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Rocket-er Docket: Mass. IP Case Sees 2 Trials In 6 Months

By **Chris Villani**

Law360, Boston (September 28, 2018, 12:35 PM EDT) -- Court watchers have been left marveling at the rapid race of an intellectual property dispute between a pair of Massachusetts 3D printing rivals, which raced to trial in less than four months this summer and saw a second trial between the two end Thursday.

Desktop Metal Inc. filed the case on March 19, claiming rival Markforged Inc. had violated a pair of patents related to 3D printing, while Markforged filed counterclaims alleging theft of trade secrets and breach of fiduciary duty. U.S. District Judge William G. Young elected to skip a preliminary injunction hearing on the patent claims and proceed straight to trial in less than four months.

He's kept the foot on the accelerator, without an apparent urging from either side, and a second jury was seated Sept. 24 on trade secrets and business tort claims, 189 days after the case was filed. The pace is significantly quicker than what is normally found in the Eastern District of Virginia, which is known as a "rocket docket" for its speedy litigation.

"To have a full jury trial on a patent case in three or four months is almost unheard of," said Erik Paul Belt, partner at McCarter & English LLP and past president of the Boston Patent Law Association. "Even in the rocket docket … you generally have a trial in nine months to a year and that's considered fast."

"One-third of the time of the famous rocket docket is speed of light fast," Belt added.

The case came out of the gate quickly. Desktop Metal filed a motion for a preliminary injunction on its patent claims on April 6 and six days later — before Markforged could file an opposition — the parties were in Judge Young's court, where he told them the case would proceed to a jury trial.

"We're going to have a trial on that because I don't trust affidavits, I don't trust theirs, I won't trust yours. I have written elsewhere that 'Affidavits are the Potemkin Villages of American litigation, all lawyer-created flash and no interior architecture,'" Judge Young said at the April 12 hearing, quoting a line he has used in the past. "I'm interested in cross-examination. I'm interested in people under oath. I'm interested in evidence."

Markforged won the first round, when a federal jury declared July 27 that they had not violated Desktop Metal's patents. Judge Young moved the nonpatent claims to a second trial that started Sept. 24 and was settled four days into the proceeding.

Even if not unprecedented, Paul Gugliuzza, a Boston University professor specializing in intellectual property law and civil procedure, said the first trial moved much faster than the typical patent case and the numbers back that up. The median number of days for a patent case to go to trial in Massachusetts is 1,011, according to Lex Machina data dating back to 2000.

But Judge Young does move more quickly. Lex Machina data from the same time period shows the median time for his patent cases that have gone to trial in Massachusetts — Judge Young sits by designation in other districts — is 627 days. Two cases, in 2006 and 2011, went to trial even faster than Desktop Metal and Markforged and in both cases, Judge Young collapsed the preliminary injunction motion into a trial on the merits.

"The quick trial on the patent, preliminary injunction claim, totally makes sense, that happens," Gugliuzza said. "But to resolve that quickly and then push so quickly through to the non-patent claims, which don't appear to have similar urgency, seems a bit strange to me."

Even though neither side was obviously in a rush to try the trade secrets claims, it seemed as though attorneys from Latham & Watkins LLP, representing Desktop Metal, knew Judge Young's practice when it comes to patent claims. They pushed for an even quicker trial date, according to a transcript of the April hearing.

"Your Honor, we'd like to go to trial as quickly as we can," Latham lawyer Charles H. Sanders said, according to the transcript.

"Monday?" the judge replied.

"Um, your Honor, um — " Sanders started before being cut off.

"You have no idea how happy it makes me to say that," Judge Young said, drawing laughter from the attorneys.

Desktop Metal asked to go to trial on the patent claims in May. Steve Cherney of Quinn Emanuel Urquhart & Sullivan LLP, Markforged's attorney, said the expedited trial date would only benefit the plaintiff and asked for six months to prepare. The request was summarily denied by the judge, according to the transcript.

"I know this is a patent case and I in no way intend to alight over the necessary complexities in a patent case, but it seems to me that courts exist to serve not the lawyers or the lawyers' convenience, but to serve the litigants," Judge Young said. "The greatest cost driver of patent litigation — indeed of all litigation in the United States — is discovery ... these are not small firms. You have many associates and the great move is to involve these associates in key roles. So that's why I'm not happy with 6 months."

"I'll tell you what I'm thinking," the judge said, "I'm thinking July."

"Would it be possible in August, Your Honor?" Cherny asked.

"No," came the reply.

"Well then, July it is," Cherny said.

Observers and analysts say the facts of the case helped lead to the rapid-fire pace, but the parties also had the right judge when it comes to not wasting time.

"I think it has to do a lot with Bill Young," said Fabio Marino, vice chair of the IP practice at Polsinelli PC. "Judge Young is one of those mythical figures, particularly in the Boston federal courthouse. He is a judge who really enjoys trial practice, so it's not unusual for him, if he gets a case he is interested, to take it by the horns."

Judge Young, 78, was appointed by President Ronald Reagan to the federal bench in 1985, and served as chief judge from 1999 until 2005. His enthusiasm for trials is palpable from the start of cases, when he excitedly instructs jurors while walking around the courtroom as if he were an attorney, often telling panels they will "judge on the cool, careful, sifting of the evidence so that here in this courtroom, justice truly may be done."

Garrard R. Beeney, a partner with Sullivan & Cromwell LLP who has tried cases before Judge Young, found the approach refreshing.

"He is a little bit traditional in terms of maybe thinking that lawyers need to use their instinct and their skills and not do what we have started to do as a profession of trying to unturn every document and take every deposition," Beeney said. "So while this is very aggressive and it has some downsides to it, I also think we have kinda lost track of Rule 1 of the Federal Rules of Civil Procedure, 'there shall be a just, speedy and inexpensive determination of every action.'"

While also appreciating the speedy trial pace, Yar R. Chaikovsky, the global co-chair of the IP practice at Paul Hastings LLP, cautioned against the thought that a faster trial equals a cheaper trial.

"In some ways clients think 'oh great, the case is faster, it'll cost less.' Absolutely not," he said, noting that all it means is more attorneys will be billing hours. "There is no way you can handle the type of issues at hand and handle them effectively, let along prepare them for trial, without having a monster team … it takes a village."

Judge Young seemed to appreciate that fact at the April 12 hearing, shooting down a complaint about a scheduling conflict by saying "you can't possibly have conflicts … you are an enormous firm, there will be battalions of lawyers deployed on this."

Chaikovsky said he is surprised more judges do not take this approach of moving right to a trial when a client asks for a preliminary injunction in a patent dispute.

"It's a positive commentary on the judges who want to do it," he said. "They are doing it for the right reasons, it's not like they need the extra burden on their backs."

Byron Pickard, co-chair of Sterne Kessler Goldstein & Fox PLLC's trial & appellate practice, marveled at the attorneys' speed in getting ready so quickly. For the first trial, fact discovery and expert discovery were each crammed into 30-day periods.

"I am just struck by how active this case has been in the few months it's been on the docket," he said. On July 6, when many lawyers and judges are on vacation, the case saw 15 docket entries.

If he were to be told that he had to be ready to try a patent case in four months, Pickard said the feeling that comes to mind is "exhilaration."

"That would definitely wake you up," he said. "It would be stressful, but exciting."

Belt chaired a local patent rule committee that recently set a two-year time frame for bringing patent cases to trial in Massachusetts, a measure that was approved by the district's judges in June. So he is on board with getting cases to trial more quickly.

But four months?

"I'd have to go home and tell my wife 'it's been nice knowing you,'" he said, "'I'll see you in four months.'"

Counsel for Desktop Metal and Markforged either declined to comment, or did not respond to inquiries for this story.

The case is Desktop Metal Inc. v. Markforged Inc. et al., case number 1:18-cv-10524, in the U.S. District Court for the District of Massachusetts.

--Editing by Emily Kokoll and Sarah Golin.