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CRA Insights: Intellectual Property is a periodic newsletter that provides summaries of notable developments in IP litigation.

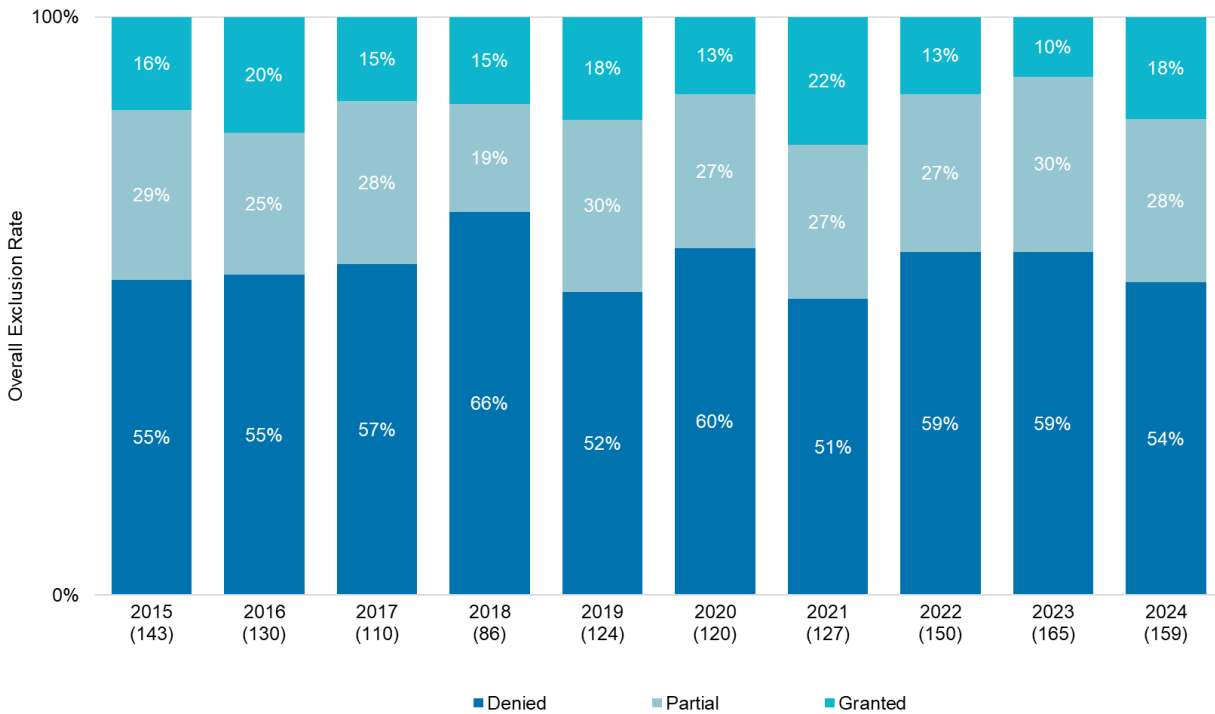
Patent damages: Recent trends in Rule 702 decisions

In this *CRA Insights*, we update the Rule 702 decision trends in last year's *Insights* with 2024 data.¹ We also provide descriptions of two specific challenges in 2024 Rule 702 decisions.

Rule 702 decision trends are based on our review of available US district court decisions concerning damages experts in patent infringement matters that have sufficient information for analysis. The number of Rule 702 decisions available to analyze in 2024 was 159, slightly lower than 2023 (165 decisions) but higher than any other year during the 2015–2024 period analyzed in this newsletter. The overall exclusion rate in such decisions—where the court either granted or partially granted a motion to exclude or limit a damages expert's testimony—was approximately 46%, higher than the 2022 and 2023 overall exclusion rates of approximately 41%. Overall exclusion rates from 2015 through 2024 are presented in Table A below.

¹ Using PACER and Docket Navigator, we identified court decisions concerning damages experts from motions to disqualify an expert, motions to strike an expert, and motions in limine relating to expert testimony in patent infringement matters in US district courts from 2015 to 2024. Note, while this newsletter refers to “Rule 702 decisions,” the analyzed motions may include challenges in addition to the reliability and relevance requirements covered by Rule 702, such as Rule 403 concerns or challenges to timeliness or disclosure issues. We analyzed and categorized these court decisions and excluded certain decisions with insufficient information for analysis. Decisions that were denied as moot or denied without prejudice to renew were also excluded. Unless otherwise noted, statistics regarding Rule 702 decisions reflect the entire 2015–2024 period.

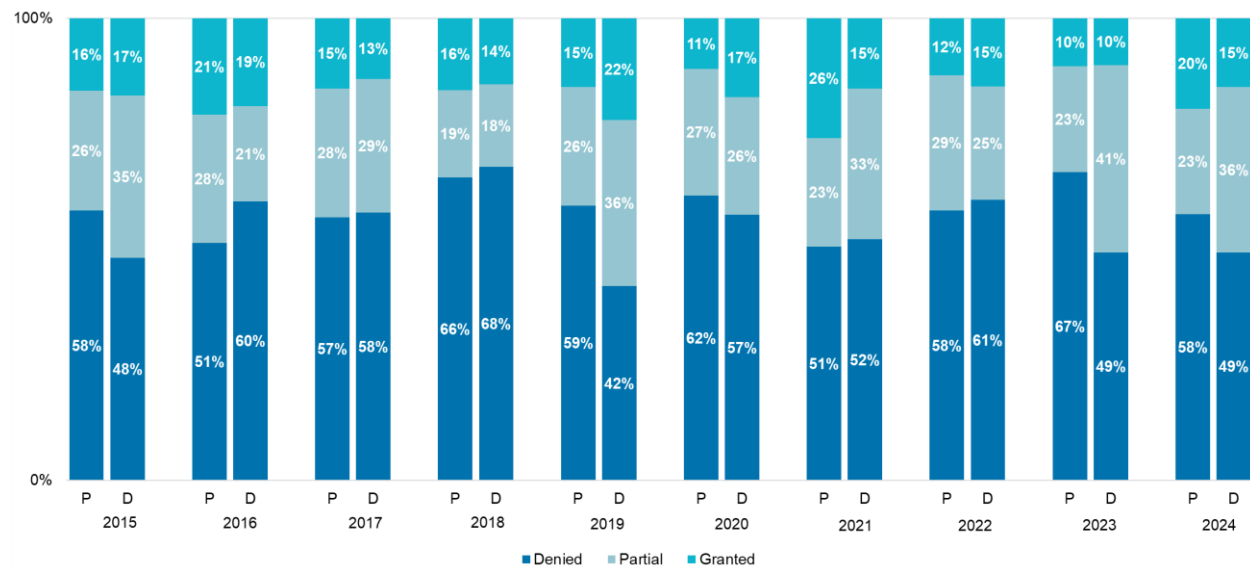
Table A: Outcomes of Rule 702 decisions by year²



We also analyze differences in exclusion rate between plaintiff's experts and defendant's experts. While the difference in overall exclusion rates between plaintiff's and defendant's experts has varied from year to year, over the entire 2015–2024 period, the overall exclusion rate has been slightly higher for defendant's experts (46%) compared with plaintiff's experts (41%). This difference in overall exclusion rates has been somewhat prominent in recent years, with the overall exclusion rate for defendant's experts exceeding the overall exclusion rate for plaintiff's experts by approximately 17% in 2023 and 8% in 2024. Overall exclusion rates from 2015 through 2024, by expert party (where "P" is plaintiff and "D" is defendant), are presented in Table B below.

² Due to rounding, some annual percentages may not sum to 100%.

Table B: Outcomes of Rule 702 decisions by expert party³



From 2015 through 2024, 237 different judges have ruled on at least one Rule 702 decision that has been analyzed in this newsletter. Five judges have ruled on over 34% of these decisions (446 out of 1,314 total decisions). Each of these five judges has ruled on at least 64 decisions over the 2015–2024 period, while the average number of decisions for the remaining 232 judges is fewer than four, with no judge ruling on more than 30 decisions. Despite the difference in the number of decisions per judge, each group of judges (top five compared with the remaining 232) had similar overall exclusion rates, demonstrating general consistency with how Rule 702 is applied by judges with different levels of Rule 702 experience. The number of decisions and overall exclusion rates for each group of judges are presented in Tables C and D below.

Table C: Rule 702 decisions by judge group

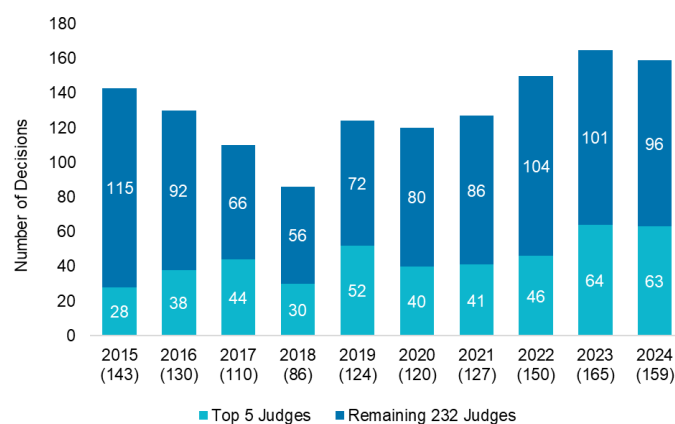
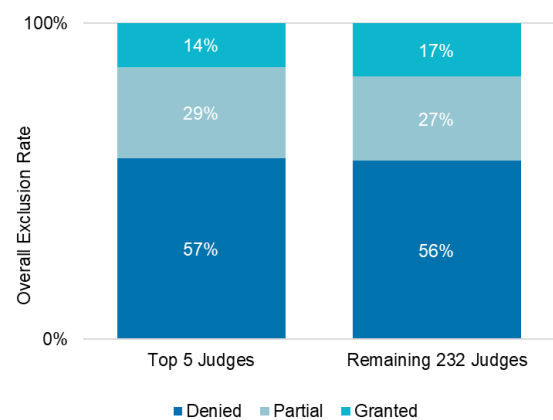


Table D: Outcomes of Rule 702 decisions by judge group from 2015 to 2024



As discussed in prior *CRA Insights*, the Supreme Court approved a clarifying amendment to Federal Rules of Evidence Rule 702 that went into effect on December 1, 2023. As demonstrated in the statistics above, the amendment has not shown to have a material impact on exclusion rates in Rule 702 decisions. For example, while the 2024 exclusion rate was somewhat higher relative to 2023 and 2022,

³ Due to rounding, some annual percentages may not sum to 100%.

the exclusion rate for 2024 was generally consistent with (although still slightly higher than) the overall exclusion rate for the 2015–2023 period. This would suggest that courts view the amendment as a clarification of the rule, rather than a change in the threshold of admissibility. For example, the following excerpts from Rule 702 decisions in non-patent cases (i.e., not included in the statistics above) provide instances where courts have explicitly disclosed that their decisions in those cases were not impacted by the rule change:

- “The court’s decision would be the same under either version of the rule” (Memorandum and Order, December 28, 2023, *Bextermueller News Distributors, Inc. et al. v. Lee Enterprises, Inc. et al.*, Case No. 4-22-cv-00344).
- “The court recites the rule in its amended form in this Order, but the court’s analysis and rulings remain the same under the previous and the current versions of the Rule” (Memorandum Order, December 29, 2023, *Kevin Brown, et al. v. Saint-Gobain Performance Plastics Corporation, et al.*, Case No. 1-16-cv-00242).
- “The Advisory Committee Notes clarify that the 2023 amendment does not ‘impose any new, specific procedures,’ but instead the amendment was made to clarify the preponderance standard for the admissibility requirements set forth in the Rule and to emphasize that an expert ‘must stay within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology.’ ... The Court’s decision regarding the admissibility of Plaintiff’s expert would be the same under either version of the Rule.” (Memorandum and Order, January 18, 2024, *Carolyn Thomas v. State Farm Mutual Automobile Insurance Company*, Case No. 4-22-cv-00724).

Below, we summarize two challenges in 2024 Rule 702 decisions.⁴

In re: NFL “Sunday Ticket” Antitrust Litigation

“College football but-for world” is speculative and inconsistent with the real world

In 2015 and 2016, numerous class action antitrust lawsuits were filed against the National Football League, Inc., and related parties (NFL) and DirecTV, Inc., and related parties (DirecTV, and together with NFL, the defendants).⁵ The consolidated class action lawsuit is centered around the alleged anticompetitive monopoly created by agreements among NFL teams and with their broadcast partners, including DirecTV, CBS, and Fox. Plaintiffs claim that these agreements enable DirecTV to charge supracompetitive prices for NFL Sunday Ticket, a television package that provides the only way to view NFL games that are not broadcast through sponsored telecasts (i.e., CBS and Fox) or cable (i.e., ESPN and NFL Network).

Among other methodologies, plaintiffs’ expert economist calculated damages using a “yardstick” methodology, intended to “compare[] the outcome of interest in an affected market to the same outcome in an unaffected benchmark market.” Plaintiffs’ expert claimed that the “outcome of interest” (in this case, a world without joint telecast licensing at the league level) can be represented by the “unaffected” college football market. This “college football but-for world” assumes individual NFL teams are allowed to act

⁴ The following case examples summarize only specific challenges in certain Rule 702 decisions. Please refer to the decisions themselves and associated filings for a more comprehensive description of each matter. The case summaries and issues highlighted therein are for illustrative purposes only and are not intended to reflect any opinions of the authors. They are solely intended to summarize the parties’ positions and court findings based on public records.

⁵ These cases were not included in CRA’s analysis of Rule 702 decisions, as they do not include claims for patent infringement.

freely, rather than jointly at the league level, resulting in NFL games airing on broadcast television or basic cable channels, which the expert claimed is similar to the college football market. In this but-for world, because class members would be able to watch all NFL games as part of their basic television package, damages are reflected by the total amount paid by each class member for NFL Sunday Ticket.

Prior to trial, defendants moved to exclude plaintiffs' expert's opinions twice, arguing that, among other things, the college football but-for world does not consider the differences between the NFL and college football television distribution. Relating to defendants' initial motion, during the class certification phase, the court ruled that the yardstick methodology is an accepted methodology in antitrust cases and that the college football market has been recognized as a close analog in the Ninth Circuit. After the court declined defendants' initial motion, defendants proceeded to file another motion, requesting that the court reevaluate the admissibility of the expert's methodology "in light of the recent amendments to Rule 702 and the need to protect the jury from inadmissible evidence." Again, the court denied the motion, emphasizing that the amendments to Rule 702 were intended to clarify, not change, the standard of review and that defendants did not "point to anything in the Court's previous decision that is inconsistent with FRE 702 as it is written now."

On June 27, 2024, the jury found that defendants conspired to restrain trade and monopolize the market for professional football telecasts in the United States. The jury also determined that defendants owed over \$4.7 billion in total damages to the class members.

On July 3, 2024, defendants filed a renewed motion for judgment as a matter of law or for a new trial, which again argued that plaintiffs' expert's damage methodologies were flawed and should be excluded. In an August 1, 2024 order, the court excluded the expert's testimony, highlighting new trial testimony that "revealed [the expert's] college football but-for world was not the product of sound economic methodology." For example, instead of explaining how out-of-market telecasts would have been available at no additional cost to cable and satellite customers in the college football but-for world, the expert simply hypothesized that there were several possibilities and testified that the defendants and their broadcast partners were "sophisticated entities ... and they figured it out in college sports, [so] they would certainly figure it out in the NFL." According to the court, the expert's assumption that the defendants and their partners would "figure it out," without sufficiently explaining the specifics of the but-for structure, is not a reliable methodology and is not grounded in economic analysis.

The court also pointed out that there are significant differences between actual college football and the expert's college football but-for world. For instance, in the real world, not all college football games are available on basic television packages, and some college football games are only available by purchasing premium network packages, such as those offered by the SEC Network. Again, the court took issue with how the expert "accounted for the differences in this but-for world by proposing multiple variations of the but-for world, without analysis of how the economically rational actors would have acted."

The court also found that plaintiffs' second economic expert's testimony was unreliable. Because these two experts provided the only support for class-wide injury and damages, the court granted defendants' motion for judgment as a matter of law. As such, the jury verdict of \$4.7 billion in total damages was voided. As of October 2025, there were two pending appeals in this matter in the Ninth Circuit (cases 24-5691 and 24-5493).

Court decision on August 1, 2024

Case No. 2-15-ml-02668 filed in the Central District of California

Exafer Ltd. v. Microsoft Corporation

Expert's flawed reasonable royalty base

In December 2019, Exafer Ltd. (Exafer) filed a complaint for patent infringement against Microsoft Corporation (Microsoft) regarding two of its US patents related to band control planes for network data flows. This technology enables computer networks to (1) function more efficiently, (2) be more agile in meeting customers' cloud computing needs, and (3) maximize the use of server and network hardware. Exafer alleged that the accused "VFP Fastpath" and "SmartNIC Accelerated Networking" features on Microsoft's cloud computing platform, known as Azure, infringed certain claims of each asserted patent, increasing the efficiency at which data is transmitted on Azure.

Both parties agreed that Microsoft does not directly charge for the accused features. Therefore, to determine a royalty base for a reasonable royalty calculation, Exafer's expert relied on the premise that the accused features allowed Azure to host more "virtual machines," which are "software representations of physical computers that run on Azure servers hosted in the Azure cloud." Using virtual machine hours sold by Microsoft on its Azure platform as the royalty base, the expert applied a royalty per virtual machine hour to estimate reasonable royalty damages of over \$211.1 million.

Among other challenges to the expert's methodology, Microsoft argued that the royalty base was "legally forbidden and untethered from the facts of the case" because virtual machines are not accused of infringement. Exafer contended that the royalty base was proper because at the time infringement began, Microsoft would have valued the accused features based on the extent to which it could increase the amount of virtual machines offered on a server. Citing *Enplas Display Device Corp. v. Seoul Semiconductor Co.*, 909 F.3d 398, 411 (Fed. Cir. 2018), the court ruled that a reasonable royalty "cannot include activities that do not constitute patent infringement, as patent damages are limited to those 'adequate to compensate for infringement' (citing *AstraZeneca AB v. Apotex Corp.*, 782 F.3d 1324, 1343 (Fed. Cir. 2015))." The court added that Exafer failed to cite any case holding that a royalty base is allowed to consist entirely of unaccused technology.

Court decision on March 7, 2024

Case No. 1-20-cv-00131 filed in the Western District of Texas

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CRA's intellectual property consultants serve as expert witnesses on damages issues and provide valuation, transactional and strategic consulting services for all types of intellectual property. To learn more, visit www.crai.com/ip.

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