

Q4 in Review

Q4 in Review: NPEs Cap Off a Busy 2021 as SEP Policies Evolve in the US and UK

In 2021, NPE activity was up significantly despite ongoing uncertainty caused by the COVID-19 pandemic. The year ended with NPE patent litigation up by nearly 10%, even when omitting the file-and-settle activity of one particularly litigious plaintiff, making it the busiest year for NPEs since 2016.

Operating company litigation remained on an overall downward trend in 2021, although much of the year's decline resulted from a downturn in Hatch-Waxman litigation targeting generic drug-makers. Omitting that distinct category of pharmaceutical litigation, operating company filings have been largely flat for the past several years.

Meanwhile, as President Joseph R. Biden Jr.'s nominee for USPTO director awaits a confirmation vote, the Patent Trial and Appeal Board (PTAB) faces continued controversy over the policies of the prior administration—specifically, the use of discretionary denials in America Invents Act (AIA) reviews. In addition, the Biden administration has proposed replacing a 2019 policy on standard essential patent (SEP) licensing that primarily favors patent owners with one suggesting a more balanced approach, walking back a prior endorsement of SEP injunctions but maintaining some focus on alleged implementer misconduct. Furthermore, an overlapping policy reform initiative is proceeding in the UK, where courts also issued two notable decisions on international SEP licensing issues in Q4.

The fourth quarter also saw a steady flow of patent divestments from operating companies to NPEs, including some linked to familiar and prolific litigants. Several publicly traded patent assertion entities (PAEs) also had an especially active fourth quarter, with regulatory filings revealing notable patent transactions, potential corporate acquisitions, and possible strategic pivots for some long-active players in the patent space. Finally, RPX research indicates that NPEs continue to make widespread use of third-party litigation funding, with other Q4 developments suggesting that the practice has become somewhat normalized in the IP space.

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Litigation Update: NPEs Maintain Filing Streak as Operating Company Litigation Plateaus

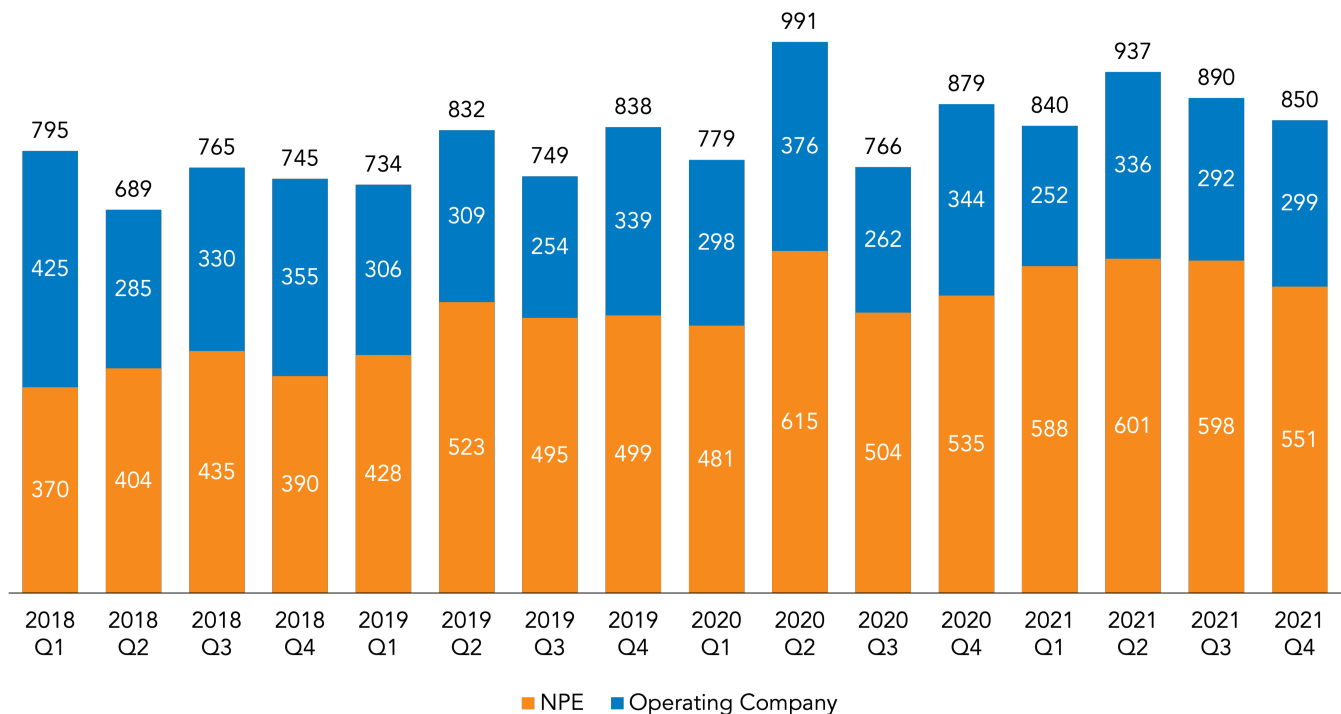
NPEs added 551 defendants to litigation campaigns in Q4 2021—up slightly from the same quarter last year though down by around 8% compared to Q3 and beating the trailing fourth-quarter 2018-2020 average by 16.1%.

Meanwhile, operating companies added 299 defendants in the fourth quarter, or about 13% less than both the year-ago quarter and the trailing average.

Defendants Added	Change Compared to:			
	Q4 2021	Q4 2020	Q4 2018-2020 Average	Q3 2021
NPE	551	3.0%	16.1%	-7.9%
Operating Company	299	-13.1%	-13.6%	2.4%
Total	850	-3.3%	3.6%	-4.5%

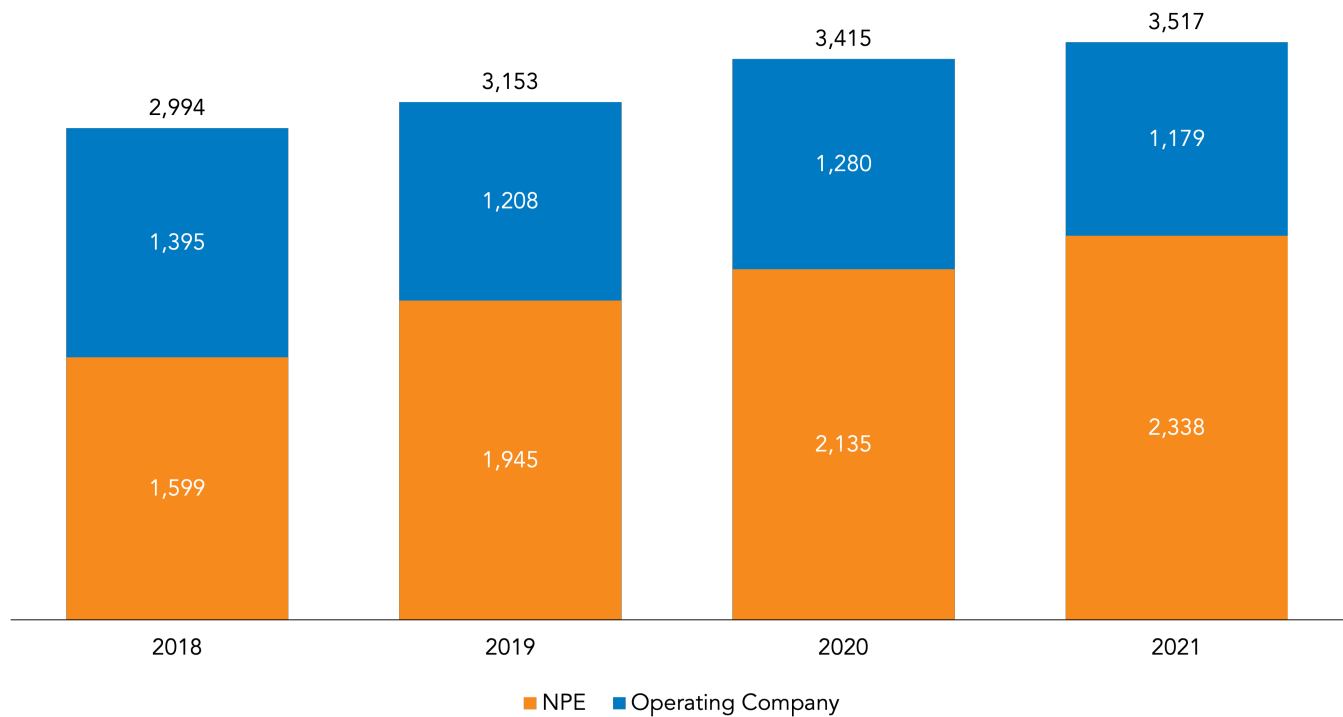
Overall, plaintiffs added 850 defendants to patent litigation campaigns in Q4, down slightly from the year-ago and preceding quarters but just above the trailing quarterly average.

Defendants Added to Litigation Campaigns by Quarter



Pulling back to a yearly view, NPEs closed out 2021 with 2,338 defendants added, or 9.5% more than in 2020's total of 2,135 defendants. Operating companies added 1,179 defendants in 2021, a 7.9% decrease from the prior year.

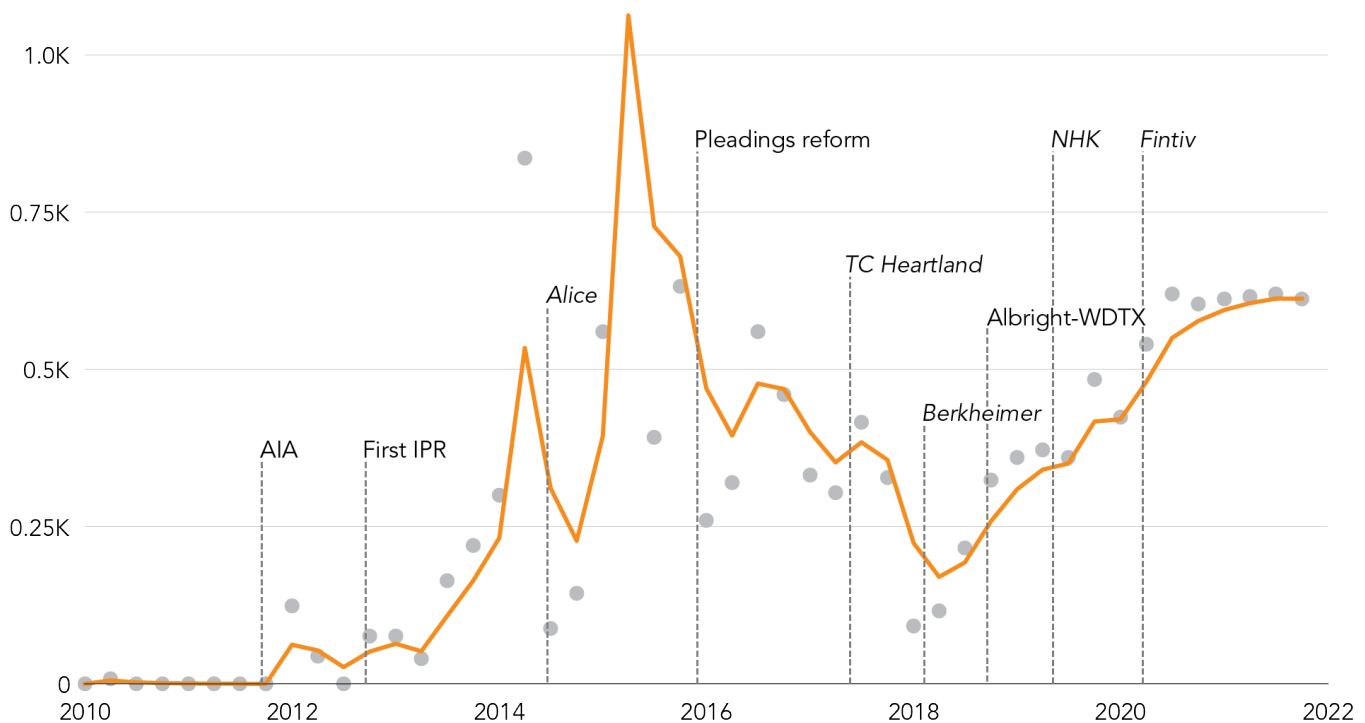
Defendants Added to Litigation Campaigns by Year



IP Edge and NPE Trends: Omitting Top Filer's Activity, NPE Litigation Was Consistently High During in Each Quarter of 2021

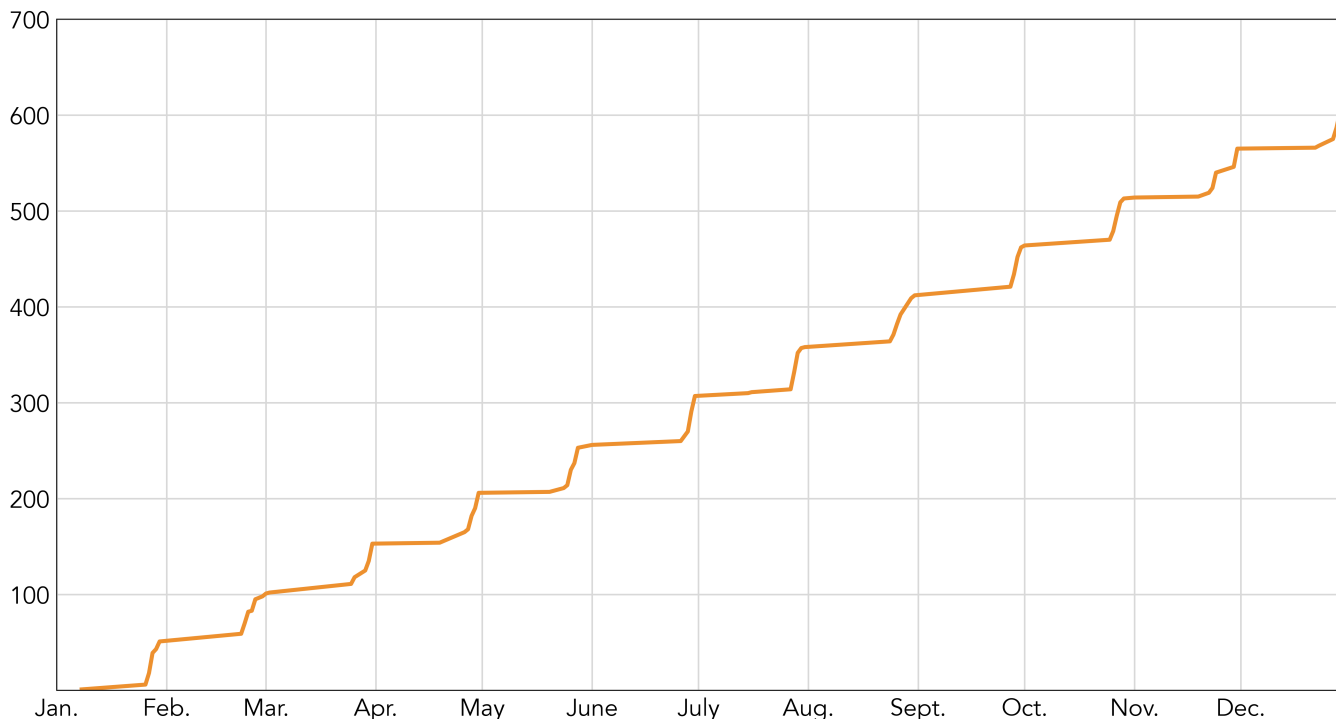
Note that the trend in the NPE numbers cited above is heavily influenced by complaints filed by affiliates of [IP Edge LLC](#), a file-and-settle monetization firm that has brought more litigation than any patent plaintiff since 2010. The volume of this litigation over time is illustrated below.

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



Litigation by IP Edge peaked in 2015 at just over 800 defendants added and declined to under 200 in 2018. Since then, IP Edge has ramped up its activity to a regular, monthly cadence of approximately 50 defendants per month—usually concentrated at the end of each month, as shown below.

Defendants Added by IP Edge in 2021, Month-to-Month (Cumulative)



For most of its history, IP Edge has tended to assert its patents through numerous, short-lived district court suits, rarely engaging in substantive litigation, and usually dismissing its cases during the initial pleadings stage. More specifically, 30% of IP Edge cases are dismissed within 90 days of a complaint, while 95% are resolved within a year. This apparent preference for early settlement also provides a potential explanation for IP Edge's overwhelming post-*TC Heartland* preference for the District of Delaware for its litigation (accounting for around 63% in 2021), as opposed to the Western District of Texas (the current favorite for other NPE plaintiffs, as detailed further below). The latter venue's emphasis on scheduling trials as early as possible may deter plaintiffs like IP Edge that seem disinclined to test their cases on the merits.

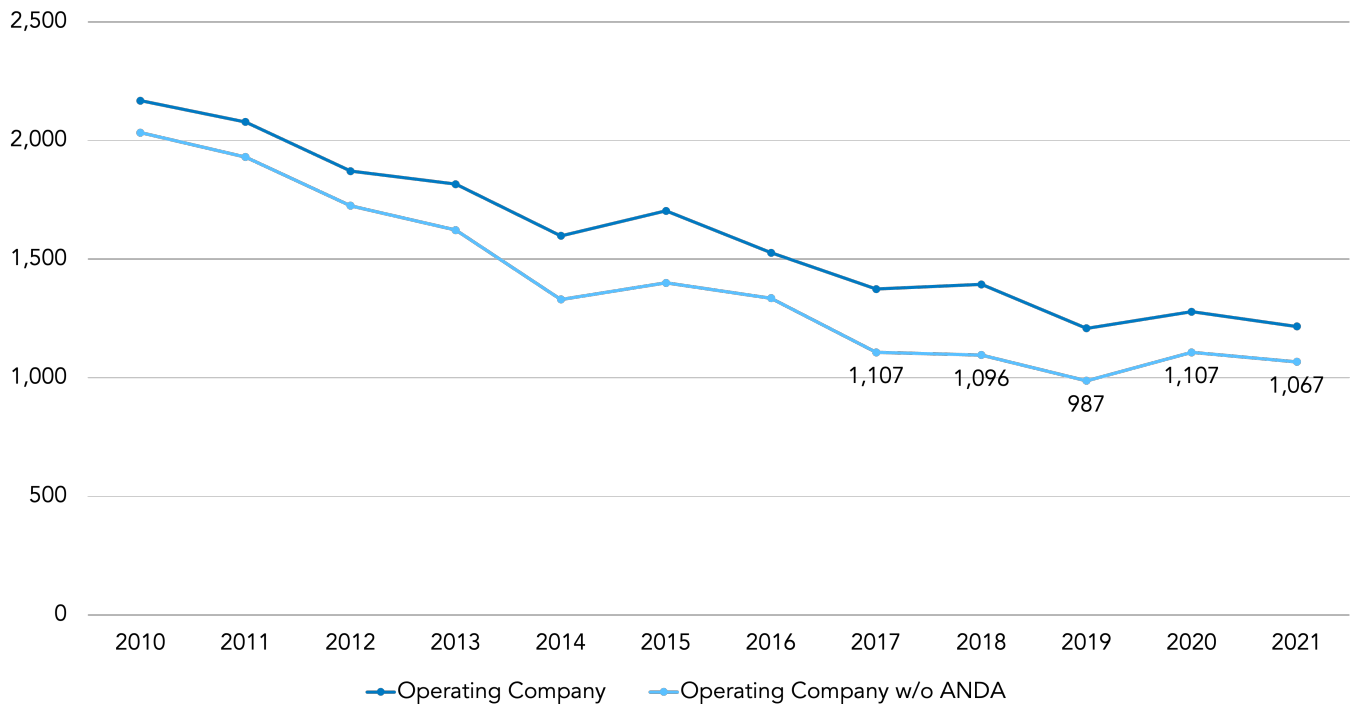
In 2021, IP Edge added 615 defendants, or about 26.3% of all NPE litigation filed during the year. Yet even when excluding IP Edge's activity, NPE litigation was up by a still-significant 9.8%—making it the busiest year for NPEs since 2016, as noted above. Omitting IP Edge also reveals that quarterly NPE litigation was otherwise quite consistent in 2021, with around 400 defendants or higher added per quarter.

Excluding ANDA Litigation, Operating Company Filings Largely Flat Since 2017

In addition, while the operating company numbers reflect a long-term downward trend (with some volatility) that began around 2010, the data are skewed somewhat by the inclusion of litigation alleging infringement through the filing of Abbreviated New Drug Applications (ANDAs). ANDA litigation (*i.e.*, patent infringement litigation filed under the Hatch-Waxman Act) had already been trending downward since 2017, but a more substantial drop began in March 2020, around the time the COVID-19 pandemic was picking up steam. The decline began to level out around the middle of last year, but 2021 still saw the slowest pace of ANDA litigation seen since 2010 (with 153 defendants added in 2021, compared to 162 in 2010).

Excluding ANDA litigation—which is distinct from “typical” operating company litigation in that plaintiffs mainly seek injunctions and the delay of generic drug products, rather than monetary damages—somewhat dampens the overall downward trend in operating company litigation. As seen below, the operating company filings since 2017—excluding ANDA activity—have been largely flat at around 1,000 to 1,100 disputes per year.

Defendants Added by Operating Companies to Patent Litigation by Year, With and Without ANDA Litigation

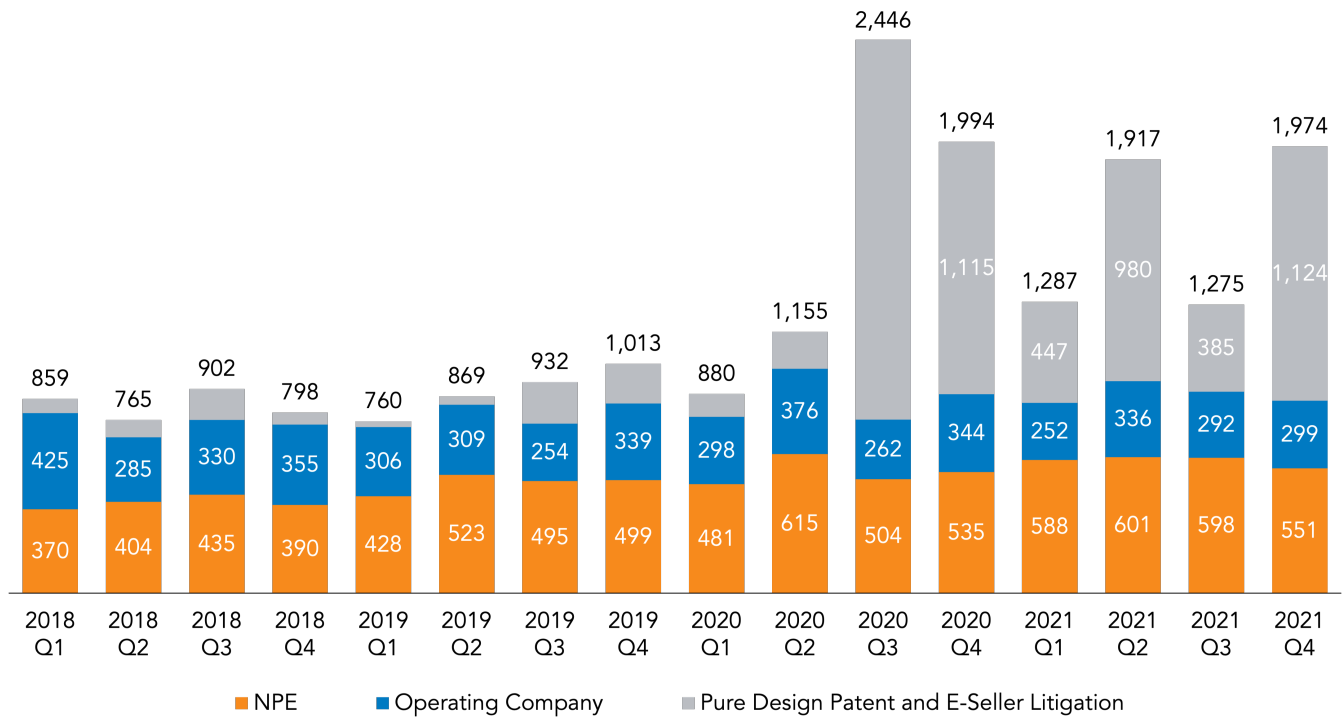


Note also that the operating company data above exclude another distinct category of litigation filed by a small group of design and utility patent owners targeting copycats and counterfeiters selling products online. RPX now excludes such cases from analyses of district court litigation because they tend not to follow the same dynamic as what most companies would consider a typical patent suit: such cases sometimes name hundreds of defendant entities, many of which may be online storefronts for the same ultimate parent. Additionally, plaintiffs mainly seek injunctive relief instead of damages, and their cases often end in default judgments.

This category of litigation, which first began to spike in Q3 2020, is shown in grey below to illustrate its magnitude.

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

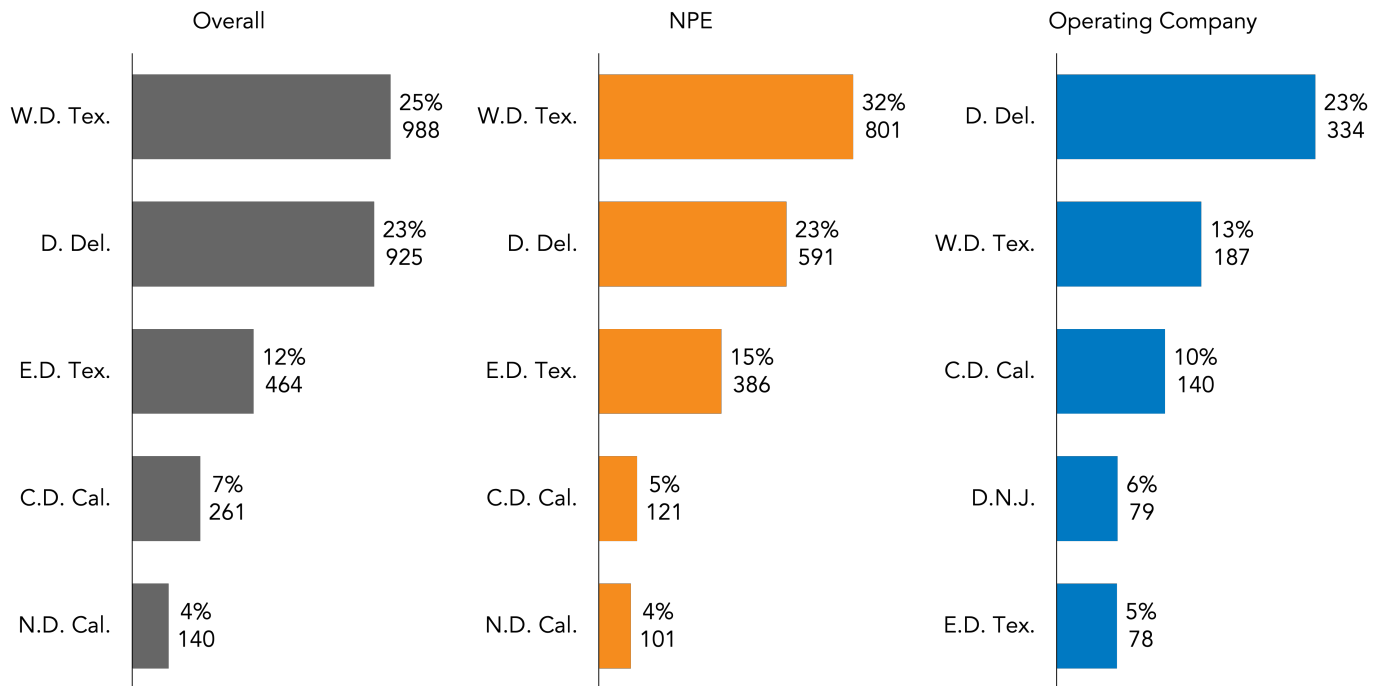
Defendants Added to Campaigns by Quarter, Including Pure Design Patent and E-Seller Litigation



Venue Update: Judge Albright Attracts Congressional Scrutiny as Federal Circuit Reversals Continue

The Western District of Texas was the most popular venue for overall patent litigation and NPE litigation in 2021 as a whole and in the fourth quarter, holding second place for operating company litigation in both periods. Delaware took second place for both overall litigation and NPEs filings, but held the top spot for operating companies, in both 2021 and Q4. Additionally, the Eastern District of Texas came in third for overall and NPE litigation—again in both periods—but saw the fifth most filings for operating companies, for which the number-three venue was the Central District of California.

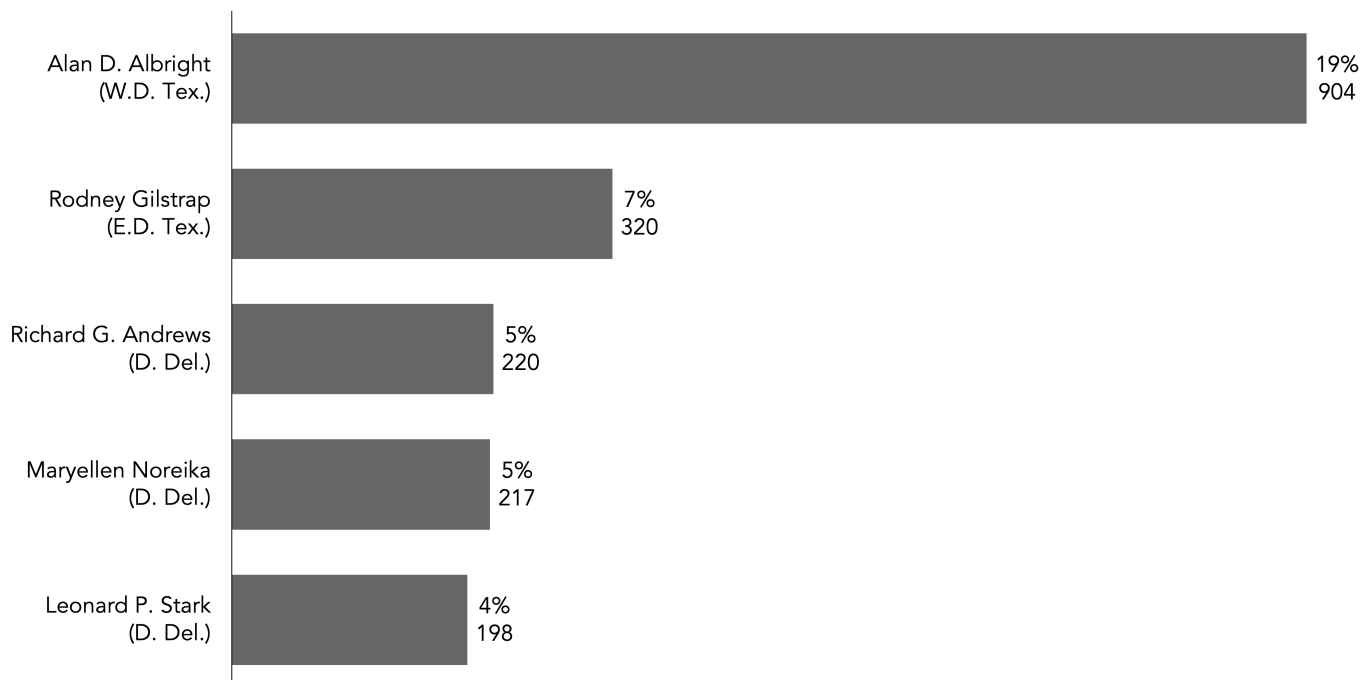
Top Patent Litigation Districts in 2021 (Full Year) by Percentage and Defendants Added



The top judge for patent litigation in both 2021 and Q4 was District Judge Alan D. Albright, who has played a key role in the Western District of Texas's rise to the top of the venue charts. In 2021, 19% of all patent litigation nationwide fell in his courtroom (rising to 21% for Q4).

Since taking the bench, Judge Albright has openly sought to attract patent cases to his district; indeed, as noted in a recent [retrospective](#), he has said that he took his position because he thought Waco was "perfect place to try and establish a serious venue for sophisticated patent litigation", and even gave a presentation to the American Intellectual Property Law Association titled, "Why You Should File Your Next Patent Case Across the Street from the 'Hey Sugar'" (a reference to a candy store near his courthouse).

Top Judges by Defendants Added to Overall Patent Litigation in 2021



Judge Albright has also given plaintiffs concrete reasons to prefer his courtroom, including by establishing rules designed to streamline and speed up litigation before him as well as taking a restrictive posture toward certain types of defensive motions. For example, he has expressed general inclinations against staying cases pending the outcome of AIA reviews (citing his belief in the importance of jury trials) and against granting early patent eligibility motions under *Alice*.

That said, the end of the year did see some notable exceptions to those plaintiff-centric tendencies, including Judge Albright's decision to grant a stay in litigation filed by DynaEnergetics due to a pending AIA trial—although the circumstances are arguably somewhat distinct. Specifically, the stay contemplated the outcome not of an *inter partes* review (IPR) but a post-grant review (PGR), which has a broader preclusive effect on district court litigation due to the availability of more grounds for challenging patent claims; moreover, the USPTO had also granted a request for *ex parte* reexamination of the patent. Meanwhile, Judge Albright appears to have recently [invalidated patents under *Alice* for the first time](#) based on unrelated challenges brought by Facebook and Intel—for the former case, granting summary judgment on the eve of trial; and for the latter, deciding the defendant's Rule 12 *Alice* motion over a year after filing.

However, perhaps Judge Albright's most distinctive tendency is his substantive handling of convenience transfer motions, which he has rarely granted since taking the bench—setting a high bar for defendants seeking that relief. In the summer of 2020, this trend began to draw the ire of the Federal Circuit, which issued a trickle of *mandamus* reversals that year that became a wave in 2021 as Judge Albright gave increasingly strong signals that he would not adjust his approach. Indeed, by the time the year came to a close, the court had reversed Judge Albright's transfer rulings on *mandamus* a full 18 times, with nine of those reversals occurring in the fourth quarter alone.

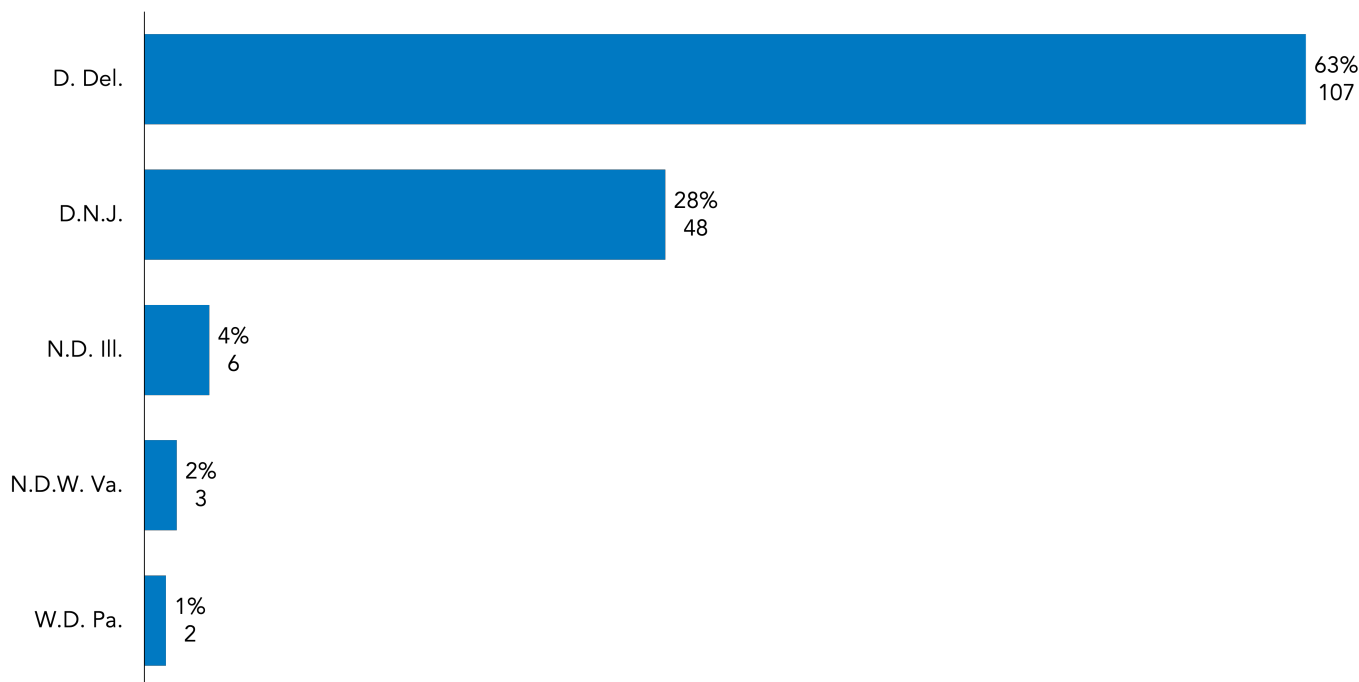
Judge Albright's handling of convenience transfers, as well as his outreach to plaintiffs and the resulting rush of litigation, have also attracted the attention of Congress. On November 2, Senators Thom Tillis (R-NC) and Patrick Leahy (D-VT) wrote to Chief Justice John Roberts, in his capacity as presiding officer of the Judicial Conference of the United States, complaining that Judge Albright's work to attract patent cases was "unseemly" and decrying the "extreme concentration of patent litigation in one district" that has resulted. They also raised concerns over his district's divisional filing rules that permit

plaintiffs to file directly in their desired division—which allows litigants to effectively pick a judge when the division has just one (as is the case in Waco with Judge Albright). The senators asked for a study on abuses of this practice. On December 15, at the direction of Chief Justice Roberts, Eastern District of New York Judge Roslynn Renee Mauskopf responded to the senators in her capacity as director of the Administrative Office of the United States Courts, stating that the Judicial Conference “strongly supports” random case assignments and informing them that the Committee on Court Administration and Case Management would study the issue further. Chief Justice Roberts then addressed the issue in the Supreme Court’s [2021 Year-End Report on the Federal Judiciary](#), writing in part that judges could “work in partnership with Congress in the event change in the law is necessary”.

ANDA Litigation Still Clustered in Delaware and New Jersey Despite Narrowed Venue Options

2021 also ended with the vast majority of ANDA litigation concentrated in Delaware and New Jersey, historically the hotspots for such activity. This was perhaps unexpected in the wake of the Federal Circuit’s November 2020 ruling in *Valeant v. Mylan*, which narrowed where venue is proper for ANDA suits. The decision relates to the prong of the patent venue statute (28 USC Section 1400(b)) under which venue is proper in part where acts of infringement have occurred—and in particular, the manner in which that prong is applied for ANDA cases, since under Hatch-Waxman, the act in question is the filing of the ANDA itself with the Food and Drug Administration (FDA).

Top Districts for ANDA Litigation in 2021 by Defendants Added



In *Valeant*, the Federal Circuit held that for venue purposes, acts of infringement occur “only in districts where actions related to the submission” of an ANDA take place, and not where the distribution of generic drugs described in the ANDA is contemplated. One year later, on November 4, 2021, the court clarified that holding in *Celgene v. Mylan*, rejecting the argument that the filing of an ANDA has a nationwide effect “felt” in any district. The Federal Circuit further explained that the defendant’s sending of a notice letter asserting noninfringement or patent invalidity (a “paragraph IV letter”) into a particular district is not an act of infringement, as the filing of an ANDA is a prerequisite to send the paragraph IV letter in the first place.

While some had anticipated that *Valeant* would lead to a dispersion among other venues akin to the exodus from the Eastern District of Texas that occurred in the wake of *TC Heartland*, which reinstated a

narrower view of the patent venue statute's first prong, wherein a defendant "resides" for venue purposes in a company's state of incorporation, that has not occurred. It is not entirely clear why ANDA litigation has remained concentrated in Delaware and New Jersey, though [some](#) have posited that this could be due to a slowdown in ANDA filings or fears over COVID-related delays. It is also possible that plaintiffs will seek to consolidate cases filed in generic drugmakers' home districts with others properly brought in Delaware or New Jersey through multi-district litigation.

Market Sector Update: Financial Services Litigation Doubles in 2021

A breakdown of NPE district court filing trends by market sector shows that litigation hitting the Financial Services market sector saw the greatest uptick in litigation during 2021—seeing 142 defendants added, or double the amount from the prior year. Forty-three of those defendants were added during Q4. Other sectors with increases included Mobile Communications and Devices (up by 35%), Media Content and Distribution (up by 30%), and Consumer Electronics and PCs (up by 24%). Sectors with less NPE litigation compared to 2020 included Biotech and Pharma (down by 50%, although this represents a decrease of just nine defendants) and Industrial (down by 42%).

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

		2020	2021
Automotive	3%	89	92
Biotech and Pharma	-50%	18	9
Consumer Electronics and PCs	24%	297	368
Consumer Products	3%	73	75
E-Commerce and Software	9%	572	624
Financial Services	100%	71	142
Industrial	-42%	43	25
Media Content and Distribution	30%	97	126
Medical	-10%	39	35
Mobile Communications and Devices	35%	117	158
Networking	-11%	486	432
Other Sectors	24%	85	105
Semiconductors	-1%	148	147

NPEs launched eight new Financial Services campaigns in 2021, half of which saw additional litigation in Q4—including some from a host of familiar litigants. Among those plaintiffs were [Liberty Peak Ventures, LLC](#), a [Dominion Harbor Enterprises, LLC](#) subsidiary that added a new case against Regions Financial to the payment card campaign that it began in July 2021, asserting patents from a portfolio of former American Express patents that it acquired from [Intellectual Ventures LLC](#) in May 2018. Also hitting various financial services defendants throughout 2021 was the search and analytics campaign waged by [Acacia Research Corporation's R2 Solutions LLC](#), with an investment banking platform among the accused products hit by a new wave of litigation filed in late November. Two other 2021 campaigns focused more squarely on financial services included one from [Auth Token LLC](#), which began filing litigation in April and has hit over 30 defendants over the provision of EMV payment cards (including 19 defendants added in Q4) (details [here](#) and [here](#)). Moreover, [Ward Participations BV](#) added [five banks](#) to the mobile payment campaign that it kicked off in August.

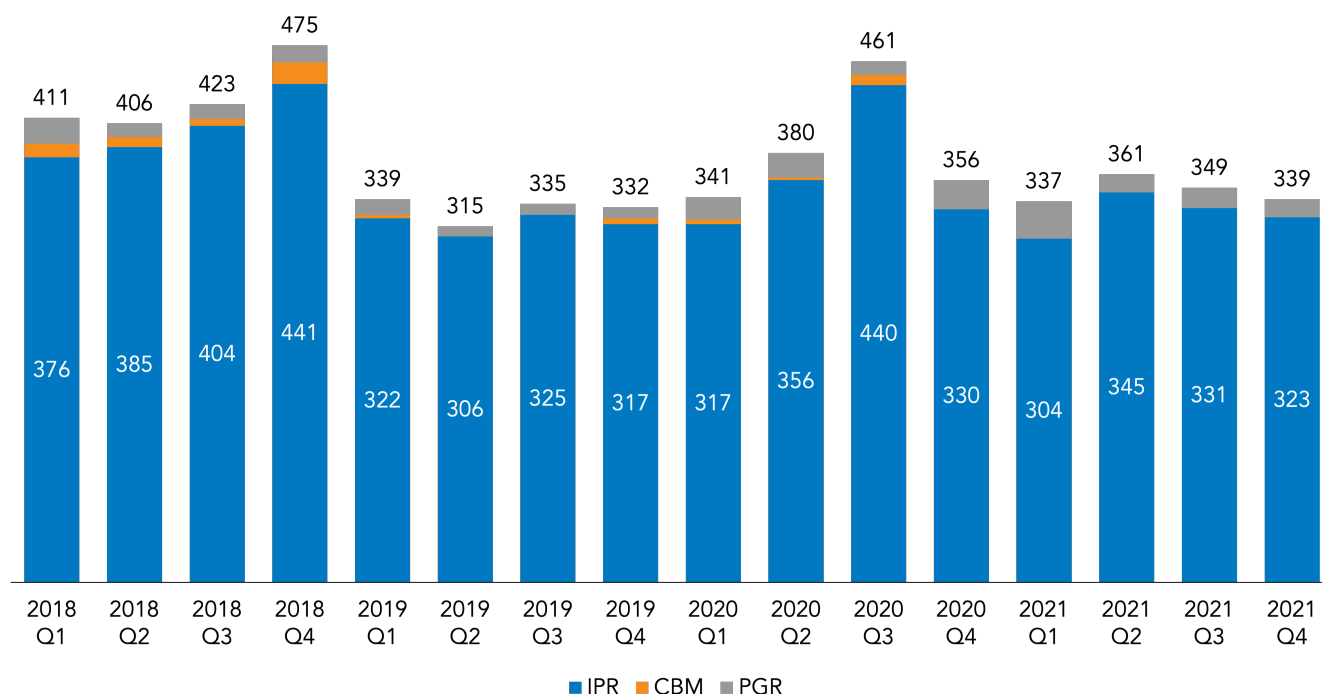
Additionally, RPX tracked several other pre-2021 campaigns hitting the financial services sector that also saw new litigation in Q4. Those campaigns included litigation from two well-known patent monetization firms: [IPValuation Partners, LLC](#) plaintiff [Lupercal LLC](#) added another case in October to the mobile check deposit campaign it has been waging since March 2019, while [Equitable IP Corporation's Communication Interface Technologies LLC](#) added two financial services providers to its mobile app notification campaign as part of a [larger wave of suits](#) filed in October 2021. Two inventor-controlled plaintiffs also joined the fray, including [Texas Secure Authentication, LLC](#) (focused on the use of multi-factor authentication methods in online banking and Internet services) and [Textile Computer Systems, Inc.](#) (suing over payment cards), while inventor and individual plaintiff [William Grecia](#) added another bank to a broader litigation campaign encompassing payment systems that dates back to 2013. Still

more plaintiffs adding financial services defendants to existing campaigns were [Authwallet LLC](#) (targeting payment authorization technology) and [Cedar Lane Technologies Inc.](#) (targeting payment kiosks).

PTAB Update: *NHK-Fintiv* Debate Plays Out Before Supreme Court and Congress

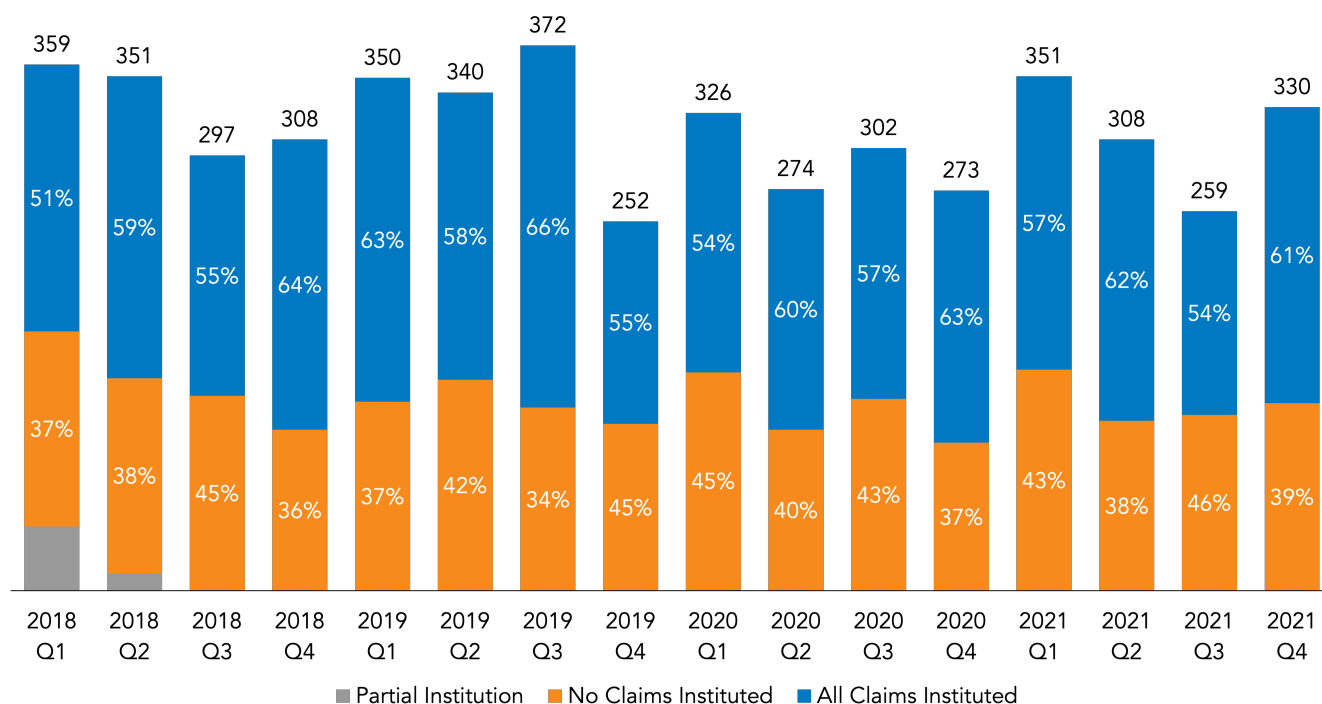
In the fourth quarter of 2021, 339 petitions for AIA review were filed with the PTAB, including 323 petitions for IPR and 16 petitions for post-grant review (PGR). Filings in Q4 were around 3% lower than Q3 2021 (when 349 petitions were filed) and about 5% less than the fourth quarter last year (which saw 356 petitions).

AIA Review Petitions Filed by Quarter



Additionally, the PTAB instituted trial in 61% of the AIA review petitions addressed in Q4, bringing the 2021 institution rate to 58.7%—slightly higher than 2020's 58.2%, but still down from 2019's 61%.

AIA Review Institution Rates by Quarter



The dip observed from 2019 to 2020 may be attributed in part to the PTAB's use of discretionary non-merits denials, based on criteria established through a growing body of internal precedent. While institution rates appear to have leveled out in 2021, such practices have remained a source of heated debate and uncertainty among stakeholders—especially the Board's practice of discretionarily denying institution due to the status of parallel litigation, through factors established in a pair of precedential decisions known together as the *NHK-Fintiv* rule.

A particularly impactful *NHK-Fintiv* factor has been one allowing the PTAB to consider the trial date scheduled in parallel district court litigation, and to deny institution when that date is too close to the deadline for the Board's own validity decision. When a defendant is sued in a venue that tends to schedule trial dates as early as possible—among them the Western District of Texas—this can force that defendant to file a petition as early as possible to avoid a discretionary denial. Moreover, for efficiency's sake, a defendant must typically wait to file an AIA review until it knows what the asserted claims are, and a plaintiff typically does not disclose them at the outset of litigation—further compressing the defendant's one-year statutory window for filing a PTAB petition.

Appellate Challenges Press On Before Supreme Court

The *NHK-Fintiv* rule has sparked several challenges since its inception, including a California complaint filed by a coalition of tech companies that was [dismissed](#) in November 2021. That complaint asserted that *NHK-Fintiv* “has dramatically reduced the availability of IPR, regardless of the weakness of the patent claims being challenged, thereby undermining IPR's central role in protecting a strong patent system”. The plaintiffs further alleged that the rule conflicts with the AIA, that it is arbitrary and capricious, and that it violates the Administrative Procedure Act (APA) because it had not been “adopted through notice-and-comment rulemaking”. But the California court ruled that the lawsuit was barred under the US Supreme Court's 2016 decision in *Cuozzo Speed Technologies v. Lee*, which precludes appellate review of institution decisions and has since been extended to matters “closely related” to institution.

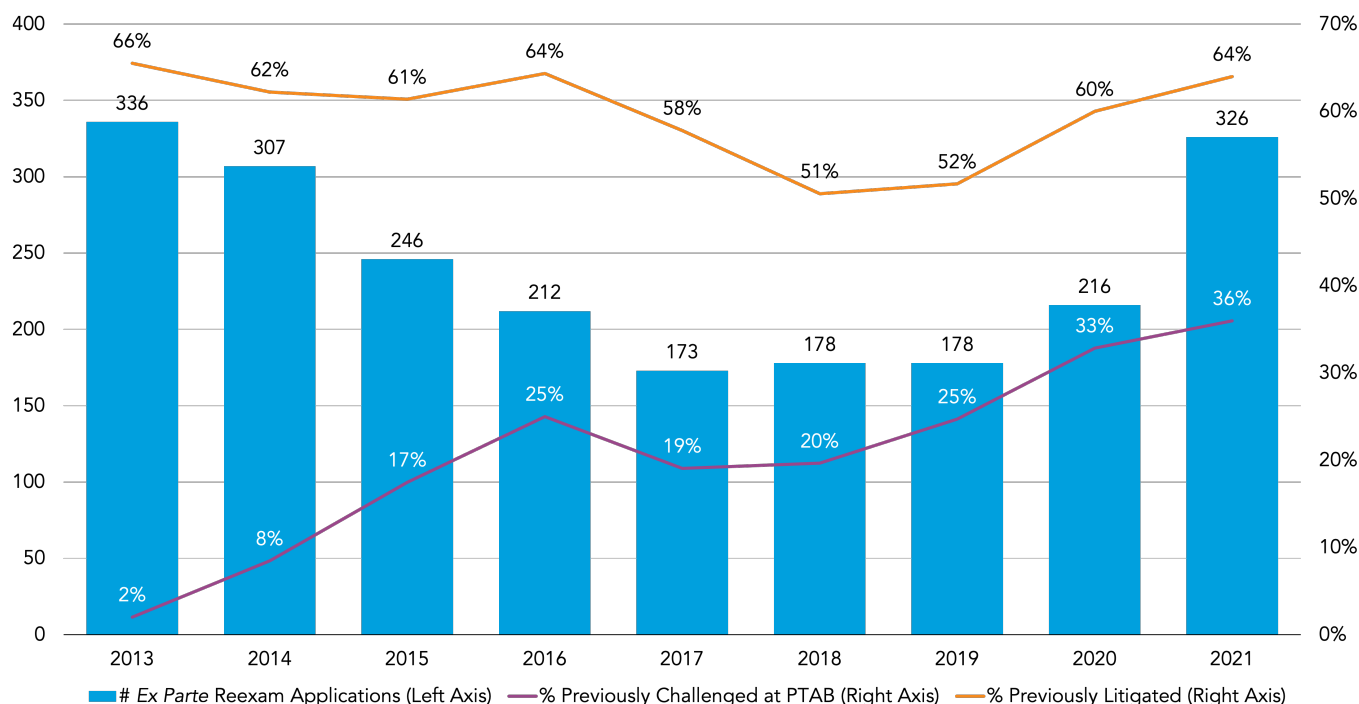
Meanwhile, on January 19, the Supreme Court rejected two petitions for *certiorari* challenging the *NHK-Fintiv* rule. The first of those was filed by Apple in July 2021, challenging a December 2020 Federal Circuit decision that dismissed its direct appeal of discretionary denials in two IPRs based on an [earlier ruling](#) that rejected another company's similar appeal under *Cuozzo*. The second petition, filed by Mylan in August, stems from another Federal Circuit opinion—its March 2021 ruling in [Mylan v. Janssen](#)—establishing that appellants face an extremely “narrow” path for challenging an *NHK-Fintiv* denial: direct appeals are barred under *Cuozzo*, while *mandamus* relief is only available to address a “colorable constitutional claim”. The US government filed briefs in opposition in the Apple and Mylan Supreme Court appeals, while others filed *amicus* briefs in support of the first two petitioners—with Roku and groups including ACT | The App Association, the Computer and Communications Industry Association, and Leading Innovators backing Apple, and Intel and the Association for Accessible Medicines backing Mylan. A third petition filed by Intel on December 13, contesting the Federal Circuit's denial of another direct appeal in light of *Mylan*, remains pending.

***NHK-Fintiv* Has Led to an Upswing in Reexam Requests**

Data show that defendants have increasingly shifted toward *ex parte* reexamination as an apparent result of *NHK-Fintiv*, seeking a process for challenging patent validity that may not be subject to the same level of discretion. In fact, the filing of requests for reexam was up dramatically compared to the year before: 326 requests for reexam were brought in 2021, or 50.9% more than in 2020. Additionally, the share of those patents that have been previously asserted in district court also increased last year, accounting for 64% of the patents with reexam requests (up from 60% in 2020 and 52% in 2019). Furthermore, the share of patents with reexam requests that were also previously challenged via AIA

review continued to go up as well—reaching 36% in 2021, compared to 33% in 2020 and 25% in 2019. Taken together, these datapoints suggest that *NHK-Fintiv* is the reason that defendants are filing more *ex parte* reexams.

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



Note: Data as of January 4, 2022. Due to the delayed availability of filing dates and related data from the USPTO, this analysis is subject to change.

Congress Scrutinizes *NHK-Fintiv*

The debate over *NHK-Fintiv* has also spilled into Congress. As noted in RPX’s [third-quarter report](#), Senators Patrick Leahy (D-VT) and John Cornyn (R-TX) introduced a reform bill in late September that would eliminate the *NHK-Fintiv* rule altogether. The proposed legislation, named Restoring the America Invents Act, would instead limit discretionary denials to circumstances involving multiple invalidity actions as established in 35 USC Section 325(d)—among a variety of changes largely favoring defendants.

Additionally, the rule has been among the most frequent topics of questioning during the confirmation process for Kathi Vidal to succeed Andrei Iancu, the rule’s progenitor, as USPTO director. Among the most notable of those questions came from Judiciary Committee member Senator Thom Tillis (R-NC), who has stated that he generally favors most of the PTAB reforms implemented by Iancu. While Senator Tillis ultimately announced his support for Vidal in January, he previously informed her that his vote was conditioned on her support for those measures—including most of the *NHK-Fintiv* rule. However, in [written questions posed to the nominee](#), Senator Tillis explained his opposition to the *NHK-Fintiv* factor centered on trial date proximity (as he also did in the hearing)—in particular, objecting to “the PTAB’s historical practice of crediting unrealistic trial schedules”, a reference to the fact that scheduled district court trial dates are often pushed back. Beyond the notion that this practice departs from the “policy underpinnings of the *Fintiv* rule”, Senator Tillis explained, he argued that this factor “has also created harmful incentives for forum shopping and inappropriate judicial behavior” and asked Vidal if she would commit to “undertake a study and review of this matter and consider whether *Fintiv* should be modified to account for unrealistic trial scheduling”. Vidal answered that she would do so if confirmed. On

November 2, Senator Tillis raised the same concerns over *NHK-Fintiv* in a letter to Andrew Hirshfeld, this time specifically calling out Judge Albright—asserting that his trial dates are often “not just unrealistic . . . but impossible to fulfill” because “multiple conflicting trials are frequently scheduled to occur on the same date before the same judge in the same courtroom”.

FRAND Update: SEP Reforms Proceed in US and UK as Courts Tackle International Licensing Issues

As the fourth quarter came to a close, two of the world's top patent jurisdictions—the US and the UK—announced further progress in their efforts to revise policies toward standard essential patent (SEP) licensing. Additionally, UK courts issued two notable decisions on jurisdiction and injunctive relief in international SEP disputes.

US: Biden Administration Announces New SEP Policy as Key Nominations Hit Speedbumps

On December 6, the US Department of Justice (DOJ), the National Institute of Standards and Technology (NIST), and the USPTO released a [draft joint policy statement](#) for [public comment](#) that lays out the Biden administration's posture toward remedies and licensing negotiations in SEP disputes. The statement walks back certain key aspects of a prior joint policy statement released by those same agencies in December 2019 under prior leadership. Perhaps most notably, the new proposal asserts that injunctions should not be issued in SEP cases when monetary damages are available—whereas the 2019 statement argued in favor of such injunctive relief. However, as detailed in [RPX's analysis](#), the draft policy also includes recommendations related to alleged implementer misconduct, building on prior statements from DOJ officials favoring a policy that balances the interests of both licensors and licensees.

The public comment period for the draft policy statement was initially limited to 30 days, prompting Senator Thom Tillis (R-NC) to request an additional 60 days for stakeholder input in a letter to Attorney General Merrick Garland and Assistant Attorney General Jonathan Kanter (the latter confirmed in November as the head of the DOJ's Antitrust Division). Senator Tillis also argued that the policy statement should not be finalized until the USPTO and NIST have confirmed political leadership—with Kathi Vidal and Laurie Locascio, the nominee for NIST director, still awaiting confirmation.

While Senator Tillis won a partial victory in the form of a 30-day extension, political pressure not directly related to patent issues have led to delays for the Vidal and Locascio nominations. On November 18, Senator Rick Scott (R-FL) announced that he would hold all Commerce and Transportation nominees until the Secretaries of Commerce and Transportation testify on supply chain issues before the Senate Committee on Commerce, Science, and Transportation—thereby placing the USPTO and NIST director nominations in timing limbo.

That said, the White House may not have to renominate Vidal once the Senate reconvenes. A Senate rule ordinarily dictates that pending nominations get sent back to the president, but on December 18, as the year's session was coming to close, Senator Chuck Schumer waived the rule for a set of nominees that included Vidal at the request of Senator Brian Schatz (D-HI). However, Locascio was not exempted along with Vidal, and her nomination was returned to the president on January 3. While these late-breaking developments mean further delays are likely, this type of situation is not unprecedented. For instance, the initial nomination of former USPTO Director Michelle Lee expired after not receiving a vote by the full Senate, but she was confirmed three months later, having been renominated at the start of the following session.

Should Vidal and Locascio get the chance to weigh in prior to the policy's finalization, only the former has spoken publicly on her relevant views in her capacity as a nominee—albeit briefly. When Senator Tillis asked Vidal whether she would support the prior 2019 statement's endorsement of SEP injunctions, her written response merely committed to work with the DOJ and NIST to “ensure that any finalized statement related to SEPs accurately reflects the patent law” as expressed in the Federal Circuit's 2014 decision in *Apple v. Motorola* decision and the Supreme Court's 2006 *eBay v. MercExchange* opinion, which are cited in both the 2019 and 2021 statements. Vidal also stated that she would make sure that the final policy was informed by public feedback, and that it includes “continued incentives to innovate in the standards setting context”.

See [RPX Insight](#) for more on Vidal's written responses to questions from the Judiciary Committee, including her comments on issues ranging from PTAB and Section 101 reform to "judge shopping" and SEP licensing.

UK: Government Details Parallel Policy Revamp as Courts Tackle More International SEP Issues

The revamped US policy was announced just one day before the UK released new details on its own balance-focused SEP policy initiative. On December 7, the UK government issued an "[open consultation](#)" seeking the public's views as to whether the SEP ecosystem—comprised of the "enabling participants, commercial relationships, infrastructure, and legal and regulatory environment"—is "functioning efficiently and effectively and striking the right balance for all entities involved", in order to "help assess whether government intervention is required". Unlike the US statement, the UK initiative does not express any particular viewpoints, instead posing 27 questions that address a wide variety of topics related to fair, reasonable, and non-discriminatory (FRAND) licensing issues, including market power and competition issues in the SEP context; transparency as it relates to essentiality declarations, licensing negotiations, and pricing; territoriality in SEP enforcement; remedies; ways to improve efficiency in SEP licensing; patent pools; and alternative dispute resolution. Comments are due on March 1, 2022.

That initiative comes as UK courts tackled additional issues related to international SEP disputes—building on last year's [landmark decision in *Unwired Planet v. Huawei*](#), in which the UK Supreme Court established that UK courts have the jurisdiction to set and impose global FRAND licenses for multinational patent portfolios, the first national court to do so. In its November 4 *Nokia v. Oppo* [opinion](#), the UK High Court of Justice declined a jurisdictional challenge from the defendant for the first time since China's Supreme People's Court ruled in *Sharp v. Oppo* that Chinese courts could also set global FRAND licenses. Despite that Chinese ruling, the UK High Court determined that under *Conversant v. Huawei*, an appeal decided alongside *Unwired Planet*, the focus of this dispute was still the infringement of UK patents, rendering the UK the most appropriate forum.

Additionally, the *Nokia v. Oppo* court denied the defendant's motion to stay the UK case in light of parallel FRAND litigation in the Intermediate People's Court of Chongqing, finding that the circumstances were not sufficiently "rare or compelling". Among the dispositive factors, the court agreed with both parties that if the Chinese court ruled on royalties, it would do so "justly" and would arrive at FRAND terms, also rejecting concerns over the relative timing of judgments in the two countries, the possibility of lower rates from the Chongqing court, and issues related to cross-licensing. More broadly, the court lamented the "unevolved" state of the present framework for resolving SEP licensing disputes as "plainly not satisfactory". Without an international dispute resolution tribunal, a solution suggested in *Unwired Planet*, the court noted that SEP owners could file where they hoped for the highest royalties, while implementers could pick venues where they expect lower rates—and remarked that neither a "race to the top" nor a "race to the bottom" are an "attractive" prospect for the telecommunications industry.

Meanwhile, the High Court of Justice's October 2021 decision in *Optis Cellular Technology v. Apple* clarified the criteria for a "FRAND injunction", a unique form of relief previously established during the *Unwired Planet* litigation. A FRAND injunction is similar to a normal one in that it bars infringement of the asserted patents but ends if the defendant enters into the FRAND license established by the court. In *Optis*, the court ruled that when defendant is deemed to infringe a SEP, it must give its *unqualified* consent to be bound by the FRAND license to be determined at a later trial; otherwise, the court will impose a FRAND injunction. Moreover, the court held that the SEP owner is entitled to such an injunction even if the court determines that it abused its dominant position, and that given concerns over holdout, to conclude otherwise would be akin to a compulsory license.

Marketplace Update: Notable OpCo-to-NPE Divestments, Public PAEs on the Move, and Lit Finance Is Further Normalized

Notable Operating Company Divestments to NPEs

Several patent assignments from operating companies to NPEs surfaced among USPTO records during Q4, with certain transactions considered notable in light of the NPE assignee's litigation history (or that of its corporate parent); its patent holdings; and/or its backing by third-party litigation funders.

- *Atlantic IP (Multiple NPEs)*

During Q4, RPX noted the movement of patents from L3Harris and Siemens to various Irish NPEs formed by monetization firm Atlantic IP Services Limited. First, in September, L3Harris [assigned](#) batches of patents to each of Atlantic IP's [Lionra Technologies Limited](#), [Ollnova Technologies Limited](#), [Scramoge Technology Limited](#), and [Speir Technologies Limited](#). Then, in October, Ollnova [received](#) a portfolio of former Siemens patents from [Fortress Investment Group LLC](#), followed by an [assignment](#) in November, this one received directly from Siemens.

As of the publication date of this report, neither Lionra nor Ollnova has filed any US patent litigation—a fact that appears likely to change given Atlantic IP's activities in 2021. Last year, the firm opened up nine new campaigns, each run by an NPE tied to Magnetar Capital, a hedge fund reporting \$13.8B of assets under management and described as an investor by Atlantic IP: [Aire Technology Limited \(f/k/a Bowen Ventures Limited\)](#) (litigating former G+D patents); [Arigna Technology Limited](#) (asserting patents received from Microchip Technology or Mitsubishi Electric in multiple automotive campaigns, as well as a mobile devices campaign); Scramoge Technology (targeting wireless charging and asserting patents received from L3Harris or LG Innotek); and [Sonraí Memory Limited](#) (asserting former Atmel patents also received through Microchip Technology).

Meanwhile, on December 30, Spier Technologies filed its first US litigation, suing Samsung over three of the wireless communication patents that the NPE received from L3Harris in September. The accused products include certain mobile devices with either 5G or UWB (ultra-wideband) functionality. See [here](#) for RPX coverage.

- *Dominion Harbor Enterprises (Columbia Peak Ventures LLC)*

Among 2021 acquisitions of patents originating with Panasonic, Sony, or TCL Technology Group, the monetization firm [Dominion Harbor Enterprises, LLC](#) also [received](#) a portfolio from Honeywell, according to USPTO data made public during Q4.

Dominion has made headlines over the years through its assertion of relatively large portfolios held by several "Peak Ventures" entities: [Liberty Peak Ventures, LLC](#) (holding a large portfolio of former American Express patents); [Monument Peak Ventures, LLC](#) (former Kodak assets), [Sovereign Peak Ventures, LLC](#) (former Panasonic assets); and [Vista Peak Ventures LLC](#) (former NEC assets). This summer, RPX [flagged](#) the assignment of a portfolio of assets from TCL Technology Group to yet another "Peak Venture" in the Dominion range: [Columbia Peak Ventures LLC](#).

In early December, a second assignment to Columbia Peak Ventures [appeared](#) among USPTO records, this one executed on September 15 and received from Honeywell. The transacted patents generally concern surveillance technologies, including object detection, personnel biometric verification, and detection of abnormal crowd behavior. Now holding at least 40 US patent assets, Columbia Peak has not filed any US patent litigation as of the publication date of this report.

Dominion's string of 2021 patent acquisitions appears to have coincided with somewhat of a reorganization for Dominion, with public records also indicating that the firm received a capital injection at some point this year; see [here](#) for more details.

- *Hilco Global (Bell Semiconductor, LLC)*

Also in December, an October 16 [assignment](#) from STMicro to [Bell Semiconductor, LLC](#) (Bell Semic), a Hilco Inc. (d/b/a Hilco Global) company, was recorded with the USPTO. The portfolio of 58 US patent assets received from STMicro has brought Bell Semic's US patent holdings to over 3,400, according to currently available USPTO records; Bell Semic acquired most of its patents from Broadcom in 2017.

Last year, Bell Semic filed four new complaints in its sole litigation campaign, all over patents received from Broadcom; two of the complaints amended (against Renesas Electronics and its subsidiary Integrated Device Technology (IDT)), the other three new (hitting each of Microchip Technology, NXP Semiconductors, and Texas Instruments).

Throughout its campaign, begun in 2019 with its original complaints against IDT and Renesas, Bell Semic has targeted the provision of various semiconductor devices (e.g., controllers, MCUs, processors, SOCs, transceivers, etc.). In its complaints, the plaintiff outlines the origins of its sizeable patent portfolio, which is only part of Hilco Global's holdings.

[Bell Northern Research, LLC](#), a separate entity under Hilco's control, also holds assets received from Broadcom, a subset of which it has been litigating since 2018. This past October, the NPE filed a complaint with the International Trade Commission (ITC) against proposed respondents BBK Electronics (OnePlus), BLU Products, HMD Global, Lenovo (Motorola Mobility), Sonim, and TCL (TCT Mobile). District court cases were already underway against several of these companies, with litigation filed by Bell Northern also active against Apple, CommScope (ARRIS; Ruckus Wireless), Dell, and HP. The NPE's infringement allegations target device (e.g., smartphone) compliance with various 802.11 networking standards, the incorporation of heat spreaders, proximity sensors, alarm systems, and more. For recent RPX coverage of the Bell Semic and Bell Northern campaigns, see [here](#).

Public PAEs in the News

- *Quarterhill*

An assignment of operating company patents to publicly traded [Quarterhill, Inc. \(f/k/a WiLAN Inc.\)](#) also came to light in Q4. Towards the end of November, Quarterhill [announced](#) the acquisition of a portfolio of patents described as relating to "wired connectivity functionality, including USB-C technologies used in various applications such as desktop and laptop computers, tablets, mobile phones, gaming consoles, and smart TVs". In a press release, Quarterhill described the source of the patents as a "publicly-traded leader in semiconductor technologies".

That source appears to have been Western Digital, which in July, through various subsidiaries, [assigned](#) batches of patents, 45 in total, to two Quarterhill entities: [Innovative Memory Systems, Inc.](#) (23 patents) and [Woden Technologies Inc.](#) (22 patents). The assignment was recorded with the USPTO on November 12.

Quarterhill's announcement came near the end of a year in which the company launched no new litigation and shortly after Delaware District Judge Richard G. Andrews dealt a blow to one of its other long-running campaigns. In October, Amazon was [granted](#) summary judgment of noninfringement, with Judge Andrews ruling that the company did not infringe two patents, asserted by [IPA Technologies Inc.](#) and generally related to speech-based control over electronic resources, through its Alexa voice assistant.

In December, Quarterhill disclosed that it is planning a strategic review of [WiLAN, Inc.](#), its patent licensing business. According to a December 15 [press release](#), strategic alternatives to be considered "may include changes to the corporate structure of WiLAN, the acquisition or disposition of assets, a going private transaction, joint ventures, the sale of WiLAN, [and] alternative operating models, among other potential alternatives".

- *Acacia Research Corporation*

Publicly traded [Acacia Research Corporation](#) also made headlines in Q4 with an [offer](#) to acquire Comtech Telecommunications, described as a “global provider of next-generation 911 emergency systems and secure wireless communications technologies”, for \$790M in cash.

Acacia’s bid came as Comtech was facing pressure from Outerbridge Capital Management, one of its major shareholders, to “refresh” its board of directors and consider a potential “whole or partial sale” of the company. Apparently referring to an October 25 letter from Outerbridge to Comtech’s board, *Reuters* reported that “Comtech angered Outerbridge last month when it announced a deal to sell a \$100 million stake in itself through a PIPE deal to hedge funds Magnetar Capital LLC and White Hat Capital Partners LP. In a PIPE deal, investors buy a publicly traded stock below its currently traded price”.

Acacia itself underwent an activist investor-led transformation in 2018, when Sidus Investment Management and BLR Partners prevailed in a proxy campaign for changes at the company, including the election of their director nominees and an overhaul of the company’s executives and board of directors.

A [strategic shift](#)—initially characterized as an “absolute return asset management strategy”—followed, part of which has involved a renewed focus on patent portfolio acquisition and assertion. That acceleration continued through Acacia’s partnership with hedge fund Starboard Value, opening up access to as much as \$500M in new capital, with which the company acquired several notable portfolios in 2019-2020 (see [here](#) and [here](#)).

In March 2021, RPX [noted](#) Acacia’s acquisition of hundreds of US patent assets from NEWRACOM, a California-based fabless company formed in 2014 by a group of individuals from the [Electronics and Telecommunications Research Institute](#) (ETRI)—patents from which seeded a new litigation campaign, begun by [Atlas Global Technologies LLC](#) in Q3.

On November 10, Acacia [announced](#) that Atlas Global had entered into a licensing agreement with Samsung, covering a group of “Wi-Fi 6 standard essential patents” and resolving litigation between the two parties. See [here](#) for more details about Acacia’s Atlas Global campaign.

- *InterDigital*

Also in November, publicly traded [InterDigital Inc.](#) (IDCC) released its third quarter earnings, reporting a 64% increase in revenue compared to Q3 2020 and a string of new licensing agreements. In an earnings call with investors, CFO Rich Brezski touted Q3 2021 as IDCC’s “strongest quarter in almost four years”.

IDCC reported total revenue of \$143.5M for the third quarter of 2021, compared to \$87.5M during the same quarter last year. Recurring revenue was \$94.4M, compared to \$87M in Q3 2020, with the increase primarily driven by ten new patent licensing agreements signed in Q3. IDCC’s cash and cash equivalents, restricted cash, and short-term investments totaled \$903.2M on September 30, 2021.

According to IDCC, Q3 licensees included “several major device manufacturers”, “one of the top ten global TV manufacturers”, and Xiaomi. [Announced](#) in early August, IDCC’s “long-term license agreement” with Xiaomi resolved all litigation between the companies and is described as covering worldwide device sales and IDCC’s cellular technology, Wi-Fi technology, and HEVC standard essential patents.

With its litigation against Xiaomi resolved, IDCC now has only one affirmative patent infringement suit active in the US, against Lenovo. That case—alleging infringement of a group of wireless communications patents through the provision of cellular-enabled Motorola and Lenovo devices practicing certain standards (e.g., HSUPA, LTE, and WCDMA)—was filed in Delaware in August 2019, within a day of IDCC also hitting Lenovo in the UK over patents declared essential to either 3G or 4G standards. (IDCC also reports having active litigation against Lenovo in China.) Litigation against Lenovo in the US may be winding down, however; in December, the parties requested that a December 28

hearing before Judge Leonard P. Stark be postponed “to allow Lenovo to consider a proposal” to resolve the dispute.

Toward the end of the fourth quarter of 2021, IDCC disclosed in an [SEC filing](#) that it had opened up new litigation in the UK, India, and Germany, accusing Guangdong Oppo Mobile Telecommunications, OnePlus Technology (Shenzhen), and realme Mobile Telecommunications (Shenzhen) of infringing patents “related to 3G, 4G/LTE and 5G and HEVC standards”.

Signs of a Maturing Litigation Finance Market

As the relatively nascent litigation finance market continues to mature, there are signs that the use of third-party litigation funding has become somewhat normalized in the IP space—particularly if the apparent widespread use of the practice among NPEs is any indication.

While it is impossible—given the confidential nature of most funding agreements—to confidently estimate the number of litigation campaigns backed by third-party funders, RPX has tied, *via publicly available records*, more than 30 NPE campaigns launched in 2021 to litigation finance firms, hedge funds, and private equity firms. In Q4 alone, at least nine new campaigns were initiated by such NPEs, targeting a wide range of products and services; RPX members can access more information about those campaigns [here](#).

Touted by some as a sign of “broader acceptance” of third-party litigation funding, in November, litigation finance firm GLS Capital [announced](#) that its subsidiary Celerity IP, LLC had “entered into agreements to be the exclusive agent for the licensing and enforcement of two separate portfolios of standard essential patents” originating with ASUSTek and currently owned by ASUS and Innovative Sonic, Ltd.

Formed in 2018 by three former Burford Capital employees, GLS [revealed](#) in January of last year that it had raised \$345M for its inaugural litigation finance fund, GLS Capital Partners Fund I, LP. The firm reports having a “diverse institutional investor base” that includes “global financial institutions, endowments, foundations and family offices”.

Chad Hilyard and Tim Berghuis serve as Celerity IP’s CEO and president, respectively. Hilyard previously served as Chief Legal Officer at Hilco IP Merchant Banking, General Counsel for [PanOptis LLC](#) and [Unwired Planet LLC](#), and Chief Intellectual Property Counsel at [Rockstar Consortium](#). Berghuis was previously Chief Licensing Officer at [InterDigital, Inc.](#)

In a press release, GLS described the portfolio now being monetized by Celerity IP as including “over 300 patent families containing thousands of patents essential to the 3G, 4G and 5G cellular standards”, adding that “many of the families have been independently reviewed and accepted to the cellular SEP licensing pools run by Via and Avanci”.

Meanwhile, the fourth quarter of 2021 also saw [Fortress Investment Group LLC](#) announce that the operations of the UK-based litigation funder Vannin Capital—which Fortress acquired in late 2019—are being “restructured into the Fortress Legal Assets business”. [According to Fortress](#), this change will have no impact on the existing investments of Vannin Capital, which at the time of its acquisition reported having \$500M in available investment capital and assets under management “consistently in the billions”.

Finally, another relatively inceptive source of capital for IP holders made headlines in Q4, when [IAM reported](#) that “winners of large district court patent infringement damages awards” were being approached with offers to insure their verdicts. The potential effects of this emerging practice on the litigation finance industry—and more importantly, the appellate strategies of patent litigants—remains to be seen.

Additional RPX Patent Market Intelligence

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