

The WilmerHale logo, featuring the name "WILMERHALE" in a serif font and a red square icon with the letters "WH" in white. The background of the entire slide is a photograph of a classical building with columns and a pediment, with the words "STATES COURT HOUSE" visible on the facade.

WILMERHALE® 

WILMER CUTLER PICKERING HALE AND DORR LLP®

WEBINAR

WilmerHale IP/IP Litigation 2020 Year in Review Webinar

January 13, 2021

Speakers: Mark Selwyn, James Dowd and Sonal Mehta

Attorney Advertising



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- Questions will be answered as time permits
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*Important 2020 Patent
Decisions*



ITC Jurisdiction

Federal Circuit: Comcast Corporation v. ITC (March 2020)

- Rejected argument that Commission’s authority under Section 337 is limited to excluding articles that infringe at the time of importation: “The Commission correctly held that Section 337 applies to articles that infringe after importation.”
- Rejected Comcast’s argument that it is not an importer because it does not physically bring any boxes into the United States and is not the importer of record.
- Found substantial evidence supported Commission’s finding that Comcast was an importer, including Comcast requiring the accused products to adhere to its specifications and acceptability standards, and controlling the volume of accused products that enter the U.S. through forecasts and orders sent to the importers of record.





Venue

Federal Circuit: In re Google (February 2020)

- Granted mandamus to decide (1) “whether a server rack, a shelf, or analogous space can be a ‘place of business,’” and (2) “whether a ‘regular and established place of business’ requires the regular presence of an employee or agent of the defendant conducting the business.”
- “[T]he maintenance activities cannot, standing alone, be considered the conduct of Google’s business. Maintaining equipment is meaningfully different from—as only ancillary to—the actual producing, storing, and furnishing to customers of what the business offers.”
- “The venue statute should be read to exclude agents’ activities, such as maintenance, that are merely connected to, but do not themselves constitute, the defendant’s conduct of business in the sense of production, storage, transport, and exchange of goods or services.”





Federal Circuit: In re Apple (November 2020)

- “[O]nce a party files a transfer motion, disposition of that motion should take top priority in the case.”
- “A district court’s decision to give undue priority to the merits of a case over a party’s transfer motion should not be counted against that party in the venue transfer analysis.”
- “The district court ... misapplied the law to the facts by so heavily weighing Apple’s general contacts with the forum that are untethered to the lawsuit, such as Apple’s general presence in WDTX and the state and local tax benefits it purportedly received from the district. The district court also misapplied the law to the facts by failing to give weight to the ‘significant connections between [NDCA] and *the events that gave rise to a suit.*’”





Patent Eligibility

Federal Circuit: Illumina v. Ariosa (March 2020)

- Found claims patent eligible because they did not merely observe the presence of a natural phenomenon, but “exploit[ed] that discovery in a method for preparation of a mixture enriched in fetal DNA.”
- “This is not a diagnostic case. And it not a method of treatment case. It is a method of preparation case. Under *Mayo*, we have consistently held diagnostic claims unpatentable as directed to ineligible subject matter. In contrast, we have held that method of treatment claims are patent-eligible. The claims in this case do not fall into either category, and we consider the claims under the *Alice/Mayo* test.”
- “The inventors here patented methods of preparing a DNA fraction. The claimed methods utilize the natural phenomenon that the inventors discovered by employing physical process steps and human-engineered size parameters to selectively remove larger fragments of cell-free DNA and thus enrich a mixture in cell-free fetal DNA. . . . [U]nder §101 the claimed methods are patent-eligible subject matter.”





Kessler Doctrine

 ***Federal Circuit: In re PersonalWeb Technologies LLC***
(June 2020)

- Held that the issue of non-infringement need not be “actually litigated” in order to invoke the *Kessler* doctrine. *Kessler* doctrine could be invoked based on a prior, with-prejudice voluntary dismissal of a patent suit.
- Under the *Kessler* doctrine, “the stipulated dismissal with prejudice conferred upon Amazon a limited trade right to continue producing, using, and selling Amazon S3 without further harassment from PersonalWeb, either directly or through suits against Amazon’s customers for using that product.”





Infringement



Federal Circuit: Godo Kaisha IP Bridge 1 v. TCL Communication Technology (August 2020)

- Rejected argument that whether a patent is essential to any standard is a question of law to be resolved during claim construction
- “Where . . . there are material disputes of fact regarding whether asserted claims are in fact essential to all implementations of an industry standard, the question of essentiality must be resolved by the trier of fact in the context of an infringement trial.”





“Analogous Prior Art”



Federal Circuit: Donner Technology, LLC v. Pro Stage Gear, LLC (November 2020)

- Clarified law of analogous prior art: “The scope of the prior art includes all analogous art. Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.”
- “Although the dividing line between reasonable pertinence and less-than-reasonable pertinence is context dependent, it ultimately rests on the extent to which the reference of interest and the claimed invention relate to a similar problem or purpose.”

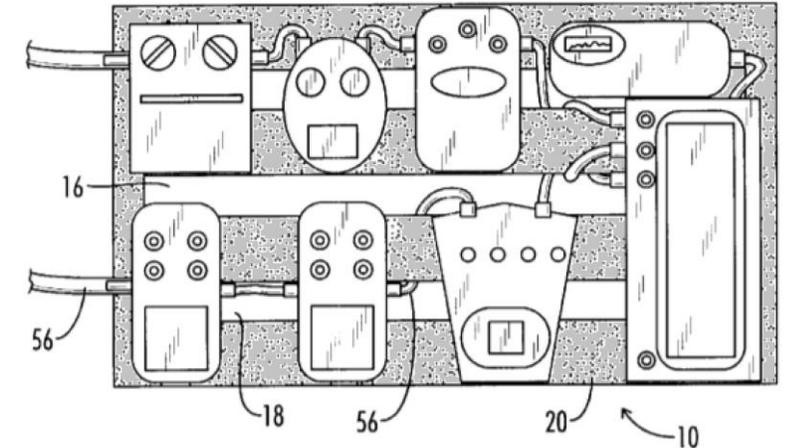


FIG. 12

March 31, 1970

J. H. MULLEN ET AL

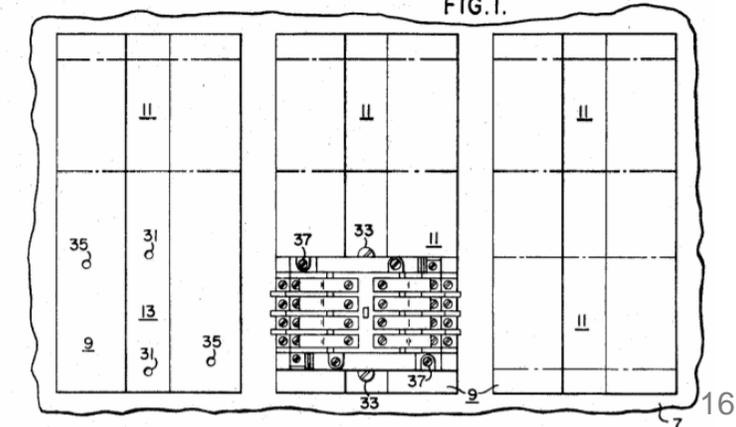
3,504,311

PLUG-IN RELAY AND SUPPORT THEREFOR

Filed April 14, 1967

5 Sheets-Sheet 1

FIG. 1.



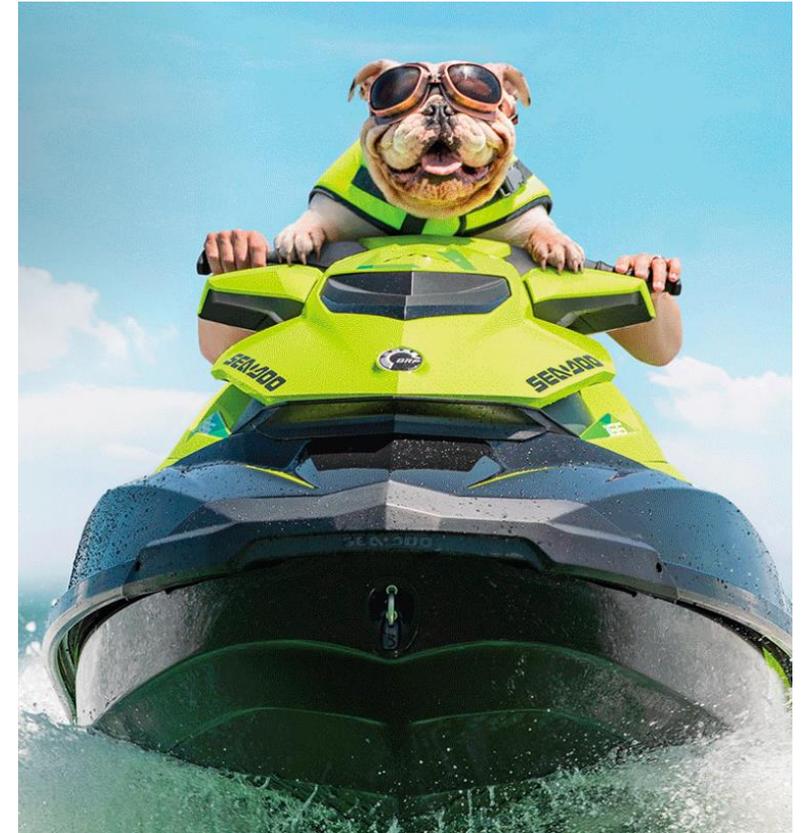


Patent Marking



Federal Circuit: Arctic Cat Inc. v. Bombardier Recreational (February 2020)

- “[T]he issue presented is whether the cessation of sale of unmarked products excuses noncompliance with the notice requirement of § 287 such that a patentee may recover damages for the period after sales of unmarked products ceased but before the filing of a suit for infringement. We hold that it does not.”
- “[T]o begin recovering damages after sales of unmarked products have begun, § 287 requires that a patentee either begin marking its products or provide actual notice to an alleged infringer; cessation of sales of unmarked products is not enough.”





Lost Profits



Federal Circuit: GlaxoSmithKline LLC v. Teva Pharmaceuticals USA, Inc. (October 2020)

- Held that the availability of other alternative products on the market did not negate a recovery of lost profits where all of the alternatives were themselves infringing.
- “[A] lost profits analysis must be based on a world in which infringement of the asserted patent does not exist, and therefore it does not allow for infringing alternatives to be available in the hypothetical ‘but for’ world.”



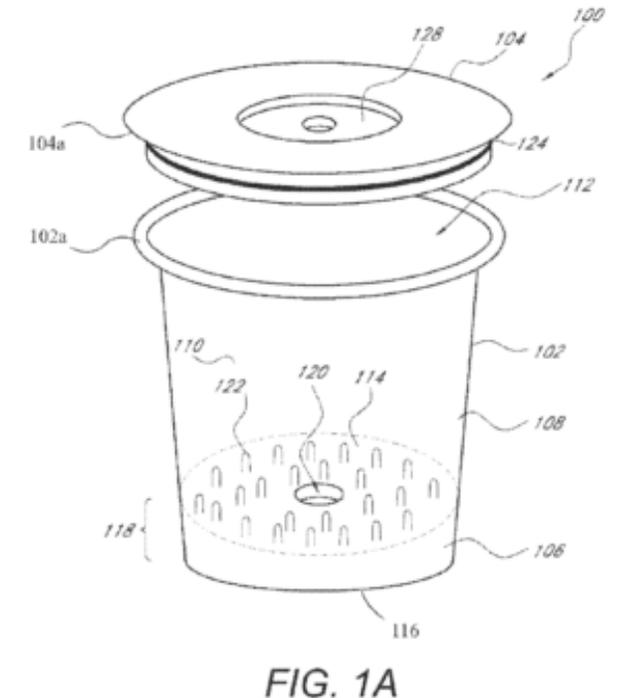
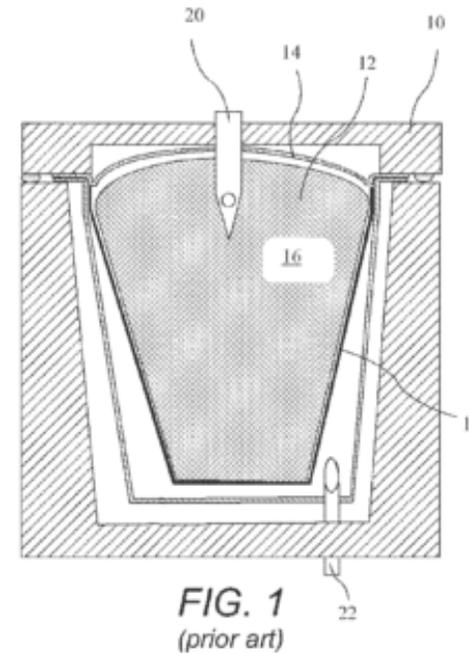


Willful Infringement



Federal Circuit: Eko Brands, LLC v. Adrian Rivera Maynez Enterprises, Inc. (January 2020)

- “Under *Halo*, the concept of ‘willfulness’ requires a jury to find no more the deliberate or intentional infringement.”
- Because the question of enhanced damages is addressed by the court after the affirmative finding of willfulness has been made, “[q]uestions of whether an accused patent infringer’s conduct was ‘egregious behavior’ or ‘worthy of punishment’ are therefore not appropriate for jury consideration.”





*Application of Discretion in
PTAB Institution Decisions*



PTAB: Apple v. Fintiv (May 2000)

- Made precedential six factors in deciding whether to exercise discretionary institution or denial:
 - Whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
 - Proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision; Investment in the parallel proceeding by the court and the parties;
 - Overlap between issues raised in the petition and in the parallel proceeding;
 - Whether the petitioner and the defendant in the parallel proceeding are the same party; and
 - Other circumstances that impact the Board’s exercise of discretion, including the merits.
- “These factors relate to whether efficiency, fairness, and the merits support the exercise of authority to deny institution in view of an earlier trial date in the parallel proceeding. . . . [I]n evaluating the factors, the Board takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.”



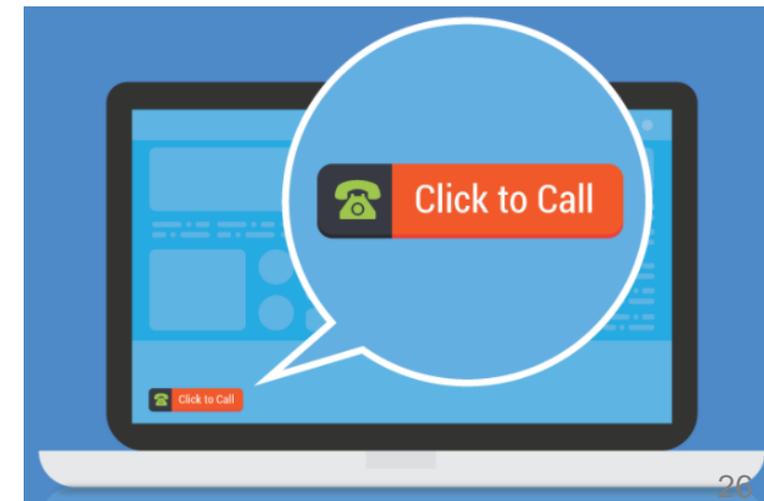


*Appealability of PTAB
Institution Decisions*



Supreme Court: Thryv, Inc. v. Click-to-Call Technologies LLP (April 2020)

- Held that judicial review is unavailable for matters “closely tied” to the decision to institute IPR, such as a time-bar challenge.
- “Section 315(b)’s time limitation is integral to, indeed a condition on, institution. After all, §315(b) sets forth a circumstance in which ‘[a]n inter partes review may not be instituted.’”
- “Because §315(b) expressly governs institution and nothing more, a contention that a petition falls under §315(b) is a contention that the agency should have refused ‘to institute an inter partes review.’” §314(d). A challenge to a petition’s timeliness under §315(b) thus raises ‘an ordinary dispute about the application of’ an institution related statute. In this case as in *Cuozzo*, therefore, §314(d) overcomes the presumption favoring judicial review.”
- Justice Gorsuch’s Dissent: “It might be one thing if Congress clearly ordained this strange result. But it did not. The relevant statute, the presumption of judicial review, and our precedent all point toward allowing, not forbidding, inventors their day in court. Yet, the Court brushes past these warning signs and, in the process, carries us another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights and liberties to bureaucratic mercy.”





Appointments Clause

 ***Federal Circuit: Arthrex, Inc. v. Smith & Nephew, Inc.***
(March 2020)

- In a per curiam decision, the Federal Circuit denied petitions for panel rehearing and rehearing en banc, with three separately-filed concurrences, one concurrence in part and dissent in part, and two dissents.
- In October, the Supreme Court granted the petition for certiorari, and the appeal has been set for argument on March 1, 2021.
- The issues presented are the following: “(1) Whether, for purposes of the Constitution’s appointments clause, administrative patent judges of the U.S. Patent and Trademark Office are principal officers who must be appointed by the president with the Senate’s advice and consent, or “inferior Officers” whose appointment Congress has permissibly vested in a department head; and (2) whether, if administrative patent judges are principal offices, the court of appeals properly cured any appointments clause defect in the current statutory scheme prospectively by severing the application of 5 U.S.C. § 7513(a) to those judges.”





*Important 2020 Trade Secret
Decisions*



Ninth Circuit: Intelliclear, LLC v. ETC Global Holdings (October 2020)

- Held that the federal Defend Trade Secrets Act (DTSA) requires trade secret plaintiffs to identify a trade secret with “sufficient particularity” before discovery begins.
- “Plaintiffs must ‘clearly refer to tangible trade secret material’ instead of referring to a ‘system which *potentially* qualifies for trade secret protection. Plaintiffs may not simply rely upon ‘catchall’ phrases or identify categories of trade secrets they intend it to pursue at trial. It is inadequate for plaintiffs to ‘cite and incorporate by reference hundreds of documents that purportedly reference or reflect the trade secret information.’”
- “Identifying trade secrets with sufficient particularity is important because defendants need ‘concrete identification’ to prepare a rebuttal. Courts and juries also require precision because, especially where a trade secrets claim ‘involves a sophisticated and highly complex’ system, the district court or trier of fact will not have the requisite expertise to define what the plaintiffs leaves abstract.”



Ninth Circuit: Attia v. Google, LLC (December 2020)

- Held as an apparent matter of first impression that the federal Defend Trade Secrets Act (DTSA) applies to misappropriations that occurred before the enactment of the DTSA provided that the acts of misappropriation continued to occur post-enactment.
- “If Congress had intended to preclude claims arising from post-enactment continued use that began prior to enactment, it could have done so by incorporating the language in section 11 of the UTSA [Uniform Trade Secret Act] into the DTSA. That it did not include such a provision in the DTSA evinces congressional intent for the statute to apply also to post-enactment misappropriation that began prior to enactment.”





Federal Circuit: Intellisoft Ltd. v. Acer Am. Corp. (April 2020)

- Where trade secret claim did not “necessarily depend[] on resolution of a substantial question of federal patent law,” the district court lacked jurisdiction under 28 U.S.C. §1 338(a) and the state law claims could not be removed to federal court under 28 U.S.C. § 1441.
- “[A] plaintiff’s reliance on a patent as evidence to support its state law claims does not necessarily require resolution of a substantial patent question.”

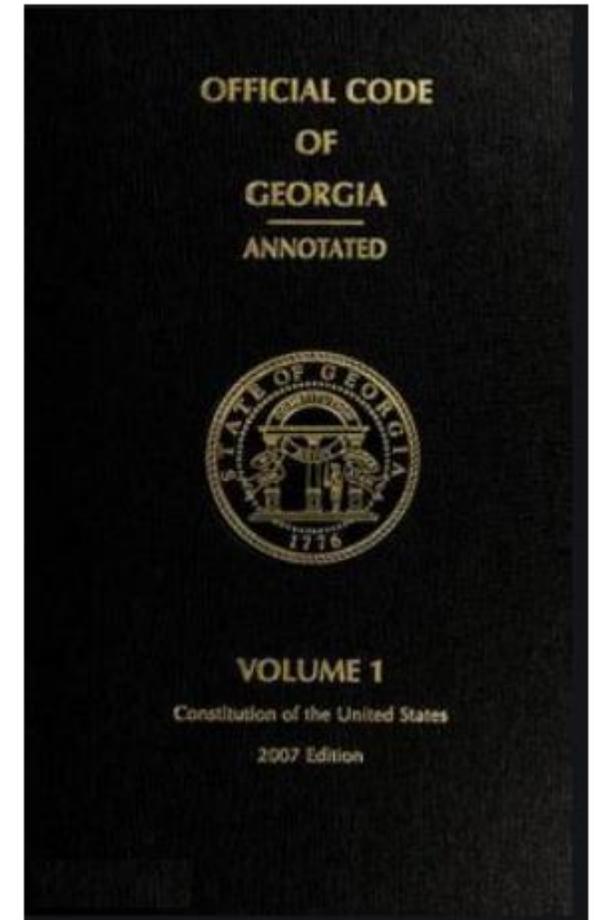
					US005410713A
	United States Patent [19]		[11] Patent Number:		5,410,713
	White et al.		[45] Date of Patent:		Apr. 25, 1995
[54]	POWER-MANAGEMENT SYSTEM FOR A COMPUTER		5,220,671	6/1993	Yamagishi 395/750
			5,230,074	7/1993	Canova et al. 395/750
			5,237,692	8/1993	Raasch et al. 395/750
[75]	Inventors: Dave White; Yen W. Lee; Rod Ang, all of San Jose, Calif.; Ray Barbieri, Campbell, Calif.; James Chen, Taipei, Taiwan, Prov. of China; Suh C. Lee, Palo Alto, Calif.		<i>Primary Examiner</i> —Allen R. MacDonald <i>Assistant Examiner</i> —George Davis <i>Attorney, Agent, or Firm</i> —Townsend and Townsend Khourie and Crew		
[73]	Assignee: Smith Corona/Acer, New Canaan, Conn.		[57]	ABSTRACT	
[21]	Appl. No.: 816,108		A power management system for a personal computer comprises a power management processor, a switchable power supply and a keep alive power supply. The processor is powered by the keep alive power supply that		
[22]	Filed: Jan. 2, 1992				



*Important 2020 Copyright
Decisions*

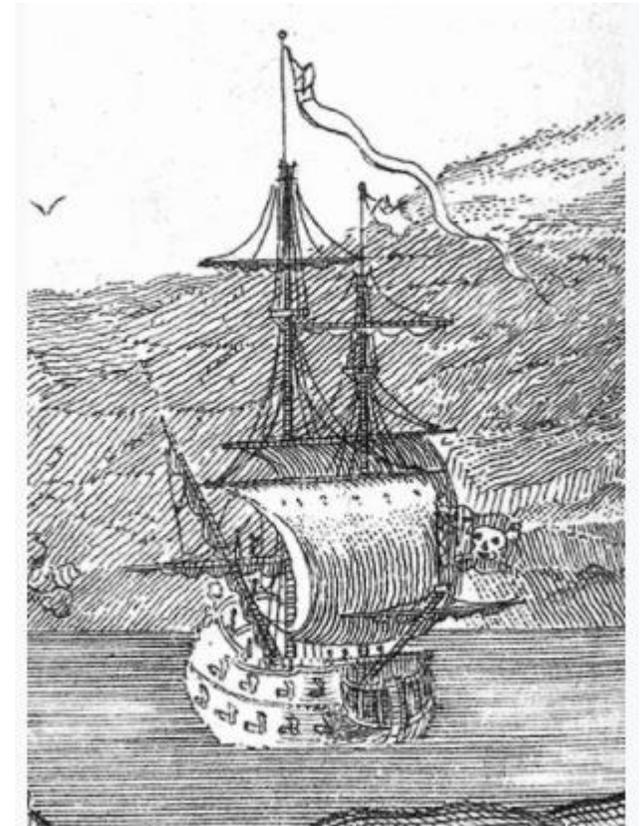
U.S. Supreme Court: *Georgia v. Public.Resource.Org Inc.* (April 2020)

- Held that copyright protection does not extend to the annotations contained in Georgia’s official annotated code.
- “Under what has been dubbed the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties.”
- “Under the government edicts doctrine, judges—and, we now confirm, legislators—may not be considered the ‘authors’ of the works they produce in the course of their official duties as judges and legislators. That rule applies regardless of whether a given material carries the force of law. And it applies to the annotations here because they are authored by an arm of the legislature in the course of its official duties.”



U.S. Supreme Court: *Allen v. Cooper* (March 2020)

- Held that state governments cannot be sued for copyright infringement because of state sovereign immunity.
- Struck down the Copyright Remedy Clarification Act of 1990, which purported to remove the states' sovereign immunity in copyright infringement cases.
- “[T]he power to ‘secur[e]’ an intellectual property owner’s ‘exclusive Right’ under Article I stops when it runs into sovereign immunity.”
- “[T]he evidence of Fourteenth Amendment injury supporting the CRCA and the Patent Remedy Act is equivalent—for both, that is, exceedingly slight. And the scope of the two statutes is identical—extending to every infringement case against a State. It follows that the balance the laws strike between constitutional wrong and statutory remedy is correspondingly askew.”



Queen Anne's Revenge

Ninth Circuit: *Alfred v. The Walt Disney Company* (July 2020)

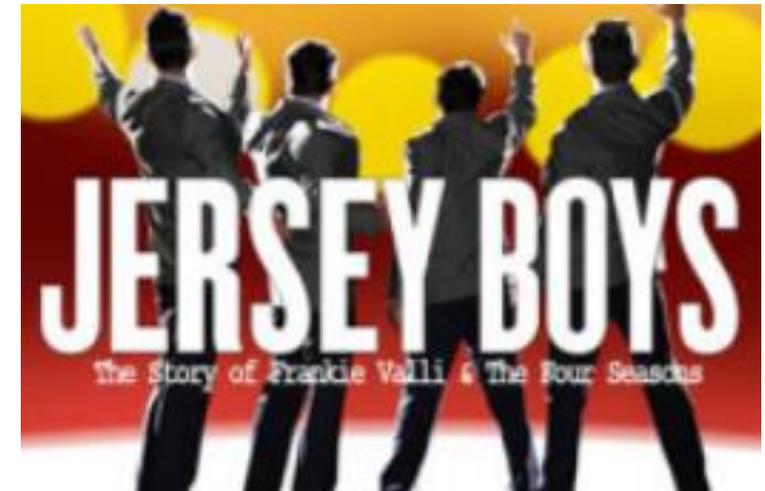
- Reversed decision granting motion to dismiss copyright infringement claim: “[E]ven when individual elements are not protected—their “[o]riginal selection, coordination, and arrangement . . . may be protectible expression.”
- “We agree with Plaintiffs that the screenplay shares sufficient similarities with the film to survive a motion to dismiss. *The Pirates of the Caribbean: Curse of the Black Pearl* film and the screenplay both begin with a prologue that takes place ten years prior to the main story; introduce the main characters during a battle, at gunpoint; involve treasure stories that take place on islands and in jewel-filled caves; include past stories of betrayal by a former first mate; contain fearful moments driven by skeleton crews; focus on the redemption of a young, rogue pirate, and share some similarities in dialogue and tone. To be sure, there are striking differences between the two works, as well—but the selection and arrangement of the similarities between them is more than de minimis.”





Ninth Circuit: *Donna Corbello v. Thomas Gaetano DeVito* (September 2020)

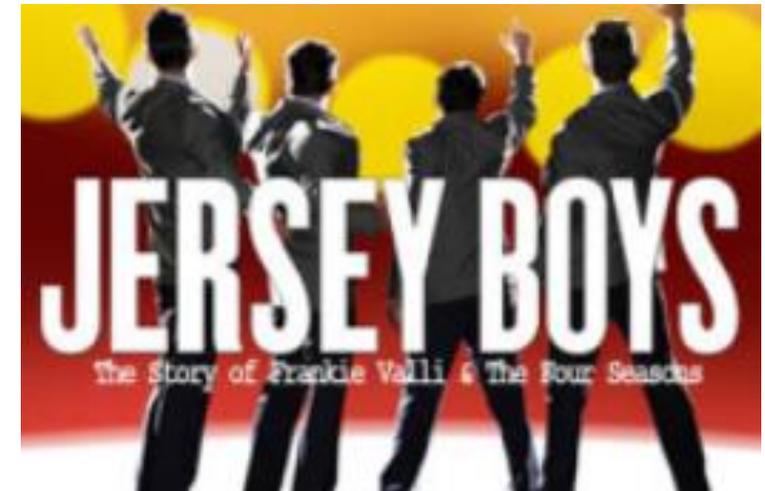
- Affirmed district court judgment after a jury trial that the musical *Jersey Boys* did not infringe plaintiff’s copyright in an autobiography of Four Seasons bandmember Tommy DeVito.
- Found that the similarities between the autobiography and the musical were “based on historical facts, common phrases and scenes-a-faire (scenes that are indispensable, or at least standard, in the treatment of a given idea’), or elements that were treated as facts in the Work and are thus unprotected by copyright, even though now challenged as fictional.”





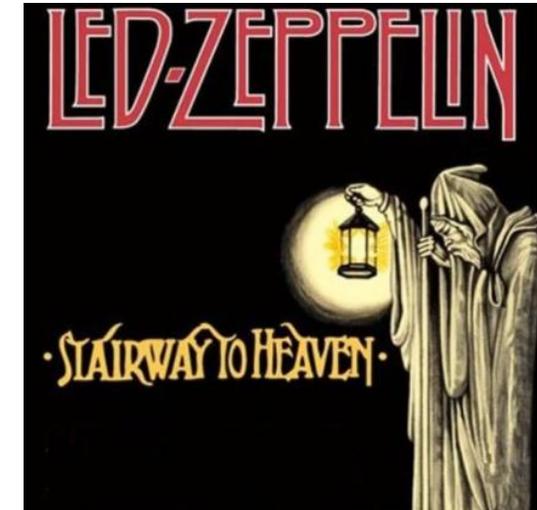
Ninth Circuit: *Donna Corbello v. Thomas Gaetano DeVito* (September 2020), *cont'd*

- Announced an “asserted truths” doctrine--similar to what other circuits call “copyright estoppel”--under which “elements of a work presented as fact are treated as fact, even if the party claiming infringement contends that the elements are actually fictional. An author who holds their work out as nonfiction thus cannot later claim, in litigation, that aspects of the work were actually made up and so are entitled to full copyright protection.”



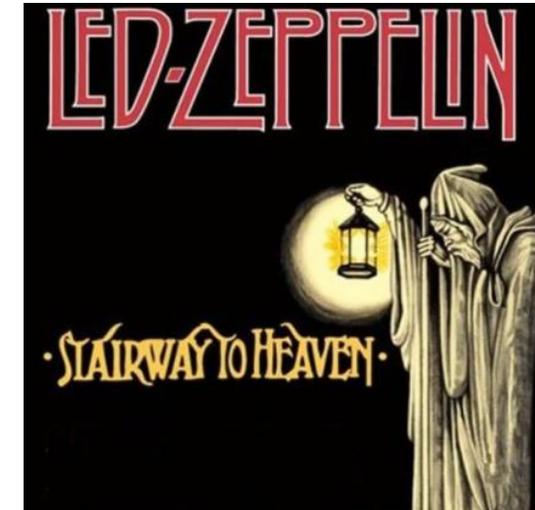
Ninth Circuit (*en banc*): *Michael Skidmore v. Led Zeppelin* (March 2020)

- Affirmed district court’s judgment after a jury trial that the opening notes of *Stairway to Heaven* did not infringe *Taurus*, a song performed by the band Spirit and written by guitarist Randy Wolfe.
- Abrogated “inverse ratio rule,” siding with Second, Fifth, Seventh and Eleventh Circuits: “Because the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary.”



Ninth Circuit (*en banc*): *Michael Skidmore v. Led Zeppelin* (March 2020), *cont'd*

- Approved of a jury instruction that copyright “does not protect ideas, themes or common musical elements, such as descending chromatic scales, arpeggios or short sequences of three notes.”
- Emphasized that while copyright has a “low bar for originality,” “copyright does not protect every aspect of a work: ideas, concepts, and common elements are excluded. Nor does copyright extend to ‘common or trite’ musical elements, or ‘commonplace elements that are firmly rooted in the genre’s tradition. These building blocks belong in the public domain and cannot be exclusively appropriated by any particular author.”

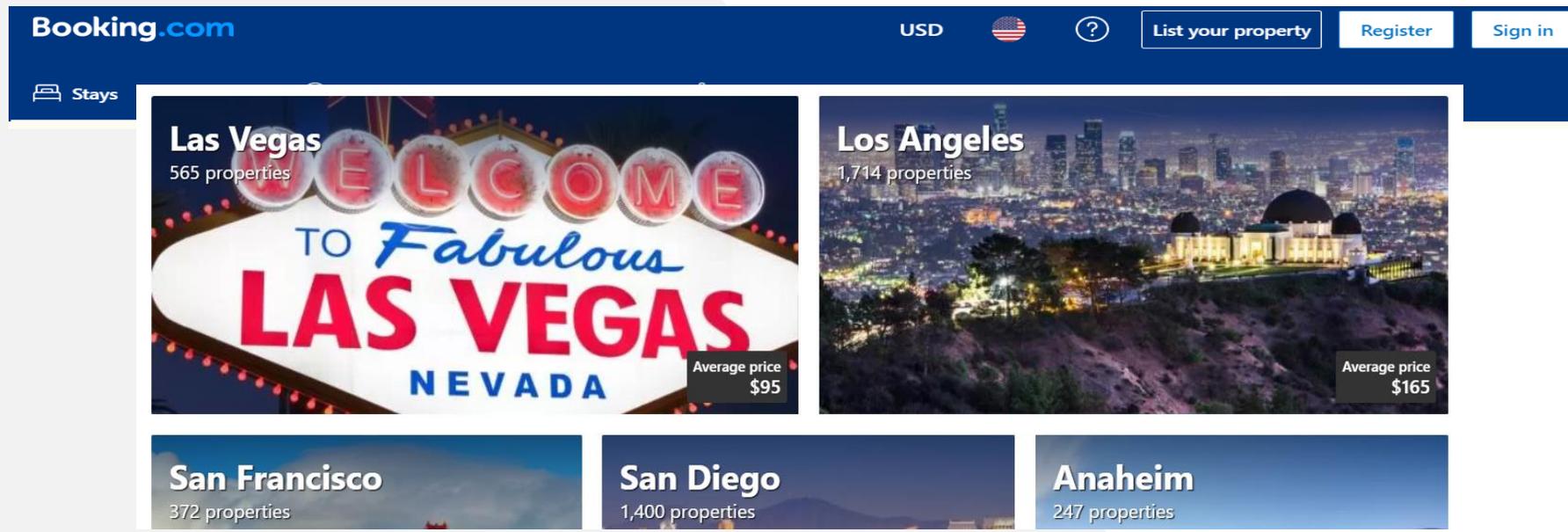




*Important 2020 Trademark
Decisions*

U.S. Supreme Court: *U.S. Patent and Trademark Office v. Booking.com* (June 2020)

- Adding a generic top-level domain (e.g., .com) to another generic term (e.g., booking) may result in a non-generic mark that is eligible to be registered as a trademark.
- “Whether any given ‘generic.com’ term is generic, we hold, depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.”



 **U.S. Supreme Court: *Romag Fasteners, Inc. v. Fossil, Inc.* (April 2020)**

- Eliminated requirement to show willfulness to obtain disgorgement of infringer's profits under the Lanham Act
- May encourage more trademark owners to pursue litigation and may result in larger jury awards



Ninth Circuit: *VIP Products LLC v. Jack Daniel's Properties Inc.* (March 2020)

- In determining whether a work is expressive, the court analyzes whether the work is communicating ideas or expressing points of view. A work need not be “equally expressive of *Anna Karenina* or *Citizen Kane*” to satisfy this test.
- “[T]he Bad Spaniels dog toy, although surely not the equivalent of the *Mona Lisa*, is an expressive work. The toy communicates a ‘humorous message,’ using word play to alter the serious phrase that appears on a Jack Daniel’s bottle—‘Old No. 7 Brand’—with a silly message—‘The Old No. 2.’”





Second Circuit: *Tiffany & Co. v. Costco Wholesale Corp.* (August 2020)

- Vacated a grant of summary judgment and held that Costco’s use of “Tiffany” on signage for rings could be found to be merely descriptive and within the bounds of fair use
- “A reasonable jury could conclude that Costco did not intend to mislead its customers and that signs bearing the word ‘Tiffany’ were the product of a good-faith attempt to communicate to its customers the setting style of certain rings that it sold.”
- “There is nothing inherently absurd about a single word’s being both a source identifier and a descriptive term within the same product class.”



Federal Circuit: *In re: Forney Industries, Inc.* (April 2020)

- Held that a multi-color product packaging mark can be source identifying and therefore may be eligible for trademark registration
- Rejected Trademark Trial and Appeal Board's requirement that proof of acquired distinctiveness was needed for a multi-color mark to be registered
- “[W]e hold that color marks can be inherently distinctive when used on product packaging, depending upon the character of the color design.”



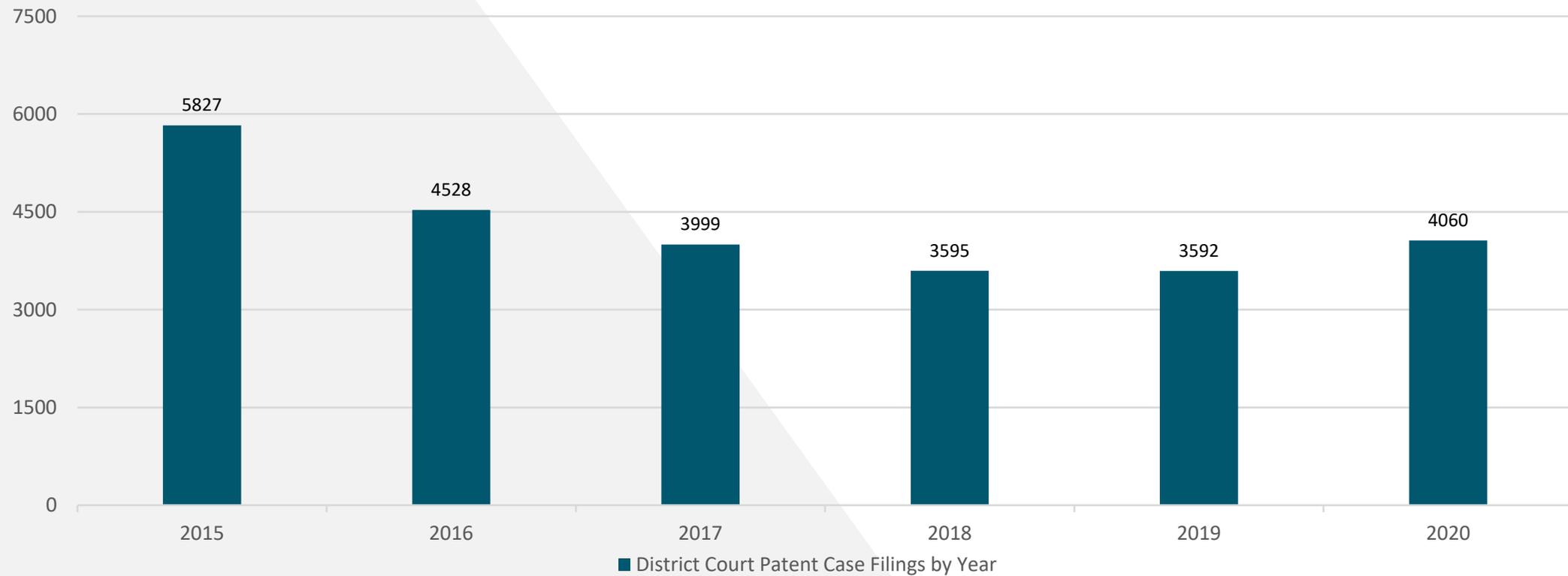


*Significant Trends In IP
Litigation*



Trend 1

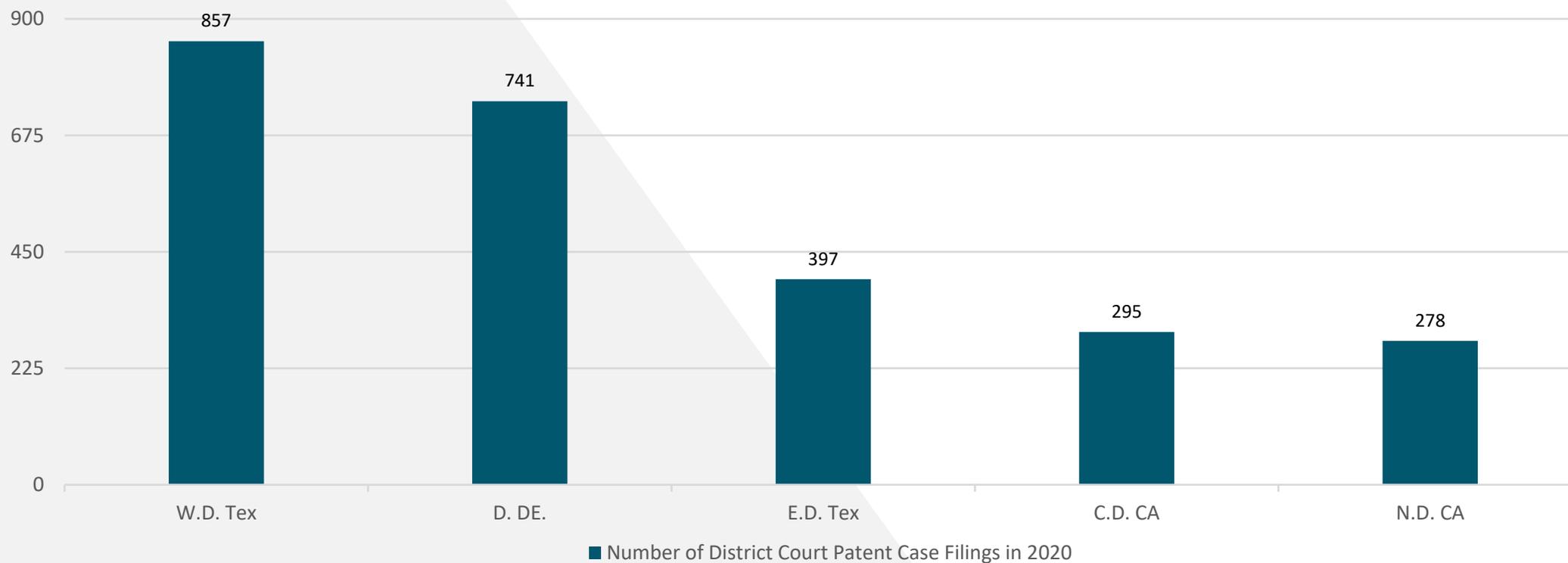
Patent Litigation Increased In 2020





Trend 2

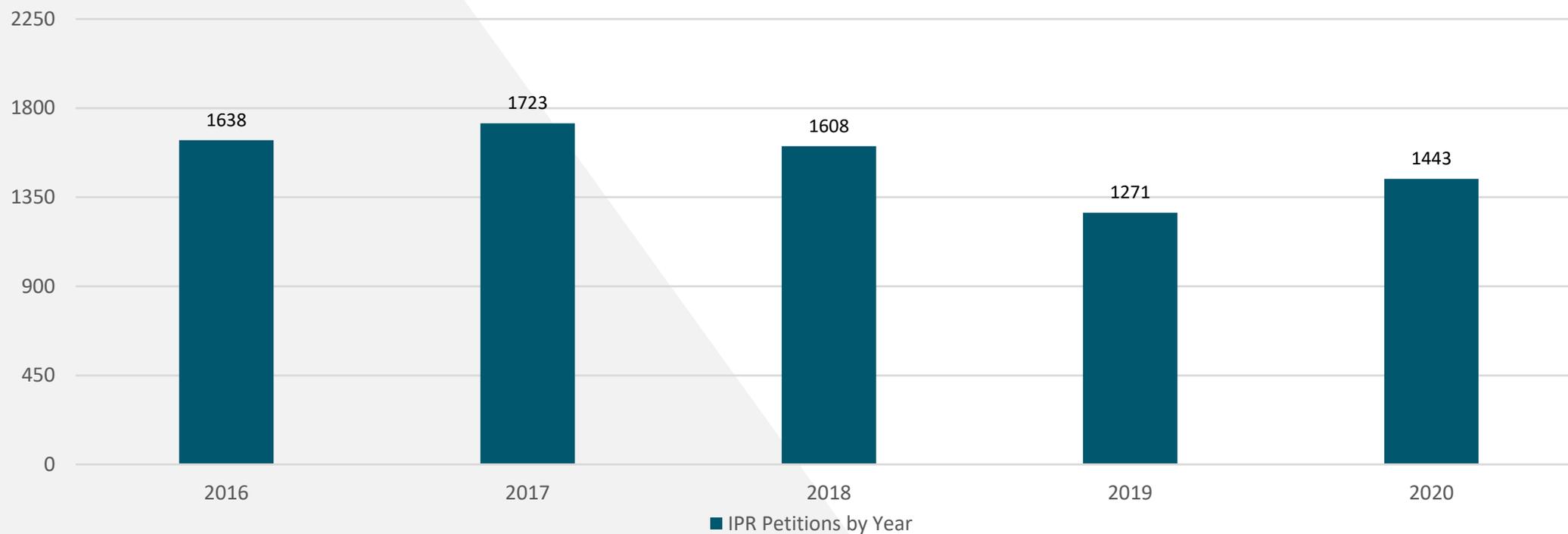
The Concentration of Patent Cases In Five Venues Continued:
Five Districts Accounted for 62% of Patent Filings in U.S.





Trend 3

IPR Petitions Rose, Reversing a Trend





Trend 4

- Continued decline in success rate for institution of IPRs
 - Rate of discretionary denials increased more than 60% in 2020
 - 12.5% of institution decisions were procedural denied in 2019
 - jumped to 20% in 2020



Trend 5

- The Appealability of PTAB Decisions to Institute or Not Institute IPR Remained a Focus
 - *Thryvv Inc. v. Click-to-Call Technologies LP*, 140 S. Ct. 1367 (2020)
 - *Facebook, Inc. v. Windy City Innovations, LLC*, 953 F.3d 1313 (Fed. Cir. 2020)



Trend 6

- The Supreme Court continues to tackle patent law issues:
 - *Minerva Surgical v. Hologic*: Whether a defendant in a patent infringement action who assigned the patent, or is in privity with an assignor of the patent, may have a defense of invalidity heard on the merits (doctrine of assignor estoppel)
 - *U.S. v. Arthrex*
 - Multiple pending petitions



Trend 7

- Copyright actions addressing software issues arising out of the outcome from the Supreme Court's decision in *Google v. Oracle*
 - Argued October 7, 2020
 - Questions:
 - (1) Does copyright protection extend to a software interface?
 - (2) If so, does the petitioner's use of a software interface in the context of creating a new computer program constitute fair use?



Trend 8

- Use of copyright, trademark, and other avenues to address “deepfakes”
 - Potential legal avenues:
 - Copyright
 - False light
 - Right of publicity
 - Defamation
 - Intentional infliction of emotional distress



Source: <https://www.youtube.com/watch?v=cQ54GDm1eL0>



Questions?



Mark D. Selwyn

Partner and Co-Chair,
Intellectual Property Litigation
Practice Group

Mark.Selwyn@wilmerhale.com



James M. Dowd

Partner
WilmerHale

James.Dowd@wilmerhale.com



Sonal N. Mehta

Partner
WilmerHale

Sonal.Mehta@wilmerhale.com



Key WilmerHale Contacts



Mark D. Selwyn

Partner, Palo Alto

Mark is co-chair of the firm's Intellectual Property Litigation Practice Group and a member of the firm's Management Committee. He has spent the last decade leading some of the most closely watched and influential patent cases involving California's most prominent technology companies. Mark also has special expertise in multidisciplinary and multijurisdictional intellectual property disputes, including leading and coordinating parallel cases spanning the United States, Europe and Asia. Mark has been named 11 times by the *Daily Journal* as one of the top IP litigators in California and named a 2019 California Trailblazer by *The Recorder*. He also received a Burton Award for excellence in legal writing in 2017.



Ranked for IP: Patent – California
Chambers USA

2005 – 2021



James M. Dowd

Partner, Los Angeles

Jim focuses his practice on patent litigation and strategy and has tried many high-stakes cases, including trials involving billion-dollar stakes, and argued important appeals for leading technology companies. He has represented a broad range of clients, including in jury and bench trials and appeals, and he has extensive experience before the ITC, handling more than a dozen cases for high-profile clients such as Broadcom, Chamberlain, Apple, MediaTek and STMicroelectronics, among others. His experience spans such diverse technologies as semiconductor manufacturing, integrated circuit design, telecommunications, software, medical devices and biological products.



Leading Lawyer in California Litigation
Managing IP

2021



Sonal N. Mehta

Partner, Palo Alto

Sonal is a first-chair trial lawyer representing many of the world's leading tech companies in in high-stakes patent and technology disputes across a wide range of industries. She has served as lead counsel for Facebook, Microsoft, Twitter, Electronic Arts and others in general commercial and IP litigation matters. Her experience spans federal jury trials, state court jury and bench trials, evidentiary hearings before the ITC, and international arbitration panels and appeals before the Federal Circuit and California appellate courts. Sonal is also President of the Federal Circuit Bar Association and has been recognized in numerous publications, including *Chambers USA*, *Law360*, *Daily Journal*, *Managing IP* and *The Recorder*, among others.



San Francisco Attorney of the Year
Benchmark Litigation

2020