

Fed. Circ. Patent Decisions In 2023: An Empirical Review

By **Dan Bagatell** (January 4, 2024, 1:28 PM EST)

This annual article provides an empirical review of the U.S. Court of Appeals for the Federal Circuit's decisions in patent cases during calendar year 2023.[1]

We saw a slight uptick in the number of decisions, but not back to pre-pandemic levels due in part to an increasing backlog of cases that are fully briefed and awaiting argument. The court's patent docket was increasingly dominated by cases from the U.S. Patent and Trademark Office; district court appeals were less prevalent last year.

Last year's low affirmance rate in district court cases seems to have been a blip, as this year marked a return to historical norms. Grants of mandamus in district court venue disputes became few and far between. Meanwhile, the affirmance rate in Patent Trial and Appeal Board cases remained high.

Patent challengers continued to fare better on appeal than patent owners and applicants, and on the whole the Federal Circuit's decisions were markedly less patentee-friendly in 2023 than in 2022. Patent owners and applicants continued to struggle in patent-eligibility cases.

Dissents were rare in 2023, due in part to the suspension of frequent dissenter Judge Pauline Newman in April.

Methodology and Scope

This year's study covers all patent cases decided by the Federal Circuit in 2023, whether by precedential opinion, nonprecedential opinion or summary affirmance.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 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



Dan Bagatell

opinion and disregards the retracted opinion.

Caseload and Case Origins

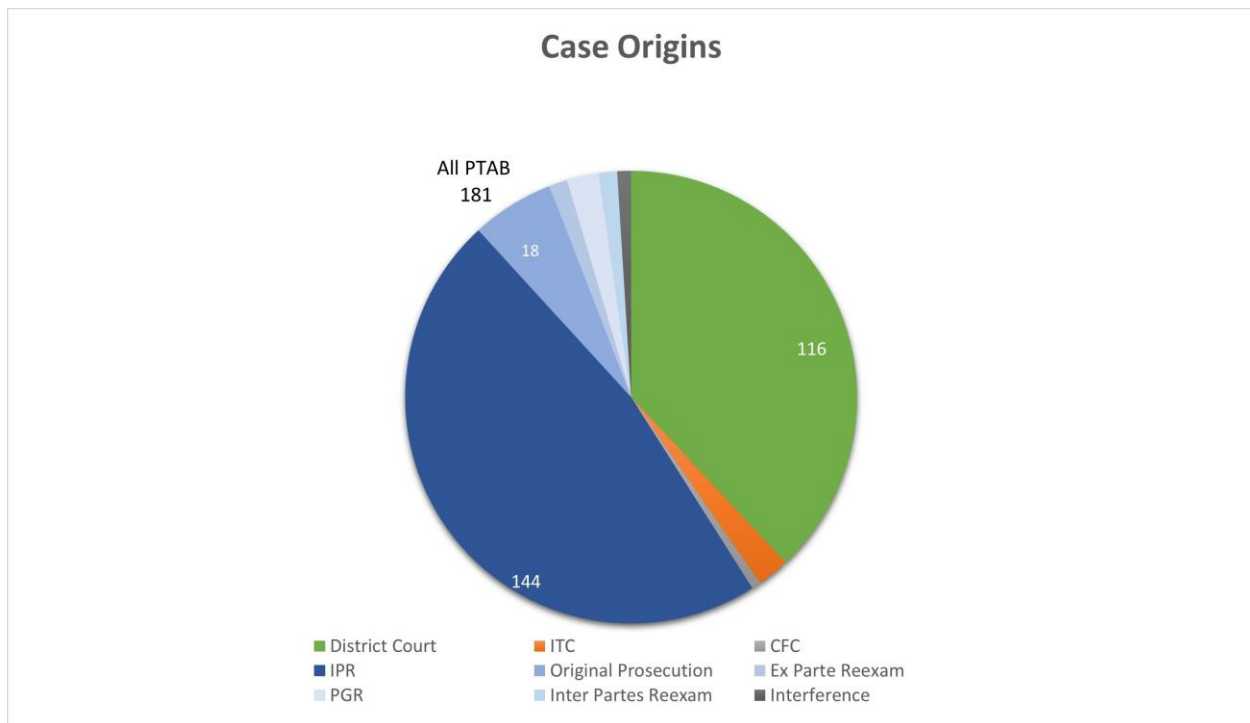
The Federal Circuit decided 306 patent cases in 2023, up from 277 in 2022, but still well down from 388 in 2021 and the pre-pandemic norm of 430 to 450 decisions per year.

Decisions in PTAB cases increased from 138 to 181, and those cases predominated, accounting for 59% of the decisions in 2023 (up from 50% in 2022). The greater prevalence of PTAB cases may reflect the bouncing back of cases that were remanded under the U.S. Supreme Court's June 2021 decision in *United States v. Arthrex Inc.*, which held that under the appointments clause of the U.S. Constitution the director of the USPTO must be able to review PTAB decisions.

Nearly half (47%) of the Federal Circuit's decisions in 2023 involved inter partes reviews, up from 41% in 2022. The rest of the Federal Circuit's PTAB docket included a smattering of seven post-grant review cases, 17 original-prosecution cases, four ex parte reexamination cases, and a handful of inter partes reexamination, interference and reissue cases.[2]

Decisions in district court appeals declined in 2023, both absolutely (from 133 in 2022 to 116 in 2023) and relatively (from 48% in 2022 to 38% in 2023). But the surge in district court patent litigation in 2022 and 2023 may produce a resurgence of appeals from district court cases in 2024 and 2025.

The remainder of the Federal Circuit's patent decisions included seven ITC cases and two cases from the Court of Federal Claims.



Affirmance Rates

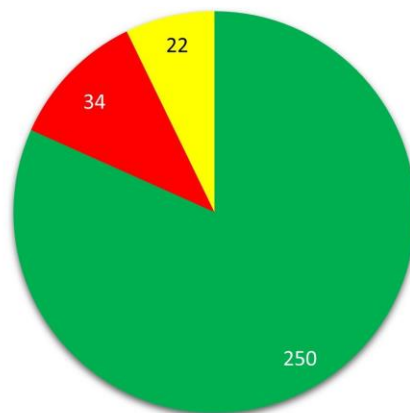
The Federal Circuit fully upheld the lower court or agency — i.e., affirmed or dismissed on all issues or denied

all relief in mandamus cases — 82% of the time in 2023, marking a return to the norm after affirming in just 69% of its patent decisions in 2022. Appellants and mandamus petitioners prevailed outright in just 11% (down from 20% in 2022), and the remaining 7% of cases produced mixed results, with each side prevailing in part.

The Federal Circuit's affirmance rate in PTAB appeals rose to 86% in 2023. The affirmance rate in IPR appeals was just slightly lower. Appellants prevailed outright in just 9% of PTAB and IPR appeals, down slightly from 2022.

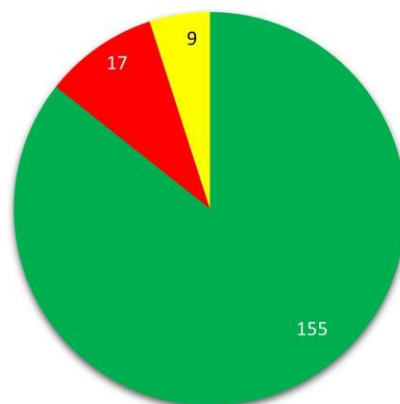
The Federal Circuit fully affirmed in 75% of its decisions in district court appeals in 2023, slightly higher than the 74% in 2021 and much higher than the 57% in 2022. The court fully reversed or vacated in only 15% of its district court cases in 2023, about half as often as in 2022.

Outcomes, All Patent Cases



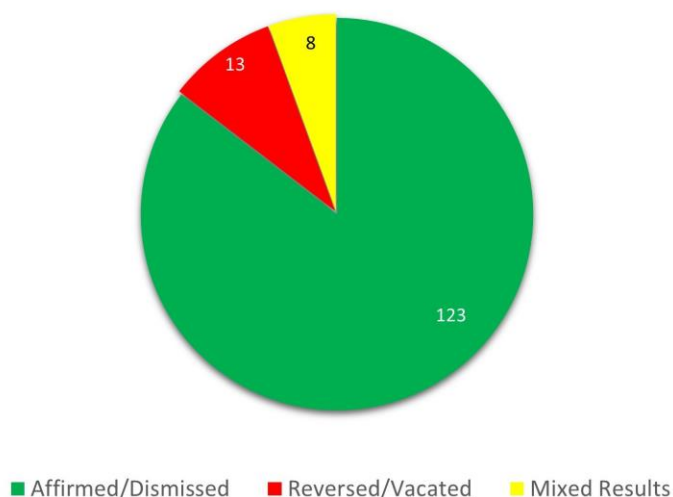
■ Affirmed ■ Reversed or Vacated ■ Mixed Results

Outcomes, PTAB Appeals

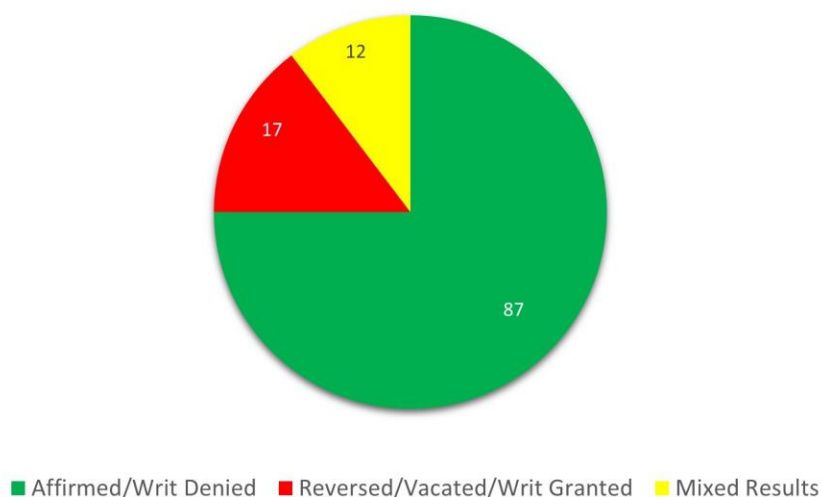


■ Affirmed/Dismissed ■ Reversed/Vacated ■ Mixed Results

Outcomes, IPR Appeals



Outcomes, District Court Appeals



Not surprisingly, cases from the U.S. District Court for the Western District of Texas (26), the U.S. District Court for the District of Delaware (18), the U.S. District Court for the Northern District of California (13), and the U.S. District Court for the Eastern District of Texas (12) continued to dominate the district court docket. But 18 of the Western District and five of the Eastern District decisions involved mandamus petitions rather than appeals from final judgments.

Western District decisions were fully upheld 77% of the time (slightly better than average), and the rest were evenly split between full reversals and mixed decisions. The Federal Circuit granted mandamus overturning Western District venue decisions only three times in 2023, and only once in the second half of the year.

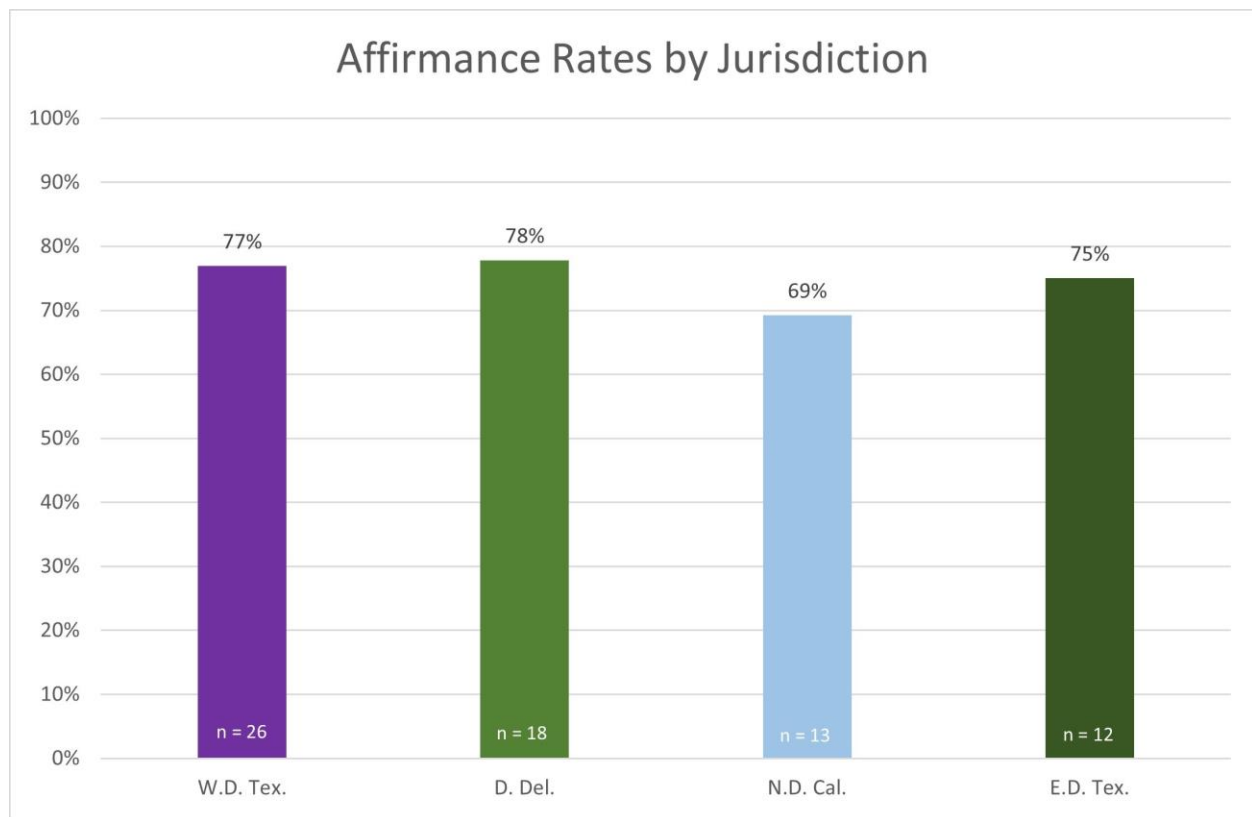
The District of Delaware was fully affirmed 78% of the time and fully reversed 17% of the time; the remainder produced mixed results.

The Northern District of California had a mixed year, with 69% of decisions fully affirmed, no decisions fully reversed or vacated, and 31% mixed results.

Eastern District of Texas decisions were fully affirmed at a 75% rate and fully reversed in the remainder.

Surprisingly, only four U.S. District Court for the Central District of California decisions were reviewed in 2023 (three affirmed, one reversed), and no U.S. District Court for the Eastern District of Virginia decisions were reviewed at all.

The ITC had another strong year, winning outright in six patent appeals and achieving a mixed decision in the seventh.

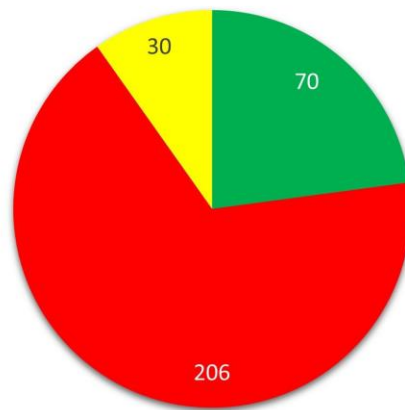


Success Rates for Patent Owners or Applicants vs. Patent Challengers

Patent owners and patent applicants prevailed outright in 23% of appeals decided in 2023, slightly lower than in 2022. They lost outright 67% of the time and achieved mixed results in the remainder.

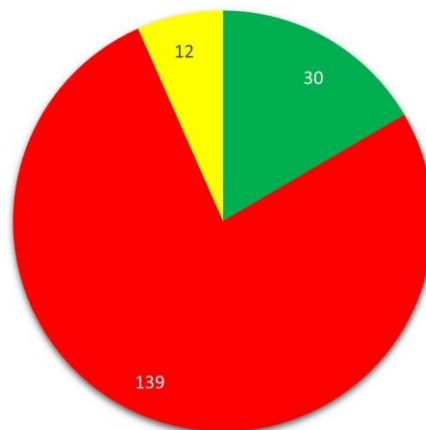
Patent owners and applicants continued to fare much better in district court cases (32% complete wins, 53% complete losses) than in PTAB cases (17% complete wins, 77% complete losses).

Patent Owner/Applicant Success, All Cases



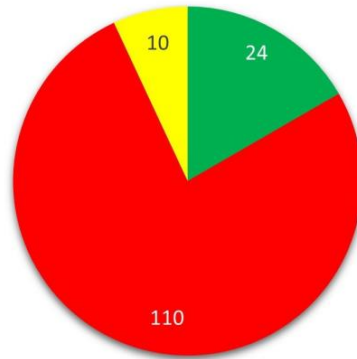
■ Wins ■ Losses ■ Mixed Results

Patent Owner/Applicant Success, PTAB Appeals



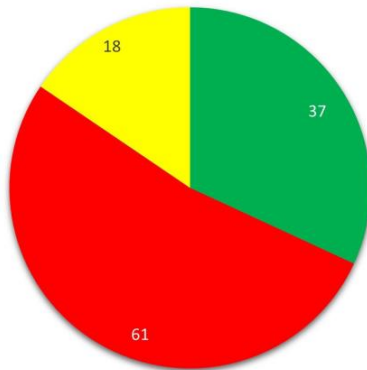
■ Wins ■ Losses ■ Mixed Results

Patent Owner Success, IPR Appeals



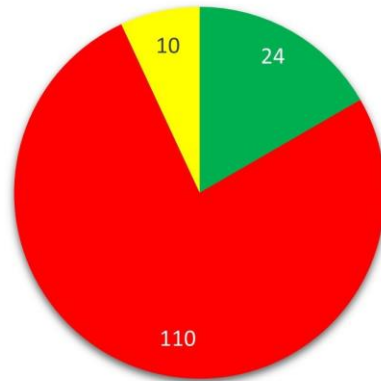
■ Wins ■ Losses ■ Mixed Results

Patent Owner/Applicant Success, District Court Appeals



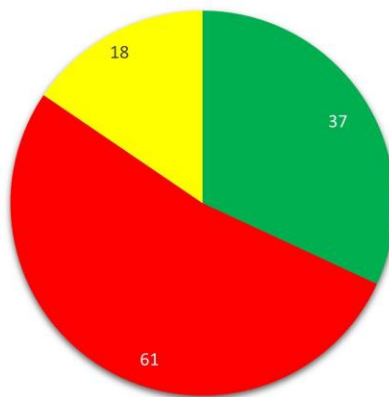
■ Wins ■ Losses ■ Mixed Results

Patent Owner Success, IPR Appeals



■ Wins ■ Losses ■ Mixed Results

Patent Owner/Applicant Success, District Court Appeals

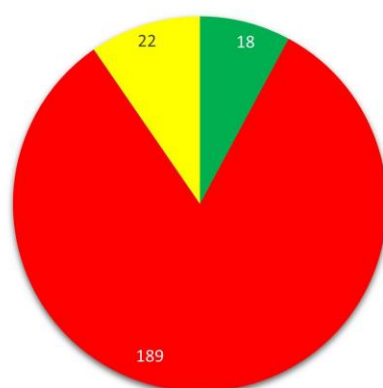


■ Wins ■ Losses ■ Mixed Results

Patent applicants or owners were appellants in 229 cases decided in 2023. In those cases, they prevailed outright just 8% of the time (worse than the 14% rate in 2022, although slightly better than in 2021) and lost outright 67% of the time (about the same as in 2022).

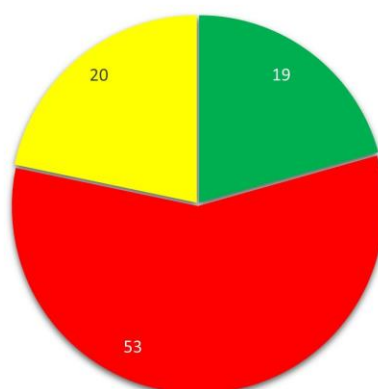
For their part, patent challengers were appellants in 92 cases decided in 2023.[3] They too fared worse in 2023 than in 2022, prevailing outright 21% of the time and losing outright 58% of the time, with mixed results in the remainder.

Patent Owner/Applicant Success as Appellant, All Jurisdictions



■ Wins ■ Losses ■ Mixed Results

Patent Challenger Success as Appellant, All Jurisdictions



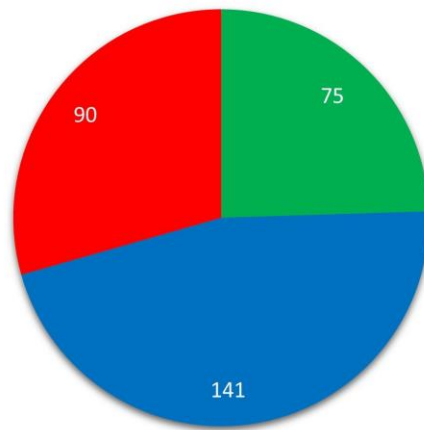
■ Wins ■ Losses ■ Mixed Results

Types of Opinions

The Federal Circuit issued precedential opinions in 25% of its patent decisions in 2023, down from 2022 but in line with previous years. The rate of nonprecedential opinions rose to 46% in 2023, and the rate of summary dispositions declined slightly to 29%.

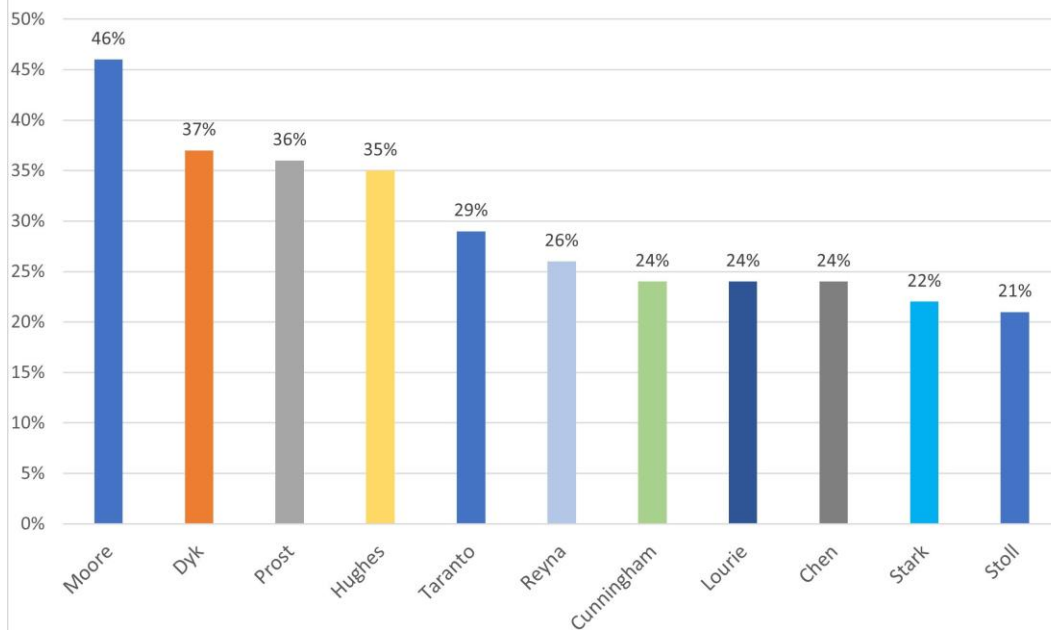
Among the judges in regular service all year, Chief Judge Kimberly Moore summarily affirmed most frequently (46%), while Judge Kara Farnandez Stoll (21%) and Judge Leonard Stark (22%) were the least inclined do so.[4]

Types of Decisions



■ Precedential ■ Nonprecedential ■ Summary Dispositions

Summary Disposition Rates by Judge



Productivity

The Federal Circuit's speed of disposition continued to decline in 2023. For true appeals, as opposed to writ petitions, the median time from docketing to date of decision increased from 12.7 months in 2021 and 13.8 months in 2022 to 16.8 months in 2023. 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 on the papers was 6.4 months — about double the wait time in 2021 and 2022.

In recent months, typical wait times have reached eight to nine months, to the consternation of some

practitioners. The court could reverse that trend in 2024, however, as it is now using all three of its available courtrooms.

The court continues to produce decisions quickly after oral argument or submission on the papers. Precedential panel opinions took a median of 3 months in 2023 (slightly higher than in 2022), and nonprecedential opinions other than summary affirmances took a median of 1.1 months in 2023 (essentially unchanged from 2022).

Among the active judges, the quickest writers were Judges Richard Taranto and Alan Lourie, with medians of 1.4 and 1.8 months for precedential decisions, respectively. Judge Timothy Dyk produced nonprecedential decisions the fastest, with a median of just 0.4 months.

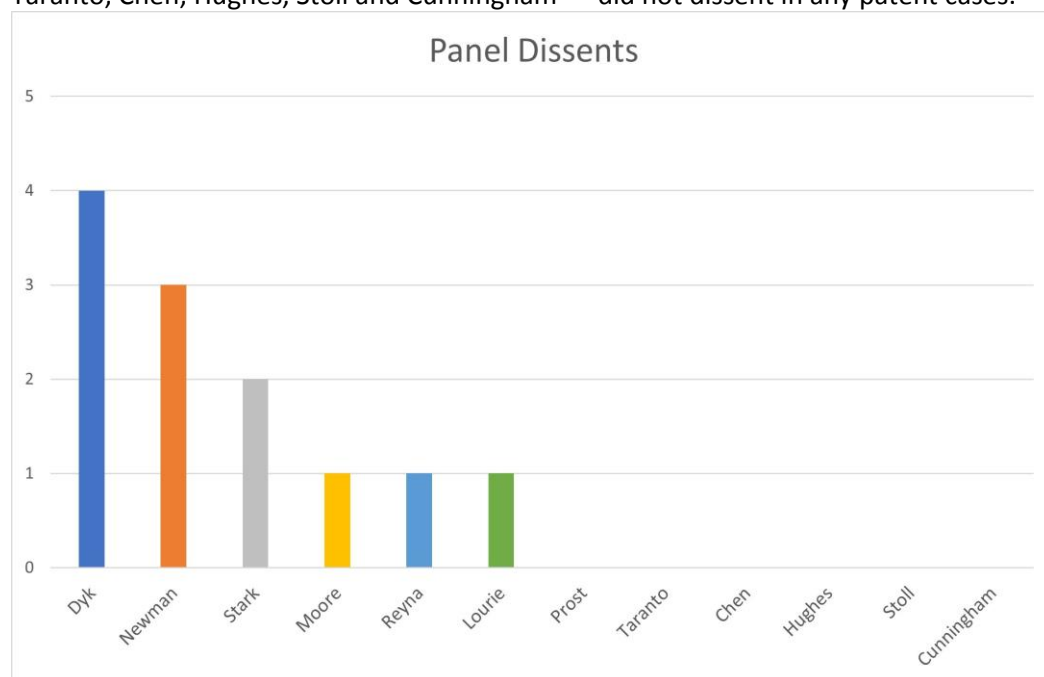
Judge Lourie led the court in patent cases decided with 94, followed by Judge Raymond Chen, who had 86. Among the senior judges, the most active were Judge Raymond Clevenger with 20 decisions and Judge William Bryson with 18.

Judge Lourie also led the court in patent opinions authored, with 25 (11 precedential and 14 nonprecedential). Judge Chen was next with 22 opinions (five precedential and 16 nonprecedential). The judges with the fewest patent opinions were Judge Todd Hughes with seven (all nonprecedential) and Judge Tiffany Cunningham with nine (three precedential and six nonprecedential).[5]

En Banc Cases and Dissents

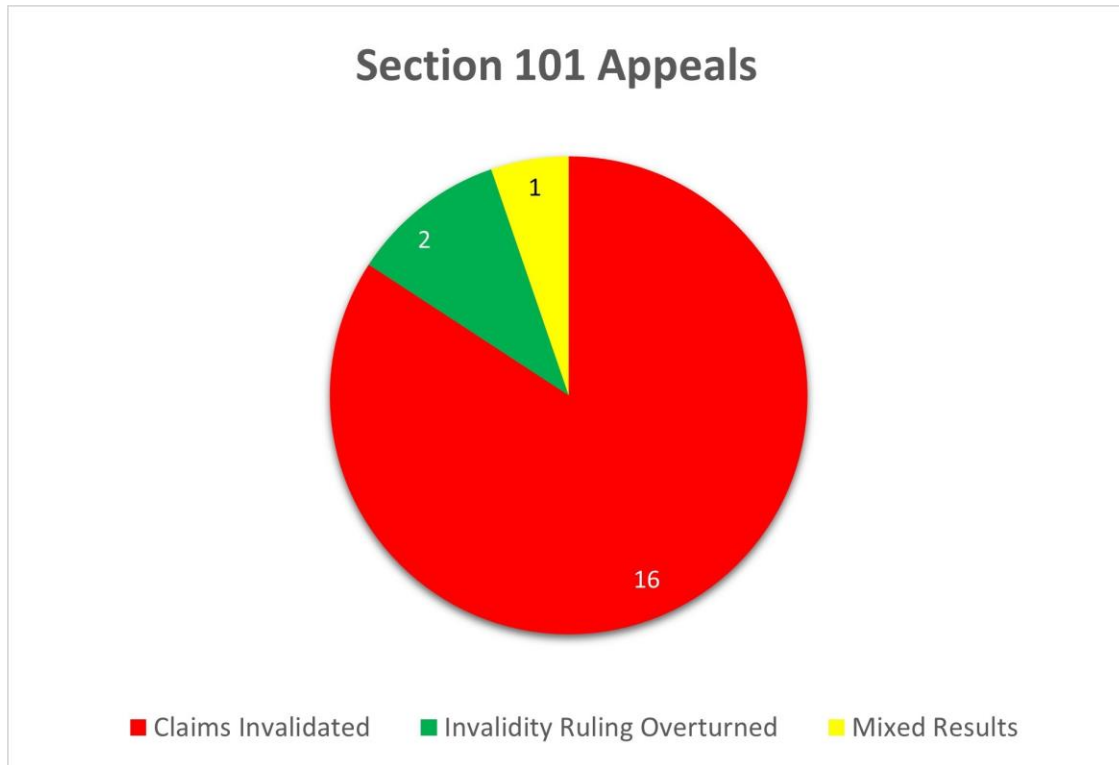
For the fifth year running, the Federal Circuit did not hear or decide any patent cases en banc, although it has scheduled a rehearing en banc in a design patent case for February 2024.[6] The rate of panel dissents in patent cases dropped sharply, from 23 (8.3%) in 2022 to 14 (4.6%) in 2023. The reduction reflects the sidelining of Judge Newman, who dissented 11 times in 2022 and just three times in 2023 out of 15 patent decisions.

Judge Dyk penned the most dissents in 2023, with four. Seven active judges — Judges Lourie, Sharon Prost, Taranto, Chen, Hughes, Stoll and Cunningham — did not dissent in any patent cases.



Section 101 Cases

The Federal Circuit decided only 19 patent-eligibility cases in 2023, about the same as in 2022 and well down from 41 in 2021. All 19 cases involved appeals by patentees. The Federal Circuit fully affirmed in 16 of them and largely affirmed in another.[7] Patentees succeeded in overturning ineligibility rulings in only two cases, and each decision was mixed overall.[8]



Patent-Friendliness Index

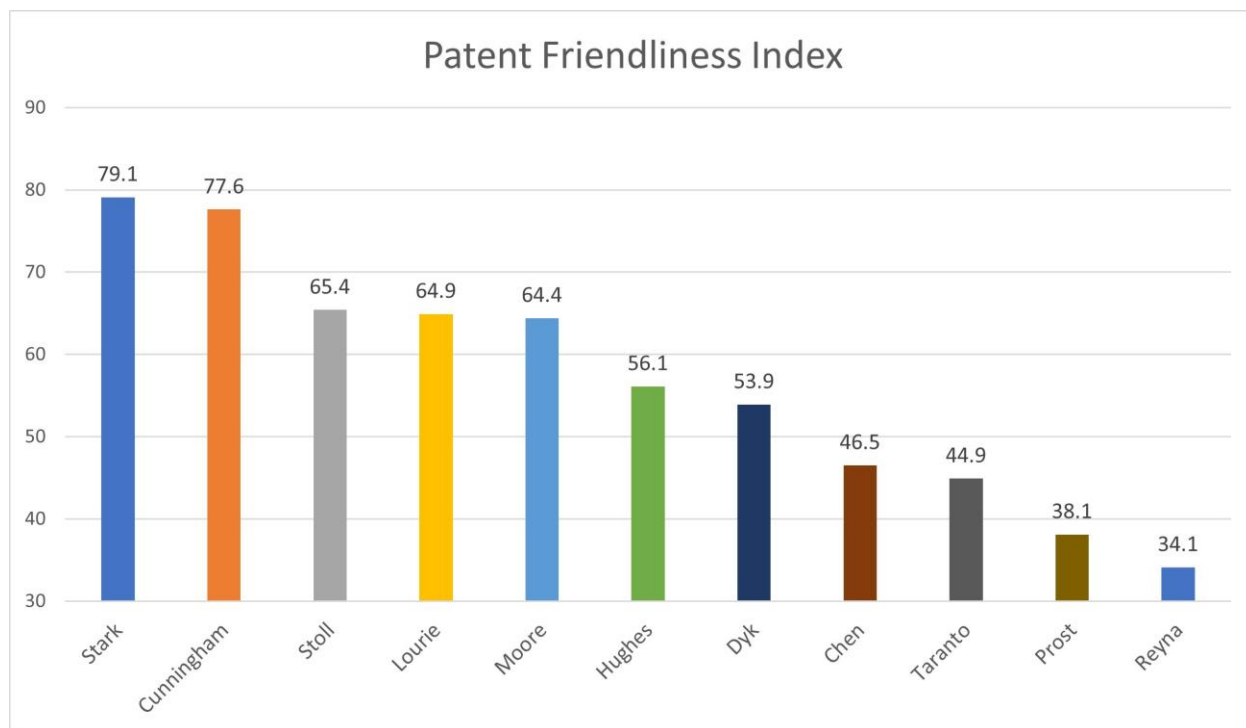
As in past years, I have calculated a patent-friendliness index for the court as a whole and for each judge. The PFI is computed as 100 plus the percentage of decisions entirely favoring the patent owner or patent applicant less the percentage of decisions entirely against the patent owner or patent applicant.

The calculation 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, the exclusion of cases producing mixed outcomes, and the equal weighting of all cases regardless of their significance and the issues raised.

In 2023, the PFI for the entire Federal Circuit was just 55.6, down sharply from 66.8, 62.9, and 65.2 in the three previous years. The decrease correlates with the higher affirmance rate in 2023 — patent owners and applicants are appellants more often than patent challengers.

The court's two newest members had the highest PFIs, with Judge Stark at 79.1 and Judge Cunningham at 77.6. Next highest was Judge Stoll at 65.4, a score that would have been middle-of-the-road in other years.

The active judges with the least patent-friendly records in 2023 were Judge Jimmie Reyna (34.1), Judge Prost (38.1) and Judge Taranto (44.9).[9]



We shall see what 2024 brings.

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[1] For the previous articles, see Dan Bagatell, Fed Circ. Patent Decisions in 2022: An Empirical Review, Law 360 (Jan. 9, 2022); Dan Bagatell, Fed. Circ. Patent Decisions in 2021: An Empirical Review, Law 360 (Jan. 6, 2022); Dan Bagatell, Fed. Circ. Patent Decisions in 2020: An Empirical Review, Law 360 (Jan. 11, 2021); 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] One decision addressed an original prosecution and an ex parte reexamination.

[3] In some cases both sides appealed, which explains why 229 + 92 exceeds the total number of patent decisions for the year. The statistics in this paragraph treat each side's appeal separately.

[4] Most summary dispositions are single-line decision orders under Federal Circuit Rule 36, but I also treat other decisions of a page or less as summary dispositions. The latter include, for example, cases in which the court simply announces that it is affirming on one ground without reaching others.

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

[6] The court continued to rehear non-patent cases en banc between 2019 and 2023. In 2023, it issued en banc decisions in two federal employment cases and a veterans benefits case.

[7] In *Hantz Software, LLC v. Sage Intacct, Inc.*, No. 2022-1390 (Mar. 20, 2023), the panel affirmed the patent-ineligibility of four asserted claims but vacated the judgment to the extent it held other, unasserted claims invalid.

[8] In *C.R. Bard, Inc. v. Med. Components, Inc.*, Nos. 2022-1136 & 2022-1186 (Feb. 17, 2023), the panel addressed cross-appeals and overturned rulings that both sides' patents were ineligible. In *Sequoia Tech., LLC v. Dell, Inc.*, Nos. 2021-2263 et al. (Fed. Cir. Apr. 12, 2023), the panel reversed an ineligibility based on claim-construction error but nevertheless affirmed the district court's non-infringement ruling.

[9] Judge Newman is not included in these rankings because she participated in only 15 patent decisions. As an absolute matter, however, she had the lowest PFI (20.0) of all the judges on the court, active or senior.