Where is Your Place of Business?

The "Regular and Established Place of Business" Analysis After *In re Cray*

Authors: Theodore Chiacchio and Jacob Graham

Venue plays a vital role in litigation. This is true with respect to patent litigation as much as any other type of litigation. Venue determines the district court in which a plaintiff may sue a defendant—thus factoring into the make-up of a jury, the judge presiding over the case, the timing and sequence of disclosures (*e.g.*, infringement or invalidity contentions), the degree to which the court may be technologically savvy, and the degree to which the court may be familiar with and knowledgeable regarding patent law, among other things.

The determination as to where venue properly lies in a patent infringement case has drastically changed over the last six months. Earlier this year, in *TC Heartland*, the Supreme Court reversed twenty-five years of precedent, which had held that a defendant may be sued in any district where there is personal jurisdiction over the defendant. *TC Heartland* re-focused the venue inquiry back to 28 U.S.C. § 1400(b), which states as follows:

> *(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 a regular and established place of business.

Immediately following *TC Heartland*, district courts reverted to case law from the 1980s and early 1990s analyzing the meaning of "regular and established place of business" under 28 U.S.C. § 1400(b). Specifically, in patent cases, district courts were often relying upon *In re Cordis*, a 1985 Federal Circuit decision finding venue proper based on the presence of two salespersons within the district. *In re Cordis* 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." *In re Cordis Corp.*, 769 F.2d 733, 786 (Fed. Cir. 1985). Turning the inquiry from whether a party has "a regular and established place of business" to whether it "does its business in that district through a permanent and continuous presence," however, does little to provide further clarity for district courts when analyzing whether venue is proper under § 1400(b).

After *TC Heartland* came down, consistent with *Cordis*, courts focused on "business presence" when analyzing whether defendant maintained a "regular and established place of business" in the district and not "presence" in the sense of a fixed, physical location. *See, e.g., Bristol-Myers Squibb Co. v. Mylan Pharms., Inc.*, No. 17-cv-379, 2017 U.S. Dist. LEXIS 146372 (D. Del. Sept. 11, 2017); *InVue Sec. Prods v. Mobile Tech, Inc.*, No. 15-cv-610, 2017 U.S. Dist. LEXIS 133187 (W.D.N.C. Aug. 21, 2017). Courts' analyses of business presence were fact-intensive and involved inquiries into revenue, sales, customers, and services in the district. In *In re Cray*, however, the Federal Circuit took a middle ground by crafting a three-pronged standard but making clear that this standard is intended to guide, not supplant, a fact-intensive, case-by-case, analysis.

In re Cray involved an appeal from the Eastern District of Texas, where the district court had crafted a seemingly plaintiff-friendly four-prong test for analyzing whether defendant has a "regular and established place of business" in the district. *In re Cray*, No. 2017-129, 2017 U.S. App. LEXIS 18398, at *5 (Fed. Cir. Sept. 21, 2017). The Federal Circuit rejected the district court's test and rejected plaintiff's argument that venue was proper based on the presence of two at-home employees. *Id.* at *3-6. These employees were (1) a territory manager that resided in the district only "from 2010 to 2011 before the underlying suit was filed," *id.* at *3; and (2) a sales executive that, among other things, never maintained Cray's products or literature at his home or indicated a place of business in the district, *id.* at *4, *27-28. In reaching its decision, the court carefully analyzed the language of Section 1400(b), separately interpreting each of the terms "place," "regular," and "established." *Id.* at *10-20. The court announced the following three-prong inquiry governing whether an entity's business in a particular district can be said to be "regular and established": "(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." *Id.* at *11.

Under the first *In re Cray* prong, the physical place in the district must be a "physical, geographic location in the district from which the business of the defendant is carried out." *Id.* at *15-16. With regard to the second *In re Cray* prong, an established business is one that is stable or present for more than a temporary period of time. *Id.* at *16-18. And under the third *In re Cray* prong, a defendant must ratify a business or exercise some other attribute of possession or control over it for it to be a place "of the defendant." *Id.* at *18-19.

As noted, while setting forth a three-part standard for the "regular and established place of business" analysis, the court at the same time hedged by commenting that "no precise rule has been laid down[,]" "each case depends on its own facts," and "no one fact is controlling." *Id.* at *14, *27. Further in this regard, the court laid out a number of factual considerations that should inform a "regular and established place of business" analysis. These included the following:

- whether the employees maintained defendant's materials at their home, *id.* at *4;
- whether defendant enlisted administrative support from within the district, *id.*;
- the type of employee fees or costs reimbursed by defendant, *id.* at *3-4;
- whether defendant paid an employee for the use of a home to operate its business, or publicly advertised or otherwise indicated that the home was a place of business, *id.* at *4;
- whether there is a geographical location from which the business of defendant is carried out, including, for example, an employee's home used for storage, or a service engaged by defendant to perform tasks, *id.* at *15-16 (citing *Cordis*, 769 F.2d at 735, 737);
- the continuous presence of the defendant in the district, *id.* at *17;
- whether "an employee can move his or her home out of the district at his or her own instigation," *id.*at *18;
- whether a defendant exercises attributes of possession or control over a place, *id.*;
- whether a defendant conditioned employment or support of the employee 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, *id.* at *18-19, *22;
- marketing or advertising regarding a place of defendant's business, *id.* at *19;
- the nature and activity of a place of business in comparison with other places of business of a defendant, *id.*;
- whether a defendant believed a location in the district to be important to the business performed or had an intention to maintain some place of business in the district, if, for example, an employee left, *id.*, at *22; and

- whether an employee's presence in the district was material to the defendant, *id*. at *23.

One issue requiring further clarity after *In re Cray* is the extent to which a defendant must have a physical presence in a district as a prerequisite to finding that the defendant has a "regular and established place of business" in the district. While the three-part standard set out in *In re Cray* seems to require that the business itself must have a physical presence, this must be squared with *Cordis*'s holding that there existed a "regular and established place of business" where the only physical presence in the forum consisted of two of defendant's employees working remotely from their homes and a secretarial service with whom the defendant had contracted. The key for the court in *Cordis* was that defendant relied upon these two employees residing in the forum to carry out defendant's business in that forum. These employees were sales people who maintained significant amounts of inventory in their homes. Their homes were functioning as de facto distribution centers in the district. In *In re Cray*, the defendant was neither here nor there as to whether the employees resided in the district or not. The work performed by the employees for the defendant in no way required that the employees reside in the district.

Statements in *In re Cray* such as the following, however, render the state of the law in this area murky:

> *For purposes of § 1400(b), it is of no moment that an employee may permanently reside at a place or intend to conduct his or her business from that place for present and future employers. The statute clearly requires that venue be laid where the defendant has a regular and established place of business, not where the defendant's employee owns a home in which he carries on some of the work that he does for the defendant.*

Id. at *22-23 (internal citations and quotations omitted). It is very difficult to square this comment with the remainder of the opinion and with *Cordis*. If an employee permanently resides at a place and intends to conduct his or her business from that place presently and indefinitely into the future, are these not necessary conditions to finding that such an employee, working remotely from their home, qualifies the business as having a "regular and established placed of business" in the district encompassing the residence (as in *Cordis*)? It may be that, according to other sections of the *In re Cray* opinion, this alone is not enough. Regardless, such facts certainly are "of moment." Did the court mean to say that such factors, standing alone, are not sufficient to satisfy the "regular and established place of business" requirement of § 1400(b)? That would make more sense given the remainder of the opinion and its purported consistency with *Cordis*.

While *In re Cray* confirms that the place of business must be that of the defendant, and *In re Cray* and *Cordis* together provide some insight as to what does and does not qualify as a regular and established place of business of defendant, this issue will need to be fleshed out further over time by district courts throughout the country. Perhaps then *In re Cray*, instead of resolving matters, at best, simply shifted the ambiguity from the "physical place" aspect of the analysis to the "of defendant" aspect. Regardless of exactly how one views the unsettled nature of this issue, the fact remains that the "regular and established place of business" analysis promises to remain an area of the law involving a series of case-specific, fact-intensive inquiries, guided by periodic Federal Circuit cases providing further guidance. While *In re Cray* was a valiant effort to provide clarity, the opinion ultimately seems to have left this crevice of the law nearly as unsettled and open to ongoing interpretation as prior to the court's decision.