

## RETHINKING COPYRIGHT PLEADINGS

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### ABSTRACT

In the months following the seminal decisions *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, courts pondered how to apply the new standard to decisions, litigants scrambled to beef up pleadings to a plausible level, and scholars worried that plaintiffs would be denied access to justice. Congress rushed to return the 12(b)(6) standard to the “no set of facts” standard espoused by the Supreme Court in *Conley v. Gibson*, to a standstill. Now that the plausibility standard has existed a few years in the court system, federal procedural actors are learning how to coexist with a standard that requires more of its litigants at an early stage.

As plausibility becomes more entrenched, courts could use it to streamline litigation of certain subjects. One such area is copyright. Universal creation and infringement of content online has caused the number of actual and threatened copyright infringement actions to increase. Plaintiffs are more aggressive, resulting in copyright misuse and trolling, and mounting statutory damages and attorney’s fees can make litigation of an inherently fact-specific tort cost-prohibitive.

As a result, there have been several movements to change copyright on a large scale, such as the Copyright Principles Project and the proposed creation of a Copyright Small Claims Court. However, such widespread changes take time. The Copyright Small Claims Court initiative started in 2006 and is now on its third public inquiry. Although careful consideration of its creation is imperative, in the meantime, authors face incredible costs when commencing an action and small-actor defendants face large settlement demands for unintentional infringements or those that could be deemed fair use. As a result, plaintiffs cope with infringing activity, and defendants pay up.

While we await a more lasting pronouncement from Congress, courts can use the plausibility pleading standard to take control of copyright litigation, cutting months of proceedings to weeks. Requiring heightened factual pleadings in accordance with *Twombly* enables courts to make key determinations at the pleadings stage and limit discovery to fill in fewer factual gaps. Further, if the pleadings do meet the actual standard, courts would be in a stronger position to decide inherently factual inquiries, such as similarity and fair use, as a matter of law. Ultimately, such an interpretation would make it not more difficult for litigants to institute or defend copyright actions, but easier for courts to decide liability more efficiently.

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