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Nike Jumpman logo: not yet a slam dunk

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25 Jul 2018

Co-published

On 27 February 2018 Nike won the copyright contest over its iconic Jumpman logo when the Ninth Circuit Court of Appeals issued its opinion of non-infringement in a 2-1 decision. However, on 13 July 2018 photographer Jacobus Rentmeester managed to keep the game against Nike alive by convincing a three-judge panel of the court to stay the mandate confirming its decision.

Facts

In 1984 Rentmeester took a picture of then-collegiate athlete Michael Jordan for *Life* magazine. The photo depicted Jordan with a basketball above his head leaping toward a basketball hoop and appearing to be preparing to dunk the ball, with a grassy knoll in the background. Rentmeester instructed Jordan on the pose he desired, which was an unusual pose inspired by the grand jete in ballet. After the photograph appeared in *Life*, Nike approached Rentmeester and requested permission to borrow colour transparencies of the photo. Rentmeester provided Nike with transparencies under a limited licence for slide presentation only. Thereafter, Nike hired its own photographer to capture an image of Jordan inspired by Rentmeester's photograph. Nike's image shows Jordan in a similar position, but with the Chicago skyline in the background and Jordan wearing Nike apparel.

After seeing the Nike photograph, Rentmeester threatened to sue and the parties renegotiated the licence. Nike paid Rentmeester \$15,000 for the right to continue using its own photograph for two years. Then, in 1987 Nike created its famous Jumpman logo based on its own photograph, which it has since used extensively in marketing merchandise.

Rentmeester sued Nike in the US District Court for the District of Oregon in January 2015, claiming that both the Nike photograph and the Jumpman logo infringed his copyright in his original photograph, in violation of the Copyright Act and the Digital Millennium Copyright Act. The district court concluded that there was no infringement as a matter of law and dismissed the claims. Rentmeester appealed to the Ninth Circuit in September 2015, arguing that the dismissal was premature as he had not been allowed to take discovery in the case.

Decision

In *Rentmeester v Nike, Inc*, 883 F3d 1111, 1116 (9th Cir 2018) the Ninth Circuit found that, despite being highly original and entitled to broad protection, Rentmeester's photograph was not infringed by Nike's photograph or the Jumpman logo. The court explained that to show infringement, Rentmeester must establish that:

- he owned a valid copyright in his photograph; and
- Nike had copied protective aspects of that photograph's expression – this required showing both copying and unlawful appropriation.

For ease of analysis, the court focused only on the photographs. At the outset, the court found that Rentmeester could show that he owned a copyrighted photograph. Further, Rentmeester's proof that Nike had access to his photograph in combination with the conceptual similarities between the works was "sufficient to create a presumption that the Nike photograph was the product of copying rather than independent creation". However, Rentmeester failed to plausibly claim that Nike copied enough of the protected expression from his photograph to establish unlawful appropriation.

Unlawful appropriation arises where the similarities between works are substantial and involve protected elements of the plaintiff's work. The court focused on the following protectable elements of Rentmeester's photograph as compared to Nike's photograph and found each to be non-substantially similar:

- Subject matter – although both pictured Michael Jordan in a leaping pose, the variation in Jordan's body position rendered the photographs distinguishable.
- Setting – although each showed Jordan jumping toward a basketball goal, Rentmeester's background included a grassy knoll whereas Nike's included the Chicago skyline.
- Angle – this aspect warranted thin protection as photographers have long used similar camera angles



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to capture subjects silhouetted against the sky.

- Arrangement – the total arrangement of these protected elements was materially different. Jordan was positioned left of centre in Rentmeester's photograph and dead centre in Nike's. Additionally, the basketball hoops in the photographs were positioned, lit and angled differently.

Ultimately, Rentmeester could not prove that Nike had unlawfully appropriated any protected aspect of his photograph and, accordingly, the same conclusion followed for the Jumpman logo. The court affirmed the district court's dismissal of Rentmeester's infringement claims.

As a result of the stay of the mandate by the three-judge panel, Rentmeester will have the opportunity to persuade the US Supreme Court to consider his appeal of the adverse ruling. The panel had only a few days earlier denied his request for a rehearing to seek reversal of its decision affirming the dismissal of his claims by the lower court.

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