



Patent Litigation Report 2021

Watch as Lex Machina's Sales Director, Neil Magenheim hosts a discussion with Michael Flynn, Partner at Morris Nichols, Seth Lindner, Partner at Carter Arnett, and report author Geneva Clark, Patent Legal Data Expert at Lex Machina. They will analyze federal patent litigation trends and offer insights about judges, parties, and law firms as well as PTAB proceedings. The webcast will include a look at how major decisions have affected the courts and the impact of COVID-19.

Speakers:



Moderator:
Neil Magenheim
Sales Director
Lex Machina



Speaker:
Michael J. Flynn
Partner
Morris Nichols



Speaker:
Seth Lindner
Partner
Carter Arnett



Report Author:
Geneva Clark
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Neil Magenheim ([00:00](#)):

... to the Lex Machina 2021 Patent Litigation Report webcast. Very happy to share with everyone today that this is Lex Machina's eighth Patent Litigation Report. And between our Report and our webcast, we'll provide some powerful insight about what happened with patent litigation in 2020 and help you gain a better understanding of what may come next. Before I introduce you to our panel, I'd like to share with you very briefly on how Lex Machina is used by the leaders in litigation.

Neil Magenheim ([00:38](#)):

As you can see on the slide, Lex Machina is consumed by some of the most recognizable brands and corporations in the world. Our corporate clients use Lex Machina to select, evaluate, and benchmark their outside counsel, and they use our data to more effectively inform their litigation strategy. We have hundreds of law firms subscribers that use Lex Machina to help them win, help them win business and help them win cases and optimize outcomes on behalf of their clients and behalf of their firms. In addition, most of Lex Machina's clients use our data as a foundational element to various reports and blog posts in a very similar capacity to how we use our data to put together our very popular reports.

Neil Magenheim ([01:31](#)):

My name's Neil Magenheim. I will be moderating today's webcast, and I'm very happy to introduce you to our guest speakers. Michael Flynn is a partner at Morris Nichols, specializing in IP litigation. He represents clients as leader local counsel in litigation cases, primarily in the district of Delaware, in a wide variety of industries with a particular focus on web-based technology, networking biotechnology and consumer products. Seth Lindner is a partner at Carter Arnett located in Dallas, Texas. Seth represents technology companies in a wide range of intellectual property matters. His practice focuses on intellectual property litigation, post-grant reviews, and strategic counseling in high-technology cases. Geneva Clark is Lex Machina's patent legal data expert. Geneva is a registered patent attorney with experience in large scale computer science and life science patent litigation, as well as patent prosecution. Welcome to the panel. Geneva over to you.

Geneva Clark ([02:45](#)):

Thank you, Neil. And thank you to our panelists for joining us in this discussion of the Patent Litigation Report. Could you each say a little bit about yourself and your practice and experience? Seth, if you could go first?

Seth Lindner ([02:58](#)):

Sure. Good morning. So I'm a patent litigator. I'm a partner at Carter Arnett. I'm actually working in Austin right now, where I live, and that's where I work. I have a background in electrical engineering, so a lot of the cases I handle tend to be in that space. Anything with a chip in it is something that I handle pretty regularly. I spent about the last decade at a couple of large law firms and I'm now at sort of more of a boutique litigation firm and I handle cases at all phases of litigation. That means necessarily that I spend a lot of time in front of the PTAB because that's a growing part of the practice for IP litigators.

Geneva Clark ([03:48](#)):

Excellent. And you, Michael?

Michael Flynn ([03:50](#)):

All right. Thank you, Geneva. So I'm Michael Flynn. I'm a partner at Morris Nichols in Delaware. If you've litigated in Delaware, hopefully that's a name that's familiar to you. Morris Nichols has appeared in about 3,000 patent cases over the last decade primarily in Delaware, although we do litigate across the country and do some PTAB work. I've personally been in about 300 of those cases. So we've got a pretty deep set of experience with our judges here in Delaware. And as Neil mentioned, we serve as both lead and co-counsel for our clients. And hopefully, I'll get to see some of you in Delaware soon.

Geneva Clark ([04:32](#)):

Great. I'd like to start off by first defining what is a case tagged patent so that I can talk you through some very interesting data findings we have.

Geneva Clark ([04:42](#)):

A patent case at Lex Machina includes cases with a claim of infringement, enforceability or unenforceability, and validity or invalidity. And then we're also going to look at the PTAB data set a little bit more briefly, and that set includes all trials that have been filed since PTAB's inception in 2012.

Geneva Clark ([05:01](#)):

So with that as a starting position, this is a graph that shows the filing trends of patent litigation since 2013 in federal district court. What we see is that in 2013, we saw a 6,000 plus cases and we see the turn line moving down slowly in the post American Invents Act era to around a little over 4,000, around 4,000 in 2017. And then after TC Heartland, a drop in 2018 and 2019.

Geneva Clark ([05:32](#)):

I'd like to bring your attention to the fact that in 2020, despite the COVID situation, we saw an uptick. This is remarkable because patent litigation is not an area that's directly affected by COVID in the sense that you don't have the same issues that insurance, contracts, and employment have where there are COVID issues directly in a lot of the patent litigation.

Geneva Clark ([05:55](#)):

Looking a little bit more closely at what's happened in the last eight quarters of patent litigation, what we see is 2019 through 2020, is a slight upward trend. I think that's meaningful because it shows that it's not simply one big bulk of cases that got dropped into patent litigation during 2020, but actually an overall upper trend throughout the year. There is a bit of a bump caused at least in part by a specific from WSOU Investments, Business rather, that have acquired several, many really, patents owned by Samsung and other companies. Some of those patents were about to expire so some of the filings directly relate to that, but not all of them.

Geneva Clark ([06:39](#)):

What we also see in PTAB, if we turn to the PTAB trend for the last eight quarters, is a slight upward trend for the year 2020. But in 2020, the sharper uptick is closely associated with, as you see here, the third quarter, which relates to a scheduled increase in fees in petitions and other costs related to patent for October 2020, and likely many petitioners sought to beat that deadline.

Geneva Clark (07:08):

Michael, could you discuss a little bit about your experience with trends and filings in district courts and behavior in 2020?

Michael Flynn (07:14):

Yeah. So in Delaware, we saw a slight dip in cases in 2020 versus 2019, but the 2020 numbers were pretty consistent with what we saw in 2018 and 2019. I think what's interesting is that the makeup of those cases that we're seeing is about the same. It's about 20% of our cases, our ANDA cases, pharmaceutical cases, about 40 to 45% are high volume plaintiffs, and the remainder are either other NPEs or competitor cases, which we saw an uptick in Delaware in sort of established competitor cases.

Michael Flynn (07:54):

Our court remains very busy. I think our judges have a little over a thousand active patent cases spread primarily over our four district court judges, and we think that 2021 is off to a really good start in Delaware. We're up probably almost 30% year to date versus 2020, so it looks like it's going to be a strong year for patent litigation again.

Geneva Clark (08:18):

That's great insight. I also just want to make a quick point for those who may not be familiar with the high volume plaintiff term. That refers to any plaintiff who, in any given year at any time, filed 10 or more cases, and it excludes ANDA cases because that's a regulatory requirement. So it doesn't point to a status issue. It does point to a nature of case and volume issue. We enable practitioners to separate on that point because it gives a different insight into what's happening with litigation.

Geneva Clark (08:47):

Seth, what trends have you experienced regarding PTAB?

Seth Lindner (08:59):

I mean, for the past few years probably every case that I've been on in litigation has included a PTAB component, and that continued right through 2020. I think we saw, in litigation, the timing of those cases was affected more greatly. The PTAB, as most folks know, is the timing of those is regulated by statute, and although the CARES Act gave a little bit of flexibility to the U.S. PTO, it didn't affect schedules all that much during 2020.

Geneva Clark (09:30):

Great. All right. Well, I'd like to turn next to district court judge filing trends, and the Judge Albright factor.

Geneva Clark (09:40):

As many practitioners know, what we've seen is a big increase in filings in the Western district of Texas, and those before Judge Albright in particular. But we also see that, as Michael mentioned, we see a lot of filings distributed among the different judges in Delaware. And Judge Gilstrap in the Eastern district of Texas is still quite busy despite what some expected to be the fallout from the TC Heartland. And we also see other judges in Eastern district of Texas and the central district of California in this list. One aspect, in addition to the very busy load that Judge Albright is experiencing, is that recent large decision in his court, jury decision, of two plus billion dollars in the VSLI versus Intel case.

Geneva Clark ([10:28](#)):

Seth, is your sense that a large decision like that one, including that decision potentially, leads to even greater interest in new filings in that related jurisdiction?

Seth Lindner ([10:38](#)):

I think it does. It certainly has put Waco on the radar even more than it was before, and there's a lot of sort of chatter in the community about that case and what it means. It really has shined sort of a spotlight on a couple of things in regard to Judge Albright.

Seth Lindner ([10:56](#)):

Number one, I mean, he's having trials right now in one of the only courts in the country that's doing that for patent trials. So Waco is definitely open. The Austin division is actually... The court is actually not opening. And so to the extent that parties prefer to be in one versus the other, if you're going to trial right now in the Western district for a patent case, it's going to be in Waco. So yeah, it's certainly that big number. And there's actually another VLSI v. Intel trial that's coming up, sort of the second wave coming up in just another month or so, and that may be similar type damages number that they're seeking, so people will certainly be looking at that pretty closely.

Geneva Clark ([11:41](#)):

Speaking to the issue of damages, let's take a brief look at damages more generally in 2020. What we see is, this is from the bottom to the top from 2013 through to 2020, and there's actually been a huge increase in damage award amounts in 2020. There were several large billion-dollar damage awards. So those were big cases like Centripetal Cisco v. Cisco, Caltech v. Apple, and Cal Institute of Technology versus Broadcom all have billion dollar awards. What we also see is that outside of that feature, we find that many cases, about the same number as last year, had large patent damages awards in 2020.

Geneva Clark ([12:31](#)):

Michael, do you find the announcement of big damage awards have an impact on party behavior in your practice?

Michael Flynn ([12:38](#)):

The thing about damages is that they are so case specific that big infringement often leads to big damages. I think in my experience, when the plaintiff's able to prove infringement and is able to prove up a damages number more times than not, the jury goes with that damages. So it's a reflection of the types of cases. And the awards we're seeing are primarily against these big tech companies. Whether that trend will continue is hard to say,

Geneva Clark ([13:10](#)):

Okay. Definitely something to keep in mind as we go forward.

Geneva Clark ([13:14](#)):

I'm going to briefly point out that one of the fallouts or situations that resulted from the TC Heartland situation with venue changes is there has been a shift in some of the plaintiffs' firms that are taking on patent work. We see some firms like Rabicoff Law, and the Chung Law firm and their violence have

increased from 2018 through 2020 and other firms as well. Several of them have increased their volume of plaintiff's work.

Geneva Clark ([13:40](#)):

While on the defense side, what we see is a little bit more stability. There's firms like Morris Nichols that do both defense and plaintiff's work. And several of the firms that are doing defense work seem to have a similar caseload in their work, Fish & Richardson, DLA Piper, Baker Botts. They tend to have more general practices, and I think they are working with their clients in a slightly different way.

Geneva Clark ([14:09](#)):

From here, let's pivot to PTAB and trial flow and findings just very briefly. This is called a Sankey chart, and we're not going to delve too deeply into it. One thing about PTAB is that, in the last couple of years, it's proved to be fairly stable in its distribution of decision-making. On the left side, you see the petition filed and on the right side, you see the result.

Geneva Clark ([14:34](#)):

But what I'd like to point out that is a little bit different is there's been a slight increase in unpatentability in 2020 versus 2019, from 17% to 20% of cases had an all claims and patentable finding. Amending claims is about stable and patent owner disclaimed findings increased from 2% of trials with petitions to 4%. These particular data points are related to, at least in part, an increase in amending activity on the behalf of patent owners through the PTAB process, and it was a goal to get that to increase. We're seeing that patent owners are taking advantage of this process to at least some extent and with some success because there's been a significant uptick in the number of cases with amended claims as a result in the last two years.

Geneva Clark ([15:23](#)):

Seth, is this consistent with your practical experience so far with patent and PTAB?

Seth Lindner ([15:31](#)):

Yeah, I think it is. I love looking at these charts by the way, I frequently do this. I think it's just a great way when your clients are considering how to approach the PTAB strategy and whether they want to file [inaudible 00:15:46] or not to get a sense of where the PTAB is and how decisions break down. This is a great way to just give them these top level numbers. So I'll throw that free plugin there for these types of graphics because I think they're great.

Seth Lindner ([15:57](#)):

But yeah, I think that's been what we've seen. I mean, it's hard. The PTAB cases, takes about a year to get through one of them so it is hard to see from your own personal experience what the trends are. So that's another reason why I like to look at this kind of data.

Geneva Clark ([16:13](#)):

Great. That's wonderful. The last set of slides we'll look at, and by no means the least though, is on the issue of district court findings.

Geneva Clark ([16:23](#)):

What we see is several things are as we would expect. Judgment on the pleadings are only down slightly, that's a little bit surprising but it is something that can be done more on the papers. Whereas summary judgments down to 43%, trials down 28%, judgements of matter of law down 20% but it's just a couple. What is surprising and also striking in multiple ways is this increase in default judgments to nearly double the amount that we saw the year before, and that a significant portion of those default judgments are tied to design patent cases, which is really a new development in patent litigation. There haven't been a ton of those, but there were during 2020 so it's a substantial shift.

Geneva Clark ([17:08](#)):

Michael, is this trend of fewer decisions being issued, in general, affecting your practice in your experience?

Michael Flynn ([17:16](#)):

So what we've seen in Delaware hasn't been quite the same decline in, for example, summary judgment. I think I looked at the numbers and we're down maybe 15 to 20% in terms of summary judgment decisions, and I think a lot of that is COVID related. After March of last year, we pushed all the trials off so there's less pressure on judges to get summary judgment decisions out when you don't have a trial looming in two months. And I think concurrent with that was extensions of discovery deadlines, depositions, and things in March, April, May last year that pushed some of those summary judgment deadlines to the later part of the year. So we haven't quite seen that same trend here in Delaware.

Michael Flynn ([17:58](#)):

The default judgment thing is just odd to me. I mean, we see maybe one patent default judgment case a year in Delaware, and it's usually an extremely small defendant, so I'd be interested to learn more. As I recall, a lot of those default judgements were in one district or a large portion were in, I think, the Northern district of Illinois, for example. So that may just be an anomaly that may not continue.

Geneva Clark ([18:24](#)):

Well, we'll definitely want to be aware of that and see how that develops this year.

Geneva Clark ([18:31](#)):

Neil, I think it's a great time for the Q&A if you're ready to take that on.

Neil Magenheim ([18:36](#)):

Absolutely. Great job. Thank you all for your insights.

Geneva Clark ([18:39](#)):

Thank you all. Wonderful.

Neil Magenheim ([18:40](#)):

So I do see a couple of questions that have come in. I'll give it a second to start asking them in an effort to encourage the attendees to ask some additional questions. So feel free to use the Q&A feature in the Zoom webcast and I could answer the questions accordingly.

Neil Magenheim ([19:03](#)):

First question looks here is for Seth. Seth, as a plaintiff's attorney with defense experience, where do you think most of the pent up demand, to the extent you think there is, will come from?

Seth Lindner ([19:20](#)):

Thanks, Neil. So I think as the pandemic recedes I expect a couple of trends, I think we'll see a slight increase in the number of patent cases due to there being more people looking to monetize their patents. These could be practicing entities that are now looking to increase the bottom line by selling their patent rights, or it could be companies that more or less failed during the pandemic that have an IP portfolio they're looking to do something with. So I think we'll see some of that. And that's in addition to the cases that got postponed during the pandemic and pushed off, but new cases are still being filed and so there will be a little bit of a rush, I think, as courts start to open up to where cases are sort of a little bit on top of each other.

Neil Magenheim ([20:09](#)):

That's great. Thank you for that. Next question that came in here is for Michael. Michael, do you think Zoom conferences and other alternative modes of communication, which are being used more often, help one party or another more?

Michael Flynn ([20:28](#)):

Wow. That's an interesting question. I don't know that I can say they help one party more than the other. I mean, as much as we like to be in front of our judges here, and I think our judges would much prefer it, I mean there's a lot of things that we can do over Zoom that just don't require the travel of co-counsel coming in for a 30-minute discovery conference or something. But I don't think that we could fairly say that there's an advantage for one party versus the other.

Neil Magenheim ([20:58](#)):

That makes sense. I see a few more questions that have come in live here. I think one of them I'll pose to Geneva. Is the number of judgments decreasing likely due to increasing settlements or maybe just PTAB proceedings? If the former, any reason why settlements have become more common? And then maybe Geneva quickly, and then over to Seth and Michael if they have any insight to share.

Geneva Clark ([21:30](#)):

Regarding PTAB in particular, there is a movement, or was under [Yanku 00:21:35] because we'll have to see since he stepped down, how things play out going forward. Could be different. But there was a policy of encouraging the termination of cases by deferring to either or other PTAB court. So there's only one PTAB petition unless there's a need or one district court decision. So there was a lot more staying in one court or the other during this time, and so it did prompt council to consider other alternatives rather than fighting on multiple fronts and being able to keep that process going. So I think that did promote settlement. We'll have to see what happens next, if that continues without the same policies or if the next leadership in PTAB and the U.S. PTO considers using the same policies.

Neil Magenheim ([22:23](#)):

Got it. That's helpful. We do have another extra minute or so here, Seth, is there anything you'd like to add to that given your PTAB experience?

Seth Lindner ([22:34](#)):

Yeah, I agree with what Geneva said there, and I think that you have to look at a little bit... I would want to dig into that data to see what kind of parties were being more likely to settle these cases early. The risk, obviously, if you're a patent owner, is that you don't want to lose your patent. If it was the first wave of, of infringement assertions that you were making, you may be more likely to try to settle a case like that quickly so that you don't lose your patent and you can continue to assert against other parties.

Neil Magenheim ([23:12](#)):

That's helpful insight for sure. This is an interesting question. I'm going to pose it to Michael. Is the adage true regarding poor market conditions increasing litigations because companies want to recapture market share?

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

It's interesting, when I was a very junior associate I was talking to one of our more senior partners, and he said, "When the economy's good, patent litigation is good. And when the economy's bad, patent litigation is great." And I think that sort of holds true and I think fits that adage that you do see that, one, you see competitors who are starting to get concerned about people that are coming into the market, especially if there's an overall decline in the market. So I think that certainly does hold true in a lot of ways.

Neil Magenheim ([24:04](#)):

Seth, anything you'd like to piggyback on that?

Seth Lindner ([24:09](#)):

I think Michael hit it exactly right. Yeah, I wouldn't add anything to that.

Neil Magenheim ([24:14](#)):

Yeah. That's great. So want to be sensitive to time and getting everyone out of here by 12:30 East Coast time here. So one question that I'll ask both Seth and Michael just to give us a little snip on is, what do you think is a patent litigation trend to be on the lookout for in 2021?

Michael Flynn ([24:45](#)):

That's an interesting question. I mean, I think what we're seeing is an uptick in more competitor cases along the lines of the prior question, Neil. We're starting to see some clients and plaintiffs that are really taking a hard look through their patent portfolios to see if there's patents that they think they should be asserting. We're not seeing as many that are really looking to sell off portfolios to some of the non-practicing entities, but we are seeing people start to take a look and see, "Are there ways that we should be capitalizing on our huge investments in intellectual property?"

Neil Magenheim ([25:33](#)):

And Seth?

Seth Lindner ([25:33](#)):

I think the thing that I'm interested in seeing is as courts around the country begin to open back up and trials can proceed certainly, in the current political environment, there are going to be some districts that do that more quickly than others, and I think it could affect how sort of venue is determined. The fact that

the court is proceeding or not, that may actually influence things. So that's something I'm going to be watching this year.

Neil Magenheim ([26:06](#)):

Very nice. Very, very, very insightful. I really do appreciate that. There were a couple other questions, due to the time we will definitely follow back up. We have the individuals and their questions. We'll definitely follow up with that. Again, Geneva, why don't you just flip to the next slide here to help wrap this up?

Neil Magenheim ([26:27](#)):

What's next? So you want to request the report, how do you get the report? Definitely, [lexmachina.com](#). The small ask is that you spend some time with our team of legal analytics experts. The reports are super powerful, super insightful, as you can appreciate and imagine. Again, this is our eighth time doing this, but what's even better is when we're able to work with you and learn a little bit more about what you're interested in and look at the data in real time through those specific combinations of criteria that matter most to you, what the task at hand is, what are those questions that you're looking to answer by looking at the data and the report. So certainly go to [lexmachina.com](#), reach out to your Lex Machina representatives. We're happy to fulfill those report requests. Again, the small ask, give us a few minutes of your time so we could dive into data that's specific to you.

Neil Magenheim ([27:16](#)):

Geneva, awesome job. Thank you so much for not only this, but the report itself. Thank you, Seth, fantastic insights, and Michael as well. Maybe we can pick up later on in the year with you guys and do some sort of a reporting and see where we're at with the trends that we've identified and where the patent litigation space is going. So again, thank you everyone for joining and attending. That does conclude the Lex Machina 2021 Patent Litigation Report webcast.

Michael Flynn ([27:49](#)):

Thank you.

Geneva Clark ([27:50](#)):

Thank you. It's been a pleasure.