

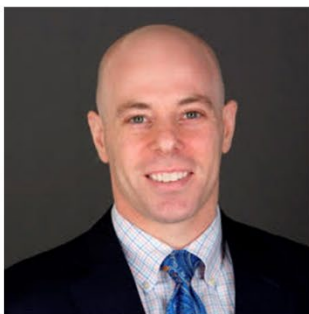
Copyright and Trademark Litigation Report 2021

The 2021 Copyright and Trademark Litigation Report focuses on federal district court data from the last three years. Join the discussion with Doug Panzer, Partner at Caesar Rivise, Patrick Arnold, Shareholder at McAndrews, report author, Rachel Bailey and our moderator, Neil Magenheim

The speakers discuss big picture trends in Copyright and Trademark litigation including:

- How the practice areas are shaped by various filing trends including file sharing and mass counterfeiting cases
- Top law firms and parties, including large scale filers
- Most active districts and judges
- Case strategy based on case resolutions and findings
- Damages trends

Speakers:



Doug Panzer
Partner
Caesar Rivise



Patrick Arnold
Shareholder
McAndrews



Rachel Bailey
Legal Data Expert
Lex Machina



Neil Magenheim
Sales Director
Lex Machina

Neil Magenheim (00:00):

Hello, everyone. Welcome to the Lex Machina 2021 Copyright and Trademark Litigation Report webcast.

Neil Magenheim (00:09):

Before we get started, two quick housekeeping items. One, this webcast is being recorded. And two, we will be taking questions if time permits via the question and answer feature in Zoom.

Neil Magenheim (00:22):

So what is Lex Machina? Lex Machina is legal analytics. Our customers and clients use Lex Machina to help them win. Law firms use Lex Machina and our data to help them win business and help them optimize outcomes on behalf of their clients and their firms. Some of the most recognizable corporations in the world use Lex Machina to select, evaluate, and benchmark through outside counsel and to make more informed data-driven business strategy decisions. Both our corporate clients and our law firm clients use Lex Machina's data as foundational elements to blog posts and articles and assets they use to market themselves in a very similar capacity to what we'll be going through today.

Neil Magenheim (01:11):

My name's Neil Magenheim. I'm the director of client relations here at Lex Machina, and I'm really excited to introduce to you our fantastic panel of speakers. First, I'm happy to introduce and welcome Doug Panzer to the panel. Doug is a partner at Caesar Rivise in the Philadelphia office. Doug focuses his practice on patent procurement, analysis, licensing, and enforcement in the electrical, computer, mechanical, and communication fields. He advises his clients on patent, copyright, trademark, and trade secret law as they apply to various technologies, including software, e-commerce development, electromagnetic devices, RFID, control systems, software, microprocessors, and medical devices. Doug, welcome, and thank you for your participation today.

Doug Panzer (02:05):

Thank you.

Neil Magenheim (02:06):

Second panelist I'd love to introduce is Pat Arnold. Pat is a shareholder at McAndrews, Held & Malloy in Chicago. Pat has been practicing IP law at McAndrew since he graduated from law school. His practice has been concentrated in patent, trademark, and copyright litigation. He also assists his clients in prosecution, counseling, and licensing. Pat has been lead trial counsel on many lawsuits, has extensive experience with all pre-trial, trial, and post-trial activities in the federal courts. Pat, thank you again for your time and participation, and welcome to our panel.

Patrick Arnold (02:45):

Thank you.

Neil Magenheim (02:47):

I'm really happy to introduce my friend and colleague, Rachel Bailey, who is the author of this report that we're about to go through. Rachel is a data relations manager and legal data expert here at Lex Machina and she focuses on trademark, trade secret, and copyright law. Rachel has a dual role here at

Lex Machina. Rachel works on external communications concerning Lex Machina's software, including reports and press requests for data. As a legal data expert, she works on data integrity for our trademark, copyright, and trade secret modules. Rachel is currently based out of New Orleans after spending several years practicing trademark law in the Bay Area. Rachel, thank you. I'm going to hand it over to you.

Rachel Bailey ([03:30](#)):

Thanks, Neil. Yeah, I'm excited. If you've been on our webcasts, I have been on quite a few of them at this point, but this is finally my practice area. So I'm excited to talk copyright and trademark. We've just had wonderful introductions, so I'm going to jump right in.

Rachel Bailey ([03:50](#)):

Right now, we're looking at copyright cases over the last decade, excluding file sharing cases. So I'll start out with big picture. Lex Machina includes in our copyright module any cases that include a claim for copyright infringement. Unfortunately, we're not talking about DMCA claims or anything like that, but just copyright infringement.

Rachel Bailey ([04:15](#)):

Then we do separate out file sharing cases. We have a case tag for that. So you can look at those cases, or you can exclude them if they're not pertinent to you. These are the more normal cases. File sharing cases are by film companies suing John Does or IP addresses. It's a very specific thing. So this is more of what you think of as a copyright case. They increased over the last decade, except for the last year, down. Some of that's likely the pandemic and then certain filers.

Rachel Bailey ([04:52](#)):

Trademark cases. Additionally, it's pretty even over the decade, but it is down. 2020 was the lowest year for trademark cases. Our trademark module, I will say, it's called trademark, but it includes the Lanham Act claims. So trademark infringement or false designation of origin, as well as dilution, cybersquatting, and false advertising. So any of those Lanham Act claims gets you into the trademark module here.

Rachel Bailey ([05:24](#)):

Just looking at these downturns, I want to ask Doug, could you discuss a little bit about how the pandemic has affected your practice?

Doug Panzer ([05:32](#)):

Sure. It's been a two-sided coin. On the one hand, we've been incredibly busy. I hear that most lawyers have been incredibly busy through the pandemic. I think some of that is the inability of people to go out and be maybe in sales meetings or other in-person meetings. They finally had time to call us and talk about the legal problems that need to be taken care of.

Doug Panzer ([05:59](#)):

On the other hand, everything obviously slowed down a little bit. I think there's less commerce that could be leading to fewer situations where claims could arise. But I think there's also been some budgetary considerations that companies need to decide with the cashflow, whether the legal budget is an area where they want to spend their money. Maybe an opposition is a better route or maybe other

areas of enforcement. Or it could just be that things don't percolate to the point of needing to file a federal lawsuit when your budget is down because of the limited cash flow.

Rachel Bailey ([06:40](#)):

For sure.

Rachel Bailey ([06:42](#)):

Now, I'm going to show some really specific filing charts. Now, we're looking at mass counterfeiting cases. So again, we tag these specifically. They're a little bit different. Honestly, they're mostly filed by two law firms. These are cases where usually a big well-known brand ... I've seen, Chanel, Harley-Davidson, all the way to the people who own Baby Shark filing against counterfeiting for either URLs or usernames on websites. It's a very specific strategy. It's up right now.

Rachel Bailey ([07:26](#)):

One thing that's down is dilution claims. I find dilution fascinating because it requires fame, and what every judge says is famous seems to be a little bit different. I think we're seeing the effect of that on this chart. Dilution claims, between 2018 and 2019 were down even more, from 827 cases to 620.

Rachel Bailey ([07:48](#)):

Lastly, cybersquatting is also down. I talked to the panelists on our prep call a lot about this as well. Some of it, I'm curious if they're still doing UDRPs, instead going to ICANN instead of-

Rachel Bailey ([08:03](#)):

Instead going to ICAM instead of filing in Federal Court, because we're looking at Federal Court cases with cybersquatting claims. So I want to turn to Pat and ask, what do you see with the data as far as dilution in cybersquatting versus your practice?

Patrick Arnold ([08:18](#)):

Well in my practice, first of all, with respect to dilution, I think this chart matches very well because it tends to be a claim that we might throw in if we can and frankly, if it's a case it's a claim you can throw in when your likelihood of confusion is perhaps a little iffy, and so you feel good about throwing it in. But what happens is when I'm black throwing it in I mean it as a complaint, but it's so difficult to prove fame it seems, niche fame or otherwise, and it's true what you said Rachel, it's hard to really tell what each court is going to do in that regard. And at least in my own practice, it tends to be if you have both claims because you thought you needed them, when you really get down to it, either towards trial or summary judgment whatever, you tend to or go the dilution claim, which I think then lends itself towards maybe not even bothering to bring it the next time. I kind of hear myself advising clients that as I speak to you about this.

Patrick Arnold ([09:21](#)):

With respect to cybersquatting, you mentioned UDRP, I think that that's a great way to go and why you see that kind of falling in Federal District Courts. Here's the way I see that. cybersquatting actually has, if you look at the statute, it has a part one of the factors that they consider is essentially is there a likelihood of confusion? I can't paraphrase it at the moment. But if you fall into that category, it's a great claim to bring in district court because the proof might actually end up being a little easier, bad faith

there as well, but a little bit easier to prove. And you're really basically talking about, did somebody go out and take a domain name similar to yours and start a business on it?

Patrick Arnold ([10:14](#)):

And if you have that, it's a great frame for the plaintiff to bring, but I think that's much less garden variety and why these are down in district court is because the garden variety one, at least from what I've seen over the years, is when the cyber squatter is, I'll joke, is somewhere in Russia, Poland, wherever, not in the US. You can't even figure out who they are. They're not a competitor. And the screen comes blank when you get on their domain name. Those, if you go through the UVRP, what I have found is, I'll almost say miraculously, but bad faith is an element, but it is so easy to prove and so cheap. And so I think that's why you see what you see. I think people realize that that avenue can be very effective, by that I mean CDRP claims are way, way cheaper. So fun cases. They just don't last long enough.

Rachel Bailey ([11:12](#)):

Yeah. It definitely makes sense. Yeah. I do want to address a question. It says, "Does the chart of trademark cases of the overall include the numbers from the next three charts?" And the answer is yes. However, you wouldn't want to add them up. You wouldn't add dilution and cybersquatting because they could overlap. So the overall trademark cases do include these. These three are a subset of our trademark cases overall.

Rachel Bailey ([11:42](#)):

Now looking at the most active districts for copyright cases, southern district of New York is number one. And then, so we've got the each year for the past three years, and then the total, and that's what we're looking at for a lot of this report is the last three years, and then the percentage overall for those three years. So southern district of New York was the most, central district of California. And we think of copyright cases being on the coast and that definitely is the case.

Rachel Bailey ([12:11](#)):

When you look at 2020, the central district of California is actually above the southern district of New York. And then looking similarly at judges, most of the judges that have a higher number of cases, only 1.8% of the overall, so we definitely don't have a Judge Albright the way we do in patent, but a lot of these judges are in the central district of California. And so what I find interesting is that there's no judge from the southern district of New York on here, which means that they're really spreading cases out in that district. And so strategizing, if you want to do a motion to transfer, or if you are trying to figure out how much experience a judge has with copyright cases, then this is interesting, particularly if you're in the southern district of New York. So I'll ask Doug, how do you use judge data in your practice?

Doug Panzer ([13:07](#)):

So I think one of the most useful things that I do in terms of judges is to see on a particular type of motion if I can find a motion that is similar to my motion that I want to bring, that came out the way I want it to come out. What did the filings look like? Sometimes I'm interested in how long did the judge take to get to that motion. But definitely one of the underlying filings look like, what was persuasive for the judge, and that seems to be pretty easy to find through Lex Machina.

Rachel Bailey ([13:43](#)):

Great. Looking At the trademark cases. northern district of Illinois is number one, and that is where patent is located, and then central district of California, and then it definitely is affected by mass counterfeiting cases, a lot of them are filed in the northern district of Illinois.

Rachel Bailey ([14:03](#)):

And then the judges for trademark are interesting. Judge Poster in the northern district of Ohio actually has an MDAL that has a lot of false advertising claims under the Lanham Act involving the opioid crisis. And so that's one related multi-district litigation that's counted many times. Judge Snyder on this list was also on the copyright list from the southern district of California. And then we see many judges from the northern district of Illinois. So I'll ask Pat, could you tell us a little bit about your experience in the northern district of Illinois?

Patrick Arnold ([14:40](#)):

Well sure. I'll make a plug, it's a great district, but maybe that's just I'm biased. But when I look at this data what sort of stands out to me having that somewhat of an old timer here and then in this court, more than other courts in the land, is that often... Put it this way. There's oftentimes we smile, about it in IP, but there's an old sort of bias that the judges kind of wince when they found I'll start with patent. They had a patent case, and you can see the grimace on their face when you step into court for the first time because there was a patent case.

Patrick Arnold ([15:17](#)):

Now that's changed a bit here because now there are judges that agree to do it. But the reason I mention that is that I often have found that a lot of judges and lawyers, and understandably so, lump trademark in with patent as something, "Boy, we don't want to touch." And while that is obviously a statement, that's just on one polar end. When I look at the judges that are active, if I smile because from pretty much each one in the northern district of Illinois is one of our newer judges, maybe a few years on the bench or so, and that's because what happens, right? The people who've been around a while say, "Here, you take this case." So that's what I see.

Patrick Arnold ([16:00](#)):

Having said that each of the judges in the northern district...

Patrick Arnold ([16:03](#)):

That's what I see. Having said that, each of these judges in the Northern District has a very good reputation and it's good to be before any of them. Does that answer your question enough?

Rachel Bailey ([16:13](#)):

Yep. I definitely think that's interesting. If you've got a newer judge, then you want to see their record. And the other thing is that there's so many mass counterfeiting cases in this district, you can check and see how many of these judges, whether they have trademark experience with mass counterfeiting specifically, which is the same thing over and over, or if they've seen something else, you definitely want to check their record. Now we're looking at plaintiffs for copyright cases filed in the last three years. So, again, this is similar, but we've got the number of districts where this plaintiff is located. Some fun stuff with the plaintiffs. So these plaintiffs, Strike 3 and Malibu Media, are filing file sharing cases. And it's film companies who filed these cases, but these two are adult film companies. And a lot of times they just want you to settle up before your IP address is revealed. So those cases have gone down, we can see in

the last three years, but I will say that they are back up again in 2021. Over 700 cases have already been filed.

Rachel Bailey ([17:27](#)):

And then some other names on this group, they file against restaurants and bars for unauthorized public plays of music or sporting events and things like that. And then the top law firms representing, that's going to mirror a little bit because Fox Rothschild is on this list for all of the file sharing cases, which they had a partner who was doing those cases in 2018 and he left to form his own law firm, which is actually on the list down here. And so those are for file sharing cases. And then a lot of people have probably heard about the Liebowitz Law Firm, which has been in the news a little bit. So they file mostly on behalf of photographers against media companies for using photographs. And Mr. Richard Liebowitz was actually suspended, so their cases are down. Although the law firm has continued to file under other attorney names. And then for trademark cases, Sream and Roor, they are on a lot of the same cases, and that is a brand, Roor, is also their trademark.

Rachel Bailey ([18:46](#)):

That is a brand that they file against a lot of convenience stores and gas stations for selling counterfeit glass water pipes for tobacco usage. So interesting stuff going on with the parties here. Lastly, I'll mention there's a lot of individuals on this list and those are models or well-known women who sue restaurants and gentleman's clubs who are using their name or their likeness in order to make it seem like they work there or something like that. That seems like a right of publicity issue, but they do include a lot of [inaudible 00:19:20] claims in those cases specifically. And likewise, the law firms representing those folks are mass counterfeiting. Greer, Burns & Crain file a lot of mass counterfeiting cases. Kohrman Jackson & Krantz, they do NOCO, which is a battery company, which is on the parties list. So we're seeing these things are parallel. So I want to throw it to the panelists. Doug, does anything on here surprise you?

Doug Panzer ([19:51](#)):

Well, I mean, I think the very noticeable stat was one that we talked about in preparing for this, is the zero filings by one of the file sharing plaintiffs in the copyright cases. And I wonder if that was a business decision in terms of deciding that that's not going to be their practice anymore, the recording industry companies moved away from that after several years of the Napster cases and things like that, or if it was just a matter of saying with the courts shut down because of COVID, there's not much pressure there. Nothing's going to move to the courts anytime soon. I mean, these people would potentially still have their names in public filing, so you've got the embarrassment factor, but I guess it would be interesting to see if Malibu is in those 700 cases that you mentioned that have come out this year.

Doug Panzer ([20:46](#)):

But I think other than that, it seems like you have that double-sided coin, like we talked about, with the trademark cases in general, which is everybody's busy and businesses are going after the things that really need to be gone after, but at the same time, when you've got courts that weren't really moving in many districts for six, seven, eight months, it probably weighed on people's decision as to whether to file at all, plus the potential cashflow implications.

Rachel Bailey ([21:19](#)):

For sure. Pat, I don't know if you want to add anything here.

Patrick Arnold ([21:24](#)):

No, I think that I was fascinated by with what Doug said there about whether that was a conscious decision by, I guess we'll say, the film industry. That might've been pandemic related and we'll see. Interesting.

Rachel Bailey ([21:43](#)):

For sure. Now this is a complicated diagram, but I'm going to point out a few things and I hope that you dig into the report. So these are case resolutions, so it's how the case ended for copyright cases terminating in the last three years. On the right hand side, we've got settlements and procedural resolutions. And so for copyright cases in the last three years, 82% settled. And then on the left hand side here, I like to point out the decisions on the merit. So these are judgements on the pleading, summary judgment, and copyright. Summary judgment is actually pretty even. So we've got claimant wins and claim defendant wins. Summary judgment, 83 cases ended on summary judgment in favor of the claimant. 85 summary judgment ended in favor of the claim defendant. Trials, a lot more climate wins, 58 to 13. Trademark looks a little bit different.

Rachel Bailey ([22:43](#)):

So, again, similar diagram, but the likely settlements are only 56% in the trademark copyright area. That's a long ways from when you say 99% of cases settle if you're working in trademark. Default judgments are way up. So there's a ton of default judgments in these trademark cases, partly because of the mass counterfeiting cases, partly because of the nature of the parties in these cases. And then looking at the merits, it's a little less even. Summary judgment, for example, claimant wins, 118 cases. Claim defendant wins on summary judgment was 154 cases. So claim defendants are wanting a little bit more trademark cases in summary judgment, but trial claimants are winning on trial. So I know this is a ton of information and I'll let you dig in, but I do want to see if, Pat, does this follow with what you see in your practice?

Patrick Arnold ([23:45](#)):

This slide, I would say, this set of data is interesting to me from two perspectives. One, the 56% of cases settling, I would say feels low to me. I'm not questioning your data at all. I mean, your data is awesome and should be used by everybody, but-

Patrick Arnold ([24:03](#)):

Data at all. I mean, your data is awesome and should be used by everybody. But that seems low to me in terms of my practice. It is true that trademark cases, if you think about it, you can make them relatively simple. And maybe that's one of the reasons people hang on longer and just try them or have somebody judge them. But that seems low to me in terms of my practice. The other thing that stands out to me is the summary judgment in favor of a claimant. We would expect it to be lower than the reverse, summary judgment in favor of the non-claimant, which is what we see here. But 118 is a fair amount, it seems to me, of claimants that actually receive summary judgment of likelihood and confusion. And I look at this and say, typically I would...

Patrick Arnold ([24:55](#)):

Put it this way. There's a little hesitancy for summary judgment to bring that for trademark cases, because think about the standard, likely the confusion is so subjective and everything else. But I think a lot of judges would say to themselves, "Well, I can look at those factors. I can tell you if the marks are

similar or not." And I think that's actually relatively encouraging from an economic standpoint for the client. So that's what I see.

Doug Panzer ([25:20](#)):

I think that's a great point on the summary judgment versus trial on likelihood of confusion questions, because it looks like from those numbers, judges are happy to say at summary judgment, "There's no way a jury can find a likelihood of confusion here." But they're not willing to say there is a likelihood of confusion. But if you look at the trial numbers, juries very frequently, when the case gets that far, look like they're saying, "Yeah, there definitely is a likelihood of confusion."

Patrick Arnold ([25:48](#)):

Yeah, it definitely reverses. But I even think the 118 where the judges are saying it is kind of intriguing.

Rachel Bailey ([25:57](#)):

Yeah. The trials do include bench trials, as well, to find your effects. So yes. And this presentation, we're coming close on our time. I have one last thing, but it doesn't include findings. So if you're into this, then you can go even deeper in the report in the findings section.

Rachel Bailey ([26:16](#)):

The last thing I'll mention quickly about damages. So there's this big chart with all kinds of different damages and where they're awarded. I just want to point out in both these practice areas, statutory damages are the highest, and there's just a massive amount of default judgment. So here we got 3.3 million, almost 3.4 million copyright statutory damages in the last three years. Excuse me, 2.3 billion, not million, billion, were on default. Similar for trademark, got 5.3 billion, and almost 5 billion of that is default.

Rachel Bailey ([26:55](#)):

And then the mass counterfeiting cases are not actually in these numbers because they're per defendant. And so they're in calculable. And so they are in the Lex Machina system, but they're not sort of calculated into the totals because we don't know how many defendants they're actually against at times. And so the amount of default damages in trademark cases is just massive. It's massive. Throw it to the panelists. Doug, how do you use damages information in your practice?

Doug Panzer ([27:32](#)):

Well, I mean, I think you need to look at it in terms of, at the very outset, is the case worth bringing? And then throughout the proceedings, how are you going to use it in terms of potential settlement, negotiation, or willingness to settle it all? Whether you're going to reveal any of that data to the other side is a whole separate question. But I think at that those two points is really where it factors in. And that first one, "Am I going to bring the case at all?" is definitely an important question. Is it worth it?

Rachel Bailey ([28:06](#)):

For sure. Well, we will send it to a Q and A. But I appreciate everyone's time. Neil if you want to-

Neil Magenheim ([28:15](#)):

Yeah. Rachel, we do have one quick question. If you wouldn't mind. It came in. How does Lex Machina prepare these reports and the reports in general?

Rachel Bailey ([28:27](#)):

So all of the data that you see in the reports is from the Lex Machina system. And I do a lot of the project management on reports. So I could talk about this a lot longer than necessary. But we put together these reports from our data, specifically. So it looks like Lex Machina, and most of these things you should be able to find relatively easily. Some of it, we put together in a little bit special view for the reports, for the trends, and we come through a lot of it to make sure that it's as clean as possible, as specific as possible, and really shows you a story of what's going on in the practice area.

Neil Magenheim ([29:14](#)):

That's great. We do have one more question which would lead to the final slide. How can we get a copy of the report? So maybe if you can... There we go. So www.lexmachina.com to request a copy of the report. As you could see, Rachel and Pat and Doug did such a great job going through the high level trends. We've looked at a lot of information today. We we bubbled up those unique, powerful, actionable insights. All we ask for in return when you request the report, small ask, set up some time with one of our legal analytics specialists to look at Lex Machina through a lens of data that matters most to you, whether it's for a certain judge, or a certain party, or a certain attorney. And in return, we'll share the report as part of spending some time with you on that.

Neil Magenheim ([30:09](#)):

No other questions have come in. So again, Rachel, thank you. Great job on putting the slides together and the report together. Pat and Doug, we can't thank you enough for your time. Your insights are invaluable. So thank you, again. And that does conclude 2021 Lex Machina copyright trademark report webcast. Thank you.

Patrick Arnold ([30:28](#)):

Thank you.

Doug Panzer ([30:30](#)):

Thanks for having us.