



Q4 in Review

Q4 in Review: 2020 Ends with Litigation Increase Despite Pandemic as Courts Tackle SEP Issues

The fourth of quarter of 2020 capped off a year in which the patent ecosystem proved quite resilient to the effects of COVID-19.

US patent litigation was down slightly during Q4, as a drop in operating company litigation more than offset an increase in NPE activity. The full year ended with 6.6% more defendants added than in 2019. However, federal courts were not immune to the effects of the pandemic, with some of the top US patent venues pausing jury trials at the end of the year in light of rising infection rates.

Meanwhile, the Patent Trial and Appeal Board (PTAB) continued to exercise greater discretion over the institution of America Invents Act (AIA) review trials, causing a dip in institution rates compared to 2019. One of those changes, a rule allowing the PTAB to consider the status of parallel district court litigation in deciding whether to institute, has sparked a widespread, heated debate.

The fourth quarter also saw another round of judicial decisions impacting standard essential patent (SEP) litigation. US courts issued rulings on the role of juries in disputes over fair, reasonable, and non-discriminatory patent (FRAND) licensing as well as the proper legal basis for resolving such disputes. Courts abroad, furthermore, tackled other high-profile questions, including automotive SEP licensing frameworks and the imposition of global FRAND licenses by national courts.

In addition, the sale of patents by operating companies fueled yet more NPE litigation, a trend that may accelerate as more businesses turn to their patent portfolios for revenue due to economic pressure caused by the pandemic. Current economic conditions have also played a part in litigation finance's explosive growth this year—the potentially profound effects of which are now becoming apparent in the patent space.

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Litigation Update: District Court Litigation Increased in 2020 Despite COVID-19 and Slight Q4 Dip, Driven by NPE Filings

The fourth quarter of 2020 saw 2.9% less patent litigation than in the same period last year, with 966 defendants added (compared to 995 added in Q4 2019).

That decline is due to a drop in litigation filed by operating companies, which added 414 defendants this past quarter, or 15.2% fewer than they did in Q4 2019 (during which they added 488 defendants). Operating company filings in the fourth quarter of 2020 were 4.9% higher than the four-year trailing average for Q4 and were 50% higher than in Q3 of this past year. Operating companies were responsible for 42.9% of the patent litigation filed in Q4 2020.

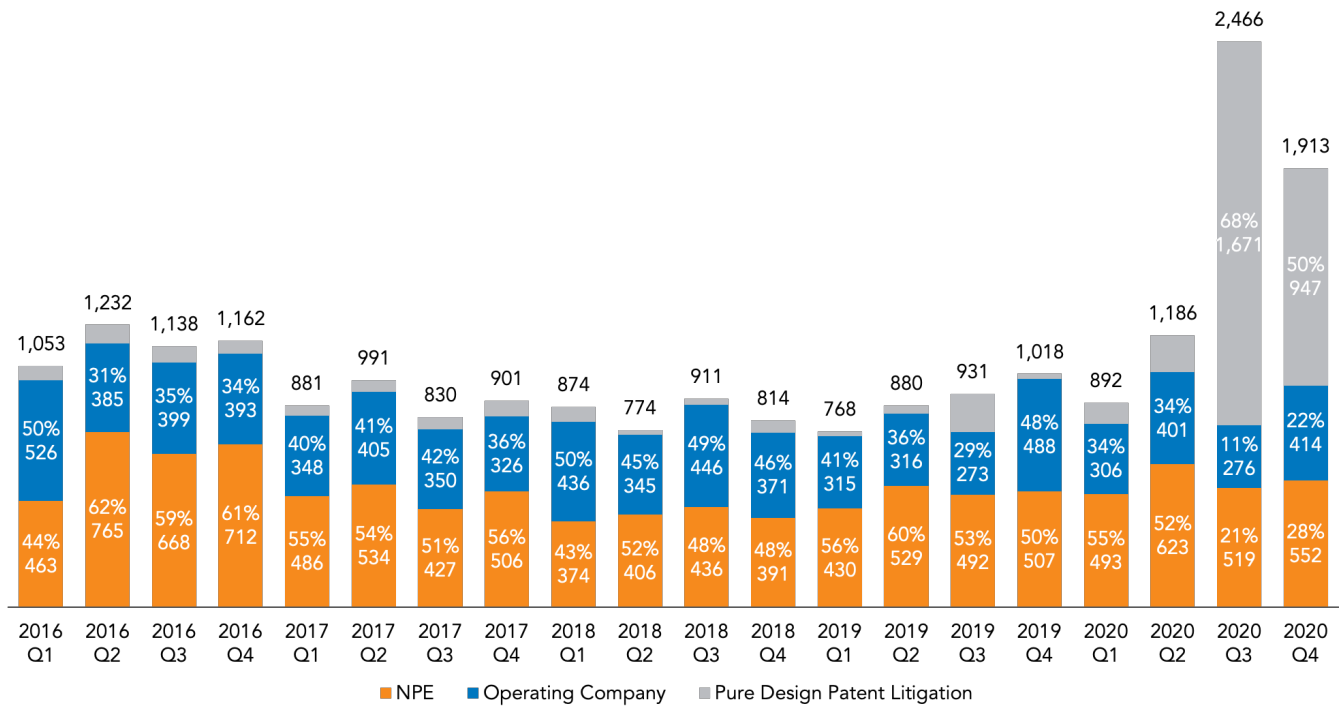
In contrast, NPEs filed 8.9% more litigation in Q4 2020 than they did in the year-ago quarter, adding 552 defendants (compared to 507 in Q4 2019). NPE filings also beat the trailing Q4 average by 4.3% and were 6.4% higher than the prior quarter. NPE litigation accounted for 57.1% of the defendants added in Q4 2020.

	Defendants Added	Change Compared to:		
	Q4 2020	Q4 2019	Q4 2016-2019 Average	Q3 2020
Operating Company	414	-15.2%	+4.9%	+50.0%
NPE	552	+8.9%	+4.3%	+6.4%
Total	966	-2.9%	+4.6%	+21.5%

Note, however, that the above data exclude cases asserting only design patents, as the fourth quarter of 2020 was the second in a row in which RPX observed a surge in defendants—mostly online merchants—named in design patent suits. Prior to Q3, such litigation accounted for a much smaller percentage of overall patent assertions per quarter.

As a result, while 87.9% more defendants were added to patent campaigns in Q4 2020 than in the year-ago quarter, pure design patent litigation was responsible for a full 50% of that latest crop of defendants. Just six pure design patent campaigns—collectively waged by three plaintiffs, Deckers Outdoor, EssilorLuxotica, and Chrome Cherry Design Studio—account for virtually all of the 947 additional defendants added during the quarter, largely targeting alleged counterfeiters of footwear, sunglasses, and children’s toys sued *en masse*.

Defendants Added to Litigation Campaigns by Quarter



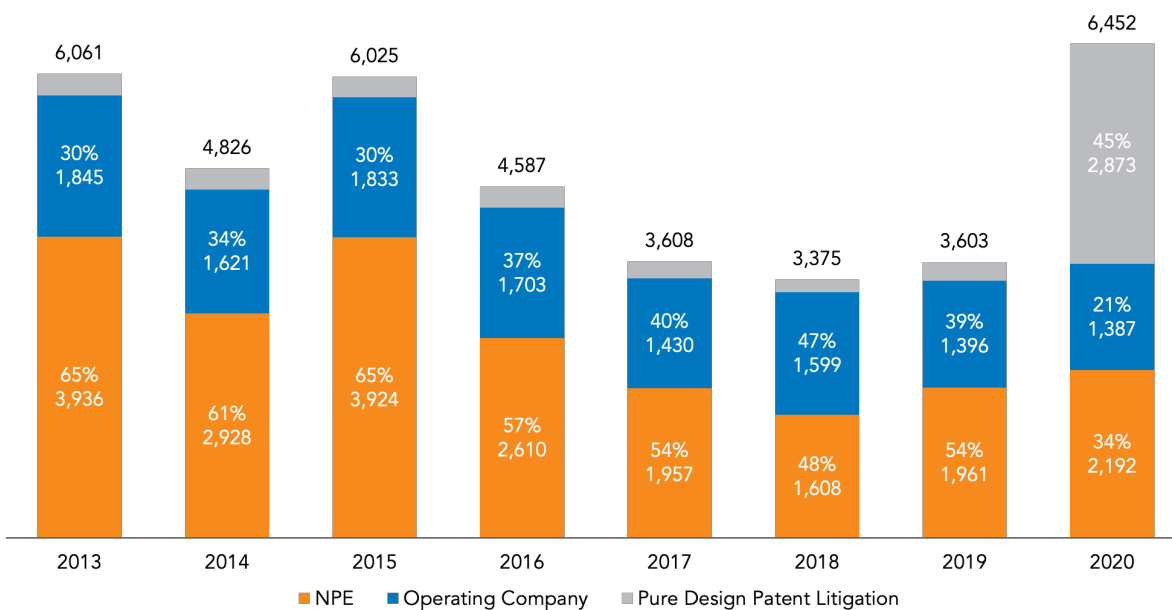
Pulling back to a yearly view reveals the extent to which the relatively few design patent cases filed in 2020 inflated the yearly numbers as well, accounting for 45% of the defendants added this past year.

However, excluding pure design patent litigation, NPEs filed 11.8% more litigation in 2020, adding 2,192 defendants (up from 1,961 in 2019), accounting for 61.2% of the 2020 total. Meanwhile, operating company filings held steady in 2020, adding 1,387 defendants—or 38.8% of the yearly total.

Overall, patent plaintiffs added 3,579 defendants in 2020, a 6.6% increase over 2019 (during which they added 3,357 defendants). From 2017 through 2020, patent litigation has held relatively steady, varying only $\pm 6\%$ from the average over the same period.

The remaining litigation analyses in this blog post exclude pure design patent litigation.

Defendants Added to Litigation Campaigns by Year



COVID-19, Economic Recessions, and Their Impact on Patent Litigation

It is also significant that both NPE and operating company patent litigation have increased since the onset of the COVID-19 pandemic, although it is important to note that a large portion of new filings during that period can be attributed to two NPE plaintiffs: [IP Edge LLC](#) (adding over 475 defendants since March 16, 2020, the week COVID-19 shutdowns began in the US) and [WSOU Investments, LLC \(d/b/a Brazos Licensing and Development\)](#) (filing over 175 new cases during that same time range).

IP Edge in particular is responsible for 25% of all defendants added to NPE litigation this past year. While IP Edge is known for its file-and-settle litigation strategy, with its cases typically short-lived and usually involving just a single patent, the effect of its growing patent portfolio on NPE litigation should not be underestimated. Indeed, IP Edge made a number of notable acquisitions during the fourth quarter alone.

Moreover, 2020 is not the first time that patent litigation, especially NPE activity, has increased during times of economic struggle. In fact, while RPX's analysis indicates that NPE litigation has been highly responsive to various patent reforms—for example, spiking just before the AIA took effect, and declining in the wake of the Supreme Court's *Alice* decision—NPEs have also been remarkably resilient during periods of economic downturn like the one caused by COVID-19. NPE litigation actually increased during the 2008-2009 recession, continuing a relatively uninterrupted upward trend from 2005 and peaking in 2011, while operating company litigation slowed in 2008-2009 and did not rebound until the 2010-2011 recovery. Time will tell if a similar pattern will hold after the COVID-19 recession.

See the "[Marketplace Update](#)" section below for more on how the current economic downturn may already be setting the stage for more NPE litigation in the near future, and how the assignment of patents from operating companies to NPEs continues to serve as a leading indicator of assertion campaigns to come.

Venue Update: West Texas Took First Place as Judge Albright and the Federal Circuit Locked Horns

In 2020, the Western District of Texas was the most popular venue for overall patent litigation (*i.e.*, with no filter for plaintiff type) and for litigation filed by NPEs, also taking third place for operating company litigation. The District of Delaware, meanwhile, was the top operating company venue and the number-two district for both overall litigation (falling behind West Texas by just under 30 defendants added) and for NPE litigation (trailing West Texas by over 200 defendants added). The Eastern District of Texas—the favored venue of NPEs prior to the Supreme Court’s decision in *TC Heartland*—took third place for overall and NPE litigation but was in fifth place for operating company litigation.

The venue rankings were the same in all three categories for litigation filed in the fourth quarter.

Top Patent Litigation Districts in 2020 by Defendants Added



As RPX has reported, the rise of the Western District of Texas can largely be attributed to District Judge Alan D. Albright, who has made no secret of his desire to attract more patent litigation to his district since taking the bench in September 2018. Along the way he has developed what some might call a restrictive approach to certain types of motions, with his treatment of motions to transfer for convenience grounds standing out in 2020—possibly, in part, because of the extent to which the Federal Circuit has pushed back.

On multiple occasions during the past year, the Federal Circuit has overturned Judge Albright’s denial of convenience transfer motions. In July, the appellate court ruled that he [improperly weighed](#) the applicable factors to deny Adobe a convenience transfer to the Northern District of California. More recently, a divided Federal Circuit granted a *mandamus* petition from Apple, ruling in November that Judge Albright erred in concluding that a variety of the applicable factors weighed against transferring a case brought by [Fortress Investment Group LLC](#) subsidiary [Uniloc 2017 LLC](#) (also to the Northern District of California). Circuit Judge Kimberly A. Moore dissented, arguing that the majority’s analysis exceeded the permissible bounds of *mandamus* review and improperly disturbed the district court’s factual findings and conclusions.

See [RPX Insight](#) for details on that latest appellate ruling.

COVID-19 Update: Top Patent Venues Take Divergent Approaches to Jury Trials

The COVID-19 pandemic has forced courts to rethink many aspects of patent litigation. While a number of district judges have moved hearings and other procedures online, the nation's top patent venues effectively suspended jury trials for most of the summer—until District Judge Rodney Gilstrap of the Eastern District of Texas resumed patent trials in August after local infection rates began to fall. However, as the pandemic moved further into its winter wave, Judge Gilstrap took the notable step in late November of [halting all jury trials before him](#) after a coronavirus outbreak during a trial under another judge in the Eastern District. Judge Gilstrap stated that he was doing so “reluctantly” but asserted that he had no alternative—arguing that the face-to-face aspect of in-person trials is essential for due process.

In contrast, while Judge Albright of the Western District has pushed trials back, he has not halted trials outright, adopting more of a wait-and-see approach. In November, he even moved a scheduled January patent trial from Austin, where the courthouse remains closed, to Waco, in an attempt to proceed on that same date. However, the Federal Circuit [ruled](#) on December 23 that Judge Albright moved the trial without proper authority and that doing so would require a complete convenience analysis to determine whether the entire case could be transferred to Waco. On December 30, Judge Albright granted the plaintiff's emergency motion for such a transfer, also announcing that he would [push the trial back to mid-February](#) to give the defendant time to appeal.

Meanwhile, as the recent spike in infections forced California into a second lockdown, courts in two of the state's federal districts [pushed back scheduled patent trials](#). On December 14, District Judge James V. Selna of the Central District of California vacated a jury trial previously scheduled for April in litigation between TCL and Ericsson over a standard essential patent (SEP) licensing dispute. Two days later, District Judge Beth Labson Freeman postponed a Northern District of California trial from January to June in litigation filed by NPE [Finjan Holdings, Inc.](#) against Cisco, following a series of prior pandemic-related continuances.

Market Sector Update: Connected Cars Drive NPEs to the Automotive Space

A surge of NPE activity in the Automotive sector, first [noted](#) by RPX in May 2020, persisted through the second half of the year. With new entrants flocking to the scene, historically aggressive plaintiffs active in the space, and cars becoming increasingly high-tech, sustained activity in the sector looks likely. The effects will be felt by a broad range of defendants, from car makers and their suppliers to tech companies and wireless technology providers.

As shown below, NPE litigation hitting the Automotive market sector increased by 120% in 2020 compared to the previous year—far more than other sectors, though Networking, Medical, and E-Commerce and Software also saw significant bumps.

While the total number of NPE cases filed in the Automotive sector this year appears relatively modest, certain indicators suggest that activity in this space will continue to increase. Significantly, most of the automotive defendants sued by NPEs this past year were named in campaigns *initiated* in 2020 (rather than in existing campaigns begun prior to 2020). Moreover, the historically aggressive behavior of some of the plaintiffs involved—as detailed below—portends further growth in this sector. So does the continued evolution of cars as connected devices.

Defendants Added to Litigation by NPEs, Percent Change from 2019 to 2020

		2019	2020
Automotive	120%	50	110
Biotech and Pharma	-21%	24	19
Consumer Electronics and PCs	-23%	434	333
Consumer Products	7%	69	74
E-Commerce and Software	18%	514	609
Financial Services	-16%	90	76
Industrial	-6%	48	45
Media Content and Distribution	-20%	131	105
Medical	37%	30	41
Mobile Communications and Devices	-11%	157	140
Networking	44%	363	523
Other Sectors	66%	59	98
Semiconductors	3%	155	160

Among the NPEs hitting the Automotive sector in 2020 were a group of first-time plaintiffs. Perhaps most notable was [21ST CENTURY GARAGE LLC](#), which in May began asserting patents from a portfolio received from [Hanger Solutions, LLC](#) in a February 2020 [transaction](#). Hanger Solutions is one of several Georgia entities, associated with Atlanta-based monetization firm [IPInvestments Group LLC \(d/b/a IPinvestments Group\)](#), that acquired thousands of patent assets from [Intellectual Ventures LLC](#) in late 2019. The 21ST CENTURY GARAGE campaign has targeted connected car technology as well as more traditional automotive systems, with accused features including airbags, smart keys, hazard detection, and remote start. While its initial round of cases filed from May through August have been dismissed, the NPE revved up its campaign once again in late November with a suit against PACCAR.

Other new campaigns launched in 2020 have targeted vehicle infotainment and/or navigation systems. Plaintiffs hitting this market subset have included inventor-controlled [StratosAudio, Inc.](#), which launched its first campaign in December; [MicroPairing Technologies LLC](#), which began filing litigation in October; [2Bcom LLC](#), which hit the road starting last January; and [Omnitek Partners LLC](#), which started a campaign in May.

Additional new plaintiffs also initiated campaigns in 2020 over other vehicle features: inventor-controlled [Engle Grange, LLC](#), which targeted keyless entry and remote start technology in a campaign that lasted from May through September; [JG Technologies LLC](#), another inventor-controlled NPE that waged a since-ended collision detection campaign during that same time period; and [RideShare Displays Inc.](#), which in November kicked off a campaign targeting vehicle identification devices used by rideshare drivers.

A variety of more established NPE players also filed Automotive litigation in the past year. Among them is longtime plaintiff [Conversant Wireless Licensing, S.à.r.l. \(f/k/a Core Wireless Licensing S.à.r.l.\)](#), a subsidiary of [Conversant Intellectual Property Management, Inc.](#), which in April sued Tesla over connected cars alleged to infringe cellular patents purportedly offered in the Avanci patent pool. That litigation ended in settlement in December. Also joining the fray was inventor and prolific litigant Leigh M. Rothschild, whose [Display Technologies, LLC](#) pivoted its long-running campaign to focus on Bluetooth-enabled automotive audio receivers in 2018 and filed several suits filed in 2020. The past year also saw several IP Edge campaigns hit companies offering products and services related to the automotive market sector, including those initiated by affiliates [Boxey Tech LLC](#), [Inspire Licensing LLC](#), [Sunset Licensing LLC](#), and [Tunnel IP LLC](#). A variety of other familiar names also targeted the Automotive sector in 2020, including [Sisvel International S.A. \(d/b/a Sisvel Group\)](#) and several related entities; [NavBlazer, LLC](#), an entity controlled by inventor Raymond Anthony Joao; inventor-controlled [Omega Patents, L.L.C.](#); [Quartz Auto Technologies, LLC](#); and [Equitable IP Corporation](#) affiliate [Route Guidance Systems LLC](#).

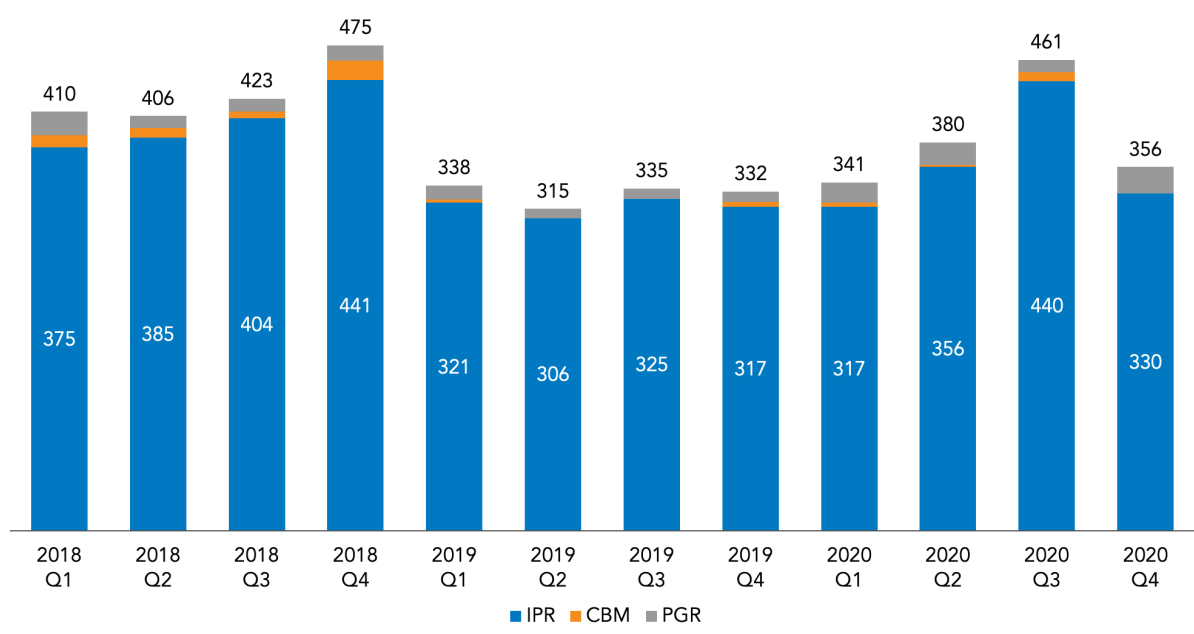
For a deeper dive on NPE activity in the Automotive sector, see [RPX Insight](#).

PTAB Update: Stakeholders Debate Rules Allowing Discretionary Denials

In the fourth quarter of 2020, 356 petitions for America Invents Act (AIA) review were filed with the Patent Trial and Appeal Board (PTAB), including 330 petitions for *inter partes* review (IPR), zero petitions for covered business method (CBM) review (which ceased to be available toward the end of Q3), and 26 petitions for post-grant review (PGR). The overall number of AIA review petitions filed in Q4 was 22.8% lower than the previous quarter, during which 461 petitions for AIA review were filed—ending a streak of quarterly increases observed since Q4 2019.

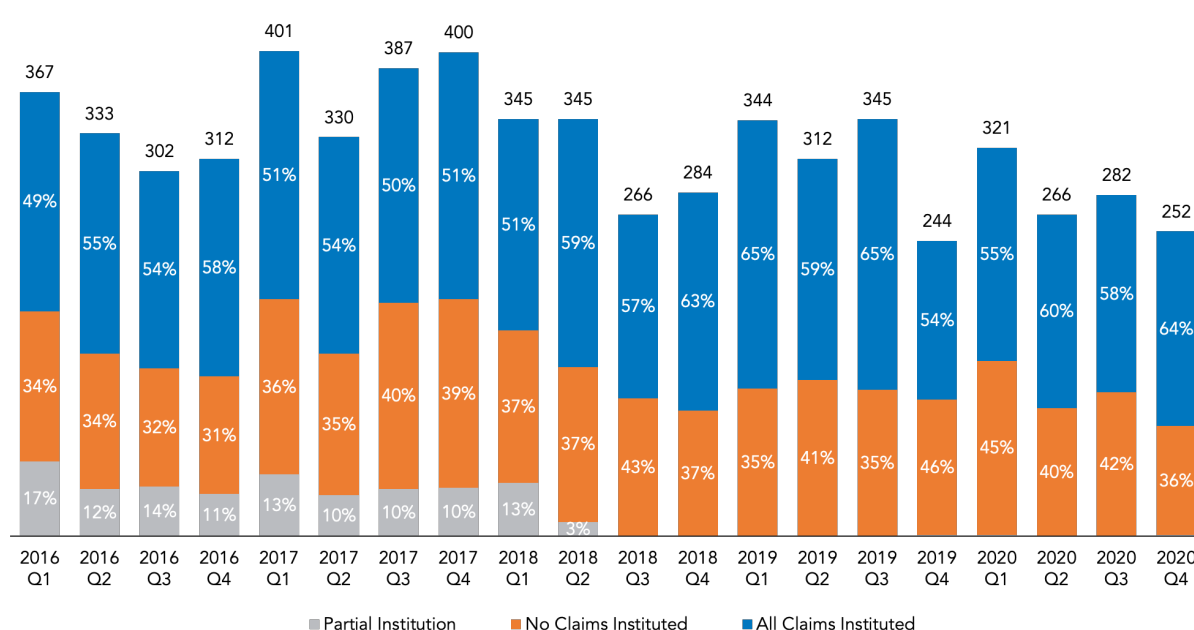
In total, 1,538 petitions for AIA review were filed in 2020, 16.5% more than were filed in 2019 (which saw 1,320 petitions).

AIA Review Petitions Filed by Quarter



Moreover, the AIA review institution rate fell by about 2.2% year-over-year, dropping from 61% in 2019 to 58.9% in 2020.

AIA Review Institution Decisions by Quarter



That decrease is at least partly attributable to the PTAB's increasing exercise of discretion to deny institution based on a growing variety of factors, perhaps most controversially through a series of decisions collectively known as the *NHK-Fintiv* rule. That rule allows the Board to deny institution based on the status of a parallel district court case involving the same patent. A lightning rod among the six *NHK-Fintiv* factors is the one allowing institution to be denied when a scheduled district court trial date is too close to the due date for the PTAB's final written decision. When litigating in venues that are more aggressive about scheduling early trial dates, such as the Western District of Texas, this factor shrinks the window in which an AIA review petition can be effectively filed to one smaller than what is practically allowed by statute.

The *NHK-Fintiv* rule has attracted a great deal of interest among stakeholders on both sides of the issue. In August, a coalition of tech companies filed a lawsuit challenging the rule in the Northern District of California, raising various substantive objections and arguing that the rule should have undergone a formal agency rulemaking process. That action has since grown to span a [wider set of interests and industries](#). Among the entities to weigh in is US Inventor, an inventor's industry association supporting the *NHK-Fintiv* rule, which is currently seeking to intervene and has even asked for all PTAB trials to be halted until its procedural objections are satisfied. Additionally, a medical technology firm joined as a coplaintiff in early November, and later that month a group of businesses and advocacy organizations from sectors including telecommunications and automotive filed a [motion](#) for leave to file an *amicus* brief in support of the plaintiffs. Moreover, the USPTO has filed a request for comment in the Federal Register, proposing to codify the *NHK-Fintiv* rules concerning parallel infringement litigation as well as other decisions governing discretionary denials—and received more than 800 comments by the December 3 deadline.

Section 101 Update: Supreme Court Denies Petition Challenging Federal Circuit’s Treatment of Facts

The US Supreme Court’s *Alice* decision has had a marked impact on the dynamics of patent litigation since its June 2014 issuance, but the Court has repeatedly declined to revisit patent eligibility in the years since it handed down that decision. That trend continued in the fourth quarter after the Supreme Court denied even more petitions challenging various aspects of the *Alice* test.

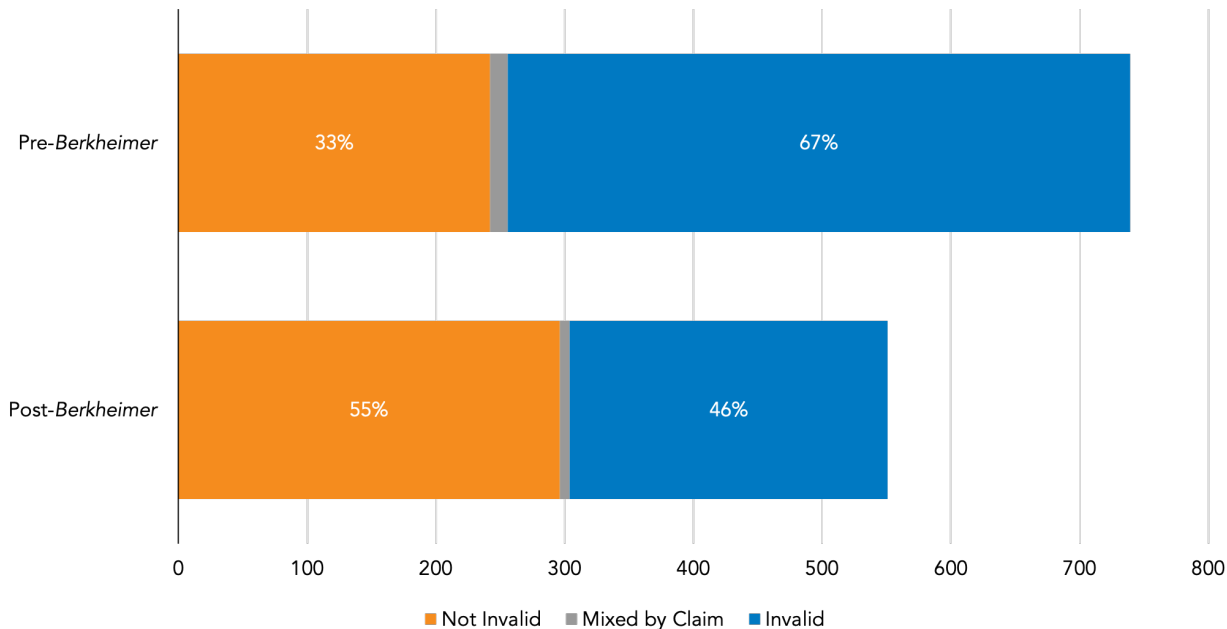
In early October, the Supreme Court denied a closely watched *certiorari* petition challenging the Federal Circuit’s controversial ruling in *Chamberlain Group v. Techtronic Industries*, commonly referred to as the “garage door” case. In that decision, the appellant had argued that the Federal Circuit erred by reducing the invalidated patent to a “single supposed point of novelty” rather than considering the claims as a whole. The ruling attracted significant interest, with Senator Thom Tillis (R-NC) arguing that the ruling highlighted both the “madness” underpinning how courts have applied *Alice* and the need for legislative reform. However, as Senator Tillis himself has lamented, the lack of consensus between stakeholders in the life sciences and tech industries on how to address Section 101 has dimmed the prospects of such reform in the near future. Indeed, Professor Colleen Chien recently [remarked](#) that the prospect of “Congressional action on Section 101”—as well as that of “near-term Supreme Court” intervention—“remains murky”.

Another petition denied in November, filed in *WhitServe v. Donuts*, highlighted a different patent eligibility issue—the role of facts in the *Alice* analysis—that has become a point of contention since the Federal Circuit’s February 2018 *Berkheimer* and *Aatrix* decisions. In those cases, the Federal Circuit ruled that dismissal under *Alice* may be premature when the patent owner can establish a factual dispute over the challenged patent’s inventiveness. The decisions effectively give some patent owners what amounts to an early *Alice* defense and have led many plaintiffs to supplement their complaints with copious factual allegations regarding their patents’ alleged inventiveness. Patent owner [WhitServe LLC](#) argued in its Supreme Court petition that the Federal Circuit erred by unduly ignoring such factual allegations offered in its own complaint, asserting that early *Alice* dismissals have been granted at “unprecedented levels”.

WhitServe’s objections notwithstanding, *Berkheimer* and *Aatrix* have actually led to a decrease in the overall *Alice* invalidation rate, as regularly observed by RPX in the nearly three years since those decisions came down. While the pre-*Berkheimer* invalidation rate was around two thirds, for *Alice* decisions issued since then, just 46% of patents have had claims invalidated.

Analysis continued on the next page.

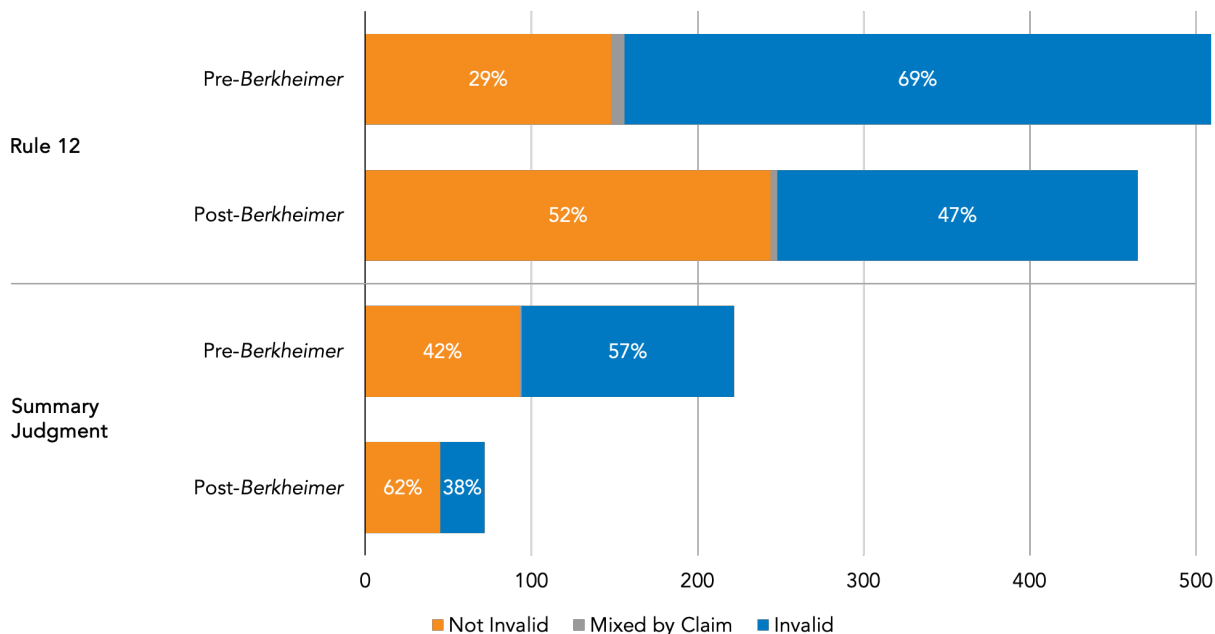
Patents Invalidated Under *Alice* Before and After *Berkheimer*



Note: Some percentages add up to more than 100%, as patent claims occasionally see multiple *Alice* rulings with different outcomes. (For example, a claim may be found not invalid in one case and invalid in another.)

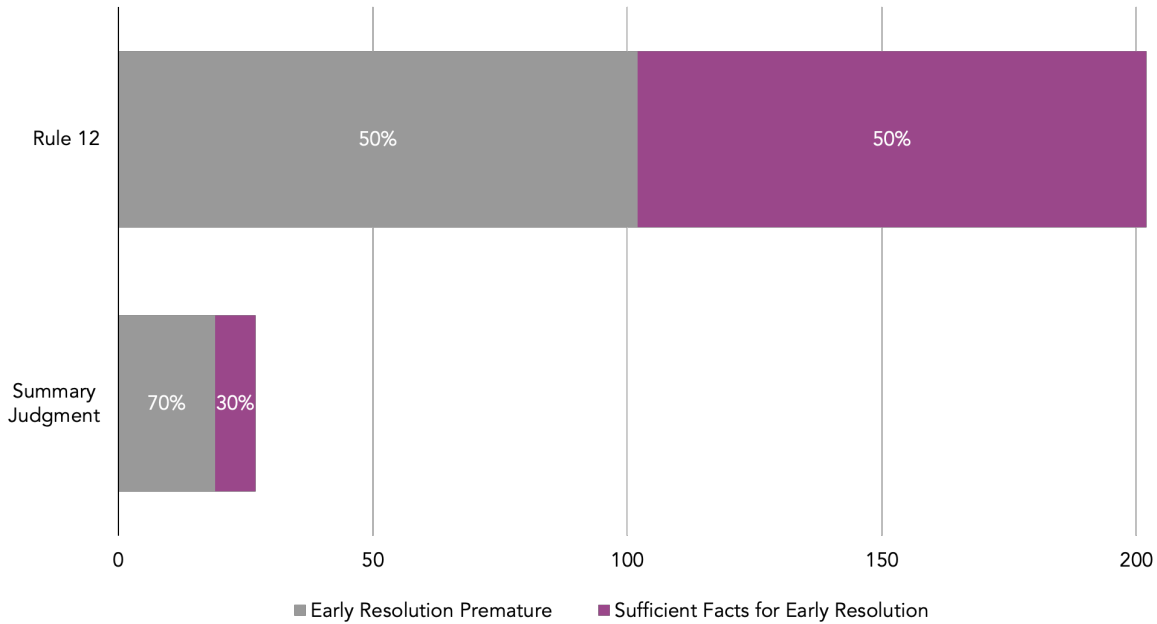
Adding a filter for procedural stage shows that Rule 12 and summary judgment—easily the two most common avenues for Section 101 challenges—have both been similarly affected by *Berkheimer*, each decreasing by about the same amount as the overall invalidation rate. For Rule 12—the earlier of the two stages, and the one highlighted by *WhitServe*—*Alice* decisions issued since *Berkheimer* and through the end of 2020 resulted in an invalidation rate just over 47% (up slightly from where that figure stood at the end of Q3), compared to around 70% before *Berkheimer*. Meanwhile, the post-*Berkheimer* invalidation rate at summary judgment stands at 38%, compared to a pre-*Berkheimer* invalidation rate of around 57%.

Patents Invalidated Under *Alice* Before and After *Berkheimer* by Procedural Stage



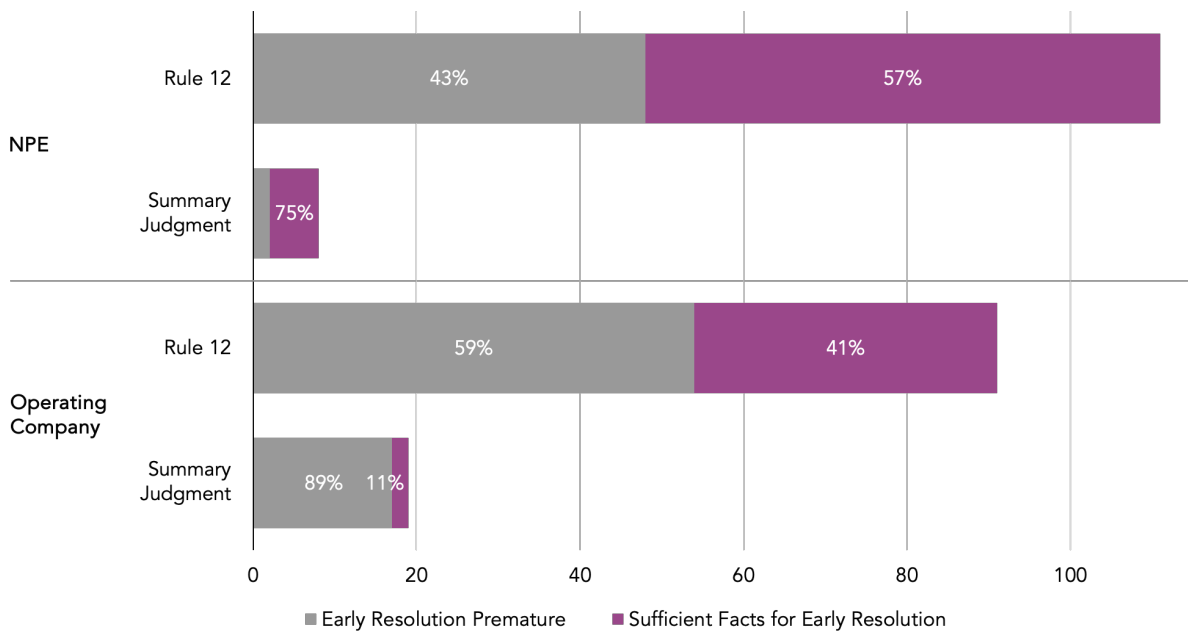
RPX data also indicate that plaintiffs remain far less successful when trying to block an *Alice* ruling at the Rule 12 stage than at summary judgment. An analysis limited to decisions that turned on *Berkheimer* or *Aatrix*, meaning a plaintiff asserted that a factual issue precluded early resolution and the court’s order actually addressed that issue, shows that courts found sufficient facts to rule about half of the time for Rule 12. However, the story is much different for summary judgment decisions turning on *Berkheimer*, for which courts found that they had sufficient facts to move forward just 30% of the time.

Patents with *Alice* Orders Addressing *Berkheimer* by Procedural Stage



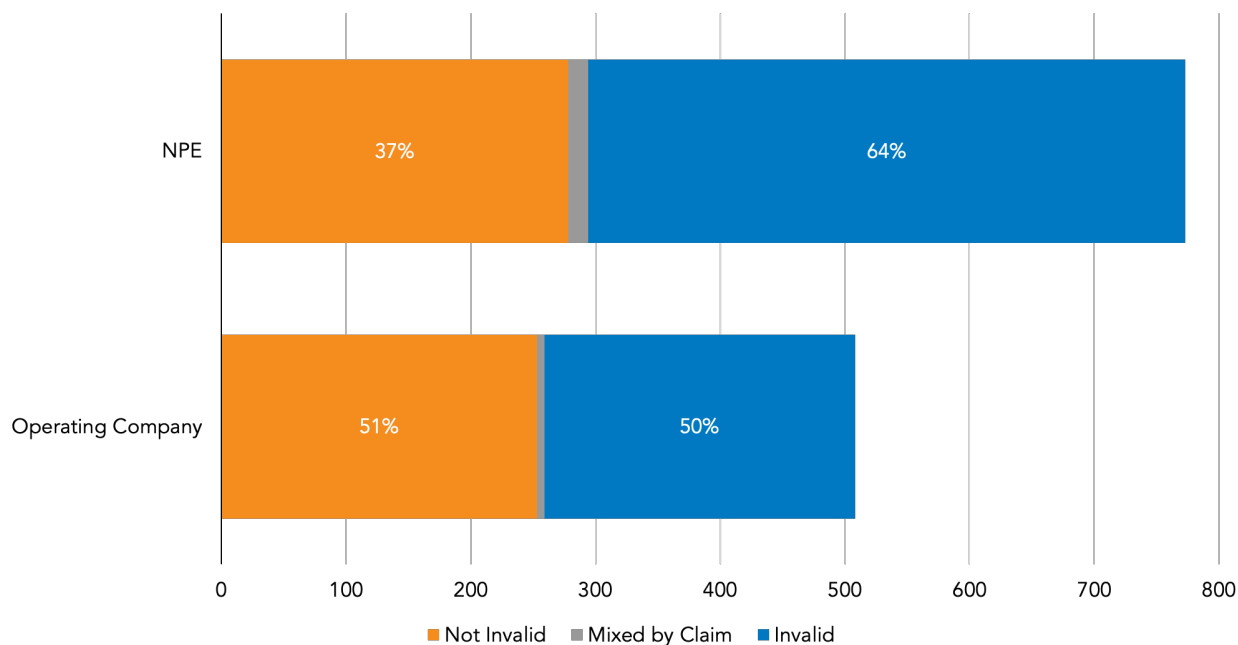
Adding a filter for plaintiff type further shows that NPEs are still significantly less successful than operating companies at blocking Rule 12 challenges under *Berkheimer/Aatrix*, with courts finding sufficient facts to issue a ruling 57% of the time for motions against NPEs but 41% of the time for those against operating companies. NPEs fare even worse at the summary judgment stage, as courts found sufficient facts to rule in 75% of *Alice* summary judgment motions against NPEs—whereas for summary judgment motions against operating companies, courts found sufficient facts just 11% of the time.

Patents with *Alice* Orders Addressing *Berkheimer* by Procedural Stage and Plaintiff Type



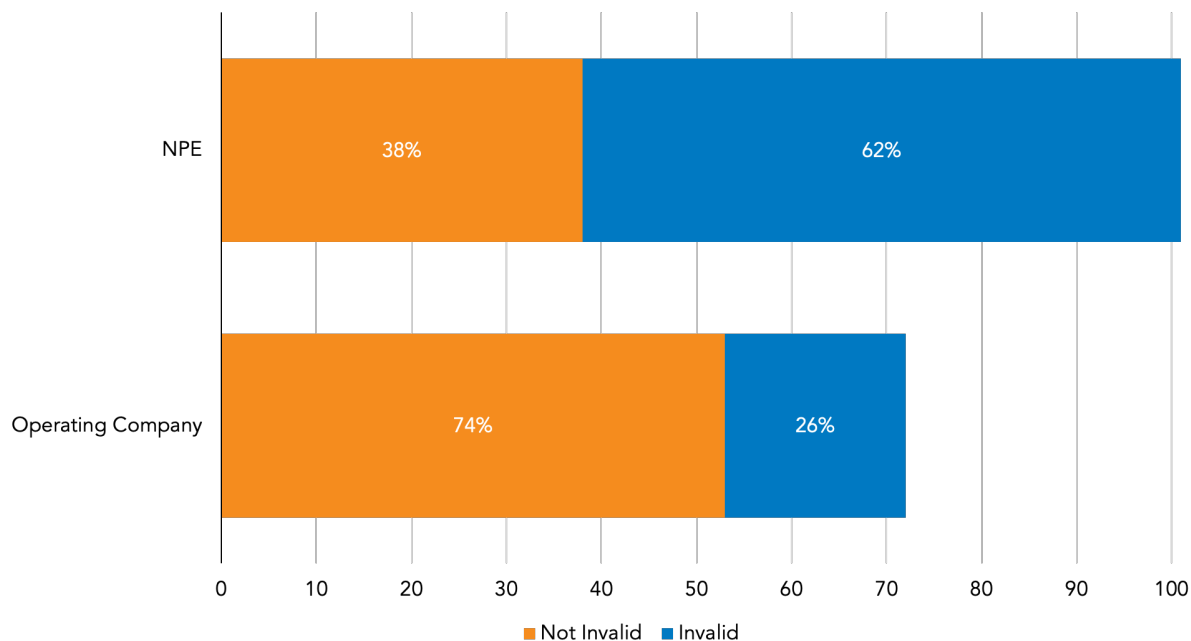
Overall, since the *Alice* decision's June 2014 issue date and through the end of 2020, 58% of patents have had claims invalidated under its rationale. Patents asserted by operating companies have fared better during that period, with about half surviving *Alice* challenges—whereas those wielded by NPEs had an invalidation rate of around 64%.

Patents Invalidated Under *Alice* Since the Decision's Issuance



Patents litigated by operating companies did even better for decisions issued just in 2020, surviving *Alice* challenges 74% of the time in the past year. In contrast, just 38% of NPE-asserted patents withstood *Alice* motions adjudicated during that period. The overall invalidation rate for 2020 was 47%.

Patents with *Alice* Challenges Decided in 2020



FRAND Update: Courts Address Jury Trials, Automotive Licensing, and Global SEP Licenses

2020 proved to be an eventful year for litigation over standard essential patents (SEPs), and the fourth quarter brought a variety of significant developments in that arena in the US and abroad.

The US: Courts Affirm Rulings on Juries in SEP Disputes

On the domestic front, the fourth quarter saw US courts double down on caselaw confirming the role of juries in SEP disputes. Most recently, on December 4, the full Federal Circuit declined to revisit the court's August decision, in [IP Bridge v. TCL](#), that juries must resolve the question of whether a patent is essential to a given standard. Additionally, in October, the Supreme Court rejected an appeal in [TCL v. Ericsson](#), in which the Federal Circuit ruled that juries must also determine royalties in SEP disputes, and that deciding such terms from the bench violates a defendant's constitutional right to a jury trial. As noted [above](#), the resulting jury trial in that case was recently delayed as a result of the COVID-19 pandemic.

The end of October also saw the Ninth Circuit opt not to rehear its August decision in *FTC v. Qualcomm*, a [notable ruling](#) in which the appeals court held that disputes over SEP licensing are best resolved under contract law, not antitrust. That holding, reversing a decision from the Northern District of California, was among a series of recent victories for the US Department of Justice's Antitrust Division, which has [advocated for the same legal theory](#) in various *amicus* briefs—including one filed in that case—and through a series of prominent policy statements.

Germany: Düsseldorf Court Seeks Clarity on Automotive Licensing Practices

Meanwhile, German courts have become even more of a focal point in the ongoing debate over how SEP licensing should work for connected cars, a rapidly expanding product category that finds itself at the intersection of two industries, automotive and cellular, with markedly different licensing practices. While some owners and licensors of cellular SEP portfolios have advocated for pricier OEM-level licenses akin to those customary for smartphones, others in the automotive space have argued that the latter industry's practice of licensing component makers further down the supply chain should extend to the connected car ecosystem.

In late November, the Regional Court of Düsseldorf—one of the forums that has seen litigation between Nokia and Daimler—stayed one of those actions and referred a series of overarching questions regarding FRAND licensing in the automotive context to the Court of Justice of the European Union (CJEU). Those questions include one asking when such a license is FRAND-compliant and another asking whether industry practices should govern the rules for component-level licensing. Other questions posed to the CJEU relate to suppliers more specifically, including whether SEP owners must license suppliers first, the levels of the chain at which suppliers are entitled to licenses, and when a downstream supplier might be subject to an injunction based on an infringement claim against an OEM.

As stakeholders await further clarity from that eventual decision, another European institution appears to have abandoned plans to take a more active role in the automotive licensing debate. In November, a draft intellectual property "action plan" to be released by the European Commission was [reportedly leaked](#), and two provisions from the draft stood out in particular—one in which the Commission stated its intention to "engage with the automotive sector" on issues related to SEP licensing transparency and predictability, and another raising the possibility of "regulatory reform" on SEP "declaration, licensing and enforcement". However, the [final action plan](#) released later that month omitted the former provision and softened the latter to focus more on facilitating industry consensus.

China: Chinese Court Agrees to Set Global FRAND License for the First Time

Another important Q4 SEP development occurred in China, where a court for the first time followed in the footsteps of the UK Supreme Court's August decision in *Unwired Planet v. Huawei*. That landmark UK opinion was the first time that a national court held that it may set the terms of a FRAND license for a multinational SEP portfolio and did so. In a similar vein, in a decision [reportedly](#) issued in October and

disclosed more widely in December, the Shenzhen Intermediate People's Court ruled that it would decide a global FRAND license in litigation between Sharp and Oppo, rejecting a jurisdictional challenge from Sharp. In deciding that it could hear the case, the court characterized FRAND disputes as distinct from pure contract or patent infringement cases. It also held that a Chinese court may adjudicate such a dispute if China is where the defendant is located, where the patent is to be enforced, or where a contract is signed or performed, among other factors. This is a broader basis than the jurisdictional holding in *Unwired Planet*, which was grounded primarily in contract law—determining that a UK court may hear such disputes because a patent owner's FRAND commitment flows from the contractual commitment made to a standard-setting organization (SSO), with contract terms able to be adjudicated by national courts.

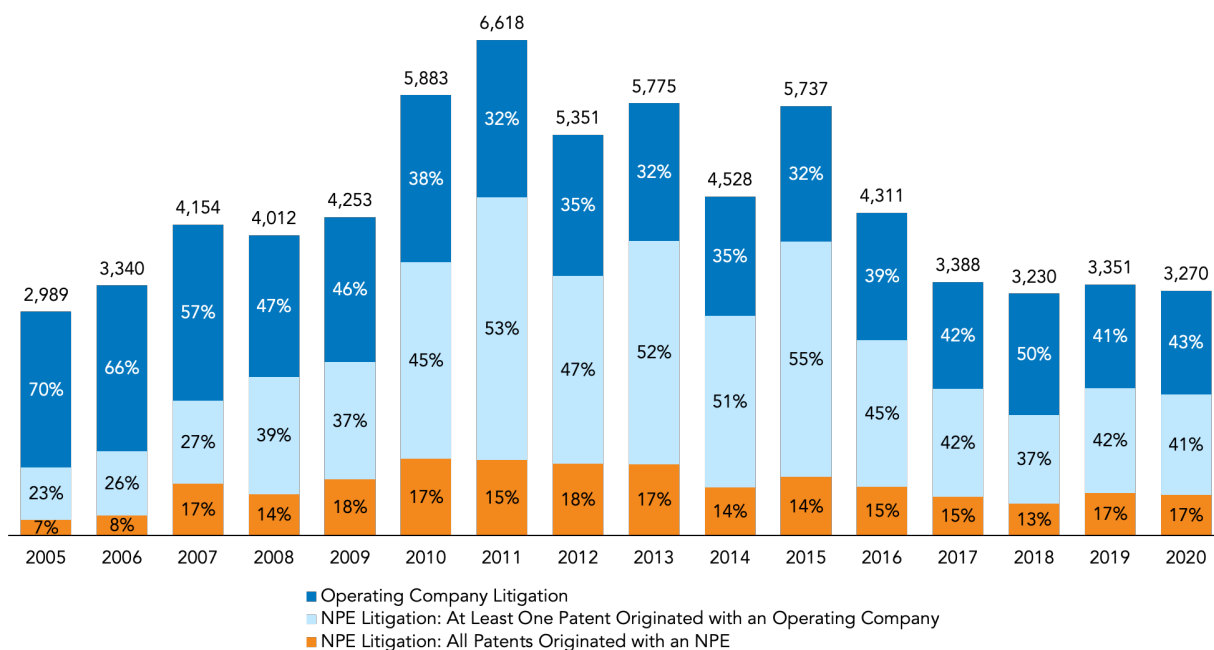
While the decision may be appealed to the Supreme People's Court, it may still further elevate China as a key battleground for SEP disputes—and could encourage more courts in other jurisdictions to compete with one another for jurisdiction. Indeed, one such dispute already appears to be playing out. In late December, the Wuhan Intermediate People's Court granted an anti-suit injunction in litigation between Ericsson and Samsung, leading District Judge Rodney Gilstrap of the Eastern District of Texas to issue a preliminary injunction in a related US lawsuit that bars the enforcement of the Wuhan injunction. This litigation could ultimately lead Judge Gilstrap to become the first US judge to impose a global FRAND license, though any such ruling would likely be subjected to appellate scrutiny.

Marketplace Update: Operating Company Divestments and Litigation Finance Fuel NPE Assertion Recessions, Operating Company Patents, and NPE Litigation

Marketplace activity in the fourth quarter showed that the acquisition and assertion of operating company patents by NPEs remained a key driver of patent litigation.

Indeed, RPX data on the origins of asserted patents show that NPE litigation is far more often based on patents originating with operating companies (shown below in light blue) than on homegrown NPE assets (shown in orange). Combined with litigation filed by operating companies (shown in dark blue), which comprises about 30-40% of defendants added in recent years, the data reveal that about 85% of the patent litigation filed in any given year from 2005 onward has concerned at least some operating company patents.

Defendants Added to District Court Litigation by Defendant Start Year



Note: Excludes declaratory judgment and design patent litigation. Operating company patents include those originating with universities as well as non-NPE individuals not working under the auspices of a company.

The reasons for the large share of NPE litigation asserting former operating company patents are not unexpected. Most NPEs have neither the resources nor the strategic inclination to develop patents in-house; further, some of the most notable plaintiffs in this category started out as operating companies in the first place (such as [Finjan, Inc.](#), an NPE recently acquired by [Fortress Investment Group LLC](#)).

This trend may accelerate as a result of the COVID-19 recession. As recently [reported](#) by RPX, if past is prologue, the current financial crisis will likely be followed by years of increased patent divestments by operating companies—including to NPEs—as those patent owners face pressure to preserve and augment balance sheet cash. Many operating companies may turn in the coming year to their patent portfolios as a source of revenue, including by selling patent assets to NPEs as well as entering into privateering partnerships with NPEs and/or monetizing their own assets directly through licensing or litigation. One likely result of that activity would be a further rise in NPE litigation.

Notable NPE Acquisitions of Operating Company Patents—and Resulting Campaigns

In the meantime, a variety of operating company-to-NPE assignments were executed or revealed in the fourth quarter—some of which have already been asserted by their new owners.

- Xerox and Monterey Research to IP Edge

One standout example is top litigant [IP Edge LLC](#), which in April [acquired](#) over 130 US patent assets from Xerox and subsidiary Palo Alto Research Corporation (PARC) through an affiliated NPE, [Majandro LLC](#). IP Edge has since farmed those patents out to several other NPEs under its control, some of which filed litigation in the fourth quarter. Those plaintiffs include [Gladiator IP LLC](#), which [launched a campaign](#) in late October, targeting printers and scanners. Other IP Edge plaintiffs also added new cases in Q4 to existing campaigns asserting some of the assets passed through Majandro—including [Milestone IP LLC](#), which in November added a fresh round of cases to the financial services campaign it [started in late August](#). Additionally, IP Edge's [Fusion IP LLC](#) launched a campaign on the final day of the third quarter and has continued to file new cases in October through December, targeting videoconferencing systems and online collaboration tools. Fellow affiliate [Realm Licensing LLC](#) also launched a campaign on the last day of Q3, targeting content management systems, and kept filing new litigation through the end of November.

Earlier in 2020, IP Edge also acquired another cache of operating company patents from IP Value Management (d/b/a IPValue) subsidiary [Monterey Research, LLC](#), which assigned semiconductor patents originating with AMD, Cypress Semiconductor, or Fujitsu to IP Edge's [Spindletop IP LLC](#). The patents were subsequently passed among various affiliated NPEs—including [Pearl IP Licensing LLC](#), which launched a campaign in late March and filed a new round of cases as December came to a close.

- Pantech to SIPCO

Another NPE that added an operating company asset to its portfolio was [SIPCO LLC](#), which has primarily litigated homegrown assets but acquired a patent from Pantech in late May. SIPCO has since asserted that patent in an [early-November suit](#) targeting Internet of Things products and emergency notification systems, adding to a campaign started all the way back in 2005.

This is not the first example of NPEs litigating Pantech patents, with other such plaintiffs including [Cellular Evolution LLC](#) and [Hypertext Technologies LLC](#)—two potentially linked NPEs that asserted such assets in campaigns that came to a close this past year.

Other Transactions Suggest that More NPE Campaigns Are Coming in 2021

Various other NPEs also acquired former operating company patents in 2020 but have yet to assert them, setting the stage for new campaigns in 2021.

Among the more recent examples is [K.Mizra LLC](#), which acquired over 25 US assets and Asian and European counterparts from Sharp in October—weeks before filing its inaugural litigation over an unrelated set of patents. With this latest acquisition, K.Mizra's US patent holdings have climbed to over 170 assets, including patents originating with IBM, Panasonic, or ZTE.

Several other notable NPE acquisitions were disclosed during Q4, including one from Mediatek to [Quarterhill Inc.](#); one from ZTE to [G+ Communications LLC](#); another from Asia Optical to [IPValuation Partners, LLC \(d/b/a IPVal\)](#) affiliate [Ranging Optics LLC](#); and one from KT Corporation to [Harfang IP Investment Corp \(d/b/a Harfang IP\)](#) affiliate [Golden Eye Technologies LLC](#). (KT transferred another set of patents to Golden Eye in November.)

Between these transactions and a variety of others that have not yet led to litigation—including significant acquisitions by IP Edge, Quarterhill, and [Acacia Research Corporation](#), as flagged in RPX's last [quarterly report](#)—these and other entities are poised to file a potential new wave of litigation in 2021.

Third-Party Litigation Funding: A Steadily Growing Catalyst of NPE Litigation

Another factor that has increasingly driven patent litigation is litigation finance, which has been picking up steam in recent years but hit new heights in 2020—with no shortage of supply (in the form of capital from wealthy investors) or demand (from plaintiffs and also from law firms).

In 2021, this trend may further accelerate as a result of the economic distress caused by the COVID-19 pandemic. As noted above, the patent marketplace has lately been teeming with former operating company patents, and in partnership with litigation funders, NPEs may begin picking up larger patent portfolios, possibly of higher pedigree—portfolios that prior to the COVID-19 recession, may have been out of their reach. The support and connections offered by an experienced litigation funder may also allow those NPEs to retain more sophisticated (or at least experienced) legal counsel, enabling such plaintiffs to more effectively litigate their newly acquired assets.

Moreover, as recently [reported by RPX](#), third-party funding may impact an NPE's willingness to resolve a dispute before trial, as obligations to lenders may deter such plaintiffs from accepting reasonable settlement offers. The precise contours of those obligations are also typically shrouded in secrecy, governed by confidentiality agreements that have occasionally triggering disputes over discovery.

Multiple decisions in patent cases this year have caught the attention of those monitoring discoverability of third-party funding agreements and communications between patent holders and funders (see [here](#) and [here](#)). Expect the debate over disclosure of third-party litigation funding to heat up in 2021, as an increasing number of plaintiffs launch campaigns backed by wealthy investors—and their targets argue for greater transparency into funding arrangements.

See [here](#) for more on how third-party funding has impacted patent litigation.

Additional RPX Patent Market Intelligence

For further analysis and up-to-date information on patent litigation and market trends, visit [RPX Insight](#).