

LAW.COM

Skilled in the Art: Cisco and Arista Find Peace. Plus, Mark Lemley Notches Another Win

Law.com

Scott Graham

August 7, 2018

Welcome to another edition of Skilled in the Art. I'm Law.com IP reporter Scott Graham. Today I'll look at the implications of the Federal Circuit's en banc decision Monday on PTAB appealability. I've also got a quick chat with a former ITC commissioner who's settling into a new job. Email me your thoughts on these issues or others at sgraham@alm.com. Or find me on Twitter at [@scottkgraham](https://twitter.com/scottkgraham).

Surprisingly Constructive Settlement for Cisco and Arista

On Sunday I hopped in my car and drove 400 miles for what was sure to be the popcorn trial of the summer. Matt Powers and Arista Networks were set to square off against John Desmarais and Cisco Systems Inc., with Cisco general counsel Mark Chandler poised to be the key witness in the antitrust trial.

Wouldn't you know? The case settled. Now I know how trial lawyers feel. (Actually, I know nothing of what that feels like because my trial preparation consisted primarily of eight hours across I-5.)

As I wrote Monday, this looks like a pretty good deal for both sides. Each company's stock popped Monday, though Arista gave back a portion of those gains Tuesday. Cisco gets \$400 million and the opportunity to continue appealing its copyright trial loss. Arista gets five years of IP peace and the opportunity to continue growing market share—though it will have to make unspecified “limited changes to further differentiate its user interfaces from Cisco's.”

If those changes are sufficiently disruptive to a user base accustomed to Cisco's command line interface, then the win probably goes to Cisco. If Arista's users can assimilate the changes and stick with the company, then I'd hand Arista the W.

Lawyers, Guns and 3D Printing

While a Texas gun rights activist fought last week to publish digital blueprints for making plastic guns with 3D printers, two leaders in the metal 3D printing space were slugging it out in Massachusetts federal court over their intellectual property.

MarkForged Inc. and Quinn Emanuel Urquhart & Sullivan drew first blood in a fast-moving court fight with Desktop Metal Inc. and Latham & Watkins. Boston-based MarkForged persuaded a jury that it does not infringe what Burlington, Mass.-based Desktop Metal describes as its two “seminal patents” in “the first office-friendly metal 3D printing system.”

Desktop Metal was founded by an early investor in MarkForged. Both sides also accuse each other of stealing trade secrets, but those allegations haven't been tried yet. The case is pending before Judge William Young.

Two observations about the patent case:

1) It moved at a ridiculously breakneck pace. The patents issued in November and December. The complaint was filed in March. The jury rendered its verdict July 27. That's a rocket docket on steroids.

2) Steve Cherny, who led Quinn Emanuel's trial team, is going up against his former law firm. Cherny departed Latham in 2008 and spent nearly 10 years at Kirkland & Ellis before joining Quinn Emanuel last year.

Feds Trying to Knock Orrick Off Fitbit Employee Case

It always struck me as a little odd that Fitbit's law firm would represent one of its former employees accused of criminally possessing trade secrets from Fitbit's now-defunct competitor, Jawbone.

Apparently it strikes the U.S. government as more than odd. The U.S. attorney's office has moved to disqualify Orrick, Herrington & Sutcliffe from representing Katherine Mogal, a user experience researcher who now works at Facebook, as my ALM colleague Ross Todd reported Monday.

In a motion signed by AUSA Amie Rooney, the government says it began raising concerns during pre-indictment discussions when Orrick was representing all six co-defendants plus Fitbit. Five co-defendants have since retained separate counsel, though the government insinuates that Fitbit might still be paying their bills.

Orrick's disqualification is required, Rooney contends, because Mogal's interests could come into conflict with those of her co-defendants, or Fitbit. "Further developments could uncover evidence that Fitbit or someone acting on its behalf coordinated, sponsored, encouraged, or knew of the defendants' actions," she writes. At some point "it may be in Mogal's interest to offer information against Fitbit in a possible plea negotiation."

Orrick partner Walt Brown, who represents Mogal along with partners Randall Luskey and Melinda Haag, told Todd that "Ms. Mogal has chosen Orrick as her counsel, the motion is without merit, and we intend to oppose it."

Fitbit was cleared of civil trade secret claims before the International Trade Commission. A California state court civil suit was settled after Jawbone began liquidation proceedings.

D-Del Back to Full Strength

The nation's busiest district court patent docket is back to full strength. The Senate confirmed Maryellen Noreika's and Colm Connolly's nominations to the District of Delaware last week. The news cheered court watchers who'd grown concerned that battles over appellate nominees and Brett Kavanaugh would crowd out district court confirmations.

"This was a real surprise," Senior Judge Gregory Sleet told my ALM colleague Tom McParland. Sleet has been pitching in along with 14 visiting judges, though his tenure is scheduled to wrap up next month.

"I think people were losing hope," Weil, Gotshal & Manges partner Edward Reinestold McParland. "It was a great relief to see these two strong nominees confirmed given the specter of a long and rocky road."

Noreika was an IP litigator at Morris, Nichols, Arsht & Tunnell, and Connolly was a Morgan, Lewis & Bockius partner and former U.S. attorney for Delaware whose practice included IP. So they're expected to provide almost immediate relief in patent proceedings.

All Laterals, All the Time

The IP lateral wheel hasn't stopped spinning. Late last month, Morgan Lewis & Bockius landed seven IP partners from McDermott Will & Emery, my ALM colleague Lizzy McLellan reported. Jeffrey Gargano, Krista Vink Venegas, Shon Lo, Hersh Mehta and Kevin Shortsle will join the firm's Chicago office. Natalie Bennett will be based in Washington, D.C., and Brent Hawkins will be in the firm's San Francisco and Silicon Valley locations. The group is focused on tech and life sciences. "It's really going to enhance our ability to try cases as well as litigate cases," said Eric Kraeutler, global leader of Morgan Lewis' IP practice.

Jones Day has brought aboard IP litigator Michael Hendershot from Paul Hastings' Silicon Valley office, my colleague Jenna Greene reports. "Mike comes to Jones Day as an accomplished IP trial lawyer who has delivered tremendous results in the most important patent courts in the United States," said Anthony Insogna, head of Jones Day's IP practice, in a news release.

And my colleague Xiumei Dong reports that LeClairRyan has added three patent lawyers in Sacramento. Charles Yang and John Yang, who are not related but have practiced together on and off for the past 10 years, join from FisherBroyles along with Todd Martin.

RPX Not Giving In on Real Parties

It looks as if RPX Corp. will try to convince the Federal Circuit to reconsider en banc a panel decision that raised the issue of its members' stakes in IPR proceedings. RPX's opponent says the defensive patent aggregator still isn't coming clean about one of those relationships.

A three-judge panel of the Federal Circuit on July 9 ordered the Patent Trial and Appeal Board to reconsider whether Salesforce.com is a real party in interest in its IPR against NPE Applications in Internet Time (AIT). The PTAB took "an impermissibly shallow" look at factors such as RPX's business model and an overlapping member on Salesforce's and RPX's board of directors.

Last week RPX filed what looked like a routine motion to extend the deadline to file a petition for rehearing. AIT attorney Steven Sereboff of SoCal IP Law Group took the unusual step of opposing.

"The court pointed to considerable evidence that RPX is acting for the benefit of its 'substantial' client, Salesforce.com, Inc.," Sereboff wrote. "Yet, RPX again asserts in its motion that it alone is the real party in interest." Nor did RPX reveal that the outcome of the case could affect eight other pending IPRs in which it purports to be the sole real party, he added.

Finally, Sereboff wrote, RPX "misrepresents to the court that it has no parent corporation. RPX's own public statements reveal that RPX has a parent corporation."

RPX filed an amended certificate of interest the same day. Not surprisingly, it did not roll over and concede that Salesforce is a real party, given that that issue remains in dispute. RPX did note that as of June 19, Riptide Parent LLC became its parent corporation. The Federal Circuit granted RPX its 30-day extension the following day.

This Mark Lemley Is on a Winning Streak

As is well known in the patent bar, there are two different people named Mark Lemley. There's the Stanford law professor who contributes volume upon volume of academic scholarship. Then there's the Mark Lemley who has the active IP practice at Durie Tangri, including several arguments each year before the Federal Circuit. (I refuse to accept that a single person could process this workload.)

The Durie Tangri Lemley won another Federal Circuit appeal July 27. In *GoPro v. Contour IP Holding*, the appellate court reversed a PTAB decision that refused to consider a GoPro sales catalog as prior art. Lemley persuaded the court that it should count because it had been circulated at a trade show—albeit a trade show for extreme sports vehicles, where action camera enthusiasts were known to attend.

That makes nine wins in a row in cases argued by the Durie Tangri Lemley—10 if you count the May venue decision *In re BigCommerce*, decided without argument.

Oh, you could quibble that one was a partial victory, a \$30 million reduction in damages but a loss on eligibility. What strikes me looking over the list is that very few were gimmes. Eight times Lemley persuaded the Federal Circuit to reverse a lower court judgment—generally an uphill battle—and seven of the 10 resulted in precedential opinions.

Pretty good work. Even better if he were somehow able to combine it with the output of the Stanford Lemley.

Wi-Lan Scores Big Verdict Against Apple

One last outcome that should not go unmentioned: IP holding company Wi-Lan obtained a \$145 million verdict against Apple last week in the Southern District of California. Jurors needed only an hour and half to deliberate before awarding damages on two Wi-Lan patents related to voice-over-LTE technology used in a variety of Apple iPhones.

“The jury worked very hard to understand the complex technology in the case,” said McKool Smith chairman Mike McKool, who helped try the case for Wi-Lan, which is now known as Quarterhill. “Our client is pleased with the verdict.”

McKool Smith’s team also included partners Robert Cote, Brett Cooper, Ashley Moore, Steven Pollinger, Jonathan Yim, and Seth Hasenour, and associates Warren Lipschitz, Kevin Schubert, Christopher McNett, Drew Hollander and Elisa Lee.