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THE "FOUL" PROTECTION FOR A PHOTOGRAPHER'S ORIGINAL AND CREATIVE CHOICES IN A PHOTOGRAPH: EXPLORING THE IMPLICATIONS OF *RENTMEESTER V. NIKE, INC.* ON CREATIVITY IN PHOTOGRAPHY

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I. INTRODUCTION

The idea that "[p]hotographs are imbued with no less creativity, depth, and meaning than any other art form, and as such should be entitled to the full protection of copyright law" is an essential concept to consider when examining the scope of copyright protection for a photograph.[1] In *Rentmeester v. Nike, Inc.*,[2] the Ninth Circuit affirmed the district court's dismissal of a copyright infringement claim filed by Jacobus Rentmeester ("Rentmeester") against Nike, Inc. ("Nike"), holding that Nike's photograph was not substantially similar to Rentmeester's photograph as a matter of law.[3] The Ninth Circuit's misguided application of copyright law in finding that the works were not substantially similar has serious implications for photographers' development of creative works in the future.

In 1984, Rentmeester photographed Michael Jordan ("Jordan") for an issue of *Life Magazine* that highlighted athletes who would be

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[1] Brief for The American Society of Media Photographers, Inc. and The National Press Photographers Association as Amici Curiae in Support of Petitioner at 13, Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (No. 18-728) [hereinafter "Brief for Am. Soc'y of Media Photographers"].

[2] 883 F.3d 1111 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

[3] *Id.* at 1116, 1125.

competing in the Summer Olympic Games.[4] The photograph featuring Jordan in "an artificial dunk pose inspired by ballet" is revered "by *TIME Magazine* as one of the most influential images of all time."[5] In addition to the unique ballet pose, Rentmeester largely orchestrated many of the elements of the photograph, including the camera position, strobe lights, and shutter speed.[6] Subsequently, Rentmeester and Nike executed a licensing agreement that allowed Nike to use the color transparencies of his photograph.[7] However, Nike violated this agreement when it hired its own photographer to shoot a photograph of Jordan that was "obviously inspired by Rentmeester's" photograph.[8] Nike's photograph captured many visually similar elements to the Rentmeester photograph, notably the leaping position towards the basketball hoop and the camera angle.[9] Then, Rentmeester allowed Nike to use its photograph on billboards and posters for two more years for $15,000.[10] In 2015, Rentmeester filed suit for copyright infringement because Nike continued to reproduce the photograph after the original two-year term expired.[11]

The Ninth Circuit held that even though the two photographs are similar, the photographs are not substantially similar because Nike's photograph displays distinct and creative photographic choices.[12] Additionally, the court reasoned that there was no copyright infringement because Rentmeester cannot prevent other photographers from capturing the idea "of Jordan in a leaping, *grand-jeté*-inspired pose."[13] However, by holding that the photographs were not substantially similar, the Ninth Circuit split from various circuits in determining the scope of protection for a photograph.[14] Compared to

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[4] *Id.* at 1115. This paragraph will only present a brief discussion of the facts. For a detailed discussion of the background of this case, see Part IV.

[5] Steve Brachmann, *Supreme Court Asked to Decide Copyrightable Elements of Iconic Michael Jordan Photograph*, IPWATCHDOG (Jan. 7, 2019), http://www.ipwatchdog.com/2019/01/07/supreme-court-rentmeester-michael-jordan-photograph/id=104650/.

[6] *Id.*; *Rentmeester*, 883 F.3d at 1115.

[7] *Rentmeester*, 883 F.3d at 1116.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*; *see* Appendix for a comparison of the two photographs.

[12] *Rentmeester*, 883 F.3d at 1121.

[13] *Id.*

[14] Petition for Writ of Certiorari at 3, Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (No. 18-728).

the Ninth Circuit, the First, Second, and Eleventh Circuits award copyright protection for a photographer's "artistic judgment" in contributing "original elements" to a photograph.[15] If the photographs were analyzed in one of these circuits by considering Rentmeester's creative choices in the "selection and arrangement" of photographic elements, the court would most likely have found that the photographs are substantially similar.[16] Unlike the Ninth Circuit, these circuits would also have found that the ballet-inspired pose is both original and protectable under copyright law.

Although inconsistency among the circuits is not necessarily a negative feature in the law, this Note will argue that the Ninth Circuit misapplied the test for substantial similarity when examining the photographs, especially when it dismissed Rentmeester's original and artistic judgments as unprotectable elements. This decision should be viewed cautiously because the Ninth Circuit dismissed "various clearly creative and unique elements" that appeared in both photographs "based on minor differences."[17] As a result, this decision has the potential to "stifle creativity" because it will limit copyright protection

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[15] *Id.* at 26.

[16] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 15; Petition for Writ of Certiorari, *supra* note 14, at 26-27. If the works were found to be substantially similar, Nike would not have a strong fair use defense. The fair use doctrine is intended to promote the growth of copyright by allowing the limited use of the expression of another work in an author's later work. In determining whether there is copyright infringement, the courts will consider four factors for the fair use defense. Specifically, the courts will evaluate "the purpose and character of the use," "the nature of the copyrighted work," "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," and "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2019). Here, Nike's fair use defense would fail because of "the amount and substantiality" factor. Nike took the heart of Rentmeester's work by posing Jordan in a similar ballet-inspired leap towards the basketball hoop. Also, it copied several photographic elements in the Rentmeester photograph, including the pose, outdoors setting, and angle. If Nike asserted a fair use defense, it would most likely fail based on this factor alone. Additionally, the first fair use factor does not weigh in favor of Nike because its photograph was not transformative. To determine whether a new work is transformative, one must evaluate "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal citations omitted). According to the Supreme Court, "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.* Nike's photograph was not transformative because it did not provide any new meaning, purpose, or expression to Rentmeester's photograph. Instead, Nike's photograph simply took various elements of Rentmeester's photograph without adding any new value to the original photograph. For an example of a photographic advertisement that was transformative, see *infra* note 150.

[17] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 15.

for a photographer who created an original work and produce confusion regarding the protections granted to photographers under copyright law.[18] Consequently, although Rentmeester's petition for certiorari was denied, the petition reflected the need for the Supreme Court to "set the law aright" to prevent a negative impact on creativity.[19]

This Note will argue that the Ninth Circuit's affirmance of the district court's decision inappropriately analyzed the substantial similarity between the photographs because the court failed to consider the creative choices in Rentmeester's overall "selection and arrangement" of photographic elements.[20] Therefore, by essentially holding that copyright law offers limited protection for a photographer's original and creative judgments in the selection and arrangement of a photograph, the Ninth Circuit's test for substantial similarity may negatively impact the future of creativity in photography by limiting the scope of protection for photographs.

Part II of this Note will explore the essential elements of a copyrightable work, which will help to lay a foundation in later sections for examining the scope of copyright protection in a photograph. Specifically, this section will discuss fixation, originality, and creativity, along with their relationship to photographic works. Then, this section will examine the requirements for copyright infringement, the inverse-ratio rule, and the extrinsic and intrinsic tests for substantial similarity. Part III will analyze the leading photography copyright infringement cases, focusing on a discussion of a photographer's creative choices in the selection and arrangement of a photograph. This section will also examine the photography cases decided in the circuits that disagree with the Ninth Circuit. Part IV will discuss the background and procedural posture of *Rentmeester*, as well as the Ninth Circuit's comparison of the two photographs and the dissenting opinion. Part V will analyze the Ninth Circuit's split from various circuits and the implications of this case on the future of creativity in photography. This section will also propose a better approach for the Ninth Circuit's review of future photography cases. Lastly, Part VI will conclude by summarizing the main points of *Rentmeester* and the impact of this decision on the creativity of photographers.

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[18] Petition for Writ of Certiorari, *supra* note 14, at 24.

[19] *Id.* at 3.

[20] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 15.

II. COPYRIGHT LAW AND PHOTOGRAPHIC WORKS

Under the "Intellectual Property Clause" of the United States Constitution, the Framers encouraged the creation of works "[t]o promote the Progress of Science and useful Arts."[21] This constitutional clause authorizes Congress "to enact both copyright and patent legislation."[22] As the production of such works was vital to the Founding Fathers for the success and development of the Nation, they expressly included an incentive to create these works in the Constitution.[23] Under the Copyright Act of 1976, several requirements must be met to ensure the creation of copyrightable works. The following subsection will examine these requirements and connect them to photographic works.

A. Scope of Protection under the Copyright Act of 1976

1. Fixation

Under the Copyright Act of 1976, copyright protection extends to "original works of authorship fixed in any tangible medium of expression."[24] Specifically, "[a] work is 'fixed' . . . when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[25] Unlike the 1909 Act, the 1976 Act secures protection for works at the start of fixation, "even if they were unpublished."[26] The 1976 Act enumerates eight categories of copyrightable works that are protected once they are fixed,[27] including

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[21] U.S. CONST. art. 1, § 8, cl. 8; *see* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02 (2019).

[22] NIMMER, *supra* note 21 (citation omitted).

[23] Gene Quinn, *Patents, Copyrights and the Constitution, Perfect Together*, IPWATCHDOG (Feb. 19, 2018), http://www.ipwatchdog.com/2018/02/19/patents-copyrights-constitution/id=93941/.

[24] 17 U.S.C. § 102(a) (2019).

[25] *Id.* § 101. Fixed works "can be perceived, reproduced, or otherwise communicated" in the following ways: "directly or with the aid of a machine or device." *Id.* § 102(a).

[26] PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2018, at 495 (2018). For works analyzed under the 1909 Act, the work secures copyright protection when it is published. *Id.* at 521.

[27] *See* 17 U.S.C. § 102(a) (providing a list of the eight categories of copyrightable works).

"pictorial, graphic, and sculptural works."[28] Additionally, "[t]he 1976 Act expanded both the scope and duration of protection."[29] With The Sonny Bono Copyright Term Extension Act of 1998, the term for copyright protection extended to the author's life plus 70 years.[30]

Another important feature of fixation is that only a fixed work in a tangible form is considered a writing within the meaning of the United States Constitution.[31] That is, under the "Intellectual Property Clause," Congress has the explicit power to grant copyright protection for an author's writing.[32] Based on the language of that clause, Nimmer argues that the Constitution requires fixation of a work in some tangible form for protection under copyright law because only then will the work be considered a writing.[33] As further discussed in Part III.A, the Supreme Court considers a photograph to be a writing consistent with the fixation requirement.[34]

2. Originality and Creativity

Next, the Constitution requires that the work is original.[35] To satisfy the originality requirement, the copyright holder must "independently create[]" the work.[36] Because originality is not equivalent to novelty, "a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[37] The originality of a work also requires creativity; however, "the requisite level of creativity is extremely low" and only "a slight amount will suffice."[38] While facts are not copyrightable because they "do not owe their origin to an act of authorship,"[39] factual

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[28] *Id.* § 102(a)(5). "'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans." *Id.* § 101.

[29] MENELL ET AL., *supra* note 26, at 495.

[30] *Id.* at 613-14.

[31] NIMMER, *supra* note 21, § 2.03[B].

[32] U.S. CONST. art. 1, § 8, cl. 8.

[33] NIMMER, *supra* note 21, § 2.03[B].

[34] For an explanation of the Supreme Court's interpretation of photographs and writings, see Part III.A.

[35] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

[36] *Id.* at 345 (citation omitted).

[37] *Id.* For example, if two poets wrote the exact same poem, the works will be original as long as the poets were not aware of the other's poem. *Id.* at 346.

[38] *Id.*

[39] *Id.* at 347.

compilations may be original if the author's choices in the selection and arrangement of the facts are original.[40] Similarly, an author's originality is essential because there is no copyright protection for mere ideas or concepts.[41] In fact, while "photographers cannot copyright their underlying subject matter . . . courts agree that the original judgments that photographers make in composing images are protectable."[42] Therefore, as long as the "photographer arranges or otherwise creates the subject that his camera captures," the work may have the necessary originality to be protectable.[43]

Over the years, the courts have articulated several protectable photographic elements that satisfy the required originality.[44] For example, "[e]lements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved."[45] These other variants may include clothing, accessories, and shade.[46] Other elements include the type of lens, the exact timing of when to take the photograph, the area where the photograph is taken, and the subject matter for the photograph.[47] One court even found protection in the photographer's artistic choice in the "skin tone of the subject."[48] Protectable elements also include "the amount of the image in focus, its graininess, and the level of contrast."[49] While this list illustrates only some of the protectable photographic elements, it exemplifies the required degree of originality that a photographer must display when taking a photograph.

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[40] *Id.* at 348

[41] *See* 17 U.S.C. § 102(b) (2019) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

[42] Petition for Writ of Certiorari, *supra* note 14, at 11. "Any one may take a photograph of a public building and of the surrounding scene. It undoubtedly requires originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc." Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916).

[43] Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 450 (S.D.N.Y. 2005).

[44] *Id.*

[45] Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

[46] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884). For a discussion of *Burrow-Giles* and its role in recognizing that photographs are protected under copyright law, see Part III.A.

[47] E. Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000).

[48] Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 (2d Cir. 1998).

[49] *Mannion*, 377 F. Supp. 2d at 450 n.37.

B. Elements of Copyright Infringement

To succeed on a claim of copyright infringement, the copyright holder needs to establish "ownership of a valid copyright" and the "copying of constituent elements of the work that are original."[50] To prove ownership of the copyright, the copyright holder must show that his work qualifies as one of the "original works of authorship" under Section 102(a) of the Copyright Act as discussed in the previous section.[51] The copyright holder can file suit for copyright infringement in this instance only after the work has been registered with the Copyright Office.[52] Next, the second element requires "copying and unlawful appropriation."[53] First, the copyright holder has to establish that his work was copied "because independent creation is a complete defense to copyright infringement."[54] As long as the defendant created his work "without knowledge of or exposure to the plaintiff's work," there is no copyright infringement.[55] However, when there is no evidence of direct copying, the copyright holder only needs to establish the defendant's access to the work and that the "works share similarities probative of copying."[56] Typically, the inverse ratio rule is applied in cases assessing the similarity of two works when a plaintiff cannot directly prove that the defendant copied his work.[57] Under the inverse ratio rule, the courts "require a lower standard of proof on substantial similarity when a high degree of access is

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[50] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

[51] 17 U.S.C. § 102(a) (2019).

[52] *See* Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC, 139 S. Ct. 881, 888, 892 (2019) (explaining that under the registration approach, a work is registered, and the copyright holder can file suit for copyright infringement, only after the Copyright Office examined the copyright application and registered the work).

[53] Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

[54] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1117 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

[55] *Id.*; *see Feist*, 499 U.S. at 345 ("Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.").

[56] *Rentmeester*, 883 F.3d at 1117. "To prove copying, the similarities between the two works need not be extensive, and they need not involve protected elements of the plaintiff's work." *Id.*

[57] *Id.* at 1124.

shown."[58] Similarly, if two works have compelling similarities, a lessened degree of access is required.[59]

Second, the copyright holder has to prove "unlawful appropriation," or the illicit and unlawful copying of the work.[60] To show unlawful appropriation, "the two works must be 'substantial' and they must involve protected elements of the plaintiff's work."[61] For unlawful appropriation, the inverse ratio test is not applied because proof of access is not relevant.[62] This part of the test only focuses on the "balance between the protection" provided to authors and the copying of too much protected expression.[63] Thus, unlawful appropriation differs from the copying part of the test because proof of access does not have any bearing on unlawful appropriation.[64] For photographs, the plaintiff must establish that the defendant "copied enough of the photo's protected expression to render their works 'substantially similar.'"[65] The following subsection will explain how the Ninth Circuit examines the substantial similarity of two works.

C. Ninth Circuit Test for Substantial Similarity

For substantial similarity, the Ninth Circuit uses a two-part test that includes "an objective extrinsic test and a subjective intrinsic test."[66] Under the extrinsic test, "analytic dissection and expert testimony are appropriate" in order to assess the specific objective criteria of the works.[67] For photographs, the extrinsic test analyzes protectable elements, including the light, pose, angle, and type of lens.[68] As part of the extrinsic test, the "court must filter out and

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[58] Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) (citing Shaw v. Lindheim, 919 F.2d 1353, 1361-62 (9th Cir. 1990)); *Krofft*, 562 F.2d at 1172.

[59] *Rentmeester*, 883 F.3d at 1124.

[60] *Id.* at 1117.

[61] *Id.* (citing Laureyssens v. Idea Group, Inc., 964 F.2d 131, 140 (2d Cir. 1992)).

[62] *Id.* at 1124-25.

[63] *Id.* at 1124 (citation omitted).

[64] *Id.* at 1124-25.

[65] *Id.* at 1118.

[66] Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

[67] Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

[68] *See* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) ("What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection."). For a list of other original elements in a photograph, see *supra* notes 44-49 and accompanying text.

disregard the non-protectible elements in making its substantial similarity determination."[69] Because the extrinsic test does not involve the trier of fact's analysis of objective elements, the extrinsic test can be decided as a matter of law.[70] However, as the dissenting opinion proposes in *Rentmeester*, the courts should consider whether it is appropriate to decide the substantial similarity of two works as a matter of law because this analysis is "inherently factual."[71] Next, under the subjective intrinsic test, the jury is presented with "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar."[72] Unlike the extrinsic test, the intrinsic test does not allow "analytic dissection and expert testimony."[73] While the circuits do not apply the exact test for substantial similarity, other circuits follow a test that is consistent with the Ninth Circuit's approach.[74] For example, the Eighth Circuit implemented the Ninth Circuit's two-part test, and the Sixth Circuit and the D.C. Circuit follow an adapted version of the Ninth Circuit's test.[75]

III. PHOTOGRAPHY COPYRIGHT INFRINGEMENT CASES

To provide a proper analysis of the photographs in *Rentmeester v. Nike, Inc.*, this Note will discuss relevant past photography cases. First, this section will examine *Burrow-Giles Lithographic Co. v. Sarony*,[76] one of the seminal photography cases, and it will evaluate its impact on subsequent photography infringement cases. Second, this section will specifically examine photography cases from the First, Second, and Eleventh Circuits. The application of copyright law in

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[69] Cavalier v. Random House, Inc., 297 F.3d 815, 822 (9th Cir. 2002).

[70] *Krofft*, 562 F.2d at 1164.

[71] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1127 (Owens, J., dissenting) (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019). For an explanation of the dissenting opinion's argument relating to copyright infringement cases decided as a matter of law, see *infra* notes 241-46.

[72] Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (quoting Pasillas v. McDonald's Corp., 927 F.2d 440, 442 (9th Cir. 1991)).

[73] *Krofft*, 562 F.2d at 1164. For an explanation of the tests used in the Second Circuit, see *infra* note 145 and accompanying text.

[74] *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (providing an extensive discussion of each circuit's test for substantial similarity).

[75] *Id.* § 13.03[E][3][d] (comparing the Eighth, Sixth, and D.C. Circuits with the Ninth Circuit's test for substantial similarity).

[76] 111 U.S. 53 (1884).

these photography cases will serve as a direct comparison to the Ninth Circuit's analysis in a subsequent section of this Note.[77]

A. Leading Photography Cases

On March 3, 1865, Congress extended copyright protection to authors of photographs and photographic negatives.[78] Through this amendment of the Copyright Act, Congress provided benefits to the authors of photographs "in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings."[79] Although Congress recognized the protection of photographs in 1865, the Supreme Court's decision in the 1884 case *Burrow-Giles Lithographic Co. v. Sarony*[80] bolstered the recognition of photographs as protectable works.

In *Burrow-Giles*, Napoleon Sarony, a photographer, photographed Oscar Wilde in New York.[81] After Sarony took the "publicity photographs" for Wilde, he "registered his images with the Copyright Office."[82] Sarony commenced the lawsuit against Burrow-Giles, a lithographic company, when it sold 85,000 copies of Sarony's photograph, titled "Oscar Wilde, No. 18."[83] Burrow-Giles argued that "a photograph is not a writing nor the production of an author" because it is merely "a reproduction, on paper, of the exact features of some natural object, or of some person."[84] Unlike a painting or engraving, the company argued that a photograph is a "mere mechanical reproduction" of living or inanimate objects in nature, without any novelty or originality when it is reproduced in photographic form.[85] Contrary to Congress's intent under the 1865 amendment to the Copyright Act, that argument suggested that protection for photographs went beyond the realm of "intellectual property rights permitted by the Constitution."[86]

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77 For a discussion of the circuit split, see Part V.

78 *See* Act of Mar. 3, 1865, ch. 126, §1, 13 Stat. 540, 540.

79 *Id.*

80 111 U.S. 53 (1884).

81 *Id.* at 54.

82 Petition for Writ of Certiorari, *supra* note 14, at 8.

83 *Burrow-Giles*, 111 U.S at 54.

84 *Id.* at 56.

85 *Id.* at 59.

86 Brief of Professor Terry S. Kogan as Amicus Curiae Supporting Petitioner at 5, Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (No. 18-728).

However, the Court dismissed Burrow-Giles' arguments for several reasons. First, the Court explained that copyright protection is not confined to actual written works, but it includes all works "by which the ideas in the mind of the author are given visible expression."[87] Although the Constitution only expressly indicates that there is protection in an author's writing, the Court explained that a writing is not limited to an author's words.[88] Instead, a writing is meant to encompass "the literary productions" of authors.[89] In this way, photographs are similar to "maps, charts, designs, engravings, etchings, cuts, and other prints" as protected works under copyright law.[90] Next, the Court found that Sarony's photograph of Oscar Wilde possessed the required originality and "intellectual invention" to be protected under the Constitution.[91] Specifically, the Court explained:

> [I]n regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.'[92]

In *Burrow-Giles*, the Wilde photograph was protected under the Constitution because it embodied Sarony's "original choices" and "artistic judgments."[93] For example, Sarony orchestrated the entire photograph by arranging and selecting various features, including the

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87 *Burrow-Giles*, 111 U.S. at 58.

88 *Id.*

89 *Id.*

90 *Id.* at 57.

91 *Id.* at 60. "We entertain no doubt that the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author." *Id.* at 58.

92 *Id.* at 60 (citation omitted).

93 Petition for Writ of Certiorari, *supra* note 14, at 38.

costume, draperies, light, shade, Wilde's pose, and other elements.[94] Under the Court's analysis, "the same 'intellectual innovation' that entitles a photograph to protection in the first place also provides protection for the photograph's expression of the original elements within it."[95] *Burrow-Giles* is one of the leading cases on photography copyright infringement because it holds that while the underlying subject of a photograph is not copyrightable, the photographer's original and creative choices are protectable.[96]

Subsequently, in *Bleistein v. Donaldson Lithographing Co.*,[97] the Court supported the protection for a photographer's original choices.[98] In this case, Bleistein sued the Donaldson Lithographing Company because that company copied three chromolithographs made for circus advertisements for a circus owned by Wallace.[99] The Court found that pictures in the form of an advertisement are protected under copyright law because it "is none the less a picture, and none the less a subject of copyright."[100] Specifically, the Court recognized that each photographic element "is the personal reaction of an individual upon nature," warranting copyright protection.[101] Lastly, the Court cautioned that it is not the role of the courts to determine the artistic value of "pictorial illustrations."[102]

These two Supreme Court cases demonstrate the importance of a photographer's originality in a photograph. In *Burrow-Giles*, the Supreme Court explained that photographs are entitled to copyright protection as long as the photographer exhibited original and creative judgments.[103] In this case, Sarony made several original and artistic choices while photographing Wilde that came from his own

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[94] *Burrow-Giles*, 111 U.S. at 55. "Wilde's image is not copyrightable; but to the extent a photograph reflects the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to 'owe their origins' to the photographer, making the photograph copyrightable, at least to that extent." Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1264 (10th Cir. 2008).

[95] Petition for Writ of Certiorari, *supra* note 14, at 39.

[96] *Id.* at 11.

[97] 188 U.S. 239 (1903).

[98] Petition for Writ of Certiorari, *supra* note 14, at 11.

[99] *Bleistein*, 188 U.S. at 248.

[100] *Id.* at 251.

[101] *Id.* at 250.

[102] *Id.* at 251. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Id.*

[103] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

"intellectual invention."[104] However, the Court implied that not every photograph is entitled to copyright protection, specifically photographic works lacking an author's thought and originality.[105] Next, the Court in *Bleistein* further discussed the originality requirement by eliminating any distinction in copyright protection between an advertisement and "the fine arts."[106] That is, any photographic work capturing an author's personality and originality will likely be copyrightable.[107] Overall, *Burrow-Giles* and *Bleistein* serve as essential cases in the evaluation of copyright protection for photographic works.

B. Circuit Court Cases

In the cases discussed below from the First, Second, and Eleventh Circuits, the courts upheld the principle that copyright law protects a photographer's original and creative choices.[108] The analysis of these circuits will serve as a direct comparison to the Ninth Circuit's application of copyright law in *Rentmeester*. Then, in Part V, the protection granted for a photographer's original choices in these circuits will be directly compared to the Ninth Circuit's analysis in *Rentmeester*.

1. First Circuit

In *Harney v. Sony Pictures Television, Inc.*,[109] the First Circuit's decision hinged on a comparison between the protectable and unprotectable elements of a photograph. In this case, Donald Harney, a freelancer, took a photograph "of a blond girl in a pink coat riding piggyback on her father's shoulders as they emerged from a Palm Sunday service in the Beacon Hill section of Boston."[110] After discovering that the father in the photograph was a German citizen who

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[104] *Id.* at 60.

[105] *See id.*

[106] *Bleistein*, 188 U.S. at 251.

[107] *Id.* at 250. "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act." *Id.*

[108] The Ninth Circuit supports the protection for photographs, but it misapplied the law by failing to find protection for individual photographic elements.

[109] 704 F.3d 173 (1st Cir. 2013).

[110] *Id.* at 176.

abducted his daughter, the FBI used Harney's photograph in a "Wanted" poster.[111] Then, Sony made a televised movie about the events, depicting Harney's photograph.[112] Subsequently, Harney filed suit for copyright infringement against Warner Brothers for allegedly copying his photograph.[113]

The First Circuit recognized several protectable elements in Harney's photograph, including the framing of the father and daughter "against the background of the church and blue sky, with each holding a symbol of Palm Sunday" and "the bright colors alongside the prominent shadows."[114] However, none of these protectable elements were replicated in Warner Brothers' photograph.[115] Instead, the similarities between the photographs were based on unprotectable elements.[116] For example, the court explained that "subject matter that the photographer did not create" is treated as mere unprotectable facts or ideas.[117] In this case, while the two photographs seem similar, "that impression of similarity is due largely to the piggyback pose that was not Harney's creation and is arguably so common that it would not be protected even if Harney had placed" the father and daughter.[118] The court recognized that there may be protection for photographs taken of fleeting events "when the photographer does not simply take her subject 'as is,' but arranges or otherwise creates the content by, for example, posing her subjects or suggesting facial expressions."[119] However, because Harney simply shot the father and daughter without making any choices in arranging them, the First Circuit held that Warner Brothers was not liable for copyright infringement.[120]

Unlike the Ninth Circuit, "the First Circuit takes a far broader view of photographers' artistry than does the Ninth Circuit."[121] The difference between Harney's photograph and Rentmeester's

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111 *Id.*

112 *Id.* "Sony depicted the Photo in that movie using an image that was similar in pose and composition to Harney's original, but different in a number of details." *Id.*

113 *Id.*

114 *Id.* at 186.

115 *Id.* In fact, "the two photographs are notably different in lighting and coloring, giving them aesthetically dissimilar impacts." *Id.* at 187.

116 *See id.* at 186.

117 *Id* at 181. According to the First Circuit, subject matter that cannot be created by a photographer includes "a person, a building, [or] a landscape." *Id.*

118 *Id.* at 186-87.

119 *Id.* at 180-81.

120 *Id.* at 182, 188.

121 Petition for Writ of Certiorari, *supra* note 14, at 29.

photograph is that Harney spontaneously shot a photograph of the father and daughter, while Rentmeester purposefully staged and instructed Jordan's position in his photograph.[122] For a staged photograph like Rentmeester's work, "copyright law requires a more dynamic measure of protection for originality"[123] because the photographer's original choices in arranging the subject of the photograph create "a protectible expressive work."[124] In contrast, Harney did not create the main subject of his photograph, thereby likening the subject to unprotectable facts.[125] However, the First Circuit applied a broader application of protection for Harney's photograph when it recognized his "artistic flair," "artistry," and "aesthetic judgments" in the photograph.[126] For example, the court acknowledged his originality and creativity in the color tones and framing of the father and daughter in the photograph.[127] Although Sony did not copy these original and protectable elements, the First Circuit respected the protection for Harney's choices in his spontaneous photograph that produced "a distinctive, original image."[128] Compared to the First Circuit, the Ninth Circuit did not provide the same protections for Rentmeester's original choices in his staged photograph of Jordan.[129]

2. Second Circuit

Although the Second Circuit and the Ninth Circuit are the two principal appellate courts for deciding photograph infringement cases, the Second Circuit, like the First Circuit, conflicts with the Ninth Circuit's narrow and limited application of copyright protection for photographs.[130]

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[122] *See id.* at 28 (explaining that Harney's photograph and Nike's photograph required a different analysis of copyright protection).

[123] *Id.*

[124] *Harney*, 704 F.3d at 181.

[125] *Id.* at 184.

[126] *Id.*

[127] *Id.* at 186.

[128] *Id.*

[129] *See* Petition for Writ of Certiorari, *supra* note 14, at 28 ("Further, even while ruling against Harney, the First Circuit displayed a considerably more robust vision of copyright protection for his spontaneous snapshot than the Ninth Circuit extended to the staged Rentmeester photo of Jordan."). For a discussion of Rentmeester's original choices in his staged photograph of Jordan, see Part IV.A.

[130] *Id.* at 29.

In *Rogers v. Koons*,[131] Jim Scanlon hired Art Rogers to photograph his eight German Shepherd puppies.[132] Rogers exhibited "[s]ubstantial creative effort" while taking the photograph and while at his lab.[133] For example, Rogers chose to photograph Scanlon and his wife with the eight puppies, and he made several selections in "the light, the location, the bench on which the Scanlons are seated and the arrangement of the small dogs."[134] Then, he "made creative judgments concerning technical matters with his camera and the use of natural light."[135] After preparing 50 images from the photography session, one photograph, later entitled "Puppies," was selected for the Scanlons to purchase.[136] Afterward, Rogers enjoyed success in this black and white photograph for other professional purposes.[137]

Subsequently, after coming across "Puppies" on a notecard in a tourist store, Jeff Koons, an artist, and sculptor, decided to incorporate it in his upcoming sculpture exhibition show.[138] Koons told his artisans "to copy" the photograph of "Puppies" for the sculpture.[139] The colorized sculpture of "Puppies," entitled "String of Puppies," was featured at gallery exhibitions and on the cover page of a newspaper calendar.[140] However, Rogers did not authorize Koons to use "Puppies" for his sculpture, resulting in Rogers' suit for copyright infringement against Koons.[141]

Here, the Second Circuit affirmed the district court's decision that Koons infringed Rogers' copyright in "Puppies."[142] Specifically, the Second Circuit agreed with the district court "that no reasonable juror could find that copying did not occur in this case."[143] Unlike most photograph infringement cases, this case was an outlier because there was direct evidence that Koons authorized the direct copying of

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131 960 F.2d 301 (2d Cir. 1992).
132 *Id.* at 304.
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at 305.
139 *Id.* In fact, "[i]n his 'production notes' Koons stressed that he wanted 'Puppies' copied faithfully in the sculpture." *Id.*
140 *Id.*
141 *Id.*
142 *Id.* at 306.
143 *Id.* at 307.

"Puppies," resulting in the grant of summary judgment for Rogers.[144] However, even in the absence of direct evidence, there would still be copyright infringement based on Koons' access to "Puppies" and the substantial similarity between the two works.[145]

Specifically, the Second Circuit explained that it is not the idea of eight puppies seated with the couple that is protected, but it is the photographer's "*expression* of this idea."[146] For example, there is copyright protection "in the placement, in the particular light, and in the expressions of the subjects."[147] If Koons had created his own expression of the idea of these puppies rather than copying Rogers' expression, then he may not have been subject to copyright infringement based on a lack of substantial similarity.[148] However, while Koons added flowers to the couple's hair and accentuated the puppies' bulbous noses, "the overwhelming similarity to the protected expression of the original work" outweighed these minor differences for finding substantial similarity.[149] Lastly, this case is particularly important because it highlights the protection in a photographer's original choices.[150] The court stated, "Rogers' inventive efforts in

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[144] *Id.*

[145] *Id.* "Such similarity is determined by the ordinary observer test: the inquiry is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" *Id.* (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)). The Second Circuit also applies an abstraction test, which requires the court to break down the work into its structural elements and filter out the non-protectable elements. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706-07 (2d Cir. 1992).

[146] *Koons*, 960 F.2d at 308.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] For a discussion of original elements that are protected under copyright law, see *supra* notes 44-49. In another Second Circuit case, the court found that while there is "no protection for the appearance in [the photographer's] photograph of the body of a nude, pregnant female," there is copyright protection in the photographer's original and creative expression in photographing the woman's body. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115-16 (2d Cir. 1998). Nevertheless, the court held that the fair use defense applied for Paramount. *Id.* at 110. For an explanation of the four fair use elements, see *supra* note 16. In *Leibovitz*, Paramount's parodic advertisement of Leibovitz's photograph was transformative. 137 F.3d at 114. In particular, "the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore" that the advertisement appears to ridicule and comment on the original photograph. *Id.* Next, although the second factor favors Leibovitz because her "photograph exhibited significant creative expression," this factor is not heavily weighted in considering fair use for parodic works. *Id.* at 115. While Paramount's advertisement extensively copied several protectable elements, such as the lighting and camera angle, this third factor has minimal "weight against fair use so long as the first and fourth factors favor the parodist." *Id.* at 116. Here, the fourth factor also favors Paramount because the parodic advertisement did not interfere with the market for Leibovitz's work. *Id.* While fair use

posing the group for the photograph, taking the picture, and printing 'Puppies' suffices to meet the original work of art criteria."[151] Therefore, a photographer's creative expression in the elements of a photograph "makes it original and copyrightable."[152]

3. Eleventh Circuit

In *Leigh v. Warner Brothers, Inc.*,[153] the Eleventh Circuit's reversal of the district court's grant of summary judgment for the defendant[154] represents another important case that contrasts with the Ninth Circuit's analysis in *Rentmeester*. In this case, Jack Leigh photographed "the Bird Girl statue in Savannah's Bonaventure Cemetery that appears on the cover of the best-selling novel *Midnight in the Garden of Good and Evil*."[155] Leigh sued Warner Brothers, claiming that Warner Brothers infringed his photograph in the movie version of the novel and in promotional advertisements.[156]

While the Eleventh Circuit rejected the claim of infringement for the film sequences, the court further analyzed Leigh's photograph and the promotional photographs.[157] The court explained that while there are identifiable differences between the two works, the Warner Brothers' photographs are similar to many of the protectable elements of Leigh's photograph.[158] In Leigh's photograph, the protectable elements include "the *selection* of lighting, shading, timing, angle, and

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applied, this case is important to show that the photographer was "entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected." *Id.* Therefore, this case supports the Second Circuit's decision in *Koons* because it protects the photographer's original choices and judgments.

[151] *Koons*, 960 F.2d at 307.

[152] *Id.* at 308. In another photograph case involving Koons, the Second Circuit found that the fair use defense applied to Koons' photograph because he took a reasonable amount of the plaintiff's work and there was no negative effect on the market. Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006).

[153] 212 F.3d 1210 (11th Cir. 2000).

[154] *Id.* at 1219.

[155] *Id.* at 1212.

[156] *Id.* at 1212-13.

[157] *Id.* at 1215-16. For the film sequences, the court held that they "have nothing substantial in common with Leigh's photograph except the statue itself." *Id.* For instance, the film sequences were taken in a different part of the Bonaventure Cemetery from Leigh's photograph, resulting in different "gravestones and greenery" shown in the works. *Id.* at 1215.

[158] *Id.* at 1216. Some differences are the appearance of the size of the statue, the lighting contrast, and specific additions in the Warner Brothers photographs, including "a green or orange tint" and "a Celtic cross and tree." *Id.*

film."[159] In particular, both "photographs are taken from a low position, angled up slightly at the Bird Girl." In addition, the tops of the photographs are bordered with Spanish moss, and the shining light "envelopes the statue."[160]

The Eleventh Circuit held that the lower court erred in deciding this case as a matter of law.[161] Because "[c]opyright infringement is generally a question of fact for the jury to decide," the court mistakenly held "that no reasonable jury" would find that the photographs were substantially similar. [162] Based on the similar photographic elements between the photographs, including the lighting, hanging Spanish moss, and positing of the camera angle, the court reasoned that these similarities were enough to prevent summary judgment.[163] Interestingly, even if a jury found that the protected photographic elements were not substantially similar, the court explained that the similarities were sufficient to at least avoid summary judgment.[164] Therefore, the Eleventh's Circuit's deference to the jury as the trier of fact is an essential part of the analysis that is missing in *Rentmeester*.

IV. BACKGROUND OF RENTMEESTER V. NIKE, INC.

A. Rentmeester and the Jordan Photograph

Rentmeester is esteemed for creating "some of the most memorable images of the twentieth century."[165] His photographs were on the cover of at least sixty-seven magazines, and his photograph of an American tank commander in the Vietnam War is respected as the first time a color photograph won the World Press Photo of the Year award.[166] Before becoming a photographer, he was an Olympic oarsman for the Netherlands.[167] His athleticism influenced his photography because he became "well-known for photographing top athletes in original, surprising, and iconic ways."[168]

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159 *Id.* at 1215 (emphasis added).
160 *Id.* at 1216.
161 *Id.* at 1213.
162 *Id.*
163 *Id.* at 1216.
164 *Id.*
165 Petition for Writ of Certiorari, *supra* note 14, at 13.
166 *Id.* at 13, 15.
167 *Id.* at 13.
168 *Id.* at 15.

In 1984, Rentmeester created a photo collection of athletes competing in the Summer Olympics that year for *Life Magazine*.[169] The photograph of Jordan, who was a student at the University of North Carolina, was included in this collection.[170] For several reasons, the photograph "is highly staged and manifests significant creativity and technical skill."[171] For example, Rentmeester wanted to take the photograph outside and away from the traditional basketball arena.[172] He further instructed his assistants to cut the grass very low in order to eliminate "visual distractions."[173] Also, he chose where he wanted to place the basketball pole and removed "any indication of basketball aside from a hoop, backboard, and pole."[174]

Next, Rentmeester was inspired to pose Jordan based on his experiences with taking photographs at the American Ballet Theatre.[175] Rentmeester envisioned that the ballet-inspired pose would appear to be "a gravity-defying dunk" to the viewer.[176] Under Rentmeester's direction, Jordan continuously practiced this unusual and artificial pose.[177] Specifically, Rentmeester had Jordan "jump with his body open and facing the camera, his left leg forward, and his left hand extended while holding the perched basketball."[178] Interestingly, as Jordan typically dunks using his right hand, it "was a creative, non-obvious decision" to arrange Jordan on the left side of the basketball hoop because it differs from the typical photos of Jordan dunking the basketball.[179]

Additionally, Rentmeester made several creative and artistic judgments with his camera.[180] For example, he used "a fast shutter speed synchronized with a powerful set of carefully-arranged outdoor strobe lights" in order to capture "a sharp silhouette of Jordan's full figure against a contrasting solid background."[181] Also, Rentmeester

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169 *Id.* at 16.
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 *Id.* at 17.
178 *Id.* at 16-17.
179 *Id.* at 17-18.
180 *Id.* at 17.
181 *Id.*

perfectly timed pressing the shutter-release on his camera when Jordan was at the highest point of his leap.[182] Lastly, Rentmeester made several choices with his lens in order to create "a deep depth of field."[183]

B. The Success of Rentmeester's Photograph

Remarkably, *TIME* Magazine recognized Rentmeester's photograph as one of the most influential photographs in the world.[184] Initially, *TIME* wanted to assemble 100 of the most influential and powerful "images that changed the world."[185] Undoubtedly, this "was an exhaustive process," and experts were essential for narrowing down the vast number of iconic photographs.[186] In the end, 100 of the most influential images from 1826 to the present day were selected.[187]

During this process, the authors of this project considered what makes a photograph influential.[188] The authors stated, "[s]ome images are on our list because they were the first of their kind, others because they shaped the way we think. And some made the cut because they directly changed the way we live. What all 100 share is that they are turning points in our human experience."[189] For *TIME*, Rentmeester's photograph deserved a spot on this list because it was perhaps "the most famous silhouette ever photographed."[190]

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[182] *Id.*

[183] *Id.* "A photographer varies the depth of field by choosing the lens, varying the aperture size (the F-stop number), and varying the focal distance. By employing an atypically deep depth of field, Rentmeester rendered all visual elements in focus, dramatizing Jordan's dunk." *Id.*

[184] *The Most Influential Images of All Time*, TIME 100PHOTOS, http://100photos.time.com/ (last visited Nov. 24, 2019).

[185] *Id.*

[186] *About the Project*, TIME 100PHOTOS, http://100photos.time.com/about (last visited Nov. 24, 2019).

[187] *The Most Influential Images of All Time*, *supra* note 184. For example, "Migrant Mother" by Dorothea Lange in 1936, "V-J Day in Times Square" by Alfred Eisenstaedt in 1945, "The Pillow Fight" of the Beatles by Harry Benson in 1964, "A Man on the Moon" photograph of Neil Armstrong in 1969, and "Oscars Selfie" taken by Bradley Cooper and posted on Twitter by Ellen DeGeneres in 2014 are just five examples that are part of the collection of 100 of the most iconic photographs. *Id.*

[188] *About the Project*, *supra* note 186.

[189] *Id.*

[190] *Michael Jordan*, TIME 100PHOTOS, http://100photos.time.com/photos/co-rentmeester-michael-jordan (last visited Nov. 24, 2019).

C. Nike's Photograph and Jumpman Logo

Interestingly, *TIME* described Rentmeester's "beautiful image" as "one unlikely to have endured had Nike not devised a logo for its young star that bore a striking resemblance to the photo."[191] Around the time that Rentmeester's photograph of Jordan was published, "Nike and Jordan entered into their well-known endorsement relationship."[192] Nike asked Rentmeester for color transparencies of his Jordan photograph for their marketing campaign.[193] Rentmeester allowed Nike to use "two color transparencies for $150 under a limited license authorizing Nike to use the transparencies 'for slide presentation only.'"[194]

However, Nike violated the terms of the agreement when it "hired a photographer to produce its own photograph of Jordan, one obviously inspired by Rentmeester's."[195] In Nike's photograph, Jordan is also leaping towards the "basketball hoop with a basketball held in his left hand above his head, as though he is about to dunk the ball."[196] Also, both photographs have an outdoors setting and are taken from an angle looking up at Jordan.[197] The differences appear to be the Chicago skyline in the background, the color of Jordan's team on his clothing, and the Nike shoes.[198] Nonetheless, Nike's photograph was successfully displayed on posters and billboards.[199] To avoid litigation after Rentmeester threatened to sue Nike, they entered into an agreement in which Nike paid $15,000 to use its photo on billboards and posters for two more years.[200] However, Rentmeester claimed that Nike used the photograph beyond the two-year term.[201] In fact, Nike's "Jumpman" logo, which is "a solid black silhouette that tracks the outline of Jordan's figure as it appears in the Nike photo," has

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191 *Id.*

192 Petition for Writ of Certiorari, *supra* note 14, at 18.

193 *Id.*

194 Rentmeester v. Nike, Inc., 883 F.3d 1111, 1116 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* For the Ninth Circuit's list of the differences between the photographs, see *infra* notes 236-39.

199 *Id.*

200 *Id.*

201 *Id.*

produced "billions of dollars of merchandise."[202] With its famous logo and branding of sports celebrities, Nike further "created the concept of athletes as valuable commercial properties unto themselves."[203]

It is possible that Rentmeester's photograph would not enjoy the same popularity today had it not been for Nike's photograph and "Jumpman" logo. In fact, *TIME's* recognition of Rentmeester's photograph as the initiation of the rise "of sports celebrity into a multibillion-dollar business" would most likely not have been possible without Nike.[204] At the same time, Nike's "Jumpman" logo and its promotional advertisements with its version of the Jordan photograph may not have been as successful without Rentmeester's photograph. However, the continued success of each photograph has no bearing on the analysis of substantial similarity. Instead, as the following part will examine, the Nike and Rentmeester photographs appear to be substantially similar despite the Ninth Circuit's findings.

D. The District Court's Analysis

In 2015, almost three decades after Nike took its photograph, Rentmeester filed suit for copyright infringement.[205] Because "Rentmeester's livelihood was commercial photography, and he did not want to put that at risk by filing a copyright lawsuit against one of the world's most important advertisers," he waited until his retirement to sue Nike.[206] Thus, Rentmeester's suit of copyright infringement only sought damages from "January 2012 to the present" if the court found infringement, the period within the three-year statute of limitations under the Copyright Act.[207]

For several reasons, which are mostly endorsed by the Ninth Circuit, the district court granted Nike's motion to dismiss the claim of copyright infringement.[208] The district court explained "that very little

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202 *Id.*

203 *Michael Jordan*, *supra* note 190.

204 *Id.*

205 *Rentmeester*, 883 F.3d at 1116.

206 Petition for Writ of Certiorari, *supra* note 14, at 20 n.1.

207 *Rentmeester*, 883 F.3d at 1116; *see* Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 671 (2014) ("Under the Act's three-year provision, an infringement is actionable within three years, and only three years, of its occurrence. And the infringer is insulated from liability for earlier infringements of the same work.").

208 Rentmeester v. Nike, Inc., No. 3:15-CV-00113-MO, 2015 WL 3766546, at *8 (D. Or. June 15, 2015).

of the selection and arrangement is original" because Rentmeester only captured the idea of Jordan leaping towards the basketball hoop in a grand-jeté pose.[209] According to the court, "[t]he only arguably original" aspect of Rentmeester's photograph is that it was shot outside rather than in a gym.[210] However, the district court dismissed this original element as "not all that original" because basketball is played outdoors every day.[211] For the district court, unlike the Ninth Circuit, Rentmeester's photograph was only entitled to "thin protection" because there is a "narrow range of expression" to express the idea in the photograph.[212] Next, the district court explained that while Rentmeester is entitled to protection for his expression of the ballet-inspired pose, the two photographs have "several material differences" in the positioning of Jordan's arms and legs.[213] For the district court, this meant that the photographs were not substantially similar under a thin protection analysis because the photographs "are not virtually identical."[214] Lastly, the district court dismissed any substantial similarities after completing the filtering process of the photographs, explaining that "there are few if any similarities."[215]

E. The Ninth Circuit's Analysis in *Rentmeester v. Nike, Inc.*

Subsequently, the Ninth Circuit affirmed the district court's holding, finding that Rentmeester's photograph and Nike's photograph were not substantially similar as a matter of law.[216] First, the Ninth Circuit acknowledged that Rentmeester satisfied the first element for copyright infringement by showing that he has a valid copyright in his

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[209] *Id.* at *6.

[210] *Id.*

[211] *Id.*

[212] *Id.* at *5; *see Rentmeester*, 883 F.3d at 1120 ("When only a narrow range of expression is possible, copyright protection is thin because the copyrighted work will contain few protectable features."); *see also* Ets-Hokin v. Skyy Spirits, Inc., 323 F.3d 763, 766 (9th Cir. 2003) (explaining that despite the similarities between the photographs, a vodka bottle is only entitled to thin copyright protection because there are only a few creative ways to photograph the bottle). For a discussion of broad copyright protection, see *infra* notes 232-33 and accompanying text.

[213] *Rentmeester*, 2015 WL 3766546, at *6.

[214] *Id.*

[215] *Id.* at *7.

[216] *Rentmeester*, 883 F.3d at 1125.

photograph.[217] For the second element, Rentmeester gave Nike the color transparencies of the Jordan photograph, establishing that "Nike's access to Rentmeester's photo, combined with the obvious conceptual similarities . . . is sufficient to create a presumption that the Nike photo was the product of copying rather than independent creation."[218] For the second part of the second element, Rentmeester had to show unlawful appropriation of his work, which requires an analysis of substantial similarity.[219]

For substantial similarity, the Ninth Circuit explained that the protectable and unprotectable elements of a photograph are dissected and filtered differently from other works.[220] In photographs, the objective elements[221] are not protectable "when viewed in isolation."[222] As long as two photographs are not substantially similar, a photographer cannot prevent another photographer from using his "wholly original subject matter by having someone pose in an unusual or distinctive way."[223] The Ninth Circuit explained that Rentmeester cannot copyright Jordan's pose and prevent another photographer from using that pose.[224] Instead, he is only given protection for the way in which the pose is expressed through other objective elements, including "the camera angle, timing, and shutter speed."[225]

Essentially, the Ninth Circuit held that "copyright law does not protect the individual expressive elements in an image,"[226] but only "the photographer's selection and arrangement of the photo's otherwise unprotected elements."[227] According to the court, these individual elements are the same as "unprotectable 'facts' that anyone may use to create new works."[228] In a factual compilation, the

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[217] *Id.* at 1117-18

[218] *Id.* at 1118.

[219] *Id.*

[220] *Id.* at 1119.

[221] For a list of objective elements, see *supra* notes 44-49.

[222] *Rentmeester*, 883 F.3d at 1119.

[223] *Id.*

[224] *Id.* The Second Circuit and the Ninth Circuit appear to agree that specific poses may not be copyrightable. While a pose is not copyrightable, a photographer may be given copyright protection if such pose is arranged in a creative and original manner. However, the Ninth Circuit strayed from the Second Circuit when it ignored the expressive and individual creative expressions in creating an original pose. *See* discussion *infra* notes 254-57.

[225] *Rentmeester*, 883 F.3d at 1119

[226] Petition for Writ of Certiorari, *supra* note 14, at 22.

[227] *Rentmeester*, 883 F.3d at 1119.

[228] *Id.* at 1120.

underlying facts are not protectable and are free to be used by anyone in another work.[229] However, if the facts are arranged and selected in an original manner, the work may be protected under copyright law.[230] Likewise, the Ninth Circuit views individual photographic elements as unprotectable and only the author's original selection and arrangement of these elements are protectable.[231]

Unlike the district court's analysis, the Ninth Circuit found that Rentmeester's photograph was entitled to broad protection.[232] The court stated that "[t]he range of creative choices open to Rentmeester in producing his photo was exceptionally broad; very few of those choices were dictated by convention or subject matter."[233] However, the Ninth Circuit believed that the two photographs were only similar in their overall idea.[234] These concepts include "Michael Jordan attempting to dunk in a pose inspired by ballet's *grand jeté*," the "outdoor setting stripped of most of the traditional trappings of basketball," and "a camera angle that captures the subject silhouetted against the sky."[235] While the photographs share these similar features "at the conceptual level," both photographs differ in their selection and arrangement of photographic elements.[236] The Ninth Circuit held that the differences between the photographs included the position of Jordan's limbs, the position of the hoops, the background, the setting, and the position of Jordan and the hoop within the frame.[237] According to the court, unlike the hoop in Nike's photograph, the hoop in Rentmeester's photograph is beyond any person's reach to dunk the basketball, creating a "whimsical rather than realistic nature of the depiction."[238] Also, in Nike's photograph, Jordan is wearing Nike

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[229] *Id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347-48 (1991)).

[230] *Id.* (citing *Feist*, 499 U.S. at 348-49).

[231] *Id.* at 1120.

[232] *Id.*; *see* Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 913-14 (9th Cir. 2010) ("If there's a wide range of expression (for example, there are gazillions of ways to make an aliens-attack movie), then copyright protection is 'broad' and a work will infringe if it's 'substantially similar' to the copyrighted work.").

[233] *Rentmeester*, 883 F.3d at 1120.

[234] *Id.* at 1122-23.

[235] *Id.* at 1123. In my opinion, the photographs are similar in their overall idea of Jordan in a ballet-inspired pose. However, this general idea should not amount to substantial similarity. Instead, Nike's photographer stole Rentmeester's creative and artistic expression of this ballet-inspired idea.

[236] *Id.* at 1122.

[237] *Id.* at 1121-22.

[238] *Id.* at 1122.

shoes and the colors of his basketball team, the Chicago Bulls.[239] Therefore, the Ninth Circuit concluded that the works were not substantially similar as a matter of law.[240]

In the dissenting opinion, Judge Owens agreed with the majority that there was no copyright infringement, but he disagreed with the court's application of the law in coming to that conclusion.[241] He reasoned that "questions of substantial similarity are inherently factual, and should not have been made" on a motion to dismiss.[242] In this case, both photographs show "Jordan doing a grand-jeté pose while holding a basketball," and the photographs "are taken from a similar angle, have a silhouette aspect of Jordan against a contrasting solid background, and contain an outdoor setting with no indication of basketball apart from an isolated hoop and backboard."[243] For Judge Owens, he was not certain "that no reasonable jury could find in favor of Rentmeester."[244] Unlike the majority, Judge Owens was hesitant to grant Nike's motion as a matter of law.[245] Consequently, Judge Owens concluded, "that whether the Nike photo is substantially similar is not an uncontested breakaway layup, and therefore dismissal of that copyright infringement claim is premature."[246]

If this case was not decided as a matter of law, it is possible that a jury would have found that the photographs were substantially similar. In fact, William Patry warned against overstepping on the jury's critical job in evaluating whether works are substantially similar.[247] He stated, "the critical point is that reasonable minds looking at the two photos might disagree about whether there is infringement. Judge Owens' partial dissent by itself is evidence of this."[248] According to Patry, the Ninth Circuit ignored the subjectivity of copyright infringement suits.[249] Specifically, the court erred in its method "where, if at least two appellate judges wouldn't find infringement, the dispute can be decided at the pleading stage so long

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239 *Id.* at 1116.
240 *Id.* at 1121.
241 *Id.* at 1127 (Owens, J., dissenting).
242 *Id.* (Owens, J., dissenting).
243 *Id.* at 1127-28 (Owens, J., dissenting).
244 *Id.* at 1128 (Owens, J., dissenting).
245 *Id.* (Owens, J., dissenting).
246 *Id.* at 1129 (Owens, J., dissenting).
247 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:86.50 (Sept. ed. 2019).
248 *Id.*
249 *Id.*

as the two works are attached to the complaint."[250] Although it is unknown whether a jury would have found the two photographs to be substantially similar, the Ninth Circuit should have given a jury the opportunity to evaluate the two works.

The subsequent section will illustrate the improper analysis of the Ninth Circuit and how the Second Circuit, similar to the First and Eleventh Circuits, would have decided this case. Then, it will examine the implications of if the Supreme Court had reviewed this case or a similar case. Lastly, it will discuss the potential negative implications of the Ninth Circuit's analysis on creativity in photography.

V. THE IMPLICATIONS OF *RENTMEESTER V. NIKE, INC.* ON CREATIVITY OF PHOTOGRAPHIC WORKS

A. Circuit Split and the Ninth Circuit's Major Errors

The Ninth Circuit's decision improperly applied the test for substantial similarity when analyzing the photographs, resulting in a split with the First, Second, and Eleventh Circuits on the protection for photographs under copyright law.[251] For the Ninth Circuit, photographic works are protected "in their selection and arrangement of unprotected facts," thereby comparing a photograph to a phonebook.[252] In comparison, several other circuits have consistently held that a photographer's original photographic choices are protected under copyright law.[253] The Ninth Circuit's split from these circuits is not necessarily undesirable if the court accurately analyzed the law and protection for photographs. However, for several reasons, the Ninth Circuit's application of the test for substantial similarity was inaccurate and improperly conducted.

First, the court ignored the Supreme Court's decision in *Burrow-Giles*, which recognized that "copyright law protects intentionally staged photographic subject matter."[254] In *Burrow-Giles*, the Court held that copyright law protects a photographer's

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[250] *Id.*

[251] *See* Petition for Writ of Certiorari, *supra* note 14, at 24 ("In holding that the individual elements of a photograph are categorically unprotectable in copyright law, even when the photographer staged an original tableau, the Ninth Circuit split from the First, Second, and Eleventh Circuits, and brought its law into tension with the Third and Tenth Circuits.").

[252] Petition for Writ of Certiorari, *supra* note 14, at 3.

[253] *Id.* at 26.

[254] Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 2.

"intellectual invention."[255] In that case, Sarony purposefully positioned Oscar Wilde, selected his clothing, and arranged the lighting to evoke a specific expression that he envisioned for the photograph.[256] This recognition for the protection of originally staged photographs prevents other photographers from replicating the creative arrangement of the subject of the photograph.[257]

An important caveat to the copyrightability of poses is that specific poses or mere ideas that are "found in the common domain are the inheritance of everyone" and are not protected under copyright law.[258] However, it is the photographer's creativity, originality, and expressive choices in posing and creating the subject of the photograph that will be protected.[259] Professor Terry S. Kogan of S.J. Quinney College of Law stated, "[i]n instances in which the artist stages or poses the scene that she ultimately paints or photographs, those actions enhance the completed work's originality because they evidence an additional input of personality into the work."[260] Thus, a photographer's choices in posing the subject of the photograph elevate the degree of creativity of the photograph.[261]

Since *Burrow-Giles* was decided in 1884, the courts have consistently recognized that "copyright protection extends to the staged subject matter of a photograph."[262] For instance, in *Harney*, the First Circuit explained that there is copyright protection when a photographer "arranges or otherwise creates the content by" posing the subject of the photograph.[263] Although the court ruled against Harney because he did not create or pose the father and daughter, the First Circuit's recognition of the protection for intentionally arranged

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[255] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884). For a detailed discussion of *Burrow-Giles*, see *supra* notes 80-96 and accompanying text.

[256] *Burrow*-Giles, 111 U.S. at 55.

[257] *See* NIMMER, *supra* note 21, § 2A.08[E][3][a][i] (2019) ("[W]hen the author of the photograph creates original subject matter (*e.g.*, a sculpture, or distinctly posing individuals) that is then incorporated into the photograph, copyright protection for the photograph actually may—in principle—allow the photographer to prevent others from reproducing that subject matter."); *see also* Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 6 ("[T]his Court established that photographers who staged their subjects were authors of original works protected from copyright infringement.").

[258] Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992).

[259] *Id.*

[260] Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 869, 911 (2015).

[261] *Id.* at 876.

[262] Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 2.

[263] Harney v. Sony Pictures Television, Inc., 704 F.3d 173, 180 (1st Cir. 2013).

subjects in a photograph is consistent with *Burrow-Giles*.[264] Similarly, the Second Circuit in *Koons* found that Rogers creatively arranged and posed the couple and their eight puppies.[265] Although the idea of the puppies with the couple is not protected, Rogers' creativity and original judgments in placing the puppies and the couple is protected under copyright law.[266]

Unlike the First and Second Circuits and the Supreme Court in *Burrow-Giles*, the Ninth Circuit failed to appreciate "Rentmeester's staged arrangement as a protected tableau."[267] For instance, "Rentmeester *created* many of his photo's most original elements by directing and posing his subject, artificially manipulating the lighting and landscape, and employing a variety of skillful compositional techniques (bearing on the angle, lens, depth of field, and more)."[268] Specifically, Rentmeester instructed Jordan on the exact ballet-inspired leaping pose that he wanted, and he positioned his camera at a precise angle to capture Jordan's leaping pose.[269] Rentmeester's staged photograph, similar to the staged photographs in *Burrow-Giles* and *Koons*, should have been protected under copyright law.[270] However, the Ninth Circuit disregarded Rentmeester's original and creative staging of Jordan and failed to recognize that Nike infringed Rentmeester's photograph.[271]

Similarly, the Ninth Circuit "failed to extend adequate copyright protection to the camera-related choices that Rentmeester made prior to taking his picture."[272] For Rentmeester, these choices included "which camera, film, lenses, and filters to use; angle of shot;

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[264] *See id.* at 182. For an explanation of the First Circuit's analysis of Harney's photograph, see *supra* notes 109-20 and accompanying text.

[265] Rogers v. Koons, 960 F.2d 301, 304, 307 (2d Cir. 1992).

[266] *Id.* at 308.

[267] Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 2. Tableau is defined as "a representation of a picture, statue, scene, etc., by one or more persons suitably costumed and posed." *Tableau*, DICTIONARY.COM, https://www.dictionary.com/browse/tableau (last visited May 11, 2019).

[268] Petition for Writ of Certiorari, *supra* note 14, at 39.

[269] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1115 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

[270] *See* Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 11 ("Accordingly, Rentmeester's tableau is protected by copyright and should be treated as the photographer's singular subject matter.").

[271] *Id.* at 8. "[N]early every single element that *Burrow-Giles* (properly) identified as protectable would not be protected under the Ninth Circuit's opinion." Petition for Writ of Certiorari, *supra* note 14, at 39.

[272] Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 2.

aperture setting (*f*-stop); shutter speed; focus; ISO setting; use of special lighting and shading techniques; and timing of shot (e.g., time of day, atmospheric conditions, and moment at which to depress the shutter button)."[273] Specifically, he "used powerful strobe lights and a fast shutter speed to capture a sharp image of Jordan contrasted against the sky."[274] Also, he shot the photo from an angle looking up at Jordan and "at the peak of his jump so that the viewer looks up at Jordan's soaring figure silhouetted against a cloudless blue sky."[275] While the Ninth Circuit did concede that Jordan's pose was "highly original," it failed to consider Rentmeester's original choices prior to photographing Jordan when it held that Nike only borrowed the idea of Rentmeester's photograph.[276] The court also likened these original photographic choices to unprotectable factual elements.[277] As the Ninth Circuit interpreted individual photographic elements as unprotectable, the court only recognized copyright protection in the selection and arrangement of these elements.[278] However, because the court only found similarities in the general idea,[279] it explained that "Rentmeester cannot claim an exclusive right to ideas or concepts at that level of generality, even in combination."[280] The court concluded that Nike's photographer made selections and arrangements that were "unmistakably different from Rentmeester's photo," resulting in no copyright infringement.[281] In contrast, the Second Circuit in *Koons* recognized that there was originality and protection in the photographer's choices, such as the posing, lighting, angle, camera, and film choice.[282]

Further, the Ninth Circuit erred when it ignored the protection for Rentmeester's individual photographic elements.[283] For example,

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[273] *Id.*

[274] *Rentmeester*, 883 F.3d at 1115-16.

[275] *Id.* at 1115.

[276] *Id.* at 1121.

[277] *Id.* at 1120 (according to the Ninth Circuit, the individual elements of a photograph are unprotectable facts that can be used by any photographer to create a new photograph).

[278] *Id.* at 1122.

[279] *See supra* note 235 and accompanying text.

[280] *Rentmeester*, 883 F.3d.at 1123.

[281] *Id.* at 1122. For the Ninth Circuit's list of the differences between the photographs, see *supra* notes 236-39.

[282] Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

[283] *See* Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 19 ("Camera-related choices are individual artistic expressions, akin to a painter's mixing his paint,

in *Leigh*, the Eleventh Circuit held that there was copyright protection in the individual elements in Leigh's photograph, specifically "the selection of lighting, shading, timing, angle, and film."[284] Unlike the Ninth Circuit, the Eleventh Circuit did not treat these elements "as unprotectable facts arranged creatively."[285] That court's decision, unlike the Ninth Circuit's decision, is supported by copyright law in its recognition that an author's expressive originality and creativity are protectable.[286] In this case, the Ninth Circuit improperly likened photographic elements to unprotectable facts because it failed to recognize that "Mr. Rentmeester did not 'select' Mr. Jordan's pose, in the same manner as would a compiler of phone numbers select what numbers to include in a phone book. The artist here *created* Mr. Jordan's pose, and he created the tangible expression of that pose in the photograph."[287] In fact, Rentmeester did not arrange "a pile of preexisting, unchanged facts," but he created "highly-original, carefully-staged elements."[288] Thus, the Ninth Circuit improperly overlooked the creative and expressive elements that are protected under copyright law.

Next, while the Ninth Circuit correctly decided that Rentmeester's photograph was subject to broad copyright protection,[289] it failed to apply broad protection to the photograph. Instead, because the court examined the individual photographic elements as unprotectable facts, the court treated the photograph "as though it were entitled to only the thin protection afforded databases, phonebooks, and other factual compilations."[290] As a result, the Ninth Circuit required that there be "near-virtual identity" between the

choosing a brush, or choosing a brushstroke technique. If a pirating photographer imitates those choices in enough detail, he will infringe the original.").

[284] Leigh v. Warner Brothers, Inc., 212 F.3d 1210, 1215 (11th Cir. 2000).

[285] Petition for Writ of Certiorari, *supra* note 14, at 36.

[286] *See* 17 U.S.C. § 102(a) (2019) (stating that there is protection "in original works of authorship fixed in any tangible medium of expression.").

[287] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 13-14. Here, the pose should be protectable because Rentmeester originally and creatively posed Jordan.

[288] Petition for Writ of Certiorari, *supra* note 14, at 39.

[289] *See* Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 2 ("Because Rentmeester both staged the tableau for his photograph and made highly original camera-related choices in taking his picture, that image is entitled to the broadest copyright protection."). For a discussion of broad copyrights, see *supra* notes 232-33 and accompanying text.

[290] *Id.* at 3; *see* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("explaining that factual compilations are subjection to thin copyright protection).

photographs in order to find copyright infringement.[291] Professor Terry S. Kogan explained when photographic works should be subject to thin copyright protection.[292] He stated, "[i]f the camera-related choices and actions that a photographer utilizes in snapping a picture have been largely dictated by previous creative choices and actions of others or by industry conventions, then the photographer's resulting image is entitled only to thin copyright protection against slavish replication."[293] Based on Professor Kogan's analysis of thin copyright protection, the Ninth Circuit misused a thin protection analysis for Rentmeester's photograph because Rentmeester originally and expressively created the photograph of Jordan.[294] Instead, for the test for substantial similarity, the court required "a near-slavish copy" of Rentmeester's photograph in order to find that Nike was liable for copyright infringement.[295]

Likewise, the Ninth Circuit's characterization of Rentmeester's idea is problematic.[296] The Ninth Circuit concluded that the overall idea of Rentmeester's photograph was to show Jordan "holding a basketball above his head in his left hand with his legs extended, in a pose at least loosely based on the *grand jeté*."[297] With this very specific characterization of the idea that included expressive elements, the court ignored Rentmeester's highly original and creative choices as protected expression.[298] The court further muddied the distinction between general ideas and expression when it likened the untraditional outdoor setting and camera angle showing "the subject silhouetted against the sky" as mere ideas.[299] By eliminating these highly

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[291] Petition for Writ of Certiorari at 25, Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (No. 18-728).

[292] Terry S. Kogan, *How Photographs Infringe*, 19 VAND. J. ENT. & TECH. L. 353, 360 (2017).

[293] *Id.* at 361.

[294] *See* Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 21 ("Despite the Ninth Circuit's consistent praise of the originality of his photograph, its analogizing Rentmeester's photograph to a factual compilation effectively relegates the work to the thinnest realm of copyright protection.").

[295] *See id.*

[296] *See* Lee Burgunder, *The Changing Landscape of Copyrights: Hope Shifts from Photographers to Users*, IPWATCHDOG (Oct. 15, 2019), https://www.ipwatchdog.com/2019/10/15/changing-landscape-copyrights-hope-shifts-photographers-users/id=114535/.

[297] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1121 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

[298] *See* Burgunder, *supra* note 296.

[299] *Id.*; *Rentmeester*, 883 F.3d at 1123.

expressive similarities from the evaluation of substantial similarity, the court only considered "secondary details," such as the position of Jordan's legs, as protected and expressive elements.[300] As a result, the court bypassed the major expressive similarities between the photographs, making it easy to find differences between these "secondary details."[301]

Another concern is that the court did not provide any guidance on how it distinguished the general idea from Rentmeester's expressive choices.[302] Instead, the court only stated the idea "as if it had to be true."[303] If the Ninth Circuit had defined the idea in a different way, it is possible that his artistic choices would have been considered expressive and protectable.[304] For example, Rentmeester's idea may have been to simply capture Jordan playing basketball, or he may have wanted to show Jordan leaping with a ballet-esque pose towards the basketball hoop.[305] Other possible characterizations of the idea include capturing Jordan leap in the air while trying to dunk the basketball, showing Jordan leap towards the hoop "with a dance move," or highlighting Jordan's leap towards the hoop "with an unusual posture."[306] Any of these characterizations would have likely given Rentmeester the protection and artistic credit for his original and expressive choices.[307] However, the Ninth Circuit chose to blend Rentmeester's expressive choices as part of the general idea, making it difficult for Rentmeester to be given the appropriate protection for his work.[308]

Next, the Ninth Circuit correctly acknowledged that if the Nike photograph replicated and exactly copied Rentmeester's "highly original" pose, a jury might have found that Nike was liable for copyright infringement.[309] The Ninth Circuit is also correct in stating that Rentmeester cannot prevent other photographers from

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[300] Burgunder, *supra* note 296. Other details considered were "the skyline, the sun, lighting and shadows, and Jordan's position in the photo." *Id.*

[301] Burgunder, *supra* note 296; *see* Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 17 ("The tangible expression of the idea by Mr. Rentmeester is exactly what was stolen.").

[302] Burgunder, *supra* note 296.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *See id.*

[309] Rentmeester v. Nike, Inc., 883 F.3d 1111, 1121 (9th Cir. 2018), *cert denied*, 139 S. Ct. 1375 (2019).

photographing the idea of Jordan in a ballet-inspired pose.[310] The crucial aspect of this case is that Rentmeester was not attempting to gain copyright protection for his ballet-inspired pose; instead, he argued for copyright protection in the original and unique choices that he made when photographing Jordan.[311] However, the essential problem is that the Ninth Circuit failed to consider that "the minor differences between Rentmeester's and Nike's photographs do not undermine the fact that Nike copied the critical features of Rentmeester's staged tableau."[312]

An evaluation of how the Ninth Circuit would have decided *Burrow-Giles* will demonstrate the court's flawed interpretation of the protection for photographic works. In *Burrow-Giles*, the Supreme Court held that Sarony's photograph of Wilde was entitled to copyright protection because he arranged an original and creative work.[313] In several ways, Sarony's and Rentmeester's photographs were similar because both photographers creatively and thoughtfully orchestrated the pose, the subject of the photograph, the perspective, the background, the lighting, and other elements. Unlike the Supreme Court's determination that Sarony was entitled to protection for these original photographic choices, the Ninth Circuit dismissed similar original artistic judgments in "Rentmeester's meticulously staged tableau" as unprotectable.[314] Thus, if the Ninth Circuit had decided the *Burrow-Giles* case, it is likely that it would have denied Sarony copyright protection for his original work.

The Second Circuit's analysis of photographic works is consistent with the Supreme Court's interpretation in *Burrow-Giles*. If this case had been decided in the Second Circuit, it is possible that Rentmeester would have been granted protection for his work. In particular, just as Rogers was granted copyright protection for his original arrangement and pose of the puppies and the couple, Rentmeester would be granted protection for his inventive positioning

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[310] *Id.*

[311] Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 13. In reality, not all ballet-inspired poses are as inventive and original as Rentmeester's pose.

[312] *Id.* at 18.

[313] For a discussion of this case, see Part III.A. Similar to Rentmeester's photograph of Jordan, "Sarony was not claiming an exclusive right to photograph Oscar Wilde." Brief of Professor Terry S. Kogan as Amicus Curiae, *supra* note 86, at 13.

[314] Reply Brief for Petitioner at 4, Rentmeester v. Nike, Inc., 883 F.3d 1111 (9th Cir. 2018) (No. 18-728).

of Jordan.[315] Unlike the Ninth Circuit, the Second Circuit would most likely hold that Rentmeester's original artistic judgments are protectable because he uniquely staged his photograph.[316]

The mere fact that the Ninth Circuit split from the other circuits is not the reason for disagreement with its decision. A major problem with the Ninth Circuit's analysis in *Rentmeester* is that it fails to provide the necessary protection for photographs. Instead, the Second Circuit's protection for photographs aligns more closely with the Supreme Court's interpretation in *Burrow-Giles*. Based on the reasons set forth in this section, the Ninth Circuit inappropriately and inaccurately analyzed these photographs under copyright law. Specifically, the court failed to appreciate that Rentmeester carefully, meticulously, and thoughtfully chose each individual element of his photograph in an artistic manner. In the next section, this Note will describe how the Ninth Circuit's decision will impact photographic creativity.

B. Creativity and Photography

Aside from the Ninth Circuit's improper application of the law, its decision also has negative implications on the future of creativity in photography. Unlike other forms of art, such as music and paintings, photography is a recent art form, resulting in photography often being viewed as an "inferior art."[317] Specifically, photography was perceived as having an inferior status largely because of "its mechanical nature and depiction of external reality."[318] Because photographs can be quickly taken due to advancements in technology, there is a misconception that taking a photograph "requires little effort."[319] In reality, many photographers, like Rentmeester, create their photographs from "a product of extensive skill, experience, and creative talent."[320] Despite these common misconceptions,

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315 For a discussion of these cases, see Part III.B.2. and Part IV.

316 *See* Reply Brief for Petitioner, *supra* note 314, at 9 ("The First and Second Circuits hold that an original tableau staged by a photographer and expressed in a photograph is protectable.").

317 Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 10.

318 Petition for Writ of Certiorari, *supra* note 14, at 11.

319 Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 4.

320 *Id.*

photographs have generally received the necessary recognition as a protected work under copyright law.[321]

However, the Ninth Circuit's decision inevitably bolstered the initial view that photographs are an inferior work of art.[322] By likening the photographic elements in Rentmeester's photograph to factual elements, the Ninth Circuit stripped Rentmeester of his creative and artistic judgments.[323] This decision wrongly implies "that the individual elements in a photograph are divorced from the creativity of the photographer."[324] As the following hypothetical will examine, each photographer's artistic and creative choices in a photograph should be protected.

In this hypothetical, consider a scenario in which Nike's photograph was simply inspired by Rentmeester's photograph and only captured the idea of Jordan in a ballet-inspired pose.[325] In this hypothetical photograph, Jordan is not leaping in a ballet-inspired pose towards the basketball hoop. Instead, Jordan is in a relevé[326] ballet position with his hands extended above his head. Unlike Rentmeester's photograph, Jordan is not dunking the basketball, but he has the basketball grasped between his upraised hands. Also, the photograph is shot at an angle looking down at Jordan's face, revealing his concentration and determination. The photographer instructed Jordan that he wanted to highlight his facial expressions. Similar to the Rentmeester photograph, the hypothetical photograph is taken outdoors, but this photograph is taken on a busy New York City sidewalk against a beautiful sunrise. Lastly, Jordan is wearing Nike apparel in this photograph, not a traditional basketball uniform.

Unlike the actual Nike photograph, this Nike photograph is not substantially similar to Rentmeester's photograph because it only copied the idea of Jordan's playing basketball in a ballet pose. While

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[321] *Id.* at 11.

[322] *See* Reply Brief for Petitioner, *supra* note 314, at 11 ("This decision thus gives renewed life to a centuries-old view of photography as an inferior art—a misperception that this Court rightly rejected in *Burrow-Giles*, and that the Court is once again called upon to repudiate here.").

[323] *See* Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 12 ("It equates a phone book—a functional tool that merely arranges pre-existing and unchanged phone numbers—with a work of art in which the artist has carefully created each foundational element.").

[324] *Id.*

[325] For this hypothetical photograph, only a few photographic elements are considered, including the pose, camera angle, and the background setting. The purpose of this hypothetical is to distinguish between inspiration and infringement of another photographer's work.

[326] In this ballet pose, the ballet dancer will have his or her feet together in a raised position.

there are similarities between the photographs, such as the outdoor setting, the hypothetical photograph does not copy any specific elements. Instead, the photographs are different in their camera angle, pose, setting, and other elements. Although some elements are quite similar, there are no indications of copying. For example, while Rentmeester's photograph is taken against a cloudless sky, this Nike photograph is shot against a beautiful sunrise, revealing clear differences in the background.

This hypothetical photograph is intended to show that photographers can be inspired by another photographer when taking a photograph. However, the resulting photograph must represent the photographer's own expression, creativity, and originality to prevent copying and infringement. In *Rentmeester*, Nike's photographer was allowed to build on the idea of a ballet-inspired pose, but he improperly stole Rentmeester's creative and artistic expression. This decision conflicts with the Framers' intent to promote the creation of creative works.[327] Further, this decision will strip photographers "of their ability to protect the creative expression of their work from anything other than wholesale lifting."[328]

The Ninth Circuit's decision may stifle creativity because photographers will be cautious about creating works that could be easily copied. In their amici curiae brief, The American Society of Media Photographers, Inc. and The National Press Photographers Association argued:

> One can imagine that if Mr. Rentmeester was faced with the knowledge that he would not be able to protect and profit from his creative work, he would not have created the image in the first place. The world would have been deprived of an iconic image that has animated the minds and souls of millions of people across the globe. . . . The public good, in a very literal sense, would have been less robust, less fulfilled, and weakened. It is inconsistent with copyright law and the constitutional purpose of the Copyright Act that Nike should reap such an enormous benefit from a creative work, without permission, and the creator should be left

[327] *See* U.S. CONST. art. 1, § 8, cl. 8.

[328] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 5.

> with a right without a remedy. Creations such as Mr. Rentmeester's must continue to be protected.[329]

The Ninth Circuit's decision may halt photographers from producing and creating works in anticipation of other photographers stealing their creative and artistic judgments. If this case had adopted the Second Circuit's approach, photographers would be rewarded for their originality and creativity rather than being punished and demeaned.[330] As the next section will discuss, the Supreme Court should have reviewed this case to protect each photographer's creative expression.

C. The Supreme Court Should Have Reviewed This Case

On March 25, 2019, the Supreme Court denied Rentmeester's petition for certiorari.[331] For several reasons, the Court should have granted this petition in order to prevent the stifling of photographic creativity and to resolve the circuit split.

First, the Supreme Court's review of the Ninth Circuit's decision could have ensured the continuation of photographic creativity and photography's place as an art form.[332] In general, while a photographer can draw inspiration from another photographer's work under copyright law, protection is "needed from wholesale duplication of the expression of their inspiration."[333] In this case, Nike was entitled to draw inspiration from Rentmeester's photograph, but it was prohibited from taking Rentmeester's original expression and creative arrangements. However, the Ninth Circuit's decision ultimately stands for the proposition that Nike could do just that.[334] In addition, the Ninth Circuit "treats photography as a second-class art and denigrates

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[329] *Id.* at 7.

[330] *See id.* at 9 ("If the goals of the courts and legislatures that have recognized the importance of copyright protection are to be upheld at all, these decisions that target and demean both photographers and photography as an art and [sic] must be reversed.").

[331] *Rentmeester v. Nike Inc.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/rentmeester-v-nike-inc/ (last visited Nov. 10, 2019).

[332] *See* Part V.B. for a discussion of the potential stifling of creativity.

[333] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 4.

[334] *See* Petition for Writ of Certiorari, *supra* note 14, at 40 ("The Rentmeester photo is an original work of art that expresses Michael Jordan's elegance and athletic ability. . . [the] expressive elements were meticulously created by Rentmeester, and then meticulously pirated by Nike.").

photographers' artistic judgments."[335] As a result, the Ninth Circuit's decision may reinforce the idea that photographs are mere factual works, stripping away the protections that should rightfully be given to photographers for their expressive photographic choices.

Second, a review of this case would have settled the circuit split on this issue, allowing photographers to be certain of the protections that they will be granted for their photographs. In Rentmeester's petition for certiorari, he persuasively argued that this case serves as "an excellent vehicle" to evaluate the differing interpretations of copyright law among the circuits.[336] In particular, while the Supreme Court's review of this case could have corrected the Ninth Circuit's flawed analysis, "the Ninth Circuit's erroneous rule of law will stand as an obstacle to uniform application of the Copyright Act" because the decision "will sow confusion, reward piracy, and stifle creativity."[337] On the other hand, even if the Supreme Court had reviewed this case and agreed with the Ninth Circuit's decision, a review of this case would have at least provided photographers with clear guidance on how the courts will examine future cases with similar issues.[338] Ideally, a review of this case would have been essential to provide clarity among the circuits on copyright protection for photographs.

In the future, the Supreme Court should correct the Ninth Circuit's flawed application of copyright law to prevent this uncertainty in the law. However, absent a Supreme Court decision, the courts interpreting the Ninth Circuit's decision should reconsider its approach in future photography infringement cases. The next section will provide a proposed approach for the Ninth Circuit, along with any other circuits that may share or adopt its view, in future cases.

D. Proposed Approach for Photography Cases in the Ninth Circuit

The decision in *Rentmeester v. Nike, Inc.* demonstrates that the Ninth Circuit should reevaluate its approach to the scope of copyright

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[335] *Id.* at 3.

[336] *Id.* at 38.

[337] *Id.*

[338] Brief for Am. Soc'y of Media Photographers, *supra* note 1, at 4 ("Leaving this area of law jumbled and confused with conflicting opinions would chill the creation of new works and give the green light to infringers the world over. These creators need clarity.").

protection for photographs. By comparing individual photographic elements to factual works, the Ninth Circuit stripped photographs of their artistic and creative nature as a protected art form. The court should consider its decision with the case law from the Supreme Court and the First, Second, and Eleventh Circuits to reevaluate the protection that it should have given to Rentmeester's photograph.

In future photography cases, the Ninth Circuit should clearly distinguish between individual unprotectable facts in a factual work and individual protectable photographic elements. Specifically, if the Ninth Circuit were to receive a photography case requiring the jury to review the substantial similarity between two photographs, the court should clearly distinguish between unprotectable facts and protectable photographic elements. This instruction to the jury would require the Ninth Circuit to accept that photographers can make creative and original arrangements and expressive choices that are protectable. The jury would also need to be instructed that mere ideas and concepts are not protectable, but it is the author's expression of that idea that is protected. For example, if a court in the Ninth Circuit were to instruct a jury based on this case, it would tell the jury that the idea of shooting a basketball in a ballet-inspired pose is not protectable. However, the court would tell the jury that Rentmeester's original and creative expression of that idea, namely the pose, lighting, angle, and camera speed, are protected. This case should have had a different result if the jury heard this case with these instructions.

Moreover, the Ninth Circuit should reexamine its application of copyright law compared to the First, Second, and Eleventh Circuits. These circuits closely align with the Supreme Court's precedent in *Burrow-Giles*, recognizing that there is copyright protection for a photographer's original and creative choices. Likewise, the Eleventh Circuit, for example, demonstrated the importance of deferring to the jury in deciding whether two works are substantially similar. Given the similarities between Nike's photograph and Rentmeester's photograph,[339] along with Rentmeester's highly original and inventive creation, the jury should have been given the opportunity to hear this case. Overall, the Ninth Circuit should consider aligning with the First, Second, and Eleventh Circuits because the approach of these circuits provides a fairer and more consistent application of copyright law.

[339] For a discussion of the similarities between the photographs, see *supra* notes 197, 243.

VI. CONCLUSION

The Ninth Circuit's decision in *Rentmeester v. Nike, Inc.* has serious implications for the future of photographic creativity and the protections given to photographs under copyright law. In deciding that the photographs were not similar as a matter of law, the court denied Rentmeester the opportunity of presenting the factual issues in his case to a jury. Further, in choosing not to review Rentmeester's case, the Supreme Court left the protection for photographs unsettled. This will most likely result in more photographers copying other photographers' creative expression without being held liable for infringement. The Ninth Circuit should correct this misapplication of the law and align with the First, Second, and Eleventh Circuits by giving protection to photographers for their creative and expressive photographic choices.

APPENDIX

Rentmeester's photograph

Nike's photograph

Note: This photographic comparison of Rentmeester's photograph and Nike's photograph is found in the Ninth Circuit's decision.