

No. 18-321

In the Supreme Court of the United States

TVEYES, INC.,

Petitioner,

v.

FOX NEWS NETWORK, LLC,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Copyright Act provides that “the fair use of a copyrighted work . . . is not an infringement of copyright.” 17 U.S.C. § 107. In determining whether a use is fair, courts consider a non-exclusive list of four, fact-intensive factors. *Id.* TVEyes, Inc. (“TVEyes”) copies all of the content from Fox News Network, LLC’s (“Fox”) channels “24 hours a day, every day,” App. 4a, and makes that content available for a fee to its subscribers so that they can watch, download, edit, archive, and further distribute that content on social media without a license from Fox.

Does a service that copies and distributes all of a copyright holder’s content in exchange for subscriber fees constitute fair use?

CORPORATE DISCLOSURE STATEMENT

Respondent in this Court, plaintiff-appellee-cross-appellant below, is Fox News Network, LLC. It is wholly owned by Fox Television Stations, Inc., which is ultimately wholly owned by Twenty-First Century Fox, Inc., a publicly traded company.

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INTRODUCTION

TVEyes' petition should be denied for the simple reason that the opinion below is a straightforward application of copyright law that does not implicate a split in the circuits, involve an important unsettled question of federal law, or otherwise raise a cert-worthy issue. Indeed, the Second Circuit's careful balancing of the four-factor fair use test was an inherently fact-bound exercise, and TVEyes' narrow disagreement with the court's finding as to one of those four factors does not begin to warrant this Court's attention.

TVEyes is in the business of delivering unlimited, unauthorized, unredacted, lengthy, seriatim high quality video clips of copyrighted content to paying subscribers. TVEyes copies everything on television and redistributes that content to its subscribers. TVEyes provides its subscribers, who do not even have to have a cable subscription, with a variety of "Content-Delivery Features" that let them watch, download, archive, edit, and redistribute television content. In short, as the Second Circuit summarized, "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." App. 13a.

Based on these specific facts, the Second Circuit had little trouble concluding that TVEyes' copying and distribution of Fox's copyrighted content for money is not a fair use. The Second Circuit acknowledged that there is a distinction between services that *find* authorized content and services that *deliver* unauthorized content. That conclusion is readily supported by TVEyes' own marketing materials, which expressly tout its service as a substitute for television services, both traditional and digital:

- “Watch live TV, 24/7”;
- “Play,” “edit,” and “download unlimited clips’ of television programming in high definition”;
- “[E]mail 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
- “Post clips on Facebook, YouTube, and Twitter on an **unlimited basis!**”

Faced with this holding, TVEyes asks the Court to review the decision below as to just one factor: the “effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). TVEyes does not suggest that the Second Circuit’s fact-intensive analysis of that factor conflicts with any decision from any other circuit. Instead, it claims only that the decision below is inconsistent with this

Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) in two ways. That claim is wrong as a matter of both law and fact.

First, TVEyes claims that the Second Circuit incorrectly applied a presumption that TVEyes' service must be harmful to Fox because TVEyes makes money off of its services. But that is simply not what the Second Circuit did. Instead, the Second Circuit grounded its conclusion that the fourth factor weighed against a finding of fair use based on the considerable evidence before it that TVEyes' undiluted distribution of lengthy video clips causes harm to the market for and value of Fox's content. In short, the court did not presume, but rather held, based on the factual record before it, that TVEyes' service is harmful to Fox, rendering any dispute about the propriety of such a presumption irrelevant.

Second, TVEyes claims that *Campbell* compels the conclusion that a copyright owner cannot preempt exploitation of "a market that enables criticism or commentary on its works." Pet. 17. That is wrong as a matter of law, but once again also irrelevant. While TVEyes repeatedly attempts to clothe itself in the mantle of media criticism, TVEyes itself does not criticize or comment on Fox's content. Instead, TVEyes' real claim is that its service enables its *subscribers* to provide such commentary. But that claim is belied by factual findings—findings that TVEyes does not contest—that this is not the principal purpose to which TVEyes' service is put. Instead, TVEyes' service was clearly designed for, and

marketed to, PR and communications professionals. And in all events, *Campbell* did not involve markets that “enable” criticism or commentary, but rather involved the criticism or commentary itself. TVEyes’ claim that it “enables” such criticism by third parties thus not only is belied by the record, but would not bring its service within the bounds of *Campbell* anyway.

For largely the same reason, TVEyes’ insistence that this case is important to the continued ability to criticize the media is sorely misplaced. The Second Circuit’s holding does not concern political dialogue, commentary, criticism, or the First Amendment; it concerns the unauthorized distribution of copyrighted content. As the Second Circuit recognized, criticism of the media is alive and well, and is in no way dependent on TVEyes’ efforts to profit from copying and distributing the media’s copyrighted content. Indeed, it is TVEyes that poses the real threat to First Amendment values, as depriving the media of its entitled copyright protection will serve to dampen public discourse by hindering the viability of media services that depend on receiving fees for their content.

In short, TVEyes seeks nothing more than splitless, factbound error correction of a decision that is eminently correct. Accordingly, Fox respectfully requests that the petition be denied.

STATEMENT OF THE CASE

A. Television Industry

Television news organizations play “a critical role in our society,” as admitted by TVEyes’ own expert. C.A. 2238 (¶192).¹ They perform the “vital public service” of “being a ‘watchdog’ on the government and many other institutions.” C.A. 1861-1938 (¶¶6, 179). The Fourth Estate, however, is in a time of transition and crisis. “[F]ewer people are watching news on television, and more people are watching news online and through social media.” C.A. 1874 (¶33). Younger consumers “do not watch traditional television,” C.A. 2676 (40:13-22), 2827 (¶4); rather, they focus on mobile content, or “content in small, easily digestible segments.” C.A. 1875-1876 (¶36).

This jeopardizes newsgathering’s financial model, C.A. 1938-1939 (¶180), resulting in news organizations cutting back on their coverage. C.A. 197-218 (¶¶99-11, 45), 1941-1942 (¶189). The audience for network evening news broadcasts has shrunk from 52 million in 1980 to 22 million in 2013, resulting in bureau closures, staff layoffs, and less coverage. C.A. 198 (¶11). Some cable news channels have even stopped covering breaking news. C.A. 217-218 (¶45).

At this critical inflection point, monetizing digital content—especially short clips—has become, as

¹ The Joint Appendix filed below with the court of appeals is indicated as “C.A.”

TVEyes' own expert admitted, "essential." C.A. 2684 (63:12-22). "[I]f one wants to make money in news and support a news organization, one should deliver it" digitally. C.A. 2685 (65:4-9).

Consequently, to support their important newsgathering and reporting efforts, television channels distribute and monetize their content in "increasingly extensive and diverse" ways. C.A. 2827 (¶4); App. 43a. "Every television news organization has a website on which it posts its video clips and other content," from which it earns advertising revenue. C.A. 1879-1880 (¶47). Similarly, they earn revenue from the sale and licensing of video clips. C.A. 1877 (¶40). Licensees use clips for diverse purposes, such as internal use, company presentations, social media posts, and web-based advertising. C.A. 2827-2834 (¶¶4, 11-15). Fox is no different and, as explained below, makes "all of its content available to the public digitally." C.A. 1963 (¶238).

First, Fox distributes all of its telecasts on its authenticated online-viewing platform, TVEverywhere. Through this service, "live online streams of FNC and FBN are available to viewers with cable or satellite subscriptions ... for authenticated streaming," App. 77a, on any computer or mobile device. C.A. 221-222 (¶9), 96 (¶29). Fox also is considering expanding the service to include "past episodes of its previously-aired television programs." C.A. 1881 (¶52).

Second, Fox makes its television content available on its website.² From the nineteen works asserted in this litigation (the “Works”), Fox created 70 video clips, which were and are available on its website. C.A. 222-223 (¶¶12-14). Fox’s online clips are used for myriad purposes by users, including for their informative or promotional value, and to criticize and comment on Fox and its coverage. C.A. 2792 (¶¶9-10), 2793-2824. Once video clips are posted to Fox’s website, visitors can “copy and paste URLs of specific clips,” share them “on social media platforms”, or embed Fox’s video player on third-party websites or in offline files, such as Word documents or PowerPoint presentations. App. 43a-44a; C.A. 223-224 (¶16). Fox encourages sharing of its clips, as they direct viewers back to its website, thereby increasing its website traffic.³ C.A. 223-224 (¶16), 2595 (¶14).

Third, Fox “licenses third party websites, including Yahoo!, Hulu, and YouTube, to store and show video clips of segments of its program on their websites,” App. 44a; C.A. 225 (¶20). These “syndication partners” are licensed to display clips from the Works. C.A. 225 (¶20). Fox also licenses its content for over-the-top delivery (*i.e.*, Fox’s content is available to anyone who purchases a subscription

² Every day, Fox makes available, shortly after airing, a percentage of previously-aired content for free as video clips on its website that are then stored in the website archives. C.A. 223 (¶13), 2592-2593 (¶7).

³ By making its content available on its website, Fox earns revenue from both pre-roll and banner advertising.

with an “OTT” service, even if she does not pay for cable television). C.A. 2603 (¶¶26-27); C.A. 2672 (22:20-23).

Fourth, Fox licenses the distribution of its “video clips through its exclusive clip-licensing agent, ITN Source, Ltd. (“ITN Source”) and Executive Interviews. App. 44a; C.A. 225-226 (¶¶21-24). These services distribute and license Fox clips to innumerable entities, including “multinational corporations, small boutique and regional companies, nonprofit organizations, and government entities,” App. 44a; C.A. 131 (¶26), “journalists and politicians,” App. 77a, and public relations and advertising firms. C.A. 126-132 (¶¶7, 27), 135-172, 175-180 (¶¶8, 20). As ITN Source’s Managing Director explained, these clips are then licensed “for a variety of uses, including ... internal corporate (such as on a company Intranet) ... and nonbroadcast (such as promotional display, internal review, and educational).” C.A. 126-132 (¶¶7, 26-27). Clips also are licensed for “digital archive[s].” App. 44a.

Fifth, television networks often license their content to media monitoring and clipping services. For instance, TVEyes licenses the rights to copy, reproduce, distribute, and display television programming from certain television networks. C.A. 646, 437-439 (96:21-98:3), 605-615 (§§A.1, B.2), 560-561 (§§1.1, 5.1). Likewise, “CNN, HLN and ABC News have chosen Critical Mention,” a similar company, to license their content, and ITN’s content is licensed to others. C.A. 132-133 (¶¶29-30).

B. TVEyes' Media Clipping Service

“TVEyes is a for-profit company with revenue of more than \$8 million in 2013.” App. 41a. It is—and markets itself as—a “clipping service.” C.A. 642. TVEyes pitches that it is better than “a traditional clipping service” that charges per-clip, because the Content-Delivery Features provide unlimited clips for one comparatively low fee in an all you could eat fashion. C.A. 620.

In advertising and describing its service, TVEyes states that, in exchange for \$500 a month, Pet. 8, users can:

- “[W]atch live TV, 24/7,” as well as “play,” “edit,” and “download unlimited clips’ of television programming in high definition” to “their hard drive or to a compact disk.” App. 41a-42a.
- The TVEyes User Manual states that TVEyes “allows you to watch live-streams of everything we are recording.” *Id.*
- TVEyes also highlights that subscribers can “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.’” *Id.*
- TVEyes’ sales team regularly contacts potential clients that appear on Fox’s channels and promotes the Content-Delivery Features by touting the ability to “save clips for use on

Facebook, YouTube, and Twitter.” C.A. 492-494 (RFAs 137, 139, 141), 1991.1, 1993-1996.

- In communications with potential customers, TVEyes states, “You can then use the clips in your Public Awareness campaigns! ... Post clips on Facebook, YouTube, and Twitter on an **unlimited basis!**” C.A. 1997.
- TVEyes’ employees actively assist customers in posting clips online. C.A. 1890-1892 (¶74).
- As stated by TVEyes’ Vice President of Global Sales, “You can email this clip to unlimited recipients, they can view it unlimited times. ***TVEyes clips are viral, like YouTube!***” C.A. 2000 (emphasis added).

1. TVEyes’ Illicit Access to Television Content

TVEyes records “more than 1,400 television and radio stations, twenty-four hours a day, seven days a week,” including Fox’s channels. App. 37a. These channels are from wide-ranging genres, including news, business, sports, entertainment, education, and local stations. C.A. 2699-2752.

TVEyes acquires that content by fraudulently purchasing standard cable and satellite subscriptions as if it were a private individual. C.A. 3028-3029 (¶10). It acquires Fox’s content from Comcast, Cablevision, and ImOn, C.A. 383, each of which

“contractually prohibits the copying and redistribution of television content.” C.A. 1916-1917 (¶116), 648-658, 663 (¶12). By surreptitiously copying and redistributing Fox’s content, TVEyes violates those provisions. C.A. 1916-1917 (¶116).⁴

2. TVEyes’ Content-Delivery Features

TVEyes offers Content-Delivery Features that do not “blacklist any material.” C.A. 433 (319:17-18). Instead, TVEyes copies all television content verbatim in its entirety and makes everything available to its paying subscribers. C.A. 69-73 (¶¶1, 30, 33, 37); App. 37a.

TVEyes also offers a separate, keyword-searchable Index that is used to generate word counts and analytics data. C.A. 383; App. 7a. To operate, the “Index” copies closed-captioning text that television networks create at great expense. App. 37a; Pet. 7.

The Index and Content-Delivery Features are independent offerings, and TVEyes can offer one without offering the other. Indeed, TVEyes’ Chief Technology Officer admitted that providing the Index does not require copying or redistributing audiovisual

⁴ DIRECTV sued TVEyes for obtaining DIRECTV’s services under false pretenses and violated its contract. C.A. 3028-3029 (¶10), 3044-3054. The case settled for undisclosed terms and the issuance of an injunction prohibiting TVEyes from using DIRECTV’s services. Orders (Dkt.41-42), *DIRECTV, LLC v. TVEyes, Inc.*, No. 2:15-CV-04364 (C.D. Cal.).

content. C.A. 1653-1658 (69:6-9, 69:22-70:19, 97:4-6, 324:13-17).

The Content-Delivery Features include the following capabilities.

First, watching. TVEyes distributes video clips for watching on its website multiple ways, all of which provide a 10-minute clip to the subscriber, which can be paused, rewound, and fast-forwarded. TVEyes' users have employed this feature to watch entire episodes of programs like *Brooklyn 99*, *Good Morning America*, *The Today Show*, *Extra*, and *Entertainment Tonight*. C.A. 1976 (§268), 669 (§7). Subscribers can “[p]lay unlimited clips” of this recorded content in 10-minute segments. C.A. 619, 624, 629. Critically, TVEyes does not limit the “ability to watch as many consecutive ten-minute segments as [subscribers] wish,” C.A. 442-443 (45:23-46:16).

Second, downloading. Once a clip is identified, a TVEyes user can “download[] 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.” App. 90a. Downloading (like all Content-Delivery Features) only takes “a few keystrokes.” C.A. 1886 (§§64-65). TVEyes admits that it “markets the availability of high quality video clip downloads to its subscribers,” C.A. 2657 (76:16-21), and that an “**unlimited number of digital clips**” may be downloaded for a flat subscription fee. C.A. 528. In other words, a subscriber can download any amount of content for any purpose.

Third, archiving. TVEyes also allows and encourages users to “create an archive of their clips,” C.A. 447 (58:9-12), in a “personal digital library on TVEyes’ server.” App. 75a. Archived video clips can be watched and downloaded in perpetuity as TVEyes provides “unlimited storage” and never deletes them, even if a subscriber terminates its account. C.A. 1920-1921 (¶126); App. 75a-76a.

Whether downloaded or archived (and then downloaded), TVEyes distributes unlimited, consecutive, “high-definition” video clips of up to 10-minutes per clip with no blackouts. C.A. 525. Due to the clips’ length, TVEyes’ CEO admitted that “download[ing] an entire news story” is “absolutely a capability.” C.A. 445 (54:17-20). Further, TVEyes adds “no identifiers” to its clips (whether downloaded or otherwise), “such as watermarks,” and the clips “can be shared with and accessed by anyone.” App. 90a; C.A. 447-448 (58:25-59:22), 424 (264:2-4). Downloaded videos do not contain copyright notices, C.A. 449 (61:4-7), or metadata or date/time codes. C.A. 1887-1889 (¶¶67-71). “There is also no ‘digital rights management’ software that limits access rights” App. 90a. Indeed, “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.” App. 76a.

Fourth, redistribution. The Content-Delivery Features are not limited to TVEyes subscribers or “authorized users.” App. 76a. Links to video clips can be shared “with others by e-mail, allowing the

recipients of the link to view the video clip on TVEyes' server through their web browsers," *id.*, without TVEyes login credentials. App. 87a. URL links also can be shared without using e-mail "through any medium that allows transmission of text," App. 87a, including "social media services, such as Facebook or Twitter," App. 76a n.3, or "instant messaging." App. 87a. "When a recipient clicks on the hyperlink, the viewer is directed to TVEyes' website, and can watch the video content in high-definition." App. 40a.

TVEyes actively encourages "users to ... publicly distribute content," C.A. 1885 (¶62), including advertising the ability to email and post an "unlimited number of clips." *See Supra* 9. For example, the TVEyes Fact Sheet touts the Content-Delivery Features as "perfect for Twitter campaigns and real time sharing," as well as for "an 'exit package' for your clients." C.A. 531-532. Similarly, once clips are downloaded, TVEyes recommends that subscribers "share it, burn it onto a disc, or post [it] on YouTube." C.A. 533-534.

In April 2015, Fox's journalism expert Dr. Knobel conducted a search for examples of such redistribution. In that snapshot search alone, on one day, she identified 140,000 links to TVEyes-created video clips posted on the Internet.⁵ C.A. 2837-2844 (¶¶19, 24). These include examples of companies

⁵ Dr. Knobel's search underrepresents the number of links because it does not reflect links posted and removed prior to or posted after the search. C.A. 2836-2838 (¶¶18-20).

using TVEyes-created clips for promotional purposes, including (a) Caffebene, a coffeehouse chain, promoting itself on Facebook using a *Fox & Friends* clip; (b) Sparkly Soul, a fitness headband supplier, posting a TVEyes link on its website to a “shout out” on *Good Morning San Diego*; (c) Interactive Toy Concepts, a toy company, using a TVEyes-created clip of FNC featuring its toy on Facebook; and (d) Dairy Queen posting to its website a clip from *Conan* featuring its company:



Caffebene USA shared a link.
September 29 · Edited



Happy National Coffee Day!! We got the chance to hang out this morning with Fox News and brighten their day with Latte Art Selfies of the Fox & Friends crew!!!

News clip link:

<http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=b4cbf25c-46be-45c2-a418-22b9bb76ca05>

Good Morning San Diego - May 2014

Thanks for the Sparkly Soul Headband shout out Allie Wagner on KUSI News Good Morning San Diego:

<http://mediacenter.tveyes.com/downloadgateway.aspx?>

UserID=187222&MDID=3647467&MDSeed=1130&Type=Media

ublog.com/media/

Rock 'n' Roll San Diego Marathon & 1/2 Marathon



Interactive Toy Concepts Ltd. · 223 like this

November 30, 2012 at 10:28am · 🌐

Special thank you to our friend Jackie for being so great! Check out our WiSpi Ir am. http://s3.amazonaws.com/TVEyesMediaCenter/UserContent/206458/135121/FNC_11-30-2012_05.51.19.mp4

DQ on Conan

Aug. 9, 2012

<http://mms.tveyes.com/Transcript.asp?StationID=3525&DateTime=8%2F10%2F2012+1%2FTerm=Dairy+Queen&PlayClip=TRUE>

C.A. 1902-1903 (§81). Moreover, Dr. Knobel identified over 3,500 Tweets posted in one year that were still available on Twitter linking to TVEyes-created clips, including:



Beef Jerky Outlet
@JerkyStore

Follow

Check it out! Our friends at FOX News trying some of our tasty beef and exotic jerky flavors this weekend: bit.ly/1yrkb9x

👍 🔄 ⭐ ⋮

FAVORITE

1

1:15 PM - 10 Nov 2014



C.A. 2838-2844 (¶¶21-24). Notably, these links direct the viewer back to TVEyes' website, rather than to the content owner's website. C.A. 2674 (27:8-10).

In addition to public posting, TVEyes-created clips have been distributed via e-mail, websites that prohibit inclusion in Google's search results (such as company intranets and websites employing the Robots Exclusion Protocol), and using downloaded clips (which are untraceable).⁶ C.A. 2836-2838 (¶¶18-20).

3. TVEyes' Subscribers

The percentage of subscribers to TVEyes' service which constitute journalism or research organizations is not as TVEyes suggests.⁷ Regardless of the subscribing entity, TVEyes' users are often public

⁶ Non-public facing redistribution of TVEyes-created clips is hard to detect because Internet search results do not include it and TVEyes does not make the clips identifiable. *See supra* 14.

⁷ The percentage of TVEyes' subscribers which are for-profit corporations, and journalism organizations, has been omitted because TVEyes deems those figures confidential. C.A. 2846-2847 (¶29).

relations and communications professionals. Additionally, at non-PR companies, TVEyes subscriptions often were purchased by or for their **PR teams**. C.A. 2847-2850 (¶¶30-36). For example, although TVEyes claims use by governmental organizations, at the White House, it was the public communications team that used TVEyes. C.A. 2243-2245, 2848-2849 (¶33). Indeed, of the active TVEyes subscribers referenced in the district court's 2014 opinion, App. 41a, **every** subscription was purchased by a PR team. C.A. 2849-2850 (¶¶35-36).

These findings are consistent with TVEyes' advertising of the Content-Delivery Features. A TVEyes Fact Sheet explains that all of the service's "primary uses" are for PR and other business-related purposes, such as "Social Media Campaigns" and "Exit Packages for Clients." C.A. 531-532. **None** of the primary uses mention scholarship, criticism, or commentary. *Id.*

4. The Content-Delivery Features Are Not Limited to Internal Research and Analysis

TVEyes absurdly asserts that it limits use of its service to "internal research purposes." Pet. 8. TVEyes' marketing materials show that the Content-Delivery Features are designed for external, promotional use, *see supra* 9, resulting in substantial Internet and social media distribution. *See supra* 11. Clearly, TVEyes' subscribers do not believe their use is limited in this way.

Moreover, TVEyes' CEO admits that TVEyes' definition of "internal" encompasses obvious external public use, such as "a PR firm sharing a video with one of its clients." C.A. 2163-2169 (198:5-9, 205:20-206:2).

5. Other Sources of Television Content

While TVEyes portrays itself as unique, Pet. 8, there are numerous other ways to obtain television content.⁸ **First**, telecasts can be recorded using DVRs or more sophisticated recording technology. C.A. 1963-1964 (¶¶240-241). For example, Volicon offers a product that "captures content directly from a cable or satellite transmission and indexes it, which allows users to search for content using closed captioning, review it, and create video clips from it." C.A. 1964-1965 (¶243). Unlike TVEyes, however, customers must have an MVPD subscription entitling them to access television programming before. C.A. 1966 (¶246).

Second, under 17 U.S.C. §108(a), Congress sanctioned archives and libraries to reproduce and distribute copies of news programs for noncommercial purposes under certain circumstances. As TVEyes' own *amici* admit, at 11, there are a number of libraries and organizations that make use of this provision.

⁸ The availability of these alternate resources rebuts the claims of TVEyes' sole amicus brief that TVEyes is necessary to criticize the media.

For example, the Internet Archive created the TV News Archive to collect, preserve, and provide television news reports to the public. C.A. 1966 (§247). Using the Archive, users can search for telecasts by keyword and watch video clips:

The screenshot displays the TV News Archive search interface. At the top, the search bar contains the text "suspicious package". Below the search bar, the results are summarized as "Search Results 0 to 49 of about 76 (some duplicates have been removed)". A navigation bar shows "First", "1", "2", and "Last". On the left side, there is a section titled "About your Search" with a bar chart showing search frequency from 2009 to 2016. Below the chart is a list of "SHOW" results, including "Charlie Rose 6", "HLN News 5", "MSNBC News Live 5", "Special Report With Bret Baier 4", "CNN Newsroom 3", "9News Now at 5pm 2", "9News Now at 6am 2", "9News Now at 6pm 2", "Anderson Cooper 360 2", "CNN Saturday Morning 2", "Eyewitness News at 4 2", "FOX Report 2", "Fox 5 News at Ten 2", and "Greta Van Susteren 2". The main content area shows three video thumbnails. The first thumbnail is from "America Live FOX News May 7, 2010 1:00pm EDT" and shows a news anchor with a "BREAKING NEWS" banner that reads "OFFICIAL: OIL CONTAINMENT BOUZOPHOS ABOVE LEAK". The second thumbnail is from "MSNBC News Live MSNBC May 7, 2010 2:00pm EDT" and shows a news anchor with a "BREAKING NEWS" banner that reads "OFFICIAL: SECURITY PACKAGE DISCOVERED IN WASHINGTON". The third thumbnail is from "Andrea Mitchell Reports MSNBC May 7, 2010 1:00pm EDT" and shows a news anchor with a "BREAKING NEWS" banner that reads "OFFICIAL: SECURITY PACKAGE DISCOVERED IN WASHINGTON". Below the thumbnails, there is a list of search results with snippets of text, including "shut down due to a suspicious package", "reports of a suspicious package", "this is being contained to fox by mps: reports of a suspicious package in times square, nypd not confirming", "suspect soon apprehended, these kinds of suspicious packages found in greece and europe, and your government not having an election result, would this have any impact on security", and "and this breaking satist times square times sq announced because of package and he told th and evacuation of time".

C.A. 3038 (§23), 3086.

Unlike TVEyes' Content-Delivery Features, the Archive's clips are only "60-second segments" and cannot be downloaded. C.A. 1868-1967 (§§19, 248). If someone wants a full program, the Archive will provide a DVD, but it must be returned within 30 days. C.A. 1868-1967 (§§19, 248). And copyright notices appear both on its website and the DVDs. *Id.*

Similarly, Vanderbilt University has maintained a Television News Archive since 1968, which was established "to capture and index television news broadcasts to make them available to researchers and to preserve them for posterity." C.A. 1969-1972

(¶¶253-260). The Vanderbilt archive permits users to borrow DVDs of television programs. *Id.*

C. The Second Circuit's Decision

On cross-appeals under 28 U.S.C. 1292(a)(1), the Second Circuit held that TVEyes' Content-Delivery Features are not a fair use. In balancing the four factors, the court held that "TVEyes is unlawfully profiting off the work of others by commercially redistributing all of that work that a viewer wishes to see, without payment or license. Having weighed the required factors, we conclude that the balance strongly favors Fox and defeats the defense of fair use." App. 16a. The court ordered the district court to enjoin TVEyes' from offering the Content-Delivery Features in accordance with its opinion. App. 18a.

REASONS TO DENY THE PETITION

This case does not come close to satisfying any of the Court's traditional criteria for certiorari. TVEyes does not even try to identify a circuit split, and for good reason, as there is none. Nor could there be, as this case involves nothing more than an exceedingly factbound application of well-settled law concerning fair use. Instead, TVEyes simply argues that the decision below is wrong. But this Court does not grant requests for mere error correction, and in any event, there is no error here to correct. To the contrary, the decision below faithfully and correctly applied this Court's precedents to conclude that TVEyes' service of delivering unlimited, unauthorized, unredacted,

lengthy, seriatim high quality video clips to paying subscribers is anything but a fair use of Fox’s copyrighted content.

Implicitly recognizing as much, TVEyes tries to change the topic, suggesting that its paid subscription service is essential to ensure that media outlets remain “the subject of legitimate research and criticism.” Pet. 3. But this case is about copyright law, not criticism of Fox. TVEyes has made no showing that, absent its Content-Delivery Features, the public would not be able to comment on Fox. Nor could it, as Fox is the subject of positive and negative commentary all the time, and its content is available in myriad ways—often for free. *See supra* 5. And Fox is not alone in this, as its business model is shared across the television industry.

What this case really is about is a service that “makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear,” App. 12a, in “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.” App. 13a. These factual findings, which TVEyes does not challenge, readily support the Second Circuit’s conclusion that TVEyes paid subscription service is not a fair use.

Indeed, there is no question that TVEyes’ Content-Delivery Features wreak havoc with the potential

markets for and value of Fox’s Works, as well as the other television programming that TVEyes copies and redistributes. While TVEyes’ petition creates a false dichotomy with copyright law and copyright holders on one side, and the First Amendment and the public on the other, Pet. 14, this Court repeatedly has rebuffed such arguments. As explained in *Golan v. Holder*, the Framers “saw copyright as an ‘engine of free expression.’” 565 U.S. 302, 328 (2012) (quoting *Harper & Row, Pub’s, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985)). “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas,” *id.*, thereby “promot[ing] . . . free expression.” *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003) (copyright is “compatible with free speech principles”).

The Second Circuit recognized that TVEyes’ Content-Delivery Features threaten the market that the Framers sought to protect. While TVEyes attacks the Second Circuit’s reasoning, as discussed below, each of its arguments fail and, critically, TVEyes has not identified any split among the circuits with regard to the question presented. The decision below does not merit review.

I. TVEYES DOES NOT EVEN ATTEMPT TO IDENTIFY A CIRCUIT SPLIT

TVEyes does not claim that there is any disagreement among the circuits regarding the question presented. That is because the law concerning the fourth fair use factor—“the effect of the

use upon the potential market for or value of the copyrighted work,” 17 U.S.C. §107(4)—is well-settled.

The fair use analysis is an inherently fact-intensive inquiry, with each factor requiring the precise application of law to fact. The Second Circuit provided such an application in this case when it held that TVEyes’ Content-Delivery Features were not a fair use when the four fair use factors were considered together. As to the **first fair use factor** (the “purpose and character of the use”), the Second Circuit held that it “slightly” favored TVEyes, but specifically held that any transformative use was “modest” because TVEyes “essentially republishes [Fox’s] content unaltered from its original form, with no ‘new expression, meaning, or message.’” App. 11a (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014)). It also found TVEyes’ use commercial, which is another prong of the first fair use factor. *Id.* As to the **second fair use factor** (the “nature of the copyrighted work”), it rejected TVEyes’ argument that Fox’s telecasts’ factual nature meant they could be “freely cop[ied] and re-disseminate[d].” App. 12a. As to the **third fair use factor** (the “amount and substantiality of the portion used in relation to the copyrighted work as a whole”), it held that the factor “clearly favors Fox because TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.” *Id.* The Second Circuit specifically contrasted TVEyes’ service with the Google Books service, noting that Google designed its service to ensure that the entirety of books, or shorter form works, were not made available to users.

Id. Moreover, it noted that “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.” App. 13a.⁹

TVEyes’ question presented focuses solely on the fourth fair use factor. This alone reveals that TVEyes’ petition is unworthy of certiorari because, as TVEyes admits, the four fair use 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.’” Pet. 5 (quoting *Campbell*, 510 U.S. at 578). Because fair use is an “affirmative defense,” the burden of proof is on its proponent, *Campbell*, 510 U.S. at 590, which must show “an absence of ‘usurpation’ harm.” *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 111 (2d Cir. 1998).

In analyzing the effect of a use on the value of the copyrighted work, courts must consider not only harm to the original work, but also “harm to the market for derivative works.” *Harper & Row*, 471 U.S. at 568.

⁹ TVEyes does not challenge these rulings. Furthermore, there is more than sufficient evidence that TVEyes harmed the potential market for and value of Fox’s content. *See infra* 30. Thus, even if TVEyes were successful on appeal, the judgment below is unlikely to change given that courts must consider all four fair use factors.

Similarly, a plaintiff does not need to show lost sales or concrete damages as this factor considers *potential* value and markets. 17 U.S.C. § 107(4). A copyright holder need not presently occupy or even intend to enter a market, much less show lost revenue. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (effect on potential market despite plaintiff stopping publication of work and lack of “actual ... monetary loss”); *Castle Rock Entm’t v. Carol Publ’g Grp.*, 150 F.3d 132, 136, 145-46 (2d Cir. 1998) (factor favored copyright holder even though there was “no evidence that [the defendant’s use] diminished [the plaintiff’s work’s] profitability” and plaintiff “evidenced little if any interest in exploiting this market”); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (reversing district court that confused “lack of ... damages with lack of adverse impact on a potential market” and holding that a plaintiff is not required to show “a decline in the number of licensing requests”).

Moreover, as this Court has explained, the fourth factor considers “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,” *Campbell*, 510 U.S. at 590 (alterations and internal quotation marks omitted), would affect the actual or potential value of, or markets for, the type of works at issue. *Harper & Row*, 571 U.S. at 568–69 (applying a “broader perspective”); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 941 n.12 (2d Cir. 1994) (considering “category of a

defendant's conduct, not merely the specific instances of copying"). In other words, courts need consider only whether a defendant's use will affect any of the plaintiff's "traditional, reasonable, or likely to be developed markets", *Ringgold*, 126 F.3d at 81, because "when multiplied many times," such use becomes "in the aggregate a major inroad on copyright that must be prevented." *Harper & Row*, 471 U.S. at 569.

Unsurprisingly, the circuit courts agree that where a defendant "replaces [the copyright holder] as the supplier of [its own content]," the fourth factor weighs against fair use. *See Infinity*, 150 F.3d at 111. It also weighs against fair use where a defendant "avoid[s] paying 'the customary price'" for the work because it diminishes the opportunity to "license to others who might regard [the work] as preempted by the [defendant's use]." *Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001). In other words, when one entity uses a work without a license, it "cheapens the value of [the] work by competing with companies that *do* pay a licensing fee." *Associated Press v. Meltwater US Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013).

In fact, numerous circuit courts have considered situations where services, like TVEyes' Content-Delivery Features, were at issue. In case after case, the circuits have found that such services harm copyright holders' markets and are not a fair use, just as the court below did here:

- The Ninth Circuit has twice rejected fair use arguments and found that the fourth fair use factor militated against fair use where services copied “television news programs” and delivered the copies to “interested individuals and businesses.” *L.A. News Serv. v. Tullo*, 973 F.2d 791, 792 (9th Cir. 1992); *see also L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987 (9th Cir. 1998). The court specifically found that “[a]t least some [of the defendant’s] customers might choose to buy raw footage from [the plaintiff] if they could not purchase edited news stories from [the defendant], and [the plaintiff] might choose to sell the raw footage to them.” *Tullo*, 973 F.2d at 799.
- The Eleventh Circuit held that it is not fair use and harms the copyright holder’s markets to distribute recordings of television news to the subjects of the reports, even if the copyright holder did not make similar recordings available and the recordings were “for personal use only.” *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1493, 1495 (11th Cir. 1984).
- In *Infinity*, the Second Circuit considered whether a service that allowed paying subscribers to “listen over the telephone to contemporaneous radio broadcasts in remote cities” caused harm to the broadcaster’s actual and potential markets. 150 F.3d at 106, 111. It held that it did, and was not a fair use. *Id.* at 111.

- In *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, the Second Circuit held that a service that “gathered news articles from a variety of sources” and distributed “abstracts” or “rough translations” to customers “compete[d] with and supersede[d] the [copyright holder’s] articles.” 166 F.3d 65, 69, 73 (2d Cir. 1999). Thus, it found that the fourth factor weighed against fair use. *Id.* at 73.

It is because of the circuits’ unanimity in their factor four analysis when faced with facts similar to those here that TVEyes has not and cannot argue that there is any circuit split on the question that it asks this Court to resolve.

II. THE OPINION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT’S PRECEDENT

Having failed to identify a circuit split, TVEyes attempts to manufacture a conflict between the decision below and this Court’s decision in *Campbell*. TVEyes is wrong on the law and the facts.

A. The Second Circuit’s Opinion Did Not Presume Market Harm

TVEyes’ first argument is that the Second Circuit’s decision “conflicts with this Court’s holding in *Campbell* that market harm cannot automatically be presumed from a defendant’s commercial success.” Pet. 14. This argument fails for three reasons.

First, the Second Circuit did not presume market harm from the fact that TVEyes' use was commercial. Contrary to TVEyes' misdescription, nowhere in the Second Circuit's factor four analysis does it mention any such presumption. App. 13a-15a. Instead, the Second Circuit applied the well-established analysis discussed above, *see supra* 23, to determine whether TVEyes' use impacts "potential licensing revenues for traditional, reasonable, or likely to be developed markets" for Fox's content. App. 14a (quoting *Texaco*, 60 F.3d at 930). It concluded that "a plausibly exploitable market for [the access provided by TVEyes] to television content" existed and that "TVEyes displaces potential Fox revenues when TVEyes allows its clients to watch Fox's copyrighted content without Fox's permission." App. 15a.

Second, the considerable evidence of the Content-Delivery Features' negative effect on the value of and market for Fox's content weighed against fair use. TVEyes illicitly acquires Fox's content by falsely claiming to be an individual customer and violating its subscription agreements. *See supra* 10. TVEyes then copies Fox's content and distributes it to paying subscribers, not one of which is required to pay for an MVPD subscription of its own. *See supra* 11. In doing so, TVEyes markets the Content-Delivery Features as a replacement for watching live TV, using a DVR, and paying for video clips from a licensed "traditional clipping service." *See supra* 9; *Wainwright Sec. Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977) (no fair use where use was "with the obvious

intent, if not the effect, of fulfilling the demand for the original work”).

The Content-Delivery Features harm Fox’s online and digital markets in multiple ways:

- By offering Fox’s content for a flat fee through its Content-Delivery Features, TVEyes lowered the licensing rates at which clients will pay for that content. C.A. 179-180 (¶20), 2616-2617 (¶15).
- The Content-Delivery Features directly compete with Fox’s “legitimate clippings,” C.A. 2679 (21:6-8), by selling to the same kinds of organizations that would license Fox’s content. *Compare* C.A. 225-226 (¶¶21-23), 126-127, 129-132 (¶¶7-12, 21-27; 135-172, 174-176, 179-180 (¶¶3, 8-9, 20) *with* App. 40a-41a. This has cannibalized the market for Fox’s clips, resulting in considerable lost sales. C.A. 178 (¶17).
- TVEyes’ video clips substitute for the clips Fox makes available on its website, depriving Fox of pre-roll and banner advertising revenue (a very important market for Fox). C.A. 2674 (27:8-10), 2680-2681 (54:25-55;6), 1910 (¶98), 2594, 2598-1602 (¶¶12, 19-24). This problem is compounded when online clips are disseminated because, instead of linking back to Fox’s website and increasing the audience for its advertising, *see supra* 7, the Content-

Delivery Features distribute clips linking to TVEyes, not Fox. *See supra 11; Video Pipeline, Inc. v. Buena Vista Home Entm't*, 342 F. 3d 191, 202 (3d Cir. 2003) (effect on market where defendant's substitutive website deprived plaintiff of the ability to "advertise, cross-market and cross-sell other products").

- TVEyes competes with Fox's syndication partners for the same reasons it substitutes for clips on Fox's websites, C.A. 225 (¶20), 456 (115:15-18), and makes future negotiations with these partners more difficult. C.A. 1912 (¶102).
- By offering streaming television, C.A. 358 (¶6), 386-289—which TVEyes markets as a replacement to "watch live TV" online, App. 41a—TVEyes' Content-Delivery Features divert viewers from Fox's TVEverywhere service, making MVPD subscriptions unnecessary. C.A. 221-222 (¶9), 1913-1914 (¶¶105-109), 2603-2604 (¶28), 669 (¶7).
- TVEyes occupies the potential market for Fox's licensing to media monitoring and clipping services. As explained above, the standard practice of TVEyes and similar services is to license the content they record. *See supra 9*.¹⁰

¹⁰ The Content-Delivery Features also harm Fox's traditional television distribution. *First*, the Content-Delivery Features diminish the value of Fox's programming and Fox's ratings,

Each of the foregoing effects on the value of and market for Fox’s content was sufficient to weigh this factor against a finding of fair use. *See Nihon*, 166 F.3d at 73 (market effect where defendant’s business “compete[d] with and supersede[d]” plaintiff’s). If others were able to make the indiscriminate use of Fox’s content in which TVEyes has engaged, the effect on Fox’s growing and essential market would devastate Fox’s growing online distribution market. C.A. 224-225 (¶19).

Third, while the Second Circuit did not do so, it could have presumed market harm in this case under this Court’s jurisprudence. TVEyes ignores critical portions of this Court’s analysis concerning when to infer that market harm exists. In *Sony Corp. of America v. Universal City Studios, Inc.*, this Court noted that if “the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.” 464 U.S. 417, 448 (1984). In *Campbell*, it clarified that such a presumption applies where there is “verbatim copying of the original in its entirety for commercial

making it less likely that MVPDs will pay Fox the same carriage fees. C.A. 665 (¶18). **Second**, TVEyes harms the value of Fox’s content to advertisers because advertising fees are “determined by the number of viewers and their demographic profiles,” *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 285, 287 (2d Cir. 2012), but TVEyes’ users are not counted in Fox’s ratings. C.A. 222-225 (¶¶12, 16, 19). **Third**, the Content-Delivery Features replace the market for Fox’s telecasts by supplying high-quality video clips of those telecasts in real-time to its subscribers. *See supra* 11.

purposes.” 510 U.S. at 591. This is because “when a commercial use amounts to mere duplication of the entirety of the original, it clearly supersedes the objects . . . of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.” *Id.* (alterations and internal quotation marks omitted). This Court then went on to say that, “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.” *Id.*

Nowhere does TVEyes mention the first part of this Court’s discussion in *Campbell*. As a result, TVEyes does not wrestle with the fact that the Content-Delivery Features come squarely within the type of circumstance where such a presumption would apply given TVEyes’ commercial use of Fox’s content by duplicating it in toto without alteration. App. 11a. Indeed, contrary to TVEyes’ claim that “Fox’s programming and TVEyes’ service ‘serve different market functions,’” Pet. 16 (quoting *Campbell*, 510 U.S. at 591), the Second Circuit held that “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.” App. 11a.¹¹

¹¹ TVEyes’ reliance on the district court’s conclusion that “TVEyes’ message, ‘this is what they said’—is a very different message from [Fox’s]—‘this is what you should

B. TVEyes Does Not Criticize or Comment on Fox

TVEyes' second argument is that the Second Circuit's decision "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." Pet. 17. Again, TVEyes misdescribes the law and the facts of this case.

First, TVEyes misinterprets this Court's holding in *Campbell*. Contrary to TVEyes' argument, nowhere in *Campbell* did this Court consider markets to "enable" criticism or commentary. Instead, *Campbell* directs courts to consider the markets that "creators of original works would in general develop or license others to develop," which would not normally include "critical works."¹² *Campbell*, 510 U.S. at 592. As discussed above, the Second Circuit recognized that TVEyes' interfered with markets that Fox would generally develop or license others to develop. *See supra* 29.

Second, despite TVEyes' repetitive references to criticism throughout its brief, TVEyes admitted that

[know or] believe," Pet. 16 (quoting App. 57a), is misplaced. As discussed below, this Court has rejected the argument. *See infra* 40.

¹² This Court did not even decide whether factor four favored fair use, instead remanding for further proceedings on the effect of "2 Live Crew's parodic rap song on the market for a nonparody, rap version of 'Oh, Pretty Woman.'" *Id.* at 593.

it does not criticize or comment on the Works. C.A. 484-485 (RFAs 75, 77), 436 (72:4-9). Thus, TVEyes' attempt to equate its Content-Delivery Features with the lampooning parody at issue in *Campbell* is illogical.¹³

What TVEyes actually seeks to do is rely on the criticism that it asserts its subscribers make using the Content-Delivery Features. Yet, the circuits uniformly hold that a defendant must defend its own copying, and cannot rely on uses made by its subscribers. The defendant in *Infinity* made the argument TVEyes advances, and the Second Circuit held that the defendant's "own retransmission of the broadcasts" must be transformative, "not the acts of his end-users." 150 F.3d at 108. Thus, because selling "access to unaltered radio broadcasts" was not transformative, it did not matter what end-users did with those broadcasts. *Id.* Similarly, while the defendants in *Tullo* and *Reuters* argued that their services were used "for 'research, scholarship and private study,'" including by journalists, the Ninth Circuit held that "the ultimate use to which the customer puts the [copy] is irrelevant." *Tullo*, 973 F.2d at 797; *see Reuters*, 149 F.3d at 993-93 (holding that service that was "cop[y]ing plaintiff's news]

¹³ Likewise, all of the cases on which TVEyes relies (at 17-18) are inapposite because in each case it was the *defendant* that criticized or commented on the plaintiff's works. That is not the case here.

footage and transmit[ting] it to news reporting organizations” could not rely on its subscribers’ use).

Moreover, TVEyes mischaracterizes the evidence about its subscribers and their use of the Content-Delivery Features. As Dr. Knobel discovered, TVEyes emphasizes organizations which may not be the majority of its subscribers. C.A. 2846-2847 (¶29-30); *see supra* 17. Similarly, when stating how TVEyes’ subscribers use its service, TVEyes fails to distinguish between the Content-Delivery Features and the Index. For example, while TVEyes quotes the portion of the district court’s 2014 opinion that recites TVEyes’ characterization of how its subscribers use its service, Pet. 9, TVEyes fails to cite *any* findings that the Content-Delivery Features themselves—as opposed to the Index—were used for any of the alleged purposes TVEyes ascribes to its users. App. 64a.¹⁴

Third, TVEyes’ suggestion that market harm does not exist because Fox would not “create a comprehensive research service” turns the fourth fair use factor on its head. The question is whether TVEyes’ undiluted distribution of Fox’s content occupies a “market that properly belongs to” Fox. *Infinity*, 150 F.3d at 105. A copyright holder is not required to provide any services in a market, much

¹⁴ Similarly, the examples cited by TVEyes’ amici (at 12-13) involved use of the Index, not the Content-Delivery Features.

less provide the same service provided by the defendant. *See supra* 23.¹⁵

TVEyes essentially asserts that, to safeguard her work, a copyright holder must make all possible uses of it. The circuits have repeatedly rejected that approach:

- In *Tullo*, the Ninth Circuit found that, even though the plaintiff marketed raw footage and the defendant marketed edited news clips, there was “an overlap between the [defendant’s] market and the *potential* [plaintiff’s] market.” 973 F.2d at 798-99.
- In *Duncan*, the Eleventh Circuit held that where the defendant sold copies of the plaintiff’s news telecasts that it “could itself sell if it so desired” but did not, the defendant “competes with [the plaintiff] in a potential market and thereby injures the television station.” 744 F.2d at 1496-97, 1499 (finding

¹⁵ TVEyes emphasizes ITN Source’s license agreement for Fox’s content, Pet. 10–11, 18, but provides no evidence that those provisions were enforced or a license denied. Contrary to TVEyes’ suggestion that “Fox’s licensing model expressly *prohibits* use of Fox clips to criticize Fox,” Pet. 18, authorized Fox clips are used to criticize and comment on Fox and its coverage. C.A. 2792 (¶9), 2793-2811. Similarly, while TVEyes argues otherwise, Pet. 18, Fox’s online services are easily used for research and analysis of Fox’s telecasts. C.A. 2792 (¶¶9-10), 2793-2824.

effect on market despite only \$35 of actual damages).

- In *Infinity*, the Second Circuit held that the defendant's occupation of the copyright holder's market even "in [a] different form" from the copyright holder, "weighs in [the copyright holder's] favor." 150 F.3d at 111.
- In *Video Pipeline*, the Third Circuit held that video clips distributed for a fee as part of an Internet-based, searchable database substituted for the authorized (but different) clips of the same content provided by the plaintiffs and affected their market. 342 F.3d at 195-96, 202-03.

Far from removing its telecasts from the research community, as TVEyes asserts, Pet. 18, Fox makes its content is available to the public in numerous ways, including for free on its website. *See supra* 5. There is no shortage of positive or negative criticism of Fox without the use of TVEyes' Content-Delivery Features. C.A. 2792 (¶¶9-10), 2793-2824. In fact, the very example of Fox coverage on which TVEyes' amici rely (at 17) belies their argument as the clip was **posted by Fox** on its own YouTube channel. Thus, Fox is criticized all the time, including using Fox's own clips, and TVEyes' Content-Delivery Features simply are not necessary for this purpose.

III. THIS CASE DOES NOT HAVE ANY OF THE BROAD IMPLICATIONS THAT TVEYES SUGGESTS

TVEyes' final argument for granting its petition is the importance of its database to "research, analysis and criticism" of the news, Pet. 19, and the use of its service in "public discourse." *Id.* at 21. But contrary to TVEyes' self-serving claims, its paid subscription service simply is not important, let alone essential, to the ability to ensure that the media remains subject to criticism. Indeed, not one of the news stories to which TVEyes cites mentions TVEyes' service, much less the Content-Delivery Features. *See id.* 20 n.5.¹⁶

Moreover, this argument underscores the inconsistency of TVEyes' position. TVEyes' service "is available for business and professional use, and is not offered to private consumers for personal use." App. 5a. Further, at the beginning of its brief, TVEyes claims that it "expressly restricts subscribers' use of the service to *internal research purposes* only." Pet. 8. Yet, by the close of its brief, TVEyes argues that its service is essential to "public discourse." Pet. 21. TVEyes cannot have it both ways. The truth is that TVEyes markets the Content-Delivery Features as a replacement for television and for the primary purpose of business-related activities like "Exit Packages for Clients." *See supra* 17. TVEyes simply

¹⁶ Moreover, the examples cited by TVEyes' amici, at 12-13, involved use of the Index, not the Content-Delivery Features.

does not market its service for criticism and commentary. *Id.* And as noted above, TVEyes has failed to cite **a single source** that the Content-Delivery Features were used for any of the alleged purposes TVEyes ascribes to its users. *See supra* 35.

Finally, TVEyes argues that its petition should be granted and the Content-Delivery Features held to be fair use because “Fox *itself* has become the news.” Pet. 20. This Court, however, has held that “[t]he promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use ‘news report’” and that the “fact that the words the author has chosen to clothe his narrative may of themselves be ‘newsworthy’ is not an independent justification for unauthorized copying of the author’s expression.” *Harper & Row*, 471 U.S. at 557. The courts of appeals are in similar agreement. The Second Circuit held in *Twin Peaks* that “public reaction to a televised program” does not make its “entire content . . . a fact that could be reported and analyzed.” *Twin Peaks Prods., Inc. v. Publ’s Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993); *Wainwright*, 558 F.2d at 96 (use that “appropriated almost verbatim the most creative and original aspects of [researcher’s] reports . . . which represent a substantial investment of time, money and labor” was not fair use, because it “did not provide independent analysis or research; it did not solicit comments on the same topics from other financial analysis; and it did not include any criticism, praise, or other reactions by industry officials or investors”). And the Ninth Circuit in *Tullo* held that a news clipping service, like TVEyes, was “no more a

‘news reporter’ than the [Video Tape Recorder] owner who tapes a publicly broadcast movie is a filmmaker.” 973 F.2d at 797.

That the television news industry, including Fox, is the true promoter of public discourse, underscores why the Second Circuit’s decision should not be disturbed. The “public has a compelling interest” in inducing the creation of “television programming.” *WPIX*, 691 F.3d at 287. In particular, news organizations perform the “essential function of democracy” of “[i]nvestigating and writing about newsworthy events,” which is “an expensive undertaking.” *Meltwater*, 931 F. Supp. 2d at 553.

Fox and other news organizations produce journalism. C.A. 1861 (¶6). They spend hundreds-of-millions of dollars a year gathering news. C.A. 1939 (¶182). They train journalists. C.A. 111 (¶6). They hire reporters and producers, who put their lives at risk to deliver news. C.A. 1937-1938 (¶179). They ferret out government corruption. C.A. 1861, 1937-1938 (¶¶6, 179). They critique and comment on one another. C.A. 3034-3035 (¶¶20-21). Even TVEyes’ expert agrees that they play “a critical role in our society.” C.A. 2238 (¶192). Protecting the ability of these organizations to survive is the true public interest.

Yet, this is a time of stress and transition for television news. Viewers are moving away from traditional television towards online and digital

distribution of short news clips, making new monetization models “essential.” *See supra* 5.

News organizations, including Fox, are developing robust digital and online presences to meet this growing demand. *See supra* 5. The Content-Delivery Features halt that evolution by diverting viewers that the television news industry needs to convert to users of its new digital platforms. If TVEyes had been allowed to continue unabated, it would have “prevent[ed] news companies and other creative companies [from] generating revenue from ... copyrighted material,” harming “the whole ecosystem.” C.A. 470 (213:6-16). Even the district court found that TVEyes’ downloading function does not “make TVEyes valuable to the public, and poses undue danger to content-owners’ copyrights.” App. 91a. Thus, any benefit from TVEyes does not “outweigh the strong public interest in the enforcement of the copyright laws or justify allowing [it] to free ride on the costly news gathering and coverage work performed by other organizations.” *Meltwater*, 931 F. Supp. 2d at 553.

CONCLUSION

For the foregoing reasons, TVEyes’ petition should be denied.

Respectfully submitted,

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