

Copyright Litigation Reform Through the Plausibility Standard for Pleadings

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Abstract

A new era of federal pleading is upon us. The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), require that courts grant a motion to dismiss pursuant to FRCP 12(b)(6) unless the plaintiff's complaint contains "enough facts to state a claim to relief that is *plausible* on its face." *Twombly*, 550 U.S. at 570. The "notice pleading" standard of the Federal Rules now requires including sufficient facts in a complaint that "raise a right to relief above the speculative level." *Id.* at 555. The long-standing requirement that the court accept the plaintiff's allegations as true is no longer applicable "to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

Recent dismissals decisions in copyright cases vividly demonstrate the potential for reform of copyright litigation contained in this new standard for evaluating the sufficiency of the pleadings. Many have bemoaned the uncertainty of the fair use defense, the expense of copyright litigation, and the subsequent chilling and anti-competitive effects caused by threats of copyright lawsuits. In *Twombly* and *Iqbal* the Supreme Court expressed concern about the asymmetrical cost of discovery if the pleading standard was set too low. The Court recognized the financial reality of allowing plaintiffs to meet their pleading burden too easily: a cost-conscious defendant would too quickly "settle even anemic cases." In copyright litigation, early settlement will often involve an agreement to stop the conduct that plaintiff alleges infringes, resulting in speech chilling as well as anti-competitive effects both of which result in negative externalities. Thus, the ability to swiftly end an anemic copyright claim through a 12(b)(6) dismissal reduces the magnitude of the threat copyright bullies wield and also the external harms caused by early settlement. By heightening the pleading standard, the Supreme Court has provided a measure of copyright litigation reform. This paper examines recent 12(b)(6) dismissals in copyright cases through this lens of reform.