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**VENUE REFORM IN PATENT LITIGATION:
TO TRANSFER OR NOT TO TRANSFER**

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ABSTRACT

Issues of venue and forum shopping have always been present in patent litigation, but they recently have attracted the attention not only of practitioners and litigants, but lawmakers as well. This article first examines the perceived problems associated with the current venue rules and suggests that forum shopping is just a symptom of the underlying disparity in the speed, quality, and certainty of the various district courts in resolving patent disputes. Restrictive venue statutes are not capable of solving these underlying problems. This article further analyzes the proposed bills in the 111th Congress, and argues that these bills will not solve the perceived problems, but instead increase the burden imposed on the federal judicial system. Finally, this article provides a new proposal with an emphasis on limiting the application of venue transfer rules, which would increase certainty and fairness in venue selection and improve the overall efficiency of the resolution of patent cases.

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I. INTRODUCTION

The venue statutes limit a plaintiff's choice of forum. The current rule regarding venue in patent litigation is clear and straightforward—for the corporate defendant, proper venue is any district court that has personal jurisdiction.¹ Accordingly, venue is primarily “a matter of choosing a convenient forum.”² This certainly gives a wide margin of discretion to patent holders regarding the choice of venue. Yet there remains a concentration of patent cases in a handful of district courts.

Indeed, issues of venue and forum shopping have always been present in patent litigation. These issues are part of the reason for the establishment of the Court of Appeals for the Federal Circuit.³ However, the practice of forum shopping does not seem to have diminished and recently has attracted the attention of not only practitioners and litigants, but lawmakers as well.

Notably, in the 111th Congress, three bills, H.R. 1260, S. 515, and S. 610, each entitled the Patent Reform Act of 2009, have been introduced which attempt to respond to current concerns about the patent process.⁴ As of the day of this writing, the amended S. 515 has been reported to the Senate.⁵ All bills include detailed and restrictive proposals regarding venue choices.⁶

Notwithstanding the profound effects they would have on patent litigation and the federal judicial system, these provisions have mostly been ignored in the literature with the exception of Rooklidge and Stasio⁷ and Rosenzweig,⁸ who provide criticism regarding similar provisions passed in previous Congressional sessions. These authors have pointed out the unintended consequences that the proposed provisions would bring to litigants and courts due to the rules' subjective and ambiguous nature.⁹ Yet Rooklidge and Stasio do not

¹ 28 U.S.C.A. § 1391 (2006); 28 U.S.C.A. § 1400 (2006).

² *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006).

³ See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 820 (1988) (Stevens and Blackmun, JJ., concurring) (concern about lack of uniformity and forum-shopping led to exclusive jurisdiction in Federal Circuit).

⁴ H.R. 1260, 111th Cong. (1st Sess. 2009); S. 515, 111th Cong. (1st Sess. 2009); S. 610, 111th Cong. (1st Sess. 2009).

⁵ S. 515, 111th Cong. (1st Sess. 2009).

⁶ See sources cited *supra* note 4.

⁷ See William C. Rooklidge & Renée L. Stasio, *Venue in Patent Litigation: The Unintended Consequences of Reform*, 20 INTELL. PROP. & TECH. L.J. 1, 1 n. 3 (2008).

⁸ Sidney A. Rosenzweig, *Patent Venue Reform: Congress Takes Two Steps Back*, 16 PROGRESS & FREEDOM FOUND. 1, 7 (2009), available at <http://www.pff.org/issues-pubs/pops/2009/pop16.4patentvenue.pdf>.

⁹ See *id.* at 8; Rooklidge & Stasio, *supra* note 7, at 1 n. 3.

provide alternative provisions to the bills, while the proposal suggested by Rosenzweig¹⁰ only modestly reduces the ambiguities of the bills' provisions and does not recognize the fundamental issues involved in the venue disputes; thus each fails to provide a comprehensive solution to the problems forum shopping and the proposed bills would cause. The traditional methods of venue restriction would inevitably increase venue related disputes. A solution to the patent venue issues should recognize the real problems of forum shopping and address their incentives.

This article examines the perceived problems associated with the current venue rules and suggests that concerns regarding forum shopping should not be overstated. Forum shopping is just a symptom of the underlying disparity in the speed, quality, and certainty of the various district courts in resolving patent disputes. Restrictive venue statutes are not capable of solving these underlying problems. Any reform regarding patent venue statutes should first clearly articulate the relationship between any perceived concerns relating to venue and forum shopping before the legitimate choice of the plaintiff in choosing a venue based upon proper considerations is sacrificed, such as the prompt resolution of its case, efficiency of the system governing its litigation obligations, and the limited resources of the federal courts.

In addition, this article points out that venue transfer rules that prolong the litigation process and impose a grave burden on the federal courts, constitute the real problems in the patent venue disputes. This article suggests that a comprehensive venue reform should address the problems venue transfer rules have caused.

This article further analyzes the proposed bills in the 111th Congress, and argues that the regulating models utilized in these bills will not solve the perceived problems, but instead increase the burden imposed on the federal judicial system. Finally, by addressing the incentives associated with forum shopping, this article provides an alternative proposal to increase certainty in venue selection and improve the overall efficiency of the resolution of patent cases. This article is the first to suggest the real solution to the venue issue should address the incentives of forum shopping through an amendment to the venue transfer rules. This article recognizes that the traditional methods of regulation would only cause more venue-related disputes. Instead, this article suggests that by providing incentives to litigants with regard to problematic venue transfer rules, it would effectively reduce the occurrence of forum shopping while addressing the overall burden related to venue issues.

¹⁰ Rosenzweig, *supra* note 8, at 16.

II. CURRENT RULES

A. BACKGROUND

In patent infringement cases, venue is governed by a special venue statute, 28 U.S.C. § 1400(b).¹¹ This statute provides that a patent infringement suit may be brought in any judicial district where 1) “the defendant resides” or 2) the defendant has “committed acts of infringement and has a regular and established place of business.”¹² On its face, the venue statute for patent infringement cases is more restrictive than the general venue statute, 28 U.S.C. § 1391(b)–(c), but this was not the intent of Congress in enacting special venue statutes for patent cases.

At the time just before the venue statutes for patent litigation were enacted, the general venue rule was very restrictive. The intent of Congress in enacting patent venue rules was to liberalize the venue choices for patent owners.¹³ Even though the Supreme Court did not fully appreciate the legislative intent in some previous cases,¹⁴ and disputes remain regarding this intent,¹⁵ in a unanimous decision in *Brunette Machine Works v. Kochum Industries*, Justice Marshall noted explicitly that the 1897 statute “was rather less restrictive than the general venue provision then applicable to claims arising under federal law.”¹⁶

Prior to 1988, for venue purposes in patent infringement litigation, a corporation was deemed to reside in its state of incorporation only.¹⁷ Thus, the application of the special venue statute resulted in time-consuming disputes regarding whether a defendant’s

¹¹ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1576-77 (Fed. Cir. 1990).

¹² 28 U.S.C. § 1400(b) (2006); *VE Holding*, 917 F.2d at 1577-78.

¹³ 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3823 (Thomson Reuters, 3d ed. 2007 & Supp. 2009) (noting that “there is ample evidence in the legislative history of the provision that Congress thought that the 1887 general statute did restrict patent infringement actions and that it wished to provide a broader choice of venue for [patent] actions.”).

¹⁴ See *Fourco Glass.*, 353 U.S. at 228 (holding that the general definition of corporate residence does not apply to patent infringement actions); *Stonite Prod. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942) (noting that the patent venue provision, i.e., the Act of 1897, “was a restrictive measure, limiting a prior, broader venue.”). But see WRIGHT ET AL., *supra* note 13, § 3823 (noting that these cases are no longer good law in light of the 1998 amendment to the corporate venue statute).

¹⁵ Rosenzweig, *supra* note 8, at 7.

¹⁶ *Brunette Mach. Works, Ltd. v. Kochum Indus.*, 406 U.S. 706, 712-13 (1972); WRIGHT ET AL., *supra* note 13, § 3823.

¹⁷ *VE Holding*, 917 F.2d at 1578.

presence in a district constituted “a regular and established place of business” or whether “acts of infringement” were committed in the district.¹⁸ The venue requirements were so heavily litigated that the pocket part to the United States Code Annotated had twenty-six columns of annotations on the former concept and fifteen more columns on the latter concept by the year 1985.¹⁹ Important judicial resources have been wasted on the resolutions of procedural questions to determine what is the most convenient location to try a case.

B. CURRENT INTERPRETATION

In 1988, a new definition of “reside” as it applies to venue for corporate defendants was adopted.²⁰ Under 28 U.S.C § 1391(c), a corporation is deemed to reside in any judicial district to which it could be subject to personal jurisdiction at the time the action is commenced.²¹ In *VE Holding v. Johnson Gas Appliance*, the Federal Circuit ruled that this definition applies to patent venue statute § 1400(b) as well.²² While there has been some controversy as to the correctness of the ruling,²³ the legislative history appears to confirm the court’s conclusion in *VE Holding*.²⁴ Accordingly, based on the plain language of § 1391(c) and the legislative history of the 1988 Act with regard to a corporate defendant, which is the norm in patent

¹⁸ See Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 551 (1973) (noting that “[a]ll too often, patent infringement suits begin with a battle over where the war is to be fought. These wasteful preliminary jousts are occasioned by the patent venue statute, which places strict limits on the plaintiff’s choice of forum in suits for patent infringement. The statute has become encrusted with hypertechnical case law The statute’s original purpose has been frustrated by judicial opinions, and its continued existence serves merely to consume the time and effort of lawyers and judges and to strain the purses and patience of persons seeking prompt, efficient adjudication of their rights.”); see also Rosenzweig, *supra* note 8, at 7; Rita M. Irani, *Jurisdiction and Venue in Patent Cases: Effect of the Federal Circuit on Construction of the Patent Venue Statute*, 69 J. PAT. & TRADEMARK OFF. SOC’Y 445, 445 (1987).

¹⁹ WRIGHT ET AL., *supra* note 13, § 3823; Rosenzweig, *supra* note 8, at 7.

²⁰ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. X, § 1013(a), 102 Stat. 4642, 4669 (1988).

²¹ 28 U.S.C.A. § 1391(c) (2006).

²² *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1584 (Fed. Cir. 1990).

²³ See WENDY H. SCHACHT & JOHN R. THOMAS, CONGRESSIONAL RESEARCH SERVICE, PATENT REFORM IN THE 111TH CONGRESS: INNOVATION ISSUES 29 (2009), available at http://assets.opencrs.com/rpts/R40481_20090409.pdf (noting some argue that there is no evidence that Congress contemplated the 1998 reforms would be applicable to the specialized patent venue statute).

²⁴ For a review of the litigation history regarding the 1998 amendment, see WRIGHT ET AL., *supra* note 13, § 3823.

litigation, venue is proper in patent infringement action in any district in which the defendant is subject to personal jurisdiction.

Section 1391(c) also reflects a recognition that in light of technological advances in transportation and communication, at least for corporate defendants, issues of inconvenience warrant less consideration. Thus, the inherent costs for the court and the parties associated with the restrictiveness of the venue statutes should be given more weight in the equation. Furthermore, having one simple set of standards controlling both the personal jurisdiction and venue rules offers advantages for federal courts as well.²⁵

Commentators argue that it is much less rigorous to satisfy the venue requirements for patent cases, which allow “substantial room for forum shopping” than in other areas of the law.²⁶ While there is indeed room for forum shopping in patent cases, it is less clear that the patent venue requirements are much more lenient in patent cases. Compared to general venue statutes, for example, 28 U.S.C. § 1391(b) does not differ substantially from the first element in U.S.C. § 1400(b), while the addition of the second element is of limited use in patent litigation.²⁷ Accordingly, the perceived forum shopping problem in patent litigation is not caused by rules less rigorous than in other areas of the law.

It should be noted that patent infringement actions and declaratory actions for patent non-infringement invalidity are governed under two different venue statutes (the former under the special venue statute, 28 U.S.C § 1400; the latter under the general venue statute, 28 U.S.C § 1391(b) and (c)).²⁸ There is no clear policy reason to distinguish these two kinds of actions in terms of venue, yet as far as corporate defendants are concerned, there is no substantial difference between how they are treated under these two rules.²⁹ This

²⁵ See *id.* § 3811 (stating that “there is a great advantage in having one standard” for both minimum contact and venue doctrines rather than “complicating an already difficult matter by having two different standards”).

²⁶ Robert J. Gunther, Jr., *Motions to Dismiss, to Transfer, to Strike*, in *ANATOMY OF A PATENT CASE* 35, 40 (2009).

²⁷ 28 U.S.C. § 1391(b) (2008); 28 U.S.C. § 1400(b) (2008).

²⁸ See, e.g., *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 238-39 (8th Cir. 1979) (“Venue in a declaratory judgment action for patent invalidity and noninfringement is governed by the general venue state, 28 U.S.C § 1391(b) and (c), not the patent infringement venue statute, 28 U.S.C. § 1400(b).” (citation omitted)); see also *VE Holding*, 917 F.2d at 1583; Dorothy R. Auth et al., *Selecting Forum and Venue for Your Patent Litigation*, in *3RD ANNUAL PATENT LAW INSTITUTE* 597, 620 (2009).

²⁹ If there is any reason to distinguish the venue for these two types of cases, the appropriate forums should be much more limited in the declaratory action cases since all focus is on the patent itself instead of the infringing activity. Auth et al., *supra* note 28, at 620.

is a clear indication that under current rules, there is no substantial difference between venue for patent infringement and venue for general actions. Special patent venue statutes are not less rigorous than general venue statutes.

C. VENUE TRANSFER

Venue transfer, together with venue selection, constitutes complete regulation of venue issues. 28 U.S.C. § 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”³⁰ Before its enactment, a federal court could only dismiss an action brought in an inconvenient but otherwise proper district under the doctrine of *forum non conveniens*.³¹ The addition of § 1404(a) does not guarantee the most convenient forum; it allows a district court to make a discretionary and individualized determination as to whether a case can be tried more conveniently in another forum.³²

This provision, however, adds another layer to already complex litigation and diverts the district court judge from engaging in the merits of the case.³³ It also can be used as a “delaying tactic.”³⁴ In

³⁰ 28 U.S.C. § 1404(a) (2006).

³¹ See 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d § 3841 (Thomson Reuters, 3d ed. 2007 & Supp. 2009); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”).

³² WRIGHT ET AL., *supra* note 31, § 3841; see also Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 99-100 (1965) (noting that the objective of this section is “to make it possible for a district court where the action has been properly brought to transfer the action the most desirable district for trial”).

³³ 15 WRIGHT ET AL., *supra* note 31, § 3841 (“The greatest cost is that an extra decision point has been added to what frequently is already complex litigation.”); David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1496 (1997) (noting that evidentiary hearings that may be necessary to reach accurate factual decisions regarding the transfer motion “only would add to the delay and the expense that normally accompanies transfer litigation”); Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 595, 607 (1951) (noting that “[n]o relief from the deluge of transfer application is foreseeable,” observing that “the district judge must be able to see through the voluminous affidavits presented” and determine who are the key witnesses, but expressing hope that “the eventual crystallizing of the criteria and boundaries of 1404(a)” would reduce the burden imposed on the district judges).

³⁴ WRIGHT ET AL., *supra* note 31, § 3841; Steinberg, *supra* note 33, at 1493 (estimating that parties annually litigate at least 5,500 unsuccessful section 1404(a)

addition to the time and expenses, the transfer statute may also increase the overall unpredictability of the litigation process.³⁵ Appellate review of venue decisions under this provision is also problematic.³⁶ One commentator noted that appellate courts are not well suited to decide the most appropriate forum of the case, and it certainly prolongs the process of the litigation.³⁷ The burden it imposes on the litigation system³⁸ may not outweigh the benefits.³⁹ Accordingly, the design of the venue transfer rule may be in need of some modification in order to achieve the optimal judicial efficiency

transfer motions, and attributing in part the large volume of unsuccessful transfer motions to the delaying tactics and noting that “the defendant may file the motion to increase the time and expense that a plaintiff must face to bring his case to trial”); David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 447 (1990) (“[S]uch motions have become a vehicle for defendant delay and an increasing burden on the already backlogged federal courts.”); Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 494 n.36 (1956), *quoted approvingly in* Lykes Bros. S.S. Co. v. Sugarman, 272 F.2d 679, 682 (2d Cir. 1959) (describing the provision that “as a delaying tactic it has few equals”).

³⁵ See Stowell R.R. Kelner, “*Adrift on an Uncharted Sea*”: A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. REV. 612, 632-33 (1992) (noting that the discretionary application of the transfer provision “make[s] the outcome of transfer motions rather unpredictable,” which increases costs, “leads to fewer meritorious transfer motions” and results in less uniformity in the decision-making); Steinberg, *supra* note 33, at 446-47 (describing that the law governing section 1404 motions is “in chaos,” and noting that “[t]he ad hoc balancing employed by the district courts precludes any prediction on whether a particular transfer motion will succeed”).

³⁶ See David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 309 (1968-1969) (“One of the big factors causing delay in the determination of transfer motions has been the uncertainty surrounding reviewability of decisions to transfer or not to transfer.”); Kitch, *supra* note 32, at 141-42 (concluding that “appellate intervention in the transfer process in turn entails such a substantial burden of delay that it outweighs the advantages of the section”); Kaufman, *supra* note 33, at 595 (noting that appeals from transfer decisions “are appearing with great frequency on the calendars of the appellate courts”).

³⁷ WRIGHT ET AL., *supra* note 31, § 3841.

³⁸ See Kelner, *supra* note 35, at 614 (noting that the statute “has spawned a bewildering amount of litigation”).

³⁹ See WRIGHT ET AL., *supra* note 31, § 3841; Currie, *supra* note 36, at 307 (“The theory is good, but it is practically unworkable. It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money.”); Kitch, *supra* note 32, at 101, 141-42 (expressing the opinion that “the cure is itself a serious disease” and concluding that “[s]ection 1404(a) suffers from an irremediable defect” and that “it is better to bear with the small number of true hardship situations that would arise under a well drawn venue code than with the burdens which will inevitably result from a transfer provision like section 1404(a)”).

in patent litigation.⁴⁰ Indeed, a comprehensive venue reform should address the problem venue transfer rules have caused.

D. PERCEIVED PROBLEMS UNDER THE
CURRENT RULE

1. The “Evils” of Forum
Shopping

Commentators contend that forum shopping under the current venue rules causes two basic problems: the normative evils and economic inefficiency.⁴¹ Regarding the normative evils, the view that the “intensity of forum shopping by parties suggests that the view of law as immutable is ultimately unfulfillable”⁴² does not lead to the conclusion that restrictive venue statutes could achieve uniformity in the legal system. The existence of forum shopping is merely a symptom of the lack of uniformity in the patent litigation system.⁴³ The venue statute is neither the cause nor the cure for this underlying problem. Removing uncertainty in the patent legal system is the most efficient way of solving the existence of forum shopping, a topic beyond the scope of this article.⁴⁴

⁴⁰ See, e.g., Steinberg, *supra* note 33, at 448, 512-23 (under the context of general litigation, proposing that “[c]ourts should decide most transfer motions only by considering the location of relevant witnesses and documents” in order to promote predictability in transfer decisions and to ease the burden of the district judges). Steinberg, however, acknowledged that this suggestion “probably would produce only a modest change in the status quo.” Steinberg, *supra* note 33, at 1505. Some critics of the transfer statute advocated the elimination of the transfer provisions while restricting plaintiff’s initial venue choices. See also Steinberg, *supra* note 33, at 1509; Currie, *supra* note 36, at 309; Kitch, *supra* note 32, at 138-39. This suggestion, however, may simply divert the focus of the disputes from transfer motions back to initial venue selections, which would not provide a comprehensive solution to the burden caused by venue issues.

⁴¹ Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 558, 589 (2001).

⁴² *Id.*

⁴³ See Scott Atkinson et al., *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping and the Federal Circuit*, 52 J.L & ECON. 411, 441 (2009) (noting that “[f]orum shopping is not an ill, in and of itself, but is a symptom of non-uniformity”); Moore, *supra* note 41, at 560 (“If all patent cases were resolved predictably and uniformly by the district courts, there would be no need for forum shopping.”). But see Kelner, *supra* note 35, at 614 (“Plaintiff forum shopping is not an evil to be avoided, but rather is an inherent part of our federal court network.”).

⁴⁴ See Atkinson et al., *supra* note 43, at 441 (noting “the root cause of the forum shopping was the non-uniformity of validity outcomes” and reduced risks associated with the uncertainty of litigation should be connected to less need to search judicial forums).

Regarding economic inefficiency, it has been argued that forum shopping wastes resources by increasing litigation costs as “parties dispute forum or pursue the most favorable forum.”⁴⁵ The suggested response is to restrict the plaintiff’s options at the outset through venue statutes.⁴⁶ In terms of efficiency, however, it is acknowledged that where patent cases have concentrated in a few district courts as a result of forum shopping, judges in those courts have developed an expertise in handling such cases and thus efficiency has been enhanced.⁴⁷

The inconvenience of litigating in a distant forum will be discussed in the next section. Regarding the procedural costs of fighting over the appropriate forum, these costs undoubtedly would continue under the proposed restrictive and mandatory venue provisions, as with cases prior to 1988.⁴⁸ This article acknowledges, however, that fights over transfer motions are problematic and steps should be taken to reduce costs and to enhance certainty.

Another issue worth considering is whether forum shopping is truly unique to patent cases. It has been argued that the 1982 creation of the U.S. Court of Appeals for the Federal Circuit alleviated forum shopping issues in patent litigation.⁴⁹ Others argue that the creation of the Federal Circuit does not diminish forum shopping but simply changes its form.⁵⁰ As Rosenzweig pointed out, similar to forum shopping in non-patent civil cases, forum shopping in patent infringement litigation prior to the creation of the Federal Circuit was driven by disparate interpretation of the law in different circuits, which was obscured by the availability of many district courts in a single circuit who held favorable views for patent holders.⁵¹ Further, plaintiffs were drawn to different circuits depending on their particular

⁴⁵ Moore, *supra* note 41, at 590.

⁴⁶ *Id.* at 590-91.

⁴⁷ *Id.* at 590.

⁴⁸ See generally Irani, *supra* note 18 (explaining problems implicit to venue-fighting, including Rule 11 sanctions, problems with determining the location of the defendant(s), corporate veil-piercing and inconsistent holdings of the circuit courts as well as a lack of holdings at that time by the Federal Circuit).

⁴⁹ See WRIGHT ET AL., *supra* note 13, § 3823 (noting that the creation of the court “has lessened greatly the need for a restrictive patent venue statute” because there were no longer “divergences in the interpretation of patent law among the courts of appeal”); see also Atkinson et al., *supra* note 43, at 441 (noting forum shopping appears to have been mitigated since the establishment of the Federal Circuit).

⁵⁰ Rosenzweig, *supra* note 8, at 8; see also Moore, *supra* note 41, at 561 (noting that “choice of forum continues to play a critical role in the outcome of patent litigation” and patent cases are “consolidated in a few select jurisdictions”).

⁵¹ Rosenzweig, *supra* note 8, at 8.

legal issues.⁵² No concentration in a few district courts could be easily observed.

Since these factors no longer exist, patent cases visibly concentrate in several districts perceived to be patent-friendly.⁵³ However, theoretically, there is no justification to regulate the venue restrictively only for patent cases, particularly if such regulation creates unintended burdens to the legal system.⁵⁴

The “hot” district courts particularly attractive to patent plaintiffs tend to be temporary. Factors regarding whether a particular court is perceived as “patent-friendly” may include speed, local rules, pro-plaintiff juries, proclivity to granting dispositive motions, experience of the judges, etc.⁵⁵ Speed is considered one of the most important factors for a district to be “patent-friendly.” It is hardly any “exploitation” of the system for a plaintiff to look for efficient venues. Furthermore, any “rocket docket” district which attracts a large volume of plaintiffs would inevitably grow larger and slower.⁵⁶ In addition, the Federal Circuit and the Fifth Circuit have been willing to issue writs of mandamus to transfer venue.⁵⁷ Any concentration of patent cases in a particular district is, to a large extent, temporary, which does not warrant disparate treatment for patent cases. Even if there will be a next Eastern District of Texas,⁵⁸ that would be temporary too, particularly if the Federal Circuit is willing to intervene in the matter.

⁵² *Id.*

⁵³ *Id.* at 9.

⁵⁴ *But see id.* (arguing that since “the forum shopping in patent cases is transparent . . . it is reasonable for Congress to address any concern that justice is administered in the federal courts haphazardly in favor of plaintiffs.”).

⁵⁵ *See id.* at 3; William D. Belanger, *Strategic Considerations in Forum Selection: Where To File a Patent Infringement Lawsuit and the Consequences* 1 (2006), http://www.aipla.org/Content/ContentGroups/Speaker_Papers/Mid-Winter1/20063/BelangerDOC.pdf; Moore, *supra* note 41, at 561 (“The differing procedures for resolving patent cases and differing potential outcomes create an environment in which forum shopping has a major impact on litigation.”).

⁵⁶ For the discussion of the Eastern District of Texas, *see* Roderick R. McKelvie, *Forum Selection in Patent Litigation: A Traffic Report*, 19 INTELL. PROP. & TECH. L.J. 1, 3 (2007) (concluding that the judges in the District “are beginning to fall behind”); Rosenzweig, *supra* note 8, at 9.

⁵⁷ *See The Eastern District of Texas—No Longer the Venue of Choice?*, METROPOLITAN CORPORATE COUNSEL, Feb. 2009, at 23, *available at* <http://www.metrocorpcounsel.com/pdf/2009/February/23.pdf>. *See generally In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008); *In re Volkswagen, Inc.*, 545 F.3d 304 (5th Cir. 2008). As a result of *In re TS Tech* and the current backlog, more cases are likely to be transferred out of the Eastern District of Texas.

⁵⁸ *See* Rosenzweig, *supra* note 8, at 9 (arguing that “a Marshall-like situation will arise somewhere else sometime soon”).

2. Inconvenience for the Defendants

The present state of technology is much different from that in the 19th Century. Arguably, the ease of communication and transportation dramatically reduce the difficulty in distant litigation.⁵⁹ It is more so for modern corporations, who are capable of selling products nationally or internationally, which under the theory of personal jurisdiction does purposefully avail them to almost any possible forum inasmuch as they do (or would) engage in infringing activity there.

Certainly, for some particular corporations sued for patent infringement dozens of times a year, conducting trials in forums across the country is not an insignificant burden. However, the core of this issue lies in harassment patent lawsuits, not in venue provisions. A change of the venue rules, which could impact all patent owners negatively, is not warranted by the marginal relief it will bring to the corporations regularly targeted by infringement suits.

The major concern of defendants is arguably not convenience *per se*. The real concern may be some particular “patent-friendly” district courts.⁶⁰ Potential favoritism towards plaintiffs in particular districts could be a problem, but it is a problem in its own right, and cannot be solved by the change in the venue rules, which does not address the inequality within the problematic district.

The term “patent-friendly” can also be associated with the expertise of the judges, the implementation of the local rules that set forth procedures for handling patent cases, or less crowded civil and criminal dockets, which better lead to predictable and cheaper litigations.⁶¹ These are not “problems” that Congress should counteract. More importantly, venue statutes, which aim for locating a convenient forum, are not designed to deal with this kind of concern. By removing choices of plaintiffs and mandatorily allocating all cases to different forums determined by statutes, the disparate treatment of patent holders is not solved. It simply encourages the activity of “venue manufacturing” in the future.

⁵⁹ Moore, *supra* note 41, at 567 (“In this age of national and international commerce, however, convenience of the parties, witnesses, and location of evidence is becoming less significant in the parties' calculus than other considerations.”).

⁶⁰ See Rosenzweig, *supra* note 8, at 6.

⁶¹ See Xuan-Thao Nguyen, *Justice Scalia's “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 114 (2008).

3. No Contact with the Forum at All

In *Beverly Hills Fan v. Royal Sovereign*, the Federal Circuit held that personal jurisdiction exists over an accused infringer when it placed the infringing products into the stream of commerce, knowing that the likely destination of the products would be the forum state.⁶² Viewed with *VE Holding*, it has been argued that the effect of these decisions is that venue is proper “wherever an alleged infringing product can be found” in a patent infringement suit.⁶³ When infringing products are sold nationally, the potential venue may include any one of the 94 judicial districts in the United States.⁶⁴

Commentators thus argue that under current venue rules, litigations usually take place in a forum with no contact with any of the parties. The district court is chosen simply because it is a “patent-friendly” forum. It should be noted, however, that under current venue statutes, the district judge maintains the discretion to transfer the case. In addition, there is recourse for remedy of potential abuse of this discretion. Even if the judge does not transfer the case out, the minimum protection for the corporate defendant is the required personal jurisdiction.

For the district court to have personal jurisdiction over the corporate defendant, two bases are possible: general and specific jurisdiction.⁶⁵ The connection between the defendant and the forum is sufficient in the situation of general jurisdiction, on the one hand, where the defendant has “continuous and systematic” contacts with the forum state.⁶⁶ “Sporadic and insubstantial contacts with the forum state” are not sufficient to establish general jurisdiction over the defendants in the forum.⁶⁷

Specific jurisdiction, on the other hand, requires the defendant to have established sufficient “minimum contacts” with the forum “such that [it] should reasonably anticipate being haled into court

⁶² *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir. 1994); *see also* Gunther, Jr., *supra* note 26, at 38.

⁶³ PATRICK J. LEAHY, THE PATENT REFORM ACT OF 2009, S. REP. NO. 111-018 (2009), at 19, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:sr018.111.pdf.

⁶⁴ *Id.*

⁶⁵ *See* *Campbell Pet Co. v. Miale*, 542 F.3d 879, 884 (Fed. Cir. 2008); *Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1360-61 (Fed. Cir. 2006).

⁶⁶ *Campbell Pet Co.*, 542 F.3d at 883 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984)); *see also* *Silent Drive, Inc. v. Strong Indus., Inc.*, 326 F.3d 1194, 1200 (Fed. Cir. 2003) (quoting *Helicopteros Nacionales de Colombia*, 466 U.S. at 414-16).

⁶⁷ *Campbell Pet Co.*, 542 F.3d at 884.

there,”⁶⁸ and “such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁶⁹ In addition to satisfying the long-arm statute of the forum state, the specific personal jurisdiction over “a non-consenting out-of-state defendant” is subject to a three-prong test of due process requirements.⁷⁰ First, the Federal Circuit has held that the district court must determine whether the defendant “purposefully directed his activities at residents of the forum.”⁷¹ Second, the claim must “arise[] out of or relate[] to those activities.”⁷² Third, the assertion of specific personal jurisdiction must be “reasonable and fair.”⁷³ This indicates that due process constraints on personal jurisdiction could ensure a proper showing of minimum connection between the defendant and the forum state. The forum may not be the most convenient forum for the corporate defendant, but it will not be the one with no connection to it at all.

III. REFORM PROPOSALS

A. PATENT REFORM IN THE 111TH CONGRESS

In the 111th Congress, three bills, H.R. 1260, S. 515, and S. 610, each entitled the Patent Reform Act of 2009, have been

⁶⁸ *Redwing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1358-59 (Fed. Cir. 1998) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁶⁹ *Breckenridge Pharm.*, 444 F.3d at 1361 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

⁷⁰ *Breckenridge Pharm.*, 444 F.3d at 1361, 1363; *see also* *Gunther, Jr.*, *supra* note 26, at 38-39.

⁷¹ *Akro Corp. v. Luker*, 45 F.3d 1541, 1545 (Fed. Cir. 1995) (quoting *Burger King*, 471 U.S. at 471-76); *Breckenridge Pharm.*, 444 F.3d at 1362-63 (citing *Akro*, 45 F.3d at 1545).

⁷² *Breckenridge Pharm.*, 444 F.3d at 1363 (citing *Akro*, 45 F.3d at 1545-46); *see also* *Autogenomics, Inc. v. Oxford Gene Technology Ltd.*, 566 F.3d 1012, 1017 (Fed. Cir. 2009) (citing *Silent Drive*, 326 F.3d at 1200); *see also* *Silent Drive*, 326 F.3d at 1200 (holding that the specific jurisdiction must be based on activities that “‘arise[] out of’ or ‘relate[] to’ the cause of action.” (quoting *Burger King*, 471 U.S. at 472-73)).

⁷³ *Breckenridge Pharm.*, 444 F.3d at 1363 (citing *Akro*, 45 F.3d at 1545-46); *see also* *Akro*, 45 F.3d at 1546 (noting that a defendant may challenge jurisdiction if it can present “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” (quoting *Burger King*, 471 U.S. at 476-77)). The factors to consider in the reasonableness analysis include: (1) “the burden on the defendant”; (2) “the forum State’s interest in adjudicating the dispute”; (3) “the plaintiff’s interest in obtaining convenient and effective relief”; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and (5) the “shared interest of the several States in furthering fundamental substantive social policies.” *Breckenridge*, 444 F.3d at 1367 (quoting *Burger King*, 471 U.S. at 477).

introduced which attempt to respond to current concerns about the patent process.⁷⁴ As of the day of this writing, the amended S. 515 has been reported to the Senate.⁷⁵ All bills include proposals regarding venue reform. Among the major broader concerns the pending legislation attempts to address, litigation costs and potential abuses by patent speculators may have their roles in venue reform.⁷⁶ As will be discussed below, venue reform actually could increase the litigation costs for the parties and impose huge burdens on the federal judicial system as a whole.

1. H.R. 1260 and S. 610

H.R. 1260 and S. 610 generally proposed that venue exist based on the following criteria:⁷⁷

(1) The restrictive location of the defendant: where the defendant has its principal place of business, or is incorporated⁷⁸.

(2) The infringing activity: “where the defendant has committed substantial acts of infringement and has a regular and established physical facility that defendant controls and that constitutes a substantial portion of the operations of the defendant,”⁷⁹ or “where the defendant has committed acts of infringement and has a regular and established physical facility.”⁸⁰

(3) The identity of the plaintiff: “where the primary plaintiff resides” if the primary plaintiff is an institution of higher education or its non-profit patent and licensing organization,⁸¹ and “where the plaintiff resides” if the sole plaintiff is an individual inventor.⁸²

(4) The location related to the invention: Where the claimed invention “was conceived or actually reduced to practice”, or where “significant research and development” of the claimed invention “occurred at a regular and established physical facility.”⁸³

(5) The location related to research, development, or manufacturing: Where a party has and controls a regular and

⁷⁴ SCHACHT & THOMAS, *supra* note 23, at 5.

⁷⁵ *Id.* at 12.

⁷⁶ *Id.* at 5-11, for the current concerns the bills intend to address.

⁷⁷ H.R. 1260, 111th Cong. § 10 (1st Sess. 2009); S. 610, 111th Cong. § 8 (1st Sess. 2009).

⁷⁸ H.R. 1260 § 10(c)(1); S. 610 § 8(b)(1).

⁷⁹ H.R. 1260 § 10(c)(2).

⁸⁰ S. 610 § 8(b)(2).

⁸¹ H.R. 1260 § 10(c)(3).

⁸² H.R. 1260 § 10(c)(4).

⁸³ S. 610 § 8(b)(4)-(5).

established physical facility devoted to research, development, or manufacturing with respect to the claimed invention.⁸⁴

(6) The consent of the defendant.⁸⁵

H.R. 1260 also would amend § 1400(b)⁸⁶ to require that “a party shall not manufacture venue by assignment, incorporation, or otherwise to invoke the venue of a specific district court.”⁸⁷

2. S. 515

On the other hand, S. 515 focuses on venue transfer rules via an attempt to codify the venue change rules of the Court of Appeals for the Fifth Circuit, which were later adopted by the Federal Circuit in *TS Tech*, instead of initial venue choices. It provides that

[f]or the convenience of parties and witnesses, in the interest of justice, a district court *shall* transfer any civil action arising under any Act of Congress relating to patents upon a showing that the transferee venue is *clearly more convenient* than the venue in which the civil action is pending.⁸⁸

This is amended from S. 515 as introduced in Senate, which contained significant restrictions on the venue choices.⁸⁹ The modification seems to be influenced by the increased willingness of the Federal Circuit and the Fifth Circuit to issue writs of mandamus to transfer venue when another forum is clearly more convenient.⁹⁰ This standard is accordingly adopted by the reported S. 515 and applied to patent cases generally.⁹¹

B. REGULATING MODELS COMPARISONS

There are basically three types of regulating models regarding venue statutes in patent litigation. The current regulating model (“current model”) regarding venue rules is to grant discretion to plaintiffs and at the same time reserve judicial discretion to transfer

⁸⁴ S. 610 § 8(b)(6).

⁸⁵ S. 610 § 8(b)(3).

⁸⁶ H.R. 1260 § 10(a).

⁸⁷ H.R. 1260 § 10(b).

⁸⁸ S. 515, § 8(a) (emphasis added).

⁸⁹ S. REP. NO. 111-018, *supra* note 63, at 19 (noting that the venue restrictions as introduced were identical to those adopted during Committee consideration of S. 1145 in the 110th Congress and “were designed to prevent plaintiffs from manufacturing venue”).

⁹⁰ *See id.*; *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008); *In re Volkswagen, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008).

⁹¹ S. REP. NO. 111-018, *supra* note 63, at 19.

cases where appropriate. The proposed regulating model in S. 610 and H.R. 1260 (“restrictive model”) is to restrict the discretion of both plaintiffs and district court judges. The S. 515 model (“mandatory transfer model”) maintains the discretion afforded to plaintiffs while restricting the discretion of the district judges by mandating the transfer of venue where there is a clearly more convenient venue.

Commentators have provided insightful criticism of the proposed venue rules in the last Congress, which are very similar to parts of the bills of S. 610 and H.R. 1260, the restrictive model.⁹² The major problem of this model is the inherent complications that arise in any restriction of venue choices, i.e., time consuming disputes regarding whether the venue is proper. The inherency of the problem is apparent in view of the excessive litigation over the simpler language in 28 U.S.C. § 1400. The vague and subjective language used in the proposed bills can only lead to even more excessive litigations.

For example, H.R. 1260 prohibits a party from “manufactur[ing] venue by assignment, incorporation, or otherwise to invoke the venue of a specific district court.”⁹³ This provision would require the district court judge to investigate the subjective intent of the parties, which would encourage discovery and venue challenges, placing a huge burden on the patent litigation system.⁹⁴ Similarly, the use of such ambiguous terms as, e.g., “substantial” acts of infringement,⁹⁵ “substantial” portion of the operation of the defendant,⁹⁶ “primary” plaintiff,⁹⁷ and “significant research and development of an invention”⁹⁸ would have the same effects.⁹⁹ Such language proposed in Congress would increase cost and complexity in patent infringement litigation.¹⁰⁰ The elements in these provisions will often require discovery and make venue selection even less predictable.¹⁰¹

⁹² See generally Rooklidge & Stasio, *supra* note 7, at 1; Rosenzweig, *supra* note 8, at 10-16.

⁹³ H.R. 1260 § 10(b).

⁹⁴ See Rooklidge & Stasio, *supra* note 7, at 3-4; Rosenzweig, *supra* note 8, at 12 (arguing that “it is reasonable to assume that the provision will cause a firestorm of disputes including early depositions of plaintiffs regarding motivations for forum selection”).

⁹⁵ H.R. 1260 § 10(c)(2).

⁹⁶ *Id.*

⁹⁷ H.R. 1260 § 10(c)(3).

⁹⁸ S. 610 § 8(b)(5).

⁹⁹ See Rooklidge & Stasio, *supra* note 7, at 4-5; Rosenzweig, *supra* note 8, at 10.

¹⁰⁰ See Rooklidge & Stasio, *supra* note 7, at 4.

¹⁰¹ See *id.* (addressing on the similar languages in H.R. 1908 and observing that “[t]his provision has so many evidentiary hurdles to overcome before resolution that the infringement action would be simply a sideshow to the venue dispute”).

A more fundamental issue is that the balance of the regulation, particularly in H.R. 1260, seriously shifts the venue advantage to the defendant in patent litigations. For most types of plaintiffs under H.R. 1260, the available venues would be only the residence of the defendant, in the narrow sense, or the location of the substantial acts of infringement where the defendant has a regular and established facility that constitutes a substantial portion of the operation of the defendant.¹⁰² Among all the conceivably proper venues, these are the locations that perhaps are most convenient to the defendant, but could be extremely inconvenient locations to plaintiffs.

It is true that venue statutes usually focus on the convenience of the defendants, and are generally designed to limit the choice of the plaintiffs. However, this is based on the premise that plaintiffs are granted tremendous discretion in venue choices. This is clear from the purpose of venue statutes, i.e., to protect defendants "from the inconvenience of having to defend an action in a trial court that is either remote from the defendant's residence or from the place where the acts underlying the controversy occurred."¹⁰³ The venue provisions proposed in the House, however, ensure that a defendant in a patent infringement suit gets the most convenient location for them only, which should not be the purpose of the venue statutes.

For a restrictive venue such as the one proposed in H.R. 1260, it is imperative that the convenience of the plaintiff and witnesses be considered; otherwise it would be a manifestly unbalanced venue statute which fails to address the fundamental purposes of the venue statutes—to select a convenient forum for all of the parties and the witnesses. The House bill seriously handicaps the ability of the plaintiff (with court oversight) to select a forum which is convenient for the case as a whole and is not feasible.

S. 610 somewhat mediates this imbalance by providing more choices for the plaintiffs. However, the evidentiary requirements remain for these choices, and venue challenges would still result in delay of patent cases and would increase the total costs to litigants and burden on district courts. It is impossible for Congress to enact all possible venue choices that would correspond to all patent cases. The associated cost and delay of litigation does not warrant such imperfect solutions.

The problem of S. 515, the mandatory transfer model, is different. The bill as reported in the Senate avoids the pitfalls of the restrictive model, but it escalates the problems associated with the

¹⁰² H.R. 1260, 111th Cong. § 10(a) (2009).

¹⁰³ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1576 (Fed. Cir. 1990) (citing 1A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.340 (2d ed. 1990)).

venue transfer provision. The diverting and delaying effects of the current § 1404(a) have been described above.¹⁰⁴ The mandatory nature of transfer as provided in the bill nearly guarantees the appeal of transfer motions, which would bring even more uncertainty in patent litigation.

The problems associated with the current model have been discussed previously. This article has argued that forum shopping, if considered a problem at all, is not a disease in itself, but merely a symptom of the overall imperfections of the judicial system as it relates to patent cases.¹⁰⁵ The discretionary transfer aspect of venue does pose burden on the judicial system as a whole. However, the current model maintains the proper balance between parties and imposes the least burden on the judicial system, with only moderate modification required. Below, this article will attempt to provide a better solution to the problem at issue.

IV. PROPOSAL FOR MODIFIED VENUE REFORM

The proper balance between plaintiffs and defendants is not the only consideration in the venue statutes. The associated procedural burden on the district court judges would inevitably affect other cases waiting to be tried. One should remember that patent cases are not the only ones on a busy district court judge's docket. Prompt and efficient resolutions of patent litigations should not be sacrificed by the wish to ensure that all cases are tried in their most convenient locations. This article suggests that a better balance between the interested parties and the system as a whole could be achieved through a modification to the current venue rules by adding a layer of certainty in the process, which removes the unpredictability associated with the transfer clause.

To elaborate, proper venue rules should be a modification of the current model. The principle should be kept intact—that the plaintiff remains the master of its lawsuit and given discretion and deference regarding the most convenient forum. Any restrictions on the choices of forum can only make it more difficult to find a forum most convenient for all the parties and witnesses.¹⁰⁶ The complexity and expertise demanded by patent cases only increase the need for discretion to be afforded to plaintiffs regarding venue choices comparing to general venue rules. Inconvenience concerns for a

¹⁰⁴ See Green, *supra* note 34.

¹⁰⁵ See Atkinson et al., *supra* note 43, at 441 (“Forum shopping is not an ill, in and of itself, but is a symptom of non-uniformity”).

¹⁰⁶ See Wydick, *supra* note 18, at 565-66 (“In practical operation, neither the patent venue statute nor any other rigid statutory formula can assure that a particular case will be litigated in the most efficient manner and in the most convenient forum.”).

corporate defendant in a modern world are not significant enough to justify the burdens a restrictive venue provision would impose on the litigation system as a whole. The real concern regarding disparate treatment in different district courts cannot and should not be dealt with by venue provisions, particularly not by the type of provision which overwhelmingly favors defendants. Indeed, restrictive venue regulations would only ensure increased venue related disputes.

If Congress persists in the view that it must prevent situations in which defendants are forced to litigate in a remote location, the transfer clause can be maintained but improved. The purpose of any such provision should be to adjust the situations in which a plaintiff chooses a distant forum which is manifestly inconvenient to both parties and potential witnesses simply to harass the defendant. As described above, the transfer provision has a negative impact on the time and energy of the district judges. In order to mitigate this disadvantage, this article proposes some preset locations determined by statute which prevent the application of the transfer rule. This would encourage the plaintiff to take the advantage of certainty and to choose among the specified venues convenient to all interested parties and greatly increase the predictability of the venue as a whole.

If for some reason the plaintiff chooses another forum, the clause should then allow the district judge, upon the motion of the party, to consider whether there is a more appropriate forum. The discretionary aspect of the consideration should be maintained in order to prevent time-consuming disputes and appeals. Since the Federal Circuit is willing to intervene when the district courts refuse to transfer the case to a clearly more convenient forum, the chances of the case being transferred, together with the advantage of filing in the specified exempted forums, would discourage the plaintiffs to choose a forum without substantial connection to both parties.

The predetermined locations may not be the *most* convenient locations for the defendants as stipulated in the House bill, but they should nonetheless be the ones which are considered acceptable under the current jurisprudence, and should not be too wide in scope in order to better safeguard the interests of defendants. The factors have to be as clear and free from dispute as possible. For multiple defendants, venue should be proper for all of them, and it seems that it should be equally applicable for safe haven clauses.

Accordingly, this article proposes the following as presumptively acceptable venues which would not be subject to a transfer motion:

(1) The location where the defendant is incorporated or has its principal place of business. Since these are the factors utilized in

federal diversity cases in terms of corporate citizenship,¹⁰⁷ it is not a difficult task.¹⁰⁸ The defendant in this situation does not have any reason to complain.

(2) The location where the plaintiff is incorporated or has its principal place of business. The patent holder's residence usually is where the bulk of documents relating to the claimed invention are located. Furthermore, since the current concern of Congress is the potential forum to which neither party has a connection, the location of the plaintiff does not belong in this category.

There could be some concern that a plaintiff may "manufacture" venue through this route.¹⁰⁹ However, it has traditionally been an acceptable forum in patent infringement cases. It is unusual for a case brought in the plaintiff's residence to be later transferred. It is doubtful that the prevention of any such rare abuses could justify the huge burden brought by the sweeping measures proposed in the House bill. It would also be manifestly unbalanced to sacrifice the right of the legitimate patents holders to have the trial conducted timely at their home district. An alternative way to restrict potential abuse is to adopt the proposals provided in S. 610 to include locations related to the invention, or related to research, development, and manufacturing. However, this would not further reformers' goals regarding disputes reductions.

(3) The location where the defendant has agreed or consented to be sued.

This article thus proposes the below amendment:

Change of venue- Section 1400 of title 28, United States Code, is amended by adding at the end the following:

(c) Change of venue- Notwithstanding Section 1404 of this title, for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action arising under any Act of Congress relating to patents to any other district or division where it might have been brought, unless the case is brought in a judicial district—

¹⁰⁷ See 28 U.S.C. § 1332(c)(1) (2006).

¹⁰⁸ See Rosenzweig, *supra* note 8, at 10, n.57.

¹⁰⁹ See *Hearing on H.R. 1260, the "Patent Reform Act of 2009" Before the H. Comm. on the Judiciary*, 111th Cong. 13 (2009) (testimony of David Simon, Chief Patent Council, Intel Corporation) (noting that some plaintiffs "already have taken steps to circumvent the *TS Tech* ruling by, for example, transferring patents to shell companies incorporated and 'headquartered' in the local forum just prior to filing suit").

(1) where the defendant has its principal place of business or in the location or place in which the defendant is incorporated or formed;

(2) where the plaintiff has its principal place of business or in the location or place in which the plaintiff is incorporated or formed; or

(3) where the defendant has agreed or consented to be sued.

V. CONCLUSION

The problem of forum shopping is inextricably intertwined with much broader and complex issues. Attempting to solve all such underlying problems with complex and restrictive venue statutes will only impose more burdens on the patent litigation system and spill over to the federal judicial system as a whole. What the patent litigation system needs is a predictable, prompt, and cost-efficient venue solution. The proposed provision addresses the core incentives in forum shopping, reduces the uncertainty of the current regulating model and the motivation of the plaintiffs to seek a less convenient forum while *increasing* the overall efficiency of the district court dealing with a patent case. This article contends that this would be a better alternative to the current patent reform bills before Congress.

