

Here's Why TVEyes Wasn't Fair Use

By **Bill Donahue**

Law360 (February 27, 2018, 8:20 PM EST) -- TVEyes was often described as a video equivalent of Google Books, so why did it fail Tuesday where the tech giant's book-scanning project famously succeeded?

Both services recorded copyrighted material en masse without authorization from a number of sources, turning it into aggregated, word-searchable databases that let users analyze and comb through material in ways they couldn't otherwise.

In Google's case, it turned millions of books into a tool to for web browsers to search humanity's written output; in TVEyes' case, it turned millions of hours of television into a tool for political campaigns, journalists and others to track the airwaves.

But while the Second Circuit ruled in 2015 that Google Books "augments public knowledge" and was protected by copyright's fair use doctrine, the very same court ruled Tuesday that TVEyes was not. Siding with Fox News, which sued the company, the court said it was "unlawfully profiting off the work of others."

Experts say the contrasting outcomes are rooted less in some kind of fundamentally new approach to the fair use doctrine, and more in key differences between the two services that ultimately led to a very different result.

"There are a number of distinguishing characteristics between Google Books and TVEyes which suggests that perhaps this is nothing more than TVEyes going too far," said Alexander Lawrence, a partner at Morrison & Foerster LLP.

In its ruling Tuesday, the Second Circuit looked heavily to the decision in Google Books, saying TVEyes' appeal "shares features" with the earlier case, but the details of features of the new service were "radically dissimilar" from Google's project.

"However, we cautioned that the case 'tested the boundaries of fair use,'" the court wrote. "We conclude that defendant TVEyes has exceeded those bounds."

For the panel, the biggest difference between the two services was not how they used the copyrighted material, but rather the amount of content that they sent along to users.

In the case of Google Books, users are presented with only “snippets” of a few sentences, can only see one snippet per page, and are prevented from doing anything that would allow them to compile snippets into “a coherent block of text.” These chunks of material, the court said, represent a “very small piece” of books that are hundreds of pages

TVEyes, instead, offers 10-minute clips of footage — a quantity that seems small until you consider that many TV channels, particularly cable channels like Fox, offer up their programming in similar bits.

“Given the brevity of the average news segment on a particular topic [these clips] likely provide TVEyes’s users with all of the Fox programming that they seek and the entirety of the message conveyed by Fox to authorized viewers of the original,” the court wrote.

TVEyes’ decision to offer “virtually the entirety of the Fox programming that TVEyes users want to see and hear” was far different than the facts of Google Books and “clearly favors” a finding against fair use, the court said.

“A key distinction between the Second Circuit’s fair use analysis in TVEyes and its analysis in Google Books lies in the amount of copyrighted material that TVEyes made available,” said Christopher Loh, a partner with Fitzpatrick Cella Harper & Scinto.

That distinction bled into other differences in how the court weighed fair use.

In Google Books, for instance, when the court ruled that offering copyrighted material to users was “transformative,” it went out of its way to stress that the “snippets” showed “just enough context” to help searchers without “revealing so much as to threaten the author’s copyright interests.”

Similarly, when that court ruled that Google’s book-scanning project would not harm the ability of the original authors to make money on the books — arguably the most important fair use factor — it stressed that the finding rested on just how little material was being presented to web browsers.

“Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book,” the court wrote at the time.

In Tuesday’s ruling against TVEyes, which turned heavily on this so-called “market harm” factor of the fair use analysis, the court simply did not find those kind of limits on the amount of content users could access.

“The 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, and that this

market is worth millions of dollars in the aggregate,” the court wrote Tuesday.

That finding, like the rest of the ruling, was suffused with that key difference: TVEyes simply took too much.

“While there may not be a market for three-line snippets of books, there is clearly a market for complete segments of news programming,” said Lawrence.

--Editing by Adam LoBelia.

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