KEKER VAN NEST & PETERS

Patent Playbook: Trends to Watch and Issues to Know

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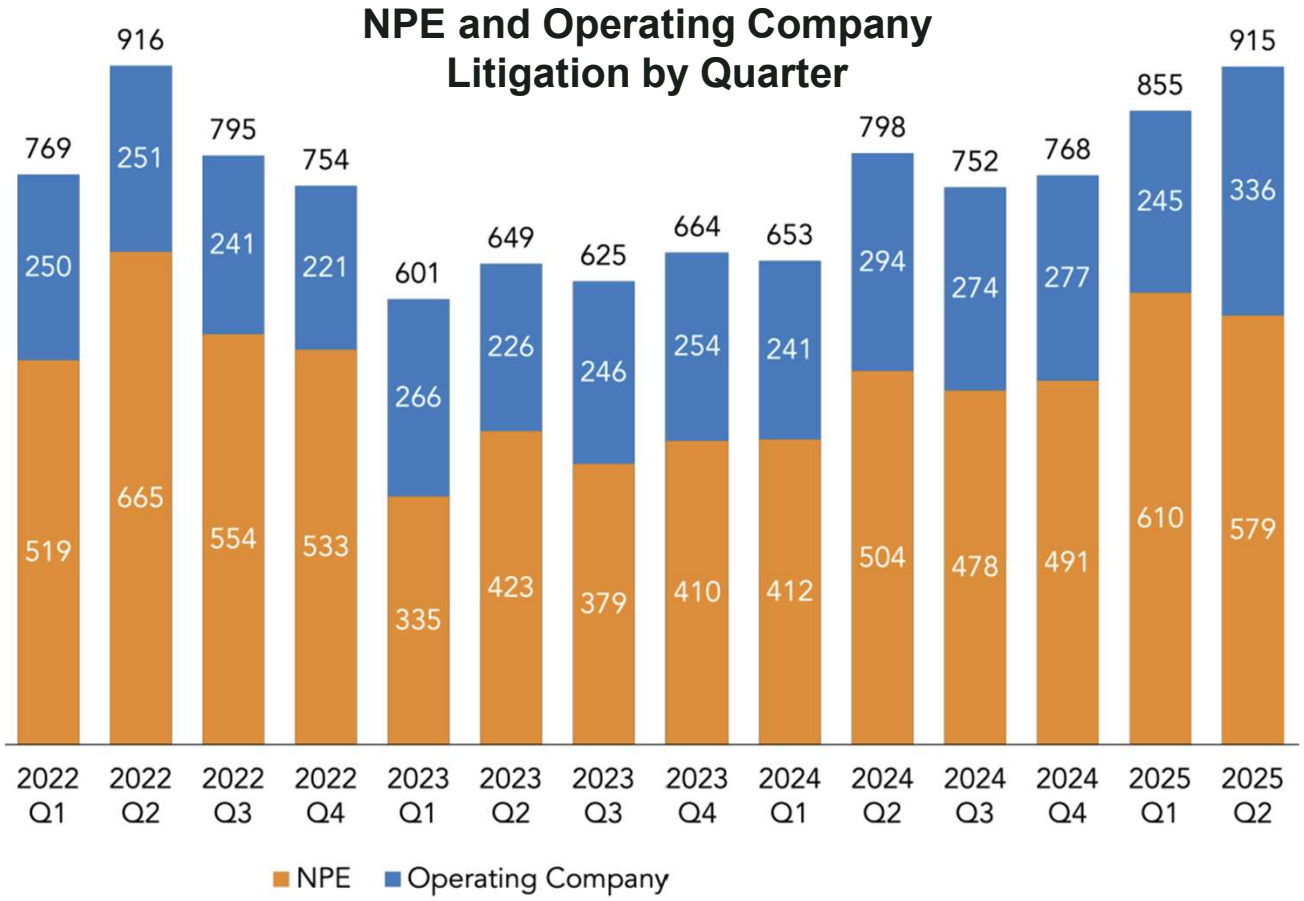
Agenda

1. Filing trends
2. Legislative developments
3. Lightning round!

Filing Trends

Filings resurged in 2025



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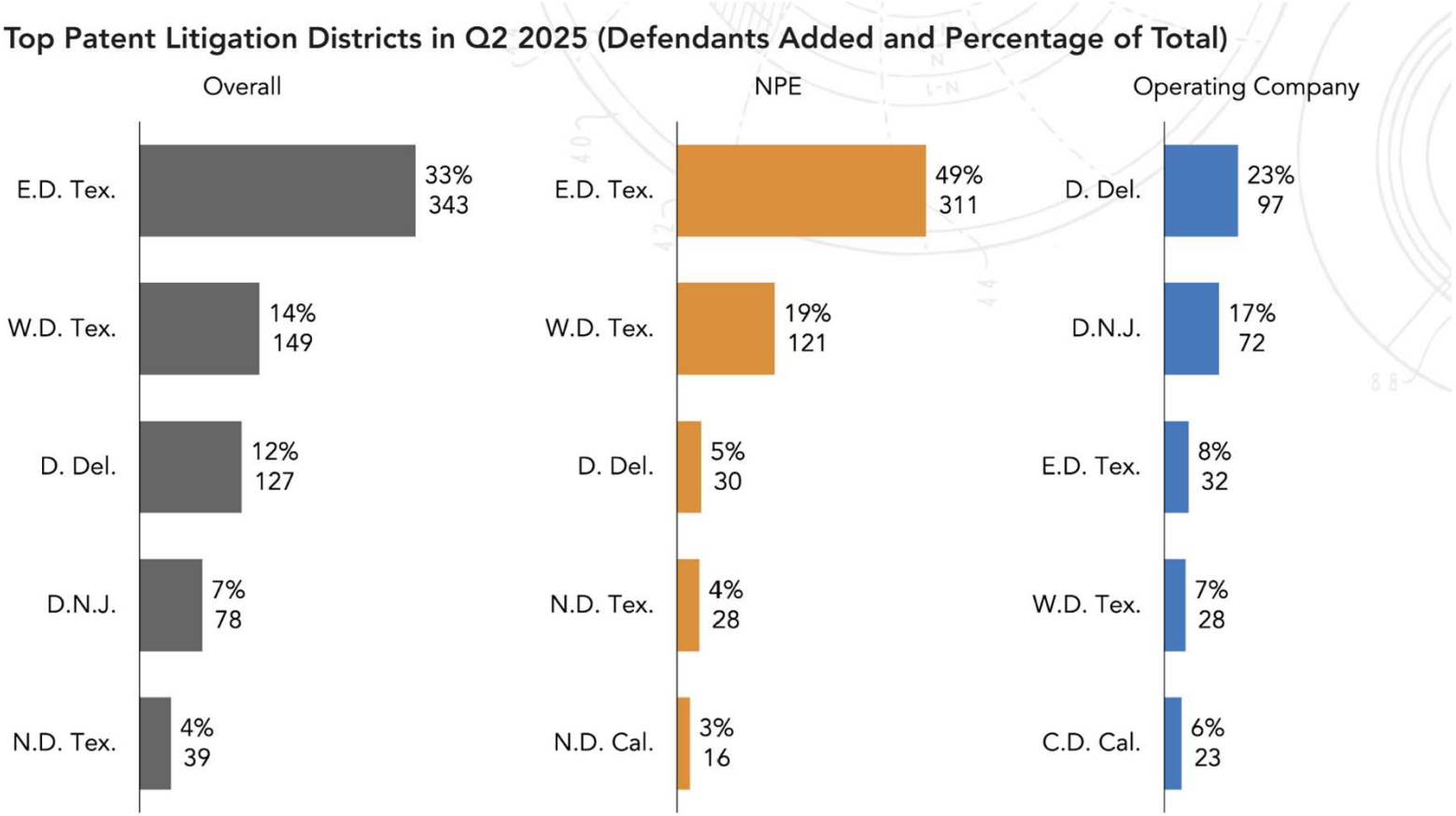
Q2 2025: Texas still reigns supreme



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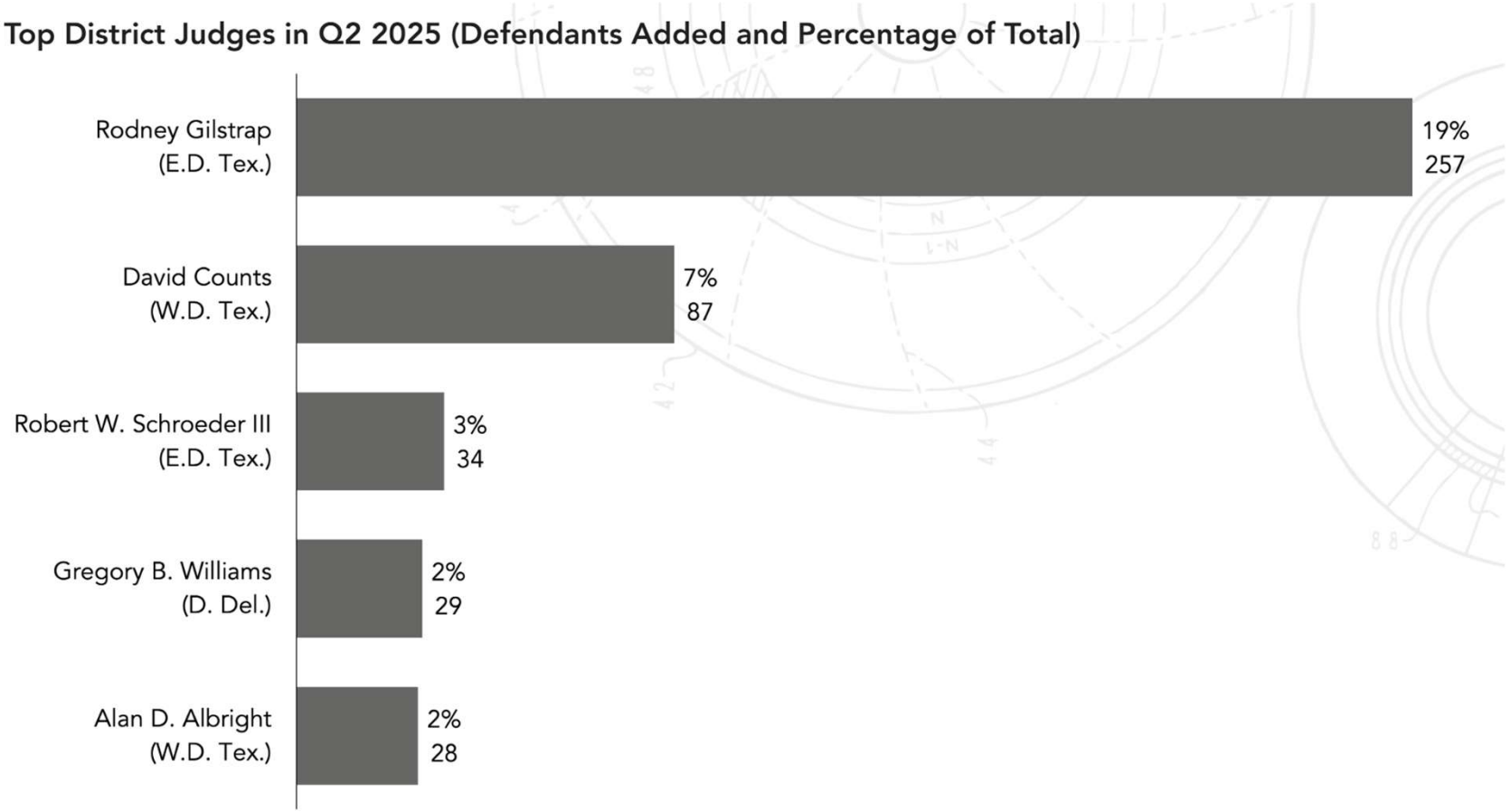
Texas still reigns supreme



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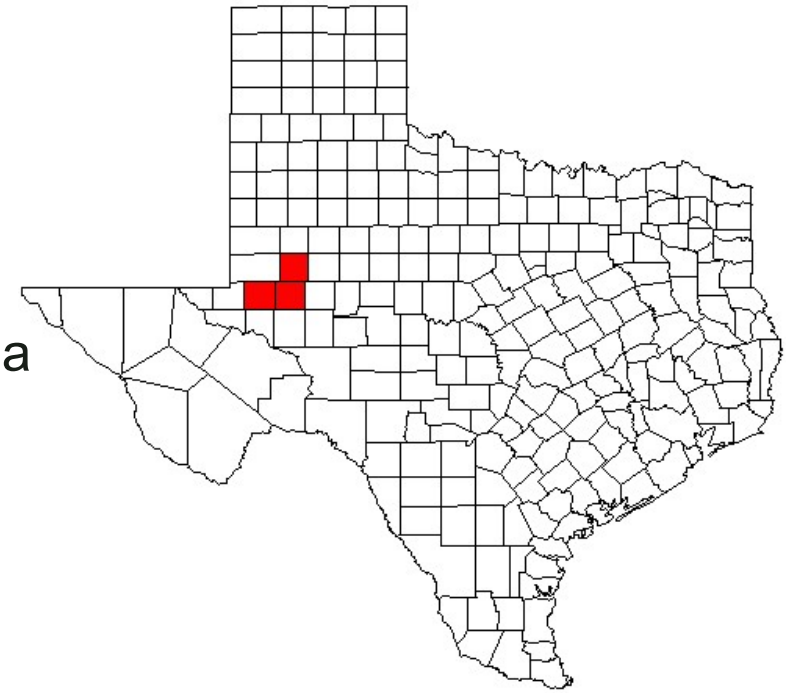
How we got here

- ***TC Heartland v. Kraft Foods*, 137 S.Ct. 1514 (2017)**
  - For purposes of patent venue, corporation "resides" in its state of incorporation
  - Hailed as the death knell of EDTX
- **Hon. Alan Albright appointed in 2018**
  - Made WDTX (Waco) a patent mecca
  - ***23%*** of all patent filings in 2022
- **Backlash**
  - July 2022: Chief Judge Orlando Garcia orders that patent cases will be randomly assigned among 12 WDTX judges
  - December 2022: New Chief Alia Moses reaffirms random assignment

WDTEX Comeback?

- Judge David Counts is the Western District's new, second-most-popular judge for patent cases.
- Judge Counts is the only judge in the Midland-Odessa Division.
- Well-known plaintiff's firms have been filing in Midland-Odessa.



Top 5 Verdicts in 2025 (so far)

Headwater Research LLC v. Samsung Electronics: **$278.79M**

- **EDTX** (Gilstrap)

Headwater Research LLC v. Verizon Communications: **$175M**

- **EDTX** (Gilstrap)

TOT Power Control, S.L. v. Apple, Inc.: **$110.73M**

- **D. Del.** (Noreika)

Maxell, Ltd. v. Samsung Electronics, Co., Ltd.: **$45.39M**

- **EDTX** (Schroeder, III)

SSI Technologies v. Dongguan Zhengyang Electronic Mech.: **$39.99M**

- **WD. Wis.** (Peterson)

Legislative Developments

The PREVAIL Act – Increased Barriers to Invalidity







- Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act, S.1553, H.R. 3160
- Purpose is to “reform” the PTAB by increasing barriers to invalidity
- Passed through Senate Judiciary Committee, on a vote of 11-10 in Nov 2024
- Stalled when Congress concluded in January 2025
- **Reintroduced in May 2025.**

The PREVAIL Act – Changes to Procedure

PTAB Now	Proposed Change in PREVAIL
Invalidity shown by "preponderance of the evidence"	"Clear and convincing evidence" of invalidity required
No standing requirement	• Those sued or threatened with suit • Those engaged or planning to engage in conduct that "reasonably could be accused of infringing" • Tax-exempt nonprofits who lack ties to for-profit companies
Invalidity can be addressed by both PTAB and District Court	No PTAB challenge available if another forum has issued a final judgment addressing validity
Multiple IPRs allowed	One IPR per patent, unless new allegations of infringement arise
Same PTAB judge that institutes presides over proceedings	Require different PTAB judge to preside over proceedings and institution

The RESTORE Act – Increased Threat of Injunctions

- First introduced in July 2024; re-introduced February 25, 2025
- Adds one sentence to Section 283:

(b) REBUTTABLE PRESUMPTION.—If, in a case under this title, the court enters a final judgment finding infringement of a right secured by patent, the patent owner shall be entitled to a rebuttable presumption that the court should grant a permanent injunction with respect to that infringing conduct."

The RESTORE Act – How did we get here?

- *eBay Inc. v. MercExchange LLC*, 547 U.S. 388 (2006)
- In press release, Senator Coons issued the following statement on Feb 26, 2025:

"Thanks to a wrongheaded decision from the Supreme Court, there are now companies who steal patented technologies rather than license them from inventors and then justify their actions as simply the cost of doing business. Innovators at universities and startups who lack resources are often unable to stop patent infringement in court and are forced into licensing deals they do not want," **said Senator Coons.** "The RESTORE Patent Rights Act will protect innovators across the country, stop the infringe-now, pay-later model in its tracks, and strengthen America's economic competitiveness for generations to come."

PERA Act –Re-Introduced in 2025

Patent Eligibility Restoration Act (PERA), S.1546

- Introduced in June 2023; withdrawn in November 2024
- Re-introduced in May 2025
- Purpose is to “restore patent eligibility to inventions across many fields”

PERA Act – Current Law

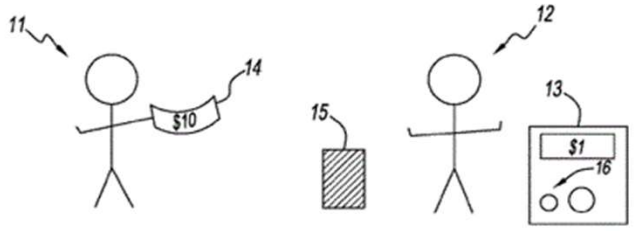


FIG. 1A
(Prior Art)

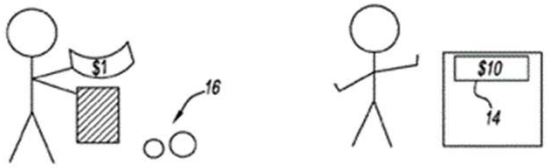


FIG. 1B
(Prior Art)

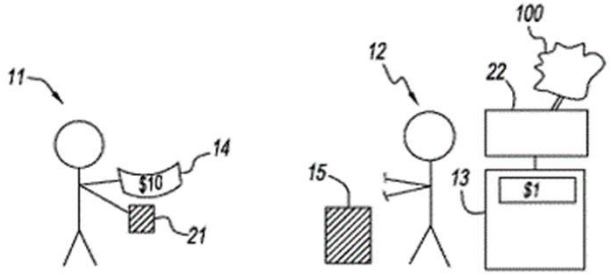


FIG. 2A

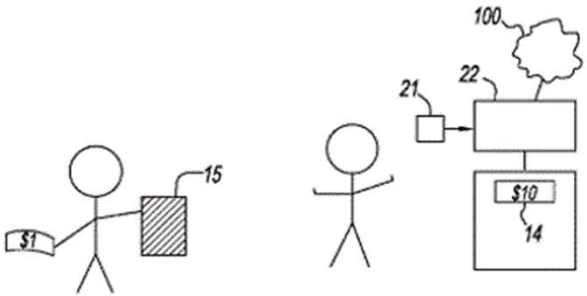


FIG. 2B

REJECTED

PERA Act – Changes to Patent Eligibility

- Judicially-created exceptions to patent eligibility would be eliminated

- Explicit exceptions:
  - Mathematical formula that is not part of a qualified invention
  - Mental process performed solely in the mind of a human being
  - An unmodified human gene (as that gene exists in the human body)
  - An unmodified natural material (as that material exists in nature)
  - A process that is substantially economic, financial, business, social, cultural, or artistic

New USPTO Leadership

- **Howard Lutnick**
- Confirmed as Secretary of Commerce, overseeing USPTO, on Feb 18, 2025
- Background in finance
- Named inventor on 400+ patents

New USPTO Leadership

- **John Squires**
- Nominated as Director of USPTO on March 10; Confirmed Sept. 18
- Partner at Dilworth Paxson
- Previously partner at Gibson Dunn & Crutcher and Perkins Coie

Other USPTO Status updates

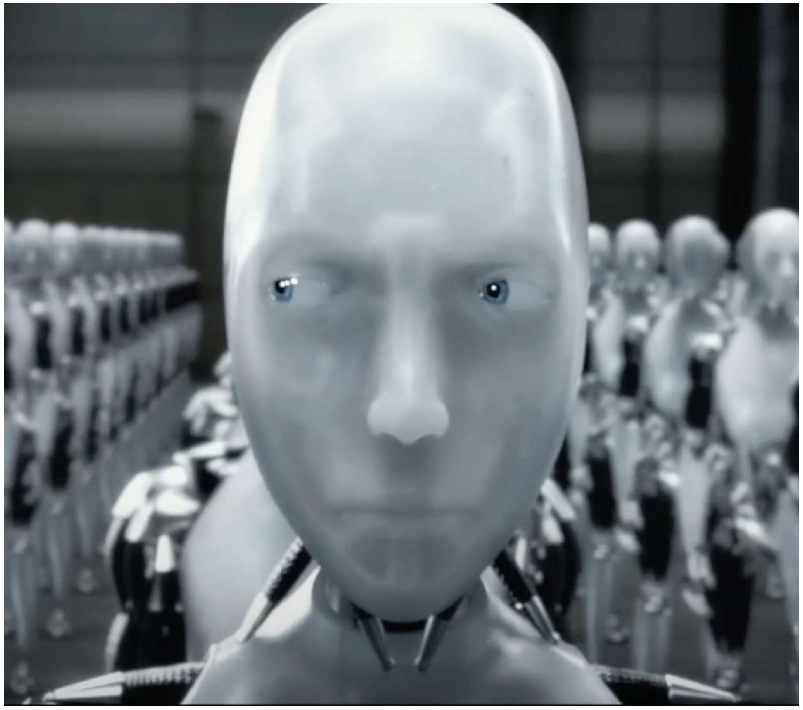
Staffing: Two thirds of the PTO exec. board has been replaced with acting officials. The agency has lost roughly 13% of judges from its admin. tribunal and hundreds of examiners.

Hiring freeze: In June, USPTO obtained an exemption from the federal hiring freeze.

Collective bargaining: On August 28, 2025, President Trump issued an executive order excluding the USPTO's entire Patents business unit from federal collective bargaining protections – including the ability to WFH.

Lightning Round!

AI Guidance under Biden



- **October 30, 2023: Executive Order 14110** — *"Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"* (President Biden)
- **February 13, 2024: USPTO issued Inventorship Guidance for AI-Assisted Inventions**
  - AI-assisted inventions are *not* categorically unpatentable for issues of inventorship.
  - For an AI-assisted invention, a natural person must have made a "significant contribution" to the claimed invention.

AI Guidance under Trump

- **January 23, 2025:** Executive Order 14179 – "Removing Barriers to American Leadership in Artificial Intelligence" → rescinded EO 14110
- **USPTO AI page – still under construction:**

Inventorship

On February 13, 2024, the USPTO issued guidance and examples on inventorship specifically for AI-assisted inventions. The USPTO is currently reviewing the examples for compliance with the AI policies of the White House, the Department of Commerce, and the USPTO. Accordingly, the examples have been placed in the Archive below.

- Inventorship Guidance for AI-assisted Inventions (February 2024)
- FAQs on Inventorship Guidance for AI-assisted Inventions

CAFC Updates: 101

- ***Recentive Analytics, Inc. v. Fox Corp.*, 134 F.4th 1205 (Fed. Cir. 2025)**
  - Decided April 18, 2025
  - Evaluated the patent eligibility of four patents that "claim the use of machine learning for the generation of network maps and schedules for television broadcasts and live events."
  - **Held:** As a matter of first impression, claims "that do no more than apply established methods of machine learning to a new data environment" are not patent eligible.

CAFC Updates: IPR Estoppel

- ***Ingenico v. IOENGINE, LLC*, 136 F.4th 1354 (Fed. Cir. 2025)**
  - Decided May 7, 2025
  - The Court interpreted the meaning of "ground" in the IPR estoppel statute. 35 USC § 315(e)(2).
  - Ground = theory of invalidity, not piece of evidence
  - **Held:** "IPR estoppel **does not** preclude a petitioner from asserting that prior art was known or used by others, on sale, or in public use in district court."
  - This means no estoppel for system art, even if that art is cumulatively disclosed in patents or printed publications that could have been raised in the IPR.

CAFC Updates: Damages

- ***EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (Fed. Cir. 2025)**
  - Decided May 21, 2025
  - Google lost a patent infringement trial and was ordered to pay $20,019,300 in damages.
  - **Held (*en banc*):** The district court abused its discretion in failing to exclude the testimony of EcoFactor's damages expert, whose opinion "was not based on sufficient facts or data."

CAFC Updates: Derivation Proceedings

- ***Glob. Health Sols. LLC v. Selner*, 148 F.4th 1363 (Fed. Cir. 2025)**
  - Decided August 26, 2025
  - The Court provided its first guidance on post-AIA derivation proceedings.
  - **Held:** To meet its prima facie burden in a derivation proceeding, a petitioner must produce prove: (i) conception of the claimed invention, and (ii) communication of the conceived invention to the respondent prior to respondent's filing of that patent application. A respondent can overcome the petitioner's showing by proving **independent conception** prior to having received the relevant communication from the petitioner.

CAFC Updates: Prosecution Laches

- ***Google LLC v. Sonos*, No. 2024-1097, 2025 WL 2473258 (Fed. Cir. Aug. 28, 2025)**
  - District Court held patents were unenforceable due to prosecution laches, given 13-year delay.
  - **Held:** Google failed to meet its burden to prove prejudice by showing that Google or others "invested in, worked on, or used the claimed technology during the period of delay."
    - "Google presented no evidence—testimony or otherwise—to support its assertion that its investment in those products actually began in 2015, or that it was caught unawares that Sonos may have already invented the adjudicated-infringing functionality when making those investments."

CAFC Updates: Attorneys' Fees

- ***Future Link Systems, LLC v. Realtek Semiconductor Corporation*, No. 2023-1056, 2025 WL 2599581 (Fed. Cir. Sept. 9, 2025)**
  - Future Link entered a voluntary dismissal without prejudice against Realtek.
  - The district court (Judge Albright) converted it to a dismissal with prejudice as a sanction.
  - **Held:** Realtek is a prevailing party for purposes of 35 U.S.C. § 285 (fees) and FRCP 54(d)(1) (costs).
    - Reasoned that Realtek "successfully rebuffed Future Link's lawsuits and ensured that Future Link can never again assert the same patents against Realtek's same accused products." (cleaned up).

SCOTUS: Case to Watch on Induced Infringement

- ***Amarin v. Hikma*, No. 24-889**
  - Petition for writ of cert filed February 19, 2025, appealing from CAFC decision *Amarin Pharma, Inc. v. Hikma Pharms. USA Inc.*, 104 F.4th 1370 (Fed. Cir. 2024)
  - Generic drug manufacturer (Hikma) had a "skinny label" for drug but advertised broader uses.
  - CAFC held that brand-name drug manufacturer could state a claim for induced infringement against generic drug manufacturer based on its external communications (label/press releases).
  - SCOTUS invited the Solicitor General to file a brief on June 23, 2025.

Thank you!