

Paradigms for Justice: Where Legislature & Judiciary Connect

In light of local and public interest considerations, who is really forum shopping?

While inadequate access to justice is the plight of the inventor-patentee facing high costs of patent litigation, justice as an advantage of the stronger seems more the mantra of antitrust targets, like Apple, with the means to endure deliberately costly and protracted litigation. Recent arguments center on venue, specifically common law treatment of 1404(a) “convenience” transfers. Evaluating the same through the lens of public interest suggests Congress and the Fed. Circuit are pulling in the same direction, and begs a question: who is really forum shopping?

Venue has an influence on the accessibility of justice in society through a mechanism very similar to tax incentives: just as higher taxes can kill the incentive for a manufacturer to expand capacity, a slower venue can kill the time-weighted return that inventors, law firms, and investors consider in evaluating cases. Lately the issue involves transfers from the Austin tech hub and Judge Albright’s West Texas docket – now home to roughly one in five patent cases¹ – to Silicon Valley and the Northern District of California. Differences in the Albright docket and the Northern District are severe – on average more than two-fold increase in the length of time to termination,² a material tax on plaintiff constituents. As such, **1404(a) transfers are not about “convenience” as much as dissuading plaintiffs from pursuing merits with the economics of a slower docket** (a paramount “inconvenience” to meritorious claimants).

While Apple denies that its corporate culture is similarly directed to avoiding justice on the merits, the House Committee for Judiciary recently questioned if “dominant companies currently may be stifling innovation” through a practice of “efficient infringement.”³ CEO Tim Cook denied the practice and noted that Apple “has an internal Business Conduct Policy for employees that prohibits the unauthorized use of third-party intellectual property.”⁴ Yet the policy itself asks employees “not to knowingly use the intellectual property of any third party,”⁵ meaning that turning a blind eye to patents conforms to corporate culture. Like (in)convenience transfers, **giving up on learning from the patent system for the sake of avoiding claimants is the type of behavior that supports cost-efficiencies to infringement.**

¹ Lex Machina data of 9/28/2020 showing YTD patent cases filed.

² Lex Machina data of 9/23/2020 showing average time to termination of patent cases since 2009.

³ *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google Before the H. Comm. On Judiciary*, 116th Cong. 1-3, (2020) (Mr. Cook Responses to Questions for the Record from The Honorable Hank Johnson), <https://docs.house.gov/meetings/JU/JU05/20200729/110883/HHRG-116-JU05-20200729-QFR059.pdf>.

Neither turning a blind eye to patents nor seeking (in)convenience transfers are congruous with a justice paradigm wherein patents “spur innovation and allow startups to effectively compete against established companies.”⁶ The common thread of public / local interest connects the congressional line of inquiry to the Fed. Circuit’s latest 1404(a) hearing:



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Counsel, is it – is it true that Flextronics is located within the district?

Yes it is.

Is it also true that Flextronics manufactures one of the accused products?

Yes it is...

And then is it also correct that Apple has an 8,000 person plant in the Western District of Texas...?

It is...

... Apple is if not the largest, one of the largest employers in the Western District of Texas... doesn't that suggest some pretty strong local interest in having litigation decided locally?

It does not, your honor...

[C]ounsel, but the accused product is made in the district... if an injunction is issued and you can't, uh, sell that product anymore, then, wouldn't that really be a problem? Wouldn't the local interest be impacted? Couldn't some of those engineers either in your Austin campus or your Flextronics manufacturer be put out of business? I mean wouldn't people lose their jobs?

The - that is not the type of local interest this court has previously credited...

... what is the local interest, then? ...⁷

With applause for Judge Moore’s rhetorical, we are left with one question: **who is really forum shopping, anyway?**

⁴ *Id.* at 3.

⁵ Apple’s Business Conduct Policy (available at <https://investor.apple.com/leadership-and-governance/>) (emphasis added).

⁶ *Supra* note 3, at 1.

⁷ *In re: Apple Inc.*, 20-135 Fed. Cir. No. 54 at 28:48 (available at http://oralarguments.ca9.uscourts.gov/default.aspx?fl=20-135_09222020.mp3).