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Apple v. Samsung: Is it Time to Change our Patent Trial System?

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Comments

Apple v. Samsung: Is it Time to Change our Patent Trial System?

*Sanjeev Bajwa**

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I. INTRODUCTION

Recent legal headlines have prominently featured the sensational case of *Apple v. Samsung*.¹ On August 24, 2012, a jury in the United States District Court for the Northern District of California ruled that Samsung infringed on numerous Apple patents and ordered the foreign company to pay over \$1 billion in damages.² The outcome of the case is far from simple and has been widely debated given the complexity of Patent Law.³ Given this complexity, why is patent law being decided by a jury of laypeople, who are non-experts in the technological or legal fields, even when such decisions involve huge sums in damages awards?⁴

The corporations involved in this lawsuit are not strangers to the global marketplace, as Apple and Samsung account for approximately 46% of the global smartphone market combined.⁵ This equates to roughly 78 million smartphones sold in one fiscal quarter.⁶ The dispute between Apple and Samsung has resulted in multi-country litigation.⁷

The U.S. trial primarily revolved around seven Apple patents, specifically three utility patents and four design patents.⁸ The three utility patents were as follows: patent '381, which includes Apple's list scrolling and bounce-back feature when the user gets to the bottom of a page; patent '163, which includes the tap-to-zoom feature where a user can tap on a particular text and the device will zoom to that text body; and patent '915, which includes the programming interfaces used for the bounce-back and tap-to-zoom features.⁹ The design patents are: patent '889, '087, and '677, which include the ornamental designs of the

1. See generally *Apple, Inc. v. Samsung Electronics Co.*, 678 F.3d 1314 (Fed. Cir. 2012).

2. Vince Font, *Apple v. Samsung II: It's Not Over Yet*, TECHNOLOGY GUIDE (Sept. 4, 2012), <http://www.technologyguide.com/default.asp?newsID=5172>.

3. See, e.g., Robert P. Merges & Richard R. Nelson, *On The Complex Economies Of Patent Scope*, 90 Colum. L. Rev. 839, 839-844 (1990) (illustrating one of the many complex fronts of Patent Law and its economics).

4. See Jeff John Roberts, *3 Reasons Juries Have No Place in the Patent System*, GIGAOM.COM (Aug. 27, 2012, 4:11 PM), <http://gigaom.com/2012/08/27/3-reasons-juries-have-no-place-in-the-patent-system/> (listing several reasons why *Apple v. Samsung* should not have appeared in front of a jury).

5. *Samsung Leads Global Smartphone Market*, UNIFIED COMMUNICATIONS STRATEGIES (Nov. 18, 2012), <http://www.ucstrategies.com/unified-communications-newsroom/samsung-leads-global-smartphone-market.aspx>.

6. *Id.* (adding the total sales of Samsung and Apple, 55 and 23 million respectively).

7. See Steven J. Vaughan-Nichols, *Apple's Worldwide War on Samsung and Android*, ZDNET (Nov. 30, 2011, 1:09 AM), <http://www.zdnet.com/blog/open-source/apples-worldwide-war-on-samsung-and-android/9945>.

8. Dr. R. Keith Sawyer, *Apple Wins Patent Case, Innovation Loses*, HUFFINGTONPOST.COM (Aug. 29, 2012, 11:39 AM), http://www.huffingtonpost.com/dr-r-keith-sawyer/apple-wins-patent-case_b_1834603.html.

9. Nilay Patel, *Apple v. Samsung: Inside a Jury's Nightmare*, THE VERGE (Aug. 23, 2012, 10:31 AM), <http://www.theverge.com/2012/8/23/3260463/apple-samsung-jury-verdict-form-nightmare>.

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iPhone and iPad; and patent '305, which covers the graphical user interface of the home screen or a portion of the home screen.¹⁰

Samsung in turn contended that Apple infringed upon Samsung's patents covering mobile communications, multitasking, email in a camera phone, and bookmarking photos.¹¹ Ultimately, the U.S. jury decided that Samsung infringed on all but one of Apple's patents, while Apple did not infringe on any of Samsung's patents.¹²

During the ongoing *Apple v. Samsung* litigation in the United States, litigation between the two companies commenced in nine additional countries.¹³ Ultimately however, some of the decisions in foreign jurisdictions were inconsistent with the U.S. decision.¹⁴ This begs the question: is the current U.S. system for handling patent infringement suits flawed? Can we learn something from foreign patent systems and apply it to our system?

Many foreign countries use specialized tribunals to decide patent infringement disputes.¹⁵ Would the United States be better served by doing away with juries as the fact-finder in patent infringement cases and instead, allow a specialized judge to ultimately decide whether an infringement occurred? This change, although radical, will likely result in more efficient trials and less reversal rates at the appellate level.¹⁶

In Part II, this Comment summarizes the present patent system in the United States and illustrates the perceived safeguards in the process of patent litigation. Part III examines the *Apple v. Samsung* jury verdict and the jury's considerations in deciding complex patent law questions. The comments by the jurors and the inconsistencies in the verdict illustrate the flaws in the current patent litigation system. Part IV examines patent litigation in other countries, and presents different methods of handling complex patent litigation. Part V discusses restructuring the U.S. patent trial system using models from various foreign countries and also explores constitutional and practical hurdles that will need to be resolved.

This Comment will conclude by recommending the expansion of the Patent Pilot Program.¹⁷ This will allow all patent trials to be exclusively heard by

10. *Id.*

11. Connie Guglielmo, *The Apple vs. Samsung Patent Dispute: 20 Talking Points*, FORBES.COM (Aug. 21, 2012, 7:36 AM), <http://www.forbes.com/sites/connieguglielmo/2012/08/21/the-apple-vs-samsung-patent-dispute-20-talking-points/>.

12. See Sawyer, *supra* note 8 (listing the patents where infringement was found).

13. Florian Mueller, *List of 50+ Apple-Samsung Lawsuits in 10 Countries*, FOSS PATENTS (Apr. 28, 2012), <http://www.fosspatents.com/2012/04/list-of-50-apple-samsung-lawsuits-in-10.html> (listing the countries where litigation between the two companies happened following April 2011).

14. Jessica Seah, *Some See Bias in Apple-Samsung Verdict*, LAW.COM (Sept. 5, 2012), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202570119537&slreturn=20130116204909>.

15. See *infra* Part IV (discussing and analyzing the main foreign patent litigation systems).

16. See *infra* Part V (discussing the positives in altering the current U.S. patent litigation system).

17. See *infra* Part VI.

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specialist judges who will replace juries. These specialist judges will be aided by technical advisors from the scientific field at issue and legal advisors for patent interpretation in order to ensure more consistent decisions and reduced reversal rates.¹⁸

II. BACKGROUND OF PATENT LAW

A. *What Are Patents?*

“A patent is an intellectual property right granted by the government” to the patent applicant.¹⁹ If granted, it gives the inventor the right “to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.”²⁰ This exclusive right given to the inventor is limited to 20 years.²¹ In exchange for this right, the inventor must disclose their entire invention to the U.S. Patent and Trademark Office, where it becomes public record.²² Disclosure requires that the inventor disclose enough information about their invention so that a skilled person in that field could create the invention based on the inventor’s disclosure.²³

The patent system serves a utilitarian goal “to promote the Progress of Science and the useful Arts.”²⁴ This protection encourages inventors to engage in creative effort.²⁵ In exchange, the public receives new valuable products from the inventors, and may use the details to create new novel inventions that further technological progress.²⁶ However, most patent lawsuit decisions reflect a view that the inventor (patent owner) is entitled to the fruits of his labor.²⁷

The U.S. Patent and Trademark Office (“USPTO”) grants two main types of patents: utility patents and design patents.²⁸ Utility patents are given for any new and useful invention or discovery of a process, machine, article of manufacture,

18. *See infra* Part V (discussing changes to the litigation system also featured in the Patent Pilot Program).

19. *Patents*, THE UNITED STATES PATENT AND TRADEMARK OFFICE (Jan. 26, 2012, 5:25:55 PM), <http://www.uspto.gov/patents/index.jsp>.

20. *Id.*

21. *Patents for Inventors*, THE UNITED STATES PATENT AND TRADEMARK OFFICE (Jan. 26, 2012, 5:25:55 PM), <http://www.uspto.gov/inventors/patents.jsp>.

22. *Patents*, *supra* note 19.

23. *Patent for Inventors*, *supra* note 21.

24. U.S. CONST. art I, § 8.

25. JOHN SPRANKLING & RAYMOND COLLETA, *PROPERTY: A CONTEMPORARY APPROACH* 271 (2d ed. 2012).

26. *Id.*

27. *Id.*

28. *See Patents*, *supra* note 19 (considering the three kinds of patents, of which the third only applies to plants).

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or composition of matter.²⁹ A design patent covers inventions that are new, original and ornamental in design for an object of manufacture.³⁰

The USPTO only grants patents after an examination officer reviews the inventor's patent application and determines that it meets the requirements for a successful patent.³¹ A successful patent application requires that the claimed invention be useful, novel, and non-obvious.³² The invention must have a useful real world purpose and the utility asserted in the application must be credible.³³ The novelty requirement ensures that the invention was not known or used by others, patented, or described in a publication in any country prior to the inventor's patent application.³⁴ Also, the invention cannot be covered by prior art.³⁵ Prior art includes any claimed invention that was patented prior to the filing date of the patent application.³⁶ If the current patent application falls within a previously patented claim, the application fails the novelty requirement.³⁷ Non-obviousness requires that the invention be sufficiently different from prior art and the differences are not considered trivial to a person having ordinary skill in the area of technology related to the applicant's invention.³⁸ If a patent application meets at least the useful, novel, and non-obvious requirements, then the patent may be granted.³⁹

B. How Are Patents Enforced

Once an inventor has been granted a patent, he has the right to enforce his exclusive use of the patent over anyone else.⁴⁰ If the patent holder suspects that another person or company is using the patent unlawfully he may sue for relief in federal court.⁴¹ Damages requested may include injunctive and compensatory damages against the alleged infringer.⁴²

29. *Id.*

30. *Id.* ("Manufacture" as defined in *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)).

31. See *Patent Law*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010, 5:21 PM), <http://www.law.cornell.edu/wex/patent> (explaining the examination process).

32. *Patents for Inventors*, *supra* note 21.

33. *Patent Law*, *supra* note 31.

34. *Id.*

35. *Id.*

36. This prior art definition as stated is based on revised §102 in the America Invents Act. AMY LANDERS, *UNDERSTANDING PATENT LAW* 209 (2d ed. 2012).

37. *Id.*

38. Mary Bellis, *Guide to Patenting and USPTO Patent Applications*, ABOUT.COM, http://inventors.about.com/od/patents/a/patent_novelty.htm (last visited Jan. 4, 2012).

39. See generally *Patent Law*, *supra* note 31 (explaining the requirements for a successful patent application).

40. SPRANKLING & COLLETA, *supra* note 25, at 271.

41. *Patent Law*, *supra* note 31.

42. See Richard V. Westerhoff, *Patent Infringement and Relief for the Patent Owner*, 44 JOM 1, 46 (1992), available at <http://www.tms.org/pubs/journals/jom/matters/matters-9201.html> (discussing various forms

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Patent right enforcement against an alleged infringer is not simple. At trial, the jury must first decide whether the patentee's claim is a valid patent claim, and if so, whether the infringer actually infringed upon the patentee's claim.⁴³ Then the level of damages must be determined.⁴⁴

To prove their case, the patentee must demonstrate that the alleged infringer has violated 35 U.S.C. § 271, which is the case if he "makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent."⁴⁵ To accomplish this, the alleged infringing invention must fall within the scope of the patent claim.⁴⁶ The scope of the patentee's claim is decided during a pre-trial hearing, commonly referred to as a Markman⁴⁷ hearing, or claim construction hearing, where a U.S. District Court judge determines the appropriate meaning of relevant keywords in the patent claim.⁴⁸ This determination of definitions in a patent claim may make a patent either very narrow or very broad in scope.⁴⁹ The importance of this hearing cannot be understated; if the claims in the patent are interpreted broadly, then the alleged infringing invention most likely will fall within the scope of the patent.⁵⁰ However, if the claims are narrowly interpreted then the infringing invention could be considered sufficiently different and thus outside the scope of the patented claim.⁵¹ The Markman hearing often serves as the ultimate determinant as to whether the inventor will have a successful infringement claim against the defendant.⁵²

of relief in patent litigation).

43. See generally Philippe Signore, *On the Role of Juries in Patent Litigation (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 791, § III.A.1.a-f. (Nov. 2001) (discussing the questions of fact left for the jury).

44. See generally *id.*

45. 35 U.S.C. § 271 (2010).

46. Donna M. Gitter, *Should the United States Designate Specialist Panel Trial Judges? An Empirical Analysis of H.R. 628 in Light of the English Experience and The Work of Professor Moore*, 10 COLUM. SCI. & TECH. L. REV. 169, 175 (2009); Arnold Silverman, *Evaluating the Validity of a United States Patent*, 42 JOM 1, 46 (1990), available at <http://www.tms.org/pubs/journals/JOM/matters/matters-9007.html>.

47. *Markman v. Westview Instruments Inc.* is a Supreme Court case deciding whether the interpretation of patent claims is a matter of law or a question of fact. Prior to this decision, juries had the responsibility of deciding what the words used in patent claims meant. Opposing results in cases with similar facts were common, and a perception arose that the outcome of such trials was somewhat arbitrary. Holding judges, not juries, would evaluate and decide the meaning of the words used in patent claims. See Gitter, *supra* note 46, at 176.

48. See J. Michael Jakes, *Using an Expert at a Markman Hearing: Practical and Tactical Considerations*, FINNEGAN (Aug. 2002), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=e3962a13-b898-4102-8fca-171c656a6ed2> (discussing the role of district court judges in determining the meaning of terms in patent construction, or *Marksmen*, hearings).

49. See, e.g., Gitter, *supra* note 46, at 176.

50. Silverman, *supra* note 46.

51. See generally *id.*

52. See generally Jakes, *supra* note 48 (discussing several strategic consideration in *Markman* hearings and emphasizing their importance in determining scope and thus possible outcome).

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An alleged infringer's most commonly employed defense is to attack the validity of the patent itself.⁵³ To prove this, the alleged infringer attempts to show that the USPTO granted the patent in error.⁵⁴ Invalidation can be accomplished by illustrating the existence of prior art, obviousness, lack of novelty, or failure to show best mode.⁵⁵ Experts in the field will generally testify as to the non-obviousness of the invention.⁵⁶ If a patent is held to be invalid, all infringement claims against it are moot.⁵⁷ These issues inevitably lead to very complex litigation with multiple defenses and reexamination of the patent itself.

C. The Court of Appeals for the Federal Circuit

Federal courts hold exclusive jurisdiction over patent laws, which are implemented by federal statute.⁵⁸ Generally, federal court structure is made up of three levels: district courts, which are the trial courts; appellate courts, usually composed of a multi-judge panel; and the United States Supreme Court.⁵⁹

Charged with administering the trial, the district court faces hurdles in handling the patent infringement cases.⁶⁰ Each district court has jurisdiction to hear nearly all types of civil and criminal cases.⁶¹ Therefore, district court judges are generalists, but may develop a certain level of expertise after hearing certain types of cases repeatedly.⁶² In patent infringement cases, the parties have the right to a jury trial.⁶³ Determining the meaning of the patent claims in dispute and instructing the jury falls on the district court judge.⁶⁴ Following these instructions, the jury deliberates on the questions of the validity of the patent, the question of infringement, and the appropriate measure of damages.⁶⁵

The federal appellate court system is divided into 12 regional circuits, which each hear appeals from district courts within their respective regions.⁶⁶ Case

53. See Silverman, *supra* note 46 (emphasizing the first point of contention as the validity).

54. *Id.*

55. See 35 U.S.C. § 102 (2012) (listing conditions to patentability).

56. Silverman, *supra* note 46.

57. *Id.*

58. 28 U.S.C. § 1338 (2006).

59. *Federal Courts' Structure*, U.S. CTS., www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx (last visited Nov. 10, 2013).

60. 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, 228 (Nov. 2010).

61. *District Courts*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx> (last visited Nov. 10, 2013).

62. Woodhouse, *supra* note 60, at 246.

63. Wesley A. Demory, *Patent Claim Obviousness In Jury Trials: Where's the Analysis?*, 6 J. BUS. & TECH. L. 449, 456 (2011).

64. *Markman v. Westview Instruments Inc.*, 517 U.S. 370, 390 (1996).

65. See generally Gitter, *supra* note 46.

66. *Courts of Appeals*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtOfAppeals.aspx> (last visited Nov. 10, 2013).

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precedent does not bind the regional circuits to other circuits' decisions, which results in the possibility of non-uniform decisions and outright conflict.⁶⁷ In an attempt to remedy this issue, Congress passed the Federal Courts Improvement Act ("FCIA") in 1982, which gave the Federal Circuit in Washington D.C. exclusive jurisdiction over patent appeals.⁶⁸ The goal was to have one jurisdiction handle all patent cases, thus eliminating inter-circuit conflicts and enhancing uniformity.⁶⁹ The Federal Circuit is currently comprised of 15 judges.⁷⁰

Parties have one last avenue for review in the face of an adverse judgment - the United States Supreme Court ("Supreme Court").⁷¹ Although not required, the Supreme Court handles all appeals from the Appellate Circuits.⁷² Historically, the Supreme Court rarely hears cases from the Court of Appeals for the Federal Circuit; however, in recent years that trend has changed.⁷³ For example, the Supreme Court has issued opinions on issues ranging from standards of patentability, requirements for proving induced infringement, burden of proof for proving a patent invalid, and the circumstances in which a permanent injunction is warranted.⁷⁴

Before the formation of the Court of Appeals for the Federal Circuit, regional appellate courts handled patent appeals.⁷⁵ As a result, inconsistencies abounded in the decisions.⁷⁶ This could be attributed to the overly complex nature of the subject matter; however, other complex areas of law did not see this great disparity.⁷⁷ When asked about the disparity, patent litigation practitioners stated that the regional circuits took very different views towards patent cases.⁷⁸ These divergence in views, led to rampant forum shopping.⁷⁹ Patent owners had no

67. Eric Hansford, *Measuring the Effects of Specialization with Court Split Resolutions*, 63 STAN. L. REV. 1145, 1152-1153 (2011). Benjamin G. Shatz, *Gimme 5: What Every Lawyer Should Know about Stare Decisis*, 28 L.A. COUNTY BAR ASSOCIATION (April 2008), available at <http://www.lacba.org/showpage.cfm?pageid=9375>.

68. *History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/landmark_22.html (last visited Nov. 10, 2013). George C. Beighley Jr., *The Court of Appeals for the Federal Circuit: Has it Fulfilled Congressional Expectations?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671, 673 (2011).

69. Beighley Jr., *supra* note 68, 673-74.

70. *Study on Specialized Intellectual Property Courts*, INT'L INTELL. PROP. INST. (May 9, 2012), <http://iipi.org/2012/05/study-on-specialized-intellectual-property-courts-published/>.

71. *A Brief Overview of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/briefoverview.aspx> (last visited Jul. 15, 2013).

72. *Id.*

73. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

74. *Id.*

75. Janice M. Mueller & Daniel Harris Brean, *Overcoming the "Impossible Issue" of Nonobviousness in Design Patents*, 99 KY. L.J. 419, 430 (2011).

76. *Id.* at 478.

77. *Id.* at 425.

78. *Panel Discussion: Specialized Courts: Lessons from the Federal Circuit*, 8 CHI-KENT J. INTELL. PROP. 317, 318 (2009) [hereinafter: *Panel Discussion*].

79. *Id.*

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confidence in defending their patent rights without having some predictability in the appellate court decisions.⁸⁰

The situation before the FCIA was best described by then-Senior Federal Circuit Judge, Marion T. Bennett:

Some of the regional circuit courts, expressing strong feelings about the dangers of monopoly and having a low regard for the expertise of the Patent Office, tended not to give any deference to the administrative examination process and invalidated many patents. It thus became important to make sure, where possible, that a patent suit be brought in the least inhospitable forum. This became a high-risk game of forum shopping. If an inventor could not be sure that his patent rights would be respected in the market place, or enforced in the courts, he was deprived of important incentives to research and development. . . This uncertainty plus the high cost of marketing something new contributed to the decline in innovation experienced in the late 1970s, especially for research institutions and technology-based industry.⁸¹

Judge Bennett's concerns address the purpose of the patent system itself, which is promoting the progress of science.⁸² The patent legal system promotes the progress of science by requiring an inventor to disclose the details of his invention in exchange for a monopoly for a specified term.⁸³ Without that assurance of monopoly for a limited term, inventors would have no incentive to make the full disclosures required for a patent application.⁸⁴ Perhaps they would rely upon the principles of trade secrets instead of patent, and the progress of science would be stunted.⁸⁵

D. Federal Appeals Reversal Rate

Since its inception, the Federal Circuit has greatly improved the predictability and reliability of patent litigation in the United States.⁸⁶ Academics have stated, “[t]he court has articulated rules that are consistent with the underlying philosophy of patent law and that are easy for the lower courts and the research community to apply.”⁸⁷

80. *Id.*

81. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

82. *Id.*

83. U.S. CONST. art. I, § 8.

84. *Patent Law*, *supra* note 31.

85. *Patents or Trade Secrets?*, WORLD INTELL. PROP. ORG., http://www.wipo.int/sme/en/ip_business/trade_secrets/patent_trade.htm (last visited Nov. 11, 2013).

86. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study In Specialized Courts*, 64 N.Y.U. L. REV. 1, 4 (1989).

87. *Id.*

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Still the court is not without its critics.⁸⁸ Since the Supreme Court ruled in *Markman v. Westview Instruments, Inc.* that claim construction⁸⁹ was a legal issue for the court to decide, this topic has been extensively commented on by academics and in judicial opinions.⁹⁰ Between the years of 1996-2003, the Federal Circuit reversed between 34.5% of all claim construction issues from district courts.⁹¹ Claim construction is difficult to decipher because patent lawyers purposely write claims broadly to cover as many future variants as possible.⁹² Furthermore, claims are not interpreted under a reasonable person standard but, from the perspective of “one of ordinary skill in the art to which the patent pertains.”⁹³ This standard requires the judge to have a clear understanding of the technology involved in the invention.⁹⁴

As Judge Plager of the Federal Circuit describes:

The way the language of the claims is construed is often outcome-determinative in a patent-infringement suit. Though there are exceptions, the structure of the accused device usually is not hard to determine; the question is always whether the claims read on, i.e., cover, that structure. So reading claims is an art of sorts, involving half technology and half linguistics.⁹⁵

For many trial judges, the lack of technology and legal experience with patent cases often leads to misunderstanding the claim itself.⁹⁶ The average federal judge is likely to see only one patent case go all the way to trial over a seven-year period.⁹⁷ This infrequency leads to a higher than normal reversal rate at the appellate level.⁹⁸ Specialist appellate-level courts tend to rely on the trial courts for matters of fact-finding.⁹⁹ “[A]s a consequence, certainty and predictability are sacrificed, even though the Federal Circuit was set up to create certainty and predictability.”¹⁰⁰ Having a specialized court so late in the process hinders, rather than promotes, predictability and certainty in the outcome of the dispute.¹⁰¹

88. *Id.* at 11.

89. *See supra* Part II.B.

90. Gitter, *supra* note 46, at 173.

91. *Id.* at 176.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; S. Jay Plager, *Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems*, 2001 U. ILL. L. REV. 69, 71.

96. Plager, *supra* note 95.

97. *See* 152 CONG. REC. H7852 (daily ed. Sept. 28, 2006). Gitter, *supra* note 46, at 176.

98. Gitter, *supra* note 46, at 176.

99. *Panel Discussion*, *supra* note 78, at 321.

100. *Id.* at 325.

101. *Id.*

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In response to these concerns, on January 4th, 2011, Congress created the “Patent Pilot Program (Patent Program).”¹⁰² The Patent Program is a 10-year project designed to specially train a select group of judges in the participating districts to hear and manage patent cases.¹⁰³ The participating districts will select a group of judges to hear patent cases.¹⁰⁴ When a patent case is initially filed in federal court, it is randomly assigned to a judge using the court’s calendar system.¹⁰⁵ If the assigned judge is not a selected patent judge, the judge may decline to hear the case¹⁰⁶ and the case is then reassigned to one of the selected patent judges.¹⁰⁷ The goal of this system is to give more experience to the selected patent judges, thereby resulting in better claim construction and more efficient jury trials.¹⁰⁸

Lawyers representing their clients are presumably highly specialized patent attorneys with some form of technical training in their respective fields.¹⁰⁹ The Patent Pilot program is an effort by Congress to train judges to handle the nuances of patent cases.¹¹⁰ On the other hand, there is no requirement that the jury possess a specific level of legal or technical expertise.¹¹¹ It is debatable whether the jury would be able to understand the legal nuances of patent law and the technical theories presented to render a verdict based only on the legal issues and the relevant facts of the case.¹¹²

E. Role of the Jury

Many experts argue that lay juries may not be able to understand issues and evidence in complex scientific or technical cases.¹¹³ Chief Justice Burger stated “the masses of complicated technical information. . .combined with the often difficult legal issues involved, strain the abilities of the juries to find facts competently.”¹¹⁴ Studies have established that the memory and comprehension

102. *The Patent Program Takes Off Around the Country*, IP LAW ALERT (Oct. 20, 2011), <http://www.iplawalert.com/2011/10/articles/patent-1/the-patent-pilot-program-takes-off-around-the-country/>.

103. *Id.*

104. *Id.*

105. *Id.*; Susan Willett Bird, *Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475, 475-476 (1974-1975).

106. *The Patent Program Takes Off Around the Country*, *supra* note 102.

107. *Id.*

108. Gitter, *supra* note 46, at 171.

109. Jennifer F. Miller, Abstract, *Should Juries Hear Complex Patent Cases?*, 4 DUKE L. & TECH. REV. ¶ 1 (2004).

110. *The Patent Program Takes Off Around the Country*, *supra* note 102.

111. *Juror Qualifications, Exemptions and Excuses*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/JuryService/JurorQualificaitons.aspx> (last visited Nov. 12, 2013).

112. Miller, *supra* note 109, at ¶ 1.

113. John W. Wesley, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 659, 684 (1984), available at <http://scholarship.law.wm.edu/wmlr/vol25/iss4/8/>.

114. LeRoy L. Kondo, *Untangling the Tangled Web: Federal Court Reform Through Specialization for*

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skills of traditional lay jurors in complex cases are inadequate because lay people tend to remember general impressions of cases rather than a logical and coherently organized pattern incorporating specific details.¹¹⁵

Research confirms that lay jurors in complex technology cases tend to evaluate the facts based upon “their own attitudes, values, prejudices, and emotions.”¹¹⁶ A typical jury panel is comprised of citizens with limited education and understanding of science and technology or legal principles.¹¹⁷ Patent infringement cases are usually highly technical and legally complex in nature.¹¹⁸ For instance, in *SCM Corp. v. Xerox Corp.*, which was a fourteen month jury trial involving complex antitrust and patent issues with over \$1.5 billion at stake, the jury’s average education level was tenth grade.¹¹⁹ Meanwhile, in *Polaroid v. Eastman Kodak*, the trial judge concluded that a person with ordinary skill in the trade in question would need to possess a Ph.D. in organic chemistry and have several years’ experience in photography systems.¹²⁰ With increasingly complex patents becoming the subject of infringement suits, the concern that juries cannot be competently relied upon to render consistent and fair decisions arises in an alarming manner.¹²¹

To add further confusion to the situation, brand loyalty can also influence an otherwise impartial jury.¹²² According to Robert Kozinets, a marketing professor at York University, “brand communities” such as Apple’s product line are replacing religions or neighborhoods as a source of personal identity.¹²³ That sense of loyalty often leads to people to protect that brand.¹²⁴ When the sense of loyalty and protection interferes with the impartiality required from a jury, it spells disaster for constitutional protections, which often end up being discarded.¹²⁵

To illustrate, the *Apple v. Samsung* trial took place in Apple’s backyard, Silicon Valley, against Samsung, a foreign competitor.¹²⁶ When asked in an interview after the verdict was reached, the jury foreman Velvin Hogan stated

Internet Law and Other High Technology Cases, 2002 UCLA J.L. & TECH. 1, 31.

115. *Id.* See also MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 45-46 (1987).

116. Kondo, *supra* note 114, at 1.

117. *Id.* at 1.

118. See *supra* Part II.B.

119. Michael A. Sartori, *An Economic Incentives Analysis of the Jury’s Role in Patent Litigation*, 79 J. PAT. & TRADEMARK OFF. SOC’Y 331, 332 (1997).

120. *Polaroid Corp. v. Eastman Kodak Co.*, 641 F. Supp. 828, 852 (1986). Sartori, *supra* note 119, at 332.

121. See Kondo, *supra* note 114, at ¶ 1.

122. Roberts, *supra* note 4.

123. *Id.*

124. *Id.*

125. *Id.*

126. Seah, *supra* note 14.

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that the jury wanted to send a message to Samsung.¹²⁷ It can be gleaned from this remark that the jury was more concerned with setting the foreign defendant straight, rather than parsing harder technical questions regarding Apple's patent coverage.¹²⁸

The oversimplification of patent infringement claims raises additional concerns. Juries are often swayed by the "he's a copycat" approach put forth by plaintiff's counsel.¹²⁹ During the trial, Apple presented its case-in-chief in the form of an easy-to-follow narrative, which can be summed up as, "that's my idea. He took it and pretended it was his."¹³⁰ Samsung however, was tasked with explaining to the jury that even though Apple had patents, Samsung was not infringing because the patents were invalid in the first place.¹³¹

As stated earlier, a common defense in a patent infringement suit is the defendant's claim that the patentee's patent is invalid.¹³² If it is found to be invalid then there can be no infringement since there are no exclusive patent rights in the first place.¹³³ Apple is claiming that Samsung stole its ideas, while Samsung is stating that it may have stolen Apple's ideas but those ideas were not illegal to steal in the first place.¹³⁴ To the jury, Samsung's arguments easily sounded stealthy and guilty, while Apple's arguments seemed "crisp and clean."¹³⁵ Thus, the possibility of the jury being swayed to punish the copycat is an expected consequence.

Judge Posner once said, "[p]atent plaintiffs tend to request trial by jury because they believe that jurors tend to favor patentees, believing that they must be worthy inventors defending the fruits of their invention against copycats."¹³⁶ Many infringement defenses are based upon the indirect theory that the defendant is innocent because the plaintiff's charge is based on an invalid patent and therefore their invention should not be immune from copying.¹³⁷ This theory is much harder for a jury to follow than the simpler narrative put forth, where the plaintiff distorts patent theory and reverts to the simple he copied my invention approach.¹³⁸

127. Dan Levine, *Jury Didn't Want To Let Samsung Off Easy In Apple Trial: Foreman*, REUTERS (Aug. 26, 2012, 1:21 AM), <http://in.reuters.com/article/2012/08/25/us-apple-samsung-juror-idINBRE87O09U20120825>.

128. Roberts, *supra* note 4.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See supra* Part II.B.

133. *See supra* Part II.B.

134. Roberts, *supra* note 4.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

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Experts have long called for the use of blue ribbon juries for complex cases such as patent infringement.¹³⁹ A blue ribbon jury panel is a jury consisting of members within the scientific community who can comprehend the technological concepts at issue in the case.¹⁴⁰ However, blue ribbon juries may not solve all of the problems facing the system.¹⁴¹ Blue ribbon jurors may have a better understanding of the scientific evidence presented but, without understanding trial procedures or the nuances behind patent infringement, these jurors may be no more competent in judging expert witnesses or determining the weight of scientific opinion on certain issues.¹⁴²

III. IS THE PATENT TRIAL SYSTEM FLAWED?

A. *The Apple v. Samsung Jury*

A nine-person jury decided the *Apple v. Samsung* case, where only one member had prior experience with patents.¹⁴³ Among the nine-person jury, four owned a smartphone and three owned tablets.¹⁴⁴ However, this jury did not consist of tech novices either.¹⁴⁵ Five of the nine jurors worked for tech companies and one member of the jury was a patent holder.¹⁴⁶ Even with the apparent exposure to technology, this jury was tasked with a verdict form that included 700 distinct questions regarding patent infringements from both parties.¹⁴⁷ The obvious question that comes to mind is how did the jury answer the long list of questions in such a short period of two and half days?¹⁴⁸ This leads many people in the tech and legal community to wonder if the jury really performed their duty responsibly and accurately.¹⁴⁹

The first issue is whether the jury was intellectually capable of understanding the jury instructions or whether the jury instructions themselves were so overwhelming that no reasonable jury could accurately decide upon it. Judge

139. Gitter, *supra* note 46, at 172.

140. *Blue Ribbon Jury*, LEGAL INFOR. INST. (Aug. 19, 2010, 5:11 PM), http://www.law.cornell.edu/wex/blue_ribbon_jury.

141. Joseph Sanders, *The Benedectin Litigation: A Case Study In The Life Cycle Of Mass Torts*, 43 HASTINGS L.J. 301, 369-371 (1992).

142. Wesley, *supra* note 113, at 684.

143. Greg Sandoval, *How Qualified Is the Apple-Samsung Jury? We Found Out*, CNET (Aug. 24, 2012, 2:52 PM), http://news.cnet.com/8301-13579_3-57499944-37/how-qualified-is-the-apple-samsung-jury-we-found-out/.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Sandoval, *supra* note 143.

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Lucy Koh¹⁵⁰ spent a great deal of time screening a large pool of potential jurors by asking various questions regarding their occupation, gadgets owned, knowledge of the legal and patent system, and whether they knew anyone who worked at either company.¹⁵¹ The result was a jury that was well educated, consisting of six college graduates and three with post-graduate degrees.¹⁵² One could argue that this jury qualifies as a blue ribbon jury based on their experience in the hi-tech industry and their education level.¹⁵³

The verdict form given to the jury was a complex one.¹⁵⁴ The jury was tasked with making decisions on several patents across different products.¹⁵⁵ For example, in order to determine whether Samsung infringed on one of the seven Apple patents, the jury needed to first decide whether the Apple patents are valid and were not the subject of prior art.¹⁵⁶

Prior art is generally defined as an invention that has been made public, prior to the filing of the patent in question.¹⁵⁷ If prior art exists on the proposed patent, then it is deemed to be an invalid patent.¹⁵⁸ The question of prior art is difficult.¹⁵⁹ Since most inventions are derived from existing ones, a new patent must have novel attributes that are not the same as those derived from existing inventions.¹⁶⁰ If the jury does decide that the patent is not disqualified by prior art, then it is a valid patent that holds protections from infringement.¹⁶¹

As discussed previously, distinction from prior art is not the only qualification required to prove a valid patent.¹⁶² The novel feature of the patent must also be non-obvious.¹⁶³ The obviousness question must be determined in light of the patent filing date;¹⁶⁴ meaning that the invention must have been non-

150. Judge Lucy Koh, U.S. district court judge who presided over the Apple Samsung trial. *Samsung Electronics Co.*, 678 F.3d at 1314.

151. Sandoval, *supra* note 143.

152. *Id.*

153. *Blue Ribbon Jury*, *supra* note 140.

154. James Niccolai, *Quick Verdict in Apple Trial Doesn't Mean Jury Shirked Its Duty*, *Expert Says*, PCWORLD (Aug. 24, 2012, 7:30 PM), http://www.pcworld.com/article/261441/quik_verdict_in_apple_trial_doesnt_mean_jury_shirked_its_duty_expert_says.html.

155. *Id.*

156. Patel, *supra* note 9.

157. Gene Quinn, *What Is Prior Art?*, IPWATCHDOG (Oct. 2, 2010, 12:13 PM), <http://www.ipwatchdog.com/2010/10/02/what-is-prior-art/id=12677/>.

158. *Id.*

159. *Id.*

160. *See id.*

161. *See id.*

162. *See supra* Part II.B.

163. *See supra* Part II.B.

164. Leonid Kravets, *Samsung v. Apple and the Obviousness Standard*, TECHCRUNCH (Aug. 27, 2012), http://techcrunch.com/2012/08/27/samsung-v-apple-and-the-obviousness-standard/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Techcrunch+%28TechCrunch%29.

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obvious at the time the invention was made.¹⁶⁵ This may qualify some of Apple's patents, such as the double-tap to zoom or the bounce-back feature, as non-obvious; but some scientific experts wonder how the jury could find non-obviousness in Apple's designs patents such as the rectangular shape with rounded corners for the iPhone.¹⁶⁶

Next, the jury needed to decide whether Samsung's products infringed upon Apple's patents.¹⁶⁷ To accomplish this, the jury looked at what level of protection the Apple patents were afforded and whether the Samsung products incorporated the protected Apple patents.¹⁶⁸ If the jury found that there was infringement by Samsung, then the jury must determine the amount of monetary damages that the infringement inflicted on Apple and how much should be awarded to Apple to remedy this infringement.¹⁶⁹

In an interview, juror Manuel Ilagan spoke about the many heated debates the jury had over the issues.¹⁷⁰ Among the issues discussed on the first day of deliberation was whether the Apple patents were valid and not disqualified by prior art.¹⁷¹ Many jurors were initially skeptical that patents regarding a tablet with round edges could not be disqualified with prior art.¹⁷²

According to Ilagan, the jury leaned heavily on Velvin Hogan: "[h]e had experience. He owned patents himself . . . so he took us through his experience."¹⁷³ However, the jury instructions from Judge Koh clearly define the duty of the jury to include:

[T]o find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.¹⁷⁴

The question arising from Ilagan's statement is whether the jury decided the case based solely on the evidence and applied the law as Judge Koh gave it to

165. *Id.*

166. Sawyer, *supra* note 8.

167. Patel, *supra* note 9.

168. *See generally id.*

169. *Id.*

170. Greg Sandoval, *Exclusive: Apple-Samsung Juror Speaks Out*, CNET (Aug. 25, 2012, 9:34 AM), http://news.cnet.com/8301-13579_3-57500358-37/exclusive-apple-samsung-juror-speaks-out/.

171. *Id.*

172. *See id.*

173. *Id.*

174. Final Jury Instructions at 8, *Apple Inc. v. Samsung Electronics Co.*, 768 F. Supp. 2d 1040 (N.D. Cal. 2011).

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them or whether they were swayed by outside influences, such as Mr. Hogan's personal patent experience.¹⁷⁵

Ilgan goes on to admit that the jury actually skipped the prior art question and moved on to the infringement questions.¹⁷⁶ By moving on to the question of infringement by Samsung, many experts wonder if the jury simply assumed that Samsung must have infringed without actually answering the question of whether Apple should be protected in the first place.¹⁷⁷ If Apple did not actually have a valid patent, then questions about infringement by Samsung would be moot.¹⁷⁸ Since the jury decided to move past the question of prior art, it shows that the jury actually felt that Apple had valid patents and decided that they would justify that conclusion by finding that there was no prior art later.¹⁷⁹ This decision runs counter to the jury instructions, as the jury does not appear to be using the admissible evidence presented at trial to justify their decision.¹⁸⁰ However, the skipping of patent validity could have been a product of the structure of the jury form itself. Jury instructions and jury forms are the product of both plaintiff's and defendant's counsel.¹⁸¹ In this case, issues regarding Apple's patents were structured in order from infringement by Samsung, validity of Apple's patents, and then damages to be awarded to Apple.¹⁸² This structure allows the jury to address the seemingly easier issue of infringement before the tougher issues of validity in light of prior art and non-obviousness theories.¹⁸³

The jury found that six of the seven Apple patents were valid¹⁸⁴ including patent '381, the bounce-back feature.¹⁸⁵ Two months after the trial, the USPTO declared in a non-final office action that claim nineteen in patent '381 (bounce-back feature) was invalid based upon prior art.¹⁸⁶ Although a non-final rejection is not yet binding and Apple has the ability to respond to the USPTO's rejection and amend their patent claim, it does raise questions regarding the jury's competence, since they concluded the patent was valid.¹⁸⁷

175. Sandoval, *supra* note 170.

176. *Id.*

177. Pamela Jones, *Jury In Apple v. Samsung Goofed, Damages Reduced—uh oh. What's Wrong With This Picture?*, GROKLAW (Aug. 25, 2012, 11:30 AM), <http://www.groklaw.net/articlebasic.php?story=2012082510525390>.

178. *See id.*

179. *Id.*

180. *Id.*

181. Patel, *supra* note 9.

182. *See generally id.*

183. *See generally id.*

184. Sawyer, *supra* note 8.

185. Florian Mueller, *Patent Office Tentatively Invalidates Apple's Rubber-Banding Patent Used In Samsung Trial*, FOSS PATENTS (Oct. 23, 2012), <http://www.fosspatents.com/2012/10/patent-office-tentatively-invalidates.html>.

186. *Id.*

187. *706 Rejection of Claims[R-5]*, USPTO (Jan. 26, 2012, 5:25:55 PM), <http://www.uspto.gov/web/offices/pac/mpep/s706.html>; Mueller, *supra* note 185.

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After finishing the questions on infringement, the jury moved to awarding money damages.¹⁸⁸ This whole process of completing the lengthy verdict form took the jury about twenty-one hours.¹⁸⁹ After the jury turned the jury form into the court, Judge Koh returned it back to the jury to correct some glaring inconsistencies.¹⁹⁰ Among the inconsistencies included awarding money damages for patents that the jury previously decided Samsung did not infringe.¹⁹¹ The misapplied damages totaled nearly two million dollars.¹⁹² These glaring mistakes point to the fact that either the jury was going through the verdict form too fast and made simple mistakes, or that by not answering the fundamental questions of Apple's patent validity, the jury had already decided that Apple was right and Samsung was wrong.¹⁹³

The jury in *Apple v. Samsung* was tasked with deciding whether Samsung infringed on Apple's patents.¹⁹⁴ This duty included determining whether Apple held valid patents, whether Samsung infringed upon these valid patents, and how much damages, if any, should be awarded to Apple.¹⁹⁵ As discussed, the *Apple v. Samsung* jury was not free of mistakes.¹⁹⁶ When issues become large and complex, as they did here, juries are not the best method for fact-finding because brand loyalty may cloud the juries' judgment.¹⁹⁷ Furthermore, the sheer complexity of the jury instructions may sway the jury to simply go with their gut first, rather than using the evidence to decide the issues at hand and thus, some changes to the patent trial system should be considered.¹⁹⁸

B. *Outcomes in Other Countries*

While the U.S. jury decided that Samsung infringed on all but one of Apple's patents, courts in other countries did not consistently rule in Apple's favor.¹⁹⁹ It should be noted the foreign cases were not deciding the exact same patent claims as in the U.S. trial.²⁰⁰

188. Sandoval, *supra* note 143.

189. *Id.*

190. Jones, *supra* note 177.

191. *Id.*

192. *Id.*

193. Sandoval, *supra* note 143.

194. Sawyer, *supra* note 8.

195. Patel, *supra* note 9.

196. Jones, *supra* note 177.

197. *Id.*

198. *Id.*

199. Hiroko Tabuchi & Nick Wingfield, *Tokyo Court Hands Win to Samsung Over Apple*, N.Y. TIMES, (Aug. 31, 2012), http://www.nytimes.com/2012/09/01/technology/in-japan-a-setback-for-apples-patent-fight.html?_r=0.

200. *Id.*

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In Japan, the Tokyo District Court ruled that Samsung did not infringe on Apple's patent technology for synchronizing music and videos between devices and servers.²⁰¹ In South Korea, a three-judge panel delivered a split decision, ruling that Apple infringed upon two of Samsung's wireless patents, while Samsung infringed on Apple's patent covering the "bounce-back" scrolling feature.²⁰² In Germany, the courts dismissed claims on both sides regarding the slide to unlock features, denied Apple's preliminary injunction against Samsung over the Apple's bounce-back patent, and ruled that Samsung did not violate Apple's patents covering their touch screen technology.²⁰³ In the United Kingdom, the High Court of Justice, Chancery Division ruled in favor of Samsung in a declaratory judgment that Samsung's Galaxy tablets were not too similar to Apple's iPad.²⁰⁴ One common systematic theme of the foreign court's ruling on these cases is that none of these countries hear patent disputes before juries as the U.S. court system does.²⁰⁵

IV. HOW FOREIGN NATIONS HANDLE PATENT LITIGATION

Seeing that courts in other countries decided these patent issues differently,²⁰⁶ this section will now examine how these other countries handle patent disputes.

A. *Asia Pacific Systems*1. *Japan*

In Japan, the Tokyo High Court established the Intellectual Property High Court of Japan ("IP High Court") in 2005 to serve as a special branch of the High Court, with exclusive jurisdiction over intellectual property matters.²⁰⁷ There are two types of cases that the IP High Court hears: intellectual property appeals for

201. *Id.*

202. Christina Bonnington, *South Korean Court Rules Apple and Samsung Both Owe One Another Damages*, WIRED (Aug. 24, 2012, 2:37 PM), <http://www.wired.com/gadgetlab/2012/08/s-korea-court-rules-damages/>.

203. Jun Yang & Karin Matussek, *Apple Loses German Court Ruling Against Samsung in Patent Suit*, BLOOMBERG (Sept. 21, 2012, 5:19 AM), <http://www.bloomberg.com/news/2012-09-21/apple-loses-german-court-ruling-against-samsung-in-patent-suit.html>.

204. Kit Chellel, *Samsung Wins U.K. Apple Ruling Over 'Not as Cool' Galaxy Tab*, BLOOMBERG (July 9, 2012, 6:35 AM), <http://www.bloomberg.com/news/2012-07-09/samsung-wins-u-k-apple-ruling-over-not-as-cool-galaxy-tablet.html>.

205. Tabuchi & Wingfield, *supra* note 199.

206. *See supra* Part III.B.

207. *History*, INTELL. PROP. HIGH CT., <http://www.ip.courts.go.jp/eng/aboutus/history/index.html> (last visited Nov. 13, 2013).

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patent applications and civil cases related to intellectual property infringement.²⁰⁸ The IP High Court only handles appeals for civil cases.²⁰⁹

Prior to 2005,²¹⁰ Japanese courts followed the German bifurcated system, where accused infringers could challenge the patent rights of a patentee only through invalidation proceedings at the Patent Office.²¹¹ This practice changed based on the Japanese Supreme Court decision of *Fujitsu v. Texas Instruments* in 2000, where the court affirmed that district courts and the High IP Courts could examine the defense of invalidity in cases where the patent at issue is clearly invalid.²¹²

However, this new system has led to unexpected problems with conflicting decisions and re-litigation based on patent validity.²¹³ Invalidity judgments by the High IP Courts are not final because they only bind the parties involved in the suit.²¹⁴ Japanese civil procedure does not have any equivalent to the collateral estoppel doctrine²¹⁵ and therefore, the judgment does not affect non-parties.²¹⁶ Thus, the patentee may sue another alleged infringer based on the same patent that was held invalid in the previous infringement trial.²¹⁷

Other disadvantages in the Japanese system include the inefficiencies inherent with the rotation system of judges and duplicate fact finding.²¹⁸ A judge's term is limited before they are transferred to another division.²¹⁹ This term limitation may hinder the development of expertise in the IP court system and cause delays when another judge must take over cases handled by the outgoing judge.²²⁰ To address these issues, Japanese procedures and the time between proceedings have become faster and shorter.²²¹ This effort to speed up the

208. *Jurisdiction*, INTELL. PROP. HIGH CT., <http://www.ip.courts.go.jp/eng/aboutus/jurisdiction/index.html> (last visited Nov. 13, 2013).

209. *Id.*

210. *History*, *supra* note 207.

211. Toshiko Takenaka, *Comparison of U.S. and Japanese Court Systems for Patent Litigation: A Special Court or Special Divisions in a General Court?* 5 CASRIP SYMP. PUB. SERIES 47, 49-50 (2000), available at <http://www.law.washington.edu/casrip/symposium/number5/pub5atcl6.pdf>.

212. *Id.* at 50.

213. TOSHIKO TAKENAKA, U. OF WASH. SCH. OF L. RES. PAPER NO. 2011-19, MERGING CIVIL AND COMMON LAW TRADITIONS IN THE PATENT VALIDITY CHALLENGE SYSTEM: JAPANESE EXPERIENCES 272 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1957397.

214. *Id.* at 274.

215. When one court has decided an issue of fact or law necessary for that verdict then collateral estoppel precludes re-litigation of that same issue in a different cause of action when one of the parties is an original party in the original cause of action. *Collateral Estoppel Definition*, THE LAW DICTIONARY, FEATURING BLACK'S LAW DICTIONARY 2ND ED., <http://thelawdictionary.org/collateral-estoppel/> (last visited Nov. 13, 2013).

216. TAKENAKA, *supra* note 213, at 275.

217. *Id.*

218. TAKENAKA, *supra* note 211, at 48.

219. *Id.*

220. *Id.*

221. David W. Hill & Shinichi Murata, *Patent Litigation in Japan*, 1 AKRON INTELL. PROP. J. 141, 142 (2007).

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litigation process has resulted in shortening the average deliberation time in district courts from 31.1 months in 1991 to 13.5 months by 2005.²²² Additionally, the efforts have made their average deliberation time roughly on par with the United States (1.12 years).²²³ Increased efficiency in the litigation process, coupled with the higher number of patent cases heard in the IP courts, has led to judges obtaining sufficient experience to confidently preside over the IP matters before them.²²⁴

Other advantages of the Japanese system include the resolution method for legal and factual issues.²²⁵ Patent judges, assisted by former patent examiners, determine both legal and factual issues.²²⁶ With the aid of former patent examiners and technical experts that understand the technology, the IP High Court judges are able to make quality decisions that are accurate and consistent.²²⁷ The technical experts only give a neutral explanation of the technical matters at issue, while the former patent examiners assist judges with patent related matters, such as claim construction and legal scope based on the patent at issue.²²⁸ Armed with complete knowledge of technical details and the patent application examination procedures, the system ensures that the IP judges clearly understand the technology and the law when deciding the scope of a patent claim and whether an infringement has occurred.²²⁹

In contrast with the U.S. system, where law clerks and court aides may assist the judge in understanding the technical matters, the burden of claim construction rests upon the judge's own understanding and experience with patent law.²³⁰ The U.S. legal system could benefit greatly if it implemented the Japanese IP support structure for judges. Having an advisor, such as a former patent examiner, who has direct experience interpreting and evaluating descriptions and claims in patent applications, would increase the quality and consistency in claim construction issues.²³¹ In comparing patent infringement reversal rates between Japan and the United States, it is clear that the United States reverses proportionately more cases than Japan.²³² Although patent infringement reversals

222. *Id.* at 147.

223. *Id.* at 148.

224. *See id.* at 143-49.

225. TAKENAKA, *supra* note 211, at 51.

226. *Id.* at 49.

227. Interview: Toshiaki Iimura, *IP High Court, Japan*, MANAGING INTELL. PROP. (Aug. 15, 2012), <http://www.managingip.com/Article/3075740/Interview-Toshiaki-Iimura-IP-High-Court-Japan.html>.

228. Hill & Murata, *supra* note 221, at 151-52.

229. Interview: Toshiaki Iimura, *IP High Court, Japan*, *supra* note 227.

230. *See supra* Part II.B.

231. *See Interview: Toshiaki Iimura, IP High Court, Japan*, *supra* note 227. *See generally* Hill & Murata, *supra* note 221.

232. Setsuko Asami, *Japan-U.S. Patent Infringement Litigation Comparison: A Visit to the United States Court of Appeals for the Federal Circuit*, 5 CASRIP NEWSLETTER (U. of Wash. Sch. of Law—Center for Advanced Study & Res. on Intell. Prop., Seattle, Wash.), Fall 1998, available at <http://www.law.washington.edu/Casrip/Newsletter/>

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may be caused by a number of factors, in the United States, claim construction based reversals account for a significant percentage of reversals.²³³

2. *South Korea*

South Korea, much like Japan, has a specialized Intellectual Property Tribunal.²³⁴ The Intellectual Property Tribunal's jurisdiction, however, only covers intellectual property rights and the granting of intellectual property rights by the Intellectual Property office.²³⁵ Infringement cases are still heard by the general courts.²³⁶ General courts, like the Seoul Central District Court that decided the *Apple v. Samsung* case, consist of a three-judge panel, which decides both legal and factual issues.²³⁷

Among the key advantages of the Japanese and Korean systems is that the judges serve as the fact finders for determining complex patent claims and determining whether an infringement occurred.²³⁸ A major problem with the U.S. system is the inability of the trial court to resolve complex patent issues.²³⁹ In an attempt to alleviate this problem, the United States allows the Federal Circuit a *de novo* review²⁴⁰ of the patent claim language.²⁴¹ However, this remedy does not address the problem of improper claim interpretation by the trial courts, which is evident by the significant number of claim interpretations that are reversed by the Federal Circuit.²⁴² By adopting experienced IP judges as fact finders at the trial level, it may reduce the number of claim construction errors, and thereby reduce the number of reversals in the Federal Circuit.²⁴³

default.aspx?year=1998&article=newsv5i3asami&+mobile; David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Case*, 107 MICH. L. REV. 222, 249 (2008), available at <http://www.michiganlawreview.org/assets/pdfs/107/2/schwartz.pdf>.

233. See *supra* Part II.D.

234. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

235. *Id.*

236. *Id.*; Ryan Goldstein, *Specialized IP Trial Courts Around the World*, 16 INTL. L. 1, 1 (Sept. 2006).

237. Evan Ramstad & Min Sun Lee, *South Korea Court Says Samsung, Apple Infringed Each Other's Patents*, WALL ST. J., Aug. 24, 2012, 9:19 AM, <http://online.wsj.com/article/SB10000872396390444812704577608242792921450.html>.

238. *Id.*; TAKENAKA, *supra* note 211.

239. TAKENAKA, *supra* note 211.

240. *De novo* review is a form of review where the appeals court holds a trial as if no prior trial was held. TAKENAKA *supra* note 211, at 51.

241. *Id.*

242. *Id.*

243. *Id.* at 51-52.

*Global Business & Development Law Journal / Vol. 27**B. European Countries**1. The United Kingdom*

The United Kingdom holds a long history of patent litigation.²⁴⁴ The United Kingdom's specialization of the court system took root from the Judicature Acts of 1873–75.²⁴⁵ These acts modernized the old system of Common Law and Chancery courts, and combined them into the High Court of Justice (“High Court”).²⁴⁶ Prior to the creation of the High Court, a patent holder seeking relief from infringement would have to bring suit in the common law court to establish validity and infringement and then bring a separate suit in the Chancery court to seek equitable relief in the form of an injunction.²⁴⁷

By creating the High Court, the Court of Chancery division (within the High Court) could now hear patent infringement cases from the start and determine validity, infringement, and whether an injunction was warranted.²⁴⁸ Although these judges had no particular expertise in patent law, they gained experience with the subject matter because there were only a few judges hearing patent matters at the time.²⁴⁹

This system remained largely unchanged until the 1940s.²⁵⁰ In 1946, a Government Committee expressed its concern with the lack of technical expertise possessed by the patent judges, which led to longer trials.²⁵¹ The committee proposed reform where the judges appointed are not only members of the Bar, but also possess “technical or scientific qualifications, at least sufficient to enable him to grasp the broad technical principles of a case without the necessity of extensive preliminary explanation or instruction in the elements of science with which the invention is concerned.”²⁵²

When evaluating the competency of a trial court, most researchers turn to reversal rate statistics as a reliable measure of competency.²⁵³ The overall appellate reversal rate in the United Kingdom of all patent cases was 19% in 2007, lower than any other type of civil action.²⁵⁴ When compared to the overall appellate reversal rate of all civil cases in 2007 (41.9%), one would conclude that

244. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

251. *Id.*

252. *Id.*

253. See Nicole L. Waters, *Civil Trials on Appeal Part 1*, 14 CASELOAD HIGHLIGHTS NAT'L CENTER FOR ST. CTS., Mar. 2007, available at <http://www.courtstatistics.org/Other-Pages/Publications/~media/Microsites/Files/CSP/DATA%20PDF/Vol14Num1CivilTrialsonAppeal1.ashx>.

254. Gitter, *supra* note 46, at 193.

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the patent trial court set the standard for consistently upheld decisions.²⁵⁵ Since most civil trials are bench trials, this data suggests that the specialized IP courts perform better than the generalized civil courts.²⁵⁶

The reversal rate for all U.S. Federal Circuit patent cases between 2000 and 2007 was 21%, while the national average of all U.S. district court decisions was 9%.²⁵⁷ This is slightly twice the national average as compared to the United Kingdom, where patent reversals were less than half their national average.²⁵⁸ However, we must keep in mind that the differences between the two patent systems may affect the reversal rate numbers.²⁵⁹ The United Kingdom requires that the loser pays the winner's litigation fees and expenses, and all trials are before judges, not juries.²⁶⁰ These factors may encourage parties who have relatively weaker cases to settle, thereby shrinking the caseload on the court.²⁶¹ It has been argued that by having a smaller caseload, the trial judges can spend more time on their trials and come to more sound decisions.²⁶² Alternatively, by weeding out the weaker cases, judges are only presented with challenging cases that are more likely to be reversed.²⁶³ Even with the differences between the two litigation systems, the United Kingdom's appeal rate is proportionally lower to its national average than the United States, which indicates that the use of specialist judges to decide both legal and factual issues is more likely to yield consistently upheld results than the current U.S. system.²⁶⁴

2. Germany

The German patent system is commonly referred to as a dual system because different courts handle infringement and validity matters.²⁶⁵ District courts in each state have specialized patent infringement departments to handle patent infringement cases.²⁶⁶ It is not required that patent judges have a technical or science background but, as a result of the high number of infringement actions filed, the judges have become highly competent in adjudicating patent

255. *See id.* at 193.

256. *See id.* at 195-96.

257. Ted Sichelman, *Are Appeals at the Federal Circuit a "Coin Flip"?*, PATENT LAW BLOG (PATENTLY-O) (Apr. 9, 2010), <http://www.patentlyo.com/patent/2010/04/are-appeals-at-the-federal-circuit-a-coin-flip.html>; Gitter, *supra* note 46, at 193.

258. Sichelman, *supra* note 257; Gitter, *supra* note 46, at 193.

259. Gitter, *supra* note 46, at 193.

260. *Id.*

261. *Id.*

262. *Id.* at 194.

263. *Id.*

264. *Id.* at 195.

265. *Study on Specialized Intellectual Property Courts*, *supra* note 70.

266. *Id.*

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infringements, since that is what they work on exclusively.²⁶⁷ The three-judge panel, much like in the United Kingdom, relies on its heavy experience to guide them to consistent results.²⁶⁸

The Federal Patent Court has jurisdiction over the validity of patent rights.²⁶⁹ A party challenging the patentee's right must file a nullity suit with the Federal Patent Court.²⁷⁰ This proceeding is handled by a panel of five judges, three of whom are technical judges, while the other two are legal judges.²⁷¹ This proceeding is adversarial, where the patent claims may be modified during the proceeding.²⁷² Due to the complex nature of the proceeding, the technical judges are crucial in understanding the challenges and the defenses presented.²⁷³

The bifurcated German system does not allow patent invalidity defenses in the District courts.²⁷⁴ Instead, the alleged infringer must bring a parallel suit for nullity in the Federal Patent Court.²⁷⁵ Typically, if the nullity suit has a likelihood of success, the district court will stay the proceedings until the nullity suit has been decided.²⁷⁶ This is advantageous since there is less likelihood of contradictory outcomes; where one party is found to be infringing by the district court and at the same time the Federal Patent Court rules that the infringed upon patent is invalid.²⁷⁷

Application of Germany's system of a panel of experienced or technical judges to the U.S. system seems similar to moving the Federal Circuit panel to the trial level.²⁷⁸ This idea, much like the Japanese system of using former patent examiners and experts, would bring a certain level of technical experience to the bench, while maintaining a high level of legal expertise.²⁷⁹ Having certain members of a judge panel who are experienced in the technical field will alleviate concerns of technical misunderstandings during claim construction and

267. *See id.*

268. *See id.*

269. *Home*, BUNDES PATENT GERICHT, <http://www.bundespatentgericht.de/cms/index.php?lang=en> (last visited Jan. 11, 2013).

270. Goldstein, *supra* note 236, at 3.

271. *Id.* at 3.

272. *See id.* at 3.

273. *Id.* at 5-7.

274. *See Study on Specialized Intellectual Property Courts*, *supra* note 70.

275. *See id.*

276. *Claim Construction in Germany's Bifurcated Patent Litigation System – Setting Things Right*, JENKINS TRADE MARK & PAT. ATT'YS, <http://www.jenkins.eu/pi-autumn-2012/claim-construction-in-germanys-bifurcated-patent-litigation-system.asp> (last visited Nov. 13, 2013).

277. *Id.*

278. *See* Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1303 (2005).

279. *See* Hill & Murata, *supra* note 221, at 151-52.

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scope determination.²⁸⁰ Concerns over “tunnel vision” with specialist judges would be alleviated by the presence of generalist judges on the panel.²⁸¹

V. PRACTICALITY OF IMPLEMENTING INTERNATIONAL FEATURES
TO THE U.S. SYSTEM

The four countries discussed above have implemented features that include: special patent courts, specialist judges with some level of scientific or technical experience, and a patent examiner and technical aides to assist presiding judges.²⁸² All of these features are successful in their respective legal systems.²⁸³ The question remains whether importing these features into the U.S. legal system would be practicable and successful.²⁸⁴ Concerns include the effort and cost needed to implement these features, the availability of enough qualified judges in the nation, and the overall constitutional barriers to implementing a nonjury trial system.²⁸⁵

A. *Specialist Judges, Aides, and Courts*

The qualifications for specialist judges appointed in countries such as the United Kingdom, Japan, and Germany vary from requiring a technical or scientific background, to formal practice as a patent attorney, to experience gained while presiding over a patent only court.²⁸⁶ The implementation of the 10-year Patent Pilot Program shows that Congress has already identified a need for specialist judges at the trial level.²⁸⁷ The Pilot Program’s goal seeks to elevate the level of patent trial experience to a select group of judges by using a secondary patent pool of judges in select districts.²⁸⁸ It is distinguishable from foreign systems because it still leaves open the opportunity for a generalist judge to take a patent case if he chooses not to defer it to the patent pool of judges.²⁸⁹ Implementing specialist judges as the primary adjudicator for all patent cases would certainly be feasible where the Patent Pilot Program is already

280. See Damle, *supra* note 278, at 1303-04.

281. *Id.* at 1308.

282. See *supra* Part IV.

283. See *supra* Part IV.

284. Damle, *supra* note 278, at 1310.

285. See *id.*; see Miller, *supra* note 109, at ¶ 1. See generally *The Patent Program Takes Off Around the Country*, *supra* note 102.

286. See *supra* Part IV.

287. Gitter, *supra* note 46, at 171.

288. *Id.* at 172.

289. *Id.* at 196-97.

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established.²⁹⁰ It would only require immediate assignment of patent cases to the patent pool of judges.²⁹¹

The Japanese system utilizes two different types of judicial aides; technical aides for the subject matter and former patent examiners for patent related issues.²⁹² Currently, federal district court judges employ law clerks to assist them;²⁹³ typically, law clerks hired by judges are recent graduates.²⁹⁴ Employment of special law clerks with scientific knowledge and patent examination experience would certainly be plausible.²⁹⁵ One potential issue is the large range of different technical subject matters possible in any one patent dispute.²⁹⁶ Hiring assistants to cover such a large spectrum of subject matter could become very costly.²⁹⁷ One possible solution would be not to assign any one technical expert to a particular judge, but to have a pool of experts that can be utilized by judges across the country.²⁹⁸ This would at least ensure that U.S. judges, just like Japanese IP Judges, could rely upon an impartial expert to aide in their understanding of the nuances behind the science at issue.²⁹⁹

The United Kingdom, Germany, and Japan have special IP courts that have exclusive subject-matter jurisdiction.³⁰⁰ As stated above, implementation of specialized IP courts in the United States could be very costly and would require special districting to meet the demands of various regions.³⁰¹ Using current district maps as a guide for a special court would lead courts in patent heavy jurisdictions, like the Northern District of California and the Eastern District of Texas, to carry a heavy caseload.³⁰² While other districts where patent cases are rarely filed would have an extremely light load.³⁰³ This disparity would result in a waste of resources.³⁰⁴

Another option would be to remove jurisdictions based on geographic location and allow jurisdictions based on subject-matter, by having various courts

290. *See id.*

291. *The Patent Program Takes Off Around the Country*, *supra* note 102.

292. *See supra* Part IV.A.1.

293. *Judicial Administration and Organization: Law Clerks*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/admin_03_11.html (last visited Nov. 13, 2013).

294. *Id.*

295. Lawrence M. Sung, *Strangers in a Strange Land*, 17 A.B.A. BUS. L. TODAY, (Mar./Apr. 2008), <http://apps.americanbar.org/buslaw/blt/2008-03-04/sung.shtml>.

296. *See Fields of Science*, MISTUPID.COM, <http://mistupid.com/science/fields.htm> (last visited Nov. 13, 2013).

297. Sung, *supra* note 295.

298. Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1677 (1998).

299. *See supra* Part IV.A.1.

300. *See supra* Part IV.

301. *See Damle*, *supra* note 278, at 1273-75.

302. Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q. J. 401, 405 (2010).

303. *Id.* *See Damle*, *supra* note 278, at 1284.

304. *See Damle*, *supra* note 278, at 1275-76.

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around the country handle different areas of patent law.³⁰⁵ However, one major drawback is the effect this would have on current civil procedure jurisdictional statutes when cases allege multiple issues in both patent and non-patent law.³⁰⁶ One solution suggests separating out all non-patent issues into a separate case.³⁰⁷ However, this would increase legal costs dramatically.³⁰⁸ The implementation of special IP courts at the trial level carries a heavy burden of cost,³⁰⁹ possible redistricting,³¹⁰ and addressing issues of jurisdiction for any non-patent related issues.³¹¹

Among the multiple proposals, the most practicable for specialization are: 1) the assignment of all patent related cases only to specialist judges within the Patent Pilot Program,³¹² 2) the hiring of specialized law clerks with prior patent examination experience,³¹³ and 3) the creation of a technical pool of unbiased experts to aid the judiciary.³¹⁴

B. Constitutional Hurdles

The above suggestions are met with substantial Constitutional hurdles.³¹⁵ The Seventh Amendment guarantees a trial by jury for “suits at common law.”³¹⁶ In *United States v. Wonson*, Justice Story was attributed with devising the “historical test” used to determine the application of the Seventh Amendment.³¹⁷ The “historical test” asks whether the right to a jury would be given to the type of case in question in English common law in 1791.³¹⁸ It has been argued that the since the Court of Common Law traditionally did not hear complex cases and that complex cases were usually heard by the Court of Chancery (without a jury) that the Seventh Amendment does not guarantee a jury trial for complex cases.³¹⁹

Another argument is that the Fifth Amendment right to due process would supersede the Seventh Amendment right to a jury trial if judges would be better suited to hear a case over a lay jury.³²⁰ In this case, the judge must show that he is

305. *Id.* at 1268.

306. *Id.* at 1284.

307. *Id.*

308. *See id.*

309. *See Damle, supra* note 278, at 1284.

310. *See id.* at 1273.

311. *See id.* at 1282-83.

312. *The Patent Program Takes Off Around the Country, supra* note 102.

313. Sung, *supra* note 295.

314. Kondo, *supra* note 114, at 312-13.

315. *See Miller, supra* note 109, at ¶ 4.

316. U.S. CONST. amend. VII.

317. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

318. Miller, *supra* note 109, at ¶ 5.

319. *Id.* at ¶ 11.

320. *Id.* at ¶ 22.

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capable of not only understanding the nuances of patent law but is also better equipped to understand the technical aspects of the subject matter over a jury.³²¹ Of course, this aggressive interpretation of the Fifth Amendment would likely require clarification from the Supreme Court.³²²

Research has shown that lay juries struggle to understand and adequately apply the law in complex cases such as patent infringement.³²³ The *Apple v. Samsung* jury consisted of highly educated jurors with real world experience ranging in the technology industry and even one patent inventor.³²⁴ Their technical acumen may even classify this jury panel as a “blue ribbon” jury.³²⁵ However, even with a competent understanding of the technical issues, this jury was not immune from mistakes in their application of intent and their decisions in awarding damages.³²⁶ If an intellectually sound jury such as this one struggled with balancing the numerous issues and facts against the complex theories of patent law, where is the assurance that any jury is capable enough to decide on complex patent matters? The missteps of the *Apple v. Samsung* jury only highlight the fast-approaching need to reevaluate whether jury trials are the best means for deciding complex patent disputes.³²⁷

VI. CONCLUSION

The legal system of the United States is regarded as one of the most developed and sophisticated legal systems in the world.³²⁸ However, consistent enforcement of patent rights can be problematic because trial judges and lay juries generally do not have the necessary patent law training or technical background to properly apply patent law standards with uniformity.³²⁹ The Federal Circuit has shown that dedicated judges with extensive IP law experience are able to deliver consistent rulings on appeals that come to their court.³³⁰ The issue is whether similar training of trial judges would result in more consistent and proper verdicts. A serious question could be raised about the role of lay juries in complex patent cases.³³¹ As we have seen with the *Apple v. Samsung* jury, which consisted of well-educated people, the idea of blue ribbon jury panels

321. *See id.* at ¶ 44.

322. *Id.*

323. Wesley, *supra* note 113, at 684; Demory, *supra* note 63, at 468.

324. *See supra* Part III.A.

325. *See supra* Part II.E.

326. *See supra* Part III.A.

327. *See generally* Roberts, *supra* note 4.

328. Steven Seidenberg, *Unequal Justice: U.S. Trials High-Income Nations in Serving Civil Legal Needs*, A.B.A. J. L. NEWS NOW (June 1, 2012, 12:50 AM), http://www.abajournal.com/magazine/article/unequal_justice_u.s._trials_high-income_nations_in_serving_civil_legal_need/.

329. Goldstein, *supra* note 236, at 1.

330. *See supra* Part II.D.

331. *See supra* Part II.E.

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is not immune from criticism.³³² Looking at the success of foreign patent systems, the implementation of specialist courts with judges as the trier of fact has led to consistently sound results.³³³ The practicality of the matter is that implementing some foreign aspects, such as IP courts with exclusive jurisdiction at the trial level, may be infeasible.³³⁴ However, at least removing juries from trials and implementing specialist judges, aided by technical advisors from the scientific field at issue, and legal advisors for patent interpretation, may bring about less litigation cost and fewer reversal rates.³³⁵ Ultimately, the implementation of a system that precludes the use of a jury may raise a constitutional issue,³³⁶ but the benefits to having a specialized patent trial system would be advantageous.

332. *See supra* Part III.A.

333. *See supra* Part IV.B.1.

334. *See supra* Part V.A.

335. *See supra* Part V.A.

336. *See supra* Part V.B.