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TVEyes Inc. Crosses the Boundary of Fair Use Defense in Copyright Infringement Case Against Fox News Network, LLC

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Plaintiff Fox News Network, LLC (“Fox”) brought a copyright infringement action against Defendant TVEyes, Inc. (“TVEyes”) for the copying and redistribution of Fox’s copyrighted content to consumers. On appeal, the United States Court of Appeals for the Second Circuit held that the commercially lucrative nature of TVEyes’ redistribution of Fox’s content crossed the boundary of a fair use defense and deprived Fox of a market that belonged to the copyright holder.

Defendant TVEyes continuously records content from over 1,400 television and radio channels, imports the content into a database, and allows its customers to search through the content using keywords. TVEyes’ customers can view, download, archive, and share ten-minute clips of the content with others for the steep price of \$500 per month. These services are only available for internal business and professional use—not personal use by individuals or external distribution by companies.

In this case, Fox did not challenge the creation of the database itself. Instead, it challenged TVEyes’ content redistribution, which allowed consumers to access copyrighted content without Fox’s permission. In response, TVEyes alleged that its copying and redistribution constituted fair use.

What is Fair Use?

Fair use is a defense to copyright infringement. The Copyright Act provides that fair use may be “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” 17 U.S.C § 107.

Courts consider the following four factors to determine if the fair use defense applies:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id. Fair use is an affirmative defense to copyright infringement, so the defendant bears the burden of proving fair use.

The Second Circuit’s Holding

Fox brought this copyright infringement action before the U.S. District Court for the Southern

District of New York, which held that some of TVEye's features, such as searching, viewing, and archiving, constituted fair use, but the downloading and sharing features did not. Accordingly, the district court issued a permanent injunction limiting some of TVEye's services.

On appeal, the Second Circuit reversed the district court's opinion and held that TVEye's redistribution of content—the viewing, archiving, downloading, and sharing features—were not protected by the fair use doctrine.

In considering the first factor for fair use, the Second Circuit determined that TVEye's copying of Fox's content “serves a transformative purpose insofar as it enables TVEye's clients to isolate from the vast corpus of Fox's content the material that is responsive to their interests, and to access that material in a convenient manner.” *Fox News Network, LLC v. TVEye, Inc.*, Case No. 15-3886. Nevertheless, the court noted that TVEye's features have “only a modest transformative character because . . . it essentially republishes that content unaltered from its original form, with no ‘new expression, meaning or message.’” *Id.*

In determining that TVEye's use was transformative, the Second Circuit relied on *Authors Guild v. Google, Inc.*, in which the court held that the copying of books and creation of a text-searchable database was transformative and constituted fair use. However, the Second Circuit noted that *Authors Guild* “test[ed] the boundaries of fair use,” and that TVEye “has exceeded those bounds.” *Id.*

Despite its somewhat transformative purpose, the Second Circuit held the commercial nature of TVEye's secondary use weighed against a finding of fair use. The court discussed TVEye's commercial success and that “TVEyes undercuts Fox's ability to profit from licensing searchable access to its copyrighted content to third parties.” *Id.*

The Second Circuit held that the fair use defense does not apply because TVEye deprives Fox of revenues when it allows consumers to view Fox's copyrighted content without permission, usurping a market that rightfully belongs to Fox, the copyright holder.

This opinion is noteworthy because of the focus on market harm as “the single most important element.” See Case No. 15-3886 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)). The focus on market harm awards greater protection to copyright holders against commercial use by potential competitors, but it remains to be seen whether other circuits will similarly consider market harm as the most important factor in determining whether the fair use defense applies.