A Pirate's Treasure?: Heightened Pleadings Standard for Copyright Infringement Complaints after Bell Atlantic Corp. v. Twombly

Benjamin W. Cheesbro

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## A PIRATE'S TREASURE?: HEIGHTENED PLEADINGS STANDARDS FOR COPYRIGHT INFRINGEMENT COMPLAINTS AFTER BELL ATLANTIC CORP. V. TWOMBLY

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I. INTRODUCTION: ROUGH SEAS

Pure notice pleading may well be a thing of the past. The long-standing tenet of notice pleading in American jurisprudence, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," is no more. From 1957 until 2007 this language provided a basis for applying Federal Rule of Civil Procedure 8(a)(2). The Conley "no set of facts" language combined with the minimal requirements of Rule 8 established a framework for evaluating the sufficiency of a complaint. However, in May 2007 the Supreme Court explicitly rejected the Conley language, explaining in Bell Atlantic Corp. v. Twombly that the seminal approach to pleading standards had "earned its retirement." The Twombly Court emphatically explained that a complaint (at least the antitrust complaint before the Court) must establish "plausible" grounds for liability rather than a mere possibility of liability. Despite the repeated references to "plausibility" and the Court's unequivocal rejection of Conley, the Twombly Court failed to clearly define the meaning and scope of its new take on pleading requirements. To complicate matters, two weeks after Twombly the Supreme Court decided Erickson v. Pardus, which explicitly rejected the notion that Twombly created across-the-board heightened pleading standards. Notwithstanding the Court's clear statements, many commentators have read Erickson narrowly and confined its holding to its facts.

Understandably, Twombly and Erickson left practitioners, scholars, and judges unclear on the status of notice pleading. Some have concluded that the plausibility standard applies broadly, requiring heightened pleading in a wide range of civil suits. Others have taken a restrictive view, concluding that Twombly had minimal

2 FED. R. CIV. P. 8(a)(2) (requiring a complaint to provide a "short and plain statement of the claim showing that the pleader is entitled to relief").
4 Id. at 555-70.
5 Erickson v. Pardus, 551 U.S. 89 (2007) (holding that a pro se litigant's 42 U.S.C. § 1983 complaint should not have been dismissed despite plaintiff's scant assertion of "substantial harm").
6 See infra note 54 and accompanying text.
7 See, e.g., Davis v. Coca-Cola Bottling Co., 516 F.3d 955, 974-75 (11th Cir. 2008) (applying Twombly plausibility requirements to Title VII action); Sovereign Bank v. BJ's Wholesale Club, Inc., 533 F.3d 162, 173 n.7 (3d Cir. 2008) (explaining that Twombly plausibility is not limited to antitrust and is equally applicable to employment discrimination claims and equitable indemnification claims). This "broad" approach most strongly comports with FED. R. CIV. P. 1 ("[t]hese rules govern the procedure in all civil actions and proceedings"), assuming that Twombly is simply an interpretation of FED. R. CIV. P. 8(a)(2).
effects on traditional pleading standards.\(^8\) And finally, some have taken an intermediate approach, explaining that \textit{Twombly} plausibility is required in some cases but not others, depending on the nature of the claim(s) or claimant(s).\(^9\) This third approach is the most in accord with the reasoning and policy concerns underlying the Court's decision in \textit{Twombly} and will be revisited.\(^10\)

Given that the scope and impact of \textit{Twombly} remain unclear, it is worthwhile to consider whether the decision will (and should) require heightened pleading in areas other than antitrust suits. Defendants accused of copyright infringement will undoubtedly invoke \textit{Twombly} as establishing a heightened pleading standard in motions to dismiss. The validity of this application of \textit{Twombly} in the infringement context depends on several factors. First, the cost of discovery in infringement suits may be important. The Court in \textit{Twombly} emphasized the defendant's burden where discovery is likely to be exceptionally expensive.\(^11\) Also, Form 19 in the Federal Rules of Civil Procedure, which provides an example of a sufficient copyright infringement complaint, may influence the appropriate pleading standard in infringement suits.\(^12\) Further, copyright infringement pleading standards may be evaluated in light of their unique substantive requirements. Specifically, infringement liability requires proof of two elements: ownership and copying.\(^13\) Applying \textit{Twombly} to infringement complaints could create substantial

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\(^8\) See, e.g., CBT Flint Partners, LLC v. Goodmail Sys., Inc., 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007) ("The Court's 'new standard' was merely a specific way to articulate a solution to what it perceived to be a specific pleading problem, in a specific area of law that inflicted a high cost upon antitrust defendants.").

\(^9\) See, e.g., Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) ("[T]he Court [in \textit{Twombly}] is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."). For a scholarly acknowledgment of the flexible standard, see Saritha Komatireddy Tice, \textit{A 'Plausible' Explanation of Pleading Standards}: Bell Atlantic Corp. v. Twombly, 31 HARV. J. L. & PUB. POL'Y 827, 838 (2008).

\(^10\) Admittedly, this intermediate standard (applying heightened pleading in certain circumstances) is somewhat at odds with Fed. R. Civ. P. 1 and the generally "transsubstantive" nature of the Rules. Despite this tension, the Second Circuit in \textit{Iqbal} adopted this approach and it is the approach most in accord with the language of \textit{Twombly}. See Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541–42 (6th Cir. 2007) (discussing the adoption of \textit{Iqbal} approach in several district courts in the Sixth Circuit).


\(^12\) See id. at 565 n.10 (explaining that Form 9—the sample form for a negligence complaint—satisfies the notice function of pleading), CBT Flint Partners, 529 F. Supp. 2d at 1379–81 (relying, in part, on the existence of Form 16—a sample patent infringement complaint form—as basis for limiting the effect of \textit{Twombly} on patent infringement pleadings). Notably, \textit{CBT Flint Partners} also relies on the heightened pleading requirements set forth by local district court rules. Id. at 1380–81. Ironically, prior to \textit{Twombly}, these local rules might have been unacceptable heightened pleading standards under Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

\(^13\) See 4-13 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13.01 (2008) (explaining that
roadblocks for plaintiffs. For example, a plaintiff might be required to allege the defendant’s copying to a point of plausibility—a difficult task where the claimant must rely on indirect evidence. Moreover, the substantive element of “copying” can be challenged as a potentially “neutral” element, failing to show any wrongful conduct. Copying does not implicate liability where the copied elements lack originality, or copying occurred but the two works at issue are not substantially similar.

Aside from the unique attributes of copyright litigation, heightened pleading should be avoided in these suits as a matter of public policy. Requiring plausibility, as opposed to mere notice, during the pleading stage acts as a barrier to plaintiffs seeking to bring infringement suits. Generally, only copyright proprietors, exclusive licensees, and beneficial owners have standing to bring a claim of infringement. As such, it will often be the original creator of the protected work, the creator’s heirs, or a purchaser of the interest who seeks to enforce the copyright. Each right holder represents a potential plaintiff, and any increased barrier to bringing suit will result in a less valuable copyright. Stated alternately, making it harder to enforce a copyright results in a less valuable exclusive right. Furthermore, devalued copyright protection reduces the incentive to create socially desirable works and counteracts the intended purpose of copyright protections: To promote creative works and combat underproduction.

This Note explains why Twombly should rarely (if ever) impose heightened pleading standards in copyright infringement suits. Part II begins with a brief description of pleading standards as they existed before 2007. Next, a brief description of the facts, rationale, and policy motivations underlying the Court’s decision in Twombly is provided. Part II also describes copyright infringement pleading requirements as they existed before Twombly. Part III demonstrates that although Twombly may be applied beyond the antitrust context, it should not be extended to copyright infringement complaints. Moreover, applying a heightened plausibility standard to copyright infringement complaints may have negative erosion-like effects on the strength of copyright protection. Part IV summarizes the effects that Twombly has had on the practice of notice pleading, and why courts should seek to minimize such effects in copyright infringement suits.

copying is often established by indirect evidence which must show access and substantial similarity).
15 See Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) (stating that only a substantial amount of copying constitutes infringement).
16 3-12 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 12.02 (2008).
II. BACKGROUND: KEELHAULING NOTICE PLEADING

A. PRE-TWOMBLY NOTICE PLEADING

Notice pleading is "[a] procedural system requiring that the pleader give only a short and plain statement of the claim showing that the pleader is entitled to relief, and not a complete detailing of all the facts." In the United States federal court system, this concept is embodied in Federal Rule of Civil Procedure 8(a)(2), which explains that "a claim for relief must contain... a short and plain statement of the claim showing that the pleader is entitled to relief." Notice pleading achieves efficiency through a legal system that compensates for minimal pleading at the outset of the suit by permitting fact gathering during the discovery phase and by allowing for summary adjudication for claims lacking merit, determined once the discovery process is complete.

The United States federal courts adopted the practice of notice pleading in response to the earlier standards of fact and code pleading. Both fact and code pleading were found to be cumbersome and unworkable. These earlier standards reduced the likelihood of resolution on the merits of cases, often leading to adjudication based on the artfulness of a pleading's drafting. In 1938, Congress enacted the Federal Rules of Civil Procedure in an effort to curtail the negative effects of prior pleading standards. In 1957, the Supreme Court described the minimal requirements of notice pleading in Conley v. Gibson. From 1957 until 2007, the Supreme Court continually reaffirmed and reiterated the especially lenient standard defined in Conley for determining the sufficiency of pleadings pursuant to Rule 8(a). Then, in 2007, the Supreme Court drastically altered its approach to notice pleading. In Bell Atlantic Corp. v. Twombly, the Supreme Court

18 BLACK'S LAW DICTIONARY 1191 (8th ed. 2004).
20 Id.
23 Conley v. Gibson, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").
explicitly and vehemently rejected the "no set of facts" language from Conley, a radical departure from the prevailing jurisprudence of prior decades.

B. BELL ATLANTIC CORP. V. TWOMBY

The Twombly ruling sent shockwaves through the American legal community, calling into question the fundamental rules of notice pleading. The opinion left many unsure of just what the Court intended to accomplish and exactly how lower courts were supposed to interpret the opinion. A proper understanding of the impact of Twombly begins with a review of the facts.

1. Facts. A group of consumers brought a class action suit based on violations of the Sherman Act against a group of local telephone and internet services providers. The plaintiffs alleged the defendant service providers had engaged in price fixing agreements as well as agreements to not compete with one another, thus violating 15 U.S.C. § 1 (section 1 of the Sherman Act). Specifically, the plaintiffs alleged that the defendants "engaged in parallel conduct" in order to shut out (or at least diminish competition from) competitive local exchange carriers (CLECs). Essentially, the plaintiffs' foundation for alleging violations of the Sherman Act was that the defendants had failed to meaningfully compete with one another. The Court ultimately concluded that the plaintiffs had failed to sufficiently plead a claim.

2. The Trouble with Twombly. The thrust of the Supreme Court's opinion in Twombly was that a complaint, which asserted that the defendants engaged in parallel conduct and refrained from competing with one another, is not (without more) sufficient to survive a motion to dismiss, given that liability under the Sherman Act requires a "contract, combination..., or conspiracy, in restraint of trade or commerce." Despite the relatively straightforward issue, the Court went well beyond what was required to resolve the principal matter. The Court's opinion has caused considerable confusion, generating uncertainty on two fronts.

26 Id. at 562–63.
27 Id. at 548–51.
28 Id. at 550–51. Section 1 of the Sherman Act, passed in 1890, has been construed by the courts to "broadly prohibit[] concerted action that 'unreasonably' restrains the nation's domestic or foreign trade." WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 2:2 (2007).
29 Twombly, 550 U.S. at 550.
30 Id.
31 Id. at 570.
34 See Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (finding that "[c]onsiderable
First, what is the scope of the opinion? Stated alternately: Does the Court's discussion of pleading requirements apply only to antitrust complaints, only to certain types of complaints (of which antitrust is one of many), or to all complaints? Second, did the Court intend to require more stringent pleading standards compared to traditional notice pleading, or did it simply restate existing standards?

The first issue of confusion, the scope of the opinion, lies in the seemingly dualistic approach the Court employed. At the outset of the opinion, the Court explained the fundamentals of antitrust liability. But after this brief discussion of substantive law, the Court proceeded to discuss broadly motions to dismiss and general principles of notice pleading. In the Court's discussion of adequate pleading requirements, it continually referred to the seminal case Conley v. Gibson.

The copious attention to Conley is important for two reasons. First, Conley was not an antitrust case. This is one indication that the Court intended Twombly to apply to non-antitrust suits as well. Second, and more importantly, Conley has long stood as a foundation for interpreting Rule 8(a)(2). Conley is not simply a footnote in federal procedure case law; it has been viewed as a crucial tenet of liberal notice pleading. The Twombly Court proceeded to expound on general pleading requirements, but also intermittently discussed specific antitrust pleading requirements. At no point in the opinion did the Court clearly limit its uncertainty was created by Twombly); Gottesman, supra note 21, at 993, 999 (complaining that "Twombly is a mess" and "[t]he confusion of the opinion is self-evident").

35 Twombly, 550 U.S. at 553-54.

36 Id. at 557-61 (discussing complaints made pursuant to FED. R. CIV. P. 8(a)(2) and motions pursuant to FED. R. CIV. P. 12(b)(6)).

37 Id. at 555, 561-64 (discussing Conley v. Gibson, 355 U.S. 41 (1957), which reversed a lower court's dismissal of the plaintiffs' complaint alleging unlawful employment discrimination prohibited under a collective bargaining agreement). Conley discussed the requirements for the adequacy of a complaint under Rule 8(a)(2) at length and provided a very light standard: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.

38 FED. R. CIV. P. 8(a)(2) provides the requirements for stating a claim for relief: "a short and plain statement of the claim showing that the pleader is entitled to relief."

39 Gottesman, supra note 21, at 985-86 (calling Conley a "talisman" for federal courts); Tice, supra note 9, at 827 (referring to Conley's "no set of facts" language as a "mantra").

40 Twombly, 550 U.S. at 553-62. The Court discusses applying these standards to a 15 U.S.C. § 1 claim and states "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, . . . but quite another to forget that proceeding to antitrust discovery can be expensive." Id. at 558. However, at other times the Court discusses pleading requirements at length with little reference to the antitrust context and several references to non-antitrust suits for support. Id. at 555, 560-63.
explanations of pleading requirements to antitrust suits. The result is that Twombly created great confusion over its scope.

The decision presents a second confusing issue: Where Twombly is applicable, what must a complainant plead to survive a motion to dismiss? Some language indicates that a new and “heightened” pleading standard was intended, while other language explicitly or implicitly rejects that notion. The two most notable reasons for reading Twombly as a mandate for heightened pleading requirements are the Court’s outright rejection of Conley’s “no set of facts” language and the Court’s continual assertion that plausibility is required at the pleading stage.

On the other hand, the Court expressly stated that it was not applying a heightened pleading standard. Also, the Court referred to other language in Conley that describes very liberal notice pleading, and explained that Form 9 in the Federal Rules’ Appendix of Forms (a picture of minimal notice pleading) would be a sufficient complaint. Despite the conflicting messages expressed in Twombly, many courts have concluded that Twombly sets forth a new pleading standard that requires greater specificity in complaints. But lower courts have not been uniform in their interpretation of the plausibility standard. These differing stances on plausibility are typically grounded in a lower court’s reliance on certain portions of Twombly (and disregard for others) or recognition of the various policy concerns addressed in Twombly.

3. Application of Twombly Beyond Antitrust. A small number of district courts have viewed Twombly as applying only to antitrust cases. However, this narrow view has not been broadly accepted and seems contrary to both Twombly’s overall tone and its frequent references to non-antitrust cases. A better reading indicates

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41 Additionally, there is support for the notion that the Federal Rules are “transsubstantive,” and the Supreme Court’s interpretation of the rules must apply to all civil suits. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.”); Spencer, supra note 22, at 457 (stating that the rules are “on their face transsubstantive, meaning that Rule 8(a)’s pleading standard applies to all cases regardless of their substance”).

42 See infra Part II.C.4 (discussing the Second Circuit Court of Appeals’ recent analysis of the conflicting signals in Twombly and how to apply the plausibility standard).

43 Twombly, 550 U.S. at 569 n.14.

44 Id. at 565 n.10.

45 Spencer, supra note 22, at 458 (“[H]undreds of published lower federal court opinions . . . have read Twombly as announcing a new pleading standard.”).

46 See Gottesman, supra note 21, at 1004–24 (analysis of the circuit court decisions after Twombly).


48 See Gottesman, supra note 21, at 1023–24 (describing the Second Circuit’s rationale in Iqbal).
a broad reach, encompassing many if not all civil suits. First, *Twombly* retired the *Conley* "no set of facts" language. This portion of *Conley* has been universally applied to all types of civil suits. It would be extremely shortsighted for the Court to overturn a mainstay of notice pleading, only to secretly intend that the holding of the opinion be limited to a specific area of law. Second, in footnote 10 of *Twombly*, the Court discusses the adequacy of a negligence complaint based on Form 9. Here, the Court recognizes that such a complaint would be adequate under the plausibility standard set forth. This footnote not only shows that the Court envisions the application of *Twombly* outside of antitrust suits, but also provides instruction on when plausibility pleading standards are satisfied. Overall, there is strong support for the notion that the Supreme Court envisions some applicability of the opinion outside the antitrust context.

Perhaps as a signal to the lower courts, the Supreme Court cited *Twombly* in *Erickson v. Pardus* just two weeks after publication of *Twombly*. *Erickson*, in resolving a motion to dismiss, stated that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson* involved a complaint by a pro se prisoner pursuant to 42 U.S.C. § 1983, alleging a violation of his Eighth Amendment rights. The reference in *Erickson* to *Twombly* says little about the full extent of *Twombly*, but it does provide valuable insight into the Court's assumption that *Twombly's* scope extends beyond antitrust suits. A further indication that *Twombly* applies beyond the antitrust area can be found in the recent application of the case to other types of suits by the circuit courts.

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49 *Twombly*, 550 U.S. at 565 n.10.
50 See Tice, *supra* note 9, at 830 ("[D]uring oral arguments, various Justices referred to Form 9 in the Appendix of the Federal Rules, indicating their concern with model pleading across subject matter.").
51 See infra Part II.C.3 (discussing the significance of footnote 10 and the adequacy of complaints based on the sample complaint forms).
52 *Erickson* v. *Pardus*, 551 U.S. 89 (2007) (explaining the requirements of FED. R. CIV. P. 8(a)(2) and citing *Twombly*).
53 Id. at 89. In *Erickson*, the Court determined that the complaint should survive a motion to dismiss, plausibility requirements were not discussed, and the plaintiff's pro se status required the district court to liberally construe the complaint. *Id*.
54 See McMahon, *supra* note 33 ("Perhaps *Erickson* simply means that *Twombly's* 'plausibility' standard, like all pleading standards, is to be applied less stringently to pro se plaintiffs."); Spencer, *supra* note 22, at 456–57 (asserting that *Erickson* is "not a proper case in which to test how the Court will apply *Twombly* in subsequent cases"). But see Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 555 (6th Cir. 2007) (Moore, J., dissenting in part) ("[I]f there was any doubt whether *Twombly* altered the pleading requirements, the Supreme Court put that doubt to rest in [*Erickson*].").
55 See Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007) (applying *Twombly* to invasion of privacy and intentional infliction of emotional distress complaint); Equal Employment
Understandably, such early application by lower courts, without approval (or even acknowledgment) by the Supreme Court, does not indicate that a broad application of *Twombly* will endure. However, until the Supreme Court clarifies its position on *Twombly*, the lower courts will continue to define the extent of the opinion.

C. ESTABLISHING PLAUSIBILITY AFTER *TWOMBLY*

This Note proceeds under the assumption (like many lower courts) that *Twombly* applies beyond the bounds of antitrust suits. This assumption naturally leads to the next inquiry: What must non-antitrust complaints plead to survive a motion to dismiss post-*Twombly*? In *Twombly*, the Court explains that Rule 8(a)(2) requirements are intended to provide notice to the defendant of “what the . . . claim is and the grounds upon which it rests.”56 Footnote 3 emphasizes that the Federal Rules have not eliminated the need for complaints to contain some facts, and points out that notice of the “grounds” upon which a claim rests will inevitably require some factual pleading.57 Next, the Court concludes that an antitrust complaint must contain enough factual material to indicate an agreement was formed.58 This requirement of suggestive facts, the Court holds, means an antitrust complaint must assert plausible grounds to infer “agreement” (a substantive element of liability).59 Here, plausibility requires “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”60 From this point the Court explores the factors that it considered in determining plausibility.

1. Cost of Discovery. The *Twombly* Court places great emphasis on the cost of discovery in antitrust suits.61 This concern is questionable, given that discovery expense has nothing to do with whether a complaint pleads enough facts to

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56 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley). Note that Footnote 10 of *Twombly* emphasizes evaluating the complaint from the defendant’s point of view, placing importance on whether the defendant can adequately respond to the complaint. *Id.* at 565 n.10.

57 *Id.* at 555 n.3. For an interpretation of *Twombly* envisioning a “two-pronged requirement” (requiring both notice of the nature of the claim and notice of the grounds upon which the claim rests) see Tice, *supra* note 9, at 837.

58 *Twombly*, 550 U.S. at 556.

59 *Id.*

60 *Id.*

61 *Id.* at 557–60.
establish plausible grounds. Instead, it appears that the Court views preventing excessive discovery costs as a policy goal furthered by the requirement of plausibility at the pleading stage. Coupled with this policy, the Court also makes two other observations: (1) Rule 8 requirements should guard against complaints which are likely to generate in terrorem settlement value (through costly discovery),62 and (2) trial courts are often unable to guard against the consequences of costly discovery by limiting the scope of discovery.63 These concerns speak little to the substance of determining plausibility, but they do reveal the Court’s motivations for requiring plausibility at the pleading stage.64

2. Factually-Neutral Elements. The Court then turns to the standards for establishing plausibility in an antitrust complaint. The Court explains that facts falling within the “neutral territory” are insufficient to establish plausibility.65 As applied in the principal case, the Twombly Court says that where defendants’ “agreement” is required for a violation of the Sherman Act, plausibility is not established by an allegation of mere “parallel conduct” which could be either lawful or unlawful.66 A. Benjamin Spencer reads this portion of Twombly as establishing “zones of pleading.”67 Spencer posits that for an allegation to move from the “neutral zone” to the “zone of plausibility” requires that the facts alleged “paint a plausible picture of liability thereby ‘showing’ that the pleader is entitled to relief”; conversely, complaints making factual allegations that are “consistent both with liability and with innocent alternative explanations” are insufficient to survive motions to dismiss.68 Spencer also acknowledges that a proper reading of Twombly indicates that plausibility may require different standards of factual pleading depending upon the type of case challenged by a motion to dismiss.69 In sum, a pleading containing only “neutral” factual assertions may be grounds for dismissal as a failure to assert a plausible claim, but distinct substantive areas of law may entail different definitions of neutrality and plausibility.

62 Id. at 557–58.
63 Id. at 559–60.
64 When is discovery “expensive” enough to become a concern? The Twombly Court refers to a memorandum from Paul V. Niemeyer, 192 F.R.D. 354, 357 (2000), explaining that where discovery is actively employed, it accounts for as much as ninety-percent of litigation costs. Also, the action in Twombly threatened particularly burdensome discovery because the plaintiffs represented over ninety-percent of all subscribers of telephone and high-speed internet service and the defendants were enormous firms with many employees. Id. at 559. The question remains: What is sufficiently expensive discovery short of the potential costs threatened in Twombly?
65 Id. at 557.
66 Id.
67 Spencer, supra note 22, at 448–50.
68 Id. at 449.
69 Id.
3. Federal Rules of Civil Procedure Complaint Forms. Footnote 10 of *Twombly* contains another noteworthy statement on plausibility pleading requirements. There, the Court discusses how the principal complaint failed to provide the defendant with sufficient notice required by Rule 8. The Court explains that Form 9, a sample negligence complaint found in the Federal Rules’ Appendix of Forms, provides sufficient notice to the defendant while the principal complaint did not. Form 9 provides sufficient notice, the Court explained, because it includes a brief narrative explanation including the time, date, and location of the events giving rise to the complaint. In contrast, the *Twombly* complaint failed to explain where and when the defendants’ agreement occurred and which defendants’ employees participated in the agreements. Here, the Court emphasized again that the absence of certain facts prohibited the defendants from adequately responding to the complaint.

Despite *Twombly*’s strong indications that the Court was trying to rein in liberal pleading standards, the Court explicitly rejected the creation of a heightened fact pleading standard. Indeed, the Court overturned a major tenet of liberal notice pleading and at the same time denied that it was doing anything more than reaffirming established standards of pleading. To bolster its position, the *Twombly* Court explained that many “judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.” Essentially, the Court posits that because many courts ignored the *Conley* “no set of facts” language it was no longer good law; or, lower courts have generally applied a

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70 *Twombly*, 550 U.S. at 565 n.10.
71 Id.
72 Id. It should be noted that the Appendix of Forms was amended shortly after *Twombly* was decided, and the sample negligence complaint is now Form 11 rather than Form 9. Also, the prior version contained fictitious locations and dates; the new form states, in relevant part: “On date, at place, defendant negligently drove a motor vehicle against the plaintiff.”
73 Id.
74 Id.
75 Id. at 569 n.14 (explaining that the complaint was not insufficient because it failed to allege “particularized” facts, but rather because it “failed in toto to render plaintiffs’ entitlement to relief plausible”).
76 Other concerns also might have been on the minds of the Justices. See McMahon, supra note 33, at 865 (indicating that if “plausibility” means “believability,” Seventh Amendment protections for jury trials might be implicated).
77 *Twombly*, 550 U.S. at 562 (citing cases). This perception of the Court has been substantiated. See Allan Ides, Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice, 243 F.R.D. 604, 604 (2006) (“[L]ower federal courts more than occasionally inhale the mantra of simplified pleading and exhale a heightened pleading standard.”).
plausibility requirement, so the Court should now embrace a less than liberal pleading requirement.

4. Second Circuit Approach. For all the above reasons, the confusion generated by Twombly is well-founded. As the district courts and the circuit courts continue to struggle with the application of Twombly, trends will likely emerge. One approach that appears to be gaining acceptance is that taken by the Second Circuit Court of Appeals in Iqbal v. Hasty. In Iqbal, the Second Circuit addressed the sufficiency of a complaint, alleging constitutional torts against United States officials during the plaintiff’s detention. The court had to determine the level of factual pleading required to survive a motion to dismiss where a plaintiff must overcome a defense of qualified immunity. The Iqbal court faced the ambiguities and challenges of Twombly head-on, and as a result arrived at two conclusions: (1) Twombly applies to more than just antitrust cases; and (2) Twombly requires “a flexible plausibility standard,” which requires heightened fact pleading where such facts are necessary to make the claim plausible.

Based on its “flexible plausibility standard,” the Second Circuit affirmed in part and reversed in part the trial court’s grant of the defendants’ motion to dismiss, and ultimately remanded the case. The court held that, under Twombly, conclusory allegations relating to some elements of the plaintiff’s claims might be insufficient to survive a motion to dismiss. The Second Circuit recognized that cases implicating qualified immunity might create policy concerns analogous to those recognized by Twombly; namely, meritless claims would create significant burdens on defendants through broad-ranging discovery. Most of the plaintiff’s claims were found to be sufficient under a “flexible plausibility standard,” though one claim was dismissed—the plaintiff’s claim of a violation of his procedural due process rights.

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78 Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), cert. granted, Ashcroft v. Iqbal sub nom. 128 S. Ct. 2931 (U.S. June 16, 2008) (No. 07-1015 (oral arguments on Dec. 10, 2008)); see also McMahon, supra note 33, at 861–62 (referencing approval of Iqbal to some extent in the Third, Sixth, Ninth, and Tenth Circuits, as well as the Federal Circuit). Iqbal is particularly desirable as a guide for applying Twombly because the Supreme Court recently granted certiorari for the case, and it is quite possible that the Court will address the Second Circuit’s application of Twombly.

79 Iqbal, 490 F.3d at 147–51.

80 Id. at 153.

81 Id. at 157–58; see also McMahon, supra note 33, at 863 (interpreting Iqbal as a statement that “Twombly requires more factual detail in complaints that allege more complex theories of liability, so as to render the plaintiff’s allegations ‘plausible’ rather than simply speculative”).

82 Iqbal, 490 F.3d at 158.

83 Id.

84 Id. at 177–78.
The *Iqbal* approach appears to be largely in-line with the Supreme Court's primary concerns in *Twombly*. The Second Circuit acknowledged the burdens imposed on defendants by discovery; it addressed whether factual allegations provided sufficient notice to defendants (pointing to time and place); and, it considered the nature of the lawsuit. However, *Iqbal* deviates sharply from *Twombly* in one important way: the Second Circuit explained that for certain claims that were borderline—nearly plausible but containing conclusory or neutral factual allegations—the weakness of the complaint could be resolved by proceeding with a “carefully limited and tightly controlled discovery” by the plaintiff, or by a defendant’s motion for a more definite statement pursuant to Rule 12(e).\(^{85}\) The *Twombly* Court clearly stated that controlled discovery would not supplant the requirements of plausibility.\(^{86}\) It may be that the Second Circuit interpreted *Twombly*’s discussion of the insufficiency of controlled discovery to solve pleading problems as relating only to discovery in a complex antitrust suit. In the context of qualified immunity charges, controlled discovery was a desirable and functional solution.\(^{87}\)

Regardless of the particular nuances of *Iqbal*, the Second Circuit’s interpretation of *Twombly* is well-reasoned and has gained support in other circuits.\(^{88}\) Therefore, this Note proceeds with a few assumptions about *Twombly* that are articulated by the Second Circuit in *Iqbal*. First, *Twombly*’s plausibility pleading requirements apply to cases other than antitrust suits. *Twombly*’s plausibility requirements will be most relevant where the litigation is complex. Where litigation is simple, satisfaction of a plausibility standard will often be identical to satisfaction of traditional liberal notice pleading standards (i.e., automobile negligence complaints similar to Form 11). The burden of discovery is relevant to applying and satisfying plausibility requirements—the higher the potential burden, the greater the need for plausible factual allegations. Where plausibility is tested, neutral factual allegations and conclusory statements (without more) will not be sufficient for a complaint to survive a motion to dismiss. Lastly, unless the value of controlled discovery can be adequately demonstrated, such limited discovery should not be viewed as a solution to dealing with complaints that fall short of plausibility.

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\(^{85}\) *Id.* at 178.


\(^{87}\) *Iqbal*, 490 F.3d at 158.

\(^{88}\) See supra note 10 and accompanying text.
D. TRADITIONAL COPYRIGHT INFRINGEMENT PLEADING REQUIREMENTS

To understand how *Twombly* might affect the pleading requirements for a copyright infringement complaint, it is necessary to consider previous approaches to dealing with these complaints. For a significant period of American history, copyright infringement procedure was governed by a separate body of rules: the Copyright Rules of Practice. However, in 2001 the Copyright Rules of Practice were completely abrogated, and now the Federal Rules of Civil Procedure govern copyright suits with full force. As such, the transsubstantive nature of the Federal Rules requires that all case law interpreting the Rules applies with equal relevancy when a Rule is implicated in a copyright suit. Despite the wide acceptance that the Federal Rules of Civil Procedure are transsubstantive, many practical remnants of the earlier Copyright Rules are still extant at the trial court level during the pleading stage. As such, commentators and courts generally agree that four elements must be pleaded for a copyright infringement complaint to survive a motion to dismiss: (1) identification of the specific copyrighted work, (2) an assertion of ownership of the work, (3) registration of the copyright (or an application for registration), and (4) identification of the infringing acts. These elements are required under notice pleading and must be pleaded with some specificity for a copyright infringement complaint to survive a motion to dismiss for the failure to state a claim pursuant to Rule 12(b)(6).

The challenge: Must plaintiffs alleging copyright infringement meet a heightened pleading standard—requiring more than the traditional elements—to survive a motion to dismiss? On one hand, copyright infringement suits have unique substantive attributes and a distinctive pleading standard. On the other, one must take into account the considerations raised in *Twombly*, the interpretations of *Twombly* in the lower courts, and the ambiguous language of the opinion itself. As will be shown, proper synthesis of these two areas requires deference to the goals and functions of a notice pleading system.

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90 Id.
91 Id. at 1038.
92 See id.; 6 William F. Patry, PATRY ON COPYRIGHT § 19:3.
93 Fairman, *supra* note 89, at 1038. Fairman argues that, although these four elements are traditionally required by courts, such requirements are actually heightened pleading standards. He explains that in a true notice pleading system elements (1) and (4) do not need to be specifically pleaded so long as the defendant can answer the complaint. Id.
One final attribute of copyright infringement suits must be considered when evaluating the effects of *Twombly*. the distinctions between the traditional pleading requirements and the elements of the prima facie infringement case. First, traditional pleading standards require a mere statement of ownership of the work, but a prima facie case requires actual ownership of the work and that the work consists of protected subject matter. The protected subject matter requirement hinges on the constitutional requirement of "originality." Moreover, the concept of originality implicates a number of nuanced doctrinal issues, including *inter alia*: the aesthetic nondiscrimination doctrine, the idea/expression dichotomy, and certain statutory bars on protection of useful articles.

The Supreme Court's opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.* is a prime example of a dispute over whether a plaintiff has established the prima facie element of protected subject matter. In *Feist* the Court had to determine whether the defendant's copying of the listings from the plaintiff's telephone directory constituted infringement. In order to do so the Court had to determine what (if any) components of the plaintiff's work were protectable subject matter. Specifically, the Court was required to look for the presence of originality in the compilation of facts.

The second distinction is that traditional pleading standards require that the plaintiff simply describe the violative acts, but the prima facie case requires an unauthorized copying of a material amount of protected expression. This prima facie element of copying is the heart of the infringement claim and consists of two

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94 See *Patry*, supra note 92, § 9:4 (defining elements of a prima facie case of infringement of the reproduction right as (1) protected subject matter; (2) ownership by plaintiff of the right alleged to have been infringed at the time it was infringed; and (3) unauthorized copying of a material amount of expression).

95 *Patry*, supra note 92, § 3:36 (discussing the Supreme Court's analysis of the doctrine in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (stating that the courts should not evaluate the artistic merit of a work, but rather should look for the presence or absence of creativity)).

96 *Id.* § 4:3 (discussing the non-protection of facts as explained in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*).

97 *Id.* § 3:36 (discussing the interpretation of 17 U.S.C. § 102(a)(5) and the role of the courts in shaping the separability doctrine).

98 499 U.S. at 363–64 (reversing the lower court's grant of summary judgment to plaintiff and holding that facts underlying a telephone directory's listings are not protected subject matter).

99 *Id.* at 342.
components: (1) that the defendant copied from the plaintiff’s work, and (2) that
the copying constituted a sufficient amount of protected material. Here again,
there are numerous doctrinal issues implicated in the prima facie element that are
not present in the pleading requirement.

A court may apply a "substantial similarity" test like the one in Three Boys Music
Corp. v. Bolton to determine the first component of the copying element. In
Bolton, the defendants’ song was not an identical copy of the plaintiffs’ work (from
nearly forty year earlier), but the defendants’ work contained many elements in
common with the original song. The defendants challenged the jury’s verdict
on the grounds that the circumstantial evidence supporting the plaintiffs’ claim of
copying was not adequately supported by the facts of the case. The Bolton court
examined both the access the defendant had to the plaintiffs’ work and the degree
to which the two works were similar in order to determine whether an inference
of copying was appropriate. Specifically, the court delved into the background
of the works, the popularity of the plaintiffs’ song, the listening habits of the
defendants at the time the plaintiffs’ song was most popular, and the degree to
which the two songs were similar. Courts also use the substantial similarity
analysis to determine whether the defendant wrongfully misappropriated a
material amount of protected expression contained in the plaintiff’s work. Both
Bolton and Feist show that prima facie elements differ substantially from the
traditional pleading requirements of a copyright infringement action.

III. DISCUSSION: NO SAFE HARBOR IN TWOMBLY

The ways in which courts actually apply Twomby plausibility are many and
varied, but a few principles have emerged. The nature of the suit is relevant to
determining plausibility. Courts should consider the policy concerns articulated
in Twomby. Additional factors are important, including: signals from the

101 PATRY, supra note 92, § 9:16.
102 Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) (affirming a jury verdict for
plaintiff’s infringement claim on the grounds that inference was proper that defendants had copied
from plaintiff’s work).
103 Id. at 485–86.
104 Id. at 480.
105 Id. at 482–86.
106 Id.
107 See, e.g., Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127 (2d
Cir. 2003) (vacating and remanding a summary judgment in favor of defendant in copyright
infringement suit on the design of a decorative carpet upon finding that the two designs were
substantially similar).
108 See supra Part II.C.1.
Federal Rules and the Appendix of Forms and whether the particular allegations are "factually neutral." The ambiguous language of the Twombly decision will provide the courts with significant flexibility in determining which factors weigh most in favor of or against imposing a more stringent standard on a plaintiff at the pleading stage.

Copyright infringement suits are likely targets for Twombly-inspired Rule 12(b)(6) motions. Defendants accused of infringement will feel empowered by the seemingly increased pleading requirements set forth in Twombly and will rely on portions of the opinion to cut against the strength of the plaintiffs’ claims. Despite the appeal of Twombly, infringement defendants should not be quick to assume that it provides another arrow in the quiver. Considering the myriad of factors that might indicate a need for heightened specificity in a complaint, the vast majority of copyright infringement claims will not require such heightened specificity. Rather, courts should conclude that most copyright infringement complaints require minimal specificity, and thus should survive motions to dismiss where only the barest of facts are alleged. Set in the language of Twombly, copyright infringement claims will be plausible and will rise above the speculative level, even when the factual assertions are minimal. In most cases, the determination of whether a copyright infringement complaint should survive a Rule 12(b)(6) motion after Twombly will be identical to the determination of a similar complaint before Twombly. There may be exceptional cases where the circumstances of a copyright infringement claim should require a heightened degree of specificity to meet the plausibility requirements of Twombly, but these circumstances will be rare, and must be distinguished from typical copyright infringement claims.

A. THE COST OF DISCOVERY IN COPYRIGHT INFRINGEMENT SUITS

The Twombly court emphasized that permitting the plaintiffs’ suits to advance to the next stage of litigation would have imposed an excessive discovery cost on defendants. Generally, lower courts applying Twombly have ignored this concern and have not made explicit mention of the potential costs of discovery as a concern when dismissing claims as implausible. Instead, courts typically rely on

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109 See supra Part II.C.3.
110 See supra Part II.C.2.
111 See supra Part II.D (discussing traditional copyright infringement pleading requirements).
112 See supra note 61 and accompanying text.
113 However, there have been two notable exceptions: (1) Some antitrust cases have considered the expense and burdens of discovery on defendants, e.g., DSM Desotech Inc. v. 3D Sys. Corp., No. 08-cv-1531, 2008 WL 4812440, at *2–3 (N.D. Ill. Oct. 28, 2008), (2) Iqbal considered the unique
Twombly's language explaining the requirements for plausibility. This could be because Twombly does not provide a clear guideline for establishing at what point discovery becomes so burdensome that it should be considered a factor in requiring greater specificity in a complaint. Or, it is possible that very few cases pose the potential for excessive discovery costs like in Twombly. A third possibility is that courts are simply unwilling to consider the cost of discovery when deciding whether to dismiss a complaint. Conversely, courts are comfortable deciding if the complaint is sufficiently plausible and provides the defendant with adequate notice. For whatever reasons, courts have not indicated that the potential for expensive discovery will be a significant concern in deciding motions to dismiss.

In copyright infringement claims, the concern over discovery expense will almost never be comparable to the expense in Twombly and should not significantly impact a court's determination of pleading requirements. First, the number of plaintiffs will never be commensurate to the class in Twombly. The nature of copyright infringement requires that suits be brought on behalf of rights-holders, and thus only a limited number of plaintiffs will initiate each suit. Second, the number of defendants might be large but will very rarely be on the scale of those in Twombly. For example, a record company might bring an infringement suit against users of a peer-to-peer network, designed to share digital copies of protected recordings. Although there might be many defendants, the heart of the matter is whether infringement occurred via the network. Thus, discovery will seek to uncover the specific instances of infringement. It will be the rare copyright infringement suit which targets a large class of defendants. Normally, one party will engage in infringing behavior that is clearly identifiable at the outset of the suit. Most discovery in copyright infringement suits will be directed at determining the specifics of the conduct (i.e., time, location, and methods), not at uncovering the clandestine efforts among numerous large corporations as in Twombly.

The Twombly court also indicated that tightly controlled discovery would not have been a sufficient solution to the problem of burdensome discovery expenses in that case. However, in Iqbal the Second Circuit, relying on Twombly, determined that controlled discovery would be a viable solution to the problem burdens imposed on government officials. Iqbal v. Hasty, 490 F.3d 143, 158–59 (2d Cir. 2007).

114 Bell Ad. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (finding that the potential discovery expense was “obvious” in that case because class of plaintiffs included a large number of subscribers, and defendant firms were some of the nation’s largest service providers).

115 See supra note 64 and accompanying text.

116 3-12 NIMMER, supra note 16, § 12.02.

117 See supra note 64 and accompanying text.

118 See supra note 86 and accompanying text.
of discovery costs based on the circumstances of that case.119 Therefore, it would appear that *Twombly*’s rejection of controlled discovery is not a rule that must be applied in every circumstance, but only in those cases where *any* discovery would be unduly burdensome on the defendant. In the vast majority of copyright infringement suits, it seems unlikely that tightly controlled discovery would impose such an undue burden on defendants as to require heightened specificity in the pleading stage. More often, plaintiffs will be motivated to initiate copyright infringement suits based on identifiable, public conduct which indicates infringement. As such, discovery will be devoted to uncovering the specifics of the conduct and will not generate broad-ranging, expensive discovery.

If courts decide to consider the potential costs of discovery when evaluating motions to dismiss infringement complaints (which seems uncommon), these courts should also feel comfortable in considering whether controlled discovery is sufficient to offset potentially excessive discovery costs. In most cases, controlled discovery will be unnecessary, but where it is appropriate it will be a sufficient alternative to heightened pleading requirements, given the nature of copyright infringement actions.

B. SIGNIFICANCE OF FORM 19 TO COPYRIGHT PLEADING

*Twombly* discussed and affirmed the validity of Form 9, the sample negligence complaint, in its discussion of pleading standards.120 Given this approval, it would appear that the presence of a copyright infringement sample complaint (Form 19) in the Federal Rules Appendix of Forms would immediately foreclose any application of *Twombly* plausibility requirements in copyright infringement complaints.121 However, the Form should not be categorically relied upon. Because liberal notice pleading has remained unquestioned for so long, and because the *Conley* “no set of facts” language has underscored that tradition, there has been little need to question the importance and strength of the forms. *Twombly* did refer to Form 9, but it did so to demonstrate the absence of certain key components of the antitrust complaint at issue.122 Reading this portion of *Twombly* as a pronouncement against any “plausibility” challenge to the bare bones of the Forms would be overly broad and formalistic. Rather, *Twombly* indicates

119 See supra note 87 and accompanying text.
120 See supra note 72 and accompanying text.
122 See supra Part II.C.3.
that in a simple negligence suit Form 9 provides enough notice to make the claim plausible. *Twombly* should not be taken to mean that all negligence complaints will be sufficient if they follow the limited framework set forth in Form 9. Indeed, there may be a negligence suit where the complaint provides the time and location of an event (the two aspects of Form 9 *Twombly* found most important) but does not allege a plausible claim.

Plaintiffs in copyright infringement suits may turn to Form 19 for guidance in drafting complaints, but they must be cautious not to rely on the presence of the Form as an airtight response to a *Twombly*-inspired motion to dismiss. In short, Form 19 may guide the practitioner in determining what must be alleged in a plausible complaint, and it may aid the court in determining what must be present to provide the defendant proper notice under *Twombly*. However, it should not be viewed as an exhaustive list of requirements for creating a plausible claim. Form 19 provides the defendant with the most essential components of a copyright infringement allegation: originality, ownership, registration of the copyright, copying (date and method), and notice. In almost all cases, factual allegations establishing these elements will satisfy *Twombly*'s plausibility requirements. However, plaintiffs must be wary; relying too heavily on Form 19 in complicated or unusual copyright infringement suits presents the very real possibility of a grant of dismissal post-*Twombly*.

C. SUBSTANTIVE ELEMENTS OF COPYRIGHT INFRINGEMENT CLAIMS

Prior to *Twombly* it was widely accepted that a copyright infringement claim should survive a motion to dismiss if four essential elements were adequately stated: "(1) specification of the copyrighted work at issue, (2) that plaintiff owns that work, (3) that registration has been obtained where required, and (4) the acts by which defendant violated plaintiff's rights, and during what time period." The significance of these four elements is crucial in light of *Twombly*. On the one hand, these elements are arguably more than what should be required under a pure notice standard. On the other hand, these four elements fall short of

123 PATRY, supra note 92, § 19:3.
124 See Fairman, supra note 89, at 1037–42. Fairman's comments show that, well before *Twombly* was decided, some viewed copyright pleading as requiring a greater level of specificity than is normally required under liberal pleading standards. The newly revised Form 19 adheres to Fairman's view, and perhaps shows that copyright pleading standards required *Twombly*-like plausibility long before *Twombly* was even decided.
125 PATRY, supra note 92, § 19:3.
126 See Fairman, supra note 89, at 1038.
establishing a prima facie case of copyright infringement.\textsuperscript{127} \textit{Twombly} seems to approach adequate pleading as a point on a factual continuum: treating facts which are speculative as falling short and treating plausible allegations as sufficient. Copyright infringement defendants will surely argue that this continuum approach requires plaintiffs to assert facts that make the prima facie elements of an infringement claim plausible in order to survive a motion to dismiss. Therefore, the question seems to be whether \textit{Twombly} plausibility requires a heightened level of pleading, one approaching a statement of the prima facie elements compared to the traditional four pleading requirements.

The two cases discussed in Part II.E, \textit{Feist} and \textit{Bolton}, are good examples of why courts should not interpret \textit{Twombly} as a basis to dismiss infringement claims for failing to plausibly plead prima facie elements.\textsuperscript{128} It is apparent that the cases would not have been decided on their merits and that using such a rule would essentially turn motions to dismiss into motions for summary judgment. Had \textit{Feist} been decided under an interpretation of \textit{Twombly} that required plausible pleading of prima facie elements, the outcome would have been different. Under such a rule, the trial court would have been forced to decide whether the plaintiff had plausibly alleged that the defendant’s copying infringed upon protected subject matter, based only on the complaint without the benefit of discovery. In turn, the plaintiff would have had to include a portion in his complaint that explained why the compilation was a protected work. The final resolution of the case would have been based on the ability of the plaintiff to describe the protectability of telephone directories.

\textit{Bolton} is also illustrative.\textsuperscript{129} In \textit{Bolton}, the court considered a jury verdict on a copyright infringement claim regarding the reproduction of a protected song. The court engaged in extensive factual review to determine whether the jury’s inference of copying was appropriate. Again, one can imagine that this case would have been resolved in a much different way under a post-\textit{Twombly} rule requiring factual allegations of prima facie plausibility. The plaintiffs’ complaint would have had to allege facts showing there was some level of access and that the works were substantially similar. The defendants would surely have challenged the complaint on the grounds that it did not allege plausible copying given the years between the two works and the significant differences. The trial court would have been faced with a valid motion to dismiss and no factual record. The resolution of such a motion would depend largely on the artfulness of the original complaint and the skill of the drafter of the motion to dismiss.

\textsuperscript{127} See supra note 94 and accompanying text.
\textsuperscript{128} See supra Part II.E.
\textsuperscript{129} See supra note 102 and accompanying text.
As both examples indicate, implementing a rule that ties the success of a motion to dismiss to allegations of prima facie elements would increase the likelihood that cases would be resolved based on the ability of the drafter rather than the merits of the claim. A clear implication of such a rule is that motions to dismiss would look more like motions for summary judgment, the difference being that the factual record is contained in the complaint rather than created through discovery. This consequence has not gone unnoticed in the wake of *Twombly*. Richard A. Epstein states that *Twombly* was a “disguised motion for summary judgment” granted because further discovery would have revealed no additional information. Epstein further argues that *Twombly* indicates that trial courts should be more willing to enter judgments at the close of pleadings, primarily where the plaintiff’s factual allegations rest solely on information which is publicly available.

Perhaps in certain situations Epstein’s approach is desirable, but the examples indicate that copyright infringement disputes are commonly fact-specific and will depend on the discovery phase to develop the legal issues. Courts should interpret *Twombly* plausibility as a guide to ensure that the factual allegations of the complaint plausibly support the traditional elements of infringement complaint pleading. As an example, the plaintiff should be required to allege facts that plausibly suggest ownership of the protected work, but disputes over whether the work is protectable subject matter should be left to the summary judgment phase. The four traditional requirements provide sufficient notice to the defendant of the complaint and the grounds upon which relief are sought. Further, these four elements, taken together, should be sufficient to push the claim beyond the “speculative level” and create a “reasonable expectation that discovery will reveal evidence” of infringement.

Lastly, courts should be hesitant to rely on any prima facie requirements in evaluating motions to dismiss on a purely precedential basis. Regardless of the statements about plausibility in *Twombly*, *Swierkiewicz v. Sorema N.A.* remains established law. The Court spoke clearly in *Swierkiewicz* and held that pleading requirements did not require an employment discrimination plaintiff to allege enough facts to establish a prima facie case of discrimination. Comparing the frequently equivocal language of *Twombly* with the clarity of *Swierkiewicz*, it seems

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131 Id.
132 See supra notes 125–26 and accompanying text.
133 See supra notes 125–26 and accompanying text.
135 Id. at 510–11.
likely that the Supreme Court is not willing to embrace a prima facie standard at
the pleading stage.

D. “FACTUALLY NEUTRAL” ELEMENTS OF A COPYRIGHT INFRINGEMENT
COMPLAINT

It is also necessary to address the role of the four traditional pleading
requirements of copyright infringement in light of Spencer’s “zones of pleading”
approach. At its base, Spencer’s approach interprets Twombly as requiring
dismissal of complaints which contain only factual allegations that are equally
consistent with liability or non-liability. Spencer labels such allegations as
“neutral” facts. He points to the plaintiff’s allegation of parallel conduct as an
example of a neutral fact. As indicated in Twombly, this allegation could indicate
liability or a mutual decision of market actors to not compete with one another,
wholly devoid of liability.

Copyright infringement pleading requirements present a challenge under this
approach. The first three traditional pleading requirements are clearly neutral,
meant only to provide notice to the defendant: specification of the work,
ownership of the work, and registration where applicable. The fourth element,
identification of the violative acts, is troublesome. As noted, the substantive
elements of copying demonstrate that many of the violative acts a plaintiff may
allege could equally indicate infringing or innocent conduct. For example, in
both Feist and Bolton the violative act was the copying of the plaintiff’s work. In
Feist, the copying was innocent conduct because the underlying work was not
protected subject matter. Conversely, the copying in Bolton was found to be
violative given the jury’s inferences from the showing of sufficient access and
substantial similarity.

These cases show that the “zones of pleading” approach may not be well
suited to every sort of complaint. Indeed, in the case of copyright infringement
suits, the only logical response to strict rejection of neutral facts is to require the
plaintiff to plead substantive elements of the claim. The preceding section
demonstrates that requiring substantive pleading is not a desirable solution.
Although Spencer’s approach has significant support in the text of Twombly,
adherence to such an approach is clearly at odds with resolving cases on their
merits. Courts should take the language from Twombly describing the neutrality of

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136 See supra note 67 and accompanying text.
137 See supra note 68 and accompanying text.
138 See supra Part II.E.
139 See supra note 99 and accompanying text.
140 See supra note 102 and accompanying text.
facts as commentary about those specific antitrust allegations and consider this language as a general balancing factor weighed against the enormous cost of discovery present in that case. In copyright infringement suits the courts should find plausibility satisfied by the adequate pleading of the four traditional elements\textsuperscript{141} and disregard the \textit{Twombly} requirement that the facts be something more than neutral.

E. POLICY IMPLICATIONS OF PLAUSIBILITY PLEADING FOR COPYRIGHT INFRINGEMENT SUITS

Interpreting \textit{Twombly} plausibility as requiring significantly heightened pleading for copyright infringement suits could have negative utilitarian consequences. Any increase in pleading standards will have a chilling effect on the likelihood of rights-holders to bring suit. The threat of litigation is the strongest (and perhaps the only effective) deterrent for would-be infringers. Therefore any impediment to bringing an infringement suit should be viewed as an erosion of the protections copyright holders retain. Eroding the protections that copyrights provide could reduce the incentive for individuals to engage in the types of creative works protected under copyrights.\textsuperscript{142}

A colorable argument could be made that raising pleading standards will have only nominal effects on the actions of potential copyright holders or the actions of potential infringers. However, this mistakenly minimizes the importance of litigation and governmental enforcement to the incentive structures created by intellectual property protection. Without the legitimate threat of government intervention, the rights of copyright holders become valueless. The exclusivity granted to the right-holder is the essential trade-off provided by the government for the creator’s efforts in generating a work. Without enforcement, there can be no exclusivity, and without exclusivity economic value is diminished. Finally, decreased economic incentives will result in a diminished quantity and quality of creative works. The degree of correlation between the barriers to litigation and the economic incentives of copyrights is extremely difficult to determine, but it should not be ignored when considering the policy effects of shifts in judicial doctrines. To do so would call into question the overarching framework created by intellectual property regimes.

Maintaining the traditional liberal notice pleading requirements for copyright infringement suits will not significantly harm defendants. Defendants will retain the same means to combat frivolous infringement suits that they have always held.

\textsuperscript{141} See supra Part II.D.
\textsuperscript{142} See supra note 17 and accompanying text.
Motions to dismiss have long been suitable and reasonable means for defendants to challenge complaints that fail to establish a claim. On the other hand, providing defendants with a Twombly-inspired defense will give infringing defendants a means to evade legitimate suits simply because the plaintiff failed to allege enough facts. Long before a case is ever considered, potential defendants faced with the option to infringe or not will be influenced by a rule that makes it harder for rights-holders to bring suit. A higher standard for plaintiffs to survive the pleading stage will decrease the power of the copyright and reduce the effectiveness of the device. Additionally, infringers will be given an extra protection when they are brought before the court. With this rule, potential defendants may breathe a little easier when they decide to infringe.

IV. CONCLUSION: PIRATES, PROCEED WITH CAUTION

Twombly created quite a kerfuffle, and the dust has yet to settle. Once the lower courts sort out the implications of the case, it may be that Twombly was a fundamental shift or simply a gentle nudge (or most likely something in between). The merits of more stringent pleading requirements are highly contestable. At one extreme, heightened standards provide the courts greater opportunities to filter out frivolous and vexatious claims. At the other, they create the risk of sheltering defendants from meritorious suits, the strength of which would be established in a later stage of litigation. The degree to which Twombly will cause such effects depends on how lower courts interpret and apply the plausibility requirement.

Copyright infringement claims should almost always be found to be plausible as long as they adequately allege the four traditional requirements of copyright infringement pleading. The vast majority of copyright infringement claims will exhibit characteristics that require only the most minimal factual specificity. Few, if any, will involve the enormous discovery costs that were threatened in Twombly. Moreover, controlled discovery will be sufficient to avoid those costs where there is a possibility of expensive discovery. Also, the fact that the Federal Rules provide a sample complaint that provides minimal factual allegations supports a minimal standard for copyright complaints. Any attempt to incorporate the substantive elements of a copyright infringement suit into the pleading requirements is ill-advised. First, it should not be permitted, given clear precedent rejecting such an approach. Second, it is undesirable because it makes it likely that suits will be decided based on the artfulness of drafting rather than the merits of

143 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d ed. 2004).
144 See supra note 21 and accompanying text.
Lastly, heightened pleading requirements should not be imposed on copyright infringement plaintiffs given the negative incentive generated by decreased enforceability of copyright protection.

In sum, a copyright infringement complaint that would have survived a 12(b)(6) motion to dismiss before *Twombly* should survive a similar motion after *Twombly*. By limiting the impact of *Twombly* on copyright infringement claims, courts will ensure that claims are resolved at the appropriate stage of litigation with the necessary factual support, and defendants accused of infringement will not be able to evade litigation by attacking the artfulness of the complaint’s drafter.

*Benjamin W. Cheesbro*