

ESSAY

JURIES, PATENT CASES, & A LACK OF TRANSPARENCY

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TABLE OF CONTENTS

I.	REVIEWABILITY OF JURY VERDICTS IN PATENT CASES.....	783
	<i>A. Form of Jury Verdicts.....</i>	783
	<i>B. Appellate Scrutiny.....</i>	790
II.	FEDERAL CIRCUIT PROFESSES A LACK OF POWER TO HELP	792
	<i>A. Federal Circuit Choice of Law Rules.....</i>	795
	<i>B. Federal Circuit Supervisory Powers.....</i>	796
III.	FEDERAL CIRCUIT IMPERIALISM.....	797
IV.	CONCLUSION.....	801

Lawyers wax on about juries lacking the competence to resolve technically sophisticated and legally complex patent cases. Complaints have focused on the low level of formal education and training of the individual jurors,¹ the natural proclivity of jurors to

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1. See, e.g., Matt Krantz, *Computers & Technology Patent Suits Try Patience of High-Tech Companies*, INVESTOR'S BUS. DAILY, Dec. 9, 1996, at A6 ("Because patent cases can last up to three months, better educated potential jurors are excused from serving. 'Only people with nothing better to do can give up 12 weeks listening to lawyers talk about high tech.');" Richard B. Schmitt, *Juries' Role in Patent Cases Reconsidered*, WALL ST. J., Feb. 18, 1994, at B6 (quoting AT&T lawyers who, after losing a jury trial,

be swayed by tangential, emotional factors, bias or prejudice,² and the high level of complexity of patent cases.³ These concerns have intensified in light of the nearly exponential increase in jury demands in patent cases in recent years.⁴ Of course, this criticism has been challenged by some who question whether the alternative—district court judges—would better resolve patent cases.⁵

Until recently, there was little more than anecdote to support these complaints. In my own prior empirical work, I substantiated significant differences in win rates between judge and jury trials of patent cases.⁶ To summarize that work:

- juries are more likely than judges to find for the patent holder⁷ and more likely to hold a patent valid, infringed, and willfully infringed;⁸

complained that the jury consisted of “unemployed laborers and housewives . . . [who did not] understand that stuff”).

2. See, e.g., Jack L. Lahr, *Bias and Prejudice Against Foreign Corporations in Patent and Other Technology Jury Trials*, 2 FED. CIR. B.J. 405, 405 (1992) (“A widespread perception within the corporate communities of many industrial countries holds that they will be treated unfairly in U.S. jury trials due to the jury bias and prejudice against foreigners.”); Gregory D. Leibold, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. COLO. L. REV. 623, 623 n.4 (1996) (suggesting that juries are easily swayed by tangential issues); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 373 n.33 (2000) [hereinafter Moore, *Black Box*] (quoting a Chief Patent Counsel stating, “I have won and lost cases with juries, and in both situations, the jury reasoning was not related to the facts”); *id.* at 373 n.36 (quoting a Chief Patent Counsel stating, “[j]urors’ decisions are based on emotional perceptions of good guy vs. bad guy”); see also Kimberly A. Moore, *Jury Demands: Who’s Asking?*, 17 BERKELEY TECH. L.J. 847, 875 (2002) (finding that jury demands are impacted by popular perceptions of jury bias against foreigners, corporations, out-of-state parties, and infringers).

3. See, e.g., *Jury Cases on Patent Infringement on Trial*, CHI. TRIB., June 12, 1995, at 6, available at 1995 WL 6216112 (“Corporate defendants and patent lawyers have long griped that intellectual property litigation is too complex to leave to plumbers, housewives, mailmen and music teachers.”).

4. See Moore, *Black Box*, *supra* note 2, at 366–67 (showing that jury trials of patent cases moved from the exception to the rule in recent years).

5. See *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 993 (Fed. Cir. 1995) (Mayer, J., concurring) (stating that “there is simply no reason to believe that judges are any more qualified than juries to resolve the complex technical issues often present in patent cases” (quoting *SRI Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985)); Howard T. Markey, *On Simplifying Patent Trials*, 116 F.R.D. 369, 372 (1987) (rejecting the argument that juries should not be used in patent cases because it “disregards the lawyer’s responsibility to educate juries”); cf. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 2 (2001) (finding that district court judges improperly construe patent claim terms in 33% of all appeals to the Federal Circuit).

6. See Moore, *Black Box*, *supra* note 2, at 367 (comparing seventeen years of patent bench trials with jury trials).

7. See *id.* at 386 (finding that patent holders prevail in 68% of jury decisions and in 51% of judge decisions).

8. See *id.* at 390–91.

- juries are more likely than judges to decide cases on an all-or-nothing basis;⁹
- juries are more likely than judges to favor the aggrieved party who initiated the litigation;¹⁰ and
- juries are more likely to find in favor of domestic parties over foreign parties.¹¹

Despite these findings, judge and jury decisions are affirmed by the Federal Circuit with equal frequency—78%.¹² Even when the appealed issues are broken down by subject matter (validity, infringement, and enforceability), the affirmance rates for jury verdicts and bench judgments are nearly identical.¹³ Comparing judge and jury appellate affirmance rates, however, like comparing apples and oranges, has several flaws.¹⁴ Jury verdicts are virtually unreviewable by the appellate court.¹⁵ This unreviewability, which undoubtedly impacts appellate scrutiny and litigation more generally, is the subject of this Essay. The opaque nature of jury verdicts, often termed “black box” verdicts, inhibits assessment of the capabilities of the adjudicators, which stifles reform efforts. Patent reform proposals often focus on the inability of juries to accurately resolve patent cases,¹⁶ but the

9. See *id.* at 403–04 (finding that juries are more likely than judges to find for the same party on issues of validity and infringement and in cases involving multiple patents).

10. See *id.* at 406.

11. See Kimberly A. Moore, *Xenophobia in American Courts* (forthcoming) (on file with author).

12. Moore, *Black Box*, *supra* note 2, at 397 (discussing the Federal Circuit’s affirmance rate).

13. See *id.* at 399 (showing statistical results from patent appeals). Although there appears to be a difference in affirmances for willfulness, this difference is most likely attributable to the fact that, when willfulness is appealed, it is generally because the court has exercised its discretion and increased damages—thereby endorsing the jury verdict. See *id.*

14. *Id.* at 400–01.

15. *Id.* at 401 (discussing barriers to Federal Circuit review of jury verdicts).

16. See, e.g., Richard P. Cusick et al., *A Critical Analysis of the Proposed National Patent Board*, 13 OHIO ST. J. ON DISP. RESOL. 461, 461 (1998) (endorsing a proposal for an industry-sponsored National Patent Board (“NPB”) to resolve patent infringement disputes); Edward V. Di Lello, *Fighting Fire with Firefighters: A Proposal for Expert Judges at the Trial Level*, 93 COLUM. L. REV. 473, 474 (1993) (proposing the creation of a new adjunct judicial office for magistrate judges who are specialists in technical fields); Leibold, *supra* note 2, at 672 (recommending the creation of specialized trial courts or juries to resolve patent cases); John B. Pegram, *Should the U.S. Court of International Trade Be Given Patent Jurisdiction Concurrent with That of the District Courts?*, 32 HOUS. L. REV. 67, 114–15 (1995) (discussing inadequacies in the patent infringement adjudication system and proposing that the U.S. Court of International Trade be given patent case jurisdiction); Davin M. Stockwell, *A Jury of One’s (Technically Competent) Peers?*, 21 WHITTIER L. REV. 645, 648 (2000) (advocating the use of expert juries to resolve patent cases); Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47

form of the verdicts themselves masks hard evidence of actual competence or incompetence.

This Essay argues in favor of increased transparency in jury verdicts. Transparency in legal process has several advantages.¹⁷ In jury trials, increasing transparency in the decision-making would increase the accuracy of the adjudication and legitimize the adjudication process. If jury verdicts are rationally based on competent decision-making, much criticism of the American right to a jury trial ideal would be silenced. Exposing inaccurate jury decision-making also has the advantages of directing targeted reform efforts and allowing for critical and meaningful review by the appellate court.

Part I of this Essay addresses the present state of reviewability of jury verdicts. Part II explains the Federal Circuit's current approach toward directing district court trial practice and its shortcomings. Part III proposes a modest change in Federal Circuit practice that would have a meaningful effect on the reviewability of jury verdicts in patent cases. Although a larger scale change in Federal Circuit choice of law rules would have several advantages over the present system,¹⁸ it is not necessary to correct the problems identified in this Essay.

DEPAUL L. REV. 49 (1997) (proposing use of specially qualified juries in cases such as patent litigation where the lay jury is ill-equipped to deal with the complexity of the issues being tried); Tom Arnold, *Why Is ADR the Answer?*, COMPUTER LAW., July 1998, at 13 (suggesting that forms of alternative dispute resolution would be better than judge or jury resolution of patent cases).

17. See, e.g., Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208, 222 (2002) ("Transparency is good because it requires us to be explicit about our values, our judgments, and our conflicts."). As one commentator discussed:

At a general level we might say that the core aims of a dispute settlement system are that it should be fair—however that is to be judged—and efficient. Yet even where there is consensus as to the nature and aims of the dispute settlement system, there are added difficulties in trying to promote transparency at the same time as promoting the other values of such a system. . . . [T]ransparency might be looked at as an instrumental value, that is, a value that seeks to promote another goal, or some inherent process value that is to be promoted for its own sake. For example, we need to consider whether a fair or just outcome is merely the result of just procedures or whether procedures can only be measured in terms of the quality of outcome. Is transparency to be valued because it encourages more accurate outcomes from the process? Does it help participants feel that they have been fairly treated? Is the system better respected because its processes and outcomes are more readily known?

Jeffrey Waincymer, *Transparency of Dispute Settlement Within the World Trade Organization*, 24 MELB. U. L. REV. 797, 810–11 (2000).

18. Refer to notes 97–99 *infra* and accompanying text (describing the advantages of a proposed change to the Federal Circuit choice of law rules).

I. REVIEWABILITY OF JURY VERDICTS IN PATENT CASES

A. *Form of Jury Verdicts*

As I reviewed the special verdict forms actually used over the last nineteen years,¹⁹ I noticed several common pitfalls. The good news is that nearly every patent case utilized special verdicts or interrogatories,²⁰ rather than general verdicts,²¹ to query the jury about its decision-making. The bad news is that the questions posed, generally, were not meaningfully drafted. The purpose of special verdicts or interrogatories is to gain insight into the jury's decision-making and, among other things, test their comprehension of the case.²² Special verdicts require the jury to answer specific factual questions in writing rather than simply state who wins.²³ Special verdicts and interrogatories have several advantages over general verdicts: (1) control of the jury; (2) facilitation of judicial review; (3) depreciation of bias in decision-making; and (4) simplification of instructions.²⁴ As one

19. As part of my study of judge and jury decisions, I collected all of the special verdicts and court opinions in all patent cases that were tried during the period 1983–1999. See Moore, *Black Box*, *supra* note 2, at 380 (detailing the empirical study). More recently, I updated this data by obtaining the same documents for the 2000–2001 patent cases.

20. A special verdict is a “special finding of the facts of a case by a jury, leaving to the court the application of the law to the facts thus found.” BLACK’S LAW DICTIONARY 1560 (6th ed. 1990). Special interrogatories are a hybrid, where the jury answers specific fact questions and also renders a verdict. See *id.* at 1397.

21. A general verdict is “[t]hat by which [the jury] pronounce[s] generally upon all or any of the issues, either in favor of the plaintiff or defendant.” *Id.* at 1560.

22. As one article noted:

The purpose of special verdicts is to brighten the line between the functions of court and jury. A jury whose role is merely to answer narrow questions of disputed fact is free from having to render an ultimate-outcome verdict that goes beyond simple fact-finding to assigning liability and its legal consequences. These are decisions into which sympathy, passion, bias, and a measure of frontier justice might enter, which could distort the evidence, or conflict with the text of the governing law.

Jordan H. Leibman et al., *The Rise and Fall and Perhaps Rise Again of the “Blindfold” Rule in Modified Comparative Fault Cases: A Proposed Experiment*, 102 DICK. L. REV. 33, 45 (1997).

23. Refer to note 20 *supra* (defining the term “special verdict”).

24. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 306–09 (2d ed. 1986 & Supp. 1993) (discussing advantages and disadvantages of special verdict forms); Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335, 347 (1999) (same); Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making*, 14 LAW & PSYCHOL. REV. 1, 2–4 (1990) (discussing the advantages of special verdicts in light of their impact on juror decision-making); see also Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1653 (2001) (“[T]he increased use of special verdict forms or general verdicts with interrogatories could enhance the transparency of the jury’s decisionmaking process.”); William L. Prosser, *Comparative*

commentator noted:

The purpose of submitting special verdicts rather than requesting a general verdict is to direct the jury to make their findings without regard to the effect of the answers upon the parties to the action. The brevity and clearness of the direct question focuses the jury's attention upon the essential issues and away from prejudice and favor. Informing the jury, either directly or indirectly, concerning whom their answers will favor, negates those advantages of the special verdict.²⁵

These benefits of special verdicts, however, are lost when the special verdicts themselves are not crafted in a meaningful way.²⁶ Patent cases, which are among the most complex of all civil litigation,²⁷ likely make drafting special verdicts difficult and contentious.²⁸ But the very complexity of the underlying facts makes the need for well-drafted special verdicts especially great.

In my review of the special verdict forms actually employed, I found a few detailed, meaningful verdicts,²⁹ but generally, the

Negligence, 41 CAL. L. REV. 1, 28 (1953) (arguing that special verdicts provide the best mechanism for reining in "the unreliable and irresponsible jury" in comparative negligence cases). Special verdicts facilitate judicial review of jury verdicts by providing a roadmap to the jury's decision-making. *See id.* at 32. This enhances accuracy and efficiency. With a detailed understanding of how the jury reached its verdict, the district court on judgment as a matter of law or the appellate court on appeal, can review the verdict for accuracy. *See id.* With a detailed roadmap, the reviewing court can focus its review without needing to scour the entire record to determine whether the jury verdict is supported by substantial evidence.

25. Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 138 (1985) (quoting *Cassia Creek Reservoir Co. v. Harper*, 426 P.2d 209, 211 (1967)).

26. *See* Moore, *Black Box*, *supra* note 2, at 401 (discussing the problems with black box verdicts).

27. *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889, 933 (2001) (finding patent cases more complex than other civil litigation); The National Academies Committee on Intellectual Property Rights in the Knowledge-Based Economy, *Conference on the Operation of the Patent System: Insights from New Research*, 271-72 (2001) [hereinafter National Academies Committee] (comments of Hon. T.S. Ellis, III), available at <http://ip.nationalacademies.org/doc.php?id=404> (last visited Sept. 21, 2002) (reporting that the Administrative Office of the Courts considers patent cases 1.7 times more complex than the average civil case, and commenting that "the NEC-Hyundai [sic] case involved 25 transistor circuitry patents, and I can tell you that it's far more than 1.7. It may be 100.7 because it's very labor intensive"); *cf.* John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 78-81 (2002) (finding that patents have become increasingly complex by comparing a sample of patents from the 1970s with a sample of patents from the 1990s).

28. *See* Longhofer, *supra* note 24.

29. For example, in one case, the jury answered 223 separate questions that went claim-by-claim on various validity and infringement issues. *See* *Union Oil Co. v. Atl. Richfield Co.*, 208 F.3d 989, 994 (Fed. Cir. 2000). This is not meant to suggest that every special verdict form ought to be this long or detailed. The *Union Oil* trial lasted forty-nine days and had many witnesses, hundreds of exhibits, and forty-one separate patent claims

special verdict forms varied between sparse and completely thoughtless declarations of which party the jury preferred. For example, in several cases, the special verdict forms actually denoted on the form exactly how to answer the questions so as to result in a win for a particular party:³⁰

1. Has PPG proved by a preponderance of the evidence that Guardian infringed claim 4 of PPG's '886 patent?
YES _____ NO _____
(for PPG) (for Guardian)

2. Has PPG proved by clear and convincing evidence that Guardian willfully infringed the PPG '886 patent?
YES _____ NO _____
(for PPG) (for Guardian)

3. Has Guardian proved by clear and convincing evidence that claim 4 is invalid for obviousness?
YES _____ NO _____
(for Guardian) (for PPG)

In this example, the jurors need not even read and analyze, much less understand, the question posed. Jurors need only know which party they would like to win and then check the appropriate answers. Although these special verdicts were quite common,³¹ it is surprising that any federal judge would permit them to be given to the jury, as they obviously undermine the very purpose of the special verdicts. These types of special verdicts mask any underlying lack of comprehension or incompetence on the part of the jury, as well as bias or prejudice that may impact the jury adjudication. Because of their simplicity, however, special verdicts have the advantage of

whose validity and infringement needed to be decided. *See id.* The jury deliberated for thirteen days before rendering its verdict entirely in favor of the patentee. *See id.*

30. This is the actual special verdict form used in *PPG Industries, Inc. v. Guardian Industries Corp.*, Civ. No. 94-1112 (W.D. Pa.) (copy on file with author).

31. *See, e.g.*, Special Verdict of May 5, 1999, *Polymer Indus. Prods. Co. v. Bridgestone/Firestone, Inc.* (N.D. Ohio) (No. 95-CV-43) (copy on file with author); Special Verdict of June 11, 1998, *Allied Signal, Inc. v. Cooper Auto., Inc.* (D. Del.) (No. 96-540) (copy on file with author); Special Verdict of Sept. 19, 1997, *Quantel Ltd. v. Adobe Sys., Inc.* (D. Del.) (No. 96-CV-18) (copy on file with author); Special Verdict of May 10, 1995, *Richardson-Vicks, Inc. v. Upjohn Co.* (D. Del.) (No. 93-CV-556) (copy on file with author), noted in No. Civ.A.93-556, 1996 WL 31209, at *1 (D. Del. Jan. 17, 1996).

reducing the possibility of an inconsistent verdict, and, by hiding all fact-finding and decision-making, they minimize reversibility. Although cynical, judges may in fact have some preference for general verdicts or meaningless special verdicts in that they are more difficult for the appellate court to overturn.³² Special verdicts virtually ensure that the case will go away at the termination of the trial.

Probably the most common shortcoming of black box special verdicts is that they are exceptionally broad, as they merely ask the jury to resolve the ultimate issue rather than answer specific underlying factual questions and leave the ultimate issue for the court. It was not uncommon for the jury to be given a single verdict on the issue of patent validity that read as follows:³³

IS THE PATENT VALID? YES NO
(Circle One)

This is true even though several alternative invalidity defenses, each with a slew of underlying factual determinations, were generally presented to the jury: anticipation for on-sale bar, public use, prior patents or printed publications, obviousness, best mode violation, written description violation, failure to enable, etc. This type of *general* special verdict does not require the jury to understand or apply any of the specific laws to the facts of the case. It is really no better than a general verdict because it just asks the jury to resolve the ultimate question of law and provides the district and appellate court with no meaningful reviewability.

With the parties proposing special verdicts and the court ruling on their form, how is it that they have ended up so uniformly bad? A major goal of the judge and lawyers in any patent case is to simplify the case for the lay jury.³⁴ Short, simple special verdicts further this goal.³⁵ Generally, one party would

32. See Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 830 (1985) ("The majority of federal judges have long preferred general to special verdict forms.").

33. See, e.g., Special Verdict of Mar. 17, 2000, *Integra Lifesciences I, Ltd. v. Merck KgaA* (S.D. Cal.) (No. 96-1307) (copy on file with author); Special Verdict of Jan. 28, 2000, *Redrill Corp. v. Driltech, Inc.* (E.D. Tex.) (No. 95-CV-189) (copy on file with author); Special Verdict of Feb. 20, 1988, *White Chem. Corp. v. Walsh Chem. Corp.* (D.N.C.) (No. 86-CV-562) (copy on file with author).

34. See Longhofer, *supra* note 24, at 335 ("The job of the lawyer and the judge in complex litigation is akin to that of a translator, converting complex factual and legal concepts into a language that lay juries can understand and can themselves translate into a just verdict.").

35. See *id.* at 347 (noting that special verdicts "limit[] the function of the jury to

prefer the short, simple verdict and the opponent would prefer a more detailed verdict. For example, when the jury decides the validity of the patent, the patent holder would likely prefer a single question: valid or invalid?³⁶ The accused infringer would likely prefer a series of detailed questions that pertain to each of the invalidity defenses it raised, as this gives the infringer more than one bite at the apple. Even if the jury finds that the patent is not anticipated by on-sale activity, it may decide that the patent is obvious.³⁷ The infringer may even prefer that the jury have to answer multiple specific questions about each defense, as this gives the accused infringer more chances at invalidating the patent.³⁸ In addition, if the jury is forced to answer a series of specific factual questions underlying validity decisions without answering the ultimate question of validity, it is more likely that bias will not impact their decision-making.³⁹ For example, practitioners and scholars alike have frequently opined that juries are not likely to invalidate patents because juries favor inventors and are unlikely to second-guess the Patent Office that has technically trained examiners who already issued the patents.⁴⁰ My own empirical research has substantiated the belief

that of fact-finder" and "ask[] the jury to perform the function it does best—finding facts").

36. See Laurence H. Pretty & Janene Bassett, *Reconciling Section 112, Paragraph 6 with the Doctrine of Equivalents in the Wake of Warner-Jenkinson Co. v. Hilton Davis Chemical*, in *PLI'S THIRD ANNUAL INST. FOR INTELL. PROP. LAW*, at 359, 392 (1997) ("Obviously, patentees will likely want simple interrogatories aimed at the central issue, hoping to convince the jury that infringement has occurred, while the accused will likely want more interrogatories in order to fragment the issues to educate jury about the infringement analysis.").

37. While trial counsel often believes that more than one chance with the jury is advantageous—hoping that the jury will see multiple verdicts as a chance to "split the baby"—the results of my empirical study on jury verdicts suggest that jury decision-making is largely all-or-nothing. See Moore, *Black Box*, *supra* note 2, at 403 ("[J]uries are much more likely than are judges to find for the same party when multiple issues need to be resolved."). In only 14% of all cases during the seventeen-year period (1983–1999) did the jury provide a mixed verdict on the issues of infringement and validity. *Id.* In only 13% of the cases where there was more than one patent at issue did the jury reach mixed results on the various patents. *Id.* at 404.

38. Similarly, the patentee may prefer multiple verdicts for infringement: one for literal infringement and one for the doctrine of equivalents. See William L. Anthony, Jr., *The Paper Side of Jury Litigation*, in *PATENT LITIGATION 2001*, at 485 (2001) (suggesting that the patentee would prefer to have the jury answer separate questions on literal infringement and infringement under the doctrine of equivalents because it increases the patentee's chance of success). In this case, the infringer may prefer a single verdict. It may even be advantageous to break the special verdicts down to an element-by-element analysis of each claim. Steven J. Glassman & George A. Xixis, *Special Verdicts in Patent Cases: A Critical But Underused Alternative*, 7 *J. PROPRIETARY RTS.* 2, 3 (1998) (stating that "special verdicts can facilitate an element-by-element analysis of each claim").

39. See Longhofer, *supra* note 24, at 347 (discussing advantages of special verdicts).

40. See, e.g., ETHAN HOROWITZ & LESTER HOROWITZ, *PATENT LITIGATION: PROCEDURE & TACTICS* § 2.02[6] (1971) (listing deference to the administrative

that juries are significantly more likely to hold a patent valid than invalid, and significantly more likely than judges to uphold the validity of a patent.⁴¹ The shorter and more obtuse the verdict, the easier it would be for bias and prejudice to impact the verdict. Because conventional wisdom and empirical research both suggest that juries are more likely to uphold the validity of a patent, patentees will prefer simple, single question verdicts and infringers will prefer multiple, detailed factual questions on their defenses.

Crafting meaningful detailed special verdicts on the validity defenses would be preferable; bias would be less likely to impact decision-making, and the district and appellate courts would be better equipped to review those verdicts. A common example is the issue of obviousness of the patent claims. Obviousness is a legal question based on a four-part factual test: (1) determining the scope and content of the prior art; (2) comparing the prior art to the claims at issue; (3) assessing the level of ordinary skill in the art; and (4) identifying objective considerations.⁴² Rather than asking the jury whether the patent claim at issue is obvious—or worse, simply asking if the patent is valid—the special verdict could ask the jury to answer each factual question in a detailed manner and leave the ultimate legal conclusion for the judge.⁴³ For example, in *Structural Rubber Products Co. v. Park Rubber Co.*, the court listed ten separate references that had been raised by the infringer in challenges to the validity of the patent.⁴⁴ The

determination of patentability as one factor that may influence the jury to find in favor of the patent holder); National Academies Committee, *supra* note 27 (noting that jurors are very impressed when “you get a big document with a blue ribbon on it that you can waive in court and say, look, this has a presumption of validity”).

41. See Moore, *Black Box*, *supra* note 2, at 390–92 (discovering that juries held patents valid in 71% of decisions, and judges held patents valid in 64% of decisions). For ease of discussion, I refer to patents as being held valid or invalid, but in actuality all patents have a presumption of validity. See, e.g., *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 714 (Fed. Cir. 1984) (noting that the presumption of validity is statutorily created). This means that courts can invalidate a patent, but the patent is already valid and need not be held valid.

42. See *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966) (interpreting the statutory requirement of nonobviousness for patentability).

43. For example, in *Sterling Drug, Inc. v. Intermedics, Inc.*, the court had the jury answer specific factual questions underlying the obviousness determination. Special Verdict Form, 670 F. Supp. 1347 (W.D. Tex. 1987) (No. CIV.A-82-CV-578) (copy on file with author). The court listed twelve references raised by the infringer as invalidating the patent and asked the jury to determine which of them were “within the scope of the prior art as to the syringe patent.” *Id.* It went on to ask the jury to identify the date of invention of the subject matter of the claims of the patent. *Id.*

44. Special Verdict Form, *Structural Rubber Prods. Co. v. Park Rubber Co.* (N.D. Ill.) (No. 79-CV-1223) (date unavailable) (copy on file with author) (the special verdict went into this level of detail on each obviousness determination for every claim of both patents at issue in the case).

court had the jury identify which references were “pertinent to the claims of the ‘051 patent.”⁴⁵ The court then had the jury determine whether each of the claims at issue would have been obvious to one of ordinary skill in the art.⁴⁶ The special verdict instructed:

If you answered “Yes” with respect to any of the claims of the ‘051 patent in response to question 2, identify with respect to each claim the prior art on which you based your conclusion that the claimed subject matter as a whole would have been obvious at the time the invention was made.⁴⁷

The special verdict then listed each of the three claims at issue with a line for the jurors to write in the particular references that they believed rendered the claim obvious.⁴⁸ Finally, question four asked the jurors to consider each of the possible objective considerations of obviousness:

Whether or not you found the subject matter of any claim of the ‘051 patent invalid under § 103 in response to question number 2, state below whether any of the following objective factors/secondary considerations regarding the ‘051 patent are established in the evidence:

Whether there was a long-felt need which the subject matter as a whole of the ‘051 patent fulfilled at the time the invention was made?

YES X NO

Whether others tried but failed to solve the problems addressed by the subject matter of the ‘051 patent?

YES NO X

Whether the subject matter as a whole of the ‘051 patent was praised by experts in the industry?

YES X NO

Whether the subject matter as a whole of the ‘051 patent was praised by the defendants?

45. *Id.* (noting that the jury found six of the references pertinent and four not pertinent).

46. *Id.* (stating that the jury found none of the three claims at issue had been proven to be obvious).

47. *Id.*

48. *Id.*

790

HOUSTON LAW REVIEW

[39:779]

YES X NO ___

Whether the defendants, in infringing the '051 patent, chose not to use the prior art Goodyear design?

YES X NO ___

Whether the defendants copied the invention of the '051 patent?

YES ___ NO X

Whether the plaintiff's SAF & DRI crossing achieved commercial success?

YES X NO ___

If you found commercial success as to the SAF & DRI crossing, was it attributable to the claimed invention in the '051 patent?

YES X NO ___

Whether the Parko crossing achieved commercial success?

YES X NO ___

If you found commercial success as to the Parko crossing, was it attributable to the claimed invention in the '051 patent?

YES ___ NO X⁴⁹

There are, of course, many ways these special verdicts could have been drafted that would test the jury's comprehension of the issues and provide meaningful reviewability.

B. Appellate Scrutiny

Appellate review of jury verdicts is less meaningful than appellate review of decisions by the court for two reasons. First, the standard of review the court employs when reviewing jury verdicts on factual questions, substantial evidence, is highly deferential.⁵⁰ It is technically more

49. *Id.* (noting that the jury found seven of the objective considerations had been established and three of them had not been established).

50. *See In re Zurko*, 258 F.3d 1379, 1384 (Fed. Cir. 2001) ("The substantial evidence

deferential than the standard applied to judge factfindings, clear error,⁵¹ although there is little practical difference between the two.⁵² Second, and more importantly, the black box nature of jury verdicts makes them virtually unreviewable.⁵³ Without any insight into the decision-making process, the court is unable to assess the accuracy of the decision or its analysis. In bench trials, the judge is required to articulate findings of fact and conclusions of law that explain and support her judgment.⁵⁴

The judge's findings, decisions, and reasoning are open to scrutiny by the appellate court. If the judge made erroneous factfindings or misapplied the law, the Federal Circuit can correct these errors on appeal. The jury's findings, however, cannot be dissected and reviewed by the appellate court, because the jury is not required to articulate reasoning for its judgments.⁵⁵

How then can the appellate court, without any detail as to the jury's decision-making, review a jury verdict? The Federal Circuit reviews jury verdicts by presuming the jury found all facts in the record in support of the court's judgment.⁵⁶ In short, the Federal Circuit presumes that all of the jury's reasoning was correct unless there are no facts in the record that would have supported that verdict. In addition to rendering jury verdicts virtually impenetrable, these types of verdicts are inefficient for the appellate court whose review is not focused, often requiring a review of the entire record to assess whether it contained substantial evidence.⁵⁷

standard has been analogized to the review of jury findings, and it is generally considered to be more deferential than the clearly erroneous standard of review.”).

51. See *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 719 (Fed. Cir. 1984) (“Findings of fact by the jury are more difficult to set aside (being reviewed only for reasonableness under the substantial evidence test) than those of a trial judge (to which the clearly erroneous rule applies).”).

52. See *United States v. Hill*, 196 F.3d 806, 808 (7th Cir. 1999) (noting there is little practical difference between clear error, substantial evidence, and abuse of discretion).

53. Refer to note 15 *supra* and accompanying text (discussing the difficulty in reviewing special verdicts).

54. FED. R. CIV. P. 52(a) (providing that the facts and conclusions may be stated orally in open court).

55. Moore, *Black Box*, *supra* note 2, at 400.

56. See *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir. 1991) (explaining that, in reviewing jury decisions, the court presumes the jury resolved all factual disputes in favor of the verdict).

57. See *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1361 (Fed. Cir. 1984) (discussing efficiency advantages when special verdicts are used).

II. FEDERAL CIRCUIT PROFESSES A LACK OF POWER TO HELP

The Federal Circuit has not been subtle about its preference for special over general verdicts in patent cases, but it does not mandate their use, much less their form. As early as 1984, just two years after the court's creation, the Federal Circuit criticized the failure of a district court to use special verdicts in connection with the issue of obviousness:

While the form of jury verdict is normally a matter of discretion with the trial court, one court has noted that the "failure to utilize this method in a patent case places a heavy burden of convincing the reviewing court that the trial judge did not abuse his discretion."⁵⁸

The Federal Circuit went on to explain that special verdicts facilitate appellate review and may help avoid lengthy retrials.⁵⁹ In a second case that same year, the Federal Circuit again recommended the use of special verdicts:

Concerns have been expressed by the patent bar that a jury trial creates a black box into which patents are thrown and emerge intact or invalid by an unknown and unknowable process. . . .

. . . .

. . . The decision of an appellate court is likely to be better focused when it is assisted [by special verdicts]. Otherwise the task of review may be unnecessarily comprehensive.⁶⁰

After extolling the virtues of special verdicts, the Federal Circuit went on to hold that:

Nevertheless, it must be left to the sound discretion of the trial court what form of verdict to request of a jury. Thus, we have held that a trial court may, with proper instructions, present a patent case to a jury for a general verdict encompassing all of the issues of validity and infringement, or may ask for a general answer on one or more specific legal issues, such as obviousness, a practice not specifically provided for in the Federal Rules.⁶¹

58. *Id.* (quoting *Baumstimler v. Rankin*, 677 F.2d 1061, 1071–72 (5th Cir. 1982)).

59. *See id.* ("Utilization of [special] verdict[s] . . . help[s] avoid lengthy retrials.")

60. *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 718, 720 (Fed. Cir. 1984) (encouraging the use of meaningful special verdict questions to aid the reviewability of jury determinations).

61. *Id.* at 720 (citations omitted). More recently, the Federal Circuit again strongly endorsed the use of special verdicts but stopped short of mandating them:

Given the nuances of patent law combined with the added complications of technology, the advantages of a special fact verdict are even more pronounced. This court early made the point that "[t]he utilization of Rule 49(a) appears to us

In *Railroad Dynamics, Inc. v. A. Stucki Co.*,⁶² the court appeared to retreat even further from requiring special verdicts, stressing the broad authority and discretion of the federal district courts to control the conduct of a trial, including the form in which juries return verdicts.⁶³ The court warned against the use of special and unauthorized procedural rules in patent cases:

When and if Rules 49, 50, and 51, Fed. R. Civ. P., are repealed, there may be room for the restriction of juries to a fact finding role and for prohibition of general verdicts in patent or other types of jury trials. Until that day, a prohibition of general verdicts (and disregard of the findings and legal conclusions a jury must make in reaching those verdicts) cannot be accomplished by judicial fiat.

There is, of course, no reason for considering patent cases as somehow out of the mainstream of the law and rules of procedure applicable to jury trials for centuries under our jurisprudence. . . . The comparatively recent resurfacing of jury trials in patent cases, though productive of discomfort for some judges and commentators, may or may not be wise or welcome; it forms no basis for creation of special and unauthorized rules, or for the consequent risk of effectively denying the constitutional right spelled out in the first clause of the Seventh Amendment.⁶⁴

Nevertheless, the court reiterated its view that, when obviousness is at issue, special verdict forms or interrogatories on the *Graham* factors⁶⁵ should be employed, stating that:

The role of the trial judge in deciding upon motions for JNOV and new trial, and that of this court on review, are greatly facilitated when the jury has answered a series of factual inquiries in writing. When obviousness is an issue, interrogatories seeking answers in writing to inquiries drawn about those listed in [*Graham*], insofar as the evidence adduced at trial relate to those inquiries, should be employed. . . .

as a particularly useful tool in conserving judicial resources and in effectuating the Congressional policy expressed in the patent laws." The Supreme Court recently emphasized that patent cases are particularly well suited for special verdicts. In many cases counsel would be well advised to request special verdicts, and in any event trial judges may exercise their broad authority over their trials by utilizing this procedural device.

Richardson-Vicks, Inc. v. Upjohn Co., 122 F.3d 1476, 1485 (Fed. Cir. 1997) (citations omitted).

62. 727 F.2d 1506 (Fed. Cir. 1984).

63. *Id.* at 1515.

64. *Id.* at 1514–15.

65. Refer to note 42 *supra* and accompanying text (describing the four-part factual test set forth in *Graham v. John Deere Co.*, 383 U.S. 1 (1966)).

Failure to submit detailed fact interrogatories will not in every case result in the need for a new trial. The practice is nonetheless strongly recommended as an appropriate means of guiding a jury, increasing the reliability of its verdict, and facilitating the judicial role following a jury trial.⁶⁶

The court even attached an appendix providing detailed examples of the proper form of interrogatories.⁶⁷

Although the Federal Circuit has not required special verdicts even in limited circumstances, such as cases involving the issue of obviousness, validity, or the doctrine of equivalents, some regional circuits have required special verdicts on underlying factual issues in patent cases. For example, despite the fact that the Fifth Circuit recognized that the district court has discretion over the manner in which matters are submitted to the jury, it ruled that it would almost always be an abuse of discretion to fail to use special verdicts for the resolution of the issue of obviousness. In this regard, the court stated that:

Special interrogatories under Rule 49(a), whose songs of praise we have repeatedly sounded, have especial value in a patent case tried to a jury. . . . While the use of special interrogatories is left to the sound discretion of the trial judge, failure to utilize this method in a patent case places a heavy burden of convincing the reviewing court that the trial judge did not abuse his discretion.⁶⁸

The Seventh Circuit went even further, requiring the use of special verdict forms in patent cases dealing with obviousness. In *Dual Manufacturing & Engineering, Inc. v. Burriss Industries, Inc.*,⁶⁹ the Seventh Circuit stated:

In considering this case we feel compelled to remark that it is an excellent illustration of the wisdom of this court's observation that "members of the Patent Bar have wisely avoided jury trials in patent litigation." A persuasive clue as to the jury's misunderstanding of what was involved in this case is provided by the fact that the jury found infringement by a chair which everyone agrees did not infringe. We do, because of the troublesome questions which seem to arise frequently where a complex patent case is

66. *Id.* at 1516–17 (citations omitted).

67. *Id.* at 1522–23 (displaying an appropriate interrogatory form). Surprisingly, almost none of the special verdict forms actually used in jury trials use this model form endorsed by the Federal Circuit.

68. *Baumstimler v. Rankin*, 677 F.2d 1061, 1071–72 (5th Cir. 1982) (footnote omitted).

69. 619 F.2d 660 (7th Cir. 1980) (en banc).

submitted to a jury of lay people, think, under our supervisory power, that it is appropriate to make the following observations on the use of special verdicts in patent cases when the issue is obviousness. Because only issues of fact subsidiary to the legal question of obviousness are within the province of the jury, its resolution of those issues of fact should ordinarily be articulated in special verdicts under Rule 49(a), Fed. R. Civ. P. The same result may be achieved by special interrogatories returned with a general verdict under Rule 49(b), a device primarily designed to test the jury's application of the law in reaching a general verdict

. . . .

. . . [T]he special verdict device may allow the jury, if one is utilized, to serve a useful function in resolving specific contested issues as to the concrete facts, and it should be used.⁷⁰

The Seventh Circuit, exercising its supervisory powers, mandated the use of special verdict forms.⁷¹

The question then is whether the Federal Circuit, when it inherited exclusive jurisdiction over patent appeals from the regional circuits, also inherited supervisory powers over the district courts in patent cases. If the Federal Circuit has supervisory power over the district courts, then it can mandate the use of special verdicts in limited circumstances, just as the Seventh Circuit did, without conflicting with the Federal Rules of Civil Procedure. The following sections explain the current Federal Circuit choice of law rules and how the court can mandate the form of special verdicts on patent issues.

A. *Federal Circuit Choice of Law Rules*

The Federal Circuit, being uniquely situated as a court with exclusive jurisdiction over patent appeals, entertains all appeals of patent cases from any of the nation's ninety-four district courts.⁷² Hence, a copyright or trademark case that originates in a district court would be appealed to the regional circuit, as would most other kinds of civil actions; but a patent infringement suit in the same district court would be appealed to the Federal

70. *Id.* at 667 (footnotes omitted); *see also* *Roberts v. Sears, Roebuck & Co.*, 723 F.2d 1324, 1340 (7th Cir. 1983) (affirming the *Dual Manufacturing* court's conclusion that special verdicts should be used).

71. *See Dual Manufacturing*, 619 F.2d at 667.

72. 28 U.S.C. § 1295 (2000).

Circuit.⁷³ Recognizing that most district court cases are appealed to a regional circuit, and in an effort to minimize confusion for the district court, the Federal Circuit adopted a choice of law rule wherein the district court should apply the law of the regional circuit to all procedural issues unless the procedural issue is related to substantive matters “unique to” patent law.⁷⁴ The court remarked that, “[d]ealing daily with such procedural questions in all types of cases, a district court cannot and should not be asked to answer them one way when the appeal on the merits will go to the regional circuit in which the district court is located and in a different way when the appeal will come to [the Federal Circuit].”⁷⁵ The result, according to the Federal Circuit, is that interpretation of the Federal Rules of Civil Procedure requires deference to the law of the regional circuit in order to maintain uniformity in district court trial management.⁷⁶

B. Federal Circuit Supervisory Powers

The Federal Circuit has held that it does not possess supervisory power over the district courts.⁷⁷ Therefore, the court cannot use this authority to mandate the use of special verdict forms as the Seventh Circuit did before the Federal Circuit’s creation. The *In re Innotron Diagnostics*⁷⁸ court held:

This court recognized that *administration, supervision, management, and overseeing* of the courts within a regional circuit are the sole province of that regional circuit and its Circuit Council. Unlike those bodies, this court is not an “administrator,” “supervisor,” “manager,” or “overseer” of

73. See *id.*

74. See *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574–75 (Fed. Cir. 1984).

75. *In re Int’l Med. Prosthetics Research Assocs., Inc.*, 739 F.2d 618, 620 (Fed. Cir. 1984).

76. See *Biodex Corp. v. Loredan Biomed., Inc.*, 946 F.2d 850, 857–58 (Fed. Cir. 1991) (noting that the Federal Circuit practice is to defer to regional circuit law for issues involving interpretation of the Federal Rules of Civil Procedure).

77. See *In re Mark Indus.*, 751 F.2d 1219, 1222 (Fed. Cir. 1984) (“This court has no administrative authority over any district court.”); *In re Oximetrix, Inc.*, 748 F.2d 637, 643 (Fed. Cir. 1984) (“This court lacks the general authority over district courts exercisable, for example, under 28 U.S.C. § 332.”); *Petersen Mfg. Co. v. Cent. Purchasing, Inc.*, 740 F.2d 1541, 1552 (Fed. Cir. 1984) (“Unlike other Circuit Courts of Appeal, we have no direct supervisory authority over district courts.” (citation omitted)); *In re Int’l Med. Prosthetics Research Assocs., Inc.*, 739 F.2d at 619 (stating that “this court is devoid of [supervisory] authority”); *C.P.C. P’ship & Bardot Plastics, Inc. v. Nosco Plastics, Inc.*, 719 F.2d 400, 401 (Fed. Cir. 1983) (noting that “[t]he [Federal Circuit] has no general authority to issue a writ of mandamus directed to a district court judge sitting in another circuit”); *Miss. Chem. Corp. v. Swift Agric. Chems. Corp.*, 717 F.2d 1374, 1380 (Fed. Cir. 1983).

78. 800 F.2d 1077 (Fed. Cir. 1986).

the district courts. Hence this court said it lacked the general authority set forth in 28 U.S.C. § 332, and that it lacked “administrative authority,” “direct supervisory authority,” and “general authority.” Those phrases were aimed primarily at petitions in category (1), because this court has no congressionally granted authority to inject itself into the business-like elements of the administration of justice within the regional circuits.⁷⁹

To the extent that the Federal Circuit’s conclusion that it does not have supervisory power over the district courts dictates that the court is unable to require the district courts to use detailed special verdict forms when the jury resolves certain patent issues, I disagree. The next section outlines my belief that the Federal Circuit does in fact, under its own choice of law rules, possess the power to mandate the form of the special verdict even if it lacks supervisory power over the district courts.

III. FEDERAL CIRCUIT IMPERIALISM

Although the Federal Circuit has been reluctant to exercise control over the form of jury verdicts in patent cases, the Supreme Court has suggested otherwise. In *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*,⁸⁰ the Supreme Court noted:

With regard to the concern over unreviewability due to black-box jury verdicts, we offer only guidance, not a specific mandate. . . . Finally, in cases that reach the jury, a special verdict and/or interrogatories on each claim element could be very useful in facilitating review, uniformity, and possibly postverdict judgments as a matter of law. We leave it to the Federal Circuit how best to implement procedural improvements to promote certainty, consistency, and reviewability to this area of the law.⁸¹

If the Federal Circuit decides that special verdict forms are the appropriate procedural mechanism to “promote certainty, consistency, and reviewability” in patent law, how can it carry out the Supreme Court’s mandate? The Federal Circuit has two options. First, *the indirect modest route*—the court could persuade district courts to utilize detailed special verdict forms when deciding doctrine of equivalents issues by holding that it is an abuse of discretion⁸² each time the court fails to do so. The

79. *Id.* at 1086 (footnote omitted).

80. 520 U.S. 17 (1997).

81. *Id.* at 39 n.8 (citation omitted).

82. Currently, the regional circuits review a district court’s refusal to submit special verdict forms or interrogatories to the jury under the abuse of discretion standard. *See,*

court could hold that the general special verdicts provided do not provide the court with an adequate basis to review the jury's decision.⁸³ After cases are consistently remanded for retrial, district courts will begin to use these special verdict forms.⁸⁴

In this way, it does not matter if the court concludes that the form of the verdict is a matter of regional circuit law rather than Federal Circuit law. The only problem with this proposal is that at least one regional circuit, the Seventh Circuit, explicitly requires the use of detailed special verdicts for the facts underlying an obviousness inquiry. Does this mean that when patent cases are appealed from a district court within the geographic boundaries of the Seventh Circuit, the Federal Circuit would require detailed special verdicts, but when the appeal comes from another jurisdiction, it would not? This scenario would become unnecessarily confusing for the court and litigants, likewise creating incentives for forum shopping among the district courts in patent cases that are in direct conflict with the court's congressional mandate to make patent law uniform and without forum shopping.⁸⁵

The second option, *a more direct but still modest route*, is to require district courts to use special verdict forms outright under the court's authority to dictate matters of procedure that are "unique to" patent law.⁸⁶ The court does not need to assume or claim supervisory powers over the district court to require a certain level of specificity in verdict forms on particular patent issues. Although the Federal Circuit, in its *In re Innotron Diagnostics* opinion, clearly held that it did not have supervisory authority over the district courts, it defined such supervisory

e.g., *Bularz v. Prudential Ins. Co.*, 93 F.3d 372, 377 (7th Cir. 1996); *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995); *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 190 (4th Cir. 1994); *Bissett v. Burlington N. R.R. Co.*, 969 F.2d 727, 732 (8th Cir. 1992).

83. See Robert N. Young, *Judge Versus Jury on the Scales of Justice: 35 U.S.C. § 112, P 6 "Equivalents" in the Balance*, 32 J. MARSHALL L. REV. 833, 861 (1999) (proposing that the Federal Circuit endorse the use of special verdicts for equivalents because the current deferential standard raises concern that judgments are unassailable).

84. Of course, I must acknowledge that the Federal Circuit does not have frequent opportunities to address the adequacy of the special verdict forms because parties seldom object to their form and preserve the objections for appeal. See Paul R. Michel & Michelle Rhyu, *Improving Patent Jury Trials*, 6 FED. CIR. B.J. 89, 105 (1996) (discussing the various duties of patent lawyers).

85. S. REP. NO. 97-275, at 20-21 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 29-30 (discussing the problem of forum shopping).

86. At least one Judge of the Federal Circuit, Paul R. Michel, has argued that the court may be able to mandate the use of special verdict forms on the issues of obviousness and the doctrine of equivalents in order to improve the reviewability of these issues when appealed from a jury verdict. See Michel & Rhyu, *supra* note 84, at 102-03 (discussing the possibility of mandating special verdicts under special circumstances).

authority narrowly to include the general business area of the court, “e.g., assignment of judges, adjustment of calendars, transfer of case to another district, [or] reference to master.”⁸⁷ The *Innotron* court went on to hold that the matter in question, whether patent issues should be separated for trial, did not fall within the general business area of the court, which is the sole province of the regional circuits.⁸⁸ The court held that it would entertain petitions for writs in patent cases because there is minimal potential for confusion in the district courts, because the Federal Circuit is the exclusive source of substantive patent law, and because the different guidance on procedure would be minimal.⁸⁹

Similarly, the specificity of the special verdict form on certain discrete patent issues, such as obviousness or the doctrine of equivalents, is not an issue that would ever be appealed to another court, is subject only to Federal Circuit law on the underlying substantive legal issues, and would impose minimal procedural difference on the district court. In fact, district court judges will likely appreciate the guidance from the Federal Circuit on the form of the verdicts.⁹⁰ Certainly, the form of the special verdict on the issue of obviousness is “unique to” patent law and, even if procedural, ought to require Federal Circuit rather than regional circuit law.

Like *Biodex Corp. v. Loredan Biomedical, Inc.*,⁹¹ where the Federal Circuit held that “the reviewability *on appeal* of fact finding made by a jury in a patent trial absent any post-verdict motion[]” is an issue unique to patent law and therefore subject to Federal Circuit rather than regional circuit law, the form of a jury verdict similarly impacts the reviewability of the patent issues on appeal.⁹² Both of these issues, reviewability on appeal of a jury verdict absent a post-verdict motion and reviewability on appeal of the form of the jury verdict, pertain to specific patent issues and relate to the Federal Circuit’s exclusive jurisdiction: “appellate review of patent trials.”⁹³

87. 800 F.2d 1077, 1082 (Fed. Cir. 1986).

88. *See id.* at 1083.

89. *See id.* (recognizing that this issue does not arise in cases in which the regional circuit courts have jurisdiction).

90. Of course, I am not suggesting that the Federal Circuit issue sample special verdict forms that ought to be employed in all cases or issue an advisory opinion on special verdict forms. The court will have to await an opportunity to consider the issue in a properly raised appeal.

91. 946 F.2d 850 (1991).

92. *Id.* at 858–59 (discussing the importance of uniformity in review of patent trials).

93. *Id.* at 859.

The Federal Circuit has held that whether personal jurisdiction attaches to a particular party is unique to patent law;⁹⁴ therefore, it makes little sense to conclude that the form of jury verdicts on particular patent law issues is not unique to patent law. The *modest* proposal of this Essay is that the Federal Circuit should accept that the application of its own choice of law rules gives the court the ability to control the form of jury verdicts as to particular patent issues.

The *ambitious* proposal of this Essay is to suggest further research into changing the Federal Circuit's choice of law rules altogether. While seemingly straight-forward, the current choice of law rule, requiring the court to apply regional circuit law on a procedural issue unless it is "unique to" patent law, has proven elusive in practice. To determine whether the district court ought to apply the regional circuit law or Federal Circuit law to a particular procedural issue, the district court must determine whether the procedural issue is "unique to," "relates to," or "pertains to" patent law. The problem with this rule is that it is difficult to determine in the first instance whether a procedural issue is "unique to" patent law.⁹⁵ In addition, under this rule, if regional circuit law ought to apply, and the regional circuit has not spoken to a particular issue, the Federal Circuit is left to predict how the regional circuit would rule on the issue and decide the case accordingly.⁹⁶

Perhaps the Federal Circuit should apply its own law to all procedural issues arising in patent cases. One argument against applying Federal Circuit law to all procedural issues is that, until each issue reaches the Federal Circuit for resolution, the district courts will be without guidance as to how the court will likely interpret or rule on a particular procedural issue. There are several responses. First, over time, this problem would correct itself as the court precedent evolves. Second, this exact situation already arises under the present law when the regional circuit has not addressed a particular procedural issue, and the district

94. See *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1565–65 (Fed. Cir. 1994) (noting that, in a case involving the assertion of personal jurisdiction, the Federal Circuit "owe[s] no special deference to regional circuit law").

95. For example, the Federal Circuit has held that the issue of whether a party is entitled to costs as a "prevailing party" pursuant to Federal Rule of Civil Procedure 54(d) is an issue unique to patent law. See *Manindra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1181–82 (Fed. Cir. 1996). Similarly, whether a court has personal jurisdiction over the defendant is an issue unique to patent law. See *Beverly Hills Fan Co.*, 21 F.3d at 1564–65. For a discussion of the *res judicata* effect of consent judgments in patent cases, see *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 475 (Fed. Cir. 1991).

96. See, e.g., *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1362 (Fed. Cir. 1990) (predicting how the Sixth Circuit would rule on sanctions in discovery rules).

court must predict how its regional circuit will rule.⁹⁷ Moreover, if there is a uniform position on a particular procedural issue among the circuits, it is likely that the Federal Circuit would rule consistently. Like other commentators, I find the Federal Circuit's current choice of law rules unsatisfying⁹⁸ and believe this avenue is ripe for further research into whether a blackletter rule—wherein Federal Circuit law would apply to all procedural issues in patent cases—might be superior to the current choice of law rules.

IV. CONCLUSION

This Essay examines the inadequacies of jury verdicts in patent cases. Jury resolution of patent cases has come under significant scrutiny in recent years amidst complaints that juries are not competent and qualified to resolve the technically sophisticated patent cases that they are increasingly called upon to resolve. Unfortunately, because of the black box nature of jury verdicts, these criticisms cannot be substantiated or refuted, and reform efforts are difficult to mount. This Essay proposes that the Federal Circuit mandate the use of meaningful special verdict forms for discrete patent issues such as obviousness and equivalents. Such a mandate would increase the reviewability, accuracy, and efficiency of the jury verdicts, ultimately improving confidence in the judicial system. It would also help focus reform efforts geared towards improving patent adjudication. Although an increase in the reviewability of jury verdicts likely would increase the number of verdicts that are reviewed, thereby increasing the number of appeals, it could decrease the number of cases that actually go to trial.⁹⁹ The proposal in this Essay attempts to balance the necessary and often conflicting goals of

97. See, e.g., *Snap-on Inc. v. Hunter Eng'g Co.*, 29 F. Supp. 2d 965, 971 (E.D. Wis. 1998) (predicting how the Seventh Circuit will rule on the issue of inadvertent waiver of the attorney-client privilege).

98. See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 61–62, 64 (1989) (arguing in favor of the Federal Circuit creating its own procedural law); Charles L. Gholz, *Choice of Law in the United States Circuit Court of Appeals for the Federal Circuit*, 13 AM. INTELL. PROP. L. ASSOC. Q.J. 309, 314 (1985) (contending that the current Federal Circuit choice of law rules create uncertainty and encourage forum shopping); Joan E. Schaffner, *Federal Circuits "Choice of Law": Erie Through the Looking Glass*, 81 IOWA L. REV. 1173, 1192 (1996) (criticizing the Federal Circuit's choice of law rules that require deference to regional circuit law).

99. The party that goes to trial hoping to win the lottery (as juries have often been compared) may be less likely to do so when such verdicts are subject to meaningful scrutiny by the district court on judgment as a matter of law and the Federal Circuit on appeal.

certainty and accuracy in the adjudication process. Although the black box nature of current jury verdicts infuses the system with great certainty, because these verdicts are very difficult to appeal for lack of ability to conduct meaningful review, they sacrifice accuracy and confidence in the adjudication system to an extent that cannot be tolerated.

As this Essay demonstrates, the Federal Circuit is empowered to dictate the form of the special verdict under its existing choice of law rules. Similar arguments could be made for jury instructions, which go hand-in-hand with special verdict forms.¹⁰⁰

100. See Gerald J. Mossinghoff & Donald R. Dunner, *Increasing Certainty in Patent Litigation: The Need for Federal Circuit Approved Pattern Jury Instructions*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 431, 436-37 (2001).