

No. 15-3885(L)

No. 15-3886 (XAP)

United States Court of Appeals for the Second Circuit

FOX NEWS NETWORK, LLC,

*Plaintiff – Appellee – Cross
Appellant,*

v.

TVEYES, INC.,

*Defendant – Appellant – Cross
Appellee.*

On Appeal from the United States District Court for the
Southern District of New York, No. 13-Civ.-5315 (Hellerstein, J.)

BRIEF *AMICUS CURIAE* OF INTELLECTUAL PROPERTY SCHOLARS IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT

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June 22, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that the amici are not a corporation that issues stock or has a parent corporation that issues stock. The amici are:

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INTEREST OF THE AMICI CURIAE¹

The amici are thirteen Professors and Scholars of Intellectual Property, Media, First Amendment and related areas of law, including a former General Counsel of the United States Copyright Office. Short biographies of the scholars are attached as Appendix A to this brief.

The scholars (“Scholars”)² teach and research copyright law, media law, first amendment law, and other related areas of the law and/or have served in the highest positions of authority with respect to the development and administration of copyright law in the United States. The Scholars have no stake in the outcome of this case other than their interest in ensuring that copyright law develops in a manner that respects its Constitutional and statutory basis and ensures that creativity and innovation continue to flourish.

¹ Pursuant to the 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 person other than the amici curiae or their counsel, contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

² The Scholars wish to thank the students of The Arts and Entertainment Advocacy Clinic at George Mason University School of Law, and in particular Mark DeSantis and Rachel Kim, for their research and drafting contributions to this brief.

The Scholars are concerned that the district court's eagerness to rewrite copyright law to provide a statutory fair use defense for "media monitoring," where Congress has three times refused to act, is inconsistent with the Constitutional separation of powers. The lower court's overly broad application of the doctrine of fair use, which dramatically expands the doctrine, will undermine the incentives and ability of creators from a variety of disciplines to benefit from the distribution and commercialization of their work in digital form.

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SUMMARY OF ARGUMENT

The district court's holdings dramatically expanded the fair use doctrine contrary to the express intent of Congress and inconsistent with existing precedent. TVEyes copies thousands of hours of entertainment, news, sports and other television programming twenty-four hours a day, seven days a week without permission or payment to authors and sells it to business subscribers for further copying and distribution at a fee of \$500 per month. (TVEyes Br. 6.) TVEyes and its amici attempt to excuse this copyright infringement by falsely characterizing the service as "media monitoring." (*Id.*) That characterization is wrong and does not justify the holdings below.

Congress thrice rejected requests to add media monitoring to the preamble of Section 107 of the Copyright Act. Instead, Congress enacted a limited alternative in Section 108, allowing libraries and nonprofit archives to engage in certain copying and archiving of works. By choosing not to include media monitoring among the enumerated examples in section 107, Congress struck the important balance between copyright holders' interests and the general public's interests in section 107. It is not the courts' role to legislate or bypass Congressional intent. For this reason alone, the district court's holdings that considered content-delivery features of TVEyes' service fair use must be reversed.

Moreover, any definition of TVEyes as a “media monitor” is a misnomer. TVEyes goes far beyond the media monitoring that was contemplated and rejected by Congress as potentially eligible for the fair use defense. At that time, a media monitoring service would give a client a short analog VHS tape that was hard to reproduce. Now, TVEyes provides subscribers unlimited digital content and encourages further distribution of works by its clients.

TVEyes likewise does not qualify for the more limited non-profit archival protections in Section 108 of the Copyright Act. TVEyes is an expensive, for-profit, business-to-business service that copies and digitally distributes copyrighted content from every cable channel around the clock and therefore does not meet the either the threshold requirements of Section 108 or the specific requirements of the exceptions contained therein.

In addition, TVEyes’ wholesale copying of thousands of hours of television programming does not fall within the contours of the fair use doctrine as consistently applied by this Court and others to media monitoring services. Nor do this Court’s decisions in *Author’s Guild v. Google, Inc. (Google Books)* and *Author’s Guild v. HathiTrust (Hathitrust)* support the result reached below. Setting aside amici’s views on those cases,³ TVEyes’ service is wholly different

³ Although several Scholars signing this brief disagree with the holdings of the court in *Google Books* and *Hathitrust*, it is not our intention, nor is it necessary to

from the services at issue in those cases. The service at issue in *Google Books* was a free service provided to the public for research purposes that incorporated measures intended to ensure that users could not obtain the full value from a work (whether that be the entire work or a key portion of a work like a travel guide or recipe book) via the search function. Likewise, *Hathitrust* involved a service displaying mere word search term results of copyrighted works. By contrast, TVEyes' service is designed to replace the original source of the work or licensed distributors of the work. The district court erred in determining otherwise and should be reversed.

ARGUMENT

I. **THE DISTRICT COURT'S HOLDING IS CONTRARY TO THE EXPRESS INTENT OF CONGRESS**

This Court should not condone TVEyes' attempt to evade Congressional intent. Copyright is a creature of statute, enacted by Congress as directed by the Constitution. As a result, any copyright analysis must begin with the statute itself. Here, statutory text and legislative history make clear that Congress expressly rejected the arguments made by TVEyes and relied on by the district court. When pressed to include media monitoring services in Section 107's preamble, Congress refused to do so three separate times. Congress instead chose to provide exceptions

relitigate those issues here, because neither decision supports a ruling in favor of TVEyes in this case.

for nonprofit archival uses of copyrighted content, including news broadcasts, in section 108. This Court should respect the will of Congress.

A. Congress Has Consistently Refused To Recognize Media Monitoring As Fair Use

TVEyes and the district court refer to the service as a “media monitoring” (or “broadcast monitoring”) service to justify the application of a fair use defense to its infringing activity. (TVEyes Br. 6.) Congress, however, consistently rejected attempts to add such monitoring to the preamble of Section 107 after considering the issue *three* times. The first attempt to add “broadcast monitoring” was in October of 1990, S. 3229, 101st Cong. (2nd Sess. 1990), the second was in October of 1991, S. 1805, 102 Cong. (1st Sess. 1991), and the third failure was in January of 1993, S. 23, 103rd Cong. (1st Sess. 1993). *None* of these attempts resulted in a bill that made it out of subcommittee, and to this day, media monitoring is not enumerated as a potential example of fair use in the Copyright Act.

The failure of those bills to make it out of subcommittee, coupled with Congress’ explicit enactment of a different, more limited, exception for non-profit archival organizations and libraries, reflects clear Congressional intent that media monitoring is not the type of activity that often merits a fair use defense; an intent that should be respected by this Court. *See Bob Jones Univ. v. United States*, 461

U.S. 574, 586-87 (1983). In *Bob Jones University*, the Supreme Court rejected a challenge to the Internal Revenue Service's interpretation of the tax code denying a tax exemption for "private schools which practice racial discrimination." 461 U.S. at 595-96. In its analysis, the Court noted that Congress did not overturn the IRS' interpretation despite the introduction of numerous bills that would have done so. *Id.* at 600-01. Observing that none of the introduced bills made it out of committee, *id.*, the court concluded that when Congress consistently refuses to act, courts cannot override Congress' decision.

Courts consistently agree with Congress that media monitoring should not be deemed fair use. For example, In *Pacific and Southern Co. Inc. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984), the Eleventh Circuit held that the defendant's videotaping of news broadcasts and subsequent sale of the tapes to the subjects of the news stories was not fair use. In *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992), the Ninth Circuit held that a service that monitored television news stations, recorded segments, and sold them to interested individuals and businesses did not amount to a fair use. In *Associated Press v. Meltwater U.S. Holdings, Inc.* 931 F.Supp. 2d. 537 (S.D.N.Y. March 21, 2013), the court held that a digital service that copied AP's content and delivered that content to paying subscribers was not fair use. This Court should reach the same result here.

Notably, Congress has had ample opportunity to amend the Copyright Act since 1993, when the last broadcast monitoring bill was introduced. Indeed, in 1998, after this Court held that radio rebroadcasts were not fair use, *see Infinity Broad Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), Congress amended related parts of the Copyright Act including the provisions of Section 108 regarding library archiving under the Digital Millennium Copyright Act. S. Doc. No. 105-190, at 24 (1998). In adopting the Digital Millennium Copyright Act, however, Congress explicitly refused to make any changes to the fair use provision of Section 107. *Id.* at 23-24.

This Court should not override clear Congressional intent and decades of consistent precedent and should reverse the district court's holding deeming certain content delivery features fair use.

B. TVEyes' Service Goes Even Further Than the Services Congress Rejected From Section 107 And Cannot Be Fair Use

TVEyes' business model goes even further than that of its 1990s counterparts, which unsuccessfully sought inclusion in section 107. Those broadcast monitors recorded a variety of programming each day and cut and compiled relevant clips for their clients,⁴ which were generally distributed on a

⁴ The broadcast monitors' clientele and TVEyes' clientele, however, are the same: political candidates, corporations, public relations firms, and advertising agencies. *Hearing on S. 1805* at 54-57.

single analog videotape. *A Bill to Amend Title 17, United States Code, To Clarify News Reporting Monitoring as a Fair Use Exception to the Exclusive Rights of a Copyright Owner: Hearing on S. 1805 Before the S. Comm. on Patents, Trademarks, and Copyrights*, 102nd Cong. 48-49 (1992). TVEyes' service goes far beyond that. It copies all programming, non-stop, and makes all of the copied content (not just what may be relevant) available to its subscribers in digital form to download, share, email and archive. Importantly, and unlike the media monitors of the 1990s, TVEyes also encourages the further distribution of digital copyrighted content by its subscribers. *Fox News Network, LLC v. TVEyes, Inc.*, 43 F.Supp.3d 379, 383-387 (S.D.N.Y. 2014).

Despite this, TVEyes believes it should prevail based on the same failed arguments the broadcast monitors unsuccessfully made to Congress. The proponents of S. 1805 argued that their services should be considered fair use because the public is entitled to easily accessible clips of broadcasts. Robert J. Cohen, President of the Video Monitoring Services of America, stated that "broadcast news monitoring services advance a core First Amendment interest . . . They [(broadcast monitors)] are the custodians of the public's right to know what is being aired about them and where." *Hearing on S. 1805*, at 32 He stressed that "the public's need for access to information from news programming should fall squarely within the scope of Section 107." *Id.* at 39 (emphasis added). He also

noted that the broadcast monitoring services were “the only means by which the public can exercise its right to know what is being aired about them and issues important to them and where.” *Id.* at 28. TVEyes and its amici make the same arguments today.

But just as media monitors failed in Congress then, the court must reject TVEyes arguments now. As Ralph Oman, former Register of Copyright, testified to Congress, and Congress apparently agreed, inclusion of broadcast monitoring would undermine copyright owners’ ability to receive compensation from the preexisting, legitimate clip licensing market. *Id.* at 5 (statement of Ralph Oman, Register of Copyrights). David Nimmer, editor of the leading treatise on copyright law similarly testified:

[T]he monitors’ activities fall afoul of the fair-use doctrine in that they simply reproduce the works of others wholesale rather than adding their own commentary, analysis . . . In short, the only result of the monitors’ activities is to destroy an ancillary market that otherwise would inure to the benefit of the copyright owners who create the subject newscast in the first place.”

Id. at 98 (statement of David Nimmer, Attorney, representing Turner Broadcast Networks). Mr. Nimmer noted that proper compensation is important for a copyright owner because maximizing the value of a copyright “encourage[s] creation of intellectual property.” *Id.* at 101. He also pointed out other provisions in copyright law that sufficiently balance free speech interests with copyright

ownership interests. He specifically noted the *Betamax* decision, which allows for private home copying of broadcast television programs, and statutory provisions like library archiving that facilitate public access to audiovisual news programs. *Id.* at 103, 107-08.

The reasons Congress rejected the inclusion of broadcast monitoring in Section 107, and the persuasive statements of Mr. Oman and Mr. Nimmer, are only more important today. Indeed, given advances in technology, the concerns animating Congress' decisions to reject media monitoring from inclusion in Section 107 are more pronounced here. If Congress did not believe that the provision of low quality videotapes containing relatively short clips of programming constituted fair use, it is hard to imagine a world in which the digital provision of high quality lengthy clips that can be widely distributed as a market substitute would fare better on Capitol Hill. Moreover, in the modern world, short form content is an increasingly valuable commodity to television networks and other content producers.

Indeed, there are many digital video services that license audio-visual programming to subscribers. Services such as Netflix and Hulu, among others, pay licensing fees to be able to provide digital video programming to subscribers. The risk of cutting into the licensing regimes of these services under the guise of fair use is substantial since the business models are so similar. Specifically here, Fox

News currently licenses clips to Hulu and Yahoo. *Fox News Network, LLC*, 43 F.Supp.3d at 389. If TVEyes' service is deemed fair use, it would devalue not only Fox News' programming, but the programming on Hulu and Yahoo as well. (Fox News' Rule 56.1 Statement of Undisputed Facts ¶106.) Notably, this decision does not just affect news programming. TVEyes copies both news and non-news programs, including programming from networks such as HBO, Bravo, Comedy Central, and ESPN. (Docket No. 117E (Simmons Decl.) Exs. 180-90.) If the district court's ruling stands, it will cause the wholesale degradation of online video platforms like Netflix and Hulu and the important licensing market driving these popular sites.

Simply put, Congress expressly chose not to include media monitoring in section 107 of the Copyright Act, rejecting the arguments now made to the courts by TVEyes. Courts have consistently agreed with Congress and the intervening years have not changed the analysis. The advances in technology, and the development of a robust market for short form licensed works, have only strengthened the arguments why such services should not be considered fair use. There is no basis for the district court or this Court to disregard the judgment of Congress. *See INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, . . . The hydraulic pressure inherent within each of the separate

Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”)

C. Requiring TVEyes To Acquire Licenses Would Have No Detriment To The Public’s Access To News And Information

TVEyes’ service can exist under a licensing regime and its claimed purposes would be served. TVEyes’ amici argue that but for organizations like TVEyes, media criticism and monitoring is nearly impossible. Mr. Cohen, made the same argument to Congress in the Senate Hearing for S. 1805. He argued that without the broadcast monitoring industry, “the ability of the public to have access to news reporting about themselves and about issues important to them will be threatened.” *Id.* at 28. He also noted that the broadcast monitoring services were “the only means by which the public can exercise its right to know what is being aired about them and issues important to them and where.” *Id.* Congress rightly rejected that argument.

Media criticism existed before TVEyes through existing licensing and archiving regimes and will continue long after. TV archiving tools such as archive.org, libraries, and other archiving organizations provide services under Section 108 of the Copyright Act. And Fox News’ content is available on its own website and through authorized platforms, syndication partners, and licensing agents. (Fox News Br. at 9-13.) The world of media criticism will not collapse

should TVEyes be required to pay license fees to content creators. Mr. Nimmer noted in his testimony that broadcast monitoring companies could surely find somewhere in their then-estimated \$50 million industry to fairly compensate the original content creators. *Id.* at 95. Similarly, TVEyes can surely find room in its \$500/month subscription fee revenues to acquire legitimate licenses.

Congress thrice rejected arguments that commercial services like TVEyes that provide video clips to subscribers should be included in Section 107 as an example of fair use. TVEyes cannot use the courts to do what Congress refused to do. The district court erred by upsetting the balance struck by Congress in Sections 107 and 108 of the Copyright Act, and its decision regarding the content-delivery features should be reversed.

D. Congress Protects The Public Interest By Providing Appropriate Exceptions For Nonprofit Archival Organizations And TVEyes Does Not Qualify

The district court's misplaced concern about the importance of archiving provides no basis for finding that TVEyes' commercial service constitutes fair use. The Copyright Act contains statutory exceptions for archival copying for non-profit organizations in Section 108 that TVEyes does not meet. The district court wholly ignored those statutory provisions when it relied on the notion that TVEyes' ability to archive and preserve entertainment, sports and other programs is essential to the free exchange of ideas, speech, and debate and concluded that

TVEyes captures programs that otherwise “disappear after airing into an abyss.”⁵
Fox News Network, LLC v. TVEyes, Inc., 2015 WL 5025274, at *20 (S.D.N.Y. Aug 25, 2015)

Under the approach adopted by Congress, three conditions qualify an organization for the Section 108 archiving exception:

- 1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- 2) The collections of the library or archives are
 - i) open to the public; or
 - ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
- 3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

17 U.S.C. §108(a). TVEyes does not meet these threshold criteria, nor could it meet any of the additional criteria in the other subsections of Section 108. TVEyes offers its services for direct commercial gain to approximately 2,000 businesses for subscription fees of \$500 a month. (TVEyes Br. at 7). Its services are neither

⁵ Television news content is public and available through licensing regimes, consistent with the Supreme Court’s holding stressing the importance of copyright in news “[i]n our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression.” *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

directed to researchers nor open to the public. (*Id.*) TVEyes does not include a copyright notice or legend on the video clips it delivers to subscribers (Fox News' Rule 56.1 Statement of Undisputed Facts ¶¶ 186-87).

Although TVEyes does not meet the criteria of Section 108, several non-profit archival organizations do. Organizations such as the Internet Archive's TV News Archive, and Vanderbilt's Television News Archives, provide archiving services to address the public interest in robust debate and criticism of the media—the concern the district court cited as animating its decision. (Docket No. 100 (Knobel Decl.) ¶¶237-60.) The district court ignored the existence of such congressionally sanctioned services when it justified its decision on the erroneous grounds that “[w]ithout TVEyes, there is no other way to sift through more than 27,000 hours of programming broadcast on television daily.” *Fox News Network, LLC*, 43 F. Supp. 3d at 396-97. Simply put: TVEyes cannot avoid fairly compensating the authors of the programs it copies and sells to its subscribers for profit by relying on the importance of archiving to the public interest. Because TVEyes cannot legitimately claim the protection of the Section 108 statutory exception, the decision of the district court must be reversed.

II. THE FAIR USE DOCTRINE SHOULD NOT BE EXPANDED TO COVER A SERVICE PROVIDING FULL UNAUTHORIZED COPIES OF COPYRIGHTED CONTENT TO COMMERCIAL SUBSCRIBERS

Courts have long agreed with Congress that services like TVEyes are simply not fair use. TVEyes captures “television and radio content from more than 1,400 channels 24 hours a day, 7 days a week . . .” and provides that content to subscribers for a fee. (TVEyes Br. at 6) This purely commercial enterprise cannot be fair use under decades of precedent. Fair use is an express statutory exception providing that copying for “purposes such as criticism, comment, news reporting, teaching..., scholarship or research” is not copyright infringement. 17 U.S.C. §107. The statute further provides that the fair use analysis includes four factors: the purpose and character of the use; the nature of the work; the amount of the portion copied in relation to the work as a whole; the effect of the use on the potential market or value of the work. *Id.* TVEyes does not comment, criticize, report, teach, or perform research on the content it copies. Its purpose is to provide, for a relatively high fee, copyrighted broadcast and cable television programming in its entirety to its subscribers. TVEyes’ use is not fair use.

A. TVEyes’ Purpose Is Not Fair Use

TVEyes miscasts its commercial purpose by pointing to hypothetical end uses by its subscribers and by making vague references to public benefit. *First*, TVEyes relies on the fact that its subscribers *could* use its service for criticism,

comment, news reporting, teaching, scholarship or research to show a purpose that could conceivably be fair use. But courts in the past, including this Court, have rejected claims of fair use for similar services based on similar arguments. In *Pacific and Southern Co.*, the defendant videotaped a television station's news broadcasts and sold the tapes to the subjects of the news reports. 744 F.2d 1490. The defendant raised a fair use argument, but the court rejected it. Regardless of what users did with the videotapes after purchase, the court noted that the defendant was not itself analyzing or improving the broadcasts. *Id.* at 1496

This Court held similarly fourteen years later in *Infinity Broadcasting*. There, a company retransmitted radio broadcasts to its subscribers over the telephone for a fee and raised a fair use defense. The defendant argued "at length" about the purposes its retransmissions served for its users and the differences from the original transmissions' purposes of mere entertainment. 150 F.3d at 108. This Court rejected the argument because the actions of the "end-users" are not part of the analysis of the first fair use factor and "difference in purpose is not quite the same thing as transformation." This Court correctly held that "a use of copyrighted material that 'merely repackages or republishes the original' is unlikely to be deemed a fair use. *Id.* (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

TVEyes goes even further than the defendants above, by encouraging the dissemination of copyrighted material (Fox News Br. at 14-16), and yet asserts a purpose based on the potential actions of its subscribers. TVEyes also claims that its service's purpose is to benefit society at large. Courts, however, have explicitly held that even if a service like TVEyes produces some socially beneficial byproduct, such qualities do not amount to fair use because the vast and complete nature of the copying is too detrimental to the owners of the copyrighted works. *See Infinity Broad Corp.*, 150 F.3d at 108-110 (holding that despite Defendant's argument that "society benefits from . . . provision of access," where the service provided Plaintiff's content "24 hours a day, seven days a week," the service was not a fair use); *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F.Supp. 2d. 537 (S.D.N.Y. March 21, 2013) (holding that a monitoring service which attempted to justify its practice with the purpose of being a search engine, and therefore socially beneficial, was not fair use because the service in reality was "an expensive subscription service that markets itself as a news clipping service, not as a publicly available tool to improve access to content across the Internet.")). Additionally, the Supreme Court has held that "'to propose that fair use be imposed whenever the 'social value [of dissemination] ... outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for

it.”” *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 559 (1985). The social value TVEyes asserts is not present. (Docket No. 150 (Knobel Decl.) ¶¶19-26.) The purpose of the service is to sell copyrighted audio-visual content for a profit. This is simply not fair use.

B. TVEyes’ Service Is Not The Same As *Google Books* Or *HathiTrust*

TVEyes attempts to distinguish itself from the settled precedent cited above by relying on the digital nature of its service and pointing to this Court’s decisions in *Google Books* and *HathiTrust*. Setting aside any disagreements amici have with respect to those cases, the district court performed an act of judicial contortion to stretch the reasoning in those cases to find some of TVEyes’ content-delivery features to be fair use. This Court should reverse the district court on that basis alone. While the services in those cases involved the creation of searchable databases of copyrighted works, neither offered the opportunity for its users to obtain full copies or the full value of the content they sought from the copyrighted material. This Court found significant that the digital libraries at issue did “not allow users to view any portion of the books they are searching.” 755 F.3d at 97. Likewise, the court in *Google Books* found significant that users could only view short “snippets” of books, and relied on the security measures in place to prevent users from copying the full value of the copyrighted works. 804 F.3d at 217, 227. To obtain actual copies of the books, a person using the search service would have

to purchase a copy, with proceeds going to the rights holders. This Court held that the purpose of those services—which were offered free to the public—fell within the statutory purpose of facilitating research and scholarship. Additionally, it found that providing only snippets of the copyrighted works, for the limited purpose of locating content, did not affect the market for the original work.

TVEyes' services go beyond search functions that lead searchers to the original material and its original source. Although TVEyes has before attempted to cloak itself in the mantle of search, and thereby take advantage of the *Google Books* and *HathiTrust* holdings, simply calling something “search” does not mean a content-delivery service can take advantage of these past decisions. By providing subscribers ten-minute segments of high definition programming and not limiting the number of consecutive segments of programming a subscriber can obtain, TVEyes effectively provides the entire unauthorized copy of the copyrighted work to a subscriber for a fee. (TVEyes Br. at 13). These segments of programming—obtained either by using search terms or by simply picking a channel, date, and time—are not search results that direct subscribers to obtain the copyrighted work appropriately from the rights holder.

TVEyes argues that its creation of a searchable video database is transformative such that its copying is fair use. Even assuming that the creation of a searchable database is transformative, TVEyes' service goes far beyond a

searchable database and actually delivers content. There is no question that “unrestricted and widespread conduct of the sort engaged in by the defendant[s] ... would result in substantially adverse impact on the potential market for [licensing of] the original.” *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 590 (1994). The aggregation and delivery of full-length, and short-form, video content to subscribers as a business model already exists, in the form of services such as Netflix, Hulu, and other digital content providers. Unlike TVEyes, those companies negotiate and pay licensing fees to the copyright owners for the privilege of providing the programming to subscribers. If TVEyes’ service constitutes a fair use, then there is nothing to stop TVEyes or copycat services from replacing Netflix or Hulu with a platform that copies and distributes without obtaining licenses. Such platforms could easily launch new direct to consumer oriented services that aggregate video content without permission, and reproduce that content in-full for its users, under the guise that its subscribers *could* use the programming for the purpose of criticism, comment, news reporting, teaching, scholarship or research.

The holdings that the search engines in *Google Books* and *HathiTrust* were both transformative and met the fair use factors does not compel the result reached by the district court. In fact, they counsel the opposite. Nothing makes this more clear than the extent to which TVEyes and its amici on the one hand rely heavily

on the fact that its subscribers do or could engage in media criticism in order to justify the service as fair use, while on the other hand attempt to distance TVEyes from the actions of its subscribers to argue that TVEyes lacks volitional conduct. The Court need not consider these self-serving arguments because both congressional intent and this Court's clear precedent mandate a reversal of the fair use decision.

C. Caselaw Outside The Broadcast Context Does Not Save TVEyes

TVEyes and its amici rely on a series of cases wholly outside the broadcast context in an effort to save the district court's erroneous holding. None provide any basis for the fair use holding with regards to the content delivery features. For example, the amici professors rely on *White v. West Pub. Corp* and *Sony Computer Entm't, Inc. v. Connectix Corp* as giving *carte blanche* to the making of "intermediate copies" of copyrighted works so long as the end goal is some socially beneficial database. (IP Law Professors Br. at 8 (citing 29 F.Supp.3d 396 (S.D.N.Y. 2014); 203 F.3d 596 (9th Cir. 2000)). But neither case so holds. *White* involved West Publishing copying legal briefs and making them available for legal researchers. The court found that West transformed the briefs because it was involved in "reviewing, selecting, converting, coding, linking, and identifying" information in the briefs (including removing personal identifying information). *White*, 29 F.Supp.3d at 399. The court further held that the provision of the briefs

to researchers could not replace the original service (legal advice and brief writing) and did not impede any licensing market. While part of the court's analysis included the fact that the briefs were copied for a research database, that finding merely rendered the third fair use factor *neutral*. 29 F.Supp.3d at 398-99. Additionally, *Connectix* involved intermediate copying necessary to access *unprotected functional elements* of works. 203 F.3d at 602. Such functional elements are not at issue in this case.

Furthermore, TVEyes' amici are incorrect in stating that TVEyes' service is one that serves "evidentiary and reporting purposes," IP Law Professors Br. at 9, and therefore is a fair use. The cases relied upon by TVEyes' amici to show such purposes are inapposite. In *Am. Inst. Of Physics v. Winstead PC*, Civ. 3:12 No. 1230, 2013 WL 6242843 (N.D. Tex. 2013), the court found that providing copies of articles for evidence in patent applications was a fair use. Additionally, in *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), the court held that the use of a lone copyrighted manuscript for evidentiary value in a child custody case was a fair use. Clearly, TVEyes does not send video clips to the USPTO to help evaluate patent applications and does not send clips to be used in child custody lawsuits.

Other cases cited by TVEyes' amici, involving the use of film clips in biographical films and documentaries, are equally out of context. *See Hofheinz v. AMC Prods., Inc.*, 147 F.Supp.2d. 127 (E.D.N.Y. 2001); *Hofheinz v. A&E*

Television Networks, 146 F. Supp. 2d. 442 (S.D.N.Y. 2001); *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 Civ. 3802, 2001 WL 1111970 (S.D.N.Y. Sept. 10, 2001). TVEyes is not a biographical film or documentary.

Unlike the services deemed fair use in the past by Congress and the courts, TVEyes reproduces, and sells for profit, what amount to full-length works that can serve as a substitute for the original works. This conduct cannot ever constitute fair use.

CONCLUSION

The district court's reasoning represents a dramatic expansion of fair use doctrine contrary to the statutory text, clear Congressional intent, and decades of precedent. The judgment of the district court with respect to the content-delivery features that were deemed a fair use should be reversed and the injunction expanded to cover such services.

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Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

The undersigned certifies that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,809 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: June 22, 2016

/s/ Jennifer Allen Sands Atkins
Jennifer Allen Sands Atkins

CERTIFICATE OF SERVICE

The undersigned certifies that on June 22, 2016 a true and correct copy of the foregoing brief was electronically filed using the appellate CM/ECF system. All counsel of record are registered CM/ECF users and will be served with a Notice of Docket Activity pursuant to Second Circuit Local Rule 25.1(h).

Dated: June 22, 2016

/s/ Jennifer Allen Sands Atkins
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APPENDIX A

Sandra Aistars leads the Arts & Entertainment Advocacy Program at George Mason University School of Law she is also Director of Copyright Research & Policy and a Senior Scholar at the Center for the Protection of Intellectual Property. Professor Aistars has twenty years of advocacy experience on behalf of copyright and other intellectual property owners. She has served on trade missions and been an industry advisor to the Department of Commerce on intellectual property implications for international trade negotiations; worked on legislative and regulatory matters worldwide; frequently testified before Congress and federal agencies regarding intellectual property matters; chaired cross-industry coalitions and technology standards efforts; and is regularly tapped by government agencies to lecture in U.S. government-sponsored study tours for visiting legislators, judges, prosecutors, and regulators. Ms. Aistars served as Chief Executive Officer of the Copyright Alliance – a nonprofit, public interest organization that represents the interests of artists and creators across the creative spectrum. She continues to collaborate with the Copyright Alliance as a member of its Academic Advisory Board. Ms. Aistars previously served as Vice President and Associate General Counsel at Time Warner Inc. and began her legal career in private practice at Weil, Gotshal and Manges LLP.

Matthew Barblan is Executive Director of the Center for the Protection of Intellectual Property. He oversees the development and operations of the Center's research and policy programs, including fellowship programs in patent and copyright law, a substantial research grant program in intellectual property law and policy, and ongoing publications, events, and academic and policy engagement. He teaches copyright at George Mason University School of Law and conducts research in patent and copyright law and policy. Matthew holds a J.D. from the University of Virginia School of Law and a B.A. from Rutgers University, where he graduated with highest honors and Phi Beta Kappa.

Jon A. Baumgarten was recognized in 2016 by the National Law Journal as an "Intellectual Property Law Trailblazer". After graduating from New York University School of Law in 1967 Mr. Baumgarten initially spent almost a decade in the private practice of copyright law and policy. Appointed General Counsel of the United States Copyright Office in January 1976 Mr. Baumgarten was a leading participant in the final formulation of the general revision of the U.S. Copyright Act and was responsible for the novel,

comprehensive rulemakings and thorough overhaul of all Copyright Office regulations and practices required under the new law. Mr. Baumgarten represented the Copyright Office before courts, Congressional committees and the Department of State and as liaison to the National Commission on New Technological Uses of Copyrighted Works (CONTU), and represented the U.S. Government in the World Intellectual Property Organization, and other international copyright forums. Mr. Baumgarten returned to private practice in 1980. In the course of a distinguished career representing individuals, companies, leading trade associations, and international consortia and lasting for more than four decades until his retirement in 2011, Mr. Baumgarten was a leading figure on the scene of copyright's dramatic encounters with changing technology and international trade, and was frequently called upon to explain U.S. copyright law to governments, policy makers, and affected groups.

Jon M. Garon is Dean of Nova Southeastern University Shepard Broad Law Center. Dean Garon is a nationally recognized authority on technology law and intellectual property, particularly copyright law, entertainment and information privacy. A Minnesota native, he received his bachelor's degree from the University of Minnesota in 1985 and his juris doctor degree from Columbia University School of Law in 1988. Prior to joining Nova Southeastern University, Dean Garon was the inaugural director of the Northern Kentucky University Salmon P. Chase College of Law, Law + Informatics Institute, which served to integrate the specialized programming on technology and information systems as they apply across legal disciplines. He also served as a professor of law teaching Information Privacy Law, Cyberspace Law, Copyright Law, Entertainment Law, and related courses. His teaching and scholarship often focus on business innovation and structural change to media, education and content-based industries. He is the author of three books and numerous book chapters and articles, including *The Independent Filmmaker's Law & Business Guide to Financing, Shooting, and Distributing Films* (A Cappella Books, 2d Ed. 2009); *Own It – The Law & Business Guide to Launching A New Business Through Innovation, Exclusivity and Relevance* (Carolina Academic Press 2007); and *Entertainment Law & Practice* (2d Ed. 2014 Carolina Academic Press).

Hugh Hansen has taught U.S. copyright law and other intellectual property courses at the Fordham University School of Law for over 25 years. He founded and directs the Fordham Conference on Intellectual Property Law

and Policy now in its 25th year. The Director General of the World Intellectual Property Organization called the conference "the Davos of the IP world." After graduation from the Georgetown Law Center, Prof. Hansen clerked for Judge Inzer B. Wyatt in the Southern District of New York and Judge Murray Gurfein in the Court of Appeals for the Second Circuit. He was AUSA in the criminal division of the SDNY U.S. Attorney's Office and as a litigation associate with Dewey Ballantine Palmer & Wood. Professor Hansen is a prolific speaker on IP law in the U.S. and Europe and conducted speaking tours in Japan and Australia. He is the author of one and editor of many books on intellectual property. In intellectual property law matters, Professor Hansen has been a lead counsel, consultant and expert witness in the U.S. federal courts and UK, German and Polish courts. He has also represented clients in matters before DG Competition of the European Commission. Managing Intellectual Property Magazine named Prof. Hansen one of the 50 most influential people in IP in the world three times. The Court of Appeals for the Federal Circuit per Chief Judge Michel gave him an award for "his contribution to the legal community's understanding of intellectual property law."

J. Devlin Hartline is Assistant Director of the Center for the Protection of Intellectual Property. Mr. Hartline leads CPIP's communications and academic advocacy efforts, working closely with CPIP scholars to publicize and promote rigorous research on the law, economics, and history of intellectual property. Prior to joining the CPIP team, he participated as a Fellow in CPIP's Mark Twain Copyright Fellowship program. His research agenda at CPIP spans a broad spectrum of doctrinal and political issues in patent and copyright law, and he teaches patent law at George Mason University School of Law. Mr. Hartline holds a J.D. from Loyola University New Orleans College of Law and an LL.M. with concentrations in intellectual property and constitutional law from Tulane University Law School. Devlin also holds a B.A. from the University of Colorado at Boulder, where he studied mathematics.

Adam Mossoff is Professor of Law at George Mason University School of Law, where he teaches and writes in the areas of intellectual property and property law. He has published numerous articles on topics in copyright law, patent law, and property law in the University of Pennsylvania Law Review, Cornell Law Review, Boston University Law Review, and Social Philosophy & Policy, among other journals. His path-breaking research on how American patent law has long secured fundamental property rights in

inventions has influenced both the public policy and academic debates about intellectual property rights. Professor Mossoff has worked with numerous think tanks and policy organizations, such as the Innovation Alliance and the Progress & Freedom Foundation (a pro-intellectual property rights think tank that shut down in 2010). He has participated in numerous congressional briefings organized by the Innovation Alliance, the U.S. Business & Industry Council and other organizations on the importance of licensing and enforcing intellectual property rights. He currently is serving on the Public Policy Committee of the Licensing Executives Society and the Intellectual Property Committee of the IEEE-USA.

Christopher M. Newman is a Professor of Law at George Mason University School of Law. Professor Newman clerked for the Honorable Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, with whom he co-published *What's So Fair About Fair Use?*, 46 J. Copyright Soc'y 513 (1999). From 2000-2007, he was a litigation associate with Irell & Manella LLP in Los Angeles, where he represented clients in disputes involving contracts, business torts, intellectual property, corporate and securities litigation, and appellate matters, as well as pro bono family and criminal law matters. Professor Newman left practice at the beginning of 2007 to serve an Olin/Searle Fellowship in Law at the UCLA School of Law, where he focused on his research and writing in the areas of property theory and intellectual property, and served as a research fellow of UCLA's Intellectual Property Project. In 2014 the American Law Institute named Professor Newman an Associate Reporter for the Restatement (Fourth) of Property. Professor Newman graduated magna cum laude from the University of Michigan Law School in 1999, where he served as book review editor for the Michigan Law Review and received Michigan's highest law school award, the Henry M. Bates Memorial Scholarship. He also holds a B.A. in classical liberal arts awarded by St. John's College in Annapolis, Maryland.

Sean M. O'Connor is the Boeing International Professor at the University of Washington School of Law in Seattle. His research focuses on intellectual property and business law, especially in the context of start-ups and commercializing innovation in technology and arts. Professor O'Connor received his law degree from Stanford Law School, a master's degree in philosophy from Arizona State University, and a bachelor's degree in history from University of Massachusetts. Before graduate school he was a singer-songwriter and rock band front man with two self-released albums that

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Eric Priest is an Assistant Professor of Law at the University of Oregon School of Law with research interests in digital copyright and the entertainment industries in the U.S. and China. Before becoming a lawyer, Eric was a pop/R&B music producer and songwriter who composed gold-selling international releases. He later worked in the Chinese music industry as a consultant, entrepreneur, composer, and producer. After law school, he was an intellectual property associate at Dorsey & Whitney LLP and a fellow at Harvard Law School's Berkman Center for Internet & Society working on the Noank Digital Media Exchange project, developing a collective licensing model for legalized file sharing. In 2007-'09 he was based in Beijing overseeing the implementation of Noank's model in China. Eric holds an LL.M. from Harvard Law School, a J.D. from Chicago-Kent College of Law, where he served as Editor-in-Chief of the Chicago-Kent Law Review, and a B.A., summa cum laude, from the University of Minnesota.

Mark F. Schultz is Associate Professor of Law and Director of Faculty Development at Southern Illinois University and a Senior Scholar and Director of Academic Programs at the Center for the Protection of Intellectual Property. Professor Schultz writes and speaks frequently around the world about the importance of legal institutions that support the creative and innovative industries. He was honored by the SIU School of Law as its Outstanding Scholar in 2008, and has been a distinguished visiting scholar at the University of Botswana, where he gave public lectures on property rights in traditional and indigenous knowledge. He has served as Chair of the Federalist Society's Intellectual Property Practice Group, Chair of the AALS Section on Internet and Computer Law, and as an NGO delegate to the World Intellectual Property Organization. He currently serves as a consultant on trade secrecy to the OECD and is Chair of the Academic Advisory Board of the Copyright Alliance.

John L. Simson is Executive in Residence at the Kogod School of Business at The American University. He has also been an adjunct professor of Entertainment Law at Georgetown Law School and was previously an adjunct professor of Entertainment Law at American University's Washington College of Law and Catholic University's Columbus School of

Law. Mr. Simson has lectured on entertainment law, intellectual property and business issues at Harvard University, Berkley, Boston University Law School, Columbia University Law School, Belmont, Berklee School of Music, McNally Smith School of Music, Loyola (New Orleans), World Intellectual Property Organization (WIPO), and many other colleges and universities. Mr. Simson has been in the music industry since his signing in 1971 as a recording artist and songwriter. His career included stints as a manager, handling the career of 5X Grammy winner, Mary-Chapin Carpenter, special advisor to Harry Belafonte for music and television projects, and a 30 year career as an entertainment lawyer advising clients on copyright and business issues in film, television, music and the visual arts. He served as the Executive Director of SoundExchange, an organization he helped launch in 2001 that collects royalties from internet and satellite radio services on behalf of recording artists and record labels. Simson received an Emmy nomination for his music supervision of the PBS series, "American Roots Music" and was named the Outstanding Volunteer Lawyer by Washington Area Lawyers for the Arts on their 10th Anniversary celebration. Simson was at the forefront of the battle for artist's rights and their ability to be paid for their work online and has been featured on NBC Nightly News, The New York Times, WSJ, Marketplace, CNN and many other news outlets. He is a frequent lecturer on music industry and copyright issues and currently serves as the Chairman of the Board of the National Recording Preservation Board of the Library of Congress, is Chairman of the D.C. Bar's Art, Entertainment, Media & Sports Law Committee, is a Board member of CINE, the Musicianship and the Music Manager's Forum. He is a 1994 Alumni of Nashville's Leadership Music Program and is a past President of the Washington, D.C. Chapter of the Grammy organization. Simson previously taught Entertainment Law at Washington College of Law and Georgetown University Law Center.

Rodney A. Smolla is Dean at Delaware School of Law in Wilmington, Delaware. Dean Smolla is the author five multi-volume legal treatises, all published by Thomson Reuters, which are updated twice annually: *Law of Defamation*; *Smolla and Nimmer on Freedom of Speech*; *Rights and Liabilities in Media Content, Internet, Broadcast, and Print*; *Federal Civil Rights Acts*; and *Law of Lawyer Advertising*. He is also author of *The First Amendment: Freedom of Expression, Regulation of Mass Media, Freedom of Religion* (Carolina Academic Press 1999); and co-author of *Constitutional Law: Structure and Rights in Our Federal System* (6th Edition, 2010, with Dean William Banks). He is the editor each year of the *First Amendment*

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