

ISSUE BRIEF: FOX NEWS NETWORK, LLC V. TVEYES, INC.

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INTRODUCTION

This issue brief summarizes *Fox News Network, LLC v. TVEyes, Inc.*, a fair use case decided by the United States District Court for the Southern District of New York involving a searchable database of broadcast news. This issue brief discusses implications of the two rulings in this case for libraries.

BACKGROUND

In July 2013, Fox News filed a complaint against TVEyes, Inc., a media-monitoring service that recorded television and radio news content to create a searchable database for its subscribers.¹ TVEyes indexed, organized, and presented broadcast content 24/7 from more than 1,400 television and radio stations. Subscribers could search content by keywords or phrases in TVEyes' database, which was created using closed captions and speech-to-text technology. Subscribers included the White House, members of Congress, the Associated Press, and government agencies and departments. Members of the general public could not subscribe to this service.

Using TVEyes' service, subscribers could track television and radio news coverage of events by conducting keyword searches, creating time ranges to tabulate how frequently specific terms were used in the media, and setting up email alerts for particular keywords and terms. Subscribers could save, archive, edit, or download unlimited numbers of clips. The clips were a maximum of ten minutes in length, with most shorter than two minutes, and were only available for 32 days following the date when they were broadcasted, unless a subscriber saved or downloaded the clips. Subscribers could email clips to anyone, even to those who were not subscribers to TVEyes' service. Subscribers signed a user agreement, which limited their use of clips to internal review, analysis, or research purposes.

Fox News alleged that TVEyes infringed Fox News' copyrights. TVEyes had not obtained a license or received authorization to use Fox News content. Fox News contended that TVEyes' service "directly competes with Fox News' telecasting and clip licensing services."² Fox News claimed that TVEyes' service adversely affected Fox News' revenue from subscriber fees, telecast advertisements, advertisements embedded in its online content, and clip licensing.

SUMMARY OF THE RULINGS

SEPTEMBER 9, 2014 OPINION

In September 2014, the court held that TVEyes' database was transformative and constituted fair use, but the record had to be further developed before the court could determine whether four features of TVEyes' service were also protected by fair use.³

¹ Complaint, *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325 (S.D.N.Y. 2013) (No. 13-CV-5315).

² *Id.* at 2–3.

³ *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).



With regard to the first fair use factor—the purpose and character of TVEyes’ use—the court stated that “databases that convert copyrighted works into a research tool to further learning are transformative.”⁴ Indexing and excerpting television content 24/7 provided a service that no other content provider offered. This factor weighed in favor of a finding of fair use.

With regard to the second factor—the nature of Fox News’ copyrighted works—the court noted that more leeway is given when a work is factual or informational and the second factor has limited value in cases where the creative aspect of the work is transformed. This factor did not weigh either for or against a finding of fair use.

With regard to the third factor—the extent of the copying by TVEyes—the court noted that there was no question that TVEyes had copied all of Fox News’ content in its entirety, but the third factor does not “counsel a simple, crude quantitative comparison” but rather asks “whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purpose asserted under the first factor.”⁵ The court found that the third factor did not weigh either in favor or against a finding of fair use.

With regard to the fourth factor—the effect of TVEyes’ use upon the potential market for or value of Fox News’ copyrighted works—the court noted that subscribers do not use the service as a substitute for watching Fox News’ television broadcasts. The court also found that “the small possible market harm to Fox News is substantially outweighed by the important public benefit provided by TVEyes.”⁶ The fourth factor did not weigh against a finding of fair use.

Upon balancing all four factors, the court noted that the purpose for which subscribers would access clips and snippets through TVEyes’ service was different than the purpose of watching a television news broadcast. The court also noted that the service served an important public interest. The court thus included that TVEyes’ service was transformative because it aimed to monitor news rather than report news, thereby constituting fair use and protecting TVEyes from liability for copyright infringement for its core service. However, the court reserved judgment as to whether four features of the service were also fair use because the factual record had to be further developed.

AUGUST 24, 2015 OPINION

In August 2015, the court held that the archiving function of TVEyes’ service qualified as fair use, but the emailing and sharing function (without the implementation of protective measures) did not qualify as fair use, nor did the downloading function or date-and-time search function.⁷ The first issue addressed for each feature was whether the function was “integral to TVEyes’ transformative purpose.”⁸ TVEyes’ core service involved recording content, indexing and organizing it in a searchable database, and allowing subscribers to search by keywords and view short video clips retrieved by their searches. The second issue addressed for each feature was whether that function

⁴ *Id.* at 393.

⁵ *Id.* at 394.

⁶ *Id.* at 397.

⁷ Fox News Network, LLC v. TVEyes, Inc., 124 F. Supp. 3d 325 (S.D.N.Y. 2015).

⁸ *Id.* at 328.



“threaten[ed] Fox News’ derivative business,”⁹ which consisted of online distribution of content and licensing services.

The archiving function allowed subscribers to archive video clips obtained in response to search queries. The archived clips were stored in a subscriber’s personal digital library on TVEyes’ server indefinitely. The court found that the archiving feature was integral to the transformative purpose of monitoring media. Additionally, because Fox News did not identify any market harm caused by archiving clips, the court held that this function constituted fair use.

The emailing and sharing function allowed subscribers to share links to video clips on TVEyes’ servers with others, even with those who were not subscribers. The court recognized the importance of email sharing in using this service, but also recognized the potential for abuse. The court held that this feature was not fair use unless TVEyes developed and implemented protections to prevent indiscriminate sharing.

The downloading function allowed subscribers to download video clips to their computers so they could use the clips offline and retain them permanently. No technological restrictions were imposed on the use or distribution of these clips. The court held that this function, albeit convenient, was not integral to the transformative service of searching and indexing content, and consequently did not constitute fair use.

The date-time search function allowed users to retrieve video clips from specific networks based on the date and time of the broadcasts. Because the court viewed this as more of a content delivery tool rather than a search tool, duplicating what one could do on Fox News’ website, the court found that it was not integral to TVEyes’ core service and posed a risk to Fox News’ derivative businesses. Consequently, this function did not constitute fair use.

IMPLICATIONS FOR LIBRARIES

Questions of fair use arise frequently in library settings. This case addressed whether a searchable database that indexed and organized copyrighted content qualified as fair use, as well as whether the service’s archiving, downloading, sharing, and date-and-time searching functions qualified as fair use. Libraries similarly organize, index, and archive various types of copyrighted materials with the goal of sharing these materials with their users. This case highlights the complexities of conducting a fair use analysis when digital content is at issue. In addition to analyzing whether the searchable database was fair use, the court also had to conduct additional fair use analyses of various features of the service, resulting in two separate opinions issued nearly a year apart.

The archiving function of TVEyes’ service constituted fair use. Libraries play an important societal role of archiving materials that are part of our cultural heritage, and section 108 of the Copyright Act permits libraries and archives to reproduce and distribute a copy of a copyrighted work under certain circumstances, such as for preservation or archival purposes. This case recognizes the importance of archiving digital materials by individuals. Today, many people have begun to actively archive digital content on their own, using services such as the Internet Archive or perma.cc, the former of which asserts that it is building an “Internet Library,” and the latter of which was built and supported by libraries. Scholars, students, and journals now rely on these services to archive digital content to ensure that the content—a significant amount of which is copyrighted—remains accessible and easy to refer back to in the

⁹ *Id.*



future.

The downloading function did not constitute fair use, while the emailing and sharing function did not constitute fair use without further protective measures to restrict who could access the content. Similarly, academic law libraries frequently advise and urge law school professors and lecturers to provide links to where the content can be found in subscription databases on their course pages rather than downloading and uploading copyrighted content. This is less convenient for students, but as the court noted in its decision, convenience alone is not a ground for fair use. Requiring students to access content through subscription databases restricts access to the content to authorized users, thereby ensuring that no licensing agreements are breached and no copyrights are infringed.

Determinations of fair use are subjective and made on a case-by-case basis, but like *Authors Guild, Inc. v. Google, Inc.* (the Google Books case)¹⁰ or *Authors Guild, Inc. v. HathiTrust*,¹¹ this case offers some guidance regarding the extent to which use of copyrighted materials without first obtaining permission or a license from the copyright owner might be protected by fair use.

Written by the AALL Copyright Committee

¹⁰ 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

¹¹ 755 F.3d 87 (2d Cir. 2014).