

IP Group Of The Year: Kecker & Van Nest

By Ryan Davis

Law360, New York (January 25, 2017, 11:32 AM EST) -- Kecker & Van Nest LLP secured victory at trial for Google Inc. in a closely watched, multibillion-dollar case where Oracle Corp. accused the Android operating system of copyright infringement, earning the firm a place among Law360's 2016 Intellectual Property Groups of the Year.

A Northern District of California jury found in May that Google's use of Oracle's copyrighted Java software code in Android systems was protected by the fair use doctrine. Had Oracle prevailed, it planned to seek as much as \$8.8 billion in damages.

The battle between the tech titans gripped Silicon Valley and cleared Google of liability in a case that has gone on for six years. The verdict was praised by many technology industry groups, which said it would protect the open-source world of software development.

The trial was a courtroom rematch for the companies, after jurors in a 2012 trial found Google liable for copying Oracle's code. U.S. District Judge William Alsup later ruled that the code was not eligible for copyright protection, but the Federal Circuit reversed, setting up the new trial on whether Google's conduct was fair use.

Partner Robert Van Nest said that the trial was challenging because the Federal Circuit ruling meant Google could not argue non-infringement to the jury. The firm therefore focused its case on arguing that Google transformed Oracle's code into a new mobile platform, making it fair use.

"That turned out to be decisive for the jurors and Judge Alsup, and we're grateful for the jury's verdict," he said.

The high stakes in the trial led to complications not often found in other intellectual property cases, Van Nest said. For instance, top Google executives Larry Page and Eric Schmidt took the stand, along with former Sun Microsystems CEO Jonathan Schwartz, who testified about how Java was developed.

"It's a whole new level of complexity when the most senior people in the company are under fire for cross, but all three of them performed very well," Van Nest said.

The Google verdict, which is now on appeal to the Federal Circuit, was one of two major copyright



victories for Keker & Van Nest in 2016. The firm also successfully defended Arista Networks Inc. in a suit brought by its rival Cisco Systems Inc. over Arista's popular Ethernet switches.

Cisco claimed that Arista's products infringed its copyright on so-called command line interfaces, the commands for operating network switches. A Northern District of California jury found in December that while Arista infringed, it is shielded from liability by the *scènes à faire* doctrine.

That doctrine precludes copyright protection for elements that are mandated or customary, and Keker & Van Nest persuaded the jury that it applied because the Cisco command line interfaces used by Arista had long been used by many other companies.

"The fact that everybody else was using the same set of commands had to be an influential factor for the jury," Van Nest said.

Partner Brian Ferrall said the firm argued that one company should not have a monopoly on the interfaces when they had been widely used by others without any complaint from Cisco.

"What made it really interesting is that as we dug into it realized there were so many references to the command line interface language being an industry standard or a de facto industry standard," he said.

If Cisco had prevailed in the case against its fierce competitor, it was seeking \$335 million, so the case was extremely important for Arista as well as for the industry, given how many other companies use the interfaces.

"Anyone out there that was using the same language and hoping to make as big an impact on the market as Arista was making ... would be concerned about a different outcome in this trial," Ferrall said.

Keker & Van Nest has 80 attorneys, about 45 to 50 of whom have done intellectual property work. The firm does not have a dedicated IP group, but such cases accounted for about 30 percent of the work the firm did in 2016, Van Nest said.

The firm's attorneys have extensive trial experience, and that background gives it an edge when it squares off with much larger firms in the courtroom, he said.

"We have the ability to boil down complicated topics to simple themes that can be understood by laypeople," Van Nest.

Since the firm's attorneys all do work in other areas of the law, "it means that all of us approach IP cases with a little bit of a broader perspective than maybe a lot of other firms do," Ferrall said.

"It's a really important skill we have that differentiates us from a lot of others," he said.

--Editing by Emily Kokoll.