

Developments

Conference Report—U.S. & German Bench and Bar Gathering: “A New Bridge Across the Atlantic”: The Future of American Patent Litigation

By David A. Hurst*

A. Introduction

The U.S. & German Bench and Bar Gathering, “A New Bridge Across the Atlantic,” held in Washington, DC, in May 2012, was aptly timed to discuss the developments in German and American patent law.¹ The Federal Circuit Bar Association and the *Patentanwaltskammer* (German Patent Lawyers Association) brought distinguished judges and attorneys from their respective countries to discuss the current state of the two patent systems. This involved consideration of where the two systems might be converging and why the two countries have had dissimilar litigation patterns. Particularly with respect to the latter of these inquiries, much of the debate throughout the conference focused on the differences in litigation discovery and procedural rules. The conference highlighted the fact that, at the most fundamental level, these differences are a product of differing perceptions of how justice should be administered. A brief overview comparing patent litigation in Germany and the United States will help frame this report.

Patents in Germany are granted through an application to the German Patent and Trademark Office (DPMA).² After an application is granted, patent litigation in Germany proceeds in one of two forms: Invalidation or infringement.³ Plaintiffs seeking to recover

* J.D. Candidate, Washington & Lee University School of Law Class of 2014. I’m forever grateful for the love and the support of my family, and for my father’s edits. I give my sincerest thanks to Prof. Seaman, for his expert feedback and comments; to Prof. Miller, for his guidance and edits; and to my friends and colleagues on the German Law Journal, for their edits and comments. All remaining errors are, of course, mine. Email: hurst.d@law.wlu.edu.

¹ *The 2012 German & United States Bench and Bar Gathering—“A New Bridge Across the Atlantic”*, BENCH AND BAR—FEDERAL CIRCUIT BAR ASSOCIATION (May 18, 2012), <https://www.signup4.net/public/ap.aspx?EID=20121754E&OID=50>.

² See Joachim Feldges & Birgit Kramer, *Patent Law*, in BUSINESS LAWS OF GERMANY ch. 13, § 13:9 (Thomas Wegerich ed., 2012).

³ See Patentgesetz [PatG] [Patent Law], Dec. 16, 1980, BUNDESGESETZBLATT [BGBl. I] 1, as amended by the Law of July 31, 2009, §§ 81–85a (Ger.). (discussing nullity proceedings); see also *id.* at §§ 139–142b (discussing patent infringement).

for another party's infringement may file in any of Germany's regional courts, with the possibility of appellate review in the higher regional courts and the Federal Court of Justice.⁴ Patent invalidity cannot be used as a defense in infringement hearings, but filing such a claim against an opponent will delay the infringement hearing.⁵ Discovery is almost non-existent. Traditionally, it has been the plaintiff's burden to collect enough evidence to substantiate a patent claim against another party.⁶ In recent years, however, the German legislature has given litigants limited discovery.⁷ Opinions are usually issued within two months of a case's filing with the court.⁸ If a defendant infringes on another's patent, German courts presume the act was done negligently.⁹ Damages are awarded generally through a calculation of lost profits.¹⁰ Finally, Germany, as a member of the European Patent Convention, may entertain infringement claims arising out of European patents.¹¹

All invalidation proceedings take place at a centralized court in Munich: The Federal Patent Court.¹² Claims in front of the Federal Patent Court are ruled on by a panel of two legal members and three technical members.¹³ Opinions are generally issued the same day as the trial.¹⁴ Appeals from the Federal Patent Court go directly to the Federal Court of

⁴ EUR. PATENT OFFICE, *PATENT LITIGATION IN EUROPE*, 24 (2nd ed. 2010).

⁵ *Id.*

⁶ Feldges & Kramer, *supra* note 2, § 13:91.

⁷ *Id.* § 13:87.

⁸ See FRANK PETERREINS, *GLOBAL PATENT ENFORCEMENT STRATEGY: GERMANY 9* (2011), available at <http://www.fr.com/files/Uploads/Documents/Patent%20Litigation%20in%20Germany%20-%20July%2020%20-%202011FINAL.pdf>.

⁹ Patrick J. Birde et al., *The Damages Test*, 177 PAT. WORLD 10, 11 (2005).

¹⁰ Patentgesetz [PatG] [Patent Act], Dec. 16, 1980, BUNDESGESETZBLATT [BGBL.]1, as amended by § 13 of the Act of Nov. 24, 2011, BGBL. I 2302, § 139(2).

¹¹ Convention on the Grant of European Patents art. 64(3), Oct. 5, 1973, 1065 U.N.T.S. 255. Since 2009, there has been a concerted effort in the EU community to address patent litigation in uniform manner. See generally *Recommendation from the Commission to the Council to Authorize the Commission to Open Negotiations for the Adoption of an Agreement Creating a Unified Patent Litigation System*, SEC (2009) 330 final (Mar. 20, 2009), available at http://ec.europa.eu/internal_market/indprop/docs/patent/recommendation_sec09-330_en.pdf. Whether the Council will be able to create a Unified Patent Court amidst the political storm surrounding the proposed agreements has yet to be seen. See generally Hiroshi Sheraton & Matthew Jones, *Draft Agreement on a Unified Patent Court—Summary and Implications*, BLOOMBERG L. REP. INTELL. PROP., Sep. 14, 2011, at 1, available at <http://www.mwe.com/info/pubs/sheraton0911.pdf>.

¹² EUR. PATENT OFFICE, *supra* note 4, at 24.

¹³ *Id.*

¹⁴ PETERREINS, *supra* note 8, at 9.

Justice.¹⁵ The Federal Court of Justice's review, however, is highly deferential and does not allow for presentation of new facts. The Federal Court of Justice will set aside a judgment of the Federal Patent Court only if the law was misapplied.¹⁶

The Leahy-Smith America Invents Act (AIA)¹⁷ has drastically changed American patent law. The AIA moved America from a "first to invent" regime, protecting the rights of the true first inventor of a new product or process, to a "first inventor to file" regime.¹⁸ The AIA charges the United States Patent and Trademark Office (USPTO) with administering a more efficient application process.¹⁹ The AIA, however, does little to specifically address some of the major issues surrounding patent litigation.²⁰ All of the United States federal district courts may hear a patent claim.²¹ Proper venue for a particular claim is established wherever the defendant resides or "has committed acts of infringement and has a regular and established place of business."²² For the purposes of establishing proper venue, corporate defendants "reside" anywhere they are subject to personal jurisdiction.²³ Discovery rules are governed by the Federal Rules of Civil Procedure, allowing for the production of any documents or electronically stored information that could be related to a claim or defense at issue in the case.²⁴ As will be discussed below, this can lead to parties engaging in abusive behavior by making frivolous discovery requests. And, unless waived,

¹⁵ See Feldges & Kramer, *supra* note 2, § 13:92.

¹⁶ *Id.*

¹⁷ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

¹⁸ See David W. Trilling, *Recognizing a Need for Reform: The Leahy-Smith Invents Act of 2011*, 2012 U. ILL. J.L. TECH. & POL'Y 239, 246 (2012); see also Robert A. Armitage, *Understanding The American Invents Act and Its Implication for Patenting*, 40 AIPLA Q.J. 1, 93-109 (2012) (providing an overview of the changes the AIA made to the "inventor-related provisions" of American patent law).

¹⁹ Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 595, 617-26 (2012) (listing the various expansions the AIA makes to the USPTO's power, including the discretion to expedite qualifying patent applications).

²⁰ For a broad perspective of what the industry—including former Chief Judge Paul Michel of the United States Court of Appeals for the Federal Circuit—felt about the enactment of the AIA, see *America Invents Becomes Law—But IP Industry Largely Unimpressed*, WEALTH OF IDEAS (Gen. Patent Corp.) Sept. 2011, available at <http://www.generalpatent.com/america-invents-act-passes-ip-industry-largely-unimpressed>. The American panelists at the conference addressed many of the concerns surrounding the AIA, much of which is reported below.

²¹ 28 U.S.C. § 1400 (2012). See Megan Woodhouse, *Shop 'Til You Drop: Implementing Federal Rules of Patent Litigation Procedure to Wear Out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227 (2010) (providing a discussion of forum shopping in patent infringement litigation and proposals of new rules to reign in the behavior).

²² 28 U.S.C. § 1400(b).

²³ 28 U.S.C. § 1391(c)(2).

²⁴ FED. R. CIV. PRO. 26.

a plaintiff has the right to demand that a patent case be submitted to a jury.²⁵ Damages for a successful infringement claim are generally calculated by the plaintiff's lost profits or by the amount of a reasonable royalty.²⁶ Where the defendant is found to have engaged in willful infringement,²⁷ plaintiffs may recover up to treble damages.²⁸ Finally, because litigation through the federal courts can be time consuming, the International Trade Commission (ITC) has begun to play a larger role in adjudicating patent claims in America.²⁹

B. Recent Developments in Patent Law

The Conference first addressed how each country is keeping up with changes in the quality of patents. During an opening panel from the American side, Solicitor Ray Chen, USPTO, recognized that the AIA helped harmonize American patent law with the majority of foreign patent systems and provided his office with the opportunity to implement new procedures to help increase the quality of its patent decisions. Judge Pauline Newman of the United States Court of Appeals for the Federal Circuit remarked that the quality of patents originates from the public's (or Congress's) attitude towards patents. Before moving on to shape laws and procedures concerning patents, she urged, the nation must naturally have strength and support for patents in the first instance. According to Judge Newman, this is reflected in the choices courts and Congress make about where to draw the line on patent protection. Do they protect everything, including small incremental steps in an invention? Or should patents be reserved for only large, transformative innovations? Only after settling these fundamental issues, Judge Newman explained, can a nation move to addressing stability and clarity of patent rights. Chief Judge Randall Rader of the United States Court of Appeals for the Federal Circuit argued that the focus of patent protection should not be on size or obviousness of the invention, but, rather, should balance protection interests with the market value of a given invention. Small, incremental steps, especially for an invention that is widely used on a regular basis, can

²⁵ "The U.S. may be the only country in the world that uses juries to decide patent cases." Philippe Signore, *On the Role of Juries in Patent Litigation (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 791, 794 (2001).

²⁶ 35 U.S.C. § 284 (2012). *But see* Christopher B. Seaman, *Reconsidering the Georgia Pacific Standard for Reasonable Royalty Damages for Patent Infringement*, 2010 BYU L. REV. 1661, 1673–76 (noting the decline in the use of lost profits due to evidentiary and procedural obstacles courts have imposed upon plaintiffs).

²⁷ *See* Laurence H. Pretty, *Damages and Attorney Fees*, in PATENT LITIGATION ch. 9, § 9.10 (Practicing Law Inst., Oct. 2011) (discussing what constitutes "willful infringement").

²⁸ 35 U.S.C. § 284 (2012). *But see* Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages after In re Seagate: An Empirical Study*, 97 IOWA L. REV. 417, 464–71 (2012) (noting that the award of "enhanced damages" is becoming less frequent, even where willful infringement is found).

²⁹ The ITC gains jurisdiction over patent claims arising out of imports through 19 U.S.C. 1337(a)(1)(B)(i) (2012). *See* Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 78–81 (2008) (discussing the rise of the ITC as an alternative forum in patent infringement litigation).

have a greater market value than a completely new and unobvious invention, especially if that new invention would find little use in the market.

The German side of the opening panel focused on the procedures used in invalidation proceedings, which were characterized as different from those in the American system. The bifurcated system featuring streamlined procedures, according to Chief Judge Beate Schmidt of the German Federal Patent Court, has strengths: By limiting the focus of the proceedings, she explained, lawyers are given “limits” to what is expected out of them. These limits help filter the numerous claims that are brought before the court so that only meritorious claims advance to a hearing. This limited focus in court proceedings, Judge Schmidt argued, helps strengthen the quality and clarity of patents. Judge Peter Meir-Beck of the German Federal Court of Justice pointed out that these procedures, and the narrow focus they impose on litigation, help expedite the appeals process, especially in light of the fact that the Federal Court of Justice does not play a very active role in reviewing lower courts’ decisions.

During a plenary discussion of the opening panel, Solicitor Chen mentioned that the PTO seriously considers what the courts say to help examiners do their jobs properly. He voiced his frustration with the fact that American courts provide only ex-post rulings on PTO decisions. In Solicitor Chen’s view, ambiguous decisions—where the court is not entirely clear on what it would have expected from the PTO in a particular patent decision—can be destabilizing to the patenting processes. He recognized that moving towards the German model, which permits courts to issue opinions ex ante, would help immensely in ensuring the quality of patent decisions.

C. Discovery (or Not)

Following the opening panel, the conference moved into a lively debate over the role of discovery in patent litigation. Though the German system allows for very little discovery, there is a growing movement calling for more discovery in patent infringement cases. Judge Meir-Beck noted that, without some form of limited discovery, the German system may leave a plaintiff with a legitimate claim unable to obtain justice due to a lack of accessible evidence. The moderators jokingly started their discussion with the American side of the panel with only the words “Discovery. Go.” For the most part, the American panelists agreed that patent lawyers know what items are expected from clients during discovery and, therefore, the process should be relatively efficient. This, of course, is far from the reality.

Judge Newman took issue with the discovery culture in patent litigation that tolerates abusive behavior. She referred to instances where discovery rules are abused to the point that one obscure and damaging email can destroy a perfectly sound patent. And, with discovery being the main cost associated with patent litigation, she seemed convinced that the United States has much to learn from the German experience of virtually no discovery.

Both Judge Newman and Chief Judge Rader acknowledged that the collaborative efforts of the bench and the Federal Circuit Bar Association to draft a "Model Order" for electronic discovery have helped streamline the discovery process.³⁰

Andrew Culbert, Associate General Counsel at Microsoft Corporation, expressed his preference for litigating patent issues as both a plaintiff and defendant in Germany. Proponents of the German system, including Culbert, point to several factors that ensure that the German courts are accurate and efficient in their rulings. These factors include the narrow focus of proceedings and the absence of a jury, which, in Germany, is replaced with the technical judges that preside over patent litigation. Culbert believes that Microsoft, as a plaintiff and a defendant, has obtained full and fair patent decisions in Germany despite the absence of an American-style discovery process. Further, the panel identified an emerging trend that suggests that plaintiffs are moving their cases to Germany, most likely to take advantage of the expedited process.

Frank Zacharias, general patent counsel for Porsche, noted that when a case ends up in American courts, the discussions among a European corporation's management are dramatically different than when the company faces a patent claim elsewhere. Instead of discussing litigation strategies, Zacharias said that the issue is sent straight to the marketing department to determine whether it is worth fighting over the patent in the American courts. For all this negative treatment of the American system, the panel nevertheless proposed that, for more difficult patent claims, U.S. courts tend to be the preferred forum.

Judge Kathleen O'Malley of the United States Court of Appeals for the Federal Circuit argued that the American discovery process is not as bad as corporate counsel characterizes it. She noted that judges have the ability to control the course of discovery and should exercise that authority more often, especially when confronted with abusive situations. Judge O'Malley pointed out that discovery is not always an unbridled rampage between two parties. Cooperation in discovery agreements has, in her opinion, been common when two large corporations are pitted against each other. Judge O'Malley characterized such cooperative behavior as a product of "mutually assured destruction": Each corporation knows the costs associated with abusive discovery requests and that both sides are fully capable in engaging in such behavior, but both sides choose not to do so.

The divergence between American and German discovery processes speaks to broader jurisprudential themes. In German patent litigation, there is a presumption of negligence when a defendant is found to have infringed upon another's patent rights. In contrast to

³⁰ An E-Discovery Model Order, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT , http://www.ca9c.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf.

the German presumption, the mental state of an infringing party is contested in the course of U.S. patent litigation. The U.S. allows for treble damages where willful infringement can be established. Because of this assessment of a party's mental state, American courts play a larger role in "truth seeking" to determine not only how a party acted, but why that party engaged in the suspect behavior.

D. Juries or Judges

The final topic subject to lively debate at the conference was the usefulness of Germany's technical judges when compared to the American jury system. The German speakers and most of the American lawyers supported the technical bench in the patent litigation setting. The judges presiding in such a trial are specially trained negating the need for expert witnesses. And, because of the centralization of the patent court in Germany, litigants have an added sense of reassurance that the court will be consistent in its rulings.

Despite the advantages of having a centralized, technical court hear patent claims, such a system does not align well with American perceptions of justice. As Judge Evan Wallach of the United States Court of Appeals for the Federal Circuit pointed out, the divergence in the German and American experiences is rooted in the philosophies that drive each of the countries. Besides the glaring distinction of the American adoption of the English common law, Judge Wallach explained that American reliance and belief in the jury system dates back to the trial of William Penn in 1670.³¹ Since then, the right to have a trial before a jury of peers has been an essential element of the American court system. Despite the striking differences in the processes of patent litigation, Judge Wallach noted that the ends to those procedural and systemic means reflect a common commitment to improving the quality of the country's patent law.

Judge O'Malley affirmed her belief in utilizing the jury system in patent litigation, pointing out that most jurors take their oaths very seriously and perform their duties with due diligence. She recalled a lengthy trial where the jury took twice the trial length to deliberate before reaching a verdict. In her debriefing with the jurors, she learned that they had all agreed to silently read over every exhibit that was placed into evidence before discussing the merits of the case. And, in her long experience on the bench, Judge O'Malley claimed to have been surprised by only one outcome that one particular jury

³¹ William Penn and William Mead were arrested in 1670 for preaching to a public assembly. Despite significant pressure from the Lord Mayor of London—who presided as judge over the trial—the jury entered a verdict of "not guilty." The Lord Mayor confined and starved the jury in an attempt to force a change in the verdict. The jury refused, were found in contempt of court, and imprisoned. WILLIAM PENN & WILLIAM MEAD, THE TRIAL OF WILLIAM PENN AND WILLIAM MEAD AT THE OLD BAILEY, 1670 (Headley Bros. 1908) (providing an account of the trial, from the perspective of the accused). The jurors of Penn's trial petitioned the Court of Common Pleas for a writ of habeas corpus, which granted the writ and ruled that a jury could not be punished for the decisions it reached. See *Bushell's Case*, 124 E.R. 1006 (1671).

reached. At the end of the day, Judge O'Malley concluded, juries put "reasonableness" into the judicial process.

E. Conclusion: Critical Remarks on the Conference and the Future of American Patent Litigation

The German litigation system clearly benefits from efficiently handling patent claims. While the U.S. has made steps towards a broader harmonization with international norms, how much should American patent law be reformed to streamline litigation? As a number of the American panelists pointed out, the experience of the American judicial system is driven by fundamental values that, at times, are diametrically opposed to technical efficiency. Calls for adjudication by eliminating juries in favor of technical judges, relying on the German experience,³² miss the mark for delivering the "justice" expected from the American judicial process.³³ The jury plays a fundamental role in the American judicial culture for a variety of reasons.³⁴ Instead of eviscerating the jury function in patent trials, courts, perhaps under guidelines set by the Federal Circuit, could make more use of special verdict forms to give the juries structure in their role of finders of fact.³⁵ But even this concession toward a technically efficient judicial process begins to erode the traditional power of the jury by transferring the ultimate responsibility of issuing the verdict from the jury to the judge. Despite the criticisms many have raised regarding the ability of the "lay"³⁶ juror to effectively decide complex patent issues, some evidence suggests that the concerns are merely academic arguments.³⁷

³² See, e.g., Ian Keeler, *Is a Jury Composed of People Having Ordinary Skill in the Art? Reasons Why the United States Should Change Its Approach to the Obviousness Question in Patent Litigation*, 21 IND. INT'L & COMP. L. REV. 253, 287–30 (2011).

³³ See John R. Alison, *The Role of Juries in Managing Patent Enforcement: Judge Howard Markey's Opinions and Writing*, 8 J. MARSHALL REV. INTELL. PROP. L. SP. 41, 44–45 (2009). See also Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1449 (2010).

³⁴ See, e.g., Catherine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2393–410 (1990).

³⁵ See, e.g., Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 90–105 (1990); Indraneel Ghosh, *The Road to Transparency: Abolishing Black-Box Verdicts on Patent Obviousness*, 26 BERKELEY TECH. L.J. 171, 190–93 (2011); Kimberly A. Moore, *Juries, Patent Cases, & a Lack of Transparency*, 39 HOUS. L. REV. 779, 797–801 (2002);

³⁶ Whatever that means.

³⁷ See Alison, *supra* note 33, at 44. Judge Markey conducted informal surveys of all sitting trial judges, asking: The percentage of times the judge agreed with a verdict; the percentage of disagreed upon verdicts the judge found "plainly reasonable;" and the percentage of times judicial action was taken where a verdict was not "plainly reasonable." As Alison notes, the results of those inquiries were, roughly and respectively: 90%, 50%, and 50%. These figures imply an unreasonable verdict requiring judicial intervention occurs around 2.5% of the time for all trials. *Id.*

Technical judges alone would do little to improve American patent litigation. Certainly, having patent “experts” on the bench helps refine patent law and the litigation experience. These “experts” can, and often have, shared their knowledge with their colleagues on the bench.³⁸ But these “experts” retain the “generalist” quality that American jurists enjoy in the federal courts. Such a quality begins to be less pronounced with technical judges.³⁹ As Chief Judge Rader’s comments make clear, patents are intimately related to their function in the marketplace. Thus, having a judicial system that can appreciate that relationship is essential if patent protection is to have any real meaning. A “generalist” judge will have frequent exposure to commercial suits and will have a deeper appreciation of the market’s interaction with patents.⁴⁰ Technical judges will have limited exposure to the broader portrait of the judicial landscape in their judicial experience, running the risk of ruling on patent claims in a vacuum of technical or scientific accuracy without regard for the ruling’s impact on the market.⁴¹ Thus, retaining the “generalist” judge is one step in promoting a judicial system beneficial to patent law.

There are, of course, other procedural inefficiencies that increase the cost of patent litigation and serve little purpose in furthering American concepts of justice. To the extent that many of these contributing factors can be controlled through judicial administration, the courts should be, as Judge O’Malley advocated, more aggressive in reigning in abusive behavior. Excessive discovery is the perfect candidate for such judicial administration. Most of the panelists at the conference shared the sentiment that sophisticated parties often know exactly what discovery is needed in order to proceed with a patent dispute. Where parties disagree on the subject, either from inexperience or out of strategic motives, judges can and should play a more active role in deterring that behavior.⁴²

Finally, the broadest concern of harmonization of systems comes down to the ability of patent holders to have a meaningful choice in where they litigate their claims. Forum selection can play a significant role in the overall litigation strategy when a party believes that litigation of its claim in a specific jurisdiction will provide some sort of competitive advantage.⁴³ To the extent that variations between jurisdictions result in different

³⁸ See Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1498 (2012).

³⁹ See Fromer, *supra* note 33, at 1458

⁴⁰ See Gugliuzza, *supra* note 38, at 1459.

⁴¹ See Fromer, *supra* note 33, at 1458 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126–37 (2007) and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, at 391–94 (2012) as examples of such ruling from the Federal Circuit).

⁴² FED. R. CIV. PRO. 16 (allowing for judicial scheduling and management of proceedings before the court).

⁴³ See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 930 (2001) (noting that patent holders consider a variety of factors when choosing a litigation forum).

strategic choices being available to claimants, such behavior is entirely rational. As the American system begins to harmonize internally among the federal circuits and with international norms, the opportunity for claimants—and perhaps agreeable defendants—to choose a particular forum based upon litigation strategies that are uniquely available there decreases. When companies are arguing over extensively technical matters that are of relatively little consequence in the larger scheme of their operations, both will likely be agreeable to efficiencies provided by the German system. But not every claimant—or defendant—will want an efficient, relatively mundane proceeding, especially, as Zacharias emphasized in his remark, when the issue is a “difficult” one. Some parties may perceive a greater likelihood of winning in one country or another.⁴⁴ Some parties, as Judge Meir-Beck’s comments allude to, may have legitimate reasons to gain access to documents held by the opposing side through American discovery processes that would be unavailable in Germany. And some parties may see litigation—or rather, the dramatic production thereof⁴⁵—in the American court system as a marketing opportunity for their product.⁴⁶ Regardless of the motive, allowing parties to maximize their chances of achieving a perceived strategy through the selection of meaningfully different forums should be a sufficiently valid consideration to keep harmonization limited to trimming the excesses in American patent litigation.

⁴⁴ See Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 156 (2008); see also Graham E. Taylor, *Protecting Innovative Technology: Global Patent Strategies: The Big Picture*, 32 CAN.-U.S. L.J. 117, 129 (2006) (describing one strategy of litigating a patent issue in Germany because of perceived advantages that did, indeed, pay off).

⁴⁵ See generally Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 OHIO ST. L.J. 655 (1997) (offering comments and critiques of televising courtroom proceedings, including the televised trial of O.J. Simpson).

⁴⁶ I hold the mildly cynical view that the Apple-Samsung feud is more of a marketing ploy—played out in the drama of a courtroom and motivated by the personalities of the boards of both companies (most notably that of the late co-founder Steve Jobs)—rather than significant legal inquiries. For a summary of the events leading up to litigation and the strategies involved at trial, see Poornima Gupta & Dan Levine, *Analysis: How Apple Overwhelmed Samsung’s Patent Case Tactics*, REUTERS (Aug. 27, 2012), <http://www.reuters.com/article/2012/08/27/us-apple-samsung-legal-idINBRE87Q02K20120827>.