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THE 2017 CLAY AWARDS

The 21st Annual California Lawyer Attorneys of the Year

INTELLECTUAL PROPERTY

Defending intellectual property in the age of technology

Oracle v. Google and Cisco v. Arista

The Keker, Van Nest & Peters trial team representing Google: (Back L-R) Michael Kwun, Steven Ragland, Gene Paige, Daniel Purcell, Kate Lazarus, Edward Bayley and Matthias Kamber, (Front L-R) Maya Karwande, Robert Van Nest, Christa Anderson, and Reid Mullen.

Robert A. Van Nest seized the mantle of Silicon Valley's premier copyright trial lawyer when he led Keker, Van Nest & Peters LLP to two resounding jury verdicts that absolved his major technology clients — Alphabet Inc. subsidiary Google and Arista Networks Inc. — of any infringement liability.

Each case asked jurors to consider whether the defendant was legally allowed to use plaintiffs' copyright-protected computer code and commands without a license. Van Nest convinced jurors to find that Google and Arista acted lawfully.

In a May retrial, a San Francisco federal jury held that Google's inclusion of Oracle Corp.'s Java programming code in its Android mobile operating system was fair

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The Keker, Van Nest & Peters trial team representing Arista: Michael Kwun, David Silbert, Robert Van Nest, Brian Ferrall and Ajay Krishnan.

use under copyright law. *Oracle America Inc. v. Google Inc.*, 10-CV3561, (N.D. Cal., filed Aug. 12, 2010).

In December, a federal jury in San Jose held that Arista Networks successfully presented a legal defense known as "scènes à faire" to justify its implementation of Cisco Systems Inc.'s command-line interfaces.

"We were on the side of defending and promoting innovation against legacy," Van Nest said. "It's gratifying to try several cases a year, especially when you're enthusiastic about the principles you're defending."

The seven-year legal slugfest between Oracle and Google attracted attention from the entire computer technology industry. A copyright win for Oracle could have brought in billions of dollars and spurred lawsuits against other companies that use elements of Java.

Oracle obtained the rights to Java when it purchased Sun Microsystems Inc. in 2010. Google's reliance on declaring code from 37 application programming interfaces, or APIs, of Java was illegal, Oracle claimed in court.

The U.S. Court of Appeals for the Federal Circuit held in 2014 that the declaring code and the "structure, sequence and organization" of Oracle's Java APIs were copyrightable, dealing a major setback to Google's defense.

On remand, a legal team led by Van Nest and second-chaired by firm partner Christa Anderson set about persuading jurors that Google's use of Java in a smartphone language was transformative, one of the key tests in determining fair use.

"The most important thing is to try and communicate in plain English the technological ideas," Anderson said. "Whoever is in the jury has a few weeks to be exposed to the technology and then make really important decisions."

The trial featured testimony from Google co-founder Larry Page, ex-Google CEO Eric Schmidt, Oracle co-CEO Safra Catz and former Sun CEO Jonathan Schwartz.

"I think the trial demonstrates that at least in California juries are receptive to the concept of fair use as a tool to promote innovation," Van Nest said. "The whole idea of fair use is to allow copying in certain circumstances to promote innovation."

Oracle appealed May's fair use verdict to the Federal Circuit last month.

With blockbuster patent damages awards on the wane, Anderson said plaintiffs are looking to get an advantage on competitors with other types of intellectual property claims.

"There are more copyright cases and more trade secrets cases and less of a heavy focus on patent cases," Anderson said.

In the Arista case, Cisco sought $335 million for Arista's illegal use of Cisco's command-line interfaces, which are typed-in manual text commands used for controlling network switches. *Cisco Systems Inc. v. Arista Networks Inc.*, 14-CV5344 (N.D. Cal., filed Dec. 5, 2014).

The San Jose federal jury found that Arista presented a valid legal defense, defeating Cisco's copyright claims. Jurors also found that Arista did not infringe a patent Cisco asserted at trial.

Van Nest has been with his current firm since the late 1970s, when he joined as its first associate.

He never could have envisioned at that time that most of his legal work would be involved with technology companies.

"None of us would have predicted the importance of or the rise of technology that has happened," Van Nest said. "None of us was aware that technology would become so important to the Bay Area or the world or that we would be able to participate it in the way that we have."

— Kevin Lee