Response Essay: Rethinking Federal Circuit Jurisdiction—A Short Comment

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Professor Gugliuzza's article, *Rethinking Federal Circuit Jurisdiction*,[1] is a massive piece of scholarship inquiring into the jurisdiction of the United States Court of Appeals for the Federal Circuit and proposing jurisdictional remedies in the hope of curing the Federal Circuit's problem with patent law.

Specifically, Professor Gugliuzza proposes to transfer much of the subject-matter jurisdiction of the Federal Circuit other than its exclusive patent jurisdiction to other courts and to fill the resulting void with appealed nonpatent cases, particularly commercial cases that involve business and economic issues, for example antitrust cases,[2] in the hope that the Federal Circuit will thereby become educated in the economics of innovation and establish patent law doctrines that foster innovation and avoid establishing patent law doctrines that impede and diminish innovation.[3]

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[1] Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437 (2012).

[2] *See id.* at 1494–1504.

[3] The Federal Circuit was not supposed to "substantively affect current law." *See* F.M. Scherer, *The Political Economy of Patent Policy Reform in the United States*, 7 J. ON TELECOMM. & HIGH TECH. L. 167, 192 (2009) (citing 127 CONG. REC. S29,887 (daily ed. Dec. 8, 1981) (statement of Sen. Charles Grassley) (quoting Senator Robert Dole)). But it did. *See* Matthew D. Henry & John L. Turner, *The Court of Appeals for the Federal Circuit's Impact on Patent Litigation*, 35 J. LEGAL STUD. 85, 108 fig.1 (2006) (showing the drastic drop in invalidity rates—and consequent rise in validity rates—that immediately followed establishment of the Federal Circuit); *see also* Robert W. Harris, *The Emerging Primacy of "Secondary Considerations" as Validity Ammunition: Has the Federal Circuit Gone Too Far?*, 71 J. PAT & TRADEMARK OFF. SOC'Y 185 (1989) (highlighting the Federal Circuit's development of "secondary considerations" as an evidentiary factor in patent validity); Robert W. Harris, *Prospects for Supreme Court Review of the Federal Circuit Standards for Obviousness of Inventions Combining Old Elements*, 68 J. PAT & TRADEMARK OFF. SOC'Y 66 (1986) (contrasting pro-patent Federal Circuit standards for obviousness with more stringent Supreme Court standards); Jon F. Merz & Nicholas M. Pace, *Trends in Patent Litigation: The Apparent Influence of Strengthened Patents Attributable to the Court of Appeals for the Federal Circuit*, 76 J. PAT & TRADEMARK OFF. SOC'Y 579 (1994) (describing areas where Federal Circuit jurisprudence has altered standards for patent validity). For a description of the substantive changes imposed by the Federal Circuit that resulted in the lowered and less certain standards and their effect on innovation in the United States, see Cecil D. Quillen, Jr., *Innovation and the U.S. Patent System*, 1 VA. L. & BUS. REV. 207 (2006) [hereinafter Quillen, *Innovation*]; Cecil D. Quillen, Jr., *Proposal for the Simplification and Reform of the United States Patent System*, 21 AIPLA Q.J. 189 (1993).

Professor Gugliuzza's paper, however, does not address a major aspect of the Federal Circuit problem, namely the absence from the United States judicial system as it applies to patents of the "self-correcting" structure that governs most other areas of federal law. This problem would continue even if Professor Gugliuzza's suggestions were to be adopted because the Federal Circuit would continue to have a practical monopoly on all patent appeals.

In that self-correcting structure, appeals from a district court are heard by the regular circuit court of appeals for the region in which the district court is located. All courts can make mistakes, but with such a structure, when the issue arises in another circuit, the courts in that other circuit are free to reconsider the issue on its merits and are not constrained by the first court's decision by stare decisis. The result is that most errors are quickly purged, and those that persist are frequently the sign of serious policy issues that deserve Supreme Court attention. By the time the issues are ripe for Supreme Court review, they have been thoroughly explored in the various courts of appeals so that the very best arguments on all sides of the issues can be presented to the Supreme Court.

Our judicial system does not work that way for patents. The Federal Circuit has a virtual monopoly on all patent appeals, and when it makes a mistake, the U.S. Patent & Trademark Office, the district courts, and the International Trade Commission are locked in by stare decisis and have no choice but to follow the mistaken policy promulgated by the Federal Circuit. This problem has even been recognized by the current chief judge of the Federal Circuit who, in his concurrence in *Moba v. Diamond Automation, Inc.*, said:

> Whenever a Federal Circuit panel makes an error interpreting the patent code, every district court in the nation, and even every later Federal Circuit panel, is obliged to follow and perpetuate the error. Even the Supreme Court has difficulty identifying errors for correction because this court's national jurisdiction requires universal application of a mistake.[4]

Restoring appellate jurisdiction in patent infringement cases to the regular courts of appeals would deal with both problems by having patent infringement appeals decided by judges who regularly deal with other business issues affecting innovation and providing a self-correcting judicial structure for the United States patent system. However, Professor Gugliuzza states that he is "skeptical that the Federal Circuit will be stripped of its patent jurisdiction anytime soon."[5]

Professor Gugliuzza then proceeds to develop his proposal to move much of the Federal Circuit's nonpatent jurisdiction elsewhere and fill the resulting void at the Federal Circuit with

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[4] 325 F.3d 1306, 1322 (Fed. Cir. 2003) (Rader, J., concurring).

[5] Gugliuzza, *supra* note 1, at 1464–65. The Commenter has suggested restoration of appellate jurisdiction in patent infringement cases to the regular circuit courts of appeals or, in the alternative, adoption of the Nard & Duffy proposal for alternative appellate tracks. *See* Cecil D. Quillen, Jr., *Commentary on Bessen and Meurer's* Patent Failure*: An Industry Perspective*, 16 J. INTELL. PROP. L. 57 (2008) [hereinafter Quillen, *Commentary*]; Quillen, *Innovation*, *supra* note 3; *see also* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007) (arguing that the Federal Circuit's exclusive jurisdiction over patents harms patent law development and suggesting alternatives). Restoration of patent infringement appeals to the regular circuit courts of appeals would return patent law to the legal mainstream and place patent appeal decisions with appellate courts that regularly deal with economic issues affecting innovation. An additional virtue of restoring appeals in patent infringement cases to the regular circuit courts of appeals would be that such appeals would then be heard by appellate courts that are less likely than the Federal Circuit to substitute their views for those of the Supreme Court.

antitrust and other commercial and business-related cases in the hope the Federal Circuit can learn innovation economics from those cases.[6]

Professor Gugliuzza's skepticism over the possibility of restoring appellate jurisdiction in patent infringement cases to the regular courts of appeals is certainly justified. The "patent crowd"—patent attorneys, patent examiners, and patent bureaucrats—has been a major beneficiary of the Federal Circuit and its lobbies would strongly oppose any such proposal because of the potential effect on its incomes, status, and numbers.[7]

I am equally skeptical about the ability to move the Federal Circuit's nonpatent jurisdiction elsewhere. The lawyers who handle these cases (and possibly some of the litigants) are unlikely to have any enthusiasm for moving them elsewhere and most certainly would lobby against any such move.[8]

And I am even more skeptical over the ability to fill the void with antitrust and other business cases that might educate the Federal Circuit about the economics of innovation. The attorneys who handle antitrust and other business cases and the federal agencies responsible for antitrust enforcement are unlikely to have any enthusiasm for having their cases adjudicated at the Federal Circuit and certainly would lobby strongly against any such proposal. A leading antitrust scholar, commenting on the possibility of a specialized antitrust court, said, "[T]he experience of the Federal Circuit cautions that a specialized court may instead promote its field at the expense of the public interest."[9]

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[6] Gugliuzza, *supra* note 1, at 1495–99. There is a question as to the extent to which the Federal Circuit is open to learning from the cases it hears. *See id.* at 1440 & n.7; *see also* Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 489 n.77 (2011) ("Federal Circuit judges may be experienced, but they are not particularly expert."). There is also a question of the extent to which the Federal Circuit understands economic literature. The dissent in *Johnson & Johnston Associates, Inc. v. R.E. Service Co.* stated that "[a] study by Wesley M. Cohen *et al.* . . . reported that in a 1994 survey of R & D managers 65% of the respondents cited the ease of avoiding patent claims as the main deterrent to patent-based investment in technology." 285 F.3d 1046, 1071 (Fed. Cir. 2002) (Newman, J., dissenting) (citation omitted). The paper reporting the study said no such thing, instead reporting that 65.3% of the R & D managers responding to the survey reported that the ease of designing around was a reason not to seek a patent, not a reason to forego an investment in technology. Wesley M. Cohen et al., *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)* 14 & figs.5–6 (Nat'l Bureau of Econ. Research Working Paper No. 7552, 2000). The Commenter's experience, reported elsewhere, is that he does not recall a single instance in his thirty years at Kodak in which Kodak chose not to go forward with an innovation because it was not patented by Kodak. Ownership of patents by Kodak on its proposed innovations was largely irrelevant to the decision of whether to commercialize or not. The key patent question was whether the proposed innovation was affected by valid patents of others. *See* Quillen, *Commentary*, *supra* note 5, at 60–61. For a detailed explanation of the economics of innovation, see generally WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE: ANALYZING THE GROWTH MIRACLE OF CAPITALISM (2002). Professor Baumol's book, however, has not been cited or discussed in any Federal Circuit opinion.

[7] *See* John H. Barton, *Reforming the Patent System*, 287 SCIENCE 1933, 1933–34 & fig.1 (2000) (showing spectacular growth in the number of intellectual property lawyers per unit of research expenditures following the advent of the Federal Circuit).

[8] This statement may not be true as to private attorneys who represent private litigants in government contracts cases. *See* Gugliuzza, *supra* note 1, at 1486–91. Presumably the Federal government would oppose any such move.

[9] Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-interventionist Challenge to Monopolization Enforcement*, 76 ANTITRUST L.J. 605, 645 (2010). For a further window into the views of the antitrust bar, see SECTION OF ANTITRUST LAW, AM. BAR ASS'N, REPORT ON THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (2002), *available at* http://www.ftc.gov/opp/intellect/0207salabarpt.pdf. The report was submitted in connection with the FTC–DOJ hearings that culminated in the October 2003 FTC Report, FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 9–18 (2003). *See also* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 448–49 (2007) (Final Comments of Commissioner Warden) (arguing that the Federal Circuit's "obviousness" jurisprudence stifles

So, creative as Professor Gugliuzza's proposal is, I think it is even less likely to be adopted than restoration of appellate jurisdiction in patent cases to the regular courts of appeals or adoption of the Nard & Duffy proposal for parallel appellate tracks.[10] Furthermore, Professor Gugliuzza's proposal, even if adopted, addresses only one aspect of the Federal Circuit problem and depends on an implicit assumption that the Federal Circuit can learn innovation economics from the business cases that replace its current nonpatent jurisdiction. This is a "heady" assumption given the Federal Circuit's view that it is not a policy court and only follows precedent.[11]

A principal objection by the patent crowd to the restoration of appellate jurisdiction to the regular courts of appeals in patent infringement cases has been that to do so would restore the "mess" that existed prior to the advent of the Federal Circuit—inconsistent decisions leading to rampant forum shopping. The Commenter has pointed out elsewhere, however, that the "mess" was largely nonexistent but nonetheless was a central part of the propaganda of those who had long sought a specialist patent court.[12]

The misinformation in that propaganda is evident from a statement of Representative Railsback:

> [W]e heard a great deal of testimony concerning the problem of forum-shopping which presently is practiced in many different district courts around the country. For example, if you wanted to bring a lawsuit which would have the effect of attacking the validity of an existing patent, you would most likely file such a lawsuit in the [E]ighth [C]ircuit. On the other hand, if you were trying to have a patent held valid, you would try and have the suit filed in the [F]ifth [C]ircuit.[13]

Apparently nobody told Rep. Railsback that only 4.1% of the validity/invalidity decisions for 1953 to 1977 were in the Eighth Circuit, fewer than any other circuit except for the Tenth Circuit and the District of Columbia Circuit.[14]

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innovation); Gugliuzza, *supra* note 1, at 1498 & n.340 (arguing that the Federal Circuit emphasizes the protection of intellectual property rights over competition).

[10] *See* Nard & Duffy, *supra* note 5.

[11] *See* Gugliuzza, *supra* note 1, at 1440 & n.7; *supra* note 6. The Federal Circuit's view of itself might be broadened if service on the court was not limited to judges who live within fifty miles of the District of Columbia. Service on the Circuit Court of Appeals for the District of Columbia is not so restricted, and there is no longer any reason why service on the Federal Circuit should be so limited. This would require amendment of 28 U.S.C. § 44(c) (2006). *See* Gugliuzza, *supra* note 1, at 1482 n.246.

[12] *See* Quillen, *Commentary*, *supra* note 5, at 63–64; Quillen, *Innovation*, *supra* note 3, at 227. Never explained by the Federal Circuit proponents was why a new specialist court was necessary to solve the alleged forum-shopping problem instead of simple amendments to the relevant venue and jurisdiction statutes.

[13] Gugliuzza, *supra* note 1, at 1448 n.46 (alteration in original) (quoting 127 CONG. REC. 27,792 (1981) (statement of Rep. Railsback)).

[14] *See* GLORIA K. KOENIG, PATENT INVALIDITY: A STATISTICAL AND SUBSTANTIVE ANALYSIS § 4.02, tbl.15 (rev. ed. 1980) (surveying the patent validity decisions of the courts of appeals from 1953 through 1977); Quillen, *Innovation*, *supra note* 3, at 228 n.62 (pointing out that the Tenth Circuit was the most favorable to patentees, with a 59.6% validity rate, and that the Eighth Circuit was the most favorable to alleged infringers, with an 88.8% invalidity rate, but that the two Circuits together had only 8% of the validity/invalidity decisions reported by Ms. Koenig (Eighth Circuit, 4.1%; Tenth Circuit, 3.9%), fewer than any other court except the circuit court for the District of Columbia). Had forum shopping been a problem, these circuits would have been swamped with patent litigation initiated by patentees (Tenth Circuit) and alleged infringers (Eighth Circuit) seeking the most favorable jurisdictions for their cases. And forum shopping did not end with establishment of the Federal Circuit. *See*

In conclusion, Professor Gugliuzza's proposal, even if adopted, would address only part of the Federal Circuit problem and depends on the heroic and unverified assumption that the Federal Circuit is open to learning from the cases it hears. Moreover, Professor Gugliuzza's proposal is as unlikely to be adopted as are proposals to restore appellate jurisdiction in patent infringement cases to the regular courts of appeals or to adopt the Nard & Duffy proposal[15] for parallel appellate tracks in patent appeals, both of which address the entirety of the Federal Circuit problem. Given these observations, it is the Commenter's view that efforts at change should be directed at resolving the entirety of the Federal Circuit problem by restoring appellate jurisdiction in patent infringement cases to the regular circuit courts of appeals. If the cause is to be lost in any event, it is better to lose fighting for the complete solution.

Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889 (2001). Nor is it clear that the Federal Circuit brought uniformity to patent law. *See* Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801 (2010); *see also* Lee Petherbridge, *Patent Law Uniformity?*, 22 HARV. J.L. & TECH. 421 (2009) (arguing that Federal Circuit decisions are heterogeneous and realism oriented and that the Federal Circuit's established rules are less broadly prescriptive than many expected).

[15] *See* Nard & Duffy, *supra* note 5.