

PRO SE PATENT APPEALS AT THE FEDERAL CIRCUIT

Daniel Harris Brean*

CITE AS: 21 STAN. TECH. L. REV. 1 (2017)

ABSTRACT

This article presents the first in-depth study of patent cases appealed by pro se litigants in the U.S. Court of Appeals for the Federal Circuit. In the 127 pro se patent appeals decided from 2006-2015, the Federal Circuit treated pro se appellants more favorably than represented appellants in important procedural and substantive ways. The Federal Circuit, on average, decides pro se patent appeals more quickly and with more detailed explanation. Pro se appellants almost always receive written opinions from the court, while represented appellants get one-word summary affirmances (“Affirmed.”) as much as half the time. Despite being issued faster, the opinions in pro se cases are often of similar length, detail, and quality to the counterpart opinions issued months later for represented parties. And the court’s mere act of writing an opinion, as opposed to issuing a summary affirmance, provides a substantive benefit to the appellant for purposes of further judicial review—it is far easier to identify factual and legal errors made by the court when the court explains its reasoning.

This disparate treatment might suggest that the pro se patent appeals are more meritorious or raise more substantial legal questions, but that does not appear to be the case. Pro se appeals are much less successful on the merits than appeals with both parties represented by counsel. And despite so many written opinions being issued to affirm pro se appeals, nearly all the opinions are designated as nonprecedential because they do not add anything significant to the body of law. The Federal Circuit thus spends a disproportionate amount of time and effort disposing of pro se patent cases, even though the merit and the legal significance of those appeals is minimal. Ostensibly, this is done to ensure that pro se appellants, who are not permitted to orally argue their cases, feel that their cases have been fully heard.

*Assistant Professor of Law, The University of Akron School of Law; Of Counsel, The Webb Law Firm. I am greatly indebted to Mark Lemley, Tim Holbrook, Ryan Vacca, Jason Rantanen, Andrew Michaels, Christian Ehret, and Abby Perdue for their helpful comments on earlier drafts of this article. The views expressed in this article, as well as any errors, are my own and should not be attributed to my employers or clients. Questions and comments are welcome to dbrean@uakron.edu.

Meanwhile, the Federal Circuit is being inundated with an unprecedented flood of patent appeals raising critical questions about the interpretation and implementation of the 2011 America Invents Act. To stay on top of this docket, something has to give. Thus far the Federal Circuit has managed its increasingly heavy case load by offsetting it with more summary affirmances in cases where both parties are represented by counsel, but that may not be enough to strike a comfortable, sustainable balance. Indeed, the court may already be signaling that it has reached a tipping point where it can no longer presume to write opinions for pro se patent appeals.

The data in this study suggests that increased reliance on summary affirmances in pro se cases may not prevent all such parties from understanding that their cases were fully heard. Roughly half of se patent appellants demonstrate a significant measure of legal sophistication or familiarity with the court, as evidenced by their briefing. The data also shows that the Federal Circuit has strayed far from its own rules for how to draft nonprecedential decisions, which should be short and to the point. About half of the nonprecedential opinions in this study are as long or longer than precedential opinions, and include extraneous background information that the parties are presumed to know.

To be clear, it is commendable for the court to want to go to such lengths to make pro se appellants feel heard. But even though the pro se patent docket is small (about 12-13 cases per year), those efforts add up and tax the court's scarce resources in ways that may not appreciably further that commendable goal, and that necessarily hinder the achievement of other important goals. Recognizing certain patterns in the pro se patent docket provides a fresh perspective that justifies a departure from a rigid one-size-fits-all approach to pro se appeals. By considering each pro se case individually, sometimes it may make the most sense not to write, or at least to write less.

TABLE OF CONTENTS

I. INTRODUCTION.....	3
A. <i>The State of the “Patent Court”</i>	3
B. <i>Special Treatment of Pro Se Patent Appeals</i>	9
II. OVERVIEW OF THE DATA SET	13
III. FEDERAL CIRCUIT PRACTICES FOR PRO SE APPEALS	18
A. <i>Briefing Requirements</i>	18
B. <i>Oral Argument</i>	22
C. <i>Voting and Disposition</i>	23
D. <i>Precedential Opinions vs. Nonprecedential Opinions</i>	25
E. <i>Rule 36 Judgments</i>	31
1. <i>Possible Increased Receptiveness to Rule 36 Judgments</i>	38
IV. RESULTS ON THE MERITS	40
V. HOW PRO SE STATUS AFFECTED THE MERITS	49
VI. USING STAFF ATTORNEYS FOR SCREENING AND DISPOSITION	55
VII. PERCEIVED ACCESS AND EQUAL JUSTICE	60
VIII. CONCLUSION.....	62
APPENDIX A	63

I. INTRODUCTION

For the ten-year period from 2006-2015, 127 pro se patent appeals were decided in the Federal Circuit—the exclusive intermediate appellate court for patent cases. This article examines those 127 cases from quantitative and qualitative standpoints. Considering data such as the identities of the appellants, the appellants’ briefing, the sources of the appeals, the merits of the appeals, and the court’s practices in disposing of the appeals, a number of observations and inferences can be made. Some of this aggregated data may be unsurprising, but some appears counterintuitive and raises interesting questions. Ultimately, the data suggests that certain modifications to the Federal Circuit’s procedures may be advisable, particularly in light of a recent flood of new patent appeals that have been spreading the Federal Circuit’s resources thin.

A. *The State of the “Patent Court”*

The Federal Circuit was created by Congress in 1982 with the “central purpose” of “reduc[ing] the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent

law.”¹ Any claim arising under the Patent Act gets appealed to the Federal Circuit.² As such, although it has exclusive appellate jurisdiction over a variety of subject matters and tribunals, the Federal Circuit is largely thought of as the “patent court.”³ The bulk of the Federal Circuit’s resources is generally spent handling patent appeals which are the most frequently and uniformly complex, both legally and factually,⁴ even if they do not comprise the largest portion of the Federal Circuit’s docket.⁵ Thus, despite the substantial non-patent docket, the “patent court” nickname remains appropriate.

But even the raw number of patent cases being appealed has been sharply increasing since the enactment of the 2011 America Invents Act (“AIA”). The AIA overhauled core provisions of the Patent Act and created new adjudicatory proceedings in the USPTO, including inter partes review (“IPR”) proceedings, heard by the newly-created Patent

1. The Federal Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; H.R. Rep. No. 97-312, at 23 *1981).

2. 28 U.S.C. § 1295 (2012).

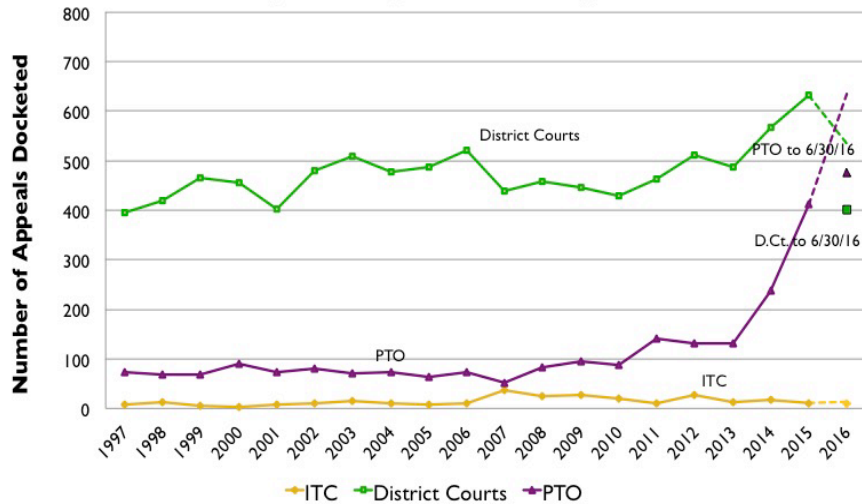
3. 28 U.S.C. § 1291 (2012); *Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIR. (May 1, 2017), <http://cafc.uscourts.gov/the-court/court-jurisdiction> [<https://perma.cc/T2NM-95L6>].

4. Patent law is notoriously complex and esoteric, and can present a wide variety of factual and legal issues to the Federal Circuit, many of which tend to push the boundaries of the law alongside the evolution of technology. *See In re Schrader*, 22 F.3d 290, 297 (Fed. Cir. 1994) (Newman, J., dissenting) (explaining that “[t]he nation has benefitted from the adaptability of the patent system to new technologies”). Former Federal Circuit Chief Judge Paul Michel estimated that patent cases require “perhaps ten times the work” of a federal employment case. Hon. Paul R. Michel, *The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1181 (1999). And, notably, in appeals concerning veterans’ benefits, absent a constitutional issue, the Federal Circuit is statutorily precluded from reviewing any factual determinations or applications of law to facts, which considerably simplifies the scope of any appeals. 38 U.S.C. § 7292(d)(2) (2012).

5. U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Caseload by Category: 2006*, (May 1, 2017), <http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/ChartFilings06.pdf> [<https://perma.cc/EY5S-SRPD>] (noting 29% of case filings at the Federal Circuit were patent cases in 2006); U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Caseload by Category: 2015* (May 1, 2017), <http://www.cafc.uscourts.gov/sites/default/files/Caseload%20by%20Category%20%282015%29.pdf> [<https://perma.cc/4SKN-F5K2>] (noting 61% of case filings at the Federal Circuit were patent cases in 2015).

Trial and Appeal Board (“PTAB”).⁶ Jason Rantanen compiled the following chart to show how dramatic this increase has been⁷:

Figure 1: Federal Circuit Patent Appeals Docketed



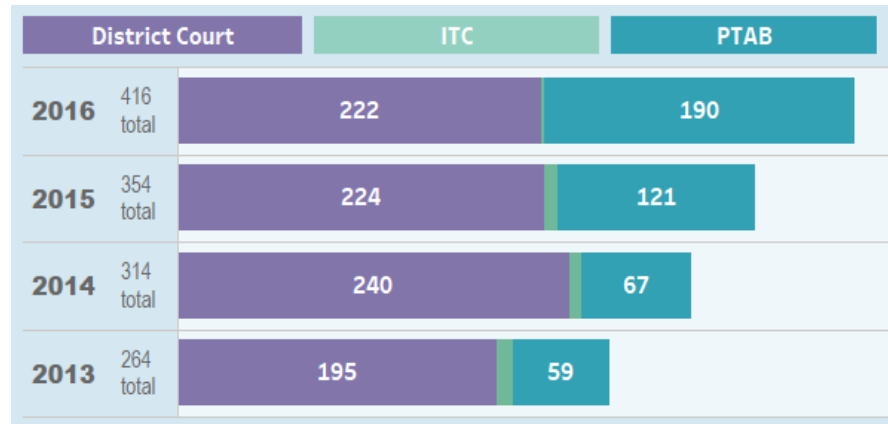
And a study from Law360 similarly demonstrates that “[a]s might be expected, data show that the number of patent decisions coming out of the Federal Circuit has risen with the size of its docket, ballooning by almost 60 percent over the past three years,” mostly due to the vastly expanded PTAB docket of AIA proceedings.⁸

6. Jason Rantanen, *Federal Circuit Now Receiving More Appeals Arising from the PTO than the District Courts*, PATENTLYO (Mar. 2, 2016), <http://patentlyo.com/patent/2016/03/receiving-appeals-district.html> [https://perma.cc/F83Z-LG7R] (“During Fiscal Year 2015 (which ended on September 30, 2015), appeals from the PTO exploded, to about a quarter of all appeals filed. Appeals from the district courts also rose, but at a slower pace.”); U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Appeals Filed, Terminated, and Pending: 2011*, (May 1, 2017), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Appeals_Filed_Term_Pend_2011.pdf [https://perma.cc/Z6G9-XQSZ] (noting 140 USPTO appeals and 462 district court appeals filed in 2011); U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Appeals Filed, Terminated, and Pending: 2015* (May 1, 2017) <http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/appealsFiledTerminatedandPending.pdf> [https://perma.cc/QK95-NDVG] (noting 411 USPTO appeals and 632 district court appeals were filed in 2011).

7. Jason Rantanen, *Inter Partes Review Statistics*, PATENTLYO (July 28, 2016), <http://patentlyo.com/patent/2016/07/partes-review-statistics.html> [https://perma.cc/2RXX-WGT6].

8. Christina Violante, *Law360’s Federal Circuit Snapshot: By the Numbers*, LAW360 (Mar. 1, 2017), <https://www.law360.com/ip/articles/894751/law360-s-federal-circuit-snapshot-by-the-numbers> [https://perma.cc/47L9-JNVL].

Figure 2: Federal Circuit Patent Appeals Decided



In response, the Federal Circuit has taken action in an effort to manage its docket efficiently. Most notably, the court has been increasingly disposing of patent appeals via summary affirmances under Federal Circuit Rule 36—i.e., nonprecedential judgments that affirm the judgment of the lower tribunal, but without a written opinion explaining the Federal Circuit’s reasoning.⁹ Such dispositions “significantly decrease the time it takes for the court to release a decision, allowing it to churn through its heavy docket.”¹⁰

But, as Jason Rantanen explained, “the court can hardly be accused of slacking: at the same time that Rule 36 summary affirmances are going up, the court is also issuing more opinions in appeals arising from the PTO than ever before.”¹¹ Indeed, the Federal Circuit wrote “a greater number of opinions in cases originating from the PTAB in the first half of 2016 than in all of 2015,” and 2016 was characterized as a

9. See *infra* Part III.E (discussing increasing usage of Rule 36 by the Federal Circuit in patent cases). As discussed below in Part III.E, a summary affirmance avoids the need to expend the substantial time and effort to draft an opinion to say, in effect, that the jury, district court, or USPTO correctly understood the facts and applied the law. This procedure, proscribed in Federal Circuit Rule 36, is a tremendously useful docket management tool that allows the Federal Circuit to focus more of its attention to cases where a written opinion explaining the basis for the judgment would be necessary and would have some precedential value.

10. Christina Violante, *Law360’s Fed. Cir. Snapshot: A by-the-Numbers Look*, LAW360 (Aug. 12, 2016), http://www.law360.com/ip/articles/826762?nl_pk=f615db4f-f7d2-4bbc-960d-2003348ae19b&utm [<https://perma.cc/A5LE-8QHW>].

11. Jason Rantanen, *Data on Federal Circuit Appeals and Decisions*, PATENTLYO (June 2, 2016), <http://patentlyo.com/patent/2016/06/circuit-appeals-decisions.html> [<https://perma.cc/RR27-GBH5>].

“blockbuster” year for patent opinions overall.¹² The court is thus very busy with its patent cases—so busy that it is issuing summary affirmances more and more, while also writing more than ever before, just to stay on top of its mounting caseload.

Many of those opinions raise important issues of broad legal implications in the context of the new AIA proceedings. The Federal Circuit has had to decide novel and critical procedural questions, such whether the USPTO is bound to finally adjudicate all challenged patent claims in such proceedings¹³ and whether the same 3-judge panel at the USPTO can decide to institute a proceeding and also issue the final judgment.¹⁴ The court has had to decide whether IPR institution decisions are appealable,¹⁵ how claims are construed in these new proceedings¹⁶ and what kinds of patents are considered “covered business methods” for purposes of the AIA Covered Business Method (“CBM”) review program (and whether that determination is judicially reviewable).¹⁷ And the court is poised to resolve many other important issues in the wake of the AIA, such as whether USPTO is correctly handling patentees’ requests to amend their claims in IPR proceedings¹⁸ and whether the “on-sale bar” for patentability still applies to private sales activities as it did before the AIA.¹⁹ And there are other areas of patent law that require

12. In the first six months of 2016, the Federal Circuit ruled on 55 IPR appeals, whereas the court ruled on 43 for the entirety of 2015. *Violante*, *supra* note 10 (“In its second year, the frequency of decisions in IPR appeals has increased threefold: from only 18 in the first half of 2015 to 55 in January through June of this year. This means that the court has already ruled in more IPRs this year than in all of 2015—an upward trend that will likely continue as more IPR decisions work their way onto the docket.”); *see also* *Violante*, *supra* note 8 (confirming larger number of decisions in 2016 than 2015, largely due to 57% increase in decisions in PTAB appeals).

13. *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1314-15 (Fed. Cir. 2016) (concluding, after extensive analysis and over a strong dissent, that “the statute cannot be read to impose such a requirement”).

14. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1033 (Fed. Cir. 2016) (“In short, both as a matter of inherent authority and general rulemaking authority, the Director had authority to delegate the institution decision to the Board. There is nothing in the Constitution or the statute that precludes the same Board panel from making the decision to institute and then rendering the final decision.”)

15. *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1273 (Fed. Cir. 2015) (“We conclude that § 314(d) prohibits review of the decision to institute IPR even after a final decision.”).

16. *Id.* at 1279 (“Even if approval of the broadest reasonable interpretation standard were not incorporated into the IPR provisions of the statute, the standard was properly adopted by PTO regulation.”).

17. *Versata Dev. Grp., Inc. v. SAP Am., Inc.*, 793 F.3d 1306, 1314-25 (Fed. Cir. 2015).

18. *In re Aqua Prods.*, 833 F.3d 1335 (Fed. Cir. 2016) (granting en banc rehearing).

19. Dennis Crouch, *Sales Activity: MedCo, Helsinn, and the AIA*, PATENTLYO

the court's careful attention, such as a substantial number of appeals in the wake of the Supreme Court's landmark *Alice* decision²⁰ concerning the boundaries of the prohibition on patenting claims directed to "abstract ideas."²¹ These cases are not routine or easy—they present new and complex questions that take considerable time and effort to resolve and harmonize with the nascent precedent, statutes, and regulations.

Stepping back from the substance of its cases, the Federal Circuit is simply busy in general. Entrusted with exclusive appellate jurisdiction over areas of paramount concern to the country and the economy—including patents, international trade, government contracts, veterans disability benefits, and federal employment²²—the Federal Circuit has been charged with the speedy and just resolution of about 1,000 appeals every year in recent years.²³ With 12 active judges, this amounts to 83.3 cases per judge each year.²⁴ But this figure is deceptively small because

(July 14, 2016), <http://patentlyo.com/patent/2016/07/activity-medco-helsinn.html> [<https://perma.cc/49HQ-A5ZU>]; *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 855 F.3d 1356, 1368-71 (Fed. Cir. 2017) (putting off for future cases the questions of whether secret sales and uses remain prior art because the sales transaction at issue in *Helsinn* was deemed to be public).

20. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

21. See, e.g., *BASCOM Global Internet Servs. v. AT&T Mobility LLC*, 827 F.3d 1341 (Fed. Cir. 2016); *Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327 (Fed. Cir. 2016).

22. 28 U.S.C. § 1291 (2012); *Court Jurisdiction*, *supra* note 3 ("The Federal Circuit is unique among the thirteen Circuit Courts of Appeals. It has nationwide jurisdiction in a variety of subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims.").

23. Cases terminated by judges in 2012, 2013, 2014, and 2015 averaged around 1,000. See U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Appeals Filed, Terminated, and Pending: 2012*, (May 1, 2017), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/Appeals_Filed_Terminated_and_Pending_2012_REV.pdf [<https://perma.cc/HJZ5-997R>]; U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Appeals Filed, Terminated, and Pending: 2013* (May 1, 2017) <http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY13/appeals%20filed%20term%20pend%209.30.13.pdf> [<https://perma.cc/X623-TB27>]; U.S. CT. OF APPEALS FOR THE FED. CIR., *Statistics: Appeals Filed, Terminated, and Pending: 2014* (May 1, 2017), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/appeals_filed_terminated_pending_2014.pdf [<https://perma.cc/WGC8-JW7L>]; U.S. CT. OF APPEALS FOR THE FED. CIR., *supra* note 6; *Statistics: Caseload, Overall: 1983-2016*, U.S. CT. OF APPEALS FOR THE FED. CIR. (May 1, 2017), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/caseload_overall_1983-2015.pdf [<https://perma.cc/2ND9-5UFJ>] (historical caseload overall). While the court receives about 1,500 cases per year on average, many of those cases are disposed of without judicial involvement (e.g., settlement, consent motions).

24. If one includes the six senior judges on the Federal Circuit, each of whose workload is about 25% that of an active judge, this only adds about 1.5 times more judicial capacity to the court. See *Court Jurisdiction*, *supra* note 3 ("When eligible,

it assumes that each judge works on each case alone, instead of the 3-judge panels that they form for every appeal. In reality, each judge is assigned to three times as many cases, or about 250 appeals each year. Even if the judge is not assigned to be the author of an opinion disposing of the case (itself a time-consuming project), the judge must read all the briefs, examine the record, study the relevant law, prepare for argument (if any), and confer and vote on every one of those 250 cases. That workload affords judges about 1.5 work days to do all of this work for every case—and this is assuming that the judges work 365 days a year. This burden is shouldered with the help of up to four law clerks per active judge, but it is still a heavy burden.²⁵

In light of the growing patent caseload, there is good reason to consider other ways that patent appeals can be handled more efficiently. Pro se patent appeals—a portion of the Federal Circuit’s docket that has received essentially no prior scholarly attention²⁶—receive special treatment from the court and raise questions of whether they may be more efficiently handled.

B. Special Treatment of Pro Se Patent Appeals

Like other courts, the Federal Circuit has its fair share of pro se litigants appear before it. Some areas of the court’s jurisdiction tend to attract many pro se appeals because the rights at issue affect only one person, the appellant, who may be unable to afford an attorney—e.g., appeals concerning veterans who have been denied disability benefits

judges may elect to take senior status, which permits them to continue to serve on the court while handling fewer cases than a judge in active service. Each judge in active service employs a judicial assistant and up to four law clerks, while each judge in senior status employs a judicial assistant and one law clerk.”). Senior judges also do not participate in en banc rehearings unless they sat on the original panel. U.S. CT. OF APPEALS FOR THE FED. CIR., Internal Operating Proc. No. 14, (2008).

25. *Court Jurisdiction*, *supra* note 3 (“Each judge in active service employs a judicial assistant and up to four law clerks.”).

26. One commentator made significant observations about pro se cases in the Federal Circuit generally, but focused on veterans and federal employment cases, arguing primarily that pro se appeals rarely warrant published opinions. See Beth Zeitlin Shaw, Case Comment, *Please Ignore this Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1030 (2004) (“Most pro se cases . . . have more straightforward facts than other appeals. Some have reasoned that many MSPB appeals have little arguable merit and there is little for the court to discuss. The statistics seem to support this theory.”); *id.* at 1032 (“Many CVA appeals come from *pro se* appellants, who write handwritten, informal briefs, often with no knowledge of the law, like MPSB appellants.”); *id.* at 1033 (“Federal appellate courts rarely allow oral arguments in *pro se* cases, and the Federal Circuit seems to be no exception.”). The most direct comparison Shaw made between pro se cases and patent cases was to contend that “[p]atent appeals merit the increased effort of published opinions; *pro se* appeals usually do not justify the increased effort it takes to write a published opinion.” *Id.* at 1037.

or appeals concerning federal employees who allege they were wrongfully terminated.²⁷

Although not as common as pro se veterans and personnel cases, pro se appeals of patent cases form a significant portion of the Federal Circuit's docket. About 3% of patent appeals that are decided by the Federal Circuit are pro se cases—roughly 12 or 13 per year.²⁸ But, as noted above, the technical and legal complexity of the subject matter typically makes the burden of resolving a patent case more onerous than most non-patent cases at the Federal Circuit. The proportion of resources expended in handling the pro se patent cases is significantly more than the raw number of cases would suggest. Plus, the burden to resolve every case in a timely fashion tends to increase as the overall caseload mounts.

Those who follow or practice before the Federal Circuit will have noticed that pro se appeals are generally not orally argued, are generally unsuccessful, and are decided in written opinions that tend to be issued on or shortly after the date that the case would have been argued per the court's ordinary scheduling practices.²⁹ In patent cases, although the Federal Circuit does not hesitate to summarily affirm judgments against represented parties following oral argument (doing so as much as 40-60% of the time)³⁰, it almost always writes opinions to decide pro se patent appeals (89.8% of the time) even though the opinions almost never add to the body of law and are therefore issued as nonprecedential 87.7% of the time.³¹ Thus, this 3% of the docket as a raw percentage is

27. See *Court Jurisdiction*, *supra* note 3 (noting that 55% of the Federal Circuit's jurisdiction consists of administrative law cases, and that those cases consist of personnel and veterans claims).

28. As explained *infra*, from 2006-2015, there were 127 patent appeals decided by the Federal Circuit. The total number of USPTO and district court appeals terminated by judges (as opposed to settlement or other non-judicial resolution) by the Federal Circuit during that time frame is 4282. See United States Court of Appeals for the Federal Circuit, *Statistics*, <http://cafc.uscourts.gov/the-court/statistics> [<https://perma.cc/6DRP-H5T8>] (Appeals Filed, Terminated, Pending, 2006-2015). This indicates that pro se appeals comprise about 2.97% of patent appeals. This figure is approximate, however, because not every appeal from the USPTO is a patent case (some are trademark cases) and there are other tribunals from which a portion of appeals may be patent cases (e.g., Court of Federal Claims or the International Trade Commission). However, because the number of trademark cases appealed from the USPTO is comparatively small, as is the number of patent cases appealed from sources other than the USPTO or district courts, this approximation is believed to be fairly accurate.

29. See *infra* Part III (describing pro se procedures in the Federal Circuit's rules).

30. See *infra* Part III.E. Although aggregating the corresponding data for non-patent pro se appeals is beyond the scope of this article, in this author's experience observing the Federal Circuit, the data is expected to be quite similar.

31. See *infra* Parts III.D – III.E.

deceptively small, as it does not reflect the disproportionately larger resources allocated to disposing of pro se patent cases.³²

This special effort in pro se patent appeals, despite the weak merits and minimal legal significance³³ of the appeals, likely stems from the court's commendable desire to make all parties appearing before the Federal Circuit feel "heard" by the court.³⁴ A one-word summary affirmance does not convey much to appellants about what the court thought of their arguments, and because pro se appellants are generally not allowed to argue their cases orally, an opinion is the only feedback ever received from the court. Writing an opinion at least says, in essence, "we read your briefing and we disagree because _____."

Nonetheless, the unwritten rule placing an effective bar on summary affirmances in pro se cases appears to be unwarranted. A summary affirmance is unsatisfying for anybody on the receiving end of it, but legally sophisticated parties understand the court's usage of that procedure as a necessary docket control management tool.³⁵ It turns out that about half of all pro se patent appellants are legally savvy enough to forego the informal briefing process permitted for pro ses and submit formal briefs in full compliance with the court's rules.³⁶ Those briefs often include coherent factual and legal arguments similar to those drafted by counsel. If a pro se appellant understands the law and the workings of the court enough to follow briefing rules and submit what looks and reads much like an appeal brief drafted by an attorney, he or she should also understand that a summary affirmance does not mean

32. To be fair, the lack of oral argument in pro se cases does offset the overall burden of those cases on the court, but in this former law clerk's experience, the opinion drafting process is more onerous than the oral argument. The necessary effort to study the case for purposes of drafting an opinion is essentially coextensive with the effort to prepare for oral argument, so the lack of an argument does not save time in preparation. The argument itself is also quite brief—only thirty minutes. FED. CIR. R. 34, Practice Note (Dec. 1, 2016) ("Time allotted for oral argument is ordinarily 15 minutes per side (not per party or attorney), although the court may vary this depending on the nature of the case.").

33. Legal significance must be distinguished from personal significance. The former concerns whether the case disposition adds to or otherwise affects the body of law, while the latter measures the import of the disposition to the parties involved. Personal significance may often outweigh the legal significance of a pro se patent appeal. The apparent ability of a party to appreciate this distinction should be considered when deciding whether and how much to write to dispose of pro se cases, as discussed herein.

34. Perhaps, beyond the immediate audience of the party involved in the litigation, the court also intends to demonstrate to outsiders or potential future litigants who might scrutinize the court's practices that that "little guy" receives as much justice in the Federal judiciary as does a large corporation. This, too, is a commendable objective, but one that is more attenuated from a given case disposition, and which may sometimes need to give way for the same reasons argued herein.

35. See *infra* Part III.E (discussing Fed. Cir. R. 36).

36. See *infra* Part III.A.

the court failed to “hear” the case.

But even if a one-word affirmance would be too terse for at least some legally unsophisticated pro se appellants, the Federal Circuit appears to write much more than is necessary or appropriate in its non-precedential opinions. The court’s own rules indicate that such opinions should be short and sweet, considering that the parties do not need to be informed of the background of the case and only need to know why the court ruled the way it did. Yet, the length and detail of nonprecedential opinions issued in pro se patent cases is often of comparable length (by word count) and detail to precedential opinions.³⁷ Legally sophisticated or not, a pro se party should not require detailed discussion of background facts and law to feel heard, nor should the public need such information for a nonprecedential opinion.

This special effort to write (and write quickly) in pro se cases adds up, and necessarily detracts from resources allocated to other cases where the court’s timely, written guidance may be more valuable and beneficial to stakeholders in the patent system. Now, while the Federal Circuit struggles to stay on top of its sharply increased patent caseload post-AIA, is the time to consider ways to improve docket management and optimize the value of case dispositions to the public. Increased reliance on summary affirmances in non-pro se patent cases may be one part of the solution, and the Federal Circuit is taking that measure, but it should not be the sole measure taken. Appropriate usage of summary affirmances in pro se appeals, combined with substantially more concise drafting of nonprecedential opinions, will go a long way to helping the Federal Circuit manage its caseload and develop a clear and consistent body of patent law in the wake of the AIA.

Ultimately, courts should not be blind to a party’s demonstrated legal sophistication, pro se or otherwise, and sophistication should be a factor when considering what practices are appropriate.³⁸ To be clear, the kind of “legal sophistication” pertinent to this article is best and most directly reflected by the party’s demonstrated understanding of the Federal Circuit’s practices, the facts and law at issue, the applicable standards of review, and the quality of the party’s briefing. That sophistication level bears on how the Federal Circuit might apply laws, rules, and procedures to ensure both justice and the perception of fairness to such a party. While other kinds of party “sophistication” might be indicated by other metrics (e.g., education, work experience), those metrics may have less correlation to how well the party understands and perceives the Federal Circuit, and are beyond the scope of this article. For

37. See *infra* Part III.D.

38. See Fed. R. Civ. P. 1 (The Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

the present purposes, the point is that affording special treatment to a demonstrably sophisticated party merely because that party appears pro se may often be inappropriate or wasteful, even if the number of pro se opinions so written is, in absolute terms, small.

* * *

Part II of this article provides an overview of the 127-case study. Part III explains the key Federal Circuit rules and procedures for briefing, argument, and disposition, and discusses how the pro se patent cases studied conform to those provisions. Part IV explores the merits of the pro se appeals studied. Part V examines whether and how an appellant's pro se status affected the merits of the appeals. Part VI considers the use of staff attorneys to handle pro se appeals. Part VII addresses the importance of perceived, as opposed to actual, fairness in access to the courts. Part VIII concludes.

II. OVERVIEW OF THE DATA SET

The data set for this study includes all pro se patent appeals resolved by the Federal Circuit for the ten-year period from January 1, 2006 through December 31, 2015. This ten-year time frame provides ample data concerning contemporary pro se appeals along with recent historical data. With 7 of the 12 active Federal Circuit judges having been appointed by President Obama beginning in 2012,³⁹ older historical data is less helpful to understanding the current court's handling of pro se cases, especially in light of its current caseload, which is a central concern of this article.

To be considered a "patent appeal" within this study, the case first had to originate in one of the tribunals where substantive patent issues may be raised—i.e., the U.S. Patent and Trademark Office ("USPTO"), the U.S. District Courts, the Court of Federal Claims ("CFC"), the Court of International Trade ("CIT"), or the U.S. International Trade Commission ("USITC").⁴⁰ The nature of the case also had to involve substantive patent law (i.e., title 35 of the U.S. Code) or patent regulations (i.e.,

39. United States Court of Appeals for the Federal Circuit, *Judges*, <http://cafc.uscourts.gov/judges> [<https://perma.cc/K4ZT-F9W7>]. Kathleen M. O'Malley was appointed in 2012, followed by Jimmie V. Reyna, Evan J. Wallach, Richard G. Taranto, Raymond T. Chen, Todd M. Hughes, and Kara F. Stoll. *Id.*

40. The Federal Circuit has exclusive jurisdiction over: (1) "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"; (2) "an appeal from a final decision of the United States Court of Federal Claims," where the U.S. can be sued for money damages arising from patent infringement; (3) "an appeal from a final

title 37 of the C.F.R.) at some stage of the proceedings. Thus, appeals concerning patentability from the USPTO would all be “patent appeals,” as would any appeal from a U.S. District Court or the Court of Federal Claims that involved a patent infringement allegation, even if the appeal raised an issue not unique to patent law, such as pleading requirements. An appeal challenging the USPTO’s application of its patent regulations (e.g., concerning patent maintenance fees or an attorney’s admission to practice before the USPTO) was treated as a patent case. An appeal from the Trademark Trial and Appeal Board, though originating at the USPTO, would not be considered a patent appeal. Cases where an *amicus curiae* proceeded *pro se*, but all parties were represented by counsel, were excluded from the study. Cases that were resolved via settlement, stipulated remand, or other means not involving a substantive decision from the court were excluded from the study. With these parameters, a group of 127 cases was identified.⁴¹ A complete listing of the cases is in Appendix A.⁴²

Table 1 and Figure 3 summarize the origins of the patent appeals in the study. The majority of the patent appeals in the study (just over 60%) originated in the district courts, with most of the remaining appeals coming from the USPTO.

TABLE 1: PATENT APPEALS BY ORIGINATING TRIBUNAL

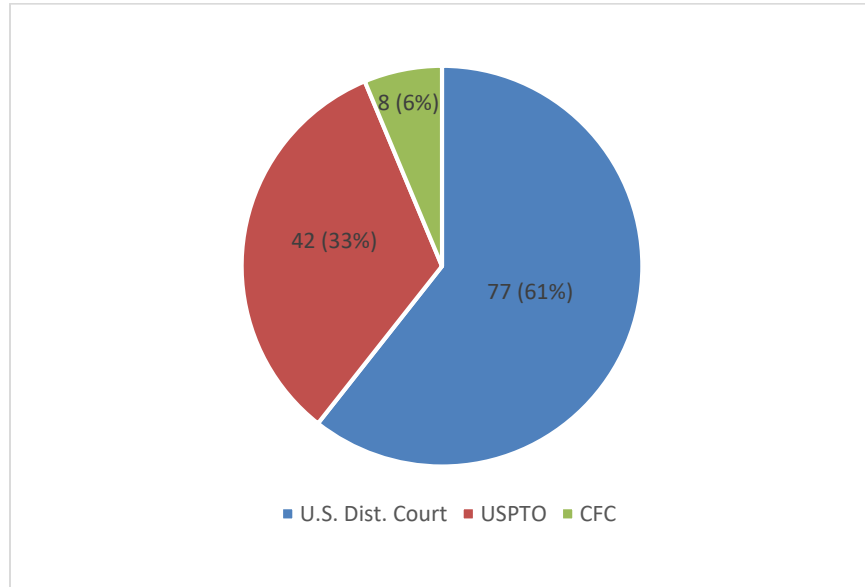
ORIG. TRIBUNAL	NO. OF CASES	PERCENTAGE OF CASES
U.S. Dist. Court	77	60.6%
USPTO	42	33.1%
CFC	8	6.3%

decision of the United States Court of International Trade”; (4) “final determinations of the United States International Trade Commission.” 28 U.S.C. §§ 1295, 1491.

41. The initial search was performed on Lexis, searching the “Federal Circuit—U.S. Courts of Appeals Cases” database for any “*pro se*” designation in the “Counsel” segment, and also including the word “patent” anywhere in the opinion. This would capture all USPTO appeals (because the USPTO is listed in the case caption) and any appeals with written decisions discussing the nature of the patent case (which would refer to the patent or patent application at issue). Because appeals from district courts would not necessarily include the word “patent” if they were summarily affirmed, a second search of the same Lexis database was conducted where the terms were “district court” & “*pro se*” & “R. 36” to capture those remaining cases. This was more efficient than searching the dockets for every summary affirmance to determine if a case was a patent case or not. Once this raw data set was gathered, the resulting set of 190 cases was manually reviewed to discard cases that did not fit the above-described parameters of the study.

42. More detailed raw data discussed throughout this article is on file with the author and available upon request.

Figure 3: Patent Appeals By Originating Tribunal



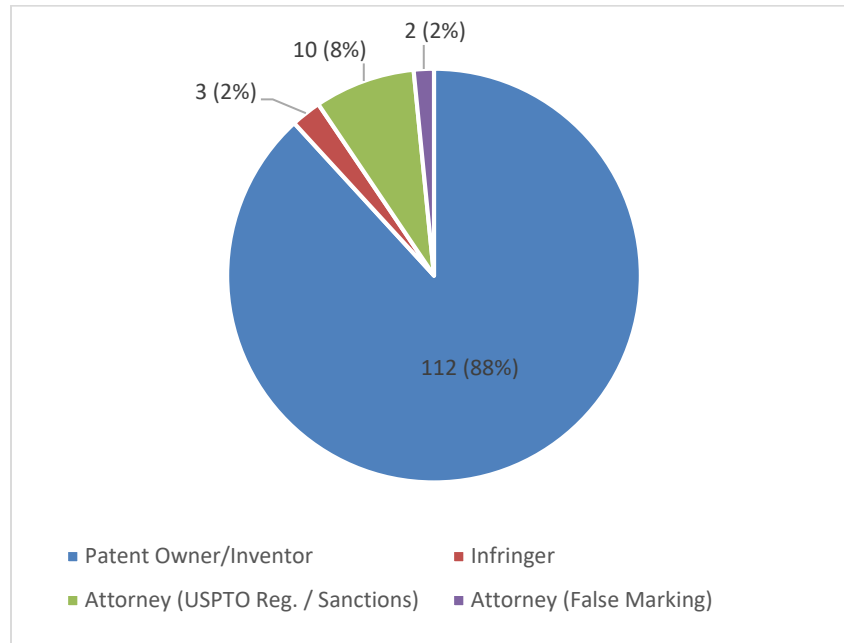
A small number of appeals came from the CFC, and none of the appeals in the data set originated in the CIT or ITC.

In every single case in the study, the pro se party was the appellant, having lost at the originating tribunal, and the appellee was represented by counsel. Table 2 and Figure 4 reflect the identities of the appellants in the study. The overwhelming majority of those appellants were inventors who owned patents or sought to obtain patent rights.

TABLE 2: PATENT APPELLANT IDENTITY

APPELLANT	NO. OF CASES	PERCENTAGE OF CASES
Patent Owner / Patent Applicant / Inventor	112	88.2%
Infringer	3	2.4%
Attorney (USPTO Reg. / Sanctions)	10	7.9%
Attorney (Qui Tam / False Marking)	2	1.6%

Figure 4: Patent Appellant Identity



A handful of appeals were raised by accused infringers, or by attorneys concerning their own USPTO registration statuses, their having been sanctioned, or their having initiated false marking lawsuits.⁴³

As detailed in Parts III and IV below, although pro se parties are entitled to submit simplified informal briefs, about half of all the appellants in this study submitted formal briefs to the Federal Circuit that complied with the rules that must be followed by parties represented by counsel. The quality of the advocacy by the appellants was sometimes rather high but was usually not great, as one would expect from briefs written by those who are not legally trained. Almost 25% of the time,

43. See 35 U.S.C. § 292 (2006) (current version at 35 U.S.C. § 292 (2011)) (defining cause of action that could be brought by “any person” against any person that deceptively marks a product with a patent number or other indication of U.S. patent protection). Notably, the law later changed to require “competitive injury,” see 35 U.S.C. § 292 (2011), and these two pro se appeals concerned related questions of standing. See *Stauffer v. Brooks Bros. Group, Inc.*, 758 F.3d 1314, 1316 (Fed. Cir. 2014) (affirming dismissal of case in light of new statute requiring proof of competitive harm for qui tam false marking actions); *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1322 (Fed. Cir. 2010) (reversing lack of standing because statute then in effect did not require competitive harm to assert qui tam false marking claim); *Worldwide Home Prods., Inc. v. Time, Inc.*, 626 F. App’x 1009 (Fed. Cir. 2015) (inequitable conduct and sanctions imposed against attorney); *O2 Micro Int’l Ltd. v. Van Loben Sels*, 426 F. App’x 913, 914 (Fed. Cir. 2011) (contempt re violation of court order concerning motion in limine).

certain arguments made by pro se patent appellants were deemed so weak or undeveloped that they were rejected by the court without any substantive analysis, and were summarily deemed “unpersuasive” or “without merit.”

Despite including many exceptionally weak arguments, the reversal rate (9.4%) among the pro se appeals was only slightly less than in appeals where both parties were represented. On issues of claim construction in infringement cases, however—an area where the Federal Circuit has a notoriously high reversal rate in the vicinity of 30%—pro se patent appellants fared much worse, getting reversals only 12.5% of the time. This may be attributable to claim construction being more legally nuanced and complex compared to common factual issues such as anticipation, where Federal Circuit’s standard of review is much more deferential.

As detailed in Part V below, a party’s pro se status otherwise did not seem to significantly affect the court’s merits rulings. A party’s pro se status was rarely called out in the court’s opinion, and when it was it rarely helped the pro se party obtain any relief. While many courts employ robust “liberal construction” practices that broadly excuse procedural defects by pro se litigants, the Federal Circuit seems to have few qualms finding issues waived and pleadings insufficient in pro se cases.

Procedurally, however, as detailed in Part III, pro se patent appeals are worlds apart from appeals involving represented parties. The most pronounced difference is the fact that while as much as 50-60% of all patent appeals have been disposed of via summary affirmances (i.e., affirming the judgment without a written opinion) in the past few years, the Federal Circuit has consistently written a formal opinion to dispose of 89.8% of the pro se patent appeals in this study. With the exception of pro se appellants that also happen to be attorneys admitted to practice before the Federal Circuit, the Federal Circuit does not allow oral argument and exclusively decides the appeals on the briefs. In turn, of the few times the Federal Circuit did not write a formal opinion and issued a summary affirmance, most involved those same pro se parties who were also attorneys.

The opinions in the pro se patent cases are rarely precedential (only 12.3%), indicating that they almost never present issues where an opinion would add anything significant to the body of law. Overall, when the Federal Circuit has written opinions in patent cases, the opinions have been precedential at least 20% of the time, and more than 50% over some time periods.

Finally, of the many pro se nonprecedential patent opinions issued, most include fairly detailed recitations of the facts and background of the case, and about half were of comparable length, by word count, to precedential opinions. The Federal Circuit’s own internal operating

procedures counsel against such opinions, indicating that nonprecedential opinions are supposed to be succinct, omitting such information because the parties presumably know it. Because the pro se appeals are generally submitted on the briefing (i.e., without argument), they are generally pre-assigned for opinion drafting before what would be an oral argument date, which means that the opinions are issued significantly earlier than they otherwise would have been.

III. FEDERAL CIRCUIT PRACTICES FOR PRO SE APPEALS

Pro se appeals are treated differently from appeals where both parties are represented in the Federal Circuit. This Part discusses the rules and internal operating procedures of the Federal Circuit pertaining to pro se appeals, as well as certain “unwritten” practices that the court follows in such cases. Detailed statistics for the 127 cases studies, as they relate to these Federal Circuit rules, procedures, and practices, are provided.

A. Briefing Requirements

Pro se appellants at the Federal Circuit can avail themselves of a simple informal briefing process that avoids cumbersome formalities concerning the content and formatting of an appeal brief.⁴⁴ Several two-page forms are provided by the Federal Circuit to facilitate informal briefing, and they vary slightly depending on the originating tribunal for the appeal.⁴⁵ A pro se appellant is required to do little more than provide a copy of the tribunal’s judgment and opinion, and write a few sentences answering direct questions such as:

Did the trial court incorrectly decide or fail to take into account any facts?

Yes No

If so, what facts?

Did the trial court apply the wrong law?

Yes No

44. FED. CIR. R. 28(g)(1) (“A pro se party may file an informal brief on the form prescribed by the court.”). Federal Rules of Appellate Procedure 28 and 32, and Federal Circuit Rules 28 and 32, provide the numerous detailed requirements for formal briefing concerning organization, headings, content, tables, citations, length, text size, typeface, margins, certificates, caption, signatures, and service.

45. See *Forms*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://cafc.uscourts.gov/rules-of-practice/forms> [<https://perma.cc/8TG4-ACYB>] (providing Forms 11-16 for various types of appeals, including Form 12 for district court appeals and Form 14 for UPSTO appeals).

If so, what law should be applied?

Are there other reasons why the trial court's decision was wrong?

Yes No

If so, what reasons?

What action do you want the court to take in this case?⁴⁶

If a pro se appellant is so inclined, he or she can attach additional pages to the form (up to 30 pages total) to provide expanded answers to the questions.⁴⁷ Informal briefing is somewhat accelerated compared to formal briefing, with opening briefs due 21 days after the appeal is docketed (rather than 60 days), and with opposition briefs due 21 days later (rather than 40 days).⁴⁸ Formal briefs are also entitled to be about twice as long as informal briefs.⁴⁹

Whether for the additional time, the additional space, or the prospect of their arguments perhaps coming across as more seriously considered and developed, for cases filed after March 1, 2012,⁵⁰ nearly every pro se litigant (with only four exceptions) in this study opted to file additional briefing beyond the two-page form, or filed formal briefs in compliance with Federal Circuit Rules 28 and 32 governing briefing format.⁵¹

Figure 5 demonstrates that in total, 45.9% of pro se parties submitted formal briefs,⁵² with an upward trend since 2009.

46. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FORM 12, <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/form12.pdf>.

47. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, GUIDE FOR PRO SE PETITIONERS AND APPELLANTS ¶ 13 (“The informal brief, together with any continuation pages needed for answers that will not fit on the form, may not exceed 30 typewritten, double-spaced pages with 1-inch margins, or their equivalent in content.”), http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/Pro_Se_Guide.pdf [<https://perma.cc/K6ZZ-Q6Y5>].

48. FED. CIR. R. 31(a), (e). The period for reply briefs is 14 days for both formal and informal briefs. *Id.*

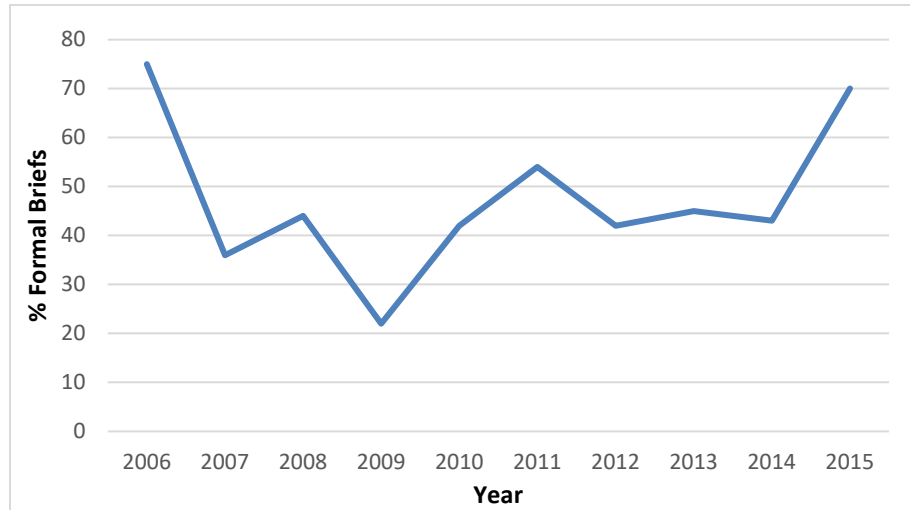
49. A formal Federal Circuit appeal brief is allowed to be up to 14,000 words, double-spaced, and 14-point font size, which typically ends up being approximately 60 pages. *See* FED. CIR. R. 32(a).

50. The Federal Circuit's PACER records for cases filed before March 1, 2012, do not include complete copies of the parties' briefs.

51. This data was gathered by individually consulting the case records on PACER, pulling copies of the briefs to visually verify whether the brief was formal or utilized the court's form for informal briefing, and to examine whether the court's docket records described the brief as “informal.” *See, e.g.*, PACER records in *Edge Sys. LLC v. Aguila*, No. 15-1507; *Yufa v. Hach Ultra Analytics, Inc.*, No. 15-1626; *Ho Keung Tse v. Apple Inc.*, No. 15-1639; *In re Rudy*, No. 13-1673; *In re Singhal*, No. 14-1704; *In re Chaganti*, No. 13-1372; *ClearValue, Inc. v. Pearl River Polymers, Inc.*, No. 12-1595; *In re Haase*, No. 12-1690.

52. Because three cases were dismissed before merits briefing took place, only

Figure 5: Pro Se Formal Briefing



Generally, the formal briefs by pro se litigants tended to be of higher quality than their informal counterparts, presenting clearer arguments and more helpful reliance on the record and applicable legal authority,⁵³ though some informal briefs were of a quality comparable to formal briefs.⁵⁴

Many pro se briefs, and primarily the informal ones, tended to be unsupported or difficult to follow, and sometimes were incomprehensible.⁵⁵ The Federal Circuit has made similar observations about the

124 cases are counted instead of the full 127 in the study.

53. See, e.g., Corrected Opening Brief, *In re Taylor*, (Fed. Cir. 2015) (No. 15-1582); Corrected Opening Brief, *In re Gross*, (Fed. Cir. 2014) (No. 14-1474); Corrected Opening Brief, *In re Chaganti*, (Fed. Cir. 2013) (No. 13-1372).

54. Admittedly, a comparison of quality between briefs is largely subjective. For purposes of this rough assessment, however, if I could follow essentially all the arguments made and understand their legal significance to the appeal, I would deem the quality of the brief high. If the brief was also well organized and contained persuasive prose, the quality was higher still. If the brief was poorly written, full of grammatical errors, irrelevancies, and non sequiturs, I deemed the quality low.

55. See, e.g., Informal Brief of Appellant, *Gal-Or v. United States* (Fed. Cir. 2015) (No. 15-5079) (“This 5-years, complex int’l litigation involves disqualification of 3 anti-Semitic Judges imposing political reciprocity hoax against Israel & this appellant, enforcing expired patent on this case & providing immunity against RULE 11 sanctions on 13 DOJ attorneys, has not even reached the level of being wrong, or repairable, as detailed herein & in attached CFC-76.”); Informal Brief of Appellant, *Michelotti v. United States* (Fed. Cir. 2014) (No. 13-5131), (appealing dismissal of complaint that sought money damages from the government based National Highway Traffic Safety Association allowing third-party Mercedes to import and sell allegedly infringing product); Informal Brief of Appellant, *Rudy v. U.S. Patent & Trademark Office* (Fed. Cir. 2014) (No. 14-1056) (seeking refund of \$90

quality of pro se appellants' advocacy, occasionally struggling to grasp pro se appellants' positions and respond to their arguments made in informal briefing.⁵⁶ And about 22% of the time, pro se appellants make arguments that are so weak or undeveloped that they do not even warrant a response from the court. In 28 of the decisions within this study, the Federal Circuit concluded its opinion by summarily rejecting additional arguments along the lines of: "We have considered [appellant's] remaining arguments and find them unpersuasive."⁵⁷ While the court is

USPTO fee because "the PTO could not properly assess those fees because Pub. Law 112-29 was null and void since Mr. Obama could not make H.R. 1249 Law as he was not eligible to be and hence was not President as he was not a natural born Citizen under the Constitution"); *Informal Brief of Appellant, In re Hoffman* (Fed. Cir. 2013) (No. 13-1657) (Appeal of enablement rejection: "No one has ever been able to mitigate and redirect hurricanes until our invention. Based on the results over the past 5 plus years of mitigating and redirecting hurricanes away from our shores, it should be abundantly obvious that something is causing this and it clearly appears to be the use of our invention by our Government.").

56. *See, e.g., In re Steed*, 802 F.3d 1311, 1319 (Fed. Cir. 2015) ("The Board criticized the 'hundred pages' of documents as being 'replete with shorthand notations, incomplete records of phone conversations, and technical terminology spread out over many years . . . we find many of these documents almost completely incomprehensible without the Appellants providing context.' Bd. Op. at 8. On our review, this criticism is accurate." [Informal brief]); *Tas v. Beachy*, 626 Fed. App'x. 999, 1004 (Fed. Cir. 2015) ("On appeal, Taş argues that the alleged act of plagiarism is relevant because a person skilled in the art, knowing the content of the earlier patent and presuming the earlier patent to be correct, would not believe the sentence-at-issue in the applications. We understand Taş's argument to not be about the alleged act of plagiarism itself, for which he still provides no legal authority, but rather to be about what a person skilled in the art would understand the applications to teach."); *Albecker v. Contour Prods., (FL)*, 578 Fed. App'x. 969, 972 (Fed. Cir. 2014) ("Albecker argues [in his informal brief] several other points in his informal briefing. Of these, he spends the most time arguing that the district court did not recognize the significance of the 'special definition' of 'top cushion.' Appellant's Br. 11. We also do not understand the significance of this point. The district court adopted Albecker's proposed construction of 'top cushion.'"); *Michelotti v. United States*, 557 Fed. App'x. 956, 962 (Fed. Cir. 2014) ("Mr. Michelotti also contends [in his informal brief] that the NHTSA has 'den[ie]d' to Plaintiff the rights and benefits of intellectual property ownership.' Compl. ¶ 3. Although Mr. Michelotti's complaint does not specify a constitutional provision, statute, or regulation he believes was violated, to the extent he intended to make out a claim under the Takings Clause of the Fifth Amendment, he would have had to allege 'that the government, by some specific action, took a private property interest for a public use without just compensation.'") (citation omitted). *Garrido v. Holt*, 547 Fed. App'x. 974, 980 (Fed. Cir. 2013) ("To the extent we understand his arguments [in his informal brief], the alleged 'misconduct' appears to be no more than disagreement over what is disclosed in the prior art.");

57. *Edge Sys. LLC v. Aguila*, 635 Fed. App'x. 897, 908 (Fed. Cir. 2015); *see also, e.g., Beriont v. GTE Labs., Inc.*, 601 Fed. App'x. 937, 940 (Fed. Cir. 2015) ("We have considered Beriont's remaining arguments and conclude that they are without merit."); *In re Chuang*, 603 Fed. App'x. 941, 947 (Fed. Cir. 2015) ("We have considered Mr. Chuang's remaining arguments and find them without merit."); *In re Singhal*, 602 Fed. App'x. 826, 831 (Fed. Cir. 2015) ("We have considered Singhal's remaining arguments and find them unpersuasive."); *Anderson v. Kimberly-Clark*

generally quite thorough in responding to most pro se arguments (generally too thorough, I argue below), this dismissive conclusion to many opinions reflects that there are often truly frivolous, off-base arguments made by pro ses. Despite the weak merits of many pro se appeals and the Federal Circuit's express warning to pro se appellants about the specter of sanctions for bringing frivolous appeals,⁵⁸ only one case in the study even mentioned the possibility of such sanctions, and the Federal Circuit declined to impose sanctions on purely procedural grounds.⁵⁹

B. Oral Argument

Consistent with Federal Rule of Appellate Procedure 34,⁶⁰ the Federal Circuit will allow oral argument in every case unless: “(a) The appeal is frivolous; or (b) The dispositive issue or set of issues recently has been authoritatively decided; or (c) The facts and legal arguments are presented adequately in the briefs and record, and the decisional process would not be aided significantly by oral argument.”⁶¹ The Federal Circuit's Guide for Pro Se Petitioners and Appellants assumes that pro se litigants' cases will not be heard orally, and sets low expectations for those who might desire oral argument, explaining that “[o]ral argument (usually 15 minutes or less) is rarely needed in pro se cases. However, you may request to argue your case before the court, giving reasons why that would aid the court.”⁶²

Corp., 570 Fed. App'x. 927, 934 (Fed. Cir. 2014) (“We have considered Ms. Anderson's remaining arguments and find them unpersuasive.”).

58. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, GUIDE FOR PRO SE PETITIONERS AND APPELLANTS, ¶ 9 (“Frivolous petitions for review and appeals will be penalized. If you file and proceed with a frivolous petition for review or appeal, you are subject to the imposition of damages, double costs, and attorney fees payable to the other party. ‘Frivolous’ means clearly hopeless and unquestionably without any basis whatever in fact or law. You may require the advice of an attorney in making your decision that your case is not frivolous.”).

59. *Roper v. Jo-Ann Stores, Inc.*, 211 Fed. App'x. 950, 952 (Fed. Cir. 2007) (“Finally, Jo-Ann argues that Roper's appeal should be sanctioned as frivolous. However, although Jo-Ann cites to Fed. R.App. P. 38, it neglects to note that sanctions may only be awarded ‘after a separately filed motion’—not after a request in an appellate brief—or after ‘notice from the court and reasonable opportunity to respond.’ Neither condition applies here, and we conclude that action to impose sanctions is unwarranted.”).

60. Rule 34 requires that the decision not to hear oral argument for any of the three reasons identified must be unanimous among the panel. FED. R. APP. P. 34(a)(2) (“Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary” for the reasons identified by the rule.).

61. FED. CIR. I.O.P. 7(2).

62. U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, GUIDE FOR PRO SE

The Supreme Court has expressly endorsed appellate courts' discretion to allow or disallow pro se oral hearings.⁶³ As one commentator summarized, "Federal appellate courts rarely allow oral arguments in pro se cases, and the Federal Circuit seems to be no exception."⁶⁴ In the ten-year period examined for this study the Federal Circuit heard oral argument in only 12 of the 127 cases, and all of those pro se appellants were attorneys admitted to practice before the Federal Circuit.⁶⁵ Further, eight of those 12 cases involved the same four pro se lawyer-appellants.⁶⁶ Some cases involved pro se appellants seeking the Federal Circuit's permission to argue, but such requests were all denied.⁶⁷

C. Voting and Disposition

If a case is heard for oral argument, the Federal Circuit panel of judges will meet after the argument and vote on how the case should be

PETITIONERS AND APPELLANTS, ¶ 15 The Federal Circuit Pro Se Guide further discourages pro se litigants from requesting a hearing by noting that "[i]f you are granted oral argument you must bear your own travel expenses to the court." *Id.*

63. *Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 160-63 (2000) ("Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*. We already leave to the appellate courts' discretion, keeping 'the best interests of both the prisoner and the government in mind,' the decision whether to allow a *pro se* appellant to participate in, or even to be present at, oral argument.") (quoting *Price v. Johnston*, 334 U.S. 266, 284 (1948)).

64. Beth Zeitlin Shaw, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1033 (2004).

65. *In re Gross*, 603 Fed. App'x. 1004 (Fed. Cir. 2015); *In re Gross*, 603 Fed. App'x. 1006 (Fed. Cir. 2015); *Worldwide Home Prod., Inc. v. Time, Inc.*, 626 F. App'x 1009 (Fed. Cir. 2015); *Stauffer v. Brooks Bros. Group*, 758 F.3d 1314, 1316 (Fed. Cir. 2014); *In re Rudy*, 558 Fed. App'x. 1011 (Fed. Cir. 2014); *Hsuan-Yeh Chang v. Rea*, 530 Fed. App'x. 958, 959 (Fed. Cir. 2013); *Cornish v. Kappos*, 474 Fed. App'x. 779 (Fed. Cir. 2012); *In re Rudy*, 463 Fed. App'x. 939 (Fed. Cir. 2012); *O2 Micro Int'l Ltd. v. Van Loben Sels*, 426 F. App'x 913, 914 (Fed. Cir. 2011); *Stauffer v. Brooks Bros.*, 619 F.3d 1321 (Fed. Cir. 2010); *Cornish v. Doll*, 330 Fed. App'x. 919 (Fed. Cir. 2009); *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir. 2006); Oral argument data and attorney admission information were confirmed via <http://ecf.cafc.uscourts.gov> [<https://perma.cc/J9TT-JRMY>].

66. John Nicholas Gross and Christopher John Rudy each argued two appeals concerning their own patent applications; Raymond E. Stauffer argued two appeals concerning his *qui tam* false marking lawsuits; and Cornell D.M. Judge Cornish argued two appeals concerning his attempt to have his USPTO registration reinstated.

67. See, e.g., *Beriont v. GTE Labs., Inc.*, 601 Fed. App'x. 937 (Fed. Cir. 2015); *Rudy v. Lee*, 562 Fed. App'x. 964 (Fed. Cir. 2014); *In re Yeager*, 527 Fed. App'x. 859, 860 (Fed. Cir. 2013); *In re Chaganti*, No. 13-1372 (request in opening brief); *Hemphill v. Johnson & Johnson*, No. 13-1503; *Ottah v. Verifone Sys., Inc.*, No. 13-1106 (request in informal brief.); *ClearValue, Inc. v. Pearl River Polymers, Inc.*, No. 12-1595; *In re Haase*, No. 12-1595 [AA: Please check this No. as we're unable to locate it on Lexis or Westlaw]. The Federal Circuit's PACER records (via ecf.cafc.uscourts.gov) show the requests and denials of oral argument. Notably, Christopher John Rudy was permitted to argue in other cases, as noted *supra* in note 66.

decided, with the presiding judge (or the senior-most judge, if the presiding judge is not in the majority) assigning authoring responsibility for the opinion, which will be issued in a few months.⁶⁸ Sometimes the panel will unanimously decide to affirm the judgment without a written opinion pursuant to Federal Circuit Rule 36, which will be issued in a matter of days.⁶⁹

As noted above, nearly every pro se appeal in this study (all but 12) was submitted on the briefs—i.e., decided without any oral argument. For such cases, the Federal Circuit’s Internal Operating Procedures allow the judges to follow the same conference and voting procedures for argued cases or, alternatively, for the presiding judge to “preassign the authoring responsibility to a panel member before the panel conference.”⁷⁰ This procedure may seem curious, as it tasks one judge on the panel with authoring the panel’s opinion before the panel has conferred to discuss the case, but the procedure further contemplates that the opinion drafted by the assigned judge will be circulated to the other panel members for voting “before the panel conference and may be ready to be issued promptly following the panel.”⁷¹

Cases that are submitted on the briefs are “calendared” for a specific date when other cases are also scheduled for argument.⁷² In practice, most of the opinions for the cases in this study appear to have been preauthored per the court’s alternative procedures, as they were issued very promptly after the panel’s conference for that day’s calendared arguments.⁷³ Generally, nonprecedential decisions (which encompass almost all pro se appeals, see *infra* Part III.D) are issued much more quickly than precedential decisions—the time from the calendared date to disposition is typically a few days or weeks for nonprecedential decisions, but generally a few months for precedential decisions.⁷⁴

68. FED. CIR. I.O.P. 8(1)-(2).

69. *See infra* Part III.E.

70. FED. CIR. I.O.P. 8(4).

71. *Id.*

72. *See* <http://cafc.uscourts.gov/argument/upcoming-oral-arguments> (listing three or four argued cases and one submitted case for each panel’s hearing).

73. *See, e.g.,* Sheridan v. U.S., No. 15-5073 (calendared for October 6, 2015, opinion issued October 8, 2015); In re Taylor, No. 15-1582 (calendared for November 4, 2015, opinion issued November 6, 2015); Tse. v. Apple Inc., No. 15-1639 (calendared for November 3, 2015, opinion issued November 5, 2015); In re Singhal, No. 14-1704 (calendared for March 6, 2015, opinion issued March 10, 2015); Hemphill v. Johnson & Johnson, No. 13-1503 (calendared for January 9, 2014, opinion issued January 14, 2014).

74. As Dennis Crouch observed, the median time from the calendared date to disposition for nonprecedential decisions at the Federal Circuit (which most pro se patent appeals are, see *infra*) tends to be within a week or two, while precedential decisions tend to take a few months. Dennis Crouch, *Waiting for Federal Circuit Decisions*, <http://patentlyo.com/patent/2013/02/waiting-for-federal-circuit-decisions.html> (last visited February 11, 2016) (“As is apparent, non-precedential

D. Precedential Opinions vs. Nonprecedential Opinions

Every Federal Circuit appeal that reaches a merits determination will be resolved in one of three ways—a precedential opinion, a nonprecedential opinion, or a summary affirmance judgment pursuant to Federal Circuit Rule 36.⁷⁵ Rule 36 judgments involve no written decision by the court other than the word “AFFIRMED,” and present special circumstances discussed *infra* in Part III.E.

The Federal Circuit almost always elects to write an opinion to dispose of pro se patent cases rather than dispose of those appeals via Rule 36 judgments. In this study, 114 of the 127 decisions (89.8%) included a written opinion.⁷⁶ The written opinions may be issued as either precedential or nonprecedential, by vote of the judges on the panel for the case.⁷⁷ According to the court’s Internal Operating Procedures, precedential opinions should only be issued where the case presents, for example, a legal issue that is particularly novel, important, of substantial public interest, or of wide applicability.⁷⁸ By contrast, nonprecedential

opinions (including Rule 36 decisions) are much quicker than precedential decisions. With a comparative median of 7 days to about 4 months respectively.”); *see also* Law360’s Fed. Cir. Snapshot: A By-the-Number Look (Aug. 12, 2016), *available at* http://www.law360.com/ip/articles/826762?nl_pk=f615db4f-f7d2-4bbc-960d-2003348ae19b&utm (“Rule 36 judgments come down, on average, nine days after oral arguments, whereas nonprecedential opinions take 49 days on average, and precedential opinions take 112 days.”).

75. Fed. Cir. R. 32.1(a); Federal Circuit IOPs, at IOP #10.

76. This figure includes the five cases in the study that were dismissed before a merits ruling. Excluding those five cases, the Federal Circuit would write opinions in 109/117 (93.1%) of cases.

77. Federal Circuit IOPs, at IOP #10.

78. More specifically, “[t]he court’s policy is to limit precedent to dispositions meeting one or more of these criteria:

- (a) The case is a test case.
- (b) An issue of first impression is treated.
- (c) A new rule of law is established.
- (d) An existing rule of law is criticized, clarified, altered, or modified
- (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.
- (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.
- (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.
- (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
- (j) A new constitutional or statutory issue is treated.
- (k) A previously overlooked rule of law is treated.
- (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.
- (m) The case has been returned by the Supreme Court for disposition by action of

decisions are those “determined by the panel issuing it as not adding significantly to the body of law.”⁷⁹ As expected, nonprecedential decisions, while potentially useful for “guidance or persuasive reasoning,” are not afforded the “effect of binding precedent” in the Federal Circuit.⁸⁰ But they can be cited to the court if issued in 2007 or later.⁸¹

The Federal Circuit stresses that “[d]isposition by nonprecedential opinion or order does not mean the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law.”⁸² It further explains that the heavy workload of the court makes it impracticable to issue precedential decisions in all cases, and notes that “[u]nnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort.”⁸³ The additional effort, according to the court, seems to be due in large part to the need for precedential opinions to “inform the bar and interested persons *other* than the parties.”⁸⁴ Thus, “[n]onprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive.”⁸⁵ Nonprecedential decisions should be short and sweet, omitting any extraneous background and discussion.

Opinions create burdens on the court well beyond the authoring judge’s writing effort, which itself is substantial and can be particularly challenging in some *pro se* cases where low-quality briefing requires considerable research to fill in factual and legal gaps that are inadequately briefed. While the initial drafting of any opinion requires careful writing supported by thorough analysis and verification of all the factual and legal assertions therein, the non-authoring judges must also assure themselves that the opinion is sound and accurate before voting to join the opinion. That alone can involve a substantial amount of research and work. This added burden is compounded for precedential opinions where, beyond the 3-judge panel’s careful review of the opinion, there is a further burden on the court as a whole. Before a purport-

this court other than ministerial obedience to directions of the Court.

(n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.”

Federal Circuit IOP ¶10, ¶4.

79. Fed. Cir. R. 32.1(b).

80. Fed. Cir. R. 32.1(d).

81. Fed. Cir. R. 32.1(c).

82. Fed. Cir. IOP 10.3.

83. Fed. Cir. IOP 10.1.

84. Fed. Cir. IOP 10.2 (emphasis in original).

85. Fed. Cir. IOP 10.3.

edly precedential opinion may be issued as precedent, every such opinion must be circulated to and reviewed by the entire court for ten working days.⁸⁶ During this time “[n]onpanel members may send comments to the authoring judge, to the panel, or to all judges” or “may submit a hold sheet pending a request for an en banc poll”⁸⁷ if the precedent creates a conflict with other precedent or raises an issue of exceptional importance.⁸⁸

Throughout the Federal Circuit’s history, the trend seems to have been toward more precedent in patent infringement appeals and less precedent in USPTO appeals. From 1982 through 2003, only 21% of patent infringement appeals resulted in precedential opinions.⁸⁹ That figure increased in 2008-2011, where the Federal Circuit disposed of patent infringement appeals with precedential opinions 43% to 59% of the time, and with nonprecedential opinions only 15% to 30% of the time.⁹⁰ From 1982 through 2003, 58% of USPTO patent appeals resulted in precedential opinions.⁹¹ This figure has dramatically decreased. In 2015, about 20% of USPTO patent appeals resulted in precedential opinions, and 20% in non-precedential opinions.⁹²

All told, in recent years the Federal Circuit decides that well over 100 patent appeals each year sufficiently add to the body of law so as to warrant a precedential opinion.⁹³ Of the 114 written decisions in this

86. Fed. Cir. IOP 10.5.

87. *Id.*

88. Fed. R. App. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”); Fed. Cir. IOP 13.2 (“Among the reasons for en banc action are: (a) Necessity of securing or maintaining uniformity of decisions; (b) Involvement of a question of exceptional importance; (c) Necessity of overruling a prior holding of this or a predecessor court expressed in an opinion having precedential status; or (d) The initiation, continuation, or resolution of a conflict with another circuit.”).

89. Shaw, *supra* note 26, at 1027-29.

90. Jason Rantanen, *CAFC: Patent Opinions Down, Rule 36 Affirmances Up*, PATENTLY-O (Oct. 27, 2011), <http://patentlyo.com/patent/2011/10/cafc-patent-opinions-down-rule-36-affirmances-up.html> [<https://perma.cc/X3QJ-ADL3>].

91. Shaw, *supra* note 26, at 1032.

92. Dennis Crouch, *Federal Circuit Operating Procedure: Affirm PTO Decisions Without Opinion*, PATENTLY-O (Oct. 14, 2015), <http://patentlyo.com/patent/2015/10/operating-procedure-decisions.html> [<https://perma.cc/NM22-XG8Y>].

93. GIBSON DUNN, *FEDERAL CIRCUIT YEAR IN REVIEW 2014/2015* 1 (2015), <http://www.gibsondunn.com/publications/Documents/Federal-Circuit-2014-2015-Year-in-Review.pdf> [<https://perma.cc/P9DK-DUXA>] (“The Court issued published opinions in a total of 110 precedential patent cases” in the 2014-15 term); GIBSON DUNN, *FEDERAL CIRCUIT YEAR IN REVIEW 2013/2014* 1 (2014), <http://www.gibsondunn.com/publications/documents/Federal-Circuit-2013-2014-Year-in-Review.pdf> [<https://perma.cc/7Q2V-E8M2>] (“The Court issued published opinions in a total of 128 precedential patent cases” in the 2013-14

10-year study, however, only 14 (12.3%) were issued as precedential, with the remaining 100 (87.7%) issued as nonprecedential.⁹⁴ Of those 14 precedential decisions, seven arose from the courts and seven arose from the USPTO, indicating that 8.24% of court appeals yielded precedential opinions, and that 16.7% of USPTO appeals yielded precedential opinions, both of which figures are much less than their represented counterparts noted above. This suggests that pro se patent appeals very rarely raise issues that, when resolved, would add anything significant to the body of law.

At least some of the precedential opinions in this study did tend to raise issues that were novel or important and likely to have broad impact, such as standing in *qui tam* false marking cases,⁹⁵ pleading requirements for direct infringement after the Supreme Court's landmark *Bell Atlantic Corp. v. Twombly*⁹⁶ decision,⁹⁷ and correcting a misapprehension by the USPTO concerning how enablement in the prior art is to be analyzed.⁹⁸

As for the nonprecedential pro se decisions, some are remarkably brief and to the point.⁹⁹ Most, however, look much like precedential

term); GIBSON DUNN, FEDERAL CIRCUIT YEAR IN REVIEW 2012/2013 1 (2013), <http://www.gibsondunn.com/publications/documents/Federal-Circuit-2012-2013-Year-in-Review.pdf> [<https://perma.cc/5LWR-5228>] (“The Court issued published opinions in a total of 120 precedential patent cases” in the 2012-13 term).

94. *In re Morsa*, 803 F.3d 1374 (Fed. Cir. 2015); *In re Steed*, 802 F.3d 1311 (Fed. Cir. 2015); *Stauffer v. Brooks Bros. Group*, 758 F.3d 1314 (Fed. Cir. 2014); *In re Morsa*, 713 F.3d 104 (Fed. Cir. 2013); *In re Mouttet*, 686 F.3d 1322 (Fed. Cir. 2012); *Stauffer v. Brooks Bros.*, 619 F.3d 1321 (Fed. Cir. 2010); *Hornback v. United States*, 601 F.3d 1382 (Fed. Cir. 2010); *In re Mettke*, 570 F.3d 1356 (Fed. Cir. 2009); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377 (Fed. Cir. 2007); *Sheinbein v. Dudas*, 465 F.3d 493 (Fed. Cir. 2006); *In re Kahn*, 441 F.3d 977 (Fed. Cir. 2006); *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir. 2006); *In re Johnston*, 435 F.3d 1381 (Fed. Cir. 2006).

95. *Stauffer v. Brooks Bros. Group*, 758 F.3d 1314 (Fed. Cir. 2014) (affirming dismissal of case in light of new statute requiring proof of competitive harm for *qui tam* false marking actions); *Stauffer v. Brooks Bros.*, 619 F.3d 1321 (Fed. Cir. 2010) (reversing lack of standing because statute then in effect did not require competitive harm to assert *qui tam* false marking claim).

96. 550 U.S. 544 (2007).

97. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

98. *In re Morsa*, 713 F.3d 104, 110 (Fed. Cir. 2013) (“While reference to the patent application is appropriate for purposes of determining what the claimed invention is, i.e., what falls within the scope of the claims, the anticipation exercise must assess the enabling nature of a prior art reference in light of the proposed claims.”).

99. See, e.g., *Hildebrand v. Steck Mfg. Co.*, 232 Fed. Appx. 985 (Fed. Cir. 2007) (372-word opinion resolving issues of anticipation, obviousness, willfulness, and other procedural arguments in an appeal from a judgment following a full jury trial); *Gal-Or v. United States*, No. 2015-5079, 2015 WL 6718352 (Fed. Cir. Nov. 4, 2015) (415-word opinion affirming trial court's dismissal of claim pursuant to Rule

opinions despite the Federal Circuit's indication that they are supposed to be shorter and more direct. The length of the opinions was often comparable to precedential decisions (see below), and almost always included a significant recitation of the facts and background of the case—information that the parties presumably did not need reiterated in a nonprecedential opinion.¹⁰⁰ Figure 6 reflects the distribution of the lengths of the 100 nonprecedential decisions in this study.

Figure 6: Nonprecedential Opinion Length

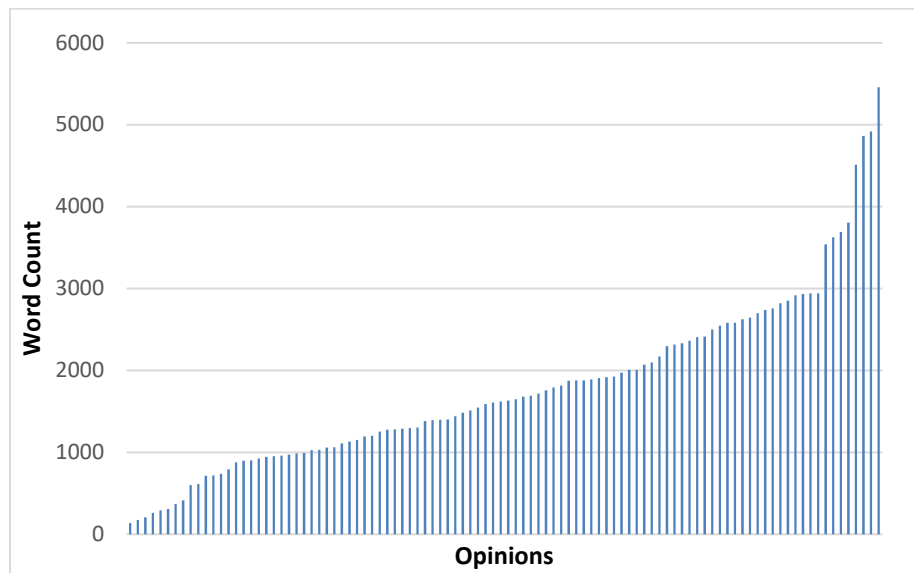


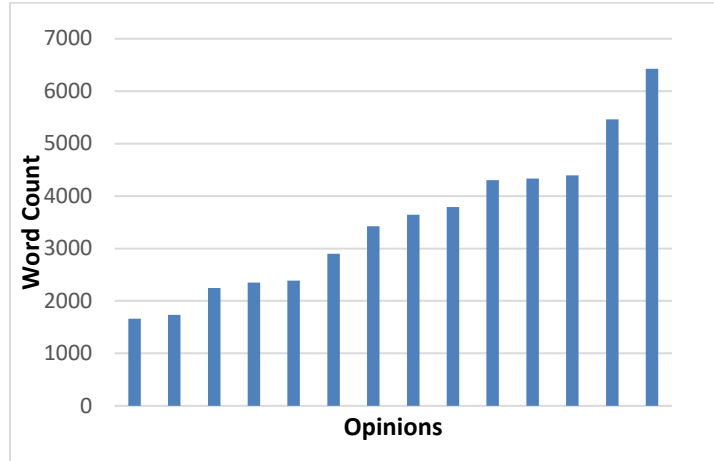
Figure 7 reflects the distribution of the lengths of the precedential opinions in the study. The average length of a nonprecedential decision was 1788 words, with a median of 1627 words. Precedential decisions ranged from 1660 words to 6429 words, averaging 3504 words with a

41(b) of the Rules of the United States Court of Federal Claims); *ClearValue, Inc. v. Pearl River Polymers, Inc.*, No. 2012-1595, 2013 WL 6404988 (Fed. Cir. Dec. 9, 2013) (174-word opinion denying appeal of costs award and other monetary sanctions, as well as final judgments relating to invalidity and trade secret misappropriation); *Parker v. Microsoft Corp.*, No. 2007-1017, 2007 WL 79411 (Fed. Cir. Jan. 10, 2007) (136-word opinion affirming dismissal on the basis of frivolousness).

100. See, e.g., *Edge Sys. LLC v. Aguila*, No. 2015-1507, 2015 U.S. App. LEXIS 22189 (Fed. Cir. Dec. 21, 2015); *Yufa v. Hach Ultra Analytics, Inc.*, No. 2015-1626, 2015 U.S. App. LEXIS 19300 (Fed. Cir. Nov. 5, 2015); *Tas v. Beachy*, No. 2015-117, 2015 U.S. App. LEXIS 17119 (Fed. Cir. Sept. 29, 2015); *In re Holness*, No. 2014-1824, 2015 U.S. App. LEXIS 8269 (Fed. Cir. May 20, 2015); *In re Taylor*, No. 2011-1275, 2011 U.S. App. LEXIS 20421 (Fed. Cir. Oct. 6, 2011); *Orenshteyn v. Citrix Sys.*, Nos. 2003-1427, 2008-1378, 2008-1400, 2009 U.S. App. LEXIS 16403 (Fed. Cir. July 24, 2009).

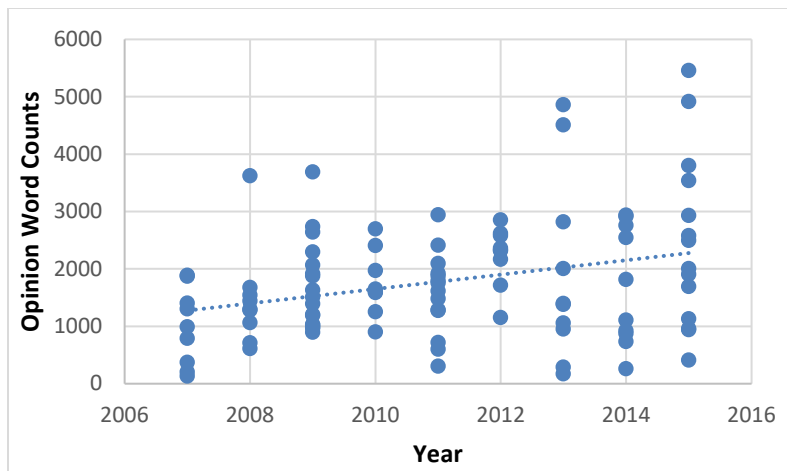
median of 3532 words.

Figure 7: Precedential Opinion Length



This indicates that roughly half of the nonprecedential decisions (48%) were in the length range of precedential decisions, though most were toward the bottom end of the precedential range. In short, the Federal Circuit does not appear to be following its own rules for how to prepare nonprecedential opinions, and may be spending far more time on those opinions than is necessary or advisable. Indeed, Figure 8 demonstrates that the word count for the court’s nonprecedential prose patent opinions has, if anything, appeared to creep up over time, with most of the longest opinions being written in the last few years.

Figure 8: Nonprecedential Opinion Length Trend



Not only is the court writing in numerous nonprecedential cases, and writing too much in those cases, but it also seems to be writing in more detail every year.

It should be noted that three of the 114 opinions in this study resulted in a split panel where one judge dissented (at least in part)—twice in precedential cases and once in a nonprecedential case.¹⁰¹ Such dissenting opinions do not affect the outcome of the case and are nonbinding, but nonetheless add significant length of the overall written decision, and so arguably those additional words should be discounted. Here, because the dissenting opinions in the two precedential cases were proportionally longer than the one nonprecedential dissent (as compared to lengths of the majority opinions), excluding those dissenting opinions would tend to make the range of nonprecedential opinion lengths overlap slightly *more* with the range of precedential opinions.¹⁰²

Finally, the opinion designations and lengths appeared to have at least some correlation to the strength of the merits of the appeal—i.e., the appellant receiving some relief on appeal. Of the 12 cases that were reversed or vacated at least in part, three were reversed with precedential opinions, which is more than twice the overall 12.3% precedential rate for the study.¹⁰³ Moreover, of the 12 cases that were reversed or vacated at least in part, all but three were above the median length in their respective categories (precedential vs. nonprecedential), and all but four were in the top third. The Federal Circuit seems to write longer and more precedential opinions when the appellant has a stronger case on the merits.

E. Rule 36 Judgments

Federal Circuit Rule 36 provides:

The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

- (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
- (b) the evidence supporting the jury's verdict is sufficient;

101. *In re Morsa*, 803 F.3d 1374 (Fed. Cir. 2015) (Newman, J. dissenting, comprising 1432 of 2901 words); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007) (Dyk, J., concurring in part and dissenting in part, comprising 2940 of 5462 words); *Beriont v. GTE Labs., Inc.*, No. 2013-1109, U.S. App. LEXIS 16205 (Fed. Cir. Aug. 6, 2013) (Lourie, J., concurring in part and dissenting in part, comprising 554 of 4863 words).

102. *See id.*

103. *See supra* note 94 for the 14 precedential decisions out of the 114 total written decisions in this study.

- (c) the record supports summary judgment, directed verdict, or judgment on the pleadings;
- (d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or
- (e) a judgment or decision has been entered without an error of law.

The Federal Circuit's Internal Operating Procedures (IOPs) further specify that all three judges on a panel for a case must agree to affirm an appeal via Rule 36.¹⁰⁴ A Rule 36 judgment comes in the form of an opinion that includes only the single word "AFFIRMED" followed by a citation to Rule 36.¹⁰⁵ It provides no explanation of the reasoning for why the Federal Circuit rejected the appellant's arguments.

For a court that is very busy like the Federal Circuit, Rule 36 provides an invaluable tool for docket and time management, saving the court from the burden of preparing a written opinion to dispose of a case that raises no novel or difficult issues of law or fact that require explication, and where the lower tribunal's judgment was clearly correct. Yet many have long criticized the Rule 36 mechanism for its lack of explanation, leaving the parties unsatisfied and the public deprived of what could be helpful analysis from the court.¹⁰⁶ Dennis Crouch also recently questioned the legal soundness of the Federal Circuit's use of summary affirmances in appeals from the U.S. Patent and Trademark Office, suggesting that a statute requires a full written opinion to dispose of such appeals.¹⁰⁷

104. Fed. Cir. IOP 10.6 ("An election to utilize a Rule 36 judgment shall be unanimous among the judges of a panel.")

105. See, e.g., *In re Gross*, No. 2014-1474, 2015 WL 2213798 (Fed. Cir. May 12, 2015).

106. See, e.g., David Hricik, *Rule 36 Summary Affirmances*, PATENTLY-O (Aug. 13, 2014), <http://patentlyo.com/hricik/2014/08/rule-summary-affirmances.html> [<https://perma.cc/B8KQ-AWJZ>] ("Today, there were a number of Rule 36 affirmances, meaning that the court affirmed what happened below, but we don't know why. . . . When I was a lawyer, I had a case Rule 36'd on our client, and I hated it. We'd written briefs, mooted the argument, traveled to DC, and then. . . nothing."); Matt Cutler, *PTAB vs. Federal Circuit Update*, IPR-PGR.COM (June 24, 2015), <http://ipr-pgr.com/ptab-vs-federal-circuit-update> [<https://perma.cc/PET9-7HQM>] ("In 12 of those 15 decisions, the Federal Circuit has simply rubber-stamped the Board's decision via a one sentence Rule 36 Judgment. This is, apparently, the manner in which the Federal Circuit is going to manage its anticipated spike in work due to appeals from decisions of the PTAB. This is a frustrating practice, however, as the growth of the law is stunted by the Federal Circuit's refusal to address the issues raised in these appeals in any substantive way."); see also Michael Loney, *Federal Circuit's Rule 36 Affirmances of PTAB Appeals Causing Frustration*, MANAGING INTELLECTUAL PROPERTY (Sept. 22, 2015), <http://www.managingip.com/Article/3490699/Federal-Circuits-Rule-36-affirmances-of-PTAB-appeals-causing-frustration.html> ("Observers . . . are disappointed by the [Rule 36] practice.") [<https://perma.cc/W2XU-465A>].

107. See 35 U.S.C. § 144 (2015) ("The United States Court of Appeals for the

A Rule 36 judgment is also inherently ambiguous when there are multiple avenues by which the Federal Circuit could have properly affirmed the judgment, amounting to a black box of legal analysis where only the outcome is known. For example, if an appeal challenged a judgment that was supported on two alternative grounds, the appellant would need to prevail on both grounds to reverse. A Rule 36 judgment in that instance will affirm but not specify whether one or both arguments were rejected. As another example, if several pieces of evidence were offered to support a critical factual finding, but each piece of evidence was challenged by the appellant as being insufficient, a Rule 36 judgment will not inform the appellant which piece or pieces of evidence were ultimately sufficient to support the finding. Not only can such outcomes be confusing to the parties, they limit the effectiveness of further judicial review because parties have a difficult time identifying any specific legal or factual error. In that sense, a written opinion confers a substantive benefit on a losing appellant, while a Rule 36 judgment weakens the party's ability to continue pressing its case. A Rule 36 judgment can also leave uncertainty as to whether or how collateral estoppel might attach (which, in turn, can multiply litigation by undermining the finality of the judgment) because nobody outside the Federal Circuit knows which issues were actually decided and were necessary to the judgment.¹⁰⁸

Federal Circuit shall review the decision from which an appeal is taken on the record before the Patent and Trademark Office. Upon its determination the court shall issue to the Director its mandate and opinion, which shall be entered of record in the Patent and Trademark Office and shall govern the further proceedings in the case.”); Dennis D. Crouch, *Wrongly Affirmed Without Opinion*, 52 Wake Forest L. Rev. ___ (forthcoming 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909007 [<https://perma.cc/P5CC-MKG8>] (arguing that 35 U.S.C. § 144 requires the Federal Circuit to write an opinion for every USPTO appeal).

108. *TecSec, Inc. v. IBM*, 731 F.3d 1336, 1343-44 (Fed. Cir. 2013) (“Here, we affirmed without opinion the district court’s judgment of noninfringement. As recounted above, the district court’s judgment was independently predicated on alternative grounds: TecSec’s failure of proof as to IBM’s and its customers’ acts and as to IBM’s intent, and its failure to show that IBM’s software met certain limitations of the claims, as construed. The former ground was not and is not dependent on any claim construction. Even though the district court stated that its claim constructions were ‘strictly necessary’ to resolving the parties’ summary judgment motions, the judgment based on TecSec’s failure of proof was independent of the court’s construction. Because claim construction was neither actually determined by nor critical and necessary to our summary affirmance in the IBM appeal, collateral estoppel does not preclude the present challenge.”). Judge Reyna dissented in *Tecsec*, saying that “I believe that entertaining this appeal gives TecSec a second bite at the apple and undermines the utility of Rule 36.” *Id.* at 1350; see also David Hricik, *Fascinating Split Decision on Impact of a Rule 36 Affirmance that May Have Significant Consequences*, PATENTLY-O (Oct. 4, 2013) <http://patentlyo.com/hricik/2013/10/fascinating-split-decision-on-impact-of-a-rule-36-affirmance-that-may-have-significant-consequences.html> [<https://perma.cc/32WR-2BV5>] (commenting on *Tecsec* decision, observing: “I bet there are an enormous number of fact

Despite these criticisms, the Federal Circuit does not hesitate to use this mechanism to summarily dispose of a great portion of the cases on its docket, as a number of statistics have shown. For patent infringement cases in 2008-2016, the Federal Circuit affirmed via Rule 36 ranging from 13% to 43% of the time, with the figure hovering close to 35% since 2011.¹⁰⁹ USPTO appeals were affirmed via Rule 36 about half the time in 2013,¹¹⁰ with that figure spiking to 63% 2015 before returning to 51% in 2016.¹¹¹ Similarly, half of all appeals from the USPTO concerning inter partes reviews of patents were affirmed via Rule 36 as of November 16, 2015.¹¹²

patterns that might be implicated by this. I am trying to get my head around how a district court's order, which is binding on the parties, becomes non-binding when affirmed on appeal? I know that this may have huge impact on Rule 36; if a panel's decision does not resolve claim construction, unless it is somehow more 'necessary' than it was here, then perhaps a panel should not use Rule 36 very often? Interesting case with lots of systemic ripples, perhaps.”)

109. Jason Rantanen, *CAFC: Patent Opinions Down, Rule 36 Affirmances Up*, PATENTLY-O (Oct. 27, 2011) <http://patentlyo.com/patent/2011/10/cafc-patent-opinions-down-rule-36-affirmances-up.html> [<https://perma.cc/EGL5-4VHS>]; The number of Rule 36 affirmances of patent infringement appeals has remained fairly stable. Jason Rantanen, *Federal Circuit Dispositions, Part II*, PATENTLY-O (Feb. 15, 2011) <http://patentlyo.com/patent/2011/02/federal-circuit-dispositions-part-ii.html> [<https://perma.cc/5VGR-2NNM>] (“Aside from a modest rise in 2006 and 2007, the CAFC’s use of Rule 36 affirmances has remained relatively constant over the last twelve years—with one important exception. That exception is FY 2011, which so far has exhibited a notable uptick in Rule 36 orders.”); Rantanen, *supra* note 11 (showing Rule 36 affirmances in district court appeals ranging from 21% in 2008 to 43% in 2016); Christina Violante, *Law360’s Federal Circuit Snapshot: By the Numbers*, LAW360 (Mar. 1, 2017) <https://www.law360.com/ip/articles/894751/law360-s-federal-circuit-snapshot-by-the-numbers> [<https://perma.cc/WG37-J7JU>] (showing 35% and 36% Rule 36 rates for 2015 and 2016, respectively).

110. Daniel C. Cooley, J. Derek McCorquindale, and Jason L. Romrell, *Navigating PTAB Appeals Before the Federal Circuit*, FINNEGAN (May 10, 2017), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=6d481cea-b457-43af-a5c3-3d7a69e14679> [<https://perma.cc/NND8-XVQV>] (“The Federal Circuit has typically affirmed a relatively high percentage of USPTO decisions, affirming about fifty percent of the USPTO decisions before it last year by Rule 36 alone.”).

111. Christina Violante, *Law360’s Federal Circuit Snapshot: By the Numbers*, LAW360 (Mar. 1 2017) <https://www.law360.com/ip/articles/894751/law360-s-federal-circuit-snapshot-by-the-numbers> [<https://perma.cc/JE6M-BKQU>]; *see also* Rantanen, *supra* note 11; Dennis Crouch, *Federal Circuit Operating Procedure: Affirm PTO Decisions Without Opinion*, PATENTLY-O (Oct. 14, 2015) <http://patentlyo.com/patent/2015/10/operating-procedure-decisions.html> [<https://perma.cc/C24A-U4PH>] (“Over the past year, the Federal Circuit has decided a large number of Patent Office appeals with R.36 judgments or non-precedential opinions. Looking at Federal Circuit decisions since January 1, 2015 that stem from Patent Office appeals: approximately 20% are precedential opinions; 20% are non-precedential opinions; and 60% are Rule 36 affirmances without any opinion at all.”);

112. Justin Hendrix and Jacob A. Schroeder, *Surf’s Up: Is the Federal Circuit Using*

Despite the overall increasing reliance on Rule 36 to manage its patent docket, the Federal Circuit's output of opinions (precedential and nonprecedential) has been steadily climbing in appeals arising from the USPTO.¹¹³ As Jason Rantanen recently explained, "the court can hardly be accused of slacking: at the same time that Rule 36 summary affirmances are going up, the court is also issuing more opinions in appeals arising from the PTO than ever before."¹¹⁴ Thus, the court appears to be using Rule 36 to help manage its increasingly busy patent docket by allocating opinion-writing resources only to the cases that warrant such dispositions—just not in pro se cases.

In this study of 127 pro se appeals, 13 resulted in Rule 36 judgments. Because the Federal Circuit almost always wrote an opinion in its pro se patent appeals, it generally reserved its Rule 36 judgments for the handful of cases that were argued orally. Nine of those 12 argued cases were affirmed via Rule 36.¹¹⁵ Of the three argued cases that were not affirmed via Rule 36, two involved standing issues in a qui tam false marking case¹¹⁶ and one involved attorney registration to practice before the USPTO,¹¹⁷ all three of which resulted in precedential opinions.

Rule 36 to Rubber-Stamp the PTAB's Decisions in IPRS?, FEDERAL CIRCUIT IP BLOG (Nov. 16, 2015) <http://federalcircuitipblog.com/2015/11/16/surfs-up-is-the-federal-circuit-using-rule-36-to-rubber-stamp-the-ptabs-decisions-in-ipers/> [<https://perma.cc/S42L-NS4X>] (describing the large number of IPR appeals as a "tsunami" that was predicted to "crush the Federal Circuit"). This article notes, however, that a number of pending IPR appeals that had been argued prior to November 2015 were unlikely to be decided via Rule 36, and were therefore likely to bring the percentage down to 37.5%. Another commentator observed that "PTAB figures are not surprising, as the court's caseload of appeals from decisions on post-grant oppositions is set to increase dramatically, offering little time for detailed opinions on every appeal." Tony Dutra, *Federal Circuit Affirmed Half of Patent Case Appeals Heard in April Without Opinion*, BLOOMBERG BNA (Apr. 30, 2015) <http://www.bna.com/federal-circuit-affirmed-n17179925964/> (last visited February 11, 2016) [<https://perma.cc/NL8N-B57R>].

113. Rantanen, *supra* note 11 ("The rate at which the court is issuing both precedential and nonprecedential opinions is climbing, with the court issuing only a few less precedential opinions in the first five-and-a-half months of 2016 than all of last year.").

114. *Id.*

115. *In re* Gross, 603 Fed. App'x. 1004 (Fed. Cir. 2015); *In re* Gross, 603 Fed. App'x. 1006 (Fed. Cir. 2015); *In re* Rudy, 558 Fed. App'x. 1011 (Fed. Cir. 2014); *Hsuan-Yeh Chang v. Rea*, 530 Fed. App'x. 958, 959 (Fed. Cir. 2013); *Cornish v. Kappos*, 474 Fed. Appx. 779 (Fed. Cir. 2012); *In re* Rudy, 463 Fed. App'x. 939 (Fed. Cir. 2012); *Cornish v. Doll*, 330 Fed. App'x. 919 (Fed. Cir. 2009); *Worldwide Home Prod., Inc. v. Time, Inc.*, 626 F. App'x 1009 (Fed. Cir. 2015); *O2 Micro Int'l Ltd. v. Van Loben Sels*, 426 F. App'x 913, 914 (Fed. Cir. 2011).

116. *Stauffer v. Brooks Bros. Group*, 758 F.3d 1314, 1316 (Fed. Cir. 2014) (affirming dismissal of case in light of new statute requiring proof of competitive harm for qui tam false marking actions); *Stauffer v. Brooks Bros.*, 619 F.3d 1321 (Fed. Cir. 2010) (reversing lack of standing because statute then in effect did not require competitive harm to assert qui tam false marking claim).

117. *Lacavera v. Dudas*, 441 F.3d 1380 (Fed. Cir. 2006).

Only four cases in this study were affirmed via Rule 36 that were not argued. One involved a pro se inventor-attorney that had previously argued multiple appeals at the court,¹¹⁸ one involved Section 101 abstractness,¹¹⁹ and the other two were related cases brought by a repeat litigant involving invalidity for lack of written description.¹²⁰

Notably, the reluctance to affirm patent pro se appeals via Rule 36 does not appear to exist as to all pro se appellants. At least one other study suggested that the Federal Circuit has more liberally issued Rule 36 affirmances in federal employment appeals from the MSPB.¹²¹

The most likely reason that Rule 36 judgments are so strongly disfavored for pro se patent appellants is to ensure that all parties appearing before the court feel that their cases were, in fact, “heard.” During an oral argument, the panel of judges will question parties about their positions and personally demonstrate the judges’ thorough consideration of the issues. But in the absence of oral argument, the judgment is the only feedback that a party will receive. A written opinion at least tells the party why its appeal was rejected.

But, ultimately, Rule 36 exists to save the court the trouble of drafting an opinion to resolve appeals where the merits are weak and the originating tribunal’s opinion adequately explains why the merits are weak. The citation to Rule 36 in the Federal Circuit’s order explains, by reference to the rule, why the judgment was affirmed. At least where the pro se party is fairly legally sophisticated—as indicated, for example, by being a repeat party before the court or by the filing of a formal brief that reads similar to one prepared by counsel¹²²—such parties will understand that a Rule 36 judgment does not mean the court failed to “hear” the case. Indeed, one extensive study of pro se litigation in the United States observed that pro se litigants “come with varied means and degrees of sophistication,” and concluded that “a party’s lack of representation can no longer serve as a proxy for sophistication.”¹²³ A pro

118. *Rudy v. Lee*, 562 Fed. App’x 964 (Fed. Cir. 2014); see *In re Rudy*, 558 Fed. Appx. 1011 (Fed. Cir. 2014); *In re Rudy*, 463 Fed. Appx. 939 (Fed. Cir. 2012)

119. *Morales v. Square, Inc.*, 621 F. App’x 660 (Fed. Cir. 2015)

120. *Ho Keung Tse v. Google Inc.*, 570 F. App’x 941, 942 (Fed. Cir. 2014); *Ho Keung Tse v. Blockbuster, Inc.*, 571 F. App’x 951 (Fed. Cir. 2014); see also *Ho Keung Tse v. Apple Inc.*, No. 2015-1639, 2015 U.S. App. LEXIS 19303 (Fed. Cir. Nov. 5, 2015).

121. *Shaw*, *supra* note 64, at 1030, 1036 (noting that in data from 1982-2003, approximately one third of the court’s Rule 36 affirmances were in MSPB cases, and further noting the “high percentage of pro se appellants in this category”); *id.* at 1031 (arguing that “when MSPB appeals contain simple facts, and when the issue has been clearly decided by the MSPB, a Rule 36 decision seems appropriate”).

122. See *supra* Part III.A (observing that about half of pro se appellants file formal briefs, many of which are fairly well written).

123. Michael Correll, *Finding the Limits of Equitable Liberty: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 892, 897 (2011). Correll specifically argued, in the context of the liberal construction rule discussed

se appellant's sophistication should be considered before an otherwise appropriate Rule 36 judgment is deemed off limits.

While there are surely other metrics of sophistication beyond what the court will see, such as a party's job or education level, such metrics are not closely tied to one's sophistication concerning appeals at the Federal Circuit. That level of sophistication is best indicated by a party's conduct before the court—whether that party has appeared before the court before, whether that party demonstrates an understanding of the court's rules (e.g., filing formal briefs), whether that party's brief understands the role of the court and its standard of review, and whether that party appreciates the significance of the relevant law and facts.

If there is any concern about the party's sophistication and ability to understand that a Rule 36 judgment does not indicate that the court failed to fully consider the appeal, the clerk could issue an explanatory statement to that effect. Such a notice to the party could explain what Rule 36 is, why it exists, and how often it is used, and reassure the party that his or her appeal received due consideration. Indeed, the court already provides parties with plain-language information sheets accompanying every judgment to explain issues concerning rehearing before the court or petitioning for certiorari to the Supreme Court.¹²⁴ These informal explanatory documents describe the significance of different types of opinions for purposes of rehearing, and explain the historical success rate for petitions.¹²⁵ Adding a similar "Rule 36 Judgment Information Sheet" along the lines suggested above would further mitigate

below in Part V, that pro se status alone "should not be permitted to have a dispositive effect on individual claims." *Id.* at 893.

124. *See, e.g.,* Becton, Dickinson and Co. v. Baxter Int'l, Inc., Appeal No. 15-1918 (Fed. Cir. 2016), ECF No. 65.

125. *Id.* The court's notice provides:

Q. When is a petition for rehearing appropriate?

A. Petitions for rehearing are rarely considered meritorious. Consequently, it is easiest to first answer when a petition for rehearing is not appropriate. A petition for rehearing should not be used to reargue issues already briefed and orally argued. If a party failed to persuade the court on an issue in the first instance, they do not get a second chance. This is especially so when the court has entered a judgment of affirmance without opinion under Fed. Cir. R.

36, as a disposition of this nature is used only when the appellant has utterly failed to raise any issues in the appeal that require an opinion to be written in support of the court's judgment of affirmance. Thus, as a usual prerequisite, the court must have filed an opinion in support of its judgment for a petition for rehearing to be appropriate. Counsel seeking rehearing must be able to identify in the court's opinion a material error of fact or law, the correction of which would require a different judgment on appeal.

...

Q. How frequently are petitions for rehearing granted by merits panels or petitions for rehearing en banc accepted by the court?

A. The data regarding petitions for rehearing since 1982 shows that merits panels granted some relief in only three percent of the more than 1900 petitions filed. The relief granted usually involved only minor corrections of factual misstatements, rarely resulting in a change of outcome in the decision.

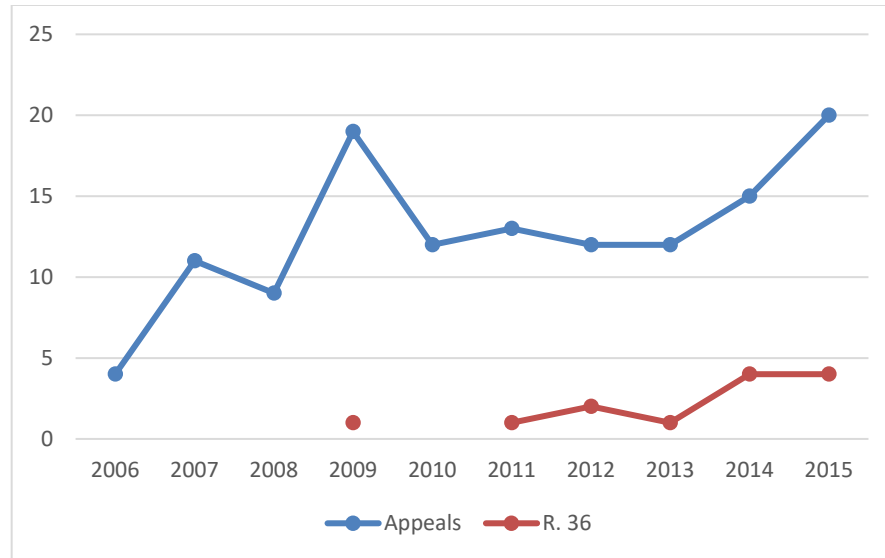
Id.

any perception of unfairness for pro se parties who are deemed sophisticated enough to receive a Rule 36 judgment.

1. Possible Increased Receptiveness to Rule 36 Judgments

The court may now be signaling that it is more receptive to using Rule 36 in pro se patent appeals than it has been in the past. Specifically, the Federal Circuit has recently begun to deviate more from its typical practice of writing in those cases. Eight of the 13 Rule 36 judgments in this study were issued in 2014 or 2015, and only one was issued before 2011. As Figure 9 shows, the Rule 36 increase seems to correlate to the increase in pro se patent appeals, which itself tracks the court's overall increasing caseload¹²⁶ since 2011.

Figure 9: Pro Se Patent Appeal and R. 36 Judgment Trends



It is too soon to tell whether this data reflects a true tipping point. But if the court is simply using Rule 36 more frequently now to offset its heavier docket, it is notable that the court does not appear to be similarly cutting back on the length of its nonprecedential opinions. As discussed above, the length of nonprecedential opinions seems to be creeping up over time, with most of the longest opinions being written since 2012. This suggests that if the court is looking to find more efficient

126. Jason Rantanen, *Inter Partes Review Statistics*, PATENTLY-O (July 28, 2016), <http://patentlyo.com/patent/2016/07/partes-review-statistics.html> [<https://perma.cc/D95V-V5J4>].

ways to dispose of pro se cases, its first inclination has been to rely on Rule 36 to avoid writing entirely, not reducing the amount of its writing in nonprecedential opinions.

Further, this deviation, if reflecting the beginning of a paradigm shift, does not clearly correlate to any specific characteristic of the party or case. Although the data set is small, the kind of party sophistication discussed above does not appear to be the reason: only eight of the 13 Rule 36 judgments occurred in cases where the pro ses submitted formal briefing, and only nine of the 13 Rule 36 judgments were issued where the pro ses were attorneys licensed to practice before the court (and those nine cases involved oral argument).

Three of the four non-argued cases that were summarily affirmed involved repeat litigants before the court, however, which may itself reveal a kind of sophistication and familiarity with the court's practices to warrant a Rule 36 judgment.¹²⁷ Such a judgment is all-the-more warranted if, as Rule 36 requires, the appeal of the repeat party is meritless. On the other hand, one pro se party, Aleksandr Yufa, filed four appeals with formal briefing. He partially prevailed on the first appeal, then lost the next three outright in 2014 and 2015, when the court has been at its busiest.¹²⁸ Despite Mr. Yufa's formal briefing and prior experience before the court, those three appeals were affirmed with written, nonprecedential opinions that were well over the average and median word counts for nonprecedential opinions.¹²⁹

Thus, being a repeat litigant may not currently influence the use of Rule 36, though perhaps it should if the party's experience with the court demonstrates the party's ability to understand the law and how the court operates. In some instances, the court's awareness of a party's prior cases before the court may even reveal a "boy crying wolf" situation where the party is aware that its cases have no merit but appeals them anyway. Rule 36 in those instances may send the appropriate message that the court cannot infinitely indulge such meritless appeals with written opinions.

Regardless of the court's specific reasons for doing so, it appears that the Federal Circuit has been more receptive to using Rule 36 in pro

127. *Rudy v. Lee*, 562 F. App'x. 964 (see *Rudy*, 558 F. App'x. 1011; *Rudy*, 463 F. App'x. 939); *Ho Keung Tse v. Google*, 570 F. App'x. at 942; *Ho Keung Tse v. Blockbuster*, 571 F. Appx. 951 (see also *Ho Keung Tse v. Apple*, No. 2015-1639, 2015 U.S. App. LEXIS 19303).

128. *Yufa v. Hach Ultra Analytics, Inc.*, No. 2015-1626, 2015 U.S. App. LEXIS 19300 (Fed. Cir. Nov. 5, 2015) (affirmed, formal brief); *Yufa v. TSI, Inc.*, 600 F. App'x. 747 (Fed. Cir. 2015) (affirmed, formal brief); *Yufa v. Lockheed Martin Corp.*, 575 F. App'x. 881 (Fed. Cir. 2014) (affirmed, formal brief); *In re Yufa*, 452 F. App'x. 998 (Fed. Cir. 2012) (affirmed-in-part, vacated-in-part, remanded, formal brief).

129. *Yufa v. Hach*, No. 2015-1626, 2015 U.S. App. LEXIS 19300 (2582 words); *Yufa v. TSI*, 600 F. App'x. 747 (3806 words); *Yufa v. Lockheed Martin*, 575 F. App'x. 881 (2759 words).

se patent appeals when it sees fit and as its caseload has gotten heavier. The mounting burden on the court may be pushing the court to look for more cases where Rule 36 may be appropriately employed, and the data presented herein may be helpful to identify such appropriate cases.

IV. RESULTS ON THE MERITS

As Table 3 and Figure 10 reflect, in the 127 patent cases included in this study, the Federal Circuit affirmed the originating tribunal the overwhelming majority of the time.

TABLE 3: PRO SE PATENT APPEAL JUDGMENTS

JUDGMENT	NO. OF CASES	PERCENTAGE OF CASES
Affirmed	110	86.6%
Reversed/Vacated (at least partially)	12	9.4%
Dismissed	5	3.9%

Figure 10: Pro Se Patent Appeal Judgments

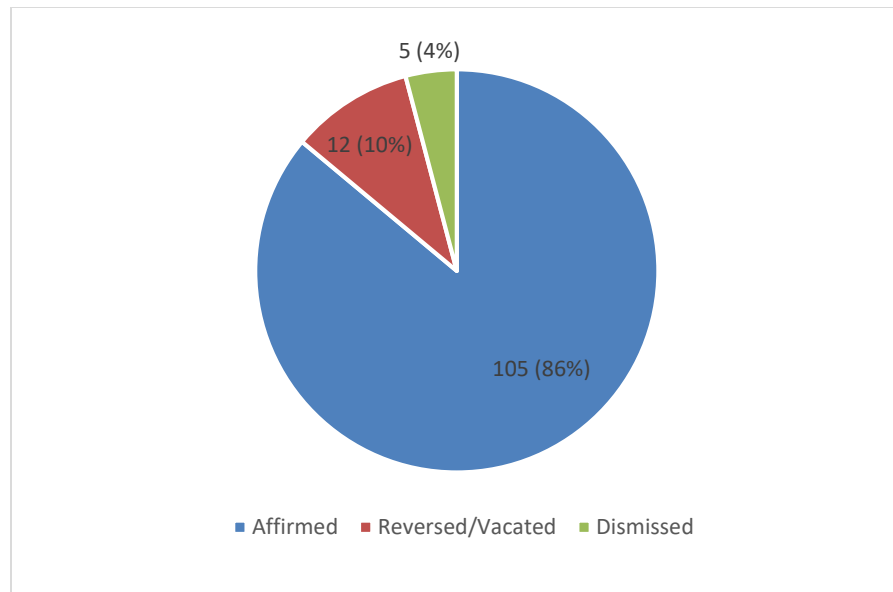


Table 4 and Figure 11 reflect affirmance rates in cases originating before the USPTO. Looking specifically at the 42 appeals from the USPTO, the affirmance rate was well above 90%.

TABLE 4: JUDGMENTS FROM USPTO APPEALS

JUDGMENT	NO. OF USPTO APPEALS	PERCENTAGE OF USPTO APPEALS
Affirmed	39	92.8%
Reversed/Vacated ¹³⁰ (at least partially)	3	7.1%

Figure 11: Judgments from USPTO Appeals

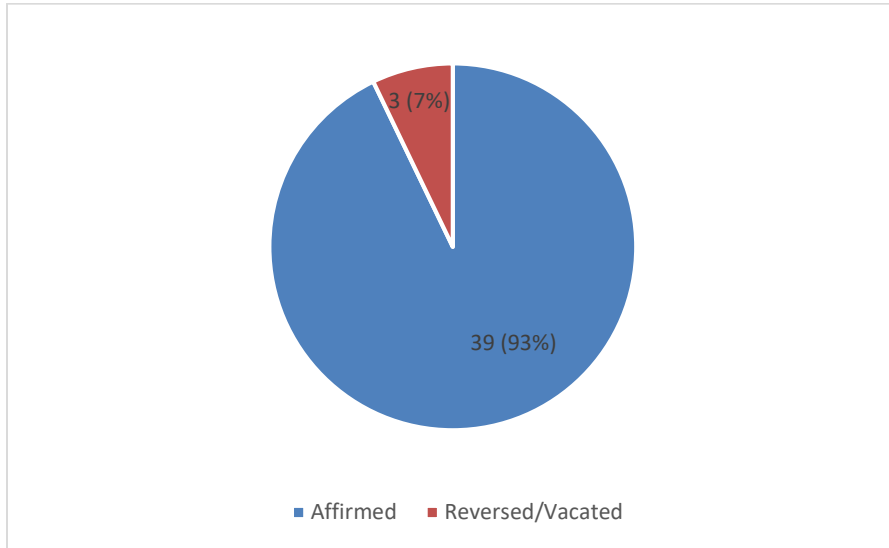


Table 5 demonstrates the frequency with which issues were appealed from the USPTO.¹³¹

TABLE 5: ISSUES APPEALED FROM USPTO

ISSUE	NO. OF USPTO APPEALS	PERCENTAGE OF USPTO APPEALS
Obviousness	26	61.9%
Anticipation	14	33.3%
Enablement	3	7.1%
Written Description	2	4.8%
Indefiniteness	2	4.8%

The three cases where the pro se appellant prevailed involved issues

130. *In re Morsa*, 803 F.3d 1374, 1375 (Fed. Cir. 2015); *Yufa*, 452 F. App'x. 998; *In re Daneshvar*, 366 F. App'x. 171 (Fed. Cir. 2010).

131. Because some appeals raised multiple issues, the grand total number of issues raised in this chart is 47, which exceeds 42—the number of distinct USPTO appeals.

of anticipation,¹³² written description,¹³³ and both anticipation and obviousness,¹³⁴ although all three of the cases were remanded such that none immediately or necessarily led to patentable claims for the appellant.

Table 6 and Figure 12 demonstrate the affirmance rate for appeals from the U.S. District Courts or the CFC. For the 85 appeals from the courts, the affirmance rate was still very high (above 80%), but was lower than it was for USPTO appeals.

TABLE 6: JUDGMENTS FROM COURT APPEALS

JUDGMENT	NO. OF COURT APPEALS	PERCENTAGE OF COURT APPEALS
Affirmed	71	83.5%
Reversed/Vacated ¹³⁵ (at least partially)	9	10.6%
Dismissed ¹³⁶	5	5.9%

132. See *Morsa*, 713 F.3d 104 (finding that the USPTO had performed an incorrect enablement analysis as to the asserted anticipating reference, and holding that “[s]ince both the Board and the examiner failed to engage in a proper enablement analysis, we vacate the finding of anticipation and remand claims 271 and 272 for further proceedings”).

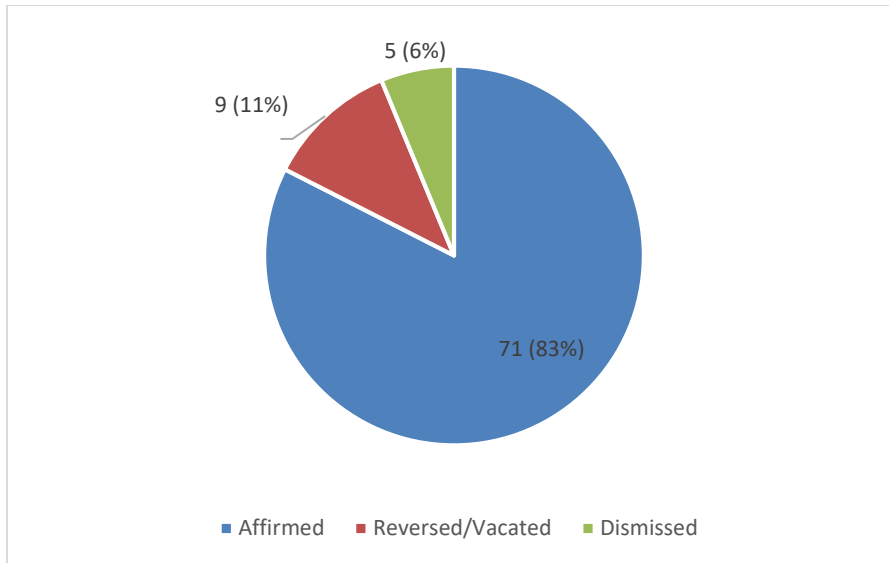
133. See *Yufa*, 452 Fed. Appx. 998 (reversing written description rejections that the USPTO conceded were erroneous); *id.* (“Because the PTO concedes the impropriety of the written description rejections of claims 6-8, we vacate and remand for the Board to withdraw those rejections and take appropriate action.”);

134. See *Daneshvar*, 366 F. App’x. 171 (finding that “relatively stretchable straps” were not properly found to exist in the cited prior art reference); *id.* (“Our decision addresses only the grounds employed by the Board, on the record before it, for affirming the examiner’s rejections; beyond that limited holding, we do not direct the manner in which the agency should proceed on remand or indicate how the issue of patentability should ultimately be resolved. Accordingly, we reverse the Board’s decision and remand for further proceedings.”) (citation omitted).

135. *Beriont v. GTE Labs., Inc.*, 535 F. App’x. 919 (Fed. Cir. 2013); *Kippen v. Pack*, 491 F. App’x. 187, 188 (Fed. Cir. 2012); *Gal-Or v. United States*, 470 F. App’x. 879 (Fed. Cir. 2012); *Stauffer v. Brooks Bros.*, 619 F.3d 1321 (Fed. Cir. 2010); *Taylor v. United States PTO*, 339 F. App’x. 995 (Fed. Cir. 2009); *Orenshteyn v. Citrix Sys.*, 341 F. App’x. 621 (Fed. Cir. 2009); *McZeal v. Sprint Nextel Corp.*, 335 F. App’x. 966 (Fed. Cir. 2009); *Georgalis v. United States PTO*, 296 F. App’x. 14 (Fed. Cir. 2008); *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

136. *Sop Servs. v. Vital Hunting Gear, Inc.*, 562 F. App’x. 982 (Fed. Cir. 2014); *Joovy LLC v. Target Corp.*, 2013 U.S. App. LEXIS 14554 (Fed. Cir. July 18, 2013); *Cornish v. Kappos*, 425 F. App’x. 885, 886 (Fed. Cir. 2011); *Kersey v. Comm’r of Patents & Trademarks*, 353 F. App’x. 432, 433 (Fed. Cir. 2009); *Haynes v. United States*, 335 F. App’x. 45 (Fed. Cir. 2009).

Figure 12: Judgments from Court Appeals



Considering that a dismissal, like an affirmance, leaves the appellant with no relief, adding the dismissals to the affirmances yields a rate of unfavorable rulings (89.4%) that is much closer to that of the USPTO affirmance rate (92.8%). Table 7 reflects the issues that were appealed from the courts more than two times.

TABLE 7: ISSUES APPEALED FROM COURTS

ISSUE	NO. OF COURT APPEALS	PERCENTAGE OF COURT APPEALS
Pleading Sufficiency / Jurisdiction	33	38.8%
Infringement	13	15.3%
Sanctions	9	10.6%
USPTO Registration	6	7.1%
USPTO Misconduct (incl. Maintenance Fees)	6	7.1%
Ownership / Inventorship	5	5.9%
Issue/Claim Preclusion	5	5.9%
Anticipation	4	4.7%
Obviousness	3	3.5%
Written Description	3	3.5%

Of the nine cases where the Federal Circuit reversed or vacated the

lower court's decision in any way, four involved claims erroneously dismissed on the pleadings,¹³⁷ one involved an issue of standing to assert a false marking claim,¹³⁸ one concerned noninfringement and inventorship judgments entered with insufficient factual findings by the district court,¹³⁹ one involved an erroneous noninfringement judgment and related Rule 11 sanction,¹⁴⁰ one involved a constitutionality and takings challenge to the USPTO's maintenance and reinstatement procedures,¹⁴¹ and one vacated an adverse judgment on a contract claim that was never actually pled by the pro se plaintiff.¹⁴² Three of those cases cannot be considered victories for the appellants, however, as the partial victory on appeal was not enough to yield a favorable result.¹⁴³

137. *Gal-Or*, 470 F. App'x. at 879 (“[B]ecause we conclude that it incorrectly determined that Mr. Gal-Or did not allege any takings claims with respect to his trade secrets, we vacate the Court of Federal Claims’ judgment and remand for further proceedings.”); *Taylor*, 339 F. App'x. at 995 (plaintiff’s suit against the USPTO for a refund of maintenance fee payment was held proper); *McZeal*, 335 F. App'x. at 966 (holding that “[t]he district court improperly dismissed for failure to state a claim, explicitly disregarding our prior mandate in this case,” but ultimately affirming dismissal for want of prosecution); *McZeal*, 501 F.3d at 1354 (“Because McZeal met the low bar for pro se litigants to avoid dismissal on the basis of Fed. R. Civ. P. 12(b)(6), we vacate the trial court’s dismissal of McZeal’s complaint and remand for further proceedings”).

138. *Stauffer*, 619 F.3d at 1321 (“We therefore reverse the district court’s decision concluding that Stauffer did not have standing” to bring a qui tam action for false marking pursuant to 35 U.S.C. § 292 (2006), which was later amended to require proof of “competitive injury,” 35 U.S.C. § 292 (2012))

139. *Beriont*, 535 F. App'x. at 919 (“Because the district court failed to make sufficient factual and legal findings on the issue of ‘shop rights,’ its ruling regarding GTE’s infringement liability for actions taken prior to June 13, 2005 is vacated. Because the district court made no explicit findings with regard to Beriont’s fiduciary duty, inventorship, or patent correction claims, its rulings with regard to these claims are vacated as well.”).

140. *Orenshteyn*, 341 F. App'x. at 621 (“While it is true that a specification may contain unclaimed inventions, we have shown that the claims in this case indicate that the use of a CPU is, in fact, encompassed within the claims. We therefore find that the district court erred in concluding that Citrix failed to demonstrate that there was no genuine issue of material fact concerning infringement of claim 1 of the ‘942 patent.”); *id.* (reversing Rule 11 sanctions because appellant was not afforded the benefit of 21-day safe harbor of Rule 11).

141. *Georgalis*, 296 F. App'x. at 14 (“We vacate the portion of the district court’s opinion granting summary judgment in favor of the USPTO on Georgalis’s claims that 35 U.S.C. § 41(b) is unconstitutional and effected a taking without just compensation, and we remand with instructions to dismiss Georgalis’s claims challenging § 41(b) for lack of jurisdiction.”).

142. *Kippen*, 491 F. App'x. at 188 (“Finally, we must vacate the district court’s entry of judgment for Allied on contract claims that Mr. Kippen did not plead. While we agree that Mr. Kippen’s patent claims against Allied are thoroughly interwoven with the rights and obligations set forth in the 1993 Agreement, the federal courts may not resolve claims not actually submitted for adjudication.”).

143. *McZeal*, 335 F. App'x. at 966 (finding dismissal of claim on Rule 12(b)(6) grounds improper, but affirming dismissal of same claim for want of prosecution); *Georgalis*, 296 F. App'x. at 14 (vacating adverse judgment on claim, but remanding

In one case involving an especially sympathetic party, the Federal Circuit went above and beyond the monetary relief sought by the appellant, awarding equitable relief in the form of reinstatement of a patent that was deemed expired.¹⁴⁴

Figure 13 demonstrates the Federal Circuit's reversal rate by originating tribunal from 2006-2015.¹⁴⁵

to dismiss same claim for lack of jurisdiction); *Kippen*, 491 F. App'x. at 188 (affirming judgments against appellant on issues of joinder, limitations on damages, non-infringement, and vacating additional adverse contract claim judgment because the district court lacked jurisdiction to so rule).

144. *Taylor v. United States PTO*, 339 F. App'x. 995 (Fed. Cir. 2009). In *Taylor*, the patentee erroneously paid \$10 less than was owed in maintenance fees. *Id.* at 996. The USPTO cashed his check and then deemed his patent expired for failure to pay the additional \$10 owed, never notifying the patentee of the deficiency in payment. *Id.* at 996. When the expiration error was noticed by the patentee at the time he tried to pay his next maintenance fee, The USPTO required him to submit a petition (with \$200 fee), but dismissed his petition without considering the merits because he could not afford, and thus did not pay, the \$200 petition fee. *Id.* The patentee was told his patent could not be reinstated. *Id.* The Federal Circuit strongly disagreed, finding that "the Office's course of action in accepting Mr. Taylor's deficient payment on the one hand, while on the other hand expiring his patent without notifying him under MPEP § 2531 that his payment was inadequate, was arbitrary and capricious." *Id.* at 998. Although the USPTO decided to refund the patentee's original maintenance fee payment and invited the patentee to submit a petition to reinstate his patent (with the \$200 petition fee), the Federal Circuit "perceive[d] no need for Mr. Taylor to submit further petitions." *Id.* at 999. In a resoundingly just decree, the court held that "in this case, equity would counsel that the PTO should reinstate Mr. Taylor's patent upon receipt of his payment for all outstanding maintenance fees. This relief will remedy, to this court's best estimation, the PTO's arbitrary and capricious actions." *Id.*

145. See Table B-8 of the *Statistical Tables for the Federal Judiciary*, available at <http://www.uscourts.gov/report-names/statistical-tables-federal-judiciary> [<https://perma.cc/9SSV-JM7X>] (search for "U.S. Court of Appeals for the Federal Circuit" under "Publication Type," then consult the Table B-8 results with reporting periods of December 31 for the years 2006-2015).

Figure 13: Federal Circuit Reversal Rate Trends

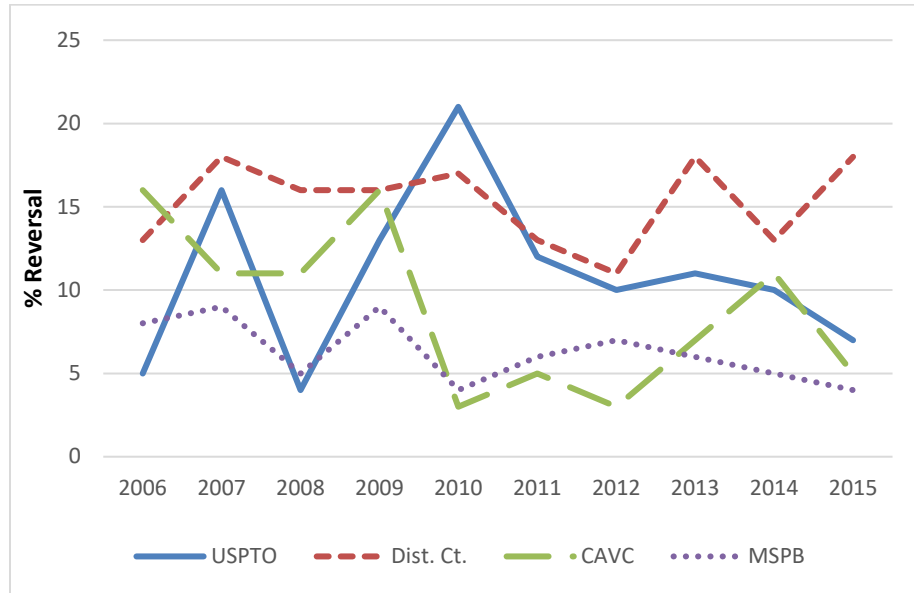


Table 8 reflects the average reversal rates by originating tribunal from 2006-2015.¹⁴⁶

TABLE 8: FEDERAL CIRCUIT AVERAGE REVERSAL RATES

TRIBUNAL	AVERAGE REVERSAL RATE
U.S. Patent and Trademark Office	10.9%
U.S. District Courts	15.3%
Court of Appeals for Veterans Claims	8.8 %
Merit Systems Protection Board	6.3%

The pro se reversal rates of 10.6% (court appeals) and 7.1% (USPTO)

146. Separate statistics for the Court of Federal Claims are not listed here because the CFC's jurisdiction includes far more than patent cases, and thus the statistics available for CFC appeal dispositions (at <http://cafc.uscourts.gov/the-court/statistics> [<https://perma.cc/L83E-UXRP>]) are unhelpful for purposes of this article. See 28 U.S.C. § 1491; 42 U.S.C. § 300aa-12. All district court appeals within the Federal Circuit's jurisdiction arise under patent law, however. 28 U.S.C. § 1295(a).

listed above are both much lower than the overall averages. The disparity becomes even more pronounced, however, when it is considered that the court's overall reversal data only appears to include total reversals,¹⁴⁷ not partial reversals as are included in this study. Here, of the 12 "at least partial[]" reversals noted above in pro se cases, only 1 of the 3 USPTO reversals were totally reversed,¹⁴⁸ and only 4 of the 9 district court reversals were total.¹⁴⁹ This would bring the pro se total reversal rate down to 4.8% in USPTO appeals (2 out of 42), and 4.7% in district court appeals (4 out of 85). By this measure, represented parties are more than three times as successful in district court appeals, and more than twice as successful in USPTO appeals. Unfortunately, more complete data of partial reversals in the overall Federal Circuit docket is not readily available for further comparison.¹⁵⁰

Notably, the USPTO reversal rate being on par with that of appeals from the CAVA is significant because veterans appeals are subject to a far more limited scope of review, where the Federal Circuit "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."¹⁵¹

Claim construction issues are somewhat of a special case for the Federal Circuit, where the reversal rate has tended to be quite high—in the vicinity of 30%.¹⁵² In the pro se patent infringement cases within

147. See Jason Rantanen, *Empirical Analyses of Judicial Opinions: Methodology, Metrics, and the Federal Circuit*, 49 CONN. L. REV. 227, 261 (2016) (explaining that the Federal Circuit's statistics deemed to include 27% "whole" reversals, and that "[t]he 27% matches up with the reversal rate reported in Table B-8 (FY Reports), but that table does not contain information on reversals-in-part."). Rantanen provides a helpful discussion of the ambiguities and limits of these reversal rate statistics. See, e.g., *id.* at 263 ("Due to the limited methodological information available for Table B-8, it is not clear exactly what the denominator is, but it appears to be appeals terminated by a merits panel. If this is so, it adds another wrinkle to the reversal rate data because multiple docketed appeals may be decided in a single appellate opinion, particularly when the appellee files a cross-appeal.").

148. *In re Yufa*, 452 F. App'x. 998 (Fed. Cir. 2012) and *In re Morsa*, 713 F.3d 104 (Fed. Cir. 2013) were only reversed in part.

149. The following were only partially reversed: *Beriont v. GTE Labs., Inc.*, 535 F. App'x. 919 (Fed. Cir. 2013); *Kippen v. Pack*, 491 F. App'x. 187, 188 (Fed. Cir. 2012); *Orenshteyn v. Citrix Sys.*, 341 F. App'x. 621 (Fed. Cir. 2009); *McZeal v. Sprint Nextel Corp.*, 335 F. App'x. 966 (Fed. Cir. 2009); *Georgalis v. United States PTO*, 296 F. App'x. 14 (Fed. Cir. 2008).

150. Rantanen, *supra* note 147, at 261 ("While the Federal Circuit no longer publishes data on reversals-in-part, at one point it did").

151. 38 U.S.C. § 7292(d)(2).

152. See, e.g., Anderson & Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 Nw. U. L. Rev. 1, 40-41 (2013) ("Our data indicate that the reversal rate of claim construction appeals at the Federal Circuit has dropped substantially since Phillips. The reversal rate since July 2005 is 24.0% on a term-by-term basis. In that time the court has reversed at least one term in 29.5% of appeals, resulting in a remand, reversal, or vacation in 23.1% of cases.");

this study, when claim construction issues were reached on the merits,¹⁵³ only one¹⁵⁴ out of eight¹⁵⁵ decisions resulted in reversal.¹⁵⁶ This reversal rate of 12.5% is well under half that of represented parties. Because the number of pro se claim construction appeals is quite small, though, the significance of these compared rates is elusive.

That the reversal rates in pro se patent cases are closer to the reversal rates in patent cases overall, but lower for claim construction, might reflect the fact that common non-claim construction issues being appealed are

Kimberly M. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231, 236 (2005) (“After a de novo appeal, the Federal Circuit held that 34.5% of the terms were wrongly construed by the district court. In the 651 cases, the Federal Circuit held at least one term was wrongly construed in 37.5% of the cases. In the cases in which one or more term was wrongly construed, the erroneous claim construction required the Federal Circuit to reverse or vacate the district court’s judgment in 29.7% of the cases.”).

153. In some cases a claim construction issue was raised but deemed waived or otherwise not reached. *See, e.g.*, *Edge Sys. LLC v. Aguila*, No. 2015-1507, 2015 U.S. App. LEXIS 22189 (Fed. Cir. Dec. 21, 2015) (“Mr. Aguila’s additional contentions as to claim construction are irrelevant on appeal, as these arguments were not made in the proceeding below and are therefore waived.”); *Yoon Ja Kim v. Earthgrains Co.*, 451 F. App’x. 922 (Fed. Cir. 2011) (“Because we conclude that the district court correctly concluded that Kim failed to raise a genuine dispute of material fact that the accused potassium bromate replacers contained the claimed amount of “ascorbic acid” by weight, we decline to address her arguments [directed to claim construction].”); *Odom v. Microsoft Corp.*, 429 F. App’x. 967 (Fed. Cir. 2011) (“In light of our disposition, we do not reach issues of claim construction and infringement of the ‘592 patent.”).

154. *Orenshteyn v. Citrix Sys.*, 341 F. App’x. 621 (Fed. Cir. 2009) (“[C]laim 1 of the ‘942 patent covers products that employ a CPU, and the district court’s grant of summary judgment of noninfringement was therefore erroneous.”).

155. *Tadayon v. Saucon Techs., Inc.*, 611 F. App’x. 983 (Fed. Cir. 2015); *Albecker v. Contour Prods., (FL)*, 578 F. App’x. 969 (Fed. Cir. 2014); *Ottah v. Verifone Sys.*, 524 F. App’x. 627, 628 (Fed. Cir. 2013); *Boesen v. Garmin Int’l, Inc.*, 455 F. App’x. 974 (Fed. Cir. 2011); *Desenberg v. Google, Inc.*, 392 F. App’x. 868 (Fed. Cir. 2010); *Fraser v. High Liner Foods (USA), Inc.*, 337 F. App’x. 883 (Fed. Cir. 2009); *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377 (Fed. Cir. 2007).

156. The study also included 12 claim construction decisions arising from USPTO appeals, but those cases were governed by the “broadest reasonable construction” standard for claim interpretation, which differs from the standard applicable to district courts. *See Am. Calcar, Inc. v. Am. Honda Motor Co.*, 768 F.3d 1185, 1189 (Fed. Cir. 2014) (“District courts and the PTO employ different evidentiary standards and rules for claim construction.”); *In re Swanson*, 540 F.3d 1368, 1377-1378 (Fed. Cir. 2008) (“[U]nlike in district courts, in reexamination proceedings ‘[c]laims are given ‘their broadest reasonable interpretation, consistent with the specification . . .’ Thus, considering an issue at the district court is not equivalent to the PTO having had the opportunity to consider it.”). This results in a “reasonableness” standard of review whereby USPTO is afforded substantially more deference than district courts on issues of claim construction. *See, e.g.*, *In re Chuang*, 603 F. App’x. 941 (Fed. Cir. 2015) (“Under the agency’s reasonable construction, there is no dispute that Lenk’s monthly fee for renting media discloses the “rental price” as claimed”); *In re Tay*, 579 F. App’x. 999 (Fed. Cir. 2014) (“[W]e agree that the broadest reasonable construction of contact encompasses the reflective layer disclosed by the prior art ‘053 application.”).

subject to deferential standards of review, while claim construction issues are generally reviewed without deference. Anticipation, obviousness, and infringement, for example, all involve factual issues where the lower tribunal's finding is reviewed for substantial evidence.¹⁵⁷ While the Federal Circuit may treat pro se cases differently on the back end of an appeal (in disposition), as a court charged with correcting error, the front-end analysis of the case and the examination of the record is exceptionally thorough in all cases. One would expect, on average, the USPTO to make a reversible mistake of fact as often in pro se cases as in non-pro se cases. Claim construction, which is generally considered a legal question reviewed de novo,¹⁵⁸ is a more complex legally-charged matter where the standards remain malleable and outcome-oriented arguments may require more legal skill to succeed.¹⁵⁹

V. HOW PRO SE STATUS AFFECTED THE MERITS

Most federal appellate courts engage in some form of what is known as the “pro se liberal construction rule.”¹⁶⁰ This judicially-created “rule,” though lacking in uniformity,¹⁶¹ amounts to a common practice

157. *In re Rambus, Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014) (“Anticipation is a question of fact reviewed for substantial evidence.”); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1280 (Fed. Cir. 2015) (“We review the Board’s legal conclusion of obviousness de novo, and underlying factual findings for substantial evidence.”); *Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.*, 815 F.3d 1314, 1318 (Fed. Cir. 2016) (“The jury’s infringement determination is a question of fact reviewed for substantial evidence.”).

158. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015) (holding that findings based on extrinsic evidence to underpin a claim construction determination will be reviewed for clear error).

159. *See, e.g., Phillips v. AWH Corp.*, 415 F.3d 1303, 1330 (Fed. Cir. 2005) (Lourie, J. dissenting-in-part) (“Again today we vainly attempt to establish standards by which this court will interpret claims. But after proposing no fewer than seven questions, receiving more than thirty amici curiae briefs, and whipping the bar into a frenzy of expectation, we say nothing new, but merely restate what has become the practice over the last ten years—that we will decide cases according to whatever mode or method results in the outcome we desire, or at least allows us a seemingly plausible way out of the case.”); *Retractable Techs. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1370 (Fed. Cir. 2011) (Moore, J., dissenting from the denial of en banc rehearing) (“Claim construction is the single most important event in the course of a patent litigation. It defines the scope of the property right being enforced, and is often the difference between infringement and non-infringement, or validity and invalidity. Despite the crucial role that claim construction plays in patent litigation, our rules are still ill-defined and inconsistently applied, even by us.”).

160. Michael A. Correll, *Finding the Limits of Equitable Liberality: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 862, 876 (2011). Correll concludes that only the First, Fourth, Eighth, and DC Circuits hold pro se litigants to “the same, or at least very similar, briefing standards as their represented counterparts.” *Id.* at 876, 897 (concluding that these jurisdictions “show a tendency to enforce waiver provisions against pro se litigants in the same way they are enforced against represented parties”).

161. Correll contends that the divergence in practice among the circuit courts likely stems from the transition of liberally construing pro se pleadings like complaints, as required by *Haines v. Kerner*, 404 U.S. 519 (1972), to doing the same for

whereby a pro se appellant's briefs are given additional benefits of the doubt and procedural advantages not afforded to represented parties.¹⁶² The practice is applied not only in criminal cases but civil cases as well. For example, it is well settled in the Fifth Circuit that "pro se litigants' briefs are liberally construed so as to avoid waiver of issues."¹⁶³ The Second Circuit has likewise held that a pro se appellant's "allegations . . . must be read so as to raise the strongest arguments that they suggest."¹⁶⁴ Many similar sentiments abound among the regional circuits.¹⁶⁵ By reaching errors not truly preserved and issues not entirely briefed, one commentator characterized the liberal construction practice as "excepting pro se litigants from many of the rigors of error preservation—affording them a special access to the courts and, arguably, a better standard of review than that enjoyed by their represented counterparts."¹⁶⁶

The opinions in this study were generally drafted such that the pro se status of the appellant is not highlighted or emphasized at all. Only 19¹⁶⁷ of the 127 cases in this study included substantive comment by the Federal Circuit about the appellant's pro se status. In 6 of those 19 cases, the pro se status of the appellant helped lead to a favorable result:

- Three decisions noted the appellant's pro se status to justify reaching arguments that were alleged to be waived or otherwise not properly before the court.¹⁶⁸

appellate briefs. Correll, *supra* note 160, at 885-86.

162. Correll, *supra* note 160, at 864-65, 875-85.

163. Audler v. CBC Innovis, Inc., 519 F.3d 239, 255 (5th Cir. 2008) (citing Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993)).

164. Weixel v. Bd. of Educ. of N.Y., 287 F.3d 138, 146 (2d Cir. 2002) (internal quotation marks omitted) (quoting McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999)).

165. Correll, *supra* note 160, at 879-85 (collecting cases).

166. Correll, *supra* note 160, at 864-65, 876. Correll concludes that this is unfair and inappropriate because it is based solely on the presence or absence of counsel, whereas other factors may indicate that liberal construction is unwarranted. *Id.* at 897. He ultimately advocates for "[t]reating pro se status as one of many concerns in deciding whether to reach beyond properly presented briefs." *Id.* at 897-99 ("[C]ourts should consider, among other things: material in the record regarding a pro se litigant's education, reasons for proceeding without counsel, and success in presenting his arguments up to that point."). These factors, together with pro se status, "would allow the courts to reach necessary issues to the greatest extent possible without usurping the role of the parties as advocates and adversaries." *Id.*

167. The listing in this paragraph includes 20 "decisions" categorized into favorable and unfavorable results, but in one case, Colida v. Nokia, Inc., 347 F. App'x 568 (Fed. Cir. 2009), the pro se status of the litigant came up in two separate unfavorable instances, hence the total "case" count being 19 instead of 20.

168. *In re Steed*, 802 F.3d 1311, 1317 n.2 (Fed. Cir. 2015) (finding that appellant's arguments concerning actual reduction to practice were made to the Board, explaining that "at that time Steed was acting *pro se* and misstated the usage 'constructively,' but the intended meaning is clear."); *Foster v. Pitney Bowes Corp.*, 549 F. App'x 982, 988 (Fed. Cir. 2013) (reaching challenge to district court's grant of

- One decision emphasized the “low bar for pro se litigants” for determining the sufficiency of pleadings, and reversed a dismissal of the complaint.¹⁶⁹
- One decision noted the “lenient treatment” of pro se appellants to justify not affirming on an alleged alternative ground not at issue in the original proceedings.¹⁷⁰
- One decision, as part of its remand of a claim erroneously dismissed, suggested that the trial court consider the pro se party’s motion for joinder of necessary parties as a motion for relief from judgment, “[g]iven the leniency with which it is to view pro se filings.”¹⁷¹

In 14 of the 19 decisions, the pro se appellant’s status did not help it obtain a more favorable result:

- Eight decisions recognized the lower pleading standards applicable to pro se litigants but affirmed the judgment that the party’s pleadings still failed to meet that minimum standard.¹⁷²

judgment on the pleadings even though the issue was not noted in appellant’s notice of appeal, explaining that “[b]ecause Mr. Foster is a pro se litigant, we have the discretion to be more lenient in interpreting his filings”); *Maxwell v. Stanley Works, Inc.*, 262 F. App’x 267, 270 n.1 (Fed. Cir. 2008) (“[A]s Sixth Circuit case law instructs us to construe filings by pro se litigants liberally, we decline to dismiss Maxwell’s appeal, which was filed within the thirty day window, because Maxwell paid the required filing fees thirty-eight days after the district court’s certification.”).

169. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1358-1359 (Fed. Cir. 2007) (“Because McZeal met the low bar for *pro se* litigants to avoid dismissal on the basis of Fed. R. Civ. P. 12(b)(6), we vacate the trial court’s dismissal of McZeal’s complaint and remand for further proceedings.”). McZeal’s complaint did not contain enough facts for the temporary restraining order and injunctions that he sought, but the district court should not have dismissed the entire complaint.” *Id.*

170. *Beriont v. GTE Labs., Inc.*, 535 F. App’x 919, 926 n.2 (Fed. Cir. 2013) (disagreeing with dissent’s suggestion to affirm on issue of patent ownership because appellee did not argue the issue in the district court, and doing so would deprive the appellant of an opportunity to respond).

171. *Gal-Or v. United States*, 470 F. App’x 879, 885 (Fed. Cir. 2012).

172. *Anderson v. Kimberly-Clark Corp.*, 570 F. App’x 927, 932, 934 (Fed. Cir. 2014) (explaining that “[p]ro se plaintiffs, like Ms. Anderson, are given greater leeway on procedural matters, such as pleading requirements,” but ultimately affirming dismissal of design patent infringement complaint under Rule 12(b)(6)); *Piecznik v. Bayer Corp.*, 474 F. App’x 766, 771 (Fed. Cir. 2012) (“No error has been shown in the district court’s rulings as to the inadequacy of the complaint’s recitation of the basis for the charges that any or all of the forty-one listed defendants infringed.”); *Pupols v. United States PTO*, 413 F. App’x 232, 235 (Fed. Cir. 2011) (“The district court was mindful that *pro se* complaints are held to a less stringent standard than formal pleadings drafted by attorneys. The court allowed Pupols to amend his complaint and advised him to ‘follow the dictates of Rule 8’ in doing so. The court dismissed the case only after Pupols failed to meaningfully amend his complaint to allege facts that showed he was entitled to any form of relief.”); *Ping Yip v. Hugs to Go LLC*, 377 F. App’x 973, 978 (Fed. Cir. 2010) (“Although we recognize the obstacles confronting a pro se litigant, we conclude that the district

- Two decisions noted the pro se appellant's status but nonetheless declined to reach an issue due to waiver because the argument was first raised in the appellant's reply brief.¹⁷³
- Two decisions noted the pro se status of the appellant, but rejected that the appellant lacked sufficient opportunity to take certain allegedly material discovery from the defendant.¹⁷⁴
- One decision noted that the party's pro se status, in part, supported the district court's anti-filing injunction for future lawsuits.¹⁷⁵
- One decision rejected the argument that the defendant-appellant's pro se status should have precluded the district court from trebling a damages award for a total of \$632,550.28.¹⁷⁶

court's actions of dismissal were in accordance with law."); *Colida v. Nokia, Inc.*, 347 F. App'x 568, 570 (Fed. Cir. 2009) ("Colida's infringement claims were facially implausible and provided the district court with no basis on which to reasonably infer that an ordinary observer would confuse the pleaded patented designs with the accused Nokia 6061 phone."); *Po Kee Wong v. United States*, 342 F. App'x 623, 625 (Fed. Cir. 2009) ("With regard to Dr. Wong's patent infringement case, the facts at most show that he does own patents, and that he sought to license them to various government agencies, and that the government would need to construct facilities before it could practice the claims of the patents. Without more, we must affirm the dismissal of the patent infringement claims."); *D-Beam v. Roller Derby Skate Corp.*, 316 F. App'x 966, 969 (Fed. Cir. 2008) ("Because Mr. Evans claims are futile on the grounds of res judicata, the district court did not abuse its discretion in denying leave to amend the complaint in this case.")

173. *Hyde v. United States*, 336 F. App'x 996, 998 (Fed. Cir. 2009) ("While the pleadings of pro se litigants are held to 'less stringent standards than formal pleadings drafted by lawyers,' *Haines v. Kerner*, 404 U.S. 519, 520 (1982), the bare assertion in Mr. Hyde's reply brief is insufficient to recast his claim for misappropriation of his invention as a claim for patent infringement occurring within the last six years at this stage of the proceedings."). *Yufa v. TSI, Inc.*, 600 F. App'x 747, 753 (Fed. Cir. 2015) ("Although *Forshey* permits this court to be less stringent in requiring the issue to be expressly presented to the district court, this court finds that even under a less stringent approach, Dr. Yufa cannot now raise this argument.")

174. *Kippen v. Pack*, 491 F. App'x 187, 191 (Fed. Cir. 2012) ("While we are mindful of Mr. Kippen's *pro se* status, we note that in this case he had the opportunity to discover all necessary detail from both Mr. Pack and Allied and, if either failed to participate fully in such discovery, to seek relief from the district court."); *Fraser v. High Liner Foods (USA), Inc.*, 337 F. App'x 883, 888-889 (Fed. Cir. 2009) ("Even taking into consideration their *pro se* status, the district court was not obligated to entertain Appellants' fishing expedition for material facts.")

175. *Colida v. Nokia, Inc.*, 347 F. App'x 568, 571 (Fed. Cir. 2009) ("Applying these standards and considering Colida's pro se status, we find no abuse of discretion in the district court's imposition of an anti-filing injunction."). Colida's infringement claims were "objectively baseless" and his pattern of filing meritless suits justified sanctions. *Id.*

176. *Gentile v. Sun Prods.*, 371 F. App'x 76, 79-80 (Fed. Cir. 2010) (citing *SRI Int'l, Inc. v. Advanced Tech. Labs.*, 127 F.3d 1462, 1469 (Fed. Cir. 1997) ("While it

Thus, when a party's pro se status is specifically called out, it rarely ends up helping that party get a more favorable result. Of course, the merits of the appeals primarily drove the end results in these cases. In many instances a party's allegations were too poorly developed, implausible, or lacking in legal support to justify relief from the Federal Circuit, even under the more lenient pro se standards.¹⁷⁷

Further, even when a pro se appellant's status is not specifically discussed in connection with an issue, pro se appellants rarely get a significant benefit of the doubt. Of the 127 cases in this study, excluding those 19 decisions noted in the preceding paragraph, the Federal Circuit expressly found pro se litigants' arguments waived for being insufficiently developed or presented 11 times.¹⁷⁸ And, again setting aside the 19 decisions noted in the preceding paragraph, the Federal Circuit affirmed

is true that when determining whether to award enhanced damages all relevant factors 'should be given the weight appropriate to their substance,' [] on this record we conclude that the district court did not abuse its discretion and had ample basis on which to treble the damages award, notwithstanding Gill's pro se status.").

177. See *supra* notes 55-57; see also, e.g., *Anderson v. Kimberly-Clark Corp.*, 570 F. App'x 927, 932, 934 (Fed. Cir. 2014) (finding no error in the court's dismissal of infringement claim because "Ms. Anderson has never explained how or why an ordinary observer would be deceived into thinking that the accused products are the same as the patented design, and her complaint for design patent infringement cannot survive on merely conclusory allegations"); *Ping Yip v. Hugs to Go LLC*, 377 F. App'x 973, 978 (Fed. Cir. 2010) ("The district court continued to find the complaints inadequate, for Yip did not describe, explain, or particularly reference facts in her pleadings, despite the guidance of the district court.").

178. *Edge Sys. LLC v. Aguila*, 2015 U.S. App. LEXIS 22189 (Fed. Cir. Dec. 21, 2015) (waiving validity arguments because "[t]he record, as presented to this court, does not demonstrate that Mr. Aguila sufficiently developed and presented his '804 and '431 patent validity arguments to the Magistrate Judge"); *Tas v. Beachy*, 2015 U.S. App. LEXIS 17119 (Fed. Cir. Sept. 29, 2015) ("Tas waived these allegations by failing to raise them below, and we find no merit to the allegations."); *In re Holness*, 612 F. App'x 999, 1009 (Fed. Cir. 2015) ("[E]ven if we assumed the PTAB based its determination on a new ground of rejection, Mr. Holness cannot now assert that such grounds constitute a violation of his due process rights."); *Stauffer v. Brooks Bros. Group*, 758 F.3d 1314, 1322 (Fed. Cir. 2014) ("The record shows that Mr. Stauffer did not raise these arguments in his initial response to the district court's show-cause order, but instead waited until his reply brief before the district court to first raise them."); *Celorio Garrido v. Holt*, 547 F. App'x 974, 980 (Fed. Cir. 2013) ("[A]rguments made for the first time in a reply brief are waived."); *In re Yeager*, 527 F. App'x 859, 862 (Fed. Cir. 2013) (citations omitted) ("[A] party that offers only a mere recitation of the claim elements and a naked assertion that the corresponding elements were not found in the proper art waives any argument with respect to those claim elements."); *In re Yufa*, 452 F. App'x 998, 1001 (Fed. Cir. 2012) (waiving an argument regarding commercial success because the court "will not consider evidence of commercial success offered for the first time on appeal and not part of the record before the PTO."); *Taylor v. United States PTO*, 385 F. App'x 980, 982 (Fed. Cir. 2010) ("Mr. Taylor thus waived his right to argue his damages claim by failing to raise the issue in his initial appeal."); *Colida v. Nokia, Inc.*, 347 F. App'x 568, 569 (Fed. Cir. 2009) ("His two-page informal brief offers no arguments and cites no evidence as to why the district court erred in dismissing his complaint

dismissals of defective complaints 15 times, ten of which complaints included allegations that appeared facially implausible or lacking in jurisdiction,¹⁷⁹ though five appeared more legitimate to potentially pass muster at the pleadings stage.¹⁸⁰

or imposing sanctions, and therefore provides no basis for us to rule in his favor.”); *In re Guess*, 347 F. App’x 558, 559 (Fed. Cir. 2009) (stating that appellants waived related arguments on appeal because “[b]efore the Board, Appellants failed to argue that any limitations unique to dependent claims 2 through 5 survive a finding of anticipation.”); *Michelotti v. United States*, 557 F. App’x 956, 961 (Fed. Cir. 2014) (“We need not consider whether such an allegation would have been sufficient to make out a claim under 28 U.S.C. § 1498(a), as Mr. Michelotti did not present this theory to the Court of Federal Claims.”).

179. *Sheridan v. United States*, 2015 U.S. App. LEXIS 17603, 2-3 (Fed. Cir. Oct. 8, 2015) (holding, in a case where plaintiff brought suit against the United States over a third parties’ alleged infringement, that none of the three statutes Mr. Sheridan said allowed him to bring this suit for monetary damages suffices to support this action); *Rozenblat v. Kappos*, 345 F. App’x 601, 603 (Fed. Cir. 2009) (holding, in a case where plaintiff sued the USPTO director, complaining that a third party’s patent was illegally issued, that “the complaint [was] defective not only for the absence of any supporting detail, but also because a challenge to validity cannot be brought in a suit against the Director of the PTO”); *Michelotti v. United States*, 557 F. App’x 956, 959 (Fed. Cir. 2014) (“Even if Mr. Michelotti is correct that the brake lighting system installed in certain Mercedes-Benz vehicles infringes his patent, the NHTSA’s grant of an exemption from Standard 108 so that Mercedes-Benz could sell such vehicles does not equate to use or manufacture of Mr. Michelotti’s invention ‘by or for the United States,’ as is required to state a claim under 28 U.S.C. § 1498(a).”); *Hemphill v. Johnson & Johnson*, 550 F. App’x 890, 891 (Fed. Cir. 2014) (dismissing because plaintiff attempted to assert expired patent more than six years after expiration, in violation of time limit of 35 U.S.C. § 286); *Fleming v. Coward*, 534 F. App’x 947, 950 (Fed. Cir. 2013) (“The district court was correct to dismiss the complaint against the PTO defendants because of Mr. Fleming’s lack of action in the PTO prior to instituting a civil lawsuit arising from the rejection of his patent application.”); *Chinsammy v. United States*, 417 F. App’x 950, 951-952 (Fed. Cir. 2011) (“Because he has never been issued a valid patent, the Court of Federal Claims correctly dismissed his appeal for lack of jurisdiction.”); *Ross v. United States*, 374 F. App’x 960, 962 (Fed. Cir. 2010) (dismissing because plaintiff did not bring suit against the United States within six years of the accrual of his right of action); *Hyde v. United States*, 336 F. App’x 996, 999 (Fed. Cir. 2009) (“Because Mr. Hyde’s claim was not filed until after the six-year statute of limitations period set forth in 28 U.S.C. § 2501 had expired, we affirm the court’s grant of the government’s motion to dismiss for lack of subject matter jurisdiction.”); *Hutchins v. Zoll Med. Corp.*, 253 F. App’x 926, 928 (Fed. Cir. 2007) (affirming dismissal of complaint on res judicata grounds where district court found that “Hutchins could have raised, and actually did raise, a claim of infringement” against the same defendant in a prior action); *Grasty v. United States PTO*, 211 F. App’x 952, 954 (Fed. Cir. 2007) (“[S]ince there was a final judgment on the merits in Ms. Grasty’s original suit, which involved the same parties (or their privies) based on the same cause of action as this suit, the district court properly dismissed Ms. Grasty’s second complaint as barred by res judicata.”).

180. *Mikkilineni v. Stoll*, 410 F. App’x 311, 313 (Fed. Cir. 2010) (citation omitted) (affirming the district court’s dismissal under Rule 12(b)(6) because “the Interim Guidelines are interpretive, rather than substantive, and are thus exempt from the notice and comment requirements of § 553 of the APA”); *Desenberg v. Google, Inc.*, 392 F. App’x 868, 870 (Fed. Cir. 2010) (affirming district court’s judgment

The fact that the Federal Circuit does not go out on a limb for pro se appellants often may reflect that the court already recognizes at least some significant legal sophistication among those parties.¹⁸¹ At least in terms of the liberal construction rule, the Federal Circuit usually declines to treat pro se status alone as a reason to afford special treatment and change the outcome on the merits. The recognition that pro se status alone should not justify a result is equally applicable to other procedures discussed above, such as the usage of Rule 36 and the drafting of shorter nonprecedential decisions.

VI. USING STAFF ATTORNEYS FOR SCREENING AND DISPOSITION

Many courts have a significant portion of their cases involve pro se parties, and have different approaches to handling such cases that are not complex and are somewhat routine. One popular approach involves the use of staff attorneys—lawyers that work for the court but are not judicial law clerks assigned to specific judges—to screen cases and recommend how they should be resolved, draft the necessary opinions and orders, and even determine if the cases warrant full judicial review at all.

In 1980, Arthur Hellman observed that this kind of “innovation” was becoming more common due to the increased volume of appeals and the corresponding need to increase the courts’ productivity.¹⁸² Hellman questioned whether the use of such attorneys assisted judges or usurped judicial power, concluding that it depended on the tasks performed: “The paradox disappears, however, if we can identify some

“that Mr. Desenberg’s complaint did not state a claim on which infringement could be found” because Google does not perform all of the steps of the claim); *Hornback v. United States*, 601 F.3d 1382, 1385 (Fed. Cir. 2010) (resolving issue of first impression of “whether the ‘use of the invention by the Government’ language in section 183 includes use of the invention that occurred after the patent for the invention has issued,” and affirming judgment that plaintiff’s complaint failed to state a claim because the statute excluded the averred conduct); *Marcinkowska v. IMG Worldwide, Inc.*, 342 F. App’x 632, 636 (Fed. Cir. 2009) (holding that, where plaintiff accused Spanish company of infringement by using the patented tennis court surfaces in a tennis match taking place abroad, but broadcast into the United States, “the district court properly granted IMG’s motion to dismiss Ms. Marcinkowska’s patent infringement claims, which were not tied to any infringing activities in the United States”); *Roper v. Jo-Ann Stores, Inc.*, 211 F. App’x 950, 951 (Fed. Cir. 2007) (affirming dismissal of Roper’s patent infringement claims because, even under the assumption that Jo-Ann’s floral foam could support growing plants, the foam “completely fails to meet any of the structural limitations of the claims of the ‘909 patent,” which require multiple “vertically spaced” sections or layers).

181. See Correll, *supra* note 160, at 892-93 (suggesting that sophistication of a pro se party may justify not invoking the liberal construction rule).

182. Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 938-40 (1980).

tasks that can be performed by judges, but need not be; or if the alternative to performance by staff attorneys is that the tasks will not be performed at all.”¹⁸³

Hellman found it acceptable for staff attorneys to help screen for “fast track” disposition of “cases likely to have no precedential value,” and to draft bench memoranda or opinions for those cases in circumstances that still involved significant involvement and final approval by the judges.¹⁸⁴ In the face of continued heavy appellate dockets, courts have run with this idea:

[T]he circuits have created pools of staff attorneys who perform preliminary reviews of the merits of certain classifications of cases that routinely appear on the appellate dockets . . . In these cases, a staff attorney typically will read the briefs to prepare a memorandum suggesting a resolution of the appeal and may even prepare a brief opinion and order disposing of the appeal.¹⁸⁵

This approach is not without criticism, and especially with regard to pro se cases, due to the appearance that the judges are not themselves resolving the cases:

[A] belief that staff, not judges, are playing a decisive role in decision making and opinion writing undermines the legitimacy of the court’s decision making process. Lawyers, litigants, and even lower court judges can find little comfort in a decision which they believe has been made by the staff. This loss of legitimacy is all the more acute because the effect of staff participation is felt most keenly in cases brought by the poor - the group most in need of the services of the federal judiciary.¹⁸⁶

But courts continue to delegate such functions to staff anyway, which other commentators support by arguing that such delegation is “necessary to allow the federal appellate courts to continue to function in an age of ballooning dockets.”¹⁸⁷ To those who support such delegation,

staff attorneys are seen as an efficient means of addressing large numbers of cases in well-defined categories that repeatedly raise a narrow set of issues. And, in their minds, where a case presents a straightforward legal question on the briefs, oral argument would be superfluous. Law clerks, staff attorneys, and restrictions on oral argument, then, principally represent time-saving devices that allow judges to concentrate their energies where they are most needed.¹⁸⁸

183. Hellman, *supra* note 182, at 940-41.

184. Hellman, *supra* note 182, at 989-91.

185. Cooper & Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 699 (2001).

186. Richman & Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 291-92 (1996); see also, Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 32 (1996) (“The courts of appeals cannot short-circuit the deliberative decision-making process without provoking a significant reduction in the quality of justice provided to individual litigants.”).

187. Cooper & Bellman, *supra* note 185, at 689.

188. Cooper & Bellman, *supra* note 185, at 708.

As described in detail above, the Federal Circuit's pro se patent docket would arguably lend itself to this reasoning, given the often weak merits and straightforward legal issues presented by those cases, set against the backdrop of a heavy docket of cases probing the boundaries of the new AIA proceedings.

The U.S. Court of Appeals for the Ninth Circuit's approach is instructive, as the Ninth Circuit resolves a large number of pro se cases each year by delegating the bulk of the work to staff attorneys. In 2015, the Ninth Circuit had 5,855 pro se appeals, accounting for 49.3% of its appeals that year.¹⁸⁹ These appeals comprised mostly prisoner petitions and agency appeals, and involved district court decisions as well.¹⁹⁰ Of the pro se appeals resolved that year, "2,641 were closed on procedural grounds, while 3,231 were terminated on the merits after oral argument, submission on the briefs, or by consolidation."¹⁹¹ Notably, as explained above, the pro se patent appeals at the Federal Circuit similarly involved procedural matters of pleadings sufficiency and jurisdiction 41.3% of the time.

For cases where Federal Rule of Appellate Procedure 34(a) would deem oral argument unnecessary,¹⁹² and where "the result is clear" and "the applicable law is established," the Ninth Circuit allows for staff attorneys to place the case onto a "screening" calendar instead of the oral argument calendar.¹⁹³ To begin this process, "[a]fter the briefing is completed, the case management attorneys inventory cases to weigh them by type, issue, and difficulty."¹⁹⁴ Every case is given a numerical weight, and the lower-weighted cases are those that are recommended for screening panels.¹⁹⁵ Recognizing that the many pro se cases are legally defective, frivolous, or straightforward to resolve, a special "Pro Se Unit" of staff attorneys was created in the Ninth Circuit, and that group

189. 2015 NINTH CIRCUIT ANN. REP. 61, <http://www.ca9.uscourts.gov/publications/AnnualReport2015.pdf> [<https://perma.cc/D3TZ-J5Z2>].

190. *Id.*

191. *Id.*

192. Fed. R. App. P. 34(a) (providing that if an appeal is frivolous, an appeal has been authoritatively decided, or the briefs and record adequately allow for disposition without oral argument, a panel can decide to forego oral argument as not helping the decisional process).

193. NINTH CIR. GEN. ORD. 8-9 (March 23, 2016), http://cdn.ca9.uscourts.gov/datastore/uploads/rules/general_orders/General%20Orders%20April%202016%204.14.16.pdf, at § 6.5(a); *see also* Ninth Circuit Appellate Practice Guide, <http://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf> [<https://perma.cc/M2M3-QHUP>].

194. THE APPELLATE LAWYER REPRESENTATIVES' NINTH CIRCUIT PRACTICE GUIDE 8 (Jan. 2017), <http://cdn.ca9.uscourts.gov/datastore/uploads/guides/AppellatePracticeGuide.pdf> [<https://perma.cc/CV3N-ELEP>].

195. NINTH CIR. GEN. ORD. at 14; Hon. J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 198-99 (2005).

shepherds essentially all pro se appeals to screening panels for more streamlined resolution of those cases.¹⁹⁶

Once a case is designated for a screening calendar, the staff attorneys prepare proposed memorandum dispositions of the cases to a rotating panel of judges, who can unanimously agree to adopt the proposed disposition after presented with the proposal orally or in writing.¹⁹⁷ If any one judge on the panel disagrees with the disposition or believes the case warrants oral argument, it will be scheduled on the oral argument calendar and assigned to a panel per the ordinary course.¹⁹⁸ Because the recommended dispositions are generally adopted, the clerk's office and its staff attorneys effectively decide how these routine cases are resolved and whether they go to three-judge panels at all. Statistics in 1998 showed that screening panels "typically decided 150 to 170 cases in a month," but former Chief Judge of the Ninth Circuit J. Clifford Wallace suggested that panels might often handle closer to 200 cases monthly.¹⁹⁹

The Federal Circuit does have staff attorneys in its clerk's office, but uses them for much more limited purposes. The clerk's office is permitted to grant unopposed motions without involving the judges if they are simple procedural matters (e.g., extensions of time, joinder).²⁰⁰ For all other motions filed before a case has been assigned to a merits panel, the clerk's office, though the "Senior Staff Attorney," "assist[s]" a designated motions panel of judges "in the processing of such motions."²⁰¹ The clerk may sign the resulting orders.²⁰² Any dispositive motions must be handled by the full motions panel, which can refer the motion to the merits panel as appropriate.²⁰³

Once a case has been calendared and assigned to a merits panel in the Federal Circuit, the clerk's office relinquishes control of the case, including any motions, to the merits panel for resolution.²⁰⁴ Thus, unlike in the Ninth Circuit, the Federal Circuit delegates almost no substantive authority to its clerk's office and staff attorneys to screen cases and control the level of adjudication given to them. To be fair, though,

196. Wallace, *supra* note 195, at 194-95.

197. NINTH CIR. GEN. ORD. at 65.

198. *Id.*

199. J. Byron R. White et al., *Final Report*, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 31 (Dec. 18, 1998), <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> [<https://perma.cc/NX6X-LA6C>]; Wallace, *supra* note 195, at 199.

200. FED. CIR. INTERNAL OPERATING PROC. 2(2) (Nov. 14, 2008), <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster1a.pdf> [<https://perma.cc/6A87-R2W2>].

201. FED. CIR. INTERNAL OPERATING PROC. at 2(3)-(4).

202. FED. CIR. INTERNAL OPERATING PROC. at 2(4)(d).

203. FED. CIR. INTERNAL OPERATING PROC. at 2(4).

204. FED. CIR. INTERNAL OPERATING PROC. at 2(6).

the clerk's and staff attorneys' "assistance" in handling motions makes the clerk's office a filter that necessarily colors a motion and affects its disposition: "Judges, of course, retain final decision-making authority, but in practice, staff attorneys and law clerks influence both the decision-making process and often its outcomes."²⁰⁵ The Federal Circuit rules and operating procedures do not specify whether the motions "assistance" involves drafting bench memoranda, opinions and orders, or both. They do, however, distinguish between merely "referring" motions and "assisting" or "presenting" on those motions, suggesting that the role of the staff attorneys is fairly involved on advising the judges and drafting proposed orders on motions.²⁰⁶

Ultimately, the more extensive involvement of staff attorneys in the Ninth Circuit seems unnecessary in the Federal Circuit. The Federal Circuit has tools in its rules and operating procedures to address its docket congestion without depriving litigants from access to judges. And it is already using those tools to some extent to handle its increased case load. By relying on summary affirmances and non-precedential opinions instead of delegating screening and initial decision making to staff attorneys, the Federal Circuit stays closer to the "ideal" where judges are active decision makers in all consequential matters of a case, and especially the case's ultimate disposition.²⁰⁷ This instills an appearance of fairness and equal access to the court that is arguably lacking in the Ninth Circuit.

The day may come when the Federal Circuit's case load cannot be managed without relying on more non-judicial help. But that does not appear to be the case today. The Federal Circuit's docket is modest compared to the Ninth Circuit's. While the Federal Circuit had 1,710 appeals on its plate in 2015 spread across 12 active judges (142.5 cases per judge),²⁰⁸ the Ninth Circuit had 11,870 cases for 29 active judges (409.3 cases per judge).²⁰⁹ Even adding the 15 senior judges on the Ninth Circuit and the 6 senior judges on the Federal Circuit, the average caseload of a Ninth Circuit judge is still well over double that of a Federal Circuit judge—hence the arguable need for the Ninth Circuit to largely delegate its simpler and more routine cases to staff attorneys.

205. Cooper & Berman, *supra* note 185, at 688.

206. FED. CIR. INTERNAL OPERATING PROC. at 2(3)-2(6).

207. Hellman, *supra*, note 182, at 938 (discussing Justice Frankfurter's ideal conditions for a successful Supreme Court: "In this view, each judge would, in every case decided on the merits, read the briefs and record, hear oral argument, confer with his brethren, research the doubtful issues, and either write an opinion or study a draft prepared by one of his colleagues").

208. FED. CIR. HIST. CASELOAD (2015), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/caseload_overall_1983-2015.pdf [<https://perma.cc/AD2H-NJX5>].

209. 2015 NINTH CIRCUIT ANN. REP. at 1, 58.

Despite the recent flood of AIA appeals at the Federal Circuit, that portion of the docket will stabilize²¹⁰ and will not increasingly burden the court year over year. The Federal Circuit is very busy but has been capable, albeit with increased reliance on Rule 36 and drafting more nonprecedential opinions, of continuing to resolve cases in a timely manner without resorting to more extreme measures. Adopting the same efficiency measures in its pro se docket, at least for parties who demonstrate themselves to have some relevant legal sophistication, would allow the Federal Circuit to further streamline its docket without reducing access to judges along the way.

VII. PERCEIVED ACCESS AND EQUAL JUSTICE

As described in the previous Part, the Federal Circuit has declined to outsource its docket management and opinion drafting to staff attorneys in pro se cases. Even though the cases are largely routine and without merit, the court goes out of its way to have the case decided by a merits panel. The panel will write an opinion with more detail and explanation than would be strictly required under the law and the court's rules and procedures. This is actual access to the court—i.e., the judges—that the Federal Circuit provides to pro se litigants, and it is commendable.

The separate issue of perceived access to judges and to a fair and equal adjudication is also important. The courts of appeals should correct error where it exists, regardless of the identity of the appellant or the legal significance of the case. As Richman and Reynolds put it,

the cost of the contemporary judicial focus on lawmaking rather than error correction largely falls on those with “unimportant” cases - the poor and powerless. Not only is the quality of decision making lower in those cases, but the system pays another heavy price - the loss of perceived legitimacy. Our judicial system can answer the cynics' charges of a systematic tilt toward the rich and powerful only if the courts police themselves rigorously and deliver on their sworn promise of equal justice.²¹¹

The fact that judges review and dispose of each case is of little solace to losing pro se appellants who receive short written rejections of their appeals, and get no other indications from the court that the court took their appeals seriously:

A party whose appeal is decided without oral argument, and whose arguments are summarily dismissed in a brief, unpublished opinion, is unlikely to be satisfied—not only because she did not prevail, but also because of the appearance

210. The rate of AIA petition filings has already begun to stabilize. See Erin Coe, *Skyrocketing Petition Rate Starts to Stabilize* LAW360 (Feb. 11, 2016), <http://www.law360.com/articles/756867/ptab-s-skyrocketing-petition-rate-starts-to-stabilize> [<https://perma.cc/G9RH-NBF4>].

211. Richman & Reynolds, *supra* note 186, at 296.

that the court did not treat her appeal seriously. Such a litigant is likely to note, as well, that other parties in other appeals seem to have been treated more respectfully: they have had the chance to argue before the court, and the court has explained its decision in a reasoned manner, in an opinion that is disseminated to the public through the court's official reporter.²¹²

The Federal Circuit's special effort of writing in *pro se* cases to make the parties "feel heard" may alleviate these concerns a bit, but the opinions are still issued without the benefit of oral argument, and are generally issued as nonprecedential, "vastly reducing judicial accountability."²¹³

For courts like the Ninth Circuit, who "triage" appeals to decide which are worth going through the "real" appellate process, the following criticism from Richman and Reynolds is more biting:

The significant cases, those brought by wealthy, powerful, or institutional litigants - receive the traditional appellate model. The routine, trivial cases - usually the ones brought by poorer, weaker litigants - are relegated to track-two appellate justice. For these cases (about half the total) the circuit courts have become certiorari courts, rather than the courts of mandatory appellate jurisdiction that Congress intended.²¹⁴

The Federal Circuit's practice is much more of a "one-track" justice system than the Ninth Circuit in many respects, though the obvious exception is its prohibition on oral argument from non-lawyer *pro ses*.

Even those who sympathize with *pro se* parties who are not afforded the exact same procedural track as others must recognize that judicial efficiency matters, and that courts have limited resources to allocate to cases that do not all require the same amount of time and effort.²¹⁵ If the goal is equal justice, the Federal Circuit is arguably failing if it strictly adheres to its one-size *pro se* disposition policy. The marked increase in Rule 36 judgments in patent appeals overall shows that represented parties raise appeals lacking merit quite a bit, yet they are treated less favorably than *pro ses* who raise similarly meritless appeals. Confidence in the fairness of the court would not be undermined if all parties who demonstrate some relevant legal sophistication—through counsel or through their own conduct—are treated similarly with shorter opinions or summary affirmances, when appropriate. For *pro ses* who appear to lack such sophistication, there the Federal Circuit's practice of

212. Cooper & Berman, *supra* note 185, at 710-11.

213. Richman & Reynolds, *supra* note 186, at 341.

214. Richman & Reynolds, *supra* note 186, at 341.

215. Cooper & Berman, *supra* note 185, at 710-11 ("[T]he cases on the courts' dockets must be decided, both for their own sakes and to allow judges to move on to subsequent filings, which show no sign of abating."); *id.* (stating that "[t]his is not to say that the courts must be brought to a standstill so as to devote a massive amount of time and energy to each and every case" but that "the court that ignores these concerns goes a long way toward defeating the truism that the law is no respecter of persons").

writing would better serve the goal of exhibiting fairness and equal justice.

As discussed above, though, a large portion of pro se appellants have sufficient legal sophistication to read and understand the court's rules, and to prepare briefs in compliance with those rules, citing to facts, precedent, and other legal authority as appropriate. For those parties, a more terse disposition of their appeals will not necessarily suggest to them that the court is administering justice unfairly or without due consideration. If there is clearly no error or legally-significant issue in a judgment on appeal, there is little reason for courts to devote disproportionate resources to such cases solely because the appellant is proceeding pro se. That looks more like preferential treatment than equal justice.

Admittedly, drafting shorter opinions and issuing Rule 36 judgments in more pro se cases could exacerbate perceptions of unfairness in some parties. But it is too simplistic to assume that all pro se appellants, let alone all members of the public, will have the same reactions to such dispositions. The court should always at least consider a pro se appellant's apparent and relevant legal sophistication before writing at length to affirm a meritless appeal.

VIII. CONCLUSION

If the merits of a case are weak and the appellant before the Federal Circuit appears fairly sophisticated or experienced, the court should consider those factors as reasons to potentially depart from its rigid pro se practice of opinion writing. To be sure, as its caseload has mounted, the court is relying on Rule 36 slightly more frequently in pro se cases, though it has not been cutting back on the lengths of its nonprecedential opinions, which appear to be increasing over time. Both mechanisms—Rule 36 and short nonprecedential opinions—can be employed in appropriate cases without a significant risk that the party will not feel heard. Such case-by-case applications of these rules will still promote perceptions of fairness and equal justice, but will avoid investing scarce opinion-writing resources in cases that are unlikely to further those goals, and which will necessarily hinder the court's achievement of other important goals.

APPENDIX A

Cases Included in Pro Se Patent Appeals Study²¹⁶

3m Co. v. Mohan, 482 F. App'x 574 (Fed. Cir. 2012)
Albecker v. Contour Prods., (FL), 578 F. App'x 969 (Fed. Cir. 2014)
Anderson v. Kimberly-Clark Corp., 570 F. App'x 927 (Fed. Cir. 2014)
Beriont v. GTE Labs., Inc., 535 F. App'x 919 (Fed. Cir. 2013)
Beriont v. GTE Labs., Inc., 601 F. App'x 937 (Fed. Cir. 2015)
Boesen v. Garmin Int'l, Inc., 455 F. App'x 974 (Fed. Cir. 2011)
Celorio Garrido v. Holt, 547 F. App'x 974 (Fed. Cir. 2013)
Chinsammy v. United States, 417 F. App'x 950 (Fed. Cir. 2011)
Clark v. Crues, 260 F. App'x 292 (Fed. Cir. 2008)
Clark v. United States, No. 2015-5002, 2015 U.S. App. LEXIS 20478 (Fed. Cir. Nov. 25, 2015)
ClearValue, Inc. v. Pearl River Polymers, Inc., 546 F. App'x 963 (Fed. Cir. 2013)
Colida v. Nokia, Inc., 347 F. App'x 568 (Fed. Cir. 2009)
Colida v. Panasonic Corp. of N. Am., 374 F. App'x 37 (Fed. Cir. 2010)
Cornish v. Doll, 330 F. App'x 919 (Fed. Cir. 2009)
Cornish v. Kappos, 425 F. App'x 885 (Fed. Cir. 2011)
Cornish v. Kappos, 474 F. App'x 779 (Fed. Cir. 2012)
D-Beam v. Roller Derby Skate Corp., 316 F. App'x 966 (Fed. Cir. 2008)
Desenberg v. Google, Inc., 392 F. App'x 868 (Fed. Cir. 2010)
Edge Sys. LLC v. Aguila, No. 2015-1507, 2015 U.S. App. LEXIS 22189 (Fed. Cir. Dec. 21, 2015)
Fleming v. Coward, 534 F. App'x 947, 950 (Fed. Cir. 2013)
Flir Sys. v. Gambaro, 486 F. App'x 878 (Fed. Cir. 2012)
Fraser v. High Liner Foods (USA), Inc., 337 F. App'x 883 (Fed. Cir. 2009)
Gal-Or v. United States, 470 F. App'x 879 (Fed. Cir. 2012)
Gal-Or v. United States, 621 F. App'x 665 (Fed. Cir. 2015)
Gentile v. Sun Prods., 371 F. App'x 76 (Fed. Cir. 2010)
Georgalis v. United States PTO, 296 F. App'x 14 (Fed. Cir. 2008)
Grasty v. United States PTO, 211 F. App'x 952 (Fed. Cir. 2007)
Haynes v. United States, 335 F. App'x 45 (Fed. Cir. 2009)
Hemphill v. Johnson & Johnson, 550 F. App'x 890 (Fed. Cir. 2014)
Hemphill v. Kimberly-Clark Corp., 374 F. App'x 41 (Fed. Cir. 2010)
Hildebrand v. Steck Mfg. Co., 232 F. App'x 985 (Fed. Cir. 2007)
Hildebrand v. Steck Mfg. Co., 292 F. App'x 921 (Fed. Cir. 2008)
Hildebrand v. Steck Mfg. Co., 333 F. App'x 507 (Fed. Cir. 2009)
Ho Keung Tse v. Apple Inc., No. 2015-1639, 2015 U.S. App. LEXIS 19303 (Fed. Cir. Nov. 5, 2015)
Ho Keung Tse v. Google Inc., 570 F. App'x. 941 (Fed. Cir. 2014)
Ho Keung Tse v. Blockbuster, Inc., 571 F. Appx 951 (Fed. Cir. 2014)
Hornback v. United States, 601 F.3d 1382 (Fed. Cir. 2010)
Hsuan-Yeh Chang v. Rea, 530 F. App'x 958 (Fed. Cir. 2013)
Hutchins v. Zoll Med. Corp., 253 F. App'x 926 (Fed. Cir. 2007)
Hutchins v. Zoll Med. Corp., 492 F.3d 1377 (Fed. Cir. 2007)

216. More detailed raw data discussed throughout this article is on file with the author and available upon request.

Hyde v. United States, 336 F. App'x 996 (Fed. Cir. 2009)
In re Bayne, 527 F. App'x 847 (Fed. Cir. 2013)
In re Bryan, 323 F. App'x 898 (Fed. Cir. 2009)
In re Chaganti, 468 F. App'x 974 (Fed. Cir. 2012)
In re Chaganti, 554 F. App'x 917 (Fed. Cir. 2014)
In re Chuang, 603 F. App'x 941 (Fed. Cir. 2015)
In re Conte, 462 F. App'x 952 (Fed. Cir. 2011)
In re Daneshvar, 366 F. App'x 171 (Fed. Cir. 2010)
In re Ditto, 499 F. App'x 1 (Fed. Cir. 2012)
In re Gardner, 449 F. App'x 914 (Fed. Cir. 2011)
In re Gleizer, 356 F. App'x 415 (Fed. Cir. 2009)
In re Gough, 451 F. App'x 927 (Fed. Cir. 2011)
In re Gross, 603 F. App'x 1004 (Fed. Cir. 2015)
In re Gross, 603 F. App'x 1006 (Fed. Cir. 2015)
In re Guess, 347 F. App'x 558 (Fed. Cir. 2009)
In re Haase, 542 F. App'x 962 (Fed. Cir. 2013)
In re Hartman, 513 F. App'x 955 (Fed. Cir. 2013)
In re Hoffmann, 558 F. App'x 985 (Fed. Cir. 2014)
In re Holness, 612 F. App'x 999 (Fed. Cir. 2015)
In re Jie Xiao, 462 F. App'x 947 (Fed. Cir. 2011)
In re Johnston, 435 F.3d 1381 (Fed. Cir. 2006)
In re Kahn, 441 F.3d 977 (Fed. Cir. 2006)
In re Margolin, 244 F. App'x 329 (Fed. Cir. 2007)
In re Mettke, 570 F.3d 1356 (Fed. Cir. 2009)
In re Morsa, 713 F.3d 104 (Fed. Cir. 2013)
In re Morsa, 803 F.3d 1374, 1375 (Fed. Cir. 2015)
In re Mouttet, 686 F.3d 1322 (Fed. Cir. 2012)
In re Rudy, 463 F. App'x 939 (Fed. Cir. 2012)
In re Rudy, 558 F. App'x 1011 (Fed. Cir. 2014)
In re Shoner, 341 F. App'x 642 (Fed. Cir. 2009)
In re Singhal, 602 F. App'x 826 (Fed. Cir. 2015)
In re Speas, 273 F. App'x 945 (Fed. Cir. 2008)
In re Steed, 802 F.3d 1311 (Fed. Cir. 2015)
In re Tay, 579 F. App'x 999 (Fed. Cir. 2014)
In re Taylor, 445 F. App'x 343 (Fed. Cir. 2011)
In re Taylor, 484 F. App'x 540 (Fed. Cir. 2012)
In re Taylor, 621 F. App'x 667 (Fed. Cir. 2015)
In re Yeager, 527 F. App'x 859 (Fed. Cir. 2013)
In re Yufa, 452 F. App'x 998 (Fed. Cir. 2012)
Joovy LLC v. Target Corp., 2013 U.S. App. LEXIS 14554 (Fed. Cir. July 18, 2013)
Kersey v. Comm'r of Patents & Trademarks, 353 F. App'x 432 (Fed. Cir. 2009)
Kippen v. Pack, 491 F. App'x 187 (Fed. Cir. 2012)
Korsinsky v. Dudas, 227 F. App'x 891 (Fed. Cir. 2007)
Kramer v. Dudas, 241 F. App'x 699 (Fed. Cir. 2007)
Lacavera v. Dudas, 441 F.3d 1380 (Fed. Cir. 2006)
Marcinkowska v. IMG Worldwide, Inc., 342 F. App'x 632 (Fed. Cir. 2009)
Maxwell v. Stanley Works, Inc., 262 F. App'x 267 (Fed. Cir. 2008)
McZeal v. Sprint Nextel Corp., 335 F. App'x 966 (Fed. Cir. 2009)

McZeal v. Sprint Nextel Corp., 501 F.3d 1354 (Fed. Cir. 2007)
MedPointe Healthcare, Inc. v. Kozachuk, 373 F. App'x 62 (Fed. Cir. 2010)
Michelotti v. United States, 557 F. App'x 956 (Fed. Cir. 2014)
Mikkilineni v. Stoll, 410 F. App'x 311 (Fed. Cir. 2010)
Mikkilineni v. Stoll, 448 F. App'x 63 (Fed. Cir. 2011)
Millman v. United States PTO, 257 F. App'x 307 (Fed. Cir. 2007)
Morales v. Square, Inc., 621 F. Appx 660 (Fed. Cir. 2015)
Murphey v. TPS Enters., 296 F. App'x 24 (Fed. Cir. 2008)
O2 Micro Int'l Ltd. v. Van Loben Sels, 426 F. App'x 913 (Fed. Cir. 2011)
Odom v. Microsoft Corp., 429 F. App'x 967 (Fed. Cir. 2011)
Orenshteyn v. Citrix Sys., 341 F. App'x 621 (Fed. Cir. 2009)
Ottah v. Verifone Sys., 524 F. App'x 627, 628 (Fed. Cir. 2013)
Parker v. Microsoft Corp., 212 F. App'x 993 (Fed. Cir. 2007)
Pellegrini v. Analog Devices, Inc., 312 F. App'x 304 (Fed. Cir. 2008)
Pieczenik v. Bayer Corp., 474 F. App'x 766 (Fed. Cir. 2012)
Ping Yip v. Hugs to Go LLC, 377 F. App'x 973 (Fed. Cir. 2010)
Po Kee Wong v. United States, 342 F. App'x 623 (Fed. Cir. 2009)
Pupols v. United States PTO, 413 F. App'x 232 (Fed. Cir. 2011)
Roper v. Jo-Ann Stores, Inc., 211 F. App'x 950 (Fed. Cir. 2007)
Ross v. United States, 374 F. App'x 960 (Fed. Cir. 2010)
Rozenblat v. Kappos, 345 F. App'x 601 (Fed. Cir. 2009)
Rudy v. Lee, 562 F. App'x 964 (Fed. Cir. 2014)
Sheinbein v. Dudas, 465 F.3d 493 (Fed. Cir. 2006)
Sheridan v. United States, No. 2015-5073, 2015 U.S. App. LEXIS 17603 (Fed. Cir. Oct. 8, 2015)
Singhal v. Mentor Graphics Corp., 328 F. App'x 648 (Fed. Cir. 2009)
Sop Servs v. Vital Hunting Gear, Inc., 562 F. App'x 982 (Fed. Cir. 2014)
Stauffer v. Brooks Bros. Group, 758 F.3d 1314, 1316 (Fed. Cir. 2014)
Stauffer v. Brooks Bros., 619 F.3d 1321 (Fed. Cir. 2010)
Tadayon v. Saucon Techs., Inc., 611 F. App'x 983 (Fed. Cir. 2015)
Tas v. Beachy, No. 2015-117, 2015 U.S. App. LEXIS 17119 (Fed. Cir. Sept. 29, 2015)
Taylor v. Taylor Made Plastics, Inc., 565 F. App'x 888 (Fed. Cir. 2014)
Taylor v. United States PTO, 339 F. App'x 995 (Fed. Cir. 2009)
Taylor v. United States PTO, 385 F. App'x 980, 981 (Fed. Cir. 2010)
Unitronics 1989 RG Ltd. v. Gharb, 318 F. App'x 902 (Fed. Cir. 2008)
Worldwide Home Prod., Inc. v. Time, Inc., 626 F. App'x 1009 (Fed. Cir. 2015)
Yoon Ja Kim v. Earthgrains Co., 451 F. App'x 922 (Fed. Cir. 2011)
Yufa v. Hach Ultra Analytics, Inc., No. 2015-1626, 2015 U.S. App. LEXIS 19300 (Fed. Cir. Nov. 5, 2015)
Yufa v. Lockheed Martin Corp., 575 F. App'x 881 (Fed. Cir. 2014)
Yufa v. TSI, Inc., 600 F. App'x 747 (Fed. Cir. 2015)