

# **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FOX NEWS NETWORK, LLC	:	
Plaintiff,	:	
-against-	:	
TVEYES INC.,	:	Case No.: 1:13-cv-05315-AKH
Defendant.	:	
	:	
	:	
	:	
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**BRIEF OF THE COPYRIGHT ALLIANCE AND VARIOUS  
PROFESSORS OF LAW AND COPYRIGHT EXPERTS AS *AMICI CURIAE* IN  
SUPPORT OF PLAINTIFF’S RENEWED MOTION FOR SUMMARY JUDGMENT**

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### **INTERESTS OF AMICI CURIAE**

The Copyright Alliance is a non-profit organization representing artists, creators and innovators who depend on copyright laws to protect their work, including trade groups, companies, associations and thousands of individuals. Its members represent a wide spectrum of creative disciplines, from television and movies, to music, to photographs, to literature. It seeks to ensure that copyright jurisprudence continues to spur the development of creative works for the benefit of the public by protecting the rights of those who invest in the development of creative works to be fairly compensated for their efforts.

The Copyright Alliance has a significant interest in the outcome of this dispute. The Copyright Alliance's members include numerous creators of television content, whose programming is directly affected by TVEyes Inc.'s ("TVEyes") conduct. As the television industry has evolved, these members increasingly rely on online and digital distribution of their content, in addition to the licensing of clips of their television programs—markets that are usurped and affected by TVEyes' delivery of unlicensed, copyrighted programs to its subscribers. In addition, the Court's reasoning in this action will certainly have implications that go beyond the television industry, and will impact the broad range of copyright disciplines in which our members participate.

The various professors and copyright experts (collectively "Professors") who join this brief teach, research and/or have an interest in the theory, law and practice of copyrights, property rights, and contracts.<sup>1</sup> The Professors have no other stake in the outcome of this case, but are interested in ensuring that copyright law develops in a way that best promotes creativity, innovation and competition in the digital world. In particular, the Professors joining this brief

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<sup>1</sup> The Professors are Jon A. Baumgarten, Adam Mossoff, Christopher M. Newman, and Mark F. Schultz.

recognize that the Court’s analysis of the fair use principles at issue in this case will have consequences well beyond the parties and specific works at issues in this litigation and, having a deep interest in the application and functioning of copyright law, seek to ensure that it is not unduly impaired in the context of new technologies and new methods and markets for the distribution of television content.<sup>2</sup>

### **PRELIMINARY STATEMENT**

In its Order and Opinion dated September 9, 2014 (Dkt No. 86, hereinafter the “Opinion”), this Court concluded that TVEyes’ “indexing and clipping” functions—through which TVEyes subscribers can search for television content using keywords and terms, and view a video clip of a portion of the program in which the keyword is mentioned—constitutes fair use. However, the Court expressly withheld judgment on certain additional services provided by TVEyes to its subscribers, by which TVEyes allows its subscribers to save, archive, download, email and share clips of the television programs in its database (the “Content-Delivery Features”), and to search for television clips by date and time instead of by keyword or term (the “Date and Time Feature”) (the “Content-Delivery Features” and the “Date and Time Feature” are collectively referred to as the “Additional Services”).

The Additional Services go far beyond simply helping subscribers search for and identify television segments that may be of interest. Rather, after subscribers have *already* identified the desired programs, through the Additional Services TVEyes actually *delivers* unauthorized copies of those programs to its subscribers. While some courts have held that the creation of a searchable database through which users can *identify* relevant copyrighted works is, in sharply-circumscribed circumstances, a transformative fair use, *no* court has ever suggested that the

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<sup>2</sup> *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Copyright Alliance and its counsel made a monetary contribution to the preparation or submission of this brief.

creator of such a database is then free to deliver unauthorized copies of the underlying works to paying customers, as TVEyes is now doing.

This is hardly surprising, as there is nothing remotely transformative about the Additional Services. Through the Content-Delivery Features, TVEyes simply provides its customers with high-definition copies of Fox News' and others, copyrighted programs, which the subscribers can then archive, download, and publicly distribute. *See Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (no fair use where defendants' "retransmissions leave the character of the original broadcast unchanged"). The Date and Time Feature is nothing more than the functional equivalent of a DVR, except with a commercial service, TVEyes, doing the recording—this is paradigmatic copyright infringement.

Because there is nothing "transformative" about TVEyes delivery of the copyrighted content of others to its subscribers, TVEyes and its *amici* continue to argue that the subsequent activities of TVEyes' *subscribers* somehow render the Additional Services a "fair use." But it is axiomatic that a commercial service such as TVEyes may *not* stand in the shoes of its customers and rely on their purportedly "fair use" of copyrighted works that TVEyes delivers without authorization. Put simply, just because what subscribers ultimately do with the content they receive from TVEyes may (or may not) be "fair" does not mean that TVEyes is entitled to distribute that copyrighted content to third parties, for a fee. Neither TVEyes nor its *amici* can muster a single case refuting this universally-accepted principle, which is fatal to TVEyes' defense.

The remaining arguments proffered by TVEyes and its *amici* similarly do not survive factual or legal scrutiny. For example, TVEyes and its *amici* repeat the refrain that TVEyes' subscribers are limited to so-called "internal" use of the copyrighted works, but (i) this is merely



another attempt by TVEyes to rely on the supposedly “fair use” of its subscribers, (ii) as a legal matter, that a use it “internal” does not render it transformative, and (iii) in any event, the evidence indisputably establishes that TVEyes’ subscribers do *not* limit themselves to “internal” uses, and TVEyes actively markets and promotes the Content-Delivery Features as a means to distribute clips publically and externally. In addition, any suggestion that subscribers “need” to receive copyrighted programming from TVEyes because the content is otherwise unavailable is not only legally irrelevant, *see Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (“Added value or utility is not the test.”), but also factually untrue, as there are myriad legitimate ways in which a TVEyes subscriber, after identifying relevant content using TVEyes’ search function, can obtain lawful copies of the desired content.

It cannot seriously be disputed that the market for the distribution of television content is rapidly evolving, with broadcasters—including members of the Copyright Alliance—increasingly relying on online and digital redistribution of their content, and other alternative licensing streams. If TVEyes and its ilk are permitted to usurp and interfere with those markets, the consequences to the television industry, and to licensing companies who actually obtain the proper authorizations from broadcasters for the redistribution of their content, can be catastrophic. Accordingly, *amici* respectfully state that Fox News’ renewed motion for summary judgment should be granted.

### **ARGUMENT**

#### **I. TVEYES CANNOT RELY ON THE ACTIVITIES OF ITS SUBSCRIBERS TO SUPPORT A FAIR USE DEFENSE**

Because the Additional Services primarily involve TVEyes’ delivery of Fox News’ (and other copyright holders’) content to its subscribers, it is important, at the outset, to note a universally-accepted principle of copyright law: The use that TVEyes’ subscribers subsequently

make of that content is *irrelevant* to TVEyes' fair use defense. In other words, that what some TVEyes' subscribers do with Fox News' (and others') content may be "fair" does *not* entitle TVEyes to deliver unlicensed copyrighted television programs to its subscribers, for a fee.

This principle has been recognized by courts in numerous circuits, across various forms of media. By way of example only:

- In *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), the defendant argued that his service, which enabled subscribers to listen to remote radio broadcasts over the telephone, was transformative because the subscribers used the broadcast for informational, rather than entertainment, purposes. The Second Circuit *rejected* this argument, holding that "it is [defendant's] own retransmission of the broadcasts, *not the acts of his end-users*, that is at issue here and all [defendant] does is sell access to unaltered radio broadcasts." *Id.* at 108 (emphasis added).
- In *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987 (9th Cir. 1998), the Ninth Circuit held that defendant infringed plaintiff's copyrights by distributing copyrighted news material to other news reporting organizations in exchange for an annual fee, rejecting defendant's argument that "if a broadcaster's use of the works for news reporting may constitute fair use, then it is obvious that the transmission of such Works to a broadcaster for such purpose cannot ... be deemed an infringement." *Id.* at 994 (quotations omitted). To the contrary, the Court held that "the question of whether defendants' copying and transmission of the works constitutes fair use *is distinct from whether their subscribers' broadcasts of the works are fair use.*" *Id.* (emphasis added).
- Similarly, in *Los Angeles News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992), the Ninth Circuit rejected defendants' claim that its news monitoring and clipping service was protected by the doctrine of fair use because clients used its recordings of copyrighted news segments for "research, scholarship and private study," holding that "the ultimate use to which the customer puts the tape is irrelevant." *Id.* at 797.
- In numerous cases concerning the reproduction of excerpts from copyrighted academic works in "coursepacks" used by college students, courts have repeatedly refused to allow defendants, who were engaged in commercial operations, "to stand in the shoes of their customers," students and professors, in claiming that their making of multiple copies of scholarly works was for nonprofit educational purposes. *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1386 (6th Cir. 1996) (en banc) ("It is true that the use to which the materials are put by the students who purchase the coursepacks is noncommercial in nature. But the use of the materials by the students is not

the use that the publishers are challenging.”); *see also Blackwell Publ’g, Inc. v. Excel Research Grp., LLC*, 661 F. Supp. 2d 786, 793 (E.D. Mich. 2009) (same); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1531 (S.D.N.Y. 1991) (“The use of the ... packets, in the hands of the students, was no doubt educational. However, the use in the hands of Kinko’s employees is commercial.”).

- In *Fox Broad. Co. v. Dish Network*, 905 F. Supp. 2d 1088 (C.D. Cal. 2012), *aff’d*, 723 F.3d 1067 (9<sup>th</sup> Cir. 2013), the Court held that, while various features offered by Dish Network (“Dish”) that allowed its subscribers to easily record and skip commercials on all primetime programming on the four major broadcast networks did not likely constitute direct or vicarious copyright infringement (as, according to the Court, the end users, not Dish, were responsible for creating the purportedly infringing copies, and time-shifting by subscribers constituted fair use), *id.* at 1098-1102, Dish likely infringed plaintiffs’ copyrights by creating its own “quality assurance” copies to ensure that its commercial-skipping product was functioning correctly, *id.* at 1102-1106. Notably, in so ruling the Court found that “[t]he fact that consumers ultimately use AutoHop ... for private home use, a fair use ... does not render [Dish’s] intermediate copies themselves a fair use as well.” *Id.* at 1106. The Court subsequently granted summary judgment to plaintiffs on this issue. *See Fox Broad. Co. v. Dish Network*, Case No. CV12-04529 DMG (SHx), 2015 U.S. Dist. LEXIS 54763, at \*80 (C.D. Cal. Jan. 20, 2015).

While *amici* respectfully disagree with various aspects of the *Dish Network* ruling, it is telling that the Court, even while ruling in Dish’s favor on various issues, recognized that the supposedly “fair use” conduct of subscribers did not excuse Dish’s own copying.

- And in *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000), the Court held that defendant infringed plaintiffs’ copyrights by copying and streaming popular music recordings to customers who had previously purchased their own *bona fide* copies of the recordings, rejecting defendants’ argument that defendants provided “a transformative ‘space shift’ by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves.” *Id.* at 351.

The lesson from these, and other, cases is clear—even if what an end user does with a copyrighted work may constitute fair use, the law does not permit a defendant to provide someone else’s copyrighted work to the end-user as part of a commercial service.

Despite this, TVEyes and its *amici* continue to argue that the activities of TVEyes’ *subscribers* somehow render the Additional Services “fair use.” At the very outset of its recent

motion for summary judgment, TVEyes asserts that the Additional Services are “fair” because its *subscribers* supposedly use them “to research and monitor television broadcasts” (Dkt. No. 133 at 1)—an argument that permeates TVEyes’ entire brief. Similarly, TVEyes’ *amici curiae* Media Critics devote pages of their brief to touting the (undisputed) value that criticism provides in a democratic society and assert that the Additional Services “further the end purposes of media criticism” (Dkt. No. 123-1 at 5-8, 15-16, 20), and *amicus curiae* Professors of Intellectual Property Law argue that the Additional Services should be deemed to be “fair use” because “they are important intermediate steps to the valuable final output of analysis and commentary.” (Dkt. No. 127 at 7). But of course, no one is currently challenging the use of Fox News’ content by media critics or other TVEyes subscribers. Rather, as in *Princeton University Press*, what Fox News is challenging “is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits—and give itself a competitive edge over other [digital markets]—by declining to pay the royalties requested by the holders of the copyrights.” 99 F.3d at 1386.

Notably, neither TVEyes nor its *amici* can cite any case stating that the commercial delivery of copyrighted content to consumers can retroactively be rendered “fair use” based on the subsequent activities of the recipients of that content, and instead they either largely ignore the issue (in the case of TVEyes) or attempt to misconstrue inapposite cases (in the case of its *amici*). For example, the Media Critics claim that cases concerning Internet search engines and searchable book databases somehow compel the conclusion that *any* functions that “further the end purposes of transformative secondary use” constitute fair use (Dkt. No. 123-1 at 20), but these cases suggest no such thing. Rather, in each of the cases in question, the court found that the defendant’s creation of a searchable index to improve access to the original works was *itself*

transformative and imbued a work with different meaning; none of the cases relied on any subsequent downstream use that Internet users made of the copyrighted material. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (stating that defendants’ “use of the images serves a different function than [plaintiff’s] use—improving access to information on the internet versus artistic impression,” and noting that “*it would be unlikely that anyone would use [defendant’s] thumbnails for illustrative ... purposes*” because enlarging them sacrifices their clarity”) (emphasis added); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (a search engine “provides an entirely new use for the original work”) (quotation omitted); *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013) (hereinafter, “*Google Books*”) (“The use of book text to facilitate search through the display of snippets is transformative.”).

It bears emphasizing that, while this Court relied, in part, on the rulings in *Google Books* and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) in finding that TVEyes’ “indexing and clipping” function constitutes fair use, neither of those cases held that the activities of *Google’s* or *HathiTrust’s* end-users gave rise to a fair use defense—rather, both cases held that the defendants’ *own activities*, in the form of “the creation of a full-text searchable database,” were themselves transformative. *HathiTrust*, 755 F.3d at 97; *see also Google Books*, 954 F. Supp. 2d at 291 (“*Google Books* thus uses words for a different purpose—it uses snippets of text to act as pointers directing users to a broad selection of books.”). These cases do not remotely suggest that the proprietor of such a database is free to distribute unlicensed copies of works included in the database to paying customers, so long as the customers might subsequently make “fair use” of the materials; to the contrary, an essential element of both *HathiTrust* and *Google Books* was that those databases contained significant

restrictions *preventing* end-users from obtaining unauthorized copies of the underlying works, thus limiting the utility of the databases to search and identification functions. *See HathiTrust*, 755 F.3d at 97 (emphasizing that digital library did “not allow users to view any portion of the books they are searching” and did not “add into circulation any new, human-readable copies of any books”); *Google Books*, 954 F. Supp. 2d at 287, 291 (as result of various “security measures to prevent users from viewing a complete copy” of a book in Google’s database, “snippets” served only to “help users locate books and determine whether they may be of interest,” and did not supplant the books themselves).

The *amici* Law Professors resort to arguing that inapposite case law on the separate question of *secondary liability*—which is not at issue here—somehow “teaches that functions that enable substantial noninfringing uses are themselves fair even if they could be misused.” (Dkt. No. 127 at 9). Again, the cases say no such thing. Cases regarding “secondary liability” concern the limited circumstances in which a defendant that does not directly infringe a plaintiff’s copyrights is nevertheless so involved with the infringement that it may be held liable for the conduct of another. *See, e.g., Arista Records LLC v. Doe*, 604 F.3d 110, 117 (2d Cir. 2010). Thus in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court held that that a defendant that *did not itself reproduce a plaintiff’s copyrighted works*, but merely designed and distributed a product—a VCR—capable of substantial lawful uses, could not be held secondarily liable based on presumed or imputed intent to cause infringement. *Id.* at 442; *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 933 (2005). In holding that Sony was not liable for the potentially infringing copying committed by *others*, the Supreme Court did not hold that any copying by Sony *itself* would constitute “fair use;” to the

contrary, the Court stated that if the VCR “were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.” 464 U.S. at 449.

The analysis is entirely different where, as here, the defendant is accused of *direct*, rather than secondary, infringement. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008) (whether a technology has “commercially significant noninfringing uses” is an inquiry relevant to *contributory*, not direct, liability); *Tullo*, 973 F.2d at 797 (rejecting argument that defendants’ customers made fair use of copyrighted works where plaintiffs’ claim “is not that [defendant] is vicariously liable for alleged infringements by its customers, but that it is directly liable for its own infringements,” and noting that “[t]he difference is crucial”). Here, TVEyes *itself* reproduced Plaintiff’s works, and distributed and publicly performed excerpts of those works to and for its subscribers. The Law Professors cannot muster a single case even *suggesting* that the existence of potentially non-infringing downstream uses by third parties provides a defense to a claim of *direct* infringement.

## II. **TVEYES’ PROVISION OF THE ADDITIONAL SERVICES DOES NOT REMOTELY QUALIFY AS “FAIR USE”**

### A. **TVEyes’ Delivery of Copyrighted Content to its Subscribers, and its DVR-Like “Date and Time” Search Feature, Do Not Transform the Content in any Way**

As the cases cited above demonstrate, in order to qualify as fair use, what TVEyes is doing with the copyrighted works must *itself* be transformative; TVEyes cannot rely on the supposedly transformative acts of its subscribers.

But TVEyes’ Content-Delivery Features are not themselves transformative in any way. Through these services, TVEyes simply provides its subscribers with high-definition copies of Fox News’, and others, copyrighted programs, which the subscribers can then archive, download, and publicly distribute. *See Infinity Broadcast Corp.*, 150 F.3d at 108 (no fair use

where defendants’ “retransmissions leave the character of the original broadcast unchanged. There is neither new expression, new meaning nor new message.”). TVEyes does not comment on, explain, or edit the clips that it delivers to its subscribers—while TVEyes has previously, and confusingly, suggested that this somehow supports its fair use defense (*see* Dkt. No. 51 at 43), the opposite is true. *See Reuters Television*, 149 F.3d at 993 (no fair use where defendant “copies footage and transmits it to news reporting organizations” but “does not explain the footage, edit the content of the footage, or include editorial comment”). That what the subscribers subsequently do with the delivered content may (or may not) be “fair” does not render TVEyes’ bare delivery of unaltered, copyrighted content “transformative.”

While this Court has already held that TVEyes’ creation of a “search engine” together with the display of “result clips” constitutes fair use (Opinion at 19), the Content-Delivery Features go well beyond that—rather than simply assist subscribers in searching for and identifying clips that may be of interest, TVEyes actually *delivers* unauthorized copies of the copyrighted works to its subscribers for their subsequent use. Neither *HathiTrust* nor *Google Books* provide support for the proposition that such content-delivery functions are protected as fair use, as both of those cases were limited to search functions, which served only to “act as pointers” and to “help users locate books and determine whether they may be of interest.” *Google Books*, 954 F. Supp. 2d at 291. As explained *supra* at 8-9, a critical aspect of those decisions was that the services in question contained significant restrictions *preventing* end-users from actually obtaining copies of the works—thus, if a user of either *HathiTrust*’s or *Google Book*’s database were to identify a book that is of interest, the user would then have to obtain an authorized copy of the book if he or she wished to actually read or utilize the book for any further purpose (including for purposes of research, criticism or comment). Here, by contrast,



once a TVEyes subscriber identifies television content that is of interest, TVEyes actually *provides the subscriber with copies of the content*, acting as an unauthorized clearinghouse for broadcast programming.

Nor is there anything “transformative” about TVEyes’ Date and Time Feature, which allows subscribers to access video clips by inputting a date, time and channel. This is nothing more than the functional equivalent of a DVR, except with a commercial service, TVEyes, doing the recording. *See Sony Corp.*, 464 U.S. at 449 (“If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair.”); *cf. Cartoon Network LP*, 536 F.3d at 133 (cable television system operator not liable for reproductions made using its remote DVR technology because customers, rather than cable operator, were responsible for making the copies); *DISH Network, LLC v. ABC, Inc.*, No. 12 Civ. 4155 (LTS) (KNF), 2013 U.S. Dist. LEXIS 143492, at \*21 (S.D.N.Y. Oct. 1, 2013) (denying preliminary injunction where pay-television provider’s customers, rather than the provider itself, were responsible for copying plaintiffs’ works). Again, there is no resemblance between TVEyes’ Date and Time Feature and the searchable databases in *HathiTrust* and *Google Books*, because the Date and Time Feature does not “help users locate [television shows] and determine whether they may be of interest,” *Google Books*, 954 F. Supp. 2d at 291—rather, it enables subscribers to access copies of copyrighted programs that they have *already* determined to be of interest. It is as if, rather than allowing users to search across a vast library to identify a list of books in which a particular search term appears, Google Books allowed a user to ask “what happens on pages 220-250 of *Game of Thrones?*”, and then allowed a user to download an (unauthorized) copy of those pages. This is paradigmatic copyright infringement.

The remaining arguments proffered by TVEyes and its *amici* concerning the supposedly “transformational” nature of the Additional Services similarly do not survive factual or legal scrutiny. For example, TVEyes and its *amici* repeat the refrain that TVEyes contractually restricts its subscribers to so-called “internal” uses, but this merely recapitulates the meritless argument that so long as TVEyes’ *subscribers* engage in fair use, TVEyes’ activities are “fair” as well. It is undisputed that TVEyes does not restrict *itself* to “internal” uses—to the contrary, TVEyes makes copyrighted content available to thousands of paying customers—and TVEyes’ use is the only one that matters for the fair use analysis.

In any case, as demonstrated at length in Fox News’ memorandum of law in support of its renewed motion for summary judgment, (i) that a use is “internal” does not render it transformative (Dkt. No. 134 at 39) and (ii) the evidence indisputably establishes that TVEyes’ subscribers do *not* limit themselves to “internal” uses, and that TVEyes actively markets and promotes the Content-Delivery Features as a means to distribute clips publically and externally. (*Id.* at 37-39; *see also* Expert Report of Beth Knobel, Ph.D., Dkt. No. 100, ¶¶ 13-14, 72-82 (hereinafter, “Knobel Report”). In fact, TVEyes’ own *amici* argue that the value of the Content-Delivery Features is that they enable third parties to use Fox News’ copyrighted content for illustrative, *external* purposes, undermining any pretense that end users limit themselves to “internal” use. (*See* Dkt. No. 127 at 10-11) (arguing that a “view-only” rule would create a “trust me” problem, and that “[t]he picture is still worth its thousand words ... when sent or displayed to the audience as support for the researcher’s arguments”).

Finally, TVEyes’ and its *amici*’s arguments that the Additional Services are “fair” because programming content distributed by TVEyes is otherwise unavailable (*see, e.g.*, Dkt. No. 133 at 33 (arguing that there are no “practical alternatives” to the Content-Delivery Features)

Dkt. No. 123-1 at 10 (arguing that a “comprehensive database of video that does not rely on permission from content creators is necessary for media critics to ... perform their roles”)) are factually untrue, and legally irrelevant. Fox News’ expert witness has identified myriad legitimate ways in which a TVEyes subscriber, after identifying relevant content using TVEyes’ search function, can obtain lawful copies of the desired content. (Knobel Report ¶¶ 237-260). That it might be useful or convenient for TVEyes’ subscribers to obtain copyrighted content via the Additional Services, rather than through these alternative (and legal) methods, is utterly irrelevant. *See HathiTrust*, 755 F.3d at 96 (“Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.”); *UMG Recordings*, 92 F. Supp. 2d at 353 (“Copyright ... is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders’ property interests.... [D]efendant’s ... argument amounts to nothing more than a bald claim that defendant should be able to misappropriate plaintiffs’ property simply because there is a consumer demand for it.”).<sup>3</sup>

It should come as no surprise that there exist numerous legitimate sources of Fox News’ and others’ programming content. History has shown that when there is a need or demand for certain content, a market-based solution that is fair to both users and rights-holders will emerge, often in the form of a clearinghouse that pays royalties to copyright owners, such as Broadcast

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<sup>3</sup> In addition to Dr. Knobel’s report, common sense defeats any argument that the Additional Services are necessary in order for media critics to analyze, comment on or criticize Fox News. As any consumer of popular media is aware, there is no shortage of commentary and criticism of Fox News on television, in print, and on the Internet. In fact, TVEyes’ *amici* Law Professors identify one particularly prominent critic, Comedy Central’s *The Daily Show*, implying that the Additional Services are necessary for *The Daily Show* to do its work. (Dkt. No. 127 at 10-11). To the contrary, this example disproves the Law Professors’ premise, as *The Daily Show* is able to offer its criticism of Fox News *despite not being a TVEyes customer*. *See* <http://www.thewrap.com/the-secret-to-daily-show-colbert-report-and-the-soup-snapstream/>.

Music, Inc. and the American Society of Composers, Authors and Publishers with respect to music performance rights, *see, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys.*, 441 U.S. 1, 5 (1979), or the Copyright Clearance Center with respect to academic and other works, *see, e.g., American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 7 (S.D.N.Y. 1992), *aff'd*, 37 F.3d 881 (2d Cir. 1994). Many of the Copyright Alliance's members operate such clearinghouses, or rely on them for licensing revenues. If companies such as TVEyes are permitted to distribute copyrighted content to third parties without paying royalties, under the guise of "fair use," legitimate clearinghouses and licensed media monitoring and evaluation (MME) companies that actually compensate copyright-owners for the use of their works will be unable to compete with companies that take such works for free. (Knobel Report ¶¶ 88-94) (explaining the danger that TV Eyes' Content Delivery Features pose to authorized licensing vendors); *see Princeton Univ. Press*, 99 F.3d at 1384, 1386 (company that does not request permission from, nor pay agreed royalties to, copyright owners gives itself a "competitive edge" over those that do pay royalties); *Associated Press v. Meltwater U.S. Holdings*, 931 F. Supp. 2d 537, 543, 561 (S.D.N.Y. 2013) (company that refuses to pay licensing fee obtains an "unfair commercial advantage" over media monitoring services that do pay a license fee).

**B. The Amount and Substantiality of the Copyrighted Content that TVEyes Makes Available to its Subscribers Weighs Against a Finding of Fair Use**

While this Court previously held that copying all of Fox News' television content was necessary to the transformative purpose of creating a searchable database (Opinion at 21-22), the amount of content that TVEyes may *copy* to create its database is an entirely separate question from the amount of content that TVEyes may then *deliver to its subscribers* via the Content-Delivery Features. The amount of content that TVEyes delivers to its subscribers is astounding—subscribers are permitted to save, archive, edit and download to their computers an

*unlimited* number of clips, in high-definition. (Opinion at 4, 6; Dkt. No. 134 at 18-19). Subscribers are able to redistribute an unlimited number of these clips to unlimited recipients through email, and post an unlimited number of clips on social media. (Opinion at 6; Dkt. No. 134 at 19). While TVEyes limits individual downloads to ten minutes, there is nothing to prevent subscribers from downloading consecutive clips seriatim, and Fox News' expert witness had no difficulty downloading an entire, hour-long episode of *NBC Nightly News with Brian Williams*. (Knobel Report ¶¶ 10, 62-71, 131-38). In any case, ten minutes is a substantial portion of any regular television program, and is longer than the average length of a television news segment.

TVEyes' purported desire to create a "searchable database" does not justify its delivery of such unlimited, lengthy and high-quality recordings of copyrighted works to its subscribers, for their unfettered use. As explained *supra* at 8-9, while the courts in this Circuit have permitted the copying of entire works in order to create and populate searchable databases, a critical element of those decisions was that the defendants did not actually provide the copyrighted work to their users—this is not the case here. Similarly, cases involving the use of thumbnail images in Internet search engines emphasize that the search engines display only "smaller, lower-resolution emails of the images" that merely served to guide users to the plaintiff's own websites (where full versions could be viewed). *See Kelly*, 336 F.3d at 815, 821. There is no comparison between these low-quality images, which acted as "pointers" and could not possibly substitute for the original works, and the unlimited clips that TVEyes delivers to subscribers, which are not only *high-definition*, but also bear no watermarks or metadata to deter infringement. (Knobel Report ¶¶ 67-71).

Finally, TVEyes continues to argue that its subscribers do not typically use the Content-Delivery Features to download full episodes. (Dkt. No. 133 at 9, 35-36). However, the Second Circuit has expressly *rejected* such reasoning, holding that where, as here, a defendant provides virtually unlimited access to copyrighted works to multiple subscribers, it is the *potential* scope of retransmission that matters:

[T]he *potential* scope of retransmission is more relevant than evidence of actual retransmission by Dial-Up users thus far. Dial-Up permits essentially unlimited access to radio broadcasts in the cities in which it has receivers and there is thus the potential for retransmission of entire copyrighted programs.... [T]he more successful [defendant] becomes in selling his service to interested parties, the more likely it is that any given broadcast will be retransmitted ... [and] that a subscriber, or the collective action of a plurality of subscribers, will cause [defendant] to retransmit most or all of a given program.

*Infinity Broadcast Corp.*, 150 F.3d at 109-10 (emphasis in original).

The determination of whether TVEyes' service is protected by the doctrine of fair use will have consequences well beyond the parties and specific works at issue in this litigation. TVEyes' services are not limited to Fox News, but rather concern "all content broadcast by more than 1,400 television and radio stations" (Order at 1), including significant content created and owned by Copyright Alliance members. The infringing Additional Services, through which TVEyes makes the copyrighted content of innumerable creators available to paying subscribers, cannot be deemed to constitute a "fair use," leaving TVEyes free to disseminate the copyrighted content of Fox News and other creators in the future, just because subscribers do not always take full advantage of the copyrighted material that TVEyes provides. The Second Circuit has already expressly held as much.

### C. The Remaining Factors Also Weigh Against a Finding of Fair Use

There is no need to significantly supplement the extensive briefing that has already been done by Fox News with respect to the remaining fair use factors. With respect to the "nature of

the copyrighted work” factor, *amici* note that, while Fox News’ news programs are certainly creative and entitled to significant copyright protection, these are not the only programs that TVEyes redistributes via its Additional Services. As the Court has noted, TVEyes records all content broadcast by more than 1,400 television and radio stations (Opinion at 1), including dramatic and fictional content created and owned by Copyright Alliance members.

Similarly, we do not intend to restate the extensive arguments that Fox News has already made concerning the real and significant market harm that the Additional Services cause to Fox News’ derivative markets, including the markets for online and digital redistribution of television content and the sale and licensing of video clips. Again, we merely note that TVEyes’ services impact thousands of channels in addition to Fox News, including channels operated by, and programs created by, Copyright Alliance members. Like Fox News, Copyright Alliance members are actively exploiting these growing markets. In addition to participating in the market for online and digital distribution, like Fox News many Copyright Alliance members earn significant revenues from licensing television and other content, often through clearinghouses and licensed MME companies as explained *supra* at 14-15.

In its Opinion, the Court ruled that Fox News had not suffered significant “market harm” in connection with the licensing and syndication of video clips because its annual revenue from these derivative sources (\$459,020) was a fraction of its overall revenue. (Opinion at 25). The Copyright Alliance respectfully disagrees that the fact that a plaintiff earns significant revenues from other markets, in addition to those being usurped by the infringer, should weigh in favor of a finding of fair use—Fox News should not be penalized because its content is so valuable that it earns significant revenues in markets other than the one being usurped. *See Meltwater*, 931 F. Supp. 2d at 560 (“Where [as here] there is a fully functioning market for the infringer’s use of

the copyrighted material, it will be difficult for the infringing party to show that it made fair use without paying a licensing fee.”). Further, it is indisputable that these derivative markets are growing at an exponential rate. Just because the derivative markets may account for a relatively small percentage of Fox News’ total revenues *today* does not mean that this will be the case *tomorrow*, and TVEyes—which copies and redistributes the copyrighted works of thousands of channels—should not be given the imprimatur of lawfulness merely because it entered the picture at a critical early juncture, before digital and other alternative forms of distribution have fully overtaken the traditional television models. *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 568 (1985) (“[T]o negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work.”) (emphasis in original, internal citations and quotations omitted).

It cannot be disputed that the market for the distribution of television content is rapidly evolving, with online and digital distribution growing more essential by the day. If companies such as TVEyes are permitted to usurp and interfere with that market at this critical stage, it could have calamitous results not only for Fox News, but for the entire television industry.

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Respectfully submitted,

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## **Biographies of *Amici* Professors**

### **Adam Mossoff**

Adam Mossoff is Professor of Law at George Mason University School of Law, and he is a Senior Scholar and Director of Academic Programs in the Center for Protection of Intellectual Property at George Mason, which he co-founded in 2012. He teaches and writes in the areas of copyright law, patent law, property law, and Internet law. He has published extensively on the theory and history of how intellectual property rights are fundamental property rights, with his articles appearing in the *University of Pennsylvania Law Review*, *Cornell Law Review*, *Boston University Law Review*, and other journals. Professor Mossoff is a past Chairman and current Vice Chairman of the Intellectual Property Committee of the IEEE-USA, a member of the Public Policy Committee of the Licensing Executives Society, a member of the Amicus Committee of the AIPLA, and a member of the Academic Advisory Board of the Copyright Alliance. Professor Mossoff graduated with honors from the University of Chicago Law School, where he was a research assistant to Richard A. Epstein and held the Bradley Governance Fellowship. Following law school, he was a John M. Olin Fellow in Law and Visiting Lecturer at Northwestern University School of Law, and he clerked for the Honorable Jacques L. Wiener, Jr. of the U.S. Court of Appeals for the Fifth Circuit. He holds an M.A. in philosophy, specializing in legal and political philosophy, from Columbia University and a B.A. with High Distinction and High Honors in philosophy from the University of Michigan.

### **Christopher M. Newman**

Christopher M. Newman is an Associate Professor at George Mason University School of Law. Following law school at University of Michigan, Professor Newman was a clerk for the Honorable Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. From 2000-2007,

he was a litigation associate with Irell & Manella LLP in Los Angeles. He joined the faculty of George Mason in 2008, and since that time has taught and written in the area of copyright law, with particular scholarly focus on the nexus between copyright and property theory. In 2014 the American Law Institute named Professor Newman an Associate Reporter for the Restatement (Fourth) of Property.

**Mark F. Schultz**

Mark Schultz is the Co-Director of Academic Programs and Senior Scholar at the Center for the Protection of Intellectual Property at George Mason University School of Law, a center that he co-founded. He also continues to serve as Associate Professor at the Southern Illinois University School of Law where he teaches copyright, cyberlaw, trade secret law, and trademark & unfair competition. He has extensive experience in private practice in the area of intellectual property and served as a judicial clerk in both the U.S. Court of Appeals for the Federal Circuit and U.S. Court of Federal Claims.

**Jon A. Baumgarten**

After graduating from New York University School of Law in 1967 Jon A. 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. Among other awards and recognitions, after his retirement Mr. Baumgarten was given a lifetime professional achievement award as a Champion of Intellectual Property by the DC Bar.