No. 18-728

IN THE
Supreme Court of the United States

JACOBUS RENTMEESTER,
Petitioner,

v.

NIKE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROFESSOR TERRY S. KOGAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Terry S. Kogan is a Professor of Law at the S.J. Quinney College of Law, University of Utah. Professor Kogan has written extensively on copyright law's treatment of photography, including *How Photographs Infringe*, 19 VAND. J. ENT. & TECH. L. 353 (2017); *Photographic Reproductions, Copyright and the Slavish Copy*, 35 COLUM. J.L. & ARTS 445 (2012); and *The Enigma of Photography, Depiction, and Copyright Originality*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 869 (2015). His recent scholarship has explored two issues raised in the petition for certiorari: what makes a photograph original for copyright purposes and how photographs infringe on copyright-protected works.

SUMMARY OF ARGUMENT

Petitioner explains that the legal standard articulated and applied by the Ninth Circuit conflicts with decisions of other courts of appeals, in particular with that of the Second Circuit in *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). *Amicus* agrees that review is warranted to address this disagreement among the courts of appeals concerning copyright protection for photographs, particularly with respect to copyright protection for staged photographs.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or his counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amicus* also represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date and that the parties have consented to the filing of this brief.

The purpose of this brief is to set out the proper framework for determining the scope of copyright protection for photographs. In the decision for which review is sought, the Ninth Circuit exhibited a profound misunderstanding as to what makes a photograph original for purposes of copyright law. As a result, it failed to recognize the ways in which respondent Nike's photograph infringed petitioner's picture:

First, the Ninth Circuit failed to appreciate how copyright law protects intentionally staged photographic subject matter. Beginning with *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), courts have long held that, where a photographer stages the "tableau" for his picture (as opposed to shooting a pre-existing scene), copyright protection extends to the staged subject matter of a photograph. The Ninth Circuit, however, did not treat Rentmeester's staged arrangement as a protected tableau.

Second, the Ninth Circuit also failed to extend adequate copyright protection to the camera-related choices that Rentmeester made prior to taking his picture, including which camera, film, lenses, and filters to use; angle of shot; aperture setting (*f*-stop); shutter speed; focus; ISO setting; use of special lighting and shading techniques; and timing of shot (e.g., time of day, atmospheric conditions, and moment at which to depress the shutter button). The court described these choices as unprotected facts instead of protectable forms of expression. Because Rentmeester both staged the tableau for his photograph and made highly original camera-related choices in taking his picture, that image is entitled to the broadest copyright protection.

Third, despite finding Rentmeester's photograph to be "highly original" and entitled to "broad . . . protection," the Ninth Circuit likened the photograph to a "factual compilation." Pet. App. 2a, 11a-12a. This mischaracterization led the court to treat a photograph entitled to the broadest possible copyright protection as though it were entitled to only the thin protection afforded databases, phonebooks, and other factual compilations.

Accordingly, in applying the substantial-similarity test to determine infringement, the Ninth Circuit required that Nike's photograph be a near-slavish copy of petitioner's image in order to infringe and denied Rentmeester the right to submit the images to a jury. This Court should grant certiorari and correct this error.

ARGUMENT

Having determined that Rentmeester "plausibly alleged" that he owned a valid copyright in his photograph and that Nike copied it, the Ninth Circuit asked whether Rentmeester "plausibly alleged that Nike copied enough of the protected expression from Rentmeester's photo to . . . render their works 'substantially similar.'" Pet. App. 7a-8a. Because the court failed to understand how copyright law protects photographs from infringement, it also ignored the substantial similarities between Rentmeester's and Nike's photographs and rejected Rentmeester's infringement claim without allowing a jury to compare the images.

I. A Photograph Can Be Original – and Hence Protected by Copyright – in Two Independent Ways

Courts have long recognized that a photograph can be original in two independent ways. First, if a

photographer staged the setting for his image (the "tableau") before snapping his picture, the photographer can claim protection over the staged tableau. Second, whether or not the photographer staged the tableau, a photographer can also claim copyright protection over his camera-related choices.[2] Because these elements are original, their presence in a copyrighted photograph are protected from infringement through reproduction or the creation of derivative works. *See* 17 U.S.C. § 106(1), (2).

Not all subject matter is protectable. A photographer who snaps a picture of a pre-existing scene cannot prevent others from taking a picture of that same subject. Rather, his protected expression is limited to the camera-related choices he made in snapping his picture.[3] If, however, the photographer

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[2] Some courts and commentators conclude that the timing of when to take the photograph – "being at the right place at the right time" – is an independent basis for originality. *See Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452-53 (S.D.N.Y. 2005). *Amicus* has argued that determining when to press the shutter button is best viewed as the final, technical camera-related choice made by a photographer. *See* Terry S. Kogan, *How Photographs Infringe*, 19 VAND. J. ENT. & TECH. L. 353, 362 n.47 (2017) ("Kogan, *Infringement*").

[3] *See* Kogan, *Infringement*, 19 VAND. J. ENT. & TECH. L. at 370 ("In instances in which a photographer points her camera at a pre-existing . . . object or scene, the law is abundantly clear: because copyright protection extends only to those components of a work that are original to the author, liability cannot rest on use of the public domain elements alone.") (alterations omitted); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.03[B][2][b] (1999) ("*Nimmer on Copyright*"); *see also Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 135 (2d Cir. 2003) ("[C]opying is not unlawful if what was copied from the allegedly infringed work was not protected, for example, if the copied material had itself been taken from the public domain.").

staged the subject matter, that photograph is entitled to protection not only for his camera-related choices but also over the staged tableau. Because Rentmeester's image is original in both respects, it is entitled to the broadest copyright protection available to a photograph.[4]

A. A Staged Tableau Is Itself a Protectable Expression

Congress extended copyright protection to photographs in 1865 under the Intellectual Property Clause of the Constitution, which empowers Congress to award exclusive rights to "authors" of original works. U.S. Const. art. I, § 8, cl. 8.[5] The law was challenged by a copyist who argued that photographs were visual records of pre-existing facts, and therefore photographers did not "author" original works. Photographs, the argument went, were outside the intellectual property rights permitted by the Constitution. This Court rejected that understanding in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884),[6] and determined that Napoleon Sarony

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[4] See discussions of photographic originality in Kogan, *Infringement*, 19 VAND. J. ENT. & TECH. L. at 361; Terry S. Kogan, *The Enigma of Photography, Depiction, and Copyright Originality,* 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 869, 906, 910 (2015) ("Kogan, *Photographic Originality*").

[5] *See* Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540, 540 ("[The Copyright Act's provisions] shall extend to and include photographs and the negatives thereof . . . and shall ensure to the benefit of the authors . . . in the same manner, and to the same extent, and upon the same conditions as to the authors of prints and engravings.").

[6] In *Burrow-Giles*, the Court concluded: "We entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are repre-

authored his photograph of Oscar Wilde by staging the tableau:

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

Id. at 60 (ellipsis in original).

With that, this Court established that photographers who staged their subjects were authors of original works protected from copyright infringement. As the court in *Mannion v. Coors Brewing* recently explained:

> It of course is correct that the photographer of a building or tree or other pre-existing object has no right to prevent others from photographing the same thing. . . . By contrast, if a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject.

377 F. Supp. 2d at 450.

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sentatives of original intellectual conceptions of the author." 111 U.S. at 58.

Following this authority, copyright scholars regularly accept that a photographer has copyright protection over a staged tableau. Professor Justin Hughes, himself a leading skeptic of broad copyright protection for photographs, has suggested that staging the scene is the foremost way in which a photographer can gain protection over his image:

> In a real sense, . . . creating the scene or subject captured in the photograph[] should be the first category of originality in a photograph because it occurs before any photographic processes and is independent of any decisions concerning photographic equipment. . . . [C]omposing and posing can form a significant basis for copyright.

Justin Hughes, *The Photographer's Copyright – Photograph As Art, Photograph As Database*, 25 HARV. J.L. & TECH. 339, 402 (2012).

The Ninth Circuit recognized that Rentmeester arranged his subject matter into a staged tableau:

> [The photograph] depicts Jordan leaping toward a basketball hoop with a basketball raised above his head in his left hand, as though he is attempting to dunk the ball. The setting for the photo is not a basketball court . . . . Instead, Rentmeester chose to take the photo on an isolated grassy knoll . . . . He brought in a basketball hoop and backboard mounted on a tall pole, which he planted in the ground to position the hoop exactly where he wanted. . . .
>
> Rentmeester instructed Jordan on the precise pose he wanted Jordan to assume. It was an unusual pose for a basketball player to adopt, one inspired by ballet's *grand jeté* . . . .

Pet. App. 2a. Despite this, the Ninth Circuit failed to appreciate how these acts of staging contribute to the photograph's originality and, accordingly, how Nike's photograph infringed on petitioner's image.

B. A Photographer Is Entitled to Copyright Protection over the Camera-Related Choices Expressed in the Photograph

For more than a century, the camera-related choices photographers make in taking photos have been protected by copyright.[7] In an early example, *Pagano v. Chas. Beseler Co.*, 234 F. 963 (S.D.N.Y. 1916), the defendant copied the plaintiff's photograph of the New York Public Library. The court held that, although "[a]ny one may take a photograph of a public building," it took "originality to determine just when to take the photograph, so as to bring out the proper setting for both animate and inanimate objects, with the adjunctive features of light, shade, position, etc." *Id.* at 964.

A more recent decision recognizing the protection of a photographer's camera-related choices is *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), in which the Second Circuit explained that "[e]lements of originality in a photograph may include posing the subjects

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[7] *See* Kogan, *Photographic Originality*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. at 896 (noting this originality was not initially recognized in early judicial opinions). One reason scholars have suggested that this type of originality was not recognized in *Burrow-Giles* was that Napoleon Sarony, the plaintiff photographer, in all likelihood did not manipulate the camera or snap the picture himself, but hired an assistant to do so. *See* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 434-35 (2004).

[i.e., staging the tableau], *lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved*." *Id.* at 307 (emphasis added).

Accordingly, whether or not a photograph's subject matter is a staged tableau, courts look to a broad range of camera-related choices as an independent ground of protection, including choices related to which camera, film, lenses, and filters to use; angle of shot; aperture setting (*f*-stop); shutter speed; focus; ISO setting; use of special lighting and shading techniques; and timing of shot (e.g., time of day, atmospheric conditions, and moment at which to depress the shutter button). These choices, expressed as one of their near-infinite combinations, are not mere facts – though the Ninth Circuit mistakenly categorized them that way. *See* Pet. App. 11a. They are protectable expressions.

The Ninth Circuit correctly identified several of Rentmeester's camera-related choices:

> Rentmeester positioned the camera below Jordan and snapped the photo at the peak of his jump so that the viewer looks up at Jordan's soaring figure silhouetted against a cloudless blue sky. Rentmeester used powerful strobe lights and a fast shutter speed to capture a sharp image of Jordan contrasted against the sky, even though the sun is shining directly into the camera lens from the lower righthand corner of the shot.

Id. at 2a-3a. Nonetheless, the Ninth Circuit failed to appreciate how the photograph's copyright protects these choices and, as a result, did not examine how Nike's photograph unlawfully copied them.

II. The Ninth Circuit Failed To Recognize That, When the Subject Matter of a Photograph Is a Staged Tableau, the Subject Matter Is Subject to Copyright Protection Even "When Viewed in Isolation"

Copyrights prohibit reproductions of a photograph's protectable expressions, so long as the reproductions are substantially similar to the originals. Because a staged tableau is a protectable expression, an image of a substantially similar tableau infringes that photograph's copyright.[8] The Ninth Circuit thus should have treated Rentmeester's staged tableau as protectable subject matter. *Nimmer on Copyright*, the same source relied on by the Ninth Circuit, says as much:

> Insofar as the underlying subject matter preexisted the photograph (*e.g.*, the individual portrayed in a portrait, the product in an advertisement), which in turn merely captured the reality of its existence, that subject matter is manifestly unoriginal to the photographer. It is a given that copyright in a photograph conveys no rights over the subject matter conveyed in the photograph. *With the rare exception of a case in which the photographer produces and creates altogether original subject matter for the photograph*, a photograph ordinarily does not give its owner any rights over its underlying subject matter.

1 *Nimmer on Copyright* § 2A.08[E][3][c] (emphasis added; footnotes omitted) (citing *id.* § 2A.08[E][3][a][i] (explaining that the "photographer's contributions in selecting, designing, positioning, and arranging the

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[8] *See* Kogan, *Infringement*, 19 VAND. J. ENT. & TECH. L. at 363.

subject of the photograph . . . constitute the originality in subject")).

The Ninth Circuit correctly noted the uniqueness of Rentmeester's tableau. *See* Pet. App. 12a-13a. Yet the court did not treat the subject matter as a protected tableau, instead dismembering it and treating each piece as a stand-alone choice:

> [P]hotos can be broken down into objective elements that reflect the various creative choices the photographer made in composing the image – choices related to subject matter, pose, lighting, camera angle, depth of field, and the like. But none of those elements is subject to copyright protection when viewed in isolation.

Id. at 9a (citation omitted). Elsewhere, the court repeats this assertion: "If sufficiently original, the combination of subject matter, pose, camera angle, etc., receives protection, not any of the individual elements standing alone." *Id.* at 10a.

The Ninth Circuit misapplied this principle to Rentmeester's tableau and used an improper level of generality. A staged tableau should be treated as a unified whole, "standing alone," and not dissected into individual elements. It is at this level, comparing the impression left by all the protectable elements taken together, that photographic infringement must be analyzed.

Accordingly, Rentmeester's tableau is protected by copyright and should be treated as the photographer's singular subject matter.

III. The Question Whether Nike's Composition Is Substantially Similar to Rentmeester's Staged Tableau and Thus Infringing Should Have Been for the Jury

Because the Ninth Circuit compared the wrong elements in its infringement test, the court concluded as a matter of law that Nike's photograph is not substantially similar to Rentmeester's photograph. This conclusion was based on a comparison of the individual expressions that made up the tableau to their corresponding expressions in Nike's advertisement. That mode of analysis was incorrect: the court should instead have considered whether the staged tableau in Nike's picture was substantially similar to the staged tableau in Rentmeester's photograph – a question that was plainly not susceptible to resolution as a matter of law.

This error is exemplified by the Ninth Circuit's treatment of Jordan's pose. The court agreed that the pose was "fanciful," but its granular treatment of that subject magnified tiny differences from how Jordan jumped for Nike:

> The two photos are undeniably similar in the subject matter they depict: Both capture Michael Jordan in a leaping pose inspired by ballet's *grand jeté*. But Rentmeester's copyright does not confer a monopoly on that general "idea" or "concept"; he cannot prohibit other photographers from taking their own photos of Jordan in a leaping, *grand jeté*-inspired pose. Because the pose Rentmeester conceived is highly original, though, he is entitled to prevent others from copying the details of that pose as expressed in the photo he took. Had Nike's photographer replicated those details in the Nike photo, a jury might well have

> been able to find unlawful appropriation even though other elements of the Nike photo, such as background and lighting, differ from the corresponding elements in Rentmeester's photo.
>
> But Nike's photographer did not copy the details of the pose as expressed in Rentmeester's photo; he borrowed only the general idea or concept embodied in the photo.

Pet. App. 14a.

Limiting the staged tableau to "the fanciful (non-natural) pose [Rentmeester] asked Jordan to assume," the court concluded that Rentmeester cannot copyright that pose itself and thereby prevent others from photographing a person in the same pose. *Id.* at 9a, 13a-14a. It stated that Nike "borrowed only the general idea or concept embodied in the photo." *Id.* at 14a. But Rentmeester is not claiming copyright protection over a particular pose, the position of Michael Jordan on a grassy knoll, or the camera's upward angle. Rather, he is claiming protection over his unique combination of those features. The arrangement, the staged tableau, is not a "general idea or concept." In *Burrow-Giles,* Napoleon Sarony was not claiming an exclusive right to photograph Oscar Wilde, or to place the subject in a particular pose, or to clothe him in a particular garment, or to use particular draperies in the background. Rather it was the combination of all of these elements of Sarony's staged tableau that the court recognized as expression deserving of copyright protection – not a mere idea or concept.

Similarly, a staged tableau orchestrated by a photographer that combines features that include an athlete in a fanciful pose, hoisting a basketball

in an unusual way, taken from a dramatic angle is protected from infringement.

In finding no substantial similarity as a matter of law, the court focused on minute differences between Nike's image and that of Rentmeester. *See* Pet. App. 14a ("The position of each of [Jordan's] limbs in the two photos is different . . . ."). But where a photographer has staged a tableau, courts regularly find substantial similarity despite significant differences between two works. In *Rogers v. Koons*, the plaintiff staged a black and white photograph of a couple sitting on a bench with eight puppies.

Jeff Koons, a famous artist, drew inspiration from the plaintiff's photograph to create a multi-color sculpture out of wood.

Koons' work is a three-dimensional sculpture; the photograph is a two-dimensional image. Koons' sculpture was polychromed with vivid colors; the

photograph was printed in black and white. The facial expressions of the figures in Koons' work varied significantly from those appearing in the photograph. Besides the bench, Koons did not copy the photograph's background elements. Despite these differences, the Second Circuit found *as a matter of law* that Koons' sculpture infringed on the photograph. In so holding, the court noted that "[s]ubstantial similarity does not require literally identical copying of every detail." 960 F.2d at 307. Moreover, the court rejected the suggestion that all Koons had copied was an unprotected idea instead of the photograph's expression:

> It is not therefore the idea of a couple with eight small puppies seated on a bench that is protected, but rather [the photographer's] *expression* of this idea – as caught in the placement, in the particular light, and in the expressions of the subjects – that gives the photograph its charming and unique character, that is to say, makes it original and copyrightable.

Id. at 308.

Compared to the differences between the two works in *Rogers v. Koons* – a black-and-white photograph and a multi-colored sculpture – the differences between Rentmeester's and Nike's works are trivial. Against the benchmark of *Rogers*, even a skeptic would consider it a close call that should have been decided by a jury.

A case that correctly treats a staged tableau as a protected expression is *Wallace Computer Services, Inc. v. Adams Business Forms, Inc.*, 837 F. Supp. 1413 (N.D. Ill. 1993). In that case, both litigants designed and sold telephone message books bearing similar photographs:

> Each photograph depicts two hands on either side of an open message book which is laid out at an angle. The right hand is about to write upon the blank message book, and there is a corner of a telephone in the upper left corner of each photo.

Id. at 1415. The plaintiff alleged that the defendant's "substantially identical photo layouts" infringed its copyright. *Id.* at 1415-16.

The defendant argued "that the only similarities between the two sets of photographs [we]re their subject matter" and that "no copying of expression ha[d] taken place." *Id.* at 1417. The court disagreed with that framework and explained: "The question at bar is whether the *entire set-up* of the copyrighted photograph, including the hand, the writing instrument, the phone, and the background, constitutes a protectible expression of an idea." *Id.* at 1418. The court answered in the affirmative:

> The idea consists of a hand with a pen over an open message book. The expression of that idea consists of the way the photographer decided to lay-out the items in the photographs. The defendant incorrectly asserts that there are very limited ways to express its idea. There are countless different layouts which could have been used by the photographer of the defendant to make photos which look different from those of the plaintiff. . . . The creative minds in charge of the defendant's advertising and marketing certainly could have opted for a photo layout that did not so closely resemble that of its competitor.

Id.

Rejecting the defendant's suggestion to "dissect[] the photograph into nonprotectible elements (i.e., a pen, a hand writing on a message book, a phone,

etc.)," the court answered that "a proper analysis requires that all of the elements be considered as a whole. . . . It is the *combination* of many different elements which may command copyright protection because of its particular subjective quality." *Id.* at 1418-19.

The same is true here. Despite the Ninth Circuit's erroneous analysis, Rentmeester is not claiming copyright protection over the right to depict each of the elements in his photograph. Rather, his claim is over the unique way that he has arrayed the elements that he has brought together in staging the tableau.

Consider another case in which a court found substantial similarity between highly distinctive expressions, *Curtis v. General Dynamics Corp.*, 1990 WL 302725 (W.D. Wash. Sept. 26, 1990). Before snapping his photograph, the plaintiff placed an old wheelchair on the back porch of his home "to obtain a dramatic photograph where the balustrade of the porch and the relationships of the upright porch posts created a perspective . . . draw[ing] the viewer's eye to . . . the empty wheelchair." *Id.* at *1. The photograph was selected for publication in a magazine that the defendant read a few years later.

The defendant subsequently hired a photographer to create images honoring President Franklin D. Roosevelt. The defendant's photographer took the wheelchair photograph to the President's Hyde Park home and photographed the President's actual wheelchair on the porch, admittedly modeling the shot on the plaintiff's photograph.

Finding that "the visual impact of the defendants' photograph of the Roosevelt wheelchair at Hyde Park leaves no conclusion other than one of obvious copying," *id.* at *9, the court stated:

> Of the fifty-seven photographs taken by [the defendant's photographer], the core of the images are simply representative of the efforts of the photographer . . . to move the wheelchair into the juxtaposition where the identical elements of expression found in the [plaintiff's] photograph are copied exactly.

Id.

Although the defendant's picture was shot in a different location with a different wheelchair, the court found substantial similarity between the staged tableaus. Similarly, the minor differences between Rentmeester's and Nike's photographs do not undermine the fact that Nike copied the critical features of Rentmeester's staged tableau.

IV. The Ninth Circuit Failed To Recognize How Nike's Photograph Infringed on the Expression Embodied in the Camera-Related Choices That Petitioner Made in Taking His Picture

In addition to misunderstanding how copyright law protects the tableau staged by Rentmeester, the Ninth Circuit also failed to appreciate how copyright protects Rentmeester's camera-related choices. The court evaluated Rentmeester's camera-related choices as individual "facts," subject only to limited protection:

> What *is* protected by copyright is the photographer's selection and arrangement of the photo's otherwise unprotected elements. If sufficiently original, the combination of subject matter, pose, *camera angle*, etc., receives protection, not any of the individual elements standing alone. In that respect . . . , photographs can be likened to factual compilations. An author of a factual

> compilation cannot claim copyright protection for the underlying factual material – facts are always free for all to use.

Pet. App. 10a (second emphasis added; citation omitted).

By treating camera-related choices as though they were facts, the court made a fundamental error. Camera-related choices are individual artistic expressions, akin to a painter's mixing his paint, choosing a brush, or choosing a brushstroke technique. If a pirating photographer imitates those choices in enough detail, he will infringe the original.

In *Leigh v. Warner Brothers, Inc.*, 212 F.3d 1210 (11th Cir. 2000), the Eleventh Circuit properly articulated and applied principles governing copyright law's protection of a photographer's camera-related choices. *Id.* at 1216. In that case, the plaintiff photographer created the iconic photograph of the Bird Girl statue that appeared on the cover of the best-selling novel *Midnight in the Garden of Good and Evil*. In conjunction with a film version of that novel, Warner Brothers used Bird Girl photographs similar to the plaintiff's photograph in its promotional materials. The plaintiff sued for infringement.

Noting that the district court "correctly identified the elements of artistic craft protected by Leigh's copyright as the selection of lighting, shading, timing, angle, and film," *id.*, the Eleventh Circuit considered whether Warner Brothers' promotional images infringed on the plaintiff's photograph. Although the court found "undeniably, significant differences between the pictures," it concluded that "the Warner Brothers images also have much in common with the elements protected by Leigh's copyright." *Id.* For example, "[a]ll of the photographs are

taken from a low position, angled up slightly at the Bird Girl so that the contents of the bowls in her hands remain hidden." *Id.* Because there were enough similarities between these camera-related choices, the court determined that whether Warner Brothers committed infringement was a question for the jury.

Here, too, there are enough similarities between Rentmeester's and Nike's photographs to submit the question to the jury.

V. The Ninth Circuit's Adoption of "Selection and Arrangement" Is Inapt when Applied to a Highly Original Work Such as Rentmeester's Photograph

In viewing Rentmeester's photograph as no more than a factual compilation, the court below relied on an article by Professor Justin Hughes that launches a head-on assault on photographic originality. *See* Pet. App. 10a (citing Hughes, 25 HARV. J.L. & TECH. at 350-51). In his article, Hughes concludes that "a large percentage of the world's photographs are likely not protected by American copyright law because the images lack even a modicum of creativity." 25 HARV. J.L. & TECH. at 374. They are unoriginal because they merely capture a "*preexisting* reality." *Id.* at 361. Elsewhere he argues:

> It is important to recognize that where the content of the photograph has an independent reality, and the photographer seeks only to achieve and does in fact achieve an accurate representation of that independent reality, there is a good chance that the photograph has no copyright protection at all.

Id. at 374.[9] Analogizing photographs to databases, Hughes argues that they are entitled at most to thin protection for the selection and arrangement of the facts that appear in the image. *Id.* at 348.

Amicus has argued that Hughes' attack on photographic originality incorrectly focuses on the real-world objects that a viewer perceives in the picture.[10] In doing so, Hughes locates photographic originality in the wrong place. That originality depends instead on a photographer's creative camera-related choices that result in the surface design on the photographic paper. Claiming that a photograph is a fact because one sees real-world objects in the image is as senseless as claiming that a photo-realistic painting is a fact because it depicts real-world objects. Both a photograph and a painting are protected by copyrights on the authors' creative choices visually expressed on a surface.

Despite the Ninth Circuit's consistent praise of the originality of his photograph, its analogizing Rentmeester's photograph to a factual compilation effectively relegates the work to the thinnest realm of copyright protection. That was a basic error, and it threatens to cut back significantly and improperly on

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[9] In fact, the Ninth Circuit misstates Hughes' argument. *See* Pet. App. 10a ("[P]hotographs can be likened to factual compilations."). The facts to which Hughes refers as compiled in a photograph are not the camera-related choices made by a photographer (which is what the appellate court treats as facts). Rather, Hughes argues that the objects that appear in a photograph – which by its nature always captures reality – are facts. Thus, for Hughes, what one sees in a photograph inevitably is a mere compilation of real-world facts.

[10] *See* Kogan, *Infringement*, 19 VAND. J. ENT. & TECH. L. at 399; Kogan, *Photographic Originality*, 25 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. at 921.

copyright protection for photographs in the Ninth Circuit. This Court's review is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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