



2018 Practice Group of the Year

Media & Entertainment

Kirkland & Ellis LLP secured a win for Fox News Network at the Second Circuit that clarified the fair use doctrine for copyrights of video clips collated by other websites, earning the firm a spot among *Law360*'s Media and Entertainment Groups of the Year.

In the closely watched copyright case, Kirkland persuaded the Second Circuit to hold in February 2018 that while the video service provided by TVEyes was a useful tool, it was “not justifiable as a fair use” because it “deprives Fox of revenue that properly belongs to the copyright holder.”

TVEyes records television around the clock and turns it into a word-searchable database, a popular service that has reportedly drawn subscribers from Congress, late-night talk shows, public advocacy groups, news organizations and many others.

The company believed it was protected by the fair use doctrine, much like Google's unauthorized digitization of millions of books. But Fox sued for copyright infringement in 2013, saying the service was more like an illegal on-demand service.

“I'm really very proud that we were selected to handle that case,” said Dale M. Cendali, who served as Fox's lead counsel and was chosen by *Law360* in December as a 2018 Media and

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Entertainment MVP. “It's an incredibly important case in protecting the rights of copyright holders and in helping to establish the correct application and balancing of the four fair use factors.”

While TVEyes provides a “transformative” use — the first of the four factors — by allowing users to search through a large amount of material, that finding was outweighed by evidence the service “usurped a function for which Fox is entitled to demand compensation under a licensing agreement,” the Second Circuit found.

“Having weighed the required factors, we conclude that the balance strongly favors Fox and defeats the defense of fair use,” according to the opinion, which the U.S. Supreme Court declined to review in December.

Kirkland is also representing Nike Inc. as it defends against allegations that the footwear giant copied Jacobus Rentmeester's photograph of Michael Jordan in its own promotional image, telling the Supreme Court earlier this month that court precedent is clear the photos are not substantially similar except in their ideas, which are not protected by copyright.

A Ninth Circuit panel last February ruled 2-1 that Nike did not copy enough details of Rentmeester's photo of Jordan to establish unlawful appropriation. The majority held that although Nike's photographer borrowed Rentmeester's idea to photograph Jordan performing a leaping pose inspired by ballet's grand jeté, Nike did not copy the details of that image, like the positioning of Jordan's limbs, the photo's

background or the lighting. Therefore, Nike hasn't infringed Rentmeester's copyrights, the majority said.

Rentmeester contended in his suit that Nike paid him \$15,000 in 1985 to use its photo under certain circumstances for two years. But Nike continued to use the silhouetted image of Jordan jumping as a logo long after the contract expired, the suit claimed.

Kirkland also represented video game maker Take-Two Interactive Software Inc. in a number of ongoing high-profile cases, including allegations the company infringed copyrights involving tattoos of several NBA players featured in its "NBA 2K" series.

In August, it secured a preliminary injunction that barred an unemployed Georgia man from selling cheat

programs used in "Grand Theft Auto" video games.

Take-Two contended in its March complaint that David Zipperer unlawfully sold GTA players a cheat program called Menyoo that allowed them to gain in-game benefits and "grief" the game play of other players by altering their play without permission.

While Zipperer told a New York federal court he had stopped distributing the Menyoo cheat menu and did "not intend to resume distribution in the future," the court held he could not claim an injunction would be moot, as he had previously made similar promises before disregarding them.

Kirkland represents media and entertainment clients in a broad range of industries, including theater,

television and video games, according to Claudia Ray, a partner with the firm.

She said she expects the firm in 2019 to continue to work with clients that are pushing the boundaries of how to create content and distribute it to customers, recognizing that as the companies create new platforms, the commonality of legal issues such as copyright and trademark law remain.

"That's what really makes it exciting," Ray said. "That's something that we expect to continue."



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