

## Court Affirms Nike Did Not Infringe Photo of Michael Jordan

(February 28, 2018) A Nike, Inc.-commissioned photograph of Michael Jordan flying through the air holding a basketball with the Chicago skyline in the background did not infringe the copyright of a photograph of the basketball legend taken by famous photographer Jacobus Rentmeester.



The Ninth Circuit affirmed a summary judgment in favor of Nike, finding that, while Rentmeester's photo was "distinctive precisely because he chose not to be bound by the conventions commonly followed in photographing a basketball player attempting to dunk a basketball" and was entitled to "broad" copyright protection, the Nike-commissioned nevertheless photo had enough differences to not be an infringement.

Rentmeester took the original photograph of Jordan in 1984 in a field where the photographer mounted a basketball hoop on a tall pole. Rentmeester instructed Jordan to pose "inspired by ballet's *grand jeté*." After the photograph ran in Life magazine, Nike obtained a limited license for the image for \$150 to use for a "slide presentation." Later, Nike hired its own photographer to produce its own photograph of Jordan, which was then used as the basis for Nike's "Jumpman" logo—a black silhouette used in connection with marketing billions of dollars of merchandise.



The appellate court found that Nike unquestionably had access to the original photograph. But the court said the works were "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 differences included the type of basketball hoop, the

Chicago skyline background, the foregrounds, the location of Jordan's hands and feet, and his position in the photograph.

Because the Nike photograph did not infringe Rentmeester's copyright, the court found the Nike logo also did not infringe.

"The results are not surprising," noted Cheryl Dancy Balough. "Copyright protection is for the expression of an idea, not the idea itself. Here, the idea of photographing Michael Jordan in flight in a non-traditional setting is not copyrightable. It seems reasonable that the court found the images have many distinguishing elements that prevent a finding of infringement." Ms. Balough is an adjunct professor of copyright law at IIT Chicago-Kent College of Law.

Balough Law Offices assists its clients in protecting their intellectual property so they can monetize their valuable assets.

*Jacobus Rentmeester v. Nike, Inc.*, Ninth Cir. No. 15-35509, filed February 27, 2018.

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