



Q3 in Review

October 12, 2021

## Q3 in Review: The PTAB Reaches an Inflection Point as DOJ Touts New “Balanced” SEP Policy

The third quarter of 2021 saw NPEs file 18.1% more patent litigation compared to the same period in 2020. Year-to-date NPE activity is also up significantly, even when excluding the impact of certain file-and-settle litigation.

However, the Patent Trial and Appeal Board (PTAB) now finds itself at an inflection point. Rule changes allowing the PTAB to deny institution in America Invents Act (AIA) trials based on the status of parallel district court litigation have led some defendants to instead file more validity challenges as *ex parte* reexaminations, but a recent appellate ruling might make that a more difficult proposition. That said, defendants also received some good news in the form of a legislative reform proposal that could walk back many of the changes that have made the PTAB a more challenging venue for validity challenges over the past few years.

Change also appears to be on the horizon for standard essential patent (SEP) licensing, as the Biden administration released some long-awaited details on its policy toward antitrust enforcement in disputes over fair, reasonable, and nondiscriminatory (FRAND) licensing, while a parallel policy initiative was announced in Europe. Moreover, China’s highest court has upped the ante in the ongoing debate over cross-jurisdictional SEP licensing disputes, confirming that Chinese courts may set the terms of global licenses—a move that might encourage races to the courthouse.

Finally, prolific patent monetization firm [IP Edge LLC](#) took its first case to trial before the International Trade Commission (ITC) in the third quarter, also joining a variety of other familiar plaintiffs in acquiring more patents of operating company origin throughout Q3—as others asserted assets divested by [Intellectual Ventures LLC](#). The third quarter also saw at least one more law firm join forces with a litigation funder, yet another sign of the growing popularity—and acceptance—of third-party funding.

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## Litigation Update: Another Busy Third Quarter for NPEs as IP Edge Keeps Up the Pace

NPEs added 595 defendants to litigation campaigns in Q3 2021, generally in line with the first two quarters of the year. Third-quarter NPE activity was up by 18.1% compared to a below-trend third quarter last year, which may have been impacted by growing backlogs in district courts due to the pandemic. Notably, NPEs had their busiest third quarter since 2016, exceeding the 2018-2020 average by 24.3%.

Year-to-date, NPEs have added 1,786 defendants, a 10.9% increase over the same period in 2020.

Defendants Added	Change Compared to:			
	Q3 2021	Q3 2020	Q3 2018-2020 Average	Q2 2021
NPE	595	18.1%	24.3%	-1.2%
Operating Company	287	9.5%	1.5%	-16.3%
Total	882	15.1%	15.8%	-6.7%

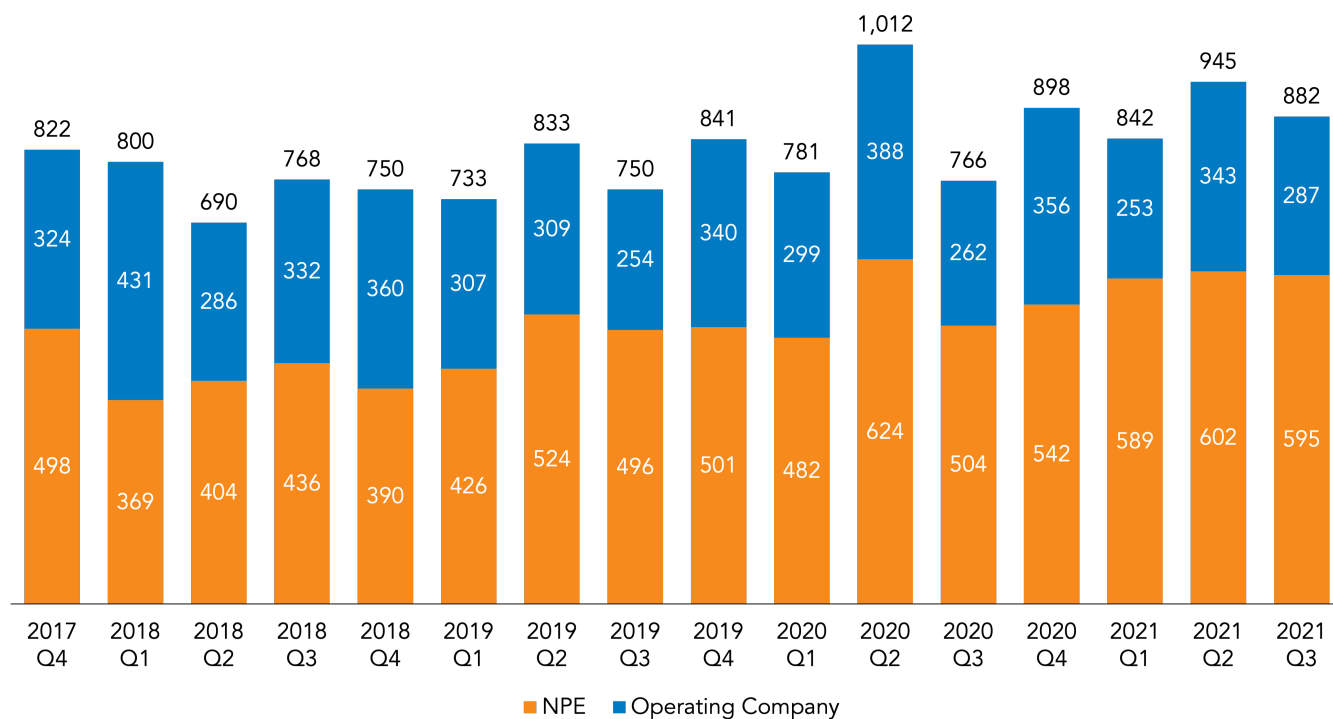
Patent monetization firm [IP Edge LLC](#), in particular, added 155 defendants in Q3, for a total of 462 defendants so far this year—up 16.7% compared to the first three quarters of 2020. IP Edge has maintained a consistent monthly pace of about 50 defendants added per month, putting it on track to hit just over 600 defendants added for the year.

Excluding IP Edge, NPEs added 440 defendants in Q3, for a YTD total of 1,324 defendants added—a still-significant increase of 9.2%. Q3 was the third straight quarter in which NPEs (minus IP Edge) added more than 400 defendants, which has not happened since 2017.

Operating companies, for their part, added 287 defendants in Q3 2021, a 9.5% increase over the same quarter last year but down 16.3% from Q2. Third-quarter operating company filings were broadly in line (+1.5%) with the average for the past three years.

In total (with no NPE plaintiffs excluded), 882 defendants were added to patent litigation campaigns in Q3 2021, or 15.1% more than the year-ago quarter. Third-quarter filings beat the three-quarter trailing average by 15.8% but were 6.7% lower than in the second quarter of this year.

### Defendants Added to Litigation Campaigns by Quarter

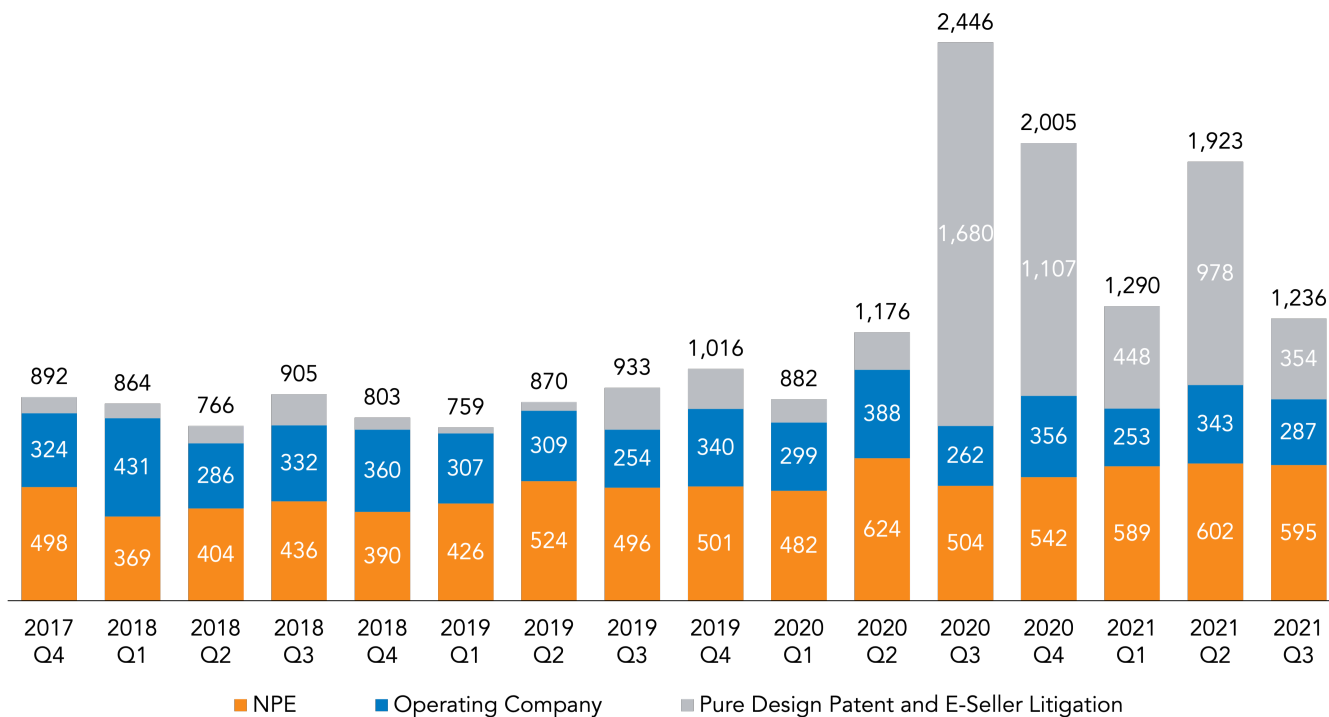


RPX has also continued to see significant levels of litigation filed by a small group of design and utility patent owners targeting copycats and counterfeiters selling products online. As noted in prior quarterly reports, RPX generally excludes such cases from analyses of district court litigation because they tend not to follow the same dynamic as what most companies would consider a typical patent suit: such lawsuits sometimes name hundreds of defendant entities, many of which may be online storefronts for the same ultimate parent; plaintiffs primarily seek injunctive relief, rather than damages; and their cases often end in default judgments.

However, this category of litigation is shown in grey below to illustrate its magnitude. In the third quarter, plaintiffs added 354 defendants to pure design patent and e-seller litigation, 23.3% more than those added to “typical” operating company litigation in Q3. This represents a 63.8% drop from the prior quarter, when 978 defendants were added to such litigation. Q3 2020—the first quarter in which RPX observed a spike in such filings—still sits atop this particular category, with nearly 1,700 defendants added to this type of litigation during that period.

Please note that apart from the graph below, the remaining analyses in this report exclude pure design patent and e-seller litigation.

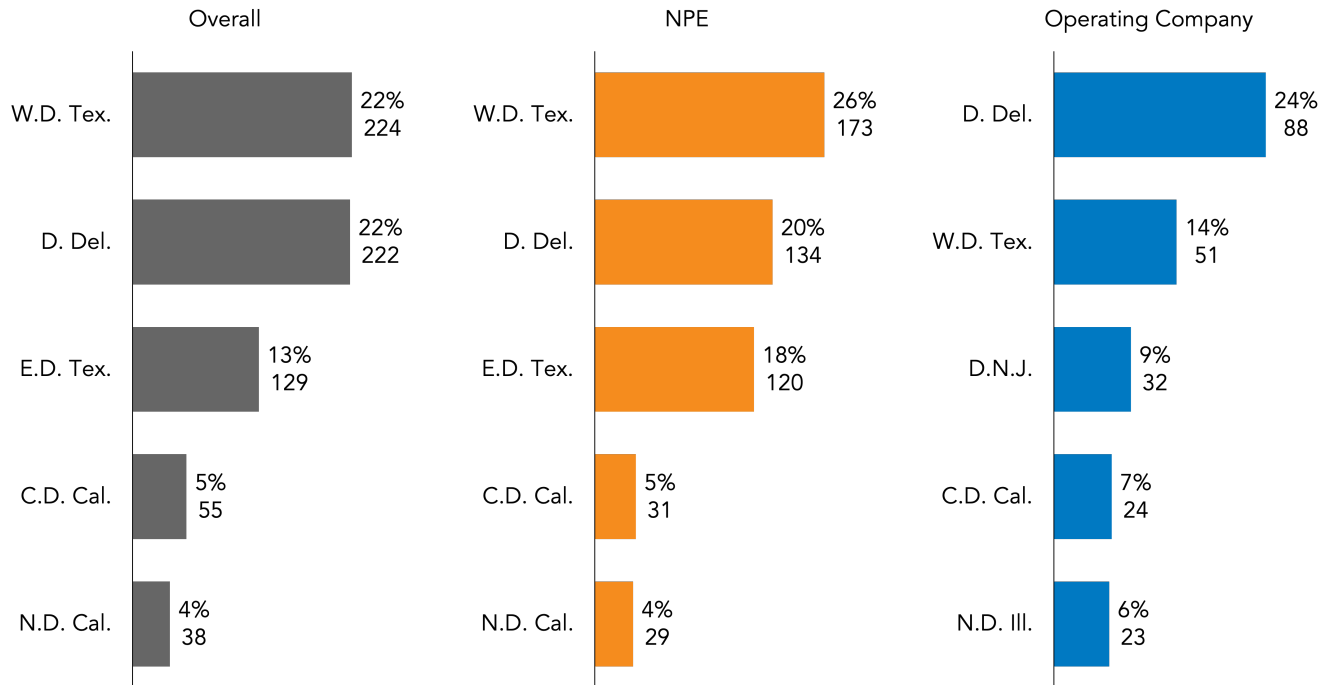
**Defendants Added to Campaigns by Quarter, Including Pure Design Patent and E-Seller Litigation**



## Venue Update: West Texas Remains on Top for NPEs as Judge Albright’s Federal Circuit Feud Persists

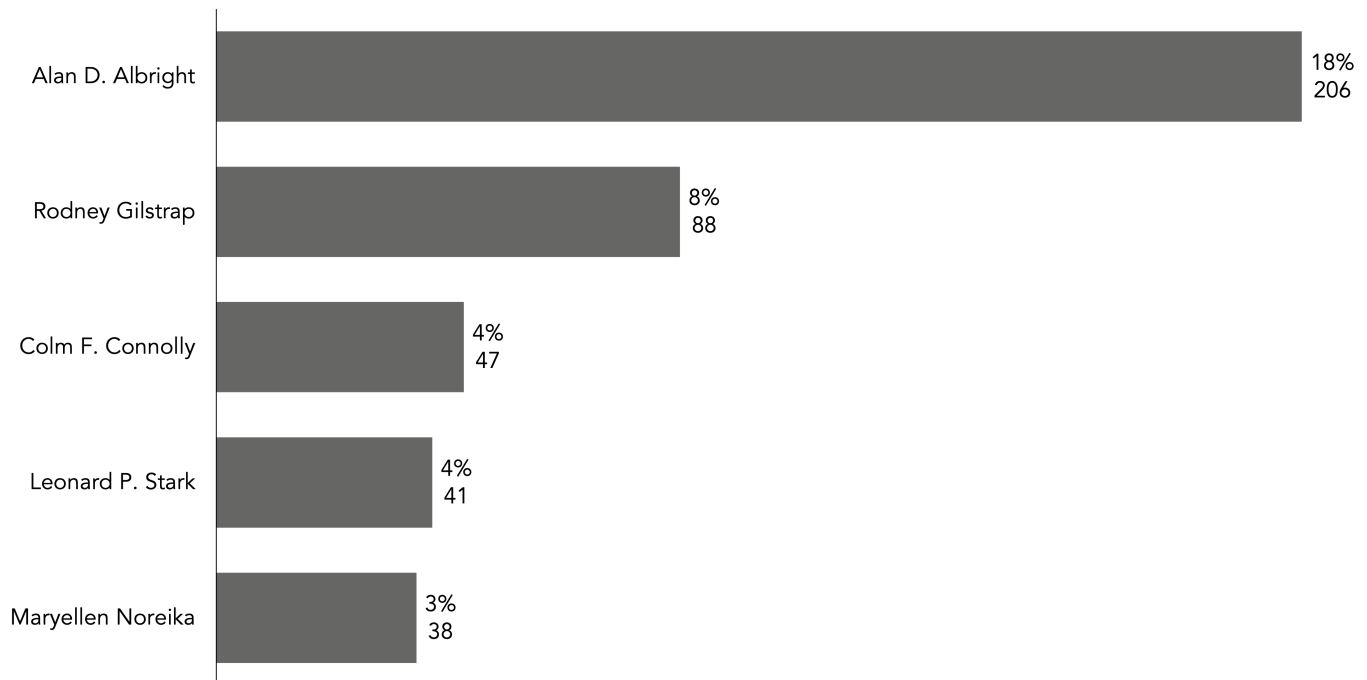
The Western District of Texas and the District of Delaware were essentially tied for first place in Q3 2021 for overall litigation, each seeing just over 220 defendants added to litigation campaigns within that period. For NPE litigation, the Western District held the top spot, with Delaware close behind. On the other hand, Delaware edged out West Texas as the number-one district for operating company litigation. The Eastern District of Texas, an NPE hotspot prior to *TC Heartland*, was the third most popular venue for both overall and NPE litigation in Q3, but not even breaking into the top five for operating company filings.

### Top Patent Litigation Districts in Q3 2021 by Percentage and Defendants Added



District Judge Alan D. Albright of the Western District of Texas was once again the nation’s top judge for patent litigation, with 18% of new patent litigation falling in his courtroom. Judge Albright was trailed by District Judge Rodney Gilstrap of the Eastern District of Texas in a distant second place (8%), who in turn was followed by District Judges Colm F. Connolly, Leonard P. Stark, and Maryellen Noreika of the District of Delaware.

## Top Judges by Defendants Added to Overall Patent Litigation in Q3 2021



Given the popularity of Austin (located within the Waco Division) as a tech hub, and the tightening of venue requirements that occurred as a result of *TC Heartland*, it is perhaps no surprise that patent plaintiffs would gravitate toward the Western District of Texas as a general matter. But the district’s dramatic rise in the rankings can be largely attributed to Judge Albright, who has sought to attract patent litigation by establishing rules designed to streamline and speed up litigation—such as staying most discovery until after the *Markman* hearing and aggressively scheduling earlier trial dates (notwithstanding delays seen last year due to the COVID-19 pandemic). While Judge Albright has [stated](#) publicly that his goal is not to establish a “plaintiff-friendly” venue, this emphasis on trials has arguably played a significant role in making his courtroom a desirable place to file litigation, beyond the inherent appeal of getting claims resolved more quickly.

For instance, Judge Albright has expressed an inclination against staying cases pending *inter partes* review (IPR), suggesting that doing so would interfere with a plaintiff’s right to have a jury trial on their patents. He has also argued against the early application of *Alice*, having previously cited the presumption of eligibility and the difficulty of applying that decision’s two-step test at the pleadings stage—remarking that he generally will not address Section 101 motions until later in the course of litigation: “[T]he great likelihood in my court is that I won’t take up a Section 101 motion until after a *Markman* in the form of a motion for summary judgment”.

Yet among the most prominent reasons Judge Albright’s courtroom might be seen as “sticky” for defendants is his handling of motions to transfer for convenience, which he rarely grants. His handling of this issue has led to an ongoing tussle with the Federal Circuit, which in part has objected to his handling of the substantive factors underpinning such transfer motions in a series of prominent reversals starting in mid-2020. Despite indications in Q2 that he would adjust his approach in response to Federal Circuit pushback, Judge Albright’s subsequent jurisprudence on transfers has indicated otherwise—as highlighted in a [recent wave](#) of new appellate reversals.

Notably, the last day of the second quarter saw the Federal Circuit issue its first precedential decision undoing a transfer order by Judge Albright, faulting him in *In re: Samsung I* for allowing venue “manipulation” by a set of plaintiffs and for misapplying a variety of factors in a similar manner to prior rulings overturned by the appellate court. Subsequent *mandamus* reversals—including a surge of new

decisions handed down as Q3 came to a close—have highlighted the same recurring legal issues, strongly suggesting that Judge Albright is disinclined to change his approach. For example, the Federal Circuit repeatedly held in those cases that he underweighs the convenience for and/or cost of attendance of witnesses (in *Samsung*, *In re: DISH*, *In re: Juniper*, *In re: Google*, and another *In re: Samsung* decision involving another plaintiff), discounts sources of proof in the transferee district (*In re: Juniper*, *In re: Google*), and misapplies factors related to compulsory process and willing witnesses (*In re: Samsung I*, *In re: DISH*, *In re: Hulu*, *In re: Juniper*). The court has also flagged as erroneous Judge Albright’s tendency to count a defendant’s generalized presence in the district—e.g., through local offices not connected to acts of infringement—as supporting the “local interest” factor (*In re: DISH*, *In re: Juniper*, *In re: Google*). And a particularly long-standing point of contention, among those dating back to reversals in 2020, has been Judge Albright’s insistence that his district’s quick time to trial tips the “court congestion” factor against transfer (*In re: Samsung I*, *In re: Hulu*, *In re: Juniper*, *In re: Google*), despite previously adjusting his approach—faulting him, in *Juniper*, for relying on aggressive scheduling orders versus actual statistics on court congestion.

With these latest rulings from the Federal Circuit, it is clearer than ever that defendants sued in West Texas may face long odds if they attempt to get their cases moved elsewhere.

## Market Sector Update: More NPEs Swerve into Automotive Space

A breakdown of NPE district court filing trends by market sector shows a marked increase in litigation hitting certain industries in Q3 2021 compared to that same quarter last year. In particular, NPE litigation targeting the Automotive sector increased by 182%, with filings also rising in sectors like Mobile Communications and Devices (up by 133%), Consumer Electronics and PCs (up by 71%), and Financial Services (up by 48%). Sectors with less NPE litigation compared to Q3 2020 included Biotech and Pharma (with a single defendant added) and Networking (down by 38%).

### Defendants Added to Litigation by NPEs, Percent Change from Q3 2020 to Q3 2021

		Q3 2020	Q3 2021
Automotive		11	31
Biotech and Pharma	-75%	4	1
Consumer Electronics and PCs	71%	65	111
Consumer Products	0%	22	22
E-commerce and Software	-1%	150	148
Financial Services	48%	25	37
Industrial	50%	6	9
Media Content and Distribution	26%	23	29
Medical	20%	10	12
Mobile Communications and Devices	133%	21	49
Networking	-38%	135	84
Other Sectors	160%	10	26
Semiconductors	64%	22	36

While the number of defendants sued in Automotive campaigns remains lower than other sectors, the litigation activity of several well-known plaintiffs in this space reflects sustained NPE interest.

Among the notable Automotive litigation filed in the third quarter was a [new campaign](#) launched by plaintiff [K.Mizra LLC](#) in early July targeting connected vehicle services, asserting a patent that it acquired in 2019 from [Brian Yates's Spectrum Patents, Inc.](#) Several existing campaigns also saw new litigation in Q3—including the automotive navigation campaign kicked off in January by [IP Edge LLC](#) plaintiff [Typhoon IP LLC](#), which [added three more cases](#) targeting infotainment systems with GPS features in late August. Both new complaints assert patents acquired from [Empire Technology Development LLC](#), a subsidiary of [Allied Inventors Management, LLC](#) (AIM), in December 2019. Additionally, inventor-controlled NPE [Blitzsafe Texas, LLC](#) sued a [host of other infotainment system makers](#)—here focusing on features related to mobile device integration and media playback—in early August, just the latest round of a campaign started back in 2015. Also alleging infringement through infotainment systems was [MicroPairing Technologies LLC](#), which [added two more automakers](#) to the campaign that it began in October 2020.

In addition, some familiar plaintiffs pivoted their existing campaigns to encompass automotive technology in Q3. Those litigants included prolific inventor and frequent filer [Leigh M. Rothschild](#), whose [Display Technologies, LLC](#) brought a [new round of cases](#) that included one automaker—once again, with infringement allegations targeting infotainment systems, these ones hit over their support of Bluetooth media playback. Also steering into the auto sector was private equity-backed NPE [Fundamental Innovation Systems International LLC](#) (FISI), which had previously focused its USB charging

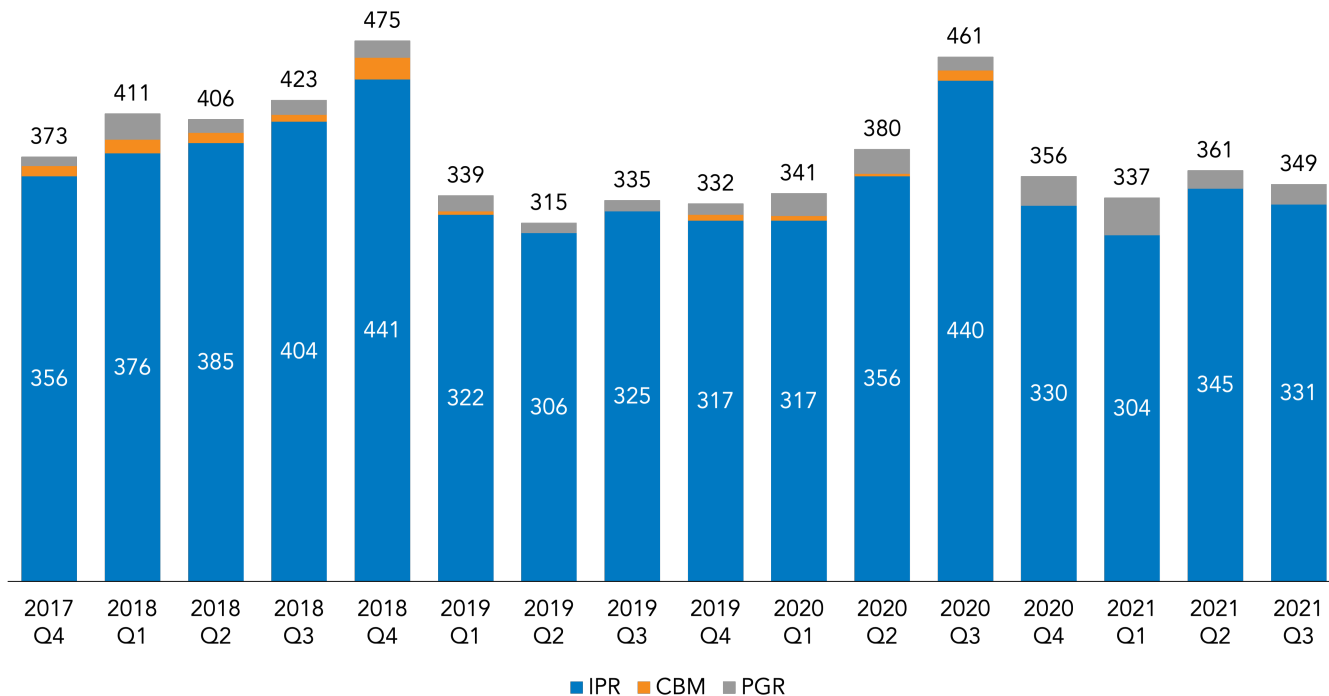


campaign asserting former BlackBerry patents on device makers, but in August [sued a group of automakers and parts suppliers](#) over the provision of USB media ports and vehicles equipped with such hardware.

## PTAB Update: Federal Circuit Gives PTO Discretion over Reexams as Reform Bill Seeks to Bolster AIA

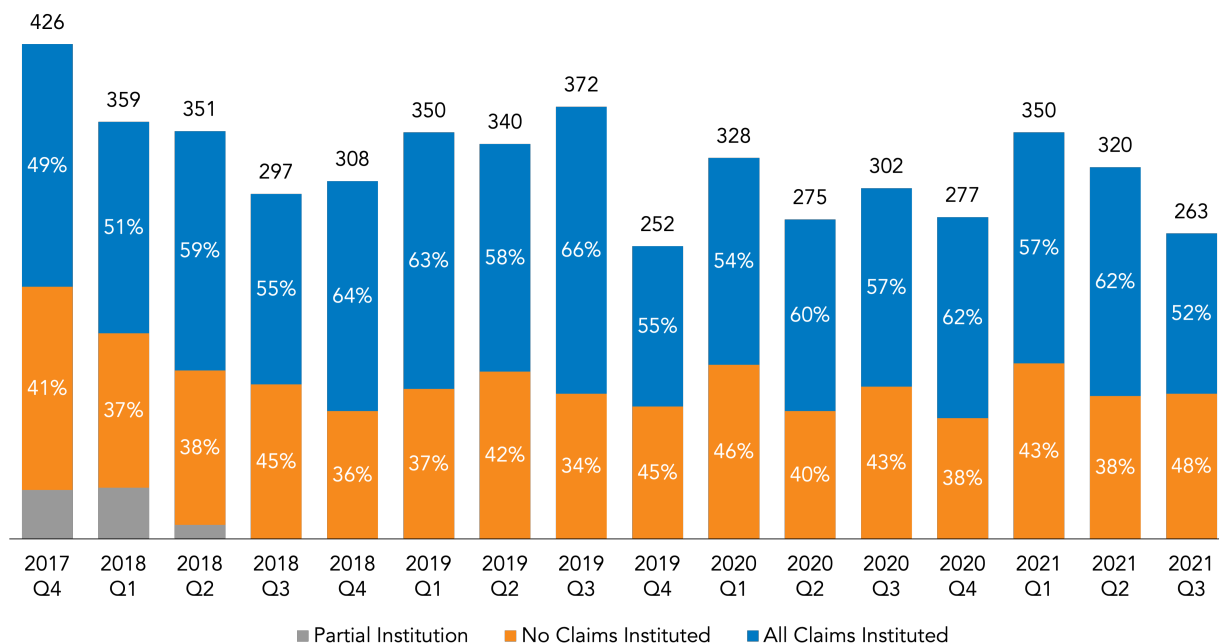
In the third quarter of 2021, 349 petitions for AIA review were filed with the PTAB, including 331 petitions for IPR and 18 petitions for post-grant review (PGR). Filings in Q3 were slightly lower (-3.3%) than in Q2 (when 361 petitions were filed) and 24.3% lower than in the above-trend third quarter last year (which saw 461 petitions).

AIA Review Petitions Filed by Quarter



Additionally, the PTAB instituted trial in 52% of the AIA review petitions addressed during the third quarter, bringing the overall institution rate for the year thus far to 57.2%—down slightly from 58.1% in the entirety of 2020 and more significantly from 61% in 2019.

## AIA Review Institution Rates by Quarter

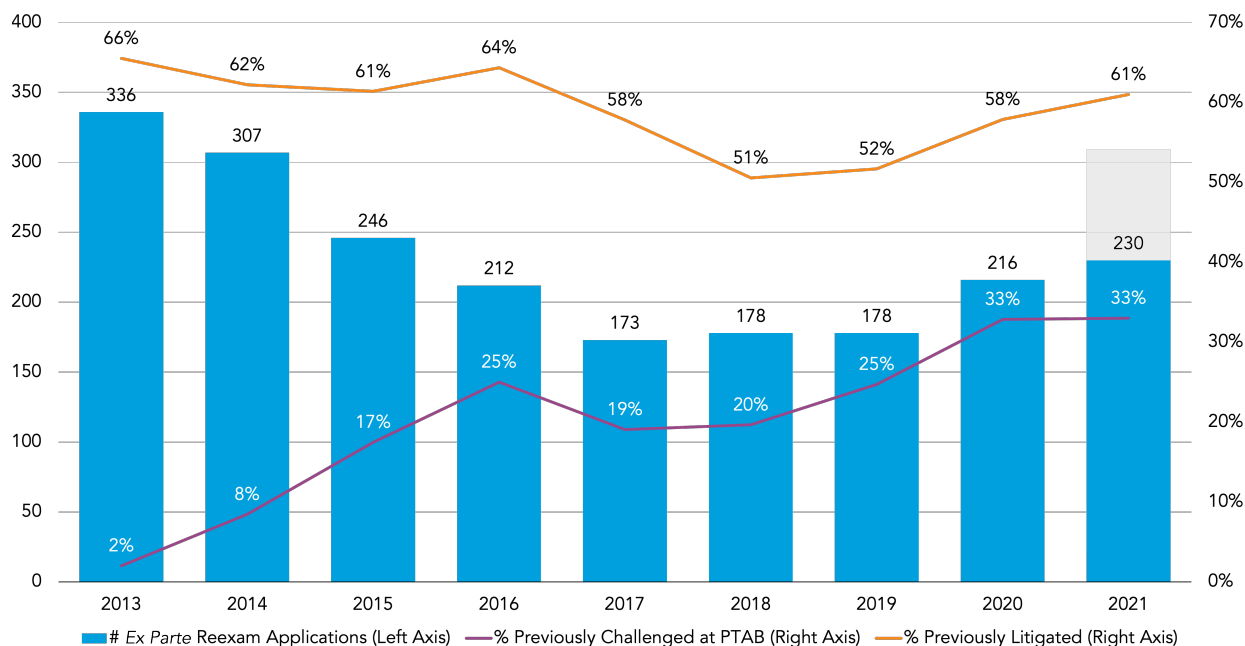


As RPX has previously [noted](#), this decrease in the AIA review institution rate can be partly attributed to the PTAB’s increasing use of discretionary non-merits denials. Over the past few years, the Board has expanded the circumstances in which it will exercise this discretion through a growing body of internal precedent—most controversially, through a pair of rulings known together as the *NHK-Fintiv* rule.

Under *NHK-Fintiv*, the PTAB may deny institution in an AIA review based on the status of a parallel district court case asserting the same patent based on several factors—including one under which the PTAB may reject a petition if the district court’s scheduled trial date falls too close to the deadline for the Board’s final validity decision. This essentially narrows the time within which a district court defendant can file an IPR: companies already have just one year from the date of service to file such a petition, and now face additional pressure to file as early as possible within that window when sued in venues that prioritize early trial dates (chief among them the Western District of Texas). Yet it can be impractical to file an AIA review within the initial stages of litigation, as plaintiffs often do not disclose the specific claims being asserted—*i.e.*, those that the defendant would want to target before the PTAB—until later.

Data indicate that one likely result of *NHK-Fintiv* has been a shift toward *ex parte* reexaminations, as defendants seek an avenue for challenging patents asserted against them that is not subject to the PTAB’s discretionary denials. For one, the filing of requests for reexam is on the rise: 21.3% more were brought in 2020 than the year before, and this trend appears set to continue in 2021 based on projected filings for the rest of the year. In fact, more reexam requests have already been filed in 2021 so far than were brought in all of last year. Additionally, the share of those patents that have been previously litigated in district court is also increasing, accounting for 61% of the patents with reexam requests filed so far this year (up from 58% in 2020 and 52% in 2019). Moreover, a significant portion of patents with reexam requests were also previously challenged via AIA review—going up from 25% in 2019 to 33% both in 2020 and in 2021 to date. These datapoints collectively suggest that defendants are filing more *ex parte* reexams as a result of *NHK-Fintiv*.

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



Note: Data as of 10/5/2021. The 2021 numbers are based on the currently available number of filings for Q1-Q3 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 Q4 2021 based on a simple linear projection.

### Federal Circuit Extends USPTO Discretion to Reexams

Defendants shifting from IPRs to reexams got some potentially unfavorable news as the third quarter came to a close. In its September 29 precedential [decision](#) in *In re: Vivint*, the Federal Circuit held that the same authority giving the Patent Office the discretion to undo institution decisions in AIA reviews also applies to reexams. Moreover, the court held that the USPTO “abused its discretion” by moving forward with the reexam at issue after having previously denied institution in a related IPR due to what it called the petitioner’s “improper” filing strategies—including the filing of multiple, overlapping petitions and the use of invalidity arguments designed to overcome prior PTAB decisions. By giving the USPTO discretion over reexam denials, and by indicating that certain PTAB filing behavior may effectively require the Patent Office to reject a reexam request, the result could be greater uncertainty for reexams in a manner akin to what litigants have experienced before the PTAB due to *NHK-Fintiv*.

### Patent Reform Bill Targets PTAB Pain Points

On the other hand, better news for frequent defendants came in the form of a PTAB reform bill recently introduced by Senators Patrick Leahy (D-VT) and John Cornyn (R-TX). The Restoring the America Invents Act, as described in a [joint press release](#) issued by the two senators, is designed to “bring more transparency into the PTO review process, prevent politicized meddling with PTO decisions, and ensure that these important PTO proceedings are widely available to the public”. Perhaps the most significant change is the proposed bill’s explicit reversal of the *NHK-Fintiv* rule by limiting discretionary denials to circumstances involving multiple invalidity actions as established in 35 USC Section 325(d). However, when there are multiple validity challenges pending against a patent, including an IPR or reexam, the bill would require the USPTO director to decide whether to stay, transfer, consolidate, or terminate any of those proceedings (actions currently left to the director’s discretion). Also, the bill would establish statutory criteria that district courts must apply when considering motions to stay pending IPR, which at present are left to the discretion of the individual judge—allowing some, like Judge Albright, to all but foreclose the possibility of such a stay under current law.

Additionally, the bill would undo a variety of changes favoring patent owners that were previously imposed by the courts. In part, the legislation would put the burden of proof on the patentability of substitute claims on the patent owner (which would undo the Federal Circuit's *Aqua Products* decision placing that burden on petitioners). The bill would also establish that a district court plaintiff's voluntary dismissal of a suit without prejudice does not trigger the statutory time bar requiring IPRs to be filed by the defendant within one year of being served with a complaint (which would reverse the Federal Circuit's *Wi-Fi One* decision holding that the time bar does begin with such dismissals).

That said, other proposed changes are also likely to be received more favorably by patent owners, beyond the requirement mentioned above that addresses the handling of parallel validity challenges. For instance, the bill would extend the IPR estoppel requirement to encompass parties added via joinder, real parties in interest, and privies, further establishing that joined parties are subject to the same estoppel as the petitioner (whereas now, joined parties are only estopped as to grounds raised in the petition). The legislation would also address the concerns raised by some stakeholders about improper political pressure on PTAB administrative patent judges (APJs) by barring *ex parte* communications from any officer with review, supervisory, or disciplinary authority over an APJ, and is not a member of the same panel, from communicating with that APJ about a matter pending before that panel.

Furthermore, the bill would codify the director review process established by the USPTO as a result of the Supreme Court's *Arthrex* decision, as well as introducing some additional requirements—including one that the director must issue written opinions detailing his or her analysis in any director reviews (whereas the few decisions so far have not included written opinions). The legislation would also require formal rulemaking to establish procedural requirements related to the timing of director reviews.

## FRAND Update: Top SEP Venues Pursue Policy Revamps as Courts Give Patent Owners Good News

### United States: Executive Branch and Courts Chart Different Courses

#### *DOJ Announces More “Balanced” Policy on SEP Antitrust Enforcement*

The end of the third quarter brought some long-awaited clarity on the Biden administration’s stance on standard essential patent (SEP) antitrust policy, an area that has seen some marked shifts in recent years under prior leadership. The Obama administration’s policy focused more on combatting patent owner hold-up and envisioned a more limited role for injunctive relief in SEP disputes. But this policy swung in a direction favoring patent owners during the Trump years under Assistant Attorney General Makan Delrahim, who focused more on implementer hold-out, pushed for SEP disputes to be resolved under contract and patent law rather than antitrust, and argued that injunctions should be available in such cases. Now, the Department of Justice (DOJ) has released details about its policy agenda under President Biden, indicating that it will take a middle-ground approach that walks back some of Delrahim’s most significant changes.

On September 29, Dr. Jeffrey M. Wilder, Economics Director of Enforcement for the DOJ’s Antitrust Division, announced this new policy in a [speech](#) at the IAM and GCR Connect SEP Summit. Wilder stated that the Antitrust Division would seek to “chart a balanced course at the intersection of antitrust and intellectual property”. To that end, he underscored the importance of promoting competition, explaining that while the agency would indeed bring antitrust enforcement back into the mix, not all SEP licensing disputes be resolved via antitrust litigation. Specifically, Wilder argued that “[a]ntitrust claims are not a panacea for failed bilateral negotiation” and that “[a]ntitrust is not the right tool for licensees who are simply dissatisfied with the rate being offered to them by an SEP holder”. Additionally, he warned that “antitrust law is not a mechanism for powerful incumbent firms to reduce the royalties they pay to implement standards where competition has not been harmed”.

In explaining the Antitrust Division’s current views on SEPs and antitrust, Wilder indicated that the division’s prior position—that antitrust was never applicable to disputes over fair, reasonable, and nondiscriminatory (FRAND) licensing—did not properly take into account the “context” in which such disputes occur. In particular, Wilder argued that the standard-setting process involves “collective action among horizontal competitors, with the potential to generate procompetitive benefits as well as the potential to confer market or even monopoly power”, which “opens the door for antitrust scrutiny”. Moreover, Wilder asserted that “courts by and large agree”, favorably citing two older appellate rulings, the Third Circuit’s 2007 decision in *Broadcom v. Qualcomm* and the DC Circuit’s 2008 ruling in *Rambus v. FTC*, that both deal with patent owners’ alleged misconduct during the standard-setting process. Those cases, explained Wilder, “strike a balance between the value of providing limited exclusivity through IP protection and the importance of promoting competition under the antitrust laws”.

Wilder also provided some more details about specific policy goals—in part, confirming that the Antitrust Division was working on implementing President Biden’s executive order on competition, which directed the DOJ, USPTO, and National Institute of Standards and Technology (NIST) to revisit a 2019 policy statement on remedies in SEP cases. In addition, Wilder discussed how the DOJ planned to work with standards development organization (SDOs) to “address licensing inefficiencies and enable the dissemination of standardized products to consumers”, focusing in particular on the business review process—under which SDOs may ask the DOJ to determine if it would seek to challenge proposed changes to their intellectual property rights policies. Here, Wilder criticized the prior administration’s posture toward business reviews conducted during the Obama years—in particular, one from 2015 that greenlit changes to the IEEE’s patent policy that clarified patent owners’ licensing obligations. In 2020, Delrahim took the “extraordinary” step of sending a letter to the IEEE that criticized that business

review letter and urged the SDO to revisit that policy. But in April 2021, the DOJ moved the letter to the “comments and advocacy” of its website. Wilder confirmed that this action was taken because Delrahim’s letter “may have shaken confidence in the business-review process and deterred efforts by SDOs to promote best practices”.

Wilder also clarified that the business review process is not meant to be an outright endorsement of a policy—citing the example of Avanci, which received a favorable business review letter in July 2020. Here, Wilder pointedly underscored that in issuing that letter, the DOJ “did not endorse . . . the pool’s approach of licensing only automakers or take a position on what licensing method was best for the automotive industry”.

Notably, Wilder also stated that the DOJ’s SEP agenda “generally aligns with the views of the Federal Trade Commission” (FTC), indicating that the two agencies would now present a united front after taking opposing stances on SEP antitrust issues during the Trump administration. This conflict most notably played out during the *FTC v. Qualcomm* litigation, in which the DOJ opposed the FTC’s case against Qualcomm—helping to convince the Fifth Circuit to reverse a ruling that Qualcomm’s license-for-chips policy violated antitrust law, and that such SEP disputes were better resolved under contract law. To that end, Wilder underscored that the DOJ would use a similar outreach strategy to push its present policy revamp, confirming that the agency would continue to file *amicus* briefs in appellate and district court litigation as well as releasing new policy guidance documents, framing these as part of an effort to ensure transparency.

#### *Fifth Circuit Upholds Result of First Jury Verdict on FRAND Compliance*

As the DOJ seeks to push US SEP policy in a new, ostensibly more balanced direction, a notable appellate decision came down in the third quarter that more squarely favored SEP owners. In late August, the Fifth Circuit issued its ruling in *HTC v. Ericsson*, which affirmed the result of the first jury verdict to address whether a SEP owner had met its obligation to offer a license on FRAND terms. That verdict, finding that HTC had not shown that Ericsson had breached its FRAND commitment, was followed by a judgment from District Judge Rodney Gilstrap that Ericsson’s license offers actually were FRAND. The Fifth Circuit upheld that judgment on appeal—in part, holding that the jury had been correctly instructed on the applicable FRAND commitments under French contract law, rather than US patent law, and ruling that the court had not erred in rejecting other jury instructions that would have “transform[ed] the non-discrimination element of FRAND into a most-favored-licensee approach”. The appellate court also confirmed that the jury verdict, and Judge Gilstrap’s ensuing judgment on FRAND compliance, had a sound evidentiary basis.

Further analysis of the *HTC v. Ericsson* decision can be found on [RPX Insight](#).

### **European Union and UK Pursue SEP Policy Changes**

The DOJ’s new antitrust policy comes as parallel debates over SEP licensing appear poised to heat up in Europe. In July, the European Commission sounded similar themes as the changes telegraphed by Wilder in its [announcement](#) that it would work to develop a new IP framework on SEPs. The Commission stated that the current SEP licensing system is “not transparent, predictable and efficient”, and disclosed that its new “initiative will create a fair and balanced licensing framework and may combine legislative and non-legislative action”. Details about the initiative are forthcoming, with the “roadmap” and “public consultation” periods of its development process yet to be announced. Additionally, the UK government announced its own SEP policy initiative later that month as it detailed its broader IP goals, stating in a [press release](#) that it would “lead a call for views to better understand how the current framework for Standard Essential Patents (SEPs) is functioning to support innovation, and to establish whether change is needed”.

## China: Nation's Highest Court Confirms That Chinese Courts Can Set Global SEP License Terms

In early September, China's Supreme People's Court (SPC) upheld a landmark ruling on SEP licensing, confirming in *Oppo v. Sharp* that Chinese courts may set the terms of global FRAND licenses—the second time that a national court has asserted such jurisdiction since the UK's *Unwired Planet v. Huawei* opinion last year.

The SPC [decision](#) in *Oppo*, dated August 19 but not reported until early September, details the requirements for courts to establish jurisdiction over such SEP disputes—which the court characterized as “special” in that they share characteristics with both contract cases (as they involve disagreements over license terms) and patent infringement cases (as they involve essentiality determinations, infringement claims, and validity claims). However, the SPC found that on balance, SEP disputes are more contractual in nature, since the resulting litigation primarily asks a court to determine the terms and conditions of a necessary license. Additionally, the SPC found that Chinese courts may exercise jurisdiction if a SEP dispute has an “appropriate connection” with China, which can be established if China is the “place where the patent right is granted, the place where the patent is implemented, the place where the patent license contract is signed, or the place where the patent license is negotiated”—with just one factor sufficient to allow the court to hear the case.

The SPC further clarified the legal basis for issuing such rulings despite competing foreign litigation. Per the SPC, under Chinese law, “even if a parallel lawsuit in a certain case is being heard in a foreign court, as long as the Chinese court has jurisdiction over the case in accordance with the law”, then the foreign “litigation does not affect the Chinese courts’ jurisdiction over the case”.

As noted in RPX's [coverage](#) of this decision, the SPC's ruling comes as SEP stakeholders in other jurisdictions seek greater clarity on China's SEP jurisprudence—including the WTO, which in July submitted a request for greater transparency that the Chinese government largely rebuffed in a September 7 response.



## Marketplace Update: IP Edge’s First Trial, More NPEs Assert IV Patents, and a New Firm-Funder Partnership Is Announced

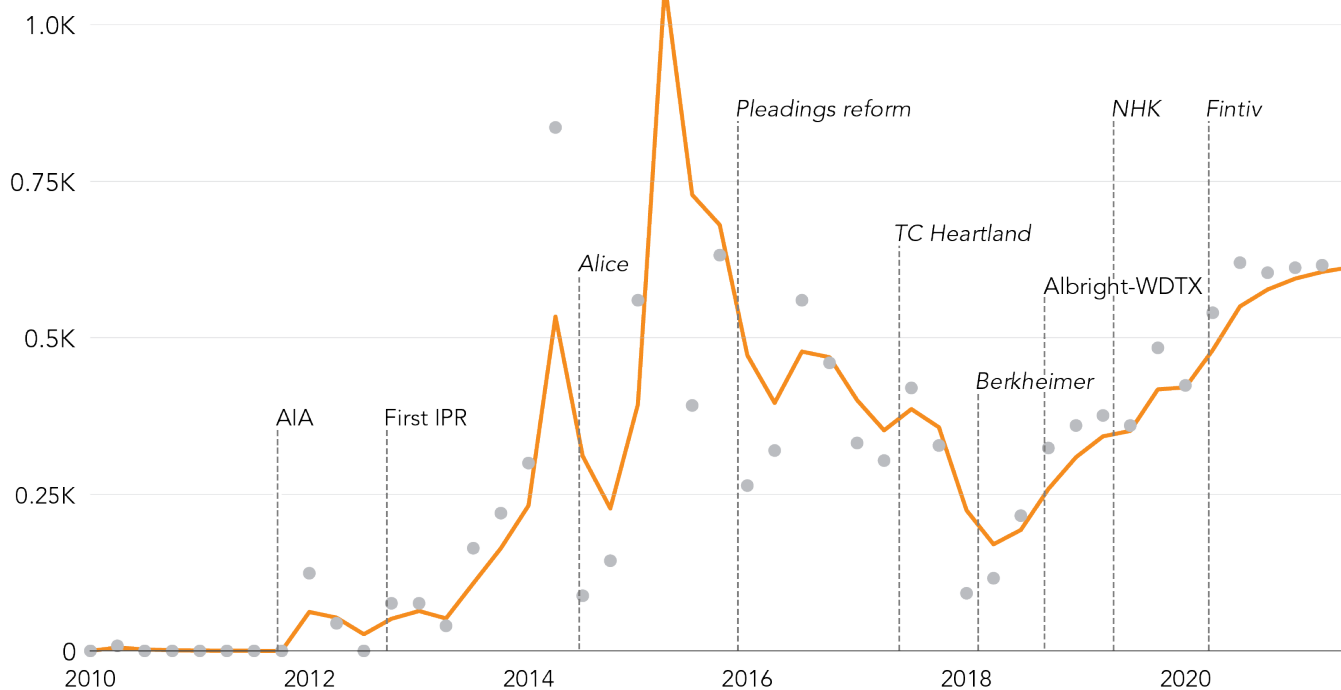
### Amid a Steady Pace of Litigation and Continued Patent Pickups, IP Edge Tries a Case at the ITC

As noted above in this report’s Litigation Update section, prolific monetization firm [IP Edge LLC](#) has been responsible for a significant portion of new NPE filings this year—accounting for nearly 26% of the defendants added to litigation so far in 2021, including 27 new litigation campaigns. While the steadiness of its current filing pace (around 50 defendants per month) is a recent development, IP Edge has consistently been a top filer for much longer.

Indeed, IP Edge has been the most litigious NPE plaintiff each year since 2014, and it has filed dramatically more litigation than any other plaintiff from 2010 onward—adding around 3,700 defendants during that period, with [Acacia Research Corporation](#) holding a distant second at just over 1,300 defendants added.

The volume of this litigation over time is illustrated below. For most of this period, IP Edge has followed the typical playbook of a file-and-settle NPE, litigation volume aside—namely, asserting its patents through numerous, short-lived district court suits, rarely engaging in substantive litigation, and usually dismissing its cases during the initial pleadings stage.

#### 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.

However, this changed in the third quarter, when IP Edge plaintiff [Q3 Networking LLC](#) tried the alleged infringement of several former Siemens patents by respondents CommScope, HP Enterprise, and NETGEAR in an evidentiary hearing before the International Trade Commission (ITC). The case, filed in late 2020, appears to be IP Edge’s first action brought in that venue. For more on that litigation, see “[IP Edge Continues Litigating Former Siemens Patents, Including Through Recently Concluded ITC Hearing](#)” (August 2021). A final initial determination remains pending.

Meanwhile, the firm continues to diversify its portfolio by acquiring patents from various sources, including operating companies, individual inventors, universities, and other NPEs. Notably, in Q3, an [assignment](#) from [France Brevets SAS](#) to IP Edge's [Burley Licensing LLC](#) came to light; the August recording of that assignment (which was executed in March) was quickly followed by the launch of two new campaigns asserting patents among those received from France Brevets: first, Burley Licensing filed separate Western District of Texas suits against Micro-Star International and Walmart, accusing each of infringing a single video quality patent received from France Brevets. Targeted is the respective provision of laptops and computer hardware equipped with graphics processing units (GPUs) that support the NVIDIA NVENC encoder. Later in August, IP Edge's [Nimitz Technologies LLC](#) sued Advance Publications (Reddit), AT&T (Bleacher Report), Pinterest, and Red Ventures (CNET) over a patent generally related to "encapsulating" multiple versions of a data stream in a "stream of packets". Nimitz then filed a new wave of suits as the third quarter came to a close, hitting BuzzFeed, Conde Nast, Skillshare, and Twitter. The plaintiff has trained its infringement allegations on the use of certain streaming protocols—HLS (Bleacher Report, BuzzFeed, Conde Nast, CNET, Skillshare, Pinterest, and Twitter) or MPEG-DASH (Reddit)—in the defendants' respective platforms.

### **IPValue Management Acquires Large Portfolios from Mitsubishi Electric, UMC**

According to USPTO records made public during the third quarter, Irish entity [Marlin Semiconductor Limited](#) [received](#) over 480 US patents from United Microelectronics Corporation (UMC) in June of this year. Irish corporate records reflect ties between Marlin Semiconductor and private equity-backed patent monetization firm IPValue Management (d/b/a IPValue), which has over the years acquired thousands of patent assets directly from operating companies—including more than 1,200 assets [received](#) in Q3 from the display business unit of Mitsubishi Electric.

IPValue describes Marlin Semiconductor's portfolio as comprising over 770 worldwide UMC patent assets related to various aspects of "semiconductor structures, processes, and circuits". The transacted US assets do not appear to have a history of assertion in any US litigation to date. Additional RPX coverage of this transaction is available [here](#).

Announced in July, Mitsubishi Electric's divestment to IPValue's [Trivale Technologies, LLC](#) reportedly involved over 1,200 worldwide patent assets, which the firm describes as encompassing "a broad range of LCD, OLED, and other technologies for high value display products".

As RPX has recently [reported](#), former Mitsubishi Electric patents are also being asserted by multiple Irish NPEs under the control of the hedge fund-backed monetization firm Atlantic IP Services Limited. One of those NPEs, [Arigna Technology Limited](#), took one of its multiple automotive campaigns to the ITC in Q2, arguing the presence of a domestic industry based on the US activities of one of its operating company licensees. More information is available at "[More Mitsubishi Electric Patents Land in NPE Hands](#)" (July 2021). In September, Arigna [launched](#) a third patent litigation campaign involving a former Mitsubishi Electric patent, this time targeting 5G mobile devices.

### **More NPEs Take Former IV Patents to the Courthouse**

Q3 saw NPEs [continue](#) to file litigation over patents received from [Intellectual Ventures LLC](#) (IV), the plaintiffs targeting a range of products and services and asserting patents of disparate origins.

#### *Elite Gaming Tech LLC and Longhorn HD*

Following a March 2021 suit against MediaTek and a late-July suit against Rockchip Electronics, NPE [Elite Gaming Tech LLC](#) fired off a dozen new suits in August, hitting Acer, Alps Electric, Broadcom (LSI), Fujitsu, Hitachi, HP, Lenovo, Marvell, NEC, Samsung, Shenzhen OnePlus Science & Technology Co., and ZTE. As in its cases against MediaTek and Rockchip, as well as its 2020 cases against ASRock, ASUSTek, Giga-Byte Technology, and Micro-Star International, the plaintiff's August complaints were filed in the

Eastern District of Texas and assert overlapping sets of patents of disparate origins—but all received from IV—and generally related to computer hardware. Elite Gaming Tech’s infringement allegations focus on long lists of computing devices (e.g., laptops, tablets, smartphones, etc.), some based on their inclusion of chipsets from Intel or hard disk drives supplied by Western Digital (directly, or by Hitachi Global Storage, which Western Digital acquired in 2012).

Sister NPE [Longhorn HD LLC](#), meanwhile, has launched three litigation campaigns to date, all asserting patents received from IV: the [first](#), begun in May 2018 and targeting various computer hardware; the [second](#), started in April 2019 and focused on networking devices; and the [third](#), kicked off in November 2020 and focused on data migration tools.

Longhorn HD expanded that second campaign in July, adding suits against Elitegroup Computer Systems and Onex (Celestica); it also added Pegatron to its earliest litigation campaign and Kyocera to its latest one. See “[Longhorn HD Continues Assertion of Former IV Patents in Separate Campaigns](#)” (July 2021) for more details.

*M-Red Inc.*

In early August, [M-Red Inc.](#), a subsidiary of publicly traded [Quest Patent Research Corporation](#) (QPRC), sued BBK Electronics (OnePlus) over the provision of smartphones incorporating certain Qualcomm systems-on-chip (SoCs) that use oscillator circuits and on-chip temperature sensors for power management. The NPE asserts the same five patents, received in March 2019 from IV, at issue in March 2021 complaints filed separately against Mitsubishi Electric, Nintendo, and Xiaomi.

Two of the patents-in-suit generally relate to an “oscillator circuit” and originate with Cypress Semiconductor, which assigned the patents to IV as part of a portfolio of nine in a May 2007 transaction; the other three broadly pertain to measuring and/or adjusting for temperature or voltage fluctuations in an integrated circuit and were developed by Airify Communications. Airify was reportedly acquired by Intel in 2004, in August of which the patents were assigned to an IV affiliate, together with more than two dozen other assets.

For more information about M-Red’s campaign and control by QPRC—which has initiated multiple campaigns asserting former IV patents, with IV retaining a financial interest in at least some of the litigation—see [here](#).

*Digital Cache, LLC and Pineapple34, LLC*

The third quarter also saw [Digital Cache, LLC](#) add more defendants to the litigation campaign begun in February 2021. In July, the NPE sued Giga-Byte Technology, Hon Hai Precision Industry (Sharp), and Micro-Star International, followed by Greenliant Systems, LTL Group, Netlist, Patriot Memory, PNY Technologies, Shenzhen Longsys Electronics, and StorCentric in August. The plaintiff asserts a single patent received from IV, generally related to “overwriting nonvolatile memory data”, with the defendants targeted over laptops with solid-state drives that support the TRIM command and garbage collection features.

The sole patent-in-suit originates with Sankyo Seiki; it was assigned to IV in June 2008 in a portfolio of two and subsequently passed to Digital Cache in May 2020 in a portfolio of 25. (IV divested a second portfolio, of more than a dozen additional assets, to Digital Cache that same month.)

The patent-in-suit is among four digital storage patents that have been asserted throughout Digital Cache’s campaign, which the NPE initiated with suits against Kingston, Seagate Technology, Toshiba, and Transcend in February 2021. In April, the NPE added suits against Avant Technology and Western Digital followed by ADATA Technology, NetApp, Panasonic, and Pure Storage in June.

Public records link Digital Cache to [Pineapple34, LLC](#), a Texas-based NPE that also began litigating a portfolio of former IV patents in February 2021, and most recently sued Acer and Fujitsu, in June 2021 (see [here](#) for more on that litigation campaign).

## Another New Law Firm-Litigation Funder Partnership Is Announced

Also during the third quarter, Mishcon de Reya [joined](#) the ranks of law firms striking formal partnerships with litigation funders. The firm announced in early September the launch of a \$200M litigation finance venture called MDR Solutions I—described by Mishcon as “the result of a strategic partnership” with Harbour Litigation Funding, one of the world’s largest privately owned litigation funders.

According to a press release issued by Mishcon, Harbour will contribute £150M to MDR Solutions I, which will be operationally separate from the law firm and “responsible for assessing and investing in prospective cases originated by Mischon de Reya”—including intellectual property disputes.

While London-based Mishcon is particularly well known for its representation of pharmaceutical patent owners before UK and European courts, here in the US, the firm has also represented NPEs, including [ChanBond, LLC](#) and several plaintiffs operating under the [General Patent Corporation](#) or [Marathon Patent Group, Inc.](#) umbrella.

Mishcon’s unveiling of MDR Solutions I came just days before its partnership reportedly approved the firm to go public in a £750M London listing. It also follows a string of other law firm-litigation funder pairings, including that of Willkie Farr & Gallagher with Longford Capital Management LP.

This past June, Willkie and Longford announced that they had entered into a \$50M funding agreement, with Longford providing equity capital to fund attorney fees and litigation costs. Largely considered the biggest US-based litigation funder, Longford has been linked by public records to a number of patent plaintiffs, including [Data Scape Limited](#); [Personalized Media Communications, LLC](#); [Proven Networks, LLC](#); [Solas OLED Limited](#); and the [Regents of the University of California](#).

Towards the end of Q3, Longford [announced](#) the close of its third litigation finance fund, reportedly raising a total of \$682M.

## Additional RPX Patent Market Intelligence

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