"exclu[sion]" fail to satisfy Article III's injury-in-fact requirement.


**IN RE: GOOGLE LLC, Petitioner**

**2019-126**

United States Court of Appeals, Federal Circuit.

Filed: 02/13/2020

**Background:** Patent owner filed infringement action against internet search engine operator. Operator moved to dismiss for improper venue. The United States District Court for the Eastern District of Texas, Rodney Gilstrap, Chief Judge, 2019 WL 3717683, denied motion. Operator petitioned for a writ of mandamus ordering the District Court to dismiss the case for lack of venue.

**Holdings:** The Court of Appeals, Dyk, Circuit Judge, held that Eastern District of Texas was not a proper venue for patent infringement action.

Petition granted.

Wallach, Circuit Judge, filed an opinion joining and concurring.

**1. Mandamus ⚿44**

Mandamus was an available remedy to determine whether venue was proper in Eastern District of Texas for patent infringement action against internet search engine operator, although Court of Appeals had previously denied mandamus on similar claims based on observation that it was not known if district court's ruling involved kind of broad and fundamental legal questions relevant to patent venue statute that had been deemed appropriate for mandamus, and there was lack of disagreement among large number of district courts, where significant number of district court decisions had adopted conflicting views on basic legal issues presented, and it was unlikely that, as cases proceeded to trial, venue issues would be preserved and presented to through regular appellate process. 28 U.S.C.A. § 1400(b).

**2. Mandamus ⚿4(4)**

While an appeal will usually provide an adequate remedy for a defendant challenging the denial of an improper-venue motion, there may be circumstances in which it is inadequate.

**3. Patents ⚿1730**

For purposes of resolving a patent venue dispute, there are three general requirements to establishing that the defendant has a regular and established place of business: (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.

**4. Patents ⚿1730**

Under the first requirement of the patent venue statute, that there must be a physical place in the district, a "place" merely needs to be a physical, geographical location in the district from which the business of the defendant is carried out. 28 U.S.C.A. § 1400(b).

See publication Words and Phrases for other judicial constructions and definitions.

**5. Statutes ⚿1216(1), 1385(2)**

Interpretation of a provision must take due account of neighboring statutory provisions, and the court normally presumes that the same language in related statutes carries a consistent meaning.

**6. Patents ⚿1730**

Under the patent venue statute, a "regular and established place of business" requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business

at the alleged place of business. 28 U.S.C.A. § 1400(b).

**7. Patents ⚿1730**

Internet search engine operator lacked a "regular and established place of business" within the district, and had no employee or agent regularly conducting its business within district, and thus Eastern District of Texas was not a proper venue for patent infringement action against operator; although operator had contracts with two internet service providers (ISP) to host servers in the district that functioned as local caches for search engine's data, operator did not have control over ISPs' provision of network access beyond requiring that they maintain network access to servers and allow servers to use certain ports for inbound and outbound network traffic. 28 U.S.C.A. § 1400(b).

**8. Principal and Agent ⚿1**

The essential elements of agency are (1) the principal's right to direct or control the agent's actions, (2) the manifestation of consent by the principal to the agent that the agent shall act on his behalf, and (3) the consent by the agent to act.

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On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in Nos. 2:18-cv-00462-JRG, 2:18-cv-00463-JRG, Judge J. Rodney Gilstrap.

**ON PETITION**

Thomas Schmidt, Hogan Lovells US LLP, New York, NY, argued for petitioner. Also represented by Neal Kumar Katyal, Keith O'Doherty, Washington, DC.

Jeffrey Bragalone, Bragalone Conroy PC, Dallas, TX, argued for respondent Super Interconnect Technologies LLC. Also represented by Thomas William Kennedy, Jr., Daniel Fletcher Olejko.

Clement Roberts, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA, for amici curiae Acushnet Company, BigCommerce, Inc., ChargePoint, Inc., Check Point Software Technologies, Inc., DISH Network, L.L.C., eBay Inc., Fitbit, Inc., Garmin International, Inc., High Tech Inventor's Alliance, HP Inc., L Brands, Inc., Netflix, Inc., Quantum Corporation, RingCentral, Inc., Twitter, Inc., Walmart, Inc., Williams-Sonoma, Inc. Also represented by Abigail Colella, New York, NY; Eric Shumsky, Washington, DC.

Brent P. Lorimer, Workman Nydegger, Salt Lake City, UT, for amicus curiae Merit Medical Systems, Inc.

Before DYK, WALLACH, and TARANTO, Circuit Judges.

Concurrence filed by Circuit Judge WALLACH.

**ORDER**

DYK, Circuit Judge.

Google LLC ("Google") petitions for a writ of mandamus ordering the United States District Court for the Eastern District of Texas to dismiss the case for lack of venue. *See Super Interconnect Techs. LLC v. Google LLC*, No. 2:18-CV-00463-JRG, 2019 WL 3717683, 2019 U.S. Dist. LEXIS 132005 (E.D. Tex. Aug. 7, 2019). We hold that mandamus is warranted and order that the case either be dismissed or transferred.

BACKGROUND

Super Interconnect Technologies LLC ("SIT") sued Google for patent infringement in the Eastern District of Texas. Under the patent venue statute, 28 U.S.C. § 1400(b), "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." SIT filed its

suit after the Supreme Court's decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, —— U.S. ——, 137 S. Ct. 1514, 1517, 197 L.Ed.2d 816 (2017), which held that "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute," and this court's decision in *In re Cray, Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017), which held that a "regular and established place of business" under the patent venue statute must be: (1) "a physical place in the district"; (2) "regular and established"; and (3) "the place of the defendant."

SIT alleged that "venue is proper ... under 28 U.S.C. § 1400(b) because Google has committed acts of infringement in the District and has a regular and established place of business in this District." *Super Interconnect*, 2019 WL 3717683, at *1, 2019U.S. Dist. LEXIS 132005, at *3. Google's business includes providing video and advertising services to residents of the Eastern District of Texas through the Internet. SIT's allegation of venue was based on the presence of several Google Global Cache ("GGC") servers, which function as local caches for Google's data.[1]

The GGC servers are not hosted within datacenters owned by Google. Instead, Google contracts with internet service providers (ISPs) within the district to host Google's GGC servers within the ISP's datacenter. When a user requests Google's content, the ISP attempts to route the user's request to a GGC server within its own network (within the district) before routing the request to Google's central data storage servers (outside the district). The GGC servers cache only a small portion of content that is popular with nearby users but can serve that content at lower latency—which translates to shorter wait times—than Google's central server infrastructure. This performance benefit is in part due to the physical proximity of the GGC servers to the ISP's users. This arrangement allows Google to save on bandwidth costs and improve user experience on its various platforms.

At the time of the complaint, Google had entered into contracts with two ISPs to host GGC servers owned by Google in the Eastern District of Texas: Cable One Inc. ("Cable One") and Suddenlink Communications ("Suddenlink"). The contracts provided that the ISPs would host Google's GGC servers in their data centers. Specifically, the GGC servers are installed in the ISP's server racks, which are cabinets that accept standard server components. Each contract states that the ISP must provide "[r]ack space, power, network interfaces, and IP addresses," for the GGC servers, and provide "[n]etwork access between the [GGC servers] and [the ISP's] network subscribers." Supplemental Record, Dkt. 31, Ex. A, at 1; *id.*, Ex. B, at 1. The contracts permit the ISPs to select the rack space for the GGC servers, but they tightly restrict the ISPs' ability to relocate the servers without Google's permission

1. Google later withdrew its servers from the district but concedes that "Google's subsequent removal of the GGC servers from service in the Eastern District of Texas does not impact venue in this case." Pet. at 6. The regional circuits appear to be split on the exact timing for determining venue. *See, e.g., Flowers Indus., Inc. v. FTC*, 835 F.2d 775, 776 n.1 (11th Cir. 1987) (holding that "venue must be determined based on the facts at the time of filing"); *Welch Sci. Co. v. Human Eng'g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969) (holding that venue is proper if the defendant had a "regular and established place of business at the time the cause of action accrued and the suit is filed within a reasonable time thereafter"). We need not decide the correct standard, because the GGC servers were present in the district both at the time the cause of action accrued and at the time the complaint was filed. For convenience, we refer to the facts relating to Google's servers in the district in the present tense throughout this opinion.

Also available as part of the eCourse
Venue Transfer and Mandamus at the Federal Circuit

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