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The USITC: where patent venue has no name

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Patrick McCarthy

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As the US Supreme Court's TC Heartland ruling continues to reshape the patent litigation landscape, patent owners may start seeking alternatives, including the International Trade Commission, says Patrick McCarthy of Goodwin.

In May 2017 the US Supreme Court's decision in *TC Heartland v Kraft Foods Group Brands* came down. This ruling overturned years of Federal Circuit precedent related to "venue" in patent cases. "Venue" controls which jurisdiction is proper when bringing patent litigation against domestic companies. In the wake of this decision, many cases are being diverted away from perceived patentfriendly courthouses and towards defendants' home turf.

As patent holders explore potential alternatives, they may find that the International Trade Commission (ITC), where venue is of no concern, is best situated to hear their cases.

Over the course of many years, an entire patent litigation ecosystem blossomed in the Eastern of District of Texas. Non-practising entities opened offices. Vendors serviced the daily courtroom flow. Restaurants catered to hungry advocates, and hotels were filled rooms with trial teams. By 2017, virtually all patent litigators in the country were intimately familiar with Marshall—a Texas town two to three hours outside of Dallas with little more than 20,000 residents.

The Eastern District established itself as a "rocket docket" and its jury pools were at least perceived as patent-friendly. As a result, it was by far the busiest patent litigation jurisdiction. The lifeline feeding this growth stemmed from the ease of securing venue there.

Venue analysis relates to domestic companies and is the location(s) where it is statutorily appropriate to bring a litigation. For patent cases, venue is proper "where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business" (28 USC §1400[b]).

Between 1990 and 2017, venue was effectively proper anywhere that a defendant had committed a purportedly infringing act. So, if a defendant did business nationwide, venue was widely available. This interpretation led to cases pouring into the Eastern District of Texas.

Notably, with respect to venue law, the Federal Circuit has clarified that *TC Heartland* only applies to the venue analysis when the named defendant in a patent litigation is a US company. Foreign defendants are not subject to the venue restrictions of *TC Heartland*.

Stemming the flow

In May 2017, however, the Supreme Court stemmed the flow of cases in the Eastern District of Texas. *TC Heartland v Kraft Foods Group Brands* overturned the Federal Circuit's interpretation and effectively found that venue is only proper where a domestic defendant is incorporated or where it has a regular and established place of business. This shift in the law has not reduced the overall volume of patent cases, but it has re-directed them. Generally, more cases are flowing to defendants' home turf.

As shown in Table 1, in the 14 months preceding the *TC Heartland* decision (March 2016 to May 2017), nearly 2,000 patent cases were filed in the Eastern District of Texas. In the 14 months since (June 2017 to August 2018), total case filings are down nearly 70%.

The District of Delaware, where many domestic companies are incorporated, and the Northern District of California, home to Silicon Valley, have both seen nearly double the number of filings.

Table 1: Numbers of patent cases filed in US venues

	Eastern District of Texas	District of Delaware	Northern District of California	US ITC
	Number of cases	**Number of cases**	**Number of cases**	**Number of cases**
March 1, 2016-May 1, 2017	1,969	633	220	68
June 1, 2017-August 1,2018	626	1,025	381	73

Impervious to Venue

One forum that is impervious to venue challenges and, therefore, the *TC Heartland* ruling, is the International Trade Commission (ITC). The ITC is less known, even among seasoned patent litigators, but its authority to hear patent cases stems from section 337 of the Tariff Act of 1930 (19 USC §1337). Section 337 grants the ITC authority to hear unfair competition cases related to imported goods. Patent infringement is explicitly listed as an unfair act within the ITC's purview.

The ITC's jurisdiction to hear cases is different from that of federal district courts. At the ITC, unlike in district court, one need not show jurisdiction over a person or entity. Instead, jurisdiction can rely entirely on the accused product(s). As long as the accused product is imported into the US, the ITC has jurisdiction. In this way, the ITC's reach spans the country's borders and all goods coming in over those borders are subject to its rule.

By virtue of this, the ITC—located in Washington, DC—is a one-of-a-kind venue. Federal district courts are confined in their geographic reach, but the ITC is not. Its geographic scope is nationwide and its rule is more closely tied to the accused product than the accused infringer. Because the ITC is effectively agnostic regarding an accused infringer's location, "venue" is not relevant. As long as there is jurisdiction over the product(s), the litigation proceeds.

Thus, it is not surprising that *TC Heartland* seems to have had minimal effect on the number of filings at the ITC—about 70 cases in the 14 months preceding *TC Heartland* and about 70 in the same period following. If anything, as the aftermath of *TC Heartland* continues to happen, the ITC may experience a higher uptick in filings.

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Indeed, some of the primary draws to the Eastern District of Texas are even more appealing at the ITC. Relative speed of the litigation is appealing to patentees trying to exert pressure on accused infringers. According to a study by Docket Navigator called "2017 Retrospective: Patent Litigation Special Report", the Eastern District has an average time to trial of under three years—as opposed to the national average which extends upwards of four years.

The ITC is even faster, and aggressively so. The ITC rules limit the amount of time that any investigation can last and it results in trial within nine to ten months and a ruling from the presiding administrative law judge (ALJ) within about one year.

The Eastern District of Texas is also favoured by patentees because, according to general perception, it is relatively less likely (than other district courts) to stay proceedings, particularly in view of *inter partes* reexaminations (IPRs). The likelihood of stay is even more remote at the ITC. As many ALJs have pointed out, section 337 itself requires that investigations conclude “at the earliest practicable time.”

Requesting a stay of a section 337 case has proved mostly to be futile. To date, no ITC action has been stayed in view of a pending IPR.

Likewise, whether “patent-friendly” domains actually exist or are just a product of chance, patent holders consistently seek courtrooms that, at least statistically, favour patentees. In 2017, 14 out of 16 ITC cases (nearly 90%) resulted in at least a partial win for the suing party.

Of course, there are distinctions between the ITC and federal district courts that can keep litigants away: claims are adjudicated by an ALJ (and the Commission), not a jury; the relief is injunctive in nature instead of monetary; and the patent owner must establish that it has a domestic industry by way of meaningful relevant investments into the US economy. Additionally, the ITC is still a rather obscure forum even for experienced litigators.

However, as the new venue interpretation pushes litigations to the home turf of potential defendants and courts that are less experienced in patent cases slow down, patent holders may start seeking alternatives. When they do, the ITC may gain more recognition and its appeal as a “venue-less rocket docket” may attract even more litigants.

***Patrick McCarthy** is a partner at Goodwin in Washington, DC. He can be contacted at: pmccarthy@goodwinlaw.com*