

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FOX NEWS NETWORK, LLC,

Plaintiff,

v.

TVEYES INC.,

Defendant.

Case No. 13-CV-5315 (AKH)

**BRIEF OF MEDIA CRITICS AS *AMICI CURIAE* IN SUPPORT OF
DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

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STATEMENTS OF INTEREST OF *AMICI*¹

Amici are media critics with decades of experience analyzing the news media and publishing commentary addressing issues of pivotal importance to democracy and society including law, money and politics, war and propaganda, freedom of speech, targeted killing, racial bias, police brutality, and economic inequality, among many others. Throughout their decades of work, *amici* have consistently relied on fair use. They have an interest in this case because of its potential impact on their ability to monitor and conduct research on the news media in a rapidly changing media landscape. *Amici* have personal and professional stakes in ensuring that the tools necessary to conduct meaningful analysis and commentary of the modern news media remain protected by fair use.

Eric Alterman is a Distinguished Professor of English and Journalism, Brooklyn College, City University of New York (“CUNY”), and a Professor of Journalism at the CUNY Graduate School of Journalism. He is also “The Liberal Media” columnist for *The Nation*, a senior fellow at the Center for American Progress in Washington, D.C., and at the Nation Institute and the World Policy Institute in New York. Alterman is a former columnist for *The Daily Beast*, *The Forward*, *Moment*, *Rolling Stone*, and *Mother Jones*. He is the author of ten books, including the national bestseller *What Liberal Media? The Truth About Bias and the News*. He won the George Orwell Award for Distinguished Contribution to Honesty and Clarity in Public Language for his first book, *Sound & Fury: The Making of the Punditocracy* (1992), and he won the Mirror Award for Best Commentary in Digital Media, given by Syracuse University’s Newhouse School, in 2011.

¹ *Amici* wish to thank former N.Y.U. Technology Law & Policy Clinic students—and now N.Y.U. School of Law graduates—Rafael Reyneri and Philip Cernera for their invaluable contributions to this brief.

Brave New Films is a media company established by filmmaker Robert Greenwald that produces progressive feature-length documentaries and investigative videos to educate, influence, and empower viewers to take action around prominent public-policy issues. Using cutting-edge Internet-video campaigns, Brave New Films informs the public, challenges mainstream narratives found in corporate media, and motivates people to take action on social issues nationwide. The organization recently launched Brave New Educators, which provides free films and educational resources to teachers and uses documentaries, blogs, and social media to start a dialogue with students and professors across college and high-school campuses.

Fairness and Accuracy in Reporting (“FAIR”) is a national media-watch group that has been producing well-documented criticism of media bias and censorship since 1986. FAIR works to invigorate the First Amendment by advocating for greater diversity in the press and by scrutinizing media practices that marginalize public-interest, minority, and dissenting viewpoints. FAIR works to expose neglected news stories and to defend working journalists when they are muzzled. FAIR works with both activists and journalists, and it maintains a regular dialogue with reporters at news outlets across the country, providing constructive critiques and applauding exceptional, hard-hitting journalism. FAIR publishes *Extra!*, a monthly newsletter featuring analysis of current media bias, censorship, and effects of media consolidation, and it produces the weekly radio program CounterSpin, which broadcasts nationally on more than 130 radio stations.

Victor Navasky has served as editor, publisher, and now publisher emeritus of *The Nation*, which he joined in 1978. He is also the George Delacorte Professor of Magazine Journalism at the Columbia University’s Graduate School of Journalism, where he directs the Delacorte Center of Magazines and chairs the *Columbia Journalism Review*. Before joining *The*

Nation, he served as an editor at *The New York Times Magazine* and wrote a monthly column about the publishing business for the *Times Book Review*. He has written several books and has been awarded the National Book Award, the George Polk Book Award, and the Ann M. Sperber Prize. Mr. Navasky is a member of the American Academy of Arts and Sciences.

INTRODUCTION

It is axiomatic that a free press, by providing a public check on government institutions and actors, is a fundamental pillar of a well-functioning democracy. *See, e.g.*, Letter from James Madison to W.T. Barry (Aug. 4, 1822), in *9 Writings of James Madison* 103 (G. Hunt ed. 1910) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”). But a truly free press must also check itself, holding itself accountable for its biases and mistakes through robust media commentary and scholarship. *See, e.g.*, W. Lance Bennett, Regina G. Lawrence & Steven Livingston, *When the Press Fails: Political Power and the News Media from Iraq to Katrina* at x (2007) (“A free and independent press is generally considered essential for democracy, both to raise timely questions about debatable government policies and to report challenges to those policies when they fail. . . . Perhaps most important, an independent press may spare people from learning too late that they have been deceived or misled, not just by their leaders, but by the press itself . . .”). *Amici* are leading media critics with decades of experience in the field that are experimenting with new forms of commentary in a rapidly evolving news-media landscape. However, the continued existence of the art form practiced by *amici* and others—and their contributions to American democracy—depends on the judicial recognition that, despite these changes, their work and their tools are found at the core of the fair use exception to copyright law.

Media research and analysis are canonical examples of fair use activities that are in the public interest, and they further the purposes of copyright by producing new original works of immense social value. However, the vast increases in news-media content over the past decade—across an ever-expanding lineup of broadcast and cable television outlets, in addition to the Internet—have made it increasingly difficult for media critics to comprehensively monitor and

analyze the news. In today’s world, media critics require access to advanced and sophisticated technological tools—like the searchable databases of video clips at issue in this case—that can only be created through the mass digitization of television news programs. Intermediate copies of content created by mass digitization are transformative, and therefore protected by fair use, because they have a fundamentally different purpose than the original works—to enable users like *amici* to effectively and timely research and analyze the news media. Any other conclusion seriously imperils the work of media critics at the dawn of an era in which media criticism has never been more important.

Because of their interest in ensuring that the research tools necessary to their work remain protected by fair use, *amici* support Defendant’s supplemental motion for summary judgment.

ARGUMENT

I. AS MEDIA CRITICS, *AMICI* PERFORM AN ESSENTIAL FUNCTION IN DEMOCRATIC SOCIETY.

A. Media critics have a long history of playing a vital role in supporting American democracy.

Media critics play a vital public role by serving as a check on the outlets from which Americans receive news information. See Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 *Cardozo Arts & Ent. L.J.* 697, 701 (1995) (“[M]edia [criticism] affords the public a view of media decision making and operations in a critical context.”). They do this in a number of ways—for example, by exposing factual errors in reporting, revealing patterns of bias, and analyzing the relative media attention being dedicated to different issues. See Tom Goldstein, *Killing the Messenger: 100 Years of Media Criticism* at x (2007) (“[C]ritics offer[] different perspectives on many of the issues that bedevil the press today—how the concentration of media ownership affects access to the public, how the media inadequately police and explain themselves, . . . how bias in reportage may be unavoidable, and

how the press sensationalizes [but also] censors itself . . .”). Original works of media criticism combine research and analysis and take many forms, ranging from newspaper columns and blog posts to documentaries and books.

B. *Amici* are leading media critics who have made substantial contributions to public discourse through their commentary and analysis.

Amici are some of the leading media critics in this country. Their work runs the gamut from traditional print commentary to innovative “quick-strike” videos aimed at mobilizing citizen awareness around an issue. *Amici*’s work continues to impact contemporary policy debates, and it makes plain the essential role that media criticism plays in American democracy.

For example, *amicus* Eric Alterman’s *What Liberal Media?* debunked the commonly heard claim that the media has a liberal bias. Through the “meticulous” use of documented sources and evidence, *Books Briefly Noted: What Liberal Media? by Eric Alterman, New Yorker*, Mar. 3, 2003, <http://nyr.kr/1FedkTn>, Alterman demonstrated that the idea was baseless—conservatives were well represented in print and were, in fact, overrepresented on television. Alterman argued that the “liberal bias” trope continued to survive as a “useful myth” for the political right because its unsubstantiated claims were hard to systematically disprove. Eric Alterman, *What Liberal Media?*, *Nation*, Feb. 24, 2003, <http://www.thenation.com/print/article/what-liberal-media> (online article excerpting the book).

Meanwhile, *amicus* Brave New Films uses documentary filmmaking and an innovative digital-distribution model to produce media commentary that inspires civic participation. For example, Brave New Films produced a full-length documentary that uncovered Fox News’ endemic bias in its programming. *See Outfoxed: Rupert Murdoch's War on Journalism* (Brave New Films 2004), <http://www.bravenewfilms.org/outfoxed>; *see also* A.O. Scott, *Spin Zones, Flag Waving and Shouting to Catch a Fox*, *N.Y. Times*, July 20, 2004, <http://nyti.ms/1FegfLT>

(Fox's "methods are analyzed by an array of media critics and activists, and also exposed by former employees of Fox News Channel and its parent, the News Corporation, some of them speaking anonymously, with their voices disguised. The story they tell is of the systematic and deliberate dismantling of journalistic norms, and of an outfit that has become not merely a voice of conservatism but a cheerleader for the Republican Party."). Its films have catalyzed popular debates about pressing public-policy issues. *See, e.g.*, Michael Barbaro, *A New Weapon for Wal-Mart: A War Room*, N.Y. Times, Nov. 1, 2005, <http://nyti.ms/1Fegzua> (detailing Wal-Mart's public responses to Brave New Films' *Wal-Mart: The High Cost of Low Price* (2005)). More recently, Brave New Films has successfully used Internet platforms like YouTube to produce and freely distribute short videos related to the day's most pressing issues. *See, e.g.*, Brian Stelter, *Released on Web, a Film Stays Fresh*, N.Y. Times, Mar. 22, 2009, <http://nyti.ms/1FefgeM> ("By producing his film-and-activism campaign at an accelerated pace on the Internet, Mr. Greenwald is capitalizing on new technology that allows filmmakers to produce their work more swiftly. . . . Timeliness is of the essence in releasing a documentary about public policy.").

Amicus FAIR has been a leading media-watchdog organization for nearly three decades. In addition to regularly publishing more traditional media commentary in print and on its website, FAIR has conducted quantitative analyses of the guests and commentators that news programs invite to their shows, helping to reveal prevalent media biases. Using this methodology, FAIR discovered that during an eight-month period in 2011 and 2012, Sunday-morning political talk shows suffered from a consistent bias in favor of conservative guests over liberal ones. *See* Peter Hart, *Right and Early*, FAIR Extra!, Apr. 1, 2012, <http://fair.org/extra-online-articles/right-and-early>. As discussed in Part II.B., *infra*, FAIR is limited in its ability to conduct such quantitative analyses because it lacks access to a comprehensive database of

television news programming.

Finally, *amicus* Victor Navasky is a distinguished, long-time media critic, scholar, and publisher. He was first the editor and later the publisher of *The Nation* from 1978 to 2005. He now serves as the Chairman of the *Columbia Journalism Review*, which analyses media industry trends and professional ethics. *See, e.g.*, David Uberti, *Factchecking's Impact*, *Colum. J. Rev.*, Apr. 24, 2015, http://www.cjr.org/analysis/political_factchecking_has_grown_up.php (evaluating impact of political fact-checking on journalism and politics); Sheila Coronel, Steve Coll & Derek Kravitz, *Rolling Stone's Investigation: 'A Failure that Was Avoidable'*, *Colum. J. Rev.*, Apr. 5, 2015, http://www.cjr.org/investigation/rolling_stone_investigation.php; Elizabeth Spayd, *The Rules of Plagiarism*, *Colum. J. Rev.*, Mar. 2, 2015, http://www.cjr.org/opinion/the_rules_of_plagiarism.php. The *Columbia Journalism Review* has won numerous awards, including the 2010 Bart Richards Award for outstanding contributions to print and broadcast journalism through responsible analysis or critical evaluation, *see* Editors, *You're Reading a Winner*, *Colum. J. Rev.*, Mar. 26, 2010, and a Mirror Award for best commentary in digital media in 2014, *see* Jina Moore, *Documenting Domestic Violence*, *Colum. J. Rev.*, Mar. 1, 2013, http://www.cjr.org/reality_check/documenting_domestic_violence.php.

In short, *amici's* work exemplifies the wide range of potential media commentary and scholarship, and the impact such works can have on public debates and policies.

II. MASS DIGITIZATION OF TELEVISION CONTENT ENABLES MEDIA CRITICS TO ENGAGE IN INNOVATIVE ANALYSIS AND COMMENTARY THAT OTHERWISE WOULD NOT BE FEASIBLE.

A. The evolving news-media landscape has made it infeasible for any human media critic to monitor and analyze all television news programming without the mass digitization of content.

Every day, a virtual flood of news content streams across countless front pages and home pages, broadcast-television and social-media feeds, and more. The amount of content being

produced in the media environment has exploded in recent years. In the relatively recent past, the “national news” available via television largely consisted of thirty-minute news programs on the three major broadcast networks. That era is now a relic. In the last two decades, the introduction and increasing popularity of twenty-four-hour cable-news networks have revolutionized the landscape. In the coming years, the amount of content being produced by news organizations will only grow, particularly with the rise of social media and Internet-streaming video clips. *See, e.g.,* Monica Anderson & Andrea Caumont, *How Social Media is Reshaping News*, Pew Res. Ctr., Sept. 24, 2014, <http://pewrsr.ch/1J3favd> (explaining that more than half of adult Americans get news from social-media sites like Facebook, YouTube, and Twitter). In order to effectively and credibly analyze and critique the contemporary media landscape, critics must be able to harness modern technology to conduct research across all publicly available content.

In the past, it was feasible—though extraordinarily time-consuming and resource-intensive—for small media-watchdog organizations like *amicus* FAIR to physically record, log, and watch each of the three daily national-news broadcasts in order to synthesize information and provide public analysis. However, today, it is not just inconvenient, but impossible, for such organizations to monitor the news media in the same way. As the universe of content has expanded, so must the ability of watchdogs to track what is being said, in what ways, how often, and by whom. Today, absent the mass digitization of television content, there is no feasible way for media critics to capture and present a comprehensive view of all of the content being broadcast to the news-consuming public.

Therefore, in order to perform their crucial societal role effectively, media critics need to be able to survey the video landscape just as they have traditionally done vis-à-vis print media. While various services that offer a comprehensive view of print-media outlets, including services

like Nexis and Google News, have long existed, the same is not yet true of television content. Video is now rising in importance as a way of communicating information, both through traditional broadcasts on television and cable as well as via the Internet. While some television networks make certain transcripts available for certain shows, many of these transcripts are partial and often inaccurate, and the networks do not uniformly release transcripts for all shows. From the media critic's perspective, the networks' unilateral control over access is a fundamental problem that inhibits the creation of valuable new works of media criticism. A news network is not likely to release transcripts of footage that will be most open to criticism, and this practice inhibits media critics from engaging in public debate precisely when their voices are most necessary. For example, *amicus* FAIR has expressed an interest in engaging in a research project related to Fox News' "Fox & Friends" morning show, because much of the commentary surrounding the program's repeated controversies have been anecdotal critiques rather than empirical analyses. *See, e.g.*, Jeremy W. Peters, *Enemies and Allies for 'Friends'*, N.Y. Times, June 20, 2012, <http://nyti.ms/1dvEHBP>. However, because Fox does not provide transcripts of the show, FAIR has been unable to engage in the project until it obtains the tools required to conduct such an analysis.

B. In order to produce effective commentary, media critics need digital research tools that enable them to comprehensively and timely analyze the news media.

A comprehensive database of video that does not rely on permission from content creators is necessary for media critics to effectively—which is to say, convincingly and credibly—perform their roles. Media critics need to not only capture all of the relevant content being produced on a daily basis, they must also have the means to analyze large quantities of data in a timely manner in order to contribute to the public discourse. Moreover, digitization will only be effective if it allows for date-and-time searching, significant retention periods, and

sharing within organizations—functions that enable media critics to save and draw on a repository of historical and current information about the media that can be shared among colleagues and relied upon to produce new original works of criticism.

A database that contains searchable text, organized by date-and-time stamps, drawn from video programming allows for the creation of major retrospective projects. For example, *amicus* Brave New Films’ recent short film, *Wrong About Iraq, Wrong About Iran* (Brave New Films 2015), <http://www.bravenewfilms.org/iran>, compares public statements leading up to the invasion of Iraq in 2003 with clips of statements currently being made about Iran. The film pairs video clips of war proponents in 2003 with statements they are making in 2015 about Iran, noting how strikingly similar the arguments for a war with Iran are to those made about Iraq a decade before, pushing the media to question these speakers on their views. The power of this narrative comes in large part from the similarities between the clips—and such a project would not only be infeasible, but inconceivable, without a massive text-based searchable database of digitized video content from which to draw.

Even where transcripts of news broadcasts are publicly available, they are inadequate as a research tool that can effectively facilitate media criticism today. Apart from the likelihood of inaccurate closed-captioning, a significant amount of information is left out of a pure-text transcript. This includes the subtleties in meaning not transmitted through the words themselves—an observation this Court has previously made in this very case. *See Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014) (explaining that “the actual images and sounds depicted on television are as important as the news information itself” because they can “powerfully modify[] the content”). It also includes data such as the images displayed alongside a story, the text of the news ticker being displayed, and information about

the identity of the speaker. The importance of this non-textual information means that media critics analyzing video content require a comprehensive database not just of transcripts, but also video clips, in order to conduct their work.

The modern news-media environment also necessitates that the research tools used by commentators be timely, which requires that they be updated automatically. One result of the ballooning media landscape is that the modern news cycle moves with unprecedented speed. *See Stelter, supra* (“Timeliness is of the essence in releasing a documentary about public policy.”). If, for example, transcripts are only released days after the fact, the newsworthiness of a critique of that news segment is significantly diminished. *Amici* have responded to this trend. For example, *amicus* Brave New Films regularly produces short films that can be released quickly online, rather than relying only on feature-length documentaries. *See* Brave New Films, More Short Films, http://www.bravenewfilms.org/more_short_films. *Amicus* Eric Alterman recently released a timely, book-length survey of New York City Mayor de Blasio’s first term in office in eBook format in order to speed its time to market for publication during the term—and not months or years after the term ended—in order to ensure its impact on still-developing public policy. *See* Eric Alterman, *Inequality and One City: Bill de Blasio and the New York Experiment, Year One* (2015). And *Amicus* FAIR has, in recent years, supplemented its monthly *Extra!* newsletter with a regularly updated blog. *See* FAIR, FAIR Blog, <http://fair.org/blog-entries>. A service that records and makes available transcripts and video clips in near real-time—which effectively requires mass digitization—is therefore key to producing relevant criticism today.

Finally, media criticism will only be credible to the public if is based on a comprehensive dataset. Moreover, only a database that contains actual video clips that can be retained for long periods of time and shared among colleagues is sufficient for enabling media commentary and

analysis—especially the creation of major retrospective projects like *Wrong About Iraq*, *Wrong About Iran*—in the modern age. A research project done using a non-comprehensive database will always be both less credible and more limited than the alternative. Absent a complete database, it would be impossible to say with authority that a story has not been covered at all unless one can search across all outlets over all times. For example, part of the mission of *amicus FAIR* is to promote “greater diversity in the press . . . by scrutinizing media practices that marginalize public interest, minority and dissenting viewpoints” and “expos[ing] neglected news stories.” FAIR, What’s FAIR?, <http://fair.org/about-fair>. FAIR can do this across print media websites using tools such as Google’s site-specific search, *see, e.g.*, Adam Johnson, *Colombian Report on US Military’s Child Rapes Not Newsworthy to US News Outlets*, FAIR Blog, Mar. 26, 2015, <http://fair.org/blog/2015/03/26/colombian-report-on-us-militarys-child-rapes-not-newsworthy-to-us-news-outlets>, but it does not have currently have the capacity to do this for video, limiting its ability to fulfill its mission.

C. Mass digitization of news media will enable the next generation of media commentary by creating searchable databases of video.

In addition to their importance in the present environment, comprehensive, searchable media databases will enable new forms of media criticism. As the mass digitization of large-scale media collections begins to take place, advances in computational power and a proliferation of new pattern-recognition and visualization tools offer media critics the chance to do what biologists, physicists, and economists have been doing for decades—analyze massive amounts of data. The potential uses of large data sets is beginning to become visible in the context of the emerging “digital humanities” field—for example, where researchers use a variety of text-mining tools to facilitate searches across millions of books. These tools enable studies that were previously impossible. *See, e.g., Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 287–

88 (S.D.N.Y. 2013) (“*Google Books*”) (“Google Books permits humanities scholars to analyze massive amounts of data—the literary record created by a collection of tens of millions of books. Researchers can examine word frequencies, syntactic patterns, and thematic markers to consider how literary style has changed over time. . . . The ability to determine how often different words or phrases appear in books at different times can provide insights about fields as diverse as lexicography, the evolution of grammar, collective memory, the adoption of technology, the pursuit of fame, censorship, and historical epidemiology.” (quotation marks and citations omitted)).

These new critical forms are powerful, not least because they tell stories that were previously impossible to tell. For example, in a related context, one digital-humanities study analyzed millions of texts and documents to determine the frequency with which the United States has been referred to as a single entity (“is”) as opposed to a collection of individual states (“are”). Using “data mining” or “text mining,” scholars have shown that it was “only in the latter half of the Nineteenth Century that the conception of the United States as a single, indivisible entity was reflected in the way a majority of writers referred to the nation,” a “trend with obvious political and historical significance, of interest to a wide range of scholars and even to the public at large.” Br. of Digital Humanities and Law Scholars as *Amici Curiae* in Supp. of Defs.—Appellees 8, *Authors Guild v. Google, Inc.*, No. 13-4829 (2d Cir. July 10, 2014), ECF No. 149. Media critics would like to engage in similar studies, which could demonstrate subtle biases in how the news media conceptualizes and presents the issues they cover. For example, with respect to “breaking news,” media critics might be interested in comparing the broadcasts of various networks in order to document which network broke news first, and how long it took for other networks to acknowledge the new reporting. If an issue is first mentioned on a morning show of

one network, how does it spread to other outlets? Or, what is the lifespan of a given type of story? What is the lifecycle of references to a particular weather event? Studies like these will only be possible if critics have access to a data source that is comprehensive, timely, allows for effective date-and-time searching, is provided by an independent source, and includes actual video clips. Moreover, if interest in a certain issue arises only after a long period of time has passed since initial reports, media critics must have access to a repository of preserved historical content as well.

In short, meaningful media criticism in today’s environment depends on the availability of searchable databases that comprehensively archive the news media. In addition to enabling the kind of media criticism that has always been fundamental to the protection of democratic values, these tools will enable new and important kinds of analysis which will help to uncover patterns of bias and reveal how news stories develop.

III. MEDIA CRITICISM IS A PARADIGMATIC EXAMPLE OF FAIR USE AND ALSO ADVANCES THE PURPOSES OF COPYRIGHT BY PRODUCING NEW COPYRIGHTED WORKS.

Media commentary and research are perhaps the quintessential examples of fair use. *See* 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting . . . scholarship, or research, is not an infringement of copyright.”); *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (“[N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.”). Moreover, media criticism depends on the fair use of the underlying works, through direct references, in order to be effective. Recognizing this, courts have consistently applied the fair use doctrine to protect media criticism as a form of First Amendment–protected speech. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994) (“[W]hen a lethal parody, like a scathing theater review, kills demand for the

original, it does not produce a harm cognizable under the Copyright Act. . . . [T]he role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.”); *see also, e.g., Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (describing fair use as a First Amendment safeguard within copyright law); *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2003) (same). Thus, media critics who use searchable databases of television content to produce commentary are operating in the very core of fair use.

Media critics also advance the central purpose of copyright by themselves producing new copyrighted works “for purposes of teaching, research, criticism, and news reporting,” *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2002). For example, *amicus* Brave New Films produces high-quality documentaries that have been viewed by millions of viewers. Brave New Films Annual Report 2014, at 2, <http://bit.ly/1SErjLq>. Moreover, these works appear in a variety of forms. For example, *amicus* FAIR produces a weekly radio show, CounterSpin. FAIR, CounterSpin, <http://fair.org/about-counterspin>. These various works, which are paradigmatic examples of creative efforts protected by fair use, further public discourse and thereby advance the goals of copyright. *See Campbell*, 510 U.S. at 579 (“The goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).²

² Whether new works of media criticism are protected by fair use is not simply a hypothetical question. When Brave New Films published *Outfoxed*, Fox News responded by publicly accusing Brave New Films of copyright infringement. *See* Press Release, Fox News Channel, Fox News Channel Statement on ‘Outfoxed’ (Jul. 13, 2004), <https://web.archive.org/web/20060927182708/http://www.foxnews.com/story/0,2933,125436,00.html>. Fair use allowed Brave New Films to stand up to this accusation, and in the end, Fox decided not to sue—presumably, because Fox knew that it would face a strong fair use defense in any litigation. *See* Robert Greenwald, *Outfoxing the Fox—Looking Back 10 Years Later*, Huffington Post, July 10, 2014, <http://huff.to/1cYlZLK> (discussing producers’ reliance on fair use).

IV. INTERMEDIATE COPYING, INCLUDING MASS DIGITIZATION, FOR THE PURPOSE OF CREATING A SEARCHABLE DATABASE THAT ENABLES MEDIA COMMENTARY IS FAIR USE.

A. Mass digitization of television news content is transformative in purpose because it provides media critics with research tools needed to create new meaning and new commentary from copyrighted news media.

The mass digitization necessary to create a searchable database of audiovisual news content is transformative because rather than simply “repackage or republish” the copyrighted works, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014), it creates a research tool that “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message” *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)). The mass digitization of audiovisual works in order to create a searchable database is transformative for the same reasons that the mass digitization of copyrighted print works in order to create a searchable database is transformative. *See HathiTrust*, 755 F.3d at 97 (holding that “the creation of a full-text searchable database is a quintessentially transformative use” in the context of digitizing print books); *Google Books*, 954 F. Supp. 2d at 291. Mass digitization of television programs entails intermediate copying of original works in order to provide *amici* and others with a research tool that enables them to use those works for a fundamentally different purpose than the copyright holder’s—to contextualize the underlying news sources and imbue them with new meaning by comparing, reframing, engaging, and analyzing them. Whereas news organizations create content in order to inform the public about the news—or about the opinions of their commentators—media critics use that same content to analyze and comment on how this news is being presented.

Tools like searchable databases of television news media enable researchers to analyze this content in ways that had been impossible previously, thereby facilitating the next generation of media commentary. Courts have repeatedly held that the intermediate copying—including

mass digitization—necessary to construct tools that enable fair uses are transformative and themselves protected by fair use. *See A.V. v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (mass digitization of students’ papers for the purpose of conducting digital comparisons across millions of documents in order to identify patterns of plagiarism was transformative); *Perfect 10, Inc. v. Amazon.com Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (intermediate copying of photo images by search engine for the purpose of location information was transformative); *Kelly*, 336 F.3d at 819 (same); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 606–07 (9th Cir. 2000) (intermediate copying in order to access unprotected elements of software by reverse engineering for the purpose of allowing competitors to enter market was fair use); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) (same).

The mass digitization necessary to create searchable databases like TVEyes is similarly transformative. Whereas in *Sony* and *Sega*, intermediate copying was necessary so that competitors could access the unprotected elements of software, here mass digitization creates intermediate copies so that users like *amici* can access the unprotected elements of news media in order to analyze and comment on them. Similar to the plagiarism-detection technology in *iParadigms*, searchable databases digitize original works so that end users can conduct massive comparative analyses. In *iParadigms*, these analyses used pattern recognition to catch plagiarism; media critics use the pattern recognition enabled by these tools to uncover biases in the news media. Finally, the search engines in *Perfect 10* and *Kelly* were deemed transformative because their purpose was information location; they permitted users to find images that otherwise would be infeasible to discover. By archiving and indexing the news media, mass digitization allows *amici* to find the metaphorical needle in the haystack within a corpus—television news media—that would otherwise be infeasible to search through.

A finding of transformativeness is particularly appropriate with respect to tools that enable media commentary and research because “there is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in § 107,” for example “criticism, comment, scholarship, or research.” *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 477 (2d Cir. 2004) (citations omitted). Mass digitization requires making intermediate copies in order to provide media critics with the research tools necessary to produce their “criticism, comment, scholarship, or research.” Just as media commentary is clearly fair use, so are the research tools that enable that commentary also fair use.

Moreover, because searchable databases of television news content create new meaning through the contextualization of and commentary on the original works via media criticism, it is entirely irrelevant that mass digitization does not alter the television content they copy and archive. *See iParadigms*, 562 F.3d at 639 (“The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”); *see also HathiTrust*, 755 F.3d at 97 (reviewing fair use holdings in cases in which original content was “unaltered”). In fact, searchable databases are only useful to media critics if they are comprehensive and present the original work unaltered. As discussed in Part II.B, *supra*, critics would be unable to accurately comment on how the news is being presented without such a database, as credible research requires reliable source material.

The argument of *amici* media companies that only the “indexing” function, rather than the “download[ing], sav[ing], shar[ing], and email[ing]” functions, of news-media database services is “necessary” for achieving the database’s purposes, *see Br. of Amici Curiae Bright House Networks et al.* at 7–8, ECF No. 118-1 (“Media Cos. *Amici* Br.”), ignores both the law on

transformativeness and the realities facing media critics.

First, with respect to mass digitization, fair use is not limited to “indexing” functions, *Media Cos. Amici Br. 8*, but covers *any* functions that further the end purposes of the transformative secondary use. To be sure, where courts have found indexing functions to further end purposes, they have found fair use. *See, e.g. Google Books*, 954 F. Supp. at 291–92; *see also, e.g., Perfect 10*, 508 F.3d at 1166; *Kelly*, 336 F.3d at 818. But those cases are not limited to indexing; indeed, their logic compels the conclusion that other functions that involve intermediate copying, *so long as they further the end purposes of the transformative secondary use*, are also protected by fair use. *See, e.g., Google Books*, 954 F. Supp. at 291 (“Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research. Words in books are being used in a way they have not been used before. Google Books has created something new in the use of book text—the frequency of words and trends in their usage provide substantive information.”); *see also, e.g., Perfect 10*, 508 F.3d at 1165 (“[E]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work. . . . Here, Google uses Perfect 10’s images in a new context to serve a different purpose.”); *Kelly*, 336 F.3d at 819 (holding that use of thumbnails was “more than merely a retransmission of . . . images in a different medium” because the thumbnails “serve[] a different function than” the original use).

Second, functions like downloading, saving, sharing, and emailing further the end purposes of media criticism. As discussed above, the rapidly changing media environment requires that media critics have access to comprehensive, accurate, historical databases of underlying news content. *See supra* Part II. Without such access, media critics will be unable to

assure themselves and the public that their research and conclusions are based on a full set of information on which critics ground their conclusions. Moreover, as the enterprise of media criticism becomes more and more complex, it likewise becomes more and more dependent on large-scale collaborations of institutional critics—like *amici* FAIR and Brave New Films—that depend on the use of advanced features like downloading, sharing, and emailing. For example, if *amicus* Eric Alterman wants to review ten hours of Fox News footage for a presentation at a media conference while on a flight from New York to Tokyo, he would need to download clips in order to study them during the flight to further the transformative purpose of developing and presenting media criticism. Or if the staff at *amicus* Brave New Films wants to collaborate remotely to analyze multiple instances of television news content, they would need to email clips back and forth in order to further the transformative purpose of . Or if *amicus* Victor Navasky wants to play news clips for his classes at Columbia University, he would need to download, email, or share those clips with his students to further the transformative purposes of criticism and education. Because any intermediate copying in examples like these is done in order to further the end purposes of transformative secondary uses, that copying is protected by fair use.

B. The factual nature of news reporting weighs in favor of fair use.

It is critical to democracy that the news remain free for public discourse. News reports are largely factual, and therefore (under the second fair use factor) the copyright in these works is thin, which weighs further in favor of fair use. *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg LP*, 756 F.3d 73, 89 (2d Cir. 2014). This is especially true of the elements of the copyrighted works used by news-media critics, who often comment not on the underlying content being transmitted, but on the fact that it is being transmitted (e.g., a study that demonstrates excessive attention to certain news stories, while ignoring others). *Cf. Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 907 (2d Cir. 2011) (finding in a related

context that “a Firm’s ability to make news . . . does not give rise to a right for it to control who breaks that news and how”). To allow those that report the news to control discourse around the news would frustrate the goals of copyright. *Cf. Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (“[T]he news element . . . is not the creation of the writer It is not to be supposed that the framers of the Constitution . . . intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.”); *Theflyonthewall.com*, 650 F.3d 876, 902–03 (2d Cir. 2011).

Furthermore, the second factor weighs in favor of fair use when humans “cannot gain access to the unprotected ideas and functional concepts contained in [a copyrighted work] without . . . making copies.” *Sega*, 977 F.2d at 1525. As discussed above, *supra* Part II, this is true for *amici*, who cannot conduct certain analyses without a comprehensive, searchable database created through mass digitization.

C. Mass digitization of news media must be comprehensive in order to fulfill its transformative purpose of enabling new forms of research and analysis.

As discussed in Part II, *supra*, mass digitization of television content enables new forms of media commentary. However, the accuracy of *amici*’s reports and analysis depends on their data sources being comprehensive. For example, a media critic seeking to argue that an important news story has been systematically ignored by certain outlets cannot prove what *hasn’t* been said unless she has access to the entirety of what *has* been said. Searchable databases can only fulfill their transformative purpose—enabling new forms of media research and analysis—if they are comprehensive. Thus, the amount and substance that these databases copy are not only “reasonable in relation to the purpose of the copying,” *Campbell*, 510 U.S. at 586—they are necessary to that purpose. As a result, the fact that mass digitization requires making intermediate copies of news programs in their entirety does not preclude a finding of fair use

because copying the whole work is reasonable in light of the transformative purpose. *See, e.g., HathiTrust*, 755 F.3d at 98 (“Because it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.”); *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (“The secondary use must be permitted to conjure up *at least* enough of the original to fulfill its transformative purpose.” (quoting *Campbell*, 510 U.S. at 588)); *iParadigms*, 562 F.3d at 642 (finding that the “use of the entirety of plaintiffs’ works did not preclude a finding of fair use”); *Perfect 10*, 508 F.3d at 1169 (explaining that intermediate copying that is “necessary to assist the user” is protected by fair use).

D. The mass digitization of television programs for the purpose of creating a searchable database does not create a cognizable market harm and the public derives a substantial benefit from it.

The intermediate copies made by mass digitization of television news programs are not substitutes for these copyrighted works and do not create a cognizable market harm under the fourth fair use factor. *See HathiTrust*, 755 F.3d at 99. As discussed in Part IV.A, *supra*, the transformative purpose of searchable databases is not to inform their users of the news but to provide a research tool that enables fair uses, like media commentary. In other words, readers of *amicus* Eric Alterman’s writings, *amicus* Victor Navasky’s *Columbia Journalism Review*, or *amicus* FAIR’s website and reports, and viewers of *amici* Brave New Films’ documentaries, do not consult the secondary works in order to learn the underlying facts the original works were trying to convey. Rather, these readers and viewers consult the secondary works of *amici* for their contributions of new meanings and interpretations of the original works. The transformative nature of the secondary use at issue—intermediate copying by a searchable database—means it is not a “substitute[] for the original” regardless of whether “the fair use, being transformative, might well harm, or even destroy, the market for the original,” *Castle Rock Entm’t, Inc. v. Carol*

Publ'g Grp., Inc., 150 F.3d 132, 145 (2d Cir. 1998); see *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (holding that when a secondary use of copyrighted works “is transformatively different from their original expressive purpose,” the copyright holder “does not suffer market harm due to the loss of license fees”).

In fact, media commentary—like parody—is the paradigmatic example of why the law differentiates between cognizable usurpation and mere diminution in market value. See, e.g., *Campbell*, 510 U.S. at 592 (“This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism.”); *Bill Graham Archives*, 448 F.3d at 614–15; *Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (holding that even “[i]f the harm [that] resulted from a transformative secondary use . . . lowered the public’s estimation of the original (such as a devastating review of a book that quotes liberally from the original to show how silly and poorly written it is), this transformative use will be found to be a fair use, notwithstanding the harm.”). As discussed in Part II.A, *supra*, ensuring that market harms caused by legitimate commentary does not preclude fair use is a very real concern for *amici* because news outlets do not make all their content available for research and commentary. See *Campbell*, 510 U.S. at 592 (“[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”). Just as courts distinguish between “biting criticism that merely suppresses demand and copyright infringement, which usurps it,” *id.* (quotation marks omitted), it is important to distinguish between tools that enable legitimate media commentary and technologies that are actual market substitutes.

Furthermore, although market harms derived from “biting criticism” are not cognizable, it is not at all clear that media commentary depresses the value of all copyrighted works. Indeed,

quite to the contrary, media critics likely increase the value of at least some copyrighted works—for example, the news media that are praised for their accuracy or objectivity.

Finally, the public benefit derived from the mass digitization of television news programming is substantial. *See Perfect 10*, 508 F.3d at 1168 (finding that a search engine putting thumbnail images “to a use fundamentally different than the use intended by” the copyright owner “provided a significant benefit to the public”). As discussed in Part II, *supra*, these databases provide media critics with the research tools necessary to perform news forms of commentary that would otherwise be effectively impossible. Independent and robust news media is essential to a functioning democracy. The news media requires, in turn, effective media analysis to ensure they too are held accountable for their mistakes and biases. But effective media commentary in today’s modern media landscape requires access to a comprehensive, up-to-date searchable database. Mass digitization is the only feasible way to archive and index television news programs works in order to construct a searchable database out of them. By providing media critics with the tools they require, mass digitization provides an invaluable benefit to the public. *See Campbell*, 510 U.S. at 579 (“Like less ostensibly humorous forms of criticism, [parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant Defendant's supplemental motion for summary judgment.

Dated: May 28, 2015

Respectfully submitted,

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