

## 3 Auto Industry IP Trends To Watch In 2023

By **Josh Pond, Mark Neblett and Eric Moss** (April 18, 2023, 10:07 AM EDT)

Henry Ford was awarded his motor carriage patent in 1901; his Ford Motor Company now holds 79,000 patents globally.[1][2]

Elon Musk was awarded his patent for electric vehicle charging a century later; his Tesla Motors now holds 3,300 patents globally — notably, all freely available.[3][4]

The engines of change over that century between Ford and Musk gain horsepower every year, and this year will be no different. Little could Ford, or perhaps even Musk, have anticipated the outsize roles that wireless communications, dynamic global trade and one particularly prolific patent court would play in our top three auto industry IP trends for 2023.

### 1. Standard-Essential Patents in Wireless Communications

First, 2023 continues an upward trend in the prominence of standard-essential patents, or SEPs, in the automotive space as the latest wireless communications technologies, including 5G cellular and Bluetooth 4 and 5, are increasingly incorporated into new vehicle infotainment systems and other onboard computers. Both vehicle manufacturers and their suppliers should take heed.

The ever-increasing importance of these technologies has led to a rise in the rate of patent applications for features essential to market-demanded connectivity technologies, compared to prior technologies such as 3G and 4G cellular and Bluetooth 2.[5] As a result, a growing number of Internet of Things patents must be navigated based on newly issued patents, particularly as nonpracticing entities accumulate patent inventories, just as they did with prior generation SEPs.

Patent platform Avanci offers to broker 2G, 3G and 4G patent portfolio licenses for automakers from a broad swath of patent holders, including NPEs and otherwise. Without such a license, an automaker can face litigation across multiple forums and patent holders. Significant Asian, European and U.S. automakers have taken those deals.[6]

One of these was Ford, but Ford litigated prior to striking a deal with Avanci. Ford was thus subject to



Josh Pond



Mark Neblett



Eric Moss

multiforum disputes involving several patentees and SEPs across the Eastern District of Texas, District of Delaware, and Munich Regional Court in Germany.[7] Further disputes will percolate — Avanci does not license auto part makers, for example, and does not yet license 5G.

Now is the time to marshal your resources for handling potential SEP portfolio licensing and litigation issues. Work on identifying proactive steps to ensure your company can immediately and aggressively respond when a demand is received. Based on our experience, a lightning-fast response is effective at minimizing litigation costs by driving early dismissal or settlement.

Looking forward: While current standards have been or are near being finalized, counsel at both automakers and their suppliers should reach out to their engineering teams to educate them about the impacts of SEPs on the company's business and encourage the teams to be active in standard-setting organizations to protect interests at the embryonic stage of next-generation standards.

Collective action can also help: The Fair Standards Alliance now counts major automotive industry players as members who have joined its quest to promote SEP licensing on fair, reasonable and nondiscriminatory terms.

## **2. Infringement Risk from Imports**

Second, U.S. Customs and Border Protection data shows automotive part imports are surging in 2023. This occurred because China significantly relaxed its COVID-19 pandemic response at the end of 2022 to stimulate economic activity, coinciding with industrial production already recovering elsewhere in the Asia-Pacific region and globally.

Unfortunately, accompanying the growth in legitimate industrial production as workers return to their factories will be a rash of unabashed automotive parts counterfeiters ramping up production as well, particularly in light of COVID-19's disruption of traditional distribution channels.

To protect a company's profitable ancillary businesses, such as replacement part programs and intellectual property rights, counsel will need to be vigilant in industry import monitoring to identify unauthorized goods and prepared to act quickly to shut down infringers.

Design patents offer an expedient, cost-effective means to protect replacement parts. While design patents have a narrower scope of protection than utility patents, since design patents are limited to the ornamental design of an article of manufacture, which is narrower than a utility patent's protection of a broader inventive concept,[8] design patents have the practical advantages of being:

- Relatively inexpensive to obtain;
- Typically issued considerably faster than utility patents; and
- Hard to "kill" by an infringer seeking to invalidate the patent.

The U.S. International Trade Commission can cut off imports of goods that infringe design patents and other IP at the chokepoint of U.S. ports under Section 337 of the Tariff Act. In 2022, Hyundai Motor notched an initial determination that large swaths of replacement automotive lamp imports infringed over two dozen design patents.

Moreover, the benefits of design patents are not limited to automakers but are equally available to automotive component suppliers to block unauthorized imports, such as knockoffs of front cooling

system radiators to rear bumpers.

Trade secrets can also help against competing U.S. imports: In 2021, LG Chem Ltd. won a momentous trade secret misappropriation ruling by the ITC that electric vehicle battery technology from SK Innovation Co. had violated Section 337.[9] The ruling threatened to freeze SK Innovation's major new plant in Georgia until SK agreed to a \$1.8 billion settlement to LG Chem.

Trade secrets require none of the costs or registration formalities to obtain patents but do demand careful identification, maintenance and security.

### **3. Western District of Texas Remains Biggest Infringement Venue**

Third, despite the U.S. Court of Appeals for the Federal Circuit's grant of several mandamus petitions moving patent infringement cases out of the U.S. District Court for the Western District of Texas, as well as that district's change in how judges are assigned cases, the number of patent infringement lawsuits filed in this venue in 2023 can be expected to be as high or higher than previous years, particularly by nonpracticing entities.

There are two driving forces. First, in recent months NPEs and other patentees have seen a decline in the Federal Circuit's grant rate of Western District of Texas transfer mandamus petitions, emboldening them to continue filing in the district. While U.S. District Judge Alan Albright has begun to grant transfer requests somewhat more often, perhaps in view of the continued transfers by the Federal Circuit, he continues to retain an outsize number of patent cases.

Indeed, the Federal Circuit granted mandamus once again on Feb. 1. The order critiqued Judge Albright's justifications for retaining cases, which include declaring that defendant witness statements are unreliable, relying on the local presence of plaintiffs despite indications that their offices appear to have been established solely for venue purposes, and the judge's view that he can handle patent cases more efficiently than other courts.[10]

Secondly, Judge Albright ended 2022 as the U.S. district court judge with the biggest share of patent cases despite the Western District of Texas's midyear change to how judges are assigned patent cases. According to data from Lex Machina's Patent Litigation Report 2023, while Judge Albright's number of new patent cases declined from 932 in 2021 to 678 in 2022, he nonetheless maintained a 20% share of all U.S. patent cases filed from 2020 to 2022.[11]

The potential remains for Judge Albright to again receive a disproportionate share of new patent cases filed in his district in 2023.

To illustrate, following a July 2022 case assignment order requiring cases filed in the Waco Division to be randomly assigned to all judges,[12] the district's case assignment order was again changed in November, this time returning the assignment of all cases, including patent cases, filed in the Waco Division to Judge Albright.[13]

While this changed once more in December by subsequently reinstating random assignment of patent cases,[14] as a practical matter Judge Albright has still received nearly all the patent cases filed in the Waco Division since Dec. 1, 2022.

Moreover, 2022's series of case assignment orders shows the possibility that the assignment rules can

be changed again at any time. Accordingly, we expect that patentees, particularly NPEs, will continue to seek the benefits of Judge Albright's ardent approach to managing patent cases.

Indeed, key players in the automotive industry — both original equipment manufacturers and tier 1 and 2 suppliers alike — have been involved in Western District of Texas patent litigation since 2020. In view of the continued likelihood of having to deal with an outsized number of complaints in the Western District of Texas, automotive industry counsel should be prepared to make decisions about venue challenges quickly to avoid substantial case development being used as a ground for denying transfer.

## **Conclusion**

In sum, here's what to expect in 2023.

SEP activity is on the rise as 5G and other technologies are increasingly adopted for various uses in the automotive industry. Accounting for this in both litigation risk analysis and development plans can reduce costs and place manufacturers and suppliers a step ahead.

Similar to SEP growth, knockoff imports are surging as the world recovers from recent pandemic-induced slowdowns. To combat these, design patents and trade secrets offer a cost-efficient approach, and the International Trade Commission can cut off imports at the chokepoint of U.S. ports.

Lastly, despite efforts to divert patent cases from the Western District of Texas, automotive companies should expect the district to remain a hotbed for aggressive litigation strategies.

The automotive industry continues to transform, so keeping these 2023 trends in mind will help automotive companies protect their valuable intellectual property and overall business.

---

*Josh Pond is a partner, Mark Neblett is counsel and Eric Moss is an associate at Crowell & Moring LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://patentyogi.com/this-day-in-patent-history/this-day-in-patent-history-on-november-5-1901-henry-ford-received-a-patent-for-a-motor-carriage/>.

[2] <https://insights.greyb.com/ford-motor-patents/>.

[3] <https://insights.greyb.com/elon-musk-patents/>.

[4] <https://insights.greyb.com/tesla-patents/>.

[5] [https://www.iplytics.com/wp-content/uploads/2021/05/SEP-litigation-trends-\\_What-does-the-data-say\\_IPlytics\\_April-2021.pdf](https://www.iplytics.com/wp-content/uploads/2021/05/SEP-litigation-trends-_What-does-the-data-say_IPlytics_April-2021.pdf); [https://www.iplytics.com/wp-content/uploads/2022/06/5G-patent-race-June-2022\\_website.pdf](https://www.iplytics.com/wp-content/uploads/2022/06/5G-patent-race-June-2022_website.pdf).

[6] <https://www.law360.com/articles/1498190/avanci-now-scores-patent-deal-with-ford>; <https://www.law360.com/articles/1489696>; <https://www.law360.com/articles/1451203>.

[7] <http://www.fosspatents.com/2022/05/dutch-network-operator-kpn-becomes-7th.html>.

[8] See, e.g., *In re SurgiSil LLP*, 14 F.4th 1380 (Fed. Cir. 2021) ("A design claim is limited to the article of manufacture identified in the claim."). In this case, the Federal Circuit reversed a U.S. Patent and Trademark Office rejection of a design application based on an object with a similar shape that the examiner found in an entirely unrelated field. This decision potentially makes design patents even easier to obtain, as it appears to narrow the scope of the prior art that design patent examiners can rely upon when considering whether to grant a new design patent.

[9] [https://www.usitc.gov/system/files/secretary/fed\\_reg\\_notices/337/337\\_1159\\_notice\\_02102021sgl.pdf](https://www.usitc.gov/system/files/secretary/fed_reg_notices/337/337_1159_notice_02102021sgl.pdf); <https://cen.acs.org/business/SK-LG-Chem-settle-EV/99/i14>.

[10] *In re Google LLC*, 58 F.4th 1379, No. 23-101 (Fed. Cir. 2023), [https://cafc.uscourts.gov/opinions-orders/23-101.ORDER.2-1-2023\\_2073596.pdf](https://cafc.uscourts.gov/opinions-orders/23-101.ORDER.2-1-2023_2073596.pdf).

[11] [https://pages.lexmachina.com/2023PatentReport\\_LP.html](https://pages.lexmachina.com/2023PatentReport_LP.html).

[12] <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Order-Assigning-the-Business-of-the-Court-as-it-Relates-to-Patent-Cases-072522.pdf>.

[13] <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Amended-Order-Assigning-Business-of-the-Court-111522.pdf>.

[14] <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20121622.pdf>