

PATENTLY UNWORKABLE: FIXING PATENT VENUE IN THE WAKE OF  
*TC HEARTLAND* AND *IN RE CRAY*

Will Nilsson\*

INTRODUCTION

In 1999, Judge T. John Ward took his seat in the Eastern District of Texas as one of President Clinton's last judicial appointees.<sup>1</sup> That year, there were fourteen patent cases filed in the district, five of which were heard by Judge Ward.<sup>2</sup> By 2016, Judge Ward's successor, Judge Rodney Gilstrap, heard 1,119.<sup>3</sup> One reason for the increase is that the Eastern District of Texas has adopted local rules, based on those of the Northern District of California, that get patent cases to trial more quickly and with more frequency than those filed elsewhere.<sup>4</sup> Some began to question the idea that plaintiffs in these cases should have the option to file in the Eastern District of Texas, and advocated for a narrower interpretation of the venue statute used.<sup>5</sup>

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\*J.D. Candidate, 2020, Baylor University School of Law; B.A., 2017, The University of Texas at Austin. I would like to thank Professor Connie Nichols for her guidance during the writing process as well as the editorial staff of the Baylor Law Review for their work in making this article happen. I would also like to thank the Honorable Rodney Gilstrap for triggering my interest in this topic.

<sup>1</sup>Hilda Galvan et al., *The America Invents Act: A Tribute to the Honorable John Ward*, 15 SMU SCI. & TECH. L. REV. 459, 462 (2012).

<sup>2</sup>Susan Decker, *Texas District is Heaven for Patent Holders Under Siege*, THE SEATTLE TIMES (May 1, 2006), [http://old.seattletimes.com/html/business/technology/2002963706\\_btpatentheaven01.html?syndication=rss](http://old.seattletimes.com/html/business/technology/2002963706_btpatentheaven01.html?syndication=rss); Loren Steffy, *Patently Unfair*, TEXAS MONTHLY (Sept. 14, 2004), <https://www.texasmonthly.com/politics/patently-unfair/>.

<sup>3</sup>*Lex Machina's Fourth Annual Patent Litigation Year in Review Report Shows 22 Percent Decline in Patent Filings in 2016*, LEX MACHINA (March 2, 2017), <https://lexmachina.com/media/press/report-shows-22-percent-decline-in-patent-filings-in-2016/>.

<sup>4</sup>See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 651–54 (2015) (chronicling the development of the Eastern District's local patent rules).

<sup>5</sup>See, e.g., Brief of the Am. Bar Ass'n as Amicus Curiae Supporting Petitioner at 4–5, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2017 WL 490584, at \*3–5; Brief for the States of Texas et al. as Amici Curiae in Support of Petitioner at 2, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2017 WL 510979, at \*2.

In 2017, the Supreme Court of the United States decided the case of *TC Heartland v. Kraft Foods Group Brands*.<sup>6</sup> The same year, the Court of Appeals for the Federal Circuit decided the case of *In re Cray Inc.*<sup>7</sup> Those two cases have made patent venue a heavily debated topic, and there are many questions that remain to be answered. One answer could come from Congress in the form of an amended patent venue statute. Another could come from a simplicity-focused approach, leading to rigidity in procedural rules and application of the statute. On the other hand, courts like the Eastern District of Texas have a considerable amount of expertise, and it would promote interests of judicial economy for district courts to emulate that expertise. But before addressing those issues, this article will examine the history of the patent venue statute leading up to the present day, and then look at the *TC Heartland* and *In re Cray* decisions that currently govern patent venue.

Congress derives its authority to create the patent system from the U.S. Constitution.<sup>8</sup> It is established under statute that federal courts have exclusive jurisdiction over patent claims.<sup>9</sup> Thus, many procedural battles relating to patent cases occur within the patent venue statute. A unique historical background tells us why there is a separate venue statute for patent cases at all. The Judiciary Act of 1789 provided the original venue statute, and things stayed relatively quiet for nearly a century.<sup>10</sup> Then, in 1887, Congress amended the venue statute.<sup>11</sup> Courts split on the interpretation of the 1887 amendment,<sup>12</sup> which led to Congress passing a patent-specific venue statute in 1897.<sup>13</sup> Interpretation of the statute has swung back and forth, with more- and less- expansive definitions of the word “resides” and “inhabits” being of issue.<sup>14</sup>

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<sup>6</sup> See generally 137 S. Ct. 1514 (2017).

<sup>7</sup> See generally 871 F.3d 1355 (Fed. Cir. 2017).

<sup>8</sup> U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

<sup>9</sup> 28 U.S.C. § 1338(a) (2011).

<sup>10</sup> Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 79 (amended 1887).

<sup>11</sup> Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>12</sup> See *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563–65 (1942) (reviewing interpretation of the 1887 statute).

<sup>13</sup> Act of Mar. 3, 1897, ch. 395, 29 Stat. 695 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>14</sup> See generally *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1518–20 (2017) (reviewing interpretation of the patent venue statute over time).

In 2017, the Supreme Court decided *TC Heartland*. After that case, interpretation of the modern patent venue statute, 28 U.S.C. § 1400(b), is that a corporate defendant “resides” only in its State of incorporation.<sup>15</sup> That definition was significantly more restrictive than the one under which the Eastern District of Texas and patent plaintiffs had been operating. Naturally, patent plaintiffs focused on the other half of Section 1400(b): acts of infringement where the defendant “has a regular and established place of business.”<sup>16</sup> In *In re Cray*, the Federal Circuit adopted a confusing test that did not sufficiently clear up the second half of Section 1400(b).<sup>17</sup>

That leaves three potential options in interpreting Section 1400(b): a legislative fix, a simplicity-based approach, and an economy-based approach. This article evaluates the strengths and weaknesses of all three approaches. The best approach to the post-*TC Heartland* and *Cray* confusion is to adopt a simplicity-based approach, in which the judicial interpretation of Section 1400(b) is broader, but simpler to apply.

## I. HOW WE GOT HERE

“Congress shall have the power . . . [t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . .”<sup>18</sup> This phrase within the U.S. Constitution gave Congress the power to provide for a patent system. That provision within Article I, Section 8 was uncontroversial, as noted by James Madison in *Federalist No. 43*:

The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most

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<sup>15</sup>*Id.* at 1521 (“As applied to domestic corporations, ‘reside[nce]’ in § 1400(b) refers only to the State of incorporation.”).

<sup>16</sup>28 U.S.C. § 1400(b) (1999).

<sup>17</sup>871 F.3d 1355, 1360 (Fed. Cir. 2017) (“[O]ur analysis of the case law and statute reveal three general requirements 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.”).

<sup>18</sup>U.S. CONST. art. I, § 8, cl. 8.

of them have anticipated the decision of this point, by laws passed at the instance of Congress.<sup>19</sup>

Congress passed the first Patent Act in 1790, creating a statutory cause of action for patent infringement in the United States.<sup>20</sup> The year before, Congress passed the Judiciary Act of 1789, which conferred jurisdiction on federal trial courts only where the defendant is an “inhabitant” or in which the defendant may be “found” for service of process.<sup>21</sup> Early cases held that provision applicable to patent infringement cases.<sup>22</sup> For nearly a century, that venue provision remained in place. But in 1887, Congress chose to narrow the venue provision, and suit could only be filed in the district in which the defendant was an inhabitant, or in which either the plaintiff or defendant was an inhabitant if jurisdiction was based on diversity of citizenship.<sup>23</sup>

In 1893, the Supreme Court interpreted the 1887 statute in *In re Hohorst*, holding that the statute was not applicable to suits in which aliens or foreign corporations were defendants, who could be sued wherever served.<sup>24</sup> In a bit of regrettable phrasing, Justice Gray added that the 1887 statute did not apply to aliens or foreign corporations “especially in a suit for the infringement of a patent right.”<sup>25</sup> Although prior to *Hohorst* the lower federal courts assumed the statute’s applicability to patent infringement cases,<sup>26</sup> afterwards many courts took the position that the 1887 Act did not apply to patent infringement cases, and that defendants could be sued wherever served.<sup>27</sup> Others believed

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<sup>19</sup>THE FEDERALIST NO. 43, 288 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>20</sup>Patent Act of 1790, ch. 7, § 4, 1 Stat. 111 (repealed 1793).

<sup>21</sup>Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 79 (amended 1801).

<sup>22</sup>See e.g. *Chaffee v. Hayward*, 61 U.S. 208, 216 (1857); *Allen v. Blunt*, 1 F. Cas 444, 446–47 (C.C.S.D.N.Y. 1849).

<sup>23</sup>Act of Mar. 3, ch. 373, 1887, § 1, 24 Stat. 552 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>24</sup>150 U.S. 653, 662 (1893).

<sup>25</sup>*Id.*

<sup>26</sup>See generally *Cramer v. Singer Mfg. Co.*, 59 F. 74 (C.C.N.D. Cal. 1893); *Bicycle Stepladder Co. v. Gordon*, 57 F. 529 (C.C.N.D. Ill. 1893); *Preston v. Fire-Extinguisher Mfg. Co.*, 36 F. 721 (C.C.N.D. Ill. 1888); *Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co.*, 34 F. 818 (C.C.N.D. Ill. 1888); *Nat’l Typewriter Co. v. Pope Mfg. Co.*, 56 F. 849 (C.C.D. Mass. 1893); *Reinstadler v. Reeves*, 33 F. 308 (C.C.E.D. Mo. 1887); *Adriance, Platt & Co. v. McCormick Harvesting Mach. Co.*, 55 F. 287 (C.C.N.D.N.Y. 1892); *Halstead v. Manning, Bowman & Co.*, 34 F. 565 (C.C.S.D.N.Y. 1888); *Miller-Magee Co. v. Carpenter*, 34 F. 433 (C.C.S.D. Ohio 1888).

<sup>27</sup>See generally *Westinghouse Air-Brake Co. v. Great N. Ry. Co.*, 88 F. 258 (2d Cir. 1898); *Earl v. S. Pac. Co.*, 75 F. 609 (C.C.N.D. Cal. 1896); *Noonan v. Chester Park Athletic Club Co.*, 75 F. 334 (C.C.S.D. Ohio 1896); *Nat’l Button Works v. Wade*, 72 F. 298 (C.C.S.D.N.Y. 1896).

that *Hohorst* was limited to infringement suits against aliens or foreign corporations.<sup>28</sup>

In response to the confusion, in 1897, Congress enacted a venue statute specifically for patent cases.<sup>29</sup> The 1897 Act was the basis for the modern patent venue statute, providing that federal courts had jurisdiction “in the district of which the defendant is an inhabitant, or in any district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business.”<sup>30</sup>

In 1897, a corporate defendant was understood to only “inhabit” the State of its incorporation.<sup>31</sup> In *Stonite Products Co. v. Melvin Lloyd Co.*, the Supreme Court held that the patent venue provision exclusively governed venue in patent infringement proceedings.<sup>32</sup> *Stonite* involved a plaintiff suing two defendants which inhabited different districts within Pennsylvania.<sup>33</sup> The issue was whether the patent venue statute (by then, Section 48 of the Judicial Code) applied, or whether Section 52 of the Judicial Code applied, providing that suits of a non-local nature could be brought against defendants residing in different districts in either district.<sup>34</sup> The Court ultimately came to the conclusion that the patent venue statute of 1897 “was intended to define the exact limits of venue in patent infringement suits.”<sup>35</sup>

In 1948, Congress enacted the modern patent venue statute, 28 U.S.C. § 1400(b).<sup>36</sup> The major substantive change to the statute was the replacement of “inhabitant” with “reside,” so the statute now allowed suit for patent infringement in any judicial district where the defendant resides or where the defendant committed acts of infringement and has a regular and established place of business.<sup>37</sup> At the same time, Congress enacted 28 U.S.C. § 1391, the general venue statute, which defined residence for corporate defendants.<sup>38</sup>

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<sup>28</sup> See, e.g., *Union Switch & Signal Co. v. Hall Signal Co.*, 65 F. 625, 626 (C.C.S.D.N.Y. 1895).

<sup>29</sup> Act of Mar. 3, 1897, ch. 395, 29 Stat. 69 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>30</sup> *Id.*

<sup>31</sup> See *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 449 (1892) (interpreting the 1887 general venue statute).

<sup>32</sup> 315 U.S. 561, 563 (1942).

<sup>33</sup> *Id.* at 562–63.

<sup>34</sup> *Id.* at 561–62.

<sup>35</sup> *Id.* at 566.

<sup>36</sup> Act of June 25, 1948, 62 Stat. 936 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>37</sup> Compare Act of Mar. 3, 1897, ch. 395, 29 Stat. 69 (current version at 28 U.S.C. § 1400(b) (1999)), with Act of June 25, 1948, 62 Stat. 936 (current version at 28 U.S.C. § 1400(b) (1999)).

<sup>38</sup> 28 U.S.C. § 1391(c) (1952) (amended 1988).

The Section 1391(c) definition of residence for corporate defendants was “any judicial district in which [the defendant] is incorporated or licensed to do business or is doing business . . . .”<sup>39</sup> The result of that legislation was a dispute over whether the Section 1391(c) definition of residence applied to Section 1400(b). Some circuits held that Section 1400(b) did, in fact, incorporate Section 1391(c),<sup>40</sup> while others held that Section 1400(b) exclusively governed patent venue.<sup>41</sup>

To resolve the conflict, the Supreme Court granted certiorari in *Fourco Glass Co. v. Transmirra Products Corp.*<sup>42</sup> In answering the question, the Court looked to whether there had been a “substantive change in [the patent venue statute] since the *Stonite* case.”<sup>43</sup> Relying on the House and Senate Judiciary Committee reports and the Revisers’ Notes, the Court concluded that there had been no substantive change and that Section 1400(b) did not incorporate the Section 1391(c) definition of residence.<sup>44</sup> In fact, the Revisers’ Notes on Section 1400(b) stated that the “Words ‘inhabitant’ and ‘resident,’ as respects venue, are synonymous.”<sup>45</sup> However, it was not always true that Section 400(b) governed venue in patent infringement cases.<sup>46</sup>

The next significant shift in patent venue occurred in 1988, when Congress amended Section 391(c) to say “[for] purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”<sup>47</sup> That amendment caused disagreement among district courts as to its meaning,<sup>48</sup> which the Federal Circuit resolved in *VE*

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<sup>39</sup> *Id.*

<sup>40</sup> See *Transmirra Prods. Corp. v. Fourco Glass Co.*, 233 F.2d 885, 888 (2nd Cir. 1956); *Guiberson Corp. v. Garrett Oil Tools, Inc.*, 205 F.2d 660, 665 (5th Cir. 1953); *Dalton v. Shakespeare Co.*, 196 F.2d 469, 472 (5th Cir. 1952).

<sup>41</sup> See *Ruth v. Eagle-Picher Co.*, 225 F.2d 572, 577 (10th Cir. 1955); *C-O-Two Fire Equip. Co. v. Barnes*, 194 F.2d 410, 415 (7th Cir. 1952); *Ackerman v. Hook*, 183 F.2d 11, 14 (3rd Cir. 1950).

<sup>42</sup> 353 U.S. 222, 224 (1957).

<sup>43</sup> *Id.* at 225.

<sup>44</sup> *Id.* at 227–29.

<sup>45</sup> *Id.* at 226.

<sup>46</sup> See *Kockum Indus., Inc. v. Brunette Mach. Works, Ltd.*, 442 F.2d 420, 421 (1972) (holding that 28 U.S.C. § 1391(d), not § 1400(b), applied to a patent suit involving a foreign corporation).

<sup>47</sup> Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, § 1013(a), 102 Stat. 4669 (1988).

<sup>48</sup> See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 n.1 (Fed. Cir. 1990).

*Holding Corp. v. Johnson Gas Appliance Co.*<sup>49</sup> Spurning *Fourco*, the Federal Circuit held that “venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced.”<sup>50</sup> That expansive definition of patent venue governed for nearly three decades, and was the status quo under which the Eastern District of Texas blossomed into the patent litigation capital of the United States.

In 2011, Congress amended Section 1391 again.<sup>51</sup> This version, the current version, provides in Section 1391(a) that “except as otherwise provided by law, this section shall govern the venue of all civil actions brought in district courts of the United States,” and in Section 1391(c)(2) that, “for all venue purposes,” corporate defendants reside “in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question.”<sup>52</sup> In 2016, in the case of *In re TC Heartland LLC*, the Federal Circuit held that the Section 1391 definition of where a corporate defendant resides still applied to patent venue.<sup>53</sup> The patent venue statute, in all its forms, had undergone numerous historical changes—with more to come.

## II. WHERE WE ARE

After the *VE Holding*, numerous developments altered how patent cases went through the justice system. Among these were the emergence of the Eastern District of Texas as the “rocket docket,” the rise of patent-assertion entities, and rapid technological development.<sup>54</sup> Some were more pleased with these developments than others,<sup>55</sup> which led to the issue being litigated all the way to the Supreme Court in *TC Heartland*.<sup>56</sup> Shortly thereafter, the

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<sup>49</sup> *Id.* at 1583.

<sup>50</sup> *Id.*

<sup>51</sup> Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 763 (2011).

<sup>52</sup> *Id.*

<sup>53</sup> 821 F.3d 1338 (Fed. Cir. 2016).

<sup>54</sup> See Decker, *supra* note 2; Steffy, *supra* note 2; see also Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2122–23 (2013) (discussing the increase in “patent trolls” filing cases); Landan Ansell et al., 2018 PWC Patent Litigation Study, 2 (May 2018) (Fig. 1 showing threefold increase in patent cases filed from 1998 to 2013), <http://www.ipwatchdog.com/wp-content/uploads/2018/09/2018-pwc-patent-litigation-study.pdf>.

<sup>55</sup> See Brief of Am. Bar Ass’n, *supra* note 5; Brief of States of Texas et al., *supra* note 5.

<sup>56</sup> See generally *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

Federal Circuit decided *In re Cray*.<sup>57</sup> Both of these cases had a profound effect on how patent venue functions. In *TC Heartland*, the Supreme Court would undo *VE Holding* and return patent venue to the *Fourco*-era interpretation, in which a corporation is deemed to reside in its state of formation.<sup>58</sup> In *Cray*, the Federal Circuit gave the phrase “regular and established place of business” a restrictive but confusing interpretation that created more questions than answers.<sup>59</sup>

#### A. *TC Heartland*

*TC Heartland* would prove to be the most important change to patent venue in decades. By undoing *VE Holding*, the Supreme Court upended patent venue once more. *TC Heartland* LLC manufactured flavored drink mixes.<sup>60</sup> The company was organized under Indiana law and headquartered in Indiana, was not registered under Delaware law, and had no meaningful presence in Delaware.<sup>61</sup> Kraft Food Group Brands LLC was organized under Delaware law and had its principal place in business in Illinois.<sup>62</sup> Kraft accused *TC Heartland* of infringing three of its patents, for liquid water enhancer products, and filed suit in the U.S. District Court for the District of Delaware.<sup>63</sup>

*TC Heartland* admitted that it had shipped orders of the allegedly infringing products into Delaware, about 2% of total sales of the product for the year 2013.<sup>64</sup> The District Court ruled that it had personal jurisdiction over *TC Heartland* for claims involving the allegedly infringing products.<sup>65</sup> Further, the District Court rejected *TC Heartland*'s argument that the 2011 amendments to 28 U.S.C. § 1391 rendered *VE Holding* no longer good law, denying *TC Heartland*'s motion to dismiss the case or transfer venue to the Southern District of Indiana.<sup>66</sup> The Federal Circuit agreed with the District

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<sup>57</sup> See generally 871 F.3d 1355 (Fed. Cir. 2017).

<sup>58</sup> 137 S. Ct. at 1520.

<sup>59</sup> 871 F.3d at 1362–63.

<sup>60</sup> *TC Heartland*, 137 S. Ct. at 1517.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *In re TC Heartland LLC*, 821 F.3d 1338, 1340 (Fed. Cir. 2016).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1340–41.



Court and denied TC Heartland's petition for a writ of mandamus.<sup>67</sup> Finding that TC Heartland was subject to the Delaware court's personal jurisdiction, thus satisfying the Section 1391 requirement, the Federal Circuit held that TC Heartland resided in Delaware for the purposes of Section 1400(b).<sup>68</sup>

The Supreme Court granted certiorari.<sup>69</sup> Prior to the Court's decision, much had been made about forum shopping by patent assertion entities (colloquially known as "patent trolls"), who made use of the Eastern District of Texas and its supposedly plaintiff-friendly rules.<sup>70</sup> On the other hand, some argued that the specialization of the Eastern District improved the administration of justice in patent cases.<sup>71</sup> The Supreme Court ultimately decided in TC Heartland's favor and reversed the Federal Circuit, bringing interpretation of the patent venue statute back to the *Fourco* era.<sup>72</sup>

Justice Thomas, writing for a unanimous Court, wrote that "[the] current version of § 1391 does not contain any indication that Congress intended to alter the meaning of § 1400(b) as interpreted in *Fourco*."<sup>73</sup> Justice Thomas pointed out that the argument that Section 1391 applied to Section 1400(b) was "even weaker under the current version of Section 1391 than it was under the provision in place at the time of *Fourco*, because the current provision includes a saving clause expressly stating that it does not apply when 'otherwise provided by law.'"<sup>74</sup> In a final blow to *VE Holding*, Congress'

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<sup>67</sup>*Id.* at 1341.

<sup>68</sup>*Id.*

<sup>69</sup>*TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1518 (2017).

<sup>70</sup>*See supra* note 5; *see also* J. Jonas Anderson, *Reining in a "Renegade" Court: TC Heartland and the Eastern District of Texas*, 39 *CARDOZO L. REV.* 1569, 1580 (2017) ("Scholars have bemoaned the high concentration of patent cases in a single jurisdiction; a jurisdiction which lacked high-technology industries. The popular press began to focus on the concentration of 'patent trolls' in East Texas courtrooms. Practitioner publications listed the Eastern District of Texas as a 'judicial hellhole' and the "worst thing that ever happened to intellectual property law.") (footnotes omitted).

<sup>71</sup>*See* Timothy T. Hsieh, *Approximating a Federal Patent District Court After TC Heartland*, 13 *WASH. J.L. TECH. & ARTS* 141, 144 (2018) ("These practices include: working with technical advisor attorneys during complex *Markman* claim construction hearings, hiring judicial law clerks with significant patent litigation experience and science, engineering, or technical backgrounds, creating and applying Local Patent Rules, and adopting other procedures such as a consolidated scheduling conference for all patent cases.") (footnotes omitted); *see also* Brief for Whirlpool Corp. as Amicus Curiae Supporting Respondent, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2017 WL 1046236.

<sup>72</sup>*TC Heartland*, 137 S. Ct. at 1520.

<sup>73</sup>*Id.*

<sup>74</sup>*Id.* at 1521.

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2011 amendments persuaded the Court that Section 1400(b) was to be interpreted more in line with *Fourco*.<sup>75</sup>

The final result of *TC Heartland* was that, for the purposes of venue under Section 1400(b), a domestic corporation “resides” only in its State of incorporation.<sup>76</sup> Almost immediately after the Court’s decision, filings in the Eastern District of Texas plummeted.<sup>77</sup> In an ironic twist, filings in the District of Delaware—the venue of dispute in *TC Heartland* itself—skyrocketed.<sup>78</sup> *TC Heartland* was decided on May 22, 2017.<sup>79</sup> On June 29, 2017, Judge Gilstrap signed his holding in *Raytheon Company v. Cray Inc.*, interpreting the other half of Section 1400(b): venue is proper where the defendant has committed acts of infringement and has a regular and established place of business.<sup>80</sup> On appeal to the Federal Circuit, *In re Cray* would continue the recent developments in patent venue started by *TC Heartland*. In the process, the Federal Circuit’s poor attempt at clarifying Section 1400(b)’s “regular and established place of business” language created more questions than answers.

### B. *In re Cray*

*In re Cray* was the follow-up to *TC Heartland* in interpreting Section 1400(b). After *TC Heartland*, plaintiffs began to use the mostly unused “regular and established place of business” portion of Section 1400(b) to invoke patent venue. Cray Inc. sold advanced supercomputers, which allegedly infringed a Raytheon patent.<sup>81</sup> Cray was incorporated in and had its principal place of business in Washington, with facilities in Minnesota, Wisconsin, California, and Austin and Houston, Texas.<sup>82</sup> Cray did not own or rent property in the Eastern District of Texas, but had two employees who worked from their homes in the district: Mr. Douglas Harless and Mr. Troy

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See Owen Byrd, *Patent Litigation Trends in the Three Months after T.C. Heartland*, LEX MACHINA (Oct. 18, 2017), <https://lexmachina.com/patent-litigation-trends-in-the-three-months-after-t-c-heartland/>.

<sup>78</sup> *See id.*

<sup>79</sup> 137 S. Ct. at 1514.

<sup>80</sup> 258 F. Supp. 3d 781, 788 (E.D. Tex. 2017).

<sup>81</sup> *In re Cray Inc.*, 871 F.3d 1355, 1357 (Fed. Cir. 2017).

<sup>82</sup> *Id.*

Testa.<sup>83</sup> Testa worked for Cray as a senior territory manager while residing in the district, but prior to Raytheon's suit against Cray.<sup>84</sup>

Harless worked for Cray as a sales executive for about seven years, selling more than \$345 million worth of Cray systems.<sup>85</sup> Cray had an internal "Americas Sales Territories" map, which listed Harless as a "Named Account Manager" and had his home in the Eastern District as his location.<sup>86</sup> Cray reimbursed Harless for his business expenses, such as cell phone bills, internet fees, mileage, and other business travel costs.<sup>87</sup> Cray provided Harless with administrative support out of the Minnesota office.<sup>88</sup> Harless prepared price quotations for customers, and listed himself as the "account executive," as well as listing his home phone number as his office number.<sup>89</sup> Harless did not keep the supercomputer systems in his home, nor did he keep Cray literature in his home, since it was available online.<sup>90</sup>

After Raytheon filed suit against Cray, Cray moved to transfer venue on the basis that it did not "reside" in the Eastern District after *TC Heartland*, and also because it did not commit acts of infringement nor maintained a regular and established place of business in the Eastern District.<sup>91</sup> The District Court did not agree with Cray's contention that it did not have a regular and established place of business, relying on the Federal Circuit's decision in *In re Cordis Corp.*<sup>92</sup> In *Cordis*, the Federal Circuit stated that "in determining whether a corporate defendant has a regular and established place of business in a district, 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 . . . ."<sup>93</sup>

Although the District Court found *Cordis* sufficient to find that venue was proper in the Eastern District, it went on to list four factors to assist in determining whether a defendant has a regular and established place of

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 1357–58.

<sup>92</sup> *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 793–94 (E.D. Tex. 2017).

<sup>93</sup> *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985).

business.<sup>94</sup> Believing that detailed factual inquiries were “inappropriate,” encouraging “both gamesmanship, as well as excessive and costly venue discovery,” and finding that such factual inquiries “ultimately amount[] to a distraction from the merits of the case,” the District Court went on to provide factors geared toward administrative simplicity.<sup>95</sup> Factor One was “the extent to which a defendant has a physical presence in the district . . . .”<sup>96</sup> Factor Two was “the extent to which a defendant represents, internally or externally, that it has a presence in the district.”<sup>97</sup> Factor Three was “the extent to which a defendant derives benefits from its presence in the district . . . .”<sup>98</sup> The final factor, Factor Four, was “the extent to which a defendant interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district . . . .”<sup>99</sup> Without applying the factors to the case at issue, the District Court endeavored to “employ analytical methods for establishing patent venue which are rooted in the . . . past, but which also embrace the future’s changes.”<sup>100</sup>

Cray petitioned the Federal Circuit for a writ of mandamus, seeking to move the case to Wisconsin.<sup>101</sup> Holding that the District Court’s four-part test was “not sufficiently tethered” to the language of Section 1400(b), the Federal Circuit granted the writ.<sup>102</sup> Substituting its own interpretation of the statute, the Federal Circuit held that the statute required: “(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.”<sup>103</sup> Analyzing the first requirement, the Federal Circuit elaborated that while a fixed, physical presence like a store was not necessary, “there must still be a physical, geographical location . . . from which the business of the defendant is carried out.”<sup>104</sup> The second requirement, a regular and established place of business, had two components: regularity and establishment.<sup>105</sup> The third requirement

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<sup>94</sup> *Raytheon*, 258 F. Supp. 3d at 794–98.

<sup>95</sup> *Id.* at 795–96.

<sup>96</sup> *Id.* at 796.

<sup>97</sup> *Id.* at 797.

<sup>98</sup> *Id.* at 798.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 799, n.13.

<sup>101</sup> *In re Cray Inc.*, 871 F.3d 1355, 1358 (Fed. Cir. 2017).

<sup>102</sup> *Id.* at 1362.

<sup>103</sup> *Id.* at 1360.

<sup>104</sup> *Id.* at 1362.

<sup>105</sup> *Id.* at 1362–63.

was that the defendant had to establish the place of business, not the employee.<sup>106</sup> Applying the requirements to the facts of the case, the Court found that Cray did not maintain a regular and established place of business in the Eastern District of Texas, but rather that “there exists within the district a physical location where an employee of the defendant carries on certain work for his employer.”<sup>107</sup>

Leaving litigants with a somewhat confusing and circularly-defined interpretation of Section 1400(b), the Federal Circuit endorsed a fact-intensive inquiry into whether the defendant has a regular and established place of business. That interpretation also ignored modern technological developments, such as e-commerce—there is a significant amount of business conducted without a physical “place” at all. Perhaps the biggest issue is the application of *Cray* and its loose definition of Section 1400(b); trial courts have been inconsistent in applying the *Cray* requirements due to the Federal Circuit’s broad language.<sup>108</sup>

### III. MOVING FORWARD

After *TC Heartland* and *In re Cray*, some courts were left scratching their heads as to just how to interpret the patent venue statute.<sup>109</sup> The impact of those decisions has even had economic effects on the Eastern District, as Apple decided to close down retail stores in Plano and Frisco, Texas to avoid

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<sup>106</sup> *Id.* at 1363.

<sup>107</sup> *Id.* at 1366.

<sup>108</sup> *See, e.g.*, *RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F. Supp. 3d 526, 550 (S.D.N.Y. 2018) (finding that home offices constituted a regular and established place of business); *see also* *Seven Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 954 (E.D. Tex. 2018) (finding a server a sufficient “physical place” for venue); *Green Fitness Equip. Co. LLC v. Precor Inc.*, No. 18-cv-00820-JST, 2018 WL 3207967, at \*3–4 (N.D. Cal. June 29, 2018) (finding acts of independent retail distributors insufficient for venue); *EMED Techs. Corp. v. Repro-Med Sys. Inc.*, No. 2:17-CV-728-WCB-RSP, 2018 WL 2544564, at \*3 (E.D. Tex. June 4, 2018) (noting that a distributor’s place is insufficient to impart to supplier); *Mallinckrodt IP v. B. Braun Med. Inc.*, C.A. Nos. 17-365-LPS, 17-660-LPS, 2017 WL 6386310, at \*3 (D. Del. Dec. 14, 2017) (allowing discovery as to whether affiliate’s business can be used for “place” of parent); *American GNC Corp. v. ZTE Corp.*, No. 4:17CV620, 2017 WL 5157700, at \*1 (E.D. Tex. Nov. 7, 2017), *vacated*, 890 F.3d 1008 (Fed. Cir. 2018) (finding that call center operated by third party was defendant’s regular and established place of business, *vacated* on burden of proof issue); *Patent Holder LLC v. Lone Wolf Distribs., Inc.*, No. 17-23060-Civ-Scola, 2017 WL 5032989, at \*6 (S.D. Fla. Oct. 31, 2017) (noting that revenue and sales alone are insufficient for venue).

<sup>109</sup> *See, e.g.*, *Mallinckrodt IP*, 2017 WL 6386310, at \*3.

being a defendant in the district.<sup>110</sup> Although the limits of fixes know only the bounds of imagination, three possible solutions appear the most likely to happen and work: a Congressional amendment of Section 1400(b), a simplicity-based judicial approach, and an economy-based judicial approach.<sup>111</sup> Of those three, the best approach is the simplicity-based judicial approach.

#### A. Congressional Solution

One possible fix to the patent venue problem is that Congress may always amend Section 1400(b) to make it easier to understand. In fact, in the years preceding both the 2011 passage of the America Invents Act and *TC Heartland*, there were a few proposed bills in Congress dealing with the patent venue statute.<sup>112</sup> The Patent Reform Act of 2005 was the first of these, restricting venue to the defendant's principal place of business and districts where acts of infringement occurred and the defendant had an established place of business.<sup>113</sup> After failing the first time, another attempt at the same

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<sup>110</sup>Sarah Perez, *Apple Confirms its Plans to Close Retail Stores in the Patent Troll-Favored Eastern District of Texas*, TECHCRUNCH (Feb. 22, 2019, 2:47 PM), <https://techcrunch.com/2019/02/22/apple-confirms-its-plans-to-close-retail-stores-in-the-patent-troll-favored-eastern-district-of-texas/>.

<sup>111</sup>*Compare* Amendment in the Nature of a Substitute to H.R. 2795, the "Patent Act of 2005": Hearing on H.R. 2795 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 1–2 (2005) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Prop.), *with* *Raytheon Co. v. Cray Inc.*, 258 F. Supp. 3d 781, 795–96 (E.D. Tex. 2017), *and* Timothy T. Hsieh, *Approximating a Federal Patent District Court After TC Heartland*, 13 WASH. J.L. TECH. & ARTS 141, 162 (2018) ("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").

<sup>112</sup>*See* Amendment in the Nature of a Substitute to H.R. 2795, the "Patent Act of 2005": Hearing on H.R. 2795 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 1–2 (2005) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Prop.); Patent Reform Act of 2007, S. 1145, 110th Cong. (2d Sess.) § 10(a) (as introduced in the Senate, Apr. 18, 2007); Patent Reform Act of 2007, H.R. 1908, 110th Cong. (1st Sess.) § 10(a) (as introduced in the House, Apr. 18, 2007); Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Cong. (2d Sess.) § 2(a) (2016).

<sup>113</sup>*See* Amendment in the Nature of a Substitute to H.R. 2795, the "Patent Act of 2005": Hearing on H.R. 2795 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary, 109th Cong. 1–2 (2005) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intellectual Prop.).

amendment was made in 2007.<sup>114</sup> In the 2007 version, Sen. Arlen Specter introduced an even more restrictive amendment to the bill.<sup>115</sup> However, these bills were objected to by Sen. John Cornyn and Rep. Louie Gohmert, both of Texas.<sup>116</sup> In the end, the America Invents Act of 2011 did not address the patent venue statute. The next attempt at amending Section 1400(b), the VENUE Act of 2016, also did not pass.

Of course, all of those attempts predated *TC Heartland* and *In re Cray*. Proponents of the mentioned amendments surely applauded recent judicial developments in patent venue, but there are still questions left unanswered. In particular, the insufficient clarity of *Cray* and the ramifications of moving patent cases from the Eastern District of Texas to courts like the District of Delaware leave open the potential of legislative solutions. The problem has not gone unnoticed, with Congressional hearings over the issue in June 2017.<sup>117</sup> But it is unclear whether Congressional action is coming. Two of the most vocal proponents of amending the statute, Rep. Darrell Issa and Sen. Jeff Flake, did not run for reelection in 2018,<sup>118</sup> and Senator Cornyn and Representative Gohmert are likely to be as opposed to narrowing the statute as they were before.<sup>119</sup>

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<sup>114</sup> See Patent Reform Act of 2007, S. 1145, 110th Cong. (2d Sess.) (as introduced in the Senate, Apr. 18, 2007); Patent Reform Act of 2007, H.R. 1908, 110th Cong. (1st Sess.) (as introduced in the House, Apr. 18, 2007).

<sup>115</sup> Michael C. Smith, "A Battle over Where the War is To Be Fought": Venue in Patent Cases, 41 *The Advoc. (Texas)* 10, 11 (2007) ("The provision went on to limit venue to: (1) where the defendant has its principal place of business or where the defendant is incorporated, or for foreign corporations with a U.S. subsidiary where the defendant's primary U.S. subsidiary is located, (2) where the defendants have: (a) committed substantial acts of infringement and (b) have a regular and established physical facility (c) that the defendant controls and (d) that constitutes a substantial portion of the operations of the defendant; (3) where the primary plaintiff resides, if the primary plaintiff is a institution of higher education, or (4) where the plaintiff resides if the sole plaintiff in the action is an individual inventor who is a natural person who qualifies at the time the action is filed as a 'micro entity' pursuant to 35 U.S.C. § 123").

<sup>116</sup> See 153 CONG. REC. H10,278 (daily ed. Sept. 7, 2007); *Cornyn Pledges to Fight for Fairness for Eastern District of Texas Courts*, JOHN CORNYN U.S. SENATOR FOR TEX. (July 13, 2007), <https://www.cornyn.senate.gov/content/cornyn-pledges-fight-fairness-eastern-district-texas-courts>.

<sup>117</sup> Tim Ryan, *Congress Urged to Reform Laws on Patent-Suit Venue*, COURTHOUSE NEWS SERVICE (June 13, 2017), <https://www.courthousenews.com/congress-urged-reform-laws-patent-suit-venue/>.

<sup>118</sup> Washington Examiner Staff, *Republicans not Running for Re-Election in 2018*, WASHINGTON EXAMINER (Sept. 12, 2017), <https://www.washingtonexaminer.com/republicans-not-running-for-re-election-in-2018>.

<sup>119</sup> See CONG. REC., *supra* note 116; CORNYN, *supra* note 116.

### B. Simplicity Approach

Justice Stephen Breyer once summarized the Supreme Court's position on procedural law as follows: "we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."<sup>120</sup> The Supreme Court continued to endorse that approach when it defined "residence" of a corporate defendant, for patent venue purposes, as its state of incorporation.<sup>121</sup> When the Federal Circuit defined "regular and established place of business," it spurned the Supreme Court's philosophical approach, instead stating that "no precise rule has been laid down and each case depends on its own facts."<sup>122</sup> Whether it wanted to expand or narrow the parameters of patent venue, the Federal Circuit failed at doing so clearly. By adopting that fact-intensive approach, the Federal Circuit has put the jurisdictional stage of proceedings in the place that Judge Gilstrap warned of—it "encourages both gamesmanship, as well as excessive and costly venue discovery," amounting "to a distraction from the merits of the case."<sup>123</sup>

That is not to say that there is no hope for application of a more rigid, predictable test for "regular and established place of business."<sup>124</sup> Although the Federal Circuit dismissed the Eastern District's four-part test,<sup>125</sup> there is potential for simple tests that *are* "sufficiently tethered" to Section 1400(b)'s statutory language. *Cray* requires a (1) physical place in the district; (2) the place is a regular and established place of business; and (3) that the place be the place of the defendant.<sup>126</sup> A more rigid application of those requirements could cut towards an expansive definition, such as "physical place" including servers or a computer, "regular and established" defined as use of the place more than once over a period of a month for some type of commercial activity, and "place of the defendant" including establishment by an agent or employee of the defendant without the defendant's express disapproval.<sup>127</sup> A less expansive approach, on the other hand, could define "physical place" as

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<sup>120</sup> *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010).

<sup>121</sup> *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017).

<sup>122</sup> *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017).

<sup>123</sup> *Raytheon Co. v. Cray Inc.*, 258 F. Supp. 3d 781, 795 (E.D. Tex. 2017).

<sup>124</sup> 28 U.S.C. § 1400(b) (1999).

<sup>125</sup> *See In re Cray*, 871 F.3d at 1362.

<sup>126</sup> *Id.* at 1360.

<sup>127</sup> *See, e.g., RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F. Supp.3d 526, 550 (S.D.N.Y. 2018) (finding that employees conducting business out of home offices meets the "regular and established business" requirement); *Seven Networks, LLC v. Google LLC*, 315 F. Supp.3d 933, 954 (E.D. Tex. 2018) (finding that a server is a sufficient "physical place" for venue).



a permanent building from which business is carried out, “regular and established” meaning use of the place for business multiple times a week for commercial activity over a period of several months, and “place of the defendant” requiring a possessory interest of the defendant.<sup>128</sup> Under either the more- or less-expansive approach, the inquiry becomes faster and easier to administer, while remaining within the confines of the Federal Circuit’s *Cray* requirements.

### C. Economy Approach

In the wake of *TC Heartland* and *Cray*, there has been a steep reduction in the number of cases filed in the Eastern District of Texas, while at the same time, the number of patent filings in the District of Delaware went up.<sup>129</sup> This mass exodus of cases raises another consequence of the narrower interpretation of Section 1400(b): the loss of judicial benefits of litigating in the “specialized” patent courts, specifically, the Eastern District of Texas.

Scholars and litigants alike lament the loss of the judicially economic patent court in Texas.<sup>130</sup> Some benefits of litigating in the Eastern District include the experience of the judges, predictable local rules, and expedience in getting to trial.<sup>131</sup> Judges also have the help of law clerks who specialize in patent law.<sup>132</sup> Predictability, such as in *Markman* rulings, is another upside to the specialized patent court.<sup>133</sup> The adoption of local rules in the nature of the Eastern District of Texas or Northern District of California in order to encourage the resolution of cases quickly saves time and money for litigants as well as keeping the court’s docket from backlogging.<sup>134</sup>

These benefits are recognized by plaintiffs and defendants, which is why many defendants still choose to litigate in the Eastern District of Texas.<sup>135</sup>

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<sup>128</sup> See *Regents of Univ. of Minn. v. Gilead Scis., Inc.*, 299 F. Supp. 3d 1034, 1041, 1044 (D. Minn. 2017) (“None of Gilead’s employees work from a stand-alone business office in Minnesota, but instead, work in the field, visiting healthcare providers.”).

<sup>129</sup> See Byrd, *supra* note 77.

<sup>130</sup> See Hsieh, *supra* note 71; Brief for Whirlpool Corp., *supra* note 71.

<sup>131</sup> Brief for Whirlpool Corp. as Amicus Curiae Supporting Respondent at 3, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (No. 16-341), 2017 WL 1046236, at \*3.

<sup>132</sup> Hsieh, *supra* note 71.

<sup>133</sup> *Id.* at 163.

<sup>134</sup> See *id.* at 163–64.

<sup>135</sup> See Geneva Clark, *TC Heartland, Legal Trends, One Year Later*, LEX MACHINA (May 23, 2018), <https://lexmachina.com/tc-heartland-legal-trends-one-year-later/> (noting as of May 2018,

However, it may work to the benefit of other courts—particularly the Delaware District Court—to adopt some of the policies and approaches that the Eastern District of Texas has. The judicially economical approach of the Eastern District would benefit litigants through the expedient resolution of meritorious claims, predictable rulings, and the presence of expert judges and law clerks. It would also benefit the courts by getting patent cases through the docket faster, especially beneficial for a district court like the one in Delaware, which has seen such a surge of patent filings.<sup>136</sup>

#### IV. CONCLUSION

The best option to address the post-*Heartland* and *Cray* confusion is to adopt a simplicity-based interpretation of Section 1400(b)'s "regular and established place of business" language. Expecting Congress to address the issue is not viable, because proposals have been introduced for over a decade and have gone nowhere. The fact is, the greatest support for amending Section 1400(b) came from those who likely welcomed *Heartland* and *Cray* and their limitations on patent venue.

District courts embracing the Eastern District "rocket docket" model is a better option, but still has its shortcomings. One possible reason why the Eastern District's Marshall division embraced its patent docket to begin with was because there is not a U.S. Attorney's office in Marshall, thus freeing up that court's ability to hear more patent cases.<sup>137</sup> District courts such as the District of Delaware or the Western District of Texas, Waco division do have U.S. Attorney's offices.<sup>138</sup> It would be difficult for the Eastern District to be replaced by those courts as a specialized patent court.

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EDTX is the second-most popular venue for patent cases, and Judge Gilstrap hears more patent cases than any other district judge).

<sup>136</sup> *See id.* (noting from May 2017 to May 2018, 23% of patent cases were filed in Delaware compared with 12% the year prior).

<sup>137</sup> U.S. Attorney's Office, Info for the Marshall Division, UNITED STATES DEPARTMENT OF JUSTICE (last updated Apr. 14, 2015), <https://www.justice.gov/usao-edtx/marshall> (indicating that the nearest U.S. Attorney's office is located in Tyler, Texas).

<sup>138</sup> U.S. Attorney's Office, About the District of Delaware, UNITED STATES DEPARTMENT OF JUSTICE (last updated July 15, 2015), <https://www.justice.gov/usao-de/about-district> (stating that the U.S. Attorney's office for the District of Delaware is in Wilmington); U.S. Attorney's Office, About the Western District of Texas, UNITED STATES DEPARTMENT OF JUSTICE (last updated Jan. 2, 2018), <https://www.justice.gov/usao-wdtx/about> (stating that the Western District of Texas has U.S. Attorney's offices not just in Waco but also in Alpine, Austin, Del Rio, El Paso, Midland, and San Antonio).

Adopting a simplicity-based judicial interpretation of “regular and established place of business” is thus the most appropriate solution to the patent venue problem. For the sake of plaintiff autonomy and efficiency, a broader interpretation would be the best approach. Procedural law should be simple to interpret and accord deference for the plaintiff’s choice of forum. There is already an infrastructure for efficient resolution of patent cases in the Eastern District of Texas. Opponents of patent assertion entities’ behavior should address the problem at its source—the U.S. Patent system itself—rather than through the proxy of Section 1400(b).

The lengthy and, at times, unpredictable history of patent venue has led to a number of interesting developments over time. From the confusion started by *Hohorst* to massive shifts from *Fourco* to *VE Holding* and back again with *TC Heartland* and *In re Cray*, patent venue jurisprudence has had an outsized impact on how patent cases are litigated. One of the more infamous examples of this would be the Samsung-sponsored ice rink in Marshall, Texas,<sup>139</sup> but the questions of where a defendant “resides” and has a “regular and established place of business” were important enough to garner media commentary, Congressional debates, and decisions from the Supreme Court and Federal Circuit.<sup>140</sup>

The reality is that interpretation of Section 1400(b) remains incomplete, as the district courts demonstrate.<sup>141</sup> With further developments nearly

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<sup>139</sup>Michael Blanding, *Why South Korea’s Samsung Built the Only Outdoor Skating Rink in Texas*, HARVARD BUSINESS SCHOOL WORKING KNOWLEDGE (June 11, 2018), <https://hbswk.hbs.edu/item/why-south-korea-s-samsung-built-the-only-outdoor-skating-rink-in-texas?cid=wk-rss>.

<sup>140</sup>Decker, *supra* note 2; Steffy, *supra* note 2; Ryan, *supra* note 117; *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017); *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017).

<sup>141</sup>*See, e.g.*, *RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F. Supp. 3d 526, 550 (S.D.N.Y. 2018) (finding that home offices constituted a regular and established place of business); *See also* *Seven Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 954 (E.D. Tex. 2018) (finding a server a sufficient “physical place” for venue); *Green Fitness Equip. Co. LLC v. Precor Inc.*, No. 18-cv-00820-JST, 2018 WL 3207967, at \*3–4 (N.D. Cal. June 29, 2018) (finding acts of independent retail distributors insufficient for venue); *EMED Techs. Corp. v. Repro-Med Sys. Inc.*, No. 2:17-CV-728-WCB-RSP, 2018 WL 2544564, at \*3 (E.D. Tex. June 4, 2018) (noting that a distributor’s place is insufficient to impart to supplier); *Mallinckrodt IP v. B. Braun Med. Inc.*, C.A. Nos. 17-365-LPS, 17-660-LPS, 2017 WL 6386310, at \*3 (D. Del. Dec. 14, 2017) (allowing discovery as to whether affiliate’s business can be used for “place” of parent); *American GNC Corp. v. ZTE Corp.*, No. 4:17CV620, 2017 WL 5157700, at \*1 (E.D. Tex. Nov. 7, 2017), *vacated*, 890 F.3d 1008 (Fed. Cir. 2018) (finding that call center operated by third party was defendant’s regular and established place of business, vacated on burden of proof issue); *Patent Holder LLC v. Lone Wolf Distribs., Inc.*, No.

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certain in the future, there are some solutions mentioned in this article that provide a path forward. Congress may address the problem at its root, by amending Section 1400(b) itself. Judicial development of a more rigid interpretation of Section 1400(b)'s "regular and established place of business" prong is another. Adoption of the Eastern District's "specialization" in patent cases is still another way to address recent developments in patent venue. Although the simplicity-based approach is the best among those three, some combination of these approaches could be beneficial. As it has been since 1789, the law of patent venue is in flux.