

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
FOX NEWS NETWORK, LLC,

Plaintiff,

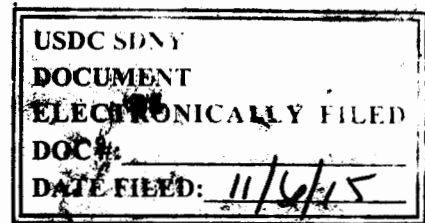
-against-

TVEYES, INC.

Defendant.  
----- X

**ORDER SETTING TERMS OF  
INJUNCTION**

13 Civ. 5315 (AKH)



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

**Background**

After issuing partial summary judgment on the affirmative defense of fair use on September 9, 2014, I held that the factual record was inadequate to determine whether four TVEyes functions were fair uses of Fox News Programming. After considering further submissions from the parties, I held on August 25, 2015, that

- (1) The archive function is fair use;
- (2) The download function is not fair use;
- (3) The share-by-email function can be fair use if TVEyes develops and implements adequate protective measures, and;
- (4) The search by date and time function is not fair use.

The parties were instructed to provide the Court with a joint submission to propose protective measures, to suggest an appropriate decree, and to advise the Court whether any issue of damages remains.

The parties raise several other issues in their joint submission.

## **1. Whether Fox News Has Shown That TVEyes' Share-by-email Function is Directly Infringing**

First, TVEyes claims that my September 9, 2014 order did not settle the issue of whether TVEyes directly infringed Fox News' copyrights. My order stated, "TVEyes admits also that it copies, verbatim, each of Fox News' registered works. These concessions constitute copyright infringement unless TVEyes shows that its use is fair." Sept. 9, 2014 Order, at 11. Thus, I found that where TVEyes functions went beyond the scope of fair use, its defense failed and direct infringement existed. TVEyes' emailing feature is one aspect of that infringement, for it is using that which it copied without legal justification. That illegal use reflects "volitional conduct." *See e.g., Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014) (finding volitional conduct shown where, "Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program."). That TVEyes' infringing and volitional conduct enables others to infringe does not mitigate TVEyes' direct infringement; it exacerbates it. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* is distinguishable; unlike TVEyes, the defendant in that case did not store the allegedly infringing works on its servers "for a period of more than transitory duration." 536 F.3d 121, 130 (2d Cir. 2008).

## **2. Proposed Limitations on Social Media Sharing Feature and Share-by-email Feature**

### **A. Whether Order is Advisory**

Fox News argues that I should not regulate the limits of TVEyes share-by-email function, for to do so would make my order "advisory." But, "a decision is not advisory where it concerns facts whose existence is imminent." *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d

441, 451 n.6 (S.D.N.Y. 2014). An actual controversy exists whether or not the TVEyes share-by-email feature constitutes fair use. My regulation of that fair use is not advisory.

**B. Scope of Injunction**

TVEyes claims that the injunction to be issued should apply only to the nineteen works that have been identified in this lawsuit. However, as the *Nimmer* treatise states, a permanent injunction “may apply not only to the works as to which infringement has already been adjudicated, but also to any other works currently owned by plaintiff, plus even works that plaintiff may create in the future.” 5 *Nimmer on Copyright* § 14.06[C][2][c]. The injunction will apply to all Fox News content copied. The 19 works were emblematic of all Fox News’ content, for Fox News complains that TVEyes copied and continues to copy all Fox News’ programs, including all copyrighted content, on a 24/7 basis.

**C. Proposed Limitations on Sharing and Email Features**

The limitations proposed by TVEyes in the joint submission of October 22, 2015 are reasonable and are largely incorporated in the Permanent Injunction and Final Order. TVEyes’ proposed limitations provide adequate assurance that the “share-by-email” and social media sharing features will be properly limited, within the parameters of fair use. Fox News proposes limitations that would eviscerate the usefulness of the service provided by TVEyes, and would not serve the purpose of copyright law to “promote the Progress of Science and useful arts.” U.S. Const., Art. I, § 8, cl. 8; see *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

The limitations proposed by TVEyes distinguish between different types of sharing, and limit both the number and identity of persons who may receive the clips by email. Limitations on the number of times a recipient may play the video is not necessary. In the course of fair use,

even an outside recipient may see fit to view the video more than ten times, the limit proposed in the spirit of cooperation by TVEyes. Likewise, the expiration of emailed clips 32 days after the email is unnecessary. Fair use does not expire after a certain number of days, and so long as the content is stored on TVEyes servers, its subscribers may share the clips by email, and the recipients may view them. Neither of these proposed limitations, which were suggested by Fox News and agreed to in less stringent form by TVEyes, are relevant as to whether or not the share by email feature falls within fair use. The limitations proposed by TVEyes and adopted in the Final Order and Injunction will sufficiently prevent the kind of indiscriminate and widespread sharing that would be beyond the bounds of fair use and that could “result in substantially adverse impact on the potential market. . . .” for FNC or FBN content. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

While TVEyes consented to additional limitations relating to accessing their system, those constraints do not relate to the issues of fair use or the share by email function, have not been litigated before this court, and may give rise to issues that may unduly burden the Court. They are not included in the Court’s decree.

### **3. Redactions**

I have reviewed the parties’ motion to file with redactions and I find the parties’ proposed redactions overbroad. The proposed redactions on pages 20–27 and 43–52 are acceptable. All other proposed redactions are denied. The issues posed by this case are important, and the public deserves as full a record as possible of its proceedings. *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

**Conclusion**

All issues of liability having been decided, the parties, by November 27, 2015, shall jointly submit a delineation of any issues of damages that remain.

SO ORDERED.

Dated: November 6, 2015  
New York, New York

  
ALVIN K. HELLERSTEIN  
United States District Judge