

BENEFITS OF PATENT JURY TRIALS FOR COMMERCIALIZING INNOVATION

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The U.S. patent system has long depended on trials before lay judges and lay juries for adjudicating patent disputes. Many think that reliance on lay judges and juries is a principal cost of the system, causing undue uncertainty, delay, expense, and error. This Paper reviews some important, underappreciated benefits of patent jury trials. One key benefit is that decisions in patent jury trials are more likely to turn on facts that are available to all interested parties to a given dispute, including the patentee, potential infringers, and those parties in or contemplating contractual relationships with either side. A second key benefit is that a typical patent jury trial generally keeps together before a single body all three key substantive areas of a typical patent dispute—validity, infringement, and remedy—which imposes important self-discipline on the arguments made by both sides to the dispute. All of this increases predictability and levels the playing field by decreasing the role that fashion and politics can play in a given dispute, which are especially important for a patent system designed to facilitate the commercialization of innovation. The Paper ends with a discussion that takes seriously the concerns raised by critics of patent jury trials as an important benchmark against which to measure an existing alternative to patent jury trials: patent infringement proceedings before the U.S. International Trade Commission (“ITC”). We note that the structure of the ITC yields proceedings that are faster than jury trials and less expensive, before a body with significant technological and legal expertise in the relevant fields, which includes the self-disciplining effect that flows from keeping all three substantive areas of patent law within the same dispute, without the cost of being as susceptible to the fashion and politics that have wielded more impact on the other agencies typically championed by critics of patent jury trials. In so doing, the Paper highlights important reasons why, all things considered, the costs of existing jury trials may be manageable tradeoffs well worth the benefits of those

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proceedings, and why it may make sense for the system to increase its reliance on patent infringement proceedings before the ITC or an alternative agency modeled on the ITC.

INTRODUCTION

Much of the criticism of the U.S. patent system over the past decade has emphasized concerns about the extensive costs, delays, and inaccuracies that result from decisions reached by lay judges and juries charged with adjudicating patent cases in U.S. district courts but who generally lack expertise in deciding patent issues. The remarks by two leading patent commentators, England's Lord Justice Robin Jacob and U.S. Law Professor Mark Lemley, are representative:

No one outside America, for instance, regards the use of jury trial as remotely sensible.¹

Could the patent system be improved, for instance in the US by abolishing jury trial . . . ?²

Jury trials in patent cases are extraordinarily expensive; reducing their number would presumably result in both quicker and cheaper resolution of patent disputes.³

This Paper offers a contrasting view. Drawing together and extending prior work that explores various approaches to resolving disputes in patent cases, this Paper highlights a set of underappreciated benefits of patent jury trials.⁴ More particularly, it explores a set of reasons why significant reli-

¹ Robin Jacob, *One Size Fits All?*, in PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 449, 455 (F. Scott Kieff ed., 2003).

² Robin Jacob, *Abolish Patents?*, IDEAS LABORATORY (Nov. 1, 2012), <http://www.ideaslaboratory.com/2012/11/01/robin-jacob-abolish-patents/>.

³ Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1728 (2013) (footnote omitted); see also AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 2007, at I-91 (2007) (reporting a private party's litigation costs for patent cases as being between approximately \$2 million and \$5 million, depending on the amount of likely damages at stake); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 11 FED. CIR. B.J. 209, 256-57 (2001) (arguing that the technical nature of patent cases makes juries unsuitable fact finders, or worse, that juries are biased in favor of patentees).

⁴ See, e.g., S. Leslie Misrock & F. Scott Kieff, *Latent Cures for Patent Pathology: Do Our Civil Juries Promote Science and the Useful Arts?*, in DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 1368, 1370-73 (1st ed. 1998) (paper presented at the Symposium on "Science in Crisis at the Millenium" at the George Washington University Center for History of Recent Science on September

ance on trials before ordinary judges and juries has the benefit of increasing predictability and leveling the playing field by decreasing the role that fashion and politics can play in a given dispute.

To be sure, from matters of demographic characteristics to the general reputation of a given party in the geographic region of the courthouse and its jury pool, a host of factors relating to fashion and politics have long been recognized as playing too great a role in ordinary civil trials such as those involving patents.⁵ Many of the more invidious aspects of this effect have been targeted by helpful reforms,⁶ and still more progress should always be considered. But civil litigation in the United States is generally considered to primarily rely on a decision-making process under which the judge neu-

19, 1996) (exploring various mechanisms available under the Federal Rules of Civil Procedure and Federal Rules of Evidence to improve the patent jury trial, and showing how the jury trial can be largely avoided for many patent cases by using techniques gleaned from the historical context of the time of the framing of the U.S. Constitution), *reprinted in* DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 1024 (2d ed. 2001); DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 1040 (3d ed. 2004); F. SCOTT KIEFF ET AL., PRINCIPLES OF PATENT LAW 1046 (4th ed. 2008); F. SCOTT KIEFF ET AL., PRINCIPLES OF PATENT LAW 983 (5th ed. 2011); F. SCOTT KIEFF ET AL., PRINCIPLES OF PATENT LAW 959 (6th ed. 2013); *see also* F. Scott Kieff, *How Ordinary Judges and Juries Decide the Seemingly Complex Technological Questions of Patentability over the Prior Art*, in PERSPECTIVES ON THE PROPERTIES OF THE HUMAN GENOME PROJECT 471, 482 (F. Scott Kieff ed., 2003) (exploring the role of lay judges and juries in deciding historical and technological fact questions in patent cases); James E. Daily & F. Scott Kieff, *Anything Under the Sun Made by Humans: Patent Law Doctrines as Endogenous Institutions for Commercializing Innovation*, 62 EMORY L.J. 967, 980-81 (2013) (exploring the effects that a broader or narrower view of patentable subject matter can have on the commercialization of innovation and the diversity of the marketplace for new technologies); F. Scott Kieff, *The Case for Preferring Patent-Validity Litigation over Second-Window Review and Gold-Plated Patents: When One Size Doesn't Fit All, How Could Two Do The Trick?*, 157 U. PA. L. REV. 1937, 1949-50 (2009) [hereinafter Kieff, *The Case for Preferring*] (exploring comparative case for relying on litigation of validity issues before lay juries and judges rather than deciding these issues using enhanced administrative procedures before the Patent Office); F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. REV. 55, 81 (2003) [hereinafter Kieff, *The Case for Registering*] (exploring why it makes sense for lay judges and juries to decide historical and technological fact questions in patent cases); F. Scott Kieff, Charles E. Miller & Bart J. van den Broek, Letter to the Editor, *Re: The Use Of Alternative Dispute Resolution Methods for Civil Actions Against the Patent Office*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 29, 29-30 (1997) (exploring alternative dispute resolution techniques in patent cases involving the Patent Office); Charles E. Miller, F. Scott Kieff & Bart J. van den Borek, *Executive Order Allows PTO Action Arbitration*, NAT'L L.J., Jan. 27, 1997, at C18.

⁵ One notorious example is the 1985 award to Pennzoil of \$10.5 billion in a contract interference case in Texas against Texaco (then largely based in New York) over the acquisition of Getty Oil, after which the jurors "explain[ed] 'that they had added \$1 billion to the award for each of the Texaco lawyers they had most despised.'" Richard A. Posner, *Juries on Trial*, COMMENTARY, Mar. 1, 1995, at 49 (reviewing JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994) and STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM (1994)).

⁶ For example, the Jury Selection and Service Act of 1968 requires that juries be "selected at random from a fair cross section of the community." Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified as amended at 28 U.S.C. § 1861 (2012)).

trally applies the procedural rules and resolves legal questions, and then either the judge or the jury neutrally decides the open factual questions, all while generally deferring to policy judgments made, out of court, by the other branches of government.⁷ In contrast, our society has often recognized that certain decisions ultimately involve a sufficiently large amount of normative and political content of the type that would be well suited to being delegated to varying degrees to various government officials who operate within structures designed to be more responsive to politics and fashion.⁸ While many aspects of the patent law system are not typically considered the topic of mainstream political debates because they are too far down in the weeds of the arcane field of patent law, popular sentiment about these aspects—which we may call fashion—have often been a prominent component of actual policy debates. And those most able to influence this popular sentiment can meaningfully increase the relative role that it plays compared to detailed factual analysis of particular cases in driving policy outcomes within those agency decisions designed to respond to such input.

Part I begins the discussion by highlighting the goal of commercializing innovation—an act distinct from making inventions—as a primary focus of the patent system. This is a distinction with several key differences. First, the goal of commercialization can be more easily accomplished. Second, targeting that goal (commercializing) has the collateral benefit of fostering the other goal (making inventions in the first place) as well. Third, maintaining focus on commercialization helps mitigate many of the infamous social costs of patents.

Part II extends the discussion by showing how the patent system's reliance on lay judges and juries facilitates the commercialization of inventions in ways that further competition as well as access to patented technologies. One key mechanism underlying this effect is that unlike decisions made within executive branch agencies such as the U.S. Patent and Trademark Office ("PTO"), patent jury trials are more likely to turn on facts that are available to all interested parties to a given dispute, including the patentee, potential infringers, and those parties in or contemplating contractual relationships with either side. A second key mechanism is that patent jury trials generally maintain before a single body all three key substantive areas of a typical patent dispute—validity, infringement, and remedy—which imposes important self-discipline on the arguments made by both sides to the dispute.

⁷ See *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) ("[I]t is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." (second alteration in original) (quoting *In re Hechinger Inv. Co. of Del.*, 335 F.3d 243, 256 (3d Cir. 2003)) (internal quotation marks omitted)).

⁸ See, e.g., Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1198-2000 (1982) (describing the public values theory of agencies).

Part III then wraps up the discussion by taking seriously the concerns raised by critics of patent jury trials as an important benchmark against which to measure patent litigation proceedings before the U.S. International Trade Commission (“ITC”). The structure of the ITC turns out to yield proceedings that combine the benefits of speed, technological expertise, and specialized legal experience with the self-disciplining effect that flows from keeping all three substantive areas of patent law within the same dispute, all at a lower expense than a jury trial. The ITC’s structure has also kept it from being as susceptible to fashion and politics as the other agencies typically championed by critics of patent jury trials.

The Conclusion points out that, all things considered, the costs of existing jury trials may be manageable tradeoffs well worth the benefits of those proceedings. In the alternative, it suggests why it may make sense for the patent system to increase its reliance on patent infringement proceedings before the ITC or an alternative agency modeled on the ITC.

I. COMMERCIALIZING INNOVATION AS THE PATENT SYSTEM’S CORE GOAL

Organizers of the conference for which this Paper was prepared pointed out in the conference’s announcement that it is “dedicated to a largely neglected perspective on patents: how they facilitate commercial transactions, and thus foster innovation and new businesses and products.”⁹ The inattention paid to the commercialization perspective is particularly unfortunate given that perspective’s prominent role in framing the U.S. patent system.

Although many commentators and policymakers see patents as tools that societies use to encourage inventors to invent, significant and politically diverse voices among those studying and implementing the U.S. patent system have instead focused on the role of strong and predictable rules for patent procurement and enforcement in facilitating competition and the commercialization of inventions.¹⁰ One key difference between these views about the core goal of a patent system lies in who is the target: inventors in particular or a diverse set of market actors in general. Another key difference lies in the mechanism contemplated to stimulate the behavior of the particular target.

The process of getting an invention commercialized requires coordination among a large number of complementary users of an invention, includ-

⁹ *Conferences*, CENTER FOR THE PROTECTION OF INTELL. PROP., <http://cpip.gmu.edu/conferences/> (last visited Apr. 4, 2014) (scroll to information under the heading “Inaugural Conference on Patent Law: The Commercial Function of Patents in Today’s Innovation Economy”).

¹⁰ B. Zorina Khan & Kenneth L. Sokoloff, *History Lessons: The Early Development of Intellectual Property Institutions in the United States*, J. ECON. PERSP., Summer 2001, at 233, 235-36.

ing venture capitalists, managers, marketers, laborers, and often the owners of other inventions. Such coordination among diverse actors can be greatly facilitated by allowing inventions to be patented and then using dispute resolution procedures to enforce those patents that have relatively low administrative costs and less reliance on flexible discretion over subjective factors. When an inventor has a patent backed up by credible enforcement in court, then that patent can act like a beacon in the dark to draw to itself all of those interested in its technology and to start conversations among them.¹¹ As long as the patent is predictably enforced, this beacon effect is followed by a bargain effect because those parties know that only those who strike deals with each other involving the patent can avoid being excluded by the patent in court.¹² Through the enforcement of those patent and contract rights, the government is able to help patentees and their contracting parties appropriate the returns to any of their rival inputs for developing and commercializing innovation—labor, lab space, capital, etc.—without the government itself having to trace the relative contributions of each participant and with less risk that political influence will affect outcomes.¹³ This decentralized, ad hoc coordination occurs spontaneously, without the government needing to amass any of the specified information it would need to directly target each of the parties.¹⁴ Instead, each party brings its own expertise and other assets to the negotiating table and knows enough about its own level of interest and capability—without necessarily having to reveal it to other parties or the government—to decide whether to strike a deal or not.

Economic history has taught that a defining feature of the early U.S. patent system, central to its economic success, was the way in which it used

¹¹ F. Scott Kieff, *On Coordinating Transactions in Intellectual Property: A Response to Smith's Delineating Entitlements in Information*, 117 YALE L.J. POCKET PART 101, 102-103 (2007); see also Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1751-52 (2007).

¹² See Kieff, *supra* note 11, at 102.

¹³ See Smith, *supra* note 11, at 1745-46. The ability of commercialization approaches toward the patent system to avoid the need for careful governmental tracing highlights an additional difficulty associated with the various theories of the patent system that focus on specific, targeted inducements, which is getting the amount of the inducement just right. Cf. Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1599 (2011) (arguing that patent validity determinations should turn on whether the particular invention would have been made or disclosed but for the inducement of the patent); Edmund W. Kitch, *Graham v. John Deere Co.: New Standards for Patents*, 1966 SUP. CT. REV. 293, 301 (“[A] patent should not be granted for an innovation unless the innovation would have been unlikely to have been developed absent the prospect of a patent.”); Robert P. Merges, *Uncertainty and the Standard of Patentability*, 7 HIGH TECH. L.J. 1, 2 (1992) (stating that the nonobviousness rule “seeks to reward inventions that, viewed prospectively, have a low probability of success”); Michael J. Meurer & Katherine J. Strandburg, *Patent Carrots and Sticks: A Model of Nonobviousness*, 12 LEWIS & CLARK L. REV. 547, 548-550, 573 (2008) (advocating various specific positive and negative direct incentive effects of the nonobviousness rule).

¹⁴ See Smith, *supra* note 11, at 1763-65.

a property rights approach to facilitate private ordering in the process of getting inventions put to use.¹⁵ Giles S. Rich, one of the two principal drafters of the statute that implemented the patent system operating in the United States from 1952 through the end of the twentieth century, was explicit in focusing on the role of patents in facilitating coordination among many diverse market participants in order to commercialize innovation, rather than on getting inventions made.¹⁶ Not only was Rich a principal drafter of the statute but he also went on to be the longest-sitting federal judge in the United States, serving on the court that heard most of the appeals in the U.S. patent system. By the time of his death, Judge Rich was widely regarded as the world's most famous patent scholar and jurist, and the father of the modern U.S. patent system.¹⁷

This view of patents has a broad and deep tradition in the United States. It is evident in Abraham Lincoln's description of the patent system as having "added the fuel of interest to the fire of genius, in the discovery and production of new and useful things."¹⁸ It has been embraced by leading jurists of commercial law from diverse political perspectives, such as Learned Hand and Jerome Frank, who immediately recognized the power of the 1952 Act in strengthening patents and who championed strong patents as tools for helping smaller market entrants compete against larger, established firms.¹⁹ Both major political parties in the United States have

¹⁵ See, e.g., Naomi R. Lamoreaux & Kenneth L. Sokoloff, *Intermediaries in the U.S. Market for Technology, 1870–1920*, in FINANCE, INTERMEDIARIES, AND ECONOMIC DEVELOPMENT 209, 210–11 (Stanley L. Engerman et al. eds., 2003); Khan & Sokoloff, *supra* note 10, at 235–36.

¹⁶ See Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws, Part V*, 24 J. PAT. OFF. SOC'Y 422, 436–37 (1942), reprinted in 14 FED. CIR. B.J. 87, 97 (2004). For the rest of Judge Giles S. Rich's five-part series of articles on this topic, see Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws, Part I*, 24 J. PAT. OFF. SOC'Y 85 (1942), reprinted in 14 FED. CIR. B.J. 5 (2004); Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws, Part II*, 24 J. PAT. OFF. SOC'Y 159 (1942), reprinted in 14 FED. CIR. B.J. 21 (2004); Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws, Part III*, 24 J. PAT. OFF. SOC'Y 241 (1942), reprinted in 14 FED. CIR. B.J. 37 (2004); Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws, Part IV*, 24 J. PAT. OFF. SOC'Y 328 (1942), reprinted in 14 FED. CIR. B.J. 67 (2004). The other principal drafter, who also wrote a great deal about the statute, was Pat Federico.

¹⁷ See, e.g., Richard A. Opper, Jr., *Giles S. Rich, Oldest Active Federal Judge, Dies at 95*, N.Y. TIMES (June 12, 1999), <http://www.nytimes.com/1999/06/12/business/giles-s-rich-oldest-active-federal-judge-dies-at-95>; Jon Thurber, *Obituary, Judge Giles Rich; Patent Law Authority*, L.A. TIMES (June 14, 1999), <http://articles.latimes.com/1999/jun/14/news/mn-46460>.

¹⁸ Abraham Lincoln, *Second Lecture on Discoveries and Inventions* (Feb. 11, 1859), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 356, 363 (Roy P. Basler ed., 1953) (emphasis added and omitted).

¹⁹ See *Reiner v. I. Leon Co.*, 285 F.2d 501, 503 (2d Cir. 1960) (Hand, J.) ("There can be no doubt that the Act of 1952 meant to change the slow but steady drift of judicial decision that had been hostile to patents . . ."); *Picard v. United Aircraft Corp.*, 128 F.2d 632, 643 (2d Cir. 1942) (Frank, J., concurring) (discussing the role of predictable rules for patent enforcement in helping a smaller "David" compete with a larger "Goliath").

similarly embraced this approach when in control of the executive branch. Judge Pauline Newman, for example, has reminded us on several occasions that during the late 1970s, when the economy was in difficult times, as it was in the 1940s (and also after the 2008 crash), a very diverse pair of U.S. Presidents decided to adopt an approach to patents like that in the '52 Act, as urged by Rich, Hand, Frank, and others.²⁰ President Carter, a Democrat, decided after a careful study to put forth a statute designed to strengthen the patent system by creating the Federal Circuit; and President Reagan, a Republican, signed the bill to much fanfare after Congress passed it.²¹

While targeting inventors to stimulate them to make inventions has much appeal, the difference between the goals of inventing and commercializing reveals some key institutional features of the patent system. Consider that the goal of getting inventions made may be accomplished by the use of targeted incentives that are alternatives to patents, such as tax credits, prizes, grants, rewards, and the like.²² Providing these targeted incentives requires an immense amount of information about who exactly should be targeted and how large the incentive should be, and those operating under the regime have stronger incentives to seek their own rewards than to discipline the giver to be more frugal in giving rewards to others.²³ Not only is amassing all of that information hard for the government to do but it is likely that large, established market actors will often be better able than smaller market entrants to wield the political influence needed to get the government to act on that information.

One feature that patents have in contrast to such rewards is that the patent applicants themselves bring to the government much of the information needed to grant and enforce the patent. Patent applicants do this through the

²⁰ Pauline Newman, Foreword, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 822-23 (2005) (reviewing history of the 1982 statute designed to strengthen the U.S. patent system and included as a major domestic policy initiative of the Carter administration before being signed into law by the Reagan administration).

²¹ For the relevant conclusions of the study, see INDUS. ADVISORY SUBCOMM. ON PATENT & INFO. POLICY, ADVISORY COMM. ON INDUS. INNOVATION, REPORT ON PATENT POLICY 155 (1979). The statute that resulted is the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

²² See, e.g., Michael Kremer, *Patent Buyouts: A Mechanism for Encouraging Innovation*, 113 Q.J. ECON. 1137, 1139-40 (1998) (suggesting the government buy out patents after conducting an auction to determine an appropriate buyout price to better address these same fields and others); Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525, 541-45 (2001) (suggesting government-sponsored cash rewards as partial or full replacements for patents and to better address fields where the disparity between average cost and marginal cost is typically large, citing as examples biotechnology and computer software, which are both focal points in today's debates about patentable subject matter).

²³ For a general critique of rewards-focused approaches to patents, see F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697, 705-17 (2001); Daniel F. Spulber, *Should Business Method Inventions Be Patentable?*, 3 J. LEGAL ANALYSIS 265, 298-304 (2011).

process of submitting and prosecuting their patent applications. A second feature of the patent system over direct rewards is that the patent system leaves the competitors of the patentee and of the patentee's business associates in a position where these competitors are putative infringers of the patent. As a result, these competitors have strong incentives to invalidate the patent by bringing to the attention of the government the rest of the relevant information needed to evaluate the validity of the patent, either when the patent is asserted against these competitors in court or during patent office reexamination.²⁴

This is not to suggest that the focus on incentives to commercialize overlooks the step of actually making inventions. A system successful in commercializing inventions will have the collateral benefit of providing positive incentives to those who make inventions because it offers them the possibility of sharing in the many rewards associated with the successful commercialization of those inventions. In addition, significant incentives to invent are otherwise provided by a host of factors that are likely to exist in the absence of a patent system, including invention's famous mother, necessity, as well as innate curiosity, the direct funding of basic research by governments and private actors, first mover advantage, and the like.

But the above discussion does outline important reasons for focusing on the goal of commercializing inventions instead of on the goal of making inventions. The patent system can be well designed to accomplish the goal of commercializing inventions in a way that also happens to foster making them without most of the collateral costs of a system primarily focused on making inventions. Further, it can do so with a range of mechanisms for minimizing and mitigating the collateral costs of enforcing property rights in patents.

For example, the commercialization view takes seriously the risk of holdup, which requires both asset specificity and opportunism.²⁵ As a result, this view of patents sees the patent law doctrines relating to the prior art as designed to ensure that valid patent claims do not cover technology in which, or even toward which, potential patent holdup victims are likely to have significantly invested.²⁶ Similarly, it views patent law's mandatory disclosure doctrines as designed to help third parties avoid making reasonable investment-backed expectations in a territory that could be targeted for threat of patent holdup by valid patent claims.²⁷ In the context of remedies for patent infringement, this view allows for remedies in particular cases of

²⁴ Kieff, *supra* note 23, at 712-13. As suggested by Professors Abramowicz and Duffy, important cost savings also can accrue if other patent examination bodies are allowed to bring to bear their own expertise in evaluating the validity of given patents. Michael Abramowicz & John F. Duffy, *Ending the Patenting Monopoly*, 157 U. PA. L. REV. 1541, 1543-45 (2009).

²⁵ See, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 61-63 (1985).

²⁶ See Kieff, *The Case for Registering*, *supra* note 4, at 76-99.

²⁷ See *id.* at 99-105.

patent infringement to be meaningfully decreased or even eliminated based on specific factual evidence of asset specificity and opportunism, including evaluating the interaction between them.²⁸

II. COMPARING PATENT JURY TRIALS WITH MOST ADMINISTRATIVE PROCEEDINGS

As explored in more detail in prior work, while court litigation is more expensive and time-consuming than many of the administrative proceedings advocated by critics of patent jury trials, this time and money is a fair price to pay for the important benefits to which they are directly tied.²⁹ Decisions in patent jury trials are closely tethered to the underlying record of factual evidence, which helps them avoid error, helps appellate courts correct errors that do arise, and meaningfully attenuates the influence of politics and fashion.³⁰ Such a detailed factual record requires significant time and money to assemble and thoroughly vet. But it is highly effective at proving historical and technological facts, such as whether a particular document of alleged prior art was in the public domain on a particular date and what technological content it communicated to people of ordinary skill in the art. In contrast, the massive savings in time and money associated with various administrative proceedings before the PTO to retest a patent's validity come

²⁸ F. Scott Kieff & Anne Layne-Farrar, *Incentive Effects from Different Approaches to Holdup Mitigation Surrounding Patent Remedies and Standard-Setting Organizations*, 9 J. COMPETITION L. & ECON. 1091, 1093-94 (2013) (showing how holdup can be better addressed by reliance on such a fact-based approach instead of allowing open textured policy debates about the possibility of holdup in general to drive outcomes in particular cases without any factual underpinnings adjudicated in those cases).

²⁹ See generally, Kieff, *The Case for Preferring*, *supra* note 4, at 1939-40; Kieff, *The Case for Registering*, *supra* note 4, at 71-74.

³⁰ Although so-called bench trials, which occur without a jury, also rely on detailed factual records developed through the rules of evidence and procedure, a benefit of the jury trial is that it allows for a separation between the judge as decider of questions of law and jury as decider of questions of fact, as well as a dynamic interaction between these two decision makers. Although a full comparison of jury and bench trials is beyond the scope of this Paper, juries have a long tradition of being viewed favorably as tools for making factual determinations. See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (“Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”); Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 307-09 (2001) (arguing that the “substantial evidence” standard applied to jury fact-finding is more stringent than the “clearly erroneous” standard applied to judicial fact-finding). Likewise there are several features of a jury trial, such as *voir dire* and the diversity of views that can emerge during deliberation among a large panel, that can reduce the influence of the fashion or political beliefs held by any one person, such as a judge. James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY 269, 279-80, 317-18, 325 (1988). The adversarial process of the trial can mitigate risks associated with so-called “group-think” and other potential shortcomings of group decision making.

precisely through the alternative reliance these administrative proceedings place on the expertise of their decision makers, which is the gravamen of the enhanced deference accorded such decisions by reviewing courts under principles of administrative law.

While it is not hard to imagine how political influence might act on a government official asked to determine, based on his own personal recollection rather than on a detailed factual record of a specific case, whether some particular technology was in sufficiently public use within a particular art by a particular date, fears about political influence driving outcomes at the PTO are not without foundation in recent history, under both Democratic and Republican administrations. The elimination of effective patent protection for computer software through the Supreme Court's 1972 *Gottschalk v. Benson*³¹ decision was generally recognized as having been the direct result of intensive influence wielded by Nicholas Katzenbach, who became general counsel of IBM in 1969, over the U.S. Department of Justice, which he formerly ran as attorney general during the Kennedy/Johnson administration. A similar influence was applied, albeit ultimately unsuccessfully, during the first Bush administration, in the lead-up to the 1994 appellate court *In re Alappat*³² decision, after the PTO commissioner had made the decision to reconstitute the office's internal Board of Appeals to hold a rehearing before a specially packed board designed to reject the patent on a type of software.³³

None of this should at all suggest ill motive, illegality, or immorality on the part of any of the private or government actors or organizations in these well-known cases of patent decisions being driven by fashion or politics. Private parties have appropriate interests in petitioning their government officials, and government officials have appropriate interest in receiving input on how their actions can best benefit society. And when particular courts have significant room to maneuver within a given policy space, similar opportunities for influence become focal points for affecting decision making by those courts as well as by agencies.³⁴ The discussion above merely highlights the way these various opportunities for influence of politics and fashion in the patent system have been well recognized as leaving the overall playing field more biased toward those businesses most able to influence politics and fashion than if the main path across the playing field entailed the more fact-based decision making of a patent jury trial.

An additional important benefit of patent jury trials over most administrative proceedings advocated by critics of patent jury trials is that patent

³¹ 409 U.S. 63 (1972).

³² 33 F.3d 1526 (Fed. Cir. 1994).

³³ See Kieff, *The Case for Preferring*, *supra* note 4, at 1950.

³⁴ See John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 519-20 (2010) (showing how lobbying efforts before the Solicitor General's Office can influence outcomes in Supreme Court patent cases).

jury trials tether issues of patent validity and infringement together before a single decision-making body. This provides important self-disciplining effects on both patentees and alleged infringers. And this self-disciplining, in turn, helps rein in the arguments presented by both sides from more distracting extremes that might introduce errors into the underlying judgment. For example, an alleged infringer may argue in defense that the patent is invalid for being so expansive as to encompass a putative piece of prior art (e.g., a journal article or example of public use). But the alleged infringer will typically be self-disciplined by the realization that such a broad interpretation of the patent is more likely to support a finding of patent infringement if it turns out that piece of putative prior art fails to knock out the patent due to a mismatch of dates or an insufficient technological disclosure.³⁵ Of course, the patentee faces the same self-discipline in reverse.

Similar self-disciplining occurs when arguments over the remedies for patent infringement must be made before the same body that hears arguments over various defenses to infringement, including validity, antitrust, and patent misuse.³⁶ The adjudicated infringer arguing for lower damages (decreased value) would be constrained in making arguments about putative anticompetitive effects that might result from a patent's essential nature (extremely high value) or about a patent's failure to meet the statutory subject matter criteria because it would preempt an entire field (also extremely high value).

On top of these self-disciplining effects, patent jury trials have a demonstrated track record of taking meaningful steps to mitigate the serious risks imposed on the entire system by bad faith arguments.³⁷ A direct way to mitigate that problem is to allow courts to award attorneys' fees and other actual damages against a party, on either side, who presses an argument in court that he has no good faith basis for thinking should win.³⁸ These damages could even be trebled in egregious cases.³⁹ Alleged infringers rightfully worry about the *in terrorem* impact of the high cost of baseless litigation and the way it can allow plaintiffs with bogus patents to shake down large companies for large numbers of expensive settlements. And small inventors rightfully worry that baseless arguments about invalidity could bleed patentees dry through years of litigation costing millions of dollars per year. Such a system of bad-loser-pays is used with some success

³⁵ See Kieff, *The Case for Preferring*, *supra* note 4, at 1961-62.

³⁶ Cf. Lemley, *supra* note 3, at 1728 (arguing that limiting juries to patent "damages would encourage (or perhaps even require) that damages be separated from infringement and validity and tried separately").

³⁷ See, e.g., Kieff, *The Case for Preferring*, *supra* note 4, at 1957-58. For a recent example of the use of sanctions to deter bad faith arguments, see *Raylon, LLC v. Complux Data Innovations, Inc.*, 700 F.3d 1361, 1367-71 (Fed. Cir. 2012), *cert. denied*, 134 S. Ct. 94 (2013).

³⁸ This issue is the subject of a pending U.S. Supreme Court case. *Icon Health & Fitness, Inc. v. Octane Fitness, LLC*, 496 F. App'x 57 (Fed. Cir. 2012), *cert. granted*, 134 S. Ct. 49 (2013).

³⁹ 35 U.S.C. §§ 284-285 (2006).

in several other areas of U.S. law and in many areas of law in the U.K.⁴⁰ There are good reasons to think it would directly address serious concerns voiced by those on both sides of the patent debate. It would be especially useful in proceedings that include the self-disciplining effects explored above, such as administrative agencies like the ITC. It should not be expected to decrease the frequency of litigation; but it should reasonably be expected to decrease its overall length and cost because when both sides know their evidence can be tested in court (or by an agency like the ITC), they know that evidence will have to comply with the rules of evidence and procedure. This gives parties incentives to exchange with their opponent the appropriate evidence of the factual basis for viewing their opponent's case as truly infirm, which puts the opponent on notice that continuing on the same path brings with it real risk.

Nevertheless, responding to popular concerns about patent jury trials, the 2011 America Invents Act significantly increased the depth and breadth of available internal PTO procedures to more closely scrutinize patent examination in the first instance, and increased options for patent revocation through reexamination or review after patents have issued. With a large budget of \$2.5 billion to \$3 billion (more than twice the budget of the main agency charged with regulating the entirety of U.S. securities markets, the Securities and Exchange Commission), the PTO has been rapidly increasing its pool of internal administrative patent judges—these are the officers who review the final determination of the patent examiners—from an historical high of about eighty around 2009 to roughly double that number in 2012, with plans to double the number again over the coming year or two.⁴¹

This vast increase in the PTO procedural mechanisms for subjecting patents to repeated scrutiny under the legal rules governing patent validity came on top of a decade of enhanced scrutiny of the putative antitrust implications of the substantive and procedural rules relating to remedies for patent infringement. This marked increase in antitrust scrutiny of patents occurred in both the U.S. Department of Justice Antitrust Division (“DoJ”), with a budget of approximately \$160 million, and the U.S. Federal Trade Commission (“FTC”), with a budget of approximately \$300 million, begin-

⁴⁰ David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583, 584-91 (2005) (discussing American uses of fee-shifting and the history of the English rule).

⁴¹ See, e.g., Dennis Crouch, *Judicial Network of the Patent Trial and Appeals Board (PTAB)*, PATENTLY-O (Dec. 16, 2012), <http://patentlyo.com/patent/2012/12/ptab-ecosystem.html> (citing and linking to Patent Public Advisory Committee Meeting Patent Trial and Appeal Board Update of December 12, 2013). Some have expressed concern that the PTO's newly enhanced procedures for reexamining patents, combined with its dramatically expanded board of administrative patent judges, will favor large, politically effective businesses in their efforts to delay or prevent small business from having enforceable patents. See, e.g., Steve Moore, *The AIA: A Boon for David of Goliath?*, IPWATCHDOG (Aug. 15, 2013, 7:45 AM), <http://www.ipwatchdog.com/2013/08/15/the-aia-a-boon-for-david-of-goliath/id=44651/>.

ning with joint hearings in 2001 and including the three-hundred-page FTC report more recently issued in 2011.⁴²

While the PTO, DoJ, and FTC of course each handles significant dockets on matters other than patents, and the budget numbers mentioned above are not offered as precise accountings for detailed comparison, they generally inform the broad discussion in at least two key ways. First, they give a reasonable sense of relative magnitude. For example, while the PTO handles trademarks as well as patents, the trademark side is a much smaller part of the PTO's overall operation. And while the DoJ and FTC also handle a much broader set of antitrust matters not involving intellectual property, and the FTC has a large consumer protection docket, both the DoJ and FTC have been highlighting their IP-focused work in their annual budget justifications for years and devoting significant resources toward their extensive IP actions over the past decade.⁴³ Second, in the case of all three of these agencies (the PTO, DoJ, and FTC), the various enhanced procedures they have deployed in response to concerns raised by critics of patent jury trials have all been of a type that lead to the non-enforcement of a patent, rather than to its enforcement. Put differently, they all have the direct effect of cutting against patents, never for them.

Present trends toward increased reliance on administrative agency proceedings instead of court litigation might make it harder for some new firms to enter and compete in markets. One reason for this is that larger firms

⁴² See Notice of Public Hearings, Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, 66 Fed. Reg. 58,146, 58,146-47 (Nov. 20, 2001) (announcing joint hearings and explaining the reasons for them); see also FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 1 (2011), available at <http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> (summarizing a decade of hearings and prior reports and their lineage up to the 2011 report); Press Release, Fed. Trade Comm'n, Muris Announces Plans for Intellectual Property Hearings (Nov. 15, 2001), available at <http://www.ftc.gov/opa/2001/11/iprelease.htm> (collecting sources, including links to Federal Register Notice and to remarks by Chairman Timothy Muris, and questioning these and other aspects of the patent system). For some recent critiques of these approaches, see Richard A. Epstein, F. Scott Kieff & Daniel F. Spulber, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 8 J. COMPETITION L. & ECON. 1, 19 (2012); Kieff & Layne-Farrar, *supra* note 28, at 1093-94. For information on the budgets of the FTC and DoJ, see FED. TRADE COMM'N, FISCAL YEAR 2013 CONGRESSIONAL BUDGET JUSTIFICATION (2012), available at http://www.ftc.gov/sites/default/files/documents/reports_annual/fy-2013-congressional-budget-justification/2013_cbj.pdf; U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CONGRESSIONAL SUBMISSION FY 2013 PERFORMANCE BUDGET 2 (2012), available at <http://www.justice.gov/jmd/2013justification/pdf/fy13-atr-justification.pdf>.

⁴³ FED. TRADE COMM'N, *supra* note 42, at 32 ("Issues in antitrust matters increasingly intersect with intellectual property concerns In FY 2012 and beyond, the FTC expects to expend significant and specialized resources to enhance its ability to investigate and litigate complex matters involving high-tech segments of the economy"); U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *supra* note 42, at 2 (noting that "[i]ntellectual property issues involving patents, copyrights, trademarks, or trade secrets are instrumental in the Division's work," while listing this IP focus as one of the only three topics selected for special call-out in a box of text at the beginning of this budget justification).

generally are thought to be more effective at bringing political influence to bear in agency determinations. A second reason is that the structure of the agency proceedings themselves favors larger firms. For example, *inter partes* review (“IPR”) is now predominantly used by large companies against small ones.⁴⁴ IPR is not used in a significant way against nonpracticing entities or “patent trolls.”⁴⁵ And IPR is only infrequently used as an alternative to litigation, with around 80 percent of IPR cases having concurrent litigation.⁴⁶ One possible explanation for these facts is the high cost of IPR. The PTO filing fee for IPR is \$9,000; if a review is instituted, there is an additional fee of \$14,000, for a total of \$23,000 in fees,⁴⁷ on top of which of course should be added attorneys’ fees, which can be easily ten times that amount.⁴⁸ Based on the *inter partes* reexamination median pendency of thirty-three months, we can expect that IPR will actually be slower than litigation in most cases.⁴⁹ Add in the significant cost of attorneys’ fees and it is easy to see why IPR can be an especially effective tactic in a cut-off-the-oxygen strategy that might be used by a large, well-financed company to simply run out the clock and budget of a smaller entity trying to rely on its patent to raise money from capital markets.

The new covered business method review program has fared little better. Early results indicate that it is only rarely used against nonpracticing entities. As with IPR, the program is mostly used by large companies, which have filed 89 percent of covered business method reviews.⁵⁰ As of August 2, 2013, no covered business method review has involved a small entity filing for review of a patent owned by a nonpracticing entity.⁵¹ The program, intended to help small entities save money and avoid litigation, does neither. Like other forms of agency review, it is primarily used by large entities against other large entities as a piece of the overall patent litigation strategy.

While limited agency review can be a useful mechanism for cleaning up invalid patents, patents cannot do their job (i.e., coordinating the com-

⁴⁴ Moore, *supra* note 41. In *inter partes* review the filing is not made by the patent owner, thus higher patenting rates by large companies do not explain this result.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 37 C.F.R. § 42.15 (2013).

⁴⁸ AM. INTELL. PROP. LAW ASS’N, REPORT OF THE ECONOMIC SURVEY 2013, at 36 (2013) (reporting median attorney fees for *inter partes* reexam in 2013 were \$50,000 through the filing request, \$70,000 inclusive of the first patent owner response, \$100,000 inclusive of all patent owner responses, \$130,000 inclusive of an appeal to the board, and \$250,000 inclusive of an appeal to federal court).

⁴⁹ Compare to a twenty-two-month median pendency for a decision on the merits in patent litigation in 2000. Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 288 (2006). Pendencies in so-called “rocket docket” districts are considerably shorter.

⁵⁰ Moore, *supra* note 41.

⁵¹ *Id.*

mercialization of innovation) for players of all sizes if everyone interested in the marketplace for investment in small, early-stage entrepreneurial enterprises knows that enforcement of the patents owned by these enterprises can be easily delayed or prevented merely by the high cost and lengthy pendency of administrative reviews.

In addition, when the relevant agency (such as the PTO or FTC) only has power to focus on one of the core substantive areas of a patent dispute, such as validity of the patent or the proper remedy for patent infringement, the proceeding often does not benefit from the important self-disciplining tensions that usually cabin the arguments made by parties on both sides of a district court patent litigation that typically involves all substantive areas of a patent case.⁵²

III. EXPLORING PATENT INFRINGEMENT PROCEEDINGS BEFORE THE ITC

In contrast with the other administrative agencies discussed above, the ITC uses only a portion of its more modest total budget of \$80 million to deploy several significant sets of professional staff with extensive experience in all three main aspects of IP, mainly patent, cases: (1) validity and enforceability, (2) infringement, and (3) remedy.⁵³ It does so on a time frame widely regarded as significantly faster for the parties than district court litigation, while being at least somewhat less expensive for the parties.⁵⁴ These groups of ITC staff include the following:

- A large department of expert patent litigators (the Office of Unfair Import Investigations) who operate independently of the Commission under formal conflict-of-interest rules in furtherance of their

⁵² See Kieff, *The Case for Preferring*, *supra* note 4, at 1961-62.

⁵³ Of the five main areas of the ITC's operations, IP-based work (so-called Ops 2) is only one of them, with the other areas being: the Commission's largest operational area, Ops 1, import injury investigations, which focuses on anti-dumping and countervailing duty cases; Ops 3, industry and economic analysis, which prepares reports under Section 332 of the Tariff Act of 1930 and other similar statutes; Ops 4, trade information services, which maintains and publishes an extensive repository of trade- and tariff-related data regularly used by governments, academics, and business, including the entire Harmonized Tariff Schedule of the United States, contributions to the International Trade Data System, the set of U.S. commitments under Schedule XX of the GATT/WTO and under GATS, and support for U.S. contributions to the WTO Integrated Database; and Ops 5, trade policy support, through which the ITC helps trade policy makers in the U.S. executive and legislative branches by providing objective consultation involving research and data compilation and analysis, often including formal details of ITC staff to these other parts of the U.S. government. U.S. INT'L TRADE COMM'N, AGENCY FINANCIAL REPORT 8, 13, 59-60 (2013).

⁵⁴ AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 48, at 34-35 (finding that Section 337 litigation is about 10 to 20 percent less expensive for the parties than patent litigation in general, depending on the amount at risk).

legal duty to represent the public's interest in each case in which they elect to participate, which is most of them;

- A large department of expert IP (mostly patent) lawyers who represent the Commission's interests in following applicable statutes and precedents for adjudicating patent cases (the Office of General Counsel's IP team), most of whom have extensive patent experience and many of whom served as law clerks at the U.S. Court of Appeals for the Federal Circuit, the appellate court in the United States that hears nearly all appeals in patent cases, including those from the ITC;
- A group of five to six administrative law judges and their staff of permanent law clerks, who collectively spend all of their time adjudicating IP disputes, mostly involving patents; and
- The six Commissioners, each of whom has at least one full-time senior counsel with extensive IP experience devoted to IP matters, mostly involving patents.

The numbers tell a compelling story. Section 337 investigations at the ITC are fast, with a median time to adjudication of fourteen months.⁵⁵ They are also inexpensive for the government to run, with an estimated marginal cost to the ITC per investigation of about \$57,000.⁵⁶ This makes an ITC investigation faster than the PTO's IPR, and at a very manageable cost to the government.

But the numbers are only part of the story for the ITC. Important internal structural characteristics of the ITC are big factors in the agency's overall political independence. Independent administrative agencies (including both the ITC and the FTC) are not within departments of the executive branch (like the PTO and the DoJ) and therefore are generally seen as less subject to political pressure than those executive branch departments.⁵⁷ The ITC also has some notable internal structural dynamics that leave it operating with a particularly high degree of independence. The ITC is a six-

⁵⁵ Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 102 (2008).

⁵⁶ U.S. INT'L TRADE COMM'N, BUDGET JUSTIFICATION FISCAL YEAR 2013, at 25, 29-30 (2012), available at http://www.usitc.gov/press_room/documents/budget_2013.pdf. According to the ITC's budget justification, there were twenty more active actions in 2013 over 2012 with a marginal cost of \$50,900. *Id.* at 29-30. The ITC sets a goal of 13.5 months per action, giving a marginal cost of an action from start to finish of \$57,262. *Id.* at 25.

⁵⁷ See generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 59-63 (1993); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 111-115 (1938).

member commission, typically evenly split between the two major political parties (there sometimes is an independent, just as there sometimes is at other independent agencies). The members serve in terms lasting nine years, with the position of Chair required by statute to switch political parties every two years. As a result, the Commission staff generally work closely with all of the Commissioners, recognizing that every two years the Chair will have to rotate and that many of the Commissioners have a good chance of serving some time as Chair. The net impact is that the ITC has long operated by consensus, with close coordination among the six members and the Commission staff, independent of both the executive and legislative branches. When there are splits in the votes of the ITC Commissioners, they tend not to fall along political party lines.

In contrast, the FTC is generally understood to act in a way that more closely reflects the views of its Chair because it has an internal structure that is more like many other independent agencies and less like the ITC. The FTC has five members, not six, and they serve for slightly shorter terms of seven years, rather than the ITC's nine-year terms. But for a number of reasons, including the fact that the Chair of the FTC can serve for the individual Commissioner's entire term (in contrast with the ITC chairmanship, which rotates every two years), the FTC Chair can direct the agency staff in a way that other FTC Commissioners cannot.⁵⁸ This allows the FTC Chair to have much more influence than the Chair's control over the agenda would itself afford, or than the Chair's single vote on matters before the Commission would imply. Furthermore, because of the Sunshine Act, no more than two FTC Commissioners can directly interact outside an open meeting on important rulemakings. The Sunshine Act, therefore, can make it difficult for Commissioners to coordinate, which can have the effect of further empowering the Chair.

Despite the relative independence, speed, and expertise of ITC patent proceedings, public reaction did not seem to match up with the benchmark set by prior public outcry about patent jury trials when the ITC was recently faced with its most high-profile patent case in a generation, which involved the so-called smart phone wars between Apple and Samsung.⁵⁹ This recent ITC case happened to result in the enforcement of a patent rather than elimination of a patent or significant restriction on patent enforcement. The almost unanimous reaction from the major media that had long been calling for faster, more expert adjudication of patent cases was very critical about the outcome, without in most instances even addressing the particular facts or reasoning of the published record or decision.⁶⁰

⁵⁸ In part, this is related to the basic internal structure and organization of the Commission, including the Chair's primary role in hiring senior leadership and setting the agenda.

⁵⁹ Neither Kieff nor Daily was involved in the case.

⁶⁰ Compare Philip Elmer-DeWitt, *How the ITC Forced a Veto in the Samsung-Apple Patent Case*, CNNMONEY (Aug. 5, 2013, 6:13 AM), <http://tech.fortune.cnn.com/2013/08/05/apple-samsung-itc->

In that case, after the ordinary full trial proceedings before the administrative law judge, with active involvement of the expert patent litigation attorneys representing the public's interest from the ITC's Office of Import Investigations, the ITC made special, supplemental solicitations for public input on the public interest. These solicitations addressed, among other things, concerns about anticompetitive effects of patent enforcement in the context of technological standard-setting organizations and putative commitments to issue licenses on so-called RAND or FRAND terms.⁶¹ The PTO, DoJ, and FTC all provided formal submissions, as has occurred in prior ITC proceedings raising similar issues. They largely reflected the FTC's decade of actions expressing significant skepticism about patent enforcement but focused largely on the broad, general policy concerns of the FTC about antitrust implications of patents, rather than on the particulars of the case at hand.

The result was an extensive record developed through a thorough factual investigation and detailed legal and economic analysis into the core underlying economics of patent holdup. The record included detailed evidence about whether particular parties were surprised; whether they were opportunistic; whether they made asset-specific investments; which particular patents were related to which particular standards; whether the patents were essential to those particular standards; what specific terms were involved in any relevant licensing commitments that were made; and how each of the particular parties acted in relation to those commitments. Based on this record, the ITC issued a detailed decision spanning roughly 150 pages, including approximately thirty-five pages devoted to the analysis of this evidence, and an accompanying thoughtful dissenting opinion of approximately ten pages setting forth detailed reasoning closely tied to the factual record which focuses largely on a different reading of the facts relating to the specific actions of the parties regarding their particular negotiating behaviors.⁶²

pinkert/ (positing that the majority in the case may have only ordered a ban in order to allow the administration to veto it and quoting with approval a statement by patent commentator Florian Mueller that "the ITC ruling is a serious threat to innovation and competition"), with Philip Elmer-DeWitt, *Apple v. Samsung: Justice Delayed Is Justice Denied*, CNNMONEY (Feb. 17, 2013, 2:45 PM), <http://tech.fortune.cnn.com/2013/02/17/apple-v-samsung-delayed/> (decrying the slow pace of patent litigation and quoting with approval a statement by Florian Mueller that "[t]he unwillingness of many U.S. courts to adjudicate patent infringement cases within reasonable periods of time is slowly but surely becoming a serious issue for the competitiveness of the innovative part of the U.S. economy" (internal quotation marks omitted)).

⁶¹ "RAND" and "FRAND" are common abbreviations for, respectively, "reasonable and nondiscriminatory" and "fair, reasonable, and nondiscriminatory."

⁶² See Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Inv. No. 337-TA-794, Slip Op. at 41-66, 105-19 (U.S. Int'l Trade Comm'n July 5, 2013) (Commission Opinion), available at http://www.kslaw.com/library/newsletters/ITCSection337Update/2013/July_17/CommOpinion794.pdf (pages 41 to 66 of the

This is not to say that reasonable minds could not differ on the issues in the particular case. Quite the opposite. The 5-1 vote and carefully written opinions on both sides show that reasonable minds did disagree and were able to explain how they came to their different conclusions based on the particular facts in the record.

Simply put, the ITC processes and resulting opinions involved highly experienced government staff with a dramatically faster time frame and significantly lower cost than district court litigation. The process relied on government officials who had extensive expertise in the relevant technology, economics, industrial dynamics, and law; who engaged in decision making that was focused on the facts; and who produced extensive and very detailed published opinions that tie the application of the law to the facts of the case at issue. And while the basic remedy often used in ITC proceedings is one that can easily appear to be blunt at first blush—a general exclusion order—the ITC also issues cease and desist orders that are in personam, meaning that they are against only those parties already involved in the proceeding. The ITC also has a demonstrated track record of very carefully tailoring orders of either type to mitigate holdup problems in particular cases depending on the record.⁶³ This all gives significant guidance to future government decision makers and private parties about how the law would be applied to facts of future cases, which allows for a measure of certainty and predictability that can help parties in organizing their affairs and conducting their governmental and commercial activities based on the facts relevant to particular cases.

Yet, when the executive branch intervened in the case afterward to set aside the ITC's remedy, the only public information it provided was contained in a single three-page letter, containing only a few lines of text explaining how it was based on the facts of this case.⁶⁴ This provided little information to academics, government officials, and businesses, in the

Commission Opinion focus on affirmative defenses relating to the SSO, and pages 105 to 119 focus on the remedy, the public's interest in the remedy, and how the remedy was tailored to address the public's interest).

⁶³ See, e.g., Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets, Inv. No. 337-TA-543, USITC Pub. 4258, at 2-3 (June 7, 2007) (Final) (Commission Determination on the Issues of Remedy, the Public Interest, and Bonding; Termination of the Investigation) (a less strict exclusion order that balanced the public interest with the protection of intellectual property); Certain Personal Data and Mobile Communications Devices and Related Software, Inv. No. 337-TA-710, USITC Pub. 4331 (Dec. 19, 2011) (Final) (Notice of the Commission's Final Determination Finding a Violation of Section 337; Issuance of a Limited Exclusion Order; Termination of the Investigation) (a limited exclusion order to account for consumer effects, including the ability to get replacement phones under warranty or insurance; the order was also delayed for four months to allow service providers time to adapt).

⁶⁴ Memorandum from Michael B. G. Froman, Ambassador, U.S. Trade Representative, to Irving A. Williamson, Chairman, Int'l Trade Comm'n 1, 3 (Aug. 3, 2013), available at http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

United States or around the world, about what facts or reasons triggered this different outcome.

The combination of the response by the public media and the response from the executive branch provides little guidance for future decision makers around the world in both the government and the market sectors about whether and to what degree particular types of evidence and specific types of economic issues will possess legal significance in future cases. Instead, whether correct or not, some might read the responses by the executive branch and the public media as suggesting that significant traction can be accomplished using the less legally formal tools of popular sentiment or political influence. Such a view could find support in longstanding academic literature studying political economy and in the highly developed practices of public and government relations. At the same time, a central lesson from the field of political economy is that the efficacy of these sorts of strategies and tactics tend to favor large, established businesses, a tendency that sometimes can come at the expense of competition and innovation.⁶⁵ Significant concerns have already been raised that the decision may suggest that political considerations could end up featuring more prominently in IP enforcement.⁶⁶

CONCLUSION

Most contemporary criticism about patent jury trials claims they are problematic because they are too long, expensive, uncertain, and error-prone, largely because they rely on ordinary, lay judges and juries to make decisions involving arcane legal issues and complex technologies. Most reforms advocated in response to these concerns involve significantly increased reliance on administrative procedures that have two key attributes: (1) they are themselves significantly amenable to being driven by political influence rather than by historical and technological facts, such as whether a particular document of alleged prior art was in the public domain on a particular date and what technological content it communicated to people of

⁶⁵ Of course, this is not always the case, as the interests of small business and entrepreneurs can gain significant political momentum from time to time.

⁶⁶ See, e.g., Susan Decker & Brian Wingfield, *Samsung Loses Bid for Obama Veto of Apple-Won Import Ban*, BLOOMBERG (Oct. 8, 2013), <http://www.bloomberg.com/news/2013-10-08/samsung-loses-bid-for-presidential-veto-of-apple-won-import-ban.html> (highlighting significant public speculation about the role of political pressure and domestic bias in the executive branch's decision to intervene against the ITC in the decision to enforce Samsung's patents against Apple, but not soon thereafter in the ITC's decision in the related proceedings to enforce Apple's patents against Samsung); Deanna Tanner Okun, Commentary, *Listen to the Factual Record on the ITC, Not the Broken One*, ROLL CALL (Nov. 25, 2013, 2:22 PM), http://www.rollcall.com/news/listen_to_the_factual_record_on_the_itc_not_the_broken_one_commentary-229303-1.html (discussing politics behind efforts to amend statute to eliminate ITC role in broad categories of patent cases).

ordinary skill in the art; and (2) they also happen to only lead to the non-enforcement of a patent, such as a PTO post-grant review, or an FTC or DoJ review for anticompetitive effect.

This Paper takes seriously the concerns raised by critics of patent jury trials as an important benchmark against which to measure patent litigation proceedings before the ITC. In so doing, it shows how these ITC proceedings go a long way in directly satisfying the stated concerns raised by critics of patent jury trials without triggering the costs raised by the particular administrative procedures involving the PTO, DoJ, and FTC, which are often advocated by critics of patent jury trials. More specifically, the Paper explores the ways in which proceedings like those conducted at the ITC are significantly less long, less expensive, and involve much more (and much more diverse) patent law expertise than the typical patent jury trial. ITC proceedings also are structured to turn on facts rather than political influence. As a result they have a long track record of reaching outcomes favoring both sides, patentees and alleged infringers, depending on the facts of the particular case.

Given the significant complexity and thoroughness of each of the organizations and procedures mentioned in this Paper, its discussion of them is far from exhaustive. Rather, the Paper merely highlights some of the ways that the stated goals of critics of patent jury trials can be meaningfully addressed without triggering what appear to be various deleterious side effects of the reform mechanisms they have recently sought to implement. To the extent that these deleterious side effects are appropriately considered to be unintended consequences, the Paper outlines important reasons alternative reforms should be considered—for example, why increased reliance on patent jury trials should be considered along with increased reliance on proceedings before the ITC or an ITC analog.⁶⁷

⁶⁷ At the same time, broad understandings of organizational psychology suggest that whatever a group is doing usually does reflect, to at least some extent, intentions that actually are present within the group and in that sense would not fairly be characterized as unintended. Furthermore, broad understandings of political science suggest that often what a group does (such as the laws passed or enforced within a larger society) is the product of a complex interaction among the relative power and intensity of preferences of particular individuals and subgroups within the larger whole and therefore typically will reflect the intentions of some members while being unintended, if not even disliked, with respect to others. *See, e.g.*, DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 4-7 (Kluwer Acad. Publishers 1987) (1958); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425-27, 432-37 (1988).