

# Abusive Patent Litigation Continues to 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, REALTORS®, hotels, grocers, convenience stores, and restaurants to national construction companies, automobile manufacturers, and technology businesses. Collectively, our members represent over 90 million U.S. employees, a figure that accounts for nearly two-thirds of private sector jobs in the U.S.

After a brief downswing, there is a resurgence in abusive patent litigation, brought about by the weakening of important tools for fighting such suits—namely Inter Partes Review (IPR) and Section 101 challenges under *Alice*.

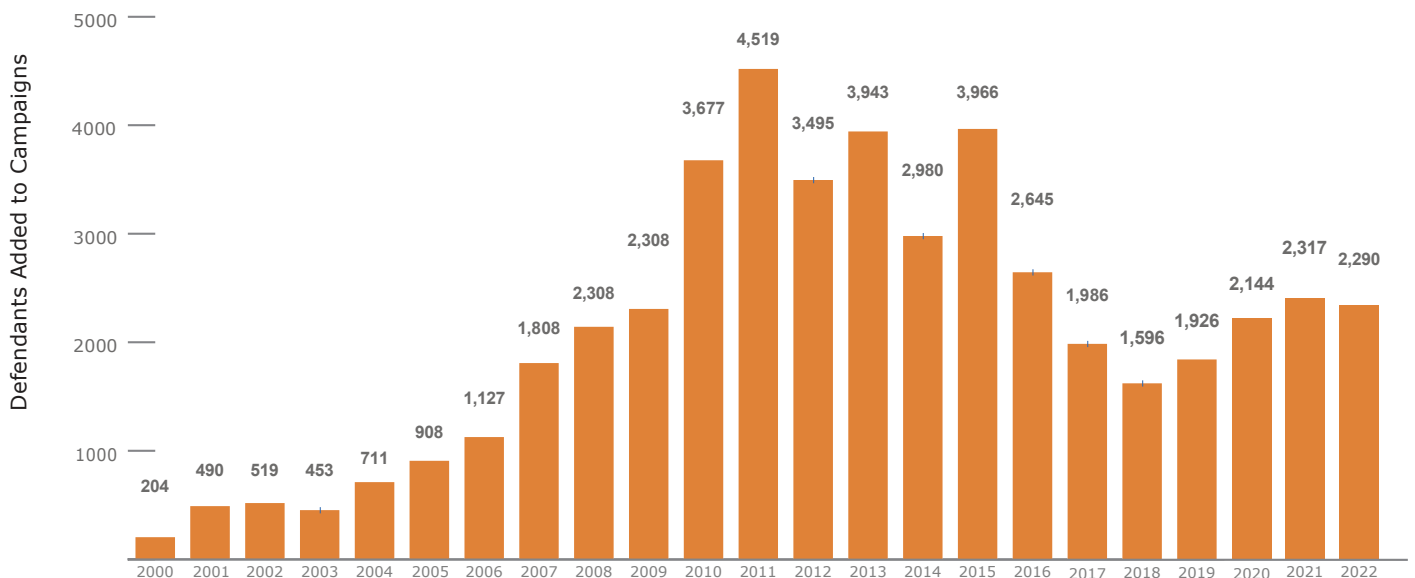
Our members appreciate the important role the U.S. patent system plays in supporting innovation. But we have also experienced the harm that patent litigation abuse and poor-quality patents can cause. Much of that abuse is perpetrated by non-practicing entities (NPEs), sometimes called patent assertion 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.

**40%**  
increase in NPE  
cases from  
2018 to 2022

As 2022 data show, abusive patent litigation by NPEs has continued to rise. The reason: important tools for fighting abusive patent litigation have been weakened.

NPE Litigation Over Time (2000-2022)



Source: RPX Corp

## Tools for Fighting Abusive Litigation Are Weaker

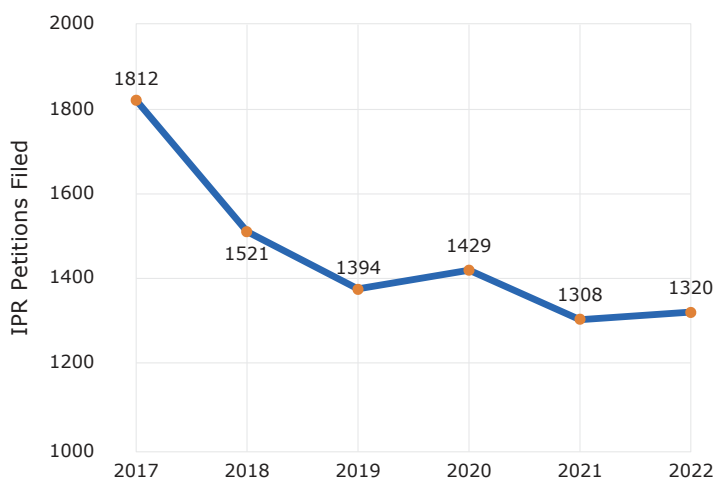
The increase in abusive patent litigation is a result of NPEs taking advantage of worsening conditions in the patent system. The IPR program has been weakened by the U.S. Patent and Trademark Office (USPTO), and businesses face increased hurdles to challenging weak patents based on the Supreme Court's *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 USPTO, which allows the public to ask the USPTO 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 USPTO has changed how patents in IPR are interpreted from the standard used across the rest of the USPTO 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 the USPTO put in place a policy that favors having invalidity decided by a court rather than by the agency that granted the invalid patent in the first place, forcing businesses to choose between fighting expensive district court litigation or settling with NPEs. As a result, fewer businesses than ever are considering the IPR process.

IPR Petitions Over Time

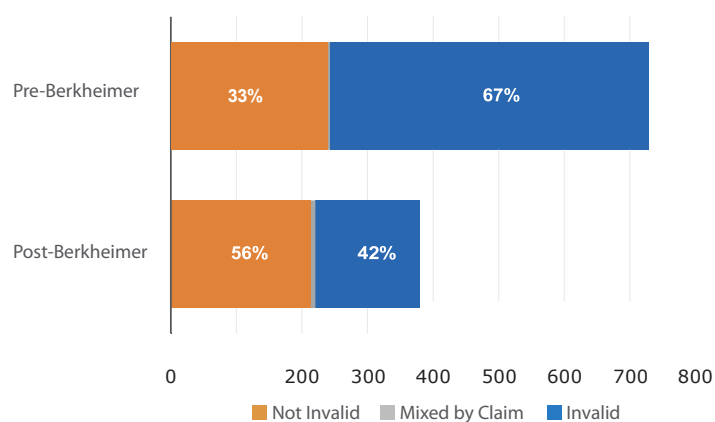


## Alice and Section 101

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 the *Alice* ruling 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?

NPEs have been left emboldened to bring abusive lawsuits based on bad patents. Main Street businesses, which are often the targets, are again experiencing the increased burden of shakedown settlement demands and wasteful litigation on patents that shouldn't have been 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.