

VENUE, THEN OR NOW?: INTERPRETING  
THE PATENT VENUE STATUTE

Alena Farber\*

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I. INTRODUCTION

The rules for venue in patent infringement lawsuits seemed settled for almost thirty years. Congress passed the first patent-specific venue statute and the precursor to 28 U.S.C. § 1400(b) in 1897,<sup>1</sup> but a 1988 amendment to the general venue statute<sup>2</sup> caused patent venue decisions to be made in the same way as in other cases involving corporations.

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1. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695 (codified as amended at 28 U.S.C. § 1400 (2018)).

2. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1013(a), 102 Stat. 4642, 4669 (1988) (codified as amended at 28 U.S.C. § 1391(c)).

For almost thirty years, patent lawsuits could be brought in “any judicial district in which such defendant is subject to the court’s personal jurisdiction.”<sup>3</sup> That is, until 2017, when the Supreme Court decided in *TC Heartland LLC v. Kraft Foods Group Brands*<sup>4</sup> that § 1400(b) is “the sole and exclusive provision controlling venue in patent infringement actions.”<sup>5</sup> Thus, patent suits can be brought only “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”<sup>6</sup>

Since *TC Heartland*, the courts have returned to the same venue regime that was in place for much of the twentieth century and, with it, to the same problems of statutory interpretation. Prior to the 1988 amendment to the general venue statute, courts confronted the question of *when* the defendant must have a “regular and established place of business” in the venue district: at the time of infringement or at the time the lawsuit is filed?<sup>7</sup> That question was moot from 1988 to 2017, but over the past three years it has posed difficulties for district courts in patent cases.<sup>8</sup> Since then, courts have disagreed on the appropriate time to evaluate venue under § 1400(b), but none of the decisions have engaged in a serious analysis of the language of the statute or its legislative history or have given more than a cursory treatment of policy implications under either interpretation.

Given that the Federal Circuit has yet to resolve the issue, it seems likely that the confusion will continue for some time and will lead to inconsistent application of the law.<sup>9</sup> However, despite the ongoing conflict amongst district courts, there has been a dearth of scholarship on the issue. Of the fifty-seven law review articles and notes written about the “regular and established place of business” provision since *TC Heartland* was decided,<sup>10</sup> *none* have focused on when to consider the

3. 28 U.S.C. § 1391(c)(2); *see also infra* Part II.

4. 137 S. Ct. 1514 (2017).

5. *Id.* at 1519 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957)).

6. 28 U.S.C. § 1400(b).

7. *See Welch Sci. Co. v. Human Eng’g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969); *San Shoe Trading Corp. v. Converse Inc.*, 649 F. Supp. 341, 343 (S.D.N.Y. 1986); *Datascope Corp. v. SMEC, Inc.*, 561 F. Supp. 787, 788 (D.N.J. 1983).

8. *See* Section III.B for an overview of cases since 2017 addressing the interpretation of § 1400(b).

9. This is true even among judges on the same court. *Compare Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 787–88 (E.D. Tex. 2017) (holding that place of business must have existed at the time the alleged infringement occurred), *mandamus granted, vacated sub nom. In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017), *with Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 931 (E.D. Tex. 2017) (holding that place of business must exist in the district at the time suit is filed).

10. According to a Westlaw search for “1400(b) ‘regular and established place of business’” conducted on April 24, 2020 and filtered to include only law reviews and journals published after May 22, 2017 (the date of the *TC Heartland* decision).

“place of business” question. This Note argues that courts should adopt a time-of-filing standard, which is better supported by the text and legislative history of § 1400(b).

This Note will proceed in seven parts. Part II will discuss the evolving approaches to patent venue from the enactment of the first patent-specific venue statute in 1897<sup>11</sup> and until the *TC Heartland* decision in 2017. Part III will review the cases that have addressed this question both before the 1988 venue amendments and after the *TC Heartland* decision and will explore trends in the outcomes of those cases. Part IV will closely examine the language and grammar of § 1400(b) and how similar language has been interpreted by the courts in other statutes. Part V will focus on the legislative history of the statute and will discuss how the contemporary committee reports and floor debates better support a time-of-filing standard. Part VI will address policy implications of the two possible approaches, and Part VII will conclude.

## II. A HISTORY OF PATENT VENUE

The patent-specific venue statute has a long and somewhat circuitous history. Throughout the nineteenth century, venue in patent cases was determined using the general venue statute, which caused confusion amongst the federal courts.<sup>12</sup> This confusion led to Congress passing the first patent-specific venue statute in 1897.<sup>13</sup> However, despite there existing a provision specifically for such cases, the correct method of determining patent venue was questioned throughout the twentieth century.

The first major question as to patent venue came in 1942, when the Supreme Court was asked to decide *Stonite Products Co. v. Melvin Lloyd Co.*<sup>14</sup> In *Stonite*, the two co-defendants Lowe Supply Company and Stonite Products were domiciled in the Western and Eastern Districts of Pennsylvania, respectively. The plaintiff filed suit in the Western District, relying on a statute permitting “suits, not of a local nature, against two or more defendants residing in different judicial districts within the same state to be brought in either district.”<sup>15</sup> Because defendant Stonite Products did not have a place of business in the Western

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11. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695 (codified as amended at 28 U.S.C. § 1400).

12. See 29 CONG. REC. 1900 (1897) (statement of Rep. Mitchell) (“Conflicting decisions have even arisen in the different judicial districts in the same States as to the construction of [the] acts of 1887 and 1888, and there is great uncertainty throughout the country as to whether or not the act of 1887 as amended . . . applied to patent cases at all.”).

13. See Part V for more discussion of Congress’s intent in passing a patent-specific venue statute.

14. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

15. *Id.* at 562 (citing 28 U.S.C. § 113 (1940) (repealed 1948)).

District, it moved to dismiss the suit for improper venue. In an extremely short opinion, the Supreme Court held that the predecessor to § 1400(b) was meant to be “the exclusive provision controlling venue in patent infringement proceedings”<sup>16</sup> and that neither the general venue statute nor other venue provisions could apply to patent cases.<sup>17</sup>

After the Judicial Code was recodified as Title 28 of the U.S. Code in 1948,<sup>18</sup> the Court clarified in *Fourco Glass Co. v. Transmirra Products Corp.*<sup>19</sup> that § 1400(b) was still the exclusive venue statute for patent cases.<sup>20</sup> In the decision below, the Second Circuit had relied on § 1400(b) in holding that suit could “be brought in the judicial district where the defendant resides.”<sup>21</sup> However, the Second Circuit went on to hold that the definition of “resides” given in the general venue statute, § 1391, “is properly to be incorporated into other sections of the venue chapter,” including § 1400.<sup>22</sup> The lower court acknowledged but ultimately disregarded the ongoing debate as to whether the 1948 statutory revision was meant to substantively change the law, explaining that it was important to be able to sue a corporation wherever it created a liability, regardless of traditional definitions of residence.<sup>23</sup> The Second Circuit held that Fourco Glass could be considered a resident of the Southern District of New York because: (1) § 1391 stated that a “corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and *such judicial district shall be regarded as the residence of such corporation for venue purposes*”<sup>24</sup>; and (2) Fourco Glass did business in the Southern District.<sup>25</sup> Therefore, venue in the case was proper under § 1400(b).<sup>26</sup>

The Supreme Court disagreed. Despite the intervening enactment of the U.S. Code, the Supreme Court considered the question posed by *Fourco* “not legally distinguishable from the question” in *Stonite*,<sup>27</sup> meaning the only issue left to resolve was whether the 1948 codification of the U.S. Code had substantively changed the meaning of the patent venue statute as the Second Circuit had suggested. Relying on “[s]tatements made by several of the persons having importantly to do

16. *Id.* at 563.

17. *Id.* at 567.

18. Act of June 25, 1948, Pub. L. No. 80-773, 62 Stat. 869 (1948).

19. *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222 (1957).

20. *Id.* at 229.

21. *Transmirra Prods. Corp. v. Fourco Glass Co.*, 233 F.2d 885, 886 (2d Cir. 1956), *rev'd*, 353 U.S. 222 (1957) (quoting 28 U.S.C. § 1400(b) (2018)).

22. *Id.*

23. *Id.* at 887.

24. *Id.* at 886 (quoting 28 U.S.C. § 1391(c) (1952) (emphasis added)).

25. *Id.*

26. *Id.*

27. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 224 (1957).

with the 1948 revision . . . that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed,”<sup>28</sup> the Court held that § 1400(b) was still “the sole and exclusive provision controlling venue in patent infringement actions.”<sup>29</sup>

After the 1957 *Fourco* decision, patent venue issues enjoyed a period of calm until 1988, when the general venue statute was amended to include the phrase “[f]or purposes of venue under this chapter.”<sup>30</sup> In *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Federal Circuit held that this amendment meant that *all* sections of Title 28 Chapter 87 (“District Courts; Venue”) were governed by the definition of “resides” given in § 1391,<sup>31</sup> despite the fact that this interpretation was at odds with both the *Stonite* and *Fourco* decisions. The lower courts dutifully adopted the same interpretation,<sup>32</sup> and this approach to patent venue controlled for almost thirty years.

During this period, courts<sup>33</sup> first looked to the patent-specific venue provision in 28 U.S.C. § 1400(b), which allows (in relevant part) a patent infringement suit to be “brought in the judicial district where the defendant resides.”<sup>34</sup> Then, when determining the place of residence for a corporate defendant, courts<sup>35</sup> looked to the general venue provision in 28 U.S.C. § 1391, which defines residence for corporations as “any judicial district in which such defendant is subject to the court’s personal jurisdiction.”<sup>36</sup> Thus, a plaintiff in a patent infringement suit needed to establish only personal jurisdiction, and therefore a corporation could essentially be sued for patent infringement anywhere it did business.

The Supreme Court first examined this use of § 1391(c) in 2017.<sup>37</sup> In *TC Heartland*, the defendant TC Heartland had argued that the District of Delaware was improper venue under § 1400(b) because TC Heartland was incorporated and headquartered in Indiana and had no “regular and established place of business” in Delaware.<sup>38</sup> Both the

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28. *Id.* at 227.

29. *Id.* at 229.

30. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1013(a), 102 Stat. 4642, 4669 (1988) (codified as amended at 28 U.S.C. § 1391(c) (2018)).

31. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990), *abrogated by* *TC Heartland LLC v. Kraft Foods Grp. Brands*, 137 S. Ct. 1514 (2017).

32. *See, e.g., In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 333 (N.D. Ill. 1990) (citing *VE Holding*, 917 F.2d at 1574).

33. *See, e.g., Helicos Biosciences Corp. v. Illumina, Inc.*, 858 F. Supp. 2d 367, 370 (D. Del. 2012).

34. 28 U.S.C. § 1400(b) (2018).

35. *See, e.g., Helicos Biosciences*, 858 F. Supp. 2d at 370.

36. 28 U.S.C. § 1391(c)(2) (2018).

37. *TC Heartland LLC v. Kraft Foods Grp. Brands*, 137 S. Ct. 1514, 1520 (2017).

38. *Id.* at 1517.

District of Delaware and Federal Circuit held that § 1391(c) supplemented the definition of “resides” under § 1400(b), and therefore both lower courts found against TC Heartland.<sup>39</sup> Meanwhile, TC Heartland continued to rely on the Supreme Court’s prior holding in *Fourco* that § 1400(b) was the only statute to govern venue in patent cases and that it was not supplemented by an earlier version of § 1391(c).<sup>40</sup>

A unanimous Supreme Court held that “the amendments to § 1391 did not modify the meaning of § 1400(b) [and] a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.”<sup>41</sup> The Court noted that there was nothing to indicate that Congress intended the 1988 amendments to alter the meaning of § 1400(b).<sup>42</sup> The argument against incorporating § 1391 was even stronger, the Court reasoned, because § 1391 now included a saving clause and applied “[e]xcept otherwise provided by law.”<sup>43</sup> Thus, § 1400(b) was once again “the sole and exclusive provision controlling venue in patent infringement actions.”<sup>44</sup>

### III. CASES INTERPRETING § 1400(B)

Because § 1400 was infrequently used between 1988 and 2017, there are two discrete time periods during which courts considered the proper interpretation of § 1400(b). First, a series of cases between 1969 and 1986 shows that every court to address the question before the venue amendment had adopted a time-of-infringement standard. Next, a line of cases beginning just after the *TC Heartland* decision documents the courts’ return to the question of how to interpret the statute. Courts today disagree as to the correct interpretation of the “regular and established place of business” requirement, with some holding that the place of business must have existed in the district at the time of the infringement and others requiring the place of business to exist in the district at the time of filing.

#### *A. Interpretation of § 1400(b) Before the 1988 Venue Amendment*

Courts that adopt a time-of-infringement standard focus primarily on equity, and overwhelmingly rely on *Welch Scientific Co. v. Human*

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39. *Id.*

40. *Id.* at 1517.

41. *Id.*

42. *Id.* at 1520.

43. *Id.* at 1521 (quoting 28 U.S.C. § 1391(a) (2012)).

44. *Id.* at 1519 (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957)).

*Engineering Institute, Inc.*,<sup>45</sup> the first case to consider the issue. In *Welch*, the Seventh Circuit considered a case in which the lawsuit was not filed until thirty-seven days after the alleged infringer stopped doing business in the district.<sup>46</sup> The defendant had won a motion for summary judgment<sup>47</sup> based on the argument that venue was improper because “he did not have a regular and established place of business at the time the suit was filed,”<sup>48</sup> but the Seventh Circuit reversed the district court’s decision, holding that “venue is properly lodged in the district if the defendant had a regular and established place of business at the time the cause of action accrued and suit is filed *within a reasonable time thereafter*.”<sup>49</sup> While the court did discuss why such a construction was not an expansion of patent venue jurisdiction forbidden by *Fourco*,<sup>50</sup> it gave only minimal attention to justifying its interpretation of § 1400(b). The court cited neither cases nor legislative history to support its interpretation<sup>51</sup> and said only that “a defendant cannot establish a business in a particular judicial district and then abandon or sell it without remaining amenable to suit for venue purposes in that district for a reasonable time,”<sup>52</sup> suggesting that the court’s decision was based in equity.

Prior to the 1988 amendment to § 1391, only two more cases addressed the correct interpretation of § 1400(b), and both adopted the reasoning of the *Welch* court. The District of New Jersey relied on *Welch* to adopt a time-of-accrual standard.<sup>53</sup> The only other case to consider the “place of business” requirement before the 1988 amendment was one in which a Massachusetts corporation was sued in New York after it had closed its only New York facility.<sup>54</sup> The Southern District of New York agreed with the reasoning of the *Welch* court, reiterating that “once a defendant has availed himself of the benefits of doing business in a district, he should not be able to retreat to his home forum

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45. *Welch Sci. Co. v. Human Eng’g Inst., Inc.*, 416 F.2d 32 (7th Cir. 1969). This decision predates the creation of the Federal Circuit in 1982. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

46. *Welch*, 416 F.2d at 36.

47. *Id.* at 33.

48. *Id.* at 35.

49. *Id.* (emphasis added).

50. *Id.* at 35–36 (citing *Fourco Glass Co. v. Transmira Prods. Corp.*, 353 U.S. 222 (1957)).

51. The Seventh Circuit did note that “[t]he federal courts are divided as to the [correct time to determine venue] under section 1391(c),” *id.* at 35 n.2, but cited no authority addressing § 1400(b) specifically.

52. *Id.* at 36.

53. *Datascope Corp. v. SMEC, Inc.*, 561 F. Supp. 787, 789–90 (D.N.J. 1983). The court made this holding explicit despite the fact that the defendant did reside in New Jersey when the original suit was filed, and only left the state while a motion for permission to file an amended complaint was pending. *Id.* at 790.

54. *San Shoe Trading Corp. v. Converse Inc.*, 649 F. Supp. 341, 342–43 (S.D.N.Y. 1986).

simply by closing up shop before plaintiff has an opportunity to file a complaint.”<sup>55</sup> The court acknowledged that the defendant’s most compelling argument was based on the text, and in particular the verb tenses, of the statute.<sup>56</sup> However, the Southern District ultimately decided that the defendant’s argument went too far.<sup>57</sup> The court held that “Congress’s objectives would better be served by holding that venue is determined at the time the claim accrues,” because “[a]bsent further support in the legislative history, the court is unconvinced that Congress chose its words with the question we are faced with in mind.”<sup>58</sup> Yet despite its reference to the legislative history of the statute, the court did not cite any materials from committee reports or floor debate to support its preferred interpretation.

#### *B. Interpretation of § 1400(b) After TC Heartland*

After the Supreme Court instructed the lower courts to use § 1400(b) as “the sole and exclusive provision controlling venue in patent infringement actions,”<sup>59</sup> the district courts quickly divided on the correct time frame for assessing venue under the statute. While some courts continued down *Welch*’s path, others relied on the language of the statute to come up with a stricter interpretation. Still others avoided the question, seemingly waiting for the Federal Circuit to take up the issue and resolve the confusion.

Although the Federal Circuit has yet to definitively rule on the issue, a decision from February of 2020 seems to invite a case that would give them the opportunity to do so. The court’s decision did not require any discussion of when venue must be evaluated, and yet the Federal Circuit went out of its way to mention the conflict.<sup>60</sup> Even though the defendant conceded that its post-filing actions did not impact venue and the court, by its own admission, “need not decide the correct standard,” the Federal Circuit still noted that “regional circuits appear to be split on the exact timing for determining venue” and discussed the two main approaches.<sup>61</sup> Nevertheless, because the Federal Circuit has yet to resolve the question, the district courts must decide between various persuasive cases but no binding precedent.

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55. *Id.* at 344.

56. *Id.* at 345.

57. *Id.*

58. *Id.*

59. *TC Heartland LLC v. Kraft Foods Grp. Brands*, 137 S. Ct. 1514, 1519 (2017) (quoting *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957)).

60. *In re Google LLC*, 949 F.3d 1338, 1340 n.1 (Fed. Cir. 2020).

61. *Id.*



1. The Time-of-Accrual Rule: *Welch*'s Progeny

Several cases addressing the venue timing question since 2017 have simply adopted the holdings of the pre-1988 *Welch* line of cases. The first court to adopt the *Welch* holding was the Eastern District of Texas when it decided *Raytheon Co. v. Cray, Inc.*, in which the court noted that, while “[f]ew courts have considered the proper time period for assessing whether a defendant has a regular and established place of business in the district, . . . each one has reached the same conclusion.”<sup>62</sup> Although *Raytheon* was overturned on other grounds,<sup>63</sup> it was far from the last case to adopt the *Welch* holding. Just a month after *Raytheon* was decided, the Northern District of California used almost the same logic as the *Raytheon* court to adopt the time-of-accrual rule:

Although few courts have considered the proper time frame for assessing whether a defendant has a “regular and established place in a district,” the courts that have examined this issue held that the critical time period is when the claim has accrued if the “suit is filed within a reasonable time thereafter.”<sup>64</sup>

Similar decisions in the Southern District of California,<sup>65</sup> Middle District of North Carolina,<sup>66</sup> District of Maine,<sup>67</sup> and Northern District

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62. *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 787 (E.D. Tex. 2017) (adopting the holding of *Welch Sci. Co. v. Human Eng'g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969)), *vacated on other grounds sub nom. In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017).

63. *See In re Cray Inc.*, 871 F.3d at 1364–67.

64. *Free-Flow Packaging Int'l, Inc. v. Automated Packaging Sys., Inc.*, No. 17-CV-01803-SK, 2017 WL 4155347, at \*4 (N.D. Cal. Aug. 29, 2017) (quoting *Welch*, 416 F.2d at 35).

65. *Genentech, Inc. v. Eli Lilly & Co.*, No. 18CV01518JLSJLB, 2019 WL 1923087, at \*4 n.7 (S.D. Cal. Apr. 29, 2019) (“Courts in this District have adopted the view that ‘under the patent venue statute, venue is properly lodged in the district if the defendant had a regular and established place of business at the time the cause of action accrued and suit is filed within a reasonable time thereafter.’” (quoting *Wi-LAN Inc. v. Lenovo (U.S.), Inc.*, No. 17CV365-BEN-MDD, 2017 WL 3194692, at \*3 (S.D. Cal. July 27, 2017))); *Wi-LAN Inc.*, 2017 WL 3194692, at \*3 (“Regardless, this Court adopts the view that ‘under the patent venue statute, venue is properly lodged in the district if the defendant had a regular and established place of business at the time the cause of action accrued and suit is filed within a reasonable time thereafter.’” (quoting *Welch*, 416 F.2d at 35)).

66. *Precision Fabrics Grp., Inc. v. Tietex Int'l, Ltd.*, No. 1:13-CV-645, 2017 WL 5176355, at \*10 n.15 (M.D.N.C. Nov. 7, 2017) (“This inquiry is properly limited to the time the cause of action accrued and a reasonable time thereafter.” (citing *Wi-LAN Inc.*, 2017 WL 3194692, at \*3)).

67. *Presby Patent Tr. v. Infiltrator Water Techs., LLC*, No. 2:17-CV-00068-JAW, 2017 WL 5895127, at \*4 (D. Me. Nov. 29, 2017) (“Although few courts have considered the proper time frame for assessing whether a defendant[ ] has a ‘regular and established place in a district,’ the courts that have . . . held that the critical time period is when the claim has accrued if the ‘suit is filed within a reasonable time thereafter.’” (quoting *Free-Flow Packaging Int'l, Inc.*, 2017 WL 4155347, at \*4)).

of Illinois<sup>68</sup> also relied upon the Seventh Circuit’s pronouncement in *Welch*, and none of the lower courts closely analyzed the statutory language or cited any materials from the legislative history of the statute to support their positions.

It seems that the Federal Circuit, however, is not convinced by *Welch*’s rationale. When the court mentioned the conflict over when to determine venue, it cited the Seventh Circuit’s decision in *Welch* as the main example of the time-of-accrual standard and the Eleventh Circuit’s decision in *Flowers Industries, Inc. v. FTC* as the main example of the time-of-filing rule.<sup>69</sup> *Flowers* dealt with the general venue statute, § 1391, and was not even a patent case.<sup>70</sup> The fact that the Federal Circuit put *Welch*’s interpretation of § 1400(b) on equal footing with a case arising in a completely different context suggests that the court may be open to a time-of-filing rule.

## 2. The Time-of-Filing Rule: Adherence to the Text

A similar number of cases have concluded that, based on the language of the statute, venue must be assessed at the time of filing. In *Personal Audio, LLC v. Google, Inc.*, the Eastern District of Texas said that its narrow reading of § 1400(b) was “supported by a consistent chain of strict interpretations . . . by the Supreme Court”<sup>71</sup> and by a Federal Circuit decision that “stress[ed] that the [venue] analysis must be closely tied to the language of the statute.”<sup>72</sup> The *Personal Audio* court closely considered the language, and especially the verb tenses, of § 1400(b) and noted that while “[t]he phrase ‘the defendant has committed acts’ applies to past acts[,] . . . the phrase ‘where the defendant has a regular and established place of business’ is in the present tense.”<sup>73</sup> Reasoning that “Congress could have used [the language] ‘has had a regular and established place of business’ but chose not to do so,” the court concluded that the “regular and established place of business” must exist at the time the suit is filed.<sup>74</sup>

Several other cases have relied on *Personal Audio* to adopt a time-of-filing rule. The Eastern District of California agreed that “[v]enue in

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68. *Motorola Sols., Inc. v. Hytera Commc’ns Corp. Ltd.*, 402 F. Supp. 3d 450, 455–56 (N.D. Ill. 2019) (relying on the time-of-accrual rule to find venue proper when there was no place of business until *after* suit was filed).

69. *In re Google LLC*, 949 F.3d 1338, 1340 n.1 (Fed. Cir. 2020) (citing *Welch*, 416 F.2d at 35; and *Flowers Indus., Inc. v. FTC*, 835 F.2d 775, 776 n.1 (11th Cir. 1987)).

70. *Flowers Indus.*, 835 F.2d at 776.

71. *Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 931 (E.D. Tex. 2017) (citing *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942)).

72. *Id.* at 930 (quoting *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017)).

73. *Id.*

74. *Id.* (emphasis added).

a patent infringement case is analyzed as of the date the suit was filed.”<sup>75</sup> The Central District of California also relied on *Personal Audio* when it held that a merger which occurred after a suit was filed did not make venue proper.<sup>76</sup> An Eastern District of Texas judge who did not decide *Personal Audio* agreed with his colleague that “[c]ourts determine venue under § 1400(b) by the facts and situation as of the date suit is filed.”<sup>77</sup> The Southern District of New York adopted a time-of-filing rule based partially on the *Personal Audio* decision and partially on the Federal Circuit’s guidance that “venue determinations ‘must be closely tied to the language of the statute,’”<sup>78</sup> which the Southern District felt would be better served by a time of filing rule.<sup>79</sup> The Eastern District of New York followed the Southern District and also adopted a time-of-filing rule.<sup>80</sup>

An extremely limited number of cases, including some of those discussed above, have adopted a time-of-filing rule based on Supreme Court and Federal Circuit cases that dealt with venue more generally. In adopting the time-of-filing rule, the Southern District of New York clearly stated that it was applying the same principle used for § 1391 to the patent venue statute.<sup>81</sup> And even before the *TC Heartland* decision, the Eastern District of Texas held in a prior § 1400(b) case that “the relevant inquiry is whether jurisdiction and venue existed at the time [the] action was filed.”<sup>82</sup> In so holding, the Eastern District cited *Hoffman v. Blaski*, a Supreme Court case addressing a transfer which mentioned § 1400(b) only in passing. Similarly, the Eastern District of Texas decision mentioned in the previous paragraph partially relied on a Federal Circuit case that held that “[m]otions to transfer venue are to

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75. *Anza Tech., Inc. v. Toshiba Am. Elec. Components, Inc.*, No. 2:17-cv-01688-WBS-DB, 2017 WL 6538994, at \*2 (E.D. Cal. Dec. 21, 2017) (citing *Pers. Audio*, 280 F. Supp. 3d at 931).

76. *Int’l Techs. & Sys. Corp. v. Samsung Elecs. Co. Ltd*, No. SACV171748DOCJDEX, 2018 WL 4963129, at \*6 n.2 (C.D. Cal. June 22, 2018) (citing *Pers. Audio*, 280 F. Supp. 3d 922).

77. *Godo Kaisha IP Bridge 1 v. Intel Corp.*, No. 2:17-cv-00676-RWS-RSP, 2018 WL 5728524, at \*2 (E.D. Tex. Aug. 29, 2018) (citing *Pers. Audio*, 280 F. Supp. 3d at 931).

78. *NetSoc, LLC v. Chegg Inc.*, No. 18-CV-10262 (RA), 2019 WL 4857340, at \*2 (S.D.N.Y. Oct. 2, 2019) (quoting *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017)).

79. *Id.*

80. *Uni-Sys., LLC v. U.S. Tennis Ass’n Nat’l Tennis Ctr. Inc.*, No. 17-CV-147(KAM)(CLP), 2020 WL 1694490, at \*7 (E.D.N.Y. Apr. 7, 2020) (citing *NetSoc*, 2019 WL 4857340, at \*2).

81. *NetSoc*, 2019 WL 4857340, at \*2.

82. *Adaptix, Inc. v. HTC Corp.*, 937 F. Supp. 2d 867, 872 (E.D. Tex. 2013) (citing *Hoffman v. Blaski*, 363 U.S. 335, 344 (1960)).

be decided based on ‘the situation which existed when suit was instituted.’”<sup>83</sup> That Federal Circuit case also dealt with transfer and itself cited *Hoffman*.<sup>84</sup> However, very few cases have relied on the *Hoffman* line of cases. The unpopularity of this approach is likely because *Hoffman*, which considered the venue question in the context of a transfer,<sup>85</sup> focused on how to determine alternative venues and addressed the question of timing somewhat in passing. Therefore, courts may find *Hoffman* to be less relevant to the current confusion about § 1400(b).

### 3. Avoiding the Issue

Some courts have declined to consider the question, choosing instead to wait until a higher court rules on it. A 2018 decision from the Eastern District of Pennsylvania considered the *Welch* holding and decided that because “this rule has not been adopted by the Third Circuit . . . this Court declines the invitation to apply said ruling in this patent case.”<sup>86</sup> Even the *Personal Audio* court, which opted for a time-of-filing interpretation, admitted that, “[f]rom the point of view of a court in equity, [the time-of-accrual] interpretation seems reasonable and fair” but decided that “[w]hether it is a correct view of statutory construction to hold that there is some equitable leeway in § 1400(b) will have to be decided by a higher court.”<sup>87</sup>

Finally, still other courts have attempted to sidestep the question by focusing on what constitutes a “reasonable time” for suit to be filed after the cause of action accrued. For example, the Middle District of Florida considered cases from both the time-of-accrual line and the time-of-filing line, but noted that “[e]ven in *Personal Audio* . . . the court’s determination of venue appears to be based, at least in part, on the unreasonableness of the delay between the termination of a regular and established place of business and the filing of the lawsuit.”<sup>88</sup> Relying on this interpretation of *Personal Audio* and on the highly fact-specific nature of evaluating regular and established places of business,<sup>89</sup>

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83. *Godo Kaisha IP Bridge 1 v. Intel Corp.*, No. 2:17-cv-00676-RWS-RSP, 2018 WL 5728524, at \*3 (E.D. Tex. Aug. 29, 2018) (quoting *In re EMC Corp.*, 501 F. Appx. 973, 976 (Fed. Cir. 2013)).

84. *In re EMC Corp.*, 501 F. Appx. at 976 (quoting *Hoffman*, 363 U.S. at 343).

85. *Hoffman*, 363 U.S. at 336.

86. *Infinity Comput. Prods., Inc. v. OKI Data Ams., Inc.*, No. 2:12-cv-06797-LDD, 2018 WL 1035793, at \*10 (E.D. Pa. Feb. 23, 2018).

87. *Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 931 (E.D. Tex. 2017).

88. *ParkerVision, Inc. v. Apple, Inc. (ParkerVision II)*, No. 3:15-cv-01477-BJD-JRK, 2018 WL 5084662, at \*9 (M.D. Fla. Mar. 8, 2018) (citing *Pers. Audio*, 280 F. Supp. 3d at 933).

89. *Id.* (quoting *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017)) (applying the Federal Circuit’s instruction to a new context); *see also In re Cray Inc.*, 871 F.3d at 1362 (discussing what constitutes a “regular and established place of business”).

the court found that venue was proper because the plaintiff's several week delay was much closer to the thirty-seven days in *Welch* than to the twenty-one months in *Personal Audio*.<sup>90</sup> The Central District of California also discussed both lines of cases but held that there was no need to choose between the time-of-accrual and time-of-filing rules because the plaintiffs had not even attempted to show that their six-month delay was reasonable under *Welch*.<sup>91</sup> Similarly, the Eastern District of Texas declined to choose between *Welch* and *Personal Audio* in a case where the plaintiffs had not shown that their four-month delay was a reasonable one.<sup>92</sup>

\* \* \*

Although at least twenty-one different cases have considered the issue of when a “regular and established place of business” must exist to satisfy the requirements of § 1400(b), none of these cases has conducted the in-depth statutory interpretation analysis that one would expect. While the *Personal Audio* court did examine the grammar and language of the text,<sup>93</sup> it did not take into account the interpretation of other statutes with the same grammatical construction. Nor did any of the cases consider the legislative history of the statute, congressional intent in enacting it,<sup>94</sup> or any potential policy concerns. This Note undertakes that analysis.

#### IV. LANGUAGE OF § 1400(B)

The grammar and verb tenses of § 1400(b) support a time-of-filing standard. The Supreme Court has instructed that in matters of statutory interpretation one must examine “Congress’ choice of verb tense to ascertain a statute’s temporal reach.”<sup>95</sup> The verb tenses used in § 1400(b) clearly indicate that the acts of infringement and existence of a regular and established place of business do not need to coincide temporally:

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90. *Id.*

91. *Incipio, LLC v. Argento SC by Sicura Inc.*, No. 8:17-cv-01974-AG-KES, 2018 WL 4945002, at \*5 (C.D. Cal. July 18, 2018).

92. *Level Sleep LLC v. Dormeo N. Am., LLC*, No. 2:18-cv-00120-RWS, 2019 WL 458467, at \*3 (E.D. Tex. Feb. 1, 2019).

93. *See Pers. Audio*, 280 F. Supp. 3d at 930.

94. The *Welch* court did mention that “[t]he purpose of this special patent venue statute was to avoid the interpretation then being given to the general venue statute which allowed a defendant in a patent infringement action to be sued wherever he could be found.” *Welch Sci. Co. v. Human Eng’g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969) (citing *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942)). However, based on the committee report and floor debate at the time of enactment, it seems unlikely that this was the sole, or even primary, purpose of the patent venue statute. *See infra* Part V.

95. *Carr v. United States*, 560 U.S. 438, 448 (2010).

“Any civil action for patent infringement *may be brought* in the judicial district where the defendant *resides*, or where the defendant *has committed* acts of infringement and *has* a regular and established place of business.”<sup>96</sup> The actual bringing of the lawsuit is referred to in the present tense, as are the residence requirement and the existence of the place of business. Congress, courts, and legal scholars all agree on the possible meanings of the present tense: “words used in the present tense include the future as well as the present,”<sup>97</sup> so “[b]y implication . . . the present tense generally does not include the past.”<sup>98</sup> Therefore, using the present tense to refer to each of these actions suggests that the residence requirement and the existence of the place of business are to be evaluated at the time that the lawsuit is filed.<sup>99</sup>

Conversely, the infringing acts and the place of business are referred to using two *different* tenses: “has committed acts of infringement” is in the present perfect tense,<sup>100</sup> while “has a regular and established place of business” is in the present tense. The Supreme Court has held that Congress’s use of the present and present perfect tenses in one statute “is significant and demonstrates that Congress carefully distinguished between present status and a past event.”<sup>101</sup> It is notable that Congress chose to refer to the place of business in the present tense because “Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option.”<sup>102</sup>

Thus, the text of the statute clearly supports a time-of-filing rule for determining venue. The Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there [and that w]hen the

96. 28 U.S.C. § 1400(b) (2018) (emphasis added).

97. 1 U.S.C. § 1 (2018).

98. *Carr*, 560 U.S. at 448; see also *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (reasoning that “the undeviating use of the present tense strongly suggests: the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past”); *Sherley v. Sebelius*, 644 F.3d 388, 394 (D.C. Cir. 2011) (“The use of the present tense in a statute strongly suggests it does not extend to past actions.”); Robert C. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 *LOY. U. CHI. L.J.* 1, 19 (2008) (“The simple present tense refers to action going on at the present time or habitually occurring absent some other reason to do otherwise.”).

99. See *United States v. Jackson*, 480 F.3d 1014, 1020 (9th Cir. 2007) (“[B]ecause Congress used the *same* tense in both elements, we give both the same temporal reach.”).

100. See *generally Present Perfect*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/present%20perfect> [https://perma.cc/V259-LWSU].

101. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983).

102. *Gwaltney*, 484 U.S. at 57. For another example of the Court drawing this distinction, see *Barrett v. United States*, in which the Court considered 18 U.S.C. § 922(g)–(h) (2018) and noted “that while the proscribed act, ‘to receive any firearm,’ is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed.” 423 U.S. 212, 216 (1976).

words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”<sup>103</sup> Nevertheless, the limits on verb tense construction in the Dictionary Act only apply “unless the context indicates otherwise.”<sup>104</sup> Here, however, the legislative history and plain text of the statute support the same rule: that a time-of-filing interpretation is correct.

## V. LEGISLATIVE HISTORY

The patent venue statute was first enacted in 1897 and originally provided:

That in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.<sup>105</sup>

Although the patent venue statute has undergone minor changes since it was first enacted in 1897, none have altered the central purpose

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103. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461–62 (2002) (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

104. 1 U.S.C. § 1 (2018).

105. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695 (codified as amended at 28 U.S.C. § 1400 (2018)). While the original version of the statute referred to “jurisdiction” and not “venue,” the Supreme Court treated the statute as applying to venue for patent cases and held that federal courts derived jurisdiction over patent cases from a different statute. *See, e.g.*, *Gen. Elec. Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 434–35 (1932) (“Section 24(7) of the Judicial Code [(codified as amended at 28 U.S.C. § 1338)] is the source from which District Courts derive jurisdiction of cases arising under the patent laws. . . . Section 48 [now § 1400(b)] relates to venue.”); *see also* *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942) (holding that “Section 48 is the exclusive provision controlling venue in patent infringement proceedings”); *Am. Chem. Paint Co. v. Dow Chem. Co.*, 161 F.2d 956, 958 (6th Cir. 1947) (relying on section 24(7) of the Judicial Code, now § 1338, for jurisdiction in a patent infringement case). Congress approved this interpretation when it revised Title 28, choosing to place § 1400 in Chapter 87: “District Courts; Venue.” Act of June 25, 1948, Pub. L. No. 80-773, ch. 87, 62 Stat. 869, 935–36 (codified as amended at 28 U.S.C. § 1400). Given this interpretation, this Note will discuss the 1897 Act as it relates to venue, not jurisdiction.

of the statute. In 1911, the patent venue statute was incorporated into the new Judicial Code, but the text of the law remained largely unchanged.<sup>106</sup> Even the major revision to the U.S. Code in 1948 brought only minor changes to the patent venue statute, leaving the key operational language largely the same.<sup>107</sup> Therefore, Congress's original intent in enacting the law in 1897 should still apply to the interpretation of the amended law today.

Congress had two goals when it enacted the 1897 Act: to resolve disagreement amongst the courts as to whether the general venue statute applied to patent cases and to facilitate service of process for patent cases. The committee report on the bill explicitly stated that the purpose of the bill was to eliminate confusion among the lower courts and choose between conflicting approaches to patent venue.<sup>108</sup> During House debate, Representative Mitchell reiterated that there was uncertainty among the courts as to how venue and jurisdiction were to be decided in patent cases, and that the bill was intended to remove such uncertainty.<sup>109</sup> The Supreme Court confirmed such an interpretation in 1942, when it held that "[t]he Act of 1897 was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887 as amended to such litigation."<sup>110</sup> Therefore, it is clear that Congress enacted a specific patent venue statute to resolve the confusion amongst the courts.

The specific provisions of the patent venue statute were carefully chosen to facilitate service of process in patent cases, which can be seen in the structure of the statute, in commentary on the bill, and during floor debates. The statute not only provided for venue where the defendant "shall have committed acts of infringement and have a regular and established place of business" but also allowed "service of process, summons, or subpoena . . . by service upon the agent . . . engaged in conducting such business in the district in which suit is brought."<sup>111</sup>

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106. Congress changed only "circuit courts" to "district courts." *Compare* Act of Mar. 3 1897, ch. 395, 29 Stat. 695, with Judicial Code of 1911, Pub. L. No. 61-475, § 48, 36 Stat. 1087, 1100.

107. *Compare* § 48, 36 Stat. at 1100, with § 1400, 62 Stat. at 936.

108. H.R. REP. NO. 54-2905, at 1 (1897) ("This bill seeks to define the jurisdiction of the courts in patent suits and to remove the uncertainty which now arises as to such jurisdiction by reason of the conflicting decisions of the various circuit courts.").

109. 29 CONG. REC. 1009, 1900 (1897) ("[T]here is great uncertainty throughout the country as to whether or not the [general venue statutes] applied to patent cases at all. The bill is intended to remove this uncertainty and to define the exact jurisdiction of the circuit courts in these matters.").

110. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 565 (1942).

111. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695, 695-96. The venue and service provisions were separated into two sections of Title 28 during the 1948 enactment of the U.S. Code. *See* H.R. REP. NO. 80-308, at A131 (1947) ("The provisions of section 109 of title 28, U.S.C.,



The report of the House Committee on Patents explained that the bill “facilitates the bringing of suits in the place of business of the parties interested.”<sup>112</sup> The only background information given in the Senate was by the chairman of the Senate Committee on Patents, who stated that, under the old regime, “it [was] very inconvenient to travel across the continent to sue [an infringer in the place of incorporation] when they are infringing in a business established near the plaintiff” and that “all there is about this bill is that it authorizes suit to be brought against an infringer in the place where the business is carried on and service to be made upon an agent in the case of a corporation.”<sup>113</sup>

These statements made during debate in the Senate cast significant doubt on the *Welch* court’s conclusion that “[t]he purpose of this special patent venue statute was to avoid the interpretation then being given to the general venue statute which allowed a defendant in a patent infringement action to be sued wherever he could be found.”<sup>114</sup> Rather, these statements suggest that the intent was to facilitate service upon defendants who are not incorporated in the state where they primarily do business. The congressional aim of facilitating service is best served by evaluating venue at the time of filing, since that is the only way to guarantee appropriate service of process.

Some Congressmen, including Representative Lacey, who first introduced the bill, did suggest that the bill would allow suits to be brought where the infringement occurred. During floor debate of the bill, Rep. Lacey explained that it made sense to have the trial in the same place as the transaction at issue<sup>115</sup> and agreed with another Congressman’s analogy to punishing someone in the same place they committed a crime.<sup>116</sup> However, it seems that the members of Congress in 1897 considered places of business to be permanent and did not anticipate companies that would operate several offices around the country. When he first introduced the bill, Rep. Lacey explained that “[t]he main purpose of the bill is to give original jurisdiction to the court where a

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1940 ed., relating to process are incorporated in section 1694 of this title.”); *see also* 28 U.S.C. §§ 1400(b), 1694 (2018). The two provisions were separated because Congress chose to create separate chapters for venue and process during the revision. *See* ch. 87, 62 Stat. 869 at 935–37 (venue); ch. 113, 62 Stat. 869 at 945 (process).

112. H.R. REP. NO. 54-2905, at 1.

113. 29 CONG. REC. 2719.

114. *Welch Sci. Co. v. Human Eng’g Inst., Inc.*, 416 F.2d 32, 35 (7th Cir. 1969) (citing *Stonite*, 315 U.S. 561).

115. *See* 29 CONG. REC. 1902 (statement of Rep. Lacey) (asking rhetorically “[w]hy not have the trial where the transaction occurs?”).

116. *See id.* (statement of Rep. Dalzell) (asking rhetorically “[w]hy not have a man punishable at the place where he commits the wrong?”).

permanent agency transacting the business is located.”<sup>117</sup> Similarly, after mentioning “the place where the transaction occurs,” Rep. Lacey clarified that the law would only apply to “the *permanent* place of business, or where the business is in existence.”<sup>118</sup> Moreover, even the Congressmen who wanted to allow suits to be brought where the infringement occurred were primarily concerned about difficulties with trial logistics and expenses.<sup>119</sup> The enacting Congress’s concerns about costly litigation would only be alleviated if the statute were read to require a place of business in the district when the case is filed.<sup>120</sup> Thus, Congress’s primary goal was to prevent companies from escaping litigation merely because they were incorporated far from their permanent place of operation. Assessing venue at the time of filing would best serve the 1897 Congress’s goal of facilitating suit and service.

## VI. POLICY IMPLICATIONS

While the plain text and legislative history of § 1400(b) both point toward a time-of-filing rule, they also suggest that Congress did not conceive of anything resembling our modern economy. The 1897 Congress was concerned about businesses headquartered on the East Coast but doing business in the Midwest,<sup>121</sup> but made no mention of businesses that might operate multiple satellite offices which open and close over time. To evaluate which approach would lead to better results today, one must start with first principles. Such an examination suggests that a time-of-filing standard would be more predictable and easier for the courts to administer, as well as more likely to discourage forum shopping in patent litigation.

### *A. Ease of Enforcement and Predictability*

A time-of-filing standard would be significantly easier for courts to administer and would lead to more consistent results across district courts — and even across judges in the same district. After the Seventh Circuit held that thirty-seven days constituted a reasonable delay in

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117. *Id.* at 1900.

118. *Id.* at 1902 (emphasis added).

119. *See, e.g., id.* (statement of Rep. Lacey) (expressing concern about “hardship by reason of the expense that it would cause of having to take depositions or transport witnesses a thousand miles in the trial”).

120. Although modern-day travel may be less expensive and tedious, the intent of the enacting Congress controls. *See Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

121. *See* 29 CONG. REC. 1902.

*Welch*,<sup>122</sup> subsequent courts were left to engage in arbitrary line-drawing exercises to determine what constitutes a “reasonable amount of time” after the cause of action accrued. For example, both the magistrate judge<sup>123</sup> and the district judge<sup>124</sup> in *ParkerVision, Inc. v. Apple Inc.* decided that a two- to six-week delay between the defendant’s office being closed and the complaint being filed was reasonable enough that the case should not be transferred. The district judge in particular compared these facts to those of previous cases, noting that the “two- to six-week delay in filing suit . . . is at most five days more than the 37-day delay in *Welch*, and much less than the 21-month delay in *Personal Audio*.”<sup>125</sup> While the facts in *ParkerVision* may have lent themselves well to such explicit comparison, a case with a two- to six-month delay in filing would have been much more difficult to resolve with simple analogy.

The Central District of California had to decide such a case when it was presented with a nine-month delay between the Defendants’ place of business in the district closing and the filing of the lawsuit.<sup>126</sup> While the court transferred the case, it did not do so based on an explicit finding that the nine-month delay was unreasonable. Rather, the court seems to have transferred the case in large part due to inadequate argument by the plaintiff.<sup>127</sup> The Eastern District of Texas also heard a case in which the plaintiffs failed to adequately establish that their delay in filing should be considered reasonable. In that case, the court found venue improper because “Plaintiffs [had] not established that Defendants should be held amenable to suit four months after their lease in this district expired.”<sup>128</sup> This repeated failure by plaintiffs to fully brief the issue suggests that plaintiffs either do not realize that they need to establish how long of a delay is reasonable, or that they do not know how to establish such a thing. In either case, such ignorance on the part of the plaintiffs speaks to a lack of clarity in how the courts have resolved

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122. *Welch Sci. Co. v. Human Eng’g Inst., Inc.*, 416 F.2d 32, 36 (7th Cir. 1969).

123. *ParkerVision, Inc. v. Apple Inc. (ParkerVision I)*, No. 3:15-cv-1477-J-39JRK, 2018 WL 5084731, at \*8 (M.D. Fla. Jan. 9, 2018), *adopted by ParkerVision II*, No. 3:15-cv-01477-BJD-JRK, 2018 WL 5084662 (M.D. Fla. Mar. 8, 2018).

124. *ParkerVision II*, 2018 WL 5084662, at \*9.

125. *Id.*

126. *Incipio, LLC v. Argento SC by Sicura Inc.*, No. SACV 17-01974 AG (KESx), 2018 WL 4945002, at \*4 (C.D. Cal. July 18, 2018) (“The parties agree that Incipio stopped working with Yankee Clipper in February 2017 and that Incipio didn’t file this lawsuit until November 2017.”).

127. *See id.* at \*5 (noting that the plaintiff “made no attempts in either its proposed amended complaint or its briefing to establish that a more than half-year delay between the termination of Defendants’ relationship with Yankee Clipper and the filing of Incipio’s suit is a ‘reasonable delay’”).

128. *Level Sleep LLC v. Dormeo N. Am., LLC*, No. 2:18-cv-00120-RWS, 2019 WL 458467, at \*3 (E.D. Tex. Feb. 1, 2019).

such issues in the past, meaning that the difficulty in administering the “reasonable amount of time” standard can adversely impact litigation.

The lack of clarity in how venue will be determined leads to significant unpredictability in litigation, which goes against the well-established principle that rules for filing suit must create predictability for potential defendants.<sup>129</sup> The Supreme Court has previously encouraged courts and legislative bodies dealing with other statutes to clarify the meaning of “reasonable time” standards:

The California courts themselves might alleviate the problem by clarifying the scope of the words “reasonable time” in this context or by indicating, when denying a petition, whether the filing was timely. . . . Alternatively, the California Legislature might itself decide to impose more determinate time limits, conforming California law in this respect with the law of most other States.<sup>130</sup>

This entreaty to the California courts and legislature suggests that the Court prefers rules that are easier to apply in consistent fashion. Certainly, this bright-line rule could be achieved if either Congress or the Federal Circuit established a definition of “reasonable delay.” But in the absence of a decision by the legislature or a higher court, district courts must endeavor to create a predictable and consistent set of rules. Even if individual judges or districts were to define “reasonable delay,” these definitions would not function consistently across the federal court system, which would defeat the purpose of one cohesive set of procedural rules. Adopting a time-of-filing standard is the surest way that the district courts themselves can create predictability.

More practically, a lack of clarity in venue decisions can lead to cases being transferred or even dismissed, and can certainly lead to significant time delays and fees while venue is disputed.<sup>131</sup> Running up attorneys’ fees over venue disputes will exacerbate the already serious

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129. *See, e.g., Helicos Biosciences Corp. v. Illumina, Inc.*, 858 F. Supp. 2d 367, 371 (D. Del. 2012) (“[A] defendant’s state of incorporation had always been a predictable, legitimate venue for bringing suit.”); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (noting that personal jurisdiction rules must “[give] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit”).

130. *Evans v. Chavis*, 546 U.S. 189, 199 (2006).

131. *See, e.g., Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 936–37 (E.D. Tex. 2017) (noting that “[w]hile this case has not even had a claim construction hearing, it has already dragged on for years due to inter partes reviews and the time spent in this court on this venue fight”).

problem of how expensive patent litigation can be.<sup>132</sup> Adhering to a time-of-filing standard would create a system that, while rigid, would also be predictable. Potential defendants would know where they are amenable to suit, and plaintiffs would be more confident that they have satisfied the venue requirements of § 1400(b).

### *B. Discouraging Forum Shopping*

Although *TC Heartland* was celebrated by some commentators as an end to forum shopping in patent litigation,<sup>133</sup> the problem has not been fully eliminated. To be involved in a dispute over the meaning of § 1400(b), the defendant would need to have closed a satellite office sometime between the alleged infringement and the complaint being filed. Therefore, the defendants most likely to be involved in such disputes are large national or international corporations with multiple satellite offices that would constitute regular and established places of business. Such large corporations generally do business — and therefore would infringe — all over the country, and certainly do business wherever they have an office. Under either interpretation of § 1400(b), these large companies would be amenable to suit essentially anywhere they have an office. But under a time-of-accrual regime, they would continue to be amenable to suit where they *formerly* had an office for an indeterminate amount of time.<sup>134</sup>

For plaintiffs, such a system is clearly advantageous. They will have an even larger pool of potential courts from which to choose the most favorable venue in terms of “convenience or expense of litigating in the forum, the inconvenience to one’s adversary, the probable or expected sympathies of a potential jury pool[,] judicial calendars and backlogs, local rules, permissibility of fee-splitting arrangements, and virtually any other interjurisdictional difference.”<sup>135</sup> Yet while a plaintiff is generally “accorded [the] privilege of bringing an action where he chooses,”<sup>136</sup> courts have historically acted to curtail the ability to

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132. As of 2017, bringing a patent infringement suit through discovery could cost between \$400,000 and \$3,000,000, depending on the amount at risk. Samson Vermont, *AIPLA Survey of Costs of Patent Litigation and Inter Partes Review*, PATENTATTORNEY.COM (Jan. 30, 2017), <https://www.patentattorney.com/aipla-survey-of-costs-of-patent-litigation-and-inter-partes-review> [https://perma.cc/PJ3F-RBLV]. Going through trial and potentially appeal could add millions to that number. *Id.*

133. See, e.g., William Vogeler, *Bad News for Patent Trolls: Forum Shopping Is Finally Over*, FINDLAW (May 23, 2017, 4:05 PM), <https://blogs.findlaw.com/technologist/2017/05/bad-news-for-patent-trolls-forum-shopping-is-finally-over.html> [https://perma.cc/JQL9-U36Y].

134. See *supra* Section VI.A.

135. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678 (1990).

136. *Helicos Biosciences Corp. v. Illumina, Inc.*, 858 F. Supp. 2d 367, 371 (D. Del. 2012) (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955)).

forum-shop.<sup>137</sup> Those in patent law are particularly wary of forum shopping,<sup>138</sup> given the prevalence of non-practicing entities, who generally file suit in a small number of districts that are considered plaintiff-friendly<sup>139</sup> and need not fear that a counterclaim for patent infringement will disrupt their business.<sup>140</sup> Therefore, a system which limits plaintiffs' ability to arbitrarily choose a forum may be especially beneficial in the patent law context.

A major argument against the time-of-filing rule is that it may violate principles of equity to allow a potential defendant to escape suit by simply closing an office.<sup>141</sup> However, this argument is unavailing for three reasons. First, even in a time-of-filing regime, corporate defendants would be unable to *wholly* avoid suit; § 1400(b) will always allow an infringement suit to be brought where the company is incorporated.<sup>142</sup> Second, it is unlikely that a business will choose to completely eliminate all presence in a judicial district simply to avoid suit,<sup>143</sup> particularly given that this would require accurate prediction of when and where a lawsuit would be filed. And finally, both time-of-accrual and time-of-filing regimes are susceptible to possible abuses, whether by potential defendants or by plaintiffs attempting to forum shop. Choosing between the two rules means choosing which risk the system is willing to tolerate. Given the very real forum shopping already engaged in by non-practicing entities<sup>144</sup> and the courts' general disapproval of the practice,<sup>145</sup> adopting a time-of-filing standard for § 1400(b) is preferable.

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137. See Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QUINNIPIAC L. REV. 25, 29–33 (2005); Note, *supra* note 134, at 1680–89.

138. See *U.S. Supreme Court Halts Forum Shopping in Patent Infringement Cases*, NUTTER: IP L. BULL. (May 23, 2017), <https://www.nutter.com/ip-law-bulletin/u-s-supreme-court-halts-forum-shopping> [<https://perma.cc/CLE7-6Z7J>] (explaining that forum shopping “is largely blamed for the disproportionate concentration of patent infringement cases that have been filed in patent-friendly venues”).

139. See Lauren H. Cohen et al., *Patent Trolling Isn't Dead — It's Just Moving to Delaware*, HARV. BUS. REV. (June 28, 2017), <https://hbr.org/2017/06/patent-trolling-isnt-dead-its-just-moving-to-delaware> [<https://perma.cc/R4KC-6PHN>]

140. Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1579 (2009).

141. See *supra* Sections III.A, III.B.1 (discussing how the time-of-accrual rule is based in equity).

142. See 28 U.S.C. § 1400(b) (2018) (allowing “[a]ny civil action for patent infringement” to be “brought in the judicial district where the defendant resides”).

143. However, not *all* presence in a given district may need to be eliminated. See *In re Cray Inc.*, 871 F.3d 1355, 1360–64 (Fed. Cir. 2017) (establishing definition for “regular and established place of business”).

144. Cohen et al., *supra* note 139.

145. See Maloy, *supra* note 137, at 29–33; Note, *supra* note 135, at 1680–89.

## VII. CONCLUSION

Despite what many courts considering the issue have held, the best approach to determining patent venue under § 1400(b) is to evaluate the facts as they exist at time of filing. Such an approach would be most in line with the plain text of the statute, which places the filing of the suit and the existence of the regular and established place of business in the same temporal frame by using the same tense to refer to both. A time-of-filing rule would also adhere most closely to the apparent intent of the 1897 Congress, which was more concerned about appropriate service of process than about accounting for a changing landscape of satellite offices. Finally, policy concerns would be best served by a time-of-filing rule, which would be easier to enforce by the courts and therefore more predictable and would discourage forum shopping by plaintiffs.

The fact that the Federal Circuit has yet to weigh in on the question coupled with the number of cases that have adopted the time-of-accrual rule make it quite possible that the issue will not be resolved any time soon. And because the lack of clarity over when to evaluate venue is not the only problem with § 1400(b),<sup>146</sup> some have called for Congress to write an entirely new statute addressing venue in patent cases.<sup>147</sup> A new statute may be the surest way to obtain the level of clarity necessary for a consistent and predictable approach to venue in patent infringement actions. Yet until Congress decides to draft such a statute, courts will continue to struggle with interpreting § 1400(b). The language and legislative history of the statute, coupled with the relevant policy concerns, suggest that the correct way to do so is by considering the facts as they stood at the time the suit was filed, rather than at some arbitrary amount of time beforehand.

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146. See, e.g., Robert Tapparo, Comment, *The Supreme Court and the Federal Circuit Turn Patent Infringement Venue Jurisprudence Upside Down*, 7 AM. U. BUS. L. REV. 407, 417–25 (2018) (describing difficulties with determining what constitutes a “regular and established place of business” (internal quotation marks omitted)).

147. See, e.g., *id.* at 425–28; Peter Estall, *Venerunt, Viderunt, Vicerunt Venue: How TC Heartland and In Re Cray Have Conquered Patent Venue for Corporate Defendants and How Congress Can Balance the Scales of Patent Venue Justice*, 103 MINN. L. REV. 1523, 1552–65 (2019).