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The authors suggest that *In re Cray* and *TC Heartland* have notable venue implications for patent infringement actions against sharing economy participants like Uber and Airbnb.

The Implications of *In re Cray* on the Sharing Economy

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In the last few months, the Supreme Court in *TC Heartland* and the U.S. Court of Appeals for the Federal Circuit in *In re Cray* have reawakened interest in patent venue jurisprudence that had remained dormant for the last 27 years. During those years, the types of businesses in our economy and the way they operate have been unshackled from geography. Sharing-economy companies like Uber and Airbnb have business operations that are, by design, unmoored to a particular place.

After *TC Heartland*, to determine proper venues outside these defendants' places of incorporation was a journey into the unknown given the lack of guidance, until recently, on what constitutes a ''regular and established place of business.'' However, the opinion in *Cray* has provided clarification but also an uphill battle for patent owner plaintiffs.

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The New Economy

Since the Federal Circuit last touched the issue of patent venue in 1985, the business world has changed dramatically. ''In this new era, not all corporations operate under a brick-and-mortar model. Business can be conducted virtually. Employees increasingly telecommute. Products may not as a rule be warehoused by retailers, and the just-in-time delivery paradigm has eliminated the need for storing some inventory.'' *In re Cray*, 124 U.S.P.Q.2d 1001, No. 17-129, D.N. 50, at 6 (Fed. Cir. 2017). The disembodiment of the modern business is also significant. Companies like Uber, Airbnb, and other companies in the ''sharing economy'' act as intermediaries between two sets of customers that provide services to one another directly. The growth of this sharing economy has been jaw-dropping—expanding from roughly $15 billion in global revenue in 2015 to an anticipated $335 billion in 2025. Price Waterhouse Cooper, *Consumer Intelligence Series: The Sharing Economy*, at 14 (2015).

The scope of proper venues for a patent infringement action against companies whose operations are geographically nebulous is an unsettled question. Only Uber has thus far had an infringement suit filed against it after *TC Heartland*. In *Fall Line Patents, LLC v. Uber Technologies, Inc.*, the plaintiff supported its choice of venue with the allegation that ''Uber maintains numerous regular and established places of business in this district by providing its ride-sharing service in this district in, for example, Tyler, Texas.'' No. 6-17-cv-00408, D.N. 1, Complaint, at 2 (E.D. Tex. July 10, 2017). Are Uber and its ilk open to actions in any district in which a driver or host signs up for their service? The answer

to this question was suggested last month by the Federal Circuit in *In re Cray*.

The New Landscape of Patent Venue

The patent venue statute, 28 U.S.C. § 1400(b), provides two options for where an infringement action may be brought: (1) ''where the defendant resides,'' or (2) ''where the defendant has committed acts of infringement and has a regular and established place of business.'' Prior to *TC Heartland*, the ''regular and established place of business'' prong was rendered superfluous by courts' interpretation of the ''resides'' prong through the lens of the general civil venue statute, 28 U.S.C. § 1391(c), which provides that an entity resides wherever it is subject to the court's personal jurisdiction. *See VE Holding v. Johnson Gas*, 16 U.S.P.Q.2d 1614, 1621 (Fed. Cir. 1990). When the Supreme Court decoupled personal jurisdiction from the residence requirement for venue, all eyes turned to the second prong.

This part of the statute had not been interpreted by the Federal Circuit since its 1985 decision in *In re Cordis*, which held that ''in determining whether a corporate defendant has a regular and established place of business in a district, the appropriate inquiry is whether the corporate defendant does its business in that district through a permanent and continuous presence there and not . . . whether it has a fixed physical presence in the sense of a formal office or store.'' 226 U.S.P.Q. 784, 786 (Fed. Cir. 1985).

Without any additional higher court guidance, district courts surveyed three decades of persuasive authority and ''failed to agree on a definitive test.'' *Cellular Dynamics Int'l, Inc. v. Lonza Walkersville, Inc.*, No. 17-cv-0027, 2017 BL 319929, at *5 (W.D. Wis. Sep. 12, 2017).

The most notable, however, was U.S. District Court for the Eastern District of Texas Judge Gilstrap's four-factor formulation in *Raytheon Co. v. Cray, Inc.*, No. 2:15-cv-01554, 123 U.S.P.Q.2d 1799 (E.D. Tex. June 29, 2017). Calling for venue rules appropriate for the ''modern era,'' Judge Gilstrap laid out four guideposts to consider—the extents to which a defendant: (1) ''has a physical presence in the district;'' (2) ''represents, internally or externally, that it has a presence in the district;'' (3) ''derives benefits from its presence in the district;'' and (4) ''interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district.'' *Id.* at 1808, 1810-11. Judge Gilstrap noted that these guideposts were advisory and his decision on the case could be supported by *Cordis* alone. *Id.* at 1812 n.3.

A petition for a writ of mandamus vacating Judge Gilstrap's order was the impetus for the Federal Circuit to consider the ''regular and established place of business'' issue after a 32-year hiatus. *In re Cray*, 2017-129, D.N. 50, at 5. The Federal Circuit found the district court's interpretation of *Cordis* to be misplaced, *id.*, and developed its own multi-factor test based on the statutory text to determine whether a defendant has a regular and established place of business in a district for purposes of establishing patent venue. Specifically, the Federal Circuit's ''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.'' *Id.* at 8.

1. Physical Place in the District

In its first requirement, the Federal Circuit clarified what might be the most directly relevant variable for an internet-based economy: physical presence. Relying on the dictionary definition of ''place,'' the court ruled that, ''[w]hile the 'place' need not be a 'fixed physical presence in the sense of a formal office or store,' there must still be a physical, geographical location in the district from which the business of the defendant is carried out.'' *Id.* at 11. The court then explicitly ruled out the possibility that ''a virtual space or electronic communications from one person to another'' could constitute a ''physical place in the district.'' *Id.*

In accordance with both *Cordis* and *Cray*, lodging provided by services such as Airbnb would self-evidently be a physical place. Vehicles provided to Uber's passengers (or at least the buildings or other locations where those vehicles are stored when not ''in service'') can also arguably be considered physical places. *See First Nat'l Bank v. Dickinson*, 396 U.S. 122, 137, 90 S. Ct. 337, 345 (1969) (finding an armored truck to be a ''place''); *United States v. Webster*, 775 F.3d 897, 903 (7th Cir. 2015) (referring to a police car as a ''place'' in the privacy context); *Rivera v. City of New York*, No. 02-cv-05264, D.N. 31 (SJ Order), at 6 (E.D.N.Y. Dec. 20, 2004) (the interior of a parked vehicle may sometimes constitute a ''public place'').

2. Regular and Established

The ''regular and established place of business'' factor has two parts considered separately: whether the place of business is ''regular'' and whether it is ''established.'' The court considers a business to be regular ''if it operates in a 'steady[,] uniform[,] orderly[, and] methodical' manner.'' *In re Cray*, No. 17-129, D.N. 50, at 11. This is in contrast to ''sporadic activity'' which cannot create venue. *Id.* at 12. For example, ''[t]he doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business; yet a series of such acts would be so considered.'' *Id.* (internal citations omitted). To be established, the place of business must be ''settle[d] certainly, or fix[ed] permanently.'' *Id.* (internal citations omitted).

The amount of time a business has been at the location is thus a relevant inquiry. For example, a five-year continuous presence would be considered established while a transient place of business would not. *Id.* The court acknowledged that a business can move its location but held that ''it must for a meaningful time period be stable, established.'' *Id.* In contrast, the court also noted that ''if an employee can move his or her home out of the district at his or her own instigation, without the approval of the defendant, that would cut against the employee's home being considered a place of business of the defendant.'' *Id.* at 12-13.

Uber could be considered to operate in a steady, uniform, orderly, and methodical (i.e., regular) manner in its operational areas. When Uber enters new regions, it executes a detailed business implementation plan and maintains close supervision over its business activities in that location. The company ''dictates the fares charged in each jurisdiction in which it operates'' and monitors the quality of its drivers in a specific location. *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 226,

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233-35 (D.D.C. 2015). While Uber's drivers could pick up business outside of the district, frequently live and park their vehicles outside of the judicial district, and can choose when and where to operate, Uber creates incentives for its drivers to operate at specific times and locations through surge pricing.

Such a business operation could be considered ''settled'' for purposes of being ''established.'' However, this might be the hardest factor to establish if the ''center of gravity'' of Uber's operation is not in the judicial district itself and has fewer drivers operating within it.

3. Place of the Defendant

Lastly, the place of business must be that ''of the defendant, not solely a place of the defendant's employee.'' *Id.* at 13. The ''defendant must establish or ratify the place of business,'' and ''[i]t is not enough that the employee does so on his or her own.'' *Id.*

The Federal Circuit enumerated factors that courts may consider when addressing this requirement. These include whether the defendant: (a) owns or leases the place or exercises other attributes of possession or control over the place; (b) conditioned employment on an employee's continued residence in the district or the storing of materials at a place in the district so they can be distributed or sold from that place; (c) markets or advertises to the extent it indicates that the defendant itself holds out a place for its business in the district; (d) represents that it has a place of business in the district; and (e) conducts similar activity at the place compared to the defendant's other places of business. *Id.* at 13-14.

(a) Exercise of Significant Control

While Uber, Airbnb, and others in the industry may not own or lease the vehicles and residences, they exercise significant control over those their drivers and hosts. Particularly, transportation services, such as Uber, set the prices; direct drivers to specific locations; control the rate of refusal of ride requests by drivers, the timeliness of drivers' responses to the requests, the display of its logo on the drivers' personal vehicles, the drivers' interactions with the passengers, including whether the drivers were permitted to accept tips; and monitor their driving quality. *See Search*, 128 F. Supp. 3d at 233. Failure to comply with Uber's guidelines may result in the driver's termination. *Id.* at 232.

(b) Conditioned employment on continued operation in location

Uber hires its drivers for a specific geographic area with the necessary licenses to drive in that area. However, the court's specific use of the term ''employment'' and ''employee'' presents a problem for potential plaintiffs. Although drivers receive payment for their rides from Uber, the company argues that its drivers are independent contractors. Courts considering the issue have reached mixed results. *See Search*, 128 F. Supp. 3d at 233 (rejected Uber's argument that its drivers are independent contractors); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1153 (N.D. Cal. 2015) (holding that Uber drivers are ''presumptive employees''). *Cf. McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 226-27 (Fla. Dist. Ct. App. 2017) (An Uber driver's level of free agency is incompatible with the control to which a traditional employee is subject.) Airbnb's control over the conduct of hosts is more distant and is a less likely candidate for a showing of employment.

(c) Marketing, advertising, and represents that it has a place of business in the district

Uber, Lyft, and Airbnb all heavily market in the locations they enter. Through labelling cars with their logo, marketing booths at public events, and promotions having friends refer other friends, these companies can saturate the market in a particular location. Furthermore, through surge pricing, both Uber and Lyft can direct their business to a particular location. Uber and Airbnb, through their websites and advertisements, announce their arrival in cities with great fanfare. The simple touch of an app on a smartphone will indicate whether the defendant operates in that area.

(d) Conducts similar activity in the district compared to its other places of business

Finally, the business of Uber, Lyft, and Airbnb operate similarly across all their locations. Their manner of operation is no more wedded to one geographic area than another.

While these factors present a mixed picture and seemingly uncertain outlook for sharing economy companies, it is the Federal Circuit's express cap on an employee's ability to expand venue on behalf of his or her employer that offers the most protection for these companies. According to *Cray*, venue must be based on ''a place of the defendant, not solely a place of the defendant's employee. Employees change jobs. Thus, the defendant must establish or ratify the place of business. It is not enough that the employee does so on his or her own.'' *In re Cray*, D.N. 50, at 5.

What Should Patentees Do?

With this broad limitation, what are patentees to do? When considering bringing an infringement action against a sharing economy participant like Uber or Airbnb, a patentee may seek to recall *Cordis*. The Federal Circuit in *Cray* did not abrogate *Cordis* but rather distinguished it on the facts as follows:

''[I]t was clear that the place of business was established by Cordis. Cordis's business specifically depended on employees being physically present at places in the district, and it was undisputable that Cordis affirmatively acted to make permanent operations within that district to service its customers there. Cordis publicly advertised a secretarial service office located within the district as a place of business of its own and used its employees' homes like distribution centers.'' *Id.* at 17.

These facts, while not analogous to those in *Cray*, may be a better fit for the business models of Uber and Airbnb.

Conclusion

Plaintiffs face an uphill battle in demonstrating that companies like Uber and Airbnb meet the requirements set out by the Federal Circuit in *Cray*. While showing that defendants' operations are physical places that are regular and established may be straightforward albeit fact-intensive queries, showing that the place is that of the defendant will be particularly difficult to show. With the rapid growth of the sharing economy and these venue decisions only months old, we can anticipate

venue battles in the near future that may clarify these issues.

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