

Forum Selling in Germany: Supply-Side Effects in Patent Forum Shopping

Stefan Bechtold Jens Frankenreiter

ETH Zurich

European Policy for Intellectual Property 10th Annual Conference

September 3, 2015

Contents

- 1 Project summary
- 2 State of the project

What is Forum Selling?

Forum shopping:

Strategic behavior by litigants aimed at selecting the forum that is expected to provide the most favorable outcome

What is Forum Selling?

Forum shopping:

Strategic behavior by litigants aimed at selecting the forum that is expected to provide the most favorable outcome

- ▶ Forum shopping potentially occurs when **two requirements** are met:
 - ▶ Permissible rules for venue selection
 - ▶ **Considerable differences** between how different courts treat and decide cases

What is Forum Selling?

Forum shopping:

Strategic behavior by litigants aimed at selecting the forum that is expected to provide the most favorable outcome

- ▶ Forum shopping potentially occurs when **two requirements** are met:
 - ▶ Permissible rules for venue selection
 - ▶ **Considerable differences** between how different courts treat and decide cases

Forum selling:

Strategic behavior by court officials / judges aimed at attracting litigation to their forum

What is Forum Selling?

Forum shopping:

Strategic behavior by litigants aimed at selecting the forum that is expected to provide the most favorable outcome

- ▶ Forum shopping potentially occurs when **two requirements** are met:
 - ▶ Permissible rules for venue selection
 - ▶ **Considerable differences** between how different courts treat and decide cases

Forum selling:

Strategic behavior by court officials / judges aimed at attracting litigation to their forum

- ▶ Alternative explanation: Random variation and positive feedback loops

Forum selling in patent infringement cases in Germany?

- ▶ Despite 12 regional courts having jurisdiction to hear patent infringement cases, in practice 3 regional courts (Düsseldorf, Mannheim, Munich) hear the bulk of cases.
 - (1) These courts handle **80 % of all patent infringement proceedings in Germany.**
 - (2) Düsseldorf hears over 7 times more patent cases than Munich.

Forum selling in patent infringement cases in Germany?

- ▶ Despite 12 regional courts having jurisdiction to hear patent infringement cases, in practice 3 regional courts (Düsseldorf, Mannheim, Munich) hear the bulk of cases.
 - (1) These courts handle **80 % of all patent infringement proceedings in Germany.**
 - (2) Düsseldorf hears over 7 times more patent cases than Munich.
- ▶ After numbers in Munich reportedly decreased as compared to the other venues, **judges adopted a novel way of administering the procedures** in order to make the proceedings more attractive (Bausch/Pfaff 2012). Reportedly, this has resulted in an **increase in patent litigation** at the Munich Regional Court.

Forum selling in patent infringement cases in Germany?

- ▶ Despite 12 regional courts having jurisdiction to hear patent infringement cases, in practice 3 regional courts (Düsseldorf, Mannheim, Munich) hear the bulk of cases.
 - (1) These courts handle **80 % of all patent infringement proceedings in Germany.**
 - (2) Düsseldorf hears over 7 times more patent cases than Munich.
- ▶ After numbers in Munich reportedly decreased as compared to the other venues, **judges adopted a novel way of administering the procedures** in order to make the proceedings more attractive (Bausch/Pfaff 2012). Reportedly, this has resulted in an **increase in patent litigation** at the Munich Regional Court.
- ▶ The Düsseldorf court created **two additional positions for patent judges** in 2005 in order to increase speed of adjudication

Forum selling in patent infringement cases in Germany?

- ▶ Despite 12 regional courts having jurisdiction to hear patent infringement cases, in practice 3 regional courts (Düsseldorf, Mannheim, Munich) hear the bulk of cases.
 - (1) These courts handle **80 % of all patent infringement proceedings in Germany**.
 - (2) Düsseldorf hears over 7 times more patent cases than Munich.
- ▶ After numbers in Munich reportedly decreased as compared to the other venues, **judges adopted a novel way of administering the procedures** in order to make the proceedings more attractive (Bausch/Pfaff 2012). Reportedly, this has resulted in an **increase in patent litigation** at the Munich Regional Court.
- ▶ The Düsseldorf court created **two additional positions for patent judges** in 2005 in order to increase speed of adjudication
- ▶ Not an isolated phenomenon: see the **emergence of the E.D. Texas** as an important forum in patent litigation in the U.S.

Existing literature

- ▶ **Moore (2001), Fromer (2010), and Lemley (2010)** empirically investigate forum shopping in patent law in the U.S.

Existing literature

- ▶ **Moore (2001), Fromer (2010), and Lemley (2010)** empirically investigate forum shopping in patent law in the U.S.
- ▶ **Cremers et al. (2013), Helmers/McDonagh (2013) and van Zeebroeck (2011)** provide empirical analyses of patent litigation in Europe.

Existing literature

- ▶ **Moore (2001), Fromer (2010), and Lemley (2010)** empirically investigate forum shopping in patent law in the U.S.
- ▶ **Cremers et al. (2013), Helmers/McDonagh (2013) and van Zeebroeck (2011)** provide empirical analyses of patent litigation in Europe.
- ▶ **Dreyfuss (1989, 2008), Moore (2001), and Fromer (2010)** provide normative analyses of the institutional framework and on the desirability of forum shopping.

Existing literature

- ▶ **Moore (2001), Fromer (2010), and Lemley (2010)** empirically investigate forum shopping in patent law in the U.S.
- ▶ **Cremers et al. (2013), Helmers/McDonagh (2013) and van Zeebroeck (2011)** provide empirical analyses of patent litigation in Europe.
- ▶ **Dreyfuss (1989, 2008), Moore (2001), and Fromer (2010)** provide normative analyses of the institutional framework and on the desirability of forum shopping.
- ▶ **Klerman (2012), Klerman (2014), Klerman and Reilly (2015), Anderson (2015)** evaluate forum selling and its policy implications in various areas of the law in the U.S.

Research questions

This project is aimed at answering the following **Research Questions**:

1. Do judges **engage in purposefully attracting patent litigation** to their court, and if yes, what are their **motives** in doing so?

Research questions

This project is aimed at answering the following **Research Questions**:

1. Do judges **engage in purposefully attracting patent litigation** to their court, and if yes, what are their **motives** in doing so?
2. Do other officials **incentivize judges to compete** for patent litigation, and if yes, what are their **motives** in doing so?

Research questions

This project is aimed at answering the following **Research Questions**:

1. Do judges **engage in purposefully attracting patent litigation** to their court, and if yes, what are their **motives** in doing so?
2. Do other officials **incentivize judges to compete** for patent litigation, and if yes, what are their **motives** in doing so?
3. What are the levers used by judges and other court officials

Judges and incentives

Why it is **surprising** if judges compete for litigation

Judges and incentives

Why it is **surprising** if judges compete for litigation

- ▶ Western democracies usually provide **strong protection of judicial independence** and, at the same time, **isolate judges from the economic consequences** of their decisions.

Judges and incentives

Why it is **surprising** if judges compete for litigation

- ▶ Western democracies usually provide **strong protection of judicial independence** and, at the same time, **isolate judges from the economic consequences** of their decisions.
- ▶ **German judges' isolation** from economic consequences
 - (1) Judges' salaries independent of the number of cases they decide.
 - (2) Judges are not elected, but get appointed by the Ministries of Justice of the German states.
 - (3) It is practically impossible to fire a judge.
 - (4) Judges enjoy tenure up to a mandatory retirement age of 65.
 - (5) Courts usually publish unanimous decisions without concurring or dissenting opinions.
 - (6) Voting behavior by individual judges is never published.

Judges and incentives

Why it is **surprising** if judges compete for litigation

- ▶ Western democracies usually provide **strong protection of judicial independence** and, at the same time, **isolate judges from the economic consequences** of their decisions.
- ▶ **German judges' isolation** from economic consequences
- ▶ Therefore, **why should judges bother?** Don't they want a quiet life?
 - (1) Patent litigation is complex & highly technical.
 - (2) Patent law can be a very formalistic area of the law.
 - (3) Patent law requires extensive expertise in specialized case law that is difficult to apply in other areas of the law.

Judges and incentives, contd...

- ▶ **Posner (1993):** Incentives of judges in general
 - (1) **Utility from the act of voting** itself
 - (2) **Popularity, prestige & reputation** vis-à-vis the bar and peer judges
 - (3) **Reversal aversion**

Judges and incentives, contd...

- ▶ **Posner (1993)**: Incentives of judges in general
 - (1) **Utility from the act of voting** itself
 - (2) **Popularity, prestige & reputation** vis-à-vis the bar and peer judges
 - (3) **Reversal aversion**
- ▶ Interesting opportunity to test whether those factors also **motivate judges' behavior in forum shopping**

Contents

- 1 Project summary
- 2 State of the project

State of the project

- ▶ We conducted around **20 interviews with patent judges, court officials and attorneys** active in patent litigation in Germany
 - ▶ We talked to judges from all three major venues + 2 from other venues
 - ▶ Semi-structured interviews: Relatively strict adherence to catalogue of questions

State of the project

- ▶ We conducted around **20 interviews with patent judges, court officials and attorneys** active in patent litigation in Germany
- ▶ From these interviews, we construct a set of hypotheses:
 - ▶ The **behavior of judges**
 - ▶ **Acts and incentives of the administration**
 - ▶ **Other issues**

State of the project

- ▶ We conducted around **20 interviews with patent judges, court officials and attorneys** active in patent litigation in Germany
- ▶ From these interviews, we construct a set of hypotheses:
 - ▶ The **behavior of judges**
 1. Judges are intrinsically **motivated to be a "good judge"**, attracting patent infringement lawsuits as a mere side-effect.
 2. Judges actively attract patent infringement lawsuits using various substantive and procedural strategies because of **career concerns**;
 3. Judges actively attract patent infringement lawsuits using various substantive and procedural strategies because of **reputation concerns** (among fellow judges, attorneys, academia or the general public);
 4. Judges actively attract patent infringement lawsuits using various substantive and procedural strategies in order to **help the local economy** (industry, attorneys, services) in their court district;
 5. Judges actively attract patent infringement lawsuits using various substantive and procedural strategies because they are **lazy**.
 - ▶ **Acts and incentives of the administration**
 - ▶ **Other issues**

State of the project

- ▶ We conducted around **20 interviews with patent judges, court officials and attorneys** active in patent litigation in Germany
- ▶ From these interviews, we construct a set of hypotheses:
 - ▶ The **behavior of judges**
 - ▶ **Acts and incentives of the administration**
 1. German states attempt to attract patent infringement lawsuits in order to **create revenue from court fees**.
 2. German states attempt to attract patent infringement lawsuits to their courts in order to **help the local economy** (industry, attorneys, services).
 3. German states attempt to attract patent infringement lawsuits to their courts in order to increase their **national and/or international reputation**.
 4. The court administrations use various organizational strategies (e.g., offering facilities, career options) to **incentivize judges** to attract patent infringement lawsuits.
 - ▶ **Other issues**

State of the project

- ▶ We conducted around **20 interviews with patent judges, court officials and attorneys** active in patent litigation in Germany
- ▶ From these interviews, we construct a set of hypotheses:
 - ▶ The **behavior of judges**
 - ▶ **Acts and incentives of the administration**
 - ▶ **Other issues**
 1. The motivations and strategies of judges, the court administration and the German states **vary across different courts** in Germany.

Next step: survey

- ▶ We aim to **validate our hypotheses** using a survey

Next step: survey

- ▶ We aim to **validate our hypotheses** using a survey
- ▶ Test whether our **hypotheses reflect the views of judges and attorneys** in the patent litigation community

Thank you! Feedback very welcome!

sbechtold@ethz.ch

www.ip.ethz.ch/people/bechtold

jens.frankenreiter@ip.gess.ethz.ch

www.lawecon.ethz.ch/people/frankenreiter

Purpose of the survey

- ▶ We aim to **validate our hypotheses** using a survey

Purpose of the survey

- ▶ We aim to **validate our hypotheses** using a survey
- ▶ First step: Test whether our **hypotheses reflect the views of judges and attorneys** in the patent litigation community

Purpose of the survey

- ▶ We aim to **validate our hypotheses** using a survey
- ▶ First step: Test whether our **hypotheses reflect the views of judges and attorneys** in the patent litigation community
- ▶ Second step: **Test whether patent judges vs. other judges / patent judges at “successful” courts vs. patent judges at less successful courts differ** along a number of dimensions, most importantly in their attitudes towards their work

Purpose of the survey

- ▶ We aim to **validate our hypotheses** using a survey
- ▶ First step: Test whether our **hypotheses reflect the views of judges and attorneys** in the patent litigation community
- ▶ Second step: **Test whether patent judges vs. other judges / patent judges at “successful” courts vs. patent judges at less successful courts differ** along a number of dimensions, most importantly in their attitudes towards their work
- ▶ (Third step: Test **which location factors are considered important** by attorneys in different jurisdictions)

Participants in the survey

- ▶ Judges
 - ▶ All judges currently dealing with patent litigation at the major German patent courts (Düsseldorf, Mannheim, München, potentially Hamburg) (rough estimate: 50 judges)
 - ▶ A random sample of judges not dealing with patent litigation at the major German patent courts
 - ▶ Potentially: Judges at courts that are not competent to hear patent cases

Participants in the survey

- ▶ Judges
 - ▶ All judges currently dealing with patent litigation at the major German patent courts (Düsseldorf, Mannheim, München, potentially Hamburg) (rough estimate: 50 judges)
 - ▶ A random sample of judges not dealing with patent litigation at the major German patent courts
 - ▶ Potentially: Judges at courts that are not competent to hear patent cases
- ▶ A random sample of lawyers dealing with patent litigation