

## Litigator of the Week: Copyright from Coast-to-Coast

Dale Cendali of Kirkland & Ellis won rulings this week in copyright cases for Fox News and Nike—before the Second Circuit and Ninth Circuit respectively.

**By Ross Todd**

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Plenty of litigators like to boast they've got a "nation-wide" practice. But for Dale Cendali of Kirkland & Ellis, proving up nationwide bona fides is as easy as pointing to one date on the calendar.

On Tuesday, Feb. 27, Cendali was on the winning side of two federal appeals court decisions in blockbuster copyright cases on either side of the country—rulings that came down a little more than an hour apart.

At 9:16 am, Cendali got word that the U.S. Court of Appeals for the Second Circuit had sided with her client Fox News in its copyright lawsuit against aggregating service TVEyes Inc. At 10:32 am, Cendali heard from the U.S. Court of Appeals for the Ninth Circuit that she'd won a ruling for Nike Inc. which was accused of infringing a photographer's copyrighted image of a young Michael Jordan with its logo for Jordan-branded shoes and apparel.

"You can imagine it was quite a day," said Cendali in a phone interview. "I was ping-ponging from call-to-call and email-to-email."

Even for Cendali, who has represented content producers in some of the highest profile copyright disputes of the past two decades, Tuesday's wins stick out—particularly the Second Circuit case.



**Dale Cendali of Kirkland & Ellis.**

There Fox News was seeking an injunction against TVEyes, a service which allows customers to grab and share 10 minute chunks of Fox's programming by searching closed captioned text to find keywords within clips. The Second Circuit found that TVEyes failed to show that its product was justified as a fair use under copyright law since it offered access to virtually all of Fox's copyrighted programming and deprived Fox of the ability to profit from licensing searchable access of its content to others.

The victory was the latest in a string of high profile wins for Cendali in cases where she's pushed back against accused infringers' fair use arguments. Notably, Cendali has beaten back the fair use claims of the publisher of an unauthorized "Lexicon" of the world of Harry Potter for author J.K. Rowling, taken on artist Shepard Fairey for unauthorized use of an AP photo of Barack Obama to create his famous Obama "Hope" image, and, alongside co-counsel at Orrick, Herrington & Sutcliffe, helped revive Oracle's copyright claims against Google at the Federal Circuit.

Cendali said that Tuesday's Second Circuit decision is "vitally important in copyright fair use law," especially for how it helped clarify the court's earlier decision in a case involving Google's program to digitize books to create a full-text searchable archive.

In the earlier case, the Second Circuit found that it was a fair use for Google to scan and digitize entire books, since it only provided small snippets of the books to people who used its search function. Cendali said that Tuesday's decision "really helped to clarify the Google Books case and to make clear where the lines should be drawn."

"The court recognized a difference between a service that would help find content and a service that would deliver copyrighted content," Cendali said. "You can see, as the court did, why that would have a significant commercial impact."

In the Nike case, the Ninth Circuit found that the company hadn't infringed the copyright of Jacobus Rentmeester, a photographer who shot an artful photo of Jordan while he was still a student at the University of North Carolina. Nike commissioned its own similar photo when it signed Jordan to endorse its products. The company adopted an outline of Jordan holding a basketball in a pose based on ballet's grand jeté for its Jordan logo—the same position that Rentmeester had Jordan take. In Tuesday's decision, the Ninth Circuit found that Reentmaster couldn't show that Nike copied enough of the protected expression from his photo to establish an unlawful appropriation in the company's photo, let alone the stylized logo.

Cendali gave credit for both victories to the team of junior partners, associates and in-house counsel backing her. They include Kirkland colleagues Josh Simmons, Jordan Romanoff, Johanna Schmitt, Daniel Bond and Shanti Sadtler Conway.

Cendali said her copyright practice has its roots in her love of the arts: She was president of the Yale Dramatic Association as an undergrad.

"I also love the intellectual nature of the law and the theater of the courtroom," Cendali said.

Cendali added that her practice has another sort of benefit: At firm cocktail parties people always ask what she's working on.

"Not everyone gets that question," said Cendali. "So I appreciate that."