Professors' Letter Supporting Venue Reform

July 12, 2016

The Hon. Bob Goodlatte, Chairman
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The Hon. Charles Grassley, Chairman
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Chairmen Goodlatte and Grassley and Ranking Members Conyers and Leahy:

The undersigned patent law academics and economics experts write to express our support for patent venue reform. Changes to the venue rules are necessary and urgent to address the significant problem of forum shopping in patent litigation cases.

As Colleen Chien and Michael Risch recently wrote for the Washington Post, "[t]he staggering concentration of patent cases in just a few federal district courts is bad for the patent system."[1] It is imperative that Congress address patent venue reform to return basic fairness, rationality, and balance to patent law. Specifically, venue reform that treats plaintiffs and defendants equally by requiring a substantive connection to the venue on the part of at least one party is critical to ensure fairness and uniformity in patent law.

As a result of current venue rules, though there are 94 federal judicial districts, a single district is home to nearly half of all patent cases. Of the 5,819 patent cases filed in 2015, nearly half—2,541 cases—were filed in the Eastern District of Texas,[2] and 95% of those cases were filed by non-practicing entities (NPEs).[3] And the Eastern District of Texas's percentage of patent cases has been steadily increasing over the last several years, rising from 11% in 2008 to 44% in 2015.[4] By comparison, the Northern District of California, home of Silicon Valley, saw only 228 patent cases filed in 2015.[5]

A single judge in the Eastern District of Texas had 1,686 of the patent cases filed assigned to his docket in 2015—in other words, a single judge handled two-thirds of the patent cases in that district, and nearly one-third of all patent cases nationwide. If all of those cases were to go to trial, that single judge would have to complete 4 to 5 trials every day of the year (including weekends)—not counting any time for motions or other hearings. The burden of this overwhelming number of cases leads, unsurprisingly, to a high reversal rate on appeal. The United States Court of Appeals for the Federal Circuit affirmed only 39% of the decisions from

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[1] Colleen Chien and Michael Risch, *A Patent Reform We Can All Agree On*, Wash. Post, (June 3, 2016, 3:07pm), https://www.washingtonpost.com/news/in-theory/wp/2015/11/20/why-do-patent-lawyers-like-to-file-in-texas/.
[2] Data from Lex Machina, https://law.lexmachina.com (analysis as of June 7, 2016).
[3] Joe Mullin, *Trolls made 2015 one of the biggest years ever for patent lawsuits*, arstechnica (Jan. 5, 2015), *available at* http://arstechnica.com/tech-policy/2016/01/despite-law-changes-2015-saw-a-heap-of-patent-troll-lawsuits.
[4] DocketNavigator Analytics, *New Patent Cases Report*, www.docketnavigator.com (report run June 2, 2016).
[5] Lex Machina, *Patent Litigation Year in Review 2015*, at 5 (Mar. 2016), *available at* https://lexmachina.com/media/press/2015-patent-litigation-year-in-review-report/.

the Eastern District in 2015.[6]

One reason for the disproportionate number of patent filings in the Eastern District of Texas is that the district employs procedural rules and practices that attract plaintiffs, including by delaying or denying the ability of defendants to obtain summary judgment to terminate meritless cases early.[7] For example, the district requires parties seeking summary judgment in patent cases to first seek permission before filing any summary judgment motion, the effect of which is to delay and deter early resolution of cases.[8]

While parties can seek transfer out of the district, some NPEs have opened offices in the district simply for the purpose of bolstering their arguments to stay in their preferred venue. The average grant of transfer in this venue took over a year (490 days), and the average denial of a transfer motion took 340 days, meaning that even cases that are ultimately transferred remain pending in the district for nearly a year.[9] Local discovery rules permit discovery to go forward even while a motion for transfer is pending, so even successfully moving to transfer only partially relieves the expense of litigating in a distant venue and the burden on the court.

The disproportionate number of patent plaintiffs—and NPEs in particular—bringing cases in a single venue ultimately results in wasted judicial resources, as more of those cases are overturned on appeal. For accused infringers, the costs of innovation are increased when they have little or no connection to the venue and are forced to litigate from a distance. The harm caused by abuse of the system and the resulting loss of trust in the uniformity and justness of the U.S. patent law system is unmeasurable.

This type of dynamic is bad for patent law, and bad for United States innovation. It is thus critical that Congress act now to pass targeted patent venue reform.

Sincerely,

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[6] Ryan Davis, *EDTX Judges' Love of Patent Trials Fuels High Reversal Rate*, Law360.com (Mar. 8, 2016), *available at* http://www.law360.com/articles/767955/edtx-judges-love-of-patent-trials-fuels-high-reversal-rate.

[7] Daniel Klerman and Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 252-53 (Jan. 2016) ("Eastern District judges are particularly hostile to summary judgment in patent cases. Patent litigators, but not other litigants, are required to seek permission before filing summary judgment motions . . . and are prohibited from moving for summary judgment if permission is denied.")

[8] *See, e.g.*, Judge Rodney Gilstrap, Sample Docket Control Order - Patent, http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22244.

[9] Lex Machina, *Patent Litigation Year in Review 2015*, 10 (Mar. 2016), available at https://lexmachina.com/media/press/2015-patent-litigation-year-in-review-report.

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