



Patent Litigation Report 2022

This webcast features Michael Flynn (Partner in intellectual property litigation at Morris Nichols Arsht & Tunnell) and Elaine Chow, author of the report and Lex Machina's Patent Legal Data Expert. The panel analyzes federal patent litigation trends over the last three years and offer insights on judges, parties, law firms, case filings, findings and resolutions, timing, damages, and more. The webcast looks at emerging trends in PTAB cases, as well as appellate outcomes in federal patent litigation.



Michael Flynn
Partner in IP Litigation
Morris Nichols Arsht & Tunnell



Elaine Chow
Patent Legal Data Expert
Lex Machina

Joshua Harvey ([00:00](#)):

Good morning to everyone and welcome to the 2022 Lex Machina patent litigation report webcast. My name is Joshua Harvey. I lead the customer success team here at Lex Machina and I'm honored to be your host today. Just a couple of quick housekeeping items before we get started, this webcast is scheduled for 30 minutes. We hope to finish with a little bit of time at the end so that we can answer some questions. You will see a Q&A box that you can submit questions, and we'll certainly try to get to as many of those as we can.

Joshua Harvey ([00:32](#)):

So today I have the absolute pleasure of talking with two very special guests. First, I'd like to introduce Michael Flynn. Michael is a partner at Morris Nichols. He represents clients as lead in Delaware Council with a focus on web based technology, networking, biotechnology, and consumer products. Michael has been recognized by Chambers USA for intellectual property and has been ranked by IAM Patent 1000. He's a graduate of Tulane Law School and Swarthmore College. Welcome Michael. Nice to have you with us today.

Michael Flynn ([01:06](#)):

Great. Thanks sir. Appreciate being here, Josh.

Joshua Harvey ([01:09](#)):

Great. Next, I'd like to introduce Elaine Chow. Elaine is our legal data expert and the area of patent law here at Lex Machina. Elaine was in private practice at an IP litigation boutique in an Am Law 100 firm. She's a registered patent attorney and is proficient in Mandarin Chinese. Elaine received her BA in applied mathematics from the University of California, Berkeley, MA in journalism from the University of Missouri, Columbia, and her JD from Georgetown University Law Center. Welcome Elaine. Glad to have you.

Elaine Chow ([01:44](#)):

Thanks Josh.

Joshua Harvey ([01:45](#)):

All right. Now, if you're not familiar with Lex Machina, we're legal analytics. We provide actual insights about judges, lawyers, law firms, parties and issues. And simply put, legal analytics help you win in the business and practice of law. Lex Machina is used by law firms of all sides, everything from solo practitioners to most of the MO 100. We have corporations, federal government agencies, litigation, funders, law schools, pretty much any organization that might need to know actionable insights from litigation outcomes. Those are our customers.

Joshua Harvey ([02:20](#)):

Before we dig into the data, I always like to just kind of remind everyone, really a lot of hard work goes into these reports. We have a great team of legal data experts that really dig into this. They put it together, they package it nicely. And one of the really cool things about Lex Machina is everything you're going to see in this report comes from Lex Machina itself. So if you have a subscription into Lex Machina, you can go in, you can find the different data points, you can dig deeper, you can break it apart, you can look broader. Whatever you want to do, you have access to this data.

Joshua Harvey ([02:54](#)):

And so today, we're talking specifically about the patent report, which is really kind of our funnest, one of our funnest releases of the year. As most of you probably know, Lex Machina spun out of the Stanford University Law School as a public interest product. Our project and our focus was patent litigation back then. And obviously we've expanded to all areas of federal law, states, appeals, all that stuff, but we've been doing patent litigation analytics for a really long time. And so this is always really one of our most popular webcast reports. And this year it's even more exciting, because for the first time ever, we're able to include appellate analytics in this report. So this is a huge step in legal analytics, huge step for Lex Machina, is we're the only company that can show you what really happened in a case from its filing and report, through the end of an appeal. This is really a game changer in legal analytics and we're very excited to be able to incorporate that into this report and into this webcast today.

Joshua Harvey ([03:53](#)):

So with that, I'm going to hand it over to Elaine and she can kick things off and start talking about the report.

Elaine Chow ([03:59](#)):

Hi everyone and welcome. We're excited to share some insights from the 2022 Lex Machina patent litigation report. And as Josh mentioned, this report features for the first time Lex Machina's legal analytics for federal courts of appeals. And we'll be showing you some appellate analytics in this webcast.

Elaine Chow ([04:17](#)):

But first, let's look at some district court filings. I'd like to define, first of all, what a patent case is in Lex Machina. It's basically cases with a claim of infringement or non-infringement, enforceability or unenforceability, validity or invalidity. Now, with respect to this chart, which looks at case filings for the past 10 years, we see that patent case filings and federal district court have declined since 2015 from a high of roughly 5,800 or so to between 35 and 4,500 filings per year. You can see that 2021's volume was nearly identical to 2020s, around 4,000 cases give or take. And although there was an uptake in filings between 2019 and 2020, 2021's on much more modest increase, only 61 cases.

Elaine Chow ([05:09](#)):

Next we'll look at the number of case filings again with the same time period, but without what Lex Machina refers to as high volume plaintiffs. A high volume plaintiff in Lex Machina refers to any plaintiff that is filed at least 10 patent cases, excluding anda cases, within a 365 day time period. Lex Machina enables users to separate data based on high volume plaintiffs, because it can provide a different insight into litigation. So excluding high volume plaintiffs, the overall volume of cases for the same time period drops significantly compared to the previous chart. So roughly in the two thousands range, and it has remained relatively steady with a slight increase in 2021 from 2,200 filings to about almost 2, 400 filings.

Elaine Chow ([06:02](#)):

So Michael, I'm curious, what's been your experience with filings in district court in 2021?

Michael Flynn ([06:10](#)):

Well, I think certainly here in Delaware, I think we followed a similar trend. We had a little uptick in 2021. I think the real surprising thing is that there wasn't a drop off in 2020 that I think a lot of people expected

after March or so, when places started shutting down. But certainly, here we've seen, I think Delaware peaked in 2013 at like 1300 cases and has dropped since then as the Eastern district of Texas took off and now the Western district, but as the chart clearly shows, among sort of competitor cases, non high volume plaintiffs, the numbers are remarkably steady.

Elaine Chow ([06:53](#)):

So year two of COVID really hasn't affected filings then in your opinion.

Michael Flynn ([07:00](#)):

It doesn't look like it and I think we're on track for another robust year of patent filings.

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

Okay, great. Next we'll look at the most active districts based on the number of cases filed. So as you can see here, the five most active districts did not change between 2020 and 2021. The Western district of Texas remains the most popular venue. And the consolidation of patent cases filed in the top three districts, which is the Western district of Texas Delaware and the Eastern district of Texas has increased from 47% in 2019 to 57% in 2021. Now, it'll be interesting to see if this list changes next year, the national patent pilot program of which some of these districts were participants ended in July of 2021. And Judge Albright's been reversed on transfer cases recently by the fed circuit. Michael, do you have any thoughts on...

Elaine Chow ([08:02](#)):

That circuit. Michael, do you have any thoughts on this list? I know Delaware is consistently popular over time here.

Michael Flynn ([08:10](#)):

Delaware's been a consistently popular venue for a long time which is a little surprising considering we just got four district judges here. I think we'll continue to be popular. The Western District, as you mentioned, has seen some reversals on venue issues. It's pretty clear that defendants are going to fight pretty hard to get out of that district with a quick time to trial that isn't advantageous to them. We'll see how that shifts over the course of the next year or two.

Elaine Chow ([08:43](#)):

And do you think with TC Heartland, Delaware will probably maintain its popularity.

Michael Flynn ([08:49](#)):

Yeah, I think that's right. Because we've got such a disproportionate number of companies incorporated in Delaware, it's pretty easy to get venue and jurisdiction here. If you take out the high volume plaintiffs, Delaware's been a consistent leader since 2012 to 2021. And even in the last two years. But the high volume plaintiffs and more of the NPEs I think are definitely going to Western District of Texas is they can.

Elaine Chow ([09:23](#)):

Okay. And that's leads us to our next slide, because not surprisingly, the most active districts correlate to the most active judges. And here we see that the most active judge between 2019 and 2021 was indeed Judge Alan Albright of the Western District of Texas, followed by Judge Gilstrap in the Eastern District of Texas, and then the four district judges from Delaware. You can see that over the three-year time period,

Judge Albright had 17% of all had cases filed in the US. And you can see the report for further details, but in 2021 he actually had 24% or almost one out of every four cases filed. Michael, given the volume of cases that Judge Albright's been getting, do you think his popularity will increase? That's a pretty big jump from 251 to 932.

Michael Flynn ([10:19](#)):

It's hard to see how that's sustainable. I know that's he's got a new magistrate and he's certainly been advocating for patent plaintiffs to be filing in Texas. But at some point though, just the volume has to catch up with him. He's also attracted the interest of Congress, that has questioned these cases being concentrated in his district. Some of that's going to continue to play out in the Fed Circuit reversals and things. I think a lot of plaintiffs will still think it's a popular place to be, and the benefit of being there and a quick time to trial, which is likely to lead to more settlements. But again, we'll have to see.

Elaine Chow ([11:03](#)):

Great. Next. We'll look at the law firms with the largest number of patent cases in Federal district court. The next two charts are going to be filed by law firm name, the number of cases by year for the past three years, the number of Federal districts, and the percentage of high volume cases. Here we see that for 2019 to 2021, the most active law firm was Rabicoff Law. They had about 78% high volume plaintiffs. Next we'll look at the most active law firms representing defendants, over the three years that was Fish & Richardson defending against high-volume plaintiffs in about 68% of their cases. Michael, do you have any thoughts of this data? I know Morris Nichols is prominent in both charts, and it's an interesting mix of law firms here.

Michael Flynn ([12:02](#)):

Yeah. I think on the plaintiff side, if you look at the top 10, I think there's two firms there that aren't at least a majority high-volume plaintiffs, and I think the Mort Law Firm, they're still mostly NPEs, even if they're not high-volume. No surprises on the defense side as well. You've got a mix there, you've got six national firms, three Delaware firms. Fish & Richardson has a Delaware office, and then you've got a Texas firm. I think those tend to be pretty consistent.

Elaine Chow ([12:37](#)):

Okay. Next we're going to pivot from law firms to case outcomes. This graph shows district court case resolutions for cases terminated in the three-year time period of 2019 to 2021. Just to give you the lay of the land, settlement and procedural resolutions on the right with green representing settlement, gold or yellow representing some sort of procedural resolution such as stay or transfer. Left-hand side shows case resolutions that are broken down into claimant, claim defendant, and those are for cases that resolved at various stages of litigation.

Elaine Chow ([13:19](#)):

Red is for the claimant, blue is for the claim defendant, and the number represents the number of district court cases, and the percentage is what case resolution is as a percentage of all district court case resolutions for the three-year time period. If you look, you'll see that 75% of cases were likely settled, and those case resolutions that were not settlements look like they overwhelmingly favored claimants by a more than two-to-one margin, you can see, primarily from default judgements, consent judgements, and trial.

Elaine Chow ([13:58](#)):

In fact, for cases that were resolved at trial, claimants prevailed by a nearly three-to-one margin. For those cases that were resolved at judgment on the pleadings, claim defendants prevailed 92 cases to one, and for those cases that were resolved at summary judgment, claim defendants prevailed by a more than two-to-one margin. Michael, I'd be curious as to what your thoughts are about this case resolution data and how does this effect case strategy, if you're representing a plaintiff versus a defendant?

Michael Flynn ([14:35](#)):

I think the most remarkable thing is how consistent this data is. I went back and pulled up the numbers in Lex Machina for the prior three-year period, 2016 to 2018, and the top line numbers were exactly the same, and even on a year over year basis they're one percentage different. There's a lot that goes into these resolutions and the largest are obviously the settlements and a lot of this is still driven by the high-volume plaintiffs again. I think if you break these numbers down by competitor cases, you're going to see a little bit of a difference there.

Elaine Chow ([15:19](#)):

Right.

Michael Flynn ([15:19](#)):

But I think we're going to continue to see very much the same type of numbers that we've see the last three years.

Elaine Chow ([15:29](#)):

Interesting. Okay. Great. Resolutions at the district court level can lead to appeals, which brings us to our next slide. This is new to Lex Machina and to the patent litigation report, and this shows the number of patent appeals filed for the past 10 years from district court cases. Note that this chart actually shows cases filed in Federal Courts of Appeal that originated from

Elaine Chow ([16:03](#)):

Those cases filed in federal Courts of Appeal that originated from patent cases, though not necessarily appealed from a patent-specific issue. So, we call these patent appeals cases. And there's additional detail in the report, but more than 90% of these appeals are no surprise to the Federal Circuit.

Elaine Chow ([16:19](#)):

So looking at this data, we see that, from a high in 2015, of 589 appeals filed, the number of patent appeals cases has actually declined quite a bit to 330 in 2021.

Elaine Chow ([16:33](#)):

So, Michael, do you have any thoughts on why there's a decrease overall in the appeals filed?

Michael Flynn ([16:39](#)):

Yeah, I think there's sort of a lagging indicator there that in 2014, 2015, is when we really start to see the rise in IPR filings, which means more cases aren't getting resolved at the District Court level.

Michael Flynn ([16:52](#)):

So, I think that, naturally, is going to lead to a decline in cases, in patent cases, appealed from District Court decisions. And it sort of follows, looking at from 2014, 2015, in IPRs and the following two years in Fed Circuit appeals.

Michael Flynn ([17:10](#)):

And I think that the other is that there's been just a real decline in patent cases that have gone to trial. In 2013 to 2016, there was an average of 125 patent trials a year. In the following three years, that dropped to 88 and then plummeted in 2020 because of COVID.

Michael Flynn ([17:28](#)):

So, I think we'll see the steady numbers that we've seen from 2018 to 2021, that there's going to be somewhere in the 350 range of cases filed, originating from District Court cases.

Elaine Chow ([17:44](#)):

Yeah, I think the lag... The lag makes sense and also the search for alternative venues, right? I guess, alternative, right? Like PTAB, for example, or even the PTO, because appeals can be... Are just time-consuming and expensive.

Elaine Chow ([18:04](#)):

Okay, so next we'll look at the data regarding resolutions of these patent appeals cases. So, this chart, again, is also new to the Lex Mach of patent litigation report. So, appellant, appellee wins are on the left. Settlement and procedural resolutions are on the right. Red represents outcomes favorable to the appellant. Blue represents outcomes favorable to appellees.

Elaine Chow ([18:29](#)):

And you'll see that, for the past three years, the appellant won 24% of the time and the appellee won 47% of the time. And 15% of these cases settled.

Elaine Chow ([18:42](#)):

There are additional details in the report, but patent appeals cases from District Court that terminated in the last three years with the decision on the merits of the appeal, had a 34% reversal rate.

Elaine Chow ([18:54](#)):

And so, Michael, I have to admit here, I was a little surprised by this, if only because I remember being told that there was a coin's flip chance of being, of prevailing at the Federal Circuit, if you appealed. But I'd be curious as to what your thoughts are?

Michael Flynn ([19:10](#)):

Yeah, I think that certainly was true, probably 10 years ago.

Michael Flynn ([19:14](#)):

Again, I think the change is driven a lot by the increase in IPR filings. So, you're getting more invalidity decisions out of the PTAB that go to appeal, and fewer District Court invalidity decisions. And I think just, generally, the Fed Circuit is less likely to reverse on infringement for a damages issue that may come up. So, again, I think it's very likely because of the increase in the IPR filings.

Elaine Chow ([19:46](#)):

Which brings us to our next slide. We're going to look at patent trial and appeal board data.

Elaine Chow ([19:52](#)):

So, while IPR filings of the PTAB increased in 2020, for the first time since 2017, we see that the number has dropped again in 2021. And you'll see here, in addition, that the chart reflects that the post-grant proceeding, known as covered business methods, was discontinued at the PTAB in 2020, and that's why that number is zero.

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

Michael, are you surprised by the drop in filings? With respect to IPR, at least, at the PTAB?

Michael Flynn ([20:27](#)):

I think it follows a little with just the drop in overall patent cases that were filed in 2018, 2019, that led to a drop.

Michael Flynn ([20:38](#)):

I think defendants are also getting more concerned about the estoppel provisions and the risk of having to go to trial with no invalidity defense, particularly the reasonably could have raised portion of that effectively means if there's prior art out there and you didn't find it, there's a chance that you're going to stop from trying to use it at trial. So, you've really got to have great prior art to want to go to IPR.

Elaine Chow ([21:09](#)):

And so, as far as managing client expectations for PTAB petitions and parallel litigation, has that gotten... It sounds like it's gotten a little more complicated recently than with, for example, Fintiv and the risk of not having prior art, if you go to trial in District Court?

Michael Flynn ([21:28](#)):

Yeah. I think, certainly, Fintiv is a factor in the Western District of Texas cases, because they've got such a quick trial time. Less of an issue here, in Delaware, because we've got trials that are usually going to be two years out, or two-and-a-half years out, from filing anyway. So, the defendants have a little more time.

Michael Flynn ([21:45](#)):

But IPRs aren't inexpensive. It's 150 to 200,000 dollars, probably, to get a good solid IPR filed. And so there's... I think defendants are looking at that, engaging the risk, would we be better off with the judge we've got on invalidity than going through the IPR process? And that's particularly true if you don't think you're going to get an institution on all the asserted patents, so you're not going to get a District Court stay.

Elaine Chow ([22:14](#)):

Yeah, that's a complicated decision to make.

Elaine Chow ([22:20](#)):

So, let's look at the PTAB trial flow. This is for trials terminated from 2019 to 2021. This is called a Sankey chart. It just shows a progression from petition to institution decision, to final decision. And, basically, you'll

see that just under half of the petitioned cases were instituted. 20% were denied institution. And then where the... The interesting thing is where the.... Where trial was instituted, all claims were found unpatentable about 18% of the time. All claims were upheld about 6% of the time, with mixed claim findings happening about 6% of the time as well. You also see that settlement occurred 12% of the time.

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

And there's more details in the report, but basically, of these 4,000 plus petitions filed, the patent owner actually won 69% of the time, although the petitioner won 22% of the time.

Elaine Chow ([23:20](#)):

And I think, Michael, you touched upon this previously, but this doesn't really... These are still pretty decent odds, right?

Michael Flynn ([23:29](#)):

They are. If you look at the... If you get instituted, you got currently about a 49% chance of that, then you've still got about a 50-50 shot of at least knocking out some claims.

Michael Flynn ([23:40](#)):

So, the decision tree for a defendant still goes back to how strong is your prior art? Are you likely to get instituted on enough claims that you're going to get a stay in District Court litigation? And that's something that the defendants and sophisticated counsel are sort of weighing all those decisions in every case.

Elaine Chow ([24:03](#)):

Yeah. I was surprised.

Elaine Chow ([24:03](#)):

Yeah, I was surprised that I guess the PTAB has evolved from the earlier days when it was considered the patent killer, right? These are little more balanced odds, I think.

Michael Flynn ([24:16](#)):

Yeah. I think one of the things that played into that was the SAS institute decision that said they've got to institute, institution's a binary decision, so if you're going to institute, you've got to do it on all claims. And I think because of that, the PTAB realized that's a major increase in workload. And I think that's when we started to see an uptick in discretionary denials under Fintiv or that the prior art's been at issue before.

Elaine Chow ([24:49](#)):

Now we're going to take a look at federal appellate case resolutions for PTAB-originated cases. And again, this data is new to Lex Machina and the patent litigation report. This looks at the data from the past three years, and we see that the appellant on the left prevailed 15% of the time, with the Appellee winning just over half of the time. There are more details in the report, but the overall reversal rate is about 23%.

Elaine Chow ([25:18](#)):

Just to point out that the data indicates the reversal rate is actually higher in patent appeals cases from the district courts than from the PTAB. But that might just be a reflection of the fact that federal circuit appeals

from district court could include other issues in a patent case besides invalidity or enablement. What do you think, Michael?

Michael Flynn ([25:43](#)):

Yeah, I think that's spot on. The PTAB gives you judges who are very experienced in patent law. Their practitioners, some of them have subject matter expertise. And I think the federal circuit recognizes that they issue well reasoned decisions on very focused issues. And they're just, I think because of that, they're far less likely to get reversed than the district court decisions are.

Elaine Chow ([26:12](#)):

Yeah, I agree. I think that makes sense. Michael, I want to thank you for joining me today and it's been really great to hear your insights on this data. And I'm going to turn it over to Josh, because I see that we've received a few questions and I think we still have some time, Josh.

Joshua Harvey ([26:31](#)):

Yeah, for sure. Michael, I think someone's going to put you on the spot with a question here. They want to know, what do you think are some of the key trends we might see in 2022?

Michael Flynn ([26:43](#)):

I think like all lawyers, I hate to make predictions. But I think obviously what we're going to see is the remnants of COVID are clearing a backlog in the court. I think we're going to see more cases go to trial, so I expect that we're going to see an uptick in appeals from district court cases. I think all the judges are working really hard to get through those cases and get juries in.

Michael Flynn ([27:09](#)):

One of the trends that we've seen has also been the pendulum swinging a little bit back on Section 101 motions. If you look at the numbers back in 2015, about a two thirds, 66% of those 101 eligibility motions were granted or granted in part to knock out claims. And in 2021, that number had dropped to just under 50%. And I think we're going to continue to see that. I think more courts are recognizing that there are ways that plaintiffs can possibly plead around that on a Rule 12(b)(6) motion.

Michael Flynn ([27:48](#)):

I think those are some trends that we're seeing in Delaware. But overall I think we're going to be pretty steady in the case filings and case resolutions and things.

Joshua Harvey ([28:04](#)):

Okay, all right. And then another question, do you think we might see more defendants pursue alternatives such as ex parte reexamination before the PTO instead of PTAP petitions?

Michael Flynn ([28:22](#)):

It's possible. There has been a little bit of an uptick. I think it's just going to be dependent on the patents in any particular case and the prior art. The one problem that the PTAB has in IPRs is just, there's a very set timing. And I don't know how they manage to get through all of the cases that they have and issue the decisions by the deadlines, but somehow they manage to do it.

Joshua Harvey ([28:50](#)):

All right. And then the last one, Michael, generally speaking, do you have clients or potential clients asking you about litigation analytics when they're discussing things like strategy and budgeting with you?

Michael Flynn ([29:07](#)):

We do. We use Lex Machina a lot to look at the timing for decisions, to look at how our judges are resolving cases. We practice almost exclusively in Delaware, so the venue decision isn't as much a part of it. But certainly when you're looking at individual judge's statistics, or when we're looking at some of the high volume plaintiffs that we're working against to see how motions have fared in other courts, but it's a great tool and I kind of geek out on diving into the numbers a little bit.

Joshua Harvey ([29:44](#)):

All right. Well, thanks so much, Michael. Thank you, Elaine. I think we're at time. Oh, just note, we did have one other question about someone asking if they'll be able to access the slides. And so we will be a recording of the webcast as well as a transcript. All the slides, the analytics that you saw on the slides are available in the report itself. I don't want to say the slides are, but we pulled the analytics from the report so if you're going to get the report, you should be able to see that.

Joshua Harvey ([30:13](#)):

This was a great conversation, really thank the both of you for your time and for going through your insights and sharing what you're seeing in patent litigation. I know one question we often get is, how will you get the report? Well, everyone on the call is going to receive a follow-up email with instructions on how to get that report. You could of course also go to www.lexmachina.com. You'll see a link to download it. If you don't currently subscribe to the patent module, we will have one ask, which is just that you'll sit down with one of our legal analytics experts for a couple minutes to talk about your cases in Lex Machina.

Joshua Harvey ([30:54](#)):

If you are a subscriber, you'll get it immediately sent to you. You also can access it in the help center in the website itself. Again, Michael, Elaine, thank you so much for joining us, really appreciate it. Thanks everyone on the call for joining us. I hope that you enjoyed this. If you want to learn more about how Lex Machina can help you win, please reach out directly and we'll help you out as much as we can. All right, great. Thanks everyone. Have a great day.

Michael Flynn ([31:24](#)):

Thanks Josh.

Elaine Chow ([31:24](#)):

Thank you.

Joshua Harvey ([31:26](#)):

Bye.

Elaine Chow ([31:27](#)):

Bye.