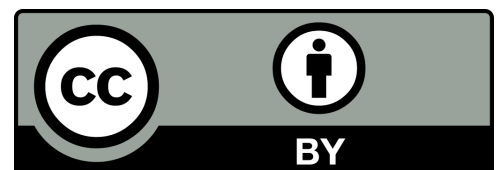


CONSULTANT'S REPORT: LEGAL ENVIRONMENT CHALLENGES AND OPPORTUNITIES FOR PRESERVATION AND ACCESS OF NEWS PROGRAMMING - DRAFT

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Introduction

A group of research institutions is undertaking efforts “to preserve and provide public access, for research, teaching and other purposes, to...news content produced by commercial and non-profit media organizations, including but not limited to CNN, NBC, WGBH, public and community television and others.”¹ These extremely valuable efforts raise a variety of legal questions, most centrally questions concerning copyright, which governs the reproduction, distribution, adaptation, public performance, and public display of works of creative expression, including news broadcasts.

This report will survey some of the ways that copyright law may affect the important cultural mission of preserving and providing access to televised news reporting. I conclude, based on the plain text of the law, its legislative history, and a series of favorable trends and developments in recent judicial decisions, that institutions have little to fear from the law as they pursue their important public service missions in this area.

Copyright is King

Several areas of law *could* be implicated by a large-scale television news preservation and access program, but copyright is the only legal concern that requires careful and particular attention.

The risk to libraries deriving from other areas of law is slight. Merely collecting, preserving, and making available materials that depict others' trademarks, for example, does not give rise to liability under the Lanham Act, as no consumer would be confused as to the (lack of) relationship between the trademarks and the collecting institution. If the situation were otherwise, libraries could not collect newspapers, magazines, or any number of materials containing third party marks.

Similarly, invasion of privacy, defamation, and misappropriation of name or likeness are all acts committed (if at all) by the underlying work - the news program - not the library. While it is not unheard of for an information service to be implicated in the reputational torts of others whose materials they ingest (Google is a popular target for people seeking to bury embarrassing material, for

example), it is a risk that libraries have recognized as the cost of doing business for as long as they have existed. Accordingly, this report will not address these areas of law any further than to say that whatever general policies an institution may have to ameliorate these risks in other collecting areas should be applied equally to news material.

Copyright, though, could have a dramatic impact on news program preservation and access. The very act of creating, much less preserving and providing access to copies of news programs implicates the copyrights of a number of well-resourced firms. Copyright holders have the exclusive right to reproduce, distribute, publicly perform, publicly display, and adapt their works, subject to a series of important limitations, exceptions, and user rights. Each program will likely contain copyrighted material belonging to multiple rightsholders (networks, affiliates, advertisers, independent producers), and that material is protected by federal law for an extraordinary term - the life of the author plus 70 years, or 95 years from creation for works made for hire. Any institution looking to build and make available a collection of this kind will need to understand their own rights to use this material under copyright law.

Licensing: An Inevitably Incomplete Solution

One way to ensure library programs do not conflict with copyright holder rights would be to seek permissions from all relevant rightsholders. While permission is certainly a desirable thing where it can be had without undue burden or expense, seeking licenses is unlikely to be a workable strategy at scale. The multiplicity of copyright holders implicated by each captured news program will mean that no permissions regime could be comprehensive. License terms, when they are available, may well be narrower than the fairly broad and flexible rights granted by the law itself. And while the Supreme Court has said that being denied permission in an isolated case does not undermine a subsequent fair use claim,² scholars have noted that the development of a “permissions culture” can make fair use harder to assert over time.³ As a strategic choice, then, libraries are likely better off relying primarily on their rights under the law, while of course taking advantage of express permissions where they are available on favorable terms.

Copyright's User Rights Provisions

While the exclusive rights granted to copyright holders are broad in scope and long in duration, they are limited and balanced by a series of provisions favoring the public, including special provisions favoring libraries, archives, and teachers, and the broad general user's right of fair use. Below I summarize the provisions with the most direct bearing on preservation of news programs.

Section 108—Reproduction and Distribution by Libraries and Archives

Section 108 empowers libraries and archives to engage in a variety of reproduction and distribution activities in furtherance of their missions. To take advantage of Section 108, an institution's collections must be open to the public or to unaffiliated researchers in the relevant field, and copying must not be done for commercial advantage. Copies made pursuant to Section 108 must include the copyright notice from the original work or, if the original notice cannot be included, a statement that the work may be protected by copyright.

The most promising parts of Section 108 for present purposes are Section 108(f)(3) and Section 108(i), which address news programs expressly, and make the fine distinctions and carveouts elsewhere in the Section (like the distinction between published and unpublished works) less important. 108(f)(3) reads

*[Nothing in this section—] shall be construed to limit the **reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program**, subject to [the Section 108 eligibility requirements];*

The clear purpose of the provision is to permit the activity described in bold, which I'll call "108(f)(3) activity." Section 108(i) also makes clear that "audiovisual work[s] dealing with news" are eligible for 108 activity.

The negative phrasing ("nothing...shall be construed to limit") of Section 108(f)(3) could be a source of confusion. Unlike the other provisions in this Section, which affirmatively permit making copies for users and for preservation purposes, 108(f)(3) itself doesn't affirmatively authorize libraries and archives to do anything. However, if the provision is read literally to overcome the various limitations elsewhere in Section 108 that might bar 108(f)(3) activity, then the affirmative grants in the Section collectively provide for an ample right to collect

and lend copies of news programs. For example, Section 108(b) and (c) include a limitation that bars making preservation copies in digital formats “available to the public in that format outside the premises of the library....” Section 108(f)(3) by its own terms nullifies these limitations where they might “limit reproduction and distribution by lending of a limited number of copies and excerpts...of an audiovisual news program....” If you apply this logic to all of the caveats, conditions, and limitations in the provisions of Section 108, the affirmative right to collect, preserve, and lend news programs emerges.

The precise contours of 108(f)(3) activity are not further elaborated in the statute. “Audiovisual news program,” for example, is not defined. The Conference Committee Report says 108(f)(3) is “intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes.”⁴ The report also says the statute means to exclude “documentary (except documentary programs involving news reporting as that term is used in section 107),⁵ magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.” The statute was written long before the age of 24-7 cable “news” programming, and the precise border between news and non-news “general interest” programming may be difficult to locate once we move from the world of “Nightly News” on one hand and “60 Minutes” on the other, to a world that also includes “The Situation Room,” “This Week Tonight with John Oliver,” and livestreamed online election night coverage from BuzzFeed. (Even the original distinction is not perfect; “60 Minutes,” a classic “magazine-format” program, has nevertheless been a source of breaking news many times in its history.)

Another important development that Section 108(f)(3) does not anticipate is the move from physical lending of media to online streaming. Streaming is a “public performance” under the Copyright Act, and Section 108 does not apply to rights other than reproduction and distribution. In the streaming era, it will be necessary to take advantage of fair use to augment the rights described in Section 108.

Section 107 - The Right of Fair Use

Section 107 of the Copyright Act codifies the equitable, judge-made doctrine of fair use, which has existed in some form for as long as there has been copyright. The fair use of a copyrighted work “is not an infringement” of copyright, notwithstanding the provisions of Section 106.⁶ Judges determine whether a use is fair on a case-by-case basis, weighing four non-exclusive statutory factors: the purpose and character of the use, the nature of the work used, the amount and substantiality of the portion used, and the effect of the use on the market for the work used. These factors are supposed to be weighed together in light of the purpose of copyright, which is to “promote the progress of Science”⁷, where “Science” means learning and culture, broadly. Trends in recent case law strongly favor fair use.

The factors on their own are notoriously unhelpful to would-be fair users, but the courts have developed a mode of applying the factors in the last 20 years that has led to relatively stable and predictable outcomes in fair use cases.⁸ Following the Supreme Court’s decision in *Campbell v. Acuff-Rose*,⁹ courts have placed heavy emphasis on the question of transformativeness, an aspect of the first factor that colors how courts see each of the others.¹⁰ A transformative use repurposes copyrighted works, showing them to a new audience or in a new context that adds value and is not a substitute for the original work in its ordinary markets. When a use is transformative, courts judge the third factor (amount/substantiality) in light of the transformative purpose, asking whether the amount is appropriate in light of that new purpose. Use of entire works has been found fair where the purpose was sufficiently transformative. Market harm is less likely to be a concern for transformative uses because they do not serve as a substitute for the original work in its ordinary markets. Some circuits treat use for the purposes listed in the preamble to Section 107 (“criticism, comment, news reporting, teaching..., scholarship, or research”) as presumptively transformative, though it’s also clear that such uses are not per se fair.

Collecting, preserving, and providing access to news programs in support of research is arguably a transformative activity insofar as it preserves and represents the programs in a new context, for new purposes, in ways that do not substitute for access to news in the ordinary market for such programs. Analogies in the case law include Bloomberg’s reproduction of an entire earnings call as news (rather than its original purpose of regulatory compliance and public

relations),¹¹ Thomson West's database of legal briefs to facilitate research (rather than their original purpose of persuading a judge in a particular case),¹² and patent attorneys' use of academic journal articles as proof of prior art (rather than their original purpose of communicating new scientific discoveries).¹³

A recent fair use case deals specifically with recording and reusing television programs, albeit in a commercial context. In *Fox v. TVEyes*,¹⁴ which is currently on appeal in the Second Circuit, the district court found that it was transformative fair use for a for-profit company to record essentially all television programming (regardless of genre) in order to support research in the mode of searching the corpus for keywords and phrases, and returning 10 minute clips as results in search queries. The finding was based primarily on prior search engine cases,¹⁵ but also on the high research value of the comprehensive database that TVEyes has created, and the favored cultural purposes of TVEyes users (criticism, comment, research). However, the district court also ruled that TVEyes had exceeded fair use by letting users search for clips by date and time, and by allowing them to email clips from search results to others.¹⁶ In both cases, the court was concerned that the features had not been sufficiently tailored to prevent abuse and ensure that all uses were for research, criticism, or comment, and not for pure entertainment/consumption. The Second Circuit is currently reviewing these decisions, and an opinion could issue at any time.

An appellate opinion in *TVEyes* (whenever we get it) may be instructive, but it is not determinative. For one thing, TVEyes' activities are commercial, which can disfavor fair use under the first factor (though less so for transformative uses). More importantly, however, the arguments for transformative use regarding news programs may be stronger due to the fleeting nature of the market for news. "Yesterday's news" is considerably less interesting to the average consumer than yesterday's (or even last week's or last year's) episode of *Game of Thrones*. Thus the difference in purpose and audience, and the lack of market substitution, will be clearer and easier to explain for a fair user focused on research uses only of news programs.

Specific practices covered by 108 and 107

Taken together, Sections 108 and 107 create a zone of protection for library use of news programs that covers a variety of activities. The following uses are either clear 108(f)(3) activities, are strongly analogous to well-established fair use precedent, or (in two instances) are permitted by the Section 110 teaching exemption.

- Capture and preservation of news programs
- Sharing of recordings between libraries
- On-premises researcher access to news programs
- Lending of 'limited numbers' of copies of entire news programs in physical formats (DVD, iPad, USB drive) for scholarship and research
- Creation of a search database and tools that permit users to do "non-consumptive research" across the database, including return of factual search results and clips analogous to "snippets" or "thumbnails"
- Permitting researchers to create and keep excerpts for purposes of criticism, commentary, teaching, and scholarship
- Use of news programs in face-to-face teaching (§110(1))
- Use of news programs in online and hybrid teaching (§110(2))

Combining Sections 108 and 107 adds another set of activities, where the spirit of Section 108 applies though its precise language does not, namely making news programs available to researchers for limited times by streaming. I believe this activity, appropriately tailored, constitutes a fair use. Section 108 shows Congress's clear intention to permit libraries to collect news programs and make them available in a limited way for research purposes. Lending was the dominant method then, but streaming serves the same purpose, and with no additional market intrusion. The purpose of 108(f)(3)'s limitation to "lending" and "limited copies" was to ensure the provision did not permit "performance, copying, or sale, whether or not for profit, by the recipient," as distinct from the library or archives.¹⁷ There is no reason a streaming service tailored for research purposes could not fulfill this same purpose, weighing in favor of fair use under the first factor. The general transformative use argument described above would also apply—streaming for research is a new purpose and not a market substitute for news programs as they are currently marketed.

Managing Risk

In addition to developing a defensible interpretation of the law, it's important to consider ways to reduce the likelihood of having to defend your interpretation in litigation, and to reduce the stakes in the unlikely event that litigation occurs.

Some general measures for mitigating risk

Any program to capture and provide access to news programs should consider measures along these lines to help mitigate risk:

- A **notice mechanism**: provide a way for copyright holders or others with concerns about your collection to provide notice to you, as a way to channel concerns into informal negotiation before they escalate into a legal dispute.
- **Technical measures** to reduce the likelihood of retention, redistribution, or unauthorized use/abuse, such as:
 - streaming media rather than downloading
 - authentication or registration for users
 - controlled digital lending using DRM
- An **access delay** - for 24-hours, 5-days, 7-days, etc. after programs first air - would help prevent any research service from serving as a potential threat to the primary market for news viewership.

Limitations on remedies

Several legal doctrines should give institutions additional comfort as they look to take advantage of their rights under the law. These doctrines lower the stakes by limiting the remedies available to copyright holders in certain circumstances.

- Section 504(c) of the Copyright Act directs courts not to award statutory damages against employees at non-profit educational institutions who have a good faith belief that their acts were fair use. Note that this protection applies only to reproduction; distribution and public performance are not shielded in this way.
- The doctrine of qualified immunity protects state employees whose acts are not clearly infringing, i.e., where a plausible argument for fair use exists.¹⁸
- State sovereign immunity under the Eleventh Amendment protects state institutions and their employees against damages awards for past conduct.¹⁹
- Under *eBay v. MercExchange*,²⁰ courts no longer award injunctions as a mat-

ter of course in all intellectual property cases, reducing the risk that a valuable project will be shut down by lawsuit.

- Attorneys' fees have been awarded to defendants in several fair use cases, including over \$3 million to Georgia in the Georgia State course reserves case (though that decision is on appeal). This could serve as a deterrent to would-be litigants.

In light of these protections, cultural heritage institutions (especially state institutions) are in a very favorable environment for exercising their rights and pursuing their mission. Not only do they reduce the potential downside risk for universities, but they increase the risk (and decrease the potential reward) for would be litigants, making legal action considerably less attractive to them.

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1. This language is from the prompt provided to me by the institutions holding this meeting. I have omitted the word "broadcast" throughout this report, as it may suggest a distinction between programs transmitted over-the-air and those transmitted over cable, satellite, or the internet, and I don't believe the broad language in the law would require such a distinction. The inclusion of CNN in the list of examples provided suggests that at the very least cable and satellite programming is a target of this project. Instead I use the neutral term "news program," which appears in the Copyright Act and its legislative history.
 2. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 fn.18 (1994).
 3. James Gibson, *Risk Aversion And Rights Accretion In Intellectual Property Law*, 116 *Yale L.J.* 882 (2007).
 4. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 77 (1976) ("House Report").
 5. The reference to Section 107 here is remarkable, as the term "news reporting" is not defined in that provision, either, nor has it been defined clearly by the courts applying Section 107.
 6. 17 U.S.C. § 107.
 7. U.S. Const. Art. I. Sec. 8 Cl. 8.
 8. Matthew Sag, *Predicting Fair Use*, 73 *Ohio St. L.J.* 47 (2012).
 9. 510 U.S. 569 (1994)
 10. Neil Netanel, "Making Sense of Fair Use," 15 *Lewis & Clark L. Rev.* 715 (2011).
 11. *Swatch Grp. Mgmt. Svces., Inc. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014).

12. *White v. West Publ'g Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014)
13. *Am. Inst. of Physics v. Schwegman Lundberg & Woessner, P.A.*, No. 12-528 (RHK/JJK), 2013 U.S. Dist. LEXIS 124578 (D. Minn. July 30, 2013).
14. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).
15. See, e.g., *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87 (2d Cir. 2014).
16. *Fox News Network v. TVEyes, Inc.*, 124 F. Supp. 3d 325 (S.D.N.Y. 2015).
17. House Report at 77.
18. *Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal.*, No. 2:10-cv-09378-CBM (MANx), 2012 U.S. Dist. LEXIS 187811 (C.D. Cal. Nov. 20, 2012).
19. *Id.* Note that these immunities are deeply unpopular with rightsholders, and public institutions have typically been anxious to avoid invoking them except as a last resort, lest Congress exercise its power to revoke immunity by statute.
20. 547 U.S. 388 (2006).

ADDENDUM: THE SECOND CIRCUIT'S OPINION IN TVEYES

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The Second Circuit recently issued an opinion finding TVEyes' for-profit service providing access to up to 10 minutes of recorded television in response to search queries was not a fair use.¹ The court's opinion is not well-reasoned,² and TVEyes and its *amici* plan to seek review by the full Second Circuit, which may reverse or rewrite the opinion. Assuming, however, that the Court's opinion stands, its impact on the non-profit activities of research institutions should be limited. Several things distinguish the activities of universities and research institutions from TVEyes.

First, libraries and archives are recognized in the law as having a special status with respect to archiving and sharing television news. Like the print-disabled in the *HathiTrust* case, whose favored status was evinced in Section 121 of the Copyright Act and in the Americans with Disabilities Act, libraries and archives can point to Section 108(f)(3) and (i) of the Copyright Act and the American Television and Radio Archives provisions at 2 USC 170 as evidence of congressional favor for their activities. This should lead a court to weigh the first fair use factor (the nature and purpose of the use) strongly in favor of non-profit libraries and archives. In *TVEyes*, by contrast, the company's commercial purpose was weighed strongly against the "slightly transformative" character of the use, leaving TVEyes with only a "slight" victory on the first factor.

Second and relatedly, the court in *TVEyes* was heavily influenced by TVEyes' commercial nature. The \$500/month charge to its subscribers is referenced twice, and subscribers to TVEyes are described as "deep-pocketed" and "willing to pay well" for access to the service. These facts weigh heavily against TVEyes in the court's analysis of market harm under the fourth factor, as the court infers a "plausibly exploitable market" from TVEyes' lucrative business serving well-heeled clients. Libraries and archives, by contrast, serve researchers who

do not pay at all for access to collections. That said, maintenance of collections and development of new services using those collections is not cost-free; as libraries and archives consider ways to cover or recover these costs, they should keep in mind the fourth factor “optics” of charging end-users and the inferences drawn by the court in *TVEyes*.

Third, TVEyes' customer base is primarily interested in recent programming—indeed, the service purges its search system of content that is more than 32 days old. This arguably places TVEyes into more direct conflict with the market prerogatives of news programmers, who derive most of the value of their content in the days and weeks immediately following broadcast. While TVEyes' users can certainly make a powerful argument that their uses are transformative and not substitutes for the market served by news programmers,³ their customers' focus on monitoring the news of the day does shade more closely to the market typically served by content owners. Libraries and archives, by stark contrast, serve researchers interested in the history of the medium, typically further removed from present-day news.

Fourth, and relatedly, libraries' and archives' users are typically better able to describe and defend a transformative purpose than TVEyes and its users. The court characterized the use as merely “watching” Fox News content that is responsive to search queries. The court rejected TVEyes' argument that enabling “research” is a transformative purpose, but it gave the argument very short shrift, citing *Texaco* for the proposition that all research cannot be treated as *per se* transformative. Of course, this does not preclude *some* research from being transformative, in the right context. Not all parody, or criticism, or news reporting is *per se* fair use, either. The key is to show how supporting research in a particular context differs from the original market purpose of the content, and is not a market substitute for it. For TVEyes as the court characterized it (primarily a way to find and watch recently-aired TV programs), the threat of substitution seemed high. For a deep archive of news content, the likely research uses will typically be more easily distinguished from “viewing recently-broadcast programming.”

Finally, creation of a deep, comprehensive archive is not a “traditional, likely to be developed” market for news programs. While many programmers make recent programs available online or through on-demand services, I am not aware of any who offer to the public a service that includes access to a comprehensive archive that goes back more than a few months. Indeed, the legal provisions mentioned above (Section 108 and 2 USC 170) are evidence that congress saw a need to empower libraries and archives to collect, preserve, and make available to researchers just such a comprehensive archive. This fact supports both a transformative use argument and a market failure argument. Non-substitution is one aspect of transformative use, and it's a part of the doctrine that goes all the way back to *Folsom v. Marsh*, which warned against “merely superseding” uses. And courts have found fair use where technologies and services serve the constitutional purpose of copyright where markets systematically fail. The facts in *TVEyes* suggest that the market will systematically fail to support deep research and critique, in particular the fact that Fox News includes a contractual requirement that users of its licensed clip service not disparage the network.

In sum, the Second Circuit's *TVEyes* opinion is susceptible to a wide range of criticisms, but even if the opinion is taken at face value, libraries and archives can effectively distinguish their activities from the activities at issue in that case.

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1. Full text of the opinion is available at <http://bit.ly/2oPfl9M>. Only the provision of access to 10 minute segments of programming was challenged in court. The search function and the creation of the underlying database was not at issue.
 2. Among its many flaws, the court misapplies the “transformative use” concept, which is central to the first factor determination and extremely influential on the remaining factors. Retroactively construing *Sony v. Universal* as a transformative use, the court emphasizes the convenience of TVEyes' service and completely overlooks the new purposes it serves. The court confuses the second factor inquiry about factual versus fictional material with the bar on copyrightability of facts under Section 102(b), resulting in a cursory and erroneous treatment of that factor. It weighs the third factor without regard to the user's (arguably transformative) purpose, leading to the hasty conclusion that essentially any amount of content be-

yond a “snippet” cannot be fair in this context. This is inconsistent with a raft of 2nd Circuit opinions, from *Bill Graham Archives* to *Swatch* to *HathiTrust*. Finally, the court's treatment of the fourth factor, market effect, is almost a parody of the circularity problem that plagues this factor. If the court is right that any use that “is clearly of value” to the user must therefore be licensed, then all fair uses are doomed. For these reasons, the court's opinion should be treated as an outlier. Nevertheless, if the holding stands, it will be important for libraries and archives to have a response to its analysis.

3. Indeed, their argument would be exactly the same one endorsed by the Second Circuit in the *Swatch* case—Fox's message is “Here is the news,” while TVEyes' message is, “Here's what Fox News said was the news.” TVEyes' users typically appreciate the difference.