

Fed. Circ.'s 2017 Patent Decisions: A Statistical Analysis

By **Dan Bagatell**

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After each fiscal year end, the Federal Circuit publishes statistics summarizing where its cases came from, the court's throughput over the year, and its median times to disposition in cases from different sources.[1] The court even tantalizes court watchers (a bit) by providing reversal rates for each agency and for district courts as a whole.[2] But the court does not explain how it calculates its statistics, and the high level at which the court presents the data obscures the juicy details. So about a year ago I began tracking the disposition of every Federal Circuit decision involving patent law—over 450 cases in calendar year 2017. This article reports some of the more interesting findings.



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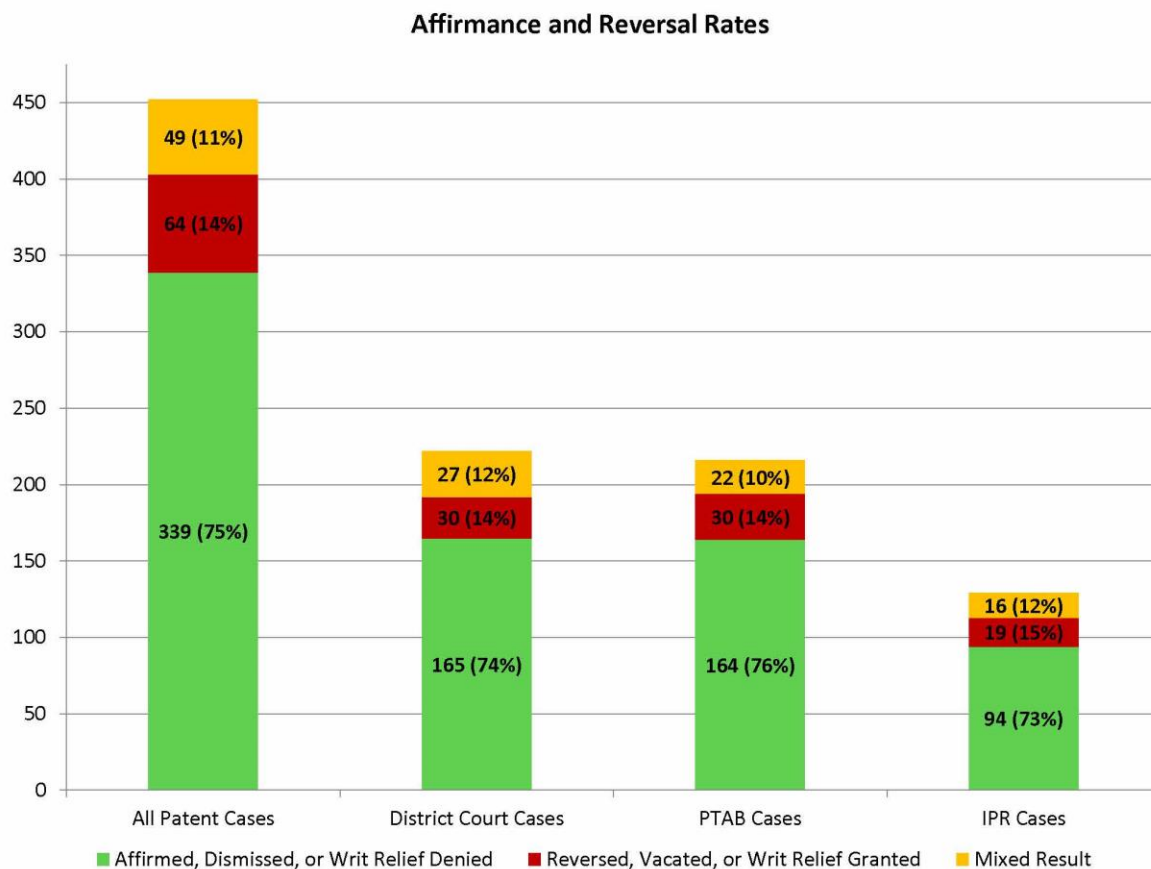
Methodology

For comparability to other data, I will briefly describe my methodology. In general, I took the cases as the court decided them. If the court resolved several companion cases in a single decision, I counted them as a single decision regardless of whether the cases were formally consolidated. Conversely, if the court decided three companion cases in three separate opinions, I counted them as three cases. I included all cases that the court decided on the merits, whether by precedential opinion, nonprecedential opinion, or summary disposition. I included petitions for writs of mandamus and dismissals for lack of appellate jurisdiction as well as true appeals, but I did not include cases that were dismissed or remanded based on settlement or a confession of error by the government. I included all decisions involving patent issues, regardless of whether they came from a district court, the Patent Trial and Appeal Board, the U.S. International Trade Commission or the Court of Federal Claims. But I excluded district court cases in which the only issues decided on appeal were nonpatent issues.

Overall Affirmance Rates

Historically, the Federal Circuit has reported “reversal” rates of about 10 to 15 percent — for example, 11 percent for district court cases and 12 percent for U.S. Patent and Trademark Office cases in the fiscal year that ended Sept. 30, 2017.[3] That figure seemed low because received wisdom among appellate lawyers is that courts of appeals affirm in about 80 percent of all appeals, and the Federal Circuit is frequently chastised for not deferring enough to district courts and agencies. I suspected that the court's number was understated because it was using total case terminations as the denominator rather than dispositions by judges (a significant difference because, according to the court's own statistics, about a

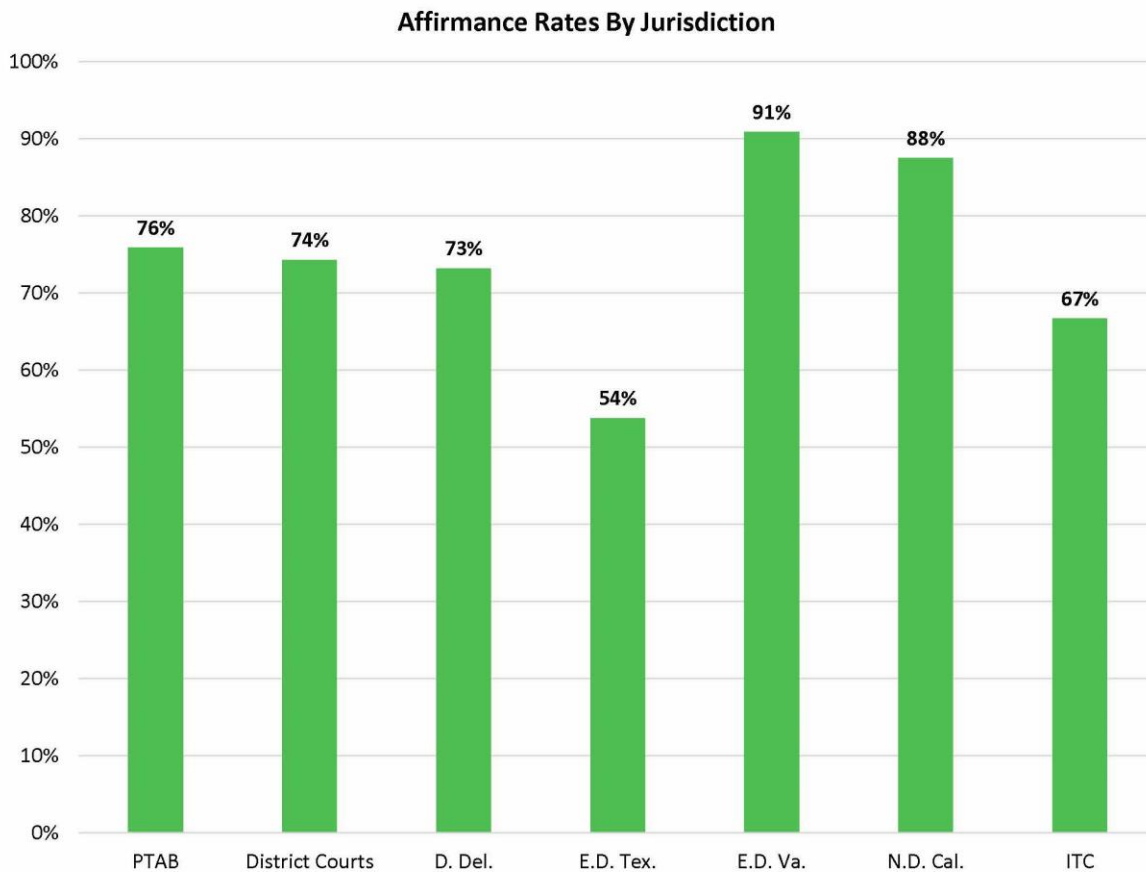
quarter of all appeals settle or are otherwise disposed of without an opinion). It also was unclear how the court was treating vacatur and mixed results (e.g., cases in which the court affirms in part, reverses in part, and remands).



In fact, the Federal Circuit’s reported numbers do understate how often the court overturns rulings by trial courts and agencies. The data for calendar year 2017 show an affirmance rate (including full affirmances, outright dismissals, and denials of all writ relief) of only 75 percent. The reversal/vacatur rate (including reversals, vacatur, and grants of writ relief) was 14 percent, and the mixed-result rate was 11 percent. Those numbers, moreover, varied considerably from quarter to quarter. The affirmance rate in 2017 Q1, for example, was 5 percent higher than in Q2, and both of those rates were much lower than the affirmance rate in 2016 Q4 of over 82 percent. The affirmance rate in 2017 Q4 was 73 percent, slightly below the annual average and still well below the level of the previous year. As discussed next, much of the decline appears due to the Federal Circuit’s rougher justice in PTAB cases last year.

Affirmance and Reversal/Vacatur Rates in Cases from Different Venues

PTAB cases accounted for about 48 percent of the Federal Circuit’s patent case load last year, and over half of those appeals arose out of inter partes reviews. By most accounts, the PTO has historically enjoyed affirmance rates of 85 percent or even higher, in part because of the lenient “substantial evidence” standard of review and in part due to the extremely high affirmance rate in appeals from ex parte prosecution cases. Those high affirmance rates persisted even in the early years of IPRs and other America Invents Act cases, despite disputes over proper construction of the statute and the PTAB’s rules implementing it.



But 2017 marked a dramatic turn for the worse for the PTO. The Federal Circuit’s affirmance rate for all PTAB cases fell to just 76 percent, and the affirmance rate in IPRs declined to just 73 percent. Even affirmance rates in ex parte prosecution and ex parte re-examination cases fell. As others have documented,[4] the Federal Circuit overturned PTAB decisions last year on a wide variety of substantive and procedural grounds — and it was an equal-opportunity reverser in that its rulings favored both patent owners and patent challengers.[5] The PTAB’s affirmance rate did tick back up to 79 percent overall (74 percent in IPR cases) in 2017 Q4, but it remains well below historical levels, which does not bode well for 2018. By comparison, the affirmance rate in 2016 Q4 was 86 percent for all PTAB decisions and an impressive 88 percent in IPR cases.

District court cases accounted for about 49 percent of the Federal Circuit’s patent-related docket in 2017. Overall, the Federal Circuit upheld district court decisions (i.e., affirmed, dismissed for lack of jurisdiction, or denied writ relief) 74 percent of the time. That number was slightly lower than the court’s average across all cases, but the discrepancy was small and largely due to a temporary uptick in early 2017 Q4 relating to the aftermath of the U.S. Supreme Court’s venue ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC*. [6]

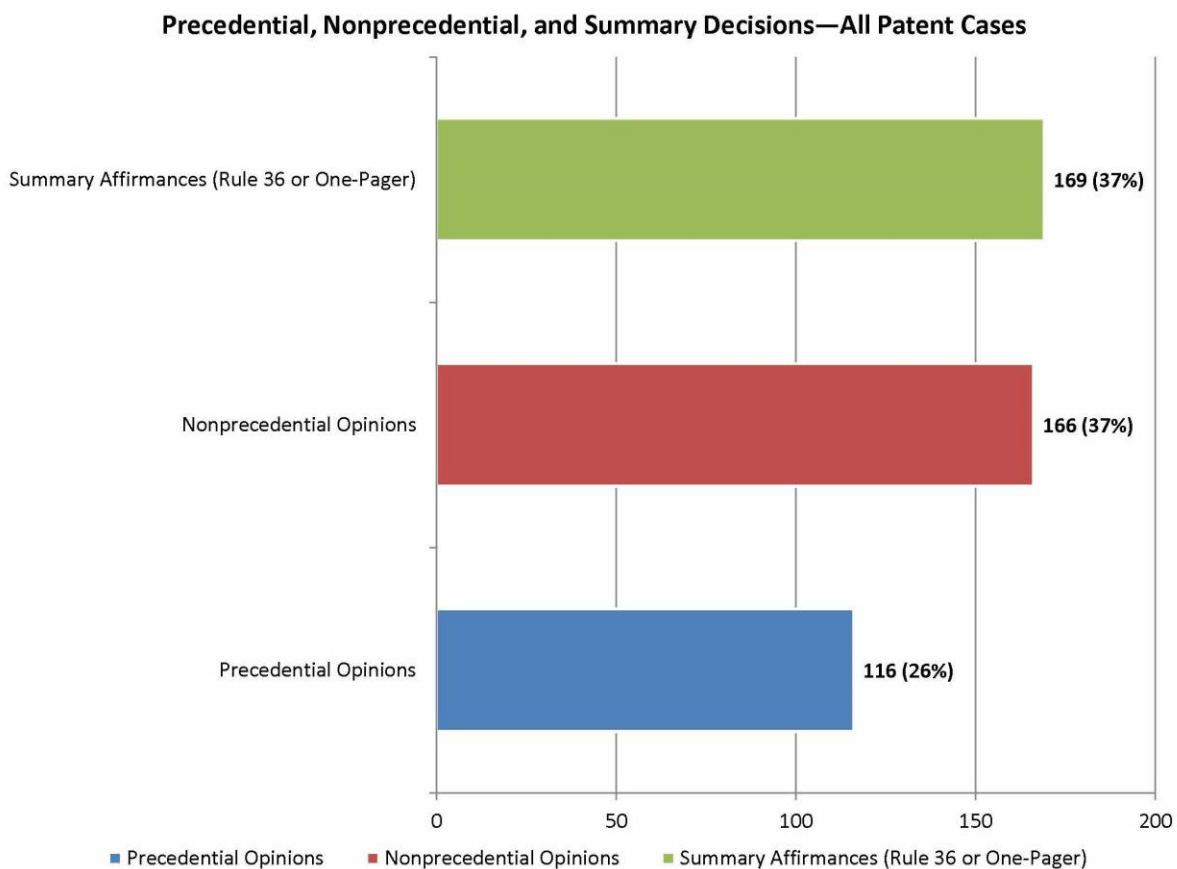
Notably, the 74 percent affirmance rate in district court cases rate was an average that masks a wide variation in the Federal Circuit’s views of which district courts were naughty and which were nice. The three most popular venues illustrate the wide variance. Judgments of the Northern District of California were fully affirmed in 21 of 24 cases, producing an affirmance rate of 88 percent. The District of

Delaware, by contrast, was close to average, with affirmances in 30 of 41 cases (73 percent) but a higher rate of reversals or vacatur than average (20 percent). The Eastern District of Texas lagged, with affirmances in only 14 of 26 cases (54 percent) and a reversal/vacatur rate of 27 percent. Of the other districts with at least ten decided appeals, the Eastern District of Virginia's achieved the best scorecard, with an affirmation rate in 10 of 11 cases (91 percent).

The remainder of the Federal Circuit's patent docket was split between the ITC and the Court of Federal Claims. The Federal Circuit affirmed the ITC in six of nine cases (67 percent), but the sample size in both jurisdictions was too small to draw strong inferences.

Precedential, Nonprecedential and Summary Dispositions

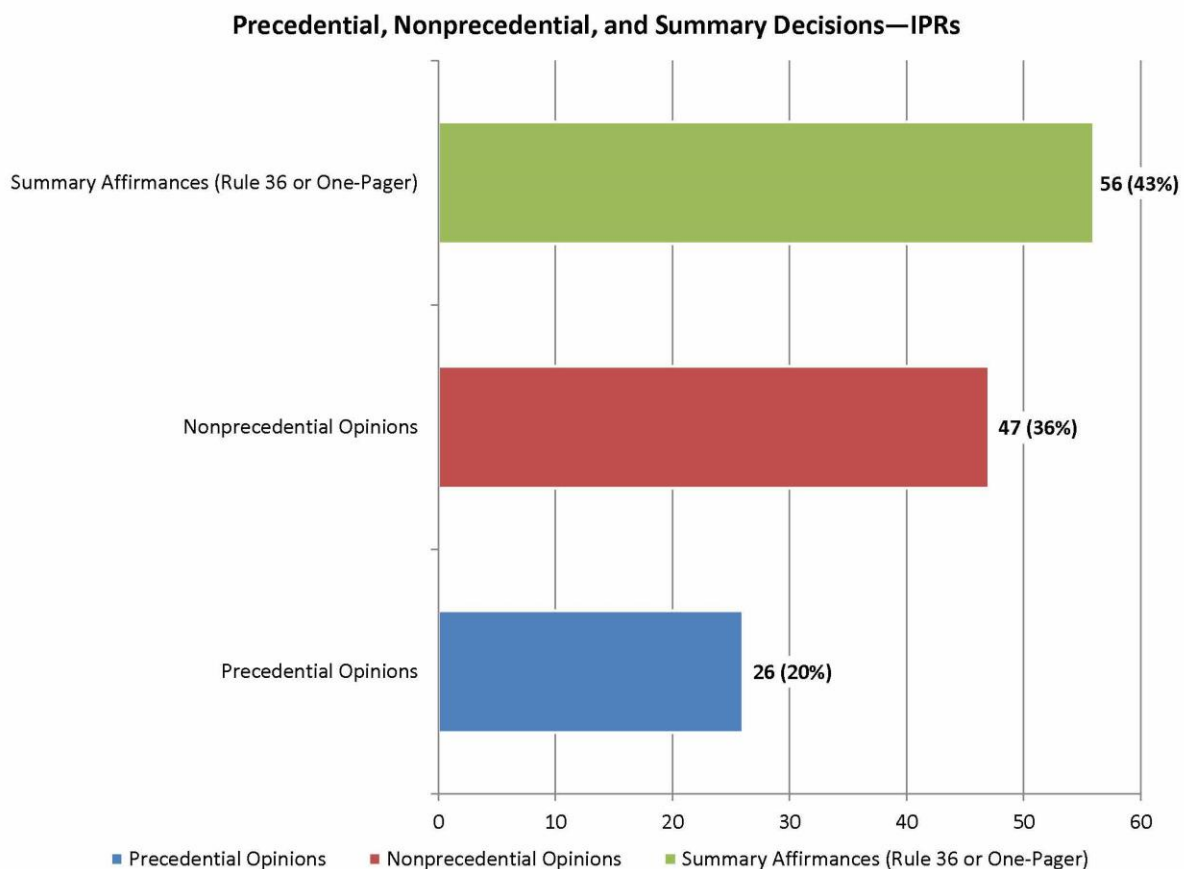
Many lawyers and academics have accused the Federal Circuit of overusing Federal Circuit Rule 36, a device by which the court provides its judgment ("AFFIRMED") with no rationale. In particular, commentators have questioned whether Rule 36 affirmances comply with the statute governing IPRs,[7] and several parties have filed petitions for certiorari asking the Supreme Court to halt the practice, although none of the petitions have been granted to date.[8] The court's defenders respond that the court has limited resources and that if it had to write opinions in every case (or even every PTAB case), it would have less time to write careful opinions in more significant cases and might revoke its practice of allowing oral argument in almost all counseled cases.[9]



The statistics for 2017 show that the court issued summary affirmances in 37 percent of its decisions,

compared to precedential opinions in 26 percent and nonprecedential opinions in 37 percent. (I define “summary affirmances” include not only single-word Rule 36 affirmances but also other one-page summary opinions, e.g., opinions affirming or dismissing on grounds that a concurrent or previous decision dictates the outcome or briefly stating that court affirms on ground A rather than ground B.)

Notably, the 37 percent annual summary disposition rate is well below the 49 percent summary disposition rate of 2016 Q4, which may have been a high-water mark, and the quarterly rates varied significantly. The numbers for the second and third quarters of 2017 were well below the annual average (down to 31 percent in 2017 Q3), but the number for Q4 rose to 39 percent. Some evidence suggests that the court was wary of issuing Rule 36 affirmances before the Supreme Court declined to review the practice: The summary affirmation rate in IPRs in 2017 Q2 and Q3 was just 28 percent, yet it jumped up to 50 percent in Q4.

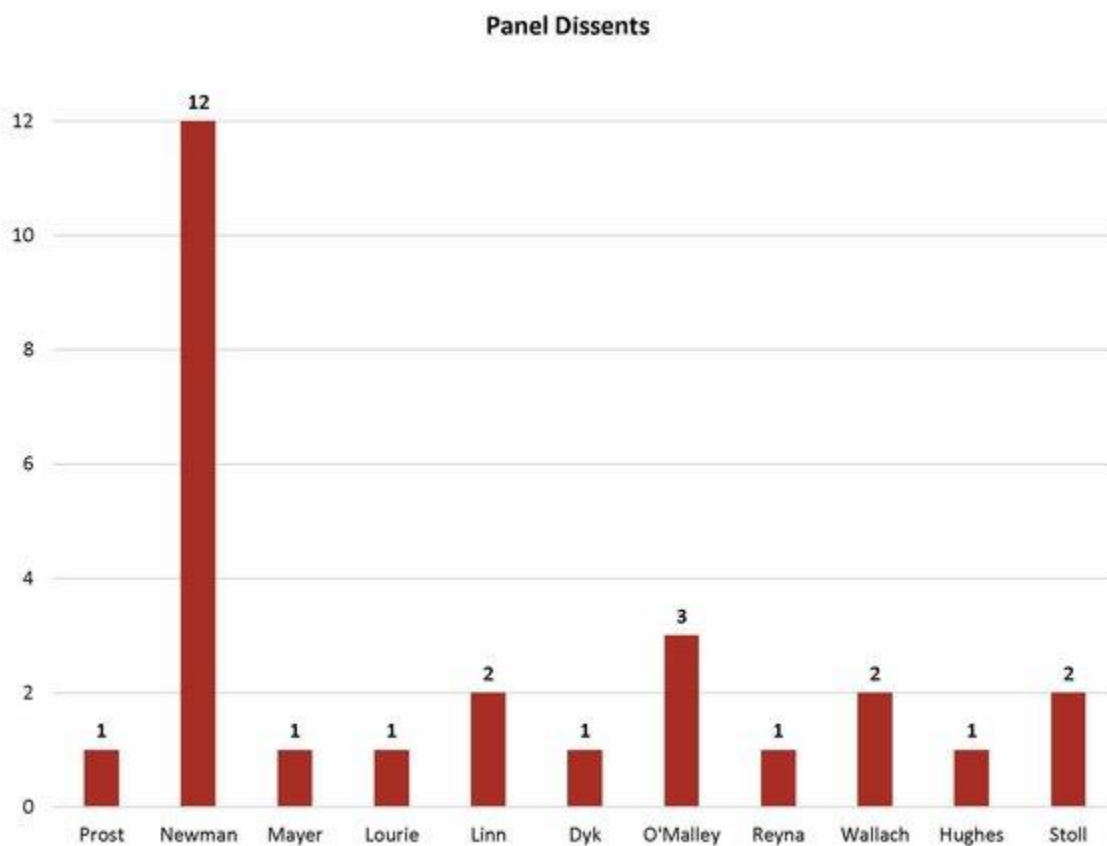


Although a summary affirmation rate of 37 percent may seem high, it is not terribly surprising given the criteria for summary affirmances and the nature of the Federal Circuit’s patent docket these days. Almost half of the Federal Circuit’s patent-related cases in calendar year 2017 came from the PTAB. Now that years of Supreme Court and Federal Circuit precedent have clarified procedural aspects of America Invents Act cases, most appeals from the PTAB involve fact-bound applications of settled law regarding anticipation or obviousness over prior art — classic candidates for summary affirmation when the Federal Circuit finds no error. District court cases account for almost all of the remaining patent docket, but many of those cases are now narrow appeals involving patent-eligibility or stipulated judgments of noninfringement based on claim construction. Now that the law on patent-eligibility and claim construction has stabilized somewhat, more cases are straightforward and fact-bound and thus

candidates for summary disposition.

Dissents and En Banc Decisions

Federal Circuit watchers often complain that the court is sharply divided on major patent law issues and that outcomes are accordingly panel-dependent. In fact, however, the Federal Circuit was unanimous in 422 of 452 cases in 2017, yielding a dissent rate of less than 7 percent.[10] Moreover, of the 30 dissents, a single judge (Judge Pauline Newman) wrote 12 and joined a 13th (a partial dissent in the en banc case of Aqua Products Inc. v. Matal[11] regarding burdens of proof on motions to amend claims in IPRs). The en banc court was closely divided in only two cases: Aqua Products, which produced a 5–4–2 split, and Secure Access LLC v. PNC Bank NA,[12] in which the court denied rehearing en banc by a 7–5 vote in a case addressing what cases are eligible for covered business method review.



The court decided only one patent case en banc in 2017 (Aqua Products) and it heard argument en banc in only one patent case in 2017 (Wi-Fi One LLC v. Broadcom Corp.,[13] regarding judicial review of the timeliness of IPR petitions and related privity issues). Those numbers are low compared to previous years. The prospect of more en banc reviews may be less palatable after the debacle in Aqua Products and reversals by the Supreme Court in two cases that the Federal Circuit thought it had resolved en banc (Impression Products Inc. v. Lexmark International Inc.[14] regarding exhaustion, and SCA Hygiene Products Aktiebolag v. First Quality Baby Products LLC[15] regarding laches).

Keeping Up With the Expanding Docket

Many observers have noted the dramatic expansion of the court's patent-related docket as a result of

IPRs, post-grant reviews, and covered business method reviews under America Invents Act. The size of the Federal Circuit remains fixed at 12 active judges, but with the help of its large complement of senior judges, the court has added additional calendar dates for several months of each of the last two years. That has made a dent in the docket, but the court nevertheless seems to be slipping further behind.

By the court's own account, the median time from docketing to disposition in district court appeals resolved by judges has increased by a full month (from 12.0 to 13.0 months) since fiscal year 2014, and by three months (10.0 to 13.0 months) in PTO appeals over the same period.[16] Moreover, the queue for oral argument, measured by the date of submission of the joint appendix to the date of oral argument and assuming no expedition or requests for delay by counsel, has grown from about three months before the America Invents Act to nearly six months currently. Although the court does not have a large backlog of argued but undisposed-of cases, the time to oral argument continues to increase.

It will be interesting to see whether the trends noted above will continue in 2018.

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[1] See U.S. Ct. of Appeals for the Fed. Cir., Statistics, <http://www.cafc.uscourts.gov/the-court/statistics> (last visited Dec. 31, 2017).

[2] See *id.*, Appeals Filed, Terminated, and Pending (Table B-8).

[3] *Id.*

[4] See, e.g., Michael Joffre et al., PTAB at 5: Part 3—Fed. Circ. Statistics, Law 360, <https://www.law360.com/articles/961586/ptab-at-5-part-3-fed-circ-statistics> (Sept. 13, 2017).

[5] See, e.g., *In re Van Os*, 844 F.3d 1359 (Fed. Cir. 2017) (failure to explain motivation to combine); *Personal Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987 (Fed. Cir. 2017) (same); *Rovalma, S.A. v. Böhler-Edelstahl GmbH*, 856 F.3d 1019 (Fed. Cir. 2017) (failure to explain understanding of a person of ordinary skill in the art and motivation to combine); *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034 (Fed. Cir. 2017) (failure to explain and support findings about multiple references); *EmeraChem Holdings, LLC v. Volkswagen Group of Am., Inc.*, 859 F.3d 1341 (Fed. Cir. 2017) (reliance on different reference); *Homeland Housewares, LLC v. Whirlpool Corp.*, 865 F.3d 1372 (Fed. Cir. 2017) (failure to construe key term); *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267 (Fed. Cir. 2017) (disregard of inconsistent testimony and failure to make record and explain ruling); *In re Smith Int'l, Inc.*, 871 F.3d 1375 (Fed. Cir. 2017) (unreasonably broad construction).

[6] 137 S. Ct. 1514 (2017). After *TC Heartland*, district courts were divided over whether the Supreme Court's decision marked a change in law such that defendants' failure to challenge venue waived their objection. In *In re Micron Technology, Inc.*, 875 F.3d 1091 (Fed. Cir. 2017), a mandamus case, the Federal Circuit held that *TC Heartland* was a change in law but that district courts could still find waiver on certain case-specific grounds. Following *In re Micron*, the Federal Circuit denied several similar

petitions for mandamus but encouraged the district courts to reconsider their rulings in view of *In re Micron*. I have treated those cases as mixed results, not affirmances, because of the invitations to reconsider and because the denials of writ relief were without prejudice to further mandamus petitions if the district courts continued to find waiver of the venue defense.

[7] See, e.g., Dennis David Crouch, *Wrongly Affirmed Without Opinion*, 52 Wake Forest L. Rev. 561 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909007.

[8] See *Leak Surveys, Inc. v. Flir Sys., Inc.*, 672 F. App'x 995 (Fed. Cir. Jan. 10, 2017), petition for cert. denied, 138 S. Ct. 325 (Oct. 10, 2017) (No. 17-194); *In re Shore*, 670 F. App'x 716 (Fed. Cir. Nov. 10, 2016), petition for cert denied, 137 S. Ct. 2197 (May 30, 2017) (No. 16-1240). At least two other petitions raising this issue remain pending.

[9] See, e.g., Matthew Dowd, *Banning Rule 36 Affirmances: Be Careful What You Ask For*, Law360, <https://www.law360.com/articles/956672/banning-rule-36-affirmances-be-careful-what-you-ask-for> (Aug. 25, 2017).

[10] This statistic does not include the dissents from denial of initial hearing en banc on the constitutionality of the IPR statute, an issue on which the Supreme Court later granted certiorari in *Oil States*. See *Cascades Projection LLC v. Epson Am., Inc.*, 864 F.3d 1309 (Fed. Cir. 2017).

[11] 872 F.3d 1290 (Fed. Cir. 2017) (en banc).

[12] 859 F.3d 998 (Fed. Cir. 2017).

[13] No. 15-1944 (argued May 4, 2017 and still pending).

[14] 137 S. Ct. 1523 (2017).

[15] 137 S. Ct. 954 (2017).

[16] U.S. Ct. of Appeals for the Fed. Cir., *Statistics, Median Disposition Time for Cases Terminated After Hearing or Submission*, <http://www.ca9.uscourts.gov/the-court/statistics> (last visited Dec. 31, 2017).