

15-3885, 15-3886

United States Court of Appeals for the Second Circuit

FOX NEWS NETWORK, LLC,

Plaintiff-Appellee-Cross-Appellant,

v.

TVEYES, INC.,

Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF MEDIA CRITICS AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE

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STATEMENTS OF INTEREST OF AMICI

Amici Eric Alterman, Brave New Films (“BNF”), and Fairness and Accuracy in Reporting (“FAIR”) are media critics with decades of experience who analyze the news media and publish commentary addressing pressing issues of national concern.¹ Amici have addressed developments in the law, money and politics, war and propaganda, freedom of speech, targeted killing, racial bias, police brutality, and economic inequality, among many other topics. To fulfill this vital First Amendment function, 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.²

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¹ Amici certify that counsel for both appellant and respondent granted blanket consent to the filing of amicus briefs in their February 25, 2016 letter [Docket 52]. Amici also certify that no party’s counsel authored this brief in whole or in part, and that no person, including any party or party’s counsel, contributed money that was intended to fund preparing or submitting this brief.

² Amici wish to thank Stanford Law School Juelsgaard Intellectual Property and Innovation Clinic certified law students William Christopher Koch IV, Stephen Liu, and Brian Quinn for their valuable contributions to this brief.

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.

BNF 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 on prominent public-policy issues. Using cutting-edge Internet-video campaigns, Brave New Films informs the public and challenges mainstream narratives found in corporate media. BNF recently launched Brave New Educators, a program that will provide free films and educational resources to teachers. Brave New Educators uses documentaries, blogs, and social media to start a dialogue with students and professors across college and high-school campuses.

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. It aims to provide media outlets with constructive criticism, and applauds exceptional, hard-hitting journalism. FAIR also publishes *Extra!*, a monthly newsletter featuring analysis of current media bias, censorship, and the effects of media consolidation, and it produces the weekly radio program *CounterSpin*, which broadcasts nationally on more than 130 radio stations.

SUMMARY OF ARGUMENT

Media criticism and analysis is a core First Amendment function, and a paradigmatic example of fair use of copyrighted work. Given the upsurge in news-media content over the past decade—across an ever-expanding lineup of broadcast and cable television outlets, in addition to the Internet—media criticism has never been more important, or more difficult. To comprehensively monitor and analyze this vast and diffuse media environment, 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 mass digitization of television news programs.

The core business functions of TVEyes, which provide subscribers with a comprehensive, searchable database of local and national television news, constitute a transformative fair use of content broadcast by Fox News Network, LLC (“Fox”). TVEyes’ archiving and date-time search functions are both key components that are transformative and contribute to the transformative character of the TVEyes database.

TVEyes’ sharing and downloading features similarly constitute fair use, whether or not they are integral components of the database’s other transformative functions. The downloading and sharing functions are vital for and inextricably intertwined with subscribers’ fair use of the TVEyes database, and they enable media critics to use clips of Fox’s content to describe, comment on, and demonstrate using the actual content how news is being communicated to viewers. These important media-criticism functions require that media critics have unconditioned access to original, unaltered television broadcasts and the ability to use them for criticism without interference by Fox or other content creators.

Furthermore, TVEyes’ use of recorded news coverage does not have a substantial adverse effect on *any* cognizable market for Fox’s works, including the

markets for cable broadcasts, online clips, and licensed content. Put simply, TVEyes' core product is not a practical substitute for any of these products.

Because Fox periodically modifies the clips that it makes available for licensing or viewing on its website, and because it requires prospective licensees to covenant not to criticize Fox News, the TVEyes downloading and sharing features are essential to full, accurate criticism and reporting. A conclusion that obtaining the clips from Fox is an adequate substitute for TVEyes would permit Fox and other broadcasters to effectively silence or blunt many of their critics, and would undermine media critics' efforts to hold Fox and other outlets accountable for bias, accuracy and mistakes. This Court should decline Fox's offer to guard the media criticism henhouse.

ARGUMENT

I. IT IS MORE IMPORTANT THAN EVER THAT A COMPREHENSIVE, SEARCHABLE DATABASE OF NEWS CONTENT BE AVAILABLE TO MEDIA CRITICS.

News reporting has undergone a radical shift since the early days of journalism in America, in ways that necessitate external checks on the power of media to shape our country's discourse. News is now a manufactured and highly processed commercial product. It is often filled with biased and polarizing commentary that can (and is intended to) influence viewers' opinions. This fragmentation of the media may lead to editorial abuse and agenda-driven

reporting, and necessitates frequent and effective critical analysis. However, the volume of news material produced in the United States has expanded to the point at which it is virtually impossible for *any* critic, let alone ordinary citizens, to gauge the reliability of reporting without appropriate tools that facilitate comprehensive analysis.

A. News today is highly processed and polarized, leaving viewers especially vulnerable to reporting biases and misinformation.

A major trend in the past century of news reporting is the prioritization of making things newsworthy and generating viewership over delivering facts and informing the public. Indeed, a distinctly modern phenomenon in news media is the social expectation that there will be a large, constant flow of news to be consumed. This constant churn and demand for content encourages some journalists to prioritize manufacturing news stories over finding them, which requires much greater investment of time and resources. For example, a 2013 study indicated that roughly half of the content on CNN and Fox News, and far above half of the content on MSNBC, were either commentary or opinion rather than factual reporting. Mark Jurkowitz et al., *The Changing TV News Landscape*, Pew Res. Ctr. (last visited Mar. 8, 2016), <http://www.stateofthedia.org/2013/special-reports-landing-page/the-changing-tv-news-landscape/>.

Such reporting can affect the nation's discourse by influencing what people accept as fact. Sharp divisions among news networks on ideological lines often

exist at the expense of fairness, accuracy, and credibility. *See, e.g., Press Accuracy Rating Hits Two Decade Low*, Pew Res. Ctr. (Sept. 13, 2009), <http://www.people-press.org/2009/09/13/press-accuracy-rating-hits-two-decade-low/> (reporting low perception of accuracy in the press, with 60% of survey respondents expressing the belief that news organizations are politically biased); *Further Decline in Credibility Ratings for Most News Organizations*, Pew Res. Ctr. (Aug. 16, 2012), <http://www.people-press.org/2012/08/16/further-decline-in-credibility-ratings-for-most-news-organizations/> (noting wide partisan gaps in news credibility ratings). Political stances frequently appear to undergird misquotation and misinformation on major cable networks as well. *See, e.g., Nareissa L. Smith, Consumer Protection in the Marketplace of Ideas*, 40 T. Marshall L. Rev. 223, 238 (2015) (documenting numerous instances of misquoting for political effect by Fox, CNN, and MSNBC between 2007 and 2011).

These biases and deceptions can have measureable results. *See, e.g., Stefano DellaVigna & Ethan Kaplan, The Fox News Effect: Media Bias and Voting*, 122 Q. J. Econ., no. 3, 2007, at 1187 (reporting that the entry of Fox News to the news market in 1996 led to gains in vote share for Republicans in towns that broadcast Fox News). And in the current media landscape, viewers can fall into the trap of being “picky about their news. They easily can filter out news on topics that are not of interest. . . . Conservative Republicans can depend on Bill O’Reilly for news

and liberal Democrats can depend on Keith Olbermann.” Natalie J. Stroud, *Niche News: The Politics of News Choice* 8 (2011). One survey shows 47% of “consistent conservatives” go to Fox News as their “main source for government and political news,” compared to “consistent liberals,” whose main sources are spread among CNN, NPR, MSNBC, and others. *Political Polarization & Media Habits*, Pew Res. Ctr. (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.

Where the flow of information is so processed and easily controllable, and the potential (frequently actualized) for abuse so high, it is critical for media critics to be able to do their work to inform the public and help maintain a more open, democratic marketplace of ideas.

B. The commentary and analysis produced by amici demonstrate the vital contributions media critics provide to public discourse.

Amici are some of the leading media critics in this country. Ranging from traditional print and online commentary to innovative documentary films, their work impacts and sheds light on contemporary policy debates. The following examples demonstrate the crucial role that media criticism can and must play in our democracy:

Through meticulous use of documented sources and evidence, amicus Eric Alterman’s 2003 book *What Liberal Media?* debunks conservatives’ common claim that the media has a liberal bias. The book demonstrates that conservatives

are well represented in print and actually overrepresented on television. Without this level of dedicated critical analysis, it would be difficult to systematically disprove the political right's claims that rely on and perpetuate the "useful myth" of liberal bias. Eric Alterman, *What Liberal Media?*, Nation, Feb. 6, 2003, <http://www.thenation.com/article/what-liberal-media/> (adapted from the book).

In 2004, amicus BNF produced *Outfoxed: Rupert Murdoch's War on Journalism* (Brave New Films 2004), <http://www.bravenewfilms.org/outfoxed>, a documentary that revealed Fox News' endemic bias in its programming. The film describes a "systematic and deliberate dismantling of journalistic norms, and . . . an outfit that has become not merely a voice of conservatism but a cheerleader for the Republican Party." A.O. Scott, *Tallyho! Spin, Flag Waving and Shouting to Catch a Fox*, N.Y. Times, July 20, 2004, available at <http://www.nytimes.com/2004/07/20/movies/film-review-tallyho-spin-flag-waving-and-shouting-to-catch-a-fox.html>. Filmmakers like BNF serve a critical role in helping the wider public become aware of ways in which the media systematically manipulates information.

Amicus FAIR has conducted quantitative analyses of commentators and guests 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>. Because it is easy for ordinary viewers not to notice the political leanings of particular guests, or to see the bigger picture, studies like FAIR's fill an important gap in public knowledge.

In short, amici's work and that of other critics shows the wide range of potential media commentary and scholarship, and the crucial role media critics play in keeping the social and political power of the media in check. This work also shows the impact media critics can have on fostering informed public debate and policy. *See, e.g.*, Michael Barbaro, *A New Weapon for Wal-Mart: A War Room*, N.Y. Times, Nov. 1, 2005, <http://www.nytimes.com/2005/11/01/business/a-new-weapon-for-walmart-a-war-room.html> (detailing Wal-Mart's public responses to BNF's 2005 documentary *Wal-Mart: The High Cost of Low Price*).

C. The sheer volume of televised news renders wide-reaching studies and criticism of news media prohibitively costly or time-consuming, absent an easily-searchable comprehensive database.

The amount of content being produced in the media environment has exploded in recent years. The most significant change, starting with the founding of CNN in 1980, was the rise of 24-hour cable news, which is now fundamental to information transfer in America. The speed with which news is produced is itself cause for concern. *See* Howard Rosenberg & Charles S. Feldman, *No Time to Think: The Menace of Media Speed and the 24-Hour News Cycle* (2008)

(discussing the dangers of news that is produced too quickly, leading to incomplete, speculative, or opinionated reporting). But it is not just 24-hour cable news that has proliferated. The average amount of news per local television channel increased by over 40% between 2003 and 2013. Katerina E. Matsa, *Local TV: Average Number of News Hours Per Weekday*, Pew Res. Ctr. (Apr. 29, 2015), <http://www.journalism.org/2015/04/29/local-tv-news-fact-sheet/>. In the future, the amount of total news content will only grow, particularly with the steady 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://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/> (explaining that more than half of adult Americans get news from social media sites like Facebook, YouTube, and Twitter).

The massive amount of content in today's media landscape poses a challenge for criticism in general, and for comprehensive analyses of the media in particular. To be truly effective and credible, critics and scholars often must be able to conduct research across large sets of, or all, publicly available content. In the past, it was feasible—though already time-consuming and resource-intensive—for small media-watchdog organizations like FAIR to physically record, log, and watch daily news broadcasts on ABC, CBS, and NBC to synthesize information

and provide public analysis.³ Today, absent the mass digitization of television content, there is no feasible way for media critics to capture and present a comprehensive view of the content being broadcast to the news-consuming public.

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, accurately, credibly, and convincingly—perform their roles. For example, FAIR has expressed an interest in a research project related to Fox News’ “Fox & Friends” program, focusing on complete and empirical analysis rather than anecdotal critique. However, because Fox does not provide transcripts of the show, FAIR has been unable to engage in the project. As another example, BNF’s 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 made in 2015 about Iran, noting how strikingly similar the arguments for war with Iran are

³ For a view of the labor-intensive nature of comprehensive media analysis, see *News Coverage Index Methodology*, Pew Res. Ctr., http://www.journalism.org/news_index_methodology/ (last visited Mar. 11, 2016). The Pew Research Center’s news coverage index requires the recording and analysis of up to 2.5 hours per day of network news programming and 3.5 hours per day of cable news programming, with the aid of a service called Snapstream that digitally records each broadcast on an in-house server. *Id.* But even services like Snapstream would be insufficient for broader studies that analyze many more news stations than just the major national networks, or retrospective studies that include analysis of past content.

to those made about Iraq a decade before, and pushing the media to question these speakers on their views. *See id.* The power of this narrative comes in large part from the juxtapositions of actual clips of the speakers. Reporting such as this will not only be infeasible, but inconceivable, without a massive searchable database of digitized video content.

Moreover, media criticism will only be credible to the public if is based on a comprehensive dataset. A research project based on a non-comprehensive database will always be both less credible and less reliable than the alternative. Absent a complete database, it would be impossible to say with authority how, or how widely, a story has been covered, or perhaps not covered at all, unless one can search across all relevant outlets over relevant times. For example, part of the mission of 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 without a complete and searchable

video database, FAIR's ability to fulfill its mission for video-based media is severely limited.

In short, meaningful media criticism today depends on the availability of a comprehensive database of relevant news video clips coupled with sophisticated search, archiving and other tools to allow the use of those clips in criticism.

Moreover, these technological tools will enable new and important kinds of analysis which will help uncover patterns of influence and bias and reveal how news stories develop.

II. TVEYES' FUNCTIONS ARE ESSENTIAL FOR MEDIA CRITICISM AND ARE INTRINSICALLY FAIR USES OF NEWS CONTENT.

A. TVEyes transforms news content into data points within a highly valuable, comprehensive, and searchable database that organizes and displays the content in ways not otherwise available.

Transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citation omitted). A work is transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message . . ." *Id.* TVEyes' database meets this definition and is profoundly transformative: it is a

comprehensive searchable tool that derives its value from the aggregation, and not the mere inclusion, of various news content from across the country.

The transformative nature of mass-digitization and aggregation in a searchable database has been repeatedly recognized by this Court. *Authors Guild v. HathiTrust* held that “the creation of a full-text searchable database is a quintessentially transformative use.” 755 F.3d 87, 97 (2d Cir. 2014). HathiTrust’s Digital Library was a digitized aggregation of copyrighted books that allowed the “general public to search for particular terms across all digital copies in the repository.” *Id.* at 91. The Court found that the “result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn,” and that the library does not merely repackage or republish the underlying works. *Id.* at 97. Further, HathiTrust’s use “adds a great deal more to the copyrighted works at issue than did the transformative uses” in previous cases, including *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609–11 (2d Cir. 2006) (involving unaltered and copyrighted concert photos included in a biography) and *Blanch v. Koons*, 467 F.3d 244, 252–53 (2d Cir. 2006) (involving the insertion of copyrighted photographs into a collage painting), *HathiTrust*, 755 F.3d at 97. The Court pointed out that in many cases, both in the Second Circuit and beyond, fair use existed even if there was no

“substantive alteration to” the underlying copyrighted works. *Id.* at 97–98 (quoting *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 639–40).

Authors Guild v. Google, Inc. (“*Google Books*”), reaffirmed the *HathiTrust* ruling, holding the “making of a digital copy [of copyrighted books] to provide a search function is a transformative use” because it “augments public knowledge by making available information *about* Plaintiffs’ books.” 804 F.3d 202, 207 (2d Cir. 2015). But *Google Books* went further, holding that Google’s “snippet view” feature was also transformative and fair. *Id.* at 207, 218. When a user searches Google Books for a search term, the snippet tool displays content from the books that contain the search term, showing the text surrounding that term. *Id.* at 209–10. “Snippet view . . . adds importantly to the highly transformative purpose of identifying books of interest to the searcher” because it is designed to “help [the searcher] evaluate whether the book falls within the scope of her interest.” *Id.* at 218.

Thus, this Court’s recent and clear decisions establish that not only is creating and making available to the public a searchable database comprised of copyrighted content transformative, but that it is also transformative to display elements of that content as part of the user’s search results. Displaying video clips alongside broadcast transcripts does not permit TVEyes subscribers to watch entire

programs free of charge, just as displaying snippets of text around a user's search does not permit Google Books users to read entire texts without charge.

Fox's attempt to characterize TVEyes as a service that permits users to watch copyrighted content for free is erroneous. It ignores *Google Books* and the overwhelmingly transformative nature of how that content is used in the context of the database. Each video is transformed from a standalone audiovisual work to an entry in a large set of data points. As with Google Books, these points collectively "augment[] public knowledge" by revealing new information and patterns which cannot be gleaned from viewing each work individually. *Id.* at 207. Consider a media critic who wants to show that an important news story has been systematically ignored by media outlets. Only a comprehensive database like TVEyes can provide information about what *hasn't* been said, precisely because users can search through everything that *has* been said. In this and similar ways, TVEyes transforms news content.

B. TVEyes' archiving and date-time search functions are critical components of TVEyes' comprehensive and innovative service and are highly transformative.

In addition to its transformative database and keyword search, the TVEyes database allows users to archive videos for viewing at a later time and to search by date and time rather than by keyword. These features are not merely "complementary," as the District Court put it. *Fox News Network, LLC, v. TVEyes,*

Inc. (“TVEyes II”), 2015 WL 5025274, at *5 (S.D.N.Y. Aug. 25, 2015). Rather, they are critical for the sort of fair uses that media critics and other users of the TVEyes service make. Each feature is just as transformative as the keyword search that *HathiTrust* and *Google Books* found to be fair use.

1. Archiving is transformative and fair use.

The archiving function enables researchers to “detect . . . patterns and trends” in news coverage over time, and facilitates otherwise impossible “longer-term, longitudinal studies of the media’s treatment of particular subjects.” *TVEyes II*, 2015 WL 5025274, at *6. Archiving “allows users to revisit clips they have already found at later dates,” which is especially important because content is searchable and viewable on TVEyes for 32 days. *Id.* After this period, “[o]nly the user who archives a particular clip is able to access it.” *Id.* As the District Court recognized, “without the ability to revisit content older than 32 days, longer-term, longitudinal studies of the media’s treatment of particular subjects would be impossible. Such subjects as the media’s changing treatment of a particular story over time, and disparities between two networks’ treatment of a given topic, are themselves newsworthy.” *Id.*

For example, consider a work of criticism like BNF’s *Wrong About Iraq, Wrong About Iran*, introduced in Section I.C, *supra*, comparing news footage and commentary from 2003 about Iraq with news footage from 2015 about Iran.

Producing such a work would be impossible if critics could not refer back to earlier news content. In addition, the film would lack thoroughness without access to an archived database like TVEyes that is comprehensive in both time and news stations offered.

Thus, archiving is transformative for two reasons. First, it is critical for thorough analysis. Without it, the database would always be limited to a month's worth of content, severely limiting its scope and comprehensive nature and therefore its usefulness to media critics and others interested in analysis over a period of more than 32 days. Insofar as the database's comprehensive character makes it transformative, see *supra* Section I.A, archiving is itself transformative because it facilitates comprehensiveness across time. Second, archiving allows users to form their own private databases that are transformative in exactly the same way that the TVEyes database as a whole is transformative. Archiving news about Iraq in 2003 can be equivalent to curating a set of videos that reflect a perceived pattern in the news, and may help to prove a particular critical point about the media. Archiving thus transforms individual videos into data points on a narrower scale, just as the overall database does on a larger one.

2. The date-time search function is also transformative and is particularly important to subscribers who use TVEyes to comparatively research and analyze media coverage.

The date-time search feature makes TVEyes' product transformative in a parallel, but no less legitimate, manner. This search feature allows users to enter "the desired channel and the desired start and end date/time (up to a 10-minute window)," upon which "TVEyes produces the corresponding transcript and video clip." *TVEyes II*, 2015 WL 5025274, at *9. This feature is transformative for several reasons.

First, in many cases, date-time search is as important and transformative as keyword search, because users often will need to examine all coverage for a particular moment or period but will not have a comprehensive list of keywords of interest. For example, date-time search would enable amici to examine news coverage in the minutes and hours after the recent terror attacks in Brussels, Belgium. Amici would use a common time sample to compare media coverage on a variety of outlets. Keyword search, however, would require amici to query the database with preconceived terms, rather than examining all of the coverage to identify trends and draw conclusions. Without the tools to identify and review coverage from that moment or period and then analyze its content, amici and other users would not be able to analyze and compare coverage of, or responses to, similar events or specific periods of time.

The date-time search feature transforms news content into a second kind of data. While a keyword-searchable database converts videos into data points based on specific words in the transcript, a date-time search converts them into data points based on where and when the videos aired, regardless of their verbal content. This categorization paradigm reveals a new set of useful information. For example, suppose that *amicus* FAIR wishes to update its 2012 study *Right and Early*, *see supra* Section I.B, by compiling statistics from 2013 to 2016 on the representation of conservative versus liberal guests on morning talk shows. To be credible, FAIR would need a robust (or perhaps complete) sample drawn from a comprehensive library. Because FAIR would view each sample without knowing *a priori* who the guests were or what political positions they argued, a keyword search would be unhelpful. But the date-time search allows these kinds of samples to be collected.

Second, even where transcripts of news broadcasts are publicly available, they are inadequate as a research tool because, apart from inaccuracies in closed-captioning, a large amount of relevant information is left out of pure-text transcript. As the District Court explained, “the actual images and sounds depicted on television are as important as the news information itself” because they can “powerfully modify[] the content.” *Fox News Network, LLC v. TVEyes, Inc.* (“TVEyes I”), 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014). Studies of these non-

textual elements of news media are not possible with a keyword-based search. For the TVEyes database to be fully comprehensive, these elements must be viewable, and the date-time search feature makes it possible to locate the relevant news clips that contain those elements. In other words, the date-time search transforms non-textual content into data points in the same way that the keyword search transforms text.

Thus, the District Court erred when it characterized date-time search as merely a “content delivery tool.” *TVEyes II*, 2015 WL 5025274, at *9. Date-time search has many legitimate search uses that are highly transformative in the same ways as are uses of keyword search. These tools are highly valuable to media critics and others making fair use of the searchable content. Archiving and date-time search are critical for the TVEyes database to maximize its utility and comprehensiveness. Each draws useful information from the underlying news content in independent, transformative ways, and are therefore integral to the full value of TVEyes as a transformative tool for media analysis.

C. TVEyes’ downloading and sharing functions are essential for and inextricably intertwined with subscribers’ fair use of Fox’s programming.

Notwithstanding Fox’s blanket argument that “TVEyes cannot rely on claimed uses made by its customers to suggest that its own copying is fair use,” Fox Br. at 11 n.4, Second Circuit precedent recognizes that functions can qualify

as fair use if they enable end users' fair use. For example, in *HathiTrust*, this Court found fair use where defendant HathiTrust provided eligible print-disabled individuals with full access to their digital library of copyrighted content, even though the provision of such access was not itself transformative. *HathiTrust*, 755 F.3d at 102 ("providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative."). HathiTrust's fair use of the copyrighted text, therefore, was conditioned on *who* was using their service and *how* they were using it. *See also Google Books*, 804 F.3d at 228–29 (providing libraries with digital, scanned copies of their books was fair use); *cf. Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (weighing fair uses of radio service's subscribers alongside the transformativeness of the service itself).

1. TVEyes' downloading and sharing functions are important to allow media critics and others to make fair use of the underlying content.

TVEyes' downloading and sharing functions enable media critics to use copyrighted television and radio broadcasts for a fundamentally different purpose and context than the original broadcast. For example, media critics can use the downloading feature to contextualize underlying news sources and imbue them with new meaning by comparing, reframing, and analyzing them in different formats. Whereas news organizations like Fox 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 news is being presented. Media critics' purposes in downloading or sharing clips do not include "scooping" Fox or "supplant[ing] [its] commercially valuable right of first publication," *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg, L.P.*, 756 F.3d 73, 83 (2d Cir. 2014) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)) (internal quotations omitted), but rather criticizing or commenting on "how Fox said it." *Cf. Swatch*, 756 F.3d at 85; *TVEyes I*, 43 F. Supp. 3d at 393.

Media criticism is dependent upon comprehensive and unconditioned access to clips that were actually broadcast to a viewing audience. Media critics need to download and share relevant portions of TVEyes' clips with their public audience to effectively comment on and critique media coverage. As the District Court recognized, TVEyes "is the only service that creates a database of *everything* that television channels broadcast, twenty-four hours a day, seven days a week." *TVEyes I*, 43 F. Supp. 3d at 393 (emphasis in original). Absent the mass digitization facilitated by TVEyes' database, there is no feasible way for media critics to capture and present a comprehensive view of all content being broadcast to the public.

2. The downloading and sharing features ensure media critics' unconditioned access to original, unaltered broadcasts.

Although the District Court reviewed each of TVEyes' functions to determine whether they were "integral to [its] transformative purpose," *TVEyes II*,

2015 WL 5025274, at *9, it erred when it declined to find fair use with respect to the downloading and sharing functions. The lower court's decision was predicated on the conclusion that the TVEyes clips were an interchangeable substitute for the clips offered by Fox and its authorized agents. *See id.* (“In such cases, TVEyes is not so transformational, since users should be able to procure the desired clip from Fox News or its licensing agents.”). If the clips were identical, and if “indiscriminately sharing” of links or downloads of those clips would posed “undue danger to content-owners’ copyrights,” the resulting risk of infringement would militate against a finding of fair use. In this context, however, the downloading and sharing functions are important for the ability of media critics to perform their crucial function.

While Fox and its exclusive licensing agent ITN Source license some clips of Fox News segments, *TVEyes I*, 43 F. Supp. 3d at 387, these clips “do not show the exact content or images that were aired on television,” and “sometimes feature ‘corrected’ versions of news stories, amending and correcting incorrect and outdated descriptions in the original television version.” *Id.* at 386. Furthermore, Fox conditions access to its clips upon licensees’ agreement to “covenant that they will not show the clips in a way that is derogatory or critical of Fox News.” *Id.*

Even if Fox were an outlier in licensing “corrected” clips and conditioning licensees’ access on a promise not to criticize its programming, however, enjoining

TVEyes' downloading and sharing functions could invite other content owners to dodge media criticism by following in Fox's restrictive footsteps. This Court has eschewed rules that would limit media critics to "sources of information that authorize disclosure" and cripple activity "whose protection lies at the core of the First Amendment." *Swatch*, 756 F.3d at 84. It has been especially unwilling to condemn services that enable end-users to make paradigmatic fair use of the copied work. *See HathiTrust*, 755 F.3d at 101–03; *Google Books*, 804 F.3d at 229 ("Google's creation for each library of a digital copy of that library's already owned book in order to permit that library to make fair use through provision of digital searches is not an infringement."). TVEyes is essential for allowing media critics and others to make sure fair uses, and its downloading and sharing functions warrant protection as fair.

D. TVEyes does not affect the potential market for Fox's works in any substantially adverse way, and any harm is outweighed by factor one.

"To defeat a claim of fair use, the copyright holder must point to market harm that results because the secondary use serves as a substitute for the original work." *HathiTrust*, 755 F.3d at 96 (citing *Campbell*, 510 U.S. at 591).

Transformative uses "by definition do not serve as substitutes for the original work." *Id.* at 99. In the District Court, Fox alleged that TVEyes' service would serve as a substitute for its flagship cable programming products, and would impair

its derivative use of clips in licensing and on its own online platforms. Fox Br. at 47–56.

The District Court quickly and correctly dispensed with the notion that TVEyes subscribers use the service as a substitute for Fox’s cable television broadcasts. It noted that “not one of the works in suit was ever accessed to watch clips sequentially,” and concluded that “[t]here is no basis for Fox News’ alleged concern that TVEyes’ subscribers are likely to watch ten minute clips sequentially in order to use TVEyes as a substitute for viewing Fox News’ programming on television.” *TVEyes I*, 43 F. Supp. 3d at 396. This finding of fact comports with basic intuition about how TVEyes subscribers would plausibly use the service.

The District Court initially rejected Fox’s argument that TVEyes would “impair[] its derivative market for video clips,” based on its conclusion that “any cognizable market harm” would be “outweighed by the public benefit arising from TVEyes’ service.” *Id.* (internal quotations and citations omitted). After examining the date/time search, downloading, and sharing functions more closely, however, the District Court held that those functions did not make fair use of Fox’s copyrighted content. *TVEyes II*, 2015 WL 5025274, at *8–10. That decision was rooted in a concern that TVEyes subscribers would use the aforementioned functions to “indiscriminately shar[e]” links or downloads, and that such sharing would pose “undue danger to [Fox’s] copyrights” and “derivative business.” *Id.*

As this Circuit has held, the fourth fair use determination turns on whether “potential purchasers may opt to acquire the copy in preference to the original,” and whether “the copy brings to the marketplace a competing substitute for the original, or its derivative.” *Google Books*, 804 F.3d at 223. In fact, the clips obtainable from TVEyes do **not** compete with those procured by Fox. As a matter of responsibility and accuracy, media critics would be unlikely to use the clips procured by Fox. Just as reporters insist upon actually viewing and confirming events to test the accuracy of official pronouncements,⁴ media critics need to view footage *exactly* as it was aired on television broadcasts to draw their conclusions. Fox’s clips—which “do not show the exact content or images that were aired on television,” and “sometimes feature ‘corrected’ versions of news stories, amending and correcting incorrect and outdated descriptions in the original television version”—are manifestly unsuitable for this purpose. *TVEyes I*, 43 F. Supp. 3d at 386.

⁴⁴ See, e.g., *Practices and Principles of Coverage Access for Independent White House Press*, White House Correspondents’ Ass’n (July 5, 2015), http://www.whca.net/2015WHCA_PracticesPrinciples_CoverageAccess.pdf (“As a general principle, the White House should not use its own videographers and photographers as a replacement for independent press coverage. When White House photographers and videographers are present, the press pool should be included whenever possible. The press pool should be given the same vantage and access to pooled and open events as the White House photographers and videographers.”).

Furthermore, even if the Fox clips were appropriate for use in media criticism and a substitute for the clips offered by TVEyes, media critics would still be unable to rely on them. Fox conditions access to and use of its clips upon licensees' agreement to "covenant that they will not show the clips in a way that is derogatory or critical of Fox News." *Id.* at 386. Responsible media criticism simply cannot be hobbled by such a covenant as a precondition to accessing and using relevant clips. Such a rule would allow Fox to achieve by contract what it plainly cannot by copyright: curbing criticism of its broadcasts. Accordingly, for users of news clips, the ability to access, use, and publish as criticism TVEyes' unadulterated and unencumbered clips are essential and otherwise unavailable; these functions are not "a competing substitute" for the product offered by Fox or its agents. *See Google Books*, 804 F.3d at 223.

E. TVEyes' copying of Fox's programming furthers the public interest in robust commentary and criticism of news reporting and media narratives.

The Supreme Court has described fair use analysis as an "equitable rule of reason," and expressly provides for consideration of the public interest alongside evaluation of the four statutory fair use factors. *See Sony*, 464 U.S. at 455. Here, the balance of the factors and the public interest weigh in favor of a finding of fair use. Where, as here, the allegedly infringing service delivers otherwise unavailable content to researchers, analysts, and academics for a transformative purpose "as

evidenced by surrounding commentary or criticism,” this Circuit has found fair use. *See Swatch*, 756 F.3d at 85. Such a finding is particularly justified where, as here, the service’s purpose is to “publish . . . factual information to an audience from which [the rights holder’s] purpose was to withhold it.” *Id.* at 85. TVEyes seeks to publish broadcasts to that audience, which includes media critics and other parties who intend to subject Fox’s programming to commentary and criticism. TVEyes’ copying of Fox’s programming “serve[s] the interest of accuracy, not piracy,” and each of its functions merit protection under copyright law. *Id.* (internal citation and quotations omitted).

CONCLUSION

In order to allow media critics to continue their valuable work of analyzing and reporting on news media and serving the strong public interest in transparency about its operations, this Court should affirm the lower court’s conclusion that TVEyes’ keyword searchable database and archiving functions are fair use. The Court should reverse the lower court’s holding regarding TVEyes’ downloading, date-time search, and sharing functions, and find that those capabilities also constitute fair use.

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Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as modified for amici by Fed. R. App. P. 29(d) because this brief contains 6952 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface limitation of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.


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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of March, 2016 I filed the foregoing Brief for Media Critics as Amici Curiae in Support of Plaintiff-Appellee-Cross Appellant with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.



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