

Trends in Patent Damages

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The U.S. patent system continues to attract the attention of a broad audience, ranging from the U.S. Congress to the mainstream media. Such attention has centered on questions of patent quality, longer pendency periods, and increased litigation. Additionally, large damages awards and/or settlements in recent high-profile patent disputes have been pointed to by proponents of patent reform. The U.S. House of Representatives and the U.S. Senate are both currently considering patent reform legislation. Should Congress pass this legislation, it would modify existing patent laws in several significant ways,¹ including the calculation of damages in patent infringement cases. This writing looks at trends that have developed in patent damages awards since the formation of the Court of Appeals for the Federal Circuit (CAFC) in October 1982.²

Case Filings

Over 90 U.S. District Courts “have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”³ Congress established the CAFC on October 1, 1982. The CAFC has nationwide jurisdiction in a variety of subject matters, including patents. Appeals of patent cases tried in district courts are heard by the CAFC. Recent statistics (1993–2006), gathered from the Judicial Business of the Courts, show the following number of patent infringement cases commenced in the U.S. District Courts (see Exhibit 1).⁴

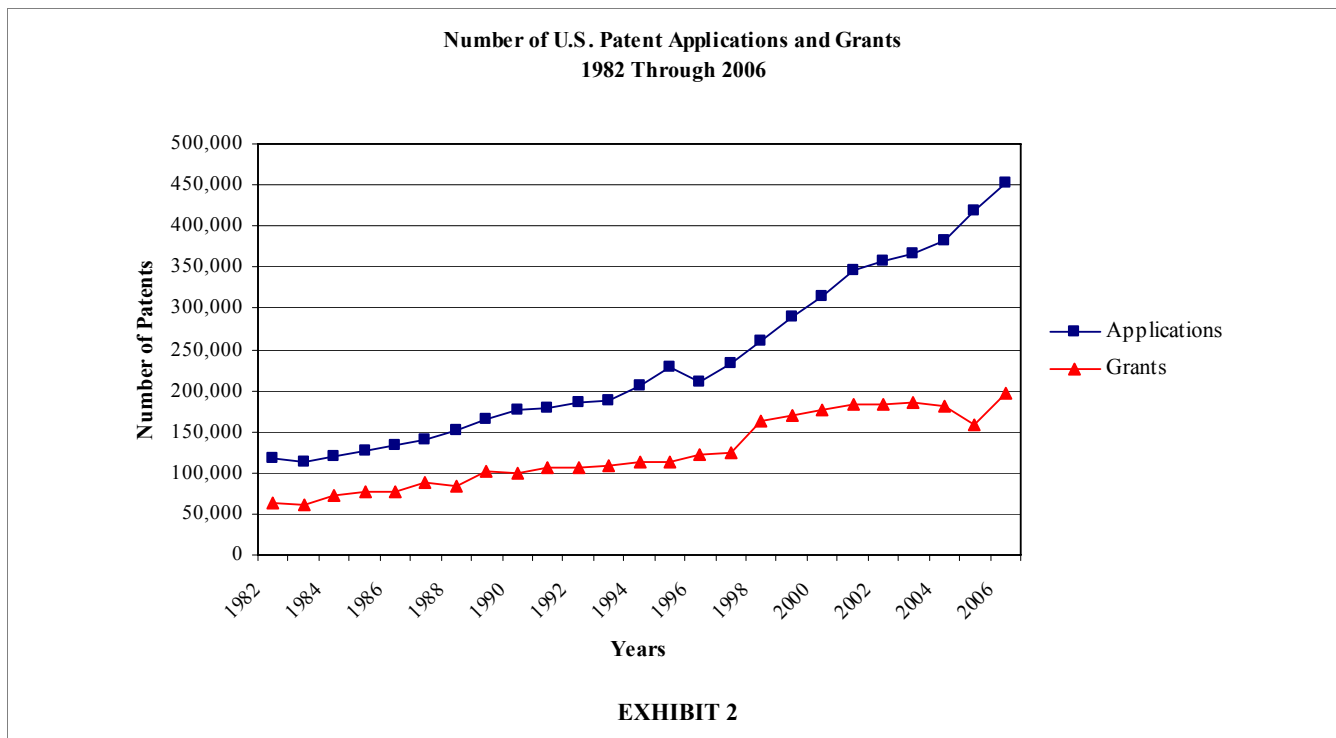
A dramatic increase has occurred in the number of patent infringement cases commenced per year from 1993 to 2006. The number of cases commenced during 2006 (2,830) represents an increase of more than 80 percent over the number of cases commenced in 1993 (1,553). However, the annual rate of increase in the number cases commenced has slowed since 2000. In the seven years from 1993 to 1999, the number of cases commenced increased by approximately 50 percent. In contrast, the number of cases commenced in the seven years from 2000 to 2006 increased by only about 15 percent.

Patent Cases Commenced by Year

YEAR	NUMBER	% INCREASE
1993	1,553	
1994	1,617	4%
1995	1,723	7%
1996	1,840	7%
1997	2,112	15%
1998	2,218	5%
1999	2,318	5%
2000	2,484	7%
2001	2,520	1%
2002	2,700	7%
2003	2,814	4%
2004	3,075	9%
2005	2,720	-12%
2006	2,830	4%

EXHIBIT 1

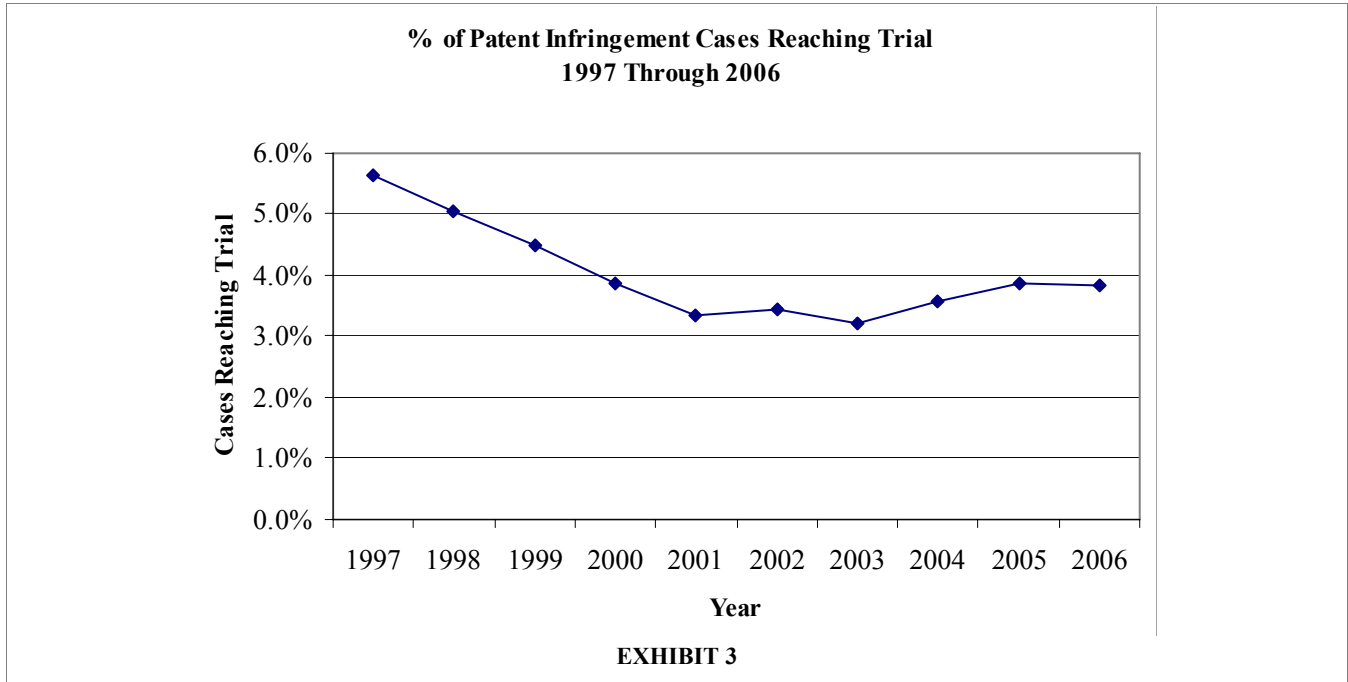
During the same period, a rapid increase has occurred in the number of patent applications filed and the number of patents granted. Exhibit 2 below summarizes the number of patent applications filed and the number of patents granted from 1982 to 2006.⁵



The number of patent applications filed per year has increased 284 percent since 1982, with 117,987 applications filed in 1982 and 452,633 applications filed in 2006. The graphic above illustrates the growth in patent applications from 1982 to present. The graphic shows an increase in the rate of growth around 1994 and continuing to the present. During the same period, the number of patents granted per year increased 211 percent, from 63,005 in 1982 to 195,885 in 2006.⁶ The graphic illustrates that patent grants have not kept pace with the rapid increase in applications, as the gap has continually widened since 1998.

Despite the increase in patent applications, patent grants, and infringement suits, the number of infringement suits reaching trial has decreased and stabilized over time. In the 1996 decision *Markman v. Westview Instruments, Inc.*⁷ (Markman), the CAFC determined that the construction of patent claims is a matter to be determined solely by the courts, and the court would, in general, hold a hearing (dubbed Markman Hearing) during the case proceedings to rule on patent claim construction issues. At the time of the decision, many questioned how many cases, if any, would actually be tried past the Markman hearing and, for those tried, whether a jury would ultimately be seated for the case. Since the Markman decision, fewer cases have gone to

trial. Exhibit 3 below illustrates that cases reaching trial have decreased from almost 6 percent of cases in 1997 to less than 4 percent of cases in 2006. Cases reaching trial seem to have stabilized, remaining between 3 percent and 4 percent of cases filed from 2000 forward.



Damages Trends

The authors of this article maintain a database of patent infringement damages awards. This database includes all damages decisions that have the following characteristics:

- involved a patent infringement action
- were decided since 1982, the creation of the CAFC
- were published/reported in either the U.S. Patent Quarterly (USPQ) or Lexis/Nexis through December 31, 2006
- have stood on appeal or remain to be heard by the CAFC

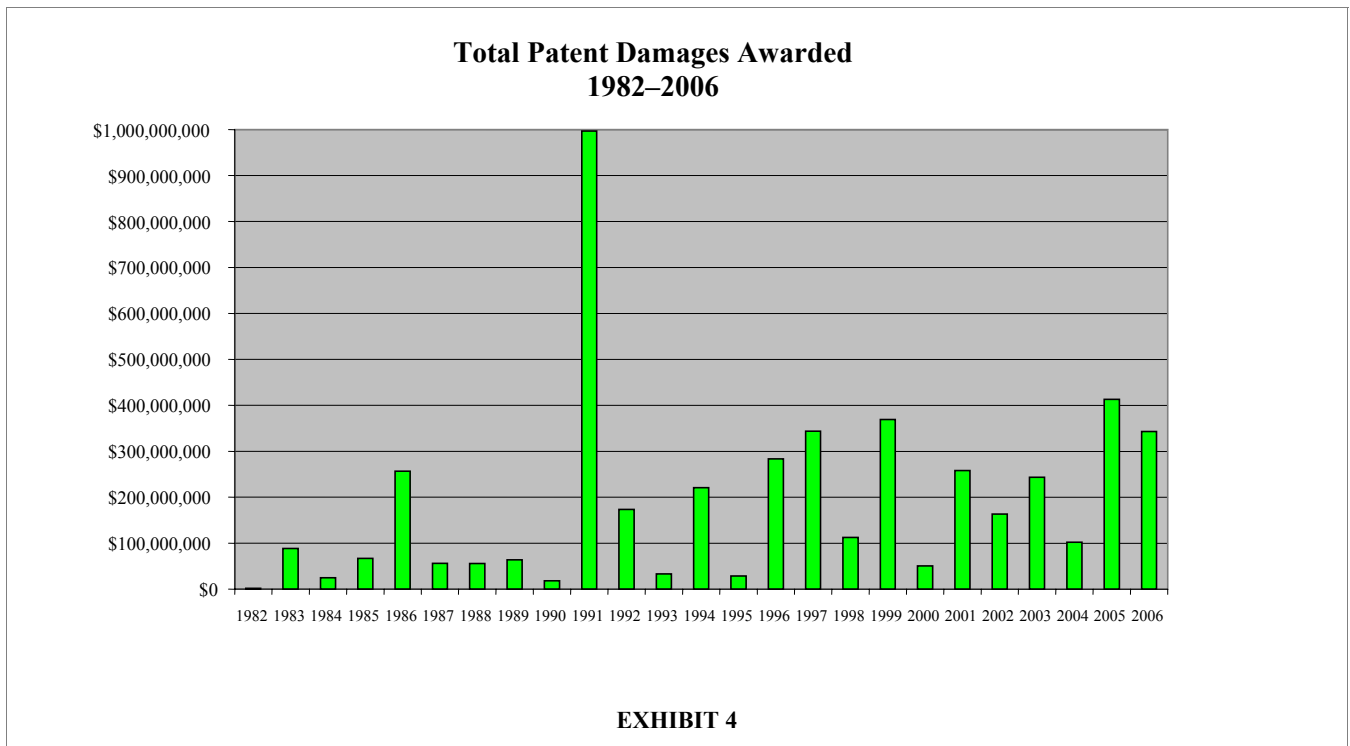
While the authors have captured all cases that involve patent damages decisions and meet the above criteria, those decisions that were remanded, reversed or vacated on appeal for issues related or unrelated to damages are excluded from the analysis. The database is updated annually to include all decisions published in the prior year. Because many of the published decisions do not contain sufficient detail to include in the complete analysis, an attempt is made to gather additional facts from published articles and/or the trying attorneys.

Although decisions are not published for all cases that are tried, the number of cases published is large enough

to allow for statistically significant inferences to be made about trends in the entire population of patent infringement cases.

Since 1982, over \$4.5 billion in patent damages have been awarded (and stood through appeal) in the approximately 320 decisions published. Over 85 percent of these dollars have been awarded since 1990. The largest award, \$873 million awarded in the 1991 decision in *Polaroid Corp. v. Eastman Kodak Co.*⁸ case, remains a multiple of the next largest award.

Looking at the amount of total damages awarded by year reveals an increase in damages starting in the mid-1990s. In the 14 years from 1982 to 1995, total damages exceeded \$200 million in only 3 years. Total damages have exceeded \$200 million in 7 of the 11 years from 1996 to 2006. Refer to Exhibit 4.



There has been, and continues to be, a large degree of variance in the size of damages awards. Such variance in award size makes it difficult to see trends if one looks at averages, but looking at medians clearly shows that the size of awards has generally been increasing over time as shown in Exhibit 5.

**Median Damages Awards
1982–2006**

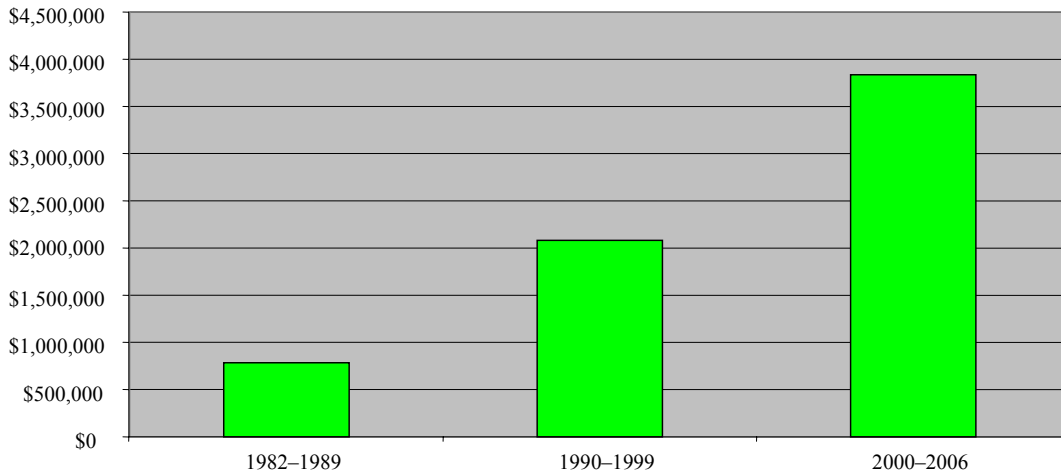


EXHIBIT 5

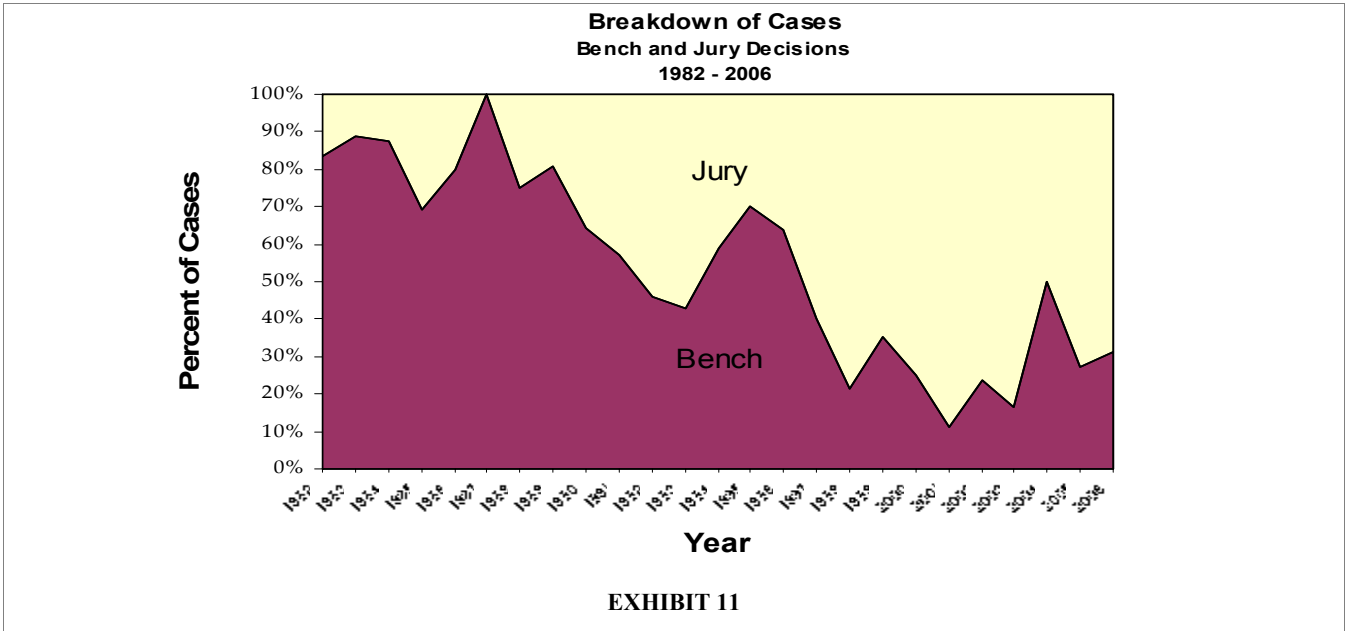
Top Damages Awards

Exhibit 6 shows a list of the top 10 damages awards. Of the top 10 awards, only one award occurred prior to 1990 while four awards have occurred since 2000. These top 10 awards account for almost 50 percent of the total patent damages awarded since 1982.

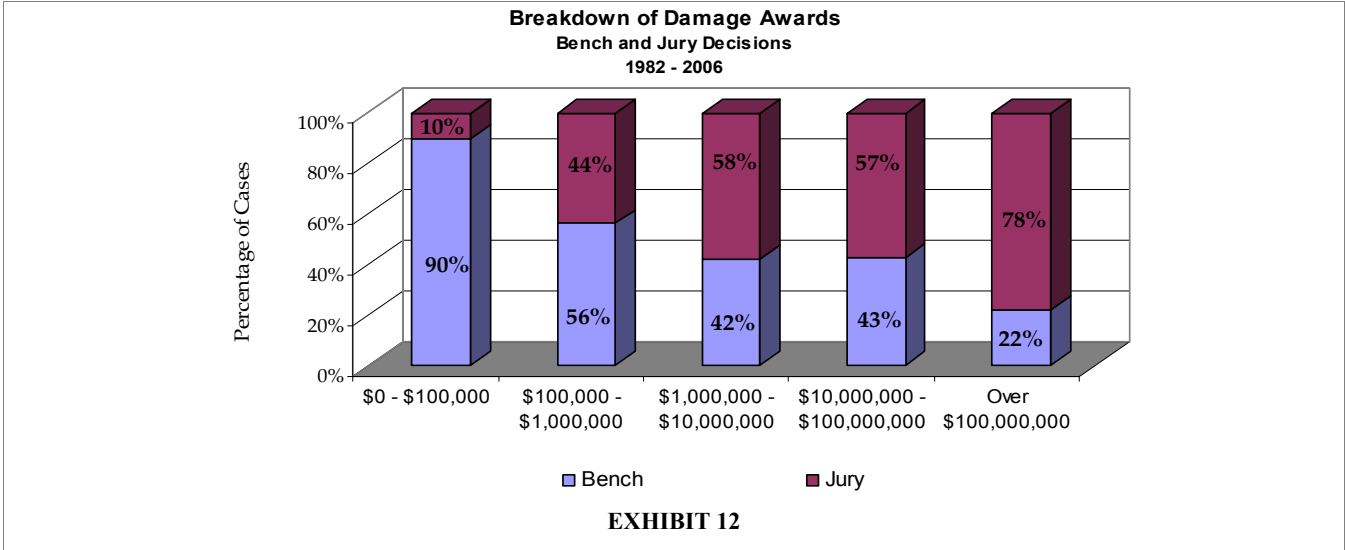
The patents in these cases include technologies and methods from a broad range of technologies and/or industries including instant photography, eye surgery procedure, pre-wired wall panels and desk components, rock drill bits, heat-shrinkable biaxially stretched film, computer software, silver catalyst used in the production of ethylene oxide, MRI equipment, water-activated casting materials, and oil and gas well fracturing. An award related to computer software, *z4 Technologies, Inc. v. Microsoft Corp. & Autodesk, Inc.*⁹, entered the top 10 list for the first time in 2006. Prior awards related to computer software that would have made the top 10 list have not stood on appeal. Microsoft Corporation was sued by Alcatel-Lucent over audio patents and in February 2007, a jury awarded damages totaling approximately \$1.5 billion; however, this decision was overturned on August 6, 2007.¹⁰

Top 10 Patent Damages Awards for the Period 1982–2006

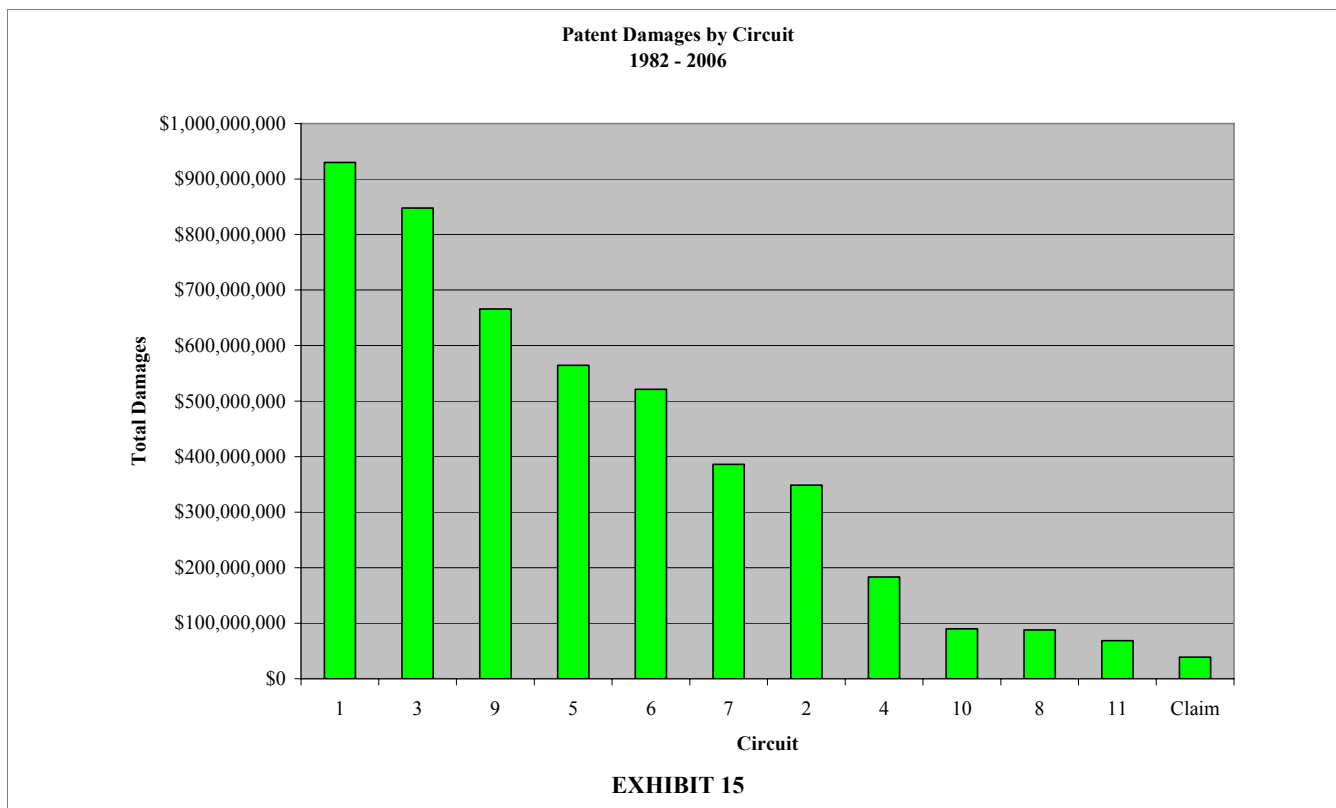
CASE	YEAR	TOTAL DAMAGES
Polaroid Corp. v. Eastman Kodak Co.	1991	\$873,158,971.00
Advanced Medical Optics, Inc. v. Alcon Laboratories, Inc. & Alcon Manufacturing, Ltd.	2005	\$213,900,000.00



The median damages award over the entire period of approximately \$3.3 million for jury decisions is nearly four times the median of \$830,000 for bench decisions. The data also clearly shows that a higher percentage of large damages awards are issued by juries. Of the top 10 damage awards, listed in Exhibit 6, 7 were jury decisions. This trend is consistent with the decrease in bench trials in concert with the increase in damage awards.



Historically, there have not been large discrepancies in damages awards between juries and the bench in terms of the different damages components. The most notable difference is that enhanced damages comprise 30



It should be noted that settlements have not been included in this analysis. If gathered and analyzed, settlements would represent a large amount of “patent damages,” as most patent disputes are settled before a decision is reached at trial.

The authors would like to recognize Jill Rusk, Christopher Groves, Brandy Fernow, Erin Wikman, Elaine McDermott, Samantha Zyontz, and Marc Peckler of Navigant Consulting, Inc. for their assistance in gathering and analyzing the data that is the basis for this article.

¹ H.R.1908 and S.1145—This article does not represent the opinions of Navigant Consulting, Inc., or any of its employees, regarding legislation pending in either the U.S. House of Representatives or the U.S. Senate.

² The authors of this article have reviewed all patent infringement decisions that include damages reported in The U.S. Patent Quarterly (USPQ) and Lexis/Nexis from 1982 through December 31, 2006, and analyzed any trends. The information in this article includes data from a patent damages database owned by one of the authors, Kathleen M. Kedrowski.

³ 28 U.S.C. 1338a.

⁴ www.uscourts.gov—Judicial Business of the U.S. Courts.

⁵ www.uspto.gov—Patent Statistics, Weekly Data, and Lists.

⁶ www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf—U.S. Patent Statistics, Calendar Years 1963—2006.

⁷ 517 US 370 (1996).

⁸ 17 USPQ 2d 1711 (D. Mass. 1991).

⁹ 2006 U.S. Dist. LEXIS 58324 (E.D. Tex. 2006).

¹⁰ Lucent Techs. et al. v. Gateway Inc. et al.

¹¹ 819 F.2d 1100 (1987).

¹² 2005 U.S. Dist. LEXIS 33369.

¹³ 2006 U.S. Dist LEXIS 9833.

¹⁴ 229 USPQ 81 (C.D. Cal. 1986).