

Fair Use in Flux: Second Circuit TVEyes Ruling May Have a Lasting Effect on Fair Use Analysis

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Fair use can be one of the most difficult issues that copyright lawyers have to address due to decades of varying court rulings applying the multi-factor balancing test, particularly in the face of new technologies that use, modify, and aggregate data in ways not envisioned under the Copyright Act. The Second Circuit's February 2018 fair use decision in the dispute between Fox News Network, LLC ("Fox") and TVEyes, Inc. ("TVEyes") added yet another wrinkle to fair use jurisprudence when the court emphasized market effect over transformative use, seemingly a departure from recent trends in the application of the balancing test. (See [Fox News Network, LLC v. TVEyes, Inc.](#), 883 F.3d 169 (2d Cir. 2018)). In recent weeks, the Supreme Court denied TVEyes' petition for certiorari, leaving in place the appeals court's decision; and Fox and TVEyes settled the case, stipulating that TVEyes may no longer make available, distribute, or publicly perform or display Fox's copyrighted video content.

TVEyes is likely to be an important decision for future fair use cases within the Second Circuit.

TVEyes in Court

Like most fair use cases, the underlying analysis and holding of TVEyes is dependent on the technology and the uses of the copyrighted material at issue. TVEyes is a media monitoring service that allows paid subscribers to track when, where, and how certain chosen keywords are used in radio and television broadcasts, and obtain the text-searchable transcripts and video clips of the portions of the television programs that use those keywords. Besides setting "watch lists" for terms and receiving real-time alerts, subscribers may also search past broadcasts from the TVEyes database, for which video is saved for 32 days. When a matching segment is located, the user can view relevant video clips up to ten minutes long (the "Watch" function).

The *TVEyes* litigation began in July 2013 when Fox sued TVEyes arguing, amongst other claims, that TVEyes' service functions infringed Fox's copyrights in their broadcasts. The argument quickly evolved to a dispute over whether TVEyes' use of Fox's material was defensible under fair use. While the lower court held that most of the core TVEyes functions were protected by fair use, the Second Circuit disagreed. Many people expected the Second Circuit to rule that the "transformative" nature of TVEyes' service fell within the boundaries of fair use the Second Circuit established in its [2015 Google Books fair use decision](#), but the Court noted several distinctions in denying TVEyes' fair use defense.

Fair Use after *TVEyes*

The *TVEyes* case was particularly noteworthy because of the Second Circuit's stance on the fourth fair use factor concerning the effect on the potential market for or value of the copyrighted work. In recent years, many courts have focused on the first factor, including the "transformative" nature of a use, and have perhaps de-emphasized the fourth fair use factor, but not the Second Circuit in this case, which stressed the market effect factor as being "undoubtedly the single most important element of fair use." The court mentioned the TVEyes service's effect on a "plausibly exploitable market," whereas prior decisions arguably took a more limited view or definition of market effect. The Second Circuit rejected TVEyes' argument that its service posed little risk of being a "competing substitute" for Fox's offerings, rather concluding that its service "undercuts" Fox's ability to profit from licensing searchable access to its copyrighted content to third parties:

"The success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips, and that this market is worth millions of dollars in the aggregate. Consequently, there is a plausibly exploitable market for such access to televised content, and it is proper to consider whether TVEyes displaces potential Fox revenues when TVEyes allows its clients to watch Fox's copyrighted content without Fox's permission."

With this discussion of the market effect, the Second Circuit's opinion begged the question whether the talisman of "transformative use" has lost its shine, at least with respect to commercial services that aggregate large swaths of copyrighted content. As part of its examination of the first fair use factor concerning the nature and character of the use, the Second Circuit stated that TVEyes' Watch function was "at least somewhat transformative," but that because the service was commercial in nature and its Watch function "does little if anything to change the content itself or the purpose for which the content is used," such transformative character was "modest at best." According to the Second Circuit, it was not enough for efficiency-enhancing commercial technologies to garner fair use protection without adding something new or exhibiting a further purpose beyond repackaging copyrighted works (though the court failed to offer any guidance on what similar services could do in the future). Judge Kaplan, in his concurring opinion, noted that, if the issue were determinative, he would have ruled TVEyes' "efficiency-enhancing delivery technology" was not at all transformative. The court's characterization of TVEyes as only "somewhat" transformative and an entity that "usurped a market that properly belongs to the copyright holder" was arguably influenced by the fact that TVEyes offered large excerpts of Fox's content (e.g., ten-minute clips), an amount "radically dissimilar" from *Google Books*, as the latter service offers users only snippets of text in response to keyword searches and places certain other limitations on viewing.

For those wondering whether *TVEyes* might represent a recalibration of the fair use analysis away from “transformative” use towards market effect, the Second Circuit’s December 2018 opinion in [Capitol Records LLC v. ReDigi, Inc., No. 16-2321 \(2d Cir. Dec. 12, 2018\)](#), provides some critical insight. *ReDigi* involved a digital service operating as an online marketplace for the resale of “used” or previously purchased digital music. The lower court had concluded that Version 1.0 of ReDigi’s service infringed Capitol’s reproduction rights, rejecting ReDigi’s argument that its service merely “migrates” a file instead of creating an infringing copy, and also rejected the viability of a first sale defense against claims ReDigi violated Capitol’s distribution right. The appeals court affirmed the holding that an infringing reproduction occurred, and dodged the issue of the first sale defense. While the case is particularly noteworthy for its holdings regarding the reproduction right and the “digital first sale doctrine,” the Second Circuit went out of its way to cite *TVEyes* when addressing ReDigi’s proffered fair use defense. The Court stated:

“*TVEyes* is a substantial precedent for our holding here. The transformative purpose and character of *TVEyes*’s use, while modest, was far more transformative than what ReDigi has shown here. *TVEyes*’s transformative uses were nonetheless easily outweighed by the harm to the rights holders’ market considered under Factor Four...Even if ReDigi is credited with some faint showing of a transformative purpose, that purpose is overwhelmed by the substantial harm ReDigi inflicts on the value of Plaintiffs’ copyrights through its direct competition in the rights holders’ legitimate market, offering consumers a substitute for purchasing from the rights holders. We find no fair use justification.”

In relying so strongly on its *TVEyes* decision, the Second Circuit reaffirmed its recent interpretation of market harm in fair use cases. It remains to be seen how this development will play out in cases with stronger examples of transformative use, but the trend is certainly worth noting going forward. It is also possible that courts simply consider fair use issues concerning aggregation services differently than other more traditional copyright cases, making the *TVEyes* ruling another plot point alongside the *Google Books* ruling.

Cert. Denied

While some in the tech industry may have thought the Second Circuit's *TVEyes* fair use decision was ripe for review, any such hopes were dashed when the Supreme Court denied *TVEyes*' petition for writ of certiorari in December 2018. In their petition, *TVEyes*' argued that this case provided an "exceptionally important" question and an opportunity to resolve conflicts between the Second Circuit's opinion and prior SCOTUS precedent. In particular, the petition attacked the Second Circuit's reasoning by arguing that market harm cannot be presumed from a transformative use's commercial success and that a copyright holder may not preempt exploitation of a transformative market if it is unlikely that the copyright holder would ever exploit the market. Consideration of such an argument will have to wait for a future litigation.

Settlement

Following the cert. denial, on January 18, 2019, the District Court entered a Consent Judgment and Stipulated Permanent Injunction in the *TVEyes* case. The Court stated that the parties reached a private settlement and that *TVEyes* would be permanently enjoined from "making available, distributing, publicly performing, or publicly displaying audiovisual clips of copyright content" owned by Fox. While the terms of the settlement are private, the permanent injunction represents a major victory for Fox and copyright holders, in general.

As *TVEyes* demonstrates, fair use determinations are notoriously unpredictable, and the balancing test can be fluid, fact-specific and dependent on the technology and medium involved. While this case is now resolved, we will continue to monitor copyright cases to see how courts interpret *TVEyes* and how media companies, content providers, or aggregators adapt their businesses to the current state of the law.

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