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# FILLING THE JURISPRUDENTIAL GAP: “REGULAR AND ESTABLISHED PLACE OF BUSINESS” AFTER *IN RE CRAY, INC.*

## INTRODUCTION

Since the nineteenth century, specific venue rules for patent infringement suits have existed in federal law.<sup>1</sup> The current version of the “Patent Venue Statute” is codified in 28 U.S.C. § 1400(b), which provides that “[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.”<sup>2</sup> Over time, the reach of this statute has changed in relation to where a corporation “resides”<sup>3</sup> in the specific context of the statute. These changes have come when courts interpret the relationship between the Patent Venue Statute and amendments to the “General Venue Statute.”<sup>4</sup> In *TC Heartland, LLC v. Kraft Goods Grp. Brands, LLC*,<sup>5</sup> the Supreme Court yet again changed our understanding of the relationship between the General Venue Statute and the Patent Venue Statute, upending over thirty years of precedent by holding that the narrower Patent Venue Statute jurisprudence, not the General Venue Statute, determines the meaning of the word “resides.”<sup>6</sup> However, the *TC Heartland* Court provided no guidance on how to apply the second portion of this once-extinct rule of civil procedure. This Note aims to provide some of that missing guidance necessary to determine which precedent remains good law, which case law has been expressly or implicitly overruled, and how the Court of Appeals for the Federal Circuit (Federal Circuit) and federal district courts are likely to rule in novel factual situations moving forward.<sup>7</sup>

The determinative issue in the vast majority of patent venue decisions is whether the defendant has a “regular and established place of business”<sup>8</sup> in the federal judicial district where a plaintiff brings suit. Venue is important to litigants because the local rules of each district court can vary drastically,

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1. Act of March 3, 1897, ch. 395, 29 Stat. 695 [hereinafter 1897 Act].
  2. 28 U.S.C. § 1400(b).
  3. *Id.*
  4. See 28 U.S.C. § 1391; see also *infra* Section I.B (providing a discussion of the history leading up to the current version of the statute).
  5. 137 S. Ct. 1514 (2017).
  6. *Id.* at 1517.
  7. See *infra* Part IV.
  8. 28 U.S.C. § 1400(b).

and these rules influence the length of the proceeding, the jury pool, the cost of litigation, and the likelihood of success.<sup>9</sup>

In *In re Cray, Inc.*,<sup>10</sup> the Federal Circuit articulated a new legal test for applying the Patent Venue Statute to different factual scenarios to answer whether there is a regular and established place of business in a plaintiff's desired judicial district. In *Cray*, a defendant's sales employee conducted some business activities from his home in the Eastern District of Texas.<sup>11</sup> In holding that there was no regular and established place of business—thereby making venue improper—the Federal Circuit recited three elements necessary to satisfy the regular and established place of business requirement: (1) there must be a “fixed, physical location,” (2) the location must be a “regular and established place of business,” and (3) the location must be “of the defendant.”<sup>12</sup> These requirements overruled the four-factor test Judge Gilstrap articulated in the proceeding below in the Eastern District of Texas.<sup>13</sup> Since the alleged facts did not establish that the defendant had any ownership or possessory interest in the employee's residence, the physical location in the district did not belong to the defendant, and the third requirement was not met.<sup>14</sup>

This Note argues that the Federal Circuit's interpretation of the Patent Venue Statute is consistent with Congress's original purpose for enacting it, which was to narrow the scope of venue when compared to general venue requirements.<sup>15</sup> Where *Cray* conflicts with prior case law, it conflicts only to the extent that there was already a conflict in the precedent with this original purpose. And in most decisions after *Cray*, district courts have resolved the conflict on the side of a narrower reading that would find venue improper.<sup>16</sup> In other words, federal district court cases applying *Cray*'s legal test have similarly erred on the side of a narrow reading.<sup>17</sup> Even though there will surely be much more case law on this topic, *Cray* provides a roadmap for the factual scenarios likely to trigger a venue challenge worth litigating, and thus require a court's analysis.

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9. See Joseph E. Cwik, *Local Patent Rules and Their Impact on Litigation*, 2012 WL 1670113, at \*1 (“Courts adopt these local patent rules to streamline patent cases by closely regulating the litigation conduct of the parties.”); Raymond L. Panneton, *Don't Feed the Troll: Curbing Patent Litigation in the Eastern District of Texas*, 55 HOUS. LAW. 24, 25 (2017); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 634 (2015) (“[F]orum shopping in patent law is driven, at least in part, by federal district courts competing for litigants. This competition occurs primarily through procedural and administrative differentiation among courts.”).

10. 871 F.3d 1355 (2017).

11. *Id.* at 1358.

12. *Id.* at 1360–62.

13. See *infra* Section III.B.

14. *In re Cray, Inc.*, 871 F.3d 1355, 1365 (Fed. Cir. 2017).

15. See *infra* Section I.B.

16. See discussion *infra* Sections III.C, Part IV.

17. See discussion *infra* Part IV.

In this Note, Part I looks at the legislative histories of the Patent Venue Statute, the General Venue Statute, and the judicial understanding of their relationship over time. Part II looks at how the phrase “regular and established place of business” in the Patent Venue Statute has been interpreted in case law from its inception up to the Federal Circuit’s decision in *Cray*, including competing theories among district courts. Part III explores *Cray*’s factual scenario, procedural history, interpretation of case law, reasoning, and the new test to be applied by district courts to determine proper venue. Finally, Part IV expands *Cray*’s rationale to the various factual scenarios and legal doctrines developed to handle these venue questions from Part II, then analyzes the decisions of district courts applying *Cray*’s test.

## I. LEGISLATIVE HISTORIES OF THE VENUE STATUTES

Where a defendant “resides” in patent infringement suits has changed based upon the Patent Venue Statute, the language of the General Venue Statute, and the relationship between the two as determined by the courts. These changes in interpretation explain both what policy reasons led to a Patent Venue Statute and why there has been a large gap in jurisprudence regarding the meaning of § 1400(b). Thus, before exploring the development of the interpretations of “regular and established place of business,”<sup>18</sup> it is necessary to review the legislative history and jurisprudence that led up to *TC Heartland, LLC v. Kraft Goods Grp. Brands, LLC*.<sup>19</sup> This involves a look at the developments of the Patent Venue Statute,<sup>20</sup> the General Venue Statute,<sup>21</sup> and the case law interpreting the relationship between the various versions of each.<sup>22</sup> Section A examines the Patent Venue Statute from its original enactment in 1897<sup>23</sup> and two subsequent amendments. Section B traces the development of the General Venue Statute through its two amendments. Finally, Section C explores the evolving relationship between these statutes as understood by the courts.

### A. Patent Venue Statute

Initially, the generally applicable provisions of the Judiciary Act of 1789 governed venue in patent infringement suits.<sup>24</sup> Since then, there have been

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18. 28 U.S.C. § 1400(b).

19. 137 S. Ct. 1514 (2017).

20. See *infra* Section I.A.

21. See *infra* Section I.B.

22. See *infra* Section I.C.

23. 1897 Act.

24. See *TC Heartland*, 137 S. Ct. at 1518; see also *infra* note 25.

three versions of the Patent Venue Statute: (1) the original enactment in 1897, (2) the codification in 1911, and (3) the codification in 1948.

### 1. 1897 Original Enactment

In a move from judicial<sup>25</sup> to legislative venue rules, Congress enacted the original Patent Venue statute in 1897, which provided,

[I]n suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a *regular and established place of business*, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.<sup>26</sup>

Congress sought to “narrow venue”<sup>27</sup> options to certain judicial districts and thereby reduce “abuses”<sup>28</sup> resulting from an overly broad venue rule. The first sentence quoted above provides two different requirements that can be met for venue to be proper.<sup>29</sup> The first way to establish proper venue was to be in “*the* district of [where] the defendant is an inhabitant.”<sup>30</sup> This was only one district at most. By contrast, the second way of establishing venue was in “*any* district in which the defendant . . . shall have committed acts of infringement and have a regular and established place of business.”<sup>31</sup> This

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25. In cases of patent infringement suits before 1897, suits were brought “in any district in which jurisdiction of defendant could be obtained.” *See* *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 434 (1932). This rule was derived from previous cases holding that, since patent law was subject to *exclusive* federal jurisdiction, the “general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several states” was not applicable. *In re Keasby & Mattison Co.*, 160 U.S. 221, 230 (1895).

26. 1897 Act, at 695 (emphasis added).

27. *Pure Oil Co. v. Suarez*, 384 U.S. 202, 207 (1966).

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

29. 1897 Act, at 695.

30. *Id.* (emphasis added).

31. *Id.* (emphasis added). This Note will not explore the requirements for what constitutes “acts of infringement” because this required is easily met by merely alleging infringing acts in the judicial district. *See* *Symbology Innovations, LLC v. Lego Sys., Inc.*, 282 F. Supp. 3d 916, 936 (E.D. Va. 2017) (“[A] complaint’s well-pled factual allegation of infringement may satisfy this requirement regardless of this type of factual dispute.”) (citing *Funnelcap, Inc. v. Orion Indus., Inc.*, 392 F. Supp. 938, 943 (D. Del. 1975)). On a similar note, this requirement is not limiting because there is no requirement for a causal nexus to exist between the alleged acts of infringement and the regular and established place of

could be more than one district. The former was more restrictive than the General Venue Statute of the time, which merely required that the venue had personal jurisdiction over the defendant.<sup>32</sup>

## 2. 1911 Codification

In 1911, Congress amended its original Patent Venue Statute when they reauthorized and added it to the Judicial Code of 1911.<sup>33</sup> The statute remained largely unchanged. In going from the original 1897 statute to the 1911 version, the term “circuit courts” is replaced by the term “district courts.”<sup>34</sup> This was not a substantive change.<sup>35</sup>

## 3. 1948 Codification

At the inception of the United States Code, Congress split up the first section of the statute, enumerating where venue is proper, with the second section, enumerating the procedures for proper service of process. Under the 1948 codification, the first section was changed to its present form. This statute provides that “[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.”<sup>36</sup> From the 1911 codification to the 1948 codification, the word “resident”<sup>37</sup> and its conjugates replaced the term “inhabitant”<sup>38</sup> and its conjugates.<sup>39</sup>

There is a similar word substitution in the second section covering service of process, which provides, “[i]n a patent infringement action commenced in a district where the defendant is not a resident but has a regular and established place of business, service of process, summons or subpoena upon such defendant may be made upon his agent or agents conducting such business.”<sup>40</sup> This enumeration shows that an agency relationship can exist to tie a defendant to a plaintiff’s desired venue.

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business. *See* *Plexxikon Inc. v. Novartis Pharm. Corp.*, No. 17-CV-04405-HSG, 2017 WL 6389674, at \*2 (N.D. Cal. Dec. 7, 2017) (“[T]he plain language of the statute does not include a nexus requirement.”).

32. *See infra* Section I.B.

33. Judicial Code of 1911, ch. 231, § 48, 36 Stat. 1087, 1100 [hereinafter 1911 Judicial Code].

34. *Id.*

35. *See* *W.S. Tyler Co. v. Ludlow-Sayler Wire Co.*, 236 U.S. 723, 724 (1915).

36. 28 U.S.C. § 1400(b).

37. *Id.*

38. 1911 Judicial Code, at 1100.

39. This was explicitly directed not to constitute a substantive change. *See* The Reviser’s Note to 28 U.S.C. 1400(b) (Supp. II 1949) (clarifying that “inhabitant” and “resident” are “synonymous” for the purposes of venue).

40. Act of June 25, 1948, ch. 646, § 1694, 62 Stat. 945 [hereinafter 1948 Act]. This section of the text is also in its current form. *See* 28 U.S.C. § 1694 (2017).

## B. General Venue Statute

### 1. 1948 Codification

When the original Patent Venue Statute was enacted in 1897, there was no reason to think the general rules of venue would modify it, nor was there one during the 1911 codification. That changed when the General Venue Statute was passed as part of the 1948 codification that provided, in relevant part,

§ 1391. Venue *Generally*

...

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.<sup>41</sup>

The heading “Venue Generally”<sup>42</sup> created confusion among the courts about whether these rules affected the Patent Venue Statute.<sup>43</sup> Specifically, courts were unsure of whether the general definition of residence under § 1391(c) altered the definition of residence under § 1400(b).<sup>44</sup>

### 2. 1988 and 2011 Amendments

In 1988, the phrase “for venue purposes”<sup>45</sup> was removed from the end of § 1391(c) of the General Venue Statute and was replaced with the introductory clause, “[f]or the purposes of venue under this chapter.”<sup>46</sup> And again in 2011, the statute was reworded such that the clause defining the scope of applicability was changed. Both changes reignited debate on its applicability to the Patent Venue Statute.<sup>47</sup> With this amendment, the entire chapter was rewritten and the phrase the scope of applicability was, and currently is, provided as,

(A) APPLICABILITY OF SECTION.--Except as otherwise provided by

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41. 1948 Act, at 935 (emphasis added).

42. *Id.*

43. *See Stonite*, 315 U.S. at 564 (observing that “the lower federal courts became uncertain as to the applicability” of general venue rules to patent infringement proceedings).

44. *See infra* Section II.C.1.

45. 1948 Act, at 935.

46. Act of Nov. 29, 1988, § 1013(a), 102 Stat. 4642, 4669 [hereinafter 1988 Act]. “[T]his chapter” refers to chapter 87 of title 28 in the United States Code, entitled “District Courts; Venue.” *Id.* at 4664.

47. *See discussion infra* Sections I.C.2--3.

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(1) this section shall govern the venue of *all* civil actions brought in district courts of the United States.<sup>48</sup>

Not only is this scope language present in the beginning of § 1391(a), subsection (c) contains similarly all-encompassing language, providing

(C) RESIDENCY.--For *all* venue purposes—

...

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, 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 and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.<sup>49</sup>

### C. *Relationship Between the General and Patent Venue Statutes*

From the 1948 codification of the General Venue Statute to the present, there has been no amendment to the text of the Patent Venue Statute. Thus, evaluations of the relationship between these two venue statutes arised from the enactment of the three versions of the General Venue Statute.

#### 1. *Original 1948 Statute and Fourco*

The 1948 General Venue Statute defined the term resident “for all venue purposes.”<sup>50</sup> Circuit courts initially split on whether use of the word “all”<sup>51</sup> meant that the definition of residency in the Patent Venue Statute was affected. In 1957, in *Fourco Glass Co. v. Transmirra Prods. Corp.*,<sup>52</sup> the Supreme Court held that the general statute had no effect on the specific statute. The Court relied on its holding in *Stonite Prods. Co. v. Melvin Co.*<sup>53</sup> that the “purpose” of the Patent Venue Statute was “not only to define the jurisdiction of the circuit courts not now defined, but also limit that jurisdiction and so clearly define it that in the future there will be no question with regard to the application of [general venue acts].”<sup>54</sup> Since “dovetail[ing]” the general provisions would have broadened venue

48. 28 U.S.C. § 1391(a) (emphasis added).

49. *Id.* § 1391(c) (emphasis added).

50. 1948 Act, at 395.

51. *Id.*

52. 353 U.S. 222 (1957).

53. 315 U.S. 561 (1942).

54. *Id.* at 565 n.5 (citing 29 CONG. REC 1900–01 (1897) (statement of Rep. Mitchell)).



possibilities, this was held to run contrary to the intent of the Patent Venue Statute, and therefore the general statute was rendered inapplicable.<sup>55</sup> Thus, the Patent Venue Statute was the “exclusive provision controlling venue in patent infringement proceedings.”<sup>56</sup>

### 2. 1988 Amendment and *VE Holding*

After Congress reworded the scope of the word residence as “[f]or all venue purposes under this chapter” in 1988,<sup>57</sup> the Federal Circuit revisited the General Venue Statute’s applicability in *VE Holding Corp. v. Johnson Gas Appliance Co.*<sup>58</sup> to decide if there was a material change with the new language. This time, the Federal Circuit held that the “meaning of the term ‘resides’ in § 1400(b) has changed”<sup>59</sup> and was now altered by the definition in § 1391(c).<sup>60</sup> The *VE Holding* court emphasized that the term “this chapter”<sup>61</sup> was newly added, and because the Patent Venue Statute fell under the relevant chapter in title 28, the general definition applied.<sup>62</sup> This issue of applicability never reached the Supreme Court before the 2011 amendment.<sup>63</sup>

### 3. 2011 Amendment and *TC Heartland*

More than a quarter century after *VE Holding*, the Supreme Court returned to the question of whether the General Venue Statute applied to Patent Venue Statute for the first time since *Fourco* in its *TC Heartland* decision.<sup>64</sup> In a ten-page opinion by Justice Thomas, the Court held that *Fourco* was still good law, that Congress did not ratify *VE Holding* with the 2011 Amendment, and that the General Venue Statute does not broaden the definition of residence in the Patent Venue Statute.<sup>65</sup> Therefore, “a domestic

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55. *Fourco*, 353 U.S. at 225.

56. *Id.* (citing *Stonite*, 315 U.S. at 563).

57. 1988 Act, at 4669.

58. 917 F.2d 1574 (Fed. Cir. 1990).

59. *Id.* at 1575.

60. *Id.*

61. 1988 Act, at 4669.

62. *VE Holding*, 917 F.2d at 1578.

63. *See, e.g.*, *Johnson Gas Appliance Co. v. VE Holding Corp.*, 499 U.S. 922 (1991) (ordering the denial of petition for writ of certiorari to the Supreme Court).

64. 137 S. Ct. at 1516. The Court was addressing the statute after the 2011 amendments. However, because it held that *Fourco* was still good law, the Court made no distinction between the 1948 codification, the 1988 amendment version, or the current version after the 2011 amendment with respect to the applicability to the Patent Venue Statute. *Id.*

65. *Id.* at 1517. The Court reasoned that the phrase “[e]xcept as otherwise provided by law” in section 1391 meant that their ruling in *Fourco* explicitly provided for such an exception. *Id.*

corporation ‘resides’ only in its State of incorporation for purposes of the Patent Venue Statute.”<sup>66</sup>

## II. “REGULAR AND ESTABLISHED PLACE OF BUSINESS” JURISPRUDENCE BEFORE *CRAY*

Between the *VE Holding* decision in 1990 and the *TC Heartland* decision in 2017, there were very few cases claiming proper venue under the second prong of § 1400(b) in that period.<sup>67</sup> With this gap in case law, district courts and the Federal Circuit only had decades-old precedent to interpret this statute. Specifically, district courts and the Federal Circuit after *TC Heartland* were left no guidance in interpreting the once-obsolete phrase “regular and established place of business.”<sup>68</sup>

Part III introduces the case law leading up to *Cray*. Whether there is a “regular and established place of business”<sup>69</sup> in the chosen venue is a question of law that relies on factual inquiries.<sup>70</sup> Although business practices vary from case to case, Donald S. Chisum explains in his treatise on patents that nearly every patent venue case’s fact pattern can be grouped into one of four categories: the “Independent Sales Representative,” the “Traveling Salesman,” the “Sales Office,” and the “Subsidiary Corporations.”<sup>71</sup> Each of these case patterns illuminates which facts courts found important when deciding if venue has been established.<sup>72</sup>

### A. *The Independent Sales Representative*

In the “Independent Sales Representative” line of cases, an individual solicits sales with the district for a corporation in districts outside of that company’s corporate residence, and the representative does not have a fixed location.<sup>73</sup> Faced with this set of facts, courts have generally concluded that contacts are too limited and therefore insufficient to meet the venue

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66. *Id.* at 1514.

67. Before *Cray* was decided in late 2017, the last time the Federal Circuit examined the “regular and established place of business” requirement was thirty-two years earlier in *In re Cordis Corp.*, 769 F.2d 733 (Fed. Cir. 1985). This gap was created because the broader definition of General Venue Statute’s broader definition of residence makes it co-extensive with personal jurisdiction. *See* 28 U.S.C. § 1391(c). Since every patent infringement requires personal jurisdiction over the defendant, *see* FED. R. CIV. P. 12(b)(2), establishing venue through the residency requirement imposed no additional limitation, and rendered the second prong of 28 U.S.C. § 1400(b) effectively moot.

68. 28 U.S.C. § 1400(b).

69. *Id.*

70. *See Cray*, 871 F.3d at 1362 (explaining that “each case depends on its own facts”).

71. 8 DONALD S. CHISUM, CHISUM ON PATENTS § 21.02[2][d] (Matthew Bender ed., 2011).

72. *Id.* at § 21.02[2][d].

73. *Id.* at § 21.02[2][d][iii].

requirement.<sup>74</sup> With regard to the salesman, courts have only cared about physical locations where business is conducted, but not the personal residence of any given employee.<sup>75</sup>

### B. *The Traveling Salesman*

In a typical “Traveling Salesman” case, a defendant company’s only business contact with the district is through a salesman with a formal relationship to an out-of-district company who seeks out deals that are forwarded to the defendant’s primary office located outside the relevant district for completion.<sup>76</sup> If this salesman does not live in the district, there can be no place of business and venue is improper.<sup>77</sup> There was a gray area, however, when the salesman lives in the district. Until 1973, venue was considered improper even with a physical residence in the district of the salesman.<sup>78</sup> But in a change of direction, the District Court for the Northern District of Ohio in *Shelter-Lite, Inc. v. Reeves Bros., Inc.* began a trend shifted away from this strict, bright-line rule and held that venue was proper where a traveling salesman lives in a judicial district when business is being performed from that residence.<sup>79</sup> Judge Green explained in *Shelter-Lite* that,

[A]n unyielding rule that a regular and established place of business cannot arise by virtue of a salesman *operating out of his residence* is at odds with the practicalities and necessities of the business community. In many instances, by reason of the type of product

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74. See, e.g., *Am. Cyanamid Co. v. Nopco Chem. Co.*, 388 F.2d 818, 820 (4th Cir. 1968) (holding that the regional sales manager doing business across ten states does not qualify as a regular and established place of business, even though the defendant lives within the district in which suit was brought).

75. See, e.g., *Eiger Mach., Inc. v. Premier Mill Corp.*, 228 U.S.P.Q. 51, 52 (N.D. Ill. 1985) (“[T]he presence of an independent sales representative paid on a commission basis who happens to have an office in a particular jurisdiction does not represent a regular and established place of business for a defendant.”) (citing *Grantham v. Challenge-Cook Bros., Inc.*, 420 F.2d 1182, 1184–85 (7th Cir. 1969); *Dual Mfg. & Eng’g, Inc. v. Burrus Indus., Inc.*, 531 F.2d 1382, 1385 (7th Cir. 1976)).

76. See *Fruit Indus. v. Metro Glass Bottle Co.*, 18 F. Supp. 489, 492 (D.N.J. 1937); CHISUM, *supra* note 67, § 21.02[2][d][i].

77. See, e.g., *IPCO Hosp. Supply Corp. (Whaledent Int’l Div.) v. Les Fils D’Auguste Maillefer S.A.*, 446 F. Supp. 206, 208 (S.D.N.Y. 1978) (“STAR does not own, lease or control any place of business or ‘physical location’ within the Southern District of New York. Because STAR does not have a ‘regular and established place of business’ within the Southern District of New York, the second basis for patent venue is not satisfied.”); *Candas v. Agnini*, 14 F. Supp. 21, 22 (S.D.N.Y. 1936) (holding that the traveling salesman’s home office was in Illinois even though the suit was brought in New York).

78. E.g., *Univ. of Ill. Found. v. Channel Master Corp.*, 382 F.2d 514, 516 (7th Cir. 1967) (determining that a sales representative operating from an office and being reimbursed phone, car and postage expenses did not have a regular and established place of business); *Silicon Tech., Inc. v. United Refractories, Inc.*, 632 F. Supp. 1, 2 (W.D. Pa. 1985) (“Where a corporation employs sales representatives within a district without owning, leasing, or controlling any real property within the district, as here, courts have been reluctant to find a regular and established place of business.”).

79. 356 F. Supp. 189 (N.D. Ohio 1973).

involved, there is simply no need for a sales representative to maintain a formal office, nor for the employers to maintain warehousing facilities in a particular locale. When the salesman spends virtually all his time on the road calling on customers, selling a product which, by reason of its bulk or specialized nature, can only be demonstrated through the use of small samples and supporting technical data, and such product is shipped directly to the customer upon completion of manufacture, the maintenance of an office, in the traditional sense, would be economically unsound.<sup>80</sup>

Other districts courts followed Judge Green's lead and began finding a "regular and established place of business"<sup>81</sup> in these types of traveling salesman cases.<sup>82</sup>

### C. *The Sales Office*

In the "Sales Office" scenario, a physical location in the district is present, but the relationship of that location to the defendant is suspect. In *W.S. Tyler Co. v. Ludlow-Saylor Wire Co.*,<sup>83</sup> the Supreme Court created uncertainty when it decided that an office used exclusively for solicitation and forwarding of sales orders to an office outside of the district would not constitute a regular and established place of business.<sup>84</sup> The Court stated that *Tyler* did not present such a finding, but it gave little to no guidance regarding which fact(s) was dispositive for meeting § 1400(b)'s "regular and establish place of business" requirement.<sup>85</sup> The four significant facts, as understood by later courts presented with this issue, were that (1) the salesman operating out of the office had no authority to accept orders, (2) a single infringement was generated by the office, (3) the salesman

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80. *Id.* at 195 (emphasis added).

81. 28 U.S.C. § 1400(b).

82. *E.g.*, *CPG Prod. Corp. v. Mego Corp.*, 214 U.S.P.Q. 129, 132 (S.D. Ohio 1980) ("[T]he fact that the agent does not perform these activities from one set physical location such as a storefront or a rented office space should not control the question of whether his employer has established a regular place of business there."); *Instrumentation Specialties Co. v. Waters Assocs., Inc.*, 196 U.S.P.Q. 684, 689-90 (N.D. Ill. 1977) ("We find it hard to believe that 'a regular and established place of business' is to be read so narrowly as to require some fixed physical location which can be said to be the regular and established place of business contemplated by § 1400(b).")

83. 236 U.S. 723 (1915).

84. *Id.* at 724.

85. *Id.* at 725 ("The circumstances attending only one sale appear in the record, and this was negotiated by the purchaser in order that it might afford the basis for a suit. Guerin received and forwarded, and his principal accepted, the order for goods, which were thereafter manufactured and shipped by express to the purchaser in New York city. This sale was consummated at St. Louis, and did not constitute an infringement of appellant's patent within the district where suit was brought.") (citing *Westinghouse Elec. & Mfg. Co. v. Stanley Elec. Mfg. Co.*, 116 F. 641 (1902)).

represented both the defendant and another company, and (4) the expenses of the office were shared between the two companies.<sup>86</sup>

After *Tyler*, several lower court opinions focused on the first requirement that lacking authority to bind the defendant to a sales agreement.<sup>87</sup> Without such authority, these offices were held not to be a regular and established place of business. Another line of cases after *Tyler*, by contrast, followed a more flexible approach to the decision.<sup>88</sup> These cases tend to focus on the third fact—that the physical office space or the sales representative is shared with another company<sup>89</sup>—and fourth fact—when the sales representative pays for the expenses<sup>90</sup>—in finding there is no place of business. Moreover, other business activities besides sales conducted at the sales office can turn it into a regular place for the purposes of § 1400(b).<sup>91</sup>

#### *D. The Parent and Subsidiary Corporations*

A case will fall under the “Parent and Subsidiary Corporations” category when a defendant corporation does not have a regular and established place of business in a district, but does have a subsidiary that has a place of regular and established place of business in the district.<sup>92</sup> While this generally will

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86. CHISUM, *supra* note 67, § 21.02[2][d][ii].

87. *See, e.g.*, *Gen. Radio Co. v. Superior Elec. Co.*, 293 F.2d 949, 951 (1st Cir. 1961) (finding no regular and established place of business where “the local salesman consummated no sales himself; his only duty with respect to sales was ‘to solicit orders [and] forward them when received to the home office for execution.’”); *Endrezze v. Dorr Co.*, 97 F.2d 46, 48 (9th Cir. 1938) (finding no regular and established place of business where five salaried employees had no authority to bind, there was no warehouse in the district, and all shipping was directed at the head office outside of the district).

88. *See Shelton v. Schwartz*, 131 F.2d 805, 809 (7th Cir. 1942) (“It is sufficient to observe that a ‘regular and established place of business’ may be found to exist, though the court does not know whether the business conducted therein was soliciting, or soliciting and selling. Emphasis must be on the existence of the regular and established place of business,—not on the nature or character of the business conducted there.”).

89. *See A. O. Smith-Inland, Inc. v. Hoeganaes Corp.*, 407 F. Supp. 539, 542 (N.D. Ill. 1976) (failing to find a regular and established place of business because the sales engineer sent to trade shows also worked for other companies in the same metals industry).

90. *See, e.g.*, *Coleco Indus., Inc. v. Kransco Mfg., Inc.*, 247 F. Supp. 571, 575 (S.D.N.Y. 1965) (finding no regular and established place of business where sales representative worked on commission and was not reimbursed for expenses while in New York); *Erickson v. Emerson*, 40 F. Supp. 844, 845 (S.D.N.Y. 1941) (finding no regular and established place of business because the independent contractor within the district “paid his own expenses and costs of doing business, and [defendant] was without any obligation and responsibility in respect thereto.”).

91. *E.g.*, *William Sklaroff Design Assocs., Inc. v. Metcor Mfg., Inc.*, 224 U.S.P.Q. 769, 772 (N.D. Ill. 1984) (finding a regular and established place of business where defendant’s products are “continually on display in a showroom that is open to visitors” in a space in the district paid for by them); *Rockwell Int’l Corp. v. Eltra Corp.*, 538 F. Supp. 700, 703 (N.D. Ill. 1982) (servicing of electronic products sufficient for a finding of a regular and established place of business).

92. CHISUM, *supra* note 67, § 21.02[2][d][iv]. This is true even for wholly-owned subsidiaries if the formalities of separate existence are adhered to. *See L. D. Schreiber Cheese Co. v. Clearfield Cheese Co.*, 495 F. Supp. 313, 318 (W.D. Pa. 1980) (“[T]he mere existence of a wholly-owned subsidiary in a judicial district does not, by itself, suffice to establish venue over the subsidiary’s parent corporation.”).

not meet § 1400(b) requirements, there is an exception to this rule when the parent company uses the subsidiary as its agent.<sup>93</sup> This agency relationship is created either when (1) the parent disregards the corporate formalities,<sup>94</sup> or (2) when there is an inseparable connection between the business operations, property, and financing of the two companies.<sup>95</sup>

### III. IN RE CRAY, INC.

With this legislative history and case law regarding what a “regular and established place of business” is, the Federal Circuit revisited this question for the first time in over thirty years in *In re Cray, Inc.*<sup>96</sup> Section A summarizes the factual background of the case. Section B looks at the overturned district court decision. Section C looks at the Federal Circuit’s interpretation and analysis of the statutory language and application of that interpretation to the facts of the case. Finally, Section D summarizes the early applications of *Cray* at the district court level.

#### A. Factual Background

Defendant Cray, Inc. (Cray) is a seller of supercomputers incorporated and having its principal place of business in the state of Washington.<sup>97</sup> Plaintiff Raytheon Co. (Raytheon) is a military equipment manufacturer that brought suit against Cray for patent infringement in the Eastern District of Texas.<sup>98</sup> To establish proper venue, Raytheon argued that the residence of a Cray employee, Mr. Douglas Harless (Harless) in the Eastern District of Texas was one of *Cray*’s regular and established place of business.<sup>99</sup> Harless worked as a “sales executive” for roughly seven years from his home in the Eastern District of Texas.<sup>100</sup> The company’s official acknowledgement of

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93. See *Minn. Min. & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985); see also *Javelin Pharm., Inc. v. Mylan Labs. Ltd.*, No. CV 16-224-LPS, 2017 WL 5953296, at \*3 (D. Del. Dec. 1, 2017) (holding that *Cray* did not alter the holding in *Minnesota Mining*).

94. See *Variable-Parameter Fixture Dev. Corp. v. Morpheus Lights, Inc.*, 832 F. Supp. 643, 644 (S.D.N.Y. 1993) (“[V]enue [can be] established as to an individual based on [corporate] alter ego theory in a district with which the individual had no connection other than through the corporation.”).

95. See *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 231 U.S.P.Q. 241, 242 (E.D. Tenn. 1986) (“[Defendant parent company] not only completely owns [subsidiary company in the district], but [parent company] completely controls [the subsidiary such that it] has no ‘separate mind, will or existence of its own.’”) (quoting *Bucyrus-Erie Co. v. Gen. Prods. Corp.*, 643 F.2d 413, 417 (6th Cir. 1981)).

96. 871 F.3d 1355 (Fed. Cir. 2017).

97. *Id.* at 1357.

98. *Id.*

99. *Id.* Another Cray employee, Mr. Troy Testa, also lived in the Eastern District of Texas. *Id.* This was disregarded, however, because Mr. Testa only resided in the Eastern District of Texas between 2010 and 2011, several years before Raytheon brought suit. *Id.* at 1364.

100. *Id.* at 1357.

his residence, however, was limited. The only company documentation that provided Harless's address was an internal document titled, "Americas Sales Territories" that listed him as a "Named Account Manager."<sup>101</sup> Cray neither paid for Harless's housing nor publicly advertised his residence to customers.<sup>102</sup> Cray argued that venue was improper because Harless's residence did not constitute a regular and established place of business under § 1400(b) and filed a motion to transfer the case to the Western District of Wisconsin.<sup>103</sup>

### B. District Court

In a twenty-page opinion, Federal District Court Judge Rodney Gilstrap denied the motion to transfer,<sup>104</sup> analogizing the case to the Federal Circuit's holding in *In re Cordis Corp.*<sup>105</sup> The district court held that, because there was a regular and established place of business in *Cordis*, there was also a regular and established place of business in the instant case, given the factual similarity, therefore making venue proper.<sup>106</sup> Accordingly, the motion to transfer was denied.<sup>107</sup>

Even though he decided that *Cordis* was dispositive, Judge Gilstrap attempted to provide guidance for how to interpret the statutory language of § 1400(b).<sup>108</sup> In an effort to update the statute to the "modern era," he laid out a four-factor test to determine whether there is a regular and established place of business, including (1) physical presence in the district,<sup>109</sup> (2) defendant's representations regarding their connection to the district,<sup>110</sup> (3) the benefits received from presence in the district,<sup>111</sup> and (4) the extent of the defendant's interactions within the district.<sup>112</sup> When applying these

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101. *Cray*, 871 F.3d at 1357.

102. *Id.*

103. *Id.* at 1358.

104. *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 783, 783–84 (E.D. Tex. 2017), *mandamus granted, order vacated sub nom. In re Cray, Inc.*, 871 F.3d 1355 (Fed. Cir. 2017).

105. 769 F.2d 733 (Fed. Cir. 1985). In *Cordis*, a Minnesota corporation sued a Florida corporation for patent infringement relating to the sale of implantable heart pacemakers. *Id.* at 734. The defendant employed two full-time sales representatives that were paid a salary plus commission and worked exclusively for the defendant. *Id.* at 735.

106. *Raytheon Co.*, 258 F. Supp. 3d at 793 ("The facts in the present case closely parallel the facts in *Cordis*.").

107. *Id.* at 799.

108. *Id.* at 794 ("For the benefit of such litigants and their counsel, the Court has conducted a thorough analysis of the existing case law regarding regular and established place of business.").

109. *Id.* at 792 (citing *Shelter-Lite Inc. v. Reeves Bros., Inc.*, 356 F. Supp. 189, 195 (N.D. Ohio 1973)).

110. *Id.* at 797 (citing *Chadeloid Chem. Co. v. Chicago Wood Finishing Co.*, 180 F. 770, 771 (C.C.S.D.N.Y. 1910)).

111. *Id.* at 798 (citing *Instrumentation Specialties Co. v. Waters Assocs., Inc.*, 196 U.S.P.Q. 684, 690 (N.D. Ill. 1977)).

112. *Id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1264–65 (6th Cir. 1996))

factors, no one factor should be dispositive and a judge must look at the totality of the circumstances.<sup>113</sup>

Cray appealed the denial of the motion to transfer to the Federal Circuit through a writ of mandamus, arguing that Judge Gilstrap's decision was a clear error.<sup>114</sup>

### C. Federal Circuit

A unanimous three judge panel on the Federal Circuit reversed the district court and held that venue was improper, thereby granting the motion to transfer.<sup>115</sup> Because the district court's four-factor test did not require a physical location in the given venue, the panel held this test as inconsistent with the statutory language.<sup>116</sup>

The panel provided their own interpretation of the phrase "regular and established place of business."<sup>117</sup> After analyzing the legislative history and pertinent case law, the panel established three requirements necessary for a "regular and established place of business."

[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. If any statutory requirement is not satisfied, venue is improper under § 1400(b).<sup>118</sup>

For the first requirement, the court explained that there must always be a "physical, geographical location in the district from which the business of the defendant is carried out."<sup>119</sup> The court relied on the historical understanding of the word "place" to derive this requirement at the time of the original Patent Venue Statute's enactment.<sup>120</sup> The court used *Cordis* as an illustrative example, where the personal homes of employees were being used "like distribution centers."<sup>121</sup>

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113. *Id.* at 799.

114. *Cray*, 871 F.3d at 1357.

115. *Id.* at 1366–67. The motion to transfer was granted only to the extent that venue was improper in the Eastern District of Texas. The Federal Circuit panel instructed the district court on remand to whether venue is proper, according to Cray, in the Western District of Wisconsin. *Id.*

116. *Id.* at 1360–64 (holding that not requiring physical presence in the district would "impermissibly expand[] the statute").

117. *Id.*

118. *Id.* at 1360.

119. *Id.* at 1362.

120. *Id.* (citing *Place*, BLACK'S LAW DICTIONARY (1st ed. 1891); *Place*, WILLIAM DWIGHT WHITNEY, THE CENTURY DICTIONARY 732 (Benjamin E. Smith ed., 1911)).

121. *Id.*



For the second requirement that the fixed physical location be both regular and an established place of business, the court explained that the physical place must be both “regular” and “established.”<sup>122</sup> Parsing the relevant text of the statute, the court reasoned that,

The noun in this phrase is “place,” and “regular” and “established” are adjectives modifying the noun “place.” The following words, “of business,” indicate the nature and purpose of the “place,” and the preceding words, “the defendant,” indicate that it must be that of the defendant. Thus, § 1400(b) requires that “a defendant has” a “place of business” that is “regular” and “established.” All of these requirements must be present.<sup>123</sup>

The court again used textual interpretation techniques with the words “regular” and “established” like it did with the word “place” to give them their ordinary, plain meaning from when the Patent Venue statute was initially enacted.<sup>124</sup>

Finally, for the third requirement, the court required that the physical location “must be a place *of the defendant*, not solely a place of the defendant’s employee.”<sup>125</sup> When determining if this requirement is met, the Federal Circuit instructed district courts to look at relevant factors such as (1) whether the defendant owns, leases, or exercises some possessory control over the relevant physical location;<sup>126</sup> (2) whether there is a storage of company materials at the relevant physical location; (3) whether marketing, advertising, or other company representations are directed *to the public* regarding the physical location; and (4) whether the nature and activity of the business being conducted at the place constitutes a business activity.<sup>127</sup>

Applying this newly articulated test to the facts of *Cray*, the court jumped straight to the third requirement: the physical location must belong to the defendant.<sup>128</sup> The court determined from the facts presented that Harless’s home in the Eastern District of Texas could *not* be construed as “a regular

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122. *Id.* at 1361–63.

123. *Id.* at 1362.

124. *See id.* (“A business may be ‘regular’ for example, if it operates in a ‘steady[,] uniform[,] orderly [, and] methodical’ manner. . . . [A] place where such business is . . . not merely temporar[y], or for some special work or particular transaction.”) (internal citations omitted); *see also id.* at 1363 (“[Established] contains the root ‘stable,’ indicating . . . that the place in question must be ‘settled certainly, or fixed permanently.’”).

125. *Id.* at 1363.

126. *Id.* (noting additionally that “small business[es] might operate from a home”).

127. In a star footnote, the court explains that this last consideration is meant to “reveal, for example, that a defendant has a business model whereby many employees’ homes are used by the business as a place of business of the defendant.” *Id.* at 1363–64.

128. *Id.* (“The third requirement . . . is crucial here”).

and established *place of business of Cray*.<sup>129</sup> While warning that no single fact will be dispositive, the court highlighted that Cray neither had possession of the home in any ownership, rental, or leasing capacity, nor selected the location of the house, nor stored company materials in the home,<sup>130</sup> nor was the location important to the business being performed by Harless, nor was Mr. Harless's employment conditioned upon living in the Eastern District of Texas.<sup>131</sup> Because the third requirement was not met, Harless's home was held not to be a regular and established place of business of *Cray*.

#### IV. ANALYSIS

Part IV assesses the accuracy with which the Federal Circuit has applied the historical context, legislative history, and case law around the Patent Venue Statute through the framework of the four categories of Patent Venue Statute cases. Section A looks at the effects on the Independent Sales Representative line of cases. Section B looks at the effects on the Traveling Salesman line of cases. Section C looks at the effects on the Sales Office line of cases. Finally, Section D explores the effects on the Parent and Subsidiary Corporations line of cases.

##### A. *The Independent Sales Representative*

In Independent Sales Representative cases, plaintiffs remain unable to establish proper venue in cases where persons independent of a defendant company distribute products in a district.<sup>132</sup> Because the first requirement from the *Cray* elements is that there be a "fixed physical presence,"<sup>133</sup> this scenario fails. To the extent that there were exceptional cases where the defendant had a high degree of control over an independent contractor in the district,<sup>134</sup> those cases will have difficulty meeting the second and third requirements.<sup>135</sup>

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129. *Id.*

130. The court rejected Raytheon's argument that this should not matter because "Cray did not need to store business material with Mr. Harless . . . because many were available online." *Id.* at 1364.

131. The court then contrasts these facts with the facts of *Cordis*, where *Cordis* established the place of business, depended on the employees to be physically in the district, and that *Cordis* "affirmatively acted to make permanent operations within that district to service the customers there." *Id.* at 1365.

132. CHISUM, *supra* note 68, § 21.02[2][d][iii].

133. *See supra* note 105.

134. *See supra* note 69.

135. *See Nike, Inc. v. Skechers USA, Inc.*, No. 3:16-CV-007-PK, 2017 WL 7275389, at \*7 (D. Or. Nov. 14, 2017) (noting that "the distinction between employees and independent sales representatives is not crucial" because of how few sales the independent representative made); *Patent Holder LLC v. Lone Wolf Distrib., Inc.*, No. 17-23060-CIV, 2017 WL 5032989, at \*6 (S.D. Fla. Nov.

In post-*Cray* cases, the most common variant of the category has been plaintiffs attempting to tie third-party distribution centers in the district to defendant corporations. So far, district courts have unanimously refused to find venue proper because these places fail to meet the *Cray*'s third requirement.<sup>136</sup>

### B. *The Traveling Salesman*

For Traveling Salesman cases, the first of *Cray*'s three requirements—that there be a physical location<sup>137</sup>—and the third requirement—that the physical location belong to the defendant<sup>138</sup>—are the most important. For the first requirement, in the typical factual scenario where a salesman has no physical office and lives outside of the district in which he is soliciting sales,<sup>139</sup> venue is still not satisfied.<sup>140</sup> Because the salesman is working for a corporation in this factual category,<sup>141</sup> a plaintiff must bring suit in the state of incorporation.<sup>142</sup>

Through the third requirement, the *Shelter-Lite* line of cases<sup>143</sup> has remained extremely narrow. Those decisions allowed for a finding of regular and established place of business for an outside corporation whose traveling salesman lives inside the district under limited circumstances.<sup>144</sup> This is the factual scenario *Cray* falls under.<sup>145</sup> *Cray*'s third requirement of the *Cray* analysis is that the physical location must belong to the defendant; in other words, the third requirement says that property can neither be

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1, 2017) (“Even assuming that certain dealers sell Lone Wolf products in the District, any such physical place would be legally insufficient to support venue because that physical place would not belong to Lone Wolf.”); *Galderma Labs., L.P. v. Teva Pharm. USA, Inc.*, 290 F. Supp. 3d 599, 611 (N.D. Tex. 2017) (finding venue improper, in part, because “none of the sales representatives identified in the record are Teva USA employees” despite Teva USA “exercis[ing] significant control over” sales representatives).

136. See *CAO Lighting, Inc. v. Light Efficient Design*, No. 4:16-CV-00482-DCN, 2017 WL 4556717, at \*2–3 (D. Idaho Oct. 11, 2017); *SportPet Designs Inc. v. Cat1st Corp.*, No. 17-CV-0554, 2018 WL 1157925, at \*3 (E.D. Wis. Mar. 2, 2018); *Hildebrand v. Wilmar Corp.*, No. 17-CV-02821-PAB-MEH, 2018 WL 1535505, at \*3 (D. Colo. Mar. 29, 2018); *Wet Sounds, Inc. v. PowerBass USA, Inc.*, No. CV H-17-3258, 2018 WL 1811354, at \*2 (S.D. Tex. Apr. 17, 2018); *EMED Techs. Corp. v. Repro-Med Sys., Inc.*, No. 2:17-CV-728-WCB-RSP, 2018 WL 2544564, at \*2–3 (E.D. Tex. June 4, 2018).

137. *Cray*, 871 F.3d at 1359.

138. *Id.*

139. See *supra* note 80.

140. CHISUM, *supra* note 67, § 21.02[2][d][iii].

141. See *supra* Section II.B.

142. See 28 U.S.C. § 1400.

143. See *supra* notes 75–77.

144. See *supra* note 78.

145. *Cray*, 871 F.3d at 1356–58.

owned exclusively by the third-party salesman, nor can an defendant corporation's employee own and exercise exclusive control over it.<sup>146</sup>

However, *Cray* did leave the door open for a situation where a corporation has some property interest in the salesman's residence.<sup>147</sup> In *Regenlab USA LLC v. Estar Tech. Ltd.*,<sup>148</sup> defendant Eclipse Aesthetics LLC (Eclipse) was held to have a regular and established place of business in the Southern District of New York through the home offices of two employees.<sup>149</sup> Distinguishing *Cray*, the court found that the employees' home offices were "of the defendant"<sup>150</sup> because Eclipse ran public advertisements for sales people in the district, preferred that the New York sales people live in the area, and the employees performed product demonstrations for customers in New York.<sup>151</sup> But for the most part, however, district courts applying *Cray*'s test have found the third requirement lacking for salesmen living in the district.<sup>152</sup>

### C. The Sales Office

Despite *Cray*'s declaration that "each case depends on its own facts,"<sup>153</sup> the facts deemed important in *Cray* are those that are given weight in future decisions. Similarly, although the Federal Circuit's decision in *Cray* cannot alter the Supreme Court precedent established by *Tyler*,<sup>154</sup> it guides which *Tyler* facts district courts now consider determinative and which *Tyler* facts district courts consider less significant.

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146. *Id.*

147. *Id.* at 1365. The *Cray* court noted that the residence could not be owned by the defendant Cray, Inc. because

There is no indication that Cray owns, leases, or rents any portion of Mr. Harless's home in the Eastern District of Texas. No evidence indicates that Cray played a part in selecting the place's location, stored inventory or conducted demonstrations there, or conditioned Mr. Harless or Mr. Testa's employment or support on the maintenance of an Eastern District of Texas location.

*Id.*

148. No. 16-CV-08771 (ALC), 2018 WL 3910823 (S.D.N.Y. Aug. 15, 2018).

149. *Id.* at \*14, \*17.

150. *Id.* at \*16. (quoting *Cray*, 871 F.3d at 1363).

151. *Id.* at \*16–17 ("[W]hen Eclipse products arrive at a customer's home, the employee uses the products stored in their home office to conduct demonstrations. This again contrasts with *In re Cray*, whose forum state-based employees did not store any inventory or conduct demonstrations in the state, or serve any customers in the district.")

152. *E.g.*, *BillingNetwork Patent, Inc. v. Modernizing Med., Inc.*, No. 17 C 5636, 2017 WL 5146008, at \*3–5 (N.D. Ill. Nov. 6, 2017); *Niazi v. St. Jude Med. S.C., Inc.*, No. 17-CV-183-JDP, 2017 WL 5159784, at \*3–5 (W.D. Wis. Nov. 7, 2017); *Automated Packaging Sys., Inc. v. Free-Flow Packaging Int'l, Inc.*, No. 5:14-CV-2022, 2018 WL 400326, at \*6–10 (N.D. Ohio Jan. 12, 2018); *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); *VoIP-Pal.com, Inc. v. Twitter, Inc.*, No. 2:16-CV-002338-RFB-CWH, 2018 WL 3543031, at \*2–4 (D. Nev. July 23, 2018).

153. *Id.* at 1362.

154. *See supra* notes 83–91.

First, whether the sales office has authority to bind the defendant<sup>155</sup> will now be of little significance. In *Cray*, Harless had full authority to sell, but this was disregarded.<sup>156</sup> Therefore, the line of cases following *Tyler* that are determinative on this fact<sup>157</sup> have greatly reduced significance, if not effectively overruled.

Second, the frequency of sales becomes a highly relevant fact.<sup>158</sup> Because the Federal Circuit defines “regular” as “steady[,] uniform[,] orderly[,] and] methodical,” a single, or very few, infringing sale will rarely, if ever, satisfy this piece of the second requirement.<sup>159</sup>

On a broader note, district courts have taken a narrow definition of what qualifies as a place of business for the second requirement, asking whether business is occurring *from* the disputed location.<sup>160</sup> This question has created a split at the district court level. In *Pers. Audio, LLC v. Google, Inc.*,<sup>161</sup> the Eastern District of Texas held that the Google Global Cache (GGC) servers were not a place of business.<sup>162</sup> The court declined to rule that the server’s function of connecting users to the internet because it would inappropriately broaden the scope of the state.<sup>163</sup> Then in *Seven Networks, LLC v. Google LLC*,<sup>164</sup> also in the Eastern District of Texas, the court held that the same GGC servers do meet the second requirement, and that venue was proper.<sup>165</sup> The *Seven Networks* court explained that requiring the presence of a person for a regular and established place of business to exist would be against the text of the statute and Congressional intent, and

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155. *Id.* at 725.

156. *Cray*, 871 F.3d at 1366.

157. *See supra* note 83.

158. *Tyler*, 236 U.S. at 725.

159. *Cray*, 871 F.3d at 1362 (internal quotations omitted); *see also Nike*, 2017 WL 7275389, at \*7 (“It is relevant that the three independent sales representatives made only a few sales compared to Defendant’s sales in other states through its brick-and-mortar stores.”); *supra* note 31 (showing that there is no recognized nexus requirement between the “regular and established place of business” requirement and the “acts of infringement” requirement of § 1400(b)).

160. *See Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-CV-1725 (JPO), 2018 WL 1478047, at \*4 (S.D.N.Y. Mar. 26, 2018) (declining to treat defendant’s telecommunication equipment as a place of business because the defendant “direct[s] telecommunications traffic through New York, but they do not engage in business from the shelf itself”); *CDx Diagnostic, Inc. v. United States Endoscopy Grp., Inc.*, No. 13-CV-5669 (NSR), 2018 WL 2388534, at \*2–3 (S.D.N.Y. May 24, 2018) (declining to treat storage units as a place of business because employees because business was conducted from the units).

161. 280 F. Supp. 3d 922 (E.D. Tex. 2017).

162. *Id.* at 934. (“It might be true that part of Google’s business relies on these servers, but that does not amount to Google’s business being carried out from them.”) (emphasis added).

163. *Id.* (“To conclude that Google’s business was being carried out by these servers would have far-reaching consequences that distort the scope of the statute; for example, every single AT&T tower would then possibly become a place of business for AT&T. Maybe even every handheld device sold by Verizon would become a place of business for Verizon because the end-user signed an agreement with Verizon regarding Verizon’s exclusive control of the device.”).

164. No. 2:17-CV-00442-JRG, 2018 WL 3634589 (E.D. Tex. July 19, 2018).

165. *Id.* at \*21.

therefore disregards that objection from the defendant,<sup>166</sup> holding that this would not constitute an impermissibly overbroad reading of the Patent Venue Statute. If this split persists in the district courts, the Federal Circuit will need to step in and clarify what qualifies as a place of business for the purposes of the Patent Venue Statute. Given the narrow reading of § 1400(b) in *Cray*, the court is likely to agree with the narrower reading of *Pers. Audio*.

Third, whether the office space is shared with another corporation decreases in significance.<sup>167</sup> This fact relates closest to the third requirement that the fixed physical location belongs to the defendant.<sup>168</sup> The court stated, in the context of a residence for one of its employees, that even such attenuated factors as conditions for employment, leasing, or “other attributes of possession or control over the place” can suffice to treat a physical establishment as being “of the defendant” for venue purposes.<sup>169</sup> Relatedly, the court emphasized that both marketing and advertising were important factors to the extent that the corporation is holding itself out to the public as having a regular and established place of business at said location.<sup>170</sup> Accordingly, any form of possession or control over a physical location, if extensive enough, is necessary as a threshold matter to meet the third requirement, even when another person or legal entity concurrently possesses or controls the identified physical location.<sup>171</sup>

Fourth and finally, whether expenses were shared by another company will not have great relevance for a similar reason the third *Tyler* fact did not have a substantial impact in *Cray*: total control over the physical location is not necessary to satisfy the third requirement.<sup>172</sup> The corporation’s representation of the physical location to the public is important once some

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166. See *id.* at \*18–19 (citing § 18(c) from the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat 284, 331 (2011), which exempted Automated Teller Machines from being regular and established places of business to support the holding that 28 U.S.C. § 1400(b) cannot be read to require a place of business to have a corporation’s employee present). *Contra Peerless*, 2018 WL 1478047, at \* (stating that that regular and established place of business requirement of 28 U.S.C. 1400(b) “requires some employee or agent of the defendant to be conducting business at the location in question”).

167. *Tyler*, 236 U.S. at 725.

168. *Cray*, 871 F.3d at 1360.

169. *Id.* at 1363 (“Relevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place. One can also recognize that a small business might operate from a home; if that is a place of business of the defendant, that can be a place of business satisfying the requirement of the statute.”).

170. *Id.* (“Marketing or advertisements also may be relevant, but only to the extent they indicate that the defendant itself holds out a place for its business.”).

171. See *Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:17-CV-00170-RWS, 2018 U.S. Dist. LEXIS 79068, at \*15–25 (E.D. Tex. Mar. 9, 2018) (finding the third requirement of *Cray* met because defendants paid third parties retailers for premium product placement in their stores and exercised control over the space by monitoring sales data, employing agents to visit the store and inspect the product placement, and reporting back about the placement).

172. See *supra* notes 125–27.

possessory interest has been established.<sup>173</sup> A sharing of expenses in *Tyler* would likely satisfy this requirement from *Cray*.

#### D. The Parent and Subsidiary Corporations

The factual scenario of *Cray* provides little guidance for this category. However, the explanation of the third requirement demonstrates the effect of *Cray* for future parent and subsidiary scenarios in an important way: how the company holds itself out can still override a legal separation between the entities to establish venue.<sup>174</sup> Just as marketing and advertising can render a place “of the defendant,”<sup>175</sup> a company whose wholly-owned subsidiary uses marketing and advertising to hold itself out as conducting business at a certain location would render a finding of proper venue even if it is formally owned by a subsidiary.<sup>176</sup>

*Bd. of Regents v. Medtronic PLC*<sup>177</sup> demonstrates that this exception exists post-*Cray*. In *Medtronic*, a building owned by MiniMed, a subsidiary of defendant Medtronic, Inc. (Medtronic), was held to be Medtronic’s regular and established place of business for venue purposes.<sup>178</sup> The court reached this conclusion because Medtronic placed its logo on the building and issued a press release.<sup>179</sup> But without this breakdown of formal separation, post-*Cray* decisions have adhered to the pre-*Cray* precedent<sup>180</sup> of denying venue to plaintiffs who only allege a corporate defendant’s subsidiary in the district.<sup>181</sup>

### CONCLUSION

After more than a thirty-year gap<sup>182</sup> in case law on the phrase “regular and established place of business” because of the *VE Holding* decision,<sup>183</sup> the Supreme Court reversed well-established Federal Circuit precedent and

173. See *supra* notes 165–67.

174. CHISUM, *supra* note 67, § 21.02[2][d][ii].

175. *Cray*, 871 F.3d at 1363.

176. See *supra* notes 100–01.

177. No. A-17-CV-0942-LY, 2018 WL 2353788 (W.D. Tex. May 17, 2018).

178. *Id.* at \*2–3.

179. *Id.*

180. See *supra* Section II.D.

181. E.g., *Symbology*, 282 F. Supp. 3d at 931–33; *Soverain IP, LLC v. AT&T, Inc.*, No. 2:17-CV-00293-RWS-RSP, 2017 WL 5126158, at \*1 (E.D. Tex. Oct. 31, 2017); *Galderma Labs.*, 290 F. Supp. 3d at 610–12; *Infinity Comput. Prods., Inc. v. OKI Data Americas, Inc.*, No. CV 12-6797, 2018 WL 1035793, at \*8–9 (E.D. Pa. Feb. 23, 2018); *Unity Opto Tech. Co. v. Lowe’s Home Centers, LLC*, No. 18-CV-27-JDP, 2018 WL 2087250, at \*2–3 (W.D. Wis. May 4, 2018) (declining to impugn physical location of parent company to two defendant subsidiaries).

182. See *supra* note 70.

183. 917 F.2d 1574 (Fed. Cir. 1990).

created a need to clarify the conflicting case law<sup>184</sup> without providing guidance on how to revive this once-extinct rule of civil procedure. In *In re Cray*, the Federal Circuit began to fill this gap in jurisprudence, almost always serving as the dispositive issue when determining whether venue is proper.

This three-part requirement from *Cray* is consistent with the original nineteenth-century purpose of the Patent Venue Statute in its efforts to tighten the scope of possible venue locations compared to the General Venue Statute.<sup>185</sup> Where *Cray* conflicts with prior case law, it conflicts only to the extent that there was a preexisting conflict between competing precedent.<sup>186</sup> And in most situations, the Federal Circuit resolved the conflict on the side of a narrower reading. So far, the district courts applying *Cray*'s test have largely followed a narrow reading. Moving forward, *Cray* and its early progeny provide a coherent roadmap for the factual scenarios likely to trigger a litigation-worthy venue question. Plaintiffs now have more limited circumstances allowing them to litigate in federal judicial district(s) outside the defendant's state of incorporation.

In conclusion, the Federal Circuit will need more cases—both from itself and district courts—to fully implement their narrow reading of the Patent Venue Statute. But *Cray*, read in light of prior jurisprudence, provides a strong framework moving forward and puts patent owners on notice that their desired venue may no longer be as easily accessible as before.

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184. See generally *supra* Part II.

185. See *supra* Section I.C.3.

186. See *supra* notes 135–56 (demonstrating that given a choice whether to interpret a *Tyler* fact narrowly or broadly, the federal circuit chose to read the narrow interpretation).

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