Introduction

“How do you persuade skeptical jurors? The ‘magic’ is hard work, good luck, and some facts, with a deep appreciation of the process and landscape. Think of the Mona Lisa, and her curious smile.”

— Morgan Chu

I. Introduction: Your Patently Unique Niche

The door closes, and a group of men and women who knew nothing of one another before trial began stare at a mountain of evidence and a list of strange and complicated questions they must answer before they can return home to their families and their lives. The substantive conversation begins something like this:

<table>
<thead>
<tr>
<th>Juror Dave</th>
</tr>
</thead>
<tbody>
<tr>
<td>“The first thing we need to do is determine the meaning of a patent. What does it mean to have a patent in this situation?”</td>
</tr>
<tr>
<td>Even by the point of deliberations, many jurors still have misconceptions about what a patent does and does not cover, and what gives a patent value. In Chapter 5 we offer strategies for presenting your most persuasive “validity or invalidity” case.</td>
</tr>
</tbody>
</table>

### Juror Sam

“Well, we know a patent exists because a patent was awarded. What else is there to know?”

A strong majority of jurors give great deference to the United States Patent & Trademark Office. We discuss who is more likely to show this deference and how you can address it in Chapter 3 on jury selection in patent cases.

### Juror Ellen

“If the Plaintiff has a patent, then where is the product? They have no product! It’s just an idea floating in the wind. You can’t patent that!”

Most jurors clamor to see the tangible value of a patent in product form and are always curious about how the product might affect them personally. In Chapter 4 we discuss ways to appeal to jurors’ own values in your opening statement.

### Juror Dave

“Maybe, but infringing means taking what has already existed. The infringing company took it and only changed some little tiny thing. They basically copied it. But Payton made it first. This big company just took it and changed it a little so they could make a bunch of money.”

Deliberations is not the time to first anticipate jurors’ street definitions and interpretations of the key issues in your case, including their interpretations of what is or is not infringement under your case facts. See Chapter 2 for ways to persuade during the Markman process, focus your case early, and develop persuasive themes with the court that can last through trial.
<table>
<thead>
<tr>
<th>Juror Ellen</th>
<th>Most jurors assume profit motive and aggressive competition as part of the corporate landscape. In a case involving a corporation as the accused infringer or an NPE (non-practicing entity) as a patent holder, jurors’ perceptions can be magnified. In this chapter we discuss perceptions of corporate litigants in patent disputes.</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Well, I think it’s just that the first patent—Payton’s patent—didn’t work. There was no product, so the corporation waited awhile and went and changed it a little bit so they could make the same basic product, but make something that worked.”</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Juror Dave</th>
<th>For plaintiffs and defendants, the invention story is one of the most unique and critical parts of a persuasive position in a patent infringement dispute. In Chapter 4 we discuss ways to present your infringement/noninfringement case.</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Payton patented a method for making a product and described how to make the product. There are lots of ways to skin a cat, but this company infringed because they made the product just like they outlined in the patent. That is clear. You can’t do that, no matter who you are.”</td>
<td></td>
</tr>
</tbody>
</table>
Juror Ellen

“Come on! They were probably working on this exact same idea the entire time Payton was. You’re assuming that everyone else was stupid and Payton was the only one who could have come up with this idea. That’s not what happens in real life. Everyone is trying to make the same new widgets, and the corporation figured out how to make it work where he could not.”

A patented product’s utility is often a key consideration for determining the value (and validity) of the patent itself. Jurors presume competition in the marketplace, and as consumers they appreciate the party that produces the best (and cheapest) product—as long as that party also played fair along the way. While your case doesn’t hinge on the consumer product, it is something the jury often considers.

Juror Sam

“Yeah, but it’s still Payton’s idea. Maybe they tweaked it a little bit, but it’s not their idea and it never was. They needed Payton’s idea to make their product. I think they infringed. I think they owe him everything they made on that thing.”

At the end of the day, jurors’ emotional reactions to the case facts are powerful motivators. Parties’ behavior matters, and jurors’ motivations are often filtered through their perceptions of the parties’ conduct as much or more than the legal standards of infringement. Chapter 6 recommends strategies for enhancing and defending money damages.

In the next stage of deliberations, jurors go into great depth about the invention and the individual or team that invented it, as well as everything that happened in the process of taking a novel idea, developing it into something patentable, securing a patent, and (typically) trying to make a product. In cases with individual patentees, jurors describe it as the “American Dream,” and have a hard time pulling the American Dream out from underneath someone with whom they have far more in common (e.g., an inventor plaintiff) than they have with a faceless defendant corporation. When the patentee is a corporation or non-practicing entity, jurors consider how the invention came about, how and why the current patent owner pursued the patent, and what that conduct says about it as a litigant. Jurors rely on their own experiences and share stories of the things that
have happened to them and how those experiences influence their views of the case. Then they typically talk about the defendant’s conduct in the case, often in the biased context of the evils of corporate America. Jurors weigh their inherent anti-corporate bias against the values of innovation and technological advancement born from the research and development wings of America’s corporate giants. When the patentee is a corporate entity or non-practicing entity, jurors rely on their collective experiences as the context under which they decide a case.

On which side do the scales of justice typically fall? Do they favor the inventor or the corporation that delivers the products jurors want and need to their local retail stores? Do they favor the non-practicing entity that bought a patent portfolio or the manufacturing company accused of infringing hard-earned patents? To what extent does the historic folklore of American inventions and world-changing patents become entangled in jurors’ and judges’ views of today’s patent lawsuits?

“[The Plaintiff] went in his garage and started this whole thing up by himself. He did everything by the book like he was supposed to. [The accused infringer] didn’t do that. And if [the accused infringer] wanted to do that, they have to come up with a whole new system that’s not the same as what he had.”

—Patent Mock Juror

We study federal judges and potential patent jurors across the United States, exploring what they think about the issues and arguments in patent lawsuits, and their answers might surprise you. Three-fourths of potential jurors (75%) believe an issued patent is often or almost always innovative and unique, and 74% also believe it is difficult to obtain a patent for an invention today.

2. Data is cited from *Persuasion Strategies 2008 Federal Judge Survey*. Persuasion Strategies surveyed a total of 105 federal court judges and federal magistrate judges in April 2008. The survey assessed opinions of attorneys, attorney performance, corporations, litigation, and the patent system. Of the 105 respondents, 52% were appointed by Republican presidents and 48% by Democratic presidents. Sixty-two percent reported presiding over 50 or more trials, 67% have served on the federal bench for 11 years or more, and 97% have presided over an intellectual property lawsuit.

3. Data is cited from *Persuasion Strategies Annual National Juror Surveys*, including years 2003–2011. Persuasion Strategies surveys 200 to 500 jury-eligible Americans every year. The survey of randomly selected jury-eligible respondents assesses attitudes and opinions regarding a variety of legal issues, including attitudes and opinions of patents and the patent system. In 2011 and 2012, the survey was conducted in conjunction with K&B National Research.

When the U.S. Patent and Trademark Office (USPTO) issues an inventor a patent for an invention, it means that invention is innovative and unique:

Potential jurors and judges have overwhelmingly positive views of patents; 98% of federal judges⁵ and 94% of potential jurors⁶ support the practice of protecting inventions with patents. At the same time, potential jurors support competitive (read inexpensive) alternatives in the consumer market, and nearly one in three (a combined 31%) say the patent process somewhat or strongly hurts competition. Jurors’ views of patents are complicated by their inherent trust that patents protect innovation and their desire to experience directly the benefits of a competitive consumer market.

---

Would you say the patent process:

![Bar Chart]


These and other data inform the overarching question: How do juries (and judges) decide patent cases? What can attorneys do to more effectively persuade fact finders?

**A. The Jury: Your Patently Unique Fact Finder**

You know it to be true, but you may not know all the reasons why patent juries are unique. First, outcomes of patent trials by jury are statistically different from outcomes of patent decisions by a judge, particularly when an individual patentee is involved. Approximately one in every five patent infringement lawsuits involving individual patentees is resolved on summary judgment. Of those cases, 87% are resolved in favor of accused infringers. Individual patentees are far more likely to lose at summary judgment—when a judge determines the outcome—than are corporate patentees. Even when a patentee proceeds with a bench trial, patentee success rates are much lower than in jury trials.

So why do patentees continue to file patent infringement lawsuits? It’s an easy answer, supported by Persuasion Strategies National Juror Survey (hereinafter National Juror Survey) data cited above as well as trends in patentee win rates in jury trials. Despite the “loss rates” when judges evaluate claims at the summary judgment, trial, and appellate stages, patentees win nearly two-thirds of jury trials. Individual litigants win 64% of all patent trials, and individual patentees win

---


78% of jury trials when the accused infringer is a corporation. These statistics support the conclusion that the disposition of patent cases resolved by jury trial is substantially different from that of patent cases resolved by the court. Pretrial jury research and mock jury data also show us that jurors react uniquely to patent disputes, particularly when a corporation is involved. Mock juror comments like the statement below are not uncommon when jurors perceive an individual inventor standing up to a corporation.

“[This case] is about a small guy getting run over by big companies, because he tried to come up with an idea, he tried to run with it, but these big companies, knowing what they are doing, kind of ran over him.”

—Patent Mock Juror

The jury research, survey data, and the human stories that illuminate both may surprise you. Based on years of public and private research, direct experience observing and interviewing potential and actual patent jurors, and work with trial counsel on how best to persuade jurors in complex cases, we shed light on how patent infringement juries make decisions and how trial counsel can more effectively persuade individual jurors. Consider a few examples:

- Identify your opponent’s strongest case—whether it deals with infringement or patent validity—and aim your case themes toward the tougher audience on the jury. While it may surprise you, jurors who are high-risk in your patent infringement case may not be the same jurors who are high-risk in your patent validity case.
- Develop an “aha” moment in your invention story even where none exists. We offer a few alternatives to patent holders and accused infringers for helping jurors see the invention story as a compelling and persuasive narrative of the time, toil, and trial and error that went into an idea or invention.
- Make jurors’ trust in and respect for the Patent and Trademark Office an advantage at trial regardless of whether you are an accused infringer or a patent holder.
- Teach jurors about patent invalidity by first making abundantly clear how a patent applicant should behave when applying for a patent and how the Patent and Trademark Office behaves when issuing a valid patent. Teaching

10. Moore, supra note 7.
how a patent should be issued will help jurors more easily understand the concept posed in a positive way. Second, it allows you to subtly present the patent holder’s options had she gone through the patent process in a legitimate manner.

These and other strategic recommendations flow directly from what we know about patent jurors. One thing we know with certainty is that jurors’ views of patent lawsuits are heavily influenced by their views and evaluation of the patent system.

II. Juror Perceptions of the American Patent

“If a budding Edison feared that the rewards of his inventive efforts would be reaped by copyists—copyists who did not even bear the costs of original research—he might abandon the laboratory for other pursuits.”

—A. L. Durham, law professor

Thankfully, jurors are persuaded by evidence, and strength of evidence is a substantial predictor of jury decision making—but it is not the only thing that influences jury decision making. In our experience, jurors’ perceptions of extralegal factors such as the credibility of industry regulators, the public perception of the respective litigants, and jurors’ perceived personal relevance to the parties’ conduct are more important in patent trials than in other types of jury trials. That may sound like an extreme declaration. No doubt, jurors’ perceptions of extralegal factors are important in other case types too. Jurors’ feelings about their own employment experiences are central to employment termination disputes. Their perceptions of the highly criticized oil and gas industry are critical in any case involving claims against an oil and gas producer. Construction delay, personal injury, and medical malpractice cases are all significantly impacted by jurors’ perceptions of factors not specifically introduced during trial—factors that will never be evidence. Litigators going to trial in any civil case must consider and address the relevant extralegal factors.

Yet, jurors’ extralegal perceptions in patent trials are more influential than others for one critical reason: Patent jurors simplify more than they do in other cases by using their extralegal perceptions to help make verdict decisions (in

Chapter 3 on jury selection in patent cases, we address jurors’ high-risk perceptions in greater detail. Those perceptions begin where patent disputes often begin: with the patent process itself.


“I would really defer now to the patent office. If they have determined twice that it was a valid patent, they have a level of expertise far beyond what we have, and it’s unfair to come back around to a layman and find that the patent office made a mistake.”

—Patent Mock Juror

Observe a typical mock patent jury deliberation and you can expect to see how powerfully jurors’ perceptions of patent disputes are linked to the history and tradition of American patents. Patents began as the core outlet for innovation. They began as protection for the value of individual ingenuity and the vessel by which individual innovation and discovery could benefit the public and encourage continued innovation. Examples of famous patented inventions demonstrate the value of patents past, and the way that value shaped public perceptions. Edison’s lightbulb, Bell’s telegraph, and numerous other patented inventions from airbags to iPhones literally changed the world. Partly because of personas like Edison, Einstein, and Steve Jobs, the jury-eligible American public still imagines the prototypical inventor as an individual sweating in a workshop or brainstorming late into the night to make real an idea that will indelibly alter the course of everyday life. It is every potential invention’s meaningful intersection with the public—the fact that it can change our lives overnight—that substantially influences patent jurors and the lens through which they view patent trial issues. Jurors summon this view when they think about patents, as reflected in their overwhelming support for the practice of protecting inventions with patents.
How do you feel about the practice of protecting inventions with patents?

Jurors imagine a creative process that rivals Edison’s or Einstein’s. They give great deference to innovators and inventors, particularly individuals who embody the American archetype of hard work, ingenuity, and progress. And that enters into their views of the parties in patent litigation. What also remains unchanged is the fact that every patent case involves a patent in one way or another.

**B. Patent Jurors Are Marked by History**

If the rich history of American patents sets the stage for jurors’ perceptions of patent trials, the patent explosion of the 1980s closes the curtain. More specifically, the patent boom explains the state of persuading jurors and judges in today’s trial courts. Patent filings steadily increased from the 1980s into the 2000s, and the number of patent lawsuits filed in U.S. federal courts approximately doubled from 1997 to 2007. Economic changes, growth in technology (specifically information technology), and the dawn of widespread computer use greatly enhanced the speed and breadth of research productivity. Businesses have taken advantage of shifts in the market, with the increasing value of intangible assets such as patents resulting in their growing attractiveness. Businesses made and continue to actively patent technology as well as purchase patents.

---

Some argue that the patent boom was due primarily to the vast increase in research productivity that resulted from the explosion of computers creating faster and more complete information access.\textsuperscript{15} This finding is supported by the relationship between research and development dollars spent and impending patent filings. Others believe there may be more to increases in patent litigation than the simple explanation that more patent grants mean more patent lawsuits.\textsuperscript{16} Patentee successes at trial encourage other patent holders to file lawsuits. Trial outcomes positively influence litigation filings, with increased median damages awards correlating with an increase in patent lawsuit filings,\textsuperscript{17} and the filing activity in some patent hotbed jurisdictions, such as the Eastern District of Texas, Delaware, and the Central and Northern Districts of California, reflects the tendency of positive plaintiff trial verdicts to increase litigation filings.\textsuperscript{18}

Regardless of the cause of the patent increase beginning in the 1980s—and you could believe in the contributions of a solid economy, an information-technology boom, a patent-friendly market, and patent-friendly courts—today’s jurors live in a world directly influenced by the fact that technology advances at an exponential rate. Consumer sophistication and access to technology influence how people consume and process information, including information and evidence at trial. Indeed, technology use depends heavily on a number of factors, not the least of which is a potential juror’s generational position in society. Statistics are changing daily, but millennial jurors (jurors born in 1980 or later) are far more likely than baby boomers (born 1946–1964) to connect wirelessly to the Internet (62\% versus 35\%) and to use the Internet as their main source of news (59\% versus 30\%).\textsuperscript{19} These gaps are likely to increase with time and the continued proliferation of wireless technology. The way jurors use technology and process information influences how they view and value patented technology on trial and must influence how you address and persuade them in the courtroom.

C. Patent Jurors’ Trust in the U.S. Patent and Trademark Office

1. The USPTO: The Most Favorably Rated Government Agency
In recent years, the American public has reported declining faith and trust in government officials and many government agencies tasked with fulfilling the

\textsuperscript{15} See Jaffe, supra note 13.
\textsuperscript{16} See Cook, supra note 12.
\textsuperscript{17} See id. at 70.
goals of the U.S. government. The shift coincides with declining public opinions about our recent presidents and the consequences of government involvement in some of the most significant and most public events of our lifetimes—the terrorist attacks of 9/11, the devastation of Hurricane Katrina, and numerous instances of corporate corruption, collapse, and massive bailouts by the federal government. The result? Jurors no longer see the same shine on the government’s seal. They do not place the same level of trust in the average government official that they did a decade ago. Where the government is involved in the facts of a lawsuit, jurors are inherently skeptical of work ethic, productivity, and even motive—with one important exception. Jurors still place great faith and trust in the U.S. Patent and Trademark Office, as demonstrated below.

**Favorable Opinions of Government Agencies**

![Bar Chart]


Of all the government agencies our litigation consulting group, Persuasion Strategies, has asked about in the last decade, nationwide jury-eligible Americans consistently rate the USPTO as the most credible. While the percentage of potential jurors rating the USPTO as credible has declined somewhat since 2006 (when 88% had favorable opinions), it is still the most favorably rated agency, with more than three-fourths of potential jurors surveyed voicing favorable opinions of

---

Interestingly, in our 2008 survey of 105 federal judges, judges also rated the USPTO as the most credible government agency, with 82% reporting favorable opinions, compared to 60% favorable opinions of the Food and Drug Administration (FDA) and just 55% favorable opinions of the Bureau of Land Management (BLM).

Based on our experience during the first half of the 2000s, potential jurors’ generally positive opinions of government regulatory agencies meant that jurors saw agency standards as benchmarks by which they could evaluate litigants’ conduct. If a heated dispute over a failed telecommunications merger ended up in the courtroom, jurors placed great weight in Securities and Exchange Commission standards and any evidence proving either party met those standards. Based on mock trial research conducted from 2006 to 2012, the fact that a party meets government standards has become less meaningful to jurors. Jurors give decreasing weight to the persuasive impact of meeting minimum standards and greater persuasive weight to contemporaneous evidence that one party was exceeding government standards, creating and meeting its own higher standards, and/or generally treating other parties with a greater and more subjective measure of respect. This phenomenon has held true with regard to the USPTO.

2. The Authority to Promote Innovation

“If they can prove to me that it was innovation to meet the market and stop a monopoly, I would favor [the accused infringer].”

—Patent Mock Juror

Jurors continue to put great faith in the work of the USPTO and its examiners, who jurors consistently believe are thorough and hardworking. This faith is predicated upon the firm expectation that examiners engage in a thorough review process for each and every patent application—and at a minimum, jurors believe the examiner’s process is more thorough and complete than jurors’ investigation of the patent at issue. The perceived magic of the patent process contributes to jurors’ trust as well, in part because jurors are happy to believe the USPTO is

21. Data is cited from Persuasion Strategies 2006 National Juror Survey, when 88% had favorable opinions of the USPTO. In 2010, 83% of those surveyed had favorable opinions of the USPTO, the most favorably rated government agency in the survey.

22. We observed these opinions in numerous mock trials and focus groups conducted in the first half of the decade, and Persuasion Strategies National Juror Survey (2003 and 2004) showed that a majority of potential jurors had favorable opinions of government officials and government agencies.

23. For instance, mock jurors give the benefit of the doubt to a company that has enacted its own internal standard that meets or exceeds the standard created by the governing regulatory agency.
entrusted with the authority to endorse innovative ideas and give them wings. Jurors generally believe the USPTO is fulfilling that mission, and few are interested in questioning that belief by pursuing data about its successes and failures or information that is not at their fingertips.

3. The Power to Promote Competition in the Marketplace

“A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the ‘Progress of Science and Useful Arts.’ At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market.”

—Supreme Court Justice Frank Murphy

A strong majority of jurors believe patents help drive innovation, production, and opportunity for consumers to get access to the latest technology. Patents give innovators a reason to innovate by protecting the fruits of their labor in the market. And make no mistake: jurors consider how the invention and the patent-in-suit relate to their everyday lives. A product that makes their lives easier is something in which they can find value, and that value allows jurors to more easily find confidence in the USPTO’s decision to grant the patent.

4. General Infallibility (Depending in Part on Your Venue and Jury Panel)

“I think [the patent examination process] is very long and I think [patent examiners] take their time and they do investigate the patent—I really do. I think they do take their time.”

—Patent Mock Juror

Jurors openly communicate their perceptions that the USPTO is a credible authority. Believe it or not, those perceptions are powerful and salient enough to influence views of the European Patent Office—an agency about which most potential jurors have little or no knowledge or familiarity. Yet, because of jurors’ strong sense of the USPTO’s dependability, we have seen jurors assume the best from the European Patent Office.

“I just don’t believe that they’re that stupid. I think the Europeans know what they’re doing.”

—Patent Mock Juror

Beginning in 2008, however, there was an increase in media coverage and commentary about the USPTO, including more widespread awareness of the large number of pending patents. A change in presidential administration brought change in the USPTO, including new initiatives to reform, and the appointment of a new director, David Kappos. The America Invents Act brought additional attention to the patent system and its evolution. Still, the average American juror remains unaware of concerns about USPTO efficiency and potential changes in the way our patent system operates. The average juror is focused on the same factors that dominate his or her patent trial decision making, starting with the authority of the USPTO and extending to patent offices from other countries. The presumption that the patent office’s work is complete and correct is a powerful influence on juror decisions.

“They wouldn’t be in the patent office unless they were very good lawyers, top of their class.”

—Patent Mock Juror

D. Juror Perceptions of the Federal Judicial Center Patent Video

“The defendant was saying they do this research. They showed a film that shows that they go through a research process and then it goes to the FDA and all that . . .”

—Patent Mock Juror

In 2002, the Federal Judicial Center released an 18-minute video tutorial designed to orient prospective jurors to the patent system and its basic elements. The video combines narration, dramatization, and imagery to demonstrate what a patent is, walk prospective patent jurors through the patent application and examination process, discuss patent invalidity, the jury’s role in the case, and the different burdens of proof that apply at trial. The individual courts have
discretion over whether or not to present the video to prospective jurors prior to their service.

Reactions to the video have been varied. Our data indicates some judges routinely incorporate the video into their juror orientations, while others do not. In 2009 we conducted a national survey of federal judges and asked them this question. The responses are set forth in the following Chart.

**How often do judges who have tried patent cases show the Federal Judicial Center video titled “An Introduction to the Patent System”?**

![Chart showing the frequency of judges showing the video.]


Attorneys and other legal analysts have evaluated the video content and some have labeled it pro-plaintiff in typical patent infringement lawsuits, claiming that inspiring imagery of blue ribbons around patents and the innovative inventions of Edison and the Wright Brothers primes jurors to favor the typical patent-holding plaintiff.26 We have shown the Federal Judicial Center video to mock jurors during the course of our mock jury research. Mock jurors’ responses to the FJC video favor the patent holder in a few ways, but also favor a patent defendant in a few even more powerful ways.

---

First, it generally confirms jurors’ already pro-USPTO and pro-patent beliefs about the patent process. Those beliefs include the following:

(1) Jurors believe the patent process is relatively complex.
(2) Jurors believe completing the patent process requires great time and effort.
(3) Jurors believe the USPTO plays a substantial role in examining patents.

The Federal Judicial Center video’s imagery and themes display the massive number of patent applications in examiners’ offices and reinforce jurors’ belief in the difficulty of the patent process. The piles of paper communicate the challenge that jurors believe typifies the patent application process and also represent inventors’ innovative thought processes put on paper. At the same time, however, the difficulty and substance emphasizes the challenges facing the USPTO, and the video helps some jurors see the patent process as more likely to lead to mistakes and human error. Here are the primary ways the video favors alleged infringers:

(1) The potential for human error when evaluating a patent application is higher than expected and is influential.
(2) An invalidity defense is a justified and typical response to infringement claims.
(3) The USPTO suffers from the same or similar limitations that limit the effectiveness of other government agencies.
(4) Jurors are empowered to make the determination of a challenged patent’s validity or invalidity.

In spite of the fact that our research data to date support the conclusion that the FJC video slightly favors defendants, the question is worth testing in your venue. At least in some venues, patent jurors begin the case with their powerful perceptions of the patent process and the USPTO reinforced by the judge and the court in which they will hear your case. Will your judge show the Federal Judicial Center video? Do you want him or her to do so? These questions are worth asking.
III. Juror Perceptions of Patent Litigants

“Judges have difficulty understanding modern technology and jurors have even greater difficulty, yet patent plaintiffs tend to request trial by jury because they believe that jurors tend to favor patentees, believing that they must be worthy inventors defending the fruits of their invention against copycats.”

— Judge Richard Posner

A. The Power of the Individual Litigant

The statistics are clear. Compared to corporations, individual litigants are significantly more likely to win patent jury trials. Jurors identify more readily with individual plaintiffs. Over and over again we find it is difficult for jurors to find against someone with whom they identify. Notwithstanding jurors’ predisposition to favor individuals over corporations and mid-sized organizations across most litigation types, jurors almost automatically integrate their extremely positive perceptions of individual inventors with individual plaintiffs who can tell a reasonable invention story. When asked to describe their impressions of individual inventors in patent suits, mock jurors consistently use positive terms such as inventor, hardworking, honorable, dedicated, knowledgeable, and smart. Jurors clearly glamorize individual litigants by combining known characteristics about the individual with the imagined characteristics derived from their expectations of the American inventor. Despite the clear power of the individual litigant, and the individual patent-holding inventor in particular, individuals don’t always prevail in litigation against corporations.

B. The Importance of Initiating the Action

Do jurors care about which party initiated the lawsuit? Does being a plaintiff provide an advantage over being a defendant? According to some statistics, individuals acquire about 15% of patents issued each year and initiate 12% or less of patent lawsuits, and individual patentees are involved in just 7% of actual patent trials. On the other hand, corporations or assignees own approximately 85% of

28. See Moore, supra note 7.
29. Id., supra note 7.
patents and initiate as many as 88% of lawsuits. For jurors, the value of initiating the lawsuit lies in one party’s ability to position itself as the harmed party instead of defending against claims that it caused harm. Make no mistake, jurors appreciate the difference.

While there are certainly cases in which a defendant can make a strong claim that it has suffered harm, jurors consider which party initiated the lawsuit in order to determine which party may be “fighting to protect its rights”—a phrase that many mock jurors have used to describe patent plaintiffs whether they are corporations or individuals. Statistics also demonstrate the small but clear advantage to being a plaintiff, with both individual and corporate plaintiffs enjoying slightly greater proportions of trial wins regardless of the type of defendant (individual or corporate) they are suing.


Do you think that getting a patent for an invention today is:

<table>
<thead>
<tr>
<th></th>
<th>2011</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Difficult</td>
<td>74%</td>
<td>76%</td>
</tr>
<tr>
<td>Easy</td>
<td>26%</td>
<td>24%</td>
</tr>
</tbody>
</table>


A law professor and current federal judge at the U.S. Court of Appeals for the Federal Circuit, Kimberly Moore found that from 1990 to 2003, patentees enjoyed a 52% win rate in bench trials and a 65% win rate in jury trials regardless of the type of defendant. That win rate increased to 78% when the individual patentee faced a corporate defendant. In the same study, Moore concluded that patentees are significantly more likely to win when three conditions are present: (1) patentee

30. Id., supra note 7.
31. Id., supra note 7.
32. Id., supra note 7.
is plaintiff; (2) patentee is an individual; and (3) the accused infringer is foreign. More recent statistics show an even greater advantage for patentees in jury trials and bench trials. From 2006 through 2011, patent holders won about 76% of jury trials and 59% of bench trials going to verdict, with a median damages award of about $8.7 million in jury verdicts. One thing is clear: juries are more likely than judges to find in favor of patentees.

Source: Moore (2006)1 Credit: Nick Bouck

Jurors clearly favor the story of the individual inventor, but how do jurors’ perceptions change when the invention is developed by a group of inventors? Yet again, Judge Moore’s analysis is helpful.

33. See Barry et al., 2012 Patent Litigation Study, supra note 9.
“The lower the number of inventors, the more likely the patentee is to win with a jury. Juries like the image of the solitary inventor toiling away at a problem. The idea of teams of people working together on a solution is not as appealing. Even when a corporation owns the patent, the patentee is more likely to win if a solo inventor rather than a team invented the technology at issue.”

—Judge Kimberly Moore

The patentee advantage is clear and powerful when the patent holder is an individual, but the advantage is substantial for other patentees as well. In one study of 262 adjudicated patent trial verdicts from 2002 to 2004, corporate patentees had a higher win rate than individual patentees in cases decided by the U.S. Court of Appeals for the Federal Circuit. Some jurors also clearly believe that assignees have and deserve the same rights to an acquired patent as an original patentee. But they also expect the assignee to live up to the responsibilities that come with ownership.

“Just because you didn’t start something doesn’t mean you’re not equally responsible if you climb on board.”

—Patent Mock Juror

This juror sentiment applies directly to the rising number of assignees and entities that do not develop or, in many instances, do not practice patents involved in patent disputes.

34. See Moore, supra note 7, at 46.
35. Paul M. Janicke & LiLan Ren, Who Wins Patent Infringement Cases?, 34 Am. Intellectual Prop. L. Ass’n Q.J. 1 (2006). The “win” in this analysis is determined by the final decision of the Court of Appeals of the Federal Circuit, as it has finally adjudicated and disposed a trial court verdict as either a “win” for the patentee or the accused infringer. The difference in this analysis compared with others is that it goes beyond district court verdicts to assess the ultimate winner as determined by the Federal Circuit.
D. The Influence of Non-Practicing Entities (NPEs)

“Something I discovered the first time I came [to Congress] is that I am a troll, that a troll is someone who does not build and sell a product. That term has been replaced by a new phrase—NPE. I am not sure if that is a step up or down but I think that I am one of those too.”36

—Dean Kamen, Entrepreneur and Inventor

There has been widespread discussion in the patent litigation community regarding the impressions and influence of non-practicing entities (sometimes called patent “trolls”)—patent-owning entities that neither invent nor “practice” the technology of their patents. Attorneys have spoken, authors have written, even judges have acted in response to the so-called “non-practicing entities” (NPEs). While non-practicing entities account for approximately 16% of a sample of once-litigated patents, NPEs filed more than 80% of the most-litigated patent suits and “own more than 50% of the 10 most-litigated patents.”37

On average, litigated patents contain more claims, cite more prior art, are cited more often in future patents, and result in more continuation applications. According to John Allison and colleagues, “The most-litigated patents have more than 50% more claims,” “cite nearly three times as many U. S. and foreign patents” and “nearly ten times as many nonpatent prior art references as other litigated patents.”38 Analysis of high-tech patent cases in district courts from 2000 to 2008 also shows that NPEs initiate lawsuits that give rise to 26% of all patent lawsuit defendants.39 There is some data to support the belief that NPEs are impacting the patent system by filing a disproportionate number of lawsuits and bringing a substantially greater number of defendants into the fold. Data from 1995 to 2010 also shows that NPEs have taken cases to trial by jury more often than practicing entities. In that 15 year span, 56% of trials involving NPEs were jury trials, while 47% of trials involving practicing entities went to jury.40


37. See John R. Allison, Mark A. Lemley & Joshua H. Walker, Extreme Value or Trolls on Top? The Characteristics of the Most-Litigated Patents, 158 U. Pa. L. REV. 1, 32 (2009). Allison and colleagues examined the most-litigated patents from 2000 to 2007 and found significant differences in basic characteristics of those patents compared to once-litigated patents.

38. Id. at 37.


So, what do jurors think about NPEs? Perhaps most important, jurors aren’t nearly as concerned with a non-practicing status as are many patent litigators. In our experience, it is not the kind of perception that drives most jurors’ decision making.

While NPEs’ negative influence on the patent system has been debated, most jurors lack the context to understand what role, if any, NPEs may play in the patent system, or even if their existence is anything but normal. Data from patent trials between 1995 and 2011 show that patent-holding NPEs and practicing entities have a similar success rate at trial—both winning about two-thirds of trials. Time spent trying to make jurors understand the context of an NPE may well be time wasted. However, an NPE’s impact on juror perceptions is certainly worth testing in a mock trial. If a litigant’s status as a non-practicing entity is truly important for the jury to contemplate, make sure the fact that the NPE does not practice the patent(s) is relevant to the jury’s task and is not simply an unrelated (and presumed negative) fact you want jurors to consider as a reason to find in your favor.

“Clearly, [the accused infringer] is doing something beneficial for society, and not just buying up patents so that they can sue their competitors who are actually creating items that work.”

—Patent Mock Juror

As counsel opposing an NPE, you might introduce the fact that the NPE does not develop its own patents, nor does it conduct its own research by highlighting exactly how a practicing entity would have researched and developed a patentable idea. This contrast alone does not make the distinction relevant to jurors. They need to know how a practicing entity’s research and development contributes to the trial story (and, by contrast, how it affects the NPE’s trial story and the decisions that accompany it).

Absent direct relevance to jurors’ decision-making task, many jurors will ignore or discount the importance of one party’s status as an NPE because they don’t fully understand or appreciate its role in the case. Jurors’ reactions will undoubtedly vary based on the nature of the case as well as by venue and the nature of the jury pool. As counsel representing an NPE, you must understand how it will be relevant and how, if at all, you should respond.

41. See Barry et al., supra note 9.
E. Corporations and Their Offspring

“[Big companies] need to know they can’t get away with it. They get away with it too often, any chance they get, and I’m sure they’ll try it again.”

—Patent Mock Juror

Based on analysis of past patent suits, the overwhelming majority (85%) of patent disputes involved corporations suing other corporations. Of the remaining suits, 11% involved an individual suing a corporation, leaving just under 5% of all patent cases involving an individual as the defendant. Analysis of “high-tech” patent cases in district court from 2000 through 2008 shows that 76% of all suits were brought by public or private corporations (not including NPEs). Corporate litigants are the norm, and the data proves that corporate defendants face some substantial challenges.

Corporate defendants face an immediate burden given many jurors’ perception that an easy case exists against them—accused infringers are thieves with resources and profit motive. To jurors, they are faceless corporations that employ research and development teams the size of small cities. And when they can’t solve the problem themselves, they buy the solutions and innovations they did not create and have no right to own.

So what happens when jurors apply anti-corporate bias and pro-patentee bias to the same corporate plaintiff in a patent dispute? Corporate patent owners win 50% of jury trials against an individual. So, for a corporate patentee-plaintiff, the punch-power of patentee bias weighs against typical anti-corporate bias to create substantially greater balance than when an individual patent-holding inventor sues a corporation for infringement. It is important to recognize that the advantages of juror perceptions are by no means exclusive to individuals. Corporate patent owners benefit greatly by taking advantage of some of the basic case narrative characteristics that give patentees a head start. For example:

Tell a compelling invention and development story.

42. See Moore, supra note 7.
43. See Chien, supra note 40. “High-tech” patents were defined as those involving hardware, software, or financial patents as classified by the USPTO and coded by the Intellectual Property Litigation Clearinghouse.
44. See Moore, supra note 7.
Demonstrate the dollars and dedication invested to secure the patent through the highly credible USPTO.

Demonstrate the individual and collective dedication to innovation and increased public access to cutting-edge advancements.

Embrace the profit motive behind being a competitive and innovative force in the relevant market in combination with the benefits it bestows on the consumer.

If plaintiff’s counsel cannot or chooses not to openly apply negative labels to patent defendants, a handful of metaphors encourages jurors to apply a variety of negative labels. With just a little help from counsel, jurors frequently describe patent defendants as “opportunists” if not pirates, thieves, or parasites. However, as defensive patenting and predatory lawsuits have evolved and become more common, jurors are more likely to perceive a corporate litigant as going beyond its right to protect its property, and instead preying unfairly on its competition—a fine line to walk with a jury.

Corporate defendants must respond to these juror perceptions by demonstrating the good-faith work they performed to achieve success. Ideally, corporate defendants can tell the story of their own idea development and discuss relevant patents other than the patent-in-suit to help jurors perceive them as innovators working to provide new ideas and products to the marketplace. See Chapter 4 for more detailed recommendations focusing specifically on trial strategies for infringement claims.
IV. Patent Juries’ Unique Challenges

A. Patents Inherently Involve Technical and Difficult Concepts

“To be sure, patent litigation almost inevitably involves science or technical arts. So if you are allergic to chemical equations, frightened by mechanical specifications, or feel that computer circuitry is the work of the devil, you may not want to don your pocket protector and venture into the world of patent litigation.”45

—Thomas Selby, patent attorney

Many patent infringement trials involve the difficult combination of innovative technology and technical detail. Software and telecommunications were two of the most likely technology areas of the most frequently litigated patents from 2000 to 2007, with nearly 75% of the most litigated patents being software patents.46 They are also two of the most prolific and evolving industries.

Two integral parts of a patent dispute—the patented invention and the patent itself—supply an overwhelming majority of the complexity and difficulty that jurors face in a typical patent trial. Consider the invention itself—a medical device, for instance. The device may have “membranes” and “filters” that interact with a tiny “pump.” Devices often include novel technology unfamiliar to anyone outside the art. Jurors lack the basic framework for understanding the form, function, and interaction of the relevant pieces and need basic building blocks to develop an understanding from the bottom up. Jurors not only fail to grasp the specific parts that make up the claimed invention; they often fail to understand the way the parts work together to create a whole. You must give them the building blocks they need to understand your case.

To further add to jurors’ intimidation, patents are complex documents requiring structural comprehension and jargon translation. It takes experience and expertise to interpret correctly and understand the entire document, at least in part because of patent law’s dynamic terms and definitions, unique processes, and special persuasive challenges. To jurors, patents are a foreign country where an unfamiliar structure and unknown language are not only meaningless, but serve as a source of confusion and frustration. Jurors hear that patents have specifications, embodiments, claim elements, references, and prior art. But they look at the patent and see little more than the USPTO’s seal of approval and the paper upon

46. See Allison et al., supra note 38.
which it is printed. Much of the rest sails over their heads at cloud level, in part
because many fail to see the need to drop below the 36,000-foot level to answer
the basic questions of infringement and invalidity. While you may address these
questions weekly in your work life, most jurors live a lifetime without ever consid‑
ering the same questions. Jurors would much rather focus on the invention story
and the people behind the story, and that is where their focus typically begins.

The details of an invention are familiar and often elementary to the inventor
steeped in its technology and art, as is the patent jargon to the attorney trained
to interpret and deconstruct patents. Many times attorneys become so steeped
in the claim language that they lose the ability to talk in human terms about what
it is and how it works. Inventors and attorneys have landed in their chosen pro‑fessions for a reason and fare quite well on their own turf. But jurors don’t get
to choose where they sit for jury service. They don’t get to choose the type of
case they will hear. Considering the fact that the typical American juror has no
more than a high school education and rarely has experience, let alone special‑ized training, in technical arts or advanced technology, the complexities of most
patent lawsuits are a passively acknowledged but often underestimated obstacle.
Jurors have trouble comprehending many elements of the typical patent trial,
with the technicalities of the patented invention and the patent itself being pri‑mary sources of the problem.

“My brain was hurting after I heard the first presentation. It was way too
technical.”

—Patent Mock Juror

Given the nature of patents and the law that governs them, it is no surprise that
attorneys specializing in patent law often have training and experience in a tech‑nical field. For instance, more than 84% of patent attorneys’ non-legal education
majors were in a scientific or technical field. For those lacking technical educa‑tion, many possess the inclination and detail orientation to handle the typical
combination of technology and technicality. These positive skills come with a
flip side. It is human nature to develop abilities consistent with our interests, but
developing one set of abilities usually means minimizing the development of oth‑ers. Communication philosophers have termed this inherently human limitation

“occupational blindness.” By virtue of focusing our energy and abilities on a specific field or specialization, we narrow our ability to perform as effectively outside those areas. Through no fault of his own, the technically proficient and detail-oriented patent attorney can often have difficulty communicating at a far less technical juror level.

2. Patent Juries Need Teachers, Not Technicians

“This evidence that we’re looking at here is just mind-boggling as hell.” —Patent Mock Juror

A patent lawyer’s technical proficiency may not always speak to the average juror. The average American juror is high-school educated, watches 28 hours of TV per week, has thousands of dollars of credit card debt, and perceives himself as making a substantial sacrifice to sit on a jury for more than a few days. The average juror has neither training nor specialized knowledge of the patent system. She has never had a single interaction or experience with the patent office, patents, or inventions, outside of hearing her distant relative describe his “invention” for a new way to turn on his lawn mower with a screwdriver. Jurors’ reactions to complex case facts and complicated attorney presentations reflect their experiences and limited facility with technical concepts. They own up to being non-technical and are frustrated by the fact that a presenting attorney would fail to recognize that most jurors aren’t technical geniuses, but neither are they uneducated imbeciles.

While it may sometimes take a rocket scientist with a law degree to understand the technology and the law that applies to a patent-in-suit, it usually takes an effective teacher to score persuasive points with a jury of laypeople. Astute litigators know patent litigation is not only for engineer-lawyers and scientists-turned-litigators. Indeed, patent juries long for counsel who can speak simply and unscientifically to help them absorb the complex and difficult concepts nearly every patent case brings to the courthouse. Clear and persuasive communication is paramount.

48. See, e.g., Kenneth Burke’s *Permanence and Change* (Third Edition), including references to Thorstein Veblen and his concept of trained incapacity. The relevant concept is that a person’s skills and abilities can also serve as a blindness—in this case, a patent attorney’s ability to excel in the world of technical detail can create a blindness to the bigger picture jurors need to understand and render fully informed decisions.

3. Patent Judges Need Teachers Too!
Most judges are more educated than the average juror, with some estimates as high as 62% of judges and magistrate judges having doctoral education (predominantly law degrees, of course), and 10% having post-doctoral training. But the average judge lacks technical training. Even judges frequently presiding over patent cases have difficulty with the technical details of new technology and specific inventions. Do not presume that judges are any more proficient with the technical details of your case than jurors would be. You have been living your case many more months or even years than your fact finder has. Listen to a judge speak at a conference or on a web meeting and you will notice that even those with dozens of patent trials under their belts do not speak with highly technical knowledge. These judges still remind patent trial attorneys to keep it simple. They lack the technical expertise and want you to make your case straightforward and clear. (See Chapter 2 for more on persuading judges and other non-jury fact finders.)

Most litigators realize the need to simplify the case for juror comprehension, but too often this understanding is only at the intellectual level. You must constantly remind yourself that jurors face an uphill battle against understanding the technical facts of your case. Look no further than the jury sitting in front of you to recall the need to simplify, simplify, simplify. Use focus groups and mock trials to gauge your fact finder’s starting point of comprehension. The same goes for judges who are not as adept at decoding technical details and technology jargon as you may think. In the chapters that follow, we provide specific examples and demonstrate concrete ways to turn understanding into habit. (See Chapter 4 for persuasive infringement/noninfringement arguments and Chapter 5 for persuasive invalidity/validity arguments.)

B. Patent Juries Do Their Job Well

“Research findings bearing on the performance of civil juries yield little support for the extreme claims charging juries with poor and irresponsible performance. Trial judges agree with jury decisions most of the time and strongly support the jury system.”

—Neil Vidmar, jury researcher

We provide our strategic advice knowing you are reading this book with the goal of becoming more persuasive in front of judges and juries. In spite of the general

findings that juries are more pro-patentee and tend to award higher damages than judges, the effects are not as extreme as you might think. So don’t get the wrong idea about civil juries. They are competently fulfilling their civic duty and delivering justice. Despite criticism based on extreme examples of jury behavior and verdicts, our private research and experience give us great confidence in the American jury, specifically when a litigating attorney takes seriously his obligation to teach simply and effectively at trial.

Bench trials or trials before blue-ribbon panels comprising experts in the technology related to the patent-in-suit may result in improvement to today’s patent jury system. As jury researcher Neil Vidmar points out regarding the jury system more broadly, however, we have “some reason to suspect that the combined judgments of jurors, enhanced through the deliberation process, may be as good or better than those that would be rendered by a randomly selected judge.”52 This is a true statement in complex cases where “jury verdicts are often defensible when examined against the evidence produced at trial.”53 Other recent conclusions are even more confident in jury performance, claiming, “Our verdict is strongly in favor of the American jury.”54 You will encounter outlying decision makers, but by and large, research and our own experience consistently suggest that the patent jury is doing its best with what you’re able to put in front of them.

V. The Takeaway

A. The Busy Future of Patent Jury Trials
Beginning in the 1980s and lasting more than two decades, patent applications, patent grants, and patent lawsuit filings were consistently on the increase. Then, patent applications flattened and patent lawsuit filings decreased just before the full impact of economic recession in 2008.55 Companies tightened their belts to survive the recession, and budget cuts as large as 20% restricted activity, including patent lawsuit activity, with the major plunge in lawsuit filings occurring in the last five months of 2008.56 But the downward trend appears to have been

52. Id.
53. Id.
56. See Amanda Bronstad, Patent Infringement Filings Take a Nosedive, Nat’l L.J. (Jan. 19, 2009), available
short-lived, with the number of issued patents increasing by 23% from 2009 to 2010 and another 5% from 2010 to 2011.57

In 2009, there were more than 2,660 patent lawsuit filings58 and more than 482,800 application filings, with over 1.2 million pending patent applications awaiting disposal.59 Patent lawsuit filings continue to track consistently with patent issues, with 2011 setting the record for the most patent actions in history at 4,015.60 Despite economic recession and changes in how litigants approach patent litigation, it remains a major area of litigation with substantial dollars at stake—and the USPTO is poised to issue a boon of patents in the 2010s.

Patent trials will continue to proliferate as the historically high correlation between patent grants and lawsuits indicates—96% correlation since 1995.61 And today, patent trials mean many patent jury trials. While juries decided just 14% of patent cases with damage awards in the 1980s, juries decided 25% during the 1990s and 55% since 2000.62 You must expect juries to continue to hear your cases, and you must continue to adapt to what jurors need to decide in your favor. We offer the guidance you need to achieve this in the pages that follow.

B. Your Patent Persuasion Challenge

Simple, clear, and persuasive communication is paramount in patent litigation. Jurors need every bit of their capabilities engaged in patent trials. Most patent cases place exceptional demands on the civil justice system, including the attorneys, the court, parties involved, and certainly jurors. The costs of litigating a patent case are significant and increasing every day, with upwards of $5.5 million for a single party to take a $25 million patent infringement suit to trial in 2009.63 The courts have felt the pressures too, with a greater proportion of cases going to jury trial—particularly in seven patent-laden jurisdictions where more than half of all patent cases are filed, including the well-known Eastern District of Texas, Central District of California, and Northern District of Illinois.64 While the locations of these patent-rich dockets are likely to shift with time, it is clear that some districts will continue to absorb the court’s burdens.

57. See Barry et al., supra note 9.
58. See Pacer Services patent lawsuit data, supra note 56.
60. Barry et al., supra note 9.
61. See id.
62. See id.
Litigators labor over massive amounts of data over months or even years of discovery and depositions, then face a trial docket that allows only a handful of days to distill years of work into a palatable whole. Making the case comprehensible is a challenge at many levels. But in the end, patent trials are about jurors, about how they make decisions based on the information provided and absorbed. Mock jurors in private research consistently struggle with complexity and damages in patent cases and express sincere appreciation for the attorney who communicates clearly and makes certain that jurors can grasp the key issues upon which her side’s argument depends. Communication is key to persuasion, and in no type of litigation is effective communication more elusive than in patent infringement litigation.

We know that juries can and do perform well when attorneys enable them to do so. We see them deliberate meaningfully in our private research, and academic research bears out their ability to comprehend complex issues as well. Scholars have considered jury performance in complex civil cases, including patent cases, and while jury performance is not perfect, reforms such as note-taking and pre-instruction facilitate comprehension and legal accuracy in more complicated scenarios. Even in lieu of these reforms, you can provide jurors the guidance they need to do their job: clear comprehension of the tie-breaker issues through simple and persuasive advocacy. This book gives you concrete pointers on more effectively persuading your jury and other fact finders.

---