

Abusive Patent Litigation Is Back On The Rise

Who We Are

United for Patent Reform (UFPR) is a broad coalition of diverse American businesses advocating for a patent system that enhances patent quality, advances meaningful innovation, and protects legitimate American businesses from abusive patent litigation. Our members are small and large — they range from Main Street retail shops, REALTORS®, hotels, grocers, convenience stores, and restaurants to national construction companies, automobile manufacturers, and technology businesses. Collectively, our members represent over 80 million U.S. employees, a figure that accounts for nearly two-thirds of private sector jobs in the U.S.

Abusive patent litigation is back on the rise. After a brief downswing, the weakening of important tools for fighting abusive patent suits – namely Inter Partes Review (IPR) and Section 101 challenges under *Alice* – have led to a resurgence.

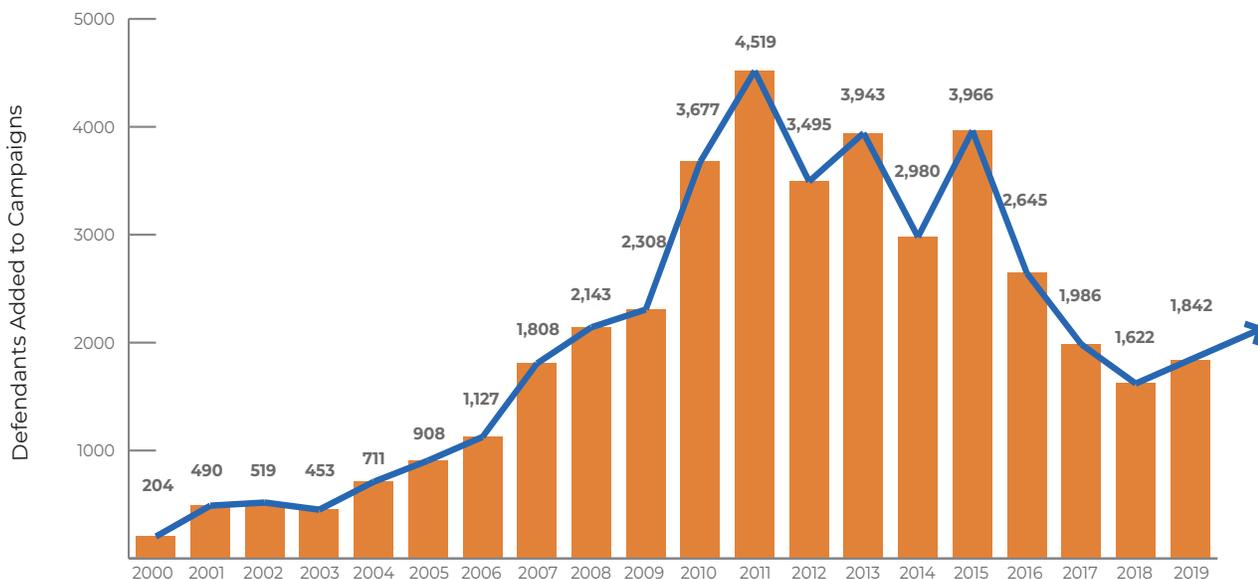
Our members, most of whom are patent owners, appreciate the important role the U.S. patent system plays in supporting innovation. But we have also experienced the harm that patent litigation abuse and poor-quality patents can cause. Much of that abuse is perpetrated by non-practicing entities (NPEs), sometimes called patent assertion entities or patent trolls. NPEs buy up patents for the purpose of extracting “hold up” settlements.

From 2005 to 2015, the number of NPE suits quadrupled, placing a crushing burden on U.S. businesses that create jobs across all sectors of the economy. We experienced a welcome slowdown starting in 2016, although the overall level of NPE litigation remained at record highs compared to earlier years.

There were
200 more NPE
cases in 2019
than in 2018, an
increase of 20%

But as the numbers for 2019 show, abusive patent litigation by NPEs is again on the rise. The reason? Important tools for fighting abusive patent litigation have been weakened.

NPE Litigation Over Time



Source: RPX Corp

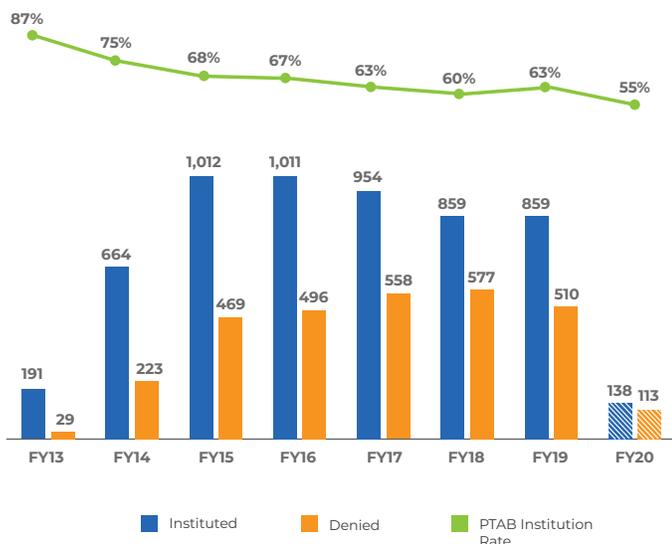
Tools for Fighting Abusive Litigation Are Weaker

The increase in abusive patent litigation is a result of NPEs taking advantage of worsening conditions in the patent system. The IPR program has been weakened by the Patent and Trademark Office (PTO), and businesses face increased hurdles to challenging weak patents based on the Supreme Court's *Alice* decision.

IPR

Congress passed the America Invents Act (AIA) in 2011 because of serious concerns that low-quality patents were placing a drag on innovation and eroding public confidence in the patent system. The AIA created the IPR program at the PTO, which allows the public to ask the PTO to take a second look at questionable patents in a procedure that is faster and cheaper than litigation. At first, IPR was an effective tool that allowed the targets of baseless litigation to fight back.

But every significant change to IPR in recent years has weakened the procedure and favored invalid patents. For instance, the PTO has changed how patents in IPR are interpreted from the standard used across the rest of the PTO to a narrower standard, making it less likely for bad patents to be found invalid. The agency made it easier for patent owners to get new claims during IPR by limiting the scope of its own review to arguments made by the challenger, resulting in some new claims issuing without any examination at all. And through regular use of its unfettered discretion to deny IPRs, the PTO has turned away challenges to invalid patents for procedural reasons, forcing businesses to choose between fighting expensive district court litigation or settling with NPEs. As a result of these changes, the PTO institutes and agrees to consider fewer cases every year, and new filings have dropped significantly.



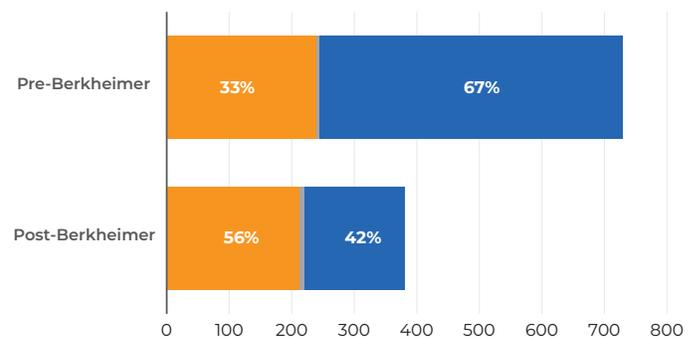
Source: [Trial Statistics](#) at slide 6

Alice and Section 101

In 2014's *Alice v. CLS Bank* decision, a unanimous Supreme Court restated what had long been the law under Section 101 of the Patent Act: abstract ideas, like business methods, cannot be patented. Although the holding of this case did not represent a change in law, some lower courts were now more willing to assess patents early in a case, before discovery and the accumulation of huge legal fees, and invalidate the non-technological e-commerce patents that NPEs commonly wield against Main Street businesses. Under *Alice*, courts easily struck down patents like those covering scavenger hunts, picture menus, and delivery notifications.

But just as IPR has undergone significant weakening, so has *Alice* and the ability to ask a court to make an early call on patent validity. In a pair of cases in 2018, *Berkheimer v. HP* and *Aatrix Software v. Green Shades Software*, the Court of Appeals for the Federal Circuit changed its approach to analyzing patents under *Alice*, pushing the decision on whether a patent is valid under Section 101 from early in a case, at the Rule 12 stage, to much later, after expensive discovery and potentially a full trial. These cases shifted the focus of the analysis from the legal question of what the patent itself says to predominantly fact-based questions outside the patent. As a result, fewer patents overall are invalidated under *Alice*, and successful litigation challenges early in a case have dropped dramatically.

Patents Invalidated Under *Alice* Before and After *Berkheimer*



Source: [Q4 in Review](#) | RPX Corp

What's Next?

While a robust IPR program and the potential for an early *Alice* decision led to a temporary decline in abusive patent litigation, we now see substantial backsliding. NPEs that may have been hesitant to sue in recent years because their targets could invalidate their weak patents are once again emboldened to demand settlements based on the high cost of litigation, and they have significantly increased their activity. The Main Street businesses that are the regular targets of these campaigns are again experiencing the increased burden of shakedown settlement demands and wasteful litigation on patents that shouldn't have issued in the first place. Tools to efficiently combat low-quality patents, like a robust IPR procedure and early *Alice* assessments, are critical for keeping things from getting worse.