

Siding With Fox, 2nd Circuit Says TVEyes Is Not Fair Use

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The Second Circuit ruled in favor of Fox News Network on February 27, 2018, in a closely watched copyright infringement case, finding that TVEyes, Inc.'s redistribution of Fox's copyrighted news clips in response to subscribers' search terms did not qualify as a fair use that would insulate the media company from liability for copyright infringement. This order overturned a 2014 decision from the Southern District of New York that TVEyes' service was protected by the fair use doctrine.

TVEyes records essentially all television broadcasts—24 hours a day, 7 days a week, on more than 1,400 channels—then creates a searchable transcript of each broadcast using closed-captioning and speech-to-text software. Its subscribers, who pay about \$500 per month for the service, are then able to input search terms and receive a list of video clips that mention that term. The user can play the clip, view an accompanying written transcript, save the clips, and send them to third parties. TVEyes' subscribers include marketing and public relations professionals, journalists, political organizations, and law enforcement. At issue on appeal was whether the TVEyes "watch function," permitting subscribers to "view up to ten-minute, unaltered video clips of copyrighted content," was protected by the fair use doctrine.

The court first found that TVEyes' copying of Fox's content was 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. It 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." In so holding, the court compared TVEyes' service to Google's "similarly transformative" pooling of digital copies of copyrighted books into a text-searchable database—which the Second Circuit had previously held did qualify as a fair use. See *Authors Guild v. Google, Inc.*, 804 F.3d 202 207 (2d Cir. 2015) ("*Google Books*"). However, the Second Circuit went on to find that TVEyes' service had only "modest transformative character because, notwithstanding the transformative manner in which it delivers content, it essentially republishes that content unaltered from its original form, with no 'new expression, meaning, or message'" (emphasis added).

While the court found that the first factor of the fair use analysis "slightly" favored TVEyes, it found the second factor ("the nature of the copyrighted work") neutral, and that the third factor ("the amount and substantiality of the portion used in relation to the copyrighted work as a whole") "clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear." In this way, the court reasoned,

TVEyes' service is "radically dissimilar" to the service at issue in *Google Books* because users of the search engine are only permitted to view a short "snippet" of the copyrighted books. In contrast, TVEyes' users are able to glean essentially all of the information about their subject via the ten-minute clips, particularly in light of "the brevity of the average news segment on a particular topic."

The Second Circuit found that the fourth factor, "the effect of the [secondary] use upon the potential market for or value of the copyrighted work," heavily favored Fox because TVEyes' valuable service deprived Fox of licensing revenues for the use. Noting that the market for TVEyes' service "is worth millions of dollars in the aggregate," the court found that TVEyes had "usurped" Fox's ability to exploit that market.

The court then took the final step of weighing all four statutory factors together, concluding that TVEyes' service did not qualify as a fair use because its merely "modest" transformative character did not outweigh the fact that the third and fourth factors weighed heavily in favor of Fox. The court concluded: "At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license. Having weighed the required factors, we conclude that the balance strongly favors Fox and defeats the defense of fair use."

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