

Leahy Institute of Advanced Patent Studies

The Naples Roundtable

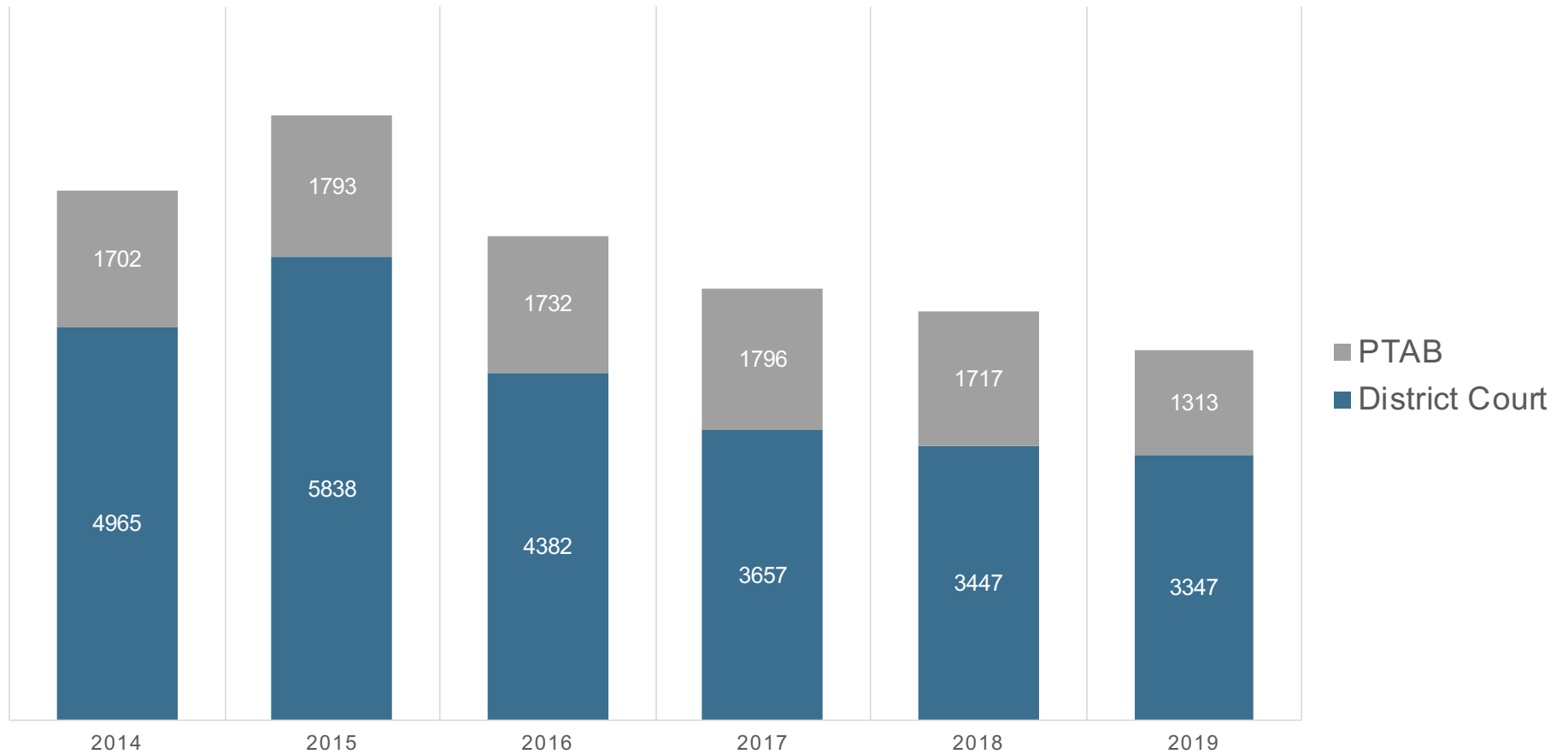
February 18, 2020 - 9:00 am to 10:15 am

Phoenix Issue VI

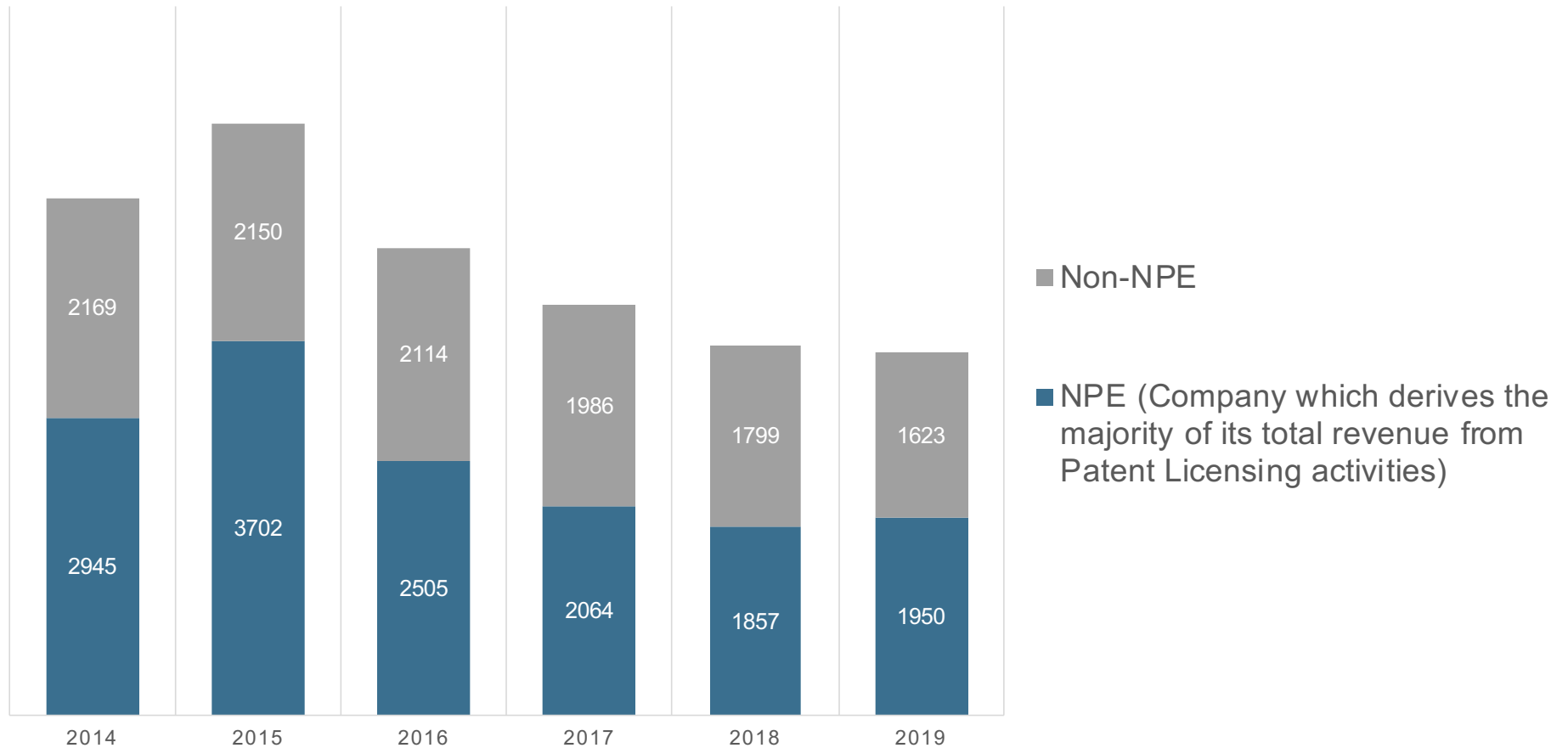
Discussion Leaders: George Pappas (*Moderator*), Judge Kent Jordan,
Paul Berghoff, and Steve Auvil

- Is patent litigation being abusively utilized today or have “Troll” actions been significantly curbed?
- Have IPRs, recent Court decisions, changes in venue selection, and the more frequent award of attorneys’ fees helped?
- What actions should be taken to improve the quality of the patents that are issued?

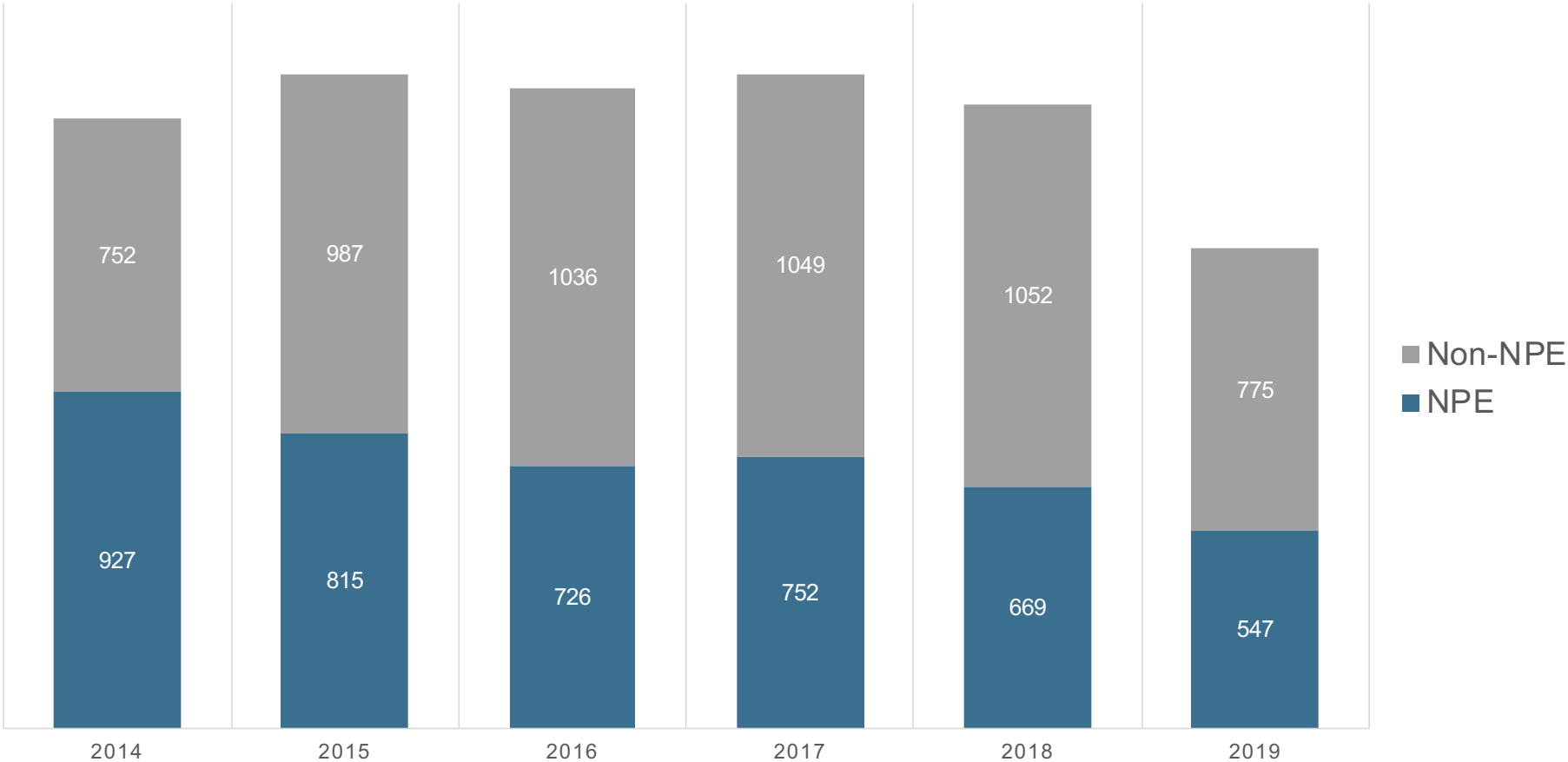
Patent Disputes Have Decreased



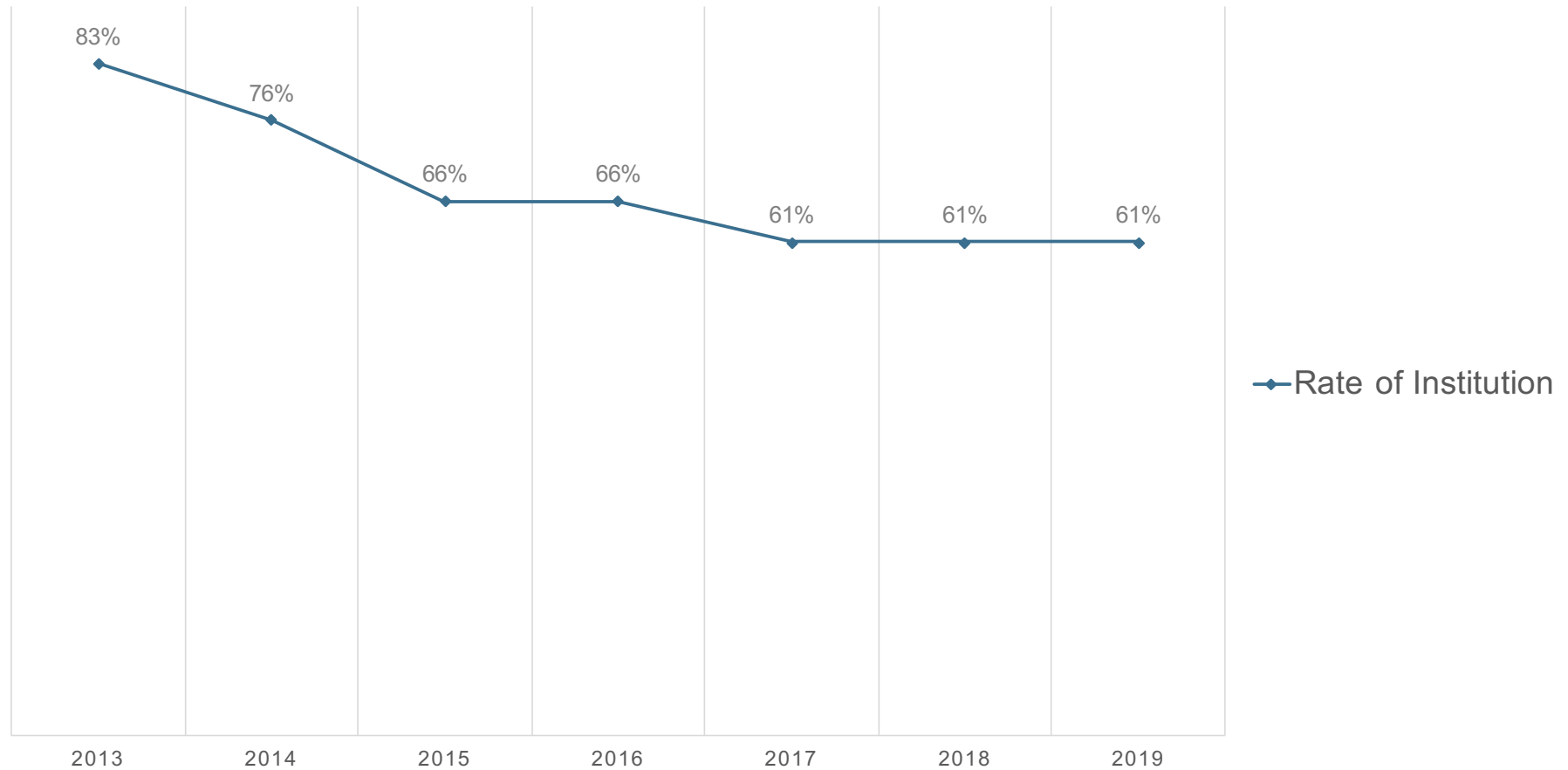
District Court Patent Litigations By NPE And Non-NPEs Have Decreased



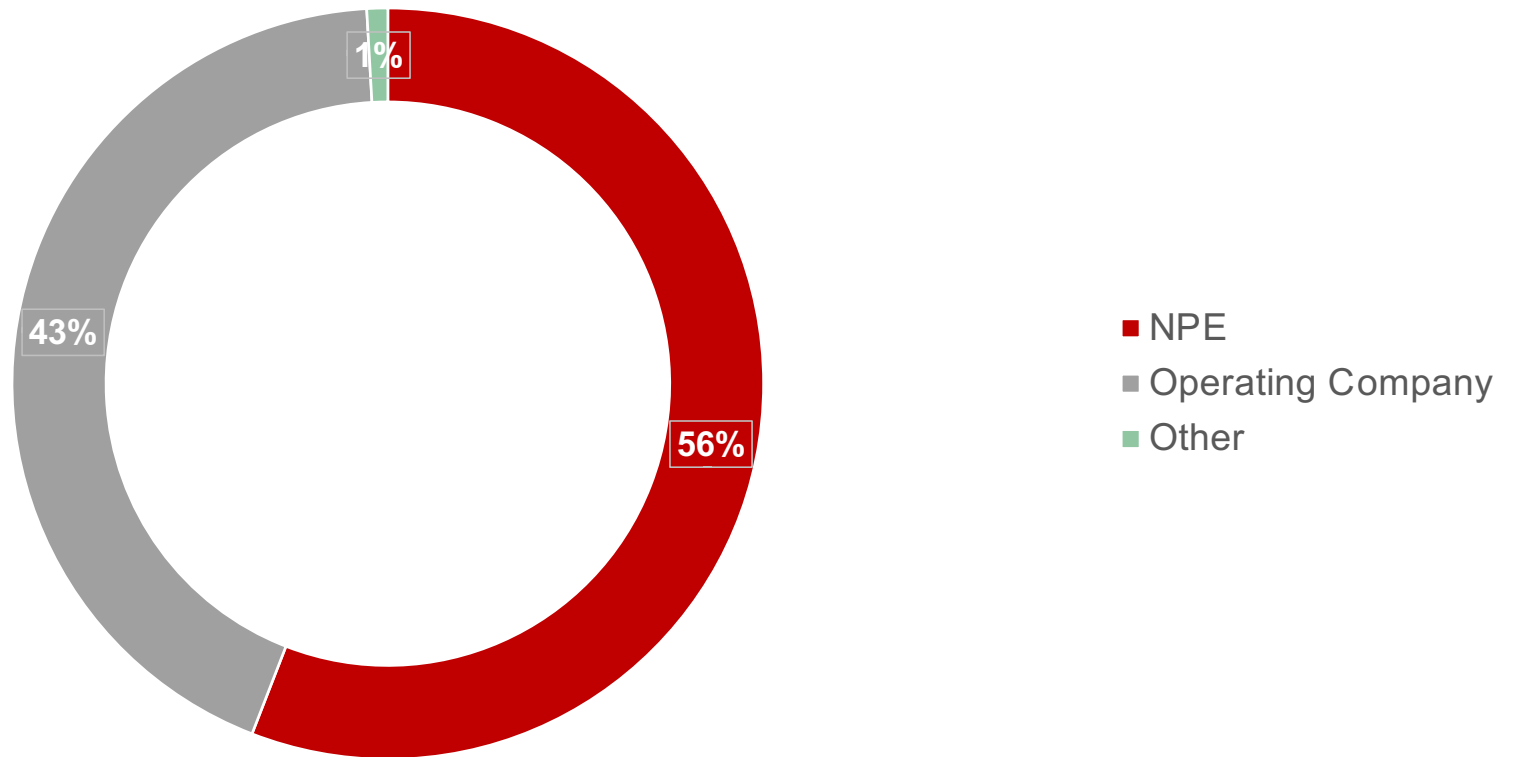
PTAB Petitions Filed Against NPE And Non-NPE Patent Owners Have Decreased



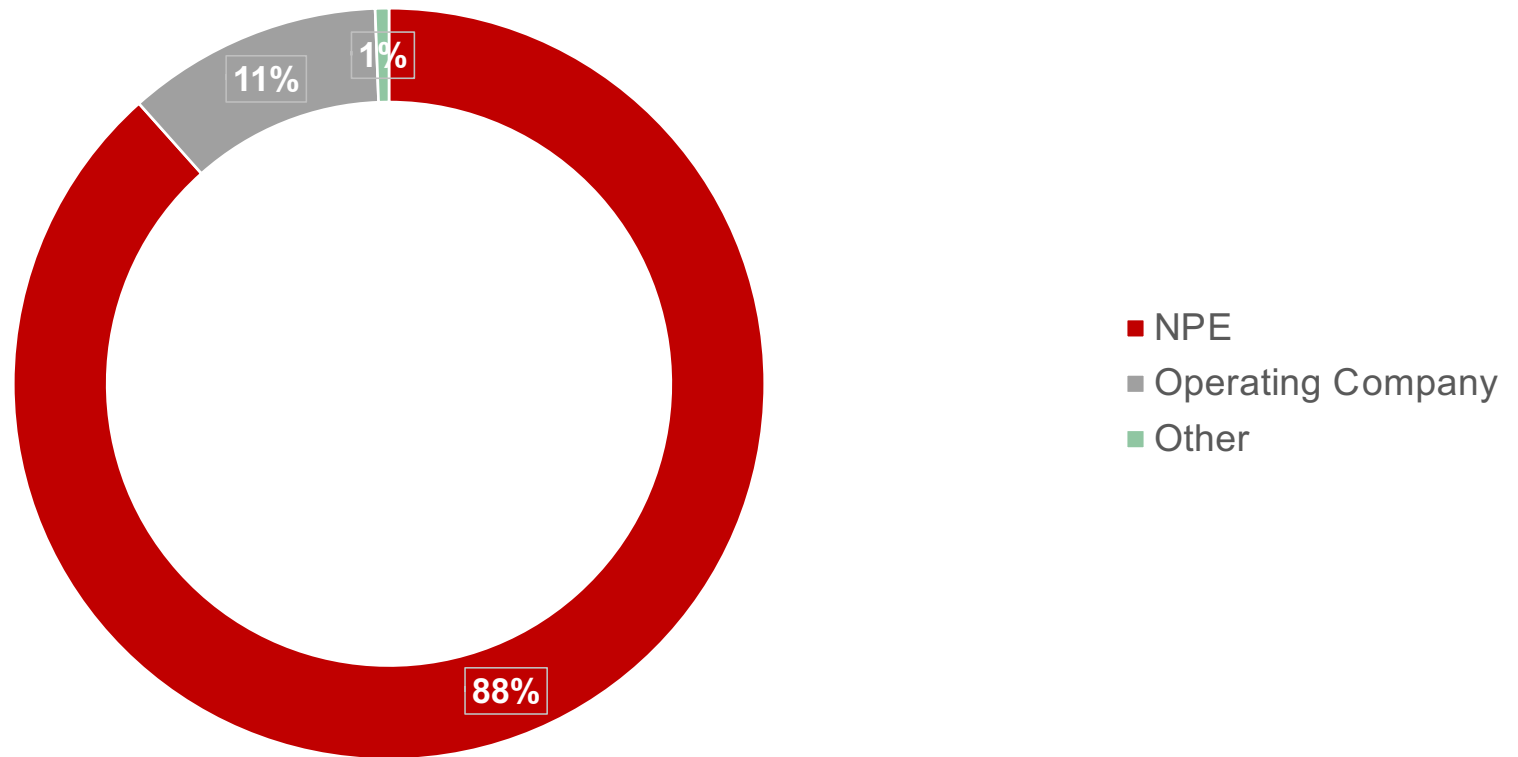
The PTAB's Rate of Institution Has Decreased To 61%



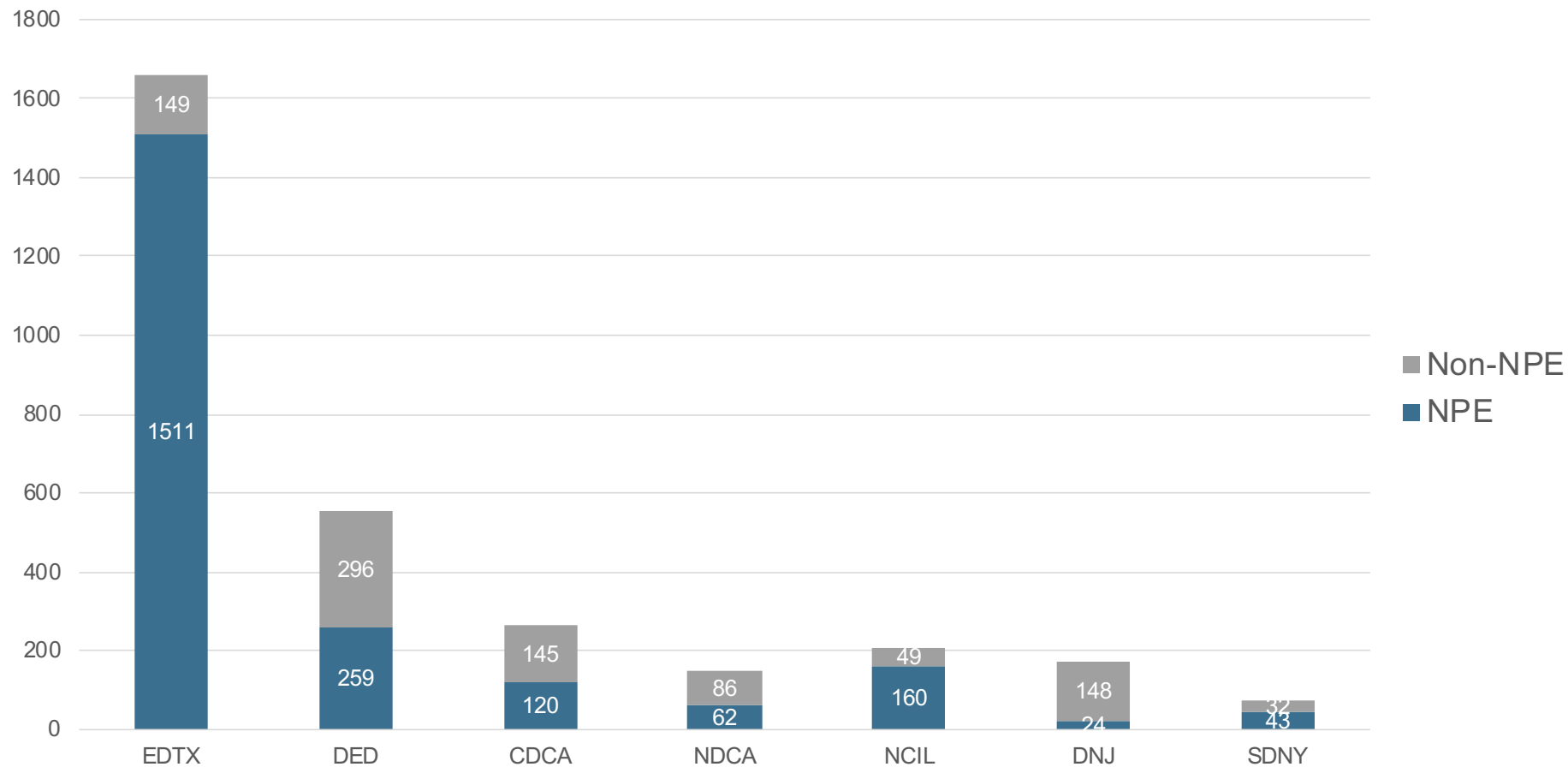
56% Of AIA Challenges Filed In 2019 That Involved High-Tech Companies Related To NPE-Controlled Patents



About 90% Of All High-Tech Litigation In 2019 Is Attributed To NPE Assertions Against High Tech Companies



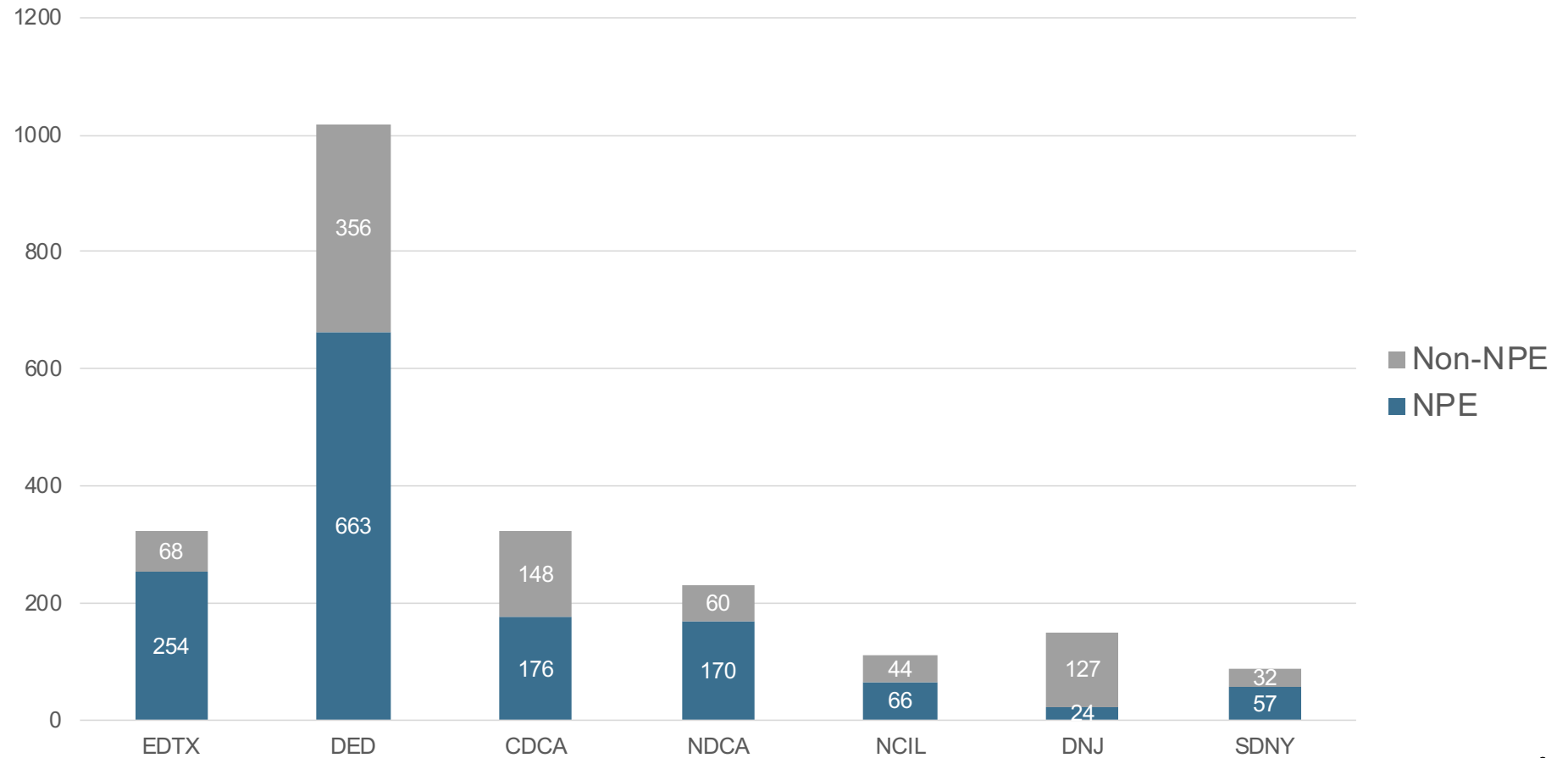
EDTX Had The Most NPE Filings One Year Prior To *TC Heartland*



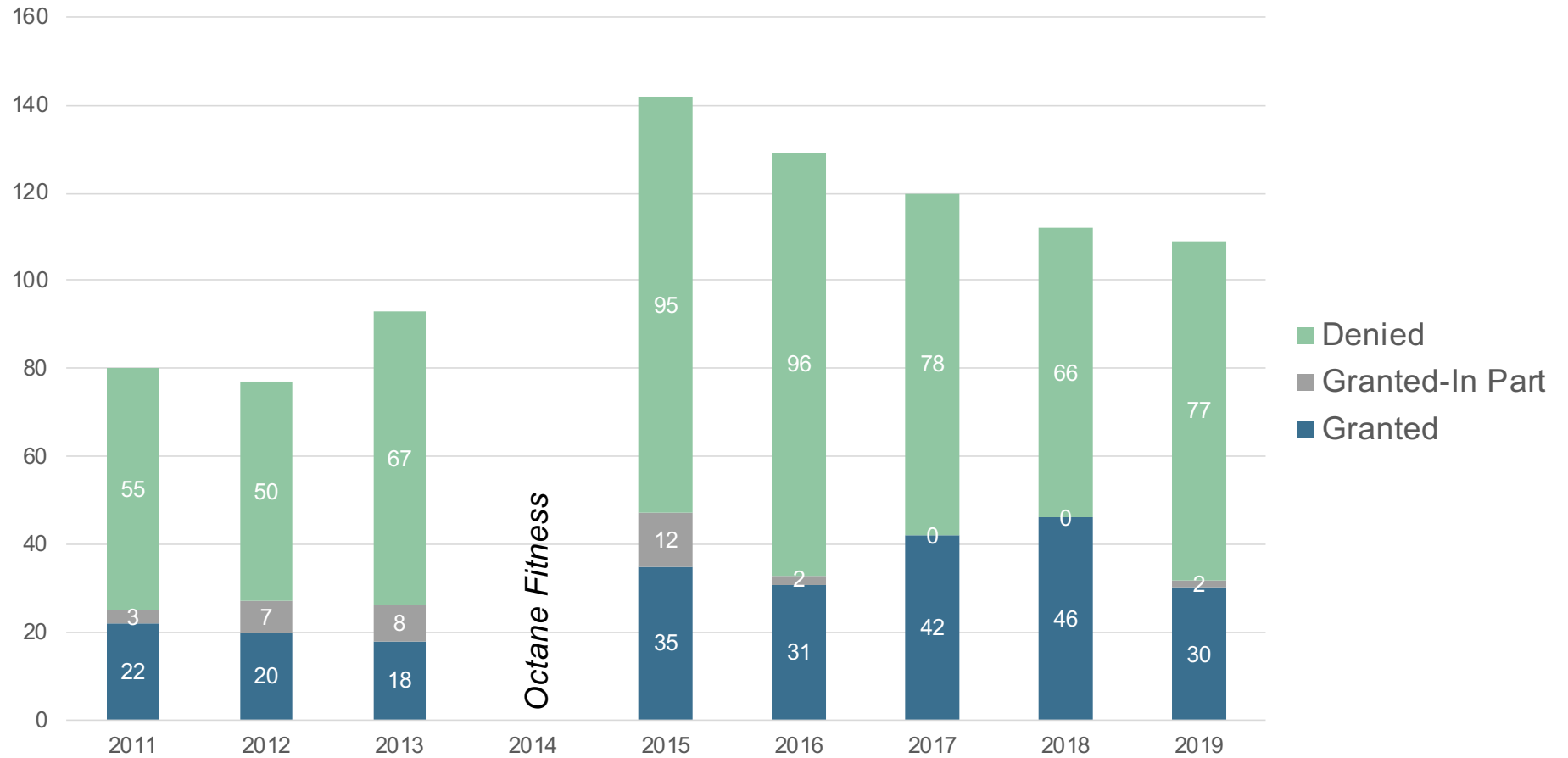
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<https://www.engine.is/news/category/patents-in-the-heartland-one-year-after-tc-heartland-texas-npes-migrate-to-greener-pastures>

2019 NPE Activity Moved From EDTX To DED Post-TC Heartland



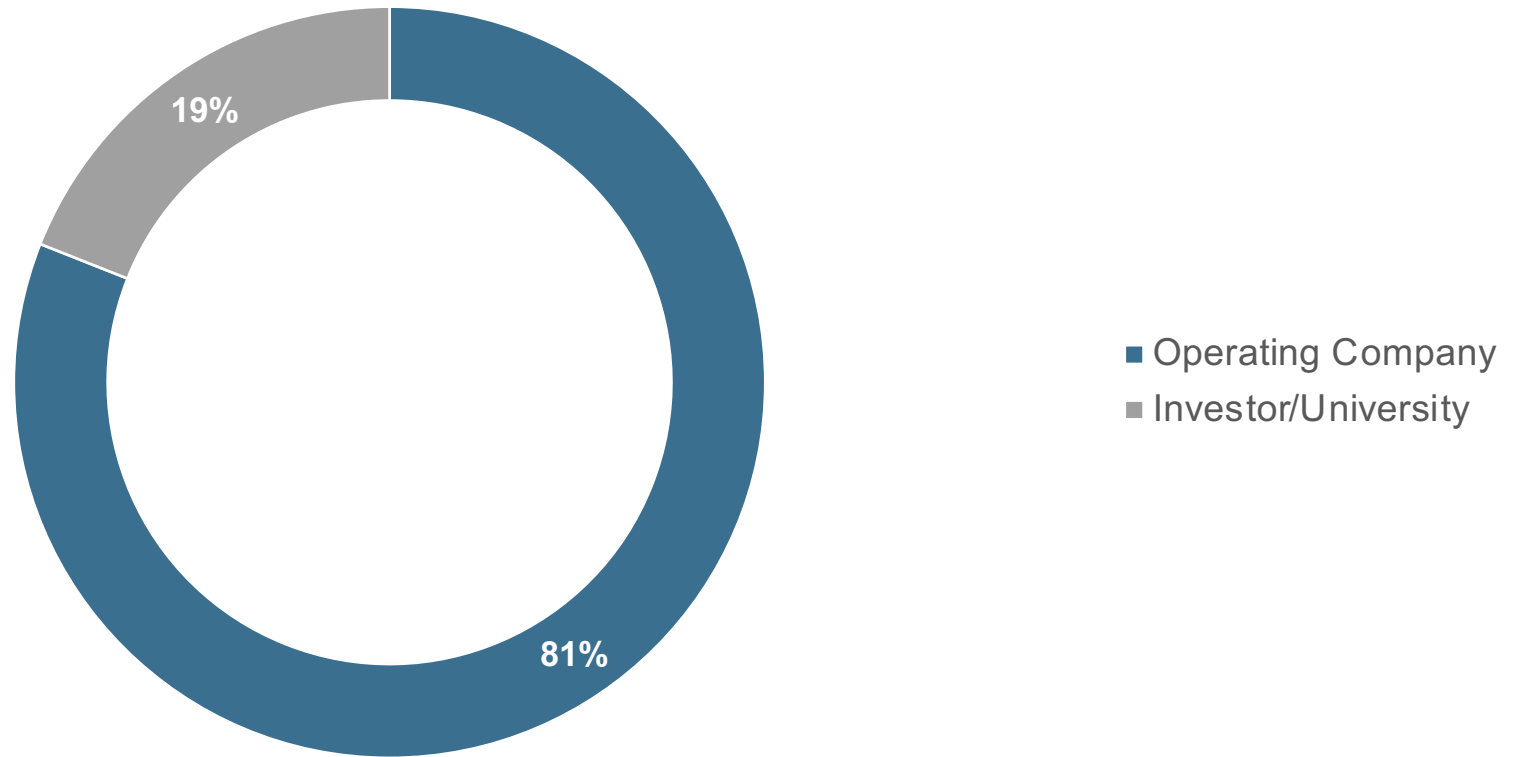
Section 285 Fee Awards Pre and Post-*Octane Fitness*



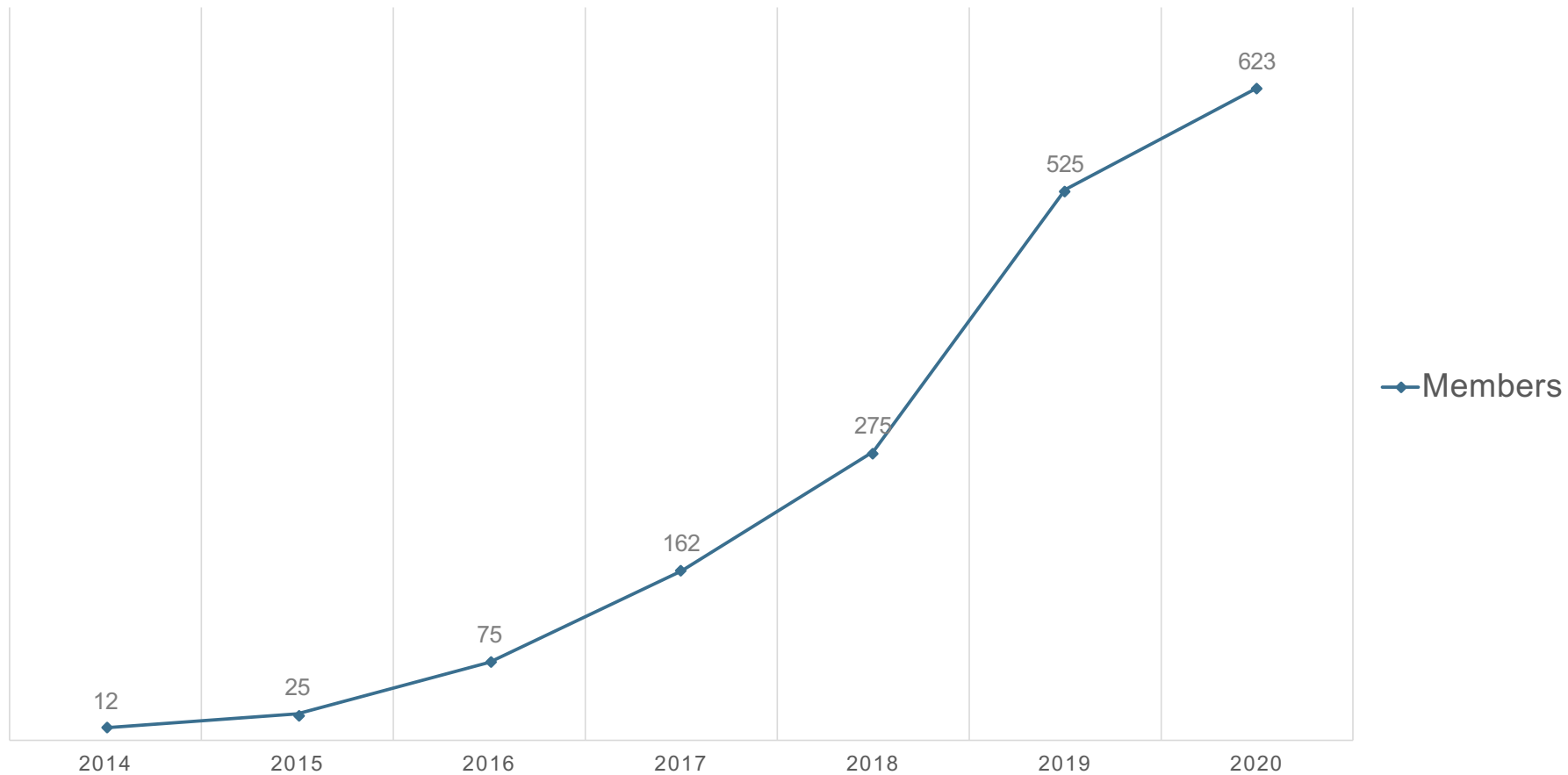
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<https://www.law.berkeley.edu/wp-content/uploads/2019/12/Panel-16-Alyssa-Caridis.pdf>

Companies Provide NPEs With Most Of Their Patents



License On Transfer Networks Grow With Promise Of NPE Protection



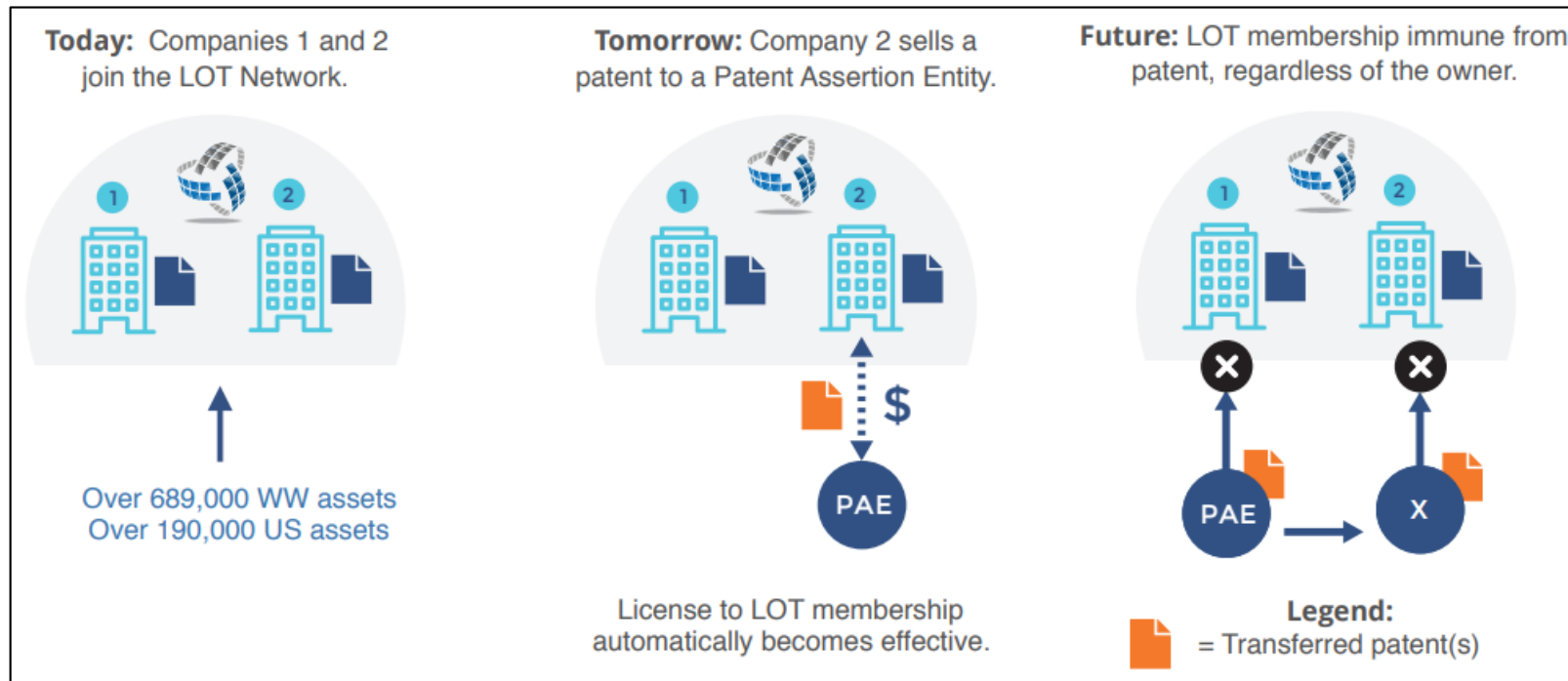
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https://lotnet.com/wp-content/uploads/2019/12/Introduction-to-LOT_12_5_19.pdf

Some of LOTs 500+ Members



Illustration Of How License On Transfer Network Agreements Work



A license to the other members of LOT Network only applies on and after transfer of the particular patent to a NPE (PAE)

LOT Network Claims That It Is Working

- Over 26,000 patents have been sold and left the Network
- 35 of those patents have been acquired by 8 different NPEs, including Intellectual Ventures
- No LOT Member has ever been sued by a patent that has left the Network

USPTO Is Taking Action To Prevent The Issuance Of Poor Quality Patents

■ Improved patent examination guidance

- January 2019-issued new guidance that revised the procedure for determining whether a patent claim is directed to a judicial exception under the *Mayo-Alice* framework.
- January 2019-also issued guidance for the examination of claims that contain functional language, addressing written description and enablement issues under 35 U.S.C. § 112(a) as well as means-plus function limitations under 35 U.S.C. § 112(f)

■ Revision of patent examination time, application routing, and examiner performance

- 2019-New time allotment method will result in examiners receiving additional examination time tailored to specific attributes of an application.
- 2020-Implementation of an automated process designed to match each application to the examiner best suited to examine the application
- 2020-New performance evaluation of examiners with a greater emphasis on the examiners prior art search and identification of the inventive concept in the application.

USPTO Is Taking Action To Prevent The Issuance Of Poor Quality Patents

- **Improved training**—Examiners have increased training opportunities to improve their ability to identify relevant prior art.
- **Quality assurance**—Assurance reviewers perform searching in a random sample of application and provide the examiner with feedback, including identification of potential areas of improvement.
- **Collaborative search pilots**—USPTO is testing new search processes and collaborations between multiple USPTO examiners, as well as between USPTO examiners and examiners from foreign patent offices.
- **Collaboration between patent examiners and the PTAB**—Multiple training sessions have occurred where judges from the PTAB provide examiners with feedback on claim interpretation and providing a proper rationale in a rejection.
- **Automation and exploring artificial intelligence capabilities**—USPTO is exploring using AI for prior art search expansion and refinement, assistance with patent classification tools, and locating similar images.

What Else Can Be Done To Prevent The Issuance Of Poor Quality Patents?

- Increase examination fees to equal USPTO's examination cost while simultaneously abolishing issuance fees
 - Examination fees currently fail to cover even half of the Patent Office's cost.
 - Eliminating issuance fees would eliminate incentive to grant patents when Patent Office is financially strained
- Limit repeat applications—Over 40% of the Patent Office's patent applications constitute repeat filings.
- Further increase the amount of time allocated to patent examiners—Patent examiners spend, on average, only 19 hours reviewing an application

Third-Party Litigation Financing

- The third-party litigation financing industry represents a \$5 billion market in the U.S.
- Legal Funder Burford Capital reported in 2017 that the use of litigation finance among U.S. law firms grew by 414% compared with four years earlier
- Single-case financing is the most common, but other types of arrangements are gaining traction, including portfolio deals (multiples of certain types of cases); factoring (allowing present recovery on legal bills to be paid in the future); and post-judgement deals (value of the deal realized while decision is on appeal)
- The most commonly funded litigation was in connection with intellectual property cases.
 - Significant possible return on investment
 - IP suits may be more susceptible to qualitative assessment—i.e., it may be easier to assess the merits at the outset.

Litigation Finance: Get the third party started, The Economist, p.70, Nov. 9, 2019; <https://www.law360.com/articles/1222483/why-litigation-funders-are-getting-into-university-patents>; <https://www.law360.com/articles/959672/3rd-party-funding-finding-a-home-in-patent-litigation>; <https://www.dandodiary.com/2018/01/articles/litigation-financing-2/latest-third-party-litigation-financing/>

Factors Helping To Drive The Increased Activity in Third-Party Litigation Funding

- The amount of litigation funding available continues to grow—because it is profitable.
- Litigation is proving to be an attractive asset class—its valuation is not correlated with other parte assets and the investment timeline typically requires a modest 3 to 5 year investment
- There is a growing reluctance among law firms to do work on full contingency after decisions like *Alice* that can be seen as unfavorable to patent owners.
- Additional source of funding for NPEs
- Universities having monetizable claims of patent infringement are becoming more receptive to third-party litigation funding
 - Universities are increasingly looking to generate income from their inventions, which has not been easy to due through licensing
 - Federal funding for research at universities has remained largely flat over the last decade
 - Universities can be reluctant to bring suit because of relationships with companies

Litigation Finance: Get the third party started, The Economist, p.70, Nov. 9, 2019; <https://www.law360.com/articles/1222483/why-litigation-funders-are-getting-into-university-patents>; <https://www.law360.com/articles/959672/3rd-party-funding-finding-a-home-in-patent-litigation>; <https://www.dandodiary.com/2018/01/articles/litigation-financing-2/latest-third-party-litigation-financing/>