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Patent Venue: One More Attempt to Broaden the Statute

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COMMENTS

Patent Venue: One More Attempt to Broaden the Statute

I. INTRODUCTION

The first major battle in patent infringement litigation concerns where to fight the war. Because defendants are very leery about litigating a patent suit in certain forums, they will fight for a forum of their choice. The defendant's uneasiness about litigating in specific forums was explained by one commentator:

> Comprehensive statistical analyses of the disposition of patent cases in recent years by the various circuits have revealed striking contrasts in "hospitality" towards patents. For example, between 1945 and 1949 the Fifth Circuit found the patent in suit to be valid in 77 per cent of its opinions. By contrast, the Second Circuit found the patent in suit to be valid in only 7 per cent of its opinions.[1]

In several unsuccessful attempts to gain access to more favorable forums, plaintiffs tried to use the more liberal general venue statute[2] instead of the patent venue statute.[3] However, it has long been settled law that venue in patent infringement litigation is determined by the patent venue statute[4] rather than by the general venue statute.[5] The Supreme Court most recently af-

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1. Seidel, *Venue in Patent Litigation*, 22 GEO. WASH. L. REV. 682 (1954) (footnotes omitted). Although the Seidel article was written before the creation of the Federal Circuit, which now hears all appeals of patent infringement suits, a district court will still make the initial determination of validity. The district courts, like the circuit courts cited in the Seidel article, also show a range of "hospitality" towards patents.

2. 28 U.S.C. § 1391(c) (1982).

3. 28 U.S.C. § 1400(b) (1982). The patent and general venue statutes are discussed *infra* notes 14-21 and accompanying text. The leading cases interpreting these provisions are discussed *infra* notes 102-111 and accompanying text.

4. *Id.*

5. 28 U.S.C. § 1391(c) (1982).

firmed this rule in *Fourco Glass Co. v. Transmirra Products Corp.*[6]

In 1988, Congress, as part of a bill that enacted major reforms in the federal judiciary, amended the general venue statute.[7] As a result of the amendment, patent litigators have renewed their attempts to expand patent venue by seeking to apply the general venue statute's liberal definition of corporate residence to the term "resides" in the patent venue statute.[8]

The district courts are split on the issue. Four district courts[9] have held that "[the patent venue statute] must be construed in combination with [the general venue statute]."[10] However, three other district courts[11] have held that "patent infringement actions are still governed by [the patent venue statute]."[12] The Federal Circuit, in two recent decisions, has held that the general venue statute for corporations defines the

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6. 353 U.S. 222 (1957). *See infra* notes 88-111 and accompanying text for a discussion of the line of cases leading up to *Fourco*.

7. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, § 1007, 102 Stat. 4642, 4669 (1988). The statute now reads:

> *For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.* In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

28 U.S.C. § 1391(c) (1988) (emphasis added).

8. *See, e.g.*, VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990); Illinois Tool Works, Inc. v. Rawplug Co., 17 U.S.P.Q.2d 1412 (N.D. Ill. 1990); Biosyntec, Inc. v. Baxter Healthcare Corp., 746 F. Supp. 5 (D. Or. 1990); Tri-Tronics Co. v. MacGregor & Co., No. 90 C 0630 (N.D. Ill. July 20, 1990) (LEXIS, Genfed library, Dist file); Regents of the Univ. of Cal. v. Eli Lilly & Co., 734 F. Supp. 911 (N.D. Cal. 1990); Joslyn Mfg. Co. v. Amerace Corp., 729 F. Supp. 1219 (N.D. Ill. 1990); Century Wrecker Corp. v. Vulcan Equip. Co., 733 F. Supp. 1170 (E.D. Tenn. 1989), *aff'd*, 1990 W.L. 178889 (Fed. Cir.), *reh'g en banc denied*, (Fed. Cir. Dec. 12, 1990); Doelcher Prod., Inc. v. Hydrofoil Int'l, Inc., 735 F. Supp. 666 (D. Md. 1989). *See infra* notes 14-21 and accompanying text (explaining how proper venue was determined under both the general and patent venue statutes prior to the most recent amendments).

9. *Rawplug*, 17 U.S.P.Q.2d at 1414; *Biosyntec*, 746 F. Supp. at 9; *Eli Lilly*, 734 F. Supp. at 913-14; *Century Wrecker*, 733 F. Supp. at 1173.

10. *Century Wrecker*, 733 F. Supp. at 1173.

11. *Tri-Tronics*, No. 90 C 0630, at 8; *Joslyn*, 729 F. Supp. at 1223; *Doelcher*, 735 F. Supp. at 668.

12. *Doelcher*, 735 F. Supp. at 668.

term "resides", used in the patent venue statute, for patent infringement suits.[13]

This comment will analyze whether the definition of "residence" in the general venue statute for corporations should apply to a corporation involved in patent infringement litigation. Part II will provide background information about the patent and general venue statutes and the Supreme Court's interpretation of these statutes. Part III will show that, based on general principles of statutory interpretation and the policy behind the original patent venue statute, the 1988 changes in the general venue statute dictate that the definition of corporate residence in the general venue statute should apply to corporations involved in patent infringement litigation.

II. BACKGROUND

Prior to the 1988 amendment, the general venue statute provided three venue tests for a corporation. The statute provided: "A corporation may be sued in any judicial district in which it is [1] *incorporated* or [2] *licensed to do business* or is [3] *doing business*, and such judicial district shall be regarded as the residence of such corporation for venue purposes."[14] The courts interpreted the statute's "doing business" test in two distinct ways. Some courts determined that a corporation is "doing business" for venue purposes if the corporation is subject to personal jurisdiction in that state, i.e., the corporation has minimum contacts with the forum state.[15] Other courts decided that "a corporation [is] 'doing business' . . . if it [is] engaging in transactions in that district to such an extent and of such a nature that the state in which the district [is] located could require the foreign corporation to qualify to do business there [a licensing test]".[16]

The patent venue statute, however, provides two tests distinct from the general venue statute, for proper venue in a pat-

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13. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1584 (Fed. Cir. 1990).

14. 28 U.S.C. § 1391(c) (1982) (emphasis added).

15. Klein, *A Recent Revision to the General Venue Statute Greatly Expands Plaintiff's Venue Choices Against a Corporate Defendant in Federal Suits for Trademark Infringement or Unfair Competition*, 1989 J. PAT. & TRADEMARK OFF. SOC'Y 886, 887.

16. *Id.* at 888.

ent infringement action.[17] Under the patent venue statute,[18] venue is proper in a district in which the defendant resides[19] (is incorporated), *or* in a district in which the defendant has "a regular and established place of business"[20] *and* has committed acts of infringement.[21]

At various times,[22] courts and commentators have attempted to apply the general venue statute in patent infringement cases in an effort to expand venue in patent suits. In the 1957 case, *Fourco Glass Co. v. Transmirra Products Corp.*,[23] the Supreme Court reaffirmed the rule that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)."[24] In *Fourco*, Transmirra Products sued Fourco Glass, a West Virginia corporation, in the southern district of New York for patent infringement, although venue was not proper in New York under either of the venue tests in the patent venue statute.[25] Fourco Glass was not incorporated in New York and, although it had a regular place of business in New York, the company had committed no acts of infringement in New York.[26]

In *Fourco*, the Court granted certiorari to resolve the conflict among the circuit courts caused by the 1948 change in the wording of the general venue statute.[27] The Court determined that "the Revisers' Notes do not express any substantive change"[28] and therefore the Court affirmed its earlier decision[29] that only the patent venue statute is relevant in patent infringement claims.[30]

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17. The statute states that: "Any civil action for patent infringement may be brought in the judicial district where the defendant [1] *resides*, or where the defendant has [2] *committed acts of infringement and has a regular and established place of business*." 28 U.S.C. § 1400(b) (1982) (emphasis added).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Usually following changes in the wording of the general venue statute.

23. 353 U.S. 222 (1957).

24. *Id.* at 229.

25. *Id.* at 223.

26. *Id.*

27. *Id.* at 224. *See* Act of June 25, 1948, ch. 646, § 1391(c), 62 Stat. 869, 935 (codified as amended at 28 U.S.C. § 1391(c) (1988)).

28. 353 U.S. at 227.

29. Stonite Prod. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942).

30. *Fourco*, 353 U.S. at 229.

In 1988 the general venue statute was changed again. Congress amended the statute, in part to clarify the discrepancy among the circuits over the meaning of "doing business" by adopting the "personal jurisdiction" rule.[31] At the same time, Congress added the words "[f]or purposes of venue under this chapter"[32] to the statute. Because the general and patent venue statutes are in the same chapter,[33] this new phrase makes it conceivable that the general venue statute's definition of corporate residence defines the term "resides" in the patent venue statute for a corporation involved in a patent infringement suit.

III. Analysis

This section analyzes whether the 1988 changes to the general venue statute indeed expand patent venue by making the general venue statute's definition of residence applicable to patent infringement suits. The section begins by analyzing various principles of statutory interpretation and how they apply to this issue. Finally, the section examines the policy served by the initial patent venue statute and whether applying the amended general venue statute's definition of residence to the patent venue statute will also serve that policy.

A. Statutory Interpretation — General Principles

1. The plain meaning rule

In *VE Holding Corp. v. Johnson Gas Appliance Co.*,[34] the court recognized that "[i]t is axiomatic that statutory interpretation begins with the language of the statute."[35] One fundamental principle of statutory interpretation enunciated by the Supreme Court, in line with this rule, is that an unambiguous statute is controlled by the plain meaning of its terms.[36] However, the

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31. *See generally* Klein, *supra* note 15, at 887-88 (noting the two positions of the circuit courts, and stating that the changes to the statute result in the adoption of the personal jurisdiction rule). The changes in 28 U.S.C. section 1391(c) also addressed the problem of venue for a corporation in a multidistrict state. Adoption of the "personal jurisdiction" rule was, therefore, only a partial reason for the overall change to the statute.

32. 28 U.S.C. § 1391(c) (1988).

33. Both statutes are in Chapter 87 of Title 28.

34. 917 F.2d 1574 (Fed. Cir. 1990).

35. *Id.* at 1579 (citing Mallard v. United States Dist. Court, 490 U.S. 296, 300 (1989); UNR Indus., Inc. v. United States, 911 F.2d 654, 659 (Fed. Cir. 1990)).

36. *See, e.g.*, United States v. James, 478 U.S. 597, 606 (1986) ("'[w]hen . . . the

Court has stated that the plain meaning will not be controlling only "in rare and exceptional circumstances."[37] In *Crooks v. Harrelson*,[38] the Court explained that rare and exceptional circumstances occur when an application of the statute's literal terms would yield an "absurd result."[39] The Court said that before "a departure from the letter of the law upon [this] ground" could be allowed "the absurdity must be so gross as to shock the general moral or common sense"[40] and in addition "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail."[41]

The amended general venue statute[42] states that "[f]or purposes of venue *under this chapter*, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced."[43] The plain meaning of this section is to supply a definition for the residence of a corporation under Chapter 87 Title 28.[44] Because the patent venue statute[45] is also in Chapter 87 Title 28, the plain meaning of the general venue statute is that in patent litigation, a corporate defendant's residence should be defined by the general venue statute.

Courts prefer to interpret a statute based on the plain meaning of its words for several reasons. In *United States v. Locke*[46] the Court, in construing the Federal Land Policy and Management Act,[47] explained that statutes are interpreted in accordance with their plain meaning because the Court gives "deference to the supremacy of the Legislature, [and the Court rec-

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terms of a statute [are] unambiguous, judicial inquiry is complete. . . .'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))). *See also* Sullivan v. Stroop, 110 S. Ct. 2499, 2502 (1990); K Mart Corp. v. Cartier, Inc. 486 U.S. 281, 291 (1988); Bethesda Hosp. Ass'n. v. Bowen, 485 U.S. 399, 403 (1988); Tennessee Valey Auth. v. Hill, 437 U.S. 153, 187 n.33 (1978).

37. Rubin v. United States, 449 U.S. 424, 430 (1981) (citations omitted).

38. 282 U.S. 55, 60 (1930).

39. *Id.*

40. *Id.*

41. *Id.*

42. 28 U.S.C. § 1391(c) (1988).

43. *Id.* (emphasis added).

44. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1578 (Fed. Cir. 1990) ("On its face, § 1391(c) clearly applies to § 1400(b), and thus redefines the meaning of the term 'resides' in that section.").

45. 28 U.S.C. § 1400(b) (1988).

46. 471 U.S. 84 (1985).

47. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1784 (1988)).

ognizes] that Congressmen typically vote on the language of a bill"[48] and therefore " 'the legislative purpose is expressed by the ordinary meaning of the words.' "[49] Additionally, it is "presumed that Congress did not use superfluous language in the statute [being construed]."[50] Therefore, the presumption should be that the language, "[f]or purposes of venue under this chapter,"[51] is not superfluous and the courts must give deference to the legislature and effectuate the ordinary meaning of the statute's language.

2. *The clear intention rule*

In *Finley v. United States*,[52] the Supreme Court, per Justice Scalia, stated that " 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed.' "[53] *Finley* suggests a rule of statutory construction that, on its face, undercuts the plain meaning rule.[54] However, *Finley* is actually consistent with the plain meaning rule.

The rule stated in *Finley* is derived from the court's holding in *United States v. Ryder*.[55] The statute in *Ryder* created priority liens for the United States on the assets of a surety to a bond in civil cases.[56] The United States attempted to apply this statute to a surety on a bond in a criminal case. The Court stated that

> [t]he revisers would not have proposed, nor would Congress

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48. *Locke*, 471 U.S. at 95. *See also* Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

49. *Locke*, 471 U.S. at 95 (quoting Richards v. United States, 395 U.S. 1, 9 (1962)). The *VE Holding* court, commenting on the lack of express consideration of the interplay between section 1391(c) and section 1400(b) in the legislative history, stated that "Congress' silence on this issue does not support a negative inference that the 1988 amendment was not intended to affect § 1400(b)." VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1581 (citing United States v. Turkette, 452 U.S. 576, 591 (1981)).

50. United States v. J. E. Mamiye & Sons, 665 F.2d 336, 339 (C.C.P.A. 1981).

51. 28 U.S.C. § 1391(c) (1988).

52. 490 U.S. 545 (1989).

53. *Id.* at 554 (quoting Anderson v. Pacific Coast Steamship Co., 225 U.S. 187, 199 (1912)).

54. The Court seems to suggest that unless Congress expressly states how the change in language of a law changes the effect of the law, the Court will not recognize a change in effect whether or not the plain language of the changed law unambiguously changes the effect.

55. 110 U.S. 729 (1884).

56. *Id.* at 738.

> have made, such a fundamental change in the law as the extension of this provision to criminal cases, *without employing more appropriate terms* for that purpose than those which the section contains. It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed.[57]

Therefore, the courts will apply the plain meaning rule if the statute unambiguously shows Congress' intent. However, if the statute is ambiguous, as in *Ryder* and *Finley*, the court will apply the "clear intention rule" and look past the language of the statute for a clear expression of congressional intent.

Because the revisions to the general venue statute are unambiguous,[58] courts should apply the plain meaning rule and should not look past the language of the statute for a clear expression of congressional intent.

3. *Congress is presumed to know legal precedent*

Another fundamental precept of statutory construction is that the Court "presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts."[59] In *Goodyear Atomic Corp. v. Miller*,[60] the Court presumed that Congress, in allowing compensation claims for employees injured on federal premises "in the same way and to the same extent"[61] as allowed under the state worker's compensation statute, was knowledgeable of existing state worker's compensation schemes. Therefore, the claimant was allowed to collect under the terms of the state compensation statute which was incorporated in the federal statute under this presumption.[62]

In *Lorillard v. Pons*,[63] the Court presumed that Congress was aware of the legal precedent behind the various sections of the Fair Labor Standards Act (FLSA)[64] of 1938 which were in-

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57. *Id.* at 739-40 (emphasis added). In *Finley*, the Court left out the first sentence.

58. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1580 (Fed. Cir. 1990) ("the language of the statute is clear and its meaning is unambiguous").

59. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-85 (1988); *See also* Lorillard v. Pons, 434 U.S. 575 (1978).

60. 486 U.S. 174 (1988).

61. 40 U.S.C. § 290 (1982).

62. The Court held that the award was "unambiguously authorized." 486 U.S. at 186.

63. 434 U.S. 575 (1978).

64. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-19 (1988)).

corporated into the Age Discrimination in Employment Act (ADEA)[65] of 1967.[66] Congress, after explicit consideration of judicial interpretation of various sections of the FLSA, expressly overruled the Court's interpretation of some sections that it incorporated into the ADEA.[67] As to the precedent not considered by Congress when it enacted the ADEA, the Court said that the "selectivity that Congress exhibited . . . in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."[68] The plaintiff was therefore allowed a jury trial under the ADEA, as under the FLSA, even though Congress did not expressly consider the right to a jury trial in adopting the ADEA.[69]

By enacting the 1988 changes to the general venue statute, Congress is presumed to be aware of the Court's holding in *Fourco*, that the general venue statute for corporations is not applicable to corporate defendants in patent infringement litigation.[70] Because Congress did not expressly overrule this line of cases, a strict application of the *Lorillard* rule suggests that *Fourco* is still good law. However, the court in *VE Holding* recognized that the *Lorillard* rule is subordinate to the plain meaning rule. The court stated, "[i]f we can infer anything from Congress' knowledge of the prior judicial interpretation of § 1400(b), given the clear language of the statute, it would be that Congress *did* intend to change the scope of venue under § 1400(b)."[71] Therefore, despite the lack of explicit consideration of any effect on the patent venue statute in the legislative history of the 1988 amendments to the general venue statute,[72] the express language suggests that Congress intended to overrule the *Fourco* line of cases.[73]

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65. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, *as amended by*, Act of April 8, 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended at 29 U.S.C. §§ 621-34 (1988)).

66. 434 U.S. at 579.

67. *Id.* at 581.

68. *Id.* at 582.

69. *Id.*

70. *See supra* notes 22-33 and accompanying text.

71. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1581 (Fed. Cir. 1990) (emphasis in original).

72. *See generally*, 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6031.

73. In *VE Holding*, 917 F.2d at 1579, the court carefully stated that it did not overrule the *Fourco* line of cases, but, the court was faced with a "matter of first impression" because of the change in the wording of the statute. However, the court did recognize

The Eighth Circuit's holding in *Johnson v. First National Bank*[74] also suggests that Congress intended to overrule the *Fourco* line of cases. In *Johnson*, the court stated that "*absent* a clear manifestation of contrary intent, a newly-enacted or revised statute is *presumed to be harmonious* with existing law and its judicial construction . . . *especially* . . . where . . . *the language of the statute under consideration is substantially identical to that of the previous statutes.*"[75] Because the language of the amended statute is not "substantially identical" to the original statute,[76] the plain language of the statute overcomes the presumption that the *Fourco* line of cases is still good law.

4. General and specific provisions

A final rule of statutory construction urged by litigators who support the *Fourco* line of cases[77] is that " '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' "[78] The northern district of Illinois, in *Tri-Tronics Co. v. MacGregor & Co.*,[79] in applying this rule, however, left out the phrase "where there is no clear intention otherwise."[80] The court, therefore, drew the conclusion that "[f]or purposes of venue under this chapter"[81] "language cannot be found to be a clear expression of the intent to amend § 1400(b) unless the general is construed as controlling the particular. [Which] would not be a proper statutory construction."[82]

Therefore, according to the *Tri-Tronics* court, a general statute can *never* control a specific statute. This, however, is an

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that Congress' intent was to overrule the *Fourco* line of cases. *Id.* at 1581.

74. 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984).

75. *Id.* at 277 (emphasis added).

76. The amendments replaced the three different venue tests with a single rule based on personal jurisdiction. *See supra* notes 7 and 14.

77. Tri-Tronics Co. v. MacGregor & Co., No. 90 C 0630, at 6-8 (N.D. Ill. July 20, 1990) (LEXIS, Genfed library, Dist file).

78. Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (venue is controlled by a narrow provision in Title 12, not by a broad provision in Title 25) (quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974)); Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944); D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 (1932).

79. No. 90 C 0630 (N.D. Ill. July 20, 1990) (LEXIS, Genfed library, Dist file).

80. *Id.* at 7.

81. 28 U.S.C. § 1391(c) (1988).

82. *Tri-Tronics*, No. 90 C 0630, at 7.

incorrect interpretation of the rule. In *Pure Oil Co. v. Suarez*,[83] the Supreme Court held that the general venue statute's definition of corporate residence applied to the special venue statute in the Jones Act.[84] The Court distinguished *Fourco*[85] based on the purposes of the statutes. *Pure Oil*, therefore, stands for the proposition that in certain situations, the general statute can supplement the specific statute, contrary to the holding in *Tri-Tronics*.[86]

Therefore, because the change in the language of section 1391(c) shows a clear intention that the general statute should supplement the specific statute, the definition of corporate residence in section 1391(c) is applicable to determine proper venue for a corporate defendant in a patent infringement case.[87]

The results reached under these general principles of statutory interpretation also are reinforced by the *actual* policy behind the enactment of the patent venue statute.

B. Legislative History[88]*—Was the Policy to Broaden or Restrict Venue Alternatives?*

In the federal courts, venue[89] was originally proper where

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83. 384 U.S. 202 (1966).

84. *Id.* at 207. *See* 46 U.S.C. § 688 (1982).

85. The Court concluded that the special venue statute involved in the Jones Act was a liberalizing statute, similar to the general venue statute for corporations, whereas the patent venue statute was originally implemented to narrow the scope of appropriate venue in patent cases. The *Pure Oil* Court relied on the Supreme Court's earlier mischaracterization of the patent venue statute in Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942). *See* Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 560 (1973) (criticizing the Court's finding that *Fourco* was distinguishable from *Pure Oil*). *See also infra* notes 96-105 and accompanying text (explaining why the characterization of the patent venue statute in *Stonite* was incorrect).

86. Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989) (antitrust), and Adams Dairy Co. v. National Dairy Prods. Corp., 293 F. Supp. 1135 (W.D. Mo. 1968) (antitrust), also illustrate situations in which a general statute can supplement a specific statute.

87. In VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1580 (Fed. Cir. 1990), the Federal Circuit held that the Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) rule was inapplicable for two reasons. The court stated:

> First, in this case the general statute, § 1391(c), expressly reads itself into the specific statute, § 1400(b). Second, § 1391(c) only operates to define a term in § 1400(b)—it neither alone governs patent venue nor establishes a patent venue rule separate and apart from that provided under § 1400(b).

917 F.2d at 1580.

88. Wydick, *supra* note 85, at 554-57 (discussing the patent venue statute's legislative history).

89. For a historical look at venue in federal courts leading up to the patent venue statute see Wydick, *supra* note 85, at 553-54; Rivise & Caesar, *Venue in Suits for Patent*

the defendant was an inhabitant or wherever he or she could be found for service of process.[90] In 1887, Congress enacted a new venue statute[91] to narrow proper venue. One commentator summarized the change by saying that this new statute "provided that diversity of citizenship cases could be brought only in a district in which the plaintiff or the defendant resided and that other cases could be brought only in the district of the defendant's inhabitance."[92] Two Supreme Court decisions[93] created confusion among the circuit courts[94] as to whether the narrower venue provisions of 1887 or the more broad venue provisions of 1789 applied in patent infringement suits.

An important issue in deciding whether the recent changes to the general venue statute make its definition of residence applicable to patent infringement litigation is whether congressional policy, in initially adopting the patent venue statute, was to broaden or to narrow proper venue for patent infringement litigation. If Congress assumed that the Act of 1887 applied to patent infringement suits, then the change broadened proper venue. If, however, Congress assumed that the Act of 1789 was the applicable law, then the change effected a restriction in proper venue for patent infringement suits.[95] The discussion sur-

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Infringement, 24 J. PAT. OFF. SOC'Y 479, 479-89 (1942) [hereinafter Rivise].

90. Judiciary Act of 1789, ch. 20, Section 11, 1 Stat. 73, 78. *See also* Wydick, *supra* note 85, at 553.

91. Act of March 3, 1887, ch. 373, Section 1, 24 Stat. 552 *as amended* by Act of August 13, 1888, ch. 866, 25 Stat. 433. The key language is:

> But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

25 Stat. at 434.

92. Wydick, *supra* note 85, at 553. *See also*, Rivise, *supra* note 89, at 481.

93. *In re* Keasbey & Mattison Co., 160 U.S. 221 (1895); *In re* Hohorst, 150 U.S. 653 (1893). For an analysis of these two cases see Note, *Patents—Venue in Infringement Suits—Interpretation of 28 U.S.C. § 1391(c) and § 1400(b)*, 26 GEO. WASH. L. REV. 117, 118-19 (1957) and Rivise, *supra* note 89, at 482-84.

94. *See* Rivise, *supra* note 89, at 485-88 (elaborating on the split among the courts).

95. One commentator described the statute as a "middle course—a venue provision which gave the plaintiff in a patent infringement case a narrower choice of forum than he would have had under the Judiciary Act of 1789, but a wider choice than he had in an ordinary federal question case under the then existing general venue statute, the 1887 Act." Wydick, *supra* note 85, at 556.

rounding the enactment of the patent venue statute,[96] as recorded in the Congressional Record,[97] indicates that Congress acted on the assumption that the current law was the Act of 1887[98] and that the policy of the patent venue statute was to liberalize the law as it then stood.[99] For example, in introducing the bill in the House, Congressman Lacey said that "[t]he main purpose of the bill is to give original jurisdiction to the court where a permanent agency transacting the business is located, and that business is engaged in the infringement of the patent rights of some one who has such rights anywhere in the United States."[100] Because Congress thought it was "giving" jurisdiction over patent cases to the courts, Congress must have assumed that patent cases were presently governed by the more limited Act of 1887 instead of the very broad Act of 1789. The Supreme Court, however, adopted the view that the Act of 1789 was the baseline for comparison and, therefore, held that venue in patent infringement litigation was governed exclusively by the patent venue statute.[101]

Due to subsequent liberalization of the general venue statute, patent litigators raised the issue of whether the patent venue statute should continue to be the exclusive statute governing patent infringement litigation. In addressing this issue, the Court in *Stonite Products Co. v. Melvin Lloyd Co.*[102] mischaracterized[103] the Act of 1897 as "a restrictive measure, limiting a prior, broader venue."[104] The Court, therefore, held that "[the patent venue provision] is the exclusive provision control-

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96. Act of March 3, 1897, ch. 395, 29 Stat. 695 (codified as amended at 28 U.S.C. § 1400(b) (1988)).

97. 29 CONG. REC. 1900-02, 2719-25 (1897).

98. *Id.* Wydick, *supra* note 85, at 554-56 (analyzing the Congressional Record in great detail and concluding that Congress acted on the assumption that patent litigation was controlled by the Act of 1887 and that the Act of 1897 was designed to expand venue in patent suits).

99. *See* Brunette Machine Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 712 (1972); Industrial Research Corp. v. General Motors Corp., 29 F.2d 623, 626 (N.D. Ohio 1928); Westinghouse Air-Brake Co. v. Great N. Ry., 88 F. 258 (2d Cir. 1898); Wydick, *supra* note 85, at 556.

100. 29 CONG. REC. 1900 (1897).

101. General Elec. Co. v. Marvel Rare Metals Co., 287 U.S. 430, 434-35 (1932).

102. 315 U.S. 561 (1942).

103. *See* Wydick, *supra* note 85, at 558. *Contra*, Comment, *Venue in Patent in Patent Infringement Cases*, 29 U. CIN. L. REV. 122, 123-24 (1960) (arguing that the patent venue statute was adopted to restrict venue in patent infringement cases, as held in *Stonite*).

104. 315 U.S. at 566.

ling venue in patent infringement proceedings"[105] because the policy behind the patent venue statute—to restrict venue in patent infringement cases—would be disserved if the plaintiff were allowed to take advantage of the liberalization of the general venue statute.

In 1948, Congress continued in its efforts to liberalize the venue laws by enacting the general venue statute for corporations.[106] Once again the question was raised whether the general venue provisions complemented the patent venue statute. Again, the Court answered in the negative.[107] In *Fourco*, the Court reached this conclusion because it refused to "replow"[108] the "purposes for adoption by Congress" of the patent venue statute,[109] and it found no substantive change in [the general venue statute] since the *Stonite* case.[110] As one commentator has observed, however, "[a] reexamination of the legislative history of the patent venue statute would have shown that this result was probably not in accord with Congressional intent."[111]

Because of the confusion over what policy was served by creating the patent venue statute, many courts manufactured policy to justify the exclusive use of the patent venue statute.[112] In *Ruth v. Eagle-Picher Co.*,[113] the court justified the rule on the basis of the "peculiar combination of science or technology and law" in patent infringement actions—patent cases are complicated.[114] The court continued, "it is important that the trial judge have first-hand . . . knowledge of the conditions, the environment and the art itself and the testimony of the most compe-

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105. *Id.* (the Court was faced with the question whether the equivalent of 28 U.S.C. section 1391(a) (1982) complemented the patent venue statute).

106. Act of June 25, 1948, ch. 646, 62 Stat. 935. *See* Wydick, *supra* note 85, at 558.

107. Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 229 (1957).

108. *Id.* at 225.

109. *Id.*

110. *Id.* at 228.

111. Wydick, *supra* note 85, at 559.

112. *E.g.*, Network Sys. Corp. v. Masstor Sys. Corp., 612 F. Supp. 438, 440 (D. Minn. 1984); Hoffacker v. Bike House, 540 F. Supp. 148 (N.D. Cal. 1981); AMP Inc. v. Burndy of Midwest, Inc., 340 F. Supp. 21 (N.D. Ill. 1971); Vibber v. United States Rubber Co., 255 F. Supp. 47 (S.D.N.Y. 1966); Bradford Novelty Co. v. Manheim, 156 F. Supp. 489 (S.D.N.Y. 1957); Ruth v. Eagle-Picher Co., 225 F.2d 572 (10th Cir. 1955). *Contra* Gaddis v. Calgon Corp., 449 F.2d 1318 (5th Cir. 1971).

113. 225 F.2d 572, 577 (1955).

114. *Id. See also Network Sys.*, 612 F. Supp. at 440 ("This specific venue statute . . . reflects a Congressional awareness of the technical nature of patent litigation and the particular advantage in limiting its prosecution to forums where the acts of infringement occurred and where the defendant is located.").

tent witnesses."[115] This policy justification, however, was never spelled out by Congress. It also improperly assumes that "most of the evidence and witnesses will emanate from the defendant's side of the case."[116] In *Gaddis v. Calgon Corp.*,[117] the Fifth Circuit rejected the trial court's attempt to manufacture a congressional policy and held that, "[s]uch history as has been cited to us indicates no such special purpose as is found by the trial court."[118]

Although courts have mischaracterized the legislative history and have manufactured policy in support of the *Fourco* line of cases, the only policy justified by the legislative history is that Congress intended to broaden venue in patent infringement suits. Other support for this policy is found in recent legislation favorable to the enforcement of patents.[119] Therefore, because congressional policy is to liberalize the patent laws, the general venue statute's definition of corporate residence should apply to the term "resides" in the patent venue statute.

IV. Conclusion

The 1988 amendment to the general venue statute[120] allows patent litigators to reraise the question of whether the general venue statute for corporations is applicable to corporate defendants in a patent infringement suit in an effort to expand patent venue.[121] In seven published opinions, the district courts are almost evenly divided on the issue,[122] while the Federal Circuit[123]

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115. 225 F.2d at 577. *Contra* Wydick, *supra* note 85, at 566 & n.102 (The patent venue statute does not apply to an action seeking a declaratory judgement as to patent validity. "This type of action represents a mirror image of an action for patent infringement. . . . If the *Eagle-Picher* rationale were satisfactory, it would apply equally to declaratory judgment actions.").

116. Wydick, *supra* note 85, at 565.

117. 449 F.2d 1318, 1319 (5th Cir. 1971).

118. *Id.* at 1319 n.1.

119. *E.g.* 28 U.S.C. § 1295 (1988) (creation of the Federal Circuit with exclusive jurisdiction over patent appeals in order to recognize value of patents and promote their enforcement); Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended at 21 U.S.C. § 355(j) (1988) (extending drug patent terms due to lengthy approval process used by the Food and Drug Administration); 35 U.S.C. § 271(g) (1988) (protecting process patents from offshore infringement).

120. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, Tit. X, § 1007, 102 Stat. 4642, 4669 (1988).

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

122. *See supra* note 8.

123. VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir.

has sided with the district courts that favor reading the two statutes together in patent infringement suits.

The courts which favor reading the two statutes together reach this conclusion based on the "plain meaning rule," a general principle of statutory construction. The plain meaning of the additional phrase, "[f]or purposes of venue under this chapter,"[124] is that the definition of residence found in section 1391(c) applies to section 1400(b) because both sections are located in Chapter 87 of Title 28.

The conclusion based on the plain meaning rule is strengthened by the policy behind the original patent venue statute. When Congress originally enacted the patent venue statute in 1897,[125] it broadened proper venue for patent infringement actions. In line with this purpose and the general trend of Congress to enact legislation favorable to the enforcement of patents, the general venue statute for corporations should be read to complement the patent venue statute.

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124. 28 U.S.C. § 1391(c) (1988).

125. Act of March 3, 1897, ch. 395, 29 Stat. 695.