

Four lessons for navigating fair use

THE CASES:

Authors Guild v Google, Inc and Fox News Network, LLC v TVEyes
United States Court of Appeals for the Second Circuit
2017-2018

In the divergent outcomes of the *TVEyes* and *Google Books* cases, **Christopher E Loh** examines the factors that tip uses of copyrighted material into the realm of fair use

In copyright law, the fair use doctrine insulates from infringement liability certain uses of copyrighted material for purposes such as criticism, comment, news reporting, teaching or research.

Fair use is codified at 17 USC Section 107. That statute sets forth four factors to be considered in determining what constitutes fair use: "(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." None of these four factors presents a bright-line inquiry; a proper analysis of each factor depends on the circumstances of each case. And because there are no bright lines to these factors, the task of determining what constitutes fair use often is difficult.

That task is complicated further by the advent of new technologies that have made possible the compilation of enormous quantities of copyrighted material into text-searchable databases. Two examples can be found in services offered by Google Books and TVEyes:

- Google Books provides a free text-searchable database of millions of books. Via a search function, users can enter a search term and retrieve a list of books from the database that contain the term. Via a "snippet-view function," users can see short snippets from the books that include the term. However, Google Books imposes a number of technological restrictions that prevent users from compiling those snippets into a coherent block of text.
- TVEyes provides to paying clients a text-searchable database of the prior 32 days'

worth of TV programming from multiple content providers. Via a search function, clients can enter a search term and retrieve a list of 10-minute clips from the database that contain that term. Via a "watch function," clients can watch unlimited 10-minute clips that include the search term.

"[Google Books] held that the search function was 'highly transformative' in that it enabled users to achieve a purpose different from that of the original works."

Certain functions of Google Books' and TVEyes' services were scrutinised recently by the United States Court of Appeals for the Second Circuit under the fair use doctrine – with different outcomes.

In *Authors Guild v Google, Inc*, 804 F.3d 202 (2nd Cir 2017), the Second Circuit held that Google Books' search and snippet-view functions qualified as fair use:

- As to the first Section 107 factor, the court held that the search function was "highly transformative" in that it enabled users to achieve a purpose different from that of the original works ie, "permitting a searcher to identify those [books] that contain a word or term of interest, as well as those that do not include reference to it." The court also found the snippet-view function transformative, because the snippets provided "just enough

context surrounding the searched term to help [the searcher] evaluate whether the book falls within the scope of her interest." This factor thus strongly favoured a finding of fair use.

- As to the second factor, the court held that the nonfiction nature of the books at issue did not favour a finding of fair use.
- As to the third factor, the court noted that what mattered was not the amount of work Google had copied, but rather the amount it made available to the public. Thus, although Google had copied books in their entirety, "restrictions built into the program work together to ensure that, even after protracted effort over a substantial period of time, only small and randomly scattered portions of a book will be accessible."
- As to the fourth factor, the court held that those restrictions made it unlikely that the snippets would substitute for the purchase of the original books.

Conversely, in *Fox News Network, LLC v TVEyes*, No 15-3885 (2nd Cir, 27 Feb, 2018), the Second Circuit held that TVEyes' watch function did *not* qualify as fair use:

- As to the first Section 107 factor, the court found the watch function only "somewhat transformative". Although the watch function enables clients to "view all of the Fox programming that...discussed a particular topic of interest to them, without having to monitor thirty-two days of programming," "it essentially republishes that content unaltered from its original form."
- As to the second factor, the court found that the factual nature of Fox News content did not favour a finding of fair use.
- As to the third factor, the court noted that – in contrast to Google Books' snippets –

TVEyes' 10-minute clips "makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear" "given the brevity of the average news segment on a particular topic".

- As to the fourth factor, the court held that "[b]y providing Fox's content to TVEyes clients without payment to Fox, TVEyes is in effect depriving Fox of licensing revenues from TVEyes or from similar entities."

Four lessons

The divergent outcomes of the *Google Books* and *TVEyes* opinions carry four important lessons for copyright litigants squaring off over fair use issues.

Who sues matters

A key factor in the *TVEyes* decision lay in who filed suit. TVEyes' service encompassed TV programming from multiple content providers. Of those providers, however, only Fox News chose to sue TVEyes. And Fox News was well situated to argue that, with respect to the third and fourth Section 107 factors, TVEyes' service made use of, and substituted for, a substantial amount of Fox News programming, particularly "given the brevity of the average news segment".

Had another content provider sought to challenge TVEyes' fair use defence – for example, Fox News' sister channel FX, which is known for its complex serialised dramas – the analysis of the third and fourth factors may well have been different. While a 10-minute clip may be sufficient to capture the entirety of many Fox News segments, it could also be argued that a 10-minute clip would not constitute a substantial portion of, or acceptable substitute for, an hour-long episode of FX's espionage drama *The Americans*.

A use that creates new search functionality will likely be found highly transformative, favouring a finding of fair use

In *Google Books*, the Second Circuit excused Google's unauthorised copying on the ground that such copying was a means to a "highly transformative" end: the creation of a new text-searchable database.

The *Google Books* court, quoting *Authors Guild, Inc v HathiTrust*, 755 F.3d 87 (2nd Cir 2014), noted that "the creation of a full-text searchable database is a quintessentially transformative use...[as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn." Thus, as to the first Section 107 factor, the *Google Books* court concluded that "as with *HathiTrust*... the purpose of Google's copying of the original copyrighted books is to make

available significant information about those books, permitting a searcher to identify those that contain a word or term of interest, as well as those that do not include reference to it...We have no doubt that the purpose of this copying is the sort of transformative purpose...strongly favoring satisfaction of the first factor."

Moreover, Fox News did not challenge the applicability of the fair use doctrine to TVEyes' search function, thus leaving intact *Google Books*' holding that copying for the sake of creating a text-searchable database is "highly transformative," favouring a finding of fair use.

“Senior Judge Lewis Kaplan...criticised the Second Circuit’s reliance on Google Books and Sony, noting that Google Books’ snippets were restricted in ways that TVEyes’ clips were not.”

A use that only increases convenience and efficiency is less likely to be considered transformative fair use

By contrast, the Second Circuit in *TVEyes* concluded that the watch function, by itself, was only "somewhat transformative" in that it permitted clients "to view the Fox programming they want at a time and place that is convenient to them, rather than at the time and place of broadcast," but did not alter the programming from its original form. The watch function's "somewhat transformative" nature was insufficient to overcome the third and fourth Section 107 factors militating against a finding of fair use.

In concluding that TVEyes' watch function was only "somewhat transformative," the Second Circuit relied on the discussion of the snippet-view function from *Google Books*, as well as on *Sony Corporation v Universal City Studios, Inc*, 464 US 417 (1984), in which the Supreme Court held that the use of VCRs to record TV shows for time-shifting purposes (ie, watching shows at a more convenient time) was "not necessarily infringing". However, in a concurring opinion, Senior Judge Lewis Kaplan of the Southern District of New York – sitting by designation in the *TVEyes* appeal – criticised the Second Circuit's reliance on *Google Books* and *Sony*, noting that Google

Books' snippets were restricted in ways that TVEyes' clips were not, and that *Sony* was decided before the concept of transformative use had entered the "copyright lexicon". Judge Kaplan further disagreed with the Second Circuit's characterisation of the watch function as "somewhat transformative," and noted that it was his inclination "to conclude that a technological means that delivers copies of copyrighted material to a secondary user more quickly, efficiently or conveniently does not render the distribution of those copies transformative, at least standing alone."

In view of those aspects of the *TVEyes* decision, a use that makes access to copyrighted material more convenient and efficient, without more, is less likely to be regarded as sufficiently transformative to qualify as fair use.

Whether TVEyes could restrict its watch function in a way that satisfies fair use remains an open question

The *TVEyes* court observed that "because Fox does not dispute TVEyes' right to offer its search function, the court's injunction shall not bar TVEyes from offering a product that includes that function without making impermissible use of any protected audiovisual content" – thereby raising the possibility that TVEyes might be able to modify its watch function in a manner consistent with fair use.

Unfortunately, the *TVEyes* court did not explain what would constitute permissible use of protected audiovisual content in this context. While the discussion of the snippet-view function from *Google Books* suggests similar restrictions that TVEyes could apply to its watch function – for example, shortening clips to less than 10 minutes, preventing clients from accessing unlimited numbers of clips, making it impossible to assemble clips into a coherent whole and placing certain programming entirely off-limits – it remains to be seen whether the imposition of any or all of such restrictions would be sufficient to transform the watch function into a fair use.

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