No. 18-321

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Fox's brief in opposition fails to dispel the clear conflict between the Second Circuit's decision and decisions holding that a transformative use may not be presumed harmful or deemed likely to harm a market that (as here) the plaintiff is unlikely to enter. Fox also fails to refute the severe practical consequences the decision below will have for free political discourse and transformative uses of copyrighted works. As the Brief of *Amici Curiae* Media Critics *et al.* explains (Br. 9-10), the decision below will "significantly curtail media researchers' abilities to analyze and report on news programming" and inhibit "criticism, parody, and analysis that copyright owners would prefer to silence and are unlikely ever to license" (*id.* at 25).

Rather than confront these reasons to grant review, Fox presents a blizzard of irrelevant factual challenges to points that are not at issue before the Court. Fox questions whether TVEyes's use is transformative (it is), whether subscribers use the service to conduct research and criticism (they do), and whether searching for clips is a replacement for simply watching television (it is not). The Second Circuit did not disturb the district court's findings in TVEyes's favor on those questions. Thus, contrary to Fox's suggestion, this case presents an ideal vehicle to resolve the question presented on market harm from transformative use.

For these reasons, Fox's defense of the decision below is unavailing and the petition should be granted.

ARGUMENT

I. FOX FAILS TO DISPEL THE CONFLICT CREATED BY THE DECISION BELOW

Contrary to Fox's assertions (BIO 23-29), the petition clearly identifies a split between the Second Circuit's decision and fair use decisions of this Court and other circuits on the analysis of market harm from a transformative use. As Fox does not dispute, the fourth (market-harm) factor is "undoubtedly the single most important element of fair use," *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985). This split of authority accordingly warrants this Court's review.

A. The Decision Below Conflicts With Other Decisions On Commercial Success In Transformative Markets

Fox does not dispute that market harm may not be presumed from a transformative use's commercial success. Nor could it, for this Court held in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), that the fourth, market-harm factor does not favor the copyright holder merely because a defendant uses a transformative work for commercial gain. As *Campbell* explained, it is "error" to presume market harm when a use is transformative, because in that case "market substitution is at least less certain, and market harm may not be so readily inferred." *Id.* at 591. Fox thus cannot deny that a decision presuming harm from a transformative use's commercial success would conflict with *Campbell*.

Instead, Fox simply asserts (BIO 29-34) that the Second Circuit did not apply any such presumption.

That is demonstrably incorrect. The Second Circuit held that the fourth factor weighs against TVEyes because "[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," elaborating that:

> 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.

App. 15a. The Second Circuit thus indisputably presumed market harm from TVEyes's commercial success.

The Second Circuit's decision thus creates a split with *Campbell* and with other court of appeals decisions that have faithfully followed *Campbell*, belying Fox's assertion (BIO 23) that the petition identifies no circuit split. See *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638-39, 643 (4th Cir. 2009) (rejecting presumption for transformative use); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007) (presumption of market harm where "use of an image is for commercial gain … does not arise when a work is transformative"); *cf. Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters.,* 533 F.3d 1287, 1319 n.37 (11th Cir. 2008) ("the loss of the licensing fee sought in the case itself does not constitute 'market harm'" because, "[i]f it did, circular reasoning would resolve

all fair use cases for the plaintiff") (quotations omitted).

Unable to identify any other decision presuming market harm from the commercial success of a transformative use, Fox directs the Court (BIO 27-29) to irrelevant examples of decisions involving *non*-transformative uses. But decisions barring copying of protected works for the *exact same purposes* as the originals have no bearing on the question presented here. See App. 53-55a (distinguishing same cases). Fox similarly misplaces reliance (BIO 33-34) on cases holding that market harm may be presumed whenever "verbatim copying" occurs. No court has held that verbatim copying of a work for a *transformative* use creates a presumption of market harm. To the contrary, the courts of appeals have repeatedly rejected such a presumption. See, *e.g.*, *Vanderhye*, 562 F.3d at 644 (no presumption of market harm from verbatim copying of entire works for purpose of offering transformative plagiarism-detection system, noting that fourth fair-use factor "must consider the transformative nature of the use"); *Perfect 10*, 508 F.3d at 1168 (because copying of entire copyrighted images as "thumbnails for search engine purposes is highly transformative, … market harm cannot be presumed"); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (because copying of entire copyrighted images was transformative, copyright owner "does not suffer market harm due to the loss of license fees").

B. The Decision Below Conflicts With Other Decisions On Preempting Transformative Markets

Fox likewise does not dispute that a copyright holder may not preempt a transformative market. Nor could it. As *Campbell* recognized, not every use that has an effect on a market is a *cognizable* market harm, because "[t]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." 510 U.S. at 592. It would be anathema to fair use to permit a copyright holder to shield itself from becoming the subject of research, criticism or commentary—fair uses identified in the preamble of 17 U.S.C. 107—simply by asserting a purported desire to offer the same service.

Unable to contest these settled principles, Fox instead asserts (BIO 35-39) that the Second Circuit never held that Fox was free to preempt the market for research, criticism or commentary on its broadcasts. Again, that assertion is demonstrably false. The Second Circuit held that TVEyes's service is "transformative" under factor one (App. 10a), but then held (App. 15a) that, under factor four, TVEyes had "usurped" Fox's potential market merely because "Fox itself might wish to exploit the market for such a service rather than license it to others." But Fox is not in the market for research, criticism and commentary on Fox content now, and no evidence in the record suggests it is likely to enter it in the future. To the contrary, Fox's licenses expressly *prohibit* use of clips in a manner "derogatory or critical" of Fox,

and severely *restrict* the use of Fox's website or licenses to conduct research. App. 43-44a, 77a.[1]

In answer to these undisputed facts, Fox asserts (BIO 26) that a "copyright holder need not presently occupy *or even intend to enter a market*" (emphasis added). But that argument is foreclosed by *Campbell*'s holding that a copyright holder may not claim harm from exploitation of a transformative market it is unlikely to enter. As *Campbell* explains, "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). Rather, any harm cognizable under factor four must be to a market that is "traditional, reasonable, or likely to be developed" by the plaintiff. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1208 (Fed. Cir. 2018) (applying Ninth Circuit law) (quotations omitted). Fox thus may not avoid a fair use defense by invoking the "potential" that it might create a market for analyzing and criticizing its own broadcasts in the future, contrary to its current undisputed policy.

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[1] While Fox contends (BIO 19-21, 39) there are "other ways" to research and criticize Fox, these are not substitutes for what TVEyes offers. App. 81-82a; Media Critics Br. 9-14 (detailing TVEyes's superior features). Fox directs the Court to the Internet Archive (BIO 19-20), but that entity joined the *amicus* brief in support of the petition, noting (Br. 11) that such organizations "simply do not have the resources to create and maintain a comprehensive database" like TVEyes's.

In this respect too, the Second Circuit's holding conflicts with the decisions of other courts of appeals. See *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."); see also *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015) ("Due to Katz's attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work."); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003) (no market harm for transformative use in market copyright holder is unlikely to enter or develop); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) ("to the extent that the copying damages a work's marketability by parodying it or criticizing it, the fair use finding is unaffected").

For all these reasons, the decision below presents a split of authority warranting this Court's review.

II. CONTRARY TO FOX'S ARGUMENTS, THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

Rather than address the question presented, Fox spends most of its opposition making incorrect factual assertions[2] and relitigating points it lost below.

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[2] To take a few examples: (1) contrary to Fox's insinuations (BIO 17-18), the record contains extensive examples of journalists and critics using TVEyes to research, criticize and comment upon news media in general (C.A.754-1418) and Fox specifically

These arguments fail. Contrary to Fox's arguments, this case presents an ideal vehicle to address the purely legal question of how to reconcile conflicting interpretations of the statutory language of § 107(4).

1. Fox challenges whether TVEyes makes transformative use, but Fox already lost that battle. See App. 55-58a, 81-82a (district court); App. 9-10a (court of appeals). As the Second Circuit explained, TVEyes's use of Fox content is

> 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.

App. 9a; see also App. 10a (TVEyes "certainly qualifies as technology that achieves the transformative purpose of enhancing efficiency").

(C.A.1420-570); (2) Fox claims it makes "all of its content available to the public digitally" (BIO 6) but actually only makes "about 16%" available online (App. 43a); (3) TVEyes does not permit public redistribution of clips (*contra* BIO 14), but restricts use to internal research purposes only—a limitation reinforced through contracts, warnings and technological limitations (App. 5a, 41a); and (4) not only can subscribers *not* watch "unlimited, consecutive" 10-minute Fox clips (compare BIO 13 with App. 41a), but there is no evidence of such abuse, and 82% of clips are shorter than one minute (App. 62-63a).

2. Fox argues at length (BIO 30-33) that there is "evidence" of TVEyes's "negative effect" on Fox's digital markets, but the "harm" it supposedly suffered is illusory based on the record below. Fox cannot deny that it restricts access to its content for the purpose of research, commentary or criticism. Thus, for example:

- *Fox's website*: Fox makes just 16% of broadcast content available online as clips on its website or through syndicated partners. App. 43a. These clips are all hand-selected by Fox to reflect its editorial preferences, not to enable objective research.[3] Not only do the clips differ from what was broadcast, but Fox restricts the use of its website to "personal use only" and it "may not be used for commercial purposes." App. 43-44a. And while Fox speculates it lost ad revenue (BIO 31-32), Fox never identified any evidence that, but for TVEyes, a user would have visited Fox's website.
- *Clip licensing*: Fox has never provided (*contra* BIO 31) any non-speculative evidence of harm by TVEyes to Fox's clip-licensing business. The district court found that "Fox News is unable to provide the identity of the customers [its licensing agent] allegedly lost." App. 63a. Fox licenses broadcast-quality clips for use in television shows, movies and other *public performances* for thousands of dollars per clip, and never identified a single license it issued

[3] C.A.222 (¶12); C.A.2351-53 (120:8-122:19).

for the purpose of research.[4] In fact, Fox *prohibits* licensees from using clips in a manner "derogatory or critical" of Fox. App. 44a, 77a.

- Television watching: While Fox asserts (BIO 32 & n.10) that TVEyes makes viewers less likely to watch live "streaming" of broadcasts, the district court rejected this as "speculation, not fact," concluding that "[n]o reasonable juror could find that people are using TVEyes as a substitute for watching Fox News broadcasts on television." App. 61-63a.[5] The Second Circuit did not disturb this ruling.

3. Contrary to Fox's suggestion (BIO 35-37), it makes no difference that TVEyes's users—and not TVEyes itself—make ultimate use of Fox's broadcasts for purposes of research, analysis, criticism and commentary. It is well-settled that fair use applies to *services* that facilitate such goals, even where those goals are fulfilled by the end users. See, *e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 218 (2d Cir. 2015) (copying entirety of books into digital database that allows users to read snippets for conducting research a fair use based on "highly transformative purpose"); *Perfect 10*, 508 F.3d at 1165 (copying entirety of images is "highly transformative" because "a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool"); *White v. West*

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[4] C.A.1642 (¶115); C.A.670-71 (¶¶2-3); C.A.682-711; C.A.713-23; C.A.2493-97 (¶¶2-6); C.A.2189, 2213-15 (¶¶39, 109, 113-18).

[5] In fact, TVEyes *cannot* be used to watch "live" television. C.A.1842 (¶¶8-9); C.A.1794-96 (¶¶3-6).

Publ'g Corp., 2014 WL 3385480, at *2 (S.D.N.Y. July 11, 2014) (fair to reproduce entire written works "toward the end of creating an interactive legal research tool").

III. FOX IGNORES THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED

Fox unsuccessfully tries to downplay the importance of the question presented. Fox has an outsized role in the political life of the United States, as Fox host Sean Hannity's recent appearance with President Trump on the campaign trail reinforces.[6] And as *amici* Media Critics note, "the Second Circuit has an outsized impact on the media industry and its critics," as well as "in copyright jurisprudence." Media Critics Br. 19-20. Accordingly, the decision below casts a chill over both the Nation's political discourse and a host of other transformative uses, especially for new technologies that allow research and analysis from databases aggregating unprecedented amounts of information. The question whether such technologies will be allowed to develop tools to aid research and enable criticism thus has exceptional national importance.

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[6] See David Bauder, ASSOCIATED PRESS, "*Fox's Hannity speaks onstage at Trump campaign rally*" (Nov. 6, 2018) https://tinyurl.com/y76ne9dj (noting Fox previously claimed Hannity would not participate, and then did not air his campaign remarks); Peter Baker, THE NEW YORK TIMES, "*Fox Rebukes Sean Hannity's and Jeanine Pirro's Participation in a Trump Rally*" (Nov. 6, 2018) https://tinyurl.com/ya5ks2ga ("the fusion of president and network seemed complete").

This is especially so because, "[t]oday, the sheer volume of ephemeral content from many different sources makes comprehensive, after-the-fact research, analysis, and criticism impossible." Media Critics Br. 10. Emerging technologies like TVEyes are critical to bringing such knowledge to the public, but decisions like the one below threaten that investment. And "while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance." *Authors Guild*, 804 F.3d at 212.

Fox points out (BIO 11) that it is not challenging TVEyes's text-based "Index" of Fox broadcasts but rather copying for its "Content-Delivery Features" that enable users to read the words of a clip, as well as *see* the images and *hear* the sounds. Fox asserts (BIO 40) that providing sounds and images of Fox broadcasts "simply is not important." But as *amici* Media Critics powerfully explain, "[i]mages, video, and sound carry far more information than text," as do "on-screen text, graphics, and video." Media Critics Br. 14-18 (citing examples); see also *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) (dissemination of audio recording a fair use because it "was able to convey with precision not only the raw data of the … words, but also more subtle indications of meaning inferable from their hesitation, emphasis, tone of voice, and other such aspects of their delivery," which "may be just as valuable"). The record likewise presents examples of use of TVEyes to research, comment on and criticize Fox content beyond a raw transcript,

including photos, charts, chyrons and facial expressions.[7] "The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[7] *E.g.*, C.A.2197-205 (¶¶64, 66, 71-86); C.A.2257-77.