

# Second Circuit Court of Appeals: Copyright Fair Use – “Transformative” Revisited: Has The Second Circuit Gone Too Far?

*Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018)

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In the United States, federal Courts of Appeals’ decisions are rendered by three judge panels unless a panel decision is reviewed and decided *en banc*, that is, by the entire court. In the most recent U.S. appellate-level fair use decision by the Second Circuit, *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), there was unanimous agreement that the defendant’s use was not protected by the fair use doctrine, but one of the judges disagreed with his cohorts’ evaluation of one of the key fair use factors. Although the outcome of the case seems obvious, the majority’s analysis of the first fair use factor, “the purpose and character of the use,” especially the now all-important “transformative” nature of the defendant’s work, is interesting and questionable. *Id.* at 176.

The result was obvious, because TVEyes’ unauthorized copying and re-distribution made available to its customers virtually all of Fox’s televised copyrighted audiovisual content and because its doing so deprived Fox of access to revenue that properly belongs to the copyright holder. The first factor evaluation was interesting and questionable, because, as District Judge Kaplan’s concurring opinion decries, the majority accepted as a positive in gauging whether defendant’s use meets the first factor “transformative” criterion (communicating something new and different from the copied work) the fact

that defendant TVEyes used allegedly new content delivery technologies to provide access to Fox's videos, even though it did no more than repackage and deliver Fox's original content to its clients. But Judge Kaplan concurred with his colleagues' rejection of the fair use defense based on the Court's strongly unfavorable evaluations with respect to the third and fourth factors: the amount used and its market impact.

TVEyes is a for-profit media company that offered a service allowing its clients (i) to efficiently sort through vast quantities of the television programming of Fox News Network ("Fox") in order to find recorded clips that provide material of interest to them and (ii) then to watch such clips and share them with others. For example, a client in marketing or public relations could employ TVEyes' service to learn how a particular product is faring in the media. Not surprisingly, Fox sued TVEyes for copyright infringement by re-distributing copied audio visual content from Fox's television programming. The district court upheld TVEyes' fair use defense, and Fox appealed.

As the Supreme Court made clear in the "Pretty Woman" case, in evaluating a fair use defense, courts "undertake a 'case-by-case' analysis in which each factor is considered and the results [are] weighed together in light of the purposes of copyright." *Fox*, 833 F.3d at 176 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 579 U.S. 569, 577-78 (1994) (internal quotation marks omitted)). In carrying out this task, the Second Circuit first decided it was "useful" to consider separately whether each of the two distinct functions of TVEyes' service would qualify as fair use. TVEyes' offered a "Search function" and "Watch function." The Search function allowed clients to *identify* videos of interest, while the Watch function allowed clients to view the clips of unfiltered Fox content. Since Fox did not challenge the search function on appeal, the Second Circuit opinion addressed only whether the Watch function qualified as fair use. See *id.* at 176.

The Court thereafter focused entirely on the four statutory fair use factors set forth in section 107 of the Copyright Act.

With regard to first factor, the purpose and character of the use, the Court cited its earlier *Google Books* and *Hathi Trust* decisions that related to the unauthorized making of digital copies of books to create a text-searchable database from which "snippets" of text can be freely accessed. Viewing these decisions as holding that creation of such a searching capability served a transformative purpose, Judges Jacobs and Newman held TVEyes' Watch function to be "similarly transformative insofar as it

enables users to isolate, from an ocean of [Fox's] programming material" video clips of interest to them. *Fox*, 833 F.3d at 177. Notwithstanding the commercial nature of the secondary use, as well as the fact that TVEyes "essentially republishes [Fox's] content unaltered from its original form, with no new expression or message," the majority concluded that the Watch function had a "modest transformative character," slightly favoring defendant. *Id.* at 178.

The majority's "transformative" analysis, in disagreement with Judge Kaplan, accorded positive weight to the secondary work's use of new technology in determining whether defendant's use "adds something new, with a further purpose or different character." *Campbell*, 510 U.S. at 579 (after quoting Justice Story's formulation, whether the new work merely "supersedes the objects" of the original creation. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C. Mass. 1846) (No. 4,901)). Though they cited *Google Books*, the majority did not take into account Judge Leval's point that "[w]ith respect to the *first factor test*, it favors a finding of fair use (unless the value of the transformative purpose is overcome by providing its [defendant's] text in a manner that offers a competing *substitute* for Plaintiffs' books)." *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015) (emphasis added).

With regard to the second factor, the opinion considered the less important factor of "the nature of the copyrighted work," namely, video news content, to play no significant role. However, its statement favoring Fox that "[t]hose who report news undoubtedly create factual works," *Fox*, 883 F.3d at 178 (citation omitted) (emphasis added), is worth noting.

With regard to the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," the Court found that "[t]his factor clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear." *Id.* at 179. The court considered the amount made available to the public "radically dissimilar" to the three lines of snippets and no more than three snippets per page at issue in *Google Books*.

The fourth factor is "the effect of the [defendant's] use upon the potential market for or value of the copyrighted work." After noting that this factor is undoubtedly the single most important element of fair use, the court opined that Fox had "much the stronger point" in contending that TVEyes' service was undercutting "Fox's ability to profit from licensing searchable access to its copyrighted content to third parties." *Fox*, 883 F.3d at 179-80.

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In weighing all of the factors and summing up, the Court stated that notwithstanding the majority's view that TVEyes' Watch function was "at least somewhat transformative," since this function "does little if anything to change the content itself or the purpose for which the content is used, its transformative character is modest at best" and only "slightly" favored TVEyes. *Id.* at 181. The Court considered the second factor neutral. With respect to the third and fourth factors, the court found that the third "strongly" favored Fox and that under the fourth factor TVEyes had "usurped a function for which Fox was entitled to compensation under a licensing agreement." *Id.* Accordingly, it held that "the balance strongly favors Fox and defeats the defense of fair use." *Id.*

\* \* \* The Fox opinion relied upon the Second Circuit's earlier *Google Books* decision but repeated its warning that it "test[ed] the boundaries of fair use." In rejecting TVEyes' fair use defense, the Court held that it had "exceeded those bounds," *id.* at 174, notwithstanding a slightly favorable finding with respect to the transformative purpose of the use of Fox's content. As Judge Kaplan's concurring opinion makes clear, the majority's slightly favorable first-factor finding on transformativeness based on "the idea that enhancing the efficiency with which copies of copyrighted material are delivered to secondary users" by an unauthorized user seems to have also gone too far. *Id.* at 185.

## Primary Contacts

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