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Approximating a Federal Patent District Court after *TC Heartland*

Timothy T. Hsieh

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APPROXIMATING A FEDERAL PATENT DISTRICT COURT
AFTER *TC HEARTLAND*

*Timothy T. Hsieh**

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ABSTRACT

This article presents a patent litigation framework for other federal district courts to follow, using the example of the U.S. District Court for the Eastern District of Texas after TC Heartland. This article also provides an overview of the TC Heartland U.S. Supreme Court case and the In Re Cray Federal Circuit opinion, as well as how those two cases have impacted patent litigation in various district courts across the country, most notably in the District of Delaware. All district courts should learn various lessons from the District Court for the Eastern District of Texas and should model their practices after its approach to handling patent cases going forward.

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INTRODUCTION

Prior to the United States Supreme Court case of *TC Heartland LLC v. Kraft Foods Group Brands LLC*,¹ the vast majority of the nation’s patent cases were filed in one court, and one court only: the United States District Court for the Eastern District of Texas.² Because of the patent law expertise of the District’s judges, procedural advantages stemming from Local Patent Rules that tend to lead to faster trials,³ and the perception of the District being plaintiff-friendly in awarding multiple multi-million dollar jury verdicts for patentees, it became the preferred choice of venue for

¹ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

² See Brian Howard, *Lex Machina 2015 End-of-Year Trends: Patent Litigation*, LEX MACHINA (Jan. 7, 2016), <https://lexmachina.com/lex-machina-2015-end-of-year-trends/> (indicating 2,540 new patent cases filed in the U.S. District Court for the Eastern District of Texas [hereinafter EDTX] in 2015, accounting for 43.6% of all the patent cases filed in the U.S. District Courts in that year). See also Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, 77 MD. L. REV. (forthcoming 2018) (manuscript at 1), <https://ssrn.com/abstract=2834130> (“[P]atentees have flocked to fewer districts, and in 2015, brought more than 40% of their cases in a single rural district with 1% of the US population, [EDTX].”).

³ See Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 1 (2017) (“[W]hat makes the [EDTX] so attractive to patent plaintiffs is the accumulated effect of several marginal advantages—particularly with respect to the relative timing of discovery deadlines, transfer decisions, and claim construction—that make it predictably expensive for accused infringers to defend patent suits filed in [EDTX].”).

many non-practicing entities (“NPEs”) or patent assertion entities (“PAEs”), a subclass of them being referred to as “patent trolls.”⁴

In many ways, due to the sheer volume of patent cases overseen, the Eastern District of Texas became in essence a specialized federal district patent court.⁵ That is, an Article III district court that retains subject matter jurisdiction and expertise to hear patent cases, where appeals would go before the United States Court of Appeals for the Federal Circuit—the only appellate court that can hear patent appeals.⁶ *TC Heartland* significantly affected venue rules on where plaintiffs could file patent suits. In the wake of its ruling, a new court—most likely the United States District Court for the District of Delaware, or perhaps the District Court for the Northern District of California or the Central District of California⁷—could become the new federal district patent court.⁸

⁴ See Adam Liptak, *Supreme Court Considers Why Patent Trolls Love Texas*, N.Y. TIMES: BUSINESS DAY (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/business/supreme-court-patent-trolls-tc-heartland-kraft.html>.

⁵ See Brief of Amici Curiae 56 Professors of Law and Economics in Support of Petition for Writ of Certiorari at 11, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2016 WL 6124403 (hereinafter *Amicus Brief 56 Professors*) (“[W]hen Congress decided to consolidate patent appeals in the newly-created United States Court of Appeals for the Federal Circuit, it deliberately chose to include both appeals from the United States Patent and Trademark Office and the district courts, so the new court would not hear only appeals from patent owners. And it considered and rejected proposals to create a specialized district court to hear patent cases. But the Federal Circuit’s interpretation of § 1400(b) has in practice created just such a court.”)

⁶ Congress created the U.S. Court of Appeals for the Federal Circuit in 1982 to increase the uniformity of patent cases. See *Federal Courts Improvement Act of 1982*, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

⁷ See Howard, *supra* note 2 (demonstrating the Central District of California as the 3rd highest ranking venue where the most patent cases were filed, after EDTX (No. 1) and the District of Delaware (No. 2)).

⁸ See Chien & Risch, *supra* note 2, at 36 (predicting that after *TC Heartland*, a net shift of roughly 35% of cases being heard in EDTX would transition to roughly 37% of cases being heard in the Northern District of California or the District of Delaware, or 21% of all cases would be transferred from EDTX to those two other Districts, and also finding that for non-practicing entity [hereinafter NPE] cases, EDTX would drop from 64% to 19% of all NPE cases and the District of Delaware and the Northern District of California would rise

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However, due to the lack of resources, patent law expertise, patent trial court experience, and lack of a deep bench of judges as in the case of Delaware, these courts might be ill-suited as transferee courts receiving the brunt of the nation's patent cases. Furthermore, these courts, with the exception of the Northern and Central Districts of California, do not have Local Patent Rules. As a result, the District of Delaware and other courts that similarly do not have any special patent rules treat patent cases just like any other case involving federal civil litigation.

Most, if not all, potential transferee courts also lack many of the practices that the Eastern District of Texas ("EDTX") has developed to make the adjudication of patent cases more efficient, fair, and in-depth. These practices include: working with technical advisor attorneys during complex *Markman* claim construction hearings,⁹ hiring judicial law clerks with significant patent litigation experience and science, engineering, or technical backgrounds,¹⁰ creating and applying Local Patent Rules, and adopting other procedures such as a consolidated scheduling conference for all patent cases.¹¹ These practices make administration of patent

collectively from about 10% to 43% of all NPE cases.

⁹ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996). *See also*, e.g., Christopher S. Finnerty, Morgan T. Nickerson & Jason C. Weida, *Behind the Curtain: Technical Advisors in Complex Litigation*, K&L GATES: STAY INFORMED (June 2, 2016), <http://www.klgates.com/behind-the-curtain-technical-advisors-in-complex-litigation-06-02-2016/> (advocating for the use of technical advisors in complex cases); Jeffrey L. Snow & Andrea B. Reed, *Technical Advisors and Tutorials: Educating Judges*, 21 A.B.A. SEC. INTELL. PROP. LITIG. 1 (2009), law.capital.edu/WorkArea/DownloadAsset.aspx?id=19398 (discussing the use of technical advisors in patent cases). As an example of biography of a technical advisor who has worked on many *Markman* claim construction hearings in EDTX patent cases, see, e.g., Richard D. Egan, EGAN, PETERMAN, ENDERS & HUSTON, LLP, <http://ipaustin.com/richard-d-egan/>.

¹⁰ *See* Timothy Li, *The Scientifically Trained Law Clerk: Legal and Ethical Considerations of Relying on Extra-Record Technical Training or Experience* (Apr. 27, 2013) (unpublished manuscript), <https://ssrn.com/abstract=2273314>.

¹¹ Michael C. Smith, *July 25 Marshall Patent Case Scheduling Conferences*, EASTERN DISTRICT OF TEXAS BLOG, <https://edtexweblog.com/july-25-marshall-patent-case-scheduling-conferences/> (describing a procedure that District Judge J. Rodney Gilstrap would hold for upcoming patent cases in Marshall: "The most recent batch of bimonthly patent case scheduling conferences was last Tuesday in Marshall . . . 21 cases were set, with only four having other cases consolidated

litigation more streamlined.

Many academic commentators have recognized benefits from *TC Heartland*, such as halted forum shopping and a lower number of cases being filed in the EDTX. At the same time, attorneys can now learn from the EDTX's success in handling patent cases to prepare whichever next federal district court(s) will receive the mantle of the new "federal patent district court." That is also not to say that the EDTX will significantly lose its stature as one of the leading patent courts where the most patent cases are filed: recent predictions calculate that the court will remain within the top districts where patent cases will be heard, in part due to the court's above-described expertise.¹²

This paper describes the key points from the holding of the *TC Heartland* case, and its relevance to the EDTX and the next potential federal patent district court that may emerge in the wake of its ruling. Part I includes an abbreviated discussion of the EDTX history. Part II summarizes the *TC Heartland*, with the aftermath briefly described. In Part III, an argument will be posited that any future district courts that may hold the title of a "federal district patent court" can learn several things about the EDTX in going forward. Part IV suggests various implementation schemes, with Part V being the conclusion and a summary of the proposals made in this paper.

I. AN ABBREVIATED HISTORY OF THE EDTX

Amongst judges, lawyers and the legal community in Marshall, Texas a saying exists that the local federal courts "went from PI to IP."¹³ According to a *New York Times* article, local lawyers "moved

with them (for a total of 34 cases still active at the time of the conference), although six of the 21 had more than one defendant (in many cases related entities) . . . trial settings were limited to late August, and the beginning of September and October.").

¹² See Steve Brachmann, *Lex Machina Reports That Q1 2017 Saw Fewest Patent Infringement Cases Since Q3 2011*, IPWATCHDOG (Apr. 30, 2017), <http://www.ipwatchdog.com/2017/04/30/q1-2017-fewest-patent-infringement-cases-since-q3-2011/id=82595/>.

¹³ Alan Cohen, *From PI to IP: Personal Injury Lawyers in Texas Want to Get Into Patent Litigation, and The Roth Law Firm is Leading the Stampede*, IP LAW & BUSINESS (November 2005),

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out of personal injury and into intellectual property.”¹⁴ However, especially after the personal injury boom in litigation—a relatively minor hike compared to the subsequent explosion of patent cases that would occur later on, federal courts in the EDTX have been relatively uncrowded in terms of criminal cases. In the early 90s Texas Instruments (“TI”) had capitalized on the EDTX’s lighter caseload.¹⁵ TI, based in Dallas, was looking for a quieter, less crowded docket to file their patent cases in. The Northern District of Texas, another federal court in Dallas, was unduly occupied with criminal cases involving the “War on Drugs” and many other federal civil cases that took priority over patent cases. Therefore, TI started bringing their patent cases to the EDTX. T. John Ward was serving as local counsel to TI in these cases, when he heard his San Francisco co-counsel bemoan the lack of the Northern District of California Local Patent Rules in the EDTX.¹⁶

District Judge Ronald M. Whyte of the Northern District of California (“NDCA”) created Local Patent Rules.¹⁷ Later sworn in

http://mcsmith.blogs.com/eastern_district_of_texas/files/IP.pdf (“Still, Smith’s firm gets noticed, for in Texas, particularly in East Texas towns like Marshall and Tyler and Longview, a lot of firms want to do what The Roth Law Firm has done: transition from personal injury work—in steady decline since the Texas legislature got serious about tort reform—to intellectual property work, where business is booming.”).

¹⁴ Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES: BUSINESS DAY (Sept. 24, 2006), <http://www.nytimes.com/2006/09/24/business/24ward.html>.

¹⁵ See Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation’s Patent Cases*, VICE: MOTHERBOARD (May 5, 2016), https://motherboard.vice.com/en_us/article/aek3pp/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases (“‘Marshall doesn’t have a criminal docket to speak of,’ said Michael Smith, an attorney in Marshall ‘Because it’s a rural division, there’s not a US attorney’s office here. There’s not a jail here. Less than 10 percent of the cases in Marshall are criminal cases, which is very unusual for a district court, and that is why the patent docket started here 23 years ago.’”).

¹⁶ *Id.*

¹⁷ See *Senior Judge Ronald M. Whyte Takes Inactive Status November 1, 2016*, U.S. DIST. CT. FOR N.D. CAL., <https://www.cand.uscourts.gov/news/200> (“In his years as a federal district judge, Judge Whyte emerged as a leading expert on patent and technology litigation. He led the development of model jury instructions and innovative patent rules and model protective orders and lectured

as Marshall's sitting federal district judge, T. John Ward brought the Local Patent Rules from the NDCA to the EDTX.¹⁸ The rules were designed to help the NDCA manage active patent cases, but they ended speeding up the administration of patent cases in Marshall significantly—and the EDTX became known as the “rocket docket” amongst patent litigation practitioners because of the lightning quick time-to-trial.¹⁹

When Leonard Davis, another District Judge in nearby Tyler, Texas (roughly an hour's drive from Marshall) joined the EDTX bench in 2002, the patent rocket docket was in full swing. The rapid-fire pace of patent trials and the efficiency with which Judge Ward, Judge Davis, Magistrate Judges Charles Everingham and John Love were able to handle technically complex pre-trial procedures was impressive to say the least. All handled technically complex pre-trial procedures such as *Markman* claim construction hearings, a multitude of complex patent motions, and tried a new patent case every few weeks. The EDTX also became attractive to NPEs, PAEs²⁰ and “patent trolls”—entities that do not make any products but simply file patents and sue parties with them. These entities preferred the low discovery costs and breakneck speed of patent trials afforded by the EDTX Local Patent Rules.

Soon, patentee plaintiffs—including various NPE/PAE/patent trolls—were winning large, multi-million-dollar verdicts, leading to the perception of Marshall and the EDTX forming a plaintiff-

on intellectual property litigation nationally.”). Professor Mark Lemley also comments, “[Judge Whyte] was the moving force behind both the Patent Local Rules and the Model Patent Jury Instructions, two efforts pioneered here in the Northern District of California that the rest of the country has since sought to emulate.” *Id.*

¹⁸ Rogers, *supra* note 15.

¹⁹ *See Id.* (“[Judge T. John Ward adopted] the Northern District of California's patent rules. He hoped it would allow for the patent cases to be settled more quickly so they would be less of a burden In reality, these changes had the opposite effect. In California, the rules help busy courts tread water. In sleepy Marshall, the efficient rules, which require filing documents under a certain timetable and limiting the number of document pages, meant cases could be settled in less than two years, garnering it the nickname ‘the rocket docket.’ It was catnip for patent holders.”).

²⁰ *See* Colleen Chien, *Patent Assertion Entities*, Presentation at FTC/DOJ Workshop (Dec. 10, 2012), <https://ssrn.com/abstract=2187314>.

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friendly jurisdiction. This further increased the number of patent suit filings. In 2011, when Judge Ward retired, the Honorable J. Rodney Gilstrap became Marshall's new District Judge.²¹ He was joined by the Honorable Roy S. Payne as Marshall's Magistrate Judge, who had previously served as a Magistrate Judge in the U.S. District Court for the Western District of Louisiana for over eighteen years.²²

From 2011 to present, Judge Gilstrap established himself as the country's "busiest patent judge" hearing the most patent cases of all time.²³ Judge Payne also became the only federal judge, either District or Magistrate, who has construed the most patent claim terms during *Markman* claim construction hearings.²⁴

District Judge Robert W. Schroeder III took the bench in Texarkana, Texas during the year of 2014, while Judge Davis retired in 2015. Many sources, such as Lex Machina and Docket Navigator, consider Judge Schroeder the second most active patent District Judge in the country, hearing the highest number of patent cases behind Judge Gilstrap.²⁵

From 2011-2013, many academic law professors and other commentators started criticizing the rampant forum-shopping

²¹ Gilstrap, James Rodney, FED. JUD. CTR., <https://www.fjc.gov/history/judges/gilstrap-james-rodney> (last visited March 1, 2018).

²² Michael C. Smith, *New Magistrate Judge Selected for Marshall*, EDTXWEBLOG.COM (Sept. 29, 2011, 1:23 PM), http://mcsmith.blogs.com/eastern_district_of_texas/2011/09/new-magistrate-judge-selected-for-marshall.html.

²³ See Rogers, *supra* note 15. See also Nushin Huq, *Rural Texas Judge Runs Busiest Patent Court in U.S.*, BLOOMBERG BNA (Apr. 20, 2017), <https://www.bna.com/rural-texas-judge-n57982086954/>.

²⁴ See Michael C. Smith, *Ever Wonder Which Judges Have Construed the Most Claim Terms?*, EDTXWEBLOG.COM (Jan. 20, 2017), <http://edtexweblog.com/ever-wonder-which-judges-have-construed-the-most-claim-terms/>.

²⁵ See Matt Chiappardi & Daniel Siegal, *Gilstrap Moves Over For America's Next Top Patent Judge*, LAW360 (June 1, 2017, 7:39 PM), <https://www.law360.com/articles/930023/gilstrap-moves-over-for-america-s-next-top-patent-judge> ("Judge Gilstrap picked up 1,615 patent cases in 2015 alone, almost double the number taken by U.S. District Judge Robert W. Schroeder III, his Texas Eastern colleague who held the No. 2 spot.").

inherent in the vast majority of patent cases being filed in the EDTX.²⁶ NPR's "This American Life" featured a broadcast on Marshall and the flood of patent cases in the EDTX.²⁷ HBO's Last Week Tonight with John Oliver did a segment on Marshall, commenting on the presence of the "Samsung Ice Skating Rink" erected by the company because it gets sued there so often.²⁸ The Today Show even aired a profile of the town of Marshall on the eve of oral arguments for *TC Heartland*.²⁹ Ironically, concerns raised by all of these commentators would be addressed by the case, which was decided on May 22, 2017.

II. A SUMMARY OF *TC HEARTLAND*

TC Heartland is a rather short, straightforward opinion as far as U.S. Supreme Court opinions are concerned. It was decided unanimously (8-0), with the majority opinion written by Justice Thomas. *TC Heartland* concerns two venue statutes: the patent specific venue statute, 28 U.S.C. § 1400(b), and the general venue statute, 28 U.S.C. § 1391(c).³⁰ Before the *TC Heartland* ruling, the reason why so many plaintiffs could file patent suits in the EDTX was because § 1391(c) was interpreted as an amendment to § 1400(b). When both statutes are read together, they say that patent suits can only be filed "where the defendant resides *or* where the defendant has committed acts of infringement *and* has a regular and established place of business."³¹ Based on this reading, § 1391(c)

²⁶ See, e.g., Chien & Risch, *supra* note 2; Amicus Brief 56 Professors, *supra* note 5.

²⁷ *When Patents Attack!*, Episode 441, THIS AMERICAN LIFE (July 22, 2011) [hereinafter THIS AMERICAN LIFE], <https://www.thisamericanlife.org/radio-archives/episode/441/when-patents-attack>.

²⁸ LastWeekTonight, *Patents: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 19, 2015), https://www.youtube.com/watch?v=3bxcc3SM_KA.

²⁹ See *Why the World's Biggest Companies Face Patent Lawsuits in This Small Texas Town*, TODAY (Mar 26, 2017), <http://www.today.com/video/see-why-the-world-s-biggest-companies-face-patent-lawsuits-in-this-small-texas-town-906713667902>.

³⁰ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517–18 (2017).

³¹ 28 U.S.C. § 1400(b) (emphasis added).

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arguably amended the meaning of “resides” by stating that “[e]xcept as otherwise provided by law” and “[f]or all venue purposes,” a corporation “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.”³²

Basically, a mass of patent plaintiffs could file patent suits in the EDTX by establishing personal jurisdiction in Marshall or Tyler or nearby. Plaintiffs often accomplished this by opening “fake offices” that manufactured personal jurisdiction for the purposes of venue.³³ The Federal Circuit, in the interim appellate review of *TC Heartland*, actually affirmed this interpretation of the above two venue statutes and stated that it was valid law.³⁴ In other words, plaintiffs could sue defendants anywhere they could establish personal jurisdiction, and hence the EDTX counted. However, the Supreme Court overruled the Federal Circuit and declared that for venue purposes in all patent cases, “resides” is interpreted as place of incorporation. As a consequence, many patent cases may shift venue to Delaware, because numerous companies have incorporated in that state.

In the case of *Fourco Glass Co. v. Transmirra Products Corp.*,³⁵ the Supreme Court concluded that for purposes of § 1400(b) a domestic corporation “resides” only in its state of incorporation, essentially rejecting the argument that § 1400(b) incorporates the broader definition of corporate “residence” contained in the general venue statute, 28 U.S.C. § 1391(c). Congress has not amended § 1400(b) since *Fourco*, but it amended § 1391 twice. Section 1391 now states: “[e]xcept as otherwise provided by law” and “[f]or all venue purposes,” a corporation “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.”³⁶

Respondent Kraft Foods filed a patent infringement suit in the District Court for the District of Delaware against Petitioner TC

³² *TC Heartland LLC*, 137 S. Ct. at 1517–18.

³³ See THIS AMERICAN LIFE, *supra* note 27 (describing the many empty offices with just names of companies on the doors that were NPEs/PAEs).

³⁴ See *generally In re TC Heartland LLC*, 821 F.3d 1338 (Fed. Cir. 2016).

³⁵ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 226 (1957).

³⁶ 28 U.S.C. § 1391(a), (c) (2012); *TC Heartland*, 1317 S. Ct. at 1517.

Heartland, a competitor that is organized under Indiana law and headquartered in Indiana but ships the allegedly infringing products into Delaware. TC Heartland then moved to transfer venue to a District Court in Indiana, claiming that venue was improper in Delaware. Citing *Fourco*, petitioner argued that it did not “resid[e]” in Delaware and had no “regular and established place of business” in Delaware under § 1400(b). The District Court in Delaware rejected these arguments. The Federal Circuit, in *In re TC Heartland*, denied a petition for a writ of mandamus, concluding that § 1391(c) supplies the definition of “resides” in § 1400(b). The Federal Circuit reasoned that because petitioner resided in Delaware under § 1391(c), it also resided there under § 1400(b).³⁷

The Supreme Court held that, as applied to domestic corporations, “reside[nce]” in § 1400(b) refers *only* to the state of incorporation.³⁸ The amendments to § 1391 *did not* modify the meaning of § 1400(b) as interpreted by *Fourco*. The Supreme Court also held that:

(a) The venue provision of the Judiciary Act of 1789 covered patent cases as well as other civil suits.³⁹ In 1897, Congress enacted a patent-specific venue statute.⁴⁰ This new statute permitted suit in the district of which the defendant was an “inhabitant” or in which the defendant both maintained a “regular and established place of business” and committed an act of infringement. A corporation at that time was understood to “inhabit” only the State of incorporation. This Court addressed the scope of § 1400(b)’s predecessor in *Stonite*, concluding that it constituted “the exclusive provision controlling venue in patent infringement proceedings” and thus was not supplemented or modified by the general venue provisions.⁴¹ In 1948, Congress recodified the patent venue statute as § 1400(b). That provision, which remains unaltered today, uses “resides” instead of “inhabit[s].” At the same time, Congress also enacted the general venue statute, § 1391, which defined “residence” for corporate defendants. In *Fourco*, the U.S. Supreme

³⁷ *TC Heartland*, 1317 S. Ct. at 1517–18.

³⁸ *Id.*

³⁹ *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).

⁴⁰ *Id.*

⁴¹ *Id.*

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Court reaffirmed *Stonite*'s holding, observing that Congress enacted § 1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status, even the fact that § 1391(c) by "its terms" embraced "all actions."⁴² The Court also concluded that "resides" in the recodified version bore the same meaning as "inhabit[s]" in the pre-1948 version.⁴³

This interpretation remained effectively unchanged until 1988, when Congress amended the general venue statute, § 1391(c). The revised provision stated that it applied "[f]or purposes of venue under this chapter." In *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Federal Circuit held that, in light of this amendment, § 1391(c) established the definition for all other venue statutes under the same "chapter," including § 1400(b).⁴⁴ In 2011, Congress adopted the current version of § 1391, which provides that its general definition applies "[f]or all venue purposes." The Federal Circuit reaffirmed *VE Holding* in the *In re TC Heartland* opinion.

(b) In *Fourco*, the Supreme Court held that the word "reside[nce]" in § 1400(b), as applied to domestic corporations, refers only to the state of incorporation.⁴⁵ Because Congress has not amended § 1400(b) since *Fourco*, and neither party asked the Court to reconsider that decision, the only question in the *TC Heartland* case was whether Congress changed § 1400(b)'s meaning when it amended § 1391. "When Congress intends to effect change of that degree, it ordinarily provides a relatively clear indication of its intent in the amended provision's text. No such indication appears in the current version of § 1391."⁴⁶ Respondent argued current § 1391(c) provides a default rule that, on its face, applies without exception "[f]or all venue purposes."⁴⁷ But the version at issue in *Fourco* similarly provided a default rule that applied "for venue purposes," and those phrasings are not materially different in this context. The

⁴² *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957).

⁴³ *Id.* at 226.

⁴⁴ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1578 (Fed. Cir. 1990).

⁴⁵ *Fourco Glass*, 353 U.S. at 226.

⁴⁶ *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1516 (2017).

⁴⁷ *Id.* at 1520.

addition of the word “all” to the already comprehensive provision does not suggest that Congress intended the Court to reconsider its decision in *Fourco*. Arguments based on this language read weaker now than when the Court rejected them in *Fourco*. The *Fourco* Court held that § 1400(b) retained a meaning distinct from the default definition contained in § 1391(c), even though the latter, by its terms, included no exceptions.⁴⁸ The current version of § 1391 includes a saving clause, which expressly states that the provision does not apply when “otherwise provided by law,” thus making explicit the qualification that the *Fourco* Court found implicit in the statute. Finally, no indication exists that Congress ratified the Federal Circuit’s decision in *VE Holding*.⁴⁹

III. *IN RE CRAY*

A. *The EDTX Case of Raytheon v. Cray*

Following *TC Heartland*, the focus of venue in patent litigation was on the meaning of the phrase “regular and established place of business,” as defined by the 1985 Federal Circuit case of *In re Cordis*.⁵⁰ In the *In re Cordis* case, the Federal Circuit stated that when analyzing the “regular and established place of business” requirement, “the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence” and not “whether it has a fixed physical presence in the sense of a formal office or store.”⁵¹ In an EDTX case that shortly followed the *TC Heartland* ruling, *Raytheon Co. v. Cray, Inc.*, Judge Gilstrap held that venue was proper under the holding of *In re Cordis*.⁵² Judge Gilstrap created and utilized a four-part test “gleaned from prior courts and adapted to apply in the modern era” as a tailored “totality of the circumstances” approach to venue, “guided by the important goal of administrative

⁴⁸ *Fourco Glass*, 353 U.S. at 228–229.

⁴⁹ *TC Heartland*, 1317 S. Ct. at 1519.

⁵⁰ *In re Cordis Corp.*, 769 F.2d 733 (Fed. Cir. 1985).

⁵¹ *Id.* at 737.

⁵² *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 793 (E.D. Tex. 2017), *vacated*, 871 F.3d 1355 (Fed. Cir. 2017).

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simplicity” to gauge whether a defendant had a “regular and established place of business.”⁵³ The four factors are:

1) Physical Presence—The extent to which a defendant has a physical presence in the district, including but not limited to property, inventory, infrastructure or people.⁵⁴

2) Defendant’s Representations—The extent to which a defendant represents, internally or externally, that it has a presence in the district.⁵⁵

3) Benefits Received—The extent to which a defendant derives benefits from its presence in the district, including but not limited to sales revenue.⁵⁶

4) Targeted Interactions with the District—The extent to which a defendant interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district, including but not limited to through localized customer support, ongoing contractual relationships, or targeted marketing efforts.⁵⁷

B. Related District of Delaware Cases

Chief Judge Leonard Stark of the District of Delaware also reached a similar conclusion in applying the *In re Cordis* holding to venue in two cases.⁵⁸ Notably, in the *Boston Scientific* opinion, Judge Stark cited *In re Cordis* to hold that analyzing whether a defendant has a “regular and established place of business” requires

⁵³ *Id.* at 796.

⁵⁴ *Id.* at 796–797.

⁵⁵ *Id.* at 797–798.

⁵⁶ *Id.* at 798.

⁵⁷ *Id.* at 798–799.

⁵⁸ See *Boston Sci. Corp. v. Cook Grp. Inc.*, 269 F. Supp. 3d 229 (D. Del. 2017); *Bristol-Myers Squibb Co. v. Mylan Pharms. Inc.*, No. 1:17-CV-00379-LPS, 2017 WL 3980155 (D. Del. Sept. 11, 2017); See also Scott J. Bornstein, Jeffrey R. Colin & Giancarlo Scaccia, *New Patent Infringement Cases Provide Guidance on Analyzing Venue in the Wake of TC Heartland*, GREENBERGTRAURIG (Sept. 19, 2017), <https://www.gtlaw.com/en/insights/2017/9/new-patent-infringement-cases-provide-guidance-on-analyzing-venue-in-the-wake-of-tc-heartland>.

“a fact intensive inquiry focused on whether the defendant does business in this District through a permanent and continuous presence here.”⁵⁹ In the *Mylan* opinion, Judge Stark ordered further discovery after he was unable to determine whether Mylan had a regular and established place of business in Delaware. Intensive discovery was necessary in this case even though “Mylan’s business model is in large part predicated upon participating in a large amount of litigation” involving drug patents that frequently take place in the District of Delaware.⁶⁰

C. *The Background of Raytheon v. Cray*

Raytheon v. Cray was pending for pre-trial matters before Judge Payne and was scheduled for trial in March of 2017 before Judge Gilstrap. Defendant Cray filed several motions, including a motion to dismiss for improper venue, or, in the alternative, to transfer to the Western District of Washington under the first-to-file rule.⁶¹ In February 2017, plaintiff Raytheon was allowed to continue the trial from March to August 2017. After the *TC Heartland* decision came out on May 22, 2017, Defendant Cray requested and received an expedited briefing schedule for its motion to transfer to the Western District of Wisconsin under 28 U.S.C. § 1406(a).⁶² Briefing closed for the motion to transfer on June 22 and on June 26, and the case was reassigned to Judge Gilstrap. On June 29, 2017, Judge Gilstrap denied Cray’s motion to transfer, which resulted in the above-discussed opinion.⁶³ On July 14, Cray filed a petition for a writ of mandamus with the Federal Circuit and on July 18, Judge Gilstrap stayed the case *sua sponte*.

D. *The In Re Cray Federal Circuit Writ of Mandamus Order*

⁵⁹ *Boston Sci.*, 269 F. Supp. 3d at 249.

⁶⁰ *Bristol-Myers Squibb*, 2017 WL 3980155, at *22.

⁶¹ *Raytheon Co. v. Cray Inc.*, No. 2:15-cv-01554-JRG-RSP, Doc. No. 21, 2015 WL 9685229 (E.D. Tex. Nov. 25, 2015).

⁶² *Raytheon*, No. 2:15-cv-01554-JRG-RSP, Doc. No. 256, 2017 WL 3432115 (E.D. Tex. June 1, 2017).

⁶³ *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 783–84.

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On September 21, 2017, the Federal Circuit granted Cray’s petition for writ of mandamus, reversed Judge Gilstrap’s ruling on Cray’s motion to transfer, and directed transfer of the *Raytheon v. Cray* case to the Western District of Wisconsin.⁶⁴

When determining venue and interpreting the language “where the defendant . . . has a regular and established place of business” under 28 U.S.C. § 1400(b) the Federal Circuit held that: (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.⁶⁵ Each of the three prongs are addressed in turn.

1) First Requirement—Physical Place in The District

The first requirement requires there “must be a physical place in the district”: specifically, “[t]he statute [1400(b)] thus cannot be read to refer merely to a virtual space or to electronic communications from one person to another” and while the “place” need not be a “fixed physical presence in the sense of 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.”⁶⁶

2) Second Requirement—The Place Must Be A Regular and Established Place of Business

The second requirement requires the place “must be a regular and established place of business” and that while a business can certainly move its location, it must for a meaningful time period be stable, established. . . . [I]f an employee can move his or her home out of the district at his or her own instigation, without the approval of the defendant, that would cut against the employee’s home being considered a place of business of the defendant.⁶⁷

⁶⁴ *In re Cray, Inc.*, 871 F.3d 1355, 1357 (Fed. Cir. 2017).

⁶⁵ *Id.* at 1360.

⁶⁶ *Id.* at 1362.

⁶⁷ *Id.* at 1363.

3) Third Requirement—The Regular and Established Place of Business Must be the Place of the Defendant

The third requirement requires that the “regular and established place of business” must be “the place of the defendant.” It “must be a place of the defendant, not solely a place of the defendant’s employee,” and

[r]elevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place. . . . Another consideration might be whether the defendant conditioned employment 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.⁶⁸

E. *The Federal Circuit’s Reasoning in In Re Cray*

After concluding that the EDTX’s refusal to transfer was an abuse of discretion, the Federal Circuit relied on the facts regarding Cray’s locations and applied the three requirements outlined above.⁶⁹

Cray is a Washington corporation with its principal place of business located in Washington. Cray does not rent or own an office or any property in the EDTX, but allowed two employees, Mr. Harless and Mr. Testa, to work remotely from their respective homes in the district.⁷⁰ Facts establishing the presence of Mr. Harless in the EDTX included: (1) his EDTX personal home location on an internal Cray “America Sales Territories” map, (2) how he received reimbursement for his cell phone usage for business purposes, internet fees, and mileage or “other costs” for business travel, and (3) how Cray provided Harless with “administrative

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.* at 1364–1365.

⁷⁰ *Id.* at 1357.

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support” from its Minnesota office.⁷¹ In denying Cray’s motion to transfer, Judge Gilstrap found that the activities of Harless were factually similar to the activities performed by the representatives in *In re Cordis*.⁷² However, the Federal Circuit noted that Judge Gilstrap did not analyze Mr. Tesla’s activities in determining whether venue was proper in denying the motion.

After discussing the standard for writs of mandamus and the onslaught of motions to transfer following *TC Heartland*, the Federal Circuit distinguished *In re Cordis*, arguing that venue was not evaluated in light of § 1400(b): “the world has changed since 1985 when the *Cordis* decision issued. In this new era, not all corporations operate under a brick-and-mortar model. Businesses can be conducted virtually. Employees increasingly telecommute.”⁷³

The third requirement that the “regular and established place of business” must be “the place of the defendant” was also vital to the Federal Circuit’s holding because the facts did not support a finding that the home of Harless was a “regular and established place of business” of Cray. “The fact that Cray allowed its employees to work from the [EDTX] is insufficient.”⁷⁴ There is also no indication that Cray owns, leases, or rents any portion of the home of Mr. Harless in the EDTX. The Federal Circuit also distinguished the present facts from the facts of *In re Cordis*, where *Cordis* was dependent on employees being physically present in the district, yet all administrative support and reimbursements for Cray’s employees were provided from outside the EDTX.⁷⁵ The Federal Circuit then concluded that its decision was consistent with other venue decisions from the Seventh and Fourth Circuits.⁷⁶

After *In re Cray*, the Federal Circuit development on an indirectly related patent venue jurisprudence was *In re Micron Technology*, which held *TC Heartland* constituted an intervening change in the law by changing “controlling law in the relevant

⁷¹ *Id.*

⁷² *Id.* at 1358.

⁷³ *Id.* at 1359.

⁷⁴ *Id.* at 1363.

⁷⁵ *Id.* at 1365.

⁷⁶ *Id.* at 1366.

sense.”⁷⁷ Therefore, parties can now successfully argue that they have not waived their venue defense because the Federal Circuit ruled that such a defense was not even available prior to the *TC Heartland* ruling. The *In re Micron Technology* holding is part of a trend by courts to make it harder for parties, predominantly plaintiffs, to stay in the forum where the patent case was filed, namely the EDTX.

IV. THE AFTERMATH OF *TC HEARTLAND* AND *IN RE CRAY*

The immediate aftermath of *TC Heartland* and *In re Cray* resulted in decreasing filings in the EDTX, and increasing filings in Delaware. For example, the 2017 Q3 litigation report from Lex Machina concludes that because of the “sea change” of *TC Heartland*:

[T]he Eastern District of Texas, typically the district seeing the most patent litigation, has finally been supplanted as the top district for patent suit filings. During 2017’s third quarter, that title belonged to the District of Delaware, which saw 212 case filings during the recent quarter as opposed to the 139 cases filed in Eastern Texas. Collectively, these two districts saw 35 percent of all patent cases filed in U.S. district courts during 2017’s third quarter. A figure showing patent suit filings in the 90-day periods both leading up to the *TC Heartland* decision and after is a pretty stark indicator of the effects of that case. 377 patent cases, a full 33 percent of all patent cases filed in the 90-day window before *TC Heartland*, were filed in Eastern Texas; 153 cases, or 13 percent, were filed in Delaware. In the 90 days after *TC Heartland*, 13 percent of patent cases (129 suits) were filed in Eastern Texas and 26 percent of cases (263 suits) were filed in Delaware.⁷⁸

⁷⁷ *In re Micron Tech., Inc.*, 875 F.3d 1091, 1094 (Fed. Cir. 2017).

⁷⁸ Steve Brachmann, *Lex Machina Q3 Litigation Update Shows Effects of TC*

The majority of patent litigation activity that has transferred from the EDTX to the District of Delaware are cases filed by high-volume plaintiffs.⁷⁹ Furthermore, statistics from the 2017 Q4 litigation report reveal that defendants are able to successfully move to transfer for improper venue out of the EDTX at even greater rates when compared to other districts.⁸⁰

In Lex Machina's Q1 litigation report, the research firm concluded that although filings for the beginning of 2017 were higher in the EDTX, they plateaued after May, when the *TC Heartland* case was decided, with Delaware picking up the slack.⁸¹

Heartland, *Oil States on Patent Case Filings*, IPWATCHDOG (Oct. 23, 2017), <http://www.ipwatchdog.com/2017/10/23/q3-litigation-update-shows-effects-tc-heartland-oil-states/>.

⁷⁹ *See id.* (“According to [Lex Machina Data Scientist and Associate General Counsel Brian] Howard, the primary driver of increased litigation levels in Delaware were high-volume plaintiffs, entities filing 10 or more patent cases within a year’s time. This same constituency had been a major contributor to Eastern Texas’ dominance in the patent litigation landscape leading up to *TC Heartland*. . . . [H]igh-volume plaintiff filings had dipped below filings from low-volume plaintiffs for the first time since the third quarter of 2011. Conversely, high-volume plaintiffs in Delaware began closing the gap between low-volume plaintiffs through 2017’s third quarter. . . . ‘If [Delaware] cases get tied up in claim construction, plaintiffs may decide to go elsewhere.’”).

⁸⁰ *See id.* (“Although a good deal of media attention surrounding the post-*TC Heartland* patent world was piqued by *In re Cray*, a case in [EDTX] in which Judge Rodney Gilstrap denied a motion to transfer venue, [EDTX] has proven to be a venue out of which defendants are increasingly able to transfer at an even greater rate than other districts. The success rate of motions to transfer venue out of [EDTX] in the 90-day period before *TC Heartland* was decided was 40 percent, but that increased to an 84 percent success rate in the 90 days after *TC Heartland*. In all other districts, the success rate of motions to transfer venue pre-*TC Heartland* was 48 percent and that percentage only rose to 70 percent post-*TC Heartland*. To Howard, this higher rate of successful motions out of [EDTX] is not necessarily an indication that plaintiffs without proper venue were choosing [EDTX] as a preferred venue anyways. [Howard said,] ‘[B]etter lawyers on average [are] defending cases in [EDTX] than . . . across all other districts[.] [T]here’s more money at issue in [EDTX] cases [B]etter lawyers are writing more successful motions.’”).

⁸¹ Brian Howard, *Lex Machina Q1 2017 Litigation Update: Patent Litigation*, LEX MACHINA (Apr. 12, 2017), <https://lexmachina.com/2017-first-quarter-litigation-update/>.

According to the Orrick IP Law Blog, EDTX fell to half of its current filings with Delaware nearly doubling in filings and other courts such as NDCA increasing by a third.⁸²

However, as some commentators suggest, *TC Heartland* will not end EDTX's influence over patent law or as a top patent venue. There are still benefits to litigating in EDTX by virtue of the now lighter docket, greater resources for efficiently handling legitimate cases, and fewer meritless cases filed by plaintiffs in bulk to extract settlements. The EDTX has more time to concentrate on a broader array of different types of lawsuits.⁸³ As a result it is likely to remain the second most selected venue for patent case filings after the District of Delaware. The EDTX will still lead patent jurisprudence without showing the overwhelming dominance it has had in the past decade. However, considering how over-burdened with patent cases the EDTX was, that may be a good thing for patent litigation across the country.

V. SUGGESTED FRAMEWORK

Whirlpool's amicus brief for *TC Heartland*, summarizes many of the benefits that the EDTX possesses for both patent plaintiffs and defendants:

Whirlpool's experience as both a plaintiff and a defendant is that patent practice in the Eastern District of Texas is neither abusive nor unreasonable.

⁸² Antony Pfeffer, *TC Heartland – One Month Later Delaware, Texas, California and Illinois Courts Most Popular Venues*, ORRICK: IP LANDSCAPE (June 22, 2017), <http://blogs.orrick.com/iplandscape/2017/06/22/tc-heartland-one-month-later-delaware-texas-california-and-illinois-courts-most-popular-venues/> (“The ranking of the top 10 jurisdictions based on percentage of patent cases filed has changed somewhat in the days post-*TC Heartland* versus the year and a half preceding the decision. The top two jurisdictions have switched places, with Delaware taking a solid lead, close to tripling its percentage of filings from 2016. Meanwhile, Texas has fallen to around half its percentage of filings. Other courts that have seen large increases in their percentage of cases include the Northern District of California and the Northern District of Illinois”).

⁸³ Erin Coe, *TC Heartland Won't End EDTX's Influence Over Patent Law*, LAW360 (Nov. 7, 2017, 3:43 PM), <https://www.law360.com/ip/articles/982823>.

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While ‘patent trolls’ seeking nuisance value settlements no doubt file cases there, it is also an attractive venue for serious litigants looking to resolve meritorious claims. The reasons are not abusive: the judges are experienced with patent law, the local patent rules are predictable, and cases proceed to trial without undue delay. Whirlpool’s water filter patent litigation does not display any of the hallmarks of abuse emphasized in the briefing before this Court, yet Whirlpool has benefited from the experience, predictability, and speed offered by the Eastern District of Texas.⁸⁴

EDTX is still a preferred District for patent defendants who are sued because of the knowledge and expertise of the EDTX, where the cases get resolved as meritoriously as possible. Experience, predictability, and speed are three hallmarks that the next federal patent district court should strive for in handling the majority of the nation’s patent cases transferred its way.

A. Experience

Experience is established not only through the number of patent cases a judge hears, but also through the types of judicial law clerks the judge hires. By hiring law clerks with technical, scientific, or engineering degrees and significant patent litigation experience, judges in future federal patent district courts can gain knowledge to better handle complex patent cases. They also can consult with experienced clerks in drafting, researching, and writing optimal orders. By seeking out clerks with significant patent law experience as well as technical backgrounds, future federal patent district court judges will be able to speed up their understanding of patent law, and therefore make the adjudication of patent cases more efficient. In addition, promoting a cultural tradition of judicial law clerks with

⁸⁴ Brief of Amicus Curiae Whirlpool Corp. in Support of Respondent, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2017 WL 1046236, <http://www.scotusblog.com/wp-content/uploads/2017/03/16-341-bsac-whirlpool.pdf>.

the aforementioned experiences bolsters the institutional knowledge of the future patent district court. This not only benefits current litigants, but fosters sound developments in patent law jurisprudence, for example, the ability to adapt and be more flexible. Judges can further educate themselves and build their experience in adjudicating patent cases optimally, by taking classes in patent law or intellectual property, or reading materials such as the Patent Case Judicial Management Guide.⁸⁵

B. Predictability

Predictability can be established through consistency in prior rulings, especially in *Markman* claim construction rulings. To that end, the use of technical advisors assisting judges during *Markman* claim construction hearings is crucial: not only will the technical advisor provide top-notch legal and technical analysis for the judge, but they may remind the judge of previous decisions and rulings so that the court is consistent with prior holdings or claim constructions.

One complaint from patent litigators in Delaware is the variability and unpredictability in each judge's claim construction. This could be a result of not using technical advisors, and simply relying on less consistent factors in rendering a *Markman* claim construction opinion. If technical advisors could be utilized, coupled with the patent law expertise and experience of judicial law clerks versed in patent law, predictability of a federal district court patent judge would be unparalleled, making the district court an attractive forum to file a patent law suit in.

C. Speed

To optimize speed for patent trials, future federal patent district courts should follow the example of the EDTX and NDCA by

⁸⁵ See Peter S. Menell et al., *Patent Case Management Judicial Guide – Third Edition* (U.C. Berkeley Pub. Law Research Paper No. 2637605, 2015, last revised 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637605. See also Dennis Crouch, *Publication of the Patent Case Management Judicial Guide (3rd Edition)*, PATENTLY-O (Aug. 17, 2016), <https://patentlyo.com/patent/2016/08/publication-management-judicial.html>.

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adopting Local Patent Rules. Adoption of these rules not only makes adjudication and administration of patent cases more efficient, but also pressures the parties to settle or only bring meritorious cases. Local Patent Rules also contribute to both the predictability and experience prong because they help judges make consistent rulings at a faster rate. Future federal district patent courts should also use procedures designed to increase the speed of patent cases such as holding monthly group scheduling conferences or standing orders on specific procedures within patent law, say motions having to do with a specific statute such as 35 U.S.C. § 101.

CONCLUSION

Attorneys can derive a variety of lessons from the EDTX to make future federal district patent courts more efficient, predictable and faster. *TC Heartland* may change the nature of filing suits, but should not change how a district court can continually improve in becoming a desired federal district patent court where parties wish to file patent cases, or a court that actively promotes and leads development of both procedural and substantive patent law across the nation.