

No. 24-711

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SUPREME COURT OF THE UNITED STATES

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Joe Morford,

*Petitioner,*

v.

Maurizio Cattelan,

*Respondent.*

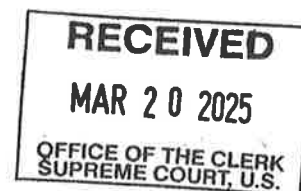
*On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Eleventh Circuit*

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REPLY BRIEF OF THE PETITIONER

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## INTRODUCTION

The defendant was not entitled to summary judgment as a matter of law in this case. Both the district and appeals court rulings were wrong. The appeals court incorrectly applied a wholesale comparison at the factual similarity stage; then an erroneous application of the inverse-ratio rule to determine access. The circuits are split as to the use of both the bodily appropriation application and inverse-ratio rule. These splits between circuits need be remedied so that there is no confusion as to what standard is to be applied to given works.

In this case, the district court ruled in favor of the defendant that there was no infringement. This was based on the judge's conclusion that there was only one way to tape a banana to a wall. Once this had been decided, the case was over, this is because there was no protected expression left to infringe. Additionally, the court credited the defendant's independent creation story, which was also dispositive. However, neither of these conclusions by the lower court survive scrutiny. The ruling was erroneous: First, to claim there is only one way to tape a banana to a wall is demonstrably absurd; particularly when hundreds of photos in documentary evidence prove otherwise. Secondly, there could be no independent creation when the defendant's story was repeatedly shown to be implausible and contradictory; and the witness affidavit exposed as being incapable of having observed the origination of the work.

Nevertheless, the appeals court upheld the decision, but on entirely different grounds. In fact, the previous determinate issues cited by the district court, simply disappeared. Instead, the infringement

was denied as the appeals court concluded the duct-tape bananas were not strikingly similar because there was an orange somewhere else in the plaintiff's display. The appeals court then determined that the work was not successful nor publicized enough to be discovered via the internet. Consequently, the 11<sup>th</sup> Circuit determined there could be no infringement. This ruling was erroneous: First, under the ascribed standard, the incorporation of non-infringed material in a comparison for striking similarity does not exist outside of a bodily appropriation assessment. And bodily appropriation is improper for artwork. And to claim that the supposed low level of similarity between the two expressions must then require the plaintiff's work to be highly publicized and successful as the only means by which to meet the burden of factual copying is the baseless inverse-ratio rule.

The circuits are split as to the use of the bodily appropriation application and inverse-ratio rule. These splits between circuits need be remedied so that there is no confusion as to what standard is to be applied to given works.

The assessment of factual similarity determines copying. The relevant portions should have been compared, but instead the entire works were considered in order to determine the similarity between the duct-tape bananas. This is wrong. Defense counsel states the bodily appropriation standard was not used in this case, then fails to clarify what standard was applied. Aside from a bodily appropriation protocol, there is no other scenario whereby anything other than the relevant portions are to be compared under a test requiring factual similarity analysis. If what defense counsel claims is true, then the appeals court simply made up a new standard in order to compare other

material until the striking similarity between the duct-tape bananas was gone. And to reiterate, once striking similarity is established, the need to show access is no longer required. When the appeals court pointed to random material outside of the compared portions in order to skew the similarity between the expressions, they invalidated their decision. It is irrefutable that such a similarity evaluation by the appeals court is not an accepted application of any existing copyright law. That being the case, it is an egregious violation requiring the Supreme Court's intervention.

Regarding the access evaluation, the appeals panel incorrectly determined that the similarity between the duct-tape bananas was so low it would require proof of wide dissemination in order to establish copying. The exclusive means applied by the appeals court demanded a high level of "publicity" and "success" of the original work in order to show the piece to have been copied. This is an unacceptable application of the inverse-ratio rule.

The appeals court could not point to any differences between the duct-tape bananas, so they went *outside* of the portions in attempt to create differences *between* the portions. And neither the appeals court nor defense counsel provide any viable explanation for this. Consider, **striking similarity is proven by a shared likeness between expressions that is unique or complex.** Here, besides the similarity meeting the burden for both, the appeals court specifically admits the similarity of the incongruous expression; then proceeds to infuse outside material in order to create dissimilarity where there is none.

And regarding the nonsensical sliding scale of the inverse-ratio rule, publicity and success cannot

be the sole factor in determining widespread dissemination. If popularity is required for material to be found online, then only celebrities would be discoverable and entitled to protection. Neither of which are true.

This case presents an ideal vehicle to resolve splits in the standard to be used for factual similarity assessment, as well as, clarification of the inverse-ratio rule across all circuits. Because the application of a bodily appropriation standard to art and the use of the inverse-ratio rule is flatly at odds with circuit or Supreme Court precedent, this case would be appropriate for summary reversal.

The defendant argues that the decision by the appeals court is correct because there is no split in the circuits. The defense counsel's effort to discount the circuit conflict, and the various vehicle issues they contrive, are equally without merit. This Court should grant the petition for certiorari.

If this ruling is allowed to stand, it constructs factual similarity as arbitrary, and copyright protection as baselessly discriminatory.

## **ARGUMENT**

### **I. Infringed Portions Can Determine Striking Similarity.**

Fundamental to the Supreme Court's decision in *Google LLC v. Oracle Am., Inc.*, was the necessary assessment and determination of what standard should be used to determine similarity when comparing works in infringement actions. The case made clear that art should be assessed differently than factual material. *See Google*, 141 S. Ct. 1183, 1197 (2021). Consequently, wholesale assessment is contrary to the analysis of non-utilitarian works,



whereas portion assessment would be appropriate for artistic expressions.

And striking similarity may be present in very small amounts of expression in compilations. *See National Conference of Bar Examiners v. Saccuzzo*, CASE NO. 03-CV-0737-BTM (NLS), (S.D. Cal. Jun. 9, 2003) (“see also *ETS v. Katzman*, 793 F.2d at 542-43 (holding that copying of even a few test questions was sufficient to justify a preliminary injunction against copying of any test).”).

Specifically, other circuits have identified “striking” similarity in portions of works consisting of a combination of otherwise unprotected elements.

In *Metcalf v. Bochco* specific portions throughout the works showed sections that were strikingly similar. The entire works were not required to be virtually identical in order for the similarity of any given segment to prove striking. Nor did the differences elsewhere impact the recognized similarities. *See Metcalf*, 294 F.3d 1069, 1073 (9th Cir. 2002) (“The **similarities** between the relevant works are **striking**”).

In *Bouchat v. Baltimore Ravens* there was significant material in one piece and not the other; yet appropriately this did not diminish the striking similarity between the portions of the shield drawings. *See Bouchat*, 228 F.3d 489, 494 (4th Cir. 2000); 228 F.3d 489, 503 (4th Cir. 2000). (“Based on Gaste and Selle, the majority maintains that Bouchat is entitled to an inference of access because of the **striking similarity** between the Ravens shield logo and his shield drawing.”).

In *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, striking similarity was determined in arrangement patterns and order of designs. Nowhere were any of these portions required to encompass the entire work

nor was the similarity thwarted because there was dissimilarity somewhere else. *See Segrets*, 207 F.3d 56, 62 (1st Cir. 2000). (“The same is true of the Charro. Many of the patterns in the Charro sweater are **strikingly similar** to those found in the intricate Primitive Patterns design, and the patterns are arranged in a similar order.”).

In *Lipton v. Nature Co.*, striking similarity was determined in selection and arrangement of portions. Nowhere did the differences outside of the copied selection and arrangement effect the identified factual similarity between the segments. *See Lipton*, 71 F.3d 464, 471 (2d Cir. 1995). (“A comparison between the selection and arrangement of terms in Lipton's book and the selection and arrangement of those on the scarf leads us to conclude that the two are "**strikingly similar**."”).

In this case, it was made obvious in the defendant's response that they do not understand the difference between the substantial similarity **standard** (as opposed to the bodily appropriation standard); and substantial similarity **analysis** (which is the step applied after factual similarity and synonymous with “actionable similarity”). (Reply pp. 20-25).

The defendant argues that there is no conflict among the courts of appeals regarding the use of the bodily appropriation and the substantial similarity standard(s). The defendant is wrong. The outcome would have been different if these same facts had arisen in a different circuit.

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

### The Substantial Similarity Standard

It was established in *Key Publications* that the bodily appropriation standard was not required for compilations. *See Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509 (2d Cir. 1991). Wholesale copying is not required to show similarity in compilations. *See Bellsouth*, 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”).

In *Educational Testing Services v. Katzman*, striking similarity was found in only a limited portion of questions. Nowhere were all the questions required to be the same to accomplish this and none of the voluminous differences elsewhere had any effect on the virtually identical similarity shared in the small segment(s) identified. *See Educational Testing Services v. Katzman*, 793 F.2d 533, 541 (3d Cir. 1986) (“our 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.”).

In *Kohus v. Mariol* a two-step approach was used to identify copyrighted portions to determine what may be protected; the infringing work is then compared to see if there is similarity to any of these protectable elements. Nowhere in this analysis is factual dissimilarity created by pointing to something outside the matching portion to claim it creates differences between these same material articles. *See Kohus v. Mariol*, 328 F.3d 848, 855 (6th Cir. 2003) (“A two-step approach that reconciles *Feist* and *Monogram Models* is found in *Sturdza v. United Arab Emirates*, 281 F.3d 1287 (D.C. Cir. 2002): the first step “requires identifying which aspects of the

artist's work, if any, are protectible by copyright," *id.* at 1295; the second "involves determining whether the allegedly infringing work is 'substantially similar' to protectible elements of the artist's work," *id.* at 1296.").

A proper process of assessing factual, then actionable similarity is illustrated in *Gates Rubber Co. v. Bando Chemical*. Only after copying is established between identified portions are the entire works then compared to determine the overall importance of the copying to the original work. *See Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 9 F.3d 823, 839 (10th Cir. 1993) ("Ultimately the court must decide whether those protectable **portions** of the original work that have been copied constitute a substantial part of the original work — i.e. matter that is significant in the plaintiff's program.").

### **The Bodily Appropriation Standard**

The bodily appropriation/wholesale copying standard has been applied to works of varied levels of creativity and factual expressions.

*See Atari Games Corp. v. Oman*, 979 F.2d 242, 244 n.4 (D.C. Cir. 1992) ("the mere indispensable expression of these ideas ... may be protected only against **virtually identical** copying"). And *See Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994) ("See also *Atari Games Corp. v. Oman*, 979 F.2d 242, 245 (D.C. Cir. 1992) (analogizing audiovisual work like a videogame to compilation of facts).").

*See Infogroup, Inc. v. DatabaseLLC*, 956 F.3d 1063, 1066 (8th Cir. 2020) ("For factual compilations, it takes "**virtually extensive verbatim copying to constitute 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,"** or **"unauthorized use of substantially the entire item."** *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989) (citations omitted).”).

See *MiTek Holdings, Inc v. Arce Engineering Co.*, 89 F.3d 1548, 1558-59 (11th Cir. 1996) (“there can be no infringement unless **the works are virtually identical**”).

The cited cases illustrate a clear split where similar types of compilations are assessed differently based on the circuit e.g. phone books in *Key* v. the data in *Infogroup*, etc. And when infringement concerns artistic elements within factual compilations, is the *Harper*, *McCulloch* or *Atari* standard applicable? See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446-47 (9th Cir. 1994) (“Apple, however, contends that its audiovisual work with animation and icon design cannot be analogized to factual works such as game strategy books, see *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.) (“[S]imilarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed.”), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984), accounting systems, see *Selden*, 101 U.S. at 104, 25 L.Ed. 841 (copyright in book describing new accounting system not infringed when defendant copied ledger sheets used in system), or organizers, see *Harper House*, 889 F.2d at 205 (as

compilations consisting largely of uncopyrightable elements, plaintiff's organizers entitled only to protection against "bodily appropriation of expression"), which are afforded only "thin" protection because the range of possible expression is narrow. *See Feist*, 499 U.S. at 349, 111 S.Ct. at 1289-90. Rather, it submits that the broader protection accorded artistic works is more appropriate. *See, e.g., McCulloch*, 823 F.2d at 321 (artistic work like a decorative plate receives broader protection because of endless variations of expression available to artist).").

In this case, there is no legitimate reason for the 11th Circuit to have negated striking similarity by pointing to "differences" elsewhere in the display. If they are claiming they did not use the bodily appropriation standard, then why did they do it?

This case is a good vehicle to resolve the split of when and how to apply either the bodily appropriation, or substantial similarity standard. The 11th Circuit's ruling to the contrary—based on longstanding circuit precedent—should not be allowed to stand.

## **II. A Work Does Not Have To Be Famous To Be Reasonably Accessible.**

To require any copyrighted work to show a high-level of publicity or success in order to prove it has an acceptable level of similarity to an infringing work is ridiculous. Besides being confusing, pointlessly biased and particularly inaccurate when applied to the internet, it is not part of the copyright statute to afford such advantage to celebrity.

*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.”).

Although the 11<sup>th</sup> Circuit decision in this case is unpublished, that does not mean this is a poor vehicle for resolving this issue. The court applied the longstanding inverse-ratio rule, which conflicts with other courts of appeals.

This case is not uncommon.

Moreover, this issue does not arise solely in the context of art, but across the broad spectrum of copyright cases where similarity and access need be determined.

The inverse-ratio rule was never particularly accurate nor useful, and to continue to allow such an interpretation or application of it in the rapidly changing digitally interconnected world is woefully inadequate and destructive to copyright protection. Further, it would put many final judgments at risk. In short, this case presents an important issue warranting this Court’s review.

Popularity and similarity should not be intertwined and are particularly harmful when applied to the internet. To continue to grant a lower level of similarity protection simply because a work was publicized or successful has more to do with fame and less to do with intellectual property. Most other circuits refuse to use the inverse-ratio rule with good reason. And in this case, the 11<sup>th</sup> Circuit used the rule and cannot claim otherwise by pretending that requiring publicity or success for widespread dissemination was somehow applied in a vacuum. The stated metric for wide dissemination by the 11<sup>th</sup> Circuit requires a very high level of popularity, which then allows a lower level of acceptable similarity to achieve copying. This is the definition of the inverse-ratio rule.

To apply a sliding scale of access to similarity is a capricious standard, which is particularly disconnected in the social media age. This case presents an excellent vehicle for the Court to reverse the 11<sup>th</sup> Circuit's decision and overturn the inverse-ratio rule.



### **CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,  
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