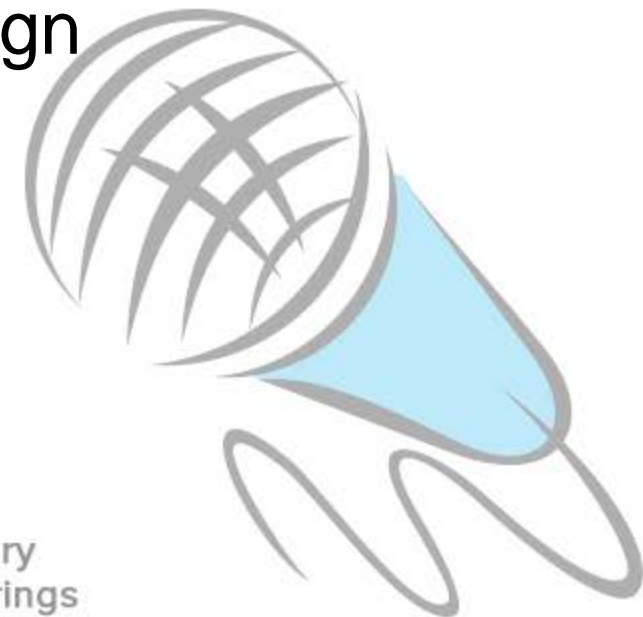


Concurrent Proceedings at the PTAB and District Court: Serial Petitioning at the PTAB & Before and After *Octane Fitness*

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Empirical Study

- Study focused on patents challenged multiple times
- Studied patents that were subject of **3 or more** post grant challenges (IPRs & CBMs only)
- Total Number of Patents Studied: **380**
- Total Number of Petitions Studied: 1,686 (161 CBMs; 1,525 IPRs)
- Timeframe: Petitions **filed September 1, 2012 – June 30, 2016**. Pending proceedings were last updated on June 30, 2017.



Number of Original vs. Subsequent Petitions

- Total Number of First (original) Petitions: **3,234**
(62.54%)
- Total Number of Subsequent (2+) Petitions: **1,937**
(37.46%)



Serial Petitioning Is Widespread

- Total Number of Challenged Patents: 3,234
- Total Number of Serially Petitioned Patents
(3+ Petitions): 380 (11.75%)
- Total Number of IPR and CBM Petitions Filed:
5,173 petitions (5,171 actually located)
- Number of Petitions Corresponding to Serially Petitioned Patents (3+ Petitions): 1,686 (32.60%)
- This means that serially petitioned patents occupy almost one-third of the PTAB's resources
- The 11.75% serially petitioned patents are likely to be the most valuable patents (the 80/20 rule)

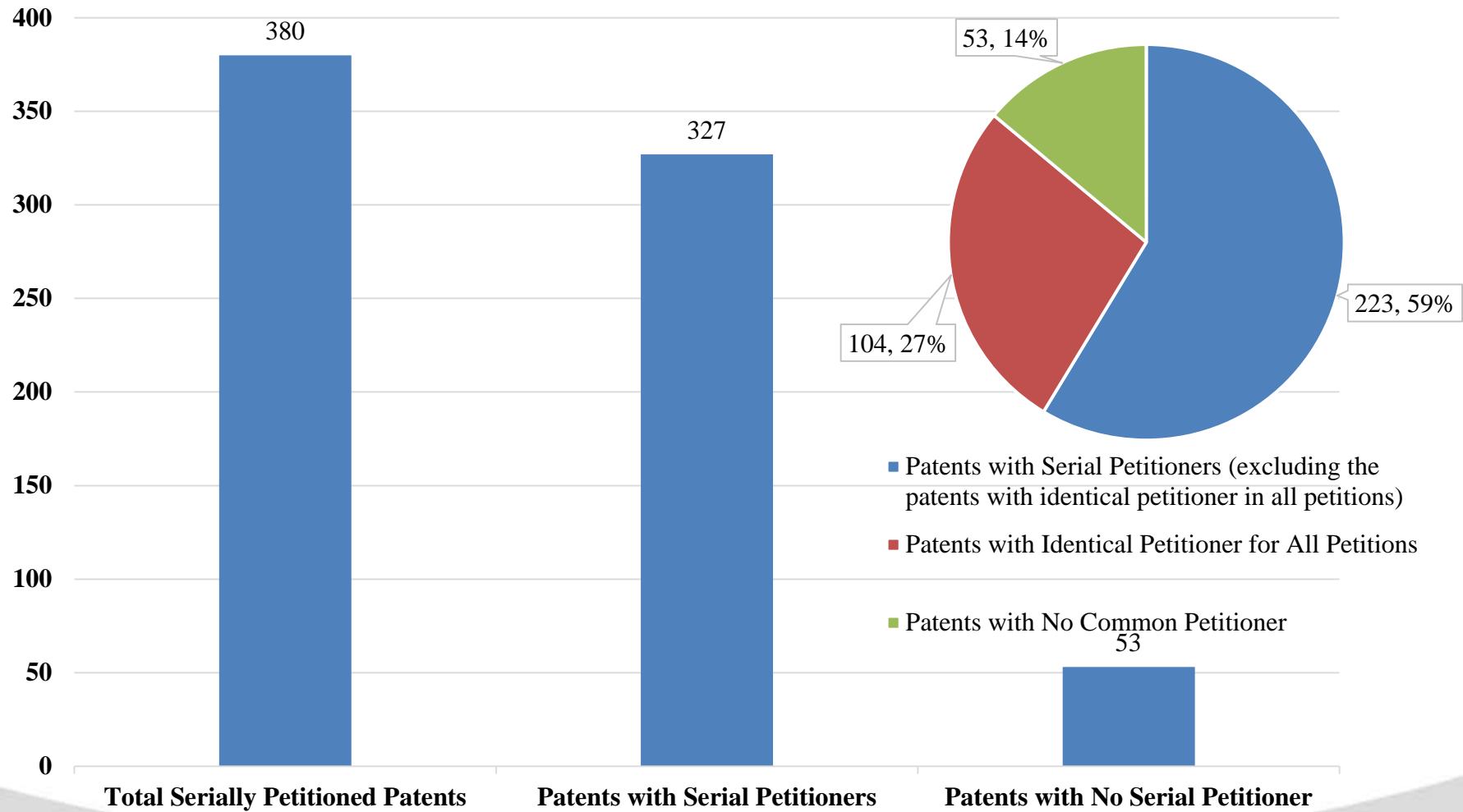


Serial Petitioning: General Overview of Results

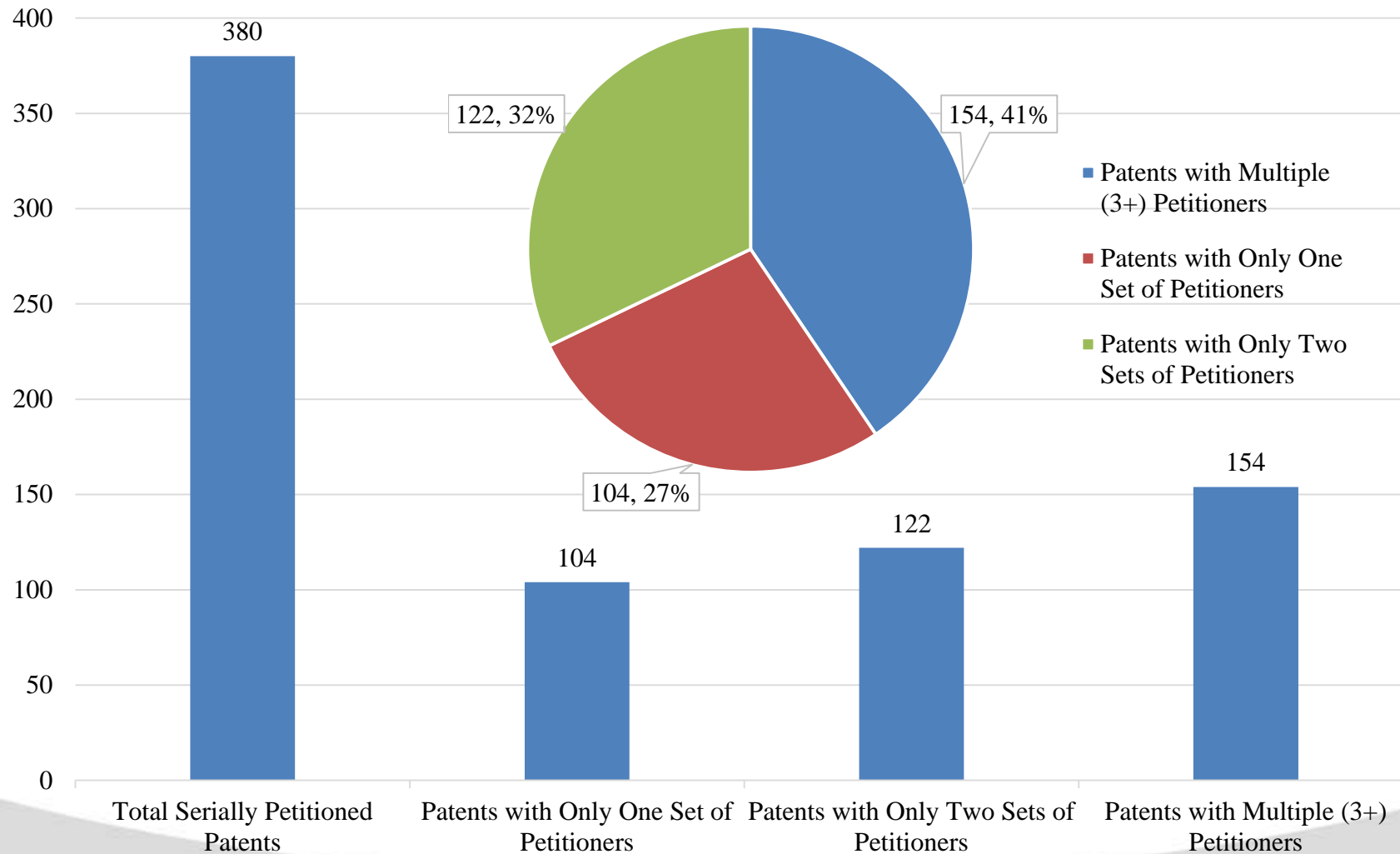
	At least 1 Common Claim Challenged in 2 or More Petitions	No Common Claims Challenged Amongst Any Petitions
At least 1 Common Prior Art Reference Put Forth in 2 or More Petitions	88.42% (336/380)	8.42% (32/380)
No Common Prior Art References Put Forth in 2 or More Petitions	3.16% (12/380)	0% (0/380)



Same Petitioner: Patents with 2 or More Petitions Filed by Same Petitioner



Same Petitioner: Number of Different Sets of Petitioners



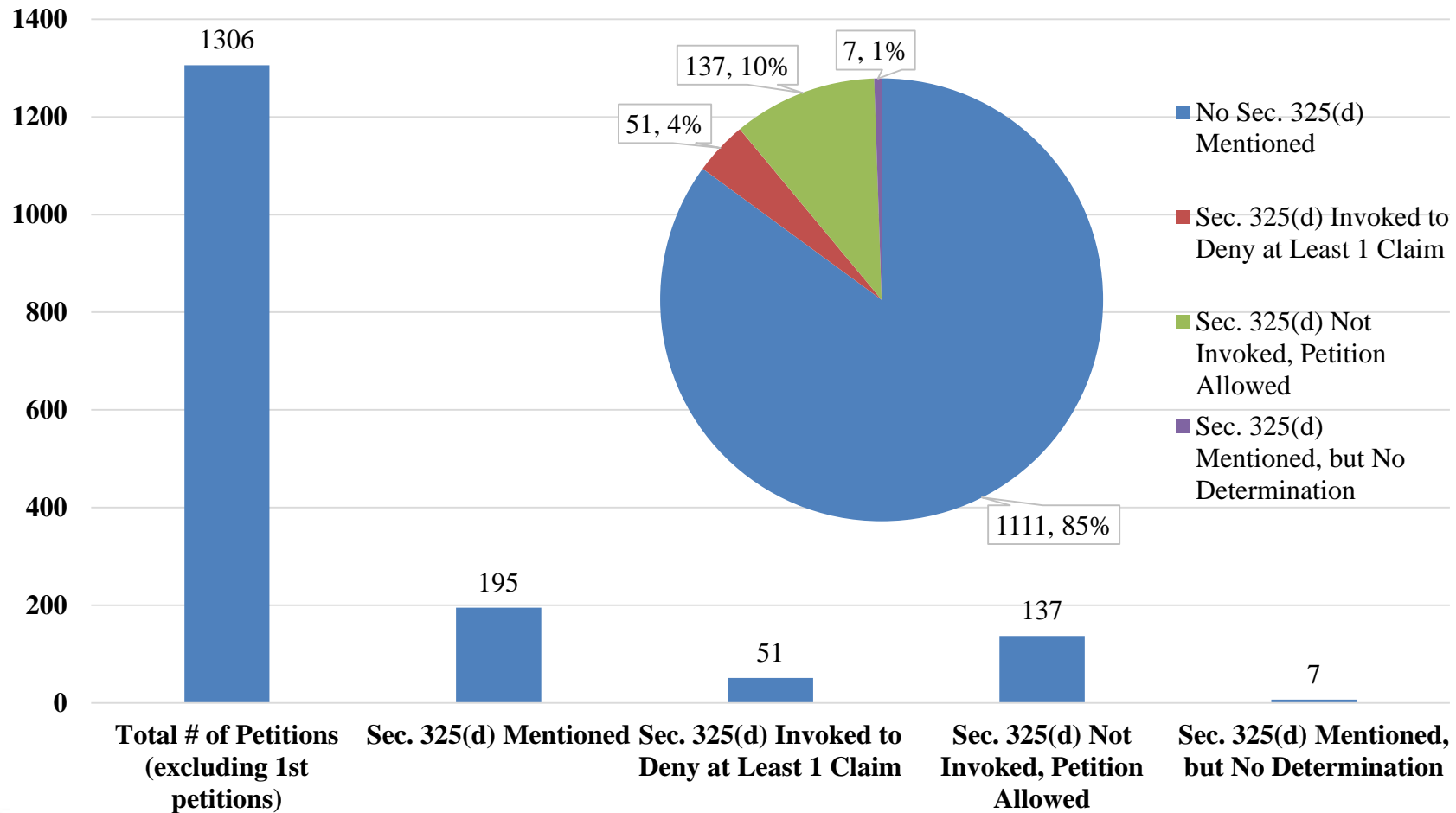
<u>Outcome of First vs. Subsequent Petitions</u>	1st Petition	2nd or later Petition
Negative Final Decision (At least 1 Claim Held Unpatentable/Adverse Judgement)	34.21%	37.75%
Denied Institution	29.47%	24.12%
Positive Final Decision (All Claims Upheld)	6.84%	6.81%
Settled (Before or After Institution)	25.79%	25.96%
Other Outcomes (Pending, Dismissed or Terminated for other Reasons)	3.68%	5.36%



<u>Outcome of Petitions by the Same Petitioner</u>	1st Petition	2nd or later Petition
Negative Final Decision (At least 1 Claim Held Unpatentable/Adverse Judgement)	34.41%	37.79%
Denied Institution	33.20%	26.72%
Positive Final Decision (All Claims Upheld)	8.10%	7.31%
Settled (Before or After Institution)	20.65%	22.34%
Other Outcomes (Pending, Dismissed or Terminated for other Reasons)	3.64%	5.85%



Universal Denial Provision (325(d)) Overview (by petition)



Summary

- We need a system that incentivizes a petitioner to take the best shot at invalidating a patent *at the outset*
- Serial petitioning (*i.e.*, third petition or higher) raises questions about the role of precedent, potential for delay and harassment, and commitment to finality
- There is a need to focus on the prior art references being presented in subsequent petitions, less so on whether it is a repeat petitioner or not
- Empirical analysis of serial petitions (3+) on same patent: PTAB not addressing serial petitioning by considering the existing AIA mechanisms in §§315(c), (d) & (e) & §325(d)
- PTAB should develop a comprehensive clear approach to the serial petitioning problem (we suggest a step-by-step framework for analysis for each subsequent petition)



BEFORE AND AFTER *OCTANE FITNESS*



Empirical Results

Before Octane Fitness (before Apr. 29, 2014 back to Sept. 2013 — 8 months)	50 cases
Motion for Fees Denied	41 cases
Plaintiff Granted Fees (whole/part)	7 cases
Defendant Granted Fees (whole/part)	2 cases
After Octane Fitness (after Apr. 29, 2014 to Sept. 25, 2014 — 5 months)	50 cases
Motion for Fees Denied	27 cases
Plaintiff Granted Fees (whole/part)	13 cases
Defendant Granted Fees (whole/part)	10 cases

