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Litigator of the Week: Robert Van Nest of Keker & Van Nest

Robert Van Nest

By Jan Wolfe
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Oracle got the world's attention when it accused Google's Android operating system of infringing patents and copyrights relating to its Java platform. The "tech trial of the century" that unfolded over the last five weeks had something for everyone. Google CEO Larry Page and Oracle CEO Larry Ellison took the witness stand. Famed attorney David Boies of Boies, Schiller & Flexner argued for Oracle along with IP powerhouse Michael Jacobs of Morrison & Foerster. The future of Java, an open-source programming language, and of Android's growing smartphone dominance was said to hang in the balance.

The jury is in. And while the battle rages on post-trial in U.S. District Court in San Francisco, it looks awfully possible that Oracle's case will wind up having been a hugely expensive dud. For that, Google can thank Robert Van Nest of Keker & Van Nest, who along with his co-counsel at King & Spalding managed to keep Oracle from scoring any major points over the course of the trial.

"I'm a bit tired," Van Nest told us Thursday morning. "But I had a great team, so I didn't have to work so hard."

On Wednesday Google prevailed in the patent phase of the trial, when the jury found that it hadn't infringed two Java patents. But what really drove home the win was the tell-all interview that the jury foreman gave reporters after the verdict.

As The Recorder's Ginny LaRoe recounted, the foreman explained how close the jury came to ruling for Google outright during the first, much more critical copyright phase. The jury concluded on May 7 that Google infringed copyrights relating to 37 Java application program interferences and nine lines of code, but it couldn't reach a verdict on whether Google's use of Oracle's IP was protected by the fair use doctrine. The foreman revealed that, at most, three jurors had agreed with Oracle on the crucial fair use question, and that for a while he was the only hold-out who disagreed with Google. One juror, he said, "was waiting for the steak" from Oracle's lawyers on the fair use issue, but "all he got was parsley."

"Establishing with the majority of jurors that Android was a fair use was really crucial to getting to where we are now," Van Nest told us. "The stakes in the copyright side of the case were much higher. Their damages case going into the trial was 90 percent copyright and 10 percent patent."

Because the jury deadlocked on whether Google's copying of the APIs was fair use, Oracle can't collect damages for the infringement. And because the copying of nine lines of code is so minor (Java has 15 million lines of code), Oracle's potential recovery for that is capped by statute at $150,000. Oracle could get another $150,000 on top of that, because U.S. District Judge William Alsup found that Google infringed one other small copyrighted section of the Java platform. But $300,000 is still a far cry from the $2.6 billion damages calculation Oracle's expert gave last June.

The jury foreman told reporters Wednesday that nine of the 12 jurors in the copyright phase thought Android "transformed" Java--a crucial factor pointing toward fair use. Van Nest had harped on that point during his closing argument, telling the jury that Oracle and Sun Microsystems, Java's creator, had tried to launch a mobile operating system and failed. "Java was something that Sun was trying to make work on a smartphone, and it failed until Android came along," he told jurors at the time. "[It's] a substantially different work, with different success in the market."

Google isn't out of the woods yet. Judge Alsup still needs to rule on whether the 37 APIs are copyrightable in the first place (he instructed the jury to presume that they are). If he rules that they aren't copyrightable, the unresolved fair use question becomes moot. But if he finds they are copyrightable, there could well be a retrial. Van Nest had immediately asked for a mistrial when the jury returned its copyright verdict, and has taken the position that, because fair use and infringement are "two sides of the same coin," the entire copyright case must be re-tried.

When asked about the risks of a potential retrial, Van Nest said he wasn't worried.

"If it does happen," he said, "we'll be ready."