May 3, 2016

Broad Coalition Supports Bill to Curtail Forum Shopping in Patent Litigation

The Honorable Chuck Grassley
The Honorable Patrick J. Leahy
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C., 20510

Dear Chairman Grassley, Ranking Member Leahy and members of the Senate Judiciary Committee,

On behalf of the undersigned civil-society and public-interest organizations, we write to express strong support for S.2733, the Venue Equity and Non-Uniformity Elimination (VENUE) Act of 2016, sponsored by Sens. Jeff Flake, R-Ariz., Cory Gardner, R-Colo., and Mike Lee, R-Utah. Preventing gamesmanship in litigation through choice of court, while not a comprehensive fix to problems within the patent system, would go a long way toward stopping a longstanding abusive practice that harms legitimate innovators, the economy, and the public.

The patent system currently suffers from a pervasive venue-shopping problem that unfairly distorts legal outcomes by allowing plaintiffs to select friendly judges in advance. According to the Mercatus Center and George Mason University, nearly half of all patent cases are filed in the U.S. District Court for the Eastern District of Texas.[1] That's more than 70 times the average number of patent cases heard in other federal judicial districts. According to a January 2016 report,[2] filings in that district have "accelerated," especially among repeat patent asserters who threaten business after business with patent lawsuits.

The incredible popularity of one district as venue for one type of lawsuit raises legitimate questions of fairness to the parties who are hauled into court there. Respected academics have identified evidence that procedures in the Eastern District of Texas unnecessarily favor plaintiffs and impose significant, unnecessary costs on companies and individuals accused of infringement, however questionable the patents and demands may be. Indeed, Kimberly A. Moore—a judge on the Federal Circuit court responsible for all patent appeals—once wrote that pervasive venue shopping in patent cases represents a failure of "the promise of equal,

[1] Eli Dourado, *Abuse of Patent Venue Rules Reaches Record-Breaking Level*, Mercatus Center (Mar. 22, 2016), http://mercatus.org/publication/abuse-patent-venue-rules-reaches-record-breaking-level.
[2] Brian Howard, *Lex Machina 2015 End-of-Year Trends*, Lex Machina (Jan. 7, 2016), https://lexmachina.com/lex-machina-2015-end-of-year-trends/.

consistent and uniform application of justice," besides creating "economic inefficiency in the legal system."[3]

These inequities cost innovative companies time, money and other resources fighting legal battles—resources that could otherwise go into creating better, more innovative, more competitive products and services. They further represent a failure to give patent litigants a fair trial, denying them access to justice and trapping them in a forum intentionally selected for its favorableness to the other side.

Although patent reform has been a hotly debated and complex topic, there is near universal agreement that patent-venue abuse must be addressed. Writing in *The Washington Post*,[4] law professors Colleen V. Chien and Michael Risch acknowledged that patent reform "has divided those who write and think about the patent system." However, they noted "there *is* one issue upon which we—and most stakeholders—agree: The staggering concentration of patent cases in just a few federal district courts is bad for the patent system."

An opportunity to correct egregious patent-venue shopping now is in the hands of Congress. Although venue reform will not solve all problems with the patent system, it is an important first step directed to an important problem. There is no question that abuse of venue stands in the way of both market competition and the right to fairly-applied due process of law. Addressing this should be common sense to individuals across the ideological spectrum, regardless where they stand on other approaches to reform our patent system.

We thus strongly urge you to support the VENUE Act to fix this abuse of our legal system.

Sincerely,

Public Knowledge
R Street Institute
Electronic Frontier Foundation
TechFreedom
Copia Institute
Engine
Institute for Liberty
Niskanen Center
The Latino Coalition
American Consumer Institute
Taxpayers Protection Alliance

[3] Kimberly Moore, *Forum Shopping In Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 893 (2001).
[4] Colleen V. Chien & Michael Risch, *A Patent Reform We Can All Agree On*, Washington Post (Nov. 20, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/11/20/why-do-patent-lawyers-like-to-file-in-texas/.

Fight for the Future
Knowledge Ecology International