RPX
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Q1 in Review

April 2024

TOYOTA EXHIBIT 1017
TOYOTA v. EMERGING AUTO
IPR2024-00814

Q1 in Review: US NPE Litigation Bounces Back as EU SEP Proposal Moves Forward

NPE litigation in the US was up by 24% in the first quarter of 2024, with the bulk of those cases filed in the Eastern District of Texas after developments in two former NPE hotspots—the District of Delaware and the Western District of Texas—reduced their appeal for such plaintiffs.

Additionally, the USPTO has indicated that it may soon introduce the final version of a long-promised Patent Trial and Appeal Board (PTAB) rulemaking package that could reshape certain key aspects of the America Invents Act (AIA) review system. In the meantime, Director Kathi Vidal has continued to use her director review power to further clarify existing rules—in one instance, overturning a set of decisions that threatened to limit the rights of defendants sued in certain large, multidistrict patent campaigns.

Moreover, a controversial European proposal to impose a new framework governing standard essential patent (SEP) licensing and enforcement has moved closer to passage despite ongoing divisions among stakeholders, as government officials—in both Europe and the US—came out in opposition.

Also during Q1, the USPTO made public a number of notable patent transactions—including transfers to plaintiffs now in litigation—and public records revealed ties between new patent campaigns and third-party litigation funders. Finally, Westfleet Advisors released its fifth annual market report on litigation finance, providing transactional data for dozens of litigation funders active in the US.

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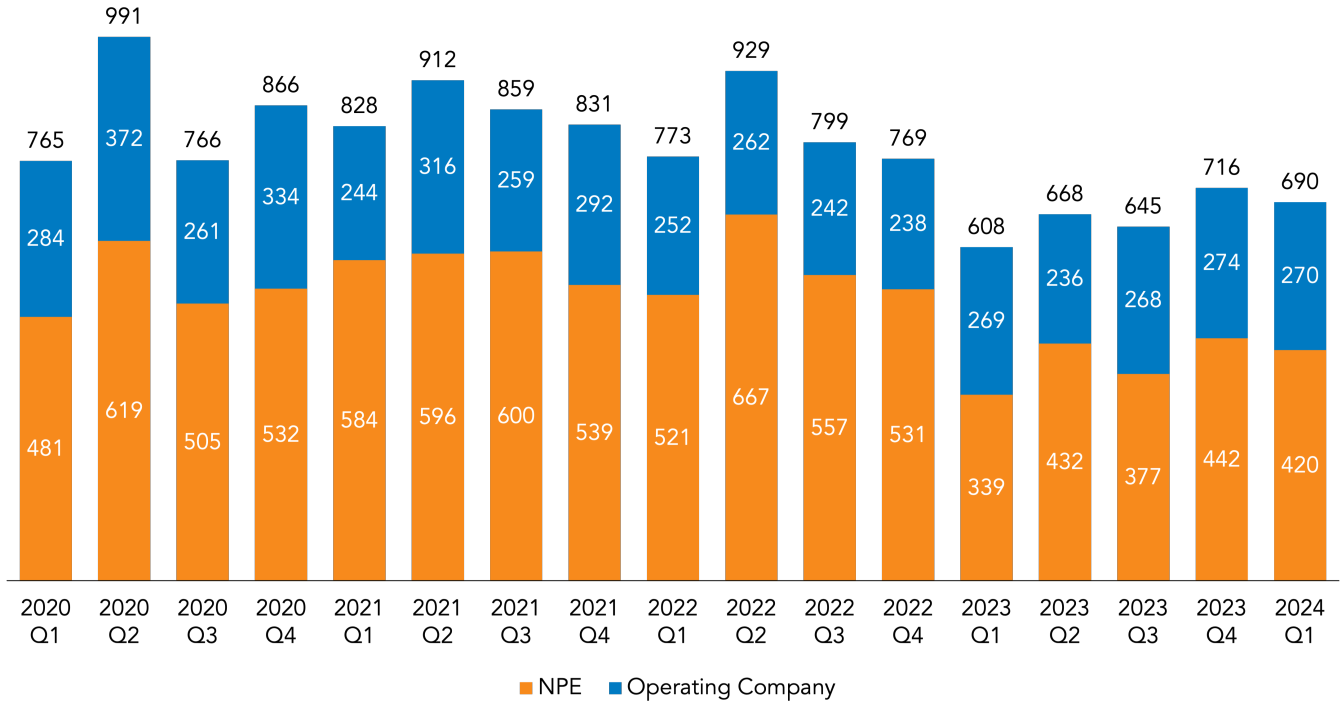
Litigation Update: NPE Activity Swings Upward by 24% as OpCo Filings Hold Steady

NPEs added 420 defendants to patent litigation campaigns in Q1 2024, up by 24% from the same quarter last year (when NPEs added 339 defendants). First-quarter NPE filings fell by 13% compared to the trailing Q1 average for 2021-2023 and were 5% lower than in Q4 2023.

NPE and Operating Company Litigation (Defendants Added)



This increase in Q1 NPE filings stands in stark contrast to the first-quarter change one year prior: Q1 2023 was 35% *lower* than Q1 2022 (when NPEs added 521 defendants). One of the primary causes of that decrease was the fact that the once-prolific monetization firm IP Edge LLC stopped filing litigation in December 2022, after previously accounting for around 25% of all NPE litigation each quarter (consistently suing around 50 defendants per month) in its most recent active period. As a result, when the firm hit the pause button in response to pressure over disclosure requirements in Delaware (as detailed further below), that change alone caused a significant drop in the relative NPE numbers for each subsequent quarter. Thus, while Q1 2022 included nearly 150 defendants from IP Edge litigation, Q1 2023 did not—with IP Edge filings accounting for most of the decrease. Excluding IP Edge activity, the gap was far smaller (a 10% decrease from Q1 2022 to Q1 2023).

IP Edge's litigation pause has continued virtually uninterrupted into 2024. As such, because it filed almost no new cases in either Q1 2023 or Q1 2024—hitting just four defendants this past quarter—the impact of this standstill has now abated almost entirely due to the mere passage of time. The firm filed just four cases in the first quarter—all through a plaintiff, Bishop Display Tech LLC, that shows some of the hallmarks of a newer breed of IP Edge NPEs.

- ***Case Assignments Get Politicized***

Another notable development that had a downward impact on NPE filings last year was a change in the Western District of Texas's rules on case assignments. This change was designed to plug a loophole that allowed patent owners to directly pick District Judge Alan D. Albright (whose approach has been widely viewed as plaintiff-friendly) by filing directly in the Waco Division, where he is the only district judge. Under an order adopted by the district's chief judge in July 2022, patent cases filed in Waco are now to be assigned randomly among a larger group of judges. However, the district subsequently adopted a practice where new cases involving the same patents and parties as prior litigation are

assigned to that same judge, meaning that Judge Albright has received the bulk of these "legacy" lawsuits, though cases falling in new campaigns have been more randomly distributed. That said, the fact that filing in Waco no longer guarantees Judge Albright has caused NPE filings in that division to drop significantly, falling by nearly 48% from 2022 to 2023—and, as a result, causing the Western District of Texas to drop in the NPE rankings.

Waco's decline continued into Q1 2024, the overall increase in NPE litigation notwithstanding: the division saw just 39 defendants added by NPEs, down from 85 defendants in Q1 2023 (a 54% drop). Excluding Waco from both periods, NPE litigation was up in Q1 2024 by a full 50% compared to the year-ago quarter.

While several of the most prolific NPEs of the past year were also among Waco's top filers in Q1 2023, some of those plaintiffs scaled back or even halted their filings there in Q1 2024. One was Jeffrey M. Gross, 2023's top overall plaintiff by volume through NPEs under his control. While Gross filed the second most litigation in Waco in the first quarter of 2023 (19 defendants added out of the 48 in total that he sued that quarter), he filed 37% less litigation there in Q1 2024 (12 defendants added in Waco out of 95 in total). Additionally, Dynamic IP Deals, LLC (d/b/a DynaIP) and affiliate Pueblo Nuevo LLC—together, the number-two overall NPE plaintiff last year—brought the most Waco litigation in Q1 2023 (adding 22 defendants there) but almost entirely stopped their Waco filings in Q1 2024 (adding just one defendant). In contrast, some NPEs kept a similar pace for their Waco filings; for instance, IP Investments Group LLC (d/b/a IPinvestments Group) hit six defendants in Waco in Q1 2023 and five defendants in Q1 2024.

The prior concentration of cases before Judge Albright, and the so-called judge shopping loophole that enabled it, attracted wider attention well before the Western District's 2022 order, including bipartisan criticism from members of the US Senate: in late 2021, Senators Patrick Leahy (D-VT) and Thom Tillis (R-NC) wrote to Supreme Court Chief Justice John Roberts, in his capacity as presiding officer of the Judicial Conference of the United States (which sets policy governing federal courts), to raise objections to the divisional filing rules that allowed plaintiffs to target Judge Albright as well as the judge's open solicitation of patent cases.

However, while patent suits were the impetus for the judiciary's scrutiny of judge-shopping, the issue later became swept up by litigation of a more partisan nature. In early 2023, conservative lawyers and elected officials began to bring cases challenging various Biden administration priorities and policies in single-judge divisions viewed as friendly to their cases. Perhaps the most widely known example is a lawsuit filed by an antiabortion group seeking to overturn the FDA approval of abortion drug mifepristone; the case was filed in the Northern District of Texas's Amarillo Division, where District Judge Matthew Kacsmaryk, who worked as an attorney for a conservative religious liberty firm before taking the bench, is the only district judge in the Amarillo Division. US Senate Majority Leader Chuck Schumer (D-NY) has led a campaign pushing against this practice, while GOP senators including Minority Leader Mitch McConnell (R-KY) has pushed back against attempts to close such loopholes, arguing that the real issue is courts issuing nationwide mandates.

This more politicized use of judge-shopping would ultimately become the apparent focus of a updated policy on case assignments released by the Judicial Conference in March: While the policy urges courts to adopt a practice of randomly assigning cases to judges throughout a district when they are filed in a single-judge division, the Conference clarified that this should apply just to "those civil actions seeking to bar or mandate statewide or nationwide enforcement of a state or federal law". Some have observed that this qualification may exclude patent cases from the recommended policy altogether, though the debate has focused mainly on the aforementioned partisan issues—with the Northern District of Texas ultimately declining to institute the policy, despite a letter urging it to do so from Democratic members of the Senate.

- ***Operating Company Litigation Holds Steady as Anticounterfeit Suits Again Target Thousands of Online Storefronts***

Meanwhile, operating companies added 270 defendants in Q1 2024, essentially holding steady compared to Q1 2023 (when such plaintiffs added 269 defendants) and Q4 2023 (274 defendants) and exceeding the trailing average by 6%.

Overall, plaintiffs added 690 defendants to patent litigation campaigns in Q1, 13% more than in the first quarter of 2023 but 6% less than the trailing Q1 average.

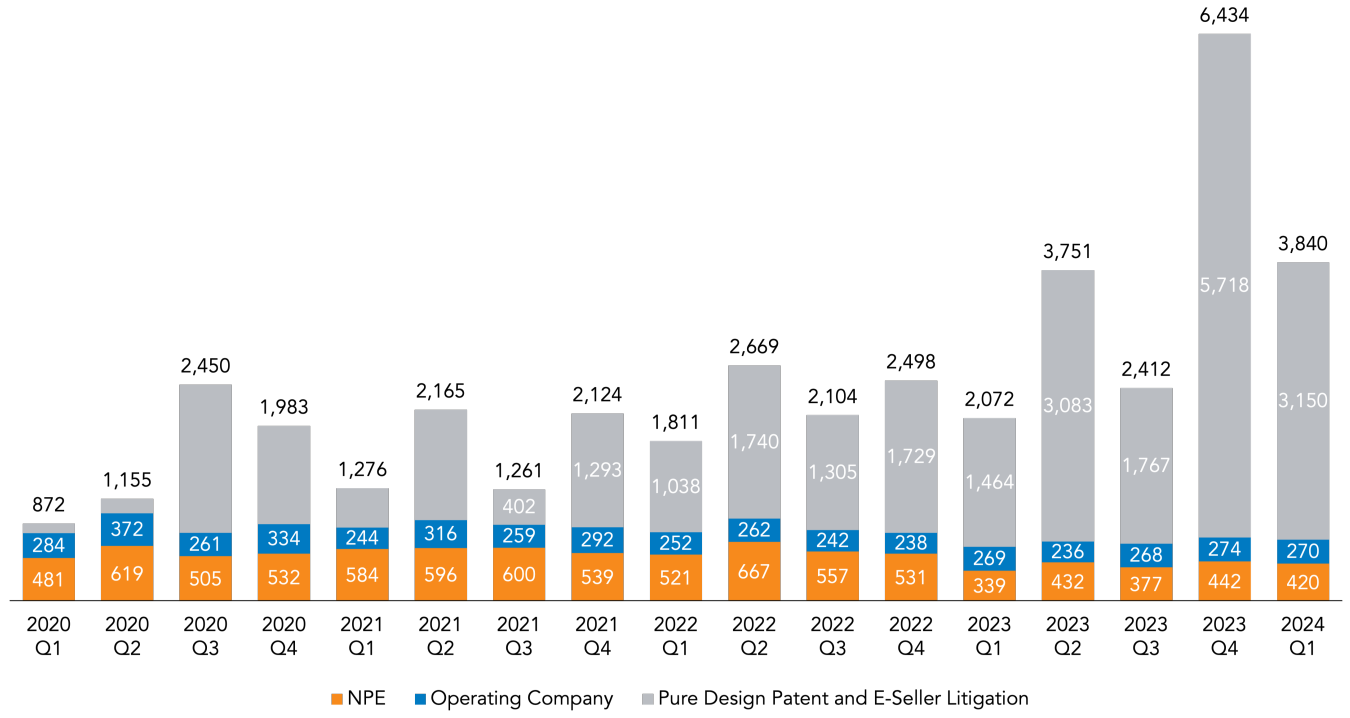
Defendants Added		**Change Compared to:**		
	Q1 2024	**Q1 2023**	**Q1 2021-2023 Average**	**Q4 2023**
NPE	420	24%	-13%	-5%
Operating Company	270	0%	6%	-1%
Total	690	13%	-6%	-4%

Additionally, the operating company data above leave out another distinct category of litigation filed by a small group of design and utility patent owners targeting copycats and counterfeiters selling products online. RPX excludes such "e-seller" cases from analyses of district court litigation because they tend to follow a different dynamic compared to what one might consider the usual patent suit. These e-seller cases sometimes name hundreds of defendant entities, many of which may be merely online storefronts or aliases for the same ultimate parent. Also, plaintiffs primarily seek injunctive relief instead of damages, and their cases often end with the e-seller defendant's failure to answer, followed by a default judgment.

This category of litigation, which began to spike in Q3 2020, is shown in grey below to illustrate its magnitude. As shown by the rightmost bar, e-seller litigation in Q1 2024 accounted for 3,150 defendants added, or 82% of all litigation during the quarter—though this number remains subject to the caveat about defendants potentially having multiple online storefronts noted above.

Apart from the following graph, the remaining analyses in this report exclude pure design patent and e-seller litigation.

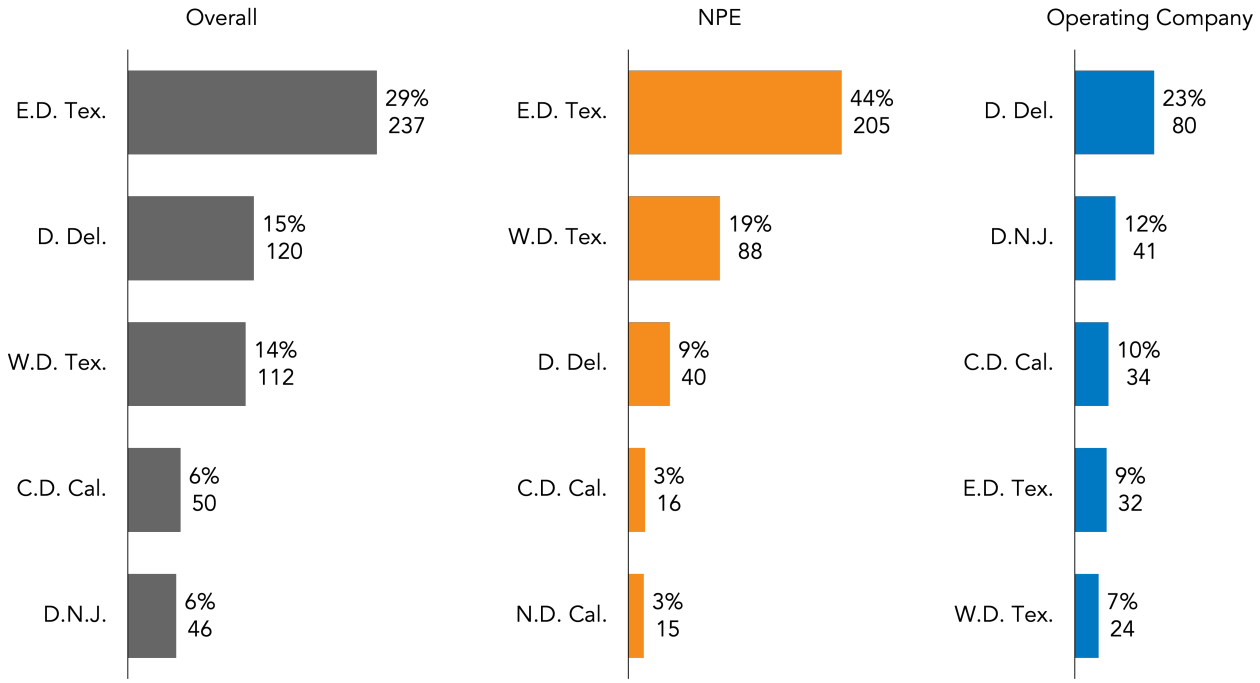
NPE and Operating Company Litigation by Quarter (Defendants Added)



Venue Update: East Texas Widens Its Lead; Delaware Disclosure Battle Takes Its Toll

The Eastern District of Texas was the top district for overall patent litigation (*i.e.*, with no filter for plaintiff type) in Q1 2024, a rank it has held since Q2 of last year. In second place, with roughly half as much overall litigation as East Texas, was the District of Delaware, which was the most popular district for operating companies in Q1 but took a distant third place for NPE litigation. The number-two venue for NPEs, and the third for overall litigation, was the Western District of Texas, its NPE docket slimmed substantially as a result of the case assignment order described above.

Top Patent Litigation Districts in Q1 2024 (Defendants Added and Percentage of Total)



Delaware has slid in the rankings over the past year, after taking first place in Q1 2023, as a result of a prolonged battle over transparency and corporate disclosures in the courtroom of Chief Judge Colm F. Connolly that has led NPEs to dramatically scale back their filings there. In April 2022, Judge Connolly imposed a pair of standing orders that forced litigants in his courtroom to disclose detailed ownership information as well as the presence of certain third-party litigation funding. After Judge Connolly became aware that a group of plaintiffs linked to IP Edge LLC had failed to comply with those orders, his resulting investigations into those entities' ownership and control shined an uncomfortable spotlight on the underlying monetization model historically followed by IP Edge: to identify passive investors in Texas to form LLCs, receive patents, and assert them in litigation using counsel identified by IP Edge (and/or its "consulting" arm MAVEXAR LLC).

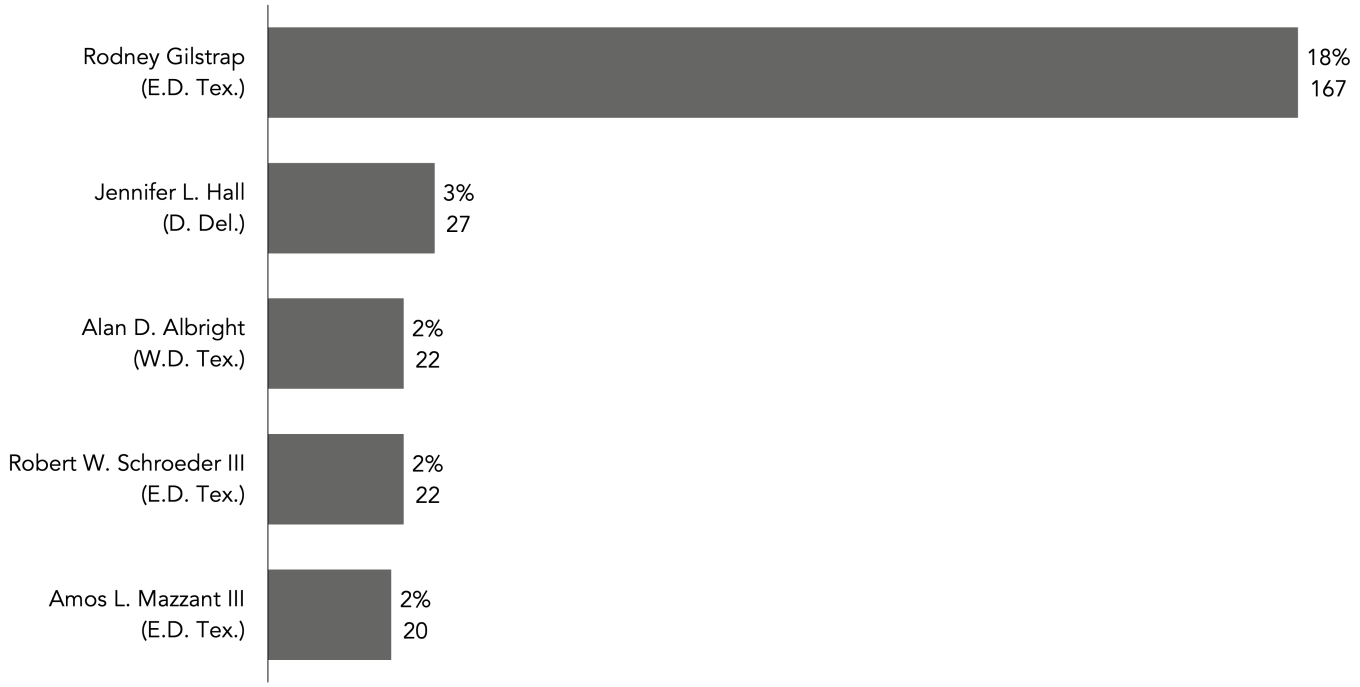
That scrutiny led IP Edge to discontinue filing under this model beginning in December 2022, as well as to multiple referral letters from Judge Connolly, including to the USPTO and the US Department of Justice, over a litany of misconduct from the attorneys involved—both those in control of IP Edge and MAVEXAR, whom he slammed for engaging in the unauthorized practice of law; and some who frequently represented IP Edge plaintiffs, through which activity he found they had committed numerous violations of the ethical rules governing attorneys. Judge Connolly continued to grill two of those attorneys in the first quarter, with an in-person hearing leading him to incredulously question their grasp of basic legal and ethical principles and even the English language itself. One of those attorneys has since sought to seal the materials he has finally produced at the court's request, arguing that Judge Connolly's inquiry into his misconduct amounts to an "ethics investigation" that must be conducted confidentially.

Recent comments from Judge Connolly indicate that he may soon apply even greater scrutiny to litigants before him. On March 28, speaking at Stanford, Judge Connolly reportedly stated that he was "going to expand the order", referring to his April 2022 standing order requiring funding disclosures, during a discussion in which he appeared to criticize IP Edge's business model, lamenting how its activity had incurred an "economic toll". Judge Connolly also spoke critically about the practice of litigation finance more broadly: "I don't believe our courts are casinos where people should just go to profit", he said, stating that he "think[s] that's bad for the system and [that] it undermines the importance of our courts". This prompted an objection from his fellow panelist Cindy S. Ahn, a director at litigation funder Longford Capital, who countered that her firm does a "heavy amount of due diligence" and follows "best practices for third-party litigation funding" where "funders do not have any control" over the litigation they end up backing. Judge Connolly responded skeptically: "I've heard funders say that before . . . If you control the purse strings, you exercise control". Judge Connolly also framed his disclosure rules as necessary for the court to identify potential conflicts, citing recent cases in which judges have been accused of conflicts of interest and stating that he does not want to follow suit.

Judge Connolly additionally acknowledged criticisms from some in the patent community that "his transparency efforts were really meant to clear cases from his patent docket", as paraphrased by *Bloomberg*. He remarked in response that he is "seeing fewer NPE cases that are funded by third parties", stating that he is getting 20% fewer lawsuits from such plaintiffs—but that those actions "'require virtually no work' because they tend to settle early". Rather, it is litigation filed by operating companies against competitors that tend to be most "work-intensive", he explained—noting that he has "about 29% of all the competitor patent cases in the United States".

Meanwhile, it was Eastern District of Texas Chief Judge Rodney Gilstrap who had the most overall patent litigation last quarter, seeing 18% of the defendants added in Q1. Western District of Texas Judge Alan D. Albright, formerly the nation's top patent judge before the aforementioned case assignment rules trimmed his patent docket, was tied for a distant third place with District Judge Robert W. Schroeder III of East Texas.

Top District Judges in Q1 2024 (Defendants Added and Percentage of Total)



Despite his lower spot in the rankings, litigation in Judge Albright's courtroom has continued to attract headlines over his handling of convenience transfer motions, long a source of tension between him and the Federal Circuit. The appellate court has frequently overturned Judge Albright's decisions in response to *mandamus* petitions objecting to his handling of the applicable transfer factors, including his emphasis on his district's quick time to trial as relevant to the public interest factor contemplating relative court congestion, as well as his tendency to hold onto such motions while moving forward on claim construction and other substantive issues.

While those reversals have been less frequent in the past year compared to when they began in 2020, further tension has arisen over the Federal Circuit's interpretation of cases from the Fifth Circuit, the regional circuit that sets the law governing this issue in Texas. Some had expected the Fifth Circuit's October 2022 decision from *In re: Planned Parenthood* to require a more deferential approach, but the Federal Circuit held otherwise the following February in its *In re: Google* opinion. In that case, the Federal Circuit ruled that it owes no deference to a judge's weighing of the court congestion factor based on a time to trial analysis (only that it must defer to the underlying factfinding), and further determined that a plaintiff that is not "engaged in product competition"—*i.e.*, an NPE—lacks an interest in a quick trial altogether.

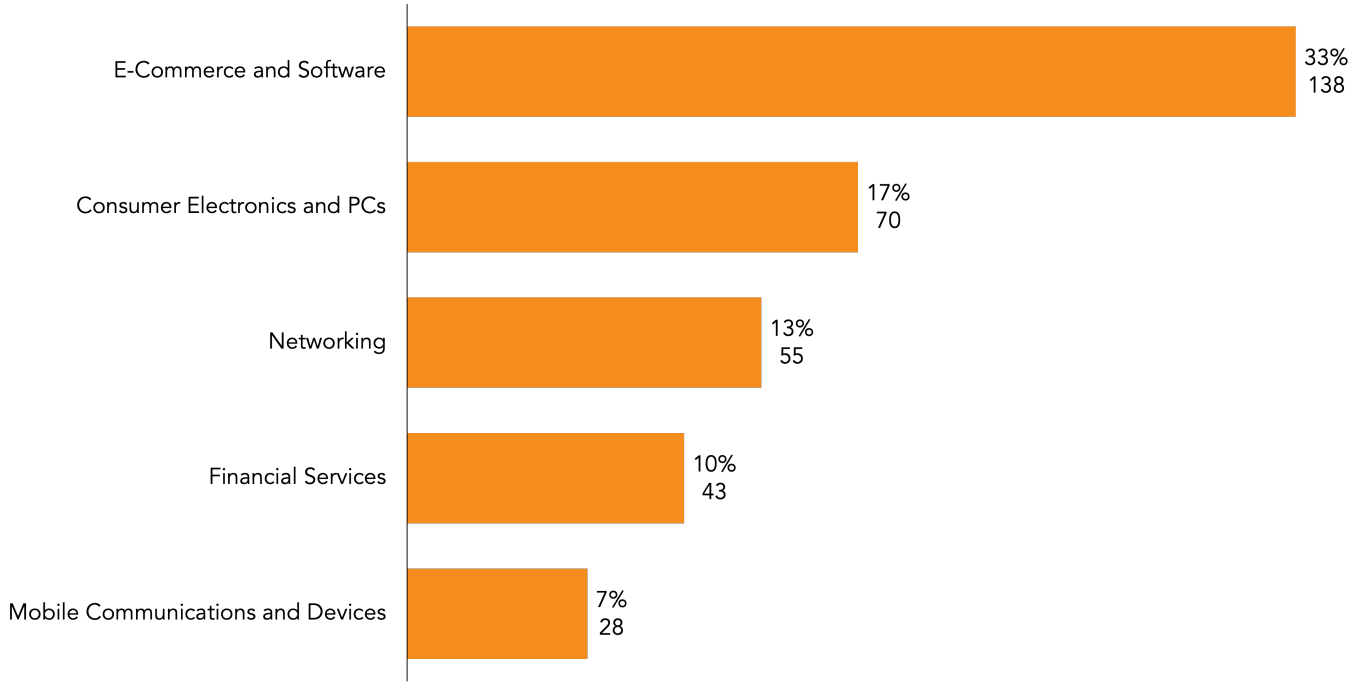
Though Judge Albright has acknowledged that he is bound by the *Google* decision, he has criticized its "product competition" requirement, arguing that "no binding Fifth Circuit precedent . . . compels its conclusion" and remarking that it "appears to be made out of whole cloth". With no Fifth Circuit ruling having yet addressed this specific issue, parties have continued to echo Judge Albright's objection here: In March 2024, Red Rock Analytics, LLC—a plaintiff fighting a transfer motion from defendants Apple and Qualcomm that has sat undecided since August 2021—argued in a supplemental brief that the *Google* decision and subsequent Federal Circuit transfer rulings contradict *Planned Parenthood*, that product competition should be irrelevant to the consideration of the court congestion factor, and that the Federal Circuit must defer to how a district court in the Fifth Circuit analyzes court congestion. Apple and Google have countered that neither *Planned Parenthood* nor another cited Fifth Circuit decision from earlier that month contradict *Google* because neither is a patent case, and that it would be an abuse of discretion for Judge Albright to hold otherwise.

More on this dispute, and the broader history between the Federal Circuit and Judge Albright, can be found on RPX Insight (see here and here).

Market Sector Update: NPEs Linked to Familiar Monetization Professionals and Inventors Hit E-Commerce and Software in Q1

The top market sector for NPE litigation in Q1 2024 was E-Commerce and Software, accounting for 33% of the defendants added to patent litigation campaigns. Consumer Electronics and PCs saw the second highest amount of NPE litigation in the first quarter, followed by Networking, Financial Services, and Mobile Communications and Devices.

Top NPE Market Sectors in Q1 2024 (Defendants Added and Percentage of Total)



A wide variety of plaintiffs hit this sector throughout the first quarter, including several linked to notable individuals active in the patent assertion space. Among them were multiple NPEs apparently associated with a familiar figure in patent monetization—a former inventor who in recent years has shifted to the assertion of patents acquired from others. Those plaintiffs included Media Key LLC, which in late February launched its first campaign over content and/or software update tools; and Webcon Vectors LLC, which two weeks prior kicked off its own campaign against communications platforms with certain videoconferencing features. Another pair of plaintiffs hitting this sector in Q1 are controlled by a second inventor and prolific plaintiff: Secure Ink LLC, which in early February filed its first litigation over web-based and mobile e-signature platforms; and Wyoming Technology Licensing LLC, which later that month added a new complaint to its ongoing campaign over virtual assistants with certain natural language processing and semantic analysis features. Additionally, in late March, Dialect, LLC filed a new case in the voice recognition software services campaign it launched in February 2023. Dialect is connected to yet another well-known figure in patent monetization who has been linked to other established NPE plaintiffs with somewhat rocky litigation histories—including Oyster Optics, LLC and Document Security Systems, Inc.

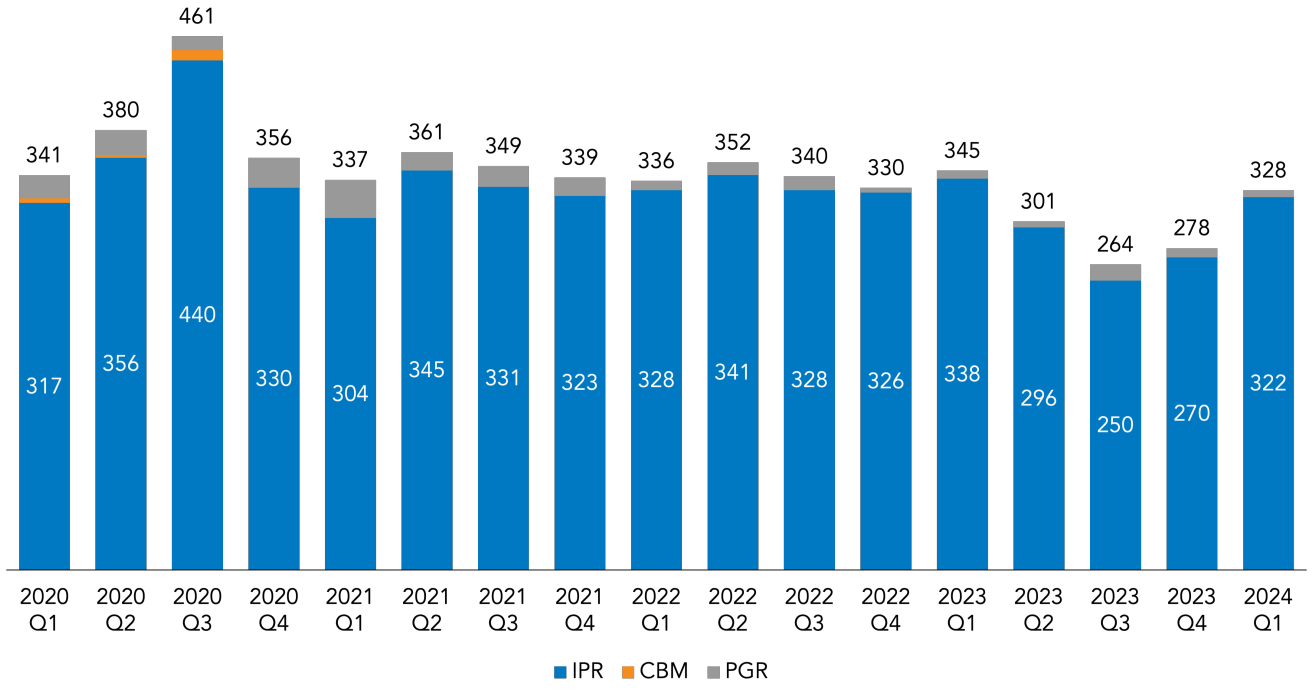
Also joining the fray were a variety of inventor-controlled plaintiffs. Those targeting this sector in Q1 included Audio Pod IP, LLC, which in late March initiated a funded campaign against certain audiobook services. In addition, Factor2 Multimedia Systems, LLC filed its first litigation in January and added new complaints in March—here, hitting user authentication features offered by social networking apps well as those used in various USPTO systems. The patents-in-suit come from a family previously asserted by its named inventors, Kamran Asghari-Kamrani and Nader Asghari-Kamrani, in a campaign that lost one patent to *Alice* and saw an unsuccessful attempt to force discovery on the issue of whether the plaintiffs

had litigation funding. Factor2's counsel has since publicly confirmed that the Asghari-Kamranis are behind this latest plaintiff as well. Other inventor-managed plaintiffs hitting this sector in Q1 included Taiwanese entity Laixion Network Technology Ltd., which filed its first litigation over social networking collaboration tools in late March; and Keysoft, Inc., which began its own campaign in late February with suits focusing on data management features found in certain advertising and customer relationship management (CRM) platforms.

PTAB Update: USPTO Teases Contents of Final PTAB Reform Package as Reexams Start Strong in Q1

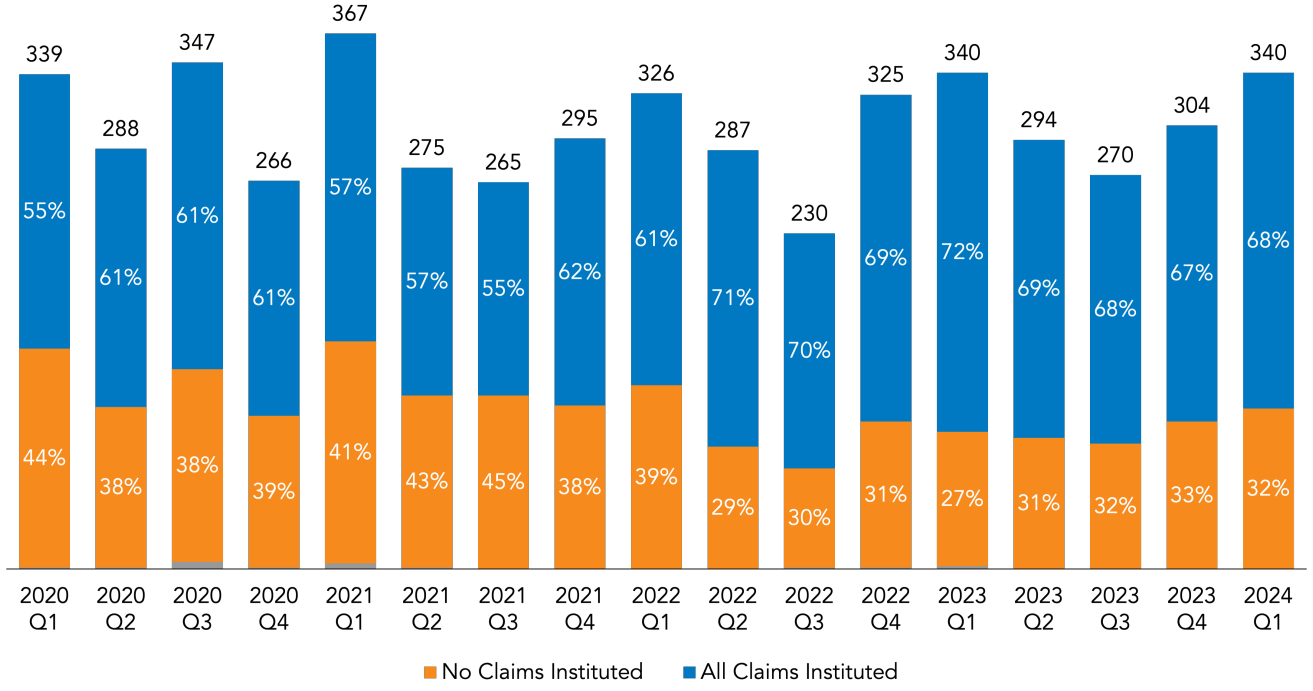
The Patent Trial and Appeal Board (PTAB) saw 328 petitions for America Invents Act (AIA) review in the first quarter of 2024, including 322 petitions for *inter partes* review (IPR) and six petitions for post-grant review (PGR). Filings were down by 5% compared to Q1 2023, which saw 345 petitions filed; but were up by 18% compared to Q4, during which 278 petitions were filed.

AIA Review Petitions Filed



The PTAB instituted trial for 68% of the AIA review petitions addressed in Q1, down from that same quarter last year (during which the institution rate was 72%) but up slightly from Q4 2023 (67%).

AIA Review Institution Rates



That slight drop from Q1 2023 comes as the USPTO teases the imminent arrival of potentially significant changes to the AIA review regime—including the PTAB's practice of discretionarily denying institution in IPRs based on the status of parallel litigation under the *NHK-Fintiv* rule. This reform effort kicked off in April 2023, when the agency released a sweeping reform proposal, in the form of an Advance Notice of Proposed Rulemaking (ANPRM), that included a kitchen sink's worth of potential reforms. However, public feedback showed that stakeholders are divided on its proposals, flagging some of the suggested changes as undercutting, or even contradicting, certain provisions of the AIA.

Among the most heavily debated changes from the ANPRM are potential new exceptions that would allow petitioners to sidestep discretionary denials altogether: One of those exceptions would apply for petitions filed within six months, in order to incentivize earlier IPR filings (questioned by some stakeholders as contradicting or undermining the one-year time window already provided by statute); and the other, perhaps more controversial one would apply to petitions found to demonstrate "compelling merits", or an especially high likelihood of prevailing on the merits (criticized as effectively overriding the statutory "reasonable likelihood" standard). Another polarizing proposal would essentially create a standing requirement—*i.e.*, limiting what types of entities may and may not file PTAB petitions—based on an expanded view of corporate relationships as well as certain exceptions concerning business models.

That said, USPTO Director Kathi Vidal subsequently clarified that the USPTO would not necessarily move forward with all of the proposals in the ANPRM and that it had followed a potentially overinclusive approach in order to receive as much feedback as possible.

In the first quarter, the USPTO began to give signs that it may be considering a more limited proposal that focuses on some of the less heavily debated aspects of the ANPRM. In early January, the agency submitted a nonpublic proposed rule for regulatory review with a title that appeared to telegraph a somewhat more narrowly tailored list of priorities: "PTAB Rules of Practice for Briefing Discretionary Denial Issues, and Rules for 325(d) Considerations, Instituting Parallel and Serial Petitions, and Termination Due to Settlement Agreement". The following month, Vidal stated in an interview that while she cannot comment on the specifics of the rule, the "title is quite descriptive of what you're going to see in the package".

The topic of discretionary denials is perhaps the broadest of the issues raised in the title and could potentially encompass either the more dramatic exceptions listed above or more modest changes contemplated in the ANPRM, such as the codification of practices regarding which statistics may be used to weigh the time to trial between two districts. Section 325(d) more specifically refers to discretionary denials where the USPTO has previously considered the asserted prior art or arguments; on this front, among the most significant of the ANPRM's proposed changes would provide a framework based on the tests laid out in governing PTAB precedent (*Advanced Bionics* and *Becton, Dickonson*) but that would take a narrower view of which art and arguments are deemed to be "previously addressed". The ANPRM's changes related to "parallel and serial petitions", or multiple petitions against the same patent, would also potentially bring a more restrictive approach than the current one, which is governed by factors laid forth in the PTAB's decisions in *General Plastic* (covering circumstances for discretionary denial of petitions from the same petitioner), *Valve I* (encompassing follow-on petitions from a district court codefendant), and *Valve II* (follow-on petitions from a previously joined PTAB copetitioner). Finally, the reference to settlements possibly relates to the ANPRM's proposed rule changes that would require parties to file copies of all settlement agreements relating to the termination of a PTAB proceeding, in part to facilitate antitrust review.

- ***Vidal Overturns Controversial Ruling That Limited IPRs Among MDL Defendants***

In the meantime, Vidal has used her post-*Arthrex* director review authority to clarify the application of the Board's existing precedent on some of these same issues. Most significantly, as Q1 approached its end, the Director reversed a set of controversial decisions that some viewed as improperly expanding the rules for denying parallel and serial petitions. Last December, automakers Ford and Honda sought

director review of decisions in which the PTAB discretionarily denied institution of IPRs they filed against Neo Wireless LLC (f/k/a CFIP NCF LLC), holding that those petitioners had a "significant relationship" under *General Plastic* and *Valve I/II* with another automaker, Volkswagen, that had previously filed an IPR against the same patent, because they were all codefendants in the same court-imposed multidistrict litigation. In February, Ford and Honda both argued that the rulings would allow patent owners to sue an "entire industry" and unfairly hold all defendants to the results of a "single IPR". Earlier that month, former Senator Patrick Leahy (D-VT), the AIA's cosponsor, published an editorial in support of their position, arguing that the panel's finding of a "significant relationship" here showed "flawed logic that cuts against widely understood concepts of justice". On March 22, Vidal agreed, reversing the denials of institution and ruling that "the Board does not recognize a 'significant relationship' between parties having different accused products that merely engage in court-ordered pretrial coordination".

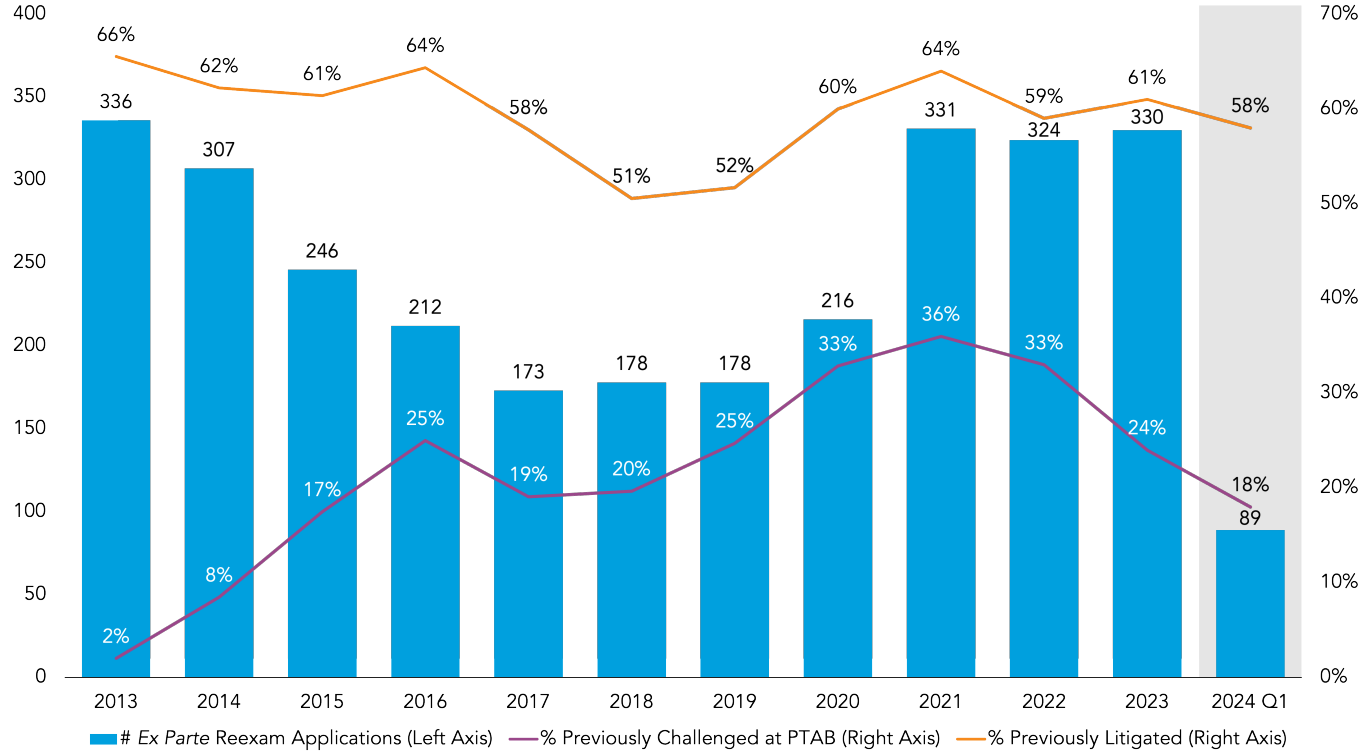
- ***Ex Parte* Reexam Requests Remain Near Their Peak Amid Ongoing *NHK-Fintiv* Uncertainty**

Discretionary denials have also continued to push plaintiffs toward *ex parte* reexaminations, which are not subject to such denials to the same extent as AIA reviews. *Ex parte* reexam filings first began to rise in response to the initial uncertainty triggered by the *NHK-Fintiv* rule: The number of such requests went up by 21% in 2020 and then by 53% in 2021, peaking that year.

Since then, yearly reexam filings have held steady, hovering around 330 requests for each of the past two years—with 2023 the second-highest filing year of the past decade. If Q1 2024 is any indication, this could be an even busier year: 89 reexam requests were filed in the first quarter, or 37% more than in Q1 2023.

The share of patents subject to reexam requests that were also previously challenged at the PTAB has fallen each year, from 36% in 2021 to 24% in 2023, and reaching just 18% in the first quarter of 2024. Meanwhile, the share of those reexam patents also litigated in district court has held steady. Together, this suggests that defendants have been placing less emphasis on the PTAB as uncertainty over discretionary denials persists and that reexams have kept their spot as a more frequently utilized defensive tool.

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



Note: Data as of April 8, 2024. Due to the delayed availability of filing dates and related data from the USPTO, this analysis is subject to change. Grey box indicates incomplete data for the year.

FRAND Update: EU SEP Regulation Moves Closer to Passage Despite Stakeholder Divisions and Political Opposition

One of the most closely watched developments in the standard essential patent (SEP) space has been playing out in Europe, where a controversial proposal for a framework governing SEP licensing and dispute resolution in the European Union (EU) moved forward in the European Parliament (EP) in Q1.

That proposal, introduced in April 2023, seeks to address the European Commission's concerns over transparency with respect to patent ownership, essentiality, and licensing rates, and concerns over existing dispute resolution mechanisms, through three overarching proposals: The regulation would create a public register in which patent owners would have to register patents they believe to be essential before they can assert them in litigation; a system requiring nonbinding essentiality checks of an annually selected subset of those patents; and a new, out-of-court process for determining fair, reasonable, and nondiscriminatory (FRAND) licensing terms that patent owners must complete before asserting relevant patents in court, though again with nonbinding results. All aspects of this new framework would be administered by the EU Intellectual Property Office (EUIPO), which currently focuses solely on trademarks and design rights, through a newly created "competence centre". The EUIPO would also be responsible for a new, optional process for determining FRAND rates, which can be initiated by either party unilaterally and would in part determine the maximum aggregate royalty rate for a given standard.

On January 24, 2024, the bill was approved by the EP's Legal Affairs Committee (JURI) by a slight majority. In doing so, JURI also adopted a set of minor amendments proposed in a late-2023 report from Member of Parliament (MEP) Marion Walsmann, the EP's rapporteur for the proposed SEP regulation (*i.e.*, the MEP responsible for guiding the proposed legislation toward passage), including new rules setting standards for the qualification and impartiality of the "SEP evaluators and conciliators" to be hired by the EUIPO; and a requirement that the EUIPO create a SEP Licensing Assistance Hub to provide free training and support on SEP matters to small and medium-sized enterprises (SMEs) and startups. The legislation then came before the full Parliament, which passed the bill in the form adopted by JURI in a first-reading plenary vote held on February 28, 2024. This means that Parliament may now begin talks with EU countries regarding what final form the legislation will take—importantly, a phase of the process that will be carried out under a new Parliament, following elections that will take place on June 9, 2024.

- ***Stakeholder Divisions Persist***

The proposal has continued to generate a heated debate among both implementors and licensors, as well as other industry and government stakeholders, in the leadup to that vote. Advocacy on the implementer side has included industry groups like the Fair Standards Alliance, which counts among its membership a host of companies selling products in markets like smartphones and mobile devices (including Amazon, Apple, Fairphone, Google, and Lenovo) and networking and cellular services (Cisco, Juniper Networks, and T-Mobile), as well as a host of automotive OEMs and component suppliers (BMW, Continental, Denso, Ford, Harman, Honda, Hyundai, Mercedes-Benz, MINI, Tesla, Thales, Toyota, u-blox, Valeo, Visteon, and Volvo). The FSA, which has criticized the "secrecy" of some licensing programs and has argued that making SEP licensing terms more "transparently available" would level the playing field, has characterized the proposed EU regulation as a positive "attempt[] . . . to redress imbalance" in the SEP space—touting its provisions on licensing transparency as well as those relating to essentiality determinations and the requirement to engage in pre-litigation mediation. FSA member Continental echoed these points in a February editorial published in *Politico EU*, arguing that the regulation would increase "transparency and predictability" and that it "would facilitate good faith negotiation on an equal footing with necessary information rather than litigation".

Among those weighing in on the licensor side has been patent pool operator Sisvel International S.A., for which President Mattia Fogliacco argued in a January editorial that despite the Commission's stated focus on helping European SMEs in SEP matters, the regulation may in fact harm them: Because the

regulation would allegedly lead to lower returns from larger implementers based outside Europe, Fogliacco contends that licensors would either need to target SMEs to "maintain their margins", meaning that the market would "effectively see European SMEs subsidising large, non-European businesses", or scale back their European R&D spending on standards development and instead focus more on proprietary technology.

Also weighing in as a licensor was Nokia, which shortly before the start of the first quarter published an editorial that expressed support for the regulation's goals of "transparency and predictability" but argued that there are better ways to achieve them. In a counterproposal, the company contended that the SEP competence center should be administered by a global standards-development organization (SDO) like the European Telecommunications Standards Institute (ETSI) rather than a regional entity like the EUIPO, to discourage parallel proceedings elsewhere; and that rather than creating a new SEP register, the EU should use an "upgrade[d]" form of ETSI's SEP database covering only patents their owners believe to be essential. The company additionally asserts that essentiality checks should be voluntary, claiming that such checks (to the extent required by antitrust law) have not helped pools like Avanci get off the ground more quickly; and suggests that the FRAND determination process should run in parallel with SEP enforcement proceedings, not come before them.

- ***Opposition from Government Officials—in Both Europe and the US***

The proposal has also triggered criticism from institutional stakeholders, both within and outside Europe. For instance, on the day of the plenary vote, European Patent Office (EPO) President António Campinos criticized the Commission for moving so quickly to pass the regulation before the election given that there are "still critical issues that need to be resolved if the regulation is to be fit for purpose". Campinos stated that the EPO "is not convinced that the proposed measures are proportionate, or indeed necessary", arguing that the legislation lacked an adequate evidentiary basis and had been finalized without a sufficiently "transparent consultation of all stakeholders and thorough impact assessments".

Even more pointed criticism came from Rian Kalden, a judge on the Unified Patent Court (UPC), the EU court with jurisdiction spanning 17 EU member states that launched this past June. In a March 19 interview at IPBC Europe with Willem Hoyng, the chairman of the UPC's Advisory Committee, Judge Kalden took particular issue with the Commission's view that courts were ill-equipped to handle SEP disputes. Judge Kalden estimated that despite the "difficulties" and "challenges" that can flow from the FRAND commitment, 95% of SEP cases "actually don't pose any problems at all"—and questioned the wisdom of "mix[ing] up the whole schedule that is working for 95% for sake of" the 5% of cases for which "there is a problem". The European Commission's apparent conclusion that judges cannot "handle [SEP] cases" is a misjudgment, she continued, as judges are "very well equipped to deal with these cases" based on their experience with determining damages related to license fees in other contexts. Remarking that the UPC had not "even had the opportunity to show [it] can deal with [SEP] cases", after identifying various aspects of UPC procedures that would be especially helpful in such litigation, Judge Kalden warned that the new framework could lead plaintiffs to enforce their patents elsewhere: "If the SEP regulation is coming to Europe, the cases will go out of Europe".

The proposal also attracted criticism from across the pond: In early March 2024, USPTO Director Kathi Vidal commented to *IAM* that the new framework was "likely to exacerbate opposing viewpoints between SEP licensors and licensees"—respectively citing their general arguments in opposition and support (as detailed further above). The Director implicitly contrasted the European Commission's approach with that of the Biden administration, highlighting the fact that the latter withdrew a prior policy addressing injunctive relief in SEP disputes—a step that, as summarized by IAM, she described as "remov[ing] the perception of special rules for SEPs". Vidal, who has previously framed SEP issues as inherently international, echoed that same sentiment here, stating that "[t]he international ramifications of any regional SEP rules must be carefully examined to ensure that the consequences are well-known

and are fully appreciated"—and that the USPTO would engage with like-minded teams in other countries in pursuit of a "globally harmonized SEP licensing framework".

More on the US government's prior response to the EU SEP framework can be found on RPX Insight.

Patent Market Update: Notable Deals and Campaigns; Industry Report Gives the Latest on Litigation Finance

- ***Notable Patent Assignments and New Funded Campaigns***

RPX flagged several patent transactions during Q1 that were deemed notable in light of the involvement of operating company portfolios and/or assignees with a history of litigating patents—some with the backing of third-party litigation funders. A rundown of noteworthy assignments made public in Q1 2024 is available here.

In addition, RPX research indicates that multiple patent campaigns that were started in Q1 2024 can be tied to specific litigation funders, with plaintiffs including established players as well as (apparently) new faces. Targeted defendants spanned several market sectors, including Media Content and Distribution, Mobile Communications and Devices, and Networking, among others. RPX members can access coverage of funded patent litigation here.

- ***Westfleet Releases Its Fifth Annual Market Report on Litigation Finance***

At the close of Q1, Westfleet Advisors released its annual market report on litigation finance, providing transactional data for 39 commercial litigation funders active in the US. As is the case for most reporting on the largely opaque practice of third-party litigation funding, the fifth iteration of Westfleet's yearly publication is inherently incomplete; however, the report does offer useful metrics by which the growth of the litigation finance market can be measured.

According to Westfleet, its latest report draws on transactional data related to the 12 months from July 1, 2022 to June 30, 2023 and covers 39 litigation funders active in the US—each of which falls into one of three categories: Dedicated funders; multi-strategy funders; and *ad hoc* funders.

Reported transaction size appears lumpy year-over-year, with overall transaction size ($7.8M) down from the same period in 2022 ($8.6M). The downward trend of new transactions in 2023 is not a result of softening demand for funding, claims Westfleet, but rather a reflection of "macro trends in the financial markets"—including the interest rate hikes of 2022-2023.

According to Westfleet, patent litigation continues to attract the largest portion of new commitments made by the funders covered by its annual report, with the category comprising 19% of all capital commitments in 2023.

Westfleet has also revised its methodology for calculating funders' assets under management (AUM) "to more accurately account for undrawn capital commitments for certain industry participants". The figures now provided for 2021 ($13.7B) and 2022 ($15.1B) were previously reported as $12.4B and $13.5B, respectively; for 2023, estimated AUM for the *39 funders* covered by Westfleet's report was $15.1B.

Still, the collective AUM for funders active in the US may be higher. As of today, the league table maintained by *The Litigation Finance Insider* reflected collective AUM of more than $17B *for just nine litigation funders*.

In its latest report, Westfleet acknowledged speculation that contingent risk insurance has had a measurable impact on commercial litigation financing activity and may even supersede litigation funding in the future. Yet, the firm claims that it does not believe insurance has yet "materially displaced litigation finance except in areas such as appellate monetizations".

RPX reported throughout 2023 on the growing range of insurance products being marketed to patent holders and litigation funders, and late last year, *Bloomberg* highlighted the competition that the insurance sector represented to traditional litigation finance.

RPX members will get a closer look at the interplay between litigation funders and contingent risk insurance in an upcoming exclusive webinar.

Additional RPX Patent Market Intelligence

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

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Q2 in Review

July 2024

Q2 in Review: PTAB Reforms Face New Challenges as China Targets Foreign Pools

NPE litigation continued on an upward trend in the second quarter of 2024, rising by 19% compared to Q2 2023. Building on a significant increase in the first quarter, NPE filings were up by 21% in the first half of the year.

In addition, the USPTO moved forward in the second quarter with planned rulemaking on a variety of issues impacting Patent Trial and Appeal Board (PTAB) reviews, including an April 2024 proposal addressing discretionary denials that drew a wide range of stakeholder feedback. However, as Q2 came to a close, the Supreme Court cast those efforts into uncharted waters by overturning the 40-year-old judicial doctrine known as *Chevron*, which required judges to give deference to agency interpretations of reasonably ambiguous statutes—now raising the possibility that the USPTO will face litigation challenging its planned rule changes once implemented.

Moreover, patent pools were in the spotlight in Q2, after it was revealed that China's Supreme People's Court became the first national court to assert the power to set global fair, reasonable, and nondiscriminatory (FRAND) rates for foreign patent pools. Furthermore, a Chinese anti-monopoly agency announced this past week that it had just initiated a formal dialogue with patent pool Avanci, LLC regarding the compliance of its automotive licensing programs with anti-monopoly laws. The Unified Patent Court (UPC) also began to issue its first rulings specific to standard essential patent (SEP litigation) last quarter, in the process revealing a split between two popular local divisions over licensing transparency—with other local divisions also diverging on issues relevant to NPE litigation more broadly.

As Q2 drew to a close, a jury in the Eastern District of Texas returned an $847M verdict in favor of General Access Solutions, Ltd., a Texas NPE that—according to public records—received litigation funding shortly before commencing that lawsuit. Meanwhile, a close review of litigation data reveals that several of the new US patent litigation campaigns begun during the second quarter can be tied to prominent third-party litigation funders—and USPTO data suggest that more such campaigns are in the pipeline.

- **Litigation Update: Upward Trend for NPE Litigation Continues in Q2**
- **Venue Update: Delaware NPE Filings Drop Further as Second-Place West Texas Hangs On**
- **Market Sector Update: Upswing in Networking NPE Litigation Fueled by Plaintiffs Linked to Industry Veterans and Monetization Firms**
- **PTAB Update: As USPTO Continues Rulemaking Push, Supreme Court Eliminates *Chevron* Deference**
- **FRAND Update: Chinese Court Asserts Rate-Setting Power for Foreign Pools; UPC Issues First SEP Rulings**
- **Patent Market Update: Significant Verdict and New Filings in Funded Campaigns; Notable Deals Revealed**

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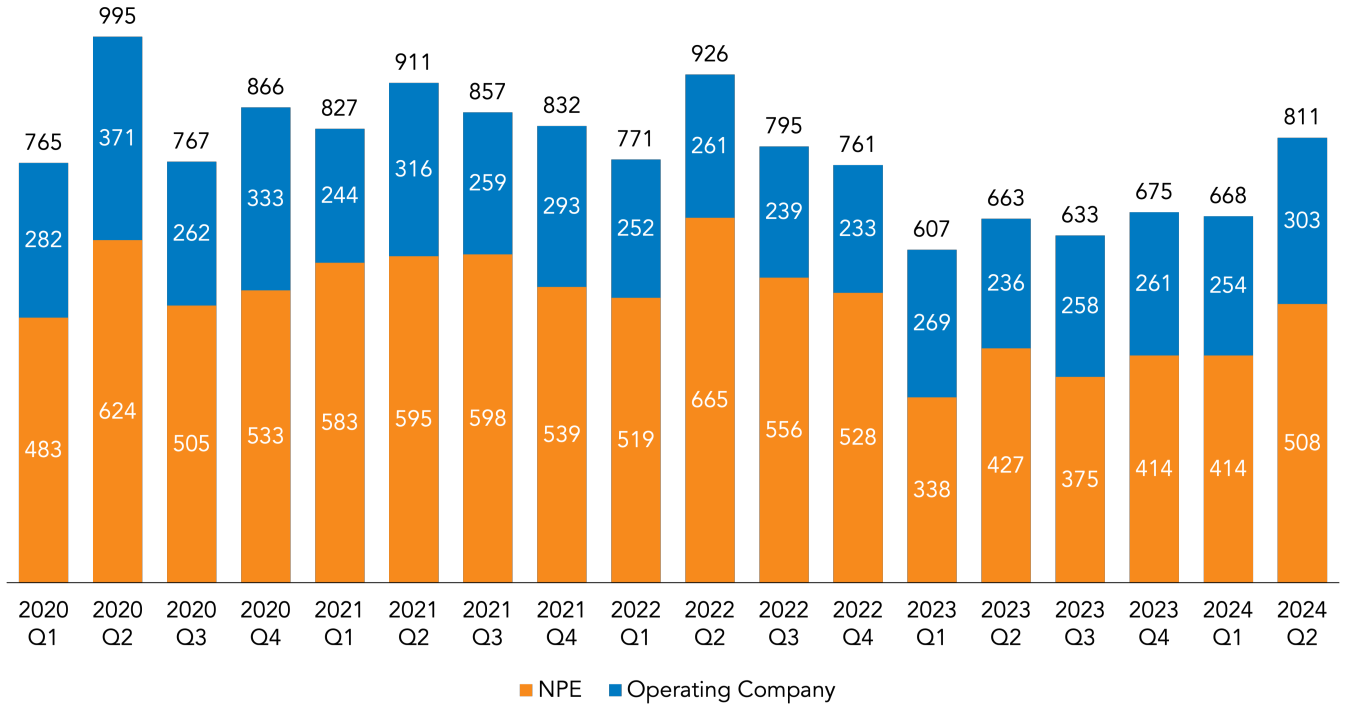
Litigation Update: Upward Trend for NPE Litigation Continues in Q2

NPEs added 922 defendants to patent litigation campaigns in the first half of 2024, a 21% increase from that same period last year (when NPEs added 765 defendants). Operating company litigation went up by 10% in the first half of the year, at 557 defendants added (compared to the 505 defendants added in 1H 2023).

NPE and Operating Company Litigation (Defendants Added)



In the second quarter of 2024, NPEs added 508 defendants to patent campaigns, an increase of 81 defendants (or 19%) compared to Q2 2023, when NPEs added 427 defendants. NPE litigation was 10% below the trailing three-quarter average for Q2 2021-2023 but was 23% more than in Q2 2023.

Operating companies added 303 defendants in Q2, which was 28% more than the year-ago quarter, exceeding the trailing three-quarter average by 12% and coming in ahead of Q1 by 19%.

Overall, patent plaintiffs added 811 defendants in the second quarter of 2024, or 22% more than in Q2 2023, 21% more than Q1 2024, and 3% less than the trailing average.

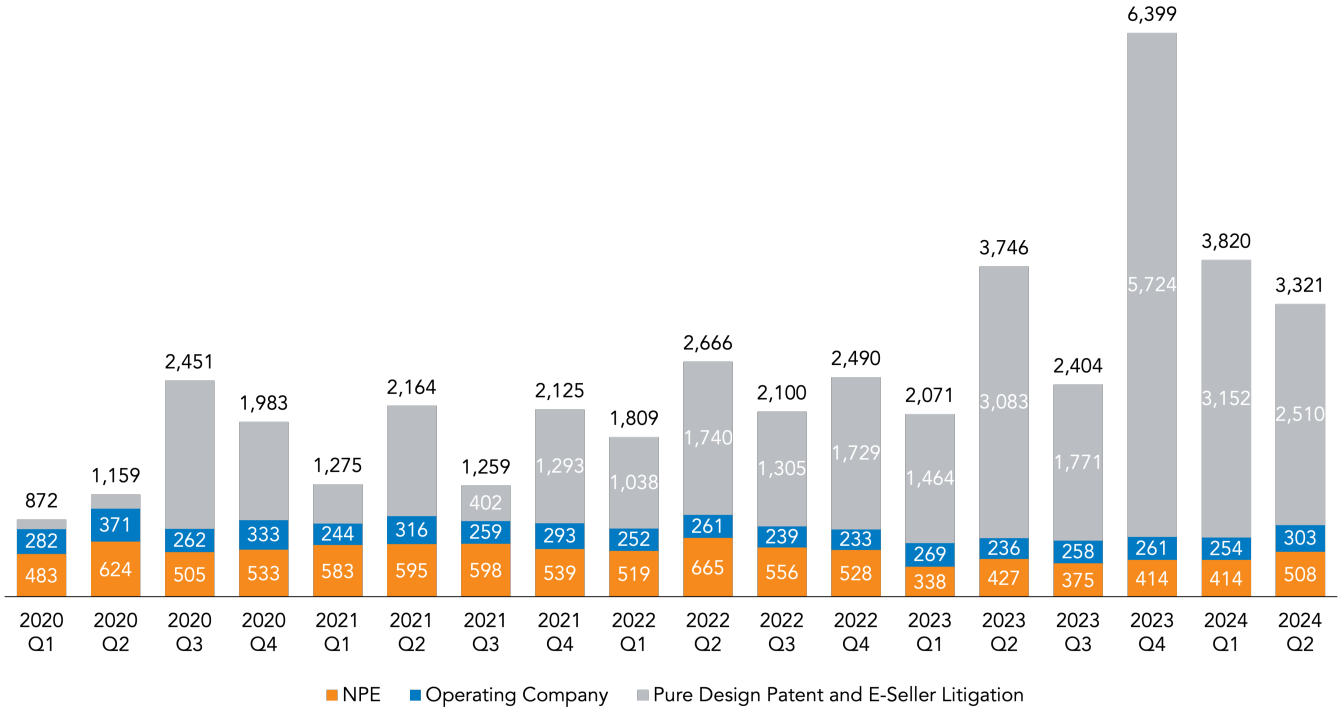
Defendants Added		**Change Compared to:**		
	Q2 2024	**Q2 2023**	**Q2 2021-2023 Average**	**Q1 2024**
NPE	508	19%	-10%	23%
Operating Company	303	28%	12%	19%
Total	811	22%	-3%	21%

Additionally, the operating company data above leave out another distinct category of litigation filed by a small group of design and utility patent owners targeting copycats and counterfeiters selling products online. RPX excludes such "e-seller" cases from analyses of district court litigation because they tend to follow a different dynamic compared to what one might consider the usual patent suit. These e-seller cases sometimes name hundreds of defendant entities, many of which may be merely online storefronts or aliases for the same ultimate parent. Also, plaintiffs primarily seek injunctive relief instead of damages, and their cases often end with the e-seller defendant's failure to answer, followed by a default judgment.

This category of litigation, which began to spike in Q3 2020, is shown in grey below to illustrate its magnitude. As shown by the rightmost bar, e-seller litigation in Q2 2024 accounted for 2,510 defendants added, or 76% of all litigation during the quarter—though this number remains subject to the caveat about defendants potentially having multiple online storefronts noted above.

Apart from the following graph, the remaining analyses in this report exclude pure design patent and e-seller litigation.

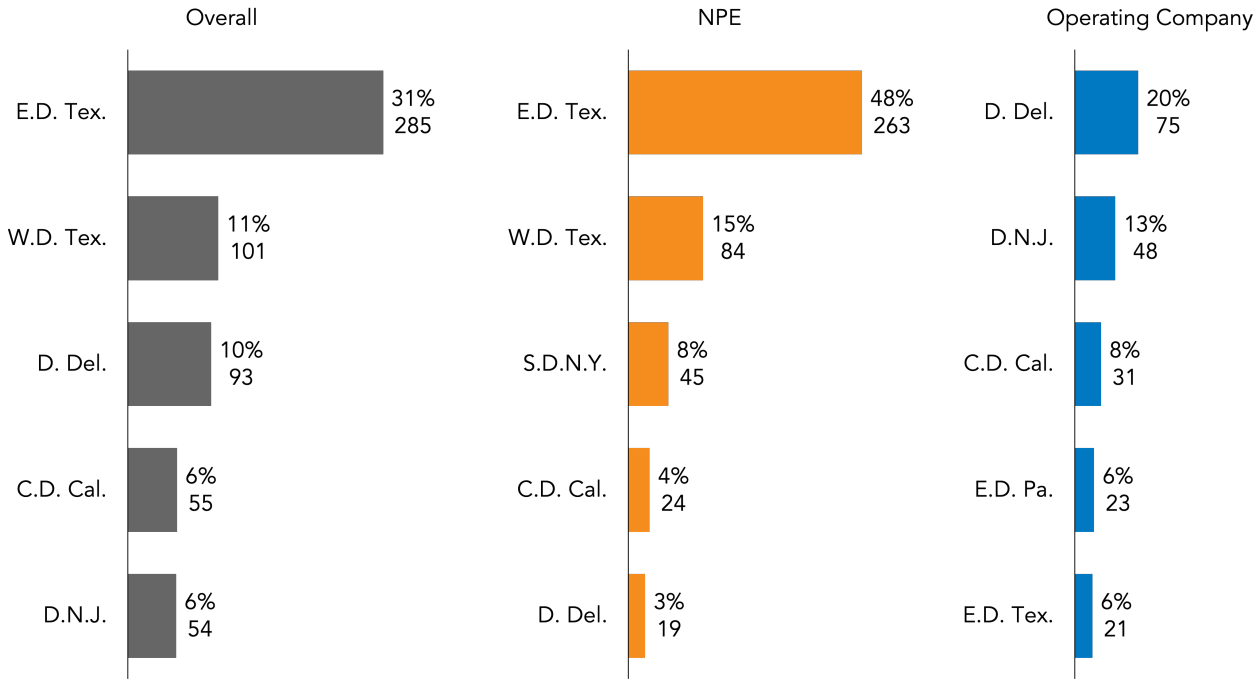
NPE and Operating Company Litigation by Quarter (Defendants Added)



Venue Update: Delaware NPE Filings Drop Further as Second-Place West Texas Hangs On

In Q2 2024, the Eastern District of Texas was once again the top district for overall patent litigation (*i.e.*, filings from all plaintiff types) and NPE litigation. However, the District of Delaware continued its downward slide in the NPE rankings, dropping from third to fifth place—pulling the district from second to third place for overall litigation even though its operating company litigation held relatively steady compared to Q1. Meanwhile, the Western District of Texas climbed to second place for overall litigation in Q2, also remaining the number-two district for NPEs last quarter.

Top Patent Litigation Districts in Q2 2024 (Defendants Added and Percentage of Total)

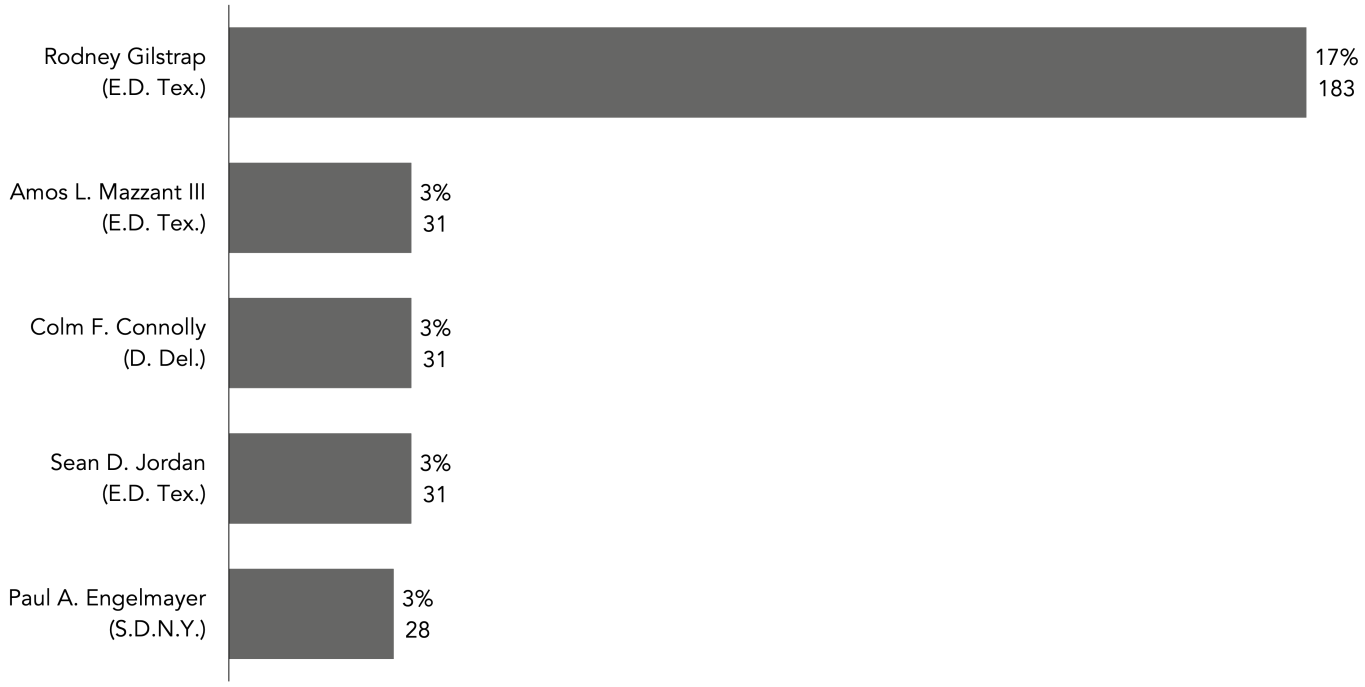


Delaware's NPE numbers have plummeted as a result of pressure over transparency in the courtroom of Chief Judge Colm F. Connolly, who in April 2022 began requiring the wide-ranging disclosure of information on corporate control and funding. Starting later that year, this triggered a heated battle with NPEs linked to monetization firm IP Edge LLC after Judge Connolly, probing into their failure to comply with those rules, identified wide-ranging fraud and ethical violations by those involved. IP Edge stopped filing there as a result, and since the firm had previously accounted for much of Delaware's NPE volume, this alone was responsible for most of the drop—but other NPEs have followed suit as well.

West Texas, which was the top patent district from Q2 2020 to Q4 2022, has also fallen in the rankings due to another key development in 2022: That July, former Chief Judge Orlando L. Garcia issued an order designed to reduce the concentration of patent litigation before District Judge Alan D. Albright, who had successfully (and openly) sought to attract patent litigation to his court. This was made possible by divisional filing rules that let plaintiffs file directly in a preferred division—letting them pick Judge Albright by filing in Waco, where he is the only district judge. The order changed this rule solely for patent cases brought in Waco, providing that they would randomly be assigned among a larger group of judges throughout West Texas, including Judge Albright. This appears to have reduced Waco's appeal to NPEs, which added just 54 defendants there in Q2 2024, compared to 103 in Q2 2023.

Perhaps not surprisingly, Judge Albright has continued to fall in the rankings as a result, failing to break the top five for the first time in Q2. The top district judge last quarter remained Chief Judge Rodney Gilstrap, with 17% of the country's patent litigation falling in his court.

Top District Judges in Q2 2024 (Defendants Added and Percentage of Total)



Though he saw a smaller portion of the nation's overall patent caseload in Q2, Judge Albright has continued to receive a disproportionate share of Waco's patent litigation despite that order, with 48% of Waco's Q2 filings ending up before him. The primary reason is that in the months following the 2022 case assignment order, the Western District adopted a practice of assigning each new patent complaint to the same judge that previously oversaw related cases involving the same parties and patents. In practice, this has led Judge Albright to receive the lion's share of those "legacy" filings, given the number of prior cases in existing litigation campaigns that had already fallen in his courtroom before the case assignment order was handed down.

That said, stakeholders have debated whether this could potentially change as a result of a revised case assignment order issued by current Chief Judge Alia Moses on May 30, 2024. That order maintains the random case assignment policy but now provides the following new language on related cases: "Parties seeking to consolidate patent cases contending all cases are related shall file a motion with sufficient legal and factual justification in the court and with the judge presiding over the case sought to be removed". However, it remains to be seen whether fewer movants will succeed in getting related cases reassigned, or whether the order will just preserve the status quo with a more fulsome record.

While it is too early to decisively answer this question, at least one judge has indicated that the existing practice should continue. On June 4, after the new order took effect, District Judge Kathleen Cardone, who had been randomly assigned a case from Proxense, LLC, transferred that case to Judge Albright with his consent, holding that "[t]o facilitate efficient docket management, all related cases are ordinarily allocated to the Judge that was randomly assigned the earliest-numbered related case" (as provided in a district-wide order issued in 2003 that concerns case assignments in *multi-judge* divisions).

Plaintiffs and their counsel have also begun to look beyond Waco in seeking a preferable West Texas venue. In particular, patent cases are increasingly flowing to the Midland-Odessa Division, where District Judge David Counts essentially adopted Judge Albright's standing order governing patent cases, with some minor changes, shortly after the issuance of the July 2022 case assignment order. Since the July 2022 order and its May 2024 replacement are both specific to patent cases filed in Waco, plaintiffs are still free to target Midland-Odessa, where they are guaranteed to get Judge Counts, the division's only

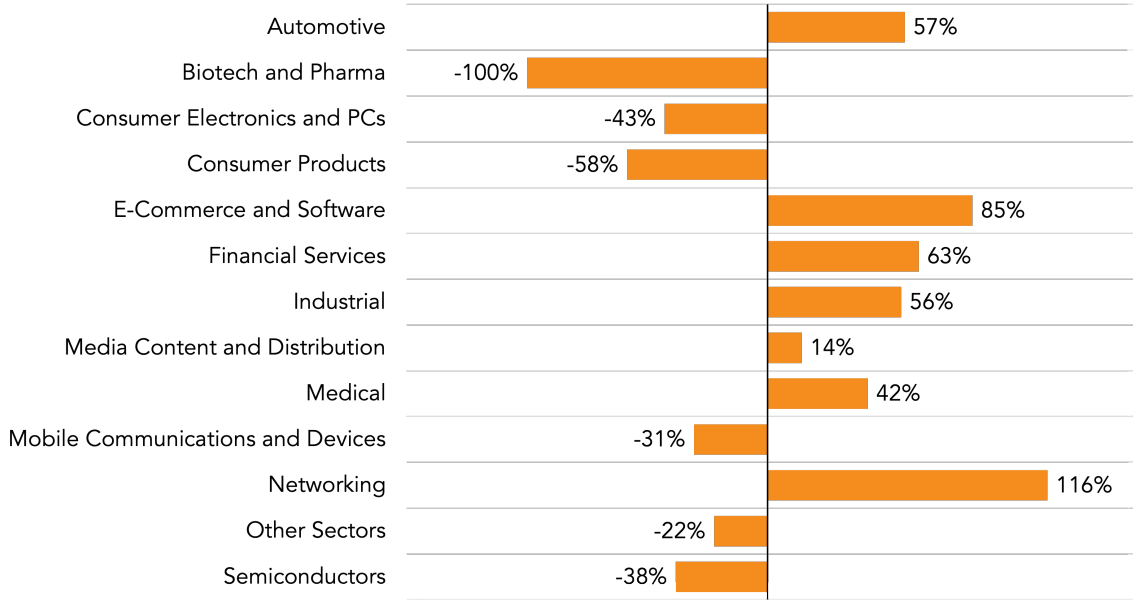
district judge, under the same single-judge filing loophole that enabled Judge Albright's former dominance.

Though Judge Counts had scarcely ever overseen patent cases before the assignment order and his adoption of Judge Albright's rules, with just one defendant added in his courtroom in 2021, his caseload has risen steadily each year since, reaching 12 defendants added in 2022 and 35 in 2023. While these are still relatively small numbers, it is also worth noting that one of the top plaintiff-side firms by volume, Ramey LLP, has increasingly focused on Midland-Odessa. Though Ramey filed virtually no cases there before Q3 2022, it has filed a steadily greater share of its litigation there, even as its overall filings in the district have dipped: After accounting for 14% of the firm's West Texas litigation in 2023 (at 16 defendants added, or 46% of Judge Counts's total 2023 caseload), 75% of the defendants added by Ramey in West Texas in Q1 2024 were in Midland-Odessa (albeit, at just nine of 12 total), and 55% in Q2 (six out of 11 defendants).

Market Sector Update: Upswing in Networking NPE Litigation Fueled by Plaintiffs Linked to Industry Veterans and Monetization Firms

A breakdown of NPE litigation by market sector shows that Networking saw the greatest increase in filings in Q2 2024, going up by 116% compared to Q2 2023. Other sectors with significant upticks included E-Commerce and Software (which saw an 85% increase), Financial Services (63%), and Automotive (57%). Sectors with fewer filings included Consumer Electronics and PCs (which decreased by 43%), Semiconductors (38%), and Mobile Communications and Devices (31%).

NPE Litigation by Market Sector, Q2 2023-2024 (Percent Change, Defendants Added)



Among the NPEs contributing to that swell in Networking litigation were several plaintiffs controlled by industry veterans. One was Innovations In Memory LLC, which in May launched a campaign targeting networking hardware (including servers and switches) and enterprise storage products that allegedly incorporate certain memory devices. The plaintiff was formed by an individual behind multiple firms engaged in patent monetization and/or financing (presently including Armada IP Capital, and formerly Soryn IP Group, LLC) and who also previously served as an engineer at InterDigital, Inc. Another such plaintiff was Encryptawave Technologies LLC, which in late June expanded its ongoing litigation campaign with a new wave of complaints over a wide range of devices (*e.g.*, computers, label printers, smartphones, smart microwave ovens, tablets, thermostats, and TVs) that support the WPA2 protocol within certain authentication tools. Encryptawave is managed by Inferential Capital LLC, which is controlled by two individuals who variously report past positions with Wi-LAN Inc., IPNav, and Acacia Research Corporation. Also adding new cases to an existing Networking campaign was Freedom Patents LLC, which filed a series of mid-June complaints alleging infringement through devices (*e.g.*, gateways, MIMO modules, and TVs) that implement MIMO Wi-Fi functionality. Freedom Patents is managed by a Texas attorney behind several other litigating NPEs, including American Patents LLC; Dynamic Hosting Company LLC; Liberty Patents LLC; Panther Innovations LLC; Plectrum LLC; and Snyders Heart Valve LLC.

Also joining the fray were two plaintiffs linked to well-known monetization firms. In early May, Fleet Connect Solutions LLC, a plaintiff associated with Texas-based Empire IP LLC, added another complaint to the campaign it launched in December 2020, here hitting networking products (*e.g.*, access points, firewalls, and routers) that support Bluetooth, IEEE 802.11ac/b/n, and LTE connectivity. Additionally, Iarnach Technologies Limited, an NPE linked to Dublin monetization firm Atlantic IP Services Limited, added a third defendant to its ongoing optical networking campaign in early April, alleging

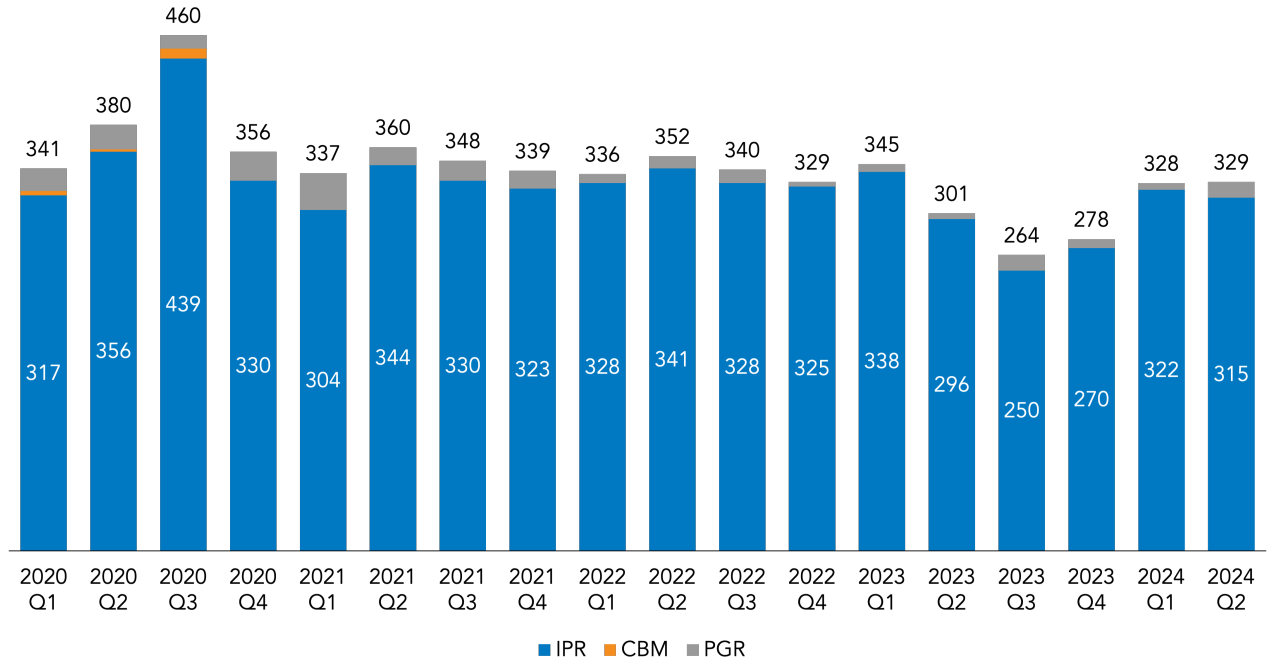
infringement through products and services related to providing DPoE v2.0-compliant networks, including optical networking hardware, transport networks, and DOCSIS back-office equipment.

Q2 also saw networking litigation from CelluPlex LLC, which in late June kicked off a campaign over telephone systems that can connect to cellular phones via Bluetooth; and Lab Technology LLC, which in late May started its own campaign over cellular networking products, including LTE modems and processors incorporating them, adding more complaints throughout June (see here and here). Both plaintiffs are part of a growing group of New Mexico-based NPEs represented by Rabicoff Law LLC that have recently launched litigation, also including Data Resonance LLC, e-Beacon LLC, Payvox LLC, and Pointwise Ventures LLC.

PTAB Update: As USPTO Continues Rulemaking Push, Supreme Court Eliminates *Chevron* Deference

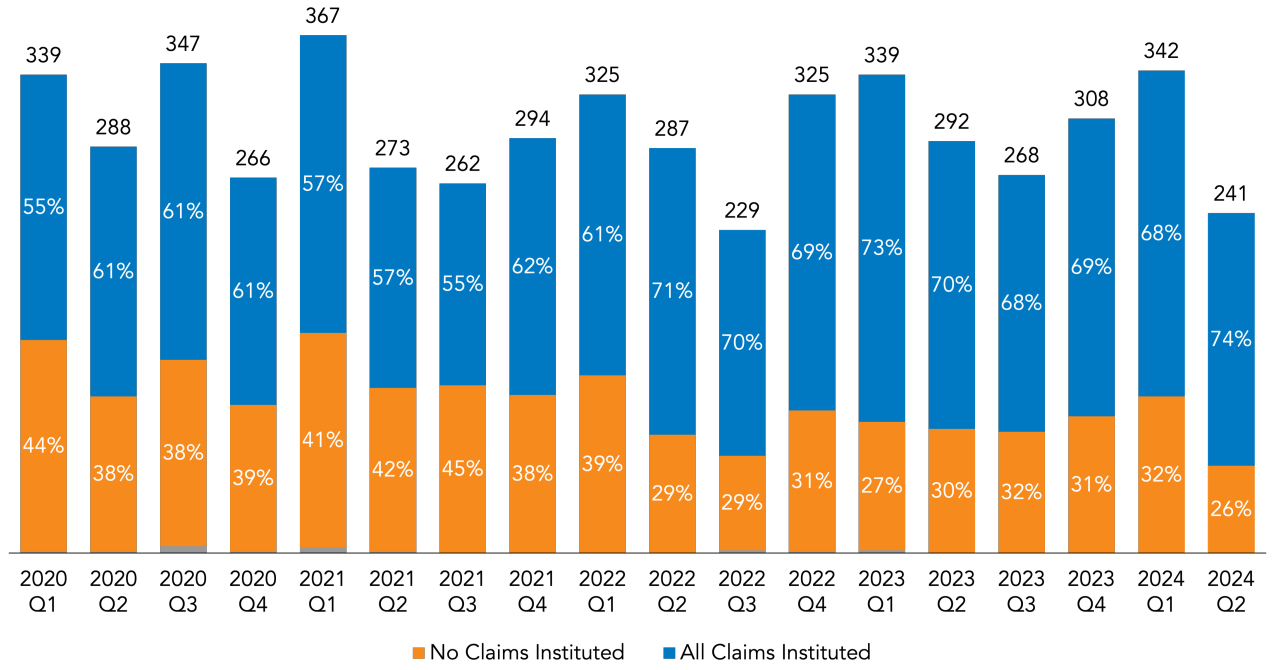
The Patent Trial and Appeal Board (PTAB) saw 329 petitions for America Invents Act (AIA) review in the second quarter of 2024, including 315 petitions for *inter partes* review (IPR) and seven petitions for post-grant review (PGR). Filings were up by 9% compared to Q2 2023, which saw 301 petitions filed; but were flat compared to Q1 2024, during which 328 petitions were filed. Filing rates also held relatively steady in the first half of the year, which was up by just under 2% from that same period last year.

AIA Review Petitions Filed



The PTAB instituted trial for 74% of the AIA review petitions addressed in Q2, up from that same quarter last year (during which the institution rate was 70%) and from Q4 2023 (68%). The institution rate for the first half of the year was 70%, versus 71% in 1H 2023.

AIA Review Institution Rates



The standards governing institution—in particular, the rules allowing the PTAB to discretionarily deny AIA review petitions—were among the areas of greatest focus in Q2 for the USPTO, which has steadily pushed to reform a variety of internal procedures using notice-and-comment rulemaking over the past year.

In late April, the USPTO released a long-awaited Notice of Proposed Rulemaking (NPRM) addressing discretionary denials before the PTAB that included just a subset of the changes from a far more sweeping—and far more controversial—rules package released in April 2023. While that earlier proposal (styled as an Advance Notice of Proposed Rulemaking, or ANPRM) floated the codification and expansion of the Board's discretionary denial practices under *NHK-Fintiv* as well as the creation of a standing requirement, the newer NPRM is limited to rules concerning "serial" and "parallel" petitions as well as validity arguments previously addressed by the USPTO, also creating a separate briefing process for discretionary denials and requiring the filing of pre-institution settlement agreements. Public comments submitted in response to the newer, more limited package by the June 18 deadline reflected feedback from a broad set of stakeholders, including licensors, frequent defendants, industry groups, and even the US Federal Trade Commission (FTC).

However, those efforts saw a potentially significant setback as Q2 came to a close, when the US Supreme Court overturned a 40-year-old doctrine called *Chevron* deference that has, until now, given many agencies wide latitude to set certain regulations.

Under *Chevron*, courts were required to defer to federal agencies' interpretation of the laws governing them when those statutes were ambiguous. For cases satisfying the various "preconditions" required for Chevron to apply, courts had to apply a two-step test: they would first ask "whether Congress has directly spoken to the precise question at issue". If the court found that "the statute is silent or ambiguous with respect to the specific issue", it would have to defer to the agency's reading if it was "based on a permissible construction of the statute".

Yet on June 28, a 6-3 Supreme Court majority overturned *Chevron* in its decision in *Loper Bright Enterprises v. Raimondo*. In *Loper Bright*, Chief Justice John Roberts, writing for the majority, grounded its decision in the history of agency oversight, arguing that under a principle established by the Founders, courts have the sole and independent authority to interpret federal statutes on questions of law. Agency interpretations of legal issues, the majority further found, have historically been granted just "due respect" and treated as informative, while only factual determinations would be given any deference. Courts have given greater weight, the majority explained, to agency interpretations "issued contemporaneously with the enactment of the statute" and those based on an agency's "specialized expertise".

The fact that the Administrative Procedure Act (or APA, a "cornerstone" law that was enacted in 1946 and governs agency rulemaking and court oversight) provides no deferential standard for when agencies answer relevant questions of law, while doing so for agency policymaking and factfinding, confirms "that courts decide legal questions by applying their own judgment" and that "agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference". *Chevron*, per the majority, violates the APA's "command" that courts must decide all relevant questions of law and interpret statutes, by requiring agencies to "'*ignore*, not follow', the conclusion they would have otherwise reached using their 'independent judgment'" (citation omitted).

In overturning *Chevron*, the majority took the significant step of breaking *stare decisis*, the principle under which the Supreme Court generally respects its prior precedent, finding that each of the applicable factors—"the quality of [the precedent's] reasoning, the workability of the rule it established, . . . and reliance on the decision"—weighed in favor of reversal. For quality of reasoning, the majority argues that *Chevron* and cases applying it failed to "grappl[e] with the APA" and highlights the "flaws" that have led the Court to narrow the decision and provide various exceptions over the years. As to *Chevron*'s workability, the majority highlights the difficulty courts have faced in attempting to provide a "meaningful definition" of the requisite ambiguity. Lastly, the majority contends that *Chevron* has not

"been the sort of stable background rule that fosters meaningful reliance" (internal quotation marks omitted) given the Court's "constant tinkering with and eventual turn away from" that decision. This makes it a gamble whether *Chevron* will be invoked at all or produce a consistent outcome if it is, the majority argues. Moreover, it contends that "[r]ather than safeguarding reliance interests, *Chevron* affirmatively destroys them" by enabling "an agency to change positions as much as it likes".

Stakeholders debating the likely impact of *Loper Bright* have focused in part on its potential impact on prior decisions. As a general matter, the majority states that the Court does "not call into question prior cases that relied on the *Chevron* framework", ruling that those decisions "are still subject to statutory *stare decisis* despite our change in interpretive methodology" unless some "special justification" is provided beyond "[m]ere reliance on *Chevron*". However, some stakeholders have echoed a counterpoint from the dissent penned by Justice Elena Kagan, who remarked that "[c]ourts motivated to overrule an old *Chevron*-based decision can always come up with something to label a 'special justification'".

Additionally, *Chevron*'s elimination still leaves a more limited form of deference known as *Skidmore*, which provides that courts may rely on agency interpretations, even for questions of law, when based on agency's "specialized expertise", with weight to be given dependent on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".

In any event, *Chevron* has been applied less frequently with respect to the USPTO. Notably, the last time that the Supreme Court applied *Chevron* was in a patent case, *Cuozzo Speed Technologies v. Lee*, in which the Court deferred to a USPTO regulation that applied a different claim construction standard (broadest reasonable interpretation) in PTAB proceedings from the one used in district court (*Philips*). (The USPTO subsequently used this same authority to switch the PTAB over to *Philips*.) Moreover, the USPTO is somewhat unique in that it is overseen by a specialist appellate court, the Federal Circuit, that has never shown deference to the USPTO on substantive rulemaking. The Federal Circuit rarely applied *Chevron* in evaluating rules promulgated by the Patent Office, and though it has upheld some USPTO regulations challenged on that basis, the court did not reach a consensus on the proper bounds of *Chevron* deference as applied to USPTO regulations while *Chevron* was still in effect (failing to do so in its split *Aqua Products* decision in 2017).

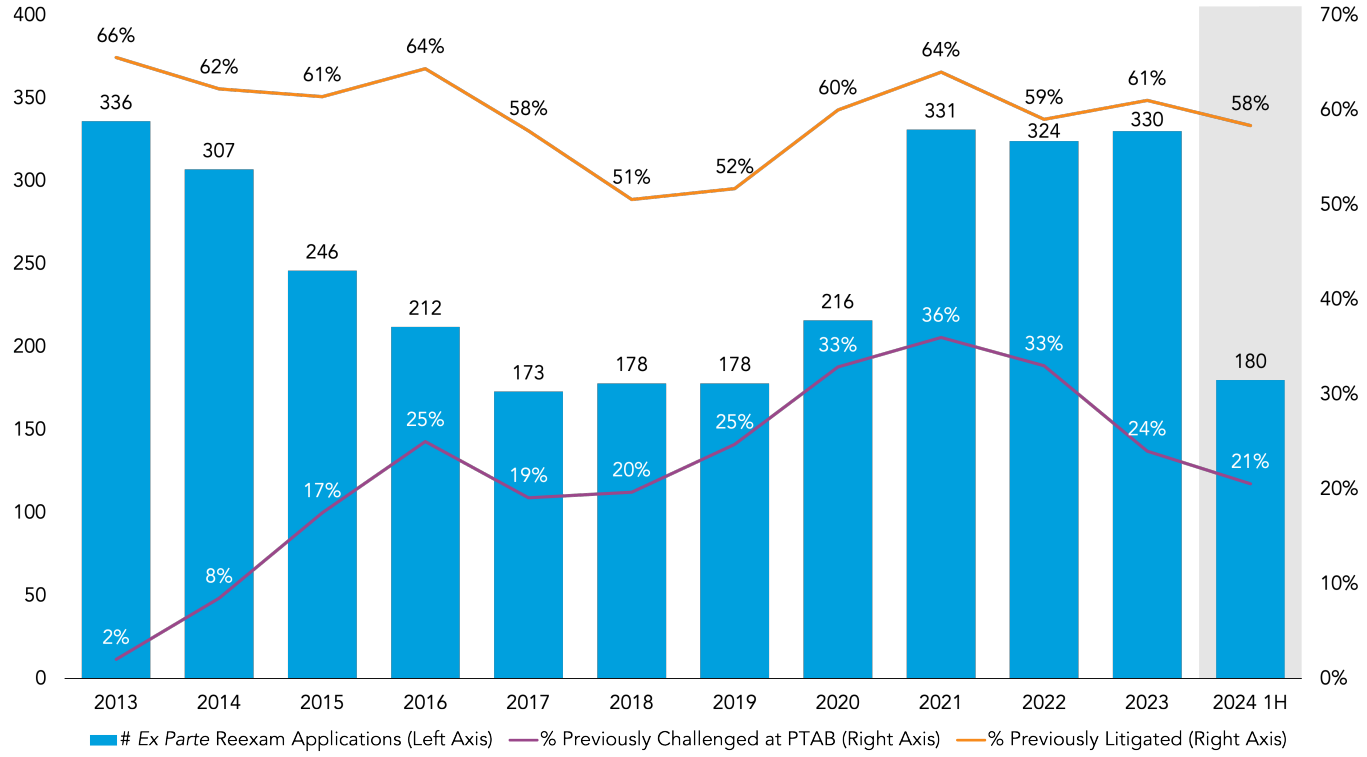
Some have observed that *Loper Bright* may encourage opponents of current USPTO regulations to file litigation challenging those policies—including issues where the Federal Circuit did not previously decide the propriety of those regulations under *Chevron*, such as whether PTAB precedential opinions were entitled to such deference. As for policies yet to be finalized, such challenges could cause roadblocks and delays for the USPTO's rulemaking proposals on discretionary denials, as described above, and other regulations recently proposed by the Patent Office (including the proposed codification of rules governing director reviews). Nonetheless, certain stakeholders (including Christopher "Kit" Crumbley, a former PTAB Lead Administrative Patent Judge) have argued that while litigation is likely, few rules are likely to be struck down, in part because the USPTO may still bolster its regulations under *Skidmore* by attempting to provide fulsome, "persuasive reasoning" justifying its relevant interpretations of the law.

- ***Reexams More Popular than Ever in 1H 2024***

As PTAB stakeholders react to the unknowns left in the wake of *Loper Bright*, uncertainty of a different sort has kept contributing to a different, ongoing trend: With institution in AIA review trials perceived as less certain as a result of the *NHK-Fintiv* rule, defendants continued to gravitate toward *ex parte* reexaminations, which are not subject to such denials to the same extent as AIA reviews. *Ex parte* reexam filings first began to rise in response to the initial uncertainty triggered by the *NHK-Fintiv* rule: The number of such requests went up by 21% in 2020 and then by 53% in 2021, peaking that year. Since then, yearly reexam filings have held steady, remaining around 330 requests for each of in 2022 and 2023 (with the latter standing out as the second-highest filing year of the past decade).

Reexam filings so far this year suggest that 2024 could be an even busier year. Filings spiked in Q1, which saw 40% more reexam requests than that same quarter one year prior. The increase was smaller but still substantial for the second quarter, which saw 27% more requests than Q2 2023—with the total number of requests brought in the first half of the year 33% greater than that same period last year. The share of patents subject to reexam requests that were also previously challenged at the PTAB has also continued to fall, from 36% in 2021 to 24% in 2023 and to 21% in the first half of 2024. Meanwhile, the share of those reexam patents also litigated in district court has held steady since 2022. This all suggests that defendants have been relying less on the PTAB as uncertainty over discretionary denials persists, and that reexams have remained a frequently utilized defensive tool as a result.

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



Note: Data as of July 8, 2024. Due to the delayed availability of filing dates and related data from the USPTO, this analysis is subject to change. Grey box indicates incomplete data for the year.

FRAND Update: Chinese Court Asserts Rate-Setting Power for Foreign Pools; UPC Issues First SEP Rulings

– ***China: Greater Scrutiny of Foreign Patent Pools by Courts and Anti-Monopoly Agency***

In 2021, China became the second country, following the UK, where courts have asserted the power to set the terms of fair, reasonable, and nondiscriminatory (FRAND) licenses for global standard essential patent (SEP) portfolios. Now, China's Supreme People's Court has reportedly held that Chinese courts may also establish global FRAND rates for entire "foreign patent pools", apparently the first time that any court has done so—affirming a ruling in favor of TCL and against patent pool administrator Access Advance LLC.

As reported by Chinese-language WeChat blog *Corporate Patent Watch* and *IAM*, TCL filed the litigation below in 2022 in two venues: one in the Shenzhen Intermediate People's Court seeking the determination of a FRAND rate, in response to allegedly "unfairly high prices" sought by Access Advance through its HEVC Advance pool (as characterized by *Corporate Patent Watch*); and the other in the Guangzhou Intermediate People's Court, asserting that Access Advance had abused its "dominance in the HEVC pool market" (per *IAM*). Access Advance then objected to the court's jurisdiction, appealing a series of adverse rulings up to the Supreme People's Court. *IAM* reports that the Supreme People's Court handed down its decision on market abuse in May, and its ruling asserting jurisdiction over pools' global FRAND rates on June 20.

Few details are otherwise available on the contents of those decisions, which followed a ruling in 2021 where the UK High Court declined to exercise rate-setting jurisdiction over Access Advance, as well as a German decision that found certain terms of that pool non-FRAND for reasons not related to licensing rates.

Meanwhile, on June 27, the Anti-Monopoly Division of China's State Administration for Market Regulation (SAMR) announced that on that same day, it had formally "reminded" patent pool Avanci about "monopoly risks in the licensing process of essential patents for automotive wireless communication standards". The SAMR advised Avanci to identify and address any such issues in a "Reminder and Urging Letter", which is the first of four steps in the "Three Letters and One Notice" soft enforcement system for ensuring compliance with anti-monopoly laws as established in late 2023. Per that announcement, the head of the Anti-Monopoly Division met with Avanci leadership and delivered the "Reminder and Urging Letter" in person. This appears to be the first time that a patent pool has received this type of scrutiny.

Avanci has since posted a Chinese-language response on its official WeChat channel, stating that it was "pleased to have had the opportunity to actively communicate with [SAMR]" about its automotive licensing programs. The pool framed that communication as having provided "valuable guidance on [its] joint licensing" that was "[s]imilar to [what] antitrust regulators in other countries and regions around the world" have provided. Avanci stated that it "will continue to comply with the antitrust laws and related laws and regulations in China and other jurisdictions around the world".

In characterizing the value of its programs to patent owners as well as Chinese implementers, Avanci stated that it "look[s] forward to continuing dialogue and discussions with Chinese automakers". To date, the pool has not yet licensed any Chinese automakers.

Time will tell whether the SAMR's Avanci inquiry ends with a similar result to the pool's engagement with the US Department of Justice's Antitrust Division, which at Avanci's request reviewed its licensing programs and in 2020 issued a favorable Business Review Letter in which the Antitrust Division stated that it would not raise a challenge to those programs.

– *UPC: Local Divisions Split on SEP Transparency and NPE Securities*

The launch of the Unified Patent Court (UPC) last June marked a new era in European patent litigation, enabling patent owners to enforce their patents in a single European Union (EU) venue with jurisdiction spanning 17 member states. As the UPC passes its first anniversary, the court has played an increasingly prominent role in multijurisdictional patent campaigns—including SEP litigation and FRAND licensing disputes.

As some of the court's first FRAND litigation moves forward, the court began to address some unanswered questions on SEP issues in Q2—in the process, revealing an apparent split between two of the court's most popular local divisions in Germany, those in Mannheim and Munich, over the proper approach to licensing transparency.

In early April, the Munich Local Division adopted a relatively expansive approach to the production of relevant license agreements as related to determining a FRAND rate, granting defendant Oppo's request to compel plaintiff Panasonic to produce all agreements covering patents declared essential to 4G standards with respect to mobile devices.

However, in mid-May, the Mannheim Local Division reached a different result—explicitly declining to follow the Munich Local Division's decision—with respect to a similarly wide-ranging motion to compel from Oppo, denying a request to order the production of 3G or 4G license agreements. The court did so based on an overarching interpretation of EU antitrust law, explaining that under *Huawei v. ZTE*, a patent owner is obligated to provide a willing implementer with a written FRAND license offer that specifies the manner in which it was calculated. Under this aspect of *Huawei*, the court held, requiring a patent owner to produce all 3G and 4G licenses would be "inappropriate" if the implementer were found to be unwilling—a determination that had not yet been made in this case. Moreover, the court ruled that under *Huawei*, a SEP owner may justify an offer's FRAND-ness, to satisfy its duty of transparency, by pointing to an existing licensing program, which it found Panasonic had done by submitting a pair of comparable licenses. Making this showing through a subset of the relevant agreements, the court additionally determined, was also consistent with *Huawei*, which provides that parties to a SEP negotiation must follow "recognized commercial practices". Here, the court found that parties following such practices in a "result-oriented" SEP negotiation would "limit themselves to a manageable number" of agreements to avoid bogging down the proceedings.

Beyond those initial SEP rulings, the court has also begun to fill in the gaps on other issues relevant to NPE litigation. One such issue relates to the court's discretion over whether to require plaintiffs to provide a security to cover the defendant's litigation costs, with local divisions again taking divergent positions.

Specifically, in late April, the Munich Local Division denied three defendants' request to order a US-based NPE, Network System Technologies LLC, to provide a security for their expected litigation costs due to concerns that the plaintiff's financial position (its lack of physical assets and allegedly "limited funds"), combined with its location outside the EU, would make a subsequent cost order unrecoverable. The court found that the NPE's "light organization" is appropriate for its business of patent monetization and that the defendants had provided no evidence showing a risk of outright insolvency, noting that its patents could be seized if necessary. Additionally, the court held that the defendant's location could not be relevant because it may not discriminate against non-EU defendants, remarking that in any event, it saw no reason why it would be any more difficult to enforce a UPC judgment or cost order in the US than it would for those from any other non-US court.

However, the Paris Local Division reached a very different conclusion in late May in litigation from another US NPE, ICPillar LLC. While the court again found that the plaintiff's US location did not justify a security, it found that there was sufficient risk that ICPillar could not cover the defendant's costs due to its limited source of income (derived only from patent assertion) and the lack of public records of its financial situation. The court additionally held that ICPillar's evidence of insurance covering its potential liability was insufficient to avoid a security because this type of insurance is designed to benefit the

plaintiff, not the potential rights of the defendants, and because the policy's actual terms had not been disclosed. The court then ordered ICPillar to provide a €400K guarantee from a bank licensed in the EU—rejecting its request to allow a guarantee from a bank licensed to operate in the US (though noting that there were banks licensed in both the EU and the US that would be permissible).

As the court moves forward with its first batch of SEP suits, stakeholders have closely watched these and other rulings by the UPC on a variety of other issues impacting cases throughout the course of litigation, including the court's approach to preliminary injunctions—and its openness to requests for such relief for NPEs. See here for more on those rulings.

Patent Market Update: Significant Verdict and New Filings in Funded Campaigns; Notable Deals Revealed

- ***$847M Damages Award Returned in Funded Campaign***

In late June, an Eastern District of Texas jury returned a verdict in favor of General Access Solutions, Ltd. (f/k/a Access Solutions, Ltd.) (GAS), awarding $583M in damages for the infringement of a first patent-in-suit; $264M, for infringement of a second. Chief Judge Rodney Gilstrap presided over the trial, in a case that GAS filed against Verizon (Verizon Wireless) back in October 2022—just a couple of months after GAS secured, according to public records, litigation funding.

The jury completed a form finding infringement of both patents and a failure to prove invalidity of certain claims of the two patents-in-suit due to lack of written description or enablement, as well as assigning the damages figures noted to each patent. GAS's campaign has been active since May 2016, when it sued Sprint (now part of Deutsche Telekom). An April 2023 case against Deutsche Telekom's T-Mobile remains active before Judge Gilstrap. The parties there are submitting claim construction briefing. RPX members can access coverage of this trial and GAS's campaign here.

- ***New Funded Litigation Campaigns***

RPX subject matter experts spend considerable time collecting and reviewing public records to identify relationships between patent holders and specific third-party funders. This systematic review has resulted in a robust, living database offering RPX members an unparalleled view into the litigation funding space.

Through this process, RPX has flagged several litigation campaigns initiated during Q2 that can be tied to prominent litigation finance firms and/or a private equity firm with a litigation finance desk.

RPX members can access a round-up of those new, funded patent litigation campaigns here, with coverage also available in our members-exclusive webinar that accompanies this quarterly report.

- ***Notable Patent Transactions Made Public in Q2***

RPX also flagged several patent transactions during Q2 that were deemed notable in light of the involvement of operating company portfolios and/or assignees with a history of litigating patents—some with the backing of third-party litigation funders. An entry point into those noteworthy assignments is available to RPX members here.

Additional RPX Patent Market Intelligence

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