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Litigators of the Week: Kirkland Fends Off Antitrust Claims for Thomson Reuters Against AI-Backed Start-Up

By Ross Todd
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Our Litigators of the Week are **Daniel Laytin**, **Christa Cottrell** and **Cameron Ginder** of **Kirkland & Ellis**, who represent Westlaw owner Thomson Reuters. Some of their colleagues represented the company when it sued ROSS Intelligence four years ago, claiming the startup scraped Westlaw's copyrighted material to develop its own AI-backed product. Laytin, Cottrell and Ginder, however, signed onto the case after ROSS filed antitrust counterclaims against Thomson Reuters.

Last week, Third Circuit Judge Stephanos Bibas, sitting by designation in the District of Delaware, granted the team's motion for summary judgment on ROSS's claim that Thomson Reuters inappropriately tied the Westlaw public law database to its search tool.

Litigation Daily: What was at stake here for Thomson Reuters?

Dan Laytin: The antitrust plaintiff here, ROSS Intelligence, was alleging that the way that Westlaw has licensed its legal research platform to law firms and legal researchers for decades was anticompetitive tying. ROSS claimed that what we know as the Westlaw product was actually two separate products—a public law database and a legal search tool—and that Westlaw was tying one to the other. ROSS claimed that absent the alleged tie, law firms and legal researchers would have mixed and matched by licensing Westlaw's public law database and ROSS's search tools.

Courtesy photos

(l-r) Dan Laytin, Christa Cottrell, and Cameron Ginder of Kirkland & Ellis.

Christa Cottrell: ROSS sought an injunction to try to force Westlaw to change the way it licensed its product. The entire injunction ROSS sought, it seemed to us, was backwards. Lawyers don't pay Westlaw just for the content, but

because it is an integrated product combining all of the features lawyers need, including case law, secondary sources, Westlaw content like headnotes, along with an array of legal search technology. Lawyers want the best product, and the fact that they turn to Westlaw as often as they do is a testament to the investment the company has made in both its library and its technology.

Cam Ginder: And the relief sought wasn't just injunctive relief. ROSS also sought a significant (and confidential) sum of monetary damages. They argued that, had Westlaw sold its cases separately, ROSS would have been a tremendous success in the market. ROSS sought to recover all of those supposed "but for" profits from Thomson Reuters, too—times three, as the antitrust laws provide for an automatic right to trebling.

How did this matter come to you and the firm?

Laytin: Our partners, **Dale Cendali** and **Josh Simmons**, were already representing Thomson Reuters, the owner of Westlaw, in copyright infringement litigation against ROSS. ROSS brought its tying antitrust claim, as well as other antitrust claims that were dismissed, as a counterclaim to the copyright infringement action. The basis of the copyright case is that ROSS infringed Westlaw's content, including its well-known headnotes, to train its AI tool. That case is still pending.

Ginder: We were really fortunate to have the opportunity to work with this client. It was a real team led by our in-house team from Thomson Reuters, including **Katharine Larsen**, **JP Giuliano** and **Anne Barnard**. And there were some interesting issues they had to help us track down, including the history of Westlaw—and the Bluebook.

Cottrell: I never thought I would have to re-read the Bluebook after law school, but we found ourselves working up cross-examination points on the import of the Northwest Reporter!

Who is on your team and how have you divided the work?

Laytin: This was the most special part about this case. Christa and I have worked together for close to 20 years, and developing a team approach is just the most important thing to us in how we work. Here, we definitely needed to. The antitrust claims raised a lot of issues and the schedule was ultra-compressed for an antitrust case. We had dozens of fact depositions, fact and third parties, in the span of a few short weeks. ROSS had experts on Westlaw's history and the history of caselaw and official reporters; on coding and the details of the Westlaw search platform; and on economics, including market analysis and consumer demand. They even brought in an expert on artificial intelligence. And of course ROSS had a damages expert. We, of course, had our own experts on the key antitrust issues. So we each took responsibility for a different subject matter, tried to master it as best we could, and worked up our crosses.

Cottrell: Everyone on the Kirkland and Thomson Reuters team developed a real area of expertise and supported the witnesses who fell into that area. That led to opportunities for everyone to have a major role at these expert depositions, including our star associates **Danielle O'Neal** (now a partner, who did an amazing cross of ROSS's technology expert), **Max Samels** (an all-around antitrust rising star) and **Lexi Wung** (who helped draft killer examinations despite it being her first expert). It wasn't just the Kirkland lawyers for sure. Our client in-house team was completely integrated and we worked together to get the work done.

Ginder: And that's all before you even get to summary judgment. We filed five summary judgment briefs and a key *Daubert* motion—all in the course of a month. From start to finish—fact discovery, expert discovery, and summary judgment—the case was compressed and expedited. We couldn't have done it without an incredible team putting in an incredible amount of work.

ROSS Intelligence closed its doors while this case was pending. How do the "Goliath versus David" optics of a case like this come into play as you litigate?

Cottrell: ROSS definitely tried to portray itself not just as a David, but as a real AI-based disrupter to Westlaw's business. We saw our charge as really digging into the facts to figure out the real story. As the Court concluded in its summary judgment opinion, there just wasn't evidence that law firms and legal researchers wanted what ROSS was selling—either the actual legal research platform that ROSS was selling when it was in business or the theoretical mix-and-match legal search technology company it claimed it was in the litigation. In the end, as the summary judgment opinion reflects, the facts showed more "dot-com bust" than "David versus Goliath."

Ginder: Equally important was showing why Westlaw is the successful product it is. Westlaw's place in the legal industry isn't a historical accident or because it has "special" access to caselaw, as ROSS tried to suggest in expert reports and depositions. The company has put tremendous effort and resources on a daily basis into developing the product lawyers trust—including investing in new technology and continually enhancing the Westlaw product.

Can you walk me through the plaintiff's tying theory and how you made the case that it was an overreach?

Laytin: Tying cases are pretty unusual in the antitrust world. Most civil antitrust litigation is focused on trying to prove a conspiracy—usually among competitors that produce similar things, where the plaintiff alleges that the competitors got together to reduce output and increase price. This antitrust case wasn't like that. Originally, ROSS alleged that Westlaw had an affirmative duty to license its public law database to competitors like ROSS, and that Thomson Reuters' copyright case against ROSS was somehow an attempt to monopolize a market, in addition to its tying claim. Those first two claims were dismissed—as to the refusal to deal claim, voluntarily by ROSS midway through the oral argument on the motion to dismiss. That left this tying claim, which we always thought was a theory that didn't fit here.

Cottrell: That's exactly it; this was a case in search of an antitrust theory. We focused on showing the differences between this case and a real tying case. In a real tying case, a producer that had, say, a super high market share of hot dogs wouldn't let customers buy their hot dogs unless they also bought their hot dog buns, where there were a lot more competitors. Hot dogs and hot dog buns are obviously separate products. We just didn't think that's what the record would show here as to Westlaw, so that's where we focused. In deposition after deposition, with both fact witnesses and experts, we worked to establish that ROSS itself was selling an integrated legal research platform, not two separate products. And Thomson Reuters' witnesses did a great job of explaining why customers choose Westlaw as one solution for their legal research

needs. In the end, there just wasn't anything in the record, from a fact or expert witness, that ROSS could point to as sufficient evidence that Westlaw was like hot dogs and hot dog buns, as opposed to what we knew it was—one product.

What's important in this decision for companies like Westlaw—an established player facing an antitrust challenge from an AI-backed disruptor?

Laytin: This case is especially impactful because the structural challenge was by a self-proclaimed AI disruptor. Of course, we have to mention that, as we know from our own use of Westlaw, Westlaw has been using AI for decades, and it continues to be at the forefront of incorporating AI and other cutting-edge technology into its product. But we think the overarching lesson here is that getting past summary judgment requires facts—expectations and hopes just aren't enough. So Thomson Reuters' decision to invest in its defense here—to develop the facts from documents, witnesses, and experts—was critical.

Cottrell: Thomson Reuters' resolve here to litigate this case through summary judgment is also noteworthy. These antitrust cases, especially structural challenges, are important to any business. And they are expensive to litigate. Which is why so many cases settle. But Thomson Reuters knew that it was right on the facts and the law and had the courage to see this case through, obtaining a decision that should reduce its risk to similar challenges going forward.

Your client still has copyright claims against ROSS teed up for trial, right? When is that set for? How much crossover has there been between the antitrust team playing defense and the copyright team playing offense?

Laytin: The court has set summary judgment briefing for this fall, with a hearing in early December, and is reserving dates for a trial next year. In terms of crossover, it was another team effort. Our colleagues Dale, Josh, **Miranda Means** and **Eric Loverro** were great to work with; they had institutional knowledge because they were on the scene first. That was invaluable in getting up to speed, and then we stayed coordinated all the way through. We look forward to watching them as the copyright case progresses—happily from the sidelines.

What will you remember most about this matter?

Laytin: Westlaw is an iconic product to every lawyer, and I'm no exception. Throughout this case, I thought back often to the law school version of myself using Westlaw to dig into antitrust case law and treatises when I was taking antitrust law as a class at Michigan Law. I never would have thought then that I would have the privilege of representing Westlaw in an antitrust battle. I'm grateful for the opportunity, and I'm not telling what (very old) version of Westlaw I used in law school.

Cottrell: That we won. On multiple grounds. Because of a full team effort. And we did it for a client that I respect and am grateful for in my practice!

Ginder: This case had it all: an amazing client, an amazing team, and interesting and challenging questions of law—with a particularly interesting set of facts for lawyers! Knowing we put in all of this work for a great client, with a great team, and succeeded—that's what I'll always remember.