

Federal Circuit Clarifies Patent Venue After *T.C. Heartland*

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In its first published venue decision after *T.C. Heartland*, the Federal Circuit reversed the Eastern District of Texas's denial of a motion to transfer venue. See *In Re Cray*, No. 2017-129, __ F.3d __ (Fed. Cir. Sept. 21, 2017). The defendant below, Cray Inc., was sued for patent infringement. Cray moved to transfer venue, arguing that venue was improper under 28 U.S.C. § 1400(b). That statute provides that, in a patent infringement case, venue is proper where the defendant resides or "where the defendant has committed acts of infringement and has a regular and established place of business." The Supreme Court recently held in *T.C. Heartland LLC v. Kraft Food Group Brands LLC*, 137 S. Ct. 1514 (2017), that § 1400(b) is the exclusive source of venue in patent infringement lawsuits.

Even though Cray was not headquartered in the Eastern District of Texas and did not maintain any physical office or property in that district, Judge Gilstrap held that venue was proper because Cray's employees, Mr. Harless and Mr. Testa, lived in the district and worked remotely from their homes. Cray sought mandamus from the Federal Circuit.

While "recogniz[ing] that the world has changed" such that "not all corporations operate under a brick-and-mortar model" and that "employees increasingly telecommute," Slip Op. at 6, the Federal Circuit pointed out that "the only question before the Court [was] whether Cray had a 'regular and established place of business' in the Eastern District of Texas," as required by § 1400(b). *Id.* at 7. The Court noted that "the requirement of venue is specific" and not to be "given a liberal construction." Slip Op. at 9 (quoting *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961)). Thus, the Court focused its analysis on the statutory language and explained that § 1400(b)

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has three distinct requirements that must be satisfied for venue to lie in a patent case.

First, there must be a “physical place,” *i.e.*, a “physical, geographical location in the district from which the business of the defendant is carried out.” Slip Op. at 11. The Court defined a physical place as a “building or part of a building set apart for any purpose.” *Id.* (quoting Whitney, *The Century Dictionary*).

Second, the place must be “regular” and “established.” Slip Op. at 11. The Court explained that sporadic or transient business activity within the district does not satisfy this requirement. *Id.* at 12. For example, a business that participated in a trade show within the district would have only transient business within the district and could not be sued there.

Third, the regular and established place of business “must be a place *of the defendant*, not solely a place of the defendant’s employee.” Slip Op. at 13. In other words, the defendant “must establish or ratify the place of business” to meet this third requirement. *Id.* For example, “whether the defendant owns or leases the place,” or “conditioned employment on an employee’s continued residence in the district or the storing of materials at the place in the district” would be relevant to this third requirement. *Id.*

The Court found this third requirement was “crucial” in this case because the “the facts presented [could not] support a finding that Mr. Harless’s home was a regular and established *place of business of Cray*.” Slip Op. at 15. As the Court explained, “no evidence show[ed] that that Cray believed a location within the Eastern District of Texas to be important to the business performed, or that it had any intention to maintain some place of business in that district in the event Mr. Harless or Mr. Testa decided to terminate their residences as a place where they conducted business.” *Id.* at 16. “In the final analysis, the court must identify a physical place, of business, of the defendant,” Slip Op. at 14, which the district court failed to do in this case. Thus, the Court held that the third requirement was not met and venue was therefore improper. The Court remanded with instructions for the district court to grant Cray’s motion to transfer.