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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

CHARLES HARRIS, as an individual and  
UNIQUE PRODUCTS AND SERVICES, a Pennsylvania Corporation

Plaintiffs,

vs.

OPRAH WINFREY, as an individual, and  
THE OPRAH WINFREY SHOW d/b/a HARPO PRODUCTIONS INC., an Illinois corporation.

Defendants.

No. :10-cv-05655-JD

Judge: Jan E. DuBois

FILED

DEC 13 2010

MICHAEL E. KUNZ, Clerk  
By [Signature] Dep. Clerk

PLAINTIFFS' RESPONSE TO DEFENDANTS'  
MOTION TO DISMISS

Plaintiffs Charles Harris ("Harris"), and Unique Products and Services ("Unique") (collectively, "Unique"), by and through their attorney James Lee Esquire, submits the following response to Defendants' motion to dismiss Plaintiffs' complaint with prejudice.

INTRODUCTION

Plaintiffs bring this action alleging Defendants infringed their copyright of the booklet "How America Elects Her Presidents" and sought for monetary relief. Mr. Harris is the author of the booklet "How America Elects Her Presidents"--a non-dramatic literary work. Mr. Harris shipped 10 copies of the booklet to the Oprah Winfrey Show on January 11, 2008, when Ms. Winfrey was supporting the then senator Barrack Obama as the Presidential candidate. Mr. Harris believed that Ms. Winfrey could give his booklet adequate publicity, which would eventually help in the increase in the booklet's sales, as the booklet dealt with American Presidents--past, as well as the present. To his dismay, however, Ms. Winfrey never endorsed the booklet, and as a result, Mr. Harris' intention behind shipping them never materialized.

After Mr. Harris shipped the booklet to ‘The Oprah Winfrey Show’, on February 10, 2010, Mr. Harris was watching the Show that was dedicated to Ms. Winfrey’s “Search For The World’s Smartest and Talented Kids.” During the show, Ms. Winfrey started asking many questions to children in her audience on different issues. Ms. Winfrey introduced a six-year-old kid, Graham as a “first-grade whiz kid who knows more about American presidents than many adults.” Mr. Harris contends that he heard Ms. Winfrey ask Graham three questions from his booklet (1) “A person must live in the U.S. how long before they become President?<sup>1</sup>” (2) “Who was the heaviest President?<sup>2</sup>” and (3) “The only President who never went to school?<sup>3</sup>” (Collectively referred to as the “Questions”). Mr. Harris was shocked because these Questions were very similar<sup>4</sup> to those that he had framed in his booklet. As Plaintiffs owned the copyright in the booklet, Ms. Winfrey infringed the copyright by asking those questions in her show. Accordingly, Plaintiffs have filed this suit alleging copyright infringement. Truly, neither Ms. Winfrey nor her very popular television show “The Ms. Oprah Winfrey Show” need any kind of an introduction, apart from stating the obvious that it is widely appreciated and watched over by millions of views across the globe.<sup>5</sup> Therefore, Ms. Winfrey caters to a large number of audiences domestically as well as internationally; as a result, even a simple infringement has the ability to cause grave damage, as it has in this case to Plaintiffs.

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<sup>1</sup> Question 3 from the booklet--“How America Elects Her Presidents.”

<sup>2</sup> Question 12 from the booklet--“How America Elects Her Presidents.”

<sup>3</sup> Question 19 from the booklet--“How America Elects Her Presidents.”

<sup>4</sup> At that time Mr. Harris heard Ms. Winfrey ask these questions, he believed them to be exact same questions as in the booklet, as opposed to the transcript now presented by Defendants, which shows that they were similar, and not exactly the same. As explained below, it is sufficient if Plaintiffs can establish that Ms. Winfrey’s questions were similar to Mr. Harris’ work from the booklet. 17 U.S.C.A. § 101

<sup>5</sup> It has been reported that the show averages an estimated 7, 14, and 15-20 million viewers a day in the United States alone. *See Wikipedia, the free encyclopedia @ [http://en.wikipedia.org/wiki/The\\_Ms.\\_Winfrey\\_Winfrey\\_Show#United\\_States\\_viewership](http://en.wikipedia.org/wiki/The_Ms._Winfrey_Winfrey_Show#United_States_viewership).*

Defendants have moved to dismiss the Complaint contending that Plaintiffs have failed to assert a plausible claim, and even if they did assert such a claim, the Copyright Act does not protect the expressions at issue here, and that other claims are preempted. Defendants' motion should be denied particularly because Plaintiffs have asserted enough facts to establish that Mr. Harris' work was original and that he owned the copyright at the time Ms. Winfrey asked those Questions. As Plaintiffs are not claiming that they have a copyright on historical facts--as Defendants would want the Court to believe--but the way in which they are presented in the booklet, they fulfill the elements of copyrights, Defendants' motion fails as a matter of law.

### LEGAL ARGUMENT

#### **A. Legal Standard**

The defendant has the burden of showing that no claim has been stated in a Rule 12(b)(6) motion to dismiss. *Kehr Packages v. Fidelcor, Inc.*, 926 F. 2d 1406, 1409 (3rd Cir. 1991). The defendants must show beyond a doubt that there are no facts which can be proven at trial which would support any of the challenged causes of action. *Conely v Gibson*, 355 U.S. 41, 45-46 (1957); *Hishon v. King & Spalding*, 476 U.S. 69 (1984); *Hughes v. Rowe*, 449 U.S. 5, 10 (1980).

The applicability of the rule is further limited by the fact that summary dismissals on the merits are disfavored. *Johnsrud v. Carter*, 620 F. 2d 29, 33 (3rd Cir. 1980). In making its decision, the court must accept plaintiff's factual allegations as true. *Albright v. Oliver*, 510 U.S. 266, 269 (1994). Additionally, all reasonable inferences must be drawn in plaintiff's favor. Furthermore, the allegations must be construed liberally since the Federal Rules require merely notice pleading and not the detailed strict factual pleading required under state pleading rules. *Leatherman v. Tarant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). Because the court must determine whether under any reasonable reading of the

pleadings the plaintiff may be entitled to relief, a claim may be dismissed only “if it appears that the plaintiffs (can) prove no set of facts that would entitle them to relief.” *Id. Gremo v. Karlin*, 363 F. Supp. 2d 771 (E.D. Pa. 2005). Accordingly, Defendants have a very heavy burden to sustain in order to prevail on any parts of this motion. Plaintiffs contend that the following detailed analysis makes it evident that defendants have not sustained that burden in this motion.

**B. Booklet’s Originality Is Subject to Copyright Protection.**

To establish a claim of copyright infringement, Plaintiffs must establish: (1) ownership of a valid copyright, (2) unauthorized copying of original elements of Plaintiffs’ work. *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 411 (E.D. Pa. 2009) (quoting *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005)); *William A. Graham Co. v. Haughey*, 430 F. Supp. 2d 458, 465 (E.D. Pa. 2006); *Association of American Medical Colleges v. Mikaelian*, 571 F. Supp. 144, 149 (D.C. Pa. 1983). Here, Defendants do not dispute that Plaintiffs own the copyright of the booklet “How America Elects Her Presidents.” Defendants claim that historical facts are not subject to a copyright protection; therefore, the complaint must be dismissed. Defendants’ motion must be denied solely because Plaintiffs do not claim that they own a copyright on ‘the fact that President Taft was the heaviest President,’ as Defendants would want the Court to believe. As explained below, Mr. Harris has sufficiently alleged facts that show that his work is original, and that the Questions that Ms. Winfrey asked ‘little Graham’ were indeed very similar to those that Mr. Harris had framed them in the booklet, and that a lay observer would find those similarities to be the result of unlawful copying by Ms. Winfrey.

**i. Plaintiffs Meet The Originality Requirement.**

Defendants are correct only to the extent that historical facts cannot be copyrighted; their motion falters because Plaintiffs never claimed to have copyrighted the historical facts about the

past Presidents of the United States. Plaintiffs allege that Ms. Winfrey asked the Questions in issue in a manner which were very similar to way Mr. Harris had framed them in his booklet “How America Elects Her Presidents.” *FMC Corp.*, 369 F. Supp. 2d 561 (E.D. Pa. 2005) (originality means that the work was independently created by the author, and “that it possesses at least some minimal degree of creativity”).

Defendants contend that ideas are not subject to copyright protection, and that facts relating to American presidents specifically that of the weight of President Taft is a historical fact, and therefore, Plaintiffs do not own the copyright. Protectable material includes expressions of ideas, and not the ideas themselves; in other words, protectable material includes only the original elements of the Plaintiff’s work. *Douglas v. Osteen*, 560 F. Supp. 2d 362, 367 (E.D. Pa. 2008). “To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” *Harper & Row*, 471 U.S. at 547-49. Because Mr. Harris framed the questions, which were not themselves copied or inspired from any historical or third party sources, they form a part of the original work of “How America Elects Her Presidents” authored by Mr. Harris, and hence, they are protected under the Copyrights Act.<sup>6</sup>

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<sup>6</sup> In *Mikaelian*, plaintiff filed a motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, to prevent defendant business from using test preparation materials alleged by plaintiff to infringe its copyrighted test questions that were used in the administration of the Medical College Admission Test. The court granted the preliminary injunction while making the following observations: (1) where allegedly infringing work is so strikingly similar to protected work as to preclude possibility of independent creation, copying may be proved even without showing of access; (2) since fair use exception to Copyright Act is affirmative defense to suit for copyright infringement, party asserting exception bears burden of production and persuasion to show that exception and defense is applicable. 571 F. Supp., at 152-54 (E.D. Pa. 1983).

Next, Defendants attempt to make a bold conclusion in their brief: they state that “even assuming arguendo, without admitting, that Defendants copied some of Plaintiffs’ questions verbatim as they allege, a copyright owner’s rights are subject to the traditional privilege of others to make ‘fair use’ of an earlier writer’s work.” Defendants cite *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985), in support of their contention that even if Ms. Winfrey copied from the booklet, she hasn’t infringed any copyright, as she is protected by the traditional privilege of third parties to make a ‘fair use’ of Plaintiffs copyrighted material. “The judicially created ‘fair use’ defense is codified at § 107 of the Copyright Act, and permits a ‘fair use of a copyrighted work.’ A garden-variety fair use is one made ‘for purposes such as criticism, comment, news reporting, teaching ..., scholarship, or research.’ A claim of ‘fair use’ is an affirmative defense for which the alleged infringer bears the burden of proof.” *FMC Corp.*, 369 F. Supp. 2d at 578 (E.D. Pa. 2005); see also *Allen-Myland, Inc. v. International Business Machines Corp.*, 746 F. Supp. 520, 534 (E.D. Pa. 1990). However, Defendants merely state that the use could be subject to fair use, but provide no justification as to how the use is subjected to the fair use.<sup>7</sup> *Mikaelian*, 571 F. Supp., 152-54 (E.D. Pa. 1983) (finding that the fair use doctrine

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<sup>7</sup> To qualify for “fair use” exemption from suit under the Copyright Act, 17 U.S.C.S. § 101 et. seq., the party asserting the fair use defense must show that he is engaged in one of the activities enumerated in 17 U.S.C.S. § 107. *Allen-Myland*, 746 F. Supp. at 534 (E.D. Pa. 1990); *Mikaelian*, 571 F. Supp., at 152-54 (E.D. Pa. 1983). 17 U.S.C.S. § 107 provides that:

Notwithstanding the provision of 17 U.S.C. § 106--providing exclusive rights to the holders of copyrights--the fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

permits copying of themes or ideas but not their expression, however, a use of the protected work which destroys the value of the protected work to the copyright holder can hardly be considered fair.)

Here, Ms. Winfrey show is and was never intended as a non-commercial or an educational program. Despite Defendants' contention that the only question similar to that in Mr. Harris' book was "Who was the heaviest President?" was not a historical fact. This question would have been a historical fact had Ms. Winfrey asked 'little Graham' "was President Taft the heaviest President?" or some other question similar to that.<sup>8</sup> Accordingly, it is Defendants' burden to establish that they were protected by the 'fair use' doctrine if they even assume for arguments sake that Ms. Winfrey copied questions from Mr. Harris' booklet.

Finally, Defendants' reliance on *Douglas*, 560 F. Supp. 2d 362 (E.D. Pa. 2008) can be distinguished from the facts in this case. In *Douglas*, plaintiff claimed that defendant infringed his copyrights as defendant's book contained several similarities to the plaintiff's book, including the same biblical stories, similar words and expressions and the same literary style. The court ruled that Copyright could not be claimed in biblical stories, which were in public domain; and could not be claimed for particular literary style; and use of "prayer power in the eyes of faith" phrase four times on one page of his differently-titled book was not likely to cause

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<sup>8</sup> Immediately after watching the show, Mr. Harris did in fact go to the website to see the transcript but it was not available online when he initially went. However, some weeks later, he went back on to the site and found the transcript, which he believed to have been altered and not an accurate recollection as to what he heard. Moreover, he used all of his resources to try to obtain the video tape of that show, but to no avail. Therefore, it is important to verify the tenacity of the transcript by comparing it with the video tape of the show, to ascertain if only one Question or all three Questions were copied by Ms. Winfrey. *Morgan v. Hanna Holdings, Inc.*, 635 F. Supp. 2d 404, 412 (W.D. Pa. 2009) (finding that owner claiming infringement of copyrights on architectural works pleaded enough facts to raise reasonable expectation that discovery would reveal evidence of necessary elements for copyright infringement on allegation that, in addition to actively concealing location of infringing property, defendant home builders profited from infringement, and other entity conducted advertising of accused works on behalf of builders).

confusion. In *Douglas*, both books that were in contention were biblical works, and that the stories were public domain, as such no person can copyright the bible. In this case, however, Ms. Winfrey is far from being an author or even a competition to someone such as Mr. Harris and his work. It is a documented fact that Plaintiffs shipped out 10 copies of the booklet to Defendants, and that it is admitted that at least one Question that Ms. Winfrey asked 'little Graham' was very similar to the one that was framed by Mr. Harris. It is not necessary that Plaintiffs show direct evidence of copying the original to establish element of copying in infringement action; when direct evidence is lacking, circumstantial evidence of access to protected work and substantial similarity between it and alleged infringing work may create inference of copying. *Mikaelian*, 571 F. Supp. 144, 149 (D.C. Pa. 1983). For example, in *Association of Minority Contractors & Suppliers v. Halliday Properties, Inc.*, No. 97-274, 1998 WL 480835, at \*6 (E.D. Pa. Aug. 13, 1998), the plaintiff brought antitrust claims against the defendants, alleging the defendants were part of a conspiracy to prevent the plaintiff from obtaining bonding that was necessary for the plaintiff to be awarded a construction contract. The plaintiff's claims involved issues of fact surrounding the activities at meetings the defendants had with alleged co-conspirators, and the details of those meetings were unknown to the plaintiffs at the time of the filing of the amended complaint. Discovery revealed that the defendants' actions were not in violation of the antitrust laws. The court concluded that many facts depended on information that could only be uncovered during discovery.

Therefore, Plaintiffs have, at this stage, alleged sufficient facts to state a claim for copyright infringement, particularly when Plaintiffs have established that Mr. Harris' work is original. Therefore, the burden is now on Defendants to prove the invalidity of the Plaintiffs'



copyrights, and a motion to dismiss cannot be used to obtain a dismissal as a matter of law.<sup>9</sup> Once Plaintiffs show that his work is original, the burden then shifts to the defendant to “prove the invalidity of the [Plaintiffs’] copyrights.” *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 668-69 (3d Cir. 1990).

**C. Twombly and Ashcroft Do Not Mandate Dismissal In This Case.**

Defendants base their motion to dismiss largely on the United States Supreme Court’s holding in *Bell Atlantic Corp. v. Twombly*,<sup>10</sup> 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Simply characterizing Plaintiffs’ allegations as “conclusory,” does not make

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<sup>9</sup> At the motion to dismiss stage, a plaintiff is required to make a “showing” rather than a blanket assertion of an entitlement to relief; this does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. *Morgan v. Hanna Holdings, Inc.*, 635 F. Supp. 2d 404, 412-13 (W.D. Pa. 2009).

<sup>10</sup> In *Twombly*, the question in that putative class action was whether a claim brought under §1 of the Sherman Anti-Trust Act, 15 U.S.C. §1, could survive a motion to dismiss when it alleged that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual contexts suggesting agreement, as distinct from identical, independent action. *Twombly*, 550 U.S. at 548. This is a narrow statement of the issue.

The complaint alleged that “incumbent local exchange carriers” (ILECs) conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs stated that the ILECs “engaged in parallel conduct” in their respective service areas to inhibit growth of upstart competitive local exchange carriers (CLCs). Their actions allegedly included making unfair agreements with the CLCs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers. Also according to the complaint, the ILECs’ compelling common motivatio[n]” to thwart the CLECs’ competitive efforts naturally led them to form a conspiracy; “[h]ad any one [ILEC] not sought to prevent CLECs ... from competing effectively ..., the result in greater competitive inroads into that [ILEC’s] territory would have revealed the degree to which competitive entry by CLCs would have been successful in the other territories in the absence of such conduct.” *Id.* at 550-551 (bracketed material by the court).

The complaint at issue in *Twombly* also charged agreements by the ILECs to refrain from competing against one another. These were to be inferred from the ILECs’ common failure “meaningfully [to] pursu[e]” “attractive business opportunit[ies]” in contiguous markets where they possessed “substantial competitive advantage,” and from a statement of a chief executive officer of an ILEC, known as Qwest, that competing in the territory of another ILEC “ ‘might be a good way to turn a quick dollar but that doesn’t make it right.’ ” *Id.* The complaint’s ultimate allegations were described as follows: “In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within the respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.” *See Twombly*, 550 U.S. at 551.

them so. When the Court compares the actual allegations in *Twombly* and *Iqbal* with the factual allegations in Plaintiffs' Complaint, it is clear that there truly is no comparison. *Iqbal*<sup>11</sup> involved a claim subject to a defense of qualified immunity; this defense, the Court determined, required somewhat detailed factual recitations in order for the complaint to plead around that defense. Similarly, the Supreme Court's earlier FRCP 12(b)(6) pleading decision, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), involved an anti-trust claim predicated on parallel conduct which, because such conduct is not itself unlawful, required pleading of facts to take the claim into the realm of illegality. Although *Iqbal* and *Twombly* apply without regard to the subject matter of the claim asserted, both presented situations which are

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<sup>11</sup> In the Supreme Court's *Iqbal* decision, Plaintiff filed a complaint against numerous federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller. *Iqbal*, 129 S. Ct. at 1942. As to those parties, the complaint alleged that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or natural origin. *Id.* In the district court, the petitioners raised the defense of qualified immunity. *Id.* When one considers the identities of the petitioners, it stands to reason that it might be difficult at the complaint stage to make specific factual allegations against high government officials of such importance in a presidential administration.

In *Iqbal*, respondent's allegations of unconstitutional misconduct by other government actors was not before the Court. *Id.* at 1942. Rather, the case turned on a narrower question of whether respondent, as the plaintiffs in the case at bar, pled factual matter that, if taken as true, stated a claim that petitioners Ashcroft and Mueller deprived him of his clearly established constitutional rights. *Id.* at 1942-43. The case against petitioners in *Iqbal* was brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *Iqbal*, 129 S. Ct. at 1943. The Supreme Court found respondent's pleadings insufficient. *Id.* at 1942.

By way of comparison, the allegations of the complaint analyzed by the Supreme Court in *Iqbal* are worth noting. The complaint contended that petitioners designated respondent as a person of "high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the United States Constitution. The complaint further alleged that "the [FBI], under the direction of defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." *Id.* at 1944. The complaint also alleged that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.* Lastly, the complaint maintained that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interests." The pleading named Ashcroft as the "principal architect" of the policy, and identified Mueller as "instrumental in [its] adoption, promulgation and implementation." *Id.* (citations omitted; bracketed material and capital lettering by the court).

completely different from the case at bar. Further, a number of the allegations in the Complaint at bar are based on the Exhibits attached, suggesting that Plaintiffs have record support for almost all allegations. Therefore, Plaintiffs clearly have "... something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (2007).

In *Mell v. GNC Corp.*, No. 10-945, 2010 WL 4668966 (W.D. Pa. Nov. 9, 2010), the District Court observed as follows

"In the aftermath of *Twombly* and *Iqbal*, and the interpretation of those two cases by the United States Court of the Appeals for the Third Circuit in a series of precedential opinions, the pleading standards which allow a complaint to withstand a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) have taken on slightly new parameters. Beginning in *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir.2008), the Court of Appeals noted, 'After *Twombly*, 'it is no longer sufficient to allege mere elements of a cause of action;' instead 'a complaint must allege facts suggestive of [the proscribed] conduct.' " *Phillips*, 515 F.3d at 233, quoting *Twombly*, 550 U.S. at 563, n. 8 (alteration in original.) Because '[c]ontext matters in notice pleading,' the *Phillips* Court held that "some complaints will require at least some factual allegations to make out a 'showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests.

"In *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir.2009) the Court of Appeals noted that following *Twombly* and *Iqbal*, conclusory "bare-bones" allegations that "the defendant unlawfully harmed me" no longer suffice. A civil complaint must now include "sufficient factual matter to show that the claim is facially plausible." *Fowler*, 578 F.3d at 210; see also *Twombly*, 550 U.S. at 555, holding that a complaint which offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." The *Fowler* court further directed that after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to show such an entitlement with its facts. As the Supreme Court instructed in *Iqbal*, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief.'

“The Court of Appeals explained the logic behind this approach in *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159 (3d Cir.2010), stating that ‘a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth....When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.’ With respect to conclusory allegations, the [Supreme] Court clarified that ‘we do not reject these bald allegations on the ground that they are unrealistic or nonsensical....It is the conclusory nature of [such] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.’

“Thus, the current formulation of the standard of review for a motion to dismiss under Rule 12(b)(6) asks the court to determine if the plaintiff’s claims are ‘plausible.’ ‘A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’... *Some claims will demand relatively more factual detail to satisfy this standard, while others require less...*

“The Third Circuit’s latest direction is that ‘[w]e must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom, but we require more than mere assertions devoid of further factual enhancement.’ ‘The assumption of truth does not apply, however, to legal conclusions couched as factual allegations or to ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.’ ‘*A complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. The Supreme Court’s formulation of the pleading standard in Twombly does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.*’ *At this stage of the litigation, the Court must determine if Plaintiffs have sufficiently pled their claims, not whether they can prove them.*”

[Internal citations omitted at places, and emphasis supplied].

Based on the above interpretation of the *Twombly* and *Iqbal*, the Court must accept the factual allegations in the complaint and all reasonable inferences that can be drawn, but not accept the legal conclusions. Accordingly, when Plaintiffs factual allegations are accepted, only Defendants’ legal conclusions remain. All the purported conclusions--such as Plaintiffs do not own copyrights on historical facts, where as Plaintiffs contended that the material in the booklet are original--are made by Defendants as opposed to Plaintiffs assertions. As stated above, most

allegations are not just supported by facts, they also have record support, accordingly, both *Twombly* and *Iqbal* are not applicable in this case, and therefore, Defendants' motion to dismiss must be denied.

**D. Plaintiffs State Law Claims Are Not Preempted.**

Preemption is an affirmative defense, which must be pleaded under Fed. R. Civ. P 8(c). *Kenepp v. American Edwards Laboratories*, 859 F.Supp. 809, 815 (E.D. Pa. 1994). Even otherwise, there are conflicting authorities over whether state law claims are preempted by Copyrights Act. In *TEGG Corp.*, No. 08-435, 2008 WL 5216169, at \*5 (W.D. Pa. Dec. 10, 2008), also a copyright action, the court held that:

“As to Plaintiff's state law claims, Plaintiff has demonstrated a sufficient inquiry into the law by presenting to the Court a split in or lack of authority as to whether each cause of action was preempted by the Copyright Act. *See* FED.R.CIV.P. 11, Notes of the Advisory Committee on Rules, 1993 Amendments. (“[T]he extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated.”).

To support its contention that its tortious interference claim should not be preempted, Plaintiff cited to a case which held that “the plaintiff's tortious interference claim was not preempted by the Copyright Act because it involved a contractual obligation to pay the plaintiff. *Cassaway v. Chelsea Historic Props. I, L.P.*, Civ. A. No. 92-4124, 1993 WL 64633 (E.D.Pa. March 4, 1993). For its civil conspiracy claim, Plaintiff highlighted a split in authority and argued this Court should apply the holding in the case of *Sullivan Assocs., Inc. v. Dellot, Inc.*, Civ. A. No. 97-5457, 1997 U.S. Dist. LEXIS 20043, at \*16-17, 1997 WL 778976 (E.D.Pa. Dec.16, 1997), which held that the plaintiff's civil conspiracy claim was not preempted by the Copyright Act because it contained an “extra element.”

In the Third Circuit, the question of whether §§ 101, *et seq* of the Copyright Act preempt state law claims turns on the application of the “functional test” to determine equivalence. *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 217 (3d Cir. 2002). “[I]f a state cause of action requires an extra element, beyond mere copying, preparation of the

derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action.” *Id.*

Section 301(a) establishes a two-step test for preemption: a state law cause of action is preempted by federal copyright laws if (1) the subject matter of the state law claim falls within the subject matter of the copyright laws, and (2) the state law right asserted is equivalent to the exclusive right federal law protects. *See Kregos v. Associated Press*, 3 F.3d 656, 666 (2d Cir.1993), *cert. denied*, 510 U.S. 1112 (1994); *Wilson v. Mr. Tee's*, 855 F.Supp. 679, 684 (D.N.J. 1994).

Under the second prong of the test, § 301(a) expressly preempts any state law claim asserting the violation of a right that is the equivalent of any right the Act grants in § 106. *See Kregos*, 3 F.3d at 666 (“A state cause of action is preempted by federal copyright laws if the subject matter of the state-law right falls within the subject matter of the copyright laws and the state-law right asserted is equivalent to the exclusive rights protected by the federal copyright law.”); *Fyk v. Roth*, No. 94-3826, 1995 WL 290444, at \*2 (E.D. Pa. May 9, 1995).

Section 106 of the Copyright Act, in turn, grants copyright holders the exclusive right:

- “(1) to reproduce the copyrighted work ...;
- (2) to prepare derivative works based upon the copyrighted work ...;
- (3) to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) ... to perform the copyrighted work publicly; and
- (5) ... to display the copyrighted work publicly.

Thus, under § 301(a), when a state law is violated by an action that also violates a right the Copyright Act grants in § 106, state law is preempted. That is, when the acts of “reproduction, performance, distribution or display ... will in itself infringe the state created

right, then such right is preempted” by the Copyright Act. *Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc.*, No. 92-1667, 1993 WL 414724, at \*15 (D.N.J. March 3, 1993); *see also Lone Wolf McQuade v. CBS, Inc.*, 961 F.Supp. 587, 1997 WL 181038, at \*11 (S.D.N.Y. April 10, 1997); *Associated Film Distrib. Corp. v. Thornburgh*, 614 F.Supp. 1100, 1119-21 (E.D.Pa.1985); *Ronald Litoff, Ltd. v. American Express Co.*, 621 F.Supp. 981, 985 (S.D.N.Y.1985).

Section 301(b) of the Copyright Act, however, limits this preemption of state law, providing that: “Nothing in the title annuls or limits any rights or remedies under the common law or statutes of any State with respect to ... activities violating legal or equitable rights that are *not* equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106....” Thus, in order for state law not be to preempted under § 301(a), § 301(b) requires that the rights state law protects be qualitatively different from the rights the Copyright Act grants, as evidenced by the addition of an extra element that alters the nature of the state law action. *Fun-Damental Too, Ltd. v. Universal Music Group, Inc.*, No. 97-1595. 1997 WL 381608, at \*3 (E.D. Pa. July 08, 1997). State law claims that are completely preempted by the Copyright Act may be converted into federal claims. *Technology Based Solutions, Inc. v. Electronics College Inc.*, 168 F.Supp.2d 375 (E.D. Pa. 2001). That is, if “[a]n extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action ..., [a] state law claim is not preempted [so long as] the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim.”

The Defendants were in receipt of Plaintiffs’ booklets and they converted the contents of Plaintiffs’ copyrighted work by virtue of unauthorized appropriation thereof and incorporated the

same in their show and therefore the tortious conversion claim has an extra element. The tort of conversion relates to interference with tangible rather than intangible property. *Peirson v. Clemens, Inc.*, No. Civ. A. 03-1145 JJF, 2005 WL 681309, at \*3 (D. Del. Mar. 23, 2005); *Stenograph, L.L.C. v. Sims*, No. Civ. A. 99-5354, 2000 WL 964748, at \*3 (E.D. Pa. Jul. 12, 2000). Importantly, “nothing in section 301 [of the Copyright Act] precludes the owner of the physical embodiment of a copyrighted work from enforcing a claim for conversion against a party who takes possession of the physical embodiment without permission.” *Peirson*, 2005 WL 681309, at \*3. See *Stenograph, L.L.C. v. Sims*, No. Civ. A. 99-5354, 2000 WL 964748, at 3 (E.D. Pa., 2000). (Granting summary judgment on claims for copyright infringement and conversion).

Also, Plaintiffs’ claim of unjust enrichment has extra elements of “possession and control” which falls outside the subject matter of copyright law. Federal copyright protection extends to “original works of authorship fixed in any tangible medium of expression . . . .” 17 U.S.C. § 102(a). Thus, the only portion of Plaintiffs’ unjust enrichment claim that arguably falls within the subject matter of copyright law is that relating to Defendant’s improper use of Plaintiffs’ copyrighted work for the show. Federal copyright law does not protect the “unauthorized possession and control” of Plaintiffs’ copyrighted work. See also, *Hustlers Inc. v. Thomasson*, 253 F. Supp. 2d at 1293, N.D.Ga., 2002 (“As mere violation of the exclusive rights of section 106 does not constitute unjust enrichment alone, Plaintiff’s claim is not preempted.”); *Weigel Broadcasting Co. v. Topel*, No. 83 C 7921, 1985 WL 2360, at 5 (N.D. Ill. Aug. 21, 1985) (“An action for unjust enrichment is not the equivalent of the exclusive rights protected by the Copyright Act.”).

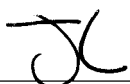
Thus, it emanates from the above that the Plaintiffs’ state law claims are not preempted by the Federal Copyright law as claimed by Defendants.



**CONCLUSION**

For the reasons stated above, Defendants' motion to dismiss must be dismissed in its entirety and Plaintiffs' request the court to impose attorney fees on Defendants.

Respectfully submitted,

By:  \_\_\_\_\_

JAMES LEE, ESQUIRE  
1500 Market Street,  
12th Floor/East Tower  
Philadelphia, Pa 19102

*Attorney for Plaintiffs*