

15-3885, 15-3886

United States Court of Appeals for the Second Circuit

FOX NEWS NETWORK, LLC,
Plaintiff-Appellee-Cross-Appellant,

v.

TVEYES, INC.,
Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

**BRIEF OF MEDIA CRITICS, ELECTRONIC FRONTIER FOUNDATION,
AND ORGANIZATION FOR TRANSFORMATIVE WORKS
AS *AMICI CURIAE* IN SUPPORT OF
PETITION FOR REHEARING EN BANC AND PANEL REHEARING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *amici curiae* Brave New Films, Fairness & Accuracy in Reporting, the Electronic Frontier Foundation, and the Organization for Transformative Works certify that none of these entities has a parent or subsidiary corporation, and that no publicly held company owns 10% or more of their stock.

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STATEMENT OF INTEREST OF AMICI

Amici Eric Alterman, Brave New Films (“BNF”), and Fairness & Accuracy in Reporting (“FAIR”) are media critics with decades of experience who analyze the news media and publish commentary addressing pressing issues of national concern. *Amici* Electronic Frontier Foundation (“EFF”) and Organization of Transformative Works (“OTW”) are non-profit institutions; EFF is dedicated to protecting civil liberties in the digital world and OTW seeks to protect noncommercial works created by fans based on existing works.¹ *Amici* have professional interests in ensuring that the tools necessary to conduct meaningful analysis and criticism of and commentary on the modern news media are properly protected by fair use.² *Amici* media critics and *amicus* EFF each previously submitted *amicus* briefs in connection with the panel’s consideration of this case.

Eric Alterman is a Distinguished Professor of English and Journalism, Brooklyn College, City University of New York (“CUNY”), and a Professor of Journalism at the CUNY Graduate School of Journalism.

¹ *Amici*’s unopposed motion for leave accompanies this brief. Both parties received notice of the filing of this motion and brief and both consent to the filing of the brief. Pursuant to Rule 29(a)(4)(E), no party’s counsel authored this brief in whole or in part, and no person other than *amici*, including any party or party’s counsel, contributed money that was intended to fund preparing or submitting this brief.

² *Amici* wish to thank Stanford Law School Juelsgaard Intellectual Property and Innovation Clinic certified law students Chris Connelly and Royce Ryu for their valuable contributions to this brief.

BNF is a media company, established by filmmaker Robert Greenwald, that produces progressive feature-length documentaries and investigative videos to educate, influence, and empower viewers to take action on prominent public-policy issues.

FAIR is a national media-watch group that has been producing well-documented criticism of media bias and censorship since 1986.

EFF is a member-supported, non-profit public interest organization dedicated to protecting civil liberties and free expression in the digital world.

OTW is a non-profit organization dedicated to protecting and preserving noncommercial works created by fans based on existing works, including popular television shows, books, and movies.

SUMMARY OF ARGUMENT

The panel's analysis of fair use with respect to TVEyes' service conflicts with Second Circuit and Supreme Court precedent. The panel's fourth factor analysis ignored the undisputed fact that Fox has foreclosed any market for critical uses, and the panel failed to address the vital public interests in fair use for criticism and commentary. Moreover, the panel did not adequately consider the transformative nature of these uses under the first factor, nor did it sufficiently weigh the factual nature of the works at issue under the second factor. If allowed to

stand, the panel's opinion will threaten the interest of the public and of media critics like *amici* in robust scrutiny of and commentary on the media.

ARGUMENT

I. The Panel's Fourth Factor Analysis Is Contrary to Supreme Court and Circuit Precedent and Ignores the Undisputed Fact That There Is No Licensing Market for Critical Uses of Fox's Content.

The panel's opinion concluded that there was harm to a potential licensing market. But the panel's analysis was simplistic and circular and ignored the requirements of Supreme Court and Second Circuit law. It also ignored the undisputed fact that the licensing market it relied on is one that Fox is explicitly unwilling to serve: the market for critical uses of Fox's content. In so doing, the panel undermined a central purpose of fair use by foreclosing, rather than enabling, use for criticism and commentary.

The fourth factor looks to "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This "enquiry must take account not only of harm to the original but also harm to the market for derivative works." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). The analysis also requires balancing "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied." *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

A. *Media critics rely on TVEyes to criticize and comment on news media.*

Media criticism and analysis is a core First Amendment function, and a paradigmatic example of fair use of copyrighted work. Given recent trends towards media polarization, bias, and loss of confidence in the accuracy of news reports, media criticism has never been more important, or more difficult. To comprehensively monitor and analyze the vast media environment spanning broadcast, cable, and the internet, media critics require access to advanced and sophisticated technological tools—like the searchable database of video clips of television news programs and the ability to watch, study, and analyze those clips that are at issue in this case.

Media critics such as *amici* play a vital role in identifying and calling attention to inaccurate, biased, or deliberately false reporting. However, the volume of news material produced in the United States has expanded to the point at which it is virtually impossible for *any* critic, let alone ordinary citizens, to gauge the reliability of reporting without tools that facilitate comprehensive analysis.

Against this backdrop, TVEyes enables critics to analyze media accuracy and bias: It gives access “‘not only to the news that is presented, but to the presentations themselves,’ for both are news: the subject that is reported, as well as

the manner in which it is reported.” SPA34.³ Using another’s copyrighted material for a purpose like this is the “kind of activity, whose protection lies at the core of the First Amendment, [that] would be crippled if the news media and similar organizations were limited to sources of information that authorize disclosure.” *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014). The Second Circuit should rehear this case to consider the exceptional importance of fair use for criticism and commentary.

B. There is no market for licensing Fox’s works for critical uses.

The panel’s conclusion that TVEyes would harm Fox’s potential licensing market ignored the undisputed fact that there is no such market for core fair uses of criticism and commentary in this case. *See Campbell*, 510 U.S. at 591 (noting “the rule that there is no protectable derivative market for criticism.”).

The District Court found that Fox conditions access to its clips upon licensees’ “covenant that they will not show the clips in a way that is derogatory or critical of Fox News.” SPA8. Furthermore, the clips Fox places online “do not show the exact content or images that were aired on television,” and “sometimes feature ‘corrected’ versions of news stories.” SPA7. Both TVEyes and amici media critics expressly highlighted Fox’s licensing restrictions in their briefs to the panel below. But the panel’s opinion wholly ignores these critical and undisputed facts; it

³ The district court’s opinions are reproduced in the Special Appendix (SPA__).

makes no mention of the restrictions or their significance: that there is no licensing market for any critical use of Fox's content.

C. TVEyes' success alone does not establish harm to Fox's potential market.

The panel's analysis of the fourth factor cannot be reconciled with Supreme Court and circuit precedent. The opinion is circular: It conflates TVEyes' commercial success with harm to Fox's potential licensing market, reasoning that the "success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips, and that this market is worth millions of dollars in the aggregate." PAdd16.⁴ But the willingness of customers to pay for TVEyes service does not necessarily establish harm to a reasonable licensing market. That conclusion is contradicted by this circuit's prior case law:

"[W]ere a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder." [*Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 n.17 (2d Cir. 1994)] (emphasis added); . . . [Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990)] (stating that "[b]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties"); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.05[A][4] (2005) (stating that "it is a given in every fair use case that plaintiff

⁴ The panel's opinion is reproduced in Petitioner's Addendum (PAdd __).

suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar”).

Bill Graham, 448 F.3d at 614.

The panel failed to conduct the required inquiry into the existence of a potential market Fox could or would exploit, and ignored the absence of evidence of actual market impact. Its reasoning was crudely simplistic: “By providing Fox’s content to TVEyes clients *without* payment to Fox, TVEyes is in effect depriving Fox of licensing revenues.” PAdd16-17. This falls far short of the rigor required in the Second Circuit. TVEyes’ commercial success alone does not mean that its service “supersede[s] the objects of the original and serves as a market replacement for it.” *Campbell*, 510 U.S. at 1177 (internal citation and quotation marks omitted).

D. The panel failed to account for the transformative nature of TVEyes’ service in conducting its analysis of effect on the market.

There is a close linkage between market harm under the fourth factor and transformativeness under the first factor: “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.” *Authors Guild v. Google, Inc.* (“*Google Books*”), 804 F.3d 202, 223 (2d. Cir. 2015); *see also Bill Graham*, 448 F.3d at 615 (“Since [defendant’s] use of [plaintiff’s] images falls within a transformative market, [plaintiff] does not suffer market harm due to the loss of license fees.”).

The District Court found undisputed TVEyes' evidence that its subscribers engaged in criticism and commentary—undoubtedly different purposes from those of the original broadcasts—and the panel recognized that TVEyes' service was at least modestly transformative. PAdd13. This transformative market, coupled with Fox's exclusion of criticism and commentary from *any* licensing market through its explicit restrictions, means that the fourth factor must weigh decidedly in TVEyes' favor. Fox cannot foreclose a market, particularly a transformative one, but then claim that harm to that market precludes a finding of fair use.

The panel compounded this error by focusing separately on each of the fair-use factors, contrary to the Supreme Court's clear instructions: "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 579. This deviation from Supreme Court precedent by the panel warrants rehearing.

The panel's failure to consider the broader purposes of copyright at issue, and to balance "the benefit the public will derive if [TVEyes'] use is permitted," *Bill Graham*, 448 F.3d at 613, unduly hampers the public's right to engage in the open and robust examination and criticism of the media that is so essential today. A conclusion that obtaining the clips from Fox is an adequate substitute for TVEyes would permit Fox and other broadcasters to effectively silence or blunt

many of their critics, and would undermine media critics' efforts to hold broadcasters and other outlets accountable for bias, accuracy, and mistakes, all contrary to the public interest, the First Amendment, and the purposes of copyright.

II. The Panel's First Factor Analysis Gave Insufficient Weight to Transformative Uses of Fox's Content for Criticism and Commentary.

In its analysis of transformativeness, the panel made no mention of TVEyes' subscribers' criticism of and commentary on Fox's news reporting. This was error. "Among the best recognized justifications for copying from another's work is to provide comment on it or criticism of it." *Google Books.*, 804 F.3d at 215.

The district court found that the evidence showing that TVEyes' subscribers used its service for these purposes was undisputed. SPA20. The court also found that Fox requires its licensees to covenant that they will not use licensed content in a "critical" manner. SPA8.

TVEyes' use of Fox's content conveys the message, "This is what they said"—a very different message from Fox's message of "This is what you should believe." *See Swatch*, 756 F.3d at 85. Neither a corrected version nor licensed content bound by Fox's restrictive covenant adequately conveys the former message. Moreover, TVEyes' watch function enables criticism and commentary by allowing critics and others to scrutinize the *actual video* of Fox programs rather than just a written transcript. *See id* at 84 (recognizing the importance of conveying "not only words . . . but also more subtle indications of meaning . . .").

Rather than providing the fair use doctrine's "guarantee of breathing space" for criticism and commentary, *Campbell*, 510 U.S. at 579, enjoining TVEyes from making fair use of Fox's content smothers any uses not friendly to Fox.

III. The Panel's Second Factor Analysis Was Inadequate and Incorrect.

When construed in accordance with Supreme Court and Second Circuit precedent, the second fair use factor weighs heavily in favor of fair use in this case. Copyright law permits broader use of a factual work reporting on matters of public concern than it does, say, a novel. The second fair use factor embodies this protection for public education, debate, criticism, and commentary, recognizing that "some works are closer to the core of intended copyright protection than others." *Campbell*, 510 U.S. at 586; *see also Stewart v. Abend*, 495 U.S. 207, 237-38 (1990) (contrasting fictional short story with factual works); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (contrasting motion pictures with news broadcasts); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 348-51 (1991) (contrasting creative works with bare factual compilations). Since facts and ideas are not themselves copyrightable, works whose value inheres in the presentation of those facts and ideas are less dependent on the copyright incentive than purely original works.

Here, the works in question are television and radio news content, i.e., material that is highly factual and informational, as well as previously published.

This content lies firmly on the “idea” side of the idea–expression spectrum, content for which tight controls would impede rather than advance copyright’s purposes.

See Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d Cir. 2014).

The panel’s desultory second factor discussion gave far too little attention to these facts. Instead, its analysis consisted of a few sentences (1) briefly repeating the truism that the second factor is rarely influential unless the work in question is unpublished; (2) rejecting the straw man claim that “others may freely copy and re-disseminate news reports;” and (3) concluding that the factor was neutral. PAdd14 (quoting *Google Books*, 804 F.3d at 220). If the Court decides to rehear this case en banc, it should revisit the second factor analysis, as well as the other factors, and find that the nature of the works at issue—factual news broadcasts that deeply influence and reflect public opinion—weighs strongly in favor of a fair use finding.

CONCLUSION

Rehearing should be granted to ensure that the panel’s opinion is consistent with Supreme Court and Second Circuit precedent and with the undisputed facts of this case.

s/ Phillip R. Malone

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) as modified for amici by Fed. R. App. P. 29(b)(4) because this brief contains 2598 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface limitation of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

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CERTIFICATES OF SERVICE

I hereby certify that on March 23, 2018, I electronically filed the foregoing BRIEF OF MEDIA CRITICS, ELECTRONIC FRONTIER FOUNDATION, AND ORGANIZATION FOR TRANSFORMATIVE WORKS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING EN BANC AND PANEL REHEARING with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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: March 23, 2018

s/ Phillip R. Malone
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