

SHAKING OUT THE “SHAKEDOWNS”:
PRE-DISCOVERY DISMISSAL OF COPYRIGHT
INFRINGEMENT CASES AFTER COMPARISON
OF THE WORKS AT ISSUE

*Evan Brown**
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ABSTRACT

In an era of copyright trolling, digital distribution, and widespread reappropriation of creative works, the specter of “shakedown” copyright infringement litigation looms larger than ever before. Some plaintiffs will hold the prospect of expensive and time-consuming discovery over alleged infringers to provoke settlement. In the wake of the Supreme Court’s decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, courts are more likely to consider the costs and time requirements of discovery when considering a defendant’s 12(b)(6) motion to dismiss. Several courts have recently indicated a willingness to grant motions to dismiss in copyright infringement cases when discovery is unlikely to produce material evidence. This Article examines the circumstances under which pre-discovery dismissal is likely to be granted, the courts’ reasoning for granting dismissal in such cases, and the potential effects on copyright infringement litigation.

* Evan Brown, University of Washington, Class of 2014. Special thanks to Professors Zahr Said and Lea Vaughn of the University of Washington School of Law, and to Robert F. Sinclair, Nick Kajka, and Caitlin Forsyth for their helpful edits and suggestions.

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INTRODUCTION

In an era when costly copyright infringement suits are often initiated to provoke settlements, pre-discovery dismissal is appealing to defendants and courts alike. Pleading rules previously made it difficult to convince a judge to dismiss the case before discovery was allowed, but in the wake of the Supreme Court's groundbreaking decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, certain types of copyright infringement suits are excellent candidates for pre-discovery dismissal. In particular, cases in which the court need only compare works of authorship to determine whether the plaintiff's claims are plausible. Such cases can be appropriately controlled with pre-discovery dispositive motions. Yet such motions will usually require courts to interpret and compare works, a task that carries certain costs.

This Article examines the circumstances under which a court is likely to consider dismissal of a copyright infringement case without discovery or trial and the pitfalls defendants may face in moving to dismiss. Part I describes the procedure and standards for pre-discovery dismissal. Part II explains how defendants in copyright infringement cases should challenge the elements of a prima facie case for infringement and prevail on defenses to infringement on a motion to dismiss. Part III presents four cases

that illustrate an emerging trend toward pre-discovery dismissal of infringement cases in certain circumstances, particularly where comparison of works is sufficient to resolve the claims and the suit appears calculated to provoke settlement. Finally, Part IV introduces some of the procedural problems presented by pre-discovery dismissal based on judicial comparison of works.

I. PRE-DISCOVERY DISMISSAL GENERALLY

The *Twombly* standard has given courts the opportunity to more easily resolve cases at a very early stage in the litigation process. Defendants who wish to avoid discovery can move to dismiss or request judgment on the pleadings where additional evidence will prove immaterial. The primary vehicle for dismissal is a Rule 12(b)(6) motion to dismiss for failure to state a claim, but motions for judgment on the pleadings and even motions for summary judgment may accomplish the same result in certain cases. Because the plausibility standard requires plaintiffs to plead allegations that illustrate what sort of evidence will be necessary to resolve the claims, pre-discovery dismissal has become a feasible strategy.

A. Procedural Considerations

A defendant who hopes to avoid the expense and inconvenience of discovery can either move for dismissal before filing the responsive pleading or move for judgment on the pleadings. If the defendant has no need to plead additional facts, a motion to dismiss for failure to state a claim is appropriate.² If a response has been filed, the defendant can instead move for judgment on the pleadings, pursuant to Rule 12(c).³ If the moving party relies on information not included in the filed pleadings, the court will convert the motion to dismiss to a motion for summary judgment. Such a conversion is important to a defendant seeking to avoid discovery, because discovery requests are allowed as part of

² Fed. R. Civ. P. 12(b)(6).

³ Fed. R. Civ. P. 12(c).

a motion for summary judgment.⁴ However, the court has discretion to grant or deny any such discovery request. Thus, pre-discovery dismissal requires a successful 12(b)(6) or 12(c) motion, or a successful argument at the summary judgment stage that discovery is unnecessary.

A 12(b)(6) motion to dismiss tests the plaintiff's claim against the facts alleged in the complaint to determine whether the case can succeed. One important advantage of a 12(b)(6) motion is that the defendant can potentially end the suit without even responding to the complaint. A major drawback, however, is that the defendant cannot argue facts extrinsic to the complaint.⁵ Thus, affirmative defenses generally cannot be raised on a 12(b)(6) motion.⁶ There is, however, an important exception to this general rule: If the complaint includes all facts necessary for the defendant to "conclusively establish" the defense, it may be raised.⁷ As the First Circuit described the exception, "dismissal . . . is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense."⁸ That is, the complaint must include all facts necessary for the defendant to establish every

⁴ Fed. R. Civ. P. 56(d)(2). Further, a non-movant who believes he was denied an opportunity to conduct necessary discovery prior to summary judgment may appeal on grounds that summary judgment was premature. *Vance By & Through Hammons v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) ("The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery."); *but see* *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 628 (6th Cir. 2002) (holding in a trade dress infringement case that denial of a discovery request aimed at producing unnecessary evidence was not error).

⁵ *E.g.*, *Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F. Supp.2d 1158, 1159–60 (C.D.Cal.1998).

⁶ *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005).

⁷ *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003).

⁸ *Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 181 (4th Cir. 1996); *accord* *C.H. Robinson Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 763 (8th Cir. 2012); *Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011); *Iowa Pub. Employees' Ret. Sys. v. MF Global, Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010); *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010); *Santana-Castro v. Toledo-Davila*, 579 F.3d 109, 113 (1st Cir. 2009); *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir. 2007); *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005); *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001); *Pentagen Technologies Int'l Ltd. v. United States*, 175 F.3d 1003, 1005 (Fed. Cir. 1999).

element of the defense.⁹ Statute of limitations or immunity defenses are often raised pursuant to this exception,¹⁰ but the exception can also be invoked to assert copyright defenses like fair use.¹¹

Documents and other works, usually central to copyright infringement cases, can be included among the facts of the complaint in several ways. The plaintiff can incorporate documents into the complaint by attachment.¹² The court can also take judicial notice of matters of public record and common public knowledge.¹³ Most importantly, the defendant can ask the court to incorporate by reference works that are central to the allegations in the complaint but have not been attached, so long as there are not material issues of fact relating to their authenticity.¹⁴ A court is

⁹ A plaintiff is not required to anticipate affirmative defenses and plead facts sufficient to defeat them. Only if the elements of the affirmative defense can be established from the factual allegations in the complaint can it be raised on a 12(b)(6) motion. *Goodman v. Praxair, Inc.*, 494 F.3d 458, 466 (4th Cir. 2007). The *Twombly* decision did not alter this requirement. *Id.*

¹⁰ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *see also* *Righthaven LLC v. Realty One Group, Inc.*, 2:10-CV-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010).

¹¹ *See* *Brownmark*, 682 F.3d at 690.

¹² Fed. R. Civ. P. 10(c); *see also, e.g.*, *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010); *McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555, n.19 (9th Cir. 1989); *Amfac Mortg. Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429 (9th Cir. 1978).

¹³ Fed. R. Evid. 201(c)(2); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Note that judicial notice may also be taken of “generic elements of creative works,” *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1128 (C.D. Cal. 2007), publicly accessible works, *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084, n.2 (C.D. Cal. 2001), and even well-known songs, *Burnett v. Twentieth Century Fox*, 491 F. Supp. 2d 962, 966 (C.D. Cal. 2007).

¹⁴ *E.g.*, *Ouwinga v. Benistar 419 Plan Services, Inc.*, 694 F.3d 783, 797 (6th Cir. 2012); *Citadel Group Ltd. v. Washington Reg'l Med. Ctr.*, 692 F.3d 580, 591 (7th Cir. 2012); *Greenpack of Puerto Rico, Inc. v. Am. President Lines*, 684 F.3d 20, 26 (1st Cir. 2012); *Kensington Volunteer Fire Dept., Inc. v. Montgomery County, Md.*, 684 F.3d 462, 467 (4th Cir. 2012); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th Cir. 1998); *but see* *Gines v. D.R. Horton, Inc.*, 12-30183, 2012 WL 4902809 (5th Cir. Oct. 17, 2012) (stating that the “one recognized

especially likely to grant such a request to incorporate when the work is all that is necessary for the court to consider whether the complaint states a valid claim.¹⁵ Many district courts have held that works at issue in a copyright infringement case are good candidates for such incorporation by the defendant,¹⁶ and at least one circuit court has written approvingly of liberally applying the incorporation by reference doctrine in copyright infringement cases.¹⁷

Of course, affirmative defenses can also be raised in the defendant's responsive pleading. If this is necessary, pre-discovery dismissal is still possible through a 12(c) motion for judgment on the pleadings.¹⁸ Any works at issue may be attached to the responsive pleading. This may be a useful tactic if the defendant wishes to assert defenses, like fair use, that can benefit from information not contained in the complaint, including other works not obviously at the heart of the claims. As with a 12(b)(6) motion, if information extrinsic to the pleadings is necessary or if documents external to the pleadings are attached, the court will convert the motion to one for summary judgment. A court may effectively convert the motion even if the pleadings contain all necessary evidence.¹⁹

exception" to the rule that external documents may not be considered as part of a 12(b)(6) motion was for documents incorporated by reference).

¹⁵ *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (“[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a prospectus upon which it solely relies and which is integral to the complaint, the defendant may produce the prospectus when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.”).

¹⁶ *Erickson v. Blake*, 839 F. Supp. 2d 1132, 1134 (D. Or. 2012); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 (N.D. Cal. 2010); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002); *Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995); *Canal Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 427 (S.D.N.Y. 2011); *Zella*, 529 F. Supp. 2d at 1131–32; *Daly v. Viacom*, 238 F. Supp. 2d 1118, 1121–22 (N.D. Cal. 2002).

¹⁷ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012) (noting in dictum that incorporation of works like television programs, which cannot be physically attached as documents, “makes eminently good sense”).

¹⁸ Fed. R. Civ. P. 12(c).

¹⁹ *E.g.*, *Swatch Group Mgmt. Services Ltd. v. Bloomberg L.P.*, 11 CIV. 1006 AKH, 2012 WL 1759944 (S.D.N.Y. May 17, 2012).

If a Rule 12 motion is converted to a motion for summary judgment, the court must provide notice to the parties and an opportunity to present evidence consistent with FRCP 56.²⁰ As noted above, the court may entertain discovery requests in conjunction with a motion for summary judgment,²¹ but any requests should be denied if evidence sufficient to dispose of the case is already in front of court.²² This is especially true in the case of converted Rule 12 motions.²³ Courts are also likely to deny discovery requests that are unduly burdensome under the circumstances.²⁴ Thus, depending on the circumstances of the case and the facts already before the court, a converted motion for summary judgment may not present major practical distinction from either a 12(b)(6) or 12(c) motion.²⁵

B. Standard for Dismissal

Prior to the Supreme Court’s ruling in *Twombly*, a court would only grant pre-discovery dismissal when it was “beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief.”²⁶ This standard required that it

²⁰ Fed. R. Civ. P. 56(c); *In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985), *cert. denied*, 475 U.S. 1015, 106 S. Ct. 1195, 89 L. Ed. 2d 310 (1986).

²¹ Compare Fed. R. Civ. P. 26(d)(1) (“A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except . . . when authorized by these rules”) with Fed. R. Civ. P. 56(b)(2) (“[T]he court may . . . allow time to obtain affidavits or declarations or to take discovery.”); see also *Brownmark*, 682 F.3d at 691.

²² *Brownmark*, 682 F.3d at 691 (“District courts need not, and indeed ought not, allow discovery when it is clear that the case turns on facts already in evidence.”)

²³ *Swatch Group Mgmt. Services Ltd. v. Bloomberg L.P.*, 11 CIV. 1006 AKH, 2012 WL 1759944 (S.D.N.Y. May 17, 2012).

²⁴ *Brownmark*, 682 F.3d at 691.

²⁵ *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007) (“Federal Rule of Civil Procedure 12(b)(6) specifically gives courts the discretion to accept and consider extrinsic materials offered in connection with these motions, and to convert the motion to one for summary judgment when a party has notice that the district court may look beyond the pleadings.”)

²⁶ *Conley v. Gibson*, 355 U.S. 41, 45–6, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

be *impossible* for the plaintiff to prove his case on the basis of the allegations made in the complaint, making pre-discovery dismissal very difficult.²⁷ The *Twombly* decision lowered the bar for defendants, requiring that plaintiffs plead sufficient factual circumstances to make the claim *plausible*.²⁸ Prior to the *Twombly* decision, a defendant had to show impossibility in order to prevail on a motion to dismiss; after *Twombly*, a defendant need only establish implausibility.

The Court's reasoning in *Twombly* relied heavily on its assessment that judicial management of the discovery process was often an inadequate check on abusive discovery in antitrust suits.²⁹ Justice will often prove elusive if "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings," and such a situation actually incentivizes unmeritorious claims. In order to better protect defendants from the threat of unduly burdensome discovery requests, the Court determined that the complaint must push the claims "across the line from conceivable to plausible."³⁰

As interpreted by the Ninth Circuit, this standard should be applied "such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."³¹ The Supreme Court clarified in *Iqbal* that the plausibility standard applied to all civil actions,³² but the warning of *Twombly* was that courts should scrutinize plausibility when claims are especially prone to abusive litigation.

²⁷ See, e.g., *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005) (vacating dismissal because the plaintiff might prove validity of copyright on several possible grounds, and noting that the court could properly determine a lack of validity as a matter of law "at any of several later stages").

²⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

²⁹ *Twombly*, 550 U.S. at 559 ("It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' [citation omitted] given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.")

³⁰ *Id.*, at 570.

³¹ *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (U.S. 2012).

³² *Iqbal*, 556 U.S. at 664.

Courts have long viewed copyright infringement cases as prone to abuse because plaintiffs are often simply trying to cash in on the success of a later work to which they did not directly contribute.³³ This has become an even larger problem with the emerging trend of copyright trolling—purchasing copyrights from the original holders in order to enforce them against infringers for profit.³⁴ The Seventh Circuit noted that “[r]uinous discovery heightens the incentive to settle rather than defend these frivolous suits.”³⁵ This potential for abuse looms large over infringement suits, and courts have begun to take into account the extent that particular claims appear to be shots across the bow intended to provoke surrender in the face of unjustifiable costs.

II. PRE-DISCOVERY DISMISSAL OF COPYRIGHT INFRINGEMENT CASES

There are two situations in which a court may grant dismissal of a copyright infringement claim. First, a defendant may challenge the complaint because a required element of infringement cannot be established on the basis of the averments. Second, a defendant may assert a defense that relies solely on pleaded facts and works before the court. Under certain circumstances, even fair use may be established without need for evidence external to the pleadings.

³³ See, e.g., *Lowenfels v. Nathan*, 2 F. Supp. 73, 80 (S.D.N.Y. 1932) (noting that it is “usual in plagiarism cases” that “obscurity is taking a long shot at success”); *Porto v. Guirgis*, 659 F. Supp. 2d 597, 617 (S.D.N.Y. 2009) (noting that a belated suit of questionable merit against successful filmmakers and producers had “the hallmarks of an abusive lawsuit”).

³⁴ See, e.g., *Third Degree Films v. Does 1-47*, 286 F.R.D. 188 (D. Mass. 2012); *In re BitTorrent Adult Film Copyright Infringement Cases*, CIV.A. 11-3995 DRH, 2012 WL 1570765 (E.D.N.Y. May 1, 2012), *report and recommendation adopted sub nom.*, *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).

³⁵ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012).

A. *Challenges to Prima Facie Showing of Infringement*

The most common method for disposing of copyright infringement cases prior to discovery is moving to dismiss because the plaintiff cannot plausibly establish one or more elements of her claim. If any of the elements of copyright infringement cannot be established by the facts as averred in the complaint, a court will dismiss the case for failure to state a valid claim. These elements are (1) registration of copyright, (2) validity of copyright, (3) copying, and (4) substantial similarity between the allegedly infringing work and the copyrighted elements of the original work.³⁶ Challenging registration or validity prior to discovery may be relatively simple in some cases, but the copying and substantial similarity elements will usually require at least comparison of the works.

1. Copying

Copying can be established in two ways: by offering direct proof that the defendant actually copied the copyrighted work, or by offering circumstantial evidence from which the factfinder can infer that copying occurred. The former method requires witness testimony or other evidence, and thus is not suited to pre-discovery dismissal. The latter method allows the court to infer that the defendant copied the plaintiff's copyrighted expression if the plaintiff establishes both (1) that the defendant had access to the work, and (2) that the allegedly infringing work is substantially similar to the copyrighted work.³⁷ The similarity finding generally

³⁶ See Howard B. Abrams, 2 *The Law of Copyright* § 14:6 (2013).

³⁷ *E.g.*, *Wildlife Exp. Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 (7th Cir. 1994). Some courts helpfully refer to the substantial similarity portion of a copying analysis as involving “probative similarity” to differentiate it from the substantial similarity evaluation used to determine whether the defendant has appropriated a sufficient amount of the copyrighted work to constitute infringement. *See, e.g.*, *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 49 (1st Cir. 2012); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 56 (2d Cir. 2003); *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, n.7 (5th Cir. 2003); *Dam Things from Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 562 (3d Cir. 2002); *Peel & Co., Inc. v. The Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d

requires the factfinder to examine the works, treating parallels “that, in the normal course of events, would not be expected to arise independently in the two works” as circumstantial evidence of copying.³⁸

If the plaintiff can provide no direct evidence of copying, a court will dismiss an infringement claim if it determines the works at issue do not exhibit similarities from which a rational jury could infer copying.³⁹ If there are no similarities between the works at all, the determination is relatively simple.⁴⁰ If there are some similarities between the works, the court may still infer lack of copying if it finds that the similarities would not indicate to rational jurors that copying occurred. For example, similarities that extend only to common influences or *scènes à faire* may not lead to rational inferences of copying.⁴¹

2. Substantial Similarity

In addition to possibly considering similarity as circumstantial evidence of copying, the court will assess similarity to determine whether the defendant’s copying is substantial enough to constitute actionable infringement. This similarity determination involves a somewhat different analysis than that required to establish copying, as it requires the court to determine whether a substantial enough portion of the expression protected by copyright has been taken, and thus whether the copying should be considered infringement of that copyright.⁴² The question presented is not

Cir. 1997); *Repp v. Webber*, 132 F.3d 882, n.1 (2d Cir. 1997).

³⁸ *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 370 (5th Cir. 2004) (abrogated on other grounds).

³⁹ *Armour v. Knowles*, 512 F.3d 147, 151 (5th Cir. 2007).

⁴⁰ *Arnstein*, 154 F.2d at 468 (“[I]f there are no similarities, no amount of evidence of access will suffice to prove copying.”)

⁴¹ *See, e.g., Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).

⁴² *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975) (“While ‘(r)ose is a rose is a rose is a rose,’ substantial similarity is not always substantial similarity.”). However, courts have at times conflated the two analyses. *See, e.g., Shipman v. R.K.O. Radio Pictures*, 100 F.2d 533, 538 (2d Cir. 1938); *Ornstein v. Paramount Productions*, 9 F. Supp. 896, 901 (S.D.N.Y.

whether the similarities can lead a jury to infer anything about the defendant's process of creation; rather, the question is whether the amount and manner of appropriation of copyrighted content is sufficient to constitute infringement. This question is answered primarily by comparing the defendant's work to the protected elements of the plaintiff's work, although expert testimony to provide context or explanation may be relevant. If the defendant copied only unprotected elements—for example, portions of works in the public domain or abstract ideas—there can be no finding of infringement.⁴³ Similarly, if the defendant's use of protected material is clearly *de minimis*, the court should not find infringement.⁴⁴

Substantial similarity is essentially a qualitative factual determination made by comparing the works at issue. The particular method of assessment differs among the circuits, but in all jurisdictions the factfinder must make a determination about an ordinary observer's reactions.⁴⁵ While this sort of determination is particularly well suited to a jury, judges are sometimes willing to find that their own reactions are sufficiently ordinary to stand in for those of any reasonable juror.⁴⁶ Indeed, as far back as 1932, the

1935).

⁴³ *Christianson v. West Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945); *Carr v. Nat'l Capital Press*, 71 F.2d 220 (D.C. Cir. 1934).

⁴⁴ *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997); *DeBitetto v. Alpha Books*, 7 F. Supp. 2d 330, 334 (S.D.N.Y. 1998).

⁴⁵ The appellate courts have developed different approaches to substantial similarity, but each involves some use of an ordinary observer/intended audience test. The Second Circuit's approach, also followed by the Third, Fifth, and Seventh circuits, is to use an "intrinsic test" by which the court decides whether an ordinary observer would apprehend protected elements of the copyrighted work in the defendant's work. The Ninth Circuit approach, used also by the Fourth and Eighth circuits, adds to the intrinsic test an "extrinsic test" by which the court compares elements of the works to determine whether there is "a triable issue of fact." *Shaw v. Lindheim*, 919 F.2d 1353, 1362 (9th Cir. 1990). Finally, the Sixth Circuit uses a somewhat different two-step approach, first determining which elements of the copyrighted work are protected, and then comparing only those elements with the defendant's work under an ordinary observer standard.

⁴⁶ *E.g.*, *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 64, 94 U.S.P.Q.2d 1354 (2d Cir. 2010); *Gal v. Viacom Intern., Inc.*, 403 F. Supp. 2d 294, 305 (S.D.N.Y. 2005); *Segrets, Inc. v. Gillman Knitwave Co.*, 207 F.3d 56, 62 (1st Cir. 2000); *Blakeman v. The Walt Disney Co.*, 613 F.

District Court for the Southern District of New York—no stranger to copyright infringement suits—announced that pre-trial comparison by the judge “should become the usual method of dealing with copyright suits, unless, owing to nice questions of originality or access, oral evidence is indicated as necessary.”⁴⁷ In these cases, the judge’s comparison of the works proves effectively dispositive, often prior to trial.

Yet for some works, substantial similarity cannot be appropriately determined prior to trial. For instance, some courts have held that an understanding of certain types of copyrightable material, particularly computer software, is beyond the realm of ordinary jurors’ experience, and thus expert testimony is necessary to find substantial similarity.⁴⁸ Works intended for specialized audiences will also generally require expert testimony before the factfinder can fully comprehend the implications of any similarities.⁴⁹ In general, though, expert testimony is not required to decide substantial similarity.⁵⁰ In fact, some courts consider expert testimony “not appropriate” to an analysis of an ordinary observer’s response.⁵¹

In order to determine substantial similarity, it is important that the court have before it the all of the works at issue. If it does not, pre-discovery dismissal is inappropriate. For example, a synopsis of the infringing work will not be sufficient, as the court needs

Supp. 2d 288, 298, 91 U.S.P.Q.2d 1637 (E.D.N.Y. 2009).

⁴⁷ *Lowenfels v. Nathan*, 2 F. Supp. 73, 75 (S.D.N.Y. 1932); *accord* *Park v. Warner Bros.*, 8 F. Supp. 37, 39 (S.D.N.Y. 1934); *see also* *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930). Note, however, that these cases predated the development of the modern tests for determining substantial similarity.

⁴⁸ *E.g.*, *Computer Associates Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992); *accord* *Peter F. Gaito Architecture*, 602 F.3d at 65.

⁴⁹ *E.g.*, *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 737 (4th Cir. 1990); *Kohus v. Mariol*, 328 F.3d 848, 856 (6th Cir. 2003).

⁵⁰ *E.g.*, *Stromback v. New Line Cinema*, 384 F.3d 283, 295 (6th Cir. 2004).

⁵¹ *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977). Notably, however, this case has been criticized by commentators as confusing the prior case law. *See, e.g.*, Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719 (2010).

further evidence to determine whether the synopsis is truly representative of the full work.⁵² So long as the works are before the court, however, either by attachment to the pleadings or incorporation by reference, wholly dissimilar works or works in which similarity extends only to unprotected elements are good candidates for pre-discovery dismissal.⁵³

B. Affirmative Defenses

An affirmative defense can also be grounds for pre-discovery dismissal, so long as evidence beyond the scope of the filed pleadings is not necessary to fully consider the merits of the defense. If the defense appears on the face of the complaint or is raised in the defendant's answer, the court may consider it. Certain defenses, like the statute of limitations, may lend themselves well to pre-discovery dismissal but are unlikely to appear on the face of the complaint. Other defenses, like laches, estoppel, and abandonment, will almost certainly necessitate introduction of evidence external to the pleadings. Fair use, the most prevalent infringement defense, often also requires additional evidence to establish. Under certain circumstances, however, fair use may be considered to appear on the face of the complaint if the works can be incorporated and if the complaint indicates no external evidence will be material. In such cases, comparison of the works may be all that is necessary for the court to resolve the issue of fair use.

Fair use has long been viewed as generally unsuitable to pre-discovery motions.⁵⁴ In analyzing fair use, courts attempt to determine whether the defendant's use of the plaintiff's work was non-competitive or transformative enough to justify a non-permissive use, in which case otherwise infringing copying may be permissible. Normally, courts accomplish this by using the

⁵² See *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

⁵³ See *Cory Van Rijn, Inc. v. California Raisin Advisory Bd.*, 697 F. Supp. 1136, 1137 (E.D. Cal. 1987); *Lake v. Columbia Broadcasting System*, 140 F. Supp. 707, 708 (S.D. Cal. 1956); *Lewis v. Kroger Co.*, 109 F. Supp. 484, 485 (S.D. W. Va. 1952); *Lowenfels*, 2 F. Supp. at 74.

⁵⁴ *E.g.*, *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (Hand, J.) (“[T]he issue of fair use . . . is the most troublesome in the whole law of copyright, and ought not to be resolved in cases where it may turn out to be moot, unless the advantage is very plain.”).

balancing test outlined in 17 U.S.C. § 107, weighing at least (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the entirety of the copyrighted work, and (4) the effect of the use on the market for the copyrighted work. Such a balancing test is poorly suited to pre-discovery dismissal in most cases. In particular, the fourth factor can be heavily dependent on the evidence presented by the parties.

Whether dismissal on fair use grounds is appropriate will hinge on whether the complaint includes allegations from which the court can infer that other evidence is reasonably likely to have an impact on the fair use analysis.⁵⁵ For example, if the plaintiff has alleged actual economic harm or facts indicating potential future harm, pre-discovery dismissal on fair use grounds will probably not be appropriate. In such a case, the court is highly unlikely to find that the fair use defense appears on the face of the complaint, and a motion for judgment on the pleadings would probably prove futile. In many cases, all elements other than market effect are clear after comparing the works and considering the factual allegations made in the complaint.

Parody, a classic but legally complicated transformational use, provides an illustrative example of the issues associated with fair use. Usually, the analysis will hinge on the third and fourth fair use factors—the amount and substantiality of the defendant’s copying, and the effect on the market for the plaintiff’s work.⁵⁶ In fact, the factors are often melded when courts examine parodies, since a parody will only be found to have copied an impermissible amount of the copyrighted work if it is likely to be a “market substitute.”⁵⁷ If it is not a market substitute, it is very difficult to prove market

⁵⁵ *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012); *see also* *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974) (“When a federal court reviews the sufficiency of a complaint . . . [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.”).

⁵⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588, 114 S. Ct. 1164, 1176, 127 L. Ed. 2d 500 (1994); MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW*, 515 (5th ed. 2010).

⁵⁷ *Campbell*, 510 U.S. at 588.

impact.⁵⁸ Further, if the effect of the parody on demand for the copyrighted work is clearly or admittedly neutral at worst and positive at best, the court may be willing to find fair use without further evidence.⁵⁹ If these factors can be clearly resolved by the court without further evidence, the court may well dismiss the case.⁶⁰ These considerations will be especially important to a court considering fair use as a matter of law prior to discovery.

III. CASE STUDIES IN PRE-DISCOVERY DISMISSAL

Four cases decided within the last several years may serve as guideposts for understanding when a court is likely to dismiss a copyright infringement case in the post-*Twombly/Iqbal* era. Both the District Court⁶¹ and Seventh Circuit⁶² opinions in *Brownmark Films, LLC v. Comedy Partners* are instructive, as they showcase the issues associated with the incorporation of works and the determination of whether a defense appears on the face of the complaint when works are so incorporated. On the other hand, the 2008 Sixth Circuit case of *National Business Development Services, Inc. v. American Credit Education & Consulting Inc.* illuminates the potential for dismissal when the plaintiff fails to describe the works at issue with sufficient specificity to allow for incorporation. In the 2010 case *Righthaven LLC v. Realty One Group, Inc.*, a District Court dismissed an infringement case by a copyright troll company on fair use grounds, which may be indicative of how courts will treat similar cases. Finally, the 2010 Second Circuit case *Peter F. Gaito Architecture, LLC v. Simone Development Corp.* exemplifies the type of case that a court is likely to consider ripe for substantial similarity analysis at the 12(b)(6) stage. These cases illustrate the sorts of procedural, factual, and equitable scenarios in which courts may be inclined to

⁵⁸ *Id.* at 591–2 (“[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”)

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Brownmark Films, LLC v. Comedy Partners*, 800 F. Supp. 2d 991 (E.D. Wis. 2011).

⁶² *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012).

dismiss infringement claims.

The District Court’s opinion in *Brownmark* illustrates the difficulties that can arise when attempting to determine whether evidence external to the pleadings is necessary when the works at issue are appropriately before the court.⁶³ The plaintiffs, creators of a viral YouTube video, sued the producers of the television comedy show *South Park* for parodying the video in an episode. The complaint alleged that the defendants had infringed by including the parody in the episode and it did not allege any separate incidents of infringement—for example, in advertisements or other promotional materials—despite having opportunities to amend both before and after the defendants moved to dismiss. The episode was thus central to the claim and could be attached to the motion to dismiss. The plaintiff’s copyrighted video was similarly incorporated by reference. Once both works were before the court, the judge decided that all of the standard fair use factors could be analyzed without additional evidence: the video was clearly a commercially released parody, the defendant had not taken more of the copyrighted work than was reasonably necessary to accomplish its purpose, and the parody was not similar enough to the original to usurp market demand. The court thus ruled that no further evidence would help the plaintiff prevail against the defense of fair use.⁶⁴

The Seventh Circuit affirmed, conspicuously commenting that “infringement suits are often baseless shakedown.”⁶⁵ The court approved of the resolution through comparison, but held that the motion to dismiss should have been treated as one for summary judgment. Still, the court saw no need to remand since it believed that any discovery requests would simply have been denied and failure to provide notice of conversion was irrelevant because the

⁶³ *Brownmark*, 800 F. Supp. 2d at 998.

⁶⁴ *Id.*. At least one court has distinguished *Brownmark* on this basis, implying that if a plaintiff raises factual allegations that indicate that other evidence may impact one or more of the fair use factors, mere comparison of the works will be insufficient grounds for dismissal before the plaintiff has an opportunity to offer such evidence. *Katz v. Chevaldina*, 900 F. Supp. 2d 1314, 1316–7 (S.D. Fla. Oct. 5, 2012).

⁶⁵ *Brownmark*, 682 F.3d at 691 (7th Cir. 2012).

plaintiff could not have offered any contrary evidence. Under the circumstances, the court found no effective difference between the two types of motions since comparison so clearly established fair use. In its estimation, all that was required to dispose of the case were the works themselves, whether they were incorporated by reference or offered on motion for summary judgment. By describing the works at issue in the complaint with particularity, but without pleading facts that made additional evidence necessary, the plaintiff had opened itself to dismissal without discovery.

Yet if a plaintiff fails to describe the infringing works with sufficient particularity, closing the door on pre-discovery comparison, the court may simply dismiss the case for failure to meet the plausibility standard. In *National Business Development Services*, the Sixth Circuit affirmed dismissal on grounds that the case was nothing more than a fishing expedition intended to uncover implausible acts of infringement through unnecessary discovery.⁶⁶ The plaintiff had sued thirteen defendants for infringement but described only in the most general terms the types of publications that allegedly infringed its copyrighted materials. The court held that such allegations were insufficient under the *Twombly* standard, noting also that “[c]opyright infringement . . . lends itself readily to abusive litigation, since the high cost of trying such a case can force a defendant who might otherwise be successful in trial to settle in order to avoid the time and expenditure of a resource intensive case.”⁶⁷

Courts may be especially sensitive to cases involving copyright trolls. In *Righthaven*, the court considered whether a real estate blogger’s use of a portion of a newspaper article constituted fair use.⁶⁸ Plaintiff Righthaven, “the first copyright troll,”⁶⁹ had purchased the copyright to the article from the newspaper after the defendant had published the reproduced portion. Instead of settling

⁶⁶ Nat’l Bus. Dev. Services, Inc. v. Am. Credit Educ. & Consulting Inc., 299 F. App’x 509, 512 (6th Cir. 2008).

⁶⁷ *Id.* at 512.

⁶⁸ Righthaven LLC v. Realty One Group, Inc., 2:10-CV-1036-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19, 2010)

⁶⁹ Ian Polonsky, *You Can’t Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 COLUM. J.L. & ARTS 71 (2012).

quickly, as most others targeted by Righthaven had done, the defendant raised fair use on a 12(b)(6) motion and the court granted dismissal. While the court’s brief opinion does not mention abusive litigation, the defendant argued in his motion to dismiss that the suit was intended as a source of revenue. Righthaven had not even sent the customary cease-and-desist letter prior to initiating the suit. It is unclear what persuasive value this had, but it is notable that the same court dismissed all of Righthaven’s similar suits as well, concluding fair use in some of them.⁷⁰ In cases such as this in which equitable considerations loom large, the court may be particularly receptive to dismissal.

Even if the suit does not appear abusive or intended to provoke settlement by threat of expensive litigation, a court may be willing to protect the defendant from unnecessary expense if the works at issue are before it and it believes that external evidence is superfluous. For example, in *Peter F. Gaito Architecture*, the Second Circuit affirmed a dismissal on substantial similarity grounds, holding that the similarity between two architectural designs could be properly determined as a matter of law after visual comparison.⁷¹ Moreover, the court explained that a *de novo* comparison of the works by the appellate court is the proper procedure for determining whether the lower court ruling was in error.⁷²

In each of these cases, the facts suggested that it was “unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.”⁷³ However, in each case the court also felt that information extrinsic to the complaint would not have changed the disposition on the merits. As the Second Circuit put it, the plaintiff was not “entitled to offer evidence in support of

⁷⁰ See, e.g., *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138 (D. Nev. June 20, 2011).

⁷¹ *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57 (2d Cir. 2010).

⁷² *Peter F. Gaito Architecture*, 602 F.3d at 66; see also, *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001); *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 766 (2d Cir. 1991).

⁷³ *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

his claims.”⁷⁴ The lack of plausibility serves as the legal grounds for dismissal, but where bad motives or indefensible expense are suggested by the facts of the case, the court may be more open to early resolution of the case.

IV. THE COSTS OF PRE-DISCOVERY COMPARISON

Although pre-discovery dismissal diminishes the overt costs of litigation, there are hidden costs that should also be considered by the courts. Early dismissal is well suited to cases involving the sorts of questions that judges are trained to analyze, but there is a danger to expanding the role of judicial comparison outside the bounds of judges’ expertise to dispose of infringement cases. Fair use presents further problems due to the prominence of market impact in the analysis and the difficulty of inferring such impact simply by comparing works.

Comparison of works without contextualizing testimony can suffer from inherent difficulties, some of which may not always be apparent. For example, substantial similarity frequently requires an analysis of whether the overall “feel” of two works is similar,⁷⁵ and this “feel” is often quite dramatically affected by context.⁷⁶ This contextual element is generally distorted in an infringement proceeding. The process of comparison itself may even convey unintended similarities.⁷⁷ Thus, the parties try to contextualize the works with testimony and other evidence. But prior to discovery and trial, they have not had a chance to thoroughly establish context; instead, the judge simply decrees that his assumed context is correct.

Considering fair use prior to discovery and trial presents a related problem, as the plaintiff is not allowed to present evidence of market impact. This impact is often effectively dispositive on

⁷⁴ *Peter F. Gaito Architecture*, 602 F.3d at 65 (quoting the *Scheuer* standard, *see supra* note 55, as stated in *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995)).

⁷⁵ *E.g.*, *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1296 (D.C. Cir. 2002); *Boisson v. Banian, Ltd.*, 273 F.3d 262, 266 (2d Cir. 2001); *see also generally* Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012).

⁷⁶ Tushnet, *supra* note 73, at 734.

⁷⁷ *Id.*

the question of fair use, yet courts seeking to dismiss a seemingly abusive suit may be tempted to make hasty assumptions. For example, the *Brownmark* court held that because the parody at issue was not a market substitute for the parodied work, it “cannot have an actionable effect on the potential market for or value of the original[.]”⁷⁸ However, the Supreme Court has held that a parody may have an actionable impact on the market for protectable derivative works.⁷⁹ Given the recent proliferation of television programs presenting licensed compilations of YouTube videos,⁸⁰ the South Park episode could plausibly have had a negative impact on the market for licensing to some such programs. A plaintiff should be allowed to present evidence of such an impact, *especially* where the impact on the derivative market is not obvious to a judge at the time of comparison.⁸¹ The threat of dismissal on fair use grounds due to the lack of clear market impact effectively requires infringement plaintiffs to anticipate and plead around the affirmative defense by pleading such an impact, which is generally improper.⁸²

Despite these sorts of problems, courts will likely continue to push for early dismissal of seemingly abusive infringement suits. In practice, much will probably depend on the facts of individual cases. If the likelihood of abusive discovery or settlement extortion is significant, the potential unfairness of pre-discovery dismissal may be weighed lightly in the balance. On the other hand, if a suit

⁷⁸ *Brownmark*, 682 F.3d at 693.

⁷⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994).

⁸⁰ For example, Comedy Central’s *Tosh.0*, MTV’s *Ridiculousness*, or SyFy’s *Viral Video Showdown*.

⁸¹ Notably, the *Campbell* Court held that “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.” 510 U.S. at 591–592. Yet the Court also explained that “the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’ [citation omitted]” *Id.* at 592. In a case such as this—admittedly quite unusual—in which the derivative market is one for “biting criticism” that brings licensing fees to the copyright holder, the competition is fairly direct and there may well be cognizable harm.

⁸² *See generally* 5 Fed. Prac. & Proc. Civ. § 1276 (3d ed.).

is not clearly abusive, the problems with reliance on comparison and assumption caution against early dismissal.

CONCLUSION

Given the requirements of the plausibility standard, judges are at greater liberty to determine that judicial comparison is sufficient to resolve a copyright infringement claim. Courts have long decided infringement cases on summary judgment by simply comparing the works at issue, but the cases discussed may indicate a trend toward even earlier dismissal using the same methods. It appears that the courts in these cases paid particular attention to the potential for high-cost litigation and discovery abuses and the resulting incentive to settle unmeritorious cases, sending a message to defendants that settlement may not be necessary in the face of “baseless shakedowns.” While there are potentially serious issues with such early dismissals, and it remains to be seen whether other courts will adopt this approach, defendants and plaintiffs alike would be well advised to consider the possibility of pre-discovery dismissal in any copyright infringement suit, especially those that threaten expensive and time-consuming discovery.

PRACTICE POINTERS

- If a case appears calculated to provoke settlement and the plaintiff is unlikely to win on the merits, the defendant may wish to pursue pre-discovery dismissal.
- If comparison of the works at issue will likely prove sufficient to resolve the plaintiff's claim, the defendant may move to dismiss for failure to state a claim rather than responding and then moving for summary judgment.
- If the complaint in a copyright infringement case refers to the works at issue, the defendant should argue that they have been incorporated by reference and attach them to a motion to dismiss.
- If the complaint does not refer to the works at issue with sufficient specificity, the defendant should move to dismiss for failure to state a claim on grounds that the claim as pleaded is not plausibly likely to succeed.