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Federal Circuit Patent Bulletin: *In re Cray Inc.*

October 9, 2017

"[Regarding a regular and established place of business in a district, there are] three general requirements relevant to the inquiry: (1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant. If any statutory requirement is not satisfied, venue is improper under § 1400(b). . . ."

On September 21, 2017, in *In re Cray Inc.*, the U.S. Court of Appeals for the Federal Circuit (Lourie,* Reyna, Stoll) granted Cray's petition for a writ of mandamus vacating the Texas district court's order denying Cray's motion to transfer, to the Wisconsin district court, Raytheon's suit alleging that Cray infringed U.S. Patents No. 7,475,274, No. 8,190,714, No. 8,335,909, and No. 9,037,833, which relate to hardware and software used in high performance computing systems. The Federal Circuit stated:

Mandamus is reserved for exceptional circumstances. A writ of mandamus "is appropriately issued, however, when there is 'usurpation of judicial power' or a clear abuse of discretion." A writ of mandamus may issue where: (1) the petitioner has "no other adequate means to attain the relief he desires"; (2) the petitioner shows "his right to mandamus is 'clear and indisputable'"; and (3) the issuing court is "satisfied that the writ is appropriate under the circumstances." Similarly, mandamus may be appropriate, as it is here, to decide issues "important to 'proper judicial administration.'" Additionally, the Supreme Court has approved the use of mandamus to decide a "basic [and] undecided" legal question when the trial court abused its discretion by applying incorrect law. . . .

Section 1400(b) provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of

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infringement and has a regular and established place of business." On the issue of improper venue, the only question before the court is whether Cray has a "regular and established place of business" in the Eastern District of Texas within the meaning of § 1400(b). Because Cray is incorporated in the State of Washington, there is no dispute that the residency requirement of that statute cannot be met here under the definition provided in TC Heartland. Nor does Cray challenge the district court's finding as to the acts of infringement within the district for purposes of venue.

[O]ur analysis of the case law and statute reveal three general requirements relevant to the inquiry: (1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant. If any statutory requirement is not satisfied, venue is improper under § 1400(b). . . . In deciding whether a defendant has a regular and established place of business in a district, no precise rule has been laid down and each case depends on its own facts.

[W]hen determining venue, the first requirement is that there "must be a physical place in the district." . . . The statute requires a "place," i.e., "[a] building or a part of a building set apart for any purpose" or "quarters of any kind" from which business is conducted. The statute thus cannot be read to refer merely to a virtual space or to electronic communications from one person to another. But such "places" would seemingly be authorized under the district court's test. While the "place" need not be a "fixed physical presence in the sense of a formal office or store," there must still be a physical, geographic allocation in the district from which the business of the defendant is carried out. . . .

The second requirement for determining venue is that the place "must be a regular and established place of business." [S]poradic activity cannot create venue. Indeed, "[t]he doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered." The "established" limitation bolsters this conclusion. The word contains the root "stable," indicating that the place of business is not transient. It directs that the place in question must be "settle[d] certainly, or fix[ed] permanently." To make "permanent" clearly accords with the "main purpose" identified in the predecessor statute's legislative history. [W]hile a business can certainly move its location, it must for a meaningful time period be stable, established. On the other hand, if an employee can move his or her home out of the district at his or her own instigation, without the approval of the defendant, that would cut against the employee's home being considered a place of business of the defendant.

Finally, the third requirement when determining venue is that "the regular and established place of business" must be "the place of the defendant." As the statute indicates, it must be a place of the defendant, not solely a place of the defendant's employee. Employees change jobs. Thus, the defendant must establish or ratify the place of business. It is not enough that the employee does so on his or her own. Relevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place. One can also recognize that a small business might operate from a home; if that is a place of business of the defendant, that can be a place of business satisfying the requirement of the statute. Another consideration might be whether the defendant conditioned employment on an employee's continued residence in the district or the storing of materials at a place in the district so that they can be distributed or sold from that place. Marketing or advertisements also may be relevant, but only to the extent they indicate

that the defendant itself holds out a place for its business.

The district court is correct that a defendant's representations that it has a place of business in the district are relevant to the inquiry. Potentially relevant inquiries include whether the defendant lists the alleged place of business on a website, or in a telephone or other directory; or places its name on a sign associated with or on the building itself. But the mere fact that a defendant has advertised that it has a place of business or has even set up an office is not sufficient; the defendant must actually engage in business from that location. In the final analysis, the court must identify a physical place, of business, of the defendant. A further consideration for this requirement might be the nature and activity of the alleged place of business of the defendant in the district in comparison with that of other places of business of the defendant in other venues. Such a comparison might reveal that the alleged place of business is not really a place of business at all. . . .

The parties' primary dispute concerns whether Mr. Harless's home, located in the Eastern District of Texas, constitutes "a regular and established place of business" of Cray. . . . The facts presented cannot support a finding that Mr. Harless's home was a regular and established place of business of Cray. The same is true as to Mr. Testa, to the extent he is relevant to this analysis. The fact that Cray allowed its employees to work from the Eastern District of Texas is insufficient. There is no indication that Cray owns, leases, or rents any portion of Mr. Harless's home in the Eastern District of Texas. No evidence indicates that Cray played a part in selecting the place's location, stored inventory or conducted demonstrations there, or conditioned Mr. Harless or Mr. Testa's employment or support on the maintenance of an Eastern District of Texas location. No evidence shows 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. . . . [T]he facts here do not show that Cray maintains a regular and established place of business in the Eastern District of Texas; they merely show that there exists within the district a physical location where an employee of the defendant carries on certain work for his employer. We stress that no one fact is controlling. But taken together, the facts cannot support a finding that Cray established a place of business in the Eastern District of Texas. Thus venue cannot exist there under § 1400(b).