

No. 15-35509

In the
United States Court Of Appeals
For the
Ninth Circuit

JACOBUS RENTMEESTER,

Plaintiff-Appellant,

v.

NIKE, INC.,

Defendant-Appellee.

Appeal from a Final Judgment of the United States District Court
for the District of Oregon in *Rentmeester v. Nike, Inc.*,
D.C. No. 3:15-cv-00113-MO

APPELLEE'S ANSWERING BRIEF

Dale M. Cendali
Johanna Schmitt
P. Daniel Bond
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Jon Stride
TONKON TORP LLP
1600 Pioneer Tower
88 SW Fifth Avenue
Portland, OR 97204
(503) 802-2034

Counsel for Defendant-Appellee

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appeal Procedure 26.1, Appellee-Defendant Nike, Inc. (“Nike”) states that it has no parent company, and that no publicly held company owns 10% or more of Nike stock.

INTRODUCTION

With this appeal, Plaintiff-Appellant Jacobus Rentmeester (“Rentmeester”) tries to revive meritless and stale claims against Nike. After sitting on his purported rights for decades, Rentmeester sued Nike for direct and indirect copyright infringement. Rentmeester alleges that a photograph of the legendary Michael Jordan dunking a basketball (“Nike Photo”) and Nike’s iconic “Jumpman” logo (“Jumpman Logo”), both of which were created decades ago, infringe a photograph that Rentmeester took of Mr. Jordan in 1984 (“Rentmeester Photo”). Rentmeester also alleges that Nike violated the Digital Millennium Copyright Act (“DMCA”) by removing copyright management information (“CMI”) from the Rentmeester Photo.

The District Court accepted all of Rentmeester’s allegations as true—including allegations of “access” and allegations he now claims show direct evidence of copying—and applied well-settled Ninth Circuit law. Ultimately, the court concluded that Rentmeester could not state a claim because the works were not sufficiently similar. It did so by defining the “idea” of the Rentmeester Photo

and filtering out the other unprotectable elements. The court then properly compared the works and concluded that the Nike Works were not substantially similar to the Rentmeester Photo as a matter of law. And because the Nike Works did not infringe, Nike also did not violate the DMCA. Any amendment would be futile as no amount of additional allegations can change what the works look like. Accordingly, the court properly dismissed Rentmeester's Complaint with prejudice.

The Rentmeester Photo and the Nike Photo are depicted below:

Rentmeester Photo



Nike Photo



(ER-70, 217–18.) Tellingly, throughout this case, Plaintiff has never put the two side-by-side. When seen together, however, the myriad differences between the expression of the Rentmeester Photo and the Nike Photo are obvious. “A picture is worth a thousand words” and the District Court’s straightforward application of basic, principled copyright law confirms this.

Rentmeester’s arguments on appeal—that the District Court should have applied a lower standard for substantial similarity or should not have required any similarity—are red herrings. No matter how much access or direct evidence of copying Rentmeester alleges, the works still must be compared. And when they are, they simply are not sufficiently similar as a matter of law. Thus, Nike respectfully requests that the Court affirm.

JURISDICTIONAL STATEMENT

Nike agrees with Rentmeester’s Jurisdictional Statement.

STATEMENT OF FACTS¹

I. RENTMEESTER’S ALLEGATIONS

Rentmeester alleges he created the Rentmeester Photo in 1984, and it was published in *LIFE Magazine*. (ER-69, 75.) Rentmeester claims he “conceived the central creative elements of the photograph” before shooting. (ER-73.)

Rentmeester’s idea was to “depic[t] [Mr. Jordan] in a way to express his tremendous athletic ability” by having him “leap through the sky and appear to soar elegantly.” (*Id.*) Part of this idea was to have him in a “pose, inspired by a ballet technique known as a ‘grand jeté,’” and “to make it appear that Mr. Jordan was in the process of a dunk” (*Id.*) The Rentmeester Photo is below:

¹ Rentmeester’s “Excerpts of Record” is improper as it contains the entire record, including briefs. Circuit Rules 30-1.4, 30-1.5.



(ER-217–18).²

Rentmeester claims that he provided Nike with “color transparencies” of the Rentmeester Photo and that at some point “[b]etween August 1984 and February 1985,” Nike used them “to produce a nearly identical photograph,” which is depicted below:

² On a motion to dismiss, courts can consider materials that the complaint incorporates by reference. *See Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001); *see also Christianson v. West Publ’g Co.*, 149 F.2d 202, 203 (9th Cir. 1945).



(ER-70, 76, 77.)

Rentmeester further alleges that in 1987, Nike began using the Jumpman Logo (depicted below), which he admits is based on Mr. Jordan's silhouette in the Nike Photo (not the Rentmeester Photo), for its Air Jordan shoes:



(ER-78, 80–81; Dkt. Entry 5-1 (“Br.”) at 13.) Rentmeester claims the Jumpman Logo is “nearly identical” to the “silhouette of Mr. Jordan” in the Rentmeester Photo. (ER-78–80.) But Rentmeester never created a silhouette of his photograph; the “similarly stylized” silhouette of the Rentmeester Photo in the Complaint was created solely for this litigation. (ER-71, 79.)

Finally, Rentmeester alleges that Nike violated the DMCA when it created the Nike Works by “intentionally remov[ing] and/or alter[ing]” the Rentmeester Photo’s unspecified CMI. (ER-87.)

II. DISTRICT COURT PROCEEDINGS

Rentmeester served his Complaint on January 23, 2015, *thirty years* after he became aware of the Nike Works. (ER-71–72.) Nike moved to dismiss under Rule 12(b)(6) because Rentmeester could not state an infringement claim as the Nike Works are not substantially similar to the Rentmeester Photo. (ER-103–52.)

Also, he could not state a DMCA claim for the additional reasons that the alleged conduct occurred before the DMCA was effective and the claim was not adequately plead. (*Id.*) Rentmeester opposed Nike’s motion. (ER-569–629.) After oral argument, on June 15, 2015, the court issued a well-reasoned decision, finding that the works were not substantially similar, and thus there could be no direct or indirect infringement or violation of the DMCA. (ER-1–14.) The court entered judgment on June 17, 2015, dismissing the Complaint with prejudice. (ER-15.)

After summarizing Rentmeester’s allegations, the District Court set forth the legal standards of copyright infringement,³ and focused on the key issue of whether the Rentmeester Photo and the Nike Works are substantially similar. (ER-4–6.) Correctly applying copyright law, the court proceeded by defining the “idea” of the Rentmeester Photo, determining the level of protection of such photograph, and comparing the protected aspects of the Rentmeester Photo to each Nike Work.

First, the court considered Rentmeester’s own statements and found the “idea” of the Rentmeester Photo was “Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet’s grand-jeté.” (ER-7; *see* ER-73.) The court properly rejected Rentmeester’s argument that the “idea” should be defined by “describ[ing]

³ Rentmeester’s contention that the court “relied on one case [*Mattel, Inc. v. MGA Entertainment*, 616 F.3d 904 (9th Cir. 2010)] to govern its analysis” (Br. at 14) is incorrect as the opinion referred to numerous cases.

the category of expression and set[ting] out basically the task that Mr. Rentmeester was charged with,” because “if that were so, broad copyright protection could be created out of thin air with vague descriptions of the commissioned task.” (ER-7, 35.)

Second, the court awarded the Rentmeester Photo “thin” protection based on the limited range of expression of the idea as defined. (ER-8–9.) The court found there are only “a handful of materially different” perspectives and lighting options to express the idea. (ER-8; *see* ER-9.) This was supported by, among other authority, *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1205 (D. Haw. 2006), which the court considered similar to this case, and which awarded “thin” protection to a photograph of a hula dancer in a particular pose, shot from a particular perspective. (ER-8.)

Third, the court “filter[ed] out the unprotected elements of the Rentmeester Photo,” and “compare[d] the [works] for substantial similarity.” (ER-10.) The following elements were identified by the court, and conceded by Rentmeester, as unprotected: “the basketball hoop, the basketball, a man jumping, Mr. Jordan’s skin color, and his clothing.” (*Id.*) The court also considered Rentmeester’s claimed rights in “his particular arrangement of these various unprotected elements,” and found “very little” of it original. (*Id.*) In particular, “the selection and arrangement of having a [sic] Michael Jordan jump with a basketball in the

vicinity of a basketball hoop” was considered “*scenes a faire* for the idea at issue,” and the outdoor location was “not all that original” given that basketball is frequently played outside. (ER-10–11.) The court found numerous differences between the Rentmeester Photo and the Nike Photo, including the poses, backgrounds, and scale and placement of Mr. Jordan. (ER-11–13.) “Given the lack of substantial similarity between the photographs at issue,” Rentmeester’s infringement claim against the Nike Photo was dismissed with prejudice. (ER-13.)

The court also compared the Rentmeester Photo to the Jumpman Logo and found that the only common aspect was the pose, which was not substantially similar. (*Id.*) Accordingly, the court dismissed the infringement claims against the logo with prejudice as well. (*Id.*)

Finally, the court dismissed with prejudice Rentmeester’s DMCA claim because the Nike Works were found non-infringing. (*Id.*)

SUMMARY OF THE ARGUMENT

With this appeal, Rentmeester continues to conflate basic principles of copyright law. To alleviate this confusion, Nike first sets forth the applicable legal framework. Copyright infringement requires, among other things, copying of *protectable*, original elements from the plaintiff’s work, such that the works are substantially similar. To make this determination, courts first define the abstract “idea” of the plaintiff’s work (which is not copyrightable) to determine the breadth

of protection. If there are limited ways to express the idea, the work is given “thin” protection; if there are myriad ways to express the idea, the work is given broader protection. Courts then compare the protectable aspects of the works to determine whether they are substantially similar as a matter of law. Because a photographer cannot claim a copyright in the underlying subject matter (such as the person, landscape, or object photographed), courts give photographs thin protection and will not find infringement unless the allegedly infringing work is virtually identical.

Here, the court correctly defined the “idea” of the Rentmeester Photo as “Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet’s grand-jeté.” (ER-7.) This definition is supported by Rentmeester’s own admissions and is consistent with how courts define the “idea” of a work. Because there are a limited number of ways to express that idea and any photograph using the same idea will be similar in some respects, the Rentmeester Photo is entitled to thin protection. A comparison of the Rentmeester Photo with the Nike Works shows that there are many differences, including the mood, depiction of Mr. Jordan, setting, color palette, and lighting. The similarities cited by Rentmeester are either unprotectable or nonexistent. Thus, as the District Court properly determined, the works are not substantially similar as a matter of law.

Rentmeester's arguments that the court should have applied a lower standard for similarity (or not required any level of similarity) pursuant to the "inverse ratio rule," or because he alleges direct evidence of copying, are unavailing. No matter how much access or direct evidence of copying is alleged or assumed, the Nike Works still must be compared to the Rentmeester Photo for substantial similarity.

The court also correctly found that Rentmeester cannot state a claim for removal of CMI under the DMCA because he cannot allege an underlying infringement. Even if he could, the dismissal was proper because the alleged conduct occurred years before the DMCA was effective and Rentmeester cannot plead adequate facts.

Lastly, the court properly dismissed Rentmeester's complaint with prejudice because any amendment would be futile. No matter how Rentmeester characterizes the works, they are simply not substantially similar as a matter of law. The dismissal with prejudice should be affirmed.

STANDARD OF REVIEW

The Ninth Circuit reviews motions to dismiss *de novo*. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1142 (9th Cir. 2008). Its review generally is limited to consideration of the complaint. *Travaglia v. Johnston*, 42 F.3d 1402, 1402 (9th Cir. 1994). The complaint "must contain sufficient factual matter,

accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions,” however. *Id.* Thus, this Court routinely affirms dismissals of copyright claims where no substantial similarity exists as a matter of law. *See White v. Twentieth Century Fox Corp.*, 572 F. App’x 475, 477 (9th Cir. 2014) (affirming dismissal where “most of the alleged similarities [between films] are not protectable”); *Wild v. NBC Universal*, 513 F. App’x 640, 642 (9th Cir. 2013) (affirming dismissal because “even assuming that NBC had access . . . Plaintiff cannot satisfy the extrinsic test”); *Thomas v. Walt Disney Co.*, 337 Fed. App’x 694, 694 (9th Cir. 2009) (affirming dismissal because “as a matter of law, [plaintiff’s] literary work was not ‘substantially similar’ to defendants’ animated movie”); *Christianson*, 149 F.2d at 203 (“There is ample authority for holding that when the copyrighted work and the alleged infringement are both before the court, capable of examination and comparison, non-infringement can be determined on a motion to dismiss.”).⁴

⁴ District courts also routinely grant motions to dismiss copyright claims where the works are not substantially similar. *See, e.g., Muromura v. Rubin Postaer & Assocs.*, No. CV 12-09263 DDP (AGR_x), 2014 WL 4627099, at *3–*4 (C.D. Cal. Sept. 16, 2014) (dismissing claim that commercial infringed photographs because works were “not substantially similar, let alone virtually identical”); *Gadh v. Spiegel*, No. CV 14-855-JFW (PJW_x), 2014 WL 1778950, at *4 n.6 (C.D. Cal. Apr. 2, 2014) (dismissing claim that movie infringed screenplay

ARGUMENT

I. STANDARDS GOVERNING COPYRIGHT INFRINGEMENT

To state a claim, a plaintiff must allege “(1) ownership of a valid copyright; and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).⁵ (ER-4.)

“Not all copying . . . is copyright infringement,” and thus this second element requires both copying as a factual matter (*i.e.*, factual copying), **and** copying that is

where similarities related to “nothing more than an unprotected idea”); *Christenson v. FLTI*, No. 6:13-cv-00254-AA, 2013 WL 5781276, at *8 (D. Or. Oct. 23, 2013) (dismissing claim where “plaintiff’s copyright is thin” and manuscripts were not “virtually identical”); *DuckHole, Inc. v. NBC Universal Media LLC*, No. CV 12-10077 BRO (CWx), 2013 WL 5797279, at *5–*9 (C.D. Cal. Sept. 6, 2013) (noting that “[t]he Ninth Circuit has long held that non-infringement can be determined on a motion to dismiss” and finding that works were not substantially similar); *Erickson v. Blake*, 839 F. Supp. 2d 1132, 1140 (D. Or. 2012) (dismissing claim because “original” aspects of plaintiff’s song was not “virtually identical, or even particularly similar,” to defendant’s song); *Campbell v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010) (dismissing claim that defendant’s animated film infringed plaintiff’s screenplay where works were not substantially similar); *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1139 (C.D. Cal. 2007) (dismissing claim that defendant’s show infringed plaintiff’s treatment because otherwise plaintiff would have “a monopoly over . . . generic elements expressed as a television talk show featuring celebrity guests and cooking”); *Cory Van Rijn, Inc. v. California Raisin Advisory Bd.*, 697 F. Supp. 1136, 1144 (E.D. Cal. 1987) (dismissing complaint because defendant’s “Claymatic Raisin” characters were not substantially similar to plaintiff’s “Raisin People” where only similarity was “the common idea of an anthropomorphic raisin”).

⁵ Whether on a summary judgment motion or a motion to dismiss, the same analysis applies. *Compare Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (affirming summary judgment) *with White*, 572 Fed. App’x at 477 (affirming dismissal).

actionable (*i.e.*, actionable copying). *Feist Publ'ns, Inc.*, 499 U.S. at 361 (where there was “no doubt” that “a substantial amount of factual information” was copied, issue remained whether “original” aspects were copied); *Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2003) (“[E]ven where the *fact* of copying is conceded, *no legal consequences* will follow from that fact unless the copying is substantial.” (emphasis added)); 4 Nimmer on Copyright (“Nimmer”) § 13.01[B].

A. Factual Copying May Be Shown Through Direct Or Circumstantial Evidence

Factual copying may be shown through direct or circumstantial evidence. *See Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076 (9th Cir. 2006); *Narell v. Freeman*, 872 F.2d 907, 910 (9th Cir. 1989); Nimmer § 13.01[B]. (ER-4.) Direct evidence of factual copying includes “party admissions, witness accounts of the physical act of copying, and common errors in [both parties’] works.” *Humphrey & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 537 (4th Cir. 2015) (quotations omitted). Deriving inspiration from a work does not constitute direct evidence of copying. *See Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 948 (C. D. Cal. 2011) (finding no direct evidence of copying where plaintiff’s sketches and doll sculpts inspired defendant’s dolls); *Maggio v. Liztech Jewelry*, 912 F. Supp. 216, 222 (E.D. La 1996) (drawing “inspiration” from plaintiff’s work constituted circumstantial, not direct, evidence); *see also Wild v. NBC Universal, Inc.*, 788 F. Supp. 2d 1083,

1110 (C.D. Cal. 2011) (applying circumstantial evidence analysis, notwithstanding suggestion that defendants “read the work and drew inspiration from it”), *aff’d*, 513 Fed. App’x at 640.

Direct evidence of factual copying is rarely available. *Fodor v. Time Warner, Inc.*, 19 F.3d 27, at *2 (9th Cir. 1994) (quoting Nimmer § 13.01[B]). Thus, a plaintiff typically establishes factual copying through circumstantial evidence. *Id.*; *see also Gadh*, 2014 WL 1778950, at *3. Circumstantial evidence of factual copying consists of establishing that (1) defendant had access to the plaintiff’s work, and (2) the two works are substantially similar.⁶ *See Funky Films, Inc.*, 462 F.3d at 1076; *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). (ER-4.)

Substantial similarity sufficient to support factual copying in the Ninth Circuit requires a showing that the allegedly infringing work is both objectively similar (*i.e.*, the “extrinsic test”) and subjectively similar (*i.e.*, the “intrinsic test”)

⁶ Some courts use the term “probative similarity,” as opposed to “substantial similarity,” in evaluating circumstantial evidence of factual copying, thus more clearly distinguishing it from the separate element of “substantial similarity,” which is required to establish actionable copying. *See* Nimmer § 13.03[A] (collecting cases). In the Ninth Circuit, as shown below, some courts reach the ultimate legal question of substantial similarity within the context of factual copying. Regardless of where the comparison takes place, the outcome is the same—infringement exists only when *protectable elements of expression* are substantially similar. *See Funky Films, Inc.*, 462 F.3d at 1077; *Newton*, 388 F.3d at 1192–93.

to the copyrighted work. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977), *superseded in part on other grounds by* 17 U.S.C. § 504(b); *see also* *Mattel, Inc.*, 616 F.3d at 913; *Funky Films, Inc.*, 462 F.3d at 1077. (ER-4.) The extrinsic test (objective similarity) may be decided on a motion to dismiss by comparing the works. *See Wild*, 513 Fed. App'x at 642. (ER-4.) In comparing the works in this context, a court “must take care to inquire only whether the *protectable elements, standing alone*, are substantially similar. In so doing, [the court] filter[s] out and disregard[s] the non-protectable elements in making [its] substantial similarity determination.” *Funky Films, Inc.*, 462 F.3d at 1077 (citation and quotations omitted); *see also Apple Computer, Inc.*, 35 F.3d at 1443. (ER-6.)

B. Actionable Copying Requires Substantial Similarity Among Protected Elements

Simply proving factual copying, however, is not sufficient in itself to prevail on a copyright claim—the copying must also be actionable. *See Feist Publ'ns, Inc.*, 499 U.S. at 361; *Newton*, 388 F.3d at 1192–93. To be actionable, a plaintiff must show that protected elements were copied, such that the works are substantially similar. *See Newton*, 388 F.3d at 1192–93 (“For an unauthorized use of a copyrighted work to be *actionable*, the use must be *significant* enough mean[ing] that . . . no legal consequences will follow from th[e] fact [of copying] unless the copying is *substantial*.” (emphasis added)); *Brown Bag Software v.*

Symantec Corp., 960 F.2d 1465, 1477 (9th Cir. 1992) (affirming summary judgment for defendant where similarities related to unprotected elements); *Berkla v. Corel Corp.*, 66 F. Supp. 2d 1129, 1141 (E.D. Cal. 1999) (“[S]ubstantial similarity remains an indispensable element of plaintiff’s proof, even in cases . . . in which defendant does not contest factual copying.”).⁷

Thus, even when factual copying is established through direct evidence (*e.g.*, the defendant admits he copied plaintiff’s work), courts still compare the works for substantial similarity in order to determine whether such copying is actionable as a matter of law. *See Narell*, 872 F.2d at 913 (affirming summary judgment for defendant where direct evidence of copying was claimed because works were insufficiently similar); *Masterson Mktg., Inc. v. KSL Recreation Corp.*, 495 F. Supp. 2d 1044, 1047, 1049 (S.D. Cal. 2007) (comparing photographs and finding

⁷ *See also Belair v. MGA Entm’t, Inc.*, 503 Fed. App’x 65, 66 (2d Cir. 2012) (“[A] plaintiff must establish both (1) actual copying and (2) the illegality of that copying as evident from a substantial similarity between defendant’s work and the protectable elements of plaintiff’s work.”); *Gordon v. Invisible Children, Inc.*, No. 14 Civ. 4122(PGG), 2015 WL 5671919, at *9 (S.D.N.Y. Sept. 24, 2015) (“Once copying has been shown, a plaintiff must still demonstrate ‘substantial similarity’ between the defendant’s work and the protectible elements of plaintiff’s work, because not all copying results in copyright infringement.” (quotations and citations omitted)); *Sater Design Collection, Inc. v. Waccamaw Const., Inc.*, No. 4:08-cv-4133, 2011 WL 666146, at *6 (D. S.C. Feb. 14, 2011) (collecting cases across circuits); *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 392-94 (S.D.N.Y. 2005) (even “[a]ssuming . . . [defendant] actually copied the [plaintiff’s p]hotograph,” photographs were not substantially similar as to their protected elements).

similarities “insufficient as a matter of law” where defendants hired photographer to “duplicate” plaintiff’s photograph). This makes sense because even if a party admits copying aspects of another party’s work, there should be no infringement if the defendant only copied unprotectable elements or the resulting work is different.

C. The “Idea” Of A Work Is Not Protected

It is axiomatic that copyright does not protect an “idea,” but rather it only protects the original “expression” of that idea. 17 U.S.C. § 102(b); *see also Golan v. Holder*, 132 S. Ct. 873, 890 (2012). Thus, in analyzing works for substantial similarity, “[t]he key question always is: [a]re the works substantially similar beyond the fact that they depict the same idea?” *Mattel, Inc.*, 616 F.3d at 917; *see also Apple Computer, Inc.*, 35 F.3d at 1443 (“[S]imilarities derived from the use of common ideas cannot be protected; otherwise, the first to come up with an idea will corner the market.”).⁸

As the District Court properly recognized, “what qualifies as substantially similar varies from case to case depending on the underlying facts,” namely,

⁸ Rentmeester attempts to challenge the District Court’s reliance on *Mattel* by taking comments during oral argument out of context and incorrectly claiming that Nike argued that the case was “inapt.” (Br. at 15.) Nike’s arguments have always been consistent with Ninth Circuit case law, including *Mattel*. Nike explained that regardless of whether works are compared for virtual identity or substantial similarity, the “extrinsic test” is applied “for all works,” and because unprotectable ideas are “filter[ed] out . . . you end up in the same place,” *i.e.*, the Nike Works are insufficiently similar to the Rentmeester Photo. (ER-61–62.)

whether the work at issue is subject to “thin” protection or “broad” protection.

(ER-4.) The Ninth Circuit explained:

If there’s a wide range of expression [to express the idea] . . . protection is “broad” and a work will infringe if it’s ”substantially similar” to the copyrighted work. If there’s only a narrow range of expression [to express the idea] . . . protection is “thin” and a work must be virtually identical to infringe.

Mattel, Inc., 616 F.3d at 913–14. Thus, courts first must decide “what idea is being expressed by the artist in the copyrighted work” in order to determine the breadth of protection. (ER-5.) *See Mattel, Inc.*, 616 F.3d at 913 (“Given that others may freely copy a work’s ideas (and other unprotectable elements), we start by determining the breadth of the possible expression of those ideas.”); *Apple Computer, Inc.*, 35 F.3d at 1446 (9th Cir. 1994) (“[T]he unprotectable elements have to be identified, or filtered, before the works can be considered as a whole.” (emphasis added)); *see also Reece*, 468 F. Supp. 2d at 1206 (articulating unprotectable idea of photograph before comparing works); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 392 (same).⁹

⁹ Rentmeester’s assertion that the District Court “[m]isus[ed]” the idea/expression dichotomy and erred by first determining the breadth of protection of the Rentmeester Photo and determining the idea before comparing the works is at odds with the law. (Br. at 4, 25.) Notably, his reliance on *McCulloch v. Albert E. Price, Inc.* is misplaced. Since that 1987 decision, the Ninth Circuit has made clear that courts should begin by defining the idea and corresponding scope of protection. *See Mattel, Inc.*, 616 F.3d at 913; *Apple Computer, Inc.*, 35 F.3d at 1443–44. Further, *McCulloch* did not hold that it was improper for a court to identify the idea first to determine the scope of

D. Courts Have Awarded Photographs “Thin” Protection And Not Found Them Infringed Unless The Works Look “Virtually Identical”

Because a photographer cannot claim a copyright in the underlying subject of a photograph, courts have awarded photographs “thin” protection. As a result, courts have not found infringement (or substantial similarity) unless the photographs look “virtually identical.” (*Cf.* ER-6.)

For example, in *Ets-Hokin v. Skyy Spirits, Inc.*, the Ninth Circuit found that a photograph of a vodka bottle was entitled to “thin” protection because “the range of protectable expression is constrained by both the subject-matter idea of the photograph and the conventions of the commercial product shot.” *Ets-Hokin*, 323 F.3d at 766. The photographs are shown below:

protection (which is what Rentmeester argues)—it merely held that the district court did not err in that case by not identifying the idea behind plaintiff’s decorative plate or determining the scope of protection accorded to it. *McCulloch*, 823 F.2d 316, 319 (9th Cir. 1987). Rentmeester’s reliance on *Cavalier v. Random House, Inc.* also is misplaced. There, the Ninth Circuit considered the ideas behind plaintiff’s works and then compared the protectable details. *See Cavalier*, 297 F.3d 815, 824 (9th Cir. 2002) (“[T]he basic idea of polishing a star and the depiction of the common features of stars are unprotectible, and the two works differ significantly in the protectible details.”).

Plaintiff



Defendant

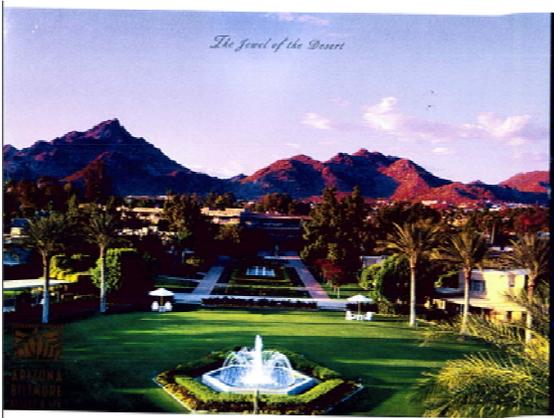


(ER-297, 299, 334, 354.) In its only decision comparing photographs for substantial similarity, the Ninth Circuit found that there could be no infringement since “Skyy’s photographs are not virtually identical to those of Ets-Hokin” and

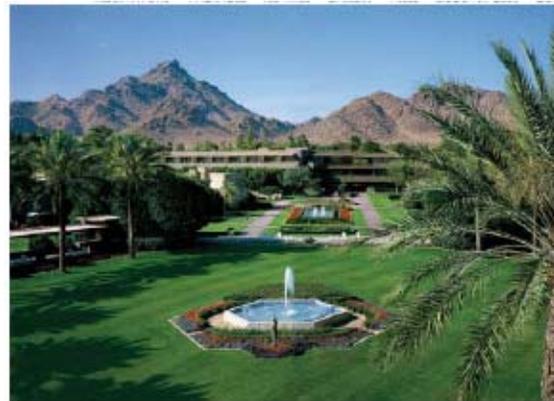
“differ[ed] in as many ways as possible.” *Id.* Because “[t]he only constant is the [subject] itself . . . [t]he photographs [were] not infringing.” *Id.*¹⁰

Further, in *Masterson Marketing, Inc. v. KSL Recreation Corp.*, the plaintiff alleged that defendants infringed by “re-creat[ing] [his] photographs of Squaw Peak” after previously licensing them. 495 F. Supp. 2d 1044, 1046 (S.D. Cal. 2007). The photographs are depicted below:

Plaintiff



Defendant



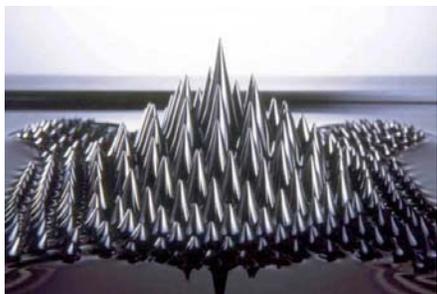
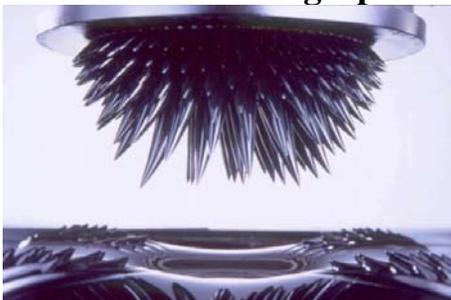
(ER-419, 421.) The court noted that “a photograph *does not and cannot create a copyright in the underlying subject matter*” and that “[f]or photos of existing objects, *even relatively small differences* in two photos *may exclude copyright infringement.*” *Masterson Mktg., Inc.*, 495 F. Supp. 2d at 1048 (emphasis added).

¹⁰ The court in *Ets-Hokin* did not simply identify the “idea” as “a photograph of a Skyy bottle,” as Rentmeester claims. (Br. at 28.) Rather, the court stated that the similarity in the photographs was “inevitable, given the shared concept, or idea, of photographing the Skyy bottle.” 323 F.3d at 766. Nowhere did the court preclude a more specific conception of the “idea” of plaintiff’s work. The decision reflects that although the photographs had many similarities beyond the depiction of the same bottle, the works were not substantially similar.

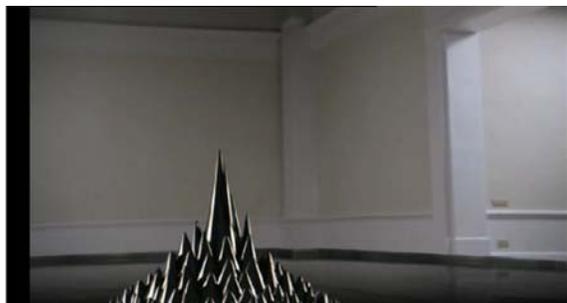
Since “[t]he subject matter of a photograph of a . . . scene . . . is not copyrightable,” the court held that defendant did not infringe even though the “photos were taken from the same vantage point and are in a [similar] format.” *Id.* at 1048–49.

Similarly, in *Muromura v. Rubin Postaer & Associates*, the court dismissed the complaint where defendant’s television commercial featuring images of ferrofluid was “not substantially similar, let alone virtually identical” to plaintiff’s photographs of ferrofluid (both depicted below). No. CV 12-09263, 2014 WL 4627099, at *3–*4 (C.D. Cal. Sept. 16, 2014).¹¹

Plaintiff’s Photographs

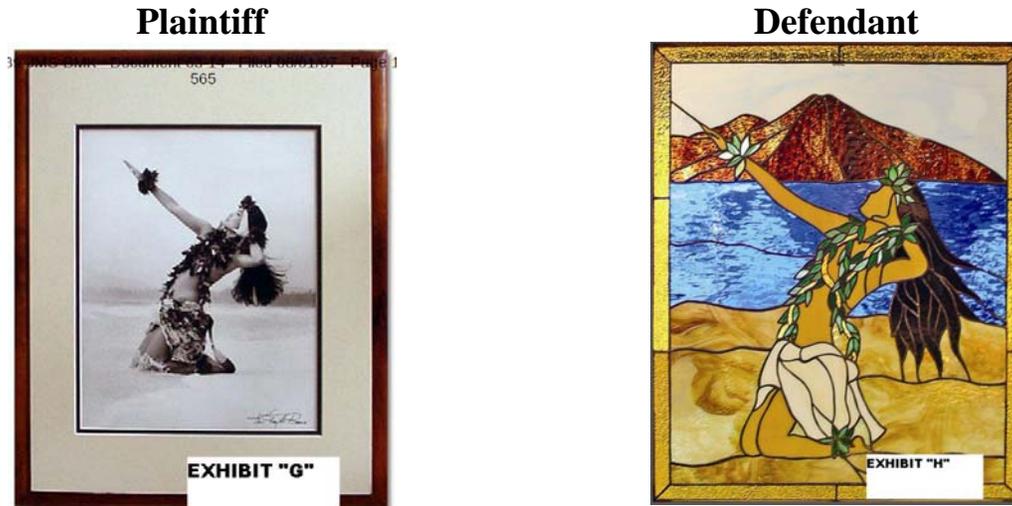


Stills from Defendant’s Ad



¹¹ See <http://sachikokodama.com/text/works/pf01/pf2.html> (last visited Nov. 27, 2015) (plaintiff’s photographs); http://www.streetfire.net/video/acura-zdx-oil-commercial_749300.htm (last visited Nov. 27, 2015) (defendant’s commercial).

In another case, the court found that defendant's stained glass piece was not sufficiently similar to plaintiff's photograph (both depicted below), and thus plaintiff was unlikely to succeed on the merits of his claim. *Reece*, 468 F. Supp. 2d at 1208.



(ER-522–23.) Despite some surface similarities (including the same pose), the court found that plaintiff was unlikely to prevail because the copyright was “thin” and the works were not “virtually identical.” *Reece*, 468 F. Supp. 2d at 1208–09.

Courts outside of the Ninth Circuit have analyzed photographs similarly:

- In *Bill Diodato Photography, LLC v. Kate Spade, LLC*, the court found the following photographs featuring identical and arguably original poses were not substantially similar because the pose was not protected and there were numerous differences. 388 F. Supp. 2d at 393.

Plaintiff



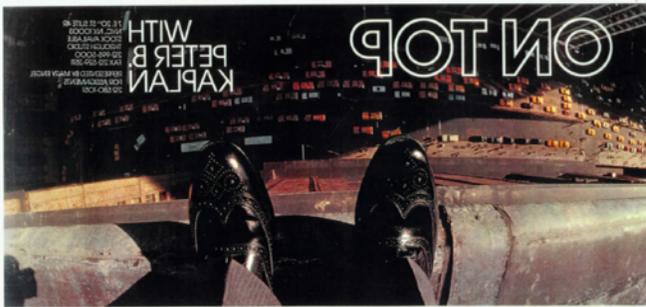
Defendant



(ER-563, 565.)

- In *Kaplan v. Stock Market Photo Agency, Inc.*, the court found the following photographs not substantially similar, despite commonalities in pose and perspective, and any similarities between the works were unprotected. 133 F. Supp. 2d 317, 328 (S.D.N.Y. 2001).

Plaintiff



THE PHOTOGRAPH IN *Kaplan v. Stock Market Photo Agency, Inc.* IS IDENTICAL TO THE PHOTOGRAPH IN *Kaplan v. Stock Market Photo Agency, Inc.*

Defendant

The defendant's photograph in *Kaplan*



See Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 467–68 (S.D.N.Y. 2005) (containing *Kaplan* photos).

- In *Sahuc v. Tucker*, the court found the following photographs were not substantially similar because “the lighting and the placement of the

subject” were different. 300 F. Supp. 2d 461, 465 (E.D. La. 2004), *aff’d*, 166 Fed. App’x 157 (5th Cir. 2006).¹²

Plaintiff



Defendant



II. AS THE DISTRICT COURT CORRECTLY HELD, RENTMEESTER CANNOT STATE A CLAIM FOR INFRINGEMENT BECAUSE NIKE’S WORKS ARE NOT SUBSTANTIALLY SIMILAR TO THE RENTMEESTER PHOTO AS A MATTER OF LAW

Turning to the works at issue, after defining the idea of the Rentmeester Photo and comparing the works, the Nike Works are not substantially similar as a matter of law. Thus, as the District Court correctly found, Rentmeester cannot state a claim for infringement.

A. The District Court Properly Defined The “Idea” Of The Rentmeester Photo

The District Court properly found that the “idea” of the photograph is “Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet’s grand-

¹² See <http://cyber.law.harvard.edu/people/tfisher/IP/Sahuc.pdf> (last visited Nov. 27, 2015).

jeté.” (ER-7.) This finding was not determined by subjectively “delv[ing] into Mr. Rentmeester’s mind at the moment he created the photograph,” as Rentmeester argues. (Br. at 26.) Rather, the court’s definition of the “idea” tracked Rentmeester’s own admissions, and is consistent with case law.

First, in defining the “idea,” the court properly took into account Rentmeester’s own statements and intended idea. (ER-7.) *See Dyer v. Napier*, No. Civ. 04-0408-PHX SMM, 2006 WL 2730747, at *7 (D. Ariz. Sept. 25, 2006) (finding photographer’s “‘intent’ to show the protective nature of a mother mountain lion with her kitten” was unprotectable); *Rachel v. Banana Republic, Inc.*, No. C-85-3786-MHP, 1985 WL 26030, at *4 (N.D. Cal. Nov. 26, 1985) (finding plaintiff’s “inten[t] to copyright . . . the idea or concept of creating synthetic animal forms” was unprotected), *aff’d in part, rev’d in part on other grounds*, 831 F.2d 1503 (9th Cir. 1987). Rentmeester admitted that his “*idea* was to tell a story of gravity-defying flight, athletic ability, and elegance” by depicting Mr. Jordan doing a “gravity-defying dunk” “inspir[ed]” by the “grand jeté[]” from ballet. (ER-589–91 (emphasis added); *see also* ER-32–33.) Further, Rentmeester alleges that his “conce[ption] [*i.e.*, idea]” was to “depict[] [Mr. Jordan] in a way to express his tremendous athletic ability” by having him “leap through the sky and appear to soar elegantly.” (ER-73–74.) A part of this idea was to have Mr. Jordan

in a “pose, inspired by a ballet technique known as a ‘grand jeté,’” and “to make it appear that Mr. Jordan was in the process of a dunk” (*Id.*)

The court’s definition of the idea of the Rentmeester Photo is also consistent with how other courts define the “idea” of a work. Courts articulate the idea of a photograph by including the subject matter and specific context, as opposed to using a broad, general description like the one Rentmeester proposes here (“an image of Michael Jordan” (Br. at 35)).¹³ For example, in *Reece*, the court defined the idea of plaintiff’s photograph as “a hula dancer performing an ‘ike movement in the hula kahiko style from the noho position”—not generally as an image of a hula dancer. 468 F. Supp. 2d at 1206. Similarly, in *Masterson Marketing, Inc.*, the court found that “[p]laintiff’s and defendants’ photographs depict a similar idea about the Arizona Biltmore Hotel property with Squaw Peak rising in the background”—as opposed to viewing the idea as an image of the Biltmore Hotel. 495 F. Supp. 2d at 1049. In *Bill Diodato Photography, LLC*, the court defined the idea of plaintiff’s photograph as “the depiction of a woman’s feet as she sits on the toilet, used as a striking device to highlight fashion accessories”—not as an image of a woman. 388 F. Supp. 2d at 392. Further, in *Kaplan*, the court found that the

¹³ Consistent with the decisions discussed below, during oral argument, the District Court rejected Rentmeester’s argument that the idea was “photographing Michael Jordan” (which is similar to Rentmeester’s definition of the “idea” on appeal), commenting: “[t]hat’s as broad as you can get.” (ER-35; *see also* ER-30.)

photographs were not substantially similar as a matter of law where “[t]he subject matter of both photographs is a businessperson contemplating a leap from a tall building onto the city street below.” 133 F. Supp. 2d at 323. The court did not broadly define the idea as an image of a businessperson, or as a businessperson contemplating suicide.

Defining the “idea” of a copyrighted work more specifically than Rentmeester advocates is not unique to photographs, as shown by other Ninth Circuit decisions:

- In *Mattel, Inc. v. MGA Entertainment, Inc.*, the court defined the idea as dolls “depicting a young, fashion-forward female with exaggerated features, including an oversized head and feet”—as opposed to merely a young, female doll. 616 F.3d at 915.
- In *Benay v. Warner Bros. Entertainment*, the court found that the similarities derived from the plot idea of the “historically unfounded premise of an American war veteran going to Japan to help the Imperial Army by training it in the methods of modern Western warfare for its fight against a samurai uprising.” 607 F.3d 620, 625 (9th Cir. 2010). The court did not more generally define the idea as a plot relating to an American war veteran going to Japan.
- In *Berkic v. Crichton*, the court found the similarities between the works did not go beyond the general plot ideas of “criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants,” and “the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization.” 761 F.2d 1289, 1293 (9th Cir. 1985). The idea was not described generally as a plot about criminal organizations.

Even the cases Rentmeester cites are consistent with the District Court’s definition of the idea. For instance, Rentmeester’s primary case, *Mannion v. Coors*

Brewing Co., states that “[a]n artist’s idea, among other things, is to depict a particular subject *in a particular way*.” 377 F. Supp. 2d 444, 458 (S.D.N.Y. 2005) (emphasis added).¹⁴ Further, in *L.A. Printex Industries, Inc. v. Aeropostale, Inc.*, this Court stated that “[t]he idea [is] a floral pattern depicting bouquets and branches,” 676 F.3d 841, 850 (9th Cir. 2012), as opposed to merely “stylized fabric designs,” as Rentmeester suggests (Br. at 35).

Moreover, in *Cavalier*, this Court defined the ideas, in part, as “stars relaxing on clouds” and “stars being polished,” which includes the activity taking place, as opposed to merely an image of “stars.” 297 F.3d 815.¹⁵ Similarly, in *Midway Manufacturing Co. v. Bandai-America, Inc.*, the court defined the idea of

¹⁴ Rentmeester’s reliance on *Mannion* is questionable because, as *Mannion* explained, its court (the Second Circuit) is “ambivalent” about dissecting protectable and unprotectable elements under its “ordinary observer” test, *id.* at 461–62, whereas this Court expressly “filter[s] out and disregard[s] the non-protectable elements in making [its] substantial similarity determination.” *Funky Films, Inc.*, 462 F.3d at 1077 (quotations omitted); *see also Apple Computer, Inc.*, 35 F.3d at 1443. Regardless, *Mannion* involved photographs with many similarities, including the “composition and angle,” “sky,” “clothing,” “jewelry,” and “angle and lighting.” 377 F. Supp. at 462–63. This stands in marked contrast to the works at issue here.

¹⁵ Rentmeester’s reliance on *Cavalier* is misplaced on this point as well as that case involved fanciful book illustrations, not photographs, and courts have since confirmed that *Cavalier* does not prevent dismissing claims where works are not sufficiently similar. *See Stabile v. Paul Smith Ltd.*, No. CV 14-3749, 2015 WL 5897507, at *10 (C.D. Cal. July 31, 2015) (rejecting plaintiff’s reliance on *Cavalier*); *Christenson v. FLTI*, 2013 WL 5781276, at *6 (D. Or. Oct. 23, 2013) (clarifying that *Cavalier* did not “alter the Ninth Circuit’s two-part inquiry” in assessing substantial similarity).

the video games at issue in detail as (1) “outer space games wherein a defendant base or rocket ship, controlled by the player, attempts to fend off attacking hordes of aliens,” and (2) “an outer space video game in which the player controls a rocket ship defending itself against a swarm of computer-controlled attacking aliens who attempt to bomb and collide with the player’s ship.” 546 F. Supp. 125, 144, 148 (D.N.J. 1982). In addition, in *JCW Investments, Inc. v. Novelty, Inc.*, the Seventh Circuit affirmed the district court’s finding that the “idea” was a “plush doll that makes a farting sound and articulates jokes when its finger is activated,” which is more specific than merely a plush doll. 482 F.3d 910, 916 (7th Cir. 2007).¹⁶

Further, Rentmeester mentions only two of the “ideas” identified in *Apple Computer, Inc.* (Br. at 28), neglecting to include the other ideas which were far more specific, such as the “use of windows to display multiple images on the computer screen and to facilitate user interaction with the information contained in the windows.” 35 F.3d at 1443–44.

¹⁶ In *JCW Investments*, unlike here, the defendant improperly “tried to shoehorn too much into the ‘idea’” by arguing that the “idea” of the doll also included detailed expression, such as that the doll was “wearing jeans and a T-shirt,” sitting “in a chair,” and “doing the ‘pull my finger’ joke.” *Id.* The court further found that the specific appearance of the doll (*e.g.*, its facial features, hair, and clothing), the specific appearance of the chair it sat on, and the specific jokes it made were protected expression. *Id.* Such detailed expression is not included within the “idea” as defined by the District Court in this case.

B. The District Court Properly Found That There Are Only Limited Ways To Express The “Idea” And Thus The Rentmeester Photograph Was Entitled To Thin Protection

After defining the idea, the District Court correctly found that there are only a limited number of ways to express the idea of Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet’s grand-jeté. Thus, the Rentmeester Photo receives only thin protection and the Nike Works are not substantially similar unless they are virtually identical. (ER-8–9.)

Attempting to argue that there are many ways to express the idea and the photograph should receive broad protection, Rentmeester relies on four additional images of Michael Jordan with a basketball. (Br. at 37, 41–42.) Such images are irrelevant, however, as they do not express the idea of Michael Jordan in a gravity-defying dunk, in a pose inspired by ballet’s grand-jeté. In addition, Rentmeester argues that there were many alternatives available to Nike for its marketing efforts and relies on a close-up image of feet wearing Air Jordan sneakers, an image of Bugs Bunny holding a basketball, and an image of an Air Jordan logo that features a basketball and wings. (Br. at 43–44.) These images also are irrelevant as it does not matter whether Nike could have advertised its Air Jordan products in different

ways; what matters is whether the Nike Works are substantially similar to the protected elements of the Rentmeester Photo.¹⁷

C. The District Court Properly Compared The Rentmeester Photo To The Nike Photo And Found Them Not Substantially Similar

As the District Court found, when the Rentmeester Photo is compared to the Nike Photo, the works are not substantially similar as a matter of law. Any similarities asserted by Rentmeester relate to unprotectable elements, which cannot support a claim for infringement.

1. The Rentmeester Photo And The Nike Photo Are Not Substantially Similar

As seen above in the side-by-side comparison (ER-70, 217–18), the differences between the photographs are numerous, including at least the following:

Differences In The Mood: The moods expressed are very different. *See Funky Films, Inc.*, 462 F.3d at 1080 (finding “drastically different” moods); *Sahuc*, 300 F. Supp. 2d at 466 (finding “feel” of photographs different; plaintiff’s “photograph emphasizes the gate itself” whereas defendants’ photograph “invites

¹⁷ Nike has opposed Rentmeester’s Request for Judicial Notice (Dkt. Entry 10), which seeks judicial notice of six images purportedly found on the Internet, an excerpt from Mr. Jordan’s autobiography, and an excerpt from an article in *Popular Photography*. As explained in Nike’s opposition, these materials should not be considered. Nevertheless, as the Court has not yet ruled on Rentmeester’s motion, Nike has responded generally to Rentmeester’s substantive arguments regarding such documents.

the viewer to enter the open gate”); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 393 (comparing “airy and provocative feel” with the mood of the other work); *Kaplan*, 133 F. Supp. 2d at 327 (comparing “somber or reflective mood” versus “mood of adventure or curiosity”).

On the one hand, the Rentmeester Photo, taken when Mr. Jordan was in college and preparing for the Olympics (ER-73), creates the mood of a young athlete striving (but not guaranteed) to achieve a goal—*i.e.*, winning an Olympic medal. This mood is expressed by depicting Mr. Jordan as very small, isolated in a deserted field with the basketball hoop towering almost impossibly high above him and far in the distance. Mr. Jordan looks like he is moving forward in space, trying with all his might to reach the basket. Even the bend in Mr. Jordan’s right arm gives the feeling of struggle, as if he is using every muscle in his body to propel himself. The Rentmeester Photo leaves uncertain whether Mr. Jordan will ever reach the basket.

The Nike Photo presents an entirely different story. Taken after Mr. Jordan signed with the Chicago Bulls, Michael Jordan in this photograph has attained a goal—he has arrived in Chicago to play professionally. Mr. Jordan soars triumphantly, almost effortlessly, over the Chicago skyline. He appears to have jumped up vertically from the ground, and is coming down to dunk. Graceful, his left arm extends above the nearby basket and his right arm extends to his side in

sharp, straight lines, with his legs forming a perfect “V” shape that accentuates his flight over Chicago. The Michael Jordan in this photograph has arrived, and the photograph communicates that he will dunk that ball.

Differences In The Depiction Of Mr. Jordan: There are also significant differences in the physical appearance of Mr. Jordan, including:

Different Placement And Scale: As the District Court found, “the scale and placement of Mr. Jordan is different: in the Rentmeester Photo he is relatively small and to the left of the frame and farther from the basket, and in the Nike Photo he is relatively large and in the center of the frame and closer to the basket.” (ER-12.) *See Muromura*, 2014 WL 4627099, at *3 (framing was different); *Reece*, 468 F. Supp. 2d at 1207 (noting “position of the subject dancer relative to her setting is not” the same); *Sahuc*, 300 F. Supp. 2d at 465–66 (no substantial similarity where elements were placed slightly differently).

Different Clothing: The Nike Photo depicts Mr. Jordan in a manner that accentuates the Nike shoes and apparel he is wearing in the distinctive red and black of the Chicago Bulls—in keeping with the overall theme of Mr. Jordan’s arrival in Chicago. In contrast, the Rentmeester Photo depicts him in dark clothing with only vague hints of color and featuring the words “USA” and “United States.” Mr. Jordan’s clothing in the Nike Photo is also

more tightly fitted, accentuating his form in a way that the baggier clothing in the Rentmeester Photo does not. Overall, the Nike Photo utilizes clothing to emphasize fashion, while the Rentmeester Photo employs clothing in a utilitarian manner. *See Gordon*, 2011 WL 3648606, at *4 (noting differences in clothing).¹⁸

Differences In Mr. Jordan's Stance: As the District Court correctly found, there are “several material differences” between the expressions of Mr. Jordan’s stance. (ER-11.) *See Reece*, 468 F. Supp. 2d at 1207 (describing differences in photographs’ poses). These differences include the position of his arms/hands and legs/feet.

First, as the District Court explained, the position of Mr. Jordan’s arms is different:

In the Rentmeester Photo, Mr. Jordan’s right arm is bent at the elbow. In the Nike Photo, Mr. Jordan’s right arm is extending straight down and away from the basket. With regards to his left arm, in the Rentmeester Photo Mr. Jordan’s arm is bent slightly backwards while in the Nike Photo it is fully extended and is depicted above the basket.

(ER-11.) Further, in the Rentmeester Photo, Mr. Jordan’s hand is at shoulder height aiming upward towards the basket, whereas in the Nike Photo, Mr. Jordan’s hand points toward the ground.

¹⁸ Rentmeester admitted that Mr. Jordan’s clothing is unprotectable. (ER-10, 49.) To the extent the clothing is considered, however, it is different.

Second, the position of his legs appears different, as the District Court explained:

In the Rentmeester Photo, Mr. Jordan's legs are positioned in the stance of someone jumping while running forward (*i.e. a traditional grand-jeté*). His legs are apart like a scissor split, nearly creating a straight line. In contrast, in the Nike Photo, Mr. Jordan's legs are positioned in the stance of someone who has jumped up vertically and spread his legs wide in *a straddle position*, creating a 'V' as opposed to a straight line.

(ER-11–12 (emphasis added).) While Mr. Jordan may have performed a grand-jeté in the Rentmeester Photo, in the Nike Photo he performed an entirely different move. This is also shown by the placement of Mr. Jordan's feet. In the Rentmeester Photo, the right side of his back foot is visible, but in the Nike Photo, the left side and top of his back foot is visible. The sole of Mr. Jordan's left foot also is visible in the Rentmeester Photo, but not in the Nike Photo.

Differences In The Setting And Background: The setting and background of the works also reveal numerous differences, as indicated by the District Court. (ER-11–12.) The Rentmeester Photo depicts “a relatively isolated knoll” (ER-72), a rural setting, which includes an image of a skeletal, leafless tree on the left side of the frame, a grassy surface, and additional foliage in the background. In contrast, the Nike Photo depicts a distinctively urban background, namely the Chicago skyline, with no trees, grass or foliage. *See Kaplan*, 133 F. Supp. 2d at 326–27 (noting different backgrounds).

Differences In The Color Palette: The works also use different color palettes, as the District Court found. (ER-12.) In the Rentmeester Photo, the sky is depicted in cool colors of blue, grey, white, and black, while the Nike Photo depicts the sky in warm colors of deep purple and red. *See Kaplan*, 113 F. Supp. 2d at 327; *Reece*, 468 F. Supp. 2d at 1208.

Differences In The Lighting, Shadows, And Depiction Of The Sun: In the Rentmeester Photo, the sun shines brightly (almost blindingly) and appears as one of the central features of the photograph. In contrast, the Nike Photo is set at dusk with the sun completely absent from the frame. (*See* ER-12.) *See Reece*, 468 F. Supp. 2d at 1208 (noting differences in “lighting element[s]” and “contrast” of works); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 393 (considering differences in lighting); *Kaplan*, 133 F. Supp. 2d at 327 (finding “distinct shadow” versus “bright sunlight” distinguished photographs).

Differences In The Appearance Of The Basketball Hoops: The specific appearance of the basketball hoops is different.¹⁹ The Rentmeester Photo shows the entire basketball hoop, which has one post and is perfectly vertical, with seemingly exaggerated height. The Nike Photo shows only part of the hoop, which has two posts and appears to be slanted and of regular height.

¹⁹ The District Court and Rentmeester agreed that the basketball hoop in the Rentmeester Photo is unprotected. (ER-10, 48.)

2. The Similarities Cited By Rentmeester Are Not Sufficient To State A Claim

As a threshold matter, Rentmeester's assertion that the District Court erred by not explicitly addressing every similarity Rentmeester alleges is unavailing. (Br. at 45.) Rentmeester cites no legal support for this argument, and indeed, the Ninth Circuit has rejected it, stating "courts may properly disregard alleged similarities that are not protectable." *White*, 572 Fed. App'x at 477 (citing *Funky Films*, 462 F.3d at 1077)).

As discussed below, Rentmeester's asserted similarities are either nonexistent or relate to unprotected elements.

The Subject Matter Is Unprotected: Rentmeester claims that "the basic 'idea,' or subject matter," of the Rentmeester Photo and the Nike Photo is the same. (Br. at 46.) But as discussed above, neither the "idea" nor the "subject matter" of a work is protectable. Mere similarity between ideas or subject matter cannot state a claim for infringement. *Mattel, Inc.*, 616 F.3d at 917; *see also Sahuc*, 300 F. Supp. 2d at 465 (finding no infringement where it was "obvious to the Court that the two photographs depict similar ideas," but "[i]deas . . . are never copyrightable").

Dance Poses Are Unprotected: Rentmeester next claims that the Nike Photo shows a similar pose as the Rentmeester Photo. (Br. 47.) Rentmeester

already conceded at oral argument, however, that “the pose itself is not anything for which you can seek copyright protection.” (ER-27.)

Indeed, Rentmeester cannot assert a monopoly over a pose inspired by ballet’s grand jeté as poses in general are not protectable. *See Reece*, 468 F. Supp. 2d at 1206 n.14 (“[I]n cases involving photographs, a plaintiff’s copyrights cannot monopolize the various poses used, and can protect only [p]laintiff’s particular photographic expression of these poses and not the underlying ideas therefor.” (quotations and citations omitted)); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 393 (same); *see also Horgan v. Macmillan, Inc.*, 789 F.2d 157, 161 (2d Cir. 1986) (“Social dance steps and simple routines are not copyrightable . . . [including] the second position of classical ballet.”); U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 805.5(A) (3d ed. 2014) (“Individual movements or dance steps by themselves are not copyrightable . . .”).

The District Court properly found that whether Rentmeester “invented” the pose, or whether it was “creative and unique” is irrelevant as ideas remain unprotectable, even if they are original, as discussed above. (ER-11.)²⁰ Moreover,

²⁰ Rentmeester cannot save his claim by alleging that both photos “captured Mr. Jordan’s full figure at the apex of his vertical leap.” (Br. at 51.) As an initial matter, in the Rentmeester Photo, Mr. Jordan has not yet achieved a sufficient height to dunk the ball, whereas in the Nike Photo, he has exceeded the height of the basket. Further, capturing a basketball player’s leap at the apex flows directly from the idea of depicting a basketball dunk, and thus constitutes unprotectable *scenes-a-faire*. *See Ets-Hokin*, 323 F.3d at 765–66 (“[W]hen

as also discussed above, the appearance of Mr. Jordan (including his stance) is different.

Rentmeester Does Not Identify Any Protectable Aspects Of The “Silhouette” And “Background”: Rentmeester argues that the Nike Photo infringes because it depicts “a sharp silhouette” of Mr. Jordan “against a contrasting solid background (a cloudless sky)” using “ambient natural backlighting” created by his decision to “sho[o]t into the sun.” (Br. at 50.) These purported similarities do not relate to protectable expression, but rather are inherent qualities of all photographs of naturally-occurring elements. *See Muromura*, 2014 WL 4627099, at *3 (courts must disregard “non-protectable natural qualities” depicted in a photo). Rentmeester cannot monopolize the depiction of a “sharp silhouette,” which is merely the shape formed by an image. Rentmeester cites cases that confirm that photographs are generally copyrightable (Br. at 50), but none of those cases stand for the proposition that the elements he cites are protectable.

Rentmeester attempts to bolster his argument by explaining the technical steps he took to create his photograph, including “us[ing] a fast shutter speed” and “sho[o]ting into the sun” to “creat[e] natural ambient backlighting.” (Br. at 50–

similar features of a work are as a practical matter indispensable, or at least standard, in the treatment of a given idea, they are treated like ideas and are therefore not protected by copyright.” (quotations omitted)).

51.) The process used or the amount of work that Rentmeester put into creating the Rentmeester Photo, however, is irrelevant, as “originality [of expression], not ‘sweat of the brow,’ is the touchstone of copyright protection” *Feist Publ’ns., Inc.*, 499 U.S. at 359–60.²¹ The Nike Photo shows that *Nike made a different artistic choice*—there is no sun, the sky is a wholly different color, and the resulting visual expression is different.

The “Outdoor Location” And General Setting Is Unprotectable:

Rentmeester argues that both the Rentmeester Photo and the Nike Photo depict an “outdoor location with no indication of basketball apart from an isolated hoop, backboard, and pole.” (Br. at 52.) The District Court properly found that the outdoor location was “not all that original” “given that a lot of basketball is played every day . . . in driveways and outdoor courts at neighborhood parks” (ER-10–11.) Indeed, the fact that the Rentmeester Photo and the Nike Photo use a basketball hoop with a solid white backboard makes sense as these are the types of

²¹ This is confirmed by the cases on which Rentmeester relies. *Ets-Hokin*, 225 F.3d at 1075 (“[T]he elements of photographs that *result* from these decisions—are worthy of copyright protection.” (emphasis original)); *Mannion*, 377 F. Supp.2d at 451 (“[T]he fact that a photographer made such [technical] choices does not alone make the image original. ‘Sweat of the brow’ is not the touchstone of copyright. Protection derives from the features of the work itself, not the effort that goes into it.”). For these reasons, Rentmeester’s reliance on an article from *Popular Photography*, which he submitted on appeal and claims shows that the same process was used to create the Nike Photo, is misplaced. (Dkt. Entry 10 at 13–14.)

hoops commonly used outdoors. Accordingly, Rentmeester's argument that the NBA at the time used a different type of hoop for indoor games is irrelevant. (Br. at 54.)

Rentmeester Does Not Identify Any Protectable Aspects of the

“Perspective” That Are Similar: Rentmeester claims that the Nike Photo infringes because it employs similar “perspective and location of the viewer vis-à-vis Mr. Jordan” as the Rentmeester Photo. (Br. at 55.) Rentmeester, however, cannot obtain a monopoly on photographing a subject from a 90-degree perspective, from a distance that enables the full figure to be seen. *See Masterson*, 495 F. Supp. 2d at 1048–49 (finding unprotected vantage point from where photograph was shot); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 393 (finding placement and angle of handbag in photograph unprotectable); *see also Reece*, 468 F. Supp. 2d at 1204 (finding use of same pose and perspective non-infringing).

The “Deep Depth of Field” Is Governed By The Subject Matter:

Rentmeester claims that both photographs use a “deep depth of field,” meaning that “both the foreground and the background . . . appear[s] in focus.” (Br. at 58.) As Rentmeester admits, however, the deep depth of field makes sense for photographs that are not close-ups, as a “shallow” depth of field includes “a close-up image of an insect on a leaf in which the insect is in focus but the leaf is not.”

(Br. at 57–58.) No photographer can monopolize taking a photograph with both the foreground and background in focus. Further, the deep depth of field in the Nike Photo contributes to its distinctive mood (as discussed above) as otherwise, the Chicago skyline would not have been identifiable.

Rentmeester’s Alleged Selection And Arrangement Does Not Save His

Claim: Finally, Rentmeester’s argument that his selection and arrangement of unprotectable elements is protected (and that the District Court failed to recognize that) does not make the photographs substantially similar as a matter of law.

As a threshold matter, the arrangement and selection of unprotected elements is entitled to only “thin” copyright protection and thus the works must be virtually identical for infringement. *See Century Tile, Inc. v. Hirsch Glass Co.*, 467 Fed. App’x 651, 652 (9th Cir. 2012) (finding “thin” protection for designs that “substantially comprise uncopyrightable elements” and finding defendant’s design not “virtually identical”); *Satava v. Lowry*, 323 F.3d 805, 811–13 (9th Cir. 2003) (recognizing that an original combination of unprotected elements is entitled only to “thin” protection against “virtually identical” copying); *Muromura*, 2014 WL 4627099, at *3 (discussing *Satava*); *see also Feist Publ’ns, Inc.*, 499 U.S. at 350–51.

Here, the District Court correctly found that, given the idea of the Rentmeester Photo, “there is nothing original about the selection and arrangement

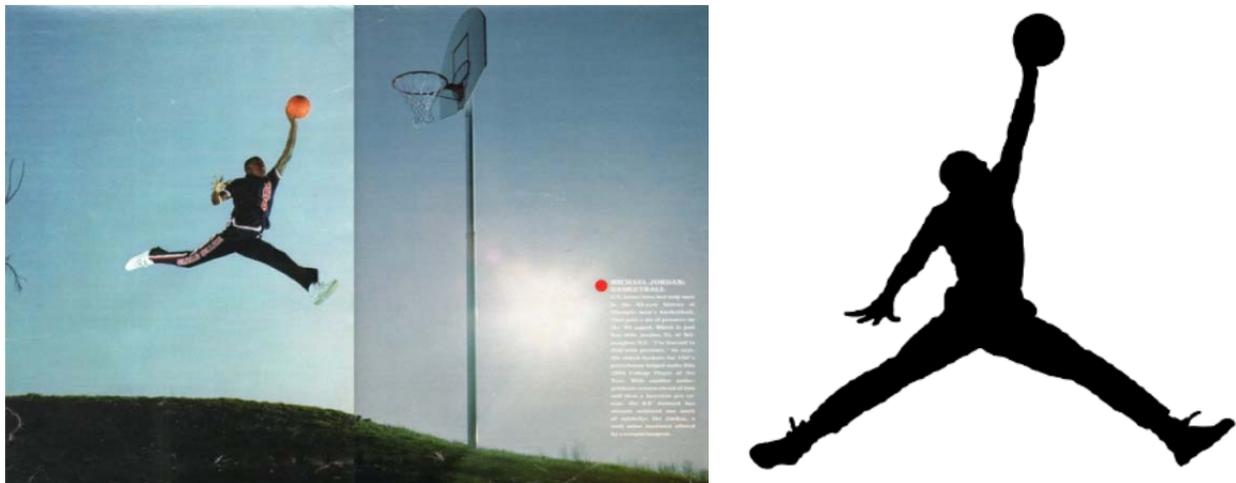
of having a [sic] Michael Jordan jump with a basketball in the vicinity of a basketball hoop—that is all *scenes a faire* for the idea at issue.” (ER-10.) This makes sense as an image of Michael Jordan dunking necessarily would include Mr. Jordan jumping, holding a basketball (in either hand) and appearing to soar towards a basketball hoop. Moreover, as discussed above, the Nike Photo shows a different pose, a different basketball hoop, a different background, and a different perspective, such that it does not copy Rentmeester’s claimed selection and arrangement.

D. The District Court Properly Compared The Rentmeester Photo To The Jumpman Logo And Found Them Not Substantially Similar

The Jumpman Logo is even more dissimilar to the Rentmeester Photo. As the District Court properly found, these works are not substantially similar as a matter of law. (ER-13.)

As an initial matter, while Rentmeester misleadingly includes a black silhouette based on his Rentmeester Photo in the Complaint (ER-79), he does not allege that he ever created a “silhouette logo” comparable to Nike’s trademarked Jumpman Logo. Rentmeester’s after-the-fact image, created apparently for purposes of this lawsuit, is irrelevant. *See Wickham v. Knoxville Int’l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984) (finding plaintiff’s altered versions of work could not support substantial similarity); *Gordon*, 2011 WL

3648606, at *4 (stating plaintiffs cannot “manipulate the comparison” between two works by “alter[ing] the images at issue in order to bolster [their] infringement claims”). The correct comparison here is between the Rentmeester Photo and the Jumpman Logo:



(ER-75, 79.)

The differences between these works are striking. The Rentmeester Photo has numerous elements that are simply not present in the Jumpman Logo. For example, in the Jumpman Logo—unlike in the Rentmeester Photo—there is no background, no setting, no color, no basketball hoop, no ground, no foliage, and no sun. The Jumpman Logo is a black silhouette of a basketball player—nothing else.

Rentmeester alleges that the person depicted and the pose of the Jumpman Logo is the same as the figure in the Rentmeester Photo. (ER-79.) But as discussed above, Rentmeester cannot copyright Michael Jordan or a “grand-jeté”

pose. Moreover, the expression of the figures in the Jumpman Logo and Rentmeester Photo are not similar:

- Mr. Jordan appears realistic and colors and contours are shown in the Rentmeester Photo, whereas, in contrast, the Jumpman Logo consists of a stylized, solid black figure.
- Mr. Jordan performs a grand-jeté in the Rentmeester Photo, wherein his legs appear in a largely straight line with the right leg bent slightly at the knee, creating a feeling of horizontal rather than vertical motion. In the Jumpman Logo, Mr. Jordan performs a different move, where his legs are straight, forming a distinctive “V” shape that creates the impression of vertical flight.
- In the Rentmeester Photo, Mr. Jordan’s right arm is bent at a hard angle with his hand pointed upwards and his left arm bent slightly back with the ball appearing to be in the process of leaving his hand. In the Jumpman Logo, Mr. Jordan’s arms are depicted in a straight line, with the right arm pointed down and slightly out with an open palm and the left arm aimed upward with the ball resting flat on Jordan’s left hand.

For at least these reasons, the Jumpman Logo and the Rentmeester Photo are far from substantially similar as a matter of law and a claim for copyright infringement cannot stand.

III. THE “INVERSE RATIO RULE” DOES NOT CHANGE THE CONCLUSION THAT THE WORKS ARE NOT SUBSTANTIALLY SIMILAR

Rentmeester argues that, given the allegations of Nike’s access to the Rentmeester Photo, a lower standard of substantial similarity applies, pursuant to the “inverse ratio rule.” (Br. at 65–66.) As a threshold matter, the District Court *did* take into account Rentmeester’s allegations that Nike had access to the Rentmeester Photo. (ER-3.) Further, as discussed below, the inverse ratio rule is

not universally applied in the Ninth Circuit, and even if it is applied here, the works remain insufficiently similar as a matter of law.

To begin with, in cases involving photographs, the Ninth Circuit has not lowered the standard for substantial similarity even where a high level of access was assumed or undisputed. In fact, notwithstanding the “inverse ratio rule” articulated by *Rentmeester*, the Ninth Circuit and its district courts have not found photographs substantially similar unless they were “virtually identical.” This is true even where there has been undisputed evidence regarding a high level of access—such as where the defendant first licensed plaintiff’s work or where the defendant instructed someone to recreate the plaintiff’s work. *See Ets-Hokin*, 323 F.3d at 766 (affirming summary judgment for defendant without reference to rule though defendant commissioned both works at issue); *Muromura*, 2014 WL 4627099, at *1 (dismissing claim without reference to rule though defendant allegedly “rented one of plaintiff’s two available works” and subsequently created allegedly similar works); *Masterson Mktg., Inc.*, 495 F. Supp. 2d at 1046 (granting defendant summary judgment without reference to rule though plaintiff alleged defendant “re-created [his] photographs” after previously licensing them).

In cases involving other types of works, the Ninth Circuit also has not always applied or even referenced the inverse ratio rule where access was conceded. *See Brown Bag Software*, 960 F.2d at 1473 (affirming summary

judgment of non-infringement without reference to rule, though defendant conceded access, because no protectable expression was copied); *Narell*, 872 F.2d at 912 (same); *Berkic v. Crichton*, 761 F.2d 1289, 1294 (9th Cir. 1985) (same).

Moreover, recent authority within the Ninth Circuit suggests that the rule has no applicability in situations where (as here) a defendant concedes or assumes *arguendo* access to a plaintiff's work. See *Williams v. Bridgeport Music, Inc.*, No. LA CV13-06004 JAK (AGR_x), 2014 WL 7877773, at *11 (C.D. Cal. Oct. 30, 2014) (rejecting application “of the so-called ‘inverse ratio rule’” because “[w]here, as here, the alleged infringers concede access, this . . . does not affect the analysis in the summary judgment setting”). Even when the inverse ratio rule has been applied in the Ninth Circuit, courts have still granted motions to dismiss if the works are not substantially similar. See *Capcom Co., Ltd. v. MKR Grp., Inc.*, No. C 08-0904 RS, 2008 WL 4661479, at *4 n.3 (N.D. Cal. Oct. 20, 2008); see also *Dyer*, 2006 WL 2730747, at *4,*11 (granting summary judgment for defendant).

In other Circuits, the inverse ratio rule is either narrowly limited in its application, or not applied at all. For instance, in the Seventh Circuit, the rule applies only to dispense with proof of access. It will not lower the standard of similarity even if there is a high degree of access. *Peters v. West*, 692 F.3d 629, 634–35 (7th Cir. 2012); see also *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 460 (11th Cir. 1994) (noting that rule is not applied, and even if it were, “even

convincing proof of access does not do away with the necessity of finding similarity”); *Sheldon Abend Revocable Trust v. Spielberg*, 748 F. Supp. 2d 200, 204 n.3 (S.D.N.Y. 2010) (deeming rule irrelevant because “it is applied only in the determination of whether there was actual copying,” not to the assessment of improper appropriation); *Green v. Lindsey*, 885 F. Supp. 469, 480 (S.D.N.Y. 1992) (“The inverse ratio rule . . . affects the quantum of proof of similarity necessary to create an inference of copying, it does not affect the quantum of proof of similarity.”).

Ultimately, no matter how much access is alleged or conceded, sufficient similarity must still be shown in order for a copyright infringement claim to stand. Otherwise, taken to its logical conclusion, Rentmeester would have this Court dispense with the substantial similarity analysis and blindly find infringement without looking at the works whenever access is alleged or conceded. This is contrary to well-settled copyright law. *See Funky Films, Inc.*, 462 F.3d at 1081 (noting that “[n]o amount of proof of access will suffice to show copying if there are no similarities”); *see also Shaw v. Lindheim*, 919 F.2d 1353, 1361 (9th Cir. 1990) (same).

The cases Rentmeester relies on do not change the outcome here. First, none of them involve photographs. (Br. at 65.) One case declines to apply the inverse ratio rule. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 486 (9th Cir. 2000).

In another, the court noted that even if the defendant had access to plaintiff's work, the plaintiff failed to show sufficient similarity between the works, such that summary judgment for the defendant was affirmed. *Benay*, 607 F.3d at 625.

Rentmeester's remaining cases offer no guidance on when and how the rule should be applied. In *Swirsky v. Carey*, the court acknowledges the rule, but does not explain how it impacted the substantial similarity analysis there. 376 F.3d 841, 845–50 (9th Cir. 2004). Similarly, in *Shaw v. Lindheim* and *Metcalf v. Bochco*, the court only noted that defendant's concession of access was merely "a factor to be considered in favor of [plaintiff]," *Shaw*, 919 F.2d at 1362, or a fact that strengthened the plaintiff's case, *Metcalf*, 294 F.3d 1069, 1075 (9th Cir. 2002). The courts did not state that the rule lessened the degree of similarity necessary to show infringement, and only found substantial similarity due to "objective similarities in protected expression." *Shaw*, 919 F.2d at 1362–64; *see Metcalf*, 294 F.3d at 1074. Here, no such objective similarities in protected expression exist between the works. Thus, Rentmeester's reliance on the inverse ratio rule cannot save his copyright claim.

IV. RENTMEESTER'S ARGUMENT THAT THE DISTRICT COURT ERRED BY COMPARING THE WORKS IN LIGHT OF HIS ALLEGATIONS OF DIRECT EVIDENCE OF COPYING IS MERITLESS

Rentmeester also argues that he can state a claim for infringement simply by alleging direct evidence of copying—even if the Nike Works are not substantially

similar. (Br. at 61–65.) This argument fails for both procedural and substantive reasons.

A. Rentmeester Waived This Argument

Rentmeester waived this argument by not raising it below. *Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015). Courts will only consider such arguments if one of three types of “exceptional circumstances” apply. *AlohaCare v. Hawaii Dep’t of Human Servs.*, 572 F.3d 740, 744–45 (9th Cir. 2009). None are present here. There is no “miscarriage of justice”; the law has not changed since the District Court’s decision; and the issue is not “purely one of law” as it is based on Rentmeester’s factual allegations of direct evidence of copying. *Id.* Moreover, even if Rentmeester’s argument constituted one of these “exceptional circumstances,” this Court should still not hear it since Rentmeester easily could have raised the issue below, but did not. *See Armstrong v. Brown*, 768 F.3d 975, 981–82 (9th Cir. 2014) (declining to consider argument that was “purely one of law” because party “ha[d] no excuse for its failure to raise these arguments below”); *Raich v. Gonzalez*, 500 F.3d 850, 868–69 (9th Cir. 2007).

B. Rentmeester Cannot Allege Direct Evidence Of Copying

Rentmeester’s various allegations of direct evidence of copying (Br. at 63–65) constitute, at best, circumstantial evidence of access, as Rentmeester does not (and cannot) allege any admission of copying by Nike, any witness account of

copying, or errors present in both works.²² See *Humphreys & Partners Architects, L.P.*, 790 F.3d at 537; see also *Mattel, Inc.*, 782 F. Supp. 2d at 948 (finding no direct evidence of copying where plaintiff's works inspired defendant's works); *Maggio*, 912 F. Supp. at 222 (drawing "inspiration" from plaintiff's work constituted circumstantial evidence); see also *Wild*, 788 F. Supp. 2d at 1110. Further, far from "ignoring" what Rentmeester now claims is direct evidence of copying (Br. at 61), the District Court expressly considered all the allegations that Rentmeester included in his Complaint. (ER-3.)

The excerpt from Mr. Jordan's biography, which Rentmeester only sought to submit on appeal, does not constitute direct evidence of copying either. As discussed in Nike's Opposition to Rentmeester's Request for Judicial Notice, Rentmeester's interpretation of the excerpt is incorrect as it merely reflects that the Jumpman Logo was based on the Nike Photo (not the Rentmeester Photo). (Dkt. Entry 10 at 11.) Regardless, as discussed below, such evidence has no effect on the ultimate question of substantial similarity.

C. Direct Evidence Of Factual Copying Does Not Negate The Requirement Of Substantial Similarity

Rentmeester's argument that his allegations of direct evidence of copying render the substantial similarity analysis irrelevant misrepresents basic principles

²² To be clear, Nike did not copy the Rentmeester Photo, and has only assumed access *arguendo* for the purposes of its motion to dismiss.

of copyright law. As discussed above, a plaintiff must show “copying of *constituent elements* of the work that are *original*.” *Feist Publ’ns., Inc.*, 499 U.S. at 361 (emphasis added). This is established by showing *both* (1) factual copying *and* (2) actionable copying. *Id.*; *Newton*, 388 F.3d at 1192–93. Direct evidence of copying merely establishes the first prong: factual copying. *See Narell*, 872 F.2d at 910; Nimmer § 13.01[B]. Thus, even with direct evidence of factual copying, the defendant must still show that such copying was actionable, such that the works are substantially similar. *See Newton*, 388 F.3d at 1192–93; *Berkla*, 66 F. Supp. 2d at 1141.²³ Such a determination can be made as a matter of law by comparing the works at issue.

The Ninth Circuit clarified that there are situations where a substantial similarity analysis may not be needed—but that is “*only* when the defendant has engaged in *virtual duplication* of a plaintiff’s entire work.” *Narell*, 872 F.3d at 910 (emphasis added).²⁴ In other words, the only times that courts have not

²³ This rule also is reflected in cases cited by Rentmeester. *See Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1214 (11th Cir. 2000) (“No matter how the copying is proved, the plaintiff *also* must establish specifically that the allegedly infringing work is *substantially similar* to the plaintiff’s work *with regard to its protected elements*.” (some emphasis added)); *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 60-62 (1st Cir. 2000) (analyzing works for substantial similarity where there was direct evidence of copying).

²⁴ Rentmeester’s reliance on *Norse v. Henry Holt & Co.*, 991 F.2d 563 (9th Cir. 1993) is misplaced. After *Norse*, the Ninth Circuit confirmed that substantial similarity is required, even where factual copying is conceded. *Newton*, 388

expressly applied a substantial similarity analysis is when such analysis would be superfluous because the works are obviously substantially similar—such as when the defendant performs plaintiff’s entire song or when defendant makes a photocopy of plaintiff’s entire book. *See id.*²⁵ These types of facts simply do not exist here.

Where direct evidence of factual copying is alleged or proven—but virtual duplication does not exist—courts still compare the works to see if the copying is actionable (*i.e.*, if the works are substantially similar as a matter of law). *See Narell*, 872 F.2d at 913 (affirming summary judgment because works were not substantially similar, where plaintiff alleged direct evidence of copying). In the context of photographs, courts have found works not substantially similar (or

F.3d at 1192–93. Further, *Norse* has been distinguished as dealing with a situation where “the protected expression had been actually copied, *i.e.*, there was more than virtual identity when the printed and protected words had been precisely appropriated,” and thus a substantial similarity analysis was not necessary. *Berkla*, 66 F. Supp. 2d at 1141 n.14.

²⁵ The cases *Rentmeester* cites reflect this rationale. *See Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) (defendant performed plaintiff’s songs); *Enterprise Mgmt. Ltd., Inc. v. Warrick*, 717 F.3d 1112, 1120 (10th Cir. 2013) (no dispute that defendant actually copied plaintiff’s diagram and diagrams were virtually identical); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) (facts established that original expression was copied, making substantial similarity analysis unnecessary); *see also Belair*, 503 Fed. App’x at 66 n.1 (finding that *Rogers* court “held that plaintiff was entitled to summary judgment after a showing of actual copying because there was no doubt that the two works were substantially similar”).

virtually identical) and thus dismissed infringement claims even where the facts arguably supported direct evidence of copying, just as Rentmeester claims to allege here. *See Ets-Hokin*, 323 F.3d at 765–66 (finding photographs not virtually identical where defendant hired other photographers to take similar photographs); *Muromura*, 2014 WL 4627099, at *2–*3 (finding works “not substantially similar, let alone virtually identical” where defendant had seen plaintiff’s photographs, rented one of them, and made ads using similar images); *Masterson Mktg., Inc.*, 495 F. Supp. 2d at 1049 (comparing works and finding similarities “insufficient as a matter of law” where defendants had hired another photographer to “duplicate” plaintiff’s photograph); *see also Belair*, 503 Fed. App’x at 66 (granting summary judgment where defendant conceded actual copying of dolls to create photograph, but works were not substantially similar); *Bill Diodato Photography, LLC*, 388 F. Supp. 2d at 394 (granting summary judgment where even assuming actual copying of plaintiff’s photograph, defendant’s photograph was not substantially similar).

Moreover, as a practical matter, allowing claims of direct evidence of copying to proceed without also considering substantial similarity, as Rentmeester urges, would lead to absurd results as a plaintiff would need only allege such direct evidence to survive a motion to dismiss, no matter how dissimilar the works. Defendants throughout various creative communities could be held hostage to meritless infringement claims as they would be unable to obtain dismissals, and

thus be forced to engage in discovery. This would also burden courts as dockets could unnecessarily be clogged with meritless disputes that could otherwise be dismissed because the works are not substantially similar, as so many courts already have done. *See, e.g., Ets-Hokin*, 323 F.3d 763; *Narell*, 872 F.2d 907; *Muromura*, 2014 WL 4627099; *Masterson Mktg., Inc.*, 495 F. Supp. 2d 1044. Thus, even if Rentmeester can allege direct evidence of copying, the District Court’s dismissal remains proper as the works are not substantially similar as a matter of law.²⁶

V. THE DISTRICT COURT CORRECTLY DISMISSED THE DMCA CLAIM

As the District Court found, Rentmeester cannot state a claim for removal or alteration of CMI under the DMCA because he cannot show an underlying act of infringement. (ER-13.) The DMCA only prohibits removal or alteration of CMI with the knowledge that it will “induce, enable, facilitate, or conceal an infringement.” 17 U.S.C. § 1202(b). Without infringement, there is no violation.

²⁶ The remaining case Rentmeester cites does not support his argument. *See L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 846 (9th Cir. 2012) (describing legal analysis when direct evidence of copying is *not* available).

Even if Rentmeester could state a claim for infringement, his claim fails for three additional reasons.²⁷ First, Rentmeester cannot seek relief based on alleged removal of CMI that occurred *fifteen years* before the DMCA made such removal unlawful. (ER-70, 78–79.) A statute has no retroactive effect absent clear congressional intent, *see, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), and when the DMCA became effective in 1998 it did not expressly command retroactive application. Because any purported removal of CMI predated the DMCA by many years, Rentmeester cannot state a claim. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950–52 (1997); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 814 (9th Cir. 1995) (“If . . . the law changes the legal consequences of conduct that takes place after the law goes into effect, the law operates on that conduct prospectively.”); *see also Goldman v. Healthcare Mgmt. Sys., Inc.*, 559 F. Supp. 2d 853, 867 (W.D. Mich. 2008) (“The parties agreed at the pretrial conference that the DMCA does not authorize recovery for any claims prior to its enactment.”).²⁸

²⁷ The Ninth Circuit can affirm a dismissal of the Complaint “on any ground supported by the record, even if the district court did not rely on the ground.” *Sybersound Records*, 517 F.3d at 1142–43.

²⁸ In *Goldman*, the court allowed the claim to go forward as to the violations occurring after the DMCA’s passage. *Goldman*, 559 F. Supp. at 868. These were a series of computer program updates, which differ from the conduct alleged here. *Goldman* involved *literal reproduction* of code—Rentmeester does not allege any such conduct. Also, *Goldman* involved continual updates

Second, Rentmeester does not allege plausible facts that CMI was conveyed in connection with the copies of the Rentmeester Photo he claims Nike used, or that Nike removed or altered such information. While Rentmeester alleges he was credited in *LIFE Magazine* for the Rentmeester Photo (ER-69–70, 76), he does not allege plausible facts that Nike physically removed this credit in creating the Nike Works. To be clear, Rentmeester does not allege that Nike directly photocopied his work or used an editing tool to modify it in creating the Nike Works, and thus deleted any CMI. Nor can he, as the works are different photographs taken in different locations, at different points in time, depicting Mr. Jordan in different clothes. Rather, at most, Rentmeester alleges that the Nike Works are unauthorized derivative works. (Br. at 1.) But case law is clear that “*basing a design on [a plaintiff’s] work* [is] not the same as removing [CMI] from an original copyrighted work . . . [and] *is not sufficient to support a claim of copyright removal* [under Section 1202].” *Frost-Tsuji Architects v. Highway Inn, Inc.*, Civil No. 13-00496 SOM/BMK, 2015 WL 263556, at *2–*3 (D. Haw. Jan. 21, 2015) (emphasis added).²⁹ In fact, to Nike’s knowledge, no claim under

of the software at issue, which essentially created a new version (and thus a new violation) with each update. In contrast, Nike—at one point in time—allegedly removed CMI or failed to provide attribution on the Nike Works and then subsequently reprinted *the exact same work*.

²⁹ See also *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999) (“Based on the language and structure of the statute, the Court holds this

Section 1202 has ever been sustained in the Ninth Circuit absent allegations or evidence that a defendant's work was *literally copied or reproduced* with altered or omitted CMI.

Rentmeester also alleges that he sent invoices to Nike which included "terms of use." (ER-76, 79, 92, 94.) But importantly, these invoices were not attached to the Rentmeester Photo. Rentmeester "cannot base a DMCA claim on CMI that was not displayed on or with the allegedly copied works." *Personal Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 929 (N.D. Ill. 2013) (dismissing claim, as "the only alleged CMI is on PKI's website, not the poems or phrases themselves," and therefore no CMI was removed); *see also* 17 U.S.C. § 1202(c) (CMI must be "conveyed in connection with copies . . . of a work"); *Kelly*, 77 F. Supp. 2d at 1122 (holding CMI was not removed from picture on website when only CMI appeared on website "in the surrounding text," not on "images themselves").

Third, Rentmeester fails to allege a nexus to the Internet or digital piracy. *See MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 942 (9th Cir. 2010) ("In enacting the DMCA, Congress sought to mitigate the problems presented by copyright enforcement in the digital age."); *Brown v. Stroud*, No. C-08-02348

provision [1201(b)(1)] applies only to the removal of [CMI] *on a plaintiff's product or original work.*" (emphasis added)), *aff'd in part, rev'd in part on other grounds*, 280 F.3d 934 (9th Cir. 2002).

JSW, 2011 WL 2600661, at *5–*6, n.6 (N.D. Cal. June 30, 2011) (plaintiff must allege facts linking conduct to Internet, electronic commerce, or other purpose of the DCMA). Here, Rentmeester only alleges that Nike published the Nike Photo on billboards and in print. (ER-78.) As to the Jumpman Logo, Rentmeester solely alleges, in passing, that some Nike products sold via “internet websites” bear the Jumpman Logo. (ER-83.) This is simply not enough to sustain a claim under the DMCA. Thus, the dismissal of Rentmeester’s DMCA claim should be affirmed.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE COMPLAINT WITH PREJUDICE

Dismissal of a complaint with prejudice is warranted when amendment would be futile. *Cali v. Rosenberg*, 45 F.3d 435, at *3 (9th Cir. 1994). In copyright cases, courts routinely dismiss with prejudice when they can determine the works are not substantially similar as a matter of law. *See, e.g., DuckHole, Inc.*, 2013 WL 5797279, at *5–*9; *Campbell*, 718 F. Supp. 2d at 1116. Courts recognize that amendment would be futile because no amount of “creative adjectives” to describe the works or allegations can “manufacture substantial similarity where none exists.” *Gordon*, 2011 WL 3648606, at *4; *see also Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir. 2010); *Erickson*, 839 F. Supp. 2d at 1140.

Here, the District Court compared the works and correctly found them insufficiently similar to state a claim. No amount of additional allegations by

Rentmeester can change how the works look; they will never be substantially similar. Dismissal with prejudice was correct.³⁰

CONCLUSION

For the reasons above, Nike respectfully requests that this Court affirm the dismissal of Rentmeester's Complaint with prejudice.

Dated: November 27, 2015

Respectfully submitted,

/s/ Dale M. Cendali

Dale M. Cendali
Johanna Schmitt
P. Daniel Bond
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Jon Stride
TONKON TORP LLP
1600 Pioneer Tower
88 SW Fifth Avenue
Portland, OR 97204
(503) 802-2034

*Attorneys for Defendant-
Appellee*

³⁰ The cases Rentmeester cites are inapposite. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (amendment not futile); *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254–55 (9th Cir. 1981) (allowing new cause of action).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,937 words, as determined by Microsoft Word 2010, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

STATEMENT OF RELATED CASES

Nike is aware of no related cases pursuant to Circuit Rule 28-2.6.

Dated: November 27, 2015

/s/ Dale M. Cendali

Dale M. Cendali

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 27, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 27, 2015

/s/ Dale M. Cendali

Dale M. Cendali
Johanna Schmitt
P. Daniel Bond
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
(212) 446-4800

Jon Stride
TONKON TORP LLP
1600 Pioneer Tower
88 SW Fifth Avenue
Portland, OR 97204
(503) 802-2034

*Attorneys for Defendant-
Appellee*