Patent Law Alert:
Federal Circuit Clarifies â€œRegular And Established Businessâ€• For Venue Purposes in In re Cray Inc.

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On September 21, 2017, the United States Court of Appeals for the Federal Circuit issued its decision in *In re Cray Inc.* The Federal Circuit granted a writ of mandamus and vacated an order of the United States District Court for the Eastern District of Texas (“District Court”) denying a motion to transfer. In doing so, the court rejected the four-factor test established by Judge Gilstrap to determine what constitutes a “regular and established place of business” within the meaning of 28 U.S.C. 1400(b).

In vacating the District Court's decision, the Federal Circuit set forth a new three-part test to assist courts in defining a “regular and established place of business” means within the meaning of Section 1400(b). The Federal Circuit listed the following three requirements as 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 of these statutory requirements is not satisfied, venue is improper.

In the District Court proceeding, Cray moved to transfer the action and argued that it did not “reside” in the Eastern District of Texas in light of the Supreme Court's recent decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC,* 137 S. Ct. 1514 (2017). Cray also argued that venue was improper in the Eastern District of Texas because Cray had neither committed acts of infringement, nor maintained “a regular and established place of business” within that district. The District Court rejected that argument and found that venue was proper based,

among other facts, on a Cray employee's activities within the District. Cray petitioned the Federal Circuit for a writ of mandamus.

In vacating the District Court's order, the Federal Circuit found that the District Court misunderstood the scope and effect of its prior decisions, leading it to improperly deny the motion to transfer. As the Federal Circuit stated, "although the law was unclear and the error understandable, the district court abused its discretion by applying an incorrect legal standard, which we now clarify in this opinion."

In its analysis of whether Cray has a "regular and established place of business" in the Eastern District of Texas within the meaning of Section 1400(b), the Federal Circuit focused on the language of the statute. It held that Section 1400(b) requires that "a defendant has" a "place of business" that is "regular" and "established." It found that the four-factor test used by the lower court was not sufficiently tethered to the statutory language, and thus failed to inform each of the necessary requirements of the statute. Rather, the Federal Circuit stated, "the analysis must be closely tied to the language of the statute."
With regard to the first requirement that there "must be a physical place in the district" the court found that the statute cannot be read to refer merely to a virtual space or to electronic communications from one person to another. Rather, there must be a physical, geographical location in the district from which the business of the defendant is carried out.

In its analysis of the second factor that the place "must be a regular and established place of business" the court focused on the word "regular." It stated that "a business may be" regular, "for example, if it operates in a steady, uniform, orderly and methodical manner." Neither sporadic business activity, nor a transient business location, can create venue.

In its analysis of the third prong that the place of business "must be the place of the defendant," the court explains that an employee's residence in a district is not necessarily enough to establish venue. "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." This was the crucial factor upon which the court relied in vacating the District Court's decision. The Federal Circuit found that an employee's home was not a regular and established place of business of Cray. Cray did not own, lease or rent any portion of the employee's home in the Eastern District of Texas. Further there was no evidence that indicated that Cray played a part in selecting the employee's location, or stored inventory or conducted demonstrations in the employee's home. Additionally, the employee's employment was not conditioned upon his maintenance of a location in the Eastern District of Texas. The District Court had merely found that there was a physical location within the district where an employee of the defendant carried on certain work for his employer.

The Federal Circuit explained that no one factor was controlling. However, taken together the facts did not support a finding that Cray had an established a place of business in the Eastern District of Texas and thus venue was improper under Section 1400(b). The case was remanded back to the District Court to determine the proper transferee district.

This decision will help companies and courts more easily determine whether a “regular and established place of business” exists for the purpose of venue under Section 1400(b).

We will continue to monitor developments in the law on patent venue. In the meantime, please feel free to contact one of our attorneys regarding the issues raised by this case.

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