# Strategy, court specialization driving increase in smart-phone litigation

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The flurry of smart-phone patent suits at the U.S. International Trade Commission (ITC) is being driven by technology companies eager to capitalize on the speed and expertise of the specialized venue, says a University of Illinois patent strategy expert.

Business professor Deepak Somaya says that this current wave of patent litigation is a "clash driven by company strategies."

"Smart phones combine lots of amazing innovation from both computing and mobile telephony, and technology companies are seeing their patents as a potential source of leverage, as something that can help them improve their competitive position against other firms seeking to take advantage of this great confluence of technologies," he said. "When these firms go court shopping for filing patent cases, many of them are choosing to target the ITC over the more typical forum of the federal district courts."

In research that will appear in the management journal Organization Science, Somaya and co-author Christine McDaniel, an economist with the ITC, investigated when companies targeted the ITC over the district courts for their import-related patent disputes. They found that company strategy, the nationality of the defendant and prior experience with the ITC were significant factors when firms went court shopping for filing patent cases.

"Almost all the research on court-shopping is focused on the policy of

the court – is this likely to be a favorable or unfavorable court?" Somaya said.

However, the main difference between the ITC – an independent, quasi-judicial federal agency that hears trade-related patent cases under section 337 of the Smoot-Hawley Tariff Act – and district courts is the degree of specialization found at the ITC.

"At the ITC, 85 percent of cases involve patent issues, whereas the typical district court judge gets one patent case every five years," Somaya said. "Most of the time the district courts are dealing with criminal cases and civil suits. So a district court is a very general purpose forum, whereas the ITC is a highly specialized one. And this specialization goes hand-in-glove with the venue's speed and expertise, which can be very important for some patent cases, depending on the company's strategy."

Taking a patent dispute to the ITC requires that the patent infringement be import-related. Once its criteria are met, however, the ITC "becomes very attractive for a particular type of patent dispute – one in which the company's strategy requires a quick and reliable decision," Somaya said.

And, according to Somaya, it is the company strategy aspect that has been attracting more smart-phone patent litigation to the ITC.

"Patent cases are usually very complicated, and can take up a lot of time and money to resolve," he said. "But since the ITC has a streamlined and fast procedure, you don't have the same burden of educating a judge or jury about what the technology is, what the relevant case law is, and so on. There is a lot of expertise in the forum already, so the adjudication is fast, less random and, relatively-speaking, cost effective."

The one disadvantage to specialized venues such as the ITC is that

they're less conducive to settling outside of court.

"Specialized venues don't leave much room for either party to play out the negotiation game," Somaya said. "If you're thinking about settling, which can be very cost effective in patent disputes, you often need more time – time to conduct negotiations, time for both sides to adjust their expectations, time to devise a mutually acceptable agreement. Going to the ITC might instead rush you through adjudication and force you to incur all the accompanying costs.

"In that case, you may be better off going to a district court simply to have the time and flexibility to negotiate a settlement."

Time, however, is the one resource that companies like Nokia, Apple and Motorola – all currently embroiled in patent litigation at the ITC – don't have.

"When the dispute involves a pivotal fast-moving technology, time is of the essence," Somaya said. "Additionally, these smart-phone patents have very high strategic stakes for firms, so you have a situation that might be very difficult for the two parties to settle on."

Once a firm has reached this point-of-no-return with litigation, it makes sense to go with the cheaper, faster, and more expert venue, which is usually the ITC, Somaya says.

"Essentially, there's so much at stake for the company owning the patents that they don't see an easy way to settle the dispute, so what they really need is a court decision in their favor," he said. "A company such as Apple simply wants to shore up the competitive advantage of the iPhone, and may not see much point in trying to negotiate a settlement."

Provided by University of Illinois at Urbana-Champaign