



Lex Machina's 2024 Patent Litigation Report

Read the transcript of Lex Machina's 2024 Patent Litigation Report webcast featuring Michael Connelly (President of WIT Legal), Michael Flynn (Partner at Morris Nichols Arsht & Tunnell), and Elaine Chow (Lex Machina's Legal Data Expert in Patent Litigation), hosted by Aria Nejad (Lex Machina's In-House Counsel). The speakers 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:



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Moderator
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Aria Nejad (00:00):

Welcome everybody to today's webcast where we'll be introducing Lex Machina's newly released 2024 patent litigation report. My name's Aria Nejad. I'm in-house counsel here at Lex Machina and I am going to be moderating today's webinar. I'll introduce our guests shortly who will discuss patent litigation trends over the last three years. They're going to offer insights on judges, venues, parties, law firms, and more than that. A couple of quick housekeeping notes before we get started. This will be a 25-minute presentation followed by answers to any questions submitted by attendees, so about 30 minutes total, so please share your questions at any time though we'll review them together at the end. End of the presentation. We do have a short survey. We'd appreciate your feedback on today's webcast. It takes less than a minute and it helps us improve future webcasts. So please take the time to share your thoughts with what you thought today.

A little bit about Lex Machina. Lex Machina is legal analytics. It's all we do. Lex Machina provides legal analytics to law firms and companies. We enable them to craft successful strategies, win cases, and close more business. Currently, we count about 80% of the AM Law 200 as clients, in addition to companies and law firms of all sizes from Fortune 500 companies to small firms and organizations. I'm joined today by my colleague Elaine Chow, Lex Machina's legal data expert in patent litigation. Before joining Lex Machina, Elaine practiced patent litigation at an IP litigation boutique and at an AM Law 100 firm. She's represented multinational technology companies as well as startups. Elaine is a registered patent attorney. Welcome, Elaine. We're also excited to have two terrific guest speakers joining our panel today. As President of WIT Legal, we have Michael Connolly with us. Michael has more than 25 years of experience litigating IP disputes and is a leading authority with broad knowledge about the trends and risks impacting different industries today and in the future. Welcome Michael.

Michael Connolly (01:52):

Thank you.

Aria Nejad (01:54):

We're also fortunate to have Michael J. Flynn with us today. Michael is a partner at Morris Nichols in Delaware, where he's represented a broad range of clients in more than 290 patent cases, as well as in copyright trademark trade secret and the antitrust matters. Welcome, Michael. Thank you. So, at this point I'm going to turn the presentation over to you, Elaine. Elaine, go ahead and begin the presentation when you're ready.

Elaine Chow (02:17):

Hi everyone, and welcome. Today we'll be presenting from our most recent patent litigation report, which focuses primarily on the three-year period from 2021 to 2023 and provides data-driven insights to the behavior of courts, judges, parties, and law firms based on patent case filings. Our 2024 patent litigation report features Lex Machina's legal analytics for patent litigation in federal district court, the federal circuit and the Patent Trial and Appeal Board. Our analytics allows users to access comprehensive litigation data from filing through appeal. Now, what we'll discuss today is an overview of what's possible with Lex Machina, but I want to point out that this data can be analyzed at a more granular level, including, for example, motions, remedies, patent findings, and even industry classification types just to name a few. Now, before we dive in, I just want to give a brief overview of the data 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, validity or invalidity, enforceability or unenforceability. This dataset includes approximately 66,000 federal district court cases since 2009, 15,400 PTAB petitions filed since 2012 and 10,700 federal circuit appeals cases originating from either district court or the PTAB since 2012. And today we'll look at some data from the past three years and in some situations the past 10 years. So, with respect to this chart, which looks at patent case filings in district court since 2014, this chart includes filings by high volume plaintiffs and Lex Machina defines a high-volume plaintiff as any plaintiff that has filed at least 10 patent cases excluding ANDA cases within a 365 day period. And Lex Machina enables users to separate data based on high volume plaintiffs because it can provide a different insight into litigation trends. So here you can see that filings continue to decrease from 2021 to 2023, dropping from 4,000 to 3,100 roughly, and that's a 10-year low.

And this decline has been fairly steady since 2015. Now for comparison, we are going to look at patent cases, case filings for the past 10 years, excluding high volume plaintiffs. And here we see the overall volume is lower, obviously in the roughly two thousand range, and it's remained relatively flat. In 2023, it was just under 2,200 filings. Now, in previous webcasts, we've pointed out that the overall decrease in general patent cases filed over the past 10 years appears to have been driven at least in part by a decrease in high volume plaintiff filings. And that is especially true this year where the number of cases filed by high volume plaintiffs dropped 45% compared to 2022. So, I'm going to ask our panelists now and ask for their thoughts on this drop in filings by high volume plaintiffs and the filing trends. Is this a side effect of the Western District of Texas order randomly assigning cases that were previously assigned to Judge Albright? Is this the side effect of Chief Judge Connolly in the District of Delaware requiring disclosure of third-party funding?

Michael Flynn (05:57):

I think Elaine, I think you nailed the point there. I mean the drop in cases, I mean there were 700 fewer high volume plaintiff cases filed in 2023 versus 2022, and that is the same 728 difference in total filings. And I think as I dug into these a little bit, I think 560 cases were filed just by IP Edge entities in 2022, and I think they filed a handful of cases in 2023. Part of that is probably driven by Judge Connolly's concerns regarding the IP Edge entities, certainly in Delaware.

Michael Connolly (06:44):

Yes, I agree with Michael. I think that's probably the bigger effect that we're seeing just kind of all around is that uncertainty about exposure in those cases. And also, I think the fact that that reflects maybe less of a desire to want to hear those cases or the feeling that maybe they're not going to be given kind of a normal or fair shake. So, I think it's a time of uncertainty for a lot of those types of plaintiffs and the vagaries of acquiring patent portfolios, which sometimes you get a big one and you roll it out and you're waiting for the next one to come. So, we just had a particularly high-volume single plaintiff of sorts with IP Edge last year or 2022.

Elaine Chow (07:37):

Right. Let's see. Oh, here we're going to look at federal appeals cases docketed and the number of district court appeals has been on a steady decline since 2015, dropping to a 10 year low in 2023 of 306 cases docketed. And this 10-year low is not just limited to patent litigation, it's reflected in our other non-patent federal appellate court data as well. And I'm curious what you think, Michael, and Michael, if this is part of the COVID lag or if this is just again reflected in the overall drop in filings as well?

Michael Flynn (08:23):

Yeah, I think if you look, it sort of follows the same trend line as the overall case filings but sort of trails it by a year or two, but I don't think it's a significant drop if you look at 2014 versus 2023, but it's sort of been a steady decline since then.

Elaine Chow (08:45):

Next, we will, as I'd mentioned before, you can get more granular with the data in Lex Machina and look at it by district. So here you can see for the three-year period, a little over 50% of all patent cases filed in the US were in one of three districts, Western District of Texas, the District of Delaware or the Eastern District of Texas. And here you can see the effect of Judge Garcia's July order from 2022. Certainly, for the three-year period, the Western District of Texas remains the most popular venue with 21.7% of all patent cases filed in the US but notably in 2023, the most active district cases filed is the Eastern District of Texas followed by the Western District and the District of Delaware. Are you surprised that plaintiffs seem to be switching going back to the Eastern District of Texas, which before Judge Albright was the most popular venue for patent cases,

Michael Connolly (09:52):

Elaine? I'll say I don't think so. I think a lot of this is reflected in filers that are in some way connected with Texas and so they were looking for a Texas venue and Eastern District of Texas offers something that's very familiar and known to them. So right now, I think the Western District does not because of the number of judges and the circulation of the cases, we may even see a further decrease just because I think we still had a number of cases that might've been getting follow on assigned in the Western District. So, there was some assurance they were going to go to Albright or something more familiar, whether the Eastern District stays that way or becomes consistently high venue again, we'll just have to see.

Michael Flynn (10:44):

Yeah, I think that's right. Great thing about Lex Machina is you can drill down on these numbers a little bit more and I went and looked and by the end of 2023, less than half of those 2023 cases filed in Western District of Texas were still active cases. So, they're coming and going pretty quickly in that district as well.

Elaine Chow (11:07):

And just like you can get granular with the districts, you can get granular with the judges. So, Judge Rodney Gilstrap is the most active judge for patent cases filed in 2023 with more than two times the number of cases case filings of the judge in second place, Alan Albright of the Western District, again, this is probably due to the Garcia order, but again, for the three year time period, Judge Albright still the most active judge for cases filed followed by Judge Gilstrap. And even though the number of filings has decreased significantly in Judge Albright's court from 2022 to 2023, he still had almost 17% of all filed patent cases filed in the US for the three-year time period. This is a decrease overall for Judge Albright, but not that much. It's in our previous report he had about 20% of all patent cases filed, which speaks to the volume he had before the order. And we will look at most active plaintiffs by cases filed over the past three years and Cedar Lane and Bell Semiconductor were at the top of last year's report. But I do want to point out a new plaintiff, patent Armory Inc. I believe they filed their 87 cases in the last three quarters of 2023. 79 of those cases were in the Western District of Texas, the District of Delaware or the Eastern District of Texas.

Michael Connolly (12:56):

Elaine, I'll just throw in here, this is an example too. These are kind of the broader statistics, but in the expert side of things, we like to look at different industries and see what the activities there are and which companies are the most active there. So we are starting to use the industry tag that you've got, the NAICS code tag, which lets you move away from the people that dominate like a Cedar Lane or Bell or Patent Armory this year to specific industries and see both sides of who is suing. And then I think you're going to show who's getting sued and it is often very helpful for us to see in an industry what's happening with automotive now versus last year or just this month, those sorts of things.

Elaine Chow (13:58):

And you ask and you shall receive. Most active defendants are primarily consumer facing tech companies, not too with a handful of pharma, not too much different from our previous report. And next we have law firm data. Lex Machina extracts the counsel data from raw sources and then normalizes the information to collect analytics on law firms and attorneys. So here the most active law firms representing plaintiffs by cases filed last three years, you can see that almost all of them, they're representing high volume plaintiff clients. And then with every plaintiff, there's always the defendant's firms. And here the HVP percentage is the percentage of cases where they're defending against high volume plaintiffs. And this is, again, this is almost identical to last year's list as well. So, Lex Machina provides case timing data to certain milestones. It's often used for forecasting, calendaring, and budgeting strategy.

So, we're going to look at some box plots here. And so, in viewing box plots, the lines represent the lower and upper quartiles, and the box represents the middle 50% of cases with the median number highlighted in the center. And so here we have time to events in patent cases terminated past three years excluding ANDA cases. And so, these median times like 814 days of summary judgment, 1,091 to trial, they're longer than what was in our last year's report. And those numbers were 793 and 1,063, and that was longer than the previous year's report. So, we're seeing some slow creep in the number of days, the median number of days to reach certain milestones and even time determination 205 days is longer than what was in the previous reports as well. So, I'm going to ask our speakers what their thoughts are as to this creep. Is this leftover from COVID? Is there something else going on?

Michael Flynn (16:32):

I'm hoping we're getting soon past the point where we can keep blaming everything on COVID. There may be some residual effects of that where things were just backed up. But if you look at things like stays pending IPR resolution, those were a little bit higher in 2022 and 2021. So that extended the overall case timeline. And frankly, you look at just the sheer number of cases that are assigned to Judge Albright or Judge Gilstrap, and I mean I don't know how you get through the summary judgment decisions on that volume of cases in sort of any timely way. So those cases that are getting to trial or going through summary judgment, it's just taken longer I think for judges to get through those.

Michael Connolly (17:20):

I think also anytime you see a shift in district, like we've seen a bit this past year, you will likely see a slowdown because you're kind of inundating one district and you're not really loosening up on another because they've also been hit. So, it's hard to know what 30 days or less in some cases means for this, but I think that sometimes happens too in the past where we've seen a jurisdictional shift happen because of some ruling or something else.

Elaine Chow (17:57):

Here we have time determination in patent originating federal appellate cases. So, this is appeals from district court and this number 338, this is also longer than what was in our previous report from last year, which was 325 days. And I think that probably is a reflection for the same reasons you had mentioned earlier. Right. And obviously if district court cases take longer to resolve, then it suggests that the appeals would also possibly take longer to terminate.

Michael Flynn (18:30):

No, I think that's right. There's just an inundation in the federal circuit between PTAB appeals and district court appeals that there's only so much work that can get done.

Elaine Chow (18:44):

And we also have case resolutions for district court cases in the past three years. So, this is our famous donut. So, settlement and procedural resolutions are on the right with green representing likely settlements and gold representing some sort of procedural resolution such as transfer left-hand side shows claimant are broken down between claimant and claim defendant wins for cases that are resolved at various stages of litigation. So red represents claimant win blue represents claim defendant win, and the number is the number of cases that were the number of district court cases and the percentage is what that case resolution is as a percentage of all district court patent case resolutions in the three-year time period. So obviously the bulk of the district court cases terminated in the last three years were resolved either likely settlement or some sort of procedural resolution that's like over 90% with regard to cases resolved on substantive grounds, they were resolved in favor of claimants more than twice as often as claim defendants primarily on default and consent judgment. Although 18% of the cases resolved in favor of claimants were done so at trial. However, you can see for cases that were resolved at summary judgment claim, defendants prevailed almost three times as often. And I know Michael and Michael practicing as attorneys, often you would hear about anecdotal evidence or the senior partner who would talk about, well, I know so and such and such happens in front of a judge. And I'm curious as to your thoughts of using the hard data versus the anecdotal evidence.

Michael Connolly (20:43):

I'm a big fan of it, Elaine. I think there's always caveats to data. And then of course this is a broader example of something you can drill down on for a judge, for a district, a judge in a certain type of technology and try to see if there's data now. And I think that can be very powerful to challenge a lot of these assumptions we carry with us because of anecdotes. Every case is its own unique animal, but I do think that can be very helpful as an intelligence tool to work with clients on expectations. We haven't really touched on it, but a lot of the timing that you can drill down on can be very helpful for billing and setting expectations with clients as well.

Elaine Chow (21:38):

Next, we will turn to the affirmance rate or the reversal rate, and here it's 66% affirmance rate. And this is actually higher. It's a little higher than last year's report, which was 64% to 36%. So, we'll keep an eye on this, but there's a little bit of a creep going on as far as the affirmance rate is concerned. So, let's see here. And now we have damages. So, in 2023 we had 80 cases, \$3.5 billion in damages. I just want to point out that a couple of things. One is the amount in column three and the reversed amount are mutually exclusive. So reversed amount is just the amount that was reversed. And we do have additional data in the report as far as type of damages awarded, whether that's reasonable royalty or lost profits or

exemplary damages. So again, reach out for a copy of a report for more details as to damage types. And here we have, we're going pivot to PTAB petitions and here similar to federal district court, we have a 10 year low in PTAB petitions filed. So, this is not trials, this is just petitions filed. And I'm curious from our panelists as far as why you think the number of PTAB petitions has dropped actually quiet, it's been quiet a bit since roughly 2017.

Michael Flynn (23:26):

I think part of it as first it's just a decrease in total number of patent cases and data is great, but anecdotally we're hearing more defendants that are willing and more eager to sort of try their invalidity case in district court where they think they may have a better shot before a judge at summary judgment or a jury. So that may ultimately lead to the decision because the estoppel effects are pretty powerful and to give up all of your invalidity options with the V tab is not as appealing as it once was, I think.

Michael Connolly (24:08):

Even this number can be affected greatly too by who's being sued in a certain year and their internal appetite or desire for PTAB actions. Some like it, some don't, and that can really, really affect it.

Elaine Chow (24:28):

So, we have most active petitioners by trial similar to our district court data, a lot of the same names as were in our district court defendant's list with a few exceptions. And then we also have the most active patent owners by trial petition in the past three years. And we also have the most active law firms by trials petitioned. And here you can see more clearly the law firms tend to be either representing the petitioner or they only represent the patent owner. And then we have, this is our Sankey chart, and that shows a progression of PTAB trials from petition through institution decision and final written decision. And for trials ending in the three-year time period, 54% of the cases were instituted, 21% were denied institution. And when trial was instituted, all of the claims are found to be un patentable 22% of the time. All of the claims were upheld 6% of the time and mixed claim findings occurring 6% of the time. And I just wanted to point out that compared to last year's report, the institution rate was 51% and a 20% institution denied rate. And I wanted to ask Michael and Michael what your thoughts were and does this sort of data inform how you counsel clients on whether to pursue relief in the PTAB?

Michael Flynn (26:08):

Yeah, I mean certainly when you look at these numbers, it's getting instituted is you got a better than 50% shot and you've got a much better shot of getting at least some claims knocked out. So, it's a great option. One of the things is it's not as cheap as you sometimes think it's going to be. It often is not significantly less expensive than litigating in the district court. So, all of those things I think go into what the best strategy is in any given case for a particular defendant.

Elaine Chow (26:44):

I think I heard that the fees may go up in 2025 as well, so we may see these numbers change over in the next couple of future reports. And then the number of appeals originating from PTAB. So, unlike the district court data, it's not like a sort of steady decline. It's kind of roughly up and down and it's actually increased slightly from 2023 actually increased from 2021. Don't want to blame COVID, but I'm curious as to why you think this trend is a little bit different from the district court appeals data.

Michael Connolly (27:29):

Well, it's clearly COVID.

Michael Flynn (27:34):

I think that's certainly true for probably 2021 where it's just a lot of stuff was put on hold or we saw, I feel like I spent most of 2020 extending case schedules or resolving cases. So, I think 2021 for sure, but there's a bit of a trend there, but we're still sort of hovering in the same zone. I don't think there's been a huge drop off either way. So, it just depends on the quality of the cases that get filed.

Elaine Chow (28:07):

Here we have the appellate cases, PTAB appellate cases terminated for the past three years, and here the affirmance rate is 78% with a reversal rate of 22%. It is higher, at least 10, 12 percentage points higher than the affirmance rate for district court cases. And this is even a slight creep up from last year's report where the affirmance rate was 76% and that was also higher than the district court affirmance rate from last year's report, which was 64%. So curious as to your thoughts as to why the affirmance rate is higher and how you would use this data to advise your clients on appeal strategy from PTAB.

Michael Flynn (28:55):

I think the affirmance rate is not terribly surprising, right? Because you've got the PTAB panels that are sort of experts in that particular field and you've only got the one issue, you've got validity in validity. So, I think it's much easier to sort of affirm those versus a district court appeal where you may have damages issues and infringement issues and more nuanced things and a wide variety of judges that are ruling at the district court level without that same patent expertise.

Michael Connolly (29:29):

Yeah, you're just also not facing as many are you trying to, was there an exclusion of something? All those kind of different appeals issues you can see in different from district court you don't see there. So, I think they tend to rely on them more.

Elaine Chow (29:46):

Well thank you. So, the highlights that we've covered today are only a small selection of the insights in the report. So please check out the full report, which includes additional data on findings and the cases pate resolutions and damages. And if you have any additional questions, please feel free to reach out to anyone on the Lex Machina team. Thank you. And back to Aria.

Aria Nejad (30:09):

Thanks Elaine. So, we're right at time. We have time for maybe one question though, so there were a lot of great questions. If we don't get to you, we'll try to answer you offline. So, thanks for submitting those. One question that came in. So, this goes for both of the Michaels. Do you have any predictions for the next few years in patent litigation? Any major shifts or movements?

Michael Flynn (30:31):

I wish I could predict these things. I think we're going to see sort of how some of the high-volume plaintiff stuff shakes out both here in Delaware and on appeals. And I think we're going to start to see that trend back up. So, we're going to 2023 might've been a bit of a correction in high volume and non-practicing entity cases. And I think that's just likely to creep back up if there's opportunities there, someone's going to take them.

Aria Nejad (30:59):

Interesting.

Michael Connolly (31:00):

And I think for us, we've been looking at some very specific industries like automobile, wireless, FinTech, gaming, some others, and trying to see where that's headed. Automobiles, I mean the overall number is not huge, but because you've got connected cars, a lot of other things, they're starting to be the target in the post Avanci license era of a bunch of individual patent holders. Wireless we're probably beyond this year for the next kind of stage of fights over the current licenses expiring or 6G coming on is too far out. So, we may not see as much of that this year, but that's kind of brewing in the background I think.

Aria Nejad (31:53):

Very interesting. Yeah. Thank you for letting us know what to keep an eye on coming up here, like gaming and auto. So interesting. So real quick, I just wanted to thank everyone for joining us today. If you're already a Lex Machina customer, you're wondering how you can get the report, you can just log right into [lexmachina.com](https://www.lexmachina.com). You can find the patent litigation report in the help center. It's in there 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 20 minutes with one of our legal data experts about receiving the report and then you'll get the report at that time. I want to thank Elaine and Michael Connolly and Michael Flynn for all of your expertise. It was a very interesting conversation and thank you all so much and to all of our attendees, thank you for joining us. If you have any questions, reach out to us directly via the Lex Machina website. Enjoy the rest of your day, everyone.