Optimal Centralization in Patent Institutions

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• Basic thesis: While centralization and uniformity have value, decentralization and disuniformity have benefits too. The correct approach to the institutional problem involves choosing the optimal degree of centralization. Polar outcomes – complete centralization or atomistic fragmentation – are rarely the optimal.
Centralization Generally

• What is the optimal degree of centralization and concentration of power?

• Governmental institutions (e.g., Should government powers be separated into distinct institutions such as in the United States or concentrated as in Parliamentary systems?);

• International law (e.g., To what extent should Europe integrate its markets across the continent?);

• Antitrust and competition analysis (e.g., Should a particular industrial merger be permitted?);

• Theory of business organizations (e.g., Should economic transactions be integrated into a firm or be subject to the forces of a decentralized market?);

• Theory and policy governing research and development (e.g., Should R&D be coordinated or uncoordinated?).
Centralization Generally

• Many examples of positive centralizations of power (e.g., the integration of the United States into a common market; the ongoing integration of the European market).

• Many examples where centralization has not worked well (e.g., the centralization of power in autocratic leaders; attempts to cartelize certain markets; mergers that create unwieldy conglomerates such as AOL-TimeWarner, DaimlerChrysler)
Benefits of Decentralization

• 1. Competition: Decentralization increases competition, which can impose a useful check on institutions and individuals.

• 2. Information gathering: Decentralized institutions may be better able to gather information.

• 3. Innovation and testing: Multiple institutions can produce and test a greater number of possible innovation.

• 4. Economies of scale for governance. This factor generally favors centralization, but there are limits on the principle.
Optimal Decentralization

• The best solution is almost never complete centralization or complete decentralization.

• A historical example: Lenin promised to organize all of Russia into “one big factory.”

• Ronald Coase’s question: Why doesn’t a firm expand until it is the size of a country?
  – Answer (for which Coase won a Nobel Prize): There are costs to centralizing authority. A firm grows until the costs of centralized management equal the costs of decentralized (or market) organization.
Jurisdiction of Patent Cases Before 1982:
13 Intermediate Appellate Courts

Supreme Court

CA 1  CA 2  CA 3  CA 4  CA 5  CA 6  CA 7  CA 8  CA 9  CA 10  CA 11  CADC  CCPA

Jurisdiction of Patent Cases After 1982: One Intermediate Appellate Court

Supreme Court

CAFC

PTO  All D.Cts.
Centralization in U.S. Judicial Structure

• We consider the Federal Circuit to be a centralized authority because it has no peer.
  – The institution has superiors (Congress and the Supreme Court) and inferiors (the district courts and, to some extent, the Patent & Trademark Office), but nothing at the same level.

• The choice of complete centralization – which is the current structure – is not likely to be optimal.
Harms of Centralization: Obviousness Example

• U.S. Supreme Court (1976) – Obviousness doctrine includes a “test of validity of combination patents” which generally precludes patent protection where a claimed invention “only unites old elements with no change in their respective functions.”

• Federal Circuit (1983 & 1984): “It but obfuscates the law to posit a non-statutory, judge-created classification labeled ‘combination patents.’” “Reference to ‘combination’ patents is, moreover, meaningless.”
Harms of Centralization: Obviousness Example

• Federal Circuit (1983-2007) required proof of a “teaching, suggestion or motivation” in order to establish that it was obvious to combine prior art references. The court stressed that there must be “rigorous application” of this test.
Harms of Centralization: Obviousness Example

IN RE DEMBICZAK, 175 F.3d 994 (Fed. Cir. 1999)
Harms of Centralization: Obviousness Example

• Supreme Court argument:
  – Justice Scalia – “This is gobbledygook. It really is, it's irrational.”
  – Chief Justice – “it's worse than meaningless.”

• Supreme Court opinion: “The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation.”
Proposed Patent Jurisdiction:
More Than One Intermediate Appellate Court

- Supreme Court
  - CAFC
  - Another Circuit – e.g., D.C.
    - Some PTO Cases
    - Some D.Ct. Cases
    - Some PTO Cases
    - Some D.Ct. Cases
Lessons for Europe

• There may be a legitimate need for increased centralization and uniformity in Europe. The current system may be too fragmented, as was the U.S. court system in 1982.

• In addressing that need, policymakers should resist the simple instinct to have complete centralization with a single specialized court or administrative body.