

No. 24-711

IN THE
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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Eleventh Circuit correctly affirm the decision and order of the United States District Court of the Southern District of Florida (the “District Court Decision”) holding that Petitioner failed to establish that Respondent had access to Petitioner’s work, *Banana and Orange*? Yes.
2. Did the Eleventh Circuit correctly affirm the District Court’s Decision holding that Petitioner’s work, *Banana and Orange*, and Respondent’s work, *Comedian*, are not strikingly similar and therefore, in the absence of access, Morford’s copyright claim failed as a matter of law? Yes.

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RESPONDENT’S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Maurizio Cattelan (“Cattelan” or “Respondent”) respectfully requests that this Court deny the petition for a writ of certiorari (the “Petition”) filed by petitioner Joe Morford (“Morford” or “Petitioner”) to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, affirming summary judgment in Respondent’s favor and dismissing Petitioner’s claim for copyright infringement (the “Eleventh Circuit Decision”).

STATEMENT OF THE CASE

The Petition raises no issue worthy of review by this Court. The questions presented involve the holdings of the district court, as affirmed by the Eleventh Circuit, that Petitioner failed to raise any genuine issue of material fact concerning either access or striking similarity necessary to support a claim for copyright infringement and that Cattelan was entitled to summary judgment as a matter of law. While Petitioner contorts mightily to frame the Eleventh Circuit’s Decision as contrary to other circuit decisions or to decisions of this Court, at bottom, the Petition asserts only that the Eleventh Circuit made erroneous factual findings or misapplied properly stated rules of law, neither of which constitute grounds for granting certiorari (and neither of which is true). Despite Petitioner’s protestations to the contrary, this copyright case involves the standard application of well-settled law to undisputed facts and is not appropriate for a writ of certiorari.

Background

Throughout 2018 and 2019, Cattelan independently created his work, *Comedian*, transforming his previous work for a *New York Magazine* cover which displayed a synthetic banana affixed to a vertical surface using red duct tape, into the current work. (District Court Decision at pp. 4-5) In December 2019, Cattelan's gallery displayed *Comedian* at the Art Basel, Miami art fair. (*Id.* at p. 2) The materials used in *Comedian* consist of a real banana, standard gray duct tape, and tacking glue. (*Id.* at p. 3; 14-15) The Installation Instructions Manual, which accompanied each edition of *Comedian*, instructed that: a piece of duct tape be torn—not cut—in a designated length and placed on a wall at a specific height from the ground and at a 37 degree angle;¹ more of the duct tape be wrapped around the banana; tacking glue be affixed to the duct-taped banana; the duct-taped banana be placed on the duct-tape on the wall fixing it to the wall at an angle of 37 degrees; and another piece of duct-tape then be placed over the banana at the same 37 degree angle and height. (*Id.* at pp. 3-4)

Petitioner allegedly made his work *Banana and Orange* in 2000. (*Id.* at p. 2) *Banana and Orange* consists of the following elements/materials: (1) a synthetic plastic orange which Morford purchased at a store, (2) a synthetic plastic banana which Morford also purchased at a store, (3) two cut pieces of lime green foam backing, (4) a laminated white wallboard panel with a wood frame, (5) multiple sized/shapes pieces of masking tape surrounding the

1. The specific heights and sizes identified in the Installation Instructions were filed under seal.

foam backing pieces, (6) multiple sized/shaped pieces of clear packing tape with clear gloss varnish giving them a visual sheen, (7) multiple sized/shaped pieces of standard, gray duct tape, and (8) rubber cement, glue and/or gum patches strategically placed to create “residue” and giving the work a “distressed” or “textured” look. (*Id.* at pp. 3, 10, 13-14)

On January 25, 2020, nearly twenty years after making *Banana and Orange*, Morford first applied to the United States Copyright Office (“USCO”) for a copyright registration for the work. (*Id.* at p. 4) After initially denying Morford’s application, the USCO, on November 19, 2020, issued copyright registration no. VA 2-223-672 for *Banana and Orange* as a compilation comprised of the foregoing eight (8) elements as a whole. (*Id.*) Morford concedes that neither a banana (real or synthetic) nor duct tape is entitled to copyright protection, that the *idea* of duct-taping a banana to a surface is also not entitled to copyright protection, and that the copyright registration for *Banana and Orange* is strictly confined to the specific compilation and arrangement of all the otherwise unprotectible elements of the work described above. (*Id.* at p. 11)

Undisputed Facts Concerning Respondent’s Lack of Access to Banana and Orange

The following facts concerning Cattelan’s lack of access to *Banana and Orange* are undisputed. Prior to this lawsuit, the parties never met, and Cattelan had never heard of and did not know Morford or any of his work, including *Banana and Orange*. (*Id.* at p. 9) *Banana and Orange* was never displayed in a physical art show

or exhibited in a gallery or museum nor was it ever sold or licensed, nor available on the market, for sale or license. (*Id.* at pp. 8-9) According to Morford, *Banana and Orange* was displayed on a paper program for a local theater production that ran in Los Angeles, California for approximately three weeks in 2000. (Petition at p. 3) There is no allegation that Cattelan saw the program, the play, or was in the state of California during the relevant time. According to Morford, *Banana and Orange* appeared on his online personal blog at www.joemorfordartist.blogspot.com; in a video on a YouTube channel under an obscure account moniker “lobsterparlourart” (which video contained nearly one hundred other works and depicted *Banana and Orange* in the middle of the video for approximately 3 seconds); and on Morford’s personal FaceBook page. Morford submitted analytics purporting to show how long *Banana and Orange* was available on each of these platforms and how many times and from what locations it was accessed on each. (District Court Decision at pp. 7-8) Cattelan objected to these analytics concerning internet availability as unauthenticated and inadmissible hearsay. Nonetheless, Morford’s allegations concerning access, as well as the proffered analytics concerning internet availability, were considered by both the district court and the Eleventh Circuit. (*Id.*; Eleventh Circuit Decision at p. 5) There is no allegation that Morford ever sent Cattelan or an associate of Cattelan an image of *Banana and Orange* at any time prior to Cattelan’s creation of *Comedian*, nor is there any allegation that Cattelan ever connected to Morford on social media or accessed or knew of any online platform connected to Morford or his work prior to this lawsuit.

Immediately after obtaining copyright registration for *Banana and Orange*, Morford filed a lawsuit against Cattelan for copyright infringement in the United States District Court for the Southern District of Florida.

Petitioner Misstated the District Court’s Decision and Order

At the close of discovery, both parties filed cross-motions for summary judgment. The district court granted summary judgment in Cattelan’s favor, dismissing Morford’s copyright infringement claim in its entirety. Having considered the evidence before it, including Morford’s proffered analytics, the district court held: “Morford Fails to Put Forth Sufficient Evidence Demonstrating that Cattelan Had a Reasonable Opportunity to View *Banana and Orange*” and therefore found no “access”; (District Court Decision at p. 7) “The Undisputed Evidence Demonstrates that Any Similarities Between *Comedian* and *Banana and Orange* are Unprotected”; (*Id.* at p. 9) “*Comedian* Does not Copy *Banana and Orange*’s Protectible Elements” to the extent there are any and therefore found neither “substantial similarity” nor “striking similarity” required to establish a copyright claim (*Id.* at p. 13); and finally, “Morford Fails to Rebut Cattelan’s Evidence of Independent Creation.” (*Id.* at p. 16)

Accordingly, Petitioner’s statement at p. 2 of his Petition that “the district court found no infringement because the judge decided there was only one way to tape a banana to a wall” is incorrect and a misstatement of the District Court Decision.

Petitioner Misstated the Eleventh Circuit's Decision and Order

The Eleventh Circuit affirmed the district court's findings "that Mr. Morford did not put forth sufficient evidence to create a jury issue on whether Mr. Cattelan had access to *Banana and Orange*" and that "Mr. Cattelan's *Comedian*, while similar to *Banana and Orange*, does not meet the high standard for "striking similarity" in the absence of access." (The Eleventh Circuit Decision at pp. 5, 7).

Accordingly, Petitioner's statement at page 2 of his Petition that "the circuit panel decided the duct tape bananas were not the same because there was an orange somewhere else in the plaintiff's display" is misleading.

**REASONS WHY THE PETITION
SHOULD BE DENIED**

I.

**THERE IS NO CONFLICT AMONG THE CIRCUITS
ON ANY ISSUE RELEVANT TO THIS CASE AND
THE ELEVENTH CIRCUIT PROPERLY GRANTED
SUMMARY JUDGMENT TO RESPONDENT BASED
ON UNDISPUTED FACTS**

This case was decided on the facts presented, utilizing accepted principles of copyright law.

To establish copyright infringement, a plaintiff must show: "(1) ownership of a valid copyright, and (2) copying of *constituent elements of the work that are original*."

Singleton v. Dean, 611 F. App'x. 671, 672 (11th Cir. 2015) (citation omitted and emphasis added). See also *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)). The copying element of plaintiff's infringement claim involves two separate inquiries: 1) whether defendant, as a factual matter, copied plaintiff's work (factual copying); and 2) whether those elements copied are protected expression, and of such importance to the copied work that defendant's appropriation is actionable (legal or actionable copying). See, *Compulife*, 959 F.3d at 1302, quoting *Peter Letterese & Assocs. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1300 (11th Cir. 2008). See also, *MiTek Holdings, Inc. v. Arce Eng'g Co., Inc.*, 89 F.3d 1548, 1554 (11th Cir. 1996), quoting, *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 832 (10th Cir. 1993). Both factual and legal copying are required to prove copyright infringement, as "[t]he mere fact that a work is copyrighted does not mean that every element of the work is protected, because copyright protection extends only to the original elements of expression in a work." *Singleton v. Dean*, 611 Fed. Appx. 671, 672 (11th Cir. 2015), quoting, *Baby Buddies, Inc. v. Toys "R" Us, Inc.*, 611 F.3d 1308, 1316 (11th Cir. 2016).

Factual copying may be shown either by direct evidence, or, in the absence of direct evidence, it may be inferred from 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." *Compulife*, 959 F.3d at 1301 and *MiTek Holdings*, 89 F.3d at 1554. Access requires a plaintiff to demonstrate that a defendant had a "reasonable opportunity" to view the work. See,

Herzog v. Castle Rock Entertainment, 193 F.3d 1241, 1249 (11th Cir. 1999).

If a plaintiff establishes access and probative similarity between the two works, they must then show “‘substantial similarity’ between the allegedly offending work and the protectable, original elements of the copyrighted works to establish legal/actionable copying.” *Bateman, supra*, 79 F.3d at 1542; *see also BUC, Intern. Corp. v. Int’l Yacht Council Ltd.*, 489 F.3d 1129, at 1149 n.42 *11th Cir. 2007). Although the “probative similarity” necessary to show factual copying and the “substantial similarity” necessary to show legal/actionable copying “are too often referred to in shorthand lingo as the need to prove ‘substantial similarity’, they are distinct concepts.” *Skidmore v. Zepplin*, 952 F.3d 1051, 1064 (9th Cir. 2020). *See also, Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (“Unfortunately, we have used the same term—“substantial similarity”—to describe both the degree of similarity relevant to proof of copying and the degree of similarity necessary to establish unlawful appropriation. The term means different things in those two contexts. To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff’s work. They just need to be similarities one would not expect to arise if the two works had been created independently. To prove unlawful appropriation, on the other hand, the similarities between the two works must be “substantial” and they must involve protected elements of the plaintiff’s work”) (citations omitted).

In the absence of access, both factual and legal copying—i.e. actionable infringement—can still be shown

by evidence that the two works are “strikingly similar”. See, e.g., *Linares v. Chirino*, 2006 WL 8432038, at *1 (S.D. Fla. Sept. 27, 2006); *Herzog*, 193 F.3d at 1248, quoting *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978) (“If the plaintiff cannot show access, the plaintiff may still prevail by demonstrating that the works are ‘strikingly similar’”); *Watt v. Butler*, 457 Fed. Appx. 856, 861 (11th Cir. 2012), (“Striking Similarity evidence is generally considered a substitute for access”); *Corwin v. Walt Disney*, 475 F.3d 1239, 1253 (11th Cir. 2007) (“When a plaintiff [in a copyright action] cannot demonstrate access, he may, nonetheless, establish copying by demonstrating that his original work and the putative infringing work are strikingly similar.”) (Citations omitted). In determining whether two works are “strikingly similar”, a court must filter out the non-protectible components of the works from the original expression that is protectible. See, *Calhoun v. Lillenas Publishing*, 298 F.3d 1128, 1132 (11th Cir. 2002); *Baby Buddies, Inc. v. Toys “R” Us, Inc.*, 2008 WL 11409910 at *3 (M.D.Fla. Oct. 3, 2008), *aff’d*, 611 F.3d 1308 (11th Cir. 2010) (“In order to survive a motion for summary judgment as to infringement . . . Plaintiff must establish the ‘striking similarity’ between the protectable elements”); *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 n.2 (11th Cir. 1996) (“An opinion establishing striking similarity should address the uniqueness or complexity of the protected work as it bears on the likelihood of copying.”) (Quotation omitted).

Applying these settled principles, the Eleventh Circuit, affirming the district court, held that Morford failed to submit evidence necessary to establish an issue of fact as to either access or striking similarity and, thus, dismissed Morford’s copyright claim.

A. The Eleventh Circuit Properly Determined No Access

1. The Eleventh Circuit Did Not Use the Inverse Ratio Rule to Decide the Access Issue

In his Petition, Morford asserts that “[t]here is a 4-2 split [among the circuits] regarding the inverse ratio rule” to determine access and that the Eleventh Circuit improperly utilized this rule in granting summary judgment to Cattelan. Neither contention has any merit. (See, Petition at pp. 13-17)

The inverse ratio rule, to the extent it has been used, relates to factual copying and “require[d] a lower standard of proof of substantial similarity when a high degree of access is shown. That is, the stronger the evidence of access, the less compelling the similarities between the two works needs to be in order to give rise to an inference of copying.” *Skidmore v. Zepplin*, 952 F.3d 1051, 1066 (9th Cir. 2020) (citations and quotations omitted). Again, the inverse-ratio rule assists only in proving factual copying, not in proving unlawful appropriation (legal copying) and, although courts have used the words “substantial similarity” when addressing the inverse ratio rule, the courts in *Skidmore* and *Rentmeester* clarified that such language refers to the probative similarity necessary to accompany access to establish factual copying.

Contrary to Morford’s misstatements, the Eleventh Circuit did not apply the inverse ratio rule to this case. Nowhere in the Eleventh Circuit Decision (or the District Court Decision) are the words “inverse ratio rule” ever

mentioned, nor were its principles applied under another name. Therefore, Morford's claim that there is a split among the circuits concerning the inverse ratio rule is a red herring.

Rather, the Eleventh Circuit applied the well accepted principles that: "[a]ccess requires proof of a reasonable opportunity to view the work in question;" *Corwin*, 475 F.3d at 1253 "The term [r]easonable opportunity does not encompass any bare possibility in the sense that anything is possible;" [a]ccess may not be inferred through mere speculation or conjecture;" *Herzog*, 193 F.3d at 1250 (citation omitted) and 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). (See, Eleventh Circuit Decision at p. 4) Morford does not argue that the foregoing principles are inappropriate or that there is any split among the circuits concerning them. The Eleventh Circuit applied these settled principles to the facts proffered by Morford, crediting his social media analytics over Cattelan's hearsay objections, and concluded that "mere availability on the internet, without more, is too speculative to find a nexus between Mr. Cattelan and Mr. Morford . . ." (*Id.* at pp. 5-6)

Based on these principles, which are nowhere addressed in the Petition, the Eleventh Circuit concluded that "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*.” (Id. at pp. 4-5)

Thus, the Eleventh Circuit did not apply the inverse ratio rule in its analysis concerning access or otherwise, and Morford’s statements to the contrary are simply without basis. The fact that the Eleventh Circuit applied the “widespread dissemination” standard (properly, as we demonstrate in A.3 below) to determine access does not equate to an application of the inverse ratio rule, which is a completely different rule applicable to different issues: the inverse ratio applies to similarity for the purpose of determining factual copying, widespread dissemination applies solely to the access determination. Morford is wrongly conflating the two for the purposes of manufacturing a circuit split, which is not appropriate.

2. There is No Conflict Among the Circuits Concerning the Inverse Ratio Rule

Regardless, there is no split among the circuits concerning the inverse ratio rule, as Morford presented no authority that it is currently utilized in any circuit. While the Ninth Circuit in *Skidmore*, *supra*, 952 F.3d 1051, 1064 (9th Cir. 2020) referenced a split concerning the inverse ratio rule, the court conceded that as of the date of its decision in 2020, only the Ninth and Sixth Circuits still used it. Since the Ninth Circuit expressly renounced the rule in *Skidmore*, 952 F. 3d at 1066 (“... we take this opportunity to abrogate the rule in the Ninth Circuit and overrule our prior cases to the contrary”), its potential use only remained in the Sixth Circuit as a vestige of that

court’s decision in *Stromback v. New Line Cinema*, 384 F.3d 283, 293 (6th Cir. 2004). However, more recently, the Sixth Circuit in *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, 958 F.3d 532, 536 n.1 (6th Cir. 2020) held that:

“Any discussion of the [inverse ratio] rule in *Stromback* . . . was entirely dictum,” the *Stromback* court having decided that because there was no substantial similarity, “access was irrelevant. . . . In fact, it does not appear that this circuit has meaningfully relied on the rule . . . in any binding precedent.”

Since *Enchant Christmas Light Maze & Mkt. Ltd. v. Glowco, LLC*, it does not appear that the Sixth Circuit has utilized the rule.

Accordingly, there is no conflict among the circuits concerning the inverse-ratio rule that would warrant resolution by this Court.

3. Morford’s Displeasure with the Eleventh Circuit’s Decision Concerning Widespread Dissemination Provides No Basis for Granting Certiorari

Morford next asserts that the Eleventh Circuit erroneously found that he failed to prove access to *Banana and Orange* through widespread dissemination. However, “a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” (See, Rule 10 of the Rules of the Supreme Court of the

United States) In any event, the Eleventh Circuit properly decided that Morford failed to establish access through widespread dissemination.

The Eleventh Circuit held that that “[b]ut even if we were to decide to adopt a ‘widespread dissemination’ approach, Mr. Morford’s evidence misses the mark.” (Eleventh Circuit Decision at p. 5) The Eleventh Circuit then set forth the appropriate standard for widespread dissemination: “[c]ircuits that have adopted a ‘widespread dissemination’ standard require that a plaintiff ‘show that the work has enjoyed considerable success or publicity.’” (*Id.* at p. 5-6) Thus, the Eleventh Circuit set forth the well settled law that to show access based on a theory of “widespread dissemination”, Morford was required to show that [*Banana and Orange*] has enjoyed considerable success or publicity.”² *Batiste v. Lewis*, 976 F.3d 493, 503-04 (5th Cir. 2020) (collecting cases); See also, *Greene v. Warner Music Group*, 2024 WL 3045966 (S.D.N.Y. June 18, 2024) (“To establish circumstantial evidence of access based on widespread dissemination, a plaintiff must allege that his work enjoyed ‘considerable commercial success’ or was readily available on the market””) (citations omitted); *Klauber Brothers, Inc. v. URBN US Retail LLC*, 2022 WL 1539905 *9 (S.D.N.Y. May 14, 2022) (“Courts have consistently recognized widespread dissemination giving rise to an inference of access *exclusively* in cases

2. As noted above, access based on widespread dissemination is not to be confused with the inverse ratio rule, which, when it existed, related to only to “factual copying”—i.e., the level of probative similarity that must accompany access to show factual copying. Widespread dissemination, on the other hand, only relates to access—i.e., a reasonable opportunity to view the copyrighted work.

where the allegedly infringing work has had considerable commercial success or is readily available on the market”) (emphasis added), quoting, *Silberstein v. Fox Ent. Group, Inc.*, 424 F.Supp.2d 616, 627 (S.D.N.Y. 2004) (collecting cases).

Morford submitted no evidence that *Banana and Orange* enjoyed commercial success or was ever available on the market. Rather, Morford argued then and continues to argue now that *Banana and Orange* appeared on his online personal blog at www.joemorfordartist.blogspot.com; in a video in a YouTube channel page under an obscure account moniker “lobsterparlourart” (which video contained nearly one hundred other works and depicted *Banana and Orange* in the middle of the video for approximately 3 seconds); and on his personal FaceBook page. He argues further that the Eleventh Circuit unfairly disregarded such evidence.

To the contrary, evidence of Morford’s internet use was expressly considered by both the district court and the Eleventh Circuit despite it being unauthenticated hearsay: “But even if we were to decide to adopt a ‘widespread dissemination’ approach . . . *Banana and Orange*’s mere availability on the internet, without more, is too speculative . . . ” (Decision at p. 6) *See also, Lois v. Levin*, 2022 WL 4351968 *3 (C.D. Cal. Sept. 16, 2022) (“Courts . . . have consistently held that mere availability of a work online is insufficient to establish widespread dissemination”); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1108 (7th Cir. 2017) (“existence of the plaintiff’s copyrighted materials on the Internet” does not raise a genuine issue of material fact as to access requiring summary judgment; “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”); *Stabile v. Paul Smith Ltd.*, 137 F.Supp.3d 1173, 1187 (C.D. Cal. 2015) (summary judgment upheld where “simply displaying an image on a website for an undeterminable period of time is insufficient to demonstrate that it was widely disseminated”); *Hayes v. Minaj*, No. 2:12-cv-07972, 2012 WL 12887393, at *3 (C.D. Cal. Dec. 18, 2012) (same); *O’Keefe v. Ogilvy & Mather Worldwide, Inc.*, 590 F. Supp.2d 500, 515 (S.D.N.Y. 2008) (same); *Cain v. Hallmark Cards, Inc.*, No. 3:15-00351, 2016 WL 3189231, at *5 (M.D. La. June 6, 2016) (“courts have consistently refused to treat internet publication alone as sufficient to engender this requisite possibility”).

While Morford is dissatisfied with accepted law regarding widespread dissemination, he cites to no conflict among the circuits,³ no conflict with a decision of this Court and no other rationale that would merit granting the Petition. And, while it is obviously true, as Morford states, that “[c]opyright protection should not be for celebrities only[,]” unknown works are certainly not entitled to *more* lenience than the law allows, nor are they given a free ride to dispense with the necessity of showing access.

3. Morford’s citation to *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016) for the proposition that “[t]he evidence required to show widespread dissemination will vary from case to case” in no way demonstrates a split among the circuits concerning the general requirement of commercial success or availability on the market to establish widespread dissemination. It merely demonstrates that courts decide cases on the facts before them, as the district court and Eleventh Circuit did here.

B. The Eleventh Circuit Used the Proper Standard to Determine No Striking Similarity

Morford’s Petition presents incorrect, confusing and, at times, difficult to comprehend statements of the law, the facts and the Eleventh Circuit’s Decision concerning striking similarity in order to conjure valid grounds for granting certiorari.⁴ Machinations aside, the Eleventh Circuit correctly applied a “strikingly similar” standard in the absence of access, and held that in the absence of access, the parties’ works are not strikingly similar and, therefore, Morford failed to raise any issue of fact concerning either factual or legal copying. Despite the confused presentation, Morford failed to identify any conflict regarding the similarity standard relevant to this case.

1. The Eleventh Circuit Correctly Applied a “Striking Similarity” Standard

As noted above, where, as here, access is not established, Morford was required to demonstrate that *Banana and Orange* and *Comedian* are “strikingly similar” to establish both factual and legal copying. See, *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 (n.2) (11th Cir. 1986) and *Calhoun v. Lillenas Publishing*, 298 F.3d 1228, 1232 (11th Cir. 2002). As the Eleventh Circuit found on page 6 of its Decision: “Striking similarity exists where proof of similarity in appearance is so striking that the possibilities of independent creation, coincidence and prior

4. For example, Morford misstates that there are two types of similarity: 1) Factual; and 2) Actionable. (Petition at p. 7). In fact, there are two types of *copying*, factual and legal/actionable.

common source are, as a practical matter, precluded,” *Olem Shoe Corp. v. Walsh Shoe Corp.*, 591 F. App’x 873, 885 (11th Cir. 2015) (citation omitted). In ascertaining whether there is a striking similarity, courts address the “uniqueness or complexity of the protected work as it bears on the likelihood of copying.” *Benson*, 795 F.2d at 975.

In the absence of access, the Eleventh Circuit utilized the correct “striking similarity” standard and held, based on the facts of this case, that “there are sufficient differences in the two displays to preclude a finding of striking similarity”, which the Court noted was “a high burden.” (Eleventh Circuit Decision at p. 7).

Here, the factual record established that Morford’s *Banana and Orange* features two green rectangular panels, each seemingly attached to a vertical surface 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. (See, District Court Decision at p. 10)

Notably, as the district court found during its filtration analysis, Morford’s copyright for *Banana and Orange* does not extend to a duct-taped banana with silver duct-tape running vertically at a slight angle, left to right” (District Court Decision at p. 11, 13) and, therefore, such

copyright is strictly confined to the *specific arrangement* of the above otherwise non-protectable elements.

As such, any copyright protection for *Banana and Orange* does not extend to (1) the idea of affixing a banana to a vertical surface using duct tape; or (2) the individual elements of a banana (real or fabricated) or duct tape—which are the two primary elements in *Comedian* and covers only the precise arrangement of its elements. See, *Folkens v. Wyland Worldwide, LLC*, 882 F.3d 768, 775 (9th Cir. 2018) (no copyright in “idea[s] first expressed in nature,” which are “within the common heritage of humankind”), and *Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 924 (11th Cir. 1983) (no copyright protection to “functional components of useful articles”).

Of all the elements of *Banana and Orange* set forth above, *Comedian* only contains a banana and duct tape, which the district court found is not protectible elements.⁵ As to the expression or arrangement of those two elements, and as the district court also found, the banana and tape in *Comedian* are arranged at different heights and different angles than the arrangement in *Banana and Orange*. The Eleventh Circuit therefore held appropriately that “[a]lthough 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.” (Eleventh Circuit Decision at p. 7), citing *Corwin*, *supra*, 475 F.3d at 1254 (no striking similarity where there were significant

5. Indeed, as noted above, the copyright registration ultimately issued was for the entire work as a compilation of no less than 8 items, at least 6 of which are not present in Cattelan’s work.

differences between the two manifestations of the design, including the presence of several elements in one that were not present in the other).

Contrary to the Petition, the dissimilarities between *Comedian* and the particular arrangement of the elements in *Banana and Orange* are appropriately considered in determining whether the work infringes a copyright for a compilation, and Morford cites no authority to the contrary. See *Interwest Constr., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 916 (11th Cir. 2008) (“dissimilarities in [the] coordination and arrangement” of “common components and elements” mandated summary judgment); *Home Design v. Turner*, 825 F.3d 1314, 1322 (11th Cir. 2016) (given “thin” copyright, “modest dissimilarities . . . are more significant than they may be in other types of art works”); *Cortes v. Universal Music Latino*, 477 F. Supp.3d 190, 1297 (S.D. Fla. 2020) (where “works are only similar as to unprotectable elements and share no commonality at the level of protectable expression” summary judgment is warranted); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214-15 (11th Cir. 2000) (summary judgment upheld where no substantial similarity between the protectable elements of “lighting, shading, timing, angle and [type of] film” and film sequences”); *Corwin*, 475 F.3d 1239 (failure to rebut defendant’s evidence of dissimilarities or independent creation mandated summary judgment dismissing copyright claim). *Herzog*, 193 F.3d at 1247 (citing *Beal v. Paramount Pictures Corp.*, 20 F.3d 454 (11th Cir. 1994) (Summary judgment upheld where similarity concerned only non-copyrightable elements)).⁶

6. The district court properly rejected Morford’s argument, repeated in the Petition, of “intentional dissimilarities”—a

Morford’s attempt to distinguish *Corwin* on the grounds that *Corwin* did not involve a compilation, is illogical. As we demonstrate *infra* in B.3, compilations are entitled to *less* protection than non-compilations, and if the Eleventh Circuit in *Corwin* was able to consider the dissimilar elements in both works, certainly the Eleventh Circuit in this case is entitled to the same consideration.

Accordingly, the Eleventh Circuit’s Decision was reached by viewing the facts in the light most favorable to Morford, accepting the factual findings of the district court in the absence of abuse of discretion, and applied the correct standard of “striking similarity” in the absence of access to uphold summary judgment in Cattelan’s favor.

2. There is no Split Among the Circuits Concerning Striking Similarity and the Eleventh Circuit Did Not Apply a Bodily Appropriation Standard

a. There is No Split Among the Circuits

Morford’s contention that there is a 4-4 split in the circuits concerning use of a “substantial similarity standard” versus a “bodily appropriation” standard is also a red herring. Because the Eleventh Circuit found that Morford failed to establish access, Morford was therefore required to show the two works were ‘strikingly similar’ to prove both factual and legal copyright infringement.

doctrine not applied in the Eleventh Circuit—because “to find that the genuine differences between Morford’s 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.” (District Court Decision at p. 15).

See, *Benson, supra*, 795 F.2d 975 (n.2); *Calhoun, supra*, 298 F.3d at 1232.

Other circuits that have considered the issue are unified in applying a “striking similarity” standard to determine both factual and legal copying in the absence of access. See, e.g., *Burkett v. Kids of America, Corp.*, 2009 WL 10729880 *2 (D. Mass., Feb. 6, 2009), citing *Mag Jewelry Co., Inc. v. Cherokee, Inc.*, 496 F.3d 108, 118 (1st Cir. 2007) (“Even without sufficient proof of an opportunity to view the product, courts have inferred access where the original work and alleged copy are strikingly similar”); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (copying may be found without a showing of access where the works in question are strikingly similar); *Walker v. Kemp*, 587 F.Supp.3d 232, 241 (E.D. Pa. 2022) (absent evidence of access, infringement can still be shown by striking similarity); *Armour v. Knowles*, 512 F.3d 147 n.19 (5th Cir. 2007) (“Although [p]laintiff might theoretically establish copying without access by proving the songs are so strikingly similar . . . the songs which we have reviewed . . . are in no way similar enough for a reasonable jury to make such a finding”); *Murray Hill Publications, Inc. v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 317 (6th Cir. 2004) (“where plaintiff cannot prove access, the copyright infringement can still succeed, but only by proof of a higher level of striking similarity”); *Design Basics, LLC v. Lexington Homes, Inc.*, 858 F.3d 1093, 1108 (7th Cir. 2017) (a plaintiff who cannot show striking similarity in the absence of access cannot survive summary judgment on a copyright infringement claim); *E.F. Johnson Co. v. Uniden Corp. of America*, 623 F.Supp. 1485 n.5 (D.Minn. 1985) (“In the absence of access, courts have required a showing of striking

similarity . . .”); *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 985 (9th Cir. 2017) (“If there is no evidence of access, a striking similarity between the works may allow an inference of copying”); *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1179 (10th Cir. 2009) (if a plaintiff is unable to demonstrate access, he may still establish copying by striking similarity); *Buchanan v. Sony Music Entertainment*, 2020 WL 21735592 *8 (D.C. Cir., May 26, 2020) (dismissing copyright infringement claim absent access or any allegation that the works were strikingly similar).

Morford cites no authority from any circuit holding that in the absence of access, factual (or legal) copying may be shown by applying a substantial similarity standard. Thus, Morford identified no conflict among the circuits concerning the applicability of the “striking similarity” standard in the absence of access. Nor is there any case which stands for the nonsensical proposition which Morford appears to advocate that one can prove striking similarity by proving substantial similarity.

None of the cases cited by Morford stand for the proposition that “substantial similarity” should be used to determine factual (or legal) copying in the absence of access, nor do they indicate any split concerning the applicability of the “striking similarity” standard in the absence of access. A review of the cases cited by Morford inarguably shows this. See, *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357 (5th Cir. 2004) (“ . . . the purpose of probative similarity is to determine whether *factual* copying may be inferred” and “this inquiry is not the same as the question of substantial similarity, which dictates whether factual copying, once

established, is legally actionable”)(emphasis added); *Metcalf v. Boeko*, 294 F.3d 1069 (9th Cir. 2002) (access was conceded, so court proceeded to substantial similarity analysis); *Bouchat v. Baltimore Ravens*, 228 F.3d 489 (4th Cir. 2000) (jury properly found access and, thus, proceeded to employ a “substantial similarity” analysis to determine actionable infringement); *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991) (Court only addressed actionable infringement on appeal, as access was not in issue); *Educational Testing Services v. Katzman*, 793 F.2d 533 (3d Cir. 1986) (substantial similarity standard applied to determine legal copying where access was not in issue); *Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003) (substantial similarity standard applied to determine legal copying where access was not in issue); and *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823 (10th Cir. 1993) (no discussion of access or factual copying).

Moreover, Morford cites no authority showing a split among the circuits as to the “bodily appropriation” standard, which has been “defined in the copyright context as ““copying or unauthorized use of substantially the entire item.”” *Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994) (citation omitted). All of the authority cited by Morford regarding bodily appropriation applied such standard only *after* finding factual copying through access and probative similarity or where access was not an issue and, even then, confined application of such standard to cases involving computer programs and other compilations of purely factual information. See, *Atari Games Corp.*, 979 F.2d 242, 244 (D.C. Cir. 1992) (case did not involve infringement; court simply concluded that Registrar’s failure to issue a copyright for plaintiff’s

video game was unreasonable given the modest degree of creativity necessary to obtain a copyright); *Infogroup, Inc. v. Database LLC*, 956 F.3d 1063 (8th Cir. 2020) (court applied the substantial similarity standard, but held that for infringement to be found on plaintiff’s computer database of factual business information, “virtually extensive verbatim copying” was required); *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs., Inc.*, 893 F.3d 1176, 1186 (9th Cir. 2018) (in the context of computer database of factual consumer data, infringement is determined by the “unauthorized use of substantially the entire item”); *MiTek Holdings, Inc. v. Arce Engineering Co.*, 89 F.3d 1548, 1558 (11th Cir. 1996) (bodily appropriation or “‘virtual identity’ as adopted by this circuit only applies to claims of compilation copyright infringement of nonliteral elements of a computer program”).

Since this case does not involve a computer program or database of factual information, the bodily appropriation standard would not be applied by any circuit, and there is no conflict germane to the decision in this case which would dictate granting of the Petition.

b. The Circuit Court Did Not Even Apply a “Bodily Appropriation” Test

Moreover, the Eleventh Circuit did not apply the bodily appropriation standard. There is no mention of the “bodily appropriation” standard in the Eleventh Circuit Decision, and the standard was not applied under any other name. Simply because the Eleventh Circuit considered one dissimilar element in the two works does not mean that the Eleventh Circuit applied the bodily appropriation standard—which requires copying or unauthorized use

of substantially the entire item. Therefore, any alleged conflict among the circuits concerning application of the “bodily appropriation” standard and the “substantial similarity” standard, even if such split existed which it does not, is irrelevant.

3. There is No Special Protection Afforded Compilations

Morford tries to create a new, higher level of protection for compilations. No such thing exists. In fact, contrary to Morford’s statements, under well-settled law, compilations are entitled to *less* copyright protection than non-compilation works, *not more*. Compilations have ‘thin’ copyright protection, extending only to the specific selection, coordination or arrangement of otherwise unprotectable elements. See, *Home Design Services, Inc. v. Turner Heritage Homes, Inc.*, 825 F.3d 1324, 1321-22 (11th Cir. 2016), quoting, *Intervest Const., Inc. v. Canterbury Estate Homes, Inc.*, 554 F.3d 914, 919-20 and n.3 (11th Cir. 2008). “The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material”. 17 U.S.C. § 103(b) (1988)⁷

7. Morford’s argument that *Banana and Orange* is entitled to “broader protection” because it is an “artistic compilation” is misleading. While it may be true that artistic or creative compilations are entitled to broader protections *than purely factual compilations*, such as compilations of names and numbers in a telephone book, as a general proposition, compilations of any type enjoy less protection than non-compilation works, as supported by the authority set forth above. See also, *Key Publications, Inc. v. Chinatown Today Pub. Enterprises, Inc.*, 945 F.2d 509, 514 (2d Cir. 1991) (“Although the test for infringement of original works and

Although Morford argues, with undue emphasis, that “this case deepens an acknowledged and entrenched conflict regarding protected expression in compilations”, and that “this court has twice granted certiorari involving the assessment of similarity in compilations”, (Petition at p. 5), citing this Court’s decisions in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218 (1985), *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340, 111 S. Ct. 1282 (1991); and *Google LLC v. Oracle Am., Inc.*, 141 S.Ct. 1183, 209 L.Ed.2d 311 (2021), nothing could be further from the truth. None of those cases addressed similarity, let alone striking similarity (or access), has any bearing on this case, or provides reason to grant the Petition. *Feist Publications* involved the issue of copyrightability where the Court was asked to decide whether a factual compilation—in that case a telephone white pages—was protectible under the laws of copyright; contrary to Morford’s statement, *Feist* had nothing to do with similarity. Likewise, and contrary to Morford’s statement, *Google* was a fair use case where similarity was conceded and not at issue and the Court was asked to decide whether identical lines of software code appearing in both the plaintiff and defendant’s software products could be used by the defendant under a fair use theory. Moreover, contrary to Morford’s misstatement, *Google* did not identify a relevant divergence among the circuits but simply involved a review of a Federal Circuit opinion applying fair use. Finally,

compilations is one of ‘substantial similarity’[presuming factual copying has been established], . . . the appropriate inquiry is narrowed in the case of a compilation”) (internal citations omitted); *Experian Information Solutions, Inc. v. Nationwide Marketing Services, Inc.*, 893 F.3d 1176, 1185 (9th Cir. 2018) (“compilations . . . receive only limited protection”).

Harper & Row, Publishers was a fair use case where this Court was asked to determine whether excerpts from the unpublished memoir of Gerald Ford could be published by the *Nation Magazine* under the doctrine of fair use; similarity was conceded and the case had nothing to do with any similarity issues.

Accordingly, this case does not implicate any issues involving a split in the circuits or issues deserving consideration by this Court.

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be denied.

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Respectfully submitted,

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