

Appellate MVP: Orrick's Joshua Rosenkranz

By **Ben James**

Law360, New York (November 23, 2011, 4:50 PM ET) -- Orrick Herrington & Sutcliffe LLP's E. Joshua Rosenkranz helped Facebook Inc. fight off a challenge to a \$65 million settlement with ex-classmates of Mark Zuckerberg who claimed the Facebook founder stole their idea for the social networking site, earning him a spot on Law360's list of Appellate MVPs.

Rosenkranz argued on behalf of Facebook before the Ninth Circuit in the high-stakes case in January, and convinced a three-judge panel to rule in April that the agreement was valid and enforceable.

Cameron and Tyler Winklevoss, Harvard classmates of Zuckerberg, alleged that he stole the idea for a social networking site after writing code for their company ConnectU, which they created along with Divya Narendra, another ex-classmate. That story was dramatized in the Academy Award-winning movie "The Social Network."

Rosenkranz is heralded by his colleagues as a brilliant strategic mind with a knack for swaying judges and crafting written arguments that sing off the page. He's utilized those qualities in appeals courts for high-profile clients like Facebook, satellite television company EchoStar Corp. and toy maker MGA Entertainment Inc.

Finnegan Henderson Farabow Garrett & Dunner LLP partner Donald Dunner, who worked alongside Rosenkranz on EchoStar's appeal to the Federal Circuit in a patent battle brought by TiVo Inc. over digital recording technology, called him imaginative and easy to work with.

"His approach to the cases I've been in has been an approach that not only makes sense legally, but on a common sense level," Dunner said. "His goal was not only to appeal to the intellect of the judges at a legal level, but to their sense on a visceral level."

In 2006, a jury found that EchoStar had infringed a TiVo patent and the district court imposed a permanent injunction barring further infringement. EchoStar redesigned its digital video recorders, but the court eventually found EchoStar in contempt on the ground that the new design was not sufficiently different from the infringing design, a ruling which meant hundreds of millions of dollars in sanctions.

In a potentially crippling ruling, the lower court ordered EchoStar to shut off the DVR function for millions of its subscribers.

Though that injunction was stayed, a Federal Circuit panel initially affirmed a Texas district court's finding that EchoStar was in contempt of the infringement and disablement provisions of the district court injunction.

But Rosenkranz persuaded the Federal Circuit to rehear the appeal en banc, and in April, the Federal Circuit vacated the district court's finding that EchoStar was in contempt of the injunction's provision for infringement of TiVo's patent. However, the appeals court upheld the contempt finding against EchoStar for failing to disable DVR features in set-top boxes and affirmed a sanctions award of more than \$90 million to TiVo. Soon after that, the case settled.

Rosenkranz helped secure an even more dramatic reversal of fortune for MGA in its intellectual property battle with Mattel Inc. over Bratz dolls. In April, after the matter had gone up to the Ninth Circuit and come back to the trial court, MGA prevailed in the case and Mattel was ordered to pay nearly \$310 million to cover damages and attorneys' fees.

Mattel had alleged that MGA designer Carter Bryant created the idea for the popular Bratz dolls while he was a Mattel employee, and brought the copyright and trademark suit seeking millions in damages. Mattel initially won \$100 million in damages and the rights to the Bratz brand.

Rosenkranz, however, argued before the Ninth Circuit when MGA challenged the lower court's injunction that forced MGA to abandon the Bratz line and hand over its trademark portfolio to Mattel.

The Ninth Circuit had already denied a stay pending appeal, and MGA brought in Orrick and Rosenkranz just weeks before their opening appeal brief was due. When Rosenkranz argued the case in December 2010, a recall of MGA's Bratz dolls was poised to launch and MGA was on the brink of being driven out of business.

"That expense alone would have sunk the company," Rosenkranz said of the recall.

The strategy in the MGA case was geared toward hitting points that would most likely have the Ninth Circuit stay the case immediately, Rosenkranz said, adding that he looked to highlight the unfairness of the situation MGA found itself in.

Mattel said it owned the idea for the Bratz line because Bryant came up with the idea during his employment with the company, which makes Barbie Dolls and other popular toys. Rosenkranz's oral argument homed in on a one-page invention agreement that Bryant had signed when he started working for Mattel, which assigned inventions he created during his employment to the company.

Rosenkranz emphasized how "scary" the assertion was that an employer could own every idea in an employee's head, and that it was bizarre to force a company out of business because of one page of "barely legible" boilerplate.

"My first priority was to demonstrate to the court that if this one-page contract is going to be the engine for the destruction of a multibillion-dollar company, it better be clear," Rosenkranz said.

There was no question, according to Rosenkranz, that Bryant did not come up with the idea for Bratz as part of his work for Mattel.

"Bratz was very non-Barbie," he said.

Rosenkranz, who spent 15 years as a public interest lawyer and was the founding president and CEO of the Brennan Center for Justice at New York University School of Law, credited his background with helping him develop a unique and solid body of appellate experience.

“A lawyer who spends their first 15 years in a private law firm is highly unlikely to get the sort of on-the-feet courtroom experience that I had,” Rosenkranz said. “I had argued 130 appeals by the time I went into private practice.”

Rosenkranz says he always knew he wanted to be a litigator, and is still intrigued by the strategic and legal maneuvering that can go on at the trial court level. Still, he's an appellate attorney at heart.

“I'm better at talking to judges about what the law should be than I am at talking to juries about what the facts are,” he said.

--Editing by Andrew Park.

All Content © 2003-2011, Portfolio Media, Inc.