

**15-3885(L), 15-3886(XAP)**

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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FOX NEWS NETWORK, LLC,

*Plaintiff-Appellee-Cross-Appellant,*

– v. –

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

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**REDACTED PAGE PROOF RESPONSE AND REPLY BRIEF  
FOR DEFENDANT-APPELLANT-CROSS-APPELLEE**

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## PRELIMINARY STATEMENT

Fox does not challenge that TVEyes engages in fair use when it captures the *text* of Fox’s television broadcasts to include in a comprehensive database, or when it provides portions of that text to users for research. Yet Fox asserts that the same use of the *audiovisual* components of those broadcasts for the same research purpose is infringing. Contrary to Fox’s argument, both TVEyes’ recording of television broadcasts and its provision of clips from those broadcasts are transformative fair uses. Research is a paradigmatic fair-use purpose under the copyright statute. 17 U.S.C. § 107 (preamble). Because television is an audiovisual medium where visual cues and the audio soundtrack matter to meaning, that purpose can be served only by audiovisual recording and audiovisual clips that allow a user to see and hear broadcast excerpts in context. To allow its users to conduct meaningful research on Fox broadcasts, therefore, TVEyes must provide *audiovisual* and not just textual content.

Fox’s true worry is that TVEyes’ users might *misuse* the service for purposes that could harm Fox’s actual or potential market for its Works.<sup>1</sup> But Fox produced no evidence that TVEyes’ users misused the Works, and the undisputed

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<sup>1</sup> Defined terms used here are the same as those used in TVEyes’ opening brief (“TVEyes Br.”).

evidence fails to show harm to Fox's legitimate markets. Fox barely mentions the district court's findings that:

- “Users access the clips and snippets for an altogether different purpose” than Fox's audience ([Sept.2014.Op.27]);
- Fox's “assumption [of substitution] is speculation, not fact” ([Sept.2014.Op.23]);
- There is “no realistic danger of any potential harm” to Fox ([Sept.2014.Op.24]);
- Even if there were any “small possible impact” on Fox, it would be “de minimis” ([Sept.2014.Op.25-26]); and
- “Clearly, TVEyes provides substantial benefit to the public” ([Sept.2014.Op.26]).

Based on these findings, the district court correctly found the viewing and archiving functions fair uses and erred in enjoining the e-mailing, downloading and date/time-search functions.

Even if any of TVEyes' functions were not a fair use, Fox fails to justify any injunction. Fox cannot establish that TVEyes has the volitional role in its users' conduct required for direct liability under *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“*Cablevision*”), 536 F.3d 121 (2d Cir. 2008). Nor can Fox justify the district court's issuance of an injunction without even considering the four-factor equitable test reaffirmed in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), or the overbreadth of that injunction.

## COUNTERSTATEMENT OF FACTS

Fox's statement of facts (Br. 5-40) bears little resemblance to the record the district court reviewed in determining that "TVEyes' evidence, that its subscribers use the service for research, criticism, and comment, is undisputed." [Sept.2014.Op.20]. Several key misstatements warrant correction:

### **A. TVEyes Is A Research Tool, Not A Delivery Service**

Fox characterizes (Br. 3-4, 15-17, 22-26, 30-31) TVEyes as a "content-delivery" service that competes with Fox. The evidence does not support that characterization.<sup>2</sup> It shows that TVEyes is a research tool that serves a niche clientele of professionals who seek to *monitor* the universe of broadcast content, not watch a particular show as one would at home. [Sept.2014.Op.27; Dkt.53("1st.Ives.") ¶¶6-10, Exs.D-E; Dkt.135-1.Ex.YYYY("Karle.Rep.") ¶¶4-9, 24-27, 92, 103-108; Fox.56.1.Resp. ¶5].

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<sup>2</sup> Fox relies heavily on citations to its expert, Beth Knobel, whose opinions should be disregarded because: (1) she claims expertise in "journalism and television production," not in digital news distribution, media monitoring or search engines, *see* [Dkt.100.Knobel.Rep.Ex.1; Dkt.143("4th.Rose").Ex.JJJJJ (86:11-87:11, 66:14-74:16)]; and (2) her two "declarations," dated May 21, 2015 and June 18, 2015, presented new opinions not included in her original expert report, *see* [Dkt.144.Anten.56(d) ¶¶17-22] (detailing new opinions), and in any event were not part of the summary judgment record before the district court when it granted summary judgment in September 2014, *see U.S. E. Telecomms., Inc. v. US W. Commc'ns Servs., Inc.*, 38 F.3d 1289, 1301 (2d Cir. 1994) ("[o]ur review is confined to an examination of the materials before the trial court at the time the ruling was made").

TVEyes creates from scratch a text-searchable library of *all* broadcasts, thereby enabling subscribers to sift through more than 27,000 hours of television content daily to locate and track information about the broadcasts pertinent to their research needs. [Fox.56.1.Resp. ¶¶13; 1st.Ives ¶¶2-5]. The district court found that, without TVEyes or a similar service, “there is no other way” to efficiently monitor tens of thousands of hours of broadcast content every day across over a thousand channels. [Sept.2014.Op.25; 1st.Ives ¶¶2-5, 11-12].

Examination of TVEyes’ many functions *beyond* the searching, viewing, archiving, e-mailing, downloading and date/time-search functions (*see* TVEyes Br. 9-15) confirms that TVEyes is a tool designed and utilized for researching broadcast content:

- **Watch Terms:** Enable subscribers to pre-select words or phrases to monitor. TVEyes then automatically searches for and collects short clips containing those terms. [Dkt.60(“Fox.56.1.Resp.”) ¶¶62-63; Dkt.54(“1st.Seltzer”) ¶37, Ex.J].
- **E-mail alerts:** E-mail notifications when Watch Terms are mentioned on a broadcast. These notifications arrive one to five minutes after the Watch Term is mentioned on air, with a snippet of transcript and a link to a short clip. [Fox.56.1.Resp. ¶¶28-29; 1st.Seltzer ¶¶14-15, 21].
- **Zoom:** Allows subscribers to scan static “thumbnail” images from a clip, to find the portion of interest more quickly. [1st.Seltzer ¶29].
- **Snapshot:** Displays on a single screen a static “thumbnail” image, between two and four minutes old, for each TVEyes

channel, allowing subscribers to visually compare what was broadcast on multiple channels at the same time. [Fox.56.1.Resp. ¶67; 1st.Seltzer ¶30; Dkt.75(“2d.Seltzer”) ¶11].

- **Ratings and publicity:** Provides viewership ratings and publicity values associated with each clip. [Fox.56.1.Resp. ¶¶32, 34; 1st.Seltzer ¶20, Ex.H].
- **Reports:** Enable subscribers to collect into a single report static “thumbnail” images, a short snippet of transcript, viewership and publicity value information and a link to a short clip of the content. [Fox.56.1.Resp. ¶42; 1st.Seltzer ¶32, Ex.I].

The undisputed evidence further demonstrates that TVEye subscribers used clips from *the Works* in a manner consistent with conducting research:

- In the 32 days the Works were searchable on TVEye, 61 subscribers played a total of 560 clips from the Works. These represent 0.000012% to 0.00013875% of all plays on TVEye during the month the clips were available. [Fox.56.1.Resp. ¶¶77, 79; 1st.Seltzer ¶43; Dkt.137(“4th.Seltzer”) ¶5; Sept.2014.Op.23].
- More than 25% of those plays were by journalists and 65% by political entities (e.g., campaigns, elected officials, PACs). [4th.Seltzer ¶5].
- 85.5% of clips played from the Works were 1 minute or less; 76% were 30 seconds or less; and 51% were 10 seconds or less. [Fox.56.1.Resp. ¶81; 1st.Seltzer ¶45; Sept.2014.Op.23].
- Clips from the Works were played, on average, for just 53.4 seconds. [Fox.56.1.Resp. ¶80; 1st.Seltzer ¶44; Sept.2014.Op.23].
- Subscribers archived just 7 clips from the Works, 6 of which were less than 86 seconds. [4th.Seltzer ¶7].

- Subscribers e-mailed just 6 clips from the Works using TVEyes' e-mail function, all by national political entities. [4th.Seltzer ¶9].
- Subscribers downloaded just 21 clips from the Works, with 20 of those downloads by journalists or political entities. [4th.Seltzer ¶11].
- No clips from the Works played, archived, e-mailed or downloaded were even close to 10 minutes, let alone "consecutive." [Fox.56.1.Resp. ¶¶80-81; 2d.Seltzer ¶5].
- The Works have not been accessible since 2013 because each was automatically deleted 32 days after first airing. [1st.Seltzer ¶42; Sept.2014.Op.23].

The record supports the same conclusion for TVEyes' subscribers' use of *FNC and FBN content other than the Works*. A decade of undisputed documentary evidence shows use consistent with research purposes:

- The average play duration of all FNC clips was 42.3 seconds, and FBN was 44.0 seconds. [Fox.56.1.Resp. ¶71; 1st.Seltzer ¶36].
- 94% of FNC clips played were 3 minutes or less; 90% were 2 minutes or less; and 82% were 1 minute or less. [Fox.56.1.Resp. ¶71; 1st.Seltzer ¶36].
- 95% of FBN clips played were 3 minutes or less; 91% for 2 minutes or less; and 82% for 1 minute or less. [Fox.56.1.Resp. ¶71; 1st.Seltzer ¶36].
- Only 5.6% of subscribers have ever seen any Fox content on TVEyes. [2d.Seltzer ¶6; Sept.2014.Op.23-24].
- Since 2003 there have been only *three* instances (or 0.000016% of all plays of FNC clips) of a subscriber accessing two or more consecutive 10-minute FNC clips and *no* such instances for FBN. [2d.Seltzer ¶5; Sept.2014.Op.24].

And the undisputed evidence also shows that, *as to channels other than Fox*, TVEyes' subscribers again use content as research purposes would suggest:

- 95% of clips were 3 minutes or less, 91% were 2 minutes or less, and 82% were 1 minute or less. [Fox.56.1.Resp. ¶69; 1st.Seltzer ¶35; Sept.2014.Op.24].
- The average play duration for clips across all channels was 40.7 seconds. [Fox.56.1.Resp. ¶68; 1st.Seltzer ¶35; Sept.2014.Op.24].
- Fewer than 0.08% of clips were played the maximum length of 10 minutes. [Fox.56.1.Resp. ¶70; 1st.Seltzer ¶35; Sept.2014.Op.24].

Moreover, it is undisputed that TVEyes' subscriber base consists overwhelmingly of journalists, government actors and private businesses. [Fox.56.1.Resp. ¶11; 1st.Ives ¶¶ 6-9, Exs.D-E]. As the district court summarized:

Government bodies use [TVEyes] to monitor the accuracy of facts reported by the media so they can make timely corrections when necessary. Political campaigns use it to monitor political advertising and appearances of candidates in election years. Financial firms use it to track and archive public statements made by their employees for regulatory compliance. The White House uses TVEyes to evaluate news stories and give feedback to the press corps. The United States Army uses TVEyes to track media coverage of military operations in remote locations, to ensure national security and the safety of American troops. Journalists use TVEyes to research, report on, compare, and criticize broadcast news coverage. Elected officials use TVEyes to confirm the accuracy of information reported on the news and seek timely corrections of misinformation.

[Sept.2014.Op.25-26]; *see also* [Fox.56.1.Resp. ¶¶49-61; 1st.Ives. ¶¶9-13]. Almost 95% of clips from the Works were played by journalists, political entities, political advocacy groups, policy groups, think tanks or the U.S. military. [4th.Seltzer ¶5].<sup>3</sup>

Fox asserts (Br. 37-38, 85) that other “non-infringing” means are available to monitor the media, but none of the services it identifies provides what TVEyes does. [Karle.Rep. ¶¶174-185; Dkt.141(“2d.Karle”) ¶¶47-53; 5th.Ives. ¶¶30-31]. For example, the TV News Archive captures only a fraction of broadcasts, operates on a 24-hour delay and does not monitor keywords or provide e-mail alerts. *See* [Karle.Rep. ¶¶182-183; 2d.Karle ¶¶48-52; 4th.Rose ¶¶11-14]. As the district court found, TVEyes “goes far beyond what the TV News Archive offers,” and “these shortcomings are important.” Aug.2015.Op.8 n.4.<sup>4</sup>

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[Dkt.140(“5th.Ives”) ¶¶22-27; Dkts.58/63(“1st.Rose”) ¶¶15-27, Exs.KK-UU].

<sup>4</sup> *Amicus* Internet Archive, which operates the TV News Archive, explains that the TV News Archive and similar services themselves must “rely on fair use” to avoid liability because the statutory exception in 17 U.S.C. § 108 for recording and lending copies of television programs “does not protect the full range of worthwhile preservation efforts.” Internet Archive Br. 21, 29.

## B. TVEyes Imposes Multiple Limits On Subscribers

Contrary to Fox's suggestion (Br. 31-37), TVEyes imposes limitations to ensure that subscribers' use is consistent with research purposes. [Sept.2014.Op.5-6]. Those limitations include:

- **Targeted Clips:** TVEyes pinpoints the content sought by subscribers by starting clips 14 seconds before the keyword aired, not at the "beginning" of a news story. [Fox.56.1.Resp. ¶82; 1st.Seltzer ¶¶3, 18, 24, 27-28].
- **32-Day Limit:** Searches are limited to material that aired within the last 32 days unless the subscriber archives a particular clip. [Fox.56.1.Resp. ¶19; 1st.Seltzer ¶5; Sept.2014.Op.5].
- **User Agreement:** Subscribers must physically sign a User Agreement that restricts use of clips to the subscriber's internal purposes only. [1st.Ives.Ex.A; Karle.Rep. ¶¶131-134; Sept.2014.Op.5]. Fox's contentions (Br. 32-33) that the User Agreement does not apply to clips, and that users do not read the agreement, are unsupported by the evidence. *See* [4th.Rose.Ex.OOOOOO (352:11-17) ("The clips are data. That's the whole point of digitization. That's what data is, data is bits and bytes."); 2d.Karle ¶¶55-57; Dkt.78("3d.Ives") ¶5; 5th.Ives ¶¶6-13, Ex.UUUUU].
- **Explicit Reminder:** Before a subscriber downloads a clip, TVEyes prominently displays: "**Important Note:** clips may be used for internal review, analysis or research only. Any editing, reproduction, publication, rebroadcasting, public showing or public display is forbidden." [Fox.56.1.Resp. ¶8; 1st.Ives.Ex.B; Karle.Rep. ¶135; Dkt.142("5th.Seltzer") ¶¶6-9; Sept.2014.Op.5].
- **Staff Reminders:** Customer service staff regularly remind subscribers, through telephone and e-mail communications, that clips obtained through TVEyes may be used only for internal review, research and analysis and are not to be publicly disseminated. [1st.Ives.¶8, Ex.C (examples); Sept.2014.Op.5]. Fox's claim (Br. 35) that e-mail warnings are "rarely used," is contradicted by the

*thousands* of e-mails from TVEyes staff in which they appear. *See* [4th.Rose. ¶25, Ex.PPPPPP; 1st.Ives.Ex.C].

- [REDACTED] [2d.Seltzer. ¶¶14-17; 4th.Seltzer ¶¶12-16; Dkt.72(“2d.Ives”) ¶19]. [REDACTED] 2d.Seltzer ¶¶5-7; Sept.2014.Op.6, 24].
- [REDACTED] [4th.Seltzer ¶16]. [REDACTED] [4th.Seltzer ¶15].
- **Limited Sharing:** TVEyes’ technology does not allow users to directly share clips on social media. [4th.Seltzer ¶¶12-15; Karle.Rep. ¶¶158-167, Ex.15; 2d.Karle ¶¶51-52].
- **Broadcaster Permission:** When subscribers ask to publicly display clips, TVEyes directs them to the broadcaster to request permission. [Sept.2014.Op.5-6; 2d.Ives ¶12, Ex.TTT; Karle.Rep. ¶138].

The record shows that these limitations are effective. TVEyes’ expert found only 44 links to Fox clips from TVEyes on the entirety of the internet, representing fewer than 0.002% of all Fox clips ever created by TVEyes. [Karle.Rep. ¶¶130, 141-157; 4th.Rose.Ex.JJJJJ (127:17-21)]. Fox’s claim (Br. 26, 50) that 140,000 links to TVEyes clips have been posted to the internet is not supported by

competent evidence.<sup>5</sup> Moreover, it is undisputed that no clips from *the Works* were ever posted to the internet. [Karle.Rep. ¶¶124, 149].

### C. TVEyes Is Not A Substitute For Watching Live Television

Fox also repeatedly represents (Br. 18, 50, 74, 76) that subscribers use TVEyes to “watch live TV.” The evidence does not support this assertion.

*First*, as a technological matter, it simply isn’t possible to watch “live TV” on TVEyes. TVEyes does not stream *any* content live from *any* source; rather, it captures content, digitizes it, and places it in a database, which can then be viewed only in short clips. [2d.Seltzer ¶¶8-9; 2d.Ives ¶¶3-6]. For the reasons explained by TVEyes’ Chief Systems Architect and its CEO, this process is not “live.” [2d.Seltzer ¶¶3-8; 2d.Ives ¶¶3-6].

*Second*, the district court examined and rejected this assertion:

There is no basis for Fox News’ alleged concern that TVEyes’ subscribers are likely to watch ten minute clips sequentially in order to use TVEyes as a substitute for viewing Fox News’ programming on television.

No reasonable juror could find that people are using TVEyes as a substitute for watching Fox News broadcasts on television. There is no history of any such use, and there is no realistic danger of any potential harm

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<sup>5</sup> Fox’s expert arrived at this calculation by running a search on Google and then merely looking at the number of “hits” listed, without reviewing the actual webpages. [2d.Karle ¶¶58-71; 5th.Seltzer ¶¶10-12]. She later ran a new search (disclosed for the first time on summary judgment), but that search resulted in just 37 playable Fox clips. [2d.Karle ¶¶65-70; 4th.Rose ¶¶16-17].

to the overall market of television watching from an “unrestricted and widespread conduct of the sort engaged in by defendant.”

[Sept.2014.Op.24] (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)). Nor would subscribing to TVEyes in lieu of cable make economic sense; TVEyes’ monthly subscription cost is many times that of cable. [Karle.Rep. ¶106]. Fox offers no response.

*Third*, Fox’s suggestions (Br. 1, 18, 25, 35, 51) that certain “marketing materials” promote TVEyes as a means to watch “live TV” or post clips on social media are not supported by the evidence. TVEyes is marketed as a service that enables business-related research and analysis of television broadcasts, as evidenced by TVEyes’ website, its official promotional materials, and *tens of thousands* of e-mails sent by its salespeople. *See, e.g.*, [[www.tveyes.com](http://www.tveyes.com); Dkt.50(“1st.Simmons”).Ex.111; 4th.Ives ¶6, Ex.ZZZZ; 5th.Ives. ¶20, Ex.VVVVV]. The “marketing materials” referenced by Fox are actually just eight emails (written between 2007 and 2011) and two documents (one of which was not even written by TVEyes), which have never reflected TVEyes’ policies. [2d.Ives ¶¶3-8; 5th.Ives ¶¶15-19; 2d.Seltzer ¶10; Karle.Rep. ¶¶139-140].

## SUMMARY OF ARGUMENT

I. The district court correctly found, based on “undisputed” evidence, that TVEyes’ viewing and archiving functions, which enable subscribers to view

short television clips “for research, criticism, and comment,” are protected fair uses under Section 107. [Sept.2014.Op.20]. Just as this Court recognized that Google Book’s snippet view “adds importantly to” the digital book database’s “highly transformative purpose,” *Authors Guild v. Google, Inc.* (“*Google*”), 804 F.3d 202, 218 (2d Cir. 2015), so TVEyes’ viewing function adds importantly to its database’s transformative research purpose. Further, TVEyes has implemented multiple limitations to help ensure its service is not misused. In any event, Fox has not identified any cognizable, nonspeculative market harm it has suffered or could suffer as a result of clips from the Works being available for research, nor has it undermined the important public benefits that function serves. For the same reasons, TVEyes’ archiving function is fair use. This Court should affirm the district court’s ruling on both.

**II.** For similar reasons, TVEyes’ e-mailing, downloading and date/time-search functions are fair uses. All further the same transformative purpose as the viewing and archiving functions, and Fox has not identified any nonspeculative market harm from these functions’ availability. The district court thus erred in excluding these functions from fair use protection.

**III.** Independently, the Court erred by holding TVEyes liable for direct infringement based on the e-mailing, downloading and date/time-search functions.

These functions are initiated automatically at subscribers' instructions, and thus do not establish TVEyes' volition as required under *Cablevision*.

**IV.** The district court abused its discretion by: (a) issuing an injunction without first applying the *eBay* factors, none of which supports injunctive relief; and (b) in any event, issuing a facially overbroad injunction that extended beyond the Works. But if the Court upholds the injunction, the district court's finding that TVEyes' e-mailing function is fair on the condition of implementing certain concrete protective measures does not render its decision "advisory."

## **ARGUMENT**

### **I. FOX FAILS TO SHOW ANY ERROR IN THE DISTRICT COURT'S RULINGS THAT TVEYES' VIEWING AND ARCHIVING FUNCTIONS ARE TRANSFORMATIVE FAIR USES**

Contrary to Fox's argument on cross-appeal, the district court correctly held that TVEyes engages in fair use by creating a comprehensive, searchable database of television broadcasts and enabling subscribers to search for, view and archive short clips from that database for the purpose of conducting internal research and analysis. After balancing the four fair-use factors "in light of the purposes of the copyright laws," [Sept.2014.Op.26] (citation omitted), the court held that TVEyes' viewing function is transformative because:

Users access the clips and snippets for an altogether different purpose [than Fox]—to evaluate and criticize broadcast journalism, to track and correct misinformation, to evaluate commercial advertising, to evaluate national security risks, and to track compliance with financial market regulations. As TVEyes points out, “monitoring television is simply not the same as watching it.”

[Sept.2014.Op.27] (citations omitted); *see also* [Aug.2015.Op.11-13] (“the archiving function is fair use”). Deeming TVEyes’ evidence “undisputed,” the court concluded that this use “for research, criticism, and comment ... shows fair use as explicitly identified in the preamble of the statute.” [Sept.2014.Op.20]; *see also NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) (use consistent with preamble creates “strong presumption” in favor of fair use).

Fox never addresses the court’s careful analysis. *First*, Fox does not direct any of its analysis specifically to the 19 Works. Fair use, however, entails “a work-by-work analysis ... focused on whether the use of each individual work was fair use rather than on the broader context of ongoing practices.” *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1259 (11th Cir. 2014); *see* 17 U.S.C. § 107 (fair use inquiry looks to “the use made of *a* work in [a] particular case”); *id.* §§ 107(1) (“*the* use”); 107(2)-(4) (“*the* copyrighted work”) (emphases added).

*Second*, Fox ignores the district court’s careful function-by-function analysis. *See Google*, 804 F.3d at 216-18 (separating analyses for “search” and “snippet” functions). Fox divides TVEyes’ service into: (1) an “Index,” or

searching function, which it concedes is fair use, *see, e.g.*, Br. 2-3 (“this case is not about” TVEyes’ “keyword-searchable word index”); [Fox.56.1.Resp. ¶16] (Fox’s “complaint is not with the creation of a word index”); and (2) one omnibus category called “Content-Delivery Features” into which it lumps the viewing, archiving, downloading, e-mailing and date/time-search functions it challenges. By failing to evaluate each function individually, Fox fails to challenge the district court’s specific rulings.

*Third*, Fox’s suggestion (Br. 17-18) that TVEyes’ searching function “does not require copying [Fox’s] audiovisual content” is incorrect. For example, it is undisputed that TVEyes must capture the audiovisual components of the Works to employ its proprietary speech-to-text technology to power its text-search database, particularly where closed captioning is not available. [Fox.56.1.Resp. ¶16 (undisputed that “TVEyes uses ... speech-to-text technology to create transcript ‘indexes’”); 1st.Seltzer ¶¶3, 14, 21; Sept.2015.Op.2]; *Google*, 804 F.3d at 217-25 (fair to make digital copy of Plaintiffs’ books for text-searchable database); *Authors Guild, Inc. v. HathiTrust* (“*HathiTrust*”), 755 F.3d 87, 94-101 (2d Cir. 2014) (similar). In any event, the searching function is fair for the reasons articulated by the district court. [Sept.2014.Op.13-15, 19-20, 27].

Upon a function-by-function analysis, the undisputed evidence shows that each of the five contested functions makes fair use of the 19 Works.

## **A. The Viewing And Archiving Functions Are Transformative**

### **1. TVEyes Used The Works For A Different Purpose**

The first factor looks to the “purpose and character” of the use, 17 U.S.C. § 107(1), focusing on whether the new use is “transformative,” *Campbell*, 510 U.S. at 578-79. A use “can be transformative in function or purpose without altering or actually adding to the original work.” *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.* (“*Swatch*”), 756 F.3d 73, 84 (2d Cir. 2014) (quotations omitted). The ultimate inquiry is whether the use “communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.” *Google*, 804 F.3d at 214.

TVEyes’ viewing and archiving functions satisfy this standard.

**Viewing:** To enable research and analysis on broadcast content, TVEyes must enable its subscribers to not only learn the existence of, but also see and hear, responsive clips because “[t]he actual images and sounds depicted on television are as important as the news information itself.” [Sept.2014.Op.18]; *see also id.* (visual and audio information ““may be just as valuable to [subscribers] as the [content], since a speaker’s demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show””) (quoting *Swatch*, 756 F.3d at 84). A subscriber cannot sufficiently research televised content—such as analyzing a graphic displayed on FNC; locating misinformation

scrolling across FBN’s ticker; studying the facial expression of an interview subject; or evaluating Fox personality Bill O’Reilly’s tone of voice—without *seeing* the images and *hearing* the words. [Karle.Rep. ¶68]. Fox’s broadcasts are more than static transcripts; they are multimedia transmissions full of visual and audio data. Thus, just as Google’s “[s]nippet view ... adds importantly to [its search engine’s] highly transformative purpose,” TVEyes similarly adds importantly to its transformative research purpose by enabling subscribers to view short audiovisual clips. *Google*, 804 F.3d at 218; *see also id.* at 217-18 (“[s]earch function ... tells only whether and how often the search term appears,” but “[m]erely knowing that a term of interest appears in a book does not necessarily tell the searcher” everything she needs to know); *Google* Br. 10-11, 15-17, 19-25 (describing how clip inspection is transformative); *CCIA* Br. 17-20 (visual displays enhance utility of database); *IP Professors* Br. 2-6 (text not substitute for images and sound); [Karle.Rep. ¶¶71-86].

As the district court explained:

The clips ... are integral to TVEyes’ service of monitoring and reporting on all the news and opinions presented by all television and radio stations. Without these excerpted video clips, TVEyes’ users could not receive the full spectrum of information identified by an index, for the excerpt discloses, 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.

[Sept.2014.Op.19]. Fox's responses do not undermine the district court's careful analysis.

*First*, Fox (Br. 42-44) and its *amici* (e.g., CNN Br. 7-11; Copyright Alliance Br. 2, 17-20) argue that, unless a service “improve[s] access” to the underlying work, it cannot be fair use. No such requirement exists; what is required is a different purpose than the original, such as “research,” “comment” or “criticism.” 17 U.S.C. § 107. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609-10, 613 (2d Cir. 2006) (fair to reproduce entire works as “historical artifacts” to “enhance[] the reader’s understanding of” and provide “visual context for” the text); *Swatch*, 756 F.3d at 84 (fair to reproduce entire work to “convey information” accurately); *White v. West Publ’g Corp.*, 2014 WL 3385480, at \*2 (S.D.N.Y. July 11, 2014) (fair to reproduce entire works to create “interactive legal research tool”). In *Swatch*, for example, Bloomberg disseminated an entire 132-minute copyrighted sound recording of Swatch executives without adding its own commentary or analysis. 756 F.3d at 78-79. This Court found that distribution to be transformative because the executives “purported to convey true answers,” while Bloomberg “was simply revealing the newsworthy information of what Swatch Group executives had said. Bloomberg’s message—’This is what they said’—is a very different message from Swatch Group’s—’This is what you

should believe.” *Id.* at 85. Similarly here, TVEyes’ message—”This is what Fox said”—is different from Fox’s message—”This is what you should believe.”<sup>6</sup>

Fox (Br. 47-49) and its *amici* (e.g., IP Scholars Br. 15-18; CNN Br. 4-5; Copyright Alliance Br. 17-18) rely on outdated cases involving non-transformative services that disseminated entire copies of copyrighted works for purposes that supplanted the originals. *See Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999) (defendant translated and sold entire copies of abstracts without transformative purpose); *Infinity Broad. Co. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (defendant did nothing more than “sell access to [entire] unaltered radio broadcasts”); *Am. Geophysical Union v. Texaco, Inc.* (“*Texaco*”), 60 F.3d 913, 916-17 (2d Cir. 1994) (photocopying for same purpose as original); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 993-94 (9th Cir. 1998) (merely copying and selling newscasts); *L.A. News Serv. v. Tullo*, 973 F.2d 791, 797-98 (9th Cir. 1992) (similar); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (no transformation where defendant “*only* copies and sells,” and did not “analyze ... or improve,” the original news broadcasts”) (emphasis added). As the district court correctly found, those cases are

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<sup>6</sup> Fox tries (Br. 54 n.12) to distinguish *Swatch* as involving “reporting,” but the preamble to section 107 includes research, comment and criticism in addition to news reporting.

unpersuasive here because those “defendants were copying the plaintiffs work and then selling it for the very same purpose as plaintiff”; they “do not shed much light ... on the question of transformation” because TVEyes has a different purpose. [Sept.2014.Op. 15-17] (discussing *Nihon, Infinity, Reuters, and Tullo*).<sup>7</sup> In any event, it is undisputed that TVEyes does not provide access to Fox’s shows in their entirety. [2d.Seltzer ¶7; 1st.Seltzer ¶35].

*Second*, Fox (Br. 52-54) and its *amici* (e.g., Copyright Alliance Br. 10-17; NAB Br. 24) argue that TVEyes cannot rely on its *subscribers’* fair-use activities. But TVEyes does not rely on its users’ purposes *instead* of its own; to the contrary, how subscribers use TVEyes evidences *TVEyes’ own* transformative purpose. In *Google*, for example, this Court looked to *searchers’* uses to evaluate whether *Google’s* display of snippets was transformative. 804 F.3d at 21-187 (“the purpose of Google’s copying of the original copyrighted books” includes “permitting a searcher to identify those that contain a word or term of interest” and “show the

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<sup>7</sup> Fox also cites (Br. 48, 54) *Associated Press v. Meltwater U.S. Holdings, Inc.* 931 F. Supp. 2d 537 (S.D.N.Y. 2013) for the proposition that a service that “delivers” content can never be transformative. The district court correctly distinguished *Meltwater* because the defendant there crawled the internet for already-existing content, while TVEyes creates a database of content that is not otherwise available, and because, “[u]nlike the indexing and excerpting of news articles, where the printed word conveys the same meaning no matter the forum or medium in which it is viewed,” providing “the [audiovisual] presentations themselves” is critical for TVEyes. [Sept.2014.Op.16-19].

searcher just enough context surrounding the search term”); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (display of images part of “an electronic reference tool”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (similar); *White*, 2014 WL 3385480, at \*2 (recognizing transformative purpose of “creating an interactive legal research tool”).<sup>8</sup> As the district court recognized, “databases that convert copyrighted works into a research tool to further learning are transformative.” [Sept.2014.Op.19-20]. Evidence of that learning is evidence of TVEyes’ transformative purpose.

*Third*, Fox asserts (Br. 54-56) that a text-search function is all that is necessary for researching television broadcasts. While this may be sufficient for some research purposes, Fox does not dispute that a text-only search would be insufficient when the research purpose requires assessing visual and audio content. [Sept.2014.Op.18] (“The actual images and sounds depicted on television are as important as the news information itself—the tone of voice, arch of an eyebrow, or

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<sup>8</sup> The cases cited by Fox (Br. 52-53) confirm this approach. In *Infinity*, this Court determined that the defendant’s own use was not transformative—“all [defendant] does is sell access to unaltered radio broadcasts.” 150 F.3d at 108. The defendant then argued that his “users transform the broadcasts,” but because his own use was not transformative, the activities of his end-users were not relevant. *See also Reuters*, 149 F.3d at 993-94 (defendant’s use not transformative in the first instance, so cannot be saved by end-user behavior); *Tullo*, 973 F.2d at 797 (similar).

upturn of a lip can color the entire story, powerfully modifying the content.”). For example, subscribers use TVEyes to analyze:

- Fox’s misappropriation of other images on the air. [Karle.Rep. ¶64, Ex.6.at.1-3].
- Fox’s use of “dishonest” charts and graphs. [Karle.Rep. ¶64, Ex.6.at.11-28].
- Fox’s misuse of a photograph in a story (which was then “corrected” on Fox’s website). [1st.Rose ¶9, Exs.DD-EE].
- Whether Fox televised an organization’s name on screen. [Ives.4th.Ex.BBBBB].
- Whether an advertisement aired on Fox. [4th.Rose.Exs.HHHHHH-IIIH; 1st.Seltzer ¶26].

*See also* IP Professors’ Br. 2-7 (“[i]mages and moving images serve important evidentiary, persuasive, and rhetorical functions that cannot be filled by words,” listing examples).<sup>9</sup>

**Archiving:** TVEyes’ archiving function allows subscribers to save clips to their TVEyes “Media Center” to view at a later date, including beyond the database’s 32-day window. [4th.Seltzer ¶6]. This function allows subscribers to preserve earlier research efforts and conduct long-term analyses. *See* [Karle.Rep. ¶¶44-46; Dkt.136(“4th.Ives”) ¶¶3-8]; *see also* [Aug.2015.Op.11-12]. Subscribers archived only seven clips from the Works, six of which were 86 seconds or less.

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<sup>9</sup> Even a pure word-frequency analysis can require review of the underlying content. *See Google*, 804 F.3d at 217-18.

[4th.Seltzer ¶7]. Fox’s expert conceded the importance of saving research.

[4th.Rose.Ex.JJJJJ (15:6-16, 27:2-8)]. As the district court ruled:

TVEyes is transformative because it “convert[s] copyrighted works into a research tool to further learning,” allowing its subscribers to “research, critici[ze], and comment.” Content does not suddenly become unfit for fair uses on the 33rd day after its creation. ... TVEyes helps promote the free exchange of ideas, and its archiving feature aids that purpose.

[Aug.2015.Op.12] (quoting [Sept.2014.Op.19-20]); *see also* Media Critics Br. 18-19 (discussing archiving). Fox offers no response.

**2. TVEyes’ For-Profit Status Does Not Weigh Against Fair Use**

While Fox argues (Br. 47) that TVEyes’ for-profit status weighs against fair use, this position disregards well-settled law that “the more transformative the new work, the less will be the significance of other factors, like commercialism.” [Sept.2014.Op.20] (quoting *Campbell*, 510 U.S. at 579); *see also Swatch*, 756 F.3d at 90-91 (similar). If “commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 ... since these activities are generally conducted for profit in this country.” [Sept.2014.Op.20] (quoting *Campbell*, 510 U.S. at 584). Because TVEyes’ functions are highly transformative, its for-profit status carries

no meaningful weight. *Google*, 804 F.3d at 219 (rejecting “that commercial motivation should outweigh a convincing transformative purpose”).<sup>10</sup>

Fox’s assertion (Br. 47) that FNC and FBN content is “particularly important” to TVEyes’ business is wrong. Between 2003 and 2014, over 94% of subscribers never accessed any Fox content. [2d.Seltzer ¶6]. Of course, because FNC is the country’s most-watched cable news network, and because its broadcasts are often part of the country’s political discourse [1st.Rose.Ex.WW; Dkt.138(“3d.Rose”).Exs.NNNNN-TTTTT], Fox’s broadcasts are important to those subscribers who conduct research *on Fox*. [Fox.56.1.Resp. ¶¶53, 60]. But that is all the more reason why TVEyes’ use is transformative.

### **3. Although Not Relevant, TVEyes Did Not Act In Bad Faith**

This Court recognizes that bad faith “generally contributes little to fair use analysis.” *NXIVM*, 364 F.3d at 479 n.2.<sup>11</sup> This is particularly true where the use is transformative. In any event, there is no evidence TVEyes acted in bad faith.

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<sup>10</sup> Even if it were relevant, any commerciality is “discounted ... where the link between [the defendant’s] commercial gain and its copying is ... attenuated.” *Swatch*, 756 F.3d at 83 (quotations omitted). Such is the case here: TVEyes charges a flat fee, regardless of whether a subscriber ever accesses Fox content. [1st.Ives ¶16].

<sup>11</sup> See *Campbell*, 510 U.S. at 585 n.18 (questioning whether any weight should be placed “on the alleged infringer’s state of mind”); *Swatch*, 756 F.3d at 83; *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

*First*, Fox contends (Br. 46) that TVEyes “illicitly” accessed the Works by “fraudulently” signing up for cable subscriptions, but cites no admissible evidence for support. The “contracts” Fox cites (Br. 45), which are internet printouts of blank forms, are inadmissible hearsay. [TVEyes.Resp.56.1 ¶¶124-125]. And Fox’s citation (Br. 16-17) to the DIRECTV litigation is irrelevant because TVEyes did not obtain Fox content through DIRECTV ([1st.Seltzer.Ex.J.at.4]). In any event, TVEyes’ agreements with cable providers are irrelevant to whether its use of Fox content was fair. TVEyes violated no contract with Fox, and TVEyes’ three providers of Fox broadcasts have not alleged any breach.

*Second*, Fox argues (Br. 46) that use after refusal of a license is bad faith. But “being denied permission ... does not weigh against” fair use because, “[i]f the use is otherwise fair, then no permission need be sought or granted.” *Campbell*, 510 U.S. at 585 n.18.

*Third*, Fox argues (Br. 46) that TVEyes “violates the accepted industry practice of obtaining licenses to use television content.” *See also* NCTA Br. 1-2, 9. But there cannot be a cognizable “industry practice” of requiring licenses for fair uses. *See infra* at 42, 44-45; *see also Campbell*, 510 U.S. at 585 n.18 (willingness to obtain license may reflect desire to avoid litigation).

**B. The Works Are Factual In Nature And Previously Published**

The second factor considers the nature of the Works, and in particular whether they are “expressive or creative, ... with a greater leeway being allowed to a claim of fair use where the work is factual or informational,” and “published or unpublished.” *Cariou v. Prince*, 714 F.3d 694, 709-10 (2d Cir. 2013) (quotations omitted). Both considerations favor TVEyes. *First*, the Works are highly factual, and Fox does not own third-party content in or factual information *about* the broadcasts. [Fox.56.1.Resp. ¶84; 1st.Rose ¶13, Ex.II]; *Google*, 804 F.3d at 224 (copyright protects original expression but not historical or other facts embedded in that expression); [Sept.2014.Op.21] (“‘greater leeway’ for a determination of fair use when the work is factual or largely informational”) (quoting *Cariou*, 714 F.3d at 709-10). *Second*, the Works were previously published, aired by Fox and viewed by millions before any of them could be researched via TVEyes. [4th.Seltzer ¶5].

Fox incorrectly represents (Br. 60-61) that “TVEyes advocates a rule that telecasts on news channels (like the Works) cannot be creative or possibly even copyrightable.” In fact, TVEyes argues only that it may provide targeted clips to subscribers so that they may gain information about the Works for research purposes. *See Google*, 804 F.3d at 220 (factor two favors fair use where secondary use provides “valuable information about the original”). In any event, where

transformation exists, the second factor has “limited usefulness.” *Bill Graham*, 448 F.3d at 612; *Google*, 804 F.3d at 220 (factor “hardly ever” matters).

**C. TVEyes Used Only As Much Of The Works As Necessary To Accomplish Its Fair Use Purposes**

The third fair-use factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). “For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use.” *HathiTrust*, 755 F.3d at 99 (quotations omitted).<sup>12</sup> Thus, even “[c]omplete unchanged copying has repeatedly been found justified as fair use when the copying was reasonably appropriate to achieve the copier’s transformative purpose.” *Google*, 804 F.3d. at 221 & nn.17, 24 (citing cases).<sup>13</sup>

**Viewing:** TVEyes’ value as a research tool is that it is a comprehensive database of *everything* broadcast on television. As the district court explained, “[t]he value of TVEyes’ database depends on its all-inclusive nature, copying

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<sup>12</sup> As noted (*see supra* 16), TVEyes must capture of the Works in their entirety to power its text-searchable database.

<sup>13</sup> Fox miscites (Br. 62) *Davis v. Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001), for the proposition that, “[w]hen copying is ‘wholesale,’ a defendant ‘cannot benefit from the third factor.’” But *Davis* merely said that “fragmentary copying is *more likely* to have a transformative purpose than wholesale copying.” *Id.* (emphasis added). *Google* and the cases it cites, *see* 804 F.3d at 221 & nn.17, 24, show that “wholesale” copying can be consistent with fair use.

everything that television and radio stations broadcast. One cannot say that TVEyes copies more than is necessary to its transformative purpose for, if TVEyes were to copy less, the reliability of its all-inclusive service would be compromised.” [Sept.2014.Op.21-22]; *see also* [Aug.2015.Op.9] (“If TVEyes did not provide a comprehensive database, its transformative value would be compromised.”).

The proper inquiry thus is not whether the Works were copied in their entirety, but rather whether the viewing function operates as “a significantly competing substitute for” the Works. *Google*, 804 F.3d at 222. It does not. During the 32 days that the Works were available for searching, only 61 subscribers—almost all journalists or political/governmental actors—viewed any clips from the Works. [Fox.56.1.Resp. ¶¶77; 5th.Seltzer ¶5]. Those clips were played for an average of just 53.4 seconds, and over 85.5% of them were a minute or less. [Fox.56.1.Resp. ¶¶79-81]. These statistics are consistent across Fox content other than the Works. [Fox.56.1.Resp. ¶¶68-71].<sup>14</sup> Since 2003, on only three occasions (across *millions* of plays) has a subscriber ever tried to view two or more sequential FNC clips, and no sequential FBN clips. And because the Works

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<sup>14</sup> Fox now suggests (Br. 65) that TVEyes’ duration statistics are “unreliable,” but Fox previously admitted these statistics as undisputed. [Fox.56.1.Resp. ¶¶67-71; 77-81].

were offered for just 32 days, there is no danger of misuse in the future. *See Swatch*, 756 F.3d at 78, 90 (distributing recording “reasonable in light of [defendant’s] purpose of disseminating important financial information to investors and analysts”).

None of Fox’s challenges change this analysis. *First*, Fox argues (Br. 63-64) that the limitations employed by TVEyes (*supra* 9-10) are insufficient because they differ from the limitations sanctioned in *Google*. That is incorrect. The scope of the limitations in a given context must be tailored to the purpose of the underlying use, and TVEyes has implemented reasonable limitations that protect against misuse here just as those implemented by Google did in that context. *See supra* 9-10 (detailing limitations); [Sept.2014.Op.24] (there is “no basis for [Fox’s] alleged concern” that subscribers “are likely to watch ten-minute clips sequentially ... as a substitute for watching [Fox] on television”).<sup>15</sup> Fox has not pointed to a single instance of any misuse of the Works. *See Google*, 804 F.3d at 229 (“possibility” of misuse insufficient); EFF Br. 24 (service need not design a tool so that infringement is impossible).

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<sup>15</sup> Fox’s *amici* (e.g., Am. Photographic Artists Br. 18-21; Copyright Alliance Br. 21; IP Scholars Br. 19) simply disregard these limitations—for example, they ignore that sequential clips *cannot* be accessed on TVEyes. [2d.Seltzer ¶¶5, 7; Sept.2014.Op.6, 24].

*Second*, Fox suggests (Br. 65) that a subscriber can download “an entire news story,” but TVEyes’ technology does not enable searches for “news stories.” To the contrary, clips automatically begin playing 14 seconds before a selected keyword appears, regardless of when any “news story” may begin. [1st.Seltzer ¶¶27-28]. Further, Fox cites no evidence that anyone viewed (or archived, e-mailed, downloaded or viewed by date/time) “an entire news story” from the Works.

*Third*, Fox argues (Br. 65-66) that TVEyes’ functions copy “the heart of the work,” but it fails to identify what “the heart” of each hour-long Works is; indeed, Fox has refused to identify “the heart” of each Work as “irrelevant.” [Dkt.73(“2d.Anten”).Ex.AAAA.Rog.21]. Any argument that whatever is viewed is by definition “the heart” is tautological and would eviscerate fair use.

**Archiving:** For the same reasons, enabling subscribers to archive already-located clips from the Works is narrowly tailored to TVEyes’ transformative purpose, as the district court rightly found. *See* [Aug.2015.Op.13]. Because the viewing of such clips is sufficiently tailored, archiving those *same* clips, in furtherance of the *same* transformative purpose, is likewise sufficiently tailored.

**D. The Viewing And Archiving Functions Do Not Harm Fox’s Market For The Works**

The fourth fair-use factor is market effect, but market harm must be “substantial,” “significant,” and “excessive” to weigh against fair use, *Campbell*,

510 U.S. at 593; *Google*, 804 F.3d at 224; *HathiTrust*, 755 F.3d at 95, and “the possibility, or even the probability or certainty, of some loss of sales” is insufficient, *Google*, 804 F.3d at 224. “To defeat a claim of fair use, the copyright holder must point to market harm that results because the secondary use serves as a substitute for the original work.” *HathiTrust*, 755 F.3d at 96. As the district court found, there is “no realistic danger of any potential harm” from TVEyes’ use of the Works. [Sept.2014.Op.24].

As an initial matter, Fox is incorrect (Br. 67) that the Court may consider harm not only to the copyrighted works before it, but also to “the type of works at issue” in the case. Rather, the question is whether “unrestricted and widespread conduct of the sort engaged in by” TVEyes would harm the “market for the *original*” work—here, the 19 Works. *Campbell*, 510 U.S. at 590 (emphasis added). The cases cited by Fox (Br. 67) do not support a contrary reading. *See, e.g., Texaco*, 60 F.3d at 926-27 (fourth factor limited to analysis of “the *precise copyrighted works*” and “the potential market for or value of *these particular works*”) (emphases added, quotations omitted);<sup>16</sup> *Ringgold v. Black Entm’t*

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<sup>16</sup> In *Texaco*, the parties agreed that the lawsuit would address only eight particular works, and the Court focused solely on those works. 60 F.3d at 918; *id.* at 931 (ruling confined to “the precise copying that the parties stipulated” to); *id.* at 927 n.12 (considering whether similar use of the copyrighted work by others “would result in a substantially adverse impact on the potential market for or value of the plaintiff’s *present work*”) (emphasis added).

*Television, Inc.*, 126 F.3d 70, 80 (2d Cir. 1997) (analysis focused on “market for the original”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (referring only to “the copyrighted work”).<sup>17</sup> Fox’s arguments about TVEyes’ future use of other Fox-owned content are thus improper.

Fox is also incorrect (Br. 67-68) that market harm may be “presumed” when an entire work is copied verbatim. As this Court has repeatedly recognized, where a use is transformative, a defendant’s use of an entire work may still not have a sufficiently significant effect on the market for the original. *See, e.g., Google*, 804 F.3d at 223-24; *HathiTrust*, 755 F.3d at 99; *Swatch*, 756 F.3d at 91-92; *Bill Graham*, 448 F.3d at 614-15; *see also Campbell*, 510 U.S. at 591 (when use of a work is transformative, “market substitution is at least less certain, and market harm may not be so readily inferred”).

### **1. TVEyes’ Viewing Function Causes No Market Harm**

Fox contends (Br. 69-81) that TVEyes’ viewing function harmed the market for the Works by: (a) reducing Fox’s ratings; (b) reducing traffic to Fox’s website; (c) depriving Fox of revenue from public performance licenses; and (d) depriving Fox of revenue from licensing Fox content to other media-monitoring services. As

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<sup>17</sup> Fox’s reference (Br. 67) to a “broader perspective” in *Harper* is misplaced. In dicta, *Harper* referenced a “broader perspective” when discussing “permit[ting] extensive prepublication quotations from an unreleased manuscript,” 471 U.S. at 569, but it did not adopt a new legal test. In any event, the Works were already published.

the district court found, and as detailed below, none of these assertions has merit. The fourth factor thus favors TVEyes because Fox offers nothing more than speculation about possible market harm. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 453-54 (1984) (rejecting as “speculative” plaintiffs’ “prediction that live television or movie audiences will decrease” as a result of video recording); *Google*, 804 F.3d at 229 (“the possibility that libraries may misuse their digital copies is sheer speculation”). Further, it is “*the copyright holder*”—Fox—who “must point to market harm that results because the secondary use serves as a substitute for the original work.” *HathiTrust*, 755 F.3d at 96 (emphasis added); *see also Sony*, 464 U.S. at 456 (“*respondents* failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm”) (emphasis added).<sup>18</sup> Fox failed to meet that burden here.

**(a) TVEyes Does Not Reduce Fox’s Ratings Or Cable Subscriptions**

Fox contends (Br. 74-76) that TVEyes harms its market for television viewing because viewing clips from TVEyes reduces Fox’s live television viewership ratings, which in turn reduces fees from advertisers and cable

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<sup>18</sup> While TVEyes bears the overall burden on its fair use defense, Fox’s failure to produce nonspeculative evidence of nonminimal harm satisfies that burden. *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (movant may obtain summary judgment “by showing that little or no evidence may be found in support of the nonmoving party’s case”).

companies. It also argues that TVEyes subscribers who view clips are likely to forgo purchasing cable subscriptions, which in turn “devalues” Fox’s TV Everywhere service, which enables subscribers to watch live FNC and FBN broadcasts on a computer rather than a traditional TV set. *See also* NTCA Br. 2-3 (concern over lost cable subscriptions). Both arguments fail.

As the district court explained, Fox’s “allegations assume that TVEyes’ users actually use TVEyes as a substitute for Fox News’ channels. Fox News’ assumption is speculation, not fact. Indeed, the facts are contrary to Fox News’ speculation.” [Sept.2014.Op.23; *see also* Karle.Rep. ¶¶103-108; 2d.Karle ¶¶2-11]. The following undisputed facts show that TVEyes is not used as a substitute for watching live Fox broadcasts and does not adversely affect Fox’s revenue streams from television viewing:

- It is not possible to watch live television on TVEyes. *See supra* 11-12. [2d.Seltzer ¶¶3-9; 2d.Ives ¶¶3-8].
- There is no evidence that subscribers who viewed clips from the Works for professional purposes would otherwise have been at home watching Fox and therefore be captured in Nielsen ratings. [(Dkt.43(“Villar”) ¶7 (Nielsen ratings based on meters placed “in the home”); Dkt.74(“2d.Rose”) ¶10, Ex.MMMM (same); 1st.Ives ¶¶6, 9, Exs.D-E (TVEyes for businesses and professionals only)].
- Subscribers viewed only short discrete snippets from the Works, not consecutive, lengthy clips. [Sept.2014.Op.23; Fox.56.1.Resp. ¶¶80-81; 2d.Seltzer ¶¶3-5; Karle.Rep. ¶104].

- In over ten years, there were only three instances where subscribers viewed consecutive clips of FNC content (and not from the Works), and none from FBN. [Sept.2014.Op.24; 2d.Seltzer ¶5; 2d.Ives ¶9].
- [REDACTED] [Sept.2014.Op.6; 2d.Seltzer ¶7].
- Fox has not introduced any evidence of a TVEyes subscriber forgoing a cable subscription.

Nor is there any evidence that TVEyes' use of the Works had, or will have, any effect on the fees commanded by Fox in connection with airing the Works (or any other broadcasts).

**(b) TVEyes Does Not Reduce Traffic To Fox's Website Or Its Partners' Websites**

Fox argues (Br. 73) that TVEyes clips “substitute[] for the clips Fox makes available on its website, depriving Fox of pre-roll and banner advertising revenue.” The record, however, contains no evidence of substitution.<sup>19</sup>

As an initial matter, this theory of market harm, which was rejected by the district court, does not apply to the vast majority of Fox broadcasts, because only 16% of those broadcasts are available online. [Karle.Rep. ¶89]. Fox's theory also rests upon the flawed premise that TVEyes subscribers who viewed clips from the

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<sup>19</sup> Again, Fox offers no analysis of the 19 Works other than to represent (Br. 10) that 70 clips from the Works “were and are available on its website.” But more than 80% of the clips accessed on TVEyes from the Works were *not* available on Fox's website. [Dkt.79(“3d.Seltzer”) ¶¶3-4]. This is consistent with Fox making only 16% of its content available on its website. [Sept.2014.Op.7].

Works would otherwise have visited Fox's website (or Fox's content partners) to search for and find those same clips. But subscribers use TVEyes because it *automatically* monitors multiple keywords simultaneously on thousands of channels across a comprehensive and accurate database of content. [Fox.56.1.Resp. ¶¶62-63; 1st.Seltzer ¶¶7, 37-39, Ex.J; 2d.Ives ¶14]. There is no evidence that subscribers would or could spend countless hours on potentially hundreds of websites, including Fox's, trying to track down relevant content by manually conducting keyword searches and sifting through mountains of content. [1st.Seltzer ¶7; 2d.Ives ¶14; Karle.Rep. ¶24]. TVEyes' automated monitoring functions alert subscribers to broadcast content of which they otherwise would not have become aware.

The undisputed evidence also shows that Fox's website and TVEyes cater to users with vastly different objectives. Fox's website is consumer-oriented and designed to provide personal entertainment and news to mass audiences. Consumers visit it to read the top news stories of the day, view trending videos, and generally peruse the site for leisure. [Dkt.145("3d.Misenti") ¶12; Villar.Ex.9.; Karle.Rep. ¶¶34-35, 102, 187-189]. The limited video news segments available on Fox's website are tailored to the interests and needs of those consumers. [Dkt.49("1st.Misenti") ¶¶12-13; 3d.Rose.Ex.MMMMM (113:4-114:21, 120:8-127:7)].

By contrast, professionals use TVEyes to run ongoing, automated, targeted search queries against a comprehensive database for research typically unrelated to the “top” news stories of the day. [Fox.56.1.Resp. ¶¶62-63; 1st.Seltzer ¶¶27-28, 37, 47(c)-48, Ex.J; 1st.Ives ¶15]. TVEyes’ subscribers cannot accomplish their research objectives on Fox’s website, for at least the following reasons:

- **Materially Different Clips:** The video segments on Fox’s website are *materially different* from the broadcasts on which they originally appeared and thus unsuitable for research. As the district court found:

The video clips [on Fox’s website] do not show the exact content or images that were aired on television—the news ticker on the bottom of the screen is absent in the online clips, for example. Furthermore, the online clips sometimes feature “corrected” versions of news stories, amending and correcting incorrect and outdated descriptions in the original television version.

[Sept.2014.Op.7] *see also* [Fox.56.1.Resp. ¶¶111-113; 4th.Rose.Ex.KKKKKK (114:4-21, 123:7-11)].

- **Incomplete Database:** Fox makes only about 16% of its broadcasts available on its website in the form of clips. [Sept.2014.Op.7].<sup>20</sup> These clips are all hand-selected by Fox’s employees to further its editorial agenda, not to promote research. [1st.Misenti ¶12; 3d.Rose.Ex.MMMMM (120:8-122:19)]. Accordingly, search results obtained from Fox’s (or its partners’) websites are incomplete and inhospitable to conducting research; a visitor cannot determine if a word or

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<sup>20</sup> This 16% represents the complete universe of clips made available on Fox’s “syndication” partner sites, such as Yahoo! and Hulu. [4th.Rose.Ex.KKKKKK (229:24-230:25)].

image never aired on Fox, or if instead it is among [REDACTED] Fox chose to not make available.<sup>21</sup>

- **Not For Professional Research:** The Terms of Service of Fox’s website restrict use to “solely ... personal, non-commercial use” for “personal enjoyment and entertainment.” [1st.Rose.Ex.HH; Fox.56.1Resp. ¶114]. Video segments on Fox’s website lack basic contextual information (e.g., air-time and show title) essential for researchers and are organized around a news story, not a targeted keyword. Fox’s website also does not allow visitors to search using Boolean logic or other advanced search functions or automatically monitor keywords. [Fox.56.1.Resp. ¶¶100-108; 1st.Seltzer ¶¶47-49].
- **Subject to Censorship:** Fox’s website cannot be used to monitor Fox because it is controlled by Fox, which uses “editorial discretion” to curate the clips on its website. Fox can alter or remove the clips posted to its site at any time, for any reason, without explanation or notice. [1st.Misenti ¶12; 3d.Rose.Ex.MMMMM (113:4-114:2, 120:8-122:19)].
- **No Advertisements:** Neither Fox’s website, nor those of its content partners, include the commercials that aired during the broadcast. [Fox.56.1.Resp. ¶104; 1st.Seltzer ¶47(e)]. They cannot be used to track or research, e.g., the relationship between Fox programming and the political or commercial advertising that supports it. [1st.Rose.Ex.NN (the Romney ads “are still airing in multiple markets, according to TVEyes, a media monitoring service”); 5th.Ives ¶28].

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<sup>21</sup> Fox’s claim (Br. 9) that it makes “all of its content available to the public digitally” is misleading; only 16% of Fox broadcasts are available online *after* airing, even though Fox broadcasts can also be viewed via streaming *while* they air. Fox’s claim (Br. 80) that 50% of its broadcasts are available on its website (based on repeat airings) is wrong because even repeats have different tickers, different advertisements and different audience viewership numbers and publicity values. [Sept.2014.Op.7; Fox.56.1Resp. ¶112; 5th.Ives ¶28; 4th.Rose ¶¶7-10, Ex.CCCCCC.; 1st.Seltzer ¶47; 4th.Rose.Ex.RRRRRR].

Fox misses the point when it suggests (Br. 81) that “putting the most newsworthy and interesting clips on Fox’s website makes it likely that the same clips will be sought by TVEyes users.” TVEyes’ users do not seek the “stories” that Fox deems “most newsworthy and interesting.” [1st.Ives. ¶15]. Rather, they target keywords that reflect highly individualized research interests—*e.g.*, “department of transportation,” “solar stocks” and “oxfam”—as opposed to the news of the day. [Fox.56.1.Resp. ¶¶62-63; 1st.Seltzer.Ex.J (list of top keywords tracked by users)].

Fox also asserts (Br. 74) that TVEyes harms Fox’s negotiating position with licensing partners by “devaluing” its content. But Fox offers no evidence in support of this proposition other than self-serving speculation, and in any event, this type of “lost licensing” revenue is not legally cognizable. *Campbell*, 510 U.S. at 591-93 (irrelevant “that a parody may impair the market” for original); *Bill Graham*, 448 F.3d at 614-15 (use that “falls within a transformative market” cannot constitute “market harm due to the loss of license fees”).

Even if Fox could prove that it has lost website traffic as a result of TVEyes (which it has not), the financial harm suffered by Fox would be negligible, if not zero, because of how websites generate advertising revenue. [Karle.Rep. ¶¶93-102; 2d.Karle ¶¶25-46; 4th.Rose.Ex.KKKKKK (75:12-76:9, 87:20-24)].

**(c) TVEyes Does Not Harm Fox's Market For Public Performance Licenses**

Both directly and through its agents, Fox licenses broadcast-quality clips for use in television shows, movies and other projects that require a public performance license from Fox. [Fox.56.1.Resp. ¶115; 1st.Rose ¶¶2-3, Exs.M, O; 4th.Rose ¶¶2-6; ]. Over [REDACTED] of these licenses are issued more than 32 days after the program was first broadcast. [Fox.56.1.Resp. ¶119]. Fox charges [REDACTED] [REDACTED] *per clip* for these licenses. [Karle.Rep. ¶¶39, 109].

Fox places many restrictions on its licensees, including:

- Fox licensees are prohibited from using licensed clips to criticize Fox, [REDACTED]. [Fox.56.1.Resp. ¶117; Dkt.68("1st.Anten").Ex.KKK.at.ITNSOURCE0000161 (§7); 3d.Rose.Ex.KKKKK.at.ITNSOURCE0000011 (§5.1.1)].
- [REDACTED]. [3d.Rose.Ex.KKKKK.at.ITNSOURCE0000011 (§2.4)].
- [REDACTED]. [3d.Rose.Ex.KKKKK.at.ITNSOURCE0000011 (§5.1.2); 3d.Rose.Ex.FFFFF; 1st.Anten.Ex.LLL (124:15-125:12)].
- [REDACTED]. [Fox.56.1.Resp. ¶118; 1st.Anten.Ex.LLL (122:14-126:19); 1st.Anten.Ex.III.at.FOXNEWS0000420 (1.1), 424 (§4.5)].

By contrast, TVEyes subscribers are limited to less-than-broadcast-quality clips for internal research, viewable only for 32 days after broadcast. [1st.Seltzer ¶¶5, 22; 2d.Ives ¶11; Karle.Rep.¶¶68-70]. In addition, TVEyes expressly prohibits the use of clips for purposes that would typically require a license from Fox. *See supra* 9-10 (detailing limitations, including prohibition on public performance of clips); [1st.Ives ¶¶7-8; 2d.Ives ¶¶17-19, Ex.TTT (e-mails of TVEyes referring subscribers to broadcasters to obtain licenses for clips); 5th.Ives ¶¶10-13; 2d.Karle ¶¶12-24 (TVEyes does not compete with Fox licensing)].

As a legal matter, Fox cannot lay claim to the market for a research tool that enables commentary and criticism. *See Campbell*, 510 U.S. at 592-93; *Bill Graham*, 448 F.3d at 614 (“[C]opyright owners may not preempt exploitation of transformative markets”) (quotations omitted).<sup>22</sup> As a factual matter, the record shows that these mutually exclusive services do not in fact compete.

*First*, it is undisputed that Fox has earned ██████████ from licensing individual clips from the Works to third parties. [1st.Rose ¶¶2-3; 1st.Anten.Ex.LLL (192:12-19); Karle.Rep. ¶¶124-125]. And TVEyes’ service has

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<sup>22</sup> For this reason, Fox’s *amici*’s claims (*e.g.*, Am. Photographic Artists Br. 5-15; NAB Br. 8-16, 25-29; AJSA 11-20; NTCA 4-11; CNN 13-16) that TVEyes usurps their clip-licensing markets are misdirected; copyright owners cannot preclude use of content for a fair-use purpose by purporting to create a licensing market for that protected purpose.

no impact on a potential *future* market for clips from the Works, because (like all content captured by TVEyes) the Works were deleted from TVEyes' servers the 33rd day after they were broadcast. [Fox.56.1.Resp. ¶19; 1st.Seltzer ¶42; Karle.Rep. ¶¶124-125].<sup>23</sup>

*Second,* [REDACTED]

[REDACTED]. [1st.Rose ¶¶2-3; Karle.Rep. ¶¶113-118; 2d.Karle ¶¶12-20]. Fox argues (Br. 71-72, 79) that TVEyes competes with its clip-licensing business because TVEyes is used by “the same kinds of organizations” that occasionally license clips from Fox. But that argument ignores the difference between uses that require public performance licenses and those that do not. For example, a political campaign might use TVEyes to research statements made by a rival candidate to prepare for a debate ([1st.Ives ¶10; 4th.Ives ¶6, Ex.ZZZZ]), but not to obtain broadcast-quality footage (which TVEyes does not offer) for a television advertisement or video shown at a national convention ([1st.Seltzer ¶22]). There is thus [REDACTED] that any clips from the Works were used in a manner that deprived Fox of public performance licensing revenue. [Karle.Rep. ¶¶109-118].

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<sup>23</sup> The sole exceptions are the seven clips from the Works permanently archived. [4th.Seltzer ¶¶6-7].

*Third*, Fox directs the Court (Br. 72-73) to a self-serving declaration rife with hearsay from the director of Fox’s sub-licensee Executive Interviews,

[REDACTED]

[REDACTED] The undisputed evidence in this case *directly contradicts* these assertions: [REDACTED]

[REDACTED]

[REDACTED] [1st.Rose ¶3, Ex.M]. The Executive Interviews correspondence is irrelevant, not only because it does not pertain to the Works, or even to Fox content, but also because it concerns licensing requirements under *English* law. [Karle.Rep. ¶119; 2d.Karle ¶17].

**(d) The Loss Of Licenses To Media-Monitoring Services Is Not Cognizable**

Finally, Fox asserts (Br. 70-71, 75) that “TVEyes occupies the potential market for Fox’s licensing to media monitoring and clip services.” In *Google*, this Court characterized a similar argument as having “no merit” because the plaintiff’s copyright “does not include an exclusive right to furnish the kind of information about the works that Google’s programs provide to the public.” 804 F.3d at 225; *see also Bill Graham*, 448 F.3d at 614-15 (“[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work. [C]opyright owners may not preempt exploitation of transformative

markets ....”) (citation and quotations omitted, alteration in original). Fox cannot corner the market for “research, comment and criticism” of its Works, just as a copyright owner in a song cannot preclude parodies by purporting to offer licenses for parodic use. Nor has Fox submitted any evidence of any such licensing market for the 19 Works.

Further, as a factual matter, Fox’s assertion (Br. 75) that TVEyes “licenses” Fox’s content to third parties is incorrect. TVEyes merely provides its partner media-monitoring companies with the ability to query TVEyes’ database on behalf of their own subscribers. [2d.Seltzer ¶¶18-19]. But TVEyes has never “licensed” any Fox content.

## **2. TVEyes’ Archiving Function Causes No Market Harm**

As the district court found, “Fox has not identified any actual or potential market harm arising from archiving.” [Aug.2015.Op.13]; *see also* [Aug.2015.Op.13 n.5] (“Fox argues that TVEyes threatens harm in derivative markets generally[,] ... but it has not isolated any harm resulting from archiving in particular.”). Fox offers no challenge to this ruling, nor could it: Only seven clips from the Works were archived by subscribers, six of which were between 44 and 86 seconds long, and Fox has identified no evidence that these clips were used in a way that has or will harm Fox’s markets. [4th.Seltzer ¶7].

### **3. The Viewing And Archiving Functions Provide Significant Public Benefits**

The fourth factor also “requires a balancing of [1] the benefit the public will derive if the use is permitted and [2] the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 613 (quotations omitted).

As an initial matter, Fox argues (Br. 82, 86) that the Court should weigh the “public benefits of the news industry” against the public benefits provided by TVEyes’ service. This is a false choice. No one disputes the public benefits of broadcast news, nor that the digital revolution has had an impact on all content industries. Those challenges, however, provide no more justification for Fox to bar TVEyes’ transformative research service than for book publishers and authors (also upended by digitization) to stop Google’s transformative search service. *See, e.g., Google*, 804 F.3d at 229; *HathiTrust*, 755 F.3d at 101, 103; [Karle.Rep. ¶¶186-193].

Inquiry into TVEyes’ public benefit must focus on the compelling public interest in researching, discovering, commenting on and even criticizing sources of news—particularly news leaders, like Fox, who influence the public’s understanding of social and political issues of the day. *See* EFF Br. 3 (“90% of media outlets are controlled by just six companies”). As the district court held:

Democracy works best when public discourse is vibrant and debate thriving. But debate cannot thrive when the message itself (in this case, the broadcast) disappears after airing into an abyss. TVEyes' service allows researchers to study Fox News' coverage of an issue and compare it to other news stations; it allows targets of Fox News commentators to learn what is said about them on the network and respond; it allows other media networks to monitor Fox's coverage in order to criticize it. TVEyes helps promote the free exchange of ideas ....

[Aug.2015.Op.12]; *see also* [Sept.2014.Op.27] (“TVEyes’ service provides social and public benefit and thus serves an important public interest.”); [1st.Ives ¶¶3-15; 1st.Rose ¶¶15-30, Exs.KK-ZZ]; Google Br. 4-12; Internet Archive Br. 5-30; EFF Br. 16-18; CCIA Br. 22-29; Media Critics Br. 5-10; IP Profs. Br. 17-18.

TVEyes has created a repository of information that can be accessed for “research, commentary and criticism” on an unprecedented scale. Using TVEyes, subscribers can efficiently sift through the daily deluge of television content from numerous, disparate sources to instantly discover information about broadcasts relevant to their research. Without TVEyes, or a service like it, there would be no other way for users to discover, gain access to and efficiently review this ephemeral information. [Sept.2014.Op.2; 1st.Ives ¶¶4-14; Karle.Rep. ¶¶174-192; 2d.Karle. ¶¶47-53].

TVEyes is also an important resource for those who criticize Fox and the news industry. [1st.Rose ¶¶26-27, Exs.VV-WW; 3d.Rose.Exs.NNNNN-TTTTT; Fox.56.1.Resp. ¶¶53, 59-61]; *see also* Media Critics Br. 5-30. As discussed *supra*

41, critics and commentators cannot license clips from Fox because licensees must covenant not to use licensed clips to criticize Fox, [REDACTED]

[REDACTED] [1st.Anten.Ex.KKK.at.ITNSOURCE0000161 (§7); 1st.Anten.Ex.KKK (200:12-203:9)]. Likewise, the video segments posted to Fox’s website do not facilitate analysis and criticism of Fox broadcasts. *See supra* 36-39; [Sept.2014.Op.7-8; 1st.Seltzer ¶¶47-49]. There is a public benefit in having a disinterested third party capture and index otherwise ephemeral television broadcasts into a searchable database, enabling users to mine information about those broadcasts for purposes that do not interfere with Fox’s “traditional, reasonable, or likely to be developed” markets. *Swatch*, 756 F.3d at 91 (quotations omitted). Just as Fox embraces (Br. 7) its role as “a ‘watchdog’ on the government,” TVEyes offers crucial capability as a “watchdog” on the “watchdogs.”

Fox argues (Br. 84) that, because TVEyes is not available to the general public, it does not enhance the public’s ability to comment on Fox’s broadcasts. But the undisputed evidence shows that the vast majority of users who accessed the Works were journalists, political candidates and elected officials—precisely the groups most likely to analyze and critique Fox. [4th.Seltzer ¶5]. Moreover, there is substantial evidence in the record of journalists and commentators using TVEyes

to publicly comment on Fox’s broadcasts. [1st.Rose ¶¶26-27, Exs.VV-WW; 3d.Rose.Exs.NNNNN-TTTTT; Fox.56.1.Resp. ¶¶53, 59-61].

To the extent Fox suffers any harm from TVEyes’ monitoring service, it is *de minimis*—both empirically and as a fraction of Fox’s \$2 billion in annual revenue. [Karle.Rep. ¶¶ 92-102; 191; 2d.Karle ¶3; 3d.Ives ¶3]; EFF Br. 22-23 (speculative Fox losses do not outweigh public interest). The benefit to Fox of preventing monitoring of its broadcasts does not outweigh the tremendous benefit to the public provided by the service. *See Google*, 804 F.3d at 224 (“the possibility, or even the probability or certainty, of some lost sales does not suffice to ... tilt the weighty fourth factor in favor of the rights holder in the original”). And even if such misuse were to occur—though the present record contains no such evidence—Fox would have remedies to combat infringement that do not intrude upon TVEyes’ fair use. *See, e.g., Google*, 804 F.3d at 229 (acknowledging alternative remedies available to publishers under proper record).

Finally, Fox argues (Br. 85) that the public benefits provided by TVEyes can be accomplished by other means. But none of the “non-infringing” alternatives cited by Fox are adequate substitutes for TVEyes. [Karle.Rep. ¶¶174-185; 2d.Karle ¶¶47-53; 5th.Ives. ¶¶30-31; 4th.Rose ¶¶11-14; Aug.2015.Op.8 n.4]; Internet Archive Br. 21.

## II. FOX FAILS TO REBUT TVEYES' SHOWING THAT ITS E-MAILING, DOWNLOADING AND DATE/TIME-SEARCH FUNCTIONS ARE TRANSFORMATIVE FAIR USES

Where the initial copying of works is transformative, enabling e-mailing and downloading of the same works for the same transformative purpose is likewise transformative. *See, e.g., White*, 2014 WL 3385480, at \*2 (transformative use where Westlaw allows users to e-mail and download as-filed PDF copies of briefs); *Am. Inst. of Physics v. Winstead PC*, 2013 WL 6242843, at \*1-2, \*5-6 (N.D. Tex. Dec. 3, 2013) (where original reproductions of articles were fair use, subsequent e-mailing and archiving of same articles for subscribers' internal purposes were "functionally identical" to original reproduction and thus transformative fair uses too).<sup>24</sup>

Fox has chosen to not address each specific function under review, and instead treats en masse TVEyes' so-called "Content-Delivery Features."<sup>25</sup> To the

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<sup>24</sup> Fox's attempt to dismiss these cases in a footnote (Br. 49-50 n.9) is unavailing. Contrary to Fox's suggestion, the plaintiff in *White* alleged that the e-mailing and downloading functions were infringing, yet the Court found that the *entire* Westlaw service was a fair use. 2014 WL 3385480, at \*2 (creation of "a link to a PDF of the as-filed version of the document" transformative). As to *Winstead*, Fox does not dispute its holding that, if an initial copy is fair use, then e-mailing and archiving "functionally identical" copies for the same purpose is also fair use. 2013 WL 6242843, at \*6.

<sup>25</sup> Fox recognizes (Br. 44 n.8) that the district court erred by applying an "integralness" test as to these three functions. *See* TVEyes Br. 23.

extent that Fox has lodged any specific critiques of TVEyes' e-mailing, downloading and date/time-search functions, TVEyes addresses each below.

**A. The E-mailing Function Is Fair Use**

Only six clips from the Works were sent using TVEyes' e-mailing function, all by national political entities, and Fox has introduced no evidence that these e-mails were publicly disseminated or otherwise used inconsistently with fair use. [4th.Seltzer ¶9; *see also* [4th.Ives ¶¶9-13; Karle.Rep. ¶¶47-51].

Fox expresses concern (Br. 25-26) that e-mailed hyperlinks could be played by "anyone," but there is no evidence that TVEyes subscribers e-mailed links of clips of the Works (or any Fox content) inconsistent with TVEyes' policies. Further, no links to clips from the Works (and only 44 Fox clips total) have ever been shared on social media, *see supra* 10-11, and in any event, TVEyes now blocks any Fox links from playing on social media. [4th.Seltzer ¶16]; *Google*, 804 F.3d at 225 (evaluating functions as "presently designed").<sup>26</sup> And in any event, for the reasons set forth in TVEyes' opening brief (at 30-31), speculation about the mere "possibility" of subscribers' misuse of the e-mailing (or any other) function is insufficient.

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<sup>26</sup> Fox repeats (Br. 36) the district court's error that these social-media blockers are supposedly "ineffective" because certain isolated e-mails referenced "subscribers' ability to share information through social media" ([Aug.2015.Op.15 n.6]), but these e-mails pre-date the implementation of the social-media blockers on March 6, 2015 ([4th.Seltzer ¶16]).

### **B. The Downloading Function Is Fair**

Subscribers downloaded only 21 clips from the Works, 20 of which by journalists or political/governmental entities. [4th.Seltzer ¶11]. Further, Fox introduced no evidence that any clips downloaded from the Works were ever posted on social media or used in any other way inconsistent with fair use. *See* [4th.Ives.Decl. ¶¶14-20; Karle.Rep. ¶¶52-59].

While Fox disparages (Br. 21-22) the availability of downloading, it does not dispute the function's transformative purpose (*see* TVEyes Br. 14, 32), nor does Fox contest that downloaded clips play poorly if uploaded to social media because the audio does not sync with the video, a malfunction TVEyes chose not to remedy because TVEyes clips are not intended for social media. [4th.Seltzer ¶15].

Finally, contrary to Fox's representation (Br. 59), TVEyes' downloading function is not merely "convenient"; it "adds important value to the basic transformative search function," and thus is transformative in its own right for promoting research. *Google*, 804 F.3d at 217-18; *see* TVEyes Br. 33-34.

### **C. The Date/Time-Search Function Is Fair**

Fox has not identified any clips from the Works found through the date/time-search function that were used inconsistently with fair-use. [4th.Ives ¶¶21-26; Karle.Rep. ¶¶61-67]

Fox argues (Br. 56) that TVEyes' date/time-search function is not transformative because market viewership and publicity values for a program can be obtained from third parties. Fox misses the point: this information is only useful when it is provided with the corresponding clip. Further, the date/time-search function is used for many other reasons, including to: (1) locate and critique a graphic, expression, reaction or picture; (2) compare and contrast stories that air at a particular time across networks; (3) study advertisements associated with particular broadcasts; (4) assemble statements by political candidates to compare with future statements; and (5) conduct research when keyword searching is ineffective. TVEyes Br. 34-35.<sup>27</sup> The date/time-search function "adds important value to the basic transformative search function," *Google*, 804 F.3d at 217, and is thus transformative. *See also* *Google* Br. 26-28 (discussing how date/time-search is consistent with fair use); *Media Critics* Br. 20-22 (examples of transformative use of date/time-search). Just as the district court found that "[t]he actual images and sounds depicted on television are as important as the news information itself,"

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<sup>27</sup> Fox asserts (Br. 56-57) that TVEyes' examples do not refer to the date/time-search function. Not only is this incorrect (*see, e.g.*, 4th.Ives.Ex.AAAAA.TVEYES-040666, Ex.AAAAA.TVEYES-041730, Ex.AAAAA.TVEYES-039200, Ex.AAAAA.TVEYES-041902), but Fox does not dispute the testimony confirming that this function is used in such a manner. [4th.Ives ¶¶21-26, Exs.AAAAA-CCCCC]; *see also* [Karle.Rep. ¶63, Ex.5; 3d.Rose.Ex.IIIII].

[Sept.2014.Op.18], the date/time-search function enables subscribers to learn that information precisely where a text-based search cannot. Fox's own example (Br. 59) proves the point: It is not possible to locate a clip containing a particular graphic on Fox's website without also knowing what words were spoken at the instant the graphic appeared.

Fox also contends (Br. 20-21) that subscribers used TVEyes' date/time-search function to "watch" TV, but there is no evidence supporting that assertion. Fox cites two anonymous Twitter posts, but both are hearsay and neither mentions date/time-search (or using it to "watch" TV). It also cites a self-serving declaration from a Fox employee who also never mentions date/time-search and used TVEyes for work-related research a decade earlier. [1st.Anten.Ex.ZZZ (95:11-17)]. Further, Fox does not dispute that fewer than 5.5% of all plays on TVEyes are conducted using the date/time-search function. [Fox.56.1.Resp. ¶67].

Finally, Fox does not dispute that, because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[1st.Anten.Ex.KKK.at.ITNSOURCE0000161

§7;

1st.Anten.Ex.LLL (200:12-203:9)], subscribers cannot procure such clips “for a fee,” as the district court erroneously held, [Aug.2014.Op.18].<sup>28</sup>

### **III. UNDER *CABLEVISION*, TVEYES CANNOT BE LIABLE FOR DIRECT INFRINGEMENT**

Fox does not dispute that volitional conduct is an “element of direct liability.” *Cablevision*, 536 F.3d at 131.<sup>29</sup> Nor does Fox dispute that it bears the burden of proving TVEyes’ volitional conduct. But Fox offers no evidence that TVEyes acted volitionally by merely housing a service that automatically creates clips in response to user-generated requests. TVEyes’ *users*—not TVEyes—exhibited the requisite volition by “issuing a command directly to [TVEyes’] system” to create particular clips out of Fox’s undifferentiated broadcasts. *Id.* at 132. TVEyes “automatically obey[ed]” these commands and thus “engage[d] in no volitional conduct” of its own. *Id.*

*First*, Fox suggests (Br. 88) that the volitional-conduct element no longer “exist[s]” after *American Broadcast Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014). But *Aereo* says no such thing, and courts recognize that *Aereo* “left the volitional conduct requirement intact.” EFF Br. 9-11 (discussing cases).

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<sup>28</sup> To the extent that Fox (unlike the district court) treats the date/time-search function as a component of the viewing function (Br. 19, 56), TVEyes’ arguments above apply. *See supra* Part I.

<sup>29</sup> Although Fox mislabels it a “defense” (at 42, 88).

*Second*, while Fox argues (Br. 89) that TVEyes’ “selection of what telecasts to include” is volitional, *Cablevision* rejected this argument, holding that the defendant’s selection of “the channels of programming” was not volitional because it “has no control over what programs are made available on individual channels or when those programs will air, if at all.” 536 F.3d at 132; *cf. Fox Broad. Co. v. Dish Network LLC*, 2015 WL 1137593, at \*19-21 (C.D. Cal. Jan. 20, 2015) (enabling customers to record “blocks” of shows not volitional).<sup>30</sup>

*Third*, Fox contends (Br. 89) that enabling users to create clips to be “watched, downloaded, and redistributed” constitutes volitional conduct. This contradicts *Cablevision*, which found that such automated, user-initiated activities are not volitional. 536 F.3d at 131. Rather, recourse against a service based on such acts is premised on secondary liability, *id.* at 133, which Fox disavowed here, [Dkt.148(Fox.SJ.Opp.Br.).at.67]. *See* EFF Br. 11-13; CCIA Br. 20-22.

*Fourth*, Fox claims (Br. 90-91) that differences in “the technologies” and “licenses” render *Cablevision* distinguishable. These distinctions have no bearing on TVEyes’ volition. TVEyes’ maintenance of a “master copy” of Fox broadcasts to power its search engine is a non-infringing fair use, and the remaining functions

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<sup>30</sup> Fox’s cited authority (Br. 89) proves the point. *See Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting) (Netflix’s arrangement and curation of pre-selected “movies” and “TV episodes” could demonstrate volition). TVEyes does not offer a library of pre-selected clips or programs.

are initiated exclusively by subscribers.<sup>31</sup> Contrary to Fox’s implication (Br. 91), the copy made by Cablevision for its RS-DVR service was *not* licensed, *see* 536 F.3d at 124. That Cablevision’s initial copy was made pursuant to a license while TVEyes’ initial copy pursuant to fair use is irrelevant.<sup>32</sup> The relevant question is whether *subsequent* copies made by users establishes TVEyes’ own volition. They do not.

*Fifth*, the volitional-conduct requirement “appl[ies] equally to all exclusive rights,” *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 147 (S.D.N.Y. 2009), and Fox offers no non-conclusory reason (Br. 92) why it does not. *See Smith v. BarnesandNoble.com, LLC*, 143 F. Supp. 3d 115, 123 (S.D.N.Y. 2015) (applies to distribution); *In re Cellco P’ship*, 663 F. Supp. 2d 363, 370 (S.D.N.Y. 2009) (public performance).

#### **IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY ISSUING A PERMANENT INJUNCTION**

By issuing the permanent injunction, the district court ruled that an absence of fair use necessitated a finding of infringement and entitlement to injunctive

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<sup>31</sup> Fox’s *amicus* Copyright Alliance argues (Br. 5-10) that, where there is no fair use, TVEyes’ conduct must be volitional. But *Cablevision* found no volition, even where fair use was waived. 536 F.3d at 124.

<sup>32</sup> Fox also cites *Cablevision* (Br. 90) for the proposition that the initial copy there was retained for 0.1 seconds, while TVEyes’ initial copy is retained for 32 days. This difference is irrelevant; the portion of *Cablevision* addressing volition does not rely on fixation. 536 F.3d at 130-33.

relief as to TVEyes' e-mailing, downloading and date/time-search functions. This was an abuse of discretion warranting vacatur.

**A. The District Court Failed To Apply *eBay***

The district court did not mention *eBay*, much less apply its four factors, before issuing the injunction. But the court was required to “apply that framework in the first instance.” *eBay*, 547 U.S. at 394. This alone requires vacatur.

**B. Fox Cannot Satisfy *eBay***

The absence of any factual evidence supporting an injunction under *eBay* favors vacating the injunction without remand. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1376-77 (Fed. Cir. 2012). Fox's counterarguments are unavailing.

*First*, Fox incorrectly represents (Br. 93) that the court found “concrete harms”; rather, it held that these functions *might* pose a “potential” ([Aug.2015.Op.14]), “danger” ([Aug.2015.Op.16]), or “risk” ([Aug.2015.Op.18]) of harm. Such possibilities are too speculative to support an injunction. *See* TVEyes Br. 57-58 (citing cases). Fox's five-year delay in bringing suit confirms “that any harm suffered by [Fox] is not so severe as to be ‘irreparable.’” *Richard Feiner & Co. v. Turner Entm't Co.*, 98 F.3d 33, 34 (2d Cir. 1996).<sup>33</sup>

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<sup>33</sup> Fox's citation to *WPIX* (Br. 93) is no help. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285-86 (2d Cir. 2012) found that the defendant's live-streaming of  
(footnote continued)

*Second*, Fox does not dispute that lost licenses and advertising views, if not speculative, are quantifiable. Instead, Fox surmises (Br. 93) that TVEyes threatens “the operation and stability of the entire industry” (quoting *WPIX*, 691 F.3d at 286). The district court correctly rejected this hyperbole, finding that TVEyes poses no “realistic danger” of even a “potential harm to the overall market of television watching.” [Sept.2014.Op.24].

*Third*, Fox argues (Br. 94) that TVEyes “cannot complain about the loss of ability to offer its infringing product” (quoting *WPIX*, 691 F.3d at 287). But *WPIX* did not involve fair use; here, by contrast, the district court found that the e-mailing, downloading and date/time-search functions can be fair. An injunction would interfere with such fair uses, and Fox identifies no hardship from the continued existence of these functions.

*Fourth*, Fox does not dispute that these functions can be used in a significant, non-infringing manner. The public interest in such availability thus outweighs any asserted harm to Fox.

### **C. The Injunction Is Overbroad**

As TVEyes explained (TVEyes Br. 59-60), the injunction is overbroad because it extends to all existing and future “content telecast on [FNC] and [FBN]”  

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uninterrupted television broadcasts in violation of 17 U.S.C. § 111 “would substantially diminish the value of the programming.” The district court here, on entirely different facts, found the opposite to be true. [Sept.2014.Op.23-24].

(Injunction ¶1), not just the 19 Works. *Waldman Publ'g Co. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) (vacating injunction of selling books “substantially similar” to plaintiffs’ as overbroad). While Fox quotes (Br. 94) a sentence from a treatise supporting a rule that injunctions apply to “all” of a plaintiff’s works, this language was written pre-*eBay*, see 3 NIMMER ON COPYRIGHT § 14.06[B] at 14-90 (1992), and ignores that courts can no longer base injunctions on “categorical” or “general” rules encompassing “a broad swath of cases,” *eBay*, 547 U.S. at 393.<sup>34</sup>

Fox also ignores that the balance of equities will vary from clip to clip because the enjoined functions are amenable to fair use. [*E.g.*, Aug.2015.Op.14]. The injunction covers over 17,500 hours of Fox content per year, while the Works represent only 19 hours from five FNC programs, including content for which Fox does not even own the copyright. [Fox.56.1.Resp. ¶84; 1st.Rose ¶13, Ex.II]. While Fox argues (Br. 95) that it should not need to bring actions for each program, it introduced no evidence that the Works are representative of “all”

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<sup>34</sup> Fox’s cases (Br. 94-95), all pre-*eBay*, are inapposite. *Princeton University Press v. Michigan Document Services Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996), *vacated* an injunction prohibiting “copying any of plaintiffs’ existing or future copyrighted works” because the district court did not sufficiently consider fair uses. See also *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994) (injunction applied to specific unregistered works); *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990) (identified characters).

current and conceivable future Fox content,<sup>35</sup> nor can it justify an injunction that extends to content for which it is not the copyright owner.

**D. The District Court Did Not Issue An “Advisory” Opinion**

As noted (*supra* 51), TVEyes’ unmodified e-mailing function is fair use. But should this Court disagree, the district court had the authority to condition its fair-use ruling upon TVEyes’ implementation of certain measures.

Contrary to Fox’s supposition (Br. 87), the court did not base its ruling on “hypothetical” facts; it relied on a record that delineated specific, concrete measures on which the parties submitted evidence and argument. *See generally* [Dkt.186]. Further, “a decision is not advisory where it concerns facts whose existence is imminent.” [Nov.2015.Op.2] (quoting *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d 441, 451 n.6 (S.D.N.Y. 2014)). Fox does not dispute that these measures are “imminent” if the injunction is upheld or that “[t]he limitations ... will sufficiently prevent” activity “beyond the bounds of fair use.” [Nov.2015.Op.4]. The court thus evaluated the facts in “the record before [it].” *Google*, 804 F.3d at 208.

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<sup>35</sup> Fox asserts that each episode “is separately written, produced, and directed,” and details the many differences between its various daytime, prime-time, overnight and weekend shows. [Dkt.48(“Wallace”) ¶¶16-25].

## CONCLUSION

The Court should rule in favor of TVEyes on both the appeal and cross-appeal.

Dated: August 15, 2016

Respectfully submitted,

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### CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 28.1(e)(2)(A) because it contains 13,975 words (based on the Microsoft Word word-count function) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using **Microsoft Word** in **Times New Roman, 14-point type**.

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