



THINK FORWARD

Patent Dispute Venue Based Solely on Server Computer Location is Improper

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March 05, 2020

On February 13, 2020, the Federal Circuit granted Google LLC's mandamus petition, ordering the district court to dismiss or transfer a lawsuit filed against Google LLC by Super Interconnect Technologies LLC in *In re: Google LLC*, 2020 U.S. App. LEXIS 4588, ___ F.3d__ (Fed. Cir. 2020).

Super Interconnect Technologies ("SIT") sued Google LLC ("Google") for patent infringement in the Eastern District of Texas, alleging that venue was proper based on the housing of Google Global Cache ("GGC") servers in that judicial district. *Super Interconnect Techs. LLC v. Google LLC*, No. 2:18- CV-00463-JRG, 2019 U.S. Dist. LEXIS 132005, at *3-4 (E.D. Tex. Aug. 7, 2019). The GGC servers functioned as local caches of Google's data and were hosted by two third-party internet service providers (ISPs) under a contract. The contract required installation and maintenance to be performed by the ISPs' employees, but also restricted the ISPs' access, use and relocation of the GGC servers without Google's permission. Google moved under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3) to dismiss the complaint for improper venue. The district court denied Google's motion, relying on its previous decision in *SEVEN Networks LLC v. Google LLC*, 315 F. Supp. 3d 933 (E.D. Tex. 2018)^[1] and finding that the GGC servers qualified as Google's "regular and established place of business" under the test articulated in *In re Cray, Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017). *Cray* provides that a "regular and established place of business" under the patent venue statute must be: (1) "a physical place in the district"; (2) "regular and established"; and (3) "the place of the defendant."

The Federal Circuit concluded that mandamus was appropriate to resolve the venue issue, in large part due to a number of district court decisions^[2] that resulted in inconsistent holdings concerning "(1) whether a server rack, a shelf, or analogous space can be a 'place of business' and (2) whether a 'regular and established place of business' requires the regular presence of an employee or agent of the defendant conducting the business." *In re: Google LLC*, 2020 U.S. App. LEXIS 4588, at *9, ___ F.3d ___.

The Court found that the GGC servers were physically located in the district in a fixed, geographic location and therefore Google met the first *Cray* factor. Under the second *Cray* factor, relying on the service statute for patent cases, 28 U.S.C. § 1694, the Court stated that "a 'regular and established place of business' requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business'." Whether Google met the second *Cray* factor therefore turned on whether the ISPs were acting as agents of Google, and, thus, conducting Google's business.

Citing Restatement (Third) of Agency § 1.01 cmt. f(1)^[3], the Court found that the ISPs were not agents of Google because Google had no right of interim control over the ISPs' provisioning of services in the form of network access. The Court further stated that ancillary conduct by the ISPs of performing a one-

time event of installation of Google-supplied server equipment and basic maintenance of Google's server equipment under step-by-step direction by Google did not amount to conducting Google's business within the meaning of the statute.

The Court concluded that the venue statute "should be read to exclude agents' activities, such as maintenance, that are merely connected to, but do not themselves constitute, the defendant's conduct of business in the sense of production, storage, transport, and exchange of goods or services." In re: Google LLC, 2020 U.S. App. LEXIS 4588, at *20, ___ F.3d ___. The Court further clarified, however, that their holding was not that a "regular and established place of business" necessarily required the presence of a human agent rather than a machine operating as an agent.

Takeaway

The Decision clarifies that an entity's server operating in a geographic location does not, in and of itself, establish the location as a place of business of the entity for purposes of venue under 28 U.S.C. § 1406(a), in the absence of an employee or agent regularly conducting business of the entity at that location. Additionally, ancillary agent activities that are meaningfully different from traditional business functions of an entity do not rise to the level of "conducting business" within the meaning of the venue statute. Left open to interpretation, however, is the type and duration of agent activity that constitutes insignificant differences with the traditional conduct of a business, and under what circumstances a non-human may perform as an agent.

^[1] In *SEVEN Networks*, the same district court found that Google's CGC servers and their locations within the district constituted "regular and established places of business" within the meaning of the special patent venue statute. *SEVEN Networks LLC v. Google LLC*, 315 F. Supp. 3d, at 964.

^[2] See, for example, *CUPP Cybersecurity LLC v. Symantec Corp.*, No. 3:18-CV-01554, 2019 U.S. Dist. LEXIS 37960, at *7–8 (N.D. Tex. Jan. 16, 2019) (holding that the defendant's servers hosted in a datacenter operated by a third party were not a regular and established place of business); *CDX Diagnostic, Inc. v. US Endoscopy Grp., Inc.*, No. 13-CV-5669, 2018 U.S. Dist. LEXIS 87999, at *7 (S.D.N.Y. May 24, 2018) (holding that the defendant's storage units had "no 'employee or agent'" conducting business and were therefore not regular and established places of business); *Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-CV-1725, 2018 U.S. Dist. LEXIS 49628, at *9 (S.D.N.Y. Mar. 26, 2018) (holding that a regular and established place of business "requires some employee or agent of the defendant to be conducting business at the location in question"); *Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:17-CV-00170, 2018 U.S. Dist. LEXIS 79068, at *14 (E.D. Tex. Mar. 9, 2018) (holding that the defendant's leased shelf space in the district was a regular and established place of business where the defendant paid "agents to monitor, clean, restock, and affix price signage" to the shelf space). *Peerless Network, Inc.*, 2018 U.S. Dist. LEXIS 49628, at *8–9 (holding that shelf space constituted a "place" under the first factor of the Cray test).

^[3] "The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents."