

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.

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

**BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION IN SUPPORT OF
DEFENDANT-APPELLANT-CROSS-APPELLEE TVEYES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Computer & Communications Industry Association states that it does not have a parent corporation and that no publicly held corporation has an ownership stake of 10% or more in CCIA.

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March 23, 2016

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INTEREST OF *AMICUS*¹

The Computer & Communications Industry Association (CCIA) represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than \$540 billion in annual revenues.² CCIA’s members include the companies that operate some of the world’s largest search engines.

CCIA’s members benefit from the Copyright Act’s “statutory monopoly” when developing new and innovative software and other creative works, and are also substantially regulated by that same system. 17 U.S.C. § 101 *et seq.* This regulation is constitutionally sound when it incentivizes authors in a way that furthers the public interest, *see Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), and because it is circumscribed by exceptions like fair use. *See Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003); *Golan v. Holder*, 132 S. Ct. 873, 890 (2012). Because “an overzealous monopolist can use his copyright to stamp out the very creativity that the Act seeks to ignite,” *SOFA Entm’t, Inc. v. Dodger*

¹ Pursuant to Local Rule 29.1, CCIA states that no counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution. All parties have consented to the filing of this brief.

² A complete list of CCIA members is available at <http://www.cciagnet.org/members>.

Productions, Inc., 709 F.3d 1273, 1278 (9th Cir. 2013), the fair use doctrine exists to ensure he does not “prevent[] the authors and thinkers of the future from making use of, or building upon, his advances.” *New Kids on the Block v. News America Publ’g, Inc.*, 971 F.2d 302, 307 n.6 (9th Cir. 1992).

In the commercial context, this increasingly involves transformative uses. In many cases these uses do not change the works at issue; rather, they allow for the provision of services, which quite frequently help the market for the underlying work, not harm it. Therefore, while CCIA members include copyright holders who benefit from strong copyright protection, they also depend greatly upon a strong fair use doctrine, which enables existing and future innovations in information services and technology. It is no coincidence that many of the most innovative information products and services of the Internet revolution have been developed in the United States, whose copyright law has long balanced robust copyright protection with a robust fair use doctrine. CCIA offers its perspective with the aim of preserving that balance.

INTRODUCTION AND SUMMARY OF ARGUMENT

Digital technology provides an unprecedented ability to find information. Works as diverse as websites, books, legal briefs, student papers, and news broadcasts can be copied into vast search databases that assist users in locating the information they seek—to find a needle within a haystack. Additionally, these search databases enable new forms of research: text and data mining that permits the detection of trends and patterns in the appearance of facts, words, and concepts within texts. Some copyright owners have objected to the creation of these search databases, but courts correctly have found the mass copying of “raw material” to build databases for “sharply different objectives” to be fair use under 17 U.S.C. § 107. *White v. West Publ’g Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014) (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

This case provides this Court with the opportunity to make explicit what is implicit in its previous decisions, most notably *HathiTrust* and *Google*: that the copying necessary to create and operate a search database is a fair use as a matter of law. The creation and operation of the search database, however, is a distinct

question from the access that the search provider affords to the content of the database. In some cases, the access afforded may well exceed fair use, and that is the appropriate focus of inquiry in copyright infringement cases related to search databases. Nonetheless, by now the issue of the lawfulness of the creation and operation of a search database should be beyond dispute; search database providers should not be required to demonstrate the lawfulness of that activity.

This brief will explain how drawing such a bright line is consistent with this Court's decisions in *HathiTrust* and *Google*, as well as the decisions of other circuit courts. The brief also argues that the district court erroneously concluded that TVEyes was directly liable for copying associated with certain additional services, when in fact that copying was undertaken by users, not TVEyes itself. The brief concludes by identifying the economic benefits associated with drawing a bright line regarding the fair use of an activity that provides enormous value to society, and the U.S. economy.

ARGUMENT

I. THE USE OF WORKS TO CREATE AND OPERATE A SEARCH DATABASE IS A FAIR USE AS A MATTER OF LAW

A. Using Works to Create a Search Database Is Distinct From Providing Access to the Works in the Database

The creation of a search database requires the copying of large amounts of material into the database. The database provider might need to convert the copied material into a more useable format, *e.g.*, translate image files into machine-readable files.³ The database provider often will make backup copies of the database to protect against loss of data in the event of system failure.⁴ Further, the database provider may need to make temporary reproductions of portions of the database in a computer's random access memory during the course of responding to a query.⁵ All of these copies are internal to the database provider's computers.

³ In the Google Library Project, Google made a digital scan of each book it borrowed from a research library, then used optical character recognition software to convert the scan machine readable text. Google retained both the scanned image and machine-readable text. *Google*, 804 F.3d at 208.

⁴ For example, HathiTrust created and maintained four text-only copies of its entire database (one on the primary server at the University of Michigan, another at the mirror server at the University of Indiana, and two encrypted backup tapes at two secure locations on the University of Michigan campus) for the purpose of balancing the load of user web traffic and serving as backup in the case of a disaster. *HathiTrust*, 755 F.3d at 99-100.

⁵ These temporary reproductions may not constitute copies under the Copyright Act. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

They are not viewable by the outside world.⁶ This brief refers these copies as “invisible uses.”⁷

Additionally, the database provider may provide its users with access to some of the material in the database to enhance the database’s utility. This access typically involves the transmission of material to the user’s computer, as well as the making of at least a temporary copy of the material in the user’s browser. This brief will refer to these accessible copies as “visible uses.”

The court below described three activities as TVEyes’ “core function”—recording content, putting it into a database and, upon a keyword query, allowing users to view short clips of the content. . . .” 2015 Order. The first two activities—recording the content and putting it into a database—are what this brief calls invisible uses. The third activity—displaying a clip in response a user query—is what this brief refers to as a visible use.

⁶ Professor Matthew Sag characterizes acts of copying which do not communicate the author’s original expression to the public as “nonexpressive uses.” Matthew Sag, *Copyright and Copy-reliant Technology*, 103 NW. U. L. REV. 1607, 1624 (2009). Professor Edward Lee describes three kinds of uses: creational uses (uses of copyrighted works to create a technology); operational uses (uses that occur during the operation of the technology once it has been created); and output uses (the distribution or display of works as an output of the technology). Edward Lee, *Technological Fair Use*, 83 SO. CAL. L. REV. 797, 842-44 (2010). Creational uses and operational uses are included in what this brief defines as invisible uses.

⁷ As discussed *infra* at 10-11, the invisible uses of works in a search database are analogous to the “intermediate copies” made during the course of software reverse engineering that courts have long found to be fair use.

This Court in *Google* recognized that invisible uses should be analyzed separately from visible uses because these two categories raised distinct fair use issues. When applying the four fair use factors to the search and snippet view functions, the *Google* court discussed each function separately. In the context of transformative use, the Court observed that the snippet view was “significantly different” from “the basic transformative search function, which tells only whether and how often the search term appears in the book.” *Google*, 804 F.3d at 217. Likewise, in the context of the amount used, the *Google* Court carefully distinguished the amount used to provide the search function from the amount of text revealed to searchers in the snippet view. The Court noted that what mattered in *HathiTrust* and *Google* “is not so much ‘the amount and substantiality of the portion used’ in *making a copy*, but rather the amount and substantiality of what is thereby made accessible to a public for which it may serve as a competing substitute.” *Google*, 804 F.3d at 222 (emphasis in original). In other words, what triggered potential liability was not the invisible uses, but the visible uses.

B. Fair Use Permits the Invisible Uses Essential to a Search Database

The permissibility of copying on a large scale to create and operate a search database has been considered by several courts over the past fifteen years, and they have reached a unanimous conclusion: such copying is a fair use. For purposes of business certainty and judicial efficiency, this Court should make explicit what is

implicit in this body of law: that the invisible uses relating to a search database are *per se* fair use. Going forward, lower courts should focus their attention on the visible uses, and the degree to which their accessibility to the public serves as competing substitutes for the original work.⁸

This Court’s application of the four fair use factors to the invisible uses by a search database provider makes abundantly clear that such uses fall within the scope of Section 107.

1. The Purpose and Character of the Use

The *Google* Court stated that it had “no difficulty concluding that Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose. . . .” *Google*, 804 F.3d at 216. In reaching this conclusion regarding these invisible copies, the Court relied on *HathiTrust*, where the Court found that “both the making of the digital copies and the use of those copies to offer the search tool were fair uses.” *HathiTrust*, 755 F.3d at 105. The *Google* Court noted that the *HathiTrust* Court had found that the downloading and

⁸ Professor Lee argues that fair use has (and should) “afford more leeway to developers at the creation and operation stages”—what this brief defines as invisible uses. Lee, *supra* note 6, at 846. In contrast, “the more doubtful questions of technological fair use occur in . . . verbatim output cases. . . .” *Id.* Such cases “raise greater concern about a superceding use that a case with limited output.” *Id.* at 847. See also Sag, *supra* note 6, at 1624 (“acts of copying which do not communicate the author’s original expression to the public should not be held to constitute copyright infringement”).

storing of complete digital copies of books “was essential to permit searchers to identify and locate the books in which words or phrases of interest to them appeared.” *Google*, 804 F.3d at 217. The Google Court quoted the *HathiTrust* Court’s conclusion that “the creation of a full-text searchable database is a quintessentially transformative use . . . [a]s the result of a word search is different in purpose, character, expression, meaning, and message for the page (and the book) from which it is drawn.” *Google*, 804 F.3d at 217 (quoting *HathiTrust*, 755 F.3d at 97).

The *Google* Court then cited *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003) as “examples of cases in which courts had similarly found the creation of complete digital copies of copyrighted works to be transformative uses when the copies served a different function from the original.” *Google*, 804 F.3d at 217 (quotations omitted). All three of these cases involved the creation of a search database. *Kelly* and *Perfect 10* involved search engines designed to find images online. *iParadigms* involved a plagiarism detection service that enabled an instructor to find works from which a student paper may have been copied without attribution. The *Google* Court explained that “[a]s with *HathiTrust* (and *iParadigms*), the purpose of Google’s copying of the original copyrighted books is

to make available significant information *about those books*, permitting a searcher to identify those that contain a word or term of interest. . . .” *Google*, 804 F.3d at 217. *See also iParadigms*, 562 F.3d at 639-40 (“iParadigms’ use of plaintiffs’ works had an entirely different function and purpose than the original works. . . . iParadigms’ use of these works was completely unrelated to the expressive content and instead aimed at detecting and discouraging plagiarism.”).

The *Google* Court also made clear that the commercial motivation of a provider of the search database should not tilt the first factor against the provider: “[o]ur court has . . . repeatedly rejected the contention that commercial motivation should outweigh a convincing transformative purpose and absence of significant substitutive competition of the original.” *Google*, 804 F.3d at 219. *See also iParadigms*, 562 F.3d at 639.

These courts’ conclusions are consistent with a long history of courts finding other invisible uses of works to be non-infringing fair use. For decades, courts have permitted the translation of machine-readable object code into human readable source code as an essential step in the development of non-infringing interoperable computer programs. In these cases, the source code was used internally and was never distributed to the public. The invisible uses of works in a search database are analogous to what courts have called “intermediate copies” made during the course of software reverse engineering. *See Sony Computer*

Entm't v. Connectix Corp., 203 F.3d 596, 599-600 (9th Cir. 2000); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1518-19 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 842 (Fed. Cir. 1992).

In *Sony Computer*, the Ninth Circuit found that the defendant's uses, which were invisible to the user and made in the course of reverse engineering, were fair use, explaining that "[a]ll of this copying was intermediate; that is, none of the Sony copyrighted material was copied into, *or appeared in*, Connectix's final product, the Virtual Game Station." *Sony Computer*, 203 F.3d at 600 (emphasis supplied). Whether the copying is for the purpose of reverse engineering or building a search database, courts consistently find that copies invisible to the end user are fair use.

In short, the first fair use factor should always weigh in favor of the creator of a search database.

2. The Nature of the Copyrighted Work

Neither the *Google* nor *HathiTrust* Courts found the second fair use factor, the nature of the copyrighted work, to be dispositive. This is "because the secondary use transformatively provides information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original." *Google*, 804 F.3d at 220. In other words, because the copying involved in the creation of a search database does not provide a meaningful

substitute for the original, the nature of the original has little relevance. *See also iParadigms*, 562 F.3d at 641-42 (second factor does not weigh against iParadigms because its “use of the works in this case—as part of a digitized database from which to compare the similarity of typewritten characters used in other student works—is . . . unrelated to any creative component.”). Accordingly, the second fair use factor does not tilt against invisible uses by search database providers.

3. The Amount Used

Invisible uses by search database providers often require the copying of entire works. The *HathiTrust* Court concluded its discussion of the third fair use factor by noting that “[b]ecause it was reasonably necessary for the [HathiTrust Digital Library] to make use of the entirety of works in order to enable the full-text search function, we do not believe the copying was excessive.” *HathiTrust*, 755 F.3d at 98. Likewise, the *Google* Court found that “not only is the copying of the totality of the original reasonably appropriate to Google’s transformative purpose, it is literally necessary to achieve that purpose. If Google copied less than the totality of the originals, its search function could not advise searchers reliably whether the searched term appears in a book (or how many times).” *Google*, 804 F.3d at 221. *See also iParadigms*, 562 F.3d at 642 (endorsing district court’s conclusion that iParadigms’ use of the entirety of original works was limited in purpose and scope as a digitized record for electronic comparison purposes only).

This conclusion is not unique to search-related cases; reverse engineering cases have similarly permitted invisible uses in the context of attempting to achieve interoperability, even though it necessarily contemplates “wholesale copying”. *See Sega*, 977 F.2d at 1527; *Sony Computer*, 203 F.3d at 605-06 (“Connectix . . . copied the entire Sony BIOS multiple times. This factor therefore weighs against Connectix. But as we concluded in *Sega*, in a case of intermediate infringement when the final product does not itself contain infringing material, this factor is of ‘very little weight.’”) (quoting *Sega*, 977 F.2d at 1526-27; citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) for proposition that “copying of entire work does not preclude fair use”).

4. The Effect of the Use on the Market

The *HathiTrust* Court found that the fourth fair use factor supported a finding of fair use because the ability to search the text of a book to determine whether it includes a search term “does not serve as a substitute for the books that are being searched.” *HathiTrust*, 755 F.3d at 100. The *HathiTrust* Court rejected the plaintiffs’ suggestion that HathiTrust impaired the emergence of a market for licensing books for digital search: “Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and full-text-search does not.” *Id.* The *Google* Court cited with approval *HathiTrust*’s conclusion that the search function does not substitute for the books being searched, *Google*, 804

F.3d at 223, and devoted the rest of its discussion of the fourth factor to snippet view. *See also iParadigms*, 562 F.3d at 644 (“Clearly no market substitute was created by iParadigms, whose archived student works do not supplant the plaintiffs’ work in the ‘paper mill’ market so much as merely suppress demand for them, by keeping record of the fact that such works have previously been submitted.”).

The *Google* Court dismissed plaintiffs’ assertion that the search function usurped their market for derivative uses. The Court explained that “the copyright that protects Plaintiffs’ works does not include an exclusive derivative right to supply . . . information [contained in the works] through query of a digitized copy.” *Google*, 804 F.3d at 225. The Court underscored this point: “Nothing in the statutory definition of a derivative work, or of the logic that underlies it, suggests that the author of an original work enjoys an exclusive right to supply information about that work of the sort communicated by Google’s search functions.” *Id.* at 226. The harms that the Copyright Act was intended to prevent are absent here. Accordingly, the fourth fair use factor also favors invisible uses by search database providers.

5. The Four Factors Weighed Together

At the end of its fair use analysis, the *Google* Court stated that “considering the four fair use factors in light of the goals of copyright, we conclude that

Google’s making of a complete digital copy of Plaintiffs’ works for the purpose of providing the public with its search . . . functions . . . is a fair use and does not infringe Plaintiff’s copyrights in their books.” *Google*, 804 F.3d at 225. The *Google* Court’s fair use analysis, as well as that of the *HathiTrust* and *iParadigms* courts, compels affirmance of the decision below that fair use permits the invisible uses TVEyes makes of Fox News broadcasts in the course of creating its search database. The indexing function TVEyes provides is analogous to those provided in *HathiTrust*, *Google*, and *iParadigms*. The TVEyes Watch List Page provides a subscriber with a daily tabulation of the total number of times keywords selected by the subscriber were mentioned on 1400 television and radio stations over a 32 day period. The user can also compares mentions of the keyword in the TVEyes database with instances of the keyword in other databases on the Internet. Additionally, the subscriber can customize the search results in various ways, including a tabulation of the number of times a term has been used in a certain time period, or receive email alerts each time a keyword is used. The invisible uses TVEyes makes of Fox News broadcasts in order to provide these indexing services are transformative because they (1) have a different purpose and function from the news broadcasts, (2) are necessary to achieve that transformative purpose, and (3) do not substitute for the news broadcasts themselves.

Furthermore, the reasoning of *HathiTrust*, *Google*, and *iParadigms* compels the conclusion that the invisible uses necessary to make any search database are fair use. Regardless of the nature of the content, providing search functionality *always* has a different purpose and function from the content itself. Copying entire works is *always* necessary to provide complete and accurate indexing. Such invisible copying *never* substitutes for the original works.

To prevent this issue from being relitigated in every case involving search indexing, this Court should draw a bright line permitting invisible uses reasonably necessary to create a search database. Doing so would conserve resources and prevent future erroneous decisions. Plaintiffs often blur the distinction between invisible and visible uses in a manner that may skew fair use analyses. Litigants mix the invisible uses of entire works in the context of the third factor with claims of market substitution by the far more limited visible uses in the context of the fourth factor. Indeed, this is precisely what Fox News did in its opening brief in support of summary judgment in the court below. Fox News' discussion of the third factor focuses on TVEyes' *invisible* use of entire Fox News broadcasts. Fox News Br. in Support of Motion for Summary Judgment at 34-35. However, Fox News' discussion of the fourth factor centers on TVEyes' *visible* use of video clips. Fox News Br. at 37-40. Drawing a bright line permitting invisible copying would avoid confusion and prevent gaming of the fair use analysis.

C. Fair Use Permits Many Visible Uses Relating to a Search Database

The foregoing discussion of invisible uses in no way suggests that visible uses cannot also be fair uses. To the contrary, the *Google* Court correctly found that the display of snippets—a visible use—in response to search queries constituted a fair use. Similarly, the courts in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003), and *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d at 1165-68, found the display of thumbnail images in response to search queries to be a fair use. However, whereas invisible uses inherently pass fair use muster, visible uses require a separate analysis to ensure that they satisfy Section 107’s requirements.

For example, the *Google* Court found snippet view to be transformative because “[s]nippet view adds important value to the basic transformative search function. . . . Merely knowing that a term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book, because it does not reveal whether the term is discussed in a manner or context falling within the scope of the searcher’s interest.” *Google*, 804 F.3d at 217-18. Google’s “division of the page into tiny snippets is designed to show just enough context surrounding the searched term to help [the searcher] evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author’s copyright interests).” *Id.* at 218.

With respect to the third factor, the *Google* Court observed that “[t]he larger the quantity of the copyrighted text the searcher can see and the more control the searcher can exercise over what part of the text she sees, the greater the likelihood that these revelations could serve her as an effective, free substitute for the purchase of the plaintiff’s book.” *Id.* at 222. However, “Google has constructed the snippet feature in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs’ books.” *Id.*

Likewise, the *Google* Court carefully examined snippet view in the context of the fourth fair use factor. The Court acknowledged that “even if the purpose of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in a widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute.” *Id.* at 223. The Court concluded that the safeguards built into snippet view prevented it from sufficiently satisfying “the searcher’s interest *in the protected aspect* of the author’s work,” *id.* at 224 (emphasis in original), so as to “provide a significant substitute....” *Id.*

In a similar manner, the Ninth Circuit considered the display of thumbnail images in *Perfect 10* and *Kelly*. Google’s use of the thumbnails was highly transformative because “a search engine transforms the image into a pointer directing a user to a source of information.” *Perfect 10*, 508 F.3d at 1165. Further,

“a search engine provides a social benefit by incorporating an original work into a new work, namely, an electronic reference tool.” *Id.* With respect to the third factor, the *Perfect 10* Court quoted the *Kelly* Court’s holding that “[i]t was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image. . . .” *Perfect 10* at 1167 (quoting *Kelly*, 336 F.3d at 821). Had *Kelly* copied only part of the image, “it would have been more difficult to identify it, thereby reducing the usefulness of the visual search engine.” *Id.* Turning to the fourth factor, the *Perfect 10* Court relied on the *Kelly* Court’s finding that the low-resolution thumbnails were not a substitute for full-sized images. *Perfect 10* at 1168.

As these decisions make clear, visible uses—the display of portions of the content of the search database—can often significantly enhance the utility of the search database. Google Books is more useful than the HathiTrust Digital Library because it displays snippets of text that allow the searcher to see the context in which the search term is used, as opposed to just the page numbers returned by the HathiTrust Digital Library. Displaying a responsive set of thumbnail images is much more helpful to a person searching for images than a list of URLs where responsive images might appear. Adding important value to the highly transformative purpose of finding information renders these displays transformative. At the same time, these decisions also make clear that the displays

should not be unlimited, lest they offer a competing substitute for the original works.

II. THE DISTRICT COURT ERRED IN FINDING THAT TVEYES ENGAGED IN VOLITIONAL CONDUCT WITH RESPECT TO THE ADDITIONAL SERVICES

The requirement of a volitional act ensures that direct copyright liability is assigned to those who perform the infringing acts, as opposed to services that may indirectly play a role in the infringement. Federal courts have consistently maintained this distinction between direct and secondary liability. *See Fox Broad. Co. v. Dish Network LLC*, No. 12-4529, 2015 WL 1137593, at *11 (C.D. Cal. Jan. 20, 2015) (“The volitional conduct doctrine is a significant and long-standing rule, adopted by all Courts of Appeal to have considered it. . . .”).

This distinction between direct and secondary liability was first articulated in *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), so as to avoid establishing “a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet”. 907 F. Supp. at 1372.

This Court endorsed the volitional conduct requirement in *Cartoon Network*, 536 F.3d at 130-31, making clear that it was necessary to establish direct infringement. If a plaintiff cannot establish volitional conduct, it may still proceed

with a copyright infringement claim, but must allege secondary liability. The volitional conduct rule will therefore never impede an injured plaintiff from seeking relief; it merely ensures the proper categorization of claims.

The distinction drawn above between invisible uses and visible uses is instructive when considering the district court's finding that TVEyes engaged in volitional conduct with respect to the "additional services" at issue in this litigation. The district court distinguished this Court's *Cartoon Network* decision on the ground that TVEyes stored the Fox News broadcasts for a period of more than transitory duration. But when TVEyes stored broadcasts for a non-transitory period, it was with respect to invisible uses, imperceptible to the subscriber, for which the district court had correctly found no liability because they were fair use. While TVEyes subscribers may *also* have caused the copying and storage of broadcasts for more than a transitory period in the course of using other TVEyes features, these are not uses for which TVEyes may be held *directly* liable.

When subscribers utilized TVEyes' additional functions, the subscriber, not TVEyes, was the volitional actor. With respect to these uses, it was the subscriber who selected the keywords, which by an automatic process produced a list of programs containing those keywords. It was the subscriber who then selected which clips to view. It was the subscriber who selected which clips to archive. It was the subscriber who selected which clips to share. It was the subscriber who

selected which clips to download. It was the subscriber who selected to view clips by date and time. Thus, for the sharing and downloading functions the district court found to be infringing, there were three intervening steps directed by the subscriber between TVEyes' reproduction and the subscriber's email or download: (a) the selection of the keyword; (b) the selection of the clip; and (c) the selection of sharing or downloading the clip.

These three intervening steps taken by the subscriber are the volitional conduct that may lead to direct infringement liability. TVEyes did not "do" these acts. Thus, if Fox News wishes to hold TVEyes responsible for these copies, it must allege indirect liability, not direct liability. It did not do so here.

III. SEARCH DATABASES PROVIDE ENORMOUS VALUE TO SOCIETY

Search databases created by the copying of vast amounts of copyrighted works provide society with enormous value while causing the copyright owners no harm. Accordingly, this Court should continue to apply Section 107 in a manner that facilitates the creation of such databases.

A. Internet Search Engines Provide Value

Consistent with the Ninth Circuit's *Perfect 10* decision and related cases, Internet search engines index (and in so doing reproduce) billions of copyright-protected web pages containing an enormous variety of works, such as news,

photographs, fan fiction, and blogs, on an ongoing basis, without license. *See, e.g., Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1165-68 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1118-19 (D. Nev. 2006);⁹ *see also Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 638-39 (E.D. Pa. 2007) (viewing, printing, and saving copies of plaintiff’s public website for historical reference in litigation from Internet Archive Wayback Machine was fair use). In order to provide this functionality to users, search engines’ mass copying must occur “routinely, automatically, and indiscriminately”. Matthew Sag, *Copyright and Copy-reliant Technology*, 103 NW. U. L. REV. 1607, 1622 (2009). Without such functionality, effectively navigating the Internet would be impossible.

The precise size of Internet search databases is a trade secret, but in 2013 Google’s index contained an estimated 23 billion web pages, Yahoo’s index 20 billion pages, and Bing’s index 17 billion pages. Google alone processes on average 40,000 search queries per second, which translates to 3.5 billion searches

⁹ These precedents “acknowledge the social utility of online indexing, and factor it into fair use analysis... adapt[ing] copyright law to the core functionality and purpose of Internet”. Congressional Research Serv., *Internet Search Engines: Copyright’s “Fair Use” in Reproduction and Public Display Rights*, July 12, 2007, at 13.

per day and 1.2 trillion searches per year worldwide. In January 2016 alone, U.S. search engines collectively processed some 17 *billion* search queries.¹⁰

The ability to instantaneously query this quantity of information provides the economy with enormous benefits. In 2011, McKinsey estimated that the gross economic value of Internet search to the global economy was \$780 billion.

McKinsey & Company, *Measuring the Value of Search* (2011),

[http://www.mckinsey.com/business-functions/marketing-and-sales/our-](http://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/measuring-the-value-of-search)

[insights/measuring-the-value-of-search](http://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/measuring-the-value-of-search). More than a half *trillion* dollars of that value flowed directly to Global GDP in the form of electronic commerce,

advertising revenues, and higher corporate productivity. Within the United States, search accounted for 1.2 percent of U.S. GDP, with \$240 billion being “captured by

individuals rather than companies, in the form of consumer surplus, and arises from

unmeasured benefits, such as lower prices, convenience, and the time saved by swift

access to information.” *Id.* Knowledge workers “experienced search-related

productivity gains of up to \$117 billion, flowing from faster and more accurate access

¹⁰ Marcus Taylor, *A Visual Comparison of Google, Yahoo and Bing’s Revenue, Profit, Market Share & More*, VentureHarbour (2013), <https://www.ventureharbour.com/visualising-size-google-bing-yahoo/> (estimating number of indexed sites); Internet Live Stats, *Google Search Statistics*, <http://www.internetlivestats.com/google-search-statistics/> (queries per second); Statista, *Number of explicit core search queries powered by U.S. search engines as of January 2016*, <http://www.statista.com/statistics/265796/us-search-engines-ranked-by-number-of-core-searches/> (total number of queries).

to information.” *Id.* This economic activity would not be possible if the construction of search engines were not permitted by fair use.

B. Other Searchable Databases Provide Value

This Court is already familiar with the social benefits provided by the HathiTrust and Google Books databases. The *Google* Court notes that the Google Books search tool “permits a researcher to identify those books, out of millions, that do, as well as those that do not, use the terms selected by the researcher.” *Google*, 804 F.3d at 209. The Court adds that “this identifying information instantaneously supplied would otherwise be unobtainable in lifetimes of searching.” *Id.* The HathiTrust and Google Books search engines also make possible “new forms of research, known as ‘text mining’ and data mining.” *Id.* These search methods “permit users to discern fluctuations of interest in a particular subject over time and space by showing increases and decreases in the frequency and usage in different periods and different linguistic regions.” *Id.* Researchers “can comb over the millions of books Google has scanned in order to examine word frequencies, syntactic patterns, and thematic markers and to derive information on how nomenclature, linguistic usage, and literary style have changed over time. *Id.* (quotations and citations omitted).

The text and data-mining of other databases enabled by fair use can also yield significant benefits. As *iParadigms* shows, data mining allows educators to

police against violations of academic norms in a manner that would not otherwise be possible. Further, “Big Data”—the “close to real-time analysis of large volumes of data”¹¹—is widely regarded as one of the catalysts that can reignite the U.S. economy. *See, e.g., McKinsey & Co., Game Changers: Five Opportunities for U.S. Growth and Renewal* (2013), <http://www.mckinsey.com/global-themes/americas/us-game-changers>. McKinsey & Co. estimates that “the widespread use of big data analytics could increase annual GDP in retail and manufacturing by up to \$325 billion by 2020 and produce up to \$285 billion in productivity gains in health care and government services.” *Id.* at 12. To be sure, much of the data on which a firm will perform Big Data analytics will be generated within the firm—for example, a retailer’s real-time information on its inventory. But the firm may well obtain some of the data it needs from other sources, including information aggregators such as TVEyes.¹² The OECD explains that information aggregators collect data from numerous sources, including “data crawled from the Internet.” OECD, *supra* note 11, at 82. This crawling of the Internet almost invariably involves the copying of websites. In affirming the

¹¹ OECD, *Data-Driven Innovation: Big Data for Growth and Well-Being* (2015), available at http://www.keepeek.com/Digital-Asset-Management/oecd/science-and-technology/data-driven-innovation_9789264229358-en#page1.

¹² The OECD describes a “data value cycle,” the starting point of which is “datafication and data collection.” Key players in data collection are “data brokers,” who “are actively engaged in the collection of additional data and their aggregation.” *Id.* at 34.

decision below with respect to TVEyes' core services, this Court should eliminate the specter of copyright liability for the act of aggregating information, that is, the invisible uses made by database suppliers. This will help ensure that the promise of Big Data comes to fruition.

C. The Court Should Not Relinquish a U.S. Competitive Advantage

The fair use jurisprudence permitting the creation and operation of search databases has provided the United States with an enormous competitive advantage over other countries. Several years ago, at the request of United Kingdom Prime Minister David Cameron, Professor Ian Hargreaves conducted an independent review of whether the UK's intellectual property laws were impeding growth. Professor Hargreaves in 2011 found that the UK's copyright laws in particular were obstructing innovation. He stated that its copyright exceptions "have failed to keep up with technological and social changes. . . . Technology has expanded the potential for communication, research, learning, and access to resources, but out of date rules mean this potential is not fully realised." Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* 41 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf. Professor Hargreaves focused in particular on the constraints the rigid UK copyright laws placed on web search engines and text and data mining:

Research scientists, including medical researchers, are today being hampered from using computerized search and analysis techniques on data and text because copyright law can restrict such usage. As data farming becomes routine in systems across the economy, from the management of transport to the administration of public services, copyright issues become ever more important as potential obstacles.

Id. at 43. Professor Hargreaves contrasted the situation in the UK with that of the United States, where fair use “provided a legal mechanism that can rule a new technology or application of technology . . . as legitimate and not needing to be regulated. . . .” *Id.* at 44. Professor Hargreaves concluded that the European Union’s framework for copyright exceptions precluded adoption of U.S. style fair use in the UK. As an alternative, Professor Hargreaves recommended a narrower exception for text and data mining. *Id.* at 48. The UK Intellectual Property Office accepted this recommendation, and Parliament in 2014 adopted an exception that permitted the copying of whole works for the purpose of engaging in noncommercial computational analysis. UK Intellectual Property Office, *Exceptions to Copyright: Research* (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf.¹³ Other jurisdictions have seen similar outcomes, where the failure to adopt flexible copyright provisions like fair use have hamstrung the

¹³ Significantly, the UK text and data mining exception does not go as far as U.S. fair use jurisprudence. It is restricted to noncommercial uses, and does not permit any visible uses of the works included in the search database.

development of domestic Internet and technology firms.¹⁴ A decision narrowing search-related fair use would risk relinquishing the competitive advantage that this doctrine has provided to the U.S. technology industry and other sectors.

CONCLUSION

Accordingly, CCIA urges this Court to affirm the district court's ruling with respect to TVEyes' core services and archiving function, and reverse the district court's ruling with respect to sharing, downloading, and date-time searching. In so doing, this Court should make clear that the invisible uses necessary to create and operate a search database are fair use.

Respectfully submitted,

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¹⁴ Matt Schruers, *How Poorly Drafted Trade Agreements Produce Bad Law and Undermine Internet Investment*, Disruptive Competition Project, Sept. 27, 2012, <http://www.project-disco.org/intellectual-property/how-poorly-drafted-trade-agreements-produce-bad-law-and-undermine-internet-investment/> (describing how absence of fair use hindered early Japanese search providers, relative to Korea).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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March 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2016, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Computer & Communications Industry Association was timely filed in accordance with Fed. R. App. P. 25(a)(2)(D) and served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

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March 23, 2016