

Fairly Unpredictable: Second Circuit Reverses District Court's Finding of Fair Use in 'Fox News Network v. TVEyes'

by Steve Kramarsky

Every day, around the world and across the wide spectrum of media, more content is created than could be consumed in several lifetimes. That creative output is only increasing, as more and more people have access to powerful creative tools and new methods of distribution. But while the depth of content available has rapidly expanded, our innate ability to process and comprehend that information has not. We increasingly rely on technological aids to separate the wheat from the chaff—sorting, identifying and providing the content we want, and excluding the vast bulk of information that we consider uninteresting, irrelevant or (perhaps) untrustworthy or inaccurate. Without such aids, we would often be left to drown in the ocean of available information.

Technology-assisted searching is particularly important to individuals and corporations whose livelihood depends on accurate and up-to-date information. It may be nice to have Google around to resolving your barroom dispute about the baseball team with the most World Series victories, but for many professionals the stakes are much higher. Business analysts, investigative journalists, reputation management professionals, and a host of other professional services providers must keep close track of the constantly changing landscape of information from a huge variety of data sources. For such professionals, merely running searches may be inefficient or even impossible, and services have arisen that constantly filter, repackage and deliver information based on the parameters their users supply.

While such technological aids have been welcomed by consumers, content creators are often less than thrilled to lose control over the use and consumption of their material. In general, copyright law strikes a balance—permitting the owner of a work to control how it is used, distributed, and reproduced, but placing limits on that control. One such limit is the statutory “fair use” exception, which provides that, in certain circumstances, the use of a copyrighted work (even without authorization) does not constitute infringement. But fair use is not a “bright line” rule. Instead, courts must examine the specific facts of each use case to determine whether the it applies.

And the outcome of a fair use inquiry can be difficult to predict. Courts often find that a service—like a search engine—that fundamentally repurposes content in some innovative or useful way has “transformed” that content and so is protected by fair use. But a recent Second Circuit decision serves as a reminder that

that “transformative” use is just one element of the fair use analysis—and it may not be enough. In *Fox News Network v. TVEyes*, 833 F.3d 169 (2d Cir. 2018), a copyright infringement action brought by Fox News against content aggregator TVEyes, the Second Circuit reversed a district court opinion that held TVEyes’s services constituted fair use because they were transformative. The Circuit’s analysis is worth a close look.

TVEyes

TVEyes is a content aggregator that provides media monitoring services to business and professional clients such as “journalists, government and political organizations, law enforcement, the military, for-profit corporations, and non-profits,” though not to private individuals. “Those services allow its clients to efficiently sort through vast quantities of television content in order to find clips that discuss items of interest to them. For example, a client in marketing or public relations interested in how a particular product is faring in the media can use the TVEyes service to find, watch, and share clips of recent television broadcasts that mention that product.” *Id.* at 174.

TVEyes provides its service by recording the broadcasts of over 1,400 radio and television stations in their entirety. It transcribes those broadcasts in almost real time to create a comprehensive, searchable text database as well as linked audiovisual content. TVEyes subscribers pay \$500/month for access that database, which they can automatically monitor using specific keywords. When a subscriber receives a notification that a keyword has been mentioned in a broadcast, the subscriber can play back the section of the broadcast that mentions the term, as well as up to ten minutes of the surrounding content. TVEyes thus provides its clients with direct access to news broadcasts—but from its own copies, not from the original source.

This service was extremely helpful to consumers, but content providers were unhappy with it, as it permitted users to consume their content without tuning in to their broadcasts. In 2013, Fox News Network sued TVEyes in federal court in Manhattan, alleging that TVEyes was committing copyright infringement by allowing subscribers to “play, save, edit, archive, download, and share” Fox News content without authorization. *Fox News Network v. TVEyes*, 43 F. Supp. 3d 379, 387 (S.D.N.Y. 2014). Ultimately, the District Court found that TVEyes’s services, allowing clients to watch clips of Fox News broadcasts that mentioned certain terms of interest, constituted fair use and not infringement. The decision was based in large part on the court’s determination that the use was “transformative,” providing a useful and innovative service to users who otherwise could not monitor the more than 27,000 hours of news footage created every day. *Id.* at 392. The Circuit disagreed.

Second Circuit’s Decision

On Feb. 27, 2018, the Second Circuit issued an opinion reversing the District Court’s finding that certain of TVEyes’s services constituted non-infringing fair use of Fox News’s broadcasts. The Second Circuit

allows subscribers to “identify videos that contain keywords of interest” (by converting speech to searchable text in the TVEyes database) and (2) the “Watch” function, which allows users to “view up to ten-minute, unaltered video clips of copyrighted content.” 833 F.3d at 176. On appeal, Fox News only challenged the “Watch” function. Nonetheless, the Second Circuit’s division of TVEyes’s services into those two distinct categories appears to have informed its analysis.

The court next turned to an analysis of the four statutory fair use factors set out in 17 U.S.C. §107. These factors are not exclusive, but they describe the contours of the analysis a court is required to undertake in considering a claim of fair use. For the first factor, the “purpose and character” of the use, the court analyzed whether “the use ‘communicates something new and different from the original or [otherwise] expands its utility,’ that is, whether the use is ‘transformative.’” *Id.* (quoting *Authors Guild v. Google*, 804 F.3d 202, 214 (2d Cir. 2015) (*Google Books*)).

Relying in large part on its decision in the *Google Books* case, which involved a challenge to Google’s text-searchable database of books and scholarly works, the Second Circuit found that “TVEyes’s copying of Fox’s content for use in the Watch function is ... transformative insofar as 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.” Thus, TVEyes’s “Watch” function was held to be “at least somewhat transformative” for the “purpose of enhancing efficiency.” *Id.* at 176-78.

Unusually, however, the court’s analysis of the first factor did not end there—mere transformative use was not enough in this case. The Circuit also considered the “commercial nature” of TVEyes’s use, which weighed against a finding of fair use, and considered that consideration especially relevant here because the transformative nature of the secondary use was “modest.” The court noted that clients used TVEyes for the “same purpose that authorized Fox viewers use those broadcasts—the purpose of learning the information reported.” On balance, and despite the modest transformation of purpose and the commercial nature of TVEyes’s use, the Second Circuit found that the first factor “slightly” favored TVEyes. *Id.*

Despite the importance of this factor, and the favorable outcome for TVEyes and its uses, the Circuit went on to analyze the other statutory factors. On the second factor (the “nature of the copyrighted work,” which “rarely” plays a significant role in the fair use analysis) the Second Circuit held that a secondary user could not redistribute copyrighted work merely because those works reported non-copyrightable facts. *Id.* at 178.

As to the third factor, the “amount and substantiality of the portion used,” the Second Circuit found that the factor favored Fox News. In so finding, the court drew an important distinction between the TVEyes service and Google’s book search. In *Google Books*, a user of Google’s services could search for books based on text and use the results to review a “snippet” of the text in that book. Those snippets allowed users to determine, based on context, whether the book was responsive to their needs. Crucial to the holding in *Google Books*, however, there were limitations on the “snippets” such that “it would be nearly impossible

for a user to see a meaningful exposition of what the author originally intended to convey to readers.” Here, by contrast, the court held that TVEyes’s services were not so limited. The ten-minute clips available to TVEyes users were likely to provide them with all of the Fox programming they were looking for. Based on that “extensive” use, the court held that the third factor weighed in favor of Fox News. *Id.* at 179.

Turning to the fourth factor, the effect of the use “upon the potential market for or value of the copyrighted work,” the court noted that the fourth factor is “undoubtedly the single most important element of fair use.” *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)). On this factor, the Circuit diverged sharply from the District Court’s analysis. The District Court found limited market impact because TVEyes clients were unlikely to use its services as a substitute for watching Fox News. The Second Circuit found that analysis too limited. The Circuit considered whether TVEyes’s use could be displacing Fox News’s revenues from licensing its content. Based on the success of the TVEyes service, the court found that the content must have value, at least to TVEyes or a similar service, and that such services should be willing to pay for it. As such, the court held that the fourth factor favored Fox News. Of course, this somewhat circular analysis raises difficult questions. If the issue of market impact can be answered by reference to the challenged use itself —“defendants used the material so they, at least, should have been willing to pay for it”—then what is left of that factor?

In any event, weighing these factors, the court found that because the transformation was “modest” and TVEyes was a commercial service using virtually all of Fox News’ content and thereby denying Fox News potential licensing revenue, the fair use doctrine did not protect TVEyes’s secondary use from the reach of the Copyright Act.

Predictably Unpredictable

As this case makes clear, the boundaries of the fair use doctrine are murky, and even the courts don’t always agree about what is permissible. Commentators have urged reform on that basis—unpredictability, which has the potential to chill innovation, does not serve the goals of the Copyright Act. Brian Sites, “Fair Use and the New Transformative,” 39 *Colum. J.L. & Arts* 513 (2016). The Circuit’s decision in *Fox News v. TVEyes* is yet another example of that unpredictability at work. Time will tell whether decisions like these have a far-reaching impact on innovation, but for now the advice to clients (at least in the Second Circuit) is that transformative use is not necessarily the key to fair use that it might once have been.

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