

COMMENTARY

Patent Litigation 2021: A Year in Review

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By Aimee Fagan

For patent litigators, 2021 has brought a steady flow of new case filings, some notable changes in the law, a slow return to the patent jury trial, and the continued attraction of all things—patent suits included—to Texas.

The business of patent litigation maintained significant energy in 2021, with available data suggesting nearly 4000 new district court cases filed, nearly 1500 PTAB proceedings initiated, and roughly 50 ITC proceedings opened for the year — which is fairly comparable to 2020. Texas and Delaware remained the epicenters of district court patent litigation, with Texas receiving nearly half of all new cases and Delaware seeing roughly a quarter. California (Central and Northern Districts) and the Northern District of Illinois also continued to see a significant volume of new cases, in line with prior years.



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The big news remains the dramatic rise of Waco's Judge Alan Albright. In 2020, there was a tremendous increase in new filings in the Western District of Texas, with Judge Albright quickly becoming the most popular patent judge for new filings in the U.S. That trend continued into 2021, with available data indicating that Judge Albright overwhelmingly received the most new patent cases of any U.S. judge, presiding over nearly a quarter of all patent cases filed during the year. 2021 brought a number of trials to Waco, including some notable verdicts for patent plaintiffs, such as a March verdict awarding VLSI \$2.18 billion against Intel, a May verdict of \$13.2 million for CloudofChange against NCR Corp., and an October verdict of \$25.9 million against Google. While Judge Albright has stated publicly that his goal was not to establish a "plaintiff-friendly" venue, his emphasis on jury trials and well-defined patent rules, as well as a general disinclination to stay cases pending *inter partes* or post grant reviews (at least initially), have likely contributed to the surge in cases filed in Waco.

However, the ever-popular District of Delaware may come close to tying the WDTX for first place as the district with the highest number of 2021 new case filings (notably with three judges sharing the load), while maintaining its lead in the biotech and pharmaceutical space. Meanwhile, the Eastern District of Texas's Chief Judge Rodney Gilstrap remains one of the busiest and most experienced patent judges, despite falling in the new case rankings during the rise of the Waco docket. The California and Northern Illinois courts remained steadily busy on par with prior years, but not at the levels seen in Texas and Delaware.

By industry, high-tech companies continue to dominate, comprising the strong majority of parties to district court and PTAB litigation. Samsung appears to be the most prolific patent litigant this year, both in PTAB proceedings and in district court, and both as a defendant and as a patent challenger. Trailing Samsung are Google and Apple. Microsoft, LG, Lenovo, Intel, HP, Huawei, and others are also highly active litigants. Non-practicing entities ("NPEs") continue to file nearly half of all U.S. district court cases, often backed by third-party financing or contingency fee arrangements. Year-to-date NPE activity is up compared to 2020, with automotive technologies seeing a significant amount of new attention.

As for the return of the jury trial, the courts' practices and ability to conduct jury trials over the course of 2021 has varied considerably from forum to forum. Both Delaware and the Eastern District of Texas have conducted a significant number of patent trials in 2021, while California has struggled to restart patent trials. Meanwhile, the Western District of Texas has seen relatively fewer patent trials in 2021, likely attributable to the relative immaturity of the court's case docket.

The district courts' popularity in 2021 was nearly matched by the volume of proceedings at the Patent Trial and Appeal Board (PTAB) and the International Trade Commission. The pace of filings has remained fairly consistent over the past several years, with a slight uptick in volume of filings in 2020 and 2021 over 2019. Similarly, the institution grant rate has remained fairly steady for several years, although 2022 could bring changes with new leadership.

In legal developments, 2021 brought some notable but not overly dramatic changes. In its much anticipated *Arthrex* decision, the Supreme Court granted the Patent Office Director the power to review final written decisions of the PTAB, resolving the outstanding issue regarding the constitutionality of the PTAB's Administrative Patent Judges' authority. Then, in late September, the Federal Circuit's *In re Vivant* decision held that the Patent Office's discretion to undo institution decisions in AIA reviews also applies to reexaminations.

Looking ahead to 2022, President Biden's nomination to head the Patent Office, Kathi Vidal, likely will be confirmed as the new director to replace Drew Hirshfeld, interim director of the Patent Office, after Andrei Iancu resigned in January. Practitioners will have to wait and see what changes will come with new leadership, but there is some speculation that Vidal will be interested in bringing clarity to the standards of patent eligibility, as she has significant experience litigating Section 101 patent issues over the course of her career. Given her historical representation of some of the larger Silicon Valley firms, some practitioners speculate that she may be inclined to restrain smaller/independent inventors

and non-practicing entities in favor of big tech. Litigants will also be looking to see what Vidal does with the PTAB's *Fintiv* precedent giving PTAB judges more power to deny petitions for *inter partes* review, which decision generally favored patent owners. Meanwhile, 2022 may bring more attention to a PTAB reform bill introduced by Senators Leahy (D-VT) and Cornyn (R-TX), dubbed the "Restoring the America Invents Act." The senators claim the legislation will bring more transparency into the patent office review process and could prevent PTAB judges from factoring in the timing of related district court litigation when deciding whether to review a patent, essentially reversing the *Fintiv* rule. Meanwhile, Senator Leahy is also credited in reports indicating that he has called on the Administrative Office of the U.S. Courts' Judicial Conference to review the sudden rise of the patent docket for the Western District of Texas, where parties can effectively select Judge Albright to preside over their litigation by choosing the division in which they file their lawsuit. It is too soon to predict whether the effort will ultimately result in some rule changes impacting judicial assignment and venue for patent cases within a district.

As for what the district court litigant can expect in 2022, particularly in terms of the resumption of widespread jury trials that have been delayed in the COVID era, Anthony Fauci's guess is as good as any. However, there seems to be a growing consensus that whatever the pandemic brings, Texans are ready to get back to living, working, and having some fun in all ways – and nothing says fun to a Texas patent litigator like a good ole' jury trial.

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