RPX
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# Q1 in Review

April 13, 2021

## Q1 in Review: Patent Litigation Surged as Third-Party Funding Further Unshackled NPEs

The first quarter of 2021 saw a marked increase in patent litigation as many of the same trends that drove filings last year continued to crystallize.

In particular, more US patent litigation was filed in Q1 2021 than in any first quarter since 2015, with NPEs also making their strongest showing since that same period. Although operating company filings also increased in the first quarter, that uptick is entirely the result of litigation targeting counterfeiters, while more traditional patent litigation was slightly down.

Meanwhile, the Patent Trial and Appeal Board (PTAB) has continued the exercise of its controversial discretion to deny institution in America Invents Act (AIA) review trials based on the status of parallel district court litigation, as the Federal Circuit made it much more difficult to appeal such rulings—causing some defendants to take a second look at reexaminations. Furthermore, Congress spared some of its attention for Section 101 reform, with certain senators resuming their advocacy for a new approach to patent eligibility and *Alice*.

With respect to standard essential patents (SEPs), the first quarter also saw jurisprudence over fair, reasonable, and non-discriminatory (FRAND) licensing move further in a patent owner-friendly direction. Most notably, Germany's Federal Court of Justice issued a follow-up ruling related to a landmark decision from last year, raising the bar even higher for the licensing conduct expected of accused infringers. On the domestic front, moreover, the Federal Trade Commission (FTC) declined to appeal last year's *FTC v. Qualcomm* decision to the US Supreme Court.

Additionally, a robust pipeline of operating company-to-NPE divestments continued to fuel the patent marketplace, with COVID-19-related economic pressure likely to prompt businesses to sell their patents to generate revenue. With the ever-increasing availability of litigation finance, more NPEs now have the means to acquire significant patent portfolios and more readily enforce them—and indeed, have already been doing so.

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

A 43.3% increase in patent litigation compared to the same period last year marked 2021's first quarter, with 1,164 defendants added to patent assertion campaigns (compared to 812 in Q1 2020)—the highest first-quarter filing levels seen since 2015. This overall upswing reflects greater activity by both NPE and operating company plaintiffs, although with a small number of plaintiffs accounting for a significant portion of the latter surge.

| Defendants Added | | Change Compared to: | | |
|---|---|---|---|---|
| | Q1 2021 | Q1 2020 | Q1 2018-2020 Average | Q4 2020 |
| NPE | 593 | +19.8% | +37.6% | +8.8% |
| Operating Company | 571 | +80.1% | +60.8% | +8.3% |
| Total | 1,164 | +43.3% | +48.1% | +8.6% |

NPEs had their busiest Q1 since 2015, adding 19.8% more defendants than they did in the first quarter of last year (593 compared to 495). Additionally, NPE filings exceeded the trailing Q1 average by 37.6% and were 8.8% higher than the prior quarter. Affiliates of prolific monetization firm IP Edge LLC once again topped the leaderboard, adding 153 defendants in the quarter vs. 106 in Q1 of 2020. Excluding the impact of IP Edge, NPE litigation still increased by 13.6% over the prior year.

The increase in NPE litigation is due in part to the ongoing flood of operating company patent divestments and the continued rise of third-party funding, as detailed further in the Marketplace Update section below.

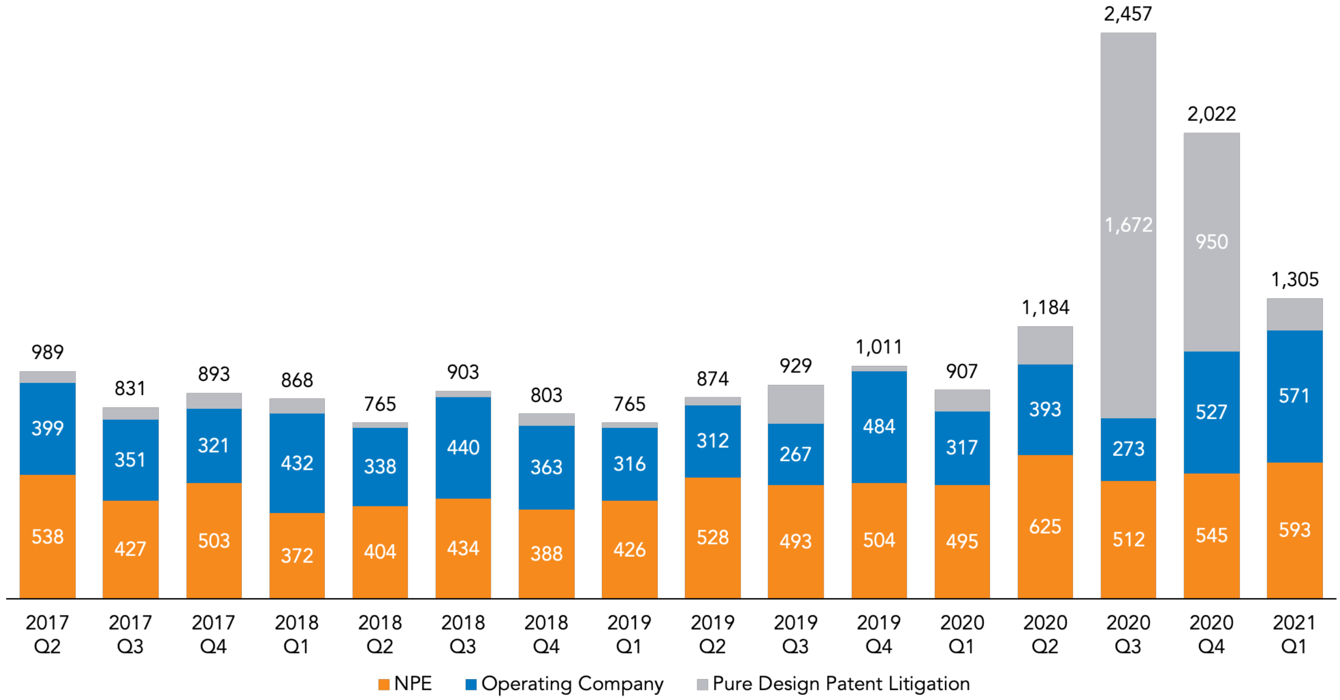
For their part, operating companies added 80.1% more defendants than they did in the year-ago quarter, adding 571 defendants (compared to 317 defendants in Q1 2020). Operating company filings also beat the trailing Q1 average by 60.8% and were 8.3% higher than the previous quarter.

However, the Q1 operating company numbers come with a significant caveat, as a single plaintiff—Doggie Dental, a maker of teeth-cleaning chew toys for dogs—was responsible for 289, or just over half, of the operating company defendants added during the quarter. All of the defendants sued by Doggie Dental appear to be online retailers (e-tailers), each sued for infringement of a single utility patent over alleged counterfeit products and were named in a single suit. Excluding that sole case, operating company litigation was actually down by 11% in Q1 2021 compared to the first quarter of 2020. Regular readers may recall that Doggie Dental added 137 defendants in Q4 2019 as well.

The Doggie Dental case follows another "canine hygiene" patent suit brought in Q4 2020 by AquaPaw, which sued around 125 defendants in Q4 over the provision of products designed to keep pets distracted while bathing. (PACER data did not reflect those defendants when RPX's last quarterly report was published, so the Q4 2020 numbers are now higher than previously reported.)

These two cases are similar to a phenomenon that RPX observed in the last half of 2020: in Q3 and Q4, a massive spike occurred in anti-counterfeit cases asserting purely design patents (as opposed to the utility patent counterfeit suits noted above), also targeting e-tailer defendants. RPX now classifies those design patent suits separately, as the dynamics of such anti-counterfeit cases are quite different from other operating company patent suits, primarily seeking injunctive relief and often ending in default judgments. Pure design patent cases are excluded from the analyses in this report (apart from the graph below, which shows those filings in grey). Factoring out these massive, multi-defendant cases (whether based on design or utility patents), litigation brought by operating companies continues on a flat to slightly downward trend, as detailed by RPX here.

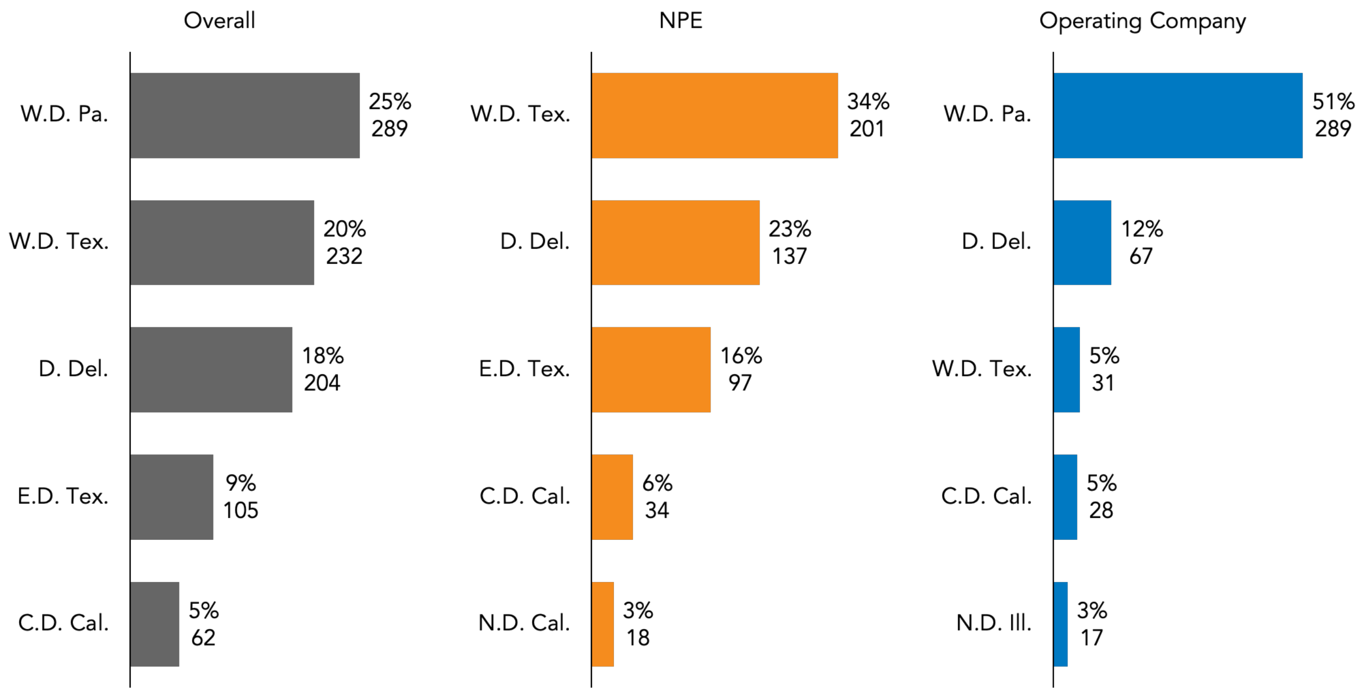
## Defendants Added to Litigation Campaigns by Quarter



## Venue Update: West Texas Tops the NPE Charts as Judge Albright Spars with the Federal Circuit

In Q1 2021, the Western District of Pennsylvania was the top venue for overall patent litigation (*i.e.*, with no filter for plaintiff type) and for litigation filed by operating companies. While that district is ordinarily not a popular patent venue, it took first place as the somewhat anomalous result of that single case filed by Doggie Dental against 289 makers of counterfeit canine hygiene products. The Western District of Texas, meanwhile, held second place for overall litigation, the top spot for NPEs, and the third highest for operating companies. Trailing West Texas for overall and NPE litigation was the District of Delaware, which in turn was followed by the Eastern District of Texas in both categories.

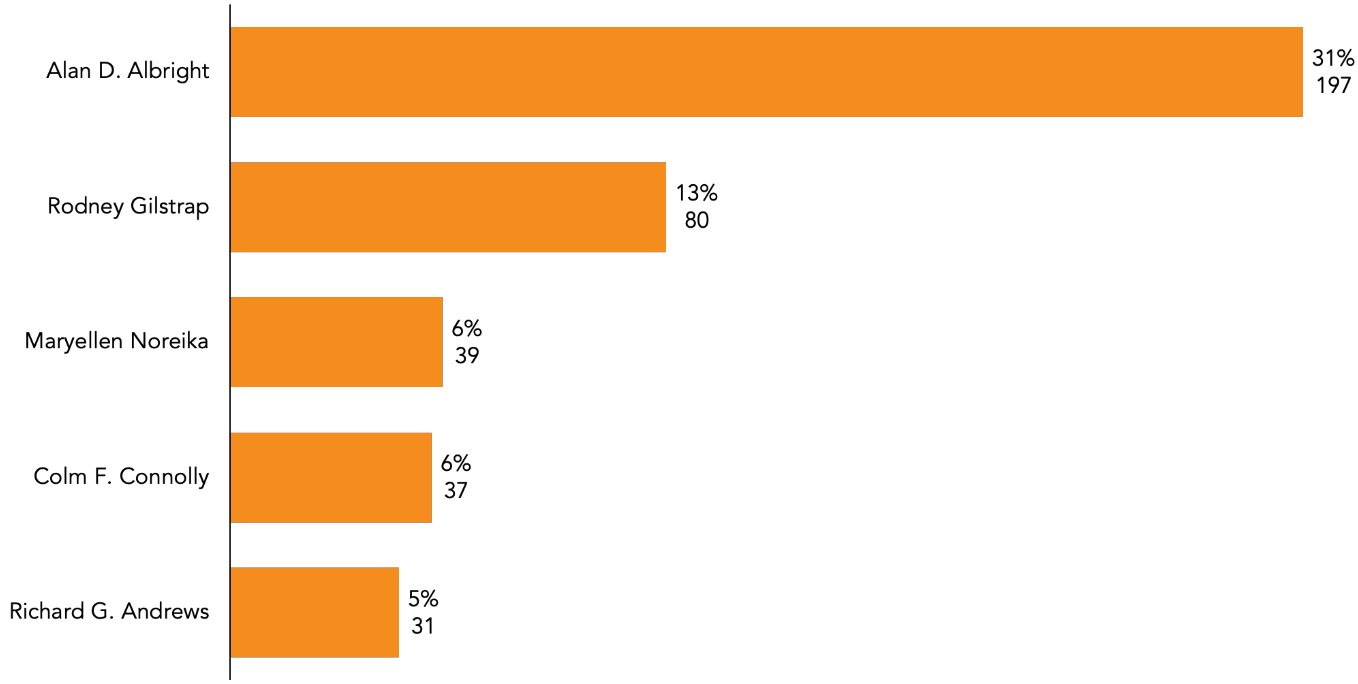
**Defendants Added to Litigation Campaigns by Quarter**




As RPX has extensively reported, the rise of the Western District of Texas—the top patent district of 2020 by a wide margin—is largely the work of District Judge Alan D. Albright, whose courtroom has become such a popular destination due to his rather plaintiff-centric posture toward certain types of early motions, including transfer requests and *Alice* challenges. Moreover, his district's lack of divisional standing rules allows plaintiffs to file directly in their preferred division—specifically, Waco, where they are guaranteed to get Judge Albright as the division's only judge.

For this reason, it is perhaps not surprising that Judge Albright presided over by far the largest share of patent litigation in 2020—accounting for 19% of all defendants sued in 2020, leading Eastern District of Texas Judge Rodney Gilstrap, who took a distant second place with 6%. While Judge Albright was narrowly outpaced in Q1 2021 by Western District of Pennsylvania Judge Mark R. Hornak, due to the aforementioned Doggie Dental case, he was the top judge for NPE matters by a significant amount, as shown below—presiding over nearly a third of such litigation. Judge Gilstrap again held the number-two spot for NPE filings, with less than half of Judge Albright's defendant count. Just behind Judge Gilstrap were three of Delaware's district judges: Maryellen Noreika (herself a former patent litigator, like Judge Albright), Colm F. Connolly, and Richard G. Andrews.

### Top Judges by Defendants Added to NPE Litigation in Q1 2021




With respect to Judge Albright's treatment of early motions, convenience transfers—a form of relief that he has rarely granted since taking the bench in 2018—spurred the most debate in Q1. In particular, a rift has grown between Judge Albright and the Federal Circuit over the handling of such transfer requests, a divide that has drawn attention to both how he weighs the various factors in any convenience analysis and, increasingly, his tendency to let those motions sit undecided for months while proceeding with other issues, particularly claim construction. The latter trend finally came to a boil in March 2021, following a series of rulings in which the Federal Circuit highlighted those delays with increasing firmness—leading Judge Albright to announce that he will now rule on interdistrict transfer motions *before* holding a *Markman* hearing.

**COVID-19 Update: Judge Gilstrap Resumes In-Person Trials, While Washington Court Holds First Virtual One**

District courts have diverged from one another on their handling of patent jury trials during the COVID-19 pandemic—and some of the nation's top patent judges have been forced to reassess their practices as infection rates rose and fell. For instance, Eastern District of Texas Judge Rodney Gilstrap suspended all jury trials due to rising COVID-19 infection rates in his district—and after a nearby trial before another judge ended in a mistrial after many of the participants contracted the disease. In that decision, Judge Gilstrap expressed a deep skepticism that jury trials, unlike other litigation procedures, could be conducted fairly in virtual form—remarking that in his view, online proceedings placed too much of a barrier between participants. However, he has since resumed in-person trials, starting with one between Solas OLED Limited and Samsung that kicked off in March.

Judge Albright, meanwhile, held his second patent trial since taking the bench starting in late February, a closely watched in-person proceeding between Fortress Investment Group LLC subsidiary VLSI Technology LLC and Intel. That trial had previously been delayed several times as a result of COVID-19, with Judge Albright initially opting to move the trial to another division in order to work around a pandemic-related courthouse closure—a decision that resulted in two trips to the Federal Circuit. After one final delay due to winter storms, the trial went ahead with a variety of safety proceedings in place, including a daily COVID-19 testing requirement for attorneys that Judge Albright has since suspended for his next trial.

In contrast, District Judge Thomas S. Zilly of the Western District of Washington has stood out for his recent decision to hold the nation's first patent jury trial over Zoom, after his district worked closely with litigants to develop practical and equitable virtual trial procedures. Those included measures taken to ensure that the court could obtain a representative jury pool that was not generationally biased, nor skewed toward jurors wealthy enough to afford the equipment needed to participate virtually, in part by offering training and computer equipment to willing jurors. The court also worked with litigants to develop an effective process for conducting trials virtually, testing that process by conducting a mock trial with counsel from an actual, pending case and a paid jury pool.

Despite the uncertainty over trial formats and procedures caused by the pandemic, Q1 2021 has continued a trend of high-dollar, high-profile jury verdicts in patent cases—including those resulting from the Solas OLED and VLSI Technology trials mentioned above, both of which resulted in significant damage awards, as well as a March infringement verdict from another trial in litigation filed by Personalized Media Communications, LLC. Such verdicts in these and other cases, issued in trials spanning the past 16 months, have capped off trials in other NPE campaigns as well as university litigation and operating company disputes, and involve products spanning market sectors including E-Commerce and Software, Financial Services, Mobile Devices and Communications, and Networking. See RPX Insight for an overview of notable verdicts handed down last year, as well as courts' posttrial handling of other large damage awards issued before 2020.

## Market Sector Update: NPE Litigation Targeting Financial Services Skyrockets in Q1

A breakdown of NPE district court filing trends by market sector (comparing the number of defendants added in Q1 to the quarterly average for 2020) reveals a marked increase in litigation targeting certain industries in the first quarter. Specifically, NPE litigation focused on the Financial Services sector jumped by 111%, with filings also rising in sectors like Mobile Communications and Devices (by 28%) and Networking (by 18%).

## Defendants Added to Litigation by NPEs, Percent Change from 2020 Quarterly Average to Q1 2021

| | | 2020 Quarterly Average | Q1 2021 |
|---|---|---|---|
| Automotive | -23% | 22 | 17 |
| Biotech and Pharma | -80% | 5 | 1 |
| Consumer Electronics and PCs | 4% | 75 | 78 |
| Consumer Products | -44% | 18 | 10 |
| E-Commerce and Software | 8% | 144 | 156 |
| Financial Services | 111% | 18 | 38 |
| Industrial | -36% | 11 | 7 |
| Media Content and Distribution | -4% | 25 | 24 |
| Medical | -50% | 10 | 5 |
| Mobile Communications and Devices | 28% | 32 | 41 |
| Networking | 18% | 125 | 148 |
| Other Sectors | 32% | 22 | 29 |
| Semiconductors | 0% | 39 | 39 |

That first-quarter wave of Financial Services litigation included lawsuits from a variety of familiar NPEs—among them IP Edge, which began a mobile point-of-sale campaign in September 2020 through its affiliated NPE Kwality IP LLC, initially targeting online payment service providers. In February, fellow IP Edge NPE Xylon Licensing LLC rebooted the campaign with a fresh wave of litigation targeting financial institutions. Another monetization firm, Dynamic IP Deals, LLC (d/b/a DynaIP), launched its own Financial Services campaign in Q1 as well through subsidiary mCom IP, LLC, also hitting several financial institutions—here over their use of digital banking platforms, focusing in part on certain analytics and marketing features.

One more NPE that joined the fray in the first quarter was Caselas, LLC, one of several entities controlled by prolific inventor Raymond Anthony Joao, which in late January sued a group of banks and credit unions over the provision of financial payment cards. Additionally, inventor-controlled NPE Proxense, LLC launched a new mobile payments campaign in March, with allegations calling out biometric authentication features in particular. Mobile payments are also at issue in the latest round of lawsuits from inventor William Grecia, filed from January through March—his latest pivot in a long-running campaign that has also encompassed streaming services and cloud storage.

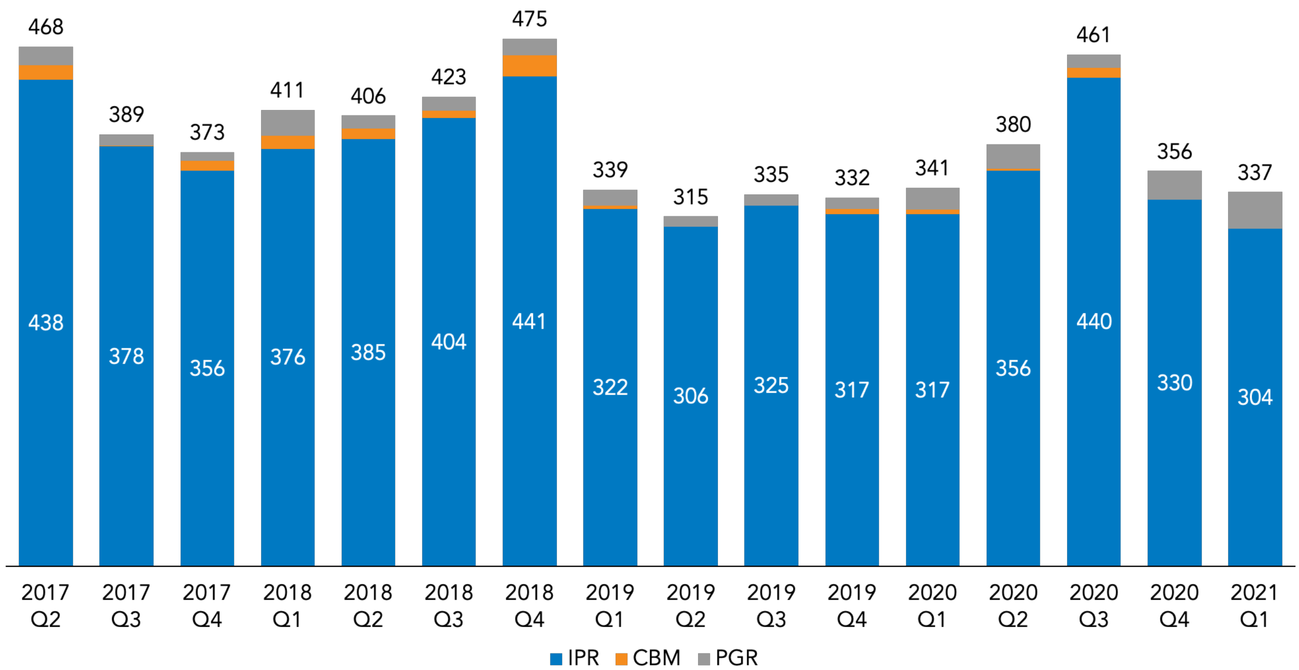
For more coverage of litigation hitting this sector, see RPX Insight.

Also, Financial Services is not the only space to see a sizeable uptick in recent NPE activity, as the Automotive sector experienced an even greater increase last year, despite the dip seen in Q1 2021. In 2020, NPE litigation targeting the Automotive sector rose by 120% compared to 2019, and 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. See RPX's [fourth-quarter review](fourth-quarter review) for a deep dive on notable Automotive litigation filed by NPEs in Q4 and 2020 as a whole.

## <u>PTAB Update: As *NHK-Fintiv* Limits IPR's Availability, Defendants Reconsider Reexaminations</u>

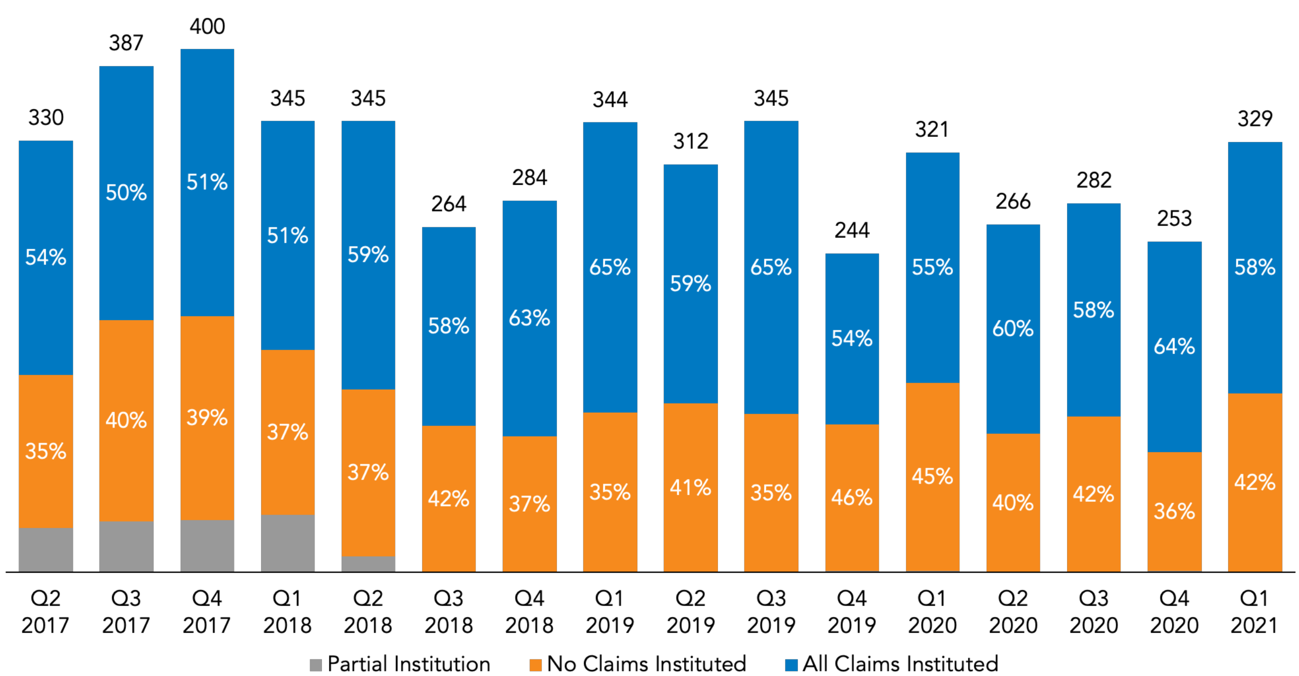
In the first quarter of 2021, 337 petitions for America Invents Act (AIA) review were filed with the Patent Trial and Appeal Board (PTAB), including 304 petitions for *inter partes* review (IPR) and 33 petitions for post-grant review (PGR). This is comparable to the number of petitions filed in Q1 2020 (341). As previously reported by RPX, PTAB petitions for 2020 as a whole were up by 16.5% compared to 2019.

**AIA Review Petitions Filed by Quarter**




However, AIA review institution rates have been on the decline. The institution rate in Q1 2021 was 58%, compared to 58.9% for the whole of 2020—which, in turn, was 2.2% lower than in 2019, when 61% of petitions were instituted.

**AIA Review Institution Decisions by Quarter**



One of the most noteworthy factors contributing to this downturn is the PTAB's increased exercise of discretion to deny institution in AIA review trials for reasons other than the merits, based on circumstances laid out in a steadily expanding body of precedential decisions. The most impactful of these has been the *NHK-Fintiv* rule, a set of factors established by the PTAB that allow it to consider the status of parallel district court litigation in deciding whether to institute. Perhaps most controversial of these factors has been one that allows the Board to deny institution when a parallel district court trial has been scheduled in close proximity to the deadline of the Board's final 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.

In the first quarter, the Federal Circuit made it much harder for such defendants to appeal the denial of an AIA review petition due to *NHK-Fintiv*. On March 13, the appellate court ruled in *Mylan Laboratories v. Janssen Pharmaceutica* that petitioner-defendants cannot directly appeal such a decision, and that they may only challenge one through a *mandamus* petition—further holding that such petitions must raise "colorable constitutional claims", a high bar to clear.

As the *NHK-Fintiv* rule makes AIA reviews a less attractive option, it is perhaps no surprise that some defendants seeking to challenge validity have increasingly been turning to *ex parte* reexaminations, which are not subject to discretionary denials. Indeed, in some cases, reexaminations have allowed companies to work around *NHK-Fintiv* denials and win stays in parallel district court litigation when IPR petitions have failed. Notably, this includes two recent rulings by District Judge Rodney Gilstrap of the Eastern District of Texas, one of which stayed litigation filed by NPE AGIS Software Development LLC and another that did the same in a case brought by Ramot at Tel Aviv University Limited. Beyond those strategic advantages resulting from *NHK-Fintiv*, reexaminations also offer other relative benefits, including that they tend to be much less expensive and the lack of estoppel—which for IPRs, bars companies from asserting in district court an invalidity argument that they "raised or reasonably could have raised" before the PTAB. That said, there are also significant disadvantages compared to IPR: in part, a third party requesting reexamination is essentially shut out from the process after the USPTO grants its request, and thus will not have the opportunity to rebut arguments subsequently raised by the patent owner.

Meanwhile, the debate continues over *NHK-Fintiv* on both sides of the issue, including through litigation that spread to a new forum in Q1. Last year, Apple, Cisco, Google, and Intel sued then-USPTO Director Andrei Iancu in the Northern District of California, seeking to side aside the *NHK-Fintiv* rule—arguing that the rule conflicts with the AIA and is undermining the IPR regime. A growing coalition of companies spanning a wide range of industries aligned themselves with the California plaintiffs in Q1, including a group of 17 companies and industry associations operating in market sectors such as Automotive, Mobile Communications and Devices, Networking, and Semiconductors that recently filed a brief in support. Also, in February, the plaintiffs beat back a motion to intervene from a coalition of entities supporting the rule; those would-be intervenors, including inventors' industry association US Inventor, have since filed suit against acting USPTO Director Andrew Hirshfeld in the Eastern District of Texas, seeking to halt all AIA reviews until the rule gets formally codified.

### *The Supreme Court Considers APJ Appointments in* Arthrex

The first quarter also saw a key constitutional question proceed before the US Supreme Court in the ongoing appeal of *Arthrex*, in which the Court will decide whether the appointment of the PTAB's administrative patent judges (APJs) violated the US Constitution's Appointments Clause. In *Arthrex*, the Federal Circuit held in October 2019 that APJs were unconstitutionally appointed, concluding that under the applicable statute they were "principal officers" requiring Senate confirmation. However, rather than eliminate the PTAB altogether, the Federal Circuit chose a more targeted solution to the constitutionality issue by severing a portion of the statute restricting the Director's removal authority over APJs, seeking to render them inferior officers.

Both the Appointments Clause question and the proper remedy, should the Supreme Court agree that the current regime is unconstitutional, remain at issue—and were both addressed by the Court during oral arguments, which were held on March 1 and revealed no clear consensus among the Justices. Stay tuned for more.

## Section 101 Update: Congress Renews Its Focus on Patent Eligibility Reform

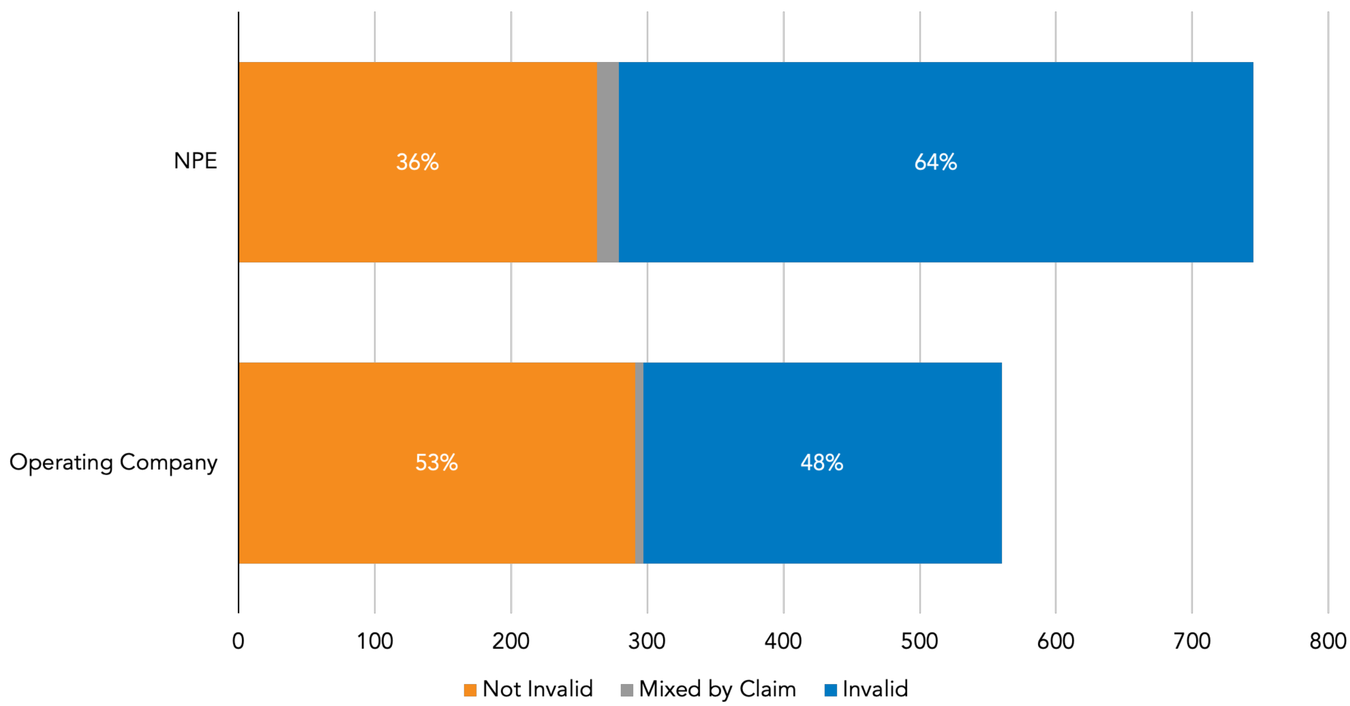
As frequently reported by RPX, the Supreme Court's *Alice* decision remains in a narrowed state since the Federal Circuit's 2018 *Berkheimer* and *Aatrix* decisions, which limited early patent eligibility rulings. While *Alice* invalidation rates have become markedly lower as a result, Section 101 has seen renewed attention from Congress in the past quarter. The following analysis reviews the latest data and takes a deep dive on those recent policy developments.

### *Data Update*

The overall invalidation rate currently stands at 57% for patents adjudicated under *Alice* since the decision's June 2014 issuance and through Q1 2021. A breakdown by plaintiff type, as shown below, reveals that NPEs and operating companies fare differently under *Alice*: challenges against patents asserted by NPEs prevail 64% of the time, whereas patents litigated by operating companies get invalidated under *Alice* 48% of the time.

The effect of *Berkheimer* is also evident at a high level, as the overall invalidation rate since that decision's February 2018 issuance has been 45%, compared to 65% before.

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

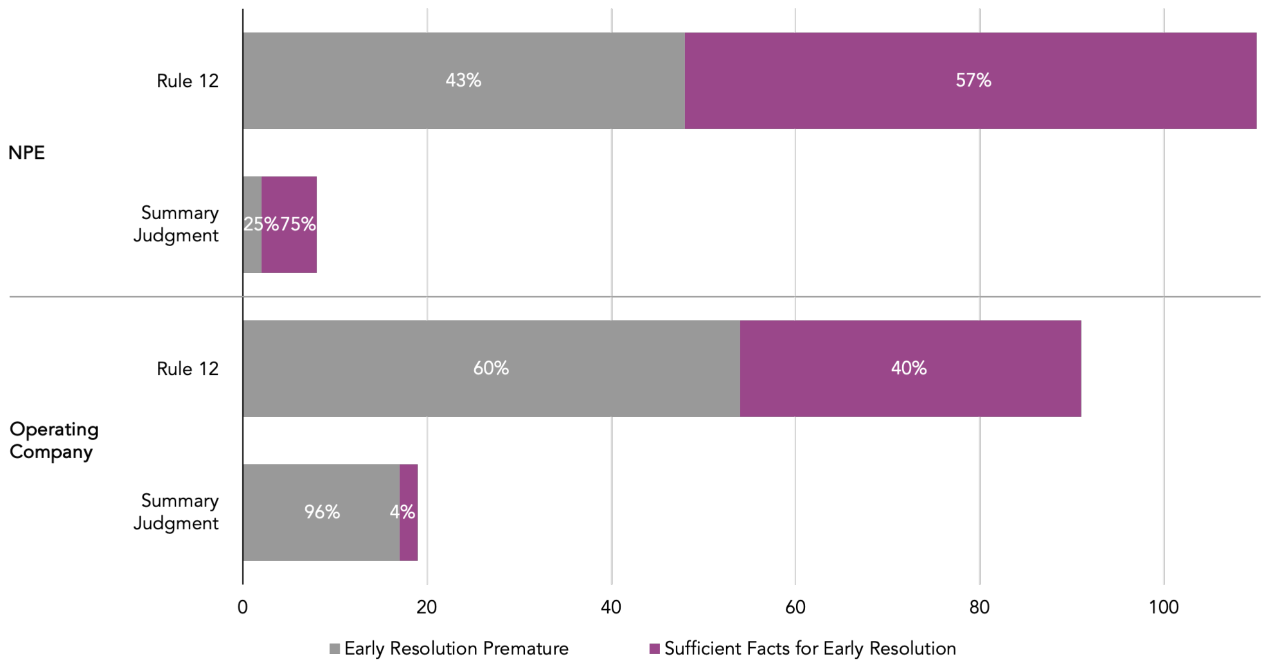



Some percentages add up to more than 100%, as patent claims occasionally see multiple *Alice* rulings with different outcomes. (For example, a claim may be found not invalid in one case and invalid in another.)

Limiting the data to decisions that turned on *Berkheimer* or *Aatrix*, meaning that a plaintiff asserted that a factual issue precluded early resolution and the court's order actually addressed that issue, further shows how the impact of *Berkheimer* varies by procedural stage. This analysis shows that courts found sufficient facts to rule about half of the time for Rule 12, compared to 23% for summary judgment.

Furthermore, adding a plaintiff type filter to that analysis, as shown on the next page, illustrates again how plaintiff type affects outcome. In particular, NPEs succeed less often 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 40% 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 4% of the time.

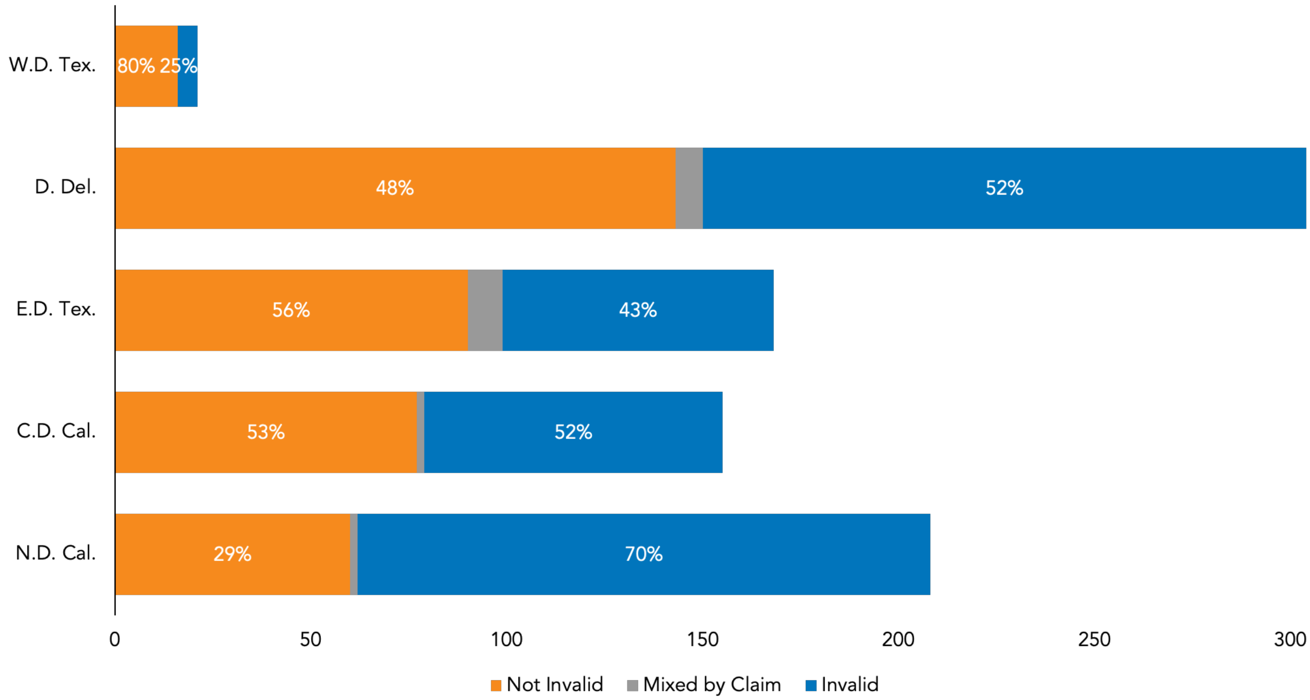
Patents with *Alice* Orders Addressing *Berkheimer* by Procedural Stage and Plaintiff Type




Additionally, the top five most popular districts for NPE litigation diverge sharply in their treatment of *Alice* motions, as shown on the following page. Of those five, the Northern District of California is the most likely to grant an *Alice* challenge, with a per-patent invalidation rate of 70%. The District of Delaware and the Central District of California, each of which has an invalidation rate of 52%, are the closest to the national average of 57%.

The Western District of Texas has the lowest invalidation rate of the group at just 25%, though it should be noted that just 21 patents appear to have been adjudicated in that venue under *Alice* since it was decided in June 2014. This small number of reviewed patents, and their low invalidation rate, are at least partly attributable to two factors: the district's relatively recent rise in the rankings as a patent venue, and Judge Albright's stated inclination against granting early patent eligibility motions.

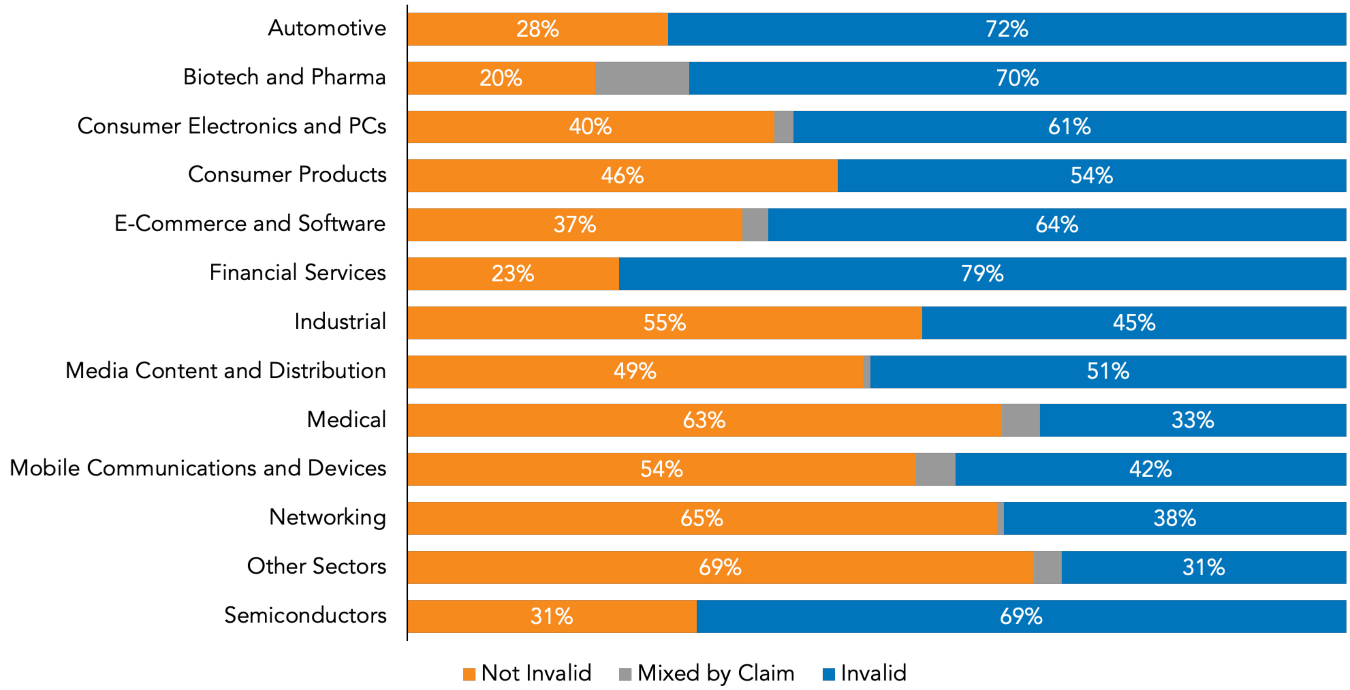
*Alice* Invalidation Rates for Top NPE Districts by Number of Adjudicated Patents




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.)

Moreover, a breakdown of invalidation rates by market sector (specifically, by the RPX market sector assigned to the litigation in which the patents were asserted and then challenged under *Alice*) reveals that parties filing *Alice* motions prevail far more often in litigation targeting certain industries. Subject matter eligibility challenges succeed most often against patents asserted in Financial Services suits, in which 79% of asserted patents adjudicated under *Alice* have had all challenged claims invalidated; followed by Automotive (72%), Biotech and Pharma (70%), and Semiconductors (69%). Sectors with the lowest invalidation rates include Medical (33%), Networking (38%), and Industrial (45%).

*Alice* Invalidation Rates by Market Sector




RPX assigns all patent infringement cases a market sector based on a manual review of the accused products, defendants, and asserted patents. 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.)

## *Policy Update*

One of the most persistent criticisms of *Alice* is the difficulty that courts face in applying the decision consistently. Among the most frequent critics of this uneven jurisprudence has been Senator Thom Tillis (R-NC), the former chair and current ranking member of the Senate IP Subcommittee, who has argued persistently in favor of legislative reform but hit a wall in 2019 after stakeholders in the life sciences and tech industries failed to reach a consensus.

While Senator Tillis has since continued to speak out on this issue, the first quarter brought signs that he and some of his colleagues are gearing up for a new run at reform. On March 5, Senator Tillis and three other members of the IP Subcommittee—Senators Tom Cotton (R-AR), Christopher Coons (D-DE), and Mazie Hirono (D-HI)—sent a letter to Acting USPTO Director Drew Hirshfeld, stating that it was "past time that Congress act to address this issue" and asking for his assistance as they "consider what legislative action should be taken to reform our eligibility laws". To that end, the senators asked that Hirshfeld "publish a request for information on the current state of patent eligibility jurisprudence in the United States, evaluate the responses, and provide [them] with a detailed summary of [his] findings"—with emphasis on current caselaw's adverse impact on "investment and innovation in critical technologies like quantum computing, artificial intelligence, precision medicine, diagnostic methods, and pharmaceutical treatments".

Weeks later, Senators Tillis and Cotton sent Hirshfeld another letter asking him to consider revising the patent examination process to conduct the Section 101 inquiry last, rather than in conjunction with Sections 102, 103, and 112. The senators expressed a concern that under the current system, "patent examiners may be issuing Section 101 rejections without the benefit of addressing prior art, clarity and enablement issues that may well inform the examiner that the claim is eligible under Section 101". Hirshfeld has since indicated that an official response to the letter is forthcoming, stating that the USPTO is considering a pilot program "to that effect".

In March, Senator Tillis also took the unusual step of cofiling an *amicus* brief with former Federal Circuit Judge Paul Michel and former USPTO Director David Kappos in *American Axle & Manufacturing v. Neapco*, a patent eligibility case presently before the Supreme Court that has ignited a heated debate over the bounds of Section 101 jurisprudence. In *American Axle*, a divided Federal Circuit found that a patent related to a quieter automotive driveshaft was unpatentably directed to a natural law, Hooke's Law, in contrast to decisions like *Diamond v. Diehr* that found a mechanical process implementing a natural law to be eligible. The full Federal Circuit was split 6-6 on whether to rehear the panel decision—falling short of the threshold for *en banc* review. Several other *amicus* briefs have also been filed in that case from a range of other stakeholders, including others from the academic community, business trade associations, and the NYIPLA. When asked about his *amicus* brief in a recent interview, Senator Tillis underscored that while he has not yet given up on the prospect of legislative reform, it is both the hardest path forward and the slowest—emphasizing that the quickest way forward is for the Supreme Court to take on the issue itself.

## FRAND Update: Caselaw Moves Further in a Direction Favoring SEP Owners

The first quarter also saw global FRAND jurisprudence move further in favor of patent owners—including a new German decision imposing heightened requirements on accused infringers, and a US ruling limiting SEP antitrust liability that a government agency recently declined to appeal.

### *Germany*

On February 22, the German Federal Court of Justice issued its decision in *Sisvel v. Haier II* ("*Sisvel II*"), which built upon its July 2020 ruling in *Sisvel v. Haier I* ("*Sisvel I*")—a landmark opinion that established a series of guidelines for the conduct expected of SEP owners and implementers in FRAND disputes. That earlier decision in part set a higher bar for accused infringers hoping to show that their prior licensing behavior had been FRAND-compliant, with the court explaining that defendants must go well beyond merely stating their willingness to take a FRAND license.

The court clarified and expanded upon these guidelines in *Sisvel II*. In part, it held that a SEP owner does not abuse its market power by submitting an initial offer that was not FRAND, explaining that such an opening offer is not the end goal but the start of a negotiation, and that it is not always clear in a complex dispute what constitutes a FRAND license. Rather, it is up to both parties to arrive at a FRAND agreement through good-faith negotiations.

In explaining the obligations for both sides in such a negotiation, the court set an even higher bar than in *Sisvel I* for implementers hoping to show that a SEP owner's conduct had been abusive under competition law: to do so, the implementer must show that it was "clearly and unambiguously" willing to take a FRAND license throughout the negotiation process, and that it maintained such willingness consistently and continuously during that process. Nearly all of the SEP owner's obligations are conditioned upon such implementer behavior, the court held, apart from its duty to provide notice of infringement. Moreover, the court held that implementer hold-out (strategic delay in taking a license) can be deemed "dishonest conduct" and characterized it as involving the exploitation of a patent owner's inherent "structural disadvantage" (*i.e.*, the need to license patents to economically benefit from them).

Also disfavoring implementers was the court's ruling limiting when they may rely on a patent ambush defense, which arises when a member of a standard-setting organization intentionally conceals information about patents relevant to a standard. Crucially, the court held that under German law, such a defense may not be asserted against subsequent assignees of a patent and is limited to claims against the original patentee—thus precluding the defense's use for patents subsequently acquired by NPEs.

### *United States*

On the domestic front, one of the most significant US developments in SEP jurisprudence came in March, when the Federal Trade Commission (FTC) opted not to appeal the Ninth Circuit's August 2020 decision in *FTC v. Qualcomm* to the US Supreme Court. In that case, the Ninth Circuit reversed the Northern District of California's May 2019 ruling that Qualcomm had violated antitrust law by requiring mobile device makers to take licenses to its patents before they could buy its cellular modem chips—holding instead that Qualcomm's conduct did not amount to a violation of antitrust law, and that such disputes over SEP licensing are best resolved under contract law.

That August ruling was one of a series of victories for the US Department of Justice's Antitrust Division, led at the time by Assistant Attorney General Makan Delrahim. Under Delrahim, the Antitrust Division reassessed its posture toward antitrust enforcement in SEP disputes, arguing that such disagreements should be handled under contract law, not antitrust; placing more emphasis on implementer hold-out rather than patent owner hold-up (the assertion of a SEP to gain an unduly high license rate); and favoring the availability of injunctive relief in SEP disputes (a remedy previously deemed anticompetitive in this context). The division advocated for these policies through a variety of channels, including the filing of *amicus* briefs in cases with SEP antitrust claims that courts ultimately found persuasive—

including *FTC v. Qualcomm* as well as another FRAND dispute dealing with SEP licensing, *Continental v. Avanci et al.*, which the court also dismissed under a similar contract law theory.

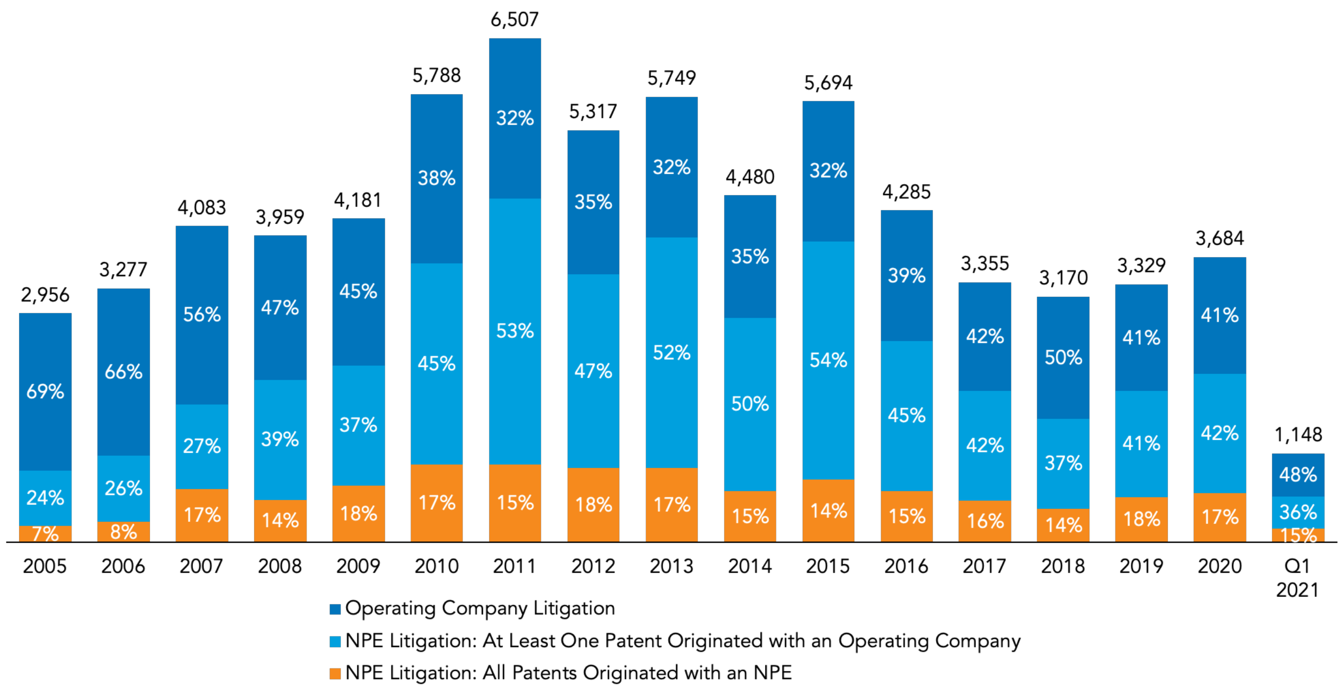
The FTC's case against Qualcomm, brought during the Obama administration but pursued during the Trump years, put the Commission squarely at odds with the Delrahim's Antitrust Division. It remains to be seen whether the Biden administration will choose a new direction, but in the meantime, the FTC has doubled down on its prior posture. In a statement announcing the FTC's decision not to appeal the *Qualcomm* case, Acting Chairwoman Rebecca Kelly Slaughter cited the "significant headwinds facing the commission in this matter", perhaps acknowledging the magnitude of the above changes in the SEP landscape, but pushed again for SEP antitrust enforcement: "Now more than ever, the FTC and other law enforcement agencies need to boldly enforce the antitrust laws to guard against abusive behavior by dominant firms, including in high-technology markets and those that involve intellectual property." Slaughter further underscored that she is "particularly concerned about the potential for anticompetitive or unfair behavior in the context of standard setting", stating that "the FTC will closely monitor conduct in this arena".

## Marketplace Update: Operating Company Divestments and Litigation Finance Fuel NPE Assertion

### *Operating Company Divestments and NPE Litigation*

RPX data on the origins of asserted patents show that the vast majority of patent litigation has consistently involved patents originating with operating companies. This trend includes NPE litigation and persisted into Q1: as shown below, the data reveal that NPEs far more often assert patents originating with operating companies (shown below in light blue) than homegrown NPE assets (shown in orange). Combined with litigation filed by operating companies (in dark blue), which comprises about 30-40% of defendants added in recent years, about 85% of the patent litigation filed in any given year from 2005 onward has involved at least some operating company patents.

**Defendants Added to District Court Litigation by Patent Origin**




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 flow of operating company patents to NPEs may accelerate as a result of COVID-19. Per prior RPX coverage, if past is precedent, the financial crisis triggered by the pandemic may well be followed by years of increased patent divestments by operating companies as those patent owners face pressure to preserve and augment balance sheet cash, with some of those assets ending up in NPE hands. One result of that activity could very well be a further rise in NPE litigation.

Indeed, such transactions continue to fuel NPE activity today, with some divestments sparking new litigation campaigns in the first quarter of 2021. Take for example the portfolio of nearly 30 patents, mostly focused on network security, that Pennsylvania-based CyberSoft, Inc. assigned in early February to NPE Cybersoft IP LLC, a subsidiary of patent monetization firm Dynamic IP Deals, LLC (d/b/a DynaIP). Cybersoft IP has since launched its inaugural campaign, targeting network security software products in a pair of lawsuits filed against BlackBerry and FireEye. That plaintiff is among a trio of Texas-based NPEs formed by DynaIP in late 2020, another one of which—AML IP LLC—has continued to file new cases in the e-commerce campaign it began just before the start of the new year.

Meanwhile, in early March, 2BCom, LLC, an NPE that has targeted automakers as well as networking companies with litigation over former Toshiba patents, received yet more patents from the Japanese conglomerate. That assignment, which includes patents related to wireless communications, could signal a plan to "refresh" a campaign that saw a string of dismissals in late 2020. Also during the first quarter of 2021, Scramoge Technology Limited—an Irish NPE linked by public records to the hedge fund Magnetar Capital, as detailed further below—received over 120 US patent assets from LG Innotek, including assets related to wireless charging and NFC communications.

A number of operating company-to-NPE divestments executed in Q1 include patents related to semiconductors. In late February, California-based fabless chipmaker NEWRACOM—formed in 2014 by a group of over 20 individuals from the Electronics and Telecommunications Research Institute (ETRI)—assigned hundreds of homegrown US patent assets, as well as a number of counterparts in Asia and Europe, to Atlas Global Technologies LLC, a subsidiary of Acacia Research Corporation. Additionally, IPValue Management (d/b/a IPValue) subsidiary Future Link Systems, LLC acquired another set of patents from NXP Semiconductors in mid-January, after filing its first litigation in late 2020 over patents from the same source. Also notable are two late-December assignments, recently made public by the USPTO, from Teleputers, LLC to Coresecure Technologies, LLC, two NPEs apparently controlled by the same Princeton professor. While Coresecure has not yet filed any litigation, Teleputers kicked off a semiconductor campaign of its own in June 2020.

*NPEs and Third-Party Litigation Funding*

Since 2019, RPX has reported on the practices of a new breed of NPEs—one with sufficient resources to acquire relatively robust portfolios of patents for assertion in expensive, often multi-front, and potentially protracted enforcement campaigns. Now, with the litigation finance industry flush with capital amid the COVID-19 pandemic, and with a number of third-party backed campaigns maturing, the effects of litigation finance on the patent space are becoming apparent.

Litigation funding is typically provided on a nonrecourse basis, with the funder collecting a return on its investment only in the event of a successful outcome. If a funded plaintiff fails to recover in litigation, that plaintiff is generally not obligated to repay the funds advanced for the litigation.

Given that a nonrecourse funding arrangement comes with the risk of a total loss for the investor, litigation funders are spending substantial time and effort evaluating patents for assertion. As litigation finance continues to permeate the patent space, the character of the assets asserted by third-party funded NPEs may reflect additional due diligence and portfolio selection.

Among the most notable campaigns with third-party backing are those being waged by a growing web of affiliated Irish NPEs backed by Magnetar Capital, a hedge fund with $12.3B in assets under management. The most established plaintiffs in that group include Data Scape Limited, litigating patents originating with Sony; Neodrón Limited, asserting patents received from Microchip or subsidiary Atmel; and Solas OLED Limited, waging a multi-front litigation campaign since April 2019 over display panels, including both district court litigation and actions brought before the International Trade Commission, and also with former Microchip patents. Amid a recent trial victory against Samsung, Solas OLED filed two new complaints against Samsung (including Samsung Display) during the first quarter. Moreover, another two related NPEs—Arigna Technology Limited and Sonraí Memory Limited—launched their first campaigns in February, wielding former HP Enterprise (HPE), Mitsubishi, or Microchip (Atmel) patents in suits targeting automakers and device makers. Meanwhile, as recently covered by RPX, USPTO records indicate that yet more well-funded Irish NPEs are waiting in the wings—some with former operating company portfolios already in hand.

Another active NPE with outside backing is Fundamental Innovation Systems International LLC (FISI), which in March added two new cases to the USB charging campaign that it has been waging since 2016 over patents acquired from BlackBerry. FISI's current management team is reportedly behind two other Irish NPEs holding significant portfolios of former operating company assets—Pictiva Display International Limited and Valtrus Innovations Limited—with USPTO records reflecting the recent movement of a large portfolio of patents from HPE to Ocean Tomo (OT Patent Escrow LLC) to Valtrus Innovations. More well-funded litigation from this team, again over former operating company patents, looks headed for the courts in 2021.

## Additional RPX Patent Market Intelligence

For further analysis and up-to-date information on patent litigation and market trends, visit RPX Insight.