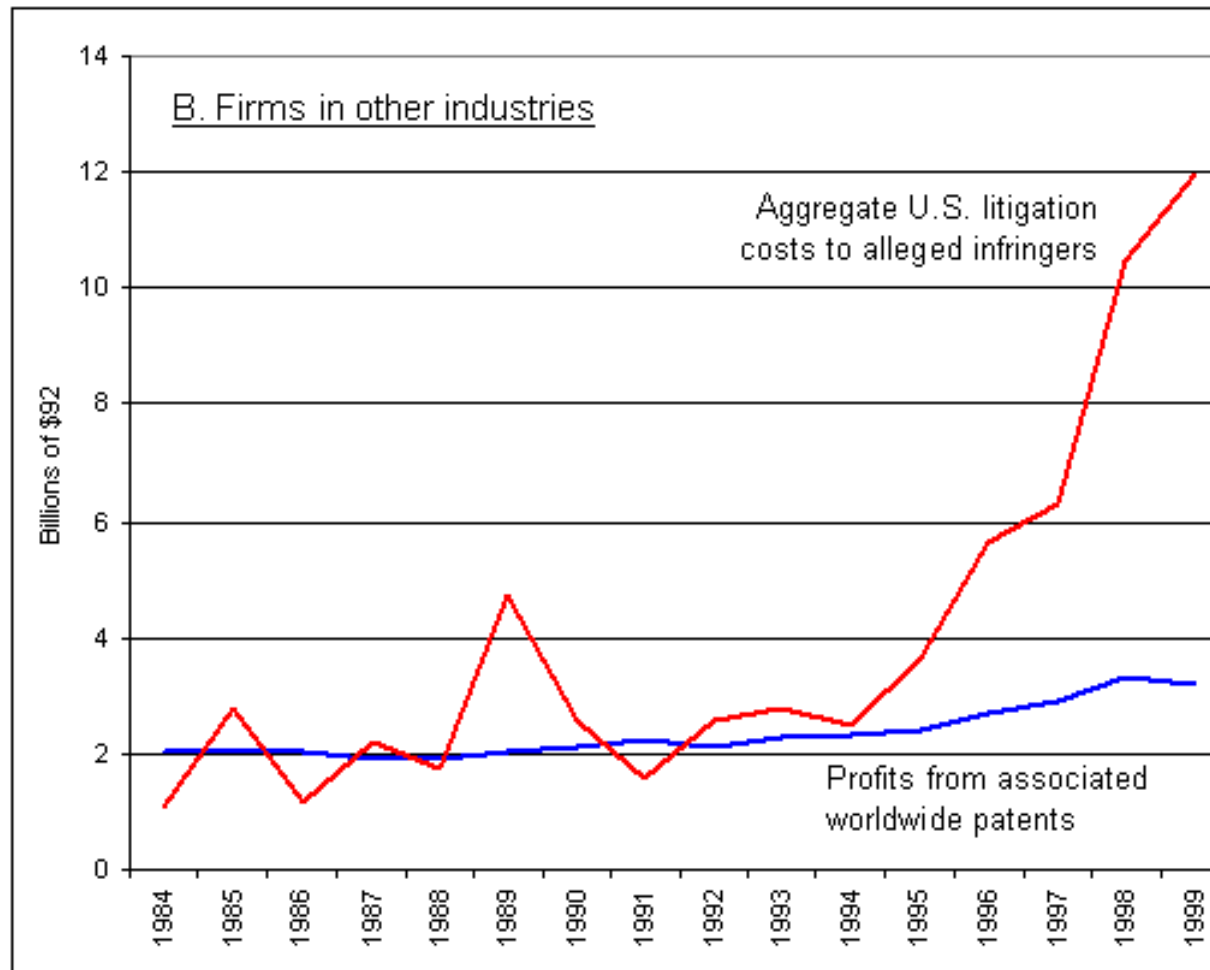
# Patents in chem/pharma

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# Patent Failure

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# What went wrong?

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"Fuzzy Boundaries" => Litigation

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# What went wrong?

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## "Fuzzy Boundaries"

- Too many patents
  - Legal abuses
  - Software, business method patents
    - high rates of litigation
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# Probability patent in lawsuit

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Technology	Percent in lawsuit
Chemical	1.1%
Other	2.2%
Software	4.6%
Business method	13.7%

# What went wrong?

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## "Fuzzy Boundaries"

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- Legal abuses
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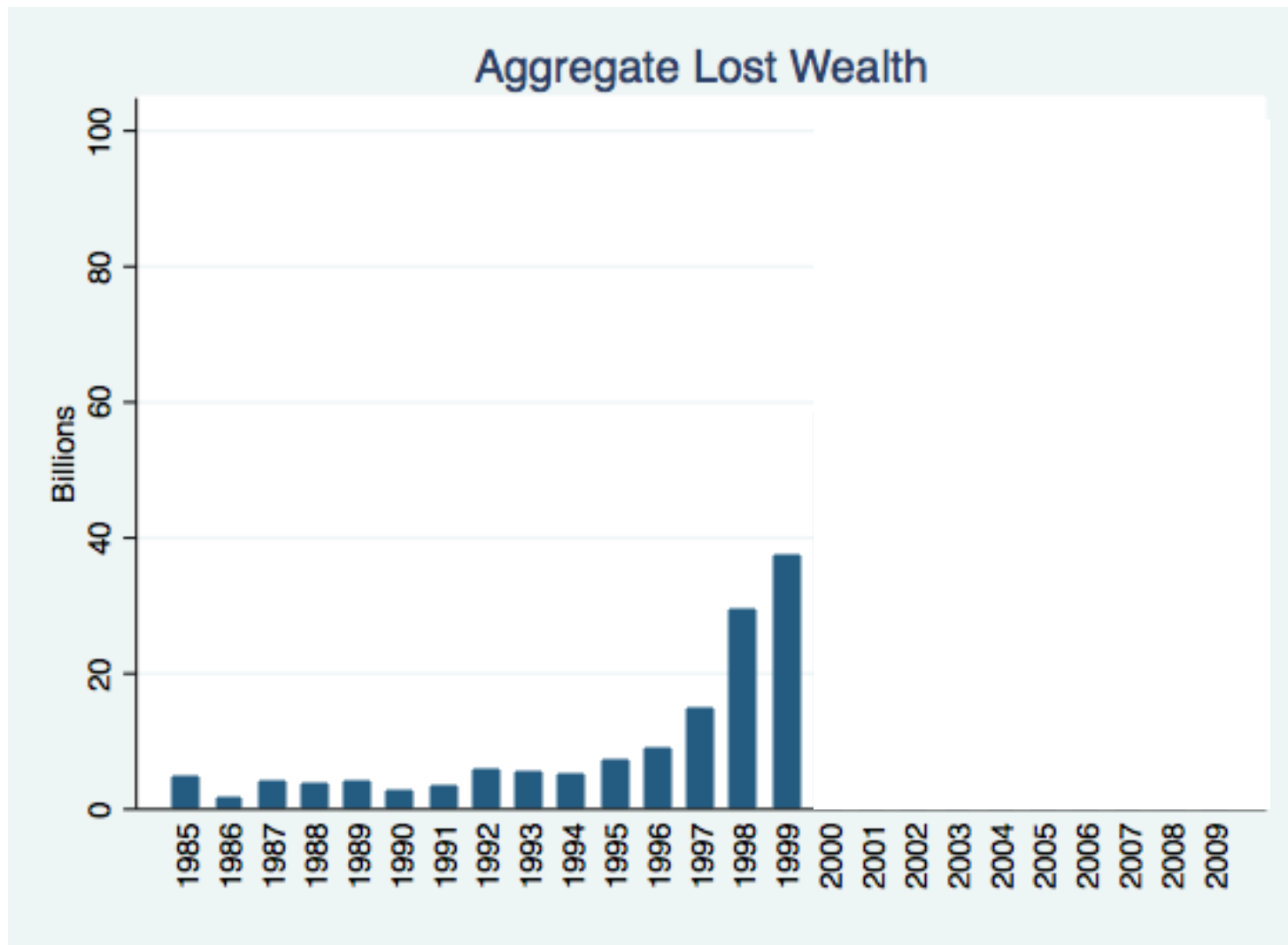
Warning: things can get worse

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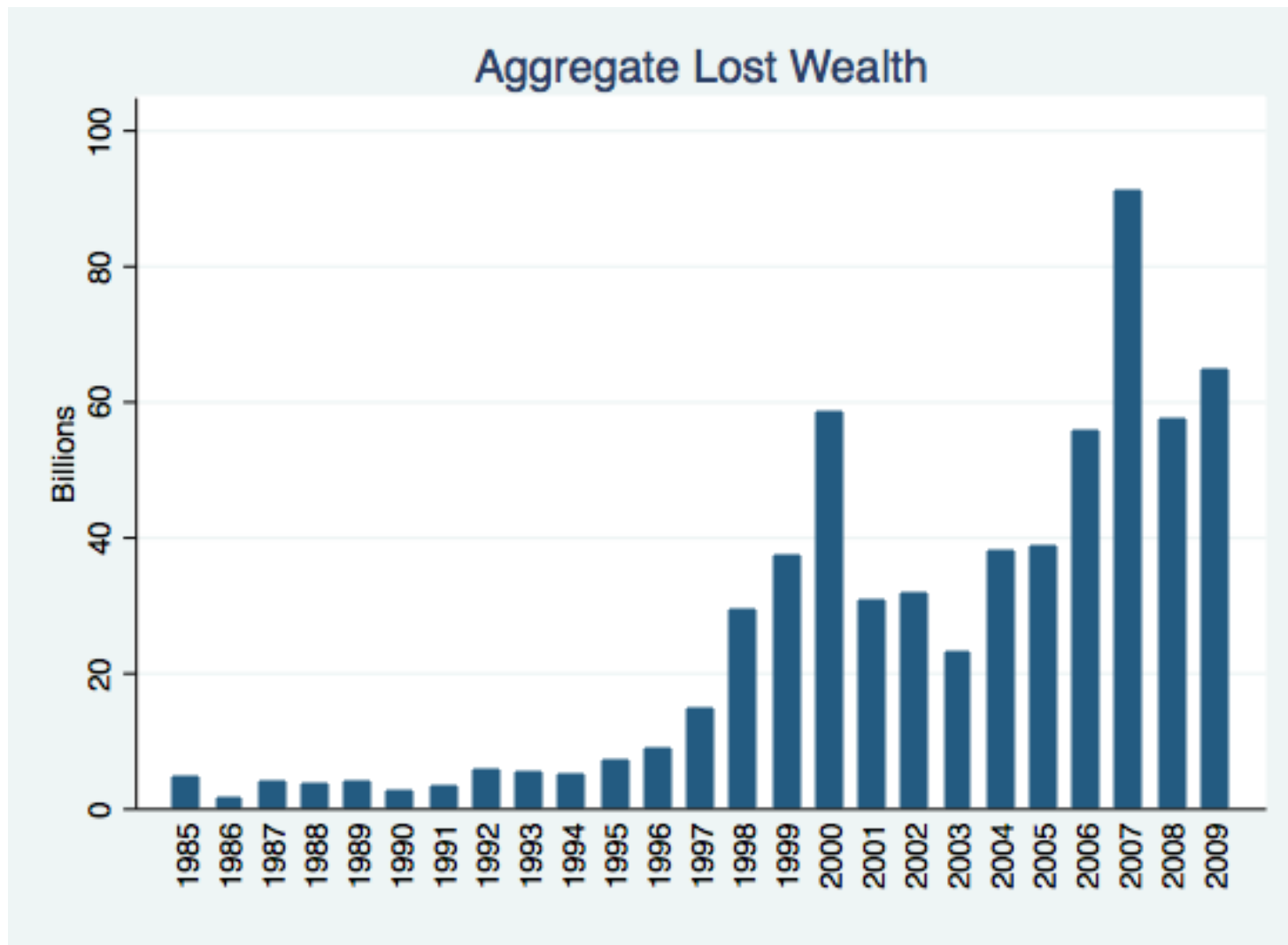
# Unfortunately...

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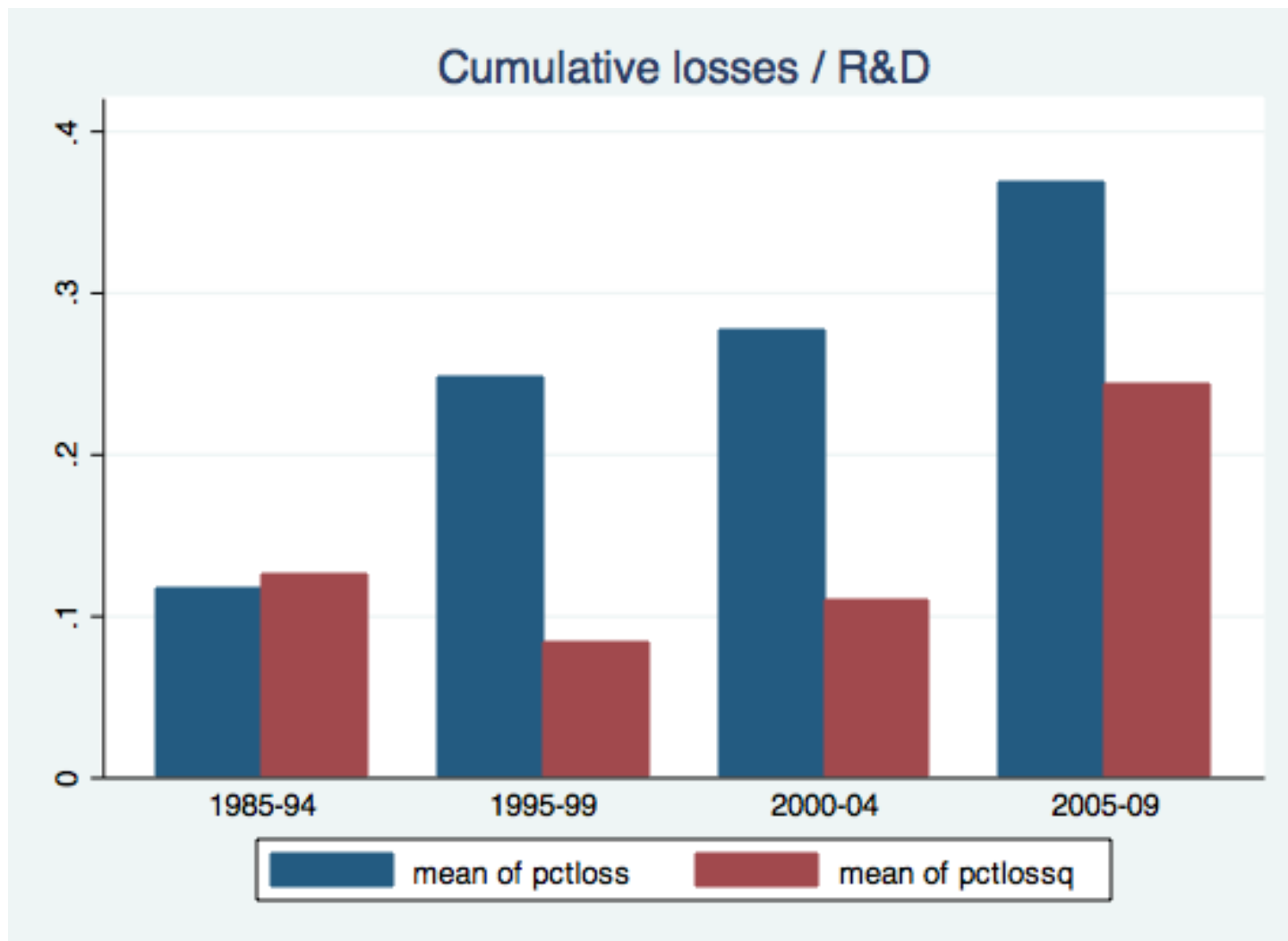
# Unfortunately...

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# Large relative to R&D

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# Two New Twists

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## 1. Trolls

a.k.a. "Non-practicing Entities" (NPEs)

## 2. Patent wars

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# What is an NPE?

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- Does not use technology
    - cannot be countersued
  - Licenses "freedom from suit", not technology
    - typically sues innovative companies
  - Typically
    - Buy up old patents
    - Some 1,000s patents
    - Assert vs. multiple parties
-

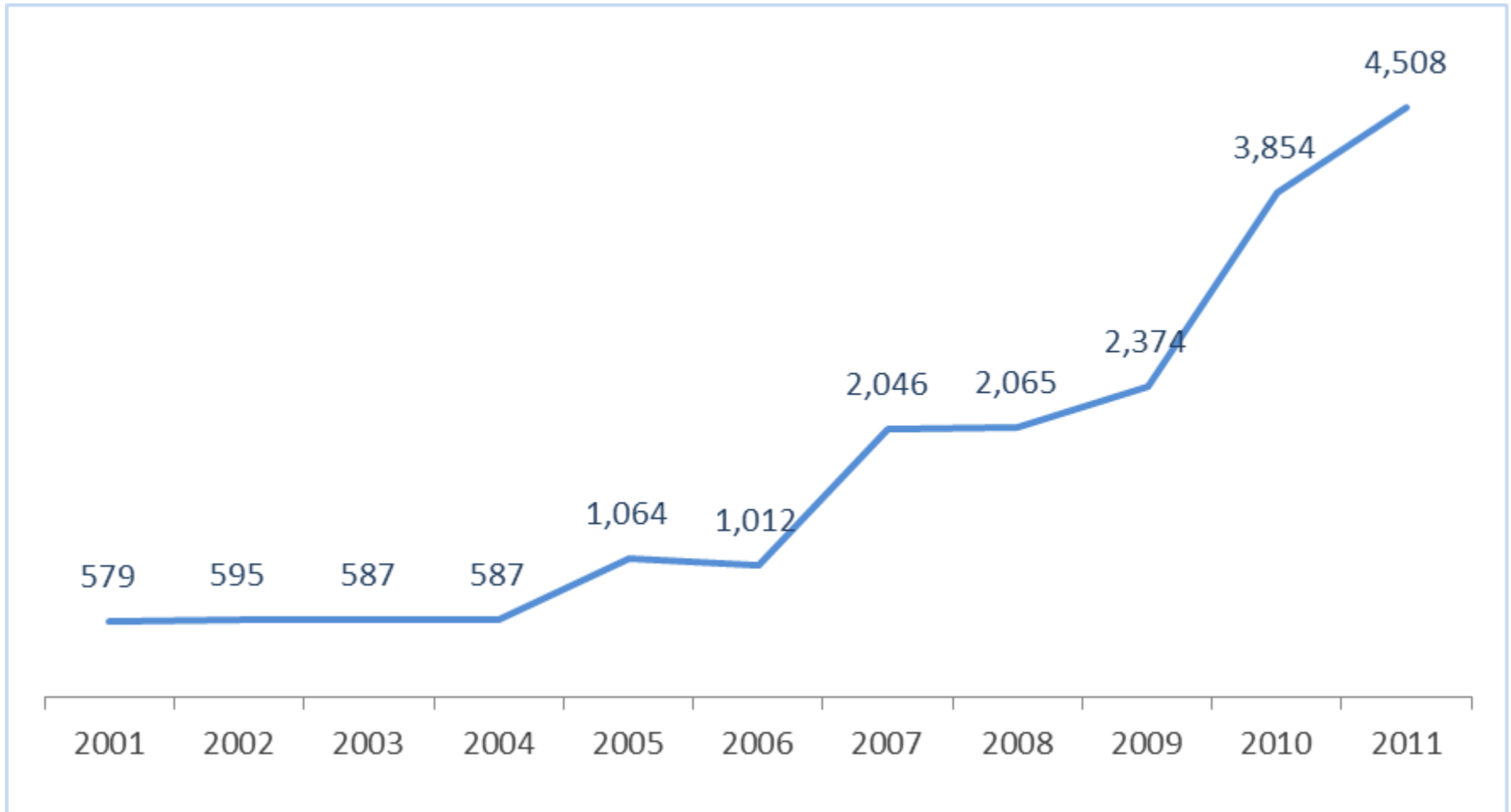
# NPE litigation

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- Mainly, SW and business methods
    - 62% are software patents
  - Old patents
    - Average: 8 years old
    - Many "continued"
  - Suing tech companies
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# Growth of Troll Defendants

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# Fuzzy Troll Patent: 7,222,078

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- Continued from 1992 application
  - Bought & prosecuted by Intellectual Ventures
    - spun off to Lodsys
  - Asserted against app developers
  - Vague wording
-



# Software patents => Word Games

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## Methods and systems for gathering information from units of a commodity across a network

Claim 1. A system comprising: units of a commodity that can be used by respective users in different locations, a user interface, which is part of each of the units of the commodity, configured to provide a medium for two-way local interaction between one of the users and the corresponding unit of the commodity, and further configured to elicit, from a user, information about the user's perception of the commodity, a memory within each of the units of the commodity capable of storing results of the two-way local interaction, the results including elicited information about user perception of the commodity, a communication element associated with each of the units of the commodity capable of carrying results of the two-way local interaction from each of the units of the commodity to a central location, and a component capable of managing the interactions of the users in different locations and collecting the results of the interactions at the central location.

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# Commodities on a network



# Patent Trolls:

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A business model  
to take advantage of  
weakness  
in patent system

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# Do NPEs promote innovation?

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Costs to defendants

\$25b legal, license

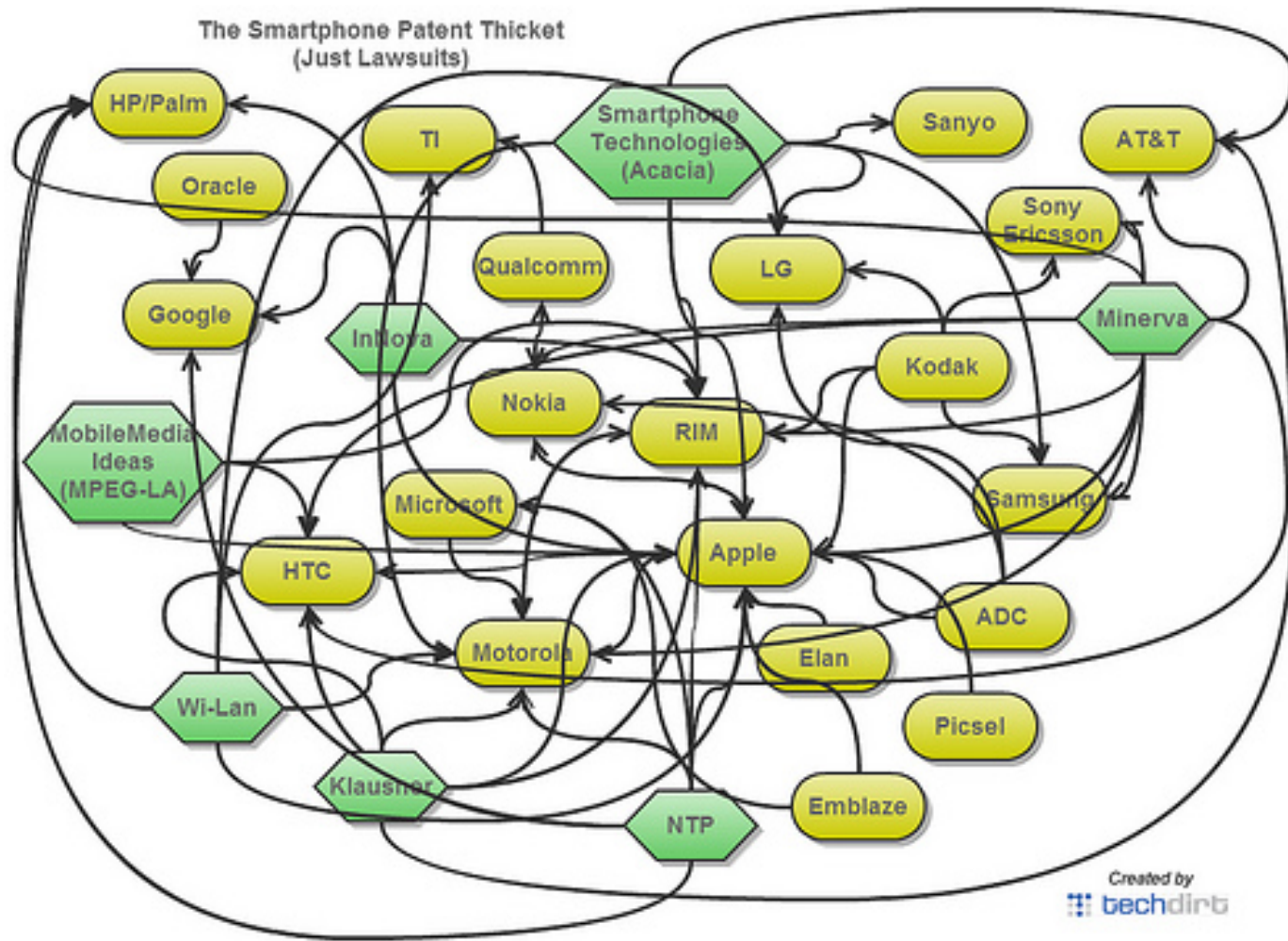
\$80b total business

Flows to inventors

~4%

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# End of Industrial Peace



# Poor patents

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## Apple v HTC

5,481,721

5,519,867

5,566,337

5,929,852

5,946,647

5,969,705

6,275,983

6,343,263

5,915,131

RE39,486

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# Poor patents

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## Apple v HTC

~~5,481,721~~

~~5,519,867~~

~~5,566,337~~

~~5,929,852~~

5,946,647 => re-design around "data tapping"

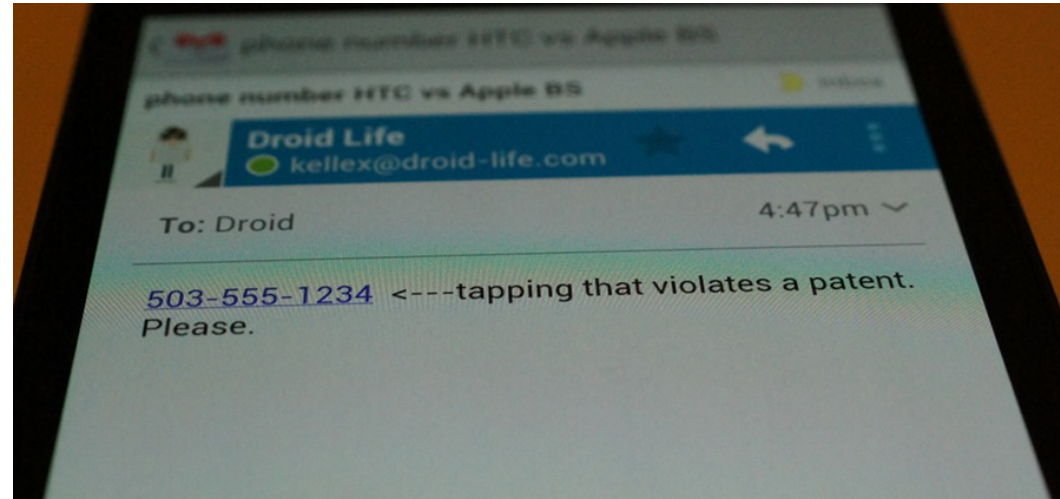
~~5,969,705~~

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~~RE39,486~~



# Poor patents

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## Apple v HTC

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~~6,343,263~~

5,915,131

RE39,486

9/10 invalid or not infringed

+ 1 MINOR improvement over Borland, 1983



# Damage, nevertheless

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- HTC *delayed*
  - Microsoft
    - Android \$\$ >> Windows phone \$\$
  - \$20b patent buying
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**What does this  
have to do with  
innovation?**

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# Only valuable to large companies

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	1996	2006
<b>Share of public firms with patents</b>		
Pre-packaged software publishers	24%	33%
" , startups (newly public)	20%	12%
<b>Share of SW patents to top 10 firms</b>	75%	81%

# Summary: SW, business patents

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- Privately valuable
    - to large firms
    - to "trolls"
  - Costly to society, small innovators
  - Not an innovation incentive overall
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