

March 2, 2018

Clarifying Outer Bounds of Copyright Fair Use, Second Circuit Finds Video Monitoring Service Infringing

By Benjamin E. Marks and Erin M. James

On February 27, 2018, the United States Court of Appeals for the Second Circuit reversed in part a district court judgment in favor of video monitoring service TVEyes in a copyright infringement action brought by the Fox News Network. In rejecting the district court's holding that TVEyes's copying and redistribution of Fox News's programming was fair use, the court of appeals found that TVEyes simply repackaged and redistributed the programming in ten-minute clips, did not alter the copied content in any way, and deprived Fox News of potential licensing revenues. The ruling did not encompass the copying of Fox News's closed-captioned text into a searchable database, which Fox had not challenged on appeal. The court remanded the case for entry of a revised injunction.

The Second Circuit's analysis distinguished its decision in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) ("*Google Books*"), in which it held that Google's copying of library books in their entirety for the purposes of creating a searchable database and distributing snippets of text in response to user search term queries was fair use. In that case, the court found Google's copying to be transformative and that the strict limits Google placed on the snippet function adequately protected the interests of copyright holders, but it cautioned that the case "test[ed] the boundaries of fair use."¹ Because TVEyes made far more of the unlicensed content available to its customers than Google did, the Second Circuit found it had exceeded the bounds of fair use. In so concluding, and despite finding TVEyes's use "somewhat transformative," the court reaffirmed that the effect of the defendant's use on the potential market for a plaintiff's work—including the licensing market—is the most important criterion in evaluating fair use.

Background

TVEyes is a video monitoring service that continuously records live television broadcasts and creates a searchable database of all recorded content. TVEyes offers a \$500 per-month subscription service to its business clientele, which includes journalists, government and political organizations, and for-profit companies. Subscribers can access the TVEyes database, search for video content by keyword (or date, time, or channel of broadcast), and watch up to 10-minute video clips mentioning the searched term. Subscribers can play an unlimited number of videos, and they also have the option to archive, download, or email video clips. In addition, TVEyes copies

the closed captioning that accompanies television programming, and allows subscribers to search and access transcripts of all recorded content.

Under the TVEyes User Agreement, subscribers pledge to use downloaded clips only for internal purposes. When downloading clips, subscribers are reminded of this limitation through a notice that warns that downloaded clips may only be used for internal review, analysis, or research and that reproduction, publication, rebroadcasting, public showing, or display of any downloaded clip is forbidden.

In July 2013, Fox News sued TVEyes in the Southern District of New York, alleging that TVEyes, among other things, was willfully infringing its copyrights by reproducing, distributing, publicly performing, and publicly displaying Fox News's programming. Fox News sought an injunction and damages. TVEyes disputed Fox News's infringement claim, asserting that its actions constituted a permissible fair use. After discovery, both parties moved for summary judgment.

The Fair Use Doctrine

As the Supreme Court observed in *Mazer v. Stein*, copyright protection is based on the belief that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"² However, "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose" of promoting "the Progress of Science and useful Arts."³ Indeed, the fair use doctrine is designed to prevent "rigid application" of copyright law from "stifl[ing] the very creativity which that law is designed to foster."⁴

The defendant bears the burden of proving that an otherwise infringing use is fair. Section 107 of the Copyright Act instructs courts to evaluate four non-exclusive factors in determining whether a use is fair:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational 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.

In conducting a fair-use analysis, courts must view the four factors holistically, weighing them together "in light of the purposes of copyright."⁵ As a sister circuit court has colorfully described, the court's task is to "consider each of the four factors and put them in the judicial blender to find the appropriate balance."⁶ "The ultimate test of fair use," the Second Circuit has explained, "is whether the copyright law's goals of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it."⁷

The District Court Decisions

In a series of decisions, Judge Alvin K. Hellerstein held that certain features of TVEyes's service constituted fair use, while others did not.⁸ Specifically, the court found that TVEyes's copying of Fox News's programming and closed captioning for indexing and clipping services was a fair use, as were the functions allowing subscribers to watch and archive video clips using TVEyes's servers.⁹ On the other hand, the court found that TVEyes's downloading and date, time, and channel search functions did not qualify as fair use. Accordingly, the court held that TVEyes was liable to Fox News for copyright infringement based solely on those offerings.¹⁰ In November 2015, the court entered an order permanently enjoining TVEyes from enabling users (1) to download Fox News video clips; (2) to view Fox News content by searching by date, time, or channel; and (3) from sharing Fox News content on social media websites.

TVEyes appealed the district court's judgment to the Second Circuit, and Fox News cross-appealed.

The Second Circuit Decision

In an opinion by Judge Dennis Jacobs, the Second Circuit reversed, holding that none of the TVEyes functions challenged by Fox News on appeal constituted fair use.¹¹ The court found that the first fair-use factor "slightly" favored TVEyes, but it held

that this factor was outweighed by the third and fourth factors, which heavily favored Fox News.

In its analysis of the first factor—the purpose and character of the use—the court acknowledged the similarities between this case and *Google Books* and, with reference to that copying-and-indexing precedent, concluded that TVEyes’s copying of Fox News’s content was “somewhat transformative.”¹² The court noted that TVEyes’s copying was “similarly transformative” because it “enables users to isolate, from an ocean of programming, material that is responsive to their interests and needs, and to access that material with targeted precision.”¹³ The court found that TVEyes’s copying also “achieve[d] the transformative purpose of enhancing efficiency” by allowing subscribers to target and view Fox News programming relating to specific topics without having to monitor hours of irrelevant broadcasting.¹⁴ Although the commercial nature of TVEyes’s copying weighed against fair use, the court held that the transformative character of the use was sufficient to tip the first-factor scales in TVEyes’s favor, albeit only slightly.¹⁵

Because the Circuit concluded that the second statutory factor—the nature of the copyrighted work—did not tilt the scales in either direction, it moved on to consider the third factor: the amount used in relation to the copyrighted works as a whole. The court readily determined that this factor favored Fox News since TVEyes “makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.”¹⁶ The court distinguished *Google Books* on the ground that in that case only a small snippet of copied books was made available to the public via the search function. TVEyes’s extensive use of Fox’s content was “radically dissimilar” because, by allowing users to view programming in 10-minute clips, TVEyes likely offered users “all of the Fox programming” that they wished to see.¹⁷

Turning to the fourth factor—the effect of the defendant’s use on the potential market for the plaintiff’s works—the court emphasized that this factor is “undoubtedly the single most important element of fair use.”¹⁸ The court found that this factor strongly favored Fox News because TVEyes was usurping potential licensing revenues that properly belonged to

Fox News.¹⁹ “Since the ability to re-distribute Fox’s content . . . is clearly of value to TVEyes,” the court stated, “it (or a similar service) should be willing to pay Fox for the right to offer the content.”²⁰

Weighing the four factors together, the court held that the modestly transformative nature of TVEyes’s service did not outweigh the other fair-use factors,²¹ and it remanded the case to the district court with instructions to revise its injunction to enjoin TVEyes from offering its infringing services.

Southern District Judge Lewis A. Kaplan, sitting by designation, filed a concurring opinion. Judge Kaplan did not agree that TVEyes’s service was “somewhat transformative.” Judge Kaplan opined that the majority’s analysis of the transformativeness of TVEyes’s use was *obiturn dictum*, since the majority ultimately concluded that the other factors, which favored Fox News, carried the day. However, Judge Kaplan also disagreed with the conclusion that TVEyes’s service was transformative, rejecting the majority’s suggestion that enhancing the efficiency of content delivery without altering the content is transformative and chiding the majority for conflating the “search” and “watch” functions in its analysis.²²

Discussion

The Second Circuit’s ruling reflects a pulling back from, or at least placing outer bounds on, the most expansive interpretations of fair use that have been criticized by some other courts and commentators.²³ In distinguishing *Google Books*, the court more clearly defined the limits of fair use, emphasizing that proper analysis is not confined to the purpose of the copying but also must take account of whether the plaintiff’s copyrighted content is actually altered.²⁴ The less the defendant alters or imbues a work with a “new expression, meaning or message,” the more transformative the taking’s purpose must be in order for the first factor to favor the secondary user. Similarly, the court emphasized the importance of balancing the third statutory factor—the amount and substantiality of taking—against the first factor. Indeed, the court found the extensiveness of the copying TVEyes’s made available to its subscribers to be the key differentiator between this case and

Google Books. Finally, the court reiterated the primacy of the fourth statutory factor, thereby implicitly addressing critiques that it had fallen into according dispositive significance to transformativeness.

Conclusion

TVEyes provides important guidance as to limits of fair use in relation to content-aggregating technology against a backdrop of several expansive fair-use

rulings by the Second Circuit, including in *Google Books*. But its holding is consistent with a wealth of other cases finding unlicensed clipping services to be infringing in both the video and print media contexts.²⁵ In that sense, TVEyes simply reaffirms existing law.

¹ *Google Books*, 804 F.3d at 206.

² *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const., Art. I, sec. 8 cl. 8) (additional citations omitted).

⁴ *Id.* at 577.

⁵ *Id.* at 578.

⁶ *Monge v. Maya Magazines Inc.*, 688 F.3d 1164, 1183 (9th Cir. 2012).

⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (internal quotations and citations omitted).

⁸ See *Fox News Network, LLC v. TVEyes, Inc.*, 124 F.Supp.3d 325 (S.D.N.Y. 2015); *Fox News Network, LLC v. TVEyes, Inc.*, 43 F.Supp.3d 379 (S.D.N.Y. 2014).

⁹ See *id.*

¹⁰ See *Fox News Network, LLC v. TVEyes, Inc.*, 124 F.Supp.3d at 337.

¹¹ Notably, Fox News did not challenge TVEyes's closed-captioning copying or indexing on appeal. Thus, the Second Circuit's decision does not encompass the district court's conclusion that those functions were fair use.

¹² *Fox News Network, LLC v. TVEyes, Inc.*, Nos. 15-3885(L), 15-3886(XAP), slip op. at 13 (2d Cir. 2018).

¹³ *Id.* at 12.

¹⁴ *Id.* at 12–13.

¹⁵ *Id.* at 13–14.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 14–15.

¹⁸ *Id.* at 15 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

¹⁹ See *id.* at 15–17.

²⁰ *Id.* at 16.

²¹ See *id.* at 17–18.

²² See *Fox News Network, LLC v. TVEyes, Inc.*, Nos. 15-3885(L), 15-3886(XAP), slip op. at 1–12 (Kaplan, dissenting).

²³ See, e.g., *TCA Television Corp. v. McCollum*, 839 F.3d 168 (2d Cir. 2016) (noting that the court's decision in *Prince v. Cariou*, 714 F.3d 694, 707 (2d Cir. 2013), has drawn criticism and represents the "high-water mark" of the court's "recognition of transformative works"); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[B][6], at 13.224.20 (stating with respect to *Cariou*: "It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that this doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.").

²⁴ See *Fox News Network, LLC v. TVEyes, Inc.*, slip op. at 13–14.

²⁵ See, e.g. *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992) (video news clipping service); *Pacific and Southern Co., Inc. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984) (TV news clipping service); *Associated Press v. Meltwater, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013); see also *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) (abstracts of news articles).

If you have questions concerning the contents of this issue, or would like more information about Weil's IP/Media practice group, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Editors:

Randi Singer (NY)	View Bio	randi.singer@weil.com	+1 212 310 8152
Jonathan Bloom (NY)	View Bio	jonathan.bloom@weil.com	+1 212 310 8775

Contributing Authors:

Benjamin E. Marks (NY)	View Bio	benjamin.marks@weil.com	+1 212 310 8029
Erin M. James (NY)	View Bio	erin.james@weil.com	+1 212 310 8865

© 2018 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please [click here](#). If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.