SHOULD PATENT JURISDICTION BE REMOVED FROM THE JURISDICTION OF THE FEDERAL CIRCUIT AND RETURNED TO REGIONAL COURTS OF APPEAL?

REPORTS OF THE

COMMITTEE ON PATENTS

AND

COMMITTEE ON FEDERAL COURTS

JULY, 2015

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INTRODUCTION

In 1982, Congress enacted the Federal Courts Improvement Act of 1982, which created the Court of Appeals for the Federal Circuit. Congress granted the Federal Circuit jurisdiction over patent appeals, among others, to create uniformity and certainty in patent jurisprudence. Since then, the Federal Circuit has been a frequent topic of commentary and debate in the academic literature. Two subcommittees of the New York City Bar Association-the Patents Committee and the Federal Courts Committee-have each prepared a report summarizing the literature and presenting their respective views regarding the Federal Circuit.

The Patents Committee's report concludes that the Federal Circuit has fulfilled its mandate of fostering uniformity and certainty in the administration of patent law. The Patents Committee concludes that the Federal Circuit should maintain exclusive jurisdiction over patent appeals.

The Federal Courts Committee's report concludes that the Federal Circuit has failed to bring about uniformity in patent jurisprudence and has imposed an increasing burden on the United States Supreme Court's docket. The Federal Courts Committee's report recommends that patent jurisdiction be returned to the regional courts of appeal.

The New York City Bar Association endorses neither of these reports. Rather, the Association presents both reports in tandem to foster the debate on this important topic.

NEW YORK CITY BAR ASSOCIATION

COMMITTEE ON FEDERAL COURTS

PATENT JURISDICTION SHOULD BE RETURNED TO REGIONAL COURTS OF APPEAL

JULY, 2015

INTRODUCTION

The Court of Appeals for the Federal Circuit has always been a center of controversy, and the controversy has intensified in recent years. As the only significant "specialized" federal Court of Appeals, the Federal Circuit was an experiment in an appellate system that overwhelmingly favors a generalist bench. To many, that experiment has failed. And in the last decade, the United States Supreme Court has joined the fray by overturning a spate of Federal Circuit decisions.

Yet, even among the staunchest critics, there is no broad consensus on what the Federal Circuit is doing wrong. The literature on this subject is immense, diffuse and contradictory. Numerous reforms have been proposed—ranging from abolishing the Federal Circuit to leaving the Circuit essentially intact—without any momentum developing around a single proposal.

The purpose of this report is twofold. First, we endeavor to provide a framework for the debate concerning the Federal Circuit's patent jurisprudence by culling the main critiques from the voluminous literature and summarizing the proposed reforms. Our goal is to focus the debate, in the hopes of moving past the seemingly endless discussion toward meaningful reform.

Second, having framed the issues in this way, we propose that jurisdiction over patent appeals be returned to the regional courts of appeal. The Federal Circuit was instituted to achieve two purposes: (1) to create a uniform patent law, and (2) to help mitigate the Supreme Court's caseload. More than three decades into its existence, the Federal Circuit has failed to meet these objectives. Among other problems, the Federal Circuit's judges appear to have become entrenched in their idiosyncratic viewpoints, which has prevented the court from establishing the uniform patent jurisprudence that Congress had intended. The regional courts of appeal, and not the Federal Circuit, offer the best chance at achieving a coherent patent jurisprudence. The generalist judges of these courts have increased their technological savvy and familiarity with intellectual property law, and there is no compelling reason to continue to exclude the patent laws from mainstream jurisprudence.

BACKGROUND

Prior to the creation of the Federal Circuit, no single court had jurisdiction over patent appeals. Appeals from the U.S. Patent and Trademark Office's ("PTO") adjudication of

patent applications were heard by the Court of Customs and Patent Appeals ("CCPA"), whereas the regional federal circuit courts had jurisdiction over claims of patent infringement filed in federal district courts.[1] Under this regime, there was "a notorious difference between the standards applied by the Patent Office and by the [regional circuit] courts."[2] There was also diversity in patent jurisprudence among the regional circuits.[3] The conventional wisdom at the time was that this diversity led to forum shopping.[4]

In 1982, Congress responded to these perceived problems by enacting the Federal Courts Improvement Act of 1982 (the "FCIA"), which created the Federal Circuit.[5] The "central purpose" of the Act was to "reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law."[6] Congress hoped to achieve this objective by consolidating patent appeals in the Federal Circuit. Congress believed that the Federal Circuit, being "[a] single court of appeals for patent cases . . . [would] promote certainty where it [was] lacking to a significant degree and [would] reduce, if not eliminate, the forum shopping that" was said to exist at the time.[7]

In addition, the Supreme Court's docket was considered too swollen to address the continuing disagreements among the regional circuits and the CCPA on patent issues.[8] Congress believed the Federal Circuit would relieve the caseload burdens of the Supreme Court and the other appellate courts.

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1 *See* Christopher A. Cotropia, *Determining Uniformity within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 Loy. L.A. L. Rev. 801, 804-05 (2010).

2 *Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966).

3 *See* Lee Petherbridge, *Patent Law Uniformity?*, 22 Harv. J.L. & Tech. 421, 422-23 (2009) (citing S. Rep. No. 97-275 (1981), *reprinted at* 1982 U.S.C.C.A.N. 11, 15-16)); Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1, 6-7 (1989); Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change, chaired by Senator Roman Hruska ("Hruska Commission"), 67 F.R.D 195, 220, 369-71 (June 20, 1975).

4 *See, e.g.*, Hruska Commission, 67 F.R.D at 220, 370; Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 Geo. L.J. 1437, 1448 (2012) (collecting authorities); Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. Rev. 505, 507 (2013). Some have questioned this conventional wisdom, and concluded that "forum shopping was not a problem." Cecil D. Quillen, *Innovation and the U.S. Patent System*, 1 Va. L. & Bus. Rev. 207, 228 (2006). Professors Craig Nard and John Duffy contend that "[t]here was . . . no empirical support for the creation of the Federal Circuit." Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. 1619, 1625 (2007).

5 Pub. L. No. 97-164, Stat. 25; Dreyfuss, *supra* note 3, at 7.

6 H.R. Rep. No. 97-312, at 23.

7 *Id.* at 22; *see also* S. Rep. No. 97-2975, *reprinted at* 1982 U.S.C.C.A.N. 11, 15-16 ("The establishment of the court of appeals for the Federal Circuit also provides a forum that will increase doctrinal stability in the field of patent law."); Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 Geo. Mason U. L. Rev. 513, 513-19 (1992).

8 S. Rep. No. 97-2975, *reprinted at* 1982 U.S.C.C.A.N. 11, 13 ("The Supreme Court now appears to be operating at—or close to—full capacity; therefore, in the future the Court cannot be expected to provide much more guidance in [patent] issues than it now does."); *accord* Newman, *supra* note 7, at 513, 516; Hruska Commission, 67 F.R.D at 220, 371.

Congress therefore gave the Federal Circuit jurisdiction over: (i) cases "arising under" the patent laws; (ii) appeals from decisions of the PTO's Patent Trial and Appeal Board; and (iii) appeals from investigations by the International Trade Commission into the importation of devices that allegedly infringed patents.[9]

In response to the concern expressed by FCIA's opponents that "entrusting a single group of judges" with patent jurisdiction might give rise to a "narrow perspective" and "tunnel vision" in the Federal Circuit, Congress granted the Federal Circuit jurisdiction over certain non-patent cases, many of which involve claims against the federal government.[10] The Court's non-patent jurisdiction includes, *inter alia*, appeals from the U.S. Court of Federal Claims, the U.S. Court of International Trade, the Merit Systems Protections Board, and findings on questions of law of the Secretary of Commerce relating to importation of scientific and technological material.[11]

Patent appeals comprise approximately 40% of the Federal Circuit's docket.[12]

CRITIQUING THE FEDERAL CIRCUIT

The Federal Circuit's patent jurisprudence has provoked extensive commentary, much of it critical of the Federal Circuit. The participants in this debate include scholars[13], judges[14], industry participants,[15] economists[16], and federal agencies[17], among others. The

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9 28 U.S.C. §§ 1295(a)(1), (a)(4)(A), (a)(6).

10 Newman, *supra* note ,7 at 520 ("The design of the new court to include a wide range of commercial litigation reflected the general concern about 'specialized' courts . . . as narrow judges bring a narrow perspective to a narrow field of law."); Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 Am. U. L. Rev. 581, 593 (1992).

11 28 U.S.C. §§ 1295(a)(2)-(3), (5), (7)-(12); 1295(b)-(c).

12 Gugliuzza, *supra* note 4, at 1439.

13 *See, e.g.*, R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Suceeding? An Empirical Assessment of Judicial Performance*, 152 U. Pa. L. Rev. 1105 (2004); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035 (2003).

14 *See, e.g.*, Hon. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, Sept. 26, 2013; *A Panel Discussion: Claim Construction from the Perspective of District Judges*, 54 Case W. Res. L. Rev. 671, 672 (2004).

15 *See, e.g.*, Quillen, *supra* note 4.

16 *See, e.g.*, Robert M. Hunt, *Nonobviousness and the Incentive to Innovate: An Economic Analysis of Intellectual Property* (Fed. Reserve Bank of Philadelphia, Working Paper No. 99-3, 1999).

17 *See, e.g.*, Sec'y's Advisory Comm. on Genetics, Health & Soc'y, Gene Patents and Licensing Practices and Their Impact on Patient Access to Genetic Tests, 63-71 (2010), *available at* http://oba.od.nih.gov/oba/sacghs/reports/SACGHS_patents_report_2010.pdf; U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, 5, 18 (2007), available at http://https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf; Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003), available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

Supreme Court has also upped its scrutiny of the Federal Circuit, as chronicled by Professor Rochelle Dreyfuss:

> In the first fifteen years of the Federal Circuit's existence, the Supreme Court largely left the court—or, more generally, patent jurisprudence—alone. It heard only eight cases involving patent issues, four on purely procedural questions. In the next half of the circuit's life, however, the Court stepped up its review considerably. It considered twenty-eight patent cases, nineteen on substantive patent law questions. Significantly, in over 80% of the cases considered, the Supreme Court reversed, vacated, modified, or otherwise seriously questioned the Federal Circuit's approach.[18]

This trend continued following the conclusion of Professor Dreyfuss' study in 2013.[19] All told, since 2004, the Supreme Court has reversed the Federal Circuit 71% of the time, which exceeds the rate of reversal for most other circuits.[20] More telling are the statistics showing how frequently the Federal Circuit is reversed compared to the size of its docket. The Federal Circuit has one of the smallest dockets among the circuit courts, as measured by the number of appeals filed, appeals pending and appeals decided. Yet a disproportionate number of decisions both reviewed and reversed by the Supreme Court originate with the Federal Circuit. Since 2004, taking account of docket size, the Supreme Court has reversed a greater percentage of Federal Circuit decisions than decisions by any other circuit.[21] Furthermore, although patents comprise only 40% of the Federal Circuit's docket, most of these reversals have focused on the Federal Circuit's patent jurisprudence.

With certain notable exceptions[22], most commentators believe that some type of reform is needed at the Federal Circuit.

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18 Dreyfuss, *supra* note 4, at 509-10.

19 *See Limelight Networks, Inc. v. Akamai Tech., Inc.*, 134 S. Ct. 2111 (2014) (reversing Federal Circuit and holding that a defendant is not liable for infringement if it did not itself commit all of the infringing conduct); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014) (rejecting Federal Circuit standard for definiteness of a patent); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (rejecting Federal Circuit test for fee-shifting in patent case); *Highmark Inc. v. Allcare Health Mgmt Sys., Inc.*, 134 S. Ct. 1744 (2014) (limiting Federal Circuit's authority to alter district court's determination on fee shifting); *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843 (2014) (reversing Federal Circuit decision that licensee has burden of persuasion in declaratory judgment action against patentee).

20 *See* http://www.scotusblog.com/reference/stat-pack/.

21 *Id.*; http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2014/12/31-0; http://www.cafc.uscourts.gov/the-court/statistics.html.

22 *See, e.g.*, Rochelle C. Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 Am. U. L. Rev. 787, 790 (2010) (stating that "from most perspectives" the Federal Circuit "has been a raging success," and that the "patent industries and the patent bar" have approved of its work); Edward Reines, *In Defense of the Federal Circuit* (Oct. 7, 2013), *available at* http://www.patentdocs.org/2013/10/in-defense-of-the-federal-circuit-a-response-to-judge-wood.html (prominent member of the patent bar opining that "the likelihood is that the court has struck about the right balance" between uniformity and diversity in its patent jurisprudence).

Yet, that is where the consensus ends. There is no agreement on precisely what ails the Federal Circuit or what the cure should be. Perhaps because the criticism is so wide-ranging, no impetus for reform has developed around a proposal.

To help make sense of this complex debate, we have summarized below the main critiques of the Federal Circuit found in the literature.

1. Uniformity

A. Lack of Uniformity

Many conclude that the Federal Circuit has not met its primary objective—creating a uniform body of patent law. Indeed, Chief Justice Roberts recently noted that he is "not sure [the Federal Circuit] is succeeding in bringing about uniformity."[23] Other federal judges agree.[24] When asked about the difficulty anticipating what the Federal Circuit will do, U.S. District Judge Marsha J. Pechman colorfully opined that "you might as well throw darts."[25] Other commentators concur that "the Federal Circuit actually lacks uniformity in its thought on legal issues."[26]

How could it be that patent jurisprudence—which emanates from a single court of appeals—lacks uniformity? The most plausible explanation is that for Federal Circuit judges, who are exposed to a narrower subject matter than generalist judges, "the repeated exposure to the same subject matter results in more diverse viewpoints. The deeper judges get into a particular subject, the more likely they are to develop their own opinions."[27] The more entrenched the judges' positions, the more difficult it is for them to reach consensus, and the more likely it is that the outcome of an appeal will turn on the composition of the deciding panel of judges.[28] Thus, the "bar of the [Federal Circuit] often complains that each judge holds independent views, creating too much panel-to-panel variability."[29]

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23 *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, No. 12-1163 (U.S.), Transcript of oral argument held Feb. 26, 2014 at 25:24-26:1.

24 Wood, *supra* note 14, at 5; *Panel Discussion*, *supra* note 14, at 672.

25 David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 Mich. L. Rev. 223, 226 n.7 (2008).

26 Cotropia, *supra* note 1, at 825; *accord, e.g.*, R. Polk Wagner & Lee Petherbridge, *Did Phillips Change Anything? Empirical Analysis of the Federal Circuit's Claim Construction Jurisprudence*, (2011).

27 Cotropia, *supra* note 1, at 820.

28 This entrenchment is arguably reflected in the dissent rate in the Federal Circuit's patent cases, which is more than twice the rate seen in other circuits. *Id*. at 815-16; *but see* Jeffrey A. Lefstin, *The Measure of the Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 Hastings L.J. 1025, 1072 (2007) (arguing that dissent rate in claim construction cases is similar to that seen in non-patent contract interpretation cases).

29 Reines, *supra* note 22; *see also* Petherbridge, *supra* note 3, at 429, 440, 465 (concluding that Federal Circuit decisions are "judge dependent"); *Panel Discussion*, *supra* note 14, at 678 (U.S. District Judge Ronald M. Whyte stating that "[c]laim construction, to some extent, is panel driven"); *but see* Nard &

Perhaps the foremost example of the Federal Circuit's unpredictability is its claim construction jurisprudence. "Construing" a patent's claims—*i.e.*, determining the scope of a patent right—is the touchstone of an infringement analysis and is often dispositive of infringement or invalidity claims.[30] Empirical studies of patent litigation have shown that a significant percentage of district court claim constructions are upset by the Federal Circuit on appeal.[31] In explaining the high reversal rate, many point to the "significant split" in the approach to claim construction within the Federal Circuit, which has resulted in a failure "to develop a fully coherent, consistent jurisprudence of claim construction."[32] At a symposium moderated by then-District Judge Kathleen O'Malley, she opined that the Federal Circuit's claim construction jurisprudence "ebbs and flows, it lurches forward only to reverse course . . . [S]ometimes we think that the only thing that really is predictable in this area of the law is that we district judges will likely get it wrong, or at least that the Federal Circuit will say we got it wrong."[33] The high reversal rate in turn discourages settlement of patent cases, because even if litigants think the district judge's claim construction is well-reasoned, there is always a significant chance that the Federal Circuit will disagree.[34]

Commentators have identified other areas of Federal Circuit precedent that are similarly "inconsistent and chaotic," such as enablement and the doctrine of equivalents.[35]

B. Too Much Uniformity

Duffy, *supra* note 4, at 1627 n.38 ("The charge of panel dependency remains a controversial one" (collecting competing authorities)).

30 *See, e.g.*, *Phillips v. AWH*, 415 F.3d 1303 (1995); *Inpro II Licensing, S.A.R.L. v. T-Mobile USA, Inc.*, 450 F.3d 1350, 1351 (Fed. Cir. 2006).

31 Lefstin, *supra* note 28, at 1026.

32 R. Polk Wagner & Lee Petherbridge, *Did Phillips Change Anything? Empirical Analysis of the Federal Circuit's Claim Construction Jurisprudence*, at 9 (2011); *accord* Wood, *supra* note 14, at 5 ("[F]or all the talk of 'uniformity,' the Federal Circuit itself has had great difficulty settling on a methodological approach for interpreting claims.").

33 *Panel Discussion*, *supra* note 14, at 672, 678 ("[P]art of the problem is that, just when you feel like you know the rules, along comes that case that does not seem to follow those rules."); *see also* Dreyfuss, *supra* note 4, at 519 ("[T]he outcome of Federal Circuit review has been unpredictable . . .Not only is it difficult for inventors and businesses to predict the scope of a claim, it is also hard for judges—including district court judges with substantial experience in patent law—to anticipate the Federal Circuit's interpretation."); Joseph S. Miller, *Enhancing Patent Disclosure for Faithful Claim Construction*, 9 Lewis & Clark L. Rev. 177 (2005) ("Claim construction jurisprudence is in disarray . . . And the muddled mix of issues the Federal Circuit framed for en banc review in the *Phillips* case suggests that the court cannot reach consensus on what the central questions are, much less on how to answer them.").

34 *Panel Discussion*, *supra* note 14, 683.

35 Kevin Emerson Collins, *Enabling After-Arising Technology*, 34 J. Corp. L. 1083, 1087-88 (2009) (addressing enablement jurisprudence); Robert W. Unikel & Douglas M. Eveleigh, *Protecting Inventors, Not Fortune Tellers: The Available Patent Protection for After-Developed Technologies*, 34 AIPLA Q.J. 81, 99 (2006) (same); Lee Petherbridge, *supra* note 3, at 429, 472 (doctrine of equivalents jurisprudence tends to "'wobble' around a nucleus of standards").

Not all critics agree that Federal Circuit jurisprudence lacks uniformity. To some, the opposite is true—"the Federal Circuit creates *too much* uniformity in patent law."[36] In their view, because all Federal Circuit judges are located in Washington, D.C., focus mainly on a narrow subject matter, repeatedly hear from the same attorneys, and are (at least theoretically) bound by *stare decisis*, Federal Circuit doctrine has become "entrenche[d]."[37] Likewise, certain commentators contend that any lack of uniformity should be viewed positively, insofar as it reveals an "active debate" among judges that will optimize jurisprudence.[38]

2. Insularity

An old proverb, applied in this context, suggests that if all judges have is the hammer of patent law, every problem will begin to look like a nail. The judges might, in other words, begin to see patents as the only incentive to innovate, and lose sight of all else.[39] This theme is recurrent in scholarship criticizing the Federal Circuit for over-emphasizing the importance of patents and patent law, and is manifested in several critiques: (1) a bias at the Federal Circuit in favor of patentability; (2) failure to consider non-patent law; (3) lack of commercial sophistication; and (4) refusal to follow Supreme Court precedent.

A. Pro-Patent Bias

Prior to the advent of the Federal Circuit, high standards for patentability prevailed in the United States. The Federal Circuit immediately lowered the standards for patentability upon its formation in 1982.[40] A common criticism of the Federal Circuit is that it has set the bar for patentability too low. Critics charge that increased patentability prompts innovators to obtain more patents, leading to more litigation and less certainty regarding whether conduct is infringing—all of which increases the cost of innovation.[41] Indeed, many of the Supreme Court's recent decisions on patent law either limit patentability or expand defenses to

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36 Cotropia, *supra* note 1, at 806 (emphasis supplied).

37 *Id*. at 807; *accord, e.g.*, John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. Rev. 657, 661 (2009) ("[C]oncentration of appellate review in the Federal Circuit is a significant structural concern."); Nard & Duffy, *supra* note 4, at 1645.

38 Golden, *supra* note 37, at 663; Newman, *supra* note 7, at 528 ("The differences of opinion among the judges of the Federal Circuit are, in microcosm, the 'percolation' that scholars feared would be lost by a national court at the circuit level.").

39 Dreyfuss, *supra* note 4, at 506; Glynn S. Lunney, Jr., *E-Commerce and Equivalence: Defining the Proper Scope of Internet Patents*, 7 Mich. Telecomm. & Tech. L. Rev. 363, 370 (2001).

40 Quillen, *supra* note 4, at 210-12; Lunney, *supra* note 39, at 370; *but see* Golden, *supra* note 37, at 660 ("Even assuming that a 'patent court' would predictably be biased toward lax enforcement of patentability requirements rather than their strict enforcement, the Federal Circuit's jurisprudence contains numerous doctrinal choices that defy this prediction.").

41 Quillen, *supra* note 4, at 219-25; *see also* Charles Duan, *A Five Part Plan for Patent Reform*, at 1.2 (May 1, 2014) ("Patents are not the only stimulus for invention and innovation . . . [N]on-patent incentives should be celebrated, and not weakened by overbroad protection of patents.").

infringement.[42] Observers posit that the Supreme Court "appears worried [about] whether the Federal Circuit overvalues patents . . ."[43]

B. Failure to Consider Other Areas of the Law

The Supreme Court has also faulted the Federal Circuit for adopting rules that deviate from the norm. For example, in *eBay, Inc. v. MercExchange, L.L.C.*, the Court rejected the Federal Circuit's liberal test for obtaining injunctive relief in favor of the "traditional test" used in other circuits.[44] Similarly, in *MedImmune, Inc. v. Genetech, Inc.*, the Court rejected the Federal Circuit's unique definition of a "case or controversy," and held that the traditional definition of that term applies to patent cases.[45]

C. Lack of Commercial Sophistication

Some critics charge that the Federal Circuit's lack of meaningful exposure to non-patent cases has "severed" the Court "from economic reality."[46] The concern is that by losing sight of the broader commercial context in which patented technologies operate, it is impossible for the judges to appreciate the ramifications of their patent jurisprudence. According to Professors Nard and Duffy, "there is a growing sense among court watchers and patent players that the Federal Circuit has fallen out of rhythm with some of the technological communities its decisions affect because the court has retreated into its own legal formalisms at the expense of gaining a good understanding of industrial and technological needs."[47] They posit that "[t]he end result is a growing skepticism about the court's ability to experiment successfully, to adapt its jurisprudence to changing scientific norms, and to develop a common law that accurately reflects the patent system's varied role in fostering technological innovation."[48]

D. Resistance to the Supreme Court's Guidance

The Federal Circuit has also been accused of ignoring Supreme Court precedent. Professor Lucas Osborn examined the Federal Circuit's application of the recent Supreme Court

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42 *See, e.g., Limelight Networks, Inc. v. Akamai Tech., Inc.*, 134 S. Ct. 2111 (2014) (limiting patentability); *Assoc. for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (same); *Quanta Computer, Inc. v. LG Elec., Inc.*, 553 U.S. 617 (2008) (expanding defense); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193 (2005) (same).

43 Dreyfuss, *supra* note 4, at 514; *see generally* Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, 106 Mich. L. Rev. First Impressions 28 (2007), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2206&context=articles ("The increasing propensity of the Supreme Court to grant review in patent cases suggests that it is concerned about how good a job the Federal Circuit is doing.").

44 547 U.S. 388, 390 (2006).

45 549 U.S. 118, 126-27 (2007).

46 Gugliuzza, *supra* note 4, at 1442. Although the Federal Circuit has a substantial non-patent docket, that docket is somewhat limited in scope, mainly consisting of lawsuits involving the federal government.

47 Nard & Duffy, *supra* note 4, at 1644.

48 *Id*. at 1647-48.

decisional law criticizing the Federal Circuit, and concluded that while the Circuit paid lip service to those decisions, it did not always incorporate their reasoning.[49] Critics argue that "because the Federal Circuit is more specialized than the Supreme Court, its judges can become intellectually complacent (some might call it arrogant) about whose resolution is correct . . . [T]he Federal Circuit is [thus] inclined to ignore Supreme Court pronouncements on technological issues the Federal Circuit considers uniquely within its competence." [50]

3. Rules-Based Decision-Making

Some commentators suggest that the Federal Circuit is a "formalistic" court, meaning that it prefers bright-line rules to loose standards.[51] This approach, like the Circuit's approach to patentability, has come under fire from the Supreme Court, which has repeatedly rejected the rigid rules established by the Federal Circuit.[52] Professor Dreyfuss observed that the Supreme Court "deals with patent law in the same way it deals with other fields: it articulates norms and policies, but rarely lays down specific rules. Instead, it leaves implementation to the lower courts. But with only one appellate court to refashion the law, and with that court the one whose decision was (often unfavorably) reviewed, the outcomes can leave much to be desired."[53]

4. Absence of Percolation

The regional circuits are not bound by each other's rulings, and instead may reconsider questions that have already been decided by another circuit. The parallel decision-making of the regional circuits tends to correct erroneous rulings, and any disagreements that persist will signal to the Supreme Court that its attention is warranted.[54] This self-correcting mechanism—often referred to as "percolation" through the regional circuits—does not exist in the Federal Circuit.[55] Chief Judge Diane Wood of the Seventh Circuit Court of Appeals characterized the problem as follows:

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49 Lucas S. Osborn, *Instrumentalism at the Federal Circuit*, 56 St. Louis U. L.J. 419, 422 (2012) (concluding that the Federal Circuit "writes as if [its] rule-oriented tests follow inevitably from controlling [Supreme Court] precedent, when in fact it appears that policy motives, not precedent, dictate the outcomes"); *see also* Gene Quinn, Chief Judge Rader Says KSR Didn't Change Anything, I Disagree, IP Watchdog (Oct. 6, 2011), http:// www.ipwatchdog.com/2011/10/06/chief-judge-rader-says-ksr-didnt-change-anything-i-disagree/id=19603/.

50 Dreyfuss, *supra* note 4, at 526, 539.

51 *See* Peter Lee, *Patent Law and the Two Cultures*, 120 Yale L.J. 2, 27 (2010); John R. Thomas, *Formalism at the Federal Circuit*, 52 Am. U. L. Rev. 771, 778 (2003).

52 *See, e.g.*, *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Bilski v. Kappos*, 130 S. Ct. 3218, 3227 (2010); *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 415, 419, 421-22, 428 (2007); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 32 (1997).

53 Dreyfuss, *supra* note 4, at 508; *but see* David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication*, 46 Conn. L. Rev. 415 (2013) (arguing that the Federal Circuit is not overly formalistic).

54 Cecil D. Quillen, *Response Essay: Rethinking Federal Circuit Jurisdiction—A Short Comment*, 100 Geo. L. J. Online 23, 24 (2012).

55 *See, e.g.*, Nard & Duffy, *supra* note 4, at 1646.

> Speaking from my own experience, I can assure you that circuit splits and disagreements with colleagues force judges to sharpen their writing, push them to defend their positions, and from time to time persuade them that someone else's perspective is preferable. This process of testing and experimentation is lost when uniformity is privileged above all other values.[56]

It is therefore "common[ly] argu[ed]" that "the Federal Circuit's exclusive jurisdiction leads to poor percolation of legal ideas" and "less experimentation with legal principles."[57]

REFORM PROPOSALS

These diverse critiques have given rise to an equally diverse array of proposals for reform. Key proposals are summarized below:

Restore Patent Jurisdiction to the Regional Circuits. Some argue that the Federal Circuit's exclusive jurisdiction over patent appeals has proven unworkable, and that patent jurisdiction should be returned to the regional courts of appeal.[58] For example, this approach is favored by Cecil Quillen, former general counsel of Eastman Kodak. Mr. Quillen advocates as follows: "Restoration of patent infringement appeals to the regular circuit courts of appeals would return patent law to the legal mainstream and place patent appeal decisions with appellate courts that regularly deal with economic issues affecting innovation. An additional virtue of restoring appeals in patent infringement cases to the regular circuit courts of appeals would be that such appeals would then be heard by appellate courts that are less likely than the Federal Circuit to substitute their views for those of the Supreme Court."[59]

Let Appellants Choose Between the Federal Circuit and the Regional Circuits. In light of her concerns about the absence of percolation at the Federal Circuit, Judge Wood proposes to eliminate the Federal Circuit's exclusive jurisdiction over patent appeals. Instead, under Judge Wood's proposal, "parties would have a choice: they could take their appeals to the Federal Circuit, thereby benefiting from that court's long experience in the field, or they could file in the regional circuit in which their claim was first filed."[60] Judge Wood states that "[s]uch a regime would have a number of advantages. Many of the benefits that accrue from specialization will remain. It is possible—maybe even likely—that the Federal Circuit would still play a leading role in shaping patent law . . . But, on the positive side, the change would provide those 'wide open spaces' for development of patent law, allowing new ideas to percolate and grow."[61]

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56 Wood, *supra* note 14, at 6.

57 Gugliuzza, *supra* note 4, at 1442 n.16 (citing authorities).

58 *See, e.g.*, Quillen, *supra* note 4, at 233; Timothy B. Lee, *Specialist Patent Courts Are Part of the Problem*, Forbes.com (Aug. 19, 2011).

59 Cecil D. Quillen, *Response Essay: Rethinking Federal Circuit Jurisdiction—A Short Comment*, 100 Geo. L. J. Online 23, 24 n.5 (2012)

60 Wood, *supra* note 14, at 9.

61 *Id*. at 9-10.

Shared Jurisdiction Between the Federal Circuit and Other Circuits. Professors Nard and Duffy, motivated by concerns similar to those expressed by Judge Wood, propose something different. Instead of giving litigants a choice, patent jurisdiction would be split between three circuits by random assignment. Specifically, Nard and Duffy "propose that, in addition to the Federal Circuit, at least one extant circuit court should be allowed to hear district court appeals relating to patent law. In addition, both the Federal Circuit and United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) should have jurisdiction over appeals from the PTO, thereby injecting into the patent system an additional judicial voice with broad expertise in administrative law and regulatory notice."[62]

Percolation Through Other Institutions. Professor Dreyfuss shares the foregoing commentators' concern about percolation, but believes that opening up patent law to the regional circuit courts would re-introduce the same disunity among circuits that was observed prior to the formation of the Federal Circuit.[63] She therefore identifies alternative means of achieving percolation. Specifically, she identifies three other institutions that regularly address patent issues—the PTO, the district courts, and foreign patent courts—that might duplicate the "percolation experience." For example, at the district court level, a pilot program is fostering patent specialization and expertise among district court judges. Dreyfuss suggests that specialized district court judges could provide a counterpoint that would hone the Federal Circuit's jurisprudence.[64]

En Banc Review by Generalist Judges. Professor Arti Rai has proposed "regular en banc review of Federal Circuit decisions by a panel of judges drawn from circuits other than the Federal Circuit."[65] According to Rai, "[e]n banc review could play a role not only in diffusing ideological content but also in tempering the Federal Circuit's formalist inclinations" and encouraging the Federal Circuit "to write opinions that [are] persuasive from a policy standpoint."[66]

Add Commercial Cases to the Federal Circuit's Docket. Professor Paul Gugliuzza proposes funneling a cross-section of the regional circuit's commercial cases to the Federal Circuit, to combat the perceived lack of commercial sophistication among Federal Circuit judges. Gugliuzza opines: "This broadening of the court's docket to include commercial cases would potentially have the generalizing influence on patent law that commentators have found lacking under the current jurisdictional structure."[67]

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62 Nard & Duffy, *supra* note 4, at 1625.

63 Dreyfuss, *supra* note 4, at 531-40.

64 *Id*.

65 Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 Colum. L. Rev. 1035, 1124-25 (2003).

66 *Id*. at 1125.

67 Gugliuzza, *supra* note 4, at 1499.

Invite More Generalists to Sit with the Federal Circuit. Some have also suggested that the Federal Circuit could "generalize its bench" by having more visiting judges—and particularly those with diverse backgrounds—sit with the court. Though the Federal Circuit currently uses visiting judges, it does so with less frequency than most regional circuits.[68]

Minimize Supreme Court Review. Professor John Golden opines that the Supreme Court's repeated reversal of the Federal Circuit has created bad policy and introduced an unwanted lay influence on matters requiring the Federal Circuit's expertise. Golden explains his position as follows: "The [Supreme] Court's primary role in [patent law] should be to combat undesirable ossification of legal doctrine. Consequently, the Court should generally confine its review of substantive patent law to situations where there is a substantial risk that Federal Circuit precedent has frozen legal doctrine either too quickly or for too long."[69]

RETURN PATENT JURISDICTION TO THE REGIONAL CIRCUITS

In determining whether and to what extent the Federal Circuit should be reformed, it is necessary to reexamine the original justification for the Federal Circuit. The Circuit was created to (1) unify patent law, and (2) help relieve the burden on Supreme Court's docket. Unfortunately, in our view, the Federal Circuit has not achieved these objectives. The Federal Circuit has failed to bring about uniformity in patent jurisprudence. Though some disagree, we believe that the evidence of lack of uniformity—and particularly the views of the patent bar, the widespread complaints of district judges, and our own review of the caselaw—is compelling. And rather than relieving any burden on the Supreme Court, the Federal Circuit in recent years has been imposing a burden on the Supreme Court's docket. As the overall number of cases decided by the Supreme Court has shrunk, the Court has been required to address an increasing number of appeals from the Federal Circuit. As a result, patent law now represents a significant portion of the Court's overall docket.

Observers have advanced a number of solutions short of a wholesale removal of the Federal Circuit's patent jurisdiction. While we applaud the thoughtfulness of these suggestions, we believe they are inadequate. Many of these proposals aim to expose the Federal Circuit to opposing viewpoints in the hopes that the percolation process will sharpen its jurisprudence. For example, Judge Wood and professors Nard and Duffy seek to achieve percolation by expanding patent jurisdiction to include some of the regional circuits. Professor Dreyfuss has a similar goal in proposing to enhance the Federal Circuit's exposure to the PTO, specialized district courts, and foreign patent courts. But the lack of uniformity and confusion at the Federal Circuit arises from the entrenchment of the individual judges' viewpoints, which in turn is a result of their long term focus on one area of the law. That focus is unlikely to diminish under any of these proposals. Indeed, if, as the evidence suggests, the Federal Circuit is reluctant to implement the Supreme Court's guidance, it is unlikely to be moved by the ideas of other courts.

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[68] *Id.* at 1473.

[69] Golden, *supra* note 37, at 662.

Other proposals would also fail to achieve the requisite uniformity. For example, creating a generalist panel to review Federal Circuit decisions en banc would be similar to the current regime, in which the generalist Supreme Court judges conduct the review. Although the proposed en banc panel might review more cases than the Supreme Court currently does, the Federal Circuit would be even less inclined to follow its lead. Likewise, Professor Gugliuzza's proposal to add commercial cases to the Federal Circuit's docket would not resolve the entrenched positions staked out by the judges on patent law issues, which are responsible for the court's disunity. Finally, we respectfully disagree with Professor Golden's suggestion that the Supreme Court should minimize its review of patent cases. The lack of uniformity in patent jurisprudence results from the nature of the Federal Circuit as an institution, and not from the Supreme Court's influence on it.

Therefore, in our view, the only feasible solution is to return patent jurisdiction to the regional courts of appeal.[70] This alone will achieve the goal of optimizing patent jurisprudence through percolation. And it will resolve the substantial dissonance between the Federal Circuit and the Supreme Court regarding the role of patents in society, as the regional circuits are far more likely to harmonize their view of patent law with the Supreme Court's.

In addition, by returning patent law to "mainstream" jurisprudence, our proposal reflects the continuing integration of patents into mainstream society. The importance of technology to everyday life in this country has grown exponentially in the past thirty years. For example, in 1984, 8.2% of American households owned a computer; by 2012 that figure had grown to 78.9%, with nearly as many households enjoying wireless and/or broadband internet access.[71] 90% of American adults own a cellphone, and 58% own a smartphone.[72] Much of our lives—including our paychecks, medical records, bill payments, workplaces, communications, photographs, music and other modes of entertainment—has been digitized. Technology companies are an increasing presence in the Fortune 500,[73] their market capitalization is now well into the trillions, and more Americans are employed in the technology sector than ever before.[74] We have undergone a technological revolution since the advent of the Federal Circuit, and the patents embodying that technology no longer belong in an esoteric court.

Some have expressed reservations about returning to the prior regime of regional patent jurisdiction, but we do not view those concerns as significant.

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70 A more modest alternative to this proposal would allow the Federal Circuit to retain jurisdiction over patent appeals from the PTO. This alternative has the potential advantage of preserving the Federal Circuit's patent expertise without sacrificing the benefits of percolation.

71 http://www.census.gov/hhes/computer/files/2012/Computer_Use_Infographic_FINAL.pdf; http://www.gallup.com/poll/166745/americans-tech-tastes-change-times.aspx; http://www.nielsen.com/us/en/insights/reports/2012/cross-platform-report-q3-2011.html.

72 http://www.pewinternet.org/data-trend/mobile/cell-phone-and-smartphone-ownership-demographics/.

73 http://venturebeat.com/2013/05/06/41-of-the-fortune-500-companies-are-tech-companies-and-here-they-are/.

74 http://www.pewresearch.org/fact-tank/2014/03/12/how-u-s-tech-sector-jobs-have-grown-changed-in-15-years/.

First, there is a concern about a return to forum shopping in response to variations between the regional circuits. First, it is not clear that forum shopping was ever such a significant problem. Second, to the extent that forum shopping may have existed, it did not disappear with the advent of the Federal Circuit. Instead, it now occurs among the district courts.[75] Moreover, it is hard to see why patent law should be distinguished from the multitude of other nationwide laws interpreted by the regional circuits. In our view, there is no compelling reason why patent law should be treated differently. Litigants may use multidistrict litigation to mitigate the risk of inconsistent adjudications between circuits.[76] And insofar as circuit splits may arise, the Supreme Court has demonstrated that it has both the time and the inclination to address them.

Second, we reject the outdated notion that patent law is simply too complex or esoteric for generalist judges. As Chief Judge Wood observed, "[j]udges on regional courts of appeals are accustomed to working with [patent] principles when they arise in copyright or trade secret cases, matters in which a patent is involved only as an asset under a license, and cases in which the patent issue arises only as a defense to the plaintiff's claim, just to name a few. In short, there are many ways in which the different forms of IP are all part of one real-world transaction. So why we should treat patent law differently is a puzzle."[77] Moreover, under the FCIA, district judges have continued to adjudicate issues arising under the patent laws, and it is impossible to make the argument that the law is too complex for circuit judges but not too complex for district judges.

Generalist judges routinely address complex issues, and patent issues are no more complicated than the issues circuit judges routinely address in other contexts. For example, complex areas of the law such as tax, bankruptcy and CERCLA are already entrusted to the regional circuits. And the district courts can take additional measures to facilitate the adjudication of patent claims and streamline the issues presented on appeal. For example, the adoption of local patent rules in the district courts that do not already have them can help streamline cases and crystalize issues early in the case. These rules can and should require technological tutorials to ensure that the district courts are educated on the technologies at issue. District courts can also be encouraged to appoint special masters to provide expertise and guidance in patent cases.

Third, we believe the transition of patent jurisdiction from the Federal Circuit to the regional circuits can be administered in a way that will avoid substantial disruption and uncertainty. Specifically, Federal Circuit precedent should remain binding unless and until it is overruled by a regional circuit. As a practical matter, the regional circuits are unlikely to radically change the existing law. They are more likely to clarify existing precedent where clarity is needed.

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75 Dreyfuss, *supra* note 4, at 520 (citing Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, 80 Geo. Wash. L. Rev. 1065, 1073-74 (2012)).

76 Wood, *supra* note 14, at 9-10.

77 *Id*. at 6.

Finally, although there may be constitutional limitations to removing Federal Circuit judges from office[78], our proposal would not require anything so drastic. Patent appeals comprise a minority of the Federal Circuit's docket. All or most of the Federal Circuit's judges could remain on the Circuit to address the remainder of the cases arising under its jurisdiction. Congress could also expand its jurisdiction to include other appropriate cases. And if all else failed, some of the Court's judges could be reassigned to other Circuits in need of assistance.

[78] *See* U.S. Const. ar. III § 1 (Article III judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). In addition, we do not believe that the Constitution precludes Congress from divesting the Federal Circuit of its patent jurisdiction. *See, e.g., Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (Congress divested the federal courts of jurisdiction to hear immigration claim); *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1109 (3d Cir. 1995) ("[I]f Congress wishes to confer exclusive jurisdiction on a federal administrative agency and divest the district courts of that jurisdiction, it would be within its constitutional power to do so . . .").

NEW YORK CITY BAR ASSOCIATION

COMMITTEE ON PATENT LAW

WHY THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT SHOULD RETAIN EXCLUSIVE JURISDICTION OVER PATENT APPEALS

JULY, 2015

Most scholars and practitioners agree that the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") has performed successfully since its establishment in 1982. The court has accomplished the goals that it was instituted to achieve, promoting uniformity and certainty in the adjudication of patent disputes and reducing the rampant forum shopping that existed in the pre-CAFC era. Since the CAFC's founding, our economy has seen tremendous growth in its technology sectors, shifting from an industrial to an information age in which intellectual property and intangibles represent the majority of value in our markets. With rapid scientific advancement, patent law must likewise keep pace and continually grapple with the nearly existential question of what constitutes an invention. The CAFC is uniquely positioned to handle these doctrinal challenges with consolidation of patent appeals allowing the court to hear patent cases far more frequently than would otherwise be possible if appellate jurisdiction was distributed among the regional circuits. Retaining exclusive jurisdiction over patent appeals provides the CAFC with the opportunity to advance its expertise in patent law, develop more nuanced approaches to legal issues, and refine the law more rapidly. As intellectual property law has become increasingly important to our economy, patent jurisprudence has received greater attention and the CAFC has faced increased scrutiny. Critiques of the CAFC have pointed to its high reversal rate at the Supreme Court and of lower court decisions, the rigidity of rules-based decision making at the CAFC, lack of percolation through sister circuits, insularity, tunnel vision, and lack of sophistication of the jurists at the CAFC. Many of these criticisms are unfounded, are based on faulty assumptions, and lack empirical support. While there is room to improve our patent system and some suggested reforms endeavor to do so, proposals to return jurisdiction over patent appeals to the regional circuit courts fail to address how the patent system will be improved by such reorganization. This report reviews and rebuts those criticisms and concludes that exclusive jurisdiction over patent appeals should remain with the CAFC.

I. The CAFC was Established After Extensive Study and Consideration of the Federal Appellate System to Resolve Significant Problems Plaguing Patent Litigation

In 1982, Congress created the United States Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") with the passage of the Federal Courts Improvement Act ("FCIA"), granting the CAFC exclusive jurisdiction over patent appeals among other areas of jurisdiction.[1] The idea of a single court with nationwide jurisdiction over patent appeals was not new. As early as 1887, legislation to create a national court for patent appeals was introduced in

[1] Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

Congress.[2] Between 1891 and 1921, at least one bill advocating the same was introduced during every Congress, totaling twenty-six bills, and during the period between 1936 and 1959, seven such more bills were introduced.[3] Interest in reforming the federal appellate system regained momentum in the early 1970s and was the subject of study and debate for over a decade leading up to the passage of FCIA. [4]

The Federal Circuit was established "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law."[5] In 1972, Congress created the Commission on Revision of the Appellate System ("Hruska Commission") to study ways to improve the federal appellate system. The Hruska Commission issued their report to Congress in 1975. Although not in favor of creating a specialized patent appeals court, the commission found that patent law presented an area of particular disuniformity marked by inter-circuit conflicts and forum shopping. Additionally, the report indicated that due to an overburdened docket, the Supreme Court could not perform a monitoring function in this area.[6] In 1978, the Justice Department issued a memorandum from the Office for the Improvements in the Administration of Justice ("OIAJ") proposing merging the Court of Claims and the Court of Customs and Patent Appeals to form a new court of appeals that would be equal to a regional court of appeals but with jurisdiction determined by subject matter rather than geography.[7] The proposal by OIAJ addressed one of the main concerns of the opponents of a specialized patent appeals court, that over-specialization would promote tunnel-vision and bias, by giving the court multiple sources of jurisdiction.[8] In 1979, President Carter announced his support of the creation of the CAFC before Congress. The 95th, 96th, and 97th Congresses held extensive hearings and considered several bills aimed at creation of the CAFC. Testimony was heard from distinguished jurists, patent practitioners, and representatives of industry, including the Attorney General and the Chief Judges of both predecessor courts to the CAFC.[9] The testimony overwhelmingly confirmed the Hruska Commission's finding that patent cases were inconsistently adjudicated.[10]

Prior to the establishment of the CAFC, inconsistent adjudication and forum shopping was indeed a major problem in patent litigation.[11] Empirical studies evince a great disparity in

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[2] Paul M. Janicke, *The Federal Circuit and Antitrust: To Be Or Not To Be: The Long Gestation of The U.S. Court of Appeals for The Federal Circuit (1887-1982)*, 69 ANTITRUST L.J. 645, at 1-3 (2002).
[3] *Id*. at 3-6.
[4] George G. Gordon et al., A.B.A. SEC. ANTITRUST L., *Report on the United States Court of Appeals for the Federal Circuit*, at 7-8 (2002), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_federalcircuitreport.authcheckdam.pdf.
[5] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 23 (1981).
[6] Gordon et al., *supra* note 4, at 13; Janicke, *supra* note 2, at 7-8.
[7] Gordon et al., *supra* note 4, at 15; Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).
[8] Janicke, *supra* note 2, at 10; Meador, *supra* note 7, at 587, 588.
[9] Janicke, *supra* note 2, at 10-14; STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 27-30 (1981); Gordon et al., *supra* note 4, at 15-17.
[10] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 21 (1981).
[11] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 20 (1981); Thomas H. Case & Scott R. Miller, Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301, 320 (1984); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the*

the rates at which patents were held invalid across the regional circuits and that forum shopping on the basis of validity rates was prevalent in the pre-CAFC era. [12] The Fifth, Sixth, and Seventh Circuits were generally regarded as more favorable to patentees, holding challenged patents valid approximately half of the time. [13] Most other appellate courts had much lower validity rates with the Eighth and Ninth Circuits having a particular reputation for holding patents invalid.[14] For instance, one study found that during the period from 1953 to 1978, the Eighth Circuit held 88% of litigated patents invalid, while another study found that from 1945-1958, the Eighth Circuit upheld only 6% of the patents that came before it.[15] During the pre-CAFC era, a single patent could also be held valid in one circuit and invalid in another.[16] Despite conflicting decisions on patent law issues among the circuits, the Supreme Court rarely reviewed patent cases, granting certiorari in only one patent case on the grounds of conflict among the circuits in the 35 year period leading up to creation of the CAFC.[17]

As a result of the lack of predictability in the patent adjudication system, the cost of patent litigation soared due to forum shopping and patents were devalued. [18] Since the validity of a patent depended heavily on where the matter was litigated, decisions to invest in patents were precarious and business planning was impeded. In the late 1970s, a domestic policy review initiated by the Carter administration identified the disuniformity in patent law as a potential impediment to continuing American dominance of the global technology industry.[19] The desire to strengthen the technology sectors of the American economy was therefore another important motivation behind the establishment of the CAFC.

II. The CAFC has Achieved the Goals it was Established to Accomplish

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Eastern District of Texas as a Preeminent Forum for Patent Litigation, 9 YALE J.L. & TECH. 193, 221 (2007); Adam Shartzer, *Patent Litigation 101: Empirical Support for the Patent Pilot Program's Solution to Increase Judicial Experience in Patent Law*, 18 FED. CIR. B.J. 191, 213 (2008); STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 20 (1981) ("The new Court of Appeals for the Federal Circuit will . . . eliminate the expensive, time-consuming and unseemly forum-shopping that characterizes litigation in the field.")

[12] Scott E. Atkinson et al., *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411, 411 (2009); Janicke, *supra* note 2, at 2.

[13] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 21 (1981); Atkinson et al., *supra* note 12, at 415; Janicke, *supra* note 2, at 2.

[14] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 21 (1981); Atkinson et al., *supra* note 12, at 415 (citing Robert L. Harmon, *Seven New Rules of Thumb: How the Federal Circuit Has Changed the Way Patent Lawyers Advise Clients*, 14 GEO. MASON U. L. REV. 573, 574 (1992) ("there was no such thing as a valid patent in the Eighth Circuit")); Janicke, *supra* note 2, at 2.

[15] Janicke, *supra* note 2, at 2.

[16] *Id*.

[17] Case & Miller, *supra* note 11, at 319 n.111 (citing 127 CONG. REC. H8391 (daily ed. Nov. 17, 1981) (statement of Rep. Railsback)).

[18] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 20 (1981); Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 787-88 (2008) [hereinafter Dreyfuss, *The Federal Circuit Comes of Age*]; Atkinson et al., *supra* note 12, at 415.

[19] Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1454 (2012).

Many scholars have written about the success of the Federal Circuit in achieving the goals it was established to accomplish.[20] The Federal Circuit has effectively eliminated forum shopping at the appellate level, reduced litigation costs, and increased uniformity of the law and predictability of outcomes in patent cases.[21] Several empirical studies support the view that the CAFC has achieved greater uniformity and predictability in patent law.[22] A 2007 study by Lee Petherbridge and R. Polk Wagner found that doctrinal developments from the CAFC had led to predictability of outcomes with regard to nonobviousness.[23] Their analysis of cases from 1990-2005, found that the Federal Circuit affirmed a lower court's determination of obviousness 65% of the time and reversed a judgment only 22.9% of the time.[24] Petherbridge and Wagner posit that this high rate of affirmance means that the law is stable and predictable because courts are able to apply the law and arrive at the correct outcome approximately three times for every instance they are reversed. A 2007 study by Jeffrey Lefstin similarly demonstrated that indeterminacy regarding infringement, validity, and inequitable conduct declined at the CAFC.[25]

Congress has also demonstrated its confidence in the Federal Circuit by expanding the court's jurisdiction over time.[26] Recently, with the passage of the Leahy-Smith America Invents Act, Congress gave the Federal Circuit exclusive jurisdiction over any civil action in which a

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[20] H. R. REP. NO. 109-407, at 4 (2006) ("Opinions will always vary, but the Federal Circuit is probably viewed by most practitioners, academics, and others as having largely complied with its mandate to bring stability, uniformity, and predictability to patent law."); Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 788; Rochelle C. Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787 (2010); Donald R. Dunner, *A Retrospective of the Federal Circuit's First 25 Years*, 17 FED. CIR. B.J. 127 (2008); Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 545 (2003); The Honorable Richard Linn, *The Future Role of the United States Court of Appeals for the Federal Circuit Now that it has Turned 21*, 53 AM. U.L. REV. 731, 732, 737 (2004); Shartzer, *supra* note 11, at 191 ("Since the creation of the United States Court of Appeals for the Federal Circuit in the early 1980's, a lingering debate amongst members of the patent bar existed over whether the court has achieved its goals of increasing decisional uniformity and reducing forum shopping in patent cases. Twenty-five years after its creation, most commentators agree that the Federal Circuit has accomplished these goals."); Rochelle C. Dreyfuss, *Abolishing Exclusive Jurisdiction in the Federal Circuit: A Response to Judge Wood*, 13 CHI.-KENT J. INTELL. PROP. 327, 334 (2014)[hereinafter Dreyfuss, *Response to Judge Wood*].

[21] Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 788-89; Atkinson et al., *supra* note 12.

[22] Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 793-94.

[23] Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051 (2007); Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 793-94.

[24] *Id*.

[25] Jeffrey A. Lefstin, *The Measure of Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L.J. 1025 (2007); *see also* Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 793-94. Lefstin also analyzed statistics relating to claim construction decisions and found that the rate of indeterminacy is similar to that of contract interpretation at the regional circuits. Jeffrey A. Lefstin, *Claim Construction, Appeal, and the Predictability of Interpretive Regimes*, 61 U. MIAMI L. REV. 1033, 1074, 1092 (2007). He also found no evidence that claim construction is less determinate than other aspects of patent law. *Id*. An analysis by Judge Rader also determined that Federal Circuit law is no less stable than regional circuit law when the number of times an issue is decided is taken into account. Randall R. Rader, *The United States Court of Appeals for the Federal Circuit: The Promise and Perils of a Court of Limited Jurisdiction*, 5 MARQ. INTELL. PROP. L. REV. 1, 4 (2001).

[26] Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 823 (citing Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 102(b), 106 Stat. 4506, 4506 (1992) (abolishing the Temporary Emergency Court of Appeals and giving its jurisdiction to the Federal Circuit)).

compulsory counterclaim arises under patent law.[27] This legislative action reverses the rule of *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, which held that the Court of Appeals for Federal Circuit lacked jurisdiction over cases in which the complaint did not allege a claim under patent law, but the answer contained a counterclaim under patent law.[28] Congress changed this rule to promote uniformity in patent adjudication.[29]

III. The CAFC Does Not Have a "Pro-Patent Bias"

The Federal Circuit has not weakened the standards for patentability or developed doctrines systematically biased in favor of patentability. The CAFC has held patents valid at roughly the same rate as some circuits in the pre-CAFC era.[30] Various studies place the validity rate at the CAFC somewhere between 45% and 58% depending on the period studied.[31] A 2007 study by Professors Lee Petherbridge and R. Polk Wagner that analyzed empirical data collected from judicial decisions spanning over fifteen years determined that the Federal Circuit found patents obvious about 58% of the time.[32] On the matter of infringement, the CAFC has decided for the accused infringer roughly three or more times as often than for patent owners.[33] A study comparing decisions of CAFC judges originally appointed to the CAFC's predecessor courts with later appointments to the CAFC found that the validity rate of both groups was quite similar.[34] The study also found that there was no significant difference in the voting patterns of CAFC judges with and without patent experience prior to their appointment with regard to validity decisions, suggesting that patent expertise does not lead to biased outcomes.[35]

IV. CAFC is Not a "Specialized Court," Having Jurisdiction Rivaling the Other Courts of Appeal

The CAFC is a court of wide subject matter jurisdiction with a "breadth of jurisdiction that rivals in its variety that of the regional courts of appeal."[36] Congress purposefully created a

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[27] Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 343 (citing 28 U.S.C. § 1295(a)(1) (2012)).
[28] Holmes Group, Inc. v. Vornado Air Circulation Sys., 535 U.S. 826, 122 S. Ct. 1889 (2002).
[29] Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 343.
[30] Janicke, *supra* note 2, at 19.
[31] *Id*. (citing Robert Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 805, 821 (1988) ("[T]he percentage of patents being held valid five years after the court's creation was about 45 percent, and this level has not changed much in more recent data."); John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AM. INTELL. PROP. L. ASS'N Q.J. 185, 205 (1998) (finding, for the period 1989-1996, 54% of litigated patents valid and 46% invalid); Donald Dunner et al., *A Statistical Look at the Federal Circuit's Patent Decisions: 1982-1994*, 5 FED. CIR. B.J. 151, 154 (1995) (where the issue was obviousness, overall validity holdings were about 58%)).
[32] Petherbridge & Wagner, *supra* note 23, at 2055. Cases employing a teaching, suggestion, or motivation (TSM) analysis resulting in a determination of obviousness 52.4% of the time and there was no observable effect of the TSM analysis on the rate of affirmance of the lower court's decision. *Id*.
[33] Janicke, *supra* note 2, at 19.
[34] John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745, 754 (2000).
[35] *Id*.
[36] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 19 (1981).

court with a broad jurisdictional mandate and expressly rejected the characterization of the court as "specialized."[37] In the eyes of the Senate, this jurisdictional grant was "sufficiently mixed to prevent any special interests from dominating" the court.[38] In addition to the jurisdiction of both its predecessor courts, the CAFC was granted several new sources of jurisdiction.[39] The CAFC's jurisdiction spans a variety of subject areas, including international trade, government contracts, patents, certain money claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims. Appeals to the court come from all federal district courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. The court also takes appeals of certain administrative agencies' decisions, including the United States Merit Systems Protection Board, the Boards of Contract Appeals, the Patent Trial and Appeal Board, and the Trademark Trial and Appeal Board. Decisions of the United States International Trade Commission, the Office of Compliance (an independent agency in the legislative branch), the Government Accountability Office Personnel Appeals Board, and the Department of Justice Bureau of Justice Assistance also are reviewed by the court. The CAFC's docket consists of administrative law cases (55%), intellectual property cases (31%), and cases involving money damages against the United States government (11%).[40] Patent cases account for less than a third of the court's docket. The judiciary of the CAFC decides a wide array of cases, allowing it to maintain a well-balanced perspective of the legal landscape. Thus, the argument that the CAFC is plagued by insularity and therefore lacks commercial sophistication is simply unfounded.

The diversity of views and backgrounds of judges at the CAFC has also increased in recent years. While the first two generations of jurists on the Federal Circuit came from the predecessor courts or legislative circles, the recent appointments to the court have backgrounds significantly more varied coming from federal district court, the Court of International Trade, the USPTO, the Department of Justice, private practice, and academia.[41] Since 2010, six of the twelve seats on the court have turned over.[42] As the court evolves and the composition of the bench changes, several criticisms of the CAFC may naturally be addressed, such as the alleged insularity, rigidity, and rules-based decision making of the court. For instance, a common critique of the CAFC is that the court's approach is too formalistic, favoring strict rules and avoiding discussion of policy considerations. Many have noted that this approach is likely rooted in the origins of the court. Upon its founding, the court's first priority was to fulfill its mandate to establish uniformity in patent law.[43] The court therefore focused on making the law easy to follow and implement at the trial court level. As these goals are achieved, the CAFC may concentrate its attention on refining the law. The new judicial appointments may already be

[37] STAFF OF H.R. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 19 (1981); A. Leo Levin, *Adding Appellate Capacity To The Federal System: A National Court Of Appeals Or An Inter-Circuit Tribunal?*, 39 WASH. & LEE L. REV. 1, 14 (1982), http://scholarlycommons.law.wlu.edu/wlulr/vol39/iss1/2; Meador, *supra* note 7, at 587, 588.
[38] Gordon et al., *supra* note 4 at 19 (citing S. REP. NO. 97-275 at 6 (1981).
[39] STAFF OF H. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON H.R. 4482, at 19 (1981).
[40] http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html.
[41] http://www.cafc.uscourts.gov/judges; Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 345-46.
[42] Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 828; Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 345-46 (2014).
[43] *Id*.

increasing the rate of dissent and debate at the CAFC.[44] As new judges are appointed to the court, it is critical that they have a deep knowledge of patent law and the intellectual rigor and motivation to tackle the doctrinal challenges of the field, as well as a broad perspective on the law and economy.

V. Sufficient Percolating Forces Exist Within the Patent System

Another argument of those who would like to strip the CAFC of exclusive jurisdiction over patent appeals is the loss of percolation of the law through the regional circuits. The theory of percolation, similar to Justice Louis Brandeis's laboratories of democracy conception of federalism, posits that the law is improved by having various courts pass on an issue thereby giving the Supreme Court a choice of tested solutions when presented with an inter-circuit conflict.[45] Although the opportunity for percolation *per se* may not exist at the appellate level in the current patent system, the law may be refined through several institutions such as the federal district courts, Congress, the Solicitor General, the Patent and Trademark Office, the Supreme Court, and at the Federal Circuit through dissent and *en banc* review.[46] Additionally, debate on patent policy and jurisprudence is alive and well within the bar, the academic community, and the business and technology sectors. Within the Federal Circuit, dissents critiquing existing doctrine are frequent.[47] The percentage of dissents is the second highest in the federal system, with dissents being filed in roughly a quarter of precedential patent decisions.[48] The Federal Circuit also decides more cases *en banc* than any other circuit.[49] Amicus briefs play an important role in encouraging the court to reexamine particular issues, increasing the chance of *en banc* review being granted from two percent in petitions without amicus briefing to twelve percent.[50] With centralization of patent appeals in the Federal Circuit, it is much easier for amici to track cases worthy of rehearing and the Federal Circuit's liberal grant policy for amicus briefs allows for consideration of diverse viewpoints and legal arguments.[51] Foreign patent courts may also offer diverse approaches, with institutions such as the Trilateral, a consortium of the European Patent Office, the Japanese Patent Office, and the PTO, engaging in comparative studies of patent laws and a significant body of literature in this area.[52]

VI. Intellectual Property Adjudication is Moving toward Specialization in the U.S. & Abroad

The unique and complex nature of patent law is widely recognized. In the United States, federal district courts have adopted patent-specific rules[53] evidencing the continued recognition by both the judiciary and the bar that patent litigation requires a specialized approach. The

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[44] Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 517 (2013) [hereinafter Dreyfuss, *Percolation*].
[45] Rader, *supra* note 25, at 3.
[46] Paul R. Gugliuzza, *Saving the Federal Circuit*, 13 CHI.-KENT J. INTELL. PROP. 350, 351 (2014).
[47] *Id*.
[48] Dreyfuss, *Percolation*, supra note 44, at 517; Gugliuzza (2014), *supra* note 46, at 357.
[49] Ryan Vacca, *Acting Like an Administrative Agency: The Federal Circuit En Banc*, 76 MO. L. REV. 733, 738 (2011).
[50] Gugliuzza (2014), *supra* note 46, at 354.
[51] Dreyfuss, *Percolation*, supra note 44, at 516.
[52] *Id*. at 538.
[53] Robert Gunther & Omar Khan, *Patent Pilot Program, One Year Later*, N.Y.L.J., Jan. 7, 2013. Twelve of the fourteen districts participating in the Patent Pilot Program are included among these jurisdictions. *Id*.

adoption of such rules began in the Northern District of California where, due to its proximity to Silicon Valley, the district court was exposed to a high number of patent cases.[54] In the years that followed, numerous district courts adopted local rules, many of which utilized the original Northern District Patent Local Rules as a template.[55] In districts without such rules, attorneys often propose a schedule modeled after the rules of another district[56] and judges apply the rules of other districts to their patent cases.[57] Local patent rules promote uniformity and increase efficiency by standardizing procedures for claim construction, providing predictable case schedules and discovery practices, regulating the exchange of invalidity and infringement contentions, and avoiding motion practice on these issues.[58] Due to the widespread success of local patent rules, the adoption of federal rules of patent procedure has also been proposed.[59]

Another development aimed at increasing judicial expertise in patent cases at the district courts is the Patent Cases Pilot Program enacted by Congress on January 4, 2011.[60] This program aims to make the resolution of patent issues at the trial level more efficient, predictable, and reliable by concentrating patent cases among designated judges in selected district courts.[61] The program will evaluate whether greater expertise will result in increased judicial efficiency and lower reversal rates in patent cases. In enacting the Pilot Program, Congress noted that most district court judges have little exposure to patent cases and that the complexity of patent litigation and the sophisticated technologies involved present unique challenges to generalist judges.[62] Patent cases account for a disproportionate share of judges' time and effort when a rare patent case is assigned to their docket.[63] Congress also attributed the high reversal rates seen at the Federal Circuit to trial court inexperience and error, citing the Federal Circuit's 35 percent reversal rate of district judges' claim construction rulings as a driver for the Pilot

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[54] Brian Davy & James Ware, *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, 966 (2009).
[55] *Id*.
[56] *See* J. Christopher Carraway, Discovery Issues in Patent Cases, 1 Patent Litigation 2008, Practicing Law Institute Intellectual Property Course Handbook at 465, 471 (2008).
[57] *See* Dennis Crouch, *Revising the Northern District's Local Patent Rules*, PATENTLY-O, Nov. 27, 2006, http://www.patentlyo.com/patent/2006/11/revising_the_no.html.
[58] Gunther & Khan, *supra* note 53.
[59] Davy & Ware, *supra* note 54, at 1016-18.
[60] Pub. L. No. 111-349, 124 STAT. 3674.
[61] H.R. Rep. No. 109-673 (2006). Fourteen districts were selected to participate in the program based on their relatively high number of patent litigation filings or their intention to adopt local rules for patent cases. Jim Singer, *14 District Courts selected for patent pilot program*, IP SPOTLIGHT, June 9, 2011, http://ipspotlight.com/2011/06/09/14-district-courts-selected-for-patent-pilot-program/; Dreyfuss, *Percolation*, *supra* note 44, at 535. Under the program, designated judges volunteer to have patent cases transferred to them from non-participating judges who have declined to hear the case in question. *Id*.
[62] H.R. Rep. No. 109-673 (2006); Sanjeev Bajwa, Comment, *Apple v. Samsung: Is it Time to Change our Patent Trial System?*, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 77, 86 (2014) (On average, a District Court Judge may see a patent case only once every 7 years.); Leychkis, *supra* note 11, at 226 ("In any given year we have a ratio of about one patent trial per ten federal judges. Given the fact that these trials are highly concentrated in a small number of districts, this means that a large number of federal judges do not regularly preside over patent trials.")
[63] H.R. Rep. No. 109-673 (2006).

Program.[64] Scholars advocating for increased patent specialization at the trial court level have also faulted erroneous lower court judgments and inexperience for the Federal Circuit's "rules-based decision making," necessitating stricter guidance and easier to follow rules.[65] The Patent Pilot Program therefore has the potential to result in higher quality opinions not only at the participating district courts but at the Federal Circuit as well, advancing patent jurisprudence at large.

While it remains to be seen whether the Patent Pilot Program will achieve its goals, some studies suggest that experience and expertise do increase decisional accuracy as measured by rates of reversal. An empirical study analyzing the affirmance rate of decisions from the fifteen districts with the most patent filings in the United States found that the likelihood of affirmance rises as more of a judge's patent cases are appealed to the Federal Circuit.[66] Additionally, district judges from jurisdictions with the largest patent dockets were reversed less often than judges from districts with smaller patent dockets.[67] Another study suggests that judges with a science background were less likely to be reversed than judges with no education in the sciences.[68]

Specialized patent courts have been widely accepted abroad. An example is the anticipated Unified Patent Court (UPC) of the European Union. The UPC, if ratified, will create a specialized patent court with exclusive jurisdiction for litigation relating to European patents. Currently, national courts and authorities of the contracting states of the European Patent Convention decide on the infringement and validity of European patents. The member states recognized that in practice, this "gives rise to a number of difficulties when a patent proprietor wishes to enforce a European patent - or when a third party seeks the revocation of a European patent - in several countries: high costs, risk of diverging decisions and lack of legal certainty."[69] Another inevitable consequence is forum shopping, as parties seek to take advantage of differences in national courts' interpretation of European patent law, procedural laws, and in the level of damages awarded.[70] These concerns echo those that were the driving forces behind the creation of the Court of Appeals for the Federal Circuit.

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[64] H.R. Rep. No. 109-673 (2006); Matthew F. Kennelly, *From the Bench, The Patent Cases Pilot Program*, 40 LITIG. 6, 6 (2014). The reversal rate for all U.S. Federal Circuit patent cases between 2000 and 2007 was 21%, while the national average of all U.S. district court decisions was 9%. Bajwa, *supra* note 62, at 100.

[65] Dreyfuss, *The Federal Circuit Comes of Age*, *supra* note 18, at 804 ("One approach is to create specialized trial courts with sufficient expertise to make correct – rather than not clearly erroneous - factual findings. With confidence that the lower courts have the technological capacity to follow its policies, the Federal Circuit would no longer need to straightjacket their decisionmaking.").

[66] Shartzer, *supra* note 11. *But see* David Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008) (finding that reversal rates do not decrease with a judge's experience).

[67] *Id*.

[68] Jeff Becker, *On Creating Specialized Patent District Courts: Why H.R. 34 Does Not Go Far Enough to Address Reversal Rates in District Courts*, 61 SMU L. REV. 1607, 1618 (2008).

[69] http://www.epo.org/law-practice/unitary/patent-court.html

[70] *Id*.; Robert D. Swanson, *Implementing the EU Unified Patent court: Lessons from the Federal Circuit*, Stanford-Vienna Transatlantic Technology Law Forum Working Paper No. 15 (2002), http://www.law.stanford.edu/sites/default/files/child-page/188509/doc/slspublic/swanson_wp15.pdf

Over ninety countries have adopted specialized tribunals for intellectual property cases.[71] The majority of signatories to the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) have established some form of court or tribunal which specializes in intellectual property rights issues.[72] Over a dozen foreign countries have a specialized trial court with exclusive jurisdiction over patent infringement cases.[73] A report by the International Intellectual Property Institute (IIPI) and the USPTO, assessing specialized intellectual property courts throughout the world found a positive correlation between specialized IPR courts and the efficient and effective resolution of IP cases.[74]

VII. Supreme Court Review of Patent Cases

Prior to the establishment of the CAFC, patent jurisprudence suffered from doctrinal instability, which had its origins in decisions of the Supreme Court.[75] As Judge Randall Rader remarked, the Federal Circuit was established to correct the failures of the Supreme Court in establishing a coherent patent jurisprudence.[76] In his view, the Supreme Court had failed to provide an appropriate standard for patentability, calling the invention standard used by the Court "incredibly diaphanous and a 'veritable phantom.'"[77] Judge Howard T. Markey, the first Chief Judge of the Federal Circuit, testified before the Senate Judiciary Committee as to what he saw as the chief problem in patent law – a decision making approach "wherein nonstatutory slogans are employed and grow into mindless decisional rules for all cases."[78] The sloganistic rules he pointed to as examples emanated from the Supreme Court, including the propositions that combinations of old elements are unlikely to be patentable and that, absent a new function, an invention is unpatentable.[79] Many other commentators also pointed to the Supreme Court as the source of problematic patent laws, including Justice Jackson who exclaimed that "the only patent that is valid is one which this Court has not been able to get its hands on."[80]

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[71] Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 329 (citing Rohazar Wati Zuallcobley et al., INT'L INTELL. PROP. INST., STUDY ON SPECIALIZED INTELLECTUAL PROPERTY COURTS (2012), http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf).

[72] Rohazar Wati Zuallcobley et al., INT'L INTELL. PROP. INST., STUDY ON SPECIALIZED INTELLECTUAL PROPERTY COURTS (2012), http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf.

[73] *Id.*; Leychkis, *supra* note 11, at 25 (citing *Improving Federal Court Adjudication of Patent Cases: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 9-10 (2005) (prepared statement of Kimberly A. Moore) (stating that specialized patent trial courts exist in Germany, China, Japan, the United Kingdom, Australia, New Zealand, Singapore, Zimbabwe, Jamaica, Kenya, Thailand, Korea and Turkey). For a discussion of the patent adjudication systems in the United Kingdom, China, and Japan, *see* Shartzer, *supra* note 11, at 200. For another account of Japan and Germany's specialized adjudication of patent cases, *see* Becker, *supra* note 68, at 1622-25. *See also* Bajwa, *supra* note 62, at 95-102 (comparing the patent adjudication systems of Japan, South Korea, the United Kingdom, and Germany with the United States and how differences impacted the outcomes of the *Apple v. Samsung* litigation in these fora).

[74] Zuallcobley et al., *supra* note 72.

[75] Janicke, *supra* note 2, at 12.

[76] Rader, *supra* note 25, at 3.

[77] *Id.*

[78] Janicke, *supra* note 2, at 12.

[79] *Id.*

[80] *Id.* (citing *Jungerson v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949)).

Historically, the Supreme Court has rarely reviewed patent cases.[81] Even rarer are Supreme Court cases dealing with substantive patent law issues in which high technology is central to the inquiry.[82] The review of nonobviousness under 35 U.S.C. § 103 presents an example of the Court's reluctance to deal with these questions. The statutory test for nonobviousness embodied in the 1952 Patent Act replaced the common law doctrine of invention that dated back more than a century to *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851).[83] Despite the fact that nonobviousness was an issue that was confronted frequently in patent litigation, it took fourteen years for the Supreme Court to issue an opinion interpreting § 103.[84] In the Federal Circuit era, the only case in which the court has issued an opinion on whether an invention is nonobvious is *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).[85] The invention at issue in *KSR* did not involve new technology; rather, the case concerned a patent for an electronic gas pedal that was a combination of old elements. The most recent case dealing with nonobviousness prior to *KSR* is *Sakraida v. AG Pro, Inc.*, 425 U.S. 273 (1976), concerning a water flush system to remove cow manure from the floor of a dairy barn, a technology that the Court noted existed since ancient times.[86]

From the creation of the Federal Circuit through 2005, the Supreme Court granted certiorari in only sixteen patent cases.[87] It was not until fourteen years after establishment of the CAFC that the Supreme Court decided a major substantive patent law issue in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).[88] The increased rate of review of patent cases in recent years, coinciding with the appointment of Chief Justice John Roberts to the Court, may reflect a concerted effort by the Court to hear cases that are systemically important rather than to signal disapproval of the Federal Circuit.[89] In today's information age, patents are more economically important and complex than ever before and it should therefore be expected that this area of law receive greater attention. Intangible assets such as intellectual property account for the vast majority of corporate assets.[90] The number of patent applications and patents granted has increased dramatically over the last two decades accompanied by a concomitant rise in patent litigation.[91] The patents today are additionally much more complex than those issued in

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[81] Case & Miller, *supra* note 11, at 319.
[82] Harold C. Wegner, *Federal Circuit Exclusive Appellate Patent Jurisdiction: A Response to Chief Judge Wood*, 13 CHI.-KENT J. INTELL. PROP. 394, 398 (2014).
[83] Wegner, *supra* note 82, at 400.
[84] *Id*. (citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966)).
[85] *Id*. at 399.
[86] *Id*.
[87] Arthur J. Gajarsa & Lawrence P. Cogswell, III, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Foreword: The Federal Circuit and the Supreme Court*, 55 AM. U. L. REV. 821, 822 (2006).
[88] Wegner, *supra* note 82, at 394.
[89] Robert C. Scheinfeld & Parker H. Bagley, *The Roberts Court Takes on Patent Cases*, N.Y.L.J., Sept. 27, 2006; Ronald Mann, *Is the New Economy Driving the Court's Docket?*, SCOTUSblog, Oct. 15, 2012, http://www.scotusblog.com/?p=153842.
[90] H.R. Rep. No. 109-673 (2006) at 4 ("As recently as 1978, intangible assets, such as intellectual property, accounted for 20 percent of corporate assets with the vast majority of value (80 percent) attributed to tangible assets such as facilities and equipment. By 1997, the trend reversed: 73 percent of corporate assets were intangible and only 27 percent were tangible.").
[91] Shartzer, *supra* note 11, at 210; Leychkis, *supra* note 11, at 197-98; Kevin A. Meehan, *Shopping for Expedient, Inexpensive & Predictable Patent Litigation*, 2008 B.C. INTELL. PROP. & TECH. F. 102901, at *1

the past.[92] In addition to having more complex subject matter, such as in new fields of invention like biotechnology and computer software development, today's patent also cite a greater number of prior art references, have more inventors, more claims, and a longer time in prosecution.[93]

Over the past five Supreme Court Terms (October Term 2009-2013), the Court has reviewed twenty two cases from the Federal Circuit, reversing in fourteen cases or 63.6% of the time.[94] During the same period of time, the Supreme Court reversed in 70.2% of cases and eight other Circuits had higher reversal rates than the Federal Circuit.[95] Cases from the Ninth Circuit comprised the greatest portion of the Court's docket and were reversed 74.7% of the time. The Sixth, Eighth, and Eleventh Circuit were each reversed over 80% of the time. In recent years, the Supreme Court has reversed lower courts at a higher rate than at some times in the past, including in the 1980s.[96] The average reversal rate over the past four Terms was 79.5%, whereas in the 1980s, the reversal rate was close to 50% in two different Terms, below 60% in two Terms, and exceeded 70% only once.[97] Criticism of the Federal Circuit based on the high reversal rate at the Supreme Court is therefore unfounded as the reversal rate is below average and is statistically on trend.

However, the decisions of the Roberts court have narrowed the scope of patentability and limited the enforceability of patent rights.[98] Whether the decisions of the Court will ultimately harm the patent system and the economic growth delivered by patents in today's economy is a question of concern.[99] Given the high technology at issue in patent litigation, the Court's reported lack of familiarity with technology is also troubling.[100] The Court's ability to understand technology at issue in patent disputes is critical to resolving questions of patentability such as novelty and nonobviousness. Although skepticism regarding judges' abilities may also be directed to the Federal Circuit, greater experience and expertise in technology can only help the court decide cases accurately.

(2008); U.S. Patent Statistics Chart Calendar Years 1963 – 2013, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm.

[92] John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 79 (2002).

[93] *Id*.

[94] http://www.scotusblog.com/reference/stat-pack/

[95] *Id*. According to my calculations, The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits each had higher reversal rates than the Federal Circuit over this five year period. *See also* Stephen Wermiel, *Scoring the Circuits*, SCOTUSblog, June 22, 2014, http://www.scotusblog.com/2014/06/scotus-for-law-students-sponsored-by-bloomberg-law-scoring-the-circuits/ (presenting statistics from the past four Supreme Court Terms, finding that: the Supreme Court reversed 70.5% of decided cases; the Federal Circuit was reversed 66% of the time; and the reversal rates at the Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits were 68.5%, 71.5%, 87%, 87.5%, 79.5%, and 81%, respectively).

[96] Wermiel, *supra* note 95.

[97] *Id*.

[98] Peter J. Toren, *The Assault on the Patent System*, WASH. BUS. J., Aug. 29, 2014.

[99] See e.g., *id*.

[100] See e.g., Brett Trout, *The United States Supreme Court v. Technology*, BlawgIT, April 20, 2010, http://blawgit.com/2010/04/20/the-united-states-supreme-court-v-technology/ (citing questions asked in oral argument in *In re Bilski* and *City of Ontario v. Quon*, reflecting a lack of understanding of modern technologies such as email, pagers, text messaging, etc.).

Despite the recent attention paid to patent law at the Supreme Court, there is no guarantee that the Court will continue its review of patent cases in the future. Proposals aimed at reforming the patent system by returning jurisdiction to the regional courts of appeal are premised on the assumption that the Supreme Court will resolve conflicts between the circuits when they arise. If the Court does not grant certiorari in these cases, as they did not prior to the creation of the CAFC, the lack of uniformity and forum shopping that existed in the pre-CAFC era is likely to return. Forum shopping in today's economic and legal climate will also likely be worse than it was in the 1970s. Modern industry and the process of invention are geographically dispersed in a way that was not possible in the past, with the internet facilitating collaboration between participants all over the world and product development and manufacturing that can similarly involve many different locations. Today's venue rules could make these actors vulnerable to suit across a wide range of jurisdictions and would likely result in aggressive forum shopping.[101] Arguments that such forum shopping will not ensue because the regional circuits will follow the precedent of the Federal Circuit are self-defeating: if the regional circuits will not craft new approaches to patent law issues, then what is the point of the proposal?

CONCLUSION

The Court of Appeals for the Federal Circuit should maintain exclusive jurisdiction over patent appeals. Most scholars agree that the Federal Circuit has fulfilled its mandate of reducing the lack of uniformity and uncertainty that formerly existed in the administration of patent law. The great success of the CAFC has arguably spurred the creation of specialized intellectual property courts all over the world.[102] While the Federal Circuit's jurisprudence may be the subject of much debate, the desirability of avoiding contradictory substantive law, forum shopping, and inefficiency should be met with near universal agreement. Predictability in patent adjudication is of vital importance to our economy, with innovative businesses reliant on intellectual property laws to protect their investment in research and development. In an age of rapidly developing technology, it is unavoidable that patent law will be forced to adapt at a far quicker pace than other areas of the law. Consolidation of patent appeals in one forum allows the patent law to be refined at an extraordinary pace as the court has the opportunity to revisit issues every few months, rather than every few years. [103] The court's resulting expertise should produce a more nuanced approach than otherwise possible. The CAFC is still a relatively young court. It should be given the time to continue to improve patent jurisprudence. Experimentation, such as the Patent Pilot Program, may result in improvements to the patent system. Further debate and possible reforms should reflect the learnings from the experience of the past and the Federal Circuit thus far, with due consideration to the principles of uniformity and predictability that motivated the formation of the CAFC.

[101] Dreyfuss, *Response to Judge Wood*, *supra* note 20, at 347-48.
[102] *Id*. at 334.
[103] Rader, *supra* note 25, at 9.