

FORUM SELLING ABROAD

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ABSTRACT

Judges decide cases. Do they also try to influence which cases they decide? Clearly plaintiffs “shop” for the most attractive forum, but do judges try to attract cases by “selling” their courts? Some American judges actively try to enlarge their influence by making their courts attractive to plaintiffs, a phenomenon known as “forum selling.” This article shows that forum selling occurs outside the U.S. as well and focuses on Germany, a country that is often held up as the paragon of the civil law approach to adjudication. As in the U.S., German courts attract cases primarily through the pro-plaintiff manipulation of procedure, including the routine issuance of ex parte injunctions in press cases and refusal to stay patent infringement proceedings when the patent’s validity is challenged in another forum. A critical difference between forum selling in Germany and the U.S. is that court administrators are more actively involved in Germany. As state officials, German court administrators have the incentive to consider the effect of caseloads on government revenue and the local economy, and they use their power to allocate judges to particular kinds of cases in order to make their courts attractive. They also use their power over promotion, case allocation, and resources to reward judges who succeed in attracting cases. Based on an extensive set of interviews with attorneys, judges and court officials, this article describes evidence of forum selling in German patent, press, and antitrust law. It also analyzes how German courts compete internationally with courts from other countries.

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TABLE OF CONTENTS

I.	Introduction.....	3
II.	The German Court System	5
	A. Court Structure.....	5
	B. Court Administration	6
	C. Jurisdiction and Venue.....	7
III.	Interview Methodology	8
IV.	Forum Selling in German Patent Litigation.....	9
	A. Introduction.....	9
	B. How Courts Compete.....	13
	C. Motives for Forum Selling.....	22
	D. Evidence Against Forum Selling.....	29
V.	Forum Selling in German Press Law.....	29
	A. Introduction.....	29
	B. Forum Shopping.....	31
	C. Forum Selling?.....	40
VI.	Forum Selling in German Antitrust Litigation	42
	A. Introduction.....	42
	B. Forum Selling?.....	44
VII.	International Forum Selling.....	48
	A. Antitrust Law	49
	B. Patent and Press Law	51
VIII.	Generalizing from the Case Studies	53
	A. Similarities to Forum Selling in the U.S.....	53
	B. Differences from Forum Selling in the U.S.	55
IX.	Conclusion	58

I. INTRODUCTION

Most judges complain about their busy dockets, but some judges seek the influence and prestige that comes from a higher caseload. In a world where plaintiffs can usually choose the forum, some judges mold procedure and manage cases to entice plaintiffs to file in their court. That is, just as it is widely accepted that plaintiffs engage in forum shopping, some judges engage in “forum selling.” This competition for cases – “forum selling” – has previously been demonstrated in common law countries¹ and arbitration.²

This article shows that forum selling also occurs in civil law systems. In theory, civil law judges are apolitical career civil servants who apply the law in a bureaucratic, anonymous fashion. Nevertheless, forum selling is a reality even in civil law jurisdictions. This article focuses on Germany, often described as the model civil law jurisdiction.³ Drawing on dozens of interviews with German judges and lawyers conducted specifically for this article, it shows that forum selling thrives in Germany. The article pays particular attention to patent law and press law, where there is good evidence for forum selling within Germany. It also analyzes antitrust, where competition is more international and German courts compete (not very successfully) against courts in the Netherlands, the United Kingdom, Finland, and other European countries.⁴

The findings in this article suggest that forum selling is driven by somewhat different factors in Germany than in the U.S. Most importantly, while individual judges are the most important agents of forum selling in the U.S., court administrators (including state ministries of justice and the executive committee of each court) play an important role in Germany. Through their power to control judicial careers and to create chambers (groups of three judges) that specialize in particular areas of law, court administrators can make their courts attractive.

Nevertheless, the methods used to implement forum selling in Germany are, in some ways, remarkably similar to those used in the U.S. For example, just like federal judges in the Eastern District of Texas, German patent and press-law judges seem to compete for litigation mostly by interpreting procedural rules in a pro-plaintiff way, which helps shield decisions from appellate

¹ Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016); see also Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085 (2014).

² Daniel Klerman, *Forum Selling and Domain-Name Disputes* 48 LOY. U. CHI. L.J. 561 (2016).

³ John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

⁴ Forum selling may also occur in other areas of German law that have flexible venue rules, including trademark, bankruptcy, unfair competition, criminal law, labor law, and in cases related to the Internet.

review.

As in the United States, forum selling is the result of venue rules that give plaintiffs almost complete choice of forum in particular kinds of cases. When plaintiffs can choose to sue in only one or two courts, judges have little to gain by aggressively competing for business, because the amount of litigation they can attract is limited. When plaintiffs can file nearly anywhere, an enterprising court can gain a sizable fraction of the entire nation's litigation in that subject area. So, for example, just three of the 115 regional courts dominate press law litigation in Germany.

As in the United States, forum selling results in a pro-plaintiff tilt. Because plaintiffs chose the forum, judges and administrators who want more cases must make their courts attractive to plaintiffs. While courts compete for cases partly by enhancing the speed and quality of their proceedings, they also do so by more questionable practices, such as *ex parte* injunctions (which deny the defendant an opportunity to be heard) and allowing plaintiffs to collect damages on patents that may be invalid.

With the possible exception of press law, forum selling in Germany seems to result in less blatantly pro-plaintiff decisionmaking than in the U.S. This may reflect the important role of state-level court administrators, who have incentives to take into account the effect biased judging would have on local industry and their own political careers. Because court competition in Germany seems more benign, the problems it causes are probably best addressed through issue-by-issue reform, such as requiring judges to stay infringement proceedings when it is more likely than not that the patent will be invalidated in another forum. While reform of the broad venue rules that allow competition may have other advantages, it may not be the best way to address the problems caused by forum selling, because tightening venue rules would undermine the benefits -- such as judicial quality, speed, and responsiveness -- that competition has fostered. Press law, however, may be an area where venue reform would be appropriate, because the pro-plaintiff bias in this area seems more pervasive and especially problematic, because it reduces the freedom of the press.

Part II provides background on the German court system. Part III discusses how interviewees were selected and how the interviews conducted. Part IV analyzes forum selling in German patent litigation. It argues that competition among courts for patent cases has partly resulted in improvements in the speed and quality of patent litigation. Nevertheless, the competition has also led to problematic practices, such as reluctance to stay infringement suits while other courts determine patent validity. This leads not infrequently to situations where a defendant is required to pay damages for infringing a patent that is later invalidated. Part V analyzes forum selling in press law, where judges on the dominant courts seem unusually willing to grant preliminary

injunctions *ex parte*, in spite of the fact that this denies defendants a key procedural right, the opportunity to be heard. Part VI explores the possibility of forum selling in antitrust. Part VII explores the international dimension of forum selling, in particular, how German courts compete with courts from other European countries. Part VIII generalizes from the analysis of particular areas of law and compares forum selling in Germany and the U.S. Part IX concludes.

II. THE GERMAN COURT SYSTEM

This section aims to introduce the reader to the German courts, with special emphasis on issues particularly relevant to this article. Describing a complex, federal system in three pages, by necessity, involves some simplification and glossing over of regional differences.

A. Court Structure

The German judiciary comprises five branches. The branch called “ordinary courts” (*ordentliche Gerichte*) has responsibility for the civil law disputes discussed in this article.

Like the U.S., Germany has both federal and state courts, but the structure is very different. The sixteen German states (*Bundesländer*) run the lower courts, which are responsible for applying both state and federal law. Federal courts generally only hear appeals from the state courts. There are no federal courts of first instance (trial courts) with general jurisdiction.

The ordinary courts system in most cases has three tiers. The 115 regional courts (*Landgerichte*) are the courts of first instance (trial courts) for larger civil cases, which are the focus of this article.⁵ The twenty-four regional courts of appeals (*Oberlandesgerichte*) are responsible for hearing appeals (*Berufungen*) from decisions by the regional courts. Decisions by the regional courts of appeals are subject to a second appeal (*Revision*) to the Federal Court of Justice (*Bundesgerichtshof*).

The judges at German regional courts are organized into chambers, which consist of three judges: a presiding judge (*Vorsitzender*) and two other judges (*Beisitzer*).⁶ One of the judges in the chamber (the *rapporteur*) assumes re-

⁵ GERICHTSVERFASSUNGSGESETZ [GVG][Courts Constitution Act], §§ 23, 71, *translation at* https://www.gesetze-im-internet.de/englisch_gvg/index.html (Ger.) [hereinafter GERMAN COURTS CONSTITUTION ACT].

⁶ GERMAN COURTS CONSTITUTION ACT, *supra* note 5. In practice, a chamber might consist of more than three judges, and in each individual case a cast of three judges is selected

sponsibility for preparing the case, but regardless of who has primary responsibility, the presiding judge largely determines how a case is handled.⁷ Final decisions are taken by majority vote and are issued in the name of the entire chamber, so the reader cannot tell who wrote the opinion. There are no concurring or dissenting opinions. As a result, the typical German judge has no ability or incentive to build an individual reputation through his or her voting behavior. Some chambers have a specialized jurisdiction, such as patent law or press law. Nevertheless, even a specialized chamber may be assigned cases outside its specialization, if it would not otherwise have a sufficient caseload.

The regional courts of appeals ordinarily hear only appeals involving more than €600,⁸ while the Federal Court of Justice, in principle, hears only appeals if the regional court of appeals allows its decision to be appealed against (*Revisionszulassung*).⁹ However, if the value of the appeal exceeds €20,000, an aggrieved party can file a motion with the Federal Court of Justice asking it to review a regional court of appeals decision denying appeal (*Nichtzulassungsbeschwerde*).¹⁰

B. Court Administration

Judges involved in court administration and officials at the state ministries of justice have significant power to determine whether a court will be an attractive venue. This group of people, which we refer to as the “court administration,” consists of two principal groups: the state ministries of justice and court executive committees (*Präsidium*).¹¹

Each German state has a ministry of justice, whose officials include

from all the judges in the chamber.

⁷ For example, the presiding judge determines when to hold an oral hearing, and which witnesses to summon before the court; ZIVILPROZESSORDNUNG [ZPO][CODE OF CIVIL PROCEDURE], §§ 272, 273, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/index.html (Ger.) [hereinafter GERMAN CODE OF CIVIL PROCEDURE].

⁸ For appeals involving up to €600, the court of first instance has to expressly allow the appeal under some circumstances; GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 511(2) and (4).

⁹ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 543(1)(1).

¹⁰ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 544; GESETZ BETREFFEND DIE EINFÜHRUNG DER ZIVILPROZESSORDNUNG [EGZPO][Act concerning the Introduction of the Code of Civil Procedure], § 26(8), *available at* <https://www.gesetze-im-internet.de/zpoeeg/index.html> (Ger.).

¹¹ Formally, the ordinary courts of the states are subordinate to the state ministries of justice. In order to guarantee judicial independence, important issues such as the allocation of judges to chambers are not determined by the ministries of justice or the court presidents, but by the court executive committees, which are the self-governing bodies of judges at individual courts.

judges on leave from their judicial duties as well as other personnel. The ministry is responsible for hiring judges and promoting them. Judges are not elected, but are typically appointed to office right after having finished their legal education. German judges enjoy tenure up to a mandatory retirement age of 65, and it is rare for a German judge to take another position after she retires. As a result, German judges enjoy considerable independence, as guaranteed in the German constitution. On the other hand, the government controls promotions, which are more common in a career judiciary like Germany's. An ambitious judge, therefore, considers potential ministry of justice reactions when making decisions. As a 19th century Prussian ministry of justice was known to say, "Judges can be independent as long as I control their promotion."¹²

The total number of judges is determined by the state parliament, but the ministry allocates the positions among the courts. The ministry of justice also appoints the president of each court, who has administrative responsibilities, including, as discussed below, service on the executive committee. In addition, the ministry allocates funds among the various courts in the state.

Each court has an executive committee consisting of the president and other judges.¹³ Judges on the executive committee, other than the president, are elected by all judges on the relevant court. The executive committee divides the judges into chambers, determines whether chambers will have subject matter specialization, and sets the rules allocating cases among chambers.¹⁴

C. Jurisdiction and Venue

Unlike in the U.S., in Germany there is no distinction between rules governing venue and those governing the jurisdiction of the regional courts. As a general rule, a defendant can always be sued at her place of residence or business.¹⁵ In addition, depending on the area of the law and the type of case, a lawsuit might also be brought elsewhere. For example, for tort cases, section 32 of the German Civil Procedure Code (ZPO) allows a plaintiff to sue in "the court in the district in which the tort was committed." Venue rules for

¹² Johann-Friedrich Staats, *Richterbeförderung und richterliche Unabhängigkeit in Deutschland: ein systemimmanenter, aber reduzierbarer Konflikt*, in Festschrift für Peter Riess zum 70. Geburtstag am 4. Juni 2002 1017, 1020, (Ernst-Walter Hanack et al., eds., 2002).

¹³ GERMAN COURTS CONSTITUTION ACT, *supra* note 5, § 21a.

¹⁴ GERMAN COURTS CONSTITUTION ACT, *supra* note 5, § 21e.

¹⁵ GERMAN COURTS CONSTITUTION ACT, *supra* note 5, §§ 12, 13, 17.

the principal legal areas discussed in this article – patent, press law, and antitrust – will be discussed in detail below. Although a case can be transferred if the original court has no jurisdiction,¹⁶ there are no rules allowing a case to be transferred solely on the grounds of convenience.

III. INTERVIEW METHODOLOGY

Our analysis is based on thirty-three semi-structured interviews with forty-eight judges, court officials, and lawyers in Germany. We chose to primarily rely on interviews for this study because of the limited data that are available about the German court system. The judges interviewed include both trial (first-instance) judges at the regional courts and appellate judges at both the regional courts of appeal and the German Federal Court. In order to encourage interviewees to respond candidly, we promised anonymity.

Seventeen of the interviews covered patent law, ten press law, and six antitrust follow-up suits. Patent law interviews took place between April 2014 and August 2014. Interviews in the other legal areas were conducted between February 2016 and January 2018. Stefan Bechtold and Jens Frankreiter conducted all interviews in German. With the exception of two phone interviews (one in patent law and one in antitrust law), all interviews were conducted in person by one interviewer.

We selected our interviewees through snowball sampling.¹⁷ This means that, after contacting a small number of practitioners we knew, we used existing contacts to get in touch with new interviewees, and then asked our interviewees for help in contacting additional interviewees. The advantage of this approach is that we gained access to some of the most important figures in each area of the law. The disadvantage is that our interviews may not be representative of the overall population of judges and attorneys in Germany.

Of the seventeen interviews in patent law, eight interviews were conducted with active and former judges. Two of these interviews involved two judges, so a total of ten judges were interviewed, of which seven were active judges at the time of the interview, two were court officials, and one was a former judge. The judges interviewed included current or former judges from the three major patent courts of first instance – Dusseldorf, Mannheim and Munich. Five were appellate judges. In seven interviews, we talked to ten lawyers and patent attorneys with offices in Munich or Dusseldorf. Finally,

¹⁶ See, e.g., GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 281.

¹⁷ See, e.g., Rowland Atkinson & John Flint, *Snowball Sampling*, in THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 1044 (Michael S. Lewis-Beck et al., eds., 2004).

we conducted one interview with three in-house lawyers at a large engineering company in Germany, and one interview with two (non-judicial) court officials at one of the three major patent courts.

In the other subject matter areas, we talked to fourteen attorneys, one judge, and three lawyers working at corporate entities with significant involvement in litigation in the relevant area of the law.

The interviews were conducted as semi-structured interviews. We did not engage in an open conversation, but structured the interviews around a list of questions that remained largely unchanged throughout the process and across the different areas of the law. During the interviews, we made sure to ask all questions to all interviewees, although we sometimes modified the order. We allowed interviewees to elaborate freely in response to our questions, and, where it seemed helpful, we followed up with related or clarifying questions. Most interviews were recorded and then transcribed. In some interviews, we were only able to take notes.

IV. FORUM SELLING IN GERMAN PATENT LITIGATION

A. Introduction

German courts are Europe's most important forum for patent disputes and are an important venue for the enforcement of patents worldwide.¹⁸ Some authors estimate that more than 60% of all patent infringement cases in Europe are brought in Germany.¹⁹ Also, patent law plays a special role in the German legal system, as it is one of the few areas where multinational corporations frequently appear before public courts.

There are twelve regional courts with jurisdiction to hear patent infringement cases in Germany.²⁰ In principle, venue rules in Germany require a plaintiff to sue in a district with a connection to the dispute. For tort cases,

¹⁸ For example, during the so-called "smartphone wars," Samsung and Apple repeatedly went to court against each other in Germany; see Yongwook Paik & Feng Zhu, *The Impact of Patent Wars on Firm Strategy: Evidence from the Global Smartphone Industry*, 27 *ORG. SCI.* 1397 (2016); see also Stuart Graham & Nicolas Van Zeebroeck, *Comparing Patent Litigation Across Europe: A First Look*, 17 *STANFORD TECH. L. REV.* 655 (2014).

¹⁹ Thomas Kühnen & Rolf Claessen, *Die Durchsetzung von Patenten in der EU: Standortbestimmung vor Einführung des europäischen Patentgerichts*, 115 *GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT* 592, 593 (2013). See also Katrin Cremers et al., *Patent Litigation in Europe*, 44 *EUR. J.L. & ECON.* 1, 23 (2017).

²⁰ See PATENTGESETZ [PatG][PATENT ACT], § 143(2), translation at https://www.gesetze-im-internet.de/englisch_patg/index.html (Ger.) [hereinafter GERMAN PATENT ACT] and the respective laws of the individual states. The 12 designated patent courts are located in Berlin, Braunschweig, Dusseldorf, Erfurt, Frankfurt, Hamburg, Leipzig, Magdeburg, Mannheim, Munich, Nürnberg, and Saarbrücken.

section 32 of the German Civil Procedure Code allows a plaintiff to sue in “the court in the district in which the tort was committed.” In patent law, this rule is interpreted to allow plaintiffs to file complaint in any district where an allegedly infringing product is sold.²¹ As in the U.S. before the Supreme Court’s recent decision in *TC Heartland*,²² this venue rule means that, for a widely distributed product, plaintiffs can bring a claim in any of the twelve courts with jurisdiction over patent disputes.²³

As mentioned above,²⁴ decisions of the regional courts can be appealed to a regional court of appeals. For each of the twelve regional courts with jurisdiction over patent suits, there is a different regional court of appeals. The Federal Court of Justice, which hears appeals from decisions by the regional courts of appeal, also has jurisdiction to hear appeals from decisions by the Federal Patent Court (*Bundespatentgericht*) in nullification proceedings.

Given the freedom plaintiffs enjoy in selecting the forum, it is not surprising to find ample evidence of forum shopping in patent litigation. Most importantly, the caseload is very unevenly distributed among the twelve relevant courts. The regional court of Dusseldorf has the highest case numbers, followed by the regional courts of Mannheim and Munich. These three courts together hear 80 to 90% of all infringement cases in Germany, with Dusseldorf hearing considerably more cases than Munich.²⁵ Given that travel within Germany is fast and German patent attorneys can and do litigate cases all over the country, the only reasonable explanation for this distribution of cases is that patent owners are strategically selecting courts in order to increase the

²¹ Christian Osterrieth, *Patent Enforcement in Germany*, in PATENT ENFORCEMENT WORLDWIDE: WRITINGS IN HONOUR OF DIETER STAUDER 111, 121-22 (Christopher Heath ed. 2015); THOMAS KÜHNEN, PATENT LITIGATION PROCEEDINGS IN GERMANY 290 (Frank Peterreins trans., 7th ed. 2015); Matthias Zigann, *Die Sicht des Patentinhabers*, HANDBUCH DES PATENTRECHTS 1033, 1060 (Maximilian Haedicke & Henrik Timmann eds., 2012).

²² *TC Heartland v. Kraft Foods Group Brands*, 137 S. Ct. 1514 (2017).

²³ Jochen Herr & Marc Grunwald, *Speedy Patent Infringement Proceedings in Germany: Pros and Cons of the Go-To Courts*, 7 J. INTELL. PROP. L. & PRAC. 44 (2012); Fabian Gaessler & Yassine Lefouili, What to Buy When Forum Shopping? Analyzing Court Selection in Patent Litigation 12 (2017), <http://ssrn.com/abstract=2931351>.

²⁴ See *supra* section II.A.

²⁵ Gaessler and Lefouili show that, during the period 2003-2008, Dusseldorf heard almost ten times as many cases as Munich, Gaessler & Lefouili, *supra* note 23. See also Katrin Cremers & Paula Schliessler, *Patent Litigation Settlement in Germany: Why Parties Settle during Trial*, 40 EUR. J.L. & ECON. 185, 197 (2015); Kühnen & Claessen, *supra* note 19, at 593; Mathieu Klos, *Standortvorteil*, 4 JUVE RECHTSMARKT 72 (2010); Stephan Haase, *Die statistische Erfassung von Rechtsstreitigkeiten in Patent-, Gebrauchsmuster- und Arbeitnehmererfinder-Sachen in der BRD im Jahre 1992: der Abschluß einer Versuchsreihe*, 84 MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 329, 330 (1994); Osterrieth, *supra* note 21, at 115-16.

likelihood of obtaining a favorable court decision.²⁶

Nevertheless, it is impossible to conclude from the distribution of case numbers alone that there is forum selling as well as forum shopping. Forum selling is the deliberate attempt by courts to attract more cases to their court.²⁷ While forum shopping refers to plaintiff's strategic choice of forum, forum selling focuses on actions by judges and court administrators to influence their caseload.

Dusseldorf has been the most important for venue for patent infringement proceedings in Germany since the end of World War II, when most Berlin-based attorneys practicing patent law moved there. Until the early 1990s, the so-called "localization principle" (*Lokalisationsprinzip*) restricted attorneys to representing clients in a single court. As a result, attorneys usually initiated proceedings in the court in their district. Theoretically, a Dusseldorf-based attorney could have brought a case in Munich as well. However, in order to do so, he had to cooperate with an attorney registered with the Munich court. This was particularly difficult, because attorneys were barred from working in law firms that included lawyers registered in different districts. Given that many attorney practicing patent law were based in Dusseldorf, it is not surprising that Dusseldorf had the highest case numbers. Besides Dusseldorf, Munich had a significant share of cases due to the fact that the German Patent Office has been based in Munich since 1949.

Important shifts in case numbers have occurred since the early days of the German Federal Republic. Although the shifts are modest compared to the meteoric rise of the Eastern District of Texas as the dominant venue for patent litigation in the U.S., they are significant. Most importantly, Mannheim has emerged as the second most important patent venue, eclipsing Munich. Thus, while Dusseldorf's position partly reflects historical factors, the present distribution of cases – as well as the handling of cases at the important patent venues – is the result of forum selling on the part of judges and court officials.

Dusseldorf was able to maintain its position as the most important patent venue through a combination of the judges' patentee-friendly handling of cases and the court administration's active staffing policy. In addition, Mannheim obtained its status as the second most important venue by positioning itself as a faster alternative to Dusseldorf at a time when Dusseldorf's success in attracting cases had led to substantial delays. This rise, in turn, led Dusseldorf to increase the number of judges focusing on patent law in an effort to increase the speed of its proceedings. Lastly, in recent years the Munich District Court has been fighting its decreasing case numbers by adopting an alternative, more plaintiff-friendly way of handling proceedings in a conscious effort to cater to the interests of plaintiffs.

²⁶ See also Gaessler & Lefouili, *supra* note 23.

²⁷ Klerman & Reilly, *supra* note 1.

One reason German courts are so attractive for patent litigation is that it is relatively easy for patentees to obtain an injunction against infringing parties. Not only are patent infringement proceedings relatively quick²⁸ and cheap,²⁹ but, in contrast to the U.S. and many other jurisdictions, injunctions are generally awarded solely based on a finding of infringement. While patent and antitrust law impose certain constraints on full enforcement of intellectual property rights,³⁰ courts usually do not give any weight to equitable considerations like the consequences of an injunction for the defendant.³¹ Furthermore, the defendant in an infringement suit cannot assert as a defense that the patent is invalid. This is a consequence of the bifurcated system of patent litigation in Germany.³² Challenges to patent validity can be raised only in administrative proceedings before the issuing authority (either the European Patent Office (EPO) or the German Patent and Trademark Office) or before the German Federal Patent Court (either as a direct challenge or as an appeal

²⁸ Cremers et al., *supra* note 19, at 13, 27; Herr & Grunwald, *supra* note 23. *See also* Kühnen & Claessen, *supra* note 19, at 593.

²⁹ Cremers et al., *supra* note 19, at 14. *See also* Kühnen & Claessen, *supra* note 19, at 593.

³⁰ Under German patent law, users of an invention might have a right of prior use (GERMAN PATENT ACT, *supra* note 20, § 12) or the right to ask for a compulsory license (GERMAN PATENT ACT, *supra* note 20, § 24). Also, courts have held that antitrust law in some cases requires a patentee to grant a compulsory license to alleged infringers; Bundesgerichtshof [BGH][Federal Court of Justice] May 6, 2009, 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 694 (2009).

³¹ THOMAS KÜHNEN, HANDBUCH DER PATENTVERLETZUNG 446 et seq. (10th ed. 2018); PETER MES, PATENTGESETZ, GEBRAUCHSMUSTERGESETZ §139 note 42 (4th ed. 2015); Ansgar Ohly, "Patenttrolle" oder: Der patentrechtliche Unterlassungsanspruch unter Verhältnismäßigkeitsvorbehalt? Aktuelle Entwicklungen im US-Patentrecht und ihre Bedeutung für das deutsche und europäische Patentsystem, 57 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT: INTERNATIONALER TEIL 787 (2008). In recent years, a number of commentators have argued that injunctive relief under German patent law should be constrained in some cases. Clemens-August Heusch, *Der patentrechtliche Unterlassungsanspruch*, in Festschrift für Wolfgang von Meibom zum 65. Geburtstag 135, 147 (Christian Harmsen et al., eds., 2010); Ohly, *id.* at 795-97; THOMAS F. COTTER, COMPARATIVE PATENT REMEDIES: A LEGAL AND ECONOMIC ANALYSIS 243-48 (2013); Christian Osterrieth, *Patent-Trolls in Europa: Braucht das Patentrecht neue Grenzen?*, 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 540 (2009); Hans-Jürgen Papier, *Verfassungsrechtliche Anforderungen an den Patentschutz*, 8 ZEITSCHRIFT FÜR GEISTIGES EIGENTUM 431 (2016).

³² *See also* Cremers et al., *supra* note 19, at 34-35; Herr & Grunwald, *supra* note 23. Recently, the ease with which patentees can obtain an injunction became the subject of severe criticism by the former Chief Justice of the German Constitutional Court, who challenged this feature as unconstitutional. Papier, *supra* note 31.

against a decision by the German Patent and Trademark Office).³³ Infringement proceedings, by contrast, are heard in the ordinary civil courts,³⁴ which do not have jurisdiction to decide patent validity. Rather, the defendant challenging the patent's validity has to initiate a separate nullification proceeding in the appropriate patent office or in the German Federal Patent Court.³⁵ If the patent infringement and the patent nullification proceedings overlap, the infringement proceedings are not automatically suspended. Rather, the ordinary civil courts enjoy discretion whether to stay the proceeding until the nullification proceeding is resolved.³⁶ As nullification proceedings usually take considerably longer than infringement proceedings,³⁷ even holders of patents that are later declared invalid regularly obtain enforceable injunctions which allow them to temporarily bar the alleged infringer from selling its products.³⁸

B. How Courts Compete

Just like in the U.S., German patent judges who are interested in attracting litigation to their court have an incentive to cater mostly to the needs of plaintiffs. Defendants usually have no way to influence the venue in which the case is heard. As mentioned above, there are no rules allowing a defendant in a German court to request transfer of the case to another court. In addition, a potential defendant cannot preempt an infringement suit by filing for declaratory judgment.³⁹

Plaintiffs focus on two main dimensions when they decide where to bring a case: the quality and predictability of the judgement as well as the speed of

³³ GERMAN PATENT ACT, *supra* note 20, §§ 21, 59, 81. *See also* Graham & Van Zeebroeck, *supra* note 18, at 670 et seq.

³⁴ GERMAN PATENT ACT, *supra* note 20, § 143(1).

³⁵ Sven Hetmank, *The Principle of Separation in German Patent Law and its Implications for Patent Litigation*, 34 EUR. INTELL. PROP. REV. 369 (2012); Anja Schwarz, *Nullity Proceedings*, in PATENT LITIGATION IN GERMANY (Claudia Milbradt ed. 2012); Katrin Cremers et al., *Invalid but Infringed? An Analysis of the Bifurcated Patent Litigation System*, 131 J. ECON. BEH. & ORGAN. 218 (2016).

³⁶ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 148. *See supra* section IV.B. 3 for a description of the practice of the courts in this regard.

³⁷ Cremers et al., *supra* note 35, at 221; Cremers et al., *supra* note 19, at 13, 27.

³⁸ Cremers et al., *supra* note 35.

³⁹ In principle, it is possible for a defendant to file for (negative) declaratory relief. However, plaintiffs can counter such a maneuver by suing for infringement elsewhere, which would render the defendant's case inadmissible. This might be different if an action for negative declaratory relief is filed with the courts in another country, *see* COTTER, *supra* note 31, at 253-55; Mario Franzosi, *Worldwide Patent Litigation and the Italian Torpedo*, 7 EUR. INTELL. PROP. REV. 382 (1997).

the proceedings. In the view of patent attorneys, there are considerable differences between the quality and speed of proceedings at different courts. Dusseldorf has a reputation for delivering the highest quality decisions. They are perceived as well reasoned, in accord with the case law of the Federal Court of Justice, and thus unlikely to be challenged or overturned on appeal.⁴⁰ This perception varies, however, for different technical areas. In particular, Mannheim has acquired a reputation for being well versed in cases concerning telecommunications.⁴¹ Mannheim also has a reputation for adjudicating cases more quickly than Dusseldorf.⁴² Munich's reputation on both dimensions has improved in recent years, but it is considered to trail Dusseldorf in quality and Mannheim in speed. By contrast, we found no evidence of systematic differences between courts in the interpretation of the substantive law.

The different strengths of individual courts seem to appeal to different kinds of plaintiffs. Patent attorneys report that they tend to file complex cases in Dusseldorf, while they prefer Mannheim when time is the most pressing concern.⁴³ In individual cases, plaintiffs might also choose to pick a slower court in order to delay the resolution of the case. Mannheim appears to attract many cases involving the telecommunications industry, while most cases involving pharmaceutical and chemical industries are filed in Dusseldorf.⁴⁴

Other differences that plaintiffs take into account when deciding where to file include the handling of preliminary injunctions,⁴⁵ the acceptance of English-language documents,⁴⁶ and the enforcement of injunctions.

1. Quality and Predictability

The ability of individual judges to improve the quality of decisions is limited. The most important determinants of the quality of a judgment are the experience and the ability of the sitting judges, and that is relatively uniform across the relevant German courts. Of course, it is possible that some judges

⁴⁰ See also Gaessler & Lefouili, *supra* note 23, at 31; Herr & Grunwald, *supra* note 23, at 47.

⁴¹ Mathieu Klos, *Angriff auf die Bastion*, 6 JUVE RECHTSMARKT 83, 87 (2012).

⁴² Osterrieth, *supra* note 21, at 115. See also Thorsten Bausch & Esther Pfaff, *Das "neue Münchner Verfahren:" eine Trumpfkarte für den Gerichtsstandort München?*, 103 MITTEILUNGEN DER DEUTSCHEN PATENTANWÄLTE 97 (2012).

⁴³ Klos, *supra* note 25, at 76.

⁴⁴ See also Gaessler & Lefouili, *supra* note 23, at 22.

⁴⁵ Reportedly, courts vary with regard to how quickly they require a plaintiff to file for a preliminary injunction. The courts in Dusseldorf and Hamburg have a reputation for being rather accommodating in this regard, while Mannheim considers late requests for preliminary injunctions inadmissible.

⁴⁶ Dusseldorf apparently requires all documents including exhibits to be translated into German. In Mannheim, only briefs have to be filed in German.

work harder, but attorneys generally describe patent judges across all courts as dedicated and highly motivated. One can speculate whether Mannheim's preference for quick decisions comes at the price of slightly lower quality, while Dusseldorf accepts longer durations in order to ensure a high quality of decisions.

Judges do, however, invest in increasing the predictability of their decisions. In Germany, whether a decision is published largely depends on a judge's decision to send it to a database provider or publishing house. Judges in Dusseldorf attempt to publish as many decisions as possible in a conscious effort to increase the predictability of their decision-making.

Court administrators also play a key role in ensuring quality. Court administrators have large influence over judges' careers. Also, they have considerable influence over judicial workloads, as they decide how many judges at a court hear patent cases, and whether patent judges also hear cases in different fields of the law. The perception of Dusseldorf as the highest-quality provider of patent litigation can be at least partly explained by the very active policy of the court administration to assign excellent young judges to patent cases, to make sure that more senior roles are given to judges with experience in patent law, and to provide patent judges with career incentives that make it attractive both for talented young judges to join this field, and for older judges to stay in the field. Other court administrations, by contrast, are perceived not to treat judges specializing in patent litigation favorably in this regard.⁴⁷ In particular, for many years the courts in Munich, in keeping with their general approach to judicial assignments, did not allow judges to spend most of their career in patent law. Also, courts can use their power to manage the caseload of patent judges in a conscious effort to provide their judges with the time necessary to produce high-quality judgments in short time.

2. Speed

While judges have limited ability to increase the quality of the proceedings, they use various tools to speed up the proceedings in an effort to appeal to plaintiffs. First, they make use of the fact that they have broad discretion in how they manage proceedings at their court. Judges have a lot of discretion in when and how often they schedule oral hearings and how many rounds of briefs they allow the parties to submit. These decisions have a major impact on the length of proceedings. Interestingly, while the three main patent courts follow different approaches in how they handle the procedures,⁴⁸ they all aim

⁴⁷ This might have changed in recent years.

⁴⁸ Mannheim normally does not schedule an early hearing, but aims at resolving cases

to resolve cases quickly. Attorneys even report that judges advertise the speediness of their proceedings towards plaintiffs, promising to resolve a case within less than one year after it is filed.

Not only do judges attempt to cater to plaintiffs by increasing the speed of proceedings. Court administrations across the country have used their power to create additional patent chambers⁴⁹ to ensure that, despite increasing case numbers, the speed of the proceedings does not suffer. One example of such an effort is the creation of a second patent chamber in Dusseldorf in reaction to Mannheim's rise during the early 2000s. Dusseldorf, like all courts at that time, had only one dedicated patent chamber. Due to increases in caseloads, the duration of proceedings increased, and attorneys were increasingly looking for alternatives. In that environment, Mannheim succeeded in attracting a considerable number of cases by offering quicker proceedings;⁵⁰ also, patent judges in Mannheim acquired a reputation for the quality of their decisions and for handling cases in a patentee-friendly way. In 2005, Dusseldorf reacted by establishing a second patent chamber, which allowed them to significantly reduce the duration of proceedings.

Increasing the speed of proceedings in most cases favors the plaintiff, which is able to obtain an injunction at an earlier point in time.⁵¹ While we claim that judges and court administrations provide for speedy proceedings in an attempt to cater to plaintiffs, we have no reason to believe that attempts to speed up proceedings favor plaintiffs in an unfair way. Most importantly, we have heard of no reports of instances in which defendants did not have sufficient time to prepare.

after only one oral hearing following the exchange of briefs between the parties. In Dusseldorf, traditionally an oral hearing was scheduled early during the proceedings in order to deliberate the procedural schedule, with a second oral hearing taking place after the end of the written procedure. Reportedly, judges have recently adopted Mannheim's approach in at least some proceedings. Munich, like Dusseldorf, schedules early hearings, but aims to provide parties with a preliminary assessment of the merits of a case. *See Osterrieth, supra* note 21, at 114-15; Herr & Grunwald, *supra* note 23. *See also* Regional Court of Munich, *Hinweise zum Münchner Verfahren in Patentstreitsachen* (2016), https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/infoblatt_m_nchner_verfahren__stand_12_2016_.pdf.

⁴⁹ A "chamber" is a group of judges, usually three, who handle a particular kind of case. So, by increasing the number of patent chambers, court administrators are increasing the number of positions for patent judges.

⁵⁰ *See also* Gaessler & Lefouili, *supra* note 23, 19 et seq. (showing that, for the time period 2003-2008, average durations of proceedings were considerably shorter in Mannheim as compared to Dusseldorf. Note however that the following analysis in Gaessler & Lefouili challenges this notion).

⁵¹ *See also* Klerman & Reilly, *supra* note 1, at 21.

3. Limiting Expert Witnesses

The length of proceedings depends, to a large extent, on whether expert witnesses are brought in by the court. German judges have the ability⁵² to appoint expert witnesses to provide an opinion on the technical aspects of a case.⁵³ Kühnen estimates the delay caused by the involvement of an expert witness to be around two years.⁵⁴

It seems reasonable to assume that, the more experience a patent judge has, the less often she is required to rely on expert witnesses. Accordingly, Dusseldorf is reported to rely on expert witnesses only rarely.⁵⁵ Mannheim's rise is partly attributed that they also used expert witnesses sparingly.⁵⁶ Munich, by contrast, until 2009 had a reputation for higher rates of expert involvement,⁵⁷ causing attorneys to counsel their clients against bringing patent suits there. As one attorney put it:

People stopped going to the Munich court, because they had the practice of involving expert witnesses in around 80, 90 percent of the cases. [...] Therefore, we just avoided going there. It took too long. [...] For some time, some people called it malpractice to go to Munich. Along those lines, it was that extreme. I am exaggerating slightly.

The use of expert witnesses by the regional court in Munich arguably was one of the factors contributing to decreasing numbers of patent cases filed there. In 2009, judges at the regional court of Munich announced the introduction of the "New Munich Proceedings" (*Neues Münchner Verfahren*), a series of changes to their way of dealing with infringement proceedings. Among other things, they announced that they would, in the future, only rely

⁵² If they do have the technical understanding necessary to establish the facts of the case, German judges are, in fact, under an obligation to appoint an expert. Although judges in principle enjoy large discretion whether to appoint an expert witness, it may give rise to a successful (second) appeal if they do not appoint an expert opinion despite not having the required technical expertise to properly establish the facts of a case. *See* KÜHNEN, *supra* note 21, at 725 et seq.; Walter Zimmermann in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESS-ORDNUNG 2, §402 note 7 § 2 (Thomas Rauscher & Wolfgang Krüger eds., 5th ed. 2016).

⁵³ Note that expert witnesses are almost always appointed by the court under German civil procedure law. Party-appointed experts, by contrast, play a much less important role than in U.S. civil procedure; *see* Langbein, *supra* note 2, at 835.

⁵⁴ KÜHNEN, *supra* note 21, at 726.

⁵⁵ Kühnen & Claessen, *supra* note 19, at 595; *see also* Herr & Grunwald, *supra* note 23, at 3.

⁵⁶ *See also* Kühnen & Claessen, *supra* note 19, at 597.

⁵⁷ Gaessler & Lefouili, *supra* note 23, at 25; Herr & Grunwald, *supra* note 23, at 3; Marcus Creutz, *Richter machen kurzen Prozess*, *HANDELSBLATT*, Jan. 27, 2011, at 55.

on expert witnesses in rare circumstances.⁵⁸ To publicize these changes, the Munich judges gathered a group of about two hundred judges, court officials, industry representatives, trial lawyers and patent attorneys in a gymnasium of a local school.⁵⁹ These changes are commonly seen as an effort to attract more litigation which was (at least temporarily) successful.

While the current handling of expert witness appointments, at least in one court, seems to be a result of forum selling, we lack a basis to claim that it has led to a procedure that unfairly favors the plaintiff over the defendant. Certainly, as mentioned before, reducing the length of proceedings mainly serves the plaintiffs' interests. At the same time, we find no evidence that the decision of the judges at the Munich regional court to resolve more cases on their own has led to a decrease in the quality of their decision-making.

4. Stays Pending Resolution of Nullification Proceedings

While the methods of competition discussed so far seem not to have resulted in a decrease in quality (and may even have enhanced it), the reluctance of courts to stay proceedings pending invalidity challenges is much more problematic. As mentioned above, judges in infringement proceedings do not have jurisdiction to decide on the validity of a patent. Instead, patent validity challenges have to be brought in separate revocation or nullification proceedings at either the relevant patent office or the German Federal Patent Court.⁶⁰ According to section 148 of the German Civil Procedure Code, judges have the power to stay infringement proceedings until completion of a pending revocation/nullification proceeding. Because nullification proceedings usually take considerably longer than infringement proceedings,⁶¹ the decision whether to stay a proceeding has a significant impact on the duration of the infringement proceeding.⁶² Also, a decision not to stay a proceeding creates a danger that the plaintiff may obtain an injunction despite the fact that the patent at issue is later declared invalid.⁶³ The plaintiff, of course, would prefer not to stay the infringement suit, both in order to make the infringement suit conclude faster and in order to get the benefit of a favorable judgment of infringement before the patent is declared invalid.

According to case law of the Federal Court of Justice, proceedings should

⁵⁸ Regional Court of Munich, *supra* note 48. *See also* Bausch & Pfaff, *supra* note 42; Herr & Grunwald, *supra* note 23, at 3; Klos, *supra* note 25, at 74.

⁵⁹ Klos, *supra* note 25, at 74.

⁶⁰ *See supra* text accompanying notes 33 et seq.

⁶¹ *See supra* section IV.A.

⁶² *See also* Gaessler & Lefouili, *supra* note 23, at 14.

⁶³ *See supra* section IV.A.

be stayed if the court considers it more likely than not (*überwiegend wahrscheinlich*) that the patent will be held invalid.⁶⁴ In practice, in recent years judges at the three most important patent courts have only granted a defendant's request to stay the case in a small minority of cases. For example, Kühnen and Claessen estimate that only 10% of all requests to stay a proceeding are granted.⁶⁵ Practitioners report that courts also differ in their willingness to stay proceedings.⁶⁶

The restrictive handling of requests to stay proceedings is communicated openly by the courts in a way that seems to be partly at odds with the case law of the Federal Court of Justice. For example, the regional court in Munich published a set of instructions called "Information concerning the Munich procedure in patent proceedings" (*Hinweise zum Münchner Verfahren in Patentstreitsachen*), which state with regard to stays:⁶⁷

The chamber handing down the decision will [...] normally only in exceptional cases come to the conclusion that there is a sufficient likelihood that the patent in question will be invalidated (or substantially confined) in the validity proceeding and stay the proceeding.

A newspaper article cited a judge from the Munich court that infringement proceedings would only be stayed if there were roughly an 80% chance that the patent would be declared invalid in the nullification proceeding.⁶⁸

There is no reason to believe that this restrictive practice is justified by the fact that most invalidity proceedings are unsuccessful. Cremers et al. analyze the outcomes of all cases at the three biggest patent courts in Germany between 2000 and 2008 in which the court issued a judgment despite ongoing

⁶⁴ Bundesgerichtshof [BGH][Federal Court of Justice] Sept. 16, 2014, 116 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 1237 (2014); BGH, [BGH][Federal Court of Justice] Nov. 11, 1986, 89 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 284 (1986) ("some chance of success"); Klaus Grabinski & Carsten Zülch in PATENTGESETZ: KOMMENTAR § 139 note 107 (Georg Benkard ed., 11th ed. 2015).

⁶⁵ Kühnen & Claessen, *supra* note 19, at 594. See also Cremers et al., *supra* note 35, at 221; Thomas Kühnen, *The Bifurcation System in German Practice*, in 16TH SYMPOSIUM OF EUROPEAN PATENT JUDGES 67 (European Patent Office ed., 2013); KÜHNEN, *supra* note 21, at 519. See also Herr & Grunwald, *supra* note 23.

⁶⁶ Herr & Grunwald, *supra* note 23, at 46.

⁶⁷ Regional Court of Munich, *supra* note 48. The courts differ somewhat in the test they purport to apply in their decision whether to stay a proceeding.

⁶⁸ Creutz, *supra* note 57. However, the Federal Court of Justice never reverted a decision not to stay a proceeding by the lower courts. One potential reason for this apparent contradiction is the fact that decisions by the lower courts are largely shielded from appellate review, see *infra* text accompanying notes 74 et seq.

nullification proceedings.⁶⁹ They find that, among all cases in which the regional court had found the defendant to be at least partly infringing, in 35.5% of the cases the patent was later declared at least partly invalid. In another 45% of the cases, the challenge to the patent validity was withdrawn before decision.⁷⁰ This means that, among the cases in which the question of validity was decided, the patent was declared at least partly invalid in almost two thirds. Kühnen and Claessen's analysis suggests that this problematic situation has continued.⁷¹

It was not always the case that requests to stay infringement proceedings were handled this way. Until the late 2000s, judges in Munich granted stays at considerably higher rates.⁷² This was one of the factors that made Munich an unattractive venue for plaintiffs and led to the introduction of the New Munich Proceeding in 2009. Besides announcing that they would appoint expert witnesses only rarely, the judges pledged to change their approach to motions to stay. Reportedly, this change has contributed to luring plaintiffs back to Munich. One lawyer commented on this change as follows:

But in practice there were significant differences. One had the impression that in Munich they basically had the view:

Well, if we are not absolutely sure about the question of infringement, we can do away with the need to obtain evidence or appoint an expert witness if the patent is invalidated, so we would rather wait.

That was in the past. This in fact led to us avoiding Munich, because one had to take into account the fact that the risk of a stay was high. This again led to a counter reaction, with the presiding judge in Munich saying, 'In Munich, we do not stay proceedings.' Which is also bizarre.

These days, judges seem to be well aware that a more generous handling of requests to stay the procedure would potentially lead to plaintiffs avoiding their court. One attorney quoted a judge at one of the major patent courts as saying in relation to a number of cases which had been stayed at this court:

Well, I do not really dare presenting these results, because it might potentially threaten our reputation as a patentee-friendly court if I tell you that during the

⁶⁹ Cremers, et al., *supra* note 35.

⁷⁰ *Id.* at 234.

⁷¹ Kühnen & Claessen, *supra* note 19, at 594.

⁷² Gaessler and Lefouili, *supra* note 23, report for the time period 2003-2008 that proceedings in Munich were stayed in 30% of all cases in which a parallel validity proceeding was pending. By contrast, the regional courts in Mannheim and Dusseldorf only stayed 18% of all cases with parallel invalidity proceedings; see also Creutz, *supra* note 57.

last year we stayed one third of the cases in which this issue played a role.

Like many procedural devices used by the Eastern District of Texas to attract patent litigation,⁷³ the decision by a German court whether to stay a proceeding is largely shielded from review by the Federal Court of Justice. Section 148 Civil Procedure Code grants judges discretion regarding their decision whether to stay a procedure.⁷⁴ There seems to be no case in which the Federal Court of Justice has annulled a decision by a lower court to stay or not to stay a patent infringement proceeding.

Some commentators have defended the courts' restrictive approach. They mostly argue that a stay of the procedure would de facto shorten the validity period of a patent.⁷⁵ Besides, they point to section 717(2) of the Civil Procedure Code, which grants alleged infringers a right to claim damages if an injunction is later revoked. Therefore, they suggest that patentees would not risk enforcing their injunctions if they thought their patent vulnerable.⁷⁶

In spite of such arguments, the practice of the courts has come under criticism in recent years, and there are good reasons to believe that the current practice unfairly favors plaintiffs.⁷⁷ First, as noted above, empirical studies find that patents that are the subject of both infringement suits and parallel nullification or revocation proceedings are, in fact, often invalid. Second, the prospect of damages is unlikely to deter patent plaintiffs from suing on weak patents, because defendants subject to injunctions later revoked actually do not consistently recover all losses they suffer when they stop selling the allegedly infringing product. Especially when the defendant was about to enter a new market, it will often have a hard time proving its loss.⁷⁸ In addition,

⁷³ Klerman & Reilly, *supra* note 1, at 250, 278, 301-2.

⁷⁴ Karl Harraeus, *Über den gleichzeitigen Ablauf von Patentverletzungs- und Patentnichtigkeitsverfahren*, 66 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 181, 182 (1964); Grabinski & Zülch, *supra* note 64, at § 139 note 108; Thomas Kaess, *Die Schutzfähigkeit technischer Schutzrechte im Verletzungsverfahren*, 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 276, 277 (2009).

⁷⁵ Grabinski & Zülch, *supra* note 64, at § 139 note 108.

⁷⁶ See Falk von Maltzahn, *Die Aussetzung im Patentverletzungsprozeß nach § 148 ZPO bei erhobener Patentnichtigkeitsklage*, 87 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 163, 165 (1985).

⁷⁷ Reto M. Hilty & Matthias Lamping, *Trennungsprinzip: Quo vadis, Germania*, in 50 JAHRE BUNDESPATENTGERICHT: FESTSCHRIFT ZUM 50-JÄHRIGEN BESTEHEN DES BUNDESPATENTGERICHTS AM 1. JULI 2011 (Achim Bender et al., eds., 2011); Kühnen & Claessen, *supra* note 19, at 595. See also Papier, *supra* note 31; KÜHNEN, *supra* note 31, at 702. Arguments against the restrictive interpretation of the requirements for staying proceedings are not new. See Harraeus, *supra* note 74.

⁷⁸ See also Tobias J. Hessel & Maximilian Schellhorn, *Die Rückabwicklung des vorläufig vollstreckten Unterlassungstitels im Patentrecht*, 119 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 672, 674 (2017); Rüdiger Rogge, *Zur Aussetzung in*

there are some situations in which the defendant cannot sue for damages after the patent is invalidated, but can only recover for unjust enrichment.⁷⁹ The evidence therefore suggests that the prospect of damages does not deter plaintiffs from suing to enforce weak patents or using the threat of an injunction as a bargaining chip to extract wide-ranging concessions from the defendant, potentially even including the withdrawal of the defendant's challenge to the validity of the patent.⁸⁰

In sum, forum selling has contributed to creating and sustaining a situation in which courts seldom stay infringement suits when there are parallel proceedings regarding patent validity. This is problematic, given that Germany's bifurcated patent litigation system makes it impossible for the defendant to challenge patent validity in an infringement suit. As a result, patent defendants may lose infringement suits based on invalid patents that they were unable to challenge in time. Judges were supposed to protect against this danger by staying infringement proceedings when invalidity was likely, but competitive pressures have rendered this safeguard ineffective.⁸¹

The fact that German judges are reluctant to stay infringement proceedings while other courts decide validity is similar the practice of U.S. Judges in the Eastern District of Texas seldom staying suits pending reexamination in the U.S. Patent and Trademark Office.⁸² The consequences in Germany, however, are much more severe. In the U.S., a patent defendant can challenge the validity of the patent in an infringement suit, so refusal to grant a stay does not mean that the defendant lacks the ability to challenge the patent in timely fashion. In contrast, in Germany, the courts that hear infringement cases lack jurisdiction to hear challenges to patent validity, so, without a stay, defendants have no ability to challenge the patent before they are found to have infringed it.

C. Motives for Forum Selling

1. Judges

As in the U.S.,⁸³ forum selling runs counter to common beliefs about how

Patentverletzungsprozessen, 45 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT: INTERNATIONALER TEIL 386, 386 (1996).

⁷⁹ This is the case if the decision by the regional court is confirmed by the regional court of appeals, or if the defendant does not appeal the decision by the regional court. Rogge, *supra* note 78, at 389; Zigann, *supra* note 21, at § 11 note 537.

⁸⁰ As mentioned above, Cremers et al., *supra* note 35, at 234, find that a substantial number of challenges to the validity of patents is withdrawn after an infringement decision.

⁸¹ See also Hilty & Lamping, *supra* note 77. Cf. Papier, *supra* note 31, at 440.

⁸² Klerman & Reilly, *supra* note 1, at 263-65.

⁸³ See Klerman & Reilly, *supra* note 1.

judges behave. In continental Europe, legal theory is still largely dominated by a legalistic view of judicial behavior. According to this view, judges care solely about finding the right legal solutions to a case. The effect of their decisions on future case filings is assumed to be irrelevant. Even if one were to adopt a more realistic approach, there are ample reasons to believe that judges would not want to attract patent cases to their court. Because patent cases are assigned to specialized chambers, increasing the numbers of patent cases could significantly affect the workload of judges working in patent law without providing them with any direct rewards. More generally, patent law tends to involve complex, highly technical fact pattern, and it can be a formalistic area of the law requiring extensive expertise in specialized case law that is difficult to apply elsewhere.

a. Interesting Cases

Judges who specialize in patent litigation probably do so because they enjoy working in this field. Patent law is considered intellectually challenging. Also, judges have the opportunity to work with some of the most sophisticated clients and lawyers. Because of the existence of specialized chambers, a small number of judges can determine how patent cases are handled.⁸⁴ As one attorney put it:

It's an advantage and a disadvantage at the same time. They have to work more, but maybe they have more interesting work. Those working in the chamber, in particular the presiding judges, have the opportunity to decide exactly how to proceed. They like to work in this area. And when we talk to the judges, there certainly is a point where they say, "Sure it's too much work but overall the work is great." Why is it great? Just like for us, in reverse: They like the complexity, and fortunately they also praise the quality of the attorneys.

A judge who contributes to attracting cases to the court has a considerable chance of being involved in these new cases. In this way, the fact that German judges who hear patent cases generally specialize in that area facilitates forum selling. Because American judges generally do not specialize, if one judge wants to hear more patent cases, it will be difficult for her to do so, because even if she gains a reputation for resolving cases in a way that patent plaintiffs appreciate, random assignment of cases generally means that even if a plaintiff files in that judge's district, the case is unlikely to be assigned to the favored judge. The Eastern District of Texas was able to overcome this

⁸⁴ Note that some of our interviewees indicate that not all judges might want to work exclusively in patent law.

problem by deviating from random assignment and, essentially, allowing patent plaintiffs to choose the judge.⁸⁵ In Germany, no such problematic deviations from general norms are needed. If the small number of judges in the relevant patent chamber or chambers want to hear more cases, they can guarantee that all future patent cases in that court will go to them.

While increasing the number of patent cases in a particular court could create a crushing workload, this is not necessarily the case. First, court administrators can divert non-patent cases that these judges might otherwise have had to hear to other judges. In addition, in the long run, court administrators can add additional judges. Unlike in the U.S., where adding judgeships requires cumbersome legislation at the national level, German court administrators have the power to increase the number of judges in particular areas. This, in turn, increases a judge's chances of staying in patent law and even acquiring a more senior position. Falling case numbers, by contrast, would over time result in a more mixed set of cases or even the reduction of the number of patent law chambers and the reassignment of judges to different legal areas.

b. Reputation and Power

Judges do not specialize in patent law only for intellectual reasons. Patent cases also provide them with the chance to wield power in an important field and to build a reputation as a successful and influential judge.⁸⁶

Patent judges get to decide commercially important cases; more senior judges even have the power to shape the development of the law in an area that is seen as important to economic development and technological progress. Attracting a higher number of cases to the court provides a larger platform with which to influence the law. Not only do higher case numbers imply more decisions in absolute terms. Also, by attracting more cases to the court, a judge also increases her chances of being involved in landmark cases. One attorney reports:

I think judges are absolutely interested in getting big, important cases. Sure this can happen. They are happy when a lawyer approaches them with a big telecommunications case, and, in view of that, they would do everything to be somehow attractive. I believe that at least those patent judges who are in office at the moment everywhere are not the ones to say: "I am happy if this huge thing ends up elsewhere." They are crazy about those cases. They want them. This is absolutely clear.

⁸⁵ Klerman & Reilly, *supra* note 1, at 254-57.

⁸⁶ On the importance of reputation for judicial systems in general, *see* NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* (2015).

Some patent judges also care about their reputations as powerful and successful figures in patent law. Another lawyer answered a question about judges' motives for attracting litigation as follows:

Disadvantage: more work. Advantage: enhanced reputation. One gets better known. They are only human. Why does a patent attorney or an attorney take on a landmark case even though there might be more lucrative work? Because one gets better known by doing landmark cases. Why do we want to get better known? Because everyone wants to be famous.

That judges are being driven by a desire to increase their reputation is also shown by an episode in which a judge issued a judgment right after the end of the oral hearing.⁸⁷ Lawyers who were present at the oral hearing attributed this decision to the fact that several journalists were present. Another indication that reputation may matter are rankings of the most popular patent judges which have been created by legal trade journals.⁸⁸

c. Career Perspectives

Building or contributing to an important patent venue can boost a judge's career prospects. Unlike in the U.S., German judges do not generally stay in the court to which they were initially appointed. Instead, if they perform well, they can expect to be promoted to a more prestigious post.⁸⁹ Increasing patent caseloads can increase a judge's chances of promotion for several reasons. First, an increase in case numbers might prompt the court administration to create additional senior positions which have to be filled with judges with prior experience in patent law. In addition, as noted above, judges with a greater caseload are more likely to be perceived as influential and successful.

In recent years, the pending introduction of the Unified Patent Court (UPC)⁹⁰ arguably provided additional incentives for judges to position themselves as successful patent law judges.⁹¹ It is expected that judges at the Unified Patent Court will be paid much more than others, and it seems reasonable

⁸⁷ While such a *Stuhlrteil* is legal, it is extremely rare in complex disputes. Usually, judgments are issued in writing several weeks or months after the oral hearing.

⁸⁸ Klos, *supra* note 25, at 79.

⁸⁹ Langbein, *supra* note 3.

⁹⁰ The UPC is a proposed common court of EU member states which, once established, will have jurisdiction to hear proceedings regarding the infringement and the validity of European-wide patents. Agreement on a Unified Patent Court, 2013 O.J. (C 175) 1. The agreement has not yet entered into force because it has not been ratified by Germany and the U.K.

⁹¹ Mathieu Klos, *Europäisches Richterranking: Favoriten für Paris*, 6 JUVE RECHTSMARKT 72 (2017).

to assume that some judges might also be attracted by the intellectual task of creating a new international court system.

d. Personal Gain and Local Economy

Judges have no direct monetary incentive to attract litigation to their court. Most importantly, their salary is not connected to the numbers of cases they decide. Still, successful and influential patent judges might profit indirectly from their status. They might give paid speeches at conferences, and they can publish books,⁹² which can generate substantial revenue for judges whose interpretation of the law is considered important. In addition, promotion to presiding judge or a higher court or selection to the Unified Patent Court would increase the judge's salary. To the extent that attracting a higher caseload contributes to a judge's reputation and enhances the chances of promotion, the prospect of a higher salary provides an indirect incentive for forum selling.

In contrast to the Eastern District of Texas, we find no indication that German judges' behavior is driven by a desire to help the local economy. Nevertheless, as noted below, court administrators may be motivated by the prospect that a strong patent court would attract technology companies to the area.

2. Court Administration

In addition to individual judges, the court administration – most importantly court executive committees and state justice ministries – may have an interest in positioning “their” patent courts to succeed in competition with other German patent courts.

a. Staffing

Court administrators play a central role in forum selling in patent litigation in Germany. Not only does their staffing policy directly affect the quality of the patent chambers,⁹³ their decisions also determine whether judges have

⁹² Some prominent patent judges, such as Thomas Kühnen from the court of appeals in Dusseldorf, publish treatises and law journal articles on patent law.

⁹³ See *supra* section IV.B. 1. Bausch & Pfaff, *supra* note 42; Klaus Schülke, *Patentgerichtsbarkeit*, in *DIE PRAXIS DES RICHTERBERUFS* 67, 77 (Peter-Christian Müller-Graf & Herbert Roth eds., 2000). In fact, the staffing of patent chambers has become a matter of state politics in the state of North Rhine-Westphalia, where Dusseldorf is located. After the state election in 2005, the ruling political parties (CDU and FDP) declared in their coalition agreement that the staffing of the two patent chambers at the regional court of Dusseldorf

an incentive to attract more cases to the court. For example, if the court administration does not react to increasing case numbers with an increase in the numbers of judges dealing with patent law, the length of proceedings will likely go up, and the attractiveness of the venue will suffer. If the court administration does not provide judges with a long-term opportunity to work in patent law and to be promoted for doing so, judges have less of an incentive to invest in acquiring patent expertise. The fact that Dusseldorf has maintained its position as the most important venue for patent litigation seems to be to a large degree caused by concerted efforts on the part of the court administration to reward patent judges, while Munich's failure to attract more cases despite the proximity of the European Patent Office and the German Patent and Trademark Office can be attributed, at least partly, to court administrators who failed to craft policies that would attract and retain patent judges.

b. Court Revenue

These observations raise the question of why court administrators use their powers to strengthen their court's reputation as a patent venue. This question is particularly relevant as it seems reasonable to assume that the strengthening of patent chambers comes at a cost: judges in other fields of the law might feel unfairly treated if they do not get the same kind of recognition for their work or if the administration does not provide them with the same resources as patent judges.

Arguably, the most important reason for court administrations to invest in successful patent chambers is the fact that the revenue from court fees is substantial. Patent law is often described as the only legal area that generates enough income to pay for a court's operations. For example, some estimate that the regional court of Dusseldorf generated about €7.5 million in court revenues from patent litigation in 2009 alone, and that the regional court of Munich generated between 2 and 5 million euros.⁹⁴ The revenues from patent and antitrust proceedings in Dusseldorf are so large that they help fund the entire judicial system in the state of North Rhine-Westphalia.⁹⁵ This creates

should be increased. Reportedly, the political goal was to secure court revenues and to head off increasing competition from the regional court of Mannheim, *see* Klos, *supra* note 25, at 83.

⁹⁴ Klos, *supra* note 25, at 83.

⁹⁵ Marcus Jung & Jörn Poppelbaum, *Justiz als Wirtschaftsfaktor: Premiumlagen*, 6 JUVÉ Rechtsmarkt 36, 37 (2015).

incentives for the court administration to provide patent courts with the resources they need to be successful and attract cases.⁹⁶

c. Aiding the Local Economy

The Dusseldorf court administration is reportedly well aware that a strong patent court helps generate additional income for the local economy.⁹⁷ More generally, being perceived as a strong forum for patent litigation is considered a positive location factor for industry. Unlike the United States, where there is considerable debate about whether strong patent enforcement benefits patent trolls at the expense productive companies, in Germany there is less concern about trolls, and strong patent enforcement is perceived as beneficial to local manufacturing. As the justice minister of Baden-Württemberg stated during the preparations for the Unified Patent Court:⁹⁸

A strong patent venue in Mannheim is beneficial for the economy in this state. In particular, the many small and medium-sized enterprises in Baden-Württemberg stand out due to their enormous innovative potential and their impressive creativity [...] In order to protect the six million jobs in the state, this intellectual property needs to be protected effectively and reliably.

d. Administrator Prestige

Contributing to a court's success might increase the prestige of the local administration as well as the personal reputation of key players such as court presidents and politicians. In 2010, for example, the regional court of Dusseldorf moved into a state-of-the-art building where patent proceedings involving companies such as Google, Apple or Samsung are held.⁹⁹ After it was announced that one of the Unified Patent Court's local divisions would be located in Dusseldorf, the state justice minister praised the state government's decision to create additional judgeships at the Dusseldorf courts as responsible for the success of these courts on a European scale.¹⁰⁰

⁹⁶ Schülke, *supra* note 93, at 77.

⁹⁷ Examples that were mentioned in our interview include law firms creating jobs in the city.

⁹⁸ Ministry of Justice and for Europe Baden-Württemberg, *Einheitliches Europäisches Patentgericht: Einrichtung einer Lokalkammer am Standort Mannheim nimmt Fahrt auf*, Mar. 1, 2016, http://www.jum.baden-wuerttemberg.de/pb/Lde/Startseite/Service/Einheitliches+Europaesches+Patentgericht_+Einrichtung+einer+Lokalkammer+am+Standort+Mannheim+nimmt+Fahrt+auf/?LISTPAGE=1825757.

⁹⁹ Jung & Poppelbaum, *supra* note 95, at 37.

¹⁰⁰ *Id.* at 38.

e. Attracting a Branch of the Unified Patent Court

In the years leading up to 2014, the introduction of the European Union's Unified Patent Court¹⁰¹ provided an additional incentive for states and their court and ministry officials to position their courts as an important patent litigation fora: decisions about the location of local branches of the Unified Patent Court were expected to take into account patent caseloads in preceding years.¹⁰²

D. Evidence Against Forum Selling

We also find a number of features that are hard to reconcile with the forum selling hypothesis. For example, the court in Mannheim has a reputation for enforcing strict time limits for preliminary injunctions. They do not ordinarily accept any request filed more than four weeks after the patentee learns about an alleged infringement. Similarly, one of the most senior judges in Dusseldorf's way of presiding over proceedings has brought him a reputation for treating litigants in a harsh and unfriendly manner.¹⁰³

In our view, these phenomena do not imply that forum selling does not exist. Instead, they indicate that, other factors sometimes prevail over the desire to hear more cases. Forum selling is a factor, but certainly not the sole factor in judicial decisionmaking.

V. FORUM SELLING IN GERMAN PRESS LAW

A. Introduction

German law accords relatively broad rights to private persons who are

¹⁰¹ See *supra* text accompanying note 90.

¹⁰² The planned UPC will consist of different courts. Local branches of its court of first instance are to be set up in various EU member states. Because of the volume of patent litigation in German courts, Germany was given the right to set up four local branches, with the exact location of the local branches determined by the German government. See Agreement on a Unified Patent Court, 2013 O.J. (C 175) 1, Art. 7(4). In 2014, the Federal Minister of Justice announced that local branches would be set up in Dusseldorf, Mannheim, Munich and Hamburg. *Standorte für künftige Lokalkammern stehen fest*, LEGAL TRIBUNE ONLINE, March 19, 2014, <https://www.lto.de/recht/nachrichten/n/eu-patentgericht-lokalkammerstandorte-hamburg-duesseldorf-mannheim-muenchen>.

¹⁰³ Jürgen Wessing & Eren Basar, *Streitwertangabe: strafbar?*, 114 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 1215 (2012).

subject to press coverage or otherwise appear in the media.¹⁰⁴ Not only is it illegal to disseminate false or libelous information, but, under certain circumstances, the media are barred from publishing photos or videos of private persons, or from reporting truthfully on an individual's private life. In addition, in sensitive matters (such as criminal investigations), it is potentially illegal to disclose the identity of persons whose actions are reported.

Plaintiffs in press law can ordinarily sue in any regional court.¹⁰⁵ In practice, plaintiffs nearly always request a preliminary injunction (*einstweilige Verfügung*),¹⁰⁶ which can be requested from any court in the district where the allegedly infringing publication is sold or otherwise disseminated.¹⁰⁷ For example, this means that plaintiffs can sue a television station which broadcasts its content nationwide before any of the 115 regional courts in Germany.¹⁰⁸ As in patent law, this permissive venue rule is the result of an expansive interpretation of section 32 of the German Civil Procedure Code.¹⁰⁹

In practice, press law cases are heavily concentrated in a small number of courts. While exact numbers are not available, information from interviewees and from appeals proceedings suggest that the courts in Berlin, Hamburg, and Cologne together hear more than half of all press cases. Substantial numbers of cases are also handled by the courts in Munich and Frankfurt.¹¹⁰

The concentration of press law cases at a small number of courts is not a new phenomenon. One historical reason for this concentration is that, until the early 1990s, attorneys were only allowed to represent clients at the court in their home district.¹¹¹ Because a case asserting a plaintiff's right of reply

¹⁰⁴ Besides individuals, corporations can also under some circumstances sue media outlets over their reporting, for example in case they spread false information about them. Nevertheless, most cases are brought by individuals.

¹⁰⁵ Defendants in practice have no ability to influence the court in which the case is heard.

¹⁰⁶ In addition, in some cases, individuals ask the court to order the defendant to publish a reply or a correction and/or sue for damages. Press law in Germany, in principle, follows general principles developed in torts law (*Deliktsrecht*). The right to publish a reply is an exception and forms part of the laws of the individual states. *See, e.g.*, HAMBURGISCHES PRESSEGESETZ [PRESS LAW OF HAMBURG] § 11; LANDESPRESSEGESETZ NRW [State Press Law of North Rhine-Westphalia] § 11.

¹⁰⁷ In contrast, lawsuits seeking to enforce an individual's right of reply generally have to be brought at the place of business of the relevant publishing house.

¹⁰⁸ Disputes in press law are usually heard by regional courts and not local courts because the amount in controversy exceeds € 5,000, see GERMAN COURTS CONSTITUTION ACT, *supra* note 5, §§ 23, 71.

¹⁰⁹ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 32 allows the plaintiff to bring a case before "the court in the district in which the tort was committed."

¹¹⁰ Uwe Jürgens, *Abgestürzte Gerichtsstände: Der fliegende Gerichtsstand im Presserecht* 42 NEUE JURISTISCHE WOCHENSCHRIFT 3061, 3064 (2014).

¹¹¹ *See supra* text accompanying note 27.

has to be brought at the publishing house's place of business, most attorneys who wanted to practice press law chose to settle in cities where major media outlets were located. As a result, courts in major media hubs turned into important venues for press litigation. Nevertheless, with the elimination of rules restricting practice to the lawyer's home city, lawyers now routinely travel to litigate in courts far from their homes. The modern concentration of press cases in a small number of courts therefore requires a different explanation.

B. Forum Shopping

Attorneys representing plaintiffs in press law cases today engage in an aggressive form of nationwide forum shopping.¹¹² With the exception of cases seeking to enforce a plaintiff's right to reply, lawyers strategically select the forum that appears most likely to achieve the best outcome for their clients. Also, lawyers react swiftly to perceived changes in court procedure: a court that handles cases in a way that is perceived as plaintiff-friendly can rather quickly attract a large number of cases, while courts that become more defendant-friendly risk losing a large share of cases.

Forum shopping is boosted by the fact that, at all regional courts which are major press law venues, press law cases are heard by only one chamber.¹¹³ This means that attorneys can de facto shop for the judges who are going to hear their case. While a chamber is composed of three judges, the presiding judge has a large influence. The fact that there is only one press chamber per court also means that a single judge, the presiding judge, has an outsized influence on the treatment of press law at that court.

Also contributing to forum shopping is the fact that many of the more important cases in press law are argued by a small number of attorneys who specialize in press law. As a result, a few attorneys interact repeatedly with a small number of judges, allowing attorneys to learn how individual judges deal with recurring issues in press law and to predict how outcomes are likely to differ from court to court.

In recent years, forum shopping in press law has been the subject of an intense debate between defenders of the status quo and proponents of venue reform. Those who favor venue reform argue that forum shopping has created a system that unfairly favors plaintiffs,¹¹⁴ and some commentators even argue

¹¹² Cf. Birger Dölling, *Der fliegende Gerichtsstand im Presserecht: Spielball der Interessen?*, 43 NEUE JURISTISCHE WOCHENSCHRIFT 113, 126 (2015).

¹¹³ Jürgens, *supra* note 110, at 3065; Constantin van Lijnden, *Fliegende Richter*, ZEIT ONLINE, JULY 14, 2016, <http://www.zeit.de/2016/28/presserecht-justiz-verfahren-gerichtsstand>.

¹¹⁴ See only Jürgens, *supra* note 110; Uwe Jürgens, *Turbulenzen im*

that this renders press-law venue rules unconstitutional.¹¹⁵ In 2009, the Federal Ministry of Justice considered the need to reform venue rules and rules governing ex parte injunctions in press law.¹¹⁶ In 2013, after passing venue reform relating to copyright law,¹¹⁷ the Federal Parliament (*Bundestag*) expressly asked the government to evaluate the need for venue reform in several legal areas including press law.¹¹⁸ A similar request to the Federal Ministry of Justice was issued by a conference of the state ministers of justice in 2016.¹¹⁹ It remains to be seen whether these initiatives will result in legislative action.

Several factors are particularly important to lawyers in deciding where to bring a press case, including the willingness of judges to issue preliminary injunctions ex parte, the ability to receive non-binding rulings, speed, and general pro-plaintiff tendencies. Because of the plaintiffs' ability to select the venue from among all regional courts in Germany, it is not surprising that the courts that attract large numbers of cases appear to be particularly plaintiff-friendly on all or most of these dimensions.

1. Ex Parte Preliminary Injunctions

One of the most disturbing aspects of German press law – and arguably one of the most troubling consequences of the flexible venue rules – is the

Presseprozessrecht: Der rechtswidrige Standardverzicht auf mündliche Verhandlungen im einstweiligen Rechtsschutz, 19 KOMMUNIKATION & RECHT 7 (2016). Cf. Dölling, *supra* note 112; Ralf Höcker & Lucas Brost, *Kompetenz zahlt sich aus: Zur Notwendigkeit des fliegenden Gerichtsstandes im Nischenrechtsgebiet Presserecht*, 5 IP-RECHTSBERATER 138 (2015).

¹¹⁵ Dieter Leuze in BERLINER KOMMENTAR ZUM GRUNDGESETZ C Art. 101 note 17 (Karl-Heinrich Friauf & Wolfram Höfling ed., 2017).

¹¹⁶ Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, *Überlegungen des Bundesministeriums der Justiz zu Änderungen im Recht der einstweiligen Verfügung*, 111 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 564 (2009); see also Dölling, *supra* note 112, at 125.

¹¹⁷ Regierungsentwurf [Cabinet Draft], *Entwurf eines Gesetzes gegen unseriöse Geschäftspraktiken*, Deutscher Bundestag: Drucksachen [BT] 17/13057 (2013), <https://dip21.bundestag.de/dip21/btd/17/130/1713057.pdf> (Ger.). The Federal Parliament restricted venue in copyright cases in which an individual was sued for non-commercial use of protected works, see URHEBERRECHTSGESETZ [UrhG][Copyright Act], § 104a, *translation at* http://www.gesetze-im-internet.de/englisch_urhg/index.html (Ger.).

¹¹⁸ Deutscher Bundestag, Plenarprotokoll 17/250 (2013), http://dip21.bundestag.de/dip21/btp/17/17250_ORIG.pdf.

¹¹⁹ Konferenz der Justizministerinnen und Justizminister, *Beschluss der Ministerinnen und Minister: „Fliegender Gerichtsstand“ (§ 14 Absatz 2 Satz 1 UWG)*, Nov. 17, 2016, https://www.justiz.nrw.de/JM/jumiko/beschluesse/2016/Herbstkonferenz-2016/top7_-fliegender_gerichtsstand_herbstkonferenz.pdf.

willingness of judges at all major press law chambers to grant preliminary injunctions without giving the defendant an opportunity to be heard. The defendant, therefore, often has no ability to inform the judges of reasons the injunction should not be issued. Because many press cases are very time sensitive, the ability to challenge or appeal a preliminary injunction after it is issued does not provide a meaningful remedy.

Individuals mostly enforce their rights by asking a court to issue an injunction against a media outlet that is about to publish or has published content infringing her rights.¹²⁰

Section 937(2) of the German Civil Procedure Code ordinarily requires judges to hold an oral hearing before issuing a preliminary injunction. Only in urgent cases (*in dringenden Fällen*) can judges dispense with a hearing or any other opportunity to respond.¹²¹ Although section 937(2) of the German Civil Procedure Code envisions *ex parte* injunctions as exceptional, all major press-law venues now routinely decide cases without holding an oral hearing. Judges could give the defendant the opportunity to respond in writing, telephonically, or in some other way.¹²² Instead, after the plaintiff files for a preliminary injunction, the plaintiff and the judge often discuss the issues on the phone without the defendant being involved, and the judge then decides whether to issue the requested injunction. Even when judges take several weeks to issue an injunction, which would seem to provide ample time for the defendant to be heard, there is evidence that judges sometimes do not give the defendant a hearing or other opportunity to present evidence or legal argument.¹²³

Plaintiffs have a strong preference for quick proceedings, and the time required to decide a motion for a preliminary injunction depends largely on a judge's decision whether to hold an oral hearing. Therefore, the ability to obtain a preliminary injunction without an oral hearing is one of the most

¹²⁰ Preliminary injunctions do not automatically expire. Instead, the defendant can obtain a court order asking the plaintiff to open principal proceedings. If the plaintiff fails to do so, the court has to revoke the preliminary injunction (GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, §§ 936, 926).

¹²¹ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 937(2).

¹²² Wolf-Dietrich Walker, *Die Schutzschrift und das elektronische Schutzschriftenregister nach §§ 915a, 915b ZPO*, in RECHTSLAGE – RECHTSERKENNTNIS – RECHTSDURCHSETZUNG: FESTSCHRIFT FÜR EBERHARD SCHILKEN ZUM 70. GEBURTSTAG 815, (Caroline Meller-Hannich et al., eds., 2015) (hereinafter Walker, *Die Schutzschrift*); WOLF-DIETRICH WALKER, DER EINSTWEILIGE RECHTSSCHUTZ IM ZIVILPROZESS UND IM ARBEITSGERICHTLICHEN VERFAHREN 280 (1993).

¹²³ See Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], cases BvQ 16/17, 1 BvQ 17/17, 1 BvR 764/17 and 1 BvR 770/17, June 6, 2017, para. 2, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/06/qk20170606_1bvq001617.html; Rafael Buschmann et al., *Bitte bellen Sie leise*, DER SPIEGEL, August 17, 2017, at 99.

important factors for plaintiffs in deciding where to bring a case. As one lawyer stated:

Those chambers, those courts that I just mentioned, they decide without holding an oral hearing. This is extremely important. [...] For this reason, these courts are absolutely superior.

Another indication of the importance of *ex parte* injunctions is the rise of Cologne as an important venue for press litigation. Until 2002, judges in Cologne usually issued preliminary injunctions only after holding an oral hearing. During that time, Cologne heard only a small number of press cases. When a new presiding judge took office, she changed this practice and started regularly issuing preliminary injunctions without giving the defendant the opportunity to respond. As a consequence, the number of cases increased substantially.¹²⁴ In contrast, interviewees report that other courts still routinely hold oral proceedings. This may explain why these courts are shunned by experienced plaintiffs' lawyers in press cases. Overall, it seems reasonable to conclude forum shopping is responsible for the fact that most press-law preliminary injunctions are issued by judges who routinely dispense with the requirement to hold an oral hearing.

The fact that, as a result of pervasive forum shopping, defendants in many cases have no genuine opportunity to respond to a motion for preliminary injunction is problematic.¹²⁵ The opportunity to be heard before adverse judicial action is one of the most basic procedural rights¹²⁶ and is one of the principal safeguards against unjust or ill-informed decisions.¹²⁷ In fact, at the time this article was being written, a constitutional complaint pending at the Federal Constitutional Court challenged the Cologne regional court's practice of issuing preliminary injunctions in press law cases without giving the defendant the opportunity to respond. In a preliminary decision, the court considered the complaint "not obviously inadmissible or without merit."¹²⁸

¹²⁴ Dölling, *supra* note 112, at 127; Jürgens, *supra* note 110, at 3064; Jürgen Dahlkamp & Barbara Schmidt, *Köln nimmt alles*, DER SPIEGEL, Oct. 13, 2014, at 150; Höcker & Brost, *supra* note 114, at 139. Note that some of our interviewees disputed this account.

¹²⁵ See also Otto Teplitzky, *Gewohnheitsunrecht? Anmerkungen zum Einfluss der normativen Kraft des Faktischen auf die einstweilige Unterlassungsverfügung*, in Festschrift für Joachim Bornkamm zum 65. Geburtstag 1086 et seq. (Wolfgang Büscher et al., eds., 2014).

¹²⁶ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW), Art. 103(1), and EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 6(1), grant defendants in Germany the opportunity to be heard. See also Teplitzky, *supra* note 125, at 1087.

¹²⁷ See Walker, *Die Schutzschrift*, *supra* note 122, at 816.

¹²⁸ Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], case 1 BvR 1783/17, Aug. 23, 2017, available at <http://www.bundesverfassungsgericht.de/>

While defendants have some opportunities to prevent issuance of preliminary injunctions or to challenge them afterwards, these mechanisms are inadequate. The defendant, for example, can try to prevent an unjust ruling by filing a protection letter (*Schutzschrift*) before the preliminary injunction is issued. These letters explain the defendant's view of the facts and the law and are filed in a central registry.¹²⁹ All courts that receive a motion for preliminary injunction are required to consult the registry to see whether a protection letter has been filed, and judges must take the arguments in the letter into account when considering whether to grant the preliminary injunction.¹³⁰

Nevertheless, the ability of a defendant to file a protection letter provides only a partial remedy to the problems posed by ex parte preliminary injunctions.¹³¹ First, the defendant may not even know that the plaintiff is likely to seek a preliminary injunction, and therefore may not realize that it needs to file a protection letter. In most cases, a defendant will only learn about a plaintiff's intent to request a preliminary injunction through a cease and desist letter. While some courts generally accept requests for preliminary injunctions only after such a letter is filed, other courts do not consider such a letter to be a requirement for issuing a preliminary injunction. By not requiring a cease and desist letter, those courts make it difficult for the defendant to anticipate when a preliminary injunction will be requested and thus make it nearly impossible for defendants to inform the judge of their side of the case by filing a protection letter. For this reason, one commentator has argued that it is generally illegal to issue an ex parte preliminary injunction when the defendant has not been sent a cease and desist letter.¹³²

Second, the defendant's ability to file a protection letter may not allow it to present a persuasive defense, because the defendant may not know the arguments put forward by the plaintiff in her motion. Therefore, she might not be able to address and respond to all relevant arguments. In cases where the

SharedDocs/Entscheidungen/DE/2017/08/rk20170823_1bvr178317.html. See also Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], cases BvQ 16/17, 1 BvQ 17/17, 1 BvR 764/17 and 1 BvR 770/17, June 6, 2017, para. 2, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/06/qk20170606_1bvq001617.html.

¹²⁹ See GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 945a. Traditionally, such a protection letter had to be filed with every court individually. Since 2016, there is a central registry with which protection letters can be filed.

¹³⁰ Ingo Drescher in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, *supra* note 52, at § 945a note 1.

¹³¹ See also Teplitzky, *supra* note 125, at 1088.

¹³² Jörg Soehring in PRESSERECHT: RECHERCHE, DARSTELLUNG, HAFTUNG IM RECHT DER PRESSE, DES RUNDFUNKS UND DER NEUEN MEDIEN 745 (Jörg Soehring & Verena Hoene eds., 5th ed. 2013). Cf. Rolf Nikolas Danckwerts, *Die Entscheidung über den Eilantrag*, 110 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 763, 765 (2008).

plaintiff sends a cease and desist letter prior to filing for a preliminary injunction, the defendant may be in a better position, because such letters usually contain at least a rough outline of the plaintiff's arguments. Nevertheless, such letters are not an adequate substitute, because they may not contain all of the plaintiff's arguments and substantiating evidence. In addition, as mentioned above, the defendant may not receive a cease and desist letter prior to issuance of the preliminary injunction.

The law also offers defendants a number of ways to ask the same court or higher courts to review a preliminary injunction. If a judge issues a preliminary injunction *ex parte*, the defendant can challenge it later and request a hearing in front of the same judge.¹³³ Preliminary injunctions can then be appealed to the regional court of appeals, but not to the Federal Court of Justice.¹³⁴ In addition, the defendant can force the plaintiff to have the injunction confirmed in principal proceedings, which would make the injunction appealable to the Federal Court of Justice.¹³⁵

Like the ability to file a protection letter, these remedies do not fix the problems posed by *ex parte* preliminary injunctions. The most important reason is the time-sensitive nature of press law cases. Media outlets are seldom interested in publishing after the time prohibited by the preliminary injunction, unless the case involves a disputed legal issue that might be important in future cases. Defendants therefore rarely appeal a preliminary injunction or force the plaintiff to request confirmation of the injunction in principal proceedings.

In addition, the opportunity to request an oral hearing after the preliminary injunction has been issued does not offer an effective remedy, in part because the oral hearing would ordinarily be held before the same judge who issued the *ex parte* preliminary injunction. Judges who grant preliminary injunctions are naturally reluctant to overturn their own decisions. Interviewees noted that at least some judges are reluctant to change their mind unless the hearing reveals that the plaintiff concealed major facts of the case. Moreover, if an oral hearing is held after an injunction issues, appellate courts will ordinarily not review the prior decision to grant the preliminary injunction *ex parte*. Any violation of the right to be heard is considered to be "cured" by the later oral hearing.¹³⁶

¹³³ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, §§ 936, 924, 925.

¹³⁴ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, § 542(2).

¹³⁵ *See supra* note 120.

¹³⁶ *See Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], cases BvQ 16/17, 1 BvQ 17/17, 1 BvR 764/17 and 1 BvR 770/17, June 6, 2017, para. 7, available at http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2017/06/qk20170606_1bvq001617.html.*

Finally, the law attempts to protect a defendant by making the plaintiff strictly liable for any damages caused by a preliminary injunction that is later revoked, and by giving the judge the ability to require the plaintiff to post a bond.¹³⁷ For press law defendants, these rules offer no meaningful protection. Because it is extremely difficult to measure the harm caused by enforcing a preliminary injunction, defendants almost never sue for damages after the preliminary injunction is rescinded, and judges usually do not require the plaintiff to post a bond.¹³⁸

2. Informal Notice of Likely Decisions

As noted above, judges at all major press law venues usually decide whether to grant preliminary injunctions after discussing the case informally with the plaintiff's lawyers, often by telephone. This opens up the possibility of a particularly aggressive kind of forum shopping. A judge who is unconvinced by the plaintiff's arguments will often inform the lawyer of her concerns and offer the lawyer the opportunity to withdraw the motion. Plaintiff can then file for a preliminary injunction in another court.¹³⁹ This procedure essentially allows the plaintiff to shop for the court most likely to grant a preliminary injunction.

3. Speed

As noted above, press cases are often time-sensitive, so speed matters for plaintiffs. Plaintiffs seek preliminary injunctions to prevent the publication or distribution of particular content. Naturally, for a preliminary injunction to have any effect, it has to be obtained before the allegedly illegal content has been broadly distributed. All major venues in press law are willing and able to issue preliminary injunctions within a couple of days.¹⁴⁰ In some cases, plaintiffs have been able to obtain a preliminary injunction against a TV station only a few hours after the TV station announced its intent to broadcast a report later the same day.

Judges at major press law venues take active measures to ensure their ability to act quickly on requests for preliminary injunctions. Unlike most other judges, judges in press law make sure to be at court most of the time.

¹³⁷ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, §§ 945, 921. The purpose of the bond is solely to serve as a security for a defendant's claim for damages in case the preliminary injunction is later revoked.

¹³⁸ Jürgens, *supra* note 114, at 10.

¹³⁹ Haertlein, *supra* note 120, § 935 note 27.

¹⁴⁰ One exception to this rule is the regional court in Hamburg, which is reported to sometimes take more time than other major courts.

Attorneys sometimes call judges prior to filing for a preliminary injunction to discuss whether the judges will be available to decide the case within the desired time period. The speediness of a preliminary injunction also depends on court staff being present to issue enforceable copies of the injunction.

More experienced judges are also able to decide cases more quickly. While plaintiffs prefer experienced judges for many reasons, including greater predictability, it usually takes less time and effort for the attorney to obtain a decision from an experienced judge. Inexperienced judges usually need time to acquaint themselves with the relevant case law, and attorneys report that they have to spend more time and effort arguing their case. As one attorney put it:

I am sold down the river if I go to a court which does not do press law at all, which has not internalized the complex case law of the Federal Court of Justice [...] There are lot of topics with which one has to be familiar. In particular, in a preliminary proceeding in which, in order to effectively enforce personality rights, I want to obtain quick protection for the person affected, sometimes within hours, I need judges who know the topic.

The desire for experienced judges gives an advantage to courts that already have large caseloads. Nevertheless, the emergence of Cologne as a major press venue after 2002 suggests that courts that previously did not have a large caseload can overcome that disadvantage by making themselves attractive in other ways.

4. Pro-plaintiff Decisionmaking

Plaintiffs also prefer judges who interpret substantive law in a way that favors the plaintiff. Many decisions in press law turn on a balancing of interests. Courts must decide, in a particular case, between freedom of the press and the privacy and reputations of individuals. Attorneys perceive some judges as being more plaintiff-friendly than others in that they give more weight to the interests of the individuals involved. In the words of one attorney:

In press law there are a couple of courts that have a reputation for their specialization in press law. And among these there are some courts that have a reputation for being particularly friendly towards the affected individual. In press law, often it comes down to a balancing of interests between the interest of the public to learn about something and the personality rights of the individual [...] And in press law there are two courts, Berlin and Hamburg [...] which have a reputation for being pro-plaintiff, because if I want to sue a media outlet as a plaintiff, then it is classic thinking of attorneys that I go to Berlin or to Hamburg because of their reputation for being plaintiff-friendly...

Note that judges are not necessarily perceived as equally plaintiff-friendly in all kinds of cases. For example, a judge might be particularly solicitous of plaintiffs in cases involving reports on criminal investigations,¹⁴¹ or might be prone to awarding particularly high amounts of damages. Nevertheless, all judges at chambers that hear a large number of press law cases are overall perceived as plaintiff-friendly.¹⁴²

Jürgens has shown that decisions decided of major press law chambers are reversed by the Federal Court of Justice at unusually high rates, and that defendants initiate a higher number of successful appeals than plaintiffs.¹⁴³ This difference in reversal rates suggests a pro-plaintiff bias in the lower court.

Although the Federal Court of Justice has the ability to correct some of the decisions of the major press law courts, it is not able to fully counteract lower court biases.¹⁴⁴ The most important reason, as discussed above, is that many press cases are time sensitive, so defendants often have no incentive to pursue the time-consuming process of appeal to the highest court. Another reason is that the Federal Court of Justices decides only legal issues and must defer to the facts found by the lower courts. Finally, the amount in controversy requirement for appellate review makes some press cases unreviewable in the Federal Court of Justice.

5. Attorneys' Fees

In some cases, it can be attractive for attorneys to file the case at a court that is known for setting the amount in controversy relatively high, because attorneys representing plaintiffs in minor cases are often not paid by the hour. Instead, they earn the statutory fee, which is paid by the defendant if the plaintiff wins. The size of this fee depends on the amount in controversy.¹⁴⁵ In press cases, where damages are subjective and uncertain, the judge has

¹⁴¹ Apparently, judges in Frankfurt currently apply rules concerning the standard of proof regarding the truth of reports on criminal acts by individuals in a way that is particularly advantageous for individuals.

¹⁴² GERARD WAGNER, RECHTSSTANDORT DEUTSCHLAND IM WETTBEWERB 37-38 (2017).

¹⁴³ Jürgens, *supra* note 110, at 3065.

¹⁴⁴ See also Sascha Sajuntz, *Die Entwicklung des Presse- und Äusserungsrechts in den Jahren 2012/2013*, 67 NEUE JURISTISCHE WOCHENSCHRIFT 25, 30 (2014).

¹⁴⁵ RECHTSANWALTSVERGÜTUNGSGESETZ [RVG][ACT ON THE REMUNERATION OF ATTORNEYS], § 2, *translation at* http://www.gesetze-im-internet.de/englisch_rvg/index.html (Ger.).

considerable discretion in determining the amount in controversy.

6. Quality and Predictability

As in patent law, the quality of decisions matters, too. The regional court in Hamburg, while being perceived as somewhat slower than other courts, is known for its well-reasoned and consistent judgments. Plaintiffs also prefer judges with substantial experience, whose decisions, in addition to being quicker, are more predictable.¹⁴⁶

C. Forum Selling?

There are a number of facts indicating that judges and court officials adjust their handling of cases in order to increase the number of press cases brought before their court. That is, in addition to forum shopping, there may also be forum selling.¹⁴⁷ The most important facts pointing to forum selling are the troubling practices discussed in the prior section. Would judges be so eager to issue preliminary injunctions *ex parte* if they were not actively trying to attract more cases? Would they not at least require plaintiffs to deliver cease and desist letters before (or at least simultaneously with) requesting a preliminary injunction? If they were not interested in attracting cases, would they not try to involve defendants in the informal (usually telephonic) discussions of preliminary injunctions? Why else would judges inform plaintiffs of their likely decisions and give them the opportunity to withdraw if it were unfavorable? These, and other procedures, which are in no way mandated by law or precedent, but that seem biased in the plaintiff's direction, are hard to explain other than as attempts to attract more cases.

In addition, there is a perception by some lawyers that judges and court administrators are trying to attract cases. Motives to do so include the fact that press cases are interesting to judges but not time-consuming, bring publicity to the court, and generate fee revenue.

1. The Perception of Forum Selling

Some interviewees opined that judges and court administrators, particularly in the regional courts in Cologne and Frankfurt, are deliberately trying to attract more cases. In the words of one attorney:

I have a feeling that it could be like that in Cologne [...], because it is trying to position itself as a press law venue [...] and then try to attract cases, because a

¹⁴⁶ On speed, *see supra* section V.B. 3.

¹⁴⁷ *See also* Jürgens, *supra* note 110, at 3066.

quick reaction – one just has to increase the amount in controversy, and it becomes more attractive. [...] And at the moment Frankfurt, they are coming, one has the feeling that they also sort of enjoy these cases.

2. Incentives to Forum Sell

It seems reasonable to infer that both individual judges and court administrators have an incentive to increase the number of press law cases filed at their court. There are a number of reasons why press law is an attractive field for judges to work in. First, it is considered an interesting area of the law, and judges seem to like working in this field. As in patent law, while an increase in case numbers will in the short run lead to an increase in a judge's workload, the court administration has the ability to divert non-press cases to other judges in order to avoid congestion in the press chamber. This means that a judge who successfully attracts more press law cases will, in the long run, be able to hear more press law cases and fewer cases from other fields. Second, cases in press law are relatively uniform and do not require complex fact-finding. This implies that judges might be able to decide large numbers of cases without strain. This, in turn, is important because judges are evaluated and promoted partly based on the number of cases they dispose of. In the words of one attorney:

I have the impression that press chambers are highly attractive for judges as a place to work. It is an interesting subject. These are quick procedures, many procedures. This leads to a high number of closed cases in the department. For starters, this is attractive for judges.

There are also some indications that court administrators are interested in attracting more press law cases to their courts, perhaps for the media attention such cases bring. One attorney reported being approached by the former president of the regional court of appeals, who asked about the reputation of the local courts in press law and about the reasons plaintiffs chose one court over the other:

Secondly, if a court has a recognized press chamber, it gains reputation. This leads to a certain name recognition, because the press, of course, loves to write about cases concerning itself [...] This means that this is attractive in this sense, and I also seem to understand from occasional statements that the presidents of the courts are interested in this. I have heard something like that very clearly from the former president of the court of appeals, who casually inquired about the reputation of the regional court and the court of appeals and who wanted to know why people go [here or elsewhere]. This was very clear indeed.

As is apparent from this quote, courts' interest in press law may be tied

to concerns about reputation. Court administrators might also be interested in press cases because of the revenue they generate from court fees. Although the amount in controversy is usually much lower than, for example, in patent law, substantial revenue may still be generated because of the high number of cases and the relative ease with which they can be decided.¹⁴⁸

3. Alternative Explanations

Nevertheless, there is no conclusive evidence of forum selling in press law. The observed phenomena are compatible with the hypothesis that judges differ in their views about the correct interpretation of the law and about the proper handling of press cases. Considerations related to caseloads may play little or no role. In most of our interviews, when asked directly, our interviewees asserted that judges did not act strategically. In addition, examples of courts that took a more defendant-friendly approach towards handling cases after a change in the composition of the chamber responsible for press law strongly suggest that, if forum selling exists, it is not a universal phenomenon.

Even if judges are not actively seeking more cases, the broad venue rules which enable nationwide forum shopping are problematic. These rules allow plaintiffs to litigate in the most plaintiff-friendly courts in the nation. This means that a handful of judges and courts decides the overwhelming majority of press law cases and do so in a way that seems excessively pro-plaintiff. Even if the variation in judicial treatment of press law cases were motivated entirely by good-faith interpretation of the relevant laws and precedents, it is troubling that venue rules empower the judges who happen to take the most pro-plaintiff positions and that defendants must conform to their views. This is especially problematic in press law, where a pro-plaintiff position is one that limits the public's access to information.

VI. FORUM SELLING IN GERMAN ANTITRUST LITIGATION

A. Introduction

While U.S. and European antitrust law generally share common goals, until recently they have relied on different enforcement mechanisms. American antitrust law has traditionally relied on a complex mix of private lawsuits and public enforcement by the Department of Justice and the Federal Trade Commission. In both the European Union and in its individual member states,

¹⁴⁸ Jürgens estimates that the revenues from press law cases heard by one of the major regional courts amount to around one million € per year, Jürgens, *supra* note 110, at 3066.

antitrust laws have traditionally been enforced solely by public antitrust agencies. Enforcement by private parties only became a significant part of European antitrust law after a decision of the European Court of Justice in the 2001¹⁴⁹ and a European Commission White Paper in 2008.¹⁵⁰

The typical way private parties enforce the prohibition against cartels¹⁵¹ is to file a follow-on damage lawsuit. Once a European antitrust authority has determined that companies have engaged in an illegal cartel, a customer of a cartel member can file a lawsuit claiming that it was harmed by the supra-competitive prices it had to pay for goods produced by the cartel.¹⁵²

Within Germany, plaintiffs in such follow-on lawsuits have considerable leeway in where to file their lawsuit. Twenty four regional courts have jurisdiction to hear antitrust follow-on damage cases.¹⁵³ The cartel member may be sued at its seat of incorporation or where the tort was committed.¹⁵⁴ The phrase, “where the tort was committed” is commonly interpreted not only to cover the place where the tortfeasor acted, but also where the protected legal interest (i.e. competition) was harmed. In follow-on damage lawsuits concerning nation-wide cartels, that means the plaintiff can usually sue in any court district in which the overpriced product was sold.¹⁵⁵ This allows plaintiffs to sue in any of the twenty four courts with subject matter jurisdiction.

¹⁴⁹ Case C-453/99, *Courage v. Crehan*, 2001 E.C.R. I-5357 (E.C.J.). On the impact of this decision, see IOANNIS LIANOS ET AL., *DAMAGES CLAIMS FOR THE INFRINGEMENT OF EU COMPETITION LAW* para. 2.13-2.16 (2015).

¹⁵⁰ Commission of the European Communities, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final (2008). On the development of private enforcement in general, see LIANOS, *supra* note 149, at para.2.10 et seq., and chapter 7.

¹⁵¹ Article 101 of the Treaty on the Functioning of the European Union (TFEU); GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN [GWB][ACT AGAINST RESTRAINTS OF COMPETITION], § 1, *translation at* https://www.gesetze-im-internet.de/englisch_gwb/index.html (Ger.) (hereinafter GERMAN ACT AGAINST RESTRAINTS OF COMPETITION).

¹⁵² The damage caused by a cartel is typically widely spread across a number of direct and indirect consumers. U.S. civil procedure allows consumers to file a class action lawsuit in order to recoup such damages in an effective manner. German civil procedure allows neither class actions nor contingency fees. As a result, German plaintiffs have relied on other mechanisms. In one model, a third party buys claims from different consumers, sues the cartel members in its own name and then distributes parts of the damages to the consumers. In another model, a large consumer creates its own subsidiary to investigate systematically all relationships to its suppliers for potential antitrust violations. The subsidiary then sues these suppliers and collects damages.

¹⁵³ These courts are based in Berlin, Bremen, Cologne, Dortmund, Dusseldorf, Erfurt, Hamburg, Hannover, Frankfurt a.M., Gera, Kassel, Kiel, Leipzig, Magdeburg, Mannheim, Mainz, Meiningen, Mühlhausen, Munich I, Nürnberg-Fürth, Potsdam, Rostock, Saarbrücken, and Stuttgart.

¹⁵⁴ GERMAN CODE OF CIVIL PROCEDURE, *supra* note 7, §§ 17, 32.

¹⁵⁵ See Landgericht Düsseldorf [LG Düsseldorf][Regional Court of Dusseldorf] Feb. 21, 2017, BeckRS 2017, 06320 notes 57-58.

The regional courts typically have a specialized chamber for antitrust cases (although Mannheim and Frankfurt have two chambers). This not only allows judges to develop expertise, but it also allows plaintiffs to predict with some certainty which judges will hear their case. Even if the judge with primary responsibility is chosen randomly from among the judges in the chamber, the presiding judge of the chamber has a large influence even when the case is assigned to another judge. So, in courts with only one antitrust chamber, the plaintiff can predict the presiding judge with certainty. In courts with two antitrust chambers, the plaintiff can predict the presiding judge with fifty percent probability.

B. Forum Selling?

Our interviewees consistently assert that plaintiffs strategically choose the venue to file their follow-on damage lawsuits. Important factors driving this decision are whether the court handles its follow-on proceedings in a speedy and effective manner. The experience of the court handling such cases is also important.

The main challenge for plaintiffs in antitrust follow-on damage lawsuits is satisfying its evidentiary burden. According to general principles of German civil procedure, the plaintiff must prove: (1) a cartel existed; (2) the particular cartel in question caused prices to increase in general; (3) the cartel had a negative impact on the plaintiff in particular; and (4) the precise damages caused by the cartel.

Proving the existence of the cartel is not difficult for the plaintiff, as the German Cartel Office or the European Commission has usually determined this element before in their public proceeding against the cartel, their determinations are binding on the courts.¹⁵⁶ Proving the other three elements is challenging. Given the limited information the plaintiff usually has and the restrictive discovery afforded by German courts, it is nearly impossible for the plaintiff to provide sufficient evidence.

Regional courts in Germany have recognized the plaintiff's evidentiary problems and started to create rules to facilitate proof. In particular, they created rules of prima facie evidence (*Anscheinsbeweis*) by which, if public authorities have proven the existence of a cartel, it is assumed that the cartel caused a general price increase and that this price increase had a negative impact on the plaintiff, thus satisfying the second and third requirements for a follow-on suit.¹⁵⁷ Courts also ruled that provisions in a sales contract be-

¹⁵⁶ GERMAN ACT AGAINST RESTRAINTS OF COMPETITION, *supra* note 151, § 33b.

¹⁵⁷ Christian Kersting, *Kartellschadensersatz: Haftungstatbestand, Bindungswirkung*,

tween a cartel member and the future plaintiff, according to which any anti-trust-related damages would be assessed at 15% of the sales price, are enforceable under German contract law, thus addressing the fourth requirement. If a court recognizes these rules of prima facie evidence and enforces contractual fixed-rate damage provisions, it is much easier for plaintiffs to win a follow-on lawsuit.

Interestingly for our purposes, different courts have embraced these procedural twists with different speed and enthusiasm. In general, there is a perception that some courts are more willing to help plaintiffs by shifting burdens of proofs than others.¹⁵⁸ The first court to apply the prima facie evidence rule was the regional court of Dortmund in 2004.¹⁵⁹ Many other regional courts have adopted similar rules since then.¹⁶⁰ According to several interviewees, regional courts in Mannheim, Hannover, Frankfurt, Stuttgart, Dortmund, Berlin, and Cologne have found cartel members liable to plaintiffs. The courts in Mannheim, Cologne and Dortmund were mentioned as particularly plaintiff-friendly.

The regional court of Mannheim seems to play a special role. This court was consistently named as a plaintiff-friendly venue. One of our interviewees noted a “sensational” decision in which the court affirmed the enforceability of contractual fixed-rate damage provisions.¹⁶¹ Our interviewee noted:

[In this decision], the court used a double prima facie evidence argument in favor of the plaintiff ... This is, of course, a very far reaching evidentiary ruling. If, in addition, you also have this fifteen percent clause in the contract, that’s a safe bet for the plaintiff, isn’t it? And there are many unresolved legal issues where a bright judge, with a creative, solid, well-founded decision, can make a splash.

The interviewee explained that judges at this court seem to care about

Schadensabwälzung, in DIE 9. GWB-NOVELLE 133, 142 (Christian Kersting & Rupprecht Podszun eds., 2017).

¹⁵⁸ For an analysis of the case law of the court of appeals of Karlsruhe versus the court of appeals of Frankfurt, see Volker Soye, *Licht und Schatten: Das OLG Karlsruhe positioniert sich zum Kartellschadensersatz*, 67 WIRTSCHAFT UND WETTBEWERB 127 (2017).

¹⁵⁹ Landgericht Dortmund [LG Dortmund][Regional Court of Dortmund], Apr. 1, 2004, WIRTSCHAFT UND WETTBEWERB 2004, 1182 – *Vitamin Cartel*; see Thomas Thiede & Tim Träbing, *Praxis des Anscheinsbeweises im Kartellschadensersatzrecht: ein Rechtsprechungsbericht*, 4 NEUE ZEITSCHRIFT FÜR KARTELLRECHT 422, 424 (2016).

¹⁶⁰ For an overview, see Thiede & Träbing, *supra* note 159, at 424-27.

¹⁶¹ Landgericht Mannheim [LG Mannheim][Regional Court of Mannheim], May 4, 2012, 12 NEUE JURISTISCHE ONLINE-ZEITUNG 1635 (2012) – *Fire department cartel*.

their reputation in antitrust follow-on proceedings. He told us that, in response to a standard motion to extend a deadline which he had filed in that court, the responsible judge told him:

You know, we are known to schedule proceedings in a speedy manner. We do not want to delay proceedings. We have a reputation to lose.

Antitrust litigation in Mannheim may benefit from spillovers from the court's prominent role in patent proceedings. In Mannheim, the two chambers that hear antitrust cases are the same chambers that hear patent cases.¹⁶² The long-time presiding judge of the Mannheim 7th chamber had gained an excellent reputation in patent law, and one interviewee attributed his handling of antitrust follow-on proceedings to his experience in patent law.

Interviewees deemed other regional courts less plaintiff-friendly than Mannheim. These less-friendly courts include the courts in Kiel, Leipzig and Dusseldorf, as well as the court in Munich. In fact, looking at the published case law, both courts in Munich and Stuttgart have refused to apply evidentiary rules helping the plaintiff.¹⁶³ Case management also differs between courts, and Mannheim has a reputation for handling cases more efficiently than other courts.

Given our interviews, we cannot conclude, with the possible exception of Mannheim, that there are clear signs of forum selling in German antitrust follow-on litigation. Even the adoption of the evidentiary rules described above does not necessarily mean that the court adopted them in order to attract litigation. As one interviewee pointed out, given the complexity and volume of antitrust follow-on proceedings, relying on such evidentiary rules expedites proceedings and makes them manageable for the judge. Also, introducing evidentiary rules that help the plaintiff may just be the right thing to do in such cases. In fact, the German legislature enacted a statutory burden shifting in the 2017 reform of the Act against Restraints of Competition. According to section 33a(2) of the revised Act, there is now a rebuttable presumption that a cartel caused a damage to the plaintiff, thereby overcoming the challenges (2) and (3) mentioned before.¹⁶⁴

Given our findings in patent law, it may be surprising that we do not find clearer signs of forum selling in German antitrust. After all, these lawsuits are often high-profile cases which are widely reported in the press; they could

¹⁶² Regional Court of Mannheim, *Geschäftsverteilung des Landgerichts Mannheim für das Geschäftsjahr 2018* (2017), available at <http://www.landgericht-mannheim.de/pb/site/jum2/get/documents/jum1/JuM/Landgericht%20Mannheim/Gesch%C3%A4ftsverteilung%202018%20-%20Richter%20-%202014.12.2017.pdf.pdf>.

¹⁶³ Thiede & Träbing, *supra* note 159, at 423.

¹⁶⁴ While the plaintiff can benefit from this burden shifting as far as the existence of a damage is concerned, he still has to prove the damage amount (challenge (4)).

be a welcome change for a judge who ordinarily has to deal with much smaller cases; judges could position themselves as guardians of competition vis-à-vis parties, their colleagues and the wider public; and the amounts in controversy are often even higher than in patent cases.

Still, our interviews reveal three reasons why there may be little or no forum selling in antitrust law. First, antitrust follow-on damage lawsuits have only recently emerged in Germany and are still relatively rare. According to estimates by one interviewee, only a few hundred follow-on lawsuits have been filed in Germany. Almost no court has to date issued a final ruling on damages; instead, most follow-on court decisions to date have dealt only with liability (*Grundurteil*). As a result, we simply do not know whether regional courts would differ in the amount of damages they award, and it is difficult to say at this point whether particular German courts are unusually plaintiff-friendly.

Second, the incentives of judges to attract such cases may be limited. Antitrust follow-on damage proceedings are typically so complex that it is unclear how a judge could handle them in an effective manner. Judges may be scared off by their sheer size and complexity.¹⁶⁵ The German court system does also not adequately reward judges' work on such complex cases. Judicial performance is typically evaluated, in part, on the number of cases a judge resolves. While the court's internal case management puts different weights on cases from different areas of the law, the weighing of antitrust follow-on lawsuits may not reflect the actual time required to process such cases. Several of our interviewees reported that a judge dealing with antitrust follow-on cases has between eighteen and twenty three hours available for such cases. It is practically impossible to deal with an antitrust case in this amount of time. This not only seriously lowers incentives for judges to become active in such cases. It also prevents them from developing the expertise required to handle such cases effectively.

As a result, some interviewees reported clear signs that judges attempt to avoid antitrust follow-on cases. One attorney told us of a proceeding where, after seven years of litigation, he still does not know whether the court has jurisdiction or not. One attorney told us:

Given the complexity of cartel damage proceedings, a court is highly motivated at the outset to figure out how to get rid of the case.

¹⁶⁵ Interviewees have told us of cases which featured up to ten defendants and fifteen third-parties (*Streitverkündete*), where all of these parties replied to the plaintiff's arguments separately. In another case, the plaintiffs submitted 320,000 receipts which were printed as hard copies twelve times and were delivered to the court in 475 folders. Generally, it is not uncommon for judges to have to read hundreds of pages of briefs.

Third, court administrators typically do not seem interested in attracting antitrust follow-on litigation to their court. Given the size and complexity of antitrust suits, court fees are unlikely to be high enough to offset the costs.¹⁶⁶ Even more importantly, political considerations may play a role. Antitrust follow-on damage lawsuits are often directed against large German companies. As damage awards against cartel members can amount to hundreds of millions or even to billions of euros, the incentive to encourage such lawsuits are limited. Germany taxes business profits with a trade tax. In 2011, this tax generated revenues of €40.5 billion. This tax generated about 49% of the overall tax income for German municipalities.¹⁶⁷ A large damage award against a German cartel member could significantly lower the trade taxes a German company has to pay. One interviewee noted that this may explain why court administrators do not encourage or facilitate antitrust follow-on lawsuits.

In addition, local sympathies work against follow-on damage lawsuits. German politicians have a long history of protecting the automobile industry,¹⁶⁸ as it generates so many high-skilled jobs. This attitude, which seems wide-spread in German society, could also have an impact on the attitude of German judges and court administrators.

This analysis shows that while there are some signs of national forum selling in antitrust follow-on damage litigation, these signs are weak, and they are limited to one court, Mannheim.

VII. INTERNATIONAL FORUM SELLING

So far, this article has focused on competition between German courts. Yet forum selling is not necessarily limited to the national level. It can have an international dimension as well. Also, the weak evidence for forum selling in Germany in areas such as antitrust law does not mean that forum selling

¹⁶⁶ Note that, while the amount in controversy in follow-on lawsuits can be in the hundreds of millions of Euros or even higher, the German Act on Court Fees (*Gerichtskostengesetz*) puts a statutory cap on the amount in controversy at €30 million (*GERICHTSKOSTENGESETZ [GKG][ACT ON COURT FEES]*, § 39(2), http://www.gesetze-im-internet.de/gkg_2004/index.html (Ger.)). This severely limits the ability of courts to generate court fees in very large proceedings.

¹⁶⁷ STATISTISCHE ÄMTER DES BUNDES UND DER LÄNDER, *ERGEBNISSE DER STEUERSTATISTIKEN* 33 (2014).

¹⁶⁸ See Jack Ewing, *As German Election Looms, Politicians Face Voters' Wrath for Ties to Carmakers*, N.Y. TIMES, Sept. 14, 2017, at B1; Melissa Eddy & Jack Ewing, *As Europe Sours on Diesel Cars, German Groups Fight to Save Them*, N.Y. TIMES, Aug. 3, 2017, at B2.

does not take place. Quite the contrary, we find that forum selling in antitrust is European-wide. It is international, rather than intra-national. It is a competition between the courts of the Netherlands, the United Kingdom, Germany, and other countries. On the other hand, pan-European forum selling is less important in the other legal areas investigated by this article.

International forum selling differs in many ways from national forum selling. While in national forum selling judges (and, in Germany, court administrators) are the most important actors, in international forum selling, national legislators play a role as well. In addition, both the substantive and procedural rules may vary across courts, and there is often no institution entrusted with ensuring the uniform application of rules in different fora.¹⁶⁹

A. Antitrust Law

Antitrust follow-on damage litigation has a strong international component. Cartels often involve member companies from different countries within the European Union. The Court of Justice of the European Union (CJEU) has confirmed that in such cases, the plaintiff may choose one cartel member as an “anchor defendant” and may sue several cartel members at the anchor defendant’s domicile, even if the other companies are domiciled in other EU member states.¹⁷⁰ Article 6(3)(b)(2) of the Rome II Convention¹⁷¹ enables the plaintiff to sue cartel members jointly and severally in the anchor defendant’s domicile not only for damages that occurred in that EU member state, but for all damages in the entire European Union.¹⁷² That is, if a company has been harmed by a cartel whose members are domiciled in Germany,

¹⁶⁹ Exceptions to this rule include the Court of Justice of the European Union, which has the power to determine the interpretation of European Union law.

¹⁷⁰ *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV et al.*, ECLI:EU:C:2015:335 (E.C.J. 2015). However, the European Court of Justice did not allow follow-on lawsuits in EU member states where the cartel had a negative impact on prices, but no cartel member had a domicile.

¹⁷¹ Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J. L 199, 40.

¹⁷² This only holds if the plaintiff sues cartel members at a location where one member is domiciled. If the plaintiff sues cartel members at the location where they formed the cartel, the plaintiff can only claim the damages that occurred in the respective EU member state. This explains the importance of identifying an anchor defendant in pan-European follow-on cases. *See Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV et al.*, ECLI:EU:C:2015:335, ¶¶ 33, 54 (E.C.J. 2015); Jens Adolphsen & Frederik Möller, *Bestimmung des anwendbaren Rechts*, in *KARTELLVERFAHREN UND KARTELLPROZESS: HANDBUCH* § 33, note 38, (Hans-Georg Kamann et al., eds., 2017); Wolfgang Wurmnest, *International Jurisdiction in Competition Damages Cases under the Brussels I Regulation:*

the Netherlands, the United Kingdom and Finland, the plaintiff can choose to sue in any of those four countries. If it chooses Germany and the anchor defendant resides in a city over which the court has jurisdiction, this court can order the German, Dutch, British and Finish cartel members to compensate the plaintiff for all the damages the cartel caused to the plaintiff in any of the twenty eight member states of the European Union. As a result, courts from different EU member states are in direct competition in antitrust follow-on damage lawsuits.¹⁷³

In this European-wide competition, German courts do not fare well. The strongest competitors are the United Kingdom and the Netherlands.¹⁷⁴ Finland is also attractive due to low court and translation costs, highly skilled and motivated judges, and speedy proceedings. While, according to one of our interviewees, Germany offers a highly nuanced and predictable jurisprudence, the German court system has serious disadvantages: language,¹⁷⁵ lack of information-technology savviness, and cost.¹⁷⁶

Dutch proceedings are attractive due to their significantly lower costs. According to one interviewee, a Dutch proceeding may cost only €70,000 in court fees for a case that includes two appeals. Dutch judges also engage in more active case management than their German counterparts in order to ensure that cases proceed in a speedy and efficient way.

Courts in the United Kingdom are also an attractive venue for follow-on litigation.¹⁷⁷ American plaintiffs find the U.K. particularly hospitable because of the similarity between the American and English legal systems and the availability of discovery. The U.K. even created a specialized court – the Competition Appeal Tribunal – to attract such litigation. Despite its name, this court acts as a trial court for antitrust follow-on lawsuits. The Tribunal has not only ensured that judges are experienced in antitrust matters, but it has increased their incentive to attract cases. In 2015, the U.K. also created class actions with an opt-out mechanism to attract plaintiffs.

CDC Hydrogen Peroxide, 53 COMM. MARKET L. REV. 225 (2016); Wolfgang Wurmnest, *Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie 1/2017*, 5 NEUE ZEITSCHRIFT FÜR KARTELLRECHT 2, 5 (2017).

¹⁷³ This does not mean that a German court dealing with a follow-on lawsuit will see courts from other EU member states as a direct competitor.

¹⁷⁴ Matthijs Kuipers et al., *Action for Damages in the Netherlands, the United Kingdom, and Germany*, 6 J. EUR. COMP. L. & PRAC. 129 (2015).

¹⁷⁵ Many German courts will not accept expert opinions and other supplementary material in English.

¹⁷⁶ A plaintiff in a German court has to pay court fees in advance, which can amount to €1.2 million for trial and two appeals in antitrust follow-on lawsuits.

¹⁷⁷ Arianna Andreangeli, *The Consequences of Brexit for Competition Litigation: An End to a “Success Story”?*, 38 EUR. COMP. L. REV. 228 (2017).

Nevertheless, the U.K. is not always the ideal venue for antitrust follow-on litigation. The main disadvantage of British proceedings are the immense cost and time of discovery. More generally, proceedings are perceived as slow. Furthermore, given that the United Kingdom is scheduled to leave the European Union, it is unclear whether U.K. judgments will continue to be enforceable in other EU member states. Going forward, this could severely impede the ability of U.K. courts to attract pan-European antitrust follow-on litigation.¹⁷⁸

Comparing the attitudes of court administrators towards antitrust follow-on lawsuits between Germany and the U.K., several interviewees noted that service industries – including legal services – are an important factor in the U.K. both economically and politically. The U.K. government is pushing London as a legal services hub, just as it is pushing London as a financial hub. According to one interviewee, legislators in the U.K. and the Netherlands actively attempt to attract as many antitrust lawsuits as possible. In contrast, German legislators simply do not see litigation as a business opportunity perhaps, as discussed further below, because they fear the impact of antitrust on German manufacturing, which they consider more important than services.¹⁷⁹

Taken together, our interviews reveal that there are strong signs in antitrust of legislatively-backed forum selling on a European level.

B. Patent and Press Law

Patent litigation also has a European dimension.¹⁸⁰ Particularly in patent litigation battles which involve global companies and products, litigants can choose among a range of possible venues. Important European countries for patent litigation include Germany, the United Kingdom, the Netherlands, and France.¹⁸¹

Nevertheless, the degree to which courts in these countries compete with each other is limited. As described above, antitrust plaintiffs can recover damages that occurred in the entire EU through a suit in a single European

¹⁷⁸ Andreangeli, *supra* note 177.

¹⁷⁹ See *infra* section VIII.B. 4.

¹⁸⁰ See also Graham & Van Zeebroeck, *supra* note 18, at 678.

¹⁸¹ See Graham & Van Zeebroeck, *supra* note 18; COTTER, *supra* note 31, at 233-36. In fact, patent litigation also has a global dimension. For recent papers that explore firm strategies in the “global patent wars” of the smartphone industry and related fields, see Paik & Zhu, *supra* note 18; Michael C. Elmer & Stacy D. Lewis, *Where to Win: Patent-Friendly Courts Revealed*, *MANAGING INTELL. PROP.* 1 (Oct. 2010); Stuart Graham & Saurabh Vishnubhakat, *Of Smart Phone Wars and Software Patents*, 27 *J. ECON. PERS.* 67 (2013).

court¹⁸² Therefore, judgments by courts from different countries can be seen as close substitutes. This is not true for patent law. In most cases, a court can *de facto* only issue an injunction against the sale of an infringing product in its own jurisdiction. Similarly it can generally grant damages for harm that occurred in that jurisdiction.¹⁸³ Therefore, a company might need to sue in several jurisdictions in order to fully enforce its right. The venue decision also turns on considerations that are unrelated to a court's efforts to attract business, such as the size of the local market, because an injunction against distributing a product in a large market is likely to require design and/or manufacturing changes that will, because of economies of scale, affect smaller markets as well, while an injunction in a small country is less likely to have cross-border influence.¹⁸⁴ As a result, courts from different European countries are in less direct competition with each other in patent litigation than they are in antitrust follow-on damage litigation.

In accordance with this view, our interviewees generally reported that the German patent system faces limited competitive pressure from neighboring jurisdictions. Suit in Germany is attractive, in part, because the German market is so large that an injunction against distribution in Germany is likely to terminate the product, to require substantial redesign, or to force the defendant to negotiate a license. Still, interviewees mostly claim the speed and the low cost¹⁸⁵ as well as the high quality of the German legal system are the

¹⁸² See *supra* section VII.A.

¹⁸³ While many litigated patents originate from a patent issued by the European Patent Office, these patents are transformed into national patents after issuance. Therefore, technically, a patentee requesting an injunction in two different jurisdictions has to base his claim on the infringement of two separate national patents. In the late 1990s, mostly in the Netherlands, national courts nevertheless started issuing so-called cross-border injunctions covering multiple jurisdictions. This practice was effectively stopped by a judgment of the CJEU determining that national courts have exclusive jurisdiction to decide cases in which the validity of a national patent is at issue. *Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG*, ECLI:EU:C:2006:457, (E.C.J. 2006). Later, the CJEU narrowed down this effective ban by allowing cross-border injunctions in preliminary proceedings. *Solvay SA v Honeywell Fluorine Products Europe BV and Others*, ECLI:EU:C:2012:445, (E.C.J. 2012). See also COTTER, *supra* note 31, at 250-55; Tilman Müller-Stoy & Jörg Whal, *The European Union: Jurisdiction, Cross-Border-Cases, Enforcement Directives and Unified Patent Court in PATENT ENFORCEMENT WORLDWIDE: WRITINGS IN HONOUR OF DIETER STAUDER* (Christopher Heath ed. 2015); Graham & Van Zeebroeck, *supra* note 18, at 674.

¹⁸⁴ There are some cases in which courts in different jurisdictions might nevertheless be regarded as viable alternatives. Plaintiffs might use injunctions issued in one jurisdiction as a bargaining chip in negotiations aimed at settling patent disputes across jurisdictions. Then, parties might aim for being the first to obtain an injunction in their favor irrespective of this injunction covers all the jurisdictions where the battle is playing out.

¹⁸⁵ See COTTER, *supra* note 31, at 235-36.

main reasons that Germany attracts the highest number of patent cases in Europe.¹⁸⁶ Compared to their counterparts in other European countries, German patent courts may also be attractive because they are reluctant to stay infringement proceedings pending the outcome of parallel nullification proceedings. As discussed above, the bifurcated patent system in Germany means that courts in infringement actions do not consider challenges to the validity of a patent, so they can proceed more swiftly.¹⁸⁷

Outside antitrust and patent law, European forum selling seems to play an even lesser role. In press law, for example, German media publish mostly in German for a German audience. As a result, plaintiffs do not consider courts in other jurisdictions to be a viable alternative to the German courts.

VIII. GENERALIZING FROM THE CASE STUDIES

While each area of law is different, it is possible to make some generalizations. In some ways forum selling is similar in the U.S. and Germany, but in other ways it is very different.

A. Similarities to Forum Selling in the U.S.

1. Broad Plaintiff Choice of Forum

The key similarity between the U.S. and Germany is the importance of permissive venue rules that give plaintiffs the ability to sue in almost any court. Both countries had rules in patent that allowed the plaintiff to sue anywhere a product was sold, which, for most patents of any significance, gave plaintiffs the ability to sue anywhere. In both Germany and the U.S., such liberal rules about venue led to the clearest examples of forum selling. In the U.S., one district, the Eastern District of Texas, actively encouraged cases and was able to garner over a quarter of all patent filings, although a recent Supreme Court decision may end its dominance.¹⁸⁸ In Germany, Dusseldorf and Mannheim have actively competed for patent cases. Venue rules in other areas of potential forum selling, such as press law and antitrust, have also been interpreted to give plaintiffs wide choice of forum.

¹⁸⁶ On the advantages and disadvantages of various European jurisdictions for patent infringement cases, see LUKE MCDONAGH, EUROPEAN PATENT LITIGATION IN THE SHADOW OF THE UNIFIED PATENT COURT 17 et seq. (2016).

¹⁸⁷ Herr & Grunwald, *supra* note 23; COTTER, *supra* note 31, at 229.

¹⁸⁸ *TC Heartland v. Kraft Foods Group Brands*, 137 S. Ct. 1514 (2017).

2. The Importance of Procedure

In both Germany and the U.S., the differences between courts that make some more attractive than others are primarily procedural rather than substantive. In both the U.S. and Germany, key factors in patent litigation are speed and the reluctance of judges to stay proceeding pending decision on patent validity by another administrative or judicial body. Similarly, in press law, speed and the ability to procure *ex parte* injunctions are crucial factors.

The fact that competition between courts usually relates to procedure rather than substance reflects the less stringent review of procedural decisions. In both the U.S. and Germany, decision relating to substantive law are generally reviewed rigorously (*de novo*). In contrast, many procedural decisions are viewed as within the discretion of the judge of first instance and reviewed deferentially. In the U.S., most procedural decisions are reviewed for abuse of discretion. In Germany, while not all procedural norms grant a judge discretion, those which do are similarly reversed only if there is a “mistake in the exercise of discretion” (*Ermessensfehler*).¹⁸⁹ In addition, in both the U.S. and Germany, interlocutory appeals are disfavored, so most procedural issues can only be appealed after the case as a whole has been terminated. In addition, procedural mistakes are unlikely to lead to reversal, as decisions are reversed only if they potentially influenced the outcome of the case (in Germany) or are not “harmless” (in the U.S.).

3. Judicial Efforts to Enhance Forum or even Judge Shopping

In both the U.S. and Germany, judges seem to have enhanced the ability of plaintiffs to get a hearing before the judges of their choice. In the Eastern District of Texas, local rules allowed the plaintiff to sue in the courthouse of its choice, and, since there was often only one judge who heard patent cases in that courthouse, ability to choose the courthouse meant ability to choose the judge. In Germany, the fact that judges in press law preliminary injunction cases would discuss their likely decision with plaintiff’s counsel and allow the plaintiff to withdraw (and sue elsewhere) if the decision was likely to be adverse gave plaintiffs a rather unique ability to select a favorable forum. More generally, as discussed below, specialization in Germany makes it easier for plaintiffs to choose the judge.

¹⁸⁹ An important example is the decision whether to stay a proceeding, *see supra* section IV.B. 4.

B. Differences from Forum Selling in the U.S.

1. The Importance of Judicial Quality

In both the U.S. and Germany, defenders of courts that succeed in the competition for cases argue that those courts attract cases by offering higher quality rather than by being biased toward the plaintiff. In the U.S., those claims did not bear much scrutiny. For example, if the Eastern District of Texas was attractive on account of the expertise of its judges, it should have been just as attractive to defendants seeking declaratory judgment as to plaintiffs. Yet defendants almost never chose the Eastern District.¹⁹⁰ In contrast, quality decisionmaking seems to be an important feature making some German courts more attractive than others. The most popular patent and press courts are respected for the quality of their decisions. Nevertheless, at least for the highest quality courts, there sometimes seems to be a tradeoff between quality and speed: if a party wants a high-quality decision in patent or press law, it may choose a different court than if it wants a fast decision.

Some of the innovations that make particular German courts attractive are also plausibly good rather than simply pro-plaintiff. In antitrust, the evidentiary rules that facilitate follow-on lawsuits seem to be warranted in cases where a public authority has already proven wrongful conduct and where more stringent procedures would mire judges and lawyers in costly and complex proceedings. Similarly, although speed often benefits plaintiffs (particularly in press cases), it is also true that, all other things equal, faster is better than slower.

2. Specialization Facilitates Forum Selling

Forum shopping and thus forum selling in Germany is made easier by judicial specialization.¹⁹¹ In the U.S., even if one or two judges would like to hear more of a particular kind of case, it is difficult for plaintiffs to be sure their case will be heard by those judges, because most American judges are part of courts with more than a dozen judges, and cases are generally assigned randomly. So, in most circumstances, a plaintiff has no more than a five or ten percent chance of getting a particular judge. In contrast, in Germany, specialized judges generally sit in chambers consisting of only three judges, and all cases of the relevant kind will be assigned to that chamber (or to one of two chambers with that specialization). In addition, the dominant influence

¹⁹⁰ Klerman & Reilly, *supra* note 1277-78.

¹⁹¹ On the role of specialization in competition among courts, see J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PENN. L. REV. 631, 636-37 (2015); Klerman & Reilly, *supra* note 1, at 303.

of the presiding judge ensures that cases assigned to that chambers are likely to be treated similarly no matter which judge actually takes primary responsibility.

Specialization also facilitates forum selling, because it requires coordination among fewer judges. If an American court wants to acquire a reputation as being plaintiff friendly in a particular area, all (or most) of the dozen or more judges on the court must agree. Agreement among such a large group is difficult. In contrast, in Germany, agreement is only necessary among the three judges in the relevant chamber, and agreement is made easier by the outsized influence of the presiding judge.

3. The Importance of Administration

Court administrators also play a larger role in making some German courts more attractive. The ministry of justice, because of its connection to the government and political parties, has a greater interest in issues such as regional economic development and court revenue than individual judges. When attracting a particular kind of case, such as patent cases, seems likely to benefit the local economy, to increase the reputation of the state and to bring in revenue through fees, the court administration can allocate judges and other resources to that kind of case.

Each court's executive committee can also play an important role by setting up chambers specializing in areas they want to attract cases. In addition, by reallocating other cases or establishing a second chamber with the same specialization, the executive committee can ensure that judges who are successful in attracting more cases are not overwhelmed by their caseloads. In fact, through its promotion policies, the ministry of justice can ensure that successful judges are rewarded.

4. Political Economy

Unlike in the U.S., there is no separate court system at the federal and the state level in Germany. All courts apply the relevant federal and state law to the cases they hear. Yet, regional courts and courts of appeal – the two kinds of courts that are of primary interest in this article– are established, managed and financed by each of the sixteen states. German states compete against each other on many dimensions. Because the judicial system is largely managed at the state level, courts can *de facto* become part of the competitive positioning of a state against other states in the German federation. Conversely, when overly aggressive courts would undermine the competitiveness of local industry or the prospects of state politicians, the administration of the courts at the state level means that administrators have both the ability and

incentive to ensure that courts play a more constructive role.

When considering the political economy of German courts, it is important to note that key decisions are made at the state level, not by individual courts and not at the federal level. For example, the promotion of judges is largely a state-level decision, as is the decision to fund new or improved facilities or to expand the number of judicial positions in a particular court. While court executive committees have the power to create specialized chambers, this requires the diversion of resources from other legal areas, and the executive committee might decline to do so only when they cannot get additional judges to staff the new chamber. As a result, the decision to create a specialized press chamber or to add a second patent chamber usually requires the cooperation of state-level administrators.

The prevalence of forum selling seems to vary with the incentives of the court administration and the state. We found the most support for forum selling in patent law, weaker evidence in press law, and even less evidence in antitrust litigation. If one considers the incentives of the court administration and the states in which these courts are located, this outcome is not surprising. If a politician wants to advance her state in competition with other German states, it seems highly promising to promote major cities in her state (such as Dusseldorf in North Rhine-Westphalia) as innovation hubs that are supported by respected patent litigation courts.

It is much less attractive for a politician to push local courts in press or antitrust law. If courts become important litigation hubs in press law, the politician may jeopardize his good relationship with local and national media outlets that may be hurt by the courts. Similarly, if courts become important centers for antitrust litigation, the politician may hurt his relationships with manufacturers, which are a particularly important sector of the German economy.

In other words, in patent law, the plaintiffs who benefit from forum selling are inventors (patent owners), and the defendants who are hurt are alleged patent infringers. In press law, the benefiting plaintiffs are often celebrities, and the hurt defendants are German media outlets. In antitrust law, the benefiting plaintiffs are a large number of companies with relatively small damage claims each, while the hurt defendants are large German employers with very large damage liabilities. Politically, it is attractive to help the plaintiffs in patent law, but not in press or antitrust law.

Theoretically, one could imagine a court in a small rural district emulating the U.S. District Court for the Eastern District of Texas and attempting to attract patent or other cases by becoming pro-plaintiff. Based on our interviews, we have found no German court that adopted that strategy. Nor do we deem it likely that any German court would do so for three reasons. First, even a small German regional court is unlikely to be located in areas that are as

rural as the Eastern District of Texas. Germany is simply a more urban country than the U.S. There are few sparsely populated areas, and German courts tend to be situated in major cities. Second, the auto industry and other important manufacturers have factories throughout Germany, and much of German media is national in audience. This decreases the likelihood that a judge in a rural regional court would adopt a strategy that could hurt German manufacturing, as it would likely hurt local factories. Similarly, anti-media decisions would likely generate negative press attention that would reach local audiences. Third, and perhaps most importantly, even if an individual judge or court were interested in such a strategy, it would be against the interests of court administrators in the state's justice ministry, who have the power to decrease funding for the court and to impede the promotion of the relevant judges. Political economy considerations operate strongly at the state level, not solely at the district level. As discussed above, it seems unlikely that a German state would tolerate judicial activity that hurt manufacturing in the state or that resulted in negative press for its politicians.

IX. CONCLUSION

Judges and court administrators compete for judicial business in Germany, especially in patent and press law cases. They do so for a variety of reasons, including prestige and court revenue. While some ways that courts compete arguably improve justice by speeding up proceedings and increasing predictability, other aspects are more problematic. Failure to stay infringement proceedings until validity challenges are resolved by other courts not infrequently subject patent defendants to unjust infringement judgments based on invalid patents. Similarly, the granting of *ex parte* preliminary injunctions in press cases denies defendants their essential right to be heard. As in the U.S., forum selling in Germany is facilitated by loose venue rules that allow most patent, press, and antitrust plaintiffs to sue in any court.