



Releasing Lex Machina's latest 2023 Patent Report

Join Robin Davis (Woodsford's Chief Investment Officer), Michael Connelly (WIT Legal's President) and Elaine Chow (Lex Machina's Legal Data Expert in Patent Litigation), hosted by Aria Nejad (Lex Machina's In-House Counsel), as they discuss patent litigation trends over the last three years and offer insights on judges, venues, parties, law firms, case filings, timing, case resolutions, findings, damages, and more.

The webcast will also include a look at emerging trends in connection with PTAB litigation and federal appellate patent litigation.

Speakers:



Robin Davis
Chief Investment Officer
Woodsford



Michael Connelly
President
WIT Legal



Elaine Chow
Legal Data Expert-Patent Law
Lex Machina



Aria Nejad
In-house Counsel
Lex Machina

Aria Nejad (00:00):

All right, and welcome everyone to today's webcast where we'll be introducing Lex Machina's newly released 2023 patent litigation report. My name is Aria Nejad. I'm in-house counsel here at Lex Machina and I'm going to be moderating today's webinar. I'll introduce our guests here shortly who will discuss patent litigation trends over the last three years, and they're going to offer insights on judges, venues, parties, law firms, and more. Couple of quick housekeeping notes up top before we get started. This is going to be a 25-minute presentation followed by answers to any questions submitted by attendees for up to about 30 minutes total. So please share your questions at any time and we'll review them together at the end. At the end of the presentation, we have a short survey we'd really appreciate your feedback on, only takes about one minute and it helps us improve our feature webcast.

(00:43):

So please take that time to share your thoughts with us. A little bit about Lex Machina. Lex Machina is legal analytics. It's our focus. Lex Machina provides legal analytics to companies and law firms enabling them to craft successful strategies, win cases and close business. We currently count over three quarters of the Am Law 100 as clients in addition to companies of all sizes from Fortune 10 companies all the way to small businesses. I'm joined today by my colleague Elaine Chow, Lex Machina's legal data expert in patent litigation. Elaine is a registered patent attorney and before joining Lex Machina, she practiced patent litigation at an IP litigation boutique and at an Am Law 100 firm representing multinational tech companies as well as startups. Welcome Elaine.

(01:29):

We're also excited to have with us today Robin Davis. Robin leads Woodsford's US underwriting and investment team for all types of litigation and arbitration as chief investment officer for the US. Robin was recognized as one of the top 100 professionals at the forefront of the litigation funding industry in the Lawdragon global 100 guide. Welcome Robin. We're also fortunate to have with us today WIT Legal's president Michael Connelly. Michael has more than 25 years of experience litigating IP disputes and is a leading authority on wireless digital streaming and automotive markets with broad knowledge about the trends and risks impacting these industries today and in the future. Welcome Michael. So at this point I'm going to turn the time over to Elaine. Elaine, go ahead and begin the presentation when you're ready.

Elaine Chow (02:15):

Thanks Aria. Thank you Robin and Michael also for joining us today. Hi everyone. Good morning. Before we dive into the data, I just wanted to give a brief overview of what's in the patent litigation module at Lex Machina. Lex Machina defines a patent case as a case with a claim of infringement or non-infringement, enforceability or unenforceability, validity or invalidity. And this dataset includes approximately 63,000 federal district court cases filed between 2009 and the present about 15,000 PTAB trials filed between 2012 and the present and roughly 8,600 federal circuit appeals cases originating either from district court cases or the PTAB since 2012. This year's report focuses on the three-year period from 2020 to 2022 and contains an in-depth analysis of case filings and insights into the behaviors of courts, judges, parties, and law firms.

(03:16):

Today's webinar focuses on a subset of these findings and for further details we would encourage you to refer to the full report that's being released today. So let's move to the first slide. So this shows patent case filings in district court, which have declined since 2015 from a high of about 5,800 to between 3,500 to 4,500 a year. And even though there was a slight increase between 2019 and 2021, we're

seeing a decrease again in 2022 to about 3,800. So Robin, I was curious if you had any thoughts about these filing trends?

Robin Davis ([03:58](#)):

Well, I think it's interesting mostly to me that from about 2020 through 2022 with some variance, it's about an even rate, which is I think showing some health for the patent litigation business. And in notable that the pandemic did not significantly decrease filings even though courts slowed down.

Elaine Chow ([04:21](#)):

And Michael, have you seen this reflected in your practice as well?

Mike Connelly ([04:28](#)):

Sorry. Yeah. Yeah. I mean we. For us through the pandemic you continued to see a lot of activity in looking ahead towards potential cases I think, in a way that people were getting swamped and now trying to figure out, okay, well what is going to be our longer term plan? And I think we're now seeing still a lot of that play out where the cases that were planned earlier a year or two ago are being filed and keeping those numbers up a bit.

Elaine Chow ([05:00](#)):

Okay. Great. On to the next slide, which this shows case filing to the same period, but without what Lex Machina refers to as high volume plaintiffs. And in Lex Machina high volume plaintiff basically is any plaintiff that is filed at least 10 patent cases excluding ANDA cases within a 365-day period. And in the product, Lex Machina enables users to separate data based on high volume plaintiffs because it can provide a slightly different insight into the litigation. And here excluding the high volume plaintiffs, you see the overall volume of cases is lower compared to the previous chart in roughly the 2000 filings each year. And it's remained relatively flat with a very slight increase, very, very slight increase in 2022. Let's see. And here we see the number of patent appellate cases docketed, and these are from federal district court for the past 10 years. The number of district court appeals has been on a pretty steady decline since 2015 and it dropped significantly in 2022 compared to two years prior. Michael, any thoughts on this?

Mike Connelly ([06:20](#)):

I mean, you do hear there's a bunch of reasons of course, that people can theorize about this, whether it's that there's more predictability now than there was in the past, which I think is very, there's a lot of sides to that. I don't know if that's what it is as much as it is time or the slowdown we saw in case pacing through the pandemic is causing some of those appeals to not have yet been filed. So we may see an upswing based on that.

Elaine Chow ([06:50](#)):

And Robin, do you, as a litigation funder, do you look at appellate filings? Is this the type of data you would look at?

Robin Davis ([07:00](#)):

Yeah, this is certainly the type of data we would look at and appellate filings and also what's happening in those appeals. It is interesting to see the drop in 2022. I am suspicious that Mike's right, that some of

this can be attributed to the slowdowns in the courts, but there could also be other factors. It'll be interesting to see if this trend continues.

Elaine Chow ([07:23](#)):

Great. Next we're going to look at most active districts by cases filed. And no surprise here, the Western District of Texas remains the most popular venue. And actually for the three-year period from 2020 to 2022, more than 50% of patent cases were filed in the top three districts. And that hasn't changed, which is the Western District of Texas, Delaware, the Eastern District of Texas. So it seems like the order from Chief Judge Garcia reassigning cases that had been filed in Waco hasn't had that much of an effect. I don't know. What do you think, Robin?

Robin Davis ([08:14](#)):

Well, I think it's certainly not showing up yet in these figures. I think I would be very interested to see what the data looks like next year and whether the district of Delaware moves back to the top spot. That wouldn't be surprising to me. This certainly overall matches up with my perception of the most popular venues, if I had to guess. So reassuring.

Elaine Chow ([08:39](#)):

And Michael, is this the sort of thing that would be helpful in your practice, looking at,

Mike Connelly ([08:44](#)):

It is. Elaine, we look at this a lot and one of the things that we'll use Lex Machina for is to go a little deeper to say, okay for ANDA cases. Again, where are they. And when you're looking at things like that, it's a lot of confirmation. Right. Okay, we know where those things are filed, New Jersey, Delaware.

Mike Connelly ([09:03](#)):

Right. Okay, we know where those things are filed, New Jersey, Delaware, but you can drill further down into the Judges, the parties. It also lets us take a look at things like venue choice and jury selection and we're doing a study now on jury attitudes in those districts, about life science cases, and Lex Machina lets us start off with understanding exactly what the split is and maybe challenging some of the assumptions about even where to bring cases or how to think about those things.

Elaine Chow ([09:36](#)):

Okay. So now we're going to see, this probably reflects the previous slide, which is most active Judges by cases filed for the past three years. It does remain, no surprise, Judge Albright, and you can see that even though the number of cases filed in his court has declined in 2022 since compared to the previous two years, he is still the most popular Judge by cases filed by a wide margin compared to the number two Judge which is Judge Gilstrap.

([10:14](#)):

And so he still has about a little over 20% of all patent cases filed in the US, at least for the last three years. And Robin, is this the sort of thing that you would look at in your practice?

Robin Davis ([10:28](#)):

Certainly, it's always very interesting to us when we can know which Judge is assigned to a case because it allows us to use more Lex Machina data to drill down on what their past performance has been, any

trends, anything we can take from that as an insight. And in a district such as Delaware, where you've got many Judges who have handled lots of patent cases, it's especially useful to be able to look at it on a district-wide basis because you don't know who a case might be assigned to, but you can still get a sense of the trends in terms of how they like to handle common patent issues such as IPRs 101 motions, et cetera. These are very important for us to understand as a litigation funder looking at a matter.

Elaine Chow ([11:14](#)):

And Michael, how do you advise your clients as far as when they find out what Judge they're assigned? [inaudible 00:11:24].

Mike Connelly ([11:23](#)):

For us, it matters a lot because if you drill into some of this data, well, even from this broader perspective, you get a real view of the fact that a lot of the IP work is happening in relatively few districts in front of relatively few Judges. But when you move beyond that, you get to Judges that may not have a lot of exposure to this, certainly may not have had exposure to the type of technology that's being talked about and that really impacts your choice of expert.

([11:53](#)):

It might impact your choice of counsel because they're just, there may need to be a different approach based upon about how busy they are in this particular space. So knowing that ahead of time, I think is becoming more crucial and more available through Lex Machina.

Elaine Chow ([12:13](#)):

So my understanding is the new chief Judge has kept the order in place that cases filed in Waco will be assigned randomly, I think with one exception for a senior Judge so we'll see if this trend continues for Judge Albright next year.

([12:33](#)):

Next step, we have the most active plaintiffs by cases filed past three years. Not surprisingly, these are high volume plaintiffs. I don't think the top three have changed since last year's report.

([12:51](#)):

And then we have also most active defendants, and again, this pretty much reflects last year's report as well. It's the Samsung entities, Google, Apple, Microsoft, Amazon, and LG. I'd be curious to know your thoughts on this, Michael, for the most active plaintiffs and defendants, if this sort of data is something you would look at.

Mike Connelly ([13:20](#)):

So we do a lot of work in Lex Machina in this space, which is party groups. So that's one of the tools we use a lot. So we'll create a party group, whether it's for a specific corporate group, which is very effective because it's never just Google. Google's connected to a bunch of different entities that they own or own a part of.

([13:45](#)):

Or you may also create a party group by market, a very small market or a large market, and get a view of things. It also lets you dig into, for those 50 cases, 51 cases that Samsung or SCAs in, who's representing them? What are the technologies behind those cases? Especially because of the way that Lex Machina attracts names, which is a real key feature and I know a lot of work goes into.

[\(14:18\)](#):

You have a confidence that you're capturing all the right cases for those parties and it gives you a really nice overview and you can look at a party, run an attorney report, run a case report, and understand their litigation picture and really from a law firm's perspective, the competitive picture for those clients.

Elaine Chow [\(14:41\)](#):

And Robin, do you look at the track record of parties when you're deciding who to fund?

Robin Davis [\(14:52\)](#):

We certainly do, both for plaintiffs and for defendants wherever that information is available, it can be useful to us. And I think also useful to us, as Mike suggested, is to look at industries and if there's any trends one can discern there in terms of what litigation trends and practices have been. Lex Machina is very helpful for us on that.

Elaine Chow [\(15:15\)](#):

Next, we will have most active law firms representing plaintiffs by cases filed. And again, these are, as you can tell by the numbers, with one exception, these firms primarily represent high volume plaintiffs and we will see most active law firms representing defendants by cases filed for the past three years.

[\(15:45\)](#):

And I think Fish was last year's number one as well. We do see also a mixture of big law firms and local counsel in this list, including Gillam and Morris, Nichols. Let's see here. Next we're going to take a look at timing data. So this is time to events in patent case that is terminated in the last three years. I'll show this and this highlights the numbers here.

[\(16:24\)](#):

These time to summary judgment, time to trial, I suspect might reflect some delay due to Covid. I'll point out that these are longer than what was in our previous patent litigation report. I think the numbers were 711 and 993 days as opposed to what this shows, which is 792 and 1,063. I was wondering, Michael, if you had any thoughts about the timing data when you advise clients?

Mike Connelly [\(17:01\)](#):

Yeah, we do use it from a perspective of trying to time out cases, especially for managing expert schedules and trying to understand that. I think for lawyers it's also, and Robin does more of this, where you drill down further. But clients have the same access to this and I think expectations about timing, expectations about when certain milestones are going to be hit in a case are a little more knowable, especially when this represents a very broad view, but you can get very narrow on it, which I know is something that Robin has done some of.

Robin Davis [\(17:44\)](#):

Yeah, and I'll agree. We definitely find data like this extremely useful. Obviously from an investment perspective, it's helpful to know when certain key events or termination or trial type events are going to occur in a case and certainly in a case that we're investing in, it's useful to look down at the district or the Judge level if there's enough data there.

Robin Davis ([18:03](#)):

... it's useful to look down at the district or the judge level if there's enough data there to try to get a sense of that to help us understand the length of the investment if it reaches these certain milestones is incredibly helpful for our purposes.

Elaine Chow ([18:15](#)):

Got it. Next we have time determination, patent originating, federal appellate cases past three years. So it's a year-ish, and again, it might reflect COVID delay. I believe it's similar to what we showed in last year's report as well. And next we're going to look at... Oops, this is our famous donut. This is district court case resolutions for cases that were terminated in the past three years. Robin, I was curious if this was something you used in your practice?

Robin Davis ([19:03](#)):

Yes. This kind of chart is incredibly useful for us and especially because on Lex Machina you can do a more refined version of the donut chart where you look at the outcomes for a particular firm or particular lawyer, a particular party or party group. It's incredibly useful to get a sense of the past performance, the litigant, their likelihood or aptitude for settlement. And we use this type of data all the time in both making investment decisions and evaluating investments as they progress.

Elaine Chow ([19:42](#)):

Michael, are you surprised how the outcomes split in the sense that claimant tends to... It looks like according to this data, there's certain milestones when the claimant has a better shot at prevailing versus when the defendant does, which seems to be more at summary judgment or judgment on the pleadings versus trial.

Mike Connelly ([20:08](#)):

Yeah, I mean, I don't know if surprised as much as I think we're getting to the stage where there's just more information available and you have to be up on it because sometimes the assumptions that we... Especially when you've been in practice for a long time, you carry a lot of assumptions with you that are really not based on anything but your own experience. And so we use this in drill down much further for a particular high volume plaintiff to see, okay, what is their spread look like? Is everything settling? Is everything settling quickly? What are these cases going to progress as? And I think especially from an in-house counsel perspective, that's the kind of key information where you can start to see what a pattern is for a certain person or a pattern in a general space for what you need to budget out.

Elaine Chow ([20:59](#)):

I wanted to point out, I was remiss in mentioning that the colors represent green is settlement or likely settlement, and then red is claimant win. Blue is claim is the defendant win, and yellow is just a procedural resolution, whether that's severance or stay or transfer. And you can see that there's a little more red than blue, although green is the biggest portion of the donut. There we go. Next we're going to pivot to PTAB petitions. The number of IPR petitions have basically decreased from over the past couple of years. It's relatively flat compared to last year, and there's been a significant drop in post-grant review petitions. CBM is zero obviously, because that provisions has been sun-setted. And then we'll look at... And Robin, do you work with PTAB in your practice?

Robin Davis ([22:14](#)):

Yes, certainly. I mean, because we fund patent litigation matters, we have to anticipate that the patents may be challenged in IPRs, as you can see here, over 1300 IPRs being filed each year. So this is a process and a phase that we anticipate in all patent litigations. And it's important for us to use these kinds of statistics to get a sense for how many PTAB petitions are being filed and also what the outcomes are likely to be.

Elaine Chow ([22:47](#)):

And Michael, you work with experts at the PTAB as well, right? Correct?

Mike Connelly ([22:54](#)):

We do, yeah. And so the same... I mean, I guess in some ways this data tracks the district court filings, right, there's always a lag to the IPR decision and you see that, of course. So the increase in 2013 in filings get you an increase, a slight decrease. Now back to maybe a more normal status, but I think IPR petitions have decisions about them have reached more of a maturity. You're getting a lot of experts who have a lot of experience in them and there's still a very viable option. Maybe not as cheap and simple as they were earlier, which I think causes them to be decided a little more... The decision to be a little more difficult. But yeah, we're heavily involved in that space as well.

Elaine Chow ([23:46](#)):

Okay. Let's take a look at the... So there's a slight bounce here. This is the federal circuit, basically federal circuit cases that originate from the PTAB. I mean, there's obviously, there's the lag issue. And the bounce may simply just reflect the lag it takes for an appeal to arise. Let's see here. And then we have, again, this is very similar to... This is most active petitioners by trials petitioned. This is going to look remarkably similar to most active defendants in federal district court. Again, Samsung entities, Apple, Google, Unified Patents is here, Microsoft. And then we have most active patent owners.

([24:40](#)):

And this is a little bit different from most active plaintiffs in federal district court, but there are some high volume plaintiffs here as well, such as WSOU investments. And now we're going to look at most active firms by trials petitioned. Again, no surprise, the top firms are basically IP focused Fish & Richardson, Finnegan, Stern and Kessler. And then we've come to... This is our sand key chart shows the progression of PTAB trials from petition through institution and final decision. And basically if you look here, of the number of petitions, roughly half, a little bit over half get instituted and 20% were denied institution. So Michael, I invite you to share your thoughts on how these numbers split out and are you surprised?

Mike Connelly ([25:52](#)):

Yeah, I think this goes to the earlier point about seeing data like this and challenging assumptions. One of the things that split the baby approach that you think, I think sometimes you can assume that the PTAB does more of which is there are claims that get through and there are claims that get denied. And here the mixed claim finding is relatively low. You mix that in with the number that aren't instituted. And once it makes it through, it's more of an all or nothing system than than you might have assumed. And I think all of these go into the decision making process, both from an in-house and an outside council perspective. And again, there's this broad data and then you get to drill down and see how parties are doing, how law firms are doing. All of that stuff is built within this too, which is all key.

Elaine Chow ([26:52](#)):

And Robin, I'd be curious to know your thoughts on this as well. Are you surprised by the numbers?

Robin Davis ([27:01](#)):

Well, I can't say I'm surprised, but it does-

Elaine Chow ([27:03](#)):

... the numbers?

Robin Davis ([27:03](#)):

Well, I can't say I'm surprised, but it does definitely highlight that whenever an IPR is filed, that it is a significant risk. And if a patent comes through it, that is a terrific result. It emphasizes that the institution decision is really a crucial phase because where institution is denied, not only does that save a lot of time in the litigation because there's less likely or only to be a very short IPR related stay of district court proceedings, but also, the claims are all still with you. Once there is institution, it's a very small number that have all claims upheld or mixed claims filings relative to the number of petitions where it turns out that all claims are found unpatentable. So this becomes a crucial step and I think, as Mike suggested, it's extremely helpful for us to be able to filter down on past party behavior. The patent has been challenged and successfully survived an IPR before. That can often be a good omen for what will happen to it in the future. So that kind of data and tracking is very useful for us.

Elaine Chow ([28:10](#)):

Great. And now, we are going to the last two slides. I'm going to show real quick here. I realize we're tight on time. This is the federal appellate case resolutions for cases from district court. You'll see that the affirmance rate is 64% and the reversal rate is 36%. And this is the appellate, basically the reversal or affirmance rate for PTAB appellate cases docketed. And you'll see it's a higher affirmance rate and a lower reversal rate, 76% and 24%. So Robin, any thoughts on how you advise-

Robin Davis ([28:59](#)):

Sure. I think it-

Elaine Chow ([29:00](#)):

... clients when you see stuff like this?

Robin Davis ([29:02](#)):

Well, I think it just shows how important it is to get it right in the first instance before the PTAB, either with institution denied or with claims being found to be not unpatentable because there's just a much higher rate of affirmance, and so whatever the PTAB does in the first instance is much more likely to stick with you. In a way that's good for certainty, but if your patent has been invalidated, those statistics are tough news. Although, it tracks with what we observe, but it shows the importance of getting your PTAB activity correct.

Elaine Chow ([29:37](#)):

Okay. And so I realize we are about out of time. So that is the end of our presentation. I wanted to thank Michael and Robin so much for joining us today. As I mentioned, what you see in this webcast is really

just some of the content in the report. And I want to thank our listeners as well. And Aria, I will turn it back over to you.

Aria Nejad ([29:57](#)):

Thank you, Elaine. Yeah, I know that we're just about out of time. We're just going to go about a minute or two over to address some of these questions. I saw one of the questions that came in from the group list. Do you have data trends of the number of cases filed in the Western District of Texas in 2022 before and after July 25th 2022? That would be interesting to see as well. I mean, the short answer is yes, right, Elaine? It's right in the product.

Elaine Chow ([30:18](#)):

Yeah. You can set a filter for the dates of when cases are filed and you can see that data.

Aria Nejad ([30:27](#)):

Right, exactly. I got one question real quick before we close out, but this question is for Robin or Michael. Do you have any predictions for the next few years in patent litigation? Any major shifts or movements?

Mike Connelly ([30:43](#)):

I mean-

Robin Davis ([30:44](#)):

Go ahead, Mike.

Mike Connelly ([30:46](#)):

Okay. I mean, I will say, we try to look ahead and choose certain areas to focus on and build expert teams in. So for us at the moment, it's wireless, it's automotive, gaming, FinTech, life sciences. There's a lot of overlap in those spaces because you're starting... Automotive is involved in wireless. Gaming, involved in wireless. The concepts and the technology that's used in all those are crossing over a lot. But we just continue to see that those are growth areas in litigation, in terms of technology spaces, which is more of our focus.

Robin Davis ([31:31](#)):

And if I can just briefly echo, and I think the first question alluded to this, but it'll be interesting to see whether the Western District of Texas maintains its popularity as a venue. Once the case is filed in Waco, aren't necessarily going to Judge Albright. I wonder whether that volume of cases will migrate to Delaware or if we're going to see another popular venue take its place. Perhaps some cases migrating back to the Eastern District of Texas and Judge Giltstrap's courtroom. But these are things that I guess will be answered in next year's presentation.

Aria Nejad ([32:03](#)):

Exactly. Yeah, lots of interesting things going to happen in 2023 to keep an eye on. I really want to just thank everyone for joining us today. Really quickly, if you are already a Lex Machina customer, then you can log in and find the patent litigation report in the help center right now. So just go up to your name on the upper right-hand corner and the help center is in that menu. And if you're not a customer, you'll

receive an email with follow-up information as well. If you're not a customer, we do ask that you spend about 10, 15 minutes with one of our legal data experts before receiving the report, but you can get it very shortly after. I want to thank Elaine and Robin and Michael for all your expertise today. Thank you so much. And thank you all at home for joining us. If you have any questions, reach out to us directly via the Lex Machina website, and enjoy the rest of your day everyone.

Elaine Chow ([32:46](#)):

Thank you.

Mike Connelly ([32:47](#)):

Thank you guys.