

Case No.

In the Supreme Court of the United States

HTC CORPORATION,

Applicant,

v.

3G LICENSING, S.A., ET AL.

Respondents,

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR WRIT OF
CERTIORARI

Directed to the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Federal Circuit

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Rule 29.6 Disclosure Statement

Under Supreme Court Rule 29.6 Applicant HTC Corporation states as follows:

HTC Corporation is a Taiwan corporation and is a publicly traded company in Taiwan, R.O.C. It has no parent corporation and no publicly held company owns 10% or more of its stock.

To: Chief Justice John G. Roberts, Circuit Justice for the Federal Circuit.

1. Pursuant to this Court’s Rules 13.5 and 22, Applicant HTC Corporation (“Applicant” or “HTC”) respectfully requests an extension of thirty (30) days, to and including January 4, 2019, to file a petition for a writ of certiorari in the matter described below.

2. The United States District Court for the District of Delaware denied, in part, HTC’s motion to dismiss or transfer venue on December 18, 2017. (Exhibit 1). The Court of Appeals for the Federal Circuit denied HTC’s petition for a writ of mandamus on May 9, 2018 (Exhibit 2), and denied a petition for rehearing *en banc* on September 6, 2018 (Exhibit 3). Applicant’s petition will challenge the decision of the Court of Appeals for the Federal Circuit in *In re HTC Corporation*, 889 F.3d 1349 (Fed. Cir. 2018). This Court has jurisdiction under 28 U.S.C. § 1254(1).

3. Without an extension, Applicant’s petition for a writ of certiorari would be due on December 5, 2018. With the requested extension, Applicant’s petition for a writ of certiorari would be due January 4, 2019. In accordance with Sup. Ct. R. 13.5, Applicant is filing this application at least ten days before the current deadline.

4. This patent infringement case squarely presents a question acknowledged by the Court but left unanswered in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017) (“*Heartland*”): whether an atextual “foreign defendant” exception exists to 28 U.S.C. § 1400(b), even though the statute, by its terms, provides for venue in “[a]ny civil action for patent infringement,” and thus, on its

face, provides “the sole and exclusive provision controlling venue in patent infringement actions” *Heartland*, 137 S. Ct. at 1519.

5. Last year in *Heartland*, this Court unanimously decided that the “general venue” statute, 28 U.S.C. § 1391, is irrelevant to determining venue in patent infringement cases, a ruling that implemented the plain language of § 1400 and confirmed the Court’s earlier decision to that effect in *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 229 (1957) (“We hold that 28 U.S.C. § 1400(b) . . . is the sole and exclusive provision governing venue in patent infringement actions and . . . is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)”; *see also Stonite Products Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942) (§ 1400’s predecessor is “the exclusive provision controlling venue in patent infringement proceedings.”)).

6. *Heartland*, however, involved only domestic parties, and the Court acknowledged that its decision could have significant “implications . . . for foreign corporations [that the Court need] not [t]here address.” *Heartland*, 137 S. Ct. at 1520 n.2. The Court further recognized that applying *Heartland* to foreign defendants would necessarily draw into question the Court’s holding in *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.*, 406 U.S. 706 (1972) (“*Brunette*”), which dealt with a predecessor version of § 1391 in the venue context. This case presents the Court with an opportunity to provide answers to those fundamental, unanswered questions.

7. Respondents 3G Licensing, S.A. (“3G Licensing”), Orange S.A. (“Orange”), and Koninklijke KPN N.V. (“KPN”) (collectively “Respondents”) sued HTC Corp. (a Taiwanese corporation with its principal place of business in Taiwan) and its wholly owned U.S. based subsidiary, HTC America, in the District of Delaware for infringing five patents. HTC America is a Washington corporation with its principal place of business in Seattle, Washington. Neither HTC nor HTC America is incorporated in Delaware or has a regular and established place of business in Delaware. Plaintiffs’ Second Amended Complaint alleged that “[v]enue is proper at least as to HTC Corporation under 28 U.S.C. § 1391(b) and (c) and 28 U.S.C. § 1400.”

8. HTC Corp. and HTC America moved to dismiss the action for improper venue under 28 U.S.C. § 1406(a) or, in the alternative, to transfer the case to the Western District of Washington pursuant to 28 U.S.C. § 1404 where venue was indisputably proper as to HTC (the plaintiffs never disputed this fact, and the court of appeals concluded that it was irrelevant). The district court first held that venue in Delaware was not proper as to HTC America (a domestic corporation) under § 1400(b) and dismissed that entity. As to HTC, however, the Court relied on 28 U.S.C. § 1391(c)(3), which provides for venue against any “defendant not resident in the United States . . . in any judicial district,” and on that basis held that venue *was* proper as to the foreign defendant, HTC Corp., in Delaware. The court of appeals affirmed this result and largely adopted the district court’s rationale.

9. The court of appeals held that as a foreign defendant, HTC is subject to a patent infringement action in any district court a plaintiff might choose, notwithstanding the unambiguous language of the patent venue statute, § 1400(b), which would make it subject to suit only “where the [it] resides, or where [it] has committed acts of infringement and has a regular and established place of business.” That result is incompatible with the straightforward language of two federal statutes — the one the court below purported to apply (§ 1391) as well as the one they largely ignored (§ 1400).

10. Specifically, the court below did not apply the patent venue statute, § 1400(b), even though it expressly applies to “any” case of alleged patent infringement. “Any” when used by Congress in this way means “every,” as this Court has recently reiterated. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018). That is, the word “any” “naturally carries an expansive meaning [and] refers to [any] member of a particular group or class without distinction or limitation’ and in this way ‘impl[ies] *every* member of the class or group.’” *Id.* at 1354 (emphasis supplied in original).

11. The consequences of this language are, or should have been, inescapable to the court of appeals: (a) this is a patent infringement action; (b) § 1400(b) applies to “any,” meaning every, patent infringement action; therefore (c) § 1400 applies. The statute says so unmistakably.

12. Just as clearly, § 1391 — the “general venue” statute on which the court below expressly relied — does not apply here. Language added to § 1391(a) in 2011

(i.e., 39 years after *Brunette*) specifies that the statute’s venue rules “[e]xcept as otherwise provided by law.” As the unanimous Court held in *Heartland*, this “saving clause applies to the entire section”; it walls off § 1391 *in its entirety* from any case for which Congress has provided a specialized venue statute such as § 1400. As the Court has elsewhere held, “Section 1391 governs ‘venue generally,’ but does not apply “where a more specific venue provision” applies. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 56 n.2 (2013). As an example of a “more specific venue provision,” the *Atlantic Marine* Court singled out § 1400, which, the Court said, is the exclusive source for “proper venue for copyright and patent suits.” *Id.*

13. This case directly presents the open question acknowledged by the Court in *Heartland*, and that question can only be answered by this Court. Although the Court often prefers to let open questions “percolate” in the courts of appeals before resolving them, this issue cannot percolate; no division of authority will develop because the Court of Appeals for the Federal Circuit has exclusive jurisdiction over patent cases. 28 U.S.C. § 1295. And only a decision by this Court can resolve the fate of *Brunette*, as only “this Court [has] the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989).

14. This application for a 30-day extension is not filed for purposes of delay. The extension is needed so that counsel of record and other members of the firm may fully familiarize themselves with the record, the decisions below, and the relevant

rules and case law. Furthermore, before the current due date of the petition, several counsel for HTC have primary responsibility for a pending matter set for hearing on December 10-14, 2018 before the International Trade Commission. *See Certain Subsea Telecommunication Systems and Components Thereof*, Inv. No. 337-TA-1098 (U.S.I.T.C. 2018).

15. For the foregoing reasons, Applicant requests that an extension of time to and include January 4, 2019, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

Dated: November 21, 2018

/s/ Stephen Kinnaird

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