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.
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?
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**
Project summary

Bechtold/Frankenreiter: Forum selling

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