

No. _____

In the Supreme Court of the United States

CLAYTON PRINCE TANKSLEY,
Petitioner,

v.

LEE DANIELS, LEE DANIELS ENTERTAINMENT,
DANNY STRONG, DANNY STRONG PRODUCTIONS, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

PETITION FOR WRIT OF CERTIORARI

Mary Elizabeth Bogan
Counsel of Record
BOGAN LAW GROUP, LLC
One Liberty Place
1650 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 385-5254
mbogan@boganlawgroup.com

Counsel for Petitioner

QUESTIONS PRESENTED

- (1) The question presented is whether the trial court should engage in a substantive analysis and determination regarding substantial similarity as a matter of law at the pleading stage of the proceedings, without discovery, cross examination of witnesses, and expert testimony, where, as in the case *sub judice*, the Petitioner has stated a valid *prima facie* cause of action, has an admittedly valid copyright, has demonstrated (with uncontested) access and probative similarity, and has alleged facts that satisfy the lay-observer test?
- (2) Whether the Court of Appeals erred in affirming the District Court's grant of Respondents' Motions to Dismiss, even though Petitioner had stated a valid *prima facie* cause of action for direct copyright infringement, thereby depriving Petitioner of his right to a jury trial as guaranteed by the 7th Amendment of the United States Constitution?
- (3) Whether Petitioner should have been permitted to amend his Second Amended Complaint?

PARTIES TO THE PROCEEDING

The Petitioner and Appellant below is Clayton Prince Tanksley.

The Respondents and Appellees below are Lee Daniels; Lee Daniels Entertainment; Danny Strong; Danny Strong Productions; Twenty-First Century Fox, Inc., Parent Company of Fox Entertainment Group, Inc., 20th Century Fox Film Corp., 20th Century Fox Television, Inc., 20th Century Tv, Inc., 20th Century Fox International, 20th Century Fox International Television, LLC, and 20th Century Fox Home Entertainment, LLC; Fox Network Group, Inc., Parent Company of Fox Broadcasting Company, Fox Television Stations, Inc., Fox Digital Media, Fox International Channels, Inc.; Does 1 through 10; Sharon Pinkenson, Executive Director; Greater Philadelphia Film Office; Leah Daniels-Butler.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT	2
1. Factual Background.	2
2. Procedural Background.	4
3. Jurisdiction in the District Court.	6
REASONS TO GRANT THE PETITION	6
A. The Court of Appeals Erred in Affirming the District Court’s Grant of Respondents’ Motions to Dismiss Where Petitioner Stated a Valid <i>Prima Facie</i> Cause of Action for Direct Copyright Infringement, There is Compelling Evidence of Actual Copying (<i>i.e.</i> , Access and Probative Similarity) and a Reasonable Inference of Material Appropriation, Combined With an Allegation Which, if Accepted as True, Satisfies the “Ordinary Observer Test”.	6
1. Petitioner Has Stated a Valid <i>Prima Facie</i> Claim for Copyright Infringement.	6

- 2. Petitioner Has Established Actual Copying. 11
- B. The Court of Appeals Erred in Affirming the District Court’s Ruling on Substantial Similarity as a Matter of Law Based on a Comparison of Complex, Artistic Filmed Works Without Permitting Full Discovery or Expert Opinion. . 14
 - 1. There is a Split Among the Circuits as to Whether a Direct Copyright Infringement Claim can be Determined as a Matter of Law by the Court Based Upon a Motion to Dismiss Without Any Discovery or Expert Testimony. 19
 - 2. The Court of Appeals Erred in Confirming the District Court’s Determination Regarding Substantial Similarity Based on Application of the Ordinary Observer Test. 22
 - a. The District Court is Not an Ordinary Observer. 22
- C. The Court of Appeals Erred in Affirming the District Court’s Grant of Respondents’ Motions to Dismiss, Even Though Petitioner Had Stated a Valid *Prima Facie* Cause of Action for Direct Copyright Infringement, Thereby Depriving Petitioner of His Right to a Jury Trial as Guaranteed by the 7th Amendment of the United States Constitution. 24
 - 1. Petitioner Has Been Deprived of His Constitutionally Guaranteed Right to a Jury Trial. 24

D. The Third Circuit Erred in Affirming the District Court’s Determination that Further Amendment of the Second Amended Complaint Would Be Futile.	28
CONCLUSION	32
APPENDIX	
Appendix A Opinion in the United States Court of Appeals for the Third Circuit (August 28, 2018)	App. 1
Appendix B Opinion and Order in the United States District Court for the Eastern District of Pennsylvania (April 28, 2017)	App. 25
Appendix C Transcript of Motions Hearing Before the Honorable Joel H. Slomsky in the United States District Court for the Eastern District of Pennsylvania (January 31, 2017)	App. 93
Appendix D Stuart Kelban Report	App. 167
Appendix E Stuart Kelban C.V.	App. 171
Appendix F 17 U.S.C. § 501(a)-(b)	App. 175

TABLE OF AUTHORITIES

CASES

<i>A Slice of Pie Prods., LLC v. Wayans Bros. Entm't.</i> , 487 F. Supp. 2d 41 (S.D. N.Y. 2007)	13
<i>Aetna Ins. Co. v. Kennedy</i> , 301 U.S. 389, 57 S. Ct. 809, 81 L.Ed. 1177 (1937)	26
<i>Agnellino v. State of New Jersey</i> , 493 F.2d 714 (3d Cir. 1974)	31
<i>Alston v. Parker</i> , 363 F.3d 229 (3d Cir. 2004)	29
<i>Amini Innovation Corp. v. Anthony California, Inc.</i> , 439 F.3d 1365 (Fed. Cir. 2006)	13
<i>Arnstein v. Porter</i> , 154 F.2d 464 (2d Cir. 1946)	14, 20, 23
<i>Art Buchwald v. Paramount Pictures, Corp.</i> , 13 U.S.P.Q. 2d (Cal. Super. 1990)	13
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)	8, 9, 10
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)	7, 8, 9
<i>Bell-Atl. Pa., Inc. v. Pa. Pub. Util. Comm'n</i> , 107 F. Supp. 2d 653 (E.D. Pa. 2000)	8
<i>Billing v. Ravin, Greenberg & Zackin, P.A.</i> , 22 F.3d 1242 (3d Cir. 1994)	26

<i>Bouriez v. Carnegie Mellon Univ.</i> , 359 F.3d 292 (3d Cir. 2004)	26
<i>Broadcast Music, Inc. v. Moor-Law, Inc.</i> , 203 U.S.P.Q. 487 (D.Del.1978)	25
<i>Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.</i> , 150 F.3d 132 (2d Cir. 1998)	20
<i>Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry</i> , 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990)	26
<i>City of Monterey v. Del Monte Dunes at Monterey, Ltd.</i> , 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)	24
<i>Computer Assocs. Int'l, Inc. v. Altai, Inc.</i> , 982 F.2d 693 (2d Cir. 1992)	14, 23
<i>Cortez v. Trans Union, LLC</i> , 617 F.3d 688 (3d Cir. 2010)	25
<i>CRA Mktg., Inc. v. Brandow's Fairway Chrysler-Plymouth-Jeep-Eagle, Inc.</i> , 1999 WL 562755 (E.D. Pa. 1999)	6, 7, 8, 11
<i>Curtis v. Loether</i> , 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)	24
<i>Dam Things from Denmark v. Russ Berrie & Company, Inc.</i> , 290 F.3d 548 (3rd Cir. 2002)	11, 23
<i>Darr v. Wolfe</i> , 767 F.2d 79 (3d Cir. 1985)	29

<i>Diopsys, Inc. v. Konan Medical USA, Inc.</i> , No. 2:15-cv-5882 (D. N.J. July 10, 2017)	29
<i>District Council 47 v. Bradley</i> , 795 F.2d 310 (3d Cir. 1986)	29
<i>Doe v. Hesketh</i> , 828 F.3d 159 (3d Cir. 2016)	24
<i>Dorchen/Martin Associates, Inc. v. Brook of Cheboygan, Inc.</i> , 838 F. Supp. 2d 607 (E.D. Mich., 2012)	21
<i>Dream Custom Homes, Inc. v. Modern Day Constr., Inc.</i> , 476 Fed. Appx. 190 (11th Cir. 2012)	13
<i>Educational Testing Services v. Katzman</i> , 670 F. Supp. 1237 (D. N.J. 1987)	25, 26
<i>Eggleston v. Daniels, et al.</i> , Case No. 4:15-cv-11893	22
<i>Feltner v. Columbia Pictures Television, Inc.</i> , 523 U.S. 340, 118 S. Ct. 1279, 140 L. Ed. 2d 438, 46 U.S.P.Q.2d 1161 (1998)	24, 25
<i>First Nat Bank of Philadelphia v. Farrell</i> , 272 F. 371 (3d Cir. 1921)	31
<i>Fletcher-Harlee Corp. v. Paote Concrete Contractors, Inc.</i> , 482 F.3d 247 (3d Cir. 2007)	28
<i>Folio Impressions, Inc. v. Byer Cal.</i> , 937 F.2d 759 (2d Cir. 1991)	15

<i>Foman v. Davis</i> , 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)	28
<i>Ford Motor Company v. Autel US Inc.</i> , 2015 WL 5729067 (E.D. Mich., 2015)	21
<i>Ford Motor Co. v. Summit Motor Prods., Inc.</i> , 930 F.2d 277 (3d Cir. 1991), <i>cert. denied</i> , 502 U.S. 939 (1991)	6, 16, 17
<i>Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc.</i> , 575 F.2d 62 (3d Cir. 1978), <i>cert. denied</i> , 439 U.S. 880 (1978)	17
<i>Gee v. CBS, Inc.</i> , 471 F. Supp. 600 (E.D. Pa. 1979), <i>aff'd</i> , 612 F.2d 572 (3d Cir. 1979)	7
<i>Greenberg v. Scholastic, Inc.</i> , Civil Action 16-6353 (E.D. Pa. March 29, 2018) .	7
<i>Haines & Kibblehouse, Inc. v. Balfour Beatty Const., Inc.</i> , 2007 WL 8026873 (E.D. Pa. 2007)	8
<i>Johnston v. Katz</i> , 1996 WL 107402 (E.D. Pa. 1996)	7
<i>Kay Berry v. Taylor Gifts, Inc.</i> , 421 F.3d. 199 (3d. Cir. 2005)	11
<i>Key Consol.2000, Inc. v. Troost</i> , 432 F. Supp. 2d 484 (M.D. Pa. 2006)	7
<i>Laureyssens v. Idea Grp., Inc.</i> , 964 F.2d 131 (2d Cir. 1992)	13, 14

<i>Laoye v. United States of America</i> , 665 Fed. Appx. 148 (3rd Cir. 2016)	29
<i>Leonard v. Stemtech International, Inc.</i> , 834 F.3d 376 (3d Cir. 2016)	25
<i>Live Face on the Web, LLC v. The Control Group Media Company, Inc.</i> , No. 2:15-cv-01306 (E.D. Pa. June 27, 2016)	29
<i>Lyons P'ship, L.P. v. Morris Costumes, Inc.</i> , 243 F.3d 789 (4th Cir. 2001)	21
<i>Mainardi et al. v. Prudential Insurance Co. of America</i> , C.A. 08-3605, 2009 U.S. Dist. LEXIS 6935 (E.D. Pa. Jan. 30, 2009)	7
<i>Malleus v. George</i> , 641 F.3d 560 (3d Cir. 2011)	10
<i>Microsoft Corp. v. Master Computer, Inc.</i> , 4:CV-04-2567 (M.D. Pa. Oct. 12, 2005)	25
<i>Molthan v. Temple Univ. of Com. Sys. of Higher Educ.</i> , 778 F.2d 955 (3d Cir. 1985)	26
<i>National Business Development Services, Inc. v. American Credit Educ. & Consulting, Inc.</i> , 2007 WL 2318752 (E.D. Mich., 2007)	21
<i>National Risk Management v. Bramwell</i> , 1992 WL 368370 (E.D. Pa. 1992)	7
<i>Nat'l Risk Mgmt., Inc. v. Bramwell</i> , 819 F. Supp. 417 (E.D. Pa. 1993)	16

<i>Nebraska v. Wyoming</i> , 515 U.S. 1, 115 S. Ct. 1933, 132 L. Ed. 2d 1, 63 U.S.L.W. 4468 (1995)	28
<i>Pension Benefit Guar. Corp. v. White Consol. Indus.</i> , 998 F.2d 1192 (3d Cir. 1993)	31
<i>Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.</i> , 602 F.3d 57 (2d Cir. 2010)	14, 15, 17, 18
<i>Peters v. West</i> , 107 U.S.P.Q.2d 1512, 692 F.3d 629 (7th Cir. 2012)	13
<i>Plunket v. Doyle</i> , No. 99-11006, 2001 WL 175252 (S.D.N.Y. Feb. 22, 2001)	9
<i>Pollick v. Kimberly Clark-Corp.</i> , 817 F. Supp. 2d 1005 (E.D. Mich., 2011)	21
<i>Rentmeester v. Nike, Inc.</i> , 883 F.3d 1111 (9th Cir. 2018)	12
<i>Rice v. Fox Broad. Co.</i> , 330 F.3d 1170 (9th Cir. 2003)	13
<i>Ritani, LLC v. Aghjayan</i> , 880 F. Supp. 2d 425 (S.D. N.Y. 2012)	9
<i>Robinson v. Family Dollar, Inc.</i> , 679 Fed. Appx. 126 (3d Cir. 2017)	10
<i>Santiago v. Warminster Twp.</i> , 629 F.3d 121 (3d Cir. 2010)	9, 10
<i>Shane v. Fauver</i> , 213 F.3d 113 (3d Cir. 2000)	29

<i>Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.</i> , 562 F.2d 1157 (9th Cir. 1977)	20
<i>Sparf v. United States</i> , 156 U.S. 51, 15 S. Ct. 273, 39 L.Ed. 343 (1895)	12
<i>Stromback v. New Line Cinema</i> , 384 F.3d 283 (6th Cir. 2004)	13
<i>TCA Television Corp. v. McCollum</i> , 151 F. Supp. 3d 419 (S.D. N.Y. 2015)	9
<i>TD Bank, N.A. v. Hill</i> , Civ. No. 12-7188 (D. N.J. July 27, 2015)	11
<i>Three Boys Music Corp. v. Bolton</i> , 212 F.3d 477 (9th Cir. 2000)	13
<i>Tienshan, Inc. v. C.C.A. Int'l., Inc.</i> , 895 F. Supp. 651 (S.D. N.Y. 1995)	13
<i>Towler v. Sayles</i> , 76 F.3d 579 (4th Cir. 1996)	21
<i>Tracinda Corp. v. DaimlerChrysler AG</i> , 502 F.3d 212 (3d Cir. 2007)	26
<i>Turner v. Yates</i> , 57 U.S. 14, 16 How. 14, 14 L.Ed. 824 (1853) . .	12
<i>United States v. Agee</i> , 597 F.2d 350 (3d Cir. 1979)	30
<i>United States v. Alker</i> , 255 F.2d 851 (3d Cir. 1958)	12
<i>Universal Athletic Sales Co. v. Salkeld</i> , 511 F.2d 904 (3d Cir. 1975)	16

Visual Commc'ns, Inc.,
2014 WL 4662474 7

Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.,
797 F.2d 1222 (3rd Cir. 1986) 11, 23

CONSTITUTION

U.S. Const. amend. 7 1

STATUTES AND RULES

17 U.S.C. §§ 101, *et seq.* 1, 6

17 U.S.C. § 501(a)-(b) 1

17 U.S.C. § 504(c) 25

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

28 U.S.C. § 1338(a) 6

Fed. R. Civ. P. 12(b)(6) *passim*

Fed. R. Civ. P. 15(a) 28

OTHER AUTHORITIES

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(2d ed.1978) 7

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(Supp. 2008) 11

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2018 update) 14

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Clayton Prince Tanksley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion is reported at No. 17-2023, 2018 WL 4087884 (3d Cir. 2018). The opinion of the District Court for the Eastern District of Pennsylvania is reported at 259 F. Supp. 3d 271 (E.D. Pa. 2017).

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. 7

Trial by Jury in Civil Cases

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (17 U.S.C. § 501(a)-(b))

See, Appendix F.

Fed. R. Civ. P. 12(b)(6)

Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

. . .

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

. . .

(6) failure to state a claim upon which relief can be granted;

STATEMENT

1. Factual Background.

In 2005, Clayton Prince Tanksley, the Petitioner herein (“Petitioner” or “Tanksley”) filed an application for copyright registration of his original pilot for a television show entitled *Cream* with the United States Copyright Office. Tanksley’s application was approved and a copyright registration (No. PAu3-022-354) was issued effective as of September 23, 2005. Since that time, Tanksley has owned all rights and title to the copyright in *Cream* as its sole and exclusive author and creator.

On or about April 5, 2008, Petitioner participated in an event and competition, the “Philly Pitch”, that had been organized, sponsored and supervised by the Greater Philadelphia Film Office, where writers and potential producers were provided with an opportunity

to pitch their film concepts to a panel of entertainment industry professionals who acted as ‘judges’. Respondent, Lee Daniels (“Daniels”) was one of the judges at this event. During the competition before the panel, Tanksley pitched a film concept entitled “Kung Fu Sissy” and also a TV Pilot, “Cream”. Tanksley also met individually during the “meet and greet” session wherein Tanksley provided each judge with a DVD of *Cream*. Daniels, in particular, evinced great interest in *Cream*, and he engaged Tanksley in a private, in depth conversation about it; whereupon, Tanksley gave Daniels several copies of a DVD consisting of three (3), approximately 30-minute episodes of *Cream*, along with a written script of the show, thus providing Daniels (and, ultimately, the other Fox Defendants¹) with direct access to his copyrighted Work.

On or about January 7, 2015, the pilot episode of a television series entitled *Empire* debuted on Fox Television. Tanksley contends that *Empire* is, in many respects, strikingly similar to *Cream* in that titles, stories, character traits, scenes, and incidents as well as various aesthetic elements, including, without limitation, the physical appearance of the characters, plots, and scenes, and story lines are virtually identical to those depicted on the DVD of *Cream*. A detailed description of these similarities, including a DVD of *Cream*, along with screen shots from both of the subject-Works, was set forth in Tanksley’s pleading.

¹ The term “Fox Defendants” refers to all of the Respondents except Sharon Pinkerson and the Greater Philadelphia Film Office. Respondents, Sharon Pinkerson and the Greater Philadelphia Film Office are referred to herein collectively as the “GPFO Defendants”.

Tanksley also alleged that he had arranged (through his management company) to have a sales representative market *Cream* for production and broadcast, but once *Empire* began airing, none of the television networks was interested in *Cream* due to its striking similarity to *Empire*. This demonstrates that several objective observers immediately recognized the obvious and substantial similarities between the subject-Works.

2. Procedural Background.

Tanksley filed his initial Complaint on January 8, 2016 asserting claims for, *inter alia*, direct and contributory copyright infringement. Tanksley's First Amended Complaint (in which Respondent, Leah Daniels-Butler was added as a Defendant but none of the substantive allegations regarding Tanksley's infringement claims were changed) was filed on January 29, 2016, long before a response from any of the Defendants was due. The Fox Defendants filed a Motion to Dismiss the First Amended Complaint on April 4, 2016, followed by the GPFO Defendants' Motion to Dismiss the First Amended Complaint filed on April 8, 2016. Tanksley responded on May 13, 2016. A motion hearing was held on June 2, 2016 and, by Order dated June 3, 2016, the District Court granted Tanksley leave to amend.

Tanksley's Second Amended Complaint was duly filed on August 1, 2016², and Motions to Dismiss the

² By Order dated August 2, 2016, the Court denied Defendants' Motion to Dismiss the First Amended Complaint as moot without prejudice.

Second Amended Complaint were filed by the Fox Defendants and the GPFO Defendants on September 30, 2016. Tanksley filed his Responses in opposition on October 30, 2016. Due to time constraints, the number of parties involved, and in order to give all of the parties an opportunity to be heard, oral argument regarding Defendants' Motions to Dismiss the Second Amended Complaint took place on several occasions between January 12 and February 10, 2017. On April 28, 2017, the District Court issued an Order granting Defendants' Motions to Dismiss the Second Amended Complaint. The District Court's grant of Defendants' Motions to Dismiss was based primarily on its finding that there was no substantial similarity between the subject-Works as a matter of law. The District Court reached this decision without permitting Tanksley to engage in discovery, without the aid of expert testimony, and without permitting him a further opportunity to amend.

Tanksley filed a Notice of Appeal to the Third Circuit Court of Appeals on May 4, 2017. In his appeal, Tanksley raised, *inter alia*, all of the issues discussed in detail below. Oral argument before the Circuit Court took place on April 9, 2018. On August 28, 2018, the Court of Appeals issued a precedential opinion ("Opinion") affirming the judgment of the District Court. Tanksley respectfully submits that, in so doing, the Court of Appeals erred in several critical respects as is set forth hereinbelow. Accordingly, Tanksley prays that a Writ of Certiorari to the United States Supreme Court be issued.

3. Jurisdiction in the District Court.

Jurisdiction in the District Court was based upon 28 U.S.C. §§ 1331, 1338(a) (subject matter jurisdiction) and pursuant to Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (federal question jurisdiction).

REASONS TO GRANT THE PETITION

A. The Court of Appeals Erred in Affirming the District Court's Grant of Respondents' Motions to Dismiss Where Petitioner Stated a Valid *Prima Facie* Cause of Action for Direct Copyright Infringement, There is Compelling Evidence of Actual Copying (*i.e.*, Access and Probative Similarity) and a Reasonable Inference of Material Appropriation, Combined With an Allegation Which, if Accepted as True, Satisfies the "Ordinary Observer Test".

1. Petitioner Has Stated a Valid *Prima Facie* Claim for Copyright Infringement.

It is well-established that, in order to *prove* copyright infringement, a plaintiff must demonstrate: (1) ownership of a valid copyright in the work allegedly infringed; and (2) that the defendant copied protected elements of that work. *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 294 (3d Cir. 1991). Thus, as was stated by the Court in *CRA Mktg., Inc. v. Brandow's Fairway Chrysler-Plymouth-Jeep-Eagle, Inc.*, 1999 WL 562755 (E.D. Pa. 1999), "[w]hen a claimant has alleged that it owns a copyright and that the defendant has copied the copyrighted material and placed the copies into the market place . . . it has

satisfied the burden of stating a claim.” *Id.* at *2, n.3.³ Also see, *Greenberg v. Scholastic, Inc.*, Civil Action 16-6353 (E.D. Pa. March 29, 2018) (emphasis added) (“In order to *plead* a plausible copyright infringement claim, a plaintiff must *allege* ownership of a valid copyright and unauthorized use of the original, constituent elements of the work.”)

More specifically in the context of a Rule 12(b)(6) motion, it has been held that,

In order to survive a motion to dismiss, a properly pled copyright infringement complaint must include allegations describing “which specific original work is the subject of the copyright claim, that plaintiff owns the copyright, that the work in question has been registered in compliance with the statute and by what acts and during what time defendant has infringed the copyright.

Gee v. CBS, Inc., 471 F. Supp. 600, 643 (E.D. Pa. 1979), *aff’d*, 612 F.2d 572 (3d Cir. 1979), citing, 2a Moore’s Federal Practice and Procedure 8.17(7) at 1767 (2d ed.1978). Applying this standard to the instant case, it is beyond contention that Petitioner has stated a valid

³ See also, *Key Consol.2000, Inc. v. Troost*, 432 F. Supp. 2d 484, 488 (M.D. Pa. 2006); *Visual Commc’ns, Inc.*, 2014 WL 4662474 at *4, citing, *Phillips*, 515 F.3d at 232–34, quoting, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Johnston v. Katz*, 1996 WL 107402, *2 (E.D. Pa. 1996) and *National Risk Management v. Bramwell*, 1992 WL 368370, *2 (E.D. Pa. 1992); *Mainardi et al. v. Prudential Insurance Co. of America*, C.A. 08-3605, 2009 U.S. Dist. LEXIS 6935, p. 13-17 (E.D. Pa. Jan. 30, 2009).

prima facie cause of action for direct copyright infringement. (Second Amended Complaint).

Of particular significance here is the critical distinction between what a plaintiff must *allege* in his complaint in order to survive a motion to dismiss, and what he must *prove* in order to prevail at trial. *CRA Mktg., Inc.* 1999 WL 562755, at *2, n.3 (emphasis added) (In considering a Rule 12(b)(6) motion, the court’s inquiry, “*is not what Plaintiff ultimately must prove to prevail on its claim, but whether its Complaint is legally sufficient.*”) Petitioner respectfully submits that this distinction is lost when, in ruling on a motion to dismiss, the trial court makes a determination regarding substantial similarity as a matter of law. Indeed, it is tantamount to requiring the claimant to actually *prove* substantial similarity at the pleading stage.

Moreover, it is axiomatic that when ruling on a motion to dismiss, “the Court must accept as true all factual allegations in the complaint, as well as all reasonable inferences that can be drawn therefrom, and construe them in the light most favorable to the plaintiff.” *Bell-Atl. Pa., Inc. v. Pa. Pub. Util. Comm’n*, 107 F. Supp. 2d 653, 659 (E.D. Pa. 2000). Accord: *Haines & Kibblehouse, Inc. v. Balfour Beatty Const., Inc.*, 2007 WL 8026873 at *1 (E.D. Pa. 2007).

Under the pleading requirements established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and *Twombly*, the plaintiff is required to “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. However, specific facts are not necessary; the plaintiff need only “give the defendant fair notice of what the ...

claim is and the ground upon which it rests.” *Twombly*, 550 U.S. at 555. The plausibility standard is satisfied if “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678, citing, *Twombly*, 550 U.S. at 556.⁴ Petitioner’s Second Amended Complaint clearly satisfies these criteria.

In *Santiago v. Warminster Twp.*, 629 F.3d 121 (3d Cir. 2010), the Third Circuit articulated a three-part analysis that a district court must conduct in evaluating whether allegations in a complaint will survive a 12(b)(6) motion to dismiss: (1) The court must “tak[e] note of the elements a plaintiff must plead to state a claim”; (2) The court must identify allegations that, “because they are no more than conclusions, are not entitled to the assumption of truth”; and (3) “where there are well-pleaded factual allegations, a court

⁴ Courts in the Second Circuit have repeatedly held that,

Neither *Twombly* nor *Iqbal* requires a plaintiff in a copyright infringement action to plead specific evidence or extra facts beyond what is needed to make the claim plausible. Thus, [o]nce there has been notice of the claim, factual and evidentiary issues ... should be developed during discovery.

Ritani, LLC v. Aghjayan, 880 F. Supp. 2d 425, 440-41 (S.D. N.Y. 2012) (citations and internal quotation marks omitted). Accord: *TCA Television Corp. v. McCollum*, 151 F. Supp. 3d 419 (S.D. N.Y. 2015). Also see, *Plunket v. Doyle*, No. 99-11006, 2001 WL 175252, at *6 (S.D.N.Y. Feb. 22, 2001) (the plaintiff need not specify each infringing act, as “discovery is likely to provide many of the details of the allegedly infringing acts and much of this information may be exclusively in defendants’ control.”).

should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.” *Id.* at 130, quoting, *Iqbal*, 556 U.S. at 675, 679). Accord: *Robinson v. Family Dollar, Inc.*, 679 Fed. Appx. 126, 131-32 (3d Cir. 2017). Also see, *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (“This means that our inquiry is normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged.”)

Accordingly, if a plaintiff, such as Petitioner, has alleged a valid *prima facie* cause of action, and those allegations are accepted as true and afforded the benefit of all reasonable inferences, it follows that he or she has stated a claim upon which relief can be granted. By undertaking to make a determination as to substantial similarity at the pleading stage, the District Court imposed upon Petitioner the excessively and prejudicially heavy burden of proving what is (in most instances), the ultimate factual issue in the case, at the very beginning of the proceedings without the benefit of the Defendants’ answers, discovery, or expert opinion. In effect, Petitioner was required to satisfy the Court that he would prevail at trial, on pain of being foreclosed from making the attempt. This burden clearly prejudicially, and in error, goes far beyond the requirements of the applicable standards described above.

2. Petitioner Has Established Actual Copying.

Direct evidence of copying or an admission by the defendant will satisfy the first element of the substantial similarity analysis (*i.e.*, whether the defendant actually copied from the plaintiff's work). *Kay Berry v. Taylor Gifts, Inc.*, 421 F.3d 199, 208 (3d Cir. 2005), citing, *Dam Things from Denmark v. Russ Berrie & Company, Inc.*, 290 F.3d 548, 562 (3d Cir. 2002), citing, *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1232 (3d Cir. 1986); *TD Bank, N.A. v. Hill*, Civ. No. 12-7188 (D. N.J. July 27, 2015). It is generally acknowledged, however, that direct evidence of actual copying is unlikely to be available. Accordingly, copying may be established circumstantially by showing access and probative similarity. *CRA Mktg., Inc.*, 1999 WL 562755 at *2; Opinion, p. 13, citing, 3 Paul Goldstein, *Goldstein on Copyright* § 9:6.1 (Supp. 2008); *Dam Things from Denmark*, 290 F.3d at 562.

In the instant case, not only has Petitioner alleged facts demonstrating access in detail⁵ and supported those allegations with documentary evidence⁶, but critically, Respondents did not contest access. Moreover, Respondent, Lee Daniels, tacitly admitted copying Petitioner's Work during a television interview by Harry Hairston, Channel 10 (NBC), that aired on or about January 14, 2016, Mr. Daniels was asked: "He claims that he came up with the idea for Empire. Is there anything you can tell me about that?" and Lee

⁵ Second Amended Complaint, ¶¶ 34-36, 73.

⁶ Exhibit "B" attached to the Second Amended Complaint.

Daniels, ‘responded’ with silence, rather than any protest or denial.⁷ As was noted by the Third Circuit in *Alker*, where there is no suggestion that the party did not understand what was said to him or that he was prevented from replying, or that the circumstances were in any way extraordinary, it is entirely proper to draw the normal inference of assent from the party’s silence.” *Id.*, 255 F.2d at 853.

Furthermore, courts in the Ninth and Sixth Circuits have held that where the plaintiff has shown a high likelihood of access, as in the instant case, the “inverse ratio rule”, which mandates a lower standard of proof with regard to probative similarity, applies. See, e.g., *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1124 (9th Cir. 2018) (“The inverse ratio rule provides that the

⁷ See, <https://www.nbcphiladelphia.com/news/local/Philadelphia-Actor-Lee-Daniel-Stole-Empire-Idea-Lawsuit-365300081.html>.

Federal Rule of Evidence 801(d)(2)(B) provides that,

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

...

(2) An Opposing Party’s Statement. The statement is offered against an opposing party and:

...

(B) is one the party manifested that it adopted or believed to be true;

Prior to the adoption of the Federal Rules of Evidence, such adoptive admissions were commonly referred to as “tacit admissions”. See, *Turner v. Yates*, 57 U.S. 14, 27, 16 How. 14, 14 L.Ed. 824 (1853). Accord: *Sparf v. United States*, 156 U.S. 51, 15 S. Ct. 273, 39 L.Ed. 343 (1895); *United States v. Alker*, 255 F.2d 851, 852-53 (3d Cir. 1958).

stronger the evidence of access, the less compelling the similarities between the two works need be in order to give rise to an inference of copying.”); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003), citing, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000); *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004). Also see, *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368-69 (Fed. Cir. 2006) (applying Ninth Circuit law). District courts in the Second Circuit have endorsed the rule without specifically adopting it. See, *A Slice of Pie Prods., LLC v. Wayans Bros. Entm’t.*, 487 F. Supp. 2d 41, 47, n.4 (S.D. N.Y. 2007) (Strong evidence of access may weigh in favor of probative similarity); *Tienshan, Inc. v. C.C.A. Int’l., Inc.*, 895 F. Supp. 651, 656 (S.D. N.Y. 1995) (“[G]iven that access has been conceded, the level of probative similarity necessary to show probative copying is diminished”). See also, *Art Buchwald v. Paramount Pictures, Corp.*, 13 U.S.P.Q. 2d 1497 (Cal. Super. 1990) (where there is a strong showing of access, less proof of similarity is enough). Other Circuits have rejected this rule, but they have done so with respect to its applicability to a substantial similarity -- as opposed to a probative similarity -- analysis. See, e.g., *Dream Custom Homes, Inc. v. Modern Day Constr., Inc.*, 476 Fed. Appx. 190, 192 (11th Cir. 2012); *Peters v. West*, 107 U.S.P.Q.2d 1512, 692 F.3d 629, (7th Cir. 2012). To date, the Third Circuit has not addressed this issue.

As was recognized by the Court below, in making a probative similarity determination, the fact-finder “may consider any aspect of the works that supports an inference of copying, even elements that are incapable of copyright protection.”. (A.15), citing, *Laureyssens v.*

Idea Grp., Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) and 3 William F. Patry, *Patry on Copyright* § 9:19 (Mar. 2018 update). Also see, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). Thus, whether or not the numerous similarities alleged by Petitioner constitute protectable elements of his Work, those allegations are most certainly sufficient to demonstrate probative similarity. Also, it is apparent that Petitioner has established actual copying because, if he had not, the District Court would not have reached the substantial similarity analysis.

If a plaintiff, such as Petitioner, who owns a valid registered copyright, has stated a plausible *prima facie* cause of action, has established actual copying (*i.e.*, access and probative similarity), and has set forth detailed allegations (including actual screen shots as well as an averment that satisfies the ordinary observer test) which clearly give rise to a reasonable inference of substantial similarity, cannot withstand a Rule 12(b)(6) motion to dismiss, then there now exists a disturbing precedent which will open the door wide for permissive plagiarism, thereby directly undermining the precise intent of the Copyright Act itself. Such precedent must not be permitted to stand.

B. The Court of Appeals Erred in Affirming the District Court's Ruling on Substantial Similarity as a Matter of Law Based on a Comparison of Complex, Artistic Filmed Works Without Permitting Full Discovery or Expert Opinion.

Following the Second Circuit's lead in *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57

(2d Cir. 2010), only a few courts within the Third Circuit have made substantial similarity determinations at the pleading stage based on the premise that, “no discovery or fact-finding is typically necessary, because ‘what is required is only a visual comparison of the works.’” *Id.* at 64, quoting, *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 766 (2d Cir. 1991).⁸ Notably, however, both *Peter F. Gaito Architecture, LLC* and *Folio Impressions, Inc.* involved comparisons of two-dimensional, static images -- architectural drawings in the former instance, and a fabric design of roses placed in horizontal lines in the latter; whereas the works at issue here are substantially more complex and dynamic. While this analysis may apply to static images and the like, this type of analysis fails when viewing extensive, developed filmed artistic works. In fact, it can be seen that a simple “visual comparison” is a particularly unsuitable means of discernment when applied to artistic dramatic filmed works (*e.g.*, tv shows, videos, movies, operas, ballets, and the like) such as those under consideration here. For example, several of the criteria applied to these types of work, such as mood and pace, are clearly not susceptible to a simple visual comparison. In the instant case, a visual comparison

⁸ Certainly, those few cases, as mentioned in the Third Circuit Opinion, do not lend any precedential value because in those cases, there is no undisputed evidence of a valid copyright, coupled with no undisputed evidence of direct access, as there is here. (A.11). Additionally, the evidence of numerous compelling substantial similarities of expressions seen in *Empire* when compared to the copyrighted *Cream*, as even recognized by the Third Circuit “superficial similarities notwithstanding”, is sufficient to minimally withstand 12(b)(6) scrutiny.

of *Cream* and *Empire* serves to highlight the huge disparity in resources available as between Petitioner and the Fox Defendants, but contributes little to the analysis of material appropriation of protectable expression.

There is a clear and unassailable distinction between a comparison of relatively uncomplicated static images, or even written materials and a comparison of complicated, dynamic, artistic performances that encompasses not only visual but auditory, emotional, and kinetic elements as well.⁹

The degree of creativity and originality involved in Petitioner's Work must be considered when making a substantial similarity determination which the Third Circuit in this case failed to do. "If the quantum of originality in plaintiff's work is very modest, more substantial similarity is required for there to be infringement." *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 290 (3d Cir. 1991), *cert. denied*, 502 U.S. 939 (1991); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975). Different standards are applied to different kinds of work. For example, more similarity is required to prove infringement of commercial documents than to prove infringement of artistic works. *Nat'l Risk Mgmt., Inc. v. Bramwell*, 819 F. Supp. 417, 427 (E.D. Pa. 1993). In *Ford Motor Co.*, the Court held that an advertising graphic of a "ghosted" Ford GT was entitled to be treated as an *artistic work*, as opposed to a *purely commercial work*, because it was highly creative and

⁹ (A.12, where the Third Circuit, in error, akin television shows to novels, plays and paintings).

because it was a design created by a graphic design company rather than a photograph. *Id.*, 930 F.2d at 294. Moreover, even with respect to artistic works, there are degrees of protection. The copyright in an impressionist painting is “stronger” than that in a painting intended to portray a bird precisely as it appears in nature. *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978), *cert. denied*, 439 U.S. 880 (1978). In this case, Petitioner’s copyrighted Work, *Cream*, undoubtedly qualifies as an “artistic work”. It is certainly as unique as Ford’s “ghosted GT” and demonstrates the highest degree of originality. Accordingly, it is entitled to strong copyright protection and a lesser degree of similarity is required in order to establish infringement.

The diverse kinds of works that are subject to copyright protection cover a huge spectrum and vary substantially in nature and complexity. Even if a simple visual inspection is sufficient for a determination of substantial similarity with respect to some kinds of work, it does not foreclose the possibility that a different standard should apply to more complex works. As the Court in *Peter F. Gaito Architecture, LLC* specifically acknowledged:

We are mindful that a motion to dismiss does not involve consideration of whether “a plaintiff will ultimately prevail” on the merits, but instead solely “whether the claimant is entitled to offer evidence” in support of his claims. *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir.1995). ***We also acknowledge that there can be certain instances of***

alleged copyright infringement where the question of substantial similarity cannot be addressed without the aid of discovery or expert testimony. See, e.g., *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir.1992) (“In making its finding on substantial similarity with respect to computer programs, we believe that the trier of fact need not be limited by the strictures of its own lay perspective.”).

Id., 602 F.3d at 65 (emphasis added).

The Works under consideration here are precisely the kind of complex, artistic, filmed, creative endeavors that require a more discerning examination conducted with the benefit of expert assistance, (providing an extensive independent analysis of the Works), and additional critical evidence obtained through discovery.¹⁰ This case involves matters of federal statutory and constitutional significance, affecting claimants across this great land, and accordingly, requires proper consideration, and an ultimate ruling, by this Honorable Court. As such, Petitioner’s Writ of Certiorari must be granted.

¹⁰ Mistakenly, the District Court utilized the Kates Video, obtained by subpoena during the initial discovery; however, erred in not permitting the completion of discovery, such as depositions of Lee Daniels, Danny Strong, Rob Kates (about the Philly Pitch event and his video), and of Petitioner about the origin of the Works. (A.29, fn.2). Moreover, the court erred in not permitting Petitioner to develop the record and to utilize expert analysis, such as the opinion of Stuart Kelban, who provided an advisory opinion reflecting the merits of the substantial similarity of *Empire to Cream*. (A.167-174).

1. There is a Split Among the Circuits as to Whether a Direct Copyright Infringement Claim can be Determined as a Matter of Law by the Court Based Upon a Motion to Dismiss Without Any Discovery or Expert Testimony.

The Third Circuit's Opinion below creates a Circuit split by holding that where there is a valid enforceable copyright; where there is evidence of undisputed direct access, and there is evidence of copying, the court can enter as a matter of law substantial similarity on a 12(b)(6) motion pertaining to complex artistic filmed works, without permitting full discovery or expert testimony.¹¹

Essentially, no other Court of Appeals has adopted the approach on a 12(b)(6), under these factual circumstances, absent discovery or expert testimony, with such complex expressions of artistic filmed works, that the majority opinion adopts here. There are divergent applications in how courts in the twelve

¹¹ The Due Process Clause of the Fourteenth Amendment of the United States Constitution states: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or **property**, without **due process** of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added).

Petitioner is entitled to have a full hearing, with presentation and cross examination of witnesses, on the merits of the case. Moreover, the court erred in not permitting Petitioner to develop the record and to utilize expert analysis, such as the opinion of Stuart Kelban, who provided an advisory opinion reflecting the merits of the substantial similarity of *Empire to Cream*. (A.167-174).

federal circuits compare works, such as the Works here, in copyright infringement cases; however, in the case *sub judice*, the Third Circuit has eviscerated the Second Circuit's standard by creating an application that prohibits any work challenged, with a valid copyright, undisputed access, and proof of probable substantial similarities, to withstand 12(b)(6) scrutiny, absent identical works.

Although most courts use one of two tests: the copying/unlawful appropriation test associated with the Second Circuit or the extrinsic/intrinsic test associated with the Ninth Circuit,¹² the Tenth Circuit, however, uses the abstraction/filtration/comparison test, which most circuits reserve for cases involving computer programs. The Sixth Circuit uses a variation of the Tenth Circuit test, which is identified as labeled filtration/comparison by its intended audience. The Eleventh Circuit uses a test that extends back to the days before the Second and Ninth Circuit approaches

¹² *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). In the Second Circuit, both the issue of copying and the issue of unlawful appropriation are fact issues for the jury. *Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946). The question of whether defendant had access to plaintiff's work also is a fact issue for the jury. *Id.* Nevertheless, courts in the Second Circuit may determine those issues as a matter of law on a motion for summary judgment if the similarities between the two works are limited to noncopyrightable elements so that a finding of noninfringement is required, or if the evidence is so clear as to fall outside the range of reasonably disputed fact only one way. *See Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998). That principle is at odds with the Ninth Circuit approach.

diverged. The Fourth Circuit, like the Ninth, uses a version of the extrinsic/intrinsic test to compare works.¹³

Notably, the Sixth Circuit, like many of the Circuit Courts, has cautioned that granting summary judgment motions (not even 12(b)(6)) in copyright infringement cases is generally disfavored. Summary judgment motions, unlike Rule 12(b)(6) motions, are premised on a developed record—often with the benefit of expert testimony. If summary judgment motions in these kinds of cases are to be granted “sparingly,” it is not surprising that this Court identified only a handful of cases within this circuit in which a district court granted a Rule 12 motion involving a copyright claim after conducting a substantial similarity analysis. See, e.g., *Ford Motor Company v. Autel US Inc.*, 2015 WL 5729067, at *5 (E.D. Mich., 2015) (Rule 12 motion granted without prejudice, plaintiff granted leave to amend complaint); *Dorchen / Martin Associates, Inc. v. Brook of Cheboygan, Inc.*, 838 F. Supp. 2d 607, 613 (E.D. Mich., 2012) (same); *Pollick v. Kimberly Clark–Corp.*, 817 F. Supp. 2d 1005 (E.D. Mich., 2011) (Rule 12 motion granted in favor of the defendant manufacturer of Huggies “jeans diapers” against the plaintiff holder of a copyright for “diaper jeans.”); *National Business Development Services, Inc. v. American Credit Educ. & Consulting, Inc.*, 2007 WL 2318752, at *3 (E.D. Mich., 2007) (Motion to dismiss granted because Plaintiff’s complaint contained a blanket assertion of entitlement to relief, but no factual

¹³ See *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001); *Towler v. Sayles*, 76 F.3d 579, 583 (4th Cir. 1996).

allegations supporting that assertion.”). Certainly, in the District Court of the Sixth Circuit, case of *Eggleston v. Daniels, et al.*, the court, while applying the inverse ratio analysis, recognized that the Plaintiff’s listing of 23 similarities was enough to withstand the 12(b)(6) Motion by the same Defendants as in our case.¹⁴ Indeed, the same ruling should have been found by the Third Circuit in this matter given the excess of 23 similarities and storylines evident when comparing *Empire to Cream*.¹⁵

2. The Court of Appeals Erred in Confirming the District Court’s Determination Regarding Substantial Similarity Based on Application of the Ordinary Observer Test.

a. The District Court is Not an Ordinary Observer.

In its opinion, the Third Circuit repeatedly emphasized the difficulties inherent in applying the appropriate analytical principles/tools and making the judgments necessary to reach a definitive determination as to substantial similarity¹⁶ but, nevertheless, affirmed the ruling of the District Court that nothing beyond a visual comparison of the subject Works was required in order to do so. The Court of Appeals also stressed applicability of the lay-observer

¹⁴ *Eggleston v. Daniels, et al.*, Case No. 4:15-cv-11893, where there was no direct access to the claimed infringer.

¹⁵ (A.93-166, Transcript of 1/31/17).

¹⁶ (A.12, 16-17).

test.¹⁷ Of particular concern is the role-shifting involved in judicial determinations of this nature, where the trial court has assumed the function of the fact-finder in order to rule on the issue of substantial similarity as a matter of law.

In the seminal case of *Dam Things from Denmark*, the Third Circuit held that once actual copying was shown, then “the fact-finder is to determine whether a ‘lay-observer’ would believe that the copying was of protectible [*sic*] aspects of the copyrighted work.” *Id.*, 290 F.3d at 561, citing, *Whelan Assocs., Inc.*, 797 F.2d at 1232.

Simply stated, the trial court is not an *ordinary* lay-observer. The marked difference between the sophisticated legal analyses in which the trial court inevitably engages in order to determine substantial similarity on a motion to dismiss, as compared to the perspective of an ordinary observer contemplated by the test, is apparent. Indeed, it has been held that expert opinion is not appropriate to determine substantial similarity because the operative test is the perception of a lay or ordinary observer which, by definition, an expert is not. See, *e.g.*, *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992), citing, *Arnstein v. Porter*, 154 F.2d 464, 468, 473 (2d Cir. 1946) (“Since the test for illicit copying is based upon the response of ordinary lay observers, expert testimony is thus ‘irrelevant’ and not permitted.”). The determination of substantial similarity from the perspective of an ordinary observer (*e.g.*, an average television viewer) is inevitably subjective. However,

¹⁷ (A.13-17).

the consensus of jurors is much more likely to provide an accurate and fair result than a sophisticated legal analysis. Accordingly, Petitioner's Writ of Certiorari should be granted.

C. The Court of Appeals Erred in Affirming the District Court's Grant of Respondents' Motions to Dismiss, Even Though Petitioner Had Stated a Valid *Prima Facie* Cause of Action for Direct Copyright Infringement, Thereby Depriving Petitioner of His Right to a Jury Trial as Guaranteed by the 7th Amendment of the United States Constitution.

1. Petitioner Has Been Deprived of His Constitutionally Guaranteed Right to a Jury Trial.

It has long been established that the Seventh Amendment is applicable to causes of action based on statutes. See, *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974):

Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

Id., 415 U.S. at 194-95. Also see, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); *Doe v. Hesketh*, 828 F.3d 159 (3d Cir. 2016). In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 343-353 118 S. Ct. 1279, 140 L. Ed. 2d 438, 46 U.S.P.Q.2d 1161,

(1998), the Supreme Court engaged in an extended discussion of the history of trying copyright infringement cases before a jury and concluded that, “[t]he Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) [of the Copyright Act of 1976], including the amount itself.” Several courts from within the Third Circuit have also found that there is a right to a jury trial under the Seventh Amendment in copyright infringement cases and have upheld that right -- even where only statutory damages or equitable relief is sought. See, e.g., *Microsoft Corp. v. Master Computer, Inc.*, 4:CV-04-2567 (M.D. Pa. Oct. 12, 2005)(confirming the plaintiff’s right to a jury trial to determine statutory damages); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 203 U.S.P.Q. 487 (D.Del.1978) (defendants’ right to a jury trial upheld, the plaintiffs’ motion to strike the defendants’ request for a jury trial on the copyright infringement claim denied.). Similarly, in *Leonard v. Stemtech International, Inc.*, 834 F.3d 376 (3d Cir. 2016), the Court of Appeals held that where the amount of the jury award is not supported by the evidence, the court, “must offer a new trial as a[] [conditional] alternative to a reduction in the award in order to avoid depriving the plaintiff of his/her Seventh Amendment right to a jury trial.” *Id.*, at 392, quoting, *Cortez v. Trans Union, LLC*, 617 F.3d 688, 716 (3d Cir. 2010). See also, *Educational Testing Services v. Katzman*, 670 F. Supp. 1237 (D. N.J. 1987), where the Court denied the plaintiff’s motion to strike the defendants’ jury demand, stating:

If I have erred, and I do not believe I have, then
I have erred on the side of protecting an
important constitutional right,

fundamental to the fair administration of justice.

Id. at 1243 (emphasis added). The fundamental importance of the right to a jury trial has been repeatedly recognized. See, e.g., *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L.Ed. 1177 (1937) (“The right to a jury trial in a civil case is a fundamental right expressly protected by the Seventh Amendment to the United States Constitution.”); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 222 (3d Cir. 2007)(same); *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292, 294 (3d Cir. 2004)(same); *Molthan v. Temple Univ. of Com. Sys. of Higher Educ.*, 778 F.2d 955, 963 (3d Cir. 1985)(same). As Chief Judge Sloviter pointed out in *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242 (3d Cir. 1994) (Sloviter, Chief Judge, dissenting),

Whenever confronted with a Seventh Amendment right to a jury trial issue, we should be mindful that it is an important constitutional right that should not be taken away lightly:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Id. at 1259-60, citing, *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S. Ct. 1339, 1344, 108 L. Ed. 2d 519 (1990).

Now, however, Petitioner and other claimants like him in the Third Circuit are, by reason of the decision below, effectively deprived of the right to a jury trial.

In essence, by allowing district courts to decide the ultimate issue in a copyright infringement case as a matter of law at the pleading stage of the proceedings, especially where the plaintiff has clearly stated a plausible claim, demonstrated access and probative similarity, and has alleged facts that satisfy the lay-observer test, it is extremely unlikely that there will ever be an opportunity for the plaintiff to get to the jury, unless the works at issue are virtually identical in every respect.

While permitting courts to decide the ultimate issues in copyright infringement actions involving complex filmed artistic works might be seen to avoid a certain amount of meritless litigation and thereby conserve judicial resources, it does so at the expense of legitimate claimants who have stated a valid cause of action, such as the case *sub judice*, yet are denied their day-in-court and deprived of the judgment of their peers. On balance, it is surely better to permit those plaintiffs who own a legitimate and enforceable copyright, have provided evidence of direct access, and have demonstrated probative similarity to advance beyond the complaint¹⁸ in order to ensure that claimants with potentially viable claims are permitted to have their cases heard by a jury. Accordingly, this case is ripe for consideration by this Honorable Court.

¹⁸ Note that there are other existing means of truncating meritless litigation, short of trial, such as a summary judgment motion, should it prove appropriate once the plaintiff has had an opportunity to conduct discovery, present and cross examine witnesses, and/or engage an expert.

D. The Third Circuit Erred in Affirming the District Court's Determination that Further Amendment of the Second Amended Complaint Would Be Futile.

The federal rules encompass the precise scenario where an amendment of the Complaint should be permitted to simply cure a pleading. Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading once as a matter of course at any time before a responsive pleading is served. "Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Determining whether to give leave of court requires an exercise of discretion by the trial court; however, the Rule itself makes clear that leave shall be freely given when justice so requires. As was stated by the U.S. Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962):

[T]he grant or denial of an opportunity to amend is within the discretion of the District Court, ... outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules.

See, *Nebraska v. Wyoming*, 515 U.S. 1, 8, 115 S. Ct. 1933, 132 L. Ed. 2d 1, 63 U.S.L.W. 4468 (1995) (noting "the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure"). Also see, *Fletcher-Harlee Corp. v. Paote Concrete Contractors, Inc.*, 482 F.3d 247, 252 (3d Cir. 2007);

Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000). In this instance, the District Court erred as a matter of law in finding that an amendment would be futile, and improperly dismissed Petitioner’s request for leave to amend in cursory fashion, without any real explanation given for the decision other than that the perceived defects in Petitioner’s pleading could not be cured by amendment.¹⁹

Courts in the Third Circuit regularly permit amendment at the pleading stage of the proceedings. See, e.g., *Laoye v. United States of America*, 665 Fed.Appx. 148 (3d Cir. 2016) (not precedential); *Diopsys, Inc. v. Konan Medical USA, Inc.*, No. 2:15-cv-5882 (D. N.J. July 10, 2017); *Live Face on the Web, LLC v. The Control Group Media Company, Inc.*, No. 2:15-cv-01306 (E.D. Pa. June 27, 2016). In *Darr v. Wolfe*, 767 F.2d 79 (3d Cir. 1985), the Court held that a plaintiff, “should be given a reasonable opportunity to cure the defect, if he can, by amendment of the complaint and that denial of an application for leave to amend under these circumstances is an abuse of discretion”. *Id.* at 81.

Indeed, it has been held that even in cases where the plaintiff has not sought leave to amend, amendment should be permitted. See, e.g., *District Council 47 v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986) (lower court should have granted leave to amend even

¹⁹ Notably, Petitioner was afforded only one opportunity to amend his Complaint in order to clarify his allegations, and thereby, “cure” any alleged deficiencies.

though the plaintiff, which was represented by experienced counsel, had never sought leave to amend).

Furthermore, leave to amend would have been especially appropriate in the instant case in light of the tacit admission of infringement by Daniels during his NBC television interview that aired on or about January 14, 2016.²⁰ During the proceedings before the District Court, Petitioner made repeated references to the Daniels' interview, and his tacit admission by failure to deny infringement, when it was certainly reasonable for him to do so.²¹ This televised interview

²⁰ See, <https://www.nbcphiladelphia.com/news/local/Philadelphia-Actor-Lee-Daniel-Stole-Empire-Idea-Lawsuit-365300081.html>.

²¹ There is ample authority recognizing the proposition that, when confronted with an allegation that is within a party's power to deny, silence will be construed as an admission. See, for example:

Applying the assumption to the present case, the government contends that Agee's silence about the presence of the heroin amounted to an affirmative denial of such presence and thus to purposeful concealment of the drugs. *Where silence is equivalent to an assertion, that silence becomes relevant to a witness' testimony as a prior inconsistent statement if the assumed affirmation is inconsistent with the witness' present testimony. If offered against a party to the action, that silence is relevant as an admission, **regardless of that party's testimony.***

United States v. Agee, 597 F.2d 350, 366 (3d Cir. 1979) (Emphasis added).

As a matter of due process these observations with regard to the weight, reliability, or probative value of silence as evidence have not been discredited by subsequent decisions of the Supreme Court. *Even Griffin did not hold that evidence of silence was so lacking in*

is a matter of public record and, as such, the District Court was obligated to consider it. See, e.g., *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (“To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record”). By denying Petitioner an opportunity to amend his pleading to certainly, minimally, include allegations regarding Daniels’ tacit admission of infringement, the District Court prevented him from alleging a material fact that might well have altered the outcome. All of these factors favor granting leave to amend. Nevertheless, the District Court denied Petitioner’s request and the Court of Appeals erroneously affirmed the lower court’s ruling in this regard.

Although not specifically stated as such, it is apparent that the District Court concluded that amendment would be futile because, having viewed the subject-Works, it had already decided that Petitioner had failed to *prove* the ultimate issue in the case (*i.e.*, substantial similarity) and, therefore, nothing that

probative value that its admission into evidence would have violated due process. It merely held that regardless of its probative value, it may not be used as evidence of guilt.

Agnellino v. State of New Jersey, 493 F.2d 714, 722 (3d Cir. 1974).

Admittedly, evidence of prior statements may be more probative to show inconsistency than evidence of prior silence. This does not mean that prior silence is always without any probative value. [Citation omitted]

First Nat Bank of Philadelphia v. Farrell, 272 F. 371, 376 (3d Cir. 1921).

Tanksley pled would change the result. Despite having stated a valid, *prima facie* cause of action in his Complaint, the well-pled factual allegations of which must be accepted as true, along with all favorable inferences derived therefrom, Petitioner was nonetheless deprived of any opportunity to develop his case through discovery, examination of witnesses, and expert analysis. Thus, it appears that, in copyright infringement cases, the complaint itself can virtually never survive a motion to dismiss. Accordingly, this case is ripe for consideration by this Honorable Court.

CONCLUSION

For all of the reasons set forth above, the foregoing Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Mary Elizabeth Bogan
Counsel of Record
BOGAN LAW GROUP, LLC
One Liberty Place
1650 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 385-5254
mbogan@boganlawgroup.com

Counsel for Petitioner