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2021 Discretionary Denials Have Passed 100, But Are Slowing

By [Dani Kass](#)

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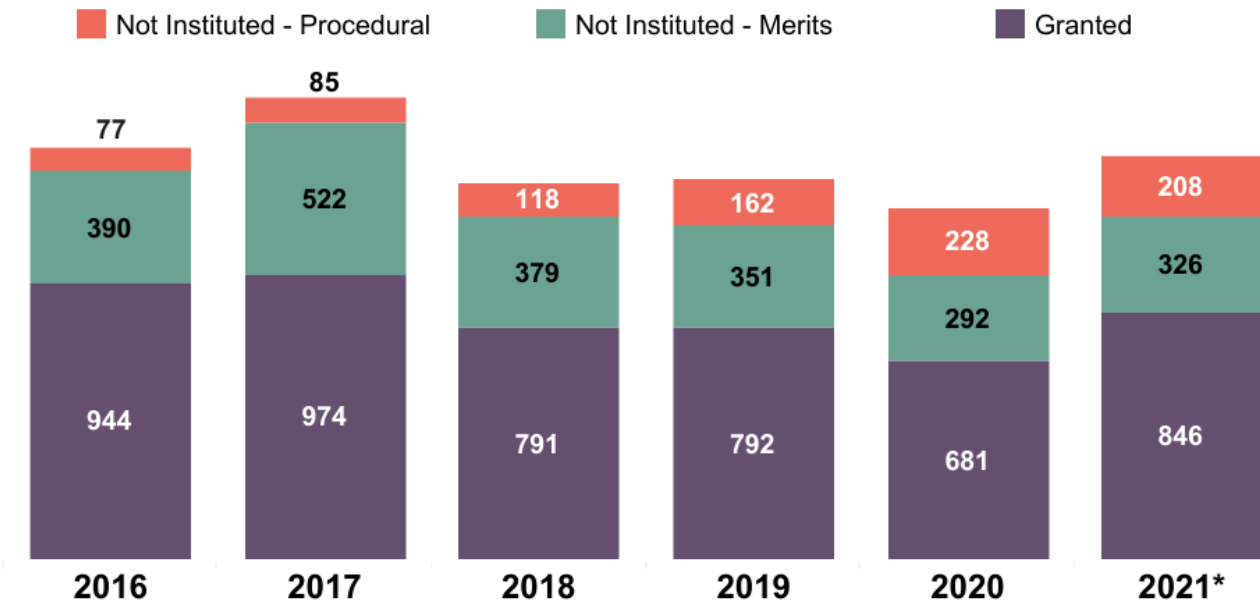
Law360 (July 15, 2021, 7:47 PM EDT) -- The Patent Trial and Appeal Board turned away 104 petitions for discretionary reasons in the first half of 2021, but more than 70% of those were in the first quarter of the year, according to new [Unified Patents](#) data.

Between January and March 2021, the PTAB rejected 74 petitions on procedural grounds, compared to 30 in the following three months, Unified Patents said July 6. Despite the dip, the group — which supports the PTAB invalidating weak patents — projected that number will double over the rest of the year, ending around 208 denials.

"As projected, discretionary denials are on pace to be just slightly lower in 2021 than in 2020 overall," the organization said.

PTAB Institution Decisions Over Time

The PTAB is increasingly denying petitions for reasons other than merits.



Source: Unified Patents. 2021 is projected based on Q1 and Q2.





Last year, the PTAB denied 292 petitions based on the merits and [228 for procedural reasons](#), while granting 681 petitions, according to Unified Patents. The amount of petitions denied for reasons such as the timing of parallel district court litigation or similarity to other petitions had more than tripled between 2016 and 2020.

A big factor in that was the PTAB's precedential Fintiv ruling, which set out criteria for when the timing of parallel litigation could justify turning away an otherwise meritorious petition. Fintiv was made precedential in May 2020, and it expanded on a previous decision called NHK Spring.

While about a [quarter of all new patent litigation](#) is being filed in the Western District of Texas, about 40% of discretionary denials based on the timing of ongoing litigation involved the Eastern District of Texas, the report says. The Western District had about 23.2% of denials, followed by Delaware, Massachusetts and the Northern District of California.

"The Western District of Texas was projected to see a slight bump in denying petitions using the NHK Spring/Fintiv framework when the patent in question is being disputed in that jurisdiction," the report says. "Now it would seem like there is a slight decrease in the WDTX, whether from lack of filing attempts, or from the speed of settlement there."

It adds that in the seven patent trials Judge Alan Albright in the Western District has overseen, the time to trial has been about 24 months. The judge's desire to get patent cases to trial quickly had been [commonly interwoven](#) with the Fintiv narrative, as patent owners could harness his attempt at getting a fast turnaround to avoid having their patent reviewed by the PTAB.

"That said, the speed of resolution in patent cases across all districts has risen substantially, even as COVID restrictions have begun to lift; the significant backlog is, rather than dissipating, apparently increasing time to resolution across the country," the report says.

Overall, Unified Patents said it expects Fintiv denials to account for 80% of procedural denials in 2021. The precedent is in the process of [being challenged](#) in California federal court by [Apple](#), [Google](#), [Cisco](#), [Intel](#) and Edwards Lifesciences, though, and the next [USPTO](#) director could also alter how it's being implemented.

--Editing by Stephen Berg. Graphic by Jonathan Hayter.

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