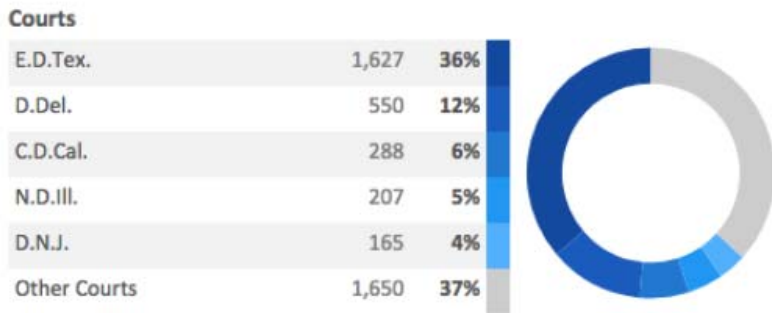
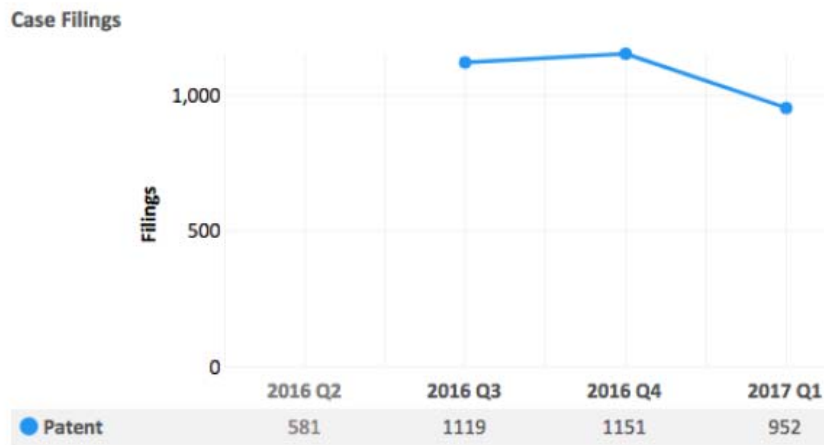


Patent Litigation Venue

Stanford Law/Berkeley Center for Law and Tech
Advanced Patent Law Institute

December 6, 2018

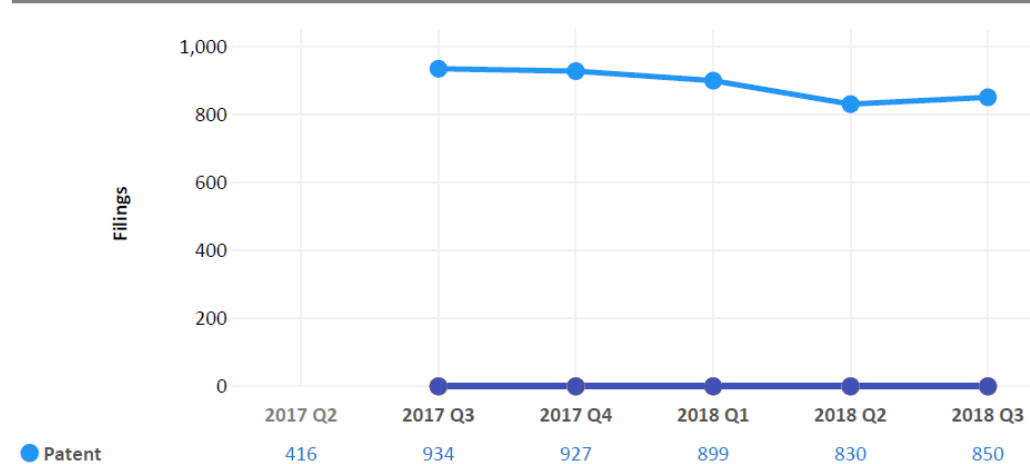
Patent Litigation Venue One Year Before *TC Heartland*



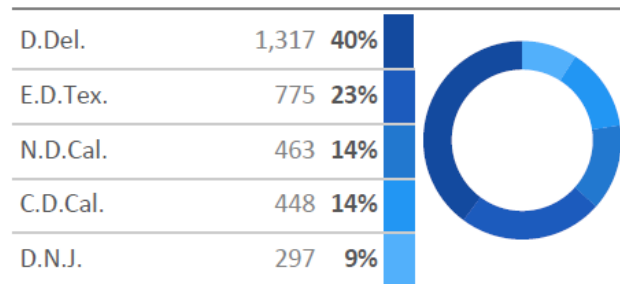
Source: Lex Machina

Patent Litigation Venue After *TC Heartland*

Case Filings (Top 6 by Focus Order)



Courts



District Judges

James Rodney Gilst...	506	15%
Leonard Philip Stark	370	11%
Richard Gibson An...	332	10%
Gregory Moneta Sl...	255	8%
Colm Felix Connolly	217	7%

73 Other Judges

Source: Lex Machina

TC Heartland: Venue Before and After

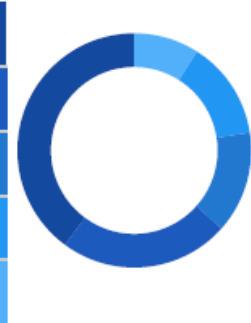
Courts

E.D.Tex.	1,627	36%
D.Del.	550	12%
C.D.Cal.	288	6%
N.D.Ill.	207	5%
D.N.J.	165	4%
Other Courts	1,650	37%



Courts

D.Del.	1,317	40%
E.D.Tex.	775	23%
N.D.Cal.	463	14%
C.D.Cal.	448	14%
D.N.J.	297	9%



Foreign Defendants

Foreign Defendants and Venue

In re HTC Corp., 889 F.3d 1349 (Fed. Cir. 2018) (Prost, Wallach, Taranto)

- HTC Corp., a foreign corporation, sued for patent infringement in District of Delaware; district court found it had venue and HTC Corp. filed a writ of mandamus seeking reversal. *Id.* at 1351.
- Federal Circuit denied writ, reaffirming the “long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special” and thus “a defendant not resident in the United States” may be sued in any judicial district. *Id.* at 1354, 1356.
- The circuit determined that the Federal Courts Jurisdiction and Venue Clarification Act of 2011 had not abrogated that rule. *Id.* at 1356.

Corporate Citizenship

Corporate Citizenship

In re BigCommerce, Inc., 890 F.3d 978, 982 (Fed. Cir. 2018) (Reyna, Linn, and Hughes)

- Held that for purposes of determining venue under § 1400(b) in a state having multiple judicial districts, a corporate defendant shall be considered to “reside” only in the single judicial district within the state where it:
 - (1) maintains a principal place of business, or
 - (2) the judicial district in which its registered office is located.*Id.* at 986.

Place of Business

“Regular and Established Place of Business”

In re Cray Inc., 871 F.3d 1355 (Fed. Cir. 2017) [Sept 21, 2017] [Lourie, Reyna, Stoll]

- Cray incorporated and had PPOB in Washington; it did not rent or own an office in E.D. Tex. but did allow two employees to work remotely from their homes in the district. *Id.*
- District court found this sufficient to establish venue, but Federal Circuit reversed, stating “the regular and established place of business . . . requires more than the minimum contacts necessary for establishing personal jurisdiction or for satisfying the doing business standard of the general venue provision.” *Id.* at 1361
- Required to show “a regular and established place of business”:
 - (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 1360.

“Regular and Established Place of Business”

In re Cray Inc., 871 F.3d 1355 (Fed. Cir. 2017) [Sept 21, 2017] [Lourie, Reyna, Stoll]

- While 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 1362.
- Sporadic or transient activity cannot meet the “regular and established” requirements. *Id.* at 1362-63.
- Finally, the place must be “of the defendant, not solely a place of the defendant’s employees.” *Id.* at 1363.
 - Relevant considerations include whether defendant: owns, leases, or otherwise controls place; conditions employment upon employee working within district; and advertises in the district to suggest the place is that of the defendant. *Id.* at 1364.

“Regular and Established Place of Business”

In re ZTE (USA) Inc., 890 F.3d 1008, 1015 (Fed. Cir. 2018) (Reyna, Linn, Hughes)

- District court denied ZTE’s motion to dismiss for improper venue, holding it failed to meet its burden to show that “partnership” with a call center did not establish a “regular and established place of business.” *Id.*
- Federal Circuit reversed, holding that its law governs the burden of proof re propriety of venue under § 1400(b), and that the burden rests on the *plaintiff*. *Id.* at 1012.
- Circuit also held district court erred in holding that the record established that ZTE had a “regular and establish place of business” in the district, noting that “the district court must give reasoned consideration to all relevant factors or attributes of the relationship” and the “mere presence of a contractual relationship” is not enough. *Id.* at 1015.
- Circuit pointed to several factors identified in *Cray* and directed district court to review them on remand, but recognized that these factors may not apply in “every § 1406 case.” *Id.* at 1015-16, 1016 n.3.

Server-Based Venue?

Served-Based Venue

U.S. District Courts

- Google Global Cache servers do not constitute a regular and established place of business. *Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 934 (E.D. Tex. 2017) (holding that servers are not places).
- Equipment on a shelf is not a regular and established place of business. *See Peerless Network, Inc. v. Blitz Telecom Consulting, LLC*, No. 17-1725, 2018 WL 1478047, at *4 (S.D.N.Y. Mar. 26, 2018) (no employee at location).
- Backup servers on a single, rented rack not a regular and established place of business. Mem. Op. & Order 3-6, *BMC Software, Inc. v. Cherwell Software, LLC*, No. 17-01074 (E.D. Va. Dec. 21, 2017), ECF No. 55

Served-Based Venue

Seven Networks, LLC v. Google LLC, 315 F. Supp. 3d 933, 937 (E.D. Tex. 2018)

- Google Global Cache servers located at ISP facilities within the district constitute a regular and established place of business.
- A server on a rack is a physical place.
- The servers are a place of business because they allow Google to more efficiently serve content to local customers, likening servers to warehouses
- The rack is Google's because it is informed of the server location, the ISP needs permission to move the servers or toggle power, and advertising describes the servers as Google's.

Served-Based Venue

In re Google LLC, No. 2018-152, 2018 WL 5536478, (Fed. Cir. Oct. 29, 2018)

- The Federal Circuit denied Google’s petition for writ of mandamus over Judge Reyna’s dissent.
- The petition presented the question of whether the U.S. District Court for the Eastern District of Texas had venue over a patent infringement action because Google’s Global Cache servers are physically located at third-party internet service provider offices there.
- The Court did not reach the merits of the petition—it denied the petition for failure to meet the requirements for mandamus relief. The Court suggested that a writ might be appropriate after further “percolat[ion].”

TC Heartland: MDL Predictions

Expert Analysis

What *TC Heartland* Could Mean For MDL Panel Patent Cases

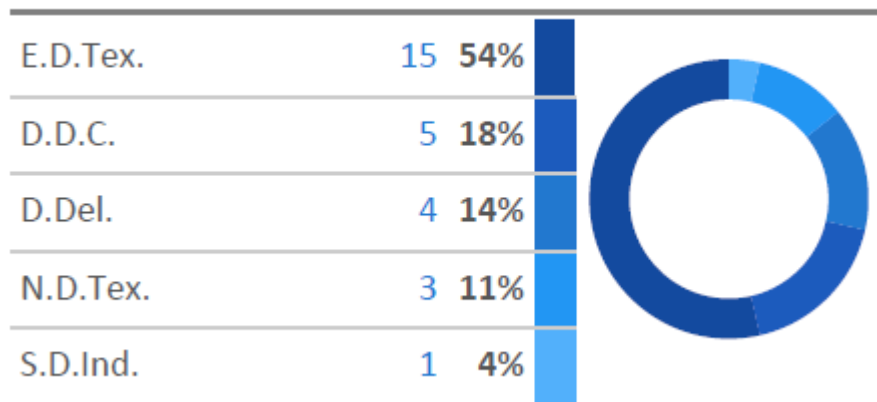
“The *TC Heartland* decision may well spell a significant uptick in patent cases handled by the MDL.”

TC Heartland's Potential Effect – Why the Supreme Court's Decision Matters

A comeback for MDL practice? From the perspective of the patent holder, particularly non-practicing entities, *TC Heartland* will make it more difficult to sue multiple defendants in a single venue. As a result, we may see a rise in the number of cases referred to the Judicial Panel on Multidistrict Litigation (MDL) for pretrial purposes. The MDL panel, however, is not an equal substitute for the freedom to venue-shop that patentees had previously: there is no guarantee that the MDL panel will consolidate a given group of patent cases; and the MDL panel, not the plaintiff, decides where to consolidate them.

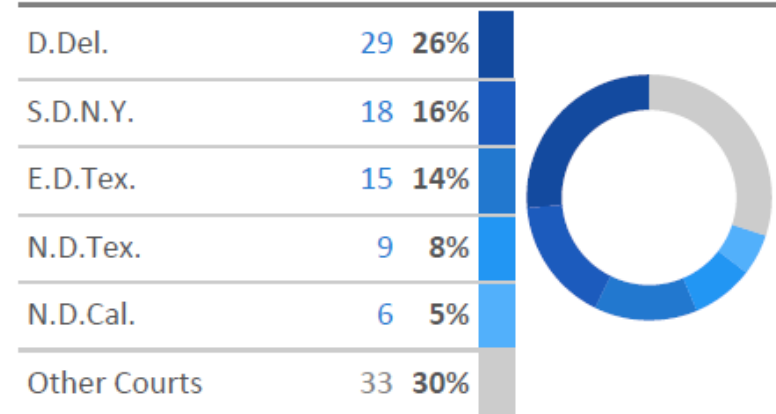
TC Heartland: MDL Before and After

Courts



28 cases

Courts



110 cases

Source: Lex Machina