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15-3886-cv(XAP)

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 FOR *AMICUS CURIAE*
THE COPYRIGHT ALLIANCE IN SUPPORT OF
PLAINTIFF-APPELLEE-CROSS-APPELLANT

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INTERESTS OF AMICUS CURIAE

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

The Copyright Alliance is a non-profit organization representing artists, creators and innovators who depend on copyright laws to protect their work, including trade groups, companies, associations and thousands of individuals. Its members represent a wide spectrum of creative disciplines, from television and movies, to music, to photographs, to literature. It seeks to ensure that copyright jurisprudence continues to spur the development of creative works for the benefit of the public by protecting the rights of those who invest in the development of creative works to be fairly compensated for their efforts.

The Copyright Alliance has a significant interest in the outcome of this dispute. Its members include numerous creators of television content, whose programming is directly affected by TVEyes Inc.'s ("TVEyes") conduct. As the television industry has evolved, these members increasingly rely on online and digital distribution of their content, in addition to the licensing of clips of their television programs—markets that are usurped and affected by TVEyes' delivery of unlicensed, copyrighted programs to its subscribers. In addition, the Court's reasoning in this action will certainly have implications that go beyond the

television industry, and will impact the broad range of copyright disciplines in which the Copyright Alliance's members participate.¹

¹ Pursuant to Federal Rule of Appellate Procedure 29(c), *amici* certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Copyright Alliance and its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Alliance is a staunch supporter of fair use principles. Its members regularly rely on these principles to create new, expressive and transformative works, consistent with the Copyright Act’s inherent purpose of promoting “the Progress of Science and Useful Arts.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994). However, if fair use principles are misconstrued to allow a commercial entity to simply redistribute and commercially exploit the copyrighted works of others on a significant scale—as the District Court allowed TVEyes to do here—it will stifle the very creativity that the Copyright Act is intended to foster.

TVEyes admits that it copies copyrighted television and radio programming “from more than 1,400 channels, 24 hours a day, 7 days a week,” and creates a “comprehensive ... database” of that content. (TVE Br. at 6).² TVEyes’ services go far beyond helping subscribers search for and identify television and radio segments that may be of interest. Rather, after subscribers have *already* identified the desired programs, TVEyes actually *delivers* unauthorized copies of those programs to its subscribers, allowing its subscribers to watch live television through its system, view unlimited, lengthy and high-quality clips of the copyrighted programs in its database, save and redistribute those clips, and even

² “TVE Br.” refers to TVEyes’ principal brief.

retrieve clips simply by asking to see whatever aired on a particular channel at a particular date and time (the “Content-Delivery Features”).

These services go well beyond the bounds of fair use. While this Court has recognized, in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (“*Google Books*”) and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (“*HathiTrust*”), that the creation of a searchable database through which users can *identify* relevant copyrighted works is, in sharply-circumscribed circumstances, a transformative fair use, this Court has *never* suggested that the creator of such a database is then free to make the underlying works available to paying customers, as TVEyes is now doing. To the contrary, a critical aspect of the *HathiTrust* and *Google Books* decisions was that those databases contained significant restrictions *preventing* end-users from viewing the underlying works, limiting the utility of the databases to search and identification functions. Simply put, there is nothing “transformative” about a commercial service like TV Eyes giving its customers access to high-quality copies of unlicensed, copyrighted television and radio programs. This is straightforward copyright infringement.

Because there is no justification for its unauthorized dissemination of copyrighted content, TVEyes, and its *amici*, now claim that TVEyes’ subscribers are responsible for accessing the copyrighted programs, and that TVEyes itself has not engaged in “volitional conduct” necessary to give rise to direct liability. But

by its own admission, *TVEyes*—not its subscribers—copies content from more than 1,400 channels in order to create the very database of television and radio content that its subscribers are able to access freely. This plainly constitutes volitional conduct sufficient to give rise to direct liability for copyright infringement.

At the same time that TVEyes disclaims responsibility for its subscribers' conduct, it inconsistently *relies* on that conduct, arguing that the subsequent activities of the subscribers, after receiving Fox News' copyrighted programs from TVEyes, somehow renders' TVEyes' dissemination of the programs a "fair use." But it is axiomatic that a commercial service, such as TVEyes, may *not* stand in the shoes of its customers, and rely on their purportedly "fair use" of the disseminated copyrighted programs. Just because what subscribers ultimately do with the content they receive from TVEyes may (or may not) be a fair use does not mean that TVEyes is entitled to provide third-party copyrighted content to subscribers, for a fee.

The market for the distribution of television content is rapidly evolving, with rightsholders—including members of the Copyright Alliance—increasingly relying on online and digital redistribution of their content, and other alternative licensing streams. Permitting TVEyes and its ilk to usurp and interfere with those markets will result in harmful consequences to the television industry, and to licensees who

actually obtain the proper authorizations from rightsholders for the redistribution of their content. And these adverse consequences are not limited to the television industry. A ruling in TVEyes' favor—finding that a commercial entity is free, under the guise of creating a searchable “database,” to disseminate copyrighted works to paying customers—will have consequences across the entire spectrum of copyright. Accordingly, *amici* respectfully request that the Court conclude that, by engaging in mass copying of others' copyrighted works, and enabling subscribers to access those works via its Content-Delivery Features, TVEyes has committed direct copyright infringement.

I. TVEYES AND ITS *AMICI* MISSTATE THE LAW IN THEIR EFFORT TO JUSTIFY TVEYES' COMMERCIAL DELIVERY OF COPYRIGHTED CONTENT

A. TVEyes' Creation of a “Comprehensive Database” of Copyrighted Television and Radio Programs Constitutes “Volitional Conduct” Giving Rise to Direct Liability

As explained in detail in Fox News' brief, and more briefly *infra* at 21, TVEyes does far more than simply help its subscribers search for and identify programs of interest; TVEyes actually gives its subscribers virtually unfettered access to the copyrighted programs in its database. Straining to avoid that this is straightforward infringement, TVEyes and its *amici* argue that TVEyes' subscribers are responsible for viewing, emailing, downloading and otherwise accessing the copyrighted works, and thus that TVEyes has not engaged in

“volitional conduct” necessary to give rise to direct liability under *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (“*Cablevision*”). (See TVE Br. at 52-56; EFF Br. at 11-13).³

This is absurd. In *Cablevision* the issue was whether the defendant actually *copied* the plaintiff’s copyrighted works, versus whether it merely gave its customers the tools with which to do so. 536 F.3d at 130-32. Here, it is *undisputed* that TVEyes itself—not its subscribers—copies “television and radio content from more than 1,400 channels,” including Fox News, and that TVEyes—not its subscribers—thus “create[s] a comprehensive ... database of that content.” (TVE Br. at 6). Even assuming that *Cablevision* survives the Supreme Court’s decision in *American Broadcast Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), it is unquestionable that this constitutes volitional conduct, sufficient to give rise to direct liability. See, e.g., *Aereo*, 134 S. Ct. at 2513 (“Video-on-demand services, like photocopiers, respond automatically to user input, but they differ in one crucial respect: *They choose the content....* That selection and arrangement by the service provider constitutes a volitional act directed to specific copyrighted works and thus serves as a basis for direct liability.”) (Scalia, J., dissenting, emphasis in original); *Cablevision*, 536 F.3d at 131 (in determining whether direct liability exists, courts look at “the volitional conduct that causes the copy to be made”).

³ References to “EFF Br.” are to the Electronic Frontier Foundation & Public Knowledge’s brief as *amici curiae* supporting TVEyes.

Unable to dispute that TVEyes itself copies Fox News’ (and others’) programs, TVEyes and its *amici* argue—without citing a single case in support—that this Court should simply *disregard* this wholesale copying for purposes of the “volitional conduct” analysis, and should instead focus solely on an ostensible lack of “volition” involved when TVEyes’ customers view, download, email or otherwise access the material that TVEyes copied. (TVE Br. at 54-55, EFF Br. at 11-13).⁴ Their reasoning, such as it is, is that the initial copying constitutes “fair use for purposes of creating an electronic research database” (TVE Br. at 55), and should be analyzed completely separately from the manner and means by which TVEyes disseminates the contents of that database to subscribers. This is inconsistent with TVEyes’ and its *amici*’s repeated arguments that the Court should not “carve[] up” TVEyes’ business model (TVE Br. at 1) or analyze features of TVEyes’ system “piecemeal” (EFF Br. at 15). More importantly, it misses the point that whether TVEyes’ copying is “fair use” in the first place

⁴ The Court need not determine, for purposes of this appeal, whether TVEyes publicly performs or distributes copyrighted programs when programs are streamed or downloaded from TVEyes’ server (either of which would give rise to direct liability, 17 U.S.C. § 106), as TVEyes’ admitted selection and copying of thousands of copyrighted works more than suffices to satisfy any “volitional conduct” requirement. However, we note that, because all streams and downloads emanate from the unauthorized copies *made by TVEyes itself* (unlike in *Cablevision*), it is TVEyes, not its subscribers, that is performing and distributing the works.

depends largely on the extent to which TVEyes makes those copies available to subscribers.

In *Google Books*, this Court unambiguously stated that whether the creation of an online database constitutes a fair use depends on “the amount and substantiality of *what is thereby made accessible to [the] public*”:

While Google *makes* an unauthorized digital copy of the entire book, it does not reveal that digital copy to the public.... **Without doubt, enabling searchers to see portions of the copied texts could have determinative effect on the fair use analysis.**

804 F.3d at 221-22 (italicized emphasis in original, bolded emphasis added); *see also HathiTrust*, 755 F.3d at 97 (emphasizing that database did “not allow users to view any portion of the books they are searching” and did not “add into circulation any new, human-readable copies of any books”). *Google Books* did not remotely suggest that, so long as the initial copying was done for purposes of creating a “searchable database,” the ability of Internet users to access the copyrighted works was irrelevant to the issue of direct infringement; rather, the Court recognized that “[t]he larger the quantity of the copyrighted text the searcher can see and the more control the searcher can exercise over what part of the text she sees,” the more likely that the initial copying is not fair use. 804 F.3d at 222.

Accepting TVEyes’ argument—that, so long as there is an ostensibly “transformative” justification for the initial copying, a defendant can permit its users unrestricted access to the underlying works without facing any threat of

direct liability—would lead to absurd results. Google, under the guise of creating a search engine, could allow its users unfettered access to entire copyrighted books—a conclusion that *Google Books* expressly disavowed. (*Supra* at 7). Similar services could copy and create “searchable databases” of Hollywood motion pictures and popular musical works, without any restrictions preventing their customers from downloading the entire works, yet disclaim direct liability. This is obviously not the law.

TVEyes and its *amici* also try to confuse the issue by suggesting that the District Court improperly found TVEyes directly liable for the acts of its subscribers.⁵ The District Court did no such thing. Rather, it expressly held that TVEyes was liable for *its own copying* of Fox News’ programs, to the extent that TVEyes allowed its subscribers greater access to those programs than was necessary for its avowed fair use:

My order stated, ‘TVEyes admits also that it copies, verbatim, each of Fox News’ registered works. These concessions constitute copyright infringement unless TVEyes shows that its use is fair.’ Thus, I found that where TVEyes functions went beyond the scope of fair use, its defense failed and direct infringement existed.

⁵ *See* TVEyes Br. at 54-56 (arguing that the District Court’s finding of direct infringement should be reversed because “TVEyes cannot be directly liable for any unauthorized copies of clips from the Works made by subscribers’ use of the e-mailing, downloading, or date/time-search functions, as those copies would be entirely user-initiated....”); EFF Br. at 12 (arguing that the District Court “impermissibly attribut[ed] a *customer’s* use of copyrighted material to TVEyes”).

(Dkt. No. 183, at 2) (internal citations omitted). While the Copyright Alliance respectfully disagrees with various aspects of the District Court’s decision (particularly its holding that TVEyes’ viewing and archiving functions are fair use), the District Court was indisputably correct that, to the extent TVEyes’ functions exceed the scope of fair use, TVEyes is directly liable for its *own* copying of Fox News’ programs.

Finally, once again ignoring that TVEyes *itself* copied Fox News programs, TVEyes’ *amici* The Electronic Frontier Foundation and Public Knowledge (collectively, “EFF”) rely on inapposite case law on the separate question of *secondary liability*—which is not at issue here—to argue that TVEyes need not take steps to “police or constrain [its] users.” (EFF Br. at 24-25). But these “secondary liability” cases by, definition, concern defendants who *do not themselves reproduce a plaintiff’s copyrighted works*, but rather merely design and distribute products (such as a VCR) capable of substantial lawful uses. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005). Despite its *amici*’s efforts to characterize it as a mere “toolmaker,” TVEyes does not simply provide its customers with a device with which they can choose to record Fox News (and other) programs—TVEyes actually *records those programs itself*, and makes its recordings available to paying subscribers. *See Sony Corp.*, 464 U.S. at 449

(stating that if the VCR “were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair”). As this Court stated in *Google Books*, the extent to which those recordings are made available to the public is, “[w]ithout [a] doubt,” a critical factor in determining whether *TVEyes’ own copying* constitutes fair use. 804 F.3d at 222.

B. TVEyes Cannot Rely on the Activities of its Subscribers to Support a Fair Use Defense

While in one breath TVEyes and its *amici* argue that TVEyes cannot be liable for the conduct of its subscribers, in the next they *rely* on the conduct of those very subscribers, repeatedly arguing that subscribers’ subsequent activities, after accessing copyrighted programs through TVEyes’ database, somehow renders TVEyes’ dissemination of the programs a “fair use.” *See* TVE Br. at 36 (arguing that emailing, downloading and date/time search functions are transformative because “[t]hey facilitate the access to clips used [by subscribers] for research purposes”); EFF Br. at 18 (arguing that TVEyes’ services “further th[e] end purposes” of “criticism , research, and scholarship” by providing media critics with access to Fox News content).⁶ TVEyes has apparently misrepresented the nature

⁶ *See also* TVE Br. at 1 (arguing that TVEyes enables subscribers not just to locate, but also to “analyze clips of television broadcasts”); 26 (arguing that “[e]nabling subscribers” to e-mail and download clips constitutes fair use because subscribers ostensibly use the clips “for the purposes of research, analysis and commentary”); 28 (arguing that features are transformative because they “enable[] subscribers to fulfill purposes that differ from the original ... purposes of the broadcasts”); 29

of its subscribers—as set forth in greater detail in Fox News’ brief, TVEyes’ subscribers are primarily public relations and communications professionals, not media critics and researchers. But in any event, no one is currently challenging the use of Fox News’ content by media critics or other TVEyes subscribers. Rather, what Fox News is challenging is TVEyes’ *delivery* of its copyrighted content to those subscribers, for a fee. *See Princeton Univ. Press v. Mich. Documents Servs.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (“[T]he use to which the materials are put by the students who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not the use that the publishers are challenging.”).

TVEyes’ and its *amici*’s arguments run afoul of a universally-accepted principle of copyright law: The use that a defendant’s customers subsequently make of copyrighted content is *irrelevant* to the defendant’s fair use defense. That what some TVEyes’ subscribers do with Fox News’ (and others’) content *may* be a fair use does *not* entitle TVEyes to deliver unlicensed copyrighted programs to its subscribers, for a fee. This principle has been recognized in numerous circuits, across various forms of media. By way of example only:

(arguing that email function “enables subscribers to collaborate with others ... for the same transformative ‘research, criticism and comment’ purposes”); 32 (“Subscribers download clips ... to engage in ‘research, criticism and comment.’”).

- In *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), defendant argued that his service, which enabled subscribers to listen to remote radio broadcasts over the telephone, was transformative because the subscribers used the broadcast for informational, rather than entertainment, purposes. The Second Circuit *rejected* this argument, holding that “it is [defendant’s] own retransmission of the broadcasts, *not the acts of his end-users*, that is at issue here and all [defendant] does is sell access to unaltered radio broadcasts.” *Id.* at 108 (emphasis added).
- In *Los Angeles News Serv. v. Reuters Television Int’l Ltd.*, 149 F.3d 987 (9th Cir. 1998), the Ninth Circuit held that defendant infringed plaintiff’s copyrights by distributing copyrighted news material to other news reporting organizations in exchange for a fee, rejecting defendant’s argument that “if a broadcaster’s use of the works for news reporting may constitute fair use, then it is obvious that the transmission of such Works to a broadcaster for such purpose cannot ... be deemed an infringement.” *Id.* at 994 (quotations omitted). To the contrary, the Court held that “the question of whether defendants’ copying and transmission of the works constitutes fair use *is distinct from whether their subscribers’ broadcasts of the works are fair use.*” *Id.* (emphasis added).
- Similarly, in *Los Angeles News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992), the Ninth Circuit rejected defendants’ claim that its news monitoring and clipping service was protected by the doctrine of fair use because clients used its recordings of copyrighted news segments for “research, scholarship and private study,” holding that “the ultimate use to which the customer puts the tape is irrelevant.” *Id.* at 797.
- In numerous cases concerning the reproduction of excerpts from copyrighted academic works in “coursepacks” used by college students, courts have repeatedly refused to allow defendants, who were engaged in commercial operations, “to stand in the shoes of their customers,” students and professors, in claiming that their making of multiple copies of scholarly works was for nonprofit educational purposes. *Princeton Univ. Press*, 99 F.3d at 1386 (“It is true that the use to which the materials are put by the students

who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not the use that the publishers are challenging.”); *see also Blackwell Publ’g, Inc. v. Excel Research Grp., LLC*, 661 F. Supp. 2d 786, 793 (E.D. Mich. 2009) (same); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) (“The use of the ... packets, in the hands of the students, was no doubt educational. However, the use in the hands of Kinko’s employees is commercial.”).

- In *Fox Broad. Co. v. Dish Network*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012), *aff’d*, 723 F.3d 1067 (9th Cir. 2013), the Court held that, while various features offered by Dish Network (“Dish”) that allowed its subscribers to record and skip commercials on all primetime programming on the four major broadcast networks did not likely constitute direct or vicarious copyright infringement (as, according to the Court, the end users, not Dish, were responsible for creating the purportedly infringing copies, and time-shifting by subscribers constituted fair use), *id.* at 1098-1102, Dish likely infringed plaintiffs’ copyrights by creating its own “quality assurance” copies to ensure that its commercial-skipping product was functioning correctly, *id.* at 1102-1106. Notably, in so ruling the Court found that “[t]he fact that consumers ultimately use AutoHop ... for private home use, a fair use ... does not render [Dish’s] intermediate copies themselves a fair use as well.” *Id.* at 1106. The Court subsequently granted summary judgment to plaintiffs on this issue. *See Fox Broad. Co. v. Dish Network*, Case No. CV12-04529 DMG (SHx), 2015 U.S. Dist. LEXIS 54763, at *80 (C.D. Cal. Jan. 20, 2015).

While *amici* respectfully disagree with various aspects of the *Dish Network* ruling, it is telling that the Court, even while ruling in Dish’s favor on various issues, recognized that the supposedly “fair use” conduct of subscribers did not excuse Dish’s own copying.

- And in *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), the Court held that defendant infringed plaintiffs’ copyrights by copying and streaming popular music recordings to customers who had previously purchased their own *bona fide* copies of the recordings, rejecting defendants’ argument that defendants provided “a transformative ‘space shift’ by which

subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves.” *Id.* at 351.

The lesson from these, and other, cases is clear—even if what an end user does with a copyrighted work may constitute fair use, the law does not permit a defendant to provide someone else’s copyrighted work to the end-user as part of a commercial service.

Neither TVEyes nor its *amici* can cite a single case refuting this principle, or otherwise stating that the commercial delivery of copyrighted content to consumers can retroactively be rendered “fair use” based on the subsequent activities of the recipients of that content. Instead, they either largely ignore the issue (in the case of TVEyes) or attempt to misconstrue inapposite cases (in the case of its *amici*).

For example, EFF claims that “[t]his Court and others have repeatedly held that the intermediate copying ... necessary to construct tools that *enable* fair uses are transformative and themselves protected by fair use” (EFF Br. at 13-14) (emphasis added), but the cited cases say nothing of the sort. Rather, in each of the cited cases, the *defendants’ own use* was determined to be transformative—none of the cases suggest that it is enough for a defendant to “enable” the transformative uses of others.

The majority of the cases cited by EFF involve search engines and searchable book databases. In each of these cases, the court found that the defendant’s creation of a searchable index to help *identify* copyrighted works was

itself transformative and imbued a work with different meaning; none of the cases relied on any subsequent downstream use that Internet users made of the copyrighted material after identifying a work that was of interest. *See HathiTrust*, 755 F.3d at 97 (“[T]he creation of a full-text searchable database is a quintessentially transformative use”); *Google Books*, 804 F.3d at 217 (“Snippet view adds important value to the basic transformative search function....”).⁷ These cases do not remotely suggest that the proprietor of such a database is free to disseminate unlicensed copies of works included in the database to paying customers, so long as the customers might subsequently make “fair use” of the materials. To the contrary, an essential element of these cases was that the databases contained significant restrictions *preventing* end-users from obtaining unauthorized copies of the underlying works, limiting the utility of the databases to transformative search and identification functions. *See Google Books*, 804 F.3d at 222 (a “variety of limitations” prevent users from using “snippet” feature for other than search and identification purposes); *HathiTrust*, 755 F.3d at 97 (digital library did “not allow users to view any portion of the books they are searching” and did not “add into circulation any new, human-readable copies of any books”).

⁷ *See also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (a search engine “transforms the image into a pointer directing a user to a source of information”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (defendants’ “use of the images serves a different function than [plaintiff’s] use—improving access to information on the internet versus artistic impression”).

Similarly, in the remaining cases cited by EFF, the copying was done by the *very party that engaged in the fair use*—in none of these cases did the defendants make their “intermediate copies” available to third parties, and then rely on those third parties’ activities to establish fair use. In both *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 598-99, 602 (9th Cir. 2000) and *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1514-15, 1522 (9th Cir. 1992) (cited in EFF Br. at 14), the defendants’ intermediate copying of copyrighted software was done so that the *defendants themselves* could access unprotected elements of the software—the defendants did not make the copyrighted software available to any third parties. And in *A.V. v. iParadigms*, 562 F.3d 630 (4th Cir. 2009), defendants’ mass digitization of students’ essays was to create a transformative service designed to detect plagiarism—the underlying papers were not made available to subscribers. *Id.* at 641 (“iParadigms did not publicly disseminate or display plaintiffs’ works and did not send them to any third party”).

TVEyes, for its part, does not cite a single case in support of its repeated proclamations that the activities of its subscribers can render TVEyes’ provision of copyrighted content a fair use. Instead, it circuitously argues, in a section of its brief addressing its “emailing” function, that a “potential for abuse” by its subscribers does not render TVEyes’ services “unfair.” (TVE Br. at 30-31). TVEyes has it backwards—the activities of its subscribers, whether permissible or

not, are irrelevant. It is TVEyes own conduct, in copying thousands of copyrighted programs and making them freely available to its subscribers, that constitutes copyright infringement, regardless of what use the subscribers subsequently make of those programs.⁸

II. TVEyes' Dissemination of Copyrighted Content to its Subscribers Does Not Remotely Qualify as "Fair Use"

A. TVEyes' Content-Delivery Features Do Not Transform the Content in Any Way

As the cases cited above demonstrate, what TVEyes is doing with the copyrighted works must *itself* be transformative; TVEyes cannot rely on the supposedly transformative acts of its subscribers.

But TVEyes' Content-Delivery Features are not themselves transformative in any way. Through these services, TVEyes simply allows its subscribers to access high-definition copies of Fox News', and others', copyrighted programs, which the subscribers can view, download and further distribute. *See Infinity*

⁸ TVEyes' reliance on *Google Books* for the proposition that a defendant may distribute copies of a work to third parties despite the "potential for abuse" (TVE Br. at 31) is unavailing. The relevant section of *Google Books* involved a fundamentally different scenario than that at issue here; Google created for participating libraries a digital copy of a book that the library *already owned*, providing the library with digital search functionality. 804 F.3d at 228-29. Here, TVEyes is not merely adding functionality to recordings of television programs that its subscribers already possess; it is providing those recordings to subscribers in the first instance. Had Google provided libraries with digital copies of books that the libraries did not already possess, the result in that case undoubtedly would have been quite different.

Broadcast Corp., 150 F.3d at 108 (no fair use where defendants’ “retransmissions leave the character of the original broadcast unchanged.”). TVEyes does not comment on, explain, or edit the clips that it delivers to its subscribers. *See Reuters Television*, 149 F.3d at 993 (no fair use where defendant “copies footage and transmits it to news reporting organizations” but “does not explain the footage, edit the content of the footage, or include editorial comment.”). That what the subscribers subsequently do with the delivered content may (or may not) be “fair” does not render TVEyes’ bare delivery of unaltered, copyrighted content “transformative.”

While this Court held in *Google Books* that, in limited circumstances, the creation of a “search engine” for the purpose of identifying books that contain a term of interest may be a transformative fair use, *see* 804 F.3d at 216-17, TVEyes’ service goes well beyond that. Rather than simply assist subscribers in searching for and identifying clips that may be of interest, TVEyes actually provides its subscribers with the clips themselves. Neither *Google Books* nor *HathiTrust*, which TVEyes and its *amici* cite throughout their briefs, suggest that the provision of copyrighted works in this manner is protected as fair use. To the contrary, as explained *supra* at 7 and 15, a critical aspect of those decisions was that the services in question *prevented* end-users from obtaining copies of the works. If a user of either *HathiTrust*’s or *Google Book*’s database were to identify a book that

of interest, the user would have to obtain an authorized copy if she wished to actually read or utilize the book for any further purposes (including for purposes of research, criticism or comment). Here, by contrast, once a TVEyes subscriber identifies television content of interest, TVEyes actually *provides the subscriber with that content*.

That the search function at issue in *Google Books* allowed searchers to read “snippets from the book searched” does not support TVEyes’ defense. The “tiny snippets” at issue in *Google Books* were “designed to show the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author’s copyright interests),” and thus aided in the “highly transformative purpose of identifying books of interest” *Id.* at 217-18. If a searcher wanted to do anything more than determine if a book was of interest, snippet view would not help her; she would have to obtain a full copy of the book, from a source other than Google.⁹ There is no resemblance between *Google Book’s* tiny “snippets” and TVEyes’ allowing subscribers to view and otherwise access lengthy, high-

⁹ TVEyes confusingly argues that the *Google Books* Court did not analyze how “integral” Google’s snippet function was to the underlying search function. (TVE Br. at 25). This is untrue. *Google Books* expressly found “snippet view” to be permissible precisely *because* it “add[ed] important value to the basic transformative search function” 804 F.3d at 217. Absent this relationship to the underlying transformative search function, the “snippets” would not have been transformative in any way.

definition television clips. TVEyes does not even pretend that the purpose of these clips is simply to help a subscriber “evaluate whether the [program] falls within the scope of her interest,” *Google Books*, 804 F.3d at 218, but instead argues that it is free to disseminate copyrighted content to its subscribers because *its subscribers* supposedly use that content for purposes of research, criticism and comment. (*See, e.g.,* TVE Br. at 28 (“All of TVEyes’ functions are transformative ... for each of them *enables subscribers* to fulfill purposes that differ from the original news and entertainment purposes of the broadcasts.”) (emphasis added)). As explained *supra*, this is incorrect.

B. The Amount and Substantiality of the Copyrighted Content that TVEyes Makes Available to Subscribers Weighs Against a Finding of Fair Use

The District Court held that copying all of Fox News’ television content was necessary to the transformative purpose of creating a searchable database. (Dkt. No. 60 (“Sept. 9 Op.”) at 21-22). However, the amount of content that TVEyes may *copy* to create its database is a separate question from the amount of content that TVEyes may then *make available to its subscribers*. As this Court held in *Google Books*, it is the latter amount that is relevant to the fair use analysis. 804 F.3d at 222 (“What matters ... is not so much ‘the amount and substantiality of the portion used’ *in making a copy*, but rather the amount and substantiality of *what is*

thereby made accessible to a public for which it may serve as a competing substitute.”) (emphasis in original).

The amount of content that TVEyes makes available to its subscribers is astounding. Subscribers are permitted to view, save, archive, edit and download to their computers an *unlimited* number of clips, in high-definition. (Sept. 9 Op. at 4-6). TVEyes purports to limit individual clips to ten minutes, but, as explained in Fox News’ brief, there is nothing to prevent subscribers from downloading consecutive clips seriatim. In any case, ten minutes is a substantial portion of any regular television program, and is longer than the average length of a television news segment. TVEyes’ purported desire to create a transformative “search engine” does not justify its delivery of such unlimited, lengthy and high-quality recordings of copyrighted works to its subscribers.

In *Google Books*, this Court observed that, as a result of a series of obstacles and restrictions created by Google, plaintiff’s counsel were never able to access so much as 16% of the text of any book (despite weeks of effort), and even then the snippets collected were “not sequential but scattered randomly throughout the book.” 804 F.3d at 222. “If snippet view could be used to reveal a coherent block amounting to 16% of a book,” this Court emphasized, “that would raise a very different question....” *Id.* at 223. Here, even a single 10 minute clip on TVEyes constitutes a coherent block comprising almost 50% of a half-hour television

program (not including commercials), to say nothing of the fact a subscriber can use multiple clips to view an entire program, with ease. Under this Court's precedent, there is no question that the amount of content that TVEyes makes available to its subscribers weighs, strongly, against a finding of fair use.

Unable to refute this, TVEyes instead, once again, attempts to rely upon its *subscribers'* conduct, arguing that most (but not all) of the specific works at issue were viewed for less than one minute. (TVE Br. at 40-41). However, this Court has expressly rejected such reasoning, holding that where, as here, a defendant provides access to copyrighted works to multiple subscribers, it is the *potential* scope of retransmission that matters:

[T]he *potential* scope of retransmission is more relevant than evidence of actual retransmission by Dial-Up users thus far. Dial-Up permits essentially unlimited access to radio broadcasts in the cities in which it has receivers and there is thus the potential for retransmission of entire copyrighted programs....

Infinity Broadcast Corp., 150 F.3d at 109-10 (emphasis in original).

In any case, the determination of whether TVEyes' service is protected by the doctrine of fair use will have consequences well beyond the parties and specific works at issue in this litigation. TVEyes' services are not limited to Fox News, but rather concern "all content broadcast by more than 1,400 television and radio stations" (Sept. 9 Op. at 1), including significant content created and owned by Copyright Alliance members. TVEyes' services cannot be deemed to constitute a

“fair use,” leaving TVEyes free to disseminate the copyrighted content of Fox News and other creators in the future, just because subscribers do not always take full advantage of the copyrighted material that TVEyes provides. The Second Circuit has expressly held as much.

C. The Nature of the Copyrighted Works, and the Effect of TVEyes’ Conduct on the Potential Markets for the Works, Also Weigh Against a Finding of Fair Use

There is no need to significantly supplement Fox News’ extensive briefing with respect to the remaining fair use factors. With respect to the “nature of the copyrighted work,” *amici* note that, while Fox News’ news programs are certainly creative and entitled to significant copyright protection, these are not the only programs that TVEyes copies and makes available to subscribers. TVEyes records all content broadcast by more than *1,400* television and radio stations, including dramatic and fictional content created and owned by Copyright Alliance members.

Similarly, we do not intend to restate Fox News’ extensive arguments concerning the real and significant harm that TVEyes’ conduct causes to Fox News’ derivative markets, including the markets for online and digital redistribution of television content and the sale and licensing of video clips. Again, we merely note that TVEyes’ services impact thousands of channels in addition to Fox News, including channels operated by, and programs created by, Copyright Alliance members. Like Fox News, Copyright Alliance members are

actively exploiting these growing markets. In addition to participating in the market for online and digital distribution, like Fox News, many Copyright Alliance members earn significant revenues from licensing television and other content, often through clearinghouses and licensed media monitoring and evaluation (MME) companies that, unlike TVEyes, actually compensate copyright-owners for the use of their works. And like Fox News, Copyright Alliance members will be significantly harmed if entities like TVEyes are permitted to direct potential viewers away from authorized sources of content.

One aspect of the District Court's opinion, however, is particularly troubling, and bears special mention. The District Court ruled that Fox News had not suffered significant "market harm" with respect to derivative markets for video clips of copyrighted content, because its revenue from derivative sources between July 1, 2012 and June 30, 2013 was a fraction of its overall revenue. (Sept. 9 Op. at 25). The Copyright Alliance strongly disagrees that the fact that a plaintiff earns significant revenues from other markets, in addition to those being usurped by the infringer, should weigh in favor of a finding of fair use.

Further, it is indisputable that derivative markets for television content are growing at an exponential rate—as explained in detail in Fox News' brief, because of changes in the television industry, television channels are monetizing their content in increasingly extensive and diverse ways. Just because derivative

markets may have accounted for a relatively small percentage of Fox News' total revenues at the time of the District Court's opinion does not mean that this will be the case tomorrow. TVEyes should not be given the imprimatur of lawfulness merely because it entered the picture at a critical early juncture, before digital and other alternative forms of distribution have fully overtaken traditional television models.

III. A Ruling in TVEyes' Favor Will Have a Destructive Effect on Content Owners Well Beyond the Present Dispute

Finally, while this action arises in the context of the television industry, it is important to note that a ruling in TVEyes' favor will have consequences across the entire spectrum of copyrighted works. Proprietors of similar databases may, for example, allow subscribers to freely stream copyrighted musical works (without compensating copyright owners), under the pretense that they are simply helping subscribers "identify" songs of interest. There will be no need for Google to impose extensive obstacles and restrictions preventing users from viewing more than a "snippet" of a book in its database, if it can simply make entire chapters available and trust that its users will engage in "fair use." If TVEyes is permitted to disseminate lengthy, high-definition television clips from its database, other "search engines" may choose to display high-quality photographic images, instead of smaller, low-quality images that merely serve to guide users to authorized websites on which the full image appears. *See Kelly v. Arriba Soft Corp.*, 336 F.3d

811, 815, 821 (9th Cir. 2003) (emphasizing that search engine displayed only “smaller, lower-resolution thumbnails of the images”).

A ruling in TVEyes’ favor will also frustrate and interfere with the development of legitimate, authorized markets for the licensing and distribution of television content and other copyrighted works. History has shown that when there is a need or demand for certain content, a market-based solution that is fair to both users and rights-holders will emerge, often in the form of a clearinghouse that pays royalties to copyright owners, such as BMI and ASCAP with respect to music performance rights, *see, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 5 (1979), or Copyright Clearance Center with respect to academic and other works (including movie clips), *see, e.g., American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 7 (S.D.N.Y. 1992), *aff’d*, 37 F.3d 881 (2d Cir. 1994). Similarly, agencies like Getty Images provide a valuable service by providing the public access to a massive amount of—properly licensed—photographs, illustrations and film footage.¹⁰ Many of the Copyright Alliance’s members operate such clearinghouses and agencies, or rely on them for licensing revenues. If companies such as TVEyes are permitted to disseminate copyrighted content to third parties, under the guise of “fair use,” legitimate clearinghouses and licensed MME companies that actually compensate copyright-owners for the use of their

¹⁰ *See* <http://press.gettyimages.com/about-us/>

works will be unable to compete with companies that take such works for free. *See Princeton Univ. Press*, 99 F.3d at 1384, 1386; *Associated Press v. Meltwater U.S. Holdings*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013).

CONCLUSION

For the foregoing reasons, the Copyright Alliance respectfully submits that this Court should hold that, by copying Fox News' (and others') copyrighted works, and enabling subscribers to access those works via its Content-Delivery Features, TVEyes has committed direct copyright infringement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 14,000 words of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman style.

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