

No. 18-_____

IN THE

Supreme Court of the United States

TVEYES, INC.,

Petitioner,

v.

FOX NEWS NETWORK, LLC,

Respondent.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In copyright law, the defense of fair use covers the transformative use of a work for research, comment, criticism and parody. Whether a use is “fair” depends upon four nonexclusive statutory factors, the fourth of which is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107(4). This Court has held that, in assessing this fourth factor, market harm cannot be presumed from a transformative use’s commercial success and that harm arising from use of the copyrighted work for the purpose of criticism is not cognizable. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-92 (1994). But in the decision below, the Second Circuit held that the fourth factor presumptively weighs against a finding of fair use if a transformative use is commercially successful and thwarts the author’s desire to prevent analysis or criticism of its work. The question presented is:

Can the transformative use of a copyrighted work cause a cognizable market harm under 17 U.S.C. 107(4) if it is used in connection with a commercially successful business that the author is unlikely to enter or authorize?

RULE 29.6 STATEMENT

TVEyes, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This Court has not reviewed a copyright fair use case in more than twenty years. Extraordinary advances in digital technology—resulting in new tools for research and analysis that could never have been imagined even as recently as a decade ago—now provide the Court with an ideal opportunity to confirm that fair use protects research services that facilitate the analysis and criticism of copyrighted works.

TVEyes is one of those advances. Its customers include government agencies and officials, such as the White House and over 100 members of Congress; branches of the military; and multiple news organizations. TVEyes indexes over 27,000 hours of television content every day, from across over 1,000 television channels. In so doing, TVEyes enables its subscribers to conduct internal research and analysis on what, when and how information is conveyed on television, including by being able to view short clips centered around searched-for keywords.

The decision below, however, allows Fox to use copyright law to stop TVEyes from enabling its customers to conduct research and analysis on content that recently aired on Fox News Channel or Fox Business Network. In evaluating the four fair use factors set forth in 17 U.S.C. 107, the Second Circuit held that TVEyes serves the “transformative” purpose of “enhancing efficiency” in research, comment and criticism, quintessential fair use purposes identified in the preamble of 17 U.S.C. 107. But the court nonetheless held that TVEyes’s service was not a fair use because TVEyes’s economic success demonstrates that it displaces revenues that Fox hypotheti-

cally might want to pursue at some point in the future.

The Second Circuit's decision conflicts with this Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-92 (1994), followed by other courts of appeals, which holds that: (1) market harm cannot be presumed from a defendant's commercial success in a transformative market; and (2) a copyright owner cannot show market harm by claiming injury to markets the author is unlikely to enter or authorize, such as for criticism of the original work. This Court's intervention is necessary to resolve this conflict.

In addition, the decision below warrants review because the question presented has exceptional importance. Televised news media—and Fox in particular—have outsized importance in today's media landscape. Unlike print publications or written content on the internet, television broadcasts are, by their very nature, ephemeral. The harnessing of technological advances to allow analysts and critics to quickly locate and research televised information is crucial to the public good and consistent with long-standing First Amendment principles. To allow a news organization to prevent meaningful research on its content under the guise of nonexistent licensing markets extinguishes this beneficial, and necessary, opportunity for discourse that analyzes and critiques the Nation's news coverage. Proper application of the fair use doctrine is the key First Amendment safeguard to protect the public from such abuses.

This case provides an ideal vehicle to correct the Second Circuit's misinterpretation of fair use and ensure that news channels cannot wield copyright

law as a shield against becoming the subject of legitimate research and criticism. The petition should be granted.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 883 F.3d 169 and is reproduced at App. 1a-35a. The Second Circuit's order denying panel and *en banc* rehearing is reproduced at App. 105a. The district court's first summary judgment opinion is available at 124 F. Supp. 3d 325 and is reproduced at App. 36a-72a. The district court's second summary judgment opinion is available at 2015 WL 7769374 and is reproduced at App. 73a-94a. The district court's order setting the terms of the injunction is available at 2015 WL 7769374 and is reproduced at App. 95a-99a. The district court's permanent injunction is available at 2015 WL 8148831 and is reproduced at App. 100a-104a.

JURISDICTION

The court of appeals denied panel and *en banc* rehearing on May 14, 2018. App. 105a. On August 2, 2018, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to September 12, 2018. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

17 U.S.C. 107 states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism,

comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT OF THE CASE

A. Statutory Framework

“From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8; alteration in original). The import of robust fair use protections is not academic; it carries

“constitutional significance as a guarantor to access and use for First Amendment purposes.” *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1260 n.3 (11th Cir. 2001); see also *Golan v. Holder*, 565 U.S. 302, 328 (2012) (describing fair use as a “build-in First Amendment accommodation[]”) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

Section 107 of the Copyright Act of 1976 codified the “common-law tradition” of fair use by listing four nonexclusive factors that courts must consider in determining whether a use is fair, and thus non-infringing.¹ *Campbell*, 510 U.S. at 577. These factors cannot “be treated in isolation,” but instead “[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.” *Id.* at 578; see also *id.* at 577 (fair use analysis “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (alteration in original)). As a general matter, the illustrative fair uses listed in the preamble of § 107—which include “for purposes such as criticism,

¹ These factors are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

comment, news reporting, teaching ... scholarship, or research”—are those “most commonly ... found to be fair uses,” *id.* at 578. But ultimately, “[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.” *Id.* at 577.

The first and fourth factors carry particular influence. The first factor is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. 107(1). “The central purpose of this investigation” is to ask “whether and to what extent the new work is ‘transformative,’” *i.e.*, “adds something new, with a further purpose or different character” than the original. *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)). This is “guided by the examples given in the preamble to § 107.” *Id.* at 578. As this Court has recognized, “the goal of copyright ... is generally furthered by the creation of transformative works and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* at 579.

The fourth factor—“the effect of the use upon the potential market for or value of the copyrighted work,” 17 U.S.C. 107(4)—has been deemed “the single most important element of fair use,” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). Under this factor, where “the second use is *transformative*, market substitution is at least less certain, and market harm may not be so readily inferred,” because such use more likely “serve[s] different market functions” than the original. *Campbell*,

510 U.S. at 591 (emphasis added). Moreover, not every use that may have an effect on the original is a *cognizable* market harm. As *Campbell* explained:

there is no protect[a]ble derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.

Id. at 592. In other words, a creator cannot stop a parodist from using her work by claiming that it interferes with her potential market for licensing parodies; otherwise, a creator could use copyright law to silence any critiques of a work.²

B. The Parties

1. TVEyes is a media-monitoring service that enables online research and analysis of the content aired on over 1,400 television and radio channels. App. 4a, 37a. Using closed captions and speech-to-text technology, TVEyes captures broadcast words and images—twenty-four hours a day, seven days a week—and creates a single, comprehensive text-searchable database of that content, resulting in the capture of over 27,000 hours of television programming every day. App. 37a, 64a. By entering keywords

² Even where a use ultimately is found not to be fair, “the goals of the copyright law ... are not always best served by automatically granting injunctive relief.” *Campbell*, 510 U.S. at 578 n.10.

(such as a politician’s name or a news event), a subscriber can quickly see an index of every instance of when, where, and how those words were mentioned over the past 32 days (older content is deleted), and can view a short clip of associated video to observe the context of the use. App. 4a-5a. “Without a service like TVEyes, the only way” for a subscriber to learn whether and how a word or phrase was used on the news, for example, “would be to have an individual watch every station that broadcast news for twenty-four hours a day taking notes on each station’s simultaneous coverage.” App. 37a-38a.

A subscription generally costs about \$500 per month. App. 5a. TVEyes is available only to professionals, such as government agencies and businesses, and not to the general public. App. 40a. As of October 2013, TVEyes had over 2,200 subscribers, including: the White House, over 100 members of Congress, the Department of Defense, the U.S. Army, the Associated Press, MSNBC, Reuters, Bloomberg, ABC Television Group, CBS Television Network, the Association of Trial Lawyers, AARP, the American Red Cross, political campaigns for Republican and Democratic candidates and organizations, and many others. App. 40a-41a, 64a.

TVEyes expressly restricts subscribers’ use of the service to *internal research purposes* only—a limitation reinforced through signed contracts, warnings, reminders and technological limitations. App. 5a, 41a. Clips located on TVEyes begin to play 14 seconds before the selected keyword occurs, not at a predesignated “beginning” of any story. App. 4a. The average clip is played for 41 seconds, and 82% of clips are played for one minute or less. App. 62a.

In addition to enabling subscribers to find and view clips for internal research and analysis, TVEyes also offers “ancillary functions” related to research—such as the ability to archive or download clips for later analysis, to email clips, and to search for clips by date and time rather than keyword—all of which likewise are restricted to use for internal research and analysis only. App. 5a.³

As the district court concluded:

TVEyes subscribers use this service to comment on and criticize broadcast news channels. Government bodies use it 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. Clearly,

³ For a more detailed description of TVEyes’s service and functions, see App. 37a-42a.

TVEyes provides substantial benefit to the public.

App. 64a. For example, TVEyes allows journalists to serve as a watchdog on how Fox covers particular subjects, compare Fox’s coverage with those of other channels, research the accuracy of the raw information, and critique the graphics used and the tone of the coverage—information that cannot be conveyed through a raw transcript and that Fox may not want to make available for criticism. App. 55a. In short, “[w]ithout TVEyes, there is no other way to sift through more than 27,000 hours of programming broadcast on television daily, most of which is not available online or anywhere else, to track and discover information.” App. 64a.

2. Fox is an international news organization that owns and operates two television channels, Fox News Channel (“FNC”) and Fox Business Network (“FBN”), which air news-related content. App. 42a.

Fox owns and operates a website on which only a limited amount of content that aired on FNC or FBN can be viewed. Specifically, just 16% of Fox broadcasts are made available on its website, Fox’s website is restricted to “personal use,” the video segments Fox makes available may be edited or “corrected” versions of the originals, and website videos excludes the “ticker” at the bottom of the screen during broadcasts. App. 43a-44a.

Fox also purports to offer licenses for use of some of the video segments that aired on FNC or FBN. However, among other provisions, licensees must agree to a specific restriction prohibiting the use of

licensed clips “in a way that is *derogatory* or *critical*” of Fox. App. 77a (emphases added).

C. The District Court Proceedings

In 2013 Fox brought claims against TVEyes for copyright infringement of 19 hour-long episodes that aired on FNC or FBN (the “Works”). App. 45a & n.3. The parties cross-moved for summary judgment on TVEyes’s fair use defense. App. 46a. The district court granted summary judgment to TVEyes that its core viewing function is a fair use, ruling that “recording content, putting it into a searchable database and, upon a keyword query, allowing users to view short clips of the content up to 32 days from the date of airing ... constitutes fair use.” App. 81a. Specifically, applying the four statutory factors, the court found that: (1) the nature of the use favors TVEyes because the use is transformative; (2) the nature of the copyrighted work is neutral; (3) the amount of use is neutral because the value of the database requires it to be comprehensive; and (4) the market effect favors TVEyes because Fox showed no licenses lost to TVEyes, Fox’s licensing market is very small, and any minimal impact on licensing is outweighed by the substantial benefit TVEyes provides to the public. App. 49a-65a.

Of particular relevance, the district court found that “[n]o reasonable juror could find that people are using TVEyes as a substitute for watching [Fox] broadcasts on television,” App. 63a, and that any potential lost revenue from the possible licensing of clips was not only “de minimis,” but “any ‘cognizable market harm’” is “substantially outweighed by the important public benefit provided by TVEyes,” App. 63a-65a (quoting *Campbell*, 510 U.S. at 590 n.21).

The district court ultimately weighed all of the factors together, concluding that “TVEyes’ service copies television broadcasts but for an entirely different purpose and function.” App. 65a. Moreover, “TVEyes’ service provides social and public benefit and thus serves an important public interest.” App. 66a. The court concluded that TVEyes’s copying of Fox content and enabling subscribers to view searched-for clips “constitutes fair use.” App. 66a.

The district court later ruled that certain ancillary TVEyes functions (archiving) are also fair use, while other functions (emailing, downloading and date/time-search) are not fair unless modified. App. 73a-94a. The court issued a permanent injunction against the functions it held not a fair use. App. 95a-99a (decision regarding terms of injunction); App. 100a-104a (permanent injunction).

D. The Second Circuit Decision

On cross-appeals under 28 U.S.C. 1292(a)(1), the Second Circuit reversed, holding as a matter of law that TVEyes’s use of Fox content to allow subscribers to conduct internal research and analysis of what had aired on FNC and FBN was not fair use.

On factor one (nature of the use), the panel majority agreed with the district court (App. 7a-11a) that TVEyes’s use is transformative, and thus “favors TVEyes,” (App. 11a) because creating a comprehensive text-searchable database of all broadcast content enables users “to isolate, from an ocean of programming, material that is responsive to their interests and needs” and to obtain “nearly instant access” to material that would not otherwise be practically retrievable (App. 9a).

The Second Circuit held that factor two (nature of the work) was neutral (App. 11a-12a), and that factor three (substantiality of use) favored Fox because “TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear” (App. 12a-13a).⁴

Finally, the Second Circuit held that factor four (market harm) favors Fox. App. 13a-15a. First, the court asserted that “[t]he success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips,” and thus that there is “a plausibly exploitable market for such access to televised content.” App. 15a. Second, the court presumed from this commercial success that TVEyes “displaces potential Fox revenues” either by “depriving Fox of licensing revenues from TVEyes or from similar entities” or by usurping Fox’s own possible “wish to exploit the market for such a service rather than license it to others.” App. 15a. The court of appeals made no reference to the anti-criticism restrictions that Fox expressly imposes on licensees or the public benefits TVEyes’s service offers.

⁴ In assessing the third factor, the Second Circuit failed to acknowledge that “the extent of permissible copying varies with the purpose and character of the use.” *Campbell*, 510 U.S. 586-87 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) for proposition that “reproduction of entire work” can be consistent with fair use); see also App. 59a-60a (“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.”).

Balancing the four factors, the Second Circuit concluded that “TVEyes’s service is not justifiable as a fair use” (App. 16a), and reversed the district court’s order “to the extent it held that TVEyes’s product was a fair use” (App. 19a). The court ordered the district court to enjoin TVEyes’s current service. App. 19a.

The Second Circuit denied TVEyes’s petition for panel and *en banc* rehearing. App. 105a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS

The decision below alters the balance between copyright protection and the First Amendment by presuming market harm from a subsequent user’s commercial success and the author’s asserted desire to exploit secondary markets. This approach not only contradicts *Campbell*—and the faithful adherence to *Campbell* by other courts of appeals—but also guts the central premise of fair use, which is to allow others to use copyrighted works when it serves the interests of copyright and is in the public interest.

A. This Court Has Held That Market Harm Cannot Be Presumed From A Transformative Use’s Commercial Success

The decision below conflicts with this Court’s holding in *Campbell* that market harm cannot automatically be presumed from a defendant’s commercial success. In *Campbell*, this Court considered

whether a secondary use—a parody of Roy Orbison’s rock ballad *Oh, Pretty Woman*—was a fair use. In assessing market harm, this Court noted that the Sixth Circuit had “resolved the fourth factor against 2 Live crew ... by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.” 510 U.S. at 591. Reversing the Sixth Circuit, this Court explained that, while a *non*-transformative use may make market substitution more likely,

when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions.

Id. (citations omitted).

The decision below, however, conflicts with that directive by holding that “[t]he success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips, and that this market is worth millions of dollars in the aggregate,” and concluding that, “[s]ince the ability to re-distribute Fox’s content in the manner that TVEyes does is clearly of value to TVEyes, it (or a similar service) should be willing to pay Fox for the right to offer the content.” App. 15a. In other words, the Second Circuit departed from *Campbell* by holding that mere business success es-

establishes cognizable market harm as a matter of law, even where the use serves transformative purposes like research, commentary or criticism. There is no dispute here that Fox’s programming and TVEyes’ service “serve different market functions.” 510 U.S. at 591; see App. 57a (“[D]atabases that convert copyrighted works into a research tool to further learning are transformative. TVEyes’ message, ‘this is what they said’—is a very different message from [Fox News]—‘this is what you should [know or] believe.’”) (quotations omitted; alterations in original).

Moreover, the decision below conflicts with those of other courts of appeals by reasoning that a defendant’s profit necessarily shows market harm. Any such result would by definition resolve all fair use cases against the defendant. After all, a copyright holder can always assert some effect on its potential market by pointing out the fact that the secondary user did not pay for the particular use in question—a feature inherent of *every* fair use case. See, e.g., *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1319 n.37 (11th Cir. 2008) (loss of licensing fee does not per se establish market harm because “[i]f it did, circular reasoning would resolve all fair use cases for the plaintiff”) (quotations omitted). As Judge Leval has elsewhere recognized: “By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.” Leval, 103 HARV. L. REV. at 1124; see also William F. Patry, PATRY ON FAIR USE § 6:10 (2017) (summarizing fallacy of this “circular[] argument”). “If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the pream-

ble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country.’” *Campbell*, 510 U.S. at 584 (quoting *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting)).

In short, the Second Circuit’s reasoning that market harm can be established by virtue of a defendant’s economic success conflicts with this Court’s precedent.

B. This Court Has Held That A Copyright Holder May Not Preempt Exploitation Of A Transformative Market

The decision below further conflicts with this Court’s precedent that a copyright owner cannot use copyright claims to preempt a market that enables criticism of or commentary on its works.

In particular, *Campbell* recognized a distinction between remediable and “*unremediable*” injuries, concluding that “there is no protectible derivative market for criticism” because “the unlikelihood that creators ... will license critical reviews ... of their own productions *removes* such uses from the very notion of a potential licensing market. 510 U.S. at 592 (emphasis added).

Courts of appeals agree that no cognizable market harm exists where the copyright owner is unlikely to agree to license such uses, such as for critique. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) (no cognizable market harm where it is unlikely that copyright holder would grant license for criticism) (citing

Campbell); *Suntrust Bank*, 268 F.3d at 1283 (Marcus, J., concurring) (copyright holder “may not use copyright to shield [works] from unwelcome comment, a policy that would extend intellectual property protection into the precincts of censorship”) (quotations omitted); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194, 207 (4th Cir. 1998) (“If there were a protectible derivative market for critical works, copyright holders would only license to those who would render favorable comment. The copyright holder cannot control the dissemination of criticism.”).

The decision below, however, conflicts with *Campbell* and its progeny in holding that TVEyes “usurped” Fox’s market because “Fox itself might wish to exploit the market for such a service rather than license it to others.” App. 15a. As the record demonstrates, it cannot be likely that Fox would ever create a comprehensive research service that would allow subscribers to search its content (much less *all* networks’ content, as TVEyes enables) and compare, analyze, and critique coverage of topics by keyword. To the contrary, Fox’s licensing model expressly *prohibits* use of Fox clips to criticize Fox, and *severely restricts* the use of Fox’s website or licenses for research and analysis concerning its broadcast content. App. 43-44a, 77a.

Moreover, a major media company such as Fox should not be permitted to unilaterally remove its broadcasts from the available universe of content for research and analysis. The purpose of and public benefit from a comprehensive research database such as TVEyes is to allow users to analyze and compare immense amounts of information across over a thousand channels, in a manner that other-

wise could not be accomplished by humans directly—what led the Second Circuit to acknowledge that TVEyes is a transformative service in the first place. If a media company could remove itself from being part of such a transformative research database, then the very benefit of such a critical service would be lost.

In permitting Fox dispositive control over a transformative research market through blanket assertion of copyright, the decision below cannot be reconciled with this Court’s precedent or the goals of fair use.

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

For the reasons set forth above, certiorari is warranted so that the Court may resolve the conflict between the Second Circuit’s decision and *Campbell* and confirm that the fair use defense prevents a copyright holder from blocking legitimate research and criticism.

An equally important reason to grant the petition is to ensure that copyright holders like Fox are not empowered to impede the creation of new technologies such as digital databases that allow broad-ranging research, analysis and criticism. TVEyes, for example, enables subscribers to conduct comparative research on the video content of news broadcasts across time and across networks. In this multimedia age, information is not only read, but also *seen* and *heard*, and the allowable tools that permit its full analysis should reflect that reality.

Moreover, the Second Circuit’s holding endangers new technologies important to political dialogue for

which the First Amendment plays a crucial role. Fox is a player of outsized relevance to national political debate. If the President tweets about an issue that aired on Fox, then Fox *itself* has become the news and an important subject for research, analysis and criticism that is enabled by TVEyes’s comprehensive database.⁵ But under the court of appeals’ market-harm ruling, Fox may withhold meaningful access to research of its broadcast content or license it only on prohibitive terms.

⁵ Examples abound of the feedback loop between Fox and the President. See, e.g., Josh Feldman, MEDIAITE, “*Trump Tweets Out Quotes from Fox News Segments Slamming DOJ and Police State*” (Sept. 1, 2018) <https://tinyurl.com/yckr6h3m>; Hunter Schwarz, CNN COVER/LINE, “*Nearly a quarter of Trump’s Instagram posts are reposts of Fox News content*” (Aug. 22, 2018) <https://tinyurl.com/yb5ex8u7>; Julie Hirschfeld Davis, NEW YORK TIMES, “*In a Fox-Inspired Tweetstorm, Trump Offers a Medley of Falsehoods and Misstatements*” (July 3, 2018) <https://tinyurl.com/ya7yoh8g>; Matthew Rozsa, SALON, “*Trump’s ‘Spygate’ tweets perfectly illustrate his Fox News feedback loop*” (May 23, 2018) <https://tinyurl.com/yak8obbf>; Mehdi Hasan, NEW STATESMAN, “*How the right-wing Fox News became Donald trump’s state propaganda channel*” (May 19, 2018) <https://tinyurl.com/yclaz8ka>; Ryan J. Reilly, HUFFPOST “*Trump’s Latest Pardon Shows The Best Way To Get One: Go On Fox News*” (Mar. 9, 2018) <https://tinyurl.com/y7d78d7w>; Andrew Marantz, THE NEW YORKER, “*How ‘Fox & Friends’ Rewrites Trump’s Reality*” (Jan. 15, 2018) <https://tinyurl.com/y943nezw>; Matthew Gertz, POLITICO, “*I’ve Studied the Trump-Fox Feedback Loop for Months. It’s Crazier Than You Think*” (Jan. 5, 2018) <https://tinyurl.com/ydzcrqrc>; Philip Bump, THE WASHINGTON POST, “*The Fox News president*” (Oct. 16, 2017) <https://tinyurl.com/y984w36h>; Maxwell Tani, BUSINESS INSIDER, “*The timing once again suggests that Trump tweets after watching Fox News segments*” (Jan. 26, 2017) <https://tinyurl.com/yd2rb8b3>.

As the district court explained:

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

App. 86a-87a. To allow a major media company such as Fox to remove itself at will from such a significant aspect of public discourse cannot be reconciled with the underlying First Amendment values that fair use is intended to protect. Democracy can thrive only where such discourse is examined in the sunlight. This Court should grant review to determine whether a copyright holder may assert purported harm to hypothetical licensing markets it would never reasonably enter to shield content from analysis and critique. See App. 86a (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market")).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 12, 2018

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

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

Docket Nos. 15-3885(L), 15-3886(XAP)

August Term, 2016
Argued: March 7, 2017
Decided: February 27, 2018

OPINION

Before: NEWMAN, JACOBS, *Circuit Judges*, and
KAPLAN, *District Judge*.*

JACOBS, *Circuit Judge*:

In this copyright infringement suit, defendant TVEyes, Inc. (“TVEyes”) offers a service that enables its clients to easily locate and view segments of televised video programming that are responsive to the clients’ interests. It does so by continuously recording vast quantities of television programming, compiling the recorded broadcasts into a database that is text-searchable (based primarily on the closed-

* Judge Lewis A. Kaplan, United States District Court for the Southern District of New York, sitting by designation.

captioned text copied from the broadcasts), and allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the clients.¹ Plaintiff Fox News Network, LLC (“Fox”), which has sued TVEyes in the United States District Court for the Southern District of New York, does not challenge the creation of the text-searchable database but alleges that TVEyes infringed Fox’s copyrights by re-distributing Fox’s copied audiovisual content, thereby enabling TVEyes’s clients to access that content without Fox’s permission. The principal question on appeal is whether TVEyes’s enabling of its clients to watch Fox’s programming is protected by the doctrine of fair use. *See* 17 U.S.C. § 107.

The district court held that fewer than all of the functions of TVEyes’s service constitute a fair use. Specifically, the district court deemed a fair use the functions enabling clients of TVEyes to search for videos by term, to watch the resulting videos, and to archive the videos on the TVEyes servers; but the court held that certain other functions were not a fair use, such as those enabling TVEyes’s clients to download videos to their computers, to freely e-mail videos to others, or to watch videos after searching for them by date, time, and channel (rather than by keyword). The district court therefore dismissed Fox’s challenge to important functions of TVEyes’s service, but also held that TVEyes was liable to Fox for copyright infringement on account of other functions of that

¹ TVEyes also captures radio content. For simplicity, this opinion will focus on only television broadcasts.

service. A permanent injunction limited various aspects of TVEyes’s service.²

This appeal shares features with our decision in *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (“*Google Books*”). That case held that Google’s creation of a text-searchable database of millions of books (including books under copyright) was a fair use because Google’s service was “transformative” and because integral features protected the rights of copyright holders. However, we cautioned that the case “test[ed] the boundaries of fair use.” *Google Books*, 804 F.3d at 206. We conclude that defendant TVEyes has exceeded those bounds.

TVEyes’s re-distribution of Fox’s audiovisual content serves a transformative purpose in that it enables TVEyes’s clients to isolate from the vast corpus of Fox’s content the material that is responsive to their interests, and to access that material in a convenient manner. But because that re-distribution makes available virtually all of Fox’s copyrighted audiovisual content—including all of the Fox content that TVEyes’s clients wish to see and hear—and because it deprives Fox of revenue that properly belongs to the copyright holder, TVEyes has failed to show that the product it offers to its clients can be justified as a fair use.

Accordingly, we reverse the order of the district court to the extent it held that some of the challenged TVEyes functions constituted a fair use. We affirm the order to the extent that it denied TVEyes’s request for additional relief. Furthermore, because the district court’s issuance of an injunction was premised on the

² Fox does not challenge on appeal the dismissal (on summary judgment) of its claims alleging “hot news” misappropriation and “direct competition” misappropriation.

incorrect conclusion that much of what TVEyes offered was a fair use, we remand for the district court to revise the injunction in light of this opinion.

I

TVEyes is a for-profit media company. It offers a service that allows its clients to efficiently sort through vast quantities of television content in order to find clips that discuss items of interest to them. For example, a client in marketing or public relations interested in how a particular product is faring in the media can use the TVEyes service to find, watch, and share clips of recent television broadcasts that mention that product.

The service works this way. TVEyes records essentially all television broadcasts as they happen, drawing from more than 1,400 channels, recording 24 hours a day, every day. By copying the closed-captioned text that accompanies the content it records (and utilizing speech-to-text software when necessary), TVEyes creates a text-searchable transcript of the words spoken in each video. The videos and transcripts are consolidated into a database. A client inputs a search term and gets a list of video clips that mention the term. A click on a thumbnail image of a clip plays the video, beginning fourteen seconds before the search term was spoken, and displays a segment of the transcript with the search term highlighted. The parties dispute the quality of the clips. Fox contends that the clips are high definition; TVEyes contends that the clips are grainier than the original broadcasts. The clips can be played for no more than ten minutes, but a user can play an unlimited number of clips. To prevent clients from watching entire programs, TVEyes (during the course of this litigation) implemented a device that is claimed to prevent

clients from viewing consecutive segments. The parties dispute whether this measure is effective.

TVEyes's service has ancillary functions. A TVEyes client may "archive" videos permanently on the TVEyes servers and may download videos directly to the client's computer. These services are useful because TVEyes otherwise deletes captured content after thirty-two days. Clients can also email the clips for viewing by others, including those who are not TVEyes clients. And clients can search for videos by date, time, and channel (rather than by keyword). The parties dispute whether clients can watch live broadcasts on TVEyes.

A TVEyes subscription costs approximately \$500 per month, is available for business and professional use, and is not offered to private consumers for personal use. Clients include journalists, government and political organizations, law enforcement, the military, for-profit companies, and non-profits.

TVEyes asserts that it restricts its clients' use of its content in various ways. For example, clients are required to sign a contract that limits their use of clips to "internal purposes only" and are warned upon downloading a clip that it is to be used for only "internal review, analysis or research." Fox contends that these safeguards are ineffective and disputes the assertion by TVEyes that its service is primarily used for "internal" research and analysis.

Fox claims that at some point TVEyes unsuccessfully approached it to procure a license to use Fox programming. Fox demanded that TVEyes stop using its programming; when TVEyes refused, litigation ensued. The lawsuit focuses on nineteen copyrighted Fox broadcasts. The legal question is whether TVEyes has

a “fair use” defense to Fox’s copyright infringement claims. 17 U.S.C. § 107.

II

The Copyright Act provides:

[T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

In fair use litigation, courts undertake a “case-by-case analysis” in which each factor is considered, “and the results [are] weighed together, in light of the purposes of copyright.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994). The factors are non-exclusive, but consideration of each is mandatory.³

³ *Pace* Judge Kaplan’s argument that our discussion of transformative use (which is integral to the first statutory factor) should be omitted from the fair-use analysis—or be deemed dicta. Whether the majority opinion’s discussion “may contribute to

Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 81 (2d Cir. 2014). Some of the factors are more important than others, with the fourth (market impact) being “the single most important element.” *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). Fair use is an affirmative defense, so TVEyes bears the burden of proving it. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994).

It is useful to analyze separately distinct functions of the secondary use (i.e., the use by TVEyes of Fox’s copyrighted material), considering whether each independent function is a fair use. See *Google Books*, 804 F.3d at 216-18. TVEyes has two core offerings: the “Search function” and the “Watch function.” The Search function allows clients to *identify* videos that contain keywords of interest. The Watch function allows TVEyes clients to *view* up to ten-minute, unaltered video clips of copyrighted content. Fox does not challenge the Search function on appeal. Fox’s challenge is to the Watch function, and we determine that its inclusion renders TVEyes’s package of services unprotected by the fair use doctrine. That conclusion subsumes and obviates consideration of certain functions that are subsidiary to the Watch function, such as archiving, downloading, and emailing the video clips.

Turning to the Watch function, we next consider each of the four factors listed in § 107.

A

In considering the first statutory factor—the “purpose and character” of the secondary use, 17

confusion and uncertainty” (Concurring Op. at 2) is not for me to say.

U.S.C. § 107(1)—the primary inquiry is whether the use “communicates something new and different from the original or [otherwise] expands its utility,” that is, whether the use is “transformative.” *Google Books*, 804 F.3d at 214. To be transformative, a use must “do[] something more than repackaging or republishing the original copyrighted work”; it must “add[] something new, with a further purpose or different character, altering the first with new expression, meaning or message ...” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (quoting *Campbell*, 510 U.S. at 579). “Although ... transformative use is not absolutely necessary for a finding of fair use, ... [transformative] works ... lie at the heart of the fair use doctrine,” *Campbell*, 510 U.S. at 579, and “a use of copyrighted material that ‘merely repackages or republishes the original’ is unlikely to be deemed a fair use,” *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1111 (1990)).

Precedent is helpful. Both parties rely most heavily on *Google Books*, which provides the starting point for analysis.

In *Google Books*, a consortium of libraries collaborated to make digital copies of millions of books, many of them under copyright. Google pooled these digital copies into a text-searchable database. 804 F.3d at 207. Anyone could search the database free. When a user entered a search term, Google returned a list of books that included the term, and, for each responsive book, Google provided a few “snippets” that contained the term. *Id.*

We held that Google’s copying served a transformative purpose because it created a text-searchable database that “communicate[d] something new and

different from the original.” *Id.* at 214. “[T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn.” *Id.* at 217 (quoting *HathiTrust*, 755 F.3d at 97).

We also held that the “snippet view” of unaltered, copyrighted text “add[ed] important value to the basic transformative search function” by allowing users to verify that the list of books returned by the database was responsive to the user’s search. *Id.* Thus, a user searching for the term “Hindenburg” could infer from snippets whether the book was referencing the Weimar president or the exploded zeppelin. *See id.* at 217-18.

TVEyes’s copying of Fox’s content for use in the Watch function is similarly transformative insofar as it enables users to isolate, from an ocean of programming, material that is responsive to their interests and needs, and to access that material with targeted precision. It enables nearly instant access to a subset of material—and to information about the material—that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means.

Sony Corporation of America vs. Universal City Studios, Inc. is instructive. *See* 464 U.S. 417 (1984). In *Sony*, a television customer, who (by virtue of owning a television set) had acquired authorization to watch a program when it was broadcast, recorded it in order to watch it instead at a later, more convenient time. That was held to be a fair use. While *Sony* was decided before “transformative” became a term of art, the apparent reasoning was that a secondary use may be a fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of

delivering content without unreasonably encroaching on the commercial entitlements of the rights holder.

The Watch function certainly qualifies as technology that achieves the transformative purpose of enhancing efficiency: it enables TVEyes’s clients to view all of the Fox programming that (over the prior thirty-two days) discussed a particular topic of interest to them, without having to monitor thirty-two days of programming in order to catch each relevant discussion; and it eliminates the clients’ need even to view entire programs, because the ten most relevant minutes are presented to them. Much like the television customer in *Sony*, TVEyes clients can view the Fox programming they want at a time and place that is convenient to them, rather than at the time and place of broadcast. For these reasons, TVEyes’s Watch function is at least somewhat transformative.⁴

* * *

⁴ TVEyes argues that the Watch function is transformative because it allows clients to conduct research and analysis of television content by enabling them to view clips responsive to their research needs. Research, TVEyes argues, is a purpose not shared by users of the original content. This argument proves too much.

That a secondary use can facilitate research does not itself support a finding that the secondary use is transformative. See *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994). In *Texaco*, a company was allowing each of its 400 to 500 scientists to photocopy journal articles pertinent to their individual research projects, thus enabling three subscriptions to service the needs of hundreds of scientists. *Id.* at 915-16. We stated that if copying were deemed transformative “simply because [it was done] in the course of doing research,” then “the concept of a ‘transformative’ use would be extended beyond recognition.” *Id.* at 924.

The first statutory factor also implicates considerations distinct from whether the secondary use is transformative. In particular, Fox argues that the “commercial nature” of TVEyes’s copying (its sale of access to Fox’s content) weighs against a finding of fair use. 17 U.S.C. § 107(1).

The commercial nature of a secondary use weighs against a finding of fair use. *See Campbell*, 510 U.S. at 585. And it does so especially when, as here, the transformative character of the secondary use is modest. *See id.* at 579 (“[T]he [less] transformative the new work, the [more] will be the significance of other factors, like commercialism”). The Watch function has only a modest transformative character because, notwithstanding the transformative manner in which it delivers content, it essentially republishes that content unaltered from its original form, with no “new expression, meaning or message.” *HathiTrust*, 755 F.3d at 96 (quoting *Campbell*, 510 U.S. at 579); *cf. Kirkwood*, 150 F.3d at 106 (service that transmits unaltered radio broadcasts in real time over telephone lines is not transformative); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 199-200 (3d Cir. 2003) (service that streams short previews of movies without commentary is not transformative). The clients of TVEyes use Fox’s news broadcasts for the same purpose that authorized Fox viewers use those broadcasts—the purpose of learning the information reported.

The first statutory factor therefore favors TVEyes, albeit slightly.

B

The second statutory factor is “the nature of the copyrighted work.” 17 U.S.C. § 107(2). This factor “has

rarely played a significant role in the determination of a fair use dispute,” and it plays no significant role here. *Google Books*, 804 F.3d at 220.

TVEyes presses the argument that, since facts are not copyrightable, the factual nature of Fox’s content militates in favor of a finding of fair use. We have rejected this argument: “Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports.” *Id.* at 220.

C

The third statutory factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). The relevant consideration is the amount of copyrighted material *made available to the public* rather than the amount of material *used by the copier*. *Google Books*, 804 F.3d at 222.

This factor clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear. While “courts have rejected any categorical rule that a copying of the entirety cannot be a fair use,” “a finding of fair use is [less] likely ... when the copying is extensive, or encompasses the most important parts of the original.” *Id.* at 221. In this respect, the TVEyes Watch function is radically dissimilar to the service at issue in *Google Books*.

Google’s snippet function was designed to ensure that users could see only a very small piece of a book’s contents. Each snippet was three lines of text, constituting approximately one-eighth of a page; a viewer could see at most three snippets per book for any searched term, and no more than one per page. Users

were prevented from performing repeated searches to find multiple snippets that could be compiled into a coherent block of text. Approximately 22% of a book's text was "blacklist[ed]": no snippet could be shown from those pages. *Id.* at 222. And snippets were not available at all for such books as dictionaries or cookbooks, in which a snippet might convey all the information that a searcher was likely to need. While the snippets allowed a user to judge whether a book was responsive to the user's needs, they were abbreviated to ensure that it would be nearly impossible for a user to see a meaningful exposition of what the author originally intended to convey to readers.

TVEyes redistributes Fox's news programming in ten-minute clips, which—given the brevity of the average news segment on a particular topic—likely provide TVEyes's users with all of the Fox programming that they seek and the entirety of the message conveyed by Fox to authorized viewers of the original. *Cf. Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564-65 (1985) (finding no fair use when the copying involved only about 300 words, but the portion copied was "the heart of the book"). TVEyes's use of Fox's content is therefore both "extensive" and inclusive of all that is "important" from the copyrighted work. *Google Books*, 804 F.3d at 221.

D

The fourth statutory factor is "the effect of the [secondary] use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). This factor is "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). It "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as

to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.” *Google Books*, 804 F.3d at 223. Critically, it requires consideration of “not only the ... market harm caused by the particular actions of the alleged infringer,” but also the market harm that would result from “unrestricted and widespread conduct of the [same] sort.” *Campbell*, 510 U.S. at 590 (internal quotation marks and alteration omitted).

TVEyes argues that its service poses little risk of being a “competing substitute” for Fox’s offerings. *Google Books*, 804 F.3d at 223. Fox argues that TVEyes undercuts Fox’s ability to profit from licensing searchable access to its copyrighted content to third parties. Fox has much the stronger point.

“It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614 (2d Cir. 2006) (quoting *Texaco*, 60 F.3d at 929). However, “not every effect on potential licensing revenues enters the analysis under the fourth factor.” *Texaco*, 60 F.3d at 929. A copyright owner has no right to demand that users take a license unless the use that would be made is one that would otherwise infringe an exclusive right. *See Bill Graham Archives*, 448 F.3d at 615. Even if a use does infringe an exclusive right, “[o]nly an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use’s effect upon the potential

market for or value of the copyrighted work.” *Texaco*, 60 F.3d at 930 (internal quotation marks omitted).

That limitation does not restrict our analysis here. The success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips, and that this market is worth millions of dollars in the aggregate. Consequently, there is a plausibly exploitable market for such access to televised content, and it is proper to consider whether TVEyes displaces potential Fox revenues when TVEyes allows its clients to watch Fox’s copyrighted content without Fox’s permission.

Such displacement does occur. Since the ability to re-distribute Fox’s content in the manner that TVEyes does is clearly of value to TVEyes, it (or a similar service) should be willing to pay Fox for the right to offer the content. By providing Fox’s content to TVEyes clients *without* payment to Fox, TVEyes is in effect depriving Fox of licensing revenues from TVEyes or from similar entities. And Fox itself might wish to exploit the market for such a service rather than license it to others. TVEyes has thus “usurp[ed] a market that properly belongs to the copyright-holder.” *Kirkwood*, 150 F.3d at 110. It is of no moment that TVEyes allegedly approached Fox for a license but was rebuffed: the failure to strike a deal satisfactory to both parties does not give TVEyes the right to copy Fox’s copyrighted material without payment.

In short, by selling access to Fox’s audiovisual content without a license, TVEyes deprives Fox of revenues to which Fox is entitled as the copyright holder. Therefore, the fourth factor favors Fox.

E

To ascertain whether TVEyes's service is protected as a fair use, the final step is to weigh the four statutory factors together, along with any other relevant considerations. The factors should not be "treated in isolation, one from another"; rather, "[a]ll are to be explored, and the results [are to be] weighed together, in light of the purposes of copyright." *Campbell*, 510 U.S. at 577-78. While the factors are not exclusive, in this case they provide sufficient guidance. *See Kirkwood*, 150 F.3d at 111.

We conclude that TVEyes's service is not justifiable as a fair use. As to the first factor, TVEyes's Watch function is at least somewhat transformative in that it renders convenient and efficient access to a subset of content; however, because the function does little if anything to change the content itself or the purpose for which the content is used, its transformative character is modest at best. Accordingly—and because the service at issue is commercial—the first factor favors TVEyes only slightly. The second factor is neutral in this case. The third factor strongly favors Fox because the Watch function allows TVEyes's clients to see and hear virtually all of the Fox programming that they wish. And the fourth factor favors Fox as well because TVEyes has usurped a function for which Fox is entitled to demand compensation under a licensing agreement.

At bottom, TVEyes is unlawfully profiting off the work of others by commercially re-distributing all of that work that a viewer wishes to use, without payment or license. Having weighed the required factors, we conclude that the balance strongly favors Fox and defeats the defense of fair use.

III

TVEyes challenges the district court’s conclusion that it is liable to Fox under a theory of *direct* copyright infringement.⁵ A direct infringer exercises “volitional conduct” to make the infringing copy. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* (“*Cablevision*”), 536 F.3d 121, 131 (2d Cir. 2008). The conduct at issue in *Cablevision* was *non-volitional*; however, it bears no resemblance to what TVEyes does. The *Cablevision* defendant provided a remote DVR service similar to the recording capability of a DVR in a television viewer’s home. Unless the *subscriber* chose to record a program, it remained on the defendant’s server for no more than .1 second. *See id.* at 124-25. By contrast, *TVEyes* decides what audiovisual content to record, copies that content, and retains it for thirty-two days. And this copying, at least to the extent that it is done to enable the Watch function, is an infringement. Volitional conduct that infringes is clear.

IV

The district court issued a permanent injunction prohibiting TVEyes from enabling its clients to download clips of Fox’s programming or to search for such clips by date and time; the court also imposed restrictions on TVEyes’s enabling of its clients to email clips or to post them to social media sites. We review

⁵ A party that has not committed direct copyright infringement may still be liable under the doctrine of contributory infringement, which allows a defendant to be held liable for infringing acts of third parties. *See Sony*, 464 U.S. at 435; *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 117-18 (2d Cir. 2010). Fox asserted liability only on the ground of direct infringement, so we do not consider contributory infringement.

the issuance of a permanent injunction “for abuse of discretion, which may be found where the Court, in issuing the injunction, relied on ... an error of law.” *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001) (quoting *Knox v. Salinas*, 193 F.3d 123, 128-29 (2d Cir. 1999) (per curiam)).

The district court’s injunction was shaped by an error of law: the mistaken assumption that the Watch function (and some features subsidiary to it) had fair-use protection. We therefore remand to the district court to revise the injunction in accordance with this opinion.

Because the product TVEyes currently offers includes the infringing Watch function and its subsidiary features (i.e., clients’ ability to archive, download, and email clips, as well as to view clips after conducting a date/time search⁶), the court should enjoin TVEyes from offering that product. However, because Fox does not dispute TVEyes’s right to offer its Search function, the court’s injunction shall not bar TVEyes from offering a product that includes that function without making impermissible use of any protected audiovisual content.⁷

⁶ There is no copyright infringement in the use of the date/time search function to discover the particular program that was playing on a certain channel at a certain time. That information is a historical fact, which is not copyrightable. *See Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1075 (2d Cir. 1992). However, enabling a client to *view* a copied video located on the basis of a date/time search can constitute infringement, and it is not a fair use.

⁷ Because Fox has not challenged the Search function on this appeal, and the parties have therefore presented no arguments about it, we express no views on it, neither upholding nor rejecting it.

CONCLUSION

The order of the district court is reversed to the extent it held that TVEyes’s product was a fair use. The order is affirmed to the extent it denied TVEyes’s request for additional relief. We remand for the district court to revise the injunction to conform with this opinion. Any further appeal will be assigned to this panel.

KAPLAN, *District Judge*,* concurring:

I concur in the result as well as part I, the preamble to part II, and parts II.B, III and IV of the majority opinion. With great respect for my learned and distinguished colleagues, however, I do not join in their characterization of TVEyes’ Watch function as “somewhat transformative.” I decline for two reasons.

First, although the majority writes that it “is at least somewhat transformative,” it holds that the Watch function nevertheless is not a fair use of Fox’s copyrighted material. Stated differently, it holds that the other factors relevant to the fair use determination carry the day in favor of Fox regardless of whether the Watch function is or is not transformative. The “somewhat transformative” characterization therefore is entirely immaterial to the resolution of this case—in a familiar phrase, it is *obitum dictum*.¹ I would avoid any such characterization even if I agreed with it.

* Lewis A. Kaplan, United States District Judge for the Southern District of New York, sitting by designation.

¹ Contrary to the majority’s suggestion, we are not obliged to reach a definitive decision as to each of the fair use factors in order to decide the fair use issue. *Henley v. Devore*, 733 F. Supp. 2d 1144, 1155 (C.D. Cal. 2010) (assuming but not deciding that

Second, while I prefer not to state a view as to whether the Watch function is transformative, I would be remiss, given the majority's opinion, if I did not express my doubt that the majority's view is correct. To the contrary, were we compelled to reach the point, I would be inclined to conclude that it is not.

I

I do not suggest that this or any appellate court should “purge dictum from [its] opinions.”² But there are situations in which sound prudential reasons counsel against making statements that are “superfluous to the court's performance of its function.”³ I submit that this is one of them.

1. “[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine[].”⁴ “[T]he more transformative the new work, the less will be the significance of other factors.”⁵ It therefore is not at all surprising that attempts by alleged infringers to characterize their uses of copyrighted works as “transformative” have become a key battleground in copyright litigation, particularly as technological advances provide ever-new contexts in which the uncompensated use of copyrighted works is very attractive. And the law governing such controversies often is far from clear. As

secondary use was transformative, but nevertheless rejecting fair use defense).

² Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1282 (2006) (hereinafter “*Dicta*”).

³ *Id.* at 1257.

⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁵ *Id.*

noted commentators have observed, courts “appear to label a use ‘not transformative’ as a shorthand for ‘not fair,’ and correlatively ‘transformative’ for ‘fair.’ Such a strategy empties the term of meaning.”⁶ Indeed, as will appear, some of our own decisions on the issue are at least in tension with one another.⁷

In these circumstances, a finding of transformative use, while “not absolutely necessary for a finding of fair use,”⁸ is “of crucial importance to the fair use analysis.”⁹ And as the issue of fair use, in the words of a distinguished panel of this Court that remain apt despite intervening years, is “the most troublesome in the whole law of copyright,” it is one that “ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain.”¹⁰ The majority’s unnecessary characterization of the Watch function as “somewhat transformative” has no “advantage,” let alone one that is “very plain.” Indeed, I fear it may contribute to confusion and uncertainty regarding this central concept in the law of fair use. Moreover, it threatens to do so in circumstances in which there is no realistic possibility of further appellate review.¹¹ The determination of the transformative use issue should be left for a case in which the question necessarily is presented.

⁶ 4 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13-169 (2017).

⁷ *See id.* at 13-170.

⁸ *Id.* at 13-166.

⁹ *Id.* at 13-166 to 167.

¹⁰ *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (L. Hand, A. Hand, Patterson, JJ).

¹¹ *Dicta*, 81 N.Y.U. L. REV. at 1262.

2. The advisability of expressing a view as to whether the Watch function is “transformative” is diminished further because this case passes judgment on a technological innovation. New efficiency-enhancing content delivery technologies that will seek to distribute copyrighted material owned by others doubtless now or soon will exist. Indeed, the efficiency enhancement that the Watch function allegedly provides appears to be, or to have become at least partly, available from Internet-based television subscription services to which Fox News presumably licenses its content.¹² Given (a) the rapid pace of technological

¹² I understand that Internet-based cable subscription services now available allow a subscriber to record cable shows, store (some with limits on the amount that can be stored, some without), and re-watch those shows within a certain time frame (for example, within nine months of the recording). See Eric Liston, *How to Watch Fox News Without Cable—Your Top 5 Options*, FLIXED (Dec. 6, 2017), <https://fliced.io/watch-fox-news-without-cable/>. Someone who wanted to “monitor” Fox News could DVR (i.e., direct video record) all Fox News shows using these paid services. Upon using TVEyes’s Search function—the transformative nature of which was not challenged—to identify when a term was said in a broadcast, the user could click directly to that portion of the broadcast and watch it immediately online using their paid subscription service. It is unclear whether these services as they currently exist would allow a user to monitor all local broadcasts throughout the country, but they certainly diminish the Watch function’s convenience value.

And technology will march on, perhaps soon eliminating altogether the efficiency the majority claims renders the Watch function transformative.

I recognize, of course, that there appears to be no discussion of these services in the record. This is at least partially attributable to the fact that the advent of some of these services post-dates this litigation. But this demonstrates handily the point that technology is rapidly evolving, which is all the more reason to decline to pronounce a piece of technology transformative when it is not necessary to do so.

change, (b) the importance of the concept of transformative purpose in fair use jurisprudence, and (c) the fact that it is unnecessary to address the question in this case, I respectfully disagree with the majority’s decision to express a view as to whether the Watch function is transformative.

II

In view of the majority’s expression of its opinion that the Watch function is “somewhat transformative,” I feel compelled to express my own doubts regarding that conclusion.

1. The majority’s opinion begins its analysis by observing, correctly in my view, that “[i]t is useful to analyze separately distinct functions of the secondary use (i.e., the use by TVEyes of Tox’s copyrighted material), considering whether each independent function is a fair use.”¹³ It then turns to the distinction between the Search function and the Watch function. The Search function “allows clients to *identify* videos that contain keywords of interest”¹⁴—it “enables users to isolate, from an ocean of programming, material that is responsive to their interests.”¹⁵ The Watch function, in contrast, “allows TVEyes clients to *view* up to ten-minute, unaltered video clips of copyrighted content.”¹⁶ In short, the Search function, which is not

¹³ Op. at 10. *See also* *Craft v. Kobler*, 667 F .Supp. 120, 128 (S.D.N.Y. 1987) (Leval, J.) (“In assessing claims of fair use, we must consider the number, size and importance of appropriated passages, *as well as their individual justifications.*” (emphasis added)); 4 WILLIAM N. PATRY, PATRY ON COPYRIGHT § 10.13, at 10-47 to 10-49 (2012).

¹⁴ Op. at 10 (emphasis in original).

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 10 (emphasis in original).

challenged here, is simply a vehicle that locates Fox’s copyrighted works among other works of interest—it finds the desired species of fish in the majority’s metaphorical sea. But the Watch function then catches those fish and delivers them to the fishmonger’s stall where TVEyes lays them unchanged (one might say untransformed) on cracked ice for the inspection of its patrons.

Metaphor aside, the majority then proceeds to test the Watch function, “consider[ing] each of the four [fair use] factors.”¹⁷ It describes our decision in *Google Books*,¹⁸ noting that we there “held that the ‘snippet view’ of unaltered, copyrighted text ‘add[ed] important value to the basic transformative search function’ by allowing users to verify that the list of books returned by the database was responsive to the user’s search.”¹⁹ And it then goes on to say:

“TVEyes’s copying of Fox’s content *for use in the Watch function* is similarly transformative insofar as it enables users to isolate, from an ocean of programming, material that is responsive to their interests and needs, and to access that material with targeted precision. It enables nearly instant access to a subset of material—and to information about the material—that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means.”²⁰

¹⁷ *Id.*

¹⁸ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) (hereinafter “*Google Books*”).

¹⁹ *Op.* at 12.

²⁰ *Id.* (emphasis added).

But, as the majority itself wrote earlier, it is the Search function that enables users to identify the desired fish in the ocean, not the Watch function. What the Watch function does is to enable instant access to digital recordings of Fox’s content that have been identified by the Search function. And the majority’s justification for concluding that the Watch function is “somewhat transformative” is that it “improves] the efficiency of delivering content.”²¹

2. I am inclined to reject the idea that enhancing the efficiency with which copies of copyrighted material are delivered to secondary issuers, in the context in which the Watch function does so, is transformative.

The concept of transformation is a relatively recent addition to copyright jurisprudence, but its antecedents have been around for a long time.

In 1841, Justice Story said that “no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism,” but use that “supersede[s] the original work” is not fair.²² Building on that idea, Judge Leval’s landmark article, which later was adopted substantially by the Supreme Court in the *Pretty Woman* case,²³ said:

“I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner

²¹ *Id.*

²² *Folsom v. Marsh*, 9 F. Cas. 342, 344 (No. 4,901).

²³ *Campbell*, 510 U.S. at 578-79.

or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely 'supersede the objects' of the original. If on the other hand, the secondary use adds value to the original—if the quoted matters is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.

Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They may also include parody, symbolism, aesthetic declarations, and innumerable other uses.”²⁴

Even on the majority's view that TVEyes' Watch function substantially improves the efficiency with which TVEyes customers can access Fox copyrighted broadcasts of possible interest, it does no more than repackage and deliver the original works. It adds no new information, no new aesthetics, and no new insights or understandings. I therefore doubt that it is transformative. Indeed, I regard *Infinity Broadcast Corp. v. Kirkwood* as having settled the question whether a use is transformative simply because it is more efficient or convenient than what preceded it.²⁵

²⁴ Pierre N. Leval, *Toward a Standard of Fair Use*, 103 HARV. L. REV. 1105, 1111 (1990).

²⁵ 150 F.3d 104 (2d Cir. 1998).

In that case, the defendant, Kirkwood, offered a service through which a Kirkwood customer, regardless of its physical location, could dial a Kirkwood device over a phone line, tune to the radio station of its choice in any of the nation's 10 largest radio markets, and listen to the broadcast of its chosen station. Kirkwood marketed the service to "radio stations, advertisers, talent scouts, and others" for purposes such as "auditioning on-air talent, verifying the broadcast of commercials, and listing to a station's programming format and feel."²⁶ No doubt Kirkwood's service was convenient and efficiency-enhancing. It enabled interested clients who, by reason of distance, could not receive the radio stations of interest to them to (a) access those stations through Kirkwood, (b) listen to their broadcasts over telephone lines and (c) do so for reasons that, at least in many cases, had nothing to do with the purposes for which local listeners tuned their radios to their stations of choice. Nevertheless, this Court rejected Kirkwood's fair use defense, stating that there was a "total absence of transformativeness" in Kirkwood's retransmission of the broadcasts.²⁷ And the Watch function at issue here is essentially indistinguishable in principle.

We rejected the argument that convenience of accessing copyrighted material is a transformative purpose in *American Geophysical Union, et al. v. Texaco*²⁸ as well. That involved photocopying of scientific journal articles for use in laboratories. Texaco there argued that "its conversion of the individual [journal] articles through photocopying into

²⁶ *Id.* at 106 (internal quotation marks omitted).

²⁷ *Id.* at 109.

²⁸ 60 F.3d 913 (2d Cir. 1994).

a form more easily used in a laboratory might constitute transformative use.”²⁹ Notwithstanding the fact that the photocopies often were more convenient or efficient than, for example, buying, borrowing, shelving and carrying about bound volumes of journals, we wrote that “Texaco’s photocopying merely transforms the material object embodying the intangible article that is the copyrighted original work. Texaco’s making of copies cannot properly be regarded as a transformative use of the copyrighted material.”³⁰

Also closely aligned with this case are others that dealt with technologies relating to digitized music, mp3s, and music sharing. Defendants in those cases argued that their technologies should be considered fair use because they permitted “space-shifting”—they allowed users to store music in different, more convenient forms that allowed them to listen to it in venues more desirable to them.³¹ In other words, the technology enhanced efficiency and convenience. But courts presented with this argument either rejected the idea that space-shifting is a transformative purpose or considered the space-shifting argument relevant only to the question of the commercial nature of the use.³²

²⁹ *Id.*

³⁰ *Id.* at 923 (citations omitted).

³¹ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff’d sub nom. A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).

³² See *A&M Records, Inc.*, 239 F.3d at 1019 (cases holding space-shifting or time-shifting to be fair use inapposite “because the methods of shifting in [those] cases did not also simultaneously involve distribution of the copyrighted material to the general public”); *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (“The [device at

These cases support my inclination to conclude that a technological means that delivers copies of copyrighted material to a secondary user more quickly, efficiently or conveniently does not render the distribution of those copies transformative, at least standing alone.

Nor does *Google Books* support the conclusion that efficiency-enhancing delivery technology is transformative in the circumstances of this case. *Google Books*, like this case, involved two features: a searchable database and the display of “snippets” from the books containing the search term.³³ We held that copying the books to enable the search function had the transformative purpose of “identifying books of interest to the searcher.” That purpose was different than the purpose of the books themselves, which served to convey their content to the reader, and it constituted fair use.³⁴ We held also that the snippets—“horizontal segment[s] comprising ordinarily an eighth of a page”—“add[ed] importantly to the highly transformative purpose of identifying books of interest to the searcher.”³⁵ But *Google Books* does not resolve this case.

issue] merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.” (citation omitted); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (considering the argument that space-shifting is transformative to be “simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation”).

³³ 804 F.3d at 206.

³⁴ *Id.* at 217-18.

³⁵ *Id.* at 209, 218.

Google designed the snippet feature “in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs’ books,” employing safeguards such as “blacklisting” (making permanently unavailable for snippet view one snippet per page and one complete page out of every ten) and showing no snippets at all from the sorts of books for which a short snippet would represent all the content a searcher wanted to see (such as dictionaries and cookbooks).³⁶ Here, on the other hand, the Watch function shows ten minute clips, and parties can play unlimited numbers of ten minute clips. Certainly a ten minute clip in many, perhaps most, situations suffices for a user to view an entire news segment. And in situations in which that is not the case, the parties dispute the effectiveness of a preventive measure TVEyes introduced during the course of this litigation to stop users from watching consecutive clips.³⁷ Given the posture of this case—review of a summary judgment decision adverse to Fox on this point—we must view the facts presented by Fox as true and therefore base our decision on the premise that users may access all of Fox’s content by stringing clips together.³⁸

³⁶ *Id.* at 222-23.

³⁷ *Op.* at 8.

³⁸ Fair use is an affirmative defense to Fox’s infringement claim and thus a matter as to which TVEyes bears the burden of proof. Accordingly, in resisting a determination that TVEyes is entitled to judgment on the basis of fair use, Fox is entitled to the view of the evidence most favorable to it with respect TVEyes’ contention that the Watch function is transformative, as it is on all other aspects of that defense. *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (“whatever evidence *there is* to support an essential element of an affirmative defense will be construed in a light most favorable to the non-moving defendant”) (emphasis in original); *Frankel v. ICD Holdings, S.A.*, 930 F. Supp. 54, 64-65 (S.D.N.Y.

The facts here thus differ from *Google Books* quite substantially. The snippet function considered there delivered much less copyrighted content than the Watch function at issue here. Nevertheless, we there concluded that the snippet function only “adds” to the transformative purpose of the Search function. Our conclusion with respect to the Google Books snippet feature therefore does not control the proper characterization of the Watch function at issue here. Moreover, we cautioned in *Google Books* that the case “test[ed] the boundaries of fair use.”³⁹

3. Nor am I persuaded by the majority’s reliance on *Sony Corporation of America v. Universal City Studios, Inc.*⁴⁰

Sony considered a claim that the manufacturer of Betamax video recorders was liable for contributory copyright infringement because its sale of the recorders facilitated copyright infringement by consumers by virtue of the consumers’ recording of copyrighted broadcasts to enable them to view the programs at times more convenient to them.⁴¹ The Court rejected the contributory infringement claim, essentially on the bases that (a) substantial numbers of copyright holders would not object to the consumers’ use of the Sony equipment for “time shifting,” and (b)

1996) (“one who relies upon an affirmative defense to defeat an otherwise meritorious motion for summary judgment must adduce evidence which, viewed in the light most favorable to and drawing all reasonable inferences in favor of the non-moving party, would permit judgment for the non-moving party on the basis of that defense”).

³⁹ *Google Books*, 804 F.3d at 206.

⁴⁰ 464 U.S. 417 (1984).

⁴¹ *Id.* at 419.

the plaintiffs had failed to prove any likelihood of consequent economic harm.⁴²

The majority here reads *Sony* as reasoning “that a secondary use may be a fair use if it utilizes transformative technology to improve the efficiency of delivering content.”⁴³ But *Sony* was decided before Judge Leval’s article introduced the concept of transformative use or purpose into the copyright lexicon.⁴⁴ I thus find what *Sony* teaches about transformative purpose, if anything, to be less than perfectly clear. I certainly do not find within *Sony* the idea that efficiency-enhancing technology is transformative.

The efficiency enhancement at issue in *Sony* was “time-shifting”—the use by a consumer of a Betamax device to record a broadcast so that the consumer could watch that show at a later, presumably more convenient, time.⁴⁵ The Court asked whether time-shifting was a substantial noninfringing use; the answer to that question determined whether Sony could be liable for contributory infringement.⁴⁶ It was in that context that the Court found that unauthorized time shifting—consumers recording copyrighted shows without authorization to watch the shows once at a later time—was “not necessarily infringing.”⁴⁷

The Court’s discussion of time-shifting focused on the non-commercial nature of in-home recording:

⁴² *Id.* at 456.

⁴³ *Op.* at 12.

⁴⁴ *Id.*

⁴⁵ *Sony*, 464 U.S. at 423.

⁴⁶ *Id.* at 442.

⁴⁷ *Id.* at 447.

“[R]espondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works. The Betamax is, therefore, capable of substantial noninfringing uses. Sony’s sale of such equipment to the general public does not constitute contributory infringement of respondent’s copyrights.”⁴⁸

Perhaps the Court in *Sony* would have found efficiency-enhancing technology to be transformative for that reason alone had that argument been put to it. But I see no indication of that in the opinion. Rather, *Sony* turned on the question whether “time-shifting,” on the facts presented in that case, was a commercial use that affected the broadcasters’ ability to make a profit in the market. And the Court so concluded without considering, at least explicitly, whether the recordings served a purpose different from the original broadcasts. In fact, the Court said that “timeshifting merely enables a viewer to see such a work which he had been invited to witness.”⁴⁹ In other words, time-shifting allows a user to do exactly that which the user could have done with the original: watch the show for whatever entertainment, informational or other purpose it serves. No new purpose had been added. So I hesitate to conclude that *Sony* mandates, or even suggests, the idea that efficiency-enhancing technology is transformative.

My hesitation in this regard is strengthened by this Court’s subsequent treatment of *Sony*. No prior opinion of this Court says, or even suggests, that *Sony* stands for the proposition that time-shifting in

⁴⁸ *Id.* at 455.

⁴⁹ *Id.* at 449.

particular, or efficiency-enhancing delivery technology in general, is transformative. In *Swatch Group Management Services Ltd v. Bloomberg L.P.*, we described *Sony* as a decision “finding a *non-transformative* use to be a fair use.”⁵⁰ *Infinity Broadcast Corp.* described *Sony*’s discussion of time-shifting as a “determination] that time-shifting of television programs by consumers in their homes was a non-commercial use.”⁵¹ Indeed, as noted, we there held that an efficiency promoting technology was not transformative and gave no sign that *Sony* was relevant to that conclusion.

Similarly, *Authors Guild, Inc. v. HathiTrust*⁵² and *Google Books*⁵³ cite *Sony* for various principles, but never for the proposition that efficiency-enhancing technology is transformative, despite that idea’s obvious potential application in those cases. Because *HathiTrust* and *Google Books* so clearly confront an issue closely related to that here, I see as instructive their omission of the idea that *Sony* declared efficiency-enhancing delivery technology to be transformative. I would join those cases in declining to construe *Sony* as offering significant guidance regarding transformative use.

In sum, *Sony*’s relevance to transformative use is, at best, unclear. I decline to join in the majority’s novel interpretation of *Sony*.

⁵⁰ 756 F.3d 73, 84 (2d Cir. 2014) (emphasis added).

⁵¹ 150 F.3d at 109 n.3.

⁵² 755 F.3d 87 (2d Cir. 2014).

⁵³ 804 F.3d at 202.

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III

For the foregoing reasons, I concur in the judgment of this Court and in part I, the preamble to part II, and parts II.B, III and IV of the majority opinion. I decline to join in part II.A and its characterization of the Watch function as “somewhat transformative.”

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Sept. 9, 2014]

FOX NEWS NETWORK,
LLC,

Plaintiff,

-against-

TVEYES, INC.,

Defendant.

ORDER AND OPINION
DENYING IN PART AND
GRANTING IN PART
CROSS MOTIONS FOR
SUMMARY JUDGMENT

13 Civ. 5315 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

TVEyes, Inc. (“TVEyes”) monitors and records all content broadcast by more than 1,400 television and radio stations twenty-four hours per day, seven days per week, and transforms the content into a searchable database for its subscribers. Subscribers, by use of search terms, can then determine when, where, and how those search terms have been used, and obtain transcripts and video clips of the portions of the television show that used the search term. TVEyes serves a world that is as much interested in what the television commentators say, as in the news they report.

Fox News Network, LLC (“Fox News”) filed this lawsuit to enjoin TVEyes from copying and distributing clips of Fox News programs, and for damages, and bases its lawsuit on the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the New York law of unfair competition and misappropriation. TVEyes asserts the affirmative defense of fair use. 17 U.S.C. § 107. Both parties have moved for summary judgment.

For the reasons stated in this opinion, I find that TVEyes' use of Fox News' content is fair use, with exceptions noted in the discussion raising certain questions of fact. Fox News' request for an injunction is denied.¹

I. Factual Background

A. TVEyes

TVEyes is a media-monitoring service that enables its subscribers to track when keywords or phrases of interest are uttered on the television or radio. To do this, TVEyes records the content of more than 1,400 television and radio stations, twenty-four hours a day, seven days a week. Using closed captions and speech-to-text technology, TVEyes records the entire content of television and radio broadcasts and creates a searchable database of that content. The database, with services running from it, is the cornerstone of the service TVEyes provides to its subscribers.

The database allows its subscribers, who include the United States Army, the White House, numerous members of the United States Congress, and local and state police departments, to track the news coverage of particular events. For example, police departments use TVEyes to track television coverage of public safety messages across different stations and locations, and to adjust outreach efforts accordingly. Without a service like TVEyes, the only way for the police department to know how every station is

¹ The parties have asked for confidentiality with respect to considerable materials in the briefs. To the extent that such information is found in this opinion, confidentiality is terminated. The interest of the public in the full basis of the fair use defense outweighs any interest in confidentiality. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004).

constantly reporting the situation would be to have an individual watch every station that broadcast news for twenty-four hours a day taking notes on each station's simultaneous coverage.

An Internet search of a recent amber alert for a missing child, for example, would not yield the same results as would a TVEyes search result, because using the internet search results would provide only the segments of content that the television networks made available to the Internet. TVEyes' search results, in contrast, will index, organize, and present what was said on each of the 1,400 stations about the amber alert reliably and authoritatively. Without TVEyes, the police department could not monitor the coverage of the event in order to ensure that the news coverage is factually correct and that the public is correctly informed.

Upon logging into its TVEyes account, the subscriber is taken to the Watch List Page. This page monitors all of the subscriber's desired keywords and terms, and organizes search results by day, tabulating the total number of times the keyword was mentioned by all 1,400 television and radio stations each day over a 32 day period. While on the Watch List Page, a user can also run a "Google News" search, comparing the mentions of the keyword or term on the internet with the mentions of the keyword or term on the TVEyes database. A subscriber can also create a custom time range to tabulate the number of times a term has been used in a certain time period, and the relative frequency of such use compared to other terms. Subscribers can set up email alerts for specific keywords or terms, and receive responses one to five minutes after the keyword or term is mentioned on any of the 1,400 television and radio stations TVEyes monitors.

TVEyes' responses to subscribers provides a thumbnail image of the show, a snippet of transcript, and a short video clip beginning 14 seconds before the word was used.

When a subscriber on the Watch List Page clicks on the hyperlink showing the number of times the term was mentioned on a particular day, the subscriber is brought to the Results List Page. The Results List Page displays each mention of the keyword or term in reverse chronological order. Each individual result includes a portion of transcript highlighting the keyword and a thumbnail image of the particular show that used the term. When the user clicks the thumbnail image of the show, the video clip begins to play automatically alongside the transcript on the Transcript Page, beginning 14 seconds before the keyword is mentioned.

The Transcript Page shows users the following information: the title of the program; the precise date and time of the clip; a transcript of the video; the name and location of the channel; market viewership of the clip according to the Nielsen Ratings data; the publicity value of the clip according to data from the television research company, SQAD; and a web address to the website for the channel that features the program or for the program itself if such a web address exists.

TVEyes also provides website pages that organize and present the relevant data graphically and pictorially. The Media Stats page organizes data associated with the watch term, providing a graphic showing the number of times the term has been mentioned over a given time period. The Marketshare page displays a "heatmap" graphic that shows the geographic locations where the term is most used, and the frequency

of the mentions. The Broadcast Network page generates a pie chart depicting the breakdown of broadcast stations on which the watch term was used. TVEyes also features a Power Search tool that allows users to run ad-hoc keyword search queries; clicking the thumbnail image will bring the user to the clip's corresponding transcript page. Subscribers also can organize searches according to dates and times, by broadcast. The "Date and Time Search" feature enables subscribers to play a video clip starting at a specific time and date on a specific television station, rather than entering a search term.

Subscribers can save, archive, edit, and download to their personal computers an unlimited number of clips generated by their searches. The clips, however, are limited to ten minutes, and a majority of the clips are shorter than two minutes. TVEyes enables subscribers to email the clip from its website to anyone, whether or not a TVEyes subscriber. If the user has downloaded the particular clip, the user can share the clip, or a link to it, on any and all social media platforms and by email. When a recipient clicks on the hyperlink, the viewer is directed to TVEyes' website, not to the content owner's website, and can watch the video content in high-definition. Unless saved or downloaded, the clip's availability is limited to the 32-day term that the clip will remain on the website from the time the clip first appeared on television. Thus TVEyes facilitates publicity activities by subscribers publicizing the content that TVEyes has captured from the broadcasts of television and radio stations, both copyrighted and non-copyrighted contents.

TVEyes is available only to businesses and not to the general public. As of October 2013, TVEyes had over 2,200 subscribers including the White House, 100

current members of Congress, the Department of Defense, the United States House Committee on the Budget, the Associated Press, MSNBC, Reuters, the United States Army and Marines, the American Red Cross, AARP, Bloomberg, Cantor Fitzgerald, Goldman Sachs, ABC Television Group, CBS Television Network, the Association of Trial Lawyers, and many others.²

All TVEyes subscribers are required to sign a contractual limitation in a User Agreement, limiting use of downloaded clips to internal purposes. Whenever a subscriber seeks to download clips, TVEyes' website gives notice that such material may be used only for internal review, analysis, or research. Any reproduction, publication, rebroadcasting, public showing or public display is forbidden. TVEyes' email communications with subscribers contain similar warnings. When TVEyes users ask how to obtain rights to publicly post or disseminate clips, TVEyes refers such inquiries to the broadcaster. TVEyes recently added a feature that will block a user from trying to play more than 25 minutes of sequential content from a single station.

TVEyes is a for-profit company with revenue of more than \$8 million in 2013. Subscribers pay a monthly fee of \$500, much more than the cost of watching cable television. TVEyes advertises in its marketing materials that its users can “watch live TV, 24/7;” “monitor Breaking News;” and “download unlimited clips” of television programming in high definition. It also highlights that subscribers can play unlimited clips

² One of the subscribers is Stroock & Stroock & Lavan, LLP, a law firm of which I was a partner before being appointed a U.S. District Judge in 1998.

from television broadcasts, “email unlimited clips to unlimited recipients” and “post an unlimited number of clips” to social media and enjoy “unlimited storage [of clips] on TVEyes servers,” and therefore is better “than the traditional clipping services.” TVEyes also advertises that subscribers can edit unlimited radio and television clips and download edited clips to their hard drive or to a compact disk. The TVEyes User Manual states that its Media Snapshot feature “allows you to watch live-streams of everything we are recording. This is great for Crisis Communications, monitoring Breaking News, as well as for Press Conferences.” Fox News draws specific attention to such live-streaming of its programs by TVEyes in its claim of copyright infringement.

B. Fox News

Fox News is an international television news organization headquartered in New York. Fox News owns and operates two television news channels: Fox News Channel (“FNC”) and Fox Business Network (“FBN”). FNC delivers breaking news in a twenty-four hour news cycle on all matters of interest, including political and business news, and has been the most watched news channel in the United States for the last eleven years. FBN is a financial news channel that provides real-time information and reports on financial and business news. FBN is distributed to over 70 million cable subscribers across the United States. Both FNC and FBN air news and information twenty-four hours a day, seven days a week. Their primary competitors are the cable television channels, MSNBC and CNN.

FNC and FBN are in the business of reporting news worldwide, and incur significant expenditures to cover developing news stories of the day, every day. Their

programs reflect creative endeavors, and considerable time, effort, and expense in delivering news and political commentary to the public. The news ticker passing horizontally at the bottom of the television screen provides real-time updates of breaking news while regular programming airs.

Fox News also has a growing online and digital presence on the Internet (as do its competitors, MSNBC and CNN). Fox News makes live streams of FNC and FBN programming available on the internet through its TVEverywhere service, to viewers having a cable or satellite subscription. Fox News also makes certain segments of its shows available to the general public on its websites, FoxNews.com and FoxBusiness.com. Fox News makes about 16% of its television broadcast content available online, and is concerned that a broader dissemination beyond that will result in a weakening of its viewer-base or create a substitute for viewing Fox News on television cable and satellite. Fox News provides clips of segments of its programs within an hour of airing, and with updates as needed. The video clips 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.

Visitors to Fox News’ websites are shown a pre-reel advertisement, before watching news clips, a feature that generates revenue for Fox News. Visitors to Fox News’ websites can also copy and paste URLs of specific clips to share on social media platforms. Fox News also allows website visitors to search the video clip content on its website, and provide keywords for

that purpose. Fox News restricts the use of the video clips provided on the websites, requiring that they are to be used for “personal use only and [the content] may not be used for commercial purposes.” Visitors to Fox News’ websites are not permitted to download any of the video clips.

Fox News licenses third party websites, including Yahoo!, Hulu, and YouTube, to store and show video clips of segments of its program on their websites, thereby generating another stream of income by the license fees Fox News charges. Fox News licensees must covenant that they will not show the clips in a way that is derogatory or critical of Fox News. In the past three years, Fox News has made approximately \$1 million in revenue from licensing content to these third party websites.

Fox News also distributes video clips through its exclusive clip-licensing agent, ITN Source, Ltd. (“ITN Source”). ITN Source distributes and licenses video clips of Fox News’ content to companies and governmental organizations for use in a variety of ways, including to post on a website or social media platform or to create a digital archive. ITN Source maintains a library of over 80,000 Fox News video clips which its customers can search using keywords. Overall, Fox News has made approximately \$2 million in licensing fees through ITN Source. ITN Source’s partner, Executive Interviews, Ltd. (“Executive Interviews”) also distributes Fox News’ content by marketing copies of video clips to guests who have appeared on Fox News’ channels. Executive Interviews’ clients include multinational corporations, small boutique and regional companies, nonprofit organizations, and government entities.

The vast majority of Fox News' revenues is derived from fees paid to Fox News by cable companies that broadcast Fox News' content. Unlike broadcast television which is aired free of charge, FNC and FBN, as cable television stations, charge fees to cable providers like, for example, Time Warner Cable, and they, in turn, charge fees for use of cable to their subscribers. Time Warner Cable and other cable and satellite providers pay Fox News per-subscriber carriage fees—the more subscribers, the bigger the carriage fee. Fees and advertising revenues from commercial advertisers and sponsors vary directly with the Nielsen Ratings of the total number of viewers, and similar ratings of traffic on Fox News websites.

Fox News filed this lawsuit because of concern that TVEyes will divert viewers of its news and commentary programs and visits to its websites. Fox News sues TVEyes for violations of the Copyright Act, 17 U.S.C. § 101 *et seq.*, and under state law for misappropriation. Fox News also alleges that TVEyes' use of Fox News' video content to create video clips that TVEyes' subscribers can play, save, edit, archive, download, and share constitute copyright infringement. Specifically, Fox News alleges that TVEyes copied and infringed 19 hour-long programs aired on FNC and FBN between October 16, 2012 and July 3, 2013 aired on FNC and FBN.³ Fox News owns copyright registrations for the nineteen hour-long shows. TVEyes asserts that its use of Fox News'

³ The 19 programs at issue in this suit are two episodes of *On the Record with Greta Van Susteren*; three episodes of *Special Report with Bret Baier*; three episodes of *The Five*; four episodes of *The O'Reilly Factor*; two episodes of *The Fox Report with Shepard Smith*; four episodes of *Hannity*; and one episode of *Special Report Investigates: Death & Deceit in Benghazi*.

content is a “fair use” protected by the Copyright Act. *See*, 17 U.S.C. § 107. The parties have cross-moved for summary judgment.

II. Discussion

A. Standard of Review

A motion for summary judgment shall be granted where the pleadings and supporting materials show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a). The court must “resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.” *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The assertion of the fair use affirmative defense raises a mixed question of law and fact that can be resolved at summary judgment if there are no genuine material facts in dispute. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

B. Copyright Infringement

The Copyright Act, 17 U.S.C. § 101 *et seq.*, grants authors “a limited monopoly over (and thus the opportunity to profit from) the dissemination of their original works of authorship.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). The Copyright Act also gives authors the exclusive right not only to reproduce these works but also to create “derivative works.”⁴ *Id.* To show copyright infringement, an

⁴ A derivative work is defined as one “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations,

author must show ownership of a valid copyright and unauthorized copying of the author's copyrighted work. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003). Fox News has shown, and TVEyes concedes, that Fox News owns valid copyrights in the nineteen television programs that form the subject of this lawsuit.⁵ TVEyes admits also that it copies, verbatim, each of Fox News' registered works. These concessions constitute copyright infringement unless TVEyes shows that its use is fair use. *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000). Fox News does not argue that TVEyes' use of Fox News' broadcasts for the purpose of creating an analytical database is a fair use; Fox News takes issue with the features of TVEyes' database that provide TVEyes subscribers with video clips of Fox News' content.

C. Fair Use

As the Supreme Court explained, from "the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts ...' U.S. Const., Art. I, 8, cl. 8." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Fair Use doctrine limits the author's monopoly over her work allowing the public to make use of the copyrighted work without the

or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

⁵ Fox News owns copyrights only over the creative expression in its television programs. Factual reports are not copyrightable because facts cannot be original to an author. Compilations and descriptions of facts, however, are copyrightable because the presentation "can display originality." *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999).

author's permission in certain situations. 17 U.S.C. § 107. The preamble to the fair use section in the Copyright Act provides in pertinent part that:

the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright ...

When the copied work is being used for one of the purposes identified in the preamble, there is a strong presumption in favor of fair use for the defendant. *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 477 (2d Cir. 2004). These examples of fair use are illustrative. *Campbell*, 510 U.S at 577-78.

A court considering whether or not a challenged and potentially infringing use of a copyrighted work is fair use must consider the following nonexclusive statutory factors:

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. The four factors should not “be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.” *Campbell*, 510 U.S. at 578. “The ultimate test of fair use is whether the copyright law’s goal of promoting the Progress of Science and

useful Arts would be better served by allowing the use than by preventing it.” *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605, 608 (2d Cir. 2006) (internal quotations and citations omitted). This evaluation is an “open-ended and context-sensitive inquiry,” *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) that calls for “case-by-case analysis.” *Campbell*, 510 U.S. at 577. A proponent of the fair use doctrine need not establish that each factor weighs in its favor to prevail. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476-77 (2d Cir. 2004). Because fair use is an affirmative defense, the proponent carries the burden of proof on issues in dispute. *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994).

i. The First Factor

The first factor directs courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). The “central purpose of this investigation” requires evaluating whether the new work “merely supersedes the objects of the original creation” or “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is transformative.” *Campbell*, 510 U.S. at 578-79 (internal citations and quotations omitted). Transformation “lies at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright” and therefore “the more transformative the new work, the less will be the significance of other facts, like commercialism, that may weigh against a finding of fair use.” *Id.*

Transformation almost always occurs when the new work “does something more than repackage or

republish the original copyrighted work.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (“A transformative work is one that serves a new and different function from the original work and is not a substitute for it.”). A use “can be transformative in function or purpose without altering or actually adding to the original work.” *Swatch Group Mgmt. Servs. v. Bloomberg LP*, 2014 WL 2219162 (2d Cir. May 30, 2014). Appreciating that this first factor largely turns on whether or not TVEyes is deemed transformative, both parties claim to have a controlling line of precedent in their favor.

TVEyes relies on a line of cases holding that electronic libraries of books, created for the purpose of allowing users to pinpoint which books use certain keywords or terms, is transformative and therefore constitutes fair use. In *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), the Second Circuit considered a copyright challenge to the Hathi Trust Digital Library (“HDL”), an electronic repository of scanned books. HDL contains over 10 million works. The general public can search HDL for any particular term. The search results will show the page numbers on which the search term appears in each book in the HDL, and the number of times the term appears. The HDL does not display snippets of the text nor can the individual view the actual page on which the term appears.⁶ The Second Circuit found that HDL was protected from copyright infringement because its “creation of a full-text searchable database is a quintessentially transformative use [and] the result of

⁶ Hathi Trust allows its member libraries to provide its patrons that have a certified print disability (meaning, among other things that they cannot physically hold a book) with access to the full contents of the book in the digital library.

a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn” and therefore qualified as fair use. *Id.* at 97.

In *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), Google defended its practice of scanning more than 20 million books without permission from the copyright holders as fair use. Google’s digital library created an index of all the words in each scanned book. Users can search for a particular word or phrase to see in which of the 20 million books that word appears. Additionally, because the books in Google Books are digitized, a user can search a particular book to see how many times that word or phrase appears in that book. Google provides a “snippet view” of the page in which the search word appears, dividing the page into eight different snippets. The results for a particular keyword only show three snippets on each page, making it difficult for a user to read the entire page without generating multiple searches for each page, and repeating such multiple searches for each page in a book. Furthermore, a user motivated to run enough different searches to cumulatively view all eight snippets on every page, still could not read the entire book since one out of every ten pages of the digitized book is blocked out and will not be shown no matter what kind of serial searches are run by a user.

The Authors Guild sued Google for copyright infringement. Google asserted a fair use defense, claiming that its creation of an online digital library was transformative. The district court agreed, ruling that Google Books’ copying created a “highly transformative” database of the words in books:

Google books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. ... The use of book text to facilitate search through the display of snippets is transformative. ... Similarly, Google Books is also transformative in the sense that it has transformed the book text into data for purposes of substantive research, including data mining and text mining in new areas, thereby opening up new fields of research. Words in books are being used in a way they have not been used before. Google Books has created something new in the use of book text—the frequency of words and trends in their usage provide substantive information.

Id. at 291. The district court considered it important that the research database had become an important tool for librarians and cite-checkers, and thus served a different purpose and function than did the book itself. Google Books was thus not a replacement of the hard copies of books, but added value by creating new information. *Id.* The district court considered that it was unlikely that someone would expend the time and effort to “input countless searches to try and get enough snippets to comprise an entire book,” and that a user probably would need a hard copy of the book to generate the search terms necessary to read the entire book. *See, also, Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (internet search engine’s display of thumbnail versions of plaintiff’s photographs constituted fair use because they were put “to a use fundamentally different than the use intended by Perfect 10”); *Kelly v. Arriba Soft Corporation*, 336 F.3d 811 (9th Cir. 2003) (same).

Fox News objects to TVEyes copying its content and disseminating it to TVEyes' subscribers. Fox News argues that excerpts, circulations, and summaries of copyrighted content are not transformative and not a fair use. See *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) (ruling that abstracts and rough translations of Japanese copyrighted content was not transformative).

In *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), defendant created a dial-up service that allowed its subscribers to call a telephone number to listen to live radio broadcasts. By telephoning the number, subscribers could listen to the radio broadcast through the phone. The Second Circuit held that defendant's telephone service was not fair use. Because the derivative broadcast merely repackaged or republished the original, there was a "total absence of transformativeness in [defendant's] act of retransmission" which prevented a fair use finding. *Id.* at 109.

In *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013), the defendants created a news monitoring service for news articles that appeared on the internet. The service featured a searchable database that allowed users to see the number of times, and where, keywords were used. The defendant used an automated computer program that crawled the Internet for news, and extracted and downloaded all content responsive to search terms, customized by users. The extracted content was then placed in a queue for indexing. Users could search the database for keywords or terms and find out how many times, when, and where they were used. The court ruled that this use was not transformative because it "uses its computer programs to automatically capture and republish designated segments of text from news

articles, without adding any commentary or insight in its New Reports.” *Id.* at 552. The district court acknowledged that the “purpose of search engines is to allow users to sift through the deluge of data available through the Internet and to direct them to the original source. That would appear to be a transformative purpose.” *Id.* at 556.

However, the district court noted that Meltwater chose “not to offer evidence that Meltwater News customers actually use[d] its service to improve their access to the underlying news stories that are excerpted in its news feed,” and without such proof, Meltwater failed to prove its fair use defense. *Id.* at 554. Meltwater failed to show that its service was actually used by subscribers for research or to transform the original news story into a factum or datum that told a broader story about the overall news reporting industry. *See, also, Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (holding that a word search of books which “does not add into circulation any new, human-readable copies of any books,” but just creates a word search, constitutes fair use); *Los Angeles News Service v. Reuters*, 149 F.3d 987 (9th Cir. 1998) (holding that copying plaintiff’s video recording of the Rodney King riots and selling it to other news stations for the very same purpose was not fair use); *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992) (holding that copying plaintiff’s video recordings of news events and selling them to news outlets for same purpose was not fair use). In the cases cited by Fox News, save for *Meltwater*, defendants were copying the plaintiff’s work and then selling it for the very same purpose as plaintiff. That is quintessential copyright infringement and thus these cases do not shed much light on the more nuanced issue before

me today, and especially not on the question of transformation.

TVEyes distinguishes itself from those cases by the different character of its database. Print is fixed in form, and regularly available from publishing sources and archives. A service that provides clipping of news articles and columns provides essentially the same service as could be provided by the content provider itself. TVEyes, however, is not a clipping service for print. TVEyes' search results show the combination of visual images and text in a medium that raises the commentator to have the qualities of news itself. The focus of certain programs and talk shows on President Obama's recent golf vacation, for example, was as much the news as the beheading of an American reporter. 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 upturn of a lip can color the entire story, powerfully modifying the content. The service provided by TVEyes, indexing and collecting visual and audio images, allows subscribers to categorize, not only content in the response to key search words, but also “information [that] 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.” *The Swatch Group Management Ltd. v. Bloomberg L.P.*, 2014 WL 2219162, at *8 (2d Cir. 2014). Unlike 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, the service provided by TVEyes is transformative. By indexing and excerpting all content appearing in television, every hour of the day and every day of the week, month, and year, TVEyes provides a service that no content provider

provides. Subscribers to TVEyes gain access, not only to the news that is presented, but to the presentations themselves, as colored, processed, and criticized by commentators, and as abridged, modified, and enlarged by news broadcasts.

There also is a second relevant distinction that makes the district judge's opinion in *Meltwater* less helpful to deciding the disposition here. Meltwater aggregated content already available to the individual user who was willing to perform enough searches and cull enough results on the Internet. The service provided simply "crawled" the Internet, gathering extant content. TVEyes, however, creates a database of otherwise unavailable content. TVEyes is the only service that creates a database of *everything* that television channels broadcast, twenty-four hours a day, seven days a week. The Internet does not and cannot house the entirety of this content because Fox News, for example, does not provide all of its content online. Thus, without TVEyes, this information cannot otherwise be gathered and searched. That, in and of itself, makes TVEyes' purpose transformative and different in kind from Meltwater's, which simply amalgamated extant content that a dedicated researcher could piece together with enough time, effort, and Internet searches. These differences further reduce the persuasive value of the district court opinion in *Meltwater*.

Fox News argues that the clips that TVEyes provides are of the very content that is protected by its copyright. The clips, however, 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.

Fox News argues that a TVEyes' subscriber could watch sequential ten minute clips of content end to end, and thus watch and hear all of Fox News' programs in their entirety just two to five minutes after they air. Fox News makes an unrealistic point, for cost and trouble would make such copying impractical and timely. In any event, the case before me must be decided on its own merits. "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." *Campbell*, 510 U.S. at 577.

I find that TVEyes' search engine together with its display of result clips is transformative, and "serves a new and different function from the original work and is not a substitute for it." *HathiTrust*, 2014 WL 2576342, at *6. In making this finding, I am guided by the Second Circuit's determination that databases that convert copyrighted works into a research tool to further learning are transformative. TVEyes' message, "this is what they said"—is a very different message from [Fox News]'—"this is what you should [know or] believe." *Swatch*, 2014 WL 2219162, at *8. TVEyes' evidence, that its subscribers use the service for research, criticism, and comment, is undisputed and shows fair use as explicitly identified in the preamble of the statute. 17 U.S.C. § 107.

The issue of fair use is affected by the issue of profits. Clearly, TVEyes is a for-profit company, and enjoys revenue and income from the service it provides. However, the consideration of profits is just

one factor, among many others. “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579; *Swatch*, 756 F.3d at 90-91. 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, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.” *Campbell*, 510 U.S. at 584. Thus I find that the first factor weighs in favor of TVEyes’ fair use defense.

ii. The Second Factor

The second statutory factor in the fair use analysis requires consideration of “the nature of the copyrighted work.” 17 U.S.C. § 107(2). This factor considers the “value of the materials used,” and calls for “the recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” *Campbell*, 510 U.S. at 586. The nature of Fox News’ programming and its copyrightable content is not disputed. The news itself is not subject to copyright protection, but the creative expression and artistic license necessarily exercised in deciding how to portray, film, direct, stage, sequence, and communicate this information is subject to copyright protection. Nevertheless, there is “greater leeway” for a determination of fair use when the work is factual or largely informational. *Cariou v. Prince*, 714 F.3d 694, 709-10 (2d Cir. 2013). In these cases, the scope for fair use is greater. *Swatch*, 2014 WL 2219162, at *13. Additionally, where the creative

aspect of the work is transformed, as is the case here, the second factor has limited value. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). I find that the second factor, the nature of the copyrighted work, does not weigh for or against a finding of fair use.

iii. The Third Factor

The third factor requires that I consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). Here, there is no question that TVEyes copies all of Fox News’ content—that is the essence of TVEyes’ business model. The third factor does not, however, counsel a simple, crude quantitative comparison. It asks rather “whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purpose asserted under the first factor.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). Thus, where copying the entire work is necessary to accomplish the transformative function or purpose, as is the case, here, this factor, like the second factor, bows to the importance and priority of the first factor’s finding of transformative use. “[T]he crux of the inquiry is whether no more was taken than necessary. 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.” *Id.*

Here TVEyes copies all of Fox News’ television content (and other stations’ contents) in its entirety, a service no one, including Fox News itself provides. The value of TVEyes’ database depends on its all-inclusive nature, copying 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. I find that the third factor, the extent of the copying, weighs neither in favor or against a fair use finding, since “the extent of permissible copying varies with the purpose and character of the use,” *Campbell*, 510 U.S. at 586-87, and TVEyes’ service requires complete copying twenty-four hours a day, seven days a week.

iv. The Fourth Factor

The fourth factor considers “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4).

It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market ... The enquiry must take account not only of harm to the original but also harm to the market for derivative works.

Campbell, 510 U.S. at 590 (internal citations and quotations omitted). Crucially, this factor “is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work.” *HathiTrust*, 2014 WL 2576342, at *9. Thus any economic harm caused by transformative uses does not factor into this analysis, “because such uses, by definition do not serve as substitutes for the original work.” *Id.* This factor also requires a “balancing of the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive

if the use is denied.” *Bill Graham*, 448 F.3d at 610 (internal quotations omitted).

a. Economic Injury

The Fair Use doctrine does not permit users to excessively damage the market for the original by providing the public with a substitute for the original work. Thus, a book review may fairly quote a copyrighted book for the purposes of fair and reasonable criticism, but the review may not quote extensively from the heart of a forthcoming memoir in a manner that usurps the right of first publication and serves as a substitute for purchasing the memoir.

Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95-96 (2d Cir. 2014) (internal citations and quotations omitted). “Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on other factors.” *Campbell*, 510 U.S. at 590 n.21.

Fox News bases its suit on 19 individual, hour-long programs that it aired between October 16, 2012 and July 3, 2013. Fox News argues that TVEyes’ service decreases the per-subscriber carriage fees that advertisers and cable and satellite providers are willing to pay Fox News. Fox News alleges that people will watch copies of content on TVEyes, and not FNC and FBN, thereby depressing Fox News’ viewership ratings. Fox News’ 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.

First, none of the shows on which Fox News' suit is based remain available to TVEyes subscribers; TVEyes erases content every 32 days. Second, in the 32 days that these programs were available to TVEyes' subscribers, only 560 clips were played, with an average length of play of 53.4 seconds and the full range of play being 11.5 seconds to 362 seconds. Of the 560 clips played, 85.5% of the clips that were played were played for less than one minute; 76% were played for less than 30 seconds; and 51% were played for less than 10 seconds. One program was not excerpted at all. The long term TVEyes statistics are consistent with the specific statistics of the 19 programs. From 2003 to 2014, only 5.6% of all TVEyes users have ever seen any Fox News content on TVEyes. Between March 31, 2003 and December 31, 2013, in only three instances did a TVEyes subscriber access 30 minutes or more of any sequential content on FNC, and no TVEyes subscriber ever accessed any sequential content on FBN. Not one of the works in suit was ever accessed to watch clips sequentially. The record does not support Fox News' allegations. Fox News fails in its proof that TVEyes caused, or is likely to cause, any adverse effect to Fox News' revenues or income from advertisers or cable or satellite providers.

In a typical month, fewer than 1% of TVEyes' users play a video clip that resulted from a keyword search of its watch terms. TVEyes subscribers play video clips, on average, for 41 seconds, while the median play duration is 12 seconds. 95% of all video clips played on TVEyes are three minutes or shorter; 91% are two minutes or shorter; and 82% are a minute or shorter. Fewer than .08% of clips are ever played for the maximum clip time of ten minutes. Most clips respond to a search using keywords, fewer than 5.5% of all plays originate from a Date and Time Search.

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 to the overall market of television watching from an "unrestricted and widespread conduct of the sort engaged in by defendant." *Campbell*, 510 U.S. at 590 (internal citations and quotations omitted). Fox News has not shown that TVEyes poses a risk to it of reduced returns on advertising rates or revenues because of alleged diversions of television viewers.

Fox News also argues that TVEyes impairs the derivative market for video clips of copyrighted content with syndication partners like YouTube, and with Fox News' exclusive licensing agent, ITN Source and Executive Interviews. Why, Fox News asks, should TVEyes subscribers purchase clips from Fox News' licensing agents if they can be procured as part of their TVEyes subscription? However, Fox News is unable to provide the identity of the customers Executive Interviews allegedly lost. Fox News' entire revenue from this derivative source, between July 1, 2012 and June 30, 2013, is \$212,145.00 from syndication partners and \$246,875.00 from the licensing of clips, a very small fraction of its overall revenue. In light of this very small possible impact, any, "cognizable market harm" that can occur is likely to be outweighed by the public benefit arising from TVEyes' services. *See Campbell*, 510 U.S. at 590, n. 21.

b. Public Benefit

The fourth factor requires a balance between the “benefit the public will derive if the use is permitted, and the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 610 (internal quotations omitted). TVEyes argues that its service provides an immense benefit to the public interest because it assembles from scratch a library of television broadcast content that otherwise would not exist and renders it easily and efficiently text-searchable. Without TVEyes, there is no other way to sift through more than 27,000 hours of programming broadcast on television daily, most of which is not available online or anywhere else, to track and discover information.

TVEyes subscribers use this service to comment on and criticize broadcast news channels. Government bodies use it 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. Clearly, TVEyes provides substantial benefit to the public.

I therefore conclude that this factor does not weigh against a finding of fair use, especially when the de minimis nature of any possible competition is considered in comparison to the substantial public service TVEyes provides. Subject to possible exceptions from the downloading and sharing of clips via social media, as discussed below, I find that the small possible market harm to Fox News is substantially outweighed by the important public benefit provided by TVEyes.

v. The Balance of the Factors

Ultimately, “the various non-exclusive statutory factors are to be weighed together, along with any other relevant considerations, in light of the purposes of the copyright laws.” *Google Inc.*, 954 F. Supp. 2d at 293. TVEyes’ service copies television broadcasts but for an entirely different purpose and function. TVEyes is not “trying to scoop” Fox News’ broadcasts or to “supplant the copyright holder’s commercially valuable right of first publication” *Swatch*, 2014 WL 2219162, at *7. TVEyes captures and indexes broadcasts that otherwise would be largely unavailable once they aired.

Users access the clips and snippets for an altogether different purpose—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.” As the Second Circuit explained in *Swatch Group Mgmt. Servs. Ltd. v. Bloomberg LP*,

In the context of news reporting and analogous activities, moreover, the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration. Courts often find such uses transformative by emphasizing the altered purpose or context of the work, as evidenced by surrounding commentary or criticism.

2014 WL 2219162, at *8. TVEyes' service provides social and public benefit and thus serves an important public interest.

I therefore find that TVEyes' copying of Fox News' broadcast content for indexing and clipping services to its subscribers constitutes fair use. However, I do not decide the issue of fair use for the full extent of TVEyes' service, TVEyes provides features that allow subscribers to save, archive, download, email, and share clips of Fox News' television programs. The parties have not presented sufficient evidence showing that these features either are integral to the transformative purpose of indexing and providing clips and snippets of transcript to subscribers, or threatening to Fox News' derivative businesses.

Similarly, neither party is entitled to summary judgment on the issue of whether the date and time search function, allowing its subscribers to search for television clips by date and time instead of by keyword or term, is integral to the transformative purpose of TVEyes and its defense of fair use. While the evidence shows that this feature does not pose any threat of market harm to Fox News, the record fails to show that it is crucial or integral to TVEyes' transformative

purpose. The factual record should be developed further before I can decide this issue.

D. Hot News Misappropriation Claim

Fox News also pleads a hot news misappropriation claim, alleging that TVEyes stole “hot news” from Fox News in violation of state tort law. In *International News Service v. Associated Press*, 248 U.S. 215 (1918), the case that created the concept of hot news misappropriation, plaintiff and defendant were in exactly the same business of gathering news worldwide and distributing it to its members, various news reporting outlets. The Associated Press (“AP”) sued the International News Service (“INS”) because the INS had engaged in a practice of “scooping” AP news stories. They did this by lifting AP news stories from AP bulletins and repackaging them as INS news stories and selling them to news outlets before the AP could. The Supreme Court ruled that this kind of “reaping what one has not sown” was tortious where the parties were “in the keenest of competition between themselves in the distribution of the news throughout the United States.” *Id.* at 231.

To prevail on a hot news misappropriation claim, Fox News must show that: (1) it generates or collects information at some expense; (2) the value of information is highly time sensitive; (3) defendant’s use of information constitutes free-riding on plaintiff’s costly efforts to generate or collect it; (4) defendant’s use of information is in direct competition with a product or service offered by plaintiff; and (5) the ability of other parties to free-ride on efforts of plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. *The National Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997).

Before addressing the merits of this claim, however, I must determine whether or not this state law claim is preempted by the federal Copyright Act. “All legal or equitable rights that are equivalent to any of the exclusive rights” of the Copyright Act “are governed exclusively by” the Copyright Act. 17 U.S.C. § 301(a). State law hot news misappropriation claims are preempted by the Copyright Act if the “claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by the Copyright Act; and the work in question is of the type of works protected by the Copyright Act.” *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 892 (2d Cir. 2011). Where both of these conditions are met, as is clearly the case here, the court then applies the “extra element test” to determine whether the claim should survive because of some extra element in the tort bringing it outside the realm of copyright.

This test asks whether “an extra element [is] required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action,” such that the claim is qualitatively different from a copyright claim. *National Basketball Association*, 105 F.3d at 850. Here, Fox News argues that the “extra element” is the fact that TVEyes stole its “hot news” and thereby “free-rides” on Fox News’ hard work and labor in the same way the INS free-rode on the AP’s labor. In making this argument, Fox News ignores the actual definition of free-riding provided by the Supreme Court in *INS*. For the purposes of this tort and its preemption test, the term “free-riding” means “taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by

complainant for money, and ... appropriating it and selling it as the [defendant's] own ..." *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 895 (2d Cir. 2011), quoting *International News Service v. Associated Press*, 248 U.S. 215, 239 (1918). The Supreme Court defined free-riding as passing off someone else's work as one's own. Here, TVEyes is not passing off Fox News' content as its own.

In *Barclays Capital*, the Second Circuit ruled that the hot news misappropriation claim was preempted by the Copyright Act, and that the "extra element" test premised on "free-riding" was not shown. In that case, the plaintiff researched and analyzed the financial markets in order to generate daily reports that provided recommendations to clients about firms in which to invest, and stock in which to trade. The defendants obtained information about firm recommendations and posted them on its website before firms made them available to the general public and before exchanges for trading in those shares opened for the day. The Second Circuit held that the hot news misappropriation claim was preempted by the Copyright Act, and that defendants were not "free-riding," but were "collating and disseminating factual information—the *facts* that Firms and others in the securities business would have made recommendations with respect to the value of and the wisdom of purchasing or selling securities—and attributing the information to its source." *Barclays Capital, Inc.*, 650 F.3d at 902.

Fox News' hot news misappropriation claim is preempted by the Copyright Act for the very same reasons. As in *Barclays*, "[i]t is not the identity of Fly and its reputation as a financial analyst that carries the authority and weight sufficient to affect the

market. It is Fly's accurate attribution of the Recommendation to the creator that gives this news its value." *Id.* Similarly, TVEyes is not a valuable service because its subscribers credit it as a reliable news outlet, it is valuable because it reports what the news outlets and commentators are saying and therefore does not "scoop" or free-ride on the news services. Thus, the hot news misappropriation claim is preempted by the Copyright Act because it fails the extra element test.

E. Misappropriation

Lastly, Fox News brings a state law misappropriation claim based on the equitable doctrine that recognizes that "a person shall not be allowed to enrich himself unjustly at the expense of another." *Georgia Malone and Company, Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012). Such a claim must be "grounded in either deception or appropriation of the exclusive property of the plaintiff." *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1025 (2d Cir. 1989). Here again, I must first determine if this claim is preempted by the Copyright Act. It is, and for straightforward reasons that echo the analysis above. Fox News goes to great length to argue that TVEyes acted in bad faith and that TVEyes' "bad faith" constitutes the extra element to take Fox News' claim outside the Copyright Act. Under this analysis, however, elements of a tort that address the mens rea or intent of the tortfeasor cannot constitute an "extra element" for purposes of evading preemption. An

action will not be saved from preemption by elements such as awareness or intent, which alter the action's scope but not its nature ... Following this 'extra element' test, we have

held that unfair competition and misappropriation claims grounded solely in the copying of a plaintiff's protected expression are preempted by section 301.

Computer Associates Intern. v. Altai, Inc., 982 F.2d 693, 717 (2d Cir. 1992) (internal citations and quotations omitted).

Thus, the misappropriation claim also is preempted by the Copyright Act. "The broad misappropriation doctrine relied upon ... is therefore equivalent to the exclusive rights in copyright law ... Indeed because the copyright act itself provides a remedy for wrongful copying, such unfairness may be seen as supporting a finding that the Act preempts the tort." *Barclays Capital, Inc.*, 650 F.3d at 895. *See also Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986) ("Walker's cause of action for unfair competition is preempted by the federal copyright laws to the extent it seeks protection against copyright of Walker's book" dismissing common law unfair competition claim as arising out of defendant's alleged copyright); *Levine v. Landy*, 832 F. Supp. 2d 176, 191 (N.D.N.Y. 2011) (plaintiff's claim is "essentially a copyright infringement claim with the added allegation that after unlawfully copying, distributing, and/or publishing the photographs, defendants stamped their own name or copyright on the works, rather than plaintiff's" and was thus preempted). This claim is also preempted by the Copyright Act and therefore must fail no matter what kind of evidence Fox News could or has produced to support it.

III. Conclusion

I hold that TVEyes' database and provision of television clips and snippets of transcript are transformative and thus constitute fair use, protecting it from claims of copyright infringement. The record must be further developed, however, before I can determine whether or not the features that allow searches by date and time, and that allow clips to be archived, downloaded, emailed, and shared via social media are integral services and protected by a fair use defense.

Counsel shall meet with me for a status conference to discuss the proceedings necessary to determine the remaining issues on October 3, 2014 at 10:00 a.m. Counsel shall meet prior to the conference, and submit their respective views in a joint letter submitted by October 1, 2014 at noon.

The Clerk shall mark the motion (Doc. No. 32) terminated.

SO ORDERED.

Dated: September 9, 2014
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX CUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Aug. 25, 2015]

FOX NEWS NETWORK, LLC, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">-against-</div> TVEYES, INC., <div style="text-align: right;">Defendant.</div>	<u>OPINION AND ORDER REGULAT- ING ISSUES OF FAIR USE AND GRANTING CROSS-MOTIONS FOR SUMMARY JUDGMENT</u> 13 Civ. 5315 (AKH)
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ALVIN K. HELLERSTEIN, U.S.D.J.:

TVEyes, Inc. (“TVEyes”) is a media-monitoring service that records all content on more than 1,400 television and radio stations and transforms the content into a searchable database. Subscribers are able to track when, where, and how words of interest are used in the media, and can obtain transcripts and video clips of the portions of the television programs that use those words. Fox News Network, LLC (“Fox News”) filed this lawsuit under the Copyright Act, 17 U.S.C. § 101 *et seq.*, claiming infringement of its copyrighted content seeking damages and an injunction barring TVEyes from copying and distributing clips of Fox News programs.¹ TVEyes asserts the affirmative defense of fair use. In 2014, the parties cross-moved

¹ Fox News also sought to recover under New York tort law for “hot news” misappropriation. I held that claim preempted by the Copyright Act, and dismissed the claim in my previous Order. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

for summary judgment. In an Opinion and Order dated September 9, 2014, I upheld TVEyes' affirmative defense of. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014). However, I reserved judgment with respect to four features of the service, finding the factual record inadequately developed to grant summary judgment to either party at that time. Specifically, TVEyes allows users to archive videos, download videos, share videos by e-mail, and search for content by date and time, rather than by keyword. The parties pursued additional discovery with respect to these features, limiting experts to one per side, followed by renewed briefing on the open issues, focusing on the following questions:

- 1) Whether each function in question is integral to TVEyes' transformative purpose, and
- 2) Whether each function in question threatens Fox News' derivative business.

This Order now resolves the renewed cross-motions for summary judgment. For the following reasons, I find that TVEyes' archiving function is fair use; that its e-mailing function, if subjected to various protections, can be fair use; but that the downloading and date-time search functions are not fair use.

THE PARTIES

i. TVEyes

As I explained in my previous opinion, *TVEyes*, 43 F. Supp. 3d at 379, familiarity with which is assumed, TVEyes creates a searchable database of virtually all television and radio content by using closed-caption technology and recording broadcasts through standard cable services such as Comcast and Cablevision. TVEyes allows users to track the usage of words or

phrases of interest, and to view the transcripts and video clips of the portions of the television broadcast that use the search term. The purpose is to give subscribers “access, not only to the news that is presented, but to the presentations themselves,” for both are news: the subject that is reported, as well as the manner in which it is reported. *Id.* at 393. TVEyes is a for-profit business with over 22,000 subscribers. It markets itself to businesses and government agencies, and counts among its subscribers the White House, Department of Defense, over 100 members of Congress, and various news and non-profit organizations. It is not open to the general public.

TVEyes subscribers may set “watch lists” for terms and receive real time alerts when the terms are used. Subscribers may also search past broadcasts, for which video is saved for 32 days. When a matching segment is located, the user can view the matching transcript and video clip up to ten minutes long, although the vast majority of clips are shorter than two minutes. The video clip is also accompanied by important analytic data such as the segment’s Nielsen viewership rating, the frequency with which the term has been mentioned over a specified time period, and the geographic markets and channels where the term is used. These searching, indexing, and display features make up TVEyes’ core function.

TVEyes also provides a suite of functions that complement its core service. The first of these functions is “archiving.” TVEyes users are able to “archive” video clips that appear in response to their search queries to a personal digital library on TVEyes’ server. Archiving a video keeps the video available

indefinitely to that subscriber.² A second complementary function is “e-mailing.” Subscribers can share links to the video clips with others by e-mail, allowing the recipients of the link to view the video clip on TVEyes’ server through their web browsers.³ TVEyes does not utilize an authentication process to limit viewing to authorized users. A third complementary function is “downloading.” Subscribers are able to download copies of identified digital video clips to their computers for offline use and permanent storage. TVEyes places no technological restriction on its subscribers’ use or distribution of downloaded video clips, nor does it utilize any method of identifying the clip as sourced from TVEyes. And a fourth complementary function is “date-time search,” by which users can retrieve video clips of chosen networks according to the date and time slots of the broadcasts. The issue in the instant motions is whether each of these four functions constitutes fair use. TVEyes has the burden to prove its affirmative defense, as I later discuss.

ii. Fox News

Again, as I discussed in my previous decision, 43 F. Supp. 3d at 379, Fox News is an international television news organization that owns and operates Fox News Channel (“FNC”) and its financial news counterpart, Fox Business Network (“FBN”). FNC is in the

² Videos are otherwise purged from TVEyes’ servers after 32 days.

³ The links to videos can also be posted to social media services, such as Facebook or Twitter. TVEyes concedes that such posting is not fair use and is not integral to its service, and it claims to have implemented a series of measures that prevent the videos from being accessed through social media. The efficacy of those measures is disputed, however. TVEyes will have to demonstrate that its measures will be reasonably effective.

business of reporting news worldwide on a twenty-four hour news cycle, and has been the most watched cable news network for the past 11 years. Its primary competitors are cable television channels MSNBC and CNN.

Viewers generally watch Fox News on television through their cable TV subscriptions, but Fox has a growing online presence as well. For example, live online streams of FNC and FBN are available to viewers with cable or satellite subscriptions through Fox's TVAnywhere platform for authenticated streaming. In addition, Fox makes a limited number of video clips available on its websites, FoxNews.com and FoxBusiness.com, although the amount of content is sharply limited by Fox's contracts with the cable companies. Currently, only about 16% of broadcast content is available on Fox's website. Fox receives advertising revenue when viewers watch videos on its websites, including revenue from banner advertisements on the page itself, and from "pre-reel" advertisements that play before a video clip begins. Fox also has agreements with syndication partners, including Yahoo!, Hulu, and YouTube, "to store and show video clips of segments of its program[s] on their websites, thereby generating another stream of income." *TVEyes*, 43 F. Supp. 3d at 387. And Fox licenses its video clips to clients, including companies, journalists, and politicians, through its agents, ITN Source and Executive Interviews. However, licensees must "covenant that they will not show the clips in a way that is derogatory or critical of Fox News." *Id.* Together, Fox News' online distribution and licensing services make up its "derivative business."

Fox invests significant resources in creating content and covering news stories. It alleges that, by making

Fox News' content available to TVEyes subscribers, TVEyes is diverting potential licensees, website visitors, and therefore revenue, from Fox.

LEGAL STANDARD

i. Summary Judgment

Under the well-established summary judgment standard, a “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In deciding the motion, the court must “resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.” *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). The court should also “eschew credibility assessments.” *Amnesty Am. v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir. 2004). However, “[t]he mere existence of a scintilla of evidence in support of the [non-moving] party’s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

ii. Copyright Infringement

The Copyright Act grants authors “a limited monopoly over (and thus the opportunity to profit from) the dissemination of their original works.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). A *prima facie* case of infringement requires an author to show only (1) ownership of a valid copyright, and (2) unauthorized copying of the copyrighted work. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003).

iii. Fair Use

Fair use is an affirmative defense to copyright infringement. *Am. Geophysical Un. v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994). It allows for a user to use copyrighted materials without permission of the author when “necessary to fulfill copyright’s very purpose, [t]o promote the Progress of Science and useful arts.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. Const. Art. I, § 8, cl. 8). The Copyright Act itself provides illustrative examples of fair use, including such “purposes [] as criticism, comment, news reporting, teaching, ... scholarship, or research.” 17 U.S.C. § 107. The statutory list is not exhaustive. Fair use requires a fact-intensive and context-specific evaluation, *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006), whether “the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (internal quotations omitted). See also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

The Copyright Act, 17 U.S.C. § 107, provides four guiding factors for evaluating a fair use defense. First, the Court must examine the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes. The “central purpose of this investigation” requires evaluating whether the new work “merely supersedes the objects of the original creation,” or “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is transformative.” *Campbell*, 510

U.S. at 578-79. Second, the Court should look at the nature of the copyrighted work. The fair use defense is stronger when the nature of the copyrighted work is factual rather than fictional. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985). Third, the Court should weigh the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This step requires the Court to ask “whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor.” *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014). Finally, the Court must examine the effect of the use upon the potential market for or value of the copyrighted work. The key inquiry at this stage is whether economic injury results from the secondary use serving as a substitute for the primary work. *Id.* at 99. Courts may consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in substantially adverse impact on the potential market ... [including] the market for derivative works.” *Campbell*, 510 U.S. at 590 (internal quotations omitted). Courts must balance “the benefit the public will derive if the use is permitted [against] the personal gain the copyright owner will receive if the use is denied.” *Bill Graham*, 448 F.3d at 610.

PROCEDURAL BACKGROUND

Fox News brought this action for infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.*, alleging that TVEyes copied and infringed 19 hour-long programs that aired on Fox News Channel and Fox Business Network between October 16, 2012 and July 3, 2013 (the “Works-in-Suit”). The 19 Works-in-Suit are: two episodes of *On the Record with Greta Van*

Susteren; three episodes of *Special Report with Bret Baier*; three episodes of *The Five*; four episodes of *The O'Reilly Factor*; two episodes of *The Fox Report with Shepard Smith*; four episodes of *Hannity*; and one episode of *Special Report Investigates: Death & Deceit in Benghazi*. In 2014, the parties cross-moved for summary judgment. I denied Fox's motion and granted TVEyes' motion in part, finding that TVEyes' core function—recording content, putting it into a searchable database and, upon a keyword query, allowing users to view short clips of the content up to 32 days from the date of airing—constitutes fair use. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

In reaching that conclusion, I looked first at the purpose and character of TVEyes' use and found it transformative because it serves a different purpose than the original. While Fox aims to report the news, TVEyes aims to monitor what the media reports as news, the latter having qualities of news in its own right. For example, the 2012 attack on the U.S. Embassy in Benghazi was important news, but so was Fox News' intense focus on the story. TVEyes was unique in providing such a reliable "database of *everything* that television channels broadcast, twenty-four hours a day, seven days a week." *Id.* at 392.⁴ I

⁴ Fox notes that since the previous set of briefs, a public, non-profit entity called the Internet Archive TV News Archive has emerged to perform the same function as TVEyes. The TV News Archive is expressly permitted by Congress to "reproduce[e] and distribut[e] by lending of a limited number of copies and excerpts ... of an audiovisual news program." 17 U.S.C. §§ 108(a), 108(f)(3). Fox argues that the allowance for TV News Archive necessarily indicates that Congress did not intend to allow a commercial library like TVEyes to provide the very same service, under the *expressio unius* canon of construction. However, TVEyes rightly

found that the character of the service was unlike the news clipping service in *Associated Press v. Meltwater U.S. Holdings*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013), which simply “crawled” the internet for news and indexed it. Instead, “TVEyes’ search results show the combination of visual images and text in a medium that raises the commentator to have the qualities of news itself.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014). I found that a better analogy was Google’s library digitization project in *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), which allowed users to search a particular book to see how many times a word or phrase appears, and provided a “snippet” view of the page. In order to provide its transformative service, I found that TVEyes must be allowed to show clips of the matching video segments because “[t]he actual images and sounds depicted on television are as important as the news information itself—the tone of voice, arch of an eyebrow, or upturn of a lip can color the entire story, powerfully modifying the content.” *TVEyes*, 43 F. Supp. 3d at 392.

points out that the allowance for TV News Archive is not dispositive. The authorizing statute, 17 U.S.C. § 108(f)(4), expressly provides that “[n]othing in this section ... in any way affects the right of fair use as provided in section 107.” And even if it did intend to preempt co-extensive services, TVEyes goes far beyond what the TV News Archive offers. For example, the record shows that TV News Archive records content only in San Francisco, Washington DC, and Philadelphia; it has a 24-hour delay; it does not allow automatic monitoring; it lacks Nielsen viewership and publicity information; and the search function fails to capture some matching results. *See* 2d Karle Decl. ¶ 48-50. For a service whose value rests in universal monitoring, these shortcomings are important. I decline to change my prior fair use ruling because of arguments based on TV News Archive.

I next looked at the nature of the copyrighted work and explained that, although “news itself is not subject to copyright protection, [] the creative expression and artistic license necessarily exercised in deciding how to portray, film, direct, stage, sequence, and communicate this information [can be protected].” *Id.* Still, I found that the factual nature of the content weighs in TVEyes’ favor.

Third, I looked at the amount and substantiality of the portion used. I explained that while it was true that TVEyes copied all of Fox News’ content, no one else did that, including Fox News itself, and that providing a reliable, 24/7, all-inclusive service was transformative. “The value of TVEyes’ database depends on its all-inclusive nature.” *Id.* If TVEyes did not provide a comprehensive database, its transformative value would be compromised. Indeed, reproducing only *some* of Fox’s content might more likely be considered unjustified infringement.

Finally, I weighed the effect on the potential market for the copyrighted work against the benefit to the public from a service like TVEyes. I found that the notion that people will watch FNC’s content on TVEyes rather than FNC, thereby depressing FNC’s viewership ratings and, in turn, its carriage fee, was pure speculation. There was no evidence of market substitution, and I found support for the proposition that such copying would be unlikely from *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013). In that case, the Court considered that it was unlikely that users would go through the trouble of “input[ting] countless searches [into Google] to try and get enough snippets to comprise an entire book.” Similarly, I thought it unlikely that TVEyes users would go through the trouble of running countless

searches to reconstruct a full TV broadcast. Meanwhile, the service provides a substantial benefit to the public. No other service allows subscribers to comment on and criticize broadcast news channels, governments to monitor the accuracy of media reports and make timely corrections, political campaigns to monitor political advertising and candidate appearances, financial firms to archive public statements by employees for regulatory compliance, the Army to track media coverage of military operations in remote locations, and journalists to research, report on, and compare news coverage. *TVEyes*, 43 F. Supp. 3d at 392.

On balance, I found that the factors supported a finding of fair use for TVEyes' core business. However, I found that the four complementary features at issue in the motions now before me—archiving, e-mailing, downloading, and date-time search—raised concerns and were not adequately explained. Therefore, I reserved judgment with respect to these features, and requested supplemental discovery and briefing. After such discovery, including depositions of one expert witness each, the parties filed renewed cross-motions for summary judgment on May 21, 2015. I heard argument on July 28, 2015, and now issue this decision.

DISCUSSION

At the outset, I note that Fox News' submission devotes substantial effort to re-litigating my previous finding of fair use. That was not the purpose of the supplemental discovery and motion practice. None of the arguments persuades me to change the rulings I made in my Opinion of September 9, 2014.

I now turn to the four complementary features at issue in the instant cross-motions.

i. Archiving

Once a user locates a video clip through a TVEyes search, he can press a button to “archive” the clip, which causes the clip to be listed in the subscriber’s “Media Center.” The Media Center is the interface through which a user plays content on the TVEyes website. Archived clips are not stored on a subscriber’s own computer; they are stored on TVEyes’ servers. The act of archiving achieves two benefits for a user. First, it allows users to revisit clips they have already found at later dates. Without the archiving function, a subscriber would have to conduct a search from scratch every single time he wanted to view a particular clip. Second, an archived clip will remain available to a user indefinitely. Ordinarily, content remains searchable and viewable on TVEyes’ servers for 32 days, after which content will no longer appear in search results and will no longer be viewable. However, when a user archives a clip within the 32-day window, it will remain saved on TVEyes’ server. Only the user who archives a particular clip is able to access it after 32 days; the clip will not appear in search results by other users.

TVEyes argues that the ability to archive video clips is integral to its service, and I agree. Requiring users to go through repeated searches every time they want to view previously identified clips would place needless obstacles in the path of prospective researchers, critics, and commentators, and would sharply curtail the value of TVEyes’ service. And without the ability to revisit content older than 32 days, longer-term, longitudinal studies of the media’s treatment of particular subjects would be impossible. Such subjects as the media’s changing treatment of a particular story over time, and disparities between two networks’

treatment of a given topic, are themselves newsworthy. *See, e.g.*, 3d Rose Decl. ¶ 16 & Ex. TTTTT (“According to TVEyes, Fox News has mentioned Benghazi 1,886 times in the past 3 months, or an average of about 21 times a day. That’s compared to 721 mentions on MSNBC (along with 718 instances of ‘Schmengazi’) and only 687 for CNN”). The ability to detect these patterns and trends is an essential feature of the transformative service that TVEyes provides. 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.” *TVEyes*, 43 F. Supp. 3d at 394. Content does not suddenly become unfit for fair uses on the 33rd day after its creation.

Justice Holmes, in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919), explained that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” The quote came in the context of a First Amendment challenge to the convictions of five men for circulating literature intended to undermine the WWI war effort, but it has application here, too. Justice Holmes was expressing the Constitution’s support for a free and open “marketplace of ideas.” *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537-38 (1980). 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, and its archiving feature aids that purpose.

Archiving video clips to remain stored beyond 32 days and to facilitate successive reference is integral to TVEyes' service and its transformational purpose of media monitoring. And Fox has not identified any actual or potential market harm arising from archiving.⁵ I hold that the archiving function is fair use, complementing TVEyes' searching and indexing functions.

ii. E-mailing and Sharing

TVEyes' permits its subscribers to share identified video clips with others by sending them a URL link to the video on the TVEyes' server. The recipient, by clicking the link, can play the video clip through his web browser, alongside the transcript of the clip. Unless downloaded—a feature that will be discussed shortly—the video clip remains on TVEyes' server only; it does not reside on the user's computer. The link is public, meaning the recipient does not need to possess TVEyes login credentials in order to access the video. Technically, the video can be shared through any medium that allows transmission of text (e.g. e-mail, social media, instant messaging), but TVEyes concedes that social media sharing is not integral to its service. It expressly allows subscribers to share links via e-mail, however, and maintains that the e-mailing feature is fair use on the ground that “email is the primary tool used to communicate and collaborate with co-workers, supervisors, and decision-makers.” TVEyes Mem. Law 23 (citing 4th Ives Decl. ¶¶ 10, 20 & Ex. AAAAA). For example, Congressional staffers

⁵ Fox argues that TVEyes threatens harm in derivative markets generally—chiefly licensing—but it has not isolated any harm resulting from archiving in particular.

share video clips among themselves; Congressmen share with members of Committees and caucuses; lawyers share with clients, etc. To prohibit e-mailing of videos would prevent relevant information from reaching the critical party.

I agree that to prohibit e-mail sharing would prevent TVEyes users from realizing much of the benefit of its transformative service. For example, members of Congress rely on TVEyes to be made aware of what the media has to say about the issues of the day and about them. But their interns and staffers, not they, sit at computers querying keywords of interest through the TVEyes portal, and then e-mail the results up the chain of command. Without e-mail, the Congressman would be limited to either sharing a computer with his staffer or else having the staffer describe the contents of the clip to the Congressman without showing him the clip. In practice, the former is unrealistic and the latter fails to deliver “the full spectrum of information ... [including] what was said, [and] 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.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (2014).

There are many players in the marketplace of ideas, each with supporting staffs of employees, interns, and independent consultants. And once information is located, parties must be able to transmit that information as part of comment, criticism, and debate. E-mailing of URL links allows information to reach the individuals who need to know what is being said in order to engage in news reporting, commentary, criticism, teaching, scholarship, research, and other fair uses permitted by the Copyright Act. *See* 17 U.S.C. § 107.

However, there is also substantial potential for abuse. In its current incarnation, TVEyes' e-mailing feature cannot discriminate between sharing with a boss and sharing with a friend, nor between sharing for inclusion in a study and sharing a clip for inclusion in a client sales pitch. Fair use cannot be found unless TVEyes develops necessary protections. What limits should be placed on subscribers who share links through social media?⁶ What can prevent subscribers from sharing for purposes not protected by § 107? If TVEyes cannot prevent indiscriminate sharing, it risks becoming a substitute for Fox's own website, thereby depriving Fox of advertising revenue. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (Courts may consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in substantially adverse impact on the potential market ... [including] the market for derivative works.").

TVEyes has the burden to show fair use. *Am. Geophysical Un. v. Texaco, Inc.*, 60 F.3d 913, 918 (2d Cir. 1994). It must develop protocols to reasonably assure that, when subscribers share video clips, they do so consistent with § 107. Until the development of

⁶ TVEyes claims to block users from viewing videos that are accessed through social media sites such as Facebook and Twitter, but Fox argues that the blocks are ineffective. Fox is correct. TVEyes has not shown how it limits the publication of shared information beyond subscribers. Indeed, TVEyes' own representatives and marketing materials have emphasized subscribers' ability to share information through social media. See Knobel Decl. Ex. 21 at TVEYES-037904 ("You can then use the clips in your Public Awareness campaigns! ... Post clips on Facebook, YouTube, and Twitter on an unlimited basis!").

reasonable and adequate protections and a satisfactory showing thereof, TVEyes' e-mailing function cannot be considered fair use.

iii. Downloading

When a subscriber identifies a clip, he can click a button on the page that downloads the clip to his computer as a local media file. The clip can then be viewed offline, without requiring access to TVEyes' server, and can be stored permanently in the subscriber's own computer memory. Downloaded clips contain no identifiers, such as watermarks, and can be shared with and accessed by anyone. There is also no "digital rights management" software% that limits access rights, as with some other forms of multimedia.

I believe that TVEyes' downloading function goes well beyond TVEyes' transformative services of searching and indexing. *See New York Times Co., Inc. v. Tasini*, 533 U.S. 483, 498 (2001) (online news database violated authors' distribution rights by selling electronic copies of their articles for download); *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013) ("[A]n electronic file transfer is plainly within the sort of transaction that [the Copyright Act] was intended to reach.") (quoting *London-Sire Records, Inc. v. Doe*, 542 F. Supp. 2d 153, 173-74 (D. Mass. 2008)); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913 (N.D. Cal. 2000) ("Plaintiff persuasively argues that downloading MP3 files does not transform the copyrighted music."); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (concluding that repackaging copyrighted recordings in MP3 format suitable for downloading "adds no 'new aesthetics, new insights and understandings' to the original"). TVEyes is trans-

formative because it allows users to search and monitor television news. Allowing them also to download unlimited clips to keep forever and distribute freely may be an attractive feature but it is not essential. Downloading also is not sufficiently related to the functions that make TVEyes valuable to the public, and poses undue danger to content-owners' copyrights.

TVEyes claims that downloading is “absolutely critical” because it allows for offline use, but very few remaining locations in the United States lack internet connectivity by modem, broadband, or wireless access. *See* Knobel Decl. ¶ 235. TVEyes claims that downloading local files allows users to transfer video clips easily between devices like laptops, tablets, and cell phones, but each of those devices can already access video clips online, almost as easily. *Id.* And TVEyes claims that downloading allows researchers to improve efficiency by organizing related clips into folders, which TVEyes' online Media Center does not allow. *See* Karle Report ¶ 54. But a limitation in TVEyes' user interface is best remedied by improving the user interface; it does not justify creating a path for infringing the copyrights of others.

The downloading function, although convenient, is not integral to TVEyes' transformative purpose. Convenience alone is not ground for finding fair use. *See Am. Geophysical Un. v. Texaco, Inc.*, 60 F.3d 913, 923 (2d Cir. 1994) (rejecting fair use where employees photocopied scientific journals for “personal convenience”); *United States v. ASCAP*, 599 F. Supp. 2d 415, 429 (S.D.N.Y. 2009) (“copyright ... is not designed to afford consumer ... convenience”) (quoting *MP3.Com*, 92 F. Supp. 2d at 352). I decline to find fair use with respect to the downloading function.

iv. Date-Time Search

In addition to searching by keyword, TVEyes subscribers can search by date and time. The user enters the desired channel and the desired start and end date/time (up to a 10-minute window), and TVEyes produces the corresponding transcript and video clip. Date-Time searches constitute about 5.5% of all TVEyes searches.

TVEyes contends that the Date-Time search function is a necessary complement to its keyword search because, often, a keyword search fails to locate the desired video segment. The keyword search function is based largely on closed caption text, TVEyes argues, which makes it highly susceptible to error, particularly with respect to proper nouns and foreign words. For example, when “a customer from Senator Ted Cruz’s staff could not locate an interview with Senator Cruz that aired on FBN, a TVEyes support agent discovered that his name was written as ‘Ted Crews’ in the closed captioning.” 4th Ives Decl. ¶ 22. The problem could be particularly acute for foreign names having variant English transliterations. But Date-Time search does not remedy this problem. True, if the closed-caption transcription misspells a proper noun, the user will be unable to find the matching segment through a keyword search. But neither will the user be able to locate the matching segment through Date-Time search unless he already knows the exact date and time slot the desired program aired. “Date-Time search” is therefore something of a misnomer. The feature is not as much a “search” tool as a content delivery tool for users who already know what they seek. In such cases, TVEyes is not so transformational, since users should be able to procure the desired clip from Fox News or its licensing agents, albeit

for a fee. Put simply, if a user wants to watch the first half of last Thursday's *O'Reilly Factor*, the Court sees no reason why he should not be asked to buy the DVD.

Unlike TVEyes' core business, its "Date-Time search" function duplicates Fox's existing functionality. Fox's contention that TVEyes' Date-Time search is likely to cannibalize Fox News website traffic and sales by its licensing agents is persuasive. TVEyes "bears the burden of showing an absence of 'usurpation' harm" to Fox News. *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111 (2d Cir. 1998). I cannot say that it has carried its burden.

The "Date-Time search" function is not integral to TVEyes' core service and poses unique risks to Fox News' derivative businesses that TVEyes' core business does not. "Date-time search" is not fair use.

CONCLUSION

For the foregoing reasons, TVEyes' archiving function qualifies as fair use, and its downloading and "Date-Time search" functions do not qualify as fair use. Its e-mailing feature can qualify as fair use, but only if TVEyes develops and implements adequate protective measures. The parties shall meet and jointly propose by September 11, 2015, a schedule for TVEyes to propose such protective measures, for Fox to respond, and, should the parties fail to reach agreement regarding the sufficiency of TVEyes' measures, for a joint submission for the Court to resolve any disputed issues. If the parties fail to agree to a schedule by September 11, 2015, they shall appear for a status conference on Friday, September 18, 2015 in Courtroom 14D to discuss their respective difficulties. The parties also shall suggest an appropriate

decree, and advise the Court whether any issue of damages remains.

The motions for leave to file amici curiae briefs (Doc. Nos. 116, 121, 128) are granted. The briefs were read and considered. The Clerk shall mark those motions, terminated.

The Clerk shall also mark the supplemental motions for summary judgment (Doc. Nos. 110, 111), terminated.

SO ORDERED.

Dated: August 25, 2015
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Nov. 6, 2015]

FOX NEWS NETWORK, LLC,

Plaintiff,

-against-

TVEYES, INC.,

Defendant.

**ORDER SETTING
TERMS OF
INJUNCTION**

13 Civ. 5315 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Background

After issuing partial summary judgment on the affirmative defense of fair use on September 9, 2014, I held that the factual record was inadequate to determine whether four TVEyes functions were fair uses of Fox News Programming. After considering further submissions from the parties, I held on August 25, 2015, that

- (1) The archive function is fair use;
- (2) The download function is not fair use;
- (3) The share-by-email function can be fair use if TVEyes develops and implements adequate protective measures, and;
- (4) The search by date and time function is not fair use.

The parties were instructed to provide the Court with a joint submission to propose protective measures, to suggest an appropriate decree, and to advise the Court whether any issue of damages remains.

The parties raise several other issues in their joint submission.

1. Whether Fox News Has Shown That TVEyes' Share-by-email Function is Directly Infringing

First, TVEyes claims that my September 9, 2014 order did not settle the issue of whether TVEyes directly infringed Fox News' copyrights. My order stated, "TVEyes admits also that it copies, verbatim, each of Fox News' registered works. These concessions constitute copyright infringement unless TVEyes shows that its use is fair." Sept. 9, 2014 Order, at 11. Thus, I found that where TVEyes functions went beyond the scope of fair use, its defense failed and direct infringement existed. TVEyes' emailing feature is one aspect of that infringement, for it is using that which it copied without legal justification. That illegal use reflects "volitional conduct." *See e.g., Am. Broad. Companies, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2507 (2014) (finding volitional conduct shown where, "Aereo's system remains inert until a subscriber indicates that she wants to watch a program. Only at that moment, in automatic response to the subscriber's request, does Aereo's system activate an antenna and begin to transmit the requested program."). That TVEyes' infringing and volitional conduct enables others to infringe does not mitigate TVEyes' direct infringement; it exacerbates it. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.* is distinguishable; unlike TVEyes, the defendant in that case did not store the allegedly infringing works on its servers "for a period of more than transitory duration." 536 F.3d 121, 130 (2d Cir. 2008).

2. Proposed Limitations on Social Media Sharing Feature and Share-by-email Feature

A. Whether Order is Advisory

Fox News argues that I should not regulate the limits of TVEyes share-by-email function, for to do so would make my order “advisory.” But, “a decision is not advisory where it concerns facts whose existence is imminent.” *Transcience Corp. v. Big Time Toys, LLC*, 50 F. Supp. 3d 441, 451 n.6 (S.D.N.Y. 2014). An actual controversy exists whether or not the TVEyes share-by-email feature constitutes fair use. My regulation of that fair use is not advisory.

B. Scope of Injunction

TVEyes claims that the injunction to be issued should apply only to the nineteen works that have been identified in this lawsuit. However, as the *Nimmer* treatise states, a permanent injunction “may apply not only to the works as to which infringement has already been adjudicated, but also to any other works currently owned by plaintiff, plus even works that plaintiff may create in the future.” 5 *Nimmer on Copyright* § 14.06[C][2][c]. The injunction will apply to all Fox News content copied. The 19 works were emblematic of all Fox News’ content, for Fox News complains that TVEyes copied and continues to copy all Fox News’ programs, including all copyrighted content, on a 24/7 basis.

C. Proposed Limitations on Sharing and Email Features

The limitations proposed by TVEyes in the joint submission of October 22, 2015 are reasonable and are largely incorporated in the Permanent Injunction and Final Order. TVEyes’ proposed limitations provide

adequate assurance that the “share-by-email” and social media sharing features will be properly limited, within the parameters of fair use. Fox News proposes limitations that would eviscerate the usefulness of the service provided by TVEyes, and would not serve the purpose of copyright law to “promote the Progress of Science and useful arts.” U.S. Const., Art. I, § 8, cl. 8; see *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

The limitations proposed by TVEyes distinguish between different types of sharing, and limit both the number and identity of persons who may receive the clips by email. Limitations on the number of times a recipient may play the video is not necessary. In the course of fair use, even an outside recipient may see fit to view the video more than ten times, the limit proposed in the spirit of cooperation by TVEyes. Likewise, the expiration of emailed clips 32 days after the email is unnecessary. Fair use does not expire after a certain number of days, and so long as the content is stored on TVEyes servers, its subscribers may share the clips by email, and the recipients may view them. Neither of these proposed limitations, which were suggested by Fox News and agreed to in less stringent form by TVEyes, are relevant as to whether or not the share by email feature falls within fair use. The limitations proposed by TVEyes and adopted in the Final Order and Injunction will sufficiently prevent the kind of indiscriminate and widespread sharing that would be beyond the bounds of fair use and that could “result in substantially adverse impact on the potential market ...” for FNC or FBN content. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

While TVEyes consented to additional limitations relating to accessing their system, those constraints do

not relate to the issues of fair use or the share by email function, have not been litigated before this court, and may give rise to issues that may unduly burden the Court. They are not included in the Court's decree.

3. Redactions

I have reviewed the parties' motion to file with redactions and I find the parties' proposed redactions overbroad. The proposed redactions on pages 20-27 and 43-52 are acceptable. All other proposed redactions are denied. The issues posed by this case are important, and the public deserves as full a record as possible of its proceedings. *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995).

Conclusion

All issues of liability having been decided, the parties, by November 27, 2015, shall jointly submit a delineation of any issues of damages that remain.

SO ORDERED.

Dated: November 6, 2015
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Nov. 6, 2015]

FOX NEWS NETWORK, LLC, Plaintiff, -against- TVEYES, INC., Defendant.	13 Civ. 5315 (AKH) ECF CASE
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**PERMANENT INJUNCTION
AND FINAL ORDER**

ALVIN HELLERSTEIN, U.S.D.J.:

WHEREAS, Fox News Network, LLC (“Fox News”) filed suit against TVEyes, Inc. (“TVEyes”), alleging *inter alia*, that “TVEyes has engaged, and continues to engage, in a pattern and practice of knowingly, intentionally and willfully infringing Fox News’s copyrights in its programming and content.” (Compl. ¶ 5);

WHEREAS, TVEyes denied the allegations of the complaint, and moved for summary judgment on the affirmative defense of fair use;

WHEREAS, on September 9, 2014, this Court issued a summary judgment opinion finding that the TVEyes core media monitoring service, including its service of providing to its subscribers a database of “television clips and snippets of transcript are transformative and thus constitute fair use, protecting it from claims of copyright infringement.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 400 (S.D.N.Y. 2014).

However, the Court reserved judgment as to whether four features of the service so qualified. *Id.*;

WHEREAS, after further hearing, on August 25, 2015, this Court issued an order holding that:

- (a) The feature of TVEyes' service that enables users to "archive" the clip to the subscriber's "Media Center" is fair use;
- (b) The feature of TVEyes' service that enables users to download, to their own computers, video clips does not constitute fair use;
- (c) The feature of TVEyes' service that enables users to search for and view television content by the date, time, and channel on which a program aired does not constitute fair use;
- (d) The feature of TVEyes' service that permits users to share content by emailing video clips to others can constitute fair use, but only if TVEyes develops and implements adequate protective measures. Opinion and Order Regulating Issues of Fair Use and Granting Cross Motions for Summary Judgment, *Fox News Network, LLC v. TVEyes, Inc.*, 13 Civ. 5315 (S.D.N.Y. Aug. 25, 2015), ECF No. 173.

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Permanent Injunction: TVEyes, and its officers, directors, servants, employees, agents, licensees, representatives, successors, assigns, attorneys and all others in active concert or participation with it, are permanently enjoined from:

- (a) Enabling users to download to their own computers video clips of content telecast on

the Fox News Channel (“FNC”) or Fox Business Network (“FBN”)

- (b) Enabling users to view FNC or FBN content by searching by date, time, and channel;
- (c) Enabling users from sharing video clips of FNC or FBN content on social media websites rather than by personally directed emails, and shall implement the limiting and blocking features described in paragraph 8, below;

2. Limitation on Number of Outside Recipients: TVEyes shall limit receipt of any given FNC or FBN clip to 5 recipients outside of a subscriber’s organization’s email domain (or other domains or sub-domains identified in good faith by the subscriber as being part of their organization when they sign up for the service). TVEyes will not allow clients to list Gmail or other widely used email providers as the domain name associated with their organization.

3. Authentication of Recipient Email Address: A recipient of a link to an FNC or FBN clip sent via the TVEyes email feature who is outside the TVEyes clients’ organization will be required to enter her own email address into a box on the screen before the clip will play. If the email address entered does not match the email address entered by the TVEyes client who sent the email, the clip will not play.

4. Clear and Conspicuous Sender Notification: Before a TVEyes client sends a link to an FNC or FBN clip outside of her organization via the TVEyes email feature, she will be presented with a prominent notification on her screen that indicates that (1) the content is protected by copyright law and may only be

used for the purpose of conducting research and analysis consistent with principles of fair use; (2) TVEyes has not licensed the content from FNC or FBN; (3) TVEyes' subscribers are not licensed to the content, and may not reproduce, distribute, or create new works, or display or perform the clips. The notification will include a box that the sender must click, indicating that she has read and understands the foregoing before she is permitted to email the clip.

5. Clear and Conspicuous Recipient Notification: When a recipient of an email sent via TVEyes' email feature containing a link to an FNC or FBN clip clicks on that link to view the clip, she will be presented with a prominent notification on her screen that indicates that (1) the content is protected by copyright law and may only be used for the purpose of conducting research and analysis consistent with principles of fair use; (2) TVEyes has not licensed the content from FNC or FBN; (3) TVEyes' subscribers are not licensed to the content, and may not reproduce, distribute, or create new works, or display or perform the clips. The notification will include a box that the recipient must click, indicating that she has read and understands the foregoing before she is permitted to email the clip.

6. Blocking Social Media Sharing: TVEyes shall implement a blocking feature that will prevent links to FNC or FBN clips stored on any servers owned or leased by TVEyes from playing when they are accessed from links posted to the major social sharing services on the internet, as identified by Alexa.com or a similar web analytics listing service. TVEyes will also block plays linked from domain names associated with the blocked sites (such as "url shorteners") to ensure that its list of blocked domains remains comprehensive.

Examples of such social media sites include: twitter.com; t.co (Twitter's URL shortener); facebook.com; fb.me (Facebook's URL shortener); linkedin.com; pinterest.com; plus.google.com; tumblr.com; vine.co; snapchat.com; hubs.ly (Hubspot, a social media posting system); bit.ly (Bitly, a social media posting system); buff.ly (Buffer, a social media posting system); and reddit.com.

7. Notice and Cure: In the event that during the first year after the Effective Date of this Order uses of FNC and FBC content are considered by Plaintiffs to violate this Order, Fox News shall notify TVEyes and the parties will cooperate to speedily resolve the matter in a manner consistent with this Order. Failing prompt resolution, either party may bring the issue to the attention of the Court for the Court's resolution.

8. Continuing Jurisdiction: Jurisdiction is retained by the Court to enforce compliance with, and consider all issues arising from, or in connection with this Permanent Injunction.

9. Effective Date: This order shall be effective December 14, 2015, and any further date ordered by this Court or the Court of Appeals incident to any appeal from this order.

SO ORDERED this 6 day of
November, 2015

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

105a

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 14, 2018]

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

v.

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

Docket Nos. 15-3885(L), 15-3886(XAP)

ORDER

Appellant-Cross-Appellee, TVEyes, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk