

15-3885(L), 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.

Case No. 13-CV-5315 (AKH)

**BRIEF OF AMICI CURIAE PROFESSORS OF INTELLECTUAL PROPERTY LAW IN
SUPPORT OF APPELLANT/CROSS-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

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

Dated: March 23, 2016

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I. Interest of Amici

Amici are academics, several of whom have done empirical work in large scale data analysis or other empirical work in copyright law.¹ The fair use principles articulated in this case will apply to database creation more broadly, and amici write in support of the District Court's initial analysis of the creation of the database and the application of fair use to the database's different functions. Given the audiovisual culture in which we live, principles of fair use with respect to databases should not be limited to text or still images. If the medium is the message, then changing the medium to text only—whether in conducting research or in communicating the results of that research to others—both changes the message and limits the ability of scholars, journalists, activists, and ordinary citizens to use databases to achieve new insights. The district court was correct to find the creation of the database to be fair use, but incorrect to reject some of its functions; its analysis wrongly conflated direct and secondary liability.

II. Summary of Argument

Video, no less than text, is an appropriate subject of fair use. This is so in the large-scale database context as well as with respect to the use of individual videos. All of the functions at issue in this case are significant to the use and function of TVEyes' transformative database.

Because the 17 U.S.C. §107 factors either favor fair use under the circumstances or have limited

¹ Academic affiliations are listed for identification purposes only. This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the leave of the Court. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

weight given the transformativeness of TVEyes' use, the Court should affirm the grant of summary judgment in favor of TVEyes as to the database as a whole, and reverse on the features of its service the District Court found not to be fair use.

III. Textual Description Is Not a Substitute for Video Images

The District Court was correct to hold that “[t]he actual images and sounds depicted on television are as important as the news information itself—the tone of voice, arch of an eyebrow, or upturn of a lip can color the entire story, powerfully modifying the content.” *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 392 (S.D.N.Y. 2014).² When TVEyes aggregates video in a database, it becomes raw material for research: individual parts are not present for their news reporting purpose, but rather for the purpose of collecting and showing what news reports were showing.

Every schoolchild knows that a picture is worth a thousand words. Non-verbal communication includes nuances of tone, facial expression, pose, and gesture that cannot be replicated in text. Viewers use these nuances to interpret meaning, to understand context, and to judge credibility. And while it is certainly possible to analyze or describe video using text in some ways, much commentary requires visual and audio quotation. Limiting the right of fair quotation to text

² See also, e.g., James Fallows, *Obama's Grace*, Atlantic, Jun. 27, 2015, available at <http://www.theatlantic.com/politics/archive/2015/06/grace/397064/> (“I cannot emphasize strongly enough the value of seeing this speech [of President Obama's eulogy for the victims of the Charleston shootings] ... versus just reading the text.... Like most Obama speeches, the text is indeed carefully written. But it is something entirely different as ... I was going to say ‘as delivered,’ but really the term is ‘as performed.’”).

deprives us of much of the communicative content that images provide. See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright Law*, 125 Harv. L. Rev. 683, 753-55 (2012).

Images and moving images serve important evidentiary, persuasive, and rhetorical functions that cannot be filled by words. Video recording of criminal confessions and compulsory dash cameras on police cars are justified by these functions.³ Empirical evidence demonstrates that images can affect decisionmaking;⁴ pictures generally are processed more quickly in the brain and are easier to remember than words.⁵ Pictures can even shape our perception of words: using pictures emphasizing one side of a balanced news report, for example, biases readers' perceptions of contested issues in favor of the pictured side, even when they don't consciously remember the content of the images.⁶ As a result, a verbal or textual description of an event will have a different effect on an audience than direct viewing of an audiovisual recording of that event. Multiple important controversies in the last year alone have depended on what video did

³³ See Jessica Silbey, *Filmmaking in the Precinct House and the Genre of Documentary Film*, 29 Columbia J. of Law & the Arts 107 (2005) (analyzing the requirement of filmed confessions and interrogations in light of the influence and independent role of film in substantive evidentiary decisions).

⁴ See, e.g., David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 Law & Hum. Behav. 183 (2006); Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 Behav. Sci. & L. 85 (2008).

⁵ See, e.g., Neal Feigenson & Christina Spiesel, *Law on Display 7-9* (2009) (reviewing research on effects of images); Julie A. Edell, *Nonverbal Effects in Ads: A Review and Synthesis*, in *Nonverbal Communication In Advertising* 11, 13 (Sidney Hecker & David W. Stewart eds., 1988) (summarizing research showing that "pictorial stimuli frequently were remembered better than were their verbal equivalents").

⁶ Dolf Zillmann et al., *Effects of Photographs in News-Magazine Reports on Issue Perception*, 1 Media Psychol. 207, 223-24 (1999); see also Ad Hoc Comm. on Fair Use & Academic Freedom, Int'l Comm'n Ass'n, *Clipping Our Own Wings: Copyright and Creativity in Communication Research* 5 (2010), available at http://www.centerforsocialmedia.org/sites/default/files/documents/pages/ICA_-_Clipping.pdf (discussing scholars' needs for audiovisual evidence).

or did not show, because people regularly want to see for themselves rather than relying on a textual description.⁷

Video clips are often used as important parts of political messages, and the video content boosts the impact of those ads by providing evidence for the eyes and ears.⁸ One recent study found that the most influential political videos were often made by nontraditional political actors using clips from existing footage, usually news footage—precisely the type of video at issue in this case. Citizen-designed political messages averaged 807,000 views, nearly fifteen times more than party-sponsored messages. Ads created by other entities, “mostly media companies, small news organizations, groups of bloggers, or small video production groups,” did even better, averaging over 2.5 million views. Of the most widely shared and thus successful videos, “only a fifth of them were produced by the campaigners, and in all cases they were not typical ads, but edited footage.” Limor Shifman, *Memes in Digital Culture* 125 (2014).

⁷ See, e.g., Lloyd Grove, *The Video That Breitbart & Trump Cannot Ignore*, Daily Beast, Mar. 11, 2016, available at <http://www.thedailybeast.com/articles/2016/03/11/the-video-that-breitbart-trump-cannot-ignore.html> (discussing video of event at political rally); Timothy Williams, *Lack of Videos Hampers Inquiries Into Houston Police Shootings*, N.Y. Times, Feb. 23, 2016, available at http://www.nytimes.com/2016/02/24/us/lack-of-videos-hampers-inquiries-into-houston-police-shootings.html?_r=0 (discussing role of video evidence in public understanding of police shootings around the country); Planned Parenthood 2015 Undercover Videos Controversy, Wikipedia, available at https://en.wikipedia.org/wiki/Planned_Parenthood_2015_undercover_videos_controversy (last visited Mar. 16, 2016); see also *Scott v. Harris*, 550 U.S. 372, 378 n.5 (2007) (“Justice STEVENS suggests that our reaction to the videotape is somehow idiosyncratic, and seems to believe we are misrepresenting its contents. We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court’s case file.”) (citation omitted).

⁸ See Patricia Aufderheide & Aram Sinnreich, *Documentarians, Fair Use and Free Expression: Changes in Copyright Attitudes and Actions with Access to Best Practices*, Information, Communication & Society, May 2015, 1-10. doi: 10.1080/1369118X.2015.10500502015 (study of 489 documentary filmmakers showing pervasive reliance on fair use).

Including video in databases therefore constitutes and supports transformative fair use. Political and cultural commenters, and especially nontraditional speakers, need wide access to pre-existing video to communicate effectively. Recognizing this, the Copyright Office has thrice ruled that the use of short audiovisual clips for communicative purposes is likely to be fair use, especially when edited into a larger commentary.⁹ In the same proceedings, the Office held that video clip licensing is not an alternative to fair use for these purposes.¹⁰ Nor need fair users rely on transcripts or verbal descriptions where the video provides the best possible evidence. See, e.g., *Caner v. Autry*, No. 6:14-CV-00004, 2014 WL 2002835 (W.D. Va. May 14, 2014) (finding that videos of plaintiff posted by defendant to expose plaintiff's alleged lies were transformative fair use); *Northland Family Planning Clinic, Inc. v. Center for Bio-Ethical Reform*, 868 F. Supp. 2d 962 (C.D. Cal. 2012) (finding that defendants' use of plaintiff's video in attacking abortion rights was fair).¹¹

⁹ Recommendation of the Register of Copyrights, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, Oct. 2015, at 82 (“a significant number of the proposed uses [of video clips] to create noncommercial videos involve criticism and commentary, which are privileged uses under section 107”). Recommendation of the Register of Copyrights, *Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention*, Oct. 2012, at 127, 128 [hereinafter 2012 Recommendation] (same); Recommendation of the Register of Copyrights in RM 2008-8, *Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Jun. 11, 2010 at 49 (same).

¹⁰ 2012 Recommendation at 131. The Office also ruled that recording a screen on a smartphone produces insufficient quality for fair use purposes. 2012 Recommendation at 132.

¹¹ See also Defendant Center for Bio-Ethical Reform's Answers to Plaintiff's First Set of Interrogatories, *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, No. 11-cv-731 (filed Apr. 16, 2012), Doc. 47-1, at 150 (explaining why defendant copied plaintiff's video: “[The Northland staffer's] consistent theme is the lie that abortion is “normal.” Every aspect of her attire, demeanor, syntax, intonation, is calculated to reinforce this deception. The same with the flowers on her desk, the soft background music, and the framed art on her walls. The CBR Video rebuts all this duplicity Every production decision CBR made was intended

More generally, the cases recognize that copying is justified when the details copied assist the fair user in accomplishing her purpose. See, e.g., *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (finding fair use when copying was of the “size and quality” necessary to the transformative purpose); *Warren Pub. Co. v. Spurlock*, 645 F. Supp. 2d 402, 420, 425 (E.D. Pa. 2009) (high-quality copied images were fair use because they were necessary for transformative purpose; “As to Plaintiffs’ argument that Spurlock could have reduced the larger images or changed all of them to black-and-white, such modifications would undermine the very heart of the publication”); cf. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 85 (2d Cir. 2014) (finding fair use where copying audio recording provided additional details on tone of voice and emphasis compared to transcript); *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1030 (9th Cir. 2000) (finding fair use where real images were necessary for accurate comparisons); *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 146 (S.D.N.Y. 1968) (finding copies of images fair because they made defendant’s theory of Kennedy’s assassination easier to understand).

Similarly, the aggregation of video into a searchable database serves a well-recognized transformative function. The database that results from TVEyes’ work is greater than the sum of its parts, making it a new resource, an example of a well-accepted category of transformative use. The database is not a substitute for any individual copyright owner’s service. *TVEyes*, 43 F. Supp. 3d at 392 (“By indexing and excerpting all content appearing in television, every hour of

as an ‘abnormal’ counterpoise to some corresponding production element in the Northland video.”).

the day and every day of the week, month, and year, TVEyes provides a service that no content provider provides.”); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216-18 (2d Cir. 2015) (database creation, search function, and snippet delivery were transformative); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (book database was transformative given the multiple new uses it enabled); *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009) (term paper database used for detecting plagiarism was transformative). Like the databases in *iParadigms*, *HathiTrust*, and *Google*, and like the enormous body of internet content recorded in Google’s online index, the video in TVEyes’ database forms a corpus whose purpose clearly diverges from and adds to the individual works therein.

IV. The Remaining Functions Serve the Same Fair Use Purposes

The District Court’s ruling as to the transformative database was a straightforward and sensible application of current transformative fair use doctrine. Likewise, the remaining functions of TVEyes serve the same transformative purposes and should be treated in the same way. Once the transformativeness of the TVEyes database is established, the remaining questions are essentially about whether TVEyes can *show* its clients the video that it told them was relevant to their search. The answer should be yes, not least because of the cases holding that internet search engines are permitted by fair use to show users images as part of the display of results of searches for images. See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2002); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); see also *Google*, 804 F.3d at 217-18 (“Snippet view adds important value to the basic transformative search function, which tells only whether and how often the searched term appears in the book. Merely knowing that a

term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book ...”).

Additionally, TVEyes’ download, archive, save, share, and email functions are fair use because they are both necessary and beneficial to achieving TVEyes’ transformative purpose: they are important intermediate steps to the valuable final output of analysis and commentary. As numerous courts have found, making intermediate copies to create a database that enables socially beneficial noninfringing individual uses and outputs constitutes fair use. See, e.g., *Authors Guild*, supra; *iParadigms*, supra; *Perfect 10*, 508 F.3d at 1168 ; *White v. West Publ’g Corp.*, No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014) (finding West’s database of legal briefs to be transformative fair use); cf. *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596, 609 (9th Cir. 2000) (approving internal copying for ultimately noninfringing output); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992) (same).

As other courts have found, substantial internal reproduction and even ultimate distribution for commercial advantage are legitimate when there is an underlying transformative purpose. See, e.g., *Am. Inst. of Physics v. Winstead PC*, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (finding that copying articles for the purpose of using them as evidence in patent applications and in internal research was transformative and fair); see also *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003) (“the narrow purpose of defendants’ use of the manuscript . . . for the evidentiary value of its content” weighed “heavily” in favor of fair use); *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1366 (E.D. Va. 1995) (finding fair use in part because documents

were copied for “news gathering, news reporting and responding to litigation,” not to “scoop” copyright owner). Evidentiary and reporting purposes, the cases find, have wide latitude.

The subsequent decision of any given client to use any given clip may or may not be fair use, but Fox decided not to litigate this case as a contributory liability case. This choice is understandable, because (1) clips are often part of significant transformative commentary on news of the day, making even subsequent distribution fair use if it did happen, and (2) the district court properly concluded that numerous uses by customers internal to their own organizations would also be fair use. Therefore, Fox could not prevail on a contributory liability theory. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 442 (1984) (even if manufacturer is generally aware that infringements are occurring, existence of “substantial noninfringing uses” avoids contributory liability for device manufacturer). The fact that TVEyes could have designed its service differently is insufficient for liability. The VCR could have been designed without a “record” button; nonetheless the Supreme Court refused to find contributory infringement in *Sony*.

It was error for the district court to treat subsequent uses of the clips by TVEyes’ clients as creating direct liability for TVEyes, which was a necessary predicate to that court’s holding that the enjoined database functions weren’t fair use. For example, with respect to the database’s emailing function, the district court held that the function created the “*potential* for abuse” by *users*. *See* Aug. 2015 Op. at 14. TVEyes’ potential responsibility for the infringing acts of others is the proper realm of secondary liability. *See Google*, 804 F.3d at 229 (discussing potential misuse of defendant’s fair use copies by defendant’s partners as an issue of secondary liability);

Matthew Bender & Co., Inc. v. West Pub. Co., 158 F.3d 693, 706 (2d Cir. 1998) (same as to use of defendant's noninfringing copies by defendant's clients); *Perfect 10*, 508 F.3d at 1169 (analyzing Google's own copying to create database under direct liability and analyzing Google's acts allegedly enabling third parties to infringe via subsequent downloading and distribution of images under secondary liability); *see also Perfect 10, Inc. v. Giganews, Inc.*, 2014 WL 8628034, at *8 (C.D. Cal. Nov. 14, 2014) (“[A] claim for direct liability requires evidence that the Defendants *directly* or *actively* caused the infringement. [Plaintiff's] continued insistence that Defendants allowed its subscribers to upload, download, and view infringing material is the stuff of indirect or secondary liability, not direct liability”; noting that this secondary liability reasoning resolves conflicting precedent on “volitional conduct”). But secondary liability was not part of Fox's case, and should not have been the basis for a liability finding against TVEyes.

In sum, without a record or argument on secondary liability, it is inappropriate to find TVEyes responsible for possible user infringement based on the functions of TVEyes' database. This is more than just a technical point: Fox would lose many such challenges to transformative uses of clips, and yet suppressing the information generation function of TVEyes would empower Fox to prevent all such fair uses, contrary to the purposes of copyright law. Functions that enable substantial noninfringing uses are themselves fair even if they could be misused. *See Sony*, 464 U.S. at 441; *cf. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 799-800, 805 (9th Cir. 2007) (holding service provider not contributorily liable for infringement taking place on other websites). This is why secondary liability and direct liability are distinct inquiries: technologies

with multiple fair-use applications should be protected, and any individual infringements from misuse addressed individually.

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

Amici urge the Court not to unduly constrain the new transformative uses that the TVEyes database permits. Large-scale databases offer new opportunities for research and transformative use, some of which database creators are just beginning to explore. A miserly interpretation of what can be done with a concededly transformative database such as TVEyes' should be rejected.

In particular, a view-only rule, excluding the ability to save, email, or download, would push to the foreground the "trust me" problem recognized by the District Court in its initial ruling that the database itself was transformative and fair. Critics, even communicating internally, would

have to demand their audiences' trust without sharing their evidence, as if Bloomberg were only permitted to describe Swatch executives' tone of voice rather than prove it with the audio recording in its possession. *See Swatch*, 756 F.3d at 85 (finding fair use where copying audio recording provided additional details on tone of voice and emphasis compared to transcript). Precisely because the news itself is important evidence—news in all forms, whether textual, audio, or visual—that evidence must be available for use in the ultimate argument or analysis made by searchers who have retrieved relevant results.

The picture is still worth its thousand words—even more so—when sent or displayed to the audience as support for the researcher's arguments. For example, *The Daily Show* focused on Fox anchor Megyn Kelly's intonation and disdainful expression as she condemned Democrats for making the same arguments she unquestioningly endorsed from Republicans, as shown in other clips replayed on *The Daily Show*. *See* Colin Gorenstein, *Jon Stewart Smacks Down Megyn Kelly for Hypocrisy over GOP Corruption*, Salon.com, May 8, 2015, available at http://www.salon.com/2015/05/08/jon_stewart_smacks_down_megyn_kelly_for_hypocrisy_over_gop_corruption;¹² *see also Kane v. Comedy Partners*, 68 U.S.P.Q.2d (BNA) 1748, 2003 WL 22383387 (S.D.N.Y. Oct. 15, 2003) (finding fair use in Daily Show's use of television clips to comment on local broadcaster), *aff'd*, 98 Fed. Appx. 73 (2d Cir.2004).

¹² This technique has been recognized as an important one in political debates, where video works far better than quotes at forcing candidates to grapple with past positions. *See, e.g.,* Jason Easley, *Megyn Kelly Destroys Donald Trump With His Own Words At Fox News Debate*, PoliticsUSA, Mar. 3, 2016, <http://www.politicususa.com/2016/03/03/megyn-kelly-destroys-donald-trump-words-fox-news-debate.html>.

TVEyes' date and time search functions similarly facilitate fair use by assisting in the retrieval of relevant clips when a searcher does not have a preset list of relevant keywords. Date and time may also be important in and of themselves. For example, commentators responded to the decision of many news outlets to report on the White House Correspondents' Dinner at the moment that major protests erupted in Baltimore. The Baltimore protests were, in the opinion of many, much more newsworthy. Effective video-based analysis and critique required searching news outlets' coverage on the particular dates and times involved, rather than searching for keywords or looking at any one news source. It was the general *absence* of coverage at a sensitive time that was at issue. *See, e.g., The Daily Show Lampoons CNN For Covering White House Correspondents Dinner Red Carpet Instead Of Baltimore Protests*, MediaMatters.org, Apr. 24, 2015, available at <http://mediamatters.org/video/2015/04/28/the-daily-show-lampoons-cnn-for-covering-white/203443>. More generally, a method of searching a database cannot in itself infringe copyrights; indeed, new methods of searching and making connections are part of why the databases themselves have transformative purposes.

Contrary to the district court's second ruling, this Court should not impose a feature-by-feature test of strict necessity or require that every feature be "integral" to TVEyes' functionality. As this Court reinforced in finding a number of Richard Prince works of appropriation art to be transformative fair use as a matter of law, "the law does not require that the secondary artist may take no more than is necessary. . . . The secondary use "must be [permitted] to 'conjure up' at least enough of the original" to fulfill its transformative purpose." *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013). While *Cariou* spoke in terms of the amount of the original work taken, its rationale—consistent with the reverse engineering cases allowing internal copying—is

equally applicable to the TVEyes functions at issue here. Fair use does not require users to adopt inefficient procedures to minimize the amount of copying that occurs. See *Connectix*, 203 F.3d at 605 (“[T]he rule urged by Sony would require that a software engineer, faced with two engineering solutions that each require intermediate copying of protected and unprotected material, often follow the *least efficient solution*.”).

With respect to the district court’s suggestion that only “strictly necessary” copies could qualify as fair use, *Winstead* is almost directly on point: In that case, the court found that making internal copies of journal articles and additional copies for clients, sharing those copies with the PTO for its evidentiary use in patent examination, and saving those copies as part of a patent application file were all transformative fair use. *Winstead*, 2013 WL 6242843, at *5-*6. Although in theory some of the copies in *Winstead* may have been redundant or not strictly necessary, the underlying use was fair and there was no reason to sacrifice the advantages of digital systems, which routinely make copies as part of their ordinary operation, allowing the preservation of an otherwise inaccessible record. In contrast to the analysis in *Winstead*, which sensibly grouped all these uses together, the rule adopted by the district court would require researchers in an organization to tell their superiors, colleagues inside and outside the organization, reporters to whom they are speaking, and others with an important interest in understanding the news, to re-perform searches and wade through the results in order to find the clips that are relevant to the matter at hand, rather than simply sending them a link to the results. Copyright law should not disrupt an otherwise sensible procedure once the initial fair use is established.

V. Other Fair Use Considerations Favor TVEyes

TVEyes is a for-profit enterprise, but this consideration is relatively unimportant in transformative fair use cases, since most fair uses are conducted by profit-seeking entities. TVEyes is not exploiting Fox's works in advertising, but rather offers its database—the creation that is more than the sum of its parts, for which individual Fox works are no substitute. As a result, the commerciality of the use is of minimal weight. *See Google*, 804 F.3d at 219.

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

As for the third factor, copying an entire work is often consistent with fair use, and such is the case here. Rather than being a new development, the database cases extend a pattern from 1978-2005 in which defendants who took the entirety of the plaintiff's work won their fair use claims

roughly as often as defendants overall.¹³ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. Pa. L. Rev. 549, 575-76, 616 (2008); *see also, e.g., Sony*, 464 U.S. at 449–50; *Kelly*, 336 F.3d at 820–21; *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 803 n.8 (9th Cir. 2003) (“entire verbatim reproductions are justifiable where the purpose of the work differs from the original”); *Bill Graham Archives*, 448 F.3d at 609 (2d Cir. 2006) (same).

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

Fox’s evidence of limited licensing markets cannot provide a substitute for transformative fair use. *Google*, 804 F.3d at 226 (“the availability of licenses for providing unprotected information about a copyrighted work, or supplying unprotected services related to it, [does not give] the copyright holder the right to exclude others from providing such information or services”); *Bill Graham Archives*, 448 F.3d at 614-15 (“[A] copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting,

¹³ As Pamela Samuelson has written, the legislative history of the Copyright Act also indicates that creating a database is not a prima facie infringement, given the removal of “indexes” from the definition of derivative works. Pamela Samuelson, *The Quest for a Sound Conception of Copyright’s Derivative Work Right*, 101 Geo. L.J. 1505, 1527, 1540, 1546 (2013).

educational or other transformative uses of its own creative work. [C]opyright owners may not preempt exploitation of transformative markets”); *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (“If the use is otherwise fair, then no permission need be sought or granted.”) (quoting *Campbell*, 510 U.S. at 585 n.18). The fact that some entities might seek to license clips that would qualify as fair use should not be used to destroy fair use; that only encourages copyright owners to engage in more aggressive attempts to bootstrap into a rule of law the willingness of risk-averse entities to engage in licensing. Jim Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 Yale L.J. 882 (2007).

The copyright owner’s lack of entitlement to transformative markets is not just a normative rule. It has strong empirical grounding in copyright owners’ self-interests, which lead them to restrict licenses in ways that tend to block core fair uses and undermine copyright law’s speech-enhancing purposes. See Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again*, 29 Berkeley Tech. L.J. 1447, 1452, 1454-55, 1460-61, 1470-71 (2014) (surveying examples).

Unsurprisingly, news organizations regularly attempt to suppress political uses of their footage. See, e.g., Susan Park, *Unauthorized Televised Debate Footage in Political Campaign Advertising: Fair Use and the DMCA*, 32 Southern L.J. 29, 30-38 (2013) (offering recent examples at the national and local levels), Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (September 2010), available at https://cdt.org/files/pdfs/copyright_takedowns.pdf (offering further examples). News organizations also are willing to pull stories and remove clips from

public availability. *See* Appellant TvEyes' Opening Br., at 46-47. Because of their own interests, news broadcasters are not motivated to preserve the historical record in full. This is the unique function that fair use databases can serve, and TVEyes' database makes the record available for timely analysis. As a result, the remaining fair use factors, particularly the market effect factor's concern for not letting copyright owners exercise censorial control through licensing, favor TVEyes as well.

CONCLUSION

For the foregoing reasons, amici urge the Court to affirm the finding of fair use with respect to the core TVEyes features, and reverse as to the features the district court found to be unprotected by fair use.

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Respectfully submitted,

/s/

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