

BROWMARK FILMS, LLC v. COMEDY PARTNERS:
WHY FAIR USERS SHOULD BE ABLE TO RELY ON FAIR USE

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The fair use doctrine is codified in the Copyright Act of 1976. It protects the use of copyrighted material by parties who do not own rights to the copyrighted works if they are used for such purposes as education, parody, or commentary. However, many parties shy away from using materials that would be protected by the fair use doctrine. This is because even when a use fits squarely within the provisions of the statute, courts are typically unwilling to dismiss the suit relying on a fair use affirmative defense based only on the pleadings. In order to avoid the expense of litigation—including discovery, hearings, and even a trial in some cases—parties choose to settle out of court, even when their fair use claim is very strong. The Brownmark Films decision paves the way for other courts to dismiss copyright infringement cases based on strong fair use defenses during the early pleadings stages of litigation, rather than force defendants to undergo long and expensive legal battles.

I. INTRODUCTION

For the past fifteen years, Comedy Central’s *South Park* has managed to make fun of virtually every aspect of pop culture.¹ The show’s masterminds, Trey Parker and Matt Stone, consistently garner critical acclaim and awards for their work from some of the most prestigious entities in the entertainment industry.² *South Park*

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¹ Katla McGlynn, *The 15 Greatest ‘South Park’ Movie Parodies*, HUFFINGTON POST (Mar. 23, 2011, 9:09 AM), http://www.huffingtonpost.com/2010/10/22/south-parks-best-movie-parodies_n_771957.html#s88257&title=Cloverfield.

² The television series has been selected for a Peabody Award, and four Emmy Awards, in addition to nominations and wins of many other prominent awards and prizes in the entertainment industry. *Awards for “South Park,”*

captivates audiences with its flippancy towards political correctness and its refusal to spare any particular group from being subjected to its mockery.³

Although Parker, Stone, and their team create each episode in its entirety, *South Park* has undoubtedly dealt with numerous copyright infringement accusations during the show's long tenure. This is evidenced by the fact that the show's website contains a "Copyright Compliance Policy" that includes a detailed procedure for parties alleging copyright infringement to follow.⁴ Because the show is based almost entirely on lampooning every mainstream topic it can, some of the sketches are strikingly similar to the original works they parody.⁵ Even though many of these original works are protected by copyrights, a provision of the Copyright

INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0121955/awards> (last visited Sept. 24, 2011).

³ See Dennis Lim, *Television: Lowbrow and proud of it*, THE INDEPENDENT (Mar. 29, 1998), <http://www.independent.co.uk/arts-entertainment/television-lowbrow-and-proud-of-it-1153256.html>.

⁴ *Copyright Compliance Policy*, SOUTH PARK STUDIOS, <http://www.southparkstudios.com/about/legal/copyright-compliance-policy> (last modified Apr. 22, 2009). Although South Park Studios does not openly publicize pending or resolved copyright infringement claims, the policy does state that "[i]f [sic] you are a copyright owner . . . and have a good-faith belief that material on our website infringes on one of your copyrights, you may notify us using this procedure When we receive a notice under this procedure, we will expeditiously remove or disable access to the material that is claimed to be infringing." *Id.* The policy further states that "[w]e take protection of copyrights, both our own and others, very seriously. We therefore employ multiple measures to prevent copyright infringement over this Site and to promptly end any infringement that might occur." *Id.* With such standardization of procedures for parties accusing South Park Studios of copyright infringement, it appears that these allegations are commonplace. *Id.*

⁵ For example, in the episodes entitled "Cartoon Wars Part I" and "Cartoon Wars Part II," the plot focuses on parodying the television show *Family Guy*. *Cartoon Wars Part I (Season 10, Episode 3)*, SOUTH PARK STUDIOS (Apr. 5, 2006), <http://www.southparkstudios.com/guide/episodes/s10e03-cartoon-wars-part-i>; *Cartoon Wars Part II (Season 10, Episode 3)*, SOUTH PARK STUDIOS (Apr. 12, 2006), <http://www.southparkstudios.com/guide/episodes/s10e04-cartoon-wars-part-ii>. Both the animation and voices that are depicted are almost impossible to differentiate from the original. *See id.*

Act of 1976⁶ permits the reproduction of copyrighted material if an objective specified in the Copyright Act, including parody, is the intended purpose of the reproduction.⁷ Known as the doctrine of fair use, this provision aims to provide security that parties, such as the creators of *South Park*, will not be subject to copyright infringement lawsuits.⁸ However, based on current legal precedent, even when a copyright infringement case is filed against a party with a strong fair use claim, the defendants are still typically forced to either settle or undergo long, expensive, and intrusive discovery procedures while awaiting trial.⁹

In its recent decision of *Brownmark Films LLC v. Comedy Partners*,¹⁰ the United States District Court for the Eastern District of Wisconsin decided to break with the traditional approach of requiring that the case undergo discovery. Instead, the court granted the defendants' motion to dismiss prior to the plaintiffs filing a suitable answer to the complaint.¹¹ The basis for granting the motion was a fair use affirmative defense raised during the early pleadings stage of the case, before discovery or any trial preparation was underway.¹²

⁶ 17 U.S.C. § 107 (2006).

⁷ *Id.*

⁸ In the section of the House Report that discusses the necessity for codifying the fair use doctrine, the doctrine is described as “one of the most important and well-established limitations on the exclusive right of copyright owners” that exists to protect defendants whose “acts constituted a fair use rather than an infringement.” H.R. REP. NO. 94-1476, at 66 (1976).

⁹ See, e.g., *Intellectual Property Ins. Serv. Corp.*, AIPLA SURVEY, <http://www.patentinsurance.com/iprisk/aipia-survey/> (last visited Sept. 24, 2011). According to the American Intellectual Property Law Association, the average cost per party associated with a copyright infringement suit with an amount in controversy of less than \$1 million is \$179,000 at the end of discovery, and \$310,000 after discovery, motions, hearings, and post-hearings. *Id.* Those amounts increase to \$435,000 and \$749,000, respectively, when the amount in controversy is between \$1 million and \$25 million, and to \$838,000 and \$1,292,000, respectively, when the amount in controversy exceeds \$25 million. *Id.*

¹⁰ No. 10-CV-1013, 2011 U.S. Dist. LEXIS 72684 (E.D. Wis. July 6, 2011).

¹¹ *Id.* at *27.

¹² *Id.* at *19.

The plaintiffs in this case alleged that *South Park* impermissibly used their copyrighted music video entitled “What What (In the Butt).”¹³ The episode features numerous well-known viral videos throughout the episode, but the one that is focused on the most is the plaintiffs’. The plaintiffs’ original video is a comedic but strange music video featuring a catchy but awkward pop song.¹⁴ As the court described it, “the video features an adult African American male ensconced in a bright red, half-buttoned, silk shirt, dancing, grinning creepily at the camera, and repeatedly singing the same cryptic phrases.”¹⁵ In the *South Park* episode, the naïve “Butters Scotch” character stars in his own music video that replicates a portion of the original video in an attempt by him and his friends to earn “Internet money.”¹⁶

While the subject matter of the case is fascinating, the legal dilemma is actually quite unremarkable.¹⁷ After all, the singular line of work that the *South Park* team is engaged in is parody, which is by definition a protected use under the Copyright Act.¹⁸ However, the fact that the judge in this case was willing to forego trial and make a decision to dismiss the suit with prejudice based on the pleadings alone was a significant departure from the usual treatment of this type of suit.¹⁹ This wise decision should be a model for other suits of this nature and adopted as a wider rule by other courts in the future.

The creators of *South Park* and other parodies of copyrighted works are far from being the only parties that worry about being subjected to infringement lawsuits, even when their use of a

¹³ *Id.* at *3.

¹⁴ brownmarkfilms, *Samwell—“What What (In the Butt)”*, YOUTUBE (Feb. 14, 2007), <http://www.youtube.com/watch?v=fbGkxcY7YFU>.

¹⁵ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *1–2.

¹⁶ *Id.* at *3; *What, What In the Butt (Season 12, Episode 4)*, SOUTH PARK STUDIOS, <http://www.southparkstudios.com/clips/165193/what-what-in-the-butt> (last visited Oct. 25, 2011).

¹⁷ Kevin Smith, *An Easy Fair Use Ruling, but with a Message*, SCHOLARLY COMMUNICATIONS @ DUKE (Aug. 16, 2011), <http://blogs.library.duke.edu/scholcomm/2011/08/16/an-easy-fair-use-ruling-but-with-a-message/>.

¹⁸ *Id.*

¹⁹ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *19.

copyrighted work is *prima facie* protected under the fair use doctrine. As a result, there is reluctance to use materials that fall under the safeguards of the fair use doctrine for fear of being subjected to copyright infringement suits.²⁰ Academia and other educational settings (i.e. research institutes and non-profits), in particular, are environments where parties are hesitant to use educational materials that are protected by copyright.²¹ Defendants often have to choose between settling early (and likely unfavorably) and going to trial. This practice discourages not only certain forms of political expression, criticism, and parody, but also the use of valuable learning and educational tools.²² The *Brownmark Films* case, therefore, could set a legal precedent that would benefit various types of fair uses beyond parody.

This Recent Development will advocate for early dismissal as a means of encouraging legal uses of copyrighted material by individuals who might otherwise be reluctant to do so. Part II will explain the basic principles of copyright law and the fair use doctrine. Part III will discuss the phenomenon of viral YouTube videos and how they relate to copyright law. Part IV will focus on the history of the *Brownmark Films* case. Part V will explain why other courts throughout the country should follow the *Brownmark Films* decision. It also will examine the value of courts

²⁰ See generally Kal Raustiala & Chris Sprigman, *Why Is There a Rule Against Poetry Critics Quoting Poetry?*, FREAKONOMICS (Dec. 8, 2009, 11:06 AM), <http://www.freakonomics.com/2011/09/13/why-is-there-a-rule-against-poetry-critics-quoting-poetry/> (“Knowing in advance what counts as fair is very difficult, and many . . . shy away from anything that a court might later deem unfair.”).

²¹ See Smith, *supra* note 17 (“Librarians and other academics are often afraid to rely on fair use, even when there [sic] arguments would be strong, because of the expense of defending a lawsuit even when you win.”); Georgia K. Harper, *Fair use of copyrighted material*, THE COPYRIGHT CRASH COURSE (last updated 2007), <http://copyright.lib.utexas.edu/copypol2.html>. This policy from the University of Texas is a prime example of the fear that even the most reputable institutions of higher education possess in terms of being subjected to copyright infringement suits. *Id.*

²² See *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 931–32 (2d Cir. 1994) (discussing a scientist that was found to have committed copyright infringement when he copied academic articles without providing the appropriate fee to the publishers).

encouraging the use of copyrighted materials in the manners that Congress defined in the 1976 Copyright Act. Finally, this section will address the importance of balancing copyright holders' interests while advocating for this position.

II. COPYRIGHT AND FAIR USE PRINCIPLES

In order to better understand the implications of *Brownmark Films*, it is important to first establish the foundations of both copyright law and the fair use doctrine, as well as how the fair use doctrine is used as a defense in copyright infringement cases.

A. Principles of Copyright Law

There is a long tradition in the United States of protecting certain creative and artistic works through copyright law.²³ Currently, the Copyright Act of 1976 describes the protections afforded to copyrighted material.²⁴ The Act begins by defining material eligible for copyright as “original works of authorship fixed in any tangible medium of expression.”²⁵ It is important to understand that “original” and “fixed” are legal terms of art, and that both must be satisfied to claim copyright protection.²⁶

²³ In fact, the framers of the Constitution sought protection for intellectual property. U.S. CONST. art. I, § 8, cl. 8. The so-called Copyright Clause empowers the Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.*

²⁴ 17 U.S.C. § 102 (2006).

²⁵ *Id.*

²⁶ See *Works Not Covered By Copyright*, CITIZEN MEDIA LAW PROJECT, <http://www.citmedialaw.org/legal-guide/works-not-covered-copyright> (last updated May 9, 2008). In order to be deemed “original,” the author of the work must have created the work herself without copying someone else’s work. *Copyright Basics FAQ*, STANFORD UNIVERSITY LIBRARIES, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter0/0-a.html (last visited Oct. 24, 2011). However, substantial similarity to other works does not automatically preclude originality. *Id.* For a work to be considered “fixed,” it must exist in a physical form for any period of time. *Id.* The physical form requirement is very lenient, and can be met even by scribbling on the back of an envelope before an impromptu speech. *Id.* However, if no notes were made prior that same impromptu speech, or if no one recorded the speech, it would not meet the “tangible” requirement. See H.R. REP. NO. 94-1476, at 52 (1976).

Material that is eligible for copyright protection includes “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”²⁷ The owner of any particular copyright has a certain collection of rights that restrict others from using the copyrighted work without prior authorization.²⁸ This includes control over derivative works.²⁹ However, there are some exceptions to copyright holders’ exclusive rights that permit use by those who do not claim any sort of ownership of a particular copyright or authorization by the copyright owner.³⁰

B. *Principles of the Fair Use Doctrine*

The fair use doctrine serves as a successful defense against copyright infringement claims.³¹ However, parties are often forced into a long and arduous litigation process before they can reach the point where a court is willing to dismiss a case or rule in the defendant’s favor based on a fair use defense. This results in massive attorney fees and serious inconveniences due to the

²⁷ See 17 U.S.C. § 102; H.R. REP. NO. 94-1476, at 66 (1976).

²⁸ 17 U.S.C. § 106 (stating the owner of a copyright has the exclusive rights “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission”).

²⁹ U.S. COPYRIGHT OFFICE, CIRCULAR 14, COPYRIGHT REGISTRATION FOR DERIVATIVE WORKS (2011). Derivative works are primarily new works that incorporate some material that is already published. *Id.*

³⁰ See 17 U.S.C. § 107.

³¹ *Id.*

intrusive discovery process.³² In order to avoid these consequences, many defendants may decide to settle prematurely.³³

In many cases, others cannot create derivative works without the original author's permission; however, the fair use doctrine provides an affirmative defense that allows others to use copyrighted work under limited circumstances.³⁴ The fair use doctrine permits the use—and consequently the infringement—of copyrighted material by third parties if certain conditions are satisfied.³⁵ Although fair use principles have long been recognized as a defense to copyright infringement suits, it was not until the passage of the Copyright Act of 1976 that fair use became codified.³⁶

³² See *supra* note 9.

³³ An example of a recent high profile fair use case involved the Associated Press and an artist named Shepard Fairey. See Jonathan Melber, *The AP Has No Case Against Shepard Fairey*, HUFFINGTON POST (Feb. 8, 2009, 10:36 PM), http://www.huffingtonpost.com/jonathan-melber/the-ap-hase-no-case-again_b_165068.html; Mike Masnick, *AP And Shepard Fairey Settle Lawsuit Over Obama Image; Fairey Agrees To Give Up Fair Use Rights To AP Photos*, TECHDIRT (Jan. 12, 2011, 11:22 AM), <http://www.techdirt.com/articles/20110112/10170012637/ap-shepard-fairey-settle-lawsuit-over-obama-image-fairey-agrees-to-give-up-fair-use-rights-to-ap-photos.shtml>; Larry Neumeister, *Obama 'HOPE' poster copyright claims dismissed*, USA TODAY (Jan. 11, 2011, 9:09 PM), http://www.usatoday.com/life/people/2011-01-11-obama-hope-poster_N.htm?csp=34life&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+usatoday-LifeTopStories+%28Life+-+Top+Stories%29. Fairey created a famous image of now-President Obama by transforming a photo belonging to the AP. *Id.* After more than two years of litigating, Fairey agreed to settle; however, many in the mainstream media continue to maintain that Fairey's fair use defense was sound. *Id.*

³⁴ See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2011).

³⁵ *Id.*

³⁶ A primary reason for passing the Copyright Act of 1976 was to make the application of the fair use doctrine by courts more uniform, and to provide guidance to users of copyrighted material. See H.R. REP. NO. 94-1476, at 66 (1976). As the House Report stated: "The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107." *Id.* at 65.

The primary purpose of the fair use doctrine is to permit uses that would ordinarily be infringement but for the existence of certain factors.³⁷ In general, there are three main uses of copyrighted materials by third parties that may be protected under fair use: comment or criticism, education, and news reporting.³⁸ Comment or criticism is often considered a “paradigmatic fair use.”³⁹ This category includes parody, which is one of the most frequently litigated fair uses.⁴⁰ The second category, educational use, varies widely; however, litigation is oftentimes centered on materials distributed at colleges and universities.⁴¹ The third type of permissible use, news reporting, includes both for-profit and not-for-profit organizations.⁴²

The Copyright Act sets forth a four-factor test to determine whether a particular use of copyrighted material is protected under the fair use doctrine.⁴³ These four factors as provided by the Act are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

³⁷ See *Id.* at 66.

³⁸ 17 U.S.C. § 107 (2006).

³⁹ See Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1107 (2007) (citing Julie E. Cohen, *The Place of the User in Copyright Law*, FORDHAM L. REV. 347, 366 (2005)).

⁴⁰ See *id.* at 1095 (citing Barton Beebe, *An Empirical Study of the U.S. Copyright Fair Use Cases, 1978–200: A Quick Report of Initial Findings for IPSC 2006*, at note 36 (Aug. 10, 2006) (claiming that almost ten percent of district court fair use cases involved a claim of parody)).

⁴¹ See *id.* at 1114–17; see also L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) (“A part of the pattern that emerged in the 1976 Act was a codified fair use doctrine, which presumably had become necessary for the partial fulfillment of the constitutional purpose of copyright—the promotion of learning.”).

⁴² See Carroll, *supra* note 39, at 1117–18.

⁴³ See generally Pete Singer, *Mounting a Fair Use Defense to the Anti-Circumvention Provisions of the Digital Millennium [sic] Copyright Act*, 28 DAYTON L. REV. 111 (2002).

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- (4) the effect of the use upon the potential market for, or value of, the copyrighted work.⁴⁴

The test is far from formulaic, and instead gives courts leeway to look at the nature and quality of each use in determining whether or not there has been an infringement.⁴⁵ The test also allows courts to weigh the importance of each factor in a particular case.⁴⁶ That is, although courts must consider all four factors, the decision to accept or reject a fair use defense is one that is highly fact-specific, with no one factor being universally determinative.⁴⁷

Unsurprisingly, some courts are less inclined to permit unauthorized use of copyrighted material when it promotes commercial gain,⁴⁸ and are more inclined to accept fair use defenses in copyright infringement suits when the use was only intended to further nonprofit educational uses.⁴⁹ However, there is no shortage of cases that accept a fair use rationale to support the use of copyrighted materials when the use is clearly for the

⁴⁴ 17 U.S.C. § 107 (2006).

⁴⁵ “Because the doctrine was developed with a view to the introduction of flexibility and equity into the copyright laws, it has evolved in such a manner as to elude precise definition.” *Marcus v. Rowley*, 695 F.2d 1171, 1174 (9th Cir. 1983).

⁴⁶ *See Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577–78 (1994).

⁴⁷ *Id.* at 578.

⁴⁸ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–51 (1984); *Hustler Magazine, Inc. v. Moral Majority, Inc.* 796 F.2d 1148, 1152 (1986) (“If the work is used for a commercial or profit-making purpose, the use is presumptively unfair.”). The House Committee amended the bill specifically to add the commercial/non-commercial nature of the work as a consideration for a fair use defense. H.R. REP. NO. 94–1476, at 66 (1976). The House Report states that this amendment was “an express recognition that . . . the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.” *Id.*

⁴⁹ *See Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1362–63 (1973) (holding that multiple photocopies distributed to doctors and researchers in their professional work was fair use). *But see Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1184–85 (W.D.N.Y. 1982) (holding that the educational board’s copying of videotapes taken from television airways and subsequent distribution to school districts was not fair use).

purposes of parody.⁵⁰ This is exactly the type of use in question in *Brownmark Films*.

C. *Protections Under Fair Use for Parodies*

Although works that are considered parodies are protected by definition under the fair use doctrine, works that are labeled satires are not.⁵¹ Thus, it is important to draw a meaningful distinction between parody and satire, as well as demonstrate how the *South Park* video falls squarely within the parameters of parody, and hence, fair use. The most rudimentary legal distinction between parody and satire is that a parody is direct commentary, and satire is indirect commentary.⁵² In other words, “while parody copies from an original work in order to comment on *that* work, satire . . . copies from an original work in order to comment on *another* work.”⁵³ The Supreme Court provided guidelines to differentiate the two:

[T]he heart of any parodist’s claim . . . is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger. Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.⁵⁴

⁵⁰ See generally *Campbell*, 510 U.S. 569 (holding that rap group 2 Live Crew’s parody of Roy Orbison’s copyrighted rock ballad “Pretty Woman” was fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2nd Cir. 1998) (holding that motion picture corporation Paramount Picture’s superimposition of Leslie Nielsen’s smiling face over Demi Moore’s in a famous photograph featuring a nude and pregnant Moore was fair use).

⁵¹ See Max Kimbrough, *Parody and Satire*, PHILADELPHIA VOLUNTEER LAWYERS FOR THE ARTS, <http://www.artsandbusinessphila.org/pvla/documents/ParodySatire.pdf> (last visited Oct. 24, 2011).

⁵² *Id.*

⁵³ *Id.* (emphasis added).

⁵⁴ *Campbell*, 510 U.S. at 580–81 (internal citations omitted).

Although these guidelines are not dispositive, they have proven useful in helping lower courts determine if works should be classified as parody or satire.⁵⁵ When defendants claim that their work is a parody, the key question for the court is whether the element of parody is incidental or integral.⁵⁶ If it is integral, then it will most likely be considered a parody.⁵⁷

Once deemed a parody, the piece must still be analyzed under the four-factor test.⁵⁸ There is no standard algorithm for whether a particular work meets the fair use threshold.⁵⁹ However, the Supreme Court has indicated that the threshold is quite low, thus leading many courts to frequently label works as parodies for fair use defenses.⁶⁰

In *Brownmark Films*, the court did not hesitate to label the video in the *South Park* episode a parody.⁶¹ The judge proceeded

⁵⁵ See, e.g., *Rogers v. Koons*, 751 F. Supp. 474, 479–80 (S.D.N.Y. 1990) (transformation factor was never even addressed, as the court felt the other factors provided enough support to reject a fair use defense).

⁵⁶ See *Kimrough*, *supra* note 51, at 1.

⁵⁷ *Id.*

⁵⁸ See *Nimmer & Nimmer*, *supra* note 34, at 4.

⁵⁹ See *Kimrough*, *supra* note 51, at 1.

⁶⁰ See, e.g., *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 974–75 (C.D. Cal. 2007) (granting defendant’s motion to dismiss based on a fair use defense by Fox, who created an episode of *Family Guy* that was found to be a parody of Carol Burnett); *Lyons P’ship., L.P. v. Giannoulas*, 14 F. Supp. 2d 947, 955 (N.D. Tex. 1998) (granting defendant’s motion to dismiss based on a fair use defense by an entertainer who performed slapstick comedy routines at sports games and used Barney the Dinosaur as the butt of his jokes). However, it is important to keep in mind that, even though courts tend to have a low threshold for allowing a particular work to be deemed a parody, there is no presumption of fairness. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 581 (1994) (noting that “[t]he Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.”).

⁶¹ *Brownmark Films, LLC v. Comedy Partners*, No. 10-CV-1013, 2011 U.S. Dist. LEXIS 72684, at *14 (E.D. Wis. July 6, 2011). It should be noted that the judge in this case did not seem to conduct a proper analysis to determine if the

to analyze the video using the four-factor test and found that the crucial factor of “purpose and character” was satisfied because the defendants’ use of the copyrighted video sufficiently transformed it for the purpose of creating a parody.⁶² This led the court to conclude that defendants’ use was fair.⁶³

III. VIRAL VIDEOS AND COPYRIGHT LAW

It is clear that fair use protections apply to a variety of creative works, many of which are categorically distinct from others.⁶⁴ In particular, YouTube⁶⁵ videos, such as the one that is central to the *Brownmark Films* case, have become the subject of numerous lawsuits in recent years.⁶⁶ While *Brownmark Films* was not the first viral Internet video to be the subject of litigation,⁶⁷ the analysis

video should be classified as a satire or a parody. *Id.*; see *Campbell*, 510 U.S. at 580–93. The court’s rationale focused on the larger commentary on the phenomenon of viral videos, rather than parodying the video itself. See *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *14 (“The episode . . . shows the inanity of the “viral video” craze . . . [T]he South Park episode . . . becomes a means to comment on the ultimate value of viral YouTube clips.”). The court does state that *South Park* “uses parts of the video . . . to poke fun at the original.” *Id.* However, the court seems to only mention this in passing, and instead focuses on “the recent craze in our society of watching video clips on the internet.” *Id.* at *23.

⁶² *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *24.

⁶³ *Id.*

⁶⁴ H.R. REP. NO. 94-1476, at 66 (1976).

⁶⁵ YOUTUBE, <http://www.youtube.com/> (last visited Nov. 10, 2011).

⁶⁶ See, e.g., Eriq Gardner, *Democrat Fights Back Against Fox News Lawsuit*, THR, ESQ. THE INTERSECTION OF HOLLYWOOD AND LAW (Oct. 10, 2010, 8:44 AM), <http://reporter.blogs.com/thresq/2010/10/fox-news-copyright-registration-candidate-advertisement.html#more> (Fox News sued former Democratic senatorial candidate for copyright infringement for using an excerpt from a program. Defendant posted video on her campaign website, claiming it was fair use.).

⁶⁷ See, e.g., Joe Mullin, *The ‘Dancing Baby’ Lawsuit Will Shape Future of Fair Use*, PAIDCONTENT.ORG (Oct. 29, 2010, 10:42 PM), <http://paidcontent.org/article/419-the-dancing-baby-lawsuit-will-shape-future-of-fair-use/>. This conflict began in 2007, when a mother posted a 30-second video on YouTube of her son dancing, with a song by Prince playing in the background. *Id.* Universal Music Group sued the mother for copyright infringement and the mother claimed it was fair use. *Id.* The legal battle is ongoing. *Id.*

and outcome of this case have the potential to create the model that other courts will follow when faced with similar cases.

A. *The Rise of Internet Video Streaming*

The phenomenon of viral online videos developed in the late 1990s when technology began to support the transmission of videos via the Internet.⁶⁸ These so-called “viral videos” started to become widespread concurrently with the increasing popularity of free video-sharing sites, with clips available to users around the world.⁶⁹

Viral videos are often created by private individuals who are unsophisticated in legal matters and who have no prior professional experience in the entertainment world.⁷⁰ Sometimes, the creation of a viral video is by mistake,⁷¹ or at a minimum, the creator is unable to make any type of reliable prediction as to the success of the video before it becomes viral.⁷² Additionally, the

⁶⁸ See Greg Lefevre, *Dancing Baby cha-chas from the Internet to the networks*, CNN (Jan. 19, 1998, 1:41 PM), <http://www.cnn.com/TECH/9801/19/dancing.baby/index.html>. Originally appearing in 1996, this video was released in order to demonstrate 3D character animation software. *Id.* The popularity of the original dancing baby was so astonishing, that it was featured on CBS’s *Public Eye with Bryant Gumbel* and *Alley McBeal*. *Id.*

⁶⁹ See Scott D. Marrs & John W. Lynd, *Viral videos publicize—but infringe*, NAT’L L.J. (May 8, 2006), <http://www.bmpllp.com/files/1155314768.pdf>.

⁷⁰ See AM. UNIV. SCH. OF COMM’N CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 2 (2008) [hereinafter CODE OF BEST PRACTICES], available at http://www.centerforsocialmedia.org/sites/default/files/online_best_practices_in_fair_use.pdf.

⁷¹ See RussiaToday, *‘Golden Voice’ homeless man finds job, home after viral video success*, YOUTUBE (Jan. 6, 2011), <http://www.youtube.com/watch?v=6rPFvLUWkzs>. Ted Williams was a homeless man standing on a street corner in Columbus, Ohio, when a news reporter approached him and had him speak on camera. See Mallory Simon, *Homeless man with ‘golden voice’ lights up Web, gets job offers*, CNN.COM BLOGS (Jan. 5, 2011, 12:08 PM), <http://news.blogs.cnn.com/2011/01/05/homeless-man-with-golden-voice-lights-up-web-gets-job-offers/>. A former radio announcer who had spent a lifetime using drugs and committing crimes, Williams was offered numerous jobs, including a fulltime position as an announcer for the NBA’s Cleveland Cavaliers. *Id.*

⁷² See Hype4, *Viral video timeline*, CREATION MACHINE (Mar. 7, 2010, 3:25 AM), <http://creationmachine.org/2010/03/07/viral-video-timeline/>.

rise of viral videos has caused things as mundane as peoples' home videos to become worldwide sensations overnight.⁷³ It has also drastically elevated the status and visibility of small, unknown companies such as Brownmark Films, LLC that promote their work on video streaming websites.⁷⁴ Unfortunately, when parties are new copyright holders, they do not tend to have the requisite knowledge or resources to police the use of their copyrights by others.⁷⁵ They face the possibility of anyone, potentially even large companies, abusing copyright protections.⁷⁶

B. *The Unique Legal Climate of Viral Videos*

Some celebrities who are widely known for their appearances in different types of video recordings make enormous amounts of money for these appearances.⁷⁷ Traditionally, these celebrities

⁷³ See, e.g., booba1234, *David After Dentist*, YOUTUBE (Jan. 30, 2009), <http://www.youtube.com/watch?v=txqiwrbyGrs>. David, age seven at the time the video was shot, had surgery to remove a tooth. *Id.* His mother was at work both before and after the surgery, so David's father taped his son's reactions for her to watch later. *Id.* Aside from David's mom, over one hundred million people have watched the clip. *Id.*

⁷⁴ See Huck Huckabee, *Promote Your Business on YouTube*, BUSINESS AND YOUTUBE, <http://businessandyoutube.com/> (last visited Nov. 10, 2011).

⁷⁵ *Id.*

⁷⁶ Of course, this trend can go the opposite way as well—unsophisticated individuals can become subject to copyright infringement suits for impermissibly using copyrighted material from large companies. For example, the women in the “Beyonce Clown” video not only play a recording of Beyonce's “Single Ladies” in the background, but also they copy some of the dance steps from the “Single Ladies” music video. pillarbox, *Beyonce Clown*, YOUTUBE (Jul. 2, 2009), <http://www.youtube.com/watch?v=ePNWCniwgfo>. This is not to suggest that any impermissible infringement was committed; however, the facts of this case are similar to the Universal Music Group case where a mother was accused of infringement for having a Prince song playing in the background of her home video. See *supra* note 67.

⁷⁷ For example, in 2010 alone Johnny Depp was reportedly paid roughly \$100 million for appearing in just three films, Adam Sandler's 2010 earnings were estimated to be around \$50 million for appearing in three films, and Jennifer Aniston's 2010 earnings were estimated to be around \$24.5 million for appearing in three films also. *Hollywood's Highest Paid Stars 2011—Highest Paid Actors*, THE RICHEST PEOPLE (Jun. 1, 2011), <http://www.therichest.org/entertainment/vanityfairtop-40-highest-paid-stars-in-hollywood/>.

only appeared on scripted television shows, movies, and commercials. However, with the advent of reality television, there has been a significant rise in semi-scripted and unscripted shows that feature formerly unknown individuals—many of whom become very wealthy from their involvement in reality television.⁷⁸

In contrast to both high-visibility professional actors and reality television stars, their viral video counterparts do not see profits in proportion to their enormous fame.⁷⁹ Many, if not most, of these celebrities did not capitalize at all on their viral videos.⁸⁰ Those that did capitalize on their viral video fame seem to have only moderate success in all but a few noteworthy cases.⁸¹

⁷⁸ For example, Nicole “Snooki” Polizzi, a complete unknown before appearing in MTV’s reality show *Jersey Shore*, is reportedly paid \$30,000 per episode to appear on the show and has a net worth of approximately \$2 million. *Nicole ‘Snooki’ Polizzi Net Worth*, 2011 CELEBRITY NET WORTH (Jun. 1, 2011), <http://www.therichest.org/celebnetworth/celeb/tv-personality/snooki-net-worth/>. However, this is not to say that all reality stars become wealthy from their appearances. The comparison being drawn here is between extremely successful reality stars and extremely successful viral videos.

⁷⁹ For example, only a very small number of YouTube users make any money directly from advertising through the YouTube partner program. *Statistics*, YOUTUBE, http://www.youtube.com/t/press_statistics (last visited Oct. 25, 2011). The company does not release numbers; however, they have stated that there are currently over 20,000 partners total and hundreds of partners who make six figures per year. *Id.* Relative to the over three billion videos that are viewed per day, it should be stressed that only a fraction of a percent of users actually make money off of the videos they create and post to the site. *Id.*

⁸⁰ It should be noted that this statement is not referring to individuals who are already well-known celebrities who appear in viral videos, which is a common occurrence on sites such as CollegeHumor and Funny or Die. COLLEGEHUMOR, <http://www.collegehumor.com/> (last visited Oct. 25, 2011); FUNNY OR DIE, <http://www.funnyordie.com/> (last visited Oct. 25, 2011).

⁸¹ Other viral video stars, such as Antoine Dodson, may find other ways to capitalize on their success besides collecting advertising revenue from YouTube directly. Because of the extreme popularity of Dodson’s interview on a local news channel and subsequent “Bed Intruder Song” that a band called The Gregory Brothers created based on the video, videos of Dodson have had well over 150 million of hits. *Search results for Antoine Dodson*, YOUTUBE, http://www.youtube.com/results?search_query=antoine+dodson&aq=f (last visited Oct. 25, 2011). However, it is unclear if Dodson receives ad revenue from the videos, many of which were uploaded by other users. *Id.* Also, Dodson was particularly successful in iTunes sales, receiving 50% of the profit

Understandably, frustrated copyright owners like the plaintiffs in *Brownmark Films* may seek windfalls from wealthy and sophisticated parties like the *South Park* defendants.

As access to various Internet sources continues to become more widespread, it is likely that the audience for viral videos will continue to grow.⁸² This would suggest that, unless there is a drastic change in U.S. copyright law,⁸³ fair use litigation regarding parties infringing on copyrighted viral video content could also increase. If this were to occur, cases such as *Brownmark Films* could be very monumental in shaping a new precedent for similar viral video cases.

Like all copyrighted works, original viral videos are afforded protections, including control over reproduction of the work and of derivative works.⁸⁴ However, the current legal landscape is such that copyrighted works are likely illegally re-posted and circulated, but the owners of the copyrights are simply unable to police all of these possible infringements.⁸⁵ Sites such as YouTube use

from sales (there were 60,000 copies of the song sold in the first 2.5 weeks of being listen on iTunes). Allison Monyei, *For Antoine Dodson, Rage Equals Riches—But How Much Money?*, BLACK VOICES (Sept. 3, 2010, 1:53 PM), <http://www.bvonmoney.com/2010/09/03/antoine-dodson-money-bed-intruder-song-itunes/>. Dodson also was known to sell merchandise through several websites, and market himself for public appearances. *Id.*

⁸² In December 1995, only 16 million people, or 0.4% of the world population, used the Internet; by June of 2011, that figure had increased to 2,110 million people, or 30.4% of the world population. *Internet Growth Statistics*, INTERNET WORLD STATS USAGE AND POPULATION STATISTICS (Jun. 2011), <http://www.internetworldstats.com/emarketing.htm>.

⁸³ Actually, a bill was introduced in the Senate in May 2011 that proposes making certain copyright infringements felonies with terms of imprisonment for up to five years. S. 978, 112th Cong. § 1 (2011). However, there is no indication that the Senate is likely to pass the bill, so an amendment to the copyright statutes is still unlikely. *Id.*

⁸⁴ See *supra* note 29 and accompanying text.

⁸⁵ When YouTube was officially launched in December of 2005, only eight million videos were watched per day; that figure increased to over two billion views per day by May of 2010. *YouTube Facts & Figures (history & statistics)*, WEBSITE MONITORING BLOG (May 17, 2010), <http://www.website-monitoring.com/blog/2010/05/17/youtube-facts-and-figures-history-statistics/>.

specialized software that automatically removes certain videos from the site and disciplines users who post the infringing material.⁸⁶ However, the reality is that there is little recourse for copyright owners who are oftentimes powerless to try and hunt down an infringer who could be located anywhere in the world. The interests of viral video copyright holders, such as those in the *Brownmark Films* case, should not be overlooked, particularly because of the challenges that these copyright owners face in policing potential infringers. Nonetheless, this should not overshadow the competing interest of forcing *prima facie* fair users to undergo the time and expense of dealing with a frivolous copyright infringement lawsuit, such as the one in *Brownmark Films*.⁸⁷ After all, Congress codified the fair use doctrine for the purpose of permitting and encouraging others to use copyrighted materials in ways that do not seriously compromise the interests of the copyright holder.⁸⁸

IV. BROWNMARK FILMS, LLC V. COMEDY PARTNERS

The *Brownmark Films* case stemmed from a Season 12 *South Park* episode entitled “Canada on Strike.”⁸⁹ The objective of the

Further, in March of 2010, over 24 hours of video footage was uploaded per minute on average, compared to just ten hours per day in January of 2008. *Id.*

⁸⁶ See *Content ID*, YOUTUBE, <http://www.youtube.com/t/contentid> (last visited Oct. 25, 2011). The Content ID software identifies potentially infringing material by comparing all audio and video from uploaded files to all audio and video content provided by content owners such as record labels and film companies. *How YouTube Detects When You Upload Copyrighted Stuff . . . And Makes Money Off It!*, SOCIAL TIMES (Dec. 8, 2010, 10:11 AM), http://socialtimes.com/youtube-make-money-off-your-videos_b29521. There is also a lot of available material discussing ways to navigate fair use and copyright compliance policies. See, e.g., CODE OF BEST PRACTICES, *supra* note 70, at 1.

⁸⁷ See, e.g., frankcorder3, *Another frivolous lawsuit?*, FIRE MCCOY . . . AND THE BOYS (Aug. 15, 2011), <http://firemccoy.com/2011/08/15/another-frivolous-lawsuit/> (discussing threats of a copyright infringement lawsuit by a politician against a blogger who successfully persuaded the politician that the suit was frivolous because the use was blatantly fair).

⁸⁸ See H.R. REP. NO. 94-1476, at 66 (1976).

⁸⁹ *Brownmark Films, LLC v. Comedy Partners*, No. 10-CV-1013, 2011 U.S. Dist. LEXIS 72684, at *3 (E.D. Wis. July 6, 2011).

episode was to mock the phenomenon of viral online videos found on websites such as YouTube.⁹⁰ The episode particularly emphasized the fact that these videos generate very little revenue, regardless of how popular they are.⁹¹

A. *The Use of Copyrighted Material by Comedy Partners*

The song in *South Park*'s video replicates many of the lyrics found in the original "What What (In the Butt)" video, but the visual presentation is slightly different.⁹² Specifically, some of the outfits that Butters wears are cute children's costumes, rather than the tight, provocative outfits that the singer in the original video wears.⁹³ Moreover, in the *South Park* episode, the video shows not only the music video itself, but also the excited reactions of Butters' friends and the comically stoic expressions of several other people who are sitting at the computers and watching the video.⁹⁴ The excitement that Butters and his friends gain from creating a viral video quickly subsides when they learn that they will not earn large amounts of money just because they created a video that is being viewed by many people, and that "their video, much like other inane viral YouTube clips, have very little value to those who create the work."⁹⁵

B. *The Eastern District Court of Wisconsin's Dismissal*

The District Court considered both the four-factor fair use test and the "principles behind the fair use doctrine" and concluded that the clip was permissible.⁹⁶ When considering the first factor of the test, or the video's "purpose and character," the court felt that the defendant's decision to use the video was "to lampoon the recent craze in our society of watching video clips on the Internet that are—to be kind—of rather low artistic sophistication and

⁹⁰ Smith, *supra* note 17.

⁹¹ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *24.

⁹² brownmarkfilms, *supra* note 14; *What, What In the Butt (Season 12, Episode 4)*, *supra* note 16.

⁹³ See sources cited *supra* note 92.

⁹⁴ See sources cited *supra* note 92.

⁹⁵ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *3.

⁹⁶ *Id.* at *23.

quality.”⁹⁷ An additional finding by the court was that the video included in the *South Park* episode was “truly transformative, in that it takes the original work and uses parts of the video to not only poke fun at the original, but also to comment on a bizarre social trend, solidifying the work as a classic parody,”⁹⁸ thereby solidly establishing the first factor of the test. Finally, the court held that, while the second factor was not useful to the fair use analysis, the third and fourth factors were.⁹⁹ The video clip lasted only fifty-eight seconds and appeared only in one episode of the show.¹⁰⁰ Also, there was very little risk that the *South Park* version of the video “would somehow usurp the market demand for the original.”¹⁰¹ Regardless of the fact that the *South Park* episode was a for-profit venture, the court still found that the use was fair.¹⁰² Even though the multinational corporation Viacom owns South Park Studios, the court chose to overlook the for-profit nature of the fair use claim, instead holding other factors to determine the outcome of the case.¹⁰³

Overall, the court concluded that based solely on the pleadings in this case the defendants’ use was fair, and consequently, there was no infringement.¹⁰⁴ With this conclusion having been made, the court dismissed the case, with prejudice, for failure to state a claim upon which relief may be granted.¹⁰⁵

V. HOW *BROWNMARK FILMS* SHOULD BE APPLIED IN OTHER COURTS

It is not commonplace for copyright infringement defendants to prevail on a motion to dismiss based on a fair use defense before

⁹⁷ *Id.*

⁹⁸ *Id.* at *24.

⁹⁹ *Id.* at *22–27.

¹⁰⁰ *Id.* at *3.

¹⁰¹ *Id.* at *26.

¹⁰² *Id.*

¹⁰³ See H.R. REP. NO. 94–1476, at 66 (1976).

¹⁰⁴ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *25–26.

¹⁰⁵ *Id.* at *26.

an answer is filed or discovery taken.¹⁰⁶ However, in this particular instance, the court was able to take judicial notice of the video in question because it was both expressly referenced in the complaint and central to the case.¹⁰⁷

A. *Why Brownmark Films Was Decided Correctly*

In *Brownmark Films*, the court strayed from precedent and dismissed a copyright infringement case before the plaintiff ever had the benefit of going through discovery.¹⁰⁸ The judge properly utilized his discretionary ability and spared the defendants from going through standard litigation procedures and perhaps a trial.¹⁰⁹ It is possible that the plaintiffs would have presented additional evidence had the judge allowed the case to proceed to trial; however, the dismissal here was with prejudice.¹¹⁰ Because a dismissal with prejudice is a final judgment, plaintiffs have the option of appealing.¹¹¹

Consequently, dismissing *Brownmark Films* and other similar copyright infringement cases is the best solution when, based on the initial pleadings, the stipulated facts strongly support a successful fair use defense. With this model, plaintiffs are not prevented from continuing to pursue their claims on appeal, which they will presumably do if their case is strong.¹¹² Also, defendants

¹⁰⁶ Paul Fakler, *Music Video Owner Takes One In The . . . : South Park Spoof Held Fair Use*, TITLE 17: THE S(C)ITE FOR COPYRIGHT LAW (July 13, 2011), <http://title17.net/2011/07/music-video-owner-takes-one-in-the-south-park-spoof-held-fair-use/>.

¹⁰⁷ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *15.

¹⁰⁸ *Id.* at *26.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *27.

¹¹¹ 28 U.S.C. § 1253 (2006). While the *Brownmark Films* case has not yet been appealed to the Court of Appeals for the Seventh Circuit, plaintiff did file three documents with the district court. See *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *1. However, none of these documents dealt with the substantive fair use claim. *Id.*

¹¹² Although defending against an appeal would also be costly, the likelihood that plaintiffs would voluntarily undergo the appeals process is low, given the disadvantages that plaintiff-appellants face. Henry S. Farber & Theodore Eisenberg, *Why do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious*

are protected from prohibitively expensive legal battles when their use of copyrighted material is squarely protected by the fair use doctrine.

B. *Copyright Holders' Arguments*

Even though the Copyright Act protects fair users from infringement suits, taken on the whole the Act is focused on establishing copyright holders' rights.¹¹³ Copyright holders are entitled to have their artistic works protected,¹¹⁴ and it is important to address the counterarguments to the fair use defense that the plaintiff could make. This is especially the case here because the court directly pointed out that one of the reasons for being able to make this decision so easily was that the plaintiff failed to make an argument that raised infringement claims outside of the context of the use of the "Canada on Strike" episode, even after being given two opportunities to amend or file a new complaint.¹¹⁵

If this case is appealed, the plaintiff will have to attack the arguments made by the court in the statutory factors analysis.¹¹⁶ In particular, Brownmark Films, LLC could challenge the court's rudimentary analysis of the work's transformativeness.¹¹⁷ Furthermore, the plaintiff could argue that the court's analysis

Losers, or Low Trial Win Rates? 6–17 (PRINCETON UNIV. INDUS. RELATIONS SECTION, WORKING PAPER NO. 567, 2011). According to a recent study, only 16.57% of plaintiffs win an appeal in federal court. *Id.* at 6.

¹¹³ 17 U.S.C. § 107 (2006).

¹¹⁴ *Id.*

¹¹⁵ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *26 ("Despite these opportunities to resolve rather glaring problems with the substance of the underlying dispute, the plaintiff has looked elsewhere and instead filed briefs that wholly ignored the central issue of this litigation, fair use.").

¹¹⁶ See *supra* text accompanying note 44.

¹¹⁷ Michael Cavanaugh, *The Riff: 'SOUTH PARK' is sued over video—but what—what does this mean for parody?*, THE WASHINGTON POST (Nov. 16, 2010, 1:30 PM), http://voices.washingtonpost.com/comic-riffs/2010/11/south_park_lawsuit.html ("[Defendant] put the well-known tune to animation The lyrics themselves, however, aren't altered in spooflike fashion (à la, say, 'Weird Al' Yankovic), so the parody becomes almost entirely a visual one. Which raises the question: Should animators have free rein to replicate any song in full—note for note, verse for verse—and profit freely simply because the tune is set to a 'toon?").

regarding whether or not the video in question was a satire or parody was not thorough enough for such a murky and unsettled topic.¹¹⁸ Finally, the plaintiffs could argue that defendant's use of some of the strongest images from the original video, such as outfits the singer was wearing and items he was holding, should cause the video to be labeled as an infringement.¹¹⁹ At this time, it is unknown whether the plaintiff will choose to pursue the appeal further, but allowing them the option to do so would prevent the plaintiff from being unfairly disadvantaged.

C. Other Courts Should Accept Fair Use Defenses Early in the Judicial Process

The court in *Brownmark Films* admitted that dismissing a case based on fair use at the pleadings stage was "irregular."¹²⁰ However, the court came to the most logical outcome because the work in question fit well within the limits of fair use.¹²¹ The court further held that the dismissal was the proper course of action "given the scope and nature of the infringement alleged by the amended complaint, coupled with the rather obvious resolution of the substantive underlying issue."¹²² Based on this supposition, "the court . . . conclude[d] that this dispute simply does not warrant 'putting the defendant[s] through the expense of discovery.'"¹²³

Other courts should be more willing to grant dismissals based on a fair use defense in the early stages of a case. This would discourage potential plaintiffs from bringing unnecessary suits when use of a copyrighted work is proper. Also, it would likely encourage other potential fair users of copyrighted materials who

¹¹⁸ See 'What What In the Butt' is Parody?, ENTERTAINMENT LAW BLOG AT ASU (Nov. 23, 2010), <http://asumentertainmentlaw.wordpress.com/2010/11/23/what-what-in-the-butt-is-parody/> ("[T]he critical question to be determined is whether South Park's version should be considered as parody" or satire.).

¹¹⁹ This would be a violation of the third factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107.

¹²⁰ *Brownmark Films*, 2011 U.S. Dist. LEXIS 72684, at *18–19.

¹²¹ *Id.* at *26.

¹²² *Id.* at *19.

¹²³ *Id.*

otherwise may have shied away for fear of being subject to suit. Furthermore, courts should not shy away from dismissing a copyright infringement case when fair use defense claims are strong, even if the facts of the case are not quite as one-sided as in *Brownmark Films*. In order to be granted a dismissal for failure to state a claim, a defendant claiming a fair use defense must highlight the facts as they apply to the four-factor test and provide the court with a clear picture of how the copyrighted work was used.¹²⁴ While defendants in fair use cases must still initially establish that the work is a parody, not a satire,¹²⁵ and particularly emphasize the transformative nature of the work, the nature of each analysis is very fact-specific. This allows courts to have flexibility in making reasonable inferences that a use was fair. As Duke University's Scholarly Communications Officer, Kevin Smith, explained:

Because it functions as a limitation on the right in question, fair use is actually a perfect example of a place where a copyright infringement claim should be dismissed because of a "failure to state a claim." That describes perfectly what is going on—because fair use has been established, the plaintiff did not have a right that was infringed in the first place. Because fair use is "a mixed question of fact and law," there will always be specific circumstances that must be adduced, but if those facts are plain on the face of the complaint, as they were in *Brownmark Films*, a judgment at that stage is entirely appropriate.¹²⁶

As this statement demonstrates, dismissing a case based on a strong fair use defense makes sense if a court takes the opportunity to weigh the four factors and determines that the alleged infringement was clearly fair use. Courts should be more inclined to exercise this judicial power, as this practice would comport with the legislative intent behind the fair use doctrine.¹²⁷

¹²⁴ To avoid dismissal, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

¹²⁵ See Kimbrough, *supra* note 51, at 2.

¹²⁶ Smith, *supra* note 17.

¹²⁷ See Carroll, *supra* note 39, at 1130–31.

VI. CONCLUSION

It is too early to predict whether other courts will follow the decision made in *Brownmark Films*. The current precedent is such that courts, if there is any question of potential liability, are unwilling to dismiss a copyright infringement case notwithstanding the potential litigation costs to fair use defendants.¹²⁸ If courts were to follow the precedent set forth in *Brownmark Films*, not only would defendants like *South Park* benefit, but other parties like fearful teachers, universities, librarians, and researchers as mentioned in Part I would feel more protected by the fair use doctrine.¹²⁹ This may result in increased, legitimate, and beneficial use of copyrighted materials.

In cases where use of a copyrighted work is clearly protected by the fair use doctrine, courts should recognize that a reluctance to dismiss claims could damage both users and potential users of copyrighted materials.¹³⁰ The most effective approach to balance the interests of copyright owners and promote fair use of copyrighted material would be for courts to be more deferential towards defendants in deciding whether to grant or deny a motion to dismiss. Plaintiffs have the right to appeal if they feel that their lawsuit is strong, and this procedure should protect copyright holders in the event that an infringement was wrongly labeled a fair use.¹³¹ This will promote a primary purpose of the Copyright Act, which is to stimulate creativity for the enrichment of the public.¹³² Hopefully, *Brownmark Films* will pave the way for

¹²⁸ The interests of copyright owners are very significant, and it is important to note that these judicial recommendations are not attempting to unfairly disadvantage plaintiffs whose work is truly being used in an illegal manner. If courts were willing to be more deferential towards defendants in fair use copyright infringement cases, plaintiffs would, admittedly, have to submit stronger initial complaints.

¹²⁹ See Smith, *supra* note 17.

¹³⁰ See Raustiala & Sprigman, *supra* note 20.

¹³¹ See Farber & Eisenberg, *supra* note 112, at 6–17.

¹³² See 17 U.S.C. § 107 (2006). This is a substantially similar to the Copyright Clause in the United States Constitution. U.S. CONST. art. I, § 8, cl. 8; see *supra* note 23.

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other courts to follow its lead and avoid the consequences of not being deferential towards a fair use defendant.