THE AFTERMATH OF TS TECH: THE END OF FORUM SHOPPING IN PATENT LITIGATION AND IMPLICATIONS FOR NON-PRACTICING ENTITIES

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The Federal Circuit closed its 2008 docket with *In re TS Tech USA Corp.*² The plaintiff at trial, Lear Corporation, had its principal place of business in Michigan.² The petitioners and defendants at trial, collectively “TS Tech,” were from Ohio and Canada.³ Curiously, Lear filed suit in the Eastern District of Texas. The plaintiff’s choice to pursue trial in Marshall, Texas--population 23,798⁴--posed an inconvenience to all parties and witnesses. The defendants accordingly filed a motion seeking transfer to a closer venue, the Southern District of Ohio, pursuant to *28 U.S.C. § 1404(a).*⁵ The district judge denied the motion.⁶ The Federal Circuit reversed and directed the Eastern District to transfer the case to the Southern District of Ohio.⁷

Over the past decade, the Eastern District of Texas has rocketed to the top of patent venue rankings with respect to filings. In 1990, one patent suit was filed in the district.⁸ In the first ten months of 2007, a national record 312 patent cases were filed against 1,253 defendants.⁹ The Eastern District is not home to any major cities or tech hubs.¹⁰ The choice of hundreds of patentees nationwide to pursue their patent suits in the Eastern District constitutes forum shopping.

Forum shopping in the Eastern District is troubling given that many of the district’s patentee-plaintiffs are non-practicing entities (NPEs).¹¹ NPEs are companies that acquire and hold patents.¹² They are “non-practicing” because they do not physically use their patents in producing or selling commercial goods or for research. Rather, NPEs hold patents only to litigate and license them.¹³ Archetypically, an NPE will discover a corporation using a technology that may infringe one of the NPE’s patents.¹⁴ The NPE will then sue that corporation for infringement with the intent of settling the suit with a licensing agreement.¹⁵ This business model of “search and sue” leads to the pejorative use of the term “patent troll” to refer to NPEs.¹⁶

*30 I. Introduction*

This article proceeds as follows. Part II begins by introducing the NPE business model, arguments for and against NPEs, and...
the Eastern District of Texas’ rise as the forum of choice in patent infringement cases. Part III analyzes the TS Tech decision specifically. Part IV reviews case law in the year since TS Tech, presents data demonstrating that TS Tech has had minimal impact on transfer rates in the Eastern District, and analyzes the district’s resistance to venue changes. Part V reviews three Federal Circuit decisions from 2009 showing that the appeals court continues to reinforce the appropriate criteria for venue change. Finally, Part VI concludes that forum shopping in general—and the Eastern District of Texas phenomenon in particular—will end in the near future. These developments combined with broader judicial and legislative movements probably signal the end of the NPE as a viable business model.

II. Non-Practicing Entities and the Eastern District of Texas

A. The Non-Practicing Entity

1. The Business Model

NPEs are rarely the originator of their patents. Most patents held by NPEs are acquired from the patent’s original inventors—individuals or small businesses—or from a company under financial distress liquidating its patent portfolio. Large NPEs may own hundreds and even thousands of patents. There are approximately 220 NPEs in the United States who have raised around $6 billion in capital over the past decade. Most NPE-owned patents are in technical fields relating to computers, electronics, software, and business methods. Because NPEs rarely practice their patents, their patents seldom encompass an entire technology or commercial product. Instead, their patents usually cover components of a finished product.

NPEs come in different forms. For instance, Science Progress describes Intellectual Ventures, the largest NPE as measured by patent holdings, as a massive private equity fund with $5 billion in capital raised from investors. Other NPEs, such as Alliencense and Rembrandt Technologies, are more litigious. They selectively acquire patents that are likely to lead to successful litigation outcomes and high licensing fees. Leanly staffed, their employees are mostly attorneys and accountants, with only a few engineers who examine prior art.

With ownership rights in hand, NPEs wait for others to infringe their patents. NPEs usually detect possible infringement by reviewing recent patent applications with the United States Patent and Trademark Office (PTO) and scrutinizing the commercial market for products that make unauthorized use of their patents. After identifying a possible infringing use, the NPE will file a patent infringement suit against the infringer, who may be using the patent as a component of a commercial product. The $1.5-2.5 million cost of defending against a patent litigation suit and the prospect of a permanent injunction or multi-million dollar damage remedy is sufficient in most cases to cause the defendant to settle and agree to a licensing arrangement with the NPE.

NPEs can be strategic in the timing of their patent acquisitions and litigation. NPEs often acquire a ten-year old patent already in common commercial use, or observe an infringing use, but wait years “in hiding” before pursuing litigation against the alleged infringer. By then the infringing use is more widespread. In both cases, the unsuspecting defendant may have invested substantially in the development and production of a product and relied upon the product as a revenue source, only to then learn that the product may infringe the NPE’s patent. Under such circumstances, the defendant will likely agree to pay the licensing fees demanded by the NPE to avoid an injunction that shuts down its product.

The NPE business model of acquire, detect, sue, and license can be lucrative. For instance, Jerome Lemelson, by filing and amending hundreds of “submarine patents” over many years and threatening suit against hundreds of companies, accumulated $1.5 billion in royalties. In 2006, the Federal Circuit enjoined Research in Motion (RIM) from using the plaintiff-NPE NTP’s patents, which concerned real-time wireless email technologies. The permanent injunction would have shut down all 4.3 million Blackberries worldwide, effectively destroying RIM’s business. RIM agreed to pay NTP $612 million to settle and for the right to continue using technology covered by NTP’s patents. Other examples of NPEs acquiring many millions of dollars through litigation abound.

Patent infringement litigation is consequently a central component of the NPE business model. It should come as no surprise that a considerable and rising proportion of patent litigation—twelve to seventeen percent of all patent cases filed between January 1, 2000 and March 21, 2008—is NPE-initiated. However, this eight-year average masks the increase in
The meteoric rise of the Eastern District of Texas reflects the unintended consequences of VE Holding’s liberal patent venue

1. The Numbers

- NPE-initiated cases during that period,\textsuperscript{48} \textsuperscript{36} which rose from under 100 before 2000 to over 450 in 2008 and 2009.\textsuperscript{49} NPEs represent over 80 percent of the suits filed involving the most-litigated patents and NPEs own more than 50 percent of the most-litigated patents.\textsuperscript{50} A survey of the ten most litigious NPEs shows that the majority of their cases were filed after 2003.\textsuperscript{51} NPEs also tend to sue more defendants; the average patentee-plaintiff in 2008 sued 2.38 defendants while NPE-plaintiffs sued 3.96 defendants.\textsuperscript{52} This trend has not gone unnoticed by industry executives. Hewlett Packard’s\textsuperscript{53} general counsel remarked *37 that the company is consistently a target of patent infringement lawsuits and that “more than half the lawsuits have been filed by non-operating entities.”\textsuperscript{54}

2. Policy Debate

NPEs have their defenders\textsuperscript{55} and detractors\textsuperscript{56} who advance arguments for why NPEs are good or bad for society and innovation. Opponents of NPEs start with the premise that the purpose of the patent system is to foster innovation for the ultimate benefit of society. In contrast, most NPEs do not innovate, nor do they practice or commercialize their patents to benefit society.”\textsuperscript{57} Instead, they acquire patents and then sue corporations and inventors who do innovate and commercialize.

Negative consequences follow. First, detractors assert that NPEs impose a large unjustified cost on the judicial system and defendants because their infringement claims often lack merit and the licensing fees they reap are excessive.\textsuperscript{58} Indeed, a PricewaterhouseCoopers study found that NPE-plaintiffs have a lower success rate than non-NPEs--29 percent versus 41 percent.\textsuperscript{59} Second, the cost to *38 defendants of defending suits and paying high licensing fees is a significant burden on innovation and the economy.\textsuperscript{60} For instance, the $612 million that RIM paid to NTP, and the billions other defendants pay in licensing fees and litigation, quite possibly cut their R&D and operation budgets. These costs might then be passed on to consumers in the form of higher prices, limited features and services, and reduced future innovation.

Despite these arguments, proponents of NPEs fundamentally disagree with the criticisms of the NPE model.\textsuperscript{61} NPEs lawfully acquire and own patents, and in filing infringement claims, NPEs are simply enforcing their government-endowed patent rights.\textsuperscript{62} Proponents also argue that NPEs present a number of benefits. NPEs help small inventors from whom they purchase their patents, because many small inventors lack the resources to bring their patented inventions to market.\textsuperscript{63} Small inventors also lack the resources to license and enforce their patents, given that litigating a patent suit can cost up to $4 million.\textsuperscript{64} By buying their patents, NPEs provide small inventors with liquidity that rewards small inventors and gives them funds needed to continue inventive activities.\textsuperscript{65} NPEs license and enforce the patents they acquire, and grant a percentage of the resulting proceeds to the inventors.\textsuperscript{66} NPEs are thus champions of small inventors; without NPEs, large corporations might be free to infringe patent rights at no cost. NPEs also serve a market-clearing function by acting as an exchange for patents.\textsuperscript{67} Viewing patents as tradable assets, NPEs’ buying and licensing activities helps create a liquid market for patents.\textsuperscript{68} This helps accurately price patents, distinguishing valuable patents from worthless ones.\textsuperscript{69} By helping small inventors and creating a liquid market for patents, NPEs only help innovation.

*39 B. The Center of the Patent Litigation Universe: The Eastern District of Texas

The surge in patent litigation in the Eastern District was made possible by VE Holding Corp. v. Johnson Gas Appliance Co.\textsuperscript{70} Patent venue is governed by 28 U.S.C. § 1400(b), which provides two options for venue: (1) where the defendant resides and (2) where the defendant commits infringement and maintains an established place of business.\textsuperscript{71} In 1988, the general venue provision, 28 U.S.C. § 1391(c), was amended to make venue proper for a corporate defendant where there is personal jurisdiction over them.\textsuperscript{72} In VE Holding, the Federal Circuit interpreted § 1400(b) in light of the amendments to § 1391(c).\textsuperscript{73} The Court held that venue was proper wherever a defendant was subject to personal jurisdiction.\textsuperscript{74} Because patent rights are federal, covering all jurisdictions, a patent holder is injured in every district where there is an act of infringement.\textsuperscript{75} As a result, personal jurisdiction exists, and therefore venue is proper in every district where there is an infringing use or sale.\textsuperscript{76} Because many patents find use in everyday commercial products sold nationwide, VE Holding effectively allows patentee-plaintiffs to file their infringement suits anywhere in the country.

Why patentee-plaintiffs have chosen the Eastern District of Texas is discussed in Part II.B.2. Part II.B.1 presents statistics illustrating the magnitude of the Eastern District anomaly.

1. The Numbers

The meteoric rise of the Eastern District of Texas reflects the unintended consequences of VE Holding’s liberal patent venue
rules. In 1990, one patent case was filed in the district. Figure 1 shows the increase in patent cases since 2000. In 2007, the district set a standing record for the number of patent cases filed in any district in any year with 368 patent cases. The district’s predominance over the nation’s patent trial docket is anomalous. The other perennial top venues for patent litigation are major population and tech centers. From 1995-1999, before the Eastern District phenomenon, the five most popular districts for patent litigation districts corresponded with major tech hubs: Los Angeles, Silicon Valley, Chicago, New York City, and Boston. A 1999 study demonstrated that some of a district’s popularity in patent cases correlated with (a) the population of the district, and (b) the number of patents granted to inventors and companies residing in the district. Excepting the Eastern District, these correlations continue today.

*41 Figure 1: Most Popular Districts by Number of Patent Cases Filed, 2000-2009

Even within the Eastern District of Texas, “judge shopping” occurs. The Eastern District has eight district judges and seven magistrates, yet over 80 percent of patent cases go to four district judges--Judge Ward, Judge Clark, Judge Folsom, and Judge Davis. These judges receive their patent caseload primarily from two divisions, Marshall and Tyler. Marshall is particularly popular. In 2007, the Marshall division accounted for 60 percent of the district’s patent cases, or 10 percent of all U.S. patent cases.

The Eastern District has attracted NPE and non-NPE plaintiffs alike. For example, the plaintiff, Lear, in TS Tech was not an NPE. Similarly, non-NPE, Texas Instruments, was one of the first patent holders to see the wisdom of filing in Marshall. Regardless, NPEs file the bulk of their infringement actions in the Eastern District. Moreover, NPEs have preferences for particular Eastern District judges.

<table>
<thead>
<tr>
<th>District</th>
<th>NPE Filed Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>E.D. Tex.</td>
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</tr>
<tr>
<td>N.D. Cal.</td>
<td>156</td>
</tr>
<tr>
<td>C.D. Cal.</td>
<td>152</td>
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<tr>
<td>S.D.N.Y.</td>
<td>122</td>
</tr>
<tr>
<td>N.D. Ill.</td>
<td>100</td>
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<td>N.D. Ga.</td>
<td>76</td>
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<tr>
<td>D.Del.</td>
<td>73</td>
</tr>
<tr>
<td>E.D.N.Y.</td>
<td>57</td>
</tr>
<tr>
<td>D.N.J.</td>
<td>56</td>
</tr>
</tbody>
</table>

*43 Table 1: Cumulative Number of Patent Infringement Suits Filed by NPEs as of August 31, 2008

Table 1 indicates that Marshall is almost a secondary place of business for many NPEs. As seen in Figure 1, the other popular venues for NPEs are populous districts, home to major tech companies, and research universities. The 2008-2009 financial crisis, and ensuing recession, may have reduced the financing that NPEs require to fund litigation. The resulting slight decline in nationwide NPE-filing in 2009 may partially explain the decrease in the Eastern District’s 2009 filing numbers.

2. The Reasons
In 2001, Judge Ward of the Eastern District adopted new patent trial rules combining the Northern District of California’s Local Patent Rules with modifications. These modifications included accelerated timelines, broader discovery requirements, and severe sanctions for non-compliance. Judge Ward’s rules turned the Eastern District into one of the nation’s fastest rocket dockets. At its prime, in the middle part of the decade, the district had a median filing-to-trial time of just twelve months for patent cases. The national average was two years. The Eastern District has slowed down considerably in recent years, which may partially explain its decline in the number of patent cases filed in 2009. Regardless, discovery still begins early in Eastern District patent cases. Defendants in the Eastern District have only nine months to complete discovery, whereas defendants in Northern California have eighteen. In 2006, the average Eastern District bench trial took 22.3 months versus 37.8 months nationwide; average jury trials took 21.1 months compared to 27.1 months nationwide.

Speed kills defendants. A faster docket saves the plaintiff litigation costs and attorney fees. Limited only by the six year statute of limitations on infringement actions, the plaintiffs can bide their time, build their position, and locate evidence and witnesses before filing their suit. Once hit with the plaintiff’s suit, the out-of-town defendant, by contrast, must scramble to complete discovery and construct their case within the district court’s tight schedule.

<table>
<thead>
<tr>
<th>District</th>
<th>Median Time To Termination (days)</th>
<th>Median Filing-To-Trial Time (days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.D. Cal.</td>
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<td>802</td>
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<tr>
<td>N.D. Cal.</td>
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<td>1046</td>
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<tr>
<td>E.D. Tex.</td>
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<td>777</td>
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<tr>
<td>N.D. Ill.</td>
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<td>894</td>
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<tr>
<td>D. Del.</td>
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<td>D.N.J.</td>
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<tr>
<td>S.D.N.Y.</td>
<td>234</td>
<td>1031</td>
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<tr>
<td>W.D. Wis.</td>
<td>279</td>
<td>335</td>
</tr>
<tr>
<td>E.D. Va.</td>
<td>156</td>
<td>327</td>
</tr>
</tbody>
</table>

*45 Table 2: Median Termination and Trial Times of Top Patent Venues and W.D. Wis. and E.D. Va.*

Speed alone does not explain the Eastern District anomaly. In light of the district’s recent slowdown, other faster dockets are available. However, the Eastern District has other qualities that draw patentee-plaintiffs nationwide. The district grants summary judgment at a rate of 10 percent. This compares to 40 percent nationwide and 70 percent in the Northern District of California. Of course, a lower summary judgment rate means that cases are more likely to go to trial.

As further proof that trials occur often, consider Table 2. The Eastern District has the second longest termination time, yet one of the shorter filing-to-trial times. A long termination time suggests that cases do not settle early before discovery and pre-trial proceedings. Instead, they frequently extend into discovery and trial. The District of Delaware is another district with this combination of long termination times and short filing-to-trial times. This partially explains why Delaware is also a surprisingly popular patent venue.

*46 Jury trials are always risky propositions for defendants, but especially in the Eastern District. Recent surveys put the patentee-plaintiff win rate at trial in the Eastern District at 90 percent compared to 68 percent nationwide. In the eighteen years preceding 2006, the district never once found a plaintiff’s patent invalid. Eastern District juries are perceived as distrustful of large corporations (i.e., defendants in patent infringement suits), with a history of handing out large plaintiff
preferences in railroad and asbestos cases. Demographic studies show that in the area where presumably most of Marshall’s jury pool originates, only 15.5 percent of local residents hold bachelor degrees, 5.1 percent hold graduate degrees, and 21.6 percent never completed high school. A large portion of the district’s population is elderly. As a result, juries in the Eastern District tend to view IP rights and infringement actions as akin to trespass on real property. Accordingly, they might be less likely than jurors in larger cities to comprehend the technology or patent policy arguments presented to them.

*47 C. The Eastern District’s Pre-TS Tech § 1404(a) Transfer Practice

Forum shopping and the Eastern District of Texas anomaly would be largely remedied if the Eastern District granted most motions seeking transfer. Venue transfer is governed by 28 U.S.C. § 1404(a). Under § 1404(a), a case may be transferred for convenience of parties and witnesses to another venue where the case could have been brought. As in TS Tech, the vast majority of patent cases on the district’s docket involve parties, witnesses, and evidence that reside entirely outside Texas, which weighs in favor of granting transfer. However, the Eastern District of Texas is protective of its docket. In civil cases generally, the district grants transfer motions only one-third of the time as compared to nearly 50 percent nationwide. 

In patent cases between 2004 and 2008, the Eastern District granted only fifteen out of forty-nine transfer motions or 30.6 percent of the time.

Before TS Tech, the Eastern District’s analysis of § 1404(a) motions seeking transfer followed Fifth Circuit precedent in form, but not substance. Under In re Volkswagen AG, transfer motions are decided using a two-step test. First, the court must determine if the case could have been filed in the proposed transferee forum, meaning venue and personal jurisdiction requirements are satisfied there. The transference district requested by a defendant is usually where the defendant resides, and under § 1400(b), venue is proper where the defendant resides. Thus, this threshold inquiry is usually satisfied.

Next, the court applies a set of private and public interest factors. The private factors are: “(1) the relative ease of access to sources of proof; (2) the availability of the compulsory process to secure witnesses’ attendance; (3) the willingness of witnesses’ cost of attendance; and (4) all other practical problems that make the case’s trial easy, expeditious, and inexpensive.” The public factors are: “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having local issues decided at home; (3) the forum’s familiarity with the governing law; and (4) the avoidance of unnecessary conflict of law problems involving foreign law’s application.” These factors compare the relative convenience of the current forum against the proposed transferee forum.

A review of the Eastern District’s application of these factors pre-TS Tech shows the district’s analyses was cursory at best and disingenuous at worst. In Tinkers & Chance v. Leapfrog Enterprises, Inc., the defendant resided in the Northern District of California, sought transfer there, and alleged that the plaintiff was a California partnership. The court denied transfer. With respect to access to sources of proof, while most of the evidence was in California, the court argued that modern technology made access easy and rendered this factor unimportant as a general matter. With respect to location of witnesses, the court found that the facts were inconclusive because the defendant failed to identify all the potential witnesses that it claimed were in California. The Eastern District of Texas also had a special localized interest in the matter because potential acts of infringement in the district had an effect on the local economy. Finally, the court adopted a strong presumption in favor of the plaintiff’s choice of forum.

Other cases show similar results and analyses. In Symbol Technologies, Inc. v. Metrologic Instruments, Inc., the plaintiff resided in New York and the defendant resided in New Jersey; therefore, the defendant moved to transfer to the Southern District of New York. Breezing through the factors, the court noted that while all relevant documentary evidence was located in New York or New Jersey, documents would have to be exchanged regardless of where the case was tried. The court concluded that the Eastern District of Texas was convenient for the New York plaintiff because the plaintiff chose to file in the Eastern District. Since patent cases generally involve third party witnesses from all over the world, cost of attendance and compulsory process factors were neutral. Network-1 Security Solutions, Inc. v. D-Link Corp. exhibits similar reasoning. The plaintiff resided in New York. The defendant resided in Taiwan and California and sought transfer to the Southern District of New York. The court advanced the usual reasons: evidence could be exchanged electronically; witnesses may have been from all over the world so New York was no more convenient; the plaintiff’s choice of forum was entitled to deference; and the district had a localized interest because the allegedly infringing sales occurred in the district.

Pre-TS Tech, the Eastern District granted transfer where extraneous circumstances favored transfer. For example, where the court lacked personal jurisdiction over the defendant or judicial efficiency counseled transfer. Commonly, the defendant in
the Eastern District action “first-filed” a declaratory judgment action in the transferee forum against the Eastern District plaintiff that alleged non-infringement and was filed before the plaintiff sued for infringement in the Eastern District. Alternatively, there was an ongoing infringement action in the transferee forum concerning the same patents and parties.147

*50 Absent such circumstances, the Eastern District rarely granted transfer. Considerations of convenience seldom mattered. Further, the Federal Circuit affirmed the district’s § 1404(a) decisions.145 “[A] district court’s decision concerning a motion to transfer venue is reviewed for abuse of discretion.”149 Because the district followed the Fifth Circuit’s § 1404(a) precedent, the district’s cursory analysis was not an abuse of discretion.150

III. In re TS Tech: The Federal Circuit Takes Action

Given D-Link, the odds seemed stacked against petitioner TS Tech when it appealed the Eastern District’s denial to the Federal Circuit.151 Very little distinguished TS Tech from D-Link and the many other cases where the Eastern District denied transfer. The plaintiff, Lear Corporation, resided in Southfield, Michigan.152 The defendants, TS Tech USA Corporation and its two subsidiaries, resided in the Southern District of Ohio and in Canada.153 Defendants sought transfer to the Southern District of Ohio.154

*51 The Eastern District analysis proceeded in customary fashion with one exception. Recall that Volkswagen set out four private factors.155 In Lear, the Eastern District added two more factors—“the plaintiffs’ choice of forum” and “the place of the alleged wrong”—citing a prior Eastern District case that predated Volkswagen.156 Under this six-factor test, the Eastern District concluded that the private factors disfavored transfer.157 Deference to the plaintiff’s choice of forum disfavored transfer.158 The court strangely found the cost of attendance factor neutral because “neither the plaintiffs nor the defendant are located in Texas.”159 The place of wrong included the Eastern District, and the remaining private factors were neutral.160 The public factors weighed against transfer since defendants’ allegedly infringing products were sold in the district.161 The court therefore denied transfer.162

The Federal Circuit ruled that the Eastern District of Texas clearly abused its discretion.163 Judge Rader’s opinion disagreed with the Eastern District on several key points. First, the district misconstrued the weight of the plaintiff’s choice of forum, incorrectly treating it as a distinct factor.164 Second, in assessing cost of attendance, the district failed to apply the “100-mile” rule established in Volkswagen.165 Under this rule, “the factor of inconvenience to witnesses increases in direct relationship to the additional distance [beyond 100 miles] to be traveled.”166 The district disregarded the fact that all the identified key witnesses in Ohio, Michigan, and Canada would have to travel 900 more miles to attend trial in Texas *52 rather than Ohio.167 Third, on access to sources of proof, the district erred in deciding this factor was neutral. Most of the evidence was located in or around the transferee forum and none was located in the Eastern District.168

Judge Rader also disagreed with the district’s common argument that modern technology and electronic storage made the access factor neutral, countering that such an approach rendered this factor superfluous.169 Discussing public factors, the existence of some infringing sales in the Eastern District was insufficient to give the district any special local interest in the matter.170 Neither TS Tech nor Lear had any offices in the district and infringing sales occurred nationwide.171 The effect of TS Tech’s alleged infringing sales had “no more or less of a meaningful connection to this case than any other venue.”172

Pre-TS Tech, the Eastern District’s § 1404(a) analysis may have been hasty and possibly misleading. Nevertheless, the Federal Circuit took a bold departure from D-Link in finding that the district clearly abused its discretion in TS Tech.173 The Federal Circuit’s own VE Holding allows the plaintiffs to choose where to file.174 In TS Tech, the Federal Circuit acknowledged that the Eastern District’s analysis was correct for many factors.175 As the Federal Circuit concurred in D-Link,176 there is some merit to the Eastern District’s contention that in this age of electronic storage and transportation, access of sources of proof can be an insignificant factor in the analysis.

On the other hand, the establishment of the Federal Circuit in 1982 was motivated by a need to unify patent case law across all jurisdictions, preventing the then *53 existing practice of plaintiffs picking jurisdictions that were more favorable in their construction of patent laws.177 Seeing the Eastern District’s continuing ascendance from D-Link in mid-2006 to its position atop the nation’s patent trial docket, the Federal Circuit may have felt compelled to enforce its mandate. The Eastern District’s failure to obey Fifth Circuit law on § 1404(a) gave the Federal Circuit an opportunity to find an abuse of discretion.
IV. The Eastern District Holds Its Ground

One might expect a reduction in patent filings in the Eastern District of Texas following TS Tech. While patentee-plaintiffs can file there, there is no guarantee the case will not be transferred out. Indeed, the Eastern District saw a decline in the number of patent cases filed in 2009,\(^1\) perhaps due to plaintiff apprehension concerning new transfer rules. In addition, the district saw a spike in transfer requests in patent cases, from nineteen in 2008 to thirty-four in 2009.\(^2\)

A. The Transfer Record Since TS Tech

The dataset in Tables 3, 4a, and 4b was compiled by using Westlaw to search for all Eastern District of Texas patent cases where the court decided a §1404(a) motion.\(^3\) Before TS Tech, the district granted transfer in 30.6% of cases (fifteen of forty-nine). Since TS Tech, the grant rate is 34.1% (fourteen of forty-one cases). \(*54\) The data, therefore, reveals a trivial change in results. The inertial effect of the plaintiff’s initial filing choice is still significant.

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<tr>
<td>2010(^3)</td>
<td>7</td>
<td>1</td>
<td>6</td>
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</tbody>
</table>

Table 3: E.D. Tex.’s Transfer Record in Patent Cases from 2004 to 2009

Examining the post-TS Tech results by date and judge reveals little. It is conceivable that the Eastern District would only gradually become acclimated to TS Tech. In May 2009, the Federal Circuit confirmed and clarified its §1404(a) transfer rules in In re Genentech, Inc.\(^4\) Yet Table 4a, infra, indicates no progression over the course of the year. The grant rate in the first half of 2009 was 35.3 percent. The rate since then is 33.3 percent. Table 4b, infra, which tracks tendencies by judge, exposes no trends that the small sample size cannot account for.

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<thead>
<tr>
<th>Date Range</th>
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Table 4a: E. D. Tex.’s Transfer Record in Patent Cases Since TS Tech by Date Range

Table 4b: E.D. Tex.’s Transfer Record in Patent Cases Since TS Tech by Judge
The next section explains how the Eastern District incorporated the TS Tech holding, yet still denied transfer motions at similar rates.

**B. The Eastern District’s Modified Analysis**

The Eastern District of Texas’s use of a six private factor test in Lear was unusual. In most pre-TS Tech cases, the district followed the analysis required by Volkswagen and enforced in TS Tech. TS Tech, therefore, did little to change the form of the analysis. Post-TS Tech, the court still begins by examining whether venue is proper in the transferee district. The court then applies the four private and four public factors. In accordance with TS Tech though, the court now recognizes that it is no longer good law to use Lear’s six-factor test and to consider the plaintiff’s choice of forum as a distinct factor.

However, the district’s application of the factors might not be in line with the spirit of TS Tech. Summarizing TS Tech’s holding in informal terms, if the facts and parties have no relation with the Eastern District of Texas (other than infringing sales that also occur nationwide), then the case should be transferred. The Eastern District’s post-TS Tech approach softens this informal holding. Since TS Tech, eleven cases have involved a Texas plaintiff. In ten of eleven, transfer was denied though the plaintiff was not necessarily from the Eastern District, there were no Texas defendants, and most witnesses and evidence were outside of Texas.

Moreover, even in cases bearing no relation to Texas, if the parties, witnesses, and evidence were scattered geographically, then transfer was usually denied. The Eastern District argued that such cases were not “regional” in nature, meaning the cases were not localized around the transferee forum. Therefore, the Eastern District is as convenient a forum as any other. The district often distinguishes TS Tech on this ground. An overview of how the Eastern District analyzes each private and public factor post-TS Tech follows.

1. Private Factor 1: Relative Ease of Access to Sources of Proof

The district’s analysis of the location and costs of procuring evidence demonstrates disinclination against transfer. First, if any identified sources of proof are located in Texas--not just the Eastern District--this may weigh against transfer, even if most evidence is located elsewhere. Only in instances where no evidence was located in the district, evidence was not geographically scattered, and evidence was localized around the transferee forum did this factor favor transfer. Second, the court sometimes found transfer disfavored by relying on the fact that the defendant failed to specifically identify evidence or if the relevancy of identified evidence was unclear. This reasoning was inconsistently applied; in one case, the court accounted for evidence not specified where said evidence was located in or near the Eastern District. Third, despite TS Tech, the district continued to argue that modern technology renders this factor unimportant and neutral. In May 2009, the Federal Circuit restated that this factor cannot be rendered superfluous on technological grounds. The district has since agreed.

2. Private Factor 2: Availability of Compulsory Process

This factor weighs the power of the transferor and transferee forums to subpoena witnesses, forcing them to attend trial and discovery proceedings. If the transferee forum is closer to the witnesses, it will have greater subpoena power and this should weigh in favor of transfer. Yet even in such cases, the Eastern District frequently finds this factor neutral. The district argues that this factor only weighs in favor of transfer when the transferee forum had “absolute subpoena power,” meaning that the transferee forum had subpoena power over all witnesses. In the Eastern District’s analysis, if the transferee forum had subpoena power over most witnesses or more witnesses than the Eastern District, this factor--at best--slightly favored transfer. The district’s remaining analysis resembles the reasoning discussed under the sources of proof factor. The court looks to the number of witnesses on each side, but has found this factor to be neutral where the witnesses are dispersed geographically. Further, this factor is found neutral if the court concludes that none of the witnesses outside the district are unwilling to attend trial in the Eastern District or that deposition testimony could be videotaped.

3. Private Factor 3: Cost and Convenience of Attendance

The Eastern District’s analysis of this factor shifted in response to a Federal Circuit case, In re Genentech. After TS Tech, the Eastern District followed the 100-mile rule, but used it to argue against...
transfer in applicable cases. First, where some witnesses were foreign, the court added up distances to argue that foreign witnesses would have had to travel farther if the transferee forum is in California. Second, in cases where witnesses resided on both U.S. coasts, the court added up distances to find that its “central location” reduced travel for witnesses on both coasts. Third, in cases where the witnesses were dispersed, the Eastern District generalized the centralized location approach and added distances to show that it was no less convenient than the proposed transferee forum.

Genentech overruled the first and second practices. The Eastern District has since agreed that the 100-mile rule is not rigidly applicable to foreign witnesses and the centralized location test is not good law. Very recent Federal Circuit cases also militate against the third practice. Finally, the Eastern District has found that in cases where the transferee forum was the Northern District of California (San Francisco, Silicon Valley) or the Southern District of New York (Manhattan), the costs of hotels, parking, meals and other expenses attendant to litigation would have been higher there as compared to divisions in the Eastern District, thus disfavoring transfer.

4. Private Factor 4: All Other Practical Problems (Judicial Economy)

As the name suggests, this factor is a catchall for all other private considerations. For example, transfer may raise issues concerning judicial economy and the “possibility of delay and prejudice.” The Eastern District favors transfer where the defendant first-filed a declaratory judgment action in the transferee forum. Transfer is also favored when a pending action in the transferee forum concerning the same or substantially similar patents has progressed further in litigation than in the Eastern District.

Judicial economy considerations can also militate against transfer. Where a pending action in the proposed transferee forum concerns the same or substantially similar patents and the Eastern District action has progressed further, transfer is disfavored. Where a declaratory action filed in the proposed transferee forum is then transferred to the Eastern District, transfer back to the transferee forum is disfavored. Transfer is also disfavored where the Eastern District has encountered the same parties or substantially similar patents in past cases. In Sanofi I, the Eastern District found that this factor disfavored transfer for two reasons. First, the defendant in the current action had previously been a plaintiff in the Eastern District in an unrelated case. Second, it was unclear whether the transferee forum had personal jurisdiction over the plaintiff. The Federal Circuit in Genentech reversed Sanofi I, finding these two considerations irrelevant.

5. Public Factor 1: Administrative Difficulties (Court Congestion)

This factor compares disposition speeds and judicial caseloads of the forums. Pre-TS Tech, the district commonly concluded that the Eastern District’s faster time-to-trial disfavors transfer to the slower transferee forum. The Eastern District has since followed the Federal Circuit’s lead and now presumes this factor to be “speculative” in many cases. In other applicable cases, the court found this factor neutral because the difference in time-to-trial is negligible. The court has also required the plaintiff to present data showing that the transferee forum is slower in patent cases specifically. Data for all civil cases generally is insufficient.

Post-TS Tech, the Eastern District in some instances has still found that the relatively greater speed of the Eastern District’s rocket docket disfavors transfer. The court has also used the speculative nature of this factor to disregard a defendant’s data showing that the Eastern District is slower or more congested. For example, while the transferee district had a faster termination time, the Eastern District had a faster time-to-trial for the cases that reached trial. Hence, this factor was inconclusive. The court also disagreed that its heavy patent caseload created congestion that slowed down its docket, though the district’s slowdown since its 2007 peak might suggest otherwise.

6. Public Factor 2: Local Interest

The Eastern District has acknowledged TS Tech’s holding that it cannot claim a localized interest on the sole ground that nationwide infringing activity also occurred in the district. However, the court has perhaps attempted to minimize the gist of TS Tech. The court has found this factor disfavors transfer so long as any party resides in Texas, even if a large number of parties are incorporated elsewhere. This factor has been found neutral when the defendant resides in the proposed transferee forum or when more infringing uses or sales occurred in the transferee forum.

7. Public Factors 3 and 4: Familiarity with Law and Conflicts of Law
Familiarity with governing law is usually neutral and rarely argued by the parties since the governing law is federal patent law. Federal district courts presumptively have equal familiarity. This factor disfavors transfer in instances where the Eastern District has confronted the same or similar parties and patents. Conversely, transfer is favored where the transferee forum has prior experience with the patents and parties. Transfer is also favored where the case involves state law claims and the transferee forum is in that state. The “conflicts of law” factor is usually neutral and is rarely argued.

V. The Federal Circuit Responds: Genentech, Hoffman, Nintendo

In 2009, the Federal Circuit reversed the district’s denial of § 1404(a) transfer in three cases. The Federal Circuit’s reversals discouraged the Eastern District of Texas’ interpretation and application of TS Tech and reinforced its precedent. A discussion of the three cases follows.

A. In re Genentech: No Centralized Location Test

Genentech reversed Sanofi I. The plaintiff, Sanofi, was a German corporation. The defendants, Genentech, Inc. and Biogen, Inc., had respective places of business in San Francisco and San Diego and sought transfer to the Northern District of California. District Judge Clark denied the defendants’ motion primarily on grounds that the parties, witnesses, and evidence were dispersed geographically. The plaintiff’s witnesses and records were located in Germany and Switzerland. Under a rigid application of the 100-mile rule, the cost of attendance and transportation would have been higher for European witnesses if trial were held in California. Potential witnesses and evidence included “individuals . . . in eleven different countries and nineteen different states.” The court concluded that the Eastern District of Texas was “centrally located” for all the parties.

The Federal Circuit ruled that that Eastern District misapplied the “central location” test, and held that the test is only applicable where some witnesses actually resided in the plaintiff’s choice of forum. Here, zero witnesses resided in the Eastern District. Accordingly, the district could not qualify as a central location. The court held that favoring transfer does not require that transfer is more convenient for all witnesses, but only that, on balance, transfer is more convenient. In addition, the 100-mile rule does not apply rigidly for foreign witnesses since they must travel large distances for any U.S. venue. The “bulk” of evidence in patent cases is presumed to reside with the defendant. Thus, transfer to a district nearer to the defendant’s residence makes access to sources of proof more convenient.

The Federal Circuit reversed other trial findings. The defendants are not required to show that the witnesses they identify are “key witnesses.” The possibility that the Northern District lacked personal jurisdiction over the plaintiff was irrelevant because whether the case could have been brought there depends only on whether the transferee forum had personal jurisdiction over the defendants. Transfer analysis is “case-by-case.” That the defendant, Genentech, had previously been a plaintiff in the Eastern District was irrelevant to whether this trial in the Eastern District was convenient for Genentech. While the Eastern District had faster time-to-trial, this factor was speculative. Circuit Judge Linn’s thoroughness in addressing each finding by the Eastern District intimates that the “abuse of discretion” standard of review is likely now a fiction in reviewing § 1404(a) cases.

Interestingly, the Eastern District’s transfer grant rate dropped after Genentech—from 45.5 percent (5 of 11) to 31.0 percent (9 of 29). While Genentech cut off particular avenues of discretion previously available (e.g., not applying the 100-mile rule rigidly for foreigners; congestion is often speculative), the Eastern District found other ways to deny venue transfer requests. In the latter half of 2009, the district consistently denied transfer on grounds that the parties were dispersed geographically.

B. Hoffman and Nintendo: No Dispersed Location Test

Decided on December 2, 2009, In re Hoffman-La Roche Inc. reversed the Eastern District’s denial of transfer in Novartis I. The plaintiff, Novartis, resided in California. The defendants resided in Switzerland and Michigan. The patent concerned a pharmaceutical drug whose development occurred in multiple jurisdictions. The Federal Circuit identified eighteen potential non-party witnesses and seven party witnesses residing in several jurisdictions. The defendants sought transfer to the Eastern District of North Carolina where much of its research and development activity took place.
*67 District Judge Folsom denied the motion on the grounds that the evidence and witnesses were dispersed geographically.272 No evidence or witnesses were in the Eastern District of Texas. However, because this was a “nationwide” suit, Judge Folsom disfavored transfer because the Eastern District of Texas was no less convenient than the North Carolina court.273 Judge Folsom also found that while the North Carolina court had subpoena power over some witnesses, it did not have “absolute subpoena power.”274 Hence, the compulsory process factor did not favor transfer.275 Finally, because the infringing sales occurred nationwide, the transferee had no greater local interest in this dispute.276 In conclusion, none of the factors favored transfer.277

The Federal Circuit rejected trial findings on nearly every factor. In his opinion, Circuit Judge Garjasa asserted: “[T]here appears to be no connection between this case and the Eastern District of Texas.”278 On sources of proof, the majority of evidence relevant to the infringement claim was in North Carolina. Judge Garjasa also reprimanded the plaintiff for transporting 75,000 pages of documents from its headquarters in California to the Eastern District of Texas in anticipation of litigation, calling it a “fiction . . . created to manipulate the propriety of venue.”279 On compulsory process, absolute subpoena power is not required for courts to favor transfer.280 Compulsory process favored transfer because the North Carolina court had subpoena power over four non-party witnesses, while the Eastern District of Texas court had subpoena power over none.281 North Carolina had a greater localized interest in the matter since the case questioned the work and reputation of several *68 scientists residing there.282 Finally, the North Carolina court had a lighter patent docket.283 Thus, the congestion factor favored transfer.284

The Federal Circuit displayed similar analysis in In re Nintendo Co.,285 decided on December 17, 2009, reversing the Eastern District’s denial of a motion to transfer venue in Motiva.286 The plaintiff, Motiva, resided in Ohio. The defendants sought transfer to the Western District of Washington where one defendant resided.287 The Eastern District’s opinion in Motiva summarizes its approach:

In those cases [Genentech and TS Tech], it was undisputed that the vast majority of identified documents and witnesses were located in and around the transferee court. Here, while Defendants rely heavily on the fact that there are no documents and witnesses located in Texas, they ultimately fail to meet their burden-proof that this case is clearly more conveniently tried in the Western District of Washington.288

The Federal Circuit rejected the Eastern District’s view that denial of transfer was proper for a patent case bearing no relation to the Eastern District.289 Geographic dispersion is not sufficient to counteract the fact that none of the witnesses or documents were located in Texas.290 Moreover, Circuit Judge Rader’s opinion disapproved the district’s speculation that some evidence may be located at the defendants’ satellite offices in California and New York.291 Judge Rader asserted that the district court’s hypothesis that evidence would come from disparate locations was based on questionable reasoning, already rejected in Genentech.292 Part VI of this article discusses these recent developments and assesses the future implications *69 for the Eastern District of Texas, forum shopping in patent cases, and the NPE business model.

VI. Implications of New Venue Law on Non-Practicing Entities

After being reversed four times by the Federal Circuit in 2009, the Eastern District of Texas should seemingly grant transfer motions more frequently. This section seeks to answer two questions. First, what is the likely future for the Eastern District and forum shopping in patent cases? Second, what are the resulting implications for the NPE business model?

A. The End of the Eastern District and Forum Shopping?

The Federal Circuit ended 2008 with TS Tech in which it departed from its history of affirming the transfer rulings of the Eastern District of Texas. In TS Tech, the Federal Circuit held that when the transferee forum is more convenient, the case should be transferred.293 In 2009, the Federal Circuit pushed further in Genentech, holding that the district could not deny transfer on grounds that the district was centrally located.294 The Federal Circuit ended 2009 with Hoffman and Nintendo, which make even clearer that the Eastern District cannot prevent the transfer of patent cases that bear no connection to the district.295

The Eastern District could continue denying transfer motions at current rates, but there is a strong likelihood of continuing reversals. Defendants, aware of TS Tech and its progeny, are likely to appeal any § 1404(a) denials.296 In form, the Federal
Circuit may recite the “abuse of discretion” standard, however, in substance, the Federal Circuit has given the Eastern District zero deference to its transfer rulings. If necessary, it appears the Federal Circuit will reverse the Eastern District’s denials one-by-one. The inevitability of eventual transfer will likely become apparent to potential patentee-plaintiffs, who will then file their infringement claims elsewhere.

The Eastern District’s disposition of SMDK Corp. v. Creative Labs, Inc. at the end of 2009 indicates a possible change of direction. The plaintiff’s principal place of business was in Florida. The defendants resided in far-flung places like California, New York, Arkansas, Indiana, and Japan. Judge Folsom noted that transfer to the Northern District of California may inconvenience some defendants, none of whom objected to the motion to transfer venue, but would be more convenient for the majority of defendants. Further, the case had no connection to the Eastern District. Citing Hoffman, Judge Folsom granted transfer.

On the other hand, three 2010 denials of motions to transfer venue create new reason for doubt that the transfer rates will increase in the Eastern District. The three cases are distinguishable from the cases that the Federal Circuit overruled in that the plaintiffs in each case resided in Texas. However, the Eastern District continues to underplay connections to the transferee forum, while overplaying any connections of the plaintiffs to the district. The district disregarded the Nintendo and Genentech presumption that the majority of evidence and factual connections in patent cases is presumed to be located where the defendant resides.

What may be more troubling about these cases is that, by focusing on the residence of the plaintiffs, they may inadvertently hint at a self-remedy for the plaintiffs. The plaintiffs can create shell subsidiaries or offices in the Eastern District to cheat any venue and §1404(a) rules. NPEs in particular could resort to this strategy. NPEs have no development or manufacturing operations and few employees. Holding only intangible property rights and some attesting documents, NPEs could easily incorporate in Texas or set up a small office in the Eastern District. Given how central litigation is to the NPE business model, it is not duplicitious to call the Eastern District their principal place of business for venue purposes. However, the Federal Circuit would easily see through this form of fabricated venue. The Federal Circuit would likely respond by modifying §1404(a) analysis to minimize the weight of the plaintiff’s location in the analysis. The court might adopt a presumption in favor of transfer if the defendant resides in the transferee forum.

Congress’ proposed Patent Reform Act of 2009 went further by proposing a modification of §1400(b), the patent venue provision. The amendment would have barred parties from “manufacturing” venue by assignment or incorporation. Venue would be proper only where (a) the defendant is incorporated; (b) the defendant has its principal place of business; (c) where the defendant is permanently located and has committed substantial acts of infringement; or (d) where the plaintiff resides if the plaintiff is a nonprofit or individual inventor. The changes would overrule VE Holding by precluding NPEs from filing where they reside since NPEs are for-profit and not inventors. The House bill called for similar amendments to §1400(b). Under H.R. 1260, venue is proper only in districts where the defendant has significant operations, with exceptions for plaintiffs who are nonprofits, academic institutions, or individual “natural person” inventors.

The Patent Reform Act of 2009 has not passed, but efforts have continued with the Patent Reform Act of 2009. At present, the Senate bill keeps §1400(b) as is, but adds §1400(c). Subsection (c) in effect codifies the TS Tech line of cases, requiring transfer upon a showing that the transferee forum is clearly more convenient than the current forum. The provision is vague and the bill leaves §1400(b) and VE Holding intact. However, as work on the bill advances, its measures could revert to resemble the stricter proposals found in the bill as introduced. Even if Congress’ efforts fail, the Federal Circuit will assuredly take action. The Federal Circuit may revise its transfer analysis to weigh the defendant’s location more heavily. Alternatively, the court may reverse VE Holding, reinterpreting current §1400(b) to define patent venue in a manner similar to the original bill’s amended §1400(b). Either way, the Eastern District of Texas phenomenon will end. Forum shopping in patent cases more generally will end because Federal Circuit law applies across all jurisdictions.

B. The End of the Non-Practicing Entity?

Without the ability to forum shop, the NPEs will likely wither, but not die. Litigation is central to the NPE business model. That does not imply that NPEs always bring frivolous claims. While NPEs have made great use of the Eastern District, a substantial share of their litigation still arises in other forums. NPEs with valid patents and meritorious infringement claims will continue to prevail. However, litigating in forums with slower dockets and less favorable conditions will lower expected returns. NPEs will face higher litigation costs because discovery and trials take longer. Defendants will be more inclined to
litigate rather than settle and to litigate using scorched earth tactics that the Eastern District barred. NPEs will also face less favorable findings from judges and juries.

Unfortunately for NPEs, changing transfer and venue rules are only part of broader judicial and legislative movements discussed below.

*73 1. Judicial Developments

The following patent law cases reduce the efficacy of litigation as part of the NPE business model:

• Permanent Injunctions: The prospect of permanent injunctions often forces patent defendants to concede to large licensing fees. After eBay Inc. v. MercExchange, L.L.C., permanent injunctions are no longer awarded as a matter of course upon finding the defendant liable for infringement. Justice Kennedy’s concurrence argued that injunctive remedies would not serve the “public interest” when the plaintiff is an NPE.

• Obviousness Standards: KSR Int’l Co. v. Teleflex Inc. adopts a more flexible test for obviousness, rejecting the prior “teaching, suggestion, motivation” (TSM) test. The new obviousness standard makes it easier for the defendants to challenge the validity of the plaintiff’s patent on obviousness grounds.

• Declaratory Judgment Actions: MedImmune, Inc. v. Genentech, Inc. permits a licensee of a patent to file a declaratory judgment action alleging non-infringement or invalidity of licensor’s patent, without terminating the license. SanDisk Corp. v. STMicroelectronics, Inc. lowers the threshold for when declaratory judgment actions can be granted. When an intended licensee rejects the license offer, this creates standing for a declaratory action. These two cases expand the circumstances under which a potential defendant can preemptively file a declaratory judgment action alleging non-infringement or invalidity of an NPE’s patent.

*74 2. Congressional Reform Proposals

As far back as 2005, Congressional reform efforts recognized the impact of NPEs. For example, some proposals would change the methods of calculating damage remedies, with the intent of reducing damage awards. Because NPEs do not commercialize their patents, their damage remedy is a reasonable royalty, rather than lost profits. A reasonable royalty is determined by considering the licensing fee the parties would agree to under a “hypothetical bargain.” However, courts have not settled on any consistent and precise methods of determining royalties from a “hypothetical bargain” and recent Federal Circuit cases indicate the law on reasonably royalties in patent cases is in a state of flux.

Complicating matters, NPEs usually hold patents covering only a component of a defendant’s infringing product. However, courts increasingly have adopted the “entire market analysis” rule. Formally applied, this rule gives NPEs a royalty based on the proceeds of all sales of the entire infringing product, although the NPE’s patent may only cover a minor component. Realizing that a strict application of the rule overcompensates in such cases, the Federal Circuit has modified the rule by using a multiplier. The NPE will receive a royalty equaling a royalty base—total proceeds from sales of the entire product—times a multiplier representing the court’s estimation of the patent’s value as a fraction of the overall product.

The Patent Reform Act of 2009 seeks to further reduce royalty rewards by tying damages to the patent’s “specific contribution over the prior art.” For guidance, courts may consider the price of licensing a “similar noninfringing substitute in the relevant market.” “In some cases, this could push damages to zero if the non-infringing substitute is in the public domain.” The most recent version of the Senate bill rejects this proposal, perhaps in response to criticism that it raises uncertainty and judicial costs. The current version of the bill gives courts and juries more discretion, while emphasizing sound methodology in computing damages and requiring documentation thereof, perhaps looking to courts of appeal to resolve any errant award amounts. In any case, reform measures and the Federal Circuit’s recent rulings will likely reduce damage awards. This will lower the expected return of litigation for NPEs.

The bill also provides for post-grant review of patents by the patent appeals board. Relative to litigation, post-grant review provides a more expedient and economical means for alleged infringers to challenge the validity of patents. NPEs are often accused of holding patents of questionable validity. If NPEs hold invalid patents, these proposals would harm NPEs by facilitating invalidity determinations of their holdings. Even if NPEs hold valid patents, post-grant review would still reduce a defendant’s costs.
3. Leave it to the Courts

If recent patent reform efforts are any indication, Congress’ current efforts are not likely to pass in the near future. The Patent Reform Act of 2009, arguably Congress’ strongest rebuke of NPEs yet, has still not passed. This hold-up is partly attributable to opposition from small inventors and their proponents. Opponents view the bill as a money grab by America’s largest corporations. The bill effectively lowers infringement penalties on large corporations by reducing litigation costs, the likelihood of liability, and the severity of remedies. The proposed change to § 1400(b), for example, is not intended to combat NPEs, but to guarantee home field advantage for large corporate defendants in patent suits. In addition, the bills’ harsh measures overreacted to the NPEs by being over-inclusive, punishing small businesses along with NPEs.

The passage of the Patent Reform Act would probably not significantly affect NPEs. If the bill does not pass, the judiciary will continue to combat the perceived abuses of the system by NPEs, from forum shopping to excessive licensing fees. If the bill does pass, the Senate’s current version does little other than expand judicial discretion. The current bill’s pullback reflects the difficulty in identifying NPEs. The 2010 bill’s tenor is to have the judiciary decide whether a plaintiff is an NPE and adjust their analysis accordingly.

Past holdings of the Federal Circuit and the Supreme Court indicate that NPEs face a gradual decline towards extinction. While never expressly identifying parties as “NPEs” or “patent trolls,” the courts have steadily reduced their usefulness to NPEs. The Federal Circuit’s 2009 skirmishes with the Eastern District of Texas are representative of the Federal Circuit’s attack on NPEs. Discouraging forum shopping was part of a larger effort to reduce the leverage that patent litigation provides NPEs.

VII. Conclusion

Over the past decade, the meteoric rises of NPEs and the Eastern District of Texas as a venue for patent litigation have gone hand in hand. The Eastern District has served as a second home for NPEs, providing a launching point for infringement suits that are central to the NPEs’ business model. The Federal Circuit’s decision in TS Tech, easing the requirements for § 1404(a) transfer of venue in patent cases, was seen by many to mark the end of the Eastern District as a haven for patent litigants. Instead, the Eastern District proved remarkably resilient, sparking a series of reversals from the Federal Circuit in 2009 concerning the requirements for transfer of venue. The appellate authority of the Federal Circuit ultimately prevails. As a result, the Eastern District of Texas phenomenon will end. Combined with the broader judicial and legislative movements, the TS Tech line of cases may also signal the decline of NPEs.

Footnotes

1 B.A.Sc. 2007, University of Toronto; J.D. 2010, University of Chicago Law School. The author would like to thank Professor Randal Picker and Sarah Weber for their contributions and insights. The author would also like to thank Stanford Law School’s Intellectual Property Litigation Clearinghouse (IPLC) and PatentFreedom for providing this paper valuable data.

2 551 F.3d 1315 (Fed. Cir. 2008).

3 Id. at 1318.


5 In re TS Tech., 551 F.3d at 1318.
Id.

See id. (granting TS Tech’s petition for writ of mandamus).


Id.


McCurdy, supra note 11.

Id.


See John R. Allison et al., Extreme Value or Trolls on Top? The Characteristics of the Most-Litigated Patents, 158 U. Pa. L. Rev. 1, 31-32 (2009) (revealing that NPEs own more than 50 percent of the most-litigated patents and account for over 80 percent of suits filed involving those patents).

Hunt, supra note 13, at 4-5.


Shrestha, supra note 12, at 115.

See Rebecca A. Hand, EBay v. MercExchange: Looking at the Cause and Effect of a Shift in the Standard for Issuing Patent Injunctions, 25 Cardozo Arts & Ent. L.J. 461, 472-73 (2007) (citing the FTC’s description of NPEs as “design firms that patent their inventions but do not practice them or patent assertion firms that buy patents from other companies (particularly bankrupt ones), not to practice but to assert against others”).


Hunt, supra note 13, at 5 (stating that NPE inventions frequently cover business methods); Shrestha, supra note 12, at 145.


McCurdy, supra note 11; Intellectual Ventures owns approximately 10,000-15,000 patents. PatentFreedom, supra note 22.

McCurdy, supra note 11.

McCurdy, supra note 11.

McCurdy, supra note 11.

Klein, supra note 19, at 298.

McCurdy, supra note 11.

Klein, supra note 19, at 300-01; McCurdy, supra note 11.


d’Incelli, supra note 33, at 347.

Klein, supra note 19, at 300.

Shrestha, supra note 12, at 122.

Shrestha, supra note 12, at 122.

See Frank, supra note 8 (describing the “submarine patent”).

See Frank, supra note 8 (describing the “submarine patent”).

NTP, Inc. v. Research in Motion, Ltd., 418 F.3d 1282, 1287 (Fed. Cir. 2005) (The Eastern District of Virginia was the district court).

Klein, supra note 19, at 297.


E.g., Klein, supra note 19, at 297-98 (discussing the example of Forgent Networks who acquired patents on video compression technology and, through suits against forty defendants in 2004, accumulated over $100 million in licensing fees).

See Allison, supra note 17, at 24 (noting that NPEs “in the most-litigated-patent set fall almost entirely into only two classes: licensing companies in the business of buying up and enforcing patents (‘trolls’ by virtually anyone’s definition) and companies started by an inventor that do not make products”).

Shrestha, supra note 12, at 121.

Id. at 146 (noting the increase from 2000 to 2008 in the proportion of patent infringement suits initiated by NPEs).


Allison, supra note 17, at 32.

PatentFreedom lists most litigious NPEs by number of patent infringement suits filed. Below is a portion of a table. PatentFreedom, supra note 22.

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<td>Sorensen Research and Development Trust</td>
<td>73</td>
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</tr>
<tr>
<td>General Patent Corp International</td>
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<td>58%</td>
</tr>
<tr>
<td>Cygnus Telecommunications Technology LLC</td>
<td>69</td>
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</tr>
<tr>
<td>Papst Licensing GmbH</td>
<td>62</td>
<td>55%</td>
</tr>
<tr>
<td>F&amp;G Research Inc.</td>
<td>56</td>
<td>91%</td>
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</table>

Table A: Most Litigious NPEs and Percentage of Their Cases That Came After 2003

52 Freedman, supra note 49, at 8.


54 Hart, supra note 53.


56 See generally Klein, supra note 19, at 297; McCurdy, supra note 11.

57 McCurdy, supra note 11.


60 McCurdy, supra note 11.

61 Id.

62 McDonough, supra note 16, at 221.


65 Shrestha, supra note 12, at 130.

66 Id. at 126-27.

67 McDonough, supra note 16, at 211; Shrestha, supra note 12, at 128.

68 Watanabe, supra note 63, at 459-61.

69 Id.; Shrestha, supra note 12, at 128.

70 917 F.2d 1574 (Fed. Cir. 1990).

71 28 U.S.C. § 1400(b) (2006) (“Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”).


73 VE Holding, 917 F.2d at 1575. The prior interpretation of § 1400(b) limited venue to where the defendant resides, or has established a place of business and committed acts of infringement. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 223, 229 (1957).

74 VE Holding, 917 F.2d at 1584.

75 Taylor, supra note 72, at 576.

76 Id.

77 See Frank, supra at note 8, at 3.

78 See infra Figure 1.
See infra Figure 1.


See infra Figure 1 (exception for the District of Delaware and the District of New Jersey, although Delaware is the place of incorporation for many defendants). See also Reed Albergotti, The Most Inventive Towns in America, Wall St. J., July 22, 2006, at P1, available at http://online.wsj.com/article/SB115352188346314087.html. (ranking cities by the number of patents granted in 2005; 12 of the top 20 cities are in California and 2 are in New York).


See Leychkis, supra note 81, at 206.


See Frank, supra note 8, at 3.


Hosie, supra note 64, at 85.

Leychkis, supra note 81, at 214; see infra Table 1.

Leychkis, supra note 81, at 214-15. Table B below is from Leychkis’ article showing the filing patterns of five NPEs from 1999-2006. Id.

<table>
<thead>
<tr>
<th>Plaintiff NPE</th>
<th>Judge Ward</th>
<th>Judge Davis</th>
<th>Judge Folsom</th>
<th>Judge Clark</th>
<th>E.D. Tex. Total</th>
<th>All other districts</th>
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<td>Ronald A. Katz Technology Licensing, LP</td>
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<td>21</td>
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<td>Data Treasury Corp.</td>
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<td>IAP Intermodal, LLC</td>
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<td>11</td>
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</tr>
<tr>
<td>Rembrandt Technologies, LP</td>
<td>5</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>5</td>
<td>--</td>
</tr>
</tbody>
</table>
Table B: Where Patent Trolls File Their Suits, Filing Patterns Of Five NPEs Since 1999-2006

McCurd, supra note 11.

See Leychis, supra note 81, at 200-01; Moore, supra note 80, at 903-07.

PatentFreedom, supra note 22.

See supra Figure 1. The Eastern District of Texas saw a drop from 300 to 240 filed patent cases from 2008 to 2009.

Taylor, supra note 72, at 572 (adding that the rules were uniformly adopted by the rest of the district in 2005).

Spangler, supra note 85, at 236-47 (explaining that under the Eastern District’s patent rules, many forms of discovery are mandatory, and providing a detailed list of court sanctions); Taylor, supra note 72, at 572-74 (noting that defendants must locate relevant prior art and present their invalidity contentions under a compressed schedule, and the court is rarely willing to allow delay for amendments to contentions; also, discussing tight deadlines for claim construction proposals and hearings).

Spangler, supra note 85, at 234.


See infra Table 2. The current filing-to-trial time is 25.5 months.

See supra Figure 1.

Spangler, supra note 85, at 234.

Leychis, supra note 81, at 209.

Id.

Taylor, supra note 72, at 577.

35 U.S.C. § 286 (2006) (“Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”).

Leychis, supra note 81, at 219.

Id.; Taylor, supra note 72, at 577.

Data collected from Stanford’s IPLC. SLS Home, supra note 83.
See supra Table 2. The E.D. Va. and W.D. Wis. reach trial in less than a year and the D. Del. is also faster.

Leychkis, supra note 81, at 216.

Id.

See supra Figure 1 (indicating that the District of Delaware is popular); supra Table 2 (indicating that the District of Delaware has the longest termination time and one of the faster time-to-trial times).

See Leychkis, supra note 81, at 210 (“To say that juries in the Eastern District of Texas favor patent holders is something of an understatement—quite plainly, an Eastern District jury is the patentee-plaintiff’s best friend.”).


Shartzer, supra note 114, at 214-15.

Leychkis, supra note 81, at 213-14; but see Spangler, supra note 85, at 261 (alternatively arguing that the plaintiff-friendly perception is overblown and that jury tendencies in the district vary greatly by division).

Leychkis, supra note 81, at 219-20.

Id. at 220.

Id. at 213.

Id. at 220; but see Parker, supra note 98, at 27 (arguing that Eastern District juries are not pro-plaintiff).

28 U.S.C. § 1404(a) (2006) (“For 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.”).

See infra note 180 and accompanying text. My own survey used Westlaw to locate all thirty-four E.D. Tex. patent cases where transfer of venue was sought and decided in 2009. The results show that only three of the cases involved a party from the district.

Leychkis, supra note 81, at 216.

See infra Table 3 in Part IV.A.
In re Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004); Network-1 Sec. Solutions, Inc. v. D-Link Corp., 433 F. Supp. 2d 795, 798 (E.D. Tex. 2006).

In re Volkswagen, 371 F.3d at 203; Network-1, 433 F. Supp. 2d at 798.

28 U.S.C. § 1400(b); e.g., Network-1, 433 F. Supp. 2d at 798.

In re Volkswagen, 371 F.3d at 203; Network-1, 433 F. Supp. 2d at 798.

Network-1, 433 F. Supp. 2d at 798.

Id.


Id. at *1

Id. at *2.

Id. at *3.

Id.

Id. at *4.


Id. at 678.

See id.

Id. at 679.

Id. at 679-97.


Id. at 796.

Id. at 796-97.

Id. at 799-802.


Id. at 968.

See id. at 968-69 (“In reviewing a district court’s ruling on a motion to transfer pursuant to § 1404(a), we apply the law of the regional circuit.”).

See In re TS Tech. USA Corp., 551 F.3d 1315, 1317 (Fed. Cir. 2008).


Id. at *12.

Id. at *1.

See supra note 129 and accompanying text.


See Lear, 2008 WL 6515201, at *1-3.

Id. at *2.
Id.

160 Id. (indicating that parties’ briefs indicated compulsory process was neutral and sources of proof could be transported electronically).

161 Id.

162 Id. at *4.

163 In re TS Tech. USA Corp., 551 F.3d 1315, 1321 (Fed. Cir. 2008).

164 Id. at 1320.

165 Id.

166 Id.

167 Id.

168 Id. at 1321.

169 In re TS Tech., 551 F.3d at 1321.

170 Id.

171 Id.

172 Id.

173 Cf. id. (“There is no easy-to-draw line separating a ‘clear’ abuse of discretion from a ‘mere’ abuse of discretion in all cases ... Nevertheless, we conclude that TS Tech has met its difficult burden of demonstrating a clear and indisputable right to a writ.”).


175 See In re TS Tech., 551 F.3d at 1319-20 (noting that “several factors that the district court afforded no weight ... were indeed neutral on the facts presented”).


I searched all federal cases using the query: ["*1404" & "TRANSFER" & "VENUE"] & "PATENT" & "INFRINGEMENT" & DA(AFT 2000) & PR(E.D. TEX)]. I ignored results from before 2004 since very few transfer motions were filed before 2004. For 2009, I supplemented this with a second query: ["TRANSFER" & "VENUE" & "(GENENTECH "TS TECH") & PR(E.D. TEX")] to check for cases citing the Federal Circuit’s decision in In re TS Tech. Finally, I supplemented all searches by searching Westlaw’s Federal Patent Cases database (FIPPAT-CS) using the following query: [PR(E.D. TEX) & "TRANSFER" /S "MOTION" & "VENUE" & DA(AFT 2003)]. I went through every case to assure that it was a patent case or if there were other reasons to not include it in my data (e.g. while a transfer motion was filed, the court never ruled on the motion). This method is concededly not complete and Westlaw may take many months before an order or decision is uploaded to its database. An analysis of Stanford IPLC’s, which is more up to date, indicates that a few of the district’s transfer orders are very brief (i.e. are not memoranda orders that explain the facts, law, and reasoning) and may contain strings that my search queries did not capture. However, my data collection method, while under-inclusive, should approximate grant/deny trends and is consistent across years and judges.

There were three cases where transfer was favored but under unique circumstances. One case was stayed pending action in transferee district, with the court noting that the factors favored transfer. Sanofi-Aventis Deutschland v. Novo Nordisk, Inc. (Sanofi II), 614 F. Supp. 2d 772, 773-74 (E.D. Tex. 2009). In another case, transfer was granted for the California defendants, but not the TX defendants. Balthasar Online, Inc. v. Network Solutions, LLC., 654 F. Supp. 2d 546, 553 (E.D. Tex. 2009). In a third case, both parties sought transfer. Digital-Vending Serv., Int’l LLC v. Univ. of Phoenix, Inc., No. 2:08-CV-91-TJW-CE, 2009 WL 3161361, at *3-4 (E.D. Tex. Sept. 30, 2009) (granting plaintiff’s motion to transfer to E.D. Va. and denying defendant’s motion to transfer to D. D.C.).


Because I used Westlaw, the data from 2010 is incomplete.

566 F.3d 1338, 1341-48 (Fed. Cir. 2009).


WL 1748573, at *1-2 (E.D. Tex. June 19, 2009) (indicating that the defendant argued that none of the parties resided in Texas while the plaintiff asserted that it had a direct connection to the Eastern District); Aloft Media, LLC v. Yahoo!, Inc., No. 6:08-CV-509, 2009 WL 1650480, at *1 (E.D. Tex. June 10, 2009); MHL Tek, 2009 WL 440627 at *1. In the one case that was transferred, both the plaintiff and one defendant were from the transferee forum. Techradium, Inc. v. Athoc, Inc., No. 2:09-CV-275-TJW, 2010 WL 1752555, at *24 (E.D. Tex. Apr. 29, 2010).

Deep Nines, 2009 WL 3784372, at *4; Emanuel, 2009 WL 3063322, at *4-5. *7-9 (“Even if Plaintiff has no connection to the Eastern District of Texas, the Defendant has still failed to demonstrate that there is a localized focus of people, events, and evidence in or near the District of Minnesota.”); Aloft, 2009 WL 1650480, at *3, *5 (explaining that the cost of attendance factor “may weigh against transfer or be neutral when the relevant witnesses are spread throughout the country or the world”); Motiva, 2009 WL 1882836, at *6 (“Here, while Defendants rely heavily on the fact that there are no documents and witnesses located in Texas, they ultimately fail to meet their burden-proof that this case is clearly more conveniently tried in the Western District of Washington.”); Konami, 2009 WL 781134, at *4-5 (finding the cost of attendance and sources of proof factors neutral because the evidence and witnesses were from varied locations across the world).

ICHL, 2009 WL 1748573, at *6 (“[C]ourts which have denied transfer motions have focused on the lack of a common regional geographic area in and around the proposed transferee forum.”); MHL Tek, 2009 WL 440627, at *4 (“The central location of this Court in relation to the parties involved in this suit makes it, at the very least, as convenient a location as the Eastern District of Michigan.”).

Motiva, 2009 WL 1882836, at *6 (“Though the Court acknowledges that this is a close case, it is readily distinguishable from cases such as In re Genentech and TS Tech. In those cases, it was undisputed that the vast majority of identified documents and witnesses were located in and around the transferee court.”); Konami, 2009 WL 781134, at *4 (“Unlike Volkswagen II and TS Tech, here all of the documents and physical evidence are not located in and around the destination venue.”); J2 Global Comm., Inc. v. Protus IP Solutions, Inc., Nos. 6:08-CV-211, 6:08-CV-262, 6:08-CV-263, 2009 WL 440525, at *4 (E.D. Tex. Feb. 20, 2009) (“[T]his case is distinguishable from TS Tech where the transferee district was much more convenient for all of the parties.”).


In re TS Tech. USA Corp., 551 F.3d 1315, 1321 (Fed. Cir. 2008).

included source code, which is stored electronically); Jackson v. Intel Corp., No. 2:08-CV-154, 2009 WL 749305, at *2 (E.D. Tex. Mar. 19, 2009) (“[D]efendants have identified no documents or evidence located in Illinois that cannot be produced electronically or easily transported to Marshall.”); Sanofi I, 607 F. Supp. 2d at 777 (decided in March 2009); J2 Global, 2009 WL 440525, at *2.

200

In re Genentech, Inc., 566 F.3d 1338, 1345-46 (Fed. Cir. 2009).

201


202


203

See In re Genentech, 566 F.3d at 1345 (reversing Sanofi I).

204

Acceleron, 634 F. Supp. 2d at 765.

205


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209

566 F.3d 1338 (Fed. Cir. 2009).

210

In re TS Tech. USA Corp., 551 F.3d 1315, 1321-22 (Fed. Cir. 2008).

211


212


213


215 In re Genentech, Inc., 566 F.3d 1338, 1344 (Fed. Cir. 2009).


218 In re Hoffman-La Roche, Inc., 587 F.3d 1333, 1336 (Fed. Cir. 2009); In re Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009).


221 Sanofi II, 614 F. Supp. 2d at 779-81.


227 Id.

228 In re Genentech, Inc., 566 F.3d 1338, 1346 (Fed. Cir. 2009).

In re Genentech, 566 F.3d at 1347.


Id.


Id.

Id.


See supra Tables 1 and 3 in Part II.B.1. Figure 1 shows that the number of patent cases filed has dropped from 368 in 2007 to 240 in 2009. Table 2 shows that the current median-to-trial time is over two years, up from less than a year circa 2004-2006.


Odom, 596 F. Supp. 2d at 1004; see also Mediostream, Inc. v. Microsoft Corp., No. 2:08-CV-3690, 2009 WL 3161380, at *5 (E.D. Tex. Sept. 30, 2009) (indicating plaintiff’s decision to drop its California state law claims rendered this factor neutral; had plaintiff kept the claim, this would have favored transfer); but see Mondis Tech. Ltd. v. Top Victory Elec. (Taiwan) Co., No. 2:08-CV-478 (TJW), 2009 WL 3460276, at *4 (E.D. Tex. Oct. 23, 2009) (holding that the existence of a simple ancillary California contract claim does not make this factor favor transfer).


See In re Genentech, Inc., 566 F.3d 1338, 1340 (Fed. Cir. 2009) (overturning the prior order denying motion to transfer).

Id. at 1340-41.


Id. at 778.

Id. at 777-78.

Id.

In re Genentech, 566 F.3d at 1344.

Id.

Id.

Id. at 1345.

Id. at 1344.
Id. at 1345.

In re Genentech, Inc., 566 F.3d 1338, 1345-46 (Fed. Cir. 2009).

Id. at 1343-44.

Id. at 1346.

Id.

Id.

Id. at 1347.

Information is based on my Westlaw survey. See supra Table 4a in Part VI.A.

See supra notes 189-191 and accompanying text.

587 F.3d 1333 (Fed. Cir. 2009).

Id. at 1338.

Id. at 1335.

Id. (“[T]he parties identified eighteen potential non-party witnesses: four from North Carolina, five from California, three from Maryland, one from Missouri, two from Alabama, two from Europe, and one, Dr. Nancy Chang, from Houston, Texas. The parties also identified seven potential party witnesses: three from North Carolina, three from New Jersey, and one from Colorado”).


Id. at 712-14.

Id.

Id. at 712-13.

Id. at 714.

Id. at 716.

In re Hoffman-La Roche, Inc., 587 F.3d 1333, 1336, 1338 (Fed. Cir. 2009).
Id. at 1336-37.

Id.

Id. at 1336.

Id.

Id.

In re Hoffman-La Roche, Inc., 587 F.3d 1333, 1336 (Fed. Cir. 2009).

In re Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009).

Id. at 1201.

Id. at 1196-97.


See Nintendo, 589 F.3d at 1199 (holding that although four Japanese witnesses would be inconvenienced, the remaining witnesses benefitted from transfer).

See id. at 1198-1200.

Id. at 1199.

Id.

See supra Part III; In re TS Tech., 551 F.3d at 1319.

See supra Part V.A.

See supra Part V.B.


No. 2:08-CV-26, 2009 WL 5246368, at *1 (E.D. Tex. Dec. 11, 2009); but see Novartis Vaccines & Diagnostics, Inc. v. Wyeth, No. 2-08-CV-00067TIW-CE, 2010 WL 1374806, at *2-3, 5 (E.D. Tex. Mar. 31, 2010) (denying transfer of venue, finding the Eastern District to be more centrally located than the Northern District of California and that access to sources of proof is an unimportant
factor because most of the documents were not located in either venue); Realtime Data, LLC v. Morgan Stanley, Nos. 6:09CV326-LED-JDL, 6:09CV327-LED-JDL, 6:09CV333-LED-JDL, 2010 WL 1064474, at *1 (E.D. Tex. Mar. 18, 2010) (denying motion to transfer venue from the Eastern District of Texas to the Southern District of New York).

SMDK, 2009 WL 524636, at *1.

Id.

Id.

Id.


In re Genentech, Inc., 566 F.3d 1338, 1345 (Fed. Cir. 2009); In re Nintendo Co., 589 F.3d 1194, 1199 (Fed. Cir. 2009).


Personal Audio LLC, MedIdea LLC, and eTool Development are likely NPEs. See generally Ipeg, Texas Forum Shopping--Europe has its Share as Well, (Mar. 13, 2010), http://www.ipeg.eu/blog/?p=1011.

See supra, Part I.


See id.

Id.

See supra Part II.B.


317  Id.

318  Id.

319  See supra Part I.

320  See Hosie, supra note 64, at 79.

321  See supra Table 1 in Part II.B.1.

322  See supra Part II.A.1.


324  See id. at 396-97.


326  See Klein, supra note 19, at 314; McCurdy, supra note 11.


328  480 F.3d 1372, 1382-83 (Fed. Cir. 2007).

329  See id.


See e.g., Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324-26, 1332-33, 1335 (Fed. Cir. 2009), cert denied, Microsoft Corp. v. Lucent Techs., Inc., 130 S.Ct. 3324 (2010).

See supra Part II.A.1.


Id. at 272-79; Posting of Amy Landers to Patently-O, 2007: Patent Reform: Proposed Amendments on Damages, http://www.patentlyo.com/patent/2007/04/2007_patern_ref.html (April 27, 2007); e.g., Lucent, 580 F.3d at 1336, 1338-39. While the Federal Circuit held that the “entire market analysis” rule did not apply in this case, they also argued the rule can be applied liberally—the patented component need not be the “basis for customer demand” if the multiplier is sufficiently small. Chief Judge Michel notes that defendants probably would not object to entire market analysis if the multiplier was 0.1 percent rather than 8 percent.

See, e.g., Lucent, 580 F.3d at 1336 (indicating that the court applied an 8 percent rate, but notes this percentage can be adjusted at the court’s discretion).


S. 515 § 4(c)(1)(B); H.R. 1260 § 5(c)(1)(B); Crouch, supra note 330.

Crouch, supra note 331.


Parthum & Signore, supra note 331, at 369-70.

Id.; Campagna, supra note 342, at 5.

See supra Part II.A.2 and accompanying text.


See, e.g., Parthum & Signore, supra note 331, at 364; Watanabe, supra note 63, at 475.

Id.
Cotropia, supra note 347, at 68; see Parthum & Signore, supra note 331, at 363-64.

Cotropia, supra note 347, at 68.

E.g., in the current version of S. 515, § 8, no amendments are made to the patent venue provision, § 1400, except to add a subsection (c) that allows transfer of venue when the court finds the transferee forum is “more convenient.” See supra Part VI.A. Consider also, current S. 515, § 4, which does not limit damages or specify how to compute them. Instead, the provision leaves it to the district court. See supra Part VI.B.2.

See Cotropia, supra note 347, at 63-64.

A Westlaw search for the term “patent troll” or “non-practicing entity” in all federal cases reveals 14 results, all from district courts. The earliest mention of the term “patent troll” is in 2007.