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FORUM SHOPPING IN PATENT CASES: DOES GEOGRAPHIC CHOICE AFFECT INNOVATION?

KIMBERLY A. MOORE*

This Article undertakes the first large-scale empirical analysis of patent enforcement in the district courts. The Article is organized around four major questions. What motivates parties to forum shop? Can variation in patent case resolution among jurisdictions be substantiated? Are jurisdictional variation and the resulting forum shopping good or efficient? Can forum shopping be reduced or eliminated?

The empirical results demonstrate that despite the creation of the Federal Circuit, choice of forum continues to play a critical role in the outcome of patent litigation. The data indicate that patent cases are not evenly dispersed throughout the ninety-four judicial districts or dispersed according to the relative size of the court's civil docket generally, but rather consolidated in a few select jurisdictions. The ten most frequently selected forums are examined in detail in an attempt to ascertain their appeal for patent holders. Noting procedural and substantive differences in adjudication of patent cases by these top ten jurisdictions, the Article determines that choice of forum is a multi-dimensional inquiry which is not easily explained.

The lack of uniformity in patent enforcement is problematic. With increasingly national competition among products, the patent jurisdiction and venue statutes allow plaintiffs to bring their patent

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suits in virtually any district in the country. Providing plaintiffs with many potential venues for bringing suit increases the ability of parties to forum shop. The Article concludes by considering whether the patent system might benefit from the increased predictability that could be achieved by a specialized trial court or a more limited venue statute.

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“Click your heels together three times and say, ‘There’s no place like home, there’s no place like home.’ ”¹

INTRODUCTION

Despite the overwhelming costs of patent litigation,² no recent research analyzing regional variation in the adjudication of patent cases exists.³ The dearth of work in this area may be attributable to an assumption that the Federal Circuit is a panacea for regional variation in patent case resolution.⁴ This assumption, however, is incorrect in a judicial system in which ninety-four district courts⁵ with

1. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

2. See AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION, REPORT OF ECONOMIC SURVEY 1999, at 72 (noting that an average patent infringement suit in California, for example, will cost each party over two million dollars in litigation expenses).

3. Two pre-Federal Circuit empirical studies verified the existence of appellate variation in patent case adjudication. See generally GLORIA K. KOENIG, PATENT INVALIDITY: A STATISTICAL AND SUBSTANTIVE ANALYSIS (1980) (providing systematic analysis of the details in patent decisions and patent office prosecution data); P.J. Federico, *Adjudicated Patents, 1948–54*, 38 J.P.O.S. 233 (1956) (providing statistical report of the number of adjudicated patents and the results of the adjudications from 1948–1954 using a database limited to published opinions).

4. E.g., Andrea Gerlin, *Patent Lawyers Forgo Sure Fees on a Bet*, WALL ST. J., June 24, 1994, at B1 (stating that the Federal Circuit, which has exclusive nationwide jurisdiction over all appeals from patent infringement suits, “wiped out all the screwy theories and forum shopping”); see also *C.R. Bard, Inc. v. Schwartz*, 716 F.2d 874, 878 (Fed. Cir. 1983) (“This court was formed to provide uniformity in the patent field and to prevent forum shopping.”). The Federal Circuit was created in 1982 in order to make patent law and its enforcement uniform and consistent. In its report on the Federal Courts Improvement Act of 1982, which created the Federal Circuit, the House stated:

Patent litigation long has been identified as a problem area, characterized by undue forum-shopping and unsettling inconsistency in adjudications. Based on the evidence it compiled during the course of thorough hearings on the subject, the Commission on Revision of the Federal Court Appellate System—created by Act of Congress—concluded that patent law is an area in which the application of the law to the facts of a case often produces different outcomes in different courtrooms in substantially similar cases. As a result, some circuit courts are regarded as “pro-patent” and other “anti-patent,” and much time and money is expended in “shopping” for a favorable venue. In a Commission survey of practitioners, the patent bar reported that uncertainty created by the lack of national law precedent was a significant problem; the Commission found patent law to be an area in which widespread forum-shopping was particularly acute.

H.R. REP. NO. 97-312, at 20–21 (1981) (footnotes omitted), *reprinted in* 1982 U.S.C.C.A.N. 11, 30–31; see also S. REP. NO. 97-275, at 5 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 15 (stating that “[t]he establishment of the Court of Appeals for the Federal Circuit also provides a forum that will increase doctrinal stability in the field of patent law”).

5. See Federal Judiciary, Frequently Asked Questions, at <http://www.uscourts.gov/faq.html#district> (last visited April 15, 2001) (on file with the North Carolina Law Review) (indicating that there are ninety-four district courts).

646 active federal judges⁶ around the country resolve patent cases in the first instance.

This Article undertakes the first large-scale empirical analysis of patent enforcement in the district courts after the creation of the Federal Circuit. My database includes every patent case that was terminated by any means (e.g., settlement, dismissal, judgment) from 1995 to 1999 (five years of data) in every district court (9615 cases) and every patent case that went to trial (1409 cases with 1943 separate claims) from the period 1983 to 1999 (seventeen years of data).

The empirical results presented in this Article demonstrate that despite the creation of the Federal Circuit, choice of forum continues to play a critical role in the outcome of patent litigation. The data indicate that patent cases are not dispersed evenly throughout the ninety-four judicial districts nor dispersed according to the relative size of the court's civil docket generally, but rather consolidated in a few select jurisdictions. This suggests that patent holders are actively selecting particular forums. The empirical results substantiate procedural and substantive differences in district court adjudication of patent cases. The differing procedures for resolving patent cases and differing potential outcomes create an environment in which forum shopping has a major impact on litigation.⁷

The lack of uniformity in patent enforcement is problematic in and of itself. The concern this inconsistency generates is greatly magnified when the patent holder has unfettered choice among the ninety-four district courts—escalating inconsistency into unpredictability. With increasingly national and international competition among products, the patent jurisdiction and venue statutes allow plaintiffs to bring their patent suits in virtually any district in the country. Providing plaintiffs with so many potential venues for bringing suit increases the ability of parties to forum shop. Much effort and expense result from the ability of parties to forum shop. The prevalence of forum shopping is a direct by-product of the existing statutory framework.

Forum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably. The idea

6. See LEONIDAS RALPH MECHAM, 1999 ANNUAL REPORT OF THE DIRECTOR, at 23, <http://www.uscourts.gov/judbus1999/contents.html> (on file with the North Carolina Law Review) (showing in Table 3 that in 1999 there were 646 judges).

7. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39–40 (1988) (Scalia, J., dissenting) (“Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum.”).

that some jurisdictions will be preferred because of bias towards one party is troubling. Forum shopping forces the acknowledgment that the promise of equal, consistent, and uniform application of justice—the legal positivist ideal—is unattainable in a system in which the law is administered by human beings.⁸ In addition to these normative implications, forum shopping creates economic inefficiency in the legal system. If all patent cases were resolved predictably and uniformly by the district courts, there would be no need for forum shopping. There would in fact be a reduction in litigation because parties would be more likely to settle if they could accurately forecast outcome.⁹

This Article addresses four major questions: What motivates litigants to forum shop? Can variation in patent case resolution among jurisdictions be substantiated? Is jurisdictional variation and the resulting forum shopping good or efficient? Can forum shopping be reduced or eliminated? Part I outlines how and why parties try to control forum selection. Focusing on the jurisdiction and venue laws for patent cases, this Part also examines where patent cases may be brought. Part II is the core empirical portion of the Article. It describes the data set used in this study, its development and composition, and the methodology used to analyze the data. The

8. Jim R. Carrigan, *Foreword to W. STUART DORNETTE & ROBERT R. CROSS, FEDERAL JUDICIARY ALMANAC, at v* (1986) (“The choice of forum and the choice of philosophical approach to a case will be critical choices as long as society chooses judges from the ranks of human beings.”).

9. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 324 (1991) (“[I]f plaintiffs and defendants always agreed in their predictions of trial outcomes, there would be no trials at all.”); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 259 (1999) (“[F]inding a settlement range depends on similar estimates of trial outcome by each side and the absence of strategic behavior.”). Of course, a party might choose not to settle for strategic reasons despite increased clarity in the ability to predict outcome. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 57 (1996) (noting that litigants may prefer resolution over settlement in order to obtain public vindication); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109–11 (1994) (suggesting that if the litigant views the opposition as morally blameworthy, he may be unlikely to accept an otherwise reasonable offer); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 79–80 (1997) (listing reasons litigants might not behave in accordance with the economic predictions). In patent cases, a party's interest in the ramifications of a final disposition of the infringement suit may be significant enough to eliminate efficient settlements. For example, one party may be particularly interested in having the court construe the patent claims because the construction could impact future development of products or future infringement suits. The accused infringer may strive to invalidate the patent to clear the way for additional product lines.

data show significant variations in district court resolution of patent cases. The variations may be broadly characterized in two ways: procedural and substantive. Both differences influence forum selection and outcome. Procedurally, I examine how district courts vary in speed of case resolution, the litigation stage at which resolution occurs, and the method by which district courts resolve patent disputes. Substantively, I examine how win rate data vary regionally. I categorize the outcome data by substantive issue to explore regional variations in validity, enforceability, infringement, and willfulness. Finally, I discuss the significant difference in patent holder win rate based on who selected the forum—patent holder or accused infringer.

Part III focuses on the pitfalls of forum shopping. Specifically, it considers whether the jurisdictional variation reflected in the data is appropriate or efficient for the legal system by examining its effects on the predictability, uniformity, and consistency of the law. Part IV recommends changes in patent case adjudication focusing on minimizing the continued viability of forum shopping. I discuss ways to eliminate forums and eliminate shopping in order to maximize efficiency and the innovation incentive animating the patent system. In particular, I consider the creation of a specialized trial court to decide patent cases or, in the alternative, more restrictive venue requirements to minimize the ability of parties to forum shop.

I. JURISDICTION IN PATENT CASES: ANYTHING GOES

A patent holder may initiate suit in any federal district court where personal jurisdiction and venue requirements are met. Personal jurisdiction is not unique to patent law and requires only that the defendant have purposeful minimum contacts with the district in which the case is brought.¹⁰ The minimum contacts rule provides fair warning to non-residents that they may be subject to litigation in that forum.¹¹ In patent cases, this inquiry involves the consideration of three factors: whether the defendant purposefully directed activities at residents of the district, whether the claim relates to the defendant's activities within the district, and whether personal jurisdiction over the defendant in the district is reasonable and fair.¹²

10. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985).

11. *See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565 (Fed. Cir. 1994).

12. *Akro Corp. v. Luker*, 45 F.3d 1541, 1545–46 (Fed. Cir. 1995); *see R. Scott Weide, Patent Enforcement Deterrence: Liberal Assertions of Personal Jurisdiction in Declaratory Judgment Actions*, 65 UMKC L. REV. 177, 178 (1996) (arguing that liberal findings of

Personal jurisdiction requirements are usually met if the defendant sells, offers to sell, or licenses others to sell products to residents of the forum.¹³ Hence, any company that operates in national commerce is likely subject to personal jurisdiction in many possible districts.

Venue is supposed to be a distinct and separate requirement from personal jurisdiction.¹⁴ Personal jurisdiction focuses on the power of the court over the parties, while venue focuses on the convenience of the particular jurisdiction for the parties to litigate the suit, particularly the defendant.¹⁵ Patent cases have their own venue statute that permits a patent suit to be brought in “the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”¹⁶ With respect to individuals, the defendant resides where she is domiciled.¹⁷ With respect to corporations, the defendant resides, for venue purposes, in any judicial district where personal

personal jurisdiction in patent declaratory judgment suits conflict with patent holder rights and public policy).

13. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (“[I]f the sale [by] a manufacturer or distributor . . . arises from the efforts of the [defendants] to serve, directly or indirectly, the market for its product . . . it is not unreasonable to subject it to suit in one of those states.”); *Beverly Hills Fan Co.*, 21 F.3d at 1565 (“The allegations are that defendants purposefully shipped the accused fan into Virginia through an established distribution channel. The cause of action for patent infringement is alleged to arise out of these activities. No more is usually required to establish specific jurisdiction.”); *Imagineering, Inc. v. Van Klassens, Inc.*, 797 F. Supp. 329, 331–32 (S.D.N.Y. 1992) (holding the sale of two allegedly infringing rocking chairs sufficient to establish personal jurisdiction over the defendants). Simply sending a cease-and-desist letter without more activity in a forum state is not enough to satisfy the minimum contacts requirement and subject the defendant to personal jurisdiction. *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360–61 (Fed. Cir. 1998); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997). Moreover, simply operating a Web site that advertises a product does not satisfy the minimum contacts requirement. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (“If the defendant enters into contracts [over the Internet] . . . personal jurisdiction is proper. . . . [Whereas, a] passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.” (citations omitted)).

14. See 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3801 (2d ed. 1986) (noting that venue and jurisdiction are distinct requirements).

15. See Charles S. Ryan, *The Expansion of Patent Venue Under the Judicial Improvements and Access to Justice Act*, 77 J. PAT. & TM. OFF. SOC’Y 85, 86 (1995); see also *Delta Air Lines, Inc. v. W. Conference of Teamsters*, 722 F. Supp. 725, 727 (N.D. Ga. 1989) (“[T]he fundamental and historical purpose of venue . . . is that there is a particular court or courts in which an action ‘should be brought’ for convenience of the parties, particularly that of defendant.”).

16. 28 U.S.C. § 1400(b) (1994).

17. 28 U.S.C. § 1400 (1994 & Supp. IV 1998).

jurisdiction is proper.¹⁸ Traditionally, the patent venue statute was the “sole and exclusive provision controlling venue in patent infringement actions” and was not supplemented by the general venue statute.¹⁹ They were distinct statutes.

The interpretation of the patent venue statute has been the subject of considerable judicial inquiry and expansion over the years. While an individual “resides” where she is domiciled, there has been some controversy as to the correct construction for corporations. Prior to the 1988 amendments to the general venue statute, the term “resides” in the patent venue statute was interpreted as permitting suit to be brought only in the corporation’s state of incorporation.²⁰ The second possible venue option was “where the defendant has committed acts of infringement and has a regular and established place of business.”²¹ This language was originally interpreted as a fixed physical facility requirement.²² The Federal Circuit broadened this test, interpreting the regular and established place of business language as meaning “whether the corporate defendant does its business in that district through a permanent and continuous presence there and not . . . whether it has a fixed physical presence.”²³

In 1988, Congress amended the general venue statute to provide that a corporate defendant “reside[s] in any judicial district in which it is subject to personal jurisdiction at the time the action is filed.”²⁴ This provision substantially broadened the number of potential venues where litigation could be initiated—from the state of incorporation to any district in which there is personal jurisdiction, which for national companies is effectively any jurisdiction. Despite the historical separation of the general venue and the patent venue

18. 28 U.S.C. § 1391(c) (1994); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1578 (Fed. Cir. 1990).

19. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957).

20. *See id.* at 229 (stating that a corporation “resides” under the patent venue statute in its state of incorporation).

21. 28 U.S.C. § 1400(b).

22. *Mastantuono v. Jacobsen Mfg. Co.*, 184 F. Supp. 178, 180 (S.D.N.Y. 1960). *Mastantuono* held that, in order to establish venue in patent litigation, a simple showing that the defendant was “doing business” in the jurisdiction would not suffice. Rather, the court stated, “It must appear that a defendant is regularly engaged in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district over which it exercises some measure of control.” *Id.*; *see also Dual Mfg. & Eng’g, Inc. v. Burris Indus., Inc.* 531 F.2d 1382, 1386–88 (7th Cir. 1976) (finding jurisdiction proper because defendant had a regular and established place of business in the judicial district).

23. *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985).

24. Pub. L. No. 87-748, 76 Stat. 744 (codified as amended at 28 U.S.C. § 1391(c) (1994)).

provisions, in *VE Holding Corp. v. Johnson Gas Appliance Co.*²⁵ the Federal Circuit determined that this modified definition of “resides” also applied to broaden the patent venue statute.²⁶ Hence, after the 1988 amendment, a corporation “resides,” for purposes of the patent venue statute, in any district where personal jurisdiction is proper.²⁷ This result rendered superfluous the patent venue statute for corporate defendants.

These liberalizations of the jurisdiction and venue statutes, combined with the technological feasibility and ease of national commerce, have greatly expanded the plaintiff’s choice of forum, which in turn has intensified and facilitated forum shopping. This means that national corporations may be sued in virtually any U.S. district court. Potential defendants do have several vehicles for leveling the playing field—namely, declaratory judgment actions and transfer statutes that permit them to request a change of venue when such a transfer is in “the interest of justice.”²⁸ Transfer motions, however, are not frequently granted, in part because courts give substantial deference to the plaintiff’s choice of forum in determining whether to transfer.²⁹ In determining whether to transfer an action to another district court where venue and jurisdiction are proper, the court considers the following factors: deference to the plaintiff’s choice of forum, convenience to the parties, convenience to witnesses and counsel, differences in costs of litigation in the two forums, the ease of access to sources of proof, congestion of the courts’ dockets, and the interest in having local controversies decided at home.³⁰

25. 917 F.2d 1574 (Fed. Cir. 1990).

26. The court’s conclusion was based on the language in the amended statute “[f]or purposes of venue under this chapter.” *Id.* at 1578 (quoting 28 U.S.C. § 1391(c)). The Federal Circuit held that the plain meaning of this language indicated congressional intent to expand the definition of “resides” everywhere that term was used in the chapter, including 28 U.S.C. § 1400(b). *Id.* at 1580.

27. *Id.* at 1578. Prior to *VE Holding*, “resides” under § 1400(b) meant the state of incorporation only. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957).

28. 28 U.S.C. § 1404(a) (1994 and Supp. IV 1998).

29. *See Hollyanne Corp. v. TFT, Inc.*, 199 F.3d 1304, 1307 n.2 (Fed. Cir. 1999) (“A transfer of venue for the convenience of the parties normally requires that the court give great weight to the plaintiff’s choice of forum and then weigh the convenience of both parties.”); KIMBERLY A. MOORE ET AL., *PATENT LITIGATION & STRATEGY* 80 (1999); *cf.* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 320 (1996) (arguing that a plaintiff’s choice of forum should only be given deference if that choice was based on demonstrable convenience).

30. *Gen. Foam Plastics Corp. v. Kraemer Exp. Corp.*, 806 F. Supp. 88, 89 (E.D. Va. 1992); *E. Scientific Mktg., Inc. v. Tekna-Seal, Inc.*, 696 F. Supp. 173, 180 n.13 (E.D. Va. 1988).

Given the breadth of these factors, transfer is a complicated inquiry very much at the discretion of the district court.³¹

Another option for a potential infringer is to act offensively in the forum selection process by bringing a declaratory judgment action. When the infringer brings a declaratory judgment action, it initiates the lawsuit and thereby chooses the forum.³² A declaratory judgment action, however, can only be brought if an actual controversy exists between the parties³³ because courts may not issue advisory opinions.³⁴ An actual controversy exists in patent disputes when there is (1) an explicit threat or other action by the patentee which creates in the infringer an objectively reasonable apprehension of being sued and (2) present potentially infringing activity or concrete steps taken with the intent to conduct such activity.³⁵ When the patentee sends the accused infringer a cease-and-desist letter accusing a specific product of infringement and threatening litigation if remedial action is not taken, declaratory judgment jurisdiction is easy for the accused infringer to establish.³⁶ In the absence of an explicit threat, courts consider the following in assessing whether there is a reasonable apprehension of suit: the patentee's willingness and capacity to sue (Has the patentee sued others? Has the patentee sued this defendant before?), the relationship between the parties at the time of the suit (Are the parties in on-going licensing negotiations?), and the nature of the contacts between the parties regarding this patent (Has the patent holder made any specific allegations? Has the patentee offered the defendant a license? Did the patentee contact the defendant directly or as part of a mass mailing?).³⁷

Personal jurisdiction and venue requirements for a declaratory judgment plaintiff are governed by the general venue statute rather

31. See 28 U.S.C. § 1404(a) (1994 & Supp. IV 1998) (granting discretion to the district court); *Reiffen v. Microsoft Corp.*, 104 F. Supp. 2d 48, 50 (D.D.C. 2000) (indicating that the district court has discretion to adjudicate motions to transfer on a case-by-case basis).

32. 28 U.S.C. § 2201(a) (1994).

33. *Id.*

34. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1326 (Fed. Cir. 1998); *Fina Oil & Chem. Co. v. Ewen*, 123 F.3d 1466, 1470 (Fed. Cir. 1997).

35. MOORE, *supra* note 29, at 29.

36. See, e.g., *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 812 (Fed. Cir. 1996) (explaining that a letter threatening litigation creates a reasonable apprehension of suit). *But see* Lisa A. Dolak, *Declaratory Judgment Jurisdiction in Patent Cases: Restoring the Balance Between the Patentee and the Accused Infringer*, 38 B.C. L. REV. 903, 944-47 (1997) (advocating a more liberal application of the actual controversy requirement for declaratory judgments in order to permit increased utilization of this equalizing tool).

37. MOORE, *supra* note 29, at 29.

than the specific patent venue statute³⁸ because a declaratory judgment action is not considered a “civil action for patent infringement.”³⁹ At present, the patent venue statute and the general venue statute are interpreted identically for corporations and turn on whether there is personal jurisdiction over the defendant.⁴⁰

Before litigation over personal jurisdiction and venue even begin, parties may forum shop with the intent of gaining the jurisdictional upperhand. Forum shopping involves “the practice of choosing the most favorable jurisdiction or court in which a claim might be heard.”⁴¹ In most civil litigation, forum shopping can occur horizontally or vertically. Vertical forum shopping is the choice between filing suit in state or federal court. If the plaintiff files suit in state court, the defendant may have the option of removing the suit to federal court under limited circumstances, such as diversity of citizenship.⁴² Generally, vertical forum shopping is not a concern in patent cases because federal district courts have original and exclusive subject matter jurisdiction over any civil action arising under the patent laws.⁴³ Horizontal forum shopping, the selection of a particular district court from the many different possible district courts, is the type of forum shopping that occurs in patent cases.

The selection of a forum initially belongs exclusively to the plaintiff who files the lawsuit. There are many reasons that a party may believe that a particular jurisdiction is preferable. In selecting a forum the plaintiff (or defendant in a declaratory judgment action) would likely consider the following: the knowledge, background, and experience of the judges; the judges’ previous experience with high technology or patent matters; the characteristics, predispositions, and biases of potential jurors; the attorney’s familiarity with the district and the judges in the district; the local rules of the district court; the practices of the judges in the district regarding whether they conduct

38. 28 U.S.C. § 1391(c) (1994 and Supp. IV 1998).

39. 28 U.S.C. § 1400 (1994 and Supp. IV 1998).

40. See *supra* notes 14–27 and accompanying text.

41. BLACK’S LAW DICTIONARY 666 (7th ed. 1999).

42. 28 U.S.C. § 1332 (1994 and Supp. IV 1998). Removal is generally permitted whenever the case could have been brought originally in federal court. See 28 U.S.C. § 1441(a) (1994).

43. 28 U.S.C. § 1338(a) (1994 and Supp. IV 1998). Courts determine if a case arises under the patent laws using the well-pleaded complaint rule. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988); see also Emmette F. Hale, III, *The “Arising Under” Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law*, 14 FLA. ST. U. L. REV. 229, 242–43 (1986). Some patent issues, such as disputes over licensing or assignments, can be brought in state court because they are a matter of state contract law rather than federal patent law.

Markman hearings; at what point in the litigation the claims will be construed; the type of evidence the judges will consider in construing the claims;⁴⁴ the court's docket and its speed in resolving cases; the reputation of the parties in the district; and, of course, traditional factors, such as the convenience for the parties, witnesses and attorneys.⁴⁵

Convenience issues once were the driving factor in venue selection for the parties. In this age of national and international commerce, however, convenience of the parties, witnesses, and location of evidence is becoming less significant in the parties' calculus than other considerations, particularly characteristics of the court such as speed, familiarity with technology, and familiarity with patent cases.⁴⁶ For example, a patent holder may prefer to initiate its lawsuit in a jurisdiction with sufficient familiarity with patent cases, such as the District of Delaware or the Eastern District of Virginia ("Rocket Docket"),⁴⁷ in the hope of an expedient resolution of their proprietary rights. The patent holder may believe that a fast jurisdiction will give the infringer less time to scour the earth looking for invalidating prior art and less time to mount a defense in general. The infringer may prefer the Northern District of California⁴⁸ because of a belief that it is likely to obtain a jury with more sophistication in

44. *Markman* hearings are evidentiary hearings held by district courts to assist the court in construing patent claims. District courts have discretion to conduct these hearings (or not conduct them) in any manner they see fit. They may construe the patent claims solely on the briefs submitted by the parties, or they may hold an evidentiary hearing (a mini-trial) with the presentation of extrinsic evidence on claim construction, including witness testimony, learned treatises, or other evidence of claim term meaning. *Markman* hearings are named after the Supreme Court decision, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391 (1996), which established that claim construction is the exclusive province of judges rather than juries.

45. In many areas of the law, the plaintiff may also consider the law of the appellate court (circuit court) in a particular forum. The creation of the United States Court of Appeals for the Federal Circuit has eliminated this consideration from the calculus. All patent infringement suits and declaratory judgment actions are appealed exclusively to the Federal Circuit. 28 U.S.C.A. § 1295(a) (1993 & West Supp. 2000). There is no shopping among the regional circuits.

46. Gita F. Rothschild, *Forum Shopping*, LITIGATION, Spring 1998, at 40, 40 ("But as cases have become bigger and the world has become smaller, lawyers are placing increasingly less emphasis on personal convenience.").

47. The Eastern District of Virginia has been dubbed the "Rocket Docket" because of the fast adjudication that occurs in the jurisdiction.

48. The Northern District of California is presently the only district with local procedural rules for patent cases mandating the procedure and practice the court will follow. N.D. CAL. CIV. P. 16-7(a); see also Mark L. Austrian & Shaun Mohler, *Timing is Everything in Patent Litigation—Fulfilling the Promise of Markman*, 9 FED. CIR. B.J. 227, 232-35 (1999) (discussing Northern District of California rules for patent cases).

high technology or computer technology because of the characteristics of the San Jose or Palo Alto population from which the jury would be pulled. The infringer may hope that a tech-savvy jury will be more likely to understand the technical distinctions between its device and the patent claims and would therefore be less likely to find infringement.⁴⁹

With borderless commerce the norm and with lax jurisdiction and venue requirements, plaintiffs in patent cases have an unfettered choice of where to bring suit. This Article attempts to ascertain whether forum really matters by determining whether there are statistically significant differences in adjudication by different districts.

II. EMPIRICAL FINDINGS

There is virtually no empirical literature on the impact of forum selection in civil litigation and none at all on patent cases after the creation of the Federal Circuit in 1982.⁵⁰ This Article presents the empirical results of a study of patent litigation from 1983 to 1999 in order to analyze all trials since the formation of the Federal Circuit. The Administrative Office of the United States Courts compiles statistics on terminated cases by subject matter, including the parties, docket number, dates of filing and termination of the suit, the monetary demand for damages by the plaintiff, the judicial district, the procedural circumstances of the termination (whether termination was by court action prior to trial, by settlement, or after a trial), whether the case was tried to a judge or jury, which party

49. Interestingly, both of these predictions turn out to be inaccurate in light of the empirical evidence. The District of Delaware has a relatively low patent holder win rate and the Northern District of California has the highest patent holder win rate. *See infra* Table 8 and accompanying text.

50. Professors Kevin Clermont and Theodore Eisenberg conducted a meaningful analysis of the impact of forum shopping on outcome in civil cases by examining different procedural methods of resolution practiced by different courts. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evils of Forum Shopping*, 80 CORNELL L. REV. 1507 (1995). Clermont and Eisenberg also considered outcome variation based on cases in which the plaintiff obtained her choice of forum versus cases that were successfully transferred by the defendant. *Id.* at 1530. They concluded that the existence of the section 1404(a) transfer option counters detriments of forum shopping. *Id.* Their research, which was based on cases adjudicated between 1979 and 1991, did not compare individual districts, consider tried issues, or study patent cases. Two pre-Federal Circuit empirical studies also substantiated the significance of forum shopping by documenting variations amongst the regional circuits in the resolution of patent cases. *See generally* KOENIG, *supra* note 3 (including a comparison of the decisions between the courts of appeals by circuit regarding adjudicated patents); Federico, *supra* note 3 (limiting analysis, however, to published opinions).

prevailed in the suit, and what relief was granted. I looked at the data provided by the Administrative Office for all patent cases terminated by any means in every district court during the five-year period from 1995 to 1999 (9615 cases), and I collected detailed information on all patent cases that went to trial during the seventeen-year period from 1983 to 1999 (1409 cases).⁵¹ For the tried cases, I acquired information including: (1) party names and docket number, (2) date the suit was filed and date of termination, (3) judicial district where the proceedings occurred, (4) stage of proceedings when the termination occurred and the manner of the termination (summary judgment, settlement, motion to dismiss, or trial, for example), (5) whether the adjudicator was judge or jury, (6) which party prevailed in the suit (patentee or alleged infringer⁵²), (7) which party was the patentee, (8) whether the fact finder held the patent valid or invalid,⁵³ (9) whether the fact finder held the patent enforceable or unenforceable, (10) whether the fact finder held the patent infringed or not infringed, and (11) whether the fact finder held the patent willfully infringed or not willfully infringed. This data set includes detailed information on every bench trial and every jury trial that has taken place in all patent cases in the last seventeen years in every district court. It consists of a defined population of 1409 cases comprising 1943 separate claims. This is the entire population of patent trials, not a sample study that chooses a limited number of trials and not only reported trials. There were 1409 patent cases that made it to trial, but only 1207 were actually resolved after trial by the

51. The Administrative Office was the original source for general information on the trial data, but I personally studied each trial reported to the Administrative Office to acquire more complete information. For a discussion of some deficiencies in the Administrative Office data, see Kimberly A. Moore, *Judge, Juries and Patent Cases: An Empirical Peek Inside the Black Box*, 98 MICH. L. REV. 365, 381 (2000). To overcome the deficiencies, I personally researched and verified the cases for which detailed information on outcome was collected in the data set of tried cases from 1983 to 1999 (1409 cases). These data were collected by researching public records, such as court opinions and news reports, and by collecting special verdict forms and judgment sheets from the district courts. For the data set of all cases terminated from 1995 to 1999, I relied upon the Administrative Office data regarding procedural termination stage and case filing and termination dates.

52. Throughout the results and tables, I will refer to the alleged infringer as the "infringer" for brevity.

53. When patents are issued by the United States Patent and Trademark Office (USPTO), they are presumed valid. 35 U.S.C.A. § 282 (West 1984 and Supp. 2000). Accordingly, the infringer has the burden of proving the patent invalid by clear and convincing evidence. *See Environ Prods., Inc. v. Furon Co.*, 215 F.3d 1261, 1265 (Fed. Cir. 2000). Since patents are already valid when validity is challenged, the court holds the patent invalid or not invalid. But for brevity, I will refer to patents as adjudicated valid or invalid throughout the tables and results.

fact finder. The other 202 were either settled during trial, or the court ruled on directed verdict or judgment as a matter of law prior to resolution by the fact finder.

In the next Subpart, I analyze these data to highlight which districts are selected most often by plaintiffs for patent suits and explore the speed of resolution, the stage of resolution, and the resolution mechanism. For each of these issues, I consider whether resolution differs by region. I also examine who selects forum to determine whether choice significantly impacts outcome.

A. *Where the Patent Cases Are Brought*

A preliminary approach to determining how much forum shopping exists is to examine whether patent cases are equally dispersed among the country's ninety-four district courts or largely consolidated in a few regions. The ten jurisdictions with the largest number of patent cases resolved between 1995 and 1999 are contained in Table 1.

	District	# of patent cases	% of all patent cases	% of all civil cases ⁵⁴	Ratio of patent cases to civil cases
1	C.D. Cal.	870	9.1	4.2	2.2
2	N.D. Cal.	606	6.3	2.3	2.7
3	N.D. Ill.	569	5.9	3.4	1.7
4	S.D.N.Y.	394	4.1	4.1	1.0
5	D. Mass.	319	3.3	1.4	2.4
6	D. Del.	308	3.2	0.3	10.7
7	S.D. Fla.	302	3.1	2.5	1.2
8	E.D. Va.	288	3.0	1.7	1.8
9	D.N.J.	286	3.0	2.6	1.2
10	D. Minn.	276	2.9	1.0	2.9

These data indicate that most patent cases are brought in only a handful of jurisdictions. As Table 1 reflects, these regions do not

54. The data in this column are derived from the Administrative Office annual reports. 1999 ADMIN. OFF. U.S. CTS. ANN. REP., at Table C (1995 to 1999) (on file with the North Carolina Law Review).

have more patent cases simply by virtue of the fact that they have larger dockets in general. The top five district courts have 29% of all patent cases terminated in the ninety-four district courts during this five-year period, but only 15% of all civil case terminations during the same period. The top ten jurisdictions combined have 44% of all patent cases terminated, but only 23.5% of all civil cases terminated. The case distribution in a district like the Southern District of New York, which had 4.1% of all patent terminations from 1995 to 1999 and 4.1% of all civil case terminations from 1995 to 1999, does not raise any red flags. The ratio of patent cases to civil cases is 1.0. However, jurisdictions like Delaware, Massachusetts, the Northern and Central Districts of California, the Eastern District of Virginia, the Northern District of Illinois, and Minnesota, where there are sizeable differences between civil case terminations and patent case terminations, raise questions. Each of these jurisdictions handles a much higher percentage of the nationwide patent caseload than they do of all civil cases.

Because the size of the dockets does not adequately explain the consolidation of patent cases in particular districts, there must be a perceived or real difference between these jurisdictions and others that explains the higher number of patent case filings. It could be that these jurisdictions contain clusters of high-tech industries; certainly this could be true for the Northern District of California, which is home to Silicon Valley. Perhaps increased technological wealth and thriving industry translate into more patents and therefore more patent disputes. To evaluate this hypothesis, Table 2 shows the number of patents granted in each state from 1995 to 1999.⁵⁵

55. The data for this table (excluding the last column) were derived from the USPTO Web site. USPTO, Statistical Reports Available for Viewing, at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/tafp.html> (last visited Apr. 15, 2001) (listing statistics on patents granted each year) (on file with the North Carolina Law Review).

Table 2: Number of Patents Granted by State from 1995–1999

Ranking by # of Patents Granted	State	# of Patents Granted	% of Patents Granted to U.S. Parties	% of Patent Cases by State ⁵⁶
1	California	63,590	18.6	18.7
2	New York	27,099	7.9	7.7
3	Texas	23,825	7.0	6.8
4	New Jersey	16,786	4.9	3.0
5	Illinois	16,486	4.8	6.4
6	Michigan	15,986	4.7	3.6
7	Pennsylvania	15,386	4.5	3.4
8	Ohio	14,382	4.2	3.6
9	Massachusetts	14,122	4.1	3.3
10	Florida	11,511	3.4	5.3
11	Minnesota	10,380	3.0	2.9
21	Virginia	4593	1.3	3.2
32	Delaware	2049	0.6	3.2

The data presented in Table 2 have several shortcomings. First, the United States Patent and Trademark Office (USPTO) data consider the number of patents granted in the entire state and do not break down the state grants by judicial district. For example, California, which is responsible for approximately twice as many patent grants as the next closest state, is composed of four judicial districts. There is no way to determine which of these four districts is responsible for the bulk of the patent grants or whether the grants are equally divided among the four districts.⁵⁷ Second, the USPTO classifies the state of patent origin according to the state of residence of the first named inventor. This classification may not accurately reflect the state of origin of the technology, because inventors may be listed in any order, alphabetical or otherwise. Moreover, these data do not reflect the assignee's location, and it is the assignee rather than the individual inventors that generally brings a lawsuit to enforce the

56. This data includes all patent case terminations in all judicial districts within a particular state.

57. This is not a problem when analyzing single-district states like Delaware and Massachusetts.

patent.⁵⁸ Finally, it could be that the location of the companies bringing patent infringement suits does not correspond to the states where they bring suit despite similar patent grant and case data. For example, a Massachusetts company could bring suit in New York, and a New York company could bring suit in Massachusetts.

Despite these shortcomings, Table 2 does suggest that more patent cases may be filed in some jurisdictions because they simply have more technology as reflected in patent grants. This holds true for California districts which comprise 18.7% of all patent case terminations (C.D. Cal. (9.1%), N.D. Cal. (6.3%), E.D. Cal. (.7%), and S.D. Cal. (2.6%)) and 18.6% of all patents granted during the same time period. Similarly, New York, Texas, and Minnesota patent case percentages approximate their national patent grant percentages.⁵⁹ These data suggest that at least in these jurisdictions, high patent case filings correlate to clusters of high tech industry. In these regions, parties may bring their lawsuits on their own turf because they perceive a home-field advantage or because the jurisdiction is simply the most convenient forum in which to litigate their dispute.⁶⁰

For jurisdictions such as Virginia and Delaware, the presence of patent seeking companies within their borders does not explain the high number of patent cases filed. Delaware is sixth in terms of the number of patent cases terminated with 3.2% of the total patent cases, yet it is thirty-second among the fifty states in terms of patents granted (0.6%) during the same time period. Virginia is eighth in patent cases (3.2%) but twenty-first in patent grants (1.3%). In short, these regions are not selected because they have clusters of high technology within their borders. Although patent grant data may indicate that in some jurisdictions clusters of patent seeking companies could be responsible for the high percentages of patent

58. Researching the principal place of business or headquarters of the parties involved in the lawsuit would likely be a more accurate way of assessing whether individual parties are engaging in forum shopping that reflect a selection based on home-field advantage.

59. As discussed above, there is no difference, however, between the percent of patent filings in the Southern District of New York and the percent of civil filings generally. It is possible that the Southern District of New York's patent case percentage is consistent with its civil docket generally and also consistent with the quantity of technology as measured by patent grants.

60. These conclusions are subject to the caveats discussed above with regard to the shortcomings of the USPTO data and, in particular, the fact that state of origin of the first named inventor may not reflect the location of the party who owns the patent and brings the suit. See *supra* note 51 and accompanying text.

cases filed, in other jurisdictions forum shopping is based upon less obvious factors.

This evidence indicates that the location of the manufacturing facility no longer dictates forum and that with increasingly national commerce plaintiffs have a virtually limitless choice of forum. In those regions with a higher concentration of industry, companies might perceive a home-field advantage or perceive the judges or juries in these regions to be favorable. Some forums are selected for convenience of trial counsel. Cases are being filed in these regions not because of limiting jurisdiction and venue options, but rather because plaintiffs (which are predominantly patent holders) prefer these regions for some reason. In the following Subparts, I examine the procedural and substantive differences in adjudication of patent cases to ascertain whether the data can provide any explanation for forum selection.

B. Procedural Variations: How Patent Cases Are Resolved by District Courts

It is indisputable that there are procedural differences in how various district courts handle patent cases. For example, the Northern District of California has individual procedural rules regarding patent cases, which were adopted to unify and streamline procedures for adjudicating patent cases in that jurisdiction.⁶¹ These rules apply to both patent infringement actions and declaratory judgment actions brought by the accused infringer.⁶² Other jurisdictions, like the District of Delaware, have uniform jury instructions for patent cases in order to eliminate substantive difficulties that may arise in jury instructions. Standard district court rules and jury instructions undoubtedly help reduce some variation in adjudication within the district, but because the application of these rules is limited to the individual district, they do not decrease forum shopping between districts.⁶³ This Subpart examines whether there is regional variation in the speed with which districts adjudicate patent cases and the way in which these cases are resolved.

61. N.D. CAL. CIV. P. 16-7(a) to -8; *see also* Austrian & Mohler, *supra* note 48, at 232-35 (discussing Northern District of California rules for patent cases).

62. N.D. CAL. CIV. P. 16-7(a) to -8.

63. *Cf.* Donald Dunner & Gerald Mossinghoff, *Increasing Certainty in Patent Litigation: The Need for Federal Circuit Approved Pattern Jury Instructions*, 10 FED. CIR. B.J. 273 (2000) (arguing that the Federal Circuit should issue standard patent jury instructions to increase consistency and certainty in patent cases).

1. Speed of Adjudication

Speed of adjudication is an important factor in selecting a forum. Quick resolution may be preferable for several reasons. It limits the amount of time the defendant has to prepare for trial and therefore impacts its ability to mount a defense.⁶⁴ It also limits the litigation expenses associated with the case. A case that is resolved in 0.43 years may be less expensive than one that lingers on for 1.5 years.⁶⁵ Expedient resolution may also be particularly important to the patent holder in order to obtain a speedy injunction to prevent further infringement, to halt price erosion, and to preserve market share.⁶⁶ Hence, plaintiffs may prefer to file in district courts with a track record of fast resolution.

The mean time for resolution of all 9615 patent cases filed in the district courts from 1995 to 1999 is 1.12 years. Tables 3 and 4 list the quickest and slowest districts for resolving patent cases from 1995 to 1999. The length of the lawsuit is measured from the filing date of the complaint to the final resolution of the case.

Table 3: Quickest Judicial Districts with at Least 50 Cases

District	# of Cases	Mean # of Years
E.D. Va.	288	.43
W.D. Wis.	105	.60
E.D. La.	53	.75
E.D. Pa.	205	.76
W.D. Wash.	180	.77

64. For example, the defendant will have less time to "scorch the earth" seeking potentially invalidating prior art.

65. Of course, the parties could have more people work on the shorter case or spend more time on it, then the litigation expenses could be the same as the case lasting one and a half years.

66. George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 361, 363 (1995).

Table 4: Slowest Judicial Districts with at least 50 Cases

District	# of Cases	Mean # of Years
W.D.N.Y.	75	1.97
W.D. Pa.	93	1.60
N.D.N.Y.	61	1.59
D. Conn.	149	1.53
S.D. Ind.	87	1.47

Three of the five fastest districts are districts in the “top twenty” in terms of number of patent cases, and none of the five slowest districts hit the top twenty. Causation is unclear. Perhaps plaintiffs in patent cases gravitate towards districts known for faster resolution, or it could be that with exposure to more patent cases particular districts become more efficient at resolving these types of cases. This theory may explain why the Eastern District of Virginia has 3% of all patent terminations, despite having only 1.7% of all civil litigation. Patent holders prefer the “Rocket Docket” for filing patent infringement suits. This theory also explains the high number of patent cases transferred from the Eastern District of Virginia (16%).⁶⁷ In fact, in many cases that are transferred from Virginia the plaintiff explicitly argues that its choice of Virginia was based at least in part on the efficiency of Virginia’s docket.⁶⁸ However, plaintiffs’ collective enthusiasm for Delaware and Massachusetts, both slow districts, remains unexplained.

2. Procedural Progress at Termination

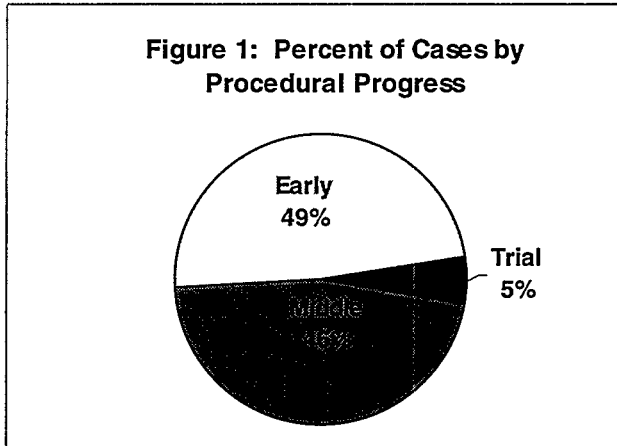
I examined the Administrative Office database to ascertain at what litigation stage patent cases are normally resolved.⁶⁹ The database of all patent cases terminated from 1995 to 1999 includes information on how far the case proceeded at the time judgment was entered. I grouped these codes into “early,” “middle” and “trial.” “Early” indicates that the case was terminated before any significant

67. See Table 7 *infra*.

68. See, e.g., *Acterna v. Adtech, Inc.*, 129 F. Supp. 2d 936, 937 (2001).

69. I am relying on the reportings from the district court to the Administrative Office regarding procedural termination mechanisms. I have not independently verified the 9615 cases reported with regard to whether the Administrative Office data accurately reported their procedural dispositions.

court action. “Trial” indicates that the case was terminated during or after a trial began. “Middle” includes all other termination times (after motion, after hearing, after pre-trial conference, etc.). As Figure 1 shows, few patent cases are resolved during or after trial; most patent cases are resolved prior to trial.

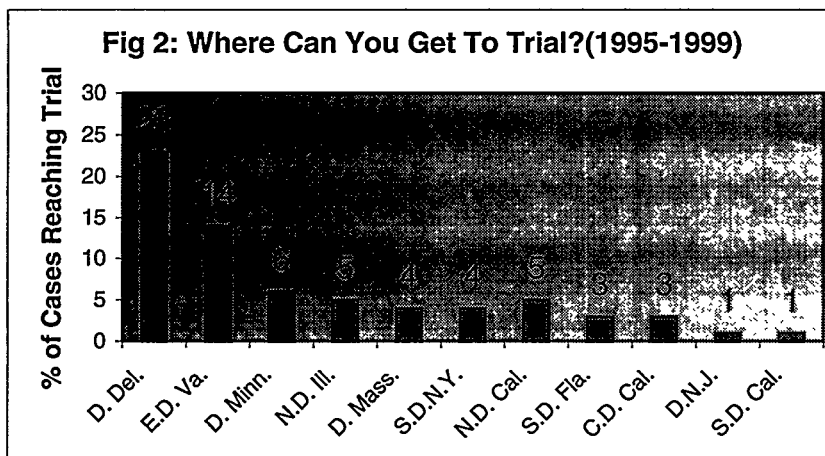


It is helpful to compare Figure 1 with similar data for individual districts to determine how much variation exists regionally. This variation does not explain why more cases are filed in the top ten jurisdictions because, as Figure 2 demonstrates, there is considerable regional variation among these courts regarding chances of getting to trial.⁷⁰ Hence, if the plaintiff’s goal is to get to trial rather than have the case forced into settlement or be resolved on summary judgment, Delaware⁷¹ or Virginia would be preferable regions. Table 5 shows the procedural stage at which the top ten jurisdictions resolve patent cases.

70. This figure measures cases that went to trial—not the number of claims or issues that were ultimately tried by a fact finder. Some cases that make it to trial are actually resolved during trial by dispositive motion or settled on the courtroom steps prior to a verdict by the fact finder.

71. Curiously, among the top jurisdictions, Delaware has the highest percentage of cases going to trial. Delaware judges (there are only four active district court judges) have a lot of exposure to and familiarity with patent cases. Under such circumstances, one might think judges with this experience might be more inclined to resolve cases by dispositive motion.

Perhaps Delaware has such a high percentage of patent case filings precisely because there are only four active district court judges—the “better the devil you know” theory. Attorneys may simply feel more comfortable filing in Delaware because of their familiarity with the judges and their practices in patent cases.



As Table 5 indicates, the top five jurisdictions (in terms of number of patent cases) generally resolve cases earlier (i.e., no court action) than the national average (49% early resolution). In fact, the Northern District of California resolves 70% of all patent cases early as compared with Minnesota's 34% and Delaware's 31%.⁷² Very few cases in the top five districts see the inside of the courtroom. Patent holders may prefer regions with a history of early resolution of patent disputes both because of the transaction cost advantages and because these jurisdictions are less likely to threaten the continued validity and enforceability of their patent rights. If jurisdictions with high percentages of early case resolution are forcing more settlements than other regions, risk averse patent holders may gravitate towards these forums, as they would be safe havens for their patents.

72. It is interesting to note the stark contrast between the District of Delaware, with its 23% trial rate, and its geographic neighbor, the District of New Jersey, with its 1% trial rate. Clearly geographic location does not explain procedural resolution mechanisms.

Table 5: Procedural Stage of Resolution

District	Early	Middle	Trial
C.D. Cal.	70%	27%	3%
N.D. Cal.	71%	44%	5%
N.D. Ill.	53%	42%	5%
S.D.N.Y.	63%	33%	4%
D. Mass.	56%	40%	4%
D. Del.	31%	46%	23%
S.D. Fla.	55%	42%	3%
E.D. Va.	44%	42%	14%
D.N.J.	40%	59%	1%
D. Minn.	34%	60%	6%

3. Method of Disposition

The database of all patent cases from 1995 to 1999 also indicates the procedural device used to dispose of the case. Over 83% of the patent case judgments have one of the following codes: consent judgment or settlement, default judgment, transfer or remand (transferred to another district or remanded to a state court), judgment on trial or directed verdict during trial, or judgment on pre-trial motion (such as a Rule 12⁷³ or Rule 56⁷⁴ motion).⁷⁵ Figure 3 shows how these methods of disposition appear in the database.

Another way of looking at the disposition method data is to compare dismissals with judgments. Of the 9615 cases, 68% were ultimately dismissed,⁷⁶ 6% were remanded or transferred, and 26% were disposed of by entering a judgment.⁷⁷

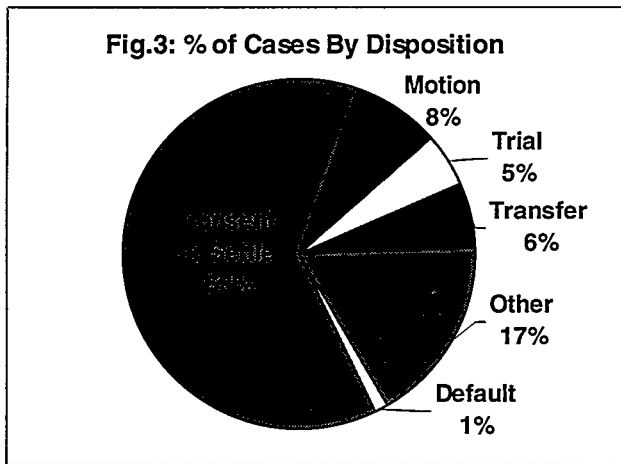
73. FED. R. CIV. P. 12.

74. FED. R. CIV. P. 56.

75. The other judgments bear unusual codes, such as dismissed for want of prosecution, dismissed for other, judgment on other, judgment on stay pending bankruptcy, statistical closing, or award of arbitrator. These codes are excluded from Figure 3.

76. Dismissals include the following codes: want of prosecution, lack of jurisdiction, voluntary, or settlement.

77. Judgment codes include the following dispositions: default, consent, pretrial motion, award of arbitrator, stay pending bankruptcy, jury verdict, court trial, directed verdict, or statistical closing.



The fact that so many patent cases are resolved via settlement, voluntary dismissal, or consent judgment warrants further exploration. Isolating just the 6007 cases (76% of the data set) which were resolved via settlement, Table 6 indicates that if settlement is going to occur, it will usually occur early in the litigation process before the parties have invested a substantial amount of litigation costs.

Table 6: Settlement Data

Procedural Process at Settlement	% of Settled Cases
Before Any Court Action	34%
Mid-litigation	51%
After Pre-trial Conference	14%
During or After Trial	1%

Table 7 contains detailed data on how the top ten jurisdictions varied according to the procedural disposition of the cases.

Table 7: Method of Disposing of Case					
District	Consent or Settle	Motion	Judgment at Trial⁷⁸	Transfer	Default
C.D. Cal.	62%	7%	2%	4%	2%
N.D. Cal.	73%	9%	4%	3%	0%
N.D. Ill.	69%	8%	5%	6%	2%
S.D.N.Y.	49%	5%	4%	5%	2%
D. Mass.	60%	4%	3%	3%	0%
D. Del.	45%	2%	15%	7%	0%
S.D. Fla.	50%	7%	2%	5%	1%
E.D. Va.	53%	4%	4%	16%	0%
D.N.J.	68%	5%	1%	6%	0%
D. Minn.	73%	6%	5%	1%	0%

As Table 7 shows, the procedural means of adjudication for the top ten jurisdictions varies by region. Many of the top ten district courts have a high percentage of patent cases resolved via settlement, consent judgment, or voluntary dismissal. Patent holders might prefer regions that force early settlement of their claims, which generally insulate their patents from the possible invalidity and unenforceability that could result from a trial.⁷⁹ Patent holders have more at stake than the infringers because, should the case proceed to trial, the patent could be invalidated or rendered unenforceable, which would affect the patent holder's ability to secure damages not only against the infringer involved in the suit, but against all potential infringers in the market. The impact of asymmetrical stakes between litigating parties has been widely studied.⁸⁰ When stakes are

78. To the extent that these numbers differ from the trial percentages in Figure 2 and Table 5, it is because these numbers reflect judgments on jury verdicts and court trials. Earlier numbers on how many cases reached the trial stage are accurate, but not all of the cases that reach trial are ultimately resolved on jury or court verdict. Some cases may settle during trial or be resolved on judgment as a matter of law (JMOL).

79. Early disposition may be an effect, rather than a cause, of forum shopping. That is, the deluge of claims has caused the jurisdiction to favor settlements.

80. See generally Kathleen Engelmann & Bradford Cornell, *Measuring the Cost of Corporate Litigation: Five Case Studies*, 17 J. LEGAL STUD. 377 (1988) (studying asymmetric stakes); Jeffrey S. Parker, *Daubert's Debut: The Supreme Court, The Economics of Scientific Evidence, and the Adversarial System*, 4 SUP. CT. ECON. REV. 1,

asymmetrical, the party with more at stake is more likely to desire settlement in close cases and only be willing to proceed to trial in cases in which they have a greater chance of success.⁸¹ This could explain the preference of patent holders who file suit in jurisdictions with a higher than average rate of early settlement. Patent holders may also prefer regions with high rates of settlement in order to acquire a list of licensees for their patent. Licensees indicate industry respect for the patent, which has several benefits. Licenses are evidence of the non-obviousness of the patent claims⁸² and are therefore useful if the validity of the patent is challenged. Licenses may also be useful evidence for determining a reasonable royalty rate for patent damages.⁸³ Finally, a list of licensees may help the patent holder enforce its patent absent the need for litigation. Evidence that competitors capitulated and licensed the patent may make it easier for the patent holder to secure future licenses.

Notice that jurisdictions such as Delaware and the Eastern District of Virginia have very high transfer rates for patent cases. It may well be because of their speed and/or perceived expertise or bias, a greater number of cases with no real link to the jurisdiction are routinely filed there.⁸⁴ Such filings are further evidence that plaintiffs

43–47 (1995) (noting that changes in the law of evidence will not alter problems such as asymmetrical stakes); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 24–25 (1984) (noting that “there are many situations . . . in which the resolution of the dispute affects one of the parties beyond the dollar amount at stake alone”); Joel Waldfoegel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J.L. & ECON. 451, 474 (1998) (finding that “information is less asymmetric among the parties proceeding to trial than among the parties to all filed cases”).

81. See Priest & Klein, *supra* note 80, at 24–25 (noting that when stakes are asymmetrical, such as when one party has a greater interest in precedent than the other, the party with higher stakes is more likely to be victorious in litigation because it is likely to proceed to trial only on cases in which it has a greater chance of winning).

82. *In re Rouffet*, 149 F.3d 1350, 1355 (Fed. Cir. 1998) (holding the existence of licenses should be considered in an obviousness inquiry as it is evidence of industry respect for the patent); *Litton Sys., Inc. v. Honeywell, Inc.*, 87 F.3d 1559, 1569–70 (Fed. Cir. 1996) (noting that objective considerations, such as the existence of licenses, are “invariably relevant” to an obviousness determination).

83. *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1109 (Fed. Cir. 1996) (holding that in assessing damages, royalty rates for other licenses can be considered); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078 (Fed. Cir. 1983) (holding that a reasonable royalty damage award may be based on an established royalty amount). Preexisting licensing rates should be a floor on damage awards, not a ceiling, since they are generally the result of voluntary agreement obviating the need for litigation. See *Maxwell*, 86 F.3d at 1109–10 (“The fact that an infringer had to be ordered by a court to pay damages, rather than agreeing to a reasonable royalty, is also relevant.”).

84. See, e.g., *Acterna v. Aditech, Inc.*, 129 F. Supp. 2d 936, 937 (2001) (rejecting arguments by the plaintiff that efficiency of the court’s docket was a basis for venue when

forum shop. With transfer generally difficult to obtain because of the deference given to a plaintiff's choice of forum,⁸⁵ a high number of transferred cases indicates that those cases had virtually no tie to the forum in which they were filed.

C. *Substantive Variation: How Win Rates Differ by District*

All of the analysis for this Subpart is performed on the data set of tried cases from 1983 to 1999 (1409 cases, 1943 claims).⁸⁶ In this Subpart, I examine whether patent holder win rates vary by district, which could explain preferences for certain forums, assuming that the parties are aware of these win rate variations.⁸⁷

1. Overall Patent Holder Win Rate by District

Overall, patentees won 58% of all patent suits.⁸⁸ These data indicate a statistically significant difference in win rate for the patentee and infringer by suit ($p < .001$). Hence we can reject with 99.9% confidence the null hypothesis that either party (patentee or alleged infringer) has an equal chance of winning a patent lawsuit.⁸⁹ How does this overall win rate compare with the win rate in each individual judicial district? Plaintiffs rush to forums in which they think they have the greatest chances of success. The descriptive statistics listed in Table 8 on the ten jurisdictions with the largest

the only other tie to Virginia was sales activity); Wayne L. Stoner, *Rocket Docket: Still an Alternative?*, 572 PLI/Pat 73, 77–79 (1999) (suggesting that the Eastern District of Virginia is increasingly transferring cases to other districts in order to combat filings by parties with little or no connection to the forum who file in Virginia to receive expedited adjudication of their patent claims).

85. Clermont & Eisenberg, *supra* note 50, at 1529 (reporting that in a study of civil cases, transfer motions occur in less than five percent of cases and they are successful about forty-five percent of the time).

86. The Administrative Office was the origin of the data. I verified and expanded these data to make more detailed findings.

87. Although lawyers and other repeat players in patent litigation may have instincts regarding certain forums, no comprehensive data such as those provided here were available prior to this Article.

88. See Moore, *supra* note 51, at 385 (offering possible explanations for the 58% patent holder win rate).

89. The null hypothesis posits “no difference” in outcome or “no relationship” between events. In this case, the null hypothesis would be that “patentees are not more likely to win patent suits than infringers.” The p value (also called the significance level) is the probability of rejecting the null hypothesis when it is actually true. Throughout this article, I use the term “significant” in the formal statistical sense indicating that the null hypothesis can be rejected with at least 95% confidence ($p \leq .05$). If $p > .05$, I conclude that observed differences or relationships are not statistically significant; thus, the null hypothesis cannot be rejected in these cases. I have tested these null hypotheses using Chi-Square p values (the “Pearson statistic”).

number of cases show variation from region to region in patentee win rates. The districts are listed in order from most to least advantageous for the patent holder.

Table 8: Win Rate Distribution

District	# of Patents ⁹⁰	Patentee Wins	Infringer Wins	β	Std. Error	P
N.D. Cal.	82	68%	32%	-.120	.057	.034
D. Minn.	48	67%	33%	-.104	.073	.154
C.D. Cal.	96	63%	37%	.062	.053	.238
S.D.N.Y.	48	63%	37%	.062	.073	.393
S.D. Fla.	24	63%	37%	.062	.102	.541
D.N.J.	23	61%	39%	.046	.104	.659
E.D. Va.	40	58%	42%	-.0123	.080	.878
N.D. Ill.	113	48%	52%	.085	.049	.083
D. Del.	142	46%	54%	.105	.044	.018
D. Mass.	50	30%	70%	.263	.072	.000

A regression model limited to the top ten jurisdictions demonstrates significant difference in outcome (patent holder win rate) among these districts.⁹¹ Stated another way, there is not an equal chance of winning in these ten jurisdictions. There is also significant difference in outcome when you compare the mean win rate of all districts with the mean win rate of three of these individual districts. As Table 8 shows, the District of Massachusetts, the District of Delaware, and the Northern District of California differ significantly from the mean patent holder win rate ($p < .05$). If patent holders knew this information, it could explain why parties select these districts with greater frequency than other districts. At least this may be true for the Northern District of California, which in addition to being a locus of high-tech companies, has a significantly higher win rate for patent holders. However, because patent suits are

90. The number of patents in each district varies from the total number of patents that went to trial because the total number reflects some cases which were disposed of after a trial began by means other than a verdict by the fact finder. Some of the claims were settled or a verdict was directed by judgment as a matter of law.

91. $F=3.355$, $p=.000$. The hypothesis that the district dummy variables are jointly zero can be rejected. This means that there is significant variation in outcome among these ten districts.

predominantly filed by the patent holder,⁹² the significantly lower-than-average win rate for patent holders in Delaware and Massachusetts raises the question: why are these two districts seeing such a high volume of patent cases?

It is interesting that the District of Delaware is among the least favorable for patent holders because Delaware's patent caseload far exceeded its percentage equivalent of civil cases generally. Delaware has 3.2% of all patent cases nationally, but only 0.3% of all civil cases. Patent holders file 86% of all patent cases,⁹³ and Delaware is home to ten times more patent cases than its civil docket would predict. Thus, either patent holders are selecting Delaware simply for its convenience (an unlikely answer in light of the size of the state and dearth of industry headquartered there) or patent holders are inaccurately perceiving Delaware to be more favorable to them than it is.

2. Win Rate by Substantive Issue by District

Table 9 categorizes the overall win rate by substantive issue.

Table 9: Patent Holder Win Rate by Issue	
Issue	Verdict for Patent Holder
Validity ⁹⁴	67% (1140)
Enforceability ⁹⁵	73% (528)
Infringement	66% (1352)
Willfulness	64% (542)

92. See *supra* notes 73–88 and accompanying text.

93. See *infra* note 101 and accompanying text.

94. Validity of an issued patent might be challenged by the accused infringer. There are a variety of grounds upon which validity could be challenged, including novelty, non-obviousness, or failure to satisfy the enablement, best mode, or written description requirements.

95. Enforceability of an issued patent might be challenged by the accused infringer. There are a variety of grounds upon which a patent may be found unenforceable, including inequitable conduct, laches, equitable estoppel, or patent misuse.

Table 10 shows the statistical variation among regions on resolution of these issues.

District	Validity	Enforceability	Infringement	Willfulness
C.D. Cal.	61% (62)	62% (42)	74% (73)	67% (39)
N.D. Ill.	61% (74)	61% (36)	66% (87)	85% (27)
N.D. Cal.	68% (53)	78% (18)	75% (68)	59% (22)
S.D.N.Y.	73% (37)	67% (12)	73% (33)	80% (15)
D. Del.	53% (109)	70% (54)	55% (120)	61% (38)
E.D. Va.	74% (34)	100% (7)	72% (32)	69% (13)
D. Minn.	66% (35)	88% (16)	70% (46)	63% (16)
D. Mass.	44% (32)	56% (9)	45% (40)	42% (12)
S.D. Fla.	86% (14)	86% (7)	68% (25)	67% (12)
D.N.J.	75% (16)	83% (6)	65% (17)	67% (3)

Table 10 shows significant variation among the ten judicial districts with regard to the issues of validity⁹⁶ and infringement.⁹⁷ Hence, the null hypothesis that a patent holder has no greater chance of winning on infringement or validity in these judicial districts can be rejected with confidence. Although some individual variation exists among districts with regard to enforceability and willfulness, as seen in Table 10, the variation is not statistically significant.⁹⁸

The descriptive statistics and regression results presented thus far demonstrate both procedural and substantive variation among the most frequently selected district courts in their resolution of patent cases. This variation suggests that there may be no single explanation of patent holders' selection of particular jurisdictions. Not all of the frequently selected jurisdictions are fast, not all are locations of high technology, not all are more favorable to patent holders, and not all force early resolution of patent cases. It is likely that some combination of factors led parties to select particular jurisdictions; in short, the choice of forum is a multi-dimensional inquiry. Perhaps the

96. $F=2.784$, $p=.002$.

97. $F=2.024$, $p=.028$.

98. This means that I cannot reject the null hypothesis that there is no variation in outcome with regard to enforceability among these ten districts. $F=1.323$, $p=.215$. Similarly, I cannot reject the null hypothesis that there is no variation in outcome of willfulness among these ten districts. $F=1.092$, $p=.366$.

best way to test the impact the choice of forum may have on outcome is to consider the difference in outcome or the effect of outcome on choice when the forum is selected by the patent holder or the accused infringer. The next Subpart will present the comparison between infringement suit outcome and declaratory judgment suit outcome.

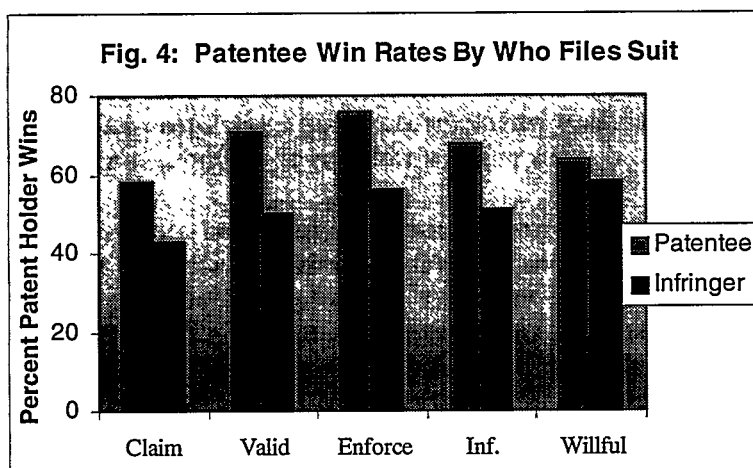
D. Declaratory Judgment Actions vs. Infringement Suits: Choice of Forums Has a Significant Impact on Outcome

There is a perception that the infringer will achieve an advantage by filing a declaratory judgment action against the patentee, rather than waiting for the patentee to file an infringement suit.⁹⁹ By filing the declaratory judgment action, the infringer chooses the forum (the one it thinks most favorable to it) and the time that the suit will begin (enabling it to surprise the patentee and force litigation before the patentee might be ready). The empirical evidence substantiates the advantage forum selection has to the parties. In cases in which the defendant was able to choose the forum (as with declaratory judgment actions) rather than the patent holder (as in infringement suits), there was a significant difference in outcome:¹⁰⁰ the defendant is much more likely to win when it selects the forum.

99. See Weide, *supra* note 12, at 177–78. Professors Clermont and Eisenberg studied the difference in outcome across all civil cases in which the plaintiff received its choice of forum versus suits that were transferred by the defendant. They discovered a significant difference in plaintiff win rate: 58% in forums selected by the plaintiff and 29% percent in forums where the case had been transferred. Clermont & Eisenberg, *supra* note 50, at 1511–12. They concluded that the transfer option might undo abusive forum selection by plaintiffs and act as a deterrent, thereby encouraging appropriate forum selection in the first instance. *Id.* at 1511. They also suggest that transfers level the playing field, neutralizing any lopsided cost advantage the plaintiff may attempt to secure. Cases are transferred, according to Professors Clermont and Eisenberg, only when the court decides that forum really would matter. *Id.* at 1515. My study differs from theirs in several ways. First, my data set is limited to patent cases, rather than all civil cases, and includes more recent data. Second, I examine every individual case and study the individual issues decided rather than just the overall outcome. Third, I independently verify all the results in the data set in which I studied outcome rather than simply relying on the Administrative Office data, which I found to be inaccurate in many instances. Fourth, I study the difference in win rates between patent infringement suits brought by the patent holder and declaratory judgment actions brought by the accused infringer. This difference should elucidate the forum selection impact even more acutely.

100. $\beta = 0.125$, $t = 3.063$, $p = .002$. These results from a linear regression model indicate a statistically significant difference ($p \leq .05$) in win rate based upon who filed the suit. In this regression model, who won (patent holder or infringer) was the dependent variable and who filed suit (patent holder or infringer) was the independent variable. A $p = .002$ allows us to reject the null hypothesis of no difference with 99% confidence ($p \leq .01$). The coefficient, β , gives the magnitude in percentage points of the difference in win rate. With $\beta = 0.125$, there is a 12.5% difference in outcome based on who filed suit. For example, the patent holder won 60.1% of all patent cases when it filed suit and 47.6% of all patent cases

Of the 1209 cases in the data set of tried cases, 14% (168 cases) were declaratory judgment actions brought by the infringer.¹⁰¹ Of the 1676 separate claims, 15% were declaratory judgment claims. As Figure 4 indicates, the declaratory judgment tool does affect the outcome of each individual issue except willfulness, in which there is no significant difference in outcome between infringement suits and declaratory judgment suits.¹⁰² Who selects the forum (patentee or alleged infringer) is a statistically significant predictor of who wins patent claims.¹⁰³ When the patent holder selects the forum, the patent holder wins 58% of the claims. When the accused infringer brings a declaratory judgment action and thereby chooses the forum, the patent holder win rate drops to 44%.



The applicable law does not change from one forum to the next, but the win rate drops significantly. Who selects the forum is also a statistically significant predictor of validity,¹⁰⁴ enforceability,¹⁰⁵ and infringement,¹⁰⁶ but not willfulness.¹⁰⁷ The most likely explanation for

in which the infringer filed suit—a 12.5 percentage point difference.

101. A case is considered a declaratory judgment action if the infringer filed the suit. These statistics do not include counterclaim declaratory judgment actions.

102. For a more detailed analysis of the distinction between infringement suits and declaratory judgment actions, see Moore, *supra* note 51, at 404–07.

103. $\beta = .141$, $t = 4.106$, $p = .000$.

104. $\beta = -.210$, $t = -5.628$, $p = .000$.

105. $\beta = -.207$, $t = -3.908$, $p = .000$.

106. $\beta = -.163$, $t = -4.306$, $p = .000$.

107. $\beta = -.067$, $t = -1.00$, $p = .318$.

the declaratory judgment effect is that forum and timing really do matter.

The best alternative explanation is that declaratory judgment suits, as a whole, are stronger suits on the merits for the accused infringers. The theory is that accused infringers would initiate litigation only in cases they think they should win. Such a theory might be verifiable if the empirical results—namely, significantly higher win rate for patent holders in infringement suits rather than declaratory judgment actions—were from a data set of all patent disputes rather than just the set of tried cases. One could determine the percentage of declaratory judgment actions filed and compare their outcome at all stages and all procedural levels with infringement suits. However, in this database, which is limited to tried cases from 1983–1999, economic theory suggests the “stronger” declaratory judgment actions would be resolved by the court at earlier stages of litigation or settled. The selection of cases that would proceed to trial would be close cases where the outcome tends towards 50/50.¹⁰⁸ The selection of tried cases is not a random or a representative subset of all disputes.¹⁰⁹

The selection effect theory is predicated on parties making rational determinations regarding whether to settle or litigate based on economic factors, including the potential gain from a favorable outcome or loss from an adverse decision, the information the parties possess about the likelihood of success at trial,¹¹⁰ and the transaction costs (litigation costs).¹¹¹ According to this model, the disputes that proceed to trial are the cases in which the parties substantially

108. See generally Priest & Klein, *supra* note 80 (observing that cases close to the decisional standard are less likely to settle because of mutual optimism).

109. See, e.g., Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1568 (1989) (noting that “expectations theory” suggests that tried cases might not reflect the pool of all disputes); Priest & Klein, *supra* note 80, at 4 (noting that “potential litigants form rational estimates of the likely decisions” and thus “disputes selected for litigation (as opposed to settlement) will constitute neither a random nor representative sample of the set of all disputes”); see also KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 58 (1960) (commenting that litigated cases bear the same relationship to the underlying pool of disputes “as does homicidal mania or sleeping sickness, to our normal life”).

110. The selection effect model allows for “divergent expectations” of the parties in estimating outcome. For example, a patent holder may believe that she has a 60% chance of winning the case on the merits, whereas the alleged infringer, with the same information, evaluates the patent holder’s chance of success at 40%. Under such circumstances, both parties may be unwilling to settle the case. The selection effect model allows for these self-serving estimation errors, but assumes that the errors are random and based on differences of opinion rather than asymmetrical information.

111. See Priest & Klein, *supra* note 80, at 4.

disagree on their chance of success, which is most likely to happen when the case falls close to the governing decision standard (where estimated outcome approaches 50%).¹¹² When the legal rules or the adjudicator clearly favors one side, economically rational behavior dictates that the parties should settle to avoid transaction costs (or the case may be resolved by the judge on dispositive motion). The cases that proceed to trial will be the difficult or close cases in which the parties are more likely to disagree on predicted outcome. These close cases should fall more or less evenly on both sides of the decisional standard resulting in a 50% win rate.¹¹³

If the accused infringer has a stronger case on the merits when it brings a declaratory judgment action, then generally those stronger cases will be resolved prior to trial and the cases which do proceed to trial will likely be “close” cases—close as measured by the parties’ estimations of outcome. Economic theory suggests that it is not likely that the difference in win rate in *tried* cases may be attributable solely to declaratory judgments being stronger cases for the infringer. This element would be factored into litigation strategy and would impact the selection of cases for trial.¹¹⁴ Hence, the difference in win rate is not likely to be attributable to a factor that can be predicted by the parties as part of their outcome estimations.

In summary, win rates differ significantly between infringement suits and declaratory judgment suits. Patent holders have a significantly higher win rate when they file suit and thereby choose the forum. In contrast, patent holder win rates decline when the accused infringer files suit and thereby selects the forum. These differences in win rate are likely attributable to forum, which suggests that forum critically impacts outcome.

112. *Id.* at 16.

113. There are other economic models (asymmetrical stakes and asymmetrical information models) that could alter the Priest & Klein 50% prediction. *See id.* These models, however, would not explain the variance in win rate for declaratory judgment versus infringement suits.

114. The notion that alleged infringers fare better in declaratory judgment actions because they are “stronger” cases is further disproved by the difference in win rate before judge and jury. *See Moore, supra* note 51, at 368. If declaratory judgment actions are “stronger” suits, then there should be a higher win rate for infringers regardless of the adjudicator. *Id.* The patent holder win rate in jury trials is 68% for infringement suits and 38% for declaratory judgment actions. *Id.* However, the patent holder win rate in bench trials is 49% for infringement suits and 48% for declaratory judgment actions. *Id.* If the stronger suit theory explained the win rate variance then it would be true for both judge and jury trials. The data show, however, that patent holder win rate is not affected by who filed the suit in bench trials. This indicates that the stronger suit theory cannot explain these results.

III. PROBLEMS CAUSED BY FORUM SHOPPING

The empirical results show substantive and procedural differences among district courts in resolving patent cases. Such variation causes the parties to spend substantial resources in selecting and fighting over forum. The evils of forum shopping generally revolve around two themes: (1) the notion that forum shopping reflects inequity in the legal system¹¹⁵ and (2) the premise that forum shopping is inefficient.

A. *The Normative Evils of Forum Shopping*

The notion that the law ought not be manipulable and that its application ought to be uniform is a fundamental tenet of our legal system. With borderless commerce, the jurisdictional choices are bountiful and the importance of consistency among forums becomes more acute. The intensity of forum shopping by parties suggests that the view of law as immutable is ultimately unfulfillable.¹¹⁶ The existence of statistical disparities in the empirical results presented substantiates concern over regional variations in patent case resolution. This manipulability of the administration of law thwarts the ideal of neutrality in a system whose objective is to create a level playing field for resolution of disputes.¹¹⁷ The ultimate result is unpredictability and inconsistency in the application of the law among the district courts. This instability erodes public confidence in the law and its enforcement and creates doubt about the fairness of the system.¹¹⁸

B. *The Economic Inefficiency of Forum Shopping?*

Commentators question the efficiency of forum shopping for several reasons. First, it has been argued that forum shopping overburdens preferred courts with a flood of patent cases.¹¹⁹ As the data indicate, a few jurisdictions consistently receive a greater

115. There is a reluctance to acknowledge that outcome can vary by region or adjudicator when the facts and the law are the same.

116. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1685-86 (1990).

117. See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 668 (1993). But see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646-48, 672-80 (1981) (arguing that having many possible forums with concurrent jurisdiction serves the beneficial function of error reduction and results in a fairer and more innovative judicial system).

118. Norwood, *supra* note 29, at 301, 305-07.

119. See Note, *supra* note 116, at 1684.

number of patent cases, out of proportion with the size of their dockets generally. This suggests that plaintiffs select these forums more consistently over alternate forums because of a perception that these forums are beneficial. This may not, however, actually be inefficient. Because in theory the total number of cases remains constant and the only variable is where the cases are brought, it would be more efficient to have those cases consolidated in discrete courts that could develop patent law expertise. If most patent cases were brought in a few choice jurisdictions (creating a group of patent courts), the judges in those jurisdictions would develop expertise with patent case management and patent law. These judges would be more efficient at resolving patent cases; even though the technology changes from case to case, exposure to the substantive law and its application would increase judicial efficiency. Over time, these judges would establish track records, increasing outcome predictability and decreasing litigation. Hence the status quo, where plaintiffs have limitless venue options, has resulted in the consolidation of patent cases among a few select jurisdictions. In this way, patent holders have effectively created their own specialized courts, which may be a more efficient system of adjudication than an equal division of cases among the ninety-four judicial districts. Maximum efficiency in this respect would be achieved by a single, specialized trial court for patent dispute resolution.

Second, forum shopping wastes resources by increasing litigation costs as parties dispute forum or pursue the most favorable forum, which often is not the closest or most convenient location.¹²⁰ There has been some suggestion that existing legal rules, such as personal jurisdiction requirements, venue requirements, transfer of venue options, or the forum non conveniens doctrine mitigate these concerns.¹²¹ This is a naive view of the legal reality, at least insofar as patent cases are concerned. Patent litigation is primarily conducted between corporations. These corporations are subject to personal jurisdiction wherever they sell products, which is increasingly nationwide. There is no venue requirement to speak of, because it devolves into a mere personal jurisdiction inquiry.¹²² The judicial doctrine of forum non conveniens is no longer applicable to curb forum shopping among federal forums because it was superseded by

120. *See id.* at 1691 (“Critics of forum shopping claim that it is inefficient because it tends to result in litigation far from the ‘natural’ forum—the one closest to, most knowledgeable about, or most accessible to the litigants.”).

121. *Id.* at 1691.

122. *See supra* notes 24–26 and accompanying text.

the transfer statute.¹²³ None of these legal rules mitigates the inefficiency caused by litigating patent cases in inconvenient forums. Finally, with regard to transfer motions, resources are wasted in the fight over the proper venue regardless of who ultimately wins. In short, it costs money to fight over forum, and it takes time for the court to handle these transfer motions.¹²⁴ If forum were more properly restricted at the outset through venue statutes, as I propose below, the need for transfer motions would be reduced.

Many commentators believe that transfer motions have, apart from their transaction costs, beneficial objectives of convenience and justice and that they have helped level the litigation playing field.¹²⁵ More likely, they have merely tilted the playing field in the opposite direction. If initial forum selection presents an extreme inconvenience for the defendant and therefore an unfair advantage for the plaintiff, transfer tilts the advantage towards the defendant. When a motion to transfer is granted, the plaintiff is not given a second chance to select a fairer district; rather, the defendant proposes an alternative district. For example, empirical work by Professors Clermont and Eisenberg has established a dramatic drop in plaintiff win rates from 58% of non-transferred cases to 29% of transferred cases.¹²⁶ At least one commentator has argued that transfer motions could help eradicate some of the inequities created by limitless modern venue statutes if transfer motions were more easily obtainable.¹²⁷ If transfer motions were easier to obtain, there would, of course, be an increase in transfer motions (thereby increasing wasteful transaction costs) and more cases would ultimately get transferred (undoubtedly delaying final adjudication

123. 28 U.S.C. § 1404(a) (1994 & Supp. IV 1998). The judicial forum non conveniens doctrine is limited to international forum conflicts. Norwood, *supra* note 29, at 318.

124. See David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 307 (1969) (arguing that resolving factually and legally complex motions to transfer “costs altogether too much time and money”); Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 100–01 (1965) (noting courts’ concern over the “impact these petitions might have not only on their own calendars but on the expeditious resolution of the litigation in the district courts”); Rothschild, *supra* note 46, at 41 (“Any lawyer experienced with forum selection battles knows that they can be lengthy, expensive—and uncertain.”); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 523 (1990) (stating that the transfer motion is “a cumbersome and costly procedure with few real beneficiaries”).

125. *E.g.*, Clermont & Eisenberg, *supra* note 50, at 1515.

126. *Id.* at 1511–12.

127. Norwood, *supra* note 29, at 318–20 (arguing that unjustifiable venue choices could be restrained by eliminating the present practice of giving substantial deference to the plaintiff’s choice of forum when considering whether to transfer cases for convenience).

and increasing transaction costs).¹²⁸ Moreover, the increased availability of transfer motions will increase the unpredictability of the forum selection process, thus making it more difficult for the defendant to estimate outcome. It will be especially challenging for the defendant to predict the outcome if it subscribes to the notion that the plaintiff's choice of forums is not the final word on who adjudicates the matter. However, if transfer motions were easier to obtain and the result of transfer was to the forum suggested by the defendant (rather than the plaintiff's second choice of forum), plaintiffs would have an incentive to select a fair, convenient forum *ex ante*. A more sensible alternative may be to limit forum selection on the front end to eliminate these added transaction costs.

C. Forum Variation Undermines the Innovation Incentive Underlying Patents

With the specter of outcome variation, forum shopping increases the unpredictability of the law and its application, in turn increasing the likelihood that parties will litigate.¹²⁹ The unpredictability in the legal system created by variation among the district courts intensifies as the number of potential jurisdictions in which to bring suit increases.¹³⁰ Unpredictable and inconsistent application of laws traditionally has been a major concern in patent cases and was the impetus for the creation of the Federal Circuit.¹³¹

Intellectual property rights are thought to be critical in spurring technological innovation.¹³² The value of a patent lies in its guarantee

128. Transfers of cases would delay final adjudication due to administrative delay and start-up time for another district to become involved in the case. There would, however, likely be an increase in settlements after successful transfer motions if the parties believe that choice of forum impacts outcome—an avenue for future empirical research.

129. Of course, to the extent that outcome cannot be estimated because of the unpredictability regarding which forum the defendant will be sued in, that unpredictability will cease to exist once the litigation is brought (once a forum is determined). After forum selection, both parties ought to be able to estimate outcome, which would cause settlement at that point. Hence, the end result is an increase in litigation, but once the forum is selected—which luckily occurs early in the litigation process—we ought to see settlement in these cases just as often as in other cases. *See supra* Table 6 (substantiating a high rate of settlement—34% of all cases—prior to any court action).

130. Uncertainty exists when parties cannot be sure what legal consequences will attach to their actions. Such uncertainty could include disagreement over the scope of the patent (the property line itself is blurry) or an inability to predict how a jury would draw the line between infringing and non-infringing conduct (an otherwise clearly defined line viewed through a fun house mirror).

131. S. REP. NO. 97-275, at 20 (1981) (Sup. Docs. No. Y1.1/5:97-275).

132. *See* Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1045 (1989); *see also* King Instruments

of exclusivity, providing the patent owner a defined property right. This value depends on the boundaries of the property right, competitors' respect for those boundaries, and the ability of the patentee to enforce them. If the property owner's ability to enforce her patent is inefficient or unpredictable, the patent's value decreases for the patent owner, competitors, and the public thereby stifling innovation and competition.¹³³

Unpredictability or uncertainty in the boundaries of the patent holder's property right and its enforceability will have several ramifications. It will divert resources from innovative efforts (research and development) to enforcement (transaction or litigation costs),¹³⁴ decreasing the value of the property right and thereby decreasing its efficacy as a means for promoting innovation. Moreover, uncertainty in the boundaries of the proprietary right will decrease innovation by unpredictably expanding or contracting the patent holder's scope of exclusivity.¹³⁵

Two possible scenarios result when the delineation and enforcement of property rights are uncertain: (1) competitors will have less respect for the property right, causing an increase in

Corp. v. Perego, 65 F.3d 941, 950 (Fed. Cir. 1995) (noting that the patent system "creates an incentive for innovation").

133. In its report to the Secretary of Commerce, the Advisory Commission on Patent Law Reform warned that the problems associated with the enforcement of patent rights "have the potential to eradicate the basic incentive provided by the patent system" and that the inherent value of the patent right can be realized only if the property owner has effective and inexpensive access to an efficient judicial system. THE ADVISORY COMMISSION ON PATENT LAW REFORM: A REPORT TO THE SECRETARY OF COMMERCE 75 (1992).

134. Many commentators have lamented the increased transaction costs caused by unpredictable, fuzzy, or muddy rules. *E.g.*, Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 312-28 (1984) (favoring sharper, clearer rules); Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322-36 (1984) (favoring clear, specific definitions because they lower information and transaction costs); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 591 (1988) ("Hard-edged rules define assets and their ownership in such a way that what is bought stays bought and can be safely traded to others, instead of repeatedly being put up for grabs.").

135. The *Markman* Court reasoned:

As we noted in *General Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369 (1938), "[t]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public." Otherwise, a "zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field."

Markman v. Westview Instruments, Inc., 517 U.S. 370, 390 (1996) (quoting *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)).

transaction costs and a decrease in value of the property right as a means for promoting innovation; or (2) competitors will effectively broaden the property right to increase certainty and avoid transaction costs, effectively eliminating competition. When uncertainty in the application of a legal standard exists, parties will either over-comply or under-comply with the legal standard, modifying their behavior more than or less than the law requires.¹³⁶

If uncertainty exists in the application of a legal standard, even parties who normally would behave efficiently will face a greater chance of being held liable because of the unpredictability.¹³⁷ The only way that these parties can reduce that chance is by over-complying with the legal rule.¹³⁸ Such behavior is inefficient as it will contract industry output and raise prices. For example, if a patent holder has a patent on a product with which a competitor would like to compete and the enforceability of the patent is uncertain in scope, the competitor would likely provide the patent holder with a larger monopoly zone than the patent itself actually entitles. In effect the zone of the patent holder's monopoly, the zone of no competition, would expand beyond what was contemplated by society when the patent was issued. In such a case, if the competitor elects to compete at all with the patented product, it would do so in a less than optimal fashion.

Neither scenario, where the patentee gets a substantially diminished property right or where the patentee gets a substantially expanded property right, will promote innovation.¹³⁹ Both modify the system of incentives that exists for securing the patent property right, tipping the careful balance that has been struck between the patent owner and the public, which ensures competition and tolerates limited monopolies to promote innovation.

The impact of uncertainty in choice of venue is actually more predictably one-sided in favor of the patent holder. In patent cases,

136. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 VA. L. REV. 965, 965-66 (1984) (concluding that socially inefficient overcompliance or undercompliance results from uncertain legal standards even when the parties are risk neutral).

137. *Id.* at 966.

138. *Id.*

139. *Contra* Ian Ayres & Paul Klemperer, *Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 993-94 (1999) (arguing that constraints on the patentee's monopoly caused by consistent under-compliance may be efficient as it enhances competition).

generally the patent holder selects venue.¹⁴⁰ Although there is usually unpredictability in permitting choice from among the ninety-four judicial districts, that unpredictability is greatly mitigated in a system in which the choice belongs exclusively to the patent holder. In this system, the defendant may not know which of the ninety-four districts she will be sued in, but because she knows that the patent holder gets to select the district, she can predict that the patent holder will choose the forum most friendly to the patent holder. Hence, infringers will systematically make *ex ante* product and design decisions in a manner most favorable to the patent holder. The infringer will systematically over-comply with the scope of the patent holder's exclusive right, consistently expanding the property right beyond what was intended when the patent was granted.

Of course, this analysis assumes one-dimensional decision-making by the patent holder and the infringer-defendant; namely, that the defendant believes that the patent holder will always select the district where it is most likely to win the case. As the empirical results suggest, however, patent holders select particular judicial districts for a variety of reasons, including speed of adjudication (e.g., Eastern District of Virginia) or chance of getting to trial (e.g., District of Delaware), and not purely on win rate data.¹⁴¹ In short, the patent holder's choice of venue is actually a multi-dimensional decision blurring the infringer's ability to predict patent holder venue choices. This uncertainty regarding the patent holder's choice of forum may result in instances of both over- and under-compliance by the competitor rather than only systemic over-compliance.

A trend in modern scholarship rejects the notion that predictability and or certainty may actually be beneficial to the legal system.¹⁴² Some of this scholarship, termed Critical Legal Studies,

140. Although in some limited circumstances the infringer may be able to select venue by bringing a declaratory judgment action, *infra* notes 32-35, a declaratory judgment action can only be brought against the patent holder when the patent holder places the infringer in reasonable apprehension of being sued. Hence, control in this circumstance remains in the patent holder's hands. *See supra* notes 72-88 and accompanying text. There is also the possibility that the infringer will be successful in getting a case transferred under section 1404. 28 U.S.C. § 1404(a) (1994 & Supp. IV 1998). This could add some uncertainty to the calculus.

141. This assumes that patent holders are actually capable of determining which judicial district would result in the highest chance of winning. The empirical evidence presented in this article may actually assist in such outcome estimation.

142. *See, e.g.,* Ayres & Klemperer, *supra* note 139, at 986-89 (arguing that "a regime with some uncertainty and delay can produce this [monopoly] reward [for innovation] more efficiently than a regime in which enforcement is instantaneous and certain"). The work of Professors Ayres and Klemperer does not affect my analysis of the inefficiency

suggests that “muddy” rules may be preferable for equitable reasons of doing justice in particular cases.¹⁴³ As Frank Easterbrook suggested, fairness is an ex post consideration second to the greater productivity associated with the ex ante position,¹⁴⁴ which is particularly true when the unpredictability is in a structural rule rather than a substantive rule. The distinction that I draw is that structural rules, like choice of venue, are rules that decide how a range of future cases ought to be decided. This is not a substantive rule that would be concerned with how a particular case ought to be resolved. Uncertainty in a substantive rule, such as the doctrine of equivalents or obviousness or the reasonableness standard for negligence, may have value to Critical Legal Studies scholars as a means for achieving justice on a case-by-case basis. Uncertainty regarding structural rules, such as choice of venue, does not concern justice between parties, but rather how or where a range of future cases ought to be brought. Hence, predictability in choice of venue rules would increase efficiency by reducing transaction costs and maximizing the innovation incentive behind the patent system without implicating the Critical Legal Studies concerns.

IV. PROPOSALS TO DECREASE FORUM SHOPPING

More research is needed on how to eliminate or decrease forum shopping. In this Subpart, I sketch three possible mechanisms for reducing forum shopping: achieving uniform application of the law by the district courts, creating a specialized trial court to adjudicate patent cases, and creating a more limiting venue statute.

caused by unpredictable choice of venue rules. First, Ayres and Klemperer focus on the efficiency of Type I uncertainty (increasing the chance that valid patents will not be enforced) rather than Type II uncertainty (increasing the chance that invalid patents will be enforced). *Id.* at 987–88. The likely impact of uncertainty in venue choice, since the choice rests predominantly with the patent holder, is over-compliance with the patent holder’s exclusive rights—Type II uncertainty. Moreover, Ayres and Klemperer’s analysis admits that delay and uncertainty can result in inefficiency, which undermines innovation that must be counterbalanced by extending the patent term. *Id.* at 1001. Increasing the predictability of structural rules pertaining to venue actually will enhance competition without the need to create a case-by-case basis approach to determine whether innovation has been stifled too much, causing the need for specialized and administratively difficult individualized patent term extensions.

143. See Rose, *supra* note 134, at 592–93 (stating that the Critical Legal Studies movement believes that muddy rules promote fairness in decision making and citing Duncan Kennedy, who “argues that hard-edged, crystal doctrines systematically abandon people to the wiles of the bad and mean-spirited”).

144. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 11–12 (1984).

The ideal mechanism for decreasing forum shopping and its associated evils is to eliminate regional disparity in resolution means and outcome. In short, the task is to eliminate variation in the ways that the district courts resolve patent cases, which is likely impossible. Even with the Federal Circuit dispensing binding substantive legal pronouncements, district court outcomes vary procedurally and substantively in ways that the appellate court cannot regulate. The human element of the administration of justice cannot be eliminated from the legal system.

It is unlikely that uniformity can be imposed in any meaningful way upon the ninety-four district courts and 646 district court judges. Therefore, the only way to eliminate forum shopping is to eliminate the choice. So long as the parties and their advocates have unfettered selection of forum, forum shopping will continue. There are two possibilities for limiting forum shopping: limit forums or limit shopping.

A. *Specialized Trial Court*

A specialized trial court with exclusive jurisdiction over patent cases could be formed. A specialized tribunal for adjudicating patent cases would be beneficial for several reasons. First, it would eliminate forum shopping entirely, as there would be no possible alternative forum. Second, it would eliminate the inconsistency and unpredictability in patent case resolution that currently exists because of district court variations which would provide better guidance to competitors for primary behavior. Third, a specialized tribunal would develop expertise in patent law and the resolution of patent cases, increasing its accuracy and efficiency at resolving these cases.¹⁴⁵ At the present, the ninety-four district courts with their 646 active district court judges resolve approximately 2000 patent cases each year. As these numbers indicate, individual district court judges are not seeing a sufficient number of patent cases to allow them to develop expertise in resolving these types of highly technical disputes.¹⁴⁶ A single,

145. The forum shopping that presently occurs actually helps to create a subset of district courts with more specialization in patent disputes as plaintiffs consistently select a group of district courts with great frequency. *See supra* notes 57–60 and accompanying text.

146. One caveat: as previously mentioned, many of the patent cases are consolidated in a few select district courts. *See supra* Table 1 and accompanying text. Hence, the 2000 patent cases filed are not divided evenly among the district courts and the 646 judges. Furthermore, senior judges can also preside over patent cases, increasing the pool of potential adjudicators beyond 646. Finally, as previously mentioned, many of the 2000 patent cases filed actually settle early in the litigation process, *see supra* Figure 3 and

uniform trial forum would decrease patent litigation overall by making the law and its application more predictable. This would divert resources from wasteful transaction costs to more socially productive research and development. Finally, the creation of a specialized trial court with exclusive jurisdiction over patent cases would decrease the clogged dockets of the district courts, removing what are among the most complex cases on their dockets. Table 12 demonstrates that patent cases average only 0.57% of the annual civil caseload in the district courts. These cases represent a much larger percentage, 9.4%, of all civil cases, which required a trial of twenty or more days. Although patent cases are not a large percentage of the docket for a district court, they are among the most time consuming.

Year	% of Civil Case Load	% of Cases Requiring 20+ Days of Trial
1983	0.44	8.9
1984	0.41	2.8
1985	0.37	9.8
1986	0.41	8.6
1987	0.43	11.4
1988	0.47	11.2
1989	0.53	8.2
1990	0.52	13.1
1991	0.52	9.5
1992	0.57	13
1993	0.65	8.7
1994	0.66	10.4
1995	0.66	7.8
1996	0.68	6.3
1997	0.73	6.5
1998	0.78	13.9
1999	0.80	8.9

As these statistics indicate, patent cases are more complex than the mass of civil case filings. It is unlikely that many district court

accompanying text, and only about 100 each year are tried, meaning that very few district court judges are actually gaining significant experience with these cases.

judges would complain about taking patent cases off their dockets.¹⁴⁷ Although this alternative has many benefits, it is unlikely that Congress will act in the immediate future to create such a specialized court. Despite the widely perceived success of the Federal Circuit, Congress is generally adverse to the notion of specialized courts.¹⁴⁸

B. *Limiting Venue by Statute*

The second way in which forum shopping could be minimized is to eliminate choice, which could easily be accomplished by tightening the patent venue requirements.¹⁴⁹ A more restrictive venue statute would limit the forums in which the defendant could be sued to a finite number based on defendant's residence and state of incorporation (both of which are controllable by the defendant). Such a limitation would reduce the plaintiff's ability to drag defendants to an inconvenient forum, thereby increasing transactions costs (at least for the defendant). It would also eliminate much of the existing fighting over transfer motions. Such a proposal, however, would disperse patent infringement filings throughout the judicial districts. Though this would reduce the clogged dockets of the now frequently targeted districts, it would also reduce the efficiency created by the current consolidation of cases in a handful of districts. As discussed above, repeatedly exposing judges to the same sorts of claims undoubtedly causes some efficiency.¹⁵⁰ Under the present unrestricted venue laws, a cluster of courts has evolved which deal with the majority of patent suits. Some of this consolidation and its ancillary efficiency may be lost by restricting venue.

Despite the potential loss of some efficiency in patent case resolution resulting from the current consolidation of cases among a few select districts, limiting venue would increase certainty and

147. One district court judge described patent cases as follows: "Honest to God, I don't see how you could try a patent matter to a jury. Goodness, I've gotten involved in a few of these things. It's like somebody hit you between your eyes with a four-by-four. It's factually so complicated." *Judicial Panel Discussion on Science and the Law*, 25 CONN. L. REV. 1127, 1145 (1993) (statement of Judge Covello, U.S. District Judge, District of Connecticut).

148. See generally Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991) (suggesting that specialized courts have fallen out of favor with Congress). Specialized courts have been criticized because of the potential for "capture by the bar" and the elimination of percolation incident to not having a plethora of courts simultaneously considering and deciding similar issues. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3-4 (1989) (discussing commentators' criticisms of specialized courts).

149. 28 U.S.C. § 1400 (1994 and Supp. IV 1998).

150. See *supra* notes 119-20 and accompanying text.

predictability for the parties. Although such a proposal would in no way reduce the inconsistency or lack of uniformity incident to having multiple decision makers, it would increase predictability and provide the public with better guidance for primary behavior in much the same way a single specialized court would. By limiting the number of jurisdictions where the defendant can be sued to a manageable number, the defendant will be better equipped to decide at the outset the boundaries of permissible behavior because it will be better able to estimate the outcome of its actions. Presently, corporate infringers may be sued in virtually any judicial district. Because of the variations in district court resolution of patent cases, these potential infringers are unable to predict to any degree of certainty the legal consequences of their behavior. They are less able to estimate outcome, which critically impacts their ability to control primary behavior in a way that limits potential liability. This inability causes the under- and over-compliance discussed above.¹⁵¹

One might argue that limiting jurisdiction to a small, finite number of districts, such as two (state of incorporation or principle place of business for example),¹⁵² could actually increase uncertainty. For example, suppose the two possible jurisdictions do not have legal precedent on the legal standard at issue in the case or that the precedent itself is uncertain. This system could create more uncertainty than a system which gave the patent holder a choice of ninety-four judicial districts because in such a system we can predict that the patent holder would select a district in which the legal standard at issue in the case is not only clear, but favorable. This would provide more certainty to the competitor who is trying to make legally rational business decisions *ex ante*. When, however, the patent holder's venue choice is multi-dimensional—i.e., based upon a variety of factors not just win rate data—the choice of ninety-four districts creates more *ex ante* uncertainty.

Limiting venue would reduce forum shopping, but it would not alleviate the variation that exists in district court resolution. This proposal would increase certainty and predictability not by making the law more uniform but by limiting the choice of where to enforce patent rights. Hence, the same lack of confidence in the fair administration of justice that currently results from the inconsistent

151. See *supra* notes 136–38 and accompanying text.

152. Of course, such a rule could have its own underlying fuzziness. For example, how a judge determines where a company's principle place of business is located is not a bright line rule.

and unpredictable patent case adjudication in the district courts will continue to exist.

This recommendation stems from the underlying purpose of the venue statute, which has been gutted by current statutory interpretations. Venue requirements were designed to be separate and distinct from personal jurisdiction.¹⁵³ The traditional purposes of venue requirements include providing the litigants with a convenient forum in which to resolve their dispute (protecting the defendant from being forced to litigate in an inconvenient forum selected by the plaintiff) and ultimately prohibiting plaintiffs from unrestrained forum shopping.¹⁵⁴

The systematic expansion of the patent venue statute through the years has rendered it superfluous.¹⁵⁵ Because venue requirements now devolve solely to an inquiry of whether requirements of personal jurisdiction have been met, there is no effective venue statute. By enacting a more limiting patent venue statute or interpreting the existing patent venue statute as limited to place of incorporation and principle place of business, much forum shopping could be eliminated. Congress enacted a more limiting patent venue statute intentionally, but now the patent venue statute is applied in the identical manner as the general venue statute for corporate defendants.¹⁵⁶ What then is the purpose of the separate and distinct patent venue statute? Under the current legal interpretation, not much.¹⁵⁷

If the statute were to limit the districts where a patent holder could subject accused infringers to litigation, those infringers would have better guidance for primary behavior. Eliminating some of the incoherence in the application of the law and thereby increasing the ability of the parties to estimate outcome will decrease litigation. Limiting venue statutes based on convenience principles will also eliminate the wasteful transaction costs associated with litigating cases in a distant forum and reduce costly battles over forum selection.¹⁵⁸ A modification of the patent venue statute to restore

153. See *supra* notes 10–19 (discussing traditional personal jurisdiction and venue requirements).

154. See William C. Johnson, Note, *The New Rule for Patent Venue for Corporate Defendants: Kansas Was Never Like This*, 11 PACE L. REV. 667, 669 (1991).

155. See *supra* notes 19–25 and accompanying text.

156. See *supra* notes 14–27 and accompanying text.

157. The current regime is an abrogation of the canons of statutory construction, for the current interpretation does not give full effect to the patent venue statute.

158. Of course, restoring some limiting effect to the separate patent venue statute would apply only to infringement suits. Declaratory judgment actions brought by accused

some significance to its separate existence could achieve this result with minimal upheaval.

CONCLUSION

Forum shopping is alive and well in patent litigation. Borderless commerce and lax jurisdiction and venue requirements give plaintiffs in patent cases an unfettered choice of where to bring suit. This Article uses empirical evidence to verify significant selection of certain forums with associated regional variation in procedural and substantive adjudication of patent cases. The data also substantiate the impact of forum selection on win rate through direct comparison among district courts with high concentrations of patent cases and by analyzing the variation in win rate based upon who selected the forum. A wide range of choices exists among available forums for bringing suit, and the empirical evidence suggests that the choice matters. Forum shopping may be more pervasive after this publication, which documents the regional variation.

Even though patent holders have ninety-four districts in which to bring suit, they consistently gravitate toward a cluster of districts. Some theories explain why particular jurisdictions may be appealing. For example, the Northern District of California has a high patent holder win rate and is the locus of many high-tech industries, while the Eastern District of Virginia affords the speediest justice in the country. There are other popular jurisdictions such as Delaware and Massachusetts whose popularity cannot be explained by the empirical results. These districts have not been particularly favorable for the patent holders and they do not provide expedient resolution, yet for some reason their percentage of patent case filings far exceeds their civil case averages generally. Accordingly, patent holders perceive some benefit to certain forums, which cannot be substantiated or explained by the empirical evidence.

infringers would fall under the general venue statute. 28 U.S.C. § 1391(b) (1994); *see also* Charles S. Ryan, *The Expansion of Patent Venue Under the Judicial Improvements and Access to Justice Act*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 187, 208 (1995) (noting that declaratory judgment suits involving patents fall under the general venue statute rather than the patent venue statute). Hence, declaratory judgment plaintiffs would have a multitude of forum choices and the aggrieved patent holder would be much more limited. Although this seems unsettling at first glance, it is actually the patent holder who dictates when a potential infringer could bring suit. Declaratory judgment actions can be brought only when the infringer has a reasonable apprehension of being sued (caused by some act of the patent holder). *Supra* notes 29–33 and accompanying text. Hence, only the patent holder's actions can give rise to a declaratory judgment action, thereby giving the patent holder significant control over the forum.

The success of the patent system for promoting innovation hinges on the certainty and enforceability of patent rights. Unpredictability in the system, which causes systematic over-compliance by competitors, is inefficient and robs the public of competing products. The disproportionate consolidation of patent cases in certain district courts suggests a preference by patent holders for these courts. The empirical results presented herein demonstrate significant outcome variation among these "preferred" forums, indicating that there are likely several reasons why patent holders gravitate towards them. Further research should consider why patent holders select these forums and how the empirical results presented in this Article might impact future forum selections. It would also be useful to study exactly how transfer options impact outcome in patent cases as a means of further examining the impact of forum selection on procedural and substantive outcome. Although concrete explanation of forum selection is often elusive, the empirical results presented offer a starting point.