

Fox News v. TVEyes: Implementing Internal Policies to More Likely Remain Within the Realm of Fair Use

This week's Second Circuit decision in *Fox News Network, LLC, v. TVEyes, Inc.* (No. 15-3885(L)) has muddled the already challenging doctrine of fair use in copyright infringement lawsuits, particularly in the context of rapidly evolving technology.

TVEyes offers a subscription service that enables its customers to conduct a text-search through its large database of recorded television broadcasts¹ based on the customers' interests. Customers are then able to watch up to 10 minutes of the broadcasts captured by their text-search. The court referred to the first aspect of TVEyes' business model as the "search" function and the second component of its business as the "watch" function. TVEyes' watch service also allows its customers to download these videos directly, to email these videos to others to view, and to search videos by specific dates and times. On appeal, Fox only challenged whether TVEyes' watch service was protected by the doctrine of fair use under 17 U.S.C. § 107. After considering each factor in the four-factor test for establishing a fair use defense, the court ultimately found in favor of Fox. It is therefore beneficial to look at how the court applied these factors in light of the technology-at-issue.

The Copyright Act, 17 U.S.C. § 107, lists factors to consider when determining whether a particular use constitutes fair use:

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit education purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

For purposes of brevity and relevance, this alert will only address the factors the court focused on (1, 3, and 4).

"Purpose and Character" of the Work

Citing its own precedent, the court stated this first factor focuses on "whether the use is 'transformative.'" The court relied on *Authors Guild v. Google Inc.*, 804 F.3d 202, 214 (2nd Cir. 2015) (Google Books) and *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (Sony) to ultimately decide the technology-at-issue was transformative. The court rejected TVEyes argument that its use was transformative because customers were able to research and analyze television content based on their searches because "facilitat[ing] research" is not a use that, on its own, is sufficient to constitute transformative use. Instead, the court emphasized the efficiency of the service in that "[i]t enables nearly instant access to a subset of material — and to information about the material — that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means."

Even though the court found the TVEyes' service was transformative, the court ultimately found the degree of transformation was "modest." In light of the "commercial nature" of the service, the court found this first factor favored TVEyes only "slightly."

The court's analysis here displays the difficulty the court will face in the future when considering the doctrine of fair use in light of rapidly evolving technology and the sharing economy. At first, the court focused on the efficiency of the service in its instant delivery. However, ultimately, the court found the simplicity of the technology, the fact that the broadcasts were merely reproduced in



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original form, worked against TVEyes' position. This position should concern companies similar to TVEyes, as the court did not offer any guidance on how companies can leverage the efficiency of their technology/use to overpower concerns of reproducing original works.

The "Amount and Substantiality of the Portion Used"

Again citing its prior case law, the court stated the relevant inquiry for this factor is what "amount of copyrighted material [is] **made available to the public rather than the amount of material used by the copier.**" (emphasis in original.) The court found this factor favored Fox because TVEyes' service "makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear."

Importantly, the court distinguished the technology here from the technology-at-issue in *Google Books*. The court's analysis is helpful here, as it shows implementing certain technological limitations can keep a company's technology/use within the realm of fair use. However, certain aspects of the court's analysis suggests it may be more difficult for some industries as opposed to others to stay within this realm. For example, the court focused on the fact that Google's service only offered "snippets" of the books it offered and "[e]ach snippet was three lines of text, constituting approximately one-eighth of a page; a viewer could see at most three snippets per book for any searched term, and no more than one per page." The court differentiated Google's limited use from the 10-minute clip of news broadcast that TVEyes offers. However, the brief nature of a television broadcast makes it much more difficult for a company like TVEyes to mimic Google's model.

Nonetheless, perhaps a company in a similar industry to TVEyes could remain in the realm of fair use by implementing other limitations set by Google's service. For example, the court noted "[a]pproximately 22% of a book's text was 'blacklist[ed]'" and that consumers were not allowed to conduct "repeated searched to find multiple snippets that could be compiled into a coherent block text." Although the brief nature of television broadcasts would likely force a company like TVEyes to shorten video clips offered, it may be worthwhile for such companies to take the videos pooled based on a customer's search and create an edited version of the videos representative of "mash ups" often created in the music context.

Market Impact

The court found this factor in Fox's favor based on its finding that TVEyes was essentially offering Fox's content to its paying customers when Fox might wish to profit by packaging its own content in a similar way. Based on this, the court stated TVEyes' service deprived Fox of licensing revenues.

This determination also emphasizes the difference between Google's service and TVEyes' service in the court's opinion. Although the court did not emphasize the difference between the two services in this opinion, it is helpful to look to the court's prior decision in *Google Books*, where this factor was found in Google's favor. There, the court emphasized that other than users who simply searched the books offered online to learn a fact, which is not copyrightable, in reality, most users would still buy the books they searched through. Once again, this also displays a difference from industries more similar to the television industry. In the book industry, the Google service is to some degree similar to a customer entering a bookstore and reading several lines of a book to determine if he or she wishes to purchase the book. A similar analogy cannot be drawn as easily to the television or other live media industry.

Conclusion

The court's analysis in this decision appears to be veering towards creating case law that is applicable to some industries as opposed to others. It is challenging as it is to determine what constitutes an "efficient" and yet "transformative" use in a world where technology is rapidly evolving.² It will be even more challenging with case law that differentiates similar technologies within different industries.

¹ TVEyes' database also contains radio content, but the opinion focused on television broadcasts for "simplicity."

² Notably, Judge Lewis A. Kaplan addressed this concern in his concurrence.