TVEyes and the Future of Technotainment

By Scott J. Sholder

I. Introduction

Several months have passed since the Second Circuit handed down its decision in *Fox News Network, LLC v. TVEyes, Inc.*,[1] and the various stakeholders are undoubtedly settling into the new reality concerning the boundaries of fair use. The court confirmed in *TVEyes* that its earlier decision in *Authors Guild v. Google, Inc.*[2] set the outer limits of fair use when it comes to duplication of copyright-protected materials for indexing and searching purposes. Whether it is seen as a victory or a setback, *TVEyes* represents the current state of the law in one of the most copyright-intensive jurisdictions in the country (encompassing the seat of the media and publishing industries).[3]

With the recent explosion in the availability of digital content, including photographs, movies, television, short-form videos and clips, music, and games, and the proliferation of new platforms and technologies for the use, exploitation, and sharing of such content, the potential impact of *TVEyes* is substantial.

II. A Quick Recap: Previously on *TVEyes*…

This article will explore some of the broader practical implications of the Second Circuit's *TVEyes* decision. First, however, a brief summary of the facts is in order.

TVEyes—a for-profit media/technology company—offered a fee-based service that allowed clients to "sort through vast quantities of television content to find clips that discuss items of interest to them" by way of, among other functions, search, archive, and watch features.[4] A judge in the Southern District of New York held that these functions constituted fair use of the plaintiff's programs,[5] but on appeal (which concerned the watch, downloading, archiving, and sharing functions but not the searching/indexing feature), the Second Circuit disagreed. The court of appeals noted that while TVEyes' copying of content and its provision of a "watch" service could be considered at least somewhat "transformative" under the first fair use factor,[6] the transformative character did not outweigh the fourth fair use factor—the impact on the market and potential market for the copyrighted works.

Specifically, the court found that TVEyes "essentially republishe[d] [copyrighted] content unaltered from its original form"[7] on a commercial basis and "undercut[] Fox's ability to profit from licensing searchable access to its copyrighted content to third parties."[8] Consumers clearly were willing to pay for a service that aggregated, indexed, and provided a searchable database of creative content. TVEyes therefore "deprive[d] Fox of revenue that properly belongs to the copyright holder," exceeding the boundaries set by *Authors Guild*.[9] Despite recent case law holding that transformative use is the most important fair use factor, the *TVEyes* court seemed to return to the earlier view that market harm is "the single most important element."

III. I'll Take Door Number Four: The Significance of the Court's Focus on Market Harm

Potential market harm, in the form of lost licensing opportunities, is the most relevant effect of services like TVEyes, not just legally but from a real-world standpoint in a modern digital environment full of content that can be indexed, searched, and consumed in a variety of ways. The strategic approach that Fox News took in the case—not appealing the district court's fair use ruling on TVEyes' indexing and searching functions, likely because they are fair uses under *Authors Guild*—may, at least tacitly, have opened a door to an *Authors Guild*-style exception for the indexing and searching of all sorts of media while, at the same time, limiting what else can be done without a license.

The dividing line, at least for the time being, is clear: third parties (i.e., technologists) can offer only limited utilitarian organizational functions vis-à- vis content they do not own, whereas content owners are, of course, free to do much more. TVEyes clearly knew that those two buckets of rights would be far more useful (and profitable) if combined. Now the question is whether coders and copyright holders can work together, above board, and still turn a profit.

A. DIY Network: Content Owner Internal Development

In the current digital environment, copyright owners will want to offer convenience and customizability for audiences looking for ways to sift through the endless amount of content available online. Content owners like Fox News, record labels with vast catalogues of digital master sound recordings, digital image libraries, and video game developers can develop indexing and searching tools as well as functionalities like sharing and downloading and charge a fee based on the value of their content and that of the services offered. *TVEyes* preserved for copyright owners the market opportunity to act as one-stop shops.

The photography and digital image licensing industry is a model of this marriage of content and technology. Aggregators of video footage, film clips, photographs, and

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other visual imagery such as Getty Images, Shutterstock, and Corbis, invested millions of dollars in the last decade digitizing and indexing their licensed content to be easily searchable, accessible, and available on-demand.[10] Their content is paid for through licensing arrangements with content owners and is offered to users for fees that vary based on the type of content and the type of license available, with royalties shared with contributors. In 2015 the market for licensing audiovisual content was valued at $550 million globally for video footage alone.[11] A ruling in favor of TVEyes in connection with its "watch" function and associated features would have endangered this established—and steadily growing—business model.

But this solution may not work for everyone. This is where teamwork comes in handy.

B. "We will add your biological and technological distinctiveness to our own": Tech/Content Synergies[12]

Internal technology development is not the only way to harness the power of search. *TVEyes* leaves the door open for synergy and partnerships between content companies and technology developers. Indeed, this arrangement seems far more likely; tech companies do not necessarily want to deal in content, and content companies do not necessarily want to deal in tech. The logical answer is for these players to work together to create market opportunities for profitable and desirable technology-driven content, which is just what the *TVEyes* court's focus on market impact allows for.

The court's holding that TVEyes' non-search functionalities supplanted the market for licensed content forces the historically opposed tech and creative industries closer together. A tag-team approach, while encouraged by *TVEyes*, is not a new concept. Indeed, the district court noted that Fox News already licensed its video clips through a clip-licensing agent called ITN Source, Ltd. that "maintains a library of over 80,000 Fox News video clips which its customers can search using keywords" and that earned Fox News approximately $2 million in licensing fees.[13]

This type of business model makes sense: choosing the type of content that is most appropriate for a particular function or audience and pulling that content in with permission of the content owners for the mutual benefit of all. It is a far more nuanced approach than the cavalier strategy of pulling in all content in a specific medium without a license and hoping for the best in a fair-use gunfight. Indeed, this type of arrangement could have resulted had TVEyes partnered with Fox News, thereby making TVEyes even more viable.

As discussed below, the melding of tech and content through legally sound licensing arrangements and cooperation between content owners and aggregators, on the one hand, and technology and software developers, on the other hand, appears to be the future that *TVEyes* predicted.

IV. Role Models: Developments in Content-Based Technology

A few recent developments demonstrate the business possibilities in the post-*TVEyes* world of technology-content fusion. While there are surely many other examples out there, the proliferation of artificial intelligence (AI) and user-generated content (UGC) apps incorporating existing creative materials provide solid examples of where the technotainment world may be headed.

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A. "I am feeling much better now":[14] HAL 9000 Is in Control of Your TV

Tech giants like Amazon, Google, and Apple are at the forefront of the AI movement. We routinely consult with Alexa, Google, and Siri, and commentators have observed that these and other types of AI will likely have very real effects on our consumption of content in the near future, especially when it comes to TV and movies.[15] In a column for *Deadline*, Arvin Patel, the chief intellectual property officer at TiVo and former chief IPO officer at Technicolor, made several predictions that are fully compatible, from a business, technological, and historical standpoint, with the legal direction in which the *TVEyes* decision is steering entertainment and media.

First, he predicted that AI "will eliminate the need for traditional programming guides and DVRs by pushing content to the appropriate output device at the perfect time for consumption."[16] This remarkable technology will also be able to predict what you want to watch and will recommend new content based on historical viewing habits and the preferences of social media connections.[17]

Patel's second salient prediction is that AI "will be able to automatically compile user-generated content and content from other sources to create new streams of content that take[] personalization to a new level. In the future, AI will make it possible to create real-time, custom-curated streams of content that are tailored just for you."[18]

Without the ability to intelligently compile, index, and search, as well as copy, distribute, share, record, and store this carefully collated material, the TV-based AI of the future would either falter or become fodder for expensive lawsuits. Patel's vision of the future of individualized content delivery requires cooperation between technology and content and is a natural extension of *TVEyes'* preservation of market opportunities for copyright owners.

B. "I'm ready for my close-up":[19] Musical.ly and the Ever-Growing UGC Movement

Another area ripe for the synergies set in motion by *TVEyes* is UGC, especially in the smartphone app space. Take musical.ly (which was just recently rebranded as Tik Tok, but for purposes of this article, will be referred to by its prior moniker). Touting itself as "a global video community" that "make[s] it easy for you to . . . make your own short videos . . . that you can share with the world," musical.ly allows users to "[a]dd your favorite music or sound to your videos for free."[20] The app allows users to edit their videos using "free music clips and sounds" from "the hottest tracks in every genre" and even "create[s] featured music playlists for you."[21] And, of course, the music database in the app itself is indexed and searchable.

Musical.ly has already been around for a couple of years, and it claims to have reached 200 million users and half of American teenagers as of April 2017.[22] But, presumably because of its license agreements with major record labels,[23] users of this hugely successful app can do far more than search through a static music database. Along with adding music to their homemade video clips, users can edit their clips, livestream,[24] and share their videos including the incorporated music clips.[25]

A 2017 partnership with Apple Music took the integration to an even higher level, allowing Musical.ly users to stream full-length songs (as opposed to 15-second clips) from Apple Music's catalog "directly within the Musical.ly app, with the further option to save particular songs to their own playlists within Apple Music and access Musical.ly-branded playlists via the streaming service as well."[26] The users' videos, themselves, are still limited to clip-based usage, but users with Apple Music subscriptions will have access to "any 15-second section from [any] full-length track [on Apple Music] within the app with which to create their videos."[27]

Ever-growing platforms like Musical.ly represent the future of the mobile app entertainment space. While Musical.ly pre-dated the *TVEyes* decision, it is consistent with the values embodied in the decision, and its immense popularity, rapid expansion and integration with other major brands, and stability as a favorite Millennial and Generation Z pastime show how much success technologists and content owners can achieve together when they each recognize the market opportunities and combine their talents and knowledge toward a common goal.

V. Conclusion: "Onward, and Yon-ward!"[28]

The future of tech-fueled media and entertainment is bright, exciting, and coming soon to an LED screen near you. While the law is notoriously slow to catch up with technology, in the case of *TVEyes* it was at least remotely punctual, and so perhaps for once the two can walk side by side, at least for a little while, until this technotainment revolution is rendered obsolete or unless the Supreme Court takes the case and decides differently.[29] Despite its seemingly timely nature, those on the hard copy-right may not like *TVEyes*, as it left intact the unchallenged search and indexing uses as fair under *Authors Guild*, while those on the far copy-left may dislike the decision because it did not go far enough to encourage the advancement of technology. However, the ruling is consistent with the direction in which the tide of major players is already headed. With the rise of AI and the explosion of interactive entertainment apps, zealots on either side may be wise to simply ride the wave—at least until it becomes necessary to jump the shark.

Endnotes

1. *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).
2. 804 F.3d 202 (2d Cir. 2015) (holding that mass copying of books for purposes of limited text searching was fair use).
3. Cowan, DeBaets, Abrahams & Sheppard LLP drafted an amicus brief in this case on behalf of American Photographic Artists, American Society of Media Photographers, Digital Media Licensing Association, National Press Photographers Association, and Professional Photographers of America, in support of Fox News Network ("CDAS Amicus Br.").
4. *TVEyes*, 883 F.3d at 175.
5. The district court held that download, e-mailing, and certain watch-related functions were not fair use. *See id*. at 173.
6. Copying "enables TVEyes'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." *Id*. at 174. Similar to the Sony "Betamax" case, the court noted that TVEyes' watch function was also akin to time- and place-shifting, and "certainly qualifies as technology that achieves the transformative purpose of enhancing efficiency," and so was "at least somewhat transformative." *Id*. at 177-78.
7. *Id*. at 178.
8. *Id*. at 180.
9. *Id*. at 174.
10. *See* CDAS Amicus Br. at nn.15-16.
11. *See id*. n.2.
12. Star Trek: First Contact. Perf. Jeff Coopwood. Dir. Jonathan Frakes. Paramount Pictures, 1996.
13. *See Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 387 (S.D.N.Y. 2014).
14. 2001: A Space Odyssey. Perf. Douglas Rain. Dir. Stanley Kubrick. Metro-Goldwyn-Mayer, 1968.

15. Arvin Patel, *Artificial Intelligence Will Be Hollywood's Next Big Star*, Deadline.com (July 20, 2018), https://deadline.com/2018/07/artificial-intelligence-hollywood-next-star-arvin-patel-commentary-1202427191/.

16. *Id*.

17. *See id*.

18. *Id*.

19. Sunset Boulevard. Perf. Gloria Swanson. Dir. Billy Wilder. Paramount Pictures, 1950.

20. iTunes Store, https://itunes.apple.com/US/app/id835599320/id835599320.

21. *Id*.

22. Dan Rys, *Musical.ly, Apple Music Ink New Partnership, With More to Come*, Billboard (Apr. 28, 2017), https://www.billboard.com/articles/business/7776302/musically-apple-music-partnership.

23. Dan Ryes, *Fresh Off a Big Funding Round, Musical.ly Signs Its First Major Label Deal with Warner Music*, Billboard (June 29, 2016), https://www.billboard.com/articles/business/7423281/warner-music-group-deal-musical-ly.

24. Todd Spangler, *Musical.ly's Live.ly Is Now Bigger Than Twitter's Periscope on iOS (Study)*, Variety (Sept. 30, 2016), https://variety.com/2016/digital/news/musically-lively-bigger-than-periscope-1201875105/.

25. iTunes Store, https://itunes.apple.com/US/app/id835599320/id835599320.

26. *Id*.

27. *Id*.

28. Nature Cat. Perf. Taran Killam. Spiffy Pictures, 2015.

29. TVEyes is currently in the process of petitioning the Supreme Court for a writ of certiorari to review the decision. See Eriq Gardner, *Fox News Taken to Supreme Court in Potential Blockbuster Case*, Hollywood Reporter (Aug. 1, 2018), https://www.hollywoodreporter.com/thr-esq/fox-news-taken-supreme-court-potential-blockbuster-case-1131466.