

## Jury Demands: Who's Asking?

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### I. Introduction

This article undertakes a large-scale empirical study of jury demands and analyzes their impact on patent litigation. Extensive scholarly literature questions the wisdom of jury decision-making in patent cases.<sup>1</sup> Scholars are concerned with the competence of lay juries to resolve technically complex patent cases<sup>2</sup> and whether juries will replace rationality with emotion in adjudicating patent disputes.<sup>3</sup> These popular perceptions of juror incompetence and bias have

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<sup>1</sup>See, e.g., Robert J. Shillman, *Defending Patents*, FORTUNE, June 25, 2001, at 30 (recommending the elimination of jury trials in patent cases because of the complexity of the technology); ADVISORY COMM'N ON PAT. LAW REFORM, A REPORT TO THE SECRETARY OF COMMERCE 107-110 (1992) [hereinafter ADVISORY REPORT] (discussing problems with jury trials of patent cases); *Fourth Biennial Patent System Major Problems Conference*, 34 IDEA 77 (1994) [hereinafter *Major Problems Conference*] (documenting the debate on the role of the jury in patent cases between twenty-nine prominent patent practitioners and professors); John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 HOUS. L. REV. 67, 70-84 (1995) (reporting the principal complaints regarding adjudication of patent suits, including unpredictability, delay, and expense); Edmund L. Andrews, A 'White Knight' Draws Cries of 'Patent Blackmail,' N.Y. TIMES, Jan. 14, 1990, § 3, at 5 [is this C5?] (calling a jury trial of a patent case "a 'judicial lottery,' an often unpredictable system that can yield huge rewards for those who are sufficiently aggressive"); Richard B. Schmitt, *Juries' Role in Patent Cases Reconsidered*, WALL ST. J., Feb. 18, 1994, at B6 (quoting patent attorney Donald Dunner as saying, "Give [jurors] a complicated biotechnology case or one involving lasers or computers, and their eyes glaze over," and Professor Martin J. Adelman as saying that jury confusion has created "a system of justice that is basically a lottery").

<sup>2</sup>See Schmitt, *supra* note 1 (suggesting that patent cases are resolved by "unemployed laborers and housewives [who] did not understand that stuff"); Matt Krantz, *Patent Suits Try Patience of High-Tech Companies*, INV. BUS. DAILY, Dec. 9, 1996, at A6 (citing patent attorney Michael Bednarek as stating that jurors on patent trials typically have the education of sixth-graders and because patent trials can last up to 3 months, better-educated potential jurors are excused from serving); *Jury Cases on Patent Infringement on Trial*, CHI. TRIB., June 12, 1995, at 6, available at 1995 WL 6216112 ("Corporate defendants and patent lawyers have long griped that intellectual property litigation is too complex to leave to plumbers, housewives, mailmen and music teachers."); *Judicial Panel Discussions on Science and the Law*, 25 CONN. L. REV. 1127, 1145 (1993) (statement of Judge Covello, U.S. District Judge, Dist. of Conn.) ("Honest to God, I don't see how you could try a patent matter to a jury. Goodness, I've gotten involved in a few of these things. It's like somebody hit you between your eyes with a four-by-four. It's factually so complicated.").

<sup>3</sup>Krantz, *supra* note 2, at A6 (reporting that the parties settled before the jury verdict because "the jury was going to be filled with retired people – this is not a jury of peers . . . . In a situation like this, you have to break the case down

caused commentators to argue that the jury's role in patent litigation should be severely limited. Commentators and participants in this symposium have proposed many alternatives and reforms, including: specialized trial judges or special masters;<sup>4</sup> specialized trial courts;<sup>5</sup> alternative dispute resolution;<sup>6</sup> expert ("blue ribbon") juries;<sup>7</sup> or Patent Office reexamination or opposition procedures.<sup>8</sup>

Despite the skepticism regarding a lay jury's ability to comprehend and adjudicate patent

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to a simple "good guy versus bad guy" story for the jury"); *Jury Cases on Patent Infringement on Trial*, CHI. TRIB., June 12, 1995, at 6, available at 1995 WL 6216112 (quoting GE as stating that the jury "apparently acted on emotion, not facts or law"). In 1999, as part of another project, I conducted a survey of Chief Patent Counsels. See Kimberly A. Moore, *Judges, Juries & Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 373-74 (2000) (describing the survey). Many of the Chief Patent Counsels believed tangential or emotional issues swayed jury decision-making. One Chief Patent Counsel with 35 years experience commented, "I have won and lost cases with juries, and in both situations, the jury reasoning was not related to the facts." *Id.* at 373 n.33.

<sup>4</sup>See ADVISORY REPORT, *supra* note 1, at 99 (discussing designation of patent cases to patent "expert" judges or assignment of a single judge in each district to hear all patent cases); cf. Edward V. Di Lello, Note, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 490-91 (1993) (proposes the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields).

<sup>5</sup>See, e.g., Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. COLO. L. REV. 623, 623 n.4, 624 (1996) (recommending the creation of a specialized trial court or panels of expert juries to resolve patent cases); *Major Problems Conference*, *supra* note 1; Pegram, *supra* note 1, at 91 (discussing inadequacies in patent infringement adjudication system and proposing that the U.S. Court of International Trade be given patent case jurisdiction).

<sup>6</sup>See, e.g., Richard P. Cusick et al., *A Critical Analysis of the Proposed National Patent Board*, 13 OHIO ST. J. ON DISP. RESOL. 461 (1997) (endorsing a proposal for an industry-sponsored National Patent Board ("NPB") to resolve patent infringement disputes); Tom Arnold, *Why Is ADR the Answer?*, THE COMPUTER LAWYER, July 1998, at 13 (suggesting that forms of alternative dispute resolution would be better than a judge or jury resolution of patent cases).

<sup>7</sup>See, e.g., Davin M. Stockwell, *A Jury of One's (Technically Competent) Peers?*, 21 WHITTIER L. REV. 645 (2000) (advocating use of expert juries to resolve patent cases); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DEPAUL L. REV. 49 (1997) (proposing use of specially qualified juries in cases such as patent litigation where the lay jury is ill-equipped to deal with the complexity of the issues being tried).

<sup>8</sup>Of course, reexamination procedures exist as a present alternative to litigation, but they are infrequently chosen because of their estoppel effects on litigating validity issues. Opposition proceedings prior to patent issuance presently do not exist. However, if enacted, they could help reduce subsequent litigation by minimizing the issuance of invalid patents. See, e.g., Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1525 (2001) (discussing the costs and benefits of an opposition proceeding for patents); Joel M. Freed & Thomas C. Reynolds, *The New Patent Landscape*, 18 COMPUTER & INTERNET L. 1 (2001) (reporting on a Congressional bill which would establish opposition proceedings for business method patents); Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.J. 577, 610-12 (1999); Mark D. Janis, *Rethinking Reexamination: Toward a Viable Administrative Revocation System for U.S. Patent Law*, 11 HARV. J.L. & TECH. 1 (1997) (suggesting further examination of foreign nullity, opposition, and revocation proceedings as potentially advantageous over the present scheme of resolving validity disputes via litigation); Craig Allen Nard, *Legitimacy and the Useful Arts*, 10 HARV. J.L. & TECH. 515, 557 (1997) (suggesting that the PTO is better suited to resolve patent validity issues than a judge or lay jury); Rochelle Cooper Dreyfuss, *Dethroning Lear: Licensee Estoppel and the Incentive to Innovate*, 72 VA.

cases, parties have increasingly called upon juries to resolve patent disputes. As Figure 1 demonstrates, jury trials of patent cases have risen dramatically in recent years.<sup>9</sup> Figure 1 compiles the only publicly available data on increased jury involvement in patent cases prior to this study. It reports the percentage of patent trials adjudicated by a jury from

1940-2000. This data is a useful starting point for comparing judge and jury outcomes in tried cases,<sup>10</sup> and may indicate whether the parties are increasingly demanding jury resolution. Are parties demanding juries more frequently or are parties simply less adept at estimating outcome when juries are involved? Because tried cases are not a random or a representative sample of all patent disputes,<sup>11</sup> this data does not provide insight into the impact of the jury demand itself on patent litigation. The absence of data on jury demands and their impact on patent litigation has handicapped analysis of reforms aimed at jury adjudication of patent cases. This Article's empirical study on jury demands attempts to correct that problem.

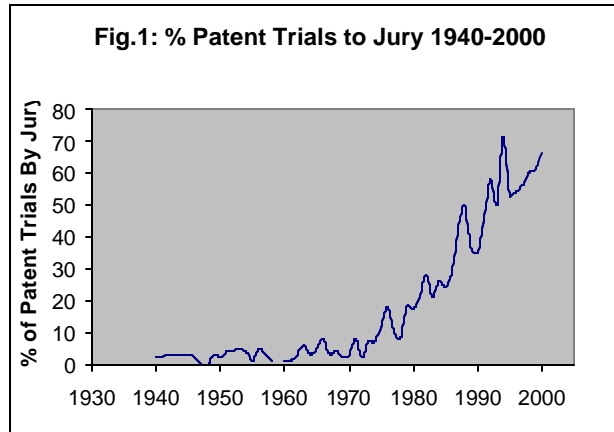
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L. REV. 677, 754 n.277 (1986); Gregory Gelfand, *Expanding the Role of the Patent Office in Determining Patent Validity: A Proposal*, 65 CORNELL L. REV. 75, 98-102 (1979).

<sup>9</sup>The underlying data for this chart was compiled from Table C-4 in the sixty Annual Reports of the Director of the Administrative Office of the U.S. Courts spanning years 1940-2000.

<sup>10</sup>My prior research compares judge and jury outcomes in tried patent cases. See Moore, *supra* note 3, at 386-94.

<sup>11</sup>See, e.g., Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1568 (1989) (describing “expectations theory,” which suggests that tried cases might not reflect the pool of all disputes); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (discussing generally that tried cases are not a random sample of all disputes and only result when the parties make inconsistent and self-serving outcome estimations); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (positing that strategic bargaining is a major factor in delineating between tried cases and cases that settle); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (suggesting the strategic bargaining impacts the pool of tried cases); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 58 (2d ed. 1951) (commenting that litigated cases bear the same relationship to the underlying pool of disputes “as does homicidal mania or sleeping sickness, to our normal life”).



This Article presents the empirical results of an original dataset of all patent cases adjudicated in the two-year period, 1999-2000 (4256 cases). This Article uses party characteristic data and data about the litigation itself to examine two important questions: 1) who is demanding the jury; and 2) what impact this demand has on the litigation. This Article also examines jury demands and the characteristics of the parties to the lawsuit and the patents at issue to ascertain whether perceptions of bias can be documented. The study measures only perceptions of relative jury bias – i.e., bias relative to a judge’s decision-making. For example, even if juries are thought to be biased against foreign corporations, those foreign corporations would still demand a jury if they believed that judges are even more biased against them. This Article does not attempt to prove or disprove the accuracy of these perceptions by looking at case outcomes. Instead, it focuses on how the parties incorporate these perceptions into their strategic decision-making about the case.<sup>12</sup>

With the increasing complexity of both technology and the patents that protect it,<sup>13</sup> the high percentage of jury demands I found (78%) may at first blush seem puzzling because prevailing wisdom is that juries are not competent to resolve patent cases. The answer, however,

<sup>12</sup>This is like an event study – a complicated opinion poll. See, e.g., Roberta Romano, *The Need For Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001) (using event studies to conclude that when companies reincorporate in Delaware their stock prices go up indicating that people perceive Delaware as better for corporate law (not that it actually is better)).

<sup>13</sup> See John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77 (2002) (finding that patents have become increasingly complex by comparing a sample of patents from the

is quite straightforward. A jury adjudicates a case if either party demands one at the outset of the litigation.<sup>14</sup> In short, this means that either party can unilaterally demand a jury and thereby subject their adversary to a jury. It is not a system wherein both sides must agree to allow a jury to adjudicate their dispute.

If juries are unable to understand the technology or apply the law, their decisions will be based on less meritorious influences such as bias, likeability, or emotion.<sup>15</sup> If juries seem biased in favor of patent holders, then it should not surprise anyone that patent holders disproportionately request jury trials. Similarly, if juries appear to favor individuals over large corporations, domestic over foreign parties, and local, in-state folk over out-of-state companies, we would expect these characteristics to influence the circumstances in which jury demands are made. By examining these factors I can report how they influence the parties' perceptions of jury competence and bias. Jury demands thus reflect perceptions of the patent process and are useful as a way of gauging that process.

## **II. The Empirical Project**

The Administrative Office of the United States Courts compiles statistics on terminated cases by subject matter. The dataset is the population of patent cases from 1999-2000 (two years). This data reflects 4256 cases and more than 6500 separate claims.<sup>16</sup> When a patent case is

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1970s with a sample of patents from the 1990s).

<sup>14</sup> Federal Rule of Civil Procedure 38(b) specifies: "Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party." FED. R. CIV. P. 38(b).

<sup>15</sup> This may explain both the preference for juries trials and the trend toward more jury demands. It could be that the increasing complexity in the underlying technology has caused the party most likely to be favored by a jury's bias to prefer juries with greater frequency. As the complexity increases, the jury may be more inclined to allow non-meritorious influence and prejudices to impact their decision-making. In short, the less a jury understands about the technology, the more likely unrelated issues will influence decision-making.

<sup>16</sup> Some cases involved more than one patent. In many cases, the patent holder would file suit against the defendant claiming infringement of more than one patent or alternatively, the defendant-infringer would file a counterclaim

terminated, the district court files a form with the Administrative Office<sup>17</sup> that includes: data regarding the dates of filing and termination of the suit; the judicial district; the procedural stage of the termination (whether termination was prior to any court action, mid-litigation, or at trial); the method of disposition (default judgment, consent judgment, settlement, summary judgment motion, jury verdict, court trial, etc.); and whether a judge or jury tried the case. Because of the high error rate in the Administrative Office data, I verified or independently researched every variable included in this study.<sup>18</sup>

Unfortunately, the data obtained from the Administrative Office did not contain any information on jury demands or any characteristic data regarding the parties. In order to collect this data, I obtained the docket sheets and complaints for the cases in the dataset. For purposes of this study, I researched the following: whether a jury trial was demanded; who demanded the jury (plaintiff, defendant, or both); which party was the patent holder (plaintiff or defendant);<sup>19</sup> whether the parties were foreign or domestic;<sup>20</sup> whether the parties were individuals or corporations;<sup>21</sup> and whether the parties were in-state or out-of-state.<sup>22</sup>

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that the plaintiff-patentee infringed the defendant's own patent. In the latter case, the court would be deciding patent infringement by the plaintiff and patent infringement by the defendant.

<sup>17</sup>See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES, Transmittal 64, vol. XI, at II-19-II-28 (March 1, 1985).

<sup>18</sup>Occasionally, a case will be reported as a patent case and not actually involve patent issues. For example, it will be a trade secret or copyright case which is inaccurately reported. I eliminated these from the dataset. The Administrative Office reporting of the procedural process and disposition of the case also turned out to be inaccurate in some instances. I corrected each of these variables through verification by obtaining the relevant case documents (complaints, summary judgment rulings, special verdicts forms, etc.) and thus all cases are included in this empirical analysis. Finally, the reporting of outcome (who won) was inaccurate or otherwise deficient with such frequency that I cut it from the dataset and independently obtained all outcome statistics by external research. The extent of inaccurate reporting and its ramifications are the subject of a future paper.

<sup>19</sup>In 15% of the cases in the dataset, the accused infringer rather than the patent holder filed suit—a declaratory judgment action.

<sup>20</sup>The plaintiff is considered foreign if the plaintiff itself (party bringing suit) is foreign. There is a separate variable which considers whether the inventors on the patents involved in the suit are foreign or domestic. The defendant is considered foreign if any of the defendants are foreign. For example, if there are three defendants and one of them is foreign, they are considered a foreign defendant.

<sup>21</sup>If any of the parties are corporations, the party is considered a corporation. For example, suppose a lawsuit were brought against an infringer by a patent holder who is an individual and the exclusive licensee for the patent which

The Administrative Office data is similarly devoid of any of the characteristics of the patents at issue in each suit and in fact, do not even report the patent numbers themselves.<sup>23</sup> I collected each patent number involved in the lawsuits in the dataset by obtaining each complaint and obtained characteristic data on the patents from the NBER database which is an extensive empirical project undertaken by Bronwyn Hall, Adam Jaffe, and Manual Trajtenberg on the characteristics of all issued patents from 1975-1999.<sup>24</sup> This characteristic data permitted comparison of patents by technological field, the number of claims, citations made by the patent to other U.S. patents, and citations of this patent received by the U.S. patents.

### **III. Jury Demands: Empirical Results on the Characteristics of Who Makes the Jury Demand**

#### *A. Plaintiff v. Defendant*

Parties demanded a jury trial in 78% of the 4256 separate patent cases terminated in the 94 U.S. district courts during the two-year period 1999-2000. Such a high percentage of jury demands suggests that in patent cases, often at least one of the parties thinks the jury will be a more favorable adjudicator than the court. The breakdown of who is doing the asking is contained in Table 1.

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is a corporation. These parties are considered a corporation. If there is more than one defendant and any of the defendants is a corporation then the party is considered a corporation.

<sup>22</sup>If any of the parties are incorporated in a particular state or have their headquarters/principal place of business in the state where the action was filed then they are considered an in-state party. Of course, this means that in cases where several defendants are sued for infringement one or more of the defendants could be out-of-state, but get classified as in-state simply because one defendant is in-state.

<sup>23</sup>Although there is a database entitled Litalert which reports the patent numbers of patents involved in litigation, only about 55% of all litigated patents are actually recorded in this dataset. See Jean Lanjow & Mark Shankerman, *Enforcing Intellectual Property Rights*, at 8 (2001) (draft on file with author) (finding that throughout the 1990s about 55% of all patent litigations are reported to LITALERT). I obtained all of the patent numbers involved in all of the litigations during this time period by resorting to the actual complaints for each suit.

<sup>24</sup>Bronwyn Hall, et al., *The NBER Patent Citation Data File: Lessons, Insights and Methodological Tools*, (NBER Working Paper No. 8498, 2001) [hereinafter *NBER Data*].

<b>Table 1: Which Party Demands the Jury</b>	
Plaintiff	49%
Defendant	7%
Both Parties	22%
Neither Party	22%

As Table 1 indicates, plaintiffs demanded a jury significantly more often than did defendants. Plaintiffs demanded a jury in 71% of all cases. Although Table 1 suggests that defendants only demanded a jury in 29% of the cases, this number is misleading because many cases are resolved before the defendant would have had a chance to make the demand. Since the defendant ordinarily files its jury demand with its pleadings (answer or counterclaim), if the case terminates prior to the defendant's involvement, the defendant has no opportunity to make a jury demand.<sup>25</sup> In those cases in which the defendant had an opportunity to demand a jury, the defendant's jury demand rate was 42%.

It is also possible that this 42% may not accurately reflect the defendant's true preference regarding adjudicator because of what I call the "me too" phenomena.<sup>26</sup> Because the plaintiff demands a jury trial in 71% of the cases, very seldom does defendant have the opportunity to make a demand that would impact whether a jury adjudicates the case. In cases where the plaintiff has demanded a jury, the defendant may not request a jury because it would be

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<sup>25</sup>Thirty-five percent of the cases resolved before the defendant filed an answer in the case either by settlement, voluntary dismissal by the plaintiff, or on a 12(b) motion to dismiss.

<sup>26</sup> The "me too" phenomena is the propensity of a defendant to demand a jury even though the plaintiff has already made a demand—when the defendant's demand is meaningless. A defendant would do this because there is no cost to make the demand. Additionally, a defendant may gain some settlement leverage if a plaintiff perceives that a



redundant to the plaintiff's demand. This is especially true because withdrawal of the jury demand requires consent by both parties even though plaintiff alone makes the demand.<sup>27</sup> According to this logic, 42% may actually be lower than defendants' actual preference. However, the pointlessness of defendant's jury demand—the “me too” phenomena—has not eliminated defendant jury demands because in 32% of the cases the defendants demanded a jury notwithstanding plaintiff's request. The “me too” phenomena could alternatively suggest that the 42% rate of demand by defendant is artificially high. It is not particularly difficult or onerous to write “Jury Demanded” in one's answer and in the cases where the plaintiff has already made the request, making demand is costless. This costlessness of defendant's jury demand could inflate the defendant's jury demand statistic. In these cases, the defendant may make a redundant jury demand for strategic negotiating reasons to avoid the appearance of weakness for settlement purposes.

The most accurate reflection of defendant's preference for a jury could come from limiting the data to those cases where the plaintiff made no demand and the defendant had an opportunity to make a demand. In this subset of the dataset, the defendant's choice matters. The defendant requests a jury in 39% of these cases.<sup>28</sup>

There is a significant literature hypothesizing that juries favor plaintiffs.<sup>29</sup> Table 1

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defendant is willing and confident to try their case before a jury.

<sup>27</sup> FED. R. CIV. P. 38(d).

<sup>28</sup> Of course, even this statistic can be questioned because the parties have until 10 days after the last pleading in order to file a jury demand. In short, although it is standard practice to attach a jury demand to the pleading (complaint, answer, or counterclaim), it is not required. Accordingly, the absence of a demand for a jury by the plaintiff in their complaint does not absolutely bar them from demanding a jury later in the pleading process. This means that when the defendant makes the jury demand first, they are not entirely certain that the plaintiff has decided not to make a demand.

<sup>29</sup> See, e.g., Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 11-12, 18-20, 31 (1982) (“In ordinary negligence cases it assumes juries will exercise a consistent pro-plaintiff, anti-corporation, anti-insurer bias.”); NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS* 11-25 (1995) (reviewing claims that juries are biased in favor of plaintiffs); *Corporate Citizenship: A Conversation Among the Law, Business and*

supports the existence of these perceptions and their application in the litigation context. Although Table 1 does not prove or disprove this hypothesis because it is not testing for outcome, it supports the existence of this perception. The empirical results prove plaintiffs prefer juries, not necessarily that juries prefer plaintiffs. Why then aren't plaintiffs demanding a jury in 100% of the cases? There are several possible explanations. First, not all plaintiffs are likely to be repeat players in patent litigation and therefore there may be an information asymmetry. One-time litigants or new litigants may be unaware of the otherwise predictable behavior of juries. Although it is possible that a particular party may be ignorant of the biases of the jury, it seems implausible that this could account for 29% of the plaintiffs not demanding a jury. This is especially true when patent litigation is such an expensive endeavor.<sup>30</sup>

Parties would unlikely spend millions of dollars litigating disputes and not research which adjudicator may favor them.<sup>31</sup> Even if the party is not a repeat player, generally the attorneys who litigate patent cases are familiar with the litigation process and jury behavioral patterns.<sup>32</sup> Perhaps all litigants do not share the perception that juries are biased in favor of plaintiffs or patent holders.<sup>33</sup> This could result in significantly different outcome estimations by the parties, thereby impeding settlement.

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*Academia*, 84 MARQ. L. REV. 723, 787 (2001) (statement of Dr. Valerie P. Hans) (suggesting that the “civil jury is thought to be extraordinarily pro-plaintiff and quite anti-business”).

<sup>30</sup>See AMERICAN INTELLECTUAL PROP. LAW ASS'N, REPORT OF ECONOMIC SURVEY 2001, at 84 (reporting that an average suit will cost each party \$1.5 million in transaction costs).

<sup>31</sup>Since only recent empirical work has substantiated popular perceptions that juries favor patent holder plaintiffs on outcome statistics, it is possible that this information was not researchable. Cf. Moore, *supra* note 3, at 403 (substantiating that juries resolve cases in favor of patent holder plaintiffs overall and on most major issues more often than judges); John Allison & Mark Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 212 tbl. 3 (67% of 73 patents valid after jury trials, 57% of 143 patents valid after bench trials).

<sup>32</sup>In fact, there are several successful jury consultation firms (DecisionQuest, Trial Behavior Consulting, Inc., etc.) which exist to help parties make predictions about jury behavior.

<sup>33</sup>I surveyed corporate Chief Patent Counsels in 1999. The results of my survey showed that 86% of the Chief Patent Counsels believed that juries were biased in favor of the patent holders. The flip side of this statistic is that 14% did not believe that juries held this prejudice. Accordingly, these 14% would make different outcome estimations than 86% of their colleagues. See Moore, *supra* note 3, at 373-74 (reporting survey results).

The fact that jury trials take longer and are more expensive than bench trials may also explain why plaintiffs may not be demanding a jury even if they are aware of the advantage of doing so.<sup>34</sup> It is surely more expensive and time-consuming to educate a jury that is seeing the technology for the first time at the trial than to educate a judge who has presided over the litigation since its inception and who has rendered a claim construction along the way.<sup>35</sup>

Another plausible explanation for why plaintiffs do not demand juries in all cases is that plaintiffs do not perceive juries as biased in only one dimension. Put simply, juries are complex and while one may form generalizations about their biases and preferences, it is not normally a single attribute inquiry. For example, if the plaintiff and defendant were virtually identical and the only difference in the way that they believed the jury would perceive them is that one was a plaintiff and the other a defendant, then a perception of pro-plaintiff jury bias would cause the plaintiff to demand a jury. However, if the plaintiff were a foreign corporation and the defendant were an in-state individual patent holder, the plaintiff may not believe that a jury would favor it because other biases may overcome the pro-plaintiff bias. Additionally, there are likely idiosyncratic case-specific factors that likely influence the decision to demand a jury in many cases.<sup>36</sup> The remainder of this section addresses other possible perceptions that could be

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<sup>34</sup>John B. Attanasio, *Foreword: Juries Rule*, 54 SMU L. REV. 1681, 1682 (2001) (“Jury trials are generally longer, more cumbersome, and more expensive than bench trials.”); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WIS. L. REV. 931, 944 (2001) (noting that jury trials are thought to be more expensive than court trials because they take longer and discovery can be more expensive because parties prepare more thoroughly). Of course, this same rationale would likely make defendants averse to juries as well.

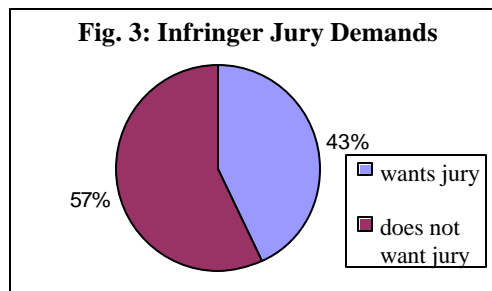
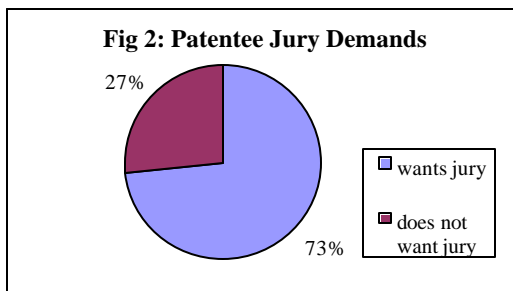
<sup>35</sup>In *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388-91 (1996), the Supreme Court held that judges, not juries, must construe patent claim terms.

<sup>36</sup>Bias based upon party characteristics is not likely to tell the whole jury demand story. For example, even if the parties believe that juries favor patentees (and all other party characteristics are equal), the patentee may not demand a jury if it believes the defendant will present a strong case of inequitable conduct. Inequitable conduct evidence suggesting that the defendant wrongfully acquired its patent by withholding material evidence from the PTO with the intent to deceive, is strong “bad guy” evidence which is likely to affect the jury’s image of the patentee. This issue and the kind of evidence the infringer/defendant could present might cause the infringer to want a jury and the patentee not to want a jury in a particular case even though the party characteristics pointed the other way.

impacting jury demands and outcome estimates.

*B. Patent Holder v. Infringer*

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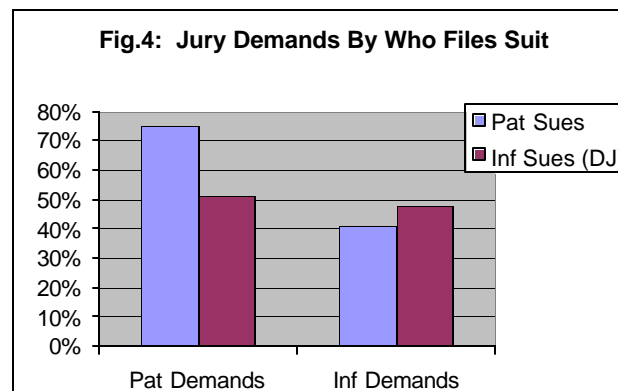
s of civil law such as products liability and medical malpractice, the plaintiff is normally the sympathetic aggrieved party seeking justice – the injured individual. The same is true in patent cases where the plaintiff is generally the patent holder seeking compensation for the defendant’s infringement of its property right. In 15% of the cases in the dataset, however, the patent holder is actually the defendant. These cases are declaratory judgment actions where the natural defendant, the accused infringer, actually initiates the lawsuit and requests a “negative declaration” of non-infringement, invalidity and/or unenforceability. To further analyze who demanded the jury, Figures 2 and 3 present the jury demand results by patent holder and accused infringer.<sup>37</sup>

<sup>37</sup>The patent holder jury demand statistics were derived by looking at all cases in the dataset in which the patent holder initiated the lawsuit and demanded a jury plus all cases in which the accused infringer initiated the lawsuit limited by procedural progress at termination to ensure that the patent holder (defendant) had an opportunity to make

The patent holder demanded a jury in 73% of the cases and the accused infringer demanded a jury in 43% of the cases. Given these percentages, it is clear that the patentee perceived an advantage to a jury trial. This is a perception that my own prior empirical work validates.<sup>38</sup>

#### 1. Infringement v. Declaratory Judgment Action

Figure 4 shows that the patent holder's jury demand rate rose to 75% after isolating those cases in which the patent holder initiated suit. By contrast, when the patent holder is the defendant (i.e., when the accused infringer initiates the lawsuit by filing a declaratory judgment action), the patent holder demanded a jury in 51% of the cases.<sup>39</sup> When the declaratory judgment plaintiff did not demand a jury (so the defendant patent holder's choice matters), the defendant patent holder demanded a jury in 52% of the cases. When the infringer is sued, it demanded a



jury in 41% of the cases. However, when the infringer is sued and the plaintiff patent holder did not demand a jury (so the defendant infringer's choice matters), the defendant infringer asks for a

a jury demand and did demand one. The infringer jury demand statistics were derived in the same manner.

<sup>38</sup>See Moore, *supra* note 3, at 386, 390 (substantiating empirically a significant advantage for the patent holder with juries rather than judges in overall win rate and on the individual issues of validity, infringement, and willfulness).

<sup>39</sup>The result was controlled to look only at the cases in which the patent holder as defendant had an opportunity to make such a demand—cases that were not resolved prior to an answer being filed in order to avoid statistical bias. For example, if I did not isolate the data in this manner, the patent holder jury demand rate for all declaratory judgment actions (where the patentee is the defendant) would be 28%, though the accurate jury demand rate (where

jury in 36% of the cases. When the infringer initiated suit by filing a declaratory judgment action (usually asking the court to declare that there is no infringement and that the patent is invalid and/or unenforceable), the infringer demanded a jury in 47% of the cases. These results indicate that while there is a perception of an advantage with the jury for the patent holder, that advantage is substantially modified by who initiates the lawsuit. The patent holder plaintiff is much more confident about its chances with a jury than is the patent holder defendant. Similarly the infringer is more likely to favor a jury when it initiates suit.

These empirical results contradict some popular notions about jury demands.<sup>40</sup> Accused infringers generally bring declaratory judgment actions when they believe they have a strong case on the merits. Why initiate suit if you estimate your chances of success as very low? Since commentators suspect that the party who demands a jury in a patent case has a weaker case on the merits,<sup>41</sup> one would expect the jury demand rates for infringers to go down and jury demand rates for the patentees to go up in declaratory judgment actions. Taking into account existing perceptions, the party with the weaker case on the merits would be more eager to have an adjudicator who they perceive to be less likely to focus on the merits—a jury. However, the empirical result defies this prediction.

One possible explanation for the infringer's increased preference for juries in declaratory judgment actions could be that these cases are more frequently focused on validity. If the infringer's primary defense to infringement is that the patent is invalid because it lacks novelty

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the patentee had the chance to make the demand) was 51%.

<sup>40</sup> It may be that declaratory judgment plaintiffs demand more juries because they believe that the plaintiff bias cancels out some of the patentee bias.

<sup>41</sup> See ETHAN HORWITZ & LESTER HORWITZ, *PATENT LITIGATION: PROCEDURE & TACTICS* 2.02[6] (Matthew Bender 1995) (“[C]ourts suspect the party who puts a patent case on the jury docket of some weakness on the merits.”); Richard B. Schmitt, *Court To Consider Limits On Juries' Role in Patent Suits*, WALL ST. J., Feb. 18, 1994 at B6 (quoting Wayne State University professor Martin J. Adelman, “there are many lawyers who believe they can benefit by jury confusion). Of course, the jury is not told which party demanded the jury trial.

or is obvious, then the adjudicator must compare the patent claims to prior art in order to determine whether there are any differences between them. The less knowledgeable factfinder is more likely to think that the technical documents look the same because they are less likely to find meaning in small technical distinctions. This increases the chances that the patent will be invalidated. Perhaps this explains why infringers prefer juries in these circumstances. Similarly, patent holders may prefer juries for infringement claims because the juries are less likely to distinguish between the patent claims and the accused device. The less sophisticated adjudicator is less likely to focus on technical distinctions. For validity issues this would favor the infringer, for infringement issues, this would favor the patent holder.<sup>42</sup>

Another explanation as to why a party is more likely to demand a jury if they are the one bringing suit is what I call the “forum effect.” The parties believe that there is an advantage to selecting forum and that this advantage is greatest when they get to pick their jury pool. In a previous study, I reported that the patent holder win rate when juries adjudicate cases falls from 68% when the patent holder initiates the suit to 38% when the infringer initiates the suit.<sup>43</sup> There is no difference in win rate statistics in bench trials; if the patent holder initiates suit the win rate is 49% and if the infringer initiates suit the win rate is 49%.<sup>44</sup> This win rate data suggests that infringers fare substantially better with a jury when they initiate the lawsuit – hence plaintiff infringers are behaving rationally by demanding juries more often.

The data in this study suggest that plaintiffs are filing suit in the state where they have a connection—plaintiffs file suit in their home state in 64% of the cases.<sup>45</sup> If parties believe that

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<sup>42</sup>Unfortunately, there is no way to verify this theory because all cases raise non-infringement and invalidity claims, whether they are declaratory judgment actions or infringement actions.

<sup>43</sup>Moore, *supra* note 3, at 368.

<sup>44</sup>*Id.* at 406 (reporting patentee win rates by who filed suit in judge and jury trials in figure 12).

<sup>45</sup>A state is considered the party’s home state if either the corporation is incorporated in that state or the company’s principle place of business (headquarters) is located in the state.

juries are prone to decide cases on tangential factors, they may believe there is a home-court advantage with a jury. The data show that in-state plaintiffs demand a jury in 73% of the cases and out-of-state plaintiffs demand a jury in 67% of the cases. In-state plaintiff demands rise even higher (75%) when they are up against an out-of-state defendant. The data in this study suggests that there is a perceived advantage to forum selection, especially when a jury is involved. My prior work substantiates a real advantage to forum selection because there is significant forum-dependent variation in procedural and substantive resolution of patent cases.<sup>46</sup>

*C. Other Potential Biases (Size and Location)*

The strategic advantage of having a jury is likely a multifactor inquiry. For example, if the defendant is foreign the plaintiff may only perceive an advantage to a jury if it is domestic. Because there are many variables that could affect whether a party perceives an advantage with a jury and therefore demands a jury trial, I ran a multivariate regression that factored in several independent variables and their impact on whether the party demanded a jury trial. This regression model analyzes the circumstances in which the plaintiff demanded a jury trial. The dependent variable is whether the plaintiff demanded a jury. The independent variables are: whether the plaintiff is an individual or a corporation (*Pcorp*); whether the defendant is an individual or a corporation (*Dcorp*); whether the plaintiff is domestic or foreign (*Pfor*); whether the defendant is domestic or foreign (*Dfor*); whether the plaintiff is located out-of-state or in-state (*Pin-state*); whether the defendant is located out-of-state or in-state (*Din-state*); whether the plaintiff is the patent holder or the accused infringer (*Patentee*); and the filing date of the litigation (*Filed*). With multivariate regression I can examine the separate effect of each

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<sup>46</sup>See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Impact Innovation*, 79 N.C. L. REV. 889, 907-920 (2001) (substantiating significant variation in the procedural and substantive resolution of patent cases by the district courts).



independent variable on the dependent variable or the statistical significance of each independent variable in predicting plaintiff jury demands. Multivariate regression only considers cases that contain information on all of the selected independent variables.

<b>Table 2: Impact of Possible Biases on Plaintiff Jury Demands</b>			
<b>Independent Variable</b>	<b>Coefficient</b>	<b>Standard Error</b>	<b>Significance</b>
<i>Pcorp</i> <sup>47</sup>	-0.070	0.025	0.005
<i>Dcorp</i> <sup>48</sup>	0.167	0.044	0.000
<i>Pfor</i> <sup>49</sup>	-0.070	0.022	0.001
<i>Dfor</i> <sup>50</sup>	0.023	0.019	0.228
<i>Pin-state</i> <sup>51</sup>	0.037	0.016	0.019
<i>Din-state</i> <sup>52</sup>	-0.066	0.016	0.000
<i>Patentee</i> <sup>53</sup>	0.279	0.019	0.000
<i>Filed</i> <sup>54</sup>	0.012	0.005	0.009

<sup>47</sup>0 = plaintiff is an individual, 1 = plaintiff is a corporation

<sup>48</sup>0 = defendant is an individual, 1 = defendant is a corporation

<sup>49</sup>0 = plaintiff is domestic, 1 = plaintiff is foreign

<sup>50</sup>0 = defendant is domestic, 1 = defendant is foreign

<sup>51</sup>0 = plaintiff is wholly out-of-state, 1 = plaintiff is either incorporated or has their principle place of business in the state where the suit is brought

<sup>52</sup>0 = defendant is wholly out-of-state, 1 = defendant is either incorporated or has their principle place of business in the state where the suit is brought

<sup>53</sup>0 = plaintiff is the infringer, 1 = plaintiff is the patent holder

<sup>54</sup> This is the filing year of the litigation. Since this is a study of all cases terminated during 1999-2000, their origination dates can vary substantially. In fact, the oldest case was filed on March, 18, 1983 and the youngest case was filed on December 6, 2000. As Figure 1 indicates, jury involvement in patent cases has changed quite dramatically in recent years. This regression confirms that in cases filed more recently there is a significantly greater chance of jury demand by plaintiff.

<i>DCI</i> <sup>55</sup>	See discussion below		
<i>Constant</i>	-23.858	9.405	0.011
Adjusted $R^2 = 0.101$ , <sup>56</sup> Number of Observations = 4106			

The regression results detailed in Table 2 show significance ( $p \leq .05$ )<sup>57</sup> for the variables *Pcorp*, *Dcorp*, *Pfor*, *Pin-state*, *Din-state*, *Filed* and *Patentee*. The regression model that contained dummy variables for the 94 district courts<sup>58</sup> also showed that in some districts there was a greater likelihood of plaintiff demanding a jury than other districts.<sup>59</sup> Figure 5 maps jury

<sup>55</sup> *DCI* is a series of dummy variables (94 to be exact) for the U.S. district courts. The Northern District of California was left out of the regression.

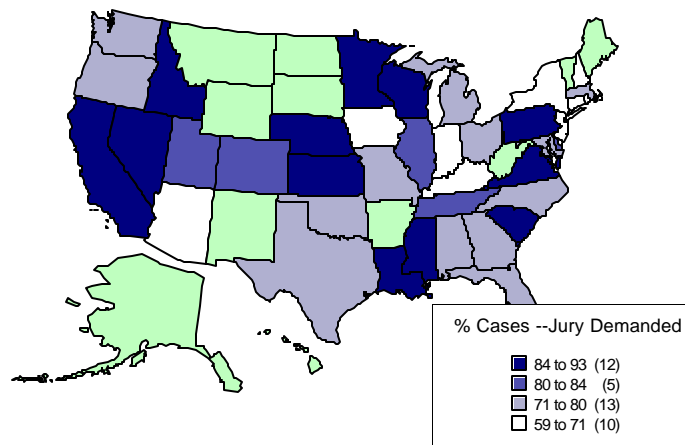
<sup>56</sup>  $R^2$  is the percent of variation of the dependent variable that is explained by the model. See PETER KENNEDY, A GUIDE TO ECONOMETRICS 26 (1998). In this model, the independent variables only explain 10.1% of the variation. Low  $R^2$  is common for limited dependent models since the models often predict probabilities between 0 and 1 while the observations are actually at either extreme. *Id.* at 233. Kennedy notes limitations of the linear probability models in general and  $R^2$  as a measure of goodness of fit for them in particular, however, a more sophisticated model would likely yield similar results. See G.S. MADDALA, INTRODUCTION TO ECONOMETRICS 330 (1992).

<sup>57</sup> In this study, I test a null hypothesis that posits “no difference” in outcome or “no relationship” between the independent variable and whether the plaintiff demanded a jury. The significance level is the probability of rejecting the null hypothesis when it is actually true. A rejection of null hypothesis with a  $p$  value  $p < .001$  indicates that there is less than one chance in a thousand of erroneously rejecting the null hypothesis of equal predicted win rates. This would translate into a confidence level of 99.9%. Hence we could reject the null hypothesis with 99.9% confidence. A rejection of the null hypothesis with  $p < .01$  has 99% confidence. A rejection of the null hypothesis with  $p < .05$  is 95% confidence. Throughout this Article, I use the term “significant” in the formal statistical sense, indicating that the null hypothesis can be rejected with at least 95% confidence ( $p \leq .05$ ). If  $p > .05$ , the relationships are not statistically significant; the null hypothesis cannot be rejected in these cases. See JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS 129 (2000).

<sup>58</sup> The frequency of jury demands varied by jurisdiction. For example, among districts with 100 or more patent cases, the rate of jury demands varied from 52% in the Southern District of New York to 83% in the Northern District of California. When dummy variables are created for all possible districts, one district must be left out of the regression. I left out the Northern District of California. The regression runs by comparing each of the 93 districts to the left out district and reports whether the plaintiff was more or less likely to demand a jury in each of the reported districts than they did in the left out district. Hence, the Northern District of California became the point of comparison against which jury demands in other jurisdictions were measured.

<sup>59</sup> The following district courts were significantly less likely to have plaintiff jury demands: District of Columbia, Massachusetts, New Hampshire, Northern District of Florida, Southern District of Florida, Southern District of Georgia, Northern District of New York, Central District of New York, Southern District of New York, Eastern District of New York, Delaware, New Jersey, Maryland, Western District of North Carolina, Western District of Virginia, Northern District of West Virginia, Northern District of Texas, Southern District of Texas, Western District of Kentucky, Western District of Michigan, Northern District of Ohio, Southern District of Ohio, Northern

Fig. 5: Geography & Jury Demands



demands by state.<sup>60</sup> There does not appear to be a geographic explanation for jury demands. Jury demands are not more prevalent on the East Coast, West Coast, North, South, or Midwest. Moreover, jury demand rates do not correlate to the number of patent suits in a given judicial district.<sup>61</sup> This means that each of these variables significantly impacted plaintiff's decision to demand a jury. In sum, plaintiffs were more likely to demand a jury when:

- plaintiff is the patent holder;
- plaintiff is an individual;
- defendant is a corporation;
- plaintiff is domestic;
- plaintiff is in-state;
- defendant has no ties with the state in which the lawsuit is brought;

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District of Illinois, Northern District of Indiana, Southern District of Indiana, Southern District of Iowa, Western District of Missouri, North Dakota, Arizona, Central District of California, Western District of Washington, Puerto Rico, Connecticut, and Northern District of Florida. There was no district where plaintiff jury demands were significantly more likely than the Northern District of California.

<sup>60</sup> Some states have more than 1 judicial district. Figure 5 lumps all jury demands in all judicial districts in each state together to present a state mean.

<sup>61</sup> It is not the case that judicial districts with more patent cases have more or less jury demands.

- the case was more recently filed; and
- the case is brought in particular districts.

Notice that these significance results demonstrate that both the plaintiff's characteristics and the defendant's characteristics impacted the circumstances in which the plaintiff requested a jury. These results probably would not shock many patent practitioners because they are largely consistent with popular perceptions of jury biases.<sup>62</sup> Practitioners believe juries prefer individuals to big corporations,<sup>63</sup> perhaps because jurors relate better to individuals or perhaps for wealth redistribution reasons. Practitioners also believe juries favor domestic over foreign parties,<sup>64</sup> and local, in-state companies over out-of-state companies.<sup>65</sup>

The multivariate regression allows one to estimate the magnitude of the effect on outcome produced by each independent variable. Using the coefficients from Table 2, I can calculate the approximate change in jury demand rate attributable to each independent variable. When there is a 50% chance that the plaintiff will demand a jury when the plaintiff is the infringer, there is a 77.9% chance that the plaintiff in an identical case will demand a jury if they are the patent holder.<sup>66</sup> This means that when the plaintiff is the patentee, it is 27.9% more likely to demand a jury. Notice that the magnitude of coefficients for the variables *Patentee* and *Dcorp*

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<sup>62</sup>This empirical study is like a sophisticated opinion poll in that it details commonly held perceptions of the ways in which juries are biased and how these perceptions influence party litigation behavior. Unlike an opinion poll in which a person could espouse any opinion, here the parties are acting on their opinions—actions speak louder than words.

<sup>63</sup>See, e.g., Barry S. Wilson, *Patent Invalidity and the Seventh Amendment: Is the Jury Out?*, 34 SAN DIEGO L. REV. 1787, 1787 n.4 (1997) (juries prefer individual inventors challenging large corporations or foreign defendants); Andrews, *supra* note 5 (juries “have proven eager to side with inventors against large companies”); Jonathon Taylor Reavill, *Tipping the Balance: Hilton Davis and the Shape of Equity in the Doctrine of Equivalents*, 38 WM. & MARY L. REV. 319, 366 (1996) (“juries also tend to idealize inventors”).

<sup>64</sup>See Jack L. Lahr, *Bias and Prejudice Against Foreign Corporations in Patent and Other Technology Jury Trials*, 2 FED. CIR. B.J. 405, 405 (1992) (“A widespread perception within the corporate communities of many industrial countries holds that they will be treated unfairly in U.S. jury trials due to the jury bias and prejudice against foreigners.”).

<sup>65</sup>Perhaps the company has developed consider local goodwill through employment of the local citizens, sponsor local sporting teams (little league), etc.

are the largest, indicating that these variables have the greatest impact on the jury demands. Although there are other variables that significantly impact whether the plaintiff demanded a jury, the magnitude of their coefficients is small which suggests that their impact was small. Moreover, the low value of the adjusted  $R^2$  (10.1%) suggests that there exist idiosyncratic case-specific factors not tested in my regression model that impact whether the plaintiff demanded a jury. This is likely a good thing, as it suggests that widely held perceptions of bias are not the only factors affecting a plaintiff's decision to demand a jury.

I ran a second multivariate regression testing the impact of variables on plaintiff jury demand rate that added technology field of the patent into the model. There are some obvious advantages to considering the type of technology at issue that could impact whether a jury is demanded.<sup>67</sup> For example, perhaps the plaintiff prefers a jury when their patent is simpler—suggesting that we may see more jury demands with mechanical inventions than chemical inventions. However, there are also concerns about running the regression by patent rather than by case, as is required in order to factor in the individual patent characteristic data. One drawback of this approach is that in a given patent case there can be multiple patents that could have differing characteristics, yet the jury demand is binary. This results in a jury for all patents or no patents.

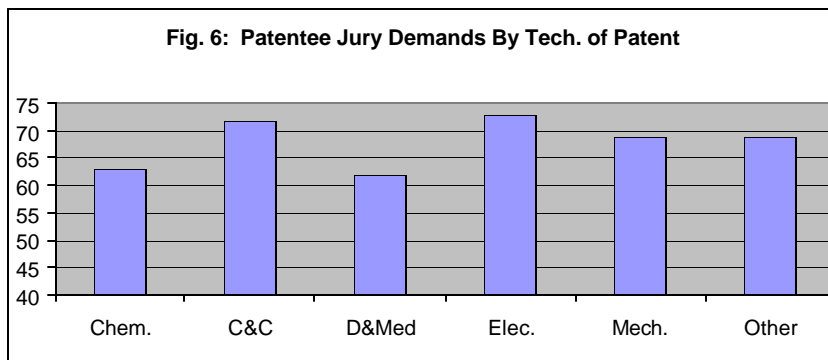
In this second regression, the patent holder plaintiff was significantly more likely to demand a jury when: the plaintiff is the patent holder; plaintiff is domestic; the defendant is foreign, the plaintiff is an individual; the defendant is a corporation; the defendant is out-of-state; the case was more recently filed; the suit was commenced in certain district courts; and based

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<sup>66</sup>Magnitude in a linear regression model is calculated directly by the coefficient. *See* Woodbridge, *supra* note \_\_, at 233-34.

<sup>67</sup> In fact, adding the patent technology field data into the regression model produced an adjusted  $R^2$  of .128,

upon the underlying patented technology field (chemical, computers and communications, electronics, drugs and medicine, mechanical, and other).<sup>68</sup> These results are entirely consistent with popular perceptions of jury bias and consistent with the results of the regression model limited to case and party characteristics. Figure 6 shows how the patent holder's jury demands varied by the technology of the patent.



For completeness, I ran a third regression on factors impacting whether the defendant demanded a jury. The regression model was limited to only the cases in which the plaintiff did not demand a jury and where the defendant had an opportunity to make a demand. Hence it is limited to cases where it mattered whether the defendant selected a jury. The only significant variables in the model were whether the defendant is the patent holder. This is consistent with impressions about jury bias, thus suggesting that parties behave in a manner that is consistent with popular perceptions of jury bias. Again, however, the data suggest that there is more to the picture than what we see in this model because of the low value of the  $R^2$  (.041= 4.1%).

In an initial regression, I included all of the same variables as Table 2 with the addition of the independent variable *DemP* that reports whether the plaintiff demanded a jury. The initial regression showed significance ( $p \leq .05$ ) for the variables *DemP* meaning that, strangely,

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indicating that 12.8% of the jury demands can be explained by the factors considered.

<sup>68</sup> Categorization of patents is originally by PTO technology class. These classes have been grouped together into

defendants were significantly more likely to demand a jury if the plaintiff had already demanded one. Why is this the case? If the plaintiff demanded a jury (signaling a belief that they would benefit from jury adjudication) why would the defendant make the “me too” demand? Defendants may have demanded a jury more frequently in these circumstances precisely because it is meaningless. Breaking this dynamic down in Table 3<sup>69</sup> shows most of the defendants’ jury demands (73%) occurred after the plaintiff had already made a request. In these circumstances, making the demand is costless—the defendant will end up with a jury anyway because of plaintiff’s jury demand and defendant need only add “Jury Demanded” to its answer.<sup>70</sup>

<b>Table 3: Plaintiff and Defendant Jury Demands</b>		
	Defendant – Jury Demand	Defendant – No Jury Demand
Plaintiff – Jury Demand	32%	41%
Plaintiff – No Jury Demand	11%	16%

The plaintiff’s demand may motivate the defendant to make the same demand because the defendant wants to communicate to plaintiff that it does not believe that the jury is bad for the defendant. For settlement purposes, the defendant bluffs—it does not want to give the plaintiff the impression that it believes the jury demand weakened its chances of success. In cases where the plaintiff has already made the demand, it would be strategically advantageous

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the six general categories in the NBER dataset. *NBER Data*, *supra* note 25.

<sup>69</sup> This reports jury demands of both parties only in cases in which both parties had an opportunity to make a demand – it excludes cases resolved prior to defendant being joined.

<sup>70</sup> It might also be logical to think that there would be a greater likelihood of defendant demanding a jury when plaintiff does not make a demand. If plaintiff does not demand a jury it would presumably be because plaintiff views a jury as not favorable to it (leaving aside information asymmetries and higher costs of jury trials as possible explanations). If plaintiff signaled to defendant that plaintiff preferred a judge over a jury by not making a jury demand, one might think this would make defendant more inclined to demand a jury. If a jury is bad for plaintiff, it

for the defendant to give the impression that it prefers a jury as well.<sup>71</sup> Perhaps bluffing could make the plaintiff question whether it is missing anything (asymmetric information). The plaintiff would wonder whether it correctly calculated the advantageousness of its jury demand if the defendant reached the same conclusion for itself. One of the parties is clearly in error or behaving deceptively for strategic purposes. It must be acknowledged, however, that bluffing is less effective when there is no cost to the defendant and the plaintiff knows that there is no cost to the defendant. In short, plaintiff may see through the defendant's attempts to bluff. The "me too" phenomena adds a lot of noise into the calculus.<sup>72</sup>

At the outset of litigation, when the parties demand a jury, they seem to behave generally in predictable ways that are consistent with popular perceptions of jury biases. Jury demands seem explainable to a measurable extent by the characteristics of the litigants and their preconceptions about jury preferences. Since the decision of whether to demand a jury is made at the origination of the litigation during the pleading stage,<sup>73</sup> we can also use this data to explore the impact these demands had on the litigation itself and the parties' strategic behavior.

#### **IV. Jury Demands: Empirical Results on the Jury Demand's Impact to the Litigation**

No legal or empirical study has yet examined how the threat of a jury trial affects the patent litigation process. Some empirical work has substantiated the perception that juries are significantly more likely than judges to decide cases in favor of the patent holder plaintiff.<sup>74</sup> This

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must be good for defendant.

<sup>71</sup>Of course this begs the question: "Then why aren't the defendants demanding a jury in 100% of the cases in which plaintiffs have already demanded." The answer could be that attorneys differ as to their strategic behavior. Or perhaps some attorneys simply do not think about the benefit of appearing to favor the jury.

<sup>72</sup>In fact, when I limit the regression to only those cases in which the plaintiff did demand a jury, just the "me too" cases, almost none of the stereotypical bias perceptions impact defendants' behavior. The only factors that exhibited any significance in that model was whether the plaintiff was a corporation and whether the litigation was filed more recently; who the patent holder was had no significance. It is not surprising that a decision that does not matter is likely to have a lot of noise in any attempt to measure factors that influence it.

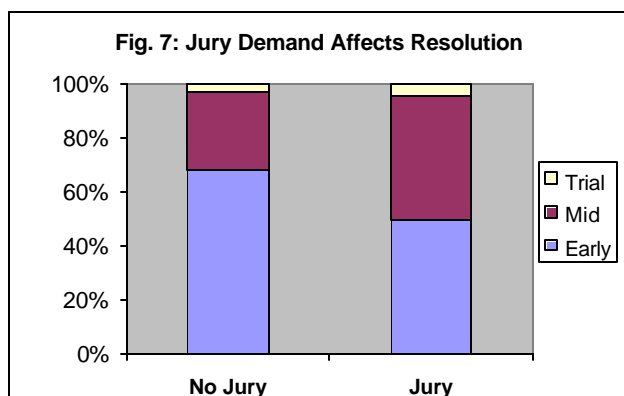
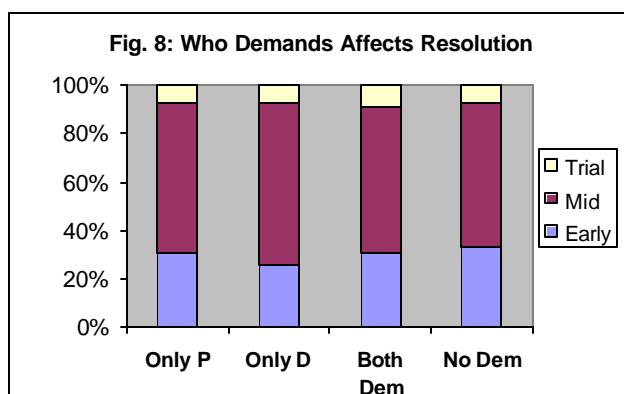
<sup>73</sup>FED. R. CIV. P. 38 (stating that jury demands must be made within ten days of the last pleading).

<sup>74</sup>See Moore, *supra* note 3, at 403 (finding that juries overall favor patent holders more than judges do); John R.



research is handicapped by the fact that outcome rates can only be compared for the cases that actually go to trial and that tried cases are not a random subset of all disputes. Because parties are likely to factor adjudicator bias into their outcome estimations and thereby into their settlement decisions, win rate data cannot measure the magnitude of the jury effect on litigation or party behavior. In an attempt to shed light on the impact of the jury demand on cases, the following section studies the impact that jury demands have on the litigation process.

#### A. *Procedural Posture of Terminated Cases*



Jury demands are a statistically significant determinant of whether a patent case goes to trial.<sup>75</sup> There was a greater chance of getting to trial when a jury was demanded (5.4% when a jury was demanded and 3.4% when no jury was

Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 211 (1998) (finding juries more likely to refuse to invalidate patents than judges at trial).

<sup>75</sup> $\beta = 0.018$ ;  $t = 2.247$ ;  $p = 0.025$ .

demanded). Perhaps district court judges are more inclined to resolve cases on dispositive motions when they themselves would be deciding the case at trial. Or perhaps the parties are worse at predicting outcomes when the trial will be to a jury and therefore are less likely to settle. To attempt to answer these questions, I examined the procedural progression and method of termination of the cases in order to compare cases where a jury was demanded with cases where no jury was demanded.

This study considers cases as resolved early if no court action is required for the resolution or if the resolution occurs prior to an answer being filed (such as on a Rule 12(b) motion). Cases are resolved mid-litigation if resolved after the decision of a dispositive motion (such as summary judgment), after the pretrial conference, or after discovery is underway. Cases are resolved at trial if a trial has begun at the time the case is resolved. Figure 7 addresses only the stage the litigation reached at the time of the termination. It does not address the procedural mechanism responsible for the termination (such as settlement, directed verdict, jury verdict, etc.). As Figure 7 indicates, cases were resolved later in the litigation process when parties demanded juries. Sixty-eight percent of all cases are resolved early (with no court action) when no jury is demanded whereas only 51% are resolved early if a jury is demanded. This may result from jury demands increasing the uncertainty in outcome estimates by the parties, thereby inhibiting the expeditious resolution of the cases.

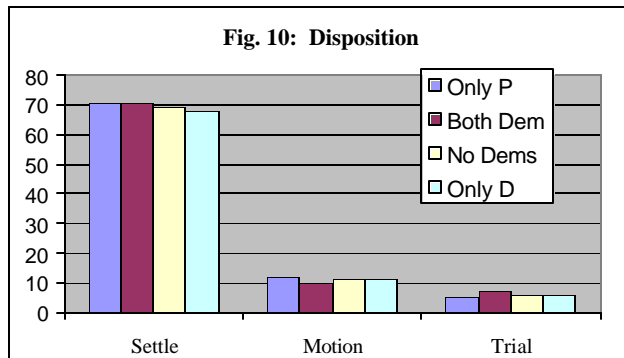
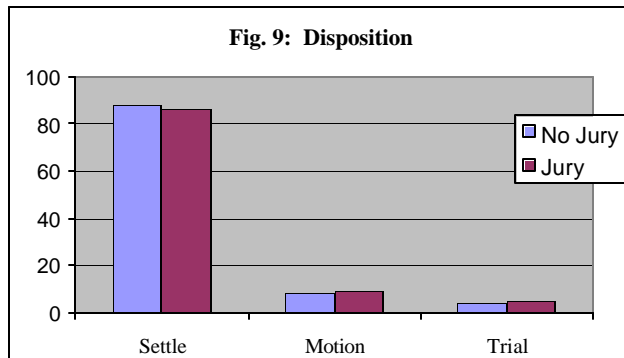
Figure 8 breaks the data down further by who demanded the jury. It shows that there is no variation in the stage of litigation at which the case is resolved depending upon who requested the jury.<sup>76</sup> Who demanded the jury does not seem to have any impact on how quickly the case is resolved.

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<sup>76</sup> While Figure 7 presents data for all cases, Figure 8 considers only the cases in which both parties had an

## B. Case Disposition and the Impacts of Jury Demands

Similarly, as Figure 9 shows, whether a jury is demanded has no impact on the ultimate resolution of the



cases. For example, whether a jury was demanded is not a significant predictor of whether a case settles.<sup>77</sup> Breaking these results down by who demanded the jury (as Figure 10 does)<sup>78</sup> the data suggests that cases in which both parties demand a jury go to trial more often. This could be explained by a theory of mutual optimism that supports the divergent expectations model for predicting which suits settle and which suits go to trial. An economic theory of case selection suggests that parties are least likely

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opportunity to make a demand.

<sup>77</sup>  $\beta = -0.002$ ;  $t = -0.143$ ;  $p = 0.886$ .

<sup>78</sup> Figure 9 includes all cases, but Figure 10 only includes cases in which both parties had an opportunity to request a jury. The problem with looking at only the data in which both parties had an opportunity to make a demand is that many of the cases in which the plaintiff demanded a jury actually settled quickly (before the defendant answered). All of these settlements are excluded from Figure 10 which is proper because in a comparison of plaintiff and defendant demands we would not be capable of knowing, since the defendant could not make a demand, whether

to settle in close cases.<sup>79</sup> In theory, parties would settle to avoid transaction costs when they can both accurately estimate their chances of success.<sup>80</sup> Cases only go to trial when there is a breakdown in the parties' abilities to estimate outcome and they are therefore unable to settle a case because of differing expectations. The data shows that this breakdown is greatest when both parties demand a jury. This could be explained by a theory of mutual optimism. Perhaps both parties perceive the jury as beneficial for them. Each party believes that it has a better chance of success with a jury than it does with a judge. However, one party is clearly wrong. This explanation depends upon a belief that when both parties are demanding a jury it is because each has evaluated the odds with the possible adjudicators and each has concluded that a jury would be preferable for them. If the defendant is largely demanding a jury after the plaintiff simply to avoid the appearance of a weakened position and is successful in bluffing the plaintiff, I would expect to see a higher rate of settlement for the cases in which both parties demanded a jury. This is not the case.

Perhaps the most interesting discovery regarding the impact of the jury demand on the litigation process is that there is no real impact.<sup>81</sup> There is no increase in settlement that can be attributed to jury demands. It does not matter whether one party or both parties demand the jury. The threat of a jury demand cannot be proven to cause an increase in settlement, even if the demand is one-sided. These conclusions would be very comforting to supporters of juries if there were no difference in win rate. Prior research has, however, shown significant win rate

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those cases ought to be categorized as demands only by the plaintiff or possibly as demands by both.

<sup>79</sup>Priest & Klein, *supra* note 11, at 15.

<sup>80</sup>This theory assumes no asymmetrical information or asymmetrical stakes. Priest & Klein, *supra* note 11, at 24-29 (explaining that the presence of asymmetrical stakes or information would tend to result in a higher win rate for the party with higher stakes or more information).

<sup>81</sup>It may be that jury demands or the threat of jury adjudication have little impact on litigation behavior because the jury's role in patent litigation has been consistently declining. *See, e.g., Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) (holding that claim construction should be decided

differences. In a prior study, I showed that patentees prevail with much greater likelihood with juries.<sup>82</sup> Table 4 reproduces these results.

<b>Table 4: Patentee Win Rates By Adjudicator</b>		
	<b>Jury</b> (781 cases)	<b>Judge</b> (895 cases)
Patentee Prevails	63%	49%
Infringer Prevails	37%	51%

In addition to generating concern about jury bias in decision-making, the prior study also highlighted possible flaws in jury decision-making.<sup>83</sup> The most significant being that cases seemed to be decided on an all-or-nothing basis by the jury.<sup>84</sup> When multiple patents were litigated, juries resolved all issues in favor of the same party in 87% of the cases whereas judges were slightly more discerning among issues resolving only 72% in favor of the same party.<sup>85</sup>

## **V. Conclusion**

Parties (predominantly plaintiffs) frequently make jury demands in patent cases (78% of the cases). The empirical results suggest that parties are motivated in their jury demands by characteristics of the litigants that they believe are likely to sway a jury in their favor. Popular perceptions of jury bias in favor of patent holders over infringers, individuals over corporations, domestic over foreign, and in-state over out-of-state seem to influence the demands. This is

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exclusively by judges).

<sup>82</sup> See generally Moore, *supra* note 3.

<sup>83</sup> *Id.* at 402-07 (substantiating more favorable win rates for patentees with juries and finding that jury outcomes are significantly affected by who initiated the lawsuit and that jury decision-making has an all-or-nothing quality which may generate concern).

<sup>84</sup> *Id.* at 402-404 (finding that when validity and infringement (two unrelated issues) were both decided by the jury, 86% of the time they were both decided in favor of the same party whereas judges only decided those issues in favor of the same party in 74% of the cases).

troubling in that it suggests that the parties believe that issues unrelated to the merits of the case are likely to influence jury decision-making. The jury demands themselves, however, have no measurable impact on the litigation process aside from the finding that when both parties demand a jury, the case is more likely to go to trial. This suggests that parties are less able to predict jury trial outcomes. Settlement rates remain constant at approximately 70% regardless of the fact of the jury demand or the disparity among the parties in their preference for a jury. In short, parties are not settling more often because of the threat of jury decisions.

It is interesting that patent holders demand juries in 73% of the cases and when those cases do not settle and a trial ensues, patent holders win with the jury in 63% of the cases. The high patentee jury demand rate suggests that the parties perceive the jury to exhibit relative bias in favor of the patentee and yet they either do not factor it in accurately or they underestimate the bias because it still appears in the win rate data. The jury demands in this empirical study demonstrate perceptions of bias. This alone suggests that avenues for reform should be considered. The win rate data which shows actual bias and possibly flawed decision-making further support continued thinking about whether alternative means of resolution are practicable.

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<sup>85</sup> *Id.* at 404.