

No. 18-\_\_\_\_

IN THE

**Supreme Court of the United States**

TVEYES, INC.,

*Petitioner,*

v.

FOX NEWS NETWORK, LLC,

*Respondent.*

**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Second Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

THOMAS C. RUBIN  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
600 University Street  
Suite 2800  
Seattle, WA 98101  
(206) 905-7000

KATHLEEN M. SULLIVAN  
*Counsel of Record*  
ANDREW H. SCHAPIRO  
TODD ANTEN  
JESSICA A. ROSE  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue  
22nd Floor  
New York, NY 10010  
(212) 849-7000  
kathleensullivan@  
quinnemanuel.com

*Counsel for Petitioner*

September 12, 2018

## QUESTION PRESENTED

In copyright law, the defense of fair use covers the transformative use of a work for research, comment, criticism and parody. Whether a use is “fair” depends upon four nonexclusive statutory factors, the fourth of which is “the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. 107(4). This Court has held that, in assessing this fourth factor, market harm cannot be presumed from a transformative use’s commercial success and that harm arising from use of the copyrighted work for the purpose of criticism is not cognizable. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590-92 (1994). But in the decision below, the Second Circuit held that the fourth factor presumptively weighs against a finding of fair use if a transformative use is commercially successful and thwarts the author’s desire to prevent analysis or criticism of its work. The question presented is:

Can the transformative use of a copyrighted work cause a cognizable market harm under 17 U.S.C. 107(4) if it is used in connection with a commercially successful business that the author is unlikely to enter or authorize?

**RULE 29.6 STATEMENT**

TVEyes, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
RULE 29.6 STATEMENT .....	ii
TABLE OF AUTHORITIES.....	v
INTRODUCTION.....	1
OPINIONS BELOW .....	3
JURISDICTION.....	3
STATUTORY PROVISION INVOLVED.....	3
STATEMENT OF THE CASE .....	4
A. Statutory Framework .....	4
B. The Parties .....	7
C. The District Court Proceedings.....	11
D. The Second Circuit Decision.....	12
REASONS FOR GRANTING THE WRIT.....	14
I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.....	14
A. This Court Has Held That Market Harm Cannot Be Presumed From A Transformative Use’s Commercial Suc- cess .....	14
B. This Court Has Held That A Copyright Holder May Not Preempt Exploitation Of A Transformative Market .....	17

II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT .....	19
CONCLUSION .....	22
APPENDIX A – Second Circuit Opinion (February 27, 2018) .....	1a
APPENDIX B – District Court First Summary Judgment Opinion (September 9, 2014) .....	36a
APPENDIX C – District Court Second Summary Judgment Opinion (August 25, 2015) .....	73a
APPENDIX D – District Court Order Setting Terms of Injunction (November 6, 2015) .....	95a
APPENDIX E – Permanent Injunction and Final Order (November 6, 2015) .....	100a
APPENDIX F – Second Circuit Order Denying Rehearing (May 14, 2018) .....	105a

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.