HOW THE JPML CAN BENEFIT FROM THE FEDERAL CIRCUIT AND VICE-VERSA

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INTRODUCTION

The creation of appellate jurisdiction is under the purview of Congress and subject to constitutional constraints.[1] Appellate jurisdiction refers to the power of a higher court to review and correct the decisions of an inferior judicial body.[2] A first-year law student may assume that appellate procedure is commensurate in scope with Rule 1 of the Federal Rules of Civil Procedure ("Federal Rules"), which governs how civil procedures are construed in district courts.[3] Rule 1 provides that all other Federal Rules should be construed and administered "to secure the just, speedy, and inexpensive determination of every action and proceeding."[4] Congress codified the establishment of the Federal Rules in 1938 to promote these very ends.[5] However, the Federal Rules of Appellate Procedure offer no analogous rule for construction.[6] This does not suggest that the purpose of Rule 1 is unexpressed when Congress acts legislatively.

Congress established the Court of Appeals for the Federal Circuit ("Federal Circuit") in 1982 with the goals of Rule 1 in mind.[7] The Federal Circuit is an appellate court having exclusive, nationwide jurisdiction over claims arising under the Patent Act.[8] The court hears administrative appeals from patentability decisions of the Board of Patent Appeals and Interferences at the United States Patent and Trademark Office as well as appeals of district court decisions involving patents.[9] Congress anticipated that the court would elimi-

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1 *See* U.S. CONST., art. I, § 8, cl. 9 (Congress shall have the power to "constitute Tribunals inferior to the supreme Court."); *see also* U.S. CONST., art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); 28 U.S.C. §§ 1291–95 (2010) (setting forth the appellate jurisdiction of the United States Courts of Appeals).

2 BLACK'S LAW DICTIONARY 928 (9th ed. 2009).

3 Fed. R. Civ. P. 1 (2010).

4 *Id*. 28 U.S.C. § 1407(f) mandates that the Judicial Panel on Multidistrict Litigation make no rules inconsistent with Rule 1.

5 1 DANIEL R. COQUILLETTE, MOORE'S FEDERAL PRACTICE § 1.21 (3d ed. 2010).

6 Fed. R. App. P. 1 (2010).

7 *See* ROBERT P. MERGES & JOHN F. DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 11 (4th ed. 2007).

8 35 U.S.C. § 100 (2010); 28 U.S.C. § 1295 (2010).

9 In addition, the Federal Circuit has exclusive jurisdiction over appeals from the following Article I tribunals: U.S. Court of Federal Claims; U.S. Court for Veterans Claims; Trademark Trial and Appeal Board; U.S. Merit Systems Protection Board; U.S. Boards of Contract Appeals; International Trade Commission. The Federal Circuit has exclusive jurisdiction over

nate non-uniformity in patent law and expedite the resolution of patent cases.[10] Since the court's inception, patents have been upheld more frequently[11] and district court decisions have been reviewed more quickly[12] than during the pre-Federal Circuit era—a victory, at least, for expediency.[13]

Congress, also with the purpose of advancing the ideals of Rule 1, established a different kind of institution in 1968—the Judicial Panel on Multidistrict Litigation ("JPML" or "Panel").[14] The JPML, although not an appellate court, is a multi-judge panel having jurisdiction to aggregate civil actions pending in federal district courts into a single, *transferee* district court for "coordinated or consolidated pretrial proceedings."[15] Congress predicted that the Panel would reduce the sprawling and duplicative nature of nationwide litigation in-

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appeals from the U.S. Court of International Trade and claims arising under the following federal laws: Patent Act; Little Tucker Act; Economic Stabilization Act; Emergency Petroleum Allocation Act; Energy Policy and Conservation Act; and Natural Gas Policy Act. *History of the United States Court of Appeals for the Federal Circuit*, THE FEDERAL CIRCUIT HISTORICAL SOCIETY, http://www.federalcircuithistoricalsociety.org/historyofcourt.html (last visited May 9, 2011).

10 *See* MERGES & DUFFY, *supra* note 7.

11 *See* Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 803, 822 (1988) ("Between 1982 and 1985, the court invalidated only forty-four percent of the patents it adjudicated on appeal from trial courts, a marked contrast to the old invalidation rate of approximately sixty-six percent.").

12 *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 319-20 (1996) ("Those judges [at specialized courts such as the Federal Circuit] work more efficiently and quickly because they do not need to learn the elementary principles of an unfamiliar subject for each new case on the docket."); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 8 (1989) ("As a general matter, the court has articulated rules that . . . are easy for the lower courts and the research community to apply.").

13 Because CAFC precedent has made validity more difficult to prove, raising the defense of invalidity has become less viable. *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, 87 (2006). Whether horizontal uniformity has been achieved is questionable. *See* Ted Siechelman, *Myths of Un(Certainty) at the Federal Circuit*, 43 LOY. L.A. L. Rev. 1161, 1165–71. Siechelman notes that forum shopping is still a significant problem in patent law, *id*. at 1169, and that Federal Circuit decisions are highly "panel dependent," *id*. at 1170.

14 *See, e.g.*, Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer, and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Policy?*, 23 MEM. ST. U. L. REV. 841, 844 (1993) ("The goal of the [§ 1407] statute was to improve the administration of justice and the operation of the federal trial courts.").

15 28 U.S.C. § 1407(a) (2010).

volving large, multi-state actors.[16] As of 2010, the Panel had consolidated a total of 349,914 actions, and 266,264 of them, roughly seventy-six percent, were terminated at the transferee court.[17] The Panel saved these terminated actions from being resolved in tandem across transferor forums and thereby accelerated the determination of duplicative nationwide litigation, thus furthering the purpose underlying Rule 1.[18]

The speediness of litigation that these two institutions realized is certainly evidence of judicial efficiency. This Article, however, argues that Congress, in establishing the Federal Circuit and the JPML, has sacrificed the "just" and "inexpensive" determination of "every action and proceeding" for the sake of macro-level judicial economy.[19] For example, litigants haled into multidistrict litigation ("MDL") lose valuable legal strategy when their case is transferred to a different circuit's district by the JPML, as evinced by *In re Korean Air Lines Disaster of September 1, 1983*.[20] When faced with an adverse court order, displaced litigants are limited to filing an interlocutory appeal to the transferee appellate court, waiting until pretrial proceedings conclude for remand, or dismissing their case voluntarily. The costliness of these limited options forces most MDL cases into settlement in the transferee forum.[21] On the other hand, the Federal Circuit's jurisprudence generates substantial costs for patent litigants when patent claims are reviewed *de novo*, as evinced by *Cybor Corp. v. FAS Technologies, Inc*.[22] Patent litigants are denied justice when the Federal Circuit fails to articulate the legal principles that underlie its opinions,[23] as evinced by recently overturned patent cases, such as *eBay Inc. v. MercExchange L.L.C*.[24] Patent appeals are funneled to the Federal Circuit, which suffers from the lowest agreement rate based on an analysis of recent Supreme Court dispositions.[25] These results do not evoke ideals of justice[26] and cost-effectiveness.

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16 *See* Roberts, *supra* note 14.

17 *See infra* text accompanying note 96.

18 *See* Fed. R. Civ. P. 1 (2010).

19 *See id*.

20 *See infra* notes 147–173 and accompanying text.

21 JAY TIDMARSH & ROGER A. TRANGSRUD, MODERN COMPLEX LITIGATION 132, 160 (2d ed. 2010).

22 *See infra* note 190 and accompanying text.

23 *See* Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1671-75 (2003) ("The Federal Circuit has proven particularly resistant to considering patent policy in making its decisions.").

24 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

25 *See infra* notes 215–245 and accompanying text.

This Article argues that the JPML and Federal Circuit, despite their range of differences, can benefit from one another and remedy each other's complex institutional challenges. The Federal Circuit can eliminate the unfairness in multidistrict litigation practice and can guide multidistrict litigation by providing uniform federal precedent. Multidistrict litigation, which is as procedurally complex as it is substantively broad, can enable the Federal Circuit to speak on non-patent law and can position the circuit to see more clearly how patents affect the overall economy.[27] Through these mutual benefits, these institutions can promote justice and cost-effectiveness for each litigant in every patent action and every MDL proceeding. To that end, I propose that Congress vest in the Federal Circuit exclusive appellate jurisdiction over the JPML and MDL courts.

Part I of this Article considers the legislative histories of the Federal Courts Improvement Act of 1982 and the codification of 28 U.S.C. § 1407 in 1968. It examines the historical backdrop that precipitated the creation of the JPML and explores the historical landscape that gave rise to the Federal Circuit.

Part II details the unfairness and costliness in the operations of interlocutory review of JPML and MDL orders. This section argues that JPML transfers override the basic principles that govern *in personam* jurisdiction. This section further demonstrates that the transfer process violates the Seventh Amendment right to trial by jury through the use of statistics that show MDL cases are rarely remanded to the transferor forum. Next, Part II examines why interlocutory review of JPML orders is inconsistent with traditional forms of appellate mandamus, and it concludes with a discussion of the transitory forum loophole that disserves plaintiffs in multidistrict litigation.

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[26] Most scholars take the view that justice and fairness are independent of one another to some degree. *See* RONALD DWORKIN, LAW'S EMPIRE 177 (1986). Others believe that one is a derivative of the other: at one end, justice as fairness regards "whatever happens through fair procedures [as] just;" at the other, fairness as justice regards "no procedure [as] fair unless it is likely to produce [an outcome] that meet[s] some independent test of justice." *Id*. My view is that justice, in the context of Rule 1, denotes a form of imperfect procedural justice—fairness of process for each litigant in every case with a need for, but not a guarantee of, a fair outcome. *See* JOHN RAWLS, A THEORY OF JUSTICE 85–87 (1971) (distinguishing between "perfect" and "imperfect" procedural justice); Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2534 (2008) ("Because the Federal Rules of Civil Procedure are reactionary—that is, they were enacted to chase and enforce substantive norms—they cannot (out of a concomitant pledge to efficiency and affordability) hope to assure a perfect outcome."). Therefore, the aim of this article is to remedy procedures with an eye toward correcting outcomes.

[27] *See* Dreyfuss, *infra* note 51.

Part III explores the institutional challenges facing the Federal Circuit, despite its success in "enhancing the stature of the patent system."[28] This section begins by analyzing the costs that its *de novo* standard of review imposes on litigants and then scrutinizes the circuit's dubious use of appellate mandamus. This section concludes by examining the Supreme Court's supervision of this judicial experiment and reveals that the Court has overturned the Federal Circuit in nearly every aspect of its jurisprudence.

Finally, Part IV proposes vesting in the Federal Circuit exclusive appellate jurisdiction over multidistrict litigation. It argues that the benefits that the JPML and Federal Circuit can provide for each other justify this proposal. This section then examines various reforms proposed by commentators, contrasts them with the instant proposal, delineates possible reasons for not implementing the instant proposal, and argues why these reasons are unpersuasive.

I. A TALE OF TWO LEGISLATIVE HISTORIES

A. Coordinating Committee for Multiple Litigation

In the early 1800s, section 734 of the Revised Statutes was the tool for handling complex litigation.[29] Enacted in 1813, the statute provided a general means for consolidation and venue changes:

> [W]henever causes of a like nature, or relative to the same question shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable.[30]

As society developed and matured, the statute proved to be inadequate.[31] Territorial expansion and civil war characterized the attitude of the mid-1800s, which was followed by reconstruction at the century's end.[32] Corporate America grew

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28 MERGES & DUFFY, *supra* note 7, at 11.

29 Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 [28 U.S.C. § 734] repealed by Judicial Code of 1948, ch. 646, § 39, 62 Stat. 869.

30 *Id*.

31 *See* Mike Roberts, *supra* note 14, at 845 ("The pre-Judicial Panel venue approach to complex, coordinated litigation and particularly to repeatedly evolving discovery problems, proved inadequate.").

32 *See, e.g.*, Outline of U.S. History, Chs. 5, 7, and 8, Dep't St. (2005), http://infousa.state.gov/government/overview/docs/historytln.pdf.

in the 1920s under the policy declared by President Calvin Coolidge that "the chief business of the American people is business."[33] During this era, the government left the monopolistic practices of large companies untouched, such as those by American Telephone & Telegraph.[34] However, as big business grew, the practice of "trust-busing," or breaking up unlawful monopolies, grew in kind.[35] During the '30s, the government enacted strong laws under the New Deal to regulate big business, such as controlling telephone rates and services.[36] World War II quelled the antitrust movement,[37] but by the early '60s, the legal landscape was replete with claims of electric equipment price-fixing.[38] Near the end of the decade, policy-makers realized that something more than consolidation and venue change was needed to deal with the burdens of nationwide, factually complex litigation.[39]

In an effort to address these concerns, in 1967, Chief Justice Earl Warren appointed a Coordinating Committee for Multiple Litigation for the United States District Courts.[40] The Coordinating Committee recommended the crea-

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33 *President Calvin Coolidge*, The Press Under a Free Government, Address before the American Society of Newspaper Editors Washington, D.C. (Jan. 17, 1925) (transcript available at the Calvin Coolidge Memorial Foundation), *available at* http://www.calvin-coolidge.org/html/the_press_under_a_free_governm.html.

34 LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 29 (2001) ("AT&T produced an extraordinary telephone system, linking 85 percent of American homes at the peak of its monopoly power in 1965.").

35 *See* MERGES & DUFFY, *supra* note 7, at 10.

36 *See* Carl I. Wheat, *The Regulation of Interstate Telephone Rates*, 51 HARV. L. REV. 846, 849 (1938) ("[T]he President (on February 26, 1934) had recommended the subjection of all phases of communication service, by wire or wireless, to the authority of a single regulatory body, and Congress responded by including in the Communications Act of 1934 comprehensive provisions for the regulation of interstate telephone and telegraph rates and practices . . .").

37 *See* Willard F. Mueller, *Antitrust in a Planned Economy: An Anachronism or an Essential Complement?*, 9 J. ECON. ISSUES 159, 167 ("As a result, even though antitrust enforcement was partially demobilized during World War II, the agencies rebounded strongly at the war's end, and the big cases went forward.").

38 *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 69, 748 (1995) ("The MDL Act was passed in 1968 in response to the thousands of electrical equipment price-fixing cases filed in the early 1960s under the federal antitrust laws.").

39 *See id*.

40 *See* Phil C. Neal, *Multi-District Coordination - the Antecedents of 1407*, 14 ANTITRUST BULL. 99, 99 (1969) ("The Coordinating Committee . . . was created in response to the huge number of private treble damage actions that were filed in the wake of the Government price-fixing cases against manufacturers of electrical equipment.").

tion of a judicial means for centralizing pretrial proceedings.[41] Responding to the Coordinating Committee's suggestions, Congress codified 28 U.S.C. § 1407 in 1968, which provides, in pertinent part, for the operation of JPML transfers:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation . . . for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.[42]

The statute establishes four requirements for an MDL transfer: (1) there must be one or more civil actions with "common questions of fact" that are pending in "different districts," (2) the transfer of pending actions must be contingent upon "convenience" for the parties, (3) transfer must also be at the "convenience" of the witnesses, and (4) transfer must "promote a just and efficient" result. Unless an action is remanded by the Panel or terminated by the parties, transferred actions remain under the jurisdiction of the Panel and are subject to any variety of changes or declinations, such as severance of cross-claims, counter claims, and third-party claims.[43] The statute further provides that the Panel shall consist of seven sitting federal judges, all appointed by the Chief Justice of the United States,[44] and no two Panel members may be from the same federal judicial circuit.[45]

B. Hruska Commission

Commentators characterize the early 1930s through the late 1970s as the anti-patent era.[46] Patents lost favor with the public during that time as a result of the antitrust movement.[47] The thrust of the anti-patent sentiment was that

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41 *Id*. at 104 ("The plan called for transferring all [nationwide] cases involving the same product line to a designated district.").

42 28 U.S.C. § 1407(a) (2010).

43 *Id*.

44 28 U.S.C. § 1407(d) (2010).

45 *Id*.

46 *See* MERGES & DUFFY, *supra* note 7, at 10.

47 *Id*.

"the rights of powerful corporations had come to dominate the interests of the community."[48] District courts upheld few patents during that era.[49] All of the circuit courts heard patent appeals, but they "diverged widely both as to doctrine and basic attitudes towards patents."[50] Across the board, the growing queue in the appellate dockets became unmanageable for appellate judges.[51] There was a need to reduce the pendency of nationwide appeals and harmonize patent law.[52]

The Commission on Revision of the Federal Court Appellate System, commonly known as the Hruska Commission after its chairman, Senator Roman Hruska,[53] was convened in 1973 to assess inefficiencies at the appellate level of the federal court system.[54] The Commission recommended a new experiment in judicial specialization that would work to funnel patent appeals into a single circuit.[55] Congress adopted the recommendations of the Commission by enacting the Federal Courts Improvement Act of 1982.[56] The legislation effectively merged the United States Court of Claims and the United States Court of Customs and Patent Appeals, which helped form the new Court of Appeals for the Federal Circuit.[57] Codified in 28 U.S.C. § 1295, the legislation granted the new circuit exclusive jurisdiction over appeals from, *inter alia*, a "final decision of a district court" involving patents under 28 U.S.C. § 1338.[58]

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48 *Id*.

49 *See* MERGES & DUFFY, *supra* note 7, at 11.

50 *Id*.

51 *See* Rochelle Cooper Dreyfuss, *Lecture — What the Federal Circuit Can Learn from the Supreme Court — and Vice Versa*, 59 AM. U. L. REV. 787, 788 (2010) ("The new court would reduce the dockets of the regional circuits, and it could, in theory, do much more."); *see also* COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted* in 67 F.R.D. 195 (setting forth the final recommendations of the Hruska Commission).

52 *See id*.

53 The Hon. S. Jay Plager, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Introduction: The United States Courts of Appeals, the Federal Circuit, and the Non-Regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 855 n.8 (1990).

54 *See* Dreyfuss, *supra* note 51, at 788.

55 *Id*.

56 *Id*.

57 *Id*.

58 28 U.S.C. §§ 1295, 1338 (2010).

II. MULTIDISTRICT LITIGATION

A. *Overriding Personal Jurisdiction*

Personal jurisdiction, otherwise known as *in personam* ("against the person") jurisdiction, refers to the power of a court to enforce its rulings over persons in a suit.[59] When a plaintiff files a complaint in court, he consents to the jurisdiction of the court in which he files his action.[60] Therefore, the usual question under a personal jurisdiction analysis is whether a defendant is subject to the court's jurisdiction.[61] Multidistrict litigation, however, ignores the reasonableness principle underlying personal jurisdiction, which is outlined in *Asahi Metal Industry Co. v. Superior Court of California*.[62]

Asahi involved a California plaintiff who was injured in a personal motorcycle accident.[63] In California court, the injured motorcyclist sued Cheng Shin, the Taiwanese manufacturer of the motorcycle's tires.[64] Seeking indemnification as to any damages that the court might award the motorcyclist, Cheng Shin impleaded Asahi, the manufacturer of the tire valves for the plaintiff's motorcycle tires.[65] Asahi was a Japanese company and had never done any business in the State of California. It never sold its tire valves to Californians, maintained no offices or agents in California, and did not advertise its products in California.[66] Cheng Shin comprised no more than 1.24% of Asahi's total sales revenue.[67]

The Court considered the following five factors in its determination of whether or not personal jurisdiction over Asahi was *reasonable*: (1) "the burden on the defendant," (2) the forum state's interest in the dispute, (3) the importance of the chosen forum to the "plaintiff's interest in obtaining relief," (4) the most efficient forum for judicial resolution of the dispute, and (5) "the shared interest of the several States in furthering fundamental substantive social

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59 *Jurisdiction Definition*, BLACK'S LAW DICTIONARY (Thomas Reuters Legal iPad Application, 9th ed., 2009).

60 *Id*.

61 *Id*.

62 Asahi Metal Indus. v. Super. Ct. of Cal., 480 U.S. 102 (1987).

63 Asahi, 480 U.S. 102, 102–03 (1987).

64 *Id*.

65 *Id*.

66 *Id*. at 103.

67 *Id*. at 106.

policies."[68] Balancing these five factors, the United States Supreme Court held that exercising jurisdiction would offend "traditional notions of fair play and substantial justice" because the interests of Cheng Shin and California were "slight" and Asahi's burden of having to defend from California was "severe."[69]

In adjudicating transfer decisions, the JPML ostensibly considers the following four factors: (1) common questions of fact, (2) convenience of parties, (3) convenience of witnesses, and (4) just and efficient conduct.[70] However, *In re West of the Rockies Concrete Pipe Antirust Cases* makes it clear that the burdens on local parties who litigate in a distant forum are irrelevant to the Panel.[71] The litigants' inconvenience is "offset by the savings from and convenience of coordinated or pretrial proceedings directed by the transferee judge."[72] The JPML's balancing test is not coextensive with a personal jurisdiction analysis because it considers only three narrow factors: questions of fact, convenience of witnesses, and just and efficient conduct.[73] The JPML transfer process overrides personal jurisdiction when the exercise of personal jurisdiction is not symmetrical between the transferor forum and the transferee forum. *City of St. Paul v. Harper & Row Publishers, Inc.* provides a good example of this.[74]

In *City of St. Paul*, the municipality brought suit in the U.S. District Court for the District of Minnesota, alleging that Defendant Harper & Row Publishers violated, *inter alia*, the Clayton Act.[75] The defendant subsequently moved for the JPML to transfer the Minnesota case to the U.S. District Court for the Northern District of Illinois, where similar litigation was pending.[76] The Panel granted the motion and transferred the Minnesota case to Chicago for coordinated pretrial proceedings.[77] The City of St. Paul then filed motions in Minnesota objecting to the JPML transfer order.[78] The Minnesota district court (the transferor court) dismissed the plaintiff's motions for lack of jurisdiction:

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68 *Id.* at 113.

69 *Id.* at 102–6.

70 28 U.S.C. § 1407(a) (2010).

71 In re West of the Rockies Concrete Pipe Antirust Cases, 303 F. Supp. 507, 509 (J.P.M.L. 1969).

72 *Id.*

73 *Id.*

74 City of St. Paul v. Harper & Row Publishers, Inc., 292 F. Supp. 837 (D. Minn. 1968).

75 *Id.* at 838.

76 *Id.*

77 *Id.*

78 *Id.*

> [T]he entry of [the JPML transfer] order effectively, and quite properly, deprived this court of further jurisdiction . . . unless and until the cases are remanded . . . by order of the Panel for trial or other disposition. If technically such order did not deprive this court for the time being of further jurisdiction[,] in any event as a matter of comity this court will not attempt to exercise any jurisdiction. Thus the propriety of maintaining these cases, or either of them as class actions will be determined by the court in the Northern District of Illinois, as will all motions now pending or later brought . . . .[79]

The transferor court declined to re-exercise jurisdiction until the JPML remanded the case.[80] This placed a burden on the City of St. Paul, who had no option but to litigate pretrial proceedings over 400 miles away in Chicago.[81] On the other hand, Harper & Row reaped the benefit of litigating its pretrial proceedings at home in Chicago.[82]

Imagine that Harper & Row first sought declaratory relief in Chicago to establish that it had not violated the Clayton Act.[83] A declaratory judgment would have enabled Harper & Row to avoid being haled into Minnesota to litigate the issue.[84] It is unlikely, however, that an Illinois district court would have exercised personal jurisdiction against the City of St. Paul. Applying the *Asahi* balancing test, a reasonable query by the Illinois district court would have found that the burden on the City of St. Paul was great and that Illinois had little interest in an out-of-state municipality's insulated affairs.[85] Thus, Harper & Row litigated pretrial proceedings against the municipality in Illinois only because of a JPML transfer. In this way, the JPML process overrides the reasonableness principle underlying personal jurisdiction because it enables the transferee court to exercise personal jurisdiction against a party when it otherwise cannot.[86]

B. No Trial, No Jury

The Seventh Amendment provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved."[87] This right extends to legal claims

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79 *Id*.

80 *Id*. at 839.

81 *Id*. at 838.

82 *Id*.

83 28 U.S.C. § 2201 (2010) (setting forth declaratory judgment).

84 *Id*.

85 *See* Asahi, 480 U.S. 102 (1987).

86 *See* In re East of the Rockies Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring) (Some parties "may be forced to litigate in districts where they could not have been sued.").

87 U.S. CONST. amend. VII.

seeking monetary damages.[88] Plaintiffs must demand a trial by jury or else the right is waived.[89] For MDL litigants, this right is illusory because "the Panel is reluctant to order a remand absent the suggestion of the transferee judge."[90] Commentators have criticized the Panel's rule as the "legal equivalent of a black hole from which cases do not emerge."[91] These cases cannot be tried in transferee forum in light of *Lexecon*, which holds that a transferee court cannot transfer to itself a case for trial.[92]

Statistics reveal that MDL cases are rarely remanded for trial at the transferor court.[93] The JPML transferred 141,364 actions before September 30, 2000,[94] and of those 141,364 actions, only 9,695 were remanded to their respective transferor districts.[95] By 2010, the Panel transferred a total of 223,085 actions and only remanded 11,986 to their respective transferor districts.[96] While this data does not discriminate between settled and unsettled cases, roughly seventy-six percent of all cases were terminated in the transferee forum as of September 30, 2010,[97] which is not surprising because most cases are forced into settlement there.[98]

The chart below plots the cumulative number of actions transferred and remanded by the JPML post-*Lexecon,* from 2001 to 2010.[99] The dataset reveals

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88 Tull v. United States, 481 U.S. 412, 426–27 (1987).

89 Fed. R. Civ. P. 38(b) (2010).

90 R.P.J.P.M.L. 10.3(a) (2010).

91 TIDMARSH & TRANGSRUD, *supra* note 21, at 153.

92 *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

93 *Id*; *see also* In re Asbestos Prods. Liab. Litig. (No. VI), 170 F. Supp. 2d 1348, 1349 (J.P.M.L. 2001) (rejecting the plaintiffs' argument that "the way in which [pretrial litigation] is being administered effectively denies their constitutional right to a jury trial").

94 *Statistical Analysis of Multidistrict Litigation 2002*, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (October 2002), http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2002.pdf.

95 *Id*.

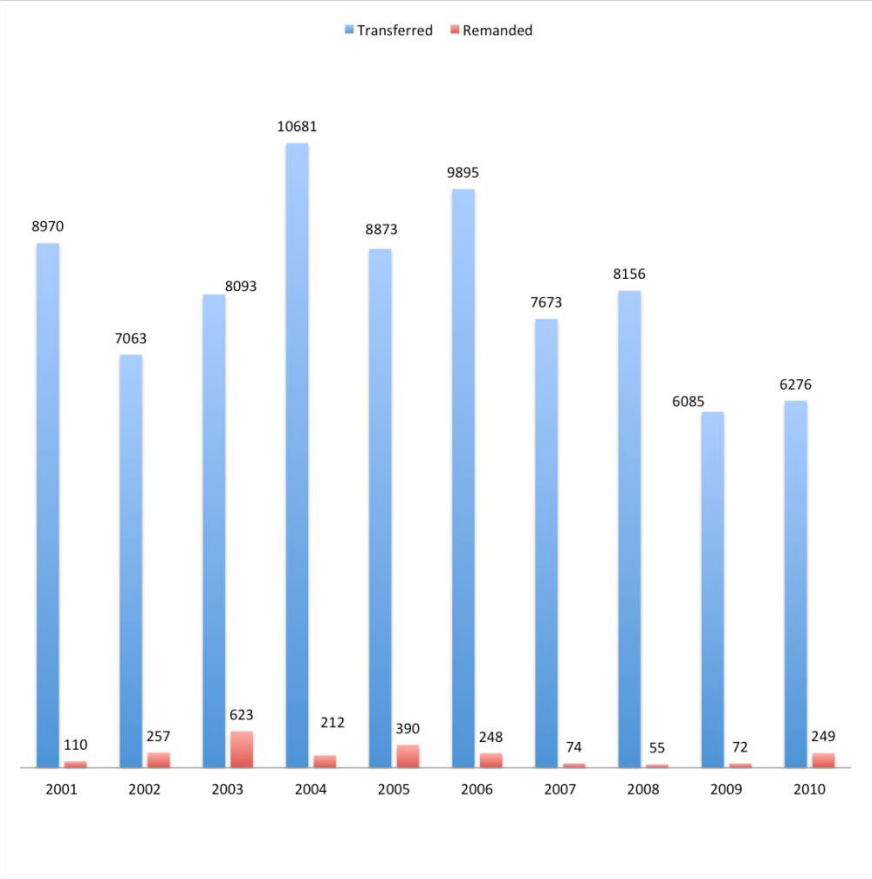
96 *Statistical Analysis of Multidistrict Litigation 2010*, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (October 2010), http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2010.pdf.

97 This percentage is the ratio of Total Actions Terminated by Transferee Courts to Total Actions Subjected to § 1407 Proceedings. *See id*.

98 *See* TIDMARSH & TRANGSRUD, *supra* note 21.

99 I compiled this data from the Statistical Information page of the JPML's website. *See Statistical Information*, JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/Statistics/body_statistics.html (last visited March 10, 2011).

that the rate at which cases were transferred peaked in 2004, decreased between 2005 and 2009, and rose sharply after 2009. The rate at which the JPML remanded cases remained relatively stable throughout the selected years despite the fluctuation in transfer rates. Objections that JPML procedures deprive litigants of their Seventh Amendment right to jury trial are particularly persuasive in light of these statistics.



The paucity of remanded cases is not necessarily unintentional.[100] Judge Charles R. Weiner, who presided over tens of thousands of MDL pretrial proceedings, suggested that he declined to remand cases to the transferor court out of concern that these trials would "upset settlement efforts" and "might force some defendants into bankruptcy, which would hurt other plaintiffs."[101] The

100 *See* TIDMARSH & TRANGSRUD, *supra* note 21, at 152-53.

101 *Id*.

JPML, in *In re Collins*, declined to remand punitive damage claims to the transferor forum where the transferee judge had a blanket practice of retaining those claims[102]—a result that the Third Circuit justified on the basis that "continued hemorrhaging of available funds" would deprive current and future victims of the ability to receive "rightful compensation."[103] For Judge Weiner and the JPML, insolvency concerns meant sacrificing individualized justice.[104] Today, the JPML's own rules make non-remand default and remand discretionary.[105]

> Where the transferee district court terminates an action by valid order, including but not limited to summary judgment . . . , [t]he terminated action *shall not be remanded* to the transferor court and the transferee court *shall retain* the original files and records *unless the transferee judge or the Panel directs otherwise*.[106]

Because the Panel regards retainment as the default, it is not unexpected that few MDL cases today see a jury on collateral issues, such as compensatory or punitive damages.[107]

C. *Escaping Appellate Supervision*

Review of JPML orders is set forth under § 1407(e).[108] The statute provides that JPML orders are only reviewable by extraordinary writ of mandamus

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102 In re Collins, 233 F.3d 809, 812 (3rd Cir. 2000).

103 *Id*.

104 *See supra* note 26. Justice, in the context of Rule 1, requires fair procedures with an eye towards a fair outcome. Depriving a litigant of a jury trial (that would be otherwise available to him but for MDL) is a deprivation of procedural justice. Even if justice only demands fair outcomes, a settlement, for example, may hardly be a fair outcome or result in a fair distribution of damages. *See, e.g.*, L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 226 (2004) ("[W]hen the judicial system effectively holds defendants absolutely liable by forcing them to settle—regardless of fault or negligence—then defendants have little incentive to take excessive precautionary measures."); *id*. at 161 ("In any type of aggregated mass tort litigation, federal judges feel a mounting pressure, be it real or perceived, to efficiently dispose of the cases, which encourages them not to question the settlement terms."); JAY TIDMARSH, FEDERAL JUDICIAL CENTER 1998, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 36–45 (1998) (discussing the *Bowling v. Pfizer, Inc*. settlement in which claims from the Consultation fund were divided equally among plaintiffs rather than on the basis of each plaintiff's actual injuries).

105 R.P.J.P.M.L. 10.1(a) (2010).

106 *Id*. (emphasis added).

107 *See id; see also* TIDMARSH & TRANGSRUD, *supra* note 21, at 152-53.

108 28 U.S.C. § 1407(e) (2010).

under 28 U.S.C. § 1651, the All Writs Act, and only by the court of appeals having jurisdiction over the district where a pre-transfer hearing is held (the pre-transfer forum) or the district where the actions are aggregated (the transferee forum).[109] In this way, the means by which the courts of appeals review JPML decisions is inconsistent with traditional models of appellate mandamus,[110] which refers to mandamus[111] issued by a higher court to compel a lower court to take, or refrain from, an action.[112] Commentators posit supervisory and advisory models as ways to explain the function of appellate mandamus.[113]

Under the supervisory model, appellate mandamus serves to correct the "established bad habits" of lower courts.[114] *La Buy v. Howes Leather Co.* exemplifies this theory.[115] There, Judge La Buy *sua sponte* referred certain antitrust cases to a special master because his "court was confronted with an extremely congested calendar."[116] The Seventh Circuit issued mandamus to compel Judge La Buy to vacate his order.[117] The Supreme Court granted *certiorari*.[118] In affirming the Seventh Circuit, the Court expressed that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial admin-

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109 28 U.S.C. §§ 1407(e), 1651 (2010); *see also* In re Wilson, 451 F.3d 161, 168 (3d Cir. 2006) ("Petitioners have satisfied the first condition to mandamus in that they have no other adequate means to attain relief from the JPML's order refusing to remand their cases. Mandamus is the sole means through which petitioners can seek review of the JPML's order.") This contrasts with § 1406(a) venue transfers, which are interlocutory orders subject to review by mandamus and final judgment. *See* Brent E. Johnson, *Federal Venue under Section 1392(a): The Problem of the Multidistrict Defendant*, 85 MICH. L. REV. 352, 352 n.6 (1986) ("The result is that, barring recourse to the extraordinary writ of mandamus, a disgruntled defendant will have to wait for a final judgment before taking an appeal on the venue issue.").

110 Paul R. Gugliuzza, *The New Federal Circuit Mandamus* 9–18 (Univ. of Fla. Levin College of Law Research, Working Paper No. 2011-06), *available at* http://ssrn.com/abstract=1734419.

111 Mandamus literally means "we command" and is one of the extraordinary writs in the common law. *Mandamus Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/mandamus (last visited April 1, 2010).

112 *See* 28 U.S.C. § 1651(a) (2010) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.").

113 *See* Gugliuzza, *supra* note 110.

114 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3934.1 (2d ed. 2010).

115 La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

116 *Id*. at 253.

117 *Id*.

118 *Id*.

istration in the federal system."[119] In the Court's view, mandamus served a corrective function.[120]

Under the advisory model, appellate mandamus is issued to address novel issues of law.[121] *Schlagenhauf v. Holder* exemplifies this theory.[122] In this case, Judge Holder ordered Schlagenhauf to submit to mental and physical examinations under Federal Rule 35.[123] Schlagenhauf sought mandamus to have the order set aside.[124] The Seventh Circuit recognized that the issue was one of first impression in the federal courts, carefully reviewed the merits of Schlagenhauf's petition, but reached an adverse decision.[125] On *certiorari*, the Supreme Court validated the use of mandamus to review "basic, undecided question[s]" of law by courts of appeals.[126] However, the Court disagreed with the Seventh Circuit's interpretation of Federal Rule 35 and remanded the case to the district court.[127] Nevertheless, mandamus served an advisory function.[128]

The circuits exercise mandamus authority over the JPML in a way that neither conforms to the supervisory or advisory model. The Panel lacks effective supervision because the Panel has more than one supervisor at almost any given time; each supervisor is equal; each supervisor makes his own rules (although two or more supervisors may make the same rule); and no supervisor coordinates with another supervisor. Advice issued to the Panel is persuasive at best because the Panel has thirteen advisors; each advisor is equal; all advice carries equal weight; each advisor holds his own opinion (although two or more advisors may share the same opinion); and no two advisors offer advice on the same issue within a reasonable period of time.

The courts of appeals exercise mandamus power over the JPML under a unique scheme that I call "time-splitting mandamus." In this way, the thirteen circuits split authority based on the temporal stage of one or more MDL proceedings. Examining a single MDL proceeding, one pre-transfer circuit exercises mandamus authority when the Panel aggregates actions for a pre-transfer hearing from transferor fora residing in one or more transferor circuits. Authori-

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119 *Id*. at 259–60.

120 *Id*; *see also* Gugliuzza, *supra* note 110.

121 *Id*.

122 Schlagenhauf v. Holder, 379 U.S. 104 (1964).

123 *Id*. at 108.

124 *Id*. at 109.

125 *Id*. at 111.

126 *Id*. at 110.

127 *Id*. at 122.

128 *See* Gugliuzza, *supra* note 110.

ty then splits time–wise on transfer—the pre-transfer circuit loses mandamus authority and one transferee circuit gains authority unless the transferee circuit is the pre-transfer circuit. The transferee circuit retains mandamus authority, notwithstanding remand to a transferor forum in a transferor circuit.[129] Outside a single MDL proceeding, however, there is other ongoing multidistrict litigation, and when viewed from this perspective, mandamus is split among two or more circuits at any give time.

Appellate mandamus issued to the JPML under 28 U.S.C. § 1407(e) is a unique form of mandamus unto itself.[130] It serves to correct the outcome of a particular transfer or remand decision and does not advise or supervise the Panel. The JPML effectively eludes guidance by the appellate courts, in part, because of the unique time-splitting scheme under which the circuits review JPML decisions.

D. *The Transitory Forum Loophole*

As master of the complaint, a plaintiff is entitled to choose his forum, which governs the law of pretrial proceedings. The "interest in preserving the plaintiff's choice of forum includes not only the court that will conduct the trial but the *appellate* court as well."[131] A plaintiff "who has a legitimate interest in litigating in a circuit whose precedent supports [his] theory of the case might omit a [particular federal] claim in order to avoid review by a [different] Circuit."[132] Thus, the complaint also "governs appellate jurisdiction."[133] However, a JPML transfer enables a defendant to avail himself of a transferee forum's disharmonious law to obtain a favorable ruling during pretrial proceedings that he could not obtain after pretrial concludes—a result that I label as the "transitory forum loophole."[134] The unfairness of this loophole manifests itself in pre- and post-transfer contexts. *Astarte Shipping Co. v. Allied Steel & Export Ser-*

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129 *See* In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig., 73 F.3d 528, 533 (4th Cir. 1996) ("[T]he Panel is directed to retransfer from the District of South Carolina, the Northern District of Florida, and the Eastern District of Tennessee to the Eastern District of North Carolina those claims that were dismissed by Judge Fox prior to the June 20, 1994, remand by the Panel.").

130 *See* 28 U.S.C. § 1407(e) (2010).

131 Holmes Group Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

132 *Id*.

133 *See* MERGES & DUFFY, *supra* note 7, at 1071.

134 *See infra* text accompanying notes 137–158.

vice[135] exemplifies the unfairness of interlocutory review of pre-JPML transfer issues, and *In re Korean Air Lines*[136] exemplifies the unfairness of interlocutory review concerning post-JPML transfer issues.

1. Interlocutory Review of Pre-JPML Transfer Issues

In *Astarte v. Allied*, the Southern District of New York granted Allied an attachment order under maritime law and held Astarte's property in abeyance until the suit could be resolved.[137] The JPML subsequently transferred the case to the Eastern District of Louisiana. Astarte appealed the attachment order to the Second Circuit (the transferor circuit),[138] and the Second Circuit dismissed the appeal for lack of jurisdiction. Astarte then appealed to the Fifth Circuit (the transferee circuit).[139]

In addressing the issue of appellate jurisdiction, the Fifth Circuit held that "[t]he review of any order of the district court in a transferred case, made before transfer, is within the jurisdiction of the court of appeals of the circuit to which the case has been transferred."[140] The court reasoned that a JPML order "transfers [an] action lock, stock, and barrel."[141] This meant that no part of the lawsuit remained in the transferor forum, and a transfer under 28 U.S.C. § 1407 deprived all courts of the transferor forum of jurisdiction.[142] Turning to Allied's substantive argument, the court concluded that the attachment order was proper under Fifth Circuit precedent and then denied Astarte's appeal.[143]

Astarte was wrongly decided because the court only looked to its own maritime precedent.[144] The court failed to consider any Second Circuit precedent when deciding the correctness of the attachment order, even though it was ordered under the laws of the Second Circuit prior to transfer.[145] In this way,

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135 Astarte Shipping Co. v. Allied Steel & Exp. Serv., 767 F.2d 86 (5th Cir. 1985).

136 In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171 (D.C. Cir. 1979).

137 Astarte, 767 F.2d at 87.

138 *Id*.

139 *Id*.

140 *Id*.

141 *Id*.

142 *Id*.

143 *Id*. at 88.

144 *See id*. (relying on Treasure Salvors v. Unidentified Wrecked & Abandoning Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) and Constructora Subacuatica Diavaz v. M/V HIRYU, 718 F.2d 690 (5th Cir.1983)).

145 *Id*.

Astarte allowed defendants (appellees) to unfairly benefit from the transitory forum loophole.[146]

2. Interlocutory Review of Post-JPML Transfer Issues

In re Korean Air Lines exemplifies the unfairness that emanates from interlocutory review of post-JPML transfer issues.[147] On September 1, 1983, Korean Air Lines Flight 007, en route to New York City from Seoul, strayed into restricted Soviet airspace as a result of pilot error.[148] Mistaking the Korean airliner for a U.S. spy plane, the Soviet military shot down the aircraft, killing all 269 passengers aboard.[149] Plaintiffs, on behalf of the deceased, filed wrongful death actions in federal district courts that were within the jurisdictions of the First, Second, and Sixth Circuits.[150] They sought damages in excess of $75,000 per victim.[151] The JPML transferred these cases for pretrial proceedings to the District Court for the District of Columbia.[152]

The salient issue before the district court was whether the Warsaw Convention, as modified by the Montreal Agreement, capped damages at $75,000 per passenger if passengers were issued defective tickets.[153] There was no damages ceiling under Second Circuit precedent, and the First and Sixth Circuits were essentially silent on the issue.[154] On interlocutory appeal, the District of Columbia Circuit followed its own precedent, which held that a defective ticket did not frustrate the Warsaw Convention, as modified by the Montreal Agreement, and its stipulated price of $75,000 per casualty.[155] The District of Columbia Circuit reasoned that the law of the transferor forum on federal questions "does not have *stare decisis* effect in the transferee forum" even though a case is to be remanded to the transferor forum at the conclusion of pretrial proceedings.[156] Damages were thus capped at $75,000 per plaintiff.[157]

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146 *See id*.

147 In re Korean Air Lines, 829 F.2d 1171 (D.C. Cir. 1979).

148 *Id*. at 1172.

149 *Korean Air Lines Flight 007*, WIKIPEDIA (May 14, 2011 9:21), http://en.wikipedia.org/wiki/Korean_Air_Lines_Flight_007.

150 In re Korean Air Lines, 829 F.2d at 1172.

151 *Id*.

152 *Id*.

153 *Id*.

154 *Id*. at 1175.

155 *Id*. at 1176.

156 *Id*.

A switch in circuits meant a markedly different outcome for the plaintiffs who filed suit in the Second Circuit.[158] This was in part because the federal laws of the two fora were non-uniform. It was no help that the multidistrict litigation statute was silent on whether transferor law applied in the transferee forum.[159] In 1972, the Panel suggested that the federal law of the transferor forum would always apply after a 28 U.S.C. § 1407 transfer, but the Panel backed away from that position in 1988, claiming that "it is not the business of the Panel to consider what law the transferee court might apply."[160] One practical effect is that plaintiffs who are haled into multidistrict litigation incur substantial expense when they are subject to, and must litigate according to, the federal laws of two fora in one legal proceeding—especially when the interpretations of those laws vary.[161]

Congress did not contemplate the transitory forum loophole when it established the JPML.[162] The history of the JPML reveals that Congress narrowly established the institution to solve the evolving difficulties in duplicative, nationwide antitrust litigation, such as claims of electronic price-fixing.[163] This type of litigation concerns complex factual issues and entails extensive pretrial proceedings, such as depositions of industry experts and corporate executives, motions *in limine* concerning the evaluation of complex economic evidence, and production of numerous privileged documents.[164] It is the duplicativeness of these pretrial proceedings that Congress sought to reduce.[165]

The D.C. Circuit incorrectly inferred Congress's purpose for creating the JPML when it decided *In re Korean Air Lines*.[166] The circuit premised its holding on its assumption that the "law of the case" must govern in the transferor forum or else transfer under § 1407 would be "counterproductive; i.e., capable of generating rather than reducing the duplication and protection Congress

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157 *Id*.

158 *Id*. at 1180.

159 *See* 28 U.S.C. § 1407(e) (2010).

160 TIDMARSH & TRANGSRUD, *supra* note 21, at 160 (internal citations omitted).

161 *See id; see also infra* note 173.

162 *See supra* text accompanying notes 34–39.

163 *Id*.

164 *See* Michael R. Baye & Joshua D. Write, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals* 1–3 (George Mason Law & Econ. Research, Working Paper No. 09-07), *available at* http://ssrn.com/abstract=1319888.

165 *See supra* notes 34–39.

166 In re Korean Air Lines, 829 F.2d 1171 (D.C. Cir. 1979).

sought to check."[167] But as the JPML's history suggests, Congress's intention to eliminate duplication did not mean that Congress intended to eliminate appeals.[168] Furthermore, the circuit's reference to the "law of the case" doctrine was a poor attempt to save an otherwise counterproductive holding.[169] The law of the case doctrine is a *discretionary* "rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter."[170] The doctrine, however, "does not limit a court's power,"[171] and "judges of coordinate jurisdiction are not bound by each others' rulings, but are free to disregard them if they so choose."[172] As such, when transferee law is more advantageous to a defendant, the D.C. Circuit's holding is unlikely to discourage a plaintiff from waiting until pretrial proceedings conclude to appeal an adverse trial court decision.[173] Conversely, when transferor law is more advantageous to a plaintiff, a defendant has incentive to prolong pretrial proceedings, such as through interlocutory appeal, to force a financially distressed plaintiff into settlement.[174] For those reasons, *In re Korean Air Lines* serves to increase the overall costs of litigation and illuminate the unfairness of the transitory forum loophole that 28 U.S.C. § 1407 created.[175]

III. THE FEDERAL CIRCUIT

A. An Expensive Standard of Review

When appellate courts review the decisions of a trial court,[176] they generally give substantial deference to the trial court's findings of fact and no def-

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167 *Id*. at 1176.

168 *See* Ragazzo, *supra* note 38, at 748 ("Sparse legislative history suggests that Congress gave little consideration to the choice of law problem [in MDL appeals].").

169 In re Korean Air Lines, 829 F.2d at 1176.

170 Pincus v. Pabst Brewing Co., 752 F. Supp. 871, 872 (E.D. Wis. 1990) (internal citations omitted).

171 Castro v. U.S., 124 S. Ct. 786, 789 (U.S. 2003).

172 United States v. Birney, 686 F.2d 102, 107 (2d Cir. 1982).

173 *See, e.g.*, Aaron Bayer, *MDL Appeals*, 27 NAT'L L. J. 43, 2 (2005) (advising practitioners engaged in multidistrict litigation to wait until remand to appeal); Mark A. Chavez, *The MDL Process*, 1656 PLI/CORP. 117, 137 (2008) (warning that "different laws are applied on appeal of the same decision by the MDL court, and litigants should carefully consider when and where to appeal adverse MDL court rulings.").

174 *See* id.

175 *Id*; *see* 28 U.S.C. § 1407 (2010).

176 Fed. R. Civ. P. 52 (2010).

erence to the court's legal conclusions.[177] Questions of law are reviewed *de novo*, meaning "anew."[178] Problems arise when issues involve mixed questions of law and fact.[179]

One can see how patent claim construction presents mixed issues of law and fact.[180] Patent claims, which are set forth in an issued patent, demarcate the metes and bounds of protection for a patented invention.[181] Claim construction refers to the court's interpretation of the words in the patent claims.[182] Words of a claim "are generally given their ordinary and customary meaning."[183] This means that the words are prescribed the meaning that they would have to "a person of ordinary skill in the art" at the time of the patentee's invention.[184] In determining that meaning, a *skilled person* must look to "the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art."[185]

Although many circuits treat hybrid questions as matters of fact and give substantial deference to the trial court,[186] the Federal Circuit follows a path of pure *de novo* review with respect to patent claim construction.[187] The Supreme Court, in *Markman II*,[188] observed that claim construction is a "mongrel practice," but the Court affirmed the Federal Circuit's pragmatic decision to treat it as a matter of law, better suited to the determination of judges, rather

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177 *See infra* text accompanying note 203.

178 De Novo *Definition*, BLACK'S LAW DICTIONARY (Thomas Reuters Legal iPad Application, 9th ed., 2009).

179 *See* MERGES & DUFFY, *supra* note 7, at 847 ("Conflicts over Mixed Questions of Law and Fact").

180 *See id*.

181 35 U.S.C. § 112 (2010) ("The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.").

182 *See, e.g*., Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996) ("We hold that the construction of a patent, including terms of art within its claims, is exclusively within the province of the court.").

183 Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996).

184 Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc).

185 Innova v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1116 (Fed. Cir. 2004).

186 *See* MERGES & DUFFY, *supra* note 7, at 847 ("Conflicts over Mixed Questions of Law and Fact").

187 *See Markman v. Westview Instruments, Inc*., 52 F.3d 967, 970-71 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996) [hereinafter *Markman I*].

188 *Markman v. Westview Instruments*, Inc., 517 U.S. 370 (1996) [hereinafter *Markman II*].

than juries.[189] *Cybor Corp. v. FAS Technologies, Inc.* plainly established that claim construction is subject to *de novo* review on appeal.[190] These cases illustrate that *de novo* review of claim construction is not inexpensive to the determination of patent cases.

In the case of *Cybor*, FAS, the patentee, claimed that Cybor's products infringed its patented pump for applying liquid onto semiconductor wafers.[191] During a *Markman* hearing, FAS introduced experts well-versed in the art of fluid dynamics to testify on the meaning of the patent claims.[192] The district court relied on the expert testimony in construing the claim terms.[193] The jury, without having weighed the credibility of the experts, found that Cybor's products infringed FAS's patent based on the meaning of the claim terms as determined by the trial judge.[194]

On appeal, the Federal Circuit recognized that the trial court had unfettered authority to weigh the expert testimony without submitting its credibility to the jury.[195] Similarly, the circuit recognized that it had unfettered review of the trial court's claim construction, "including any allegedly fact-based questions relating to claim construction."[196] The circuit then proceeded to construe the patent claims anew,[197] affording no weight to FAS's experts or to the lower court's interpretation of the patent claims.[198] Based on its own construction, it affirmed that FAS's patent was valid and was infringed.[199]

That patent claim construction—an arguably factually intensive endeavor for a skilled artisan—is a matter of law imposes considerable expenses on patent litigation. Parties have incentive to put on numerous expert witnesses at a *Markman* hearing to persuade a trial judge who generally lacks a technical background to adopt a particular claim construction. The Federal Circuit, however, has no obligation to accept expert testimony (and in many cases ignores or

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189 *See* Markman II, 517 U.S. at 388 ("So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms.").

190 *See* Cybor Corp v. FAS Tech., Inc., 138 F.3d 1448, 1450 (Fed. Cir. 1998) (en banc) (holding that "claim construction, as a purely legal issue, is subject to *de novo* review on appeal").

191 *Id.* at 1453.

192 *Id.* at 1471.

193 *Id.* at 1455–56.

194 *Id.* at 1453.

195 *Id.* at 1455–56.

196 *Id.* at 1456.

197 *Id.* at 1458.

198 *Id.* at 1458–60.

199 *Id.*

rejects it).[200] This in turn fosters appeals that present highly factual arguments, which parties may not file until after a final judgment because the Federal Circuit refuses to review claim construction on interlocutory appeal—notwithstanding that claim construction is central (and oftentimes necessary) to evaluating validity and infringement.[201] This regime whereby questions of sophisticated fact are afforded no deference hardly evokes the inexpensive determination of patent cases.

Post-*Cybor*, there has been much debate about the Federal Circuit's *de novo* standard of review.[202] In *Phillips v. AWH Corp.*, Judges Mayer expressed marked concern in his dissent:

> While this court may persist in the delusion that claim construction is a purely legal determination, unaffected by underlying facts, it is plainly not the case. Claim construction is, or should be, made in context: a claim should be interpreted both from the perspective of one of ordinary skill in the art and in view of the state of the art at the time of invention . . . . We simply must follow the example of every other appellate court, which, regarding the vast majority of factual questions, reviews the trial court for clear error . . . . Therefore, not only is it more efficient for the trial court to construct the record, the trial court is better, that is, more accurate, by way of both position and practice, at finding facts than appellate judges.[203]

Despite these concerns, the Federal Circuit and the Supreme Court refuse to revisit *Markman* or *Cybor*.[204] The reason for the Supreme Court's refusal is relatively clear: the Court defers to the specialized nature of the Federal Circuit on how to review hybrid issues.[205] The Federal Circuit's reasoning is less than clear. Looking at statistics, the Federal Circuit reversed over thirty-three

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200 *See, e.g.*, Markman I, 52 F.3d at 983 ("Thus, to the extent they were testifying about construction itself, we reject Markman's and Markman's patent expert's testimony as having any controlling effect on what the court below and we perceive to be the meaning of 'inventory' as used in the patent and prosecution history."); John P. Sutton, *Should the Federal Circuit Defer to Findings of Fact by Tribunals Below It?*, 89 J. PAT. & TRADEMARK OFF. SOC'y 701, 710 (2007) ("Instead of deferring to the district court in its expert-assisted claim construction, the Federal Circuit has adopted a *policy* of excluding expert evidence . . . .").

201 *See* Kyle J. Fiet, *Restoring the Promise of Markman: Interlocutory Patent Appeals Reevaluated Post-*Phillips v. AWH Corp., 84 N.C. L. REV. 1291, 1321 (noting that the Federal Circuit "has thus far exercised its discretion and refused all such interlocutory claim construction appeals").

202 *See* MERGES & DUFFY, *supra* note 7, at 847 ("Controversy of *Cybor"*).

203 Phillips v. AWH Corp., 415 F.3d 1303, 1332–34 (2005) (Mayer, J., dissenting).

204 *See, e.g.*, MERGES & DUFFY, *supra* note 7, at 847 ("Controversy of *Cybor"*); Cybor Corp, 138 F.3d at 1450; Markman II, 517 U.S. at 388.

205 *See supra* note 99.

percent of district court claim constructions in 2001 on *de novo* review.[206] One can guess that the court values whatever uniformity *de novo* review provides over the expenses that patent litigants incur.

B. Selective Mandamus

The Federal Circuit has an unorthodox mandamus practice.[207] It was not until 2008 that the circuit issued its first mandamus decision in the case of *In re TS Tech Corp*.[208] In that case, Lear sued TS Tech for patent infringement in the U.S. District Court for the Eastern District of Texas.[209] TS Tech subsequently moved to transfer the case to the Southern District of Ohio. The district court denied TS Tech's motion, and TS Tech petitioned for mandamus, which the Federal Circuit granted.[210]

Since *TS Tech*, the Federal Circuit granted mandamus disproportionately in cases where parties sought to transfer cases away from the Eastern District of Texas and denied petitions disproportionately to transfer cases to the Eastern District of Texas.[211] Commentators suggest that the Federal Circuit's aggressive review of Eastern District transfers is motivated by the perception that the Eastern District has a "poor reputation among patent-infringement defendants" or by disappointment that the district has tried "to make itself a judicial center for patent ligation."[212] Nevertheless, these reasons are inconsistent with the traditional roles of mandamus; i.e., supervision and advice.[213] The Federal Circuit is not correcting the bad behavior of the Eastern District nor is the circuit advising the district on novel legal issues.[214] One explanation for the Federal Circuit's selective use of mandamus is that the court is avoiding the messy legal and policy issues of its jurisprudence that Eastern District has illuminated. Nonetheless, the circuit's selectivity unfairly burdens parties where the proper venue should be Eastern Texas.

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206 Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 11 (2001) (finding that the Federal Circuit reversed thirty-three percent of district court claims constructions).

207 *See* Gugliuzza, *supra* note 110, at 36–40.

208 In re TS Tech USA Corp., 551 F.3d 1315, 1317–18 (Fed. Cir. 2008).

209 *Id*.

210 *Id*.

211 *See* Gugliuzza, *supra* note 110, at 42–47.

212 *Id*. at 50.

213 *Id*. at 15–18.

214 *Id*.

C. The Lowest Agreement Rate

The Supreme Court overturned nearly every aspect of the Federal Circuit's jurisprudence since its inception. The Court overturned the Federal Circuit's rigid obviousness doctrine in *KSR International Co. v. Teleflex Inc.*;[215] its bright-line test for prosecution history estoppel in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*;[216] its limited application of patent exhaustion in *Quanta Computer, Inc. v. LG Electronics, Inc.*;[217] its doctrine of equivalents in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*;[218] its licensing jurisprudence in *MedImmune, Inc. v. Genentech, Inc.*;[219] its limited safe harbor exemption for research activity in *Merck KGaA v. Integra Lifesciences I, Ltd.*;[220] and its bright-line test for injunctive relief in *eBay*.[221]

An empirical analysis of the last decade of United States Supreme Court dispositions reveals that the Court reversed the decisions of this judicial experiment more than any other federal appellate court.[222] Although this may not be the best comparison because the Federal Circuit is almost never party to a circuit-split, it provides support for one conclusion that the circuit is more error-prone than regional circuits. Even if we compare the number of times the Supreme Court agreed with each regional circuit based on circuit splits vis-à-vis the number of times the Supreme Court agreed with the Federal Circuit alone, the data reveals that the Supreme Court has agreed with the Federal Circuit less than any regional circuit.[223]

One explanation for the Federal Circuit's lowest agreement rate is that the circuit reviews the majority of its cases much differently than regional circuits review the majority of their cases. The Federal Circuit has adopted a *de*

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215 KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 415 (2007).

216 Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722 (2002).

217 Quanta Computer, Inc. v. LG Electronics, 553 U.S. 617 (2008).

218 Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co., 520 U.S. 17 (1997).

219 MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007).

220 Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005).

221 eBay, 547 U.S. 388 (2006).

222 *See* Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 3 LANDSLIDE 2, (2010) (giving the Federal Circuit the lowest grade of 'D').

223 Between 2005 and 2008, the Supreme Court agreed with the Federal Circuit twice, whereas the Court agreed with each regional circuit at least twenty-one times based on circuit splits. *Compare* Eric Hansford, Note, Measuring the Effects of Specialization with Circuit Split Resolutions, 63 Stan. L. Rev. 1145, 1165 (2011) *with* Hofer, *supra* note 222.

novo standard when reviewing most patent issues,[224] and patents constitute a majority of the Federal Circuit's docket.[225] If other circuits were to review the majority of appellate issues *de novo*, then the statistics may be more favorable to the Federal Circuit. Moreover, patent appeals, unlike general appeals, are not distributed among the regional circuits,[226] making it rare for the Federal Circuit to compare and borrow precedent from other circuits and impossible to wait around for the Supreme Court to speak on another circuit's interpretation of patent law.[227] Thus, the Federal Circuit may suffer from an intrinsic disadvantage when its agreement rate is measured vis-à-vis the regional circuits.

Nonetheless, these statistics reveal something about the Federal Circuit as an institution. The circuit adopted the precedent of its predecessor, the Court of Customs and Patent Appeals (CCPA), which did not have jurisdiction over district court patent cases.[228] The CCPA's jurisprudence concerned appeals of administrative decisions from the USPTO and comprised bright-line rules.[229] The Federal Circuit, however, built on CCPA precedent in the litigation con-

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224 *See, e.g.*, In re Carlson, 983 F.2d 1032, 1038 (Fed. Cir. 1992) (Clevenger, J.) ("[T]his court reviews an obviousness determination . . . de novo . . . .") (citation omitted); Durel Corp. v. Osram Sylvania Inc., 256 F.3d 1298, 1307 (Fed. Cir. 2001); ("Enablement is ultimately a question of law which this court reviews de novo."); LaBounty Mfg. Inc. v. United States Int'l Trade Comm'n, 867 F.2d 1572, 1576 ("Prosecution history estoppel is a legal question that is subject to de novo review by this court."); Cybor Corp, 138 F.3d at 1450 (Patent claim construction is reviewed de novo.); Wilson Sporting Goods Co. v. David Geoffrey & Associates, 904 F.2d 677, 683–84 ("Whether an asserted scope of equivalents would impinge on prior art is an issue of law that we review de novo."); Riverwood Int'l Corp. v. R.A. Jones & Co., Inc., 324 F.3d 1346, 1352 (Fed. Cir. 2003) ("This court reviews de novo the legal question of what qualifies as prior art…."); Georgia-Pac. Corp. v. U.S. Gypsum Co., 195 F.3d 1322, 1326 (Fed. Cir. 1999) opinion amended on reh'g, 204 F.3d 1359 (Fed. Cir. 2000) ("Double patenting is a question of law, which we review de novo."); Power-One, Inc. v. Artesyn Technologies, Inc., 599 F.3d 1343, 1350 (Fed. Cir. 2010) ("A determination of indefiniteness is reviewed de novo."); McNulty v. Taser Int'l, Inc., 106 F. App'x 15, 20 (Fed. Cir. 2004) (Whether element of patent claim is means-plus-function claim is question of law, reviewed de novo.).

225 Dreyfuss, *supra* note 51, at 795 ("[D]espite congressional attempts to give the Federal Circuit cases outside patent law, patents remain at the core of its docket.").

226 *But see* Holmes Group, 585 U.S. at 826 (2002) (holding that regional appellate courts can hear cases where patent claims arose solely as counterclaims).

227 *See* id.

228 *See* Gugliuzza, *supra* note 110, at 21–22.

229 *Id*.

text.[230] It is not a surprise that each of the above reversals arose out of patent litigation rather than administrative review.[231]

The CCPA's bright-line rules pervaded peripheral areas of patent law, such as injunctive relief.[232] Over time, the Federal Circuit adopted a presumptive approach to granting patentees injunctions without articulating innovation policy.[233] Permanent injunctions were the norm if patent infringement was shown.[234] In contrast, the regional circuits applied an equitable test before granting permanent injunctions.[235] The regional circuits required a movant to establish that (1) it suffered an "irreparable injury," (2) it had "no adequate remedy at law," (3) an equitable remedy was warranted after "considering the balance of hardships" of the parties, and (4) a permanent injunction served the "public interest."[236] The Supreme Court vacated the Federal Circuit's bright-line test for injunctive relief in *eBay* and admonished the circuit for failing to "reconcile its jurisprudence with a wider range of decisional law."[237]

The specialized nature of the Federal Circuit isolates it from the other courts of appeals, and the effects of the Federal Circuit's isolation are evident. Most significantly, the opinion writer fails to articulate the innovation policy that underlies the court's holdings.[238] The opinions cite intellectual property scholarship four times less frequently than other circuits do in intellectual property cases,[239] and the opinions suffer from a myopic view of how patents affect the overall economy.[240] On the other hand, the Supreme Court does not suffer from this legal nearsightedness.[241] With its generalist docket, it can see when

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230 *Id*.

231 *See supra* notes 215–221.

232 *See* eBay, 547 U.S. at 393.

233 *Id*. at 389.

234 *Id*.

235 *Id*.

236 *Id*.

237 Craig A. Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1639–40 (2007).

238 *See* Burk & Lemley, *supra* note 23.

239 Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 676-83 (2002) (providing empirical research that demonstrates the other circuits cite scholarship in intellectual property cases roughly four times more frequently than does the Federal Circuit in its patent cases.).

240 *See* Dreyfuss, *supra* note 51, at 800 ("[T]he Federal Circuit is not well-positioned to think about how patents fit into the overall economy or to see when patent doctrine has deviated from general rules of law.").

241 *Id*. at 795 (discussing the micro and macro level perspective of the Supreme Court).

too much protection stifles the "Progress of Science and useful Arts," such as when permanent injunctions issue automatically upon a ruling of patent infringement.[242]

The Federal Circuit, however, is not blind to the effects of its isolation. In the words of Former Chief Judge Michel:

> We just keep replicating the old results based on the old precedents, whether they have kept pace with changes in business, changes in technology, or changes of a different sort . . . . [W]e just get the Federal Circuit talking to itself, with the brief writer just being the echo of what we wrote in all those prior cases. And then we write some more cases, and the cycle just goes on and on and on.[243]

Unfortunately, the court espouses a lofty, formalistic approach with its opinions.[244] This approach is antithetical to the concept of individualized justice because it fails to perceive how judicial rulings affect innovation, society, or the parties to a suit.[245]

IV. A STALKING HORSE PROPOSAL FOR REFORM

While the impact of this proposed reform remains speculative, it provides the starting point for stimulating a discussion about problems and possible resolutions for the Federal circuit, the JPML, and MDL courts. Ideally, refinement will present a consensus solution on how best to deal with the transitory forum loophole, the lack of meaningful review of JPML transfer and remand decisions, the expensive determination of patent cases, the selectivity of the Federal Circuit's mandamus practice, and the dearth of innovation policy in patent law. This Article proposes ideas that attempt to collectively solve these problems while promoting justice and the inexpensive determination of all legal actions and proceedings.

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242 U.S. CONST. art I, § 8, cl. 8; *see* eBay, 547 U.S. 388 (2006).

243 Hon. Paul Michel, Keynote Presentation, Berkeley Center for Law & Technology Conference on Patent System Reform, Mar. 1, 2002 (transcribed by Gerald T. Peters), posted to Internet Patent News Service, patnews@patenting-art.com (Greg Aharonian ed., Aug. 1, 2002).

244 *Id*.

245 *See generally* Martha C. Nussbaum, *Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 5, 24–33 (2007) (arguing that "lofty formalism" is antithetical to the Capabilities Approach). "Perception" requires Aristotelian, "sympathetic understanding" of human matters. *Id*. Without perception, it seems impossible to cognize what procedural justice requires.

A. Capturing Mutual Benefit

Much like *The Odd Couple*, the Federal Circuit and JPML can benefit each other in various ways. The Federal Circuit can draw on its successful unification of patent law to harmonize MDL jurisprudence, and harmonizing MDL jurisprudence can enable the Federal Circuit to speak on issues outside its patent law jurisprudence. The Federal Circuit can provide needed supervision over the JPML, and JPML mandamus jurisprudence can provide a model for the Federal Circuit for broadening its selective use of mandamus. To those ends, this Article proposes that these mutual benefits be instated by vesting in the Federal Circuit exclusive jurisdiction over both pre- and post-JPML transfer orders. This requires modifying § 1407(e) and § 1295 to provide the Federal Circuit exclusive appellate jurisdiction over JPML transfer and remand orders, their denials, and all subsequent orders.[246]

1. Closing the Transitory Forum Loophole

The root of the transitory forum loophole is the disharmonious interpretation of federal law, which was also a problem that beleaguered patent jurisprudence prior to 1982 before Congress created the Court of Appeals for the Federal Circuit.[247] The Federal Circuit unified patent law, and the circuit can do the same for MDL jurisprudence that concerns federal law.[248]

Closing the transitory forum loophole is essential to fairness. Multidistrict litigation lacks integrity when it denies a plaintiff a right or remedy during pretrial proceedings that is otherwise available to him after pretrial concludes.[249] When multiple actions are consolidated for pretrial proceedings, it is nothing short of arbitrary that similarly situated plaintiffs across multiple transferor fora are treated differently.[250] The Federal Circuit can correct this unfairness by providing a strictly vertical forum for MDL appeals. To that end, this Article's proposal charges the Federal Circuit with reviewing pre- and post-JPML orders, including appeals after a case is remanded to the transferor court. This would provide certainty as to what law governs in the MDL context and thereby ena-

246 *See* 28 U.S.C. §§ 1407(e), 1295 (2010).

247 *Id*.

248 MERGES & DUFFY, *supra* note 7, at 11.

249 *See* RONALD DWORKIN, LAW'S EMPIRE (1986). Dworkin uses a checkerboard example to show that integrity is in play in our rejection of checkerboard laws. *Id*. at 217–18. Integrity, according to Dworkin, "sits between" fairness and justice. *Id*. at 179–180.

250 *See* Etelson v. Office of Pers. Mgmt., 684 F.2d 918, 926 (D.C. Cir. 1982) ("Government is at its most arbitrary when it treats similarly situated people differently.")

bles parties to exercise meaningful choice when deciding whether to embark on the MDL path.

By tasking the Federal Circuit to harmonize MDL jurisprudence concerning federal law, the instant proposal enables the circuit to speak further on non-patent law and enlarge its non-patent precedent, which the circuit applies to the rare patent appeals containing non-patent claims.[251] It is naive to think that the Federal Circuit has nothing meaningful to say about non-patent law,[252] and the failure to enable the circuit to speak on issues outside patent law only "deprives the public of the court's valuable expertise."[253] The instant proposal provides the circuit with an average set of 113 consolidated cases per year from which it can exercise interlocutory review[254] and an average set of 233 individual actions from which it can exercise final judgment review.[255]

Providing the Federal Circuit with broad subject-matter is important to reconciling the court's jurisprudence with the larger realm of decisional law. MDL appeals are particularly appropriate for this as they yield searching questions about, *inter alia,* environmental law, employment practices, antitrust law, economic evidence,[256] product liability, and securities fraud.[257] This Article's proposal effectively expands the scope of the Federal Circuit's jurisprudence and provides the court with a docket that reflects the state of the nationwide economy.[258] A less specialized docket would present the court with alternative

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251 *See* Robert W. Gomulkiewicz, *The Federal Circuit's Licensing Law Jurisprudence: Its Nature And Influence*, 84 WASH. L. REV. 199, 199–200 (2009) (recognizing that the Federal Circuit's precedent includes non-patent law licensing); see *Lawler Mfg. Co., Inc. v. Bradley Corp.*, 280 Fed. Appx. 951 (Fed. Cir. 2008) (interpreting contract law); *see also* Gugliuzza, *supra* note 110, at 56.

252 Dreyfuss, *supra* note 51.

253 Gugliuzza, *supra* note 110, at 56.

254 I determine this number by averaging the number of MDL dockets opened and denied between 2001 and 2010. *See Annual Statistics of the United States Judicial Panel on Multidistrict Litigation: January through December 2010* (2010), JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/Statistics/JPML_Annual_Statistics-CY_2010.pdf.

255 I determine this number by averaging the number of remands between 2001 through 2010. *See Annual Statistics of the United States Judicial Panel on Multidistrict Litigation: January through December 2010* (2010), JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/Statistics/JPML_Annual_Statistics-CY_2010.pdf.

256 *See* Baye & Write, *supra* note 164.

257 The Judicial Panel on Multidistrict Litigation divides MDLs into ten unique subject-matter categories: "(1) air; (2) antitrust; (3) contract; (4) common disaster; (5) employment practices; (6) intellectual property; (7) miscellaneous; (8) products liability; (9) sales practices; and (10) securities." Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2344 n.89 (2008) (citation omitted).

258 Dreyfuss, *supra* note 51.

approaches to handling mixed questions of law and fact, which are at the core of its costly *de novo* review of patent claim construction.[259] It would provide for the circuit a more distinct framework on how patents fit into the economy as a whole and thereby make the court more suited to articulate innovation policy in its patent cases.[260]

2. Remedying Mandamus

One of the most pressing issues facing the JPML is the lack of meaningful review of transfer and remand orders by way of mandamus.[261] The JPML frequently issues orders that are replete with conclusory labels and lacking reasoned analysis as to why a transfer fulfills the statutory "common questions of fact," "convenience" of parties and witnesses, and "just and efficient conduct."[262] This unreasoned analysis contributes to the Panel's failure to attend to the burdens of displacing litigants via transfer, and time-splitting mandamus forecloses meaningful correction by the courts of appeals.

The Panel's inattention to the burdens on litigants is troubling because multidistrict litigation presents a David and Goliath scenario for a financially distressed plaintiff whose case against a multistate defendant has been transferred to a forum where it could not have been brought otherwise. Determinations of preliminary questions of removal and remand are heard by the transferee district court,[263] and the transferee appellate court hears interlocutory review of those orders as well as the JPML transfer order.[264] The courts of the transferor forum remain powerless unless the case is remanded for trial, which is statistically unlikely to occur.[265] This system deprives a plaintiff of his right to trial by jury and disrespects the idea that the plaintiff is the master of his complaint.[266]

The instant proposal trades time-splitting mandamus for exclusive Federal Circuit mandamus. With one court of appeals to advise and supervise the JPML, the Panel's decisions would be subject to meaningful appellate review.

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259 *See* MERGES & DUFFY, *supra* note 7, at 847 ("Conflicts over Mixed Questions of Law and Fact").

260 See Dreyfuss, *supra* note 51.

261 TIDMARSH & TRANGSRUD, *supra* note 21, at 156–57.

262 *Id*; 28 U.S.C. § 1407(a) (2010).

263 *See supra* text accompanying notes 135–155.

264 *Id*.

265 *See supra* text accompanying notes 93–107

266 *Id*.

This leaves less room for the Panel to issue transfer orders lacking reasoned analysis in the same way that appellate oversight curbs district courts from departing or varying from the sentencing guidelines without providing specific reasons.[267]

Conversely, overseeing multidistrict litigation can help the Federal Circuit to reexamine its selective mandamus practice.[268] The first time the circuit issued mandamus was in 2008, nearly twenty-five years after its inception.[269] Its practice is unfair to parties who are properly before a particular district but who are transferred away because of the circuit's institutional bias, such as its bias against the Eastern District of Texas.[270] In these instances, mandamus should advise district courts on novel points of law and correct abuses below, rather than avoiding these issues through selective transfer.[271] This Article's proposal requires the Federal Circuit to issue mandamus to MDL courts when appropriate and thereby confront the legal principles underlying general mandamus jurisprudence.[272]

B. Comparing Alternative Reforms

Until now, legal scholarship has only offered proposals separately addressing concerns with the Federal Circuit and JPML. Scholarship like this fails to realize that there are legal benefits that result from pairing specialized institutions. For example, one pre–*Lexecon* commentator recommends instituting a pre-remand hearing at which the Panel would decide whether to consolidate a case for trial in the transferee forum, the transferor forum, or another forum.[273] While this proposal maximizes judicial economy by allowing consolidation of multiple cases for trial, it opens a plaintiff, in one legal proceeding, to being

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267 *See* Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing* 1, 22 (Va. Public Law & Legal Theory Research, Working Paper No. 2010-23), *available at* http://ssrn.com/abstract=1434123 ("We conclude that district judges are meaningfully constrained by the prospect of appellate reversal.")

268 *See supra* note 207–14.

269 *Id*.

270 *Id*.

271 *See* Gugliuzza, *supra* note 110, at 7.

272 *Id*.

273 Blake M. Rhodes, *Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 745 (1991).

subject to the varied interpretations of federal law in four horizontal fora.[274] It disregards the procedural unfairness of appealing an adverse decision to multiple fora, and it aggravates tensions between the choice of law and the law of the case doctrines when two or more appellate courts review decisions below. By providing a single appellate forum, the instant proposal closes the transitory forum loophole that this commentator's proposal exacerbates.[275]

In contrast to this idea of a pre-remand hearing, Professor Robert Ragazzo, a law professor at the University of Houston, suggests applying the federal law of each transferor forum in multidistrict litigation.[276] While Ragazzo's solution does a better job of promoting fairness for plaintiffs, it presents an especially perplexing process for a transferee judge when one or more transferor circuits have not spoken on ambiguous federal law, which is theoretically uniform nationwide, and the transferee judge must interpret that law.[277] Notwithstanding ambiguous federal law, interlocutory review, under Ragazzo's proposal, remains nothing more than an expensive dress rehearsal when the transferee circuit is not the transferor circuit, as the one or more transferor circuits (aside from the Supreme Court) are the final expositors of transferor law. By providing a single set of Federal Circuit precedent, this Article's proposal eliminates review of a transferee ruling by two fora in one legal proceeding and the sophistry associated with a transferee judge interpreting ambiguous federal law.

With respect to remedying the Federal Circuit, Professors Craig Nard, a law professor at Marquette University, and John Duffy, a law professor at George Washington University, suggest duplicating specialty appellate courts across the country.[278] While their proposal promotes the regional percolation of

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274 This assumes that each of the following fora reside in different circuits: (1) the transferor forum, (2) the forum where the pre-transfer hearing is held, (3) the transferee forum, and (4) the trial forum.

275 *Id*.

276 Ragazzo, *supra* note 38, at 768–69.

277 *See* In re Korean Air Lines, 829 F.2d at 1183 (Ginsburg, J., concurring) ("As a result, any attempt by Chief Judge Robinson to predict how the First and Sixth Circuits would interpret the Warsaw Convention on this precise point would necessitate casuistical musings concerning whether another circuit's case law might be read to compel, or even perhaps just to suggest, an interpretation in conflict with his. Such intellectual practices fall within the domain of the sophist, not that of the judge."); *cf*. *Sun Oil Co*. *v*. *Wortman*, 486 U.S. 717 (1988) (holding that the Kansas Supreme Court did not violate the Full Faith and Credit Clause or the Due Process Clause by construing that the laws of Texas, Oklahoma, and Louisiana were coextensive with Kansas law).

278 Nard & Duffy, *supra* note 237, 1647 (proposing that multiple extant circuits hear patent appeals).

patent law, it is likely to multiply the existing problems facing the Federal Circuit across the country. On the other hand, this Article's proposal provides the Federal Circuit a multidistrict litigation docket that reflects the state of the national economy.[279] By expanding the Federal Circuit's jurisdiction into the realm of more general appeals, the instant proposal internally seeks to correct the lack of diversity in patent law that Nard and Duffy condemn without duplicating the Federal Circuit's challenges nationwide.

While these alternative approaches have their own advantages, none of them addresses the collective unfairness of the JPML's transfer process and its isolation from the Federal Circuit. This Article's proposal integrates specialized institutions in ways that improve each of them.

C. Evaluating This Proposal

While this Article's proposal charges the Federal Circuit with harmonizing more federal law, it does not suggest that the court harmonize the law of other circuits. Rather, the present proposal limits the Federal Circuit's new authority to deciding questions of federal law arising from its exclusive jurisdiction over MDL appeals. This proposal also allows the circuit to borrow ideas from any source, including those provided by other circuits' laws, foreign law, and non-legal literature. It both expands the set of Federal Circuit precedents and the overall set of precedents of the courts of appeals. This promotes diversified decision-making,[280] which provides the Supreme Court with the benefit of more circuits' views before making nationwide policy.[281] Having the option to choose the fittest out of many rules, in theory, leads to better law.[282]

While this proposal trades one set of precedents for another, it replaces horizontal precedent with vertical, coherent *sui generis* precedent that binds the JPML and MDL courts. An examination of *In re Korean Air Lines* shows that interpretations of ambiguous federal law vary among the circuits and that *ad hoc* decision-making determines whether transferor law applies in the transferee forum.[283] Each circuit's choice of law decisions do not bind MDL courts outside

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279 *See* Fallon, *supra* note 257.

280 Jeremy T. Grabill, Comment, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299 (2005).

281 *See id; but see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1590 (2008) (recognizing that variations in interpretation of federal law are not always worth correcting, and in some cases may reflect regional preferences).

282 *See* Grabill, *supra* note 280, at 299.

283 *See supra* text accompanying notes 135–155.

a particular circuit, and transferee and transferor courts typically sit in separate circuits and are thus not subject to each other's interpretations of federal law. Likewise, the JPML's placement in the federal court system means that no circuit's precedent binds JPML decisions. Under this Article's proposal, uniform federal precedent applies to all litigants haled into multidistrict litigation and thereby places these litigants on equal footing. Instead of one set of precedents being applied in the transferee forum and a second set (or more) being applied on remand, the instant proposal creates a single superset of vertical precedents.

V. CONCLUSION

The JPML and the Federal Circuit represent congressional experiments within the judicial system. Both the 1967 Coordinating Committee and the 1973 Hruska Commission were aimed at promoting the "just, speedy, and inexpensive determination" of litigation issues.[284] Since their inceptions, the JPML and Federal Circuit have been (and continue to be) relatively successful in expediting issue resolution.[285] Patents have been reviewed and upheld more frequently than during the pre-Federal Circuit era,[286] and the JPML has effectuated dispositions or settlements in roughly seventy-six percent of the cases it has transferred.[287] However, the ideals of individualized justice and inexpensive resolution of individual cases have been sacrificed for the sake of macro-level economy.[288] The pairing of these two institutions would be beneficial for promoting undeniably necessary institutional reform.

The JPML can benefit from the Federal Circuit. The Federal Circuit has valuable expertise unifying federal law and overseeing district court cases involving patents nationwide. The JPML can benefit from oversight by a single, federal appellate court and the resultant elimination of time-splitting mandamus that deprives the Panel of supervision and advice. Oversight by a specialized court of appeals having nationwide jurisdiction would unify MDL jurisprudence and thereby close the transitory forum loophole, eliminating the unfairness and costliness that emanate from a party being temporally subject to the non-uniform laws of two fora in a single legal proceeding.

The Federal Circuit can benefit from the JPML. Multidistrict litigation represents a rich source of diverse subject matter that reflects a broad

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284 Fed. R. Civ. P. 1 (2010).

285 *See supra* text accompanying notes 8–19.

286 *See* Merges, *supra* note 13.

287 *See supra* text accompanying note 96.

288 *See supra* text accompanying notes 147–206.

cross-section of the nationwide economy. JPML and MDL jurisprudence exhausts complex issues of transfer, remand, and mandamus. The Federal Circuit can benefit from an infusion of generalist appeals that present alternatives to its unfair selective mandamus practice and its costly handling of hybrid questions. Generalist appeals would allow the Federal Circuit to see more clearly the legal principles in patent law and the effects that intellectual property has on the overall economy, making the circuit better suited to adjudicate patents with fairness, integrity, and consequence sensitivity.

To these ends, this Article has proposed vesting in the Federal Circuit exclusive appellate jurisdiction over multidistrict litigation. The Federal Circuit and the JPML can benefit from one another and together remedy each other's complex, institutional challenges.