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Expert Analysis

# Guidance on What Constitutes a 'Regular and Established Place of Business'

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The past year has seen significant changes in venue law in patent cases. In *TC Heartland v. Kraft Food Group Brands*, 137 S. Ct. 1514 (2017), the U.S. Supreme Court held that venue is proper under 28 U.S.C. §1400(b), the patent venue statute, only in the judicial district in which the defendant resides or in a judicial district in which the defendant committed acts of infringement and has "regular and established place of business." Then, in *In re Cray*, the Federal Circuit gave some guidance as to what constitutes a "regular and established place of business" for patent-venue purposes. See 871 F.3d 1355 (Fed. Cir. 2017). Since then, at least two dozen district-court cases have applied *In re Cray* to determine whether venue was proper. Because of the importance of filing suit in a district in which venue is proper, we report here on the post-*Cray* landscape and provide guidance for practitioners.

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## 'In re Cray'

Raytheon sued Cray for patent infringement in the Eastern District of Texas, despite Cray being headquartered and incorporated in Washington state. The district court denied Cray's motion to transfer venue, finding that venue was proper even though Cray does not own or rent any property in the Eastern District of Texas. See *Raytheon Co. v. Cray*, 258 F. Supp. 3d 781 (E.D. Tex. 2017). The court relied on *In re Cordis*, 769 F.2d 733 (Fed. Cir. 1985), which itself involved a defendant that did not own or lease property in the forum district, but that employed two sales representatives in that district. In *Cordis*, the Federal Circuit had held that "the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence there and not … whether it has a fixed physical presence in the sense of a formal office or store." Id. at 737.

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Relying on *Cordis*, the district court found that venue was proper in the Eastern District of Texas because Cray had a sales representative who worked remotely from his home in that district, using an "office" telephone number with an Eastern District of Texas area code, and because the sales representative had access to online sales brochures that could be distributed to prospective customers. *Raytheon*, 258 F. Supp. 3d at 793-94.

Cray sought a writ of mandamus, which the Federal Circuit granted, holding that the district court abused its discretion in denying Cray's motion to transfer venue. See *In re Cray*, 871 F.3d at 1359. The Federal Circuit identified three general requirements that must be satisfied under the "regular and established place of business" 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. While *Cordis* does not require a fixed physical presence such as a formal office or store, "there must still be a physical, geographical location in the district from which the business of the defendant is carried out." Id. at 1362. The second requirement precludes reliance on a location at which there is only "sporadic activity," such as a semiannual display of a defendant's products at a trade show in the district. Id. Finally, the physical location must be that of the defendant, "not solely a place of the defendant's employee." Id. at 1363. The court explained that considerations relevant to this factor include "whether the defendant owns or leases the place" or "exercises other attributes of possession or control over the place," and whether the defendant conditioned employment on the employee's residence in the district or on the storing of materials at a place in the district. Id.

Given the detailed nature of the venue analysis after 'TC Heartland' and 'In re Cray', these decisions may suggest an increased willingness to allow early, targeted discovery in connection with motions to dismiss or transfer based on venue.

Turning to the facts before it, the Federal Circuit found venue to be improper in the Eastern District of Texas because the sales executive's home there was not "a regular and established *place of business of Cray*," Id. at 1365 (emphasis in original), because "[t]here is no indication that Cray owns, leases, or rents any portions of" the executive's home, and because there is no evidence that "Cray played a part in selecting the place's location, stored inventory or conducted demonstrations there." Id.

### Post-'Cray' Decisions

Some trends have emerged in the two dozen or more cases that have applied *In re Cray* to assess whether a defendant has a "regular and established place of business" in the district in which suit was filed. Given that courts appear split regarding which party bears the burden of proving that venue is (or is not) proper (compare *FOX Factory v. SRAM*, No. 3:16-cv-00506-WHO, 2018 WL 317839 (N.D. Cal. Jan. 8, 2018), and *Precision Fabrics Grp. v. Tietex International, Ltd.*, No. 1:13-cv-645, 2017 WL 5176355 (M.D.N.C. Nov. 7, 2017), with *Mallinckrodt IP v. B. Braun Medical*, No. 17-365-LPS, 2017 WL 6383610 (D. Del. Dec. 14, 2017), and *American GNC Corp. v. ZTE*, No. 4:17CV620, 2017 WL 5157700 (E.D. Tex. Nov. 7, 2017)), practitioners should be aware of the facts that district courts have found significant in this analysis.

Operating a physical facility in the district has been held sufficient to create venue over the defendant. See *Intellectual*

*Ventures II v. FedEx*, No. 2017 WL 5630023, No. 2:16-CV-00980-JRG (E.D. Tex. Nov. 22, 2017) (retail and service locations for shipping goods); *Plexxikon v. Novartis Pharm.*, No. 17-cv-04405-HSG, 2017 WL 6389674 (N.D. Cal. Dec. 7, 2017) (manufacturing facility and research facility). So, too, has maintaining a call center in the district, even where it is operated by a third party under contract to the defendant. See *GNC*, 2017 WL 5157700.

In contrast, however, the physical presence in the district of a subsidiary or a corporate affiliate, rather than of the defendant itself, has been held insufficient to establish venue over the defendant. *Galderma Labs., L.P. v. Teva Pharm. USA*, No. 3:17-cv-01076-M, 2017 WL 6505793 (N.D. Tex. Nov. 17, 2017); *Post Consumer Brands v. General Mills*, No. 4:17-CV-2471 SNLJ, 2017 WL 4865936 (E.D. Mo. Oct. 27, 2017). So, too, has the defendant's registering with the forum state to do business and designating an agent for service of process. See *BillingNetwork Patent v. Modernizing Med.*, No. 17 C 5636, 2017 WL 5146008 (N.D. Ill. Nov. 6, 2017); *Symbology Innovations v. Lego Sys.*, No. 2:17-cv-86, 2017 WL 4324841 (E.D. Va. Sept. 28, 2017).

Relatedly, having sales representatives or independent dealers within the district has been held insufficient to establish venue. See *FOX Factory*, 2018 WL 317839; *Nike v. Skechers U.S.A.*, No. 3:16-cv-007-PK, 2017 WL 7275389 (D. Or. Nov. 14, 2017). Keeping a limited amount of sample products or product literature in employees' homes within the district has also been held insufficient. See, e.g., *Automated Packaging Sys. v. Free-Flow Packaging Int'l*, No. 5:14-cv-2022, 2018 WL 400326 (N.D. Ohio Jan. 12, 2018); *Regents of Univ. of Minn. v. Gilead Scis.*, No. 16-CV-2915, 2017 WL 4773150 (D. Minn. Oct. 20, 2017).

Courts have also tended not to accept as sufficient in-district interactions between the defendant and a third party. Providing computer servers or equipment for use at third-party facilities in the district has been held insufficient for venue. *Automated Packaging*, 2018 WL 400326; *Personal Audio v. Google*, No. 1:15-CV-350, 2017 WL 5988868 (E.D. Tex. Dec. 1, 2017). So has controlling and monitoring the activities or facilities of third parties. *Lites Out v. OutdoorLink*, No. 4:17-CV-00192, 2017 WL 5068348 (E.D. Tex. Nov. 2, 2017) (monitoring billboard lighting and structural integrity); *Univ. of Minn.*, 2017 WL 4773150 (controlling of the protocol of clinical trials and providing drugs for use in trials).

Finally, a recent series of decisions from Chief Judge Leonard P. Stark in Delaware has allowed discovery into the in-district actions of corporate affiliates or subsidiaries in order to test the propriety of venue there. See *Mallinckrodt*, 2017 WL 6383610; *Javelin Pharm. v. Mylan Labs. Ltd.*, No. 16-224-LPS, 2017 WL 5953296 (D. Del. Dec. 1, 2017); *UCB v. Mylan Techs.*, No. 17-322-LPS, 2017 WL 5985559 (D. Del. Dec. 1, 2017). Given the detailed nature of the venue analysis after *TC Heartland* and *In re Cray*, these decisions may suggest an increased willingness to allow early, targeted discovery in connection with motions to dismiss or transfer based on venue.