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Will forum shopping days, like holiday shopping days, soon come to an end?

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by Shannon Bjorklund

It's no secret that plaintiffs bringing patent litigation choose the forum carefully. Though the appellate review of patent litigation is centralized in one appellate court with limited jurisdiction – the Court of Appeals for the Federal Circuit – patent litigations proceed in district courts of general jurisdiction throughout the nation. There is a remarkable concentration of cases; over half of the patent infringement cases filed in 2015 were filed in two jurisdictions: the Eastern District of Texas (43.6%) and the District of Delaware (9.3%). The other 47% of cases were spread among the remaining 92 district courts across the nation.

One defendant is challenging this practice, and the U.S. Supreme Court has agreed to consider the issue. TC Heartland LLC was sued in federal court in Delaware for alleged patent infringement. TC Heartland moved to transfer the venue to Indiana, its state of incorporation, but the request was denied. The Federal Circuit affirmed the district court's decision, and TC Heartland petitioned for certiorari.

TC Heartland's argument relies on a distinction between general venue rules – which allow for suit in any jurisdiction in which a corporation operates or can be found – and the specific venue rules for patent cases. In simplified terms, TC Heartland's argument is as follows:

- Section 1400(b), the patent venue provision, states that a "civil action for patent infringement" can be brought in one of two places: (1) the district in which defendant resides, or (2) a place where defendant committed acts of infringement and has a regular and established place of business.
- Section 1391(c), a general venue provision, has come to mean that a defendant can be sued in any jurisdiction in which personal jurisdiction can be exercised over it.
- In 1957, the U.S. Supreme Court held that "§ 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be

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supplemented by the provisions of 28 U.S.C. § 1391(c)," which is a general venue provision. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957).

- In 1990, the Federal Circuit was asked to decide a similar issue as in *Fourco in VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). Noting that Congress had revised § 1391 in 1988, the Federal Circuit stated that it was faced with a "question of first impression." It came to the opposite decision as the Supreme Court. The Federal Circuit held that the new § 1391 applies to patent infringement cases, and that a corporate defendant "resides" in any jurisdiction in which there would be personal jurisdiction.
- In 2011, Congress modified § 1391 again, providing that § 1391 governs "all civil actions" "except as otherwise provided by law."

Petitioner TC Heartland argues that the general venue statute does not modify the patent-specific statute, particularly in light of the 2011 amendment. The respondent, Kraft Foods, argues that the Federal Circuit correctly ruled that § 1391 – after the 1988 amendment – does modify § 1400(b), and that the Federal Circuit's decision was correct. The Supreme Court granted *certiorari* on December 14. This complicated issue of statutory construction is the type of issue the Supreme Court enjoys. We can expect to see a hotly-contested issue and some heavy-duty briefing with extensive legislative history and analysis, and a substantial number of amicus briefs. Just at the petition stage, the Court received seven amicus briefs from four industry groups, 56 professors and 33 companies.

If Heartland is successful in narrowing the jurisdictions in which a defendant may be sued, the ruling could apply to copyright cases as well, though the limits would not be the same. Section 1400(b) allows a defendant in a patent infringement suit to be sued in (1) the district in which it resides, or (2) a place where defendant committed acts of infringement and has a regular and established place of business. In contrast, a copyright case can proceed under § 1400(a) in any jurisdiction "in which the defendant *or his agent* resides *or may be found*."

Stay tuned for further developments on this case at The TMCA!