

No. 2018-152

IN THE
United States Court of Appeals
for the Federal Circuit

IN RE GOOGLE LLC,

Petitioner,

On Petition for a Writ of Mandamus to the
United States District Court for the Eastern District of Texas
Nos. 2:17-cv-00442
Judge Rodney Gilstrap

**COMBINED PETITION FOR PANEL REHEARING OR
REHEARING EN BANC**

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November 12, 2018

CERTIFICATE OF INTEREST

Counsel for Petitioner Google LLC hereby certifies as follows:

1. The full name of every party represented by me is: **Google LLC.**
2. The real parties in interest are: **Google LLC.**
3. All parent corporations and any publicly held companies that own 10% or

more of the stock of the parties I represent are as follows:

Google LLC is a wholly owned subsidiary of XXVI Holdings Inc., which is a wholly owned subsidiary of Alphabet Inc., a publicly traded company.

(NASDAQ: GOOG, GOOGL). No publicly held company owns 10% or more of Alphabet Inc.'s stock.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me in the trial court or that are expected to appear in this court are:

Hogan Lovells US LLP: Neal Kumar Katyal, Colleen Roh Sinzdak, Thomas P. Schmidt, Sara Solow.

Quinn Emanuel Urquhart & Sullivan, LLP: Charles Kramer Verhoeven, Andrea Pallios Roberts, Brian E. Mack, Felipe Corredor, Jonathan Tse, Lance Lin Yang, Lindsay M. Cooper, Miles Davenport Freeman, Nithin Kumar, Patrick Curran, Sean S. Pak, Melissa Baily, Gavin Snyder, Michael Yoo.

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

Google LLC seeks a writ of mandamus directing the district court to dismiss or transfer the case in *SEVEN Networks, LLC v. Google LLC*, No. 2:17-cv-00442 (E.D. Tex.). That case has been partially consolidated with *SEVEN Networks, LLC v. Samsung Electronics Co., Ltd., et al.*, No. 2:17-cv-00441 (E.D. Tex.), and the resolution of the present petition may affect that consolidated case. SEVEN Networks, LLC has also sued a different defendant alleging infringement of several of the same patents. *SEVEN Networks, LLC v. ZTE (USA) Inc., et al.*, No. 3:17-cv-01495 (N.D. Tex.). In addition, Google LLC has sought a declaratory judgment of non-infringement involving the same patents at issue in the present petition in *Google LLC v. SEVEN Networks, LLC*, No. 3:17-cv-04600 (N.D. Cal.). That case is currently stayed. Finally, Google LLC has petitioned for *inter partes* review of the patents at issue in the present petition in Nos. IPR2018-01047, -01048, -01049, -01050, -01051, -01052, -01094, -01095, -01101, -01102, -01103, -01104, -01115, -01116, -01117, -01118. The Patent Trial and Appeal Board has not yet acted on those petitions.

Dated: November 12, 2018

/s/ Neal Kumar Katyal
Neal Kumar Katyal

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FEDERAL CIRCUIT RULE 35(b) STATEMENT

Based on my professional judgment, I believe this appeal requires an answer to a precedent-setting question of exceptional importance: Whether the presence of equipment owned by a defendant in the facility of a third party in a judicial district can qualify as the defendant’s “regular and established place of business” in that district under the patent venue statute. 28 U.S.C. § 1400(b).

/s/ Neal Kumar Katyal
ATTORNEY OF RECORD FOR GOOGLE LLC

INTRODUCTION

“[W]hen the writ of mandamus is sought from an appellate court to confine a trial court to a lawful exercise of its prescribed authority, the court should issue the writ almost as a matter of course.” *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc). Accordingly, in the last year alone, this Court has granted five mandamus petitions to “correct a district court’s answers to ‘basic, undecided’ legal questions * * * in the venue context.” *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017); *infra* p. 13. In so doing, the Court has properly discharged its “duty * * * to exercise supervisory control of the district courts in order to insure proper judicial administration.” ADD10 (Reyna, J., dissenting) (quoting *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304 (9th Cir. 1982)). In this case, however, a divided panel of this Court departed from this precedent and failed to grant mandamus relief to correct the district court’s error

regarding a “‘basic, undecided’ legal question[.]” concerning the meaning of the patent venue statute. *Micron*, 875 F.3d at 1095.

Specifically, the district court held that a defendant has a “regular and established place of business” in a district where it merely owns computer servers in a facility owned and controlled by a third party. That far-reaching holding defies the text and purposes of the venue statute, defies the Supreme Court’s attempt in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), to rein in abuses of patent venue, and defies the guidance that this Court has already provided on the venue statute’s meaning. *See* ADD12-13 (Reyna, J., dissenting). It created an acknowledged split on the meaning of the venue statute even within the Eastern District of Texas itself. And it will have vast implications for the administration of patent law—as the broad amicus support for the mandamus petition showed. *Etsy*, *HP*, *Netflix*, *Ringcentral*, *Red Hat*, *Salesforce*, *SAP America*, *Twitter*, and the *High Tech Inventors Alliance Amici Br. 3-4*; *Intel Amicus Br. 1-3*.

The panel stated that mandamus was not “warranted” because the district court’s ruling “rest[ed] on a variety of facts.” ADD4-6. Not so: The district court’s ruling rested on a basic legal error about the meaning of the venue statute that has already had dramatic and palpable ramifications. Since the district court’s decision, Google has been sued *seventeen* times for patent infringement in the

Eastern District of Texas—thirteen of those since the panel denied mandamus review two weeks ago. In the entire year prior to the district court’s decision, Google was not sued for patent infringement in the Eastern District of Texas once. And suits against other defendants will proliferate based on the same flawed theory of venue.

Refusing to stem that tide now is not a sensible way to administer a patent system. “Leaving this issue to percolate longer in the courts * * * will only result in wasted judicial and litigant resources.” ADD14 (Reyna, J., dissenting). It would mean throwing out not only a trial in this case, but potentially trials in all of the new cases mentioned above (and others cases involving other defendants). In the meantime, venue would turn on the identity of the judge to whom the case happens to be assigned.

Mandamus, to be sure, is an “extraordinary remedy.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). But the district court’s ruling was extraordinarily consequential—and wrong. As Judge Reyna recognized, this Court has “a responsibility * * * to address a district court’s expansive application of the patent venue statute and to provide guidance.” ADD14.

The Court should grant panel rehearing or rehearing en banc.

FACTUAL AND PROCEDURAL BACKGROUND

1. Google has developed a network to deliver content to its users. Appx209. The core of that network is Google's data centers, which provide computation and backend storage. Appx210. There are a handful of data centers in the United States; none is in Texas. The next layer of Google's network infrastructure is known as "Edge Points of Presence" ("PoPs"). Appx211. PoPs are where Google's network connects to the rest of the internet. Google has no PoPs in the Eastern District of Texas. *Id.*

The last pieces of the network are called "edge nodes," also referred to as "Google Global Cache" or "GGC" servers. Appx212-213. GGC servers are computers hosted in the facilities of a local internet service provider (ISP), almost always at the request of the ISP. *Id.*; *see* Appx215-216. If an ISP chooses to host a GGC server, then a copy of certain portions of digital content popular with the ISP's subscribers can be temporarily "cached" on that GGC server. Appx212. As a result, an ISP does not need to fetch the content from outside its network.

GGC servers are generic, off-the-shelf machines, made by third-party computer manufacturers. Appx196. If an ISP requests to participate in the GGC program, Google verifies that the ISP is eligible, and then the ISP and Google enter into a service agreement that defines each party's role. *See, e.g.,* Appx138-144. The computer manufacturer will ship the machines directly to the ISP. Appx196.

The ISP unpacks and installs the server in its own facility, at which point digital content popular with the ISP's subscriber base loads onto the machine. Google has no physical access to an ISP's facilities during the life of the agreement. Appx139.

3. Respondent sued Google for patent infringement in the Eastern District of Texas. Google moved to dismiss for improper venue or, in the alternative, to transfer the case to the Northern District of California under 28 U.S.C. § 1406(a). The district court denied Google's motion. As relevant here, the court held that Google has "a regular and established place of business" in the Eastern District because of the GGC servers located at the ISPs in the District. Appx19 (internal quotation marks omitted). In so holding, the court expressly "disagree[d]" with the "conclusion" of "its sister court"—which had found that Google had no place of business on the same underlying facts. *Id.*

Google petitioned this Court for mandamus, which a divided panel denied. The panel stated that the district court's ruling had looked at a "variety of facts" and at "many specific details of Google's arrangements and activities." ADD4-5. As a result, the panel said that "it is not known if the district court's ruling involves * * * broad and fundamental legal questions." ADD5. The panel also maintained that it was "appropriate to allow the issue to percolate" further. ADD6.

Judge Reyna dissented. He wrote that "Google's petition presents fundamental issues concerning the application of § 1400(b) that have far reaching

implications and on which district courts have disagreed.” ADD11. And he explained his skepticism of the district court’s ruling: “It seems to me that under [*In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017)], Google’s servers or the server racks on which the servers are kept may not constitute a ‘regular and established place of business’ for venue.” ADD12.

ARGUMENT

I. THE DISTRICT COURT COMMITTED A CLEAR ERROR OF LAW IN INTERPRETING THE PATENT VENUE STATUTE.

a. In order for venue to be proper in a patent infringement suit, the defendant must either be incorporated in or have “a regular and established place of business” in the relevant district. 28 U.S.C. § 1400(b). The phrase “place of business”—as a matter of precedent and as a matter of plain text—contains two different requirements. First, a place of business must be real property. As this Court has put it, “[t]he statute requires * * * ‘[a] building or a part of a building set apart for any purpose’ or ‘quarters of any kind’ from which business is conducted.” *Cray*, 871 F.3d at 1362 (quoting William Dwight Whitney, *The Century Dictionary* 732 (Benjamin E. Smith, ed. 1911)). That gloss on the meaning of the phrase accords with common dictionary definitions. The Oxford English Dictionary, for instance, defines “place of business” as “a place where business is conducted, spec[ifically] a shop, office, or other commercial establishment.” Oxford English Dictionary (online ed. 2018).

Second, a “place of business” must be a place where either employees or other agents of the company are present to carry out the business. This, again, follows from the plain meaning of the phrase. A structure is only a “place of business” if business “is conducted” there. *Place of Business*, Oxford English Dictionary. And, as a general matter, business is conducted *by people*. One does not typically refer to a computer as “conducting a company’s business”; it is the human employees who do that. *See CDx Diagnostic, Inc. v. U.S. Endoscopy Grp., Inc.*, 2018 WL 2388534, at *3 (S.D.N.Y. May 24, 2018).

This interpretation is confirmed, beyond any doubt, by the patent service statute. The service statute and the venue statute were enacted side-by-side as a single provision on the same day. *See* 29 Stat. 695-696 (1897). Both are still on the books with non-substantive modifications (though they are now codified in separate sections). The service statute provides that “[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.*” 28 U.S.C. § 1694 (emphasis added). “In other words, § 1694 presumes that a defendant with a ‘place of business’ in a district will also have ‘agents conducting such business’ in that district.” *Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, 2018 WL 1478047, at *4 (S.D.N.Y. Mar. 26, 2018).

Reading “place of business” in Section 1400(b) in this manner is consistent with the statute’s purpose and legislative history. As this Court has explained, the venue “statute’s ‘main purpose’ was to ‘give original jurisdiction to the court where a permanent agency transacting the business is located.’” *Cray*, 871 F.3d at 1361 (quoting 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey)). And the examples of permanent business locations discussed in the legislative history shed light on what Congress had in mind as a “place of business”: a “manufactory,” or an “office where the goods are sold.” 29 Cong. Rec. 1900 (1897) (statement of Rep. Lacey). Those examples confirm the need for real property, and for employees conducting the “business” from such locations.

b. With these principles in mind, it is clear that Google does not have a “place of business” in the Eastern District. First, a computer server itself does not qualify. The district court found otherwise because a computer “occup[ies] a physical space” and “service[s]” a “business need.” Appx21, Appx28. But this Court was clear in *Cray* that the phrase “place of business” refers to a “*building*” or “*quarters*.” 871 F.3d at 1362 (emphasis added) (internal quotation marks omitted). It does not include a physical object simply because the object occupies physical space. Indeed, the district court’s reading could turn any piece of company-owned equipment into a place of business, expanding the venue statute beyond recognition. See *Automated Packaging Sys., Inc. v. Free-Flow Packaging Int’l*,

Inc., 2018 WL 400326, at *9 (N.D. Ohio Jan. 12, 2018) (“machines at the customer’s locations” not places of business of the defendant); *HomeBingo Network, Inc. v. Chayevsky*, 428 F. Supp. 2d 1232, 1250 (S.D. Ala. 2006) (similar).¹

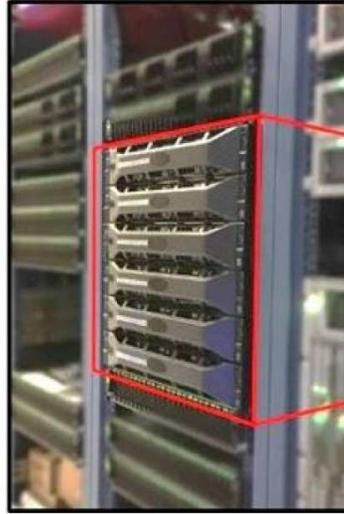
Further, Google does not own, rent, or lease any real property in the Eastern District. Appx130. Nor does Google have any employees who work at a Google office there. Appx136. Indeed, the uncontroverted evidence is that no agent or employee of Google has *ever* visited the GGC servers located in the District. Appx196. The fact that, despite these circumstances, Google was deemed to have a “place of business” in the Eastern District highlights the breathtaking scope of the district court’s ruling and its massive implications for patent litigation going forward.

c. The district court reasoned that the “rack space” which holds a server could be a “place of business” under the statute. Appx40. That was wrong for two reasons. First, as one court has put it, “whatever a ‘place of business’ is, it is not a shelf.” *Peerless Network*, 2018 WL 1478047, at *4-5. The GGC servers are installed in a few shelves of a nondescript rack in a large room full of other rows of shelves. The servers are like a few books in a library:

¹ The district court also likened the computer servers to a warehouse, Appx30-34, but the analogy fails. A warehouse has both of the necessary characteristics of a “place of business”—it is real property, and it is staffed by actual employees of the business. A computer has neither.



Interior Rack Spaces



Google GGC Servers

Opp. to Mandamus 12. These particular shelves are not a “building,” “quarters,” “commercial establishment,” or any other accurate gloss on the meaning of a “regular and established place of business.” *See supra* p. 6-7.

Indeed, *any* physical object rests upon some physical space; to hold that such space qualifies as a “place of business” would eviscerate the statutory limits on venue. As Judge Reyna recognized, the “district court’s current reading of § 1400(b) may be even more expansive than the district court’s reading of the statute that we vacated in *Cray*.” ADD12. Again, companies would potentially become subject to venue in any judicial district in the United States in which a physical object belonging to the company—a computer, cell phone tower, cable box, piece of railroad track, perhaps even a mailbox—was located. *See Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 934 (E.D. Tex. 2017). Indeed, under the district court’s rule, *Cray* (which held that an employee’s home office

was not a defendant's place of business) might have come out differently if the employee happened to use a company-owned computer at home. ADD12 (Reyna, J., dissenting).

Further, the rack space and the ISP's facility more broadly are *not Google's*, and the specifics of Google's relationship with the ISPs only illustrate how expansive the district court's ruling truly is. *See Cray*, 871 F.3d at 1363. Google does not own or lease the "rack space" within the ISPs where the servers are stored, any more than someone who loans a book to a friend has "leased" the space on the bookshelf where the book sits. Appx40. The relevant agreements say only that an ISP will "provide" "rack space" for the equipment. Appx138. That rack space is expressly located "in *the Host's* collocation facilities"—real property locations owned or rented by the ISP. *Id.* (emphasis added). Google does not even have physical access to the rooms holding the servers and their racks. Appx139. The contract only grants Google access *if* the agreement is terminated and *if* the ISP refuses to surrender the equipment back to Google. Then, and only then, may Google "enter any premises of Host where such equipment is located during normal working hours" in order to get it back. *Id.* That is a far cry from a "lease," and certainly does not convert the *ISP's* place of business to *Google's* for venue purposes. Nor has Google "ratif[ied]" or "represent[ed]" that it has a "place of

business” in the Eastern District. *Cray*, 871 F.3d at 1363; *see* Pet. for Mandamus 19-20.²

* * *

The district court’s impulse to update the venue statute for the digital age is understandable. The “world has changed” in the century-plus since Congress enacted the current patent venue law, particularly with the advent of computing. *Cray*, 871 F.3d at 1359. “But, notwithstanding these changes, in the wake of the Supreme Court’s holding in *TC Heartland*, * * * [courts] must focus on the full and unchanged language of the statute.” *Id.* And that language is “specific and unambiguous,” and should not, “in the interest of some overriding policy, * * * be given a liberal construction.” *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (internal quotation marks omitted). The district court did not heed that instruction.

² The district court also relied on Section 18(c) of the America Invents Act, which provides that an ATM machine “shall not be deemed to be a regular and established place of business” for certain venue purposes. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 18(c), 125 Stat. 329, 331 (2011). According to the court, that provision implies that ATM machines otherwise *would* be places of business. But an equally “plausible construction of Congress’ action in” 2011 is that it was merely “clarifying the original meaning” of the venue statute. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988). And “the opinion of this later Congress as to the meaning of a law enacted [more than a century] earlier does not control the issue” in any event. *Id.*

II. THE COURT SHOULD ISSUE A WRIT OF MANDAMUS.

This Court has used its mandamus power to correct erroneous interpretations of the patent venue statute and to provide guidance on “basic, undecided” questions about its application on numerous occasions. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). In the past year alone, this Court has done so in five separate cases involving § 1406 rulings. *In re BigCommerce, Inc.*, 890 F.3d 978 (Fed. Cir. 2018); *In re ZTE (USA) Inc.*, 890 F.3d 1008 (Fed. Cir. 2018); *Micron*, 875 F.3d 1091; *In re Cutsforth, Inc.*, 2017 WL 5907556 (Fed. Cir. Nov. 15, 2017); *Cray*, 871 F.3d 1355. When “recurring legal issues” threaten “considerable litigation producing disparate results,” mandamus review is “justif[ied].” *Micron*, 875 F.3d at 1095. That is the case here.

The panel determined that mandamus was not “warranted” because the district court’s ruling “rest[ed] on a variety of facts” and “focused on many specific details of Google’s arrangements and activities.” ADD4-6. Whatever the district court’s “focus[],” the fact remains that the court made a basic legal error regarding the meaning of the venue statute, and the “interpretation of a statute * * * is a question of law.” *Lane v. Principi*, 339 F.3d 1331, 1339 (Fed. Cir. 2003). This Court should correct that error.

Of course, the district court decided the legal question here in the context of a particular case. But that is utterly unsurprising; indeed, “[i]t is the merit of the

common law.” Oliver Wendell Holmes, *Codes and the Arrangement of the Law*, 5 Am. L. Rev. 1 (1870). *Cray* also involved a highly specific set of facts, but this Court appropriately used that case as a vehicle to provide guidance on the meaning of the venue statute. Just like that case, the district court here decided “fundamental issues concerning” the patent venue statute, and “[m]andamus review * * * is vital to provide needed guidance.” ADD10 (Reyna, J., dissenting).

Further, the panel did not explain how any of the facts it identified muddy the straightforward statutory question at the heart of this case. All the facts go to the functioning or location of the GGC servers. ADD4. But the core legal contention of the petition is that the phrase “regular and established place of business” means real property with employees or agents of the defendants present conducting the defendant’s business. If that is right, then Google unquestionably has no place of business in the District, and the “specific details of Google’s arrangements” do not matter.

The panel also stated that it did “not know[.]” whether the question decided by the district court was sufficiently “fundamental.” ADD5. The days following this court’s denial of mandamus should dispel any uncertainty: Google was sued multiple times in the Eastern District of Texas. Some of those complaints relied specifically on this Court’s denial of mandamus as authority supporting venue. *See* Compl. ¶ 5, *Super Interconnect Techs. v. Google LLC*, No. 2:18-cv-00463-JRG

(E.D. Tex. Nov. 2, 2018); Compl. ¶ 30, *Dynamic Data Techs. v. Google LLC*, No. 2:18-cv-00466-RWS (E.D. Tex. Nov. 5, 2018). And the reasoning of the district court’s opinion sweeps far beyond Google; one plaintiff, for instance, recently asserted that a technology company has a regular and established place of business in the Eastern District of Texas because the company sent “representatives” to “Best Buy stores” to give “in-person demonstrations” of a product. Compl. ¶ 6, *Motiva Patents, LLC v. Facebook Techs., LLC*, 9:18-cv-00178-JRG (E.D. Tex. Oct. 3, 2018).

The concern of the many amici who supported Google—that the district court’s ruling would effectively restore the pre-*TC Heartland* regime—has thus already been borne out. And failing to intervene now will just mean “wasted judicial and litigant resources.” ADD14 (Reyna, J., dissenting). Google and other similarly situated defendants will be forced to preserve and brief their venue objections in all of those cases, and then go through *Markman* hearings, summary judgment briefing, and trial, all before courts that have no authority to hear the cases. A core function of mandamus is to ensure the lower courts remain “confine[d]” to the “lawful exercise of [their] prescribed” authority, and thus to prevent this kind of waste. *Schlagenhauf*, 379 U.S. at 109-110 (internal quotation marks omitted).

The panel also downplayed the “great uncertainty among district courts and litigants facing” the question in this case. ADD13 (Reyna, J., dissenting). The decision below openly created a split even within the Eastern District of Texas on the specific question of whether Google’s GGC servers satisfy the patent venue statute. *Compare* Appx15-39, with *Personal Audio*, 280 F. Supp. 3d at 933-935. Given the volume of patent litigation in that District, this conflict is reason enough for this Court “to adopt a uniform national rule” on “patent-specific venue.” *ZTE*, 890 F.3d at 1013. Other courts beyond the District have added to the cacophony. Some have weighed in on whether telecommunications equipment more generally can qualify, and have reached holdings at odds with the court’s decision below. *See, e.g., Peerless Network*, 2018 WL 1478047, at *3-5 (“a shelf containing a piece of [the defendant’s] telecommunications equipment” in the district was not a regular and established place of business); Memorandum Opinion & Order at 4, *BMC Software, Inc. v. Cherwell Software, LLC*, No. 1:17-cv-01074-LO-TCB (E.D. Va. Dec. 21, 2017), ECF No. 55 (rental of a computer server in the district was not a regular and established place of business); *see* *Etsy, et al. Amici Br.* 10-16; *Intel Amicus Br.* 2-4. Others have weighed in on whether an agent or employee of the defendant must be present at the putative place of business. *See supra* p. 7.

In short, the decision below—if left to stand—will compound (and has already compounded) the considerable confusion in the lower courts. It will

dramatically expand the patent venue statute and subject numerous companies to suit or the threat of suit where they have no proper place of business. It will restore the permissive venue regime that the Supreme Court, in *TC Heartland*, sought to rein in. If ever this Court’s “supervisory [and] instructional” function were essential, it is now. *BigCommerce*, 890 F.3d at 981 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, Google respectfully requests that this Court grant the petition for panel rehearing or rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This petition for rehearing en banc complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,892 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the tpestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

/s/ Neal Kumar Katyal

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

In re: GOOGLE LLC,
Petitioner

2018-152

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in No. 2:17-cv-00442-JRG, Judge J. Rodney Gilstrap.

ON PETITION

Before DYK, REYNA, and TARANTO, *Circuit Judges*.

Order for the court filed PER CURIAM.

Dissenting opinion filed by *Circuit Judge* REYNA.

PER CURIAM.

ORDER

Google LLC petitions for a writ of mandamus that would direct the United States District Court for the Eastern District of Texas to dismiss or transfer this patent case for improper venue under 28 U.S.C. § 1400(b) (“Any 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.”).

ADD1

SEVEN Networks, LLC opposes the petition. Google replies.

I

SEVEN sued Google in the Eastern District of Texas, alleging that Google was infringing ten of its patents. SEVEN's complaint alleges that venue in the Eastern District is proper under 28 U.S.C. § 1400(b). It does not allege that Google "resides" in the Eastern District. Rather, it alleges that "Google has committed acts of infringement in this District and has a regular and established place of business in this District." Amended Complaint at 2–3, *SEVEN Networks, LLC v. Google LLC*, 2:17-CV-00442 (E.D. Tex. Aug. 22, 2017), ECF No. 34.

Following discovery on venue, Google moved to dismiss or transfer the case under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). The district court denied Google's motion, concluding that SEVEN met its burden of demonstrating that venue in the Eastern District of Texas over Google was proper. *SEVEN Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 966–67 (E.D. Tex. 2018). The decision rested on the servers that Google owns and uses to deliver content to its customers through "Edge Nodes" in Google's content-delivery "Edge Network"; some of those servers are located at facilities of various local Internet Service Providers ("ISPs") in the Eastern District, under contracts establishing strong Google control over the servers and their physical location. Examining the statutory language and its interpretation by this court in *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017), *see SEVEN*, 315 F. Supp. 3d at 938–41, the district court held that those servers and their locations under those contracts together constituted "regular and established place[s] of business" for Google, *id.* at 947–67. The court further held that venue is proper under § 1400(b) when the district is one where the defendant has "committed acts of infringement" and "has a regular

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and established place of business,” even if the alleged acts of infringement are not related to the identified regular and established place of business. *Id.* at 945–46.

Google now seeks mandamus. Google principally challenges the district court’s conclusion that the Google servers and their locations in the district, under the contracts discussed in the opinion, constitute regular and established places of business of Google’s. Secondly, Google argues that § 1400(b) requires that the alleged acts of infringement be related to the regular and established places of business.

II

A writ of mandamus is a “drastic and extraordinary remedy reserved for really extraordinary causes.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). There are three general requirements for a writ to issue. First, the petitioner must “have no other adequate means to attain the relief” desired. *Id.* (citation omitted). Second, the petitioner must show that the “right to issuance of the writ is ‘clear and indisputable.’” *Id.* at 381 (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). Third, “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Id.* (citations omitted).

In accordance with the Supreme Court’s decision in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 379–84 (1953), this court has made clear that, unlike with convenience-based motions to transfer under 28 U.S.C. § 1404, mandamus ordinarily is unavailable for immediate review of rulings on motions under § 1406 asserting lack of venue under § 1400(b): a post-judgment appeal generally is an adequate remedy for asserted § 1400(b) violations. *See In re HTC Corp.*, 889 F.3d 1349, 1352–54 (Fed. Cir. 2018). We have nevertheless found mandamus

to be available for asserted § 1400(b) violations in certain exceptional circumstances warranting immediate intervention to assure proper judicial administration. *See, e.g., In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018); *In re BigCommerce, Inc.*, 890 F.3d 978, 980 (Fed. Cir. 2018); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1102 (Fed. Cir. 2017); *Cray*, 871 F.3d at 1367. But we do not find such circumstances in this case.

The district court's venue ruling rests on a variety of facts it found about Google's interests in and activities involving its servers and Google's contracts with hosting ISPs that govern the location of those servers. The ruling states that it is not the servers in isolation, but the servers and their specific locations under specific contracts, that are regular and established places of business of Google's. *SEVEN*, 315 F. Supp. 3d at 951–53, 956, 964, 965, 966–67. And it does so based on findings of at least the following facts. Google owns and wholly controls the servers, located in the district under specific contracts with ISPs—which may not even tighten a screw without Google's instruction. *Id.* at 951–53, 965. The location of the servers in the district serves Google's business interests—by serving interests of Google's ISP customers (*e.g.*, in saving transport costs), Google's end-user customers (*e.g.*, in quick delivery of content), or both—as confirmed by Google's advertising of its Edge Network and the Edge Nodes for efficient content delivery; and upon installation of the servers, Google places its inventory in (loads its content onto) those servers, and when Google's end-user customers ask Google for that inventory, Google can and often does fulfill those requests from those local servers. *Id.* at 947–50, 956, 960–61, 965–66. And the server-placement contracts provide Google very strong control to keep the servers at their locations once they are installed. *Id.* at 952–53, 965.

The main issue that Google presents to us concerns whether the district court erred in holding that its servers

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and their locations under specific contracts constituted Google's "regular and established place[s] of business." 28 U.S.C. § 1400(b). On that issue, though, Google has failed to show that the district court's ruling implicates the "special circumstances justifying mandamus review of certain basic, unsettled, recurring legal issues over which there is considerable litigation producing disparate results." *Micron*, 875 F.3d at 1095; see *ZTE*, 890 F.3d at 1011; *Cray*, 871 F.3d at 1359–60; *BigCommerce*, 890 F.3d at 981.

The district court focused on many specific details of Google's arrangements and activities, as already summarized, and examined those details under the specific language of the statute and of this court's decision in *Cray*. The court also closely examined a wide range of relevant legal authority, including authority concerning warehouses and authority concerning machines that serve customers without their owner's employees (or indeed any human attendants) on site. *SEVEN*, 315 F. Supp. 3d at 938–41, 954–56, 958–61, 962, 963. As one of the amici supporting Google recognizes, the scope of the district court's decision is, in many respects, "unclear." Br. of Amici Curiae Etsy 13. Under these circumstances, it is not known if the district court's ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b) that we have deemed appropriate for mandamus despite the general adequacy of ordinary post-judgment appeal for rulings on venue motions under § 1406. Compare with *Cray*, 871 F.3d at 1359–60 (basic framework for applying statutory terms hardly interpreted for more than twenty-five years), *Micron*, 875 F.3d at 1095–96 (change of law and preservation or loss of § 1400(b) rights), *BigCommerce*, 890 F.3d at 980 (whether a defendant can reside in more than one district in a multi-district state), and *ZTE*, 890 F.3d at 1011 (whether Federal Circuit or regional circuit law applies and who has the burden of persuasion).

Nor does the issue involve anything close to the kind of almost-even disagreement among a large number of district courts that was present in *Micron*, 875 F.3d at 1095–96. Even if the legal issue were more clearly defined, the paucity of district court cases that have so far addressed the issue suggest that the “extraordinary remedy” of a writ of mandamus is not currently warranted. Thus, it would be appropriate to allow the issue to percolate in the district courts so as to more clearly define the importance, scope, and nature of the issue for us to review.

We thus find mandamus not to be warranted for Google’s main argument.

Google’s distinctly secondary issue presented to this court concerns the relationship between the “regular and established place of business” requirement and the “acts of infringement” requirement of the portion of § 1400(b) at issue. As to this issue too, we find an insufficient basis for mandamus relief. Although the issue involves a more clearly defined legal principle than Google’s main issue, it is not one on which there is currently a substantial degree of disagreement or a demonstrated need for immediate appellate resolution. *See generally HTC*, 889 F.3d at 1352–54.

Moreover, although we again draw no ultimate merits conclusion, we conclude, based on the district court’s opinion, that there is no “clear and indisputable” error in the court’s resolution of this issue. That resolution finds at least a substantial basis in the language of the statute (which uses simply “and,” not another phrase pointing to a tighter linkage) and in various precedents following the text in that respect, including a decision of then-District Judge Learned Hand, *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.*, 180 F. 770, 771 (C.C.S.D.N.Y. 1910). Google has not shown otherwise by pointing outside venue law to the requirement, for specific personal juris-

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diction, that a defendant's contacts with a forum must relate to the basis of the suit, as recently confirmed in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017). The portion of § 1400(b) at issue here readily satisfies that requirement ("acts of infringement" must take place in the district) and then requires more (a "regular and established place of business"). Nor has Google shown a "clear and indisputable" right by pointing to language in this court's decision in *In re Cordis Corp.*—in which we denied mandamus—that described certain facts present in a Seventh Circuit decision. 769 F.2d 733, 737 (Fed. Cir. 1985) (discussing *Univ. of Ill. Found. v. Channel Master Corp.*, 382 F.2d 514 (7th Cir. 1967)). Whatever the force of Google's arguments in an ordinary appeal, they are insufficient to show a "clear and indisputable" right to support mandamus on this second venue issue.*

* Google initially advanced a third argument in its mandamus petition—that all the steps of a method claim must be alleged to have been performed within the district to meet the "acts of infringement" requirement of the venue statute. This issue became moot when, in the case-narrowing procedure followed in the district court, SEVEN withdrew its assertion of the method claims in question. Google asks this court, without any supporting analysis or any indication that it has asked the district court, to vacate the portion of the district court ruling focused on claims of method patent infringement, *SEVEN*, 315 F. Supp. 3d at 943–45. We deem it the better course to deny this request, leaving Google to present to the district court any argument it has for vacatur of the portion of the decision at issue.

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Accordingly,

IT IS ORDERED THAT:

The petition for writ of mandamus is denied.

FOR THE COURT

Oct. 29, 2018

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner
Clerk of Court

ADD8

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

In re: GOOGLE LLC,
Petitioner

2018-152

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in No. 2:17-cv-00442-JRG, Judge J. Rodney Gilstrap.

ON PETITION

REYNA, *Circuit Judge*, dissenting.

ORDER

The majority declines to undertake mandamus review of whether Google LLC’s servers located on shelves at facilities of a few local Internet Service Providers can constitute a “regular and established place of business” of Google’s under 28 U.S.C. § 1400(b). Specifically, the majority concludes that “it is not known if the district court’s ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b)” that would warrant mandamus review and that “it would be appropriate to allow the issue to percolate in the district courts so as to more clearly define the importance, scope, and nature of the issue for us to review.” I disagree with the majority

ADD9

on both accounts, and I dissent, therefore, from my colleagues' decision not to take up the merits of the petition.

Courts have recognized that mandamus review is a part of the “duty of appellate courts to exercise supervisory control of the district courts in order to insure proper judicial administration.” *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1304 (9th Cir. 1982). As the Supreme Court has recognized, mandamus serves “a vital corrective and didactic function.” *Will v. United States*, 389 U.S. 90, 107 (1967). Mandamus is entirely appropriate to decide issues important to “proper judicial administration.” *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957); *see also Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (approving use of mandamus to decide a “basic [and] undecided” legal question); *In re Queen’s Univ. at Kingston*, 820 F.3d 1287, 1291 (Fed. Cir. 2016) (noting that mandamus is appropriate “to further supervisory or instructional goals where issues are unsettled and important”).

Mandamus relief is reserved only for “exceptional circumstances.” *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Typically, mandamus will not issue in connection with rulings on motions to cure improper venue under 28 U.S.C. § 1406. *See In re HTC Corp.*, 889 F.3d 1349, 1352–54 (Fed. Cir. 2018). But in the short time since *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), this court has seen fit on multiple occasions to take up on mandamus review the merits of a venue ruling to rein in a district court’s impermissibly expansive reading of 28 U.S.C. § 1400(b) to ensure proper judicial administration. *See, e.g., In re BigCommerce, Inc.*, 890 F.3d 978, 982 (Fed. Cir. 2018) (reviewing whether defendant was deemed to reside in only one judicial district in a state of multiple judicial districts); *In re Cray Inc.*, 871 F.3d 1355, 1359–60 (Fed.

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Cir. 2017) (reviewing whether the home of an employee was a regular and established place of business).

Like those cases, Google's petition presents fundamental issues concerning the application of § 1400(b) that have far reaching implications and on which district courts have disagreed. In the wake of *TC Heartland*, courts have wrestled with what constitutes a "regular and established place of business" to establish proper venue in a patent case. This is especially pertinent to companies whose business is conducted substantially over the internet, like Google. As we recognized in *Cray*, "[i]n this new era, not all corporations operate under a brick-and-mortar model," as companies are increasingly conducting their businesses virtually. 871 F.3d at 1359. Nevertheless, we emphasized that "there must be a physical place in the district" under § 1400(b). *Id.* at 1360. Mandamus review in this case is vital to provide needed guidance on how to apply the statute in this context.

This case presents fundamental issues concerning proper judicial administration and the application of *Cray*. We stressed that under § 1400(b), "the analysis must be closely tied to the language of the statute." *Id.* at 1362. To that end, *Cray* makes clear that the statute requires a physical "place" of the defendant, i.e., "a building or a part of a building set apart for any purpose or quarters of any kind from which business [of the defendant] is conducted." *Id.* (internal quotation marks and citations omitted). The statute "cannot be read to refer to refer merely to a virtual space or to electronic communications from one person to another." *Id.* at 1362. Indeed, *Cray* reined in the district court's expansive test that would seemingly have authorized such a virtual space or electronic communication as a "place." *Id.* We also noted that district courts should be mindful that Congress intended § 1400(b) to be a "restrictive measure," not "to be given liberal construction" and to be "careful not to conflate showings that may be sufficient for other purposes,

e.g., personal jurisdiction or the general venue statute, with the necessary showing to establish proper venue in patent cases.” *Id.* at 1361 (internal quotation marks and citations omitted).

Here, Google and *amici* have raised significant questions as to whether the district court’s ruling disregards these admonishments. It seems to me that under *Cray*, Google’s servers or the server racks on which the servers are kept may not constitute a “regular and established place of business” for venue to be proper in the district, yet the majority declines to address *Cray* in any meaningful way. The district court’s current reading of § 1400(b) may be even more expansive than the district court’s reading of the statute that we vacated in *Cray*.

In *Cray*, we held the defendant did not have a regular and established place of business in the district despite the defendant having an employee living in the district and conducting company business out of his home office. *Id.* at 1364–66. By contrast here, Google owns and controls servers that “deliver information” located on leased shelf space that are maintained by employees of Internet Service Providers and have no physical interaction, in particular with Google employees (or customers). *See SEVEN Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 948, 950–54 (E.D. Tex. 2018). The district court’s current reading of § 1400(b) suggests that merely owning and controlling computer hardware (i.e., servers) that is involved in some company business is sufficient. Based on such a reading, had the defendant in *Cray* simply owned and controlled the computer hardware on which its employee conducted company business, that would seem to change the outcome of that decision entirely. The district court’s lengthy justification for finding that a server can be a “place” calls into question whether its reading is sufficiently tethered to statutory language and consistent with a plain reading of § 1400(b). *See id.*

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The majority gives short shrift to the fact that the issue of whether and to what extent servers or similar equipment can constitute a “regular and established place of business” within the meaning of § 1400(b) is one of first impression for this court and one in which there is great uncertainty among district courts and litigants facing this issue. Indeed, there is substantial disagreement on this issue even within the Eastern District of Texas involving the same facts and the same defendant. *See SEVEN*, 315 F. Supp. 3d 933, at 950 (disagreeing with *Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 934 (E.D. Tex. 2017)). And at least one other district court has also wrestled with whether a piece of the defendant’s telecommunication equipment occupying a shelf in the district can satisfy § 1400(b). *See Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-CV-1725, 2018 WL 1478047, at *3–4 (S.D.N.Y. Mar. 26, 2018). The district court here also noted numerous other court decisions with disparate outcomes on, for example, whether vending or similar types of machines were considered places of business, whether shelf space or warehouses constitute places of business, and whether some agent or employee is required at the place of business. *SEVEN*, 315 F. Supp. 3d at 955–56, 958–61, 961–65.

The majority concludes that it would be better to allow this issue to continue to percolate in the district courts before a ruling by this court. But the majority provides no explanation for why waiting would somehow benefit our review, how long percolation should take place, or how many courts must first wrestle with this issue. In concluding that Google’s petition does not implicate the “special circumstances justifying mandamus review,” the majority fails to recognize the far-reaching implications of the district court’s ruling. As Google notes, under the district court’s expansive understanding of what constitutes a “regular and established place of business,” a company could potentially become subject to

venue in any judicial district in which a physical object belonging to the company was located. The *Personal Audio* court also recognized the “far reaching” consequences of finding that Google has a regular and established place of business in these circumstances. *Personal Audio*, 280 F. Supp. 3d at 934. For example, is every individual cell phone tower a “regular and established place of business” for a cellular service provider? *See id.* And is a home office that contains at least a computer a “regular and established place of business” simply because an employer provides the computer and controls its operation and placement?

As in *Cray*, there is uncertainty among district courts and litigants on the issue presented by this case. *Cray*, 871 F.3d at 1359. The question presented by Google’s petition thus squarely meets the requirements for mandamus review to address “certain basic, unsettled, recurring legal issues over which there is considerable litigation producing disparate results” and ensure proper judicial administration. *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017). Leaving this issue to percolate longer in the courts as the majority suggests will only result in wasted judicial and litigant resources as they continue to wrestle in uncertainty. We have a responsibility as the reviewing court to address a district court’s expansive application of the patent venue statute and to provide guidance here regarding what constitutes a “regular and established place of business” for proper patent venue under § 1400(b). For these reasons, I respectfully dissent.

CERTIFICATE OF SERVICE

I certify that on November 12, 2018, I caused a copy of the foregoing document to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

/s/ Neal Kumar Katyal