

15-3885, Cross-Appeal 15-3886

IN THE
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 (13-cv-5315)

**BRIEF FOR THE ELECTRONIC FRONTIER FOUNDATION & PUBLIC KNOWLEDGE AS
AMICI CURIAE SUPPORTING APPELLANT–CROSS-APPELLEE TVEYES, INC.**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amici curiae* the Electronic Frontier Foundation and Public Knowledge certify that none of these entities has a parent or subsidiary corporation, and that no publicly held company owns 10% or more of their stock.

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INTERESTS OF *AMICI CURIAE*¹

This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a) with the consent of all parties.²

The Electronic Frontier Foundation (“EFF”) is a member-supported, non-profit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF represents more than 26,000 contributing members. On behalf of its members, EFF promotes the sound development of copyright law as a balanced legal regime that fosters creativity and innovation while respecting individual rights and liberties. EFF has contributed its expertise to many cases applying copyright law to new technologies, as *amicus curiae*, as party counsel, and as court-appointed attorneys *ad litem*. See, e.g., *Fox Broad. Co., Inc. v. Dish Network*, 747 F.3d 1060 (9th Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Brownmark Films v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015); *Mick Haig Prods. E.K. v. Does 1–670*, 687 F.3d 649 (5th Cir. 2012).

¹ *Amici* wish to thank N.Y.U. Technology Law & Policy Clinic students Brian Eschels and Peter Steffensen for their invaluable contributions to this brief.

² Pursuant to Federal Rule of Appellate Procedure Rule 29(c), *amici* certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

Public Knowledge (“PK”) is a non-profit public interest 501(c)(3) corporation, working to defend citizens’ rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas, Public Knowledge frequently files *amicus* briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of copyright is to stimulate the progress of science and the arts. Accordingly, copyright law embodies a balance between a bundle of rights and incentives for creators, and an equally important set of limiting principles that ensure that copyright claims do not stifle new creativity and innovation. *Amici* submit this brief to urge the Court to reaffirm and enforce two of those essential limiting principles: the volitional conduct requirement and the fair use doctrine.

This case raises two important legal questions: (1) whether a service like TVEyes can be *directly* liable if its customers use the service in a way that constitutes or leads to infringement; and (2) whether the fact that a customer might use features of the tool to infringe deprives the toolmaker of fair use protections. The answer to both questions must be “no.” Courts have time and again denied requests to expand copyright liability to toolmakers whose equipment or systems are used by third parties to infringe.

First, courts around the country agree that *direct* liability can only attach to the party who controls the decision to copy. A party whose role is limited to providing the means by which copies are made, without itself engaging in any volitional conduct, cannot be liable for direct infringement. *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (“*Netcom*”). That “volitional conduct” requirement is shorthand for the sensible

rule that only parties who “themselves engaged in the infringing activity” can be liable as direct infringers. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984). Absent such a rule, toolmakers could be strictly liable for how users employ their tools, which would in turn have spelled the early death of any number of useful technologies, from the photocopier to the VCR, to the fax machine, and so on. Even a pencil can be used to infringe copyright; the volitional conduct rule (and the corollary doctrines of secondary liability) help ensure that the pencil-maker is not responsible for such infringement. Reversing that trend would cast a dangerous legal shadow over innovation.

Second, courts have also consistently recognized that fair use protects technologies that make copyrighted works easier to analyze. Search engines for web pages, images, and books have all prevailed over copyright challenges, as did an analytical database for detecting plagiarism. Fair use promotes speech and innovation by protecting transformative uses of copyrighted material—such as creating an analytical database—and by protecting the tools that enable *other* fair uses, such as a tool that enables scholarship and remix videos commenting on the original works.

Here, the “tool” in question offers the particular benefit of enabling mass media analysis, an essential task for scholars and the general public alike. Citizens rely on news media to inform them about current affairs; social scientists and other

researchers rely on TVEyes' service to analyze and critique the way news media perform that vital function. TVEyes has been used to generate both anecdotal evidence for arguments and statistical analyses of news coverage that enhance our understanding of the news media.³ In an era where 90% of media outlets are controlled by just six companies,⁴ insights derived from analytical engines like TVEyes are a critical check on the Fourth Estate.

When analyzed under the correct framework, it is clear that the only volitional conduct in which TVEyes has engaged is a lawful fair use, just like the makers of the analytical tools for other media that have come before. These makers will continue to develop new analytical tools as long as the law does not become hostile to such innovation. Turning back the clock and stripping toolmakers of the

³ E.g., Carl Sessions Stepp, *Going Easy on President Bush*, *Am. Journalism Rev.*, <http://ajrarchive.org/Article.asp?id=4175> (reviewing Eric Bollert, *Lapdogs: How the Press Rolled Over for Bush* (2006)); Douglas Bicket & Melissa Wall, *Circling the Wagons: Containing the Downing Street Memo Story's Impact in America*, 31 *J. of Comm'n Inquiry* 206, 210 (2007), available at https://www.researchgate.net/publication/249735443_Circling_the_WagonsContaining_the_Downing_Street_Memo_Story's_Impact_in_America (using TVEyes to assess American media coverage of a prominent story in the British news media); Matthew Hale, *TV News Coverage of New Jersey: A Snapshot of the Evening News on NJTV, WNBC and WPVI 2* (2013), http://www.eagleton.rutgers.edu/events/NJPMNJ_TV_findings_final_report.pdf (using TVEyes to capture local news broadcasts for quantitative analysis); Donald Matthew Moore, *The Impact of South Carolina's 2012 Republican Presidential Primary* 24 (2014) (unpublished Master's thesis, University of South Carolina), <http://www.scgop.com/files/MattMooreThesisFinal.pdf>.

⁴ Ashley Lutz, *These 6 Corporations Control 90% Of The Media In America*, *Business Insider*, June 14, 2012, <http://read.bi/1RhabM6>.

legal clarity offered by the volitional conduct doctrine and settled rules for fair use would be catastrophic. *Amici* urge the Court to maintain the important protections provided to innovators of new technologies and services that have developed over the last several decades.

I. TVEYES CANNOT BE HELD DIRECTLY LIABLE FOR THE VOLITIONAL CONDUCT OF ITS SUBSCRIBERS.

Because any hypothetical infringement arising from use of the various features of TVEyes' system can only arise from the user's volitional conduct, TVEyes cannot be directly liable for such infringement.

A. Direct Infringement Requires Volitional Conduct on the Part of the Accused.

Until the late 20th century, engaging in direct copyright infringement was almost invariably a matter of physically undertaking the infringing activity. Today, however, copying instructions can be delivered via wired or wireless communications to a remote network server, personal computer, or other digital device located off the copier's premises, and usually maintained by a third party. In response to this physical and legal separation between the party who controls the copying decision and the party who provides the tools with which to make a copy, courts have held that direct liability can only attach to the party who controls the decision to copy.

Thus, to determine who is liable, courts “direct [their] attention to the volitional conduct that causes the copy to be made.” *Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 131 (2d Cir. 2008). The same analysis extends to all exclusive rights under copyright, not just reproduction. *Id.*; see also *Arista Records v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148 (S.D.N.Y. 2009); *Smith v. BarnesandNoble.com*, No. 12 Civ. 4374, 2015 WL 6681145, at *6 (S.D.N.Y. Nov. 2, 2015).

The Supreme Court has long looked to volitional conduct as a logical dividing line between direct and contributory liability. In *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), for example, the Court specifically rejected the argument “that supplying the ‘means’ to accomplish an infringing activity and encouraging that activity through advertisement are sufficient to establish liability for copyright infringement.” *Id.* at 436. In other words, merely establishing the parameters under which the tool makes copies does not create direct liability. Decades later, the Court reaffirmed that imposing direct liability on those who merely provide the tools with which an infringing copy is made would fail to “leave[] breathing room for innovation and a vigorous commerce,” and could “trench[] on regular commerce or discourag[e] the development of technologies with lawful and unlawful potential.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933, 937 (2005).

In the interim between these decisions, the volitional conduct requirement for direct copyright infringement liability was embraced by courts across the country in recognition that providers of Internet services should not be saddled with potentially staggering strict copyright liability due to acts of infringement by some of their users. In the seminal case of *Religious Technology Center v. Netcom Online Communications Services*, 907 F. Supp. 1361 (N.D. Cal. 1991), for example, the court relied on *Sony* to correctly hold that, for direct liability to attach, there must be a volitional act taken by the defendant that resulted in the specific infringement, beyond merely providing the system a third party used to create an infringing copy. *Id* at 1370.

In the more than 20 years since *Netcom*, courts have consistently recognized that holding a service provider strictly liable for the independent acts of third-party copyright infringers simply because the infringing material “was stored on or passed through the service provider’s facilities would be, in effect, to hold the entire internet liable for the bad acts of a few.” *Perfect 10, Inc. v. Giganews, Inc.*, No. CV 11-07098, 2014 WL 8628034, at *7 (C.D. Cal. Nov. 14, 2014).

Thus, in *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the Fourth Circuit followed *Netcom* and held that the defendant Internet service provider could not be liable for direct copyright infringement where its subscribers chose to post copyrighted photographs on its website. The court acknowledged that

the Copyright Act does not require an infringer to have knowledge that its conduct amounts to copyright infringement, but emphasized that the Act does require “conduct by a person who causes in some meaningful way an infringement.” *Id.* at 549 (relying on *Sony*). The court held that direct liability requires more than merely providing a tool used by others to make illegal copies. Rather, as in *Netcom*, “a person had to engage in *volitional conduct*—specifically, the act constituting infringement—to become a direct infringer.” *Id.* at 550–52 (emphasis added).

This Court has come to the same conclusion. In *Cartoon Network*, this Court explained that it was not direct infringement to “sell[] access to a system that automatically produces copies on [the user’s] command,” when it was the user’s actions that created the infringing copy. 536 F.3d at 132. The Court wrote, “[w]hen there is a dispute as to the author of an allegedly infringing instance of reproduction, *Netcom* and its progeny direct our attention to the volitional conduct that causes the copy to be made.” *Id.* at 131. In determining who “makes” a copy, the court concluded that “a significant difference exists between making a request to a human employee, who then volitionally operates the copying system to make a copy, and issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct.” *Id.* The service provider in the former situation may be directly liable; the provider in the latter situation may not.

Following *Cartoon Network*, the Ninth Circuit ruled that a pay television service provider could not be liable for direct copyright infringement where television programs were copied at the user's command. *Fox Broad. Co., Inc. v. Dish Network*, 747 F.3d 1060, 1067–68 (9th Cir. 2014). The court held that “operating a system used to make copies at the user's command does not mean that the system operator, rather than the user, caused copies to be made.” *Id.* at 1067.

In both *Cartoon Network* and *Dish Network*, the defendant enjoyed “unfettered discretion” in selecting networks from which users could make recordings. *Cartoon Network*, 536 F.3d at 132; *Fox Broad. Co. Inc. v. Dish Network*, 905 F. Supp. 2d 1088, 1101 (C.D. Cal. 2012). Such discretion, however, is not “sufficiently proximate to the copying to displace the customer as the person who ‘makes’ the copies when determining liability under the Copyright Act.” *Cartoon Network*, 536 F.3d at 132.

Congress has also noted and approved the use of these judge-made limits on liability in copyright cases. Considering in the late 1990s how to adapt copyright law for the Internet age, the Senate Judiciary Committee acknowledged that the *Netcom* court “approached the issue” of intermediary liability using “contributory and vicarious liability doctrines.” S. Rep. No. 105–190 at 19 & n.20 (1998). The Committee expressly “decided to leave current law in its evolving state” rather than overrule the holding of *Netcom. Id.*; see *Lorillard v. Pons*, 434 U.S. 575, 580

(1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change”); 17 U.S.C. § 512(l) (preserving judge-made intermediary liability).

To be clear, the volitional conduct requirement does not excuse toolmakers from all liability. Instead, it simply requires the application of secondary liability principles, which include proof of additional elements before a toolmaker can fairly be held responsible: that the technology is not “capable of substantial noninfringing uses,” *Sony*, 464 U.S. at 442; that the provider distributes the technology with the specific objective of promoting infringing uses, *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 936–37; or that the provider supervises the infringing activity and has a direct financial interest in the particular act of infringement, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001).

B. The Supreme Court’s Decision in *Aereo* Did Not Disturb the Volitional Conduct Rule.

Amici anticipate that Fox may argue that *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), altered the volitional conduct analysis. If so, Fox would be incorrect. To the contrary, the Supreme Court did not expressly address the general volitional conduct requirement for direct liability under the Copyright Act at all. Rather, *Aereo* considered whether a

service provider that used its technology to receive television programs that had been broadcast publicly over the air and then transmit those programs to its own paid subscribers by Internet streaming could be directly liable for copyright infringement. *Id.* at 2506. The Court held that, under those circumstances, the defendant was not merely an equipment supplier and that it actually publicly performed the programming as defined by the Copyright Act's Transmit Clause. *Id.* at 2503–04.

Indeed, the *Aereo* majority did not deny the existence of the volitional conduct requirement or claim to limit its scope, and the Court's analysis can easily be reconciled with the volitional conduct rule. The Court distinguished between an entity that “engages in activities like *Aereo*'s” and one that “merely supplies equipment that allows others to do so.” *Id.* at 2504. It found that *Aereo*'s conduct occupied a very particular place in the broader copyright scheme, saying that “the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that *Aereo* ‘perform[s],’ but it does not determine whether different kinds of providers in different contexts also ‘perform.’” *Id.* at 2510. Although the Court held on the facts of the case that *Aereo* had a sufficient likeness to a cable company to lead to a presumption of direct performance, the Court recognized that the distinction between active and passive participation remains a central part of the analysis of direct infringement. *Id.*

The consensus among the courts, including courts in this Circuit, is that *Aereo*'s holding left the volitional conduct requirement intact. *E.g.*, *Smith*, 2015 WL 6681145, at *4 & n.3 (*Aereo* did not address the volitional conduct requirement, “and *Cartoon Network* remains controlling in this Circuit.”); *Fox Broad. Co. v. Dish Network*, No. CV 12-4529, 2015 WL 1137593, at *11 (C.D. Cal. Jan. 20, 2015); *Fox Television Stations, Inc. v. FilmOn X*, No. 13-758, 2015 WL 7761052, at *23 (D.D.C. Dec. 2, 2015); *Gardner v. CafePress Inc.*, No. 3:13-cv-1108, 2014 WL 6890934, at *3 (S.D. Cal. Dec. 4, 2014).

Moreover, although the *Aereo* majority was silent on the doctrine of volitional conduct per se, Justice Scalia provided a thorough exposition of the volitional conduct requirement in his dissenting opinion, traversing the leading appellate cases: *Fox Broadcasting*, 747 F.3d at 1066–68; *Cartoon Network*, 536 F.3d at 130–31; and *CoStar*, 373 F.3d at 549–50. He explained that the volitional conduct requirement is a “profoundly important rule,” and that “our cases are fully consistent with a volitional-conduct requirement.” *Aereo*, 134 S. Ct. at 2512–13 (Scalia, J., dissenting). The majority did not dispute Justice Scalia's characterization.

C. TVEyes' Volitional Conduct Was Limited to Copying News Programs to Create Its Analytical Tool.

TVEyes has created a system that allows users to investigate and interact with copyrighted works. It could be directly liable if it infringed copyright in the

course of creating this tool (though, as discussed below, TVEyes' acts are protected by fair use). It cannot, however, be directly liable for the ways that *users* employ its tool. Accordingly, the district court's conclusion that TVEyes' share-by-email function is directly infringing because "using that which [TVEyes] copied without legal justification . . . reflects 'volitional conduct,'" Order Setting Terms of Injunction at 2, *Fox News Network, LLC v. TVEyes, Inc.*, No. 13 Civ. 5315 (S.D.N.Y. Nov. 6, 2015), ECF No. 183, was simply erroneous.

The district court's analysis displays precisely the approach *Cartoon Network* rejected, impermissibly attributing a *customer's* use of copyrighted material to TVEyes. Like the defendant in *Cartoon Network*, TVEyes has built a system that "automatically obeys commands and engages in no volitional conduct," *Cartoon Network*, 536 F.3d at 131. It is undisputedly the *user* who chooses to share a link; it is the *user* who chooses to download a clip; and it is the *user* who chooses the parameters of a search. If a customer uses TVEyes' system for infringement, the customer's action is the proximate cause of any harm.

Thus here, as in *Cartoon Network*, the alleged infringer's "control over recordable content, and the instrumentality of copying" is "more relevant to the question of contributory liability," *Cartoon Network*, 536 F.3d at 132; accord *Fox Broad.*, 905 F. Supp. 2d at 1102; see also *Metro-Goldwyn-Meyer Studios Inc.*, 545 U.S. at 960 (Breyer, J., concurring) ("[T]he producer of a technology which

permits unlawful copying does not himself *engage* in unlawful copying.”

(emphases in original)).

The volitional conduct rule wisely protects TVEyes from direct liability for the possible uses of its tool. The Court should correct the district court’s error.

II. CREATION AND OPERATION OF AN INTERACTIVE ARCHIVE IS A LAWFUL FAIR USE.

A. Numerous Courts Have Held That Fair Use Protects The Creation of Databases of Copyrighted Works.

As the Supreme Court has repeatedly held, courts must take care to ensure that copyright is not used to “discourage[e] the development of technologies with lawful and unlawful potential.” *Metro-Goldwyn-Meyer Studios Inc.*, 545 U.S. at 937. Fair use helps achieve that goal by providing the breathing room necessary for innovation and experimentation.

The fair use doctrine has consistently protected tools that analyze copyrighted works and make them useful in new ways. This Court and others have repeatedly held that the intermediate copying—including the creation of comprehensive digital archives of copyrighted works—necessary to construct tools that enable fair uses are transformative and themselves protected by fair use. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (mass digitization of books to create a publicly available and searchable books database); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (mass digitization of

books to create searchable database, improve accessibility for the print disabled, and archive books); *A.V. v. iParadigms*, 562 F.3d 630, 638 (4th Cir. 2009) (mass digitization of student's 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 locating information was transformative); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (same); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 607 (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).

TVEyes' use strongly resembles the uses found to be fair in these cases. In *Sony* and *Sega*, intermediate copying was necessary so that competitors could access the unprotected elements of software; here, TVEyes creates intermediate copies that enable users to access the unprotected elements of news media (air time, ratings, keywords, etc.) in order to analyze and comment on them. In *iParadigms*, the defendant's comprehensive database, indices, and annotations enabled pattern recognition software to catch plagiarism; here, similar tools enable media critics to recognize patterns and uncover biases in the news media. The

search engines in *Perfect 10* and *Kelly* were transformative because their purpose was information location: they enabled users to find images that otherwise would be infeasible to discover. By archiving and indexing news media, TVEyes allows critics to perform analyses and searches that would otherwise be infeasible.

B. The Fair Use Analysis Should Be Tied to Potentially Infringing Acts.

Because TVEyes' conduct is closely analogous to the mass copying deemed fair use in prior cases, the district court's analysis should have been straightforward. Instead, it broke from these precedents by analyzing piecemeal how users might theoretically use various features of TVEyes' system, in search of some potential use that would *not* be fair. This was error.

The fair use analysis should have focused upon the only act by TVEyes that potentially implicates Fox's rights: copying the Fox broadcasts to create its analytical tool. Fair use need only be asserted to protect acts that implicate a copyright owner's exclusive rights. If an act does not implicate the rights defined in 17 U.S.C. § 106, it is already noninfringing and the analysis ends there. But the district court's quarrel lies largely with TVEyes features that do not implicate any such right. Sharing a link to a copyrighted work does not fall within any exclusive right (even if downloading a copy from that link might). Nor is any Section 106 right implicated by searching for works that meet certain criteria, such as airing at a particular moment in history or containing certain terms.

To be clear, the features of the tool are not entirely irrelevant to the fair use analysis. Those uses are highly germane to the purpose of the copying and potentially to its effect on the market. But where those features do not themselves involve an act by the accused that implicates the exclusive rights of copyright, they need not *individually* constitute fair uses. It was inappropriate for the district court to deny TVEyes' fair use defense out of concern for features that did not implicate Fox's exclusive rights to begin with.⁵

C. The TVEyes Research Tool is Protected by Fair Use.

Amici urge the Court to consider the whole of the TVEyes service, rather than take a piecemeal approach. Once the right lens is applied, it becomes clear that each of the four statutory factors, considered together in light of copyright's purpose, favors a finding of fair use.

1. TVEyes' Use Is Highly Transformative and Benefits the Public.

The first fair use factor asks whether the new work has added something to the original that furthers a new purpose or changes the character of the original, thereby transforming it. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁵ Even under the incorrect view that TVEyes infringes when a user employs the TVEyes system to advance an infringing use, such as downloading a snippet for an infringing use, this would only be relevant to establish liability for infringing that particular work. It would not undermine the fairness of copying all of the other works in the database not infringed by the user's act.

TVEyes' database and analytical engine made something new, different, and useful out of news programs. By annotating clips with information such as viewership statistics and indexing the clips' content, TVEyes "expands [the original work's] utility" in a transformative way, *Authors Guild*, 804 F.3d at 214. A TVEyes subscriber can see how often keywords have been used on different channels, and can view, archive, or share a link to the relevant snippet of timestamped transcript. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 384 (S.D.N.Y. 2014). With another click, the user can view the video's Nielsen viewership rating, as well as the video itself, which are at most ten minutes long. *Id.* at 385. TVEyes also generates "heatmaps" and pie charts that visually represent the distribution of keyword mentions in terms of geography and media organization. *Id.* TVEyes subscribers can view coverage at a specific moment in time by searching by video timestamp. *Id.* at 384. After identifying a video of interest, TVEyes subscribers may archive it (thereby preserving it on TVEyes' servers indefinitely for use by the subscriber), download it, or share a link to it with others. *Id.* at 385.

The TVEyes system and each of its features thus enable subscribers to discover, gather, and report factual information about how media outlets are framing and describing important events. As this Court has recognized, generating information about "what was said" for the fact of its having been said, rather than

for the sake of repeating its message, is a transformative use. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg*, 756 F.3d 73, 85 (2d Cir. 2014) (upholding transformative purpose of posting, without editorial comment, an audio recording and transcript of a conference call). All of this additional context adds utility to and transforms the original work, just as Google's addition of searchable text and snippet view transformed the books it scanned. *Authors Guild*, 804 F.3d at 214.

More generally, Section 107 specifically calls out purposes such as criticism, research, and scholarship, and TVEyes functions like downloading, saving, sharing, and emailing all further those end purposes. The rapidly changing media environment requires that media critics have access to comprehensive, accurate, historical databases of underlying news content. Without such access, media critics cannot assure themselves and the public that their research and conclusions are grounded in a full set of information.

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 that depend on the use of features like downloading and sharing links. Scholars can test each others' conclusions using the same "data"; professors can easily identify and teach appropriate news clips; and researchers can build their own topic-specific databases (e.g., a database focusing exclusively on coverage of the Donald Trump presidential campaign).

2. Use of Published, Fact-Based Works Weighs In Favor of Fair Use.

The second factor in the fair use inquiry, the nature of the work, also supports a finding of fair use. Specifically, the law of fair use “recognizes a greater need to disseminate factual works than works of fiction or fantasy.” *HathiTrust*, 755 F.3d at 96 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985)). Uses of published, rather than unpublished, works are also more likely to be fair. *Harper & Row, Publishers, Inc.*, 471 U.S. at 564. As a news service, Fox News publishes news and news commentary that it holds out as factual reporting or opinion about real-world events. The published, factual nature of Fox News’s broadcasts supports TVEyes’ fair use of that content.

3. TVEyes Made Appropriate Use of Entire Works to Create a Comprehensive Media Analysis Tool.

The third factor examines “the amount and substantiality of the portion used” in relation to the entire copyrighted work. 17 U.S.C. § 107(3). The scope of permissible copying “varies with the purpose and character of the use.” *Campbell*, 510 U.S. at 586–87. This factor has repeatedly sustained copying of entire bodies of work, where such copying is “reasonably appropriate” to the transformative purpose. *Authors Guild*, 804 F.3d at 221.

Here, TVEyes has copied a great deal, but no more than necessary to achieve its transformative purpose. If it copied less, it would no longer be able to provide

definitive information about broadcasts to its subscribers. The accuracy of media analyses 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.

4. TVEyes Has Generated New and Important Public Benefits Rather Than Supplanting Any Market for Fox's Works.

Fourth, fair use considers “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107. The market harm in question must be one “that results because the secondary use *serves as a substitute for the original work.*” *HathiTrust*, 755 F.3d at 96 (emphasis added).

Users of TVEyes' system are not simply seeking a way to watch Fox News. A cable subscription and DVR would provide a far less expensive and onerous way to consume and obtain recordings of a full menu of news channels, including Fox News. The TVEyes service costs \$500 per month and is far less useful for consumption because it serves up content in short snippets. *TVEyes, Inc.*, 43 F. Supp. 3d at 385. TVEyes is therefore a poor substitute for a Fox News subscription. Rather, it serves a market for media research and analysis that Fox News does not attempt to serve.

Where, as here, a defendant's use is transformative, 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”).

Media commentary—like parody—is a paradigmatic example of why the law differentiates between substitution 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 protectable derivative market for criticism.”); *Bill Graham Archives*, 448 F.3d at 614–15; *Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“[H]arm result[ing] from a transformative secondary use that 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 . . .”). Just as courts distinguish between “biting criticism that merely suppresses demand and copyright infringement, which usurps [it],” *Davis*, 246 F.3d at 175 (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 harm caused by criticism is not cognizable, it is not at all clear that media commentary depresses the value of all works it targets. To the contrary, criticism may increase the value of some copyrighted works—for example, the news media that are praised for their accuracy or objectivity.

Similarly, TVEyes is no substitute for the Fox News videos that are available for licensing. These licensed videos “do not show the exact content or images that were aired on television.” *TVEyes, Inc.*, 43 F. Supp. 3d at 386. They may be corrected, for example, or news tickers may be removed. *Id.* TVEyes’ version of the video is therefore not identical to the licensed videos available online. And even if the videos licensed by Fox News were faithful to the original broadcasts, TVEyes could not achieve the transformative purpose of creating a comprehensive media analysis tool by piecemeal licensing of the few videos Fox News makes available.

Further, even assuming that TVEyes usurps some portion of the market for Fox News broadcasts, the fourth factor would require that this harm be balanced against the public benefit of the use. *Bill Graham Archives*, 448 F.3d at 613. As the district court catalogued extensively, TVEyes’ service yields enormous benefits to the public, including journalistic benefits and even national security. *TVEyes, Inc.*, 43 F. Supp. 3d at 397. Society benefits when media organizations are held to account. These benefits outweigh the unproven market loss Fox News asserts.

Speculation about harm that TVEyes users could cause by misusing the service should have no place in this analysis. As outlined above, TVEyes cannot be directly liable for infringement by its users, and Fox News has disclaimed any secondary liability claims. It should not be permitted for purposes of the fair use analysis to raise harms related to claims it has abandoned.

To the extent the Court concludes that potential harms from customers' infringing use are relevant to TVEyes' act of copying, the existence of such harms would be one consideration to weigh against the rest of the multifactor analysis. The Supreme Court has explained, in the context of contributory liability, that the possibility of infringing uses is far from fatal. Only when the noninfringing uses are not "substantial" can they be outweighed by infringing uses of the tool. *Sony*, 464 U.S. at 442.

Here, the noninfringing uses of TVEyes' system are not only substantial, they are overwhelmingly predominant.

In short, TVEyes has created a transformative database that contributes uniquely to the public's understanding of how current events are communicated. The comprehensive nature of this database enables new and powerful forms of media critique. The media organizations subject to that critique may not like it, but "harms" based on criticism are not cognizable under copyright law—rather, the law actively fosters such speech. The TVEyes service offers something new and

different from Fox's offerings, rather than being a mere substitute for them. All four factors support TVEyes' fair use defense.

D. A Toolmaker Need Not Design a Tool So That Infringement is Impossible.

Finally, *amici* are deeply troubled by the district court's suggestion that TVEyes' fair use defense should turn, in part, on whether it has deployed technological protocols to ensure its users comply with Section 107. *See Fox News Networks, LLC v. TVEyes, Inc.*, No. 13 Civ. 5315, 2015 WL 5025274, at *8 (S.D.N.Y. Aug. 25, 2015). In fact, TVEyes has designed certain features to make it harder for customers to engage in acts that might infringe, such as by serving video downloads that don't perform well when uploaded to YouTube. Fourth Decl. of David Seltzer ¶ 15, *Fox News Network, LLC v. TVEyes, Inc.*, No. 13 Civ. 5315 (S.D.N.Y. July 8, 2015), ECF No. 137. And, to be sure, well-heeled innovators like Google are sometimes able to take even more extraordinary technical measures to make infringement difficult for their users.

But the law does not require such measures. This is clear from the numerous court decisions upholding the legality of tools where the maker had not taken such steps, including *Sony*, 464 U.S. 417. The Supreme Court explained in *Grokster* that "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses." 545 U.S. at 939 n.12.

Congress itself acknowledged this principle in the context of the DMCA's ban on circumvention, which makes it clear that nothing in that law requires device makers to implement restrictions on how copyrighted works may be used. 17 U.S.C. § 1201(c)(3).

This is the right policy. Requiring toolmakers to police or constrain their users would hinder fair uses of copyrighted works and other forms of speech. Indeed, the presence of Technological Protection Measures (TPMs) restricting access to copyrighted works has led to problems for a host of communities, who approach the Copyright Office every three years for exemptions to the ban on circumventing TPMs. In the most recent rulemaking, members of the public explained how such measures interfered with documentary filmmaking, efforts to make print media accessible to people with disabilities, video remixing, computer security research, jailbreaking of phones, and even auto repair—to name just a handful of the 26 exemption classes that were considered.⁶ Here, for example, TVEyes downloads that perform poorly on YouTube might deter infringement, but also make it harder to publish fair use documentaries or reaction videos about news coverage. Courts should not invent a requirement for toolmakers to create

⁶ U.S. Copyright Office, *Recommendation of the Register of Copyrights, Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention* (Oct. 8, 2015), <http://1.usa.gov/1XNYQDR>.

technologies that burden First Amendment–protected fair uses of copyrighted works.

Moreover, mandatory technological restrictions, monitoring, or filtering would also create roadblocks to market competition and noncommercial use by giving wealthy incumbent companies a significant advantage over smaller players. Any information technology *can* be used to infringe copyright, from web browsers to social media to the most humble blog or bulletin board. If any new service in this space must include costly anti-infringement technologies, nonprofits and entrepreneurs will find it impossible to offer some online services, even where those services would be used predominantly for lawful purposes. It is also unclear that such technologies can even be created for tools that enable fair uses, given the fact-specific and context-dependent fair use analysis. The trend, unfortunately, is for such technologies to over-police and prevent substantial swathes of lawful speech.⁷

The law wisely does not require toolmakers to hobble tools that enable fair uses, nor to silence lawful speech by some to prevent others from infringing. Imposing such requirements would be contrary to the Supreme Court’s *Sony* precedent, Congressional policy, and copyright’s goals of promoting speech and

⁷ Elliot Harmon, *Content ID and the Rise of the Machines*, EFF Deeplinks Blog (Feb. 26, 2016), <https://www.eff.org/deeplinks/2016/02/content-id-and-rise-machines>.

innovation. The district court should not have suggested otherwise, and *amici* urge the Court to avoid the same error.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment of noninfringement in favor of TVEyes.

Dated: March 23, 2016

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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of *Amici Curiae* Electronic Frontier Foundation and Public Knowledge in Support of Appellant–Cross-Appellee TVEyes, Inc. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,556 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, the word processing system used to prepare the brief, in 14-point font in Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2016, a true and correct copy of the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation and Public Knowledge in Support of Appellant–Cross-Appellee TVEyes, Inc. was served on all counsel of record in this appeal via CM/ECF pursuant to Second Circuit Local Rule 25.1(h)(1)–(2).

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