

Creative Content Client Advisory

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*The Potential Impact of Iqbal on Pleading Copyright Claims**Paul M. Smith and Steven B. Fabrizio, Co-Chairs, Creative Content Group*

In its recent decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court addressed the pleading standard that plaintiffs' complaints must meet in civil actions. Although it involved constitutional claims in a *Bivens* action against numerous federal officials, the case has implications for all civil actions, including copyright suits. Indeed, in the first month since the decision was announced, it has already been cited in over 200 lower-court opinions. This Client Alert discusses the *Iqbal* decision and its potential impact on copyright owners' efforts to enforce their rights in court.

SUMMARY OF IQBAL

The Court's analysis in *Iqbal* expands upon its earlier decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Court held that a well-pleaded complaint must "raise a right to relief above the speculative level." *Id.* at 555. It explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations omitted and bracket in original). Further, the *Twombly* Court held that a complaint must "state a claim to relief that is plausible on its face." *Id.* at 570. A complaint that pleads

facts that are "merely consistent" with a defendant's liability "stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 557.

The *Iqbal* Court articulated a two-step process for courts to follow in assessing a motion to dismiss. First, a court should exclude from its analysis pleadings that "because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 129 S. Ct. at 1950. Second, if "there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

With respect to the first step of this inquiry, the *Iqbal* Court stated that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 555). As such, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*; accord *id.* at 1950 ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff

armed with nothing more than conclusions.").

With respect to the second step of the inquiry—namely, the determination of whether a complaint has stated a plausible claim for relief—the *Iqbal* Court stated that it is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950. A court's analysis should focus on whether the plaintiff has pled "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Id.* at 1949. This *plausibility* standard is not a *probability* requirement; "but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, "where a complaint pleads facts that are merely consistent with a defendant's liability," or a court cannot "infer more than the mere possibility of misconduct, the complaint has alleged—but not 'show[n]—'that the pleader is entitled to relief.'" *Id.* at 1950 (citing Fed. R. Civ. P. 8(a)(2)).

IMPACT ON COPYRIGHT CASES

While the precise impact of *Iqbal* will not be clear until lower federal courts have had more opportunity to apply that decision in various factual settings, *Iqbal* will potentially affect the pleading of all copyright

infringement claims. Of particular note is *Iqbal*'s possible impact on the pleading of copyright inducement claims and claims seeking to hold principals and/or corporate officers liable for copyright infringement.

With respect to copyright inducement claims, a complaint containing the unsupported conclusory allegation that a defendant "intended to foster copyright infringement" would conceivably not survive a motion to dismiss under *Iqbal*. A defendant could argue that such an allegation is simply a "legal conclusion" or "threadbare recital" of the intent element. Depending on the facts of the case, moreover, the defendant could contend that, even if the facts alleged in a complaint could possibly result in a finding that a defendant intended to foster infringement, such facts do not plausibly establish that purpose.

Similarly, a principal or corporate officer defendant could assert that an allegation of "alter ego" status or "personal participation" in infringing

activities is not enough to withstand a motion to dismiss. A defendant once again could argue both that such an allegation constitutes a conclusory recitation of an element that should be disregarded by the reviewing court and that, based on the facts of the case, a finding of personal participation or alter ego status is possible but not plausible.

RESPONDING TO *IQBAL*

The *Iqbal* decision suggests that plaintiffs pay particular attention to the specific allegations included in their complaints. In addition to stating that the elements of a given claim have been met, a plaintiff would be well advised to describe the evidence on which that finding is based—especially where an inferential finding is necessary. Thus, for example, a plaintiff alleging intent to induce copyright infringement would be wise, to the extent possible, to plead the underlying facts that constitute the conduct or expression demonstrating the defendant's intent. Likewise, an "alter ego" or "personal participation" claim may

be bolstered by inclusion of the factual predicate for such a finding.

In responding to motions to dismiss that rely on *Iqbal*, plaintiffs should marshal all of the well-pleaded facts alleged in the complaint and, in some cases, may want to consider making nuanced arguments as to whether an allegation should be regarded as "conclusory" or how a court should distinguish between allegations that possibly give rise to liability and those that plausibly do so.

Over time, the lower courts will continue to flesh out the standard concerning the sufficiency of pleading under *Iqbal*, and standards for particular types of cases, including copyright claims, may evolve. Until then, the decision suggests that all plaintiffs would be well advised to avoid pleading unsupported conclusory allegations and to place a renewed emphasis on pleading facts that allow a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

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