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### Court Competition for Patent Cases

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## ARTICLE

### COURT COMPETITION FOR PATENT CASES

J. JONAS ANDERSON<sup>†</sup>

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## INTRODUCTION

There are ninety-four federal district courts in the United States, but nearly half of the six thousand patent cases filed in 2013 were filed in just two of those courts: the District of Delaware and the Eastern District of Texas.<sup>1</sup> In the Eastern District of Texas and the District of Delaware—

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<sup>1</sup> Based on statistics from September 16, 2013, 6134 patent cases were expected to be filed in federal district courts in 2013; of those, 1464 were expected to be filed in the District of Delaware and 1327 were expected to be filed in the Eastern District of Texas. See Press Release, Perkins Coie, Unprecedented Patent Case Concentration (Sept. 16, 2013), available at [http://www.perkinscoie.com/news/news\\_detail.aspx?news=1476](http://www.perkinscoie.com/news/news_detail.aspx?news=1476); see also Ryan Davis, *Eastern Texas Judge Has Nation's Busiest Patent Docket*, LAW360 (May 13, 2014, 7:42 PM), <http://www.law360.com/articles/536886/eastern-texas-judge-has-nation-s-busiest-patent-docket>, archived at <http://perma.cc/999J-6LXZ> (explaining the reasons underlying the high volume of patent litigation brought in the Eastern District of Texas).

neither of which is home to a major technology industry<sup>2</sup>—patent litigation comprises an astounding proportion of each court’s docket: twenty-eight percent of 2013 filings in the Eastern District of Texas were patent cases while fifty-six percent of 2013 filings in the District of Delaware were patent cases.<sup>3</sup> In fact, the two judges with the busiest patent dockets—Judge Rodney Gilstrap in the Eastern District of Texas and Judge Leonard Stark in the District of Delaware—have larger patent dockets than does the entire Central District of California, the district that receives the third most patent cases in the country.<sup>4</sup>

While the popularity of the Eastern District of Texas and the District of Delaware with patent plaintiffs is a relatively recent phenomenon,<sup>5</sup> the litigation tactic of selecting the court that offers the greatest odds of success—otherwise known as forum shopping—is not. Forum shopping has been a significant concern in the patent system for over forty years.<sup>6</sup> Forum

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<sup>2</sup> See Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 407 (2010) (explaining that unlike other top destinations for patent cases, Delaware and Texas have neither large populations nor prominent technology industries).

<sup>3</sup> See FEDERAL COURT MANAGEMENT STATISTICS DECEMBER 2013 (2013), available at <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-december-2013.aspx> (select “Delaware” or “Eastern Texas”; then follow “Go” hyperlink) (noting that in 2013, 2374 total cases were filed in Delaware and 5330 total cases were filed in the Eastern District of Texas); Statistics Summary, Lex Machina, U.S. District Court for the District of Delaware (on file with author) (noting that in 2013, 1335 of the filings in Delaware were patent cases); Statistics Summary, Lex Machina, U.S. District Court for the Eastern District of Texas (on file with author) (noting that in 2013, 1494 of the filings in the Eastern District of Texas were patent cases). In third place for percentage of patent cases was the Northern District of California, which devoted about 3% of its overall civil docket to patent cases in 2010. Henry Wong, *An Empirical Look at the District Courts Handling Patent Cases 8* (Jan. 20, 2012) (unpublished manuscript), available at <http://www.sociallaw.com/slbook/judgeyoung12/HBW%20Final%20Paper.pdf>.

<sup>4</sup> Judges Gilstrap and Stark had 941 and 532 patent cases, respectively, added to their dockets in 2013; in contrast, the Central District of California received 399 patent case filings that same year. Davis, *supra* note 1. The changes in joinder rules from the America Invents Act partially explain the incredibly high number of cases filed with Judges Gilstrap and Stark. See Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. (forthcoming 2014) (manuscript at 2) (demonstrating that the rise in raw numbers of patent suits since 2010 was driven by changes to the joinder rules); see also David O. Taylor, *Patent Misjoinder*, 88 N.Y.U. L. REV. 652, 700-06 (2013) (describing the legislative process behind the change in the joinder rules).

<sup>5</sup> From 1995 to 1999, Delaware received 3.2% of all patent filings in the United States, while the Eastern District of Texas did not rank in the top ten venues for patent litigation. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 903 (2001).

<sup>6</sup> Congress felt that patent forum shopping was so problematic that in 1982, it created the U.S. Court of Appeals for the Federal Circuit in an effort to curb the practice. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.); see also *Court of Appeals for the Federal Circuit—1981: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th

shopping is generally understood to be driven by the search for favorable substantive law, favorable procedural rules, or “home court advantage.”<sup>7</sup> However, the persistence of forum shopping in patent law cannot be fully explained by substantive legal differences or home court advantage.<sup>8</sup> Patent litigants cannot obtain substantive legal differences by forum shopping because all federal district courts are bound by the same legal rules that come from the U.S. Court of Appeals for the Federal Circuit. Furthermore, the fact that the majority of patent cases are filed in district courts that do not have sizeable technology industries indicates that most forum shopping is not the result of major technology companies seeking the advantages of litigating at the nearest courthouse.<sup>9</sup>

That leaves procedural differences. This Article theorizes that forum shopping in patent law is driven, at least in part, by federal district courts competing for litigants. This competition occurs primarily through procedural and administrative differentiation among courts. All patent infringement cases are heard in federal court and are therefore governed by the Federal Rules of Civil Procedure. Despite the existence of the Federal Rules, district courts across the United States have adopted local rules specifically for patent cases. Intriguingly, some districts have adopted local patent rules despite almost never hearing patent cases in their courtrooms,<sup>10</sup>

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Cong. 6 (1981) (statement of C.J. Howard T. Markey, Court of Customs and Patent Appeals) (discussing the problems of forum shopping in patent law); *id.* at 50 (statement of J. Jancin, Jr., President-Elect, American Patent Law Association) (discussing forum shopping stemming from the lack of national uniformity in patent law); H.R. REP. NO. 97-312, at 20-21 (1981) (explaining how forum shopping exists because some circuits are “pro-patent” and some are “anti-patent”); Comm’n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 370 (1975) (arguing that forum shopping in patent law was “extensive”); Jack Q. Lever, Jr., *The New Court of Appeals for the Federal Circuit (Part I)*, 64 J. PAT. OFF. SOC’Y 178, 186-97 (1982) (describing congressional motivation behind the creation of the Federal Circuit); Ellen E. Sward & Rodney F. Page, *The Federal Courts Improvement Act: A Practitioner’s Perspective*, 33 AM. U. L. REV. 385, 387-88 (1984) (discussing congressional concern about patent forum shopping and the detrimental effects of uncertainty on patent values).

<sup>7</sup> See *infra* Part I.

<sup>8</sup> See Moore, *supra* note 5, at 938 (concluding that a “concrete explanation of forum selection [in patent law] is often elusive”); see also Lemley, *supra* note 2, at 428 (evaluating district courts empirically across a range of characteristics consistently identified with forum shopping and finding that the traditional theoretical conception of forum shopping matches with the practice “only in part”).

<sup>9</sup> See Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1463-64 (2010) (finding that patent cases cluster outside of traditional technology centers due to plaintiff-friendly procedures and no restrictions on forum shopping).

<sup>10</sup> See Megan M. La Belle, *The Local Rules of Patent Procedure*, 46 ARIZ. ST. L.J. (forthcoming 2015) (manuscript at 18), available at <http://ssrn.com/abstract=2459785> (noting that the explanation for patent local rules is, in some districts, “less [than] obvious”).

suggesting that local patent rules serve a signaling function for courts looking to attract potential patent litigants.

Beyond procedural distinctions, courts can compete for litigants by adopting administrative norms and practices that align with plaintiff preferences, such as predictable judge assignment procedures, favorable case management norms, and preferential motions practices. Conversely, a court can dissuade litigants from filing in its courtrooms by adopting norms that are contrary to litigant preferences, such as randomization of judge assignments and adoption of case management norms which do not appeal to particular litigants. To encourage filings, court-created norms must be consistent and predictable; in contrast, to discourage filings, courts must seek to decrease predictability. In essence, maintaining trial management practices in a predictable manner that favors a particular type of litigant (almost always plaintiffs) allows district courts to compete for the business of litigation, while adopting case management practices that litigants disfavor or that are unpredictable reduces a court's ability to attract forum shoppers.

Appreciating the impact of court competition in patent litigation provides numerous explanatory benefits over the current litigant-centric theory of forum shopping. First, court competition offers an explanation for the prevalence of patent forum shopping in the Federal Circuit era.<sup>11</sup> Although the Federal Circuit was created in an effort to eliminate the forum shopping caused by regional variations in patent law,<sup>12</sup> forum shopping remains rampant today. Court competition theory suggests that by centralizing patent appeals in the Federal Circuit—and thus unifying the law nationally—the relative importance of distinctions between district court administrative practices increased significantly. The presence of a centralized appellate court allows district courts to better leverage case management distinctions in an effort to attract patent litigants.

Second, court competition for patent cases better explains the appeal of particular district courts to plaintiffs. The traditional account of outcome- and geographic-based distinctions as the basis for forum shopping cannot account for district courts with similar characteristics that experience vastly different numbers of case filings. For instance, the Eastern District of Texas

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<sup>11</sup> See generally Lemley, *supra* note 2 (collecting data about the effect of different factors specific to district courts on patentees' choices of where to file); Moore, *supra* note 5, at 901-24 (suggesting that the venue and identity of the filing parties can affect outcomes in patent litigation, in turn leading to forum shopping and its adverse consequences).

<sup>12</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 2-4 (1989) (describing Congress's motivations for creating the Federal Circuit).

receives over 1300 patent cases annually,<sup>13</sup> while the Eastern District of Oklahoma has received only two patent cases in the past decade.<sup>14</sup> Similarly, likelihood of success at trial cannot fully explain litigant choice.<sup>15</sup> Empirical studies find that patentees are most successful when bringing suit in the Northern District of Texas, yet litigants largely prefer the Eastern District of Texas and the District of Delaware.<sup>16</sup> Court competition theory, in contrast, better maps the forum shopping that occurs in patent cases: courts that adopt procedures that appeal to patent litigants tend to receive more patent filings than courts that offer less appealing procedures.

Lastly, court competition theory links patent forum shopping with other legal areas that have also experienced high rates of forum shopping, most particularly bankruptcy law.<sup>17</sup> Bankruptcy judges have engaged in many of the same practices that district courts have used to attract litigants. The primary difference is that for patent cases, some courts have actively discouraged litigants from filing in their courts;<sup>18</sup> similar examples of courts actively discouraging filings are not present in the literature on bankruptcy court competition.

The fact that bankruptcy and patent law are the two fields of federal law that have experienced large amounts of court competition suggests that legal fields with specialized judges may be more prone to court competition. This may be true for a number of reasons. First, specialized courts may receive greater benefits from successfully attracting litigants than do courts of general jurisdiction and therefore are more likely to attempt to increase case filings. Scholars have suggested that specialist bankruptcy judges seek to attract cases in order to increase the power of the court.<sup>19</sup> By increasing case filings, specialized judges justify their specialized position and expand the court's influence and prestige. Second, specialist judges may have unique non-bureaucratic reasons to compete for cases. Specialists more easily obtain the prestige associated with being an expert

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<sup>13</sup> See *supra* note 1.

<sup>14</sup> Lemley, *supra* note 2, at 435 app. A.

<sup>15</sup> See *id.* at 410 ("In short, if patentees or accused infringers are to pick a forum only by win rate, both sides should probably be picking different districts than they currently do.").

<sup>16</sup> *Id.* at 407-09 tbl.3.

<sup>17</sup> For a broader discussion of similar issues experienced by bankruptcy courts with respect to forum shopping, see LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 25-48 (2005).

<sup>18</sup> See, e.g., *infra* subsection II.A.2.c (discussing the Eastern District of Virginia's attempts to discourage patent litigants from filing in the District's Alexandria Division).

<sup>19</sup> See generally LOPUCKI, *supra* note 17.

jurist than do generalist judges.<sup>20</sup> Indeed, much of what motivates generalist judges to pursue increased patent filings is the ability to specialize. In many respects, some judges on the Eastern District of Texas and the District of Delaware operate like specialist patent judges.

The history of court competition in patent and bankruptcy law has normative implications for policymakers. The prevalence of court competition in areas of specialized adjudication suggests that lawmakers contemplating new, specialized courts should carefully consider—and limit—future courts’ abilities to attract litigation. In particular, lawmakers should consider restricting venue options in specialized legal areas to reduce court competition. Furthermore, attention should be paid to the oversight capabilities of appellate courts tasked with policing the case management practices of trial courts in specialized legal fields.

Forum shopping has fundamentally altered the landscape of patent litigation in ways detrimental to the patent system as a whole.<sup>21</sup> Court competition creates even more problems, ranging from reduced trust in the judicial process to uneven playing fields for litigants. Congress and legal academics have proposed a variety of solutions to reduce forum shopping. Those proposals usually involve either increased venue restriction for patent cases or the creation of a specialized patent trial court—essentially, all proposals involve limiting choice for litigants. This Article sketches out possible modifications to patent case assignment rules that could be used—possibly in conjunction with venue restrictions—to reduce both forum shopping and court competition. Three potential modifications are examined. First, Congress could require district courts to randomize their assignment procedures. Second, patent cases could be assigned randomly to a subset of district court judges. Currently, Congress is engaged in just such an experiment on a small scale: the Patent Pilot Program (PPP) allows qualifying districts to assign patent cases to a small group of judges within the district.<sup>22</sup> Third, patent cases could be assigned by a judicial panel, similar to the one used for Multi-District Litigation (MDL). This Article also addresses jurisdictional concerns involved in employing such assignment methods. Ultimately, while the more radical case assignment procedures would reduce forum shopping and court competition for patent cases, they would also increase litigation costs for all patent plaintiffs—not

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<sup>20</sup> See *id.* at 45-47 (describing one particular bankruptcy judge’s status as a “bankruptcy celebrity”); see also *infra* subsection II.B.1.

<sup>21</sup> See Fromer, *supra* note 9, at 1464-65 (discussing the negative results of widespread forum shopping).

<sup>22</sup> See *infra* subsection III.C.2.

just forum shopping plaintiffs. Thus, this Article supports a more modest fix: a randomization requirement for federal district court judge assignment.

This Article's argument proceeds in three parts. Part I offers an overview of the literature on forum shopping. That literature largely understands forum shopping as revolving around the search for favorable substantive and procedural law, while largely ignoring any active role for courts and judges in the process.

After establishing the theoretical foundations of forum shopping, Part II provides a historical account of forum shopping in patent law, beginning with the pre-Federal Circuit era before turning to current practices. Profiles of three district courts—the District of Delaware, the Eastern District of Texas, and the Eastern District of Virginia—serve as a case study. As a partial explanation for the existence of forum shopping in patent cases, this Part introduces the theory of court competition. Building on the case study, this Part examines the trial practices that courts can use to influence venue decisions. Additionally, this Part offers possible explanations for courts' interest in competing for patent cases, such as increased judicial prestige, personal satisfaction, and indirect budgetary benefits.

Part III explores the normative implications of court competition by specialized courts. In doing so, it connects the Article's description of court competition for patent cases with the literature of court competition in bankruptcy law. Bankruptcy scholars have proposed increased randomization as a means of reducing court competition. Building on those proposals, this Part examines three potential avenues for randomizing patent case assignment.

## I. FORUM SHOPPING

Forum shopping has long been considered “a national legal pastime.”<sup>23</sup> While the fairness of forum shopping has been hotly debated among jurists and academics,<sup>24</sup> litigants regard the choice of venue as just one tool among

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<sup>23</sup> J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

<sup>24</sup> Compare *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) (“There is nothing inherently evil about forum-shopping.”), and *Atl. Star*, [1974] A.C. 436 (H.L.) 471 (appeal taken from Eng.) (Simon of Glaisdale, L.J., dissenting) (stating that forum shopping “should be a matter neither for surprise nor for indignation”), with *Fromer*, *supra* note 9, at 1464-65 (explaining the “three principal concerns” of forum shopping in patent law).

many in the litigation toolkit.<sup>25</sup> Venue choice can, among other things, lead to larger verdicts,<sup>26</sup> favorable substantive law,<sup>27</sup> more permissive statute-of-limitation periods,<sup>28</sup> or sympathetic juries.<sup>29</sup> Litigants may face a host of different venue options: between state and federal court, between various state courts, or between different federal courts. Forum shopping can involve international venue considerations as well.<sup>30</sup>

Existing legal scholarship on forum shopping has almost universally focused on the actions of plaintiffs and defendants.<sup>31</sup> In the traditional account, forum shopping involves three steps: (1) determining which forum(s) meet the prerequisites for subject matter jurisdiction, personal

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<sup>25</sup> The ability to file a case in one of a number of different courts has been an important part of litigation since the Supreme Court's 1878 decision in *Pennoyer v. Neff*, 95 U.S. 714 (1878). Since *Pennoyer*, the Supreme Court has attempted to clamp down on the more egregious abuses of "tag" jurisdiction. However, many of these decisions have increased parties' ability to forum shop. For example, *International Shoe Co. v. Washington*—the preeminent case on personal jurisdiction—established more sensible jurisdictional principles than *Pennoyer*, but it also expanded state (and by extension federal) court jurisdiction to defendants with "minimum contacts" with the forum. 326 U.S. 310, 316 (1945). The minimum contacts standard means that national corporations are more likely to be subject to jurisdiction in a variety of fora, increasing the ability of clever plaintiffs to shop for the most advantageous venue.

<sup>26</sup> See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 556 (1989) ("Especially in tort cases, venue often determines the size of a verdict because the generosity of juries varies from one location to another.").

<sup>27</sup> See *id.* at 558 (noting that forum shopping in divorce cases results from a desire to "evade overly restrictive home-state divorce laws"); see also Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 266-67 (1991) (arguing that plaintiffs forum shop to obtain more favorable law).

<sup>28</sup> See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772 n.1 (1984) (involving a libel suit brought in New Hampshire where relatively few magazines were sold after Ohio dismissed the suit on statute-of-limitations grounds); see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729-30 (1988) (allowing States to apply their own statutes of limitations to claims governed by the substantive law of a different state).

<sup>29</sup> In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)—a famous example of venue decisions being driven by jury pool—the plaintiffs filed suit in Creek County, Oklahoma, a blue-collar area known for large tort awards. See Juenger, *supra* note 26, at 560. The defendants then removed the case to federal court to secure the more "straight-laced" jurors in Tulsa, but ultimately the Supreme Court held that Oklahoma lacked jurisdiction, so the venue game was for naught. *Id.*

<sup>30</sup> See *id.* at 560-62 (discussing a case involving an overseas plane crash litigated in federal court in Los Angeles). Many of the same considerations that drive forum shopping in state and federal courts influence the choice of international forum as well. Indeed, foreign jurisdictions seem more welcoming of alien forum shopping than the U.S. Supreme Court. See *id.* at 564 ("Compared to the United States Supreme Court, some foreign tribunals positively welcome forum shoppers.").

<sup>31</sup> See, e.g., Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 379 (2006) ("The players in forum shopping include the plaintiff(s) and counsel, the defendant(s) and counsel, and any anticipated additional participants.").

jurisdiction, and venue; (2) weighing the benefits and drawbacks of each eligible forum; and (3) filing suit in the forum that yields the greatest likelihood of a favorable outcome.<sup>32</sup> Scholars have identified three main factors that determine how litigants evaluate the likelihood of favorable outcome:<sup>33</sup> favorable substantive law,<sup>34</sup> favorable procedural provisions,<sup>35</sup> and favorable local considerations.<sup>36</sup> For instance, in some cases a plaintiff might prefer a particular venue because courts in that jurisdiction are bound by a legal rule that favors the plaintiff's case, while other forums do not follow that particular rule. In other cases, different procedural rules (such as differing statutes of limitation) could motivate a plaintiff to file in one forum but not another. Lastly, local considerations (such as proximity to witnesses and the composition of the prospective jury pool) may influence a plaintiff to prefer one forum over another.

Defendants are not completely powerless when faced with a forum-shopping plaintiff. Defendants can urge the court to transfer the case to a forum that is less favorable to the plaintiff. In modern practice, courts typically transfer cases in one of two ways. First, the common law doctrine of forum non conveniens permits courts to transfer cases over which they have jurisdiction but which would pose an inequitable inconvenience to the

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<sup>32</sup> See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) ("The plaintiff's opening moves include shopping for the most favorable forum. Then, the defendant's parries and thrusts might include some forum-shopping in return, possibly by a motion for change of venue."); see also Bassett, *supra* note 31, at 382 (applying rational choice theory to forum shopping and concluding that "the rational lawyer will choose" the venue that potentially offers "a more favorable outcome").

<sup>33</sup> See Bassett, *supra* note 31, at 346, 348-50 (listing the "considerations that inform and guide" forum decisions as choices involving (1) different substantive laws, (2) different procedural provisions, and (3) subjective and personal factors).

<sup>34</sup> See Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1390 (2004) (identifying substantive law differences as an important consideration in forum shopping); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 191 (2000) ("One of the most important potential consequences of forum selection is a difference in applicable law.").

<sup>35</sup> Ryan, *supra* note 34, at 200 ("The choice of favorable substantive law is the most dramatic prize for the successful forum-shopper, but there are also many important procedural distinctions among courts.").

<sup>36</sup> Local considerations consist of a variety of factors that are unique to each court. These factors can include judicial reputation; geographical proximity to litigants, witnesses, or counsel; reputation of a court's jury pool; and counsel's familiarity with the court. See Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 80 n.2 (1999) (cataloguing the potential motives for forum shopping); Bassett, *supra* note 31, at 350-51 (listing the factors involved in choosing venue); Juenger, *supra* note 26, at 573-74 (noting considerations of "the forum's reputation for fairness (or pro-plaintiff bias), the efficacy and speed of judicial proceedings, the quality of available counsel, and . . . the 'legal climate'").

courts or parties.<sup>37</sup> This doctrine is most often invoked in cases involving foreign defendants.<sup>38</sup> Alternatively, 28 U.S.C. § 1404(a) permits courts to transfer a civil action to another district “[f]or the convenience of parties and witnesses, in the interest of justice.”<sup>39</sup> Second, defendants have the option of filing a motion to dismiss for improper venue.<sup>40</sup> Kevin Clermont and Theodore Eisenberg summarize the venue game as follows: “The plaintiff’s opening moves include shopping for the most favorable forum. Then, the defendant’s parries and thrusts might include some forum-shopping in return, possibly by a motion for change of venue. Venue is worth fighting over because outcome often turns on forum.”<sup>41</sup> Clermont and Eisenberg’s empirical work validates their claim regarding the importance of venue. They found that plaintiffs win 58% of civil cases that remain in the plaintiff’s selected forum.<sup>42</sup> On the other hand, in cases that are transferred to the defendant’s preferred venue, the plaintiff wins only 29% of the time.<sup>43</sup> The frequency and intensity with which parties litigate venue only serves to reinforce the point.

Nearly everything written about forum shopping—whether from a judicial, academic, or practitioner perspective—involves some iteration of the familiar moves described above. Therefore, it is not surprising that courts have been overlooked as players in the forum shopping game because many of the factors thought to influence forum shopping (e.g., substantive law, procedural rules, and local considerations) are outside the control of any particular judge or court. For instance, the doctrine of *stare decisis* prevents a trial judge from altering the law by which he or she is bound to attract litigants.<sup>44</sup> Similarly, a judge is powerless to place his or her court in proximity to witnesses or to alter the characteristics of the local jury pool.

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<sup>37</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (proposing a balancing test for courts to use when deciding whether to dismiss a claim under the doctrine); Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 389-90 (1947) (examining the constitutional limitations on the application of the doctrine in the United States).

<sup>38</sup> See *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007).

<sup>39</sup> 28 U.S.C. § 1404(a) (2012).

<sup>40</sup> See FED. R. CIV. P. 12(b)(3).

<sup>41</sup> Clermont & Eisenberg, *supra* note 32, at 1508.

<sup>42</sup> *Id.* at 1511-12.

<sup>43</sup> *Id.* at 1512.

<sup>44</sup> See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 725-29 (1988) (examining theories of *stare decisis* and the broader context of their evolution).

Traditional scholarship has also assumed that courts are disinterested in impacting venue decisions.<sup>45</sup> If a court increases its appeal to litigants, the workload of that court increases with no corresponding increase in compensation. The work of a judge is stressful enough without unnecessarily seeking out more work. Thus, courts are portrayed in the literature as “passive” institutions lacking both the incentive and the ability to influence litigants’ venue preferences.<sup>46</sup>

## II. COURT COMPETITION

Unlike many forum shopping plaintiffs, patent litigants cannot, in general, shop for favorable substantive law. Patent cases in all U.S. district courts are governed by the law of the Federal Circuit, not the circuit where the district resides.<sup>47</sup> Furthermore, patent litigants are bound by the same set of procedural rules—the Federal Rules of Civil Procedure.<sup>48</sup>

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<sup>45</sup> See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 11 (1993) (characterizing some judges as pursuers of “leisure”).

<sup>46</sup> See WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS 26 (1990) (“Courts are relatively passive organizations within a demanding environment . . .”); see also LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 191 (1975) (“Courts in our tradition are passive; they sit waiting for cases. They do not call them up on their own . . .”). See generally Donald J. Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125 (1973) (arguing that litigants shape the law’s application and interpretation by initiating and defending cases).

<sup>47</sup> Patent cases are governed by the substantive law of the Federal Circuit. See 28 U.S.C. § 1295(a)(1) (2012) (granting the Federal Circuit exclusive jurisdiction over cases arising under federal patent law). In limited circumstances (such as cases with patent law raised solely as a counterclaim), cases with patent issues fall outside the jurisdiction of the Federal Circuit. See, e.g., *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002) (“Not all cases involving a patent-law claim fall within the Federal Circuit’s jurisdiction.”). But even those cases tend to be decided by looking to the law of the Federal Circuit. See Christopher A. Cotropia, *Arising Under” Jurisdiction and Uniformity in Patent Law*, 9 MICH. TELECOMM. & TECH. L. REV. 253, 309-10 (2003) (arguing that regional circuits should look to Federal Circuit law for patent issues even where the Federal Circuit does not have jurisdiction).

<sup>48</sup> While intracircuit procedural nuances still exist, the Federal Circuit has held that procedural rules on “patent-related” matters are governed by Federal Circuit law, while procedural rules pertaining to nonpatent issues are governed by circuit law. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 & n.14 (Fed. Cir. 1984). For a critique of this rule, see Ted L. Field, *Improving the Federal Circuit’s Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 GEO. MASON L. REV. 643, 685 (2009), where the author argues that the Federal Circuit “has inconsistently articulated its choice-of-law rules for procedural issues in patent cases” and applied them inconsistently. In addition to the Federal Rules of Civil Procedure, many district courts have adopted their own procedural rules for patent cases, an issue I address in depth in subsection II.B.2.a.

There are, to be sure, a number of formal procedural differences between district courts. Almost all federal district courts have adopted additional “local” rules that supplement the Federal Rules. An increasing number of courts have even adopted special “patent local rules” that only apply in patent cases.<sup>49</sup> But as further discussed in subsection II.B.2.a, *infra*, these differences between local rules are more likely to serve as signals of court competition for patent cases than as driving forces behind litigants’ choice of forum. Scholars of the patent system have identified a host of court factors that entice litigants to file patent cases in particular courts.<sup>50</sup> These characteristics include time to trial, likelihood of getting to trial, and average damage awards.

Despite legal scholars’ inattention to the role of courts in forum shopping,<sup>51</sup> courts have engaged in competition for litigants in various legal areas. Properly understood, forum shopping in patent law is partly the result of this competition for litigants.

The theory of court competition complicates the traditional notion of forum shopping.<sup>52</sup> Instead of a single-step game played between the plaintiff and defendant, court competition theory involves a two-step model. First courts compete (if they choose to do so); then plaintiffs and defendants engage in forum shopping.

In the first stage—court competition—courts establish procedural rules, administrative procedures, and informal norms of case management in their courtrooms.<sup>53</sup> If those established procedures are predictable and favorable to the party selecting the forum, they may attract litigants to file in that particular forum. To the extent they are unpredictable or unfavorable to the party selecting the forum, they may dissuade litigants from filing there. Of

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<sup>49</sup> See generally La Belle, *supra* note 10 (manuscript at 15-21) (explaining the “special” rules of procedure that the Federal Circuit and lower Federal Courts have developed for patent cases).

<sup>50</sup> See *supra* note 8 and accompanying text; see also Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 805 (2008) (analyzing suggestions to decrease forum shopping for a host of different factors by improving appellate decisionmaking in patent cases and using specialized courts).

<sup>51</sup> A few scholars have broken with the traditional narrative of courts as neutral players in the venue game. For example, Friedrich Juenger has written about courts influencing venue decisions in international law, although he has not focused attention on courts competing with other courts within the same country. See Juenger, *supra* note 26, at 564-70 (describing how many foreign countries openly flaunt their litigation-friendly rules to attract “alien” plaintiffs). Similarly, Lynn LoPucki has detailed the manner in which bankruptcy courts and judges have engaged in competition for litigants. See generally LOPUCKI, *supra* note 17.

<sup>52</sup> See generally LOPUCKI, *supra* note 17, at 137 (distinguishing “court competition” from “forum shopping”).

<sup>53</sup> See *infra* subsection II.B.2.

course, most trial management procedures are not designed to influence litigants' choice of forum. Judges are, in most cases, largely indifferent to the types of cases filed in their courts and simply handle the cases assigned to them in the most efficient manner possible. However, in certain instances, a court might desire to have some influence over the nature of its docket. It is in those instances that court competition becomes relevant.

Even if a forum maintains administrative norms that appeal to plaintiffs, the court must find some method of communicating those norms. Courts can signal their interest in certain types of cases in various ways. First, the court can codify certain practices into local procedural rules. Second, word-of-mouth can convey the court's interest to other litigants. Practitioner publications are filled with suggestions of courts that are ideal for certain types of cases. Lastly, judges and courts can explicitly announce their interest in certain types of cases. While this last signaling method may seem unlikely, it is increasingly common in modern patent litigation practice.<sup>54</sup>

Forum shopping plaintiffs or defendants then battle over forum in an attempt to secure the court with the most favorable set of legal rules, procedural rules, and administrative norms. First, the plaintiff selects the most favorable forum in which the jurisdictional requirements are met. In response, the defendant has three options: (a) acquiesce to the plaintiff's choice of venue, (b) move to transfer the case to another venue that is more favorable to the defendant, or (c) bring a motion for forum non conveniens. In some cases, the defendant can preempt the venue choice of the plaintiff by filing a declaratory judgment action.<sup>55</sup>

To be clear, the model described above does not reject the previous literature on forum shopping or the features of courts that scholars have previously identified as important to forum-shopping litigants. Instead, the model builds upon previous scholarship by examining where and why those court-specific features develop in the first place. The thesis of this Article assumes that courts are, at times, motivated by concerns outside the traditional realms of equity and efficiency typically associated with the judicial role. Courts can seek to attract litigants by offering services that appeal to particular plaintiffs. Conversely, these same institutions can seek to repel litigants by offering unappealing services. Courts can compete with each other for litigants, and at times, they do.

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<sup>54</sup> See *infra* Section II.B.

<sup>55</sup> See *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007) (finding jurisdiction over a declaratory judgment action challenging the validity of a patent even though the patent licensee had not breached its license).

There are generally three concerns associated with forum shopping in general and patent forum shopping in particular: non-uniformity, inefficiency, and unfairness.<sup>56</sup> Forum shopping creates uneven enforcement when patent rights are more likely to be upheld in particular courts.<sup>57</sup> The practice is also inefficient because litigants often spend resources litigating over venue. Furthermore, uneven enforcement of rights makes the legal system appear unjust and arbitrary.<sup>58</sup>

Court competition heightens the three concerns generally associated with forum shopping. First, to compete for litigants, courts must distinguish themselves from other courts by offering more services that appeal to one party—the party selecting venue. By offering what amounts to plaintiff-friendly services, the odds of success are tilted in favor of patentees in those venues. Second, court competition adds additional inefficiencies to the judicial process. Aside from the typical venue battles that litigants wage, courts seeking to influence venue choices make case management decisions in an effort to attract future litigants, rather than to handle cases efficiently. This can lead to inefficient procedural and administrative practices. Lastly, when courts actively pursue litigants, questions of judicial neutrality are inevitable.

To examine court competition theory in patent law, Section A of this Part describes the history of forum shopping in patent law beginning with the period immediately before the creation of the Federal Circuit and up to the present day. In doing so, it studies the history of three high-volume patent districts: the District of Delaware, the Eastern District of Virginia, and the Eastern District of Texas. Section B suggests possible motivations for judges and courts to engage in court competition. Then, based on the case study of the three district courts, it discusses ways in which courts compete for litigants.

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<sup>56</sup> See, e.g., Fromer, *supra* note 9, at 1464-65 (describing the underlying flaws of forum shopping).

<sup>57</sup> *Id.*; see also Moore, *supra* note 5, at 920-21, 921 fig.4 (discussing the effects of forum shopping on the outcome of the case).

<sup>58</sup> Moore, *supra* note 5, at 924 (“This instability erodes public confidence in the law and its enforcement and creates doubt about the fairness of the system.”).

### A. *The Rise of Court Competition in Patent Litigation*

#### 1. Shopping for a Circuit Court: 1970–1982

Before 1970, patent litigation was a highly specialized practice.<sup>59</sup> Nearly all patent litigation was handled by boutique law firms filled with former employees of the United States Patent & Trademark Office (PTO).<sup>60</sup> The typical path to becoming a patent litigator consisted of working for a short time at the PTO, then transitioning to a private company or law firm to learn the nuances of patent procurement, and then advancing to the specialized litigant class of the patent bar.<sup>61</sup> Perhaps because of this customary apprenticeship in patent prosecution (the term used for procuring patents), patent litigators of the era were uncomfortable with jury trials. Thus, the overwhelming majority of patent cases before 1970 were tried without juries.<sup>62</sup>

During the 1970s, however, seasoned litigators began entering the field of patent litigation. The trial lawyers who ventured into the arcane world of patent law began emphasizing the value of juries.<sup>63</sup> Additionally, these attorneys brought a wealth of knowledge from other legal fields, which they quickly applied to patent cases. They introduced complex procedural arguments into patent cases, many of which were adopted by courts.<sup>64</sup> The new emphasis on procedural and legal innovations, as well as the increased

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<sup>59</sup> See Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 835 (1977) (finding that the patent bar in 1977 was a "group of four thousand lawyers constitut[ing] a particularly distinct specialization within the legal profession"); cf. Ralph E. Harper, Commentaria, *An Open Letter to the Patent Bar*, 56 J. PAT. OFF. SOC'Y 189, 190 (1974) (referring to a subset of the Patent Bar members as the "litigating bar").

<sup>60</sup> See Wilbur F. Pell, Jr., *Patent Law Cases – A Retrospective View from a Lame Swan Appellate Judge*, 9 APLA Q.J. 105, 107 (1981) (describing the author's experience as a lawyer at a general practice firm whose patent practice consisted of giving inventors directions to the offices of nearby patent firms).

<sup>61</sup> See Craig E. Larson & Donald S. Holland, *A Study of New Patent Lawyers*, 9 APLA Q.J. 12, 33 (1981) ("At the beginning of their practice, the majority of all new lawyers spend virtually all of their time on patent procurement."); Robert D. Yeager, *The Patent Profession: A Time to Go Public For New Lawyers*, 9 APLA Q.J. 60, 63-64 (1981) (describing professional paths and career progressions for patent attorneys).

<sup>62</sup> See J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. U. L. REV. 1, 18-21 (2014) (discussing the rise of jury trials beginning in the mid-1970s).

<sup>63</sup> See *id.* at 19-20 (explaining litigators' many reasons for favoring juries and the success of this strategy).

<sup>64</sup> *The Sixth Annual Judicial Conference of the United States Court of Customs and Patent Appeals*, 84 F.R.D. 429, 440-43 (1979) (lamenting the burdensome nature of patent litigation in district courts, especially abuses of the discovery process).

importance of juries, led to an explosion of forum shopping in patent cases.<sup>65</sup>

When patent lawyers went in search of the ideal forum in the 1970s, they were shopping for circuits that were “pro-patent.”<sup>66</sup> Regional variations in substantive patent law determined whether a circuit court was characterized as pro- or anti-patent.<sup>67</sup> Some circuits imposed high standards of proof to uphold the validity of a patent, while others did not.<sup>68</sup> Some circuits made it difficult for declaratory judgment plaintiffs to establish standing, while others did not.<sup>69</sup> And some circuits were simply skeptical of the value of the patent system generally, while others found it beneficial.<sup>70</sup>

Patent holders tended to prefer to file their cases in a district court within the Fifth, Sixth, or Seventh Circuit because various holdings from those circuits improved a patentee’s odds of success.<sup>71</sup> Defendants commonly filed motions to transfer.<sup>72</sup> Defendants usually preferred to litigate in the Eighth or Ninth Circuit, where case law was less favorable towards patentees.<sup>73</sup> Motions to dismiss were litigated with vigor.<sup>74</sup> Empirical evidence validates these anecdotes: the odds of having a patent

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<sup>65</sup> See generally Scott E. Atkinson et al., *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411 (2009) (empirically demonstrating that forum shopping on the basis of patent validity rates was widespread but ceased in the late 1970s).

<sup>66</sup> See *id.* at 415 (noting various courts of appeals that were known to rule in favor of patentees more often than other courts).

<sup>67</sup> See Howard T. Markey, *The Phoenix Court*, 10 APLA Q.J. 227, 232-34 (1982) (explaining the numerous differences among courts in the tests, standards, and practices employed in patent cases).

<sup>68</sup> See *id.* at 233 (describing the differing obviousness standards for design patents among the various circuit courts).

<sup>69</sup> See *id.* at 232 (describing the divergent practices among circuit courts regarding whether the licensee had to terminate the license to challenge the validity of a patent in a declaratory judgment action).

<sup>70</sup> See Dreyfuss, *supra* note 12, at 6-7 (explaining the overall skepticism toward the patent system and the differing burdens various courts placed on patentees and alleged infringers).

<sup>71</sup> *Id.* at 7; Robert L. Harmon, *Seven New Rules of Thumb: How the Federal Circuit Has Changed the Way Patent Lawyers Advise Clients*, 14 GEO. MASON L. REV. 573, 573-74 (1992).

<sup>72</sup> Consider *Hoffman v. Blaski*, 363 U.S. 335, 342-44 (1960), in which an accused infringer was ultimately denied transfer from the Fifth Circuit to the Seventh Circuit but not before litigating the transfer motion in both circuits and the Supreme Court.

<sup>73</sup> Harmon, *supra* note 71, at 574 (“When this author broke into the business, and for many years thereafter, it was quite clear that there was no such thing as a valid patent in the Eighth Circuit, and the climate in the Ninth Circuit was not much more hospitable.”).

<sup>74</sup> See *supra* note 72.

found to be valid could differ by over fifty percent, depending on the circuit court that ultimately reviewed the case.<sup>75</sup>

Many patent lawyers were troubled by the substantial differences between circuits in the handling of patent cases. In 1972, Congress established the Commission on Revision of the Federal Court Appellate System (better known as the “Hruska Commission”) to explore ways to control the increasing number of cases filed in the federal courts.<sup>76</sup> Patent reform advocates saw the Hruska Commission as an ideal opportunity to push for a solution to the divergent approaches to patent validity among the various circuits.<sup>77</sup> The Hruska Commission was inundated with complaints about forum shopping generally and the problem with patent forum shopping in particular. Professor James Gambrell and well-known patent attorney Donald Dunner testified before the Commission about their survey of patent attorneys. Gambrell and Dunner’s findings confirm the common perception of patent attorneys of this era: forum shopping was “extensive” and “directly attributable” to the differences in application and interpretation of the patent statute among the various numbered circuit courts.<sup>78</sup> According to Gambrell and Dunner, “patent owners and alleged infringers spend inordinate amounts of time, effort and money jockeying for a post position in the right court for the right issues. Nowhere is the quest more vigorously pursued than for the right forum to rule on validity.”<sup>79</sup>

In response, the Hruska Commission recommended that a national appeals court be established to address some, but not all, patent cases.<sup>80</sup> Under the Commission’s proposal, typical patent cases would have

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<sup>75</sup> See Atkinson et al., *supra* note 65, at 433 (“[A]ll else constant, a switch from the Third Circuit to the Tenth Circuit in the pre-[Federal Circuit] era results in an increased likelihood of patent validity of 0.52.”).

<sup>76</sup> See generally Comm’n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 218-19 (1975) (“The question, however, is whether, in light of the other demands placed upon the [Supreme] Court, and considering the interests of the system as a whole, some issues might better be decided by another tribunal empowered to hand down precedents of national effect.”).

<sup>77</sup> F. M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. ON TELECOMM. & HIGH TECH. L. 167, 188 (2009) (describing how the majority of respondents approved a “proposal calling for a new centralized appellate court . . . [that] was circulated in July 1978 to [anyone] likely to have any significant interest in the subject” (internal quotation marks omitted)); see also Dreyfuss, *supra* note 50, at 788 (“It was thought that if patent appeals were channeled to a single court, . . . the quality of decisions in patent disputes would improve.”).

<sup>78</sup> Comm’n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedure: Recommendations for Change*, 67 F.R.D. 195, 369-70 (1975).

<sup>79</sup> *Id.* at 370.

<sup>80</sup> *Id.* at 371.

continued to be litigated in the numbered circuit courts of appeal. But, if a particularly difficult question of patent law arose, the case could be transferred to the newly established court.<sup>81</sup> The Commission rejected proposals to create an appeals court that would handle all patent matters.<sup>82</sup>

Two years after the Hruska Commission's recommendations, Congress passed the Federal Courts Improvement Act of 1982 (FCIA).<sup>83</sup> Breaking with the Hruska Commission's recommended solution, the FCIA created the United States Court of Appeals for the Federal Circuit and gave the court exclusive jurisdiction over all appeals arising under the patent laws.<sup>84</sup> Congress's motivation to create the Federal Circuit stemmed in large part from a desire to eliminate regional differences in patent enforcement that were driving forum shopping in patent litigation. By centralizing patent appeals in one circuit, Congress hoped to harmonize patent law across the United States and eliminate forum shopping in patent litigation.<sup>85</sup>

## 2. Shopping for a District Court: 1982–2013

By and large, the creation of the Federal Circuit has succeeded in creating a uniform, national patent law.<sup>86</sup> Although the court has been criticized for being “pro-patent” and overly formalistic (among other things), centralizing all appeals in one court has eliminated regional variations in substantive law.<sup>87</sup> Because all patent appeals now are heard at the Federal Circuit, patent holders, at least in theory, can no longer forum shop for advantageous substantive law.

Despite the Federal Circuit's oversight and control of patent law, forum shopping persists.<sup>88</sup> Over six-thousand patent cases are filed annually in the United States,<sup>89</sup> but those cases are not evenly distributed among the

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<sup>81</sup> *Id.*

<sup>82</sup> See generally Scherer, *supra* note 77, at 187-88 (discussing the Commission's rejection of a specialized court to hear all patent appeals).

<sup>83</sup> See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

<sup>84</sup> *Id.*

<sup>85</sup> See Dreyfuss, *supra* note 12, at 2-3 (discussing the efficiency and administrative reasons weighing in favor of the creation of the Federal Circuit).

<sup>86</sup> *Id.* at 74 (“On the whole, the CAFC experiment has worked well for patent law, which is now more uniform, easier to apply, and more responsive to national interests.”).

<sup>87</sup> See generally *id.* at 64-65 (discussing the success of the Federal Circuit and proposing ways to increase its efficiency).

<sup>88</sup> See, e.g., Moore, *supra* note 5, at 901-07 (conducting an empirical analysis of patent forum shopping).

<sup>89</sup> Projections indicate a total of 6134 patent cases will be filed in the United States in the year 2013. Press Release, Perkins Coie, *supra* note 1.

ninety-four U.S. federal district courts. Nearly half of all cases are filed in the top two districts (Delaware and Eastern Texas) and seventy-five percent are adjudicated in the top ten districts.<sup>90</sup> Geographical considerations do not explain the concentration of patent cases.<sup>91</sup>

Scholars have empirically examined the problem in an attempt to decipher precisely what drives forum shopping in patent law. Then-professor Kimberly Moore—who is now a Federal Circuit judge—conducted the first empirical analysis of forum shopping in patent cases filed after the creation of the Federal Circuit.<sup>92</sup> Moore found that the cluster of patent cases filed in certain districts could not be explained fully by the concentration of innovation in those districts.<sup>93</sup> Moore also found that the party that initially files suit (i.e., a patentee in an infringement action or an accused infringer in a declaratory judgment action) was a significant predictor of validity, enforceability, and infringement.<sup>94</sup> “The most likely explanation” for this result, Moore concludes, “is that forum and timing really do matter.”<sup>95</sup>

Moore hypothesized that a number of differences among district courts could explain the forum shopping phenomenon. She found that the top districts tended to be those with speedier dockets, greater likelihood of settlement before trial, or higher patentee win rates.<sup>96</sup> However, Moore admitted that none of these traditional characteristics could explain the stratification of patent cases.<sup>97</sup> As a solution to the forum shopping problem, Moore proposed either the creation of a specialized patent district court<sup>98</sup> or modification of the patent venue statute.<sup>99</sup>

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<sup>90</sup> See *id.* (summarizing 2013 patent case concentration).

<sup>91</sup> See Fromer, *supra* note 9, at 1453-54 (positing that courts’ generous interpretation of the venue statutes makes geography irrelevant in patent cases). Xuan-Thao Nguyen argues that the Eastern District’s high concentration of patent cases is consistent with the large numbers of patentees who reside in Texas. Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 134-35 (2008). But the fact that Texas has a large number of patentees does not explain why so many patentees file suit in the Eastern District of Texas rather than in the Northern, Southern, or Western Districts, all of which have larger populations, more technologically-based companies, and, presumably, more patentees.

<sup>92</sup> Moore, *supra* note 5, at 892.

<sup>93</sup> *Id.* at 904-07.

<sup>94</sup> *Id.* at 921.

<sup>95</sup> *Id.* at 921-22.

<sup>96</sup> *Id.* at 907-18.

<sup>97</sup> *Id.* at 919 (“Th[e] variation suggests that there may be no single explanation of patent holders’ selection of particular jurisdictions.”).

<sup>98</sup> *Id.* at 932-34.

<sup>99</sup> *Id.* at 934-37.

Mark Lemley has found that patent forum shopping has increased since Moore's study.<sup>100</sup> Lemley's study assumes patent litigants are seeking the traditional benefits of forum shopping: the best mixture of speed, likelihood of getting to trial, and win-rate.<sup>101</sup> However, like Moore, Lemley admits that those characteristics cannot explain the clustering that occurs in patent litigation. For example, according to Lemley's theory, patent filings should not be clustered in the Eastern District of Texas.<sup>102</sup> Instead, Lemley's metrics indicate that the Middle District of Florida, a rather unpopular forum with patent litigants, should be receiving more patent cases than Texas.<sup>103</sup>

To shed light on why certain districts receive the bulk of patent cases, this Section will examine the forum shopping experience of three district courts: the Eastern District of Texas, the District of Delaware, and the Eastern District of Virginia.

a. *Eastern District of Texas*

Over the past decade, the district that has received the most attention—some might say notoriety—for its patent litigation docket has been the Eastern District of Texas. A mere afterthought for patent plaintiffs in 2000, the Eastern District had eclipsed all other districts for patent filings by 2008.<sup>104</sup> Today, over twenty-one percent of all patent cases are filed there.<sup>105</sup> The rise of the Eastern District of Texas as the premier patent forum is a complex and controversial story. Regardless of what one thinks of the merits of the district as a patent forum, however, it is nearly universally accepted that the district's preeminent place in patent litigation today is largely due to the efforts of one man: Judge T. John Ward.<sup>106</sup>

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<sup>100</sup> See generally Lemley, *supra* note 2 (discussing the most advantageous forums in which to file patent suits).

<sup>101</sup> *Id.* at 402-03.

<sup>102</sup> *Id.* at 410 (pointing out that the Eastern District of Texas is not even among the top five districts in terms of patent win-rates).

<sup>103</sup> *Id.* at 421 ("The best aggregate patent district for plaintiffs is, surprisingly, the Middle District of Florida.").

<sup>104</sup> Elizabeth P. Offen-Brown, Note, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to TS Tech and Genentech*, 25 BERKELEY TECH. L.J. 61, 70 & tbl.1 (2010) (depicting the Eastern District of Texas's "drastic increase in patent filings").

<sup>105</sup> See Press Release, Perkins Coie, *supra* note 1.

<sup>106</sup> See, e.g., Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 207 (2007) (discussing Judge Ward's influence on the district); Michael C. Smith, *Rocket Docket: Marshall Court Leads Nation in Hearing Patent Cases*, 69 TEX. BAR J. 1045, 1048 (2006) (listing Judge Ward's efforts to welcome patent cases in his district). *But see* Nguyen, *supra*

Prior to Ward's arrival on the bench, the Eastern District heard few patent cases. The district had long been known as a plaintiff-friendly district, often attracting class action personal injury suits.<sup>107</sup> Plaintiff firms were attracted to the district due to the unique attributes of the local jury pool.<sup>108</sup> Judge Ward was appointed to the bench in the Eastern District in 1999. Almost immediately he set out to attract patent litigants to his district.<sup>109</sup>

Two years after Ward was appointed to the court, he adopted a set of additional procedural rules for patent cases modeled on the Northern District of California's rules.<sup>110</sup> Ward's rules had a few plaintiff-friendly elements that the Northern District of California's rules lacked.<sup>111</sup> For example, while the Northern District established an eighteen-month discovery period, Ward's rules permitted only nine months.<sup>112</sup> Furthermore, Ward's rules provided defendants little ability to alter the discovery deadlines or trial dates, allowing plaintiffs to impose a strict timeline on often overwhelmed defendants.<sup>113</sup> The entire Eastern District adopted Ward's rules in 2005.<sup>114</sup>

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note 91, at 123 (stating that Richard Agnich, the former general counsel for Texas Instruments, is "generally credited for the creation of the EDTX as the patent trial court").

<sup>107</sup> See Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform* 15-18 (Univ. of Tex. Sch. of Law, Law and Econ., Research Paper No. 211, 2012), available at <http://web.stanford.edu/dept/law/ipsc/Paper%20PDF/Golden,%20John%20-%20Paper.pdf> (finding that tort reform led to an increase in patent filings in Texas possibly due to greater "space" in courts' dockets to hear IP cases).

<sup>108</sup> See Dick Dahl, *IP Plaintiffs Flocking to Small Town in Eastern Texas*, ST. LOUIS DAILY REC., June 6, 2006 (describing the benefits accruing to plaintiffs from the "uneducated" local jury pool that favors property rights); see also Nguyen, *supra* note 91, at 122-24 (describing how other companies followed the lead of Texas Instruments in deciding to bring large patent suits in the Eastern District of Texas to take advantage of the court's "speediness").

<sup>109</sup> See Allen Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for Its Expertise and 'Rocket Docket'*, DALL. MORNING NEWS, Mar. 26, 2006, at 1D (describing how the city of Marshall, Texas began to attract more patent litigation).

<sup>110</sup> James Ware & Brian Davy, *The History, Content, Application and Influence of the Northern District of California's Patent Local Rules*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 965, 1011 (2009).

<sup>111</sup> See Alfonso Garcia Chan, *Proposed Patent Local Rules for Adoption by Texas' Federal District Courts*, 7 COMPUTER L. REV. & TECH. J. 149, 151 (2003) (comparing Judge Ward's local rules with the Northern District of California's rules); Alisha Kay Taylor, *What Does Forum Shopping in the Eastern District of Texas Mean for Patent Reform?*, 6 J. MARSHALL REV. OF INTELL. PROP. L. 570, 572-73 (2007) (describing the unique Eastern District of Texas local rules, including the mandate requiring defendants to compile all information used to invalidate the plaintiff's claims before trial).

<sup>112</sup> Leychkis, *supra* note 106, at 209.

<sup>113</sup> *Id.*

<sup>114</sup> See E.D. TEX. PAT. R. 1-3.

The new rules brought predictability and uniformity to the district's case management practices. In addition, the Eastern District's rules resulted in litigants getting to trial twice as quickly as litigants in the Northern District of California.<sup>115</sup> The speed and predictability of litigation in the Eastern District led to an explosion in patent filings. The district's caseload grew from fourteen patent filings in 1999 to fifty-five in 2003.<sup>116</sup>

Patent plaintiffs found the district to be accommodating in many other ways as well. For instance, the district gained a reputation for awarding massive patent infringement damages. In 2006, for example, Z4 Technologies received a \$133 million damages award against Microsoft Corporation.<sup>117</sup> Even more appealing to plaintiffs, no plaintiff had ever lost a patent trial in the Eastern District until 2005: twelve trials had resulted in twelve verdicts of valid and infringed.<sup>118</sup> The speed, large damage awards, outstanding win-rates, likelihood of getting to trial, and plaintiff-friendly local rules suddenly made the Eastern District the venue of choice for patent plaintiffs. Filings jumped to 214 in 2006.<sup>119</sup>

The Eastern District also began experimenting with its case assignment system for patent cases. Patent-holding companies (known as patent trolls or non-practicing entities) began to view the Eastern District as an ideal venue for their repeat appearances.<sup>120</sup> The cities and towns in the Eastern District profited from the increase in patent litigation. Money from out-of-town litigation has supported the economies of Marshall and other cities in the Eastern District.<sup>121</sup> Indeed, Marshall has long enjoyed the economic benefits of litigation. Prior to the rise of patent cases, the city enjoyed a reputation as a haven for personal injury suits.<sup>122</sup> The legal community, in particular, has also benefited from the increased workload. Some local firms switched from acting as local counsel in personal injury suits to providing

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<sup>115</sup> See Dahl, *supra* note 108 (quoting a plaintiffs' attorney stating that his case would have taken twice as long in California).

<sup>116</sup> Leychkis, *supra* note 106, at 206 tbl.6.

<sup>117</sup> Z4 Techs. v. Microsoft, No. 06-0142, 2006 WL 1626711, at \*2 (E.D. Tex. Apr. 19, 2006).

<sup>118</sup> See Leychkis, *supra* note 106, at 211-12 tbl.7 (listing the damages awarded in those cases).

<sup>119</sup> *Id.* at 205 tbl.5.

<sup>120</sup> See Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, at B1 ("A lot of the cases being filed in Marshall are by patent holding companies, or patent trolls . . .").

<sup>121</sup> See Dahl, *supra* note 108 (noting the increase in commercial rental values and the support of local hotels and restaurants to accommodate patent attorneys).

<sup>122</sup> See Creswell, *supra* note 120 (discussing class action suits filed by Marshall lawyers against companies that used asbestos).

counsel to patent firms.<sup>123</sup> The economic benefits of the patent docket have also enabled the Eastern District to renovate its court buildings.<sup>124</sup>

In fact, the economic windfall of increased patent litigation in the small towns of East Texas has been felt in some of the most unlikely corners. Companies that frequently litigate in the town of Marshall, Texas—including Tivo, Medtronic, and Opti Inc.—have helped stimulate the local economy by purchasing prize cattle at the livestock auction during Farm City Week in Marshall.<sup>125</sup> Tivo purchased its steer for around \$10,000, shortly before a major trial in Marshall began.<sup>126</sup> Festivals all over Marshall have benefited from the deep pockets of companies coming to the town's courthouses. Samsung, the electronics giant, is the sponsor of most major festivals in Marshall.<sup>127</sup>

b. *District of Delaware*

Perhaps the largest outlier district in terms of number of patent litigation filings relative to the number of patent-holders in the state is the District of Delaware. The District of Delaware has been one of the busiest patent districts in the country for over fifteen years yet has little local industry to speak of, few patentees within the state, and a small civil docket.<sup>128</sup> Despite the lack of connection to technology industries, Delaware is the state of incorporation for the majority of America's largest corporations.<sup>129</sup> Delaware's status has given its courts a disproportionate

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<sup>123</sup> See Dahl, *supra* note 108 (stating that the Roth law firm switched from 75% personal injury work to 75% intellectual property work over the course of five years); see also Avraham & Golden, *supra* note 107, at 17-19 (demonstrating that tort reform led to a rise in patent cases in the Eastern District of Texas).

<sup>124</sup> Nguyen, *supra* note 91, at 142 n.153 (“[T]he century-old Harrison County Courthouse in the Marshall division has been renovated and updated to handle the expanding patent docket.”).

<sup>125</sup> See, e.g., Zusha Elinson, *IP Trial Strategy: Buying Tivo's Bull*, RECORDER (June 26, 2009), <http://www.therecorder.com/id=1202431746710>, archived at <http://perma.cc/5NMX-GGZT> (demonstrating an example of an attorney's case strategy involving the purchase of a steer at a local livestock auction).

<sup>126</sup> *Id.* (explaining that the seller, a high school senior, received \$10,000 from the sale for her college fund).

<sup>127</sup> *Id.*

<sup>128</sup> See Moore, *supra* note 5, at 903-05 & tbls.1 & 2 (demonstrating the relatively small patent caseloads and number of patents granted in Delaware as compared to a sampling of other U.S. states).

<sup>129</sup> *About Agency*, STATE OF DEL., <http://www.corp.delaware.gov/aboutagency.shtml> (last visited Jan. 16, 2015), archived at <http://perma.cc/79GB-ATYL> (“More than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home.”).

number of opportunities to establish expertise in multiple areas of business law, including corporate law, bankruptcy, and, more recently, patents.<sup>130</sup>

Because of Delaware's unique ties to the business community, its courts have been particularly interested in attracting litigation to the state.<sup>131</sup> Delaware's economy is largely based on its status as a business headquarters, and the courts are largely viewed as part of that economy.<sup>132</sup> The local bar is intimately connected with the judiciary. Attracting litigation to the state means income from visiting attorneys. It also increases the business for local attorneys, who are required to participate in all proceedings before the Delaware courts.<sup>133</sup> Furthermore, increased workloads often lead to increased budgets for the judiciary.<sup>134</sup>

Attracting patent litigation to Delaware has not been difficult. The judges in Delaware receive the most patent cases per capita of any district in the country.<sup>135</sup> Thus, the District of Delaware offers unparalleled expertise in patent cases.

Beyond expertise, the District also offers a number of other benefits for patent litigants who are interested in getting to trial—usually plaintiffs. Delaware is the district in which a patent case is most likely to reach trial—almost 12% of cases receive a trial.<sup>136</sup> The district achieves this high trial rate not through local patent rules, but rather through a norm shared by the district's judges to grant summary judgment motions rarely.<sup>137</sup> The infrequency of obtaining summary judgment increases costs for defendants,

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<sup>130</sup> See LOPUCKI, *supra* note 17, at 47-48.

<sup>131</sup> See LOPUCKI, *supra* note 17 and accompanying text (stating that court competition is more likely in specialized legal fields than nonspecialized fields).

<sup>132</sup> Delaware has also competed for securities class action cases. See John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?*, 9 J. EMPIRICAL LEGAL STUD. 605, 647 (2012) (describing Delaware's attempt and failure to attract more securities class action cases). *But see* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942, 963 (Del. Ch. 2013) (upholding a forum selection clause in a Delaware corporation's bylaws requiring plaintiffs to file in Delaware).

<sup>133</sup> D. DEL. R. 83.5(d); BANKR. D. DEL. R. 9010-1(c).

<sup>134</sup> See *infra* subsection II.B.1.b (indicating that increased caseloads can lead to additional judgeships which then lock in higher budgetary outlays).

<sup>135</sup> See Donald F. Parsons, Jr. et al., *Solving the Mystery of Patentees' "Collective Enthusiasm" for Delaware*, 7 DEL. L. REV. 145, 150 tbl.2 (2004) (illustrating the high rate at which patent cases are filed per judge in Delaware relative to other states).

<sup>136</sup> Lemley, *supra* note 2, at 411 tbl.4.

<sup>137</sup> See *id.* at 403 (arguing that jurisdictions that deny summary judgment motions are more patent-friendly).

increases the odds of getting to trial, and incentivizes defendants to settle out of fear of potentially large damage awards.<sup>138</sup>

Maintaining informal norms regarding summary judgment and trial practices can be difficult for a court. Individual judges may have preferences that differ from the court as a whole. But with only four judges, Delaware's small size permits the district to settle on shared norms more easily than would be possible in a larger district.

c. *Eastern District of Virginia*

The Eastern District of Virginia possesses a number of attributes that are appealing to plaintiffs. Most noticeably, since 1997 the district has had the fastest average case time for its civil docket of any district court in the country.<sup>139</sup> Patent cases reach resolution, on average, in less than eight months and those that go to trial usually do so in less than a year.<sup>140</sup> But speed is not the only advantage for patent plaintiffs in the so-called "rocket docket":<sup>141</sup> the district has many experienced patent jurists, is home to the U.S. Patent & Trademark Office, chooses from a jury pool with a large number of scientifically trained individuals, and awards relatively high damages on average when a patent is found to be infringed.<sup>142</sup>

The Eastern District of Virginia's reputation as a forum for speedy justice began long before patent litigation was a major component of federal civil dockets. In the 1950s, Judge Bryan of the Eastern District decided that he would speed up the trial process in his courtroom. The desire for speedy execution of justice would eventually pervade the entire

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<sup>138</sup> See Timothy B. Lee, *Courts in Two States Are Tilting the Nation's Patent System Toward Plaintiffs*, WASH. POST (Sept. 19, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/19/courts-in-two-states-are-tilting-the-nations-patent-system-toward-plaintiffs>, archived at <http://perma.cc/U3EN-SEYV> ("[J]udges in Delaware are relatively slow to rule on summary judgment motions. That raises the cost of litigation for defendants, giving plaintiffs more leverage in settlement negotiations.").

<sup>139</sup> Jerry Markon, *A Double Dose of Molasses in the Rocket Docket*, WASH. POST, Oct. 3, 2004, at C4.

<sup>140</sup> Lemley, *supra* note 2, at 414 tbl.5, 416 tbl.6 (indicating the average time to resolution and time to trial for selected U.S. district courts including averages for the Eastern District of Virginia of 0.64 and 0.96 years, respectively).

<sup>141</sup> See, e.g., Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985-2010*, 11 J. MARSHALL REV. INTELL. PROP. L. 58, 61-63 (2011) (suggesting that the district's strict enforcement of early deadlines and "effective, judge-driven settlement program" earned the Eastern District of Virginia its "rocket-docket" reputation).

<sup>142</sup> *Id.* at 60-64, 69.

culture of the court.<sup>143</sup> To this day, the court prides itself on being one of the fastest courts in the country. The court achieves its current speed by imposing a heavy-handed case management style early in the trial process and strictly enforcing a tight trial schedule.<sup>144</sup>

Patent litigants did not fully appreciate the benefits of litigating in the Eastern District of Virginia until the late 1990s.<sup>145</sup> Once patent litigators fully appreciated the advantage of the “rocket docket,” however, the district experienced an explosion of patent filings, receiving over sixty per month.<sup>146</sup> But the increased number of patent filings was not entirely welcomed by the judges of the district. Because patent cases are complex and technical, the district found that it was unable to maintain its quick pace while wading through hundreds of patent cases.<sup>147</sup>

In response, the district made two subtle changes to its administrative practices that were designed to dissuade patent litigants from using their courts.<sup>148</sup> First, the judges on the court began to transfer cases out of the district at a much higher rate.<sup>149</sup> In the mid-1990s, it was considered rare for the Eastern District of Virginia to transfer cases out of its district,<sup>150</sup> but the

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<sup>143</sup> See T.S. Ellis, III, *Quicker and Less Expensive Enforcement of Patents: United States Courts*, Presentation at the Proceedings of the 1999 Summit Conference on Intellectual Property (1999), in 5 CASRIP PUBLICATION SERIES: STREAMLINING INT'L INTELL. PROP. 11, 14 (2000) (“[The rocket docket] has been in effect since the 1950s, largely as the result of the efforts of Judge Albert Bryan . . . .”); see also Heather Russell Koenig, *The Eastern District of Virginia: A Working Solution for Civil Justice Reform*, 32 U. RICH. L. REV. 799, 802 (1998) (“The local rules for the entire Eastern District of Virginia were structured to eliminate docket delay and expedite the sometimes burdensome litigation process . . . .”).

<sup>144</sup> See Vishnubhakat, *supra* note 141, at 61-63; see also Dabney J. Carr, IV & Robert A. Angle, *Litigating Patent Infringement Cases in the “Rocket Docket” of the Eastern District of Virginia*, 22 INTELL. PROP. & TECH. L.J. 14, 14 (2010) (noting that the Eastern District of Virginia’s local rules outline a short timeline for each stage of trial).

<sup>145</sup> See Dana D. McDaniel, *Patent Litigation on the Rocket Docket After Markman v. Westview Instruments, Inc.*, VA. LAW., Apr. 2002, at 20, 20 (describing the explosion of patent filings in the late 1990s).

<sup>146</sup> See *infra* note 156 and accompanying text (noting the Eastern District of Virginia’s high monthly rate of patent filings).

<sup>147</sup> See Lloyd Smith, *An Interview with Judge Gerald Bruce Lee, United States District Court, Eastern District of Virginia*, LANDSLIDE, Nov.–Dec. 2013, at 7, 9 (finding patent cases “[a]bsolutely” more complex and time-consuming).

<sup>148</sup> See William P. DiSalvatore, *Filing Considerations in Patent Litigation*, in PATENT LITIGATION 81, 92-95 (2001) (discussing the Eastern District of Virginia’s efforts to reduce its attractiveness as a forum for patent litigation by various means, including increased venue transfer).

<sup>149</sup> See *id.* (noting that the courts have been less willing to defer to the plaintiff’s choice of forum).

<sup>150</sup> See Thomas W. Winland, *A Whirlwind Ride on the Rocket Docket*, FINNEGAN (1995), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=73ea67c4-61cb-47fd-9252->

Eastern District soon began transferring a large number of patent cases to other venues.<sup>151</sup> Judge Lee of the Eastern District has stated that “if we did not properly examine the venue, then we would be overwhelmed with every single patent case that involved a device that was sold at Tyson’s Corner Mall,” a popular mall in a suburb of Washington, D.C..<sup>152</sup>

The second change that the Eastern District made to dissuade patent filers was an alteration of the judge assignment procedure for patent cases. The Eastern District of Virginia has three divisions: Alexandria, Norfolk, and Richmond.<sup>153</sup> Before 2002, civil litigants were randomly assigned to a judge within the district in which the case was filed.<sup>154</sup> Most patent plaintiffs preferred to file in the Alexandria division due to its proximity to the PTO and Washington D.C. law firms, its predictable trial management of patent cases, and its experience in handling patent cases.<sup>155</sup> But in 2002, the Alexandria division was receiving up to sixty patent case filings per month, a number that made it impossible for the court to maintain its speedy reputation.<sup>156</sup>

To reduce the flood of patent litigants, the Eastern District changed its case assignment procedures.<sup>157</sup> The new assignment procedure stipulated that patent cases (and *only* patent cases) that were filed in the Alexandria

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05d316ad34f4, archived at <http://perma.cc/C5Q5-H7GT> (noting that even when another venue is available, “rarely is a defendant able to successfully avoid the whirlwind ride on the Rocket Docket”).

<sup>151</sup> See Moore, *supra* note 5, at 915 (highlighting the Eastern District of Virginia’s increased willingness to transfer patent cases).

<sup>152</sup> Smith, *supra* note 147, at 9.

<sup>153</sup> Carr & Angle, *supra* note 144, at 14.

<sup>154</sup> See Dabney J. Carr, IV & Robert A. Angle, *Traps for the Unwary: Litigating Intellectual Property Cases in the Rocket Docket*, 11 MEALEY’S LITIGATION REPORT: INTELLECTUAL PROPERTY, Apr. 7, 2003, at 1, 7 n.3 (“Previously, the Alexandria division did not assign cases to particular judges until trial. For hearings or proceedings prior to trial, parties were assigned randomly to any of the judges in the division.”).

<sup>155</sup> See *id.* at 1-2 (discussing some of the advantages of filing in Alexandria). The Alexandria division has a reserved day for nondispositive motions hearings, whereas the Norfolk and Richmond divisions do not. *Id.* at 5. In the Alexandria division, unlike in the Richmond division, discovery and nondispositive motions are heard by magistrates. *Id.* And in the Alexandria and Richmond divisions, unlike in the Norfolk division, at least one judge is always available to rule on emergency motions. *Id.* at 4.

<sup>156</sup> Timothy S. Ellis, III, Remarks at the Seventh National Advanced Forum on Litigation Patent Disputes (Feb. 5, 2001), cited in McDaniel, *supra* note 145, at 23 n.1.

<sup>157</sup> Carr & Angle, *supra* note 144, at 18 n.1 (describing the assignment procedure which randomly assigns cases among the speedy Alexandria docket as well as Norfolk and Richmond); see also Smith, *supra* note 147, at 9 (“One of the reasons we decided as a court to randomly assign patent cases is because we realized we were being overwhelmed here in Alexandria . . . . We decided to spread the cases around and it has helped us greatly.”).

division were to be randomly reassigned among the judges of all three divisions.<sup>158</sup> Under the new rules, a litigant expecting to try his patent case before the experienced judges in Alexandria might find himself litigating before a less-experienced patent jurist in Norfolk or Richmond.

The changes achieved the Eastern District's goals of reducing patent filings.<sup>159</sup> As a result, the "rocket docket," with its unpredictable judge-assignment procedure and its willingness to transfer patent cases to other district courts, has not attracted patent cases at nearly the same rate as the District of Delaware or the Eastern District of Texas.<sup>160</sup>

### B. Court Competition in Patent Litigation

Some district judges have become increasingly open about their desire to see more patent cases come to their courtrooms. Prior to his nomination to the bench, Judge Ward of the Eastern District of Texas had almost no patent experience to speak of—he litigated a single patent case while in private practice.<sup>161</sup> But upon becoming a judge, Ward decided that he would seek out patent litigants. Judge Ward stated, "I enjoyed the intellectual challenge [of the patent case], so when I came to the bench, I sought out patent cases."<sup>162</sup>

More recently, judges in other districts have echoed Judge Ward's desire to increase patent litigation filings in their districts. For instance, Judge Conti of the Western District of Pennsylvania has noted that her district "ha[s] been trying to be a good forum for patent cases."<sup>163</sup> Judge Lancaster, also in the Western District of Pennsylvania, has expressed hope that the Patent Pilot Program "will continue to attract more out-of-state [patent] cases to the area."<sup>164</sup>

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<sup>158</sup> See Carr & Angle, *supra* note 154, at 2.

<sup>159</sup> See Smith, *supra* note 147, at 9 (indicating that the random assignment system has served its purpose in reducing Alexandria's patent docket).

<sup>160</sup> See Roderick R. McKelvie, *Forum Selection in Patent Litigation: A Traffic Report*, 19 INTELL. PROP. & TECH. L.J. 1, 1 (2007) (summarizing patent case filings to show that the Eastern District of Virginia "continues to lag behind other districts in attracting patent cases").

<sup>161</sup> Pusey, *supra* note 109.

<sup>162</sup> *Id.*

<sup>163</sup> Katie Angliss, *Patent Law in Pittsburgh: Perspectives from the Bench*, 11 PITTSBURGH J. TECH. L. & POL'Y 1, 3 (2011).

<sup>164</sup> Molly Hensley-Clancy, *U.S. District Court of Western Pennsylvania Attracts Patent Cases*, PITTSBURGH POST GAZETTE (July 23, 2012, 4:00 AM), <http://www.post-gazette.com/business/legal/2012/07/23/U-S-District-Court-of-Western-Pennsylvania-attracts-patent-cases>, archived at <http://perma.cc/JM3G-2CAL>.

Other district courts in Texas are attempting to emulate the Eastern District's success in steering patent litigants to its courtrooms. In a recent interview, Judge Barbara Lynn of the Northern District of Texas was "frankly a little bit disappointed" that patent filings in her district had increased only "slightly" since participating in the Patent Pilot Program.<sup>165</sup> "I hope we'll get more patent cases than we have right now," she said.<sup>166</sup> Further, Judge Lynn hoped that her district could "be considered a real alternative to the Eastern District [of Texas]" because her district had "the interest and the capacity" to handle additional patent cases.<sup>167</sup> Another judge in the Northern District has publically invited members of the patent bar to file cases in the district.<sup>168</sup> The Southern District of Texas has also enacted reforms aimed at improving efficiency and attracting litigants.<sup>169</sup>

Roderick McKelvie, a former judge from the District of Delaware has commented on the competition for patent cases. According to him, some district courts have "hung out a welcome sign for patent cases by expressing interest in the cases, forming advisory committees, or adopting local rules."<sup>170</sup>

But not all judges who are interested in influencing venue decisions are attempting to attract litigants—indeed some are interested in dissuading patent litigants from filing in their courts. The Western District of Wisconsin has purposefully developed a reputation for speedy adjudications.<sup>171</sup> But, much like the experience of the Eastern District of Virginia, Western Wisconsin has found that patent cases make it difficult to achieve the district's efficiency goals. According to Magistrate Judge

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<sup>165</sup> Judge Barbara Lynn on Patent Pilot Program, TEX. LAW. (2013), <http://www.texaslawyer.com/id=1202598369142>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 477 & n.196 (2010) (noting that some judges have "a strong interest in presiding over patent cases" (citing Jordan T. Fowles & Tung T. Nguyen, *Texas Litigators Go to Lake Tahoe*, INTELL. PROP. L. SEC. (State Bar of Tex., Austin, Tex.), 2007, at 2, available at <http://www.texasbariplaw.org/Portals/0/Newsletters/2007/2007%20Advanced%20Patent%20Lit%20Course.pdf>)).

<sup>169</sup> See whitself, *Texas Smart*, AGORACOM (Dec. 19, 2006), <http://agoracom.com/ir/patriot/forums/discussion/topics/134915-rules-of-the-court-and-frivolity/messages/519031>, archived at <http://perma.cc/6JER-N5CQ> (discussing the possibility of efficiency improvements in the Southern District of Texas).

<sup>170</sup> McKelvie, *supra* note 160, at 3.

<sup>171</sup> See Allen A. Arntsen & Jeffrey A. Simmons, *The Tundra Docket: Western District of Wisconsin*, LAW360 (Mar. 12, 2008, 12:00 AM), <http://www.law360.com/articles/49923/the-tundra-docket-western-district-of-wisconsin>, archived at <http://perma.cc/62FN-Z2ZG> ("The Wisconsin court's 'rocket docket' status is nothing new. For the past ten years, the court has consistently ranked between the first and fourth-fastest courts in the country in time to trial.").

Crocker of the Western District of Wisconsin, “We’ve become a patent magnet for the world. We never invited them. They just came.”<sup>172</sup>

### 1. Judicial Incentive to Compete

What would motivate a judge or a group of judges on a court to engage in the forum shopping game with litigants? In the case of courts seeking to dissuade litigants from filing in their courtrooms, the answer seems obvious: most federal judges have a large and ever-growing caseload—they do not want to see additional difficult cases arrive on their docket. Furthermore, patent cases are both complex and time-consuming. By reducing patent filings, judges can decrease their workload and focus on trimming their case backlog.

But why would a judge (or a court) want to attract litigants? Shouldn’t they want to do precisely the opposite? Because of their fixed salaries, judges do not profit directly from increased filings in their courtrooms.<sup>173</sup> In fact, by attracting more cases, a judge increases her already large workload with no accompanying pay increase.<sup>174</sup> Some explanation of the incentives for courts to seek out litigants is therefore in order.

#### a. Individual Incentives

Courts consist of individuals who possess distinct desires and interests, and the motivations of individual judges often fail to align with the motivations of their fellow judges.<sup>175</sup> Thus, any discussion of courts and the incentives of courts must necessarily examine the incentives of individual judges within those courts. While judges receive no direct monetary benefits for adjudicating particular types or numbers of cases, they may benefit in less tangible ways.

*Personal Interest:* Perhaps the most obvious reason that judges might seek to attract certain cases is a personal preference for hearing those cases. Judge Ward himself has cited “the intellectual challenge” of patent cases as

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<sup>172</sup> Jerry Crimmins, *Patent Plaintiffs Flock to ‘Rocket Docket’ in Wis.*, CHI. DAILY L. BULL., Aug. 14, 2008, available at <http://www.whdlaw.com/Resources/File/Carter.ChicLawBull.8.08.pdf>.

<sup>173</sup> See Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 833-34 (providing context regarding the structure and operation of judicial compensation and incentives).

<sup>174</sup> See Posner, *supra* note 45, at 11 (discussing the way in which many judges are motivated to maximize “leisure”).

<sup>175</sup> Cf. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 254 (1992) (“Individuals have intentions and purpose and motives; collections of individuals do not. To pretend otherwise is fanciful.”).

the reason he has encouraged patent litigants to file in his courtroom.<sup>176</sup> A judge may have a personal preference for patent cases over other types of cases that appear on the court's docket.<sup>177</sup> While the appeal of patent cases is far from universal among judges,<sup>178</sup> ninety-four district judges from the fourteen districts have volunteered to participate in the Patent Pilot Program,<sup>179</sup> indicating that there are a number of judges who enjoy the work of adjudicating such cases.

*Reputational Effects:* Richard Posner has suggested that federal judges (like him) are motivated by the same "instrumental and consumption goals" that motivate private individuals.<sup>180</sup> For Posner, judges are simply self-interested, rational actors like everyone else.<sup>181</sup> However, as he admits, there are key differences between judges and private individuals, namely, private individuals are motivated by increased earning potential while federal judges have a fixed income for life.<sup>182</sup> Posner recognizes that "prestige is unquestionably an element of the judicial utility function."<sup>183</sup> However, he dismisses prestige as a major factor in judicial decisionmaking

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<sup>176</sup> See Pusey, *supra* note 109; Barrie McKenna, *Venue Shopping? See You in Marshall*, GLOBE & MAIL (May 4, 2006, 9:54 PM), <http://www.theglobeandmail.com/technology/venue-shopping-see-you-in-marshall/article1099055>, archived at <http://perma.cc/3TV7-JA85> (reporting an interview with Judge Ward about his docket).

<sup>177</sup> See Tim McGlone, *Resigning Judge Says He Was Tired of Drug and Gun Cases*, PILOTONLINE.COM (Feb. 14, 2008), <http://hamptonroads.com/2008/02/resigning-judge-says-he-was-tired-drug-and-gun-cases>, archived at <http://perma.cc/Z75K-ET6S> (reporting that U.S. District Judge Walter D. Kelley, Jr., enjoyed complex patent cases more than drug and gun cases).

<sup>178</sup> See Dionne Searcey, *Judges Outsource Workloads as Cases Get More Complex*, WALL ST. J. (Sept. 29, 2013, 5:40 PM), <http://online.wsj.com/news/articles/SB10001424052702303983904579095593058503678>, archived at <http://perma.cc/6PFM-2PB4> (quoting Royal Furgeson, a now retired district court judge for the Northern District of Texas, who acknowledged that to him, as an English major, it had been helpful to appoint special masters in patent cases "to kind of unravel some of that stuff").

<sup>179</sup> Ron Vogel, *The Patent Pilot Program: Reassignment Rates and the Effect of Local Patent Rules*, N.Y. INTELL. PROP. L. ASS'N BULL. (N.Y. Intellectual Prop. Law Ass'n, Fort Lee, N.J.), Oct.–Nov. 2013, at 5-6 app. C (listing judges participating in the program).

<sup>180</sup> Posner, *supra* note 45, at 39.

<sup>181</sup> See *id.* at 23-30 (comparing the decisionmaking process of judicial voting to making decisions in other areas of life); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 505-06 (3d ed. 1986) (arguing that the utility function of judges is similar to that of other people though judges may also "seek to impose their personal preferences and values on society"). See generally William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (examining the motivations of judges).

<sup>182</sup> See Posner, *supra* note 45, at 13 (theorizing that judges are not motivated solely by money because of their tenure and fixed salaries).

<sup>183</sup> *Id.*

because “there is little an individual judge can do to enhance his prestige as a judge.”<sup>184</sup>

For district court judges, however, one available means of enhancing one’s judicial reputation is by becoming an expert in handling particularly difficult types of cases. Creating a reputation as a competent patent judge can, in fact, enhance one’s judicial prestige. Patent cases are widely recognized as extraordinarily complex and difficult cases.<sup>185</sup> Because of the difficulty of trying patent cases and the large damage sums potentially at stake, patent cases also tend to be tried by highly competent and well-compensated counsel. Gaining a reputation for efficient and fair handling of patent cases can elevate the stature of a judge among both the bar and his peers on the bench.

Indeed, certain district court judges have developed such a reputation for competence in patent cases. These judges have distinguished themselves as preeminent triers of patent cases, despite that they—like all federal district judges—are generalists.<sup>186</sup> If, as Posner suggests, prestige makes up part of the judicial utility function, then the ability to establish oneself as an expert adjudicator of complex cases—such as patent cases—would be an incentive for judges to attract more patent cases to their courtrooms.

The prestige associated with being an expert patent trial judge brings other potential benefits as well. Specialized bar groups, as well as patent bar associations like the American Intellectual Property Association, often invite judges to speak at their conferences.<sup>187</sup> Judges from the Eastern District of Texas, the District of Delaware, and the Northern District of California therefore receive a large number of invitations to such

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<sup>184</sup> *Id.* at 13-14.

<sup>185</sup> See Smith, *supra* note 147, at 9 (discussing the amount of time that judges must devote to patent cases as opposed to other civil matters).

<sup>186</sup> See, e.g., Edward Reines, *Northern District of California’s New Patent Rules*, PATENTLY-O (Feb. 3, 2008), <http://patentlyo.com/patent/2008/02/northern-distri.html>, *archived at* <http://perma.cc/66CG-NYQ6> (referring to Judge Whyte as “a leading jurist in the patent field”); Hal Wegner, *Next Tuesday! Chief Judge Holderman (N.D. Ill.), Leading Patent Jurist, Speaks at GW April 16th; Sidney Katz Remembered*, L.A. INTELL. PROP. L. ASS’N (Apr. 9, 2013), <http://www.laipla.net/next-tuesday-chief-judge-holderman-n-d-ill-leading-patent-jurist-speaks-at-gw-april-16th-sidney-katz-remembered>, *archived at* <http://perma.cc/USY5-4FG2> (referring to Judge Holderman as “one of the more influential members of the Federal Judiciary in the patent area”). Judge Jordan, now a judge on the Third Circuit, continues to sit by designation in the district court in patent cases. See *Hon. Kent A. Jordan*, THE SEDONA CONF., <https://thesedonaconference.org/bio/jordan-kent> (last visited Jan. 16, 2015), *archived at* <http://perma.cc/T3WZ-59QC>.

<sup>187</sup> See, e.g., THE SEDONA CONF., <https://thesedonaconference.org> (last visited Jan. 16, 2015), *archived at* <https://perma.cc/6VZG-G59B> (stating that the conference’s mission is to invite bright legal minds to speak about intellectual property rights).

conferences.<sup>188</sup> To the extent that professional reputation is a desirable commodity, increasing patent filings in an effort to be perceived as an expert may appeal to judges.

Indeed, the prestige associated with being a well-known patent trial judge can lead to post-judicial opportunities. Recently, a number of judges from patent-heavy districts have retired from the judiciary and entered private practice as patent litigators.<sup>189</sup> In fact, the last two chief judges of the Eastern District of Texas have left the bench for private practice.<sup>190</sup> In many cases, former judges who leave the bench to practice patent law had little to no experience with patent law prior to serving as a judge.<sup>191</sup>

b. *Institutional Incentives*

*Local Benefits.* Another reason that courts might seek to increase filings in a particular legal field is to benefit the local communities in which they reside. Local bar associations are often closely tied with the judges that sit in their localities.<sup>192</sup> Those associations have an interest in increasing the legal work within their communities. Because judges often come from those same bar groups and retain friendships and relationships within those groups, they may feel a sense of pride bringing in business for local

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<sup>188</sup> *Id.*

<sup>189</sup> Judge Ward retired from the Eastern District of Texas in 2011 and is now a partner of his own firm. See *T. John Ward*, WARD & SMITH L. FIRM, <http://www.wsfirm.com/attorneys/t-john-ward> (last visited Jan. 16, 2015), archived at <http://perma.cc/GRW5-BX7T>. Judge Folsom retired from the Eastern District of Texas in 2012 and is now a partner at Jackson Walker LLP, specializing in intellectual property cases. See *David Folsom*, JACKSON WALKER LLP, [http://www.jw.com/David\\_Folsom](http://www.jw.com/David_Folsom) (last visited Jan. 16, 2015), archived at <http://perma.cc/PJ2C-F6UB>.

<sup>190</sup> See *T. John Ward*, *supra* note 189; *David Folsom*, *supra* note 189.

<sup>191</sup> For example, Judge Farnan of the District of Delaware, a former U.S. Attorney, retired from the bench in 2010 and started a law firm with his sons; he lists his specialty as “patent litigation and consulting.” See *Joseph J. Farnan, Jr.*, FARNAN LLP, <http://www.farnanlaw.com/Joe-Farnan-Bio.html> (last visited Jan. 16, 2015), archived at <http://perma.cc/YJY2-PH9A>.

<sup>192</sup> For instance, in the Western District of Pennsylvania, the district’s selection for the Patent Pilot Program was seen by both judges and the local patent bar as an opportunity to increase the ability to compete for “out of state” patent cases. See *supra* notes 163-64 and accompanying text (describing the courts’ role in encouraging patent cases to be brought in their jurisdiction).

attorneys.<sup>193</sup> Many district courts, including Delaware and Eastern Texas, have rules that require local counsel in all cases before the court.<sup>194</sup>

Patent attorneys are particularly interested in connecting with local federal judges since all patent cases are tried in federal court. Thus, local patent bars are often well-connected with their local judges. Indeed, many judges have commented on the potential benefit of bringing patent cases to their local communities.<sup>195</sup>

The spillover effects of increased litigation can also extend beyond the legal field. A number of cities within the boundaries of the Eastern District of Texas have seen a substantial increase in demand for office space and hotel rooms due to the visiting attorneys who come to town for trial.<sup>196</sup>

*Bureaucracy Theory.* Scholars have long recognized that governmental institutions often seek to maximize the institutions' budget.<sup>197</sup> Bureaucracy theorists posit that agency officials care about "salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau," all of which depend to some degree on the size of the agency's budget.<sup>198</sup> The employees of the agency, so the theory goes, share an interest in budget maximization because the benefits of having a larger budget redound to them in the form of greater career prospects.<sup>199</sup>

The budget of each district court is controlled by the Administrative Office of the Courts. For a court seeking to maximize its budget, increased workloads are one way of getting a larger slice of the judicial budgetary pie. Additionally, districts with larger caseloads may receive funds for improvements and upgrades to physical facilities, courtroom technology,

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<sup>193</sup> See Hensley-Clancy, *supra* note 164 (discussing judges' enthusiasm for the Patent Pilot Program, in part based on the benefits to the local legal community).

<sup>194</sup> For instance, both the District of Delaware and the Eastern District of Virginia require local counsel in all civil cases. See D. DEL. R. 83.5(d); BANKR. D. DEL. R. 9010-1(c); E.D. VA. LOC. ADM. R. 83.1(D)(1)(b).

<sup>195</sup> See Hensley-Clancy, *supra* note 164 (predicting that the increase in patent cases will bring more work for local patent attorneys and that larger firms may also establish local offices).

<sup>196</sup> See Dahl, *supra* note 108 ("[T]he steady pace of out-of-town-lawyers—who often arrive in large numbers for a high-stakes trial—has created a regular flow of money into [Marshall, Texas].").

<sup>197</sup> See generally WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (applying economics to the study of bureaus and governments).

<sup>198</sup> *Id.* at 38.

<sup>199</sup> William A. Niskanen, *A Reflection on Bureaucracy and Representative Government*, in *THE BUDGET-MAXIMIZING BUREAUCRAT: APPRAISALS AND EVIDENCE* 13, 18-19 (André Blais & Stéphane Dion eds., 1991); see also Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 870-71 (2014) (stating that even lower-level employees share an interest in budget maximization due to trickle down effects).

and administrative personnel. For example, the courtrooms in the Eastern District of Texas were recently renovated, in part to accommodate the district's high caseload.<sup>200</sup>

Perhaps the largest bureaucratic benefit of increased caseloads is the potential for an additional judgeship for the district.<sup>201</sup> Increasing the number of judges in a district locks in higher budgetary outlays as judicial salaries are constitutionally protected and district budgets are largely tied to the number of judges in the district.<sup>202</sup> Additionally, each judge is automatically allowed to hire an assistant and one or two law clerks. District courts that have higher civil case loads also tend to have a greater number of personnel, including magistrate judges who assist judges in the adjudication process.<sup>203</sup>

## 2. Judicial Ability to Compete

If we assume that judges may, in some instances, be motivated to compete for litigants, what tools can those judges use to attract litigants? A wide variety of characteristics influence forum shopping, but many are outside of a court's control. For instance, the makeup of a court's potential jury pool is highly important to litigants, yet it is also a characteristic that courts cannot change or improve. The quality of a district's jury pool is a function of the job opportunities and educational offerings found within a district's boundaries.<sup>204</sup> Courts have no direct impact on demographic factors.

More fundamentally, courts are unable to offer explicitly what the forum shopper is ultimately seeking, namely, a successful suit. Simply offering victory to the highest bidder is antithetical to the judicial process.

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<sup>200</sup> Nguyen, *supra* note 91, at 142 n.153.

<sup>201</sup> See, e.g., Letter from the Honorable B. Lynn Winmill, Chief Dist. Judge, Dist. of Idaho, to Senator Mike Crapo et al. 1 (Aug. 15, 2013), available at <http://www.judgingtheenvironment.org/library/letters/New-judgeships-ID-J-Winmill-Myers-8-15-13.pdf> (“[T]he formula for allocating funds to the [district courts] is driven, in large part, by the number of judicial officers in each district.”).

<sup>202</sup> See *id.* at 1-2 (explaining the relationship between the district's budget and the number of judgeships in the district).

<sup>203</sup> HEYDEBRAND & SERON, *supra* note 46, at 94 (“[T]he size of the court's total personnel resources is explained, in large part, by the combined effect of the governmental sector (b\* = .69) and civil filings (b\* = .23).”).

<sup>204</sup> See Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 JUDICATURE 22, 25 (1980) (examining the relationship between jury decisionmaking and juror characteristics such as race, age, gender, and education).

The notion of selling justice is abhorrent to notions of equity and fair-play.<sup>205</sup> Courts and judges in the United States have vehemently and consistently rejected such an idea. The courts have successfully limited corruption in judicial dealings through a number of mechanisms.

One of the most important of these corruption-detering mechanisms is appellate review.<sup>206</sup> If a trial court judge or an entire court were to dole out justice without reliance on sound legal principles, the appellate court assigned to review the case would quickly reverse the trial court's decision. This second look at cases limits a trial court's ability to increase filings by always siding with the plaintiff. In essence, the trial courts can be thought to operate in a heavily regulated environment. Even if a court desired to explicitly offer successful outcomes to plaintiffs, it could not do so because judicial checks are built into the system.

But district courts that are interested in impacting venue decisions have some tools at their disposal. In general, by decreasing the uncertainty and risk inherent in litigation in ways favorable to plaintiffs, courts can try to compete with other courts for those litigants. If a court or a judge can increase the odds of success for plaintiffs (even slightly) and signal that fact to future plaintiffs, the court may be successful in attracting cases to its court.

One way to attract plaintiffs is to offer appealing procedural rules that are not offered by other courts. Even though all district courts are bound by the Federal Rules of Civil Procedure, a number of district courts have adopted additional procedural rules for patent cases—called patent local rules (PLRs)—often in an attempt to attract litigants.<sup>207</sup> Some litigants prefer litigating in districts with PLRs because case scheduling and discovery proceed in a more predictable manner than they might otherwise. Some litigants prefer PLRs because they may inherently favor their side.

A second way to attract litigants is by offering more predictable case management procedures than other courts. Case management refers to a court's administrative oversight of the litigation process.<sup>208</sup> Decisions

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<sup>205</sup> See Ian Ayres, *The Twin Faces of Judicial Corruption: Extortion and Bribery*, 74 DENV. U. L. REV. 1231, 1235 (1997) (“[A] judge’s action in agreeing to receive money is morally repugnant regardless of whether the agreement is an extortion or a bribe.”).

<sup>206</sup> See generally Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969) (examining the role of appellate review in United States federal courts).

<sup>207</sup> For a discussion of the history of patent local rules, see Ware & Davy, *supra* note 110.

<sup>208</sup> See PETER S. MENELL ET AL., PATENT CASE MANAGEMENT JUDICIAL GUIDE 1-2 (2d ed. 2012) (discussing the importance of judicial oversight of patent cases to avoid excessive burdens on the court).

concerning the flow and process of litigation are often insulated from appellate review by the abuse of discretion standard.<sup>209</sup> While case management decisions are often not reviewable or are reviewed with a high level of deference on appeal, they can be extremely important to litigants. For instance, a judge's decision on the length of time for or the scope of the discovery process can at times be as important as a decision on a legal issue.<sup>210</sup> Judges and courts establish discovery norms. If predictable, those discovery norms can appeal to plaintiffs and encourage more filings.

Because district courts control most case management decisions and those decisions can be important to litigants, one would expect such decisions to be a primary way in which district courts seek to attract litigation to their courtrooms. This is precisely what has occurred in patent law.

a. *Procedural Distinctions: Patent Local Rules*

Among the forum-shopping factors that districts can control, perhaps none is as effective at signaling a district's interest in attracting patent litigants as the creation of patent local rules.<sup>211</sup> Patent local rules establish procedural rules and schedules for the handling of patent cases in a district. In districts with PLRs, litigants know *ex ante* the general format and timeline that any potential patent suit might take. For the great majority of litigants interested in reducing uncertainty, PLRs can be very appealing.

In 2000, the Northern District of California became the first district court to adopt patent local rules.<sup>212</sup> The Northern District's PLRs established standards for initial case management conferences,<sup>213</sup> required heightened pleading standards,<sup>214</sup> and set a detailed schedule for managing the claim construction portion of patent cases.<sup>215</sup> Numerous districts have

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<sup>209</sup> See *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam) (adopting the abuse of discretion standard in a case dismissed for discovery violations).

<sup>210</sup> See also Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 334-36 (2008) (discussing the importance of the scope of e-discovery in commercial disputes, marital litigation, personal injury, and trade secret theft and the impact on the underlying litigation).

<sup>211</sup> See McKelvie, *supra* note 160, at 3 (explaining that while adopting local rules may not necessarily increase patent filings, it indicates that judges are more familiar with patent cases and are more open to trying them).

<sup>212</sup> Ware & Davy, *supra* note 110, at 979.

<sup>213</sup> *Id.* at 980.

<sup>214</sup> *Id.* at 983-84.

<sup>215</sup> *Id.* at 996-98.

followed the lead of the Northern District of California in adopting PLRs.<sup>216</sup>

Of course, not all plaintiffs prefer filing in districts with PLRs. One of the leading venues for patent litigation over the last decade—the Central District of California—does not have formalized patent rules, but the district has consistently drawn large numbers of patent cases to its courts.<sup>217</sup> A large population and concentration of technology companies is likely the primary driver of the popularity of the Central District, but some have argued that the flexibility of a court that is not bound by the strict timeline of PLRs can attract litigants who may want to propose alternative schedules and timeframes to the court.<sup>218</sup>

Adopting local rules does not guarantee that patent litigants will suddenly prefer a particular district court. The Western District of Pennsylvania adopted local rules in 2005 in an effort to signal its desire to hear more patent cases.<sup>219</sup> The district has not seen a significant increase in patent filings since that time.<sup>220</sup> Other districts, including the Western District of Tennessee, the Western District of North Carolina, the District of Idaho, and the District of New Hampshire, have adopted PLRs in an effort to attract litigants, but with little success.<sup>221</sup>

Indeed, although PLRs may serve as a signal that a district court is interested in attracting patent cases, adopting PLRs has generally failed to increase filings in a district. Empirical evidence has found no correlation between adoption of PLRs and an increase in patent case volume.<sup>222</sup> In some ways, PLRs represent an announcement that a district court is

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<sup>216</sup> *Id.* at 1011.

<sup>217</sup> See Erin Coe, *Central Calif. Tops Eastern Texas as Patent Hot Spot*, LAW360 (July 7, 2010, 4:31 PM), <http://www.law360.com/topnews/articles/163315/central-calif-tops-eastern-texas-as-patent-hot-spot>, archived at <http://perma.cc/NK8R-62QR> (“The Central District of California is also a sought-after jurisdiction for plaintiffs because, unlike the Eastern District of Texas, it does not have local patent rules and provides more opportunities for parties to quickly resolved [sic] their disputes . . .”).

<sup>218</sup> See *id.* (quoting Mark Scarsi, head of Milbank Tweed Hadley & McCloy LLP’s West Coast IP litigation team, as saying that “[t]he Central District of California is more flexible, and parties are free to propose different procedures to put issues to the court earlier”).

<sup>219</sup> See Nguyen, *supra* note 168, at 487 (detailing the Western District of Pennsylvania’s efforts to attract patent cases); see also Henry M. Sneath & Robert O. Lindefeld, *Fast Track Patent Litigation: Toward More Procedural Certainty and Cost Control*, 73 DEF. COUNS. J. 201, 201 (2006) (stating that the Western District of Pennsylvania hoped its PLRs would draw “a larger share of the regional and national patent litigation claims” to its courtrooms).

<sup>220</sup> McKelvie, *supra* note 160, at 3.

<sup>221</sup> See generally La Belle, *supra* note 10.

<sup>222</sup> See Vogel, *supra* note 179, at 2-3 (describing a study that found no significant difference in caseloads between districts after PLRs were adopted).

interested in hearing patent cases. While courts can advertise their interest, plaintiffs are generally in control of the venue decision—at least until a court considers transfer.

b. *Case Management Distinctions*

The second major category of tools that courts can employ when competing for litigants is the administrative management of their cases. There are many ways that a court might devise attractive or repellant case management practices. This subsection will focus on four practices that have been employed successfully in court competition for patent cases: (1) case assignment procedures, (2) trial philosophy, (3) reluctance to transfer, and (4) speed.

i. *Case Assignment Procedure: The Ability to Judge Shop*

As any experienced litigator will tell you, the judge assigned to a case is more important than the district in which the case is filed.<sup>223</sup> Certain judges have reputations for being irrational, curmudgeonly, or unfair while others are viewed as even-handed, fair, or easy-going.<sup>224</sup> Most districts have procedures for assigning cases that limit the ability of any particular plaintiff to select any particular judge.<sup>225</sup> This system does not guarantee fairness, but it attempts to ensure that each case has roughly the same odds of landing before any particular judge.

If a court intends to attract filings, however, eliminating or reducing the random nature of case assignments can help.<sup>226</sup> Two districts, the Eastern District of Texas and the Eastern District of Virginia, have tinkered with their case assignment procedures with an eye toward impacting patent litigation filings. As detailed in subsection II.A.2.c, *supra*, the Eastern District of Virginia reconfigured its judge assignment procedures in

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<sup>223</sup> One need look no further for proof of this maxim than that judge shopping receives universal contempt, whereas forum shopping gets mixed reviews. See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 300-01 (1996) (comparing the judicial system's differing views on forum shopping and judge shopping).

<sup>224</sup> See Weyman I. Lundquist, *The New Art of Forum Shopping*, 11 LITIG. 21, 22 (1985) (discussing forum shopping strategies used to avoid "Judge Curmudgeon").

<sup>225</sup> See, e.g., *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (noting that random assignment "prevents judge shopping by any party, thereby enhancing public confidence in the assignment process").

<sup>226</sup> Lynn LoPucki demonstrated that the single-judge nature of Delaware's bankruptcy court was a boon for attracting litigants in the 1990s because litigants who filed in Delaware knew the judge for their case *ex ante*. See generally LOPUCKI, *supra* note 17.

2002.<sup>227</sup> The district's new assignment procedure increased the uncertainty of judge and divisional assignment of patent cases—and only patent cases.<sup>228</sup> The increased unpredictability of judge assignment has reduced the appeal of the district to patent litigants, which was the goal behind the amended procedure.<sup>229</sup>

Like the Eastern District of Virginia, the Eastern District of Texas has, over the years, modified its case assignment procedure for patent cases. Unlike its counterpart in Virginia, however, the Eastern District of Texas altered its procedures with an eye towards *increasing* the district's appeal to patent plaintiffs.

The Eastern District of Texas is split into six divisions: Texarkana, Marshall, Sherman, Beaumont, Tyler, and Lufkin.<sup>230</sup> Because the district can have up to eight active judges, a random case assignment procedure would force litigants to risk assignment to a judge who has handled relatively few patent cases or who dislikes patent cases entirely.<sup>231</sup> To reduce the risk of drawing an unsatisfactory judge for a patent case, the Eastern District has adopted a case assignment system that allows plaintiffs, in some instances, to select a particular judge.

The district's case assignment system is nominally random.<sup>232</sup> However, the Chief Judge, in accordance with his powers under 28 U.S.C. § 137, periodically issues general orders that modify the percentage of divisional cases that are assigned to particular judges.<sup>233</sup> The patent case assignment proportions in the Eastern District of Texas differ from the general civil case assignment proportions: a particular judge might be assigned 50% of the general civil cases filed in Texarkana division, yet be assigned 100% of the patent cases filed there.<sup>234</sup>

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<sup>227</sup> See *supra* note 157 and accompanying text.

<sup>228</sup> See *supra* note 158 and accompanying text.

<sup>229</sup> See *supra* note 159 and accompanying text.

<sup>230</sup> UNITED STATES DISTRICT COURT: EASTERN DISTRICT OF TEXAS, <http://www.txed.uscourts.gov/page1.shtml?location=info> (last visited Jan. 16, 2015), *archived at* <http://perma.cc/7YB6-9FC8>.

<sup>231</sup> See *Mike McKool, Founder of McKool Smith in Dallas*, TEX. LAW., <http://www.texaslawyer.com/id=1202520214208> (last visited Feb. \_\_, 2015), *archived at* <http://perma.cc/ETE2-H7LM> (espousing lawyers' fear that Judge Marcia Crane would preside over their patent case since she had little experience and seemed not to like patent cases).

<sup>232</sup> Brooke Terpening, *Practice Makes Perfect? An Empirical Analysis of H.R. 5418*, 4 FLA. INT'L U. L. REV. 287, 311 (2008).

<sup>233</sup> See *id.* at 311-12 (explaining that the fixed percentage of cases the Chief Judge assigns to each judge depends on "shifting workloads, recusals, new appointments, and retirements").

<sup>234</sup> See *id.*

Examining the most recent general order reveals numerous ways to choose a particular judge in the Eastern District of Texas. If a litigant prefers Judge Clark, for example, he or she need only file the case in either Beaumont or Lufkin because Judge Clark is assigned 100% of patent cases filed in those districts.<sup>235</sup> Before the most recent update of the district's assignment procedures in April 2014, one could file a patent case in the Tyler division and enjoy a 95% chance of drawing Judge Davis (the other 5% of patent cases were assigned to Judge Schneider).<sup>236</sup> Before Judge Ward—one of the most experienced patent district court jurists in the United States—stepped down from the bench, one could file in Marshall or Texarkana, where he drew 100% of the patent cases filed.<sup>237</sup> Judge Gilstrap, who previously had the heaviest patent caseload in the country, presides over all cases filed in the Marshall Division.<sup>238</sup>

The result of this unique judge assignment system for patent cases is a predictable formula litigants can use to select their preferred jurist. Some regular patent infringement plaintiffs, including non-practicing entities, consistently file in a single division to have their cases heard before the same judge.<sup>239</sup> Indeed, as can be seen from the table below, two divisions receive a disproportionate amount of the patent filings in the district: filings in Tyler and Marshall consist of 91% of all patent filings in the Eastern District of Texas.

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<sup>235</sup> General Order Assigning Civil and Criminal Actions 11-2 (E.D. Tex. Mar. 3, 2011), available at [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=20087](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=20087).

<sup>236</sup> *Id.*

<sup>237</sup> General Order Assigning Civil and Criminal Actions 08-15 (E.D. Tex. Dec. 22, 2008), available at [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=1925](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1925).

<sup>238</sup> General Order Assigning Civil and Criminal Actions 14-8 (E.D. Tex. Apr. 2, 2014), available at [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=24426](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=24426).

<sup>239</sup> See Leychkis, *supra* note 106, at 214 (explaining that the Eastern District of Texas has become the district of choice for patent trolls who prefer the local juries and the ability to bring almost all of their cases before the same judge).

Table 1: Eastern District of Texas Case Filings By Division 2012<sup>240</sup>

Division	Cases	% of All	Plaintiffs	Defendants
Beaumont	24	1.9%	31	104
Marshall	600	47.4%	710	1101
Sherman	58	4.6%	73	121
Tyler	562	44.4%	864	1258
Lufkin	22	1.7%	22	58
<b>Total for All Divisions</b>	<b>1266</b>	<b>100%</b>	<b>1700</b>	<b>2642</b>

Because the district's case assignment system permits judge shopping, many non-practicing entities consistently select the same judge. In fact, since 1999, Data Treasury Corporation, Orion IP, and IAP Intermodal have collectively filed thirty-seven patent suits in the district.<sup>241</sup> Each company has filed every one of their lawsuits before a single judge: Data Treasury's cases have all been heard by Judge Folsom, Orion's by Judge Davis, and IAP's by Judge Ward.<sup>242</sup>

The ratio of patent cases assigned to each judge is constantly changing in the Eastern District of Texas.<sup>243</sup> But it is generally true that at any particular time at least one division will send all of its patent cases to one judge.<sup>244</sup> Likewise, it is almost always true that each division has no more than two judges handling the patent cases filed in any particular district.<sup>245</sup> This situation permits litigants to have much more control over one of the primary motivations behind forum shopping: drawing the most advantageous judge possible. Indeed, the assignment system in the Eastern District of Texas permits litigants to move beyond forum shopping to judge shopping. In contrast with forum shopping, which has both critics and

<sup>240</sup> James C. Pistorino, *2012 Trends in Patent Case Filings and Venue: Eastern District of Texas Most Popular for Plaintiffs (Again) But 11 Percent Fewer Defendants Named Nationwide*, PERKINS COIE, Feb. 2013, at 10 tbl.4, available at <http://www.perkinscoie.com/images/content/2/8/v2/28227/lit-13-02pistorino-2012article.pdf>.

<sup>241</sup> Leychkis, *supra* note 106, at 215 tbl.8.

<sup>242</sup> *Id.*

<sup>243</sup> Previous divisions of labor allowed even more blatant judge shopping. *See, e.g.*, General Order Assigning Civil and Criminal Actions 09-20 (E.D. Tex. Dec. 17, 2009), available at [http://www.txed.uscourts.gov/cgi-bin/view\\_document.cgi?document=2256](http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=2256) (assigning many cases from one district to only one judge).

<sup>244</sup> Compare General Order, *supra* note 235, with General Order, *supra* note 237.

<sup>245</sup> Compare General Order, *supra* note 235, with General Order, *supra* note 237.

defenders, judge shopping is almost universally condemned by both commentators and judges themselves.<sup>246</sup>

ii. Preference for Trials

Some courts gain a reputation as being particularly open to staging trials. Most patentees want to have the threat of reaching trial, as juries are more likely than judges to uphold patent validity and find patents infringed.<sup>247</sup> Thus, districts that are seen as more likely to advance a case to trial tend to be more attractive venues for patentee plaintiffs.<sup>248</sup>

The Eastern District of Texas and the District of Delaware are the top two venues for litigants seeking trial, or at least the threat of trial.<sup>249</sup> On average, 2.8% of U.S. patent cases reach trial, but in those two districts 8% and 11.8% of patent cases, respectively, reach a final decision before a jury or judge.<sup>250</sup> The Western District of Wisconsin and the Eastern District of Virginia, two other districts with sizable patent dockets, follow closely behind with 7.4% and 6.4% of cases reaching trial.<sup>251</sup>

Courts can establish norms that preference trials in a number of ways. First, some courts—such as Delaware—obtain a reputation for conservative application of summary judgment.<sup>252</sup> When faced with a dispositive summary judgment motion, judges in Delaware are more likely to err on the side of caution and send the case to trial than other courts. And some of the summary judgment precautions in Delaware are unique to patent cases. For example, some judges in Delaware require additional “screening procedures” for summary judgment motions in patent cases.<sup>253</sup> Those screening procedures include requiring parties to submit briefs to seek

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<sup>246</sup> See Norwood, *supra* note 223, at 299-300 (“[J]udge-shopping is still ‘universally condemned’ by the courts.” (internal quotation marks omitted)).

<sup>247</sup> See, e.g., John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 212 tbl.3 (1998) (finding that patentees win 67% of jury verdicts on validity but only 28% of pretrial motions); Lemley, *supra* note 2, at 403 (explaining that when patent owners select a forum, “[t]hey know that most summary judgment rulings favor defendants in patent cases, but that juries tend to be far more pro-patentee”).

<sup>248</sup> See *id.*

<sup>249</sup> *Id.* at 411 tbl.4.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See Lee, *supra* note 138 (observing that Delaware judges are “relatively slow to rule on summary judgment motions,” which increases litigation costs for defendants and gives plaintiffs the upper hand in settlement negotiations).

<sup>253</sup> See Parsons, *supra* note 135, at 157 (describing the additional procedural requirements prescribed by Judge Sleet and former Judge Farnan for summary judgment motions in patent cases).

permission to file summary judgment motions and certified statements assuring the court that no material factual dispute exists.<sup>254</sup> The additional layers of procedural complexity required to file for summary judgment in Delaware partially explain the low rates of patent cases that terminate at the summary judgment stage.<sup>255</sup>

Second, a court can encourage trial by expediting the process of getting to trial. For litigants, time is money. The longer a case drags out before trial, the greater incentive there is for both sides to settle. Courts with reputations as “rocket dockets” (such as the Eastern District of Virginia and the Western District of Wisconsin) likely get to trial more often than most courts simply because trials tend to occur more quickly in those courts.<sup>256</sup> Third, courts can strictly enforce calendar dates established before trial or in PLRs. The Eastern District of Texas has a reputation for inflexibility on trial delays and calendaring changes, while the Central District of California is much less inclined to get to trial and often delays cases for relatively long periods of time.<sup>257</sup>

### iii. Reluctance to Transfer

Judges have a great deal of discretion in deciding motions to transfer venue.<sup>258</sup> Transfer is permitted when doing so is in the “interest of justice.”<sup>259</sup> Certain district courts have developed a reputation as unwilling to transfer cases to another forum. Forums that have obtained such a reputation are more appealing to patentees because their initial choice of forum is likely to be the final forum.

The Eastern District of Virginia transfers a higher percentage of its patent cases to other forums than most districts.<sup>260</sup> Forum shopping plaintiffs are well aware of a court’s likelihood to transfer a case. After all,

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<sup>254</sup> *Id.*

<sup>255</sup> *See id.* at 156-57 (noting that in 2003 and 2004, “the vast majority” of summary judgment motions were denied in Delaware and, of those that were granted, none disposed of the entire case).

<sup>256</sup> *See supra* subsection II.A.2.c; *see also* Lemley, *supra* note 2, at 414-15 tbl.5 (organizing district courts according to speed in reaching an ultimate disposition of the case with the Western District of Wisconsin and the Eastern District of Virginia topping the list).

<sup>257</sup> *See* Coe, *supra* note 217 (contrasting the strict schedule in the Eastern District of Texas with the more flexible schedule in the Central District of California).

<sup>258</sup> *See* Moore, *supra* note 5, at 898 (“[T]ransfer is a complicated inquiry very much at the discretion of the district court.”).

<sup>259</sup> 28 U.S.C. § 1404(a) (2012).

<sup>260</sup> *See* Moore, *supra* note 5, at 909, 915-16 (suggesting that patent plaintiffs file in the Eastern District of Virginia due to judicial efficiency and expertise, which explains why the high percentage (16%) of cases are transferred for lacking any connection to the forum).

the real advantage of forum shopping is undermined if the chosen court simply transfers the case to a less desirable forum.

On the other hand, the most popular current destinations for patent plaintiffs—the Eastern District of Texas and the District of Delaware—both have reputations as districts that are unlikely to grant transfer motions.<sup>261</sup> That reputation likely reassures forum shopping plaintiffs. Until very recently, the Federal Circuit has chosen not to interfere with district court venue selection. In fact, before 2008, the Federal Circuit consistently interpreted the patent venue statute quite broadly.<sup>262</sup> Prior to December 2008, the Federal Circuit had never, in its twenty-six years of existence, reversed a district court's denial of a motion to transfer venue.<sup>263</sup>

Since 2008, however, the Federal Circuit has taken a much more active interest in venue disputes. The Federal Circuit entered the forum selection fray following a decision from the Fifth Circuit overturning the Eastern District of Texas's denial of a transfer motion in a products liability lawsuit.<sup>264</sup> In a surprise move, the Federal Circuit granted a mandamus appeal to review a denial of a motion to transfer out of the Eastern District of Texas in *In re TS Tech USA Corp.*<sup>265</sup> Since *TS Tech*, the Federal Circuit has granted mandamus review on seven motions to transfer.<sup>266</sup> All but one of the mandamus actions have arisen out of the Eastern District of Texas. The outlier involved a decision by the Northern District of California to grant a transfer motion *into* the Eastern District of Texas.<sup>267</sup>

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<sup>261</sup> See, e.g., Offen-Brown, *supra* note 104, at 73 (noting that until 2008, “it was difficult to obtain transfer” from jurisdictions like the Eastern District of Texas); Parsons, *supra* note 135, at 151 (“Transfer motions in Delaware are rarely granted.”). *But see* Paul M. Janicke, *Venue Transfers from the Eastern District of Texas: Case by Case or an Endemic Problem?*, LANDSLIDE, Mar.–Apr. 2010, at 16, 16 (finding that the percentage of patent cases transferred by the Eastern District of Texas “was about the same” as the average nationwide in 2006 and “significantly more” in 2007).

<sup>262</sup> See Moore, *supra* note 5, at 936 (lamenting the Federal Circuit's conclusion that the patent venue provisions are coextensive with personal jurisdiction with respect to corporate defendants, rendering the patent venue statute “superfluous”).

<sup>263</sup> Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 (2012).

<sup>264</sup> See *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc) (“Concluding that the district court gave undue weight to the plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts, [the court] hold[s] that the district court reached a patently erroneous result and clearly abused its discretion in denying the transfer.”).

<sup>265</sup> 551 F.3d 1315, 1318 (Fed. Cir. 2008).

<sup>266</sup> See *In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011); *In re Vistaprint Ltd.*, 628 F.3d 1342 (Fed. Cir. 2010); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Hoffman-La Roche, Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009).

<sup>267</sup> See *In re Aliphcom*, 449 F. App'x 33 (Fed. Cir. 2011).

## iv. Speed

Another case management norm that deserves discussion is that of speedy adjudication. Some districts have made the speed with which they dispense justice an integral part of the district's culture. The Eastern District of Virginia has consistently been one of the most efficient places in the country to try civil cases over the past three decades.<sup>268</sup> In order to become a "rocket docket," the district adopted hard rules for setting trial conferences and dates.<sup>269</sup> The Western District of Wisconsin has also become known as a particularly fast place in which to litigate cases. For patent cases, both districts average less than eight months to resolution and less than a year to reach trial.<sup>270</sup>

For many patent plaintiffs, speed kills; the faster a court conducts its business, the faster a defendant must decide whether to risk a jury decision or settle.<sup>271</sup> Therefore, Western Wisconsin and Eastern Virginia are attractive locations in which to litigate for a wide variety of litigants who want to quickly resolve their dispute. But the appeal of a rocket docket can often be self-limiting. When more and more patent cases clog a docket, it becomes more difficult to maintain the status as a rocket docket. The Eastern District of Virginia, in particular, began to be flooded with patent litigation that threatened its status as an efficient purveyor of services.<sup>272</sup> Judges from both the Eastern District of Virginia and the Western District of Wisconsin have expressed dismay at the drag that a high number of patent cases inflict on the speed of their civil docket.<sup>273</sup>

## III. THE IMPLICATIONS OF COURT COMPETITION

Judges and courts can, if they want, influence litigants' venue choice in patent cases. When courts are so inclined, they can attempt to attract or dissuade patent litigants from filing in their courts by altering

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<sup>268</sup> See *supra* subsection II.A.2.c.

<sup>269</sup> See Koenig, *supra* note 143, at 803 n.25 (recounting the changes brought about by Judge Walter E. Hoffman designed to remove the case backlog and relieve the overburdened docket in the Eastern District of Virginia).

<sup>270</sup> See Lemley, *supra* note 2, at 414 tbl.5, 416 tbl.6 (showing the Western District of Wisconsin and Eastern District of Virginia to have the shortest times to resolution and shortest times to trial among districts with twenty-five or more outcomes).

<sup>271</sup> See *id.* at 413 (noting that plaintiffs are interested in speedy resolutions to keep costs down and to get quick relief in addition to building a war chest to sue other defendants).

<sup>272</sup> See *supra* subsection II.A.2.c.

<sup>273</sup> See *supra* notes 147 and 172 and accompanying text.

administrative procedures in predictable ways that increase a plaintiff's odds of achieving his or her goals. The previous Part should make clear, however, that court competition differs in important ways from forum shopping. Ultimately, court competition is a prelude to forum shopping: courts or judges can establish case management norms that have the potential to influence venue choices, but litigants retain the ultimate ability to select venue.

This Part will discuss the implications of court competition for patent law and for specialized legal areas more generally. This Part concludes with an examination of potential randomization proposals for reducing the forum shopping and court competition problems in patent law.

#### A. *The Cost of Court Competition*

It should be noted at the outset of any discussion of the drawbacks of court competition that some scholars have argued in favor of court competition. For instance, Xuan-Thao Nguyen has argued that the rise of the Eastern District of Texas as a preeminent location for patent litigation has improved the patent system as a whole.<sup>274</sup> According to Nguyen, the appeal of the Eastern District of Texas stems from aspects of the district that are outcome neutral.<sup>275</sup> Nguyen claims that litigants are attracted to the Eastern District of Texas because of the knowledgeable and welcoming jurists in the district, the district's reputation for fairness and reasonableness, its customer-oriented approach, and its unbiased jury pool.<sup>276</sup> As evidence of the improvement, Nguyen offers a number of examples of litigants who were pleased with their experience before the judges of the Eastern District.<sup>277</sup> Scholars in other areas of the law have made similar claims. In the bankruptcy context, scholars have argued that Delaware's successful bid to attract bankruptcy cases has led to salutary effects on the bankruptcy system, including increased judicial expertise and efficiency.<sup>278</sup>

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<sup>274</sup> Nguyen, *supra* note 91, at 155 (suggesting that instead of transforming the venue rules to stop forum shopping, reformers should look to the Eastern District of Texas as an example of a court transforming itself "into a knowledgeable center with strong expertise in solving patent disputes").

<sup>275</sup> *Id.* at 136-37 (citing examples of judges' expertise and local rules that enhance fairness in the judicial process).

<sup>276</sup> *Id.* at 136-43.

<sup>277</sup> *See, e.g., id.* at 138-39 (detailing the successful and pleasant experience of one of the lead counsels for Intel Corporation in a case tried in the Eastern District of Texas).

<sup>278</sup> *See, e.g.,* Robert K. Rasmussen & Randall S. Thomas, *Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations*, 54 VAND. L. REV. 283, 289-90 (2001)

Proponents of court competition, however, rely on a shaky premise, namely, that courts competing for litigation will not bend the adjudicative process to favor one group of litigants over another. While this is almost certainly true in most cases, it is also almost certainly not true in every case. Indeed, courts that create favorable environments for plaintiffs are more likely to win a competition for litigants than courts that maintain a more neutral environment. Plaintiffs prefer courts that offer greater odds of success. In essence, a competition for litigants favors courts that can offer the most predictable advantages to one side. Thus, if one recognizes that court competition will reward courts that favor plaintiffs, such competition has the pernicious effect of undermining the ultimate fairness of the legal process while simultaneously reducing confidence in the legal system.

Although Nguyen's claims about the value of expertise are undoubtedly true, the development of that expertise likely came at the expense of evenhanded resolution of patent disputes, at least initially. Critics of the early practices of the Eastern District of Texas point to the courts' excessive damage awards, inflexible and expensive discovery schedule, and reluctance to transfer cases as examples of plaintiff-friendly rules that led to the rise of the patent troll.<sup>279</sup> While the current court appears to be much more evenhanded in its handling of cases, the early years of the court left much to be desired.<sup>280</sup> If the court had not been extremely plaintiff-friendly in its case management practices, it is unlikely that the judges in the district would have been able to develop the expertise they now possess. Indeed, the Federal Circuit and the Supreme Court have taken steps to rein in the Eastern District of Texas's ability to attract litigants.<sup>281</sup>

A separate group of scholars has noted the legal innovation that can occur when courts share jurisdiction with other courts. For instance, Craig Nard and John Duffy have recently proposed an end to the Federal Circuit's exclusive jurisdiction over patent cases.<sup>282</sup> If patent appeals were heard at

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(disputing the suggestion that adjudicating a large proportion of major corporate bankruptcies in Delaware is bad for social welfare); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 325-29 (2001) (describing the "virtues of Delaware" including the ability of Delaware judges to use their expertise to change quickly and refine their regulatory efforts).

<sup>279</sup> See generally J. Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367 (2010) (discussing mechanisms used by districts such as the Eastern District of Texas that encourage patent troll behavior).

<sup>280</sup> See *id.* at 368-69 (noting that plaintiffs were 20% more likely to secure favorable judgments in the Eastern District of Texas than the nationwide average).

<sup>281</sup> See, e.g., *supra* notes 258-67 and accompanying text (discussing recent action by the Federal Circuit in considering writs of mandamus for transfer of venue).

<sup>282</sup> See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1650 (2007).

various circuit courts, they argue, there would be greater experimentation in patent jurisprudence that would lead to beneficial results for the patent system.<sup>283</sup>

However, this group of scholars is speaking of a different sort of competition than the one addressed in this Article. Those scholars are addressing the optimal balance of power concentration between specialized and generalist appellate courts.<sup>284</sup> They are largely addressing decisions that are made by appellate courts rather than trial courts. In the appellate context, there are benefits to be had from a decentralized, multi-court structure, including the ability to develop and test different legal approaches to the same problem.<sup>285</sup> Instead of competing for litigation business and the accompanying expertise that comes with winning that competition, appellate courts can “compete” in the sense of crafting legal rules that best embody legislative policies. And the extent of such competition is easily checked: legal innovations by appellate courts—which often lead to “circuit splits”—are often reviewed by the Supreme Court.<sup>286</sup> Conversely, district court administrative processes, such as case assignment and case management procedures, are rarely studied and almost never reviewed by appellate courts. Because of this, such procedures present a perfect vehicle for engaging in competition for litigants.

Successful competition for litigants can certainly lead to expertise; the Eastern District of Texas now has some of the most experienced and seasoned patent trial judges in the country. But such expertise often comes with a price. The Eastern District’s meteoric rise as an exceptional patent court has met with harsh criticism from the bar. Indeed, Justice Scalia has referred to the district as a “renegade jurisdiction[.]”<sup>287</sup>

#### B. Court Competition as a Feature of Specialized Adjudication

Patent law is not alone in fostering competition among courts. Indeed, beginning in the 1980s, courts in Delaware and New York sought to attract bankruptcy filers with many of the same tools that the Eastern District of Texas and others would employ decades later in an effort to attract patent

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<sup>283</sup> See *id.* at 1651-55 (arguing that a decentralized model would result in “new ideas and approaches to challenges facing our patent system”).

<sup>284</sup> See *id.* at 1626-27 & nn.31-36 (discussing scholarly works looking at the concentration of power in areas such as the separation of powers doctrine, federalism, and international law).

<sup>285</sup> *Id.* at 1653.

<sup>286</sup> See *id.* (discussing the role of percolation in appellate review in order to create sound binding precedent).

<sup>287</sup> Nguyen, *supra* note 91, at 112.

litigants.<sup>288</sup> Bankruptcy cases, like other federal cases, are heard before federal district courts. However, all districts have standing orders that refer bankruptcy cases to the bankruptcy court within each district.<sup>289</sup> A district court may choose to hear the case itself,<sup>290</sup> but in practice this rarely occurs.<sup>291</sup> In essence, bankruptcy courts are specialized courts within the district courts. Appeals of bankruptcy court decisions go to the district court in which the case arose and then to the circuit court of appeals for that district.<sup>292</sup>

From 1974 to 1978, Congress made a comprehensive revision of the bankruptcy code, including a change to the bankruptcy venue statute.<sup>293</sup> The new statute stated that “a [bankruptcy] case . . . may be commenced in the district court for the district in which the domicile, residence, principal place of business . . . or principal assets . . . of the person or entity” are located.<sup>294</sup> By the 1990s, judicial interpretations of the venue statute had liberalized bankruptcy venue to the point where large public corporations were largely free to file in any bankruptcy court in the United States.<sup>295</sup>

From 1980 to 1986, 32% of “big-case bankruptcies” were filed in New York courts.<sup>296</sup> Much of the appeal of New York’s bankruptcy courts was based on geography; firms entering bankruptcy often have major operations in New York and the majority of bankruptcy professionals (lawyers,

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<sup>288</sup> See LOPUCKI, *supra* note 17, at 25-76 (describing how New York and Delaware courts became attractive venues for bankruptcy litigation).

<sup>289</sup> See Allen R. Kamp, *Court Structure Under the Bankruptcy Code*, 90 COM. L.J. 203, 208 (1985) (“[A]ll districts have promulgated a general order referring all bankruptcy cases to the bankruptcy judges.”).

<sup>290</sup> See *id.* (analyzing § 157(d) of the 1984 Bankruptcy Code and considering instances in which a district court may withdraw a bankruptcy case).

<sup>291</sup> See *id.* at 208-09 (noting that a case may be withdrawn for cause and that the legislative history indicates that withdrawal should only be used sparingly).

<sup>292</sup> *Id.* at 210-11.

<sup>293</sup> See Martin I. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 1, 5 (1979) (outlining the changes to the jurisdiction and venue provisions including giving the district courts original and exclusive jurisdiction of all cases under Title 11, which is delegated in turn to the bankruptcy court).

<sup>294</sup> 28 U.S.C. § 1408(1) (2012).

<sup>295</sup> See LOPUCKI, *supra* note 17, at 15; see also, e.g., *In re Ocean Props. of Del., Inc.*, 95 B.R. 304, 305-07 (Bankr. D. Del. 1988) (granting a motion to transfer venue from Delaware, the state of incorporation, to Florida, the location where the business is conducted); *In re Del. & Hudson Ry. Co.*, 96 B.R. 467, 467 (Bankr. D. Del. 1988) (noting that venue was proper in both Delaware and New York for a Delaware corporation with corporate offices in New York).

<sup>296</sup> LOPUCKI, *supra* note 17, at 47-48.

accounting firms, and financial advisors) were located there.<sup>297</sup> But New York's appeal went beyond geographic convenience. New York bankruptcy courts tended to rule for bankruptcy filers on three key issues: extensions of exclusivity,<sup>298</sup> attorneys' fees,<sup>299</sup> and first-day orders.<sup>300</sup> The handling of those largely procedural issues (as well as an unusual case assignment method<sup>301</sup>) drove New York bankruptcy dominance.

New York's status as the go-to location for large bankruptcy cases, however, was short-lived. By the early 1990s, Delaware had become the leader in big bankruptcy filings.<sup>302</sup> Lynn LoPucki has chronicled how Delaware's emergence as a bankruptcy court of choice was the result of the efforts of Delaware's lone bankruptcy judge, Judge Balick, to attract "a major industry to her state."<sup>303</sup> Judge Balick's case management techniques, along with the predictability of case assignment in a one-judge district, elevated Delaware to the top district for bankruptcy filings.<sup>304</sup>

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<sup>297</sup> *Id.* at 40.

<sup>298</sup> Extensions of exclusivity permit the bankrupt firm to pay nothing to its creditors while negotiations continue. *Id.* at 41. Between 1980 and 1986, New York courts extended exclusivity in 92% of cases compared with other courts that only extended exclusivity in 73% of cases. *Id.*

<sup>299</sup> *See id.* at 44-45 (noting that New York courts, unlike courts in Philadelphia and Miami, rarely restricted hourly attorney rates).

<sup>300</sup> *See id.* at 45 (observing that New York courts recognized that "the practicalities of operating a business in bankruptcy reorganization were often in conflict with the requirements of the Bankruptcy Code" and were thus more accommodating than courts in other cities when such conflicts arose).

<sup>301</sup> LoPucki also noted that the New York courts had some irregularities in the case assignment practices that may have appealed to bankruptcy filers. While the state claimed it was employing a system of random case assignments, a single jurist, Judge Lifland of the Manhattan Division of the United States Bankruptcy Court for the Southern District of New York, was assigned eight of the thirteen cases filed in the five-judge district in 1985. *Id.* at 46-47. Judge Lifland was particularly popular with bankruptcy filers, and he welcomed high profile cases to his courtroom. *See id.* at 46 ("Judge Lifland wanted the big cases, and the debtors' lawyers wanted him to have them. In the early 1980s, New York was the most attractive bankruptcy venue in the country, and Burton Lifland was the most attractive judge in that venue."). Knowing that Judge Lifland was likely to be assigned to big bankruptcy cases made filing in the Southern District of New York very attractive to potential litigants.

<sup>302</sup> *See id.* at 74 (noting that Delaware surpassed New York for number of big bankruptcy case filings in 1992).

<sup>303</sup> *Id.* at 76; *see also id.* at 56-74 (arguing that Judge Balick actively pursued bankruptcy filings by making rulings favorable to bankruptcy filers).

<sup>304</sup> *Id.* at 75 (noting the appeal of filing in a one-judge district). Because of the increase in filings, Delaware was awarded a second bankruptcy judge in 1993, although the district did not adopt the random case assignment model of New York. *Id.* at 74-75. The migration of big bankruptcy cases towards New York and Delaware alarmed bankruptcy professionals in other states. Beginning in Houston, members of affected cities' local bankruptcy bars approached their local bankruptcy judges and asked for changes in local rules and attorney fee rulings to make the local courts competitive. *Id.* at 125-26.

Delaware's bankruptcy court engaged in many of the competitive techniques that federal district courts have used to compete for patent cases. For instance, the competition for both patent and bankruptcy cases has involved small, seemingly unlikely locales as litigation hotspots: Marshall, Texas and Wilmington, Delaware for patent cases and Wilmington, Delaware for bankruptcy.<sup>305</sup> In both instances, courts have increased the speed with which they dispose of cases in an effort to attract litigants.<sup>306</sup> Both bankruptcy and federal district courts have also adopted peculiar procedural rules meant to influence venue decisions,<sup>307</sup> including the elimination of random case assignment<sup>308</sup> and a predilection to deny motions to transfer.<sup>309</sup> The history of court competition for both bankruptcy and patent cases involves judges who gain important judicial experience,<sup>310</sup> as well as the prestige associated with complex and difficult cases.<sup>311</sup> Both instances demonstrate the importance of forum shopping to the local economies in which the respective courts sit.<sup>312</sup>

There are, however, some intriguing differences between bankruptcy's experience with court competition and patent law's experience. For instance, some courts, like the Eastern District of Virginia, have sought to reduce patent filings in their districts. This does not appear to be the case when looking at competition for bankruptcy cases. Furthermore, competition in patent cases is unique because it involves generalist judges competing for a specialized docket. Federal district court judges are not specialists, while bankruptcy judges hear only bankruptcy cases.

The parallels between district court competition for patent law and bankruptcy court competition for bankruptcy cases suggest that the creation of specialized courts may play a role in court competition. That insight runs counter to the notion in the scholarship that specialized courts *reduce* forum shopping.<sup>313</sup> Judicial specialization might contribute to court

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<sup>305</sup> *Id.* at 51-53.

<sup>306</sup> *See id.* at 117 (noting that the refiling rate in Delaware is high because "Delaware processes cases faster than other jurisdictions").

<sup>307</sup> *See id.* at 125-26 (recounting the requests of Houston lawyers to their local bankruptcy judges to make several procedural changes to attract more bankruptcy litigation to the city).

<sup>308</sup> *Id.* at 75.

<sup>309</sup> *Id.* at 38-39.

<sup>310</sup> *Id.* at 39.

<sup>311</sup> *Id.* at 19-20.

<sup>312</sup> *See id.* at 128-29 (explaining how the increase in bankruptcy filings caused law firms to expand in Delaware and impacted the local economy).

<sup>313</sup> *See, e.g.,* Dreyfuss, *supra* note 12, at 32 (discussing Congress's belief that the Federal Circuit would eliminate forum shopping); Moore, *supra* note 5, at 932-34 (arguing for the creation of a specialized trial court to eliminate forum shopping); John B. Pegram, *Should There Be a U.S.*

competition in different ways depending on the structure of the specialized court. Bankruptcy and patent law have specialized courts at different levels of the litigation process: bankruptcy cases are tried before specialist judges and appealed to generalist geographic circuit courts; patent cases are tried before generalist federal judges and appealed to the specialized Federal Circuit.

Specialization at the appellate level may increase opportunities for court competition in two ways: by increasing the relative value of district court case management procedures to litigants and by leveling the court competition playing field. Part of the attraction of appellate specialization (or more precisely, centralization) is the resulting uniformity of the law in the specialized area. Since legal disuniformity is the traditional driver of forum shopping, it is thought that unifying the law will eliminate (or at least reduce) forum shopping. But, when legal differences among fora are eliminated, forum shoppers turn their attention to administrative and procedural nuances among courts. Distinct, predictable, and favorable administrative and procedural practices become increasingly appealing to litigants who are unable to shop for distinctions based in law. The uniformity of patent law throughout the country forces forum-shopping plaintiffs to seek out advantageous case-management norms and procedural differences. Before the Federal Circuit existed, those case-management norms, while valuable, were overshadowed by the significant differences in substantive law among the circuits.<sup>314</sup> Thus, courts that are interested in competing for litigants may find that the suite of administrative procedures they can offer is more attractive to forum-shopping plaintiffs in the Federal Circuit era because plaintiffs cannot shop for substantive legal differences.

The presence of a centralized appellate court for patent cases may also level the playing field for courts to compete for litigants, thereby increasing the number of district courts that can realistically enter into competition. During the pre-Federal Circuit era, only district courts in pro-plaintiff circuits (the Fifth, Sixth, and Seventh Circuits) could realistically compete for litigants.<sup>315</sup> Even those districts, however, were bound by different standards and rules on patent law than other courts in other circuits. Those

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*Trial Court with a Specialization in Patent Litigation?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 765, 770 (2000) (explaining that "rampant forum shopping" was a major cause of the creation of the Federal Circuit); Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 877-78 (2002) (recognizing that commentators have suggested that the creation of specialized patent trial courts could reduce forum shopping and legal inconsistency at the trial level).

<sup>314</sup> See *supra* subsection II.A.1.

<sup>315</sup> See *supra* note 71 and accompanying text.

differences might limit any one districts' appeal to litigants. Or those districts might reside in circuits that had unappealing precedent on procedural questions that might be important to particular patent plaintiffs. And even then, forces outside of the trial court's control (such as changes to the law, a shift in the appellate court's support for the patent system) might undermine any efforts to attract litigants. The result was that very few (if any) district courts could offer the sorts of procedural and administrative advantages that would appeal to a significant number of plaintiffs.

The creation of the Federal Circuit essentially commoditized patent litigation. Now, every district court in the country operates with the same baseline law and the same court reviewing procedural and discretionary decisions.<sup>316</sup> That means that any district court that is interested in attracting patent cases can attempt to do so without circuit-specific limitations. While before the Federal Circuit plaintiffs shopped for law, now they shop for trial practices and procedures.

Specialization at the trial court level may increase court competition in different ways than specialization at the appellate level does. Specialized trial judges may be more incentivized than generalist judges to compete for litigants. In particular, specialized judges may see more value in obtaining the reputational benefits that come from increased expertise. Most specialized trial judges want to be seen as experts in their specialty; bankruptcy judges, presumably, hope to be recognized as experts in bankruptcy law. The benefit to a generalist judge of becoming an expert in a particular field is less apparent; peer generalist judges are unlikely to be impressed by a particular judicial expertise.

Additionally, specialized trial courts are likely to experience more direct bureaucratic rewards when successfully competing for cases than generalist courts are. LoPucki has detailed the bureaucratic rewards that the bankruptcy court in Delaware received after increasing the court's caseload, namely increased judgeships and money for the court.<sup>317</sup> Of course, the success with which the Eastern District of Texas and the District of Delaware have attracted patent cases demonstrates that specialized courts are not the only courts that are incentivized to compete for litigants. But

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<sup>316</sup> Although the Federal Circuit formally reviews non-patent procedural questions under the law of the geographic circuit, the court has largely looked to its own precedents for procedural questions in patent cases. *See Dreyfuss, supra* note 12, at 30-52 (pointing to confusion caused by the Federal Circuit in three specific areas: jurisdiction, adjudication of non-patent aspects of cases, and supervision of lower courts in partnership with regional circuits).

<sup>317</sup> LOPUCKI, *supra* note 17, at 128-29.

specialized trial courts may be particularly motivated to attract cases to justify the court's very existence.

Another specialized court that handles patent cases provides an interesting example. The United States International Trade Commission (ITC) is a quasi-judicial federal agency that adjudicates disputes regarding U.S. imports.<sup>318</sup> The ITC is limited in the remedies it can provide to plaintiffs: it cannot grant monetary damages; instead, it can only restrict imports of products that infringe a valid U.S. patent. Despite that limitation, the ITC receives a large number of patent cases every year, reaching a high of seventy cases in 2011, before averaging just over forty over the past two years.<sup>319</sup> The ITC's importance in the patent system has increased significantly in the past decade.<sup>320</sup> The administrative law judges (ALJs) of the ITC are considered specialists in patent law. The ALJs are also highly aware of the impact that their patent caseload has on certain bureaucratic matters, namely ITC judgeships and courtroom space. For instance, in the ITC's annual report, the Commission has said that the significant increase of cases over the past five years has led to "[a] shortage of courtrooms," which has "hampered scheduling of evidentiary hearings."<sup>321</sup> The courtroom shortage due to the increased caseload led to the acquisition of additional space and the construction of a new courtroom in October 2012.<sup>322</sup> Similarly, former Chief Administrative Law Judge Paul Luckern has noted that he thinks the ITC currently has enough judges (six), "[b]ut things could change. The caseload could increase."<sup>323</sup> The judges on the ITC are aware that increased caseloads lead directly to increased judgeships and other potential benefits to the Commission, such as new courtrooms. That sort of direct link between increased caseloads of a

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<sup>318</sup> See *About the USITC*, U.S. INT'L TRADE COMMISSION, [http://www.usitc.gov/press\\_room/about\\_usitc.htm](http://www.usitc.gov/press_room/about_usitc.htm) (last visited Jan. 16, 2015), archived at <http://perma.cc/6QBK-U67C>.

<sup>319</sup> See U.S. INT'L TRADE COMM'N, *FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS 1* (2013), available at [http://www.usitc.gov/press\\_room/documents/featured\\_news/337facts.pdf](http://www.usitc.gov/press_room/documents/featured_news/337facts.pdf).

<sup>320</sup> See David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1702 (2009) ("[O]nly recently has [the ITC] become a popular forum for adjudication of patent infringement claims.").

<sup>321</sup> See U.S. INT'L TRADE COMM'N, *supra* note 319, at 1.

<sup>322</sup> *Id.*

<sup>323</sup> *An Interview with the Honorable Paul J. Luckern, Chief Administrative Law Judge of the US International Trade Commission*, INTELL. PROP. & TECH. NEWS (June 28, 2011), [https://www.dlapiper.com/en/us/insights/publications/2011/06/an-interview-with-the-honorable-paul-j-luckern-c\\_/](https://www.dlapiper.com/en/us/insights/publications/2011/06/an-interview-with-the-honorable-paul-j-luckern-c_/), archived at <https://perma.cc/SJ76-AZCY>.

particular type of case and institutional benefits is more obvious on specialized courts than on generalist ones.

All this is not to say that court competition can only occur in specialized courts. Forum shopping is not unique to fields of law that have specialized courts.<sup>324</sup> Furthermore, scholars have surmised that court competition for cases could occur in virtually any field of law.<sup>325</sup> Clearly the potential correlation between specialization and court competition is not the only explanation for the rise of competition that has occurred in bankruptcy and patent law. Those fields' broad venue statutes have allowed numerous courts to compete for litigants. Charismatic judges that can set a court's agenda have also played key roles in both patent law and bankruptcy's court competition history. But the history of court competition in areas governed by specialized courts suggests that creating specialized courts may increase the incentives and opportunities for courts to compete for litigation.

Lawmakers who understand the potential downsides of court competition can better structure specialized courts to avoid the problems that have arisen in patent and bankruptcy litigation. For example, when creating specialized courts, lawmakers should consider the venue provisions that accompany the new court's jurisdiction. In patent law, for instance, court competition could have been reduced if litigants simply had fewer venue choices.<sup>326</sup> Similarly, bankruptcy law's forum shopping problem began when statutory changes to the venue statute enabled courts to compete among themselves for business.<sup>327</sup>

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<sup>324</sup> Mississippi courts, for example, have long been a hotbed of class action litigation. *See, e.g.,* Adam Liptak, *Court Has Dubious Record as a Class-Action Leader: Critics Say Victims Lose, Even If They Win*, N.Y. TIMES, Aug. 15, 2002, at A14 (attributing the appeal of Mississippi courts to a propensity to approve lawyer-friendly settlements).

<sup>325</sup> *See, e.g.,* Daniel Klerman, *Personal Jurisdiction and Product Liability*, 85 S. CAL. L. REV. 1551, 1554 (2012) (suggesting that states might compete to attract business to the state by "weakening their product liability law or otherwise tilting their procedural and choice-of-law rules to favor defendants").

<sup>326</sup> Recently, Congress seriously considered, but ultimately chose not to amend the patent venue statute. *See* Patent Reform Act of 2006, S. 3818, 109th Cong. § 8(a) (proposing limitations on available venues for litigants). In previous work, I have argued that the venue provisions were removed from the America Invents Act due to interbranch dialogue between Congress and the Federal Circuit. *See* J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1070-71 (2014) (arguing that the venue provisions were removed due to the actions of the Federal Circuit that altered the law that Congress was seeking to reform). *See generally* Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961 (2014) (cataloguing the dialogue between Congress and the Federal Circuit during the passage of the AIA).

<sup>327</sup> *See* LOPUCKI, *supra* note 17, at 15 (tracing the development of bankruptcy venue provisions "that allowed the bankruptcy court competition to develop").

The second lesson for lawmakers is that appellate courts need to be more diligent in supervising trial court practices in areas of specialized adjudication. The Federal Circuit, for its part, has begun to take steps in this direction, as it has begun to review denials of motions to transfer much more rigorously than it had previously done.<sup>328</sup> District courts would be well-advised to similarly police the case management practices of their bankruptcy courts.

### C. Reducing Forum Shopping and Court Competition

To reduce forum shopping in the patent system, policymakers must also reduce courts' ability to compete for litigants. This Section reviews current academic and congressional proposals to reduce forum shopping in patent law. All of these proposals share a common feature: they seek to greatly reduce, if not eliminate, discretion in litigant venue decisions. Building on these proposals, this Section analyzes other as-yet unstudied means of reducing court competition in patent cases.

#### 1. Scholarly Proposals

Scholars who view patent forum shopping as problematic have put forth a number of proposals designed to reduce the practice. Those proposals generally involve one of two solutions: (1) the creation of specialized patent trial courts or (2) reduced venue options for litigants.<sup>329</sup>

Kimberly Moore has proposed the creation of a specialized trial court for patent cases that would be reviewed by another specialized court, the Federal Circuit.<sup>330</sup> Moore's proposed creation of a single trial court to handle all patent trials would completely eliminate forum shopping because "there would be no possible alternative forum."<sup>331</sup> Other scholars have made similar proposals.<sup>332</sup>

Judicial specialization does not, of course, fend off competition between courts. The bankruptcy courts' long history of court competition demonstrates the potential for competition among specialized courts. Most

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<sup>328</sup> See *supra* notes 262-267 and accompanying text.

<sup>329</sup> See Fromer, *supra* note 9, at 1466-67 (describing the two ways that critics of forum shopping have suggested to "clamp down" on the problem: a specialized trial court or restrictions on venue choices).

<sup>330</sup> Moore, *supra* note 5, at 932.

<sup>331</sup> *Id.*

<sup>332</sup> See, e.g., Rai, *supra* note 313, at 877-78 (outlining a proposal for the creation of a specialized patent trial court).

proposals for a specialized patent trial court, however, envision a single court that would handle all cases and would therefore have no other court against which to compete.<sup>333</sup> While specialized courts of the sort envisioned by Judge Moore would eliminate forum shopping (and competition for litigants) by eliminating alternate courts, specialized trial courts have potential downsides as well, including narrowness of vision and capture.<sup>334</sup>

Scholars have also proposed changes to the patent venue statute.<sup>335</sup> For instance, Jeanne Fromer has proposed “making patent venue proper only in the district in which the principal place of business of any of a case’s defendants is located, with a safety valve to avoid due process concerns, which might occur in a minute number of cases.”<sup>336</sup> Restricting venue in patent law is likely to decrease forum shopping because it will limit courts’ ability to compete for litigants.<sup>337</sup> The more restrictive the options, the less competition will exist. Restricting venue limits a court’s ability to attract litigants and therefore decreases the likelihood that any particular court will craft rules or norms specifically designed to attract plaintiffs. Such a change would shift courts’ focus back to crafting rules and norms that streamline the litigation on the docket—rather than shape the docket in the first place—and would be a welcome modification to the patent system.

Of course, venue restrictions do not automatically eliminate court competition for litigants. Indeed, bankruptcy has a more restrictive venue statute than patent law,<sup>338</sup> yet it has been afflicted with persistent forum shopping and court competition.<sup>339</sup> Bankruptcy courts in districts that are home to large numbers of corporate headquarters (or, in Delaware’s case, the state of incorporation) were able to compete for litigation because many large bankruptcy actions satisfied the requisite venue and jurisdictional requirements. While not every bankruptcy court could compete successfully for litigants, the Delaware court could.

The same holds true for patent law—not all proposals to restrict venue would eliminate forum shopping. For example, Judge Moore has proposed limiting venue in patent cases “based on [a] defendant’s residence and state

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<sup>333</sup> Moore, *supra* note 5, at 932.

<sup>334</sup> Rai, *supra* note 313, at 895-97 (discussing arguments against the creation of a specialized patent trial court).

<sup>335</sup> See, e.g., Moore, *supra* note 5, at 936-37 (concluding that “modification of the patent venue statute” could increase the efficiency of dispute resolution “with minimal upheaval”).

<sup>336</sup> Fromer, *supra* note 9, at 1447.

<sup>337</sup> See *id.* at 1478-79 (arguing that restricting venue to a litigant’s principal place of business will decrease forum shopping and in turn promote more skilled decisionmaking).

<sup>338</sup> See *supra* notes 293-94 and accompanying text.

<sup>339</sup> See *supra* notes 295-312 and accompanying text.

of incorporation.”<sup>340</sup> Adopting Judge Moore’s proposal would likely decrease the number of cases filed in the Eastern District of Texas due to an inability to compete with courts that have more contacts with broader swaths of potential defendants. Her proposal would not, however, significantly reduce the overall competition for patent litigation. Even though a restricted venue statute often limits the number of courts that can compete for litigants, it does not eliminate such competition. In fact, as LoPucki has shown in the bankruptcy context, competition between courts can be quite robust even when only two courts are involved.<sup>341</sup> Indeed, any venue statute that relies on state of incorporation merely tilts the competitive playing field in Delaware’s favor.

Jeanne Fromer’s proposed venue modification—combined with the new joinder rules of the America Invents Act (AIA)—would likely eliminate court competition from patent litigation. Because the AIA restricts joinder of accused defendants to cases arising out of the “same transaction [or] occurrence” of infringement,<sup>342</sup> patent plaintiffs usually must bring suit against defendants on an individual basis. Thus, since Fromer’s proposal limits venue to the defendant’s principal place of business,<sup>343</sup> there would be only one available venue per patent suit.

## 2. Congressional Proposals

Congress has also shown an interest in tinkering with the patent venue statute. Early versions of the AIA contained alterations to the venue statute that would have limited venue to jurisdictions where (a) defendant had its principal place of business or (b) infringement occurred and the defendant had an established business.<sup>344</sup> Later versions loosened the restrictions on venue by permitting venue in the location in which the plaintiff resides as long as the plaintiff was an individual inventor or institution of higher learning.<sup>345</sup> Ultimately, however, Congress passed a version of the AIA which contained no changes to the patent venue statute.<sup>346</sup>

But Congress has enacted one change to patent case assignments that has the potential to significantly impact forum shopping. Arising from

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<sup>340</sup> Moore, *supra* note 5, at 934.

<sup>341</sup> See LOPUCKI, *supra* note 17, at 74 (discussing competition between bankruptcy courts in New York and Delaware).

<sup>342</sup> 35 U.S.C. § 299(a)(1) (2012).

<sup>343</sup> Fromer, *supra* note 9, at 1477.

<sup>344</sup> Anderson, *Congress as a Catalyst*, *supra* note 326, at 986.

<sup>345</sup> *Id.* at 993 n.10.

<sup>346</sup> *Id.* at 1004.

academic arguments for specialized adjudication in patent law, Congress began the Patent Pilot Program (PPP) in 2011.<sup>347</sup> The PPP allows selected district courts to create a subgroup of judges within the district that are preselected to handle patent cases filed in the district.<sup>348</sup>

While the PPP was designed to increase expertise among judges handling patent cases, it may also lead to increased competition among those judges for patent cases. Before the creation of the PPP, district courts with large numbers of judges (such as the Northern District of California and the Northern District of Illinois) were largely unable to compete with the smaller district courts (such as the Eastern District of Texas, the District of Delaware, and the Western District of Wisconsin) for patent cases. In the competition for litigants, districts with fewer judges have multiple advantages over larger districts in the market for patent litigation.

First, smaller districts are more able to develop an expertise in a particular area. For instance, the District of Delaware has four active-service judges.<sup>349</sup> Because of the small number of judges on the court and the high number of patent cases on the docket, each judge has a large number of docketed patent cases at any one time. In 2009 alone, each active judge averaged over fifty new patent cases assigned to his or her docket.<sup>350</sup> Contrast the District of Delaware with the Central District of California, which received the most patent filings of any district in 2009. The Central District has twenty-seven active judges.<sup>351</sup> Again assuming that senior judges are not assigned any patent cases, the average Central District judge received around nine patent cases in 2009. Thus, judges in small districts can acquire expertise more quickly than judges in large districts.

Second, smaller districts can unify district norms. A large district, like the Southern District of New York, confronts a collective action problem when adopting local rules or informal norms governing cases. The twenty-eight judges in the district are distinct individuals, some of whom may want to see an increase in a certain type of litigation and some of whom may prefer precisely the opposite. Smaller districts, on the other hand, have fewer potential judges willing to resist the move towards district-wide conformity. Indeed, the list of districts that have adopted PLRs is filled

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<sup>347</sup> Patent Cases Pilot Program, Pub. L. No. 111-349, 124 Stat. 3674 (2011).

<sup>348</sup> *Id.*

<sup>349</sup> 28 U.S.C. § 133(a) (2012). In addition to the four active judges, the District of Delaware currently has one senior judge.

<sup>350</sup> This does not include senior judges who, in most districts, can take patent cases if they so desire. Most senior judges do not choose to do so.

<sup>351</sup> 28 U.S.C. § 133(a) (2012). An unfilled vacancy exists on the court as of the time of this writing.

with districts that are among the top ten districts for annual patent filings<sup>352</sup> and districts with fewer than eleven judges.<sup>353</sup> Of the four largest districts in the country—those with over twenty judges—only the Northern District of Illinois has adopted PLRs, despite the prevalence of patent litigation in many of those large districts.<sup>354</sup>

Third, small districts can more easily adopt a unified judicial philosophy with an eye towards attracting litigation. For the same reasons outlined above, collective action problems make unification of large districts much more difficult than smaller ones. For example, rocket dockets tend to arise in smaller districts because the judges are more capable of acting as a collective to reduce backlog.<sup>355</sup>

Fourth, small districts enjoy the benefits of reduced uncertainty in the judge assignment process. In the Western District of Wisconsin, which has only two active-service judges,<sup>356</sup> potential plaintiffs can assume a 50% probability of being assigned to a particular judge. The Central District of California, on the other hand, presents much greater uncertainty in predicting one's judge.

Fifth, small districts, like small companies, can be more responsive to changes in the market. When new procedural issues arise in patent litigation, smaller districts can quickly alter their rules or norms to improve the litigation experience in their district.

Given all of the competitive advantages of small districts, the PPP may merely level the competitive playing field for large districts. Now, large districts like the Northern District of Illinois can theoretically compete with smaller districts because, for patent cases only, they operate much like a small district court. While the PPP is likely to increase judicial

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<sup>352</sup> This includes the Eastern District of Texas, the Northern District of California, the District of Massachusetts, the Northern District of Illinois, the District of New Jersey, the Southern District of California, and the District of Minnesota.

<sup>353</sup> The districts with PLRs and the number of judges in those districts are the Northern District of California (14), the Southern District of California (13), the Western District of Washington (7), the Northern District of Texas (12), the Eastern District of Texas (7), the Southern District of Texas (19), the Western District of Wisconsin (2), the District of Minnesota (7), the Northern District of Illinois (22), the Western District of Pennsylvania (10), the Northern District of Georgia (11), the Eastern District of Virginia (11), the Eastern District of North Carolina (4), the District of New Jersey (17), the District of Massachusetts (13), and the Northern District of Ohio (11). 28 U.S.C. § 133(a) (2012).

<sup>354</sup> Historically, the Central District of California and the Southern District of New York are among the top ten filing districts. *See Lemley, supra* note 2, at 405 tbl.2.

<sup>355</sup> *See Vishnubhakat, supra* note 141, at 68-70 (discussing the characteristics of rocket dockets).

<sup>356</sup> 28 U.S.C. § 133(a) (2012).

specialization in patent cases, it also may allow more districts to enter into the competition for litigants.

### 3. Other Potential Methods of Reducing Court Competition

There are ways to eliminate court competition beyond the traditional academic approaches of venue restrictions and the creation of specialized trial courts. One way that has been suggested in the literature on bankruptcy forum shopping involves randomization of case assignment. This subsection will briefly analyze the costs and benefits of three such potential randomization procedures.

#### a. *Randomizing Case Assignment Within Districts*

First, and most painlessly, Congress could mandate that district courts randomize assignment of patent cases within their districts. Limiting the ability of courts, such as the Eastern District of Virginia and the Eastern District of Texas, to deviate from random assignment procedures for patent cases would eliminate one of the most effective efforts to attract, or dissuade, patent litigants from filing in a court.

The Eastern District of Texas has continually had case assignment procedures for patent cases that allow litigants to select the judge who will preside over their case.<sup>357</sup> Such an ability to “judge shop” has been uniformly decried as antithetical to notions of justice.<sup>358</sup> LoPucki notes that the ability to “judge shop” was one of the features of Delaware bankruptcy courts that initially appealed to bankruptcy filers.<sup>359</sup>

Congress could easily eliminate courts’ ability to permit pre-selection of judges. Under 28 U.S.C. § 137, chief judges of district courts have the power to “assign the cases” in accordance with the rules and orders of the court.<sup>360</sup> The statute grants chief judges broad discretion in assigning cases. Congress could amend the statute to require that district courts assign cases in a randomized manner among the judges. This modification would eliminate one of the primary judicial means of attracting litigants with very little cost.

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<sup>357</sup> See *supra* subsection II.B.2.b.i.

<sup>358</sup> See *supra* note 223.

<sup>359</sup> See *supra* note 226.

<sup>360</sup> 28 U.S.C. § 137 (2012).

b. *National Assignment of Patent Cases*

Alternatively, Congress could create a more radical means of randomizing case assignment in patent cases. For instance, Congress could adopt nationwide jurisdiction for patent cases and randomly assign patent cases to a subset of district judges with expertise in patent law. Under this system, patent litigants would file cases with a national body, and then each case would be randomly assigned to a judge with expertise in patent law. Such a proposal would eliminate forum shopping, but would impose significant additional costs on patent litigants that would likely outweigh the benefits.

At first glance, assigning patent cases nationally has a number of potential benefits. First, it eliminates the ability of judges and courts to compete for litigants. Because patent cases would be assigned randomly on the national level, courts would be unable to attract or dissuade litigants from filing. Likewise, litigants would be unable to select advantageous venues, thus eliminating forum shopping as well.

Second, because court competition would be eliminated, courts would have no incentive to persuade litigants to file in their court by adjusting administrative, procedural, and case management practices. Instead, courts would be incentivized to structure their case management practices to efficiently handle patent cases.

A third benefit would be increased judicial specialization in patent trials. A subset of federal district judges would hear all patent cases, thus developing expertise in patent law and patent case management, similar to the expertise enjoyed today by some judges in Delaware and the Eastern District of Texas. The desire to have experienced patent jurists has driven many reform proposals in patent law, from the PPP to the creation of the Federal Circuit.<sup>361</sup>

Of course, there are drawbacks to any radical alteration of the litigation system, and the drawbacks of national assignment of patent cases likely outweigh any benefits gained from reduced court competition. First, a national assignment system would eliminate litigant choice with respect to venue. It is a generally accepted premise of the U.S. adversarial litigation system that a plaintiff has the right, at least initially, to bring her case in a forum of her choice.<sup>362</sup>

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<sup>361</sup> See *supra* subsections II.A.1-2.

<sup>362</sup> See *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) ("While a defendant does have a right, given by statute, to remove in certain situations, plaintiff is still the master of his own claim."). The existence of the plaintiff-choice system does not have a

National patent assignment would also raise constitutional questions about jurisdiction: for a district court to hear a case, it must possess subject matter jurisdiction, personal jurisdiction, and proper venue. Patent law has its own venue statute that permits patent infringement suits to be brought in any district where (1) the defendant resides or (2) “the defendant has committed acts of infringement and has a regular and established place of business.”<sup>363</sup> Following the 1988 amendment to the general venue statute, the Federal Circuit has interpreted a corporation’s residence as any district in which personal jurisdiction lies.<sup>364</sup> Therefore, in patent cases, venue is proper whenever personal jurisdiction exists.

For a court to exercise personal jurisdiction, the defendant need only have “minimum contacts” with the forum.<sup>365</sup> If patent cases were randomly assigned, these requirements would be easily met in most cases; companies that offer products nationally are likely to be subject to the personal jurisdiction of a large number of district courts, if not all ninety-four U.S. district courts.<sup>366</sup> In some cases, however, minimum contacts would not exist.

Antitrust law provides a potential statutory fix to this problem. Federal Rule of Civil Procedure 4(k)(1)(A) requires that federal courts follow the jurisdictional requirements imposed by the states in which those courts reside.<sup>367</sup> However, an exception to that rule is provided in Rule 4(k)(1)(C), which recognizes that Congress has the authority to create nationwide jurisdiction for federal question cases.<sup>368</sup> Thus, Congress could establish nationwide jurisdiction for all patent cases. By doing so, Congress could enable nationwide case assignment and eliminate jurisdictional limits on all

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strong theoretical pedigree, however. See Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 BROOK. L. REV. 1, 2 n.4 (2011) (noting that while the scholarly commentary on the issue is lacking, it is “the baseline norm that . . . plaintiffs have the initial choice of judicial system . . . and the place of trial (venue)”).

<sup>363</sup> 28 U.S.C. § 1400(b) (2012).

<sup>364</sup> *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990); see also Moore, *supra* note 5, at 896-97 (describing the conflation of the patent venue statute and the general venue statute in patent cases); Thomas A. O’Rourke, *The Modernization of the Patent Venue Statute*, 14 GEO. MASON L. REV. 585, 600 (1992) (concluding that the standards for personal jurisdiction and venue are identical in patent cases).

<sup>365</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

<sup>366</sup> Moore, *supra* note 5, at 897.

<sup>367</sup> FED. R. CIV. P. 4(k)(1)(A).

<sup>368</sup> See FED. R. CIV. P. 4(k)(1)(C) (permitting personal jurisdiction “when authorized by a federal statute”).

patent cases. Congress has done this with antitrust cases, permitting nationwide jurisdiction for Sherman Act cases.<sup>369</sup>

Ultimately, nationalizing the patent assignment system is undesirable because it throws the baby out with the bathwater.<sup>370</sup> If all cases were randomly assigned nationally, patent plaintiffs would quite often be forced to litigate away from “home.” For those patent plaintiffs that are small entities, being assigned to a far-away district court could represent a significant financial burden.<sup>371</sup> Indeed, while the districts of Delaware and Eastern Texas oversee a large portion of patent litigation in the United States, a significant portion of the patent litigation in other districts involves small entities. Colleen Chien has found that around 18% of patent plaintiffs are small companies, nonprofits, or individuals.<sup>372</sup> Such plaintiffs would be significantly burdened if forced to litigate in a random district. Thus, a dramatic change to patent litigation, like a national assignment system, would potentially impose additional costs on those least able to bear them and would be politically unfeasible.

c. *Judicial Assignment of Venue*

As a third option, patent cases could be assigned to the most convenient district as determined by a judicial panel. A similar process occurs with Multi-District Litigation (MDL). In civil actions “involving one or more common questions of fact . . . pending in different districts,” the Judicial Panel on Multidistrict Litigation—a special entity within the U.S. federal court system—determines whether multiple actions should be consolidated in a single court for pretrial proceedings.<sup>373</sup> The Judicial Panel is comprised of seven judges from different circuits who are appointed by the Chief Justice of the United States.<sup>374</sup> In theory, patent cases could be submitted to

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<sup>369</sup> 15 U.S.C. § 5 (2012).

<sup>370</sup> See, e.g., Daniel Klerman, *Rethinking Personal Jurisdiction*, J. LEGAL ANALYSIS (forthcoming) (manuscript at 47-51) (evaluating potential randomization proposals and ultimately concluding that they “are not likely to be implemented” because they offend traditional notions of due process and sovereignty).

<sup>371</sup> See *id.* at 48 (discussing the costs associated with random assignment of cases, including increased regional attorney fees and increased travel costs).

<sup>372</sup> Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1600 tbl.3 (2009).

<sup>373</sup> 28 U.S.C. § 1407(a) (2012).

<sup>374</sup> *Id.* § 1407(d); see also *Overview of Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/panel-info/overview-panel> (last visited Jan. 16, 2015), archived at <http://perma.cc/X9DH-GXZ9>.

a similarly constructed panel, which would then select the venue with the greatest ties to the case.

While such a procedure would likely result in a more equitable and rational assignment of patent cases in most instances, it would impose an additional layer of complexity and cost to the patent system. Indeed, a judicial panel for patent case assignment would be much more burdensome than that for MDL. The Judicial Panel on Multidistrict Litigation issued 432 orders in 2013, its highest number on record.<sup>375</sup> In contrast, nearly the same number of patent cases was filed in district courts in the month of December 2013 alone.<sup>376</sup> Any patent assignment panel would have to resolve venue for over ten times the number of cases decided by the Judicial Panel on MDL—a costly judicial undertaking. Thus, while such an assignment panel could improve the patent system, the increased administrative costs would have to be carefully considered.

#### CONCLUSION

Forum shopping in patent law is fueled in part by competition among courts to attract litigants. Courts engage in court competition for a host of reasons, including prestige, increased budget outlays, or personal interest in particular types of cases. Courts can compete for litigants by establishing predictable practices—some administrative, some procedural—that appeal to particular plaintiffs.

Court competition in patent law parallels the court competition that has occurred in bankruptcy law. In both areas, courts have attracted litigants by permitting “judge shopping,” creating unique procedural rules that were seen as pro-plaintiff, and adopting predictable case management norms that appealed to plaintiffs. In patent law, unlike bankruptcy, some courts have sought to dissuade litigants from filing in their courtrooms. In patent law, as in bankruptcy law, the competition for litigants has at times led to an unfair disadvantage to defendants.

Previous scholarly proposals to limit venue or create a specialized patent court have the potential to reduce or eliminate court competition, but also carry a number of drawbacks. Randomizing judge assignment also has the potential to reduce patent forum shopping but has yet to be considered by

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<sup>375</sup> U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2013), available at [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2013.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf).

<sup>376</sup> 428 cases were filed in December 2013. *Lex Machina Releases First Annual Patent Litigation Year in Review*, LEX MACHINA (May 13, 2014), <https://lexmachina.com/2014/05/patent-litigation-review>, archived at <http://perma.cc/L2J2-E6TP>.

academics studying the patent system. Ultimately, Congress should require district courts to assign cases randomly among the district's judges, perhaps in conjunction with tightened venue requirements for patent cases. While most districts already employ randomized patent case assignment, some districts have used nonrandom assignment to either attract or repel patent filers. Requiring random assignment would not wholly eliminate court competition in patent cases, but it would remove one of the primary means by which courts seek to attract litigants to their courtrooms.