

No. 13-CV-5315 (AKH)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FOX NEWS NETWORK, LLC,

PLAINTIFF.

v.

TVEYES INC.,

DEFENDANT.

Case No. 13-CV-5315 (AKH)

**BRIEF OF AMICI CURIAE PROFESSORS OF INTELLECTUAL PROPERTY LAW IN
SUPPORT OF DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY
JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that the amicus is not a corporation that issues stock or has a parent corporation that issues stock.

Dated: June 17, 2015

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I. Interest of Amici

Amici, Barton Beebe (NYU Law); Christopher Buccafusco (Cardozo Law); Mark Lemley (Stanford Law); Glynn Lunney (Tulane Law); Mark McKenna (Notre Dame Law); Pamela Samuelson (Berkeley Law); Matthew Sag (Loyola University-Chicago Law); Christopher Jon Sprigman (NYU Law); Rebecca Tushnet (Georgetown Law); and Molly Shaffer Van Houweling (Berkeley Law), are academics, many of whom have done empirical work in large scale data analysis or other empirical work in copyright law.¹ The fair use principles articulated in this case will apply to database creation more broadly, and amici write in support of the District Court's initial analysis and its application to the remaining functions at issue. It is vitally important that the principles of fair use with respect to databases should not be limited to text or even to images, given the audiovisual culture in which we live. If the medium is the message, then changing the medium to text only—whether in conducting research or in communicating the results of that research to others—both changes the message and limits the ability of scholars, journalists, activists, and ordinary citizens to use databases to achieve new insights.

II. Summary of Argument

¹ Academic affiliations are listed for identification purposes only. Amici hereby state that none of the parties to this case nor their counsel in this case authored this brief in whole or in part; no party or any party's counsel contributed money intended to fund preparing or submitting the brief; and no one else other than Amici and their counsel contributed money that was intended to fund preparing or submitting this brief. Amici also hereby state that TVEyes has consented to the filing of this brief, and Fox has consented "to the extent that it only addresses the issues currently before the Court and is not duplicative of the briefs that other amici have requested to file." We rely on that consent as our source of authority to file.

Video, no less than text, is an appropriate subject of fair use. And as this Court’s earlier ruling correctly found, this is so in the large-scale database context as well as with respect to the individual use of images. Most importantly at this stage in the litigation, all of the functions on which this Court reserved judgment are significant to the use and function of the resulting transformative database, which the Court has held to be fair use. Because the 17 U.S.C. §107 factors either favor fair use under the circumstances or have limited weight given the transformativeness of TVEyes’ use, the Court should grant summary judgment in favor of TVEyes on the remaining features of its service.

III. Textual Description Is Not a Substitute for Video Images

This Court was correct to hold that “[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.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014). Indeed, to hold otherwise would defy common sense. When TVEyes aggregates video in a database, it becomes raw material for research: individual parts are not present for their news reporting purpose, but rather for the purpose of showing what news reports were saying.

Fox’s expert’s claim that “it is often a simple matter to comment on and criticize television news channels without audiovisual content at all” (Knobel Expert Report 99) ignores what every schoolchild knows—that a picture is worth a thousand words. People pick up nuances of verbal tone, facial expression, pose, and gesture, among other non-verbal cues that cannot be replicated in text, to interpret meaning, to understand context, and to judge credibility. And while it is

certainly possible to comment on video using text in some ways, others require visual and audio quotation. Limiting the right of fair quotation to text deprives us of much of the communicative content that images provide. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 753-55 (2012).

Generally, images, including video images, communicate differently from the way words do and thus can serve as important evidentiary, persuasive, and rhetorical roles that cannot be filled by words. “Images transform statistics and anecdotes into fact.” Farhad Manjoo, *True Enough: Learning To Live In A Post-Fact Society* 79 (2008). Empirical evidence demonstrates that images can affect decisionmaking.² This is unsurprising, because pictures are generally processed more quickly in the brain and are easier to remember than words.³ Pictures increase our attention to, and the information we acquire from, accompanying text.⁴ Pictures can even shape our perception of words: using pictures emphasizing one side of a balanced news report, for example, biases readers’ perceptions of contested issues in favor of the pictured side, even when they don’t consciously remember the content of the images.⁵ As a result, a verbal or

² See, e.g., David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 Law & Hum. Behav. 183 (2006) (demonstrating that jurors respond emotionally to gruesome photographs); Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 Behav. Sci. & L. 85 (2008) (demonstrating that neurological images influence jury findings).

³ See, e.g., Neal Feigenson & Christina Spiesel, *Law on Display* 7-9 (2009) (reviewing research on effects of images and arguing that law should recognize the relevance of the special features of images); Julie A. Edell, *Nonverbal Effects in Ads: A Review and Synthesis*, in *Nonverbal Communication In Advertising* 11, 13 (Sidney Hecker & David W. Stewart eds., 1988) (summarizing research showing that “pictorial stimuli frequently were remembered better than were their verbal equivalents”).

⁴ Dolf Zillmann et al., *Effects of Photographs on the Selective Reading of News Reports*, 3 Media Psychol. 301, 320–21 (2001).

⁵ Dolf Zillmann et al., *Effects of Photographs in News-Magazine Reports on Issue Perception*, 1 Media Psychol. 207, 223–24 (1999); see also Ad Hoc Comm. on Fair Use & Academic Freedom,

textual description or report of an event will have a different effect on an audiences than direct viewing of a video recording of that event.

Video clips are regularly used as important parts of political messages, and the video content boosts the impact of those ads by providing evidence for the eyes and ears. This is especially true for messages from political outsiders. One recent study found that the most influential political videos were often made by nontraditional political actors using clips from existing footage, usually news footage. The party-sponsored political messages examined in the study received an average of 55,000 views, while citizen-designed political messages averaged 807,000 views, and ads created by other entities, “mostly media companies, small news organizations, groups of bloggers, or small video production groups,” averaged over 2.5 million views. Of the most viral videos, “only a fifth of them were produced by the campaigners, and in all cases they were not typical ads, but edited footage.” Limor Shifman, *Memes in Digital Culture* 125 (2014).

A wide interpretation of fair use in the context of video images is sensible in light of this empirical evidence. Political and cultural commenters, and especially nontraditional speakers, need wide access to pre-existing video to communicate effectively. The Copyright Office has twice ruled that the use of short audiovisual clips for communicative purposes is likely to be fair

Int’l Comm’n Ass’n, *Clipping Our Own Wings: Copyright and Creativity in Communication Research* 5 (2010), available at http://www.centerforsocialmedia.org/sites/default/files/documents/pages/ICA_-_Clipping.pdf (discussing scholars’ needs for audiovisual evidence).

use, especially when edited into a larger commentary.⁶ In the same proceeding, the Office twice held that video clip licensing is not an alternative to circumventing access controls in aid of making short clips for fair use purposes.⁷ Fair users need not rely on transcripts or verbal descriptions where the video provides the best possible evidence. See, e.g., *Caner v. Autry*, No. 6:14-CV-00004, 2014 WL 2002835 (W.D. Va. May 14, 2014) (finding that videos of plaintiff posted by defendant to expose plaintiff’s alleged lies were transformative fair use); *Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012) (finding that defendants’ use of plaintiff’s video in attacking abortion rights was fair).

More generally, the fair use cases recognize that copying is justified when the details copied assist the fair user in accomplishing her purpose. See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (finding fair use when copying was of the “size and quality” necessary to the transformative purpose); *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402, 420, 425 (E.D. Pa. 2009) (high-quality copied images were fair use because they were necessary for transformative purpose; “As to Plaintiffs’ argument that Spurlock could have reduced the larger images or changed all of them to black-and-white, such modifications would undermine the very heart of the publication”); cf. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d

⁶ Recommendation of the Register of Copyrights, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, October 2012, at 127, 128 [hereinafter 2012 Recommendation] (“the record amply supports the conclusion that a substantial number of the proffered examples [of short video clips used in criticism or commentary] likely would be considered transformative”); Recommendation of the Register of Copyrights in RM 2008-8, *Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, June 11, 2010 at 49 (same).

⁷ 2012 Recommendation at 131. Contrary to Fox’s expert’s opinion, cf. Knobel Decl. at 12, the Office also ruled that recording a screen on a smartphone produces insufficient quality for fair use purposes. 2012 Recommendation at 132.

Cir. 2014) (finding fair use where copying audio recording provided additional details on tone of voice and emphasis compared to transcript); *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1030 (9th Cir. 2000) (finding fair use where real images were necessary for accurate comparisons); *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968) (finding copies of images fair because they made defendant's theory of Kennedy's assassination easier to understand).

Similarly, the aggregation of video into a searchable database serves a well-recognized transformative function. The database that results from TVEyes' work is greater than the sum of its parts, which is a well-accepted way in which a new resource can be transformative, and not a substitute for any individual copyright owner's service. *TVEyes*, 43 F. Supp. 3d at 392 ("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."); see also *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding that book database was transformative given the multiple new uses it enabled); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009) (finding that term paper database used for detecting plagiarism was transformative); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013) [*Google Books*] (finding that book database and index was highly transformative because it enabled "readers, scholars, researchers, and others" find books). Like the term paper databases in *iParadigms*, the print book databases in *HathiTrust* and *Google Books*, and the enormous body of internet content recorded in Google's online index, the video in TVEyes' database forms a corpus whose purpose clearly diverges from and adds to the individual works therein.

IV. The Remaining Functions Serve the Same Fair Use Purposes that the Court Approved in Its Prior Ruling

The Court's prior ruling was a straightforward and sensible application of current transformative fair use doctrine. Likewise, the remaining functions of TVEyes (regarding which the court reserved judgment) serve the same transformative purposes and should be treated in the same way. Once the transformativeness of the TVEyes database is established, the remaining questions are essentially about whether TVEyes can *show* its clients the video that it told them was relevant to their search. The answer should be yes, not least because of the cases holding that internet search engines are permitted by fair use to show users images as part of the display of results of searches for images. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2002) and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

Additionally, TVEyes' download, archive, save, share, and email functions are fair use because they are both necessary and beneficial to achieving TVEyes' transformative purpose: they are important intermediate steps to the valuable final output of analysis and commentary. As numerous courts have found, making intermediate copies to create a database that enables socially beneficial noninfringing individual uses and outputs constitutes fair use. See, e.g., *Authors Guild*, supra; *iParadigms*, supra; *Perfect 10*, 508 F.3d at 1168 ; *White v. West Publ'g Corp.*, No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014) (finding West's database of legal briefs to be transformative fair use); cf. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 609 (9th Cir. 2000) (approving internal copying for ultimately

noninfringing output); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992) (same).

As other courts have found, substantial internal reproduction and even ultimate distribution for commercial advantage are legitimate when there is an underlying transformative purpose. See, e.g., *Am. Inst. of Physics v. Winstead PC*, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (finding that copying articles for the purpose of using them as evidence in patent applications and in internal research was transformative and fair); see also *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003) (“the narrow purpose of defendants’ use of the manuscript . . . for the evidentiary value of its content” weighed “heavily” in favor of fair use); *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1366 (E.D. Va. 1995) (finding fair use in part because documents were copied for “news gathering, news reporting and responding to litigation,” not to “scoop” copyright owner). Evidentiary and reporting purposes, the cases find, have wide latitude.

The subsequent decision of any given client to broadcast any given clip may or may not be fair use, but it is not challenged by Fox. This silence is understandable, because clips are often part of significant transformative commentary on news of the day. Further, Fox has not put forth a secondary liability analysis linking TVEyes to any hypothesized user infringement. The fact that TVEyes could have designed its service differently is insufficient. The VCR could have been designed without a “record” button; nonetheless the Supreme Court refused to find contributory infringement in *Sony*. Without a record or argument on secondary liability, it would be inappropriate to find TVEyes responsible for possible user infringement based on the functions of TVEyes’ database. This is more than just a technical point: Fox would lose most such

challenges to transformative uses of clips, but objecting to the information generation function of TVEyes would let Fox prevent numerous potential fair uses, contrary to the purposes of copyright law. The case law on secondary liability in copyright teaches that functions that enable substantial noninfringing uses are themselves fair even if they could be misused. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 441 (1984); cf. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 799-800, 805 (9th Cir. 2007) (holding service provider not contributorily liable for infringement taking place on other websites). This is, indeed, why secondary liability and direct liability are distinct inquiries: technologies with multiple fair-use applications should be protected, and any individual infringements from misuse addressed individually.

In fact, TVEyes goes above and beyond what fair use requires by contractually limiting users to internal research and analysis, even though numerous other uses would also be justified and fair given the transformativeness of the TVEyes database. Such uses include criticism, in cases such as *Caner* and *Northland*, and evidentiary or illustrative uses. See *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d. 127 (E.D.N.Y. 2001) (holding that use of film clips in a documentary about a film studio was fair use); *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d. 442 (S.D.N.Y. 2001) (holding that use of film clips in a biographical film about an actor was fair use); *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 CIV. 3802(HB), 2001 WL 1111970 (S.D.N.Y. Sept. 10, 2001) (finding that use of film clips in a TV program about the history and politics of alien visitation movies was fair use); Michael C. Donaldson, *Refuge from the Storm: A Fair Use Safe Harbor for Non-Fiction Works*, 59 J. Copyright Soc'y U.S.A. 477 (2012) (surveying case law).

Given the precedent establishing that uses conceptually similar to the ones that the TVEyes service facilitates are fair, amici urge the Court not to unduly constrain the new transformative uses that the TVEyes database permits. Given the multiple opportunities for new forms of research and expression that large-scale databases offer, some of which we are just beginning to explore, a miserly interpretation of what can be done with a concededly transformative database such as TVEyes' should be rejected.

In particular, a view-only rule, excluding the ability to save, email, or download, would just push to the foreground the "trust me" problem recognized by the Court in its initial ruling. Critics, even communicating internally, would have to demand their audiences' trust without sharing their evidence, as if Bloomberg were only permitted to describe Swatch executives' tone of voice rather than prove it with the copy in its possession. Precisely because the news itself is important evidence, that evidence must be available for use in the ultimate argument or analysis made by searchers who have retrieved relevant results.

The picture is still worth its thousand words—even more so—when sent or displayed to the audience as support for the researcher's arguments. *The Daily Show* offers examples every day. For example, it recently focused on Fox anchor Megyn Kelly's intonation and disdainful expression as she condemned Democrats for making the same arguments she unquestioningly endorsed from Republicans, as shown in other clips replayed on *The Daily Show*. See Colin Gorenstein, *Jon Stewart Smacks Down Megyn Kelly for Hypocrisy over GOP Corruption*, Salon.com, May 8, 2015, available at http://www.salon.com/2015/05/08/jon_stewart_smacks_down_megyn_kelly_for_hypocrisy_over

[_gop_corruption](#); see also *Kane v. Comedy Partners*, 68 U.S.P.Q.2d (BNA) 1748, 2003 WL 22383387 (S.D.N.Y. Oct. 15, 2003) (finding fair use in Daily Show's use of television clips to comment on local broadcaster), *aff'd*, 98 Fed.Appx. 73 (2d Cir.2004).

TVEyes' date and time search functions similarly facilitate fair use by assisting in the retrieval of relevant clips when a searcher does not have a preset list of relevant keywords. Date and time may also be important in and of themselves. In an example that occurred recently, commentators responded to the decision of many news outlets to report on the White House Correspondents' Dinner at the moment that major protests erupted in Baltimore. The Baltimore protests were, in the opinion of many, much more newsworthy. Effective video-based analysis and critique required looking at what the news outlets were covering at the particular dates and times involved, rather than searching for keywords—it was the *absence* of coverage at a sensitive time that was at issue. See, e.g., *The Daily Show Lampoons CNN For Covering White House Correspondents Dinner Red Carpet Instead Of Baltimore Protests*, MediaMatters.org, Apr. 24, 2015, available at <http://mediamatters.org/video/2015/04/28/the-daily-show-lampoons-cnn-for-covering-white/203443>.

TVEyes' functionality should not be crippled to prevent these kinds of fair uses, especially since the search results come from a database whose creation the Court previously found to be transformative and fair. A method of searching a database cannot in itself infringe copyrights; indeed, new methods of searching and making connections are part of why the databases themselves have transformative purposes.

More generally, the Court should not impose a feature-by-feature test of strict “necessity” to TVEyes’ functionality. As the Second Circuit recently reinforced in finding a number of Richard Prince works of appropriation art to be transformative fair use as a matter of law, “the law does not require that the secondary artist may take no more than is necessary. . . . The secondary use “must be [permitted] to ‘conjure up’ at least enough of the original” to fulfill its transformative purpose.” *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir.2013). While *Cariou* spoke in terms of the amount of the original work taken, its rationale—consistent with the reverse engineering cases allowing internal copying—is equally applicable to the TVEyes functions at issue here. Fair use does not require users to adopt inefficient procedures to minimize the amount of copying that occurs. See *Connectix*, 203 F.3d at 605 (“[T]he rule urged by Sony would require that a software engineer, faced with two engineering solutions that each require intermediate copying of protected and unprotected material, often follow the *least efficient solution*.”). *Winstead* is almost directly on point: In that case, the court found that making internal copies and copies for clients, sharing those copies with the PTO for its evidentiary use in patent examination, and saving those copies as part of a patent application file were all transformative fair use of journal articles. *Winstead*, 2013 WL 6242843, at *5-*6. Although in theory some of those copies could have been done without, the underlying use was fair and there was no reason to sacrifice the advantages of digital systems, which routinely make copies as part of their ordinary operation, allowing the preservation of an otherwise inaccessible record. Similarly, copyright law should not disrupt an otherwise sensible procedure once the initial fair use is established.

V. Other Fair Use Considerations Favor TVEyes

TVEyes is a for-profit enterprise, but this consideration is relatively unimportant in transformative fair use cases, since most fair uses are conducted by profit-seeking entities. TVEyes is not exploiting Fox's works in advertising, but rather offers its database—the creation that is more than the sum of its parts, for which individual Fox works are no substitute. As a result, the commerciality of the use is of minimal weight. *See Bill Graham Archives*, 448 F.3d at 612 (use of plaintiff's images in book sold for profit was not for “commercial gain” because defendant “has not used any of BGA's images in its commercial advertising or in any other way to promote the sale of the book.”)

The second §107 factor, the nature of the work, favors TVEyes in two ways. First, TVEyes only copies works that have already been widely disseminated—that's its point. This favors fair use. *See, e.g., Kelly*, 336 F.3d at 820 (“Published works are more likely to qualify as fair use because the first appearance of the artist's expression has already occurred.”); *Arica Inst. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (plaintiff's work was “a published work available to the general public,” and the second factor thus favored the defendant). Second, the copied works are news programs, and “[i]t is well established that ‘the scope of fair use is greater with respect to factual than non-factual works.’” *Swatch*, 756 F.3d at 89 (quoting *New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp.*, 904 F.2d 152, 157 (2d Cir. 1990)). The additional presence of expressive elements make the broadcasts copyrightable, see *Feist*, 499 U.S. at 348, but do not confer a thick or strong copyright.

As for the third factor, copying an entire work is often consistent with fair use, and such is the case here. Rather than being a new development, the database cases on which this Court relied

extend a pattern from 1978-2005 in which defendants who took the entirety of the plaintiff's work won their fair use claims roughly as often as defendants overall.⁸ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pa. L. Rev. 549, 575-76, 616 (2008); see also, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984); *Kelly*, 336 F.3d at 820–21; *Mattel*, 353 F.3d at 803 n. 8 (9th Cir. 2003) (“entire verbatim reproductions are justifiable where the purpose of the work differs from the original”); *Bill Graham Archives*, 448 F.3d at 609 (2d Cir. 2006) (same).

Analysis of the fourth factor, market harm, depends very much on the legitimate markets a copyright owner is allowed to control. See *Authors’ Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014) (“any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work”); *Arrow Prods., LTD. v. Weinstein Co. LLC*, -- F. Supp. 3d --, 2014 WL 4211350 (S.D.N.Y. Aug. 25, 2014) (copies of short portions of film *Debbie Does Dallas* were transformative fair use; alleged licensing market was not within copyright owner’s legitimate market because uses were transformative).

Fox’s evidence of limited licensing markets simply cannot provide a substitute for transformative fair use. *Bill Graham Archives*, 448 F.3d at 614-15 (“[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work. [C]opyright owners may not preempt exploitation of transformative markets”); *Blanch v. Koons*, 467 F.3d 244,

⁸ As Pamela Samuelson has written, the legislative history of the Copyright Act also indicates that creating a database is not a prima facie infringement, given the removal of “indexes” from the definition of derivative works. Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 Geo. L.J. 1505, 1527, 1540, 1546 (2013).

256 (2d Cir. 2006) (“If the use is otherwise fair, then no permission need be sought or granted.”) (quoting *Campbell*, 510 U.S. at 585 n.18). The fact that some entities might seek to license clips that would qualify as fair use should not be used to destroy fair use; that only encourages copyright owners to engage in more aggressive attempts to bootstrap the practices of risk-averse entities into a rule of law. Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882 (2007).

The copyright owner’s lack of entitlement to transformative markets is not just a normative rule. It has strong empirical grounding in copyright owners’ own interests, which lead them to restrict licenses in ways that tend to choke off core fair uses. For example, Fox’s expert discusses Whipclip, a site offering clips from selected recent shows. Knobel Decl. at 26. This offering allows only personal, noncommercial use and the clips cannot be used in other contexts, such as with added analysis or commentary. See <https://www.whipclip.com/terms>.

Unsurprisingly, news organizations regularly attempt to suppress political uses of their footage. See, e.g., Susan Park, *Unauthorized Televised Debate Footage in Political Campaign Advertising: Fair Use and the DMCA*, 32 Southern L.J. 29, 30-38 (2013) (offering recent examples at the national and local levels), Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (September 2010), available at https://cdt.org/files/pdfs/copyright_takedowns.pdf (offering further examples). They also are willing to pull stories and remove clips from public availability. See Defendant TvEyes’ Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment, at 55 (Fox avoids posting clips that might embarrass it on its own sites).

Because of their own interests, news broadcasters are not motivated to preserve the historical record in full. This is the unique function that fair use databases can serve, and TVEyes' database makes the record available for timely analysis. As a result, the remaining fair use factors, particularly the market effect factor's concern for not letting copyright owners exercise censorial control through licensing, favor TVEyes as well.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant Defendant's supplemental motion for summary judgment.

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Respectfully submitted,

/s/

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