

# THE RECORDER

## Oracle/Google trial places Farella partner in odd spot

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SAN FRANCISCO — When the armies of attorneys for Oracle Corp. and Google Inc. go to trial in the Android showdown, there will be one litigator in the room with a major speaking role and absolutely no dog in the hunt.

John Cooper, a Farella Braun & Martel partner and founder of its IP litigation group, is essentially working for U.S. District Judge William Alsup, who tapped him to represent the court-appointed expert who is going to tell jurors how much the whole thing is worth.

In the trial that begins today, the tech giants will duke out whether Google's Android software infringes Oracle's Java technology.

Alsup took the apparently unprecedented step of bringing in a lawyer to represent economics professor James Kearl, whom Alsup appointed to offer an "independent" damages report after being displeased with the theories espoused by either side. And he has asked Cooper to conduct a two-hour direct examination of Kearl, should trial get that far.

"It sounds like a creative way of managing trial in the already established proper use of a neutral expert," said Neil Smith, a Ropers Majeski Kohn & Bentley partner in San Francisco who isn't involved in the case.

It's just one point of interest in the high-stakes trial featuring high-flying lawyers fighting over potentially hundreds of millions of dollars.

The "World Series of IP cases," as Alsup dubbed it during a recent hearing, is set to proceed in three phases, beginning with copyright liability, then moving to patent infringement. If Oracle, whose legal team is led by Morrison & Foerster's Michael Jacobs, prevails in one or both of those phases, then the focus turns to Cooper and Kearl and the parties' own damages experts.

It appears Kearl's damages theory bodes well for Google, whose trial team is led by Kecker & Van Nest's Robert Van Nest. After seeing Kearl's report, Google offered to pay Oracle around \$2.8 million, plus royalties, if infringement is proven at trial. Oracle rejected the offer, and is seeking around \$1 billion and an injunction stopping Google from distributing Android software, which Oracle says infringes patents it acquired from Sun Microsystems Inc.



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**WILL WORK FOR JUDGE:** Farella Braun & Martel partner John Cooper is representing, for free, the court-appointed damages expert.

Lawyers are generally wary of court-appointed experts, figuring jurors may put too much stock in their testimony. To lessen that risk, Oracle and Google came up with language to introduce Kearl: "Dr. Kearl is an independent expert who was not retained by either party, but was appointed by the court to testify in this case. The court has ordered that his fees are to be paid by both Oracle and Google. You should consider his testimony in the same way that you would any other witness."

Less defined is Cooper's role in representing Kearl.

Independent experts have been put on the stand in a small number of cases, a practice upheld by the U.S. Court of Appeals for the Federal Circuit. But in all the instances anyone can cite, it's been the judge, or lawyers for the parties, doing the questioning.

By bringing in Cooper, Alsup is extricating himself from that task. Nicholas Groombridge, a Paul, Weiss, Rifkind, Wharton & Garrison IP litigator in New York, says he understands a judge's desire to limit his interaction with a witness in front of jurors. A judge, he suspected, could think inserting himself is "inconsistent with my role as being an impartial umpire in the case."

One thing that will certainly be on Cooper's mind, lawyers said, is how to draw out the testimony in a way that doesn't call into question his neutrality. "If the parties themselves are left to the task of eliciting

information from the expert, a lack of neutrality is fine because each side is representing their own interest," said Reed Smith's Raymond Cardozo, an appellate lawyer who does IP work. For Cooper, a "just-the-facts-ma'am examination" would probably be the best approach, he said.

Cooper declined to be interviewed. But fellow members of the IP bar say he is well-suited for the role of the court's "facilitator" based on both his trial experience and demeanor. A review of his court cases over the past decade indicates he's not represented either Oracle or Google in court.

"There's going to be some heavy cross-examination, so having a lawyer present for the neutral expert making objections might be helpful in the flow and control of the trial," said Smith of Ropers. "In case management, it probably helps being a traffic cop to some extent, protecting the witness against improper questions."

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But unlike the scores of lawyers hired for the trial by Google and Oracle, Cooper won't be getting paid — he's contributing his time pro bono. By not forcing the parties to compensate his expert's lawyer, attorneys say Alsup probably avoided having to get Oracle and Google to agree on who it would be.

The silver lining for Cooper? "One thing he knows for sure," Cardozo said, "is he's not going to lose the case."