Lack of patent specialists, once the norm, leaves US district courts an outlier

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By Melissa Ritti

Three years after Congress sunset the Patent Pilot Program, patent cases are trending downward in the US, where the right to a jury trial and commitment to random judicial assignments make it all but impossible to replicate the specialization taking place abroad. Centralizing the more complex and time-consuming aspects of patent litigation — like claim construction and discovery disputes — could lead to faster resolutions, however, ensuring small and medium enterprises aren't priced out of the courtroom.

When Congress authorized the Patent Pilot Program, or PPP, it was with bipartisan support and the best of intentions.

The idea was straightforward: judges from one of 13 US district courts chosen by the Director of the Administrative Office of the United States Courts would volunteer to oversee patent cases and take on assignments transferred internally from non-participating colleagues.

As originally proposed, the so-called pilot judges would receive specialized training and development opportunities, while participating courts would receive federal funding for additional law clerks and other administrative support.

Representative Judy Chu, a California Democrat, speaking on the House floor in December 2010, said a "cadre" of judicial experts in patent law was necessary not only to stem high reversal rates at the US Court of Appeals for the Federal Circuit, but to provide the economy a boost.

With greater consistency and predictability in the disposition of patent cases, Chu reasoned "businesses will be able to allocate more time to inventing and less time litigating."

Over the following decade, more than 100 pilot judges oversaw thousands of patent cases. By some measures, Chu's vision was realized.

Data compiled by the Federal Judicial Center, or FJC, showed that pilot cases were more likely to settle, went to trial an average of 15 percent faster and were less likely to be appealed than cases decided by nonpilot judges.

But in one key metric the pilot cases came up short: upon reaching the Federal Circuit, they enjoyed no statistical advantage over their nonpilot counterparts, with both affirmed or reversed at more or less the same rate.

In 2021, the PPP was sunset.

In their final report to Congress, the Administrative Office of the US Courts, or AOUSC, revealed that the pilot judges, themselves, weren't completely sold on the experiment. While those with less patent experience at the start found participation in the PPP helpful, judges with a history of overseeing patent litigation were less impressed.

"An approximately equal number of judges indicated the pilot should be extended as indicated it should not be extended," the AOUSC told Congress, adding, "lack of compelling evidence counsels against extending the pilot to other district courts or making the pilot permanent."

What is missing from either retrospective, however, is input from the innovators singled out by Chu and others as the intended beneficiaries of the PPP.

— Measure of confidence —

The Eastern District of Texas took patent specialization into its own hands long before the PPP, in the relatively tiny town of Marshall. There, former Judge T. John Ward crafted new local rules in the 1990s intended to streamline patent litigation.

US District Judge Rodney Gilstrap took over for Ward in 2011 and adopted his predecessor's page limits and strict

timetables. The approach would go on to be replicated in the Western District of Texas with the addition of a division in Waco presided over since 2018 by US District Judge Alan Albright.

Despite criticism in Congress and even after the US Supreme Court's 2017 decision in TC Heartland v. Kraft Foods limited venue to districts where a "regular and established" place of business is maintained, the duo oversaw 27.2 percent of all US patent litigation from 2021 to 2023, according to Lex Machina.

Albright's dominance was blunted earlier this year with the adoption of a new random assignment procedure in the Western District, but Gilstrap remains unconstrained. As of this writing, 672 of the nation's 4,098 open patent cases — 16.4 percent — are assigned to his courtroom.

For better or worse, litigants in Marshall have some measure of confidence that their case will be heard by a judge experienced in all manner of patent disputes. The FJC's concluding study shows that pilot cases emanating from the Eastern District had the lowest rate of appeal of any of the 13 participating district courts.

— Balance, fairness —

Elsewhere in the US, there are no guarantees.

District court judges are appointed for life and come from diverse academic and professional backgrounds, which may or may not involve technical expertise.

That doesn't bother Michael Summersgill, a partner at WilmerHale, who believes generalist judges "can be an advantage not a disadvantage."

Although unique in many ways, Summersgill says patents "have more in common with other areas of the law than differences," with both often coming down to the same fundamental issues like witness and attorney credibility. "Having experience with non-patent cases — such as commercial, competition, and even criminal cases — gives judges a broader perspective that leads to more balance and fairness in the system," Summersgill adds.

Additionally, he warned that specialization is not without its own risks.

"Consider some specialized patent infringement courts where they are willing to issue an injunction before separate invalidity courts even rule on invalidity," he notes to MLex. "That narrow focus on infringement can result in decisions, such as issuing an injunction on a potentially invalid patent, that just don't make any sense in the real world."

"Having judges with broader experiences increases the chances of practical, sensible outcomes," he adds.

— Cost-prohibitive —

For Anne Li, co-chair of the Life Sciences and Patents group at Crowell & Moring, the appeal of specialization has less to do with judicial experience and more to do with litigation inefficiencies. "I do think it would be helpful to have patent savvy courts," she tells MLex, singling out claim construction as an example "where a lot of people spend a lot of time and money."

"If you had a court that could make a claim construction ruling early, it would be dispositive in most cases. However, because it is also reviewed de novo by the Federal Circuit, once the claim construction ruling comes down you still either settle or have to go to trial [before] your claim construction ruling gets reviewed. It's a backwards way to get this done," Li said.

Additionally, local rules can vary not only from district to district but also from judge to judge, and clogged dockets can take years to get to trial. That makes enforcing patents in the US a potentially cost-prohibitive roll of the dice, especially for small to medium enterprises like solo inventors and startups.

Certain courts, like those in Texas as well as the District of Delaware, bring litigants a measure of predictability, Li said, but "it's where they don't see a lot of patent cases, that the fear of getting overturned is so high that you're much more likely to end up in trial."

In the EU and throughout Asia, much of that uncertainty, inefficiency and cost simply doesn't exist.

— UPC model —

At the local and regional divisions of the Unified Patent Court a panel of three judges, each experienced in patent law, is assigned from beginning to end unless parties elect, affirmatively, to proceed before a single judge. For more complex cases the UPC adds a fourth “technically qualified” judge who is a specialist in the field of invention.

There are no juries and no lifetime appointments at the fledgling court, which has largely succeeded in its goal of producing a merits decision within about a year.

Japan’s Intellectual Property High Court marks its 20th anniversary in 2025. They receive appeals from special patent divisions within the Tokyo and Osaka District Courts where, data maintained by the World Intellectual Property Organization, or WIPO, show approximately a third of patent disputes end in settlement. For those that don’t, the average time to trial is just over 15 months.

The UK sends its highest-profile patent disputes to the UK High Court in London, but for nearly all others, exclusive jurisdiction rests with the Patents Court, a division of the Business and Property Courts of the High Court of Justice.

Germany maintains separate courts for infringement and invalidity, China’s elaborate network of intellectual property courts and agencies routinely produce merits decisions in six to 12 months, and India is rapidly expanding its capacity for specialized patent litigation.

Three intellectual property divisions have been added since 2022 alone, at their High Courts in Dehli, Madras and Calcutta; a fourth is in the works in Karnataka, and discussions are underway for a fifth, in Bombay.

— Sensible outcomes —

Of course, the US court system is not completely bereft of patent specialists.

The US Court of Appeals for the Federal Circuit is tasked with reviewing all district court decisions that “arise under” federal patent law, along with final decisions by the Patent Trial and Appeal Board and determinations by the International Trade Commission regarding violations of Section 337 of the Tariff Act.

But patents aren’t the Federal Circuit’s only specialty. The 12-member court has exclusive jurisdiction over disputes involving international trade, veteran benefits, monetary claims against the US government, federal personnel, and more, leading to backlogs of its own — further prolonging the life of a case, and increasing the likelihood that an appeal is abandoned prematurely.

Jamie Simpson, chief policy officer and counsel of the Council for Innovation Promotion, or C4IP, tells MLex the cost of litigating is “probably too high for a lot of inventors, making it very hard for smaller companies to effectively use the patent system.” However, she continued, “even if you have specialized courts — which might be a good thing — there’s going to still be the need to have jury trials because of the Seventh Amendment.”

“You could have specialized courts all you want, but at the end of the day, they’re going to have to be tried by a nonspecialized adjudicative panel. That’s a unique difference in the US legal system that can’t easily be changed,” she adds.

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