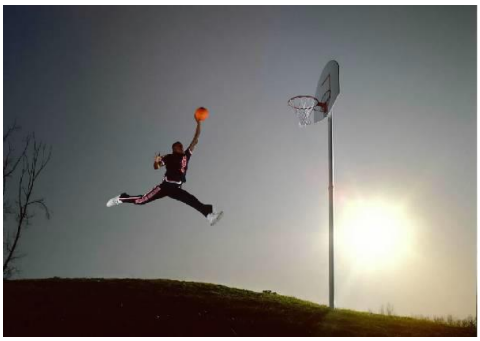
Rentmeester v. Nike: Copyright Protection for Photography

On February 27, 2018, the United States Court of Appeals for the Ninth Circuit held that photographer Jacobus Rentmeester had failed to demonstrate that Nike infringed Rentmeester's copyright in a photograph of Michael Jordan. The decision triggered extensive debate about the scope of copyright protection for photographs. On December 3, 2018, Rentmeester filed a petition for certiorari in the United States Supreme Court, asserting that the Ninth Circuit's decision conflicts with the law of the First, Second, and Eleventh Circuits. Nike's opposition is due on February 6, 2019. These are filings to watch. The Ninth Circuit's decision and the parties' competing filings raise critical questions about photography that impact the law of substantial similarity and, indirectly, the hotly debated topic of fair use.

I. Background

In 1984, Jacobus Rentmeester made a photograph of Michael Jordan jumping toward a basketball hoop in the style of ballet's grand jeté with a basketball raised above his head in his left hand. Shortly after, in 1984 or 1985, Nike commissioned its own photograph of Jordan that was later used in its Air Jordan marketing campaign and for the famous "Jumpman" logo.[1] Nike was aware of Rentmeester's photograph. Here are the two photographs:

Rentmeester's Photograph



Nike's Photograph

Rentmeester sued Nike in 2015, alleging copyright infringement.[2] The district court granted Nike's motion to dismiss under Fed. R. Civ. P. 12(b)(6). The Ninth Circuit affirmed, holding that Nike's photograph was not substantially similar to Rentmeester's photograph.[3] The court explained that although "photos can be broken down into objective elements that reflect the various creative choices the photographer made in composing the image—choices related to subject matter, pose, lighting, camera angle, depth of field, and the like . . . none of those elements is subject to copyright protection when viewed in isolation."[4] These elements must be viewed as a whole—as they were selected and combined in the original photograph—and then compared from that perspective to the arrangement of the same elements in the allegedly infringing work.[5]

The Ninth Circuit performed this analysis on Rentmeester's and Nike's photographs to determine whether they were substantially similar. It observed that the photographs were similar in "general ideas or

1 *Rentmeester v. Nike*, 883 F.3d 1111, 1116 (9th Cir. 2018).
2 *Id.* at 1115.
3 *Id.* at 1116, 1125.
4 *Id.* at 1119.
5 *Id.* at 1119-20.

concepts," such as Jordan's grand jeté pose, the unusual outdoor setting, and the angle from which the shots were taken. But the court concluded that Nike's photographer "did not copy the details" of the "protectable" elements in Rentmeester's photograph;[6] instead, the photographer "made choices regarding selection and arrangement that produced an image unmistakably different from Rentmeester's photo in material details[.]"[7] For example, the court noted that Nike's photograph has different lighting and background imagery, poses Jordan in slightly different ways that emphasize vertical instead of horizontal propulsion, changes the angle of the basketball hoop and pole, and zooms in closer to Jordan.[8] The court held that these "differences in selection and arrangement of elements [in the Nike photograph] … preclude as a matter of law a finding of infringement."[9] It therefore affirmed the district court's dismissal of Rentmeester's complaint, with prejudice and without leave to amend.

II. The Petition for Certiorari

In December 2018, Rentmeester filed a petition for certiorari in the United States Supreme Court, arguing that the Ninth Circuit's decision creates a circuit split, that the decision is incorrect, and that this case is "an ideal vehicle to address a vitally important issue."[10] He contends that the Ninth Circuit's decision "treats photography as a second-class art" by protecting photographs "only in their selection and arrangement of unprotected facts," which he argues entitles photographs "to markedly thinner protection than any other art form."[11]

Rentmeester argues that the Ninth Circuit's decision conflicts with the law of the First, Second, and Eleventh Circuits, because these circuits treat the individual elements of a photograph as "protected for purposes of substantial similarity analysis."[12] For example, Rentmeester claims that *Rogers v. Koons*, *Leibovitz v. Paramount Pictures Corp.*, and *Mannion v. Coors Brewing Co.* upheld the principle that the individual elements of a photograph deserve broad protection.[13] He also asserts that the Eleventh Circuit "treats the individual elements as protectable, rather than treating them as unprotectable facts arranged creatively."[14]

By contrast, Rentmeester argues that the Ninth Circuit's decision protects "none" of a photograph's "creative elements," therefore requiring photographers to prove "super-substantial similarity" between a photograph and an allegedly infringing work.[15] According to Rentmeester, this new test "will drastically reduce the protection that photographs enjoy under copyright law."[16] Rentmeester also draws from the Supreme Court's decision in *Burrow-Giles Lithographic Co. v. Sarony*, which, he argues, requires the same level of copyright protection for the individual elements of a photograph as the individual elements of novels, plays, motion pictures, and songs.[17]

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6 *Id.* at 1122-23.
7 *Id.* at 1122.
8 *Id.* at 1121-22.
9 *Id.* at 1122.
10 Rentmeester Petition for a Writ of Certiorari, December 3, 2018, at 24-40, *available at* https://www.supremecourt.gov/DocketPDF/18/18-728/73985/20181203175127055_Rentmeester%20Petition.pdf.
11 *Id.* at 3.
12 *Id.* at 27.
13 *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2005).
14 *Id.* at 35-36 (citing *Leigh v. Warner Bros.*, 212 F.3d 1210 (11th Cir. 2000)).
15 *Id.* at 25.
16 *Id.* at 37.
17 *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); Petition at 38-39.

III. Significance

A war rages in the realm of appropriation art. Appropriation artists and photographers both claim the other side is stifling creativity—one side cries theft, the other relies upon the First Amendment (or at least its general principles). Appropriation artists won a significant battle in the Second Circuit decision of *Patrick Cariou v. Prince*, where the Second Circuit held that Richard Prince did not infringe Cariou's copyrights in several photographs.[18] Another photographer lost a copyright fight in the Seventh Circuit when his picture of a political figure was modified for use on a t-shirt.[19] More cases move through the court system: Richard Prince's appropriation of images from Instagram[20] and Andy Warhol's celebrity portraits of Prince, the music artist.[21] Other disputes have made the press but not yet the courts.

These cases raise important questions about comparative artistry. How do you compare and contrast the elements of a photograph with the elements of a painting or mixed-media work? Do the light and dark of the two works matter? How about the colors? What about the texture of the work? Do we identify which features of each medium comprise artistic value and then compare those? What makes a work qualitatively valuable? Quantitatively valuable? Do we care the same about both? These questions are impossible to answer on a generalized basis. Imagery, for example, plays a different role in a Peter Max than an Andy Warhol. So, too, in a Robert Indiana versus a Peter Beard versus a Hank Willis Thomas. Courts have struggled to create uniform standards to govern an unconventional world, which often sees artistic value in dislocation and non-conformity.

The Ninth Circuit's decision in *Rentmeester v. Nike* was a battle between photographers, each of whom took a picture of Michael Jordan in a similar, stylized pose. But this case also impacts the broader appropriation debate involving works in other media, because the real issue it decides is how we should think about photographs as art. That issue is critical in the current debate about fair use. It arose, for example, in *Cariou*, where the court found that Prince's work had "a different character…new expression, and employ[s] new aesthetics with creative and communicative results distinct" from Cariou's photographs.[22] The "character" and "aesthetics" both defined and distinguished the legally relevant features of the art. It also arose when courts looked beyond transformation for answers to copyright disputes. In *Kienitz*, the Seventh Circuit searched the new artwork for material that was appropriated from the source photograph. To perform this analysis, the court needed to decide which parts of the two works mattered. You can't decide the "amount and substantiality" of the copyrighted work that was used without first deciding how to look at and value the work. Should we protect a photographer's lighting choices? A painter's palette? Both? With what relative weight? Individually or only in combination with other elements? What happens if palette is critical to one painter and an afterthought for another? These artistic questions—and their legal implications—are barely beneath the surface.

Rentmeester contributes to the Ninth Circuit's views about photography as art and the protection of new expression. It is important to watch the outcome of Rentmeester's petition to the Supreme Court and the way in which *Rentmeester* is relied upon, and received, in other courts.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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18 *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).
19 *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).
20 *Graham v. Prince*, 15-cv-10160 (S.D.N.Y.).
21 *The Andy Warhol Foundation v. Goldsmith, et al.*, 17-cv-2532 (S.D.N.Y.).
22 *Cariou*, 714 F.3d at 694.

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