



LAW360

2018 Rising Star Joshua Simmons

Kirkland & Ellis LLP partner Joshua Simmons has a passion for the arts that has motivated him to nab intellectual property wins as high up as the Second Circuit for clients like Fox News, landing him a spot among the attorneys under 40 named as *Law360's* media and entertainment Rising Stars.

His biggest case:

Simmons represented Fox News as it brought claims of copyright infringement against TVEyes, a broadcast media search engine that pulls clips from television and radio and then indexes them into a word-searchable database. The Kirkland team initially failed to sway a federal judge who ruled that some of its features constituted fair use.

"Everyone sort of knows Fox's television content. They have a huge and growing digital media side to their business," said Simmons. "Explaining how important that was, and how that is really the future of all television stations, was a challenge."

Simmons didn't stop at the district court level, and the Kirkland team won on appeal before a Second Circuit panel in February.

TVEyes had argued that it was no different from Google Books, a massive unauthorized search engine

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of books that the Second Circuit ruled was fair use in 2015. But Simmons and the Kirkland team persuaded the circuit court to find that TVEyes had gone a step further, depriving Fox News of revenue it deserved.

"It's really an important case," said Simmons, "because so much of television — and media in general — is going digital and trying to capture short-form content."

His proudest moment:

Simmons' first case at Kirkland called for defending the creators

of ABC favorite "Modern Family" from allegations that it ripped off a writer's idea for a pilot television series called "Loony Ben." He represented a slew of defendants, including ABC Inc., 20th Century Fox Television parent News Corp. and show creators Steven Levitan and Christopher Lloyd.

"It's something I look back with fondness on," said Simmons, an admitted "Modern Family" fan.

A federal judge in New York's Southern District tossed the case, brought by writer Martin Alexander, before he appealed to the Second Circuit.

There, a case that Simmons had worked on during his first week as a Kirkland associate became another victory for the firm: a panel ruled that the similarities between "Modern Family" and "Loony Ben" were "sparse and minor," according to the court's opinion.

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Other notable cases:

Simmons and his team at Kirkland have been defending Take-Two Interactive Software in a novel dispute that accuses the developer of infringing copyright-protected tattoos displayed on LeBron James and other basketball players in its video game “NBA 2K.”

According to the lawsuit, a company called Solid Oak Sketches had acquired the copyrights from tattoo artists responsible for inking the players. The company then sued Take-Two despite the game maker having obtained the rights to depict the players in the game. Take-Two has argued that the tattoos’ presence in the game are protected under fair and de minimis use, or a small, allowable use of the artwork.

“They’re really a cutting-edge video game company, and we’ve been fortunate to work with them on a number of cases,” said Simmons.

Simmons and his team successfully shot down a bid for some statutory damages and a portion of attorneys’ fees in 2016, when U.S. District Judge Laura Taylor Swain said that

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the copyright should have been “registered prior to the alleged infringement” in order to receive the award. But the suit is ongoing, as trimmed allegations were allowed to proceed in March.

Simmons also filed suit on behalf of Take-Two against a band of software developers accused of tampering with the makeup of Grand Theft Auto V to tilt the game in their favor.

“People are trying every which way to cheat,” said Simmons. “The law is there to ensure that video games are played in the way they’re intended.”

U.S. District Judge Lewis A. Kaplan signed off on an agreement in May that barred two American developers from further cheating at the game with their European co-conspirators.

Why he practices media and entertainment law:

Simmons had a clear reason for going into his legal specialty: “Because I love media and

entertainment,” he said. Simmons performed in school and community theater from middle school through his first year in college, working as an actor and as a behind-the-scenes designer for lighting and sound.

But Simmons was quick to say he doesn’t miss the spotlight.

“I get to see so many people that are so talented,” he said. “I really think I found the right place for me.”



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