RESPONSE

MISSING DECISIONS AND THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Merritt McAlister's Missing Decisions *is an important contribution to our understanding of civil procedure, judicial decisionmaking, and the law itself. McAlister's study demonstrates that many merits terminations by federal appellate courts aren't readily accessible to the public, nor do they show up in major legal research databases like Westlaw, Lexis, and Bloomberg.*

Two of the limitations of Missing Decisions *are that it relies on summary statistical tables to quantify the portion of merits terminations that are "missing," and that it doesn't include the United States Court of Appeals for the Federal Circuit because its statistical tables are in a different format than those of other circuits. Yet, the Federal Circuit is a prime candidate for understanding the issue of "missing decisions." It is a court that has employed summary decisionmaking to a great extent, even as it is perhaps the most scrutinized court aside from the Supreme Court.*

This Response draws on datasets of the Federal Circuit's dockets and decisions to examine the issue of "missing decisions" at the Federal Circuit. It finds that while the Federal Circuit makes virtually all of its decisions on the merits of an appeal available on its website, there are still many decisions that are only accessible via the appeal dockets themselves—McAlister's "missing decisions." In particular, decisions on the appropriateness of an appeal, such as appellate jurisdiction or timeliness, are commonly not posted to the court's website.

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INTRODUCTION

Merritt McAlister's *Missing Decisions* pierces through the appearance of appellate decisions to illuminate a hidden reality.[1] At its core, *Missing Decisions* challenges two foundational assumptions common to legal thinking: our certainty about what constitutes "the law," and our belief that in 2021, everything is at our fingertips—especially something as important (to many legal thinkers, at least) as federal appellate decisions. But, as McAlister demonstrates, they're not: a substantial number of appellate merits decisions aren't readily accessible to the public, nor do they show up in major legal research databases like Westlaw, Lexis, and Bloomberg.

This leads to McAlister's ultimate recommendation: that all terminating decisions in federal appeals be made available by those courts on a free, public site rather than locked away behind the paywall of PACER.[2] This recommendation is especially important given the evidence that McAlister presents that, in recent years, the contents of the major legal research databases have drawn almost entirely on what is available for free on the courts' websites rather than what actually exists on PACER. And even behind the paywall, decisions are hardly accessible: they can be searched by origin, date, docket and party name, but that is it. Available does not mean accessible.[3]

While these observations are significant, there are some limitations to McAlister's study. One is that *Missing Decisions* uses statistical summary

1 Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1101 (2021).

2 *Id.* at 1160 (recommending that all terminating decisions in federal appeals be made freely available).

3 *Accord* Acceleration Bay, LLC v. Activision Blizzard, Inc., 908 F.3d 765, 773 (Fed. Cir. 2018) (stating that "public accessibility requires more than technical accessibility" in the patent prior art context).

tables rather than drawing upon the actual docketed appeals in order to quantify the portion of merits terminations that are "missing." In addition, McAlister necessarily doesn't include the United States Court of Appeals for the Federal Circuit because its statistical tables are in a different format than other circuits, one based only on numbers of original appeals rather than consolidated terminations. That difference in format prevents the direct application of McAlister's methodology to the Federal Circuit.[4]

Yet, at the same time, the Federal Circuit is a prime candidate for understanding the issue of "missing decisions." It has been labeled the "Secret Circuit,"[5] and is a court whose practice with summary affirmances—affirmances with no judicial reasoning—has been written about at length.[6] And just as it may "change the law by saying nothing"[7] in its Rule 36 summary affirmances, it can also shape the law by determining what decisions are publicly accessible. Knowing what the court has—and has not—made easily accessible also matters given the numerous empirical studies that have examined the court's decisionmaking.[8]

This Response draws on datasets of the Federal Circuit's dockets and decisions to examine the issue of "missing decisions" at the Federal Circuit. This examination reveals that approximately 63% of all docketed appeals at the Federal Circuit between 2008 and 2018 terminated in an "Opinion"[9] or

4 *See* McAlister, *supra* note 1, at 1126 n.124 (noting that McAlister's article does not discuss unpublished decisions from the U.S. Court of Appeals for the Federal Circuit because the Administrative Office does not report data from that circuit). For data from the U.S. Court of Appeals for the Federal Circuit, see ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS OF THE U.S. COURTS tbl.B-8 (2021) [hereinafter JUDICIAL BUSINESS] (summarizing the number of appeals filed, terminated, and pending during the twelve-month period ending September 30, 2021).

5 BRUCE D. ABRAMSON, THE SECRET CIRCUIT: THE LITTLE-KNOWN COURT WHERE THE RULES OF THE INFORMATION AGE UNFOLD (2007).

6 *See, e.g.*, Kimberly A. Moore, Markman *Eight Years Later: Is Claim Construction More Predictable?*, 9 LEWIS & CLARK L. REV. 231, 234 (2005) (addressing the issue of summary affirmances); Beth Z. Shaw, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1013-14 (2004) (explaining the issue of summary affirmances); Dennis Crouch, *Wrongly Affirmed Without Opinion*, 52 WAKE FOREST L. REV. 561, 561 (2017) (discussing the issue of incorrect summary affirmances); Matthew J. Dowd, *Rule 36 Decisions at the Federal Circuit: Statutory Authority*, 21 VAND. J. ENT. & TECH. L. 857, 857 (2019) (addressing the interaction of Rule 36 summary affirmances and certain statutory provisions).

7 Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765, 765 (2018).

8 *See* Ryan Vacca, *The Federal Circuit as an Institution*, *in* 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 104, 138-43 (Peter S. Menell & David L. Schwartz eds., 2019) (noting numerous studies analyzing the decisionmaking of the Federal Circuit).

9 "Opinion" refers to the documents that the court itself labels "Opinion."

summary affirmance under Federal Circuit Rule 36[10] that is available on the court's website. From there, however, the data become more complex. In some years, the Federal Circuit posted large numbers of orders (as distinguished from traditional "Opinions" or Rule 36 affirmances) on its website, while in others, the court posted almost none. But even these orders don't account for all terminations. A deeper analysis is necessary.

To further investigate "missing decisions" at the Federal Circuit, my research team and I created a dataset of all terminating orders for appeals filed in 2015 that did not have a terminating document available on the court's website. Thirty-one percent of all appeals did not have a terminating document available on the court's website. However, a large portion of these appeals were terminated through voluntary action (or inaction) by the appellant (23% of all appeals). The remaining 8% were terminated for a variety of reasons, including a small number (sixteen) that were terminated in a nonprecedential order addressing the substantive merits of the appeal.[11]

Although non-voluntary terminations comprised less than 10% of all terminations of appeals filed in 2015, we also observed some distinctive patterns about these terminations that the court did not post to its website. There is almost a complete absence of decisions that involve the "appropriateness" of an appeal, such as dismissals for lack of appellate jurisdiction and transfer orders. Similarly missing were judicial decisions dismissing appeals for failure to file appeals within the required time.

The remainder of this Response proceeds as follows. Part I compares the number of docketed appeals to the number of documents available on the Federal Circuit's website for appeals filed in 2008–2020. Part II compares the results from Part I to search results from the major legal research databases used in *Missing Decisions.* Part III takes a deep dive into terminations that were not posted on the court's website for appeals filed in 2015. Finally, Part IV provides some observations, conclusions, and recommendations.

I. COMPARISON OF DECISIONS TO DOCKETED APPEALS

The core of *Missing Decisions* involves a comparison of the number of consolidated merits terminations reported in Table B-12 of *Judicial Business* to the number of results obtained by searching Westlaw, Lexis, Bloomberg

10 Under Federal Circuit Rule 36, "[t]he court may enter a judgment of affirmance without opinion" when an opinion "would have no precedential value" and specified circumstances exist, such as that "the evidence supporting the jury's verdict is sufficient." FED. CIR. R. 36.

11 *See infra* pp. 84-85.

Law,[12] and FDsys.[13] For the twelve federal appellate courts whose terminations are reported in these tables, McAlister finds a substantial difference between the number of consolidated terminations reported by the courts and the number of results reported by Lexis, Westlaw, Bloomberg Law, and FDSys—to the tune of nearly 30% of all merits terminations.[14] For example, the number of results returned for searching Lexis for the relevant time period were only 73% of the number of consolidated merits terminations.[15] McAlister also observes substantial inter-circuit variability in the frequency of these "missing decisions."[16]

Unlike the twelve circuits that McAlister analyzes in *Missing Decisions*, however, termination data for the remaining federal circuit court—the Court of Appeals for the Federal Circuit—is self-reported by the court in a form that isn't conducive to direct comparison with standard legal research databases. While *Judicial Business* reports appellate terminations in Tables such as B-5A and B-12 for the other twelve circuits, the Federal Circuit uses Table B-8, which reports only the numbers of terminations of individual appeals—not consolidated terminations.[17]

Because Table B-8 reports only information for individual appeals, the methodology used in *Missing Decisions* can't be directly used for the Federal Circuit. This is because the commercial research databases return results based on *documents* rather than *appeals*. And since a single document—whether it is an opinion, a summary affirmance, or an order—can decide multiple appeals, the numbers returned by searching Westlaw, Lexis, or similar sources will automatically be smaller than the numbers of terminations reported by the Federal Circuit.

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12 To be clear, this doesn't refer to the Bloomberg Docket database, which is separate from its legal decisions database. The Bloomberg Docket database is a great resource; however, it is also limited to only what has been affirmatively collected from PACER rather than containing the entirety of PACER. We actually observed that most of the "missing decisions" for the Federal Circuit were not available on the Bloomberg docket database until we affirmatively requested them.

13 *See* McAlister, *supra* note 1, at 1120-25.

14 *See id.* at 1128 (noting that 30% of merits terminations from appeals as of right and original proceeding are not easily accessible). The number of results returned for FDSys was even lower. *Id.* at 1126.

15 *Id.* at 1126 fig.2.

16 *Id.* at 1134 tbl.3 (depicting significant variation among circuits in their percentage of unreasoned merits terminations).

17 Although the version of Table B-8 that is posted on the court's website is based on the end of the Financial Year, Table B-8 is also available ending on a quarterly basis. *See Caseload Statistics Data Tables*, U.S. CTS., https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables [https://perma.cc/6JLD-2JE6] (type "B-8" in the "Search by table number field"; then click "Apply").

There's another complexity with relying on Table B-8: it counts some appeals twice.[18] Appeals that are "reinstated" are counted both for the year the appeal was initially filed and the year it was reinstated.[19] According to the clerk's office, "reinstatement" can occur when an appeal is dismissed for failure to prosecute and the deficiency is satisfied within the appropriate time, a petition for rehearing is granted, or sometimes on remand from the Supreme Court.[20] As a result, a single appeal may show up multiple times in Table B-8. This doesn't diminish the importance of these individual terminations being publicly accessible, but it does add more complexity to the analysis.

To avoid the disutility of Table B-8 and obtain a more granular view of potential missing decisions, my research team and I used data drawn directly from PACER and the court's own website. This consists of two datasets from the Federal Circuit Dataset Project initiated by this author: the *Compendium of Federal Circuit Decisions* (the "document dataset"), which contains all opinions, summary affirmances, orders and other documents posted by the Federal Circuit on its website, and a dataset of Federal Circuit dockets (the "docket dataset").[21] The document dataset consists primarily of opinions and summary affirmances under Federal Circuit Rule 36—although for a period of time between 2008 and 2014, the court also posted a substantial number of orders covering a variety of matters (some as mundane as motions for extensions of time for a filing). The docket dataset includes the docket numbers of every Federal Circuit appeal since 2000 that is accessible through PACER, along with other information obtained from PACER.

By drawing from both datasets, it is possible to determine which appeal dockets have a document available on the court's website and which do not.

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18 A comparison of the number of appeals filed reported by the Federal Circuit in Table B-8 to the dockets actually available on PACER indicates that Table B-8 reports about eighty-seven more appeals filed on average each year than PACER indicates actually exist. *See* Jason Rantanen, *Federal Circuit Docket Dataset*, HARV. DATAVERSE (Sept. 10, 2021) [hereinafter *Docket Dataset*], https://doi.org/10.7910/DVN/EKSYHL; *see also* Jason Rantanen, *The Federal Circuit Dataset Project* (Univ. of Iowa Coll. of L., Legal Stud. Rsch. Paper No. 2021-31, 2021) [hereinafter *Rantanen Research Paper*], https://papers.ssrn.com/abstract_id=3921275 (describing the *Federal Circuit Docket Dataset*).

19 *See* Email from John C. Paul, Ct. Servs. Manager, U.S. Ct. of Appeals for the Fed. Cir. to Jason Rantanen, Hammer-Boyd Professor of L., Univ. of Iowa Coll. of L. (July 20, 2021, 6:01 AM) (on file with author) ("The B-8 table tracks both cases which were filed within the fiscal year, as well as cases which were reinstated in the given period.").

20 Email from John C. Paul, Ct. Servs. Manager, U.S. Ct. of Appeals for the Fed. Cir. to Jason Rantanen, Hammer-Boyd Professor of L., Univ. of Iowa Coll. of L. (July 21, 2021, 5:54 AM) (on file with author).

21 *The Compendium of Federal Circuit Decisions*, https://fedcircuit.shinyapps.io/federalcompendium (last visited Jan. 15, 2022); *Docket Dataset*, *supra* note 18. Details about the construction of these two datasets are available in Jason Rantanen, *The Landscape of Modern Patent Appeals*, 67 AM. U. L. REV. 985, 986-88 (2018) and *Rantanen Research Paper*, *supra* note 18, at 1-2.

In a nutshell, each record in the docket dataset was associated with the corresponding documents in the document dataset using the appeal docket numbers in the caption of the document.[22]

Table 1 shows whether each docketed appeal had an Opinion or Rule 36 summary affirmance available on the Federal Circuit's website for appeals filed in a given year. In addition, if it did not have either an Opinion or Rule 36 affirmance, but did have at least one Order, it is reflected in the "Order" column.[23] Because the earliest documents posted to the website are dated late 2004, relatively few appeals filed before 2003 are associated with a document in the dataset. Similarly, many appeals filed in 2020 or 2021 haven't yet been decided and thus do not have a corresponding decision associated with them. As a reminder, this data is on the per-*docket* level, meaning that it reflects whether an appeal docketed at the Federal Circuit has an associated opinion, Rule 36 affirmance, or order (if neither an opinion nor Rule 36 affirmance is available) on the court's website. It does not reflect the raw number of *documents*. Finally, as in the comparable analysis from *Missing Decisions*, the dockets reflected here include both original proceedings and regular appeals.[24]

22 The appeal docket numbers are contained in the caption accompanying the docket. These were collected through a combination of automated and human coding, then manually verified. *Rantanen Research Paper*, *supra* note 18. We estimate that approximately 1% of documents may currently be missing one or more docket numbers in the dataset. A recent review of 3,300 opinions identified 31 records that were missing docket numbers (these were subsequently corrected). The full process for how the datasets were combined is provided in the project STATA code. *See Docket Dataset*, *supra* note 18.

23 *See* Table 1. When making this match, Opinions and Rule 36 affirmances were prioritized over Orders, and only the highest priority document was counted for that appeal. In other words, if an appeal had both an Opinion and an Order associated with it, it was treated as having an opinion. In addition, note that an appeal does not necessarily end when the court enters a terminating order. There may be motions for reconsideration or petitions for rehearing. This analysis looks only at whether there was *some* terminating order available on the court's website.

24 *See* McAlister *supra* note 2, at 1134-35. Note that only a relatively small number of the dockets in Table 1 (about forty to sixty per year) are original proceedings.

Table 1: Comparison of Numbers of Appeals Docketed at the Federal Circuit to the Type of Document Available on the Court's Website

Year Appeal Docketed	Opinion	Rule 36	Order	No Document	Total
1999	1	0	0	361	362
2000	2	0	0	1,310	1,312
2001	8	0	0	1,309	1,317
2002	7	0	0	1,785	1,792
2003	171	0	1	1,238	1,410
2004	629	1	4	844	1,478
2005	644	0	4	771	1,419
2006	617	49	23	909	1,598
2007	698	149	48	529	1,424
2008	654	140	153	384	1,331
2009	564	148	231	254	1,197
2010	519	161	305	140	1,125
2011	571	181	364	127	1,243
2012	558	228	334	139	1,259
2013	606	214	252	218	1,290
2014	643	256	194	363	1,456
2015	791	343	7	540	1,681
2016	805	379	10	633	1,827
2017	716	347	33	514	1,610
2018	592	294	25	556	1,467
2019	620	183	32	598	1,433
2020	316	110	48	1,104	1,578
2021	5	1	23	755	784
N/A[25]	11	6	8	1	26
Total, 1999–2021	10,748	3,190	2,099	15,382	31,419
Total, 2008–2018	7,019	2,691	1,908	3,569	15,486

Looking only at the range for which we would expect to find a decision on the court's website if one was made (i.e., appeals docketed between 2008 and 2018), approximately 45% of docketed appeals are decided in an opinion, approximately 17% are summarily affirmed, and approximately 37% have neither an opinion nor Rule 36 available on the Court's website.

25 Records with no year reflect docket numbers that appear on Federal Circuit documents but do not match to a docket number that results from searching PACER. Close examination of samples of these results indicates that the dockets themselves are under seal or not available on PACER. *See Rantanen Research Paper*, *supra* note 18, at 9, 15-16.

We also looked to see whether the dockets with no terminating decision had some document other than an opinion or order in the document dataset. Of the approximately 5,900 dockets without an Opinion or Rule 36 affirmance between 2008 and 2018, 1,908 had an "Order" associated with the appeal number in the document dataset. These orders range from relatively trivial matters (such as motions to extend the time for filing a brief) to appeal terminations (such as orders dismissing the appeal). Thus, just because there is an "Order" for an appeal on the court's website does not mean that there is a terminating order.

But even if one were to assume that all of these orders are appeal-termination orders (and they are not), that still leaves 3,868—25% of all appeals—without any documents in the dataset for appeals filed between 2008 and 2018. Even for years in which the Federal Circuit was routinely posting orders, a substantial number of dockets do not have any orders associated with them on the website. And for dockets filed in more recent years, the dataset contains orders for only about 1–2% of dockets without an opinion or Rule 36 affirmance. This means that there are, indeed, a substantial number of appeal terminations that do not have an associated decision or other terminating order available on the court's website. What this does not tell us, however, is the type of terminations for these appeals. Are they merits terminations, voluntary dismissals, or something else?

II. COMPARISON WITH OTHER DATASETS

To determine how the documents available on the Federal Circuit's website relate to those in commercial databases, we also replicated McAlister's methodology for determining the number of results obtained from searching the major legal research databases. The following table indicates the number of results from each source for the relevant Federal Circuit dataset as compared to the number of documents available on the Federal Circuit's website. In contrast with Table 1, Table 2 indicates the year of the document rather than the year the appeal was filed. As before, this analysis includes decisions in original proceedings such as petitions for a writ of mandamus.[26]

26 To construct the Westlaw, Lexis, and Bloomberg components of this table, we employed the same methodology used by McAlister, with the exception that we used a calendar year date range rather than a financial year date range. FDSys data is not included here because, for some years, at least, the results on FDSys are unique at the appeal docket number level, not the document level. This means that a single document is represented multiple times in the results, limiting comparability to the other data sources.

Table 2: Comparison of Federal Circuit Search Results from Various Databases

Year	Fed. Cir. Website	Westlaw	Lexis	Bloomberg
2008	746	1,594	1,830	1,595
2009	1,546	1,311	1,446	1,272
2010	1,527	1,130	1,693	1,122
2011	1,916	1,232	2,328	1,308
2012	1,855	930	2,267	1,227
2013	1,110	783	1,266	965
2014	1,234	901	1,262	984
2015	765	770	804	808
2016	817	839	844	844
2017	785	878	865	864
2018	745	829	806	806
2019	763	802	811	806
2020	781	887	891	888

This comparison reveals variation between sources in the number of results. For most years, the numbers of results across the databases are relatively consistent, but for other years they are wildly different. A likely reason for the variation from 2010 to 2014 is the inclusion of the miscellaneous orders on the court's website. These may have been selectively excluded by Westlaw and Bloomberg. In addition, while there is general consistency between the number of results for 2015 to 2020, for some years, the number of documents available in the commercial databases is 5–10% higher than the documents obtained directly from the court's website (e.g., 2017, 2018 and 2020). It is possible that these databases may sometimes pull documents directly from PACER according to their own criteria. For example, in some instances we saw other types of documents in the commercial database, such as orders relating to a request for rehearing en banc and, for 2020, voluntary dismissal orders.[27]

In any event, even for years in which the commercial databases contain a hundred more documents than are available on the court's website, it is still not close to filling the gap of missing terminations (and this only applies to the most recent years).

27 Although we did not conduct a systematic review for this entire time period, a pilot comparison of the Westlaw results to the documents from the court's website for 2020 indicated that the Westlaw results included some voluntary dismissal orders. An example is *Topps Co., Inc. v. Koko's Confectionary & Novelty, Inc.*, No. 2020-2332, 2020 WL 9156947 at *1 (Fed. Cir. Dec. 29, 2020).

III. Analysis of Missing Terminations for 2015

What the two foregoing analyses do not reveal is the composition and nature of these missing terminations. Unfortunately, as McAlister observes, examining individual dockets is a substantial undertaking. Just obtaining the dockets for those appeals without an opinion, Rule 36 affirmance, or order available on the website is a major undertaking beyond the scope of a response essay.[28]

Because of this, my research team and I examined just the set of dockets created in the year 2015. This year is relatively recent, yet all appeals filed in that year had a terminating order by the time we conducted the review.[29]

The first step was to compare the set of docket numbers for all appeals filed in 2015 to the appeal numbers for documents available in the document dataset.[30] Table 3 shows whether the document was available on the court's website and, if so, the type of terminating document. It does not include original proceedings, such as petitions for writs of mandamus.

Table 3: Source of Documents in *Compendium of Federal Circuit Decisions* (2015)

Document Type	Fed. Cir. Website	Missing	PACER	Total
Missing	0	489	0	489
Opinion	790	0	0	790
Order	6	0	8	14
Rule 36	343	0	0	343
Total	1,139	489	8	1,636

In total, 1,636 appeals were filed in 2015. Of those, 790 resulted in a written opinion available on the court's website, while another 343 were summarily affirmed under Rule 36 in an order available on the court's website. Another six appeals had an "Order" available on the court's website, which in all but one case

28 "Dockets" here means the actual docket itself, rather than just the docket number. The actual docket shows each individual docket entry. By reviewing the docket and the terminating order, it's possible to ascertain how the appeal was resolved.

29 We also double-checked the appeal docket number data for documents in the *Compendium* to make sure that every docket number pertaining to a document was correctly reported. This resulted in the identification of sixteen documents that were missing one or more docket numbers; these were corrected in the document dataset.

30 The document dataset was recently supplemented with the addition of terminating documents for miscellaneous dockets. Missing terminating documents for these miscellaneous dockets were obtained from PACER. Column titles indicate whether a document was collected from the Federal Circuit's website or from PACER. "Missing" indicates that at the time we ran this analysis, the document dataset (which was based on what was available on the court's website) did not include a terminating document for this appeal.

was an order terminating the appeal. This left 497 appeals—31%—without a terminating document available on the court's website.[31]

To determine the composition of these potential "missing decisions," my research team and I reviewed the dockets and their terminating orders from PACER via a combination of Bloomberg's docket access and PACER directly. For each terminating order, we coded (1) the type of termination, (2) the reason for the termination, and (3) the text for the docket entry terminating the appeal. In addition, we coded the full set of docket numbers pertaining to that order.

Table 4 shows the type of termination for the 497 dockets that did not have an associated terminating document available on the court's website. The record unit is the docket.

Table 4: Type of Terminating Document for Federal Circuit Appeals Filed in 2015 Without a Terminating Document Available on the Court's Website

Type of Terminating Document for Missing Terminations	Frequency	Percent
Dismissal	435	87.53
Merits Order	16	3.22
Remand	23	4.63
Transfer	23	4.63
Total	497	100.00

Nearly all (88%) of the terminations without a terminating document available on the court's website were dismissals. None of the missing terminating documents were opinions or precedential orders. However, we did identify a small number of orders that resolved the appeal on the merits, as well as a handful of remand and transfer orders.

Many of the terminations were sought by the appellant or parties jointly—in other words, they were voluntary. For example, 17 of the 23 remands were voluntary, in that either both parties moved jointly, or one party moved and was unopposed. Similarly, as Table 5 shows, 70% (303/435) of the dismissals were voluntary while another 17% (72/435) were due to a failure to prosecute the appeal (such as failing to timely pay the docketing fee or file a brief).

31 These are the 489 dockets that did not have a document in the dataset plus the 8 dockets with a document that we had collected directly from PACER as part of another project.

Table 5: Reason for Dismissal of Appeals Filed in 2015

Reason Appeal Dismissed	Frequency	Percent
Appeal filed too late	11	2.53
Appeal is moot	3	0.69
Failure to Prosecute	72	16.55
Improper cross-appeal	3	0.69
Lack of appellate jurisdiction	31	7.13
Other	12	2.76
Voluntary Dismissal	303	69.66
Total	435	100.00

Excluding those appeals that were voluntarily terminated, terminated through mootness, or terminated because of inaction by the appellant (i.e., voluntary dismissals, voluntary remands, and dismissals for failure to prosecute or mootness) left 57 dismissed appeals, 23 transferred appeals, 16 appeals decided on the merits, and 6 appeals remanded to the lower tribunal. Collectively, these constitute 6% (102/1,636) of the terminations of all appeals filed in 2015. If one were to consider the denominator to be these 57 appeals plus the 1,139 opinions, Rule 36 affirmances, and orders available on the court's website (i.e., what one could reasonably argue are the court's actual "decisions") from Table 3, that rises to 8%—still a very small fraction of the total terminating decisions by the court.

Yet, while the number of missing Federal Circuit decisions is small, it is not miniscule. Analyzed with documents as the record unit as opposed to dockets, the missing decisions consist of 41 dismissal orders, 23 transfer orders, 12 merits orders, and 6 remand orders. Each of these is discussed in more detail below.

A. *Missing Dismissal Orders*

While the dismissal orders may initially appear insignificant, a closer look reveals a wealth of hidden jurisprudence. Of the forty-one non-consented dismissal orders, eleven were based on a failure to comply with the statutory deadline for filing an appeal with the court. Three were dismissals of cross-appeals that the court considered to be improper—a matter that commentators have written about.[32] And a handful of orders just didn't contain any information other than that the appeal was dismissed.

32 *See, e.g.*, Andrew V. Trask, *Conditional Cross-Appeals at the Federal Circuit*, 22 FED. CIR. BAR J. 501, 501 (2012) ("Recent decisions indicate that a cross-appeal on patent infringement, which

The largest group of dismissals, however, was for lack of appellate jurisdiction. In several instances, such as Appeal No. 2016-1343, the court concluded that the appeal was premature, and thus the court lacked jurisdiction under 28 U.S.C. § 1295(a).[33] In others, the court dismissed the appeal as outside its statutory jurisdiction. Although none of these orders on lack of subject matter were precedential, and they may seem mostly mill-run, they are precisely the kind of "missing decisions" that McAlister discusses in her article.[34]

Finally, there were two fairly significant dismissal orders that didn't fall into any of the other categories; these might fall into the category of "oversight" rather than systematic non-inclusion. *Arunachalam v. SAP America, Inc.* was the first.[35] *Arunachalam* involved application of collateral estoppel to bar not just relitigation of the *identical* claims that were invalidated in a previous litigation, but also other claims in those patents. The Federal Circuit held that collateral estoppel barred Dr. Arunachalam's claims because the same lack-of-enablement flaw applied to the other claims of the patent as well.[36] The second was *Witherspoon v. Office of Personnel Management*, which involved the issue of substitution for a deceased petitioner in a matter before the Office of Personnel Management.[37] Both of these decisions, too, are rather substantive and thus fall within the types of decisions that McAlister's analysis raises concerns about.

B. *Missing Merits Orders*

The most surprising set of "missing decisions" were the merits orders. These orders briefly or summarily affirmed the court or tribunal being reviewed, but unlike a summary affirmance under Federal Circuit Rule 36,

would not offer broader relief than the district court's judgment of invalidity, would be improper in these circumstances.").

33 Bestop, Inc. v. Tuffy Sec'y Prods., Inc., No. 2016-1343, at 2 (Fed. Cir. Mar. 10, 2016) (nonprecedential order).

34 In addition to being important in its own right, see Joseph R. Re, *Federal Circuit Jurisdiction over Appeals from District Court Patent Decisions*, 16 AIPLA Q.J. 169 (1988), for a discussion on various jurisdictional problems unique to the Federal Circuit. Decisions about the court's jurisdiction may also be relevant to the Federal Circuit's choice of law jurisprudence, a topic receiving current scrutiny. *See* Jennifer E. Sturiale, *A Balanced Consideration of the Federal Circuit's Choice-of-Law Rule*, 2020 UTAH L. REV. 475 (stating that the Federal Circuit's jurisdiction is based on subject matter, rather than geography, and demonstrating the choice of law issues that arise thereunder).

35 No. 2015-1424 (Fed. Cir. Sept. 23, 2016) (per curiam) (nonprecedential order) (consolidated appeal of Nos. 2015-1424, 2015-1433, 2015-1429, and 2015-1869).

36 *Id.* at 7. While there are several other decisions in related matters, see, e.g., *In re* Arunachalam, 709 F. App'x 699, 701, 703 (Fed. Cir. 2017) (discussing ongoing patent litigation with against different entities), I was unable to locate the *Arunachalam v. SAP America, Inc.* order on Westlaw or Lexis.

37 No. 2015-3106 (Fed. Cir. Sept. 3, 2015) (consolidated appeal of Nos. 2015-3106 and 2015-3145).

they provided additional reasoning or discussion. For example, the order in *Olesky v. General Electric Co.*, contained the following text:

> The judgment of the United States District Court for the Northern District of Illinois is affirmed on the ground that the district court properly granted summary judgment that General Electric did not infringe the asserted claims of the U.S. Patent No. 6,449,529 ("'529 patent"). In light of this disposition, this court does not reach the issues of whether the '529 patent claims are patent eligible under 35 U.S.C. § 101, and whether General Electric maintained its shop right to the '529 patent.[38]

The "merits order" in Appeal No. 2015-1654 was similar. In that order, the court affirmed the district court's decision that the patent claims would have been obvious.[39] Other merits orders affirmed in different types of appeals. One "merits order," in Appeal Nos. 2016-1317, 2015-5092, 2015-5045, 2015-5078 and 2015-5129, involved a summary reversal that was partially consented to by the appellees.[40]

One common feature of all of the merits decisions in this "missing decisions" set is that they were all nonprecedential and labeled as an "Order." This observation is consistent with McAlister's observation that while federal appellate courts routinely make "Opinions" available on their websites, they are less good about making documents labeled as "Orders" available.[41]

C. *Missing Transfer and Remand Orders*

The final set of "missing decisions" consisted of transfer and remand orders. The transfer orders involved the transfer of appeals to other circuits that would have jurisdiction over the appeal. The six remand orders in this subset were contested remand orders. As with the dismissal orders discussed above, access to these orders would shed greater light on the court's legal decisionmaking.

D. *Missing Orders in Miscellaneous Dockets*

Table 3 only contains data for "regular appeals." The Federal Circuit also decides petitions for writs of mandamus and petitions for permission to appeal—i.e., the "original proceedings" that McAlister suggests may constitute a substantial portion of the missing decisions. Although not

38 Olesky v. Gen. Elec. Co., Nos. 2016-1149, 2015-1186, 2016 WL 9447164, at *1 (Fed. Cir. Dec. 21, 2016).

39 Purdue Pharma L.P. v. Amneal Pharm., LLC (*In re* Oxycontin Antitrust Litig.), No. 2015-1654 (Fed. Cir. Apr. 8, 2016) (per curiam) (nonprecedential order).

40 Longnecker Prop. v. United States, No. 2015-5045, at 7 (Fed. Cir. Nov. 14, 2016) (nonprecedential order) (consolidated appeal of Nos. 2015-5045, 2015-5078, 2015-5092, 2015-5129, and 2016-1317) ("Appellees consent in part to the motion.").

41 *See* McAlister, *supra* note 1, at 1136-37 (stating that, while "'opinions' are easy and free to find," Courts of Appeals do not routinely publish "judgments" for free on their websites).

included in Table 3, there were also forty-five "miscellaneous" matters docketed at the Federal Circuit in 2015. Of these, only two were decided in an opinion or order available on the court's website. The lack of these decisions does not appear consistent: although the court's website contained almost no orders for miscellaneous matters docketed in 2015, for other years, substantial numbers of these orders are available. Yet, the absence of these orders is concerning, as they are legally significant,[42] and in recent years have become especially newsworthy.[43] A deeper examination of petitions for writs of mandamus and other original matters is the subject of a future article.

IV. OBSERVATIONS, CONCLUSIONS, AND RECOMMENDATIONS

Overall, the Federal Circuit has done a good job in making judicial decisions involving merit determinations in regular appeals available on its website. While there were a small number of merits decisions that weren't available on the website, the vast majority of the court's merits decisions appear to be available on its website. This broad availability reduces the barriers to public access to merits decisions, created by PACER or a paid commercial database.

However, this analysis also revealed some systematic patterns of decisions that are *not* made available on the court's website, and thus are unlikely to be collected by the major research databases. Many decisions in petitions for writs and permission to appeal, and decisions involving the court's jurisdiction can only be found by looking up the party name or appeal docket number on PACER. Not only may the absence of these decisions shape the law, but it may also affect legal scholarship: given what appears to be the court's jurisprudence, scholars focus on merits issues even though a portion of the court's terminations are on jurisdictional grounds. And even if these jurisdictional decisions don't make new law, they're still informative about the court's rulings and practices. Indeed, for the same reasons that the court makes available nonprecedential merits opinions, it should also make available nonprecedential contested dismissal, remand, and transfer orders.

Given this, I wholeheartedly agree with McAlister's recommendation that all judgments, opinions, and dispositive orders be posted to the court's website. The court already identifies when an appeal is terminated: it reports statistics on terminations in in Table B-8. And the court already makes summary affirmances under Rule 36 available on its website. It would not be

42 *See, e.g.*, Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791 (2013) (discussing the significance of the Federal Circuit's jurisdiction).

43 *See* Dennis Crouch, *(Non)Precedent on Venue Transfer?*, PATENTLYO (May 10, 2021), https://patentlyo.com/patent/2021/05/nonprecedent-venue-transfer.html [https://perma.cc/SRX8-U3R9] (describing recent Federal Circuit decisions on petitions for writs of mandamus).

a great jump to also make appeal dispositions available—especially when they are orders that contain judicial reasoning. Making all terminating orders available would also help avoid the occasional instance in which a merits termination like those described in Part III is not posted on the website.

To be clear, my suggestion isn't that every Federal Circuit order—including orders on requests to extend time—be posted to the court's website. While perhaps an even better approach would be for the court to adopt something akin to the Supreme Court's interface,[44] which provides a publicly accessible clickable docket, that may be too much given the resource constraints faced by the court. Dispositive orders, on the other hand, are a relatively discrete set of orders that are very similar to what the court already posts on its website, and whose absence most directly raises the concerns described by McAlister.

In the end, while it is not a full solution to the opaqueness of the PACER paywall, posting all the Federal Circuit's opinions, judgments and dispositive orders to its website would be a relatively easy step forward toward eliminating the issue of *Missing Decisions*.

44 SUP. CT. OF THE U.S., https://www.supremecourt.gov/docket/docket.aspx [https://perma.cc/E8W8-NAQF]. Thanks to Dmitry Karshtedt for this suggestion.