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Q2 in Review

July 13, 2021

Q2 in Review: *Arthrex* Creates a New IPR Review Pathway, and More NPEs Head to the ITC

As Q2 2021 comes to a close, year-to-date NPE litigation is up by 7% compared to the first half of 2020. Excluding certain file-and-settle activity, NPE assertions remain fairly stable compared to last year, while operating company litigation decreased. The first half of the year saw a particular upswing in NPE activity hitting certain market sectors, including Financial Services, Media Content and Distribution, and E-Commerce and Software.

Moreover, the quarter ended with big news for the Patent Trial and Appeal Board (PTAB), which the US Supreme Court left largely intact in its June *Arthrex* decision. However, the ruling granted the USPTO director significant new review authority over *inter partes* review (IPR) decisions in the process. The Patent Office's resulting interim director review program could cause delays and backlogs in some IPRs. Meanwhile, petitioners appear to be increasingly shifting from IPR to its predecessor, *ex parte* reexamination, as a result of Board rules that limit IPR's availability for district court defendants.

Additionally, the second quarter saw multiple NPEs taking their enforcement campaigns to the International Trade Commission (ITC) while also filing yet more district court litigation—all alleging infringement of patents developed by operating companies. Also in Q2, a variety of familiar players formed new NPEs during the quarter, likely in preparation for the acquisition and assertion of patents. Finally, one court set forth a novel local rule requiring the disclosure of litigation funding, while a newly enforced state law took aim at an NPE targeting small businesses.

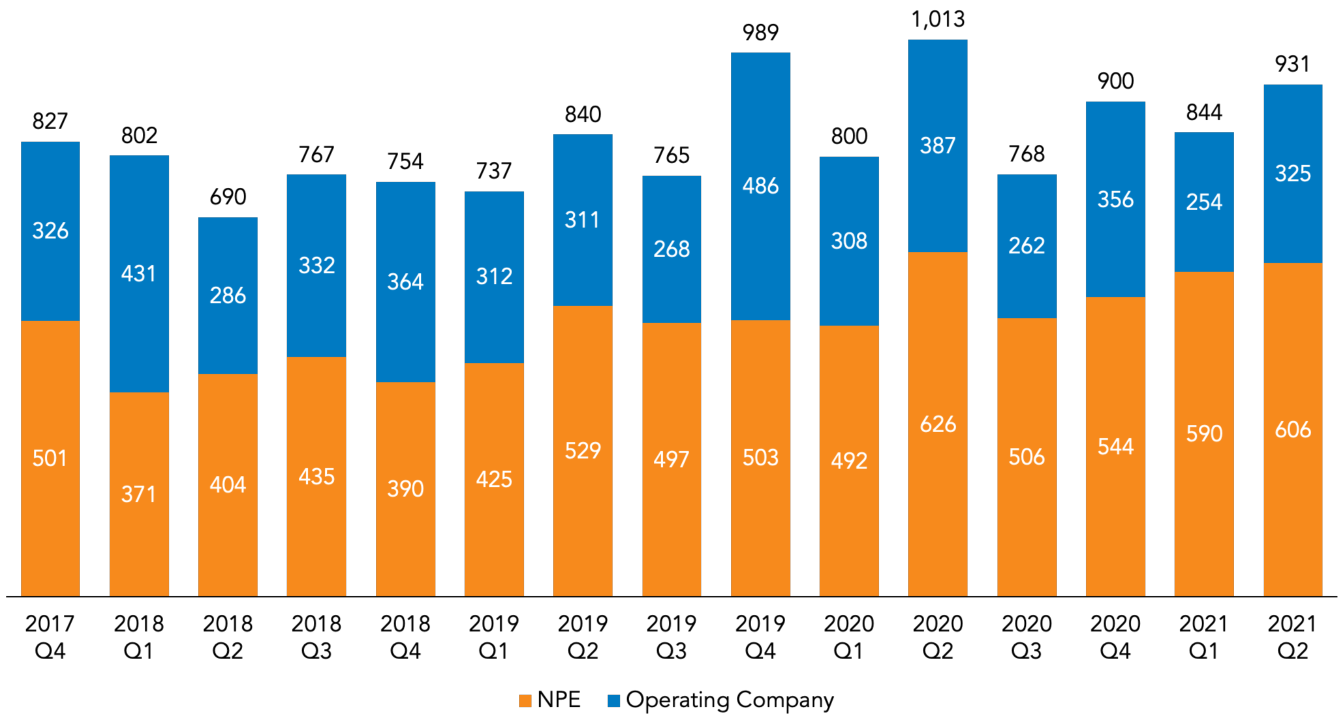
District Court Update: NPE Filings Hold Steady Despite Q2 Dip as OpCo Litigation Decreases

NPEs added 1,196 defendants to patent litigation campaigns during the first half of 2021, or 7% more than in the first half of the past year (during which NPEs added 1,118 defendants). Most of that increase is due to litigation filed by apparent affiliates of prolific patent monetization firm IP Edge LLC, which were responsible for 307 (or 25.7%) of the defendants added in the first half of this year.

Excluding IP Edge, NPE litigation was still up by 1.4% during the first half of the year, essentially holding steady compared to the same period in 2020. Even without IP Edge, NPEs filed more litigation in the first half of the year than they have during any initial half-year since 2016. With IP Edge included, NPEs had their busiest first half-year since 2017.

Operating companies, for their part, added 579 defendants in the first half of 2021, or 16.7% less than the same half of 2020 (during which they added 695 defendants).

Defendants Added to Litigation Campaigns by Quarter



In the second quarter of 2021, NPEs added 606 defendants to litigation, 3.2% less than the same period last year. However, Q2 NPE filings exceeded the trailing three-quarter Q2 average by 16.6% and were 2.7% higher than in Q1 2021 (during which NPEs added 590 defendants). NPE filings accounted for 65.1% of the patent litigation filed in the second quarter.

Meanwhile, operating companies added 325 defendants during Q2 2021, 16% less than they did in the second quarter of last year. Second-quarter operating company filings were 0.9% lower than the three-quarter Q2 average but were 28% higher than in Q1 2021 (during which they added only 254 defendants). Operating companies were responsible for 34.9% of the patent litigation filed in Q2.

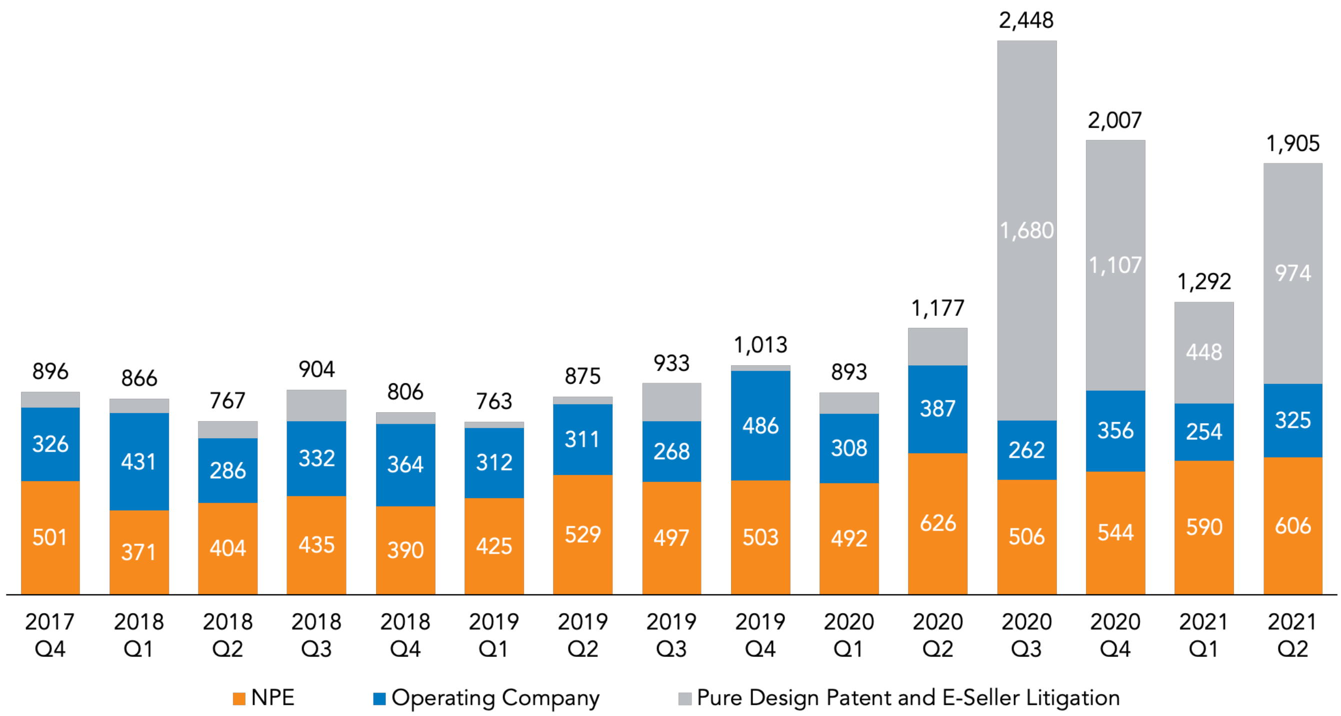
In total, 931 defendants were added to patent suits in Q2 2021, or 8.1% less than the same quarter last year. Nonetheless, this represented a 9.8% increase over the trailing Q2 average and a 10.3% increase over Q1 2021.

Defendants Added		Change Compared to:		
	Q2 2021	Q2 2020	Q2 2018-2020 Average	Q1 2021
NPE	606	-3.2%	16.6%	2.7%
Operating Company	325	-16.0%	-0.9%	28.0%
Total	931	-8.1%	9.8%	10.3%

Note that the analysis above excludes litigation filed by a small group of design and utility patent owners targeting copycats and counterfeiters selling products online. RPX now classifies these cases separately, as the dynamics of anti-counterfeit cases are quite different from other operating company patent suits, in that they primarily seek injunctive relief plus forfeiture of cash balances held in online merchant accounts, and they often end in default judgments. Moreover, these suits sometimes name hundreds of defendant entities, many of which may be online storefronts for the same ultimate parent.

While such litigation was once rare, RPX observed spikes in design patent and e-seller litigation starting in Q3 and Q4 2020, with hundreds of defendants targeted in just a handful of lawsuits. Although this type of litigation slowed in Q1 2021, filings spiked again in the second quarter, as shown below—totaling 974 defendants added, more than NPE and other operating company filings combined.

Defendants Added to Campaigns by Quarter, Including Pure Design Patent and E-Seller Litigation

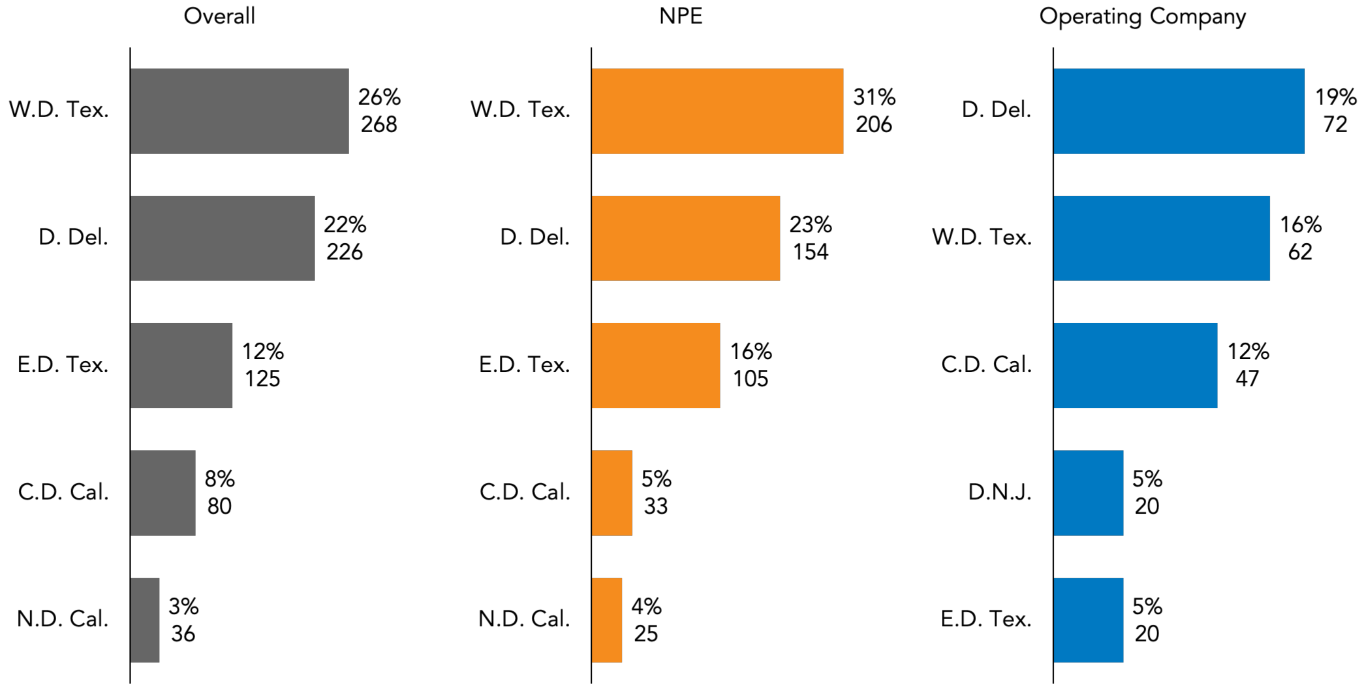


The analyses in the remainder of this report exclude pure design patent and e-seller litigation.

Venue Update: West Texas Remains Atop the Heap as Judge Albright Reacts to Appellate Reversals

In Q2 2021, the Western District of Texas was the top venue for overall patent litigation (*i.e.*, with no filter for plaintiff type) and for litigation filed by NPEs, taking a close second place for litigation filed by operating companies. The most popular operating company venue was the District of Delaware, which took second place for both overall and NPE litigation. Meanwhile, the Eastern District of Texas, formerly an NPE hotspot before the realignment caused by the Supreme Court's 2017 *TC Heartland* decision, was only the number three district for NPEs and overall litigation, tied for fourth place with the District of New Jersey for operating company filings.

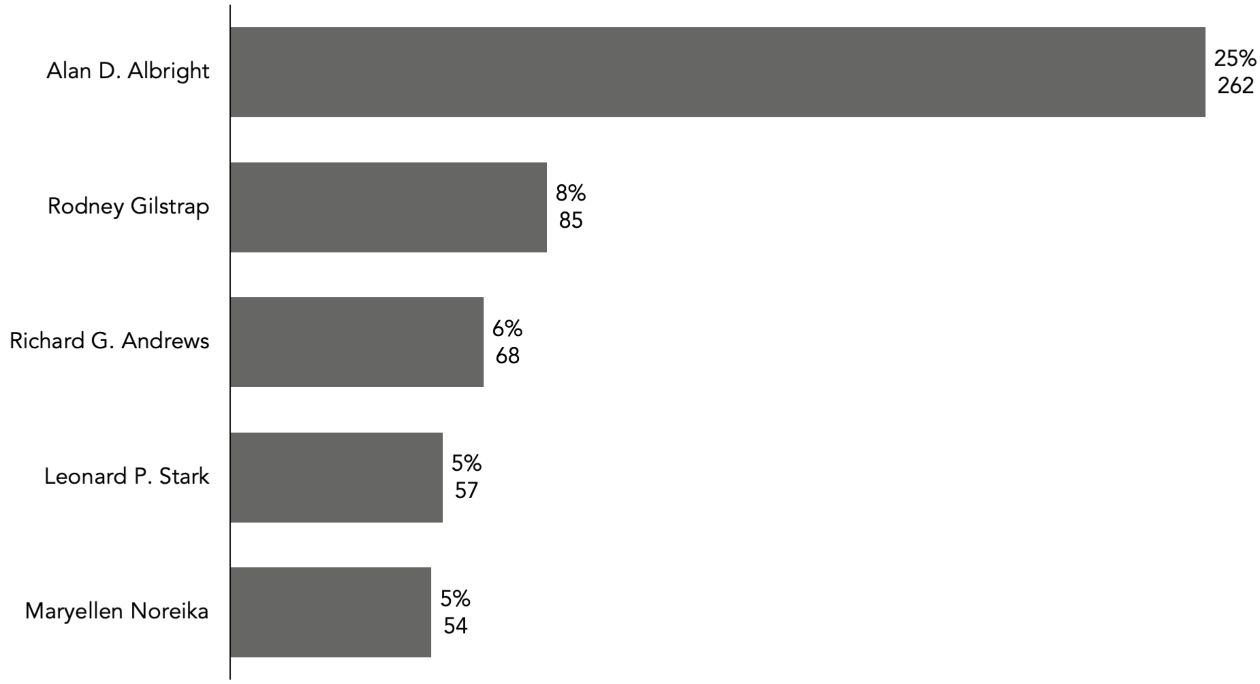
Defendants Added to Litigation Campaigns by Quarter



As covered extensively by RPX (see, *e.g.*, here and here), the rise of the Western District of Texas is due largely to the efforts of District Judge Alan D. Albright to attract patent litigation to his courtroom. Indeed, plaintiffs can effectively pick Judge Albright directly, as his district's lack of divisional standing rules allows them to file directly in their preferred division—here, Waco, where Judge Albright is certain to self-assign the case as the division's only district court judge.

For this reason, it is unsurprising that Judge Albright was the nation's top patent judge for overall litigation, as shown below, also holding that distinction for litigation filed by NPEs.

Top Judges by Defendants Added to Overall Patent Litigation in Q2 2021



Since taking the bench in late 2018, Judge Albright has stood out in part due to his somewhat restrictive stance on various types of defensive motions, including motions to stay cases pending IPR (which he has stated he prefers not to grant) and patent eligibility challenges (which he tends not to allow for a variety of reasons).

But it is his approach to transfer motions that has perhaps attracted the most interest among patent litigants—especially motions to transfer for convenience, which he has rarely granted since taking the bench. Over the past year, this reticence has triggered a back-and-forth between Judge Albright and the Federal Circuit, which has repeatedly faulted his handling of convenience transfer requests—focusing most recently on his application of the relevant substantive factors. On that front, the second quarter saw Judge Albright finally begin to adjust his approach after a series of prominent reversals by the appellate court. In one recent ruling, Judge Albright took a markedly different posture with respect to certain transfer factors, in recognition of the Federal Circuit's rebukes—in part, applying factors related to witness travel distance less rigidly and placing less emphasis on his district's quick time to trial.

In contrast, less attention has been paid to his treatment of motions alleging improper venue, since—unlike the Eastern District of Texas—many companies have active operations in West Texas and may therefore "reside" in that venue as defined by *TC Heartland*. While such a venue challenge may not be an option for some defendants, recent orders by Judge Albright suggest that improper venue challenges may succeed in his court for companies with a sufficiently minimal presence there.

Market Sector Update: NPE Financial Services Litigation Swings Further Upward

An analysis of NPE district court filing trends by market sector reveals a significant uptick in litigation targeting certain industries in the first half of 2021, compared to that same period last year. Specifically, NPE litigation hitting the Financial Services sector increased by 171%, with filings also rising in sectors like Media Content and Distribution (by 37%) and E-Commerce and Software (by 18%).

Defendants Added to Litigation by NPEs, Percent Change from 1H 2020 to 1H 2021

		1H 2020	1H 2021
Automotive	-39%	66	40
Biotech and Pharma	-69%	13	4
Consumer Electronics and PCs	6%	169	179
Consumer Products	-31%	39	27
E-Commerce and Software	18%	290	342
Financial Services	171%	24	65
Industrial	-36%	22	14
Media Content and Distribution	37%	38	52
Medical	-41%	22	13
Mobile Communications and Devices	6%	79	84
Networking	13%	223	253
Other Sectors	58%	36	57
Semiconductors	-32%	97	66

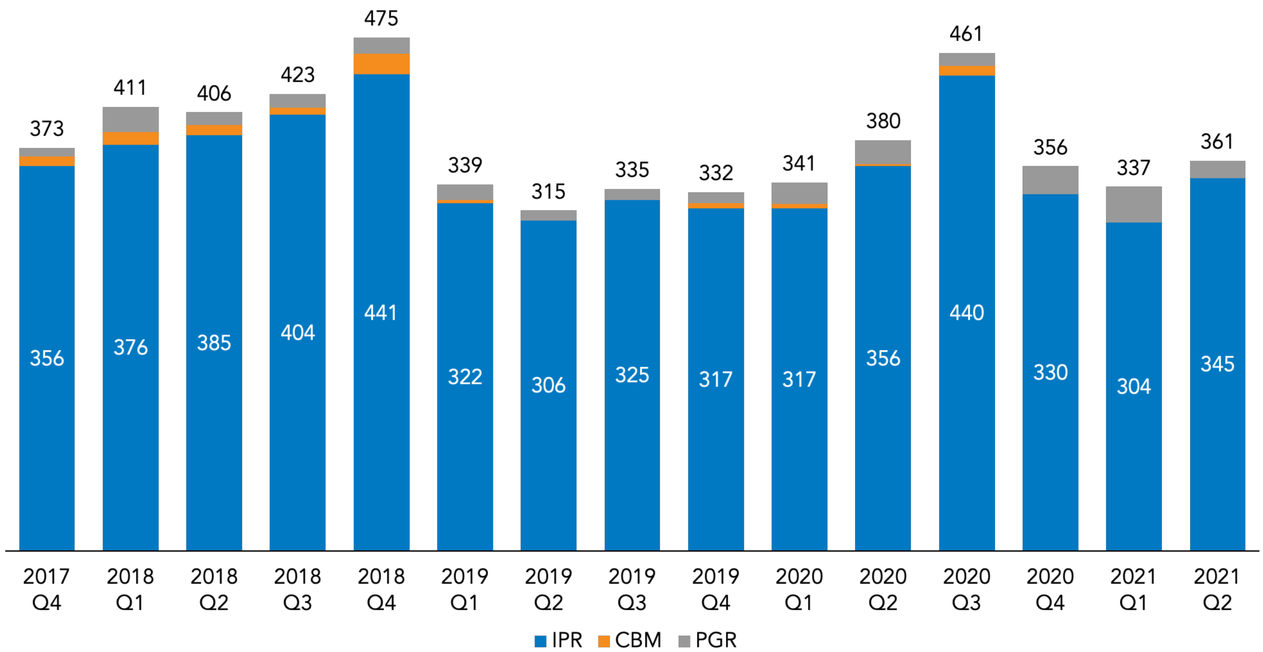
Although the number of Financial Services defendants sued is relatively small in both periods, the litigation hitting that sector has been filed by plaintiffs linked to several well-known NPE litigants. In the second quarter, those included monetization firm Dynamic IP Deals, LLC (d/b/a DynaIP), which in May expanded the Financial Services campaign it launched in Q1 through subsidiary mCom IP, LLC. That NPE's Q2 complaints target several financial institutions and one provider of banking industry tech over certain digital banking platforms, focusing in part on features related to consumer transaction management and monitoring, customer data analytics, and marketing; the plaintiff has since filed more suits in July. Inventor-controlled Mirror Imaging L.L.C. also filed a new round of litigation targeting a group of banks in the second quarter, wielding a newer set of patents that it defensively characterizes as "post-*Alice*" following the invalidation of its prior asserted patents under Section 101. Additionally, a new EMV "smart card" campaign was launched in early Q2 by Auth Token LLC, an entity linked to an individual behind many other litigating NPEs, recent examples including Compression Vectors, LLC; Display Vectors LLC; Netcom Global Solutions LLC; and TurboCode LLC.

Coverage of recent NPE activity in other top market sectors can be found on RPX Insight, including campaigns hitting the E-Commerce and Software and Media Content and Distribution sectors.

PTAB Update: *Arthrex* Upholds IPR Regime While *NHK-Fintiv* Triggers Further Uptick in Reexams

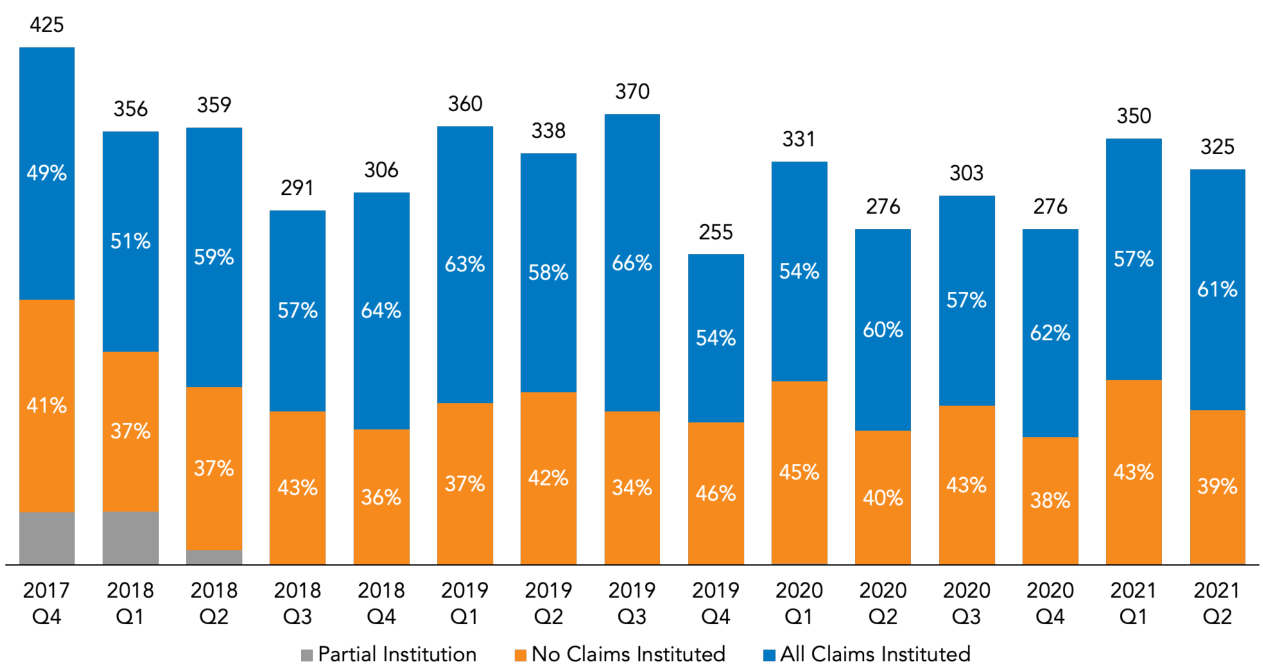
In the second quarter of 2021, 361 petitions for America Invents Act (AIA) review were filed with the PTAB, including 345 petitions for IPR and 16 petitions for post-grant review (PGR). Filings in Q2 were 5% lower than in the same quarter last year (when 380 petitions were filed) but were 7.1% higher than in Q1 2021 (which saw 337 petitions).

AIA Review Petitions Filed by Quarter



Meanwhile, the AIA review institution rate for the second quarter of 2021 was 61%, up from 57% in Q1 2021. The institution rate was 58.7% for the first half of 2021, compared to 57% for the same period last year.

AIA Review Institution Decisions by Quarter



The Supreme Court's *Arthrex* Decision: IPR Lives On, While the USPTO Director Gains New Authority

Perhaps the most significant development impacting the PTAB in Q2 was the divided Supreme Court decision in *United States v. Arthrex*, which upheld the IPR regime but gave the USPTO director much more power over AIA review trials in the process. On June 21, the Court ruled that the appointment of the PTAB's administrative patent judges (APJs) violated the US Constitution's Appointments Clause because the USPTO director lacked the ability to sufficiently review their decisions. The Court's solution was to give the director the authority to review and rehear IPR final written decisions himself or herself.

While *Arthrex* preserves much of the IPR status quo, the interim director review procedure announced by the USPTO on June 29 could have a significant impact. The new rules create a separate process for director review of both IPR and PGR decisions that will exist alongside the preexisting panel rehearing system. Under this new structure, a party dissatisfied with a panel's final written decision has two options to fight that outcome within the PTAB: the dissatisfied party can (1) request director review of the final written decision, or (2) request panel rehearing. Should the party initially seek director review under the first option, a denial by the director removes the option to then request a panel rehearing. If the party first seeks panel rehearing, the party may only subsequently seek director review if the panel granted the rehearing request. The director's review can address any issue; is conducted *de novo* (*i.e.*, with no deference to the panel's ruling); and can even be initiated *sua sponte* (without a request from either party), either in the first instance or after a panel grants or denies rehearing.

Going forward, one all but certain result of this new dual-review system will be a flood of additional rehearing requests, as parties previously limited to panel rehearing can now file requests for director review as well. Moreover, this impact may not be limited to IPRs and PGRs still within the 30-day window for requesting a panel rehearing, as the director may extend rehearing deadlines for "good cause". In particular, as noted on the USPTO's "*Arthrex* Q&As" page, such a waiver is available for "[p]arties whose deadline for requesting rehearing had expired at the time the *Arthrex* decision issued", as long as they are still within the window to file a notice of appeal. A July 20 update to that guidance further explained that director review requests for PTAB decisions appealed and then remanded due to *Arthrex* will be considered timely if filed within 30 days of a court's remand order.

A deluge of new requests could make impacted IPRs and PGRs take much longer to resolve, particularly for such cases that subsequently get appealed to the Federal Circuit, an avenue that remains available irrespective of whether the director review procedure occurred. Relatedly, it is not yet clear how cases held in abeyance due to the Federal Circuit's *Arthrex* ruling will be affected. However, on June 23, that court issued a *sua sponte* order requiring that PTAB appellants that raised Appointments Clause challenges file briefs within 14 days "explaining how they believe their cases should proceed in light of *Arthrex*".

Additionally, vesting the rehearing decision directly in the USPTO director, a presidential appointee, raises the possibility that such review could become more politicized than under the prior system, though the specter of Federal Circuit review could serve as a counterbalance. In any event, *Arthrex* appears likely to elevate the importance of the USPTO director to an even greater extent and will undoubtedly increase anticipation over President Joe Biden's selection of a nominee for that role.

NHK-Fintiv Rule Pushes District Court Defendants to File More *Ex Parte* Reexaminations

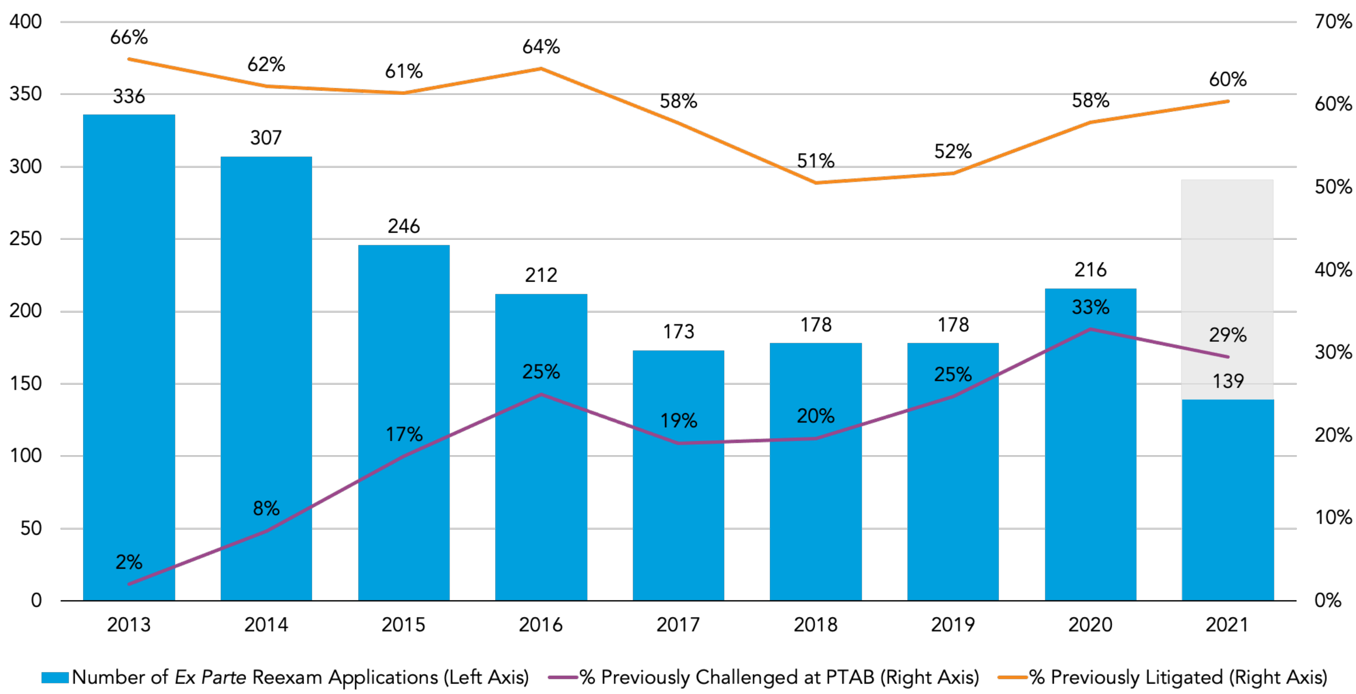
Over the past two years, the PTAB has made a series of changes that have effectively limited the availability of IPR for many district court defendants—and as confirmed by RPX data, this shift has led some to take a renewed look at *ex parte* reexamination.

The changes in question known as the *NHK-Fintiv* rule, came about in a pair of precedential decisions through which the PTAB expanded the circumstances in which it will exercise its discretion to deny institution in IPRs. Most notably, *NHK-Fintiv* allows the Board to consider the status of a parallel district court case, and to deny institution if the court has scheduled a trial close to when the Board's final decision would be due. This added wrinkle can be especially problematic if a defendant is sued in a venue that tends to schedule earlier trial dates, like the Western District of Texas, since a company hoping to defend itself by filing an IPR would have to bring its petition much earlier to avoid that trial date. Yet such quick action may be infeasible as a practical matter, since defendants often do not learn what claims of a patent are being asserted against them—and thus, what claims to challenge in an IPR—until later in the course of litigation.

As the uncertainty introduced by the *NHK-Fintiv* rule makes America Invents Act (AIA) reviews a less attractive option, some defendants seeking to challenge patent validity have increasingly turned to *ex parte* reexams, which are not subject to discretionary denials and have other advantages (including lower cost and lack of estoppel) despite affording the validity challenger little to no opportunity to participate in the proceeding after the request is filed.

Indeed, RPX data reveal that 21.3% more *ex parte* reexam applications were filed in 2020 than the year before, as shown below. What's more, the overlap between the patents challenged in those reexam applications and those previously challenged before the PTAB in an AIA proceeding has grown: while 25% of the patents hit with *ex parte* reexam applications in 2019 had previously been subjected to a PTAB proceeding, that percentage rose to 33% in 2020. Additionally, the share of patents with reexam requests that have been litigated in district court is also on the rise, climbing from 52% in 2019 to 58% in 2020. Taken together, this trend suggests that the increase in applications for *ex parte* reexam is the result of *NHK-Fintiv*, and if current trends hold, 2021 could see an even greater upswing.

***Ex Parte* Reexam Filings and the Share of Challenged Patents with Prior Litigation and PTAB Reviews**



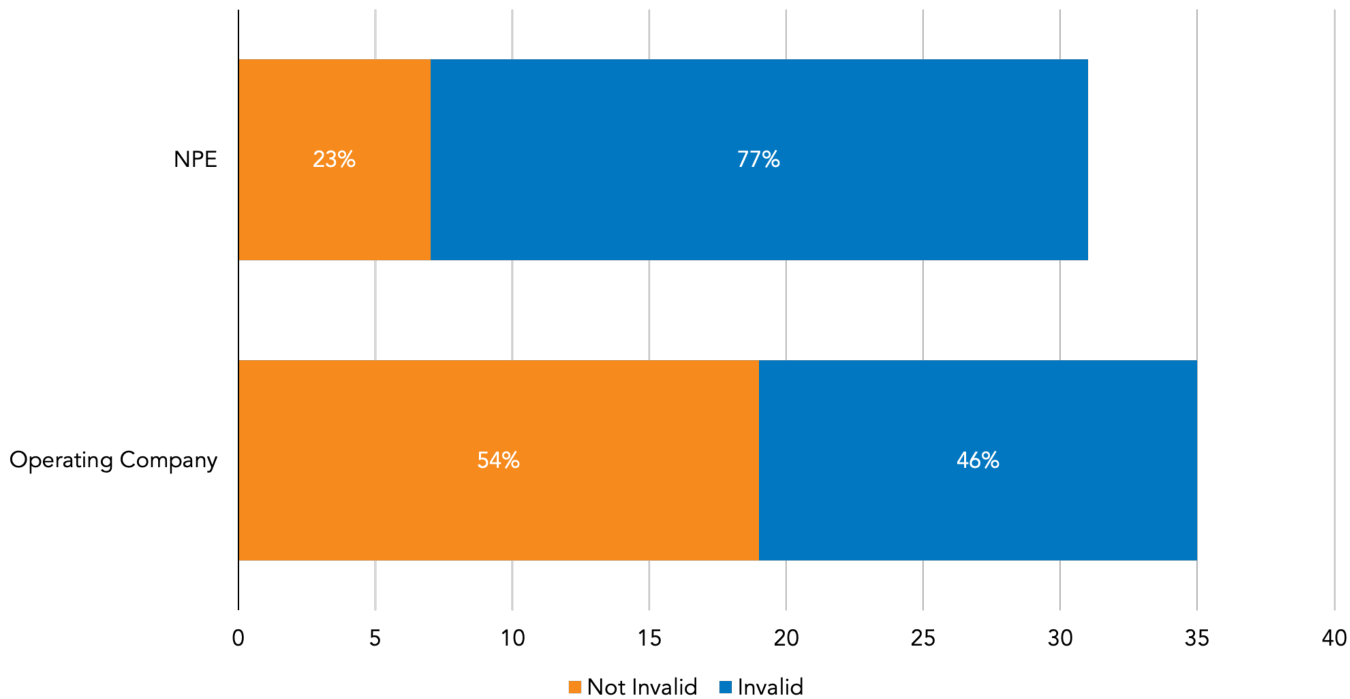
Note: Data as of 7/9/2021. The 2021 numbers are based on the currently available number of filings for Q1-Q2 2021. Due to the delayed availability of filing dates and related data from the USPTO, this analysis is subject to change. The gray area for 2021 represents the number of filings for Q3-Q4 2021 based on a simple linear projection. Sources: USPTO, PACER, RPX Research.

Section 101 Update: Breaking Down the Post-*Berkheimer* Status Quo

RPX has detailed in recent years how the Federal Circuit's 2018 *Berkheimer* and *Aatrix* decisions have limited courts' ability to grant early patent eligibility challenges brought under *Alice*, causing a significant drop in the *Alice* invalidation rate. That lower rate has essentially become the status quo for defensive eligibility motions: for *Alice* motions decided since *Berkheimer* and through Q2 2021, courts have invalidated all challenged claims 47% of the time, compared to 65% before *Berkheimer*. The overall *Alice* invalidation rate, from the decision's issuance through Q2, is 58%. Patents asserted by NPEs have been invalidated 65% of the time in that timeframe, in contrast to 48% for those wielded by operating companies.

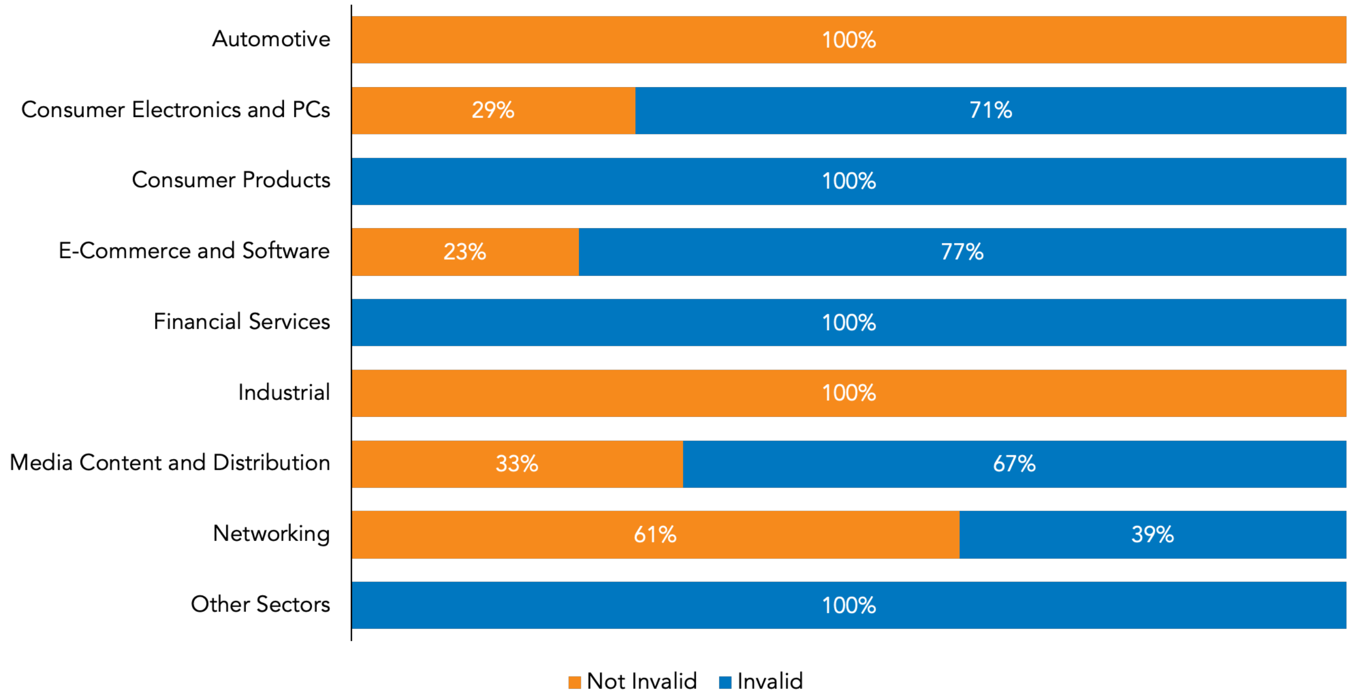
Limiting this analysis to *Alice* motions adjudicated in the first half of 2021 results in a 61% invalidation rate during that period. Moreover, as shown below, the data diverge by plaintiff type: patents asserted by NPEs were invalidated 77% of the time, versus 46% for patents litigated by operating companies.

***Alice* Invalidation Rates by Plaintiff Type for Motions Decided in the First Half of 2021**



Additionally, 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 the industries with the most *Alice* activity in the first half of the year. During that period, the E-Commerce and Software sector saw the most *Alice* decisions on a per-patent basis, with 35 patents adjudicated and an invalidation rate of 77%. The Networking sector was in second place with 18 patents adjudicated, though those patents fared much better, with a 39% invalidation rate. Courts ruled on the validity of just seven patents asserted in Consumer Electronics and PCs litigation, with five (71%) held invalid. Other sectors saw even fewer challenges resolved, with four Automotive patents all surviving *Alice*, two of three Media Content and Distribution patents ruled unpatentable, two patents asserted in the Industrial sector held to be not unpatentable, two Consumer Products patents both invalidated, and one Financial Services patent ruled to be invalid.

Alice Invalidation Rates by Market Sector for Motions Decided in the First Half of 2021



FRAND Update: Biden Administration Signals New Policy on SEP Antitrust Enforcement

The past four years saw a significant shift in the US government's posture toward antitrust enforcement in standard essential patent (SEP) disputes. Under Assistant Attorney General Makan Delrahim, the Department of Justice's (DOJ's) Antitrust Division advocated for several policy changes generally favoring patent owners, arguing that SEP disagreements are best resolved under contract law instead of antitrust, placing more emphasis on implementer hold-out rather than patent owner hold-up, and pushing for the availability of injunctive relief in SEP cases. Delrahim dubbed this set of policy principles the "New Madison" approach.

Under Delrahim, the Antitrust Division advocated for these policies through several channels, including the filing of *amicus* briefs in SEP disputes and conducting outreach to standard-setting organizations. This advocacy also included the withdrawal and replacement of a 2013 joint policy statement between the DOJ and USPTO, which had focused more on the hold-up problem and the anticompetitive effects of injunctive relief as used to gain leverage in SEP licensing disputes. In December 2019, the DOJ issued a new joint policy statement with the USPTO and the National Institute of Standards and Technology (NIST) detailing why injunctions should be available in SEP disputes. In particular, the statement asserted that a SEP holder's commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms is relevant for determining "appropriate remedies" but "need not act as a bar to any particular remedy"; that both injunctions and damages should be available as remedies for the infringement of SEPs subject to FRAND commitments; and that the framework for determining those remedies should be the same as other cases: "there are no special rules limiting" such remedies.

On July 9, President Joe Biden signed an executive order on competition law that explicitly called for the Attorney General and Secretary of Commerce to consider taking SEP antitrust policy in a new direction—including a specific mandate to revisit the December 2019 joint policy statement:

> To avoid the potential for anticompetitive extension of market power beyond the scope of granted patents, and to protect standard-setting processes from abuse, the Attorney General and the Secretary of Commerce are encouraged to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019.

The new executive order follows a series of other signs during the second quarter that a policy shift was imminent. In early June, acting Assistant Attorney General Richard Powers stated that the administration is developing a more "balanced" policy toward the interplay of competition and IP law: "I think it's fair to say that the new administration is rethinking what policies in this area will best serve competition and consumers . . . No one should be surprised if you see things coming soon from us on that front". Two months prior, the DOJ moved a widely publicized letter that Delrahim sent to the Institute of Electrical and Electronics Engineers (IEEE), which espoused several "New Madison" principles, from the "guidance" section of its website to a "comments" page. The move has been interpreted by some as a further sign of an impending policy shift.

Those developments follow another telling update filed by the government in *Continental v. Avanci et al.* (3:19-cv-02933), an automotive SEP dispute on appeal before the Fifth Circuit in which Delrahim's Antitrust Division had previously weighed in. In that case, the Northern District of Texas dismissed claims that patent pool Avanci's OEM-only licensing practices violated antitrust law. The court's dismissal order cited a September 2020 statement of interest filed by the government that in part argued that there exists no "antitrust duty" at all to license on FRAND terms and reiterated Delrahim's emphasis on resolving SEP disputes under contract law. However, in mid-May, the government distanced itself from that statement, arguing before the Fifth Circuit that it had not yet "express[ed] its current views of the antitrust issues raised by this case" and offering to do so in an *amicus* brief.

Marketplace Update: More ITC Actions, a Raft of New NPEs, and Increased Transparency into Litigation Funding

More NPEs Head to the ITC with Former Operating Company Patents in Hand

Several NPEs have taken their enforcement campaigns to the International Trade Commission (ITC) this year, with the complainants relying on the activities of their licensees, and/or their sources of patents, to establish a domestic industry with respect to the asserted patents. As recently reported by RPX, at least three NPEs filed complaints before the ITC during the second quarter of 2021—and each assert former operating company patents.

Most recently, Proven Networks, LLC filed a May 28 complaint (the NPE's first to date before the ITC) proposing as respondents Arista Networks, HP Enterprise (Aruba Networks), Cisco, Dell, F5 Networks, Juniper Networks, and Palo Alto Networks and targeting "certain networking devices, computers, and components thereof" (337-TA-3550).

As in the NPE's dozens of district court complaints filed since March of last year, Proven Networks' ITC complaint asserts former Nokia (or Alcatel-Lucent) patents generally related to data network optimization through network data, traffic, and security management.

Also in late May, hedge fund-backed Irish NPE Neodrón Limited filed a new ITC complaint against proposed respondents Infineon (Cypress Semiconductor), Renesas, and STMicro (337-TA-3549), further bringing overlapping Western District of Texas cases against each of those same companies. Neodrón's ITC complaint targets "certain power inverters and converters, vehicles containing the same, and components thereof".

Throughout Neodrón's campaign, begun in May 2019, the NPE has asserted more than two dozen patents, generally related to touch sensors and controls, among the portfolio of assets that it received from Microchip Technology.

Meanwhile, another Irish NPE under the same umbrella, Arigna Technology Limited, made its first trip to the ITC in May, filing a complaint targeting "networking devices, computers, and components thereof" against proposed respondents Audi AG and Audi of America, LLC; Bayerische Motoren Werke AG and BMW of North America, LLC; Bentley Motors Limited and Bentley Motors, Inc.; General Motors Company and General Motors LLC; Automobili Lamborghini S.p.A. and Automobili Lamborghini America, LLC; Daimler AG and Mercedes-Benz USA, LLC; Porsche AG and Porsche Cars North America, Inc.; and Volkswagen AG and Volkswagen Group of America, Inc. (337-TA-3550).

The ITC complaint asserts two patents—one originating with Mitsubishi, the other with Atmel—each of which has been previously asserted by the NPE in litigation.

So far in 2021, at least one other NPE has filed its first complaint before the ITC: In February, undeterred by a late January Federal Circuit setback in its sole litigation campaign, Evolved Wireless, LLC filed two new district court cases, one against Lenovo (Motorola Mobility) in the Northern District of Illinois and one against Samsung in the Eastern District of Texas, as well as a complaint before the ITC (337-TA-3531) with proposed respondents Motorola Mobility and Samsung. The defendants are accused of infringing three wireless communications patents through the provision of "LTE-compliant cellular communication devices", including various smartphones, tablets, and smartwatches. For more details, see "Evolved Wireless…Evolves…in Light of Recent Federal Circuit Opinion" (February 2021).

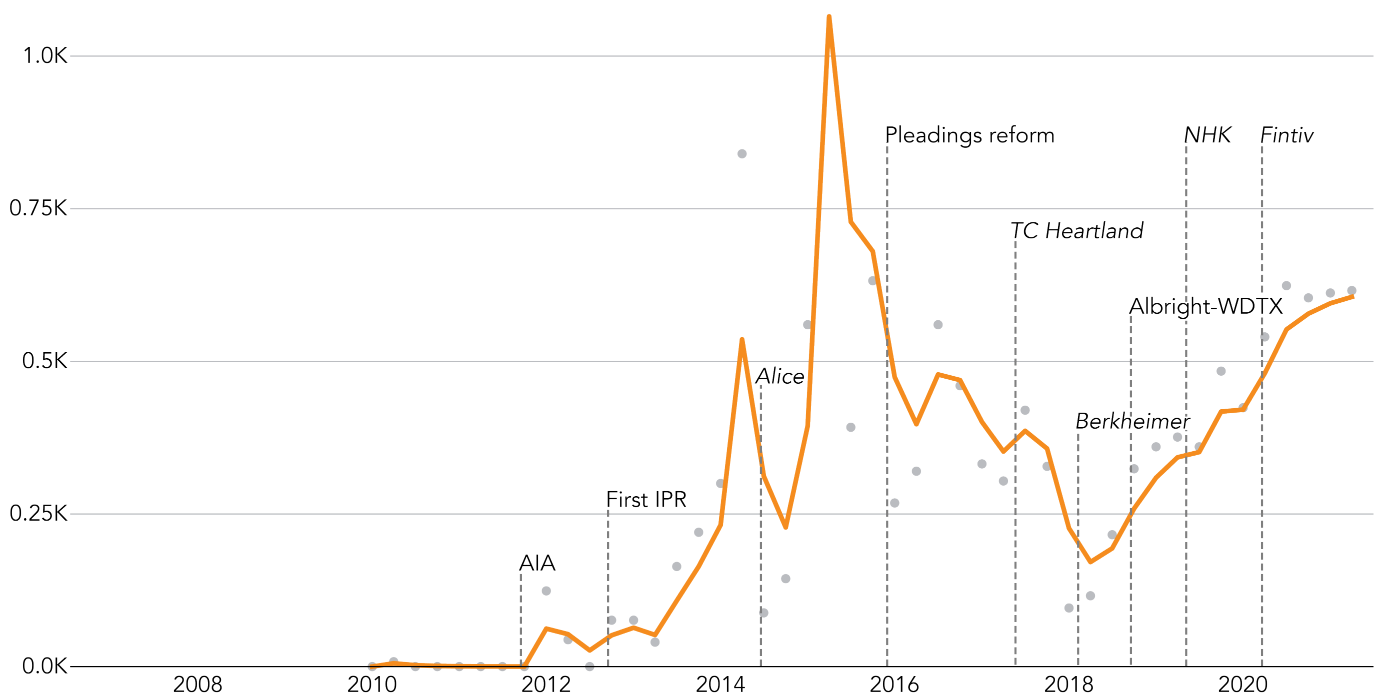
For RPX coverage of other NPEs currently litigating before the ITC, see "Pictos Takes Another Run at Samsung in the Eastern District of Texas" (May 2021); "Solas OLED Pummels Samsung with More Litigation" (March 2021); and "Siemens Moves to Quash Q3 Networking's Domestic Industry Related Subpoena" (February 2021).

Familiar Faces Form a Raft of New NPEs During 1H 2021

RPX has flagged public records reflecting a rash of NPE creation during the first half of 2021, including by the patent monetization and advisory firm Dominion Harbor Enterprises, LLC; Jonathan Szarzynski's Endpoint IP LLC; monetization firms IPValuation Partners LLC (d/b/a IPVal) and Longhorn IP LLC; and David White/Strategic Intellectual Solutions LLC. If past practices are precedent, patent assignments to these recently formed NPEs are likely in the pipeline—followed by the launch of new litigation campaigns in the months ahead.

Notably, prolific patent plaintiff IP Edge LLC formed over a dozen new Texas NPEs during Q2 alone, suggesting that the firm may continue filing new litigation at its current pace through 2021.

Defendants Added to Litigation by IP Edge Plaintiffs (2010-2021)



Annualized defendants with EMA smoothing of 0.50 based on quarterly data. Time-series data is plotted at the start of each period.

IP Edge finished last year well atop the list of NPE plaintiffs, with nearly 550 defendants added across 58 of its campaigns. RPX data indicate that so far this year, the firm has launched roughly 14 new campaigns and added over 300 defendants to litigation.

Over the years, IP Edge has turned to various sources for its patents, including individual inventors, operating companies, other NPEs, and at least one university—and its pipeline appears chock full of assets still to litigate. Perhaps most notable among them is a large portfolio of assets—more than 700—picked up from Technicolor SA in July 2020. The second quarter of 2021 saw that portfolio's first visible movement since it was acquired, with IP Edge's Magnolia Licensing LLC (the primary vehicle through which IP Edge appears to have completed that acquisition) transferring former Technicolor patents to at least three IP Edge NPEs: Bataan Licensing LLC, Sunflower Licensing LLC, and Triumph IP LLC.

IP Edge has never taken a case to trial, with litigation usually ending at the pleadings stage, or just after. However, last year it filed an ITC complaint, a first for the firm, through controlled plaintiff Q3 Networking LLC, against respondents CommScope, HP Enterprise, and NETGEAR, arguing the presence of a domestic industry based on the US activities of the original source of the patents asserted, Siemens. That investigation continues into expert discovery and dispositive motions.

New Jersey Imposes Local Rule Requiring Disclosure of Third-Party Litigation Funding

With the litigation finance industry reporting record fundraising amid the COVID-19 recession, the impact of third-party funders on the litigation landscape has continued to deepen. As litigation finance continues to permeate the patent space—and a growing number of NPEs launch campaigns backed by wealthy investors—more defendants are urgently seeking greater transparency into litigation funding arrangements.

Litigants in New Jersey federal court are now considerably closer to knowing who is funding litigation against them—and on what terms. In late June, Chief Judge Freda Wolfson issued an order amending the local rules of the New Jersey District Court and requiring litigants to disclose information regarding nonrecourse litigation funding. Litigants in New Jersey federal court must now disclose, within 30 days of filing an initial pleading or the transfer of a case to the district, the identity of their funder(s), including their name, address, and if a legal entity, its place of formation; as well as whether the funder's approval is necessary for litigation decisions or settlement decisions in the action. If the answer to that last question is in the affirmative, the plaintiff must reveal the nature of the terms and conditions relating to that approval and provide a brief description of the nature of the financial interest.

Moreover, parties may now seek additional discovery of the terms of any such litigation funding agreement "upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case".

For RPX coverage of this decision, see here.

Washington State Goes After NPE Targeting Small Businesses

Also in Q2, Washington Attorney General Bob Ferguson filed a lawsuit against Landmark Technology A, LLC (Landmark A) asserting that the NPE is in violation of his state's Patent Troll Protection Act—a bill prohibiting bad faith assertions of patent infringement. According to Ferguson's complaint—reportedly the first to seek enforcement of the act—Landmark A has sent more than 1,800 demand letters in recent years to myriad companies, such as bakeries, florists, restaurants, pharmacies, hardware stores, jewelers, and bookstores, demanding $65K to license, under the threat of litigation, a patent "related to loan processing and credit reporting". With infringement allegations primarily targeting customer log-in pages on company websites, argues Ferguson's complaint, "any business with a web presence is a potential target" for Landmark A.

Between 2008 and 2018, over 130 unique defendants were sued *over that same patent* (7,010,508) by Landmark Technology, LLC, an apparently unrelated NPE controlled by the patent's sole named inventor, Lawrence B. Lockwood. The "old" Landmark took a "file-and-settle" approach to litigation; RPX data indicate that most of the NPE's cases were settled or dismissed between six to eight months after the original complaint.

The "new" Landmark appears to be taking a similar approach to litigating the '508 patent. Since launching its campaign in early 2019, *the current plaintiff*, Landmark A, has filed at least 14 patent infringement suits asserting the '508 patent. Like its predecessor, Landmark A rarely pursues a case for even a year, with most cases terminated by voluntary dismissal within three to six months of filing.

More than a dozen of Landmark A's targets have filed complaints for declaratory judgment (DJ) of noninfringement—and in some cases, invalidity—of the '508 patent. The DJ plaintiffs span a wide range of businesses, including a restaurant, a tool distributor, a PVC pipe manufacturer, a manufactured house supplier, and a jeweler.

Some of those DJ complaints (*e.g.*, here and here) point to the NPE's apparent strategy of agreeing to quick settlements to avoid substantive litigation—which they say could lead to, for example, "potentially damaging" rulings on dispositive motions that may negatively impact Landmark A's ability to obtain licensing fees from future targets.

The DJs also take aim at the NPE's frequent and repeated demands for a $65K licensing and settlement fee—a tactic that some believe is designed to extract payment from recipients of assertion letters, with Landmark A knowing that such a payment would be significantly lower than the cost of defending against litigation in federal court.

However, the average license and settlement fee paid may be much lower, argues V. Sattui Winery, a California winemaker that filed a DJ against Landmark A in late 2019. Without specifying the basis for its claim, V. Sattui alleges in a November 2019 amended complaint that the "average settlement amount for a license to the '508 patent is less than one hundred dollars".

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