The Supreme Court and the Federal Circuit Turn Patent Infringement Venue Jurisprudence Upside Down

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THE SUPREME COURT AND THE FEDERAL CIRCUIT TURN PATENT INFRINGEMENT VENUE JURISPRUDENCE UPSIDE DOWN

ROBERT TAPPARO*

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I. INTRODUCTION

Justice Thomas’ textual interpretation of the patent venue statute in *TC Heartland LLC v. Kraft Foods Group Brands LLC*,¹ set the stage for a stark reversal in patent venue jurisprudence, which was then solidified by the federal circuit decision *In re Cray, Inc.*² The Supreme Court ruled that 28 U.S.C. section 1391(c),³ the general venue statute, does not modify the meaning of 28 U.S.C. section 1400(b), the patent venue statute.⁴

The Supreme Court’s decision in *TC Heartland* reversed twenty-seven years of patent venue jurisprudence and revived an interpretation that patent infringement venue is governed solely by a separate venue provision in 28 U.S.C. section 1400(b).⁵ Moreover, the *TC Heartland* and *In re Cray* decisions significantly restricted where a patent holder can file an infringement action against a defendant who is allegedly infringing upon a patent holder’s intellectual property.⁶ The *TC Heartland* decision ultimately left one question unanswered that the Federal Circuit addressed in *In re Cray*: what is the meaning of a “regular and established place of business” under section 1400(b)?⁷ In September 2017, the Federal Circuit enacted a three-part test that has solidified the Supreme Court’s efforts to restrict where

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² In re Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).
³ 28 U.S.C. § 1391(c) (2012) (“Residency. For all venue purposes . . . an entity . . . whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question . . . .”).
⁴ TC Heartland, 137 S. Ct. at 1517.
⁵ 28 U.S.C. § 1400(b) (“Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”).
⁶ See Robert G. Bone, Comment, Forum Shopping and Patent Law - A Comment on TC Heartland, 96 Tex. L. Rev. 141, 141 (2017) (stating that the *TC Heartland* decision has restricted where patent holders can file infringement actions).
patent infringement actions can be filed.\(^8\)

This Comment will first examine the patent infringement venue jurisprudence leading up to the Supreme Court and Federal Circuit’s 2017 decisions and the consequences of these decisions. Next, this Comment will argue that the courts have created an over-restrictive system governing where patent infringement actions may be filed which will negatively affect wide swaths of businesses. The Supreme Court and Federal Circuit have created a test that cannot be easily applied to businesses in the twenty-first century who operate primarily on the Internet or through complex partnership agreements.

This Comment recommends that the United States (“U.S.”) Congress enact new legislation that balances the interests of both patent holders and alleged infringers to easily assert their rights in court while also helping to curtail the pervasiveness of patent trolling. Finally, this Comment concludes that without changes to the current law governing patent infringement venue, forum shopping will continue and small business owners who depend on patent protection will be negatively impacted and may ultimately be unable to access the court system.

II. A HISTORICAL GUIDE TO PATENT INFRINGEMENT VENUE JURISPRUDENCE

A patent is an exclusive right granted by the U.S. government to an inventor to exclude others from making, using, offering to sell, selling any patented invention, or importing into the U.S. any patented invention throughout the term of the patent.\(^9\) A patent holder may sue anyone that violates the patent holder’s rights by infringing upon the patent holder’s exclusive right to exclude others from using the patented invention.\(^10\) Since the late 19th century, patent infringement venue has been treated separately from general venue that governs other civil actions.\(^11\)

In 1887, the venue for patent infringement actions was only appropriate

\(^8\) In re Cray Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017) (introducing a test to determine residency in infringement actions under 28 U.S.C. § 1400(b)).

\(^9\) 35 U.S.C. § 271(a) (2012) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

\(^10\) Id.; see also Frequently Asked Questions: Patents Basics, WORLD INTELL. PROP. ASS’N, (last visited Apr. 22, 2018), http://www.wipo.int/patents/en/faq_patents.html (“[P]atent protection means that the invention cannot be commercially made, used, distributed, imported, or sold by others without the patent owner’s consent.”).

where the defendant was an inhabitant.\textsuperscript{12} Congress enacted this change in law to curtail patent infringement actions filed in inconvenient locations merely because service was provided in the district.\textsuperscript{13}

In 1897, Congress passed the antecedent to the modern-day patent venue statute which provided that patent infringement actions could only be brought "in the district where the defendant is an inhabitant, or in any district where the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business."\textsuperscript{14} The Supreme Court in \textit{Stonite Products Co. v. Melvin Lloyd Co.},\textsuperscript{15} ruled that no other statute governed patent infringement actions.\textsuperscript{16} This case created the foundation for the U.S. courts to treat patent infringement venue differently than all other civil action venue in the future.

\textbf{A. Defining Corporate Residency}

Congressional recodifications of the venue statutes have created confusion in patent infringement venue jurisprudence. In 1948, the patent venue statute was re-codified to its present-day language as 28 U.S.C. section 1400(b): "[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 infringement and has a regular and established place of business."\textsuperscript{17} This re-codification created controversy between the historical precedent of restrictive patent venue and the more liberal approach by the newly codified conventional venue statute.\textsuperscript{18}

In 1957, the Supreme Court examined the patent venue and general venue statutes to analyze the meaning of the word "resides."\textsuperscript{19} The Court in \textit{Fourco Glass Co. v. Transmirra Products Corp.}\textsuperscript{20} ruled that "resides" only applied

\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{15} Stonite Prods.' Co. v. Melvin Lloyd Co., 315 U.S. 561, 563 (1942) (holding that the patent venue statute was not supplemented by the general venue provisions).
\item \textsuperscript{16} Id.
\item \textsuperscript{17} 28 U.S.C. § 1400(b) (Supp. || 1949).
\item \textsuperscript{18} Id. § 1391(c); see also Wydick, supra note 12, at 558 (stating that the 1948 recodification greatly expanded the forums available to the plaintiff in patent infringement actions).
\item \textsuperscript{19} See Christoff, supra note 14.
\item \textsuperscript{20} Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957).
\end{itemize}
to the state in which the defendant was incorporated.\textsuperscript{21} This ruling significantly limited where patent infringement actions may be brought under 28 U.S.C. section 1391(c), which allows civil actions to be filed “in any judicial district which such defendant is subject to the court’s personal jurisdiction with respect to the action in question . . . .”\textsuperscript{22} The Court rejected the argument that section 1391(c) and section 1400(b) should be read together to determine appropriateness of patent infringement venue and reiterated that section 1400(b) is the sole provision controlling patent infringement venue.\textsuperscript{23} The Court ultimately determined that the meaning of “resides” under section 1400(b) had a more restrictive definition than it did under section 1391(c).\textsuperscript{24}

B. Federal Circuit Interpretation Expands Patent Infringement Venue

Congress again amended the statutory language of the venue statutes in 1988.\textsuperscript{25} The language in 28 U.S.C. section 1391 was amended to include “[f]or the purposes of venue under this chapter.”\textsuperscript{26} The location of 28 U.S.C. section 1400(b) is in the same chapter as § 1391(c).\textsuperscript{27} In \textit{VE Holding Corp. v. Johnson Gas Appliance Co.},\textsuperscript{28} the patent holder challenged whether this phrase was meant to modify the meaning of corporate residency under section 1400(b).\textsuperscript{29} The Federal Circuit held that the addition of this provision altered the meaning of the statute and, from now on, venue for patent infringement actions would be supplemented by the language in section 1391(c).\textsuperscript{30} This ruling expanded appropriate patent infringement venue to

\begin{itemize}
  \item 21. \textit{Id.} at 226 (1957) (restricting the venues appropriate for patent infringement actions to the state of incorporation under the residence clause of 28 U.S.C. 1400(b)).
  \item 22. 28 U.S.C. § 1391(c) (2012).
  \item 23. \textit{See Fourco}, 353 U.S. at 229 (holding that 28 U.S.C. § 1391(c) cannot be read to expand patent infringement venue under 28 U.S.C. §1400(b)).
  \item 24. \textit{See Wydick, supra} note 12, at 559 (stating that “resides” under 28 U.S.C. § 1400(b) only included the state of incorporation of the business).
  \item 26. \textit{Id.}
  \item 28. \textit{VE Holding Corp. v. Johnson Gas Appliance Co.}, 917 F.2d 1574, 1575 (Fed. Cir. 1990).
  \item 29. \textit{Id.} at 1576, 1578 (examining whether the language “under this chapter” in section 1391(c) modified the residency definition in section 1400(b) which is located in the same chapter but has historically been treated separately when determining appropriate patent infringement venue).
  \item 30. \textit{Id.} at 1578 (holding that the addition of “For the purposes of venue under this chapter” language in section 1391(c) expanded the scope of patent infringement jurisdiction because section 1400(b) is in the same chapter of the United States Code).
\end{itemize}
anywhere the defendant is subject to personal jurisdiction.”31

C. 2011 Amendment to 28 U.S.C. Section 1391(c) Sets the Stage for TC Heartland

In 2011, the phrase “for purposes of venue under this chapter” in 28 U.S.C. section 1391(c) was changed to “for all venue purposes.”32 The Court again had to determine whether this phrase modified the meaning and application for patent infringement venue.33 This amendment to the statute would ultimately form the basis of the Court’s decision to narrow the scope of patent infringement jurisdiction in TC Heartland LLC.34

Kraft Foods Inc. filed a patent infringement action against TC Heartland, an Indiana-based corporation that does not have any places of business in Delaware.35 However, TC Heartland’s products were shipped into the state.36 TC Heartland filed a motion to transfer venue to the Southern District of Indiana, but the Delaware District Court denied the motion citing VE Holding Corp.37 TC Heartland unsuccessfully argued to the district court that venue was improper and that the Fourco Glass Co. case should be the exclusive venue provision governing patent infringement actions.38 Shortly thereafter, the Federal Circuit denied TC Heartland’s petition for a writ of mandamus to re-examine the district court’s ruling that the definition of residency in 28 U.S.C. section 1391(c) applied to defendant corporations in a patent infringement action.39 TC Heartland appealed to the Supreme Court

32. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, sec. 202, § 1391, 125 Stat. 758, 763 (2011) (eliminating the language “under this chapter” in section 1391(c), which was the foundation of the court’s opinion in VE Holding Corp. where the court held that section 1391(c) expanded the scope of patent infringement venue).
34. Id. (considering that the amendments were made to section 1391 and not 1400(b), which was the subject of the ruling in Fourco Glass Co. v. Transmirra Products Co.).
35. Id. (stating that TC Heartland does not operate any stores in Delaware).
36. Id.
37. Id.; see also Kraft Foods Grp. Brands LLC v. TC Heartland LLC, No. 14-28-LPS, 2015 U.S. Dist. LEXIS 127972, at *4-5 (Sept. 24, 2015) (arguing that venue was proper under 28 U.S.C. § 1391(c) because VE Holding Corp. held that section 1391(c) augmented the narrow scope of patent infringement jurisdiction under section 1400(b)).
38. Christoff, supra note 14.
39. See In re TC Heartland LLC, 821 F.3d 1338, 1344-45 (Fed. Cir.) (holding that TC Heartland met sufficient minimum contacts for jurisdiction and that the court’s exercise of jurisdiction was reasonable), cert. granted, 137 S. Ct. 614 (2016).
The Court unanimously overturned the ruling in *VE Holding Corp.*, which determined appropriate patent infringement action venue since 1990. The Court held that *Fourco Glass Co.* still applied because the 2011 change to the patent statute showed that Congress intended to change the meaning of 28 U.S.C. section 1391(c). The Court noted that Congress removed “under this chapter” from section 1391(c) which formed the basis of the Federal Circuit’s decision in *VE Holding Corp.* Second, the Court pointed out that the 2011 version of section 1391 contains the phrase “as otherwise provided by law.” When the Federal Circuit decided *VE Holding Corp.*, this provision was not in the statute. Finally, the 2011 amendment removed the phrase “under this chapter” from section 1391(c) which formed the basis for the *VE Holding Corp.* opinion. *TC Heartland* marks the return to the previous theory prior to the holding in *VE Holding Corp.*, that 28 U.S.C. section 1400(b) is the sole provision directing patent infringement venue for domestic entities.

**D. In re Cray Inc. Solidifies TC Heartland**

In the wake of *TC Heartland*, the question of what a “regular and established place of business” was under section 1400(b) remained unclear. In 2017, Raytheon, a defense contractor, filed a patent infringement action...
against Cray Inc. in the Eastern District of Texas. Cray Inc. is incorporated in Washington state and does not have any property interests in the Eastern District of Texas. However, two Cray Inc. employees were allowed to work remotely from their homes in the Eastern District of Texas.

Reimbursement for travel expenses and cell phone usage from the properties was provided to these employees, and internal company documents included phone numbers for the employees with Eastern District of Texas area codes that were not owned by the corporation.

The Federal Circuit ruled that a “regular and established place of business” must satisfy three factors: “(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.” Applying this test to the aforementioned facts, the Federal Circuit determined that while the employees were conducting business in the Eastern District of Texas, the home offices were not the places of the defendant. Cray Inc. did not own or lease the properties, which the court determined did not permit venue within the district.

E. Forum Shopping Runs Rampant in the Eastern District of Texas

Following the VE Holding decision, plaintiffs filing patent infringement actions were incentivized to bring their actions in courts that would yield favorable results. The rules established exclusively in the Eastern District of Texas weigh heavily in the plaintiff’s favor. The district has many “pro-

50. Id. at 1357 (noting that the employees owned and controlled their homes and not Raytheon).
51. See id. at 1357-58; see also id. 1358-61 (citing In re Cordis Corp., 769 F.2d 733, 736-37 (Fed. Cir. 1985)) (exemplifying that, under In re Cordis Corp., contacts would have been sufficient to satisfy venue under 28 U.S.C. § 1391(c) prior to the TC Heartland decision).
52. Id. at 1357-58.
53. Id. at 1360.
54. Id. at 1365-66.
55. Id.
56. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1583-84 (Fed. Cir. 1990) (stating that section 1391(c) expanded upon section 1400(b) which enabled infringement actions to be filed in any jurisdiction in which the defendant was subject to personal jurisdiction).
57. Bone, supra note 6, at 145 (“With this many venue options available, patentee-plaintiffs had strong incentives to shop for a court that offered the most favorable procedures.”).
58. See id. at 146-147; see also Loren Steffy, Patently Unfair, TEX. MONTHLY, https://www.texasmonthly.com/politics/patently-unfair/ (last visited Apr. 25, 2018) (stating that the Eastern District is popular with plaintiff’s lawyers because the small federal criminal docket allows cases to get to trial rapidly).
patentee procedures, including a restrictive approach to granting summary judgment (making it harder for defendants to exit lawsuits) and a preference for broad and expedited discovery (increasing defendant's costs relative to plaintiff's).” 59 These provisions make settlements more likely which lead to “patent trolling” or non-practicing entities who file patent infringement lawsuits exclusively to obtain settlements from wealthy potential patent infringers. 60 The patent community has viewed the Supreme Court’s TC Heartland decision as a judicial activism attempt to mitigate the issue of patent trolling. 61

F. District Courts’ First Attempts at Patent Infringement Venue Post TC Heartland and In re Cray, Inc.

Prior to the TC Heartland case, Symbology initiated a patent infringement action against Lego Systems in Virginia. 62 Lego Systems is a Danish company incorporated in Delaware and headquartered in Connecticut. 63 One week after the In re Cray decision, the District Court for the Eastern District of Virginia ruled that Lego Systems did not have a “regular and established place of business” within the district pursuant to the three-part In re Cray test. 64 Lego Systems has no stores and operates no facilities within Virginia. 65 However, Lego Brand Retail, Inc., a separately incorporated subsidiary of Lego Systems, Inc., operates three stores in Virginia that sell products designed and manufactured by Lego Systems, Inc. 66 Even though Lego Brand Retail, Inc. is a subsidiary company that maintains “separate finances, assets, officers, and records,” 67 the court noted that:

[s]o long as a formal separation of the entities is preserved, the courts ordinarily will not treat the place of business of one corporation as the place of business of the other. On the other hand, if the corporations disregard their separateness and act as a single enterprise, they may be

59. Bone, supra note 6, at 146.
60. Id. at 147.
61. Id. at 148 (“[I]t is not much of an exaggeration to say that the patent community viewed TC Heartland as a patent reform case aimed at the patent troll problem.”).
62. Symbology Innovations, LLC v. Lego Sys., Inc., 282 F. Supp. 3d 916, 927, 935 (E.D. Va. 2017) (stating that venue was appropriate under VE Holding Corp. prior to the TC Heartland decision).
63. Id. at 922.
64. Id. at 929-36.
65. Id. at 923.
66. Id.
67. Id. at 932.
treated as one for purposes of venue. The court held that venue in the Eastern District of Virginia was not appropriate because Lego Systems, Inc. did not have a “regular and established place of business in the district because the court could not attribute the subsidiary corporation properties to Lego Systems, Inc.” The court noted that the second prong of the test was not established: the retail locations of Lego Brand Retail, Inc. were not legally recognizable as places of Lego Systems, Inc. for purposes of the litigation. The court did not dispute that the retail locations were regular and established places of business, nor did the court refute that the locations were in the judicial district.

In the Eastern District of Texas, cases with similar facts have not been ruled in favor of the plaintiff. Plaintiff Intellectual Ventures filed a patent infringement action in the Eastern District of Texas against FedEx Corporation. For example, FedEx Corp., incorporated in Delaware, is headquartered in Tennessee and provides “general financial, legal, and business guidance . . . in the logistics, freight, and package transportation, and print and copying fields” to its subsidiary companies: FedEx Office, Express, Ground, Supply Chain, Freight, and Custom Critical. FedEx Office is incorporated and headquartered in Texas. No other subsidiary of FedEx Corp. is headquartered or incorporated within the state of Texas. Because all other FedEx corporations aside from FedEx Office are incorporated outside of the state of Texas, venue is only proper in the Eastern District of Texas if each corporation has a “regular and established place of business” within the state.

Intellectual Ventures argued that venue is proper in the Eastern District of Texas because the subsidiary corporations of FedEx Corp. do business from fixed physical locations within the district. The defendant corporations

68. Id. (citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3823 (4th ed. 2017)).
69. Id. at 933.
70. Id.
71. See id. at 931-33.
73. Id. at *1.
74. Id. at *1-2.
75. Id. at *1.
76. Id. at *1-2.
77. Id. at *6.
78. Id. at *6 ("Plaintiff’s Complaint alleges that FedEx Express, FedEx Custom
made no showing that the FedEx companies did not operate out of physical locations within the district.  

Because FedEx Corp. subsidiary corporations operated in cooperation with other branches of the FedEx company at locations within Texas, the district court ruled that venue was proper in the district due to FedEx’s “regular and established place of business” within the state.  

III. 28 U.S.C. Section 1400(b) Is Not Easily Applied and Harms Businesses

Since the Federal Circuit’s In re Cray decision, district courts have struggled to uniformly apply the three-part test to determine whether a person or entity has a “regular and established place of business.” One major point of discrepancy is whether a corporation with no property or agents in a state may have a “regular and established place of business” in the district if a partner corporation operates a place of business within the district.

A. District Courts Send Conflicting Signals About Regular and Established Places of Business

District courts’ disparate interpretation of similar fact patterns injects uncertainty into patent infringement venue jurisprudence. The In re Cray, Inc. three-part test does not resolve the discrepancies between the Intellectual Ventures II, LLC and Symbology Innovations, LLC district court decisions. These seemingly similar fact patterns have yielded

Critical, FedEx Ground, FedEx Freight, and FedEx Supply Chain carry out business from ‘a physical, geographical location’ in this district.” (quoting In re Cray, Inc., 871 F.3d 1355, 1362-63 (Fed. Cir. 2017)).

79. Id. at *7.
80. Id.
82. See Intellectual Ventures II LLC, 2017 WL 5630023, at *1-2 (operating a subsidiary that sells parent company’s goods); see also Symbology Innovations, LLC v. Lego Sys., Inc., 282 F. Supp. 3d 916, 927 (E.D. Va. 2017) (operating a subsidiary that offers services performed by another subsidiary of the parent company).
85. Symbology Innovations, LLC, 282 F. Supp. 3d at 916.
86. See In re Cray, 871 F.3d at 1360 (“(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.”); see also Symbology Innovations, LLC, 282 F. Supp. 3d at 916;
conflicting results in different district courts. Both companies were incorporated in a state outside of the judicial district where the infringement action was filed, but separately incorporated subsidiaries operated businesses within the state. In both cases, the subsidiaries satisfy the first prong of the test requiring a physical location within the district. Each company operates a subsidiary, like Lego Brand Retail, Inc. and FedEx Office, which have a physical location in the states of Virginia and Texas, respectively.

Next, the place must be regular and established. Lego Brand Retail, Inc. operates permanent stores that sell Lego-designed and manufactured goods. Similarly, FedEx Office is headquartered in Texas and other branches of the company operate locations within the state. In both cases, the subsidiary corporations of each defendant were operating at a permanent fixed location within the state, satisfying part three of the In re Cray test. However, the district court in Symbology Innovations, LLC noted that revenue derived within a given jurisdiction holds no weight in a section 1400(b) venue analysis. The FedEx court did not consider this in their analysis.

Finally, in both instances, part three of the In re Cray test was the determinative factor. The Symbology Innovations court determined that Lego Systems, Inc. did not operate the stores in Virginia even though their subsidiary owned and operated the stores to sell goods produced by the parent company. The court noted that the detached financial organization

89. See In re Cray, 871 F.3d at 1360.
94. See In re Cray, 871 F.3d at 1360 (explaining that the physical place of business must be the place of the defendant).
95. Symbology Innovations, LLC, 282 F. Supp. 3d at 931 (“Revenue derived from the forum has no bearing on whether § 1400(b)’s requirements are met.” (citing In re Cray, Inc., 871 F.3d 1357, 1360-61)).
97. See In re Cray, 871 F.3d at 1360 (the defendant’s place); Symbology Innovations, LLC, 282 F. Supp. 3d at 923; Intellectual Ventures II LLC, 2017 WL 5630023, at *2.
98. See Symbology Innovations, LLC, 282 F. Supp. 3d at 923.
of the subsidiary prevented the court from attributing the properties to Lego Systems, Inc.99 However, in Intellectual Ventures, FedEx Corp. and its subsidiary corporations were also financially separate.100 Services provided by FedEx were available at subsidiary locations within the state, similar to the goods manufactured by Lego Systems, which were also available at subsidiary locations within the state.101 These outwardly similar factual situations yielded different results in district court due to the test created by the Federal Circuit in In re Cray.102

Corporations such as FedEx Corp. and Lego Systems, that have subsidiary corporations, are each separate entities from their subsidiary corporations, but they may operate interrelated businesses.103 The Supreme Court and Federal Circuit have not presented a straightforward method for distinguishing between a separate corporate subsidiary from a corporate subsidiary that operates as “the place of the defendant” even though the two entities file separate financial documents and have separate legal structures.104 This ambiguity will continue to lead to differing results for similar factual situations across different circuits.105 This issue can be quickly rectified with a new piece of legislation from Congress addressing patent infringement venue under section 1400(b).106

B. The In re Cray Test is Not Easily Applied to a Large Number of Businesses

The In re Cray test fails to consider how a large portion of domestic corporations operate in the U.S. In deciding In re Cray, the Federal Circuit

99. Id. at 932-33.
101. Id. at *7; Symbology Innovations, LLC, 282 F. Supp. 3d at 925.
102. In re Cray, 871 F.3d at 1360.
103. See Symbology Innovations, LLC, 282 F. Supp. 3d at 930 (noting the financial and legal separation between the corporate entities but that the business interests between them are tied together); Intellectual Ventures II, 2017 WL 5630023, at *1.
104. In re Cray, 871 F.3d at 1360, 1363 (establishing that the defendant corporation must own, lease, or otherwise control the property to satisfy the regular and established place of business requirement under section 1400(b)).
did not consider how the application of the three-part test would disproportionately affect patent holders filing infringement actions against corporations with non-traditional physical locations.\textsuperscript{107} Companies that operate entirely online, such as Amazon.com, do not operate out of traditional brick and mortar locations, as was the case in the late 1800s when the patent venue statute was first enacted.\textsuperscript{108} For these companies, it is entirely plausible that patent infringement actions against them may only be able to be filed in the jurisdiction of incorporation.\textsuperscript{109} This development will have serious consequences for small businesses without the funds to litigate expensive patent infringement actions in foreign jurisdictions.\textsuperscript{110}

Companies who are forced to litigate patent infringement actions against companies who do not operate traditional brick and mortar locations where the acts of infringement are occurring will be forced to file their lawsuits in distant jurisdictions.\textsuperscript{111} Many more cases will need to be filed in states where corporations are incorporated, such as Delaware, which is not historically viewed as a plaintiff friendly venue.\textsuperscript{112} The \textit{TC Heartland} and \textit{In re Cray} decisions increase the cost on small businesses that seek to enforce their intellectual property rights in federal court.\textsuperscript{113} These decisions inject uncertainty into the patent sphere, and will lead to more complex litigation, raising the cost for small businesses to enforce their patent rights in court.\textsuperscript{114} Moreover, these rulings will disincentivize innovation by small businesses because they will not be able to easily enforce their patent rights.\textsuperscript{115} If companies are no longer able to affordably litigate against infringing parties, the patent portfolios of these entities will lose their value because the cost to

\textsuperscript{107} See id. (explaining many businesses’ online nature).

\textsuperscript{108} Id. (stating that companies can operate entirely online without ever establishing a fixed physical location within the United States).

\textsuperscript{109} Id. (stating that the court disregarded how businesses operate in the twenty-first century and will restrict plaintiff’s filing location to the state of incorporation of the infringing corporation).

\textsuperscript{110} See Quinn, supra note 83 (giving Paul Morinville’s reaction to \textit{TC Heartland}).

\textsuperscript{111} See id. (giving William A. Munck’s reaction to \textit{TC Heartland}).

\textsuperscript{112} See id. (stating that the District of Delaware, while competent at patent infringement litigation, does not require upfront investment in the case like the Eastern District of Texas).

\textsuperscript{113} See id. (giving Paul Morinville’s reaction to \textit{TC Heartland}, that costs will increase due to the inconvenience of small businesses being forced to litigate only in the judicial district where the alleged infringer is incorporated).

\textsuperscript{114} See id. (stating that venue disputes will complicate litigation and bring a level of unpredictability to a previously reliable aspect of a dispute).

\textsuperscript{115} See id. (stating Paul Morinville’s reaction to \textit{TC Heartland}, arguing that small businesses will not be able to enforce their patent rights due to the increased cost and inability to obtain a favorable outcome such as an injunctive relief or damages).
enforce the patent in court would outweigh the benefit received through litigation.\textsuperscript{116} In order to rectify these issues created by the Federal Circuit and Supreme Court, Congress should rework patent infringement venue to allow a more uniform application of the law to corporations to create more stability and certainty in the law.\textsuperscript{117}

\textit{C. Patent Infringement Filing Has Been Significantly Impacted by TC Heartland Decision }

Since the Supreme Court and Federal Circuit decided \textit{TC Heartland} and \textit{In re Cray}, patent infringement filings have profoundly shifted from years prior.\textsuperscript{118} In 2017, the Eastern District of Texas saw more patent infringement cases filed in the district than any other judicial district, but after the \textit{TC Heartland} decision on May 22, 2017, there was a dramatic shift in filing activity.\textsuperscript{119} The District of Delaware overtook the Eastern District of Texas in the second half of 2017 as the most popular district for patent infringement filings.\textsuperscript{120} Additionally, other judicial districts, such as the Western District of Texas, the Western District of Washington, the Southern District of Texas, and the District of Massachusetts, saw 115.8, 108, 76.5, and 60.3 percent increases respectively in patent infringement cases in 2017 after the Supreme Court decided \textit{TC Heartland}.\textsuperscript{121}

The large number of cases still filed in the Eastern District of Texas can be attributed to the fact that the \textit{TC Heartland} decision only applies to domestic businesses.\textsuperscript{122} Foreign corporations operating within the U.S. are still subject to civil action for patent infringement in any jurisdiction

\textsuperscript{116} See id. (arguing that small business’ patent portfolios will become unenforceable due to the cost-prohibitive status of patent infringement actions).

\textsuperscript{117} See Noonan, supra note 106 (arguing for Congress to liberalize patent infringement venue standards).

\textsuperscript{118} See Brian Howard, \textit{Lex Machina Q4 2017 End of the Year Litigation Update}, LEX MACHINA (Jan. 16, 2018), https://lexmachina.com/lex-machina-q4-litigation-update/ (analyzing the shift in patent infringement filings in prominent patent districts such as Delaware, Northern and Southern Districts of California, and Washington, where they experienced increased litigation while the Eastern District of Texas experienced a decline in filings).

\textsuperscript{119} See id. (analyzing how patent infringement action filings in districts outside of the Eastern District of Texas have increased).

\textsuperscript{120} See id. at fig.3 (explaining that the District of Delaware overtook the Eastern District of Texas for the number of patent infringement actions filed).


\textsuperscript{122} See id. (noting that the Supreme Court limited the \textit{TC Heartland} decision to domestic corporations).
pursuant to section 1391(c). In *TC Heartland*, the Court stated that the decision only applied to domestic corporations. If this were not the case, the number of filings in the Eastern District of Texas may have declined even further.

The uptick in the California and Delaware judicial districts logically follows the holding in *TC Heartland*. More than half of publicly traded American companies and sixty-six percent of Fortune 500 companies are incorporated within the state of Delaware. The proportionally large number of businesses incorporated in the minute state of Delaware will predictably yield an outsized number of patent infringement cases filed within the district due to the new restrictions on appropriate patent infringement venue. After the *In re Cray* decision, it has become increasingly difficult to satisfy venue requirements based on the “regular and established place of business” clause of 28 U.S.C. section 1400(b). The three-part test established by the Federal Circuit requires a physical place owned by the defendant within the district. Online businesses and companies with complex corporate structures comprising subsidiary corporations do not cleanly fit into the Federal Circuit’s *In re Cray* three-part

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123. 28 U.S.C. § 1391(c) (2012) (establishing a personal jurisdiction standard to determine appropriate venue in civil actions).


125. See Anger & Zelkind, *supra* note 121 (noting that cases may have been improperly filed in the Eastern District of Texas and may be subject to dismissal or transfer out of the jurisdiction to the appropriate district).

126. See Howard, *supra* note 118 (stating that because a large percentage of American corporations choose to incorporate in Delaware that more patent infringement action filings will occur in Delaware because venue is always appropriate in the jurisdiction of incorporation).


128. See Coe, *supra* note 105 (stating that the large number of patent cases that could be filed in Delaware could lead to a congested docket which would increase the time it takes to reach a judgment).

129. See id. (quoting Susan Morrison) (“It’s going to be easier to establish venue in Delaware because of the ‘resides’ language in the [patent] statute. . . . If plaintiffs sue a Delaware corporation in Delaware, it provides them with certainty that they won’t face a venue challenge.”).

130. *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017).
test to determine patent infringement venue.\textsuperscript{131}

It is much easier to satisfy venue requirements by suing in the jurisdiction of incorporation, which has prompted the increase in infringement filings in jurisdictions where there are more incorporated entities due to clarity of the law under section 1400(b).\textsuperscript{132} The uptick in California filings can be attributed to the fact that many companies have headquarters in the state, making venue appropriate under the “regular and established place of business” clause.\textsuperscript{133} Moreover, because the companies have offices in California, venue would also be appropriate because they have committed acts of infringement within the district.\textsuperscript{134}

These developments are a first glance at the initial consequences of the change in venue jurisprudence as a result of TC Heartland and In re Cray. Companies looking for certainty and seeking to reduce unnecessary litigation will continue to choose to file their patent infringement actions in jurisdictions where venue is certain to be appropriate namely in the state of incorporation.\textsuperscript{135}

\textbf{D. Supreme Court Jurisprudence Negates the Original Intent of the Patent Venue Statute}

The Supreme Court’s holding in TC Heartland paved the way for the Federal Circuit to decide the In re Cray decision.\textsuperscript{136} This narrow patent infringement venue provision is analogous to the original 1887 Act, that only permitted infringement actions to be filed in the jurisdiction in which the defendant is an inhabitant.\textsuperscript{137} When the In re Cray test is examined in the

\begin{itemize}
  \item \textsuperscript{132} See Coe, supra note 105 (stating that there is no ambiguity that venue is appropriate when choosing to sue in the jurisdiction where the alleged infringer is incorporated).
  \item \textsuperscript{133} Anger & Zelkind, supra note 121 ("[T]he reason . . . may be that the plaintiffs in these cases have relied on Section 1400(b)’s second venue option to sue Silicon Valley’s technology companies where they are headquartered — that is, where they have ‘a regular and established place of business’ . . . .").
  \item \textsuperscript{134} See id. (establishing appropriate venue under section 1400(b)’s second prong).
  \item \textsuperscript{135} See Quinn, supra note 83 (giving Jonathan Waldrop’s reaction to TC Heartland, that companies will choose venues based on place of incorporation rather than clustering cases in the Eastern District of Texas and the District of Delaware).
  \item \textsuperscript{136} See TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1517 (2017); In re Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017) (establishing that patent infringement venue is only appropriate in the jurisdiction when the defendant has a physical place in the district, that place is a regular and established place of business, and that it is the place of the defendant).
  \item \textsuperscript{137} See Noonan, supra note 106; Wydick, supra note 12, at 553.
\end{itemize}
context of the 1897 Act,\textsuperscript{138} the test contradicts Congress’ original intention of liberalizing patent infringement venue in 1897.\textsuperscript{139} The 1897 Act sought to expand appropriate patent infringement venue to prevent plaintiffs from litigating in inconvenient judicial districts.\textsuperscript{140} The law at the time sought to diversify the venues in which a patent infringement action could be filed.\textsuperscript{141} The law, as it currently stands, restricts where plaintiffs can file patent infringement actions.\textsuperscript{142} The Supreme Court and Federal Circuit have brought the status of patent infringement venue back to the late 1800s by restricting appropriate patent infringement venue.\textsuperscript{143} Prior to the 1897 Act, venue was only proper where the defendant could be served.\textsuperscript{144}

Similarly, today, venue is only proper where the defendant is incorporated or operates a physical location.\textsuperscript{145} These were also the only places a business could be served in the late 1800s.\textsuperscript{146} The legislature in the late 1800s intended to expand patent infringement venue, not restrict where actions could be filed.\textsuperscript{147} Today’s legal standard for determining venue overly restricts where a defendant can be sued for patent infringement which contradicts the initial patent infringement venue standard established in the 1897 Act.\textsuperscript{148} \textit{TC Heartland} and \textit{In re Cray} have contradicted the exact purpose of the original venue statute which sought to expand patent holders’ access to the court system.\textsuperscript{149}

\begin{thebibliography}{99}
\bibitem{139} Id. (expanding the venues where infringement actions could be filed prior to implementation of the act).
\bibitem{140} \textit{See} Wydick, \textit{supra} note 12, at 554.
\bibitem{141} Noonan, \textit{supra} note 106.
\bibitem{142} \textit{See} In re Cray, Inc., 871 F.3d 1355, 1360 (Fed. Cir. 2017).
\bibitem{143} \textit{See} Christopher Gaspar & Sean Hyberg, \textit{Supreme Court Turns Back the Clock on Venue in Patent Infringement Litigation}, L. J. NEWSL., http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/06/01/supreme-court-turns-back-the-clock-on-venue-in-patent-infringement-litigation/ (last visited Apr. 29, 2018) (stating that the initial intent of the 1897 Act was to place patent infringement actions in “a class by themselves, outside the scope of general venue legislation”).
\bibitem{144} \textit{See} TC\textit{Heartland}, LLC, 137 S. Ct. at 1514 (explaining that the prior to the 1897, plaintiffs could “bring suit . . . anywhere a defendant could be found for service of process”).
\bibitem{145} \textit{See id.} at 1517; \textit{In re Cray}, 871 F.3d at 1360.
\bibitem{146} \textit{See In re Cray}, 871 F.3d at 1360 (creating a restrictive three-part test to determine whether venue is proper in a district); Wydick, \textit{supra} note 12, at 553.
\bibitem{147} \textit{See} Wydick, \textit{supra} note 12, at 554, 556-57 (arguing that general venue was stricter than patent infringement venue after the 1897 act was passed which liberalized patent infringement venue separately from all other venue provisions).
\bibitem{149} \textit{See} Bone, \textit{supra} note 6, at 149 (stating that the 1897 Act “recognized two grounds for patent venue: (1) the district where the defendant is an “inhabitant” . . . and
With its decision in TC Heartland, the Court reversed a longstanding trend of expanding the scope of patent infringement venue, reviving the legal standard used prior to 1990 in determining patent infringement venue. The Court revived the Fourco Glass Co. holding which stated that section 1400(b) was the sole provision governing patent infringement venue. The 1897 Act provided an exception to civil venue provision to grant patent holders increased flexibility in venue. However, the Court is ironically using that same exception in the law to create a special provision for patent infringement venue that restricts appropriate venues for patent holders when filing patent infringement actions. To rectify the negative consequences for patent holders of the In re Cray and TC Heartland decisions, the U.S. Congress will have to rethink how patent infringement venue is determined for domestic corporations.

IV. CONGRESS MUST AMEND THE 28 U.S.C. SECTION 1391(c) AND 28 U.S.C. SECTION 1400(b) TO CREATE UNIFORMITY IN PATENT INFRINGEMENT VENUE JURISPRUDENCE

Congress must pass a patent infringement venue reform act or the negative impact of TC Heartland and In re Cray will cripple the U.S. patent system and ultimately stifle innovation within the U.S. Congress, through legislative action, should create a system of patent-specific district courts that have exclusive jurisdiction over patent infringement actions scattered throughout the country in every jurisdiction.

A. Establish Patent Specific District Courts

Coupled with this new legislation, Congress should abolish section 1400(b), which created a separate venue statute for patent infringement

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150. See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 226 (1957) (restricting the venues appropriate for patent infringement actions to the state of incorporation under the residence clause of 28 U.S.C. 1400(b)).
151. Id. (establishing that patent infringement venue is only determined under section 1400(b)).
152. See Ch. 395, 29 Stat. at 695.
154. See Noonan, supra note 106 (calling on the United States Congress to liberalize patent infringement venue to expand where corporations can be sued for patent infringement).
155. See Quinn, supra note 83 (giving Brian Pomper’s reaction to TC Heartland).
actions. This system of patent-specific district courts, analogous to the Federal Circuit at the appellate level, will create uniformity among the courts so that forum shopping is limited and access to the court system is maximized through a uniform set of policies and procedures.

The branches of the patent-specific district court system would be spaced sporadically throughout the country. Plaintiffs would not be required to litigate in courts across the country because there would be a patent-specific courthouse in every federal judicial circuit across the country. Each of the eleven numbered federal circuits would have at least one patent-specific district court house in their district. The law would mandate that infringement actions be filed in a patent district court where the defendant is subject to personal jurisdiction under section 1391(c).

The outlined system is similar to that of the U.S. bankruptcy court system. Bankruptcy courts are separate divisions within Federal District Courts. These courts have exclusive jurisdiction over bankruptcy cases arising within the U.S. Having separate patent-specific branches of district courts would greatly improve the consistency of judicial outcomes and reduce the steep learning curve for judges unfamiliar with patent-specific laws. Allowing judges to specialize in an area of law will yield more uniform outcomes based on the facts of the cases.

156. See 28 U.S.C. § 1400(b) (2012) (stating that patent infringement venue is governed by this separate statutory provision).

157. See generally Noonan, supra note 106 (“It seems likely that, as in so many areas of patent law, the only remedy for this state of affairs will be if Congress steps in and changes the statute to again liberalize where proper venue in patent cases can be found.”).


159. See U.S. Bankruptcy Courts, Fed. Jud. Ctr., https://www.fjc.gov/history/courts/u.s.-bankruptcy-courts (last visited Apr. 29, 2018) (stating that bankruptcy courts are divisions within the federal district court system, and that all bankruptcy cases are referred to the bankruptcy judges by the district court).

160. Id. (stating that only bankruptcy courts have the authority to litigate bankruptcy matters; no other court has jurisdiction over these proceedings).

161. Jason Rantanen & Joshua Haugo, District Court and Patent Cases, Part I, PATENTLYO (Apr. 28, 2014), https://patentlyo.com/patent/2014/04/district-courts-patent.html (“At least a substantial number of District Court judges do not hear more than an occasional patent case, and thus may find it difficult to determine which cases are ‘exceptional’ based on their past experience with other patent cases.”).

162. Chris Burke, Advantages & Disadvantages of Specialized Courts, LEGAL BEAGLE, https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html (last updated June 20, 2017) (“Specialized judges have a greater understanding of
B. Drawbacks of Patent-Specific District Courts

While this proposal would greatly increase the efficiency and uniform application of patent jurisprudence throughout the country, this proposal would cost a lot of money. However, costs could be mitigated through court costs on litigants. The typical entities involved in patent infringement litigation are corporations that can easily afford a small filing fee in addition to the 2.8 million dollars it costs on average to litigate a patent infringement action through the final disposition in federal court. Businesses who choose to take on this immense cost to pursue a patent litigation action can afford to pay a small nominal fee to the court, which will ultimately benefit the corporation because patent law will be uniformly applied across the entire county. These corporations will no longer be at a legal disadvantage based on the forum chosen by the plaintiff because the law will be uniformly applied across all districts, which is analogous to the Federal Circuit at the appellate level.

C. Personal Jurisdiction Standard for Venue Establishes Certainty and Uniformity

Applying the personal jurisdiction standard for venue to patent law will ensure that companies who incorporate in a given jurisdiction, and do not have other brick and mortar locations, are not protected from litigating in other jurisdictions merely because they do not have an office there even though they routinely sell their product or service in the jurisdiction.

A return to the personal jurisdiction standard for venue will also bring certainty back to the venue debate in patent infringement cases. The new test produced in In re Cray by the Federal Circuit created confusion, not issues and are better able to offer fair rulings based on the facts.

163. Rebekah Diller, Court Fees As Revenue?, BRENNA CTR. FOR JUST. N.Y.U. (July 30, 2008), https://www.brennancenter.org/analysis/court-fees-revenue (stating that states such as Colorado use court fees to fund new court houses).

164. Chris Neumeyer, Managing Costs of Patent Litigation, IP WATCHDOG (Feb. 5, 2013), http://www.ipwatchdog.com/2013/02/05/managing-costs-of-patent-litigation/id=34808/ (citing The American Intellectual Property Law Association) (“[T]he cost of an average patent lawsuit, where $1 million to $25 million is at risk, is $1.6 million through the end of discovery and $2.8 million through final disposition. Adding insult to injury, more than 60% of all patent suits are filed by non-practicing entities (NPEs) that manufacture no products and rely on litigation as a key part of their business model.”).

165. Id. (stating that patent litigation will always be costly especially when one party aggressively pursues an aggressive discovery strategy).


167. See id.
The personal jurisdiction standard is more easily applied because all other cases adhere to the personal jurisdiction standard for venue. This will reduce the amount of money and time spent litigating a pre-trial issue that will not help end the dispute between the parties.

V. CONCLUSION

The *TC Heartland* and *In re Cray* cases have significantly limited a plaintiff’s access to the court system when filing patent infringement actions. Plaintiffs are restricted to filing in the state of defendant’s incorporation or where the defendant has a permanent place of business that satisfies the three-part *Cray* test. These two decisions will harm plaintiffs when the defendant does not have any physical places of business, such as online companies. Online retailers, software companies, and other types of businesses that do not operate out of fixed physical locations will be able to avoid litigation in all jurisdictions except for the jurisdiction in which they are incorporated.

District courts will struggle to implement the *In re Cray* test without amendments to the venue statute or additional guidance provided by the Federal Circuit or the Supreme Court due to the evolving business model of modern companies. As the law currently stands after *In re Cray*, there is significant uncertainty that will persist until a more concrete standard for patent infringement venue is implemented.

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168. See *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017); see also Noonan, *supra* note 106 (discussing the issues with *In re Cray* and how the decision may have left plaintiffs with no place to sue for patent infringement).

169. See 28 U.S.C. § 1391(c) (stating the venue standard for civil actions).

170. See Letter from Professors, to the House and Senate Judiciary Committee, on Supporting Venue Reform, (July 12, 2016), https://drive.google.com/file/d/0B4BdaKgM6bo7cUt1YXdfSBOfQyaXJvRnVBS3pBQXZMLURR/view (appealing to Senators to change the venue rules in patent litigation to end forum shopping and reduce costs of litigation).