

# DRAFT

## KEYNOTE ADDRESS: IS IT TIME TO ABOLISH THE FEDERAL CIRCUIT'S EXCLUSIVE JURISDICTION IN PATENT CASES?

Hon. Diane P. Wood\*

Good afternoon. Let me begin by thanking the Chicago-Kent Law School for the opportunity to share some unconventional thoughts with you about the way in which we have been handling patent appeals for more than 30 years. Whether you think that is a long time or a short time probably depends on how old you are: most of the people who are still in law school were not even born when Congress decided to assign all true patent appeals to the Federal Circuit, and so they will naturally think that we've had this system forever; old-timers like me can remember the previous regime, when the regional circuits handled patent appeals just as they do all other appeals (indeed, when I was a law clerk on the Fifth Circuit, my last assignment was a case concerning *plant* patents!). But either way, we should all be able to agree that there is nothing inevitable about the current system. And so, I'd like to spend my time this afternoon exploring the question whether it is time to abolish the Federal Circuit's exclusive jurisdiction over patent appeals. For those of you simply interested in the bottom-line, I will spare you the suspense: I believe the answer is "Yes." I hope that this does not cause you to think that my topic is so fanciful that you would be better off spending the next twenty minutes or so texting or checking your emails. In fact, as I propose to show you, there are better ways to solve the problems that this branch of the Federal Circuit's exclusive jurisdiction was designed to address, and, at a broader level, our understanding of intellectual property (IP) itself has shifted and deepened since 1982 in a way that pushes us back toward the unification of judicial responsibility for the field as a whole.

As I have already mentioned, the Federal Circuit came into existence in 1982, with the passage of the Federal Courts Improvement Act.<sup>1</sup> That Act gave the new court exclusive jurisdiction over three types of appeals in patent cases: (1) appeals from district courts in cases "arising under" the patent; (2) appeals from decisions of the Patent and Trademark Office's Board of Patent Appeals and Interferences; and (3) appeals from investigations of the International Trade Commission into the importation of goods that allegedly infringe a U.S. patent.<sup>2</sup> This work comprises the largest part of the court's present docket. Yet the Federal Circuit is not a "specialized" court in the same sense as is the Complex Commercial Litigation Division of the Delaware Superior court or the Labor Court in France. Instead, it is a court (like all federal courts) of limited

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\* Chief Judge, U.S. Court of Appeals for the 7th Circuit. These remarks were delivered on September 26, 2013 at the Chicago-Kent Supreme Court IP Review. Copyright © 2013, Chicago-Kent Journal of Intellectual Property, Hon. Diane P. Wood.

<sup>1</sup> Pub. L. No. 97-164, 96 Stat. 25 (1982).

<sup>2</sup> *Id.*

jurisdiction, but its areas of competence are more tightly defined. Perhaps because it was worried about “over-specialization,” or perhaps more simply because it needed a home for the other idiosyncratic cases that had belonged to the Court of Customs and Patent Appeals and the old Court of Claims (the Federal Circuit’s predecessors), Congress also assigned to the Federal Circuit responsibility for various other types of cases: Tucker Act cases, unfair trade cases, government contract cases, and cases concerning federal workers, to name a few. In fact, fifty-seven percent (57%) of the court’s current docket is not patent-related: it is, instead, entertaining appeals from tribunals, such as the Court of Federal Claims, the Merit Systems Protection Board, and the Court of Appeals for Veterans Claims.<sup>3</sup> Whether it has actually been helpful to assign this hodgepodge of cases to one court—the Federal Circuit—is debatable.<sup>4</sup>

Before it is possible to make any judgments on that question, we need to go back in history and review why Congress chose to give the Federal Circuit exclusive jurisdiction over patent appeals in the first place. The standard account focuses on three main goals.

The “central purpose” of the Act, according to the House Judiciary Committee’s report on the Federal Courts Improvement Act, was “to reduce the widespread lack of *uniformity* and uncertainty of legal doctrine that exist[ed] in the administration of patent law.”<sup>5</sup> Uniformity has its allure in most areas of law. As long ago as 1816, Justice Story invoked the “importance, even necessity of uniformity of decisions throughout the whole United States” in his opinion in *Martin v. Hunter’s Lessee*.<sup>6</sup> But, Congress saw the lack of uniformity in patent law as a particular concern. The lack of “nationally binding decisions” on issues of patent law, it believed, was giving rise to “widespread” forum-shopping. This, in turn, made “effective business planning [im]possible,” since “the validity of a patent [might depend] upon geography (*i.e.*, the accident of judicial venue).”<sup>7</sup> Some more recent studies have questioned whether disuniformity and forum-shopping were really such great problems in the 1970s,<sup>8</sup> but this, at least, is the standard account. As the country emerged from a period of economic stagnation, Congress was persuaded that it was necessary for the courts to speak in one voice in order to maintain and foster the United States’ competitive advantage in innovation and especially in the burgeoning technology fields.<sup>9</sup>

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<sup>3</sup> Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1461 (2012).

<sup>4</sup> See Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. U. L. REV. 1619, 1642 (2007).

<sup>5</sup> Gugliuzza, *supra* note 3, at 1456 (emphasis added).

<sup>6</sup> 14 U.S. 304, 347–48 (1816).

<sup>7</sup> H.R. REP. NO. 97-312, at 20–21 (1981), *quoted in* Nard & Duffy, *supra* note 3, at 1620.

<sup>8</sup> See Cecil D. Quillen, Jr., *Innovation and the U.S. Patent System*, 1 VA L. & BUS. REV. 207, 228 (2006).

<sup>9</sup> Gugliuzza, *supra* note 3, at 1455–57; *see also* Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581, 615 (1992).

Of course, uniformity says nothing about *quality or accuracy*. A broken clock tells the time with impeccable uniformity: the only problem is that it is right only twice a day. (I realize the delicacy of saying that an appellate court reaches the “right” or “accurate” answer; I use the terms here in the same way that Professor Rochelle Cooper Dreyfuss did: as a description of “whether the law ... is ... responsive to the philosophy of the Patent Act, to national competition policies, and to the needs of researchers and technology users.”<sup>10</sup>). The advocates of the 1982 legislation thought, however, that it would be beneficial in this particular way to have patent appeals adjudicated by specialists, rather than generalist judges. By “removing these unusually complex [and] technically difficult ... cases from the dockets of the regional courts of appeals” and placing them in the hands of judges who were more familiar with patent law and the policies animating it,<sup>11</sup> Congress thought that the judicial system would produce *better* results.

Finally, there is the related *efficiency* rationale. From 1960 to 1973, the number of cases terminated in the courts of appeals increased almost four hundred percent (400%), and this upward trend continued throughout the 1970s.<sup>12</sup> Patent cases are often complicated, and no doubt many judges were happy to have such appeals deleted from their dockets. Parties with a stake in patent cases—like all litigants who come into any court—were also interested in receiving speedier justice. These concerns over accuracy and efficiency, however, were not new; nor were they in any way unique to patent litigation. This is what Judge Learned Hand—no intellectual slouch—had to say on the subject in a 1911 opinion addressing the patentability of purified adrenaline:

I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils, for only a trained chemist is really capable of passing upon such facts, e.g., in this case the chemical character of Von Furth's so-called “zinc compound,” or the presence of inactive organic substances ... How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.<sup>13</sup>

Judge Hand's concerns about competent handling of sophisticated expert testimony are just as salient today as they were when he wrote these words; that

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<sup>10</sup> Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 796 (2008) (quoting Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 5 (1989)).

<sup>11</sup> Gugliuzza, *supra* note 3, at 1456.

<sup>12</sup> *Id.* at 1455.

<sup>13</sup> *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911).

task, however, is no more or less difficult in patent cases than it is in complex environmental cases, Food and Drug cases, antitrust cases, or many others. In the patent field, Congress believed that assigning exclusive appellate jurisdiction to the Federal Circuit would be an effective way to address all three of the concerns I have identified. Interestingly, the business community was a powerful advocate for the 1982 legislation, as one can see from the post-enactment comment of the U.S. Chamber of Commerce that the Federal Circuit was “The Court American Business Wanted and Got.”<sup>14</sup>

With that background in mind, we are set to consider whether—no matter what the original intentions, aspirations, or expectations—the experiment has worked, or on the other hand, whether we should put it to rest. My critique relies in large part on three of the leading legal thinkers of our times: the Dixie Chicks, Robin Thicke, and Burt Bacharach.

As Dixie Chicks’ fans in the audience will know, the chorus of the song “Wide Open Spaces” (their third single off their debut album in 1998) tells the story of a young woman striking out on her own, somewhere out West. The chorus goes:

She needs wide open spaces  
Room to make her big mistakes  
She needs new faces  
She knows the high stakes ...<sup>15</sup>

Think about it: room to make her big mistakes. Author Henry Petroski makes much the same point in his book, *To Engineer is Human: The Role of Failure in Successful Design*. The virtues of uniformity have their limits. No one wants to live in an echo chamber, and no thinker or innovator will get very far surrounded by a bunch of yes-men. The Supreme Court learns valuable lessons about which cases are the hardest, and which are most worthy of *certiorari*, by watching the development and resolution of conflicts in the circuits or the state supreme courts. Patent law, too, needs “wide open spaces / room to make [its] big mistakes.” Mistakes teach valuable lessons; they can reveal where the cracks in the foundation are and how they should be fixed. A proposition that seems obvious to one person might seem questionable to another, ambiguous to a third, and flatly wrong to a fourth. As in the song, percolation is needed despite (or maybe *because of*) the high stakes.

Some examples help to make this point. One critical area of patent law is claim construction: every patent must contain “claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.”<sup>16</sup> As anyone who has even brushed by patents will know, articulating claims can be a devilishly tricky exercise—one that “fundamentally require[s] that technological ideas—inventions—be captured

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<sup>14</sup> See Gugliuzza, *supra* note 3, at 1454 n.85.

<sup>15</sup> DIXIE CHICKS, *Wide Open Spaces*, on WIDE OPEN SPACES (Monument Records 1998).

<sup>16</sup> 35 U.S.C. § 112 (2006 & Supp. V 2012).

(precisely!) by language, and later ‘de-translated’ back into their technological essence by those other than the inventors.”<sup>17</sup> Yet, for all the talk of “uniformity,” the Federal Circuit itself has had great difficulty settling on a methodological approach for interpreting claims.<sup>18</sup> (This is not to criticize the court: observers of the regional circuits spot intra-circuit conflicts from time to time, despite our best efforts to use the *en banc* process and other mechanisms to keep circuit law straight.) Scholars have used different labels to describe the Federal Circuit’s approaches—“holistic” versus “procedural,” “pragmatic textualism” versus “hypertextualism”—but it’s not the terms that matter. As Professors Craig Allen Nard and John F. Duffy have argued, “in a polycentric model, the value and soundness of these interpretative approaches would be put to the test. The competition among circuits would likely give rise to a consensus methodology (which may be an entirely new posture), add resolution to the benefits and shortcomings of existing approaches, or present the Supreme Court with a clearer picture of the claim construction landscape.”<sup>19</sup>

The same goes for the Federal Circuit’s “nonobviousness” jurisprudence. Section 103 of the Patent Code provides that a patent cannot issue on subject matter that would have been “obvious” to a hypothetical “person having ordinary skill in the art.”<sup>20</sup> The Federal Circuit’s jurisprudence in this area has been subjected to significant criticism. Many have suggested that “the standard of nonobviousness is now so low, new technologies spawn thickets of patent rights on marginal improvements,” effectively imposing “a heavy tax on invention and discourag[ing] entry into innovative enterprises.”<sup>21</sup> Again, this is an area where several circuits’ elaboration of competing viewpoints might prove useful: perhaps there are different ways, better ways, to approach nonobviousness. Speaking from my own experience, I can assure you that circuit splits and disagreements with colleagues force judges to sharpen their writing, push them to defend their positions, and from time to time persuade them that someone else’s perspective is preferable. This process of testing and experimentation is lost when uniformity is privileged above all other values.

At the risk of introducing unwanted controversy into this talk, my second “intellectual giant” in patent law is Robin Thicke, whose #1 hit “Blurred Lines” has swept the airwaves, YouTube, and other media this year.<sup>22</sup> Before you faint, let me assure you that I am well aware of the nature of this “song.” And I have no use for the misogynism of the lyrics and, in particular, the ugly and

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<sup>17</sup> R. Polk Wagner & Lee Petherbridge, *Did Philips Change Anything? Empirical Analysis of the Federal Circuit’s Claim Construction Jurisprudence*, 3 (Oct. 10, 2007), available at <http://www.lawseminars.com/materials/07CLAIMPA/claimpa%20m%20wager%2009-12.pdf>.

<sup>18</sup> Nard & Duffy, *supra* note 4, at 1656.

<sup>19</sup> *Id.* at 1656–57.

<sup>20</sup> 35 U.S.C. § 103 (2006).

<sup>21</sup> Dreyfuss, *supra* note 10, at 794.

<sup>22</sup> ROBIN THICKE, *Blurred lines*, on BLURRED LINES (Star Trak 2013).

insensitive allusions to rape. But, I'll bet that the people in this room under the age of thirty or thirty-five know about it; apparently there have already been 143 million viewings on YouTube!! So, I will use it here for its title and underlying message: lines that we thought were sharp are nothing of the kind.

The argument in favor of a specialized court for patent appeals is that this is an area where an *expert* court is particularly beneficial. But that proposition is contestable from several standpoints. First, the lines between the law governing patents and the law governing other forms of intellectual property law (copyright, trademark law, trade secret law, and so on) are blurring. For example, software is commonly protected under copyright, but some software might be patented. For many years, business methods were trade secrets, but now they are patentable. At the most general level, the same basic policies animate all aspects of our intellectual property regime: the idea that notional boundary lines need to be drawn around valuable property that individuals create, and the belief that the definition of such property rights "promotes long-term cultural and technological progress better than a regime of unbridled competition."<sup>23</sup> Judges on the regional courts of appeals are accustomed to working with these principles when they arise in copyright or trade secret cases, matters in which a patent is involved only as an asset under a license, and cases in which the patent issue arises only as a defense to the plaintiff's claim,<sup>24</sup> just to name a few. In short, there are many ways in which the different forms of IP are all part of one real-world transaction.<sup>25</sup> So why we should treat *patent* law differently is a puzzle.

If the answer is simply that patent appeals are much more difficult than any other type of case that comes before the courts, there are two responses. First, how much harder are they (in theory), and what makes them so? We have not adopted specialized trial courts for patent cases; they go before the district courts, who manage the expert witnesses and data collection with the same tools they use for other complex litigation. Both the district courts and the regional courts of appeals routinely deal with all manner of difficult, technically complex subjects. If there are doubters among you, I would direct you to the Seventh Circuit's recent opinion in *Bernstein v. Bankert*,<sup>26</sup> in which we clarify (in over seventy-six pages) what events trigger the availability of a Section 113 *contribution* claim under the Comprehensive Environmental Response, Compensation, and Liability Act (or CERCLA), and when the party must

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<sup>23</sup> J.H. Reichman, *Charting the Collapse of the Patent-Copyright Dichotomy: Premises for a Restructured International Intellectual Property System*, 13 CARDOZO ARTS & ENT. L.J. 475, 475 (1995).

<sup>24</sup> See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002). In *Vornado*, the Supreme Court also precluded Federal Circuit jurisdiction over patent issues that were stated only in counterclaims, but Congress legislatively overruled that result for compulsory counterclaims in Pub. L. No. 112-29, Sept. 16, 2011.

<sup>25</sup> J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1994).

<sup>26</sup> 2013 WL 3927712, at \*13 (7th Cir. July 31, 2013).

instead resort to a Section 107 claim for *cost recovery*. And *Bernstein* was no different from any other CERCLA opinion you might find from any circuit. Or, you could pick up practically any telecommunications decision—or a computer-software copyright case, or a thorny antitrust dispute, or some petitions for review under the Immigration and Nationality Act. (The field of immigration, it is worth noting, is another area where one could argue there is a pressing need for courts to speak with “a unified national voice.” Yet, it is the regional courts of appeals—appropriately so, in my view—who are responsible for petitions for review from the Board of Immigration Appeals.)

Even though these cases are complex, there is great value in obtaining the views of a number of judges, and there is great value in using generalist judges. Law, in the final analysis, governs society. It should not be an arcane preserve for specialists, who never emerge to explain, even to their clients, what the rules are or why one side or the other prevailed. It is the responsibility of the parties to present their cases in a comprehensible form to the tribunal—just as it is the responsibility of the judges to delve into the record, apply fair rules of procedure, consider burdens of proof, and come to sound results. Patent cases are no worse (and no better) than cases arising in many other areas. While there may be some gains from specialization, and while many of the civil law nations have opted for this approach, there are losses too. Traditionally, we have found that the costs of specialization are not worth its benefits. I remain convinced that this continues to be true, at least in our legal culture.

Although patent claims may involve very complicated *technology*, the basic legal principles are relatively straightforward. Indeed, “[w]ith only a few exceptions, the [patent code] does not distinguish between different technologies in setting and applying legal standards.”<sup>27</sup> Cases requiring the assistance of those with expert “knowledge, skill, experience, training, or education” to understand underlying *factual* matters occur every day in the federal courts; that’s why we have Rule 702 of the Federal Rules of Evidence. The fact that the line between patent law and other areas of law is indeed a blurred one needs to be borne in mind when we talk about the need for specialization (which, in turn, relates to the *accuracy* and *efficiency* rationales I set forth at the beginning of my talk) and the Federal Circuit’s exclusive jurisdiction over these appeals.

Finally, we can turn to my third great legal theorist, Burt Bacharach, and his well-known treatise on IP entitled, “(There’s) Always Something There to Remind Me.” Some of the younger people in the audience may know this from the cover by the British New Wave band Naked Eyes (1983),<sup>28</sup> but the song has

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<sup>27</sup> Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1576 (2003).

<sup>28</sup> NAKED EYES, *(There’s) Always Something There to Remind Me*, on BURNING BRIDGES (EMI 1983).

been around much longer than that—it was first recorded by Dionne Warwick in 1963.<sup>29</sup> Specifically, I want to flag the following passage:

When shadows fall I pass a small café  
 Where we would dance at night  
 And I can't help recalling  
 How it felt to kiss and hold you tight  
 Oh how can I forget you  
 When there is always something there to remind me  
 Always something there to remind me

Much like the mournful protagonist of this work, the federal courts of appeals haven't quite gotten past patent appeals either, for there is “always something there to remind [us]” of them.

That is because of the messy fact that, in truth, the Federal Circuit does not exercise exclusive jurisdiction over *all* things-patent: the regional circuits are still called upon to resolve patent questions quite frequently in cases that do not technically “arise under” the patent laws. For instance, until 2011, even *compulsory* patent counterclaims did not “arise under” the patent laws.<sup>30</sup> Even though Congress amended the patent laws to address this issue—relaxing slightly the well-pleaded complaint rule, in effect—patent issues are often embedded in suits in other ways.<sup>31</sup> For example, courts may be required to address underlying issues of patent law to resolve a state-law malpractice claim. The Supreme Court recently held in *Gunn v. Minton*<sup>32</sup> that the Federal Circuit's exclusive appellate jurisdiction does not extend to such appeals.

To be clear, I am not saying that regional courts systematically would do a *better* job of handling patent law in these situations, or that they necessarily would resolve these questions more *expeditiously*. My point is simply that the regional courts continue to exercise authority over these “reminders” of patent law, and it has not brought our patent regime to its knees.

So what should we do instead? You will note that the title of my talk is not whether we should *abolish* the Federal Circuit, or even whether we should strip it entirely of its patent jurisdiction. My question is a more modest one: should we eliminate its *exclusive* jurisdiction over patent cases, and re-introduce into the country the same kind of marketplace of ideas at the court of appeals

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<sup>29</sup> DIONNE WARWICK, *(There's) Always Something There to Remind Me*, on THE WINDOWS OF THE WORLD (Rhino 1967).

<sup>30</sup> *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831–34 (2002), *abrogated by* Leahy-Smith America Invents Act, Pub. L. No. 112-29 (2011) (“The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction ... of an appeal from a final decision of a district court of the United States ... in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection.”).

<sup>31</sup> *See, e.g., Cnty. Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 734 (7th Cir. 2007).

<sup>32</sup> 133 S. Ct. 1059, 1068 (2012).



level that we have for almost every other kind of claim. Under the alternative regime I envision, parties would have a choice: they could take their appeals to the Federal Circuit, thereby benefiting from that court's long experience in the field, or they could file in the regional circuit in which their claim was first filed. This is the Fleetwood Mac model: "You can go your own way."<sup>33</sup>

The system I propose is similar to the one that is available in labor law cases, where the parties have a choice of where they may seek review of the National Labor Relations Board's decisions. Under the National Labor Relations Act, "any person aggrieved" by a final order of the NLRB may obtain a review of the order (1) in a court of appeals where the alleged unfair labor practice occurred; (2) in a court of appeals where the party "resides or transacts business"; or (3) in the D.C. Circuit.<sup>34</sup> If *both* parties are "aggrieved" (say, the Board agrees that six of the employer's alleged unfair labor practices occurred, but not the seventh), then there is a potential dilemma. If the Union, based in Orlando, Florida, wanted to seek review of a recent board order, it would most likely want to proceed in the Eleventh Circuit, where the President's recess appointments are viewed as valid.<sup>35</sup> Walt Disney, the employer of the union members, might prefer to file in the D.C. Circuit, which recently ruled that the President's appointments were constitutionally invalid under the Recess Appointments Clause.<sup>36</sup> But, in these "race to the courthouse" situations, there is a reasonable and effective solution: if two petitions are received within ten (10) days of the Board order, the agency must notify the Judicial Panel on Multidistrict Litigation (JPML), which will then randomly select one or the other.<sup>37</sup>

Something similar could be constructed for patent appeals. The alternative is not a return to the "bad old days" in which a single patent might be valid in the Second Circuit and invalid in the Tenth at the same time. The "aggrieved party" could be given the option of seeking review either in the Federal Circuit or in the regional circuit with jurisdiction over the district court from which the appeal is taken.<sup>38</sup> If there are cross-appeals or multiple pending appeals around the country pertaining to a single patent, and they are in different circuits, the procedure outlined by 28 U.S.C. § 2112(a) could be adapted to allow the JPML to select one forum for that patent or that case. This would address the valid concern about the possibility of inconsistent decisions addressing the same patent or litigant. One court would be responsible for that particular case, but the development of the law would benefit from a variety of viewpoints.

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<sup>33</sup> FLEETWOOD MAC, *Go Your Own Way*, on RUMOURS (Warner Bros. 1977).

<sup>34</sup> 29 U.S.C. § 160(f) (2006).

<sup>35</sup> *Evans v. Stephens*, 387 F.3d 1220, 1223, 1227 (11th Cir. 2004).

<sup>36</sup> *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. 2013).

<sup>37</sup> *See* 28 U.S.C. § 2112(a) (2006).

<sup>38</sup> *See* 28 U.S.C.A. § 41 (2006).

Such a regime would have a number of advantages. Many of the benefits that accrue from specialization will remain. It is possible—maybe even likely—that the Federal Circuit would still play a leading role in shaping patent law. Its opinions would be closely watched by regional circuits, just as the D.C. Circuit exercises leadership in various aspects of administrative law because it hears so many such cases. The absolute number of patent cases that would return to the regional courts would not be large; there is, thus, no reason to expect that this change would have much of an effect on time to disposition. But, on the positive side, the change would provide those “wide open spaces” for development of patent law, allowing new ideas to percolate and grow. The Supreme Court would also have the benefit of fuller development in the lower courts and, thus, more information about which cases warrant one of the scarce slots in its annual docket.

The way in which patent law might develop in these different regional circuits should itself be instructive. Dan Burk and Mark Lemley have argued that in certain industries—software and biotechnology, for example—the Federal Circuit’s application of common legal standards (obviousness, enablement, and written description) “has gotten the policy precisely backwards.”<sup>39</sup> It is entirely possible that the Ninth Circuit, where a disproportionate share of these cases arises, would be better attuned to these policy considerations.

Speaking personally, I would welcome the re-integration of intellectual property law in the regional circuits. I hope that I have persuaded you that the kind of change I am proposing is at least possible and that it could be accomplished without a return to the negative aspects of the pre-1982 regime. In any event, it has been a pleasure to be here, and I wish you the best with this year’s Supreme Court IP Review.

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<sup>39</sup> Burk & Lemley, *supra* note 29, at 1577–78.