COPYRIGHT LAW AT THE FEDERAL CIRCUIT

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The Court of Appeals for the Federal Circuit is the nation's preeminent patent law court. But curiously, it sometimes decides important copyright law cases too. The primary way that copyright cases reach the Federal Circuit is when a copyright case from another circuit also includes a patent claim, since all appeals of patent claims go to the Federal Circuit. Yet by the time many of these copyright-patent cases reach the Federal Circuit, the patent claims are dead, and the appeal only concerns copyright law issues. Commentators have worried about the Federal Circuit's involvement in important copyright cases because of a perception that the court is biased in favor of rights holders, lacks copyright law expertise, and may create significant legal uncertainty with its copyright law decisions. These factors may also encourage copyright plaintiffs to forum shop their copyright appeals to the Federal Circuit by including a trivial patent claim in their case. Scholars have responded to these and related concerns by calling for greater scrutiny of the Federal Circuit's non-patent case law.

Despite these calls for action, we only have anecdotal accounts of the Federal Circuit's involvement in copyright law. In this Article, we take up the task of assessing the Federal Circuit's role in copyright law. As part of that assessment, we review all of the Federal Circuit's available copyright law opinions to learn more about the Court as a copyright law decision-maker. That review helps inform our analysis of the court's relative advantages and disadvantages as a copyright law court. Overall, we conclude that despite concerns about the court's involvement in important copyright law cases, the Federal Circuit is relatively well equipped to handle them. While the Federal Circuit may sometimes engage in copyright law mischief, its relative advantages outweigh its disadvantages and provide it with a stable foundation for a productive role in copyright law and policy going forward. However, the Federal Circuit's growing involvement with software copyright cases may change the calculus significantly if the court becomes the de facto "supreme court" of software copyright law appeals, because such a role may make the court more disposed to formalistic, error-prone decision-making in that sphere. That outcome, in turn, would undermine copyright's constitutional purpose of advancing societal progress.

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INTRODUCTION

In its recent *Google v. Oracle* decision, the U.S. Supreme Court addressed a key copyright doctrine – the law of fair use.[3] Importantly, *Google v. Oracle* concerned an appellate decision from the Court of Appeals for the Federal Circuit (the "Federal Circuit").[4] Granted, the Supreme Court regularly reviews cases from the Federal Circuit, particularly in recent years.[5] But typically those cases concern patent law, not copyright law.[6] After all, Congress instituted the Federal Circuit in late 1982 to help steer patent law in the right direction by hearing and deciding all appeals of patent law cases.[7] How, then, did an important copyright law decision land in the lap of the Federal Circuit–and ultimately, the Supreme Court?

For the most part, Congress did not structure the Federal Circuit's jurisdiction so that copyright law cases would naturally find their way to the court.[8] But copyright law cases can end up with the Federal Circuit if the underlying case involves, at some point in the litigation, a patent law claim.[9] In fact, this is precisely what happened in *Google v. Oracle*: Oracle's initial filing included a patent infringement claim, but that cause of

[3] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021).
[4] *Id.*
[5] Paul Gugliuzza, *How Much Has the Supreme Court Changed Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 330 (2017) (making this point).
[6] *Id.*
[7] R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1116 (2004) (noting that the Federal Circuit was meant to help "yield a clearer, more coherent, and more predictable patent doctrine, reduce or eliminate forum shopping, and at least rationalize – if not strengthen – the patent grant.").
[8] There is one important exception. Appeals of copyright cases originating in the Court of Federal Claims all go to the Federal Circuit. *Frequently Asked Questions*, U.S. CT. FED. CLAIMS, http://www.uscfc.uscourts.gov/faqs#Appeals.
[9] 28 U.S. Code § 1295(a)(1) (2011) (providing the jurisdiction of the Federal Circuit, which includes "an appeal from a final decision of a district court of the United States…in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents…").

action never made it past the case's initial stages.[10] Instead, the real issues in the case were always about copyright law.[11] But because of the early patent law claim, the case's appeal of copyright law issues went to the Federal Circuit.[12]

Should it have? Is the Federal Circuit, the nation's preeminent patent law court, well equipped to decide important copyright law questions? Does it do so often? And if so, how has the Federal Circuit fared? Observers have worried about the Federal Circuit's involvement in important copyright law disputes for a number of reasons. For starters, some have accused the Federal Circuit of being too cozy with the patent community, in ways that bias the Court in favor of intellectual property owners.[13] To the extent that the Federal Circuit harbors biases in favor of intellectual property owners, it could mean that the Federal Circuit also unfairly favors copyright owners in copyright law disputes.[14] Some claim, in fact, that this is precisely what happened in *Google v. Oracle*, with the Federal Circuit misconstruing the relevant law in favor of Oracle, the copyright owner.[15]

Furthermore, the Federal Circuit's expertise in patent law could affect its analysis of copyright law issues in ways that depart from copyright law's purposes. That is, the Federal Circuit's deep involvement with patent law may mean that it unavoidably views copyright issues through a patent-colored lens. But the two intellectual property regimes are distinct in doctrines and purposes, and those differences matter.[16] Patent law is meant to incentivize the development of inventive ideas.[17] To do so, patent law grants qualifying

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[10] *The Supreme Court's Decision in Google v. Oracle: Transformative Use of Popular Code Can Be 'Fair Use'*, ClearyGottlieb, https://www.clearygottlieb.com/news-and-insights/publication-listing/the-supreme-courts-decision-in-google-v-oracle (last visited Dec. 11, 2025) (indicating that the initial claim against Google included patent infringement allegations).

[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Timothy B. Lee, *After a Scandal at America's Patent Court, It's Time for Reform*, Vox (May 27, 2014), https://www.vox.com/2014/5/27/5753866/the-real-problem-with-the-federal-circuit ("the court as an institution does seem to have an unduly cozy relationship with the patent bar"); Adam B. Jaffe & Josh Lerner, Innovation and Its Discontents; How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do About It 105 (2004) (showing a dramatic rise in the number of appeals where a patent was found valid and infringed after the Federal Circuit took over nationwide appeals of patent cases).

[14] *See, e.g.*, Rochelle Cooper Dreyfuss, *Specialized Adjudication*, BYU L. Rev. 377, 380 (1990) (pointing to factors that may make the Federal Circuit prone to capture by intellectual property owners); Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 Geo. L.J. 1437, 1449 (2012) (summarizing arguments regarding why the Federal Circuit may be prone to capture by the patent bar).

[15] *See, e.g.*, Jonathan Band, *The Federal Circuit Blows It Again in Oracle v. Google*, Disruptive CompetitionProject(Mar.27,2018), https://www.project-disco.org/intellectual-property/032718-federal-circuit-blows-oracle-v-google/ (critiquing the Federal Circuit's application of Ninth Circuit law in favor of Oracle); Pamela Samuelson, *Three Fundamental Flaws in CAFC's* Oracle v. Google *Decision*, 37 Eur. Intell. Prop. Rev. 702, 702, 706-08 (2015) (critiquing the Federal Circuit's decision).

[16] Clark D. Asay, *Intellectual Property Law Hybridization*, U. Colo. L. Rev. 65, 67-68 (2016) (discussing those differences while arguing for adaptations from one to the other body of law to help serve each law's Constitutional purposes).

[17] *Id.*

inventors certain rights in those ideas.[18] Copyright law, on the other hand, aims to encourage the development of creative expression.[19] To achieve that end, copyright law excludes protection from ideas–no matter how creative they are–while providing rights to parties in their creative expression of ideas.[20] Both regimes are meant to improve society, but each goes about it in its own way.[21] Judges on the Federal Circuit steeped in patent law and ideology may often find it difficult to withhold protections in copyright cases that patent law readily grants.

These concerns become more pronounced when considering the possibilities of gamesmanship. A copyright owner who wishes their appeal of a copyright law issue to go before a favorable Federal Circuit may include a patent law claim in their suit–even an otherwise very weak claim–simply to ensure that any possible appeal does, in fact, go to the Federal Circuit. Even if the litigant is unsure about the Federal Circuit's stance on their copyright issue(s), the litigant may simply wish to avoid their home circuit. These possibilities become even more stark when considering that at least some of these litigants may have prior experience before the Federal Circuit as patent litigants. In fact, gamesmanship is pervasive throughout the federal court system, by both judges and litigants.[22] It would thus come as no special surprise if litigants gamed the system to get their copyright claims before the Federal Circuit, too.

A final concern is that the Federal Circuit's copyright law decisions may frequently muddy the waters of important circuit copyright case law. The Federal Circuit, when deciding copyright law issues, is to apply the law of the circuit from which the case originates.[23] Yet when it decides copyright cases in accordance with the relevant circuit's law, the Federal Circuit's decisions are not binding on the circuit from which the case comes.[24] This conundrum can leave parties affected by the decision in some doubt as to what the circuit's case law actually is, which is precisely what happened in the *Google v. Oracle* case before the Supreme Court stepped in.[25]

Because of these and related concerns, scholars have called for greater scrutiny of the Federal Circuit's case law outside of the patent law realm.[26] Despite those calls and the

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[18] *Id.*
[19] *Id*.
[20] *Id*.
[21] *Id.*
[22] *See, e.g.*, Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419 (2021) (discussing the phenomenon of judges advertising to lawyers in pursuit of patent cases); Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. 631 (2015) (discussing forum shopping by litigants as well as courts competing for cases).
[23] Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990) ("When the questions on appeal involve law and precedent on subjects not exclusively assigned to the Federal Circuit, the court applies the law which would be applied by the regional circuit.").
[24] Lee Gesmer, *Federal Circuit's Fair Use Decision in Oracle v. Google – Astonishing, But Not Surprising*,MASSL.BLOG(May3,2018), https://www.masslawblog.com/copyright/federal-circuits-fair-use-decision-in-oracle-v-google-astonishing-but-not-surprising/ ("The case is not binding on any other circuit, not even the Ninth Circuit, from which it arose.").
[25] *Id.*
[26] *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6 (1989) (examining the Federal Circuit as a specialized court and highlighting

potential issues articulated above, to date we have no systematic review of the Federal Circuit as a copyright law court.[27] Instead, we have anecdotal accounts of the Federal Circuit as a copyright decision-maker, mostly in response to its decisions in the *Google v. Oracle* saga.[28] In this Article, we take up the task of analyzing the Federal Circuit as a copyright law court. We examine the Federal Circuit's relative advantages and disadvantages in handling copyright law cases. As part of doing so, we review all the Federal Circuit's available copyright law opinions to help inform our assessment.[29]

Overall, our review indicates that the Federal Circuit functions as a relatively capable copyright law court, and we see no immediate reason to alter its jurisdiction over copyright law cases. For instance, we failed to find convincing evidence that the Federal Circuit is biased in favor of copyright owners or that its deep experience in patent law hinders the Court in competently deciding copyright law issues. While some commentators highlighted these concerns in the context of the Federal Circuit's *Oracle v. Google* decisions,[30] reviewing other copyright law opinions from the Federal Circuit paints a different picture. In some copyright law domains, for example, the Federal Circuit has been a defendant's best hope.[31] Furthermore, the Federal Circuit sides more frequently with defendants than plaintiffs, at least in its available copyright law opinions.

Nor did we find conclusive indications of gamesmanship—at best the data is equivocal. For instance, few copyright appeals from other circuits make their way into a Federal Circuit written opinion—our data suggest that the Federal Circuit is on the lower end of courts of appeal in terms of copyright appeals that result in a written opinion. Of course, the focus on written opinions may mask the reality that many more cases are being appealed to and decided by the Federal Circuit without the Court providing a written decision (or being settled earlier on). Indeed, the Federal Circuit has come under fire in the patent sphere for deciding many cases without providing its reasoning in a written opinion.[32] Furthermore, the fact that the Federal Circuit issues as many copyright opinions as it does—even if relatively few compared to at least some other circuits—may actually point to successful forum shopping. Overall, we believe the data on this question is inconclusive.

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the court's potential involvement in spheres outside of patent law); Jeanne Fromer, *The Federal Circuit's Reach as a Specialized Court Beyond Patent Law*, *in* IN IMPROVING INTELLECTUAL PROPERTY (2023) (examining some areas of copyright law the Federal Circuit may increasingly encounter and urging the Federal Circuit to heed Professor Rochelle Dreyfuss's earlier call for the court to more thoughtfully develop the law in these areas).

[27] Some scholars have examined the Federal Circuit's non-patent jurisdiction. *See, e.g.*, Gugliuzza, *supra* note 14. But these accounts do not focus on the court's copyright experience specifically.

[28] *See* proceeding discussion about concerns regarding the Federal Circuit in response to its decisions in *Oracle v. Google*.

[29] For a list of the opinions reviewed as part of this study, please see Appendix A.

[30] *See supra* note 13 and accompanying text.

[31] This is almost certainly true in the DMCA context, where the Federal Circuit has found that violations of the DMCA require a nexus to copyright infringement. See Clark D. Asay, *An Empirical Study of the DMCA's Anti-Circumvention Provisions*, 51 FLA. ST. U. L. REV. (forthcoming 2024).

[32] *See*, *e.g.*, Dennis D. Crouch, *Wrongly Affirmed Without Opinion*, 52 WAKE FOREST L. REV. 561 (2017) (discussing this Federal Circuit practice and critiques thereof).

The relatively small number of cases the Federal Circuit hears and opines on from any given circuit may also suggest that concerns about the muddying of important circuit court case law are mostly overblown. The Federal Circuit has only issued copyright law opinions one or two times in most circuits, with a few exceptions. This does not mean that the court does not occasionally engage in copyright law mischief. But mischief is common in other circuits, too, though the Federal Circuit's involvement in other circuits' development of copyright law complicates matters some.

In contrast, the Federal Circuit's relative advantages as a copyright law decision-maker further militate against some of these concerns. First, the Court's deep expertise in intellectual property law provides it with a baseline sophistication in intellectual property law matters that many other courts of appeal lack. Second, the Federal Circuit's constant exposure to new technologies as part of its patent law caseload may better equip it than other courts of appeal in handling complicated copyright law cases in domains such as software. And finally, because the Court hears appeals from every major circuit and has a somewhat steady diet of copyright law cases (even if on the lower end in overall volume), its exposure to copyright law is in some ways broader than at least some other courts of appeal.

Overall, our evidence thus points to a court that is reasonably well equipped to handle copyright law cases. However, it remains vital to continue to monitor the Federal Circuit's ongoing involvement in the development of copyright law, particularly with respect to software copyright cases, its most frequent type of case. If the Federal Circuit becomes the de facto "supreme court" of software copyright appeals, then the court may become more likely to engage in formalistic, error-prone decision-making in the copyright law realm, the very source of many commentators' gripes about the Federal Circuit in the patent law sphere.[33] Such an outcome, in turn, could imperil copyright's constitutional purpose in advancing societal progress.[34]

This Article proceeds as follows. Part I provides a brief history of the Federal Circuit, including an explanation of how copyright law cases make their way to the court and concerns commentators have expressed about the court as a copyright law decision-maker. Part II addresses these concerns by discussing the relative advantages and disadvantages of the Federal Circuit in the copyright law realm. This discussion includes an empirical assessment of the Federal Circuit's available copyright law opinions. Part III concludes by outlining our findings' possible implications for the Federal Circuit's copyright law jurisdiction and copyright law more generally.

I. A BRIEF HISTORY OF THE FEDERAL CIRCUIT

This Part briefly reviews some of the history behind the Federal Circuit. This review is not meant to be exhaustive; those accounts are elsewhere.[35] Instead, our intent is to

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[33] *See infra* notes 49-55 and accompanying text.

[34] Kayla Mullens, *Applying the De Minimus Exception to Sound Recordings: Digital Samplers Are Neither Thieves nor Infringers*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 731, 737-738 (2017) (discussing the utilitarian purposes behind copyright law).

[35] *See, e.g.*, Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1994) (providing one account of the court's formation).

provide enough background so that readers can better appreciate the empirical and normative analyses in Parts II and III.

A. A Specialty Court – For Patents

The Federal Circuit has been controversial since its inception.[36] Instituted in late 1982, the Federal Circuit was meant to help address at least two major concerns in patent law at the time.[37] First, some observers argued that the different circuits' treatment of patent law doctrines was so varied as to leave patent holders in doubt about their rights from one circuit to the next.[38] That doubt, in turn, was purportedly undermining those parties' incentives to pursue socially beneficial innovation, particularly on a nationwide basis.[39] This might be particularly so as litigants forum shopped among the circuits for the "best" patent law treatment.[40] What was needed, some argued, was a "Supreme Court" of patent law to help bring greater uniformity to patent law doctrines.[41] That uniformity would provide inventors with a surer foundation upon which to build their socially beneficial innovations.[42]

The second problem the Federal Circuit was meant to address concerned a perception that circuit courts had significantly weakened the patent grant.[43] According to some observers, circuit courts had gradually diluted patent rights by giving little to no deference to patent examiners' administrative decisions because of a "low regard for the expertise of the Patent Office."[44] Circuit courts had also purportedly weakened the patent grant by overemphasizing the ills of patent monopolies in invalidating many patents.[45] A specialty court for patents could help right this wrong by bolstering patent rights in the face of such perceived circuit court hostility.

To achieve these objectives, the Federal Circuit would hear and decide all appeals of patent law cases.[46] The idea was that by centralizing all patent appeals within a single

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[36] *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) (arguing that the court's failure to develop a jurisdictional concept of itself has resulted in it falling short of its efficiency objectives); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1040 (2003) (noting that Congress choosing to focus patent reform on the appellate level a mistake).

[37] Wagner & Petherbridge, *supra* note 5.

[38] Rachel Sachs, *The New Model of Interest Group Representation in Patent Law*, 16 YALE J. L. & TECH. 344, 362-363 (2014) (reviewing some of this history).

[39] *Id.*

[40] Atari, Inc. v. JS & A Grp., Inc., 747 F.2d 1422, 1440 (Fed. Cir. 1984), overruled by Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998) (expressing the view that one of the motivations behind the Federal Circuit's creation was to address forum shopping).

[41] Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, MICH. L. REV. FIRST IMPRESSIONS 106 (2007): 28-33 (calling the Federal Circuit "the parent in charge" in its relationship to the U.S. Supreme Court).

[42] Sachs, *supra* note 38.

[43] *Id.*

[44] U.S. JUDICIAL CONFERENCE COMM. ON THE BICENTENNIAL OF THE CONSTITUTION OF THE U.S. THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY, 1982-1990 at 10 (Marion T. Bennett ed., 1991) [hereinafter, "FEDERAL CIRCUIT: A HISTORY").

[45] Sachs, *supra* note 38.

[46] FEDERAL CIRCUIT: A HISTORY, *supra* note 44.

court, over time the Federal Circuit would help develop more consistent, coherent, and substantively better patent law doctrines.[47] Hence, the Court's expertise in patent law would help instill greater confidence in those inventors who relied on patents in pursuing their inventive activities.[48]

Some early assessments concluded that the Federal Circuit was succeeding–at least in part. Professor Rochelle Dreyfuss surmised five years after the Court's formation that the Court had experienced some success in making patent law more precise by articulating, at least in some domains, "[b]right line rules, objective criteria, and minimal exceptions."[49] She also suggested that the Court had made strides in making patent law "more accurate" by formulating "rules that reflect sensitivity to the needs of the technology industry" and that advance "national policy."[50] Overall, she concluded, the Court was "moving in the right direction."[51]

However, that honeymoon period quickly came to an end–at least in scholarly circles. In 2003, Professor Arti Rai criticized the Federal Court for developing formalist, bright-line rules that ignored the fact-intensive nature of patent cases.[52] Around the same time, Professor John Thomas criticized the court's move towards rule-based adjudication, suggesting that predictability and certainty in patent law are not the only objectives the Federal Circuit should pursue.[53] Professor Dreyfuss, too, reassessed the Federal Circuit's performance in 2008, concluding that the court had too often sacrificed accuracy in favor of precision in patent law.[54] Dreyfuss surmised that the Supreme Court's frequent reversals of Federal Circuit decisions reflected the high court's belief that the Federal Circuit was failing to strike the right balance.[55]

As Professor David Taylor notes, Rai, Thomas, and Dreyfuss are not alone in their critiques of the Federal Circuit.[56] Many scholars seem to agree that the Federal Circuit's formalism has been to the detriment of patent law across a range of doctrines.[57] As Professor Timothy Holbook puts it, "[t]he tendency towards crystal rules at the Federal Circuit transcends any particular issues in patent law."[58]

However, this antipathy towards the Federal Circuit is not universally shared. Those in industry–patent holders–are often very much in favor of the Federal Circuit's

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[47] Charles W. Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 MO. L. REV. 43, 44 (1984) (noting that the Federal Circuit was meant to "reduce the contradiction and confusion in patent law that many believed had been generated by the twelve other courts of appeals.").
[48] *Id.*
[49] Dreyfuss, *supra* note 33, at 8.
[50] *Id.* at 14-20.
[51] *Id.* at 64.
[52] Rai, *supra* note 33, at 1037.
[53] John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771 (2003).
[54] Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 804 (2008) (making this point).
[55] *Id.* at 798.
[56] David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415, 435 (2013).
[57] *Id.* (summarizing some of this literature).
[58] Timothy R. Holbrook, *The Supreme Court's Complicity in Federal Circuit Formalism*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 1 (2003).

handiwork.[59] Of course, it is not true that all industry players approve of the Federal Circuit's performance, at least all the time. In fact, some in industry have recently questioned the Federal Circuit's continuing usefulness.[60] But that sentiment seems to owe in significant part to the Supreme Court's muddying of the patent law waters in the past decade more than anything the Federal Circuit has done on its own.[61] Overall, the general sentiment seems to be that the Federal Circuit is pro-patent owner.[62] And that stance, in turn, means that many patent holders view the Federal Circuit as their best bet.[63]

Indeed, a major complaint about the Federal Circuit is that it is too cozy in its relationship with the parties who regularly come before it.[64] One relatively recent example of this is the controversy surrounding former Federal Circuit Chief Judge Randall Rader's resignation.[65] Judge Rader sent an email to an attorney who had appeared before him, praising their argumentation and encouraging the attorney to show the email to potential clients.[66] Aside from violating ethical obligations, the controversy seemed to confirm what many observers had long argued–that the Federal Circuit is captured by the very industry it is meant to regulate.[67]

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[59] Alan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545 (1997) ("...the neutral balance between patent holders and the public domain created by the constitutional and statutory system has been shifted by the United States Court of Appeals for the Federal Circuit to one that unduly favors the patent holder").

[60] Gene Quinn, *The Campaign Against Judge Newman Underscores the Downfall of the Federal Circuit*,IPWATCHDOG(May8,2023), https://ipwatchdog.com/2023/05/08/campaign-judge-newman-underscores-downfall-federal-circuit/id=160676/ ("[I]t [has] become common for many in the industry to ask openly whether the Federal Circuit had outlived its usefulness").

[61] Kirk Hartung, *Recapping Eight Years of the Patent Eligibility Mess: Clearly, It's Past Time for the Supreme Court or Congress to Provide Clarity*, IPWATCHDOG (May 12, 2023),https://ipwatchdog.com/2023/05/12/recapping-eight-years-patent-eligibility-mess-cl-early-past-time-supreme-court-congress-provide-clarity/id=160805/ (discussing the mess the Supreme Court has made of patent eligibility doctrines and detailing requests from several parties, including the Federal Circuit, to the Supreme Court to fix that mess).

[62] Dreyfuss, *supra* note 33, 17–20, 25–26 (1989) (describing Federal Circuit's sensitivity to patent policy and resulting pro-patent owner stance in substantive issues as well as improved availability of remedies and preliminary injunctive relief); Lawrence G. Kastriner, *The Revival of Confidence in the Patent System*, 73 J. PAT. TRADEMARK OFF. SOC'Y 5, 13 (1991); Allan N. Littman, *Restoring the Balance of Our Patent System*, 37 IDEA 545, 545 (1997) (indicating that the Federal Circuit is overwhelmingly pro-patent); Allan N. Littman, *The Jury's Role in Determining Key Issues in Patent Cases: Markman, Hilton Davis, and Beyond*, 37 IDEA 207, 209 (1997) ("Patent lawyers have perceived both juries and the Federal Circuit to be pro-patent."); Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 803, 822 (1988) (noting the Federal Circuit's pro-patent reputation).

[63] *Id.*

[64] Gugliuzza, *supra* note 14, at 1449 (summarizing arguments that the Federal Circuit is prone to capture).

[65] Joe Mullin, *Top US Patent Judge Resigns Following "Ethical Breach,"* ARSTECHNICA (June 16, 2014), https://arstechnica.com/tech-policy/2014/06/top-us-patent-judge-resigns-following-ethical-breach/.

[66] *Id.*

[67] *Id.*

B. A Specialty Court – For Copyright?

At first glance, these critiques may seem to have little to do with copyright law. They naturally focus on the Federal Circuit's role in developing patent law. But the Federal Circuit has also begun to generate controversy in copyright circles with some of its copyright law decision-making.[68] And as we shall see, some of the same criticisms that commentators have leveled against the Federal Circuit in the patent context have been raised against it in the copyright realm as well.

As discussed in the Introduction, the most prominent recent example of the Federal Circuit stoking copyright controversy is the *Google v. Oracle* case, where the Supreme Court ultimately overturned a Federal Circuit decision on appeal.[69] Before the Supreme Court decision, the Federal Circuit controversially overturned two district court decisions from the Ninth Circuit.[70] Each such Federal Circuit decision resulted in a significant amount of backlash, with some claiming the Federal Circuit had disturbed decades of stable copyright law precedent.[71]

Yet the Federal Circuit has been involved in other prominent copyright cases as well. These include several decisions revolving around the Digital Millennium Copyright Act, a controversial statute that provides copyright owners with extra protections for their copyrighted works.[72] More recently, the Federal Circuit has resolved other important software related copyright cases too.[73]

Given its typical patent law focus, one might fairly ask why the Federal Circuit is involved with copyright law at all. There are two primary ways in which the Federal Circuit comes to hear appeals of copyright cases. The first is that all appeals of decisions from the Court of Federal Claims ("Claims Court") go to the Federal Circuit.[74] The Claims Court has jurisdiction over cases where citizens file claims for money damages

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[68] Michael Barclay, *EFF Asks the Supreme Court to Clean Up the Oracle v. Google Mess*, ELECTRONICFRONTIERFOUNDATION(Feb.25,2019), https://www.eff.org/deeplinks/2019/02/eff-asks-supreme-court-clean-oracle-v-google-mess (summarizing some of the criticism).

[69] Andrew Chung, *U.S. Supreme Court backs Google over Oracle in Major Copyright Case*, REUTERS(Apr.5,2021), https://www.reuters.com/world/us/us-supreme-court-sides-with-google-major-copyright-dispute-with-oracle-2021-04-05/.

[70] Timothy B. Lee, *The Supreme Court Hears Oracle v. Google Tomorrow—Here's What's at Stake*,ARSTECHNICA(Oct.6,2020), https://arstechnica.com/tech-policy/2020/10/google-asks-supreme-court-to-overrule-disastrous-ruling-on-api-copyrights/ (providing this background).

[71] *Id.* (quoting several commentators making this point).

[72] *See* Robert Arthur, *Federal Circuit v. Ninth Circuit: A Split Over the Conflicting Approaches to DMCA Section 1201*, 17 MARQ. INTELL. PROP. L. REV. 265 (2013) (reviewing these cases).

[73] Michael Barclay, *In SAS v. WPL, the Federal Circuit Finally Gets Something Right on Computer Copyright*,ELEC.FRONTIERFOUND.(Apr.10,2023), https://www.eff.org/deeplinks/2023/04/sas-v-wpl-federal-circuit-finally-gets-something-right-computer-copyright (reviewing one such recent case).

[74] *FrequentlyAskedQuestions*,U.S.CT.FED.CLAIMS, http://www.uscfc.uscourts.gov/faqs#:~:text=To%20appeal%20a%20judgment%20issued,%2D12(f) (indicating this).

against the federal government.[75] Hence, to the extent that a citizen wishes to file a claim against the federal government claiming that it owes the citizen money because the federal government infringed their copyright, that claim would be filed with the Claims Court. And the subsequent appeal of any such claim would go to the Federal Circuit.[76]

The second way that a copyright appeal comes before the Federal Circuit is more controversial. Appeals of copyright cases in federal district courts go to the Federal Circuit if the case involves a patent law claim at some point in the underlying litigation.[77] This is so regardless of whether the appeal actually involves a patent law issue.[78] And it is so regardless of how early on in the litigation the patent law issue falls by the wayside.[79] Hence, pure copyright law appeals can and do go before the Federal Circuit. Again, this was precisely the case in *Oracle v. Google*–in both instances, the case involved no lingering patent law issues by the time it made its way to the Federal Circuit.[80]

When the Federal Circuit takes on a copyright law case in this way, it is supposed to apply the law of the circuit from which the case originated.[81] Hence, these cases are complicated for the Federal Circuit to decide not only because they concern copyright law–an area of law outside of the Federal Circuit's particular expertise–but also because the court must learn and apply a circuit's law with which it may have little to no familiarity.

Indeed, some observers highlighted this concern during the Federal Circuit's *Oracle v. Google* decisions, claiming that the Federal Circuit misapplied both copyright law generally and Ninth Circuit law specifically in rendering its decisions.[82] In doing so, scholars argued that the Federal Circuit disturbed decades of precedent in a way that was sure to stifle innovation and creativity in the software industry.[83] The Ninth Circuit itself may have repudiated the Federal Circuit's interpretation of its law shortly thereafter in a

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[75] *Id.* ("As established by Congress in 1855, the purpose of the court is to allow citizens to file claims for money against the federal government.").

[76] Another is that the Federal Circuit hears appeals of final decisions of the United States Court of International Trade. 28 U.S.C. §1295(a)(5) (2011). Only one of our cases came to the court in this way.

[77] 28 U.S.C. §1295(a)(1) (2011) (specifying the Federal Circuit's jurisdiction to include "an appeal from a final decision of a district court of the United States…in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents…").

[78] This is so because, even if the appeal does not involve a patent law issue, the original civil action still arose in part based on a patent law issue.

[79] *Id.*

[80] Josh Landau, *Why Was Oracle v. Google in the Federal Circuit?*, PatentProgress (Nov. 21, 2019),https://docs.google.com/document/d/1hfS6u4VX2cXxqfpePHDVMUq9v-Gr8LXm/edit (articulating the reasons for this).

[81] Peter S. Menell, *API Copyrightability Bleak House: Unraveling and Repairing the "Oracle V. Google" Jurisdictional Mess*, 31 Berkeley Tech. L.J. 1515, 1518 (2016) (making this point).

[82] *Id.* at 1519 ("...the Federal Circuit's 2014 decision in *Oracle v. Google* misinterpreted Ninth Circuit law (and copyright law in general).").

[83] *Id.* ("Building on and interoperating with widely adopted software platforms is the lifeblood of Internet age computing and commerce. Yet the *Oracle v. Google* litigation looms, like a dark cloud, over the industry."); Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After Google v. Oracle*, 100 Tex. L. Rev. 1, 4 (2021) (discussing the Federal Circuit's deviation from decades of precedent regarding software copyright).

subsequent case, where its holding seemed to conflict with the Federal Circuit's *Oracle v. Google* reasoning.[84]

This odd route to the Federal Circuit has raised other alarm bells for copyright law observers as well. Some commentators worry that the Federal Circuit's too cozy relationship with patent holders will extend to copyright holders.[85] That is, a court captured by patent rights holders may be more likely to be sympathetic to other rights holders.[86] In fact, sometimes the parties may be the same – a patent holder who regularly appears before the Federal Circuit may also bring a copyright claim before the same court, in the hopes that the court's familiarity with them in the patent sphere will prove helpful with its copyright law claims.[87]

Furthermore, a court steeped in patent law and policy may rely on the same ideology in rendering copyright law decisions. In other words, some worry that a court that specializes in patent law may find it difficult to see copyright law issues through anything other than a patent-colored lens.[88] Yet the two regimes are distinct in purpose and approach, and those differences matter.[89] According to patent law's primary theoretical accounts, patents are meant to incentivize parties to pursue inventive activity for the benefit of society.[90] Patents provide such incentives by granting inventors limited rights in their patentable ideas.[91] These rights allow patent holders to exclude others from pursuing the same invention and may thus encourage those parties to develop their inventions for society's benefit.[92]

Copyright rights are also meant to incentivize parties, but in a different way.[93] Copyright provides parties limited rights in their original works of authorship.[94] Those

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[84] Bikram Yoga College of Indiana, L.P. v. Evolation Yoga, LLC, 803 F.3d 1032, 1042 (9th Cir. 2015) (holding that even if there are multiple methods to reach a particular end, a choice made among those methods is not expression to which copyright protection extends, a holding that contradicts the Federal Circuit's copyrightability holding in *Oracle v. Google*).

[85] Landau, *supra* note 80 ("The Federal Circuit is often criticized for its favoritism to patent owners…It's not surprising that that bias might extend into copyright, leading to a decision that has been widely criticized as incompatible with the precedent it supposedly relies on…").

[86] Gugliuzza, *supra* note 14, at 1449 (discussing reasons why the Federal Circuit may be prone to capture).

[87] Landau, *supra* note 80 (articulating this concern).

[88] Corynne McSherry, *The Federal Circuit Has Another Chance to Get it Right on Software Copyright*,ELEC.FRONTIERFOUND. (Aug. 30, 2021), https://www.eff.org/deeplinks/2021/08/federal-circuit-has-another-chance-get-it-right-software-copyright (arguing that the Federal Circuit should fix its erroneous reasoning from *Oracle v. Google* in a subsequent software copyright case by treating copyright and patent laws as distinct in purpose and in their contours).

[89]Asay, *supra* note 16, at 75-81 (laying out some of the main differences between the two regimes).

[90] John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. CHI. L. REV. 439, 439-440 (2004) (discussing the "rewards" theory as the traditionally dominant approach and Kitch's "prospect" theory as an extension of it).

[91] *Id.*

[92] *Id.*

[93] Asay, *supra* note 16, at 75-81 (discussing some of the differences between patent law and copyright law).

[94] *What Is Copyright?*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/what-is-copyright/#:~:text=Copyright%20is%20a%20type%20of,a%20t

works must originate with the author, be "fixed" in some tangible medium, and include a "modicum of creativity."[95] But copyright expressly excludes ideas from its ambit of protection, no matter how creative or novel those ideas may be.[96] According to the Supreme Court, such ideas are to be protected under patent law, if any.[97] Hence, despite sharing some superficial similarities, the two regimes are distinct in purpose and function.[98] With patent law ideology firmly rooted in its collective psyche, the Federal Circuit may not always appreciate those differences. In fact, some claim this is precisely what occurred in the Federal Circuit's *Oracle v. Google* decisions–the Federal Circuit misapplied copyright law in a way that ultimately protected patent-eligible matter with copyright.[99]

Finally, these worries coalesce in a concern about gamesmanship. If potential litigants perceive the Federal Circuit as biased in favor of rights holders and beholden to patent law ideology, they may include trivial patent claims in their copyright lawsuits to ensure that any potential appeals go before the Federal Circuit.[100] This may be particularly likely in industries such as information technology and software, where including a patent claim is easy enough to do.[101]

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angible%20form%20of%20expression. (discussing the requirements of copyright protection).

[95] *Id.*

[96] 17 U.S.C. § 102(b) (1990) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[97] Baker v. Selden, 101 U.S. 99 (1879) ("The claim to an invention or discovery of an art of manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.").

[98] Asay, *supra* note 16.

[99] Landau, *supra* note 80; *Oracle v. Google*, ELEC. FRONTIER FOUND., https://www.eff.org/cases/oracle-v-google (discussing the Federal Circuit's erroneous overturning of the district court's decision that Oracle's software was not subject to copyright, which earlier ruling "clearly understood that ruling otherwise would have impermissibly—and dangerously—allowed Oracle to tie up 'a utilitarian and functional set of symbols,'...").

[100] Krista L. Cox, *Oracle v. Google Is More Evidence That The Federal Circuit Has No Business DecidingCopyrightCases*,ABOVETHELAW(Mar.29,2018), https://abovethelaw.com/2018/03/oracle-v-google-is-more-evidence-that-the-federal-circuit-has-no-business-deciding-copyright-cases/ ("It seems inevitable that copyright holders could try to add on patent claims simply to ensure Federal Circuit review."); Lemley & Samuelson, *supra* note 83, at 2 (indicating that litigants who wish their copyright claims to go before the Federal Circuit can achieve that end "by a simple trick of forum shopping, namely, adding a patent claim to their complaints").

[101] Lemley & Samuelson, *supra* note 83, at 2 (highlighting recent software copyright cases that have reached the Federal Circuit through inclusion of a patent claim); Raymond Millen, *Seven Years After Alice, 63.2% of the U.S. Patents Issued in 2020 were Software-Related*, IPWATCHDOG (Mar. 17,2021), https://ipwatchdog.com/2021/03/17/seven-years-after-alice-63-2-of-the-u-s-patents-issued-in-2020-were-software-related/id=130978/#:~:text=In%202020%2C%2063.2%25%20of%20issued,issued%20to%20several%20large%20players. (discussing the rise of the software industry and software-related patents).

But it could happen in other industries as well, since appeals of design patents also go to the Federal Circuit.[102] Some have argued that design patents serve the same or a similar purpose to copyrights and often cover the same subject matter.[103] Hence, copyright owners may frequently have design patents covering the same subject matter as their copyrighted material, meaning that including a patent claim in their copyright cases is not only possible, but, perhaps, likely. The number of design patents has also risen dramatically in recent years, meaning that there are more such patents to include in complaints to ensure that any appeal of copyright issues goes to the Federal Circuit.[104]

Forum shopping might be particularly likely because litigants may often wish to escape their own circuit. For instance, a plaintiff in the Ninth Circuit may have a good understanding of and experience with Ninth Circuit judges and law and conclude, based on that understanding, that it is unlikely to succeed in the Ninth Circuit with its case. Because the Federal Circuit is less familiar with Ninth Circuit law and copyright law more generally, the plaintiff may wish to take its chances with the Federal Circuit rather than the known circuit, especially given the court's perceived bias in favor of rights holders. And to take that chance, the plaintiff need merely include some patent law claim in its copyright case. Gamesmanship is not merely some theoretical concern, either–studies have identified patterns of gamesmanship throughout the federal court system.[105]

Yet despite these concerns of patent law bias and influence, legal uncertainty, and gamesmanship at the Federal Circuit, to date we lack robust analysis and evidence regarding their validity. Anecdotes such as the Federal Circuit's *Oracle v. Google* decisions dominate the conversation. Yet those decisions, while important, are just that: anecdotes. To assess these concerns' validity and the Federal Circuit as a copyright law decision-maker more generally, we need a more thorough review of the Federal Circuit in the copyright law sphere. In the next Part, we detail how we went about conducting that investigation.

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[102] 28 U.S.C. § 1295(a)(1) (2006) (indicating that appeals from district courts in cases arising under the patent laws go to the Federal Circuit).

[103] Laura A. Heymann, *Overlapping Intellectual Property Doctrines: Election of Rights Versus Selection of Remedies*, 17 STAN. TECH. L. REV. 239 (2013) (describing the overlap between design patents and copyright generally).

[104] Megan Redmond, *The Rise of Design Patents in the Last Decade*, JDSUPRA (Mar. 25, 2022), https://www.jdsupra.com/legalnews/the-rise-of-design-patents-in-the-last– 6370630/ (discussing the rise of design patents); 2*022 Design Patents Year in Review: Analysis & Trends*, STERN, KESSLER, GOLDSTEIN & FOX(2022), https://www.sternekessler.com/sites/default/files/2023-02/design-law-report-final.pdf (discussing the increase of both design patents and litigation surrounding design patents).

[105] Lyle Denniston, *Chief Justice Wants Less Gamesmanship by Lawyers*, SCOTUSBLOG (Dec. 31, 2015), https://www.scotusblog.com/2015/12/chief-justice-wants-less-gamesmanship/ (discussing Chief Justice John Roberts remarks in 2015 admonishing lawyers to serve justice rather than engaging in gamesmanship); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1994) (discussing the pervasiveness of forum shopping); Scott E. Atkinson, Alan C. Marco, & John L. Turner, *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J. L. & ECON. 411 (2009) (discussing the issue of forum shopping in the circuit courts prior to the establishment of the Federal Circuit); *supra* note 20 and accompanying text.

II. THE FEDERAL CIRCUIT AS A COPYRIGHT LAW COURT

In this part, we respond to the criticisms discussed above by assessing the Federal Circuit's relative advantages and disadvantages as a copyright law decision-maker. As part of that analysis, we assess some quantitative aspects of the Federal Circuit's available copyright law opinions. Here we briefly detail how we went about collecting these opinions as well as some of the limitations to our approach.

To find all of the Federal Circuit's available copyright opinions, we relied on Westlaw's "Federal Copyright Cases" database. We used Westlaw's "Advanced Search" option to limit this database to only copyright cases from the Federal Circuit.[106] At the time we ran this search, it yielded 150 cases. We then reviewed these cases to determine if any of them were "false positives," meaning they did not actually involve the Federal Circuit opining on or deciding a copyright law issue. After removing the false positives, we were left with fifty-six cases. In these cases, we found fifty-six majority opinions, three concurrences, and six dissents. Unless otherwise noted, when we refer to "opinions" below, we mean the fifty-six majority opinions. We discuss the dissents and concurrences separately.

We extracted a number of data points from each of the opinions, including:

- Year of the opinion;
- Underlying circuit or court;
- The panel judges and opinion author;
- The procedural posture of the underlying case;
- The subject matter of the copyrighted material;
- The copyright issues the court addressed;
- The authorities the court cited in applying copyright law;
- Whether the court referenced patent law in applying copyright law;
- Whether the case also involved patent claims (either design or utility);
- Which party won; and
- Whether the opinion involved a concurrence or dissent or both.

We selected these data points because we believe that each of them could be relevant to assessing the Federal Circuit as a copyright law decision maker. For instance, how often the Federal Circuit relies on patent law in applying copyright law may help us understand to what extent the Court's patent law expertise influences its copyright law jurisprudence. Furthermore, the types of copyright law cases the Court hears, including the doctrines the Court applies, the circuits from which the appeals emanate, the authorities upon which the Court relies, and the underlying subject matter, may provide insights into the Court's relative copyright experience. Tracking the number of appeals

[106] Our precise search was as follows. First, from Westlaw Precision's homepage, we selected "Cases." From there, we selected "Cases by Topic – Intellectual Property." Clicking that link then redirects to a link for "Federal Copyright Cases." Clicking on that link leads to a list of the most recent federal copyright cases. From there we selected "advanced" search and in the field "Court Name/Prelim (PR)" we inputted, in quotes, "United States Court of Appeals, Federal Circuit." We conducted this search initially on March 9, 2022. We updated the search in late 2023 to include one additional case.

and their provenance also helps assess the issues of legal uncertainty and gamesmanship. Finally, taking account of the winners and losers in these appeals may help us better gauge the extent to which the court is biased in favor of rights holders.

Before covering our results, we discuss some possible limitations to our empirical approach. First, focusing on appeals that made it to the Federal Circuit certainly doesn't tell us everything we'd like to know about either the relevant litigants or the Federal Circuit as a copyright law court.[107] In fact, such a focus may mask important information relevant to assessing the court, given that written opinions are a rare event in the litigation process and are certainly not representative of typical litigation outcomes.[108] Most cases, after all, settle.[109] While a statistical profile of the court's copyright law opinions provides us with some useful information,[110] over relying on a quantitative assessment of the court's opinions would be misplaced, particularly given that the court has issued so few copyright law opinions in its history.[111] For these reasons, in the following sections we assess the court holistically by examining both quantitative and qualitative aspects of its copyright law decision-making.

Second, as with all research involving data extraction, errors can occur throughout the coding process. To minimize such issues, at least three independent parties coded each opinion, and coders received training regarding how to perform the data extraction. When discrepancies between results arose, we reviewed those discrepancies to reconcile them. Coding results with significant deviations were eliminated and redone by another party. Through these efforts, we believe the coding results are as consistent and robust as possible.

Third, the population of cases available through Westlaw may not be the entire population of relevant cases, since Westlaw uses discretion in which cases it includes in its service.[112] Westlaw excludes some cases from its database, and it may never find yet others.[113] Furthermore, no combination of available databases is likely to change this result, because in some cases judges simply choose not to make some of their opinions available.[114] Our reliance on Westlaw's classification of cases as copyright law cases may also be misplaced if Westlaw's classifiers failed to include some relevant copyright law opinions in their database.

Despite these possible concerns, we feel confident that Westlaw has included the vast majority, if not all, of the Federal Circuit's relevant copyright law opinions. First, to a

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[107] David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 682 (2007).
[108] *Id.*
[109] Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?* 6 J. EMP. LEGAL STUD. 111 (2009) (discussing the high rate of settlement in civil cases).
[110] As others have suggested, opinions published through services like Westlaw remain the best indication of how courts define important legal doctrines. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 733 (2011) (making this point).
[111] Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, U. CHI. L. REV. 213 (2017) (discussing the usefulness of qualitative research methods in legal research).
[112] *See generally* Ellen Platt, *Unpublished vs. Unreported: What's the Difference?*, 5 PERSPS.: TEACHING LEGAL RSCH. & WRITING 26, 26-27 (1996) (discussing how Westlaw and Lexis choose which opinions go into their databases).
[113] *Id.*
[114] *Id.*

significant extent, Westlaw's business model depends on providing access to every possible opinion.[115] Second, our anecdotal review of known Federal Circuit copyright law opinions confirms that they've all been included in the Westlaw database. Third, the E-Government Act of 2002 requires federal judges to make their written opinions electronically available, meaning, at least since around that time, Westlaw has had access to a greater number of opinions (and is likely to have included them in its database as a result).[116] This does leave open the possibility that some of the Federal Circuit's early opinions are not available on Westlaw. Fourth, while it's possible that Westlaw's classifiers failed to include relevant copyright law opinions in its "Federal Copyright Cases" database, the reality is that their classification system seems overinclusive, if anything–the high number of false positives in our review suggests that Westlaw's classifiers overidentify cases as copyright law opinions. Ultimately, given what we know, if there are important opinions missing from the database, it would come as a significant surprise–to both us and, most likely, Westlaw. Finally, while some opinions may be missing, we believe our holistic assessment of the court using both qualitative and quantitative methods helps ensure a robust analysis of the court as a copyright law decision-maker.[117]

We now turn to assessing the Federal Circuit's relative advantages and disadvantages as a copyright law court, with analysis of the court's copyright law opinions constituting an important part of that assessment.[118]

A. Intellectual Property Law Experience

Does the Federal Circuit's deep involvement with patent law make it a less capable copyright law court? The evidence we gathered does not support that conclusion. In fact, Federal Circuit judges' significant intellectual property law experience may be a boon

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[115] Mitch Fraas, *Legal Databases: Comparative Analysis*, CTR. FOR RSCH. LIBRS., https://www.crl.edu/collections/topics/legal-databases-comparative-analysis, (indicating that services like Westlaw "should be the first choice for those interested in locating specific reported cases in American courts back to the founding" and that they "also provide by far the best coverage of legal material generated since 1990").

[116] U.S. Gov't Accountability Off. GAO-05-12, *Electronic Government: Federal Agencies Have MadeProgressImplementingtheE-GovernmentActof2002*31(2004), https://www.gao.gov/assets/gao-05-12.pdf.

[117] We also note that other researchers have developed a database specifically for the Federal Circuit. *See* Jason Rantanen, *The Landscape of Modern Patent Appeals*, 67 AM. U. L. REV. 985 (2018) (describing the Compendium of Federal Circuit Decisions). That database and its interface is tailored most specifically to patent law research, even though the database also includes copyright decisions. The database also only goes back to 2004.

[118] We also note that the Federal Circuit's unique jurisdiction over appeals from the Court of Federal Claims makes it helpful in many cases to consider these appeals separate from appeals coming from other circuit courts. For example, the concern that parties might insert nominal patent claims to get appeals before the Federal Circuit is not applicable in Federal Claims cases because all appeals from the Claims Court go before the Federal Circuit. The nature of the copyright claims made before the Claims Court is similarly unique because these claims are made against the federal government and often involve pro se plaintiffs who seemed unable to fully flesh out their claims. Though the Claims Court cases continue to provide important insights, the differences between these cases and the other cases in our study mean that we will sometimes analyze them separately.

rather than a liability in its copyright law decision-making. This may be so for at least three reasons, as discussed below.

1. Intellectual Property Law Mavens

As the court of appeals for all patent law cases, judges on the Federal Circuit are accustomed to dealing with intellectual property law issues. While patent law and copyright law have important differences, they also have a "historic kinship," according to the Supreme Court.[119] Indeed, countries across the globe have adopted both forms of legal protection as means to encourage socially beneficial creative activities.[120] The historic kinship between the two legal regimes also means that courts, including the U.S. Supreme Court, sometimes borrow from one body of law in crafting the other.[121] By providing it with a baseline understanding of intellectual property law issues, the Federal Circuit's patent law expertise may thus aid it in deciding copyright law issues.

Of course, such borrowing and influence are precisely what some worry about—the Federal Circuit, as a predominantly patent law court, may be more likely than other courts of appeal to be influenced by patent law in its copyright law decision-making.[122] And that influence may be unwarranted in many cases, given that patent law and copyright law, despite their kinship, are distinct bodies of law with different purposes.[123] As the Supreme Court has explained, the "two areas of the law . . . are not identical twins." Consequently, courts must "exercise . . . caution . . . in applying doctrine formulated in one area to the other."[124]

But the Federal Circuit's deep experience in patent law does not mean that it is destined to egregiously rely on patent law principles in deciding copyright law issues. As the Federal Circuit itself has noted, a "court deciding a copyright case may use a tool familiar from patent law, without necessarily following every aspect of patent law's use of that tool."[125] In fact, that deep patent law experience may mean that the Federal Circuit is in a better position than other courts of appeal to distinguish between copyright law oranges and patent law apples. Or, in cases where reliance on patent law principles is helpful, the Federal Circuit's deep patent law experience should enable it to do so fruitfully. Furthermore, the Federal Circuit also at times hears trademark law appeals, thereby rounding out its broad intellectual property law experience.[126]

What do the court's copyright law opinions tell us, if anything, about how patent law affects the court's copyright law decision-making? Those opinions cannot directly

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[119] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984).
[120] J.H. Reichman, *Legal Hybrids Between the Copyright and Patent Paradigms*, 94 COLUM. L. REV. 2431, 2448-2451 (1994) (discussing the adoption of harmonized copyright and patent regimes across the world).
[121] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984).
[122] *See supra* notes 85-89 and accompanying text.
[123] *Id.*
[124] *Id.* at 439 n.19.
[125] Gaylord v. United States, 777 F.3d 1363, 1367 (Fed. Cir. 2015).
[126] *Whatisthe"FederalCircuit?"*,MOLOLAMKEN(2021), https://www.mololamken.com/knowledge-what-is-the-federal-circuit (discussing how the Federal Circuit hears appeals from the Patent and Trademark Office).

address whether the court's patent law expertise *aids* it in rendering copyright law decisions—it is difficult to imagine how such aid might manifest itself in the court's written opinions. But our analysis of the opinions provides at least some evidence that the court's patent law expertise does not seem to lead it astray in deciding copyright law cases. That conclusion is based on two results: first, we did not uncover a significant amount of explicit reliance on patent law in the opinions; and second, when we did find references to patent law, we did not find those references to be wholly without merit.

As to the first point, we only found fourteen of the fifty-six opinions to include the court borrowing from or making analogies to patent law to help answer copyright law questions. And as we discuss below, some of those references were merely fleeting. While we lack robust points of comparison, the fact that only a quarter of the court's opinions include explicit patent law references does not strike us as an overreliance on patent law, particularly given that some of those references were trivial. Of course, our empirical inquiry on this question is limited in that we could only track what the judges explicitly put in the opinions—the influence of patent law on the judges' thinking is certainly not limited to whatever references to patent law Federal Circuit judges include in their copyright decisions. Be that as it may, that only a quarter of the copyright law decisions include explicit patent law references suggests that Federal Circuit judges are either guarded in including such references or, perhaps more likely, that they simply primarily rely on copyright law when deciding copyright law issues.

As to the second point, our qualitative assessment of those patent law references suggests that most if not all of them have some merit. For instance, four of the fourteen references were in opinions appealed from the Claims Court, where the panel compared the statutory waiver of sovereign immunity by the federal government for copyright infringement with the "parallel provision" waiving liability for patent infringement.[127] There is at least some reason to think that Congress meant for the waivers of sovereign immunity for each to be consistent, given that both waivers of liability share parallel phrasing and are contained in neighboring provisions in the same section of the same act.[128] Congress also established the Claims Court to hear monetary claims against the federal government and has specifically assigned exclusive jurisdiction over appeals from the Claims Court to the Federal Circuit.[129] Taken together, this all suggests that Congress intended for the Federal Circuit to consistently interpret federal sovereign immunity generally and with respect to copyright and patent claims in particular. The Federal Circuit's reliance on provisions waiving sovereign immunity for patent claims to inform its understanding of the waiver of sovereign immunity for copyright claims thus seems appropriate.

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[127] These cases are: Walton v. United States, 551 F.3d 1367, 1370 (Fed. Cir. 2009); Gaylord v. United States, 678 F.3d 1339, 1343 (Fed. Cir. 2012); Blueport Co., LLC v. United States, 533 F.3d 1374, 1380 (Fed. Cir. 2008); and Pentagen Techs. Int'l. Ltd. v. United States, 175 F.3d 1003, 1005 (Fed. Cir. 1999).

[128] *See* 28 U.S.C. § 1498(a)–(b); *see also* Walton, 551 F.3d at 1370 (Fed. Cir. 2009) (describing section 1498(b) waiving liability for copyright infringement claims as a "parallel provision" to section 1498(a) waiving liability for patent infringement claims and explaining that both provisions share language expressly declining to grant a cause of action to those who develop a patent or create a copyrighted work while in the "employment or service of the United States.").

[129] UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *Court Jurisdiction* (Apr. 8, 2024), https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/.

In the remaining cases, the Federal Circuit referenced patent law in relation to an eclectic set of copyright questions. Our review of these references also did not unearth clearly erroneous reliance on patent law. For example, after citing to copyright-related sources, a Federal Circuit panel pointed to a patent precedent to support its conclusion that the totality of the parties' conduct should be considered in determining the existence of an implied-in-fact license.[130] In another case, the panel relied on arguments both parties made based upon patent law precedents to determine that parties must satisfy the Copyright Act's territorial requirement to establish a cause of action, but need not satisfy the territorial requirement for a court to have subject matter jurisdiction over a claim.[131]

In *Oracle v. Google*, the panel analogized the standard of review granted to a jury's finding of fair use to the standard of review given to a jury's finding of obviousness, relying on analogies made by both sides.[132] The Federal Circuit's first opinion in *Oracle v. Google* also made a comparison between patent law and copyright law, rejecting the argument that a work can lose copyright protection when it becomes the industry standard, relying in part on the fact that permissible uses of patents that become the industry standard generally require royalty payments.[133]

In another case, the Federal Circuit resisted a call to give the term "sale" in section 106(3) of the Copyright Act precisely the same meaning the court had given it in section 271 of the Patent Act, finding that the text of section 106(3), the legislative history, treatises, and Ninth Circuit precedent commanded that "sale" in the context of section 106(3) always requires a transfer of title.[134] In another opinion, the Federal Circuit drew on its approach to design patents to explain that it was not error for a district court to compare the defendant's allegedly infringing work with minifigures embodying the plaintiff's copyrighted images instead of limiting its comparison to the registered images registered alone.[135] A footnote reference to patent law's test for an actual controversy in a different case fleshed out the meaning of "litigation, actual or prospective" in a Copyright Office regulation permitting a plaintiff or defendant to request a copy of a registered work in connection with litigation related to the copyrighted work.[136] In yet another, the Federal Circuit referenced patent law's reasonable royalty standards in assessing a copyrighted work's fair market value.[137] Finally, the Federal Circuit pointed to the need for some underlying direct patent infringement to give rise to a claim of indirect infringement to explain that trafficking liability under section 1201(a)(2) of the DMCA requires underlying circumvention under section 1201(a)(1).[138]

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[130] Bitmanagement Software GmBH v. United States, 989 F.3d 938, 947 (Fed. Cir. 2021).
[131] Litecubes, LLC v. Northern Light Prods., Inc., 523 F.3d 1353, 1367 (Fed. Cir. 2008).
[132] Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1195 n.4 (Fed. Cir. 2018).
[133] Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1372 n.16 (Fed. Cir. 2014).
[134] Milo & Gabby LLC v. Amazon.com, Inc., 693 Fed.Appx. 879, 889–91 (Fed. Cir. 2017).
[135] LEGO A/S v. ZURU Inc., 799 Fed.Appx. 823, 830 (Fed. Cir. 2020).
[136] Atari Games Corp. v. Nintendo of America Inc., 975 F.2d 832, 841 n.4 (Fed. Cir. 1992).
[137] Gaylord v. U.S., 777 F.3d 1363, 1367 (Fed. Cir. 2015).
[138] Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1196 n.13 (Fed. Cir. 2004). In the remaining case that references patent law, the court referenced patent law in a footnote in support of its conclusion that the district court's copyrightability hearing was appropriate, analogizing it to a Markman hearing under patent law. The court also made a fleeting reference to patent law by citing to Judge Easterbrook's reference to patent law in support of his interpretation of certain copyright law principles. SAS Institute, Inc. v. World Programming Ltd., 64 F.4th 1319, 1329, 1333

Apart from sovereign immunity, it is difficult to discern any pattern in when the Federal Circuit turns to patent law to help answer copyright questions. Some of the cases involved directly analogous provisions of the Copyright Act and the Patent Act, such as the case dealing with the meaning of "sale" and the case concerning the jurisdictional implications of territorial requirements. Still other references to patent law bear no resemblance to copyright doctrines, such as the reference to the standard of review granted to jury decisions on obviousness to understand the deference given to jury verdicts for fair use. In several of these cases, the court's reference to patent law is in response to arguments the litigants themselves raised. Yet even when the applicability of patent law to copyright questions is questionable at best, our qualitative review did not uncover any egregious misapplications of patent law to copyright law questions.[139]

Of course, our qualitative review above is not meant to prove that the Federal Circuit's reliance on patent law is perfectly logical in every instance. We have only provided brief summaries of how the court relied on patent law in addressing copyright law questions. And it seems certain that at least some of our readers may take exception to at least some of the examples discussed above. But even if the Federal Circuit's reliance on patent law in interpreting copyright law issues is not always flawless, our review did not point to egregious flaws. Instead, in each instance we could at least identify some logical basis for the court's use of patent law principles.

In sum, there is some reason to believe that the Federal Circuit's deep intellectual property law expertise equips it well to handle all types of intellectual property law issues, including copyright law issues. While examining the court's copyright law opinions can't provide us with direct evidence in support of that claim, that examination at the least suggests that the court's patent law expertise does not seem to frequently cloud its copyright law vision. This is not to say that the court's reliance on patent law in interpreting copyright law questions is always perfect. But it is to say that our review did not identify egregious or extensive examples of misapplications of patent law to copyright law issues.

2. Copyright Law Expertise

Another reason that the Federal Circuit's patent law expertise is unlikely to interfere with the court's ability to ably interpret and apply copyright law is that the court hears a fair number of copyright law cases. That steady diet of copyright law cases, in turn, means the court is able to develop its own copyright law expertise in a way that helps mitigate concerns about the court having on patent law blinders.

We don't mean to overstate the court's copyright law experience. It goes without saying that the Federal Circuit is not in the same hemisphere as either the Second Circuit or Ninth Circuit in its overall volume of and experience with copyright law cases.[140]

(Fed. Cir. 2023).

[139] Of course, as discussed earlier, it is possible that patent law has more of an influence on the Court's copyright law decision-making than our assessment suggests, given that our analysis focuses on express patent law references in the opinions.

[140] Clark D. Asay, *An Empirical Study of Copyright's Substantial Similarity Test*, 13 UC Irvine L. Rev. 35, 57 (2022) ("Commentators widely consider the Second Circuit and Ninth Circuit as the leaders in copyright law, and other empirical studies dealing with different copyright topics have

Those circuits are in a league of their own.[141] But while its number of copyright law opinions is not enormous, the Federal Circuit appears to decide copyright law cases at similar rates to other middle of the road to low-volume courts of appeal.

For instance, running the same search for all other circuits shows that the First, Eighth, Tenth, and D.C. Circuits appear to have heard *fewer* copyright cases than the Federal Circuit during the same time span of our study, while the Third Circuit's number of cases is about the same as the Federal Circuit's.[142] As mentioned, the Second and Ninth Circuits are in a class of their own, while the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits make up the middle of the pack.[143]

Beyond those bare numbers, the Federal Circuit takes on cases from all the other circuits—our data show that the Federal Circuit has heard copyright law cases from every circuit except the District Court for the District of Columbia (cases the D.C. Circuit would normally hear), a court that almost never hears copyright law cases.[144] The Federal Circuit has also decided copyright law appeals emanating from the International Trade Commission and, per statute, the Court of Federal Claims.[145]

That broad exposure to copyright case law from across the board may suggest that the Federal Circuit is a more sophisticated copyright law decision maker than some of its sister courts of appeal, even if those courts otherwise hear similar numbers of copyright cases. For instance, the Court's exposure to multiple circuits' copyright case law may mean that it comes to its copyright law cases with a more nuanced view of copyright law than a circuit court mired only in its own (limited) circuit case law. Of course, other courts of appeal may sometimes choose to delve into the case law of other circuits in search of persuasive authority in any given case.[146] But they need not (and often don't).[147] The Federal Circuit, in contrast, must apply the law of the circuit from which the appeal comes.[148] And because the source of copyright law appeals to the Federal Circuit frequently changes, that means the Federal Circuit must grapple anew with the copyright

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typically found courts within these circuits to be the most active on copyright issues…This study's results reaffirm previous studies on this score.").

[141] *Id.*

[142] When we run the same search for each circuit and then limit the results to only decisions after the start date of the Federal Circuit (October 1, 1982), we get the following results: First Circuit (118), Second Circuit (569), Third Circuit (154), Fourth Circuit (197), Fifth Circuit (233), Sixth Circuit (224), Seventh Circuit (202), Eighth Circuit (110), Ninth Circuit (953), Tenth Circuit (96), Eleventh Circuit (240), D.C. Circuit, and Federal Circuit (150). If we assume each circuit has a similar false positive rate as the Federal Circuit, then we can reliably compare these results to show that the Federal Circuit is similar to other low-volume circuits in terms of copyright decisions.

[143] *Id.*

[144] *See, e.g.*, Asay, *supra* note 137, at 57 (highlighting data showing that the D.C. Circuit hears very few substantial similarity cases).

[145] *Frequently Asked Questions*, U.S. Ct. Fed. Claims, http://www.uscfc.uscourts.gov/faqs (discussing these jurisdiction matters).

[146] Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 Ok. L. Rev. 55 (2009) (discussing a theory of persuasive authority).

[147] *Id.* at 59-61 (discussing the concept of binding authority).

[148] Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1575 (Fed. Cir. 1990) ("When the questions on appeal involve law and precedent on subjects not exclusively assigned to the Federal Circuit, the court applies the law which would be applied by the regional circuit.").

case law of many circuits.

That exposure, however, may not be all that broad given the relative paucity of copyright law appeals that the court actually decides. After all, even though the Federal Circuit has taken appeals from nearly every circuit, in most cases it is only one or a few opinions from each circuit (and usually spread out over decades). The judges involved in those decisions are also not consistent.[149] Ultimately, the court's exposure to a broad array of circuit court case law may seem more theoretical than real.

But another aspect of the Federal Circuit's copyright exposure undercuts this criticism some, leading to another manifestation of the Court's relatively broad experience with copyright law. Because the Federal Circuit hears all appeals from the Claims Court, the court has a relatively consistent diet of copyright law cases from that source. As the exclusive appellate court over those cases, the Federal Circuit must develop its own copyright appellate law. And in developing that appellate law, the court frequently relies on and cites to its own copyright law cases, including those that emanate from other circuits.[150] This suggests that the Court revisits and draws upon its own experience with other circuits' copyright case law in crafting its own appellate direction for cases coming from the Claims Court. And that appellate enterprise, overall, may mean that the Federal Circuit is at least as well equipped as other circuit courts in handling copyright law questions.

The Court's steady diet of cases from the Claims Court, as well as those that come to it via other circuits, also help expose the Federal Circuit to a broad array of copyright law questions. Our empirical review shows that the court has experience handling key questions in many copyright law areas, including fair use, copyright infringement, remedies, copyrightable subject matter, copyright licensing, the Digital Millennium Copyright Act, among others. In some domains such as the DMCA, the Federal Circuit's cases are some of the most important cases on the topic generally.[151] Although these cases do not represent how a majority of circuits address key DMCA questions, they do represent an important minority position among circuits.[152] In fact, DMCA appellate decisions are a relatively rare phenomenon more generally, with only nineteen total appellate decisions among all the circuits.[153] This means that the Federal Circuit's three cases on the topic provide it with more DMCA expertise than many other circuits.[154]

Of course, other circuit courts may have similar or greater levels of exposure to these and other copyright law doctrines. It is beyond the scope of this project to collect data on those other circuits to make such a comparison possible. But as noted, our data indicate that the number of appeals resulting in a written decision at the Federal Circuit is similar

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[149] Marin K Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 67 (2017) (discussing how empanelment works on Federal Courts of Appeal).

[150] In appellate cases emanating from the Court of Federal Claims, the Federal Circuit cited to its own case law in over seventy percent of the cases.

[151] Arthur, *supra* note 69 (discussing some of these cases in describing the Ninth Circuit approach compared to the Federal Circuit's position on key DMCA issues).

[152] *Id*.

[153] *See* Clark D. Asay, *An Empirical Study of the DMCA's Anti-Circumvention Provisions*, 51 FLA. ST. U. L. REV. 9 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4343160 (highlighting that in the DMCA's entire history, there have only been nineteen appellate decisions interpreting and applying the statute).

[154] *Id.*

to or more than the number in several other circuits. Indeed, other empirical studies on copyright law have pointed to some of these other circuits as relative copyright law neophytes.[155] This all suggests that the Federal Circuit has at least similar—and in some cases greater—amounts of exposure to a diverse set of copyright law questions as some other circuits.

In sum, the Court's steady exposure to not only patent law, but copyright law as well, may mean that the Court is as well equipped—and perhaps in some cases better—as other courts of appeal in handling difficult copyright law questions.

3. Technological Acumen

The Federal Circuit's exposure to technology as part of its patent law cases may also at times aid it in deciding important copyright law questions. For instance, as the appellate court for all patent law cases, the Federal Circuit frequently grapples with complex technological and scientific questions in deciding those patent law cases.[156] This is so because patents apply to technological and scientific innovations that satisfy certain requirements.[157] Hence, in deciding patent law cases, the Court must frequently learn about and understand how various technologies and scientific discoveries work to determine whether those discoveries qualify for a patent or whether they infringe upon an existing patent.[158] As one federal judge put it: "Patent litigation is like the neurosurgery of litigation: it is hard scientifically and it is hard legally."[159] Consequently, over time, Federal Circuit judges may develop significant technological expertise based on their patent law decision-making. Or even if they do not become experts in a particular technological domain, they at least gain experience in navigating and learning about complicated technological areas—and applying the law to them. Finally, at least some Federal Circuit judges come with technological backgrounds as well.[160]

The Court's collective technological facility may therefore be helpful in the copyright sphere when its copyright cases involve complicated technologies. One such technological domain is software. Lawmakers have made clear that copyright applies to software.[161] But they have provided little direction about how it applies, leaving courts to

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[155] Asay, *supra* note 192 (showing a majority of the circuits handle very little substantial similarity litigation relative to the big three–the Second, Ninth, and Eleventh Circuits).

[156] *See, e.g.*, Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L. J. 2 (2010) (discussing the Federal Circuit's adoption of formalistic rules, which tended to allow generalist judges to streamline technologically complex patent cases, followed by a series of Supreme Court's decisions that forced judges to more fully engage technologically complex patent cases).

[157] Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 348-49 (2010) (discussing some of the requirements of patentability).

[158] Kathleen M. O'Malley, Patti Saris & Ronald H. Whyte, *A Panel Discussion: Claim Construction from the Perspective of the District Judge*, 54 CASE W. RES. L. REV. 671, 682 (2004) (discussing the technologically challenging nature of patent litigations).

[159] *Id.*

[160] Charlie Stiernberg, *Science, Patent Law, and Epistemic Legitimacy: An Empirical Study of Technically Trained Federal Circuit Judges*, 27 HARV. J.L. & TECH. 279 (2013) (discussing how technically trained judges on the Federal Circuit frequently overrule patent law decisions from judges lacking technical expertise).

[161] Clark D. Asay, *Copyright's Software Anticommons*, 66 EMORY L. J.265, 273-275 (2017) (tracing

figure out how to apply copyright law principles developed in domains like literature and visual art in the software context.[162] That translation project has not always been smooth, with software copyright proving to be one of the thorniest areas of modern-day copyright law.[163] In fact, some of the Federal Circuit's copyright law decisions in the software context have been front and center in that bumpy road. In the Introduction, we discussed the Federal Circuit's controversial *Oracle v. Google* decisions, which have provided much of the ammunition for critiques of the Federal Circuit's copyright law decision-making.[164]

Be that as it may, the Federal Circuit's technological acumen may place it in a better position to decide copyright law cases in domains such as software than other courts of appeal. This may be particularly so as the Court decides increasingly more software copyright cases. The Court may do so for several reasons. First, because patents and copyright law often simultaneously apply to software, software copyright disputes are more likely than many other copyright case types to land in the Federal Circuit's lap on appeal.[165] Second, as discussed, to the extent that litigants wish for their appeal to go before the Federal Circuit, they can often achieve that end in the software context by including a patent claim in what is otherwise a copyright law case.[166]

Our empirical results, in fact, show that software cases are the largest source of copyright appeals before the Federal Circuit, with a total of eighteen opinions. Software was the subject matter of the important *Google v. Oracle* case and other recent cases as well.[167] Most of these software claims have come to the Federal Circuit through inclusion of a patent claim. For instance, over eighty-three percent of these software appeals arrived at the Federal Circuit from courts other than the Claims Court, meaning the only way these appeals made it to the Federal Circuit was because of a patent claim. In fact, a little over forty-four percent of Federal Circuit appeals emanating from a court other than the Claims Court include software as subject matter. In contrast, appeals from the Claims Court have only included software three times, constituting about fourteen percent of appeals from the Claims Court. This latter percentage is closer to what other empirical studies of copyright litigation suggest is the norm for software as the subject matter of copyright cases.[168]

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the history of how software came to be subject to copyright).

[162] *Id.* at 275.

[163] *Id.* at 276—279 (discussing some of the main critiques of copyright as applied to software).

[164] *See, e.g.*, Corynne McSherry, *Federal Circuit Continues to Screw Up Copyright Law and Thwart Innovation*, ELECTRONIC FRONTIER FOUNDATION (Mar. 27, 2018), https://www.eff.org/deeplinks/2018/03/federal-circuit-continues-screw-copyright-law-and-thwart-innovation (indicating plaintiffs are likely to try to get their copyright appeals before the Federal Circuit because "[w]hat plaintiff wouldn't prefer a playing field slanted so dramatically in their favor?").

[165] Clark D. Asay, *Intellectual Property Law Hybridization*, 87 U. COLO. L. REV. 65, 93 (2016) (discussing how copyright and patent law both apply to software).

[166] Lemley & Samuelson, *supra* note 83, at 2 (highlighting recent software copyright cases that have reached the Federal Circuit through inclusion of a patent claim).

[167] Dennis Crouch, *Copyrightability of Software: The Next Big Case*, PATENTLYO (Aug. 25, 2021), https://patentlyo.com/patent/2021/08/copyrightability-software-next.html (discussing some of these cases).

[168] Asay, *supra* note 192, at 68 (highlighting technology cases, which include software, as

Given that so many of the court's cases involve software, the court's technological acumen from deciding patent law cases may be particularly helpful in its ability to capably function as a copyright law court—at least in these domains. Of course, the dangers of patent law influence may also be particularly relevant in software cases because of software's utilitarian nature and the reality that patents also apply to software.[169] Again, some claim such intermixing of legal regimes played a role in the Federal Circuit's *Oracle v. Google* decisions.[170] But as discussed above, we did not find egregious examples of this concern when reading the opinions. Furthermore, the court's relatively robust overall copyright experience may help mitigate any such concerns. Indeed, commentators have offered praise for some of the Federal Circuit's more recent software copyright cases.[171]

Of course, not all copyright cases do, in fact, involve technological developments. It becomes more of a stretch to argue that the Federal Circuit's technological acumen aids it in rendering copyright law decisions in more traditional copyright spheres such as literature and the visual arts, even if those domains are complicated in their own right.[172] In fact, in those areas, it may be that the Court's technological focus in the patent sphere makes it difficult for the court to decide copyright law cases without the court's patent law biases coming into play. Though we did not find significant evidence of such biases in this study, they remain something to continue to monitor.

B. Rights Holder Bias?

Another primary concern about the Federal Circuit as a copyright court is that it is biased in favor of rights holders.[173] That bias, in turn, may translate to the court favoring copyright holders in its copyright decisions. One way to assess that question is to examine how frequently plaintiffs prevail in the court's copyright cases. Another is to examine whether the court presents a united front on copyright law questions more so than in other contexts. We examine both questions below.

1. Plaintiff Win Rates

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constituting about 16% of substantial similarity litigation).

[169] *See, e.g.*, Viva Moffatt, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473 (2004) (discussing the problem of overlapping intellectual property protections).

[170] *See supra* note 96 and accompanying text.

[171] Michael Barclay, *In* SAS v. WPL*, the Federal Circuit Finally Gets Something Right on Computer Copyright*, ELEC. FRONTIER FOUND. (Apr. 10, 2023), https://www.eff.org/deeplinks/2023/04/sas-v-wpl-federal-circuit-finally-gets-something-right-computer-copyright.

[172] *See, e.g.*, Azmina Jasani & Emelyne Peticca, *The Tension Between Copyright Law and Appropriation Art: Where Is the Line Between Artistic Innovation and Stealing?*, THE ART NEWSPAPER (Sept. 29, 2021), https://www.theartnewspaper.com/2021/09/29/the-tension-between-copyright-law-and-appropriation-art-where-is-the-line-between-artistic-innovation-and-stealing (discussing copyright complexities in the visual arts realm).

[173] *See supra* note 59 and accompanying text.

At first glance, it may appear that the Federal Circuit actually *disfavors* copyright holders. Plaintiffs prevailed in only sixteen opinions compared to thirty-six opinions won by the defendants (four opinions were won in part by the plaintiff and in part by the defendant). That said, nearly half of the defendants' victories (sixteen) were on appeal from the Claims Court. Other factors seem to be at play in these cases, as litigants before the Claims Court frequently acted pro se and might have lost for reasons other than disfavor towards copyright holders—bias in favor of the government, for instance.

When removing Claims Court appeals, the results become a bit more even, though defendants still win more frequently than plaintiffs do. Of the thirty-four non-Claims Court opinions, defendants prevailed outright in nineteen of them (about fifty-six percent of the time). Plaintiffs, meanwhile, emerged victorious in only eleven opinions, or thirty-two percent. When adding in the four opinions where both plaintiffs and defendants earned partial victories, the defendants' rate of success rises to about sixty-eight percent, while plaintiffs' climbs to a little over forty-four percent. These bare percentages do not paint a picture of undue bias in favor of rights holders, even if recent high-profile cases such as *Oracle v. Google* lead some to speculate otherwise.[174]

In fact, in some areas of copyright law, the Federal Circuit seems to be defendants' best bet. For instance, in all three of the court's DMCA cases, the defendant prevailed. Among the circuits, the Federal Circuit has articulated the most pro-defendant understanding of the DMCA.[175] Even with respect to copyrightability, one of the most contentious issues from the *Oracle v. Google* saga, the Federal Circuit has generally sided with defendants, deciding in their favor in eight of the court's thirteen opinions involving copyrightability questions.

In other areas of copyright law, the Federal Circuit may lean ever so slightly in favor of plaintiffs. For instance, in the area of remedies, the court has sided more frequently with plaintiffs than defendants. But even there, where patent law's influence may be at its nadir, the court comes out mostly even. When software is the subject matter of the case, the court mostly comes out even as well. These may be areas where the court favors rights holders more than otherwise. But the nearly even splits in these areas point more to normal litigation outcomes than undue bias.[176]

Of course, these bare percentages don't tell the whole story. The court's small copyright caseload, particularly in specific copyright law domains, makes drawing too firm of conclusions hazardous. But at least on the surface, it does not appear that the Federal Circuit unduly favors rights holders in how it decides copyright law cases. It may still lack significant experience in certain areas of copyright law and misapply it at times, regardless of who wins and who loses. But a clear bias in favor of copyright owners does not seem to be manifest—in fact, based on the limited data that we have, some may argue the opposite is true.

2. Copyright Collegiality

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[174] Landau, *supra* note 80.
[175] Arthur, *supra* note 69.
[176] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–5, (1984) (discussing reasons why win rates between defendants and plaintiffs should normally approach fifty-fifty).

Another way to assess possible bias is by examining to what extent the Federal Circuit presents a united front on copyright matters. If Federal Circuit judges generally fall in line with whatever direction the court's leaders signal, that "collegial" behavior could indicate a court prone to bias. The Federal Circuit has been described as a "collegial court" in the patent sphere, where claims of patent owner bias are frequent.[177] As discussed above, it does not appear that the court favors plaintiffs over defendants, at least based on the raw percentages. But assessing the court in terms of unity may be another way to assess whether the court is likely to exhibit biases over time.

One manifestation of this unity may be in the number of "per curiam" cases, where no individual judge is listed as the opinion author. In total, thirteen of the opinions were so designated (twenty-four percent). Traditionally, courts sign cases "per curiam" to indicate complete court unity in the result.[178] Often that unity is meant to signal to the world that the case was so straightforward and uncomplicated that the court's opinion enjoys full and complete institutional support.[179] This mode of opinion authorship was more common in bygone eras.[180] But since the early twentieth century, per curiam decision-making has waned.[181] In its stead, more overt individual authorship of both majority and dissenting opinions has come to prevail.[182] *Per curiam* decision-making is thus now more the exception than the rule.[183] In fact, one recent study found that in federal circuit courts, the rate of per curiam decisions ranges from under one percent of terminated cases on the low end to seven percent on the high end.[184] The Federal Circuit's *per curiam* rate in copyright cases is thus more than triple the rate of other federal circuit courts at the high end.

This may suggest that the Federal Circuit is particularly united in copyright matters, at least more so than other circuit courts. But that conclusion changes when considering that all but one of its per curiam opinions come from cases appealed from the Claims Court. Based on our review, these cases have a higher frequency of pro se litigants and often involve narrower and less complicated copyright questions. Furthermore, because Claims Court cases count as one of "the fields of law" within the Federal Circuit's jurisdiction, it may be that judges without strong interest or beliefs about copyright law are often assigned these cases as part of providing them with a "representative cross-section of the fields of law" within the Federal Circuit's jurisdiction.[185] These

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[177] Brian R. Matsui, Seth W. Lloyd, & Samuel Benjamin Goldstein, *Agreeing to Disagree? How Often Do Judges Dissent*, Federal Circuitry (July 30, 2020), https://federalcircuitry.mofo.com/topics/200729-agreeing-to-disagree-how-often-do-judges-dissent.
[178] Laura K. Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 Neb. L. Rev. 517, 519-20 (2000).
[179] *Id.*
[180] *Id.*
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] Squire Patton Boggs, *The Connection between Caseload and Per Curiam Circuit Court Opinions*, 6th Circuit Appellate Blog (Mar. 27, 2016), https://www.sixthcircuitappellateblog.com/news-and-analysis/the-connection-between-caseload-and-per-curiam-circuit-court-opinions/.
[185] Fed. Cir. R. 47.2(b).

factors all seem to mean less infighting and more consensus on Claims Court copyright appeals.

On the other hand, this means that only one of the thirty-three copyright opinions that have come to the Federal Circuit through a patent claim has resulted in a per curiam opinion. That three percent rate puts the Federal Circuit right in the middle of other circuits in terms of per curiam decision-making. This suggests that the Federal Circuit, at least in this important subset of its copyright cases, is similar to other circuit courts with regards to per curiam decision-making.

Another way to assess the Federal Circuit's relative unity (or lack thereof) in copyright matters is to examine the number of dissents in these copyright cases (and, to a lesser extent, the number of concurrences). In total, we found six dissenting opinions in the Federal Circuit's fifty-six copyright opinions. While this number means that only about eleven percent of the court's copyright cases include a dissent, that figure is nearly double the percent of the court's patent cases that include a dissent.[186] Furthermore, when excluding Claims Court appeals given their high rate of per curiam decisions, the percent of copyright cases that include a dissent rises to nearly fifteen percent. Other studies of circuit courts have found that the percent of cases that include a dissent is somewhere between 2.6 and 7.8 percent.[187] These data may thus suggest that the Federal Circuit is more divisive on copyright law issues than its peers.

Concurrences also show some division in cases, though perhaps less than dissents. Concurrences typically highlight differences in reasoning, even if reaching the same result.[188] Concurrences are also less frequent than dissents–one study found that concurrences happen in less than one percent of published circuit court decisions.[189] In the Federal Circuit's copyright cases, concurrences also appeared less frequently than dissents, but were still filed in about five percent of the fifty-six opinions.

While the population of opinions is small, in total these metrics point to a somewhat fractious Federal Circuit on copyright law matters, particularly when factoring out non-Claims Court decisions. As mentioned, the Federal Circuit has been referred to as a "collegial court."[190] Recent events call that characterization into question.[191] So, too, may the court's copyright jurisprudence. And that fractious approach to copyright law matters may be another indication that the court is unlikely to exhibit strong biases one way or the other, now or in the future.

C. Is Forum Shopping at the Federal Circuit a Reality?

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[186] Matsui et al., *supra* note 174 (showing the percent of dissents in patent cases to be about 6 percent).
[187] Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 11 J. LEGAL ANALYSIS 101, 106-7 (2011).
[188] *Id.*
[189] *Id.*
[190] Matsui et al, *supra* note 174.
[191] Gene Quinn, *Chief Judge Moore Said to Be Petitioning to Oust Judge Newman from Federal Circuit*, IPWATCHDOG (Apr. 12, 2023), https://ipwatchdog.com/2023/04/12/chief-judge-moore-petitioning-oust-judge-newman-federal-circuit/id=159393/ (discussing attempts by Judge Moore to remove Judge Newman from the court).

Another major concern about the Federal Circuit as a copyright court is that of forum shopping—plaintiffs may frequently include trivial patent claims in their copyright cases to ensure that the Federal Circuit, rather than their home court of appeal, hears their case.[192] We think the number of available copyright law opinions from the Federal Circuit does not conclusively answer the question of whether forum shopping is occurring. But we think the concern about forum shopping loses some potency because, as discussed, the Federal Circuit does not appear to be biased in favor of rights holders, nor does its patent law expertise seem to get in its way of functioning as a capable copyright law court.

As to the number of opinions, as previously assessed, we found only fifty-six copyright law opinions in the Federal Circuit's forty-one-year history. That equates to a little over one copyright law opinion per year on average (1.37). Furthermore, of those fifty-six cases, twenty-two (nearly forty percent) come from the Claims Court and another from the International Trade Commission (ITC). That leaves just thirty-three copyright law opinions appealed from other federal district courts–less than one case per year, on average, over the Federal Circuit's entire tenure (0.8). By way of contrast, the Federal Circuit decides hundreds of patent law cases per year on average.[193]

Figure 1 below shows the opinions' distribution across time. The court decided a few opinions early in its history, but then next rendered a copyright decision seven years later. Thereafter, the court has typically decided in a written opinion two to three copyright cases per year, with some years fewer and some years—particularly 2007-2008—showing a spike.

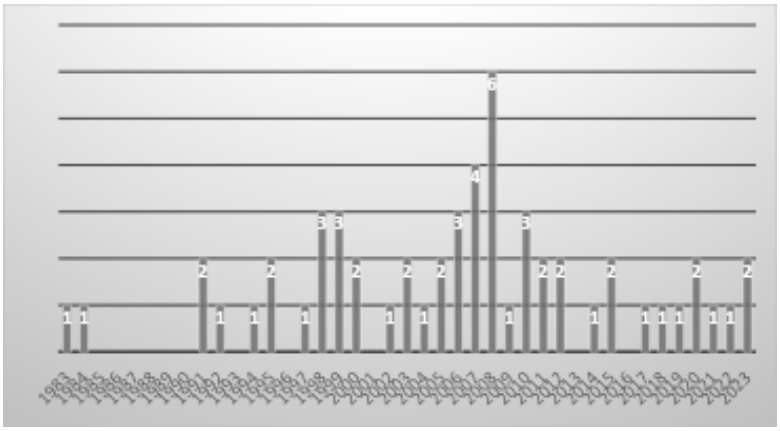

Figure 1. Distribution of Copyright Cases Over Time

[192] Lemley & Samuelson, *supra* note 83, at 2.

[193] Dan Bagatell, *Fed. Circ. Patent Decisions In 2022: An Empirical Review*, LAW360 (Jan. 9, 2023), https://www.law360.com/articles/1562614/fed-circ-patent-decisions-in-2022-an-empirical-review (indicating that the average number of decisions per year in recent years has been between 200-450).

The early absence of copyright opinions may be in part a function of the 2002 E-Government Act not yet being in effect. That Act required federal judges to make their written opinions electronically available by April 2005.[194] Many courts, perhaps seeing the writing on the wall, seem to have begun making their opinions electronically available a few years earlier than that date.[195] Before the digital age, most opinions that Westlaw included were "published" opinions, or opinions that judges, in their discretion, requested the West Company include in one of their federal reporters.[196] Hence, Westlaw was unlikely to have found and included unpublished copyright decisions, to the extent that they existed, prior to the early 2000s, when courts started joining the digital revolution in earnest.[197] The seven-year stretch of no copyright decisions may thus reflect that Westlaw simply lacked access to whatever unpublished copyright decisions the Federal Circuit reached during that time.

When focusing only on cases from 2000 and onwards, the average number of opinions per year rises from 1.37 to 1.78 (a little less than half an opinion increase). When excluding Claims Court decisions, the average rises from 0.8 to 1.09. Of course, those increases might simply be the result of increasing amounts of litigation in general. But they may also suggest that our data suppress the actual number of Federal Circuit copyright decisions due to a lack of access to unpublished copyright opinions prior to the digital age.

Be that as it may, these relatively low numbers may suggest that the gamesmanship worry has not historically played out much. Nearly forty percent of the Federal Circuit's copyright law cases come not from gamesmanship, but through its congressionally mandated jurisdiction–appeals from the Claims Court. Less than one opinion per year has come to the Federal Circuit otherwise (or about one opinion when focusing on more recent years). And only the most cynical observers would claim that those remaining thirty-three cases all came to the Federal Circuit through intentional forum-shopping. In short, while the theory behind forum-shopping seems plausible, at first blush the Federal Circuit's relatively small copyright law caseload might suggest such gaming has not been a widespread phenomenon.

That conclusion is subject to several caveats, though. First, the historical paucity of copyright law appeals to the Federal Circuit does not mean that litigants don't *try* to forum shop. As mentioned earlier, cases don't reach the appellate level for a variety of reasons, with most cases settling.[198] Plaintiffs may very well be inserting patent claims in their copyright cases quite frequently, only to settle or otherwise drop the case sometime before the case reaches the Federal Circuit. In short, our metrics are not fully representative of whatever forum shopping is happening.

Second and related, the small number of copyright cases that reach the Federal Circuit does not appear to be that much different than several other courts of appeals. For instance, running the same search for all other circuits shows that the First, Eighth, Tenth, and D.C. Circuits appear to have *fewer* copyright cases than the Federal Circuit during

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[194] *See supra* note 113.

[195] Asay, *supra* note 139, at 60 (pointing to evidence of this possibility in another empirical copyright law study).

[196] Hoffman, Izenman & Lidicker, *supra* note 104, at 693.

[197] Asay, *supra* note 139, at 59-60.

[198] Eisenberg & Lanvers, *supra* note 106.

the same time span, while the Third Circuit's number of cases is about the same as the Federal Circuit's.[199] The Second and Ninth Circuits are in a class of their own, while the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits make up the middle of the pack.[200] The Federal Circuit's jurisdiction over appeals from the Claims Court inflates its copyright law numbers some, at least in terms of assessing possible forum shoppers. But even accounting for that, it appears that the Federal Circuit is not too much of an outlier, especially given that there aren't many copyright routes to the court. In fact, some might view the number of non-Claims Court/ITC copyright cases the Federal Circuit decides per year – around one – as clear evidence of forum shopping, given the low number of appellate decisions in litigation in general and copyright in particular.[201]

Third, even if we assume that historically copyright litigants have not sought out the Federal Circuit as much as supposed, it could be the case that litigants increasingly insert patent claims in their copyright cases to ensure that the Federal Circuit hears their appeals. This might be so for several reasons. For starters, as discussed above, the rise and rise of design patents increases the possibility of including patents that overlap with copyright claims.[202] But utility patents have continued to increase in numbers, too, providing yet another means of more frequently including patent claims in copyright cases.[203] This may be particularly so in industries such as software and information technology more generally, where overlapping patent and copyright protection is common.[204] And with those industries continuing to rise, the number of copyright cases going before the Federal Circuit may, too.

In fact, the *Oracle v. Google* decisions from the Federal Circuit may act as a catalyst for future forum shopping. While the Supreme Court overruled the Federal Circuit on the fair use question, it did not address the Federal Circuit's copyrightability decision, much

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[199] When we run the same search for each circuit and then limit the results to only decisions after the start date of the Federal Circuit (October 1, 1982), we get the following results: First Circuit (118), Second Circuit (569), Third Circuit (154), Fourth Circuit (197), Fifth Circuit (233), Sixth Circuit (224), Seventh Circuit (202), Eighth Circuit (110), Ninth Circuit (953), Tenth Circuit (96), Eleventh Circuit (240), and Federal Circuit (150). If we assume each circuit has a similar false positive rate as the Federal Circuit, then we can reliably compare these results to show that the Federal Circuit is similar to other low-volume circuits in terms of copyright decisions.

[200] *Id*.

[201] Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMP. STUDIES 659 (2004) (showing the appeal rate of all filed cases to be around ten percent, which rises to a little over twenty percent when limiting the analysis to cases with a definitive judgment one way or the other); *see supra* note 109 (highlighting the relatively low numbers of appellate decisions in most circuits).

[202] Heymann, *supra* note 100.

[203] *See, U.S. Patent Statistics Chart Calendar Years 1963 - 2020*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm (tracking the increase in utility patents over the years).

[204] Viva R. Moffatt, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473 (2004) (discussing how copyright protections might be used to protect things that patents should protect).

to the chagrin of some observers.[205] Some potential plaintiffs may thus still see the Federal Circuit as their best bet because of its perceived pro-rights holder position.[206]

Overall, then, it remains difficult to determine whether copyright litigants are forum shopping, at least based solely on the numbers. Historically, *successful* forum shopping by plaintiffs wishing to appeal their cases to the Federal Circuit seems to have been more the exception than the rule, with around a case per year on average successfully making its way to the Federal Circuit and resulting in a written decision. But it's hard to assess that number in isolation–it certainly puts the Federal Circuit on the lower end of circuit courts in terms of copyright law appeals. But that's probably to be expected given the court's focus on patent law. The fact that the court is deciding around one copyright case a year (after excluding its Claims Court and ITC appeals) may, in fact, be an indication of successful forum shopping. The evidence is, at best, inconclusive.

That inconclusiveness, though, may change with the software and information technology industries continuing to rise and with the Federal Circuit's *Oracle v. Google* decisions still on the books (at least in part). Those factors may point to a future where the Federal Circuit hears more copyright law cases than ever before. Time will tell.

However, even if plaintiffs do forum shop their copyright cases to the Federal Circuit, we are less worried than others about that reality because the Federal Circuit appears to function as a relatively capable copyright law court. As discussed above, the court's overall intellectual property law familiarity, copyright law experience, and technological acumen put it in a relatively good position to address copyright law issues. This may be particularly so with respect to subject matter that are the most likely to come before it, such as software. Furthermore, as also discussed above, it does not appear, at least on its face, that the Federal Circuit exhibits strong rights holder biases in who it favors in its written opinions, nor that it is particularly united one way or the other on copyright law matters. This all suggests that, if forum shopping is, in fact, occurring, it may not be working as intended.

D. Inconsistent Case Law Development -- Sowing Copyright Confusion?

Another concern we wished to explore is the claim that the Federal Circuit may frequently sow significant legal confusion when it hears copyright cases originating in other circuits. This was a major concern in the *Oracle v. Google* saga—commentators argued that the Federal Circuit disregarded decades of established Ninth Circuit precedent in reaching its decision and thereby injected significant legal uncertainty into the software industry.[207] To assess this concern, we first examined the number of Federal Circuit opinions from each circuit, followed by an analysis of the Federal Circuit's citation patterns in those opinions.

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[205] Lemley & Samuelson, *supra* note 83 ("The Court's sweeping fair use ruling is an important victory for software developers and for an open internet. But the decision not to address the larger question—whether interfaces are copyright-protectable at all—will produce uncertainty.").

[206] *Id.* ("Because the Court sidestepped the copyrightability issue in Google, Federal Circuit judges may well decide (wrongly) that the Court implicitly accepted its earlier holding that software interfaces are copyrightable.").

[207] *See supra* note 13 and accompanying text.

1. Which Circuits Face the Greatest Risk?

As discussed earlier, the Federal Circuit is to apply the law of the circuit from which the copyright case originates. Yet, curiously, its interpretation and application of that circuit's law is not binding on future courts in that circuit going forward.[208] Hence, the Federal Circuit, with relatively little experience with a particular circuit's law or copyright law more generally, may be prone to misapply the law in ways that leave those relying on it unclear about permissible legal parameters going forward.

There is certainly truth to the contention that the Federal Circuit generally lacks expertise in any given circuit's law or copyright law more generally. As we've discussed above, over its history, we were only able to find thirty-three appeals of copyright cases when excluding appeals of Claims Court and ITC cases. That limited number of cases simply provides the Federal Circuit with little experience with any given circuit's interpretation of copyright law. And with respect to copyright law more generally, even including the Claims Court/ITC decisions leaves the Federal Circuit with relatively meager copyright experience, even if comparable to other courts of appeal. These two deficits combined may mean that, when the Federal Circuit takes on copyright law cases from another circuit, it is prone to sow confusion rather than clarity.

Where might this confusion be most prevalent? Outside the Claims Court, the largest source of copyright appeals was, by far, the Ninth Circuit with ten copyright appeals. The First Circuit followed with five copyright appeals. The Third, Fourth, and Eighth Circuits each had three copyright appeals. The Second, Tenth, and Eleventh Circuits each produced two copyright appeals, while the Fifth, Sixth, and Seventh Circuits each were the source of only a single copyright appeal.[209]

Despite being in the lead, even the number of appeals from the Ninth Circuit provides the Federal Circuit with relatively little experience in that circuit's copyright case law. This is particularly so given that those cases analyze an eclectic set of copyright law doctrines, as discussed above. And the remaining circuits fare even worse. This data may thus provide evidence in support of the argument that the Federal Circuit lacks sufficient experience in both specific circuit case law and copyright law more generally, and that that lack of experience may make the Federal Circuit prone to the types of mistakes some claim it committed in *Oracle v. Google*.

The other side of the coin, though, is that the Federal Circuit's limited toe-dipping in any given circuit's case law means that, even if the court makes an occasional mistake, the gravity of any given mistake is limited. For instance, even though some worried about the Federal Circuit's effects on Ninth Circuit law with its *Oracle v. Google* decision, others pointed out that the Ninth Circuit seemed to clear up any confusion about its law shortly thereafter.[210] Furthermore, because the Federal Circuit is unlikely to take on another Ninth Circuit case any time soon—particularly relating to the same copyright doctrines—any short-term harm done may be minimal. With that said, even short-term ills can be harmful, as they were in *Oracle v. Google* before the Supreme Court stepped in.

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[208] *See supra* note 22 and accompanying text.
[209] Our search found no copyright appeals from the D.C. Circuit.
[210] *See supra* note 81 and accompanying text.

Another factor militating against the worry that the Federal Circuit will frequently sow legal confusion is that the court is relatively well equipped to handle copyright law issues. As discussed, its intellectual property law experience, steady copyright law diet, and technological acumen provide it with advantages over at least some of its peer circuit courts in deciding thorny copyright law issues, particularly in domains such as software. Furthermore, its exposure to copyright law from nearly every other circuit, and its development of its own appellate copyright law, may help counteract any tendencies towards copyright law muddling that may otherwise occur. None of this suggests that the court is likely to perform perfectly. But these factors point to a more competent copyright law court than some may depict.

In sum, the Federal Circuit's limited and scattered case law from other circuits may mean that it lacks sophistication in any particular circuit's application of copyright law. And that lack of expertise may make the Federal Circuit prone to mucking up the field in any given case. Practically speaking, though, the Federal Circuit opines on copyright matters in the different circuits so irregularly that is unlikely to be in a position to cause long-standing mischief. It may sometimes do so in the short term, as in *Oracle v. Google*. But in the long run, in most cases that confusion will likely remain negligible. Furthermore, its overall intellectual property law experience, including its copyright law experience and technological acumen, may help equip the court to avoid any long-lasting damage in deciding copyright law issues.

2. Who Does the Federal Circuit Cite?

The legal authorities to which the Federal Circuit cites in its copyright decisions may also offer insights about the Federal Circuit's copyright experience and any possible legal confusion it is likely to sow. In this section, we discuss how.

Before getting into specifics, we note that the percentages in this section exclude self-citations. We define self-citations as references to caselaw that the case requires. For instance, when the Federal Circuit hears an appeal from a case emanating from the Ninth Circuit, it must apply Ninth Circuit law to the case. In such a scenario, we excluded citations to Ninth Circuit cases when calculating our metrics. Similarly, appeals from the Claims Court require the Federal Circuit to apply its own precedent to resolve the case. We also disqualified such self-citations. Excluding self-citations, we believe, provides a more accurate picture of which sources of authority the Federal Circuit seeks out in answering copyright questions.

The most frequently cited source of copyright authority in the Federal Circuit's copyright decisions is the Supreme Court, showing up in sixty-four percent of the court's opinions. This is unsurprising given that Supreme Court cases are the law of the land. In fact, one might reasonably argue that Supreme Court references should be excluded as self-citations. But we chose to include them because the Supreme Court's copyright caselaw is thin enough to be non-mandatory in many areas of copyright law. Despite this, other studies of copyright law litigation have also found Supreme Court case law to be a top-cited source of authority.[211]

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[211] *See* Asay, *supra* note 192, at 79 (finding the Supreme Court to be the most cited authority when excluding self-citations).

The next most frequently cited source of authority comes as at least a mild surprise: the Federal Circuit cited to its own copyright cases in fifty-three percent of its non-Claims Court opinions when interpreting and applying other circuits' copyright law. In one respect, this is unsurprising because it makes some sense that the court would be the most familiar with and thus look to its own copyright caselaw when addressing copyright law questions. On the other hand, given the Federal Circuit's somewhat limited experience in copyright law, it is slightly surprising that the Federal Circuit looks internally so frequently when applying other circuits' copyright law.

That result may be less confounding when considering how often the court cites to a multitude of authorities when rendering copyright law decisions. For instance, in sixty-eight percent of its copyright decisions, the Federal Circuit cited at least two, and sometimes up to fourteen, different authorities in interpreting and applying copyright law. When excluding Claims Court appeals, which tend to be simpler cases merely requiring application of Federal Circuit precedent, the percentage rises to over seventy-six percent. These metrics may suggest that the Federal Circuit, as a relative novice in copyright law, provides a variety of authorities from numerous jurisdictions to help bolster its copyright law reasoning.

To which circuits does the Federal Circuit most frequently look to for guidance? Unsurprisingly, the Federal Circuit looks to Second (thirty-one percent) and Ninth Circuit (thirty-three percent) case law the most regularly. The Second and Ninth Circuits are the mainstages in copyright litigation, and studies show that other circuits frequently rely on those circuits' copyright caselaw in rendering their own copyright decisions.[212] Beyond that, the Federal Circuit was mostly an equal opportunity citer: it relied on most of the other circuits' case law between fifteen to eighteen percent of the time, with the First Circuit an outlier on the high end (twenty-four percent) and the Third and Eighth Circuits getting cited in about eight percent of opinions when excluding self-citations.

Ultimately, the Federal Circuit's citation patterns leave us in some doubt about their implications. On the one hand, it may be concerning that the Federal Circuit relies so frequently on its own limited caselaw (and expertise) when grappling with thorny copyright questions. In order to avoid copyright confusion in other circuits, it may be better if the court stuck to the law of the circuit. On the other hand, the court seems to do its homework most of the time by also relying on Supreme Court and a multitude of sources when answering those questions, including case law from the influential Second and Ninth Circuits. Those realities may point to a court learning its copyright ropes over time, in a way that mitigates concerns about the court frequently muddying the copyright law waters in the originating circuit courts of appeal.

CONCLUSION

We started this study animated by concerns that the Federal Circuit, steeped in patent law ideology and with little copyright law experience, may frequently misapply copyright law in a biased manner that distorts important circuit copyright law. The Federal Circuit's

[212] *See,* Asay, *supra,* note 192, at 79 (showing the Second and Ninth Circuits are the most frequently cited courts in substantial similarity litigation); Clark D. Asay, Arielle Sloan, & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. Rev. 905, 937 (2020) (showing courts cite to Second and Ninth Circuit case law at high rates when applying the fair use test).

decisions in *Oracle v. Google* are the main pieces of evidence observers use to validate these concerns. A related concern is that that bias will promote forum-shopping, as copyright holders who wish their copyright claims to go before the Federal Circuit can easily achieve that end by including a trivial patent claim in their complaint.

Our findings provide a mix of responses to these concerns. While the Federal Circuit is certainly not a mainstay in copyright law, the court appears to decide copyright law cases at least as frequently as multiple other circuit courts of appeal. Indeed, the Federal Circuit's jurisdiction over Claims Court appeals ensures some consistency in the number of copyright law appeals it hears. While it may be far-fetched to characterize the court as a sophisticated copyright law court, it appears to possess at least as much copyright law sophistication as several of its sister circuit courts of appeal.

In fact, the court's patent law expertise may bolster the Federal Circuit's copyright law sophistication by providing it with a baseline of intellectual property law exposure as well as honing its technological savvy. That technological savvy may be particularly useful to the court in copyright cases dealing with subject matter such as software, the most frequent type of subject matter that comes before the court in its copyright law cases. And while some may worry about the court deciding copyright law cases with patent law blinders on, our reading of the court's copyright law opinions did not uncover significant evidence in support of that concern. We believe, overall, that the court's intellectual property law experience is a boon rather than a liability in its ability to capably function as a copyright law court.

We also did not find significant evidence of biased decision-making. Overall, defendants fared better than their counterparts, and in some subject matter areas like the DMCA, the Federal Circuit has articulated some of the most pro-defendant interpretations of copyright law, broadly defined. Outside of its Claims Court decisions, the Federal Circuit also appears to function as a typical circuit court of appeals in terms of per curiam decision-making and the numbers of dissents and concurrences in its copyright law opinions. While the court's small number of decisions makes it difficult to draw broad conclusions, the available evidence does not point to a court biased in favor of rights holders or one that exhibits a united front one way or the other.

As to forum-shopping, the evidence is somewhat equivocal. On the one hand, a little over one opinion a year may suggest little successful forum shopping is happening. On the other hand, that the Federal Circuit issues similar numbers of copyright opinions as other circuit courts of appeal, with the majority of those decisions relating to software, may point to successful forum shopping. While we believe strong conclusions on this question are difficult to draw, currently we feel less concerned about the issue than perhaps others because the court seems to otherwise function as a capable copyright law court.

Indeed, while the court may sometimes get a particular circuit's case law wrong, in general the Federal Circuit appears to rely on a multitude of legitimate authorities in interpreting and deciding copyright law issues, including, in particular, Supreme Court, Second Circuit, and Ninth Circuit case law. Furthermore, the likelihood of regular copyright law mischief in any circuit is low simply because the Federal Circuit decides cases on any given topic in a particular circuit so infrequently. We believe any mischief the Federal Circuit causes is likely to be short-lived for similar reasons—because of the Federal Circuit's infrequent dabbling in any circuit's copyright law, courts in most circuits will generally have the chance to right whatever wrongs the Federal Circuit

causes. Of course, it's possible that Federal Circuit decisions will exert influence over the relevant circuit in ways that perpetuate those wrongs. And even short-term problems are still problems. We don't mean to suggest these won't remain concerns, even if we believe the factors discussed above help mitigate them some.

What does this all mean for the Federal Circuit going forward? The evidence may best support the status quo. While many have worried about the Federal Circuit's role in copyright law, our analysis points to a court that typically carries out its responsibilities reasonably well. Indeed, while the Federal Circuit may not be the nation's preeminent copyright law court, the Federal Circuit is no more of a novice in copyright law matters than some of its sister circuit courts, and may even surpass some of them because of its broad-based intellectual property law experience and technological savvy.

Yet it is worth continuing to monitor the Federal Circuit's involvement in copyright law issues, particularly with respect to software. In addition to its *Oracle v. Google* decisions, the court has decided other important software copyright cases recently.[213] As discussed above, software is the court's most frequent type of copyright subject matter, and that trend is likely to continue, and perhaps increase, as software continues to grow in importance.[214] Indeed, because software is at the heart of our ever expanding digital economy[215] and qualifies for both patent and copyright protections,[216] the likelihood of increasingly more software copyright claims reaching the Federal Circuit seems high.

The likelihood of the Federal Circuit taking on ever more software copyright cases may also increase to the extent that litigants purposefully forum shop their software copyright complaints to the Federal Circuit by including trivial patent claims. While the evidence on forum shopping to date is inconclusive at best, we think it is possible, and perhaps even likely, that litigants will increasingly seek out the Federal Circuit for their software copyright cases. The court's decisions in *Oracle v. Google* and lingering perceptions of the Federal Circuit as pro-rights holder may persuade at least some plaintiffs to go the Federal Circuit route. Indeed, in some cases, the Federal Circuit may prove the lesser of two evils for plaintiffs hoping to avoid their home circuit court.

These factors may mean that the Federal Circuit becomes, over time, the nation's de facto software copyright court of appeals. In other words, the Federal Circuit may come to play a similar role with respect to software copyright appeals as it does for patent appeals—a specialty court that, because of its repeated exposure to software copyright issues over time, develops significant expertise and leadership in that domain.

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[213] *See, e.g.*, SAS Institute, Inc. v. World Programming Ltd., 64 F.4th 1319, 1329, 1333 (Fed. Cir. 2023) (holding that the district court's use a copyrightability hearing was permissible).

[214] Paul Ohm & Blake Reid, *Regulating Software When Everything Has Software*, 84 GEO. WASH. L. REV. 1672 (2016) (discussing the importance of software in the modern economy).

[215] Hila Lifshitz-Assaf & Frank Nagle, *The Digital Economy Runs on Open Source. Here's How to Protect It*, HARV. BUS. REV. (Sept. 2, 2021), https://hbr.org/2021/09/the-digital-economy-runs-on-open-source-heres-how-to-protect-it (discussing the importance of software to the digital economy).

[216] Timothy K. Armstrong, *Symbols, Systems, and Software as Intellectual Property: Time for CONTU, Part II?*, 24 MICH. TELECOMM. & TECH. L. REV. 131, 134 (2018) (discussing how software qualifies for both types of protections, though recent developments have thrown into doubt the boundaries of such protections).

In such a scenario, some may worry that the Federal Circuit will adopt some of the detrimental behaviors that others have accused it of in the patent sphere. For instance, in the patent law realm, the court has been frequently accused of a formalism in how it interprets and applies patent law doctrines (a formalism that the Supreme Court has at times rebuked).[217] That formalism may have come about in part because the Federal Circuit and others came to view it as a "supreme court" of patent law, tasked with rationalizing patent law doctrines in a coherent, more predictable manner.[218] Although the Federal Circuit lacks a similar formal mandate with respect to software copyright law, the court may develop a similar formalism in that space to the extent that it and litigants come to see the Federal Circuit as the de facto leading court of appeals for software copyright law.

Commentators have argued that the court's formalism in patent law often ignores impacts on innovation and tends to favor rights holders.[219] While we have not discovered similar biases in the court's copyright law opinions to date, that could change if the Federal Circuit becomes the de facto leader in deciding software copyright law appeals. Such a development would fulfill the worries of at least some commentators, who argued that the Federal Circuit engaged in precisely such mischief in *Oracle v. Google* by upending decades of precedent from other circuits.[220]

On the other hand, even if the Federal Circuit were to become such a leader in software copyright appeals, that may bode well for the future of copyright law as applied to software. As discussed, the Federal Circuit was instituted in part in order to help harmonize patent law.[221] By at least some accounts, patent law had proved too complicated for many of the regional circuits to handle, and Congress created the Federal Circuit to help develop a more coherent patent law system.[222] And while criticisms of the Federal Circuit are aplenty, other commentators suggest that the Federal Circuit has enjoyed some success in promoting a better patent law corpus.[223]

Might the Federal Circuit play a similar role with respect to software copyright? Copyright as applied to software has long challenged courts.[224] Similar to patent law, having a single court hear many if not all software copyright appeals may promote

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[217] *See supra* notes 49-55 and accompanying text.

[218] Timothy R. Holbrook, *The Federal Circuit's Acquiescence(?)*, 66 AM. U. L. REV. 1061, 1064 (2017).

[219] Thomas, *supra* note 53, at 797-803 (discussing the Federal Circuit's formalism and its failure to consider innovation policy as part of that formalism); Bruce Rubinstein, *A Little History*, 7 CORP. LEGAL TIMES 38 n.63 (Feb. 1997) (stating that "[t]he Court's tilt is demonstrably in favor of patent holder . . ."); Nancy Rivera Brooks, *Invention is Often the Mother of Litigation*, L.A. TIMES, Feb. 20, 1990, at 1 (reporting Professor John Wiley's view that the Federal Circuit is a "strongly propatent court").

[220] Lemley & Samuelson, *supra* note 83.

[221] *See supra* note 33-45 and accompanying text.

[222] *Id.*

[223] Ryan G. Vacca, *The Federal Circuit as an Institution*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW (Peter S. Menell, David L. Schwartz, and Ben Depoorter, eds., Edward Elgar Publishing 2019) (reviewing some of the conflicting accounts on this score).

[224] Pamela Samuelson, Randall Davis, Mitchell D. Kapor, & J.H. Reichman, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994) (discussing the complications of intellectual property protections for software).

greater coherency and predictability in the law as well as judicial expertise and understanding of some of software copyright law's complications. While the Federal Circuit may not now have that expertise, over time it may develop it.

The Federal Circuit lacking a formal charge to hear all software copyright appeals may also address some of the concerns surrounding the Federal Circuit's jurisdiction over all patent law appeals. For instance, some have worried that a single court deciding all patent appeals results in a lack of diversity and path dependencies in how patent law issues are decided.[225] Spreading appeals among a multitude of circuits (or at least a few others) may result in a more well-rounded patent law, or at a minimum keep the Federal Circuit honest.

In the copyright law space, even if the Federal Circuit came to hear most software copyright appeals, it remains unlikely that it would hear *all* such appeals because the statute does not require it as it does in the patent space. That may mean that, while the Federal Circuit would play a leading role in the development of software copyright law, it would not play the *only* role, as other circuit courts would still be involved, even if to a lesser extent.

Ironically, if the Federal Circuit were to take on such a role in software copyright law, that role would contradict another of the reasons for instituting the Federal Circuit's patent law jurisdiction. That jurisdiction was meant in part to address forum shopping, where litigants often sought out the best circuit for their particular patent law issue. If the Federal Circuit were to become the de facto leading court on software copyright issues, that result would owe significantly to litigants forum shopping their claims to the Federal Circuit, in hopes of it being their best bet. While the lack of exclusive jurisdiction may mitigate that concern some, it remains worth monitoring going forward.

In conclusion, while our study suggests that the Federal Court currently functions as a capable copyright law court, it remains important to continue to assess the court's role in copyright law issues. If the Federal Circuit does morph, over time, into the nation's leading court on software copyright law issues, that may portend both good and ill. Formalistic rule-making may stifle software innovation, while greater uniformity and predictability in the law may promote it. While we believe the current evidence supports maintaining the court's status quo, developments along these lines may support adjustments to the Federal Circuit's jurisdiction, all in order to ensure that copyright law continues to serve its Constitutional mandate of promoting the "progress of science and the useful arts."[226]

APPENDIX: FEDERAL CIRCUIT CASES SURVEYED

SAS Institute, Inc. v. World Programming Limited, 64 F.4th 1319 (Fed. Cir. 2023).
Aljindi v. United States, 2023 WL 2778689, No. 1:21-cv-01295-SSS (Fed. Cir.).
Hudson Furniture, Inc. v. Mizrahi, 2022 WL 16954854, No. 1:20-cv-04891-PAC-RWL (Fed. Cir.).
Bitmanagement Software GmBH v. United States, 989 F.3d 938 (Fed. Cir. 2021).
Lanard Toys Limited v. Dolgencorp LLC, 958 F.3d 1337 (Fed. Cir. 2020).

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[225] Vacca, *supra* note 223 (summarizing some of this literature).
[226] U.S. CONST. art. I, § 8, cl. 8 (stating that Congress has the power to enact copyright laws to "promote the Progress of Science and useful Arts").

LEGO A/S v. ZURU Inc., 799 Fed.Appx. 823 (Fed. Cir. 2020).
Syngenta Crop Protection, LLC v. Willowood, LLC, 944 F.3d 1344 (Fed. Cir. 2019).
Oracle America, Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018).
Milo & Gabby LLC v. Amazon.com, Inc., 693 Fed.Appx. 879 (Fed. Cir. 2017).
Clark v. U.S., 632 Fed.Appx. 1027 (Fed. Cir. 2015).
Gaylord v. U.S., 777 F.3d 1363 (Fed. Cir. 2015).
Oracle America, Inc. v. Google Inc., 750 F.3d 1339 (Fed. Cir. 2014).
Gaylord v. U.S., 678 F.3d 1339 (Fed. Cir. 2012).
Pieczenik v. Bayer Corp., 474 Fed.Appx. 766 (Fed. Cir. 2012).
Potter v. U.S., 424 Fed.Appx. 941 (Fed. Cir. 2011).
Siler v. U.S., 416 Fed.Appx. 907 (Fed. Cir. 2011).
Yip v. Hugs to Go LLC, 377 Fed.Appx. 973 (Fed. Cir. 2010).
Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010).
Siler v. U.S., 363 Fed.Appx. 750 (Fed. Cir. 2010).
Walton v. U.S., 551 F.3d 1367 (Fed. Cir. 2009).
Tavory v. NTP, Inc., 297 Fed.Appx. 986 (Fed. Cir. 2008).
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