

Fed. Circ. Patent Decisions In 2022: An Empirical Review

By **Dan Bagatell** (January 9, 2023, 5:13 PM EST)

This article provides an empirical review of the U.S. Court of Appeals for the Federal Circuit's decisions in patent cases during calendar year 2022.[1]

The Federal Circuit decided far fewer patent cases in 2022 than in previous years — over 100 less than in 2021, which was itself a down year. The court's affirmance rate in 2021 was also much lower than normal. That was primarily due to a stunningly low affirmance rate in district court cases — just 57%.

Patentees and patent applicants fared much better than in 2021 in district court appeals, worse in appeals from the Patent Trial and Appeal Board, and about the same overall. The percentage of precedential decisions increased, but so did the dissent rate.

The court was not quite as draconian in patent eligibility cases, but patentees and applicants still struggled.

Methodology and Scope

This year's study covers all patent cases decided by the Federal Circuit in 2022, whether by precedential opinion, nonprecedential opinion or summary affirmance.

It includes merits decisions and rulings on writ petitions, but it excludes denials of leave to appeal, dismissals for lack of finality, stipulated dismissals and remands, and dismissals for mootness.

The study includes appeals and writ petitions from judgments and orders by district courts, the PTAB, the U.S. International Trade Commission and the U.S. Court of Federal Claims, but only cases in which the Federal Circuit decided at least one patent law issue.

The study takes decisions as the Federal Circuit decides them: If the court resolves companion cases separately, the decisions are counted separately, and if the court decides multiple appeals in a single opinion, all are counted as one decision, regardless of whether the matters were formally consolidated.

When the Federal Circuit reissues an opinion after granting rehearing, the study counts the reissued opinion and disregards the retracted opinion.[2]



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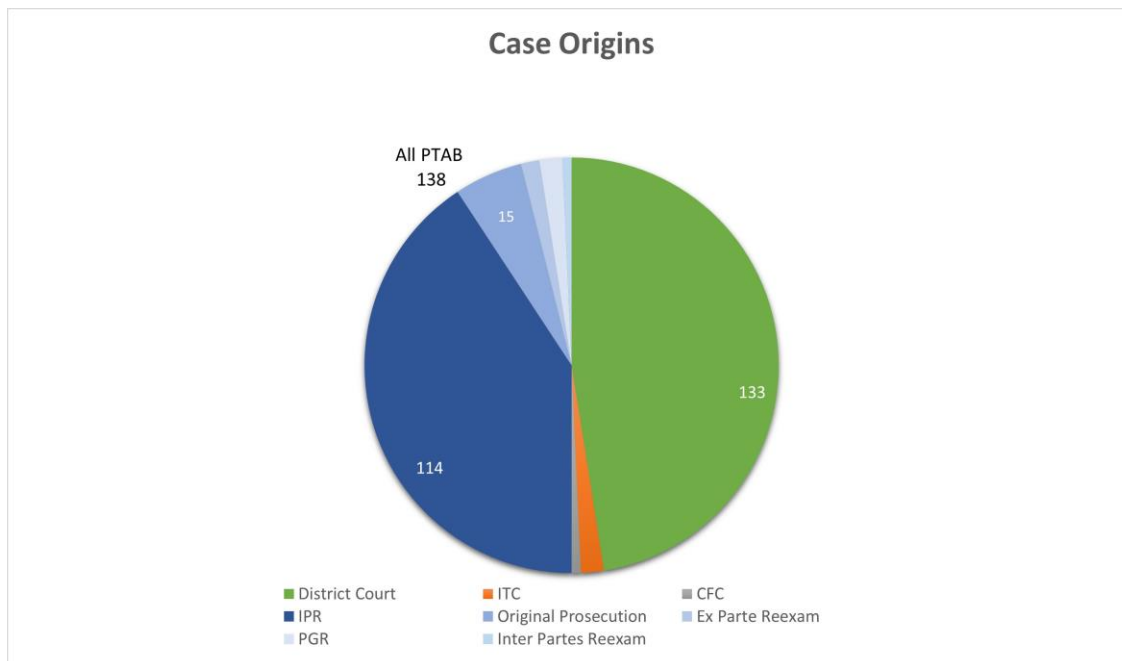
Caseload and Case Origins

The Federal Circuit decided 277 patent cases in 2022, down more than 100 from 2021 and down over a third from the pre-COVID-19 norm of 430 to 450 decisions per year.

Appeals from both district courts and the PTAB declined substantially but, unlike 2021, the number of district court appeals, 133, nearly matched the number of PTAB appeals, 138.

The court decided just 114 appeals from inter partes reviews, but IPR appeals still accounted for 41% of its patent cases, similar to 2021.

The other PTAB appeals included 15 original-prosecution cases, six post-grant review cases — two of which also included IPR aspects and one of which was a covered business method case — and two inter partes reexamination cases. The court also decided five ITC cases — one a combined ITC/PTAB appeal — and two Section 1498 cases from the Court of Federal Claims.



Affirmance Rates

The Federal Circuit fully upheld the lower tribunal — i.e., affirmed or dismissed on all issues or denied all relief in mandamus cases — in just 69% of its patent decisions in 2022, down considerably from 78% in 2021.

Appellants and mandamus petitioners prevailed outright 20% of the time — up from 13% in 2021 — and the remaining 11% of cases produced mixed results with each side prevailing in part.

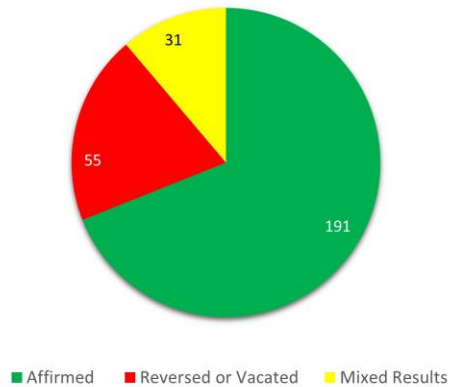
The Federal Circuit's affirmance rate in PTAB appeals was 80% in 2022, down slightly from 81% in **2021** and more significantly from nearly 86% in **2020**.

One rough quarter — the second fiscal quarter — spoiled an otherwise good year for the agency. The PTAB's affirmance rate in IPR appeals was 78% for the year, with a similar quarterly pattern. Appellants

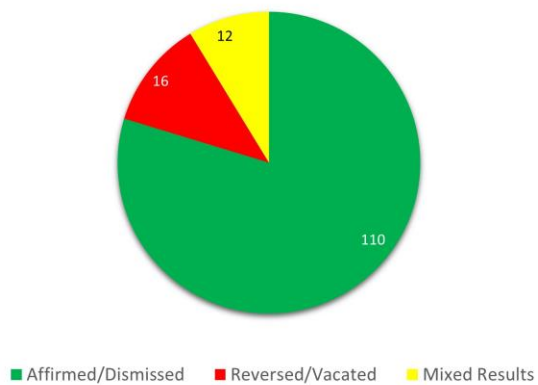
prevailed outright in 12% of PTAB appeals and 11% of IPR appeals, up slightly from 2021.

The Federal Circuit fully affirmed district court decisions just 57% of the time in 2022 — down sharply from 74% of the time in 2021 — and it fully reversed or vacated an unusually high 29% of the time. The ITC prevailed in four of its appeals and lost once.

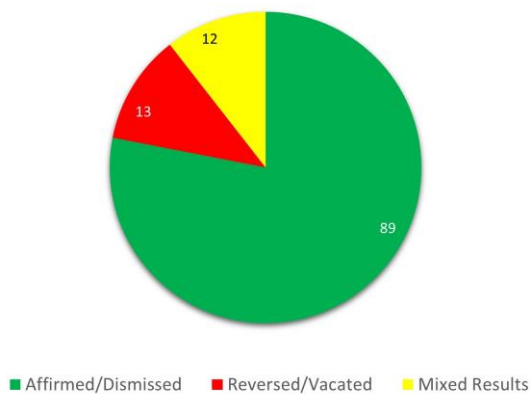
Outcomes, All Patent Cases

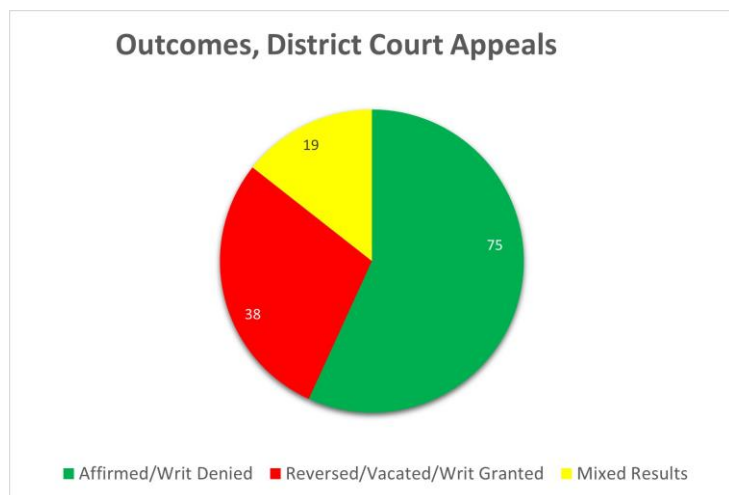


Outcomes, PTAB Appeals



Outcomes, IPR Appeals





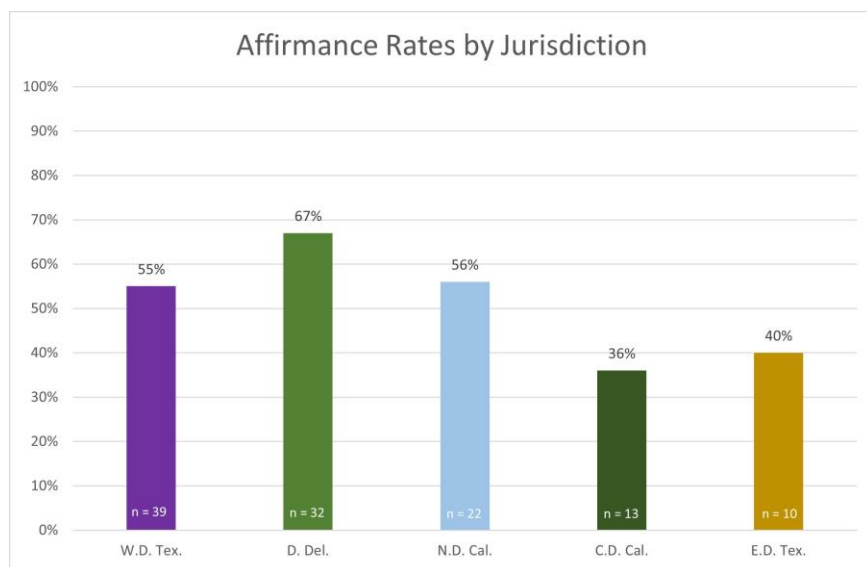
All the major patent litigation forums had rough years in 2022. Not surprisingly, the U.S. District Court for the District of Delaware and the U.S. District Court for the Western District of Texas had the most reviewed decisions — 21 and 20, respectively.

The District of Delaware's decisions were affirmed 67% of the time, and fully reversed or vacated 19% of the time. The Western District of Texas' decisions were affirmed less often, 55% of the time, but at a higher rate than 2021.

That court's reversal rate was 40% in 2022, down from 46% in 2021 — mostly due to an improved record on mandamus petitions.

California district courts also did not fare well: The U.S. District Court for the Central District of California had a full affirmance rate of just 36% and a full reversal or vacatur rate of 27%, while the U.S. District Court for the Northern District of California was fully affirmed 56% of the time and fully reversed 44% of the time.

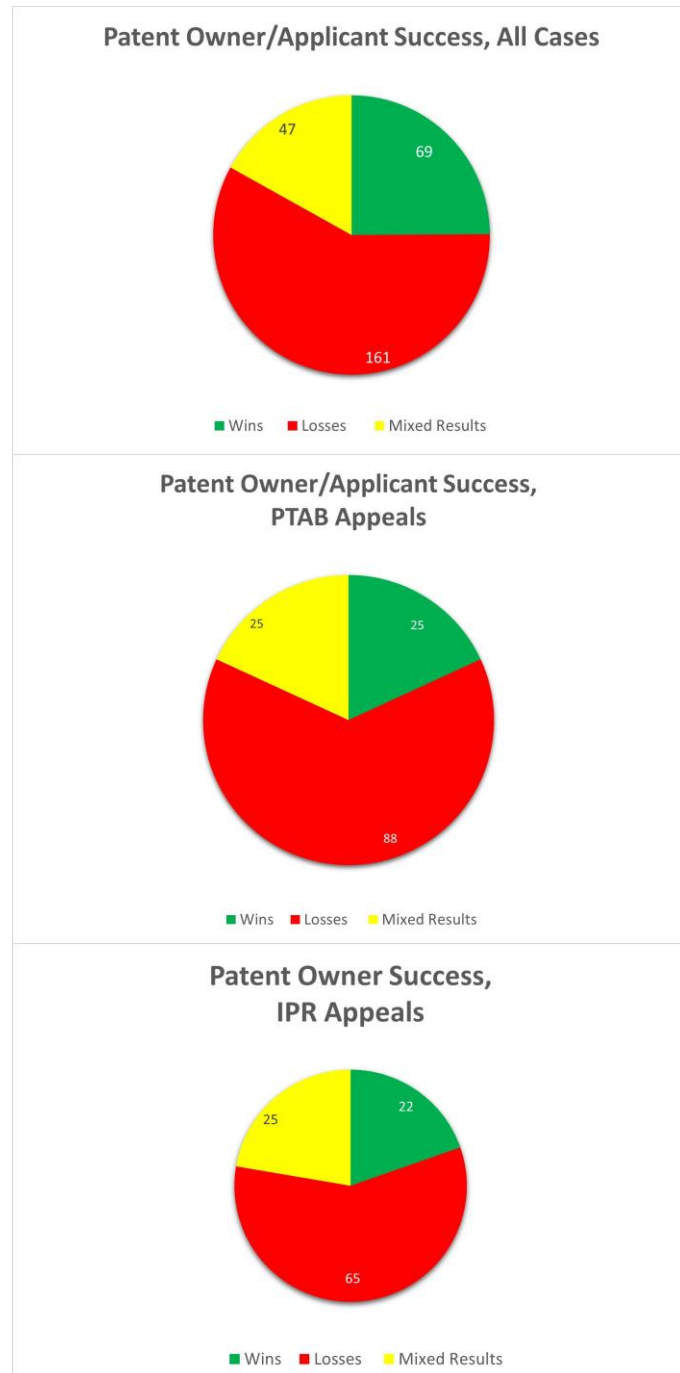
Even the normally high-flying U.S. District Court for the Eastern District of Virginia had a down year, with an affirmance rate of just 60%.

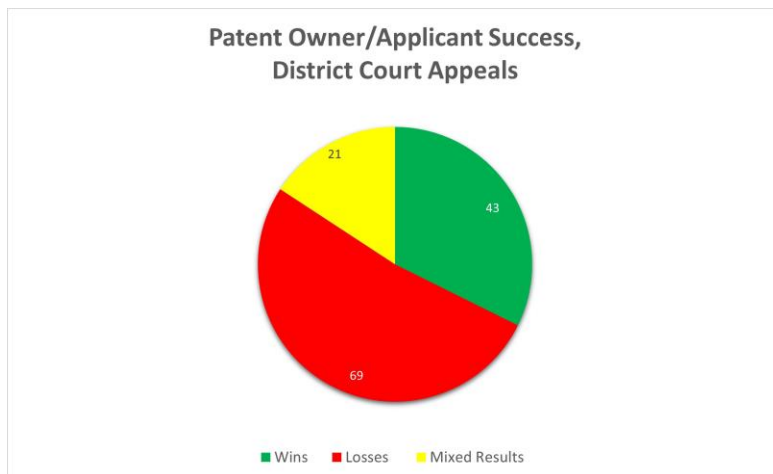


Success Rates for Patent Owners or Applicants vs. Patent Challengers

Patent owners and patent applicants prevailed outright in 25% of all patent appeals in 2022, almost the same as in 2021. They lost outright 58% of the time, a little better than 2021.

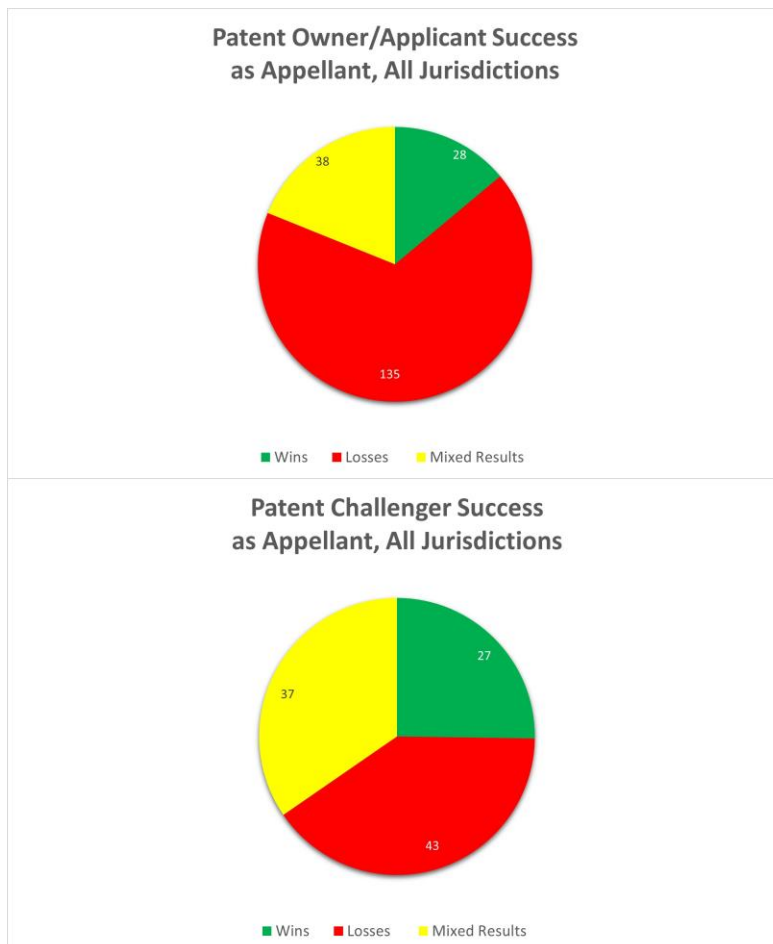
But in a change from 2021, patent owners and applicants performed much better in district court appeals, with 32% wins and 52% losses, than in PTAB appeals, with 18% wins and 64% losses. In IPR appeals, patent owners won outright 19% of the time, lost outright 57% of the time and had mixed results in the rest.





Patent applicants or owners were appellants in 201 cases decided in 2022. In those cases, they prevailed outright 14% of the time — double 2021's rate — and lost outright 67% of the time, an improvement over 79% in 2021.

By contrast, patent challengers were appellants in 107 cases.[3] Challenger appellants prevailed outright 25% of the time, lost outright just 40% of the time and had mixed results in the remaining 35%.

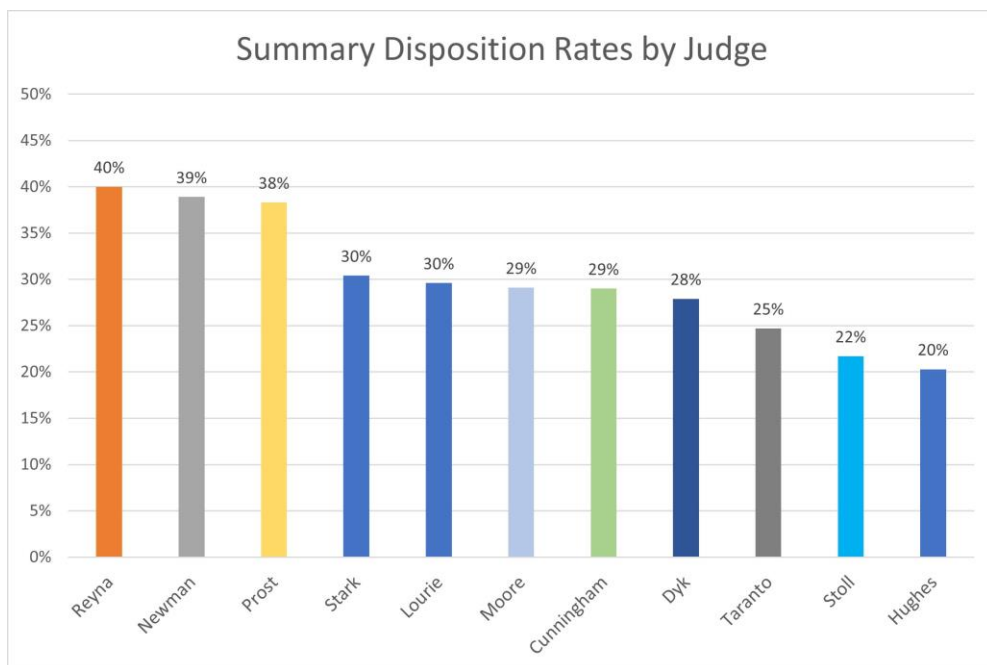
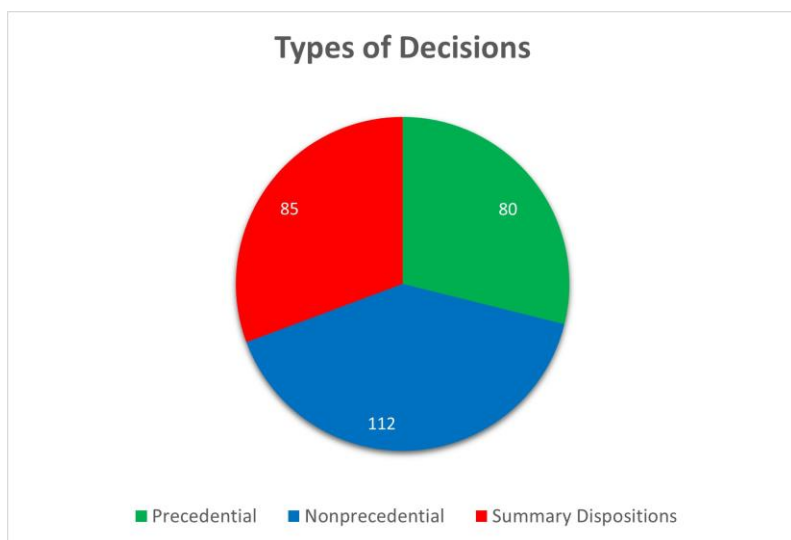


Types of Opinions

The Federal Circuit issued precedential opinions in 29% of its patent decisions in 2022, up from 20% in 2021 and 25% in 2020.

The rate of nonprecedential opinions fell to just 40% from 49% in 2021, and the rate of summary dispositions remained at a historically low level of 31%, even though in-person arguments are now back in full swing.

Among the active judges, U.S. Circuit Judges Jimmie Reyna, Raymond Chen, Pauline Newman and Sharon Prost were the most likely to summarily affirm, while U.S. Circuit Judges Todd Hughes and Kara Farnandez Stoll were the least likely to do so.[4]



Productivity

The Federal Circuit's productivity slipped in 2022. For full-fledged appeals, the median time from docketing to date of decision increased from 12.7 months in 2021 to 13.8 months in 2022.

For the year, the median lag time from the ready date — in most cases, submission of a compliant joint appendix — to oral argument or submission grew slightly, from 3 to 3.3 months.

But in the last half of the year, wait times grew to nearly six months on average, as the court scheduled few arguments over the summer and is still using only two of its three courtrooms now.

The time from oral argument or submission to decision did not change much: Precedential opinions took a little less time than 2021 — a median of 2.6 months — and nonprecedential opinions took a little more, a median of 1.1 months.

Among the active judges, the speediest authors were U.S. Circuit Judges Richard Taranto, Alan Lourie and Prost, with medians of 1.5, 1.8 and 1.8 months for precedential decisions, respectively. Chief Circuit Judge Kimberly Moore and U.S. Circuit Judge Timothy Dyk were close behind.

Judge Dyk and Judge Reyna led the court in the number of patent cases decided, with 87 and 86, respectively.

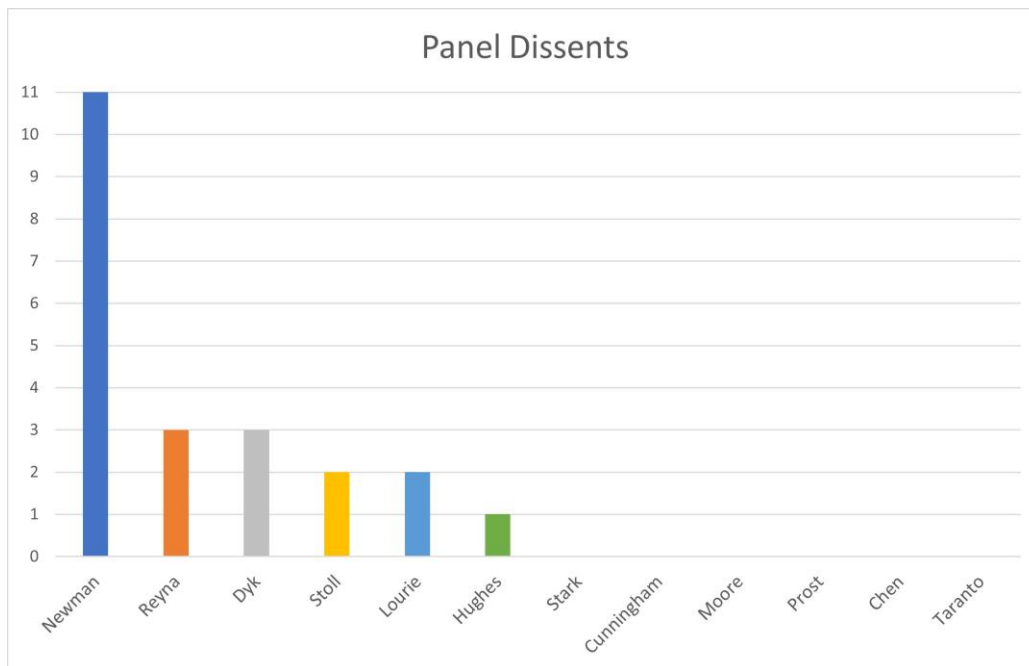
Apart from recently appointed U.S. Circuit Judges Tiffany Cunningham and Leonard Stark, who participated in just 32 and 23 patent decisions, respectively, Judge Newman and Judge Moore participated in the fewest cases, with 54 and 55, respectively. Among the senior judges, Judges Alvin Schall and William Bryson decided the most patent cases, with 20 and 18, respectively.

Judge Stoll authored the most precedential majority opinions in patent cases in 2022, with 13, with Judge Moore next at 11. Judge Dyk authored 12 nonprecedential majority decisions in patent cases, followed by Judge Moor at 11 and Judge Lourie at 10.

Overall, Judge Moore authored 22 majority decisions in patent cases, followed by Judge Dyk and Judge Stoll at 21. Judge Newman authored the fewest majority opinions in patent cases — one — followed by recent appointees Judge Cunningham with five and Judge Stark with six.[5]

En Banc Cases and Dissents

The Federal Circuit again did not hear or decide any patent cases en banc in 2022. But the rate of panel dissents in patent cases increased to over 8%. Judge Newman was again the court's most frequent dissenter with 11 in 54 decisions, followed by Judge Reyna and Judge Dyk at three. Six of the 12 active judges did not dissent at all.

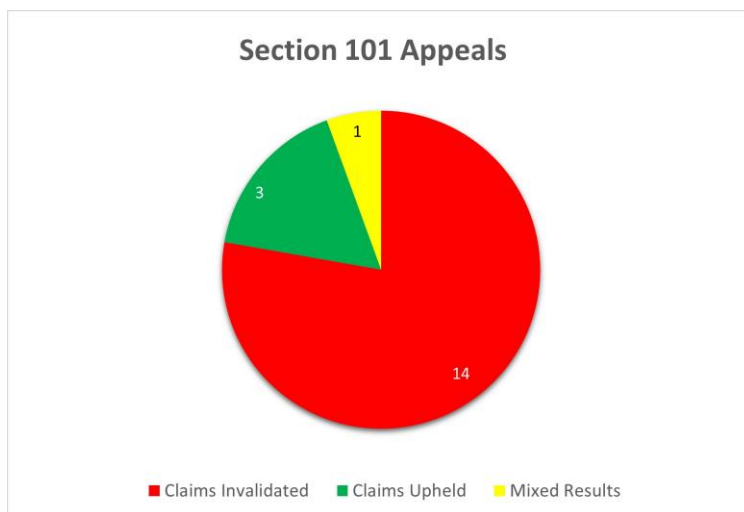


Section 101 Cases

In 2021, the Federal Circuit decided 41 cases involving patent eligibility issues and held all challenged claims patent ineligible in 39 of them.

This year, the record was more mixed but still weighted heavily toward ineligibility rulings. The court decided just 18 patent eligibility cases, and patentees or applicants prevailed at least in part in four of those.

In two of the four, the court affirmed district court rulings that claims were patent eligible,[6] and in one the court reached a mixed decision, holding some claims eligible and others ineligible.[7] Only one decision fully reversed a district court's ineligibility ruling.[8] Two of the decisions provoked partial dissents.[9]



Patent Friendliness

As in past years, I have calculated a patent friendliness index for the court as a whole and each judge.

The patent friendliness index is computed as 100 plus the percentage of decisions entirely favoring the patent owner or patent applicant minus the percentage of decisions entirely against the patent owner or patent applicant. The index disregards mixed decisions and dissents from denials of rehearing en banc.

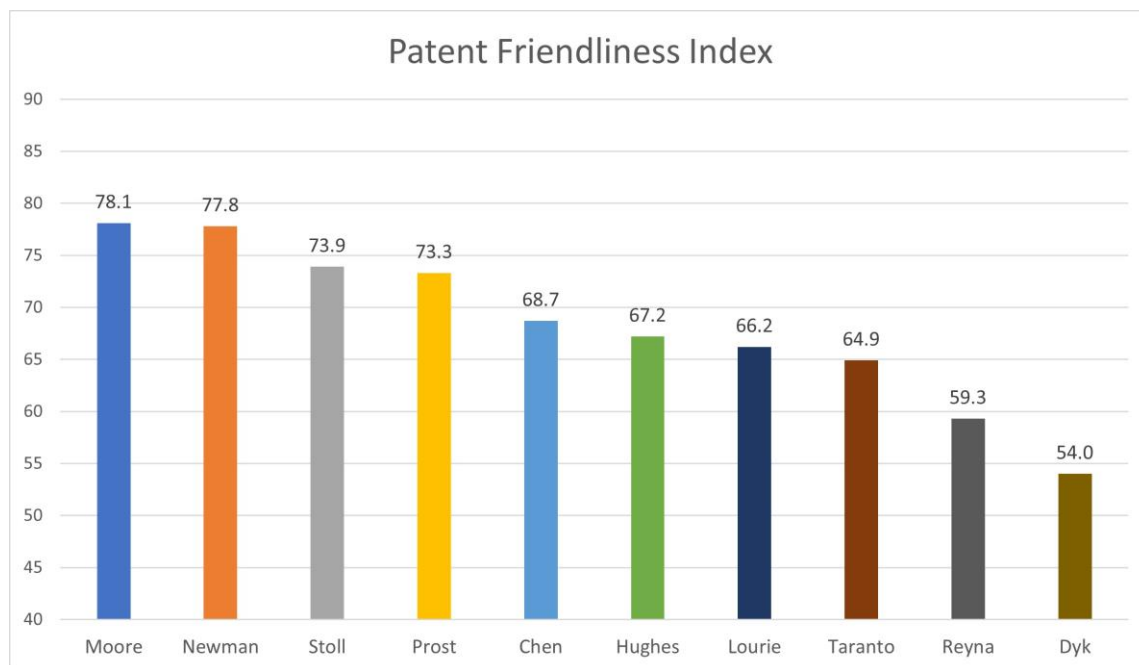
It is only a rough measure due to the random distribution of cases among the judges, its exclusion of cases with mixed outcomes, and its equal weighting of all cases regardless of their significance and the issues raised. But it is instructive even though it should be taken with a grain of salt.

In 2022, the patent friendliness index for the Federal Circuit as a whole was 66.8, up from 62.9 in 2021 and 65.2 in 2020. As discussed above, this increase was largely due to patentees' stronger performance in district court appeals.

Among the active judges with at least 50 decisions, Judge Moore was the most patent friendly on this measure, with a patent friendliness index of 78.2, followed by Judge Newman at 77.8 and Judge Stoll at 73.9.

The active judge with the lowest patent friendliness index was Judge Dyk at 54, followed by Judge Reyna at 59.3. The two newest judges, Judge Cunningham and Judge Stark, had relatively low patent friendliness indexes — in the low 50s — but that may just reflect their random case draws, as neither one dissented in any patent cases this year.

We shall see whether 2022's trends of patent friendliness and skepticism toward district court decisions will continue in 2023.



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[1] For the previous articles, see Dan Bagatell, Fed Circ. Patent Decisions in 2021: An Empirical Review, Law 360 (Jan. 6, 2021); Dan Bagatell, Fed. Circ. Patent Decisions in 2020: An Empirical Review, Law 360 (Jan. 11, 2020); Dan Bagatell, Fed. Circ. Patent Decisions in 2019: An Empirical Review, Law 360 (Jan. 9, 2020); Dan Bagatell, Fed. Circ. Patent Decisions in 2018: An Empirical Review, Law360 (Jan. 3, 2019); Dan Bagatell, Fed.Circ.'s 2017 Patent Decisions: A Statistical Analysis, Law360 (Jan. 5, 2018).

[2] Data reported here for 2021 may vary slightly from data reported last year because decisions in one year are sometimes revised and reissued in the following year.

[3] In some cases both sides appealed.

[4] Most summary dispositions are single-line decision orders under Rule 36, but this study treats all affirmances in one page or less as summary dispositions.

[5] The statistics in this paragraph include rulings on writ petitions but not unsigned per curiam decisions.

[6] Cal. Inst. of Tech. v. Broadcom Ltd., 25 F.4th 976 (Fed. Cir. 2022); ADASA Inc. v. Avery Dennison Corp., No.2022-1092 (Fed. Cir. Dec. 16, 2022) (to be published in F.4th).

[7] Weisner v. Google LLC, No. 2021-2228 (Fed. Cir. Oct. 13, 2022) (to be published in F.4th).

[8] Cooperative Ent'mt, Inc. v. Kollektive Tech., Inc., 50 F.4th 127 (Fed. Cir. 2022).

[9] In Weisner, Judge Hughes would have held all the claims patent-ineligible. And in Int'l Bus. Mach. Corp. v. Zillow Grp., Inc., No. 2021-2350 (Fed. Cir. Oct. 17, 2022) (to be published in F.4th), Judge Stoll would have held some of the claims eligible and others ineligible.