

# 15-3885(L)

## 15-3886(XAP)

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IN THE

United States Court of Appeals  
FOR THE SECOND CIRCUIT

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FOX NEWS NETWORK, LLC,

*Plaintiff-Appellee-Cross Appellant,*  
—against—

TVEYES, INC.,

*Defendant-Appellant-Cross Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK,  
CASE NO. 13-CV-5315, HON. ALVIN HELLERSTEIN

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**PAGE PROOF REPLY BRIEF FOR PLAINTIFF-APPELLEE-  
CROSS APPELLANT FOX NEWS NETWORK, LLC  
[REDACTED]**

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## INTRODUCTION

This case raises issues of vital concern to the future of journalism and television. The news industry is under strain, struggling to expand its digital offerings and continue producing vital coverage. This Court need not take Fox’s word for it; 31 individuals and organizations (including CNN)—representing thousands of news and television industry members—support Fox’s position and ask this Court to apply established copyright principles to TVEyes’ unparalleled infringement.<sup>1</sup>

TVEyes admits television news’ public benefits. Yet, instead of supporting the journalists TVEyes claims are its primary customers (they are not), it invites this Court to distort copyright law and this case’s facts to reach a result that is anything but fair.

Contrary to TVEyes’ deviation from well-settled law, the following legal principles govern this case:

- Mass digitization that delivers unauthorized copies, instead of identifying authorized copies, is not fair use.
- Courts consider a defendant’s bad faith and commercial use.
- Neither TVEyes’ subscribers’ uses, nor their convenience, make a use transformative.

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<sup>1</sup> Capitalized terms not defined here are defined in Fox’s opening brief (“FB”). “TR” is TVEyes’ response.

- The substantiality of TVEyes' taking is determined by what the Content-Delivery Features "make available," not what was actually accessed by TVEyes' customers.<sup>2</sup>
- The effect on Fox's market is shown by the Content-Delivery Features substituting for Fox's offerings. Fox need not provide its content in the same manner or under the same conditions as TVEyes, and neither actual damages nor lost revenues are required.
- Consideration of the public benefit is holistic, not limited to TVEyes' alleged benefits.

Under these legal principles, TVEyes has failed to establish fair use.

TVEyes' response also is noteworthy for the many factual admissions and omissions that it makes, including that:

- TVEyes copies and distributes Fox's content in violation of express provisions of its cable agreements, which prohibit the redistribution of television content.
- TVEyes continued using Fox's content after being refused a license and representing that it would desist, deviating from the accepted industry practice of licensing television content.
- TVEyes is a for-profit company that makes money by offering Fox's content to paying subscribers.

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<sup>2</sup> The district court considered TVEyes' Content-Delivery Features separately, even though they use the same audiovisual files copied from Fox's telecasts. *Infra* 6. This brief addresses solely the viewing and archiving features but, for convenience, uses the term "Content-Delivery Features."

- TVEyes' Content Delivery-Features have been marketed to "watch live TV, 24/7," play "unlimited clips," and archive them "FOREVER!"
- ██████████ of TVEyes' paying subscribers are journalism organizations; the ██████████ is for-profit corporations.
- TVEyes is ██████████ used by the PR and communications teams of TVEyes' subscribers.
- The Works include numerous expressive elements.
- TVEyes copied and made available the Works in their entirety.
- The Content-Delivery Features affect the value of Fox's clips, cause Fox to lose promotional opportunities, and divert viewers from Fox's authenticated online viewing service.

Finally, it cannot be overemphasized that, as Fox explained in its opening brief and TVEyes conspicuously ignores, *it is TVEyes' burden* to prove fair use. FB 45. TVEyes cannot meet its burden. Its response is merely smoke and mirrors, obscuring a simple case with legal and factual mumbo-jumbo.

## ARGUMENT

### I. TVEYES CANNOT MEET ITS BURDEN ON FAIR USE

TVEyes claims the Content-Delivery Features are fair use because they are part of a "comprehensive, searchable database." TR 14. While a database that finds authorized copies of copyrighted works might be

fair use if the copyright holder’s markets were not affected, this Court has never found providing unauthorized copies itself to be fair use. FB 42; *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216 (2d Cir. 2015) (database “for identification of books” that included only limited text to assist in identification fair use); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (searchable database that did not provide any copyrighted content fair use).<sup>3</sup> TVEyes’ position also is inconsistent with the other authorities Fox cited, FB 43, none of which TVEyes’ response addresses.

Failing to address Fox’s central distinction between ***finding*** and ***delivering*** content, TVEyes relies on its Index to bootstrap support for

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<sup>3</sup> TVEyes’ cited cases did not involve mass-digitization, TR 17, 19, and are distinguishable. *Bill Graham Archives v. Dorling Kindersley Ltd.* involved a biography, not a database. 448 F.3d 605, 609 (2d Cir. 2006). *Swatch Group Management Services Ltd. v. Bloomberg L.P.* involved “news reporting and analogous activities,” and Swatch’s attempt to block access to an otherwise unavailable, newsworthy recording. 756 F.3d 73, 82, 84-85 (2d Cir. 2014). *White v. West Publishing Corp.* involved the defendant “reviewing, selecting, converting, coding, linking, and identifying” documents before making them available. 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014).

TVEyes is not engaged in these activities; it copies and redistributes Fox’s telecasts without commentary or news reporting. FB 54; *infra* 16; [Simmons.Decl.Exs.70 (RFAs 75, 77).] Moreover, unlike Swatch, Fox publicly distributes its telecasts, which can be legitimately accessed in numerous ways. FB 5-14, 37-39.

its viewing and archiving features. This is inappropriate. *First*, the Index and Content-Delivery Features involve two, independent acts of copying. FB 18. TVEyes creates one set of text files to operate the Index,<sup>4</sup> [Simmons.Decl.Ex.121.Ex.A.at.5-7], and a separate set of audiovisual files to operate the Content-Delivery Features.

[Simmons.Decl.Ex.121.Ex.A.at.4-5, 11.] Only the latter is at issue in this appeal as Fox is not challenging the Index.<sup>5</sup> *Second*, TVEyes concedes that the “district court erred,” TB 25, when it found the viewing feature to be fair use because it was “integral to TVEyes” Index. [Sept.2014.Op.19.]<sup>6</sup>

TVEyes also asserts that this Court should not address the Content-Delivery Features holistically. TR 15-16. As Fox’s telecasts

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<sup>4</sup> TVEyes states that it uses “speech-to-text” technology to “power” its database, TR 16, but this is exaggeration. For Fox’s content, TVEyes merely runs searches on the closed captioning text that Fox (and other television channels) create at substantial expense. [Simmons.Decl.Ex.121.Ex.A.at.4-5.] Regardless, “speech-to-text” would be copied into the Index’s text files.

<sup>5</sup> Contrary to TVEyes’ assertion, TR 16, however, Fox does not concede that the Index is fair use.

<sup>6</sup> To be clear, it is not integral because the Index would operate without the Content-Delivery Features. [Knobel.Decl. ¶¶190-203, 261-64.]

were copied to create the audiovisual files used by all of TVEyes' Content-Delivery Features, [Simmons.Decl.Ex.121.Ex.A.at.16-21]; FB 89, addressing the purpose of that copying (providing the features) together is appropriate. *See Google*, 804 F.3d at 209-210 (addressing features using index and those using book page reproductions). Moreover, each feature similarly distributes Fox's content. FB 17-29. TVEyes tacitly concedes that holistic treatment is appropriate by relying on its viewing feature argument to support its archiving feature. *See* TR 31, 46-49.

Finally, TVEyes criticizes Fox for addressing TVEyes' copying of Fox's telecasts, rather than the 19 representative Works. TR 15. TVEyes, however, copies and uses all of Fox's content similarly, *cf.* FB 92-95; [Nov.2016.Op.3], making holistic treatment appropriate. *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998). Furthermore, TVEyes itself vacillates between the Works, TR 15, 27, Fox's content, TR 17-18, and all of the content it records, TR 28, 47.

#### A. **TVEyes Misapplies Factor One**

##### 1. **TVEyes Implicitly Admits Its Bad Faith**

TVEyes downplays bad faith, claiming it is irrelevant, TR 26, but this consideration is "integral." *NXIVM Corp. v. Ross Inst.*, 364 F.3d

471, 478 (2d Cir. 2004); FB 45. Moreover, TVEyes does not dispute its egregious acts. TVEyes obtained the Works illicitly and uses them in breach of its cable agreements, which “prohibit the redistribution of content received by customers,” NCTA Br. 9 (without license, customers “may not rebroadcast”); FB 46,<sup>7</sup> and are intended to prevent the very harm TVEyes causes. [Carry.Decl. ¶¶13, 17-21]. Indeed, DIRECTV sued TVEyes for breaching DIRECTV’s agreements, resulting in a court order prohibiting TVEyes from using DIRECTV’s services in the future.

FB 17.

TVEyes also does not dispute that it used Fox’s content after both being refused a license and reneging on its repeated representations that it would remove Fox’s content, deviating from industry practice. FB 14, 40, 46. This is bad faith under *KCAL* and *Roy Export*, FB 46, neither of which TVEyes addresses. Instead, it relies on a footnote in *Campbell*, TR 26, but there was no license request to “avoid ... litigation” here. *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119,

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<sup>7</sup> Neither the agreements, see *E.E.O.C. v. Peabody W. Coal Co.*, No. 2:01-CV-01050, 2012 WL 5034276, at \*3 (D. Ariz. Oct. 18, 2012), nor Dr. Knobel’s expert opinions (FB 17), *United States v. Daly*, 842 F.2d 1380, 1387 (2d Cir. 1988), are hearsay.

1122 (9th Cir. 1997) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 n.18 (1994)).

## **2. TVEyes Concedes Its Commercial Use**

TVEyes concedes, but improperly downplays, that its use is commercial. FB 47. **First**, its argument essentially would write commerciality out of the statute, TR 24, ignoring the requirement that courts “shall” consider it. 17 U.S.C. §107(1). **Second**, TVEyes asserts that if its use is transformative, commerciality is given less weight. TR 24. But TVEyes’ use is not transformative, so commerciality weighs against fair use. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1177 (9th Cir. 2012); *United States v. ASCAP*, 599 F. Supp. 2d 415, 428 (S.D.N.Y. 2009). **Finally**, TVEyes is wrong that its commercial use should be “discounted” because it “charges a flat fee.” *Compare* TR 25 n.10 with *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (commercial despite “annual fee”); *Associated Press v. Meltwater US Holdings, Inc.*, 931 F. Supp. 2d 537, 543, 552-53 (S.D.N.Y. 2013).

## **3. TVEyes Cannot Show a Lack of Substitution**

Numerous courts have held that services that distribute broadcast content in a manner similar to the Content-Delivery Features are not

fair use. FB 47. TVEyes calls these decisions “outdated,” TR 20, but they actually are consistent with this Court’s most recent mass-digitization cases. FB 42-43. Moreover, TVEyes’ argument makes no sense as this Court is still bound by precedent unless overruled *en banc*. See *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004).

TVEyes also attempts to distinguish these cases by asserting that the infringing services “disseminated entire copies of copyrighted works,” and TVEyes does not. TR 20. TVEyes, however, makes *all* of Fox’s telecasts available as unlimited, high-definition video clips. *Infra* 20. Additionally, those services actually provided *less* of the works at-issue than TVEyes does here. See *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 69, 72 (2d Cir. 1999) (selling “abstracts,” not whole articles); *Infinity*, 150 F.3d at 106, 108; (access to current, not prior, broadcasts); *Reuters*, 149 F.3d at 994 (programs containing clips from plaintiff’s works); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 792, 798 (9th Cir. 1992) (“portions of LANS’s footage”); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1493, 1495 (11th Cir. 1984) (“portion of the newscast.”).

**a. TVEyes' Content-Delivery Features Are Not Transformative**

TVEyes' viewing and archiving features are substitutive. FB 51. They replace purchasing video clips and watching television programs via television, authenticated viewing, and online, because the same content can be viewed and permanently libraried on TVEyes' website. *Compare* FB 5-14 with FB 18-19; [Sept.2014.Op.6.] Indeed, TVEyes markets its service to "watch live TV, 24/7," with "unlimited clips" to "play," [Sept.2014.Op.6]; "archive ... without limitation," [Knobel.Decl. ¶62];<sup>8</sup> FB 21; and substitute for "traditional clipping service[s]." FB 14-15; [Simmons.Decl.Ex.108.at.TVEYES-001997; Simmons.Decl.Exs.88-89.]

TVEyes wrongly runs from its marketing materials—which tout watching "live TV" and viewing content in "real-time,"

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<sup>8</sup> TVEyes asks this Court to disregard Dr. Knobel's opinions, TR 3 n.2, but did not file a *Daubert* motion, instead submitting its own expert declarations. [Karle.Decl.; Dkt.141("Karle.2d.Decl.")] TVEyes has waived this argument. *See Millea v. Metro-N. R. Co.*, 658 F.3d 154, 163 (2d Cir. 2011). Moreover, Dr. Knobel's opinions may be considered in this cross-appeal both because they are part of the summary judgment record and the district court reevaluated its first opinion based on later discovery. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); [Aug.2015.Op.8 n.4]; TR 18 (relying on TVEyes' expert).

[Simmons.Decl.Exs.88, 87.at.TVEYES-044104; Sept.2014.Op.6]—  
claiming that subscribers cannot actually watch live television using  
the Content-Delivery Features. TR 12. ***First***, TVEyes is merely  
splitting hairs, as any delay is just a matter of seconds (essentially live),  
[Simmons.Decl.Exs.121.Ex.A.at.8, 64 (303:11-19)], and regardless,  
accessing television programs after they air still substitutes for  
watching live television as anyone with a DVR knows.<sup>9</sup> FB 18-24.

***Second***, it is legally improper for TVEyes to deny the  
functionality of its service when its own documents promote such uses.  
*See Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 142  
(2d Cir. 1998) (dismissing “post hoc rationalizations” inconsistent with  
prior statements); *Meltwater*, 931 F. Supp. 2d at 552 (marketing showed  
substitution); *Salinger v. Colting*, 641 F. Supp. 2d 250, 258, 260 n.3, 262  
(S.D.N.Y. 2009) (rejecting post-hoc re-characterization given pre-

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<sup>9</sup> TVEyes asserts that its subscribers do not watch ten-minute clips of Fox’s programming sequentially, TR 11, but there is contrary undisputed evidence. FB 20. Regardless, watching shorter clips also is substitutive, as news segments are short. [Wallace.Decl. ¶30]; *Meltwater*, 931 F. Supp. 2d at 552.

litigation documents), *vac. and rem. on other grounds*, 607 F.3d 68 (2d Cir. 2010).<sup>10</sup>

**Third**, TVEyes' assertion that its subscription is too expensive to be a substitute, TR 12, is wrong because TVEyes is less expensive than legitimately purchasing the channels it provides, [Knobel.3d.Decl. ¶17, Ex.214], and offers more functionality than merely viewing and archiving, FB 21-28.

**b. TVEyes Cannot Rely on Its Subscribers' Uses**

TVEyes continues to rely on its subscribers' uses of Fox's content to argue that TVEyes' own 24/7 copying and retransmission is transformative. TB 28-36. TVEyes' reasoning is erroneous. FB 52-60.

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<sup>10</sup> TVEyes criticizes Fox for citing only eight sales emails and two marketing documents, TR 12, but they are exemplary. [Knobel .Decl. ¶74.] Indeed, even TVEyes' improper post-litigation materials, *supra* 11, are consistent with the pre-litigation documents Fox cited. [Simmons.Decl.Ex.111.at.TVEYES-008271 (“**unlimited** access to all streaming audio and video”); Dkt.140(“Ives.5th.Decl.”)Ex.VVVVV.at.1 (“Easily ... share clips”), at.3 (“unlimited access to real-time news broadcasts”), at.21 (same), at.23 (government PR team uses TVEyes), at.24 (use of features to distribute “radio or TV coverage” and competition with “per-clip” services), at.36 (PR specialist at Fortune 500 company uses TVEyes).] TVEyes' other supposed evidence is of unknown date and provenance. FB 56 n.14.

**First**, TVEyes argues that this Court may consider “how subscribers use TVEyes” as evidence of TVEyes’ purpose. TR 21 (misquoting *Google*, 804 F.3d at 217 (concerning search, not snippets)). Consistent with prior cases, FB 52, however, *Google* found it transformative to make “available significant information *about the books*,” such as word frequency; it did not rely on Google’s users’ activities. 804 F.43d at 217.<sup>11</sup>

TVEyes also claims the Content-Delivery Features should be presumed transformative because some of TVEyes’ subscribers allegedly use the service for “research,” which appears in the fair use statute. TR 19. TVEyes itself, however, does not perform research—it just provides copies of content, [Simmons.2d.Decl.Exs.125 (238:9-11, 255:5-18)]—and again it cannot rely on its subscribers’ uses. *Supra* 12. Moreover, Congress and multiple courts have rejected TVEyes’ argument. See IP Scholars Br. 1 (“Congress thrice rejected requests to add media monitoring to the preamble.”); *Reuters*, 149 F.3d at 994

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<sup>11</sup> *Accord Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (pointing to “source of information”); *Kelly v. Arriba Soft. Corp.*, 336 F.3d 811, 818 (9th Cir. 2002) (improving “access to [authorized] images”); *White*, 29 F. Supp. 3d at 399 (editors’ activities).

(clipping service not engaged in research); *Meltwater*, 931 F. Supp. 2d at 552-53.

**Second**, TVEyes continues to mischaracterize who its subscribers are and how they use the Content-Delivery Features. Contrary to TVEyes' claim, TR 7, the features [REDACTED] by PR professionals, not journalists (which represent [REDACTED] of TVEyes' subscribers).<sup>12</sup> FB 29, 54-56; ASJA Br. 6; [Knobel.Decl. ¶199, Ex.58.] Similarly, TVEyes categorized the subscribers who purportedly accessed the Works, TR 8, but did so without identifying which subscribers supposedly fit in what categories.<sup>13</sup> Even if the categories

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<sup>12</sup> TVEyes claims that Dr. Knobel's calculation is underinclusive because TVEyes barters free access to Fox's content to certain organizations in exchange for promotional credit. TR 8 n.3. But this is further evidence of TVEyes' diversion and commerciality. Further, even if each organization TVEyes identifies were added to the calculation, journalism organizations would represent [REDACTED] of TVEyes' current clients. [Knobel.2d.Decl. ¶29, Ex.160.] Moreover, TVEyes does not state whether it gives free access to for-profit corporations or PR firms.

<sup>13</sup> TVEyes is attempting to use discovery as a sword and a shield. Throughout discovery, TVEyes refused to identify its subscribers by name, [Dkt.97.at.14], and Fox relied on the district court's correct statement of the law that TVEyes' users' activities were irrelevant to fair use (TVEyes did not disagree). FB 53 n.11. Then, TVEyes created its made-for-litigation categories, which are solely substantiated by TVEyes' say so. Regardless, TVEyes' own

were accurate (which cannot be determined), they are undermined by the fact that even at such organizations, TVEyes' actual users predominantly are PR professionals. FB 29-30. Indeed, for over a decade, TVEyes has publicly confessed its intention "to make a play for marketing and PR professionals." [Knobel.Decl.Ex.58.] TVEyes offers no response, and its post-litigation, re-characterization of its service for use by journalists is legally improper. FB 53-57; *supra* 11.

TVEyes also continues to assert that it "imposes limitations to ensure that subscribers' use is consistent with research purposes," TR 9, but its assertion is contradicted by TVEyes' design, marketing, and encouragement of the use of the Content-Delivery Features. FB 14, 17. It also is contradicted by TVEyes' own inconsistent description of its services. *Compare* TR 9 (claiming restriction to internal use), 30 n.15 (claiming "sequential clips *cannot* be accessed") *with* TR 49 (public use), 6 (subscribers "accessing two or more consecutive 10-minute FNC clips"), 36. Moreover, TVEyes' failure to respond to Fox's exposé of the

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categories include publications, PR firms, and "radio productions." [Seltzer.4th.Decl. ¶5.]

supposed limits as empty promises, FB 31-37, is a tacit admission that the “limitations” are no limit at all. As to TVEyes’ new arguments:

- TVEyes asserts that “*thousands* of e-mails from TVEyes staff” contain an email footer limiting use of the features, but it cites only ***eleven*** such emails. TR 10. Setting aside that these footers are buried at the end of emails and easily would not be seen, FB 35, they are inconsistent with the statements in the body of the emails. For instance, TVEyes relies on an email where, two pages before the footer, a TVEyes salesperson writes: subscribers can view “digital video segments in real-time, and instantly share those results with unlimited recipients ... You may ... download an unlimited number of digital clips ... for a flat monthly fee ... UNLIMITED clips.”

[Rose.4th.Decl.Ex.PPPP.at.TVEYES-044094, at.TVEYES-044130.] He then provides four video clips (three from FBN). [Rose.4th.Decl.Ex.PPPP.at.TVEYES-044095.] Similarly, even the emails on which TVEyes relies show the footer frequently is not used. [Ives.1st.Decl.Ex.C.at.TVEYES-041564; Rose.4th.Decl.Ex.PPPP.at.TVEYES-037104.]

- TVEyes’ assertion that starting clips “14 seconds before the keyword aired” is a limitation, TR 9, makes no sense because, once a clip is identified, the features will deliver any part of the program. FB 20.
- TVEyes claims that making content available for 32 days is a limitation, TR 9, but that is the window during which Fox’s up-to-the-minute news programming is most valuable, and clips can be saved permanently. FB 21-24.

Regardless, these “limitations” clearly are ineffective. In one snapshot search, Dr. Knobel identified 140,000 links to TVEyes-created video clips on social media platforms and other public websites. FB 26.

TVEyes responds that its expert conducted a similar search revealing fewer links, TR 10, but his methodology was flawed and his results inaccurate. [Knobel.2d.Decl. ¶26.]<sup>14</sup> Moreover, TVEyes ignores the 3,500 Tweets containing links to TVEyes-created clips, from one year alone, identified by Dr. Knobel, including:



[Knobel.2d.Decl. ¶21, Ex.154.]

***Third***, even if TVEyes were correct about how its users employ the features, Fox's offerings serve the same purposes. FB 58; *Infinity*, 150 F.3d at 108 (broadcasts monitored by “turning on a radio”);

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<sup>14</sup> TVEyes' response is misleading because it only mentions “playable Fox clips,” TR 11 n.5, which likely stopped playing after TVEyes’ 32-day window. TVEyes also ignores the transmission of other copyright holders’ content, despite its value in showing the limitations’ ineffectiveness.

[Simmons.2d.Decl.Ex.125 (53:4-12) (same by “watching television”).]

TVEyes’ silence on the issue is another tacit admission.<sup>15</sup>

**Finally**, TVEyes continues to rely on the convenience of watching or archiving a clip, instead of using an authorized method. TR 17, 23. This Court, however, has rejected the argument that a use is transformative because it is convenient. FB 59-60; *see also ASCAP*, 599 F. Supp. 2d at 428 n.12; *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000); [Aug.2015.Op.17.] TVEyes does not directly respond to this Court’s precedent cited by Fox, instead implicitly asserting that *Google* broke with them. TR 18. Google, however, distributed only enough text to determine “whether the book falls within the scope of [the searcher’s] interest (without revealing so much as to threaten the author’s copyright interests).” 804 F.3d at 218. Although accessing more content from books might be convenient, this

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<sup>15</sup> TVEyes misdescribes Fox’s argument as “a text-search function is all that is necessary for researching television broadcasts.” TR 22. To the contrary, TVEyes claimed the features were necessary to perform research, TB 34, and Fox showed that the same research could have been conducted using Fox’s website. FB 59. TVEyes has no response (despite relying on the same example, TR 23). *See also ASJA Br. 21* (features not necessary to conduct journalistic research).

Court required Google’s users to acquire an authorized copy instead. By contrast, TVEyes’ features make available all of Fox’s content.

**B. TVEyes Does Not Dispute Evidence that Factor Two Favors Fox**

Notably, TVEyes’ response abandons TVEyes’ argument that telecasts cannot be creative. *Compare* TB 37-39 with TR 27. Yet, without responding to the district court’s finding that the Works “reflect creative endeavors,” [Sept.2014.Op.7], or the substantial evidence supporting that finding, FB 61, TVEyes conclusorily asserts that the Works are “highly factual.” TR 27. TVEyes’ silence—as well as its own reliance on the Works’ creative “visual and audio” aspects, TR 18—is a tacit admission that this factor militates against fair use. *See Infinity*, 150 F.3d at 109.

TVEyes also argues that, under *Google*, this factor favors fair use when subscribers “may gain information about the Works for research purposes.” TR 27. But *Google* held that “replicating protected expression in a manner that provides a meaningful substitute for the original” weighs against fair use. 804 F.3d at 220. Further, TVEyes’ subscribers do not retrieve only unprotectable elements of Fox’s content from TVEyes. FB 24, 62.

### C. TVEyes Fails to Address that It Copies and Makes Available the Entirety of the Works

TVEyes' response continues to rely on assertions concerning the amount of content actually accessed by TVEyes' users, TR 29-30, rather than how much content is "made accessible" and "could" be accessed. FB 63-65; *Google*, 804 F.3d at 222-24. Because TVEyes makes all of Fox's content available, including the qualitatively valuable parts of each Work, it cannot benefit from this factor. FB 63;<sup>16</sup> cf. *Swatch*, 756 F.3d at 90 (copying "entire work" never "*favors* fair use").<sup>17</sup>

TVEyes asserts without legal support that its limitations provide sufficient protection to satisfy *Google*'s requirements, TR 30, but TVEyes misses the point: TVEyes does not limit the amount of content

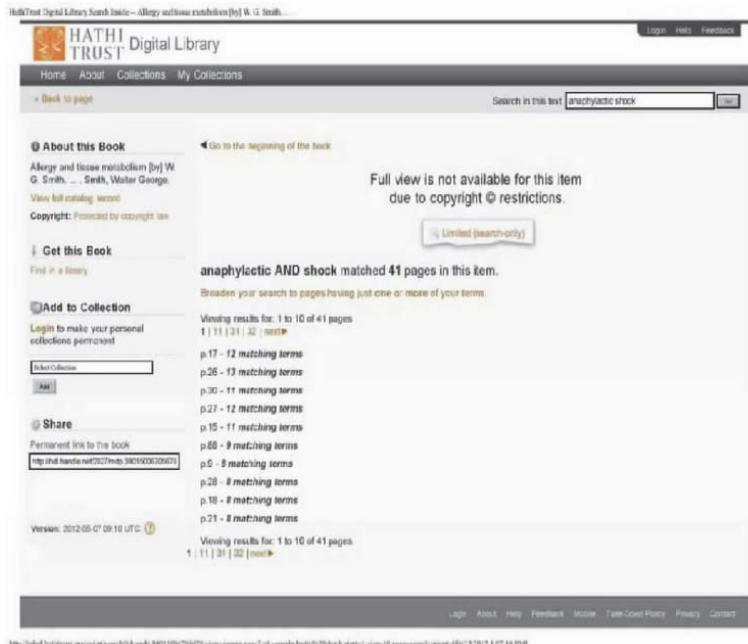
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<sup>16</sup> TVEyes oddly claims it "does not enable searches for 'news stories'" TR 31, while stating it makes all of Fox's broadcasts available for searching. TR 4. As the features make all of Fox's telecasts accessible, this factor weighs against TVEyes regardless of what searches are used. FB 64-65.

<sup>17</sup> TVEyes complains that Fox has not identified the Works' "heart," but no identification is necessary as TVEyes copied the entirety of the Works. [TVEyes.Resp.SUF. ¶149.] Furthermore, courts look to what was most relevant to the copyist to determine what is qualitatively valuable. *Harper & Row Publishers, Inc. v. National Enters.*, 471 U.S. 539, 565 (1985); *Meltwater*, 931 F. Supp. 2d at 557-59. Regardless, it was TVEyes that sought an order "that the parties need not respond to contention interrogatories" (including on this issue). [Dkt.18.at.3.]

made available. FB 31-37, 65-66; *supra* 15. Similarly, TVEyes is not immunized by a claimed lack of “danger of misuse in the future.” TR 30. This factor weighs against fair use even where future misuse is not possible. *Infinity*, 150 F.3d at 110 (transmitting broadcasts without future playback not fair use). Further, archived clips are saved permanently. FB 22-23.

TVEyes is wrong that, under *HathiTrust*, this factor supports fair use because TVEyes’ copying was “necessary” to its purpose of creating “a comprehensive database.” TR 28-29. *First*, *HathiTrust*’s purpose was making books text-searchable. 755 F.3d at 97. Here, the Index, not the Content-Delivery Features, plays that role and is irrelevant. FB 20. *Second*, the *HathiTrust* search results delivered **no** copyrighted content, just the page numbers on which keywords appeared:



755 F.3d at 91, 97. This is in sharp contrast to TVEyes, which provides *all* of Fox's content in high-definition. TVEyes asks this Court to interpret *HathiTrust* and *Google* in a way that would gut their carefully balanced holdings.

Finally, TVEyes' alleged statistics, TR 29, are misleading. *First*, TVEyes' self-serving categories are inapposite. *Supra* 14. *Second*, TVEyes' claimed clip view durations are unreliable, FB 65, which TVEyes tacitly admits by failing to respond to Fox's critique of TVEyes' methodology.<sup>18</sup>

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<sup>18</sup> TVEyes asserts that Fox admitted the durations' veracity, TR 29 n.14, but Fox admitted only that declarations on which TVEyes relied accurately stated the methodology used, not its propriety.

**D. TVEyes' Omissions and Misstatements Show that the Fourth Factor Weighs Against Fair Use**

TVEyes' fourth factor legal analysis is fatally flawed. *First*, TVEyes continues to invert the inquiry, asserting that, for the Content-Delivery Features to affect Fox's markets, Fox's website must allow TVEyes' subscribers to "accomplish their [supposed] research objectives." TR 38, 41. The proper inquiry is whether TVEyes provides a service that occupies a "market that properly belongs to" Fox. *Infinity*, 150 F.3d at 110; FB 77-78. While continuing to misapply the analysis, TVEyes does not respond to Fox's legal arguments.

TVEyes' misstep is critical because TVEyes markets the features as replacements for Fox's offerings, from which users can "watch live TV" and "play ... unlimited clips' of television programming in high definition." FB 14-15, 69. TVEyes' subscribers have no need for an MVPD subscription, Fox's websites, or a licensed "clipping service." FB 17. TVEyes' own CEO admitted that with a "high quality/high definition" TVEyes clip, TVEyes' subscribers "would have no need to go

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Regardless, TVEyes cannot meet its burden under this factor. FB 65-66.

to Fox.” [Simmons.Decl.Ex.66 (83:17-22).] Because TVEyes’ features fill Fox’s role in its own market, they are not fair use. FB 70.

**Second**, TVEyes fails to address the effect “unrestricted and widespread” use of the sort engaged in by TVEyes would have on Fox’s markets. *Campbell*, 510 U.S. at 590. TVEyes’ silence speaks volumes.

**Third**, TVEyes is wrong that this Court may consider only the Works. TR 32. Courts look to the effect a defendant’s use will have on “traditional, reasonable, or likely to be developed” markets. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997).<sup>19</sup> That analysis would be difficult without considering the markets for the types of works at-issue, which is why a defendant’s use must be “[p]laced in a broader perspective” of the effect a fair use finding will pose “to the marketability” of such works “in general.” *Harper*, 471 U.S. at 569. TVEyes attempts to limit *Harper*, TR 33 n.17, but the legal principle is clear. *Google*, 804 F.3d at 223 (books in general); *Am.*

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<sup>19</sup> Contrary to TVEyes’ assertion, TR33, *Ringgold* rejected consideration of work-specific damages, rather than the impact on the potential market. 126 F.3d at 81.

*Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 n.12 (2d Cir. 1994)

(category of defendant’s conduct, not “specific instances of copying”).<sup>20</sup>

**Fourth**, TVEyes improperly shifts its high burden of proof to Fox, TR 34, but the fair use proponent—TVEyes—carries “the burden of demonstrating fair use” as to “relevant markets.” *Campbell*, 510 U.S. at 590; *Infinity*, 150 F.3d at 111 (defendant “bears the burden of showing an absence of ‘usurpation’ harm”).<sup>21</sup> Moreover, despite TVEyes’ bald assertion that market harm should not be presumed, TR 33, it offers no rebuttal to the Supreme Court’s requirement of a presumption in the “context of verbatim copying of the original in its entirety for commercial purposes.” See *Campbell*, 510 U.S. at 591; FB 68.

**Fifth**, TVEyes repeatedly asserts that Fox’s clear evidence of market harm is not “legally cognizable.” TR 40, 42, 44. TVEyes,

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<sup>20</sup> TVEyes partially quotes *Texaco* trying to cabin its reasoning, TR 32, but the opinion merely distinguished types of works: “*journal issues and volumes*,” and “*individual journal articles*.” 60 F.3d at 927.

<sup>21</sup> TVEyes relies on *HathiTrust* and *Sony*, TR 34, but those cases involved non-commercial use by the alleged direct infringers and, to the extent they are inconsistent with *Campbell* (the Court’s more recent decision), they are not binding. *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). Also, *Gallo v. Prudential Residential Services*, cited by TVEyes, TR 34 n.18, did not involve fair use. 22 F.3d 1219 (2d Cir. 1994).

however, misreads the cases it cites. *Campbell* distinguished “critical works” for which “no protectable derivative market” exists and other uses. 510 U.S. at 592; *Bill Graham*, 448 F.3d at 610, 614-15 (biography with similar critical purpose). Furthermore, even though it recognized parody as a critical work and transformative, the Court still required consideration of harm caused by the work’s other “effects.” *Campbell*, 510 U.S. at 592-94 (remanding for further proceedings on factor four). This belies TVEyes’ argument that no market harm may exist for transformative uses. TR 44. Regardless, TVEyes admits its Content-Delivery Features do not provide criticism or commentary. *Supra* 12.<sup>22</sup>

**Finally**, TVEyes, like the district court below, again equates an effect on Fox’s market with actual damages. TR 31; [Sept.2014.Op.24 (requiring “danger of … potential harm” and “reduced returns on advertising rates or revenues”). This is erroneous. “Actual present harm need not be shown … [n]or is it necessary to show … future harm.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). Also, requiring a decline in licensing, instead of merely a

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<sup>22</sup> The portion of *Google* TVEyes cites, TR 44, was not the Court’s factor four analysis. 804 F.3d at 225.

failure to pay the “*customary* price,” is reversible error. *Ringgold*, 126 F.3d at 81. Importantly, monetary loss is not required, although, as discussed below, it is present here. FB 46-69; *Duncan*, 744 F.2d at 1496-97, 1499 (effect on market despite only \$35 of damages). TVEyes’ failure to respond to Fox’s legal argument on this issue is fatal to its case.

### **1. TVEyes Implicitly Admits that the Fourth Fair Use Factor Favors Fox**

While Fox’s opening brief detailed the ways the Content-Delivery Features harm Fox’s online and digital markets, FB 70-75, TVEyes failed to address many of them:

- The effect on the value of Fox’s clips. FB 70.
- Fox’s lost promotional opportunities. FB 73.
- Diversion of viewers from Fox’s authenticated online viewing service. FB 74.
- Disruption of the balance between traditional and digital television distribution, FB 77, particularly given TVEyes’ breach of its cable agreements. *Supra* 6.

TVEyes’ silence, even if this Court adopted TVEyes’ many legal errors, *supra* 23, weighs this factor against fair use. *See Norton v. Sam’s Club*, 145 F.3d 114, 117 (2d Cir. 1998) (“Issues not sufficiently argued in the briefs are considered waived.”); *see also Google*, 804 F.3d

at 227 (destroying work's value is "substantial rebuttal" to fair use); *Video Pipeline, Inc. v. Buena Vista Home Entm't*, 342 F.3d 191, 202-03 (lost cross-selling opportunity); *Infinity*, 150 F.3d at 111 (customer diversion); *Video-Cinema Films, Inc. v. Lloyd E. Rigler-Lawrence E. Deutsch Found.*, No. 04-CV-5332, 2005 WL 2875327, at \*8 (S.D.N.Y. Nov. 2, 2005) (eroded value).

## **2. TVEyes' Content-Delivery Features Compete with Fox's Offerings**

TVEyes' responses to Fox's other arguments do not move the needle. *First*, TVEyes does not refute that the Content-Delivery Features compete with Fox's clipping businesses as they target the same kinds of organizations. FB 71. Instead, TVEyes re-asserts its arguments that Fox only issues public performance licenses and that the features are not used for that purpose. FB 43, 49; TR 43. Fox showed that TVEyes' arguments are factually wrong. FB 79; [Ashton.2d.Decl. ¶¶7-11 (██████████ ██████████)].] TVEyes offers no response.

TVEyes also does not dispute that it has devoured Fox's licensing market by using its "less expensive" flat-rate business model to

undersell Fox's partners that charge per clip, causing lost sales. FB 72.

Instead, it claims Fox's content has not been licensed for research. TR

44.<sup>23</sup> Fox, however, **has** licensed its content for research.<sup>24</sup>

[Williams.Decl. ¶¶11-12, 26 (licensed for [REDACTED]  
[REDACTED]); Ex.25.at.19; at.38 (examples include [REDACTED]  
[REDACTED] project).] Regardless, the features-at-issue are used

primarily for non-research purposes, FB 26, and are not marketed,  
used, or restricted to it. FB 24, 31.

TVEyes further asserts that because the Works stopped playing  
on TVEyes' website after 32 days, they do not affect Fox's future clip  
licensing. TR 43. This argument is unavailing as Fox's content is most  
valuable in that window. *Supra* 16. Moreover, archived clips—which  
TVEyes admits exist for the Works, TR 43 n.23—obviate the need to  
seek clips after 32 days. TVEyes offers no evidence that any subscriber  
that played or archived the Works later licensed that content from Fox  
(*i.e.*, the Content-Delivery Features are substitutive). *See BMG Music*

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<sup>23</sup> TVEyes asks this Court to ignore evidence of lost sales because it concerns “licensing requirements under *English* law,” TR 44, but cites no legal or factual authority supporting doing so.

<sup>24</sup> TVEyes re-asserts that Fox's partners have not issued licenses for the Works, TR 42, but does not respond to Fox's rejoinder, FB 79.

*v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (copy played and retained substitutes).

**Second**, Fox showed that TVEyes' video clips substitute for clips on Fox's website, causing lost pre-roll and banner advertising revenue. FB 73. TVEyes again chastises Fox for not making its content available in the same format or under the same conditions as TVEyes. TR 37-40. Yet, it ignores that Fox need not do so to show substitution. *Supra* 23; FB 77-78. It also ignores Fox's rejoinder to its factual assertions. FB 80-81. As to TVEyes' new arguments:

- TVEyes claims that only the Content-Delivery Features “alert subscribers to broadcast content of which they otherwise would not have become aware” and contain other features, TR 37, 39, but Fox provides that functionality. [Misenti.2d.Decl. ¶3-5; Misenti.Decl. ¶14.]
- TVEyes asserts that Fox’s website does not “include the commercials that aired during the broadcast,” TR 39, but that content is not owned by Fox and, thus, not at issue. It also is available using non-infringing alternatives. FB 37.
- TVEyes alleges that any harm suffered by Fox would be “negligible” because of “how websites generate advertising revenue.” TR 40. Leaving aside that lost revenue is irrelevant, *supra* 25, using a methodology proposed by TVEyes’ own expert, it was determined that TVEyes’ service

caused lost revenue in the millions to tens-of-millions.  
[Misenti.3d.Decl. ¶¶22-24.]<sup>25</sup>

**Third**, Fox provided substantial evidence that the Content-Delivery Features harm Fox’s negotiating position with its syndication partners. FB 74. Although TVEyes’ response claims that Fox’s evidence is mere “speculation,” TR 40, it offers no contrary evidence. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

**Fourth**, TVEyes harms the “vibrant market for the licensing of audiovisual content,” including the “robust” one for monitoring and clipping services. APA Br. 5-12; FB 75; CNN Br. 17. TVEyes’ assertion that this market is not “cognizable,” TR 44, is legally erroneous. *Supra* 25. As TVEyes does not address the evidence that a traditional market exists for licensing telecasts to media monitors, FB 14, it essentially concedes that it occupies Fox’s licensing market.<sup>26</sup> *Infinity*, 150 F.3d at 111.

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<sup>25</sup> TVEyes’ claim that it provides “less-than-broadcast-quality clips,” TR 42, is belied by its own licensing agreement. [Simmons.Decl.Ex.100.at.2.] Regardless, high-definition clips are substitutive.

<sup>26</sup> TVEyes continues to rely on *Google*, TR 44, but the burgeoning market for licensing of book information cannot be compared to

**Sixth**, the features devalue and substitute for Fox's traditional television distribution. FB 75-77. As to devaluation, TVEyes states there is no evidence that the features affect "the fees commanded by Fox." TR 36. This threadbare assertion, however, is insufficient to overcome the significant evidence of devaluation Fox presented. *See Infinity*, 150 F.3d at 110. Indeed, similar evidence established irreparable harm in *WPIX, Inc. v. ivi, Inc.*, which TVEyes notably does not distinguish. 691 F.3d 275, 285-86 (2d Cir. 2012).

As to substitution for Fox's live telecasts, although addressed in separate bullets, TVEyes essentially argues that live television cannot be watched on its service. TR 35-36. That is not true. *Supra* 10; FB 15, 18. TVEyes also asserts that its subscribers would not be included in Nielsen's ratings because they use the features at work. That also is wrong. [Rose.2d.Decl. ¶10, Ex.MMMM (Nielsen measures "all

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TVEyes' demonstrated harm to this established market. *See* IP Scholars Br. 18-21.

screens”].] Moreover, TVEyes offers no evidence that its service is used exclusively at work.<sup>27</sup>

#### E. The Public Interest Favors Fox

TVEyes prominently admits the “public benefits of broadcast news,” TR 46, but nonetheless advocates a fair use theory that would undermine journalism’s critical role in this country (as discussed by numerous journalists, television channels, and even Fox’s competitors). ASJA Br. 9-10; CNN Br. 3; NAB Br. 2, 8-14, 16-18. TVEyes’ public benefit argument fails. *First*, Supreme Court and Second Circuit precedent makes clear that any public benefit analysis must be holistic, weighing the Content-Delivery Features’ benefits against the possible disruption to Fox and other journalism organizations. FB 82-84. Without citing a single case supporting its position,<sup>28</sup> TVEyes asks this Court to ignore the cases cited by Fox, none of which TVEyes attempts to distinguish.

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<sup>27</sup> TVEyes claims that Fox has not identified harm from archiving, TR 45, but the Content-Delivery Features stem from the same infringing act and cause the same harm to Fox’s markets. *Supra* 6.

<sup>28</sup> TVEyes relies on *Google* and *HathiTrust*, TR 46, but they do not address public benefit.

**Second**, TVEyes' opening brief claims that the features enhance the public's ability to comment on news. TB 48. Fox rejoined that this was untrue as TVEyes' service is not available to the public. FB 84. TVEyes concedes that Fox was correct. TR 48.

Now, TVEyes relies on the features being used "publicly" by its subscribers. TR 49. This contention reveals TVEyes' argument as Janus-faced. It asserts that the features are used only internally, TR 9, 14, 42, yet relies on their public use. TR 49. TVEyes cannot have it both ways and does not address its hypocrisy. FB 48. Moreover, the interests of TVEyes' clients do not "outweigh the strong public interest in the enforcement of the copyright laws" or justify allowing TVEyes to "free ride on the costly news gathering and coverage work performed by other organizations." *Meltwater*, 931 F. Supp. 2d at 553.

**Third**, Fox explained that even if TVEyes provides public benefits, because those benefits can be accomplished by other methods, they are irrelevant. FB 85. TVEyes concedes Fox's legal position, instead asserting that "none of the 'non-infringing' alternatives cited by Fox are adequate substitutes for TVEyes." TR 49. TVEyes is incorrect. FB 85; ASJA Br. 21-22. Contrary to TVEyes' arguments elsewhere in

its brief, TR 48, (a) Fox's clips could be licensed for commentary, FB 79-80; (b) Fox's website clips have been used for analysis and criticism, FB 80; and (c) other recording tools and news archives are equally able to record Fox's content, FB 37.<sup>29</sup>

***Fourth,*** TVEyes' suggestion that Fox should bring lawsuits against each TVEyes subscriber using Fox's content, TR 49, is inconsistent with TVEyes' own direct infringement. FB 88-91; Copyright Alliance Br. 4-10.

***Finally,*** TVEyes silently has conceded that it cannot cloak itself in the mantle of journalism and claim a resulting public benefit. FB 86. As true journalists explained, "TVEyes' services, by copying and delivering copyrighted journalistic efforts (as well as massive amounts of entertainment and sports), makes a mockery of true journalists and those who study and criticize journalism." ASJA Br. 6.

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<sup>29</sup> After claiming this Court's analysis should be restricted to the 19 Works, TR 15-16, 23, 32, TVEyes now critiques the TV News Archive for not including as many channels as TVEyes, TR 8. What is relevant here is that the TV News Archive includes all of Fox's content. [Knobel.Decl. ¶¶250-51.]

## **II. THE DISTRICT COURT'S ADVISORY OPINION WAS CONSTITUTIONAL ERROR**

Rulings must be grounded in “established facts” and cannot have a “hypothetical basis.” *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977). For fair use, courts must consider “the precise facts at hand,” *Texaco*, 60 F.3d at 916, not conjecture or speculation. *See Google*, 804 F.3d at 223; *United States v. Broad. Music, Inc.*, 275 F.3d 168, 178-79 (2d Cir. 2001).

TVEyes’ arguments notwithstanding, the district court impermissibly dictated hypothetical limitations on TVEyes’ emailing feature. **First**, there was no “concrete” record, TR 61, as the parties’ briefs were theoretical, addressing potential implications of possible measures. [Joint Submission 22-32, 43-52]; *Info-Hold, Inc. v. Muzak Holdings LLC*, No. 1:11-CV-283, 2012 WL 5419347, at \*2 (S.D. Ohio Nov. 6, 2012). **Second**, the facts were not “imminent,” TR 61, as they were not “definite and concrete.” *In re Motors Liquidation Co.*, No. 15-CV-2844, 2016 WL 3766237, at \*23 (2d Cir. July 13, 2016). TVEyes would not have implemented the limitations but for and until the

injunction issued, TR 61, and they may not work as described. FB 32-37. Thus, their effect on Fox's markets is not definite.<sup>30</sup>

## **CONCLUSION**

Fox requests that this Court rule in its favor.

Dated: August 29, 2016

*/s/Dale Cendali*

Dale Cendali

KIRKLAND & ELLIS LLP

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<sup>30</sup> Contrary to TVEyes' assertion, TR 61, Fox did not admit that the measures would prevent infringing activity. [Joint Submission.33]

**CERTIFICATE OF TYPE-VOLUME COMPLIANCE**

The undersigned certifies that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,987 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: August 29, 2016

/s/ Dale M. Cendali

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