

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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BROWNMARK FILMS, LLC,

Plaintiff,

v.

Case No. 10-CV-1013

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

Defendants.

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**ORDER**

Federal lawsuits seldom touch on such riveting subjects and regard so many colorful parties as the present matter. The plaintiff, Brownmark Films, LLC (“Brownmark”), is the purported co-owner of a copyright in a music video entitled “What What (In the Butt)” (“WWITB”), a nearly four minute ditty regarding the derrière of the singer of the underlying work. (Am. Compl. ¶¶ 11-13). The music video begins with an array of bizarre imagery – from a burning cross to a floating pink zeppelin – and only gets stranger from there. The heart of the video features an adult African American male ensconced in a bright red, half-buttoned, silk shirt, dancing, grinning creepily at the camera, and repeatedly singing the same cryptic phrases: “I said, what what, in the butt” and “you want to do it in my butt, in my butt.” Meanwhile, the defendants are the entities involved in the production of “South Park,” an animated sitcom that centers on the happenings of four foul-mouthed fourth graders in a small mountain town in Colorado. *Id.* ¶¶ 6-10. In the nearly

fifteen years South Park has aired on Comedy Central, the four central characters have, amongst other adventures, battled space aliens,<sup>1</sup> hunted Osama Bin Ladin in the wake of 9/11 ala Elmer Fudd and Bugs Bunny,<sup>2</sup> and have, more recently, resolved the nation's economic woes by charging the nation's consumer debts on one of the character's credit card.<sup>3</sup>

Brownmark and the makers of South Park find themselves litigating against each other in federal court as a result of an April 2, 2008 episode of the television program. (Am. Compl. ¶ 14). Specifically, Brownmark's amended complaint seeks damages and injunctive relief for copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.*, against the defendants because of a South Park episode entitled "Canada on Strike." (Docket #6). In that episode, one of the characters – the naive "Butters Stotch" – is coaxed by his fellow classmates to record an internet video in the hopes of "making money on the Internet." The video – which lasts for fifty eight seconds of the approximately twenty-five minute episode – replicates parts of the WWITB video, with the nine-year old Butters singing the central lines of the original video, while dressed as a teddy bear, an astronaut, and even as a daisy. In the episode, Butters' video, much like the original WWITB video, goes "viral," with millions watching the clip. However, after their attempts to collect "internet money"

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<sup>1</sup> See *South Park: Cartman Gets an Anal Probe* (Comedy Central television broadcast Aug. 13, 1997).

<sup>2</sup> See *South Park: Osama bin Laden Has Farty Pants* (Comedy Central television broadcast Nov. 7, 2001).

<sup>3</sup> See *South Park: Margaritaville* (Comedy Central television broadcast March 25, 2009).

prove fruitless, the South Park fourth graders learn that their video, much like other inane viral YouTube clips, have very little value to those who create the work.

For as remarkable and fascinating the parties and issues surrounding this litigation are, this order, which will resolve a pending motion to dismiss (Docket #8), will be, by comparison, frankly quite dry. The central legal issues surrounding the motion to dismiss require that the court resolve several relatively tricky issues regarding copyright law and civil procedure, hardly the sort of subject that would create millions of fans, as the work of all of the parties before the court did. Nonetheless, while the court has a “tough job,” “someone has to do it,” and, “with shoulder to the wheel,” this court “forge[s] on” to resolve the pending motion. *Janky v. Lake County Convention & Visitors Bureau*, 576 F.3d 356, 358 (7th Cir. 2009).

Before resolving the substance of the defendant’s motion to dismiss, however, the court must discuss the procedural rules animating a Fed. R. Civ. P. 12(b)(6) motion. Fed. R. Civ. P. 12(b)(6) permits a defendant to assert a defense that the underlying complaint fails to state a claim upon which relief can be granted. To survive a 12(b)(6) motion to dismiss, the plaintiff’s complaint must only “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is *plausible* on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)) (emphasis added). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949; see also *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404-05 (7th Cir. 2010) (“[T]he plaintiff must give enough details about the subject-matter of the case to present a story that holds together . . . the court will ask itself *could* these things have happened, not *did* they happen.”). More broadly, a district court must consider whether the plaintiff’s allegations are “unrealistic or nonsensical,” purely “speculative,” or even “contradict other” allegations in deciding the ultimate question of whether a complaint has “enough substance to warrant putting the defendant through the expense of discovery.” *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011). With these principles in mind, the court proceeds to examine the defendants’ arguments in order.

#### **A. Standing**

First, the defendants argue that Brownmark does not have standing to sue for copyright infringement. (Def.’s’ Br. at 1). The amended complaint indicates that Robert T. Ciraldo (“Ciraldo”), Andrew T. Swant (“Swant”), and Sam Norman (“Norman”) “created [the] original music video known as” WWITB. (Am. Compl. ¶ 11). Eventually, the three individuals registered the copyright in the video with the United States Copyright Office and secured a Certificate of Registration for the copyright. *Id.* ¶ 12. The amended complaint further states that Messrs. Ciraldo and Swant – but not Mr. Norman – “assigned their interest” in WWITB to Brownmark in 2008. *Id.* ¶ 13. Relying on the Ninth Circuit case of *Sybersound Records, Inc. v.*

*UAV Corp.*, 517 F.3d 1137, the defendants contend that “unless all the other co-owners of the copyright joined in granting an exclusive right to” a party, all Brownmark obtained from Mr. Ciraldo and Mr. Swant was a non-exclusive license in WWITB, which is insufficient to obtain standing to sue for a copyright violation. (Def.’s’ Br. at 9-10) (citing *Sybersound Records*, 517 F.3d at 1145-46). The court, however, is unpersuaded by the defendants’ first argument.

The determination of whether a party has standing to sue for copyright infringement is governed by section 501(b) of the Copyright Act. Section 501(b) provides, in relevant part, that “the legal or beneficial 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.”<sup>4</sup> 17 U.S.C. § 501(b). Put another way, those who have exclusive rights in a copyright have standing to sue for copyright infringement, whereas “a person holding a non-exclusive license is not entitled to complain about any alleged infringement of the copyright.” *Hyperquest, Inc.* 632 F.3d at 382. As such, the issue for the court is whether Brownmark is the owner of an *exclusive* right provided by the copyright for WWITB. To resolve this issue, the court must take a step back and examine the rights afforded to joint authors of a copyrighted work.

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<sup>4</sup> In turn, the Copyright Act entitles a copyright owner to a bundle of six different exclusive rights, including the right to reproduce the copyrighted work and the right to prepare derivative works based on the copyrighted work. *Hyperquest, Inc. v. N'Site Solutions, Inc.*, 632 F.3d 377 (7th Cir. 2011) (quoting 17 U.S.C. § 106).

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