**Wright v Warner Books**

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** | Bad faith in refusing to give letters to plaintiff or obtain permission for use shows that purpose was not scholarly; it was something else. [But Dr. Walker owns the letters, and she gave plaintiff 6 of them before the biography was published.] Lack of permission doesn’t matter to fair use analysis. | Scholarly biography. | + Defendant  Scholarly biography. Fits in preamble to factors as criticism, scholarship, research (presumption of fairness even tho publishers seek profit). Furthers goals of © by adding value to prior intellectual labor. |
| **Nature** | Unpublished letters. | ?? Dr. Walker paraphrased the original works [irrelevant], portions of which were straightforward reporting. | + Plaintiff |
| **Amount + Substantiality** | Does not explain why small percentage of use (<1% of letters and journal entries) favors her.  Plaintiff argues paraphrasing uses Wright’s expressive style. |  | + Dr. Walker / Defendant. Factor includes direct quotes and close paraphrases. Consider quantity and quality of use.  [Of all passages used, 7 are protected by ©. Quantitatively, they are at most 2 pages of 423 page book.  None are “heart” of the work. Walker’s paraphrasing does not preempt other journal entries. Expressive paraphrasing establishes Walker’s credibility and enhances her analysis. It is not the whole value of the book. ] |
| **Effect on market** | She agrees with Harper & Row in 1969 to publish a collection of Wright’s letters. [But Walker gave plaintiff Wright’s letters more than 5 years prior to lawsuit, and little action toward publishing letters 20 years after the agreement with H&R. In 1979 plaintiff wanted to pause book until she had letters from Ralf Ellison and George Padmore. But Ellison didn’t share letters, and Padmore lost his. Even if book is published, defendant’s use won’t harm it. | 6 letters would be tiny part of letter collection, publication in Walker’s book might create demand for a publication of all letters. | + Defendant. Plaintiff must show that 7 instances where Dr. Walker used Wright’s expression harmed the market for Wright’s work. No market threat shown. |

**Gaylord v US**

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** | Transformative.  Don’t need to comment on original to be transformative. | Commercial use.  Not transformative. | -Fair. Not transformative. Sculpture and stamp have same purpose of honoring veterans. Stamp is commercial. Depiction of the sculpture is not different enough to be transformative.  [Lower court held purpose was transformative because photographer created a surrealistic environment with snow and subdued light, viewer unsure whether figures are living or sculptures. USPO transformed the photo even more. But analysis is between sculpture and stamp, not photo. Moreover the sculpture is already surrealistic. Snow doesn’t change the original.]  Commercial use |
| **Nature** | Expressive and creative | Published work – national monument a | - Fair because expressive and creative. |
| **Amount** |  | Diminished the expressive qualities of the column by making it greyer, adding snow, which obscures features. Necessary to include soldiers in the stamp to convey message. | -Fair.  The Column is the focus of the stamp; it’s importance is not downplayed. Stamp is entitled “Korean War Veterans Memorial.” |
| **Effect on market** | Sculptor conceded Stamp increased the value of the Column. | Sculptor conceded Stamp increased the value of the Column. | + Fair.  The photo is not a substitute for the work, and will not harm sculptor’s efforts to market derivative works. |

**Fox News v TVEyes**

**Copying**

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** | No transformative. Content is not changed or commented on, i.e., no added value.  Commercial use.  Users can piece together clips to substitute for Fox broadcasts [but this is too labor intensive.] | Transformative use, see Authors Guild v Hathi Trust and Authors Guild v Google. People can search for words in scanned books. Google shows snippets. Books were turned into data. Database serves different purpose than original books. A person could not do same work. | Transformative. TVEyes doesn’t simply provide news clips. The images and sounds are just as important as the news coverage is, i.e., how news is reported Tone of voice, facial expression). This goes beyond copying transcripts.  TVEyes info is available only by watching or listening to broadcasts. Nobody can gather all this content by searching the Internet. |
| **Nature** | Creative expression in content is copyrightable, e.g., staging, filming, sequencing, direction. | News is not copyrightable.  Use is transformative. | Neither + or – fair. |
| **Amount** | All content is used. | Necessary to copy all content for the service TVEyes provides.  Would be less reliable if TVEyes did not have all content. | Neither + or – fair. |
| **Effect on market** | TVEyes is substitute for 19 programs between Oct. 16, 2012 and July 3 2013. Reduces subscription fees Fox content, viewership (lower ratings), ad revenue. [But none of 19 shows are available to TVEyes users because TVEyes erases content every 32 days. Only 560 clips of those shows were retrieved thru TVEyes, avg pay of 53.4 seconds (total range was 11.5 – 362 seconds). From 3.31.2003-12.31.2013 Only 3 times did a TVEyes subscriber watch more than 30 minutes of Fox content. No works were watched in successive clips so as to substitute for the entire program.  More stats show that viewing times of TYEyes re too short to be substitutes for programs.  Harm to derivative licensing market. [But no evidence shown.] |  | Statistics show that subscribers do not use TVEyes as a substitute for programs. No danger of this happening.  Any economic harm is outweighted by public benefit. |

TVEyes also argued public benefit of uses: govt uses it to monitor accuracy of news reporting, political campaigns use it to monitor advertising and candidate appearances, financial firms monitor public statements by employees for compliance, Army tracks media coverage of movements to safeguard troops, journalists compare and comment on coverage.

**Archiving**

Subscribers can archive clips in their accounts on TVEyes servers, access them indefinitely. (Other content is deleted after 32 days.) Saves the subscriber from having to re-do searches.

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** |  | This is integral to service. Adds value. Can do longitudinal studies of coverage. Otherwise viewers would have to re-do searches. Provided examples. | + Fair.  Being able to watch long-term trends is part of TVEyes transformative service.  Public benefit to foster free debate exchange of ideas. |
| **Nature** |  |  |  |
| **Amount** |  |  |  |
| **Effect on market** |  |  | No market harm shown from archiving feature. |

**Emailing and Sharing**

Subscribers can share clips and transcripts with anyone. No need to have a TVEyes account to receive clips. Clips are saved on TVEyes server. Can use any sharing platform. But TVEyes concedes that use of social media is not integral to its service.

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** |  | Necessary. Clients communicate thru email, sending links. Dominant form of business communication. | Emailing is vital for exchange of ideas, commentary, scholarship, analysis, and other fair uses.  HOWEVER the current system does not distinguish among recipients. Potential for abuse. Not fair unless TVEyes implements limits on sharing, otherwise sharing may usurp use of Fox’s own website. |
| **Nature** |  |  |  |
| **Amount** |  |  |  |
| **Effect on market** |  |  |  |

**Downloading**

Subscribers can download unlimited clips onto own computers and save indefinitely. Clips have no identifiers, watermarks, restrictions on further sharing.

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** |  | Transformative. Critical feature because it allows offline use. [But most users have an Internet connection these days.] | This exceeds transformative services. Not essential to transformative use of searching and monitoring news. |
| **Nature** |  |  |  |
| **Amount** |  |  |  |
| **Effect on market** |  |  |  |

**Date-Time Search.** About 5.5% of searches.

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| **Factor** | **Plaintiff** | **Defendant** | **Court** |
| **Purpose** |  | Necessary because keywords may not retrieve desired video segment. They are based upon closed captioning transcripts which many misspell or wrongly transcribe words, esp. foreign terms. [But date-time search does not fix this. It will only work if subscriber knows when a program aired. | Not transformational. IT only works if users know what they are looking for. Users could get clips from TVEyes instead of licensing them. |
| **Nature** |  |  |  |
| **Amount** |  |  |  |
| **Effect on market** |  | Did not show that date-time feature did not harm market. |  |