



The echo of American Fair Use and of its boundaries, in the EU and Italian System. A comparative analysis in the wake of the Fox News victory over TVEyes

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📌 MEDIA AND ENTERTAINMENT, INTELLECTUAL PROPERTY

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After a long copyright lawsuit started in 2013, on January 18, 2019, Fox News informed the New York Federal judges that it had reached a settlement agreement with TVEyes pursuant to which TVEyes is no longer permitted to transmit copyrighted material from Fox News.

The settlement was reached almost one year after the decision of the Second Circuit (*Fox News Network, LLC v. TVEyes, Inc.*, No. 15-3885, 2d Cir. 2018) stating that the TVEyes' news monitoring functions other than archiving of video clips do not constitute fair use of Fox's

broadcast and thus infringe copyright of this latter.

TVEyes is a media monitoring service that allows its users to find and share clips of broadcast programs and that, in exchange of fee from business and professional users, records programming from over 1.400 television and radio stations and compiles the recorded programs into text-searchable databases. The subscribers could not only search the database by keyword or date and time, but also watch, archive, download, and email the ten-minute-long clips contained in the search results. In 2013, Fox sued TVEyes for copyright infringement; while the District Court



seemed to be in favor of TVEyes defense (holding that most of TVEyes functions were protected by fair use) the US Court of Appeal for the 2nd circuit reversed the decision and stated that TVEyes' services did not constitute fair use because, even if the use was somewhat transformative, the result on Fox's potential revenues was significant. The only exception was made for TVEyes text-searchable database of broadcast closed captions. The decision of the Court of Appeal was appealed by TVEyes to the Supreme Court; that Court denied TVEyes' petition, saving the appellate court's decision, leading to the decision of the parties to settle.

This lawsuit presents the opportunity to explore the boundaries of fair use and to outline how certain exceptions and limitations to the author's exclusive rights are provided and applied under the EU and Italian systems, making a comparison with the fair use doctrine as developed in the US.

Fair use is a concept born and developed in the common law systems; in particular, pursuant to US law, the fair use doctrine permits limited use of copyrighted material without needing to acquire authorization from the legitimate rightsholder. Broadly speaking, "fair use" can be defined as copying of copyrighted material for a limited and "transformative" purpose, hence causing minimal harm to the rights holder's legitimate markets. Fair use is often utilized as a defense against a claim of copyright infringement. When analyzing fair use claims, Article 17 U.S.C. § 107 (2012) requires Courts to consider at least the following four factors: (1) the "purpose and character of the use"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used"; and (4) the effect on the "potential market for or value of the copyrighted work." But what is "transformative" use and how was this very concept utilized in other recent US case law to rule out copyright infringement? Transformative use is also known as the "Fifth Factor". A work is "transformative" if it uses another work in completely new or unexpected ways. Sometimes, Courts have found copies made as part of the

production of new technologies to be transformative uses.

In this respect, reference should be made to another famous case (*Authors Guild v. Google, Inc., No. 13-4829, 2d Cir. 2015*) where fair use was found when Google Books enabled users to search databases of books to view short passages or "snippets" containing the user's desired keywords. In that case, different from the Fox TVEyes case, the Second Circuit panel stated that Google Books presented a unique set of facts that "test[ed] the boundaries of fair use". In fact, in the *Fox News vs. TVEyes* case of 2018, the Court of Appeal of the Second Circuit concluded that TVEyes "exceeded those bounds".

The underlying tension between the need to protect authors' exclusivity and the public interest in the diffusion of creative works arises more and more often in the digital environment, where the scope of fair use needs to be structurally realigned and adapted to accommodate socially valuable uses provided by new technologies. The web, which has become the main venue for access to audiovisual contents facilitates the transmission, reproduction and modification of videos, images, audio files, etc. Thus, it can be difficult for right-holders to seek protection and remuneration for the on-line exploitation of their works.

Derogations to author's exclusive rights are also present within the EU copyright law, but within an apparently less flexible regulatory framework.

In fact, EU law (consistent with civil law systems, including Italy) lays down an exhaustive list of "free utilizations", endowed with exceptional character. In particular, Article 5, paragraphs 2 and 3, of Directive 2001/29/EC of 22 May 2001 *on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive)* provides a catalogue of optional exceptions that each EU member State could transpose into its own national system.

However, each exception must be applied in compliance with the strict “three-step test” specified under Article 5(5) of the *InfoSoc* Directive: i.e. exceptions and limitations can only occur i) in certain special cases, ii) which do not conflict with a normal exploitation of the work or other subject-matter, and iii) do not unreasonably prejudice the legitimate interests of the right-holder. Article 5(3)(d) allows quotations for purposes such as criticism or review, provided that a) they relate to a work or other subject-matter which has already been lawfully made available to the public; b) the source, including the author's name, is indicated, unless this turns out to be impossible; c) their use is in accordance with fair practice, and d) to the extent required by the specific purpose.

The Italian legislators implemented the quotation exception through a statutory provision. Article 70 of the Italian Copyright Act sets out the principle whereby, at certain conditions, the partial quotation, summary or reproduction of a work, and its communication to the public, are free. In particular, these uses are allowed:

- when performed for purposes of criticism and discussion, within the limits of such purposes and provided they do not compete with the commercial exploitation of the work;
- when performed for purposes of teaching or scientific research, the use must only have illustrative and non-commercial purposes.

This principle also applies when the use in question (quotation, summary, etc.) occurs on the Internet. In addition, the same Article (at para. 1-bis) allows a specific digital use, namely the on-line, free-of-charge, publication of low-resolution or degraded images and music, but only for teaching or scientific use and for a non-profit purpose.

Turning to the enforcement of exceptions to copyright law, the EU and Italian courts can decide to adopt a more or less flexible approach, within the margins of their discretionary power, which is exercised especially in adapting the normative paradigm to new technologies.

Actually, in the EU and Italian context, there is no lack of decisions whereby, like in the American case *Fox News vs. TVEyes*, the interest of the right-holder was protected in relation to retransmission of audiovisual content, on web platforms.

As an example, the *ITV Broadcasting et al. vs. TVCatchup* case of the European Court of Justice (CJEU, 07.03.2013, C-607/11) is worth mentioning. Several commercial television broadcasters, including ITV Broadcasting Ltd., had filed a lawsuit against TVCatchup Ltd. (TVC) in the United Kingdom, alleging breach of copyright in their broadcasts and films, due to the service of on-line diffusion of TV programs offered by TVC. Such service, in particular, permitted its users to receive, via web, live streams of free-to-air television broadcasts, and ensured that users could obtain access only to content which they were already entitled to watch by virtue of their television licence, by authenticating the user's location and refusing access where the conditions imposed on users were not satisfied.

In its preliminary ruling, the CJEU gave an extensive interpretation of the “*communication to the public*” right included among by the author's exclusive rights under Article 3(1) of the *InfoSoc* Directive. According to the Court, this concept encompasses retransmission of works included in a terrestrial television broadcast, where the retransmission is made by an organization other than the original broadcaster, by means of an internet stream made available to subscribers (even though subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on TV).

This decision does not deal with free-use exceptions, but it is consistent with the approach of granting a high level of copyright protection in the Internet environment. In other decisions, specifically regarding the enforcement of the quotation exception set out in Article 5(3)(d) of the *InfoSoc* Directive, the CJEU clarified that the conditions provided must be interpreted strictly,



because that exception is a derogation from the general principle established by the Directive (namely the requirement of consent from the copyright holder for any reproduction of a work); on the other hand, also according to the CJEU, the interpretation of those conditions must permit the effectiveness of the exception itself to be safeguarded and its purpose to be observed (see, among others, *Eva-Maria Painer vs. Standard VerlagsGmbH et al.* case, CJEU, 01.12.2011, C-145/10).

Looking at Italian case law on enforcement of the quotation exception to on-line uses, the few cases reported confirm a quite rigid interpretation of the corresponding provision (Article 70 Italian Copyright Law).

A very interesting case dealt with the on-line diffusion of footage from the famous TV reality-show program "*Il Grande Fratello*" ("*The Big Brother*"), performed through the video-sharing platforms YouTube and Google Video (*RTI Reti Televisive Italiane SpA vs. YouTube LLC, Google UK Inc., Google UK Ltd.* case: Court of Rome, 16.12.2009, confirmed by Court of Rome, 11.02.2010). TV broadcaster RTI, owner of the exclusive rights to use and economically exploit the program in Italy, obtained an order of immediate removal of the web content concerned. According to the Court, the quotation exception under Art. 70 could not be successfully invoked, because the on-line diffusion at stake had a merely commercial purpose, resulting from the considerable commercial advertising present in the web pages of YouTube and Google video.

In another case (*RTI Reti Televisive Italiane SpA vs. Italia On Line Srl* case: Court of Milan, Specialized Section, 07.06.2011, no. 7680), RTI filed a suit against the owner of the Internet portal "*ItaliaOnLine*", complaining about the presence on this platform of video fragments of several TV programs owned by the plaintiff. In particular, by typing the title of the program, it was possible to search for snippets published by users; through key-word advertising, such

snippets were associated with sponsored links.

The Court acknowledged that, in the abstract, the exercise of the quotation right (or another free-use right) could exclude a platform owner's responsibility towards the rightholder. Yet, the exception could not operate in this specific case, because the defendant had not been able to prove the fulfilment of the conditions set out by the law for the exercise of the free-use (quotation) right: Italia On Line had limited itself to alleging its right in general terms, without producing any specific video, viewing which the required conditions would have allowed assessing.

Finally, an interesting Italian case on the retransmission of copyrighted audiovisual content (although not on the Internet) was brought before the Milan Court of Appeal some years ago (Milan Court of Appeal, Specialized Section, 24.11.2010, No. 3225, *RTI Reti Televisive Italiane SpA vs. Telepiù Srl et al.* case). Considerable snippets of the TV program "*La notte degli Oscar*" ("*The Oscar Night*"), covered by copyright, were retransmitted within another TV program ("*Fuego*"), belonging to a different TV broadcaster (RTI). The Court pointed out that *Fuego* could not qualify as a TV program with informative nature: in fact, it was not limited to giving and commenting on news, because, by virtue of specific production choices, it also provided an artistic show, competing with *The Oscar Night* itself. The extended duration of the clips broadcasted, as well as the mode of transmission, were further elements considered by the Court, who excluded the application of the quotation exception provided under Article 70 of Italian Copyright Act.

In light of the case law discussed above, it seems that the difference in the normative approach does not itself preclude the convergence of the American and EU/Italian systems towards the same outcomes, particularly when dealing with similar issues about copyright protection in the digital environment.

After all, in 2007 the Italian Government, in answering a parliamentary question on the possibility of regulating fair use in Italy, specified that Article 70 of Italian Copyright Law itself must already be interpreted in the sense of admitting fair use in our national system. This clarification sounds indicative of a certain alignment between the Italian and American approach.

In addition, with reference to the scenario in Europe, a push towards copyright protection on line comes from the EU Commission's *Proposal for a Directive on copyright in the Digital Single Market*, issued on September 14, 2016 very recently finalized.

The Directive "*provides for rules to adapt certain exceptions and limitations to digital and cross-border environments*" (Recital 3), and Article 13 thereof focuses on the use of protected content by

Internet providers giving access to audiovisual works, like video-on-demand platforms and user-uploaded-content platforms (YouTube, Facebook, etc.). The final amendments to the original text of that Article, especially aim at making sure that rightsholders are properly remunerated.

In conclusion "fair use" remains a fascinating topic that, nowadays, clearly affects innovation and creativity. In both US and EU this doctrine has been described as "the most troublesome in the whole law of copyright" and we should all be aware, in particular when dealing with innovation (inside or outside inside the tech space), that it is becoming more and more difficult to rely on the assumption that the use of copyrighted works will in the end be considered "fair".



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