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No Christmas In July For Patent Litigation

by
Nicholas Tsui
and
Wesley Achey

Alston & Bird
Atlanta, GA

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Commentary

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Nicholas Tsui
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Wesley Achey

[Editor's Note: Nicholas Tsui (nick.tsui@alston.com) is a Senior Associate and Wesley Achey (wes.achey@alston.com) is a Partner in the IP Litigation group at Alston & Bird LLP in the Atlanta office. Any commentary or opinions do not reflect the opinions of Alston & Bird LLP or LexisNexis[®], Mealey Publications[™]. Copyright © 2020 by Nicholas Tsui and Wesley Achey. Responses are welcome.]

Abstract

In this paper, we investigated jury verdicts in patent litigation from the period 2010–2020. Specifically, we evaluated whether juries would display any bias against patent litigation plaintiffs over the winter holiday season for having to serve jury duty at a seemingly inopportune time. To the contrary, however, the data did not indicate any such bias but rather suggested that juries were more generous during the winter holiday season than any other time of year. That is, the average dollar value of jury awards to prevailing patent litigation plaintiffs for December was significantly higher than for any other month. On the other hand, the average dollar value of jury awards to prevailing patent litigation plaintiffs for July was significantly lower than for any other month. Additionally, plaintiffs had a higher rate of prevailing in a jury trial than defendants for every month of the year except July. Thus, to the extent there is any seasonal bias in jury verdicts in patent litigation cases, jurors appear to be more upset with plaintiffs for having to spend the height of summer in a courtroom rather than the height of winter.

I. Introduction

The outcomes of jury trials are notoriously difficult to predict.¹ Jury biases and tendencies peripheral to, or

even unrelated to, the merits of a particular lawsuit have been a subject of significant interest.² Specifically, issues such as racial bias,³ power bias,⁴ out-of-state bias,⁵ and plaintiff bias⁶ have all been studied and analyzed.

With respect to patent litigation, in particular, juries have also been extensively studied at least in part due to concerns over a lay juror's ability to understand the highly technical nature of the disputes.⁷ It has been noted that the United States may be the only country that allows patent trials to be adjudicated by a lay jury.⁸ Juries are statistically more likely to find a patent valid than a judge.⁹ Juries are more likely than not to find infringement and willful infringement.¹⁰ Juries may favor domestic companies over foreign companies.¹¹ And juries may be more likely to award higher damages than a judge.¹² Accordingly, jury bias in patent litigation has been a long-standing concern, as it has been in other fields.¹³

At the same time, perhaps an equal, if not greater, amount of effort has been spent on behalf of potential jurors trying to avoid serving jury duty.¹⁴ There exist countless websites offering advice on how to do so.¹⁵ One may be tempted to think that juries required to perform their civic duty during the holiday seasons may be especially upset to the point of risking bias against the plaintiffs. Potential seasonality effects or bias on jury outcomes has not been previously investigated. Thus, the focus of this study was whether, in the context of patent infringement lawsuits, juries have been more likely to reach a verdict in favor of defendants or whether juries have awarded lower damages to prevailing

plaintiffs during the winter holidays (i.e., December) compared with other times of the year.

To the contrary, we report that in patent litigation cases from 2010 to 2020, the odds of a plaintiff prevailing were not significantly affected by the holidays and in fact the damages awarded by the juries to a prevailing plaintiff were actually higher than other times of the year. Interestingly, if there is any seasonal bias in jury verdicts, it is in July, at the height of summer, when both plaintiff verdicts and jury damage awards to a prevailing plaintiff were the lowest compared with any other month in the year. The data would seem to suggest that juries are more generous during the winter holiday season and are more upset about missing the beach season in the summer than the holidays in the winter.

II. Methodology

In order to investigate jury trial outcomes, we collected all the patent litigation jury verdict data from the Jury Verdicts & Settlements database on Lexis Advance for the last ten years (2010–2020). Specifically, we investigated two substantive outcomes: Plaintiff Verdicts

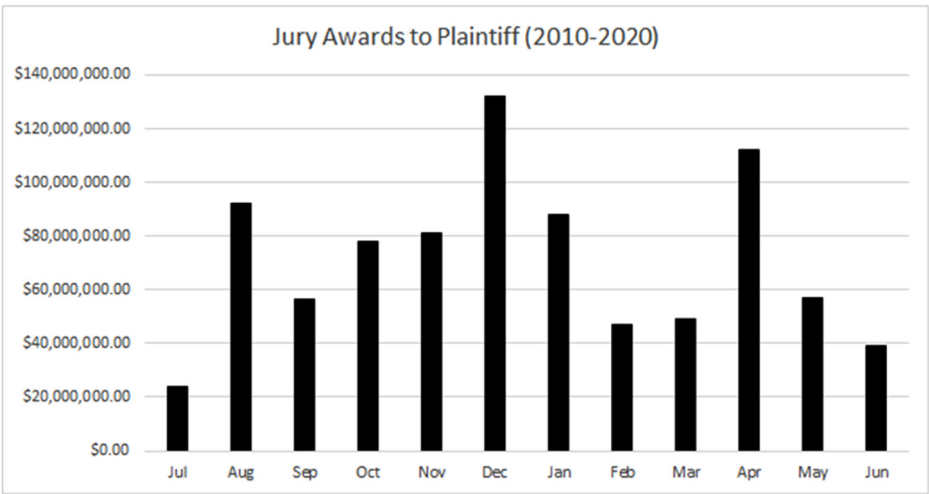
and Defendant Verdicts.¹⁶ We deleted any duplicate verdict entries in the database results.¹⁷ Then, within each category, we only considered Plaintiff Verdicts for which an award dollar value was provided. We assumed that a Plaintiff Verdict without an award dollar value was likely related to a declaratory judgment action in which a win for the plaintiff would not correlate with a win for the patent owner, the latter of which was the result we were interested in evaluating.

At the time of writing this paper, the LexisNexis database did not contain any 2020 jury verdict data other than for January.

III. Results

As shown in Figure 1, the average dollar value of jury awards to a prevailing patent infringement plaintiff was higher for December than for any other single month over the last ten years. Thus, not only does there appear to be no negative bias of juries toward patent infringement plaintiffs during the winter holidays (i.e., December), there actually appears to be increased generosity in favor of the prevailing plaintiffs during that time.

Figure 1. Average dollar value of jury awards to plaintiffs per month for the period 2010–2020.



The underlying data is presented in Table 1, which also includes the number of jury verdicts in favor of the defendants over the same period. As seen in the table, over the last ten years, November, December, and January represent three of the top five months in terms of the average dollar value of jury awards to a prevailing

patent infringement plaintiff. On the other hand, July exhibited the lowest average dollar value of jury awards to a prevailing patent infringement plaintiff by far compared with any other month. The value for July was nearly half the value for the next-lowest month, which was June.

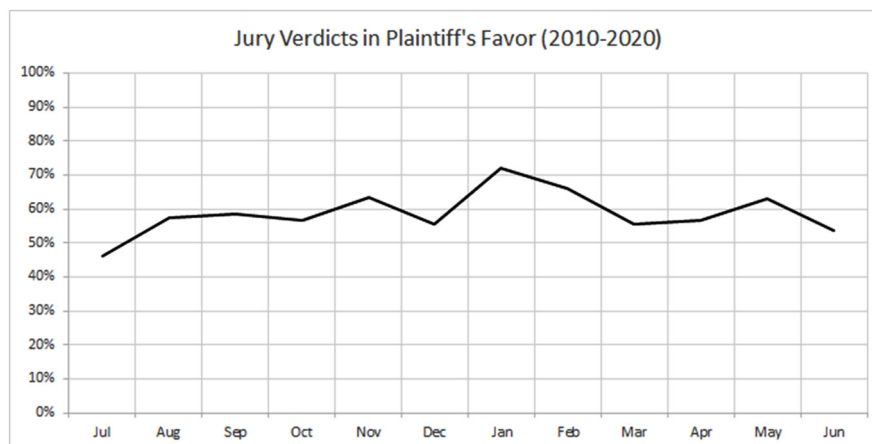
Table 1. Number of verdicts in the plaintiff's favor, average dollar value of jury awards to plaintiffs, number of verdicts in the defendant's favor, and percentage of plaintiff verdicts before a jury per month for the period 2010–2020.

Month	Plaintiff Verdicts (#)	Jury Award (average \$)	Defendant Verdicts (#)	Plaintiff Verdict Rate (%)
July	25	\$ 23,689,230.00	29	46%
August	43	\$ 92,286,734.00	32	57%
September	51	\$ 56,264,196.00	36	59%
October	42	\$ 77,827,366.00	32	57%
November	52	\$ 81,123,977.00	30	63%
December	36	\$ 132,172,491.00	29	55%
January	46	\$ 87,969,652.00	18	72%
February	58	\$ 47,050,538.00	30	66%
March	64	\$ 49,048,478.00	51	56%
April	51	\$ 112,177,762.00	39	57%
May	51	\$ 57,063,170.00	30	63%
June	46	\$ 39,037,723.00	40	53%

Additionally, it can be seen in the table that over the last ten years, with the exception of July, jury trial outcomes in general tend to favor patent infringement plaintiffs. This could be because plaintiffs that do not lose on summary judgment and do not settle generally have a better chance of prevailing than not in a jury

trial. It could also be that jurors generally tend to favor patent owners over accused infringers. Although the plaintiff win rate is the highest in January, there does not appear to be any noticeable seasonal bias for December or November.

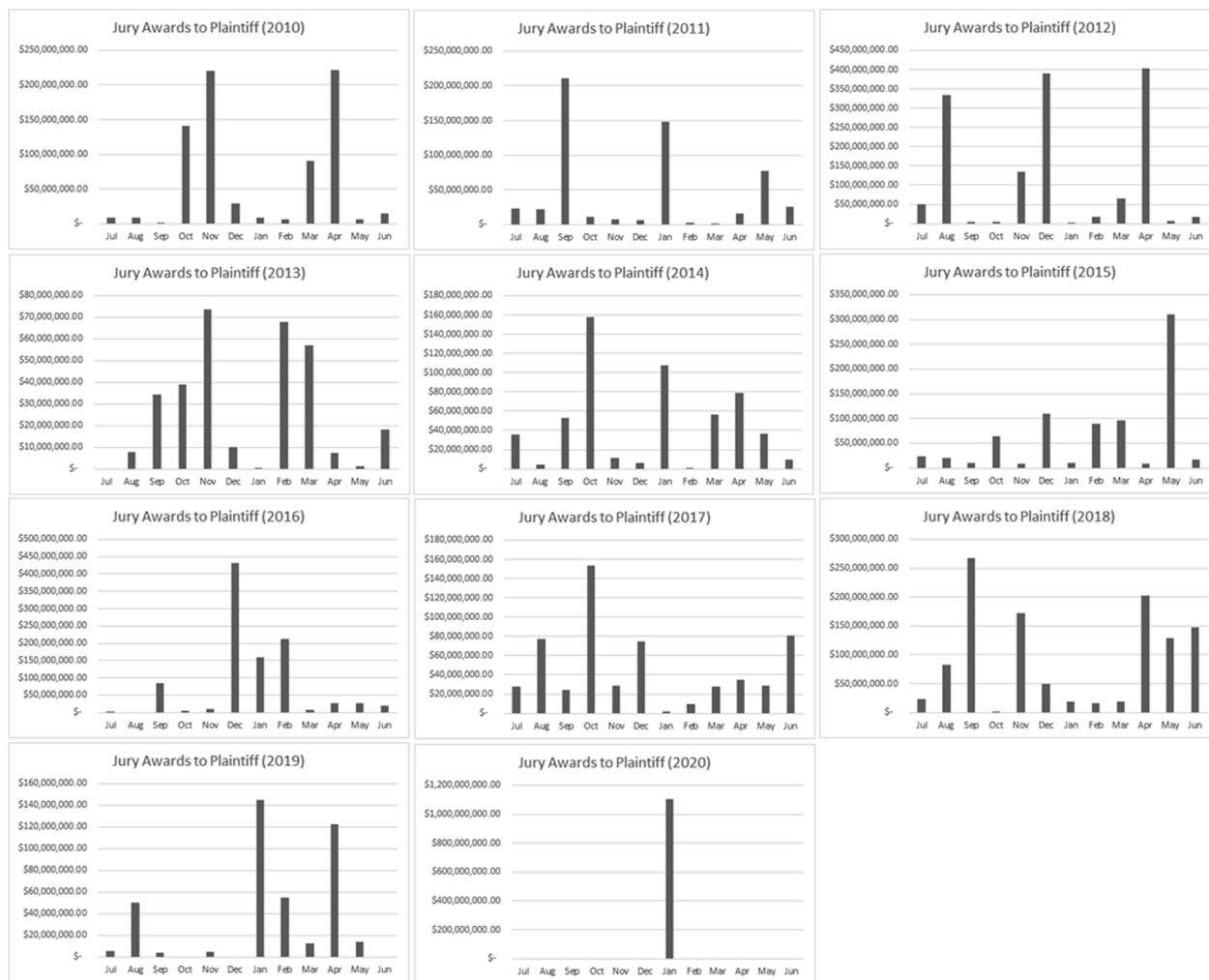
Figure 2. Percentage of plaintiff verdicts before a jury per month for the period 2010–2020.



The aggregate ten-year data seem to suggest that if there is any seasonal bias in jury verdicts, it is in July, at the height of summer, rather than in December, at the pinnacle of the winter holiday season.

Unfortunately, it is more difficult to discern any obvious trends in the data year over year, as shown in Figure 3. Unlike the aggregate data over the last ten years, there is no single month that repeatedly has the highest average dollar value of jury awards to plaintiffs.

Figure 3. Average dollar value of jury awards to plaintiffs per month for each year from 2010 to 2020.¹⁸



In fact, when looking at the top three months for average dollar values of jury awards to plaintiffs (only for 2010–2019 because in 2020 there was only data for January), the first-quarter months (January, February, March) appeared nine times, the second-quarter months (April, May, June) appeared eight times, and the fourth-quarter months (October, November, December) appeared nine times. Notably, the third-quarter months (July, August, September) appeared only four times in the top three months for average dollar values of jury awards to plaintiffs between 2010 and 2019. Thus, even year over year,

juries appear to be least friendly toward plaintiffs during the height of the summer.

It should be noted, however, that for any given month in any given year, the number of jury verdicts in favor of the plaintiff was relatively small (i.e., typically less than ten). This is shown in Table 2. With the number of plaintiff verdicts per month to analyze being typically less than ten, the average dollar value award can be easily distorted by a single very large or very small award. This may be one reason why it was difficult to discern any seasonal trends (other than the potential negative bias in the summer).

Table 2. Number of verdicts in the plaintiff's favor and average dollar value of jury awards to plaintiffs per month for each year from 2010 to 2020.

	2010		2011	
Month	Plaintiff Verdicts (#)	Jury Award (average \$)	Plaintiff Verdicts (#)	Jury Award (average \$)
July	4	\$ 8,986,017.00	4	\$ 23,350,000.00
August	4	\$ 8,174,214.00	6	\$ 22,310,822.00
September	9	\$ 355,193.00	5	\$210,427,005.00
October	5	\$141,500,956.00	6	\$ 10,773,277.00
November	6	\$220,993,802.00	8	\$ 7,107,598.00
December	8	\$ 28,643,332.00	5	\$ 6,185,730.00
January	8	\$ 8,287,567.00	8	\$148,082,741.00
February	12	\$ 6,636,638.00	7	\$ 2,898,835.00
March	14	\$ 89,981,304.00	10	\$ 1,481,535.00
April	10	\$221,330,793.00	8	\$ 15,991,546.00
May	6	\$ 5,779,846.00	6	\$ 76,664,584.00
June	10	\$ 14,942,638.00	4	\$ 25,760,336.00
	2012		2013	
Month	Plaintiff Verdicts(#)	Jury Award (average \$)	Plaintiff Verdicts (#)	Jury Award (average \$)
July	4	\$ 50,947,912.00	0	-
August	7	\$334,145,094.00	2	\$ 7,763,220.00
September	4	\$ 5,168,717.00	4	\$34,179,066.00
October	3	\$ 4,086,408.00	6	\$39,001,965.00
November	9	\$133,948,429.00	4	\$73,453,720.00
December	3	\$390,097,173.00	1	\$10,000,000.00
January	6	\$ 2,623,423.00	2	\$ 158,954.00
February	8	\$ 18,488,948.00	3	\$67,755,722.00
March	3	\$ 64,387,140.00	7	\$57,156,077.00
April	3	\$402,708,546.00	5	\$ 7,210,184.00
May	7	\$ 6,719,303.00	2	\$ 1,055,703.00
June	5	\$ 17,607,745.00	7	\$18,162,424.00

	2014		2015	
Month	Plaintiff Verdicts (#)	Jury Award (average \$)	Plaintiff Verdicts (#)	Jury Award (average \$)
July	1	\$ 35,423,997.00	1	\$ 23,850,000.00
August	3	\$ 4,506,698.00	4	\$ 20,458,956.00
September	7	\$ 52,557,532.00	4	\$ 9,945,083.00
October	8	\$157,465,815.00	7	\$ 63,431,955.00
November	9	\$ 11,672,313.00	4	\$ 8,125,941.00
December	4	\$ 6,342,272.00	2	\$109,811,783.00
January	5	\$107,230,818.00	5	\$ 9,589,846.00
February	2	\$ 313,139.00	7	\$ 90,242,646.00
March	6	\$ 56,074,167.00	6	\$ 96,911,986.00
April	7	\$ 79,269,573.00	4	\$ 8,894,440.00
May	4	\$ 36,536,126.00	4	\$310,247,996.00
June	2	\$ 9,556,868.00	4	\$ 17,692,173.00
	2016		2017	
Month	Plaintiff Verdicts (#)	Jury Award (average \$)	Plaintiff Verdicts (#)	Jury Award (average \$)
July	1	\$ 486,000.00	1	\$ 28,000,000.00
August	0	-	6	\$ 77,142,508.00
September	9	\$ 85,330,777.00	5	\$ 23,963,479.00
October	2	\$ 4,077,360.00	3	\$153,117,215.00
November	2	\$ 10,198,195.00	2	\$ 28,816,000.00
December	6	\$432,435,012.00	2	\$ 75,000,000.00
January	5	\$159,390,400.00	1	\$ 1,400,000.00
February	6	\$213,101,507.00	4	\$ 9,353,961.00
March	5	\$ 8,358,006.00	6	\$ 27,884,610.00
April	4	\$ 26,016,664.00	2	\$ 35,156,890.00
May	4	\$ 27,495,497.00	5	\$ 29,090,127.00
June	4	\$ 19,057,122.00	3	\$ 80,766,667.00

	2018		2019	
Month	Plaintiff Verdicts (#)	Jury Award (average \$)	Plaintiff Verdicts (#)	Jury Award (average \$)
July	6	\$ 22,711,600.00	2	\$ 5,688,103.00
August	9	\$ 82,978,663.00	1	\$ 49,920,000.00
September	1	\$268,000,000.00	2	\$ 4,104,726.00
October	1	\$ 1,250,000.00	0	-
November	6	\$172,437,951.00	1	\$ 4,937,874.00
December	4	\$ 49,016,921.00	0	-
January	3	\$ 19,005,259.00	1	\$145,100,000.00
February	4	\$ 15,872,114.00	4	\$ 54,733,066.00
March	3	\$ 19,093,362.00	3	\$ 12,650,615.00
April	5	\$202,572,702.00	2	\$122,881,263.00
May	4	\$129,050,414.00	8	\$ 13,821,828.00
June	6	\$146,773,868.00	0	-
	2020			
Month	Plaintiff Verdicts (#)	Jury Award (average \$)		
July	0	-		
August	0	-		
September	0	-		
October	0	-		
November	0	-		
December	0	-		
January	1	\$1,107,042,349		
February	0	-		
March	0	-		
April	0	-		
May	0	-		
June	0	-		

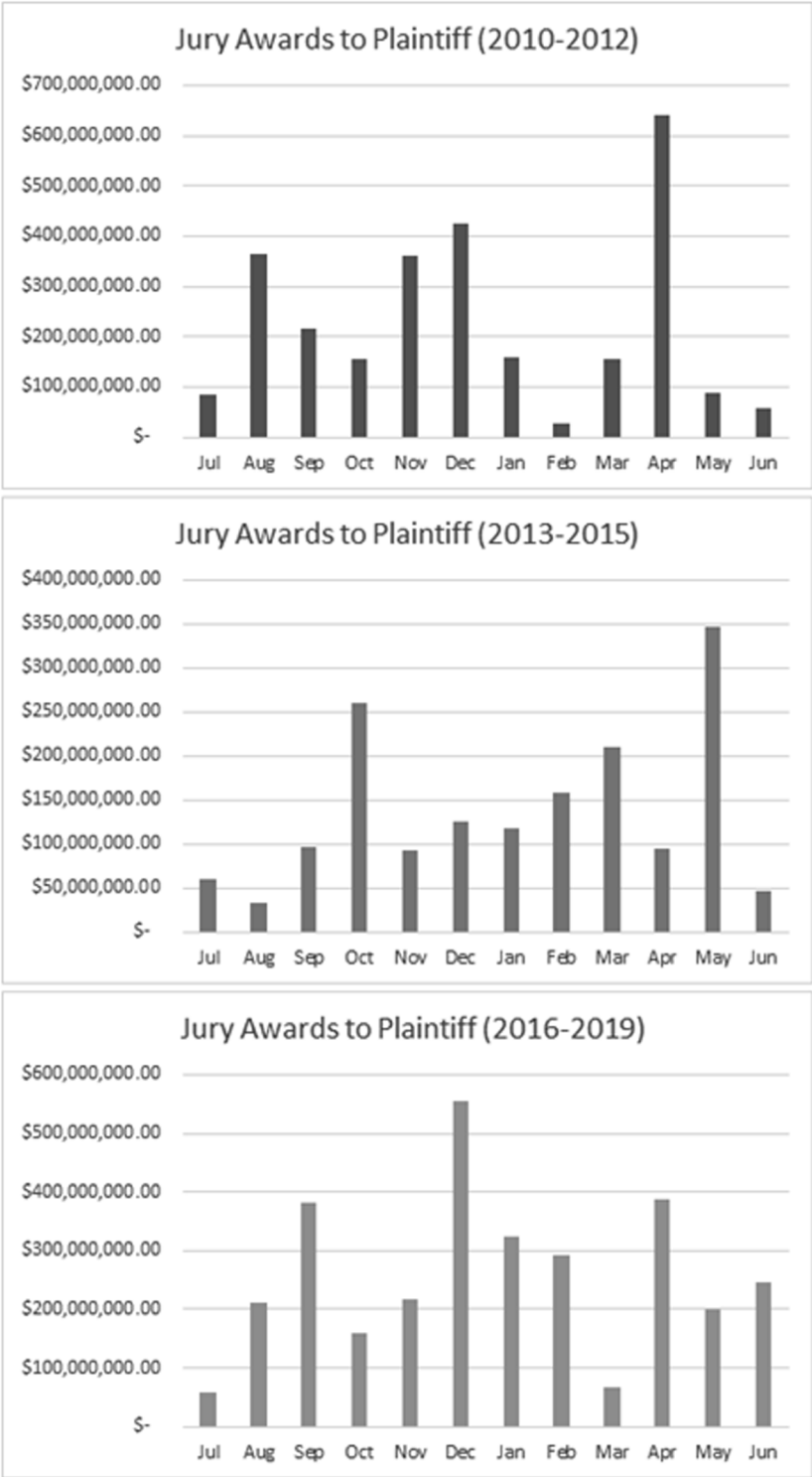
Since the number of plaintiff verdicts to analyze per month for any single year was relatively small, we also examined clusters of years. That is, we aggregated data

from 2010–2012, 2013–2015, and 2016–2019, as shown in Fig. 4. It can be seen that December exhibited the highest jury awards to patent infringement

plaintiffs by far during 2016–2019. December was also the second-highest month during 2010–2012, and the fifth-highest month during 2013–2015. Thus, while the trend of juries potentially favoring plaintiffs during

the winter holidays is strongest in the most recent years, there certainly do not appear to be any periods of time where any negative bias during the winter holidays can be seen.

Figure 4. Average dollar value of jury awards to plaintiffs per month for the periods 2010–2012 (top), 2013–2015 (mid), and 2016–2019 (bottom).



On the other hand, July is one of the bottom three months for average dollar value of jury awards in all three periods. The data are summarized in Table 3.

Table 3. Average dollar value of jury awards to plaintiffs per month for the periods 2010–2012, 2013–2015, and 2016–2019.

Month	2010–2012 Jury Awards (average \$)	2013–2015 Jury Award (average \$)	2016–2019 Jury Award (average \$)
Jul	\$ 83,283,929.00	\$ 59,273,997.00	\$ 56,885,703.00
Aug	\$ 364,630,130.00	\$ 32,728,874.00	\$ 210,041,171.00
Sep	\$ 215,950,915.00	\$ 96,681,681.00	\$ 381,398,982.00
Oct	\$ 156,360,641.00	\$ 259,899,735.00	\$ 158,444,575.00
Nov	\$ 362,049,829.00	\$ 93,251,974.00	\$ 216,390,020.00
Dec	\$ 424,926,235.00	\$ 126,154,055.00	\$ 556,451,933.00
Jan	\$ 158,993,731.00	\$ 116,979,618.00	\$ 324,895,659.00
Feb	\$ 28,024,421.00	\$ 158,311,507.00	\$ 293,060,648.00
Mar	\$ 155,849,979.00	\$ 210,142,230.00	\$ 67,986,593.00
Apr	\$ 640,030,885.00	\$ 95,374,197.00	\$ 386,627,519.00
May	\$ 89,163,733.00	\$ 347,839,825.00	\$ 199,457,866.00
Jun	\$ 58,310,719.00	\$ 45,411,465.00	\$ 246,597,657.00

Thus, once again, we see evidence that the jury awards to prevailing patent litigation plaintiffs are generally higher in December and are generally lower in July.

IV. Conclusion

In examining jury verdicts in patent litigation during 2010–2020, we saw no negative bias against plaintiffs in December. In fact, we saw that the average dollar value of jury awards in December was consistently higher than in other months of the year. Therefore, rather than being upset with plaintiffs for having to serve jury duty over the winter holidays, jurors appear to be more generous toward prevailing patent infringement plaintiffs during that time. Conversely, the average dollar value of jury awards in July was consistently among the lowest of any months of the year. Thus, it appears that any potential seasonal bias against prevailing patent infringement plaintiffs exists in the height of the summer rather than in the winter. Perhaps jurors are less upset about spending the holiday season in the courtroom compared with spending the beach season in the courtroom. Indeed, the data indicates that July is

the only month of the year when plaintiffs had a less than 50 percent chance of prevailing at a jury trial. While this paper only analyzed data for patent litigation cases, it would be interesting for subsequent studies to analyze other subjects for similar seasonal trends.

Endnotes

1. See, e.g., Jacobson, J., et al., Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion, *Journal of Empirical Legal Studies*, 8(S1), 99–119 (December 2011); Hermann, P.J., Predicting Verdicts in Personal Injury Cases, 1962 Ins. L.J. 505 (1962).
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 6. See, e.g., Hulbert, L. G., Parks, C. D., Chen, X., Nam, K., & Davis, J. H., The plaintiff bias in mock civil jury decision making: Consensus requirements, information format and amount of consensus, *Group Processes & Intergroup Relations*, 2(1), 59-77 (1999); Ruiz, G.M., Understanding the Pro-plaintiff Bias in Consumer Protection Legal Processes, *J. Consum. Policy*, 37, 113-141 (2014).
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 12. See, e.g., Swabb, T.L., Federal Circuit Cannot Stop Runaway Jury Awards in Patent Suits; Companies Should Insure Themselves Against this Risk, *Mealey's Litig. Rep.: Patents*, Sept. 5, 1995, at 11.
 13. See, e.g., Leibold, G.D., In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation, 67 U. Colo. L. Rev. 623 (1996); Shaw, B.Z., Judging Juries: Evaluating Renewed Proposals for Specialized Juries From a Public Choice Perspective, 2006 UCLA J.L. & Tech. 3 (2006); Moore, K.A., Jury Demands: Who's Asking?, 17 Berkeley Tech. L.J. 847 (2002).
 14. See, e.g., Sams, David & Neal, Tess & Brodsky, Stanley, Avoiding Jury Duty: Psychological and Legal Perspectives, *The Jury Expert*, 25, 4-8 (2013); Coffey, C.A. et al., An Examination of Website Advice to Avoid Jury Duty, *Court Review*, 52(3), 110-118 (2016).
 15. See, e.g., <https://www.lawfirms.com/resources/general-practice-/us-legal-system/5-legal-easy-ways-get-out-jury-duty>; <https://www.businessinsider.com/how-do-i-avoid-jury-duty-2013-12>; <https://www.legallanguage.com/legal-articles/avoid-jury-duty/>. Accessed on March 26, 2020.
 16. The database also contains settlement information, which was not relevant to our analysis in this paper.
 17. The database appeared to contain duplicate entries for jury awards where, for example, an issue at the district court was appealed and then remanded without disturbing the jury award value.
 18. As explained previously, at the time of writing this paper, the LexisNexis database did not contain any 2020 jury verdict data other than for January. ■

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LexisNexis®

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)988-7744 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

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