NOTE: This order is nonprecedential.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.

O R D E R

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

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.

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.*

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.