The Ever Increasing Concentration of Patent Cases in Plaintiff-Favored Venues: Can we Avoid Critical Mass?

By Richard L. Brophy

With each passing year, the number of patent lawsuits filed in the United States continues to rise. In 1990, only 1,200 patent lawsuits were filed in jurisdictions across the United States. By 2010, that number had more than doubled to 2,892.[1] This meteoric rise in patent litigation is attributable in part to the ever increasing role intellectual property plays in today's economy. Well established companies are increasingly turning to intellectual property, and particularly to patents, as a way to secure their position in the marketplace. At the same time, start-up companies are relying more than ever on patents to secure sources of capital and to differentiate themselves and their products, hoping to achieve market success.

Patents are effective in this role largely due to the drastic economic consequences a patent lawsuit can have for a company accused of infringement. Those found infringing can be subjected to onerous damages, future royalty obligations, or prohibited from manufacturing their flagship products. Even the mere accusation of infringement can be fatal to a company unable to shoulder the steep costs of defending against those accusations.

The commercial dangers of patent litigation are augmented by the fact that patent plaintiffs have the ability to control when and, more importantly, where the litigation takes place. By taking advantage of unique flexibilities granted to them under the patent laws, plaintiffs have almost unlimited freedom to litigate in the forum of their choice. Using these freedoms, plaintiffs can choose a jurisdiction with unusually high win rates, plaintiff-friendly juries, advantageous local rules, or one that eschews summary judgment.

Although there are ways for patent defendants to try to avoid a plaintiff's choice of forum, courts' willingness to defer to the plaintiff's choice, coupled with shifting views on venue transfer, are making these arguments increasingly ineffective. To avoid the possibility of litigation in an unfavorable forum, would-be defendants now resort to declaratory judgment as a way to turn the tables and take advantage of the plaintiff-friendly venue rules themselves.

Patent plaintiffs, whether patent owners or accused infringers, consistently flock to a handful of recognized patent-friendly jurisdictions to litigate their claims. This trend is so prevalent that now almost half of all patent cases filed in the United States are heard in only ten of the ninety four judicial districts in the United States.[2] This consolidation of patent cases to a small number of district courts has led to the creation of patent litigation hotbeds—judicial districts well-versed in patent litigation practice and known for their predictably pro-plaintiff decisions.

In some respects, this consolidation has had a positive effect in the advancement of patent litigation practice in the United States. District courts with healthy patent dockets have developed local patent rules that increase the efficient resolution of those disputes. In addition, judges in these districts have gained valuable experience in handling patent cases which, in turn, increases the predictability and accuracy of their decisions.

These advantages are largely overshadowed, however, by the serious concerns that lax venue and jurisdictional rules raise about the convenience and fairness of patent litigation to accused infringers. Defendants finding themselves in a savvy patent plaintiff's crosshairs are routinely forced to litigate in hostile jurisdictions having little to no connection to the parties or their dispute.

Although the Federal Circuit has shown a recent interest in preventing forum shopping by sharpening the teeth of the venue transfer statute, it

1. Data from 2010 Annual Reports by Director of Judicial Business of United States Courts, <www.uscourts.gov/judbususc/judbus.html>.

2. *See, e.g.*, Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q. J. 1, 6-7 (2010).

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is possible this is nothing more than an aberration. The Federal Circuit's efforts are hampered by their reliance on individual circuit case law and by the broad discretion district court's enjoy to grant or deny transfer motions.

Even as the Federal Circuit is taking these small steps to stop forum shopping and the rising density of cases in patent hotbeds, Congress is taking leaps in the opposite direction through its creation of a patent pilot program. This program, whose goal is to educate district court judges in patent litigation best practices, will likely provide further incentives for patent plaintiff's to continue concentrating patent cases in a few favored venues.

To fully appreciate how patent case consolidation got to where it is today, it is important to understand why jurisdictional and venue laws make it possible and how subtle differences between the district courts motivate plaintiffs to file in one venue over another.

I. Personal Jurisdiction and Venue – One in the Same for Patent Litigation.

Patent litigation is governed by special jurisdiction and venue rules that are unique to patent law. Due to the way courts have interpreted these rules, patent plaintiffs have more freedom than most to engage in forum shopping.

To establish personal jurisdiction over a defendant in a patent case, a plaintiff need only show that the defendant has certain "minimum contacts" with a particular forum such that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[3] A patent plaintiff can establish these minimum contacts simply by showing that an alleged infringer made offers to sell or sold potentially infringing products within the forum.[4] Because most companies now conduct business on a national scale and on the internet, patent plaintiffs are generally able to establish sufficient minimum contacts to bring suit against an alleged infringer in any forum it chooses.[5]

Venue statutes are designed to protect defendants from being haled into a foreign jurisdiction completely divorced from the facts and evidence central to the parties' dispute. Unfortunately, courts have interpreted the patent venue statute in such a way that it cannot perform this function. According to the patent venue statute, 28 U.S.C. § 1400(b): "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Because federal courts interpret "corporate residence" as "any judicial district in which [the corporation] is subject to personal jurisdiction at the time the action is commenced," venue is instantly satisfied once a patent plaintiff establishes personal jurisdiction over a defendant.[6] As a result of this circular interpretation of patent venue and jurisdictional rules, a patent plaintiff can use the sale or offer for sale of any allegedly infringing product taking place within a given district to establish personal jurisdiction and venue sufficient to bring suit there.[7]

II. Adding Insult to Injury – The Steady Demise of the Venue Transfer Statute

Once a patent plaintiff establishes jurisdiction and venue in a particular district a defendant's only recourse is to request a transfer of venue under to 28 U.S.C. § 1404(a).

That statute reads in pertinent part:

> *For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.*

Much to the dismay of patent defendants, this statute is now far less effective in persuading courts to transfer cases than it used to be. This is principally due to the rapid advances in technology that have taken place in the sixty years since the statute's inception.

In 1948, Congress enacted section 1404(a) to supplement the then-existing common law of *forum non conveniens*. The goal of the new statute was to prevent "waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense."[8]

Factors established by the Supreme Court and used to evaluate *forum non conveniens* disputes were quickly adapted for use in evaluating venue transfer requests.[9] Among the factors to be considered when analyzing transfer requests were (1) the relative ease of access to sources of

3. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

4. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("[W]here the defendant 'deliberately' has engaged in significant activities within a state, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there . . . .").

5. *Id*. at 476; *see also 3D Systems, Inc. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1379-80 (Fed. Cir. 1998).

6. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

7. *See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994) ("Defendants, acting in consort, placed the accused fan in the stream of commerce, they knew the likely destination of the products, and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there.").

8. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

9. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 313 (5th Cir.) (*en banc*).

proof, (2) the cost of attendance for willing witnesses, and (3) any other practical problems that make trial of a case easy, expeditious and inexpensive.[10] Today's technology frees litigants of these limitations.

When Congress first enacted the venue transfer statute, consideration of these factors was vital to ensuring that a lawsuit was fair and balanced. Limitations on the technology available to litigants at that time meant that the inaccessibility of documents, physical evidence or witnesses could potentially cripple an opponent's case.

In 1941, German scientists had just completed the world's first fully programmable computer, the "Z3," which used celluloid tape as memory, took three seconds to perform a single multiplication task, and weighed over 2,200 pounds.[11] Today, the phones we carry in our pockets have infinitely more processing power.

High-speed transportation was also in its infancy. The Lockheed Corporation designed the Air Force's first fully operational jet fighter, the P-80 Shooting Star, in 1943.[12] It would be another ten years before Boeing ushered in the jet age, an era of fast, inexpensive air travel with the release of its "707" jet airliner.[13]

Rotary phones powered by batteries dominated households and offices: twenty-five years would pass before the transmission of the world's first email and thirty years before the invention of the cell phone.[14]

Without the modern technological conveniences we enjoy today—electronic discovery, email, video conferencing, and relatively fast, cost-effective travel—it is easy to understand why Congress was cognizant of the importance of conducting litigation in jurisdictions located near witnesses and sources of physical evidence.

In the years following the enactment of section 1404(a), courts interpreted the statute with a keen eye towards furthering its fundamental underpinnings. Courts readily transferred cases to jurisdictions having the strongest relationship with the evidence and witnesses relevant to the parties' dispute. In 1947, the Supreme Court affirmed a district court's decision to transfer a case against the Louisville and Nashville railroads from the Eastern District of Illinois to the Eastern District of Kentucky on the grounds that it was inappropriate to require necessary witnesses to make the "approximately twenty-four hour" trip (only 420 miles) from Irvine Kentucky to East St. Louis, where the district court was located.[15]

By the 1970s, however, technological advancements had begun to erode the strength of these arguments. For example, in *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.*, the Fifth Circuit explained that "technological advances in transportation and communication . . . have reduced the potential hardship to a [party] defending a lawsuit in a foreign district."[16]

In the years after *Northside*, decisions on venue transfer have increasingly ignored arguments that point to the location of documents and witnesses as a basis for transferring a case to another jurisdiction. In 1998, the Ninth Circuit found that it was not a violation of due process rights to require a defendant in Illinois to litigate in California.[17] The court explained that defendant's arguments, which focused on the location of evidence and witnesses, are "no longer weighed heavily given modern advances in communication in transportation," and that "in this era of fax machines and discount air travel, requiring [the defendant] to litigate in California is not constitutionally unreasonable."[18]

These recent decisions, especially that of *Toeppen*—finding venue appropriate in a jurisdiction over 2,000 miles from the defendant's place of residence—exemplify the effect that advancing technology have had on defendants and their ability to affect venue transfer in the years since the Supreme Court decided *Collett*.

III. New Thinking – Freedom to Sue Where you Choose.

No longer constrained by the physical location of documents or witnesses, plaintiffs' attorneys enjoy an unprecedented ability to file lawsuits in the forum of their choosing. Statistics on patent case filings across the United States reflect this: in the last decade, half of all the patent cases filed in the United States were filed in ten of the ninety-four federal districts in the United States.[19] These districts were (in order of most cases filed): the Central District of Califor-

10. See, e.g., *Volkswagen*, 545 F.3d at 315.

11. June Jamrich Parsons & Dan Oja, New Perspectives, Computer Concepts (2007), <http://user.cs.tu-berlin.de/~zuse/Konrad_Zuse/en/rechner_z3.html>.

12. William Green & Gordon Swanborough, The Complete Book of Fighters 345 (2001), <http://en.wikipedia.org/wiki/Lockheed_P-80_Shooting_Star>.

13. Tony Pither, The Boeing 707, 720 and C-135 21 (1999).

14. Ray Tomlinson. "The First Network Email", <http://openmap.bbn.com/~tomlinso/ray/firstemailframe.html>; *Wave New World*, Time, October 19, 2009, at 48; U.S. Patent No. 3,906,166.

15. *Ex parte Collett*, 337 U.S. 55 (1949).

16. *Northside Iron & Metal Co. v. Dobson & Johnson, Inc.*, 480 F.2d 798, 800 (5th Cir. 1973).

17. *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998).

18. *Id.*

19. Lemley, *supra* at 6-7.

nia, the Northern District of California, the Northern District of Illinois, the Eastern District of Texas, the Southern District of New York, the District of Delaware, the District of New Jersey, the District of Minnesota, the District of Massachusetts, and the Southern District of California.[20]

The fact that patent cases are not evenly distributed across the judicial districts evidence the failure of courts to apply patent law equally and uniformly. A variety of qualities inherent to particular districts influence a patent plaintiff's choice of forum. These qualities include a district's particular local patent rules, time to resolution, willingness to transfer cases, and the sympathies of each district's particular jury pool. These differences explain why 2,289 patent cases were filed in the Central District of California last year while only 198 were filed in the District of Nevada.[21]

A. Win Rates

First and foremost, patent plaintiffs are interested in winning and they choose jurisdictions primarily based on win rates. For many years, lawyers relied on word of mouth and their own experiences with a jurisdiction to decide where to file suit. More recently, however, plaintiffs have turned to resources that provide statistical data on patent litigation to tip the proverbial scales in their favor. Examples of services providing this data include the Stanford Intellectual Property Litigation Clearinghouse[22] ("IPLC") and patstats.org.[23]

Empowered with the information services like the IPLC provide, patent plaintiffs flock to jurisdictions like the District of Delaware and Eastern District of Texas where win rates for plaintiffs hover just below 50%.[24] Similarly, plaintiffs avoid districts like the Eastern District of Wisconsin and the Northern District of Georgia whose plaintiff success rates are far lower, nearer 10-15%.[25]

Not to be outdone, accused infringers also research forum statistics—looking for defense-favorable jurisdictions in which to initiate declaratory judgment actions. Interestingly, the benefits of defendant forum-shopping can be even more profound than they are for plaintiffs. A recent study reflects that patentee's win 68% of jury trials they file, but are only successful 38% of the time when defending against a declaratory judgment action.[26]

B. Speed to Disposition

In addition to win rates, patent plaintiffs are also concerned with the time it will take to resolve cases. Faster case resolution holds down litigation costs, puts pressure on unprepared defendants, and assists the patent holder in quickly establishing a reputation for patent enforcement in the marketplace. For these reasons, patent plaintiffs routinely file cases in "rocket dockets," districts having special rules that ensure quick resolution of civil cases. Jurisdictions like the Eastern District of Virginia and Western District of Wisconsin are known for resolving cases in as little as six months, half the average of other patent jurisdictions.[27]

The recent passage of the America Invents Act is likely to put even more pressure on patent plaintiffs to seek out jurisdictions known for quick resolution of patent cases. Under the new patent laws, plaintiffs are no longer permitted to join multiple defendants into a single lawsuit based solely on their status as an alleged infringer.[28] These new joinder provisions are aimed at controlling the conduct of "non-practicing entity" or "NPE" plaintiffs[29]—companies that buy and enforce patents against any number of corporate defendants in what some characterize as an unduly aggressive and opportunistic manner.

Because most patent plaintiffs, including NPEs, do not have the capital necessary to finance a separate lawsuit against every potential defendant, patent plaintiffs will likely be turning to rocket dockets as a way to resolve seriatim lawsuits as quickly as possible.

C. Ability to Avoid Summary Judgment.

For patent plaintiffs, summary judgment is the enemy. Statistically speaking, judges are far more likely to find a patent invalid on summary judgment than a jury is at trial, and juries are more willing to award large monetary damages.[30] It is disappointing to most patent plaintiffs, then, that on average only 2.8% of patent cases ever see the courtroom.[31] While it is true that a majority of patent cases settle, those that

20. *Id.*

21. *Id.* at 7-8.

22. <http://www.law.stanford.edu/program/centers/iplc/>.

23. <http://www.patstats.org/>.

24. Lemley, *supra* at 8-10.

25. *Id.*

26. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 Mich. L. Rev. 365, 368 (2000).

27. Lemley, *supra* at 15-16.

28. America Invents Act of 2011, 35 U.S.C. § 299 (2011).

29. Non-practicing entities are also often referred to pejoratively as "patent trolls."

30. *See, e.g.*, John R. Allison & Mark A Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 212-213 (1998) (explaining that patentees win 67% of jury verdicts on validity but only 28% when raised via summary judgment).

31. Lemley, *supra* at 14.

do not are almost always resolved in summary judgment.

Despite the low overall probability that a patent case will go to trial, patent plaintiffs can drastically alter their chances simply by electing to file in a forum that is less inclined to dispose of cases on summary judgment.

Jurisdictions predisposed to denying requests for summary judgment are, naturally, more plaintiff-friendly. The District of Delaware and the Eastern District of Texas are two such jurisdictions. Almost 12% of the patent cases filed in Delaware and 8% of cases filed in the Eastern District of Texas end up in front of a jury.[33]When compared against statistics from the Eastern District of Wisconsin, where only 0.8% of its patent cases to go to trial, it is easy to see why patent plaintiffs are motivated to forum shop.[34] A case filed in Delaware is four times more likely to go to trial than the national average, and *fifteen times* more likely to go to trial than a case filed in the Eastern District of Wisconsin.[35]

IV. Judicial Integrity and the Federal Circuit's Recent Efforts to Enforce §1404.

The increasing concentration of patent cases in a handful of "patent-friendly" jurisdictions raises significant concerns about the fair administration of justice. Rampant forum shopping runs the risk of undermining procedural fairness and, ultimately, the ability for alleged infringers—especially smaller companies and individual business owners—to fairly defend themselves in court.

The truth is a defendant caught in a plaintiff-friendly forum has very little chance of escaping. The venue transfer statute was intended to protect a defendant from being forced to litigate in an *inconvenient* forum, not an *unfavorable* one. A defendant sued in a plaintiff-friendly forum often finds itself grasping for arguments to explain why the plaintiff's chosen forum is inconvenient, only to have those arguments disregarded by the district court on the grounds that modern technology renders the purported inconvenience irrelevant.

Several recent decisions from the Federal Circuit seem to indicate a willingness to right the venue ship by refocusing transfer decisions on the core values that first motivated Congress to enact section 1404(a). On September 14, 2007, the Lear Corporation filed a patent infringement suit against TS Tech USA Corporation and two of its affiliates in the Eastern District of Texas.[36] Lear accused TS Tech of manufacturing and selling headrest assemblies that infringed Lear's patents. TS Tech immediately filed a motion to transfer venue to the Southern District of Ohio where most of the key witnesses and evidence in the case were located.[37]

The district court in Texas ultimately denied the transfer motion, reasoning that the sale of several Honda vehicles including the headrest assemblies in the Eastern District of Texas gave the citizens of the district a "substantial interest" in having the case tried locally.[38] TS Tech responded by petitioning the Federal Circuit for a writ of mandamus.

Much to the surprise of the patent litigation community, the Federal Circuit issued the writ and ordered the Eastern District of Texas to the transfer the case to Ohio.[39] Applying Fifth Circuit law,[40] the court of appeals criticized the district court in Texas for giving too much deference to the plaintiff's choice of forum and for failing to consider traditional venue transfer factors including (1) convenience to the parties, (2) convenience to witnesses, and (3) the relative availability of physical evidence in and near the transferee venue.[41]

Shortly after *TS Tech*, the Federal Circuit issued a second writ to the District Court for the Eastern District of Texas in *In re Genentech, Inc*.[42] Just as it had in TS Tech, the Federal Circuit explained that was an abuse of discretion for a district court to fail to consider geographical convenience, including the location of witnesses and easy access to sources of physical evidence.[43]

With the success of petitions for writs of mandamus on the rise, corporate defendants have turned to this remedy almost as a matter of course following denial of venue transfer requests. In the last few years, the Federal Circuit has reversed seven decisions from the Eastern District of Texas for refusing to transfer patent cases out of the district.[44]

It is clear from these decisions that

32. *Id*. at 12-14.

33. *Id.*

34. *Id.*

35. *In re TS Tech USA Corp*., 551 F.3d 1315 (Fed. Cir. 2008).

36. *Id*. at 1318.

37. *Id.*

38. *Id.* at 1323.

39. Unlike jurisdictional issues in patent cases which are governed by Federal Circuit case law, the law of the individual circuits controls venue transfer issues. In this instance, the Federal Circuit relied on the Fifth Circuit's recent decision in *In re Volkwagen of America Inc*., 545 F.3d 304 (5th Cir. 2008).

40. *TS Tech*, 551 F.3d at 1319.

41. *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009).

the Federal Circuit is motivated to breathe new life into the venue transfer statute in an effort to level the playing field for defendants. Only time will tell whether these recent decisions from the Federal Circuit will abate or significantly reverse the trend of concentration of patent litigation in a few select venues. The overall effect of these decisions will be tempered by the standard of review in venue transfer cases (abuse of discretion), the time and cost involved in obtaining appellate review, and the procedural precedent of the various circuits that support the issuance of writs on transfer issues.

V. A New Reason to Shop - The Patent Pilot Program.

Just as the Federal Circuit is realizing the importance of revitalizing the foundational principles of venue transfer, Congress is taking steps to increase incentives for patent plaintiffs to test the potency of those statutes.

In July of this year, Congress began a "patent pilot program" designed to enhance selected district courts' expertise in complex patent litigation. The goal of the program is to create districts with specialized patent judges that will be better equipped to provide efficient, uniform decisions in patent cases. In theory, experienced judges will be more familiar with the various stages of patent litigation and will be able to resolve cases more quickly and with lower reversal rates on appeal.

The obvious risk inherent in this program is the introduction of yet another motivation for patent plaintiffs to seek out favorable districts at the expense of procedural fairness for alleged infringers. Specialized patent courts will likely become predictable, allowing plaintiffs to look to venues that provide favorable results on issues particular to a given case.

The program may do nothing more than focus the patent consolidation problem on the particular districts that participate. Many of the districts selected for participation are known for their busy patent dockets, but others are not. Although it is unlikely that the most popular patent districts chosen to participate will see a significant increase in patent cases, some of the lesser-utilized districts, such as the Western District of Pennsylvania and the District of Nevada, may see a sizeable increase in patent filings. There will be incentives for patent plaintiffs to seek out new jurisdictions with less crowded dockets and an interest in hearing patent cases.

Recognizing this potential risk, Congress has encouraged districts participating in the program to continue to randomly assign cases to all judges within the district, including those not participating in the pilot program. Non-participating judges that are assigned a patent case will then have the opportunity to keep the case or pass it off to a judge that is participating in the pilot program. The question is whether this procedure will adequately deter patent plaintiffs from aggressively seeking out those jurisdictions they believe will increase their chances of a successful outcome. If history is any indication, the answer to this question will likely be no.

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42. *Id.*

43. *In re Nintendo*, 598 F.3d 1194 (Fed. Cir. 2009); *In re Hoffman-La Roche,* 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Zimmer Holdings, Inc.,* 609 F.3d 1378 (Fed. Cir. 2010); *In re Volkswagen of America,* 545 F.3d 304 (Fed. Cir. 2008); *In re TS Tech USA Corp.* 551 F.3d 1315 (Fed. Cir. 2008); and *In re Microsoft*, 630 F.3d 1361 (Fed. Cir. 2011).

44. It is noteworthy that seven of the fourteen districts selected for the pilot program are already in the list of top ten patent litigation jurisdictions.