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Banana, tape and what makes art original enough to claim copyright

Question: Can a banana with duct tape infringe on the copyright of a banana and an orange with duct tape?

Discussion: Copyright infringement requires the unauthorized copying of an original work of authorship. The plaintiff, Joe Morford, created a work that consisted of a banana and an orange duct taped to a green background with masking tape added around the edges of the background. He published his work on his social media and his website.

The defendant, Maurizio Cattelan, created a work that consisted of an over-ripe banana duct taped to a neutral colored background with no additional masking tape. Cattelan's work proved quite popular, and he was able to sell three copies and two proofs for more than \$390,000.

Morford sued Cattelan for copyright infringement. Cattelan brought a motion to dismiss, arguing that Morford cannot claim a copyright in the idea of taping fruit to a background and the idea is not sufficiently original to warrant copyright protection.

The district court denied the motion to dismiss. The



IP NEWS CHALLENGE

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court went into a lengthy discussion of evaluating the elements of copyright infringement. The court held that Morford had sufficiently alleged the two primary elements of copyright infringement: access and substantial similarity between the works.

One of the most interesting parts of the court's analysis was the discussion of evaluating substantial similarity. The court acknowledged that other

courts have used different types of analysis ("extrinsic v. intrinsic test" or "lay observer test") but felt that the appropriate test is more a matter of semantics.

The court used a three-step test. The first step was "abstraction," which requires a breakdown of the constituent structure parts of the work. The second step was "filtration," where the court filters out the unprotectable elements of the work. The third step was "comparison," where the protectable elements of the works are compared to determine substantial similarity.

Answer: It depends. Comparing only the protectable elements of the original work to the infringing work in the case may leave only minimal creative elements for an infringement analysis.

Case Cite: *Morford v. Cattelan*, 21-2039-Civ-Scola (D.C.S.D. Fla. 2022).

Sur-Reply: The court held that Cattelan's argument that Morford's work wasn't copyrightable would be more appropriate at the summary judgment stage. However, many courts and commentators believe copyrightability should be decided first.