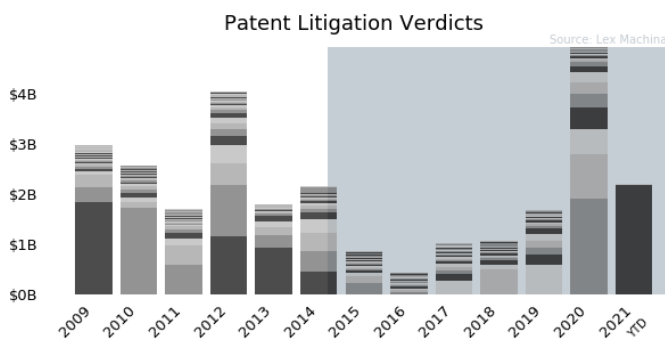


Dotcom Roots to the Return of Large Patent Verdicts

Big Tech and large verdicts emerged, in part, due to post-dotcom patent policy reforms

Big Verdicts are Back

No one in patent litigation missed the headline: VLSI just won a two billion dollar jury verdict against Intel with Judge Alan Albright presiding over his second patent trial as a federal district judge in West Texas. The ruling notably comes on the heels of billion-dollar verdicts against Apple/Broadcom and Cisco in the Central District of California and Eastern District of Virginia, respectively. Data from Lex Machina clearly shows a resurgence of large verdicts (note: blocks in the chart below delineate individual verdicts, e.g., against each of Broadcom, Cisco, and Apple).



The Alice Effect

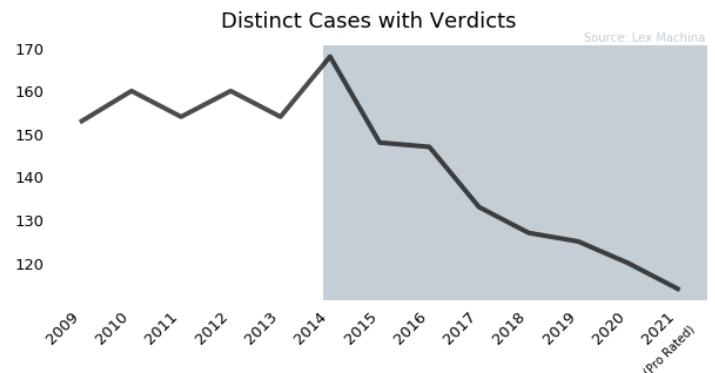
While large verdicts are not unprecedented in patent litigation, the data suggests a recent comeback after a dry spell for plaintiffs from 2015 through 2018. The timing of the trough – right after the Supreme Court issued its *Alice* decision in 2014 – comes as no surprise. *Alice* has come to stand for more than just a reversal in patent eligibility; it was the major headline in a period generally rich in policy wins for Big Tech. The legislative branch, for example, passed the America Invents Act and established the Inter-Partes Review process in 2012. The *Alice* effect sums up a broad paradigm shift to higher standards of patent

validity on a timeline flagged with a grey background in the enclosed charts.



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The *Alice* effect did more than create a trough in the dollar value of annual jury awards: the number of patent cases with jury verdicts also started a steep decline 2015. And while dollar values of jury verdicts awarded annually are seeing a resurgence, the number of cases generating those verdicts continue to decline. Although it is hard to say if defendants are winning (as opposed to settling) more than they used to, the *Alice* effect certainly marks a precipitous drop in the number of cases with jury verdicts.



Thesis & Dotcom Backdrop

Why are verdicts rising? The simple intuition is that big trees fall harder, and Big Tech is big. But how does that reconcile with the downward pressure of patent policy and continued decline in cases with jury verdicts? The answer lies within a colorful history of patent policy and its ties to the rise of Big Tech.

The US PTO overhyped the internet just as much as public equity markets during the dotcom

era. A common thread of *vague ideas for how to make money with the internet* underpins both (1) fundamentals for dotcom era tech IPOs, and (2) the validity of overly broad business method patents issued at the time. Both bubbles burst – tech equities without strong fundamentals collapsed, and patents without strong validity positions were effectively invalidated through the *Alice* era.

The eBay Effect

The 2014 *Alice* era was neither the first, nor the only seminal curtailment of rights following the US PTO's dotcom folly: the Supreme Court handed down a landmark ruling in 2006 that paved the road for dotcom survivors to become Big Tech. The new legal framework provided that tech inventors could no longer patent something and expect exclusive rights to the invention. Instead, incumbent tech companies would be allowed, from then on, to steal from inventors. Inventors were left with the limited recourse of "monetary remedies that allow an infringer to use an invention against the patentee's wishes."¹ Competition was reduced, and over time tech companies grew larger. Dotcom startups like Amazon (1994), Google (1998), and Facebook (2004) are now under antitrust scrutiny and make headlines like "Proof Big Tech is way too big: It's a quarter of your [S&P 500] portfolio."²

The Bottom Line

The US PTO's dotcom mishap led to a whipsaw of patent policy reforms best described by the *eBay* and *Alice* effects. While the turn of the century saw the rise of a burgeoning and competitive tech

industry, patent policy reforms empowered incumbents with (1) the right to practice patented inventions (per the *eBay* effect) and (2) reduced odds of cases reaching a jury trial (per the *Alice* effect). The tech industry became entrenched: Big Tech emerged. And, big trees fall harder – so jury verdicts are up.

¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (emphasis in original).

² Paul R. La Monica, Proof Big Tech is way too big: It's a quarter of your portfolio (last updated, January 6, 2021), available at

<https://www.cnn.com/2021/01/06/investing/stocks-sp-500-tech/index.html>.