

No. 18A-_____

IN THE
Supreme Court of the United States

JACOBUS RENTMEESTER,

Applicant,

v.

NIKE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPLICATION FOR A 60-DAY EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 24, 2018

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**TO: The Honorable John G. Roberts, Jr., Chief Justice of the United States
Supreme Court and Circuit Justice for the United States Court of Appeals for
the Ninth Circuit**

1. Applicant Jacobus Rentmeester respectfully requests an extension of 60 days from October 4, 2018, to and including December 3, 2018, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

2. The petition for a writ of certiorari is currently due on October 4, 2018. The Ninth Circuit issued its initial opinion on February 27, 2018. The petitioner timely filed a

petition for rehearing en banc and the Ninth Circuit denied the petition on July 6, 2018. This application is being filed on September 23, 2018—within 10 days of the date on which the petition for certiorari is due absent an extension. *See* S. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Copies of the Ninth Circuit’s opinion and order denying rehearing are attached.

3. Petitioner filed his copyright-infringement action against respondent Nike Inc., alleging that Nike unlawfully copied protectable creative elements from a famous photograph petitioner created of Michael Jordan. The district court granted Nike’s motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Rentmeester v. Nike, Inc.*, No. 3:15-CV-00113-MO, 2015 WL 3766546 (D. Or. June 15, 2015).

4. The Ninth Circuit panel majority affirmed the district court, while Judge Owens dissented in part and urged partial reversal of the district court. *Op.* at 1. In affirming the district court, the majority held that photographs receive no protection for their “objective elements that reflect the various creative choices the photographer made in composing the image[.]” *Id.* at 11. According to the majority, “a photographer’s copyright is limited to ‘the particular selection and arrangement’ of the elements as expressed in the copyrighted images.” *Id.* at 13-14 (citation omitted). In this regard, the majority likened photographs to phone books and other factual compilations, which receive protection only for “selection and arrangement.” *Id.* at 13-15. The majority viewed “[t]he individual elements that comprise a photograph . . . as the equivalent of unprotectable ‘facts’ that anyone may use to create new works.” *Id.* at 13.

5. Petitioner sought panel rehearing, or in the alternative, rehearing en banc, which the Ninth Circuit denied on July 6, 2018. Judge Owens voted to grant the petition for rehearing and rehearing en banc.

6. The Ninth Circuit's opinion contradicts prior decisions of this Court, creates circuit splits with the First, Second, and Eleventh Circuits, and raises questions of exceptional importance, including: (a) whether a photographer's copyright is limited to the selection and arrangement of the elements expressed in the image, or whether the photographer's creative expression of the elements themselves is also protected; (b) whether photography receives the same protection against copyright infringement as other art forms; and (c) whether a reasonable juror can find two works substantially similar where the defendant copies the creative heart of the plaintiff's work.

7. The majority opinion contradicts decisions concerning photography in the First, Second, and Eleventh Circuits. Contrary to the Ninth Circuit's majority opinion in this case, courts in the First, Second, and Eleventh Circuits, in comparing photographs for similarity, have not looked merely to "selection and arrangement." *See Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 187 (1st Cir. 2013) (comparing photograph and movie with regard to pose, setting, lighting, coloring, aesthetic impact, placement, and background); *Rogers v. Koons*, 960 F.2d 301, 307–08 (2d Cir. 1992) (comparing photograph and sculpture with regard to poses, expressions, lighting, shading, placement, and composition); *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1216 (11th Cir. 2000) (comparing photographs with regard to subject's size and placement, incidental objects, setting, lighting, coloring, angle, border, atmosphere, and visual impact).

8. The Ninth Circuit’s majority opinion also conflicts with longstanding Supreme Court precedent holding that a photographic portrait is “an original work of art” entitled to copyright protection. *Burrow-Giles Lithographic Co. v. Saronny*, 111 U.S. 53, 60 (1884). The same “intellectual invention” that entitles a photograph to protection in the first place also provides protection for the creative elements within it, *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1074–75 (9th Cir. 2000); *Rogers*, 960 F.2d at 307–08—just as the expressions of the observable creative features in an illustration, novel, play, motion picture, or song are protected.

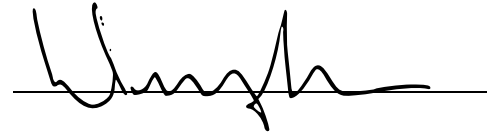
9. Petitioner respectfully requests a 60-day extension of time to file a petition for a writ of certiorari seeking review of the Ninth Circuit’s ruling and submits that there is good cause for granting the request. Counsel with primary responsibility for drafting the petition have recently been retained, and the additional time will allow them to further investigate the case and the manner in which the Ninth Circuit’s ruling conflicts with the decisions of other federal courts. In addition, counsel has a number of other professional obligations that will prevent them from preparing an adequate petition absent the requested extension.

CONCLUSION

10. For the foregoing reasons, applicant respectfully requests that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including December 3, 2018.

Dated: September 24, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Deepak Gupta', is written over a horizontal line.

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CERTIFICATE OF SERVICE

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In compliance with Supreme Court Rules 29.3 and 29.5, I, Deepak Gupta, counsel of record for the applicant and a member of the Bar of this Court, hereby certify that on September 24, 2018, a copy of the accompanying Application for a 60-Day Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed in the above-captioned manner, was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

September 24, 2018



Deepak Gupta
Counsel for Petitioner

APPENDIX

App. A Ninth Circuit Opinion, dated February 27, 2018.

App. B Order on Panel Rehearing and Rehearing En Banc, dated July 6, 2018.