Nos. 21-139, 21-140

United States Court of Appeals for the Federal Circuit

IN RE SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., LG ELECTRONICS INC., LG ELECTRONICS U.S.A. INC.,
Petitioners,

On Petition for a Writ of Mandamus to the United States District Court for the Western District of Texas in Nos. 6:20-CV-00257-ADA and 6:20-CV-00259-ADA, Judge Alan D. Albright

AMICUS CURIAE BRIEF OF COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTEREST

I certify that the following information is accurate and complete to the best of my knowledge.

Dated: April 12, 2021 */s/ Joshua Landau*

Joshua Landau

1. Represented Entities	**2. Real Parties in Interest**	**3. Parent Corporations and Stockholders**
Computer & Communications Industry Association	None	None

4. Legal Representatives
Not Applicable

5. Related Cases
None

6. Organizational Victims and Bankruptcy Cases
Not Applicable

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STATEMENT OF INTEREST

The Computer & Communications Industry Association ("CCIA") is an international nonprofit association representing a broad cross section of communications and technology firms. For nearly fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA members[1] employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. CCIA regularly files *amicus* briefs in this and other courts to promote balanced patent policies that reward, rather than stifle, innovation.

Choice of forum plays a critical role in the outcome of patent litigation. Despite CCIA members being located in a number of areas around the country, lawsuits by non-practicing entities against CCIA members are increasingly concentrating in the Western District of Texas. CCIA is concerned that Ikorongo's tactical gamesmanship, if left unchecked, would permit plaintiffs to vitiate 28 U.S.C. § 1404(a) and

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[1] CCIA's members are listed at https://www.ccianet.org/members. Petitioner Samsung and listed real-party-in-interest Google are CCIA members, but took no part in the preparation or funding of this brief.

eliminate all possibility of transfer away from a plaintiff's preferred district.

Pursuant to Fed. R. App. P. 29(a)(4)(e), no counsel for a party to the case underlying the pending petition for writ of mandamus authored this brief in whole or in part, and no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

Choice of forum plays a critical role in the outcome of patent litigation. The speed at which non-practicing entities, such as Ikorongo, have flocked to the Western District of Texas reflects this simple fact. In 2016 and 2017, the Western District of Texas saw a total of 123 patent case filings. The Waco division received two of those. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. *27 (forthcoming 2021). That situation has changed. In the year 2020 alone, 793 new patent cases were filed in Waco, an increase of more than 39,500% over 2016 and 2017. *Id.*

Following in the footsteps of the Eastern District of Texas, the Western District has resisted efforts by defendants to transfer their cases to other jurisdictions under 28 U.S.C. § 1404. And much like the Eastern District of Texas, this Court has been forced to issue a series of writs of mandamus to correct errors made by the sole judge hearing cases in Waco, Judge Albright. In one year alone, the Federal Circuit has granted mandamus in six of Judge Albright's cases. *See, e.g., In re Adobe Inc.*, 823 F. App'x 929 (Fed. Cir. 2020); *In re Apple Inc.*, 979 F.3d 1332; *In re Intel Corporation*, No. 2021-105 (Dec. 23, 2020); *In re Nitro*

Fluids LLC, 978 F.3d 1308 (2020); *In re SK hynix Inc.*, No. 2021-113 (Feb. 1, 2021); *In re Tracfone Wireless, Inc.*, No. 2021-118 (Fed. Cir. Mar. 8, 2021). This represents a mandamus rate twice as high as when the Federal Circuit first began issuing mandamus orders on venue and transfer to the "renegade district" of the Eastern District of Texas. Transcript of Oral Argument at 11, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *see also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 350 (2012).

In the present case, plaintiff Ikorongo intentionally created a shell entity and granted it rights to assert the relevant patents in only one forum. Setting aside the error of law committed by the district court in determining that the transferee district would not have been a proper venue for the case, this represents precisely the kind of gamesmanship that the equitable application of venue and transfer law rejects. Venue is intended to protect defendants from being forced to litigate in an inconvenient forum, and to prevent patent plaintiffs from maintaining the case in an inconvenient forum. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 184 (1979).

CCIA's members, who are regularly subject to patent litigation in inconvenient forums, are concerned that a refusal to grant mandamus in this case would lead to a flock of shell entities receiving sub-assignments in order to avoid the possibility of transfer. CCIA is also concerned that blessing this practice would increase court competition to attract patent litigants, resulting in the adoption of court procedures that substantively favor plaintiffs, inefficient processes designed to attract litigants rather than minimize the cost of adjudication, and a perception that the judges involved are not neutral arbiters but in fact are biased. *See* Anderson & Gugliuzza, *supra*, at 13–14.

Indeed, that perception already exists regarding Judge Albright. *See, e.g.*, Kenneth Artz, *Surprise Waco, Texas, is the Patent Litigation Capitol of the United States!*, Texas Lawyer (Oct. 8, 2020), https://www.law.com/texaslawyer/2020/10/08/surprise-waco-texas-is-the-patent-litigation-capital-of-the-united-states/ ("[Judge Albright]'s got to give patentees what they want, and he does.").

This Court should reject Ikorongo's gamesmanship and grant mandamus. The district court's decision represents a determination at odds with the "interests of justice" that § 1404(a) is intended to respect.

Failure to address this issue through mandamus would ensure that "dozens of cases will proceed through motion practice, discovery, claim construction, or trial before potentially getting thrown out by a reversal of a ruling on a motion to dismiss for improper venue." *In re Google LLC*, 914 F.3d 1377, 1381 (Fed. Cir. 2019) (Reyna, J., dissenting from decision not to reach mandamus). Given the likely immediate adoption of this tactic absent its rejection by this Court, mandamus in the present case is appropriate to forestall these harms.

ARGUMENT

The present petition represents a clear case for mandamus. The underlying decision is egregiously flawed and the issue is likely to recur repeatedly absent intervention by this Court. Ikorongo's tactics represent the latest in a long line of attempts to manipulate jurisdiction in service of forum shopping. Case law requires rejection of these attempts and the concomitant harms to investment and innovation.

I. Ikorongo's Tactic Is The Latest In A Long History Of Non-Practicing Entities Attempting To Game The System To Keep Cases In Their Preferred Forums

Ikorongo's sub-licensing tactic, while novel to patent law, is hardly novel in its overall intent—to attempt to block adjudication of issues outside of a non-practicing entity's preferred forum, despite the inconvenience of that forum. Non-practicing entities (NPEs) have been utilizing these tactics for decades.

A. NPEs have attempted many tactics in an effort to keep cases in their preferred jurisdictions.

Previous tactics used by NPEs to attempt to maintain or limit jurisdiction have run the gamut. Solely in the context of attempting to provide jurisdiction and avoid transfer, tactics have included the

transfer of documents from other locations to Texas counsel's office, *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009), the use of in-district empty offices that contain nothing relevant, *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010), and now the use of shell geographic sublicenses. The use of empty offices in Eastern Texas is so widespread and widely recognized that it has been reported on by the press outside of specialty legal arenas and been the subject of a documentary. *See* Timothy B. Lee, *These Empty Offices Are Costing the US Economy Billions*, Vox (Jun. 8, 2016), https://www.vox.com/2016/6/8/11886080/patent-trolls-eastern-texas; *see also* Austin Meyer, *The Patent Scam* (2017).

In related arenas, entities have attempted to limit declaratory judgment jurisdiction by assigning rights to holding companies, *Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266 (Fed. Cir. 1998), as well as the rental of tribal sovereign immunity to block declaratory judgments and *inter partes* review, *St. Regis Mohawk Tribe v. Mylan Pharmaceuticals*, 896 F.3d 1322 (Fed. Cir. 2018).

Ikorongo's geographic sublicense tactic isn't even novel to the world of law—the use of geographic subsidiaries to channel bankruptcy

proceedings for parent entities into desirable jurisdictions was recognized over a decade ago. *See* Lynn LoPucki, *Courting Failure* (2005).

The common thread in each and every one of these cases is the attempt to provide a rationale, however thin, that the initial jurisdiction can use to justify a rejection of any motions to transfer.

B. Minimizing transfer of cases is a key factor in attracting litigation.

Patent owners "are unlikely to file in [inconvenient forums] unless they are confident that their case will remain in the district long enough to obtain its benefits." *See* Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 Cal. L. Rev. 241, 260 (2016). And the Western District's recent practice of severely limiting transfers has attracted litigation. The nearly 40,000% increase in litigation in Waco is evidence of this attraction. And the vast majority of that litigation is brought by NPEs with little to no connection to the Western District, drawn by the promise of a court that will neither transfer nor stay their case. *See* Anderson & Gugliuzza, *supra*, at 7 (noting that more than 85% of cases in the Waco Division are brought by NPEs).

Given the clear preference for the Western District exhibited by NPEs and the history of their use of gamesmanship to stay in their favored forums, it is no surprise that Ikorongo resorted to gamesmanship in this case.

II. The Statute And Caselaw Require Rejection Of The Type Of Gamesmanship Exemplified By Ikorongo's Tactics

In addressing transfers from the Western District of Texas, this Court applies Fifth Circuit law. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). And that law could not be clearer—the court's "duty is to ignore the gamesmanship of the litigants and to seek the most just result permitted by applicable law." *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1149 (5th Cir. 1984). This principle comports with the Supreme Court's transfer jurisprudence, which consistently rejects attempts at jurisdictional manipulation.

A. Courts should not permit parties to, via their own actions, block a transfer otherwise warranted, especially when the end result is to keep an action in an inconvenient venue.

Most critically, in *Van Dusen*, the Court stated that "in construing § 1404(a) we should consider whether a suggested interpretation would discriminatorily enable parties opposed to transfer, by means of their

own acts or omissions, to prevent a transfer otherwise proper and warranted by convenience and justice." *Van Dusen v. Barrack*, 376 U.S. 612, 623 (1964). The Court has also explicitly rejected the use of jurisdictional tactics to provide a shelter to keep proceedings "in costly and inconvenient forums." *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26–27 (1960).

Absent mandamus, any plaintiff who opposed transfer could employ geographic sublicensing as in this case in order to prevent a transfer, no matter how appropriate that transfer might be and how inconvenient and expensive the plaintiff's selected forum might be.

Van Dusen and *Continental Grain* reject the idea that this is an appropriate interpretation of the transfer statute. Where a plaintiff, by its own action, has changed a particular transferee forum from an appropriate venue to a facially inappropriate venue, the proper interpretation of the transfer statute requires understanding "where the case might have been brought" in 28 U.S.C. § 1404 to refer to the situation as it existed prior to plaintiff's manipulative action.

B. If manipulation by a party is found in the record, then the issue of transfer should be determined as if the manipulation had never occurred.

The Court has also explicitly stated that "if the record reveals attempts at manipulation," the proper approach for the court to take is to examine the situation as it would have been "in the absence of such manipulation." *Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2009). Here, the plaintiff has undisputedly created this situation through its own actions. It was done in preparation for litigation and with the purpose of manipulating jurisdiction to avoid transfer.

Waterman, relied upon by the plaintiff Ikorongo and by Judge Albright, is simply irrelevant to the question of whether transfer is appropriate. *Waterman v. Mackenzie*, 138 U.S. 252 (1890). No one disputes that patents may have their rights sub-divided on a geographic basis. That case, decided prior to the creation of the patent-specific venue statute in 1897, has no bearing on the propriety of transfer in the face of gamesmanship, particularly in light of the century of intervening case law that requires the rejection of jurisdiction manipulation and adjudicating transfer on the basis of the situation that would have existed if not for the acts of the party opposing transfer.

C. Applying the transfer and venue statutes as the district court has would effectively eliminate defendants' sole recourse against inconvenient forums.

The through-line in the Court's cases is that § 1404(a) should not be applied so as to "create or multiply opportunities for forum shopping." *Ferens v. John Deere Co.*, 494 U.S. 516 (1989). The application of § 1404(a) by the district court does not simply multiply opportunities for forum shopping but ensures that transfer, the primary remedy against the selection of inconvenient forums by plaintiffs, will never be available.

The issue is all the more compelling when a plaintiff seeks to use its own actions to attempt to defeat transfer on the basis of venue. The purpose of statutory venue is "to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 184 (emphasis in original). To turn this on its head by suggesting that venue should allow a plaintiff to guarantee an unfair or inconvenient place of trial is a direct contradiction to the commands of the Supreme Court.

Beyond the legal harms, preventing transfer from inconvenient forums risks harms to the beneficial economic aspects of the patent system more generally.

III. Failure To Grant Mandamus Would Harm The Patent System And Burden Defendants Generally, Reducing Investment In Product Development

Allowing plaintiffs to not just select their preferred forum but to protect it against any possibility of transfer would have a plethora of negative effects, including harming the public perception of the patent system and trust in the fairness of the adjudications it reaches, aiding actual plaintiff-biased policies, significantly restricting access to the *inter partes* review (IPR) system, and reducing economic investment and innovation by firms such as CCIA's members.

A. Blessing transfer gamesmanship harms trust in the patent system.

Forum shopping triggers a host of normative concerns about the legal system. Our legal system centers on the notion that "the law ought not be manipulable and that its application ought to be uniform." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. Rev. 879, 924 (2001). While achieving this ideal might not be practical, that does not mean that the

law ought to encourage manipulation and non-uniformity. To do so would "erode[] public confidence in the law and its enforcement and create[] doubt about the fairness of the system." *Id.* This erosion of confidence is all the greater when courts are actively courting litigants and litigation, leading to questions of their neutrality. *See* Anderson & Gugliuzza, *supra*, at 15–16.

B. Allowing plaintiffs to avoid transfer out of the Western District of Texas will protect its pro-plaintiff procedures and undermine the inter partes review system.

The actual procedures employed in the Western District of Texas appear to be designed "mainly to process cases as quickly as possible—except when it is defendants who want a quick dismissal" or, as this Court has observed in recent cases, when it is defendants who want a ruling on motions to transfer without "egregious delay and blatant disregard for precedent." *Id.* at 55; *In re SK hynix*, No. 2021-113. This effort to delay defendant's motions and process the remainder of the case as swiftly as possible generally favors patent plaintiffs over patent defendants, particularly when the plaintiffs are NPEs, as 85% of plaintiffs in the Western District of Texas are, and as the plaintiffs in the present case are. *See* Anderson & Gugliuzza, *supra*, at 34–38

(explaining why plaintiffs, particularly NPE plaintiffs, generally benefit from faster timelines at the expense of defendants such as CCIA's members).

These procedures also undermine the IPR system. Under the current *NHK Spring/Fintiv* regime, IPRs are extremely likely to be denied if a co-pending litigation's scheduled trial date pre-dates the date of a predicted final written decision. Given the way in which the district court typically sets case schedules, by filing in the Western District of Texas a plaintiff can "essentially eliminate[] the prospect of PTAB review." *Id.* at 47. This interaction between Judge Albright's standard case schedule and current USPTO procedure provides an additional benefit to plaintiffs who remain in Judge Albright's courtroom, while removing the potential for defendants to use the efficient and accurate IPR system that Congress created.

C. Permitting jurisdictional manipulation of this type would further centralize NPE activity into the Western District of Texas and exacerbate forum shopping harms

The overall result of blessing Ikorongo's use of geographic sublicensing gamesmanship as a way to ensure that transfer is unavailable would be for NPE litigation to centralize in Waco. Unlike

operating companies, who often would prefer to sue in their own home district where their litigation costs will be lower and juries are more likely to be sympathetic, NPEs are unlikely to benefit from sympathetic juries in their home district and are less likely to have a cost advantage to litigating there. *See* Klerman & Reilly, *supra*, at 278–79.

This centralization is likely to exacerbate the harms discussed above. But beyond those harms, centralization into a district runs the risk of harming the economy of that district in the long run. After the centralization of NPE litigation into the Eastern District of Texas, some companies withdrew their operations from the Eastern District of Texas entirely. *See* Chaim Gartenberg, *Apple is Reportedly Closing Two Stores in a Texas District to Avoid Patent Trolls*, The Verge (Feb. 22, 2019), https://www.theverge.com/circuitbreaker/2019/2/22/18236424/apple-closing-stores-eastern-district-texas-avoid-patent-trolls.

While leaving the Western District of Texas might prove more difficult, due to the more significant investments many companies have made in Austin, centralization of NPEs in Waco might lead other

companies to reconsider their plans to move a portion of their operations to the Western District.

D. Increased NPE litigation reduces productive economic activity by operating companies.

It is well-established that firms reduce innovative activity as they are increasingly targeted by patent lawsuits. *See, e.g.*, Filippo Mezzanotti, *Roadblock to Innovation: The Role of Patent Litigation in Corporate R&D*, Management Science (forthcoming 2021). And it is also increasingly well-established that *inter partes* review has positive economic benefits, providing increased employment and R&D investment. *See Unified's Patent Quality Initiative (PQI) Releases Economic Report Showing the AIA Led to over 13,000 Jobs and Grew the U.S. Economy by $3 Billion since 2014*, Unified Patents, https://www.unifiedpatents.com/insights/2020/6/23/the-perryman-group-releases-economic-report-an-assessment-of-the-impact-of-the-america-invents-act-and-the-patent-trial-and-appeal-board-on-the-us-economy. Permitting transfer to be completely prevented by use of geographic sublicenses would likely centralize NPE litigation into the Western District of Texas. And in doing so, litigation targeting productive firms would increase and access to IPR would be reduced.

The net result, supported by the empirical evidence, is that productive firms like CCIA's members would reduce their innovative activity and employment, harming the overall progress of the useful arts. U.S. Const. Art. I, § 8, cl. 8.

Interpretations of intellectual property statutes should take into account the likely impact on the Constitutional purpose those statutes seek to serve. *Cf. Google LLC v. Oracle America, Inc.*, No. 18-956 at *34 (U.S. Apr. 5, 2021). And here, the evidence strongly suggests that allowing plaintiffs to block transfer via manipulative tactics would negatively impact economic and scientific development.

Much like competition for patent plaintiffs, bankruptcy competition also had deleterious effects on the public. Companies reorganized in cases handled by the most successful competitor court failed after reorganization at a rate four times as high as the average in other bankruptcy courts. LoPucki, *supra*, at 112–17. Geographic case placement in bankruptcy enabled these negative impacts. This Court should not seek to replicate that experience in the patent system by blessing the gamesmanship employed in the present case.

CONCLUSION

This Court should grant mandamus to reject plaintiff Ikorongo's attempt at jurisdictional manipulation. Absent this Court's intervention, this tactic is likely to spread rapidly and result in numerous cases proceeding in inconvenient fora before the issue is revisited in a future case. Accordingly, LG and Samsung's petitions for a writ of *mandamus* should be granted.

April 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

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April 12, 2021 /s/ Joshua Landau

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I caused the foregoing **Brief of the Computer & Communications Industry Association as *Amicus Curiae* in Support of Petitioner** to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all counsel of record.

April 12, 2021 /s/ Joshua Landau

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