

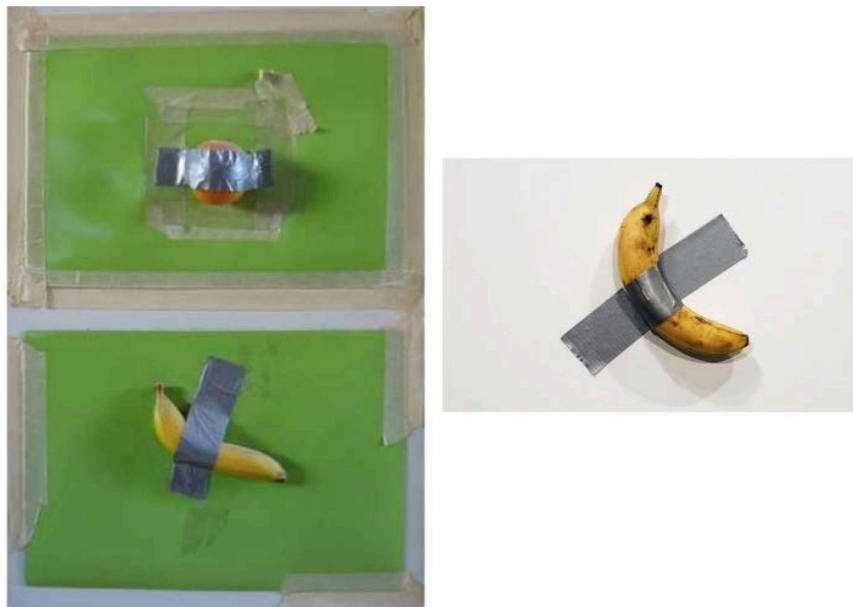
## COPYRIGHT LAW

### *Morford v. Cattelan: If Two Artists Tape a Banana to A Wall ...*

By Robert W. Clarida and Thomas Kjellberg

**“Bananas are great, as I believe them to be the only known cure for existential dread.”  
-- Anne Lamott**

On July 7, 2022 the Southern District of Florida denied a motion to dismiss in *Morford v. Cattelan*, 2022 WL 2466775 (S.D. Fla. July 7, 2022), which began by posing the following question: “Can a banana taped to a wall be art?” At issue was a claim by artist Joe Morford that his sculptural diptych, “Banana & Orange,” allegedly created in 2000 and shown at left below, was infringed by a work entitled “Comedian” by internationally famous artist Maurizio Cattelan, shown at right below. Both works prominently feature a banana affixed to a wall with silver duct tape, though Plaintiff’s banana is plastic and Defendant’s is overripe:



The Cattelan work generated international press attention at the 2019 Art Basel Miami Beach art fair and allegedly resulted in sales of over \$390,000 for Defendant. Plaintiff’s work enjoyed no comparable success.

The Court immediately recognized that to ask “is it art?” is “more a metaphysical question than a legal one,” and instead framed the legal question as an inquiry into whether Morford’s *pro se* complaint sufficiently alleged that “Cattelan’s banana infringes his banana.” For the Court, this legal question was “just as difficult,” but ultimately resulted in the denial of Defendant’s motion to dismiss.

What’s so difficult? Why was this complaint not dismissed? We will get to access and similarity in a minute, but many other factors seem to have weighed heavily against dismissal. First, plaintiff was *pro se*, and the complaint was filed on a court-provided, fill-in-the-blank computer form, the “Pro Se 1 (Rev 12/16) Complaint for a Civil Case.” Its main substantive allegation reads “The defendant’s piece ‘Comedian’ is plagiarized from the plaintiff’s original art ‘Banana & Orange’.” Under the *Iqbal/Twombly* standard that the Court purported to apply, it is hard to see this allegation as offering anything beyond “mere labels and conclusions.” But courts are famously forgiving of pleading deficiencies by *pro se* litigants, and here, perhaps hoping to move the proceedings along toward settlement, the Court did not even ask plaintiff to replead, simply finding that “plaintiff has adequately alleged” copyright infringement.

Second, the Court cited venerable authority for the proposition that juries, not judges, should decide the inherently subjective issue of substantial similarity. There is ample precedent to the contrary, and the Court noted that dismissals on this ground seem to be increasingly common. But it chose the more cautious approach, concluding that unless the similarities and differences between the parties’ works “render a plaintiff’s case bunk as a matter of law, such questions should go to the trier of fact.” *Id.* at \*7.

Another factor in the result may have been the Defendant’s choice not to attack plaintiff’s copyright under the merger doctrine, *id.* at \*10. Under that principle, if there are only a few ways

to express an idea, the plaintiff's particular expression of it cannot be protected; otherwise, a plaintiff could effectively monopolize the idea itself, which the Copyright Act expressly forbids in 17 U.S.C. 102(b). A merger argument here would seem to have much to recommend it: if the idea is "a banana taped to a wall," one could argue – though Defendant did not – that there are only so many ways to express that idea, or alternatively that plaintiff's expression of it is too uncreative to warrant protection.

The phrase "apply hook to wall" has been held unprotectable on this basis, see *E.H. Tate Co. v. Jiffy Enterprises, Inc.*, 16 F.R.D. 571 (E.D. Pa. 1954), so it is at least arguable that a sculptural expression of the idea "apply banana to wall" is likewise uncopyrightable. This doctrine is fully applicable to sculptural works, such as the jewel-encrusted bumblebee brooch that was denied protection in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9<sup>th</sup> Cir. 1971). If the *Herbert Rosenthal* plaintiff could not monopolize the idea of "a jeweled bee pin," neither should the plaintiff in *Morford* enjoy exclusivity for the idea of a banana taped to a wall.

The Court frankly acknowledged that Plaintiff "cannot claim copyright in the *idea* of a banana taped to a wall," *Morford* at \*7 (emphasis original), but then went on to hold that "[w]hile using silver duct tape to affix a banana to a wall may not espouse the highest degree of creativity, its absurd and farcical nature meets the minimal degree of creativity needed to qualify as original." *Id.* at \*8. What, exactly, is "absurd and farcical" here, apart from the idea? The color of the duct tape? The Court did not elaborate, other than to say "at this stage the Court holds that Morford's choices in giving form to Banana & Orange are sufficiently original." *Id.* Further, the Court observed in a footnote that Plaintiff had registered the work with the Copyright Office, which "provides additional support in favor of the validity of Morford's copyright." *Id.* The registration

certificate – obtained 20 years after the alleged creation of the work – is attached to the complaint, and identifies Banana & Orange as a “sculpture.”

Turning to access, the Court found that Plaintiff “generally alleged that Cattelan had access” to Plaintiff’s work. In support, it cited a page of the Complaint that makes no mention of access whatsoever, except perhaps under a very generous reading of the term “plagiarized,” which arguably implies access. The Court further accommodated the *pro se* Plaintiff by considering factual claims he made in his brief opposing the dismissal motion, which stated that his work had been available for a number of years on YouTube, Facebook, and his own personal website. In response, Defendant cited “a multitude of cases for the proposition that access cannot be established by mere internet publication,” but the Court noted that all but one of those authorities were decided on summary judgment. And in any event, the Court continued, “courts in this District have held that plaintiffs must have the opportunity to establish evidence showing the extent of internet presence in support of access.” *Id.* at \*9. Discovery presumably awaits.

With respect to substantial similarity, the Court began by considering which test to apply: the traditional lay observer standard, the extrinsic/intrinsic analysis developed in the Ninth Circuit, or the abstraction-filtration-comparison method most often applied in software and literary cases. The Eleventh Circuit has at times used each of the three, and the *Morford* Court saw no material difference:

Ultimately, any disagreement on the appropriate test is “more of a matter of semantics than substance.” [Citation omitted]. In all cases—no matter the title given to the controlling test—courts must determine “whether a reasonable jury could find the [works at issue] substantially similar at the level of protected expression.”

*Id.* at \*5.

The Court found that Morford had plausibly alleged such similarity. Applying the abstraction-filtration-comparison approach, the Court declined to filter out Morford's specific "choices in color, positioning and angling" of the sculptural elements. The Court recognized that "[o]f course, there are only so many choices an artist can make in colors, positioning, and angling when expressing the idea of a banana taped to a wall," but as noted above, Defendant chose not to assert the merger doctrine and the Court therefore did not consider this limited range of expression for purposes of determining substantial similarity. *Id.* at \*10.

To summarize,

[w]hile Morford is afforded no protection for the idea of a duct-taped banana or the individual components of his work, Morford may be able to claim some degree of copyright protection in the "selection, coordination, [and] arrangement" of these otherwise unprotectable elements.

*Id.*

Finally, at the comparison step of its analysis, the Court found similarities with respect to exactly these elements:

In both works, a single piece of silver duct tape runs upward from left to right at an angle, affixing a centered yellow banana, angled downward left to right, against a wall. In both works, the banana and the duct tape intersect at roughly the midpoints of each, although the duct tape is less centered on the banana in Morford's work than in Comedian.

Defendant pointed to additional elements in Morford's work that are not present in Cattelan's "Comedian," *i.e.* the orange, the green background, and the use of masking tape borders, but the Court disregarded these differences and found that "the alleged infringement of Morford's banana is sufficient, quantitatively and qualitatively, to state a claim." *Id.* at \*11. "At the motion to dismiss stage," wrote the Court, "the Court need not decide exactly where to draw the line" as to substantial similarity, "but only that some plausible line exists." *Id.*

## CONCLUSION

The precedential value of the *Morford* decision will probably be slim to none. Contrary to some media reports, it does not hold that taping a banana to a wall is copyrightable. It does hold, however, that where a *pro se* plaintiff alleges infringement of such a work, and that work has been registered with the Copyright Office, and the defendant does not raise the merger doctrine to challenge copyrightability, a Court in the Eleventh Circuit may well deny a motion to dismiss and leave the parties to weigh the benefits of settlement against the cost, effort and uncertainty of continued litigation and possible jury trial. For the parties, that's not bunk as a matter of law.

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Robert W. Clarida is a partner in the New York law firm of Reitler, Kailas & Rosenblatt LLP and the author of the treatise *Copyright Law Deskbook* (BNA). He is co-presenter, with Thomas Kjellberg, of "Recent Developments in Copyright," a review of copyright decisions delivered each year at the annual meeting of the Copyright Society of the USA, and is a past Trustee of the Copyright Society, a past Board member of the American Intellectual Property Law Association and former chair of the Copyright and Literary Property Committee of the Association of the Bar of the City of New York.

Thomas Kjellberg is of counsel to the New York law firm of Cowan, Liebowitz & Latman, P.C. He is a past Trustee of the Copyright Society and former chair of the ABA Copyright Office Affairs Committee, and is the chief author of the annual review of copyright decisions published each year in the *Journal of the Copyright Society of the USA* and delivered, with Mr. Clarida, at the Copyright Society's annual meeting.