



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FOX NEWS NETWORK, LLC,

Plaintiff,

-against-

TVEYES, INC.

Defendant.

**OPINION AND ORDER
REGULATING ISSUES OF FAIR
USE AND GRANTING CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

13 Civ. 5315 (AKH)

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ALVIN K. HELLERSTEIN, U.S.D.J.:

TVEyes, Inc. (“TVEyes”) is a media-monitoring service that records all content on more than 1,400 television and radio stations and transforms the content into a searchable database. Subscribers are able to track when, where, and how words of interest are used in the media, and can obtain transcripts and video clips of the portions of the television programs that use those words. Fox News Network, LLC (“Fox News”) filed this lawsuit under the Copyright Act, 17 U.S.C. § 101 *et seq.*, claiming infringement of its copyrighted content seeking damages and an injunction barring TVEyes from copying and distributing clips of Fox News programs.¹ TVEyes asserts the affirmative defense of fair use. In 2014, the parties cross-moved for summary judgment. In an Opinion and Order dated September 9, 2014, I upheld TVEyes’ affirmative defense of *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014). However, I reserved judgment with respect to four features of the service, finding the factual record inadequately developed to grant summary judgment to either party at that time. Specifically, TVEyes allows users to archive videos, download videos, share videos by e-mail,

¹ Fox News also sought to recover under New York tort law for “hot news” misappropriation. I held that claim preempted by the Copyright Act, and dismissed the claim in my previous Order. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

and search for content by date and time, rather than by keyword. The parties pursued additional discovery with respect to these features, limiting experts to one per side, followed by renewed briefing on the open issues, focusing on the following questions:

- 1) Whether each function in question is integral to TVEyes' transformative purpose, and
- 2) Whether each function in question threatens Fox News' derivative business.

This Order now resolves the renewed cross-motions for summary judgment. For the following reasons, I find that TVEyes' archiving function is fair use; that its e-mailing function, if subjected to various protections, can be fair use; but that the downloading and date-time search functions are not fair use.

THE PARTIES

i. TVEyes

As I explained in my previous opinion, *TVEyes*, 43 F. Supp. 3d at 379, familiarity with which is assumed, TVEyes creates a searchable database of virtually all television and radio content by using closed-caption technology and recording broadcasts through standard cable services such as Comcast and Cablevision. TVEyes allows users to track the usage of words or phrases of interest, and to view the transcripts and video clips of the portions of the television broadcast that use the search term. The purpose is to give subscribers "access, not only to the news that is presented, but to the presentations themselves," for both are news: the subject that is reported, as well as the manner in which it is reported. *Id.* at 393. TVEyes is a for-profit business with over 22,000 subscribers. It markets itself to businesses and government agencies, and counts among its subscribers the White House, Department of Defense, over 100 members of Congress, and various news and non-profit organizations. It is not open to the general public.

TVEyes subscribers may set “watch lists” for terms and receive real time alerts when the terms are used. Subscribers may also search past broadcasts, for which video is saved for 32 days. When a matching segment is located, the user can view the matching transcript and video clip up to ten minutes long, although the vast majority of clips are shorter than two minutes. The video clip is also accompanied by important analytic data such as the segment’s Nielsen viewership rating, the frequency with which the term has been mentioned over a specified time period, and the geographic markets and channels where the term is used. These searching, indexing, and display features make up TVEyes’ core function.

TVEyes also provides a suite of functions that complement its core service. The first of these functions is “archiving.” TVEyes users are able to “archive” video clips that appear in response to their search queries to a personal digital library on TVEyes’ server. Archiving a video keeps the video available indefinitely to that subscriber.² A second complementary function is “e-mailing.” Subscribers can share links to the video clips with others by e-mail, allowing the recipients of the link to view the video clip on TVEyes’ server through their web browsers.³ TVEyes does not utilize an authentication process to limit viewing to authorized users. A third complementary function is “downloading.” Subscribers are able to download copies of identified digital video clips to their computers for offline use and permanent storage. TVEyes places no technological restriction on its subscribers’ use or distribution of downloaded video clips, nor does it utilize any method of identifying the clip as sourced from TVEyes. And a fourth complementary function is “date-time search,” by which users can retrieve video clips of

² Videos are otherwise purged from TVEyes’ servers after 32 days.

³ The links to videos can also be posted to social media services, such as Facebook or Twitter. TVEyes concedes that such posting is not fair use and is not integral to its service, and it claims to have implemented a series of measures that prevent the videos from being accessed through social media. The efficacy of those measures is disputed, however. TVEyes will have to demonstrate that its measures will be reasonably effective.

chosen networks according to the date and time slots of the broadcasts. The issue in the instant motions is whether each of these four functions constitutes fair use. TVEyes has the burden to prove its affirmative defense, as I later discuss.

ii. Fox News

Again, as I discussed in my previous decision, 43 F. Supp. 3d at 379, Fox News is an international television news organization that owns and operates Fox News Channel (“FNC”) and its financial news counterpart, Fox Business Network (“FBN”). FNC is in the business of reporting news worldwide on a twenty-four hour news cycle, and has been the most watched cable news network for the past 11 years. Its primary competitors are cable television channels MSNBC and CNN.

Viewers generally watch Fox News on television through their cable TV subscriptions, but Fox has a growing online presence as well. For example, live online streams of FNC and FBN are available to viewers with cable or satellite subscriptions through Fox’s TVAnywhere platform for authenticated streaming. In addition, Fox makes a limited number of video clips available on its websites, FoxNews.com and FoxBusiness.com, although the amount of content is sharply limited by Fox’s contracts with the cable companies. Currently, only about 16% of broadcast content is available on Fox’s website. Fox receives advertising revenue when viewers watch videos on its websites, including revenue from banner advertisements on the page itself, and from “pre-reel” advertisements that play before a video clip begins. Fox also has agreements with syndication partners, including Yahoo!, Hulu, and YouTube, “to store and show video clips of segments of its program[s] on their websites, thereby generating another stream of income.” *TVEyes*, 43 F.Supp.3d at 387. And Fox licenses its video clips to clients, including companies, journalists, and politicians, through its agents, ITN Source and Executive Interviews.

However, licensees must “covenant that they will not show the clips in a way that is derogatory or critical of Fox News.” *Id.* Together, Fox News’ online distribution and licensing services make up its “derivative business.”

Fox invests significant resources in creating content and covering news stories. It alleges that, by making Fox News’ content available to TVEyes subscribers, TVEyes is diverting potential licensees, website visitors, and therefore revenue, from Fox.

LEGAL STANDARD

i. Summary Judgment

Under the well-established summary judgment standard, a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding the motion, the court must “resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.” *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The court should also “eschew credibility assessments.” *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). However, “[t]he mere existence of a scintilla of evidence in support of the [non-moving] party’s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

ii. Copyright Infringement

The Copyright Act grants authors “a limited monopoly over (and thus the opportunity to profit from) the dissemination of their original works.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). A *prima facie* case of infringement requires an author to show only (1) ownership of a valid copyright, and (2) unauthorized copying of the copyrighted

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