



PATENT, TRADEMARK & COPYRIGHT



JOURNAL

Reproduced with permission from BNA's Patent, Trademark & Copyright Journal, 81 PTCJ 803, 04/15/2011. Copyright © 2011 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

VENUE

The author questions whether the problem of forum shopping in patent cases, particularly in the Eastern District of Texas, has been solved and whether increased scrutiny of improper joinder of defendants is warranted.

Concentration of Patent Cases in Eastern District of Texas Increases in 2010



By JAMES PISTORINO

At the end of 2008, the U.S. Court of Appeals for the Fifth Circuit issued its en banc writ of mandamus in *In re Volkswagen of America Inc.*, 545 F.3d 304, 89 USPQ2d 1501 (5th Cir. 2008) (76 PTCJ 865, 10/17/08), followed shortly thereafter by the Federal

James Pistorino is a partner with Perkins Coie, Palo Alto, Calif. He thanks Paul Janicke for comments on an earlier draft.

Circuit's ruling in *In re TS Tech USA Corp.*, 551 F.3d 1315, 89 USPQ2d 1567 (Fed. Cir. 2008) (77 PTCJ 243, 1/9/09). Both of those cases involved the U.S. District Court for the Eastern District of Texas attempting to hold cases in that district that were ultimately found to have little or no connection with the district.

Thereafter, in 2009 and 2010, the Federal Circuit issued writs of mandamus to transfer from Eastern District of Texas in the following cases: *In re Genentech Inc.*, 566 F.3d 1338, 91 USPQ2d 1027 (Fed. Cir. 2009) (78 PTCJ 109, 5/29/09); *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 92 USPQ2d 1861 (Fed. Cir. 2009) (79

PTCJ 155, 12/11/09); *In re Nintendo Co.*, 589 F.3d 1194, 93 USPQ2d 1152 (Fed. Cir. 2009) (79 PTCJ 224, 1/1/10); *In re Zimmer Holdings Inc.*, 609 F.3d 1378, 95 USPQ2d 1733 (Fed. Cir. 2010) (80 PTCJ 292, 7/2/10); *In re Microsoft Corp.*, No. 944 (Fed. Cir. Jan. 5, 2011) (81 PTCJ 308, 1/14/11); and ¹ *In re Acer America Corp.*, 626 F.3d 1252, 97 USPQ2d 1253 (Fed. Cir. 2010) (81 PTCJ 177, 12/10/10).² These decisions made the Eastern District the court against which the most writs of mandamus were issued during the period 2008-2010. Indeed, during this period, three times as many writs (nine) were issued against the Eastern District as were issued against its nearest competitor, the Northern District of California, which had three.³

In light of this turn of events, heading into and during 2010, many predicted the end of the Eastern District of Texas as the favorite place to haul defendants in patent cases. Among the comments were:

- “[*TS Tech* and its progeny] has already shifted IP plaintiffs away from this once-popular forum. ‘Plaintiffs used to file cases in Texas that they would not file now.’”⁴
- “Forum shopping in general—and the Eastern District of Texas phenomenon in particular—will end in the near future.”⁵
- “The *TS Tech* decision by the Federal Circuit is expected to reduce significantly the number of patent cases that are filed in the Eastern District of Texas.”⁶
- “I’d be surprised if the Eastern District of Texas takes the lead [in case filings] now that the standard for refusing to transfer is pretty high.”⁷

Prior to *TS Tech*, in 2007 and into March 2009, the venue reform proposals contained in the patent reform bills working their way through the House and Senate contained very stringent venue requirements. For example, S. 515, 111th Cong. (2009) would have limited venue in patent cases to:

1. the defendant’s principal place of business;

¹ Nonprecedential order for *In re Microsoft* issued Nov. 8, 2010.

² The Federal Circuit also issued a writ in *In re Oracle Corp.*, No. 951 (Fed. Cir. Nov. 1, 2010) directing the district court to revisit the Section 1404 analysis.

³ In three other cases, the Eastern District of Texas withdrew or reversed an underlying decision while a petition for a writ of mandamus was pending, thereby avoiding potential additional writs of mandamus. See *MedIdea LLC v. Smith & Nephew Inc.*, No. 2-09-cv-378-TJW (E.D. Tex. July 6, 2010); *Graphon Corp. v. Juniper Networks Inc.*, No. 2-07-cv-373-TJW-CE (E.D. Tex. Dec. 30, 2009); *Software Rights Archive LLC v. Google Inc.*, No. 2-07-cv-511-CE (E.D. Tex. July 22, 2010).

⁴ See Susan Beck, “Federal Circuit Again Rebukes Eastern District of Texas Judge for Not Transferring Case,” *The American Lawyer* (Dec. 22, 2009) (quoting Ed Reines of Weil Gotshal & Manges).

⁵ Mark Liang, “The Aftermath of *TS Tech*: The End of Forum Shopping in Patent Litigation and Implications for Non-Practicing Entities,” 19 *Tex. Intell. Prop. L.J.* 29, 32 (2010).

⁶ Timothy Meece and V. Bryan Medlock, “Is *TS Tech* the Death Knell for Patent Litigation in the Eastern District of Texas?” *The IP Litigator*, Volume 16, Number 6, (November/December 2009).

⁷ See Erin Coe, “Central Calif. Tops Eastern Texas As Patent Hot Spot,” *Law360*, (July 7, 2010) (quoting LegalMetric’s founder and director of research Greg Upchurch).

2. where the defendant committed a substantial portion of the alleged infringement and also has a regular and established physical facility that defendant controls and constitutes a substantial portion of the operations of the defendant; or
3. where the plaintiff resides if the plaintiff is an institution of higher education; a non-profit; or a sole inventor that qualifies as a micro-entity.

Perhaps believing that venue abuse had been addressed or would be solved in the near future, in the wake of *TS Tech*, the venue reform proposal was first changed to merely recite the same standard used in *TS Tech* (see 515, 111th Cong. (Manager’s Amendment of April 2, 2009)) before finally being removed in its entirety in the current version that was passed by the Senate on March 8 (See S. 23, 112th Cong. (2011)) (81 PTCJ 629, 3/18/11).

Contrary to the predictions, an analysis of patent litigation filed in the United States through the end of 2010 reveals a strikingly different outcome. Instead of a reduction of patent cases in the Eastern District of Texas, 2010 saw that district have the most patent filings as an absolute number. More importantly, the total number of parties involved in patent cases in Eastern District of Texas rose to more than 25 percent of all the parties involved in patent litigation in the United States during 2010.

The following article provides data on 2010 and 2009 patent filings nationwide, as well as historical information. In addition, false patent marking cases filed in 2010 are broken out so that the trends in more traditional patent cases can be examined.

The Data Sources

Docket data on patent lawsuit filings across the United States from Jan. 1, 1999, to Dec. 31, 2010, were retrieved from Pacer and compiled into a database. Pacer classifies each party in a suit as a plaintiff, defendant, or other secondary classification (e.g., intervenor, third-party plaintiff/defendant, and counter/cross claimant). The secondary classifications were filtered and only the primary plaintiff(s) and defendant(s) examined.⁸ Between 1999 and 2010, this dataset included information on 136,763 parties involved in 32,182 cases.

⁸ Some aspects of the Pacer dataset bear noting. First, the dataset includes information from the original case filing as well as any later added parties. Thus, the reported numbers are not a perfect reflection of the action at the time of filing as parties may have been added later. Second, the dataset only classifies parties as plaintiffs or defendants and makes no effort to classify the parties as patentees or accused infringers. Thus, in actions seeking a declaratory judgment of non-infringement/invalidity, the party/parties bringing the declaratory judgment action (presumably the accused infringers) will be classified as the plaintiffs and the patentee/patentees will be classified as defendants. Third, named plaintiffs/defendants are counted each time they appear as a party. Thus, a single party that brings four suits asserting patent infringement is counted as four plaintiffs in the reported data. Fourth, only cases coded as patent cases (code 830) were pulled. Thus, to the extent that cases were miscoded they are not included. For example, at least some false marking cases have been coded as 890 (other statutory actions) or 690 (forfeit/penalty; other). Finally, the U.S. Court of Federal Claims does not fully participate in Pacer so patent cases filed there are not included.

For the year 2010, the dataset included information on 18,595 parties involved in 3,512 cases.⁹

Many previous articles have focused on case filings as an absolute number. That is, for comparison purposes, a case filed by a single plaintiff against a single defendant (in the Central District of California, e.g.) was counted the same as a single case filed against 40 defendants (in the Eastern District of Texas, e.g.). The Pacer dataset used in this article enables comparison at the party level, and that may more accurately reflect where patent litigation is occurring.

In addition, 2010 saw an unprecedented rise in false marking litigation. In order to isolate the effect of the false marking cases, analyses were conducted factoring out these cases.

The listing of false marking cases at www.grayonclaims.com was used for this analysis, and a complete listing of the cases considered false marking cases as well as all the underlying data is available upon request. While a small number of false marking cases were filed before 2010 (approximately 23 in 2009), the total number of pre-2010 false marking cases is believed to be immaterial to the analysis of the larger trends.

2010 Patent Filing Statistics

As shown in Table 1, in 2010, the Eastern District of Texas led the United States in patent filings when looking at: (a) the number of cases; (b) the number of plaintiffs; (c) the number of defendants; (d) defendants per case; and (e) defendants per plaintiff. Conversely, the Eastern District of Texas tied with the Northern District of Illinois in having the lowest number of plaintiffs per case. In 2010, the average patent case in the Eastern District of Texas was a single plaintiff suing seven defendants.

The data above also show what was previously hidden: the defendants in the Eastern District of Texas, both as an absolute number and when compared to patent cases in other districts. As an absolute number, in 2010, more than 25 percent of all the defendants named in patent cases were being sued in the Eastern District of Texas. When compared to other districts, more than five times as many defendants were named in that district as in its nearest competitor (Delaware). This was so, despite the fact that the Eastern District of Texas only had about 2.5 times as many cases as Delaware. The ten jurisdictions with the highest number of defendants are shown in graphical form in Figure 1.

As noted above, there was a dramatic increase in 2010 in the number of false marking cases. A total of 695 cases were counted as false marking cases in this analysis. False marking cases were factored out of the total filings, with the results shown in Table 2. For comparison purposes, Table 3 shows patent filings in the top ten jurisdictions in 2009.

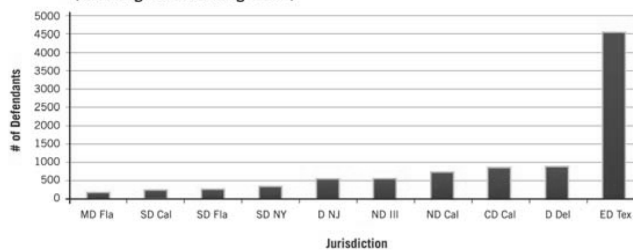
As shown in Table 2, 2010 saw non-false marking patent litigation filings in the Eastern District of Texas increase by nearly 20 percent. This rise was eclipsed only by the number of defendants named in the Eastern District of Texas, which surged more than 70 percent

⁹ Other sources report slightly different numbers. For example, www.patstats.org reports that there were 3,605 patent cases in 2010. That figure is based on reports from Courtlink provided by Lexis. Because the Pacer data utilizes a consistent standard, any difference with other reported numbers should not affect the trend analysis.

Table 1: Top Ten Jurisdictions with the Most Patent Cases in 2010 (Including False Marking Cases)

Jurisdiction	Cases	Plaintiffs	Defendants	Defendants per Case	Plaintiffs per Case	Defendants per Plaintiffs
Eastern District of Texas	647	768	4522	7.0	1.2	5.9
District of Delaware	259	655	890	3.4	2.5	1.4
Northern District of Illinois	250	289	579	2.3	1.2	2.0
Central District of California	236	386	870	3.7	1.6	2.3
Northern District of California	206	407	742	3.6	2.0	1.8
District of New Jersey	158	359	555	3.5	2.3	1.5
Southern District of New York	117	261	331	2.8	2.2	1.3
Southern District of Florida	83	129	274	3.3	1.6	2.1
Northern District of Ohio	75	101	138	1.8	1.3	1.4
District of Massachusetts	74	136	146	2.0	1.8	1.1

Figure 1: Jurisdictions with the Most Defendants in Patent Litigation in 2010 (Including False Marking Cases)



over the 2009 numbers. In 2010, the average non-false marking case in the Eastern District of Texas was a single plaintiff suing 13 defendants. 66 of the non-false marking cases filed in 2010 in the Eastern District of Texas named 20 or more defendants. While the Central District of California had more patent filings as an absolute number in 2009, the new information shows that nearly three times as many defendants were being sued in the Eastern District of Texas as in the Central District of California in 2009. Including false marking cases, the number of defendants named in the Eastern District of Texas more than doubled over the 2009 numbers.

Figure 2 shows the same information as Figure 1 with the false marking cases excluded.

Table 2: Top Ten Jurisdictions with the Most Patent Cases in 2010 (Excluding False Marking Cases)

Jurisdiction	Cases	Plaintiffs	Defendants	Defendants per Case	Plaintiffs per Case	Defendants per Plaintiffs
Eastern District of Texas	299	407	3879	13.0	1.4	9.5
District of Delaware	255	649	884	3.5	2.5	1.4
Central District of California	225	371	833	3.7	1.6	2.2
Northern District of California	180	378	707	3.9	2.1	1.9
Northern District of Illinois	179	216	476	2.7	1.2	2.2
District of New Jersey	151	352	530	3.5	2.3	1.5
Southern District of New York	102	246	299	2.9	2.4	1.2
Southern District of Florida	76	115	248	3.3	1.5	2.2
District of Massachusetts	74	136	146	2.0	1.8	1.1
Eastern District of Virginia	65	80	161	2.5	1.2	2.0

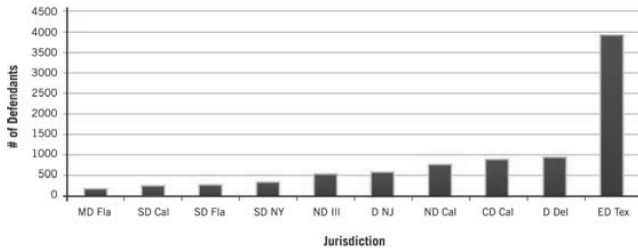
While the above figures and tables look only at 2009 and 2010 data, Figures 3-5 examine the longer term trends. In the figures below, there is a bump in the Eastern District of Texas in 2001, in terms of defendants per case. In 2001, there were only 34 patent cases brought in that district. However, one of those cases (brought by the Massachusetts Institute of Technology and Electronics for Imaging) named 228 defendants.

Figure 3 shows that while there has been a steadily increasing number of plaintiffs and cases filed in the

Table 3: Top Ten Jurisdictions with the Most Patent Cases in 2009 (Including False Marking Cases)

Jurisdiction	Cases	Plaintiffs	Defendants	Defendants per Case	Plaintiffs per Case	Defendants per Plaintiffs
Central District of California	276	453	799	2.9	1.6	1.8
Eastern District of Texas	250	355	2257	9.0	1.4	6.4
District of Delaware	233	601	877	3.8	2.6	1.5
Northern District of California	168	344	665	4.0	2.0	1.9
District of New Jersey	147	337	379	2.6	2.3	1.1
Northern District of Illinois	138	184	376	2.7	1.3	2.0
Southern District of New York	116	324	347	3.0	2.8	1.1
Southern District of California	77	94	337	4.4	1.2	3.6
District of Massachusetts	65	140	154	2.4	2.2	1.1
Eastern District of Virginia	58	72	242	4.2	1.2	3.4

Figure 2: Jurisdictions with the Most Defendants in Patent Litigation in 2010 (Excluding False Marking Cases)



Eastern District of Texas, since about 2003, the number of defendants named in those cases has increased dramatically. While the number of defendants leveled off in the period 2007-2009, it increased in 2010 both when including and excluding false marking cases.

Figure 3: 1999 - 2010 Patent Litigation in ED Tex (Excluding False Marking Cases)

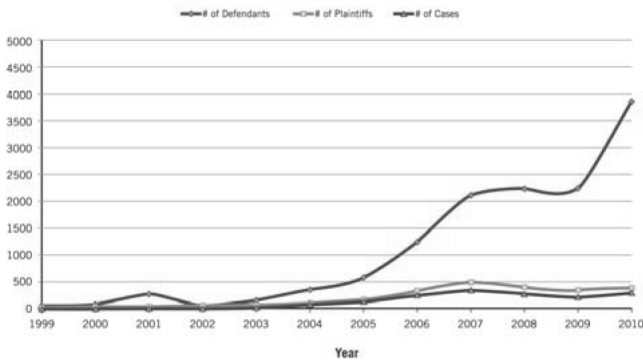
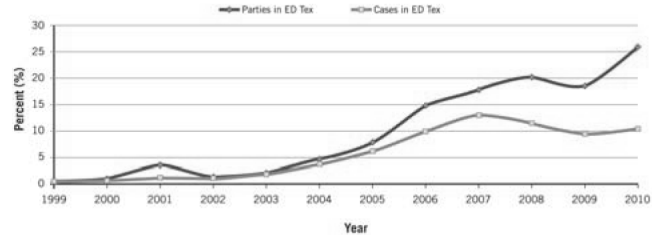


Figure 4 shows that as a percentage of the total number of parties involved in patent litigation in the United States, the Eastern District of Texas has risen since 2002. Even when false marking cases are excluded, Figure 6 shows that the percentage exceeded 25 percent in

Figure 4: 1999 - 2010 Patent Suits in ED Tex as a Percentage of the Nationwide Total (Excluding 2010 False Marking Cases)



2010. Thus, in 2010, nearly one out of every four parties involved in non-false marking patent litigation filed was either a plaintiff or a defendant in the Eastern District of Texas (with the vast majority as defendants). That figure increases to nearly one out of three when false marking cases in 2010 are included. Figure 4 also shows how focusing solely on the number of cases filed may give a misleading picture of the patent litigation reality. While the Eastern District of Texas percentage of cases has actually fallen since peaking in 2007 and is now in the 10 percent range, the percentage of parties in those cases is more than double that figure and is on the rise.

Figure 5: Defendants Per Case in the Top 5 Jurisdictions in Patent Litigation (Excluding 2010 False Marking Cases)

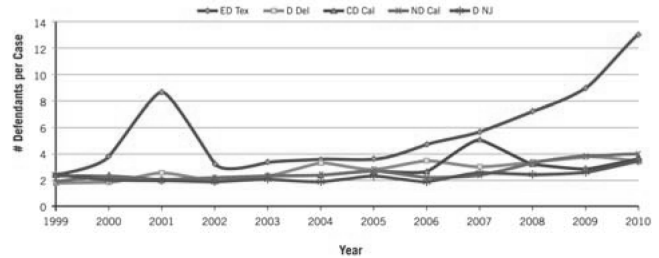


Figure 5 compares the number of defendants per case in the top five jurisdictions. As noted above, a single case caused the bump in the Eastern District of Texas in 2001. The figure shows that the Eastern District of Texas is the outlier. While the other districts have remained fairly consistent at between two and four defendants per case, since 2006 the Eastern District of Texas has risen steadily in terms of the number of defendants per case. That trend peaked in 2010 with 13 defendants being named on average in non-false marking cases in that district.

The data reported in this article should cause a re-thinking of whether the forum shopping issue in patent cases (particularly in the Eastern District of Texas) has been solved and whether increased scrutiny of improper joinder of defendants is warranted.