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Fox News v. TVEyes Shows Fair-Use Defense Remains Risky Business

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“It seems to me that if there were any logic to our language, trust would be a four letter word.”¹ TVEyes must have felt just like Tom Cruise’s character in *Risky Business* after trusting that the Second Circuit, which had recently found that Google’s Google Books platform constituted copyright fair use, would find that TVEyes’ distribution of copyrighted television clips was likewise a fair use. In Fox News Network’s suit against the media-monitoring service, TVEyes argued that its searchable database for television programming was “the audio-visual analog to [] Google Books,”² and that its fair-use defense should succeed for the same reasons Google’s had in the Second Circuit’s *Authors Guild, Inc. v. Google, Inc.*³ decision (hereinafter *Google Books*). But the Second Circuit reached the opposite conclusion, holding that TVEyes’ service was not a fair use of Fox’s protected content.⁴ The Court’s holding confirms that fair use is unpredictable, and can be a risky—and expensive—defense for an accused infringer to rely on. But it also demonstrates that fair use does have limits, which is good news for content owners.

TVEyes Creates a Searchable Database of Television Clips

Advertised as a “search engine for television,”⁵ TVEyes provides subscribers—journalists, government and political organizations, the military, corporations, and non-profits—a searchable database of television content.⁶ TVEyes continuously records broadcasts from over 1,400 channels, transcribes them using closed-captioned text feeds and speech-to-text software, and consolidates the transcripts into a text-searchable database.⁷ For about \$500 per month, subscribers can search the database using keywords to find and play relevant television clips of up to ten minutes.⁸

After failed licensing talks, Fox sued, alleging TVEyes’ distribution of Fox News clips infringed Fox’s copyrights. The Southern District of New York found that the

TVEyes functionality permitting a user to watch Fox's content was fair use.⁹ On appeal, TVEyes argued that its service was substantially similar to Google Books' service—a searchable database of 20 million books—merely applied to television broadcasts.¹⁰ The Second Circuit had previously found that Google's use was fair after applying 17 U.S.C. § 107's four non-exclusive statutory factors—(1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the copyrighted work used, and (4) the impact on the copyrighted work's market.¹¹ Indeed, Google supported TVEyes' argument, citing the Google Books decision in an amicus brief bolstering TVEyes' position.¹²

Unlike Google Books, TVEyes' Use Was Not Fair

But the Second Circuit focused on the differences between TVEyes' use and Google's use—not their similarities. The Second Circuit's opinion demonstrates just how case-specific fair use can be. Its decision focused primarily on one factual difference—the quantity of the content provided with the search results—that impacted the court's analysis of fair use factors three and four, which relate to the amount of the work copied and the impact on the copyrighted work's market.

The *Google Books* court diligently explained just how little of each book Google Books made available. The *Google Books* plaintiff hired researchers to determine how much of a single book a user could compile. Search results included up to three “snippets” that contained the searched term—sections equal to approximately 1/8 of a single page from the book.¹³ Google barred users from seeing additional snippets even with repeated searches of the same keyword or different computers.¹⁴ Google also completely hid one snippet from every page and every tenth page, no matter the search.¹⁵ Plaintiffs' researchers were never able to access more than 16 percent of any given

book, and results were limited to randomly scattered snippets.¹⁶ TVEyes, on the other hand, provided ten-minute clips—virtually all of the content a user sought, especially given the brevity of the average TV news segment.¹⁷ According to the Second Circuit, this factual difference favored fair use in *Google Books*, but disfavored fair use in *TVEyes*.

The court's analysis of the market impact turned on the same distinction. Providing up to 16 percent of a book in random snippets was unlikely to replace purchasing the book for most users.¹⁸ Further, Google disabled snippet views for books where a snippet might satisfy a user's entire need for the book, such as dictionaries and cookbooks.¹⁹ TVEyes did not take such precautions, and the court found that TVEyes displaced Fox News' rightful licensing market, since users would no longer need to ask Fox News for content available via *TVEyes*.²⁰

In both *Google Books* and *TVEyes*, the court found providing the ability to search for specific content in books or television to be transformative.²¹ But on balance, the Second Circuit determined that the “somewhat transformative” nature of TVEyes' offering was not enough to overcome the commercial nature of the use, the ability of TVEyes users to view essentially all of the content they desired, and the usurpation of Fox's ability to license its content for compensation.²²

The Risky Business of a Fair-Use Defense

Fair-use is notoriously complicated. The U.S. Supreme Court has provided guidance on the doctrine several times.²³ Despite this guidance, courts often remark that fair use remains a difficult doctrine to apply.²⁴ It requires a “case-by-case analysis” that is “not to be simplified with bright-line rules.”²⁵ The Federal Circuit recently spent several pages discussing the applicable standard of review in fair-use cases.²⁶ As recently held by the Federal Circuit (applying Ninth

Circuit Law) in *Google v. Oracle*, fair use analysis is “a primarily legal exercise” subject to de novo review.²⁷ So even a favorable decision in the trial court can be easily reversed. Further, it provides only a defense to infringement, not immunity from suit. It can only be decided after significant litigation and after infringement has already been found.

Content owners should be encouraged by the decision, which sets limits on the fair use defense, which seemed to be expanding in applicability. For those using copyrighted content without a license that believe their use is fair, the *TVEyes* case demonstrates how uncertain and costly a fair-use defense can be. *TVEyes* spent years litigating, and won summary judgment on fair-use. And *TVEyes* had what it believed to be analogous precedent from *Google Books* that it argued required a ruling in its favor. But under de novo review, the court found a single factual distinction required a completely different fair-use outcome. And the Second Circuit directed the district court to enjoin *TVEyes* from providing its core product, demonstrating that reliance on a fair-use defense to copyright infringement remains a dangerous proposition, and a very risky business model.

¹ Joel Goodson, *Risky Business* (1983).

² Oral Argument Tr. at 1:6-12, *Fox News Network, LLC v. TVEyes, Inc.*, No. 15-3885, Dkt. 346 (2d Cir. Mar. 24, 2017).

³ 804 F.3d 202 (2d Cir. 2015).

⁴ *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180-81 (2d Cir. 2018).

⁵ As of publication, *TVEyes* was still offering its subscription services. It has not yet filed a petition for review by the Supreme Court, but has until the end of May 2018 to do so.

⁶ *Fox News*, 883 F.3d at 175.

⁷ *Id.*

⁸ *Id.*

⁹ *Fox News Network, LLC v. TVEyes, Inc.*, 124 F.Supp.3d 325 (S.D.N.Y. 2015).

¹⁰ Oral Argument Tr. at 1:6-12, *Fox News Network, LLC v. TVEyes, Inc.*, No. 15-3885, Dkt. 346 (2d Cir. Mar. 24, 2017).

¹¹ *Google Books*, 804 F.3d at 229.

¹² Br. for Amicus Curiae Google Inc., *Fox News*, 2017 WL 664295, at *9 (Feb. 16, 2017).

¹³ *Google Books*, 804 F.3d at 209.

¹⁴ *Id.* at 210.

¹⁵ *Id.*

¹⁶ *Google Books*, 804 F.3d at 222-23.

¹⁷ *Fox News*, 883 F.3d at 179.

¹⁸ *Google Books*, 804 F.3d at 224.

¹⁹ *Id.*

²⁰ *Fox News*, 883 F.3d at 180.

²¹ *Fox News*, 883 F.3d at 177-78; *Google Books*, 804 F.3d at 217-18.

²² *Id.* at 180-81.

²³ E.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Stewart v. Abend*, 495 U.S. 207 (1990); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

²⁴ E.g., *Oracle Am., Inc. v. Google LLC*, No. 2017-1118, 2018 WL 1473875, at *6 (Fed. Cir. Mar. 27, 2018) (“[T]he doctrine of fair use has long been considered ‘the most troublesome in the whole law of copyright.’”) (quoting *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012)).

²⁵ *Campbell*, 510 U.S. at 577.

²⁶ *Oracle*, 2018 WL 1473875, at *7-10 (Fed. Cir. Mar. 27, 2018).

²⁷ *Id.* at *8.

The Blurred Line Between Inspiration and Infringement: *Williams v. Gaye*

Wesley Lewis



Wesley
Lewis

In *Williams v. Gaye*,¹ the high-profile copyright dispute between the heirs of Motown legend Marvin Gaye and the creators of the 2013 chart-topper “Blurred Lines,” a Ninth Circuit panel consisting of Judges Milan Smith, Mary Murguia, and Jacqueline Nguyen

recently left undisturbed a jury’s 2015 verdict that “Blurred Lines” infringed on the copyright of Gaye’s 1977 work, “Got To Give It Up.” Although the 2-1 decision largely sidestepped the key doctrinal issues at the core of the case—deferring instead to the jury’s verdict and ruling predominantly on procedural grounds—this decision is nevertheless likely to have a significant impact on copyright litigation in the music industry going forward.

Marvin Gaye released the hit song “Got To Give It Up” in 1977. Decades later, Pharrell Williams, Robin Thicke, and Clifford Harris, Jr. (better known as the rapper “T.I.”) released the chart-topping single

“Blurred Lines,” which captures a similar sound and employs comparable stylistic elements to those in “Got To Give It Up.” The similarity may not have been a pure coincidence; Thicke himself acknowledged Gaye as a musical inspiration, and during the “Blurred Lines” studio sessions, Thicke reportedly told Pharrell Williams, “[w]e should make something like [Got To Give It Up], something with that groove.”

Upon the song’s release, the Gaye family and Bridgeport Music, the owner of the copyright in the Funkadelic song “Sexy Ways,” both alleged that “Blurred Lines” infringed on their respective copyrights. Thicke, Williams, and Harris preemptively brought suit against both the Gayes and Bridgeport Music, seeking declarations of non-infringement. Despite their stated reluctance to sue and admiration for both Gaye and Funkadelic, Plaintiffs may have been encouraged to act preemptively in part due to Bridgeport’s litigious reputation;² facing presumptively inevitable litigation, Plaintiffs’ decision to take the offensive at least gave them the opportunity to select the forum of their choice. Predictably, Defendants countersued for infringement. In 2015, a jury found that “Blurred Lines” and “Got To Give It Up” were substantially similar, and the district court entered a judgment awarding the Gayes more than \$5 million in damages and a running royalty of 50 percent of future songwriter and publishing revenues.

Both parties appealed. Much of the briefing and argument in the Ninth Circuit focused on the disputed importance of the song’s “lead sheet” on deposit at the Copyright Office and the extent to which the sound recording of “Got To Give It Up” could permissibly inform the substantial similarity inquiry. Importantly, because “Got To Give It Up” was released before the effective date of the 1976 Copyright Act, the song is governed by the earlier Copyright Act of 1909. As a result, only the musical composition is protected—not, as is the case for songs governed by the 1976 Act, both the composition and sound recording. As the Ninth Circuit observed, it is unclear,

therefore, “whether copyright protection for musical compositions under the 1909 Act extends only to the four corners of the sheet music deposited with the United States Copyright Office, or whether the commercial sound recordings of the compositions are admissible to shed light on the scope of the underlying copyright.”

In March, the Ninth Circuit affirmed the jury verdict “on narrow grounds,” relying significantly on the procedural posture of the case. While the panel held that “Got To Give It Up” was entitled to broad copyright protection, it nevertheless accepted, without deciding, the district court’s determination that the scope of Defendants’ copyright was limited to the lead sheet on deposit with the Copyright Office. As a result of the Court’s deferential and procedure-heavy approach, the majority’s opinion gave virtually no guidance on one of the core issues of the case: the line between permissible levels of inspiration and infringing copying of musical works.

Judge Jacquelyn Nguyen dissented, arguing that the majority’s ruling “strikes a devastating blow to future musicians and composers everywhere” by essentially allowing de facto copyrights in musical “grooves” or styles. Nguyen observed that the two songs have different lyrics, melodies, harmonies, and rhymes, and although “juries are entitled to rely on properly supported expert opinion,” the defendants’ expert did not successfully establish a legally sufficient basis for a finding of infringement. Instead, Judge Nguyen noted, the Gayes’ expert improperly “cherry-picked brief snippets” to opine that there was a ‘constellation’ of elements that, while individually unprotectable, could support a finding of substantial similarity when taken together.

This decision is likely to have a number of repercussions throughout the music industry. First, musicians and producers may now be more circumspect in their statements regarding musical inspiration and influences, lest such admissions subject

them to allegations of infringement. Furthermore, as Judge Nguyen's dissent suggests, the ruling may inspire litigious copyright holders to assert weak infringement claims to protect musical styles based on a song's overall "groove" or style. The majority, in a footnote, sought to allay fears regarding the impact of the decision, suggesting that "going forward, a number of the contentious issues presented in this case will occur with less frequency with the passage of time." But, while it is true that the unsettled evidentiary role of sound recordings in litigation under the 1909 Act will likely become less significant as more works are governed by the 1976 Act, Judge Nguyen's concern regarding the overexpansive application of copyright protections to musical styles is likely to remain relevant to claims governed by either act. Although the precise impact of this case will likely remain unclear for some time, the question that it raises regarding the difference between inspiration and infringement is certainly not going anywhere.

¹ *Williams v. Gaye*, No. 15-56880 (9th Cir. Mar. 21, 2018).

² As Plaintiffs alleged in their complaint, Bridgeport is "in the business of trolling for opportunities to threaten to sue and to sue musicians, performers, producers and others in the music industry for infringement of its copyrights."

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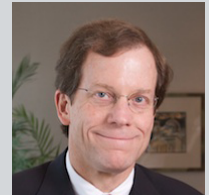
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