

No.

24-711

12/31/2024

SUPREME COURT OF THE UNITED STATES

Joe Morford,

Petitioner,

v.

Maurizio Cattelan,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Joe Morford, Pro Se
1125 E. Broadway #216
Glendale, CA 91205
(818) 422-9263
joemorford@gmail.com

QUESTIONS PRESENTED

Striking similarity establishes a likeness so strong it can prove copying without the need to show access. Access, when required, is proven by a reasonable opportunity to encounter the material.

The questions presented are:

1. Can portions of artwork establish striking similarity?
2. Must artwork be popular, prosperous or promoted to be reasonably accessible online?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings in the court of appeals below.

Pursuant to Federal Rule of Appellate Procedure pursuant to Rule 14.1(b).

Branch, Elizabeth L., Circuit Judge
Cattelan, Maurizio
Clyde & Co.
Cohen, Adam M.
Goodman, Jonathan, Magistrate Judge
Hook, Adam Ray
Jordan, Adalberto, Circuit Judge
Kane Kessler, P.C.
Morford, Joe
Nevins, Julie Elizabeth
Pryor, Jill A., Circuit Judge
Scola, Jr., Robert N., Judge
Susman, Dana M.

Submitted by:
Signature: /s/ Joe Morford
Name: Joe Morford
Address: 1125 E. Broadway #216
Glendale, CA 91205
Telephone: (818) 422-9263

STATEMENT OF RELATED PROCEEDINGS

Morford v. Cattelan, No. 23-12263 (11th Cir.)
(Opinion issued and judgment entered 08/16/2024;
petition for rehearing denied 10/15/2024; mandate
issued 10/23/2024.)

Morford v. Cattelan, No. 21-20039-Civ-Scola
(S.D. Fla.) (order granting summary judgement for
the defendant issued 06/09/2023.)

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PETITION FOR A WRIT OF CERTIORARI

Joe Morford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of Eleventh Circuit Court of Appeals is reproduced in the Appendix at D.

The decision of the U.S. District Court for the Southern District of Florida is reproduced in the Appendix at E.

JURISDICTION

The court of appeals issued its judgment on 08/16/2024. The denial for rehearing was issued on 10/15/2024. Mandate was filed on 10/23/2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is U.S.C. §§ 1254.

STATEMENT OF THE CASE

“It’s just a stupid banana taped to a wall—who cares. A kid could do that.”

If copyright protection only applies to things people like, then it does not work. Art will not always be understood, that is its nature. And a thing is not required to be celebrated or comprehended to be a protected expression. That is supposed to be part of the promise of copyright. To undermine this is to discourage creativity. If the rule is that making something that others find “silly” is free to steal, then intellectual property rights are arbitrary.

Picasso's *Bull's Head* is just a couple of bike parts. *My Nurse* by Oppenheim is shoes tied to a plate. Rothko painted rectangles.

Yeah, it's a stupid banana taped to a wall. But copyright protection is granted by a process and nowhere in this process is the accommodation to any given person's palate.

According to *Feist* the duct-tape banana is protected expression. According to *Google* artwork is entitled to a higher level of protection. According to *Harper* the duct-tape banana is the heart of the work. According to *Star Athletica* the duct-tape banana is perceived the same in either piece. According to *Warhol* the courts are not to play art critics.

In this case, the district court found no infringement because the judge decided there was only one way to tape a banana to a wall. The circuit panel decided the duct-tape bananas were not the same because there was an orange somewhere else in the plaintiff's display. Neither of these opinions are supported by caselaw anywhere.

The duct-tape banana in either piece is virtually identical, matching in unique and complex intricacies. They are by definition, strikingly similar. Yet, this was disregarded. The defendant has made great efforts to convince the court his piece was banal and commonplace: Nothing special "something anyone would do." But this story only appeared *after* he was sued. Up to that point it was quite the opposite.

It's hard to be an artist. But, the plaintiff is not asking anyone to buy his stuff—he is just asking that they not be allowed to steal it.

Yeah, it's just a stupid banana taped to a wall. But if copyright is only for works that are popular or successful, then there is no such thing as copyright protection. It is a sham.

The duct-tape banana may be seen as "silly" but it certainly exposed serious flaws in protection.

A. Background

Joe Morford is a Los Angeles based visual artist. In 2000 he completed a work entitled *Banana and Orange*. It is a combination of pre-existing material which was selected, coordinated and arranged in an original expression.

Banana and Orange is an abstract work in the tradition of the Surrealist movement of paired incongruity. See <https://tinyurl.com/28hnwbv9>. The work is an absurdist piece consistent with e.g. Dali's *Lobster Telephone* (© Salvador Dali, Gala-Salvador Dali Foundation/DACS 2023).

Banana and Orange was completed in 2000 and first published on audition notices, handbills and ultimately posters that year for a stage production with an irreverent theme entitled *Breakfast, Lunch & Dinner*. This play ran at the Raven Playhouse in North Hollywood (August 3 - September 9, 2001). *Banana and Orange* was first uploaded online as follows: Facebook (Joe Morford Artist) 07/23/2015; Blogspot (Joe Morford Artist) 07/02/2016; and YouTube (Lobster Parlour Art) 07/18/2008.

Banana and Orange was first posted online some 10 years prior to infringement. On two of these three sites, the piece was prominently featured during that time. The work was verifiably accessed in over 25 countries. All the content on all of the

plaintiff's art sites has been constantly publicly accessible since upload date and remains to this day.

Plaintiff became aware of the defendant's duct-taped banana in late 2019 via a Facebook meme. Plaintiff immediately recognized it being from his work *Banana and Orange*. After brief research, the plaintiff learned the piece was titled *Comedian* and was presented by someone named "Maurizio Cattelan."

On 01/25/2020 plaintiff applied for copyright registration for *Banana and Orange*. On November 19, 2020 the plaintiff was advised that copyright for *Banana and Orange* had been approved. The copyright registration number is VA0002223672.

B. Procedural History

Upon receiving the approval of the copyright, plaintiff filed a complaint for copyright infringement per Section 504(c) of the Copyright Act. Per 28 U.S.C. § 1338. And as the display and sales of the piece *Comedian* took place at ArtBasel in Miami, the Southern District of Florida would have jurisdiction over the case. The complaint was filed in Federal Court the Southern District of Florida, Miami on 01/04/2021 and entered on FLSD Docket on 01/06/2021.

On 06/09/2023 the district court granted summary judgement in favor of the defendant. This decision was appealed. On 08/16/2024 the appeals court affirmed the district court's decision. The plaintiff requested a rehearing en banc. On 10/15/2024 the petition for rehearing en banc was denied.

In *Morford v. Cattelan*, the circuit panel reduced its decision to two key elements 1) striking

similarity; and 2) reasonable access. They denied the existence of either. The rulings by the circuit are clearly erroneous. The panel ruling is contrary to US Supreme Court and Circuit precedent.

REASONS FOR GRANTING THE WRIT

This case is about two compilation wall sculptures of duct-tape bananas. The circuit ruled the plaintiff was unable to establish reasonable access or striking similarity to his duct-tape banana. They affirmed the district court's summary judgment order in favor of the defendant. These are reversible errors that negatively impacted the plaintiff's case.

This case deepens an acknowledged and entrenched conflict regarding protected expression in compilations. The Supreme Court has previously granted certiorari addressing importance of portions in compilations. *See Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218 (1985). And this court has twice granted certiorari involving the assessment of similarity in compilations. *See Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991). And *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 209 L. Ed. 2d 311 (2021). Both of these issues are at the forefront here. This case presents an opportunity for this court to resolve how similarity is assessed in alternate categories of compilations. In *Google*, the Supreme Court noted the divergence in the circuits; however, the Court did not conclude what standard should be applied regarding creative compilations that are non-utilitarian. Though it was made clear that such works were entitled to broader protection. *See Google*, 141 S. Ct. 1183, 1197 (2021).

As well, regarding access, this case presents an opportunity for precedent setting resolution of the inverse-ratio-rule. There remain significant splits between the circuits on application of this standard which is increasingly impacted by internet exposure. This issue illustrates an urgent need for resolution in order to maintain unity among the circuits and effectively afford copyright protection. This includes the First Impression consideration of the role of social media analytics.

The circuit splits on these issues indicate that this action would have come out differently had it been filed in an alternate court. This case provides a vehicle to resolve this division among the federal circuits.

In the Eleventh Circuit, to establish a claim of copyright infringement, a plaintiff must prove, first, that they own a valid copyright in a work and, second, that the defendant copied original elements of that work. Here, the plaintiff has a valid copyright and has shown the requisite copying.

I. SIMILARITY

The plaintiff is suing for infringement of the duct-tape banana in his wall sculpture *Banana and Orange*. The duct-tape banana is protected expression. In order to determine if copying took place, the articles are to be compared. However, instead of comparing the relevant portions, the panel compared the entire works and pointed to material elsewhere that was not infringed. They claimed these differences, outside of the duct-tape bananas, negated striking similarity *between* the duct-tape bananas. In doing so, the panel determined the

entire works had to be the same in order for the duct tape bananas to be deemed strikingly similar.

There are two types of similarity: 1) Factual; and 2) Actionable. Factual determines copying; Actionable determines infringement. There are two ways to show factual copying: 1) Striking Similarity; or 2) Probative Similarity plus Access. Striking similarity may prove copying and negate the requirement to show access to the original work. Striking similarity must possess a shared likeness that is either unique *or* complex and is required to be “virtually identical.” It is not required to be “exactly alike.” *See Olem Shoe Corp. v. Wash. Shoe Corp.*, No. 12-11227, 23 (11th Cir. 2015). Striking similarity may be present in portions or entire works. The threshold is applied under one of two standards. This is the bodily appropriation or substantial similarity standard(s). They are defined as follows:

The bodily appropriation standard requires an entire work to be virtually identical to prove copying and infringement. *See Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1186 (9th Cir. 2018) (“In the context of factual compilations, we have held that infringement should not be found in the absence of “bodily appropriation of expression”).

The substantial similarity standard identifies portions to determine factual copying (probative or striking); then compares those portions to the overall work to determine actionability. *See Compulife Software, Inc. v. Newman*, No. 21-14071, 9 (11th Cir. 2024) (“The factual copying inquiry is “whether the defendant, as a factual matter, copied

portions of the plaintiff's program.""). And *See Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 370 (5th Cir. 2004) ("[A] finding of factual copying only requires similarity between portions of the plaintiff's work, not overall similarity."). And striking similarity may be present in very small amounts of expression in compilations. *See Educational Testing Services v. Katzman*, 793 F.2d 533, 541 (3d Cir. 1986) ("[O]ur examination discloses that at least some of Review's questions are so strikingly similar to those prepared by ETS as to lead to no other conclusion than that they were copied."). Specifically, other circuits have identified "striking" similarity in portions of works consisting of a combination of otherwise unprotected elements. *See Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002). And *See Bouchat v. Baltimore Ravens*, 228 F.3d 489, 494 (4th Cir. 2000); 228 F.3d 489, 503 (4th Cir. 2000). And *See Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 62 (1st Cir. 2000). And *See Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995).

A. The Circuits Are Split

There is a 4-4 split in the circuits regarding the use of the bodily appropriation standard in compilations.

Substantial Similarity Standard (4): *See Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 514 (2d Cir. 1991). And *See Educational Testing Services*, 793 F.2d 533, 541 (3d Cir. 1986). And *See Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003). And *See Gates Rubber*

Co. v. Bando Chemical Industries, Ltd., 9 F.3d 823, 839 (10th Cir. 1993).

Bodily Appropriation Standard (4): *See Atari Games Corp. v. Oman*, 979 F.2d 242, 244 n.4 (D.C. Cir. 1992). And *See Infogroup, Inc. v. Database LLC*, 956 F.3d 1063, 1066-67 (8th Cir. 2020). And *See Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc.*, 893 F.3d 1176, 1186 (9th Cir. 2018). And *See MiTek Holdings, Inc v. Arce Engineering Co.*, 89 F.3d 1548, 1558 (11th Cir. 1996).

Determination of relevant similarity can both establish copying and negate access, this split presents different outcomes depending on where a case is filed. Contrary to its stated default, the 11th Circuit has applied a bodily appropriation standard to the wall sculpture in this case.

B. The 11th Circuit's Decision Is Wrong

In this case, the 11th Circuit court of appeals has entered a decision in conflict with the decision of other United States court of appeals on the same important matter.

Factual similarity should not be assessed under a bodily appropriation standard as creative works never require identical replication to establish copying for obvious reasons. *See Harper*, 471 U.S. 539, 583 n.5 (1985) ("Otherwise a plagiarist could avoid infringement by immaterial variations."). Requiring identical replication in artwork would allow an infringer to copy significant portions of protected expression without penalty. Which is exactly what happened here.

Artistic compilations are afforded broader protection and should be assessed under the

substantial similarity standard. *See McCulloch*, 823 F.2d 316, 321 (9th Cir. 1987) (“Works that are not factual receive much broader protection under the copyright laws because of the endless variations of expression available to the artist.”).

The selection, coordination and arrangement of the duct-tape banana is protected expression as established in *Feist*. And wholesale copying is not required to show similarity in all compilations. *See Bellsouth Adv. Pub. v. Donnelley Info. Pub.*, 999 F.2d 1436, 1478 (11th Cir. 1993) (“*Key Publications*, 945 F.2d at 514 ([R]ejecting arguments that *Feist* requires a subsequent compiler to produce an “exact replica” of the copyrighted compilation”). Further, the Supreme Court has acknowledged the stronger protections afforded to creative, non-utilitarian, works when discussing compilations in *Google*. *See Google*, 141 S. Ct. 1183, 1197 (2021) (“Thus, copyright’s protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function.”). And the default analysis for compilations for the 11th circuit is substantial similarity. *See Compulife*, 959 F.3d 1288, 1302 (11th Cir. 2020) (“(*BellSouth* established the ‘substantial similarity’ standard as the default mode of analysis for compilation copyright claims.”). Consequently, it is clear that the panel had to intentionally depart from convention in order to apply a bodily appropriation standard to this wall sculpture.

Striking similarity between the duct tape bananas is established as they are the same unconventional combination of incongruous material,

which create a visual illusion and are presented in the same manner. They are virtually identical and, by definition, unique or complex. Moreover, if the defendant's duct-tape banana is not strikingly similar, then what would be?

The panel created dissimilarity where there is none. The circuit acknowledged the unique similarity between the portions; then diluted it by injecting material from elsewhere into the comparison. Factual similarity between portions is never disposed of by pointing to alternate content. *See Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) ("Moreover, no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated."). As well, such practices have long been rejected in copyright assessment. *See Harper*, 471 U.S. 539, 565 (1985) ("[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate.").

Here, the only case law cited by the panel in explanation was expressly *not* a compilation. *See Corwin v. Walt Disney*, 475 F.3d 1239, 1251 n.8 (11th Cir. 2007) ("[W]e conclude that the Painting is not appropriately analyzed as a compilation. 17 U.S.C. § 101."). Further, *Corwin*, dealt with utilitarian works where no like portions of protected expression were identified. In this case, the work is not utilitarian, and the relevant protected portion is clearly identified. And unlike *Corwin*, the originality of the duct-tape banana was explained and the plaintiff pointed out how the expressive effect was duplicated in the defendant's piece. And at the level of protected expression the relevant articles are strikingly similar. Importantly, no differences

between the duct-tape bananas were cited by the circuit panel in this case. And pointing to differences elsewhere in the plaintiff's display does nothing to change this. *Corwin* does not support either the panel's analysis or judgement. The panel's analysis of striking similarity in this case does not follow the law.

Even when comparing whole works side-by-side, identified factual similarity in portions is not affected by the presence of material elsewhere. This includes evaluation under dissection, total concept and feel, more discerning/ordinary reasonable observer test(s), extrinsic/intrinsic, idea/expression dichotomy, etc. In fact, if anything, unprotected elements may provide further evidence of copying. *See Gates*, 9 F.3d 823, 833 n.7 (10th Cir. 1993) ("The fact that non-protectable elements of the original program were also copied, although it cannot be the basis for liability, can be probative of whether protected elements were copied."). Consider, here, either piece manifest as fine art compilation wall sculptures where taped fruit is not dictated by form.

The panel has attempted to erase the obvious. The circuit acknowledged the unique likeness between the two duct-tape bananas. This constitutes both probative and striking similarity. Yet, the panel then oddly references the fact that "identical expression does not necessarily constitute infringement." While true, such an observation is irrelevant as factual similarity establishes **copying**—not **infringement**. Actionable similarity determines infringement, and the panel has stated they are not addressing this. And there is no caselaw, which

allows for multiple standards to be applied out-of-context in order to support a desired result.

This decision is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

II. ACCESS

The access in this case is determined on a sliding scale called the “inverse ratio rule.” This means a popular piece is required to show less of a similarity, while a more unknown work must show a greater similarity in order to establish exposure. This rule assumes the work of those who are not famous cannot be reasonably found online.

Consequently, the panel dismissed striking similarity and required the plaintiff to show access under the inverse-ratio rule. *See Shaw v. Lindheim*, 908 F.2d 531, 539 (9th Cir. 1990) (“[A] very high degree of similarity is required in order to dispense with proof of access, it must logically follow that where proof of access is offered, the required degree of similarity may be somewhat less than would be necessary in the absence of such proof.”). The panel chose to apply this rule even though the 11th Circuit has stated they do not use the inverse-ratio-rule. *See Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994) (“[T]he inverse-ratio rule has never been applied in this Circuit.”).

A. The Circuits Are Split

There is a 4-2 split regarding the inverse ratio rule. *See Skidmore v. Zeppelin*, 952 F.3d 1051, 1066 (9th Cir. 2020) (“The circuits are split over the inverse ratio rule, but the majority of those that have

considered the rule declined to adopt it. The Second, Fifth, Seventh, and Eleventh Circuits have rejected the rule.”). The 9th has since abrogated the rule. *See Skidmore*, 952 F.3d 1051, 1066 (9th Cir. 2020) (“Because the inverse ratio rule, which is not part of the copyright statute, defies logic, and creates uncertainty for the courts and the parties, we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary.”). Such a practice undermines aspiring artists by denying protection against infringement simply because they are not famous. *See Skidmore*, 952 F.3d 1051, 1068 (9th Cir. 2020) (“To the extent “access” still has meaning, the inverse ratio rule unfairly advantages those whose work is most accessible by lowering the standard of proof for similarity.”). Copyright protection should not be for celebrities only. *See Skidmore*, 952 F.3d 1051, 1068 (9th Cir. 2020) (“[N]othing in copyright law suggests that a work deserves stronger legal protection simply because it is more popular or owned by better-funded rights holders.”).

B. The 11th Circuit’s Decision Is Wrong

The 11th Circuit court of appeals has entered a decision in conflict with the decision of other United States court of appeals on the same important matter.

Most other circuits have rejected the inverse ratio rule. The 9th Circuit abrogated the rule entirely in en banc ruling. Here the 11th Circuit applied the rule, even against its prior rejection; then refused to address the ruling en banc. This presents a clear and significant conflict between the circuits on a fundamentally important matter.

The standard for demonstrating access is direct proof, chain of events or wide dissemination. In this case, the plaintiff, demonstrated the wide dissemination of his work. And the chasm of interpretation for such exposure has grown commensurate with the internet.

Wide dissemination is assessed differently in the circuits. *See Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) (““The evidence required to show widespread dissemination will vary from case to case.””). In this case, the circuit chose to apply a “publicity” or “success” standard. *See Batiste v. Lewis*, 976 F.3d 493, 503 (5th Cir. 2020) (“Simply put, the plaintiff must show that the work has enjoyed considerable success or publicity.”). This rule, as related to the internet, is particularly inaccurate. *See Skidmore*, 952 F.3d 1051, 1068 (9th Cir. 2020) (“As a practical matter, the concept of “access” is increasingly diluted in our digitally interconnected world. Access is often proved by the wide dissemination of the copyrighted work.”). In this case, the plaintiff provided proof of wide dissemination via continuous worldwide public availability over an extended period in relevant online corridor(s). Yet, this was determined to be insufficient.

The inverse-ratio-rule rewards the renowned and threatens the obscure. The impact of this ultimately chills creativity—the opposite of the law’s stated intention to “... promote the progress of science and useful arts.” (Article I, Section 8, Clause 8 and U.S. Code: Title 17).

The courts are not bound to follow an outdated and hollow interpretation of law. *See Stewart v.*

Abend, 495 U.S. 207, 236 (1990) (“permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”).

If reasonable access is to be required, there are more accurate ways to determine this, certainly regarding online material. To that end, this case requests a First Impression consideration for the inclusion of social media Analytics, where available, in order to substantiate access when necessary. In this case the plaintiff provided such Analytics, which were given no evidentiary weight even though they clearly showed relevant access.

Here, the 11th Circuit court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The panel applied the inverse ratio rule to the plaintiff’s online postings and required him to present significant “success” or “publicity” to prove his works were accessible. Such a standard is blatantly inaccurate, obsolete and baselessly discriminatory in the cyberworld. The applied threshold ignores the nature of the internet where virtually anything can be found at any time world over. And such exposure is accomplished not only by proactive search, but also by passive delivery via profiling.

Moreover, the plaintiff does not ask that any level of access alone prove copying or infringement. Copying is proven via demonstrable levels of otherwise inexplicable similarity. Using the inverse ratio rule to pretend the work was not accessible and dismiss the plaintiff’s case is not copyright law.

The circuit ruled that the duct tape bananas do not look alike because there was a duct tape orange somewhere else, and the plaintiff's work could not be found online because he was not a celebrity. This is not copyright law.

There are clear issues of law here regarding material facts. Summary judgment should have never been awarded for the defendant. *See Beal*, 20 F.3d 454, 460 (11th Cir. 1994) (“[A] genuine issue of material fact would preclude summary judgment.”).

Had the plaintiff filed this action in another circuit, it would have had a different outcome.

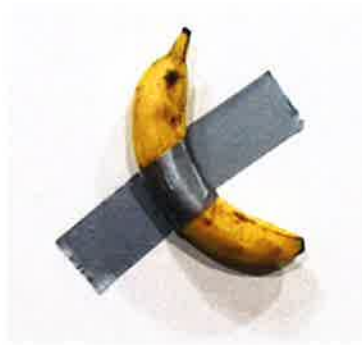
III. REFERENCE

Proportional Comparison

A. Striking Similarity

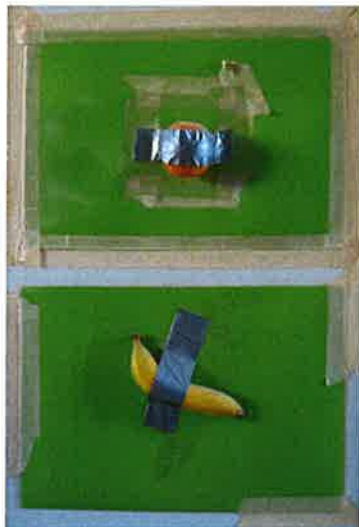


Plaintiff
Duct-Taped Banana



Defendant
Duct-Taped Banana

B. Substantial Similarity



Banana and Orange



Comedian

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/Joe Morford

pro se

1125 E. Broadway #216

Glendale, CA 91205

(818) 422-9263

joemorford@gmail.com

TABLE OF APPENDICES

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1a

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 23-12263

JOE MORFORD,

Plaintiff-Appellant,

versus

MAURIZIO CATTELAN,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-20039-RNS

JUDGMENT

ISSUED AS MANDATE 10/23/2024

(1a)

2a

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 16, 2024

For the Court: DAVID J. SMITH, Clerk of Court

3a

UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 23, 2024

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 23-12263-CC
Case Style: Joe Morford v. Maurizio Cattelan
District Court Docket No: 1:21-cv-20039-RNS

A copy of this letter, and the judgment form if noted above, but not a copy of the court's decision, is also being forwarded to counsel and pro se parties. A copy of the court's decision was previously forwarded to counsel and pro se parties on the date it was issued.

The enclosed copy of the judgment is hereby issued as mandate of the court.

The court's opinion was previously provided on the date of issuance.

Clerk's Office Phone Numbers

General Information: 404-335-6100

4a

Case Administration: 404-335-6135

CM/ECF Help Desk: 404-335-6125

Attorney Admissions: 404-335-6122

Capital Cases: 404-335-6200

Cases Set for Oral Argument: 404-335-6141

Enclosure(s)

MDT-1 Letter Issuing Mandate

5a

APPENDIX B

**UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

**ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303**

David J. Smith
Clerk of Court

For rules and forms visit
www.call.uscourts.gov

October 15, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-12263-CC
Case Style: Joe Morford v. Maurizio Cattelan
District Court Docket No: 1:21-cv-20039-RNS

The enclosed order has been entered on petition(s)
for rehearing.

See Rule 41, Federal Rules of Appellate Procedure,
and Eleventh Circuit Rule 41-1 for information
regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

General Information: 404-335-6100
Case Administration: 404-335-6135
CM/ECF Help Desk: 404-335-6125
Attorney Admissions: 404-335-6122
Capital Cases: 404-335-6200
Cases Set for Oral Argument: 404-335-6141

REHG-1 Ltr Order Petition Rehearing

6a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12263

JOE MORFORD,

Plaintiff-Appellant,

versus

MAURIZIO CATTELAN,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-20039-RNS

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

7a

Before JORDAN, JILL PRYOR and BRANCH,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

8a

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOE MORFORD,
Plaintiff-Appellant,

versus

MAURIZIO CATTELAN,
Defendant-Appellee.

No. 23-12263

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-20039-RNS

JUDGMENT

9a

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 16, 2024

For the Court: DAVID J. SMITH, Clerk of Court

10a
APPENDIX D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOE MORFORD,

Plaintiff-Appellant,

versus

MAURIZIO CATTELAN,

Defendant-Appellee.

No. 23-12263

Non-Argument Calendar

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cv-20039-RNS

Before JORDAN, JILL PRYOR and BRANCH,
Circuit Judges.

PER CURIAM:

Joe Morford, a California artist proceeding *pro se*, appeals the district court's grant of summary judgment in favor of Italian artist Maurizio Cattelan in a suit claiming that Mr. Cattelan's work, *Comedian*, infringed the copyright on his work, *Banana and Orange*. Both works involve the application of duct tape to a banana against a flat surface. Mr. Cattelan's now-viral piece sold at Miami's Art Basel for over \$100,000. Mr. Morford claims that piece was a copy. On summary judgment, the district court held, among other things, that Mr. Morford failed to show that Mr. Cattelan had a reasonable opportunity to access Mr. Morford's *Banana and Orange* piece, and thus, did not meet the standard for either probative or striking similarity to establish a copyright claim.

Upon review, we affirm.¹

I

We review the district court's ruling on summary judgment *de novo*. See *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010). We will affirm the district court's grant of summary judgment if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See *id.* at 1263–64; Fed. R. Civ. P. 56(a).

¹ Photos of the two works are attached as an appendix.

We view the record, and all its inferences, in the light most favorable to Mr. Morford. *See Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207 (11th Cir. 1997). A genuine issue of material fact is one that can be resolved properly only by a factfinder because it “may reasonably be resolved in favor of either party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A non-movant’s failure to prove an essential element of its claim renders all factual disputes as to that claim immaterial and requires the district court to grant summary judgment to the movant. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

II

On appeal, Mr. Morford argues that because he can demonstrate striking similarity between *Banana and Orange* and *Comedian*, he was not required to proffer evidence of access to show copyright infringement. In the alternative, he argues that he can show substantial similarity and that Mr. Cattelan had a reasonable opportunity to access *Banana and Orange* because it was widely disseminated and readily discoverable online. We agree with the district court that Mr. Morford did not put forth sufficient evidence to create a jury issue on whether Mr. Cattelan had access to *Banana and Orange*. We also agree that Mr. Cattelan’s *Comedian*, while similar to *Banana and Orange*, does not meet the high standard for “striking similarity.”

A

To establish a *prima facie* case for copyright infringement, the plaintiff must prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”

Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1541 (11th Cir. 1996) (quoting *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). Copying requires both factual and legal copying, *i.e.*, the plaintiff must show both that (1) the defendant actually used the copyrighted work, and (2) the copied elements are protected expression such that the appropriation is legally actionable. *See Compulife Software, Inc. v. Newman*, 959 F.3d 1288, 1301–02 (11th Cir. 2020).

A plaintiff may show factual copying by either direct evidence, or in the absence of direct evidence, indirect evidence “demonstrating that the defendant had access to the copyrighted work and that there are probative similarities between the allegedly infringing work and the copyrighted work.” *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996). Access requires the plaintiff to show that the defendant had “a reasonable opportunity to view the work in question.” *Corwin v. Walt Disney World Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) (internal citation and quotations omitted). Importantly, the term “[r]easonable opportunity does not encompass any bare possibility in the sense that anything is possible,” and “[a]ccess may not be inferred through mere speculation or conjecture.” *Herzog v. Castle Rock Ent.*, 193 F.3d 1241, 1250 (11th Cir. 1999) (internal citation and quotations omitted). Importantly, a plaintiff cannot prove access only by demonstrating that a work has been disseminated in places or settings where the defendant may have come across it. *See id.* at 1249–52 (holding that a “nexus” between the plaintiff and the defendant is required to establish an inference of access where the plaintiff’s work was disseminated in

a setting where the defendant may have come across the work).

Here, the district court did not err in granting summary judgment in favor of Mr. Cattelan. Mr. Morford did not put forth sufficient evidence to establish the requisite nexus between his *Banana and Orange* work and Mr. Cattelan, and therefore, failed to create a jury issue on whether Mr. Cattelan had a reasonable opportunity to access *Banana and Orange*. See, e.g., *Herzog*, 193 F.3d at 1249–50 (agreeing that the plaintiff did not assert sufficient evidence to refute the defendant’s testimony that he had never heard of or seen the plaintiff’s work prior to the lawsuit); *Benson v. Coca-Cola Co.*, 795 U.S. 973, 975 (11th Cir. 1986) (evidence was insufficient to establish access where the plaintiff performed song primarily in South Florida, performed it on isolated occasions in three other states, and there was no evidence that any of the defendant’s songwriters visited these venues during the relevant time period).

Mr. Morford presented evidence that his *Banana and Orange* piece was available on his public Facebook page for nearly ten years, was featured in one of his YouTube videos, and was also featured on a blog post. Based on online metrics, he posits that his website has been viewed in over 25 countries, with thousands of unknown viewers potentially coming across *Banana and Orange* during that time. But even if we were to decide to adopt a “widespread dissemination” approach, Mr. Morford’s evidence misses the mark. Circuits that have adopted a “widespread dissemination” standard require that a plaintiff “show that the work has enjoyed considerable success or publicity.” *Batiste v.*

Lewis, 976 F.3d 493, 503–04 (5th Cir. 2020) (collecting cases). Mr. Morford has not done so. *Banana and Orange’s* mere availability on the internet, without more, is too speculative to find a nexus between *Mr. Cattelan* and Mr. Morford to satisfy the factual copying prong of his infringement claim.

B

Nonetheless, where a plaintiff cannot demonstrate access, he or she may “establish copying by demonstrating that [the] original work and the putative infringing work are strikingly similar.” *Corwin*, 475 F.3d at 1253 (citation omitted). A striking similarity exists where the similarity in appearance between two works is “so great it precludes the possibility of coincidence, independent creation or common source.” *Benson*, 795 F.2d at 975 n.2. In ascertaining whether there is a striking similarity, we address the “uniqueness or complexity of the protected work as it bears on the likelihood of copying.” *Id.* This is a high burden.

Mr. Morford asserts that he has established striking similarity based on the same two incongruous items being chosen, grouped, and presented in the same manner within both works. But even “identical expression does not necessarily constitute infringement.” *Calhoun*, 298 F.3d at 1232 & n.9. *Cf. Orig. Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 n.11 (11th Cir. 1982) (cautioning district courts “not to be swayed by the fact that two works embody similar or even identical ideas”); *Franklin Mint Corp. v. Nat’l Wildlife Art Exchange, Inc.*, 575 F.2d 62, 66–67 (3d Cir. 1978) (though ideas in the two paintings of cardinals involved were similar, the expressions were not, and

thus, no copyright infringement). Although the use of the same two incongruous items (a banana and duct tape) are indeed similar, there are sufficient differences in the two displays to preclude a finding of striking similarity. For example, *Banana and Orange* contains both a banana and an orange held by duct tape, while *Comedian* only contains a banana held by duct tape. *See, e.g., Corwin*, 475 F.3d at 1254 (concluding that plaintiff failed to raise a genuine issue of material fact as to striking similarity where there were significant differences between the two manifestations of the design, including, the presence of several elements in one that were not present in the other).

III

Because Mr. Morford was unable to establish reasonable access or striking similarity, we affirm the district court's summary judgment order in favor of Mr. Cattelan.²

AFFIRMED.

² Because we rule on these grounds, we do not address the district court's additional or alternative holdings, such as the analysis on whether Mr. Morford established substantial similarity (or probative similarities) or the applicability of the merger doctrine.

17a
APPENDIX



Orange and Banana, D.E. 76-2



Comedian, D.E. 74-1

18a

**UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

David J. Smith
Clerk of Court

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING

56 Forsyth Street, N.W.
Atlanta, Georgia 30303

For rules and forms visit
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August 16, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-12263-CC

Case Style: Joe Morford v. Maurizio Cattelan District
Court Docket No: 1:21-cv-20039-RNS

Opinion Issued

Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing

The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard. See 11th Cir. R. 35-5(k) and 40-1.

Costs

Costs are taxed against Appellant(s) / Petitioner(s).

Bill of Costs

If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees

The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information: 404-335-6100

Case Administration: 404-335-6135

CM/ECF Help Desk: 404-335-6125

Attorney Admissions: 404-335-6122

Capital Cases: 404-335-6200

Cases Set for Oral Argument: 404-335-6141

OPIN-1 Ntc of Issuance of Opinion

APPENDIX E

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA**

JOE MORFORD,
Plaintiff,

v.

MAURIZIO CATTELAN,
Defendant.

Civil Action No. 21-20039-Civ-Scola

Order on Cross-Motions for Summary Judgment

This matter is before the Court on the parties' cross motions for summary judgment. The Defendant, Maurizio Cattelan, moves for summary judgment on pro se Plaintiff Joe Morford's claim for copyright infringement. (Def.'s Mot. Summ. J., ECF No. 79.) The Plaintiff also moves for summary judgment on his copyright infringement claim. (Pl.'s Mot. Summ. J., ECF No. 81; Pl.'s Memo. Supp. Mot. Summ. J. ("Memo."), ECF No. 82.) Both parties have responded to each other's motions. (Pl.'s Resp., ECF No. 90; Def.'s Resp., ECF No. 88.) And both parties have replied in support of their own motions. (Def.'s Reply, ECF No. 95; Pl.'s Reply, ECF No. 96.) After careful consideration of the briefing, the record, and the relevant legal authorities, the Court **grants** the Defendant's motion for summary judgment (**ECF No. 79**) and **denies** the Plaintiff's motion (**ECF No. 81**).

1. Background

“Life imitates art far more than art imitates life.” Oscar Wilde, *The Decay of Lying* (1891). Few people, least of all Maurizio Cattelan, probably expected that his now-infamous, absurdist display of a banana duct-taped to a wall at Art Basel Miami in 2019 would end in litigation. In 2020, however, fellow visual and conceptual artist Joe Morford sued Cattelan, bringing this action for copyright infringement. Morford alleges that Cattelan’s banana-on-the-wall from Art Basel—named *Comedian*—unfairly copies his own banana-on-a-wall work, named *Banana and Orange*. (Compl., ECF No. 1.)

Previously, the Court denied Cattelan’s motion to dismiss Morford’s complaint. In doing so, the Court found that it could not resolve the alleged similarities or dissimilarities between the two works as a purely legal matter based only on the pictures and descriptions provided in Morford’s complaint. (Order Denying Mot. Dismiss, ECF No. 56.) Now, after the close of discovery, both Morford and Cattelan move for summary judgment, asserting that Morford’s sole claim for copyright infringement can be resolved on the present record. The undisputed materials facts are these.

Maurizio Cattelan, a self-described “visual and conceptual artist” and Italian citizen, designed *Comedian* for the Art Basel Miami art fair in December of 2019. (Def.’s Statement of Material Facts (“SOMF”) ¶¶ 2-3, 18, 20, ECF No. 78; M. Cattelan Decl. dated Mar. 2, 2023 (“Cattelan Decl.”) ¶¶ 3, 14-15, ECF No. 74-1.) *Comedian*—a banana duct-taped to a wall—was meant to be “simple,” “banal,” and to reflect “absurdity.” (Def.’s SOMF ¶¶

19-13; Cattelan Decl. ¶¶ 14-16.) Joe Morford, a California citizen who is also a conceptual artist, designed his own banana-duct-taped-to-a-wall work (*Banana and Orange*) in 2001. (Pl.'s SOMF ¶¶ 1-5, ECF No. 83; J. Morford Decl. dated Mar. 3, 2023 ("First Morford Decl.") Ex. 1 at 3-5, ECF No. 84-1; Dep. Tr. of J. Morford dated Dec. 9, 2022 ("Morford Dep.") at 8:16-22, ECF No. 76-1.)

The two works are provided below, with Morford's *Banana & Orange* (Figure 1)¹ on the left and Cattelan's *Comedian* (Figure 2)² on the right:



Figure 2: *Banana and Orange*



Figure 1: *Comedian*

Figure 1: *Comedian*

Figure 2: *Banana and Orange*

1 (Morford Dep. Ex. 2, ECF No. 76-2.)

2 (Def.'s SOMF ¶ 29; Cattelan Decl. ¶ 21.)

The Court now reviews the undisputed facts as they stand with regards to the composition of each work.³

First, the basic similarities. Both works are three-dimensional wall sculptures depicting bananas that are duct-taped to a vertical surface. (Pl.'s SOMF ¶¶ 14-15, Def.'s SOMF ¶¶ 19-27.) In each sculpture, a single piece of plain gray duct tape crosses a yellow banana at an angle and affixes the banana to a vertical surface. (Pl.'s SOMF ¶ 12, Def.'s SOMF ¶ 29.) In both sculptures, the banana is oriented with the stalk on the top, left-hand side of the work from the viewer's perspective. (Pl.'s SOMF ¶ 12, Def.'s SOMF ¶ 29.)

Second, the more specific characteristics of each work. *Banana and Orange* depicts both a banana and an orange, with the orange taped above the banana. (Morford Dep. at 101-112, ECF No. 76-1; Morford Dep. Ex. 2.) Both the banana and the orange are centered on solid green rectangular panels. (Morford Dep. Ex. 2.)

³ The Court observes at this juncture that the parties do not necessarily agree with each other's phrasing of specific observations about the two works, or about other presented facts. The Court will cite to underlying source documents for each fact that it finds to be undisputed where applicable. Frequently, the parties dispute a particular fact offered by the other side without providing any evidentiary support establishing that fact to be in dispute. A party may not simply object to the other's facts and survive summary judgment; he must instead point to evidence that raises a dispute with regards to the veracity of that fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Each of those panels is bounded by plain masking tape. (*Id.*; Morford Dep. at 107:6-15.) Both pieces of fruit are plastic sculptures. (Morford Dep. at 88:2 – 90:25.) The orange is duct-taped with the tape running nearly horizontal, while the banana is at a slight angle (less than 45° from horizontal), with the stalk of the banana rising and pointing slightly towards the left, and the duct tape crossing the banana in a nearly perpendicular manner. (Morford Dep. Ex. 2.)

Comedian, meanwhile, depicts only a banana duct-taped directly to a wall. (Def.'s SOMF ¶¶ 19-21; Cattelan Decl. ¶¶ 14-15.) The banana in *Comedian* is a real banana; any regular banana from any store may be used in the work. (Def.'s SOMF ¶ 20; Cattelan Decl. ¶ 15.) The work does not specify a specific color for its background; any wall will do. (Def.'s SOMF ¶ 47; Cattelan Decl. ¶¶ 31-33.) There is no border around the banana. (Def.'s SOMF ¶ 49; Cattelan Decl. ¶ 34.) Because the banana is taped directly to the wall, *Comedian* sets out a very specific height at which it is to be placed above the floor. (Def.'s Sealed SOMF ¶ 28.)⁴ The banana is placed with the stalk to the left, and it is at a strong angle (greater than 45° from horizontal), with the stalk rising and pointing back

⁴ The exact specifications of *Comedian's* installation were filed under seal, and the Court need not recount them precisely here. (Def.'s Sealed SOMF ¶ 28, ECF No. 86-2, sealed.) Instead, the Court observes that *Comedian* has such specifications and will address them only in reference to their similarity, or lack thereof, with *Banana and Orange*.

towards the right. (Def.'s SOMF ¶ 49; Cattelan Decl. ¶ 34.)

Morford originally developed *Banana and Orange* in California in 2001, and the work has been available on the internet through several websites for a number of years. (Pl.'s SOMF ¶¶ 6-9; First Morford Decl. Ex. 1 at 3-7.)⁵ *Banana and Orange* was first made available on YouTube on July 18, 2008, and has been viewable in a brief portion of a video there since. (Pl.'s SOMF ¶ 6; First Morford Decl. Ex. 1 at 5.) The work has also been shared on Facebook through a single post and on Blogspot via a blog post since July 23, 2015, and July 2, 2016, respectively. (Pl.'s SOMF ¶¶ 7-8; First Morford Decl. Ex. 1 at 6-7.) Additionally, Morford puts forward some screenshots of website analytics purportedly demonstrating that, between these three sites, *Banana and Orange* has been viewed by internet users in twenty-five different countries. (Pl.'s SOMF ¶ 9; First Morford Decl. Ex. 1 at 18-20.) Finally, Morford registered a copyright for *Banana and Orange* in 2020: he originally submitted his application on January 25, 2020, and after an initial denial and resubmission, the United States Copyright Office approved his

⁵ Cattelan objects to the admissibility of Morford's evidence under Federal Rules of Evidence 402, 403, 802, 901, and 901. (Def.'s Resp. Pl.'s SOMF ¶¶ 6-9, ECF No. 89.) The Court assumes the admissibility of the documents Morford offers to support those facts without deciding that they are actually admissible. As the Court addresses below in Section 3(A), even taken fully at face value, Morford's proof of internet presence is not sufficient to support a finding that Cattelan had access to *Banana and Orange*.

application on November 19, 2020. (Def.'s SOMF ¶¶ 38-42; Pl.'s Resp. Def.'s SOMF ¶¶ 38-42.)

Cattelan, on the other hand, submits his own declaration and the declaration of one of his employees in Italy describing the process by which he created *Comedian*. Cattelan relates that he conceived of the idea for *Comedian* in response to a request in September of 2019 to present a work at the Art Basel art fair in Miami, scheduled for December of 2019. (Def.'s SOMF ¶¶ 18-19; Cattelan Decl. ¶¶ 13-15.)⁶ Cattelan drew his inspiration from an idea he had previously used in a work for *New York Magazine* in 2018, where he had depicted a banana hanging from a billboard with red duct-tape. (Def.'s SOMF ¶¶ 11-16; Cattelan Decl. ¶¶ 8-11.) Based on this inspiration, Cattelan made some changes to the *New York Magazine* banana piece and asked his employees in Italy to test out bananas taped to the wall of his studio at different heights and angles. (Def.'s SOMF ¶¶ 21-24; Cattelan Decl. ¶¶ 15-18.) Cattelan chose the final specifications for *Comedian* following that experimentation. (Def.'s SOMF ¶ 25; Cattelan Decl. ¶ 19.) One of Cattelan's employees, Jacopo Zotti, corroborates Cattelan's account of *Comedian's* development process. (J. Zotti Decl.

⁶ Morford disputes much of what Cattelan asserts in the declaration, claiming that Morford "has no idea if this is true," asserting that Cattelan's statements are "baseless," or arguing that Cattelan's statements are invalid. (*See, e.g.*, Pl.'s Resp. Def.'s SOMF ¶¶ 1-31, ECF No. 91.) But Morford presents no evidence—testamentary or otherwise—to refute Cattelan's statements. (*See id.*)

dated Mar. 3, 2023 (“Zotti Decl.”) ¶¶ 5-7, ECF No. 75-1.) Finally, Cattelan expressly states that he has never heard of Joe Morford prior to this lawsuit and was similarly unaware of *Banana and Orange*. (Def.’s SOMF ¶¶ 32-33; Cattelan Decl. ¶¶ 24-27.)

2. Legal Standard

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. The moving party bears the burden of proof to demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. “An issue of fact is ‘material’ if, under the applicable substantive law, it might affect the outcome of the case.” *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259–60 (11th Cir.2004). “An issue of fact is ‘genuine’ if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party.” *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories

and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323–24. The nonmovant’s evidence must be significantly probative to support the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court will not weigh the evidence or make findings of fact. *Anderson*, 477 U.S. at 249; *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court’s role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the nonmoving party. *Id.*

Finally, where the moving party has asserted affirmative defenses, it bears the burden of proof to show that no genuine issue of material fact exists with respect to the affirmative defenses. *Singleton v. Dep’t of Corr.*, 277 F. App’x 921, 923 (11th Cir. 2008); see also *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994) (“Thus, by moving for summary judgment . . . , defendants thrust before the court for scrutiny not only the merits of plaintiff’s evidence, but the strength of their own defense and must establish that there is an absence of any issue for jury resolution.”).

3. Analysis

Previously, in its order denying Cattelan’s motion to dismiss, the Court observed that it thankfully did not have to determine “what art is” to resolve the thorny issues then before it. Now, presented with a fulsome factual record and cross-motions for summary judgment, “what art is” looms closer in mind. Fortunately, the Court still need not attempt to answer that age-old (and frankly unanswerable) question. But the Court must resolve

here whether it can find that one artist's banana duct-taped to a wall is, in fact, an infringement upon another's, or whether such an issue must be decided by a jury. Art may not be easily definable, but life does imitate it—even in its absurdities.

To succeed on a claim of copyright infringement, a plaintiff must prove two elements: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1301 (11th Cir. 2020) (quoting *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1541 (11th Cir. 1996)). Copying requires both “factual and legal copying”—in other words, a plaintiff must show both that (1) the defendant “actually used” the copyrighted work and that (2) the copied elements are “protected expression” such that the appropriation is legally actionable. *See Newman*, 959 F.3d at 1301 (citing *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1148 n.40 (11th Cir. 2007) and *MiTek Holdings, Inc. v. Arce Eng'g Co.*, 89 F.3d 1548, 1554 (11th Cir. 1996)).

First, a plaintiff must show factual copying by either (1) direct evidence or (2) indirect evidence “demonstrating that the defendant had access to the copyrighted work and that there are probative similarities between the allegedly infringing work and the copyrighted work.” *See Newman*, 959 F.3d at 1301 (quoting *MiTek*, 89 F.3d at 1554). “Access requires proof of ‘a reasonable opportunity to view’ the work in question.” *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1253 (11th Cir. 2007) (quoting *Herzog v. Castle Rock Ent.*, 193 F.3d 1241, 1249 (11th Cir. 1999)).

Second, legal copying looks to whether the similarities between the two works extend to the work's original, protectible elements. *See Newman*, 959 F.3d at 1306; *see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 359 (1991). "In most cases, 'a substantial similarity' between the allegedly offending program and the protectable, original elements of the copyrighted works establishes actionable copying." *Newman*, 959 F.3d at 1302 (cleaned up). Not all aspects of a work are protectible. *Herzog*, 193 F.3d at 1248 ("It is an axiom of copyright law that the protection granted to a copyrightable work extends only to the particular expression of an idea and never to the idea itself."). Therefore, courts must assess "both the quantitative and the qualitative significance" of the protectible elements that the infringing work purportedly copies from "the copyrighted work as a whole." *Newman*, 959 F.3d at 1302 (cleaned up).

Morford argues that he is entitled to summary judgment because there is no dispute of material fact that Cattelan had access to *Banana and Orange*, that *Comedian* has substantial similarities to *Banana and Orange's* protectible elements. (Pl.'s Memo. at 6-19.) Cattelan, of course, argues the opposite—that Morford has failed to put forth sufficient evidence of access and *Comedian* is sufficiently dissimilar to *Banana and Orange's* protected elements. (Def.'s Mot. Summ. J. at 9-17.) Cattelan also argues that he has put forth evidence that he independently created *Comedian*, which Morford has failed to rebut, and that Morford's claims are precluded by the doctrine of merger. (*Id.* at 17-20.) While applying the standards established by the Eleventh Circuit and considering only the undisputed material facts the

parties put forth, the Court addresses each of the parties' arguments in turn.⁷

A. Morford Fails to Put Forth Sufficient Evidence Demonstrating that Cattelan Had a Reasonable Opportunity to View *Banana and Orange*

Access may not be proven by showing that a defendant simply had some possible opportunity to review a plaintiff's copyrighted work. Rather, the Eleventh Circuit requires a plaintiff to demonstrate that a defendant had a "reasonable opportunity to view" the copyrighted work. *Herzog*, 193 F.3d at 1249. Importantly, "[r]easonable opportunity does not encompass any bare possibility," and "[a]ccess may not be inferred through mere speculation or conjecture." *Id.* (citations omitted).

Morford argues that Cattelan had a reasonable opportunity to view *Banana and Orange* because it has been posted on the internet for several years. He asserts that his work "has been available on YouTube since July 18, 2008, on Facebook since July 29, 2015, and on Blogpost since July 2, 2016." (Pl.'s Mot. Summ. J. at 6; Pl.'s SOMF ¶¶ 6-9; First Morford Decl. Ex. 1 at 3-7.) Based on the fact that *Banana and Orange* has been "verifiably viewed

⁷ Morford also argues that he has a valid copyright in *Banana and Orange*, which Cattelan disputes. The Court assumes for the sake of argument (but does not find) that Morford has demonstrated that he has a valid copyright. As the Court will address below, because Morford has not put forth sufficient evidence to meet his burden of proving copying, the Court need not address whether his copyright is valid.

worldwide over a span of approximately 10 years prior to the appearance of [the] [D]efendant's piece," Morford argues by implication that access can, at this point, be presumed. ((Pl.'s Mot. Summ. J. at 6-7; Pl.'s SOMF ¶¶ 6-9; First Morford Decl. Ex. 1 at 3-7.))⁸

But mere availability, and therefore possibility of access, is not sufficient to prove access. *Herzog*, 193 F.3d at 1249. "[M]ere speculation and conjecture" are insufficient to sustain a finding of access. *Id.* A plaintiff cannot prove access only by demonstrating that a work has been disseminated in places or settings where the defendant may have come across it. *Id.* at 1249-52 (holding that some "nexus" between the plaintiff and the defendant is required to establish an inference of access where the plaintiff's work was disseminated in a setting where the defendant may have come across the work). And, despite the Plaintiff's arguments to the contrary, whether a work has caught on in popularity is a viable consideration in determining access. *Watt v. Butler*, 457 F. App'x 856, 859-60 (11th Cir. 2012) (holding that the plaintiff could not prove a finding of access where there was "no evidence that 'Come Up' [the plaintiff's allegedly infringed song] ever caught on in popularity" or that the song or the performing group ever "became a commercial success."). A work's mere presence on the internet alone, then, is insufficient to demonstrate access without some

⁸ The parties do not dispute whether *Banana and Orange* and *Comedian* have "probative similarities" sufficient to support indirect evidence of copying. Given that both works are bananas duct-taped to walls, the Court sees no need to belabor this point. (See Order Denying Mot. Dismiss at 4-6.)

additional proof that the defendant had some plaintiff's work enjoyed some meaningful level of popularity. *See Herzog*, 193 F.3d at 1249; *Watt*, 457 F. App'x at 859-60.⁹

The Plaintiff puts forward no evidence here supporting a reasonable opportunity for Cattelan to have viewed *Banana and Orange*. His evidence amounts to no more than proof that his work was available on one Facebook post, one YouTube video, and one blog post. (Pl.'s SOMF ¶¶ 6-9; First Morford Decl. Ex. 1 at 3-7.) Nowhere is Morford able to demonstrate that *Banana and Orange* enjoyed any particular or meaningful level of popularity; in fact, the evidence cited supports the opposite finding, that it remained a relatively obscure work with very limited publication or popularity. (*Id.*) Nor is Morford able to demonstrate any particular nexus between Cattelan and himself. Instead, the only record evidence relating to any connections between the two is Cattelan's clear statement that he had never heard of Morford until this lawsuit. (Def.'s SOMF ¶¶ 32-33; Cattelan Decl. ¶¶ 24-27.) The Court cannot find that Morford has demonstrated that Cattelan had access

⁹ While the issue has not been addressed directly in the Eleventh Circuit, other Circuit Courts of Appeals have held that mere publication on the internet is not sufficient to demonstrate access. *See, e.g., Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1108 (7th Cir. 2017) (holding that "the existence of the plaintiff's copyrighted materials on the Internet, even on a public and 'user-friendly' site, cannot by itself justify an inference that the defendant accessed those materials."). This holding comports with the relevant Eleventh Circuit case law, as the Court observes above, and the Court finds it to be persuasive here.

to *Banana and Orange* based on these facts. *See Herzog*, 193 F.3d at 1249; *Watt*, 457 F. App'x at 859-60. While this finding alone would be dispositive of Morford's claims, the Court will further address the works' similarities and Cattelan's asserted defenses below.

B. The Undisputed Evidence Demonstrates that Any Similarities Between *Comedian* and *Banana and Orange* Are Unprotected

The Court's determination of legal copying is based on the century-old understanding that "unprotected material should be disregarded when comparing two works." *Newman*, 959 F.3d at 1303. To understand whether material is protected and therefore determine whether two works are substantially similar in a legally protectible manner, the Eleventh Circuit has prescribed the use of the "abstraction-filtration-comparison" test. *Id.* "In order to ascertain substantial similarity under this approach, a court first breaks down the allegedly infringed program into its constituent structural parts—that's abstraction." *Id.* (cleaned up.) "Next, the court sifts out all non-protectible material—filtration." *Id.* (cleaned up.) Finally, the "last step is to compare any remaining kernels of creative expression with the allegedly infringing [work] to determine if there is in fact a substantial similarity—comparison." *Id.* (cleaned up.) Applying the abstraction-filtration-comparison test, the Court finds that Cattelan has established that *Comedian* is not substantially similar to *Banana and Orange*. Primarily, this is determined at the filtration and comparison stages: once the Court sorts out what parts of *Banana and Orange* are

protectible and compares those parts to *Comedian*, it becomes clear that there is no dispute of material fact that *Comedian* is too dissimilar to *Banana and Orange* to be a legal copy.

(1) Abstraction: The Pieces of *Banana and Orange*

The abstraction test, initially developed to review claims of copyright infringement relating to novels and plays but also applied in contexts such as software programming, requires the Court to “reverse engineer” the work at issue. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 707 (2d Cir. 1992); *see also Bateman*, 79 F.3d at 1543-45 (adopting the Second Circuit’s abstraction-filtration-comparison test in the context of computer programming). To do so, the Court must “dissect the allegedly copied [work’s] structure and isolate each level of abstraction contained within it.” *Altai*, 982 F.2d at 707. In undertaking this test, the Court is guided by the principle so well-articulated by Judge Learned Hand when addressing abstraction:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the general statement of what the play is about, and at times consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930). In separating *Banana and Orange* into its abstract parts, then, the Court seeks to separate Morford's expressions from his ideas.

The Court has previously reviewed *Banana and Orange* to apply the abstraction test in deciding Cattelan's motion to dismiss. That same analysis still applies here, as the undisputed evidence that the parties have put forward demonstrates. The Court there found these to be the abstracted elements of *Banana and Orange*:

Morford's *Banana & Orange* features two green rectangular panels, each seemingly attached to a vertical wall by masking tape. The panels are stacked on top of each other, with a gap between each. Roughly centered on each green panel is a fruit: an orange on the top panel and a banana on the lower panel. The orange is surrounded by masking tape, and a piece of silver duct tape crosses the orange horizontally. The banana is at a slight angle, with the banana stalk on the left side pointing up. The banana appears to be fixed to the panel with a piece of silver duct tape running vertically at a slight angle, left to right.

(Order Denying Mot. Dismiss at 9.) The Court will again review the filtration test, applying these abstracted elements, but this time with the benefit of the parties' undisputed facts following discovery.

**(2) Filtration: *Banana and Orange* Contains
Few Protectible Elements**

The filtration step is based on the idea that “copyright protection extends only to a work’s expressive elements, not to any underlying ‘idea, procedure, process, system, method of operation, concept, principle, or discovery’ expressed therein.” *Newman*, 959 F.3d at 1304 (quoting 17 U.S.C. § 102). The filtration step also incorporates the merger doctrine. This doctrine captures the understanding that “some expression may be so intrinsic to the communication of an idea—or procedure, process, etc.—that it is considered to have ‘merged’ into the idea.” *Id.* Filtration also takes into consideration that “material taken from the public domain is unprotected, even if incorporated into a copyrighted work.” *Id.* Additionally, “material may be unprotected if it constitutes *scènes à faire*—that is incidents, characters, or settings that are indispensable or standard in the treatment of a given topic.” *Id.* (cleaned up.) And “[f]inally, certain ways of arranging information—say, alphabetically—are entirely unoriginal, and therefore unprotectable.” *Id.*

Generally, the burden of demonstrating that a particular element of a work should be filtered out during this stage falls on the defendant. *Id.* at 1305 (“we now clarify that after an infringement plaintiff has demonstrated that he holds a valid copyright and that the defendant engaged in factual copying, the *defendant* bears the burden of proving—as part of the filtration analysis—that the elements he copied from a copyrighted work are *unprotectable*.”) (emphasis in original). Therefore, the Court will approach the filtration analysis by assessing whether Cattelan can meet this burden.

Before the Court begins its filtration analysis, it must review the items it previously decided on Cattelan's motion to dismiss that have not changed here. First, "Morford cannot claim a copyright in the idea of affixing a banana to a vertical plane using duct tape." (Order Denying Mot. Dismiss at 9.) Second, Morford cannot "claim a copyright in bananas or duct tape." (*Id.*) The Court did find that Morford may be able to present some more specific aspect of *Banana and Orange* that is protectible. (*Id.* at 10.) But, because the argument was not developed at the time, the Court did not determine how the merger doctrine might apply to these two works. (*Id.*) Accordingly, it will do so now.

As noted above, "copyright normally protects the expression of ideas, but not the ideas themselves." *BUC Int'l*, 489 F.3d at 1142. By way of example (and as the Eleventh Circuit observed in *BUC International*) the expressions in the novel *Moby-Dick* are protected by copyright, but "the idea of hunting a formidable whale at the lead of an eccentric captain is not." *Id.* This "idea-expression dichotomy" is the normal standard in copyright law. *Id.* at 1143.

But "[u]nder the merger doctrine, expression is not protected in those instances where there is only one or so few ways of expressing an idea that protection of the expression would effectively accord protection to the idea itself." *BellSouth Advert. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436, 1442 (11th Cir. 1993) (cleaned up). The Eleventh Circuit has offered a few examples of ideas that have "so few ways" of being expressed that the expression of the idea necessarily "merges" with the

idea itself, making the expression therefore unprotectible. *Id.*; *BUC Int'l*, 489 F.3d at 1142.

For example, the everyday “Prohibited” sign merges with the idea that something is prohibited, making the classic “circle with a diagonal line crossed through it” unprotectible even as an expression. *BUC Int'l*, 489 F.3d at 1143. Similarly, an alphabetical arrangement of a business directory cannot be protected because it “is the one way to construct a useful business directory.” *BellSouth*, 999 F.3d at 1442. In other words, when the way to express an idea is so limited in practice that separate expressions of that idea will necessarily be the same, the expression is not protectible. *BUC Int'l*, 489 F.3d at 1143; *BellSouth*, 999 F.3d at 1442.

The parties argue vigorously over whether the merger doctrine is at all applicable to the concept of a banana taped to a wall with duct tape. Cattelan, unsurprisingly, advocates that “the idea of duct-taping a banana to a vertical surface and the expression are essentially one and the same.” (Def.’s Mot. Summ. J. at 20.) Morford, in turn, argues that the doctrine is wholly inapplicable. He asserts that the method both artists chose—the banana and the duct tape placed at an essentially perpendicular angle, with a single piece of tape crossing the banana, and the two objects forming an “X”—is a “creative choice” that can be copied. (Pl.’s Resp. at 18.)

Guided by the Eleventh Circuit’s decision in *BUC International*, the Court finds that the merger doctrine is applicable, although not as broadly as Cattelan argues. 489 F.3d at 1143. While addressing the merger doctrine in the context of software programs, the Eleventh Circuit offered an analogy

that is spot on to the present situation—like the “Prohibited” sign, there are only so many ways to express the concept of a banana taped to a wall. *Id.* (“Since there are effectively only a few ways of visually presenting the idea that an activity is not permitted, copyright law would not protect the expression in this case, i.e., the circle with the line through it.”).

The method chosen by both Morford and Cattelan—the “X” shape of the duct tape crossing the banana in a perpendicular manner—essentially merges with the concept of taping a banana to a wall. *Id.* It is, to put it bluntly, the obvious choice. Placing the tape parallel with the banana would cover it. Placing more than one piece of tape over the banana, at any angle, would necessarily obscure it. An artist seeking to tape a banana (or really, any oblong fruit or other household object) to a wall is therefore left with “only a few ways of visually presenting the idea”—all of which involve a piece of tape crossing the banana at some non-parallel angle. *Id.*

Where does this leave the Court’s filtration analysis? Effectively, it removes from consideration the largest and most obvious abstracted element of *Banana and Orange*: the “banana [that] appears to be fixed to the panel with a piece of silver duct tape running vertically at a slight angle, left to right.” (Order Denying Mot. Dismiss at 10.) This expression is not protectible under the merger doctrine. But that is not to say that Morford’s work is wholly unprotectible under the doctrine, and this is where the Court diverges from Cattelan’s position. There are still protectible elements of Morford’s work: (1) the green rectangular panel on which the fruit is placed; (2) the use of masking tape to border the

panels; (3) the orange on the top panel and banana on the bottom panel, both of which are centered; (4) the banana's placement "at a slight angle, with the banana stalk on the left side pointing up." (*Id.*)

Having reduced the protectible elements of Morford's work to these four elements, the Court proceeds to the final step: comparison.

(3) Comparison: *Comedian* Does Not Copy *Banana and Orange's* Protectible Elements

The comparison step is perhaps the most direct, although it still has its nuances: once the Court has broken down the original work into its relevant parts and "filtered" out the unprotectible portions, the Court must compare the allegedly infringing work with the protectible parts that remain. This is not a simple comparison of any and all similarities. *Herzog*, 193 F.3d at 1257 ("Lists of similarities between the two works are 'inherently subjective and unreliable,' particularly where the list contains random similarities, and many such similarities could be found in very dissimilar works.").

Rather, "the court's substantial similarity inquiry focuses on whether the defendant copied any aspect of this protected expression, as well as an assessment of the copied portion's relative importance with respect to the plaintiff's overall [work]." *Altai*, 982 F.2d at 710. This inquiry must focus on whether any similarities are significant to the copyrighted work—not whether those similarities are significant to the allegedly infringing work. *Newman*, 959 F.3d at 1308 ("The law is clear that both the quantity of the appropriation and the qualitative importance of the appropriated portion

are properly judged by their significance to the copyrighted work, not their significance to the allegedly infringing work.”).

Considering the filtered, protectible aspects of *Banana and Orange*, and comparing the associated aspects of *Comedian*, the Court arrives at the following list of comparable elements of each work.

<u>Element</u>	<u><i>Banana and Orange</i></u>	<u><i>Comedian</i></u>
Background:	Solid green, rectangular panel	No specified background, any wall space may be used; white wall used in example
Border:	Plain masking tape	No border
Placement:	Banana roughly centered in bottom panel, below orange, with the stalk placed to the left-hand side	Banana placed at specified height above the floor, ¹⁰ with the stalk placed to the left-hand side

¹⁰ As the Court observed in Section 1, *supra*, the exact height at which the banana in *Comedian* is placed above the floor was filed under seal, and the Court need not identify the exact specifications here to demonstrate this element’s difference from *Banana and Orange*.

Angle:	A slight angle (less than 45° from horizontal), with the stalk of the banana rising and pointing slightly towards the left	A strong angle (greater than 45° from horizontal), with the stalk of the banana rising and pointing back towards the right
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Reviewing these elements as a whole, it is clear that *Banana and Orange* and *Comedian* share only one common feature that the Court has not already set aside as unprotectible: both bananas are situated with the banana's stalk on the left-hand side of sculpture. This solitary common feature is, on its own, insignificant and insufficient to support a finding of legal copying. *See Altai*, 982 F.2d at 710. And the placement of the banana's stalk (on the right-hand side of the sculpture versus the left, or vice-versa) would be another element subject to the merger doctrine anyway: there are only two ways the stalk may be placed, to the right or to the left. *BUC Int'l*, 489 F.3d at 1143.

The remaining features are simply too disparate to support a finding of substantial similarity. *Banana and Orange's* background is green and is not a part of the wall itself. (Morford Dep. Ex. 2.) *Comedian's* background is always the wall itself; it just so happens that in the (in)famous Art Basel display, the wall was white. (Def.'s SOMF ¶ 47; Cattelan Decl. ¶¶ 31-33.) *Banana and Orange* has a border of masking tape around the piece; *Comedian* has no border—it is simply a banana on a wall.

(Morford Dep. Ex. A; Morford Dep. at 107:6-15; Def.'s SOMF ¶ 49; Cattelan Decl. ¶ 34.) The banana in *Banana and Orange* is roughly centered on the green backing and placed below a similarly centered orange. (Morford Dep. at 101-112, ECF No. 76-1; Morford Dep. Ex. 2.) The banana in *Comedian* is placed relative to the floor, rather than relative to a piece of backing or another object taped to the wall. (Def.'s Sealed SOMF ¶ 28.). Finally, *Banana and Orange's* banana is placed at a different angle than *Comedian's*, and the bananas' stalks ultimately point in different directions due to the different angles. (Morford Dep. Ex. A; Def.'s SOMF ¶¶ 29, 49; Cattelan Decl. ¶¶ 21, 34.)

Morford makes much of the fact that the bananas' angles are relatively similar, but this point actually works against him. There are only so many angles at which a banana can be placed on a wall (360, to be precise, unless one breaks the measurements down beyond degrees—but making such a minute distinction would be reaching a point of absurdity best left out of the courts and in the hands of artists). Finding that Morford's and Cattelan's selections of different angles were “close enough” to reach substantial similarity would necessarily place a significant legal limit on the number of ways that a banana can be taped to a wall without copying another artist's work. *See BUC Int'l*, 489 F.3d at 1143. In other words, the Court would need do that which it has already said it cannot do—find that Morford could copyright the idea of duct-taping a banana to a wall.

Finally, these differences are not “intentional dissimilarities,” as Morford argues, that would allow the Court to find legal copying despite the

differences. (Pl.'s Memo. at 13-14.) Intentional dissimilarity—a doctrine that, to the best of the Court's determination, has not been applied in the Eleventh Circuit—allows a court to support a finding of substantial similarity if certain dissimilarities in two works are “particularly suspicious.” *See, e.g., Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984) (discussing and applying the doctrine in the context of “striking similarity” analysis). Regardless, this concept does not help Morford's claim. To find that the genuine differences between Morford' and Cattelan's works could be disregarded as “intentionally dissimilar” would be to find that Morford could essentially copyright the idea of a banana taped to a wall. This the Court will not do.

Instead, these differences demonstrate that *Comedian* and *Banana and Orange* are different expressions of the underlying idea. While the Court was previously unwilling to find that *Comedian* was not substantially similar to *Banana and Orange*, it was there working under the standards imposed by Federal Rule of Civil Procedure 12(b)(6) and without the benefit of discovery. (Order Denying Mot. Dismiss at 9-10.) Having reviewed the parties' extensive factual submissions in support of their motions, and having fully addressed the applicability of the merger doctrine, the lack of similarity between the two works is now clear and inescapable.

Comedian simply contains two many differences from *Banana and Orange*: the banana used, the angle at which it is placed, the method by which it is taped to the background, the background itself, and the exacting standards that Cattelan developed for *Comedian's* display. To find otherwise would further limit the already finite number of ways in which a

banana may be legally taped to a wall without infringing on Morford's work. *See, e.g., BUC Int'l*, 489 F.3d at 1143. Accordingly, the Court finds that *Comedian* and *Banana and Orange* are not substantially similar and, therefore, Cattelan cannot have legally copied Morford's work.¹¹

C. Morford Fails to Rebut Cattelan's Evidence of Independent Creation

Even if Morford could establish that Cattelan had access to *Banana and Orange* and that *Comedian* bore a substantial similarity to the earlier work, he cannot point to any evidence in the record contradicting Cattelan's evidence that *Comedian* was independently created. "Proof of access and substantial similarity raises only a presumption of copying which may be rebutted by [the defendant] with evidence of independent creation." *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228, 1232 (11th Cir. 2002). Once the defendant offers competent evidence of independent creation, the burden shifts to the plaintiff to prove that the defendant in fact copied the original work. *Id.* at 1233. Additionally, evidence of independent creation may be accepted even if it is not from or "corroborated by documentary evidence

¹¹ Morford also argues that *Comedian* is strikingly similar to *Banana and Orange* and, therefore, he does not even need to prove the access prong of factual copying. (Pl. Memo. at 8-9.) Because the Court finds the two works not to be substantially similar, it also finds that they are not strikingly similar. *Corwin*, 475 F.3d at 1253 ("Striking similarity exists where the proof of similarity in appearance is 'so striking that the possibilities of independent creation, coincidence and prior common source are, as a practical matter, precluded.'").

or by a disinterested third-party.” *Watt*, 457 F. App’x at 861; *see also Calhoun*, 298 F.3d at 1233-34 (accepting the defendant’s statement in his affidavit that he independently created a song at issue in a copyright dispute and observing that the plaintiff failed to rebut this competent evidence).

Cattelan provides sufficient competent evidence supporting his defense of independent creation, and Morford fails to rebut any of it. Cattelan has provided, in his own declaration, a detailed description of the circumstances under which he created *Comedian*. (Cattelan Decl. ¶¶ 8-25.) Cattelan first thought of the idea of displaying a banana taped to a wall in 2018, in response to an invitation from *New York Magazine*. (*Id.* ¶¶ 8-10.) He eventually adapted this idea for Art Basel in Miami. (*Id.* ¶ 14-15.) In doing so, he decided that a real banana and ordinary gray duct tape best suited his vision for the work. (*Id.*) Cattelan decided to charge \$120,000 for the piece to further demonstrate its absurdity. (*Id.* ¶ 16.) Additionally, Cattelan had detailed discussions with his staff regarding the specifications for *Comedian*: the angle at which the banana should be placed, the lengths of duct tape, the height above the ground, etc. (*Id.* ¶¶ 18-19.) One of Cattelan’s employees (Jacopo Zotti) also submitted a declaration confirming Cattelan’s recollections of the process used to create *Comedian*. (Zotti Decl. ¶ 5-8.) Finally, Cattelan affirmatively states that he had never heard of Morford or *Banana and Orange* prior to this lawsuit. (Cattelan Decl. ¶¶ 24-30.) This is all sufficient and competent evidence of Cattelan’s independent creation of *Comedian*. *Calhoun*, 298 F.3d at 1233-34 (holding that composer’s affidavit stating he independently created allegedly infringing

hymn at church service and did not rely on “any sheet music, lead sheets or hymnals” in doing so, along with affidavits of witness, sufficed to prove independent creation defense when unrebutted).

Morford never rebuts any of Cattelan’s or Zotti’s statements. To be sure, he challenges them, and asserts that Cattelan cannot base independent creation on those facts alone. (Pl.’s Resp. at 17-18). But Morford credits Cattelan’s own statements in Morford’s response to Cattelan’s statements of material facts: he cites to Cattelan’s declaration for the points the Court has just observed, above. (Pl.’s Resp. SOMF ¶¶ 54-71.) Morford then cites statements from Cattelan suggesting that Cattelan is willing to appropriate another artist’s work. (*Id.* ¶¶ 68-71.) None of those statements involve the circumstances at hand, however. Rather, they amount to nothing more than an expression of Cattelan’s views on art in general.¹² And, more importantly, Morford never cites to any record evidence that raises a genuine dispute of material fact regarding Cattelan’s explanation of independent creation.

In sum, Cattelan is the only party who has put forward any evidence addressing the defense of independent creation. The Court may, and does, credit his declaration and the declaration of his employee. *Calhoun*, 298 F.3d at 1233-34. Morford puts forward no evidence demonstrating that anything Cattelan or Zotti says is untrue. Therefore,

¹² This even assumes that the Court could or would credit the statements as relevant and as permissible, rather than a non-permissible attack on character. Fed. R. Ev. 401, 404.

even if Morford could prove factual and legal copying through reasonable opportunity for access and substantial similarity, the independent creation doctrine would prevent his recovery against Cattelan for copyright infringement. *Id.*

4. Conclusion

The Court finds that there is no dispute of material facts with regards to Cattelan's lack of access to *Banana and Orange*, the lack of legal similarities between *Comedian* and *Banana and Orange*, and Cattelan's proof of his independent creation of *Comedian*. For these reasons, as detailed above, the Court **grants** Defendant Maurizio Cattelan's motion for summary judgment (**ECF No. 79**) and **denies** Plaintiff Joe Morford's motion for summary judgment (**ECF No. 81**).

The Clerk is directed to **close** this matter. Any pending motions are **denied as moot**. The Court will separately enter final judgment, as required by Federal Rule of Civil Procedure 58.

Done and ordered at Miami, Florida on June 9, 2023.

s/Robert N. Scola, Jr.
United States District Judge

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December 31, 2024

Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20002

RE: JOE MORFORD V. MAURIZIO CATTELAN

Dear Sir or Madam:

I certify that at the request of the Petitioner, on December 31, 2024, I caused service to be made pursuant to Rule 29 on the following counsel for the Respondent:

RESPONDENTS:

Dana M. Susman, Esq.
Kane Kessler, P.C.
600 Third Avenue, 35th Floor
New York, NY 10016
212-541-6222
dsusman@kanekeessler.com

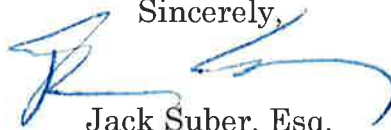
Adam M. Cohen, Esq.
Kane Kessler, P.C.
600 Third Avenue, 35th Floor
New York, NY 10016
212-541-6222
acohen@kanekeessler.com

Julie Nevins, Esq.
Clyde & Co US LLP
1221 Brickell Avenue, Ste 1600
Miami State, FL 33131
305-329-1794
julie.nevins@clydeco.us

Adam R. Hooch, Esq.
Stroock & Stroock & Lavan LLP
2 South Biscayne Boulevard
Suite 2300
Miami, FL 33131
305-358-9900
ahooch@stroock.com

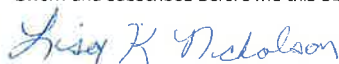
This service was effected by depositing three copies of a Petition for Writ of Certiorari in an official "first class mail" receptacle of the United States Post Office as well as by transmitting digital copies via electronic mail.

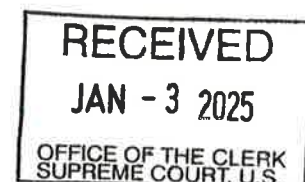
Sincerely,


Jack Suber, Esq.
Principal



Sworn and subscribed before me this 31st day of December 2024.





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December 31, 2024

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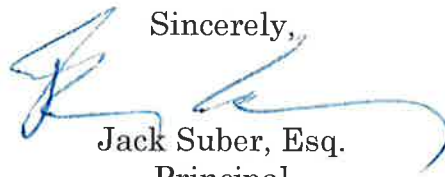
RE: JOE MORFORD V. MAURIZIO CATTELAN

Dear Sir or Madam:

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari referenced above contains **3,948** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Sincerely,



Jack Suber, Esq.
Principal



Sworn and subscribed before me this 31st day of December 2024.

