

Fox News Network, LLC v. TVEyes, Inc.
Nos. 15-3885, 15-3886 (2d Cir. Feb. 27, 2018)

Year	2018
Court	United States Court of Appeals for the Second Circuit
Key Facts	Defendant TVEyes, Inc. (“TVEyes”) is a media company that records the content of more than 1,400 TV and radio channels, imports that content into a database, and permits its clients, for a \$500 monthly fee, to view, archive, download, and share with others TV clips of up to ten minutes in length. Plaintiff Fox News Network, LLC (“Fox”) owns content that TVEyes recorded and provided to its clients; it sued TVEyes for copyright infringement in the United States District Court for the Southern District of New York. The district court held that some of TVEyes’s functions constitute a fair use, including the functions that enabled clients to search videos by term, to watch the resulting videos, and to archive the videos on the TVEyes servers. But the court also held that some functions were not a fair use, including those enabling clients to download videos to their computers, to e-mail the videos to others, or to watch videos after searching for them by date, time, and channel, rather than by keyword. The district court thus dismissed Fox’s challenge to several functions of the TVEyes service, but Fox won a permanent injunction with respect to those functions the court held not to be fair use. In its appeal, Fox challenged the district court’s finding that the “Watch” function was a fair use, though did not challenge the court’s finding with respect to the “Search” function.
Issue	Whether TVEyes’s redistribution of Fox’s content constitutes a fair use.
Holding	After conducting the four-step analysis, the court found that TVEyes’s Watch function was not a fair use; this holding, according to the court, “subsumes and obviates consideration of certain functions that are subsidiary to the Watch function, such as archiving, downloading, and emailing the video clips.” The court concluded that the first factor, purpose and character of the infringing work, “favor[ed] TVEyes, albeit slightly,” because the “Watch function is at least somewhat transformative” in that it permits clients to “view the Fox programming they want at a time and place that is convenient to them.” The fact that the use is commercial did not entirely outweigh its transformativeness. The second factor, nature of the copyrighted work, “play[ed] no significant role here.” The third factor, amount and substantiality of the portion used, weighed against fair use because “TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear,” which makes TVEyes “radically dissimilar to the service at issue” in <i>Authors Guild v. Google</i> ; “TVEyes’s use of Fox’s content is therefore both extensive and inclusive of all that is important from the copyrighted work.” The final factor, effect of the use upon the potential market, weighed against fair use because “there is a plausibly exploitable market for such access to televised content,” and “[t]he 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.” The court noted 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.” Weighed together, the court concluded “that TVEyes’s service is not justifiable as a fair use.” The court remanded to the district court to revise its permanent injunction accordingly.
Tags	Second Circuit, Internet/Digitization, Film/Audiovisual
Outcome	Fair use not found

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