Supplement to the Los Angeles and San Francisco
Daily Journal
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TOP INTELLECTUAL PROPERTY LAWYERS 2018

Brian Ferrall

FIRM	CITY	SPECIALTY
Keker, Van Nest & Peters LLP	**San Francisco**	**Patent and copyright litigation**

Ferrall successfully defended Comcast Cable Communications LLC against patent infringement claims brought by Two-Way Media Ltd. involving multicasting and real-time streaming technology.

U.S. District Judge Richard G. Andrews of the District of Delaware declared Two-Way Media's patents invalid following Ferrall's arguments.

Ferrall also argued the appeal at the U.S. Court of Appeals for the Federal Circuit, which affirmed Comcast's victory in November after concluding that the Two-Way Media patents were directed to abstract ideas. *Two-Way Media Ltd. v. Comcast Cable Communications LLC et al.*, 2016-2531 (Fed. Cir., filed Nov. 1, 2017).

He recently got the en banc petition for the case denied in March.

Ferrall also scored an influential win in a case against Cisco Systems Inc. over the issue of the extent to which textual commands that are used to control ethernet switches are copyrightable. Cisco accused his client, Arista Networks Inc., of infringing, and the jury ruled in favor of Arista on both copyright and patent claims. *Cisco Systems Inc. v. Arista Networks Inc.*, 14-CV5344 (N.D. Cal., filed Dec. 5, 2014),

"Other ethernet companies used them and Cisco didn't say anything about it," he said. "We introduced evidence saying that Cisco actually liked that other competitors were using it. It made them the industry standard."

"Except then when Arista did it and actually started really threatening Cisco's dominance, Cisco turned around and sued and claimed copyright over these commands," Ferrall added.

He said that he used a scenes a faire defense, which he explained is a doctrine which says that stock effects of a certain genre, in literature or other art, are not protected by copyright. The attorney successfully extended this argument to the computer copyright context and the jury granted "a complete victory."

Ferrall said that his overall approach to law is influenced by Daniel Kahneman, a Nobel-Prize winning psychologist and economist who pioneered modern theories in behavioral psychology.

He said that reading Kahneman's work "really has changed the way I go about putting together a presentation and trying to understand the audience, trying to understand how human decision making has sort of inherent frailties in it ... and errors at times, and trying to anticipate those, and figure out how to be sure that you don't fall into traps of ... weaknesses or errors in decision making."

— Caroline Hart

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Robert A. Van Nest

FIRM	CITY	SPECIALTY
Keker, Van Nest & Peters LLP	**San Francisco**	**litigation**

Van Nest's trial court win for client Alphabet Inc.-owned Google LLC over Oracle Corp. took a swerve in March at the U.S. Court of Appeals for the Federal Circuit when the panel reversed in Oracle's favor and sent the matter back to San Francisco federal court for damages assessment hearings.

Google said it is evaluating its further appeal options. The case involves Oracle's patent and copyright claims over the Java programming code. *Oracle America Inc. v. Google Inc.*, 2017-1118 (Fed. Cir., filed Oct. 26, 2016).

Van Nest continues to represent Google in an arbitration against its former engineer Anthony Levandowski, accused of poaching Google employees to launch the self-driving truck startup Otto, which Levandowski later sold to Uber Technologies Inc. "This is the other half of the fight," Van Nest said, referring to the courtroom showdown between Google's Waymo unit and Uber that ended in a multimillion-dollar settlement in February.

"It's an exciting, hard-fought arbitration," the Keker, Van Nest & Peters LLP partner said. "Levandowski has taken the Fifth, but we expect resolution by late spring."

Van Nest is also deeply involved in defending Qualcomm Inc. in multidistrict litigation over claims the chipmaker ignored its contractual obligation to license standard-essential patents at what is known in the industry as fair, reasonable and nondiscriminatory, or FRAND, rates. Consumers and Apple Inc. have filed more than two dozen antitrust suits following a Federal Trade Commission suit a year ago.

The FTC alleged that Qualcomm engaged in exclusionary conduct that inflates its competitors' baseband processor sales, reduces competitors' ability and incentive to innovate, and raises consumers' costs for phones and tablets.

"There are dozens of cases. We're in two," Van Nest said, naming a consumer class action and the FTC case, which is set for a bench trial in 2019. Both are before U.S. District Judge Lucy Koh of San Jose. Class certification hearings are set for summer 2018; briefing begins in May, Van Nest said.

"The FTC claims that Qualcomm used its market power in mobile chips to extract excessive royalties from smartphone makers. Qualcomm maintains that its patent royalty rates are fair and do not discriminate." *In re: Qualcomm Patent Licensing Antitrust Litigation*, 17-MD2773 (N.D. Cal., consolidated April 6, 2017).

— **John Roemer**

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