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Intellectual Property Alert: Where and How You Store Your Servers May Subject You to Patent Litigation in a Distant Jurisdiction

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Aaron M. Williams

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CLIENT ALERT | 2.21.2020

With the growth of big data and cloud computing, more and more businesses are moving their computer servers offsite to large server farms or server clusters. While such changes in storing and managing digital information may benefit the business or customers, it may unwittingly subject the company to potential patent litigation in unfamiliar jurisdictions.

Venue in Patent Cases Generally

The patent venue statute, 28 U.S.C. § 1400(b), allows a plaintiff to file a lawsuit for patent infringement in “[a]ny . . . judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” For these purposes, a domestic corporation resides “only in its State of incorporation.” *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017). Accordingly, a plaintiff is permitted to sue a company for patent infringement in a state or jurisdiction in which infringement has occurred and where the defendant company: (1) is incorporated; or (2) has a regular and established place of business (a REPoB).

Your Data Center May Be One of Your Regular and Established Places of Business

In a recent opinion *In re Google, LLC*, Case No. 2019-126, the Federal Circuit provided new guidance regarding how the location of a company’s servers may constitute a REPoB. Google contracted with internet service providers (ISPs) within the Eastern District of Texas—where Google was sued for patent infringement—to host several of Google’s cache servers. Google’s servers functioned as local caches for Google’s data within the ISP’s datacenter. Google’s cache servers were installed in the ISP’s server racks and each ISP provided Google with rack space, power, network interfaces, and IP addresses, as well as network access between Google’s cache servers and the ISP’s network subscribers.

A Server Rack, a Shelf, or an Analogous Space Can Be a “Place of Business”

A “place” in this context is significantly broader than the traditional brick and mortar business storefront or office space. The Federal Circuit expressly rejected Google’s argument that a “place of business” for purposes of being a REPoB must be based in real property ownership or a leasehold interest in real property. Instead, the Federal Circuit reiterated that a “place of business” need only be a specific location within the district from which the defendant carries out its business. The shelf or rack space Google leased from the ISPs to house its cache servers was a physical place, with a fixed geographic location, and, therefore, a “place of business” for purposes of determining where it could be sued for patent infringement.

To be a REPoB, more is required than a mere constant, fixed physical presence within the district. The Federal Circuit agreed with Google’s argument that a “place of business” requires a company employee or agent be regularly present and conducting the company’s business from that place. Despite housing its cache servers there, no Google employees ever conducted any business in the Eastern District of Texas. Rather, Google relied on the ISPs to perform certain functions per the terms of their agreements.

Accordingly, the Federal Circuit was forced to address the scenario of whether the ISPs could be considered Google’s agents. In doing so, the Federal Circuit held that for purposes of determining whether a company has a REPoB, the agent’s activities cannot be “merely connected to” the defendant’s business—*i.e.*, general maintenance of the servers—but rather should constitute a part of the defendant’s business “in the sense of production, storage, transport, and exchange of goods or services.” Because the ISPs were performing only specialized maintenance and isolated installation functions for Google, they were not functioning as Google’s agents. Accordingly, the Federal Circuit held that Google did not have a REPoB within the Eastern District of Texas.

Practice Tip: The Federal Circuit scrutinized the agreements between Google and the ISPs to determine whether an agency relationship existed. To the extent you are relying on your host to monitor and maintain your servers, you are more likely to succeed in transferring the litigation to a more preferable location if you can establish that the contractual tasks you have entrusted to the server host are: (1) infrequent; or (2) unrelated or tangential to your core business competencies.