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Google lawyer sticks to his guns

Facing long odds, Robert Van Nest wins over judge and jury

By Craig Anderson

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Robert A. Van Nest spent weeks during his defense of Google Inc. against Oracle Corp.'s copyright claims hauling out an old filing cabinet to explain why his client was not liable for infringement.

The San Francisco-based name partner at litigation boutique Keker & Van Nest LLP was trying to explain Java application programming interface packages, known as APIs, and why Google should not be held liable for using the same structure in its Android operating system.

"It's only a system of organization," Van Nest told the jury during his closing statement in the copyright phase of the trial. "It's my file cabinet."

Van Nest was trying to reach two audiences. He hoped to persuade the jury that Google did not infringe those Java programming tools but also was aiming his argument squarely at U.S. District Judge William Alsup of the Northern District of California.

The argument failed with the jury, in large part because Alsup — who chose to decide after the trial the pivotal question of whether Java APIs could be copyrighted in the first place — instructed the jury to assume the Oracle copyrights covered them.

But the filing cabinet analogy must have resonated with Alsup, who used a similar comparison in his ruling last week in Google's favor.

"Each package is like a bookshelf in the library," the judge wrote. "As to the 37 packages, the Java and Android libraries are organized in the same basic way but all of the chapters in Android have been written with implementations different from Java but solving the same problems and providing the same functions."

Even with the copyrightability instruction against him, Van Nest avoided defeat with the jury by turning to another argu-



Robert Van Nest, of Keker & Van Nest LLP

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ment: that Google made fair use of the Java APIs by transforming them, adding its own code so Java — which had been invented in the 1990s for use on desktop computers — could be used in smartphones.

Android, Van Nest told the jury in his closing statement, "is part of a phenomenal new product that was different."

The argument proved to be an extremely potent one. Jury foreman Greg Thompson said the smartphone users on the jury played an influential role, and they did not like the idea of limiting expansion of technological innovation, "of what's seen as the common good."

The jury deadlocked on whether Google's infringement was permitted under the fair-use exception to the Copyright Act, depriving Oracle of what it hoped would be a \$1 billion damages verdict and an injunction requiring Google to license the Java APIs.

The end result was a near-complete victory in what Alsup had described before the

trial as "the World Series of IP cases."

"He has been nothing but amazing," said Catherine Lacavera, Google's director of litigation, in a telephone interview on Monday. "He kept the whole team together. He's a terrific trial lawyer and a terrific trial strategist."

During the trial, the silver-haired Van Nest showed different sides of his personality.

He was the amiable courtroom presence who joshed with the sometimes-irascible Alsup and connected with the jury by making clear arguments in what was a complex case involving computer code, intellectual property law and a blizzard of Google internal emails that were not always easy to explain away.

And he was a fierce competitor, tripping up Oracle's chief executive officer Larry Ellison — a veteran witness and commanding presence — minutes after he took the stand by contrasting his answers during trial with

Litigator connects in the ‘World Series of IP cases’

conflicting deposition testimony and stalking out of the courtroom after a clash with David Boies, New York-based chairman of Boies, Schiller & Flexner LLP, outside of the judge and jury’s presence.

And most importantly, he was the lawyer who kept winning, against an all-star team of lawyers led by Boies and Michael A. Jacobs, a San Francisco-based partner at Morrison & Foerster LLP regarded as one of the sharpest intellectual property lawyers in the country.

Now Oracle must persuade the U.S. Court of Appeals for the Federal Circuit to overturn Alsup’s ruling last week to continue seeking damages and an injunction barring Google from using 37 Java APIs in Android without a license. *Oracle America Inc. v. Google Inc.*, 10-03561 (N.D. Cal., filed Aug. 12, 2010).

In the trial’s second phase, Van Nest persuaded the jury to reject Oracle’s assertion that Google infringed two Java patents.

Google lost on only two minor counts, of copying nine lines of source code that Alsup characterized as an innocent mistake and eight test files that were never shipped with Android. The judge said that would be worth statutory damages of only \$150,000 and possibly as little as \$200.

At the time, Alsup’s jury instruction to assume for the purposes of deliberations

that the structure, sequence and organization of the Java APIs were covered by copyright seemed like a major setback.

After all, Van Nest led off his opening statement in April with the argument that the Java APIs are free because they are needed to use the Java programming language, which Oracle conceded cannot be infringed.

But he emphasized the fair-use argument in his closing statement, making what foreman Thompson said was a strong impact on a majority of the jury, which deadlocked 9-3 in favor of Google on the that question .

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—Henry C. Bunsow

Van Nest declined to comment for this story but previously praised two members of his trial team, Michael S. Kwun a former Google in-house counsel now at Kecker & Van Nest, and Bruce W. Baber of King & Spalding for making the arguments that Alsup agreed with in deciding the Java APIs cannot be copyrighted.

Attorneys who know Van Nest say they are not surprised by his ability to utilize the lawyers with whom he works or by his

dogged determination.

“Bob is a team player,” said Henry C. Bunsow, a former partner at Kecker & Van Nest who worked alongside Van Nest in previous cases and recently started his own practice in San Francisco. “He goes a long way to let everybody participate. Bob will make the key decisions but is very inclusive.”

Catherine M. McEvelly, vice president and general counsel at Torrance-based Honda North America Inc. who has worked with Van Nest since 1994, describes that as “classic Bob. He’s a great leader who is very mindful of getting input along the way” because it helps him test out the best arguments.

She also praises Van Nest’s optimistic nature and competitive streak. “He’s definitely Type A,” McEvelly said. “He works harder than most of his associates.”

Van Nest is staying quite busy, starting a new patent infringement trial next week while representing HTC Corp. in its smartphone patent infringement battle against Apple Inc. along with Quinn Emanuel Urquhart & Sullivan LLP.

McEvelly said Van Nest is a great lawyer. “He’s the kind of person you want standing by your side when you’ve got a big problem.”