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IP CASE OF THE WEEK

The Place of Business is People

Presence of Server in District Does Not Create Venue for Patent Infringement

By: Reid Huefner and Ifti Zaim | March 9, 2020

The Federal Circuit held that a server owned by Google, Inc. that was installed in a third-party contractor's datacenter did not constitute a "regular and established place of business" under the patent venue statute, 28 U.S.C. § 1400(b), because none of Google's employees did business at the site. *In re: Google LLC*, Case No. 2019-126 (Fed. Cir. Feb. 13, 2020). This decision provides some clarity as to when a party will be found to have a "regular and established place of business" ("REPB") and thus bridges a rift that emerged between districts in the wake of *TC Heartland*.

Venue for patent infringement lawsuits is only proper where (1) the defendant resides, or (2) where it has a "regular and established place of business" ("REPB"). 28 U.S.C. § 1400(b). Prior to *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), a corporate defendant was deemed to "reside" in any district where it was subject to personal jurisdiction, which, for many corporations, meant virtually any judicial district. Against that legal backdrop, the Eastern District of Texas surged to prominence as the most popular venue for patent litigation, peaking at an incredible 43.6% of all new federal patent infringement actions in 2015. This all changed with *TC Heartland*, which held that a corporation only "resided" in its district of incorporation. Even though E.D. Tex. remained a desirable venue for patent litigation plaintiffs, few corporations now "resided" in the district. New patent case filings in E.D. Tex. plummeted from a peak of 2,546 in 2015 to just 333 in 2019, and showing an REPB is now often critical to establishing proper venue in the district.

The Federal Circuit first clarified what constitutes an REPB in its landmark ruling in *In re: Cray*, which identified three general requirements: "(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." 871 F.3d 1355, 1360 (Fed. Cir. 2017). In *Google*, the Federal Circuit, on Google's Petition for Writ of Mandamus, addressed two issues: (1) whether a server rack (or the like) was a "place of business," and (2) whether an REPB requires an employee or agent of the defendant to be present.

The district court found venue appropriate based upon the presence of Google Global Cache ("GGC") servers in the district. These GGC servers were located in datacenters owned by third party internet service providers ("ISPs"). They were installed and serviced by the ISP's employees (subject to close direction by Google per the contract). As to the first *Cray* factor, the Federal Circuit held that a "place" need not be an ownership or leasehold interest in real property. Rather, leased shelf or rack space, such as that occupied by the GGC servers, did constitute a "place of business." However, as to the second *Cray* factor, the Court held that an employee or agent of the defendant must be present and conducting the defendant's business at the place of business in order for it to qualify as an REPB. The Court relied upon the service provisions enacted simultaneously with the patent venue statute in 1897 to demonstrate that the originally enacted statute presumed the presence of employees or agents of the defendant at the REPB. The Court further held that the venue statute should exclude agents' activities that are connected to but do not actually constitute the defendant's business, finding that the ISP's maintenance obligations did not make them agents of Google under the statute.