

IN THE
Supreme Court of the United States

MICHAEL YAMASHITA, *et al.*,

Petitioners,

v.

SCHOLASTIC INC.,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF THE
QUESTION PRESENTED**

Whether Petitioners have presented compelling reasons to grant the Petition where (1) no Circuit Court split exists with respect to the proper pleading standard for copyright infringement; and (2) the Second Circuit's decision does not conflict with *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) or any other decision of this Court.

**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

There are no parties to the proceedings other than those listed in the caption. Petitioners Michael Yamashita, Inc. and Michael Yamashita (collectively “Yamashita”) were plaintiffs in the district court and appellants in the court of appeals. Respondent Scholastic Inc. (“Scholastic”) was defendant in the district court and appellee in the court of appeals.

Pursuant to Rule 29.6 of the Supreme Court Rules, Scholastic states that Scholastic Corporation is a publicly held corporation owning 10% or more of Scholastic Inc.’s stock.

TABLE OF CONTENTS

	<i>Page</i>
COUNTERSTATEMENT OF THE QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES	vi
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
STATEMENT OF THE CASE	3
I. BACKGROUND AND FACTS OF THE CASE	3
A. YAMASHITA'S COMPLAINT CONTAINS NO SPECIFIC A L L E G A T I O N S O F INFRINGEMENT.....	4
B. SCHOLASTIC MOVES TO DISMISS AND TO TRANSFER THE CASE TO THE SOUTHERN DISTRICT OF NEW YORK.....	6
II. PROCEEDINGS BELOW.....	6

Table of Contents

	<i>Page</i>
A. THE DISTRICT COURT DISMISSES THE CASE AS A “FISHING EXPEDITION” AND “AIMLESS TRAWLING” NOT PERMITTED BY RULE 8.....	6
B. YAMASHITA’S AMENDED COMPLAINT LARGE LY REPEATS THE CONCLUSORY ALLEGATIONS.....	7
C. THE APPELLATE COURT AFFIRMS THE LOWER COURT’S DISMISSAL	8
D. YAMASHITA FILES HIS PETITION FOR A WRIT OF CERTIORARI.....	10
III. REASONS FOR DENYING THE PETITION.....	11
A. THE SECOND CIRCUIT DID NOT IDENTIFY A NEW PLEADING STANDARD FOR COPYRIGHT INFRINGEMENT ACTIONS.....	11
B. CASES CITED FROM THE THIRD AND SEVENTH CIRCUITS DO NOT CREATE A CIRCUIT SPLIT.....	13

Table of Contents

	<i>Page</i>
C. THE SECOND CIRCUIT'S RULE IS THE CORRECT ONE	15
CONCLUSION	18

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009)	2, 11, 12, 15
<i>Baisden v. I'm Ready Prods., Inc.</i> , 693 F.3d 491 (5th Cir. 2012)	13
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	2, 11, 12, 15
<i>Bourne v. Walt Disney Co.</i> , 68 F.3d 621 (2d Cir. 1995)	9, 10, 13
<i>Carlin v. Bezos</i> , 649 F. App'x 181 (3d Cir.), <i>cert. denied</i> , 137 S. Ct. 168, 196 L. Ed. 2d 141 (2016), <i>reh'g denied</i> , 137 S. Ct. 543, 196 L. Ed. 2d 438 (2016)	14
<i>CBS Corp. v. F.C.C.</i> , 663 F.3d 122 (3d Cir. 2011)	14
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991)	1, 11, 12
<i>Graham v. James</i> , 144 F.3d 229 (2d Cir. 1998)	13

Cited Authorities

	<i>Page</i>
<i>Kelly v. L.L. Cool J.,</i> 145 F.R.D. 32 (S.D.N.Y. 1992), <i>aff'd</i> , 23 F.3d 398 (2d Cir. 1994)	12
<i>MacLean Assocs., Inc. v.</i> <i>Wm. M. Mercer-Meidinger-Hansen, Inc.,</i> 952 F.2d 769 (3d Cir. 1991)	14
<i>MAI Sys. Corp. v. Peak Computer, Inc.,</i> 991 F.2d 511 (9th Cir. 1993).....	13
<i>In re McGraw-Hill Global Educ. Holdings LLC,</i> 909 F.3d 48 (3d Cir. 2018)	2, 11, 13, 14
<i>MDY Indus., LLC v. Blizzard Entm't, Inc.,</i> 629 F.3d 928 (9th Cir. 2010).....	13
<i>Muhammad-Ali v. Final Call, Inc.,</i> 832 F.3d 755 (7th Cir. 2016).....	3, 11, 14, 15
<i>Pa. Pharmacists Ass'n v. Houstoun,</i> 283 F.3d 531 (3d Cir. 2002)	14
<i>Petrella v. Metro-Goldwyn-Mayer, Inc.,</i> 572 U.S. 663 (2014).....	16
<i>SCA Hygiene Prods. Aktiebolag v.</i> <i>First Quality Baby Prods., LLC,</i> 137 S. Ct. 954 (2017).....	16

<i>Cited Authorities</i>	<i>Page</i>
<i>Spinelli v., Nat'l Football League,</i> 903 F.3d 185 (2d Cir. 2018)	9
<i>Tasini v. N.Y. Times Co.,</i> 206 F.3d 161 (2d Cir. 2000)	13
<i>Yamashita v. Scholastic Inc.,</i> 936 F.3d 98 (2d Cir. 2019)	8
<i>Young-Wolff v. McGraw-Hill Cos.,</i> No. 13 Civ. 4372, 2014 WL 349711 (S.D.N.Y. Jan. 31, 2014)	16
STATUTES	
Copyright Act, 17 U.S.C. § 101 <i>et seq.</i>	16
OTHER AUTHORITIES	
3-18 Milgrim on Licensing § 18.64 (2017)	16
Federal Rules of Civil Procedure Rule 8	<i>passim</i>

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Yamashita claims that the Second Circuit misapplied the pleading standard for a copyright infringement claim, and that this standard is being applied differently in the Second Circuit than in other Circuits. Neither of these contentions is valid. Yamashita brought an action for breach of copyright alleging that it had licensed to Scholastic the right to use certain photographs and that Scholastic might have exceeded the permitted scope of those licenses—some of which date back for twenty years. Yamashita contends that he should be permitted to proceed with this case despite being unable to plead any infringing conduct with plausibility as required by Rule 8 of the Federal Rules of Civil Procedure (“Rule 8”), and to use the action to determine whether any infringement occurred. In a nutshell, Yamashita seeks to use the courts to conduct an audit of Scholastic’s uses of his photographs, an attempt that the district and appellate courts properly rejected.

Yamashita now seeks to save his claims by arguing that there is a split between the Second Circuit, on one hand, and the Third and Seventh Circuits, on the other, regarding the appropriate pleading standard. He suggests that the Second Circuit improperly requires a plaintiff in a copyright infringement case to plead extra elements in a way that is inconsistent with the two elements of a copyright infringement claim described by this Court in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), a case that did not involve any analysis of the pleading standard. In essence, Yamashita asserts that the Second Circuit failed to follow *Feist* and hold that in

order to plead a claim for copyright infringement, all a plaintiff needs to do is to allege, without anything more, that he: (i) owns some copyrighted material; and (ii) that the defendant may possibly have used such material in some unspecified way during some unspecified period of time without the copyright holder's permission.

First, Yamashita mischaracterizes the Second Circuit's holding. In its decision, the Second Circuit was clear that its ruling "turn[ed] not on whether there are two or four elements of a generic copyright infringement claim..." App.11a-App.12a. The Second Circuit merely followed the requirements of Rule 8, as they were articulated by this Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), by requiring Yamashita to plead, with plausibility, that his photographs were actually infringed.

Moreover, to the extent there is any disagreement between the Circuits that have looked at the pleading issue, it is exceedingly narrow. Yamashita makes much of the fact that the Second Circuit followed its long-standing precedent—shared by the Fifth and Ninth Circuits—by requiring him to specifically allege use of his photographs by Scholastic outside of the terms of the licenses his agents granted and he identified in his Complaint. He claims that this burden is inconsistent with decisions from the Third and Seventh Circuits. It is not. To the extent the Third Circuit suggested that it might apply a different pleading requirement than the one applied in the Second Circuit in *In re McGraw-Hill Global Educ. Holdings LLC*, 909 F.3d 48 (3d Cir. 2018), that case involved dueling petitions for writs of mandamus to determine whether lower courts properly dealt with motions to transfer

venue. The pleading standard issue was not before that court and anything it might have said in the course of its opinion is therefore *dicta*. The Seventh Circuit’s decision in *Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755 (7th Cir. 2016), is easily distinguished on its facts because there, unlike in the instant case, the plaintiff had alleged copyright infringement with specificity and the defendant had raised the possible existence of an implied license in order to justify what the plaintiff had claimed was a completely unlicensed infringement.

Given that there is no split among the Circuit Courts, and that the decision of the Second Circuit correctly applied the pleading standard encapsulated by Rule 8, Yamashita’s Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

I. BACKGROUND AND FACTS OF THE CASE

Yamashita originally brought this action on June 28, 2016, accusing Scholastic of copyright infringement related to 119 licensed uses (the “Uses”) of 83 photographs identified in the exhibit to the Complaint (the “Photographs”). App.29a-App.75a (the “Complaint” or “Compl.”). The earliest invoices for these licensed Uses date back to June 16, 1999—nearly eighteen years before Yamashita filed the Complaint. App.36a-App.37a (Compl., Ex. A rows 1-4). As of the date of filing, 77 of the invoices for the Uses (approximately 65%) were at least ten years old. App.36a-App.75a (Compl., Ex. A rows 1-79, 105-118).

The case was originally filed in the District Court for the District of New Jersey. App.29a. That court transferred the case to the Southern District of New York pursuant to a mandatory venue provision. The District Court (Forrest, J.) then dismissed all but one of Yamashita's claims for failure to state any cause of action for copyright infringement. App.21a. The parties settled the one remaining claim, and an appeal to the Second Circuit followed. The Second Circuit affirmed the District Court's order dismissing the case in a per curiam opinion published at 936 F.3d 98. App.1a.

A. YAMASHITA'S COMPLAINT CONTAINS NO SPECIFIC ALLEGATIONS OF INFRINGEMENT

Michael Yamashita alleges that he is a professional photographer who resides in New Jersey. App.30a (Compl. ¶ 2). Michael Yamashita, Inc. is a New Jersey corporation owned by Mr. Yamashita. App.30a (Compl. ¶ 3). Scholastic is a New York corporation that is the world's largest publisher and distributor of children's books. App.30a (Compl. ¶ 4).

In the Complaint, Yamashita claimed that Scholastic exceeded the scope of 119 licenses granted to Scholastic and, as a result, infringed the copyrights in the Photographs at some unspecified time in one or more of five possible ways. Yamashita provided no factual basis for his purported belief that this infringement occurred. He did not identify the way in which any of the licenses had allegedly been exceeded or when such alleged infringement had taken place. Yamashita merely pled, upon information and belief, a list of ways all of these

licenses might have been exceeded. App.31a-App.32a (Compl. ¶ 13 (listing five possible bases for infringement using an “and/or” connector)). Yamashita confirmed that he had no specific information on how or when—or, indeed, *if*—his Photographs had been infringed, alleging instead that “Scholastic alone knows the full extent to which it has infringed Yamashita’s copyrights by making unauthorized uses of the Photographs, but it has not shared this knowledge with Yamashita.” App.32a (Compl. ¶ 15). Thus, Yamashita sought to use this litigation as a means of auditing Scholastic’s use of photographs, some of which were licensed nearly twenty years ago.

The only material allegations in the Complaint based on facts (rather than speculation pled on unsupported information and belief) were that: (1) Yamashita owns the copyrights in the Photographs (App.31a (Compl. ¶ 7)); (2) acting through the stock photo agency Corbis Corporation (“Corbis”), Yamashita sold Scholastic limited licenses to use those Photographs (App.31a (Compl. ¶¶ 9-10)); and (3) that Scholastic has been sued for copyright infringement in other cases involving other photographers and other publications. App.32a (Compl. ¶ 16). Yamashita did not identify the purported limits to any license or describe how or when Scholastic may have exceeded such limits.

The specific information in the Complaint about the alleged licenses to Scholastic was included in the exhibit appended to the Complaint, which identified the invoice date and Corbis’s invoice number for each of these licenses. App.36a-App.75a. The Exhibit listed 119 licensed Uses, but identified only three of the Scholastic book titles that purportedly included licensed Photographs—two of which were apparently the hardcover and paperback versions

of the same publication. App.29a-App.75a (Compl. ¶¶ 16, 72, 80).

B. SCHOLASTIC MOVES TO DISMISS AND TO TRANSFER THE CASE TO THE SOUTHERN DISTRICT OF NEW YORK

On September 14, 2016, Scholastic moved to dismiss the Complaint for failure to meet the standards of Rule 8 and/or to transfer the matter from the District of New Jersey to the Southern District of New York. App.21a-App.22a. Scholastic also argued that the Complaint failed to satisfy the requirements of Rule 8 and, in particular, failed to allege by what acts and at what time Yamashita's Photographs were allegedly infringed. *See id.* Scholastic further contended that Yamashita improperly was seeking to audit Scholastic for all uses of his Photographs, despite lacking any right to do so under the Copyright Act or any bargained-for contractual right to audit.

On November 29, 2016, the District of New Jersey (Chesler, J.) ordered transfer, but did not reach Scholastic's motion to dismiss. *See generally* App.21a-22a.

II. PROCEEDINGS BELOW

A. THE DISTRICT COURT DISMISSES THE CASE AS A “FISHING EXPEDITION” AND “AIMLESS TRAWLING” NOT PERMITTED BY RULE 8

Upon receipt of the case, the District Court for the Southern District of New York inquired whether Scholastic intended to renew its motion to dismiss, which it would

hear without further briefing. App.21a-22a. Scholastic confirmed that it did, and the Court thereafter heard the motion. *See generally* App.21a-App.24a.

In the order that followed, the District Court dismissed Yamashita's Complaint in its entirety for failure to "plead facts to support its claims beyond mere speculation . . ." as is required by Rule 8. App.21a-App.24a (the "Dismissal Order"). As the District Court stated, while the Complaint "speculate[d] about 'various ways' defendants might have infringed" Yamashita's copyrights, it failed to "name a single instance of infringement or allege facts to establish a timeframe for when such an infringement might have occurred." App.23a. It also rejected Yamashita's argument that he properly established a timeframe for the alleged infringement by claiming that it occurred after Scholastic obtained the photographs, noting that '[a]ny infringement would necessarily happen 'after' defendants accessed the copyrighted material.' App.23a n.1. The District Court concluded that "[t]he complaint contain[ed] so few factual allegations it is nothing more than a fishing expedition. Rule 8 does not permit such aimless trawling." App.23a.

B. YAMASHITA'S AMENDED COMPLAINT LARGELY REPEATS THE CONCLUSORY ALLEGATIONS

On January 23, 2017, Yamashita sought reconsideration of the Dismissal Order and leave to file an amended complaint. App.7a. Yamashita did not contest the District Court's finding that the initial Complaint was a fishing expedition, but asked that the District Court allow him to replead the very same 119 Uses by providing additional information related to only one. App.7a.

The proposed first amended complaint that Yamashita attached to his motion provided no additional information whatsoever regarding 118 of the Uses that the District Court dismissed and merely included images of 2 other licensed Uses that provided no indication that Scholastic exceeded the terms of the licenses for those Uses. *See id.* Yamashita instead confirmed, as he did in the Complaint, that he still had no information of infringement for those Uses. App.8a. The lone additional fact Yamashita pled concerned only the Use identified in row 80 of the initial Complaint (the “Row 80 Use”). Yamashita claimed that a reference to the publication associated with the Row 80 Use appeared on Scholastic’s website as part of a lesson plan—with no link or other apparent way to purchase that book—after the license for the Row 80 Use allegedly expired. App.7a.

In an Order dated February 28, 2017, the District Court granted leave to amend only as to the Row 80 Use, and denied leave as to all other Uses as “plaintiff has shown not a single fact supportive of an infringement claim with regard to any of these images.” App.8a-App.9a. The parties then settled the Row 80 Use (App.9a), and the case was appealed to the Court of Appeals for the Second Circuit.

C. THE APPELLATE COURT AFFIRMS THE LOWER COURT’S DISMISSAL

The Second Circuit affirmed the District Court’s dismissal of the Complaint. *See* App.1a-App.20a (*Yamashita v. Scholastic Inc.*, 936 F.3d 98 (2d Cir. 2019)). The appellate court acknowledged that Yamashita had pointed to *Feist*, and that he had urged the court to find

that, under that decision, he need only establish two elements—(1) ownership of a valid copyright and (2) copying of the constituent elements of the work that are original—in order to properly plead his claim. App.10a-App.11a. However, the Second Circuit was clear that “the correct disposition here turns not on whether there are two or four elements of a generic copyright infringement claim, but...whether, in pleading copyright infringement, a plaintiff who has authorized the licensed use of its work to the alleged infringer must allege with specificity facts concerning the limits and asserted breaches of the licenses...” App.11a.

In finding that Yamashita did not meet this standard, the Second Circuit confirmed that while the existence of a license is “generally viewed as an affirmative defense to a claim of copyright infringement” (App.11a-App.12a (citing *Bourne v. Walt Disney Co.*, 68 F.3d 621, 630-31 (2d Cir. 1995); *Spinelli v. Nat'l Football League*, 903 F.3d 185, 199 (2d Cir. 2018))), “in cases where only the scope of the licenses is at issue, the copyright owner bears the burden of proving that the defendant’s copying was unauthorized.” App.12a (quoting *Bourne*, 68 F.3d at 631). In other words, “when the existence of a license is not in question, a copyright holder must plausibly allege that the defendant exceeded particular terms of the license.” App.12a (emphasis in original). The Second Circuit ultimately held that “[a]bsent at least a modicum of such additional factual allegations, Yamashita’s Complaint is fairly characterized as no more than a collection of speculative claims based on suspicion alone. Such a complaint for infringement neither complies with Rule 8 nor states a plausible claim for relief. Accordingly, we are compelled to agree with the District Court that the Complaint does not survive Scholastic’s motion to dismiss.” App.14a.

In so holding, the Second Circuit held that “to sustain such a compliant that alleges nothing but suspicions of infringement where a license has been granted is to invite transformation of the courts into an audit bureau for copyright licensing, an administrative function that [they] are hardly designed to serve.” App.16a. The court also noted that although the Third Circuit had “expressed disagreement” with the Second Circuit’s approach in *Bourne*, that case was decided “in a procedural context quite different from that before” the Second Circuit. App.18a-App.19a. Yamashita thus had to “marshal more than unsubstantiated suspicions to gain entitlement to broad-ranging discovery of his agent’s licensee,” *i.e.*, Scholastic. App.17a.

The Second Circuit subsequently denied Yamashita’s petition to rehear the case en banc. App.25a-App.26a.

D. YAMASHITA FILES HIS PETITION FOR A WRIT OF CERTIORARI

Yamashita filed a Petition for a Writ of Certiorari to this Court (the “Petition”). The Petition claims that the fundamental issue is whether the Second Circuit “err[ed] in holding that a complaint for copyright infringement must be dismissed unless it alleges particular facts showing ‘1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) [as now required by the Second Circuit but not by the Third and Seventh Circuits] by what acts during what time the defendant infringed the copyright?’” Petition at 2 (emphasis in original). Yamashita further argues that this final element stands in conflict

with the Third Circuit’s decision in *In re McGraw-Hill*, the Seventh Circuit’s decision in *Muhammad-Ali* and this Court’s holding in *Feist*. *See id.*

III. REASONS FOR DENYING THE PETITION

A. THE SECOND CIRCUIT DID NOT IDENTIFY A NEW PLEADING STANDARD FOR COPYRIGHT INFRINGEMENT ACTIONS

Yamashita argues that the Petition presents a question that “is both straightforward and manifestly important.” Petition at 6. He claims that “there is one pleading standard [for copyright infringement claims] in New York and a very different one in Chicago and Philadelphia.” *Id.* This is not the case.

The Second Circuit was clear that it was not applying any heightened pleading standard. While the court acknowledged that “[t]he parties ha[d] framed their dispute about the Complaint’s sufficiency around the question whether the District Court erred by adopting the...four-part definition of an adequate copyright infringement claim...the correct disposition here turns not on whether there are two or four elements of a generic copyright infringement claim, but instead on the implications of the fact, acknowledged in Yamashita’s Complaint, that Scholastic procured licenses to copy the Photographs.” App.10a-App.11a. All that the Second Circuit did was to analyze the sufficiency of Yamashita’s Complaint under Rule 8 and the standards articulated by this Court in both *Iqbal* and *Twombly*. In doing so, it found that the Complaint did not meet this standard. App.14a (“Absent at least a modicum of such additional factual allegations,

Yamashita's Complaint is fairly characterized as no more than a collection of speculative claims based on suspicion alone. Such a complaint for infringement neither complies with Rule 8 nor states a plausible claim for relief.”).

To the extent the District Court—and not the Second Circuit—relied on the articulation of the elements of a copyright claim in *Kelly v. L.L. Cool J.*, 145 F.R.D. 32 (S.D.N.Y. 1992), *aff'd* 23 F.3d 398 (2d Cir. 1994), *Kelly* is in no way inconsistent with *Feist*. Yamashita is correct that *Feist*—a thirty-year-old case famously involving an issue concerning the copyrightability of listings in a telephone book rather than the pleading standard (*id.*, 499 U.S. at 342)—articulates only two elements that must be *proven* to establish copyright infringement: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original” (*id.* 361), where *Kelly* breaks these elements down to a more granular four. See *Kelly*, 145 F.R.D. at 36 (“A properly plead copyright infringement claim must allege 1) which specific original works are the subject of the copyright claim, 2) that plaintiff owns the copyrights in those works, 3) that the copyrights have been registered in accordance with the statute, and 4) by what acts during what time the defendant infringed the copyright.”). However, *Kelly*—decided and affirmed after *Feist*—merely articulates the types of facts that must be pled to establish this second element with the requisite amount of particularity required by Rule 8 and the standards articulated in *Iqbal* and *Twombly*.

Accordingly, this case neither presents a Circuit split on what the appropriate pleading standard is for copyright cases, or otherwise conflicts with the precedent of this Court. The Petition should therefore be denied.

B. CASES CITED FROM THE THIRD AND SEVENTH CIRCUITS DO NOT CREATE A CIRCUIT SPLIT

If the Petition points to any disagreement at all between Circuits it is far narrower than the pleading standard, and not a Circuit split.

As the Second Circuit recognized in this case (*see* App.11a-App.12a), it long ago adopted the rule that, where the existence of a license is clear from the face of the Complaint, the copyright owner must plead—and, in later stages, prove—that that license has been exceeded. *See Bourne*, 68 F.3d at 631 (2d Cir. 1995); *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998); *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 171 (2d Cir. 2000). This is also the rule in the Ninth Circuit (*see MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010) (in the face of a license, “the potential for infringement exists only where the licensee’s action (1) exceeds the license’s scope (2) in a manner that implicates one of the licensor’s exclusive statutory rights.”); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 517 (9th Cir. 1993) (same)) and the Fifth Circuit. *See Baisden v. I’m Ready Prods., Inc.*, 693 F.3d 491 (5th Cir. 2012) (upholding jury instruction in a copyright infringement case that stated that “[Plaintiff] must prove by a preponderance of the evidence that Defendants’ copying was not authorized by this license”).

While the Third Circuit indicated that it may be inclined to establish a different rule in *In re McGraw-Hill*, that case is hardly binding Third Circuit precedent. *In re McGraw-Hill* involved dueling petitions for writs of

mandamus to determine whether two lower courts properly dealt with motions to transfer venue. *See id.*, 909 F.3d at 52 (“These consolidated mandamus petitions require us to decide whether two professional photographers bringing separate copyright infringement actions are bound by a forum selection clause in contracts they did not sign.”). The proper pleading standard was not in front of the court, and thus anything said on the subject is dicta. *See CBS Corp. v. F.C.C.*, 663 F.3d 122, 164 (3d Cir. 2011) (finding was “merely background information incidental to the Supreme Court’s holding and therefore dicta.”).

The decision in *In re McGraw-Hill* also is contrary to prior, binding Third Circuit precedent affirming dismissal of a copyright infringement claim where the plaintiff had not demonstrated that defendant exceeded the scope of the license Plaintiff granted. *See Carlin v. Bezos*, 649 F. App’x 181, 182 (3d Cir.), *cert. denied*, 137 S. Ct. 168, 196 L. Ed. 2d 141 (2016), *reh’g denied*, 137 S. Ct. 543, 196 L. Ed. 2d 438 (2016)); *see also MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 779 (3d Cir. 1991) (a copyright owner who grants a license to use his copyrighted material typically can maintain a claim of copyright infringement only by showing that the “licensee’s use goes beyond the scope of the nonexclusive license.”). Thus, even had the issue been in front of the *In re McGraw-Hill* panel—and it was not—the panel would not have been free to overrule these prior decisions. *See Pa. Pharmacists Ass’n v. Houstoun*, 283 F.3d 531, 534 (3d Cir. 2002) (“Under a longstanding practice of our Court, a panel may not overrule another panel decision”).

Muhammad-Ali, while somewhat closer to the instant case in terms of its procedural posture, is distinguishable

on its facts. There, the plaintiff had not pled that a license had been issued and the case did not involve the question whether the claim of infringement had been pleaded with the requisite specificity. Rather, the defendant, faced with a claim of copyright infringement based upon its distribution of lithographs depicting Louis Farrakhan, asserted that its use had been permitted under an implied license. *See id.*, 832 F.3d at 762. In other words, unlike the situation here, there was a dispute as to the existence of the license rather than simply to its scope, and placing the onus of establishing a license on the licensor makes more sense.

Neither of these cases creates a Circuit split on even this narrower issue of which party bears the burden of pleading or proving that a use exceeded the scope of a license, and thus this petition should be denied.

C. THE SECOND CIRCUIT'S RULE IS THE CORRECT ONE

In any case, the Second Circuit's rule is the better choice, as it follows the requirements of Rule 8 as they were articulated by this Court in *Iqbal* and *Twombly*. By Yamashita's own admission, at the time he filed his Complaint, he lacked knowledge that Scholastic infringed any of his copyrighted works. *See* App.32a (Compl. ¶¶ 14-15). He instead sought to turn a claim for copyright infringement into an opportunity to audit Scholastic's uses of his photographs, and relied on the continued viability of the so-called "discovery rule" as governing the question as to when the statute of limitations accrues in

copyright cases¹ to extend that audit back nearly twenty years. This is not only inconsistent with the Copyright Act, which does not grant copyright owners a statutory right to audit supposed uses of their works (*see* 17 U.S.C. § 106 (identifying the exclusive rights of copyright owners, which does not include an audit right); *see also Young-Wolff v. McGraw-Hill Cos.*, No. 13 Civ. 4372, 2014 WL 349711, at *6-8 (S.D.N.Y. Jan. 31, 2014) (“Plaintiff points to neither case law nor language in the Copyright Act[] indicating that a copyright owner has an inherent right to sue a licensee for an audit.”)), but with Yamashita’s licenses, which did not provide him with an audit right despite the fact that such provisions are common. *See* 3-18 Milgrim on Licensing § 18.64 (2017) (“One of the most common provisions of a license agreement is a provision giving the licensor the right to verify or otherwise confirm running royalty reports (or other promised performance) of the licensee.”).

To permit a plaintiff to assert copyright claims based on licenses issued many years ago without requiring her to plead specific facts supporting her infringement

1. Although it is not before the Court in this case, two recent decisions by this Court cast doubt on the continued viability of the discovery rule. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961-62 (2017). This case makes plain why the “injury rule” is not only a more appropriate interpretation of the Copyright Act’s language indicating that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued (17 U.S.C. § 507(b)), but makes more sense in practice because it would prevent licensors from looking back twenty or more years in an effort to uncover licensee wrongdoing.

allegations would, for all intents and purposes, extend the statute of limitations to seek recovery back through the entire term of copyright. Imagine if the grantor of some type of license to use her copyrighted material in the motion picture *Gone With the Wind* could, in 2016, could suddenly claim that she believed that her license might have been exceeded 60 years ago and pursue a lawsuit for conduct that may or may not have occurred decades ago. This would be an absurd result that would threaten to undermine the established licensing scheme in publishing, entertainment and other contexts, where (as here) licensors bargain for audit rights but are required to pursue such rights during applicable time periods.

It would also place undue burden on the courts. As the Second Circuit recognized in this case, “to sustain such a complaint that alleges nothing but suspicions of infringement where a license has been granted is to invite transformation of the courts into an audit bureau for copyright licensing, an administrative function that we are hardly designed to serve.” App.16a. Thus, even if there were any disagreement among the Circuits—and, as noted above, there is not—the rule as articulated by the Second, Fifth and Ninth Circuits and applied in this case, would be the correct one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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