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NOTE

OPTIONS FOR FEDERAL CIRCUIT REFORM DERIVED FROM GERMAN LEGAL STRUCTURE AND PRACTICE†

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I. INTRODUCTION

Among patent law practitioners, the creation of the Federal Circuit represents an innovation of significant importance[1] that has been examined as a model for specialized courts generally[2] and patent courts in particular.[3] The Federal Circuit shares a date of birth with two other innovations: Sony's CDP-101, the "[w]orld's first compact disk player,"[4] and Walt Disney World's Experimental Prototype Community of Tomorrow (EPCOT). While the compact disk player has begun to fade out of contemporary society amidst adoption of MP3 and other digital technologies, EPCOT perseveres in its "celebration of human achievement, namely technological

1. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 10-11 (6th ed. 2013).

2. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study In Specialized Courts*, 64 N.Y.U. L. REV. 1, 26 (1989).

3. *Id.*

4. *Corporate Information Regarding Home Audio*, SONY, http://www.sony.net/SonyInfo/CorporateInfo/History/sonyhistory-a.html.

innovation and international culture."[5] With the ever present criticism by a variety of commentators, the question remains to be answered: will the Federal Circuit follow the path of the compact disk player, or will it continue to innovate, adapt to new challenges, and remain a beacon of hope for supporters of specialized courts? Perhaps following EPCOT's example and looking to international approaches could be helpful in forging a path into the future.

This Note argues that the Federal Circuit experiment in specialized courts could be improved through the application of principles borrowed from international legal systems, particularly the German patent courts. Part I looks to the reasons that Congress created the Federal Circuit, commentary on the success of this experiment in specialized courts, and the likely trajectory of legal adjudication in United States patent law. Part II explores recent criticism of the Federal Circuit, taking particular notice of commentary from Chief Judge Wood of the Seventh Circuit Court of Appeals and Professors John F. Duffy and Craig Allen Nard of the University of Virginia and Case Western Reserve law schools, respectively. Finally, Part III provides suggestions for possible reform influenced by the German court system and explores their applicability to the commentary and criticism considered earlier.

II. THE CURRENT STATE OF UNITED STATES PATENT COURTS AND THEIR GERMAN COUNTERPARTS

This Note seeks to address possible modifications in Federal Circuit structure and procedure in an effort to resolve issues that have been noted by multiple distinguished commentators. In order to reach the point of providing potential solutions, it is worthwhile to first consider the overall structure of the systems and their reasons for existence. This Part explores the basic structure, jurisdiction, conception, and future of the Federal Circuit in order to better orient the reader. An examination of the Patent Pilot Program in the federal district courts is also included. Finally, the structure of the German patent courts is examined so that it can be compared later in the piece to the structure of the United States patent courts, and the question of forum shopping in the context of both criticism and commentary is explored.

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5. Craig Elliott, *A Brief History of Disney World's EPCOT Center*, http://www.abcarticledirectory.com/Article/A-Brief-History-of-Disney-World-s-EPCOT-Center/119813 (last visited Mar. 6, 2014).

A. Conception and Development of the Federal Circuit from 1982 to Present

Congress established the United States Court of Appeals for the Federal Circuit (Federal Circuit) on October 1, 1982.[6] The Federal Circuit has nationwide jurisdiction on subject matter ranging from international trade and veteran's benefits to government contracts and federal personnel.[7] The court is perhaps best known for its jurisdiction over intellectual property matters, including its exclusive jurisdiction over patent appeals from federal district courts.[8] As such, much of the court's adjudication arises from disputes among patent holders, patent applicants, and the United States Patent and Trademark Office (USPTO).[9] Consequently, the Federal Circuit plays a critical role in the United States patent system and helps to serve the goals of Congress, which established the USPTO under the constitutional determination "[t]o promote the Progress of Science and useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10]

The Federal Circuit continues to hear many cases of considerable importance in areas other than intellectual property; however, intellectual property cases make up a significant portion of the Federal Circuit's docket. The percentage of intellectual property cases has increased by approximately 20% since the 2006 term. In 2013, nearly half of the Federal Circuit docket was composed of intellectual property cases.[11] This represents a high-water mark for the court as the percentage has increased each year from 2006 through 2013, from a low of 29% of the docket to the current high.[12] This trend has been accompanied by a significant increase in the number of patent applications and patents issued each year.[13]

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6. *Court Jurisdiction*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited Mar. 6, 2014).

7. *Id.*

8. *Id.*

9. *Appeals Filed by Category*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/images/stories/Statistics/fy%2013%20filings%20by%20category.pdf (last visited Mar. 6, 2014).

10. U.S. CONST. art. I, § 8, cl. 8.

11. *Appeals Filed by Category*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/images/stories/Statistics/fy%2013%20filings%20by%20category.pdf (last visited Mar. 6, 2014).

12. *Id.*

13. *U. S. Patent Statistics, Calendar Years 1963-2013*, UNITED STATES PATENT AND TRADEMARK OFFICE, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf (last visited Mar. 7, 2014).

Technological innovation continues apace throughout the world, and the United States remains the largest consumer economy in the world.[14] Given this information, it is reasonable to anticipate continued growth of litigation among patent holders, licensees, and other interested parties.

The Leahy-Smith America Invents Act (AIA) entered into effect on March 16, 2013, providing for several new actions that may have some influence on the quantity of patent cases that reach the Federal Circuit.[15] Among the changes that could have an impact are the new first-to-file approach to inventor priority,[16] the institution of Post-Grant Review ("PGR") proceedings,[17] and the new Inter-Partes Review ("IPR") proceedings.[18]

The new first-to-file system is intended to bring the United States into concert with the majority of the international community for purposes of inventor priority.[19] The new system has been a frequently debated and often lauded portion of the new law,[20] with commentators both praising the international harmonization and questioning the effect the changes may have on smaller entities, including lone inventors.[21] The change will eventually lead to the end of interference proceedings before the patent office, although there may still be disputes concerning derivation. These proceedings will still exist for some time, as applications filed prior to the March 16, 2013 start date of the AIA are still prosecuted under the rules of the 1952 Patent Act.[22]

As appeals from interference proceedings can proceed either to the Federal Circuit or the Court of Appeals for the District of Columbia, the change in appeals may be somewhat limited. In addition, it is difficult to determine the effect of this change on the

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14. *National Accounts Main Aggregates Database*, UNITED NATIONS STATISTICS DIVISION, http://unstats.un.org/unsd/snaama/resQuery.asp (GDP by Expenditure, at current prices – US Dollars).

15. America Invents Act, Public Law 112-28 (2011).

16. 35 U.S.C. § 102(a)(1) (2011).

17. 35 U.S.C. § 282(b) (2011).

18. 35 U.S.C. § 315(b) (2011).

19. Leonid Kravets, *First-To-File Patent Law Is Imminent, But What Will It Mean*, TECH CRUNCH (Feb. 16, 2013), http://techcrunch.com/2013/02/16/first-to-file-a-primer/.

20. *Id.*; *see also* Ian Ayres, *Will First-to-File Hurt Small Inventors?*, FREAKONOMICS.COM (Sept. 20, 2011), http://freakonomics.com/2011/09/20/will-first-to-file-hurt-small-inventors/.

21. Ian Ayres, *Will First-to-File Hurt Small Inventors?*, FREAKONOMICS.COM (Sept. 20, 2011), http://freakonomics.com/2011/09/20/will-first-to-file-hurt-small-inventors/.

22. 35 U.S.C. § 35 (2011).

Federal Circuit docket. It is quite possible that by phasing out these proceedings there will be fewer cases originating in the USPTO that reach the Federal Circuit. Yet, since these interferences were already rather uncommon, it is unlikely that this will have any major effect on the appellate case load.

The new PGR process in the AIA allows anyone to challenge the validity of a patent within nine months of its issuance. A step in the direction of the European model, akin to patent oppositions, the process allows for the challenger to request the cancellation as unpatentable of one or more claims of a patent on any ground that could be raised in a district court proceeding. This mini-trial in the patent office is appealable to the Federal Circuit and is designed to work in concert with the new IPR such that an IPR action cannot be undertaken until the nine-month window for PGR has closed.[23] These processes are designed to work alongside litigation, such that PGR cannot be requested if the requestor has already filed a civil action in the district courts. The goal of this approach is to prevent duplicative proceedings when possible. Perhaps this influence will decrease the number of matters appealed to the Federal Circuit, but at this point it is hard to find evidence in either direction.

Another change in the AIA that could influence the number of cases reaching the Federal Circuit is the institution of the new IPR system that has replaced the Inter Partes Reexamination proceedings at the USPTO. It is unclear whether this change will have any significant effect on the number of cases reaching the Federal Circuit. The number of reexaminations remains quite small in comparison to the number of patent applications and issued patents. Additionally, the proceedings must be filed before a declaratory action is filed in the district court by the patent challenger,[24] and litigation in the district courts is automatically stayed after an IPR is filed. Thus, the likelihood of a major change in the number of matters appealed to the Federal Circuit seems small.

As business method patents have been subject to the new Inter Partes Review process since September 16, 2012, they may be the first art group to demonstrate a difference in the number of appeals for Federal Circuit review; however, at this point the long-term effect on case load is difficult to ascertain.

23. 35 U.S.C. § 311(c) (2011).
24. 35 U.S.C. § 315(a)(2) (2011).

The Federal Circuit has now entered its fourth decade of adjudication.[25] It currently has eighteen judges[26] who handled 1,259 appeals filed in 2013.[27] Among the eighteen judges are six that have assumed senior status.[28]

From its inception the Federal Circuit has represented the specialization of the adjudication of patent disputes by channeling patent appeals to a single court.[29] This specialization has allowed for numerous studies on the viability and utility of specialized courts. Notably, studies by Professor Rochelle Cooper Dreyfuss of NYU School of Law have provided insights at both the five[30] and twenty[31] year intervals. Examinations by Professors Nard and Duffy have provided both insights into the performance of the court and proposals for further experiments in specialization and optimization.[32]

B. The Influence of International Patent Systems Has Been A Significant Part of American Patent Law From Its Inception

Looking to international norms when crafting patent laws is at the heart of the American patent system. It is quite clear that James Madison took the British experience with patents into consideration when drafting the language that would become Article 1, Section 8, Clause 8 of the Constitution.[33] The founders, in their writings, demonstrate an understanding of Lockean ideals and the work of

25. *Court Jurisdiction,* UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited Mar. 7, 2014).

26. *Judges*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html (last visited Mar. 7, 2014).

27. *Historical Caseload*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/images/stories/Statistics/historical%20caseload%20graph%2083-13.pdf (last visited Mar. 7, 2014).

28. *Judges,* UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html (last visited Mar. 7, 2014).

29. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study In Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

30. *Id.*

31. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769 (2004).

32. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007).

33. THE FEDERALIST NO. 43 (James Madison).

Adam Smith, who notably supported the granting of patents[34] despite his admonitions against the evil of monopolies. The new first-to-file system and the model of PGR, akin to European patent oppositions, are but two of the most recent modifications inspired by European systems. Others include changes in the calculation of United States' patent terms and the recent restrictions on publication safe harbors meant to prevent American inventors from abandoning their potential patent rights abroad through disclosure. With this tradition in mind, a brief examination of international cooperation in patent law may be helpful.

International cooperation in patent law has progressed alongside globalization and the growth of new markets throughout the world. Patent rights are limited to specific jurisdictions and the patent rights prescribed by the United States Constitution are explicitly limited to the jurisdiction of the United States of America. As national patent rights could not provide protection abroad, a variety of solutions have been proposed over more than 150 years to the issues of international protection. Notably, the global harmonization of domestic patent systems has been influenced by: the 1883 Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty (PCT) entered into force in 1978, the European Patent Convention, the World Intellectual Property Organization, and the Trade Related Aspects of Intellectual Property (TRIPS) agreement.

Similarly, domestic changes have been introduced to normalize American patent laws with international norms. Many of these changes have been made in response to international agreements, such as the Patent Cooperation Treaty[35] or the TRIPS agreement,[36] but others, notably modification to longstanding patent law in the AIA, have led to greater standardization of patent prosecution standards.

There is considerable disagreement over the value of harmonization and the utility of some changes that have been made to United States patent law in the process. Although many

34. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book V. Ch. I (1776).

35. *See* ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 489 (6th ed. 2013) ("The PCT was signed in 1970 . . . . Its major purpose is to streamline the early prosecution stages of patent applications filed in numerous countries[,] . . . its major advantage is that is that it gives an inventor (and her patent lawyer) more of a precious commodity in the prosecution of an application destined for many countries: time.").

36. *See id.* at 480 (The reformation of § 104 came in 1994, when the U.S. (as well as most other industrialized countries) acceded to the TRIPs agreement.).

modifications have occurred in the areas of application and prosecution due to globalization of patent law, there have been very few modifications or even suggestions for modification based on international court structures.

C. The German Patent System

The German patent system has proven to be a "top jurisdiction for patent litigation," as "[e]nforcing patents in Germany provides important leverage for enforcing patent rights across Europe."[37] Germany is among the largest consumer economies in the world,[38] and is "one of the most important markets in the world."[39] It maintains a patent system with a "unique structure"[40] and has a reputation for resolving suits "well ahead of U.S. counterpart suits, at a fraction of the cost."[41]

The German civil law system maintains three court instances: "District Courts, the Appeal Courts and the Federal Supreme Court."[42] Although the legislative acts are the primary source of law and the courts are "usually inquisitorial, unbound by precedent . . . German courts do carefully review previous rulings of other courts."[43] Both the "well-developed body of precedent" and the lack of a jury may lead to efficiency in the system.[44]

Under the Germany system, there are "separate courts for asserting and invalidating issued patents."[45] Nullity actions are brought to invalidate German national patents or the German part of a European patent and the Federal Patent Court maintains exclusive jurisdiction to adjudicate these actions.[46] The Federal Patent Court has jurisdiction over matters involving the validity of patents, utility models, trademarks, and designs. In addition to its first instance jurisdiction over patent nullity actions, it also acts as a

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37. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE xxi (Kluwer Law International BV) (2011).

38. *National Accounts Main Aggregates Database*, UNITED NATIONS STATISTICS DIVISION, http://unstats.un.org/unsd/snaama/resQuery.asp (GDP by Expenditure, at current prices – US Dollars).

39. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE xxi (Kluwer Law International BV) (2011).

40. *Id.*

41. *Id.*

42. *Id.* at 13.

43. *Id.*

44. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 13-14 (Kluwer Law International BV) (2011).

45. *Id.* at 15.

46. *Id.*

court of second instance for appeals against decisions of the German Patent and Trademark Office."[47] "The Federal Patent Court has no jurisdiction over disputes concerning infringements of patents" and is therefore quite specialized.[48]

Patent infringement proceedings are "exclusively litigated through Germany's district courts."[49] The Federal Republic is divided into twelve courts with the most active being the District Court of Dusseldorf in the western portion of the country.[50] As in the United States, the "selection of the court is usually based on strategic considerations of the patentee."[51] In most instances, the patentee is able to control jurisdiction, even in many instances of declaratory judgment actions.[52] Panels in each of the districts are "composed of three judges who are trained in patent law and have several years of practical experience with patent cases."[53] Additionally, the three districts that have the highest number of patent cases "each have two chambers dedicated to patent infringement matters."[54]

In infringement actions, the second instance is heard by the appeal court having jurisdiction over the District Court that decided the case in the first instance.[55] This structure is similar to the current approach in copyright and many trademark cases, and was the approach in the United States prior to the creation of the Federal Circuit. The heavy weighting of cases in the more popular fora, however, may provide for greater specialization among the appellate courts that serve Dusseldorf, Mannheim, and Munich.[56]

Finally, the third instance of infringement actions is adjudicated by the Federal Supreme Court.[57] The court is alternatively called the Federal Court of Justice (*Bundegerichtschof*) and employs 128 judges that compose twelve civil panels and the five criminal panels and several special panels.[58] Each panel is

47. *Id.*

48. *Id.* at 16.

49. *Id.*

50. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 17 (Kluwer Law International BV) (2011).

51. *Id.* at 18.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 18 (Kluwer Law International BV) (2011).

57. *Id.*

58. *The Federal Court of Justice*, DER BUNDESGERICHTSCHOF 5 (Herausgeber 2014).

"composed of six or seven judges" and also has a presiding judge. Of these seven or eight jurists, only five are involved in each individual decision.[59]

For civil cases, jurisdiction is traditionally allocated following "the principle of highest possible specialisation."[60] This emphasis on specialization is useful in considering the purpose of the Federal Circuit Court of Appeals and the frequent goals for decreasing allocation based on subject matter. At the Federal Court of Justice, the Tenth Panel is currently assigned both patent law and tourist travel law.[61] While it is not clear that these subjects are related, the Ninth Civil Panel covers both insolvency law and lawyers' liability[62] and the Federal Circuit itself covers issues other than intellectual property.[63]

A distinct court, the Federal Constitutional Court (*Bundesverfassungsgericht*), is also located in Karlsruhe but exists to "ensure that all institutions of the state obey the constitution."[64] The Federal Constitutional Court "consists of two Senates, each of them with eight members."[65] "Currently, the Vice-President presides over the First Senate, the President over the Second Senate."[66] The Senates each have several panels and the panels have three members each.[67] A majority of the Court decisions are made by "Chambers, which each consist of three Justices of one Senate."[68] The Chamber is able to grant relief, but the decision must be disclosed in a written proceeding and be unanimous.[69] If the chamber cannot reach an agreement, the entire Senate, sitting with eight Justices, will hear the matter.[70]

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59. *Id.* at 11.

60. *Id.* at 17.

61. *Id.*

62. *Id.*

63. *Appeals Filed by Category*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://cafc.uscourts.gov/images/stories/Statistics/fy%2013%20filings%20by%20category.pdf (last visited Mar. 6, 2014).

64. *The Federal Court of Justice*, DER BUNDESGERICHTSCHOF, 59 (Herausgeber 2014).

65. *Structure*, BUNDESVERFASSUNGSGERICHT, http://www.bundesverfassungsgericht.de/EN/Das-Gericht/Organisation/organisation_node.html (last visited Apr. 13, 2015).

66. *Id.*

67. *Id.*

68. *Reaching a* Decision, BUNDESVERFASSUNGSGERICHT, http://www.bundesverfassungsgericht.de/EN/Verfahren/Der-Weg-zur-Entscheidung/der-weg-zur-entscheidung_node.html (last visited Apr. 13, 2015).

69. *Id.*

70. *Id.*

D. Domestic and International Forum Selection Issues

Questions of forum shopping and the potential issues associated with such challenges remain prevalent in both American and international patent law. Notably, Germany remains the country of choice for a plurality of litigants in Europe.[71] One of the benefits of a single appellate court is the inability of litigants to escape unfavorable precedents by pursuing actions in different circuits. Making changes to expedite the review of critical issues may alleviate some of the forum shopping issues present in the United States, but many of the problems noted by commentators will likely remain.

Concerns about forum shopping in the United States remain prominent in the academic literature.[72] The issue is in no way exclusive to patent law, but as Professor Lemley of Stanford University School of Law has noted, "it seems that the jurisdiction in which a case is litigated has a significant impact on its outcome."[73] Professor Lemley found that the "variation in win rates ranges from a high of 55% in the Northern District of Texas to a low of 11.5% in the Northern District of Georgia."[74] Upon further limiting the analysis to the largest districts, "the variation is [still] substantial, ranging from a high of 45.3% in the District of Delaware to a low of 21% in the District of New Jersey."[75] The study goes on to note that there are additional concerns outside of win-rate that are also significant to forum choice in litigation, and the study as a whole demonstrates that forum shopping is certainly present in the field of patent litigation.[76] In addition, the recent *Gunn* decision is evidence of a desire to pursue patent cases in the state courts, a different type of forum shopping that is also present in the American Patent litigation system.[77] Although the Federal Circuit has jurisdiction over all matters arising under the Patent Act, there are matters of patent law that are often handled by the State Courts when they do not "substantially relate to a Federal interest." The exact reason for these desires is not entirely clear, and could possibly stem from personal and economic factors or a desire for efficiency.

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71. *Id.*

72. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 402 (2010).

73. *Id.* at 410.

74. *Id.*

75. *Id.*

76. *Id.*

77. Gunn v. Minton, 133 S. Ct. 1059 (2013).

In Europe, forum shopping is also quite common. "Many different countries may be selected for an enforcement venue, or parallel enforcement actions may be brought in different European countries simultaneously. . . . In recent years, that jurisdiction of choice has been Germany."[78] For some time, commentators have debated whether or not it is preferable to have parties shopping for the perfect forum.[79] As Professor Lemley notes, "[t]he districts with the most patent cases largely track population and technology centers." Two exceptions are "the District of Delaware, which is the state of incorporation of many litigants, and the Eastern District of Texas, which has little connection to innovation, except its choice as a destination for patent plaintiffs."[80] While forum shopping remains a question of some significance in the United States, efforts to look to the European model for solutions will likely be in vain. In Europe, parties may choose the German courts for their unique "'split system;' the expertise and reputation of German infringement courts; the speed and low costs of proceedings in Germany; and the customs gatekeepers standing at the border to Europe's largest market."[81]

E. Validity and Nullity Actions

In infringement and declaratory judgment actions, an accused infringer or potential infringer can challenge the patent as invalid.[82] The United States Supreme Court has noted that the public interest is served when invalid patents are eliminated during validity considerations.[83] In the United States, questions of validity are typically treated as matters of law.[84] There exists substantial tension between maintaining uniformity in patent proceedings by minimizing questions of fact in validity considerations while

78. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 1 (Kluwer Law International BV) (2011).

79. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001).

80. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 407 (2010).

81. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 1 (Kluwer Law International BV) (2011).

82. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 54 (6th ed. 2013).

83. Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 100 (1993).

84. Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1566 (Fed. Cir. 1987).

simultaneously respecting the importance of the underlying facts.[85] In some cases, the Federal Circuit has been quite deferential to jury findings of fact during validity determinations. [86] Ultimately, questions of validity often involve jury and judicial determinations in the United States.

In Germany, validity challenges are tried separately from infringement actions.[87] Actions impeaching the validity of an issued patent are called nullity proceedings and occur in the Federal Patent Court if they are instituted after the window for opposition proceedings has closed.[88] This separated system has been called "a defining characteristic of German patent litigation." [89] The separation of validity and infringement is maintained in all instances and, even in cases where both the infringement and validity action reach the court of last resort, they remain independent of one another.[90]

Nullity actions typically move more slowly than infringement actions in Germany.[91] Under this system, a nullity action instituted at the Federal Patent Court would be decided as a first instance by the specialized court. If it is appealed, it is adjudicated by Chamber X of the Federal Supreme Court.[92] Infringement actions would originate in the district courts.[93] If they are appealed, they would be heard by the regional appellate court,[94] and the court of last resort would remain the Federal Supreme Court chamber.[95] In contrast to the United States practice, in Germany a plaintiff is not required to demonstrate a particular interest for a nullity action.[96] In addition, third parties may become involved in nullity actions if they have a legal interest in the suit.[97] At the close of the nullity proceeding, "infringement proceedings will be closed to the extent the patent

85. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 991 (6th ed. 2013).

86. *Id.*

87. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 1 (Kluwer Law International BV) (2011).

88. *Id.* at 15-16.

89. *Id.* at 1.

90. *Id.* at 16.

91. *Id.*

92. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 94-95 (Kluwer Law International BV) (2011).

93. *Id.* at 17.

94. *Id.* at 18.

95. *Id.* at 19.

96. *Id.* at 95-96.

97. *Id.* at 98.

was revoked."[98] If an inconsistency exists between a closed infringement proceeding and a closed nullity proceeding, a separate new trial must be initiated to correct issues.[99]

In a recent article, Professor Lemley suggested that there may not be a constitutional requirement for jury trials on matters of validity in the federal courts.[100] He argued specifically that "while the right to a jury trial on patent validity issues is widely assumed, there is in fact no solid support in modern case law for such a right."[101] The Federal Circuit addressed the issue in *In re Lockwood*[102] but the Supreme Court declined to address the issue at all.[103] Professor Lemley further identified ways in which the United States patent system would look quite different if there were no right to a jury for validity questions, noting particularly the fact that the USPTO is an administrative agency,[104] and judges review decisions made by administrative agencies with varying degrees of deference.[105] If, as Professor Lemley argued, there is no right to a jury trial under the Seventh Amendment in validity actions, the German example would not be impossible to follow. If, on the other hand, the Supreme Court were to find that there is a right to a jury in validity actions, the structure of district court patent proceedings would be limited to something similar to current procedures barring the dramatic and unlikely circumstances of a constitutional amendment or a reversal of the case by the Supreme Court.

F. The Patent Pilot Program: An Attempt at Specialized District Courts

The Patent Pilot Program, launched in 2010, is a 10-year project intended to determine whether it would be advantageous to change the way that the district courts resolve patent cases.[106] In essence, the program allows participating district courts to direct patent cases to a specified group of judges. As these judges will hear

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98. ALEXANDER HARGUTH & STEVEN CARLSON, PATENTS IN GERMANY AND EUROPE 108 (Kluwer Law International BV) (2011).

99. *Id.*

100. Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1675 (2013).

101. *Id.*

102. *In re* Lockwood, 50 F.3d 966, 970 (Fed. Cir. 1995).

103. Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1675-76 (2013).

104. Dickinson v. Zurko, 527 U.S. 150, 154-55 (1999).

105. Administrative Procedure Act, 5 U.S.C. § 706 (2006).

106. *District Courts Selected for Patent Pilot Program*, UNITED STATES COURTS, http://www.uscourts.gov/news/newsview/11-06-07/District_Courts_Selected_for_Patent_Pilot_Program.aspx (last visited Mar. 7, 2014).

the majority of the patent cases in the district, they are expected to become experts in the field. Districts that are participating include the Eastern District of Texas and the Northern District of California,[107] both very busy venues for patent litigation.[108] Over the course of the program, these courts will issue status reports[109] that may be of use in assessing the success of the endeavor.

III. POTENTIAL ISSUES WITH THE FEDERAL CIRCUIT'S STRUCTURE AND JURISDICTION

By looking to Chief Judge Wood's recent proposal for modifying the Federal Circuit's jurisdiction in the context of prior suggestions by Professors John Duffy and Craig Nard, this Note seeks to address potential issues and solutions provided by each of the three esteemed commentators. The section first considers Chief Judge Wood's criticism of the lack of sufficient intellectual conflict. It also explores the suggestion that the other circuits have sufficient capacity to handle patent matters. Finally, it considers Duffy and Nard's proposal for improving the Federal Circuit through jurisdictional modification.

A. Chief Judge Wood's Criticism and Commentary

Criticism of the Federal Circuit has been frequent over its 33-year tenure as the sole jurisdiction for patent appeals.[110] Among recent critics of the Federal Circuit are Chief Judge Diane Wood[111] and Judge Richard Posner[112] of the Seventh Circuit. Chief Judge Wood's speech "Keynote Address: Is it Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?" addresses concerns about the specialization, accuracy, and efficiency of the Federal

107. Gibbons P.C., *The Patent Pilot Program Takes Off Around the Country*, IP LAW ALERT (Oct. 20, 2011), http://www.iplawalert.com/2011/10/articles/patent/the-patent-pilot-program-takes-off-around-the-country/.

108. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 406 (2010).

109. *Id.*

110. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study In Specialized Courts*, 64 N.Y.U. L. REV. 1, 25 (1989).

111. *Seventh Circuit Judges*, UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT, http://www.ca7.uscourts.gov/contact.htm#dwood (last visited Mar. 7, 2014).

112. Richard A. Posner & William M. Landes, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 112 (2004) ("As expected, the Federal Circuit has turned out to be a pro-patent court in comparison to the average of the regional courts that it displaced in the patent domain. The evidence that supports this conclusion is set forth in the book chapter on which this Essay is based.").

Circuit.[113] The Chief Judge examines commentary by Duffy and Nard and their proposal for expanding the number of appellate courts with patent jurisdiction to provide greater consideration of the "soundness of these interpretative approaches."[114] She further notes that the claim construction methodologies of the Federal Circuit have been extensively criticized. [115] Critique of § 103 nonobviousness jurisprudence is raised as an additional criticism of the Federal Circuit's determination, stating that "[t]he Federal Circuit's jurisprudence in this area has been subjected to significant criticism," and "the standard of nonobviousness is now so low, new technologies spawn thickets of patent rights on marginal improvements."[116] Ultimately, both of these critiques are centered on the determination that the "process of testing and experimentation is lost when uniformity is privileged above all other values." This criticism seems to relate to the lack of competing voices, such as those present in circuit splits on other issues.

A second argument raised by Chief Judge Wood is that many other areas of intellectual property are adjudicated by the circuit courts, and with greater interaction among the various forms of intellectual property the various federal appellate courts have gained greater experience with issues that are common across the intellectual property field.[117] Chief Judge Wood proceeds to reject the assertion that patent disputes are simply more complicated than other types of legal disputes, citing the Seventh Circuit's recent decisions on Comprehensive Environmental Response Compensation and Liability Act litigation to support her argument.[118] She argues that "there is great value in obtaining the views of a number of judges, and there is great value in using generalist judges." [119] "[T]he basic legal principles are relatively straightforward," despite the involvement of "very complicated *technology*."[120] Under this line of argument, the federal courts deal

113. Hon. Diane P. Wood, *Keynote Address: Is it Time To Abolish the Federal Circuit's Exclusive Jurisdiction In Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

114. *Id.* at 5.

115. *Id.*

116. *Id.*

117. *Id.* at 6.

118. *Id.* at 7.

119. Hon. Diane P. Wood, *Keynote Address: Is it Time To Abolish the Federal Circuit's Exclusive Jurisdiction In Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 7 (2013).

120. *Id.*

with complicated matters frequently, and therefore the fact that patent law is quite complicated is inapposite.

Chief Judge Wood's argument is not directed to abolishing the Federal Circuit.[121] She claims, rather, that the Federal Circuit should be stripped of its exclusive jurisdiction over patent cases. She suggests a system where parties would have the opportunity to choose the Federal Circuit or a geographically defined circuit court.[122] This would apparently function similarly to the structure of labor appeals that allow for choice among the D.C. Circuit and the courts of appeals where the alleged unfair practice occurred or the court of appeals where the party resides.[123] The Chief Judge argues that this approach would retain "[m]any of the benefits that accrue from specialization," while "[t]he Supreme Court would also have the benefit of fuller development in the lower courts and thus, more information about which cases warrant one of the scarce slots in its annual docket."[124]

Chief Judge Wood identifies several arguments that appear prominently when the Federal Circuit is examined.[125] She argues that it is often incorrect, not necessarily efficient, and not necessary for serving the needs of the United States patent system. Many commentators have responded to this critique, and it is fair to say that there is substantial support for the Federal Circuit system as it exists today, but ignoring Chief Judge Wood's thoughtful critique would limit opportunities for further improvement.

1. The Federal Circuit is Often Overruled by the Supreme Court and Out of Step with Academic Literature

It is undeniable that the Federal Circuit has clashed with the United States Supreme Court with increasing frequency in recent terms. [126] The Supreme Court has overruled Federal Circuit

121. *Id.* at 9.

122. *Id.*

123. *Id.*

124. *Id.* at 10.

125. Hon. Diane P. Wood, *Keynote Address: Is it Time To Abolish the Federal Circuit's Exclusive Jurisdiction In Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 2-3 (2013).

126. Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, 106 MICH L. REV 28 (2007), *available at* http://repository.law.umich.edu/cgi/viewcontent.cgi?article=2206&context=articles.

precedent in the recent *Bilski*,[127] *Prometheus*,[128] and *Myriad*[129] cases, among others, and in 2014 the Supreme Court granted *certiorari* to six cases from the Federal Circuit and overturned more than 80% of them.[130] This trend has been viewed by commentators as a desire to "rein in" the court and bring it in line with the Supreme Court's view of patent law.

As Chief Judge Wood noted in her comments, the Federal Circuit does not have proper circuit splits. It remains conventional wisdom among legal commentators that a circuit split will likely lead to Supreme Court adjudication.[131] Professors Duffy and Nard have relied on this issue for their suggestion that the optimal number of courts having jurisdiction over patent disputes is likely fewer than twelve and greater than one.[132] This change could also alleviate some of the duties of the Solicitor General, who has been asked with increasing frequency to opine on the issues in patent law that are ripe for Supreme Court review.[133] Such a task places the fate of patent law determinations in the hands of one person, or at the very minimum one legal department, that of the Solicitor's office, and is surely susceptible to the lack of diversity in legal thought that Chief Judge Wood has criticized.[134]

2. The Regional Circuits are Sufficiently Competent to Handle Patent Issues

Chief Judge Wood further notes that, under her proposal, "[i]t is possible—maybe even likely—that the Federal Circuit would still play a leading role in shaping patent law . . . The absolute number of patent cases that would return to the regional courts

127. Bilski v. Kappos, 561 U.S. 593, 593 (2010).

128. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1291 (2012).

129. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2109 (2013).

130. Kedar S. Batia, *Stat Pack for October Term 2013*, SCOTUSBLOG (July 3, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/07/SCOTUSblog_Stat_Pack_for_OT13.pdf.

131. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1448 (2009).

132. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1664 (2007).

133. *See, e.g.*, *Myriad*, 133 S. Ct. 2107.

134. Hon. Diane P. Wood, *Keynote Address: Is it Time To Abolish the Federal Circuit's Exclusive Jurisdiction In Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1, 4 (2013).

would not be large."[135] Thus her suggestions seem to fail to provide a solution to her expressed concerns.

Whether the regional appellate courts have the faculties to handle patent issues is surely a difficult question to address. Commentators have provided a variety of opinions, and it is clear that the Seventh Circuit, as well as the other regional circuits, has dealt with many complex and difficult issues.[136] This challenge to Federal Circuit jurisdiction is therefore not a problem with the Federal Circuit; it is a protest on behalf of the rest of the federal appellate judiciary and clearly should not be dealt with by suggesting a lack of adjudicatory proficiency among those honorable jurists.

Until 1982, many of the cases that now fall under the Federal Circuit's jurisdiction were handled by the regional courts of appeals. The common argument, addressed expressly by Chief Judge Wood, is that the patent cases are sufficiently complicated or technical that they require a specialized judiciary to adequately adjudicate cases. The question of whether patent law is truly different from other areas is legitimately debated. On the one hand, the Constitution expressly calls for the patent system, and the United States Patent Office is older than almost all of the other administrative agencies in the federal government. On the other hand, the regional appellate courts handle cases pertaining to copyright law, which springs from the same clause in the Constitution as patent law. The question remains whether there is something special about the "useful arts" that is perhaps more trying or of greater import than the progress of "science" in the historical context of writings and other forms of publication.[137] Many commentators have responded to Chief Judge Wood by rejecting her criticism, although in very respectful and thoughtful ways. This Note seeks to propose solutions, drawn from German court experience, to some of the problems she has identified and to look for new ways to solve old problems. Where some aspects of the proposal seek to borrow a structure from trademark law,[138] the following suggestions remain rooted in patent practice, albeit international practice.

135. *Id.* at 10.
136. *Id.* at 7.
137. U.S. CONST. art. 1, § 8, cl. 8.
138. Lanham Act, 15 U.S.C. § 43(a) (2012).

B. The Duffy and Nard Proposal

In their analysis of the Federal Circuit, Duffy and Nard noted the related issues of over-centralization and overspecialization.[139] They determined that problems of over-centralization of jurisdiction exist and are present in the Federal Circuit, contributing to a "growing sense among court watchers and patent players that the Federal Circuit has fallen out of rhythm with some of the technological communities its decisions affect . . . ."[140] The authors identified the problem of insularity[141] and mirrored Chief Judge Wood's concern over the small pool of judicial perspectives on patent appeals. Like Chief Judge Wood, Duffy and Nard do not argue for a "full-scale return to pre-Federal Circuit institutional structure."[142] Rather, they suggest that it would be better to expand jurisdiction over patent appeals to "at least one extant circuit court"[143] to complement the Federal Circuit.

IV. PROPOSED SOLUTIONS TO THE PROBLEMS IDENTIFIED

This Note argues that the Federal Circuit can decrease its rate of reversal, demonstrate the importance of its specialization, and improve its overall efficiency if Congress were to look to international precedent, particularly the German Federal Court System, for potential modifications. Three possible modifications are discussed in this Note. They include the bifurcation of the Federal Circuit to form two competitive yet equal branches that could generate circuit splits and provide greater clarity on pressing issues of patent law. Second, the expansion of the Patent Pilot Program in the district courts to improve the quality of jurisprudence at the first instance, and, finally, the exploration of separating validity and infringement proceedings when possible.

A. By Modifying the Structure of the Federal Circuit, Issues that Require Supreme Court Intervention Can be Clarified and Illuminated

As noted, patent law is the second most frequently reviewed subject in the Supreme Court docket today. That reality need not be a condemnation of the Federal Circuit as the law of patents is of

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139. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1621-22 (2007).

140. *Id.* at 1644.

141. *Id.* at 1622-23.

142. *Id.* at 1650.

143. *Id.*

incredible significance to the American and global economies and a part of the entrepreneurial fabric of American culture. The fact that the Supreme Court takes an interest in this subject matter is no indictment of the court. This is no different from the Supreme Court taking an interest in corporate law arising from the Third Circuit, the home of the District of Delaware and a great many of the country's large corporations. The goal of the Federal Circuit shouldn't be just to "get things right" as Chief Judge Wood suggests, but rather to provide the necessary adjudication to solve those issues that it can and prepare those issues it cannot solve for final adjudication.

As Chief Judge Wood noted, the current structure of the Federal Circuit does not lend itself to circuit splits. Proposals for resolving this issue, such as the expansion of jurisdiction advocated by Chief Judge Wood as well as Duffy and Nard, seek to address this problem,[144] but the potential solutions offered undermine the goal of providing specialized adjudication for patent issues. A preferable yet related solution lies in looking to the structure of the German court system, and the Federal Constitutional Court in Karlsruhe, otherwise known as the *Bundesverfassungsgericht.* The German Federal Constitutional Court maintains a bifurcated structure that includes two Senates. Although the court does not function in the same manner as the Federal Circuit, the structure could be uniquely useful in addressing concerns for circuit splits and accusations of a lack of intellectual diversity in opinions.

By splitting the Federal Circuit into two "Senates" or perhaps "bodies" with some modicum of independence, the Federal Circuit could have the opportunity to produce the circuit splits that are so desired by commentators. It could also have a greater opportunity to address significant doctrine before it rises to the level of Supreme Court adjudication. Under the current court structure, prior decisions by panels remain binding precedent upon future panels. Barring a desire to rehear a case *en banc* or a grant of *certiorari*, the decision of a three-judge panel is likely a final resolution of an issue for some time. Under a bifurcated structure, glaring issues in the Federal Circuit jurisprudence could be addressed more quickly through consideration by the "body" that had not yet addressed the issue. An additional modification, allowing a majority of the judges on the second body to request a review of a case *en banc*, could provide for swift responses to areas of great disagreement among members of the court.

144. *Id.* at 1646.

This modification generates two potentially significant changes in the Federal Circuit approach. First, it would allow for splits between bodies that could be analogized to circuit splits, and second, it would create opportunities for greater commentary on issues of significant interest to the patent community. As Duffy and Nard noted, the "single court is bound to follow its own precedents without the benefit of sister-circuit jurisprudence."[145] This limitation can be alleviated through the bifurcated structure through which each side would not bind the other, but would remain persuasive precedent for the other body. Such an approach provides an opportunity for the Federal Circuit to avoid problems of "poor lawyers representing one side" in an important dispute.

This approach necessarily reduces the certainty that Federal Circuit decisions, in principle, would have, but it isn't clear that the Federal Circuit maintains the level of finality that it did in prior decades. Particularly with the frequent review by the Supreme Court in recent terms, this change would likely make little difference to the patent community. If the second body to address an issue agrees with the first, the case can be resolved quickly and the community will be made aware of the uniformity of both bodies. If the bodies disagree, the Federal Circuit can seek to resolve the controversy through *en banc* review.

This approach makes it easier for the Federal Circuit to reverse its own precedent, which the Federal Circuit does "infrequently" [146] and opens up significant questions to greater commentary. The author anticipates two likely scenarios for body splits under this new structure: (1) the first body to address the matter issues a judgment that is profoundly controversial and the second body responds with a different resolution in rapid succession (the *CLS Bank* approach); or (2) the jurisprudence of the first body to address the issue becomes notably problematic over time and the second body addresses the issue to highlight the potential problems (the *Cybor* doctrine approach). In each situation, the issues can be resolved more efficiently through the proposed structure with few potential downsides.

1. The *CLS Bank* Approach

In areas of profound controversy at the Federal Circuit, the court cannot satisfy its purpose of creating uniformity. The decision

145. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1632 (2007).

146. *Id.* at 1632.

in *CLS Bank v. Alice*[147] generated seven opinions from the *en banc* review with each opinion providing a somewhat different approach to the case. It would be hard for any commentator to make sense of this mass of legal reasoning, and it likely would be even more trying for prospective litigants to find any determinative principle in the case. This result is a clear failure to satisfy the uniformity goal and leaves the decision open for Supreme Court adjudication.

Under the proposed structure, this type of case would also generate significant controversy. Should one body issue such a decision, the other may choose to take up the case or petition for *en banc* review immediately. Under the proposal above, a majority of either body within the Federal Circuit could institute an *en banc* proceeding, potentially increasing the occurrence of the proceedings. The Federal Circuit could then arrive at the same point of confusion and the Supreme Court would be left to determine whether or not it should clarify the issue. Thus, problems of the *CLS Bank* type that generate great confusion would still become clearly evident, but could perhaps reach this point more quickly. With each body serving as a check on the other, issues that are particularly controversial could be highlighted more rapidly than they are under the current structure.

2. The *Cybor* Doctrine Approach

The second type of issue can be considered by looking to the controversy surrounding the Federal Circuit's "*Cybor* doctrine." The *Cybor* doctrine essentially determines that claim construction is an issue of law reviewed *de novo* on appeal.[148] The doctrine has been roundly criticized by district court judges, who feel that their claim constructions should be awarded some deference rather than suffer under *de novo* review by the Federal Circuit. The case was decided on March 25, 1998 by a strong majority in an *en banc* proceeding. As this decision has created concern among many in the district courts, it was recently revisited by the Federal Circuit in another *en banc* proceeding. The case, *Lighting Ballast Control LLC v. Philips Electronics N.A. Corp.*,[149] reaffirmed the determination that questions of claim construction are questions of law and are reviewed *de novo,* but this decision included four dissenters, a larger number than the original two judge dissent in *Cybor*. The case was

147. CLS Bank Intern. v. Alice Corp. Pty. Ltd., 717 F.3d 1269 (Fed. Cir. 2013).

148. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1455 (Fed. Cir. 1998).

149. Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp., 744 F.3d 1272, 1273 (Fed. Cir. 2014).

ultimately remanded[150] following the Supreme Court's decision in *Teva Pharmaceuticals*,[151] but in the approximately sixteen years that it failed to address the issue, practitioners faced ever increasing uncertainty. The growing dissent against the doctrine called for finality, and although Judge Newman looked to the "principles of stare decisis" and "national uniformity, consistency, and finality,"[152] the doctrine grew less stable and more likely to fall in the face of growing opposition than it did before the decision was rendered.

Under the proposed structure, the question could be addressed more quickly as panels from either body could work to rein-in a doctrine that they find problematic, exposing the cracks in the uniform pedestal of our patent laws and highlighting these fractures for Supreme Court repair. Surely an issue of this type takes time to develop and mature, but a specialized court like the Federal Circuit has the unique ability to be very in tune with the issues in the important field of patent law and could use the bifurcated structure to thoughtfully expose problems quickly.

The German system uses a separate court to deal with nullity actions, effectively fast tracking the issues for Federal Supreme Court review. This approach gets to the primary goal of the patent system, which is to establish the correct law in an efficient manner so that innovation can be effectively nourished. Our system shares these goals, and by adopting the proposed structure can maintain a system that reaches the correct outcomes in a judicious manner. Had the parties that created the Federal Circuit wanted it to be the actual final word on patent issues, they would have placed it outside of the jurisdiction of the Supreme Court. As this is likely neither feasible within our constitutional structure nor practical, the court was formed as an appellate court that would generate uniformity. When the Federal Circuit is unable to provide uniformity on its own, it is in the public's interest that it makes this situation quite clear to the Supreme Court and its related infrastructure so that the issues can be properly and finally resolved.

150. *See* Lighting Ballast Control LLC v. Universal Lighting Techs., Inc., 135 S. Ct. 1173 (2015).

151. Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015).

152. *Id.* at 1277.

B. Expanding the Patent Pilot Programs that Have Emerged in Several District Courts Based on the German Model Could Increase the Quantity and Quality of Legal Commentary on Patent Issues While Supporting the Federal Circuit's Mandate to Resolve Patent Issues

The Patent Pilot Program that originated from *Pub. L. No. 111-349* in early 2010 is a good start to producing more consistent district court adjudication in patent cases. The German infringement proceeding model uses three judges with experience in patent law to adjudicate the matter. It maintains a form that is quite different from that of the United States' district courts, but could provide some useful insights.

The German courts separate nullity actions, essentially invalidity actions, from infringement actions. This approach would be difficult to conceive within the American framework, although the increased application of litigation before the patent office, including IPR and PGR could be considered a move in this direction. A distinction between invalidity and infringement proceedings, however, could be made by the Federal Circuit and could have a dramatic effect on the nature of patent appeals in the United States.

The German patent courts are noted for their efficiency. Among the factors that contribute to this rapid adjudication are the separation of nullity and infringement actions, the lack of preliminary hearings, and the lack of jury involvement in patent court proceedings. Although the right to a jury in infringement proceedings has been prescribed by the Supreme Court in *Markman*,[153] Professor Lemley recently argued that there is no constitutional requirement for a right to a jury in validity proceedings.[154] As Professor Lemley notes, there is one case decided by the Federal Circuit, *In re Lockwood*,[155] that has ruled on the issue, but were the Federal Circuit to take an action to overturn this precedent, an entirely new model could emerge through which validity proceedings could be addressed by district court judges in the form of bench trials.

While nullity proceedings typically proceed at a slower pace than infringement proceedings in the German courts, this appears to be a matter of procedural realities and court structure, not necessarily a matter of preference for the order. Were district court

153. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

154. Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673 (2013).

155. *In re* Lockwood, 50 F.3d 966, 980 (Fed. Cir. 1995).

judges, following the support of the Federal Circuit, to make validity determinations without the presence of a jury, the questions, particularly those concerning validity, could be expedited. Not only would questions of real merit reach the Federal Circuit more quickly, the Federal Circuit would have the benefit of reviewing the district court judge's reasoning.

Under such a system, the Patent Pilot Program would be an essential element in creating greater clarity for the American patent system. The program, which seeks to generate greater expertise among the district court judges, remains heavily debated, but under the proposed framework could be incredibly beneficial to addressing issues with the patent system as a whole.

V. CONCLUSION

The great experiment of the Federal Circuit has persisted for over thirty years. Over this period, the court has had a dramatic impact on American patent law, as it has nurtured the discipline throughout a growth in scope and importance. To abandon this experiment or take actions that would undermine it would be to ignore the significant improvements in the position of patent law over its history. Ignoring thoughtful criticism, however, would be unwise. Walt Disney dreamed of an EPCOT that would exemplify the spirit of innovation.[156] Although the park was originally designed around this concept,[157] the overall idea was adapted to include a World Showcase with pavilions dedicated to diverse countries, including Germany.[158] By looking to international experience and domestic precedent, the Federal Circuit experiment can continue to be refined and the American patent system can continue to aspire to greater heights of efficiency and justice, and pursuing these goals will continue to "promote the Progress of Science and useful Arts."[159]

156. Craig Elliott, *A Brief History of Disney World's EPCOT Center*, ABC Article Directory, http://www.abcarticledirectory.com/Article/A-Brief-History-of-Disney-World-s-EPCOT-Center/119813 (last visited Mar. 6, 2014).

157. *Id.*

158. *Id.*

159. U.S. CONST. art. 1, § 8, cl. 8.