NO. 11-2620

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BROWNMARK FILMS, LLC,

PLAINTIFF-APPELLANT,

V.

COMEDY PARTNERS, MTV NETWORKS, PARAMOUNT PICTURES CORPORATION, SOUTH PARK DIGITAL STUDIOS, LLC, and VIACOM INTERNATIONAL INC.,

DEFENDANTS-APPELLEES.

On Appeal From The United States District Court
For The Eastern District of Wisconsin, Case No. 10-cv-1013 JPS
Honorable J.P. Stadtmueller, District Judge

BRIEF AMICUS CURIAE OF ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-2620

Short Caption: Brownmark Films, LLC v. Comedy Partners, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Amicus Curiae Electronic Frontier Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Julie P. Samuels, Corynne McSherry and Michael Barclay

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

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None

Attorney's Signature: /s/ Julie P. Samuels Date: December 19, 2011

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STATEMENT OF INTEREST[1]

Amicus curiae submits this brief pursuant to FED. R. APP. P. 29(b). Defendants-Appellees Comedy Partners, *et al*. ("Comedy Partners" or "Appellees") consent to the filing of the brief. Plaintiff-Appellant Brownmark Films, LLC ("Brownmark") does not consent.

The Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its almost 15,000 dues-paying members have a strong interest in assisting the courts and policymakers in striking the appropriate balance between copyright law and the public interest.

As part of its mission, EFF often represents individuals and businesses that have been subject to legal threats, or dragged into litigation, based on their fair use of preexisting creative works. EFF also commonly weighs in as amicus in such litigation. For example, EFF is involved in several lawsuits brought by Righthaven LLC (a "copyright troll," as discussed below). To date, courts have agreed with EFF that it is proper to dismiss Righthaven's cases at the pleading

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus contributed money intended to fund preparing or submitting this brief. Web sites cited in this brief were last visited on December 16, 2011.

stage, either on fair use or other grounds. If this Court were to accept Brownmark's invitation to hold that fair use defenses can *never* be considered at the pleading stage, such a holding could undermine both EFF's clients and its mission.

EFF thus has a specific, direct interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Electronic Frontier Foundation files this brief because the Court's ruling in this matter may have significant implications beyond the specific parties and content involved here. Brownmark asks this Court to come to a dangerous conclusion: that fair use (and, apparently, virtually any affirmative defense) cannot be decided on a motion to dismiss, no matter how obvious that the use is fair and, therefore, non-infringing. Brownmark's theory finds no support in copyright jurisprudence. Quite the contrary: ending litigation involving obvious fair uses at the pleading stage helps accomplish Section 107's purpose of ensuring that there is adequate breathing space for new creative expression. Many fair users lack the resources to take on the costs and fees of litigating a case through summary judgment. The ability to establish quickly that a use is fair (in appropriate circumstances) means, as a practical matter, that fair users will not be forced to go down without a fight and, equally importantly, will not hesitate to engage in the fair use in the first place.

EFF is particularly concerned about this matter because it often represents and/or counsels individuals and businesses that face this very dilemma. For example, EFF is involved as counsel or amicus in defending several cases brought by Righthaven LLC, an entity that was created solely for the purpose of pursuing copyright litigation based on the re-posting of all or portions of newspaper articles. Although fair use often clearly protects such postings, Righthaven used the cost of litigation (coupled with the threat of statutory damages) to extort quick settlements. Preserving a means for quick dismissal of such cases helps mitigate that unfair pressure.

Of course, Righthaven's victims are not the only fair users who can benefit from the ability to dismiss copyright litigation early. As explained below, a broad variety of persons, from remix artists to political activities, have been subject to legal claims based on their fair use of another's work. A categorical rule preventing dismissal at the pleading stage would discourage those uses, particularly where the creators in question lack substantial litigation budgets.

Copyright law exists to serve the *public's* interest, and that interest is best served when the public can make use of another's copyrighted works in a reasonable fashion without undue legal risk. Thus, dismissal of clear-cut fair

use cases at the pleading stage helps strengthen copyright's overall design and protects the public interest.

ARGUMENT

I. THE ABILITY TO DISMISS A CASE ON FAIR USE GROUNDS SUPPORTS THE ESSENTIAL COPYRIGHT BALANCE

A. Dismissing Obvious Fair Use Cases at the Pleading Stage Helps Deter Abuses of the Copyright System

This case involves a specific copyright claim and a specific fair use defense. An objective comparison of the two videos alleged in Brownmark's complaint confirms the district court's conclusion that Comedy Partners' animated video is a parody of Brownmark's music video. Thus, the court correctly dismissed the complaint. However, parodies are only one form of fair use. In other types of lawsuits, some of which are recent inventions of our litigious society, fair use is equally clear-cut. Dismissal of such cases at the pleading stage benefits speakers, the courts, and the public interest.

The rapidly escalating problem of "copyright trolls" – *i.e.*, entities that embrace copyright litigation as a business model – offers a case in point.

1. Righthaven LLC

One notorious copyright troll is Righthaven. Righthaven has allegedly acquired rights to sue on articles in newspapers such as the *Las Vegas Review-*

Journal and the *Denver Post*. Righthaven then files copyright infringement lawsuits, without advance notice, as part of a business model of "encouraging and exacting settlements from Defendants cowed by the potential costs of litigation and liability." *Righthaven LLC v. Hill*, Case No. 1:11-cv-00211 (D. Colo. April 7, 2011) (order denying motion to enlarge time), Dkt. 16 at 2. Righthaven endeavors "to create a cottage industry of filing copyright claims, making large claims for damages and then settling claims for pennies on the dollar." *Righthaven LLC v. Democratic Underground*, LLC, Case No. 2:10-cv-1356 (D. Nev. April 14, 2011) (order on motion for reconsideration), Dkt. 94 at 2. Righthaven has filed more than 200 lawsuits in the District of Nevada and more than 50 suits in the District of Colorado seeking to extort such settlements.[2]

Many of Righthaven's targets made clear fair uses of the newspaper articles in question. For example:

- In *Righthaven v. Gardner*, Righthaven sued a reporter who wrote an article about the Colorado Righthaven lawsuits, illustrated with a grainy excerpt from the court record, claiming that Gardner

[2] *See* EFF case pages for *Righthaven v. Democratic Underground* and *Righthaven v. Wolf*, respectively:
https://www.eff.org/cases/righthaven-v-democratic-underground and
https://www.eff.org/cases/righthaven-v-wolf.

infringed Righthaven's copyright in the court record. *See Righthaven LLC v. Gardner*, Case No. 1:11-cv-00777 (D. Colo. March 25, 2011) (complaint, exhibit 2), Dkt. 1-2. After an outcry, Righthaven dropped the suit, calling it a "clerical mistake." Nate Anderson, *Copyright troll Righthaven's epic blunder: a lawsuit targeting Ars*, Ars Technica (March 29, 2011).[3]

- *Righthaven v. Hill* involved a lawsuit against a blogger for temporarily posting a photograph from the *Denver Post* on his blog, along with political commentary. *Righthaven LLC v. Hill*, Case No. 1:11-cv-00211 (D. Colo. March 21, 2011) (brief in support of defendant's motion to dismiss), Dkt. 12-1 at 2-4. Righthaven dismissed the suit voluntarily. *Id.*, Dkt. 17-18.
- In *Righthaven v. Democratic Underground*, Righthaven sued over a five-sentence excerpt from a *Las Vegas Review-Journal* article that appeared on the defendant's politically oriented blog. After the district court dismissed Righthaven's suit for lack of standing, Stephens Media, the owner of the *Las Vegas Review-Journal*, conceded that the use of the excerpt was fair use. Case No. 2:10-

[3] http://arstechnica.com/tech-policy/news/2011/03/copyright-troll-righthavens-epic-blunder-a-lawsuit-targeting-ars.ars.

cv-1356 (D. Nev. Nov. 17, 2011) (Stephens Media response to motion for summary judgment), Dkt. No. 174, at 2:6-8.

- In *Righthaven LLC v. Realty One Group, Inc.*, Righthaven sued a real estate blog for quoting the first eight sentences of a 30-sentence article. The portion quoted was factual news reporting. The district court granted defendant's motion to dismiss on fair use grounds.[4] Case No. 2:10-cv-1036 (D. Nev. Oct. 19, 2010) (order granting motion to dismiss), Dkt. 17 (appeal docketed as Ninth Circuit No. 11-15714).

None of these cases should ever have been filed, and certainly none of these defendants should have been subjected to protracted litigation. On Brownmark's theory, however, the defendants would have no choice but to suffer through discovery, a prospect that would doubtless encourage many to settle rather than defend their fair use.

2. Mass Copyright Litigation

Brownmark appears to be arguing that a motion to dismiss can never be based on *any* affirmative defense. *See* Brief of Plaintiff-Appellant Brownmark

[4] Other defendants, including the named defendant in that case, were dismissed, also on fair use grounds, in response to a motion to set aside a default judgment. Case No. 2:10-cv-1036 (D. Nev. Feb. 8, 2011) (order granting motion to set aside and dismissing defendants), Dkt. 24.

at 11-12. Comedy Partners explains why that is incorrect. *See* Comedy Partners Br. at 9-11, 18-19, 22-24. If Brownmark is indeed making this sweeping assertion, then a sound rejection of such reasoning is necessary to help level the playing field occupied by a different type of "copyright troll": the mass litigant.

Attorneys (often with little copyright experience) representing small movie producers (often pornographic films) have sued more than 200,000 anonymous John Doe defendants for infringement when the Doe defendants allegedly downloaded certain films over a BitTorrent network.[5] These cases all follow a similar pattern. The plaintiff files a single complaint against hundreds, sometimes thousands, of John Does at once. After obtaining permission for early discovery, the plaintiff then uses the subpoena process to seek the Does' identities from their online service providers. It then sends out form settlement demands for approximately $2,000 (or some other number significantly less than the cost of litigation). So far, it appears that not one of these cases has been litigated on the merits.

Many courts have thrown out these suits on procedural grounds (such as improper joinder and jurisdiction), and courts have recognized the impropriety

[5] Sarah Purewal, *Copyright Trolls: 200,000 BitTorrent Users Sued Since 2010*, PCWorld (August 9, 2011), http://www.pcworld.com/article/237593/copyright_trolls_200000_bittorrent_users_sued_since_2010.html.

of using the judicial process solely to extract quick settlements. As one court observed:

> This course of conduct indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does. Whenever the suggestion of a ruling on the merits of the claims appears on the horizon, the plaintiffs drop the John Doe threatening to litigate the matter in order to avoid the actual cost of litigation and an actual decision on the merits. The plaintiffs' conduct in these cases indicates an improper purpose for the suits.

K-Beech, Inc. v. John Does 1-85, Case No. 3:11-cv-469 (E.D. Va. Oct. 13, 2011) (order severing Does 2-85) Dkt. 13 at 4-5; s*ee also CP Prods., Inc. v. Does 1-300,* Case No. 1:10-cv-6255 (N.D. Ill. Feb. 24, 2011) (order dismissing for abuses of joinder, jurisdiction, and venue) (Shadur, J.), Dkt. 32.

A ruling in Brownmark's favor, however, could be used to support the mass litigants' improper purpose. Many of the defendants in mass copyright cases may have legitimate defenses, but lack the resources necessary to raise them. That burden would be more significant if these defenses could never be resolved on a motion to dismiss.

Moreover, affirmance in this case would send a signal that copyright lawsuits are not vehicles for bypassing basic civil procedure. In several of these mass cases, plaintiffs have defended their blunderbuss approach on the grounds

that complying with due process is too onerous a burden for copyright owners, given the extent of online infringement. *See e.g., On the Cheap, LLC v. Does 1-5011*, Case No. 3:10-cv-04472 (N.D. Cal. July 14, 2011) (plaintiff's response to order to show cause), Dkt. 41. As Amicus has explained repeatedly, however, copyright actions must conform to the same rules as other civil claims, including the basic standards of due process. *See id.,* (N.D. Cal. Aug. 18, 2011) (brief of amicus curiae regarding order to show cause), Dkt. 54.

Brownmark similarly asks this Court to endorse a form of copyright exceptionalism. It should decline to do so, both because Brownmark is wrong, and to avoid putting another arrow in the copyright trolls' quiver. Confirming the ability of a district court to dismiss a case at the pleading stage in appropriate circumstances would, by contrast, deter such vexatious behavior and help defendants with meritorious defenses to resist inappropriate pressure. It will have the added benefit of clearing district court dockets of unmeritorious litigation.

B. Early Dismissals Helps Protect Individual Fair Users Confronted With Frivolous Lawsuits and Improper DMCA Takedowns

In the last decade, the ability to remix and share existing video content has been democratized to an unprecedented degree, thanks to the combination of inexpensive video editing tools on personal computers and free, easy-to-use

video hosting services such as YouTube. For example, Arab-American artist and filmmaker Jacqueline Salloum created an extraordinary remix video, "Planet of the Arabs," which combines clips from decades of popular movies and television shows to comment on the demonization of Arabs in American media, particularly the common portrayal of Muslims as terrorists.[6] "Homophobic Friends," by remixer Tijana Mamula, combines short clips from the popular TV show *Friends* to comment on homophobia in popular media.[7] Remixing is also being recognized as an important pedagogical practice on every educational level, with scholarship as well as practical classroom textbooks being written on this subject.[8] These forms of remix are valuable not only in themselves, but also because they help create the next generation of artists, who can gain skills and exposure otherwise entirely unavailable to them.

Unfortunately, although many of these remixes are clearly sheltered by the fair use doctrine, it can be difficult for remix video creators to keep their videos online. Large media companies deliver hundreds of thousands of

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[6] hnassif, *Planet of the Arabs*, YouTube (Apr. 14, 2006), http://www.youtube.com/watch?v=Mi1ZNEjEarw.

[7] Tijana Mamula, *Homophobic Friends*, Political Remix Video (July 11, 2011), http://www.politicalremixvideo.com/2011/07/11/homophobic-friends.

[8] Colin Lankshear & Michele Knobel, *Remix: The Art and Craft of Endless Hybridization*, 52 JOURNAL OF ADOLESCENT & ADULT LITERACY 22-33 (2008), http://extendboundariesofliteracy.pbworks.com/f/remix.pdf; Catherine Latterell, *Remix: Reading and Composing Culture* (2005).

"takedown" notices under 17 U.S.C. § 512 each month to online service providers who host and link to information posted by Internet users. While many of those notices target clear cases of copyright infringement, remix video creators have found themselves mistakenly caught in the takedown notice driftnet.[9] If she insists on her right to counter-notice pursuant to 17 U.S.C. § 512(g) to have her video restored, a remix creator exposes herself to a potential litigation. If she does not have the option of ending that litigation quickly, at relatively minimal expense, she will be more likely to hesitate to file a counter-notice.

C. Early Dismissal Fosters Timely Political Speech

The same tension exists with respect to a new and important video genre called "political remix videos" (or PRVs). This form of creative expression has become a powerful and persuasive way to raise public awareness regarding a variety of issues. For example, one popular video, "The Rent is too Damn High – Up Remix," combines footage from Disney's animated film *UP* with audio from a New York gubernatorial debate featuring Jimmy McMillan,

[9] Oday, *DMCA Double Jeopardy*, YouTomb (Oct. 31, 2009), http://youtomb.mit.edu/blog/; *see also MG Siegler, Hitler is Very Upset That Constantin Film is Taking Down Hitler Parodies,* TechCrunch (Apr. 19, 2010), *http://techcrunch.com/2010/04/19/hitler-parody-takedown/* (reporting on the removal of the popular Hitler internet memes).

candidate for governor from the Rent is Too Damn High Party.[10] McMillan was a sensation at the debate, and the remix helped keep attention on the issues he raised.[11]

Political remixes may also become the center of political activism. For example, the Move Your Money project, which encourages citizens to move their bank accounts from the major banks that received funds from the 2008 bailout deal to small community banks, came to popular attention in part through a video created by documentary filmmaker Eugene Jarecki.[12] The video juxtaposes excerpts from the classic film *It's a Wonderful Life* (in which community banker George Bailey helps his community fight off a predatory competitor) with television footage from congressional hearings about the bailout.[13] This type of comparison and analysis, using clips to prove its points, is a quintessential transformative fair use.

As with remix videos in general, PRVs may be subject to takedowns and legal threats. The creators, who are usually amateurs and, therefore, less likely to

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[10] Joe Sabia, *The Rent is Too Damn High*, Political Remix Video (Oct. 19, 2010), http://www.politicalremixvideo.com/2010/10/19/the-rent-is-too-damn-high-up-remix.

[11] *Id.*

[12] Eugene Jarecki, *Move Your Money*, YouTube (Dec. 29, 2009), http://www.youtube.com/watch?v=Icqrx0OimSs.

[13] *Id.*

have significant litigation budgets, are more likely to be chilled by such threats if they must face litigation through summary judgment or trial. That chill is inimical to copyright's purpose and fundamental free speech interests.

Political campaigns that use snippets of news broadcasts and other works in advertisements have also faced legal threats. Using small portions of another's copyrighted work for political commentary – core political speech – would certainly seem to qualify as fair use. In practice, however, the fair use doctrine hasn't always deterred unmeritorious copyright claims.[14] In 2009, for example, Stand for Marriage Maine ("SFMM")[15] received a copyright cease-and-desist letter from National Public Radio ("NPR") after SFMM used 20 seconds of NPR content in a video designed to persuade Maine voters to

[14] This problem may be acutely felt during political campaign season, where timing is crucial. *See generally* Center for Democracy & Technology, *Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech* (Sept. 2010),

https://www.cdt.org/files/pdfs/copyright_takedowns.pdf;

See also Arizona Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1008 (9th Cir. 2003) ("Restricting spontaneous political expression places a severe burden on political speech because, as the Supreme Court has observed, 'timing is of the essence in politics … and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.'") (*citing Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969)).

[15] Stand For Marriage Maine is a political action committee of Maine residents who support a traditional definition of marriage. Stand For Marriage Maine, About Us, http://www.standformarriagemaine.com/?page_id=2.

overturn the state legislature's legalization of same-sex marriage.[16] In the video, SFMM argued that if same-sex marriage were legalized, schoolchildren would be taught about gay sex. SFMM supported its claims using material from a 2004 broadcast of the NPR program "All Things Considered."[17] With just two weeks left before the vote, NPR filed copyright complaints with the sites hosting the advertisement and the ads were taken down, even though SFMM's use of the NPR content was likely a fair use.

Similarly improper takedowns marred the 2008 presidential campaign. For example, CBS, Fox News, and the Christian Broadcasting Network all filed copyright complaints against John McCain's presidential campaign for posting campaign ads on YouTube that included short clips of news broadcasts, and NBC did the same for an Obama-Biden video. Some of McCain's videos contained fewer than ten seconds of news footage and were clearly used for the purpose of commentary and advocacy.[18]

While such uses are fair, the threat of litigation through a jury trial (or

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[16] Ben Sheffner, *NPR Makes Copyright Claim Over Anti-Same-Sex-Marriage Ad; Another Political Fair Use Fight*, Oct. 21, 2009, http://copyrightsandcampaigns.blogspot.com/2009/10/npr-makes-copyright-claim-over-anti.html.

[17] Matt Wickenheiser, *NPR Wants Same-Sex Marriage Ad Pulled,* Portland Press Herald-Maine Sunday Telegram, Oct. 20, 2009, http://updates.pressherald.mainetoday.com/updates/npr-wants-same-sex-marriage-ad-pulled.

[18] Sheffner, *supra* note 16.

even summary judgment) means that only defendants who are able to tolerate significant legal costs will be able to defend themselves.[19] Allowing for dismissal of clear fair uses at the pleading stage helps limit the potential harm caused by abusive copyright claims.

II. FAIR USE IS AN ESSENTIAL PART OF THE COPYRIGHT BALANCE

The fundamental goal of copyright law is to promote creativity, innovation and the spread of information and knowledge for the public good. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). The Copyright Act seeks to accomplish these goals by (1) providing authors with exclusive rights in their original work; and (2) providing safeguards for secondary uses of copyrighted works. *See, e.g.*, 17 U.S.C. §§ 107-122 (creating exceptions and limitations to original author's exclusive rights in order to encourage and protect subsequent use of those works).

Taken together, these incentives and limits create a balance between the rights of copyright owners and the general public to create, re-use, and adapt creative works, "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975);

[19] Amicus recognizes that prevailing parties in copyright action may be able to recover attorneys' fees. However, the recovery is by no means guaranteed. *See, e,g,, Savage v. Council on American-Islamic Relations*, Case No. 3:07-cv-06076 (N.D. Cal. Nov 12, 2008) (order denying motion for attorneys' fees in fair use case), Dkt. 60.

see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("[t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'"), *quoting* U.S. CONST., ART. I, § 8, cl. 8.

Thus, the limits on copyright are just as crucial as the incentives, and it is immaterial if they are asserted as part of a case-in-chief or as an affirmative defense. Indeed, if the balance of copyright law is to mean anything, it is that the public's interest in downstream uses of the protected work is just as important as the rights-holder's interest in its exclusive rights.

Fair use is one of the most crucial of the various limits on copyrights, because it directly shelters progressive creativity and innovation, ensuring that the copyright statute does not "stifle the very creativity which that law is designed to foster.'" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (*quoting Stewart v. Abend*, 495 U. S. 207, 236 (1990)). Fair use permits secondary creators to stand "on the shoulders of a giant" in order to "see farther than the giant himself." 4 W. Patry, PATRY ON COPYRIGHT, § 10:2 at 10-13 - 10-14 (Thomson Reuters/West 2011). Fair use of another work benefits the public's access to scholarship, research, parody, commentary, news reporting, and the like, by permitting reproduction of another's work for those and similar purposes. As leading commentators have recognized, fair use is not an

exception to copyright's reach, but "a necessary part of the overall design." P. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).[20]

To achieve these goals, however, it is important that fair uses be as free as possible from unmeritorious copyright claims. As explained above, the threat of protracted litigation will inevitably discourage individuals with limited resources from engaging in, or defending, fair uses. That outcome cannot serve copyright's purpose.

Moreover, although it is categorized as a "defense," fair use is more directly and intimately tied into a copyright claimant's case in chief than are other affirmative defenses. Section 107 of the Copyright Act is unambiguous:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright.

17 U.S.C. § 107. Pursuant to the plain language of the Copyright Act, then, a fair use is a non-infringing use whether or not the user is herself sued and pleads fair use as a defense. Indeed, the Supreme Court could hardly be clearer: "Anyone . . . who makes a fair use of the work is not an infringer of the copyright with respect to such use." *Sony Corp. v. Universal Music Studios, Inc.,* 464 U.S. 417, 433 (1984); *see also Online Policy Group v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1200 (N.D. Cal. 2004) (a fair use "is not infringement of a copyright."); *Assoc. of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 523 (2d

[20] http://www.yalelawtech.org/wp-content/uploads/leval.pdf.

Cir. 1991) ("[i]t has long been recognized that certain unauthorized but 'fair' uses of copyrighted material do not constitute copyright infringement"); *Penelope v. Brown*, 792 F. Supp. 132, 136 (D. Mass. 1992) ("The fair use of a copyrighted work is not an infringement of copyright.").

Thus, the affirmative defense is simply the procedural vehicle through which the question of fair use is raised. It defies reason to suggest a court cannot, in appropriate circumstances, answer that question at the pleading stage.

CONCLUSION

Amicus urges this Court to protect the copyright balance and refuse Brownmark's invitation to deprive fair users (and the courts) of an economical and prompt means of resolving clear-cut cases. The district court correctly considered the issue of fair use at the pleadings stage. This Court should affirm the judgment in favor of Appellees.

Dated: December 19, 2011

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Curiae Electronic Frontier Foundation In Support Of Appellees And Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: December 19, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2011, I electronically filed the foregoing Brief of Amicus Curiae Electronic Frontier Foundation In Support Of Appellees And Affirmance with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 19, 2011

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