

NO. 11-2620

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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BROWNMARK FILMS, LLC,

PLAINTIFF-APPELLANT,

v.

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

DEFENDANTS-APPELLEES.

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

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**MOTION OF AMICUS CURIAE ELECTRONIC FRONTIER  
FOUNDATION FOR LEAVE TO FILE AMICUS BRIEF  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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Pursuant to Federal Rules of Appellate Procedure 27 and 29, the Electronic Frontier Foundation (“EFF”) respectfully moves this Court for leave to file an amicus curiae brief in support of Defendants-Appellees Comedy Partners, *et al.* (“Comedy Partners” or “Appellees”). Comedy Partners consents to the filing of the brief. Plaintiff-Appellant Brownmark Films, LLC (“Brownmark”) does not.

This Court has recognized that amicus briefing may be helpful in certain circumstances, *i.e.* (1) “when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do”; (2) “when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest.” The Court may also consider (3) whether one of the parties “sponsored or encouraged” the filing of the brief; and (4) whether the amicus brief “merely duplicates the brief of one of the parties.” *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). All four of these factors weigh in favor of the grant of this motion and the filing of EFF’s brief.

#### **I. STATEMENT OF INTEREST AND “UNIQUE PERSPECTIVE”**

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 policy-makers in striking the appropriate balance between copyright law and the public interest. As part of its mission, EFF has often served as amicus in key copyright cases, including *Golan v. Holder*, No. 10-545 (U.S. Supreme Court, filed June 21, 2011, on behalf of the American Library Association and other amici); *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (U.S. Supreme Court, filed Dec. 15, 2010); *UMG Recordings, Inc. v. Veoh Networks, Inc.*, Case No. 09-56777 (9th Cir. filed July 23, 2010); *Vernor v. Autodesk, Inc.*, No. 09-35969 (9th Cir., filed Feb. 11, 2010); and *Perfect 10, Inc. v. Google, Inc.*, No. 06-55406 (9th Cir., filed July 20, 2006).

EFF has a particular interest in a balanced copyright system that protects legitimate innovators and online free speech from the chilling effects of unnecessary legal uncertainty. Unlike the parties to this case, EFF represents the interests of individuals – specifically those who often lack resources to litigate in federal court – who make fair uses of copyrighted content. This amicus brief will assist the Court in understanding the broad impact a ruling in *Brownmark*'s favor could have on creators, innovators, and consumers.

## **II. THE HOLDING IN THIS CASE MAY AFFECT OTHER CASES WHERE EFF IS LITIGATING FAIR USE**

A ruling in *Brownmark*'s favor could materially affect several cases in which EFF is involved, either as amicus or as co-counsel, as well as the many fair use

creators that seek EFF's assistance when they face legal threats. To take just one example, EFF is actively involved in several cases brought by Righthaven LLC. As EFF's brief explains in more detail, Righthaven was created solely as a vehicle for copyright litigation. Righthaven does not create any original works of authorship itself – rather, it purchases copyrights in works created by others (such as newspaper articles), and then sues people who post portions of those articles on the Internet.<sup>1</sup> Although such postings are often clearly protected by fair use, Righthaven uses the cost of litigation to extort settlements.

Righthaven has filed more than 250 lawsuits in the Ninth and Tenth Circuits, many of which are still pending. For the most part, the Ninth and Tenth Circuit district courts have agreed with EFF that it is proper to dismiss Righthaven's cases at the pleading stage, either on fair use grounds or other grounds. (Comedy Partners briefly mentions one such case, *Righthaven, LLC v. Realty One Group*, Case No. 2:10-cv-1036 (D. Nev.), where the court granted Realty One's motion to dismiss Righthaven's complaint based on fair use. Comedy Partners' brief at 15 n.7).

In this case, if this Court held that fair use defenses can *never* be considered at the pleading stage – as Brownmark asserts – that holding could adversely affect

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<sup>1</sup> See generally EFF, "Copyright Trolls," <https://www.eff.org/issues/copyright-trolls>.

EFF's ongoing litigation against Righthaven and other copyright trolls. Moreover, a decision favoring Brownmark would likely also create an unnecessary split in the circuits.

In addition, EFF frequently represents innovators and creators who engage in activities protected by fair use yet who are threatened by overzealous copyright owners.<sup>2</sup> EFF would like to be able to advise such clients that motions to dismiss on fair use grounds are available in appropriate situations.

EFF thus has a specific, direct interest in the broader implications of the outcome of this case, which alone justifies the filing of EFF's brief.

### **III. EFF IS NOT AFFILIATED WITH ANY OF THE PARTIES**

As an independent non-profit public interest organization, EFF is not sponsored by any of the parties to this case. Indeed, although EFF supports Comedy Partners in *this* case, EFF recently filed two amicus briefs *adverse* to Comedy Partners and two other Appellees (Viacom and Paramount) in a highly publicized case pending in the Second Circuit. *Viacom Intern. Inc. v. YouTube*,

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<sup>2</sup> See footnote 1, *supra*; EFF, "Legal Assistance from EFF," <https://www.eff.org/pages/legal-assistance>.

*Inc.*, 718 F.Supp.2d 514 (S.D.N.Y. 2010), *appeal pending*, Second Circuit No. 10-3270.<sup>3</sup>

While EFF does not agree with Comedy Partners' positions in the *YouTube* case (involving DMCA safe harbors under 17 U.S.C. § 512), EFF does agree with Comedy Partners' position here. Because of the important fair use issues involved here, EFF decided to file its amicus brief independently of any suggestion or encouragement by Comedy Partners.

#### **IV. EFF'S BRIEF IS NOT DUPLICATIVE OF EITHER PARTY'S BRIEF**

Finally, EFF's brief does not duplicate either party's brief, and in particular does not duplicate Comedy Partners' brief, which EFF supports.

#### **CONCLUSION**

EFF's brief meets the requirements of Federal Rule of Appellate Procedure 29, and it provides the Court with an important perspective not offered by the parties to the litigation. For the above reasons, EFF respectfully requests this Court's leave to submit the accompanying brief.

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<sup>3</sup> See EFF, case page for *Viacom v. YouTube*,

<https://www.eff.org/cases/viacom-v-youtube>. EFF's amicus briefs opposing Viacom and Comedy Partners can be found at:

[https://www.eff.org/sites/default/files/filenode/viacom\\_v\\_youtube/YouTubeAmicusBriefFINAL.pdf](https://www.eff.org/sites/default/files/filenode/viacom_v_youtube/YouTubeAmicusBriefFINAL.pdf) (district court brief, dated April 12, 2010); and

[https://www.eff.org/sites/default/files/filenode/viacom\\_v\\_youtube/ViacomvGoogleAmicus.pdf](https://www.eff.org/sites/default/files/filenode/viacom_v_youtube/ViacomvGoogleAmicus.pdf) (Second Circuit brief, dated April 7, 2011).

Dated: December 19, 2011

By: /s/ Julie P. Samuels

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### CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2011, I electronically filed the foregoing Motion of Amicus Curiae Electronic Frontier Foundation For Leave to File Amicus Brief 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

By: /s/ Julie P. Samuels

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