

# 15-3885(L)

**15-3886(XAP)**

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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FOX NEWS NETWORK, LLC,

*Plaintiff-Appellee-Cross-Appellant,*

—against—

TVEYES, INC.,

*Defendant-Appellant-Cross-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR *AMICI CURIAE* GOOGLE INC. AND MICROSOFT CORP.**

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JOSEPH C. GRATZ  
DURIE TANGRI LLP  
217 Leidesdorff Street  
San Francisco, California 94111  
(415) 362-6666

*Attorneys for Amicus Curiae  
Microsoft Corp.*

BRIAN M. WILLEN  
WILSON, SONSINI, GOODRICH  
& ROSATI, P.C.  
1301 Avenue of the Americas,  
40th Floor  
New York, New York 10019  
(212) 999-5800

LAUREN GALLO WHITE  
STEPHEN N. GIKOW  
WILSON, SONSINI, GOODRICH  
& ROSATI, P.C.  
650 Page Mill Road  
Palo Alto, California 94304  
(650) 493-9300

*Attorneys for Amicus Curiae  
Google Inc.*

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae state as follows:

Google Inc. is a wholly owned subsidiary of Alphabet Inc., a publicly held corporation. Accordingly, Alphabet Inc. has more than 10% ownership of Google Inc.

Microsoft Corporation has no parent corporation, and no other publicly held corporation owns 10% or more of its stock.

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**CASES**

*A.V. ex rel. Vanderhye v. iParadigms LLC*,  
562 F.3d 630 (4th Cir. 2009).....15

*Authors Guild, Inc. v. Google Inc.*,  
804 F.3d 202 (2d Cir. 2015).....passim

*Authors Guild, Inc. v. Google Inc.*,  
954 F. Supp. 2d 282 (S.D.N.Y. 2013) .....7

*Authors Guild, Inc. v. HathiTrust*,  
755 F.3d 87 (2d Cir. 2014).....passim

*Bill Graham Archives v. Dorling Kindersley Ltd.*,  
448 F.3d 605 (2d Cir. 2006).....14

*Blanch v. Koons*,  
467 F.3d 244 (2d Cir. 2006)..... 15, 19

*Fox News Network, LLC v. TVEyes, Inc.*,  
43 F. Supp. 3d 379 (S.D.N.Y. 2014) .....passim

*Fox News Network, LLC v. TVEyes, Inc.*,  
No. 13 Civ. 5315 (AKH),  
2015 WL 5025274 (S.D.N.Y. Aug. 25, 2015).....26

*Kelly v. Arriba Soft Corp.*,  
336 F.3d 811 (9th Cir. 2003).....passim

*Perfect 10, Inc. v. Amazon.com, Inc.*,  
508 F.3d 1146 (9th Cir. 2007).....passim

*Sorrell v. IMS Health Inc.*,  
131 S. Ct. 2653 (2011).....5

*Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*,  
756 F.3d 73 (2d Cir. 2014)..... 15, 25, 26

*Zhang v. Baidu.com Inc.*,  
 10 F. Supp. 3d 433 (S.D.N.Y. 2014) .....4, 5

**MISCELLANEOUS**

About Our App, RedLaser.com, <http://www.redlaser.com/application>  
 (last visited Mar. 21, 2016) .....6

About, Twitch.com, <https://www.twitch.tv/p/about>  
 (last visited Mar. 21, 2016) .....21

About, Unfiltered.News, <http://unfiltered.news/about.html>  
 (last visited Mar. 21, 2016) .....8

About Us, Periscope.com, <https://www.periscope.tv/about>  
 (last visited Mar. 21, 2016) .....21

About Us, Shazam.com, <http://www.shazam.com/company>  
 (last visited Mar. 21, 2016) .....6

About Us, TubularLabs.com, <https://tubularlabs.com/team/>  
 (last visited Mar. 21, 2016) .....23

Alex Chen et al., The Netflix Tech Blog, “Distributed Neural Networks with  
 GPUs in the AWS Cloud” (Feb. 10, 2014), [http://techblog.netflix.com/  
 2014/02/distributed-neural-networks-with-gpus.html](http://techblog.netflix.com/2014/02/distributed-neural-networks-with-gpus.html).....22

Allison Shapiro, Pacific Standard, “On Harper Lee’s Enduring Legacy”  
 (Feb. 19, 2016), [http://www.psmag.com/books-and-culture/the-  
 enduring-legacy-of-harper-lee](http://www.psmag.com/books-and-culture/the-enduring-legacy-of-harper-lee).....7

Amanda Walgrove, Contently, “The Explosive Growth of Online Video, in 5  
 Charts” (July 6, 2015), [https://contently.com/strategist/2015/07/06/the-  
 explosive-growth-of-online-video-in-5-charts/](https://contently.com/strategist/2015/07/06/the-explosive-growth-of-online-video-in-5-charts/).....21

Bing Blogs, “Ride Search Wave into Election Data & See Super  
 Tuesday Bing Predictions” (Feb. 29, 2016),  
[https://blogs.bing.com/search/2016/02/29/ride-search-wave-  
 into-election-data-and-see-super-tuesday-bing-predictions/](https://blogs.bing.com/search/2016/02/29/ride-search-wave-into-election-data-and-see-super-tuesday-bing-predictions/) .....8

Brett King, The Huffington Post, “Too Much Content: A World of Exponential Information Growth” (Jan. 18, 2011), [http://www.huffingtonpost.com/brett-king/too-much-content-a-world b 809677.htm](http://www.huffingtonpost.com/brett-king/too-much-content-a-world-b-809677.htm).....5

CamFindApp.com, [www.camfindapp.com](http://www.camfindapp.com) (last visited Mar. 21, 2016) .....6

Cisco, Visual Networking Index (VNI), <http://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/index.html#~completeforecast> (last visited Mar. 21, 2016).....21

“Data Download: Put The Archive To Work,” <https://politicaladarchive.org/data/> (last visited Mar. 21, 2016).....27

“Dive into the data and resources,” Political TV Ad Archive, <https://politicaladarchive.org/> (last visited Mar. 21, 2016) .....23

Eriq Gardner, The Hollywood Reporter, “Fox News Heads to a Jury Trial to Defend Its Use of 9/11 Photos on Facebook” (Dec. 22, 2015), <http://www.hollywoodreporter.com/thr-esq/fox-news-heads-a-jury-850674> .....16

Greg Jarboe, ReelSEO, “Which U.S. Presidential Video Campaigns Are Actually Engaging Viewers?” (Jan. 14, 2016), <http://www.reelseo.com/presidential-video-campaigns-engagement/>.....23

Greg Jarboe, ReelSEO, “Why A Mobile Video Marketing Strategy Is Essential For Fortune 50 Brands” (Jan. 26, 2016), <http://www.reelseo.com/mobile-video-marketing-strategy-fortune-50/#ixzz42TpdLYlg> .....20

How to Create Snaps, Snapchat.com, <https://support.snapchat.com/a/create> (last visited Mar. 21, 2016) .....20

Introducing Video on Instagram, Instagram.com <http://blog.instagram.com/post/53448889009/video-on-instagram> (last visited Mar. 21, 2016) .....20

Jonathan Barnard, ZenithOptimedia, “Mobile To Drive 19.8% Increase In Online Video Consumption In 2016” (July 31, 2015), <http://www.zenithoptimedia.com/mobile-drive-19-8-increase-online-video-consumption-2016/> .....21

“Mapping 400,000 Hours of U.S. TV News,” Internet Archive Blogs, <https://blog.archive.org/2013/12/13/mapping-400000-hours-of-u-s-tv-news/> (last visited Mar. 21, 2016).....22

Robinson Meyer, The Atlantic, “A New Map Reveals the Geography of American TV News” (Dec. 17, 2013), <http://www.theatlantic.com/technology/archive/2013/12/a-new-map-reveals-the-geography-of-american-tv-news/282443/> .....9

“Search Engine Optimization for Music Websites,” <http://musicbiz.org/wp-content/uploads/2013/10/SEOInfographic1013.jpg?7e93cc> (last visited Mar. 22, 2016) .....12

Statistics, YouTube.com, <https://www.youtube.com/yt/press/statistics.html> (last visited Mar. 21, 2016).....20

Stephen Carter, Chicago Tribune, “Word bans at Harvard won’t help racial justice” (Feb. 26, 2016), <http://www.chicagotribune.com/news/sns-wp-blm-race-comment-f6fee6e-dca7-11e5-8210-f0bd8de915f6-20160226-story.html> .....7

Stuart Dredge, Business Insider, “Shazam Is Driving \$300 Million In iTunes And Amazon Sales” (Feb. 27, 2013), <http://www.businessinsider.com/shazam-is-driving-300-million-in-itunes-and-amazon-sales-2013-2> ..... 11, 12

Vine (service), Wikipedia.com, [https://en.wikipedia.org/wiki/Vine\\_\(service\)](https://en.wikipedia.org/wiki/Vine_(service)) (last visited Mar. 21, 2016).....20

## **INTRODUCTION**<sup>1</sup>

This appeal raises important questions about how copyright law applies to search technology. Search tools are essential to the digital world. They help people find and make sense of the world’s ever-increasing mass of information. Most copyright owners embrace effective search technology, recognizing that it makes their works more relevant and often more valuable. Courts in copyright cases have consistently held that search providers are protected by fair use. *See, e.g., Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202 (2d Cir. 2015) (“*Google Books*”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). These rulings have fostered the development of widely used tools that create enormous public benefits.

Technology is never static, of course, and new forms of search continue to evolve to address cultural, social, and intellectual needs. Video is one of these new frontiers: it has become an increasingly important medium of information and expression. Video-enabled devices and the unprecedented increase in the availability of video content have changed the way people communicate, remain

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c) and Local Rule 29.1, amici curiae state that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no persons other than amici curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

informed about the world, and uncover new insights. Effective search tools will play a critical role in the public's ability to sift through and analyze video in innovative ways.

This case gives the Court an opportunity to reaffirm the value of search technology in this context. The following principles, drawn from existing case law, are particularly important in allowing search to thrive:

- Copying material for inclusion in a search index is highly transformative;
- Full-text copying can be fully consistent with copyright law;
- Including snippets of copyrighted material in search results furthers a search engine's transformative purpose;
- Search engines are unlikely to meaningfully substitute for the original work or harm its market value; and
- Copyright holders cannot establish market harm by invoking speculative lost opportunities to license a transformative use.

The Court should make clear that these principles apply equally to search technology that helps users locate and analyze video content. It should also confirm that copyright does not restrict users from running various types of search queries, including searches for material based on the date or time it was published. Such queries are common and facilitate any number of legitimate uses. Resolving this appeal based on these precepts will help ensure the continued development and innovation of beneficial search technology.

## INTERESTS OF THE AMICI

Google Inc. (“Google”) and Microsoft Corp. (“Microsoft”) (collectively, “Amici”) are leaders in the field of search technology.

**Google** is a diversified technology company whose mission is to organize the world’s information and make it universally accessible and useful. Google offers a variety of web-based products and services—including Google Search, Gmail, Google Maps, YouTube, and Blogger—that empower people around the world to create, find, organize, and share information.

**Microsoft** is a leader in the technology industry. Since its founding in 1975, it has developed a wide range of software, services, and hardware products, including the Bing search engine, the flagship Windows operating system, the Office suite of productivity applications, the Surface tablet computer, and the Xbox gaming system. These systems and services allow users to access and analyze incredible amounts of information stored in a wide variety of media.

The issues presented in this appeal are of particular importance for Amici. Although Google and Microsoft are competitors, they stand together in recognizing that search tools are essential to making information more accessible and useful. While best known for their Internet search engines, Amici are continually working to develop new kinds of search technologies across emerging platforms. In doing this important work, Amici rely on principles of fair use. While most search

engines need to copy material to create search indexes and to display portions of material to show users what results matched their query and why they may be relevant, courts have repeatedly found that such copying and display is permitted by copyright law. Amici have a powerful interest in ensuring that courts continue to recognize the importance of search technology and the proper application of copyright law to it, especially as search evolves into new media.

This appeal is particularly significant in that regard, as it involves a search engine that focuses on indexing video content. This Court's approach to TVEyes' technology matters a great deal to Amici and other innovators working to take search in new directions. It matters a great deal to Amici's users, who regularly use search tools to discover information and insights, make decisions, and remain informed on vital matters. The decision in this case will help shape the innovation environment in which search technologies will develop.

## **ARGUMENT**

### **I. SEARCH TECHNOLOGY HAS ENORMOUS PUBLIC BENEFITS**

#### **A. Search Is An Essential Tool In An Information Society**

Search tools are a vital element of contemporary life. Internet search engines collect and communicate information that is “the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.” *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014)

(quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011)). As the total of publicly available information continues to swell exponentially, the importance of search tools will only increase.<sup>2</sup> In every aspect of their lives—as students, professionals, parents, voters—people depend on search tools to sift through and make sense of the abundance of information. Moreover, authors and publishers will increasingly rely on those same tools to find their audiences and customers.

Online search engines like Google Search and Microsoft Bing embody what many think of when “search” comes to mind. These tools crawl the Internet to index web pages so that users can locate relevant information via text-based search queries. Their purpose “is to retrieve relevant information from the vast universe of data on the Internet and to organize it in a way that would be most helpful to the searcher.” *Zhang*, 10 F. Supp. 3d at 438. But web and text-based search is only part of the story. There are many other forms of search technology, and new applications for search are emerging at a rapid pace.

A few examples illustrate how search has expanded beyond the “ten blue links” displayed on web-enabled search pages: song-recognition technology enables users to identify recorded music by “listening” to short clips of recorded songs; photo-recognition technology enables individual photo collectors to identify

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<sup>2</sup> See Brett King, The Huffington Post, “Too Much Content: A World of Exponential Information Growth” (Jan. 18, 2011), [http://www.huffingtonpost.com/brett-king/too-much-content-a-world\\_b\\_809677.html](http://www.huffingtonpost.com/brett-king/too-much-content-a-world_b_809677.html).

and organize photos by subject and location; price-comparison technology allows shoppers to quickly identify sellers and compare prices; social media sites enable individuals to find former classmates and co-workers, like-minded hobbyists, and affiliated political groups.<sup>3</sup>

### **B. Search Tools Advance Public Knowledge And Understanding**

Courts have repeatedly recognized the social and public benefits that search tools offer. As the Ninth Circuit has explained, online search engines are electronic reference tools that put existing works to new uses, helping people find information and glean insights they might otherwise miss. *Perfect 10*, 508 F.3d at 1165. This “benefit[s] the public by enhancing information-gathering techniques on the internet.” *Kelly*, 336 F.3d at 820.

Search technology not only allows information to be found, it enhances the value of information. It allows people to collect and synthesize data, to compare information across large data sets, and find patterns in the data. The goal of quickly, efficiently, and accurately identifying information drives the development of increasingly effective search tools. These tools can provide not only access to catalogued information but also information about that information.

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<sup>3</sup> See, e.g., About Us, Shazam.com, <http://www.shazam.com/company> (last visited Mar. 21, 2016); CamFindApp.com, [www.camfindapp.com](http://www.camfindapp.com) (last visited Mar. 21, 2016); About Our App, RedLaser.com, <http://www.redlaser.com/application> (last visited Mar. 21, 2016).

As this Court has explained, the “search engine also makes possible new forms of research.” *Google Books*, 804 F.3d at 209. Google’s “Ngram” tool, for example, allows users to comb through the contents of tens of millions of books to examine “‘word frequencies, syntactic patterns, and thematic markers’ and to derive information on how nomenclature, linguistic usage, and literary style have changed over time.” *Id.* (quoting *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013)). The Ngram Viewer can be used to visualize the influence of notable works of fiction,<sup>4</sup> to study the linguistic underpinnings to the historical understanding of slavery,<sup>5</sup> and for countless other purposes.

Google’s new Unfiltered.News site provides yet another example. This data-visualization tool scans Google News content and generates a map display of the most popular stories in different regions around the world. It enables searching by date, topic, and geographic location, empowering users to track the popularity—or underrepresentation—of news around the world, outside of their own countries.<sup>6</sup> Likewise, Bing’s Search Wave uses machine-learned predictive models that build

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<sup>4</sup> See Allison Shapiro, Pacific Standard, “On Harper Lee’s Enduring Legacy” (Feb. 19, 2016), <http://www.psmag.com/books-and-culture/the-enduring-legacy-of-harper-lee>.

<sup>5</sup> See Stephen Carter, Chicago Tribune, “Word bans at Harvard won’t help racial justice” (Feb. 26, 2016), <http://www.chicagotribune.com/news/sns-wp-blm-race-comment-f6feee6e-dca7-11e5-8210-f0bd8de915f6-20160226-story.html>.

<sup>6</sup> See About, Unfiltered.News, <http://unfiltered.news/about.html> (last visited Mar. 21, 2016).

upon anonymized and aggregated search-engine queries along with other data to predict the winners of the Republican and Democratic nominations in each state. This data allows Bing to provide unique insights into candidate searches by state, age, and gender.<sup>7</sup>

Image or video search tools can be used for similar analytics and insights. Using an image search tool, a researcher can conduct a historical comparison of how an everyday subject—a location, a telephone, “family”—has been photographed in different regions, by different people, and at different times throughout history. A video search tool can enable the same type of statistical study, enabling users to study, for example, descriptive words historically used by newscasters when describing the characteristics of presidential candidates or nominees to the Supreme Court.

These are just a few examples of the kinds of insights made possible by search technology. There are many more. Audio and visual search tools can help users analyze broadcasts to detect patterns, trends, and other information that, without a comprehensive search tool, might be overlooked. For example, in 2013, the Internet Archive scanned four years of its archive of television news to generate data visualizations showing which geographic locations were most often

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<sup>7</sup> See Bing Blogs, “Ride Search Wave into Election Data & See Super Tuesday Bing Predictions” (Feb. 29, 2016), <https://blogs.bing.com/search/2016/02/29/ride-search-wave-into-election-data-and-see-super-tuesday-bing-predictions/>.

mentioned in TV news broadcasts in the United States.<sup>8</sup> The visualizations enabled users to understand television news in a new way by organizing content geographically to highlight the differing intensities with which TV news covers different parts of the world.

The district court in this case recognized that video search tools facilitate a deeper analysis of how the news is covered, by showing how words and images are used to report particular stories by different networks and at different periods in time. “The actual images and sounds depicted on television are as important as the news information itself—the tone of voice, arch of an eyebrow, or upturn of a lip can color the entire story, powerfully modifying the content.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014). These tools facilitate fact-checking, allow businesses and organizations to identify and respond to misstatements, and enable reporting on the accuracy and consistency of statements made by candidates running for an elected office. This type of analysis is not possible just by watching television or listening to the radio. Its availability depends on robust search technology.

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<sup>8</sup> *See, e.g.*, Robinson Meyer, The Atlantic, “A New Map Reveals the Geography of American TV News” (Dec. 17, 2013), <http://www.theatlantic.com/technology/archive/2013/12/a-new-map-reveals-the-geography-of-american-tv-news/282443/>.

**C. Effective Search Tools Require Copying And Displaying Snippets Of Copyrighted Material**

Search depends fundamentally on two things: a broad index, and the ability to effectively search that index. This invariably requires the reproduction and display of the underlying, searchable material. *See, e.g., Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (“It is not disputed that, in order to perform a full-text search of books, [Google Books] must first create digital copies of the entire books.”). For example, web search engines necessarily copy enormous numbers of web pages to compile a comprehensive index against which search queries can be run. Omissions from this index can diminish the search engine’s accuracy and utility. *See Kelly*, 336 F.3d at 821 (“If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.”).

Likewise, useful search results generally will include at least some sample of responsive material to enable the user to assess the search results, determine their relevance and responsiveness, and understand why a given query produced a given result. Google Books returns snippets of books, because “[m]erely knowing that a term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book.” *Google Books*, 804 F.3d at 217-18. Image search engines display “thumbnails” of responsive photographs, which “allow users to

recognize the image and decide whether to pursue more information about the image.” *Kelly*, 336 F.3d at 821.

This case involves the same framework. TVEyes had to copy a large number of TV broadcasts in order to build an index that would enable its users to effectively search across those programs. And, just as with web search, book search, and image search, TVEyes provides snippets of broadcast content to enable users to reasonably discern the relevance and context of its search results. Indexes and snippets are common features of search technology and are widely recognized as non-infringing uses.

#### **D. Search Tools Can Improve The Market For Copyrighted Works**

By making content more readily accessible, search tools often expand the accessible marketplace for (and increase the value of) copyrighted works. For example, in 2013, the music search and identification app Shazam reported driving more than \$300 million per year in download sales by directing users who searched for audio clips to download stores like iTunes and Amazon.<sup>9</sup> Similarly, Shazam provides a second-screen experience to complement TV viewing with content such as “episode descriptions, quizzes, tweets, cast information and playable clips of every song on the soundtrack, with links to buy song downloads, TV episodes and

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<sup>9</sup> See Stuart Dredge, Business Insider, “Shazam Is Driving \$300 Million In iTunes And Amazon Sales” (Feb. 27, 2013), <http://www.businessinsider.com/shazam-is-driving-300-million-in-itunes-and-amazon-sales-2013-2>.

merchandise.”<sup>10</sup> Unsurprisingly, copyright holders largely welcome these kinds of search tools—not only tolerating, but actively engaging with search technology to help identify or advertise their content. As just one example, in 2013 the Music Business Association (formerly the National Association of Recording Merchandisers (“NARM”) and digitalmusic.com) issued an infographic titled “Search Engine Optimization for Music Websites,” intended to educate its members about how search engines work and how to optimize the visibility of their content online, “leading to higher search engine results and increased business.”<sup>11</sup>

## **II. SEARCH TECHNOLOGY IS A PARADIGMATIC EXAMPLE OF NON-INFRINGEMENT USE**

Given the importance of search, the necessity of copying and display of copyrighted material in order to build search tools, and the unlikelihood that search technologies will harm the market for copyrighted works, it is no surprise that courts have repeatedly recognized that the use of copyrighted materials in the creation and development of search tools is non-infringing.

Just last year, this Court held that Google’s “making of a complete digital copy of Plaintiffs’ works for the purpose of providing the public with its search and snippet view functions ... does not infringe.” *Google Books*, 804 F.3d at 225.

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<sup>10</sup> *Id.*

<sup>11</sup> “Search Engine Optimization for Music Websites,” <http://musicbiz.org/wp-content/uploads/2013/10/SEOInfographic1013.jpg?7e93cc> (last visited Mar. 22, 2016).

This holding builds on and reflects how other courts have consistently approached these issues. *See, e.g., HathiTrust*, 755 F.3d at 101 (“[T]he doctrine of fair use allows the Libraries to digitize copyrighted works for the purpose of permitting full-text searches.”); *Kelly*, 336 F.3d at 822 (“Arriba’s use of Kelly’s images as thumbnails in its search engine is a fair use.”).

In concluding that search tools make legitimate use of the copyrighted works that they render searchable, courts have articulated several overarching principles, which should apply in this case and other cases applying copyright law to search technology.

**A. Copying Material For Inclusion In A Search Index Is Transformative**

This Court has expressly held that “the creation of a full-text searchable database is a *quintessentially transformative* use,” *HathiTrust*, 755 F.3d at 97 (emphasis added). The Ninth Circuit has similarly stated that a search engine has “an obvious claim to transformative value.” *Perfect 10*, 508 F.3d at 1165 (citation omitted). “[A] search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.” *Google Books*, 804 F.3d at 217.

The creation of a comprehensive index is a prerequisite to identifying and locating the content in which “words or phrases of interest to [the user] appeared.”

*Id.* This transforms the indexed content into a search tool separate and distinct from the underlying work itself, and one which facilitates new insights into information. Such transformation weighs heavily against infringement. *See id.* at 216-17 (“We have no difficulty concluding that Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose.”); *Perfect 10*, 508 F.3d at 1165 (“Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information.”).

**B. Copying Entire Works Is Not Necessarily Inconsistent With Copyright Law**

In the search context, courts “have rejected any categorical rule that a copying of the entirety cannot be a fair use.” *Google Books*, 804 F.3d at 221; *see also Perfect 10*, 508 F.3d at 1165 (“[E]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”). This Court has also applied this principle to reject infringement claims even in non-search cases involving the unaltered reproduction of entire copyrighted works. *See, e.g., Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (copying of copyrighted images “in their entirety” does not weigh against fair use because the copies are “tailored to further [the]

transformative purpose” and necessary “to ensure the reader’s recognition of the images”); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 90 (2d Cir. 2014) (copying “the entire [copyrighted] recording was reasonable in light of its purpose of disseminating important financial information to investors and analysts”); *Blanch v. Koons*, 467 F.3d 244, 248, 258 (2d Cir. 2006) (copies of the “dominat[ing]” elements of plaintiff’s photograph into defendant’s painting weighed in favor of fair use because the elements were copied “to further [defendant’s] purpose of commenting on the ‘commercial images ... in our consumer culture’”).<sup>12</sup>

**C. Including Snippets Of Copyrighted Material In Search Results Furthers A Search Engine’s Transformative Purpose**

This Court and the Ninth Circuit have consistently rejected the contention that a work is infringed when a snippet of that work is displayed by a search engine. Even the most firmly entrenched fair uses such as criticism and reporting would be seriously undermined by a contrary ruling. How, for example, can a critic faithfully review a work of fiction without including excerpts of the book? Television programs like *The Daily Show* and *The Colbert Report* have made

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<sup>12</sup> Other courts have held likewise. *See, e.g., A.V. ex rel. Vanderhye v. iParadigms LLC*, 562 F.3d 630, 642 (4th Cir. 2009) (holding that copying “substantially the whole of plaintiffs’ works” does not weigh against fair use because the copies are used “as a digitized record for electronic ‘comparison purposes only’”).

mainstream the use of television clips in the cause of satire and commentary.<sup>13</sup> These examples remind us that showing a snippet of the original work can call it up in the minds of the audience in a manner that furthers the transformative purpose.

Copyright law has recognized the same relationship where search engine snippets are concerned: users have to be able to review some portion of a work in order to identify the extent of its responsiveness and the context in which the searched query appears. Courts thus have repeatedly held that providing snippets of copyrighted material (text, thumbnails, photographs, or short video clips) furthers the transformative purpose of search engines. *See, e.g., Perfect 10*, 508 F.3d at 1165 (“[An image] search engine transforms the image into a pointer directing a user to a source of information.”); *Kelly*, 336 F.3d at 819 (“Arriba’s use of the images serves a different function than Kelly’s use—improving access to information on the internet versus artistic expression.”). In *Google Books*, for example, search alone “tells only whether and how often the searched term appears in the book”; it “does not reveal whether the term is discussed in a manner or context falling within the scope of the searcher’s interest.” *Google Books*, 804 F.3d

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<sup>13</sup> Fox News itself has invoked the fair use doctrine to defend its use of “visually altered, significantly cropped and low-resolution versions” of photos for the purpose of reporting. *See* Eriq Gardner, *The Hollywood Reporter*, “Fox News Heads to a Jury Trial to Defend Its Use of 9/11 Photos on Facebook” (Dec. 22, 2015), <http://www.hollywoodreporter.com/thr-esq/fox-news-heads-a-jury-850674>.

at 217-18. To facilitate that additional analysis, snippets are critical. “Snippet view adds important value to the basic transformative search function.” *Id.*

This reasoning applies equally to short video clips like those at issue here. As the district court explained, the clips that TVEyes displays in its search results are “integral to TVEyes’ service of monitoring and reporting on all the news and opinions presented by all television and radio stations. Without these excerpted video clips, TVEyes’ users could not receive the full spectrum of information identified by an index.” *TVEyes*, 43 F. Supp. 3d at 393.

**D. Search Engines Are Unlikely To Meaningfully Substitute For The Original Work Or Harm Its Market Value**

The final fair use factor asks whether there is evidence that the use at issue meaningfully substitutes for the original work or otherwise harms its market value. This Court and others have rightly found that the uses that search engines make of copyrighted content are unlikely to do so. *Kelly*, 336 F.3d at 821. In *Google Books*, the Court held that “[e]ven if the search function revealed 100% of the words of the copyrighted book, ... [i]t cannot be said that a revelation is ‘substantial’ in the sense intended by [fair use] if the revelation is in a form that communicates little of the sense of the original.” 804 F.3d at 223 (explaining that “[t]he fragmentary and scattered nature of the snippets revealed, even after a determined, assiduous, time-consuming search, results in a revelation that is not ‘substantial’”). Similarly, the Ninth Circuit observed in *Kelly*: “By showing the thumbnails on its results page

when users entered terms related to Kelly’s images, the search engine would guide users to Kelly’s web site rather than away from it.” 336 F.3d at 821. The district court here reached the same conclusion, dismissing arguments that users “could watch sequential ten minute clips of content end to end, and thus watch and hear all of Fox News’ programs in their entirety.” *TVEyes*, 43 F. Supp. 3d at 393.

These rulings recognize that, by limiting the size or quality of the snippets and employing them in a search context, a search engine is unlikely to harm the value of the works that it helps users find and analyze. In the absence of hard evidence of demonstrable market harm, courts should not presume that short excerpts displayed in search results are substitutional.

**E. Copyright Holders Cannot Establish Market Harm By Invoking Speculative Lost Opportunities To License A Transformative Use**

Speculation about hypothetical lost opportunities to license transformative fair uses that do not otherwise harm the market value of a work should not be enough to prove infringement. As this Court explained in *HathiTrust*, “[l]ost licensing revenue counts ... only when the use serves as a substitute for the original.” 755 F.3d at 100.

Because the full-text searches at issue in *HathiTrust* were transformative, it was “irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair).” *Id.* The authors there could not establish market harm by claiming that every copy used “in

generating full-text searches represents a lost opportunity to license the book for search.” *Id.* at 99. The Court applied the same logic in *Google Books*, rejecting the plaintiffs’ argument that “the availability of licenses for providing unprotected information about a copyrighted work, or supplying unprotected services related to it, gives the copyright holder the right to exclude others from providing such information or services.” 804 F.3d at 226; *see also Blanch*, 467 F.3d at 258 (where plaintiff had “never licensed any of her photographs for use in works of graphic or other visual art,” no market harm resulted from defendant’s use of plaintiff’s photograph in a painting).

### **III. SEARCH TOOLS THAT FIND AND ANALYZE ONLINE VIDEO CONTENT CALL FOR THE ROBUST APPLICATION OF FAIR USE PRINCIPLES**

Applying these core principles is particularly important in this appeal because it involves the nascent and rapidly evolving area of video search. Video search technology, like that offered by TVEyes, is becoming increasingly vital, as video becomes an ever more important vehicle for the exchange of information and culture. This case provides an opportunity for the Court to confirm that the same fair use principles apply to video search technologies as have applied to previous search engine innovations.

**A. Video Is A Vital Medium On The Internet For Which New Forms Of Search Technology Will Play A Critical Role**

Video is everywhere. Modern devices—phones, computers, televisions, video game systems—allow users to access, create, and distribute video content on an unprecedented scale. Indeed, the sheer amount of video content now available online is already staggering—and still growing. YouTube alone has over one billion users, who watch hundreds of millions of hours of YouTube videos each day.<sup>14</sup> Facebook has more than 500 million users watching videos on its service.<sup>15</sup> Nearly every other major social media site—Instagram, Snapchat, and more—has integrated video directly into its platform, allowing users both to create and share their videos, and to view videos shared by others.<sup>16</sup> Even more recently, services

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<sup>14</sup> See Statistics, YouTube.com, <https://www.youtube.com/yt/press/statistics.html> (last visited Mar. 21, 2016).

<sup>15</sup> See Greg Jarboe, ReelSEO, “Why A Mobile Video Marketing Strategy Is Essential For Fortune 50 Brands” (Jan. 26, 2016), <http://www.reelseo.com/mobile-video-marketing-strategy-fortune-50/#ixzz42TpdLYlg>.

<sup>16</sup> See Introducing Video on Instagram, Instagram.com <http://blog.instagram.com/post/53448889009/video-on-instagram> (last visited Mar. 21, 2016); How to Create Snaps, Snapchat.com, <https://support.snapchat.com/a/create> (last visited Mar. 21, 2016). Social media platforms like Vine were built specifically to host user-generated video content. See Vine (service), Wikipedia.com, [https://en.wikipedia.org/wiki/Vine\\_\(service\)](https://en.wikipedia.org/wiki/Vine_(service)) (last visited Mar. 21, 2016).

like Periscope and Twitch have focused on “live-streaming” whereby users can stream video live to the Internet.<sup>17</sup>

One report found that adults in 2015 spent an average of one hour and 16 minutes each day watching digital videos—up from just 21 minutes in 2011.<sup>18</sup> Another predicted that “[t]he average amount of time people [would] spend consuming online video each day [would] increase by ... 19.8% in 2016.”<sup>19</sup> Cisco predicts that “IP video will represent 80 percent of all traffic by 2019, up from 67 percent in 2014.”<sup>20</sup> In short, video is becoming the dominant medium on the Internet.

Video’s emerging status as the preferred medium for social, political, and cultural life makes video search technology increasingly important. To realize the potential of this medium, people increasingly need tools that will enable them to sift through and understand the vast amount of video in a meaningful way. What

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<sup>17</sup> See About, Twitch.com, <https://www.twitch.tv/p/about> (last visited Mar. 21, 2016); About Us, Periscope.com, <https://www.periscope.tv/about> (last visited Mar. 21, 2016).

<sup>18</sup> See Amanda Walgrove, Contently, “The Explosive Growth of Online Video, in 5 Charts” (July 6, 2015), <https://contently.com/strategist/2015/07/06/the-explosive-growth-of-online-video-in-5-charts/>.

<sup>19</sup> See Jonathan Barnard, ZenithOptimedia, “Mobile To Drive 19.8% Increase In Online Video Consumption In 2016” (July 31, 2015), <http://www.zenithoptimedia.com/mobile-drive-19-8-increase-online-video-consumption-2016/>.

<sup>20</sup> See Cisco, Visual Networking Index (VNI), <http://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/index.html#~complete-forecast> (last visited Mar. 21, 2016).

does this technology look like? It is still taking shape, but early signs point to innovations in both search and analytics for video.

As an initial matter, search tools designed particularly for video are vital because finding relevant content will be increasingly difficult as more video is created and hosted online. Google and Microsoft have deployed innovative search technologies, and many other companies are innovating as well. Netflix, for example, has used “Deep Learning” algorithms to train an artificial neural network on cloud servers, in an effort to identify “better ways to find the best movies and TV shows for our members.”<sup>21</sup>

In addition, new analytic tools allow individuals to identify and understand macro (and micro) trends in video content over time. For example, the Internet Archive’s data visualization tool discussed above displays how frequently different locations were represented on TV news over time.<sup>22</sup> Similarly, some companies

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<sup>21</sup> See Alex Chen et al., The Netflix Tech Blog, “Distributed Neural Networks with GPUs in the AWS Cloud” (Feb. 10, 2014), <http://techblog.netflix.com/2014/02/distributed-neural-networks-with-gpus.html>.

<sup>22</sup> See “Mapping 400,000 Hours of U.S. TV News,” Internet Archive Blogs, <https://blog.archive.org/2013/12/13/mapping-400000-hours-of-u-s-tv-news/> (last visited Mar. 21, 2016).

provide general usage statistics across various video platforms, creating a backbone for understanding how users interact with video content.<sup>23</sup>

These tools are already put to good use in the political arena. As political candidates work to engage their supporters via video, new analytic tools promise to help astute observers analyze this content to see which videos are connecting with voters.<sup>24</sup> Another site “collects political TV ads in key early 2016 primary election states, unlocking the metadata underneath and highlighting quality journalism to provide journalists, civic organizations, academics, and the general public with reliable information on who is trying to influence them and how.”<sup>25</sup>

More comprehensive analytics systems for video are necessary to extract meaning from video as effectively as existing tools that search text. Such analytics tools will be helpful not only to content producers, but also to those wishing to study video usage and development over time. The freedom to study and incorporate a wide range of video content will be essential to divining how users value and are influenced by content. And innovations in these fields will depend, in

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<sup>23</sup> See, e.g., About Us, TubularLabs.com, <https://tubularlabs.com/team/> (last visited Mar. 21, 2016).

<sup>24</sup> See Greg Jarboe, ReelSEO, “Which U.S. Presidential Video Campaigns Are Actually Engaging Viewers?” (Jan. 14, 2016), <http://www.reelseo.com/presidential-video-campaigns-engagement/>.

<sup>25</sup> See “Dive into the data and resources,” Political TV Ad Archive, <https://politicaladarchive.org/> (last visited Mar. 21, 2016).

part, on a copyright environment that fosters and enables these advances, rather than treating them as infringements.

**B. Proper Application Of Copyright Is Vital To Protecting Innovations In Video Search And Analytic Technology**

While these video search and analytic technologies hold great promise, like most search tools they will often require copying, altering, or displaying portions of original works in ways that implicate copyright law. Innovators will only continue to develop these new tools if they have sufficient certainty that their actions will not give rise to billions in statutory damages liability to copyright owners. This is not to argue for “fair use exceptionalism” for video; on the contrary, this case provides an opportunity to clarify that the same fair use principles that courts have applied in other search engine contexts continue to obtain in the world of video search.

1. Video Search Is Just As Transformative As Search Tools Operating In Other Media

The Court should make clear that a search tool does not become infringing simply because it enables searching for video content, rather than text or images. Video search tools like TVEyes operate very much like other search engines: they index content to make it searchable. They also deliver short snippets of responsive content as part of search results, enabling users to understand why certain matches were found and to help them gain new insight about that material. There is no

reason that the copyright principles that protect search technologies in the context of the web, images, or books, should not apply equally to video-based searching.

Snippets of video are equivalent to excerpts of text or thumbnails of images. When delivered by a search provider, they transform the original works into pointers or sources of information. Such clips are delivered by search providers, not for entertainment or consumptive purposes, but instead to tell users where such material can be found and to offer them new analytic insights about that material. There is often no other way to convey those insights than to provide snippets; descriptions, summaries, or other substitutes may not provide the same insights, as this Court has recognized.

In *Swatch v. Bloomberg*, for example, the Court explained that recording and disseminating an audio recording of a call could be transformative for fair use purposes because it enabled the defendant to convey with greater “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.” 756 F.3d at 84 (“a speaker’s demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show”). That is equally true for video, as the district court in this case observed: “Subscribers to TVEyes gain access, not only to the news that is presented, but to the presentations themselves, as colored, processed, and criticized by the

commentators, and as abridged, modified, and enlarged by news broadcasts.” *TVEyes*, 43 F. Supp. 3d at 392-93. A video snippet, like an audio recording, “conveys information that a transcript or article cannot.” *Swatch*, 756 F.3d at 86.

2. Searches Done By Date And Time Can Be Fully Consistent With Copyright

While keywords are used for many searches, there is nothing talismanic for fair use purposes about that form of searching. In this case, however, the district court drew a sharp legal distinction between keyword searches and “date-time searches,” which allow TVEyes users to look for content based on when it was broadcast. The court held categorically that snippets delivered in response to date/time searches are infringing. *Fox News Network, LLC v. TVEyes, Inc.*, No. 13 Civ. 5315 (AKH), 2015 WL 5025274, at \*9 (S.D.N.Y. Aug. 25, 2015). Never before has a court suggested that a search is infringing simply because it allows users to run searches using certain parameters. Amici are concerned that this aspect of the court’s ruling could have unintended consequences for search providers.

To serve their transformative function, search tools allow users to search for different kinds of content in different ways. In addition to using keywords, users of different such engines can search for various forms of metadata, such as the author or title of a work. With some tools, users can search by submitting images that will match similar images; with others, users can provide an excerpt from a song in order to retrieve its title, the singer’s name, and other information. Temporal

criteria, such as dates and times, are also regular ways of running searches. Both Google and Bing allow users to search the web for pages, images, or online videos published in a particular date range.<sup>26</sup>

There are all sorts of legitimate reasons people may want the ability to search for information by date and time. That is especially so for video news broadcasts. Such searches allow users to conduct comparative analyses of coverage of a significant news event during a given time period; a searcher can see how different networks covered the event at the same time or when certain stations switched to a different story. Using date/time searches, researchers could compare the amount of time various networks give to a presidential election one day, one week, one month, and one year before Election Day. They could compare and assess which stations devoted live coverage to the President's announcement of an appointment to the Supreme Court or which stations cut away from regular programming to cover a breaking story. Historians could examine the political ads that ran during a particular month of a campaign to see which candidates did the best job of capturing a particular media market—or they could analyze ads

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<sup>26</sup> As another example, the Internet Archive's "Political TV Ad Archive" indexes and allows searching of televised political advertisements. Those searches can be done based on a wide array of criteria, including candidate name, sponsor, network, message, number of times aired, as well as the date and time a given advertisement aired. "Data Download: Put The Archive To Work," <https://politicaladarchive.org/data/> (last visited Mar. 21, 2016).

broadcast on different networks or at different times on a particular date. Countless other examples could be given.

This Court should reject any categorical claim that allowing users to run searches based on a date (or any other criteria) makes a search provider a copyright infringer. Temporal searching is entirely consistent with copyright, and it facilitates any number of highly transformative and beneficial uses. A ruling that some kinds of search queries fall outside fair-use protection would have serious practical consequences, impeding the development of legitimate search tools and deterring the use of legitimate search techniques that help increase public access to knowledge and information.

### **CONCLUSION**

In deciding this appeal, the Court should confirm that the core principles of fair use discussed above apply to video-based search technology. It should also make clear that merely allowing users to search for content by date, time, and other criteria is not copyright infringement.

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WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: s/ Brian M. Willen  
Brian M. Willen

Attorneys for *Amicus Curiae* Google Inc.

DURIE TANGRI, LLP

By: s/ Joseph C. Gratz  
Joseph C. Gratz

Attorneys for *Amicus Curiae* Microsoft Corp.

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The undersigned counsel for Amici Curiae Google Inc. and Microsoft Corp. certifies that this brief complies with the type-volume limitation set forth in FED. R. APP. P. 32(a)(7)(B)(i). This brief contains 6,370 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

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By: s/ Brian M. Willen  
Brian M. Willen