

THE 2019 CLAY AWARDS

The 23rd Annual California Lawyer Attorneys of the Year

INTELLECTUAL PROPERTY

Intellectual property expertise safeguards technology giant's patents from incursions by its competitor



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Cisco Systems Inc. v. Arista Networks Inc.

From a whiteboard in a conference room in San Francisco, Kirkland & Ellis LLP lawyers representing technology giant Cisco Systems Inc. in 2014 designed a massive, multi-year campaign to defend Cisco's patents from incursions by rival Arista Networks Inc.

Cisco alleged that former employees who had founded Arista were competing in the Ethernet data switching market using many of the same features Cisco had developed and patented. The task facing the Kirkland team, led by partners Adam R. Alper, Michael W. De Vries and Sarah E. Piepmeier, was to prove it and stop it. Their strategy, launched with an original warning shot in U.S. District Court for the Northern District of California in December 2014, involved multiple proceedings spanning years there and before the U.S. International Trade

Commission and Customs and Border Protection, at the U.S. Patent and Trademark Office Patent Trial and Appeal Board, and at the U.S. Court of Appeals for the Federal Circuit.

"All three of us were in it from the beginning," said Alper. The team was joined by Kirkland's Brandon H. Brown, Akshay S. Deoras, Lien K. Dang, Robert N. Kang and Justin Singh. "We saw an overall Arista scheme to take Cisco's technology."

Courts agreed. In 2016, an administrative law judge at the ITC issued a pro-Cisco determination prohibiting the entry or sale of Arista products it held infringed three of Cisco's core patents, that Arista copied Cisco's patented technology and that an exclusion order should issue. After partial review, the full Commission agreed and specifically noted that Arista had a

"culture of copying" Cisco. The importance of the patented technology was not in dispute; one of the infringing features, Arista SysDB technology, had been hailed by Arista officials as the "secret sauce" of Arista's products.

Arista countersued in the Northern District, alleging that Cisco violated the Sherman Act for monopolizing the \$23 billion global market for Ethernet data switches. In May 2018, U.S. District Judge Beth Labson Freeman denied Arista's partial summary judgment motion. In August 2018, on the eve of trial, the case settled with Arista agreeing to pay Cisco \$400 million.

Said De Vries, "We foresaw from the first that this would be a multi-faceted, multi-venue dispute. We did envision its length and breadth from the start. With our great team of IP attorneys, we spent many weeks whiteboarding our strategy. It felt like one of those TV crime dramas where detectives put pictures up and draw lines among them. At one point we said, 'Look: the text of their manual is the same as the text of our manual.' It took hard work and ingenuity. That was an interesting and fun time period."

Piepmeier, a patent litigator and a leader of the firm's Bay Area IP practice, said, "Cisco's and Kirkland's relationship runs long and deep. A key to our success was knowing their business so well."

She said a watershed moment came when the team read the ITC's "culture of copying" opinion. "We said, 'Yeah, this is it. This is what we knew from the start was going on, and now we have it on the public record.'"

Alper said a key part of the case was examining Arista's senior executives before the ITC. "We were able to confront them not just with patent infringement, but with a concerted effort to copy us. Their senior engineer just admitted it, right on the stand."

De Vries pointed to the settlement as a satisfying conclusion to the case. "It was a very public validation of Cisco's strategy from the outset. There was no murky confidential settlement. We had invested so much of our lives in this, and you don't often have a public ending like that."

— John Roemer