AUGUST 17, 2015 | BY DANIEL NAZER

Deep Dive: Why We Need Venue Reform to Restore Fairness to Patent Litigation

Back in 2011, This American Life toured an office building in Marshall, Texas, and found eerie hallways of empty offices that serve as the 'headquarters' of patent trolls. For many, that was the first introduction to the strange world of the Eastern District of Texas, its outsized role in patent litigation and especially its effective support of the patent troll business model. Trolls love the Eastern District for its plaintiff-friendly rules, so they set up paper corporations in the district as an excuse to file suit there. Meanwhile, defendants find themselves dragged to a distant, inconvenient, and expensive forum that often has little or no connection to the dispute.

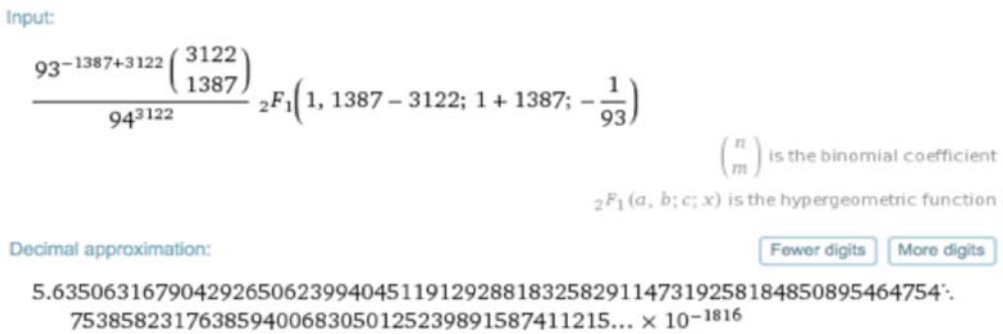
The remote district's role has only increased since 2011 and the latest data reveals that the Eastern District of Texas is headed to a record year. An astonishing 1,387 patent cases were filed there in the first half of 2015. This was 44.4% of all patent cases nationwide. And almost all of this growth is fueled by patent trolls.

Happily, lawmakers have finally moved to restore some balance. The latest version of the Innovation Act in the House includes language that would make it much harder for trolls to file in the Eastern District of Texas. The proposal goes under the decidedly mundane name of "venue reform" but it could actually be crucial to the effort fix our broken patent system.

The Luckiest Court in the Universe

The Eastern District of Texas is a federal court district running along the Texas-Louisiana border. The district covers a largely rural area without much of a technology industry. It is just one of 94 federal district courts. (Some states, like Vermont, have a single federal district, while others, like Texas and California, have as many as four.) If patent cases were distributed evenly among the federal district courts, each one would have received about 33 cases so far this year – a far cry from the 1,387 filings in the Eastern District of Texas.

Accident? We don't think so. In fact, we ran a calculation to see how likely it is that at least 1387 of 3122 patent cases might end up there by chance. This was the result:



This probability is so vanishingly small that you'd be more likely to win the Powerball jackpot 200 times in a row. Obviously, something other than chance is attracting trolls to this remote district.

Now that folks are taking notice, some Eastern District of Texas jurists are feeling a bit defensive. Former Judge Leonard Davis, for example, recently said: "To say the Eastern District is responsible [for the patent troll problem] is to say that the Southern District of Texas is responsible for immigration problems." This is nonsense. The Southern District of Texas gets immigration cases because it sits on the U.S.-Mexico border. There is no equivalent reason for the Eastern District of Texas to be a hotbed of patent litigation. To understand why the district sees so much patent trolling, we need to look deeper.

How We Got Here

The Eastern District of Texas was not always so popular. In 1999, only fourteen patent cases were filed there. By 2003, the number of filings had grown to fifty-five. Ten years later, in 2013, it was 1,495.

This massive rise in litigation followed the appointment of Judge T. John Ward in 1999, and his drive to create local patent rules. Judge Ward's rules, while similar to patent rules in other federal districts, had some additional plaintiff-friendly features such as a compressed discovery schedule and a short timeline to trial. This so-called "rocket docket" attracted patent plaintiffs eager to use the compressed schedule to pressure defendants to settle. For those cases that went to trial, the district got a reputation for huge patent verdicts. As one commentator explained, the Eastern District's "speed, large damage awards, outstanding win-rates, likelihood of getting to trial, and plaintiff-friendly local rules suddenly made [it] the venue of choice for patent plaintiffs."

The explosion in patent litigation promptly led to a burst of new economic activity in East Texas. As the BBC wrote, Marshall is a "sleepy town kept busy with patent cases." The patent litigation boom creates business for hotels, restaurants, trial graphics services, copying, expert witnesses, jury consultants, court-appointed technical advisers, and, of course, lawyers. In other words, patent litigation has become important to the economic health of the communities surrounding the courthouse. But the federal courts don't exist to generate business for a particular region.

Tipping The Scales on Both Procedure and Substance

So why are these plaintiff-friendly rules so important? First, the rules impose particular burdens on defendants. If a patent case proceeds to discovery—the process whereby parties hand over information potentially relevant to the case—it will usually be more expensive in the Eastern District of Texas. This is because the local discovery order in patent cases requires parties to automatically begin producing documents before the other side even requests them. In patent troll cases, this imposes a much higher burden on defendants. Operating companies might be forced to review and disclose millions of documents while shell-company patent trolls tend to have very few documents. Trolls can exploit this imbalance to pressure defendants to settle.

Second, the rules make it harder to eliminate cases early. The Supreme Court's decision in Alice v CLS Bank invalidated many of the low-quality software patents favored by patent trolls. But this only helps defendants if they are able to get a ruling to that effect from the judge overseeing their case. Judges Rodney Gilstrap and Robert Schroeder recently indicated that they would require patent defendants to ask permission before they can file a motion to dismiss raising Alice. This means that defendants in the Eastern District of Texas will more often be forced to go through expensive discovery.

When judges in the Eastern District do issue rulings on challenges raising Alice, their decisions are very different from jurists in other parts of the country. Recent data from Docket Navigator analyzed all challenges under 35 USC § 101 so far this year:

- Nationwide: 71% granted or partially granted; 29% denied (76 decisions)
- Northern District of California: 82% granted or partially granted; 18% denied (11 decisions)
- District of Delaware: 90% granted or partially granted; 10% denied (10 decision)

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Trolling Effects

Ways To Help

- Eastern District of Texas: 27% granted; 73% denied (11 decisions)

While each challenged patent claim is different, the overall trend suggests judges in the Eastern District of Texas are applying Alice in a way that is far more favorable to patent owners.

The Alice decision, and its companion, Octane Fitness v. Icon Health & Fitness gave judges additional tools for quickly dismissing meritless patent cases and holding unscrupulous plaintiffs to account. This means that patent trolls—particularly those that bring weak cases hoping to use the cost of defense to extort a settlement—now need a favorable forum more than ever. Small wonder we've seen a spike in EDTX filings.

We have also written about unfair rules that make it harder for patent defendants to file for summary judgment in the Eastern District of Texas. These rules have a real impact. A recent study found that judges in the Eastern District granted only 18% of motions for summary judgment of invalidity while the national grant rate is 31%. And that statistic, of course, does not include all the summary judgment motions that would have been filed had the defendant been given permission.

Judges in the Eastern District of Texas have also harmed defendants by delaying rulings on motions to transfer (these are motions where the defendant asks for the case to be moved to a more sensible location). Delay prejudices defendants because they are stuck litigating an expensive case in a remote forum while the judge sits on the motion. (The judges' rules make clear that a pending motion to transfer or a motion to dismiss is not grounds to stay discovery in a case). The Federal Circuit recently issued a stern order (PDF) finding that an Eastern District magistrate judge had "arbitrarily refused to consider the merits" of a transfer motion. When that transfer motion was finally considered, it was granted (PDF), but not until after extensive litigation had already occurred, and requiring the parties to pay for a court-appointed technical advisor (PDF). More generally, studies have also found the Eastern District of Texas is reversed by the Federal Circuit at a higher rate compared to other districts.

Venue Reform Can Fix the Mess

It's time for Congress to act. Although the Federal Circuit has overruled some of the Eastern District of Texas' most egregious venue decisions, it has failed to bring basic fairness to where patent cases are litigated. We need new legislation to clarify that patent cases belong in forums with a real connection to the dispute.

Fortunately, Congress is looking at the problem. Representative Darrell Issa recently offered an amendment (PDF) to the Innovation Act that would tighten venue standards in patent cases. On June 11, the House Judiciary Committee approved the amendment. If this bill becomes law, shell company patent trolls will no longer be able to drag out of state operating companies all the way to Eastern Texas.

It's long past time for Congress to bring fairness to where, and how, patent cases are litigated. Contact your representative and tell them to pass the Innovation Act and to ensure that any final bill includes meaningful venue reform.

Patents | Patent Trolls | Innovation

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