**YOU BE THE JUDGE!**

**A Fair Use Workshop**

1. ***Wright v. Warner Books, Inc.,* 953 F.2d 731 (2d Cir. 1991)**

* Author Richard Wright, best known for his works Native Son and Black Boy, died in 1960. The copyrights in his published and unpublished works passed to his wife, Ellen Wright, upon his death.
* After Wright died, Dr. Margaret Walker wrote a scholarly biography titled “Richard Wright: Daemonic Genius.” Dr. Walker asked Ellen Wright for permission to use parts of Wright’s works in the biography but was refused. In 1988, Warner Books published the biography over Ellen Wright’s continued complaints regarding the use of six of Wright’s unpublished letters and ten unpublished journal entries.
* Dr. Walker used approximately one percent of each of the letters or journal entries at issue.
* Most of the passages taken from Wright’s works convey facts or ideas. One fifty-five word passage from a letter describes Wright's views on the art of writing, and Dr. Walker also paraphrases Wright's views on his development as a writer. The expressive portions of Wright’s work that were used by Dr. Walker total approximately two pages of her 428-page book.
* In 1969, Ellen Wright made an agreement with Harper & Row to publish a collection of Wright's letters that would include the six letters used in the biography. That agreement remained in effect at the time the biography was published in 1988, but the collection of letters had not yet been prepared for publication. According to a 1979 letter, Ellen Wright asked that the project be put on hold until she obtained copies of Wright’s letters to other notable figures, including Ralph Ellison and George Padmore. Ellison subsequently refused to give Ellen Wright the letters in his possession, and the Padmore letters were determined to have been lost.

1. ***Gaylord v. US, 595 F. 3d 1364*, (Fed. Cir. 2010)**

* Frank Gaylord, a nationally recognized sculptor, designed the sculptural portion of the Korean War Memorial in Washington, D.C. and and is the sole copyright owner of the sculptures. His design includes 19 statues representing a platoon of foot soldiers in formation, referred to as “The Column.”
* Shortly after the Memorial was dedicated, John Alli took a photograph of the Memorial as a retirement gift for his father, a veteran of the Korean War. The photograph was taken after a snowstorm and features 14 of the Memorial’s 19 statues surrounded by snow.
* In 2002, the Postal Service decided to issue a 37-cent stamp titled “Korean War Veterans Memorial” commemorating the 50th anniversary of the armistice of the Korean War. The Postal Service selected Mr. Alli's photograph for the stamp and paid him $1500 for its use. Mr. Alli told the Postal Service that it would need the permission of the owner of the copyright of the underlying work, but the Postal Service did not seek Mr. Gaylord's permission.
* The Postal Service produced approximately 86.8 million stamps before retiring the stamp on March 31, 2005. The Postal Service received over $17 million from the sale of nearly 48 million stamps. It was estimated that the Postal Service generated $5.4 million from the sales of stamps to collectors who did not use the stamps to send mail. In addition, the Postal Service sold retail goods such as commemorative panels and framed art featuring images of the stamp.

1. ***Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014)**

* TVEyes is a media-monitoring service that records all content broadcast by more than 1,400 television and radio stations twenty-four hours per day, seven days per week, and transforms the content into a searchable database for its subscribers. TVEyes erases content every 32 days.
* Subscribers can determine when, where, and how particular search terms have been used, and obtain transcripts and video clips of the portions of the television show that used the search terms.
* In a typical month, approximately 1% of TVEyes' users play a video clip they found through a keyword search. TVEyes subscribers play video clips, on average, for 41 seconds, while the median play duration is 12 seconds.
* Subscribers can save, archive, edit, and download to their personal computers an unlimited number of clips generated by their searches. The clips are limited to ten minutes, and a majority of the clips are shorter than two minutes.
* Subscribers must sign a User Agreement limiting use of downloaded clips to internal purposes. When subscribers ask how to obtain rights to publicly post or disseminate clips, TVEyes refers such inquiries to the broadcaster.
* TVEyes is available only to businesses and not to the general public. Its subscribers include the United States Army, the White House, members of the United States Congress, and local and state police departments, who use it to track the news coverage of particular events. For example, police departments use TVEyes to track television coverage of public safety messages across different stations and locations, and to adjust outreach efforts accordingly.
* TVEyes is a for-profit company with revenue of more than $8 million in 2013. Subscribers pay a monthly fee of $500.
* Fox News delivers breaking news in a twenty-four hour news cycle and has been the most watched news channel in the United States for the last eleven years. It makes about 16% of its television broadcast content available online. Its video clips do not show the exact content or images that were aired on television—the news ticker on the bottom of the screen is absent in the online clips and online clips sometimes include corrections to news stories.
* Visitors to Fox News' websites are shown a pre-reel advertisement, before watching news clips, a feature that generates revenue. Fox also licenses third party websites, including Yahoo!, Hulu, and YouTube, to show video clips of segments of its program on their websites. The vast majority of Fox News' revenues is derived from fees paid by cable companies that broadcast Fox News' content.
* Fox’s lawsuit named 19 specific hour-long programs recorded by TVEyes. In the 32 days that these programs were available on TVEyes, 560 clips were played, with an average length of play of 53.4 seconds and the full range of play being 11.5 seconds to 362 seconds. Of the 560 clips played, 85.5% were played for less than one minute; 76% were played for less than 30 seconds; and 51% were played for less than 10 seconds.