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Copyright battle ensues over Jordan's 'Jumpman' silhouette

Who knew that the most famous image of the greatest basketball player of all time was inspired by a ballet move called a grand jeté?

The player, of course, is Michael Jordan, and the image is "Jumpman," the ubiquitous silhouette that can be seen on every pair of Air Jordan shoes.

The Jumpman trademark has been part of Nike's multibillion-dollar-a-year basketball business since 1987, but now Jumpman's history faces a full-court press.

The origin story is told in a copyright infringement lawsuit Jacobus Rentmeester filed in January against Nike in federal court in Oregon. Rentmeester, in 1984, created a photograph of Jordan that Rentmeester now claims is the image that Nike transformed into advertisements and eventually the Jumpman logo. He claims that Nike's use of the image for the past 30 years was without his permission and thus constitutes copyright infringement.

But how could the photographer sue now for an infringement that began when Michael Jordan still had hair?

The answer came last year in the Supreme Court's decision in *Petrella v. MGM*. The court held that a claim filed 18 years after the movie "Raging Bull" premiered in 1980 was not barred by laches so long as some infringement occurred within three years of filing.

Returning to prehistoric Jumpman, Rentmeester had been retained by Life magazine to do a photo essay featuring U.S. athletes going to the 1984 Olympics. Among them was North Carolina star Michael Jordan.

Rentmeester says that before he arrived in Chapel Hill, N.C., he had conceived the central elements of the photo. To "maximize visual attention on an isolated picture of Mr. Jordan," he decided to shoot outside and depict Jordan appearing to "soar elegantly" through the sky. Instead of a flying dunk, Jordan is performing something akin to a ballet leap called the grand jeté.

Rentmeester emphasizes that his image does not depict Jordan's natural jump or his dunking style. In the photo, Jordan (who is right-handed) has his left leg forward, the ball in his left hand, his body open and facing the camera and not the hoop, his limbs extended outward.

The lowering sun and adept use of a strobe flash created a photo with a "sharp and compelling silhouette of Mr. Jordan against a contrasting clear sky." What does this have to do with Nike and how can this be infringement?

There are innumerable photos of MJ soaring through the air ready to dunk a basketball, not the least of which are some wonderful shots of his famous free-throw line dunk in the 1988 NBA slam dunk contest.

This is where the story gets interesting (although, according to Nike, legally irrelevant). In the months after Rentmeester's photo appeared in Life, Nike contacted him and requested two slides of the image to use for a "slide presentation only," promising "no duplication." Rentmeester agreed and received a fee of $150.

Not long after that, Nike launched advertisements with a new photo of Jordan in a Jumpman pose — legs splayed, left leg forward, ball in his left hand, body open and facing the camera, with a clear sky in the background.

Rentmeester complained, and Nike agreed to pay him $15,000 for a two-year license to use Nike's photo only on posters and billboards in North America.

In 1987, apparently more confident of Jordan's star power, Nike launched the Jumpman logo, now seen around the world and famous as a Nike brand.

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Nike argues that there should be only a very narrow scope of protection and that photographs of the same subject matter cannot be substantially similar unless they are virtually identical. (While that might be true for a picture of Mount Rushmore, one might question whether it covers Jordan doing a grand jeté.)

Nike says that while there may be similarities between Jumpman and Rentmeester's image, there is no infringement if the only similarities arise from unprotectable elements of a photo, such as the idea. Copyright does not protect ideas, only the way ideas are expressed.

Nike relies on cases such as *Bill Diodato Photography v. Kate Spade LLC* (S.D. N.Y. 2005) and *Kaplan v. Stock Market Photo Agency Inc.* (S.D. N.Y. 2001), both of which basically found that the subject matter of a photo was an unprotectible idea.

A more nuanced treatment is seen in *Mannion v. Coors Brewing Co.* (S.D. N.Y. 2005). The court highlighted the difficulty of identifying the "idea" of a photo. The distinction between idea and expression, which arose in the context of literary copyright, is less appropriate when dealing with photographs. "It is not clear that there is any real distinction between the idea of a work of art and its expression. An artist's idea, among other things, is to depict a particular subject in a particular way." The court pointed out that originality may inhere in the photographer's "creation of the subject" to be photographed.

Nike has moved for dismissal, claiming that there is no infringement as a matter of law. It will be interesting to see whether the court will apply the narrow approach of *Diodato* and *Kaplan*, and take the question out of the hands of the jury, or in a jurisprudential grand jeté leave the issue of substantial similarity to a jury of reasonable Oregonians.

INSIDE IP LAW

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