

UNITED for PATENT REFORM

Comments of United for Patent Reform in Response to the Administrative Conference of the United States Small Claims Patent Court Study

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 United States.

UFPR appreciates the opportunity to submit comments in response to the Administrative Conference of the United States' (ACUS) small claims patent court study, which explores whether there is a need for a small claims patent court, the feasibility and potential structure of such a court, and the relevant legal, policy, and practical considerations in establishing a small claims patent court.

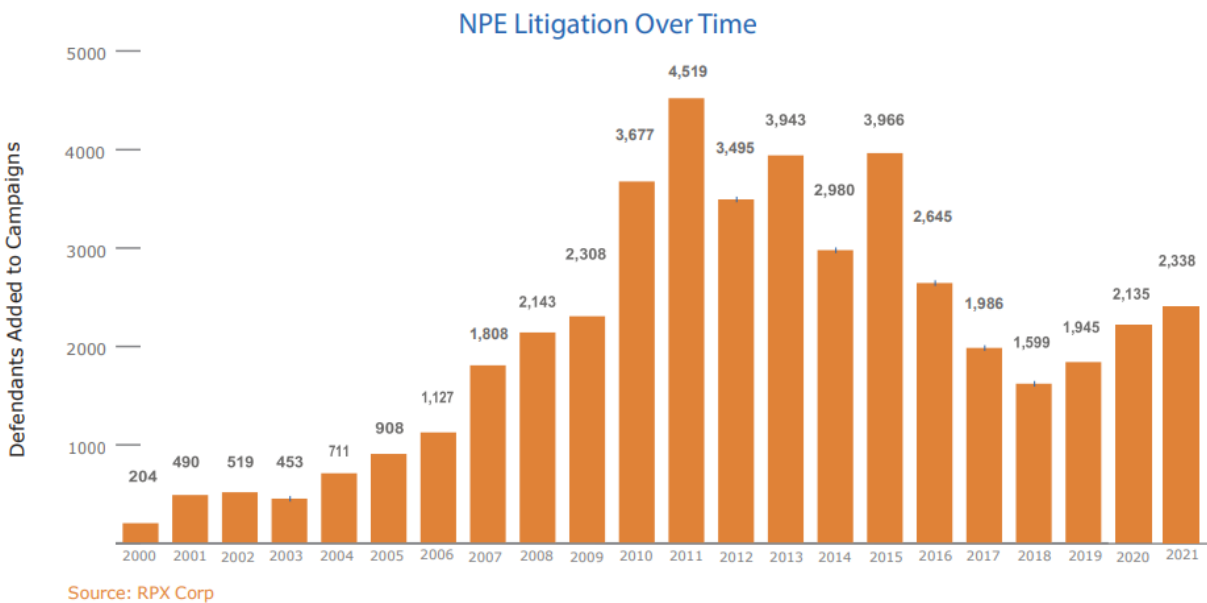
UFPR recognizes the legitimate interest in addressing the high cost of patent litigation, and in ensuring that small-and-medium-sized enterprises are able to enforce their patents. However, UFPR has concerns that, without appropriate scoping, a small claims patent court would be abused by non-practicing entities (NPEs) to tax small businesses, particularly those that are unfamiliar with the patent system and can be severely harmed by even small payouts.

While many of UFPR's members are patent holders, a greater percentage hold no patents at all, and their only interaction with the patent system is getting sued or threatened with suit by a patent holder, typically an NPE. More often than not, this is on the basis of vague, over-broad patents that should not have issued in the first place, and primarily for technology where the targeted business is simply an end user of the product at issue, and not the creator of the product itself. This is why UFPR cares deeply about the patent system and making sure that it works so that the benefits of innovation can be experienced by all Americans, while the harms of abusive litigation are not.

Abusive patent litigation brought by NPEs has been a significant problem for years, with UFPR members routinely targeted by these lawsuits. As the chart below illustrates, NPE

litigation peaked in 2011, and generally trended downward after that until 2018. The downward trend was largely brought about by two improvements to the patent system. First, the enactment of the America Invents Act and its creation of the Inter Partes Review (IPR) process at the U.S. Patent and Trademark Office (USPTO) provided an efficient, cost-effective, and expert process for addressing invalid patents. Second, the Supreme Court’s 2014 restatement of the law around patent eligibility in *Alice* curtailed the availability of patents covering abstract ideas like methods of conducting business from being used to go after productive companies.¹

However, with the weakening of both the IPR process and the ability for early disposition of a case under *Alice*, litigation brought by NPEs began to rise starting in 2018. By 2021, it had increased by 46% over its 2018 level. Much of this growth was from cases filed before one specific judge whose court was attractive due to practices that made it even harder to challenge a patent’s validity using the IPR process, or to get an early decision from the court on patent eligibility. These practices shielded invalid patents from evaluation so that the prospect of expensive litigation would encourage a defendant to settle, preferring to pay for an invalid patent rather than potentially bankrupt itself by getting to trial.



Just recently, the Western District of Texas issued an order to address the concentration of patent litigation before one judge.² As a result, patent litigation filed in the Western District of Texas –

¹ *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 573 U.S. 208 (2014).

² See Order Assigning the Business of the Court as it Relates to Patent Cases (W.D. Tex. Jul. 25, 2022), found at <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf>.

primarily brought by NPEs – is returning to its previous level, demonstrating the impact that a court’s approach to handling patent litigation can have on its popularity with NPEs.³

These developments make clear the importance of scoping a small claims patent court to ensure that it does not create yet another forum for opportunistic NPEs to go after small businesses. Along these lines, UFPR has four suggestions to consider as part of this study.

First, participation must be voluntary for both the patent holder and the defendant and relief must be limited to damages or a royalty. This mirrors the approach before the newly-created Copyright Claims Board, which gives the respondent the opportunity to opt out of the small claims proceeding, at which point the rights holder can pursue a district court lawsuit. The Claims board has no injunctive power. The opt-out process must also be inexpensive and streamlined so that the cost of opting out does not itself create the shakedown value that NPEs have leveraged in district court to date. UFPR believes that, by being voluntary, any new court will avoid being used as a tool by NPEs to harass businesses and will also avoid running afoul of any constitutional issues that will otherwise arise.

Second, the validity of the asserted patent should be evaluated by the USPTO. In any patent litigation, assessing the validity of the patent at issue is a critical component of the case. One study shows that half of all software and business method patents – which are the types of patents most often exploited by NPEs – may be invalid.⁴ To avoid eroding public confidence in the patent system, any new court should evaluate the validity of the asserted patent and can leverage the IPR process to do so. IPR is an efficient and expert tool for addressing any errors in granting a patent and also helps to streamline issues for the related court proceeding. The USPTO is well-positioned to serve this role using the existing IPR process.

Third, patent holders should have to practice their invention to use any new court. UFPR believes that for a small claims patent court to truly serve its purpose of promoting innovation and allowing patent holders to more easily enforce their rights, such a court should be limited to those patent holders who actually practice their invention. In other words, the court should have a “working requirement.” For these entrepreneurial patent holders, a small claims patent court gives another option to enforce their patent and allow those parties that are also implementing the technology to pay the necessary license fees. Or, such a party could opt for a district court action where an injunction would be possible if that is their goal. A “working requirement” would ensure that the new forum is not abused by

³ See Judge Albright’s *New Caseload Dips as Order Distributing Waco Patent Cases Takes Effect*, Aug. 5, 2022, found at <https://insight.rpxcorp.com/news/71378-judge-albright-s-new-caseload-dips-as-order-distributing-waco-patent-cases-takes-effect>.

⁴ See Shawn P. Miller, *Where’s the Innovation? An Analysis of the Quantity and Qualities of Anticipated and Obvious Patents*, Feb. 10, 2012, found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029263.

opportunistic parties that are not otherwise manufacturing products or providing services to consumers that are covered by the patent.

Fourth, any third-party litigation funding must be disclosed. Even in the case where a patent is being practiced, both parties should be aware of who is funding the dispute to avoid “sham” practices that could create perverse incentives. In what has become a common practice in recent years, unknown actors with heavy financial interest in a litigation operate in the shadows to harass defendants small and large. This type of behavior, with its lack of transparency, adds complexities and inefficiencies to the litigation process. For example, a litigation funder could strategically target small end users like Main Street retail shops in hopes of collecting many smaller payouts and refuse to participate in global settlement with more patent-savvy companies that actually supply the accused technology. Such bad conduct has led some jurisdictions – including the District of Delaware – to adopt standing rules requiring the disclosure of third-party funders.⁵ Any new court should do the same to prevent harassment and gamesmanship.

UFPR appreciates this opportunity to share areas for further study as part of this process and is happy to provide further input as it moves forward.

⁵ See Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022), found at <https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf>.