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Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform

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Justice Scalia called the United States District Court for the Eastern District of Texas (EDTX) the "renegade jurisdiction." Critics label it the "rocket-docket" for patents. All blame the EDTX for the ills of patent litigation, demanding for national reform. This Article challenges the prevailing myths with an empirical quantitative study of more than 27,000 patent cases filed in the last decade and a qualitative study on patent forum shopping. This Article contends that the proposed venue reforms will not prevent litigants from shopping for a favorable forum in which to resolve patent litigation. This Article suggests that instead of the quick fixes vis-à-vis proposed venue reform legislation and the condemnation of the EDTX, reformers should view the EDTX as part of the solution, a case study of how a district court has actively transformed itself into an accessible and knowledgeable court with strong expertise in solving patent disputes.

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I. INTRODUCTION

It has become a fashionable practice lately for lawyers of major corporations and national newspapers to join in the chorus, criticizing the United States District Court for the Eastern District of Texas (EDTX) for its patent rocket-docket with "speedy judges."[1] Justice Scalia participated in the mix by calling the EDTX a "renegade jurisdiction[]" during the oral argument for *eBay Inc. v. MercExchange, L.L.C.*[2] Critics regard the EDTX as a plaintiff's haven for patent litigation.[3] Moreover, as the comments and myths about the

1. *See* Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, § 3, at 1 (stating that the EDTX's "mushrooming" patent docket with "hungry plaintiffs' lawyers, speedy judges and plaintiff-friendly juries" is "encouraging an excess of expensive litigation that is actually stifling innovation"); *see also Patent Trolls: Fact or Fiction?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 31 (2006) [hereinafter *Patent Trolls*] (statement of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.) (describing the EDTX as a pro-plaintiff forum where patent litigation has "skyrocketed").

2. *See* Transcript of Oral Argument at 11, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (No. 05-130); *see also* Vinson & Elkins L.L.P., Eastern District of Texas Applies KSR v. Teleflex in Invalidating Patent (Aug. 31, 2007), http://www.velaw.com/resources/news_detail.aspx?id=7784 (reporting on Justice Scalia's statement on the EDTX as a renegade jurisdiction of patent litigation).

3. *See* Creswell, *supra* note 1 ("A lot of the cases being filed in [the EDTX] are by patent holding companies, or patent trolls, as they're called, whose primary and only assets

EDTX increase, recent national calls for patent law reforms inject the EDTX at the center of the venue provisions of various proposed legislation.[4] Many seem to blame the EDTX for the wrongs of the patent litigation system.[5]

To steer patent litigation away from the EDTX, various interest groups have proposed a number of national reform proposals to end patent forum shopping. One of the proposals asserts that a patent case may only be brought in a judicial district where either party to the litigation resides or where the defendant has committed infringement and has a regular place of business.[6] Another proposal narrows the patentee's choice of forum by allowing the patentee to bring its patent infringement case only in the judicial district where the defendant resides.[7] Another proposal advocates that judges must transfer patent cases filed without substantial evidence or witnesses connected to the forum and prohibits the use or sale of the infringing products from being considered as substantial evidence.[8] Lastly, another proposal seeks creation of a specialized district court for patent cases to reduce forum shopping.[9]

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are patents." (quoting a Texas attorney)); Sam Williams, A Haven for Patent Pirates (Feb. 3, 2006), http://www.technologyreview.com/read_article.aspx?id=16280&ch=infotech&a=f ("In one federal court in East Texas, plaintiffs have such an easy time winning patent-infringement lawsuits against big-tech companies that defendants often choose to settle rather than fight.").

4. *See* Susan Decker, IBM Sues Amazon.com for Infringement of Five Patents (Oct. 23, 2006), http://www.bloomberg.com/apps/news?pid=20601204&sid=a1LVK9oRjqdw&refer=technology:

> Companies including Intel Corp. have criticized the Eastern District of Texas, saying the court tilts toward patent owners and is too often used by companies or individuals hoping to parlay patents of questionable validity into cash.
>
> . . . .
>
> The Intellectual Property Owners Association in Washington, of which IBM is a member, has supported proposed legislation that would include limitations on so-called forum-shopping in patent cases.

5. *See Patent Trolls*, *supra* note 1, at 31-32 (statement of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.) (singling out the EDTX as a forum for patent trolls to litigate and urging for venue reform to stop forum shopping); Anne Broache, Senators Offer Sweeping Patent System Changes (Aug. 4, 2006), http://news.cnet.com/2100-1028_3-6102493.html ("[T]he Hatch-Leahy bill would place new restrictions on the courts where patent cases could be filed—an attempt at rooting out 'forum shopping' for districts known for favorable judges.").

6. *See* Patent Reform Act of 2006, S. 3818, 109th Cong. § 8(a) (2006).

7. Lamar Smith, Amendment in the Nature of a Substitute to H.R. 2795 § 9, at 56-57, http://www.jonesday.com/files/upload/AmendedSmithBill.pdf (last visited Sept. 17, 2008).

8. *See* Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. § 7 (2006).

9. *See* H.R. 5418, 109th Cong. (2006) (as passed by the House of Representatives, Sept. 28, 2006).

This Article contends that the proposed venue reforms will not prevent litigants from shopping for a favorable forum in which to resolve patent litigations. Based on a study of 27,496 patent cases filed at the district court level, empirical evidence demonstrates that litigants will continue to search for and move to new judicial districts if the current favorites are overcrowded or if filing in those districts is strongly discouraged by judges. Empirical evidence identifies a shift in rocket-docket districts, as formerly favored districts such as the United States District Court for the Eastern District of Virginia (EDVA) are being replaced by newcomers like the EDTX. The empirical inquiry begs for a closer look at the shift through a case study of the EDTX. To that end, this Article suggests that instead of the quick fixes vis-à-vis proposed venue reforms and the condemnation of the EDTX, reformers should view the EDTX as part of the solution—a case study of how a district court has actively transformed itself into a knowledgeable court with strong expertise in solving patent disputes. As a case study, the EDTX informs reformers of factors influencing the transformation of an unknown district court into an efficient, fast-track, and accessible patent jurisdiction. It may serve as a model for others to solve the acute problem of too many judicial districts with judges who do not want patent cases on their dockets, as noted by some scholars.[10] Indeed, the few courts with high numbers of patent cases dislike the amount of patent litigation in their courts.[11] In light of such unfriendliness, there is a need to have courts similar to the EDTX to solve patent disputes.[12]

This Article proceeds as follows. Part II explains the state of patent litigation over the last ten years. The rise in the number of patent grants, the increase in patent litigation, and the climb in litigation costs and damages paint a grim picture that patent litigation has grown out of control and must be reformed, according to critics, by focusing on the patent shopping venue problem, specifically the EDTX. Part III dispels the myths about the EDTX by examining its geographical location and its corporate origin through the actions of

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10. *See* Mark A. Lemley, *Reconceiving Patents in the Age of Venture Capital*, 4 J. SMALL & EMERGING BUS. L. 137, 147 (2000).

11. *Id.* ("There are 'rocket dockets' developing, but the judges in those rocket dockets often don't particularly like the idea that they're attracting patent litigation. Many of them don't enjoy patent cases.").

12. *See id.* ("When we do have to litigate, we ought to examine ways that we can make that litigation go more quickly. . . . We need more rocket dockets in general in litigation in the United States.").

Texas Instruments (TI) in creating a rocket-docket district solving patent disputes against Asian patent infringers.

Part IV contains an empirical quantitative study of all patent cases filed in all district courts in the last ten fiscal years, October 1, 1996, to September 30, 2006, and reveals that although patent cases continue to concentrate in a handful of judicial districts, there has been a shift in patent forum selections. The EDVA has seen a major decrease while the EDTX has experienced a major increase in the number of patent cases filed.

Part V identifies and explains possible reasons for the changes in the EDVA and the EDTX. Reasons for selecting the EDTX as a judicial district for patent cases are not simple. Part V suggests that qualitative factors, such as the willingness of judges and juries in welcoming patent cases, the adoption of patent rules on case management, the strict adherence to the rules imposed by judges, and the entrepreneurial spirit of court employees are strong elements in transforming a judicial district into a knowledgeable and high-demand center to solve patent disputes.

Part VI provides the background of patent venue reform provisions contained in numerous bills introduced in both the United States Senate and the House of Representatives. Blaming the EDTX for the ills of patent litigation seeps through testimonies at hearings for the bills. Part VI critiques the patent venue reform provisions and asserts that the provisions are both ineffective and unnecessary. This Article concludes that patent forum selection will continue as some favorite districts become disfavored and that new districts will emerge as judges and litigants seek to become the next favorites by learning from the accomplishments of the EDTX.

II. THE RISE OF PATENT LITIGATION

Companies file patent applications and seek patent grants for multiple purposes. As reported elsewhere, some companies today use patents mainly for defensive purposes,[13] while other companies exploit patents through licensing business models.[14] Some companies utilize

13. *See* Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1532-33 (2003) (identifying and discussing defensive use of patents).

14. *See* Oren Bar-Gill & Gideon Parchomovsky, *The Value of Giving Away Secrets*, 89 VA. L. REV. 1857, 1867 (2003) (discussing how U.S. companies obtain billions of dollars through licensing); Brad Stone, *Nickels, Dimes, Billions*, NEWSWEEK, Aug. 2, 2004, http://www.newsweek.com/id/54559 (reporting how major companies like IBM receive billions of dollars annually through its patent licensing program).

their patents to build their patent thicket,[15] while other companies rely on their patent portfolios as signals of innovative strength.[16] The varied use of patents in the marketplace demonstrates how patents are deemed at the outset as valuable corporate assets that companies continue to apply for and seek.[17]

The number of patent applications has increased significantly in the last ten years. In 1995, the number of utility patent applications totaled 212,377, and in 2005, the number jumped to 390,733.[18] Likewise, the number of patents issued during this time increased significantly.[19] Indeed, in 1995, there were 101,419 patents issued, and ten years later, in 2005, the number of patents granted was 143,806.[20] Not surprisingly, the amount of patent litigation has dramatically increased.[21] News coverage of patent cases has also become more common, particularly when large verdicts such as the $1.52 billion awarded by the jury in a recent case against Microsoft attracts worldwide attention.[22]

Patent litigation is factually intensive and costly.[23] Lawyers must familiarize themselves with the patented invention and the allegedly

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15. Companies use patents as blocking patents, refusing to license the patents so others cannot use the patent for an entire line of research. *See, e.g.*, Robert Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 75, 80-82 (1994) (giving examples of blocking patents).

16. *See* bNET, Xerox Innovators Achieve 15,000th U.S. Patent; Company Portfolio Signals 70-Year Legacy of R&D Strength (Oct. 14, 2002), http://findarticles.com/p/articles/mi_m0EIN/is_2002_Oct_14/ai_92796026 ("Xerox Corporation . . . has reached a milestone of earning more than 15,000 U.S. patents, underscoring its leadership and legacy as one of the world's top technology innovators.").

17. *See, e.g.*, Merges, *supra* note 15 (discussing the importance of blocking patents).

18. U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT STATISTICS, CALENDAR YEARS 1963-2007, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf (last visited Aug. 26, 2008) (providing statistics of patent applications of all origins, domestic and foreign, filed in the United States).

19. *Id.* (compiling and reporting the number of patents issued annually).

20. *Id.*

21. *See* Sarah Lai Stirland, *Will Congress Stop High-Tech Trolls?*, NAT'L J., Feb. 26, 2005, at 612 ("A report published last year by the National Academy of Sciences showed that, from 1998 to 2001, the number of patent-infringement lawsuits that were resolved in federal district courts doubled from 1,200 to 2,400 cases per year.").

22. *See* Saul Hansell, *MP3 Patents in Upheaval After Verdict*, N.Y. TIMES, Feb. 23, 2007, at C1. *See generally* Ina Fried, Microsoft Hit with $1.5 Billion Patent Verdict (Feb. 22, 2007), http://news.zdnet.com/2100-3513_22-151311.html; Jessica Mintz, *Microsoft Hit with $1.52B in Damages*, WASH. POST, Feb. 23, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/02/22/AR2007022201589.html.

23. *See* Dee Gill, *Defending Your Rights: Protecting Intellectual Property Is Expensive—and Often Crucial*, WALL ST. J., Sept. 25, 2000, at 6 (stating that a patent case is "over four times as expensive as a typical copyright case with similar exposure").

infringing technology.[24] They must submit claim charts, disclosures of preliminary infringement contentions, and invalidity contentions.[25] They often need expert witnesses to explain the technologies involved to the judges.[26]

In 2006, there were 2830 patent cases filed across the United States.[27] Ten years ago, in 1997, the number of patent cases filed was only 2095.[28] Major corporations spend large sums annually to defend themselves in patent infringement cases. For example, Microsoft spends about $100 million[29] and Intel $20 million.[30] Also, an industry study revealed that the average cost of a patent case was $1.2 million.[31] A more recent commentator stated that the cost per case is now $1.5 million.[32] In cases where the damages reach approximately $25 million, the parties may incur extraordinary expenses, some "totaling" an alarming $8 million per case.[33]

The cost climbs on a steep upward trajectory for defendants if they are found liable and face an injunction order. The threat of

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24. *See generally* Michael D. Kaminski, Effective Management of U.S. Patent Litigation (Oct. 26, 2005), http://www.foley.com/files/tbl_s31Publications/FileUpload137/2941/Effective%20Management%20of%20US%20Patent%20Litigation.pdf (stating that patent litigations are costly because they often involve complex technology and providing an example of factually intensive preparation at the prelitigation stage: lawyers in prelitigation must review the patents at issue, the prosecution history, and relevant prior art to evaluate the validity of the patents).

25. *See generally* Patrick H. Higgins & Mary Sue Henifin, *Build, Maintain, and Enforce Strategic Market Exclusivity, in* PATENT ENFORCEMENT BEST PRACTICES: LEADING LAWYERS ON EVALUATION A PATENT'S SCOPE, INVESTIGATING INFRINGEMENT CLAIMS, AND DEVELOPING STRATEGIES FOR PROSECUTION AND DEFENSE 5, 20-22 (Eddie Fournier ed., 2007), *available at* http://bipc.com/media/pnc/5/media.1625.pdf (detailing the preparation before and after the *Markman* hearing in patent cases).

26. *See generally* Cynthia E. Kernick, *The Trial, in* PATENT LITIGATION STRATEGIES HANDBOOK 767, 803-05 (Barry L. Grossman & Gary M. Hoffman eds., 2d ed. 2005), *available at* http://www.reedsmith.com/_db/_documents/PLI2_Chap_21.pdf (discussing the pretrial preparation in patent cases).

27. Inter-Univ. Consortium for Political & Soc. Research, Federal Court Cases: Integrated Data Base, 2006, http://dx.doi.org/10.3886/ICPSR04685 (last visited Oct. 29, 2008).

28. Inter-Univ. Consortium for Political & Soc. Research, Federal Court Cases: Integrated Data Base, 1970-2000, http://dxidoi.org/10.3886/ICPSR08429 (last visited Oct. 29, 2008) [hereinafter Integrated Data Base].

29. Steven Vaughan-Nichols, Microsoft Advocates for Patent Reform (Mar. 10, 2005), http://www.eweek.com/c/a/Windows/Microsoft-Advocates-for-Patent-Reform/.

30. *See* Stirland, *supra* note 21, at 612.

31. *See* Gill, *supra* note 23.

32. *See* Mark H. Webbink, *A New Paradigm for Intellectual Property Rights in Software*, 2005 DUKE L. & TECH REV. 0012, ¶ 15, *available at* http://www.law.duke.edu/journals/dltr/articles/2005dltr0012.html (reporting patent litigation statistics).

33. *See* Stirland, *supra* note 21, at 613 (reporting on the average damages in patent cases).

injunction often may force defendants to settle the litigation by paying a monetary amount to avoid such injunction. The Blackberry litigation is an example of a patent infringement case where the defendant paid $612.5 million to settle the litigation a week after the district judge strongly hinted of issuing an injunction order.[34] An injunction is the strongest weapon a patentee can use against the defendant, capable of forcing the defendant to the settlement table.[35] The power of injunctive relief became a major concern in patent cases where the United States Court of Appeals for the Federal Circuit held that an injunction was near automatic as a remedy against the infringing defendant.[36] The outcry against the special availability of an injunction in patent cases led the United States Supreme Court to overturn the Federal Circuit's established ruling on injunction.[37] Even with the new standard for injunction in patent cases, from the defendant's side, litigation is just too costly to maintain if an injunction is imminent.[38]

Critics strongly believe that patent litigation is out of control,[39] arguing that excessive litigation both discourages patentees from enforcing their patent rights and encourages patent speculators or patent holding companies to aggressively bring baseless patent infringement cases against major companies that are viewed as

34. *See* Tom Krazit & Anne Broache, BlackBerry Saved (Mar. 3, 2006), http://news.cnet.com/BlackBerry-saved/2100-1047_3-6045880.html.

35. *See* William C. Rooklidge, *Reform of the Patent Laws: Forging Legislation Addressing Disparate Interests*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 9, 13 (2006) ("[A] cornerstone of the patent owner's right to exclude is the court's power to grant injunctive relief . . . .").

36. *See* Jeremiah S. Helm, Comment, *Why Pharmaceutical Firms Support Patent Trolls: The Disparate Impact of* eBay v. MercExchange *on Innovation*, 13 MICH. TELECOMM. & TECH. L. REV. 331, 339 (2006) (stating that pharmaceutical companies generally are more in favor of automatic injunction rules due to their long and costly research and development for drug products).

37. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (reversing the Federal Circuit's standard on injunctive relief for patent cases); Rooklidge, *supra* note 35, at 14-16 (explaining reasons and critiques advanced by different interests groups on injunction standard in patent cases).

38. *See* Rooklidge, *supra* note 35, at 13 (asserting that patentees such as universities, research institutes and independent inventors "often press claims for injunctive relief in order to obtain higher settlement amounts or license fees").

39. *See also Patent Trolls*, *supra* note 1, at 23-26 (testimony of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.) (testifying that patent litigation is out of control and needs urgent reform); *Amendment in the Nature of a Substitute to H.R. 2795, the "Patent Act of 2005": Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 7, 47 (2005) [hereinafter *Hearings on Substitute*] (statement of Emery Simon, Counsel, The Business Software Alliance) ("[T]he problem of excessive litigation continues to spiral out of control in our industry.").

potential deep-pocketed entities.[40] Lobbyists and various interest groups seek to reform patent law.[41] Recent national patent reform efforts aim to curtail patent litigations, particularly on topics such as willful infringement, inequitable conduct, injunction, jurisdiction, and venue.[42] The venue provisions as proposed in numerous congressional bills are squarely directed at the EDTX where patent litigation has risen sharply in the last three years.[43]

III. THE EDTX—A CORPORATE ORIGIN

A. Where Is EDTX?

The EDTX is located in the northeastern part of the state of Texas.[44] Contrary to the image of the Wild West and cowboys, Texas is one of the top three states in the number of patents granted annually by the United States Patent and Trademark Office (PTO).[45] While California leads the nation in the number of patents issued, Texas often vies with New York for second place.[46] Texas is among the states with

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40. *See Hearings on Substitute*, *supra* note 39, at 63-65 (response of Philip S. Johnson, Chief Patent Counsel, Johnson & Johnson); *see also id.* at 7 (statement of Emery Simon, Counsel, The Business Software Alliance) ("[F]iling suit in jurisdictions with a demonstrated pro-plaintiff bent . . . undermines confidence in the fairness of adjudicated outcomes. It has proven very burdensome for technology companies sued in jurisdictions far removed from their principal places of business where the bulk of the evidence or witnesses are to be found.").

41. *See generally Patent Trolls*, *supra* note 1, at 23-25 (testimony of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.) (lobbying for patent litigation reforms on behalf of Time Warner); *Hearings on Substitute*, *supra* note 39, at 5-6 (testimony of Emery Simon, Counsel, The Business Software Alliance) (lobbying for patent litigation reforms on behalf of the computer and software industry).

42. *See* Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. (2006); H.R. 5418, 109th Cong. (2006). *See generally* Patent Reform Act of 2006, S. 3818, 109th Cong. (2006); Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005).

43. *See infra* Table 6.

44. *See* U.S. Dist. Court for the E. Dist. of Tex., Districts of Texas, http://www.txed.uscourts.gov/Directories/DistrictInformation/DistrictsOfTexas.htm (last visited Aug. 26, 2008) [hereinafter Districts of Texas].

45. *See* U.S. Patent & Trademark Office, Patent Statistics Reports Available for Viewing: Statistics by Calendar Year, January 1 to December 31, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/reports_stco.htm#P_COUNTS (last visited Aug. 26, 2008) (providing the number of utility patents granted each year for each state from 1992 to 2005). In 2005, California received 17,989 patents, Texas 5260, and New York 4703. Other states following behind New York were Michigan (3367), Massachusetts (3114), New Jersey (2557), Minnesota (2431), Ohio (2319), Pennsylvania (2298) and Washington (2291). *See* U.S. PATENT & TRADEMARK OFFICE, CALENDAR YEAR 2005 PATENT COUNTS BY PATENT TYPE AND BY STATE AND COUNTRY OF ORIGIN, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_05.htm (last visited Oct. 14, 2008).

46. For 2004, California received 19,488, Texas 5930, and New York 5846. U.S. PATENT & TRADEMARK OFFICE, CALENDAR YEAR 2004 PATENT COUNTS BY PATENT TYPE AND

the largest number of Fortune 500 companies.[47] For example, IBM, even though its headquarters are located elsewhere, has a branch office in Texas that procured 677 patents in 2006.[48]

The EDTX is a compact district and geographically contiguous.[49] It prides itself on covering the "Right Side" of Texas[50] and is comprised of six divisions: Sherman, Tyler, Marshall, Texarkana, Lufkin, and Beaumont.[51] The northern boundary of the EDTX borders Dallas, one of the largest metropolitan areas in the United States. Additionally, the northern region of the EDTX includes cities such as Plano, Trophy Club, The Colony, Allen, Frisco, and McKinney.[52] The district headquarters of the EDTX is located in the Tyler division.[53] The district runs along the Texas and Louisiana border to the east, while the southern boundary reaches the Beaumont area.[54]

BY STATE AND COUNTRY OF ORIGIN, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_04.htm (last visited Oct. 14, 2008). For 2003, California received 19,692, Texas 6037, and New York 6237. U.S. PATENT & TRADEMARK OFFICE, CALENDAR YEAR 2003 PATENT COUNTS BY PATENT TYPE AND BY STATE AND COUNTRY OF ORIGIN, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_03.htm (last visited Oct. 14, 2008). For 2002, California received 18,831, Texas 6030, and New York 6360. U.S. PATENT & TRADEMARK OFFICE, CALENDAR YEAR 2002 PATENT COUNTS BY PATENT TYPE AND BY STATE AND COUNTRY OF ORIGIN, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_02.htm (last visited Oct. 14, 2008). For 2001, California received 18,598, Texas 6,371, and New York 6,349. *See* U.S. PATENT & TRADEMARK OFFICE, PATENT COUNTS: STATES AND COUNTRIES OF ORIGIN: CALENDAR YEAR 2001, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_01.htm (last visited Oct. 14, 2008).

47. *See The* Fortune *500 Ranked Within States*, FORTUNE, Apr. 17, 2006, at F32, *available at* http://money.cnn.com/magazines/fortune/fortune500/states/T.html (reporting that in 2006, Texas had 102 Fortune 500 companies while New York and California had 92 and 110, respectively).

48. *See* Victor Godinez, *Patent Leader IBM Dreams Up an Online Inventor's Forum*, DALLAS MORNING NEWS, Jan. 11, 2007, at 1D, *available at* http://www.dallasnews.com/sharedcontent/dws/bus/industries/techtelecom/stories/DN-ibmpatents_11bus.ART.State.Edition1.31049b9.html (reporting that 677 out of 3621 patents granted to IBM in 2006 came from IBM's office in Texas).

49. *See* Districts of Texas, *supra* note 44.

50. *See* U.S. Dist. Court for the E. Dist. of Tex., District Information, http://www.txed.uscourts.gov/Directories/DistrictInformation/DistrictInformation.htm (last visited Oct. 13, 2008) [hereinafter District Information] ("The Eastern District of Texas District Clerk's Office employs professional staff. Our employees are committed to doing quality work and providing excellent customer service. Our district is located on the 'Right Side' of Texas and is comprised of six divisions; Beaumont, Lufkin, Marshall, Sherman, Texakarkana [sic] and Tyler. Our district headquarters is located in the Tyler Division in the city of Tyler, Texas.").

51. *Id.*

52. *See* U.S. Dist. Court for the E. Dist. of Tex., Sherman Division, http://www.txed.uscourts.gov/Directories/DistrictInformation/Sherman/ShermanInformation.htm (last visited Aug. 26, 2008).

53. *See* Districts of Texas, *supra* note 44.

54. *See id.*

The convenient proximity to a metropolis provides easy access to various divisions in the EDTX. Dallas and other cities within the EDTX vicinity are home to twenty-two Fortune 500 companies as of 2006.[55] The northern boundaries of the EDTX are home to thousands of corporate headquarters.[56] Some of the companies are leaders in their industries, such as ExxonMobil and TI.[57]

B. The Rocket-Docket

The phrase "rocket-docket" describes district courts with swift, speedy pretrial procedures.[58] In the early 1970s, Judge Albert Bryan, Sr., of the EDVA, initiated the approach of taking the maxim "justice delayed is justice denied" very seriously.[59] As a result, the EDVA was "regularly beating the national averages for closing cases."[60] The

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55. *See* Press Release, Jo Trizila, Dir. of Media Relations, Greater Dallas Chamber, 22 DFW Companies Make Fortune 500 List—Up Five from 2005 (Apr. 3, 2006), http://www.wliinc2.com/cgi/foxweb.dll/wlx/cs/wlxenews?cc=DCCTX&action=DISPLISTDET&docid=255.

56. *See* C.J. Gustafson, The Business Student's Guide to Dallas Business Education and Careers (Oct. 20, 2004), http://www.businessschools.com/cities/dallas.html.

57. *Id.* (listing nineteen Fortune 500 companies).

58. The Norfolk division in Virginia was known in the 1980s as a rocket-docket. *See* David O. Loomis, *Why Norfolk's "Rocket-Docket" Is the Fastest, Fairest, Federal Court in the Country*, VA.-PILOT & LEDGER STAR, Apr. 3, 1988, at B1 (interview with Senior United States District Judge Walter E. Hoffman):

> Q. What is it about the way this court handles its civil caseload that warrants the name "the rocket-docket"?
>
> A. When I took over in 1954 there were about 1,300 cases that were pending. Fortunately, I had the opportunity to work on various committees headed by Judge Alfred P. Murrah, who was the chief judge of the 10th Circuit. . . . He was my predecessor as director of the Federal Judicial Center in Washington.
>
> Judge Murrah was a man devoted to the proper administration of justice and trying to expedite cases through trial. In 1962 I adopted some of the suggestions that I had learned from Judge Murrah. And I put them into effect in Norfolk's United States District Court on August 1, 1962. I really didn't get any genuine relief on the docket until 1967 when two additional judges joined me here. We rapidly brought that docket right up to date. Whether it was the system or whether it was the added manpower, we very soon hit the top and have pretty well led the nation in most instances since then.

59. *See* Tim Mazzucca, *In Alexandria Court, Lawyers Work in a Different Orbit*, WASH. BUS. J., Mar. 7, 2003, *available at* http://www.bizjournals.com/washington/stories/2003/03/10/focus4.html; *see also* George F. Pappas & Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA 361, 363 (1995) ("Since at least 1980, one federal district court has stood out in its attempt to speed cases through its docket. The Eastern District of Virginia . . . has succeeded in making speedy justice a reality, even in the most complicated patent cases." (footnotes omitted)).

judges there achieved the results by employing local rules that limited discovery, narrowed the time period to object to written discovery requests, demanded trial preparation by addressing and admitting all exhibits before trial, refused continuances, and limited the number of expert witnesses.[61] The rocket-docket concept became a judicial management method where judges took active roles in controlling deadlines and minimizing continuances while aiming to have speedy resolutions.[62]

Intellectual property attorneys, after learning the reputation of the EDVA, flocked to the district and began to file and litigate patent cases there.[63] It did not take very long for the EDVA to receive an increased share of patent cases. The transformation of the EDVA into a rocket-docket magnet for patent cases has raised some concerns, particularly as to how expedited pretrial procedures favor parties with more resources.[64]

C. TI and the EDTX Rocket-Docket

Corporate America has transformed the EDTX into a rocket-docket. Contrary to the belief that patent trolls graze unhindered in the EDTX, it was the American corporate giant TI[65] that brought patent cases to the EDTX in the early 1990s.[66] Prior to filing lawsuits with the EDTX, TI embraced an aggressive strategy to sue Asian

60. Mazzucca, *supra* note 59; Pappas & Sterne, *supra* note 59, at 363-64 (describing the case management and pretrial procedures adopted by the EDVA to speed cases through the docket).

61. *See* Perkins Coie L.L.P., Litigation: Virginia Capabilities, http://www.perkinscoie.com/litigation/ (follow "Virginia Litigation" under "Downloadable Files") (last visited Aug. 26, 2008) (explaining the procedures for pretrial at the Eastern District of Virginia).

62. Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 227 (1997) (focusing on the effectiveness of rocket-docket courts).

63. *See* Pappas & Sterne, *supra* note 59, at 382 ("The speed and efficiency of the Eastern District has won praise from counsel and parties alike. The Court's streamlined rules and procedures prove conclusively that patent disputes can be resolved fairly, promptly, and at a reasonable cost.").

64. *See* M. Patricia Thayer, *Rocket Dockets: What, When and Where*, *in* PRACTISING LAW INST., PATENT LITIGATION 2000, at 41, 55 (2000) (concerning that expedited patent case pretrial proceedings favor parties with most resources).

65. TI is a Fortune 500 company and is ranked 167th in the United States. *See The 500 Largest U.S. Corporations*, FORTUNE, Apr. 17, 2006, at F1, *available at* http://money.cnn.com/magazines/fortune/fortune500/snapshots/1333.html.

66. *See* Pappas & Sterne, *supra* note 59, at 362 ("[W]idely publicized litigation campaigns waged by Texas Instruments . . . as [an] example[] of aggressive litigation and licensing policies that ha[s] paid substantial dividends."); *see also* Allen R. Myerson, *Market Place: Will Those Royalties to Texas Instruments Continue To Pour In?*, N.Y. TIMES, Sept. 22, 1994, at D10 (reporting on TI's tactics to generate licensing revenue after litigation).

competitors for patent infringements of its computer chips and to force its competitors to pay patent licensing fees.[67] Beginning in 1986, TI launched a simultaneous litigation attack on infringers, filing in the district court in the United States District Court for the Northern District of Texas in Dallas and with the United States International Trade Commission.[68] In 1992, TI searched for a favorable forum in which to litigate its patent infringement lawsuits within a quick time period.[69] Indeed, with its headquarters in Dallas and a large portfolio of important patents,[70] TI decided to file patent infringement actions against one Korean and eight Japanese companies in the EDTX for fast enforcement of its patent rights.[71]

Richard Agnich, generally credited for the creation of the EDTX as the patent trial court, was the general counsel for TI when the company decided to sue infringers in the EDTX.[72] The defendants attempted to have the case transferred to the United States District Court for the District of Idaho but did not succeed.[73] TI profited handsomely from its infringement litigation. Samsung, one of the defendants, signed a licensing agreement with TI, agreeing to pay TI more than $1 billion dollars in royalties.[74] TI also pursued litigation against Hyundai Electronics, which ended in a $25.2 million verdict.[75] TI and Hyundai Electronics then entered into a licensing agreement wherein Hyundai agreed to pay TI over $1 billion in royalties over a

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67. *See* Creswell, *supra* note 1 (stating that TI's litigation strategy forces its rivals to take licenses).

68. *See* G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL 122 (2004).

69. *See* Tex. Instruments Inc. v. Micron Semiconductor, Inc., 815 F. Supp. 994 (E.D. Tex. 1993) (noting that the action was filed on September 25, 1992).

70. *See* Lawrence M. Fisher, *Patents: Aggressive Defender Branches Out*, N.Y. TIMES, Jan. 25, 1992, at 38 (reporting that other competitors view TI as "a litigious dinosaur that has turned to the courtroom because it can no longer compete in the market" and as "stifling creativity").

71. *See id.* ("[TI] shifted tactics in the mid-1980's when . . . it sued one Korean and eight Japanese semiconductor companies, accusing them of infringing its semiconductor patents. The settlements of those suits have yielded Texas Instruments hundreds of millions of dollars in royalty payments since 1986.").

72. *See* Allen Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for Its Expertise and 'Rocket Docket,'* DALLAS MORNING NEWS, Mar. 26, 2006, at 1D, *available at* http://www.dallasnews.com/s/dws/bus/stories/DN-marshall_26bus.ART0.State.Edition1.3eb99e4.html (reporting on the role of TI in shaping the EDTX as a patent forum).

73. *See Micron Semiconductor*, 815 F. Supp. at 999-1000 (ruling that the patent infringement case should be stayed rather than transferred to the District of Idaho).

74. *See Company News: Texas Instruments and Samsung Reach Licensing Pact*, N.Y. TIMES, Nov. 27, 1996, at D3, *available at* http://query.nytimes.com/gst/fullpage.html?res=9F03E2DF1F3DF934A15752C1A960958260.

75. *See* Tex. Instruments, Inc. v. Hyundai Elecs. Indus., Co., 49 F. Supp. 2d 893, 895 (E.D. Tex. 1999).

period of ten years.[76] The aggressive tactics saved and positioned TI as a company with a strong licensing practice supported by a formidable litigation arsenal against potential infringers.[77] In 1996, TI earned more revenue from licensing than manufacturing products.[78]

Following in TI's footsteps, major corporations descended on the EDTX to file patent cases, taking advantage of the court's speediness to resolve disputes.[79] Patent holders from a wide range of industries, such as branded office products,[80] shoes,[81] national defense,[82] computer manufacturing,[83] online automobile marketplaces,[84] software,[85] and optical subsystems[86] sought to enforce their patent rights in the

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76. *See Company News: Texas Instruments and Hyundai in Pact To End Lawsuits*, N.Y. TIMES, May 25, 1999, at C4, *available at* http://query.nytimes.com/gst/fullpage.html?res=9907EFDE1331F936A15756C0A96F958260.

77. *See Company News: Texas Instruments in Pact with NEC*, N.Y. TIMES, Apr. 2, 1991, at D5, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D0CE4D71531F931A35757C0A967958260 (reporting on cross-license agreement that provided TI with higher royalty fees); *see also Chip Patent Suit by Texas Instruments*, N.Y. TIMES, June 30, 1992, at D2, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E0CE4D81639F933A05755C0A964958260 (reporting that TI brought suit against Sanyo Electric Company after TI had negotiated license agreement with numerous companies).

78. *See* Terry Ludlow, Why Is Everybody Picking on Me? (July 26, 2006), http://www.ipfrontline.com/depts/article.asp?id=11909&deptid=5 ("IBM and TI both have collected in excess of $1 billion in licensing fees in a single year."); *The 500 Largest U.S. Corporations*, *supra* note 65.

79. *See* Creswell, *supra* note 1 (attributing the increase of patent litigation filed in the EDTX to the court's speediness and plaintiff-friendly juries).

80. Acco Brands is a publicly traded company and one of the world's largest suppliers of branded office products with annual revenues of nearly $2 billion. *See* Acco Brands, Inc. v. ABA Locks Mfr. Ltd., No. 2:02-CV-112, 2006 WL 887396 (E.D. Tex. Mar. 28, 2006), *aff'd in part, vacated in part, rev'd in part*, 501 F.3d 1307 (Fed. Cir. 2007).

81. *See* Nike, Inc. v. Adidas Am. Inc., 479 F. Supp. 2d 664 (E.D. Tex. 2007).

82. *See* Raytheon Co. v. McData Corp., No. 2:03-CV-013, 2004 WL 952284 (E.D. Tex. Feb. 10, 2004).

83. *See* Dell USA L.P. v. Lucent Techs., Inc., 464 F. Supp. 2d 620 (E.D. Tex. 2006).

84. *See* Autobytel, Inc. v. Dealix Corp., 455 F. Supp. 2d 569 (E.D. Tex. 2006). Autobytel Inc. (Nasdaq: ABTL) is one of the largest online automotive marketplaces, empowering consumers to make smart vehicle choices using objective automotive data and insightful interactive editorial content. The result is a convenient car-buying process backed by a nationwide network of dealers who are committed to providing a positive consumer experience. Every day consumers choose Autobytel-owned and -operated Web sites—Autobytel.com, Autoweb.com, CarSmart.com, Car.com, AutoSite.com, Autoahorros.com, and CarTV.com—to facilitate their car-shopping decisions. *See* Autobytel.com, About Autobytel, http://www.autobytel.com/content/home/help/index.cfm/about (last visited Sept. 30, 2008).

85. Advanceme Inc. v. RapidPay, LLC, 509 F. Supp. 2d 593 (E.D. Tex. 2007).

86. *See* Finisar Corp. v. DirecTV Group, Inc., No. 1:05-CV-264, 2006 WL 2699732 (E.D. Tex. Aug. 4, 2006). Finisar Corporation provides optical subsystems and components that connect local area networks, storage area networks, and metropolitan area networks worldwide. *See* Finisar Home Page, http://www.finisar.com/home.php (last visited Oct. 14, 2008).

EDTX.[87] Well-known corporations such as Nike, Acco Brands, Micron Technology, Dell, Autobytel, Raytheon, Finisar, and Symbol Technologies were among the plaintiffs.[88]

IV. AN EMPIRICAL STUDY: SHIFTING OF PATENT FORUM SHOPPING—A NATIONWIDE TREND

A study of 27,496 patent cases filed from October 1, 1995, to September 30, 2006, reveals a strong shift in patent forum shopping. The following describes data collection, statistical analysis, and explanation for the changes in filing patent cases.

A. The Data and Methodology

The most current raw data related to patent cases was gathered by accessing the Web site of the Inter-University Consortium for Political and Social Research (ICPSR) at http://www.icpsr.org. A search for "federal court cases" was conducted in the text box on the home page of the Web site. The search yielded a long list of data sets.[89] The following data sets were selected:

4685	Federal Court Cases: Integrated Data Base, 2006
4382	Federal Court Cases: Integrated Data Base, 2005
4348	Federal Court Cases: Integrated Data Base, 2004
4026	Federal Court Cases: Integrated Data Base, 2003
4059	Federal Court Cases: Integrated Data Base, 2002
3415	Federal Court Cases: Integrated Data Base, 2001
8429	Federal Court Cases: Integrated Data Base, 1970-2000

The Federal Court Cases: Integrated Data Base Series contain data collected by the ICPSR from 100 federal court offices throughout

87. *See* Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. Inc., 492 F. Supp. 2d 600 (E.D. Tex. 2007). CSIRO, which is Australia's national science agency, brought suit against Japanese Buffalo Technology and its U.S. subsidiary over a patent dealing with a wireless local area network. Commonwealth Scientific & Indus. Research Org. v Buffalo Tech., Inc., No. 2007-1449, 2008 WL 4274482, at *1 (Fed. Cir. Sept. 19, 2008).

88. *See* Nike, Inc. v. Adidas Am. Inc., 479 F. Supp. 2d 664 (E.D. Tex. 2007); *Dell*, 464 F. Supp. 2d 620; *Autobytel*, 455 F. Supp. 2d 569; Symbol Techs., Inc. v. Metrologic Instruments, Inc., 450 F. Supp. 2d 676 (E.D. Tex. 2006); *Finisar Corp.*, 2006 WL 2699732; Micron Tech., Inc. v. Tessera, Inc., 440 F. Supp. 2d 591 (E.D. Tex. 2006); ACCO Brands, Inc. v. ABA Locks Mfr. Ltd., NO. 2:02-CV-112, 2006 WL 887396 (E.D. Tex. Mar. 28, 2006); Pusey, *supra* note 72 ("Besides TI, other major companies took their disputes to Marshall: Nokia vs. Kyocera; Nortel vs. Ciena; Raytheon vs. Oracle; Nike vs. Adidas; and Samsung vs. Matsushita.").

89. Inter-Univ. Consortium for Political & Soc. Research, Search Results, http://search.icpsr.umich.edu/ICPSR (search for "federal court cases") (last visited Sept. 29, 2008).

the United States.[90] The annual data information covers from October 1 of the previous year to September 30 of the current year. The ICPSR obtains the information at two points during the life of a case: filing and termination.[91] All termination data contains information on both filing and termination.[92] Pending data contains only filing information.[93]

To "download" the selected data, new users must register with the ICPSR.[94] The user is given a number of choices regarding what files they would like to download. To download the above selected data sets, "all files" was chosen. The user is also given the choice to download civil terminations or pending cases for the year in question. It is only necessary to download the pending case data for the last year of the analysis period, since the pending data for previous years will be incorporated into the terminating data for subsequent years or into pending data for the last year of analysis. For example, when gathering data from 1996 to 2006, the user does not need to look at the pending case data from 2004. This data will ultimately end up in one of three places: 2005 terminated case data, 2006 terminated case data, or 2006 pending case data because the pending case data set is not limited to cases filed in 2006.

After the raw data sets are downloaded, the Statistical Package for the Social Sciences (SPSS) statistical software is utilized to process the data into a more usable format. Once the data is formatted and appears in the SPSS Data Editor, patent cases are isolated. The isolated patent cases are then statistically analyzed as, for example, they appear in the Tables below.

90. Inter-Univ. Consortium for Political & Soc. Research, Federal Court Cases: Integrated Data Base Series, http://www.icpsr.umich.edu/cocoon/ICPSR/SERIES/00072.xml (last visited Oct. 14, 2008) (explaining how data for the Federal Court Cases: Integrated Database Series was collected).

91. *Id.*

92. *Id.*

93. *Id.*

94. Inter-Univ. Consortium for Political & Soc. Research, Create a New Account, https://www.icpsr.umich.edu/cgi-bin/newacct (last visited Oct. 14, 2008).

B. Tables of Patent Cases and Explanations

Table 1
Top Ten Judicial Districts for Patent Cases
Filed in Fiscal Period Oct. 1, 1995, to Sept. 30, 2000

Judicial District	FY96	FY97	FY98	FY99	FY00	Total
California—Central	164	165	195	222	274	1020
California—Northern	106	162	159	143	170	740
Illinois—Northern	119	125	116	139	150	649
Delaware	61	76	98	93	103	431
New York—Southern	83	77	76	83	110	429
Massachusetts	65	62	74	84	85	370
New Jersey	57	77	72	68	68	342
Minnesota	62	69	45	73	66	315
Florida—Southern	67	56	33	85	67	308
Virginia—Eastern	55	64	75	59	42	295

Table 2
The Top Ten Judicial Districts for Patent Cases
Filed in Fiscal Period Oct. 1, 2000, to Sept. 30, 2005

Judicial District	FY01	FY02	FY03	FY04	FY05	Total
California—Central	252	211	360	333	267	1423
California—Northern	136	187	186	182	205	896
Illinois—Northern	152	165	172	155	162	806
New York—Southern	154	136	112	176	136	714
Delaware	139	133	137	172	128	709
New Jersey	101	115	126	141	99	582
Minnesota	76	80	80	87	86	409
Texas—Eastern	27	35	50	104	148	364
Massachusetts	65	71	69	84	73	362
Pennsylvania—Eastern	55	61	70	117	56	359

Table 1 identifies the ten judicial districts with the most patent cases filed during the five-year fiscal period from October 1, 1995, to September 30, 2000. During this fiscal period, the EDVA was number ten, with 295 cases.

Table 2 identifies the ten judicial districts with the most patent cases filed during the next five-year fiscal period from October 1, 2000, to September 30, 2005. Comparing Table 1 and Table 2, the order of the top three judicial districts remains unchanged: the United

States District Court for the Central District of California, the United States District Court for the Northern District of California, and the United States District Court for the Northern District of Illinois. The United States District Court for the Southern District of New York moved ahead of the United States District Court for the District of Delaware, occupying fourth place. The United States District Court for the District of New Jersey moved one ranking to sixth place and the United States District Court for the District of Minnesota moved to seventh. The United States District Court for the District of Massachusetts fell from sixth to ninth place. Neither the United States District Court for the Southern District of Florida nor the EDVA remained in the top ten list. The new judicial districts that appear in the current top ten list are the EDTX and the United States District Court for the Eastern District of Pennsylvania, in eighth and tenth places, respectively.

Table 3
Expanded List of Judicial Districts for Patent Cases
Filed in Fiscal Period Oct. 1, 2000, to Sept. 30, 2005

Rank	Judicial District	FY01	FY02	FY03	FY04	2005	Total
1st	California—Central	252	211	360	333	267	1423
2nd	California—Northern	136	187	186	182	205	896
3rd	Illinois—Northern	152	165	172	155	162	806
4th	New York—Southern	154	136	112	176	136	714
5th	Delaware	139	133	137	172	128	709
6th	New Jersey	101	115	126	141	99	582
7th	Minnesota	76	80	80	87	86	409
8th	Texas—Eastern	27	35	50	104	148	364
9th	Massachusetts	65	71	69	84	73	362
10th	Pennsylvania—Eastern	55	61	70	117	56	359
13th	Florida—Southern	52	53	75	55	67	302
22nd	Virginia—Eastern	41	46	28	50	51	216

Table 4
Expanded List of Judicial Districts with Patent Cases
Filed in Fiscal Period Oct. 1, 1995, to Sept. 30, 2000

Rank	Judicial District	FY96	FY97	FY98	FY99	FY00	Total
1st	California—Central	164	165	195	222	274	1020
2nd	California—Northern	106	162	159	143	170	740
3rd	Illinois—Northern	119	125	116	139	150	649
4th	Delaware	61	76	98	93	103	431
5th	New York—Southern	83	77	76	83	110	429
6th	Massachusetts	65	62	74	84	85	370
7th	New Jersey	57	77	72	68	68	342
8th	Minnesota	62	69	45	73	66	315
9th	Florida—Southern	67	56	33	85	67	308
10th	Virginia—Eastern	55	64	75	59	42	295
15th	Pennsylvania—Eastern	45	41	45	58	54	243
39th	Texas—Eastern	9	7	15	21	20	72

Table 5
Changes in Judicial Districts During Two Five-year Fiscal Periods,
Oct. 1, 1995, to Sept. 30, 2000, and Oct. 1, 2000, to Sept. 30, 2005

Judicial District	FY'01-'05	FY'96-'00	Cases	%Change
California—Central	1423	1020	403	40%
California—Northern	896	740	156	21%
Illinois—Northern	806	649	157	24%
New York—Southern	714	429	285	66%
Delaware	709	431	278	64%
New Jersey	582	342	240	70%
Minnesota	409	315	94	30%
Texas—Eastern	364	72	292	400%
Massachusetts	362	370	-8	-2%
Pennsylvania—Eastern	359	243	116	48%
Florida—Southern	302	308	-6	-1%
Virginia—Eastern	216	295	-79	-27%

Table 3 provides an expanded list of judicial districts with patent cases filed during the last five-year fiscal period, from October 1, 2000, to September 30, 2005. Table 5 provides a comparison of the data for patent cases filed in the districts in the expanded list identified in Table 3. Table 4 shows the data collected for the earlier five-year fiscal period from October 1, 1995, to September 30, 2000. The

EDVA experienced a major change, falling from tenth to twenty-second place. The EDTX moved up dramatically from thirty-ninth place to eighth place. The general fluctuation in the number of patent cases in other judicial districts is shown in Table 5.

Table 5 indicates that all of the top judicial districts, with the exception of the EDVA, the District of Massachusetts, and the Southern District of Florida, experienced large increases in the number of patent cases filed in the last five-year fiscal period. These judicial districts saw double-digit increases in the number of patent cases filed. The District of Massachusetts and the Southern District of Florida remained relatively unchanged during the two periods. The number of patent cases filed in the EDVA dropped 27% between the first period and the second period.

The EDTX experienced the most dramatic increase, a 400% jump in the number of patent cases filed in the last two five-year fiscal periods. The number of patent cases filed in the EDTX has steadily increased in fiscal years 2001 (35%), 2002 (30%), 2003 (43%), 2004 (100%), 2005 (42%) and 2006 (46%), as shown in Table 6 below. The changes during the last two fiscal years of 2005 and 2006 are not as drastic as the figure shown in the fiscal year of 2004.

Table 6
Changes in Each of the Last Five Fiscal Years

Texas—Eastern	FY01	FY02	FY03	FY04	FY05	FY06
Number of Cases Filed	27	35	50	104	148	216
Change from Previous Year	35%	30%	43%	100%	42%	46%

Table 7
Ranking of Judicial Districts with Patent Cases
Filed in Fiscal Year 2006

Rank	District	FY06 Cases
1st	California—Central	281
2nd	Texas—Eastern	216
3rd	California—Northern	163
4th	New Jersey	145
5th	Delaware	139
6th	Illinois—Northern	138
7th	New York—Southern	135
8th	Massachusetts	80
9th	Georgia—Northern	77
10th	Florida—Southern	69
11th	Minnesota	67
12th	Pennsylvania—Eastern	66
13th	Michigan—Eastern	61
14th	Texas—Northern	58
15th	California—Southern	55
16th	Colorado	51
17th	Florida—Middle	51
18th	Utah	49
19th	Ohio—Northern	43
20th	Connecticut	41
21st	Wisconsin—Eastern	40
22nd	Missouri—Eastern	40
23rd	Oregon	40
24th	Virginia—Eastern	39

Table 7 shows the most current ranking for the judicial districts with patent cases filed from October 1, 2005, to September 30, 2006. The EDVA continued its decline, holding twenty-fourth place. The EDTX now occupies second place.

C. The Rocket-Docket Shift: From EDVA to EDTX

Table 5 shows that the EDVA experienced the most drastic decrease in the percentage of patent cases filed in the last two five-year fiscal periods. The EDVA fell from 295 cases filed in the first five-year fiscal period of October 1, 1995, to September 30, 2000, to 216 cases filed in the last five-year fiscal period of October 1, 2000, to

September 30, 2005. The difference in number constitutes a 27% drop in the number of patent cases filed in the two periods.

The EDVA was identified in an earlier study as one of the top districts with patent cases filed during the 1995-1999 period even though Virginia did not have correlating clusters of high technology industry.[95] Litigants in the EDVA often describe that court as the fastest trial docket in the country for complex commercial cases.[96] The court still strictly enforces a 90- to 120-day discovery period, and the average case has a life expectancy of eight months from filing to trial.[97] So, why did the number of patent cases filed in the EDVA drop, as shown in Table 5?

In the 1990s, the reputation of the EDVA attracted patent litigants who flocked to the district in search of quick justice.[98] The EDVA's status as a rocket-docket for patent cases quickly caused a backlog, and the EDVA no longer maintains its status as the rocket-docket patent litigation district.[99] In fact, judges in the EDVA actively discourage litigants from filing patent cases in their district through the court's

95. *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 906 (2001) ("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.").

96. *See* T.S. Ellis, III, *Judicial Management of Patent Litigation in the United States: Expedited Procedures and Their Effects*, 9 FED. CIR. B.J. 541, 541 (2000) ("[A]ll cases . . . proceed from birth to death, start to finish, in 6-8 months, regardless of the nature or dimensions of the case and with only the rarest of exceptions.").

97. *See* Thayer, *supra* note 64, at 53-54 (describing the fast and firm case management procedures at the EDVA). Some law firms' Web sites advertise their knowledge and expertise of litigating in the fast speed at the EDVA. For example, at Wiley Rein's Web site, the firm highlights its litigation in the famous BlackBerry patent infringement case in the EDVA and explains its knowledge of the rocket-docket pace at the EDVA. *See* Wiley Rein L.L.P., Eastern District of Virginia: The Rocket Docket, http://www.wileyrein.com/practice.cfm?practice_id=99&parentID=29 (last visited Oct. 16, 2008).

98. *See* John B. Pegram, *Should There Be a U.S. Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 792 (2000).

99. *See* William P. DiSalvatore, *Filing Considerations in Patent Litigation*, *in* PRACTISING LAW INST., PATENT LITIGATION 2001, at 81, 92-93 (2001) ("Many plaintiffs have recognized the benefits of the Eastern District 'rocket dockets,' leading to the filing of a large number of patent cases in the District. This, in turn, has led to certain changes in the practices of that Court that may, to some parties, reduce the attractiveness of the Eastern District as a forum to litigate.").

increasing willingness to transfer venue[100] and implement the court's district-wide case assignments.[101]

In transferring venues, if the EDVA is not the plaintiff's home forum, the court employs a restrictive deference to the plaintiff's choice of forum.[102] The court acts on the defendant's motion to transfer, and the case may be moved to the defendant's "home court."[103] This discourages plaintiffs from filing their patent cases in the EDVA if the odds of a transfer are high.[104] Plaintiffs do not want their cases transferred out of the EDVA to a district that may be more favorable for defendants. Thus, plaintiffs voluntarily choose not to file their cases in the EDVA, causing the number of patent cases in that district to drop.[105]

Additionally, on the district-wide case assignment, plaintiffs, who once hoped to litigate in a division located near Washington, D.C., and northern Virginia, now must face the undesirable reality that their cases

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100. *See* Moore, *supra* note 95, at 909 (noting that the EDVA transfers a high number of cases). Some scholars have suggested that the high transfer rate out of the EDVA demonstrates that

> this is legitimate forum selection, which is welfare-enhancing, rather than forum shopping, which might be a zero or negative sum game. The transfer rate might suggest that the judges are quite good at weeding out cases that have little connection with the venue—and are filed by parties who are forum shopping, quite possibly for the reasons speculated above, and have little other connection with the Eastern District.

Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1380 n.70 (2004).

101. *See* DiSalvatore, *supra* note 99, at 93 (discussing the EDVA's efforts in reducing the attractiveness of the district as a magnet for patent cases).

102. *See, e.g.*, Corry v. CFM Majestic Inc., 16 F. Supp. 2d 660, 666 (E.D. Va. 1998) ("A plaintiff's choice of forum, while usually entitled to substantial weight, is here of little moment because it is neither plaintiff's nor defendants' home forum [and] this forum has essentially little or no connection to the operative facts giving rise to the dispute . . . ." (citation omitted)).

103. *See* DiSalvatore, *supra* note 99, at 93-95 (explaining the undesirable consequence of the defendant's transfer of venue motion in cases where the plaintiffs chose the EDVA when it was not their home forum).

104. *Id.*; *see also* Thayer, *supra* note 64, at 59 (noting that during the first eleven months of 1998, the Alexandria division of the EDVA granted sixteen out of the twenty-two motions brought to transfer patent cases).

105. *See* Roderick R. McKelvie, Forum Selection in Patent Litigation: A Traffic Report for 2006, at 4 (May 2007), *available at* http://www.cov.com/publications/ (select "McKelvie" from the "Author" drop down box, follow the hyperlink to the article) ("[I]n selecting a jurisdiction, the plaintiff must be comfortable that the judges in the district it selects will . . . find the court has personal jurisdiction over the defendant and that venue is proper. . . . [This] explains, in part, the decline of the Eastern District of Virginia as a favored forum, as one of the steps the judges took to turn off the flow of cases there was to dismiss certain cases for lack of jurisdiction.").

may be assigned to the central or southern divisions of the EDVA.[106] A plaintiff would not want to litigate in those undesirable divisions for fear of lack of familiarity, inconvenience, and judges without experience in presiding over patent cases.[107] Consequently, the EDVA's practices strongly discourage patent cases from being filed there. These two practices drastically reduced the number of patent cases filed in the EDVA.

V. THE EDTX TRANSFORMATION

There have been a number of studies attempting to explain why certain districts have attracted many patent cases.[108] These studies generally focus on the quantitative numbers of the winning rate, the speed of adjudication, the likelihood of transfer, and statistics on granting preliminary injunction, summary judgment, and stay pending action.[109] These studies, however, do not provide a full picture of how the EDTX transformed into a rocket-docket forum for patent cases. The examination below juxtaposes the statistics illustrating Texas's national leadership in the number of patents obtained with the qualitative factors, such as welcoming judges, local patent rules, strict adherence to the rules imposed by judges, no competing dockets, and entrepreneurial spirits of court employees and local people toward having patent cases in small towns, and concludes that it is logical for high numbers of patent cases to be filed in the region.

A. The Statistics

Professor Moore, now the Honorable Judge Moore of the Federal Circuit, noted in an earlier study that although a comparison of the patent cases filed in a particular state with the patent grants issued by the United States Patent Office for the particular state has many shortcomings, the comparison was still useful.[110] Professor Moore identified that unlike other states, Texas's patent case percentages

106. DiSalvatore, *supra* note 99, at 95-96 (suggesting that central and southern divisions are not viewed as a desirable forum of litigation for patentees).

107. *See* William G. McElwain, *Filing Considerations*, *in* PRACTISING LAW INST., *supra* note 64, at 93, 104 (explaining the EDVA's district-wide case assignment and how it may prevent plaintiffs from filing their cases).

108. *See* McKelvie, *supra* note 105 (summarizing various studies on factors influencing patent forum selection).

109. *Id.*

110. *See* Moore, *supra* note 95, at 905-06.

approximately equaled its national patent grant percentage.[111] During the period of 1995-1999, Texas was third, behind California and New York, in the number of patents issued by the PTO.[112]

Table 8
Utility Patent Grants 2002-2006

States	2002	2003	2004	2005	2006	Total	Percent of Patent Grants
California	18831	19692	19488	17989	22275	98275	23.0%
Texas	6030	6027	5930	5260	6308	29555	7.0%
New York	6360	6237	5846	4703	5627	28773	6.9%
Michigan	3862	3855	3757	3367	3758	18599	4.4%
Massachusetts	3608	3909	3672	3114	4011	18314	4.0%
New Jersey	3762	3522	2957	2557	3172	15970	3.90%
Illinois	3471	3299	3162	2752	3294	15978	3.80%
Pennsylvania	3343	3177	2883	2298	2842	14543	3.50%
Minnesota	2751	2955	2754	2431	2957	13848	3.20%
Florida	2397	2561	2456	2291	2600	12305	2.90%
Virginia	1160	1114	1077	946	1094	5391	1.30%
Delaware	355	346	342	318	357	1718	0.04%
Total U.S. Patent Grants	86980	87901	84271	74637	89823	423612	

With the recent data of patent grants for each of the states,[113] Table 8 shows that California continues to lead the states with 23% of all the utility patents issued between 2002 and 2006. Texas, known to have clusters of high technology industry, follows California with 29,555 patents. New York is third with 28,773 patents. As the EDTX is ranked eighth in Table 3 of the current top judicial districts with patent cases filed during the five-year fiscal period of October 1, 2000, to September 30, 2005, Texas's high number of patent grants, behind only California's, confirms that Texas's patent cases approximate its patent grants more than other districts.

111. *See id.* (noting that California, New York, and Texas were the three states with the most patent grants issued by the PTO).

112. *See id.*

113. Data for each of the states in Table 7 was isolated for 2002, 2003, 2004, 2005, and 2006 from the USPTO Web site. *See* sources cited *supra* note 45.

B. The Judges

1. Knowledgeable, Welcoming, and Organized

The judges are one striking factor that lawyers litigating in the EDTX have identified as key to the transformation of the EDTX into a patent forum: the judges have become knowledgeable about patent law due to the expanding number of patent cases filed with the EDTX.[114] They enjoy presiding over patent cases and encourage patent cases to be filed in their divisions.[115] The attorneys who litigate in front of these judges also take note of their expertise.[116] The judges accept

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114. In comparison, judges in other districts do not have the same expertise over patent cases. *Compare* S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69, 77 ("Simple math suggests that, on average, each trial judge heard three plus cases over the five year period, which is less than one patent case a year. The distribution among the individual judges, however, is even more revealing. The data indicate that the majority of the judges heard two or fewer patent cases in the entire five years."), *with The Eastern District of Texas: A Magnet for Patent Litigation*, METROPOLITAN CORP. COUNS., Sept. 2006, at 53, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=September&artYear=2006&EntryNo=5575 (interviewing two partners with Akin Gump Strauss Hauer & Feld L.L.P.).

115. Notably, Judge Ward has sought out patent cases because he likes the intellectual challenge they provide. *See* Pusey, *supra* note 72 ("Judge Ward, a longtime trial attorney and Clinton appointee, knows this well. Fifteen years ago, he was a trial lawyer on the losing side of a $27 million verdict for patent infringement filed by Dallas-based Texas Instruments. 'I lost, but I enjoyed the intellectual challenge,' said Judge Ward, 'so when I came to the bench, I sought out patent cases.'").

116. An interview of attorneys who regularly litigate patent cases in the EDTX and other districts throughout the country reveals the attorneys' respectful and admirable view of the judges in the EDTX. *The Eastern District of Texas: A Magnet for Patent Litigation*, *supra* note 114, at 53. Below is an excerpt of the interview:

> Warren: The judges Dan mentioned decided that they liked to handle patent cases. They pushed for rules that expedited the litigation process. Now, the entire district has adopted them, and all the judges are using them. Unlike in some jurisdictions, these judges do not move the dates. As a result, there is a compressed timeline.
>
> . . . .
>
> Editor: Does the Eastern District have access to the expertise required to cope with the complex technical issues involved in much of today's patent litigation?
>
> Perez: Yes. The judges are sensitive to the need to understand the complex technologies involved in an increasing number of cases. They know their stuff. For example, Judge Davis has a master's degree in computer science. In addition, if the court gets into an advanced area of technology, it will use technical advisors, i.e., individuals who are skilled in the relevant area from a technology standpoint. For example, if the case involves routers for telecommunications, the court will retain an electrical engineer who is experienced in that area. She will come in and get involved in the *Markman* hearing process. There will be a dialogue with the advisor and judge so that the judge can understand the technology.

that many patent cases involve complex technologies, and they ask for technical tutorials and use technical advisors at hearings.[117] They welcome patent cases filed in their court with a set of local rules specifically for patent cases to manage the docket and expedite the litigation process.[118] By adhering to the rules, judges enhance fairness, curb potentially abusive lawyer conduct resulting from the violation of rules and deadlines, and promote efficiency in handling patent litigation filed in their court.[119] As a result of the judges' efforts, a large number of patent cases are resolved in a short period of time.[120]

In addition, the judges are not afraid of acting as arbiters in discovery disputes; they provide a hotline number for lawyers to contact a judge who is on call during business hours to rule on discovery disputes and to enforce provisions of these rules.[121] Lawyers receive "an immediate hearing on the record and [a] ruling on the discovery dispute, including whether a particular discovery request

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> In addition, Eastern District judges will ask for a technical tutorial. It is the obligation of counsel to be able to explain the technology so that it can be understood by the court.

117. *See id.*; *see also* Pusey, *supra* note 72 (reporting that lawyers give judges in the EDTX, especially Judge T. John Ward "high marks for being well-prepared and well-versed in the particulars of the cases he hears").

118. *See The Eastern District of Texas: A Magnet for Patent Litigation*, *supra* note 114, at 53.

119. See Pusey, *supra* note 72:

> Judge Ward decided to fashion a system that would attract even more intellectual property litigation.
>
> He patterned his local patent rules after some he admired in the Northern District of California. Those rules, and the generally high metabolism of the Eastern District, he said, began attracting patent cases that couldn't be heard in other patent-laden districts in states such as California, Virginia, and Wisconsin.

See also CooperVision, Inc. v. CIBA Vision Corp., No. 2:06-CV-149, 2007 WL 2264848, at *2 (E.D. Tex. Aug. 6, 2007) ("Bullying, venomous and tit-for-tat pretrial antics go against the letter and spirit of the Federal Rules of Civil Procedure, and they especially assail customary and expected practice in the Eastern District of Texas.").

120. *See* Creswell, *supra* note 1 (discussing "the Rules" introduced by Judge Ward, which "turned Marshall's federal court into a 'rocket-docket'—a place where the time between filing and trying a lawsuit became significantly shorter than in other districts").

121. U.S. DIST. CT. E. DIST. TEX. R. CV-26(e):

> The court shall provide a judge on call during business hours to rule on discovery disputes and to enforce provisions of these rules. Counsel may contact the judge by dialing the hotline number listed above for any case in the district and get an immediate hearing on the record and ruling on the discovery dispute, including whether a particular discovery request falls within the applicable scope of discovery, or request to enforce or modify provisions of the rules as they relate to a particular case.

falls within the applicable scope of discovery, or request to enforce or modify provisions of the rules as they relate to a particular case."[122]

2. Reasonable and Fair

Unlike judges in the majority of the district courts across the United States, the EDTX judges possess valuable experience in presiding over patent cases.[123] The EDTX judges are known among litigators as reasonable and fair.[124] Contrary to the myth that the EDTX is a haven for patentees only,[125] lawyers for defendants prevailed in cases where the merits were on their side. For example, in November 2006, Robert Van Nest, one of the lead counsels for Intel Corporation in its recent case in the EDTX, received a summary judgment ruling on invalidity for Intel.[126] Van Nest admitted that "[s]ummary judgment rulings on invalidity cases are unusual in any district."[127] In the same month, Van Nest's San Francisco law firm also prevailed, obtaining a favorable ruling for Comcast, a defendant in a patent infringement case filed in the EDTX.[128] These rulings dispel the myth that defendants cannot win in the EDTX in patent cases and in particular at summary

122. *See id.*

123. As indicated in the Purpose and Need for Legislation accompanying House Bill 5418, district court judges do not have the opportunity to hear patent cases due to "the relative infrequency of patent litigation, early settlement of most suits, and random assignment of cases." H.R. REP. NO. 109-673, at 4 (2006), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp109&sid=cp109MHseG&refer=&r_n=hr673.109&item=&sel=TOC_7516& (reporting that a "judge from the U.S. District Court in Chicago, historically one of the top five busiest district courts in terms of patent case filings, reported his personal patent case workload never exceeded five percent of his calendar").

124. *See* Curt Harler, *Legal Action on the Go: The Patent Rocket-Docket*, SMART BUS. DALLAS, June 2007, *available at* http://www.sbnonline.com/Local/Article/12051/71/42/Legal_action_on_the_go.aspx ("[J]udges in the Eastern District do not show favoritism. I think that every judge would be offended by the suggestion." (quoting an experienced EDTX litigator)).

125. *See* Williams, *supra* note 3 (stating that in the EDTX plaintiffs "have such an easy time winning patent-infringement lawsuits against big-tech companies that defendants often choose to settle rather than fight").

126. *See* Maurice Mitchell Innovations, L.P. v. Intel Corp., No. 2:04-CV-450, 2006 WL 3447632 (E.D. Tex. Nov. 22, 2006); Anna Oberthur, *In Plaintiff-Friendly District, Intel Deflects Patent Challenge*, S.F. DAILY J., Nov. 29, 2006, *available at* http://www.kvn.com/pdfs/Intel.pdf (reporting defendants prevailed on summary judgment in the EDTX).

127. Oberthur, *supra* note 126 (quoting Robert Van Nest).

128. *Id.*

judgment in such cases.[129] In 2007, in seven out of the nine cases that were tried to a verdict in the EDTX, defendants prevailed.[130]

C. *Local Rules for Patent Cases*

The EDTX has reformed patent litigation at the local level with the adoption and enforcement of a set of local rules for patent cases filed in the district.[131] Judge Ward first adopted the rules in the EDTX before the entire district developed uniform local rules for patent cases.[132]

The EDTX local rules for patent cases require all parties to observe the fast pace of litigation.[133] The rules set short deadlines with which litigants must comply.[134] The rules manage the docket, facilitate the procedures unique to patent litigation, and control lawyers' abuses.[135]

The local patent rules instruct plaintiffs to disclose their infringement contentions within ten days after the initial case management meeting with defendants, and the defendants must provide their invalidity contentions within forty-five days thereafter.[136] In the excerpt below, an attorney explains that the EDTX's patent rules were the sole important factor for his client's choice of where to file the patent case.

> Frankly, there's nothing like the patent rules up in New York. . . .
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> . . . .

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129. *See id.*

130. *See* Nate Raymond, *Taming Texas*, AM. LAW., Mar. 2008, at 100 (noting that in 2007, in seven of nine cases tried to verdict defendants prevailed in the EDTX).

131. The EDTX amended its local rules to include a set of rules for patent cases. U.S. DIST. CT. E. DIST. TEX. R. app. M (Feb. 22, 2005), *available at* http://www.txed.uscourts.gov/Rules/LocalRules/Documents/Appendix%20M.pdf [hereinafter PATENT RULES].

132. *See* Alfonso Garcia Chan, *Proposed Patent Local Rules for Adoption by Texas' Federal District Courts*, 7 COMP. L. REV. & TECH J. 149, 150-51 (2003) (noting the local patent rules adopted by the United States District Court for the Northern District of California and Judge T. John Ward of the EDTX).

133. *See also* Pusey, *supra* note 72 (reporting that "the fast pace of litigation practiced in East Texas is attractive").

134. *See* PATENT RULES, *supra* note 131 (setting forth a specific time table at each stage of the patent case and stating that the parties must comply).

135. For example, the EDTX imposes a strict page limit on dispositive motions. *Id.* The same page limit is applied to patent cases. *See id.* (stating that briefs for claim construction hearings must follow Local Rule, CV-7(a)); U.S. DIST. CT. E. DIST. TEX. R. CV-7(A) (providing the page limitation on dispositive motions).

136. *See* PATENT RULES, *supra* note 131 (listing patent rules 3-1 and 3-2, which govern plaintiff's disclosure of claims and infringement contentions, and patent rules 3-3 and 3-4, which govern defendant's invalidity contentions).

> . . . [J]ust the fact that we have the early disclosures of infringement positions; we've got the claim charts underway; we're going to get that to them, you know, promptly; the requirement of having their invalidity contentions to us promptly, those are things we don't have in other courts. . . .
>
> . . . And so it will save us time, it will save us money, and it will much more likely lead to a prompt determination, respectfully, Your Honor, if you keep the case. . . .
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> . . . .
>
> . . . I try patent cases all over the country. And when we get before a judge—and obviously they all work hard and mean well and want to do the best—that doesn't understand patents or doesn't like patent cases, it's—it takes years longer; it's much more expensive; there are no procedures in place to make it work efficiently.[137]

The excerpt illustrates that the EDTX's local patent rules, particularly the early disclosure of infringement positions required of the plaintiff and the invalidity contentions required of the defendant, save the parties significant time and money.[138] The local patent rules expedite efficiency and prompt determination of the cases. Prepared parties and litigants will generally favor the fast-paced and efficient approach.[139] The attorney in the excerpt urged the EDTX not to transfer the case to a different district, knowing that except in a very few districts with local patent rules, his case would last longer and cost his client more.[140]

It is often said that rules are useless when they are not enforced. To create a magnet forum for patent cases, the EDTX judges set a timetable for when important documents in patent cases are due and set firm dates for claim construction hearings.[141] They do not move the dates after they have set them.[142] The firmness of the schedule creates

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137. Transcript of Record at 4, 7, 15-16, Symbol Techs., Inc. v. Metrologic Instruments, Inc., 450 F. Supp. 2d 676 (E.D. Tex. 2006) (No. 2:05-CV-509).

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* PATENT RULES, *supra* note 131 (listing patent rule 4, which sets forth Claim Construction Proceedings, including a time table for discovery, exchange of proposed terms and claim elements for construction, exchange of preliminary claim constructions and extrinsic evidence, a joint claim construction and prehearing statement, claim construction briefs, and a claim construction hearing).

142. *See The Eastern District of Texas: A Magnet for Patent Litigation*, *supra* note 114, at 53.

a high level of certainty on which litigants can rely, knowing that they must work to meet the deadlines and resolve the matters accordingly.[143]

Under the rules which are strictly enforced by the EDTX judges, lawyers are not allowed to engage in activities, such as unfettered length motions and lawyer soliloquies, that will lead to delays and prolong the case on the docket. For example, Judge Ward enforces page limits on documents and time limits on opening and closing arguments.[144] He is not hesitant to interrupt lawyers brusquely if they go over their allotted limits or to impose fines when necessary.[145]

D. Docket: No Competing Cases

Another striking feature about the EDTX is the lack of competing criminal cases in the docket.[146] Civil litigants are well aware that their patent cases do not enjoy priority if they file their cases in a district court burdened with criminal cases.[147] Under federal law, criminal cases proceed on an expedited schedule.[148] The EDTX has very few criminal cases, and as a result, the docket is more available for patent cases.

E. Customer-Oriented Approach

Another important factor regarding the transformation of the EDTX into a patent forum is the customer-oriented approach adopted by the District Clerk's Office. The Office sees its role as the provider of "excellent customer service" to users such as litigants and their counsel.[149] The EDTX views those who use the court system as "customers" and the purpose of its existence is to serve its customers.[150] This spirit, as evidenced by the EDTX's Web site, touts the professional staff who are committed to doing quality work for

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143. *Id.* ("[EDTX judges] set trial dates and, likewise, make them stick. The certainty of the dates along with the hardworking judges make the Eastern District a magnet for patent cases." (quoting a patent litigator)).

144. *See* Creswell, *supra* note 1 (providing various examples of how Judge Ward manages patent cases).

145. *See id.* (reporting the strict adherence to the rules and little to no tolerance for lawyer's abuses by Judge Ward of the EDTX).

146. *See* Michael C. Smith, *Rocket Docket: Marshall Court Leads Nation in Hearing Patent Cases*, 69 TEX. B.J. 1045 (2006), *available at* http://www.texasbar.com/Template.cfm?Section=Texas_Bar_Journal1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=16286 (stating that criminal cases take only about ten percent of the docket).

147. *Id.*

148. FED. R. CRIM. P. 50; 18 U.S.C. § 3003 (2000).

149. *See* District Information, *supra* note 50.

150. *Id.*

customers.[151] In addition, the prominent "excellent customer service" indicated on the EDTX's website demonstrates that the employees of the EDTX, who are members of East Texas communities, welcome cases filed in their courts, especially patent cases.[152]

The Clerk's Office has also embraced technology in its docket management strategy.[153] The Office adopted digital filing and accepts online payments for court's fees.[154] Digital filing has streamlined paperwork and increased efficiency throughout the EDTX.[155]

F. The Jury

Critics complain that the EDTX is a patent haven for patentees because juries in East Texas have strong pro-plaintiff biases.[156] The numbers do not support the charge of irrational pro-plaintiff biases. Since 1999, there have been only sixteen patent cases that ended with jury verdicts.[157] This number constitutes 2.6% of patent cases (16/621) decided by jury trial during the period between fiscal years 1999 and 2006.[158]

Most importantly, the largest jury verdict in the EDTX during this period was $133 million in *z4 Technologies, Inc. v. Microsoft Corp.*[159] The second largest jury verdict was $73 million in *TiVo, Inc. v.*

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151. *Id.*

152. *Id.*; *see also* Pusey, *supra* note 72 (reporting that Marshall businesses and citizens welcome patent cases to their town).

153. *See* U.S. Dist. Court for the E. Dist. of Tex., Attorney Registration Form, http://www.txed.uscourts.gov/FilingInfo/E-Filing/ecfform.pdf (last visited Aug. 26, 2008) (registration form for using the electronic filing system in the EDTX); U.S. Dist. Court for the E. Dist. of Tex., How To Electronically File a New Case, http://www.txed.uscourts.gov/Rules/newcase.pdf (last visited Aug. 26, 2008). Additionally, the century-old Harrison County Courthouse in the Marshall division has been renovated and updated to handle the expanding patent docket. *See* Creswell, *supra* note 1.

154. *See* U.S. Dist. Court for the E. Dist. of Tex., Important Information, http://www.txed.uscourts.gov/ (last visited Oct. 31, 2008) (providing links to e-filing and payments at the home page of the EDTX's Web site).

155. Michael C. Smith, Ream of Paper #4 Opened, http://mcsmith.blogs.com/eastern_district_of_texas/2008/06/ream-of-paper-4-opened.html (June 10, 2008, 17:41 CST) (discussing that all filings are electronic, which eliminates the need for paper).

156. *See generally* Creswell, *supra* note 1 (reporting what attorneys think about the juries in the EDTX).

157. Michael C. Smith, Eastern District Jury Verdict #16-$133 v. Microsoft et al. http://mcsmith.blogs.com/eastern_district_of_texas/2006/04/eastern_distric.html (Apr. 19, 2006, 12:39 CST).

158. *Id.*; Integrated Data Base, *supra* note 28.

159. No. 6:06-CV-142, 2006 WL 2401099 (E.D. Tex. Aug. 18, 2006).

Echostar Communications Corp.[160] These numbers are significantly smaller than the $1.5 billion verdict against Microsoft handed down by the jury in the United States District Court for the Southern District of California.[161] These numbers suggest that juries in the EDTX and their patent awards are within the range of verdicts decided by juries from other districts, as noted by other commentators.[162]

In summary, the condemnations leveraged against the EDTX have little foundation. The EDTX's experienced judges, efficient case management method, and helpful court employees are important factors in its positioning as a qualified forum for complex technology-related litigation that other district courts attempt to avoid. The EDTX's efforts should not be diminished by the exaggerated allegations of patent forum shopping abuse that led to the proposed national patent forum shopping reforms.

VI. NATIONAL PATENT FORUM SHOPPING REFORM

In the last several years, corporations from various industries with different agendas have lobbied Congress for amendments to existing patent laws.[163] Some intellectual property organizations want the United States to abandon the first-to-invent system and adopt the first-to-file system.[164] The software industry, with its fear of patent infringement suits, demands revisions to the system of injunctions and

160. No. 2007-1022, 2007 WL 1686729 (E.D. Tex. May 30, 2007). For a comprehensive blog tracking jury verdicts in the EDTX, see Smith, *supra* note 157 (reporting exclusively on the EDTX).

161. *See* Special Verdict Form, Lucent Techs. Inc. v. Gateway, Inc., No. 02-CV-2060, 2008 WL 4349236 (S.D. Ca. Sept. 25, 2008), *available at* http://www.casd.uscourts.gov/uploads/Attorney%20Assistance/File%20Review/Noteworthy%20Filings/02cv2060B-CAB.pdf; Fried, *supra* note 22 (reporting on the verdict).

162. *See* Sheri Qualters, *Intellectual Property Verdicts Exceed $1.3 Billion: Companies Are Prepared To Go to the Mat To Protect Intangible Assets*, NAT'L L.J., Feb. 26, 2007, at S4, *available at* http://www.law.com/jsp/article.jsp?id=1172829796667 ("Professor Paul Janicke at the University of Houston Law Center, who has tracked jury verdicts in the Eastern District of Texas, concluded that tales of runaway patent juries are 'strictly anecdotal.'").

163. *See Committee Print Regarding Patent Quality Improvement: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 1-2 (2005) (opening statement of Rep. Lamar Smith, Member, House Comm. on the Judiciary).

164. *See generally* Rooklidge, *supra* note 35, at 10-12 (discussing the legislative recommendations of the American Intellectual Property Law Association (AIPLA) to reform patent law). Other independent inventors groups oppose AIPLA's proposal on moving the patent system from first inventor to first to file. *Id.* at 22.

damages.[165] Other industries oppose the software industry's proposals on damages.[166] Depending on their economic interest, companies seek amendments to particular areas of the law advantageous to their own industries.[167]

Among the various proposals advanced by different interest groups, provisions related to patent litigation, including jurisdiction and venue, were included.[168] Testimony, from individuals representing their respective interest groups, often cites the EDTX as an example of patent litigation increase and abuse.[169] These testimonies, coming from major and powerful industries, lobby for reforms to end forum shopping, and, not surprisingly, have found their way into various drafts and bills sponsored by different legislators.

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165. Notably, the Business Software Alliance (BSA) advanced their proposals for placing limitations on injunction and damages. *See generally id.* at 13 (discussing BSA's proposals).

166. *See id.* at 21 ("The Coalition (including AIPLA and IPO), the Pharmaceutical Research and Manufacturers Association and the Biotechnology Industry Organization, prefer no change in the patent damages statute . . . ."); *see also Hearings on Substitute*, *supra* note 39, at 11-12 (statement of Philip S. Johnson, Chief Patent Counsel, Johnson & Johnson) (explaining how the business model employed by the pharmaceutical industry dictates the industry's proposed reforms).

167. Wendy H. Schacht & John R. Thomas, *Patent Reform: Innovation Issues*, *in* PATENT TECHNOLOGY: TRANSFER AND INDUSTRIAL COMPETITION 1, 13 (Juanita M. Branes ed., 2007) ("In summary, then, the patent laws provide a 'one size fits all' system, where all inventions are subject to the same requirements of patentability and scope of protection, regardless of the technical field in which they arose. ' Innovators in different fields nonetheless have varying experiences with the patent system. These discrepancies, among others, lead to the expectation that distinct industries may react differently to the various patent reform proposals presently considered by Congress."). *See generally Hearings on Substitute*, *supra* note 39, at 23-34 (statement of Robert Chess, Chairman, Nektar Therapeutics).

168. *Hearings on Substitute*, *supra* note 39, at 5 (statement of Emery Simon, Counsel, The Business Software Alliance) ("We support the approach of the Substitute in addressing the problem of forum shopping by plaintiffs. The Substitute would create a viable means for the defendant to have the case moved to a more appropriate venue. The practice of filing suit in jurisdictions with a demonstrated pro-plaintiff bent warps settlement demands and undermines confidence in the fairness of adjudicated outcomes. It has proven very burdensome for technology companies sued in jurisdictions far removed from their principal places of business where the bulk of the evidence or witnesses are to be found.").

169. *See Patent Trolls*, *supra* note 1, at 31 (statement of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.) (providing information about the increase in the number of patent cases filed in the EDTX as an example of forum shopping); *see also Hearings on Substitute*, *supra* note 39, at 9 (statement of Emery Simon, Counsel, The Business Software Alliance) (criticizing districts as pro-plaintiff).

A. *Analysis and Critiques of Proposed Venue Reform Provisions*

1. Some Historical Background

On June 8, 2005, Representative Lamar Smith, Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary, introduced House Bill 2795, the Patent Act of 2005, a comprehensive legislation to overhaul the patent system.[170] The legislation proposed by Smith did not contain any provision on venue reform.[171]

House Bill 2795 then faced the intense lobbying efforts of various interest groups[172] who offered their comments, revisions, and substitutes for the bill on patent quality and patent litigation reform.[173] On July 26, 2005, Representative Smith circulated an Amendment in the Nature of a Substitute to House Bill 2795, containing a proposed patent venue reform provision.[174] The related Senate version of House

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170. Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005); Press Release, Rep. Lamar Smith, Smith Introduces Patent Reform Bill (June 8, 2006), http://lamarsmith.house.gov/Read.aspx?ID=669.

171. *See* Press Release, *supra* note 170:

The Patent Act:

- Provides that the right to a patent will be awarded to the first inventor to file for a patent who provides an adequate disclosure for a claimed invention;
- Simplifies the process by which an applicant takes an oath governing the particulars of an invention and the identity of the rightful inventor;
- Deletes the "best mode" requirement from § 112 of the Patent Act, which lists certain "specifications" that an inventor must set forth in an application;
- Codifies the law related to inequitable conduct in connection with patent proceedings before the PTO;
- Clarifies the rights of an inventor to damages for patent infringement;
- Authorizes courts with jurisdiction over patent cases to grant injunctions in accordance with the principles of equity to prevent the violation of patent rights;
- Authorizes the PTO to limit by regulation the circumstances in which patent applicants may file a continuation and still be entitled to priority date of the parent application;
- Expands the 18 month publication feature to all applications;
- Creates a new post-grant opposition system;
- Allows third-party submission of prior art within six months after the date of publication of the patent application.

172. *Hearings on Substitute*, *supra* note 39, at 1 (statement of Rep. Lamar Smith, Member, House Comm. on the Judiciary) (documenting the subcommittee's fourth hearing on patent reform in the 109th Congress). AIPLA submitted its markup to the Smith Draft. *See* Fish & Richardson, P.C., Balanced and Achievable Patent Law Reform, Now, *available at* http://www.fr.com/news/AchievablePatentReform.pdf (last visited Oct. 29, 2008).

173. Fish & Richardson P.C., A Coalition for 21st Century Patent Reform: Balanced Initiatives To Advance Quality and Provide Litigation Reforms (Sept. 1, 2005), http://www.fr.com/news/2005-09-14_Coalition_Draft.pdf.

174. Smith, *supra* note 7:

Bill 2795 during the 109th Congressional Session was Senate Bill 3818.[175]

On August 3, 2006, Senators Orrin Hatch[176] and Patrick Leahy introduced Senate Bill 3818, Patent Reform Act of 2006.[177] The Senate Bill represents the work of major patent law reforms championed by

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SEC. 9. VENUE.

. . . .

(b) VENUE FOR PATENT CASES

(1) IN GENERAL. Section 1400 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) Any civil action arising under any Act of Congress relating to patents, other than an action for declaratory judgment or an action seeking review of a decision of the Board of Patent Appeals under chapter 13 of title 35, may be brought only—

"(1) in the judicial district where the defendant resides;

"(2) in the judicial district where the defendant has committed acts of infringement and has a regular and established place of business; or

"(3) if the plaintiff is a not-for-profit educational institution that owned the rights of the patents in suit as of the effective filing date of those patents, in any judicial district in which the defendant is subject to personal jurisdiction at the time the action is commenced.

"(c) Notwithstanding section 1391(c) of this title, for purposes of venue under this section (b), a defendant that is a corporation shall be deemed to reside in the judicial district in which the corporation has its principal place of business."

175. Patent Reform Act of 2006, S. 3818, 109th Cong. (2006).

176. Senator Orrin Hatch made a statement introducing Senate Bill 3818. With respect to the proposed venue provision, Senator Hatch stated: "Section 8 would amend the current statutory provision that determines the appropriate venue for patent litigation. The intent of the venue language is to serve as a starting point for discussions as to what restrictions—if any—are appropriate on the venue in which patent cases may be brought." 152 CONG. REC. S8831 (daily ed. Aug. 3, 2006) (statement of Sen. Orrin Hatch, Member, S. Judiciary Comm.).

177. Patent Reform Act of 2006, S. 3818 § 8:

SEC. 8. VENUE AND JURISDICTION.

(a) VENUE FOR PATENT CASES.—Section 1400 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) Any civil action arising under any Act of Congress relating to patents, other than an action for declaratory judgment or an action seeking review of a decision of the Patent Trial and Appeal Board under chapter 13 of title 35, may be brought only—

"(1) in the judicial district where either party resides; or

"(2) in the judicial district where the defendant has committed acts of infringement and has a regular and established place of business.

"(c) Notwithstanding section 1391(c) of this title, for purposes of venue under subsection (b), a corporation shall be deemed to reside in the judicial district in which the corporation has its principal place of business or in the State in which the corporation is incorporated."

diverse industries with different economic interests and goals for the patent system. With respect to patent litigation reform, the Senate version contains a proposed jurisdiction and venue provision.[178]

2. The Senate Version for Patent Venue

Senate Bill 3818 seeks to amend 28 U.S.C. § 1400 by narrowing the current statute governing where patent cases can be brought.[179] As the current statute stands, patentees can bring their patent infringement cases to district courts where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business.[180]

The proposed provision in Senate Bill 3818 adds a restriction to the existing statute. It allows a patent infringement action to be brought only in the judicial district where either party resides.[181] For purposes of determining an appropriate venue, a corporation is deemed to reside in the judicial district where the corporation has its principal place of business or in the state in which it is incorporated.[182]

Under the proposed provisions, patentees have fewer options as to where to bring their cases. Under Senate Bill 3818, the patentee cannot bring a patent infringement case in a district where neither the patentee nor the defendant resides.[183] That means, for example, if the patentee is a Delaware corporation with its principal place of business in Cleveland, Ohio and the defendant is a Delaware corporation with its principal place of business in Seattle, Washington, the patentee can only bring its case in the United States District Court for the Northern District of Ohio, the District of Delaware, or the Western District of Washington.

Under the proposed venue provision, the reformers seek to prevent districts such as the EDTX from becoming magnets for patent cases. A plaintiff, not incorporated in Texas and without its principal place of business in the EDTX, does not reside there, and hence the

178. The difference between the House version and the Senate version of the venue provision is that the Senate version does not have a special paragraph on where not-for-profit plaintiffs can bring their infringement suit. Also, the Senate version allows infringement cases to be brought in judicial districts where either party resides whereas under the Substitute House Bill 2795, infringement cases can only be brought in the judicial district where the defendant resides. *See* S. 3818 § 8; Patent Reform Act of 2005, H.R. 2795, 109th Cong. § 9 (2005); *Smith*, *supra* note 7, § 9.

179. *See* Patent Reform Act of 2006, S. 3818 § 8.

180. 28 U.S.C. § 1400(b) (2000).

181. Patent Reform Act of 2006, S. 3818 § 8(a).

182. *Id.*

183. *Id.*

court would have no right to keep the case and must dismiss. These requirements, if the proposed venue provision becomes law, will deprive the EDTX from hearing many patent cases.

3. Pitfalls in the Proposed Venue Provisions of Substitute House Bill 2795 and Senate Bill 3818

The proposed venue provisions, with their aim to neutralize the EDTX, are ineffective. It is easy to detect the pitfalls in the proposed venue provisions. Patentees can incorporate their companies in the EDTX and subsequently bring a patent infringement action against any potential defendant.[184] By incorporating in the EDTX, any patentee would fulfill the requirement that one party to the patent litigation reside within the EDTX.

It is common knowledge that incorporating a company is a simple and inexpensive process.[185] Patentees could and would easily incorporate their companies in the EDTX or any other district that they believe to be cost-effective and beneficial to the disposition of their cases. Such conduct defeats the goal of the proposed venue provisions. Perhaps the ineffectiveness of the proposed venue provisions imply that the sponsors of these bills did not truly believe that venue is as magnified a problem as represented by some interest groups.[186]

4. The Coalition and the House Version of House Bill 5096

The Coalition for 21st Century Patent Reform is a powerful organization. The Coalition is primarily comprised of major companies in the software and computer hardware industries, and it vigorously campaigns for their interests.[187] The Coalition lobbies to

184. Patent Reform Act of 2006, S. 3818 § 8; Smith, *supra* note 7.

185. Tex. Sec'y of State, Filing Guide for Business Organizations and Nonprofit Associations, http://www.sos.state.tx.us/corp/forms/filingguide/pdf/index.shtml (last visited Oct. 14, 2008).

186. *See generally Patent Trolls*, *supra* note 1, at 31-32 (testimony of Chuck Fish, Vice President and Chief Patent Counsel, Time Warner, Inc.); *Hearings on Substitute*, *supra* note 39, at 5 (testimony of Emery Simon, Counsel, The Business Software Alliance).

187. Members of the Coalition include 3M, Abbott Laboratories, Air Liquide, Air Products, AstraZeneca, Baxter Healthcare Corp., Beckman Coulter, Bridgestone Americas, Bristol-Myers Squibb, Cargill Incorporated, Caterpillar, Cephalon, CheckFree, Corning, Dow Chemical, Eastman Chemical, Electronics for Imaging, E.I. du Pont (DuPont), Eli Lilly, ExxonMobil, General Electric, Genzyme, GlaxoSmithKline, Henkel Corporation, Hoffman-La Roche, Johnson & Johnson, Merck, Millennium Pharmaceuticals, Monsanto, Motorola, Novartis, Patent Cafe.com Inc., Pfizer, Procter & Gamble, Sangamo BioSciences, Texas Instruments, United Technologies, Weyerhaeuser, Wyeth, and AIPLA. *See* Press Release, Coalition for 21st Century Patent Reform, Coalition for 21st Century Patent Reform Seeks

reform patent litigation and produces its own version of legislation for patent venue.[188]

As previously noted, Representative Smith's version of House Bill 2795 originally did not contain any patent venue provision.[189] The intense lobbying efforts of the Coalition yielded the Substitute House Bill 2795, which contains a patent venue provision that restricts where patent infringement cases can be brought.[190] Under Substitute House Bill 2795, the patentee can only initiate its patent infringement action in the defendant's home court or where the defendant resides.[191] The Coalition was not pleased with Substitute House Bill 2795 and continued to press for its transfer of venue version, among other issues.[192] On October 20, 2005, Representative Smith offered an amendment to the Coalition's version in the form of a substitute bill.[193]

To Protect American Innovation and Competitiveness (Mar. 21, 2007), http://www.patentsmatter.com/press/release_032107.php.

188. For example, the Coalition offered the following "Transfer of Venue" proposal:

SEC. 9. TRANSFER OF VENUE

Section 281, as amended by Section 5, is further amended by inserting at the end the following:

"(c) TRANSFER OF VENUE.—

A court shall grant a motion to transfer an action under subsection (a) to a judicial district or division in which the action could have been brought and that is a more appropriate forum for the action, which includes any judicial district or division where a party to the action has substantial evidence or witnesses, if—

"(1) the action was not brought in a district or division—

"(A) in which the patentee resides or maintains its principal place of business,

"(B) in which an accused infringer maintains its principal place of business, or

"(C) in the State in which an accused infringer, if a domestic corporation, is incorporated;

"(2) at the time the action was brought, neither the patentee nor an accused infringer had substantial evidence or witnesses in the judicial district in which the action was brought, and

"(3) the action has not been previously transferred under this subsection.

"(d) For purpose of this section (c), use or sale of allegedly infringing subject matter in a judicial district shall not, by itself, establish the existence of substantial evidence or witnesses in such a judicial district."

Fish & Richardson P.C., *supra* note 173 (providing the redline version of the Coalition's markup of the original House Bill 2795).

189. *See* Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005).

190. *See* Smith, *supra* note 7.

191. *Id.*

192. *See* Fish & Richardson P.C., *supra* note 173.

193. *See* K. Karel Lambert, Patent Reform Act of 2005 (HR 2795)—Markup of Title 35 USC (Oct. 24, 2005), http://www.4ipt.com/IPMetalworks/Title35-perCoalitionPrintRev_20Oct2005.pdf (tracking the various markup versions of H.R. 2795).

The amendment contains language similar to the Coalition's transfer of venue provision.[194]

Subsequently, on April 5, 2006, Representative Howard Berman introduced House Bill 5096, or Patents Depend on Quality Act of 2006, which included a proposed venue provision.[195] This proposed venue provision contains some similar characteristics of the version championed by the Coalition.[196]

Overall, the 109th Congress ended without further action on Senate Bill 3818 and House Bill 5096. On April 18, 2007, both the Senate and the House of Representatives introduced the Patent Reform Act of 2007, Senate Bill 1145[197] and House Bill 1908,[198] respectively, for the 110th Congress. The Patent Reform Act of 2007 contains a venue provision identical to the provision in Senate Bill 3818 of the 109th Congressional Session.[199] The House passed its version of the

194. *Id.*

195. Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. § 7 (2006).

196. *See id.*; Fish & Richardson P.C., *supra* note 173.

197. Patent Reform Act of 2007, S. 1145, 110th Cong. (2007). For the history of S. 1145, see S. 1145: Patent Reform Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=s110-1145 (last visited Aug. 26, 2008).

198. Patent Reform Act of 2007, H.R. 1908, 110th Cong. (2007). For the history of H.R. 1908, see H.R. 1908: Patent Reform Act of 2007, http://www.govtrack.us/congress/bill.xpd?bill=h110-1908 (last visited Aug. 26, 2008).

199. On June 21, 2007, the Senate Judiciary Committee held a hearing for a mark-up session on Senate Bill 1145. Senator Patrick Leahy introduced a substitute bill to Senate Bill 1145. The Judiciary Committee adopted the manager's amendment. The bill, however, has not been reported out of the Committee. The Substitute version of Senate Bill 1145 added new language to paragraph (c) of the proposed venue provision. Patent Reform Act 2007, S. 1145, 110th Cong. (2007), *available at* http://www.jonesday.com/files/uplaod/IP_PatentRef_S.1145Jun2107.pdf (manager's amendment intended to be proposed by Mr. Leahy). The added new language is in italics as follows:

SEC. 10. VENUE AND JURISDICTION.

(a) VENUE FOR PATENT CASES.—Section 1400 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) Any civil action arising under any Act of Congress relating to patents, other than an action for declaratory judgment or an action seeking review of a decision of the Patent Trial and Appeal Board under chapter 13 of title 35, may be brought only—

"(1) in the judicial district where either party resides; or

"(2) in the judicial district where the defendant has committed acts of infringement and has a regular and established place of business.

"(c) Notwithstanding section 1391(c) of this title, for purposes of venue under subsection (b), a corporation shall be deemed to reside in the judicial district in which the corporation has its principal place of business or in the State in which the corporation is incorporated, *or if the corporation's principal place of business is outside the United States, then the corporation's residency, for the purposes of this*

bill, but the Senate made no efforts to bring its version to the floor at the end of 2007.[200] On February 8, 2008, the Bush Administration expressed its view on the proposed patent law reform legislation and declined to support Senate Bill 1145.[201]

5. Critiques of the Coalition's Version and House Bill 5096

Both House Bill 5096[202] and the Coalition's version advocate for a new patent transfer provision.[203] Under the proposed amended section 281, the district court must transfer patent cases to a more appropriate forum, thereby preventing forum shopping.[204] For ease of analysis, both House Bill 5096 and the Coalition's version will be referred to as "Coalition's version."

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section, shall be the place within the United States from which the corporation's primary United States subsidiary is directed and controlled."

200. *See Legislation/Patents: Venture Capital Firms Ask Lawmakers for Changes to Pending Patent Reform Bill*, 75 BNA'S PAT. TRADEMARK & COPYRIGHT J. 85 (2007) (providing an update of the pending legislation on patent reform).

201. *See* Letter from Nathaniel F. Wienecke, Assistant Sec'y for Legislative & Intergovernmental Affairs, U.S. Dep't of Commerce, to Sen. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (Feb. 4, 2008), *available at* http://www.aipla.org/Content/ContentGroups/About_AIPLA1/AIPLA_Reports/20084/AdminLtr-S1145-020408.pdf.

202. Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. (2006) provides:

SEC. 7 VENUE

Section 1400 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(c) A court shall grant a motion to transfer an action to a judicial district or division in which the action could have been brought if—

"(1) such judicial district or division is a more appropriate forum for the action, including any judicial district or division where a party to the action has substantial evidence or witnesses;

"(2) the action was not brought in a district or division—

"(A) in which the patentee resides or maintains its principal place of business;

"(B) in which an accused infringer maintains its principal place of business; or

"(C) in the State in which an accused infringer, if a domestic corporation, is incorporated;

"(3) at the time the action was brought, neither the patentee nor an accused infringer had substantial evidence or witnesses in the judicial district in which the action was brought; and

"(4) the action has not been previously transferred under this subsection.

"(d) For purposes of subsection (c), the use or sale of allegedly infringing subject matter in a judicial district shall not, by itself, establish the existence of substantial evidence or witnesses in such a judicial district."

203. *See* Fish & Richardson P.C., *supra* note 173; *see also* Lambert, *supra* note 193.

204. *See* Fish & Richardson P.C., *supra* note 173; *see also* Lambert, *supra* note 193.

Instead of limiting the availability of jurisdictions in which to initiate a patent infringement action, the Coalition's version forces the district court to transfer actions that have been brought without a substantial connection between the case and the forum.[205] The court must determine whether there is a more appropriate forum for the action. The more appropriate forum is the judicial district where either the patentee or the defendant has substantial evidence or witnesses.[206] That means the plaintiff's choice of venue is granted only if the plaintiff can establish that it has substantial evidence related to the infringement action there.[207] The parties will have to litigate and the court will have to determine the meaning of substantial evidence. The Coalition's version prohibits a determination of substantial evidence based solely on the use of infringing products or services.[208] Likewise, the sale of infringing products or services alone cannot establish the existence of substantial evidence or witnesses in the forum.[209]

The Coalition and its advocates believe their version would be the most effective[210] in ending forum shopping in patent cases;[211] however, the Coalition's version has several shortcomings.

The Coalition's version pursues an agenda that patent cases are different from other types of cases in order to justify a special statute on the transfer of venue for patent cases. This "different" agenda does not fit well within the recent rulings of the Supreme Court.[212] Further, the Supreme Court recently expressed its displeasure at patent case law created by the Federal Circuit.[213] Specifically, the Court rejected the

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205. *See* Patents Depend on Quality Act of 2006, H.R. 5096.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Philip S. Johnson, *Patent Reform Legislation: An Introductory Note*, *in* ALI-ABA COURSE OF STUDY: TRIAL OF A PATENT CASE 47, 53, 97 (2006).

211. *See Hearings on Substitute*, *supra* note 39, at 5 (testimony of Emery Simon, Counsel, The Business Software Alliance) (commenting on the Coalition's venue proposal); *see also id.* at 16 (statement of Philip S. Johnson, Chief Patent Counsel, Johnson & Johnson) ("This provision will likely reduce forum shopping, and enhance the perceived fairness of our system of patent enforcement.").

212. *See generally* eBay Inc. v. MercExchange, L.L.P., 547 U.S. 388, 394 (2006) (reversing the Federal Circuit's special standard on injunctive relief for patent cases).

213. *Id.* at 391-92 ("As this Court has long recognized, 'a major departure from the long tradition of equity practice should not be lightly implied.' Nothing in the Patent Act indicates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions 'may' issue 'in accordance with the principles of equity.'" (citations omitted)).

special standard for injunction in patent cases.[214] The Court insisted that the standard for issuing injunctions in patent cases is similar to other types of cases.[215]

Also troublesome is the way in which the Coalition's venue version contradicts well-established jurisprudence on transfer of venue. Typically, a district court, in considering a transfer of venue motion, applies the law of the regional circuit court.[216] Courts will look to the transfer of venue statute, 28 U.S.C. § 1404, which permits transfer for the convenience of parties and witnesses, in the interest of justice.[217] When considering whether or not to transfer venue, the district court must exercise its discretion in light of the particular circumstances of the case.[218] That means the district court has to make its determination according to an individualized, case-by-case consideration of convenience and fairness.

For example, under the United States Court of Appeals for the Third Circuit's transfer of venue jurisprudence, the convenience determination involves private and public interest factors.[219] These private interests include: (1) the plaintiff's choice of forum; (2) the defendants' preference; (3) whether the claim arose elsewhere; and (4) the location of books and records, to the extent that they could not be produced in the alternative forum.[220] The relevant public interest factors include: "[1] the enforceability of the judgment; [2] practical considerations that could make the trial easy, expeditious, or inexpensive; [3] the relative administrative difficulty in the two fora

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214. *Id.* at 393-94 ("[T]he Court of Appeals departed in the opposite direction from the four-factor test. The court articulated a 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged.' . . . [W]e vacate the judgment of the Court of Appeals . . . [and] hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.").

215. *Id.* at 394.

216. *See* Storage Tech. Corp. v. Cisco Sys., Inc., 329 F.3d 823, 836 (Fed. Cir. 2003).

217. 28 U.S.C. § 1404 (2000).

218. Tex. Instruments Inc. v. Micron Semiconductor, Inc., 815 F. Supp. 994, 997 (E.D. Tex. 1993).

219. *See generally* Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995).

220. *Id.* Likewise, the United States Court of Appeals for the Fifth Circuit has its own set of private factors for a transfer of venue for the convenience of the parties in the interest of justice. The private factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *In re* Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004).

resulting from court congestion; [4] the local interest in deciding local controversies at home; and [5] the public policies of the fora."[221]

The plaintiff's choice of venue is accorded considerable weight.[222] The court assumes that in selecting a particular forum, the plaintiff makes a choice that generally reflects its rational and legitimate concerns, including convenience to the plaintiff and its witnesses.[223] The rational and legitimate concerns underscore the reason why the plaintiff's choice is automatically a paramount consideration.[224] Regional circuit courts have long instructed that the plaintiff's choice of forum should rarely be disturbed.[225] It is the defendant who carries the burden to establish the need for transfer.[226]

District courts, in applying their respective regional circuit's law, have routinely analyzed the various factors to determine whether to transfer patent cases for the convenience of parties and witnesses, in the interest of justice. District courts, presiding over patent cases, have noted that patent disputes today can hardly be described as a local controversy unique to a specific judicial district.[227] Technologies based on patents have been developed for use in a wide range of fields across the United States.[228] Even though patent cases are document-intensive, courts have commented that arguments as to their location can be "misleading," because today, documents located elsewhere can be scanned, digitized, copied, and transported with ease due to recent

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221. *Jumara*, 55 F.3d at 879 (citations omitted). The Fifth Circuit also applies a similar set of public factors which include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law." *In re Volkswagen AG*, 371 F.3d at 203.

222. *Jumara*, 55 F.3d at 879.

223. *See* Clopay Corp. v. Newell Cos., 527 F. Supp. 733, 736 (D. Del. 1981) ("[P]laintiffs' choices will generally reflect their rational and legitimate concerns, including convenience to themselves and their witnesses.").

224. *See* Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970).

225. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); *Jumara*, 55 F.3d at 879 ("[T]he plaintiff's choice of venue [will] not be lightly disturbed." (citation omitted)).

226. *Jumara*, 55 F.3d at 879.

227. Affymetrix, Inc. v. Synteni, Inc., 28 F. Supp. 2d 192, 207 (D. Del. 1998); *see also* Network-1 Sec. Solutions, Inc. v. D-Link Corp., 433 F. Supp. 2d 795, 799 (E.D. Tex. 2006) ("[T]he patent venue statute is much more expansive than the general venue statute and gives a plaintiff broader discretion in where the plaintiff chooses to bring the suit." (footnote omitted)).

228. *See Affymetrix, Inc.*, 28 F. Supp. 2d at 207 ("[T]echnologies . . . they have developed are used by numerous medical, pharmaceutical, and scientific laboratories scattered across the globe.").

technological advances.[229] Sensitive to judicial economy and the docket volume, courts are willing to consider and compare the "speed" at which the patent litigation could proceed in different fora.[230]

B. Stepping Back and Looking Ahead

The above analysis and critique of the patent reform legislation on patent venue demonstrate that the reform is unnecessary and the proposed bills are ineffective. Lobbyists, interest groups, and Congress should not waste time on patent venue reform. Instead of hastening efforts to pass legislation on patent venue, reformers would be wiser to view the EDTX as part of the solution, an important case study of how a district court has transformed itself into a knowledgeable center with strong expertise in solving complex patent disputes brought by litigants across the nation.

Both the empirical inquiry of more than 27,000 patent cases and the case study of the EDTX have demonstrated that patent forum selection will continue as districts become disfavored and new districts emerge as judges and litigants seek to become the next favorites by learning from the accomplishments of the EDTX.[231] Indeed, the judges and lawyers at the United States District Courts for the Western District of Pennsylvania, the Northern District of Georgia, and the Northern District of Texas have informed the world of their receptive attitudes toward patent cases filed in their courts. These districts have followed the EDTX by adopting patent litigation case management in their efforts to attract more patent litigation to their districts.[232]

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229. *See* Critikon, Inc. v. Becton Dickinson Vascular Access, Inc., 821 F. Supp. 962, 966-67 (D. Del. 1993) ("The location of documents, in the context of access to proof, in a document-intensive case [like an action for patent infringement] can be misleading.... Regardless of where trial is held, the documents will be copied and mailed to the offices of counsel and subsequently transported to trial."); *see also Network-1 Sec. Solutions*, 433 F. Supp. 2d at 799 ("[T]he documents can (and will likely) be exchanged electronically. Unless the parties manage to schedule a document inspection or prototype inspection at the same time a hearing is scheduled in the case, D-Link will not be less inconvenienced in traveling to New York than to Texas for this purpose." (footnote omitted)).

230. *See* Tuff Torq Corp. v. Hydro-Gear Ltd. P'ship, 882 F. Supp. 359, 364 (D. Del. 1994) (taking into account the speed at which the litigation could proceed in the respective fora); *Network-1 Sec. Solutions*, 433 F. Supp. 2d at 800 (considering the docket and speed between the Eastern District of Texas and the Southern District of New York with respect to the present patent case).

231. *See* Joe Vanden Plas, With Patents, Wisconsin Court Gaining Reputation as a "Rocket Docket" (Oct. 2, 2006), http://wistechnology.com/articles/3363 (noting that the District of Wisconsin is now the new rocket-docket for patent cases).

232. *See* Kenneth R. Adamo & Robert C. Kahrl, Jones Day Commentaries: Federal District Court in Pittsburgh Adopts Specialized Local Rules for Patent Cases (Jan. 2005), http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S1366 (announcing that the District

VII. CONCLUSION

The qualitative data reminds all reformers that patent forum shifting is natural because litigants are advocates for their clients, searching for districts with knowledgeable judges and shorter timetables to resolve complex patent litigation. The qualitative data paints only half the picture of the EDTX. Regardless of the labels "renegade jurisdiction" or "rocket-docket," the EDTX's transformation from an unknown district in the heartland of the United States to an adjudication center with judicial expertise to resolve patent disputes offers all reform-minded individuals and groups some lessons on how to train other district courts in patent law knowledge and expertise.

Court for the Western District of Pennsylvania (WDPA) has joined the EDTX and Northern District of Georgia in adopting the new local patent rules in January 2005); R. David Donoghue, Are Local Patent Rules Coming to a District Near You (Apr. 9, 2007), http://www.chicagoiplitigation.com/tags/local-patent-rules/ (wishing that the Northern District of Illinois would adopt a set of local patent rules); Mike Madison, New Local Patent Rules in Pittsburgh (Dec. 30, 2004), http://madisonian.net/archives/2004/12/30/new-local-patent-rules-in-pittsburgh (explaining that the WDPA's local patent rules aim to attract more patent litigation to Pittsburgh); Scott & Scott, Northern District of Texas Issues Local Patent Rules, http://blawg.scottandscottllp.com/businessandtechnologylaw/2007/05/northern_district_of_texas_iss.html (May 8, 2007, 11:43 CST) (discussing the District Court for the Northern District of Texas's adoption of the local patent rules to attract patent litigation to its court).