

Pleading in Technicolor: When Can Litigants Incorporate Audiovisual Works into Their Complaints?

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INTRODUCTION

When defendants move to dismiss a case under Federal Rule of Civil Procedure (FRCP) 12(b)(6),¹ the court generally may consider only the material contained in the pleading. If a party presents—and a court considers—matters outside the pleading, the Federal Rules require the court to convert the motion into one for summary judgment.² Upon conversion, the parties are permitted to supply the court with “materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials.”³ Furthermore—and perhaps more importantly—if the parties do not have adequate information at this point in the process, the court may “allow time to obtain affidavits or declarations or to take discovery,”⁴ thus opening up the door to greatly increased time and expense.

There are, however, exceptions to the general rule prohibiting the inclusion of any outside materials. FRCP 10(c) states that a “statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.” Thus, the Supreme Court has held that when considering a motion to dismiss, courts should examine “documents incorporated into the complaint by

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¹ FRCP 12(b)(6) allows defendants to move to dismiss a suit for “failure to state a claim upon which relief can be granted.”

² See FRCP 12(d) (stating that if matters outside the pleading are considered by a court, “the motion must be treated as one for summary judgment”).

³ FRCP 56(c)(1)(A).

⁴ FRCP 56(d)(2).

reference, and matters of which a court may take judicial notice,” in addition to the complaint in its entirety.⁵

The Seventh Circuit recently decided two cases that dealt with incorporation of a “written instrument” into a pleading. The first of these cases is *Brownmark Films, LLC v Comedy Partners*,⁶ in which the court faced the issue of whether the defendant could incorporate two audiovisual works by reference to aid in showing that the alleged copyright infringement was a parody.⁷ The court noted that while several district courts had permitted the incorporation of such works by reference, no court of appeals had so held.⁸ Instead of ruling on the issue itself, and in light of the fact that the parties had not briefed the question, the Seventh Circuit bypassed the issue by converting the motion to dismiss into a motion for summary judgment and finding for the defendants.⁹

In the second case, *Bogie v Rosenberg*,¹⁰ the Seventh Circuit was again asked to decide whether it could consider, on a motion to dismiss, an audiovisual work attached to a complaint.¹¹ This time, the suit involved claims for invasion of privacy and misappropriation of image.¹² The court referred back to its decision in *Brownmark*, but instead of making a similar move and converting the motion into one for summary judgment, it held that because it made sense to attach the video here, it would permit the attachment.¹³ The court gave only a few sentences of analysis and did not attempt to define what a “written instrument” is or how audiovisual works fit into this category.

⁵ *Tellabs, Inc v Makor Issues & Rights, Ltd.*, 551 US 308, 322 (2007).

⁶ 682 F3d 687 (7th Cir 2012).

⁷ See id at 689.

⁸ See id at 690–91.

⁹ See id at 691–94 (reserving the resolution of the question of extending incorporation-by-reference doctrine to audiovisual works for a later date). The court’s conversion of the motion into one for summary judgment and its subsequent termination of the lawsuit under Rule 56 without first permitting discovery is unusual. The court stated that this was permissible because “[d]istrict courts need not, and indeed ought not, allow discovery when it is clear that the case turns on facts already in evidence.” Id at 691. This is likely to occur in cases involving parody, but not in other, more fact-intensive fair use claims that may turn on the effect of the allegedly infringing work. See Pamela Samuelson, *Unbundling Fair Uses*, 77 Fordham L Rev 2537, 2540 (2009) (“Fair use is [] often decried for the unpredictability said to attend the fact-intensive, case-by-case nature of fair use analysis.”).

¹⁰ 705 F3d 603 (7th Cir 2013).

¹¹ Id at 609.

¹² Id at 607.

¹³ See id at 609.

Resolving the question of whether an audiovisual work can be considered a “written instrument” that may be attached or incorporated into complaints would have a great impact on the disposition of cases that rely on these materials. While the change from a motion to dismiss to a motion for summary judgment did not seem to be of much significance in *Brownmark*, this is the exception rather than the rule. In many cases, a court will not have all the necessary materials to decide a motion for summary judgment at the pleading stage and will permit discovery to take place before ruling.¹⁴ This can lead to greatly increased costs and even the settlement of suits that may in fact be frivolous.¹⁵ If, however, a court can consider videos that manifest copyright infringement, libel, or invasions of privacy on a motion to dismiss, at least some cases can be decided at an earlier point and the pleadings stage will increase in importance.

Because no court has undertaken any real analysis of the circumstances under which it is permissible to attach an audiovisual work to a complaint,¹⁶ this Comment provides perspective on what considerations should come into play in its resolution. Part I gives a general overview of FRCP 10(c) and the way it is generally used. Part II examines the *Brownmark* and *Bogie* decisions, along with the decisions of the various district courts that have permitted the attachment of audiovisual works. Part III discusses a solution to the question that relies on the history of the Rule and the definition of the term “written instrument,” both of which show that it was understood at the time of the Rule’s passage to include materials evidencing legal rights and duties in a way similar to a contract. This is the case despite ongoing disagreement as to the breadth of the definition of a “written instrument.” This Part then applies that definition to audiovisual works and concludes that in some instances, such as in copyright cases like *Brownmark*, the attachment of audiovisual works is consistent with this definition, whereas in other

¹⁴ The court in *Brownmark* treated this particular lawsuit as “frivolous” and recognized the danger of permitting discovery. See *Brownmark*, 682 F3d at 691. Nevertheless, it is not clear that other courts would be as willing to limit discovery in cases such as this. The change from a motion to dismiss to one for summary judgment opens up the possibility of case mismanagement by courts, whereas simply permitting the motion to remain under 12(b)(6) takes away even the possibility of “[r]uinous discovery heighten[ing] the incentive to settle rather than defend these frivolous suits.” *Id.*

¹⁵ See *id.*

¹⁶ As noted, the Seventh Circuit is the only court of appeals to have discussed the issue, and its analysis, which only amounted to a few short sentences, left much to be desired. See *Bogie*, 705 F3d at 609.

instances, such as in invasion of privacy cases like *Bogie*, it is not. This solution has the benefit of being the approach that follows most readily from the text and history of the Rule, as well as being the most sensible and efficient solution for judges deciding cases involving audiovisual works.

I. FRCP 10(C) AND THE INCORPORATION-BY-REFERENCE DOCTRINE

Under FRCP 12(b)(6), a defendant may file a motion to dismiss for “failure to state a claim upon which relief can be granted” prior to answering the complaint. If in making the 12(b)(6) motion, however, the defendant attempts to present matters outside the pleadings, “the motion must be treated as one for summary judgment under Rule 56.”¹⁷ The reason for this Rule is likely related to the fact that “[t]echnically . . . the Rule 12(b)(6) motion does not attack the merits of the case; it merely challenges the pleader’s failure to state a claim properly.”¹⁸ Thus, because outside information tends to concern the merits of a case, it matters less in simply deciding whether the plaintiff has stated a viable claim. Although the standard for what facts the plaintiff must allege has changed over time,¹⁹ the primary purpose of pleadings is still to give notice to the defendant.²⁰ Because courts are only evaluating the legal sufficiency of the claims, matters outside the pleadings generally do not have a place in 12(b)(6) motions.

Three important changes occur once a motion is converted from a 12(b)(6) motion to one for summary judgment. First, “[a]ll parties must be given a reasonable opportunity to present all the

¹⁷ FRCP 12(d).

¹⁸ Charles Alan Wright and Arthur R. Miller, 5C *Federal Practice and Procedure* § 1366 (West 3d ed 2012).

¹⁹ See, for example, *Bell Atlantic Corp v Twombly*, 550 US 544, 554–63, 570 (2007); *Ashcroft v Iqbal*, 129 S Ct 1937, 1950–52 (2009). See also Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 Lewis & Clark L Rev 15, 29–31 (2010) (arguing that the plausibility standard for motions to dismiss the Supreme Court created in *Twombly* and *Iqbal* is converging with the standard for summary judgment); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash U J L & Pol 61, 99 (2007) (contending that the Supreme Court correctly decided *Twombly* and arguing that in cases involving public facts where “the full record at the time of the motion to dismiss does not support any plausible factual inference of guilt, then it is time to invoke a mini-summary judgment under the guise of a motion to dismiss”).

²⁰ See *Twombly*, 550 US at 555 (stating that FRCP 8(a)(2) requires only a short and plain statement of the claim to give the defendant fair notice).

material that is pertinent to the motion.”²¹ This means that the parties can support their contentions by providing the court with any materials that are part of the record.²² More importantly, under FRCP 56(d), if the nonmoving party can show “by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery.” Discovery is a serious consequence, as it often results in the expenditure of large amounts of time, effort, and money.²³ Finally, the burden the moving party must bear is greater for a motion for summary judgment than for a motion to dismiss.²⁴ “Rather than merely showing that the challenged pleading fails to state a claim for relief, he or she is obliged to demonstrate . . . that there exists no genuine issue as to any material fact and that the movant is entitled to the entry of a judgment as a matter of law.”²⁵ Motions to dismiss therefore require fewer materials, less time and money, and are more easily overcome than motions for summary judgment.

As is often the case, there are exceptions to the rule disallowing consideration of outside materials on a motion to dismiss. The Supreme Court has stated that “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference,

²¹ FRCP 12(d).

²² FRCP 56(c)(1) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations[,] . . . admissions, interrogatory answers, or other materials.”).

²³ See Frank H. Easterbrook, *Discovery as Abuse*, 69 BU L Rev 635, 636 (1989) (describing discovery as “both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one’s adversary”). See also Lawyers for Civil Justice, Civil Justice Reform Group, and US Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies*, appendix 1, 8 (Administrative Office of the US Courts May 2010), online at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf> (visited Sept 12, 2013) (finding that the average total annual litigation cost increased from \$66 million in 2000 to \$115 million in 2008, and that high costs of discovery are a large portion of these costs); *Costs and Burdens of Civil Discovery*, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 112th Cong, 1st Sess 1–2 (2011) (statement of Representative Trent Franks) (noting that the costs of discovery can run into the millions of dollars).

²⁴ See Thomas, 14 Lewis & Clark L Rev at 28–31 (cited in note 19).

²⁵ Wright and Miller, 5C *Federal Practice and Procedure* § 1366 (cited in note 18).

and matters of which a court may take judicial notice.”²⁶ The judicial-notice exception permits courts to take certain information into account such as universally recognized facts, things generally known within the limits of their jurisdiction, and general customs and usages of merchants.²⁷

A second exception is the incorporation-by-reference doctrine, which is currently rooted in FRCP 10(c). The Rule states that “[a] statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.” This Rule permits plaintiffs to attach written instruments to their complaints. It also allows defendants to incorporate written instruments that the plaintiff fails to attach into motions to dismiss without converting them to motions for summary judgment. Documents are considered incorporated by reference if they are “referred to in the plaintiff’s complaint and are central to her claim.”²⁸ Courts have further held that

when a plaintiff chooses not to attach to the complaint or incorporate by reference a prospectus upon which it solely relies and which is integral to the complaint, the defendant may produce the prospectus when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.²⁹

The scope of the exception of the incorporation-by-reference doctrine is uncertain.³⁰ Some courts have held that “this is a narrow exception aimed at cases interpreting, for example, a contract. It is not intended to grant litigants license to ignore the distinction

²⁶ *Tellabs, Inc v Makor Issues & Rights, Ltd.*, 551 US 308, 322 (2007).

²⁷ See *Brown v Piper*, 91 US 37, 42 (1875) (explaining that while the court may be bound “carefully to exclude the influence of all previous knowledge” of private and special facts, the court may take judicial cognizance of certain things).

²⁸ *Venture Associates Corp v Zenith Data Systems Corp*, 987 F2d 429, 431 (7th Cir 1993). See also *Cortec Industries, Inc v Sum Holding LP*, 949 F2d 42, 47 (2d Cir 1991) (holding that “the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference”).

²⁹ See *Cortec Industries*, 949 F2d at 47.

³⁰ See *Tierney v Vahle*, 304 F3d 734, 738–39 (7th Cir 2002) (discussing several decisions both within and outside the Seventh Circuit that interpret the Rule in various ways).

between motions to dismiss and motions for summary judgment.”³¹ Other courts have permitted various materials to be incorporated, including photographs,³² memos,³³ and affidavits.³⁴ This Comment ultimately argues that it is the narrow conception of the Rule that is more consistent with its history and purpose.³⁵ Moreover, this formulation is aligned with the purpose of the Rule, which “reflects the pressure on judges in a busy court to dispose of meritless cases at the earlier opportunity.”³⁶

II. IGNORING A PROBLEM: CURRENT APPROACHES TO ATTACHMENTS OF AUDIOVISUAL WORKS

The question that courts must confront in deciding whether to incorporate an audiovisual work into a complaint is definitional: Can an audiovisual work be a “written instrument” for purposes of Rule 10(c)? While this may initially seem like a simple question, courts have treated “written instrument” as a term of art, thus making its precise application somewhat complex.³⁷ The Supreme Court has recognized that

where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.³⁸

³¹ *Levenstein v Salafsky*, 164 F3d 345, 347 (7th Cir 1998). See also *Pension Benefit Guaranty Corp v White Consolidated Industries, Inc*, 998 F2d 1192, 1196 (3d Cir 1993) (holding that “a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss *if the plaintiff’s claims are based on the document*”) (emphasis added).

³² See *Holder v Enbridge Energy, LP*, 2011 WL 3878876, *6 (WD Mich).

³³ See *Guglielmo v Cunningham*, 811 F Supp 31, 34 & n 3 (D NH 1993).

³⁴ See *CompassBank v Villarreal*, 2011 WL 1740270, *7 (SD Tex) (holding that defendants admitted by default to the factual averments in an affidavit filed as an attachment to the complaints). But see *Galvan v Yates*, 2006 WL 1495261, *4 (ED Cal) (holding that affidavits are not written instruments within the meaning of FRCP 10(c) but are instead evidence that should not be included in the pleadings).

³⁵ See Part III.

³⁶ *Tierney*, 304 F3d at 738. See also text accompanying notes 207–08.

³⁷ See notes 30–36 and accompanying text. Indeed, Judge Frank Easterbrook recently noted that “[w]hether a document to which a complaint refers . . . is treated as part of the complaint . . . has been a difficult question.” *Eastland Music Group, LLC v Lionsgate Entertainment, Inc*, 707 F3d 869, 871 (7th Cir 2013).

³⁸ *Morissette v United States*, 342 US 246, 263 (1952).

Thus, the recognition that certain words are terms of art means that the definition one might associate with them today is not necessarily the definition conceived of in the Rule. This is where legislative history can be used to show “that words with a denotation ‘clear’ to an outsider are terms of art, with an equally ‘clear’ but different meaning to an insider.”³⁹ Nevertheless, as this Part discusses, in the several cases in which the question of whether audiovisual works can be written instruments has arisen, courts have afforded it little analysis.

A. The Seventh Circuit’s *Brownmark* Decision

The Seventh Circuit recently drew attention to the incorporation-by-reference doctrine and its application to works that may not be thought to fall within a commonsense definition of a “written instrument.” In *Brownmark*, a production company brought an action against a television broadcast company alleging copyright infringement of a music video.⁴⁰ The defendants in the case broadcast the popular adult animated television show *South Park*. In the episode at issue, the entire nation of Canada goes on strike, “demanding a share of the ‘Internet money’ they believe is being generated by viral videos and other online content.”⁴¹ The main characters in the show, a group of South Park Elementary School boys, decide to try to buy off the striking Canadians by creating their own viral video, thus earning their own “Internet money.”⁴² Their video is called “What What (In The Butt),” and is based on a real-world viral video, the copyright to which the plaintiff owns.⁴³ The plaintiff therefore filed suit against the defendants for copyright infringement. While the complaint contained references to both versions of the video, the plaintiff did not attach either the original work or the allegedly infringing episode.⁴⁴ In response, the defendant claimed that the *South Park* episode was clearly a parody—and thus a fair use—and attached the two works while moving for failure to state a claim under FRCP 12(b)(6).⁴⁵ The district court granted the motion to dismiss based on the fair-use affirmative defense

³⁹ *In the Matter of Sinclair*, 870 F2d 1340, 1342 (7th Cir 1989).

⁴⁰ *Brownmark*, 682 F3d at 689.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Brownmark*, 682 F3d at 689.

⁴⁵ *Id.*

without addressing whether the incorporation by reference of the audiovisual works was proper.⁴⁶

On appeal, the Seventh Circuit held that “courts should usually refrain from granting Rule 12(b)(6) motions on affirmative defenses. . . . But when all relevant facts are presented, the court may properly dismiss a case before discovery.”⁴⁷ Nonetheless, the court also noted that “no court of appeals has ruled that the content of television programs and similar works may be incorporated by reference.”⁴⁸ While noting its belief that “it makes eminently good sense to extend the doctrine to cover such works, especially in light of technological changes that have occasioned widespread production of audio-visual works,” the court concluded that since the parties did not brief the issue it should “reserve the resolution of the question for a later date.”⁴⁹ In order to avoid the question, the court converted the motion to dismiss into one for summary judgment and held that, since the defendant did not request discovery and because discovery in this case was not necessary, dismissal of the case was proper.⁵⁰

B. The Seventh Circuit’s *Bogie* Decision

The issue involving the incorporation of audiovisual works came before the Seventh Circuit again in *Bogie*, though in the context of a different set of claims. In this case, the plaintiff claimed that the defendant, comedian Joan Rivers, invaded her privacy and misappropriated her image.⁵¹ The plaintiff had attended one of Rivers’s comedic performances, during which Rivers made a joke about Helen Keller. This drew heckling from a member of the audience who had a deaf son.⁵² Following the performance, the plaintiff went backstage to get a book signed by Rivers. The plaintiff “engaged Rivers in a short conversation during which [the plaintiff] expressed frustration with the heckler and sympathy for Rivers. Rivers responded with an expression

⁴⁶ See *Brownmark Films, LLC v Comedy Partners*, 800 F Supp 2d 991, 998, 1002 (ED Wis 2011).

⁴⁷ *Brownmark*, 682 F3d at 690.

⁴⁸ *Id.* at 691.

⁴⁹ *Id.*

⁵⁰ *Id.* at 692 (noting that “[t]he only possible disadvantage to the plaintiff was the lack of notice . . . but this error is harmless when the opponent opposing the motion could not have offered any evidence in response”).

⁵¹ *Bogie*, 705 F3d at 607.

⁵² *Id.*

of sympathy for the heckler.”⁵³ This conversation was captured on film and later appeared in a documentary about Rivers entitled *Joan Rivers: A Piece of Work*. The plaintiff sued for compensatory damages and an injunction, attaching the documentary work to the complaint.⁵⁴ Rivers filed a motion to dismiss. The district court viewed the video and granted the motion.⁵⁵

The Seventh Circuit noted that FRCP 10(c) permitted the court to consider exhibits attached to the claim, and explained that “[a]s we said in *Brownmark Films*, it makes ‘eminently good sense’ to apply these principles to video recordings attached to or referenced in a complaint, and we do so here.”⁵⁶ The court then held that the exhibit contradicted the allegations in the complaint and therefore required ruling against the nonmoving party.⁵⁷ It explained that “[s]uch an analysis is no different than that involved in contract disputes in which a plaintiff attaches a contract to the complaint and makes an allegation that the contract on its face clearly disputes.”⁵⁸ This was the extent of the court’s reasoning on this issue, and it moved on to affirm the district court’s dismissal of the claims.⁵⁹ Although this case did not involve a copyright claim concerning fair use—where using the audiovisual work in deciding the case is arguably more conclusive—the court did not distinguish between different kinds of claims and how the role of an audiovisual work might change, depending on the legal claim. It seemed instead to announce a blanket rule permitting the extension of the incorporation-by-reference doctrine to any video recording attached to or referenced in the complaint.⁶⁰

C. District Court Cases Involving Audiovisual Works under FRCP 10(c)

In *Brownmark*, the Seventh Circuit noted that, while no court of appeals had then held that audiovisual works may be

⁵³ Id.

⁵⁴ Id.

⁵⁵ *Bogie*, 705 F3d at 608.

⁵⁶ Id at 609.

⁵⁷ See id at 610–12, 614–15 (holding that the plaintiff could not meet the elements of an invasion of privacy or misappropriation of likeness claim because the video showed there was no reasonable expectation of privacy and that the plaintiff’s image was not central to the film).

⁵⁸ Id at 609 (quotation marks omitted).

⁵⁹ *Bogie*, 705 F3d at 616.

⁶⁰ See id at 609.

incorporated by reference into a complaint, several district courts had done so.⁶¹ The court cited three such cases, all brought in California, to support the proposition.⁶² While none of these courts offered an explanation of the reasoning behind their decisions to permit the incorporation by reference of audiovisual works, it is still useful to look at instances in which incorporation has been permitted.

The first of these cases is *Burnett v Twentieth Century Fox Film Corp.*⁶³ Coincidentally, this case also dealt with a copyright infringement suit involving an adult cartoon. The television show at issue here was *Family Guy*. In the episode in question, Carol Burnett is portrayed in animated form as the “Charwoman,” a character she played in *The Carol Burnett Show*, along with a slightly altered version of the musical theme from her show.⁶⁴ Burnett filed suit against Fox for copyright infringement, violation of the Lanham Act, violation of California’s statutory right of publicity, and common law misappropriation of name and likeness.⁶⁵ While Burnett attached copies of the certificate of registration for her copyright in *The Carol Burnett Show*, she did not include the allegedly infringing episode in her complaint.⁶⁶ Fox then filed a motion to dismiss the case under FRCP 12(b)(6). In its motion, Fox noted that Burnett did not attach the video, though it was referenced, and proceeded to attach a copy of the episode at issue as an exhibit to its motion.⁶⁷ In addressing the motion, the court noted that while “[t]he scope of review on a motion to dismiss for failure to state a claim is generally limited to the content of the complaint[,] [t]he Court may [] consider exhibits submitted or referenced in the complaint.”⁶⁸ This was the full extent of the court’s analysis of the issue. Following this statement, and without any reference to

⁶¹ See *Brownmark*, 682 F3d at 691.

⁶² *Id.*

⁶³ 491 F Supp 2d 962 (CD Cal 2007).

⁶⁴ *Id.* at 966.

⁶⁵ *Id.*

⁶⁶ See Complaint for 1) Copyright Infringement; 2) Violation of the Lanham Act; 3) Statutory Violation of Right of Publicity; and 4) Common Law Misappropriation of Name and Likeness, *Burnett v Twentieth Century Fox Film Corp.*, Civil Action No 07-1723, *3 (CD Cal filed Mar 15, 2007) (available on Westlaw at 2007 WL 4698345).

⁶⁷ See Defendant Twentieth Century Fox Film Corporation’s Notice of Motion and Motion to Dismiss under FRCP 12(b)(6); Supporting Memorandum of Points and Authorities, *Burnett v Twentieth Century Fox Film Corp.*, Civil Action No 07-1723, *3–4 (CD Cal filed Apr 27, 2007) (available on Westlaw at 2007 WL 4698340).

⁶⁸ *Burnett*, 491 F Supp 2d at 966 (citation omitted).

FRCP 10(c) or the “written instrument” requirement, the court moved on to an analysis of whether the use was fair.⁶⁹ The court dismissed each of the claims in turn.⁷⁰

The next case cited by the *Brownmark* court dealt with the issue in a similar manner. In *Daly v Viacom, Inc.*,⁷¹ the plaintiff appeared in the promotional advertising of the television program *Bands on the Run*.⁷² She sued the film producer and distributor, alleging statutory and common law commercial misappropriation, intrusion, false light, defamation, infliction of emotional distress, and unfair business practices.⁷³ The defendant then moved to dismiss the claim under FRCP 12(b)(6).⁷⁴ Just as in *Burnett*, the court here stated that “documents specifically referred to in a complaint, though not physically attached to the pleading, may be considered where authenticity is unquestioned.”⁷⁵ Interestingly, though the court’s statement referred specifically to “documents” and not audiovisual or other materials, it did not explore the distinction and considered the television program as it went through the different allegations of the complaint.⁷⁶ After examining each of the claims in turn, the court dismissed them all.⁷⁷

The final case that the *Brownmark* court cited was *Zella v E.W. Scripps Co.*⁷⁸ In this case, the plaintiffs had contacted the president of the Food Network television station about an idea for a show called *Showbiz Chefs* and submitted a one-page outline of the plot and characters and three-page script for the show—both of which were original and fixed in a tangible medium and therefore copyrighted.⁷⁹ Two weeks later, the president of the network rejected the idea but did not return the documents to the plaintiffs.⁸⁰ Three years later, the Food Network launched a show that the plaintiffs alleged infringed on the copyright of their proposed show idea.⁸¹ The defendants filed a

⁶⁹ Id at 966–67.

⁷⁰ Id at 971, 974.

⁷¹ 238 F Supp 2d 1118 (ND Cal 2002).

⁷² Id at 1121.

⁷³ Id.

⁷⁴ Id.

⁷⁵ *Daly*, 238 F Supp 2d at 1121–22.

⁷⁶ Id at 1122.

⁷⁷ Id at 1127.

⁷⁸ 529 F Supp 2d 1124 (CD Cal 2007).

⁷⁹ Id at 1126. See also 17 USC § 102(a).

⁸⁰ *Zella*, 529 F Supp 2d at 1126.

⁸¹ Id at 1126–27.

motion to dismiss for failure to state a claim and attached DVDs of several episodes of the allegedly infringing television show, meant to show the differences between its content and the plaintiff's proposal.⁸² In their memorandum, the defendants urged the court to consider the episodes, citing various authorities in support of the claim that "a document may be considered on a motion to dismiss when the plaintiff refers to the document in the complaint, but does not physically attach the document to the complaint."⁸³ The court accepted this rationale and considered the attached DVDs.⁸⁴ Again, neither the defendants nor the court perceived any problem with considering the DVDs a "document" or "written instrument" under FRCP 10(c). The court then analyzed the claims and determined that, since the works lacked substantial similarity, there was no copyright infringement, and the court dismissed the case.⁸⁵

Thus, while the *Brownmark* court was correct in citing these cases as those in which the courts permitted audiovisual works to be incorporated by reference into the complaint, none of the cases actually analyzed the issue or even recognized it as a question. Furthermore, most other courts allowing for the incorporation of audiovisual works have followed the same general pattern as the courts cited in *Brownmark* in that they do not provide any useful analysis of the issue.⁸⁶

The one exception to this lack of analysis comes in *Bowens v Aftermath Entertainment*.⁸⁷ This case involved a rap music concert scheduled in Detroit. In previous performances on the tour,

⁸² *Id.* at 1128.

⁸³ Reply Memorandum of Points and Authorities in Support of Defendants CBS Television Distribution, King World Productions, Inc. and Harpo Productions, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint, *Zella v E.W. Scripps Co.*, Civil Action No 06-07055, *7-8 (CD Cal filed Dec 10, 2007) (available on Westlaw at 2007 WL 5193711).

⁸⁴ *Zella*, 529 F Supp 2d at 1128.

⁸⁵ *Id.* at 1139.

⁸⁶ See, for example, *Louis Vuitton Mallatier SA v Warner Brothers Entertainment Inc.*, 868 F Supp 2d 172, 174, 176 n 2 (SDNY 2012) (permitting the incorporation by reference of a DVD of a film in which a trademark was allegedly infringed and dismissing the complaint); *Randolph v Dimension Films*, 630 F Supp 2d 741, 744-45 (SD Tex 2009) (permitting the incorporation by reference of a copy of the plaintiff's book and the defendant's movie in a copyright infringement suit, referring to both as documents, and dismissing the complaint for lack of substantial similarity between the two works); *Tessler v NBC Universal, Inc.*, 2009 WL 866834, *3, 8 (ED Va) (permitting the incorporation by reference of several television episodes in a copyright infringement suit and dismissing the complaint for lack of substantial similarity between the two works).

⁸⁷ 254 F Supp 2d 629 (ED Mich 2003).

the artists played a short video to introduce the performers.⁸⁸ Before the Detroit concert began, however, city officials came to the arena and met with several tour representatives.⁸⁹ In the meeting, the city officials cited various obscenity statutes and demanded that the video not be played during the performance.⁹⁰ The city officials alleged that this was a private meeting, but the tour representatives used hidden cameras and microphones to record the conversation.⁹¹ These recordings were then incorporated into a concert DVD, which “has become one of the hottest-selling music videos, achieving worldwide multi-platinum status.”⁹²

Following the success of the DVD sales, the city officials filed a complaint alleging violations of the Federal Wiretap Act.⁹³ The defendants in the case moved to dismiss under FRCP 12(b)(6), attaching the concert DVD as evidence that the meeting with the city officials was not private.⁹⁴ After quoting the relevant portion of FRCP 10(c), the court refused to permit the incorporation of the DVD, finding that “[p]lainly, the Concert DVD is not a ‘written instrument,’ and the Court is not convinced that it may construe the DVD as such for the purpose of incorporation by reference under Rule 10(c).”⁹⁵ The court went on to explain its understanding of the incorporation-by-reference doctrine as a narrow exception limited mainly to those cases interpreting a contract.⁹⁶ The doctrine did not apply in this case because

[u]nlike a suit under a contract or pension plan document, the Concert DVD does not define the rights and obligations of the parties. Thus, as opposed to being a “written instrument” for the purposes of Rule 10(c), the Court concludes that the DVD is the sort of “lengthy exhibit[] containing

⁸⁸ Id at 634.

⁸⁹ Id at 634–35.

⁹⁰ Id at 635.

⁹¹ *Bowens*, 254 F Supp 2d at 635.

⁹² Id (quotation marks omitted).

⁹³ Id.

⁹⁴ Id at 638–39.

⁹⁵ *Bowens*, 254 F Supp 2d at 639.

⁹⁶ See id. See also *Northern Indiana Gun & Outdoor Shows, Inc v City of South Bend*, 163 F3d 449, 453 (7th Cir 1998); *Levenstein v Salafsky*, 164 F3d 345, 347 (7th Cir 1998).

extraneous or *evidentiary material* [that] should not be attached to the pleadings.”⁹⁷

The court therefore did not consider the DVD, and concluded that the plaintiffs had alleged sufficient facts to state a claim.⁹⁸

This overview of relevant case law suggests that it is not uncommon for parties to attach audiovisual works in complaints and motions to dismiss in a variety of cases. It further demonstrates that, for the most part, district courts have not conducted any kind of thorough analysis to determine whether the works are properly considered. In fact, many of the courts have failed even to note the possibility, notwithstanding the seemingly plain language of the Rule that an audiovisual work may be outside the definition of a “written instrument.” Yet, as the *Bowens* case suggests, a more in-depth analysis is both possible and fruitful. The following Part attempts to remedy this gap in analysis through an examination of the history of the Rule and its purpose, an examination which tends to show support for the result reached in *Bowens*.

III. HISTORY AND ANALYSIS OF FRCP 10(C)

In order to determine whether an audiovisual work may ever be attached to a complaint under FRCP 10(c) or incorporated by reference into a motion to dismiss, one must first determine the precise scope of the definition of “written instrument.” This Part undertakes that task, first by looking to the dictionary definition of a “written instrument” and to cases using the term around the time when the Rule was enacted. This shows that the phrase was a term of art, historically understood as referring to something akin to a contract that evidences legal rights and duties. This Part then turns to the history of the Rule itself, which further supports this definition.

Following the discussion of the term’s historical meaning, this Comment considers how courts have applied FRCP 10(c) to cases not involving audiovisual works, which reveals disagreement on the proper breadth of the Rule as it applies to affidavits. An analysis of the disagreement shows that the courts that interpret the Rule more broadly than the historical definition base this interpretation on misread precedent.

⁹⁷ *Bowens*, 254 F Supp 2d at 640 (citation omitted).

⁹⁸ *Id.*

After concluding that the definition of a “written instrument” as material evidencing legal rights and duties is the definition with more support overall, this Part turns to a consideration of whether and when an audiovisual work might fall into that category. A look at an early procedural rule regarding copyright cases gives some evidence that copyrighted works generally and even audiovisual works specifically were deemed to be included under the definition of “written instruments.” This Part then argues that when audiovisual works evidence legal rights or duties, they should be considered written instruments for purposes of the Rule. Thus, whether an audiovisual work may be attached to a pleading depends on whether it evidences legal rights or merely has evidentiary value. If it is the former, then the work may be attached, whereas if it is the latter, attachment should not be permissible.

A. Defining “Written Instrument”

1. Dictionary definitions.

In determining the definition of a “written instrument,” the obvious starting point is a dictionary. *Black’s Law Dictionary* defines an instrument as “[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate.”⁹⁹ The contemporary edition of *Webster’s Collegiate Dictionary* has two relevant definitions of an instrument, the first defining it as “[t]hat by means of which something is performed or effected,” and the second, noted as a legal definition, stating that it is “a writing, as a deed, writ, etc.”¹⁰⁰ Case law decided around the time the Federal Rule first came into being supports this definition, showing that the term was used almost exclusively in cases referring to contractual disputes and not as a term referencing simply any kind of document.¹⁰¹ Many such cases cited to then-current dictionaries

⁹⁹ *Black’s Law Dictionary* 869 (West 9th ed 2009).

¹⁰⁰ *Webster’s Collegiate Dictionary* 522 (G & C Merriam Co 5th ed 1938).

¹⁰¹ See, for example, *Main v Pratt*, 114 NE 576, 578 (Ill 1916) (“An escrow has been defined to be a written instrument which by its terms imports a legal obligation.”); *People v Dadmun*, 137 P 1071, 1071–72 (Cal App 1913) (defining a “written instrument” as “some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty”); *Cox v Farley*, 2 Ohio Dec Reprint 291, 291 (1860) (“Webster defines the word, as a writing containing the terms of a contract.”). But see *Corbett v Clough*, 65 NW 1074, 1075 (SD

for definitions of a “written instrument.” For example, *Bouvier’s Law Dictionary* defined it as “[t]he writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place, or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills.”¹⁰² Another contemporary dictionary speaks of a “written instrument” as one which, “if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.”¹⁰³ Thus, the common usage of the term at the time of the writing of the Rule shows that the drafters likely understood it as a phrase referring to contractual documents, or those materials evidencing legal rights and duties, and little else.¹⁰⁴

2. The history of FRCP 10(c).

The origins of the Rule itself also give credence to this definition of a “written instrument.” The Advisory Committee Notes¹⁰⁵ for FRCP 10(c) state that “the rule is an expansion in conformity with usual state provisions,” citing an Illinois statute as the basis for the relevant portion of the Rule.¹⁰⁶ The original Illinois statute from which the Rule was drawn states:

1896) (providing a definition of a “written instrument” as “something reduced to writing as a means of evidence”).

¹⁰² *Patterson v Churchman*, 23 NE 1082, 1083 (Ind 1890).

¹⁰³ *In re Benson*, 34 F 649, 653 (SDNY 1888).

¹⁰⁴ Courts often look to the original public meaning of a term used in a statute or constitutional provision in order to determine how it should be interpreted. See, for example, *District of Columbia v Heller*, 128 S Ct 2783, 2815–16 (2008) (accepting the limitation of the Second Amendment to those weapons in common use at the time of the Amendment’s passage).

¹⁰⁵ The use of Advisory Committee Notes in interpreting the Federal Rules of Civil Procedure is a generally acceptable practice, though Justice Antonin Scalia recently limited his approval of the exercise in stating that

[t]he Advisory Committee’s insights into the proper interpretation of a Rule’s text are useful to the same extent as any scholarly commentary. But the Committee’s *intentions* have no effect on the Rule’s meaning. Even assuming that we and the Congress that allowed the rule to take effect read and agreed with those intentions, it is the text of the Rule that controls.

Krupski v Costa Crociere Spa, 130 S Ct 2485, 2498–99 (2010) (Scalia concurring). Nevertheless, in instances such as this, where the history is used only to understand the meaning of a term of art, even strict textualists like Judge Easterbrook are generally amenable. See *In the Matter of Sinclair*, 870 F2d 1340, 1342 (7th Cir 1989) (Easterbrook). See also *Tome v United States*, 513 US 150, 167 (1995) (Scalia concurring).

¹⁰⁶ See FRCP 10, Advisory Committee Notes to the 1937 Adoption. Since its adoption, the Rule has only been amended once. In 2007 it was altered “as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules.” See FRCP 10, Advisory Committee Notes

Whenever an action, defense or counterclaim is founded upon a written instrument, a copy thereof, or so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader shall attach to his pleading an affidavit stating facts showing that such instrument is not accessible to him. In pleading any written instrument a copy thereof may be attached to the pleading as an exhibit. In either case the exhibit shall constitute a part of the pleading for all purposes. No *profert* shall be necessary.¹⁰⁷

This rule obviously differs from FRCP 10(c) in that the attachment is required when the complaint is founded on the instrument, whereas attachment is always permissive under the Federal Rules. While the current wording of the Rule does not make clear whether FRCP 10(c) is referring to all written instruments or only those upon which a claim is founded, the original wording of the Rule in 1938 stated that “[a] copy of *any* written instrument which is an exhibit to a pleading is a part thereof for all purposes.”¹⁰⁸ The Advisory Committee Notes for the 2007 amendment of the Rule state that the language of the Rule had been “amended as part of the general restyling of the Civil Rules” and that any “changes are intended to be stylistic

to the 2007 Amendment. For state statutes similar to the Illinois provision cited by the Advisory Committee as well as a general discussion of the old code pleading practices, see Okla Stat § 297 (1921) (stating that a copy of a written instrument must be attached if it forms the basis of the claim); 87 Ohio Rev Code § 105 (1860); Charles Alan Wright and Arthur R. Miller, 5A *Federal Practice & Procedure* § 1327 (West 3d ed 2012).

¹⁰⁷ Ill Rev Stat ch 110, § 160 (1933). Prior to the passage of this statute, under the common law of pleading plaintiffs were not permitted to attach written instruments they were suing on to their pleadings as exhibits. See *MacKnight v Federal Life Insurance Co*, 278 Ill App 241, 244 (1934) (holding that, while the copy of an insurance policy would not be permitted under the common law system of pleading, it is now permitted under the new statute). See also *Plew v Board*, 113 NE 603, 604 (Ill 1916) (“By the regular practice at law a copy of a writing upon which a suit is brought is no part of a declaration.”); *Franey v True*, 26 Ill 184, 186 (1861) (“[T]he copy indorsed on the declaration is no part of the declaration, and has been repeatedly held to be no part of the record, and a bill of exceptions can alone inform us of what it is.”); *Harlow v Boswell*, 15 Ill 56, 58 (1853) (“The copy of the note attached to the count formed no part of the declaration, and could not be noticed on demurrer.”); *Pearsons v Lee*, 2 Ill 193, 194–95 (1835) (holding that the court could not look at a copy of an attached agreement with “legal eyes” because it forms no part of the declaration); *Gulf, C. & S.F. Ry. Co v Cities Service Co*, 270 F 994, 997 (D Del 1920) (“If the action is founded upon a contract or conveyance, which at common law is valid without deed or writing, the declaration need not count upon or take notice of the writing. In such cases the writing is regarded merely as evidence.”).

¹⁰⁸ Rules of Civil Procedure for the District Courts of the United States, 308 US 663, 675 (1938) (emphasis added).

only.”¹⁰⁹ This shows that the Rule was not meant to differentiate between written instruments in the way the Illinois statute did. It is therefore necessary to look at the way in which the Illinois courts have interpreted the term “written instrument” in either situation to determine what meaning it should be given.

In most cases, the Illinois courts interpreted the term “written instrument” to mean something akin to a contract. Early cases that fell under the portion of the statute requiring the attachment of legal instruments involved documents such as deeds,¹¹⁰ contracts for sale of real estate,¹¹¹ leases and mortgages,¹¹² contracts of employment,¹¹³ and publishing agreements.¹¹⁴ In cases like these, if the plaintiff did not attach the instrument on which the claim is founded, the defendant had the ability to move to dismiss the case on that basis alone.¹¹⁵

Cases falling under the second part of the statute—that is, where attachment of the written instrument was permitted, but not required—were also often connected to disputes that involved contracts but were not based on them. An example of such a case is *Armstrong v Guigler*,¹¹⁶ which was an action for breach of fiduciary duty. Here the court held that a “breach of an implied fiduciary duty is not an action *ex contractu* simply because the duty arises by legal implication from the parties’ relationship under a written agreement.”¹¹⁷ Similarly, the court in *Farm Credit Bank of St. Louis v Biethman*¹¹⁸ held that the defendant was permitted, but “not required[,] to attach a written copy of the agreement to their counterclaim because their claim was not *founded upon* the agreement, but rather, upon the promissory note and deed of trust,” which were attached to the

¹⁰⁹ FRCP 10(c), Advisory Committee Notes to the 2007 Amendment.

¹¹⁰ See, for example, *Darst v Lang*, 10 NE2d 659, 662 (Ill 1937).

¹¹¹ See, for example, *Greig v Russell*, 4 NE 780, 782 (Ill 1886); *Price v Solberg*, 109 NE 1024, 1025 (Ill 1915).

¹¹² See, for example, *Armstrong v Douglas Park Bldg. Ass’n*, 52 NE 886, 886 (Ill 1898).

¹¹³ See, for example, *Awotin v Abrams*, 33 NE2d 179, 180–81 (Ill App 1941).

¹¹⁴ See, for example, *Bertlee Co v Illinois Publishing & Printing Co*, 52 NE2d 47, 54 (Ill App 1943).

¹¹⁵ See *Senese v City of Chicago*, 232 NE2d 251, 252 (Ill App 1967).

¹¹⁶ 673 NE2d 290 (Ill 1996).

¹¹⁷ *Id.* at 296. See also *Moroni v Intrusion-Prepakt, Inc*, 165 NE2d 346, 350 (Ill App 1960) (holding that a counterclaim was not insufficient for failing to attach an alleged contract where it was “not upon the actual terms of the contract that [the defendant] must succeed, but under a term that must be implied merely from its existence”).

¹¹⁸ 634 NE2d 1312 (Ill App 1994).

complaint.¹¹⁹ Yet because these actions are so closely related to contracts, the permissive portion of the Illinois statute allows them to be attached, whereas at common law they would have been excluded completely.¹²⁰

While the vast majority of cases applying the Illinois statute deal with some form of a contractual agreement as a written instrument, there are several exceptions. These deal mainly with determining whether the attached exhibit controls when there is a conflict between the complaint and the exhibit. The accepted rule is that where the claim is based on the written instrument, the instrument itself controls, but if the claim is not based on the instrument, the instrument does not control.¹²¹ For example, in *McCormick v McCormick*,¹²² an Illinois appellate court held that the trial court improperly relied on the truth of exhibits consisting primarily of memoranda and letters written by the defendants, as they were not instruments upon which the claim was founded.¹²³ The court did not hold that the letters and memoranda constituted written instruments under the statute, as it does not seem that this issue was up on appeal. Nevertheless, the trial court did permit these documents to be attached. Other cases representing exceptions to the rule are similar in that the issue of whether the documents were in fact written instruments was not at issue on appeal and the court only decided that the claims at hand were not founded on them.¹²⁴

From this history, it is clear that the archetypal case to which the Illinois statute applies “generally consist[s] of instruments being sued upon, such as contracts or agreements.”¹²⁵ While there are cases in which courts have permitted the attachment of documents that are not contracts, these are the exception rather than the rule, and in no such case has any appellate court directly addressed whether the document attached actually falls within the category of a written instrument.

¹¹⁹ Id at 1318.

¹²⁰ See note 107.

¹²¹ See *Bajwa v Metropolitan Life Insurance Co*, 804 NE2d 519, 531 (Ill 2004).

¹²² 455 NE2d 103 (Ill App 1983).

¹²³ See id at 108.

¹²⁴ See, for example, *Senese v Climatemp, Inc*, 582 NE2d 1180, 1186 (Ill App 1991) (holding that a letter of intent was not a written instrument upon which the claim was founded, but not deciding whether it was a written instrument under the Illinois statute); *Garrison v Choh*, 719 NE2d 237, 240–42 (Ill App 1999) (holding that an affidavit attached under the requirements of a medical malpractice statute was not properly incorporated by reference, but not holding that it could not be a written instrument).

¹²⁵ *Bajwa*, 804 NE2d at 531. See also notes 110–14 and accompanying text.

Furthermore, the Illinois Supreme Court has limited what may be included in the class of written instruments by stating that “[t]he only matters for the court to consider in ruling on the motion [to dismiss] are allegations of the pleadings themselves, rather than the underlying facts. Thus, the court may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings, or other evidence.”¹²⁶ Insofar as the definition of “written instrument” in Rule 10(c) is based on the 1937 Illinois statute, these cases add more support to the notion that the Rule only contemplates attachment of documents that evidence legal rights or duties.

B. Disagreement Regarding the Meaning of “Written Instrument” under FRCP 10(c)

Despite the reasonably clear history of the Rule, there has been some confusion and disagreement among courts regarding the definition of a “written instrument” under FRCP 10(c), particularly in its application to affidavits. There are two basic views on what the term “written instrument” entails that are usually brought to bear when courts consider whether to permit plaintiffs to attach affidavits to their complaints. The first view interprets the phrase, in a way consistent with the original Illinois statute, as a narrow term including only those documents that serve functions similar to a contract, in that they evidence legal rights and duties.¹²⁷ The second view gives the phrase a much broader application, without any stated limitation.¹²⁸ Surprisingly, though these disparate views have existed for a number of years, the issue has received no scholarly attention. Indeed, many courts do not even acknowledge the division in their decisions.

¹²⁶ *In re Chicago Flood Litigation*, 680 NE2d 265, 277 (Ill 1997).

¹²⁷ See, for example, *Rose v Bartle*, 871 F2d 331, 339–40 n 3 (3d Cir 1989), quoting Wright and Miller, 5A *Federal Practice and Procedure* § 1327 (cited in note 106) (“[T]he types of exhibits incorporated within the pleadings by Rule 10(c) consist largely of documentary evidence, specifically, contracts, notes, and other ‘writing[s] on which [a party’s] action or defense is based.’”).

¹²⁸ See, for example, *Northern Indiana Gun & Outdoor Shows, Inc v City of South Bend*, 163 F3d 449, 452–53 (7th Cir 1998).

1. The narrow definition of a “written instrument” as material evidencing legal rights and duties.

Among those courts that give the Rule a narrow interpretation, the Third Circuit provides the most in-depth explanation of its reasoning. In *Rose v Bartle*,¹²⁹ the court held that an affidavit should not be treated as a written instrument. It claimed that

[t]o hold otherwise would elevate form over substance by drawing a distinction between an affidavit filed with an answer and an affidavit filed with a motion to dismiss under 12(b)(6). In addition, this would further blur the distinction between summary judgment and dismissal for failure to state a claim upon which relief could be granted.¹³⁰

This blurring would occur as a result of allowing evidentiary material to be considered in the motion to dismiss, while it is usually permitted only in later stages of the process when the actual merits of the case are in dispute.¹³¹ The Ninth Circuit has adopted a similar viewpoint. In *United States v Ritchie*,¹³² the court held that “[a]ffidavits and declarations . . . are not allowed as pleading exhibits unless they form the basis of the complaint.”¹³³ In addition to the Third and Ninth Circuits, various district courts have also used the narrow conception of the Rule in cases dealing with affidavits, as well as other materials.¹³⁴

¹²⁹ 871 F2d 331 (3d Cir 1989).

¹³⁰ *Id* at 339–40 n 3.

¹³¹ See notes 18–19 and accompanying text.

¹³² 342 F3d 903 (9th Cir 2003).

¹³³ *Id* at 908.

¹³⁴ See, for example, *Murphy v Cadillac Rubber & Plastics, Inc*, 946 F Supp 1108, 1115 (WDNY 1996) (holding that affidavits are not written instruments because they do not evidence legal rights or form the basis of the complaint); *DeMarco v DepoTech Corp*, 149 F Supp 2d 1212, 1220 (SD Cal 2001) (holding that an affidavit is not a written instrument because it is “a piece of evidentiary matter . . . [and] does not form the basis of Plaintiff’s claims”); *Bowens v Aftermath Entertainment*, 254 F Supp 2d 629, 640 (ED Mich 2003) (holding that a concert DVD was not a written instrument because it did not “define the rights and obligations of the parties”); *Cabot v Wal-Mart Stores, Inc*, 2012 WL 1378529, *8 (D NM) (holding that the photographs plaintiff attempted to attach were “not the kind of ‘documentary evidence, specifically contracts, notes, and other ‘writing[s] on which [a party’s] action or defense is based’” that courts typically permit parties to attach to their pleadings under rule 10(c)”; *Nkemakolam v St John’s Military School*, 876 F Supp 2d 1240, 1247 (D Kan 2012) (holding that an x-ray and photograph attached to the plaintiffs’ complaint were “clearly intended as evidence to support specific factual allegations by plaintiffs. . . . [and] are not ‘written instruments’ and thus are not the types of exhibit contemplated by Rule 10 as proper attachments to a pleading”); *United States v International Longshoremen’s Association*, 518 F Supp 2d 422, 465–66 (EDNY 2007) (holding that a written instrument is a “document evidencing legal rights

2. Confusion in the Seventh Circuit.

In two out of three cases, the Seventh Circuit has expressed support for the narrow reading of FRCP 10(c). First, in *Perkins v Silverstein*,¹³⁵ the court refused to permit the attachment of “newspaper articles, commentaries and editorial cartoons” to the complaint, which alleged an employment discrimination and sexual harassment action.¹³⁶ The materials involved media reports of the defendant as the subject of a sex-for-jobs scandal.¹³⁷ The court stated that these attachments were “not the type of documentary evidence or ‘written instrument[s]’ which Fed.R.Civ.P. 10(c) intended to be incorporated into, and made a part of the complaint.”¹³⁸

In the second case supporting a narrower reading, *Levenstein v Salafsky*,¹³⁹ the defendants attempted to attach a “raft” of documents to their motion to dismiss.¹⁴⁰ The court noted that, while defendants may attach documents when they are referred to in the complaint and central to the plaintiff’s claim, “this is a narrow exception aimed at cases interpreting, for example, a contract. It is not intended to grant litigants license to ignore the distinction between motions to dismiss and motions for summary judgment.”¹⁴¹

The third case, *Northern Indiana Gun & Outdoor Shows, Inc v City of South Bend*,¹⁴² in which the Seventh Circuit took a much broader view of the definition of a “written instrument,” was decided a mere fifteen days after *Levenstein* by a completely different panel of judges.¹⁴³ In this case, the court considered letters written by one of the defendants that were attached to a motion for judgment on the pleadings.¹⁴⁴ These letters informed the plaintiff that, before it would be permitted to hold any other gun shows, it would have to agree that no ammunition or weapons

or duties or giving formal expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or security agreement”) (quotation marks omitted).

¹³⁵ 939 F2d 463 (7th Cir 1991).

¹³⁶ *Id* at 467 n 2.

¹³⁷ *Id* at 467.

¹³⁸ *Id* at 467 n 2.

¹³⁹ 164 F3d 345 (7th Cir 1998).

¹⁴⁰ *Id* at 347.

¹⁴¹ *Id*.

¹⁴² 163 F3d 449 (7th Cir 1998).

¹⁴³ *Levenstein* was decided on December 16, 1998, by Judges Diane Wood, Walter Cummings, and Ilana Rovner; *Northern Indiana* was decided on December 31, 1998, by Judges Michael Kanne, William Bauer, and Daniel Manion.

¹⁴⁴ *Northern Indiana Gun & Outdoor Shows*, 163 F3d at 453.

would be on the premises, thus effectively preventing them from having the show at all.¹⁴⁵ The plaintiff alleged that this policy was a violation of its First Amendment rights.¹⁴⁶ These letters might have been permitted even under a narrow conception of the term “written instrument”—as they alter the business understanding between the parties like a contract would—but the court used broader language in permitting their incorporation. The court stated that “[h]istorically, this Court has interpreted the term ‘written instrument’ as used in Rule 10(c) to include documents such as affidavits, [] letters, . . . contracts and loan documentation.”¹⁴⁷ Subsequent opinions have cited this case for the proposition that affidavits are written instruments, even though this was not actually the case’s holding.¹⁴⁸

The problem with the Seventh Circuit’s statement that historically affidavits have been permitted is that the authority the court cites does not back this claim. The case the court cites in order to support its assertion is *Schnell v City of Chicago*,¹⁴⁹ which in turn cites to only one case, *Fisher Iron & Steel Co v Elgin, J. & E. Ry. Co.*,¹⁵⁰ to support its use of an affidavit in a motion to dismiss.¹⁵¹ But *Fisher* does not actually stand for the proposition that affidavits may be attached to and considered part of the complaint. In *Fisher*, the plaintiff attached three exhibits to the complaint. All three were letters of correspondence between the plaintiff and the defendant, which constituted an offer to sell an abandoned railroad track, a proposal to buy the track for \$10,000 with a deposit of \$1,000 enclosed, and a letter returning the \$1,000 deposit.¹⁵² These letters amount to an offer and acceptance, as in a contract, and would thus qualify as a written instrument under the narrow meaning. Thus, there was

¹⁴⁵ Id at 451.

¹⁴⁶ Id at 452. The plaintiff argued that this amounted to a “no gun show policy” and that it “prohibited it from exercising its First Amendment right to engage in activities conveying truthful and legitimate speech, as well as political speech,” and was “an impermissible content-based restriction existing only because the defendants did not agree with the message of the speech the gun show conveyed.” Id at 453.

¹⁴⁷ Id at 453 (citations omitted).

¹⁴⁸ See, for example, *Eagle Nation, Inc v Market Force, Inc*, 180 F Supp 2d 752, 754 (ED NC 2001). See also *Northern Indiana Gun & Outdoor Shows*, 163 F3d at 453.

¹⁴⁹ 407 F2d 1084 (7th Cir 1969).

¹⁵⁰ 101 F2d 373 (7th Cir 1939).

¹⁵¹ See *Schnell*, 407 F2d at 1085.

¹⁵² *Fisher Iron & Steel*, 101 F2d at 373–74. Indeed, these three letters seem to fall into the category of a contract, which is the quintessential case to which FRCP 10(c) is applied.

no affidavit involved in this case's pleadings, and therefore it is not clear why the court in *Schnell* relied on *Fisher* to support the proposition that affidavits could be attached.

3. The broad definition of a “written instrument” under FRCP 10(c).

In addition to the Seventh Circuit *Northern Indiana Gun & Outdoor Shows* case, several district courts—but no other circuit courts—have taken the broader view of the definition of “written instrument” and have permitted documents like affidavits to be included as part of the complaint. One example of this line of cases is *United States v 2121 Kirby Drive, Unit 33, Houston, TX*.¹⁵³ The District Court for the Southern District of Texas permitted the attachment of a “lengthy affidavit describing numerous details supporting the claims,” while citing FRCP 10(c).¹⁵⁴ In a footnote, the court explained its belief that the Fifth Circuit “harbors no reservation about recognizing attached affidavits as ‘written instruments’ for inclusion in Rule 10(c).”¹⁵⁵ In support of this claim, the court cited *Northern Indiana Gun & Outdoor Shows*,¹⁵⁶ along with three other cases—two from the Fifth Circuit, one from the First Circuit—none of which actually stand for the proposition.

The first of these cited cases is *Lovelace v Software Spectrum Inc.*¹⁵⁷ In this case, the Fifth Circuit did not even use FRCP 10(c). Instead, the court adopted the Second Circuit’s rule that “a district court deciding a motion to dismiss a securities fraud action may take *judicial notice* of the contents of documents filed with the Securities Exchange Commission.”¹⁵⁸ As explained above, judicial notice is a separate doctrine from the incorporation-by-reference doctrine of FRCP 10(c).¹⁵⁹ The court was not holding that the contents of the SEC documents were incorporated

¹⁵³ 2007 WL 3378353 (SD Tex).

¹⁵⁴ *Id.* at *1.

¹⁵⁵ *Id.* at *3 n 1.

¹⁵⁶ Other district courts that have likewise taken the broader conception of “written instruments” have done so either by citing to *Northern Indiana* or without any explanation for their conclusions. Compare *Eagle Nation*, 180 F Supp 2d at 754 (quoting *Northern Indiana* as the standard for what is included in the definition of a “written instrument”), with *CompassBank v Villarreal*, 2011 WL 1740270, *7 (SD Tex) (permitting the attachment of an affidavit with no explanation, and citing to FRCP 10(c)) and *Asanov v Hunt*, 2006 WL 1289055, *1 (MD Pa) (same).

¹⁵⁷ 78 F3d 1015 (5th Cir 1996).

¹⁵⁸ *Id.* at 1018 (emphasis added).

¹⁵⁹ See notes 26–27 and accompanying text.

by reference into the complaint. Instead, the court stated that for a certain class of complaints—those involving securities fraud—courts are permitted to take judicial notice of SEC filings even though they were not included in the complaint.¹⁶⁰

Next, the *Kirby Drive* court cited to a First Circuit case, *United States v Parcels of Land*.¹⁶¹ In this case, however, the First Circuit affirmed the district court's grant of summary judgment to the government.¹⁶² The same rules do not apply to the summary judgment stage of pleading as to a motion to dismiss.¹⁶³ It is true that the plaintiff in the case also attempted to argue that the government "failed to state with sufficient particularity the circumstances from which the government's claim arose," and to answer this argument, the court said that the affidavit attached to the complaint, as well as to the motion for summary judgment, was sufficient to state a claim.¹⁶⁴ Nevertheless, the question of whether the affidavit could be considered a written instrument for purposes of a *motion to dismiss* was not before the court. This case, therefore, does not support the claim that affidavits are "written instruments."

Finally, the court in *Kirby Drive* cited to another Fifth Circuit case, *Financial Acquisition Partners LP v Blackwell*.¹⁶⁵ In this case, the court upheld a district court's decision that an affidavit was not a written instrument under FRCP 10(c) and therefore struck the opinions in the affidavit, while still considering the factual portions.¹⁶⁶ The *Kirby Drive* court argued that this implied that "factual allegations asserted in affidavits [are] part of the complaint itself."¹⁶⁷ This assertion, however, relies on dicta. The appeal only concerned whether the court should have struck the opinion portions and not whether it should have considered the factual portions. Indeed, the First Circuit seems to refute the idea that the *Kirby Drive* court cites it as supporting, stating that "[e]ven if non-opinion portions of an expert's affidavit constitute an instrument, pursuant to Rule 10, opinions

¹⁶⁰ See *Lovelace*, 78 F3d at 1018.

¹⁶¹ 903 F2d 36 (1st Cir 1990).

¹⁶² *Id.* at 38.

¹⁶³ Compare FRCP 12 (governing the rules for motions to dismiss), with FRCP 56 (governing the rules for motions for summary judgment).

¹⁶⁴ *Parcels of Land*, 903 F2d at 48.

¹⁶⁵ 440 F3d 278 (5th Cir 2006).

¹⁶⁶ *Id.* at 285–86.

¹⁶⁷ *2121 Kirby Drive, Unit 33, Houston, TX*, 2007 WL 3378353 at *3 n 1.

cannot substitute for facts.”¹⁶⁸ The use of “if” in this sentence makes it clear that the court did not rule on whether affidavits could be considered written instruments. Therefore, this case does not support the claim made in *Kirby Drive* that the Fifth Circuit has no qualms about permitting affidavits to be attached as written instruments.¹⁶⁹

This division among courts shows that courts following the narrow interpretation base their decisions on a desire to maintain a separation between motions for summary judgment and 12(b)(6) motions, as well as a recognition that the exception is normally directed at cases based on a contract. Those courts that have adopted the broader interpretation do so based on unfounded claims of historical practices. Thus, not only do the dictionary definition of a “written instrument” and the history of FRCP 10(c) support the narrow conception of the term, but the reasoning of those courts that adopt the narrow view is far more persuasive than the reasoning of the courts that adopt the broader conception.

C. Audiovisual Works as Written Instruments: The Life and Death of Copyright Rule 2

Having now determined that a written instrument is properly defined as something evidencing legal rights and duties, the next relevant question to address is whether an audiovisual work may ever fall into that category. Beyond the history of Rule 10(c) itself, further history related specifically to copyright cases suggests that the term should include at least some audiovisual works.

In 1909, the Supreme Court adopted special procedural rules for copyright cases.¹⁷⁰ Though the rules were rescinded in 1966,¹⁷¹ their history as well as their rescission are informative. Copyright Rule 2 stated the following:

A copy of the alleged infringement of Copyright, if actually made, and a copy of the work alleged to be infringed, should

¹⁶⁸ *Financial Acquisition Partners*, 440 F3d at 286 (emphasis added).

¹⁶⁹ See text accompanying note 155.

¹⁷⁰ See Rules for Practice and Procedure under Section 25 of an Act to Amend and Consolidate the Acts respecting Copyright, Approved March 4, 1909, To Take Effect July 1, 1909, Chapter 320, 35 Stat 1075, and Promulgated by the Supreme Court of the United States, June 1, 1909, 214 US 533 (1909).

¹⁷¹ See Amendments to the Rules of Civil Procedure for the United States District Courts, 383 US 1029, 1031 (1966).

accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works and in any case where it is not feasible.¹⁷²

One might assume that the exclusion of dramatic compositions from the works that must be attached also includes audiovisual works. A motion picture could easily fit into that category. Furthermore, the other items excluded from attachment are those that are not “written” in the normal sense of the word. This Rule could therefore be seen as upholding Rule 10(c)’s differentiation between “written” and “unwritten” works. If this were the case, Copyright Rule 2 would give credence to an interpretation of FRCP 10(c) that excluded all audiovisual works because they are not “written.”

This interpretation, however, is not altogether correct. First, Copyright Rule 2 does not actually exclude dramatic and dramatico-musical works from being attached; it merely exempts them from the *mandatory* attachment requirement applicable to other copyrighted works. Moreover, it is likely that the real distinction here is the practicability of attachment—the kinds of works that are excluded from the Rule are those that are not easily attached. Where a public performance of a play is not recorded, it is simply not possible to attach it (though even in these cases, the script of the play would likely need to be attached). Indeed, the list following “dramatic and dramatico-musical compositions” along with the exclusion of “any case where it is not feasible” further corroborate the idea that it is the impracticality of attachment rather than the type of work—written or unwritten—that is involved. The attachment of a sculpture would be uncomfortably bulky, and even if there were a recording of a public performance available, the attachment of the reel would do little to aid the court unless it possessed the technology to view the work. Advances in technology since 1909, however, have made such attachment of audiovisual works not only feasible, but relatively simple. One need only attach a DVD, include a flash drive, or type out a link to a website containing the video.

Furthermore, even in the era in which this rule was in effect, its application to a variety of different works shows that it

¹⁷² 214 US at 536.

was not actually the format of the work that mattered in determining whether to attach it, but simply whether it was possible. Courts used Copyright Rule 2 to allow the attachment of books and musical compositions, and so excluding audiovisual works would require distinguishing those from other unwritten works.¹⁷³ A painting does not seem to be any more of a “written instrument” than an audiovisual work.

Indeed, cases involving motion pictures did occur under the Rule. In one such case, the plaintiff claimed that the defendant’s motion picture operetta infringed on his play.¹⁷⁴ In compliance with the Copyright Rule, the plaintiff submitted summaries of both works along with the complaint.¹⁷⁵ The judge in the case stated that he “read with great care the typed copies” of both the play and the operetta, but beyond this, with both parties present, he “also [saw] the latter on the screen.”¹⁷⁶ This implies that even when the actual copyrighted or allegedly infringing works were not attached—likely because of the nature of the work at that time—judges could still view the works and use that viewing in deciding motions to dismiss. Further, this also suggests that judges did not view audiovisual works as being excluded from the Copyright Rule, so that even if it was impracticable to attach the copyrighted work, it did not mean that the judge could not consider it on a motion to dismiss.

An early California case supports this intuition. In *Weitzenkorn v Lesser*,¹⁷⁷ the plaintiff claimed that the defendant’s motion picture infringed upon the plaintiff’s literary composition.¹⁷⁸ Here, the court stated that “[b]y reason of its nature and bulk . . . a copy of the motion picture film is not attached to the complaint,” though the plaintiff did attach a copy of the literary composition itself.¹⁷⁹ Nevertheless, this case occurred under the California Code of Civil Procedure; at the request of the defendants

¹⁷³ See, for example, *Buck v Liederkrantz*, 34 F Supp 1006, 1007 (ED Pa 1937) (holding that the plaintiff’s complaint was defective because it did not contain a copy of the musical composition alleged to be infringed); *Cole v Allen*, 3 FRD 236, 237–38 (SDNY 1942) (attaching several books whose copyrights were allegedly infringed); *Machtenberg v Sterner*, 8 FRD 169, 169 (SDNY 1948) (granting the defendant’s motion to annex a copy of a musical composition to the complaint).

¹⁷⁴ See *Shipman v R.K.O. Radio Pictures*, 20 F Supp 249, 250 (SDNY 1937).

¹⁷⁵ *Id.* at 249.

¹⁷⁶ *Id.* at 250.

¹⁷⁷ 256 P2d 947 (Cal 1953).

¹⁷⁸ *Id.* at 950.

¹⁷⁹ *Id.*

the court made an order for a viewing of the motion picture prior to and in connection with its ruling on the demurrers. The order also directed that the contents of such production be deemed a part of the complaint to the same extent and with the same force as though such production had been attached to the complaint.¹⁸⁰

This rule then gives the parties another way—orders for viewing—to make the copyrighted works a part of the complaint. It suggests that while attachment is preferable, if it is not practicable, other methods can be used. And in either instance, the work is a part of the complaint, just as a written instrument is a part of the complaint under FRCP 10(c).

Finally, in one Ninth Circuit case involving an allegation of copyright infringement of the appellant's play by the appellee's motion picture, the parties annexed to the complaint a copy of the play and a release print¹⁸¹ of the motion picture.¹⁸²

Copyright Rule 2, however, was rescinded in 1966.¹⁸³ One could argue that this was simply the end of a brief experiment permitting works other than traditional written instruments to be attached to complaints as exhibits and considered a part of the pleadings. However, this theory is largely debunked by the Advisory Committee Notes on the rescission:

This is a special rule of pleading unsupported by any unique justification. The question of annexing copies of the works to

¹⁸⁰ *Id.* at 951 (quotation marks omitted). The rule of procedure the court is referring to comes from former Cal Code Civ Pro § 426 (1947) and what is now Cal Code Civ Pro § 429.30, which states:

If the complaint contains a demand for relief on account of the alleged infringement of the plaintiff's rights in and to a literary, artistic, or intellectual production, there shall be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production. If, by reason of bulk or the nature of the production, it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable to attach a copy of the production to the complaint shall be alleged; and the court, in connection with any demurrer, motion, or other proceedings in the cause in which a knowledge of the contents of such production may be necessary or desirable, shall make such order for a view of the production not attached as will suit the convenience of the court to the end that the contents of such production may be deemed a part of the complaint.

¹⁸¹ A release print is a copy of a film that is provided to a movie theater for exhibition.

¹⁸² See *Dezendorf v Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 850 (9th Cir. 1938).

¹⁸³ See Amendments to the Rules of Civil Procedure for the United States District Courts, 383 US at 1031.

the pleading should be dealt with like the similar question of annexing a copy of a contract sued on. The FRCP permit but do not require the pleader to annex the copy.¹⁸⁴

This shows that the rescission of Copyright Rule 2 was not a statement by the Committee that copyrighted works should no longer be attached at all. Rather, the language in the notes makes it very clear that the Committee believed attachment of such works would still be permitted, and thus that they were already somehow included in the definition of a “written instrument.”

Commentators at the time applauded the rescission of the Rule, noting that the annexing of exhibits in copyright cases “can be uncomfortably bulky [and] should not follow an iron prescription,” and that “[e]veryone agreed that the copyright rule about annexing the works in suit was a nuisance and should be rescinded.”¹⁸⁵ As explained earlier, the issues of bulk that once came along with audiovisual works are now largely a thing of the past. It would no longer be necessary to attempt to awkwardly attach a 35mm release print reel to a complaint. Yet, even if bulk were a problem, if the plaintiff or defendant undertakes to attach the work, there seems to be no reason in the Advisory Committee’s mind that they should not be permitted to do so.

More recent approval of this idea is found in FRCP Form 19. This form was added to the FRCP in 2007 and gives an example of a proper complaint for copyright infringement and unfair competition. The complaint uses an example of a suit for copyright infringement of a book and attaches both the plaintiff’s copyrighted book and the defendant’s allegedly infringing book as exhibits to the complaint, presumably under FRCP 10(c).¹⁸⁶ If a copyrighted book is considered a “written instrument” for purposes of Rule 10(c), and if an audiovisual work serves the same purpose as the book in evidencing legal rights and duties in a copyright case, there seems to be little reason that the book, but not the audiovisual work, may be attached. Indeed, if bulk is what courts are concerned about, two books are arguably more

¹⁸⁴ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (“Committee on Rules of Practice and Procedure”), *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts (“1964 Preliminary Draft”)*, 34 FRD 325, 410 (1964).

¹⁸⁵ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 Harv L Rev 591, 618 (1968).

¹⁸⁶ See FRCP Form 19.

bulky than two DVDs and could take much more time to go through, especially if the two DVDs contain works like the *South Park* episode and the original YouTube video, with a combined running time of around thirty minutes. Indeed, this distinction would not even follow from a fairly conservative reading of the Rule.¹⁸⁷

D. Understanding When Audiovisual Works Are Written Instruments

While the previous Section provides support for the idea that copyrighted works—and therefore some audiovisual works—might fall under the definition of “written instruments,” this Section attempts to explain why this is so and what it means for the use of audiovisual works in other kinds of claims.

1. Audiovisual works as written instruments in copyright suits.

As the Advisory Committee Notes to the rescission of Copyright Rule 2 suggest in comparing the annexation of a copyrighted work to the annexation of a contract,¹⁸⁸ the two kinds of works share characteristics that make them written instruments. Most importantly, the creation of either a contract or a copyrighted work evidences legal rights and duties. The rights attach to a contract immediately upon its creation and signing, and the rights attach to a copyrighted work immediately upon

¹⁸⁷ For example, as Professor Caleb Nelson explains, even textualists, who are known for being conservative in their reading of statutory language, find it proper to apply the idea behind the term to the concept at hand when the concept may or may not have been in the minds of the original writers. Professor Nelson uses an example of a statute requiring the inspection of ovens being applied to newfangled appliances, and states that

textualists will not ask, on a case-by-case basis, whether the enacting legislature would have wanted to cover those appliances if it had known about them. Instead, textualists will emphasize the need to identify an appropriate verbal formula to determine the coverage of the word “ovens,” and they will take the statute to cover a particular appliance only if the appliance fits within that formula.

Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 413 (2005). In this instance, the particular verbal formula for a written instrument is something that evidences legal rights and duties, and so the appropriate question is whether a particular audiovisual work fits into that category.

¹⁸⁸ See Committee on Rules of Practice and Procedure, *1964 Preliminary Draft*, 34 FRD at 409–10 (cited in note 184). See also note 184 and accompanying text.

its fixation in a tangible medium.¹⁸⁹ Just as the fact that there is a written, signed contract shows the court that the parties at least attempted to memorialize an agreement consisting of obligations and entitlements, the fact that there is a tangible, creative work—whatever the format—shows that the party engaged in the kind of process required by the Copyright Act¹⁹⁰ in order to create a protectable work. Just as a written contract imposes rights and duties, the existence of a copyrighted work includes rights (the right of the copyright holder to exclusive use of the work,¹⁹¹ subject to fair use¹⁹²) and duties (the duty of others to refrain from copying the protected work¹⁹³).

While this comparison shows that valid copyrighted works can be written instruments, it does not necessarily provide similar support for the attachment of the allegedly infringing works in copyright cases. Instead of being used as evidence of rights and duties, these works are used to show that the rights arising from the original work were or were not infringed. Where the plaintiff attempts to attach the work, he is doing so precisely because he is claiming that it is devoid of certain rights. When a defendant attempts to attach the work, he is arguing that it does evidence rights and duties, but that is the very issue that is disputed. The latter of the two possibilities is the one of most concern here, as a defendant could not argue against the plaintiff's attachment of the allegedly infringing work without undermining his own position.¹⁹⁴ When it is the defendant attaching the work, however, the plaintiff could attempt to prevent its

¹⁸⁹ See 17 USC § 102.

¹⁹⁰ Pub L No 94-553, 90 Stat 2541 (1976), codified as amended at 17 USC § 101 et seq.

¹⁹¹ See 17 USC § 106.

¹⁹² See 17 USC § 107.

¹⁹³ See generally Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 Harv L Rev 1664 (2012) (explaining the private law structure of copyright law as imposing rights and duties). The copyright holder also has an obligation to permit fair use of the work and to release it into the public domain following the term of copyright protection. 17 USC § 302. Indeed, the purpose of copyright law under the Constitution is to enhance the public domain. See *Feist Publications, Inc v Rural Telephone Service Co*, 499 US 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.”), quoting US Const Art I, § 8, cl 8.

¹⁹⁴ In order for the defendant to argue that the work should not be considered under Rule 10(c), he would have to argue that it did not evidence legal rights and duties—that it was not a validly copyrighted work, likely because it infringed on the plaintiff's work. While this argument might prevent the attachment, it would basically result in the forfeiture of the lawsuit.

consideration by arguing that it is not a written instrument and its attachment is therefore impermissible under Rule 10(c).

But even if the primary purpose of attaching the work is to show evidence of infringement rather than rights and duties, the fact that the audiovisual works are original and fixed in a tangible medium means they still evidence legal rights of their own—and are therefore written instruments. This is similar to a contract case in which the plaintiff alleges that a certain provision is void because it is unconscionable. The fact that one portion may be void does not invalidate the remainder of the contract,¹⁹⁵ just as the fact that one portion of an audiovisual work may infringe on a copyrighted work does not void the rights attached to the remainder of the work. Moreover, if a plaintiff's allegation that a work is not a valid written instrument could prevent the attachment of that work, this would defeat one of the main purposes of the incorporation-by-reference doctrine, which is to prevent the plaintiff from avoiding a motion to dismiss by refusing to attach a document that might undermine her claim.¹⁹⁶

It could also be argued that even if the allegedly infringing copyrighted work is technically a “written instrument,” it does not evidence the legal rights and duties on which the case is founded and therefore should not be attached. This is in tension with Copyright Rule 2, which required the attachment of the allegedly infringing works. Nevertheless, this requirement can be reconciled with Rule 10(c). Recall that one of the main differences between the original Illinois statute and Rule 10(c) is that the Illinois statute *required* the attachment of written instruments upon which a claim was *founded*, and *permitted* the attachment of *any other* written instrument, while Rule 10(c) simply permitted the attachment of written instruments with no added distinctions.¹⁹⁷ This means that even though the suit is not founded on the rights of the allegedly infringing work, that is not a necessary prerequisite to its attachment. The attachment is still functioning as a written instrument within the

¹⁹⁵ See, for example, *Alterra Healthcare Corp v Bryant*, 937 S2d 263, 270 (Fla App 2006) (“Generally, contractual provisions are severable, where the illegal provisions do not go to the contract’s essence, and, there remain valid legal obligations with the illegal provisions eliminated.”); *Vegesina v Allied Informatics, Inc*, 572 SE2d 51, 53 (Ga App 2002) (“If a contract is severable, the part of the contract that is valid will not be invalidated by a separate and distinct part that is unenforceable.”); *In re Port. Pub. Co*, 57 SE2d 366, 367 (NC 1950).

¹⁹⁶ See note 29 and accompanying text.

¹⁹⁷ See notes 107–09 and accompanying text.

case, in that the defendant is at least claiming that it evidences rights and duties.¹⁹⁸ Therefore, the permissive nature of Rule 10(c) allows for its attachment.

2. Uses of audiovisual works outside of copyright claims.

The previous arguments show that, in some instances, audiovisual works can be included in the definition of a “written instrument” for purposes of attachment under FRCP 10(c). One particular time in which this is the case is when the suit concerns copyright infringement. Yet, while copyright infringement cases may be the most common cases in which it would be desirable to attach such a work, there are other such instances.¹⁹⁹ In these cases, the ability of the plaintiff to attach the audiovisual work to the complaint, or the defendant to incorporate it by reference into a motion to dismiss, will depend on the type of complaint and therefore on whether the audiovisual work is functioning as a written instrument.

While copyright cases are examples of audiovisual works functioning as written instruments, a case like *Bogie*²⁰⁰ would be an example of a situation in which the audiovisual work was not a written instrument and therefore should not have been considered on a motion to dismiss. *Bogie* dealt with claims for invasion of privacy and misappropriation.²⁰¹ In such a case, unlike suits for copyright infringement, the fact that the audiovisual work was created does not also create rights and duties related to the issue at hand. The right to privacy that was allegedly invaded in *Bogie* existed prior to the creation of the audiovisual recording. The recording, therefore, was functioning as mere evidence of the alleged infringement of the right, and not as a written instrument showing the existence of the right itself.²⁰²

¹⁹⁸ Moreover, the allegedly infringing work can aid in defining the extent of the rights and duties that attach to the allegedly infringed copyrighted work. See text accompanying notes 203–05.

¹⁹⁹ Another example may be a video-recorded will, which serves a purpose similar to a contract in creating rights for those named beneficiaries. See Gerry W. Beyer, *Will Contests – Prediction and Prevention*, 4 Est Planning and Community Prop L J 1, 27 (2011). See also *The Simpsons: Mona Leaves-a* (Fox Television Broadcast May 11, 2008) (presenting an episode in which Homer’s mother leaves a video will specifying her last wishes).

²⁰⁰ See notes 51–60 and accompanying text.

²⁰¹ See *Bogie*, 705 F3d at 607.

²⁰² The previously noted claim by the *Bogie* court that the analysis “is no different than that involved in contract disputes in which a plaintiff attaches a contract to the complaint and makes an allegation that the contract on its face clearly disputes” does not

One might argue that even the audiovisual work in *Bogie* is still a written instrument because it is arguably copyrighted. After all, it fulfills the requirements of the Copyright Act in that it is an original work in a fixed and tangible medium.²⁰³ Again, because Rule 10(c) does not differentiate between written instruments that the suit is founded upon and any other written instrument,²⁰⁴ one could argue that such a work could be attached simply because it is copyrighted, and therefore evidences some legal rights and duties—even if those rights and duties have nothing to do with the case. Nevertheless, the application of the Illinois statute to cases permitting the attachment of a written instrument that did not give rise to the claim shows that even in such instances, there is some relationship between the rights and duties evidenced by the audiovisual work and the case at hand. In *Guigler*, for example, the attached contract was a written instrument that the plaintiff was permitted, but not required, to attach because the fiduciary duty at issue was implied from the contract but was not founded on it.²⁰⁵ The contract aided the court in determining the extent of the rights and duties at issue, just as an allegedly infringing copyrighted work helps the court determine the boundaries of the rights attached to the original work. This is not the case in *Bogie*, however. In that case, the audiovisual work is evidence of the events that may have infringed on rights, but the audiovisual work cannot alter or determine the extent of those rights, as they exist regardless of—and not because of—the creation of the work. Moreover, the relevant portion of the Illinois statute states that “[i]n pleading any written instrument a copy thereof may be attached to the pleading as an exhibit.”²⁰⁶ This implies that the party attaching the work must be pleading it as a written instrument—something evidencing rights and duties—and not as mere evidence. Thus, while any audiovisual work can be a written instrument, it must be functioning as such in the case at hand in order to be eligible for attachment under Rule 10(c).

change this reasoning. The court there is making a claim regarding whether the exhibit or the contract controls where there is a contradiction between the two. See *id.* at 609. This has nothing to do with whether the audiovisual work is a written instrument, but only bears on whether the court views the work as being that on which the claim is founded. See text accompanying notes 125–26.

²⁰³ See 17 USC § 102.

²⁰⁴ See notes 105–09 and accompanying text.

²⁰⁵ See *Guigler*, 673 NE2d at 296.

²⁰⁶ 735 ILCS 5/2-606.

One final issue that should be addressed is how Rule 10(c) applies to cases in which some claims deal with an audiovisual work as a written instrument and others would use it as mere evidence. An example of such a case would be *Burnett*, which was a suit for copyright infringement of a television show, violation of the Lanham Act, violation of the right of publicity, and misappropriation of name and likeness.²⁰⁷ Under Rule 10(c), the audiovisual work at issue would be functioning as a written instrument for the copyright claim, but not for the other allegations. It would make little sense, however, to require the court to consider the work when deciding a motion to dismiss the copyright claim, but to disregard it for each of the others. Indeed, the wording of Rule 10(c) states that when a written instrument is an exhibit to a pleading, it is “a part of the pleading for all purposes.” Therefore, so long as the work is functioning as a written instrument for one of the claims alleged in good faith, the audiovisual work can be considered for all of the claims in the pleadings.

Thus, in each case involving audiovisual works, courts will need to undertake an analysis to determine if the work is functioning as a written instrument prior to permitting or forbidding its attachment. Permitting attachment of these kinds of works in situations in which they are functioning as written instruments will aid courts in moving through cases more quickly and in getting rid of unmeritorious claims. *Brownmark* was arguably such a case. The plaintiffs may have assumed that they would at least be able to make it through the motion to dismiss and proceed to the lengthy and expensive discovery process. They then may have hoped that the prospect of discovery expenses would convince the defendants to settle. These kinds of fishing expeditions would be much less successful in copyright cases if the courts at least permitted the works to be attached.

It is not clear, however, that these same reasons support the attachment of audiovisual works in other cases. For example, in suits like *Bogie* dealing with claims of invasion of privacy and misappropriation,²⁰⁸ the audiovisual work attached would serve as evidence that there was a recording of what the plaintiff believed was a private conversation, but it would not show that the rights and duties existed in the first place. Furthermore, it is not

²⁰⁷ *Burnett*, 491 F Supp 2d at 966. See also notes 63–70 and accompanying text.

²⁰⁸ *Bogie*, 705 F3d at 607. See also notes 51–60 and accompanying text.

clear that attaching such works in this instance would be as determinative of the case as attaching the works in copyright cases. In a case for invasion of privacy, contextual information unavailable from the audiovisual recording alone would be necessary in deciding a case. For example, a judge would need to know whether there was consent to the alleged invasion. While the recording may aid in a determination of whether there was a reasonable expectation of privacy, it may not even settle that point, as the circumstances surrounding the recording will still be relevant. In a copyright case, by contrast, something like parody can be determined by looking at the two works on their own. Moreover, while describing the scene and quoting the words said in a privacy complaint would seem to be an adequate way of informing the judge of the situation, it is much less effective to attempt to explain the similarities and differences between two pieces of music or two audiovisual works in a copyright infringement case. It seems much more efficient in this case to permit the judge to simply view both and make a determination based on this. Thus, in an invasion of privacy suit, the attachment of the audiovisual work not only provides insufficient information to decide a motion to dismiss, but it also provides that information in a way that does not add much to the complaint alone. Therefore, not only is the proposed reading of Rule 10(c) the most accurate based on its history and textual meaning, it is also the most pragmatic considering how the audiovisual work will be used in various suits. This solution permits judges to move through suits quickly—either by viewing audiovisual works that are determinative of claims early on, or by saving the time of viewing a work that is not as relevant to the early stage of the suit.

CONCLUSION

As may now be seen, the question of whether an audiovisual work may be incorporated by reference under FRCP 10(c) is a question deserving of much more analysis than any court has yet given it. Indeed, buried within the incorporation-by-reference doctrine, one finds an area of disagreement among courts regarding what the term “written instrument” actually means. One view would include only documents such as contracts, which evidence legal rights and duties. The second is far broader and lacks a clear limit on its reach. In delving into the history of FRCP 10(c) and the statute on which the doctrine was

based, it is clear that there is significant evidence to support the former reading of the term. This narrow reading, however, does not altogether exclude audiovisual works from inclusion in the definition. Audiovisual works that are the equivalent of written instruments—those that evidence legal rights and duties—could also be included by reference. One such example of a case in which an audiovisual work functions as a written instrument is in a suit for copyright infringement, where the existence of the audiovisual work itself shows existing rights and duties. Audiovisual works do not manifest the existence of rights and duties, however, in claims like invasion of privacy, in which the audiovisual work serves as mere evidence of actions that may have infringed on preexisting rights. The distinction drawn here is in line with the history of the Rule, its purpose, and efficiency concerns of courts.

This Comment attempts to address a problem that has received insufficient attention from scholars or courts by presenting a solution that is consistent with both the history and text of the FRCP. It suggests that in future cases concerning audiovisual works and FRCP 10(c), courts should be engaged in an analysis of whether the work evidences legal rights and duties and thus falls under the category of written instruments.