15-3885(L)

15-3886(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FOX NEWS NETWORK, LLC,

Plaintiff-Appellee-Cross-Appellant,

—against—

TVEYES, INC.,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* CABLE NEWS NETWORK, INC., GRAY TELEVISION GROUP, INC., HEARST TELEVISION, INC., AND ITV AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENTS

Cable News Network, Inc. is a wholly owned subsidiary of Turner Broadcasting System, Inc., which itself is a wholly owned subsidiary of Time Warner Inc., a publicly traded corporation.

Gray Television Group, Inc. is a Delaware corporation that is 100% owned by WVLT-TV, Inc., a Georgia corporation. WVLT-TV, Inc. is 100% owned by Gray Television, Inc., a Georgia corporation. Gray Television, Inc. is a publicly traded corporation and shares of its stock are traded on the New York Stock Exchange.

Hearst Television, Inc. is privately held and no publicly held corporation owns 10% or more of Hearst Television, Inc.

ITV America is owned by ITV US Holdings, Inc., which is a Delaware corporation not publicly traded in the United States. No publicly held corporation owns 10% or more of ITV America. The ultimate corporate parent of ITV US Holdings, Inc. is ITV plc, which is publicly traded on the London Stock Exchange.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae create and distribute high-quality news and entertainment content. *Amici* submit this brief in support of Fox News' appeal from the district court's September 9, 2014 decision[2] and partial appeal from the district court's August 25, 2015 decision,[3] and in support of Fox News' opposition to TVEyes' partial appeal from the district court's August 25, 2015 decision. *Amici* submit this brief to emphasize that the case at bar is not just about Fox News. The lower court's decision affects all creators and publishers of broadcast and digital content, including *amici*, who depend on licensing and advertising sales to support their continuing ability to produce high-quality news and entertainment content.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is a highly trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news web sites in the United

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[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. All parties in this matter have consented to the filing of this brief.

[2] *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (hereinafter "*TVEyes I*").

[3] *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325 (S.D.N.Y. 2015) (hereinafter "*TVEyes II*").

States; CNN Newssource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

Gray Television Group, Inc. owns 92 television stations in 50 small and mid-sized markets that collectively broadcast approximately 180 program streams including 35 channels affiliated with the CBS Network, 26 channels affiliated with the NBC Network, 19 channels affiliated with the ABC Network and 13 channels affiliated with the FOX Network. Gray owns number-one or number-two ranked television station operations in essentially all of its markets, which collectively cover approximately 9.4 percent of total United States television households.

Hearst Television, Inc. owns 30 television stations, which reach a combined 18 percent of U.S. viewers and is part of Hearst Corporation, one of the nation's largest diversified media and information companies.

ITV America is the largest independent non-scripted television producer in the United States, producing hundreds of hours of successful programming across multiple networks. It includes ITV Entertainment, the flagship production arm of ITV Studios in the U.S., and the acquired top production companies of Gurney Productions, High Noon Entertainment, Thinkfactory Media, DIGA and Leftfield Entertainment.

SUMMARY OF ARGUMENT

It is no secret that the media industry has come under enormous financial pressure in the digital age. Producing high-quality reporting and programming is an expensive endeavor, and creators are dependent upon ever-diminishing ad and licensing revenues in order to fund their continued ability to cover matters of public interest. As people consume more and more news and entertainment via mobile devices and the Internet, the market for streaming audio and video has become a key source of revenue. Indeed, today's consumers are increasingly drawn to shorter, topical video clips on their computers and mobile devices rather than full-length programming.

TVEyes unlawfully misappropriates that market for itself. First, it charges hefty subscription fees to its customers in exchange for distributing massive numbers of full clips of news stories it has neither created nor licensed in the present case, and allowing them to watch live-streams of unlicensed television content in real-time. Second, it has functions enabling its users to download, archive and re-distribute lengthy high-resolution segments of unlicensed television content, with no restrictions on downstream use. Clips shared via TVEyes do not direct users back to an original site, preventing the copyright owner from monetizing the content either through direct advertising, increased traffic metrics, or licensing. Instead, TVEyes captures 100% of its high subscription revenues for itself, with no outlay for the valuable content that it sells.

The business model employed by TVEyes is a familiar one: it is a clipping service aimed at businesses. Decades of precedent in this Circuit and elsewhere have squarely held that a clipping service is neither a transformative nor a fair use of the content that it distributes; rather, the clipping service must license the content it distributes to customers from the rightful copyright holder. [4] Indeed, in a case directly analogous to this one – involving a commercial subscription-based clipping service that, like TVEyes, redistributed copyrighted content on a massive scale under the guise of fair use – Judge Denise L. Cote observed that labeling such a business model as "fair use" would eviscerate the ability of media organizations to fund their important public work:

> Investigating and writing about newsworthy events occurring around the globe is an expensive undertaking and enforcement of the copyright law permits [the Associated Press] to earn the revenue that underwrites that work. Permitting Meltwater to take the fruit of AP's labor for its own profit, without compensating AP, injures AP's ability to perform this essential function in a democracy.

[4] *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 199 (3d Cir. 2003) (clip previews of movies); *Nihon Keizai Shimbun v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (abstracts of news articles); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (radio monitoring service); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 797, 799 (9th Cir. 1992) (video news clipping service.); *Pacific & Southern Co., Inc. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir.1984), *cert. denied*, 471 U.S. 1004 (1985) (TV news clipping service).

Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 553 (S.D.N.Y. 2013) (hereinafter "*Meltwater*").

Like Meltwater before it, TVEyes tries to avoid the clear precedent of clipping-service cases by cloaking itself in the mantle of Google and other online search engines, describing itself as a "research tool that transforms television broadcasts into an online database that can be searched by subscribers for research purposes." Def. App. Br. at 1. But as the Court noted in *Meltwater*, "adopting technology used by search engines does not by itself make one a search engine" for purposes of a fair-use argument, and "use of an algorithm to crawl over and scrape content … is surely not enough to qualify as a search engine engaged in transformative work." *Meltwater*, 931 F. Supp. 2d at 555, 561. In form and function, TVEyes is highly distinguishable from the free, public-facing services offered by the HathiTrust Digital Library and Google Books that were found to be fair uses by the Second Circuit – not least of all because these two services, unlike TVEyes, (a) significantly limit the amount of copyrighted content served in response to a query and (b) direct users to the original work. See *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (hereinafter "*HathiTrust*"); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (hereinafter "*Google Books*"). Swapping humans for algorithms and paper copies of clips for digital delivery does not change the fundamental nature of TVEyes: it is a clipping service that provides full-length, high-resolution TV clips to its corporate users for a flat subscription fee, without compensating the creators of that content.

TVEyes' "transformative use" argument centers on two related points that are deeply flawed. First, it argues that it provides a "useful" service. But that has never been the test of the scope of copyright protection – indeed, such a test would eviscerate copyright protection and the incentives to create valuable works. As this Court made adamantly clear in *HathiTrust*, "[a]dded value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it." 755 F.3d at 96.

Second, TVEyes repeatedly argues that its use is transformative because Fox does not post many of its television shows online or otherwise make them widely available after airing without conditions. This argument, adopted by the court below, conflicts with a central tenet of copyright law. As the exclusive owner of the rights set forth in Section 106 of the Copyright Act, it is the copyright holder's prerogative to decide whether, when and in what media to distribute a work. In today's world, piracy and rampant infringement constitute significant threats for the television industry, as with other media industries. This Court should protect the right of every television network or other copyright holder to make its own determinations on whether to take the risks inherent in making its works readily available following their airing. TVEyes usurps that decision from the copyright holders, including by permitting broad, unlimited re-distribution of clips.

In sum, it is clear that the service offered by TVEyes goes far beyond the pale of "fair use" as formulated by this Court and others. For the reasons set forth herein, *amici* therefore urge this Court to deny TVEyes' appeal and to grant Fox News' cross-appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE MAJORITY OF TV EYES' FUNCTIONS TO BE FAIR USE

A. This Case is Highly Distinguishable from Prior Decisions Concerning Online Search Engines

Although TVEyes seeks to portray itself as "Google Books for television," this case is starkly different than *Google Books*, *HathiTrust* and earlier seminal cases such as *Kelly v. Arriba Soft* and *Perfect 10*. In each of these cases, the defendant provided information enabling the user to *locate* the original work but did not provide the user with the complete, full-resolution work itself. And critically, the Ninth Circuit's reasoning in *Kelly* and *Perfect 10* turned on the fact that the low-resolution thumbnails served as an electronic "pointer" directing a user to the original website. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *see also, e.g., Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821-22 (9th Cir. 2002) (finding "visual search engine" to be a fair use where it displayed only "lower-resolution thumbnails" that would "guide users to [the copyright owner]'s web site rather than away from it"). Likewise, in *HathiTrust*, the card catalog-like index merely provided the user with the name and title of the book, along with the page numbers where a search term could be found and links to find the work in a library – but did not display *any* text from the underlying work absent authorization from the copyright holder. *HathiTrust*, 755 F.3d at 91. And in the *Google Books* case, Google provided brief snippets, along with links directing the user to sites offering the book for sale, as well as libraries where copies could be found. *Google Books*, 804 F.3d at 208-09.

The district court's initial opinion below in this case represents a far greater – and far more dangerous – extension of the fair use doctrine and should be reversed. The commercial services offered by TVEyes do not fit the mold of a classic "search engine." Unlike Google Search, Microsoft Bing, and the HathiTrust digital index, TVEyes is not a free, consumer-facing index that helps the public locate and navigate to the original TV clips. Instead, it is an expensive, business-facing, PR-focused clipping service that not only allows companies to search for TV clips on certain keywords, but serves up *the full clips themselves* – all without paying the content creator. It is a business built on the use of another's content without compensation, without any justification that it is acting as an electronic pointer to the original work.

While TVEyes tries to cloak itself in the mantle of new technology, it is in fact a very old use – a commercial, for-profit clipping service. Clipping services have never been – and still are not – a transformative use or a fair use. *See supra* at n.4 (collecting cases). By providing the full clip, TVEyes "merely repackages or republishes the original." *Infinity Broadcasting*, 150 F.3d at 108. It provides no commentary, and it copies the content in order to make money directly from the undiluted use of the copyrighted material; that is the central feature of its business model. Its high-priced subscriptions are available "only to businesses and not to the general public," and it markets itself to PR and communications professionals as an alternative to "the traditional clipping services," boasting that it allows subscribers to download, share, and post "unlimited" numbers of television clips, as well as to "watch live-streams of everything we are recording." *TVEyes I*, 43 F. Supp. 3d at 385. Accordingly, like Meltwater, TVEyes is an "expensive subscription service that markets itself as a news clipping service, not as a publicly available tool to improve access to content across the Internet." *Meltwater*, 931 F. Supp. 2d at 554.

TVEyes also declines to employ any of the technological safeguards used by Google Books, HathiTrust, and other search services to limit use of copyrighted content only to that which is necessary to serve its information-location function. Unlike the index in *HathiTrust*, TVEyes does not limit itself to information about *where* certain terms appear in a television show, along with information about how to obtain those clips legally. TVEyes also contains no technological limitation to prevent users from simply querying successive segments by date and time to obtain – and watch – entire television programs. The search platform in *Google Books*, in contrast, shielded a certain portion of displayed content to prevent users from ever obtaining the full text of a copyrighted work through successive queries.

Furthermore, unlike the image-search tools at issue in *Perfect 10* and *Kelly*, TVEyes does not serve up only low-resolution thumbnails or even snippets that act as a "pointer" to the original material in response to search queries; instead, it provides "unlimited" high-resolution, full-length clips of any given television coverage, which can be as long as 10 minutes in length. TVEyes also touts the ability of users to "watch live TV, 24/7" – allowing its subscribers to watch live streams of television channels in real time, without any requirement that these subscribers have a cable or satellite subscription before watching this copyrighted content through TVEyes. If they miss a live stream, users can simply query TVEyes' database – which includes entire television programs recorded by TVEyes without authorization, which users can view in 10-minute segments.

Making matters worse, the clips are delivered from an archive of copies created and maintained by TVEyes – meaning that when a TVEyes user displays or disseminates a clip obtained through the service, the content owner does not even receive the benefit of valuable ad revenue or even usage metrics that would be captured by directing the user to the original video segment. Usage by TVEyes subscribers thus effectively occurs in a black box, with content owners cut off from monetizing or even monitoring downstream use of their copyrighted content.

B. TVEyes' Transformative Use Argument Fails for Several Additional Reasons

There are several other critical flaws in TVEyes' transformative use argument. First, TVEyes attempts to deflect criticism of its infringement-enabling business model by pointing to potential fair use by *downstream users* of clips obtained through TVEyes – such as commentary, news reporting, criticism, and national-security analysis. But while, for example, an academic's use of clips for research purposes may be protected by fair use, that does not inoculate the entire business model of the clipping service – primarily serving PR purposes – under the fair use doctrine.

On the contrary, a commercial redistributor of content cannot stand in the shoes of its users for purposes of the transformative-use test. As the Second Circuit has ruled: "[I]t is [the defendant's] own retransmission of the broadcasts, not the acts of his end-users, that is at issue" in the fair-use analysis – and where, as here, "all [the defendant] does is sell access to unaltered [television] broadcasts," there is no transformative use. *Infinity Broad. Corp.*, 150 F.3d at 108. *See also Princeton Univ. Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1389 (6th Cir.

1996) (courts have "properly rejected attempts by for-profit users to stand in the shoes of their customers") (citing W. Patry, *The Fair Use Privilege in* Copyright Law, 420 n.34 (1985)).

Second, TVEyes' argument that its use is transformative because its users view the clips for different purposes than Plaintiff's customary audience is also off-base for another reason. As with other networks, many Fox viewers view the Fox news shows not for the purpose of obtaining hard news – which in today's world can be obtained from numerous fast-breaking headline services – but for far broader purposes, including monitoring how an issue is being portrayed by Fox. Many public officials, Washington staffers, journalists, and business people watch Fox's shows on television to see Fox's slant on or coverage of an issue, in order to gauge and react in some fashion to that depiction. In short, TVEyes creates a false, artificial distinction between the alleged purposes of its users and those of Fox's television viewers.

Finally, this Court should reject TVEyes' argument that its use is transformative because Fox does not post many of its television news programs online or otherwise make them widely available after airing without conditions. As the exclusive owner of the rights set forth in Section 106 of the Copyright Act, it is the copyright holder's prerogative to decide whether, when and in what media to distribute a work. As the U.S. Supreme Court stated in *Stewart v. Abend*, 495

U.S. 207, 228-29 (1990), "[N]othing in the copyright statutes would prevent an author from hoarding all of his works during the term of copyright. In fact, this Court has held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work." This control vested by the Copyright Act in the copyright holder is all the more important in the digital age, where piracy and infringement of content is rampant. Each media entity must have the right to make its own assessments of the relative risks and merits of any given form of distribution or exploitation. Carried to its logical conclusion, TVEyes' argument would mean that movie studios, for example, would be required to make their movies available on DVD or through streaming at the time of their theatrical release. In sum, TVEyes' argument that its use is transformative, and hence a fair use, should be rejected.

C. TVEyes Causes Market Harm to Content Providers

The "clipping service" market is a traditional market, so TVEyes' unlicensed usurpation of that market causes market harm. Content providers of all stripes have long licensed their works to clipping services. For example, *amicus* Gray Television Group for many years has had news content-licensing agreements in place with news aggregators such as Burrelles-Luce and Critical Mention (http://monitor.criticalmention.com/media-monitoring/) – as well as TVEyes.

TVEyes itself licenses certain content, including video clips, from many media companies, including Bloomberg. *See* Fox News Network, LLC's Rule 51.6 Statement of Undisputed Facts in Support of Its Motion for Summary Judgment, at ¶¶ 238–247, Sept. 2, 2014 (ECF No. 42). Yet it chooses not to compensate the vast majority of similarly-situated companies, like Fox News, whose content it copies and delivers to subscribers. By refusing to license such content for its own clipping service, TVEyes is plainly attempting to "profit from the exploitation of the copyrighted material without paying the customary price." *Harper & Row Publishers, Inc. v. Nation Enterp.*, 471 U.S. 539, 562 (1985). As this Court has recognized, "[t]he fair use doctrine is not a license for corporate theft." *Iowa State Univ. Research Found., Inc. v. Am. Broad. Co., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980).

The market harm stemming from TVEyes' redistribution is not solely limited to direct uncollected / unpaid licensing fees from TVEyes itself. Unlike segments available for viewing on a network's website or its company-branded YouTube page, segments downloaded from TVEyes do not provide analytics to the content owner about the number of views or shares – vital currency for digital publishers who carefully track usage of content in order to set advertising rates. Nor can the content owner derive revenue from advertising or otherwise benefit from the public display of its copyrighted content when it is downloaded through

TVEyes. Accordingly, by diverting viewers from live telecasts, DVR and on-demand viewing, and segments made available by producers and their licensees online or through DVD sales, TVEyes prevents content owners from recuperating through advertising, fees, and/or valuable viewership metrics the significant expenses invested to produce that content.

In its appellate brief, TVEyes contends that market harm must be "significant" in order for this factor to weigh against fair use, drawing upon language in this Court's decision in *Google Books* concluding that the fourth factor favored fair use there because Google's actions did not "deprive the rights holder of significant revenues." *Google Books*, 804 F.3d at 223. As construed by TVEyes, this elevated bar inappropriately places the burden on the copyright holder to show harm to an existing, and "significant," revenue stream and is at odds with Supreme Court precedent. While the Supreme Court stated in *Harper & Row v. Nation Enterprises* that fair uses are those "which do[] not materially impair the marketability of a work," it did not require the loss of a significant revenue stream. To the contrary, the Supreme Court emphasized that "a use that supplants *any part* of the normal market for a copyrighted work would ordinarily be considered an infringement." 471 U.S. at 566, 568 (emphasis added). The Court also made clear that "to negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work." *Id.* at 568 (emphasis in original) (citation omitted).

In applying this precedent, there is no place for the courts to make subjective judgments about whether a revenue stream is "significant" enough to be deserving of protection; all income is desirable for copyright holders, particularly in today's landscape of rapidly diminishing revenue sources. Requiring the revenue stream to be "significant" has the undesirable effect of under-valuing works created by small, independent content creators who are unlikely to garner high fees for the use of their works. It may also penalize large entities if the revenue stream associated with the secondary use is considered "insignificant" in relation to their entire revenue stream – as the district court did in this case. *See TVEyes I*, 43 F. Supp. 3d at 396 (finding that the fourth factor favored fair use where Fox's revenues from licensing clips of its programming accounted for a small fraction of its overall revenues). In fact, prior cases have recognized that the fourth factor favors the copyright holder even where there was *no* evidence of current licensing income/economic harm, in recognition of the copyright holders' right to control dissemination of his or her work. *See, e.g., Salinger v. Random House*, 811 F.2d 90, 99 (2d Cir. 1987) ("Salinger … is entitled to protect his *opportunity* to sell his letters …"); *cf. Stewart*, 495 U.S. at 228-29. In considering this appeal, we urge the Second Circuit to follow the clear guidance of the Supreme Court rather than the erroneous narrowing of the market-harm factor argued by TVEyes based on its reading of *Google Books*.

II. IN ITS SECOND DECISION, THE DISTRICT COURT CORRECTLY HELD THAT TV EYES' DOWNLOADING, EMAILING, AND DATE/TIME SEARCHES DID NOT QUALIFY AS FAIR USE

As the district court properly recognized, one of the greatest threats posed by TVEyes is that it offers features that facilitate the broad public distribution of TV clips. In short, these clips are a direct substitute for *amici*'s own distribution of clips and other content, which they monetize in various ways.

Describing a purportedly transformative purpose in the abstract is not sufficient – TVEyes must show that the functions of its product are tailored to effectuate that transformative purpose. "[U]sing the mechanics of search engines to scrape material … and provide it to consumers in response to their search requests does not immunize a defendant from the standards of conduct imposed by law through the Copyright Act, including the statutory embodiment of the fair use defense." *Meltwater*, 931 F. Supp. 2d at 556. Precedent in this Circuit requires the courts to look closely at the mechanics of each challenged use, examining the nexus between that use and the proffered transformative purpose. *See, e.g.*, *Google Books*, 804 F.3d 202 (examining each challenged use separately under the four-factor test); *HathiTrust*, 755 F.3d 87 (same). For this reason, the court below asked the correct question in its second decision when it considered whether each specific function was "integral" to the transformative use proffered by TVEyes. *TVEyes II*, 124 F. Supp. 3d at 328.

A. Emailing/Sharing Function

While TVEyes claims that its users share content from TVEyes for transformative purposes, the district court correctly recognized that TV Eyes does not actually take any technological steps to limit user sharing of clips to scenarios that would fall within Section 107 of the Copyright Act.

The ability to view a shared clip is not limited to those with TVEyes credentials, and TVEyes allows – and encourages – subscribers to share clips publicly on social media. TVEyes thus permits subscribers to make copyrighted content publicly available without any limitation to fair uses. It allows subscribers to completely bypass the actual owners of the copyrighted content and instead substitutes itself as the gatekeeper for this valuable content that it did not create or license from Fox. And because its profit model is based on flat subscriptions rather than ads or usage, it has no incentive to monitor or control its users' reuse of the copyrighted content.

The recipient and viewers of the copyrighted content are viewing the copy on TVEyes' server. That view count is not captured by the content owner, nor does the content owner have the ability to monetize that view through ad placement.

B. Downloading Function

As the court recognized, the TVEyes download function contains no technological limitations on use that would tailor this function to the purported transformative purpose. The clip contains no watermarking, no digital-rights management (DRM) software, no beacon or tracking of any sort. It can be stored permanently by the subscriber, shared without any limitation, and stitched together with other clips to create a longer piece. *TV Eyes II*, 124 F. Supp. 3d at 336. Having designed its platform with no technological limitations, TVEyes cannot claim that use is limited to the uses contemplated by Section 107.

Furthermore, as the district court correctly recognized, the "convenience" factor urged by TVEyes "is not ground for finding fair use." *TV Eyes II*, 124 F. Supp. 3d at 336-37. It would of course be convenient to have unlimited access to the full content of copyrighted works, in high resolution, without ads, and without any limitation on use. But if that were the guiding principle, the bundle of rights in copyright would be effectively null. Accordingly, courts have routinely rejected fair-use arguments grounded in "convenience." *See, e.g., Am. Geophysical Un. v. Texaco, Inc.*, 60 F.3d 913, 923 (2d Cir.1994) (rejecting fair use defense where employees copied scientific journals for "personal convenience"); *United States v. ASCAP*, 599 F. Supp. 2d 415, 429 (S.D.N.Y. 2009) (explaining that "copyright ... is not designed to afford consumer ... convenience") (internal quotations omitted).

In its appellate brief, TVEyes claims that "downloading serves the same purpose as archiving." (App. Br. at 14) Yet it fails to show why this additional function is necessary, or how it grapples from a technological standpoint with the obvious opportunity for rampant infringement by letting users download lengthy segments of high-definition TV content for unlimited use and reuse. With the archiving function, TVEyes at least has the opportunity – which, so far, it has not exercised – to limit downstream use of content to comply with fair use, or to comply with a court order to remove infringing content from its service. The downloading function contains no such safeguards – instead, it allows users to stockpile unlimited numbers of lengthy, high-resolution clips to use at their discretion for any purpose in perpetuity, regardless of whether that use comports with Section 107.[5]

C. Date/Time Search Function

Finally, the lower court correctly held that the "date/time" search function does not satisfy TVEyes' proffered transformative function. If a user *already knows* when a particular television segment aired, he or she can go directly to the content owner to view or obtain it. In that case, TVEyes is simply serving the

[5] Indeed, it is worth noting that even though the lower court found that the downloading function did *not* qualify as fair use, TVEyes' decision to design that function without any downstream control mechanisms likely means that it cannot now claw back the vast amount of content it has already allowed its users to download freely since its inception.

same function as the original owner and its licensing agents – it is a repository to license valuable content that someone is looking to use. TVEyes still charges its users a premium to access this desired content – it just does so in the form of a flat subscription fee, which it keeps entirely for itself without compensation to the content owners.

CONCLUSION

In sum, the district court correctly found that TVEyes' emailing, downloading, and date/time search functions did not qualify was fair use, but it erred in holding that the remainder of the TVEyes functions – including the ability to archive, save, and display clips – qualified as fair use. For the reasons set forth herein, *amici* urge this Court to grant the appeal by Fox News and to deny the appeal by TVEyes.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 4,935 words, excluding exempted parts, as determined by the word-counting feature of Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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