

Slam Dunk for Nike – Jumpman Logo Clear of Copyright Dispute

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by Cristofer Leffler

On March 25, 2019, the Supreme Court declined to hear an appeal of Nike's successful dismissal of a copyright infringement lawsuit filed by photographer Jacobus Rentmeester against Nike's ubiquitous Jordan Brand Jumpman Logo, ending a four-year legal battle.

Background

In 1984, in the lead up to the 1984 Summer Olympics, Rentmeester created a photo essay for the Summer 1984 Special Issue of *Life Magazine* featuring athletes preparing to represent the United States in the 1984 Olympics. The subjects included Carl Lewis, Greg Louganis, Edwin Moses, and of interest here, Michael Jordan. In the summer of 1984, Michael Jordan had just completed his junior year at the University of North Carolina where he was selected by consensus to the NCAA All-American First Team and was awarded the Naismith and Wooden College Player of the Year awards.

As described in the Complaint, "Mr. Rentmeester's central idea was to tell a story of gravity defying flight, athletic ability, and elegance, all in a single dramatic image... To give his idea physical expression, Mr. Rentmeester needed to take Mr. Jordan out of the conventional context of a basketball court and place him outside... Doing so maximized visual attention on a full-body figure of Mr. Jordan."

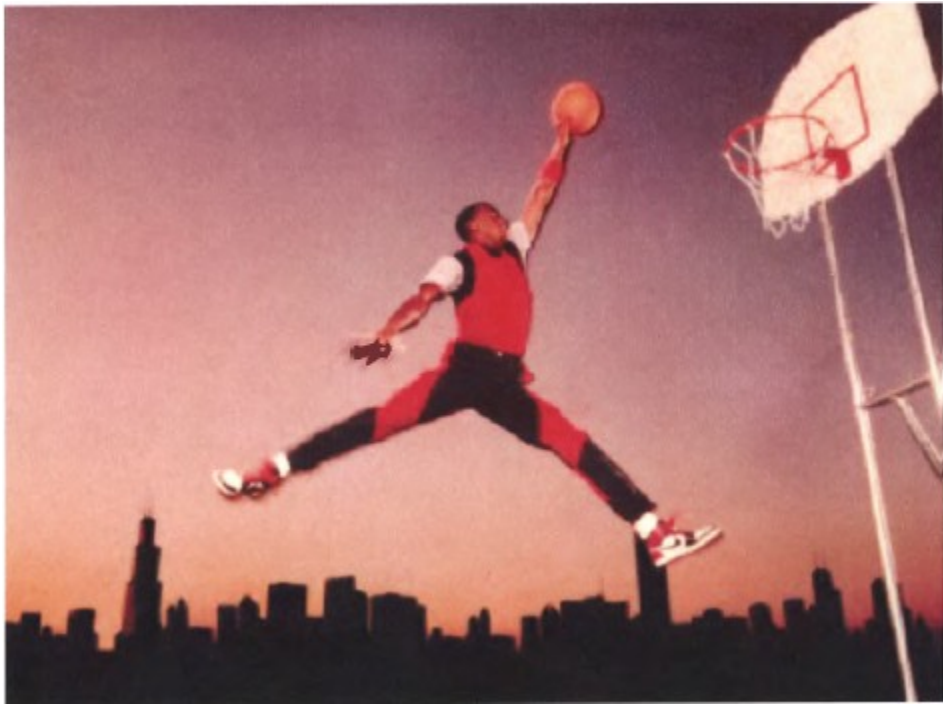
A critical element of the photo was the pose. Mr. Rentmeester conceived of an "artificial pose" whereby Mr. Jordan would perform a ballet pose known as a "*grand jetés*." According to the Complaint: "If applied literally, Mr. Jordan attempting a ballet leap would appear awkward and confusing. But if adapted creatively, with Mr. Jordan extending his non-shooting left arm straight and forward, triumphantly holding a basketball (as the tip of a crown holds a jewel), and framing the shot with Mr. Jordan appearing to glide away from the earth and toward a basketball hoop, the effect would be powerful, compelling, and unique." The resulting photo appears below.

Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation



At approximately the same time *Life Magazine* published the Rentmeester Photo, Nike was preparing to launch its endorsement relationship with Michael Jordan. Nike contacted Mr. Rentmeester and licensed the use of color transparencies of the Rentmeester Photo “for slide presentation only, no layout or any other duplication” was permitted. Then, less than seven months later, Nike commissioned a photograph of Mr. Jordan that Nike displayed on billboards and posters.



Beginning in 1987, Nike created a silhouette of Mr. Jordan taken from the Nike Photo and began using what became known as the “Jumpman Logo” on all of its Jordan Brand merchandise.



The Complaint and Motion to Dismiss

On January 22, 2015, more than *thirty years* after Mr. Rentmeester first learned about the Nike Photo, Mr. Rentmeester sued Nike for copyright infringement, alleging that the Nike Photo and the Jumpman Logo infringe the Rentmeester Photo. Nike filed a motion

to dismiss for failure to state a claim, arguing that photographs of the same subject are not “substantially similar” unless they are “virtually identical.” Nike argued that the differences between the Rentmeester Photograph and the Nike Photograph and Jumpman Logo were substantial. Specifically, Nike argued the following differences:

- **Differences in Mood** – The Rentmeester photo creates the mood of a young athlete striving (but not guaranteed) to achieve a goal. Mr. Jordan is very small in relation to the photo, isolated in a deserted field with the basketball hoop towering almost impossibly high above him and far in the distance. The Nike photo depicts the Michael Jordan who has attained a goal—he has arrived in Chicago to begin his promising professional career. Mr. Jordan soars triumphantly, almost effortlessly, over the skyline of Chicago. The Michael Jordan of the Nike Photo has made it.
- **Differences in the Appearance of Mr. Jordan** – Mr. Jordan is wearing different clothing in the two pictures; Mr. Jordan is placed differently in the two photos and the placement of his image is different; Mr. Jordan’s body position is different, specifically with regard to the placement of his arms, hands and legs.
- **Differences in the Setting and Background** – The Rentmeester Photo was taken on an isolated grassy knoll with a leafless tree and foliage in the foreground; the Nike Photo depicts an urban background with no trees, grass or foliage.
- **Differences in the Color of the Sky** – The sky in the Rentmeester Photo is depicted in cool colors of blue, grey, white, and black; the Nike Photo depicts the sky in warm colors of deep purple and red.
- **Differences in Lighting, Shadow, and depiction of the Sun** – The sun shines brightly and centrally in the Rentmeester Photo, casting shadows of Mr. Jordan’s face and figure; the Nike Photo is set at dusk with the sun absent from the frame.
- **Differences in the Appearance of the Basketball Hoops** – The hoop in the Rentmeester photo has one post and appears perfectly vertical in the distance and at a height that seems impossibly out of reach for Mr. Jordan; the hoop in the Nike Photo, has two posts, is at an angle and appears perfectly in reach for Mr. Jordan to dunk the basketball.

The District Court Sides with Nike

Ultimately, the district court agreed with Nike:

[t]he idea in the Rentmeester Photo is, “Michel Jordan in a gravity-defying dunk, in a pose inspired by ballet’s *grand-jeté*.” Given this idea, there is nothing original about the selection and arrangement of having a Michael Jordan jump with a basketball in the vicinity of a basketball hoop—that is all *scènes à faire* for the idea at issue.

The court continued:

I find no substantial similarity between the Rentmeester Photo and the Nike Photo . . . I believe these many differences are sufficient to overcome the one similarity that Mr. Rentmeester has to hang on to—the fact that the photographers were taken from similar angles.

In light of the court’s finding with respect to the Nike Photograph, the court also determined that the Jumpman Logo was not infringing. “The only similarity between the Rentmeester Photo and the Jumpman Logo is the pose—the Jumpman Logo is nothing

more than an expression of the pose [and] ... the two poses are not substantially similar and therefore the two works are not substantially similar.”

The Ninth Circuit Affirms the District Court

In a split decision, the Ninth Circuit affirmed the district court, but not without clarifying some aspects of the law. The Ninth Circuit first explained the “extrinsic test” for copying, which

[a]ssesses the objective similarities of the two works, focusing only on the protectable elements of the plaintiff’s expression. Before that comparison can be made, the court must “filter out” the unprotectable elements of the plaintiff’s work—primarily ideas and concepts, material in the public domain, and *scènes à faire* (stock or standard features that are commonly associated with the treatment of a given subject). The protectable elements that remain are then compared to corresponding elements of the defendant’s work to assess the similarities in the objective details of the work.

With respect to the Rentmeester Photo, the court explained “Without question, one of the highly original elements of Rentmeester’s photo is the fanciful (non-natural) pose he asked Jordan to assume,” but “[w]ithout gainsaying the originality of the pose Rentmeester created, he cannot copyright the pose itself and thereby prevent others from photographing a person in the same pose.” Rather, “[w]hat is protected by copyright is the photographer’s selection and arrangement of the photo’s otherwise unprotected elements.”

Contrary to the district court’s finding that the Rentmeester Photo was entitled only to “thin protection,” the Ninth Circuit found that the photo “is undoubtedly entitled to broad rather than thin protection” in light of the great range of creative choices that were made and depicted in the photograph. But acknowledging that the photo was entitled to broad protection did not change the outcome. In determining whether the Nike Photograph was substantially similar to the Rentmeester Photograph, the court concluded:

The works at issue here are as a matter of law not substantially similar. Just as Rentmeester made a series of creative choices in the selection and arrangement of the elements in his photograph, so too Nike’s photographer made his own distinct choices in that regard. Those choices produced an image that differs from Rentmeester’s photo in more than just minor details.

The court continued “if the Nike photo cannot as a matter of law be found substantially similar to Rentmeester’s photo, the same conclusion follows ineluctably with respect to the Jumpman Logo.”

By declining to hear the case, the Supreme Court ensured the controversy would remain resolved in Nike’s favor under the Ninth Circuit’s reasoning.