

NOTE

SOUTH PARK AND UNIVERSITY LIBRARIANS: A POTENTIAL ALLIANCE IN THE FIGHT TO PRESERVE FAIR USE RIGHTS FOR AMERICA’S UNIVERSITIES

Evan Miller

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INTRODUCTION

Jane, a spunky red-haired librarian, was discussing copyright law with three wide-eyed college professors. To Jane’s dismay, a professor named Tim distributed a journal article to his students through an online course management system. Jane seemed intrigued and asked: “Oh boy, did you check with the copyright holder to see if it’s okay to post that article?” Tim was perplexed. “I’m using it for educational purposes, so I don’t need permission,” he told Jane. Jane began explaining copyright law to her colleagues. “We have a responsibility to protect the rights of copyright holders, no matter how we share their work,” Jane warned the group. “Sure, but who is really going to know if we illegally share content? Does it really

matter?" asked another professor. "Oh, it matters. It's the law," Jane replied.¹

The scene transcribed above is part of an animated video that is prominently featured on the Copyright Clearance Center's ("CCC") website.² The CCC is a digital licensing clearinghouse that sells licensing plans to educational institutions and businesses.³ The CCC's animated video is set on a fictitious college campus with a plaque reading "veritas," the Latin term for "truth," prominently featured in the background.⁴ Presumably, the CCC chose to prominently display "veritas" to depict its position of "when in doubt, obtain permission" as morally right.⁵ Unsurprisingly, given that the CCC is a licensing clearinghouse, the video encourages university faculty to approach fair use with caution.⁶

The United States Constitution authorizes Congress to pass copyright laws intended to "promote the Progress of Science and useful Arts."⁷ To be sure, guaranteeing that authors of novel and creative content can protect their intellectual property is critical to encouraging new innovation.⁸ Overly aggressive enforcement of copyright laws, however, has an undesirable outcome: shrinking the scope of fair uses of copyrighted material for

¹ *Copyright on Campus Video*, COPYRIGHT CLEARANCE CENTER, http://www.copyright.com/content/cc3/en/toolbar/education/resources/copyright_on_campus.html.

² *Id.*

³ *About Us*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html>. The CCC claims that it was "created in 1978 at the suggestion of Congress . . ." *Technological Protection Systems for Digitized Copyrighted Works: Written Comments of Copyright Clearance Center, Inc.*, United States Patent and Trademark Office (Jan. 14, 2003). Although not readily apparent from the CCC's promotional materials, the suggestion of Congress it refers to appears to be the following line from a 1975 Senate Report: "Concerning library photocopying practices not authorized by this legislation . . . , the committee recommends that workable clearance and licensing procedures be developed." S. REP. NO. 94-473, at 71 (1975).

⁴ COPYRIGHT CLEARANCE CENTER, *supra* note 1; LATIN FOR LAWYERS: WITH 1000 LEGAL MAXIMS, at 300 (The Lawbook Exchange, Ltd., 1992).

⁵ *Copyright Basics Video*, COPYRIGHT CLEARANCE CENTER, http://www.copyright.com/content/cc3/en/toolbar/education/resources/copyright_basics1.html.

⁶ The "when in doubt, obtain permission" philosophy would pressure university faculty to seek licenses, even when the majority of their unlicensed use falls under fair use. *See Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190 (N.D. Ga. 2012) (finding Georgia State University liable for only five of the ninety-nine counts of copyright infringement).

⁷ "The Congress shall have Power . . . To 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." U.S. CONST. art. I, § 8.

⁸ Tom Braegelman, *Copyright Law in and Under the Constitution: The Constitutional Scope and Limits to Copyright Law in the United States in Comparison with the Scope and Limits Imposed by Constitutional and European Law on Copyright Law in Germany*, 27 CARDOZO ARTS & ENT. L.J. 99, 104 (2009).

permissible purposes, such as educational purposes.⁹

This Note argues that academic institutions should pair two recent court decisions, *Cambridge University Press v. Becker* and *Brownmark Films, Inc. v. Comedy Partners*, to aggressively defend their right to reproduce unlicensed copyrighted materials for classroom use. In *Cambridge University Press*, three publishers brought a copyright infringement suit against Georgia State University (“GSU”) claiming its unlicensed reproduction of copyrighted works violated federal copyright law.¹⁰ The district court overwhelmingly found in GSU’s favor on fair use grounds, finding for the publishers in only five out of the seventy-five triable counts of copyright infringement.¹¹ This Note contends that nonprofit educational institutions can, and should, employ the lessons learned in *Cambridge University Press* to protect their fair use rights. In *Brownmark Films*, a copyright holder sued South Park Digital Studios claiming South Park unlawfully copied its protected music video without a license.¹² The district court granted South Park’s pre-trial motion to dismiss because South Park’s use was protected under fair use.¹³ This Note will later suggest that nonprofit educational institutions can pair the substantive principles from *Cambridge University Press* and procedural principles from *Brownmark Films* to better protect their fair use rights.

First, this Note discusses the fair use defense to copyright infringement and its importance to our system of copyright law.¹⁴ Second, this Note explores scholarship regarding the effects that industry customs and risk-averse attitudes have on intellectual property law. Specifically, this section discusses the “clearance culture” problem and how the litigiousness of the CCC threatens educational institutions’ right to fairly use unlicensed copyrighted material. Third, this Note proposes a potential strategy to solve, or at least alleviate, the clearance culture problem by encouraging educational institutions in the United States to strategically use the hard-fought substantive victory in *Cambridge University Press* and the significant procedural victory in *Brownmark Films* to defend their rights.

⁹ Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1089, 1148 (2007).

¹⁰ *Cambridge Univ. Press*, 863 F.Supp.2d 1190.

¹¹ *Id.*

¹² *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991, 995 (E.D. Wis. 2011).

¹³ *Id.*

¹⁴ In an effort to limit the parameters of this discussion, this Note will only discuss copyright issues relevant to nonprofit educational institutions. Additionally, this Note’s focus is further limited to the fair use defense. Scholarship that advocates for the expansion of Section 108 to give colleges and universities broader freedoms when distributing copyrighted material does exist, however, such positions, while interesting and supportive of this Note’s general purpose, are beyond the scope of this discussion.

I. COPYRIGHT LAW AND FAIR USE

The Copyright Act of 1976 affords a copyright holder a number of exclusive rights, including the right to reproduce the copyrighted work.¹⁵ Not all works are copyrightable; this statutory protection is reserved for original content that has some creative characteristic.¹⁶ If an unauthorized user intrudes on the copyright holder's exclusive right to reproduce his or her work, in whole or in part, then the copyright holder has the right to sue the user for copyright infringement.¹⁷

A person is allowed to use copyrighted work without permission when Section 107's multi-factor analysis weighs in the user's favor.¹⁸ In general, a user should consider these four factors before using copyrighted work without permission: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for a nonprofit educational purpose; (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 (4) the effect of the use upon the potential market for or value of the copyrighted work."¹⁹ Though courts have weighed some factors more heavily than others, no one factor is dispositive and courts must weigh the factors together.²⁰ Additionally, this four-factor list is not exhaustive.²¹ Given the fact-intensive nature of the fair use inquiry, it is important to consider how each factor would apply to nonprofit educational institutions that wish to reproduce particular copyrighted works, in particular ways for particular purposes, without the copyright holder's permission.

The first of the four listed factors that courts consider when analyzing a fair use defense is the "purpose and character" of the use, "including whether such

¹⁵ 17 U.S.C. § 106 (2012) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work . . .; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies . . . to the public by sale or other transfer of ownership . . .").

¹⁶ *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

¹⁷ 17 U.S.C. § 501 (2012) ("The legal . . . owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.").

¹⁸ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (affirming that statutory examples of permissible uses under the fair use doctrine requires case-by-case analysis rather than application of rigid rules).

¹⁹ 17 U.S.C. § 107 (2012).

²⁰ *Campbell*, 510 U.S. at 578.

²¹ *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

use is of commercial nature or is for nonprofit educational purposes.”²² Pierre Leval, a revered copyright scholar and judge, referred to the “purpose and character” of the use as the “soul” of the fair use defense.²³ The fair use defense is bolstered when the defendant uses the copied materials for educational purposes.²⁴ An educational purpose, however, does not automatically ensure a successful fair use defense and is just one factor courts will consider.²⁵ With respect to the character of the use, courts are more likely to find work consisting of comment or criticism fair use because, as a public policy matter, society should encourage circulation of such comment and criticism.²⁶ For example, a student writing a paper about a philosopher can quote the philosopher when analyzing his views.

The second factor courts consider when conducting a fair use analysis is the “nature of the copyrighted work.”²⁷ Courts and scholars alike generally accept the proposition that the law should offer greater protection to creative works.²⁸ Therefore, those who limit their copying to factual works, especially in academic settings, will have a stronger fair use defense.²⁹ As with other factors of fair use, however, no brightline rule distinguishes “factual” from “creative” works.³⁰ For example, courts have taken different approaches when discussing the nature of copyrighted scholarly or educational works. As applied to “coursepacks,” federal district courts in Michigan and New York came to opposite conclusions in their discussion of fair use’s second factor.³¹

²² 17 U.S.C. § 107(1) (2012).

²³ Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

²⁴ *Campbell*, 510 U.S. at 579 n. 11 (1994) (“The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.”) (explaining that factor one favors defendant nonprofit educational institution, even when the works are nontransformative); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1224 (N.D. Ga. 2012) (finding that “the fact that the copying is done by a nonprofit educational institution leaves no doubt” that the purpose and character of the use favor defendants).

²⁵ *Campbell*, 510 U.S. at 584.

²⁶ 17 U.S.C. § 107 (2012); see *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (finding that a biography that excerpted copyrighted works to comment on or criticize the original author fell squarely within the parameters of fair use).

²⁷ 17 U.S.C. § 107(2) (2012).

²⁸ *Cambridge Univ. Press*, 863 F.Supp.2d at 1225.

²⁹ See *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990) (explaining that although “factual” works is not defined, reproducing compilations of facts and other factual-based works are more likely to receive fair use protection than fictional works).

³⁰ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991).

³¹ Compare *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996), with *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1552 (S.D.N.Y. 1991).

Fortunately, the Michigan decision, which works against the interests of universities, can be explained away as misguided and unpersuasive.

In *Princeton University Press v. Michigan Document Services, Inc.*,³² publishers brought a copyright infringement action against a “commercial copyshop” that prepared “coursepacks” for University of Michigan students without paying royalties or procuring licenses for its use of copyrighted material.³³ The district court granted the publishers equitable relief and enhanced damages.³⁴ On appeal, the Sixth Circuit ultimately agreed with the district court’s decision that the “commercial exploitation of the copyrighted materials did not constitute fair use.”³⁵ The Sixth Circuit also acknowledged that the works were “certainly not telephone book listings,” and stated that the content, which consisted of excerpts of non-fiction books, was sufficiently creative to undercut a fair use defense. Consequently, the second factor cut “against a finding of fair use.”³⁶ The Sixth Circuit, however, seemed to confuse the requirements for a prima facie copyright infringement claim with factors relevant for a fair use defense. At this point in the court’s analysis, it should be concerned not with whether the works were sufficiently creative to support a prima facie case of infringement, but rather whether the works were sufficiently creative to tilt the second fair use factor in the plaintiff’s favor.³⁷

In *Basic Books, Inc. v. Kinko’s Graphics Corp.*,³⁸ the District Court for the Southern District of New York held that works similar to those at issue in the Michigan case were actually factual in nature.³⁹ Publishers sued a Kinko’s copy shop for, at the request of college professors, copying excerpts of copyrighted content and compiling those excerpts into course packets, which the shop then sold to college students. After recognizing that “[f]actual works, such as biographies, reviews, criticism and commentary, are believed to have greater public value and, therefore, uses of them may be better tolerated by the copyright law,” the court concluded that the “books infringed in suit were factual in nature” and that the second factor weighed in favor of the defendants.⁴⁰ Like *Princeton University Press*, however, the court in *Basic Books* ultimately sided with the copyright holders.

The third factor a court will consider when conducting a fair use analysis is the “amount and substantiality of the portion used in relation to the

³² *Princeton Univ. Press*, 99 F.3d at 1381.

³³ *Id.*

³⁴ *Id.* at 1383.

³⁵ *Id.*

³⁶ *Id.* at 1389.

³⁷ *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1227 (N.D. Ga. 2012).

³⁸ *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

³⁹ *Id.* at 1532-1533.

⁴⁰ *Id.*

copyrighted work as a whole.”⁴¹ When analyzing this factor, courts consider “the quantity of the materials used,” but also “their quality and importance.”⁴² Courts have suggested that the amount of a work that a user can permissibly copy changes with the purpose and character of the use.⁴³ Thus, no formula exists for determining the exact percentage of work a university professor can copy. The court in *Cambridge University Press*, however, suggested that nonprofit academic institutions can use copyrighted material without permission for educational purposes so long as the material is ten-percent of the work or less, or, if the work has more than ten chapters, is one chapter or less.⁴⁴ This Note contains a thorough discussion of *Cambridge University Press* in Section IV.

The fourth listed factor that courts consider when conducting a fair use analysis is the adverse effect of the defendant’s use on the market value of the original work.⁴⁵ The law is particularly concerned with whether the copied work substitutes for the original work in the marketplace.⁴⁶ In *Princeton University Press*, for example, the court found that the copied portions were a small percentage of the entire work and thus not substitutes for the entire original work.⁴⁷ Additionally, professors at the University of Michigan testified that they “do not use excerpts when they would otherwise assign the entire work,” indicating that the excerpts did not substitute the original works.⁴⁸ Still, the court in *Princeton University Press* ruled in favor of the plaintiffs, prompting attentive universities to fear that fair use is not a strong defense for university coursepacks. Fortunately for universities, there are a number of distinctions to be made between *Princeton University Press* and *Cambridge University Press*, most importantly that the defendant in *Cambridge University Press* was public university, not a commercial copyshop. The commercial copyshops are distinguishable from public universities because, whereas students had to purchase the coursepacks in *Princeton University Press*, the copyrighted material in *Cambridge University Press* was made freely available to students through an online course management system. In cases involving students purchasing coursepacks from commercial copyshops, it is more apparent that a market for the works exists

⁴¹ 17 U.S.C. § 107(3).

⁴² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994).

⁴³ *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1226 (N.D. Ga. 2012).

⁴⁴ *Id.* at 1243. A more robust discussion of *Cambridge University Press* appears in Section IV.

⁴⁵ 17 U.S.C. § 107(4) (2013).

⁴⁶ *Peter Letterese & Associates, Inc. v. World Institute of Scientology Enterprises, Intern.*, 533 F.3d 1287, 1315 (11th Cir. 2008).

⁴⁷ *Princeton Univ. Press*, 99 F.3d at 1409.

⁴⁸ *Id.*

and that licenses are available.

The four factors of fair use work to create a flexible doctrine. Because the fair use defense is flexible, and largely defined by case law, it is exceptionally susceptible to the influence of industry customs and risk-averse attitudes. If universities shy away from defending their fair use rights in court, their fair use rights will continue to dwindle; a classic “use it or lose it” scenario.

II. THE COPYRIGHT CLEARANCE CULTURE

A. Industry Customs and Risk Aversion

Licensing customs and risk-averse attitudes among universities and colleges have weakened fair use rights. Indeed, as Lawrence Lessig observed, industry players create the rules governing content, but these rules have little relationship to the law.⁴⁹ Supporting Lessig’s observation is the fact that even though fair use was intended to permit some copying for permissible educational purposes, the doctrine’s flexibility is having the opposite effect. For example, American universities have responded to flexible and uncertain copyright law with an attitude of risk aversion, avoiding litigation at the cost of their fair use rights. In 1983, New York University (“NYU”) settled a copyright infringement suit on the condition that the university would adopt a restrictive copyright policy.⁵⁰ Because the parties settled the case, the court never addressed whether NYU’s copying was permissible under fair use. Three decades later, publishers and licensing clearinghouses are still fighting to restrict the fair use rights of non-profit educational institutions.

The CCC serves as one of the largest licensing clearinghouses in the country.⁵¹ A large portion of the CCC’s offered services are targeted at universities.⁵² If universities start to more heavily rely on fair use, then the CCC will likely see fewer universities purchasing expensive licensing packages.⁵³ Thus, through financing copyright litigation and copyright

⁴⁹ LAWRENCE LESSIG, *FREE CULTURE* 187 (2004). Lessig’s book is primarily concerned with creative works, but his concern can easily apply to information in an academic settings.

⁵⁰ Sheldon Elliot Steinbach, *Photocopying Copyrighted Course Materials: Doesn’t Anyone Remember the NYU Case?*, 50 ED. LAW REP. 317, 318 (1989).

⁵¹ Press Release, Copyright Clearance Center, Copyright Clearance Center and Canadian Licensing Organizations Expand Partnership (Jun. 6, 2005), *available at* <http://www.copyright.com/media/pdfs/press-release-05-06-06b.pdf>.

⁵² In addition to their academic licensing plans, CCC also sells licensing plans to government organizations, hospitals, and business. *Products & Solutions*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions.html>.

⁵³ Moreover, if academic licensing was not an important element of its business model, the CCC surely would not have underwritten lengthy litigation brought by

“education” like the vignette that was transcribed at the beginning of this Note, the CCC encourages universities to purchase licenses that they may not actually need rather than risk copyright holders hauling the school into court.⁵⁴

Simply put, a license is a contract that gives the recipient of the license permission to copy and distribute copyrighted work.⁵⁵ Purchasing permission to copy and distribute copyrighted work, however, implies that the licensee did not already have that right.⁵⁶ Yet, there is a general practice to license all uses of copyrighted material, even when there is a strong fair use defense.⁵⁷

There are three primary sources for customs concerning fair use in academic settings. First, during Congress’s drafting of the Copyright Act of 1976, a group of publishers and academic institutions created the “Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals.”⁵⁸ Second, the Association of Research Libraries published a code of best practices in fair use for academic and research libraries.⁵⁹ Third, many universities and colleges have provided their staff with fair use checklists that attempt to assist staff in determining whether their proposed use would fall under the fair use defense.⁶⁰

three publishers against Georgia State University. *See* Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

⁵⁴ *Id.*; The CCC advertises multiple copyright course offerings, including “Copyright for Academia.” *Certificate Programs*, COPYRIGHT CLEARANCE CENTER, http://www.copyright.com/content/cc3/en/toolbar/education/course_catalog.html (last visited Mar. 30, 2014).

⁵⁵ *See* Christopher Newman, *A License is Not a “Contract Not to Sue”:* *Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101, 1109 (2013).

⁵⁶ If unlicensed copying of copyrighted work falls under the fair use exception, then no infringement action can be brought and permission is unnecessary. *See* 17 U.S.C. § 107 (2012).

⁵⁷ Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1911 (2007).

⁵⁸ H.R. REP. NO. 94-1476, at 67-70 (1976).

⁵⁹ ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012), *available at* <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

⁶⁰ *See, e.g.*, CORNELL UNIV., CHECKLIST FOR CONDUCTING A FAIR USE ANALYSIS BEFORE USING COPYRIGHTED MATERIALS, *available at* http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf (last visited Mar. 30, 2014); COLUMBIA UNIV., FAIR USE CHECKLIST, *available at* <http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>; GA. STATE UNIV., FAIR USE CHECKLIST, *available at* http://www.usg.edu/images/copyright_docs/fair_use_checklist.pdf (last visited Mar. 30, 2014).

Some scholars, like Jennifer Rothman, have argued that customs are detrimental to intellectual property rights. Rothman's concerns provide a helpful lens through which to discuss the three aforementioned primary sources for customs concerning fair use in academic settings. Rothman offered three reasons why the use of customs in intellectual property law is undesirable.⁶¹ First, Rothman suggested that customs will not "lead to an optimal development or allocation of [intellectual property]."⁶² Second, Rothman argued that the use of customs as a legal standard for fair use is undesirable because customs undermine the public's stake in using copyrighted material.⁶³ To be sure, when industry players are controlling the development of the law, the public's influence is weak. Third, Rothman compared customs in other areas, such as contract law, to customs in intellectual property and concludes that while customs may be helpful in some contexts, customs that evolve into standards are harmful to the public's interests in the intellectual property context.⁶⁴ A close review of the customs in intellectual property supports Rothman's concerns.

During the passage of the Copyright Act of 1976, representatives from publishing groups and academic groups created the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respects to Books and Periodicals."⁶⁵ The Agreement's language was not included in the Act of 1976, but Congress did enter the agreement's text into the legislative history for the Act.⁶⁶ The agreement was not intended to serve as the ceiling for permissible classroom copying.⁶⁷ To be sure, the guidelines were "not intended to limit the types of copying permitted under the standards of fair use" and the authors made clear that "[t]here may be instances in which copying" would violate the guidelines but are nonetheless "permitted under the criteria of fair use."⁶⁸ Still, many feel that the guidelines are overly restrictive.⁶⁹ For example, the guidelines "prohibit" teachers from repeatedly copying the same material each semester.⁷⁰

⁶¹ Rothman, *supra* note 57, at 1906-1907.

⁶² *Id.* at 1906.

⁶³ *Id.* at 1907.

⁶⁴ *Id.* at 1907-08.

⁶⁵ H.R. REP. NO. 94-1476, at 68-70 (1976).

⁶⁶ *Id.* at 67. See 17 U.S.C.A. § 107 for the final text of the relevant section of the Copyright Act.

⁶⁷ H.R. REP. NO. 94-1476, at 68 (1976) (explaining that "[t]he purpose of the following guidelines is to state the minimum standards of educational fair use . . .").

⁶⁸ *Id.*

⁶⁹ See generally Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001).

⁷⁰ H.R. REP. NO. 94-1476, at 69 (1976). See also *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1227-28 (N.D. Ga. 2012) (discussing Classroom Guidelines' "blanket prohibition" of copying over multiple terms).

Even though the language of the Classroom Guidelines was not included in the Copyright Act of 1976, some courts have viewed the text as “persuasive authority.”⁷¹ In *Princeton University Press*, the Sixth Circuit Court of Appeals recognized that the Classroom Guidelines did not have the force of law but found that the guidelines “give a general idea as to the type of copying Congress believed would constitute a fair use.”⁷² That courts rely on the Classroom Guidelines as persuasive authority is troubling because, as Jennifer Rothman argued, customs result in suboptimal development of intellectual property rights.⁷³ Customs result in the suboptimal development of intellectual property rights because, at their base, customs in the intellectual property context are established and followed to avoid litigation, not to ensure that the public can enjoy robust fair use rights.⁷⁴

The Association of Research Libraries (“ARL”)⁷⁵ published a “Code of Best Practices in Fair Use for Academic and Research Libraries” (“Code”).⁷⁶ The ARL disclaimed that the terms of the Code were not negotiated with rights holders and noted that its objective was “not to constrain librarians’ reliance on fair use, but to enable it.”⁷⁷ Certainly this would quell, though not completely eliminate, Rothman’s concern that the public’s interests were not adequately represented during the creation of these customs.⁷⁸ Still, the Code is suboptimal because the Code is billed as a great tool in “arriving at rational risk management strategies” to avoid litigation, rather than a tool to arrive at

⁷¹ See *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 919 n. 5 (2nd Cir. 1994) (explaining that “[t]hrough these guidelines are not considered necessarily binding on courts . . . , they exist as a persuasive authority marking out certain minimum standards for education fair uses . . .”).

⁷² Amy Groves, *Princeton University Press v. Michigan Document Services, Inc.: The Sixth Circuit Frustrates the Constitutional Purpose of Copyright and the Fair Use Doctrine*, 31 GA. L. REV. 325, 346 (1996).

⁷³ Rothman, *supra* note 57, at 1906-07.

⁷⁴ *Id.*

⁷⁵ “ARL is a nonprofit organization of 125 research libraries at comprehensive, research-extensive institutions in the US and Canada . . .” *About ARL*, ASSOCIATION OF RESEARCH LIBRARIES, <http://www.arl.org/arl/index.shtml> (last visited May 19, 2014).

⁷⁶ The ARL published the Code in conjunction with American University’s Washington College of Law. American University also publishes codes of best practices in fair use for documentary filmmakers and online video creators. See, ASSOCIATION OF RESEARCH LIBRARIES, *supra* note 59.

⁷⁷ “This code of best practices was not negotiated with rights holders. This code is the work of the academic and research library community and arises from that community’s values and mission. It presents a clear and conscientious articulation of the values of the community, not a compromise between those values and the competing interests of other parties.” *Id.* at 3.

⁷⁸ Jennifer Rothman suggests that customs are undesirable because the public is underrepresented in their development. Rothman, *supra* note 57, at 1950.

the fullest enjoyment of fair use rights permissible under the law.⁷⁹ Because the Code is framed as a tool to avoid litigation, risk-averse attitudes will persist. After all, the Code concedes that it “does not exhaust the application of fair use rights.”⁸⁰ Most applicable to modern educational practices, the Code does discuss electronic reserves at length and provides the following principle: “[i]t is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.”⁸¹ Still, the Code is not much help to universities as “appropriately tailored course-related content” is a euphemism for content tailored to a narrow understanding of fair use rights.

Taking a more interactive approach, in addition to the option to consult the Classroom Guidelines and the Code, most universities provide faculty with fair use checklists.⁸² These checklists prompt faculty members to consider a number of factors and conclude whether a court would consider their proposed use fair.⁸³ Most universities use the Copyright Advisory Office at Columbia University’s “Fair Use Checklist” as a model for their own.⁸⁴ The original Columbia University checklist, however, does not provide much guidance to faculty members. For example, the Columbia University checklist declares that using a “small quantity” of a copyrighted work will favor a fair use defense, but provides no explanation regarding what “small quantity” means in practice.⁸⁵ In contrast, GSU’s current checklist is significantly more detailed.⁸⁶ Instead of informing faculty that using a “small quantity” weighs in favor of fair use, GSU’s checklist illustrates a “small quantity” as follows: “Decidedly small portion of work used (no more than 10% of work not divided into

⁷⁹ ASSOCIATION OF RESEARCH LIBRARIES, *supra* note 59, at 10.

⁸⁰ *Id.* at 3.

⁸¹ *Id.* at 14.

⁸² See Cambridge Univ. Press v. Becker, 864 F. Supp. 2d 1190, 1219 (N.D. Ga. 2012).

⁸³ See, e.g., Cornell University, *Checklist for Conducting a Fair Use Analysis Before Using Copyrighted Materials*, CORNELL UNIVERSITY COPYRIGHT INFORMATION CENTER, 1, http://copyright.cornell.edu/policies/docs/Fair_Use_Checklist.pdf (last visited Mar. 31, 2014) (instructing faculty to “check all boxes that apply,” and “where the factors favoring ‘fair use’ outnumber the factors weighing against a finding of ‘fair use,’ reliance on the fair use exception is justified”).

⁸⁴ See, e.g., University System of Georgia, *Fair Use Checklist*, UNIVERSITY SYSTEM OF GEORGIA, http://www.usg.edu/images/copyright_docs/fair_use_checklist.pdf (last visited Mar. 31, 2014) (“Revised for use by the University System of Georgia, based upon the Copyright Advisory Office at Columbia University’s ‘Fair Use Checklist,’ <http://www.copyright.columbia.edu/fair-use-checklist>”).

⁸⁵ Kenneth D. Crews, *Fair Use Checklist*, COPYRIGHT ADVISORY OFFICE AT COLUMBIA UNIVERSITY LIBRARIES, 2 (May 14, 2008), <http://copyright.columbia.edu/copyright/files/2009/10/fairusechecklist.pdf>.

⁸⁶ University System of Georgia, *supra* note 84.

chapters or having less than 10 chapters or no more than 1 chapter of a 10 or more chapter work).”⁸⁷ Although bright-line numerical cut-offs generally offend the flexible nature of fair use, GSU’s checklist does not imply that any copying of a book that is greater than ten percent or ten chapters is automatically copyright infringement. GSU’s fair use checklist sets out to establish a safe harbor of sorts, and does not purport to establish the ceiling of permissible copying. GSU adopted a fair use checklist in 2009 after three publishers sued GSU for copyright infringement.⁸⁸ GSU’s current fair use checklist reflects Judge Orinda Evans’s decision in *Cambridge University Press*, which will be discussed at length in Section IV of this Note.⁸⁹

Like other sources of customs concerning fair use, the primary purpose of fair use checklists is to avoid litigation.⁹⁰ After completing the University of Arizona’s fair use checklist, for example, the user is directed to check one of two boxes in response to the following question: “is it reasonable to conclude that, in balance, the foregoing factors favor ‘Fair Use’?”⁹¹ If the user marks “no,” then the checklist instructs the user to seek permission to use the copyrighted work.⁹² If the user marks “yes,” then the site instructs the user to “maintain a copy of this worksheet for reference in the event of an infringement claim.”⁹³ The University of Arizona’s apparent intent in employing its fair use checklist is to avoid litigation. Or, in the alternative, if litigation is unavoidable, there apparent intent is to defend and, if they lose, to avoid a willfulness damage award.

The prevalence of customs in intellectual property-heavy industries is unsurprising because the law is so uncertain,⁹⁴ and the uncertainty in the law is

⁸⁷ *Id.*

⁸⁸ Kevin Smith, *That Pesky Checklist*, SCHOLARLY COMMUNICATION @ DUKE (July 19, 2009), <http://blogs.library.duke.edu/scholcomm/2009/07/19/that-pesky-checklist/>; see *Cambridge Univ. Press v. Becker*, 862 F. Supp. 2d 1190, 1190 (N.D. Ga. 2012).

⁸⁹ University System of Georgia, *supra* note 84; see *Cambridge Univ. Press*, 862 F. Supp. 2d at 1243.

⁹⁰ See *What is Fair Use?*, UNIVERSITY OF MASSACHUSETTS MEDICAL SCHOOL (Dec. 18 2013), <http://libraryguides.umassmed.edu/content.php?pid=154236&sid=1329810> (explaining that their fair use checklist and materials can provide considerable “guidance in making fair use evaluations and/or avoiding litigation”).

⁹¹ University of Arizona Office of the General Counsel, *Fair Use Checklist*, UNIVERSITY OF ARIZONA, 2, <http://www.library.arizona.edu/services/faculty/scholcom/fairuse/> (last visited Mar. 31, 2014).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Rothman, *supra* note 57, at 1909.

dramatically increased by changing technologies.⁹⁵ In the context of colleges and universities, technology has moved distribution of scholarly articles away from the physical copy shops in *Basic Books* and *Princeton University Press* to online course management systems like Blackboard and uLearn.⁹⁶ Now university faculty members are looking for guidance.

Aggressive litigation on behalf of publishers, however, obstructs this search for guidance because risk-averse attitudes make it less likely that colleges and universities will fight for robust fair use rights. James Gibson identified the problem of overly limited fair use rights as one of risk aversion: “because liability is difficult to predict and the consequences of infringement are dire, risk-averse intellectual property users often seek a license when none is needed.”⁹⁷ Gibson argued that risk aversion leads to a circular system in which content users seek licenses, even when they do not need them, creating a custom that encourages more licensing because users are afraid of being sued by copyright holders, which consequently influences the development of the “license first” doctrine.⁹⁸ The doctrine is impacted by the over-licensing of work and, making matters worse, the Supreme Court has suggested that customary licensing is a factor in fair use analysis. So, by purchasing licenses, users contribute to the erosion of fair use rights. Gibson referred to this circular effect as “doctrinal feedback.”⁹⁹

Encouraging universities to defend their fair use rights is easier said than done. As Gibson argued, “[i]t is usually in a user’s best interest to secure a license rather than take even a small risk of an adverse judgment; the simple reality is that finding out whether permission is required usually costs more than getting permission.”¹⁰⁰ If more universities begin vigorously defending their fair use rights, and are successful in the process, universities will save substantial money in the long run. After all, universities are repeat players in

⁹⁵ *Id.* at 1910.

⁹⁶ *Compare* Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (describing a case in which the course management system at issue was uLearn), *with* Princeton Univ. Press v. Mich. Document Srvs., 99 F.3d 1381 (6th Cir. 1996) (involving a physical copy shop). Blackboard Learn, a course management system that allows professors to distribute information and communicate with their students, boasts over 200 partners and 20 million daily users. *See About Bb*, BLACKBOARD, <http://www.blackboard.com/Platforms/Learn/Overview.aspx> (last visited Mar. 24, 2014).

⁹⁷ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 885. A “low stakes” copyright dispute just through discovery exceeds \$100,000. Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1003-04 (2007).

the content market; with every new class comes new content demands. By combining the decisions in *Cambridge University Press* and *Brownmark Films*, universities may be able to quickly end aggressive copyright litigation and bolster their right to freely use copyrighted work to educate others. As a substantive legal victory, universities should see *Cambridge University Press* as a lighthouse of certainty in a sea of ambiguity.

Unlike the Uniform Commercial Code, Congress has not formally incorporated customs into copyright law.¹⁰¹ Still, customs appear to be at the foundation of the fair use doctrine. The Supreme Court in *Harper & Row* noted that “the fair use doctrine was predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption . . .”¹⁰² Therefore, although Section 107 of the Copyright Act does not mention customs, the Supreme Court expects content-makers to understand what will likely happen to their work once released into the market, and to adjust their expectations accordingly.¹⁰³ The Supreme Court’s emphasis on customs in *Harper & Row* demonstrates how courts, through interpretation of customs, contribute to the development of fair use rights.¹⁰⁴ Interestingly, the Supreme Court’s phrasing in *Harper & Row* places the burden on the content-maker, not the user, for the notion of fair use is founded on the idea that the content-maker understands that his work is subject to manipulation and transformation in the public arena.¹⁰⁵ So then, content-makers can pressure content-users to over license, which in turn creates a custom to license and a subsequent expectation among content-makers that most uses of their work will be licensed. If universities stand up for their rights to fairly use copyrighted work in the classroom, and that becomes the reasonable expectation, they could alter how courts view their fair use defenses.

C. The Copyright Clearance Center

The CCC is contributing to the custom to license all uses, even when the user has a strong fair use defense, by litigating “gray area” cases of copyright

¹⁰¹ “The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies,” which include permitting the “continued expansion of commercial practices through custom . . .” U.C.C. § 1-103(a)(2) (2011). Customs also appear in the U.C.C.’s definition of “Buy in ordinary course of business.” *Id.* § 1-201(b)(9) (defining “Buyer in ordinary course of business” as one who “comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices”).

¹⁰² *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 550 (1985).

¹⁰³ *Id.*

¹⁰⁴ See generally *Harper & Row*, 471 U.S. 539.

¹⁰⁵ *Harper & Row*, 471 U.S. at 550.

infringement.¹⁰⁶ Such litigiousness leads to risk-averse behavior by universities, who constitute some of the CCC's most prominent customers and most recent targets for litigation.¹⁰⁷ Whether a market exists for the copyrighted work is a key factor in determining copyright infringement. Therefore, the licensing market that the CCC fosters, and the ease by which users can access and purchase those licenses, is exceptionally relevant.

The CCC is the premier digital licensing clearinghouse for American universities.¹⁰⁸ The CCC offers two licensing options for educational institutions: the pay-per-use model and the blanket model.¹⁰⁹ The pay-per-use model allows colleges and universities to pay for permission to use specific content when the need arises.¹¹⁰ The blanket model charges colleges and universities an annual fee for permission to use a wide array of content from participating rightholders.¹¹¹

Universities using the pay-per-use model begin their permission request process at the CCC's website.¹¹² The CCC's website limits searches to a work's title or ISBN.¹¹³ A Pennsylvania State University study found that staff members spend approximately five minutes requesting permission for each work through the CCC's website.¹¹⁴ If the work is "available" from the CCC, the CCC will inform the user if the work is immediately available, and at what cost.¹¹⁵

The CCC claims that the price and convenience of its licensing system makes it an invaluable tool for colleges and universities.¹¹⁶ The affordability of the CCC's licenses, however, was at question in *Cambridge University*

¹⁰⁶ Gray area cases are especially common when old laws apply to new technologies. *See* *Cambridge Univ. Press*, 863 F.Supp.2d 1190 (N.D. Ga. 2012).

¹⁰⁷ *See* Court Order at 10 n. 2, *Cambridge University Press*, 863 F.Supp.2d 1190 (N.D. Ga. 2012) (No. 235) (explaining that CCC underwrote half of the litigation costs for the three publishers' suit against GSU).

¹⁰⁸ *About Us*, COPYRIGHT CLEARANCE CENTER, <http://www.copyright.com/content/cc3/en/toolbar/aboutUs.html>.

¹⁰⁹ J. Christopher Holobar & Andrew Marshall, *E-Reserves Permissions and the Copyright Clearance Center: Process, Efficiency, and Cost*, PORTAL: LIBR. & THE ACAD., Vol. 11, No. 1, 517 (2011).

¹¹⁰ *Id.* at 518.

¹¹¹ *Id.*

¹¹² *Id.* at 519.

¹¹³ *Id.*

¹¹⁴ *Id.* at 520.

¹¹⁵ *Id.*

¹¹⁶ Press Release, Copyright Clearance Center Announces Annual Copyright License for Academia, COPYRIGHT CLEARANCE CENTER (June 22, 2007), *available at* http://www.copyright.com/content/cc3/en/toolbar/aboutUs/newsRoom/pressReleases/press_2007/press-release-07-06-22.html.

Press.¹¹⁷ Tom Allen, CEO of the Association of American Publishers, wrote an opinion-editorial appearing in *Publishers Weekly*, arguing that GSU could purchase an annual license under the CCC's blanket model for only \$3.75 per student.¹¹⁸ Kevin Smith, a Scholarly Communication Officer at Duke University, claimed that Allen might not be giving the whole picture.¹¹⁹ Smith observes that the \$3.75 per student fee is probably the first-year price, and that the price will go up over time.¹²⁰ Smith mentioned that the CCC presented Duke University with a similar model that would start at a low price, but would increase quickly.¹²¹

In the following section, this Note will discuss, among other things, how courts have analyzed factors regarding availability of licenses when reviewing the fourth listed factor for a fair use defense: whether the copy serves as a substitute for the original in the market.

IV. STRATEGIC LITIGATION

When confronted with litigation, universities should strategically use recent decisions in *Cambridge University Press v. Becker* and *Brownmark Films v. Comedy Partners* to defend their fair use rights. By quickly dismissing weak copyright infringement cases, without great time or expense, universities can change the industry-wide risk-averse attitudes and encourage universities to take more chances in exercising their right to fairly use copyrighted material in the classroom.

A. Brownmark Films, Inc. v. Comedy Partners

The plaintiffs in *Brownmark Films v. Comedy Partners* sued South Park Digital Studios for its depiction of an immensely popular online music video in its critically acclaimed animated comedy show, *South Park*.¹²² The music video in question featured Sam Norman, also known as Samwell, performing

¹¹⁷ Kevin Smith, *Licenses, Prices, Fair Use and GSU*, SCHOLARLY COMMUNICATION @ DUKE (Aug. 3, 2011) available at <http://blogs.library.duke.edu/scholcomm/2011/08/03/licenses-prices-fair-use-and-gsu/>.

¹¹⁸ Tom Allen, *Common Goals: AAP on the GSU E-reserve Lawsuit*, PUBLISHERS WEEKLY (Jul. 8, 2011), available at <http://www.publishersweekly.com/pw/by-topic/columns-and-blogs/soapbox/article/47931-common-goals-aap-on-the-gsu-e-reserve-lawsuit.html>.

¹¹⁹ Smith, *supra* note 120.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Brownmark Films v. Comedy Partners (Brownmark II)*, 682 F.3d 687, 689 (7th Cir. 2012).

his song, “What What (In the Butt)” (“WWITB”).¹²³ The Seventh Circuit Court of Appeals artfully described the song as a “paean to anal sex.”¹²⁴ The South Park episode at issue was “Canada on Strike,” in which the children of South Park set out to become Internet-famous and earn enough money to meet Canada’s demands and end Canada’s strike.¹²⁵ In that episode, the children of South Park created a popular online video featuring Butters, a popular South Park character, singing WWITB.¹²⁶

In its claim against South Park, Brownmark Films sought damages and injunctive relief for copyright infringement.¹²⁷ South Park filed a 12(b)(6) motion to dismiss on the grounds that their use of the WWITB video clearly constituted parody and thus was permissible as fair use.¹²⁸

In opposition to South Park’s motion, Brownmark Films argued that South Park Digital Studios could not bring a defense of fair use, an affirmative defense, to support their pre-trial 12(b)(6) motion to dismiss, but the district court disagreed.¹²⁹ Raising an affirmative defense on a 12(b)(6) motion to dismiss is generally inappropriate because the record, which is limited to the pleadings, is usually insufficient for the reviewing court to make a determination.¹³⁰ The Seventh Circuit Court of Appeals, however, agreed with the district court that *Brownmark* was a clear case of fair use and the parties should not have to suffer through the costly and potentially lengthy process of discovery.¹³¹ If the plaintiffs had alternatively answered the complaint alleging an affirmative defense, said answer would have initiated the discovery process.¹³² The Seventh Circuit affirmed the district court ruling, holding that South Park’s version of WWITB was “clearly a parody and has not supplanted the original WWITB.”¹³³

The district court found that the first factor favored South Park because the purpose of the use was clearly to parody the original.¹³⁴ The music and choreography were markedly similar, and the point of South Park’s video was

¹²³ *Id.*

¹²⁴ *Id.* at 689.

¹²⁵ *Id.*; see also “South Park” *Canada on Strike* (TV Episode 2008), IMDB, <http://www.imdb.com/title/tt1211261/>.

¹²⁶ *Brownmark II*, 682 F.3d 689.

¹²⁷ *Brownmark Films, LLC v. Comedy Partners (Brownmark I)*, 800 F. Supp. 2d 991, 994 (E.D. Wis. 2011).

¹²⁸ *Brownmark II*, 682 F.3d 689.

¹²⁹ *Brownmark I*, 800 F. Supp. 2d 999.

¹³⁰ *Brownmark II*, 682 F.3d at 690. “Brownmark correctly notes that courts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses Further, these defenses typically turn on facts not before the court at that stage in the proceedings.” *Id.*

¹³¹ *Id.*

¹³² *Brownmark II*, 682 F.3d at 691.

¹³³ *Brownmark II*, 682 F.3d at 693.

¹³⁴ *Brownmark I*, 800 F. Supp. 2d 1000.

to highlight the ridiculous nature of the original video. The court found that the second factor of the fair use analysis, the nature of the work, was also little help to Brownmark, despite the creative nature of the plaintiff's video, because parody almost always involves creative work.¹³⁵ The third factor, the substantiality of the work copied, also favored South Park because Butters's version of WWITB did not supplant the original.¹³⁶ Lastly, the district court held that the fourth factor, the market effect of the use on the original, favored South Park, because, as the children in the episode found out, viral videos are only worth "theoretical dollars," meaning that the millions of views that the original music video received on YouTube do not correspond to millions of dollars in the offline world.¹³⁷ This is to say that there is no market in which to supplant the original.

The Seventh Circuit noted that this was not the first time they have granted a 12(b)(6) motion to dismiss based on an affirmative defense.¹³⁸ In *Brooks v. Ross*, the Seventh Circuit affirmed a grant of a motion to dismiss based on a statute of limitations defense because all the relevant dates were set forth in the complaint.¹³⁹ Similarly, the Seventh Circuit's decision to uphold the dismissal in *Brownmark II* turned on the sufficiency of the factual record at the pleadings stage.¹⁴⁰

To bolster its motion to dismiss Brownmark Film's suit, South Park attached the original music video and the version aired in "Canada on Strike" to its motion.¹⁴¹ To support its motion, South Park relied on the incorporation by reference doctrine.¹⁴² Rule 12(d) of the Federal Rules of Civil Procedure "requires that Rule 12(b)(6) or 12(c) motions containing materials outside of the pleadings be converted into motions for summary judgment."¹⁴³ Of course, South Park sought to avoid summary judgment and the costly discovery that would result.¹⁴⁴ The incorporation by reference doctrine allows a court to consider "documents attached to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to his claim."¹⁴⁵

Brownmark II has received significant attention because the court, for the first time, extended the incorporation by reference doctrine to audio-visual

¹³⁵ *Id.* at 1001.

¹³⁶ *Brownmark II*, 682 F.3d 693.

¹³⁷ *Id.* at 689, 693-94.

¹³⁸ *Id.* at 690.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 690-91.

¹⁴¹ *Id.* at 689.

¹⁴² *Id.* at 690.

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *Wright v. Ass'd. Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

works.¹⁴⁶ It is not controversial, however, to say that the incorporation by reference doctrine applies to text.¹⁴⁷ In a copyright infringement complaint, for example, the plaintiff must identify the allegedly infringing text and the copyrighted work itself.¹⁴⁸ Thus, it would be easy for a defendant, such as a university, to incorporate such text in a 12(b)(6) motion to dismiss. Pairing the 12(b)(6) fair use strategy from *Brownmark Films* with the fair use framework from *Cambridge University Press* could provide universities with an efficient method to enforce their fair use rights.

B. Cambridge University Press v. Becker

In *Cambridge University Press*, three publishers sued GSU alleging ninety-nine counts of copyright infringement.¹⁴⁹ The publishers alleged that GSU violated copyright law when it distributed excerpts of copyrighted work to GSU students via an online course management system.¹⁵⁰ Judge Orinda Evans concluded that all but five of the seventy-five triable claims of copyright infringement were protected under fair use.¹⁵¹ Judge Evans's ruling is favorable to universities who use course management systems to distribute excerpts of copyrighted works to their students.¹⁵² The ruling in *Cambridge University Press* brings some certainty to the otherwise murky field of copyright law.¹⁵³ Under the *Cambridge University Press* framework, so long as the excerpts of the copyrighted work are for an educational purpose, limited to the students enrolled in the class, factual in nature, and the amount copied falls under a certain threshold (roughly ten-percent of the work), then the copying is permissible.¹⁵⁴

Reviewing Judge Evans's analysis will help demonstrate how universities can wield *Cambridge University Press* to limit the negative effects of the clearance culture.

Factor One: Purpose and Character of the Use: Judge Evans decided that the first factor of fair use, the purpose and character of the use, favors the

¹⁴⁶ See *Brownmark II*, 682 F.3d at 690-91.

¹⁴⁷ See *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

¹⁴⁸ See *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1201-03, 1218, 1221 (N.D. Ga. 2012).

¹⁴⁹ *Id.* at 1190, 1203-05.

¹⁵⁰ *Id.* at 1201, 1218-21.

¹⁵¹ *Id.* at 1363.

¹⁵² See Michael Les Benedict, *Landmark Decision on Electronic Reserves for Courses*, PERSP. ON HIST., Sept. 2012, available at <http://www.historians.org/perspectives/issues/2012/1209/Landmark-Decision-on-Electronic-Reserves-for-Courses.cfm>.

¹⁵³ See *Id.*

¹⁵⁴ See *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190, 1242-43 (N.D. Ga. 2012).

defendants because the copies were for instruction and scholarship at GSU.¹⁵⁵ The publishers argued that other courts had ruled against users claiming fair use, despite the educational purpose of the use.¹⁵⁶ In arguing this point, the publishers concede that the first factor cuts against them, but maintain that losing the first factor is not dispositive. During her discussion of the first factor of fair use, Judge Evans distinguished the instant case from other coursepack cases because the copies were made by a nonprofit educational institution for educational purposes.¹⁵⁷ In other cases, for-profit copy shops produced the coursepacks for commercial purposes.¹⁵⁸

Additionally, the publishers argued that the pure duplication of the copyrighted work meant that the work was not transformative, and thus the first factor should favor the plaintiffs.¹⁵⁹ Judge Evans cited one of the Supreme Court's landmark copyright cases, *Campbell v. Acuff-Rose Music, Inc.*, for the proposition that classroom reproduction was one of the intended statutory exceptions to the law's focus on transformative uses.¹⁶⁰ Concluding her first factor analysis, Judge Evans acknowledged that a nonprofit educational purpose does not automatically ensure fair use and continued to review the other factors of GSU's fair use defense.¹⁶¹

Factor Two: Nature of the Copyrighted Work: Judge Evans opens her factor two analysis by distinguishing between ideas and expression.¹⁶² In *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the Supreme Court rejected the idea that non-creative phonebooks should receive copyright protection simply because a great deal of work went into compiling the content of the directory.¹⁶³ Rejecting this "sweat of the brow" doctrine, the Supreme Court determined that work qualifies for copyright protection if the "work is independently created by the author and possesses some minimal degree of creativity."¹⁶⁴ Judge Evans acknowledged that all of the texts in question met the requisite degree of creativity to qualify for copyright protection.¹⁶⁵

Judge Evans noted, however, that courts must look further than a black-and-white creative-noncreative standard. When analyzing a fair use defense, *Campbell* encourages courts to look at the degree of creativity in the works: the

¹⁵⁵ *Id.* at 1224.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996).

¹⁵⁹ *Cambridge Univ. Press*, 863 F.Supp.2d at 1224.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

¹⁶² *Id.* at 1225.

¹⁶³ *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

¹⁶⁴ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1225.

¹⁶⁵ *Id.*

higher the level of creativity used in the work, the higher level of copyright protection the work is afforded under the law.¹⁶⁶ None of the books at question in this case were fictional, which, according to Judge Evans, would have warranted a greater degree of protection.¹⁶⁷

The plaintiffs argued that the works in question should receive greater protection because of their scholarly nature. The plaintiffs' witnesses testified to the large amount of time and money that goes into researching and writing scholarship.¹⁶⁸ Judge Evans rejected this argument, stating that, in regards to factual scholarship, "cost, effort, and level of creativity required to produce the work are not relevant to the factor two analysis."¹⁶⁹ Judge Evans ultimately decided that "the books involved in this case are properly classified as informational in nature . . . favoring fair use."¹⁷⁰

Factor Three: Amount and Substantiality of the Portion Used: Plaintiffs argued that the Classroom Guidelines should be used by the Court to limit the permissible amount of copying. Judge Evans rejected this argument, noting that Congress never adopted any part of the Classroom Guidelines and that the guidelines were only intended to be advisory.¹⁷¹ The House Committee report made clear that "the purpose of the Guidelines was to state the minimum and not the maximum standard of educational fair use."¹⁷² Additionally, Judge Evans noted that a "brightline restriction," like the one in the Classroom Guidelines, "stands in contrast to the statutory scheme described in [Section] 107, which codified a multi-factorial analysis in which no factor is dispositive."¹⁷³

Throughout her analysis, Judge Evans searched for certainty. Judge Evans noted that "in the absence of judicial precedent concerning the limits of fair use for nonprofit educational uses, universities have been guessing about the permissible extent of fair use."¹⁷⁴ Succeeding in her goal, Judge Evans's opinion brings some clarity to an otherwise ambiguous area of the law.

This much-needed clarity stems from Judge Evans's conclusion that factor three will favor fair use when the length of an excerpt from a book that is not separated into chapters, or has less than ten chapters, falls under ten-percent.¹⁷⁵

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1225-26.

¹⁶⁸ *Id.* at 1226.

¹⁶⁹ *Id.*

¹⁷⁰ Ultimately, Judge Evans decided that the second factor favors GSU because the work copied was predominantly informational, and thus received lesser protection than creative work would. *Id.* at 1226.

¹⁷¹ *Id.* at 1227-29.

¹⁷² *Id.* at 1228.

¹⁷³ *Id.* at 1229.

¹⁷⁴ *Id.* at 1232.

¹⁷⁵ *Id.* at 1243.

Additionally, factor three will favor fair use when the length of the excerpt used from a book with more than ten chapters is one chapter or less.¹⁷⁶ Judge Evans did not assert that excerpts longer than ten-percent or one chapter would always fail fair use analysis.¹⁷⁷ To be sure, just as the Classrooms Guidelines does not represent the fair use ceiling, Judge Evans is not suggesting that her enumerated limits set the maximum allowable copying under fair use.¹⁷⁸ She did, however, set a fairly formulaic standard for universities to consider when striving to satisfy the third factor of fair use.¹⁷⁹

Factor Four: The Effect of the Use on the Potential Market Value of the Copyrighted Work: Citing *Campbell*, Judge Evans noted that “factor four should weigh against defendant[s] only when the harm is significant.”¹⁸⁰ Defendants have the burden of proof and are responsible for showing that any harm to the market value of the copied work is insubstantial.¹⁸¹ The law is primarily concerned with market substitution.¹⁸²

Judge Evans emphasized that the defendant’s use of only small portions of the work strengthen the fair use defense.¹⁸³ After noting that the length of the copied excerpts averaged ten-percent of the whole works, Judge Evans concluded that a ten-percent excerpt “would not substitute for the original, no matter how many copies were made.”¹⁸⁴ Judge Evans further noted that a professor who repeated his or her use of an excerpt constituting ten-percent of the original work would not substantially harm the market potential of the copyrighted work.¹⁸⁵ Though some minimal harm will be done to the market value of the copyrighted work, to argue that any harm to the copyrighted work undermines fair use is circular and counterproductive. A copyright holder will experience some harm in every fair use case, but the real question for courts to decide is whether the harm is so substantial to remove the copying from fair use’s protection. On that point, Judge Evans underscored that “[f]actor four should weigh against defendant only when the harm is significant”¹⁸⁶

The plaintiffs relied heavily on *American Geophysical Union v. Texaco Inc.* to support their contention that the fourth factor weighed against fair use.¹⁸⁷ In

¹⁷⁶ *Id.*

¹⁷⁷ *See Id.*

¹⁷⁸ *See Id.* at 1243.

¹⁷⁹ *See Id.*

¹⁸⁰ *Id.* at 1235.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1236.

¹⁸³ *Id.* at 1243.

¹⁸⁴ *Id.* at 1236.

¹⁸⁵ *Id.* On this point, Judge Evans significantly parts with the Classroom Guidelines which prohibits repeated copying of works; *see* Classroom Guidelines, *supra* note 48, at 69.

¹⁸⁶ *Id.* at 1235.

¹⁸⁷ *Cambridge Univ. Press*, 863 F.Supp.2d at 1236.

Texaco, the Second Circuit found that the existence of an opportunity to purchase licenses through a system like the CCC's means that seeking "payment for a particular use tends to become legally cognizable under the fourth fair use factor" ¹⁸⁸

First, Judge Evans acknowledged that copying small portions of work did not have a sufficient impact on the market value of the entire copyrighted works to effectively replace the works in the marketplace, noting that professors would not have had students buy the entire books if they could not use the excerpts. ¹⁸⁹ Judge Evans noted, however, that losing revenue from multiple permissions in an academic setting could result in substantial financial loss. ¹⁹⁰ Because GSU was distributing excerpts digitally, Judge Evans concluded that the permissions argument was only valid when there are easily accessible digital permissions. ¹⁹¹ Plaintiffs did succeed in five of their copyright infringement claims where digital licenses were easily accessible. Therefore, Judge Evans limited the reach of the *Texaco* decision by concluding that only when the specific permission that the defendant needs is available can the court look at the existence of a market as evidence of adverse effect on market value. ¹⁹² In *Cambridge University Press*, Judge Evans decided that the record contained insufficient evidence of the availability of digital licenses, and thus factor four did not weigh in the plaintiff's favor. ¹⁹³

Admittedly, *Cambridge University Press* is only one decision from one district court. Because *Cambridge University Press* was decided so recently, and immediately appealed to the Eleventh Circuit Court of Appeals, which at the time of this publication has yet to release its decision, courts have had few opportunities to rely on Judge Evans's rationale. That Judge Evans's 350-page decision is thorough and well-reasoned should provide comfort to other district courts look to rely on her rationale. Judge Evans noticeably took the time to conduct a multi-factor analysis for every copyright infringement claim, leaving no question regarding the thoroughness of the Judge's application of the law to the facts. ¹⁹⁴ Most importantly, Judge Evans provided a thorough framework through which universities can defend their fair use rights. After *Cambridge University Press*, colleges and universities can have greater confidence about the use of copyrighted material in the classroom.

¹⁸⁸ *Id.* (citing *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994)).

¹⁸⁹ *Id.* at 1236.

¹⁹⁰ *Id.* at 1237.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1238.

¹⁹⁴ *Id.* at 1210.

C. Melding South Park's Procedural Victory with GSU's Substantive Victory

Copyright law depends on "litigation for its development and efficacy."¹⁹⁵ Congress recognized that the judiciary would play a large role in developing the doctrine of fair use, but courts cannot develop fair use without any fair use cases.¹⁹⁶ Unfortunately, given the complexity and uncertainty of fair use cases, libraries and universities are often unlikely to engage in full-throated defense of their rights.¹⁹⁷ Large licensing groups, like the CCC, however, have an incentive to litigate for more expansive rights for copyright holders because, even if the expected returns from one defendant are small, the aggregate effects are large.¹⁹⁸ The CCC's litigation bolsters its effect by playing a key role in the establishment of an industry custom to over license to avoid the risk of suit. Universities, however, should look to pair the decisions in *Brownmark Films* and *Cambridge University Press* to end litigation quickly and forcefully assert their fair use rights.

1. Distilling Fair Use Principles from Cambridge University Press

In the same way that South Park used basic fair use principles to quickly dismiss *Brownmark Films*'s complaint, universities can potentially use the basic fair use principles clarified in *Cambridge University Press* to quickly dismiss claims from publishers.

Cambridge University Press first addressed the "purpose and character of the use."¹⁹⁹ *Cambridge University Press* stands for the following principle: if the copying is done by a nonprofit educational institution, and if the copies are being used for an educational purpose, then the first factor favors the defendant.²⁰⁰ The Seventh Circuit, when reviewing South Park's motion to dismiss, noted that parody was clearly the type of transformative use contemplated in the preamble of Section 107 of the Copyright Act of 1976.²⁰¹

¹⁹⁵ John Fonstad, *Protecting Fair Use with Fogerty: Toward a New Dual Standard*, 40 U. MICH. J.L. REFORM 623 (2007).

¹⁹⁶ H.R. REP. NO. 94-1476, at 66 (1976) ("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."); *Id.* at 65 ("Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.").

¹⁹⁷ Fonstad, *supra* note 195, at 630-631.

¹⁹⁸ *Id.* at 628.

¹⁹⁹ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1224.

²⁰⁰ *Id.*

²⁰¹ 17 U.S.C. § 107 (2012) ("[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

Even clearer than parody, which was only implied in Section 107's preamble, copying for educational purposes was explicitly contemplated by Congress as permissible fair use.²⁰²

The second principle distilled from *Cambridge University Press* addresses the "nature of the copyrighted work" and states that if the copying work is factual and informational in nature, then the second factor of a fair use analysis favors the defendant.²⁰³ The Seventh Circuit in *Brownmark* found that the creative nature of Brownmark's work was of little relevance since parodies inevitably involve creative works.²⁰⁴ As seen in *Cambridge University Press*, a court should have no problem drawing a similar brightline when the work copied is factual and informational in nature.²⁰⁵ Only the Sixth Circuit found coursepacks sufficiently creative to tilt the second factor of fair use in the plaintiff's favor, and the court's reasoning was misguided and remains unpersuasive.

The third principle from *Cambridge University Press* addresses the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."²⁰⁶ Under *Cambridge University Press*, if the copied excerpt is ten-percent or less of an entire work with less than ten chapters, or the copied excerpt is one chapter or less of a work with more than ten chapters, then the third factor favors fair use.²⁰⁷ The hard line that Judge Evans presented in *Cambridge University Press* provides future courts with the necessary guidelines to rule on a motion to dismiss at the pleadings stage.²⁰⁸ Because the plaintiff must reference both the copyrighted work and the infringing works in the complaint, defendants can use incorporation by reference to attach the texts to their 12(b)(6) motion to dismiss.²⁰⁹ Using incorporation by reference in this way eliminates the need for costly and lengthy discovery.²¹⁰

2. Lessons Learned from *Brownmark Films*

South Park's 12(b)(6) motion to dismiss briefly ran through the four factors of fair use. Regarding the purpose of the use, South Park noted that the purpose of the show "was to comment on and critique the social phenomenon that is the 'viral video.'"²¹¹ As to the nature of South Park's use, South Park explained that the original WWITB video had been viewed millions of times

²⁰² *Id.*

²⁰³ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1225.

²⁰⁴ *Brownmark II*, 682 F.3d at 693.

²⁰⁵ *Cambridge Univ. Press*, 863 F.Supp.2d at 1226.

²⁰⁶ 17 U.S.C. § 107(3).

²⁰⁷ *Cambridge Univ. Press*, 863 F.Supp.2d at 1243.

²⁰⁸ *Id.*

²⁰⁹ *Brownmark II*, 682 F.3d at 690.

²¹⁰ *Id.* at 690-91.

²¹¹ *Id.* at 693.

online, and its popularity was one of the reasons why South Park chose to parody WWITB.²¹² South Park argued that the amount used favored fair use because fair use allows users to copy recognizable elements of the plaintiff's work so that the audience understands the target of the humor.²¹³ Lastly, South Park argued that the economic impact of the defendant's work has minimal relevance in parody cases because it is unlikely that the "creators of imaginative works will license critical reviews or lampoons of their own production."²¹⁴ The most important principle garnered from the *Brownmark Films* decision is that when all relevant facts are present in a complaint, "a court may properly dismiss a case before discovery . . . on the basis of an affirmative defense."²¹⁵

3. Preemptively Addressing Criticism

To be sure, a hypothetical risk-averse General Counsel for the University of Any State will present some concerns regarding pairing *Cambridge University Press* and *Brownmark Films*. Is *Brownmark Films* limited to parody? Can a court conduct the market effect analysis based on the pleadings in every fair use case? Will *Brownmark Films* and *Cambridge University Press* extend to other jurisdictions? This section will address the General Counsel's concerns in turn.

First, *Brownmark Films* is not limited to parody. *Brownmark Films*'s procedural holding can apply to any case with pleadings factually rich enough to establish a viable fair use defense.²¹⁶

Second, a court cannot conduct the market effect analysis based on the pleadings every time, but in a case like *Cambridge University Press*, lack of reliable market effect analysis may make no difference.²¹⁷ The court in *Cambridge University Press* acknowledged that unlicensed reproduction of scholarly works could have an adverse market effect, but since GSU was distributing the excerpts digitally, there needed to be easily accessible digital licensing solutions available.²¹⁸ In *Cambridge University Press*, digital licenses were not easily accessible for all of the copied material. Because GSU could not easily access digital licenses, Judge Evans was unpersuaded that GSU's copying and distribution had an adverse effect on the market. Still, the mere existence of digital licensing solutions does not foreclose a fair use defense.

Finally, it is perhaps too early to conclude that *Brownmark Films* and

²¹² *Id.* at 693.

²¹³ Defendants' Memorandum of Law in Support of Motion to Dismiss, Plaintiff's Amendment Complaint, Docket No. 15, 2:10-CV-01013-JPS.

²¹⁴ *Campbell*, 510 U.S. at 592.

²¹⁵ *Brownmark II*, 682 F.3d at 690.

²¹⁶ *Id.*

²¹⁷ *Cambridge University Press*, 863 F.Supp.2d at 1243.

²¹⁸ *Id.*

Cambridge University Press will absolutely extend to other jurisdictions, but there is little reason to think otherwise.²¹⁹ In fact, *Brownmark Films*'s procedural holding was treated favorably by a District Court in the Sixth Circuit Court of Appeals²²⁰ and the Second Circuit Court of Appeals.²²¹

Additionally, at the time of publication, the Seventh Circuit's decision in *Brownmark Films* has received minimal negative treatment, consisting of only two cases, both of which are inapplicable to cases like *Cambridge University Press*.²²² For an example of negative treatment, consider *Katz v. Chevaldina*. The Southern District Court of Florida distinguished *Katz v. Chevaldina* from *Brownmark Films* in two ways.²²³

First, the district court in *Katz* noted that "in *Brownmark Films* the plaintiff alleged a single infringing use" whereas in *Katz*, the plaintiff alleged that the defendant "[had] published numerous infringing copies" in a variety of contexts.²²⁴ In *Katz*, the court was concerned about the defendant publishing a copyrighted headshot in a variety of contexts that may fall outside the fair use for news reporting defense.²²⁵ Even though a case involving a publisher suing a university will undoubtedly involve more than one infringing copy, all copying will occur in the same context: inside a classroom for educational purposes.²²⁶ Thus, the context for analysis will not change like it did in *Katz*, and *Brownmark Films* remains, at least in theory, an appropriate procedural framework by which educational institutions may enforce their fair use rights.²²⁷

In *Katz*, the plaintiff was able to undermine the plaintiff's fair use case by pointing to the variety of contexts, including commercial contexts, in which the picture was published.²²⁸ Plaintiffs, in a case like *Cambridge University Press*, would likely be unsuccessful in their efforts to contest the defendant's position as a nonprofit educational institution, using copies for educational purposes. Additionally, through the incorporation-by-reference doctrine, the defendants could show, in fact, that the substantiality of the work used was under the threshold set by Judge Evans in *Cambridge University Press*.²²⁹ Of course, this threshold is not an absolute but serves as a helpful tool for future courts to analyze fair use cases. An area where the plaintiffs could draw doubt and show that a triable issue of fact remained is on the market effect of the copies.

²¹⁹ See *Tovey v. Nike, Inc.*, 2012 WL 7017821, at *7-8 (N.D. Ohio).

²²⁰ See *Id.*

²²¹ *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013).

²²² See *infra* notes 215-224.

²²³ *Katz v. Chevaldina*, 900 Fed. Supp. 2d 1314 (S.D. Fla. 2012).

²²⁴ *Id.* at 1316.

²²⁵ *Id.* at 1316-17.

²²⁶ See *Cambridge Univ. Press*, 863 F. Supp. 2d 1190.

²²⁷ See *Katz*, 900 F. Supp. 2d at 1316.

²²⁸ *Id.* at 1315-16.

²²⁹ See *supra* note 207.

If the plaintiffs can effectively allege that a digital licensing solution was available, then the court may have to consider that issue further, following discovery.²³⁰

In *Tovey v. Nike*, a trademark case, a magistrate judge in the Northern District of Ohio expressly rejected the defendant's attempt to raise a fair use defense in a 12(b)(6) motion to dismiss.²³¹ The district court, however, rejected the magistrate judge's recommendation noting that in *Brownmark Films* the Sixth Circuit held that "affirmative defense of fair use applies to bar trademark infringement claims."²³² The district court went on to reject the fair use defense, not due to procedural impropriety, but because the record did not include the necessary facts to support the defendants motion to dismiss.²³³ Again, a 12(b)(6) motion to dismiss based on a fair use defense depends on pleadings that develop a rich factual record. Fortunately, because a copyright infringement claim requires the plaintiff to plead specific infringements, and the incorporation by reference doctrine permits defendants to attach the copyrighted works to their motion to dismiss, finding a sufficiently rich factual record at the pleadings stage is feasible for universities.

IV. CONCLUSION

The fair use doctrine, as applied to universities that use online course management systems to distribute copyrighted material, is unclear. This lack of legal clarity is fostering customs that pressure universities to seek permission to copy work, even when most of the proposed copying is protected under fair use. These customs are also leading to risk-averse attitudes among the university faculty, which further entrench the custom of "when in doubt, seek permission" — a problem of circularity. These customs and risk-averse attitudes restrict the fair use rights of educational institutions because they keep fair use cases out of court. Congress designed fair use with courts in mind and courts need to hear a variety of cases to determine the appropriate boundaries of fair use. However, courts cannot play their role in the developing the doctrine of fair use if universities shy away from defending their fair use rights.

Universities won a major substantive victory in *Cambridge University Press v. Becker*. Judge Orinda Evans created a clear framework within which university faculty can feel comfortable exercising their fair use rights. Moreover, universities can utilize the procedural victory in *Brownmark Films v. Comedy Partners* in which the Seventh Circuit Court of Appeals affirmed

²³⁰ See *Cambridge Univ. Press*, 863 F. Supp. 2d at 1243.

²³¹ *Tovey v. Nike, Inc.*, No. 1:12-cv-0448, 2012 WL 7017821, at *8 (N.D. Ohio July 3, 2012).

²³² *Tovey v. Nike, Inc.*, No. 1:12-cv-0448, 2013 WL 486341, at *8 (N.D. Ohio Feb. 6, 2013) (quoting *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 611-12 (6th Cir. 2009) (internal quotation marks omitted)).

²³³ *Tovey v. Nike, Inc.*, No. 1:12-cv-0448, 2013 WL 486341, at *14.

the district court's decision to grant a 12(b)(6) motion to dismiss based on the affirmative defenses of fair use.

Primarily, universities are risk-averse because they wish to avoid being dragged through lengthy and costly litigation. Pairing the holdings in *Cambridge University Press* and *Brownmark Films* may allow the universities to take infringement claims, like the one against GSU in *Cambridge University Press*, out of court quickly. In the end, pairing these substantive and procedural victories will allow universities to bolster their fair use rights through case law while simultaneously undermining the customs that harm those rights.