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# **The Best Practice for IP Judiciary**

## **Lessons from the Federal Circuit Experience**

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# CAFC's Contributions

- Domestic
  - Increasing patent value
  - Uniformity and legal certainty
  - Enhancing U.S. influence on patent law developments in US trade partners
- International
  - A best practice model for IP special judiciary
  - Easy to understand U.S. patent law
  - Harmonization

# Critiques on CAFC

- Pro-Patent Bias
  - Generalists v. Specialists
- Bright Line Rules v. Broad Standards
  - Uniformity & Predictability v. Accuracy (?)
- Centralization v. Percolation
  - Lack of legal innovations (U.S. Common law tradition)

# Pro-Patent Bias

- Is the CAFC pro-patent?
  - Some statistics done by US academics show otherwise
    - There are courts in other jurisdictions which are more patent friendly than the CAFC
  - Pre-1982 U.S. courts were extremely anti-patent
    - U.S. Supreme Court has been always anti-patent
    - The average invalidity rate at U.S. appeal courts went up to 90%
    - Only after the creation of CAFC, the invalidity rate went down to less than 50%

# Bright Line Rules

- Can the flexible broad standards bring an expected benefit?
  - The broad standards are difficult for USPTO examiners and juries to apply in determining patentability and infringement
  - Supreme Court's broad standards confuse USPTO examiners.

# Centralization

- Can inter-circuit percolation bring a better approach or rules?
  - CAFC is engaging intra-percolation
  - Internationally, courts in different jurisdictions engage percolations to develop the best approach under international IP frameworks
  - U.S. needs a system to take advantage of the international percolation.

# Critiques on U.S. Supreme Court

- Unclear broad standards
  - Policies and norms without any specific rules
- Lack of understanding technologies
  - Heuristic Approach
- Lack of understanding international obligations and practices at USPTO
  - Disrupting harmonization



# Lessons Learned for UPC

- Prevent pro-patent bias
  - Patent experienced and less experienced judges
  - Transfer of judges
- Develop bright line rules
  - Adopt and improve EPO case law
  - Collaboration with the EPO
- Centralization is necessary for the uniformity and legal certainty.
  - International percolation for the best practice



Email your comments to [toshiko@uw.edu](mailto:toshiko@uw.edu)

**Thank You; Merci; Danke;  
Gracias**

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