

Toward a More Reliable Fact-Finder In Patent Litigation

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TOWARD A MORE RELIABLE FACT-FINDER IN PATENT LITIGATION

AMY TINDELL*

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INTRODUCTION

Commentators describe the institution of the American jury as both a blessing and a curse. On the positive side, scholars hail the jury as a stalwart protector of defendants from an overly oppressive government.¹ Judges praise juries for providing an additional measure of perceived fairness and credibility to the United States legal system.² The presence of a jury tends to encourage simplification of complex issues.³ Further, service on a jury provides a practical education in civics to the American public.⁴ These praises, however, are sung more loudly in some corners of the legal world than in others. For example, many practitioners in

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1. Davin M. Stockwell, Comment, *A Jury of One's (Technically Competent) Peers?*, 21 WHITTIER L. REV. 645, 662–63 (2000).

2. See, e.g., *Standard Oil Co. v. Ariz.*, 738 F.2d 1021, 1031 (9th Cir. 1984); see also Stockwell, *supra* note 1.

3. Deborah M. Altman, Comment, *Defining the Role of the Jury in Patent Litigation: The Court Takes Inventory*, 35 DUQ. L. REV. 699, 707 (1997).

4. See generally D. GRAHAM BURNETT, *A TRIAL BY JURY* (2001).

patent law view jury fact-finding in their cases as a curse. At best, patent litigators may perceive juries as simply unequipped to understand complex technical, scientific, and legal standards involved in patent cases.⁵ Tangential issues are thus viewed as more likely to sway a patent jury that does not understand more challenging issues central to a case.⁶ At worst, patent juries are thought to be just plain biased in favor of patentees who have the benefit of approval from the experts at the Patent and Trademark Office (PTO).⁷

In accordance with these critiques of juries in patent trials, the Court of Appeals for the Federal Circuit (Federal Circuit) has narrowed the role of the jury in patent trials.⁸ Moreover, the Supreme Court has for the most part affirmed these Federal Circuit's decisions.⁹ The reasoning of these opinions that limit the jury's role in patent litigation stands in a shadow cast by the Seventh Amendment's codification of the right to a jury trial in certain civil trials.¹⁰ The combination of developing patent law and varying interpretations of how to apply the Seventh Amendment to patent cases has created the current inconsistent approach to the division of labor between judges and juries in patent litigation.

Despite limits placed on jury decision-making in patent cases and practitioner complaints about jury outcomes, the number of patent cases involving juries is increasing.¹¹ Statistical analyses of recent patent cases confirm that whether a judge or jury serves as the fact-finder has a significant impact on outcomes¹² even though neither fact-finder traditionally has technical or scientific training.¹³ The Federal Circuit's juggling of factual matters, legal matters, precedent, and the Seventh Amendment in patent cases demonstrates that perhaps the round peg of patent law does not fit into the proverbial rectangular jury box.

In an attempt to fit these incongruous pieces together, this paper will

5. Gregory D. Leibold, Comment, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. COLO. L. REV. 623, 624 (1996).

6. *Id.*

7. *See id.*

8. *Id.*

9. *Id.* at 624–25.

10. *See generally* Altman, *supra* note 3.

11. *Id.* at 699–700.

12. Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 11 FED. CIR. B.J. 209, 212–13 (2001–2002).

13. *See* Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 888–89 (2002).

trace the development of Seventh Amendment precedent in the context of patent litigation to its current status. Further, this paper proposes a system akin to peer review to replace the traditional jury in patent trials. Such a system would be analogous to the current “Peer-to-Patent” experiment at the PTO, wherein scientific and technical experts have the opportunity to aid PTO examiners in determining the validity of patents.¹⁴ The patent system is a unique system in American law because it boasts its own bar and its own governmental agency; in turn, its own court demands its own jury tailored to fill in the adjudicatory gap.¹⁵ Adjudication of such public rights as those involved in patent validity¹⁶ would find increased efficiency and credibility with public expert input. Moreover, given that there are few constitutional constraints on adjudication of public rights, such a process likely would survive constitutional scrutiny.¹⁷ The area of patent law provides the American legal system with a unique opportunity to develop flexibility in the context of an otherwise cumbersome division of fact and law.

I. HISTORICAL DEVELOPMENT OF SEVENTH AMENDMENT JURISPRUDENCE

The Seventh Amendment provides, “[i]n [s]uits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.”¹⁸ The amendment seems to provide for the right to a jury trial in civil suits, but its language is unclear, especially when compared to that of the Sixth Amendment.¹⁹

14. See Ethan Katsh & Beth Noveck, *Peer to Peer Meets the World of Legal Information: Encountering a New Paradigm*, 99 LAW LIBR. J. 365, 371–72 (2007).

15. See Stockwell, *supra* note 1, at 683–85.

16. See *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985).

[T]he grant of a valid patent is primarily a public concern. Validity often is brought into question in disputes between private parties, but the threshold question usually is whether the PTO, under the authority assigned to it by Congress, properly granted the patent. At issue is a right that can only be conferred by the government. *Id.* See also *In re Lockwood*, 50 F.3d 966, 981 (Fed. Cir. 1995) (Nies, J., dissenting), *vacated sub nom.* *Am. Airlines v. Lockwood*, 515 U.S. 1182 (1995) (“This court has held that the issue of validity of a patent involves *public rights*, not merely *private rights*.”).

17. See Stockwell, *supra* note 1, at 691–92.

18. U.S. CONST. amend. VII.

19. The Sixth Amendment to the U.S. Constitution provides,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

For example, the Sixth Amendment embraces within its scope “all criminal prosecutions,” but the Seventh Amendment leaves open the extent of its application to “[s]uits at common law.”²⁰ Additionally, the Sixth Amendment requires that the accused “shall enjoy” the right, while the Seventh Amendment employs the more permissive phrase that the right “shall be preserved.”²¹ Finally, the Sixth Amendment specifies from where the jury will be drawn, while the Seventh Amendment makes no such specification, leaving jury composition open.²² The language of the Sixth Amendment demonstrates “that Congress knew how to use [clear,] express language when it drafted the Seventh Amendment.”²³ The Supreme Court has interpreted the different phrasings of the Sixth and Seventh Amendments to mean that the right to a jury trial is mandated in criminal cases but not in civil cases.²⁴ Further, the Supreme Court has ruled that the Seventh Amendment, unlike the Sixth Amendment, is not essential to due process and thus not applicable to the states.²⁵

The traditional role of the American jury under both the Sixth and Seventh Amendments has been to decide questions of fact, as opposed to legal matters.²⁶ This responsibility was established first by the Judiciary Act, which was enacted before the Seventh Amendment was ratified.²⁷ The Judiciary Act provided that “the trial of issues in fact, in the district courts . . . shall be by jury.”²⁸ The Seventh Amendment itself expressly notes that “facts” initially tried by the jury may not be re-examined in a U.S. court.²⁹ Finally, the Supreme Court generally affirmed this notion, stating that “[q]uestions of fact in common law actions shall be settled by a jury . . .”³⁰ and warning that “the ultimate

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.

U.S. CONST. amend. VI.

20. Stockwell, *supra* note 1, at 656.

21. *Id.* at 656–57.

22. *Id.* at 657.

23. *Id.*

24. See *Colgrove v. Battin*, 413 U.S. 149, 152–56, 162–63 (1973); see also Stockwell, *supra* note 1, at 657.

25. Leibold, *supra* note 5, at 651; see also *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1875).

26. See Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1131–32 (2003).

27. *Id.* at 1133.

28. Judiciary Act of 1789, ch. 20, sec. 9, 1 Stat. 73, 77 (1789).

29. U.S. CONST. amend. VII.

30. *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 596 (1897).

determination of issues of fact by the jury [shall] be not interfered with.”³¹

Recently, however, the Supreme Court has shifted its focus away from the fact-law distinction to other concerns. In the 1987 case of *Tull v. United States*, for example, the Supreme Court applied a two-prong historical-analog test to determine whether a real estate developer accused of violating the Clean Water Act was entitled to a trial by jury under the Seventh Amendment.³² The first step of the test was to determine whether the present action was analogous to a suit at common law, as opposed to a suit in equity or admiralty, as of the 18th century—the time of the Seventh Amendment.³³ The second prong examined whether the remedy sought was legal or equitable in nature.³⁴ Taking into account the nature of the action and the remedy sought, the Court focused on the latter and found the case closely analogous to punitive damages in the 18th century, which were available in courts of law.³⁵ Although the result suggested that Tull was entitled to a jury trial on some issues, the Court took it one step further.³⁶ It stated that the civil penalties involved in Tull’s trial were not a “fundamental element of a jury trial” because Congress may fix those penalties by statute and therefore may delegate such responsibilities to judges.³⁷

The Supreme Court in *Tull* further observed that in the past it considered “practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law” to find that a litigant was not entitled to a jury trial.³⁸ A later decision qualified this consideration as applying only where “public rights” were at issue.³⁹ Unlike “private rights,” Congress may assign causes of action involving “public rights” to a non-Article III court.⁴⁰ Although the Federal Circuit ignored this comment in *In re Lockwood*, stating that an action for a declaration of patent invalidity may be brought in an Article III court because declaratory judgments may be brought properly in an

31. *Ex parte Peterson*, 253 U.S. 300, 310 (1920).

32. 481 U.S. 412, 414, 417–18 (1987).

33. *Id.* at 417.

34. *Id.* at 417–18.

35. *Id.* at 423–24.

36. *See id.* at 425 (“We must[,] . . . whether Congress can, consistent with the Seventh Amendment, authorize judges to assess civil penalties.”).

37. *Id.* at 426–27.

38. *Id.* at 418 n.4.

39. *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 53 (1989).

40. *Id.* at 52–55.

Article III court,⁴¹ the relevance of the court's decision should not be underestimated. For example, many issues relevant to public rights in patents may be decided at the PTO, thus falling outside of Article III.⁴² With its specialization in technical and scientific fields, the PTO may be more "functionally compatible" with patent issues than a lay jury.

Indeed, commentators and courts have long debated whether juries are competent to decide certain issues.⁴³ Alexander Hamilton posited in his Federalist Paper Number Eighty-three that very complex issues "require often such long, deliberate, and critical investigation as would be impracticable to men called from their occupations, and obliged to decide before they were permitted to return to them."⁴⁴ Hamilton worried that demanding that lay juries decide issues that are too complicated may undermine respect for the jury system.⁴⁵ Although not addressing lay juries in particular, Judge Learned Hand later criticized generalist courts and "the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of [science and technology] to pass upon such questions" of high difficulty and complexity.⁴⁶ Similarly, and more recently, Judge Michel of the Federal Circuit reflected that businesses and corporations competing in high stakes technology races may pressure Congress to increase specialization in U.S. courts.⁴⁷ Because their cases have such large economic and practical impacts, these businesses are unlikely to trust a lay and generalist system with their intellectual property

41. 50 F.3d 966, 972 n.5 (Fed. Cir. 1995), *vacated sub nom.* Am. Airlines v. Lockwood, 515 U.S. 1182 (1995).

The Court has cautioned that the Seventh Amendment does not automatically entitle a party to a jury trial if Congress can and has assigned adjudication of the legal claim concerning such public right exclusively to an administrative agency. However, as "[n]o one disputes that an action for a . . . [declaration of patent invalidity] may properly be brought in an Article III court," this limitation on Seventh Amendment protection "does not affect our analysis."

Id. (quoting *Chauffeurs v. Terry*, 494 U.S. 558, 565 n.4 (1990)) (citation omitted).

42. *See, e.g.*, 35 U.S.C. § 131 (2000).

43. *See* Beth Z. Shaw, *Judging Juries: Evaluating Renewed Proposals for Specialized Juries From a Public Choice Perspective*, 2006 UCLA J.L. & TECH. 3, ¶¶ 14–16 (2006).

44. THE FEDERALIST NO. 83, at 527 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

45. *Id.* at 527–28.

46. Shaw, *supra* note 43, ¶ 24 (quoting *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F.95, 115 (C.C.S.D.N.Y. 1911)) (alteration in original).

47. Shaw, *supra* note 43, ¶ 25; *see also* Paul R. Michel, Foreword, *The Court of Appeals for the Federal Circuit Must Evolve to Meet the Challenges Ahead*, 48 AM. U. L. REV. 1177, 1184–85 (1999).

concerns.⁴⁸

Developing common law has revealed a split in the circuit courts over the so-called “complexity exception” to the Seventh Amendment.⁴⁹ In the case of *Ross v. Bernhard* in 1970, the court recognized “the practical abilities and limitations of [a] jur[y]” in deciding the issues as a factor in determining whether a particular claim gives rise to a jury trial.⁵⁰ Later, the Third Circuit ruled that due process may require that a judge, rather than a jury, try certain cases, for example, when the complexity of a case prevents a jury from using rational means to find facts and to reach a verdict.⁵¹ The Third Circuit thus recognized an apparent conflict between the Fifth Amendment due process requirement and the Seventh Amendment jury trial provision.⁵² In contrast, the Ninth Circuit has refused to recognize a complexity exception to the Seventh Amendment, noting the difficulties that would be involved in developing a test to determine the level of complexity required to avoid a jury trial.⁵³ The Ninth Circuit asserted that a complexity exception would “improperly demean[] the intelligence of the citizens of this Nation.”⁵⁴ Further, the court in *Kian v. Mirro Aluminum Co.* asserted that proposals for specialized juries were “elitist” and undermined a fundamental right.⁵⁵ The Supreme Court, for its part, has yet to rule yea or nay as the last word on the issue of the complexity exception to the Seventh Amendment.⁵⁶

II. THE SEVENTH AMENDMENT IN THE CONTEXT OF PATENT TRIALS

The Federal Circuit and the Supreme Court’s modern approach to defining the role of the jury in patent cases began with the case of *Markman v. Westview Instruments*.⁵⁷ Herbert Markman brought an action against Westview in the Eastern District of Pennsylvania for

48. See Michel, *supra* note 47, 1184–1185; Shaw, *supra* note 43, ¶ 25.

49. See Shaw, *supra* note 43, ¶ 15; see also Philippe Signore, *On the Role of Juries in Patent Litigation (Part I)*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 791, 817–18 (2001).

50. 396 U.S. 531, 538 n.10 (1970).

51. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079, 1084 (3d Cir. 1980) (affirming denial of jury trial in action for violations of the Lanham Act, the Wilson Tariff Act, the Antidumping Act, and the Sherman Act).

52. *Id.* at 1084.

53. *In re U.S. Fin. Sec. Litig.*, 609 F.2d 411, 431–32 (9th Cir. 1979).

54. *Id.* at 430.

55. 88 F.R.D. 351, 355 (E.D. Mich. 1980) (refusing to strike plaintiff’s jury demand and denying defendant’s request for expert in patent licensing dispute).

56. See Leibold, *supra* note 5, at 650–51.

57. *Markman v. Westview Instruments, Inc.*, 722 F. Supp. 1535 (E.D. Pa. 1991).

patent infringement,⁵⁸ and the jury construed the term “inventory” in Markman’s patent claims to include “cash” or “invoices” but not “articles of clothing” for a finding of infringement.⁵⁹ The district court, however, granted Westview’s motion for judgment as a matter of law, asserting that patent claim construction was a matter of law for the court to decide.⁶⁰ The court held that the claim term “inventory” meant “articles of clothing” and not “cash” or “invoices” and subsequently directed a verdict for noninfringement.⁶¹

Upon Markman’s appeal, the Federal Circuit affirmed the district court’s grant of judgment as a matter of law.⁶² The Federal Circuit agreed that patent claim construction is a legal matter for judges to decide, likening patent claim construction to statutory interpretation, which is a matter of law for the court.⁶³ The Federal Circuit agreed with the district court that a judge may examine the claims, the specification, and the prosecution history, in addition to weighing extrinsic evidence like expert testimony to construe the meaning of a patent claim term.⁶⁴ The court went even further to grant itself *de novo* review of claim construction.⁶⁵ In a concurring opinion, Judge Mayer asserted that claim construction traditionally had been a matter of law but that the underlying factual issues must be left to a jury.⁶⁶ Judge Newman vigorously dissented, emphasizing the hazards of *de novo* review⁶⁷ and tracing the Seventh Amendment provision of a trial by jury in the context of patent cases.⁶⁸

58. *Id.* at 1536.

59. *See id.* at 1536–37; *see also* Markman v. Westview Instruments, Inc. (*Markman I*), 52 F.3d 967, 979 (Fed. Cir. 1995).

60. *Markman*, 772 F.Supp. at 1536.

61. *Id.* at 1537–38.

62. *Markman I*, 52 F.3d at 988–89.

63. *Id.* at 987.

64. *Id.* at 979–80.

65. *Id.* at 974.

66. *Id.* at 989–90 (Mayer, J., concurring). J. Mayer’s opinion includes a string cite of fourteen Federal Circuit opinions holding the underlying factual inquires of claim construction to be appropriate matters for jury decision-making. *Id.*

67. *Id.* at 999–1000, 1006 (Newman, J., dissenting) (“In resolving litigation controversy by determining mechanical or chemical or electronic truth, it is hard to understand why justice should be handicapped in the Federal Circuit by replacement of a live trial with cold documents.”).

68. *Id.* at 1000 (Newman, J., dissenting) (“The majority today denies 200 years of jury trial of patent cases in the United States, preceded by over 150 years of jury trial of patent cases in England, by simply calling a question of fact a question of law. The Seventh Amendment is not so readily circumvented.”).

The Supreme Court granted certiorari to the *Markman* case and affirmed the Federal Circuit's finding that patent claim construction is indeed a matter of law for the court to decide.⁶⁹ After the court construes the relevant claim, a jury may decide whether it is infringed by an accused device.⁷⁰ The Court attempted to apply the historical-analog test and to examine its own precedent but found both analyses inconclusive as to the issue of claim construction.⁷¹ It instead turned its focus to "functional considerations."⁷² The Court asserted that judges are better-suited than juries to construe patent claims because they have more training and experience in construction of written documents.⁷³ Judges, in weighing expert testimony, have superior ability to "evaluate the testimony in relation to the overall structure of the patent."⁷⁴ The Supreme Court finished by stressing the importance of uniformity in construing patent claims, a goal more likely accomplished by judicial interpretation than by jury interpretation.⁷⁵ Although the Supreme Court did not expressly affirm *de novo* review, the Federal Circuit affirmed its *de novo* review standard two years later in *Cybor Corporation v. FAS Technologies*.⁷⁶

Around the same time that the Federal Circuit decided *Markman*, it granted a petition for writ of mandamus directing a district court to reinstate a jury demand in the case of *In re Lockwood*.⁷⁷ In the district court, Lockwood alleged that American Airlines' computerized reservation system infringed two of his patents relating to self-service terminals and automatic ticket dispensing systems.⁷⁸ American counterclaimed for a declaratory judgment of noninfringement or a judgment that the patents were invalid.⁷⁹ The district court granted American's summary judgment motion on the infringement claim.⁸⁰ After American moved to strike Lockwood's motion for a jury trial, the

69. *Markman v. Westview Instruments, Inc. (Markman II)*, 517 U.S. 370, 391 (1996).

70. *Id.* at 384.

71. *See id.* at 388.

72. *Id.*

73. *Id.* at 388–89.

74. *Id.* at 390.

75. *Id.* at 390–91.

76. 138 F.3d 1448, 1451 (Fed. Cir. 1998).

77. 50 F.3d 966, 968 (Fed. Cir. 1995), *vacated sub nom.* *Am. Airlines v. Lockwood*, 515 U.S. 1182 (1995).

78. *Id.*

79. *Id.*

80. *Id.*

district court agreed that because the remaining claims were equitable in nature Lockwood was not entitled to a jury trial.⁸¹

Upon Lockwood's petition for a writ of mandamus to the Federal Circuit, the district court acknowledged that the only claim remaining in Lockwood's case was American's claim for a declaratory judgment of patent invalidity.⁸² The Federal Circuit noted, however, that the Supreme Court previously established that the equitable or legal nature of a declaratory judgment action depended on the controversy upon which it was founded.⁸³ The Federal Circuit found that the underlying controversy for the instant declaratory judgment action was really a suit for patent infringement brought by Lockwood with an affirmative defense of invalidity pled by American.⁸⁴ Because such a suit could have been brought at law or at equity during the 18th century, Lockwood was entitled to have factual questions relevant to the validity of his patents tried before a jury.⁸⁵ The dissent argued compellingly that Seventh Amendment jury trials are not available for a determination of public rights such as those involved in the validity of a patent.⁸⁶ The Supreme Court then vacated and remanded the decision without explanation.⁸⁷ Six years later, however, the Federal Circuit asserted that its reasoning in *Lockwood* was "neither supplanted nor questioned" in ruling that a defendant asserting only an affirmative defense of invalidity is not entitled to a jury trial where the patentee-plaintiff prays only for the equitable remedy of injunction.⁸⁸

The most recent case addressing the Seventh Amendment right to a jury trial in patent cases is *In re Technology Licensing Corporation*.⁸⁹ In *Technology Licensing*, the Federal Circuit endorsed the analysis of a magistrate judge in a case where the plaintiff sought declaratory judgment of patent invalidity and the defendant-patentee asserted a counterclaim of infringement, seeking only an injunction.⁹⁰ The

81. *Id.* at 968–69.

82. *See id.* at 969 (“The courts concluded that ‘the remaining claims are equitable in nature [and] the plaintiff [Lockwood] is not entitled to a trial by jury as a matter of right.’”) (alteration in original).

83. *Id.* at 973. *See also* *Simler v. Conner*, 372 U.S. 221, 223 (1963) (per curiam).

84. *In re Lockwood*, 50 F.3d. at 974.

85. *Id.* at 976.

86. *Id.* at 981 (Nies, J., dissenting).

87. *Am. Airlines v. Lockwood*, 515 U.S. 1182, 1182 (1995).

88. *Tegal Corp. v. Tokyo Electron Am., Inc.*, 257 F.3d 1331, 1340 (Fed. Cir. 2001).

89. 423 F.3d 1286 (Fed. Cir. 2005).

90. *Id.* at 1286–87.

magistrate judge, relying heavily on the historical-analog test used in *Lockwood*, ruled that the case most resembled an infringement action with a defense of invalidity, with only an equitable remedy sought by the patentee.⁹¹ The Federal Circuit affirmed the magistrate judge's decision that Technology Licensing Corporation was not entitled to a jury trial.⁹²

Thus, the general tendency of recent Federal Circuit and Supreme Court decisions regarding the right to a jury trial in patent cases, although inconsistent, has been to narrow the role of juries.⁹³ Particularly the *Markman* case stripped the jury of a central role in deciding patent issues because often patent cases turn on the construction of claim terms.⁹⁴ Similarly, the *KSR International Co. v. Teleflex, Inc.* case decided by the Supreme Court just last year, which loosened the standards for proving obviousness (and thus invalidating a patent),⁹⁵ arguably paves the way for increased trial court summary judgments against patentees. This trend would take yet another patent issue, already ultimately a question of law for the judge (with underlying factual issues), away from the jury. Additionally, the Federal Circuit has focused on the remedy originally sought by the patentee, whether plaintiff or defendant, in deciding whether to grant a jury trial.⁹⁶ When a patentee requests an equitable remedy, like an injunction, the court is likely to deny a jury trial.⁹⁷

Judges—at least those on the Federal Circuit and the Supreme Court—seem to believe that juries are less qualified to make decisions in patent cases.⁹⁸ A question remains, however, as to whether the narrowing of the role of the jury in patent cases is warranted. Are the outcomes in cases decided by judges and cases decided by juries different? Do the outcomes reveal faulty reasoning or biases that negatively affect the administration of justice? If parties nonetheless increasingly request juries, what do they hope to gain?

91. *Id.* at 1288.

92. *Id.* at 1291.

93. See Leibold, *supra* note 5, at 624–25.

94. *Markman v. Westview Instruments, Inc.*, 52 F.3d at 993 (Mayer, J., concurring); *id.* at 999 (Newman, J., dissenting) (“Deciding the meaning of the words used in the patent is often dispositive of the question of infringement.”).

95. 550 U.S. 398, 414–27 (2007).

96. See *In re Technology Licensing Corp.*, 423 F.3d at 1287.

97. See *id.*

98. See *Markman v. Westview Instruments, Inc. (Markman II)*, 517 U.S. 370 (1996).

III. JUDGING JUDGES AND JURIES: WHAT THE STATISTICS SUGGEST

Implicit in the Seventh Amendment's provision of jury trials in civil cases is the presumption that there is a reason why a party may choose to have its trial heard by a judge or a jury. In complex, high stakes, and expensive cases like patent trials, it is important to explore the soundness of this presumption, especially when there is a statistically significant bias in favor of the patentee in trial decisions overall.⁹⁹ In tried cases between 1983–1999, patentees won 58% of suits (706 cases) while the alleged infringer prevailed in 42% (503 cases).¹⁰⁰

This overall statistic could be skewed by particularly biased outcomes for either jury trials or bench trials. Indeed, the patentee prevailed in 68% of suits tried by a jury and only 51% cases tried by a judge.¹⁰¹ Thus, as anticipated by popular perception, whether the adjudicator is a judge or a jury in a patent case is a significant predictor of who will win the lawsuit.¹⁰² Moreover, jury outcomes tend to fluctuate over time while judge outcomes have remained relatively consistent over the years.¹⁰³ This fluctuation could be due to the fact that jurors are one-time participants in the legal system and have no opportunity to learn or to adjust reasoning over time while such experience-building is part of a judge's job description.¹⁰⁴

Turning to substantive issues, including validity, enforceability, infringement, and willful infringement, patentees continue to have the edge over alleged infringers; however, choice of adjudicator remains predictive of outcome.¹⁰⁵ A patent is more likely than not to be upheld by both judges and juries, but an outcome of validity is significantly more likely with a jury.¹⁰⁶ Similarly, alleged infringers with defenses of

99. See Moore, *supra* note 12, at 233 tbl.2. All statistics from the Moore article are from a data set of cases from 1983 to 1999.

100. *Id.*

101. *Id.* at 234.

102. *Id.* This distinction between judge and jury adjudication is not valid for all types of trials, however. In a study of product liability and medical malpractice cases, plaintiffs experienced a higher win rate in bench trials, but not jury trials. *Id.* at 234–35.

103. *Id.* at 235.

104. *Id.* at 237.

105. See *id.* at 237–38.

106. *Id.* at 239–40. Juries uphold validity in 71% of cases, while judges uphold validity in 64% cases. *Id.* at 239. The data set for these statistics, however, did not include dispositive motions granted by judges, so it is possible that judicial invalidations were underestimated. *Id.* at 240. One study found that judges uphold validity for just over one quarter of the patents decided in pre-trial motions. John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 212 tbl.3 (1998); Signore, *supra* note

unenforceability are successful only 28% of the time with judges and 25% of the time with juries.¹⁰⁷ Commentators believe that juries are more susceptible to pressure to defer to PTO “experts” than are judges and thus are less likely to support invalidity or unenforceability defenses of alleged infringers.¹⁰⁸

In matters of infringement, the trend continues, but differences between judge and jury adjudications are more noticeable.¹⁰⁹ The overall rate for a finding of infringement is 65%, or 888 out of 1359 decisions.¹¹⁰ Like validity, a finding of infringement is significantly more likely with a jury as adjudicator (71% or 503 decisions) than with a judge (59% or 385 decisions).¹¹¹ Further, juries find willful infringement in almost three-fourths of cases (71%), while judges find willful infringement in only half (53%).¹¹² These larger differences between judge and jury decisions in matters of infringement may reflect the differing evidentiary burdens for substantive patent issues.¹¹³ For example, an alleged infringer must prove a defense of invalidity or unenforceability by clear and convincing evidence,¹¹⁴ but the standard for an alleged infringer to prove noninfringement is preponderance of evidence.¹¹⁵ Alleged infringer win rates with judge adjudicators reflect these standards. Alleged infringers win 36% of decisions on validity and 28% on enforceability, but only 41% of decisions on infringement where alleged infringers have a lower evidentiary burden.¹¹⁶ Alleged infringer win rates for jury adjudications do not reflect these different standards, however, prevailing in 29%, 25%, and 29% decisions for validity, enforceability, and infringement, respectively.¹¹⁷ These findings suggest that juries are either influenced by bias for patentees, do not understand the meaning of differing evidentiary burdens, or ignore the

49, at 821.

107. Moore, *supra* note 12, at 239. This is not a significant difference.

108. *Id.* at 239–40.

109. *See id.*

110. *Id.* at 237 tbl.4.

111. *Id.*

112. *Id.*

113. *Id.* at 239.

114. *Id.* at 238; *see also* Ultra-Tex Surfaces, Inc. v. Hill Bros. Chem. Co., 204 F.3d 1360, 1367 (Fed. Cir. 2000).

115. Moore, *supra* note 12, at 238; *see also* Seal-Flex, Inc. v. Athletic Track & Court Constr., 172 F.3d 836, 842 (Fed. Cir. 1999).

116. *See id.* at 237 tbl.4.

117. *See id.*

different standards for the substantive issues.¹¹⁸

Further, a patentee must prove willfulness—that the infringer intentionally or recklessly disregarded the patentee’s rights—by clear and convincing evidence.¹¹⁹ This substantive issue had the largest spread in patentee win rates between judges and juries as adjudicators.¹²⁰ Tellingly, juries find willful infringement as often as they find infringement, in 71% of cases; whereas judges are less likely to find willful infringement (53% of decisions) than infringement alone (59% of decisions).¹²¹ Thus, juries appear to be more easily swayed by the idea that alleged infringers are “bad guys” harboring an intent to steal an innocent victim-patentee’s technology.¹²² Balancing out this inequity in judge and jury adjudications, judges are much more likely choose to enhance damages in cases in which a judge found willfulness (95% of cases) than they are to enhance damages in cases in which a jury found willfulness (63% of cases).¹²³ It is unclear whether judges purposefully function as a check on juries’ tendency to find willfulness or whether judges are simply more likely to credit the accuracy of their own findings on the issue of willfulness.¹²⁴

Despite these differences between judicial adjudicators and jury adjudicators, the Federal Circuit upholds judge and jury findings for the substantive issues of validity, infringement, and enforceability at an almost identical rate.¹²⁵ Therefore, as measured by appellate affirmance rates, judge and jury adjudications have comparable accuracy.¹²⁶ The Federal Circuit, however, does affirm jury verdicts for willfulness in 94% of decisions, compared to judge verdicts for willfulness in 80% of decisions.¹²⁷ This finding is not surprising, however, given that jury willfulness findings that are appealed tend to be those where the judge has enhanced damages; therefore, an appellate court is usually evaluating a willfulness finding endorsed by both the judge and the jury

118. *See id.* at 239.

119. *Id.* at 238; *see also* *Georgia-Pacific Corp. v. U.S. Gypsum Co.*, 195 F.3d 1322, 1334 (Fed. Cir. 1999).

120. *See Moore, supra* note 12, at 237 tbl.4.

121. *Id.*

122. *Id.* at 240–42.

123. *Id.* at 242.

124. *See id.*

125. *Id.* at 247 tbl.7 (finding validity affirmed, jury, 78%, judge, 77%; enforcement affirmed, jury, 75%, judge, 76%; infringement affirmed, jury, 77%, judge, 82%).

126. *See id.*

127. *Id.* at 247 tbl.7.

in a case.¹²⁸

Fact-finder performance may also be measured by tendency to find for the same party when multiple issues must be resolved and the tendency to find for the plaintiff.¹²⁹ Judges and juries differ in these measurements as well.¹³⁰ While both juries and judges tend to find for the same party on multiple issues, juries so find significantly more often (87% of cases) than do judges (72% of cases).¹³¹ These numbers suggest that judges may have superior ability to resolve claims more subtly “issue-by-issue rather than suit-by-suit.”¹³² Further, which party files suit is a significant predictor of who wins patent claims when the jury is the adjudicator but not when the judge is the adjudicator.¹³³ Patentees experience higher win rates when they bring the case compared to actions brought by an infringer (declaratory judgment action) with the jury as the fact-finder.¹³⁴ This data suggests that juries, but not judges, may have more sympathy towards patentees when patentees themselves bring the case as opposed to alleged infringers.¹³⁵ Overall, juries may be more likely than judges to be swayed by peripheral issues including which party brought the claim in patent cases.¹³⁶

Despite the jury’s partially earned reputation for lack of understanding in patent cases, the incidence of jury trials on patent issues is increasing.¹³⁷ In 1940, only 2.5% of patent cases tried in district courts were heard by juries.¹³⁸ From 1968–1970, that figure remained unchanged as “juries decided only thirteen of nearly four hundred patent trials in the federal district courts[,]”¹³⁹ that is, around 3%. In contrast, from 1997–1999, juries tried 59% of all patent trials in district courts, meaning that parties requested their Seventh Amendment rights to a jury trial in those cases.¹⁴⁰ Perhaps a patentee requesting a jury hopes that the jury will be impressed by the PTO seal of approval on the

128. *Id.* at 246–48.

129. *See id.* at 250–51.

130. *See id.* at 250–52.

131. *Id.* at 252 fig.11.

132. *Id.* at 252.

133. *Id.* at 254 fig.13, 255 fig.14.

134. *Id.* at 253.

135. *Id.* at 255.

136. *See id.* at 253–54

137. *Id.* at 209.

138. *Id.* at 210.

139. Stockwell, *supra* note 1, at 660.

140. Moore, *supra* note 12, at 210.

patent.¹⁴¹ If a party's case is weak, attorneys may request a jury in hopes that technical questions will overwhelm the jury to increase their chances of prevailing.¹⁴² Or, an attorney may hope that the client's position is the "morally" stronger one to elicit sympathy from a more malleable jury.¹⁴³ A U.S. company bringing an action against a foreign company may request a jury trial in hopes of winning through the "home court advantage."¹⁴⁴ When examined through an opponent's point of view, the reasons above would provide motivation to avoid a jury.¹⁴⁵ These choices by litigating parties likely account for some differences in judge-decided versus jury-decided outcomes because the choices determine what kinds of cases are tried before each fact-finder. Thus, given the statistics and popular perceptions of juries compared to judges as fact-finders, it is difficult to understand motivations behind requesting a jury or a bench trial.

IV. WHERE DO WE GO FROM HERE? FROM PEER-TO-PATENT TO PEER-REVIEWED LITIGATION

Differences between judges and juries as adjudicators are even more interesting considering that neither group typically is qualified to find facts in scientifically or technically complex patent cases.¹⁴⁶ Some judges may have more experience and skill in understanding patent law, but most do not benefit from any sort of technical training necessary to understand the facts of a typical patent case,¹⁴⁷ which involve difficult concepts common to fields such as electrical engineering, software development, biochemistry, and yes, rocket science. Even a judge with training in one of these areas would likely not be able to understand subtle differences between technological devices in another area. Thus, it would seem that, as a fact-finder, neither a legally trained judge nor a lay juror should be expected to perform competently.¹⁴⁸

One possible solution to this problem of under-qualified fact-finders in patent cases is to delegate the responsibility to an administrative

141. Signore, *supra* note 49, at 824.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 824–25.

146. See Rai, *supra* note 13, at 888–89.

147. See *id.*; see also United States Court of Appeals for the Federal Circuit, Judicial Biographies, available at <http://www.cafc.uscourts.gov/judgbios.html> (last visited Feb. 9, 2009) (noting that Judges Gajarsa, Linn, Lourie, Moore, and Newman have technical backgrounds).

148. See Rai, *supra* note 13, at 888–89.

tribunal.¹⁴⁹ As noted above, the Supreme Court has held that the Seventh Amendment right to a jury trial depends upon the nature of the issue and the forum.¹⁵⁰ The Seventh Amendment does not apply to public rights, for example.¹⁵¹ Further, Congress has the discretion to establish administrative tribunals to decide an issue without a jury if the issue involves patent rights as public rights.¹⁵² This discretion holds even if a public right is enforced against a private party.¹⁵³ Thus, Congress could dedicate a special fact-finding section of the PTO to hold its own tribunals or simply to assist a court in fact-finding.¹⁵⁴ The PTO may hire specialists across all scientific and technical areas to ensure accuracy and consistency across patent cases.¹⁵⁵ Any judicial review would have a standard deferential to the PTO with respect to the fact-finding.

An alternative and more experimental solution, drawing on Beth Noveck's current Peer-to-Patent program at the PTO,¹⁵⁶ involves a specialized jury more akin to peer review than to twelve experts sitting in a jury box during trial. The Peer-to-Patent program, also called the Community Patent Review Project, is a collaboration between the New York Law School Institute for Information Law & Policy and the PTO aimed at more thorough, efficient, and effective review of patent applications so that only valid and meritorious patents are issued.¹⁵⁷ The program employs public consultation software to allow qualified members of the public to submit prior art and commentary relevant to particular patents to the currently overworked and overextended examiners at the PTO.¹⁵⁸ The software allows self-selecting contributors to rate and rank the information submitted, as well as each other, based on expertise and usefulness in the process.¹⁵⁹ The Peer-to-Patent program "builds upon the notion that expertise is not centralized but

149. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 460–61 (1977).

150. *Id.*

151. *Id.* at 450.

152. See *id.* at 455.

153. *Id.* at 452–55.

154. See Stockwell, *supra* note 1, at 688.

155. *Id.* at 688–89.

156. For more on the development of the Peer-to-Patent program, see Posting of Nancy Scola to Science Progress, <http://www.scienceprogress.org/2008/08/better-patents-through-crowdsourcing/> (Aug. 29, 2008). See also Katsh & Noveck, *supra* note 14.

157. Katsh & Noveck, *supra* note 14, at 371.

158. *Id.* at 367, 371.

159. *Id.* at 372.

distributed in the minds of those with the requisite knowledge.”¹⁶⁰

Considering that neither the average judge nor the average randomly-selected jury has the “requisite” knowledge to understand fact-finding in the average patent case,¹⁶¹ a system similar to Peer-to-Patent may provide assistance in patent litigation. Similar software could be used to allow experts in relevant fields to learn about a particular disputed factual issue in a particular case and then weigh in, providing support for the opinion.¹⁶² For example, experts could submit prior art relevant to validity issues such as novelty, obviousness, and anticipation—as in the Peer-to-Patent program¹⁶³—or experts could identify sources that explain the meaning of particular term claims in the relevant technical field. Additionally, experts could comment on the differences between two devices to determine infringement issues. Information and experts would be rated and ranked so that the software would present the most relevant and important contributions first to the legal adjudicator of the case.¹⁶⁴ Such ranking of information and experts would prevent the adjudicator from being swamped with irrelevant postings. Further, experts would be identified and asked to reveal any conflicts of interest, incurring more effective accountability than a traditional peer review system. Such biographical information together with rankings would hold accountable self-proclaimed “experts” in likely satisfaction of *Daubert* issues and allow the community of the relevant field to question or even disqualify a poster as an expert.

This fact-finding system based on Peer-to-Patent could be applied whether the dispute is resolved in an Article III court, in an administrative tribunal at the PTO, or in a collaboration between the two.¹⁶⁵ Congress has the authority to amend patent litigation and to establish new jury practices for it.¹⁶⁶ Of course, the software would

160. *Id.* at 371.

161. *See* Rai, *supra* note 13, at 888–89.

162. *Cf.* Katsh & Noveck, *supra* note 14, at 371–72 (“Using communication technology, it is possible to create a new mechanism for large-scale distributed decision making that distinguishes legal from scientific decisions. With procedures in place to distribute but interconnect these two forms of expertise, it is possible to create new mechanisms for making administrative decisions more broadly.”) (citations omitted).

163. *See id.*

164. *Cf. id.* at 372 (“Participating reviewers could use the original software not only to submit bibliographic information, but also to rank that information. In so doing, they would collaboratively create a rank-ordered list of citations. The software would then forward only the top ten citations to the patent examiner for review.”).

165. *See* Stockwell, *supra* note 1, at 682–85.

166. *Id.* at 683; *see In re Lockwood*, 50 F.3d 966, 982–83 (Fed. Cir. 1995) (Nies, J.,

eliminate much of what composes the fact-finding portion of a patent trial currently, with attorneys presenting the court with evidence, and expert witnesses giving opinions on the stand. This process would rely instead on paper and on technology but certainly could be applied without offending Seventh Amendment, due process, or equal protection concerns.¹⁶⁷

The proposed program could be implemented consistently with the provisions of the Seventh Amendment.¹⁶⁸ The Supreme Court has noted in the past that “[n]ew devices may be used to adapt the ancient institution [of the Seventh Amendment right to a jury trial] to present needs and to make of it an efficient instrument in the administration of justice.”¹⁶⁹ As to patent cases in particular, the Federal Circuit has asserted, “[a] constitutional jury right to determine validity of a patent does not attach to this public [patent] grant.”¹⁷⁰ The Patent Clause itself contains no reference to juries, and there is evidence that the founders considered, and rejected, providing a clause that patent cases should be heard by a jury.¹⁷¹ Further, the historical-analog test used by the courts¹⁷² is inappropriate for modern-day patent cases because it improperly focuses on the legal posturing of the case, rather than the nature of the fact-finding that must be accomplished by the jury. Indeed, the historical-analog test assumes that a jury would have the capability to find facts using rational means.¹⁷³ The 18th century founders could not have anticipated the complexity of modern cases for which lay jurors would have no rational means of understanding.¹⁷⁴ Thus, reference back to the founders’ legal structuring is not an effective means to determine

dissenting), *vacated sub nom.* *Am. Airlines v. Lockwood*, 515 U.S. 1182 (1995); *see also* The Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, § 202 (codified at 35 U.S.C. § 271(e)(1) (1984)) (changing litigation requirements regarding new drugs).

167. *See* Stockwell, *supra* note 1, at 690–93.

168. *See id.* at 690, 692.

169. *See id.* at 683 (quoting *In re Peterson*, 253 U.S. 300, 309–10 (1920)) (alteration in original).

170. *In re Lockwood*, 50 F.3d at 983 (Nies, J., dissenting).

171. *See* Stockwell, *supra* note 1, at 690–91.

172. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 417–18 (1987).

173. *See In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1079 (3d Cir. 1980)

The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules.

Id.

174. *See id.*

who should preside as a proper fact-finder. This new software program that would allow experts to come to a consensus on complex patent issues through a rational process, though not a traditional “jury,” would more faithfully fulfill the demands of the Seventh Amendment.

Applying the Peer-to-Patent program to patent litigation would also stand up to due process and equal protection concerns. Due process requires a balance between governmental interests and private interests in the context of governmental abuse of power or a deprivation of life, liberty, or property.¹⁷⁵ As a preliminary matter, patent validity constitutes an area of strong public interest rather than private interest in patents.¹⁷⁶ The government harbors a strong interest in consistent, uniform, and accurate adjudication of patent public rights that outweigh residual private interests.¹⁷⁷ Legislation from Congress implementing the program would not be an abuse of power or a deprivation because there is no automatic right to a jury trial in patent cases in the first place.¹⁷⁸ If anything, the right to due process would be fortified by a provision for technically competent fact-finders.¹⁷⁹

Along similar lines, since a jury trial in patent cases is not a fundamental right, and jury reviewers would not be distinguished by any suspect or quasi-suspect classification, only rational basis review under equal protection would apply.¹⁸⁰ Since a system of expert fact-finders for patent cases would constitute a rational means to protect a legitimate governmental interest of effective and efficient adjudication of patent rights, Congress’ implementation of this program would not offend equal protection concerns.

The Peer-to-Patent program as applied to patent litigation would increase the efficiency and the effectiveness of fact-finding in patent trials. The legal adjudicator, whether a judge or a PTO administrator, would have the benefit of experts from the relevant technical field weighing in on complex factual issues not suitable for unaided judge or lay jury determination. Such a program would introduce a new source of relevant information to the legal system, as well as expand its concept

175. See U.S. CONST. amend. V; *Mathews v. Eldridge*, 424 U.S. 319, 332–35 (1976).

176. See *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985); *In re Lockwood*, 50 F.3d 966, 981–82 (1995) (Nies, J., dissenting).

177. See *Stockwell*, *supra* note 1, at 692; *Markman v. Westview Instruments, Inc. (Markman II)*, 517 U.S. 370, 390–91 (1996).

178. See *Tull v. United States*, 481 U.S. 412 (1987).

179. See *Leibold*, *supra* note 5, at 649–50.

180. See *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (rational basis review); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage as an example of a fundamental right).

of what constitutes legitimate authority for decision-making.¹⁸¹ The Peer-to-Patent program at the PTO has enjoyed apparent success so far as influential companies like Microsoft, Sun Microsystems, IBM, Hewlett Packard, and General Electric have offered their patents as guinea pigs.¹⁸² It is possible these companies believe that such a process offers an opportunity for increased legitimacy of their patents. Further, examiners have used information supplied by self-appointed experts and in two cases relied primarily on that information to reject claims.¹⁸³ Gathering information from experts using modern technology may have a place in patent litigation as well as in prosecution.

CONCLUSION

The complexity of modern patent litigation is difficult to square with the Seventh Amendment provision of trial by jury in some civil cases. Indeed, recent Supreme Court and Federal Circuit decisions have narrowed the role of the jury in patent cases. This reduced jury role is perhaps warranted as statistics from patent trials suggest that juries may not understand technical issues as well as judges (e.g., evidentiary standards), and that juries may be biased or swayed by peripheral concerns. Erosion of the traditional jury system for patent trials should not be alarming, however, given the public nature of patent rights and the lack of constitutional or statutory mandate for jury fact-finding in patent cases. Further, although judges may possess extensive experience and skill in patent law, they are also likely inappropriate fact-finders in the world of patents due to their lack of technical or scientific expertise.

To accomplish effective fact-finding in patent litigation, Congress may implement a special information-gathering system through modern software. This system would be analogous to the Peer-to-Patent program currently underway at the PTO, wherein self-selected experts weigh in on prior art issues relevant to a patent in front of an examiner. A distributed network of experts would come to a collaborative consensus on disputed issues in a trial through rating and ranking information and each other, creating a clearer picture for the legal adjudicator. It is likely that this program would overcome constitutional

181. See Katsh & Noveck, *supra* note 14, at 365.

182. The Peer to Patent Project: Community Peer Review of Patents, USPTO Office Actions and Early Peer-to-Patent Results, <http://cairns.typepad.com/peertopatent/2008/02/uspto-office-ac.html> (last visited Jan. 11, 2009).

183. *Id.*

challenges. It would, however, challenge stagnated views of what constitutes a “jury” and of appropriate sources of information and authority in the legal system.