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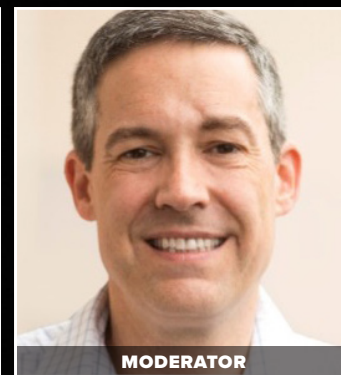
## **PATENT LITIGATION TRENDS 2022**



**Brittany Amadi**  
WilmerHale



**Lewis Hudnell III**  
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**Robert Stanley**  
Novartis

MODERATOR

# **EXECUTIVE SUMMARY**



## Patent Litigation Trends 2022

### MODERATOR:

Robert Stanley, *Global Head of Intellectual Property, Novartis*

### PANELISTS:

- Brittany Amadi, *Partner, WilmerHale*
- Lewis Hudnell III, *Principal and Founder, Hudnell Law Group P.C.*

### OVERVIEW

This panel of patent litigators discussed trends in patent litigation, most notably the rise in cases concentrated in five districts. The rapid increase in cases before a single judge in Texas is causing ripple effects throughout the system. Combined with the discretion of the patent office, the availability of inter partes review proceedings to challenge patents is limited. One reaction to these trends is the growth in mandamus petitions to the Federal Circuit to change venue, creating a new body of case law.

### KEY TAKEAWAYS

**The rising number of patent cases are concentrated in five districts nationwide.**

After a slight dip in patent cases filed in 2017, the number of patent cases started to rise again in 2020, accelerated in 2021, and is expected to rise this year.

### BIG IDEAS

- A single judge in the Western District of Texas remains dominant in US patent litigation.
- The patent office is limiting the number of IPR challenges it hears and is imposing additional time constraints.
- A new pattern that has developed in response to these trends is the use of mandamus petitions to the Federal Circuit, notably seeking changes in venue.

Factors behind this increase include the availability of third-party funding for litigants who otherwise might not have sufficient resources. Investors are attracted by the potential for large damages awards. In addition, the threat of invalidation at the patent office has diminished, enhancing the incentives of patent owners to file lawsuits.

Patent case filings are concentrated in five districts that in 2021 accounted for 68% of patent cases

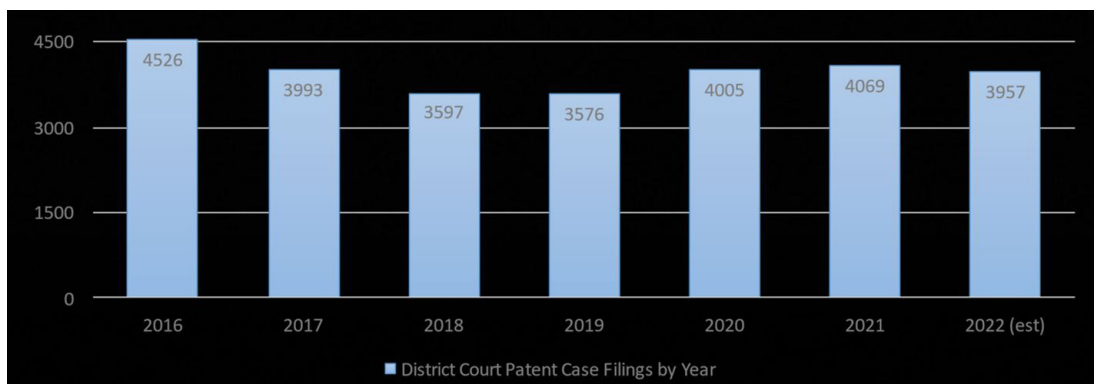


Figure 1: Patent cases from 2016 to 2022 (est.)

nationwide, up from 63% in 2020. These districts are in Texas (ED Tex. and WD Tex.), Delaware, and California (ND Cal. and CD Cal.).

**Texas remains the hotbed of patent litigation.**

Texas alone accounted for more case filings in 2021 than the rest of the country (aside from the five districts) combined.

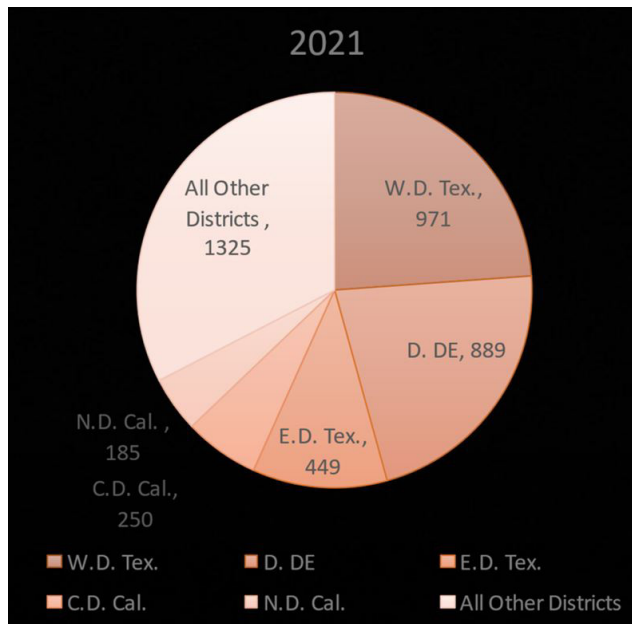


Figure 2: Patent cases are concentrated in five districts

The Eastern District of Texas had been a popular location to file patent infringement for decades, due to local patent rules that offered the prospect of a speedy trial and perceived plaintiff-friendly juries. The rise in the Western District stems from a single judge, Judge Albright, and the way the *TC Heartland* Supreme Court case on venue has played out.

**“In the Eastern District of Texas, for a long time the primary patent infringement jurisdiction in the nation, you had four or five different judges hearing patent cases. In the Western District you have pretty much all of those cases (almost 25% of the total) concentrated before a single judge, which is very unusual.”**

— Brittany Amadi, WilmerHale

Judge Albright adopted local rules where a plaintiff knew that it was unlikely a case would be stayed during proceedings before the patent office and that trial was likely in 12 to 24 months. It remains to be seen, however, if Western District juries are as pro-plaintiff as perceived.

**“Judge Albright has made very clear publicly that if you are plaintiff and you file here [WD Tex.], you’ll be able to get a trial date and you will get to a verdict before a jury.”**

— Brittany Amadi, WilmerHale

The standing order for scheduling cases in Judge Albright’s court ensures there is no fact discovery before claim construction, significantly impacting case strategy. The initial focus is overwhelmingly on claim construction and invalidity contentions. There is increased urgency if pursuing a challenge at the patent office.

**“You are almost laser focused on that aspect of the case in that phase, leading up to the Markman hearing [claim construction], because in terms of the merits, that’s really all there is to do.”**

— Lewis Hudnell III, Hudnell Law Group P.C.

In contrast, in the Eastern District discovery is not stayed until after claim construction, meaning parties are conducting fact discovery while prepping claim construction and do not yet know all of the facts they need. Once the claim construction is concluded, litigants truly know what the case is about and can focus on fact discovery for the remainder of the case.

**To try to challenge the patent’s validity at the patent office through inter partes review, a party must act fast.**

The Patent Trial and Appeals Board (PTAB), part of the Patent Office, hears challenges to a patent’s validity called inter partes review (IPR proceedings). The PTAB has discretion to decide which proceedings to hear—and discretionary denials for IPR institutions have risen in recent years. The institution rate, which was over 80% in 2013, has dropped to around 60% and the rate of discretionary denials rose rapidly in 2020 and 2021.



In deciding whether to institute a proceeding, the patent office looks at whether a party has demonstrated a likelihood that the patent was not valid. But in recent years it has focused heavily on a different factor: how soon the case will go to trial if there is parallel litigation. With a quick trial date it can be challenging to make an IPR petition to meaningfully help a case, especially in the Western District of Texas, where the case is not stayed pending an IPR proceeding. The clear implication is that parties must file their IPR petition quickly to try to get in front of district court proceedings, notwithstanding the one-year statutory time frame they are technically allowed.

**“You don’t get the full one-year period after you’ve been served with a complaint to get your petition on file.”**

— Lewis Hudnell III, Hudnell Law Group P.C.

**Mandamus—once extraordinarily rare—plays an increasingly prominent role seeking venue changes from Texas.**

Defendants looking to counter the plaintiff-friendly Western District and their relative inability to challenge patents through IPR are increasingly filing mandamus petitions to the Federal Circuit. Mandamus acts similarly to an interlocutory appeal, asking an appellate court to review a district court’s action before the entry of final judgment. Historically, mandamus petitions have been exceedingly rare, and are risky because if it fails the party is in front of the same district court judge.

**“You want to make sure that your mandamus petition, if you’re going to go down that route, is strong because there is the potential that it could get denied. And then you’re right back in front of the judge who you filed the petition against.”**

— Lewis Hudnell III, Hudnell Law Group P.C.

In the last year, however, mandamus petitions have flooded the Federal Circuit from the Western District of Texas, primarily focusing on venue. As a result there is a dramatic rise in opinions from the Federal Circuit, some of which are scathing criticisms of Judge Albright’s failure to follow the Federal Circuit’s guidance.

Some trends related to mandamus petitions include:

- **A roadmap for success.** Through repeated petitions, parties are learning what is necessary for a successful mandamus petition.
  - *In re Google LLC*, 2021-144 (Fed. Cir. Aug. 4, 2021): **denied** because there was insufficient evidence showing that Northern California was a more convenient venue for this litigation.
  - *In re Google LLC*, 2021-178 (Fed. Cir. Nov. 15, 2021): **granted** because more evidence was providing showing Northern California to be a more convenient venue.
- **Parties lacking a clear connection to another district face hurdles.**
- **The speed with which the district court acts cannot outweigh all other considerations for transfer.** *In re Apple Inc*, the Federal Circuit said speed should not outweigh the other factors.
- **The nature of a party’s ties to the district is significant for a venue determination.** In establishing venue, it is necessary to drill down to determine the footprint of a company and its presence in a geography.
- **The Federal Circuit will examine pre-litigation acts aimed at manipulating venue.**
- **Other key lessons from the mandamus decisions.** With each Federal Circuit decision, parties are learning more about the precise showing that will be required to establish venue in a district. Because the Western District of Texas includes Austin and surrounding areas where large tech companies have a growing presence, it will be increasingly difficult for them to argue that the venue is clearly less convenient than the Northern District of California.



## BIOGRAPHIES



**MODERATOR**

**Robert Stanley**

*Global Head of Intellectual Property,  
Novartis*

Robert Stanley is the global head of intellectual property at Novartis, leading 270 colleagues responsible for all intellectual property prosecution, counseling, and litigation, including NIBR research and development, Innovative Medicines oncology and pharmaceuticals, and Sandoz biosimilars and generics. Located in Basel, Switzerland, and in this role since mid-2020, Robert is the chair of the Novartis IP Leadership Team and a member of Novartis's Legal Leadership Team. Robert joined Novartis in 2017 as the global head IP litigation, responsible for leading the global IP litigation team along with coordinating and driving the strategy for significant and complex IP disputes throughout the Novartis Group. Prior to Novartis, Robert was a partner at Finnegan, Henderson, Farabow, Garrett & Dunner LLP, where he focused on pharmaceutical patent litigation as well as prosecution and counseling for patents and trademarks. Robert has a B.S. in chemistry and a B.A. in political science from Furman University, and a J.D. from the University of Georgia.



**Brittany Amadi**

*Partner, WilmerHale*

Brittany Amadi is a partner at Wilmer Cutler Pickering Hale and Dorr LLP. Ms. Amadi focuses her practice on intellectual property litigation at the trial and appellate stages. She represents clients in high-stakes patent and trademark litigation across a wide range of industries, including financial services, software, medical devices, semiconductors, and pharmaceuticals. Her experience includes matters before the U.S. Supreme Court and several other appellate courts, jury trials in U.S. district courts, and post-grant proceedings before the Patent Trial and Appeal Board. She also has an extensive practice before the Federal Circuit, where she has argued complex patent issues and represented clients in more than 25 appeals. Ms. Amadi has been recognized as a Rising Star in Intellectual Property by *Law360* (2020), as well as a "South Trailblazer" by *The American Lawyer* (2021) and a "Woman Worth Watching in STEM" by *Diversity Journal* (2021). Ms. Amadi is an adjunct professor at American University Washington College of Law, where she teaches a course on patent litigation. Prior to joining the firm, Ms. Amadi clerked for Federal Circuit Judge Timothy Dyk and for Eastern District of Virginia Judge Raymond Jackson. Ms. Amadi graduated *cum laude* from Harvard Law School in 2010.

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Lewis Hudnell III is an intellectual property attorney specializing in patent litigation and the founding principal of Hudnell Law Group P.C. He works closely with clients to understand their business and their needs in order to develop innovative strategies for helping them achieve favorable results in complex, high-stakes patent disputes. Mr. Hudnell's clients have ranged from individual inventors to major technology companies in the electronics, semiconductor, networking, computer software, electronic commerce, and financial services industries. Mr. Hudnell has successfully represented clients in patent trials in federal court and obtained numerous settlements and dismissals of patent lawsuits in favor of his clients. He has also successfully represented clients in post-grant proceedings before the Patent Trial and Appeal Board. Mr. Hudnell also counsels clients on strategically protecting their inventions, preparing and negotiating various technology agreements, selling and acquiring intellectual property rights, monetizing intellectual assets, and managing patent litigation risk. Before founding HLG, Mr. Hudnell was a principal in the New York office of Fish & Richardson P.C. Mr. Hudnell earned a B.S. in Operations Research and Industrial Engineering from Cornell University, and a J.D. from the University of Pennsylvania Law School.

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