

15-3885(L), 15-3886(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.

Appeal from the United States District Court for the Southern District
of New York, case no. 1:13-cv-5315, Hon. Alvin Hellerstein

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

RICK KAPLAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N. Street, N.W.
Washington, D.C. 20036
(202) 429-5430

JOSEPH R. PALMORE
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-6940
JPalmore@mof.com

PAUL GOLDSTEIN
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

*Counsel for Amicus Curiae National
Association of Broadcasters*

JUNE 22, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae National Association of Broadcasters states that no corporation owns 10% or more of its stock.

Dated: June 22, 2016

s/ Joseph R. Palmore

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. BROADCASTERS PROVIDE CRUCIAL SERVICES TO LOCAL COMMUNITIES	4
A. Local Broadcasters Deliver Television Programming To Millions Of Americans	4
B. Local Broadcasters Incur Substantial Costs In Producing And Delivering Programming	7
II. BROADCASTERS MAKE THEIR CONTENT AVAILABLE IN AN EVER-INCREASING NUMBER OF WAYS	8
A. Viewing Habits Have Changed Substantially In Recent Years	8
B. Broadcasters Have Responded To These Developments And Made Their Content Available Online	10
C. Broadcasters Continue To Make Their Content Available For Licensing	15
III. TVEYES OFFERS A COMPETING MEANS OF ACCESSING BROADCASTERS' CONTENT WITHOUT AUTHORIZATION TO USE THAT CONTENT	16
A. Redistributing Broadcasters' Content Online Is Not A Transformative Use	18
B. Redistributing Broadcasters' Content Online Causes Broadcasters Harm In The Markets For Their Copyrighted Works	25

CONCLUSION.....30

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Authors Guild, Inc. v. HathiTrust</i> , 755 F.3d 87 (2d Cir. 2014)	23, 25, 28, 29
<i>Authors Guild v. Google, Inc.</i> , 804 F.3d 202 (2d Cir. 2015)	18, 21, 22, 23, 28
<i>Bill Graham Archives v. Dorling Kindersley Ltd.</i> , 448 F.3d 605 (2d Cir. 2006)	22, 27
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	18, 26
<i>Elvis Presley Enters., Inc. v. Passport Video</i> , 349 F.3d 622 (9th Cir. 2003)	21
<i>Fox News Network, LLC v. TVEyes, Inc.</i> , 43 F. Supp. 3d 379 (S.D.N.Y. 2014)	17, 19, 20, 21, 28
<i>Harper & Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	23, 25
<i>Infinity Broad. Corp. v. Kirkwood</i> , 150 F.3d 104 (2d Cir. 1998)	19, 24
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	27
<i>Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.</i> , 756 F.3d 73 (2d Cir. 2014)	27
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994).....	4
<i>WPIX, Inc. v. ivi, Inc.</i> , 691 F.3d 275 (2d Cir. 2012).....	26
STATUTES	
17 U.S.C. § 107(4)	25

OTHER AUTHORITIES

ABC All Access, http://abcallaccess.com/abc_property/watch-abc-app10

Attorney in Porreca case suspended from practicing law (June 9, 2016),
<http://news10.com/2016/06/09/attorney-in-porreca-case-suspended-from-practicing-law>14

Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, American Journalism Review (Aug. 27, 2012), <http://tinyurl.com/AJRPalser>.....6

Bob Papper, *RTDNA Research 2015: Tracking what’s new online*, RTDNA (Apr. 20, 2015), http://www.rtdna.org/article/research_tracking_what_s_new_online 13, 14

Bob Papper, *RTDNA Research: The business of TV news*, RTDNA (May 16, 2016), http://www.rtdna.org/article/rtdna_research_the_business_of_tv_news14

Bob Papper, *RTDNA Research: Newsrooms grow mobile and social*, RTDNA (Apr. 18, 2016), http://www.rtdna.org/article/rtdna_research_newsrooms_grow_mobile_and_social12

Bob Papper, *RTDNA Research: What stations are doing online*, RTDNA (Apr. 4, 2016), http://www.rtdna.org/article/rtdna_research_what_stations_are_doing_online.....12, 13, 14

CBS All Access, <https://www.cbs.com/all-access>.....10

Chris Tribbey, *Hearst TV Looks to Verizon Digital Media Services for Streaming*, Broadcasting & Cable (June 14, 2016), <http://www.broadcastingcable.com/news/local-tv/hearst-tv-looks-verizon-digital-media-services-streaming/157290>11

Comments of the NAB, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25 (May 7, 2010)7

Comments of the NAB, *Expanding Consumers’ Video Navigation Choices*, FCC MB Docket No. 16-42 (Apr. 22, 2016).....7

Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011 (2003)20

FCC, *Amendment of the Commission’s Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, 29 FCC Rcd. 3,351 (2014).....8

FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, 30 FCC Rcd. 3,253 (2015).....4, 5, 7, 8

Fox Broadcasting Company, <http://www.fox.com>10

Goldstein on Copyright (3d ed. 2015)3

Harry A. Jessel, *Sinclair Eager To Offer Next-Gen TV Services*, TVNewsCheck (Apr. 14, 2016), <http://www.tvnewscheck.com/article/93955/sinclair-eager-to-offer-nextgen-tv-services>12

In Changing News Landscape, Even Television is Vulnerable, Pew Research Center (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable>8

Jeffrey Eisenach & Kevin Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* at 4 (June 2011), attached to Reply Comments of the NAB, FCC MB Docket No. 10-71 (June 27, 2011)8

Jerald Fritz, Testimony Before the Copyright Office, Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (May 9, 2003)16

Katerina Eva Matsa, *Local TV Audiences Bounce Back*, Pew Research Center (Jan. 28, 2014), <http://tinyurl.com/PewBounceBack>.....6

Kenneth Olmstead et al., *News Video on the Web: A Growing, if Uncertain, Part of News*, Pew Research Center (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/news-video-on-the-web>9

Lisa Richwine, *Local TV takes news to Web in fight for cord cutters*, Reuters (July 14, 2015), <http://www.reuters.com/article/us-television-broadcasters-insight-idUSKCN0PO0A520150714>11

Local News in a Digital Age, Pew Research Center (Mar. 5, 2015),
<http://www.journalism.org/2015/03/05/local-news-in-a-digital-age>.....6

NBC TV Network, <http://www.nbc.com>10

NBCUniversal Archives, Licensing Terms and Conditions (revised
 Feb. 21, 2013), <http://www.nbcuniversalarchives.com/nbcuni/showAllLicensesToUser.do>.....15

NewsON, <http://newson.us>11

NYS Exposed: New York State signs off on huge insurance rate increases?
 (May 23, 2016), <http://www.whec.com/nys-exposed/new-york-state-signs-off-huge-insurance-rate-increases/4146511/?cat=11217>.....13

Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1112
 (1990).....19

Press Release, FCC, Broadcast Station Totals as of December 31, 2015 (Jan.
 8, 2016), <https://www.fcc.gov/document/broadcast-station-totals-december-31-2015>4

Press Release, FCC, Ten Days and Counting to DTV Transition (June 2,
 2009), <http://tinyurl.com/DTV10Days>5

Second main break causes headaches for crews, folks in Troy (Jan. 23,
 2016), <http://news10.com/2016/01/23/water-main-break-in-troy-saturday-morning>.14

Statement of FCC Chairman Tom Wheeler, *Amendment of Part 11 of the
 Commission's Rules Regarding the Emergency Alert System
 (PS Docket No. 15-94) and Wireless Emergency Alerts (PS Docket No.
 15-91)* (Jan. 28, 2016).....6

Todd Spangler, *Tribune to Stream Local TV News Reports to Watchup
 Internet Apps*, Variety (Mar. 16, 2015),
<http://variety.com/2015/digital/news/tribune-to-stream-local-tv-news-reports-to-watchup-1201453471>.....11

Univision, <http://www.univision.com>.....10

Wayne Friedman, *CBS All Access Expands To Most Of U.S.*,
MediaDailyNews (July 17, 2015),
[http://www.mediapost.com/publications/article/254239/cbs-all-access-
expands-to-most-of-us.html](http://www.mediapost.com/publications/article/254239/cbs-all-access-expands-to-most-of-us.html)11

INTEREST OF AMICUS CURIAE¹

The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Copyright Office, the Federal Communications Commission (FCC), other regulatory agencies, and the courts on behalf of its members. The majority of NAB's members are local, independent stations.

NAB has a substantial interest in the correct outcome of this case. Without the proper application of the copyright laws to broadcast programming and the retransmission of broadcast signals, broadcasters will be seriously impeded from fulfilling their statutory obligation to offer free over-the-air programs that meet the needs and interests of the communities they are licensed to serve. Unauthorized exploitation of broadcasters' programming in a manner that replicates the services broadcasters provide pulls viewers away from lawful sources, siphoning off from NAB's members the audiences and revenues essential to recouping the significant costs of acquiring, producing, and distributing local and national programming. Adherence to the Copyright Act—and proper recognition of the limited scope of

¹ All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

the exceptions in the Act—is therefore critical to the continued ability of broadcasters to serve their communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years, NAB members—including both national networks and independently owned local stations—have taken great efforts, at great expense, to make the video content they produce available online. Through live-streaming, subscription services, specialized apps, and station websites, viewers can now watch both live and recorded broadcast television in ways that would have been unimaginable two decades ago.

TVEyes is distributing this same content online for profit, but without compensating broadcasters for its use of their copyrighted works. It enables its paying subscribers to view, archive, download, email, and post 10-minute segments of broadcasters’ newscasts—content TVEyes copies from broadcasts throughout the country. TVEyes claims that its unauthorized use of these video segments constitutes a fair use of that copyrighted content.

But fair use does not allow third parties to profit from copyright holders’ expressive endeavors by exploiting their protected works in a manner that displaces the legitimate, licensed market for those works. The doctrine helps to ensure that copyrighted works may be put “to their most beneficial use,” but it does not authorize uses that would unduly impair the private rights of those who created

the works (and thereby undermine the incentive to create such works in the first place). *See* Goldstein on Copyright § 12.1 (3d ed. 2015). TVEyes' online reproduction, display, and delivery of broadcasters' copyrighted works represent just the sort of infringing conduct against which the Copyright Act was intended to protect.

TVEyes may also be serving functions that are arguably not infringing. In particular, as TVEyes repeatedly emphasizes, its creation of a searchable database to help subscribers learn about broadcasters' newscasts—as distinguished from the features of its service that then enable these subscribers to view and distribute those newscasts—may represent a new and transformative use of broadcast content.

But even assuming *some* aspects of TVEyes' service are a fair use of copyrighted content, that does not mean that TVEyes can cloak *all* aspects of its service in the mantle of fair use. Indeed, nothing about TVEyes' delivery of its copies of broadcasters' video segments is transformative: TVEyes simply provides its subscribers with the very same video clips that broadcasters themselves make available through any number of similar outlets. TVEyes' recorded clips thus serve as a mere substitute for broadcasters' own (original) versions. And by disseminating such substitutes, TVEyes impinges upon broadcasters' ability to obtain a fair return on their investment in these works from advertising and

licensing, whether derived from traditional avenues or through broadcasters' ever-increasing presence in the online media market. TVEyes' exploitation of broadcasters' copyrighted works in this manner is not fair use. It drains away advertising and licensing revenue critical to broadcasters' ability to fulfill their public-interest obligation to meet the needs of the communities they serve.

ARGUMENT

I. BROADCASTERS PROVIDE CRUCIAL SERVICES TO LOCAL COMMUNITIES

A. Local Broadcasters Deliver Television Programming To Millions Of Americans

As the Supreme Court has observed, “the importance of local broadcasting outlets can scarcely be exaggerated.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal quotation marks omitted). As of December 31, 2015, there were more than 1,387 full-power commercial television stations licensed by the FCC. Press Release, FCC, Broadcast Station Totals as of December 31, 2015 (Jan. 8, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-337189A1.pdf. While some broadcast stations are owned and operated by national networks, the majority of local stations are independently owned. See FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, 30 FCC Rcd. 3,253, 3,321, 3,324 (2015) (“Video

Competition Report”). These stations deliver news, sports, entertainment, and other programming to millions of Americans.

The programming of broadcast television stations takes three principal forms. First, local broadcasters obtain a significant amount of content from the major national networks with which they are affiliated, such as ABC, CBS, NBC, Fox, and Univision. *See id.* at 3,321. Second, local broadcast stations obtain syndicated programming—including both original programming and reruns of popular network television series—from content providers. *Id.* at 3,322. Third, broadcast stations offer locally produced programming, including local news, weather, emergency alerts, sports, public affairs, and other content of particular interest to the communities the stations are licensed to serve. *Id.*

Local broadcasters provide all of this programming to the general public free of charge. “For many people, free, over-the-air television is their primary source of news, information and emergency alerts—not to mention entertainment.” Press Release, FCC, Ten Days and Counting to DTV Transition (June 2, 2009), <http://tinyurl.com/DTV10Days>. In addition, millions more watch broadcast television stations as retransmitted by a cable system or satellite carrier to which viewers pay a monthly fee. *See Video Competition Report*, 30 FCC Rcd. at 3,339-40. Broadcasters are thus a critical source of programming for the American public, reaching approximately 96% of households. *Id.* at 3,339.

Local broadcasters' role in delivering the news is especially significant. According to one survey, "local TV remains a top news source for Americans, with almost three out of four U.S. adults (71%) watching local television news." Katerina Eva Matsa, *Local TV audiences bounce back*, Pew Research Center (Jan. 28, 2014), <http://tinyurl.com/PewBounceBack>; *see also Local News in a Digital Age*, Pew Research Center (Mar. 5, 2015), <http://www.journalism.org/2015/03/05/local-news-in-a-digital-age> (study finding that "nearly nine-in-ten residents" in three surveyed cities "follow local news closely," and that the majority rely on local TV for such news). Local broadcast news has become an increasingly important source of investigative journalism as newspapers and other forms of traditional media continue to decline. *See Barb Palser, A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, *American Journalism Review* (Aug. 27, 2012), <http://tinyurl.com/AJRPalser>. And local broadcast news also serves a crucial function in emergency situations, such as the January 2016 blizzard that blanketed the northeast. *See Statement of FCC Chairman Tom Wheeler, Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System (PS Docket No. 15-94) and Wireless Emergency Alerts (PS Docket No. 15-91)* (Jan. 28, 2016) ("This past weekend's historic winter storm

reminded us how much we rely [on] broadcasters and other TV providers to keep us informed during emergencies.”).

B. Local Broadcasters Incur Substantial Costs In Producing And Delivering Programming

Providing quality programming of particular interest to local communities is expensive. Local stations must hire reporters and camera crews, purchase news vans and other equipment, and maintain production facilities. According to the most recent available data, local stations spend an average of \$3.2 million annually producing local news; the figure for local network affiliates in the ten largest markets is more than \$17 million. *See* Comments of the NAB, *Expanding Consumers’ Video Navigation Choices*, FCC MB Docket No. 16-42, at 6 n.11 (Apr. 22, 2016). Commercial-free reporting during emergencies is especially expensive for local stations. *See* Comments of the NAB, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 16 (May 7, 2010) (noting that one local station spent \$160,000 on a season’s worth of hurricane coverage, not counting lost advertising revenue).

These are not local broadcast stations’ sole costs. In addition, local stations face substantial capital expenses for their transmission facilities, and they must pay fees to acquire local rights to network and syndicated programming. *Video Competition Report*, 30 FCC Rcd. at 3,339.

In covering these expenses, local broadcasters “remain highly dependent on advertising revenues.” *Id.*; see FCC, *Amendment of the Commission’s Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, 29 FCC Rcd. 3,351, 3,388 (2014) (“[O]n-air advertising revenues still constitute about 85 percent of broadcasters’ revenues.”). Because “news output is strongly and positively correlated with station revenues,” diminished advertising revenue would result in reduced levels of local news for viewers. Jeffrey A. Eisenach & Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* at 4 (June 2011), attached to Reply Comments of the NAB, FCC MB Docket No. 10-71 (June 27, 2011).

II. BROADCASTERS MAKE THEIR CONTENT AVAILABLE IN AN EVER-INCREASING NUMBER OF WAYS

A. Viewing Habits Have Changed Substantially In Recent Years

The development of the internet has changed many things, but perhaps few more so than the manner and means by which viewers consume news. Millions of Americans continue to watch news on television, either through free over-the-air broadcasts or as transmitted by a cable or satellite provider. But television news viewership has nevertheless fallen in recent years. *See, e.g., In Changing News Landscape, Even Television is Vulnerable*, Pew Research Center (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even->

television-is-vulnerable (finding that television news viewership dropped by 13% between 1991 and 2012).

Consumption of news online—including news videos—has correspondingly skyrocketed. Indeed, as of 2014, more than 36% of U.S. adults watch news videos online. Kenneth Olmstead et al., *News Video on the Web: A Growing, if Uncertain, Part of News*, Pew Research Center (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/news-video-on-the-web>. These trends are likely to accelerate given both advancements in technology and the high percentage of young adults who watch news online. *See id.* (48% of 18-29 year olds watch online news videos).

Perhaps just as important as the medium over which viewers now consume news videos is the type of videos they now tend to favor. Rather than watch an entire news program, many viewers pick and choose among segments of the program or programs that most interest them. Thus, as Dr. Beth Knobel explained in her expert report below, “modern consumers are increasingly less likely to get their news by watching long-form television content in their homes, but instead seek to watch shorter, topical video clips on their computers and mobile devices.” Dkt. No. 100, at 4, *Fox News Network, LLC v. TVEyes, Inc.* No. 1:13-cv-5315 (S.D.N.Y Jan. 26, 2015).

B. Broadcasters Have Responded To These Developments And Made Their Content Available Online

Broadcasters have by no means ignored these trends. Instead, both the national networks and local stations have made active and sustained efforts to ensure that viewers can access their video content online.

These efforts take a variety of forms. For example, national networks have launched so-called “TV Everywhere” services through which viewers may both live stream video content and access archived programs. *See, e.g.*, CBS All Access, <https://www.cbs.com/all-access>; ABC All Access, http://abcallaccess.com/abc_property/watch-abc-app. The networks have also worked together to establish joint ventures like Hulu.com, a standalone online service through which viewers can watch a wide variety of previously broadcast programs. Each of the networks also has its own website on which browsers can view both video clips and full programs. *See, e.g.*, NBC TV Network, <http://www.nbc.com>; Fox Broadcasting Company, <http://www.fox.com>; Univision, <http://www.univision.com>. The networks are compensated for making their copyrighted video content available in this manner through both advertising revenue and subscription fees.

Local broadcasters have likewise made their video content available online in a number of ways. They have, for example, teamed with the national networks to make their programming available through TV Everywhere services. *See, e.g.*,

Wayne Friedman, *CBS All Access Expands To Most Of U.S.*, MediaDailyNews (July 17, 2015), <http://www.mediapost.com/publications/article/254239/cbs-all-access-expands-to-most-of-us.html> (noting that local TV offerings from areas encompassing nearly 75% of U.S. households will be available through CBS All Access).

Local broadcasters have also worked together to create apps through which viewers can access local news programming from a variety of stations. One such app, called NewsON, provides users with content from 130 stations in more than 90 television markets. *See* NewsON, <http://newson.us>; *see also* Lisa Richwine, *Local TV takes news to Web in fight for cord cutters*, Reuters (July 14, 2015), <http://www.reuters.com/article/us-television-broadcasters-insight-idUSKCN0PO0A520150714> (describing launch of NewsON). Another similar service, Watchup, delivers contents from more than 30 stations nationwide. Todd Spangler, *Tribune to Stream Local TV News Reports to Watchup Internet Apps*, Variety (Mar. 16, 2015), <http://variety.com/2015/digital/news/tribune-to-stream-local-tv-news-reports-to-watchup-1201453471>. And 26 local news stations owned by Hearst Television have recently teamed with Verizon to facilitate both live streaming and on-demand playback of all of these stations' content, with a special focus on mobile devices. Chris Tribbey, *Hearst TV Looks to Verizon Digital Media Services for Streaming*, Broadcasting & Cable (June 14, 2016),

<http://www.broadcastingcable.com/news/local-tv/hearst-tv-looks-verizon-digital-media-services-streaming/157290>.

All told, more than 93% of broadcast television stations make content available on an app of some form. Bob Papper, *RTDNA Research: Newsrooms grow mobile and social*, RTDNA (Apr. 18, 2016), http://www.rtdna.org/article/rtdna_research_newsrooms_grow_mobile_and_social. And further innovations are in the works. *See, e.g.*, Harry A. Jessel, *Sinclair Eager To Offer Next-Gen TV Services*, TVNewsCheck (Apr. 14, 2016), <http://www.tvnewscheck.com/article/93955/sinclair-eager-to-offer-nextgen-tv-services> (describing Sinclair Broadcast Group’s plan to use a “wireless IP pipeline” to “broadcast a national multichannel TV programming service”).

These services complement broadcast stations’ websites, which also provide users with a broad array of video content—particularly local news content. According to one recent report, every television station that broadcasts local news also has a website that provides local news. *See* Bob Papper, *RTDNA Research: What stations are doing online*, RTDNA (Apr. 4, 2016), http://www.rtdna.org/article/rtdna_research_what_stations_are_doing_online (“*RTDNA Research 2016*”). Nearly 73% of these stations make their newscasts available live, while another 43% make recorded newscasts available (with more than half of those in the largest 100 markets nationwide doing so). *Id.* These

percentages are growing: the number of station websites that provide recorded newscasts, for example, has increased by more than 20% in the last year. *Compare id., with Bob Papper, RTDNA Research 2015: Tracking what's new online*, RTDNA (Apr. 20, 2015), http://www.rtdna.org/article/research_tracking_what_s_new_online (“*RTDNA Research 2015*”). Indeed, in response to a recent survey of local stations, more than 76% of TV news directors “said they started something important online last year.” Papper, *RTDNA Research 2016*.

The website for WHEC, the NBC affiliate in Rochester, New York, provides a good example of local stations’ efforts to make their video content available online. At www.whec.com/pages/it/livestream.shtml, viewers can watch a live stream of the local news broadcast. They may also peruse and view clips of previously broadcast news segments. Viewers can, for example, watch all three and a half minutes of the WHEC news team’s May 23, 2016 story on the rising cost of long-term care insurance and the state government’s failure to respond. *NYS Exposed: New York State signs off on huge insurance rate increases?* (May 23, 2016), <http://www.whec.com/nys-exposed/new-york-state-signs-off-huge-insurance-rate-increases/4146511/?cat=11217>.

WTEN, the ABC affiliate in Albany, New York, provides viewers with similar access. At <http://news10.com/news10-abc-live-stream>, viewers can watch a live stream of the local broadcast. They may also find any number of previously

broadcast news clips—including, for example, a full 26 second story from June 9, 2016, detailing an appellate court’s decision to suspend the defense attorney in a high-profile murder case, *see Attorney in Porreca case suspended from practicing law* (June 9, 2016), <http://news10.com/2016/06/09/attorney-in-porreca-case-suspended-from-practicing-law>; or a minute-and-a-half-long January 23, 2016 segment about the city of Troy’s second water main break in less than a week, *see Second main break causes headaches for crews, folks in Troy* (Jan. 23, 2016), <http://news10.com/2016/01/23/water-main-break-in-troy-saturday-morning>.

Viewers have responded favorably to these increased online offerings. From 2014 to 2015, for example, page views and unique visitors to local stations’ websites nearly doubled. Papper, *RTDNA Research 2015*. This past year, station websites reported an average of more than 6.5 million total page views and 839,000 unique viewers. Papper, *RTDNA Research 2016*. In the top 50 national markets, those figures were 11.6 million and 1.4 million, respectively. *Id.*

This growing online audience has, in turn, benefitted local broadcasters. With increased online viewership comes increased advertising revenue, whether from video ads that play before or during online news content or from banner ads displayed on the pages on which consumers view that content. As a result, the profitability of local broadcasters’ websites has consistently increased over the past decade and a half. *See* Bob Papper, *RTDNA Research: The business of TV news*,

RTDNA (May 16, 2016), http://www.rtdna.org/article/rtdna_research_the_business_of_tv_news. WHEC, for example, currently derives 6.3% of its overall revenue from such digital sources—and that figure has been growing at a rate of approximately 30% per year. The station expects that revenue related to online content will become increasingly significant in the coming years.

C. Broadcasters Continue To Make Their Content Available For Licensing

Even as they have taken advantage of these new-media outlets for distributing their content, NAB's members have come increasingly to rely on more traditional sources of compensation: licensing fees. The national networks—like cable news networks and other television news organizations—all earn revenue by licensing clips of their programming to those who wish to use them. *See* Answering Br. 13-14; Dkt. No. 100, at 19, *Fox News Network*, No. 1:13-cv-5315; *see also, e.g.*, NBCUniversal Archives, Licensing Terms and Conditions (revised Feb. 21, 2013), <http://www.nbcuniversalarchives.com/nbcuni/showAllLicensesToUser.do> (NBC's licensing agreement, which accompanies its online archive of video content available for licensing dating back to the late 1940s). Local broadcast stations are able to do the same, in part through the use of what are known as “video monitors” or “clipping services”—third parties that distribute licensed clips of broadcast content.

In these respects, broadcasters' current practices mirror what they have been doing for years. As former NAB director Jerald Fritz explained in 2003 testimony before the Copyright Office regarding third-party video monitors that (like TVEyes) distribute video clips to those who request them, NAB member stations allow video monitors to fulfill this distribution role—but only “via contract.” Jerald Fritz, Testimony Before the Copyright Office, Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (May 9, 2003). Fritz continued:

WJLA's coverage of the Air Florida disaster and dramatic helicopter rescue in the Potomac River 20 years ago is a classic example of why our news is proprietary. We get numerous calls annually for copies of that video. Similarly, our station in Little Rock has an enormous archive of video involving Bill Clinton as Arkansas Attorney General and Governor that people pay us to use. Our award-winning investigatory pieces involving cellular phones, radon tests and fire retardants are certainly the kinds of material the clients of the Video Monitors want. We didn't produce those stories for free and we don't license them for free.

Id.

III. TVEYES OFFERS A COMPETING MEANS OF ACCESSING BROADCASTERS' CONTENT WITHOUT AUTHORIZATION TO USE THAT CONTENT

TVEyes subverts NAB members' ability to secure a fair return on the substantial investments they have made in creating and distributing copyrighted video content. TVEyes does so by recording the broadcasts of more than 1,400

television and radio stations to create a searchable database of newscasts. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 384 (S.D.N.Y. 2014). It enables its paying subscribers to watch live-streams of all the broadcasts it records while it records them. *Id.* at 386. These subscribers may also search through TVEyes' database by the terms used in a newscast or by the date and time on which it aired on a particular station. *Id.* at 385. Rather than direct these subscribers to licensed sources on which they might then view the video content their searches reveal, TVEyes will *itself* transmit the desired video in high-definition clips up to ten minutes in duration. *Id.* Beyond simply viewing this video content on TVEyes's website, TVEyes's subscribers may then archive the videos, download them to their personal computers, email them to others, or share them on social media. *Id.*

Thus, as TVEyes itself advertises, its subscribers can “watch live TV, 24/7,” “play unlimited clips from television broadcasts, ‘email unlimited clips to unlimited recipients,’ . . . ‘post an unlimited number of clips’ to social media and enjoy ‘unlimited storage [of clips] on TVEyes servers.’” *Id.* at 385-86 (final alteration in original); *see* Answering Br. 1-2, 15-16. This expansive, unlicensed copying and redistribution of broadcast stations' copyrighted content—the very same content these stations are themselves attempting to license and distribute over

the air, via cable and satellite providers, and through various online outlets—is not a fair use. It is, instead, an unauthorized and exploitative misuse.

A. Redistributing Broadcasters’ Content Online Is Not A Transformative Use

TVEyes contends that its use of broadcasters’ content is “transformative” and therefore non-infringing. The use of a copyrighted work is “transformative” when it does not “merely supersede the objects of the original creation,. . . [but] instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal quotation marks and alteration omitted). Assuming arguendo that the recording of video content to create a searchable database may itself sometimes represent a transformative use of that content, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015) (“*Google*”), that does not mean that *all* aspects of TVEyes’ copying and subsequent use of others’ broadcasted video content represent a different and transformative use of those works.

Indeed, TVEyes provides much more than a searchable database: it also displays, delivers, and enables the redistribution of the content that its searches reveal. This Court must consider whether these fundamentally different aspects of TVEyes’ service—and not simply “the secondary work overall”—constitute a

transformative use of the copyrighted content TVEyes has recorded. Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1112 (1990).

They do not: TVEyes adds nothing to the original works when it allows its paying subscribers to view, download, and redistribute those same works. That is most obviously true of TVEyes' live-streaming of broadcast content (a feature TVEyes notably fails to mention in its opening brief). But it is also true of TVEyes' subsequent use of the works it has copied. When TVEyes displays the three-and-a-half-minute WHEC news clip detailing the state's failure to keep insurance premiums in check, *see supra* p. 13, it has not transformed that video content in any way. Instead, it simply allows its subscribers to view the very same video content they might have viewed on WHEC's original broadcast and might now view on WHEC's own website. A use cannot be transformative where, as here, it "merely repackages or republishes the originals." *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (holding that retransmission of radio broadcasts over the telephone that left "the character of the original broadcasts unchanged" was not a fair use) (quoting Leval, 103 Harv. L. Rev. at 1111).

In this respect, TVEyes is serving the same function as television monitoring and clipping services, which have long enabled those interested in obtaining clips of broadcast content to do so. Indeed, in its advertising, TVEyes compares its service to that of "the traditional clipping services." *Fox News Network*, 43

F. Supp. 3d at 386. These “traditional” clipping services, however, obtain and distribute such broadcast content only through licensing agreements with those who created and hold the rights to it. In fact, the Copyright Office has long rejected television monitors’ claims that their recording and redistribution of copyrighted broadcast content are somehow fair use. *See* Copyright Office, Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011, 62,017 (2003) (rejecting request from a “group of broadcast monitors, businesses that tape television news programs off the air for their customers,” for an exemption from redistribution limitations for “news and public affairs programming,” observing that the purpose “for which the broadcast monitors seek an exemption does not appear to constitute a noninfringing use”). TVEyes should be treated in the same manner.

In reaching a contrary conclusion, the district court conflated the value of TVEyes’ search function with the value of the (copyrighted) expressive content that TVEyes delivers to its subscribers. The district court believed that the 10-minute clips that TVEyes displays in its search results are “integral to TVEyes’ service” because “[w]ithout these excerpted video clips, TVEyes’ users could not receive the full spectrum of information identified by an index.” *Fox News Network*, 43 F. Supp. 3d at 393. That “information,” the court continued, includes “not only what was said, but also how it was said, with subtext body language,

tone of voice, and facial expression—all crucial aspects of the presentation of, and commentary on, the news.” *Id.* But as the court’s statement reveals, the “information” TVEyes provides is simply the expressive content of the works it is displaying and for which these works are entitled to copyright protection in the first place. *See Google*, 804 F.3d at 220. TVEyes does not transform video content merely by enabling it to be viewed and appreciated in much the same manner as it was always meant to be viewed and appreciated. *See Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 628-29 (9th Cir. 2003) (use of copyrighted video clips of Elvis in a documentary not transformative when the clips “play[] without much interruption, [and t]he purpose of showing these clips likely goes beyond merely making a reference for a biography, but instead serves the same intrinsic entertainment value that is protected by Plaintiffs’ copyrights”).

The contrast between TVEyes and other search databases illustrates the critical distinction, overlooked by the district court, between providing information *about* a work (which may be transformative) and simply providing the work itself (which is not). If a Google search result directs a user to a New York Times article of interest, Google does not provide the user with Google’s own copy of the article. Rather, the search engine directs the user to the New York Times’ website, where the user is then able to access the actual article. Likewise, while the Google Books project enables users to search within the text of more than 20 million

books, it does not display the entirety of these copies to users in response to a search request. *Google*, 804 F.3d at 208. Instead, as this Court emphasized in concluding that this unlicensed use was consistent with the copyright laws, Google Books displays only “tiny snippets,” which are carefully tailored “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).” *Id.* at 218; *accord, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (finding fair use where reproducer of copyrighted images “used the minimal image size necessary to accomplish its transformative purpose”). Moreover, for “books for which a single snippet is likely to satisfy the searcher’s present need for the book, such as dictionaries, cookbooks, and books of short poems,” Google “disables snippet view entirely.” *Google*, 804 F.3d at 210.

Here, in sharp contrast, TVEyes provides no such carefully tailored “tiny snippets” or limitations on those displays “likely to satisfy the searcher’s present need” for the videos in question. *Id.* Instead, it provides its subscribers with its own copies of full 10-minute clips. Clips of this duration will invariably encompass all but the very longest news segments. They are also precisely what modern viewers increasingly tend to favor, and what news broadcasters themselves attempt to deliver on their websites and elsewhere online. *See* Dkt. No. 100, at 4,

Fox News Network, No. 1:13-cv-5315. In *Google*, this Court observed that the “larger the quantity” of content a searcher can see, “the greater the likelihood that those revelations could serve her as an effective, free substitute for the purchase of the” copyrighted work. 804 F.3d at 222. With TVEyes, that threat is less a “likelihood” than a certainty: TVEyes delivers, and profits from, the very same content that viewers seek out from news broadcasts in the first place.

Ultimately, then, the district court’s conclusion that TVEyes somehow transformed the original works simply by delivering them to its subscribers stems from the court’s assessment of the value of making this content available. And, to be sure, TVEyes’ subscribers may think it convenient to be able to find this video content in one easy-to-access location, rather than on content-provider-specific websites and apps or through more traditional clipping services. But “[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985). In part for that reason, “[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.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014). TVEyes’ display and delivery of copyrighted videos serves no “new and different function”; it is not transformative. *Id.*

Nor, for that matter, may TVEyes claim (as it now attempts to do) that its use of these recordings is transformative simply because its *subscribers* might make transformative use of them. *See* Opening Br. 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.”). As this Court has recognized, the transformative use inquiry focuses on the particular copying, delivery, and retransmission that the defendant engages in, not the downstream uses that third parties might make of the same content. *Infinity Broad. Corp.*, 150 F.3d at 108 (“[I]t is Kirkwood’s own retransmission of the broadcasts, not the acts of his end-users, that is at issue here and all Kirkwood does is sell access to unaltered radio broadcasts.”). A book reviewer writing an article about a book may be entitled to use quotations from the book in his review. That does not mean that a service that provided him free access to that book could avoid payment to its author or publisher. Likewise here, even if TVEyes’ subscribers may make fair use of broadcasters’ video content (of which, of course, there is no assurance), TVEyes is not on that basis authorized to deliver broadcasters’ content to its subscribers.

B. Redistributing Broadcasters' Content Online Causes Broadcasters Harm In The Markets For Their Copyrighted Works

For many of the same reasons that TVEyes' use of NAB members' copyrighted content is not transformative, it also threatens "the potential market for or value of" that content. 17 U.S.C. § 107(4). This factor of the fair use inquiry is concerned with "the harm that results because the secondary use serves as a substitute for the original work." *HathiTrust*, 755 F.3d at 99; *see also Harper & Row, Publishers*, 471 U.S. at 566 (characterizing this consideration as "undoubtedly the single most important element of fair use"). Here, there can be little question that TVEyes' online service offerings of broadcasters' programming provide its subscribers with a substitute for those copyrighted works, harming the rights holders in a number of actual and potential markets.

First, TVEyes' provision of copyrighted newscasts and other works detracts from the audience that would watch these newscasts when first broadcast. A TVEyes subscriber will feel less need to watch WTEN's 5 PM news broadcasts on an authorized outlet if she knows she can later access all of the relevant segments through her TVEyes subscription (or, similarly, if she watches it on TVEyes' live-stream). Even if the number of TVEyes subscribers who act in this fashion is relatively small, the loss of such audience members due to this substitution is a cognizable market harm: courts must "consider not only the extent of market harm

caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.” *Campbell*, 510 U.S. at 590 (internal quotation marks and alteration omitted). If services such as TVEyes were to become more prevalent or gain more subscribers, the loss of live audiences—and resulting diminution in the advertising revenues and carriage fees upon which broadcasters depend—would be all the greater. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012) (recognizing the harm to broadcasters from similar unauthorized retransmissions).

Second, TVEyes diverts its subscribers from legitimate, licensed websites and other online services where content producers have made this same video content available. Each TVEyes subscriber who watches WTEN’s report on the defense attorney handling a local murder trial on the TVEyes website (or downloaded on his own computer from that website), *see supra* p. 14, is someone who does not watch the same clip on WTEN’s website. TVEyes thus deprives WTEN’s site—and other similar station websites—of the page views and visitors that make such websites an increasingly important source of revenue for broadcasters.

Third, TVEyes threatens broadcasters’ ability to take advantage of such online distribution channels in the future. In considering market harm, courts must

account not only for present markets but also for “the loss of a potential yet untapped market.” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 91 (2d Cir. 2014). As previously described, *see supra* pp. 10-15, broadcasters’ efforts to provide their programming online to the viewing public, while recent and emerging, are becoming an increasingly important part of their business models. If TVEyes and others like it are able to establish themselves as online outlets for recorded broadcasts, broadcasters themselves will be less willing and able to expand into that market for their works. This “meaningful likelihood of future harm” to copyright holders further weighs against fair use. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

Fourth, TVEyes deprives broadcasters of licensing fees. Of course, much of this loss stems from TVEyes’ own failure to pay broadcasters the fees that other clipping services would pay for similar redistribution of their works. *See Bill Graham Archives*, 448 F.3d at 614 (every fair use case “involves some loss of royalty revenue because the secondary user has not paid royalties”) (quoting Leval, 103 Harv. L. Rev. at 1124). But broadcasters’ potential loss of licensing fees also results from the ability of TVEyes’ subscribers to use downloaded clips for purposes that require the copyright holder’s permission: because these subscribers are able to obtain the clips from TVEyes at no added charge, they may

not know or care about their obligation to pay licensing fees to those actually holding the rights if their use is not itself fair. *See* Answering Br. 15.

Fifth and relatedly, TVEyes' service also represents a threat to the value of NAB members' copyrighted works because of the extent to which it enables TVEyes' subscribers and other third parties to further disseminate broadcasters' video content. This Court has recognized that, even if a secondary user's own use is arguably "fair," the fact that it "unreasonably expose[s] the rights holder to destruction of the value of the copyright" by hackers or other unauthorized users can "furnish a substantial rebuttal to the secondary user's claim of fair use." *Google*, 804 F.3d at 227. This Court has rejected such "exposure-to-piracy" arguments only where there is evidence that the secondary user properly secures the copyrighted content against unauthorized use. *Id.*; *see HathiTrust*, 755 F.3d at 100-01 (rejecting contention regarding subsequent distribution by relying upon "the extensive security measures the Libraries have undertaken to safeguard against the risk of a data breach").

TVEyes provides no such security. To the contrary, it permits its subscribers to email video clips and even post them publicly on social media, exercising no effective control over such subsequent redistribution. *Fox News Network*, 43 F. Supp. 3d at 385; *see* Answering Br. 32-37. Concern over this potential misuse of its service—and the resultant harm to the value of broadcasters'

copyrighted works—does not, as TVEyes insists, reflect “pure speculation.” Opening Br. 31. Far from it. Indeed, Dr. Knobel was able to locate more than 140,000 public-facing hyperlinks linking to video clips archived on TVEyes’ servers. Dkt. No. 157, at 12, *Fox News Network*, No. 1:13-cv-5315. Dr. Knobel’s search likely underestimates the amount of video content taken from TVEyes and made available to the general public: many other clips from TVEyes may not be traceable, or may not be revealed by search engines. Dkt. No. 100, at 34-35, *Fox News Network*, No. 1:13-cv-5315. Such unchecked and widespread dissemination further undermines broadcasters’ ability to control the display and distribution of their works in a manner that ensures their creators are fairly compensated.

In sum, in each of these five ways, TVEyes “excessively damage[s] the market for the original by providing the public with a substitute for that original work”—precisely what a “fair use” cannot do. *HathiTrust*, 755 F.3d at 95. TVEyes thereby threatens broadcasters’ ability to fulfill their obligation to provide news and other content to the local communities they are licensed to serve. This Court should not allow TVEyes to usurp the market for broadcasters’ works in this fashion.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision to the extent that it held that TVEyes' provision of copyrighted television clips to its paying subscribers is a fair use of those copyrighted works.

Dated: June 22, 2016

Respectfully submitted,

RICK KAPLAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N. Street, N.W.
Washington, D.C. 20036
(202) 429-5430

s/ Joseph R. Palmore
JOSEPH R. PALMORE
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-6940
JPalmore@mofo.com

PAUL GOLDSTEIN
JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Amicus Curiae National Association of Broadcasters

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 22, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 22, 2016

s/ Joseph R. Palmore

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 6,409 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2010 in 14-point Times New Roman font.

Dated: June 22, 2016

s/ Joseph R. Palmore
