In the Supreme Court of the United States

JACOBUS RENTMEESTER,

Petitioner,

v.

NIKE, INC.,

Respondent.

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

BRIEF OF AMICUS CURIAE DIGITAL JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

Andrew Grimm
DIGITAL JUSTICE
FOUNDATION
15287 Pepperwood Drive
Omaha, NE 68154
(531) 210-2381

Gregory Keenan DIGITAL JUSTICE FOUNDATION 81 Stewart Street Floral Park, NY 11001 (516) 633-2633 J. Carl Cecere Counsel of Record CECERE PC 6035 McCommas Blvd. Dallas, TX 75206 (469) 600-9455 ccecere@cecerepc.com

Counsel for Amicus Curiae

January 7, 2019

TABLE OF CONTENTS

Table of authorities	i
Interest of amicus curiae]
Introduction and summary of argument	2
Argument	4
I. Technological developments now permit photography to meet, even exceed, other mediums' artistic potential	⁴
II. Technological developments also compound the consequences of failing to protect individual photographic elements	18
III. Technological developments also reduce the risk that upholding photography's equal artistic capacities might lead to overprotection	18
Conclusion	18



TABLE OF AUTHORITIES

Cases:	

Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)	6
Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)	
Eldred v. Ashcroft, 537 U.S. 186 (2003)	16
Enter. Mgmt. Ltd. v. Warrick, 717 F.3d 1112 (10th Cir. 2013)	11
Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)	. 6, 13, 14
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), aff'd, 309 U.S. 390 (1940)	18
Statutes:	
Act of March 3, 1865, 38th Cong., 2d Sess., 16 Stat. 198	6
17 U.S.C. §	
101	12
102(a)(4)	11
107	17
Other Authorities:	
A Brief History of Photo Fakery, N.Y. Times (Aug. 23, 2009), ">https://nyti.ms/2QrUc0D>	5
Antonia Bardis, Digital Photography and the Question of Realism, 3 Journal of Visual Art	
Practice 209 (2004).	7



Other Authorities—continued:
T.M. Cannon & B.R. Hunt, <i>Image Processing by Computer</i> , 245 Scientific American 214 (1981
Diarmuid Costello & Margaret Iversen, Photography Between Art History and Philosophy, 38 Critical Inquiry 679 (2012)11
Sony Devabhaktuni, <i>Overlooking Overpainting</i> , Architectural Association Files 16 (2010)10
Christine Haight Farley, The Lingering Effects of Copyright's Response to the Invention of Photography, 65 U. Pitt. L. Rev. 385 (2004)
Vicki Goldberg, <i>Portrait of a Photographer as a Young Artist</i> , N.Y. Times (Oct. 23, 1983)
Paul Goldstein, Goldstein on Copyright (3d ed. 2017)
Katie Hafner, The Camera Never Lies, But the Software Can, N.Y. Times (March 11, 2004) https://nyti.ms/2H06aPl
Rosemary Hawker, <i>Idiom Post-medium:</i> Richter Painting Photography, 32 Oxford Art Journal 263 (2009)
Brian Hayes, Computational Photography, 96 American Scientist 94 (2008)
Justin Hughes, <i>The Photographer's Copyright— Photograph as Art, Photograph as Database</i> , 25 Harv. J.L. & Tech. 327 (2012)
David La Rocca, <i>The False Pretender: Deleuze</i> , Sherman, and the Status of Simulacra, 69 Journal of Aesthetics and Art Criticism 321 (2011)



Other Authorities—continued: Susan Laxton, As Photography: Mechanicity, Contingency, and Other-Determination in Gerhard Richter's Overpainted Snapshots, 38 Elizabeth Porter, Taking Images Seriously, 114 Kristen Radden, 5 Painterly Apps to Turn Your *iPhone Photos Into Paintings*, iPhone Photography School (Dec. 9, 2014) Barbara Savedoff, Escaping Reality: Digital Imagery and the Resources of Photography, 55 Journal of Aesthetics & Art Criticism 201 Vlad Savov, Google Gives the Pixel Camera Superhuman Night Vision, The Verge (Nov. Alison C. Storella, Note, It's Selfie-Evidence: Spectrums of Alienability and Copyrighted Content on Social Media, 94 B.U. L. Rev. Edward Weston, Seeing Photographically, 9 Complete Photographer 3200 (1943), reprinted in Photographers on Photography 173



DOCKET

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time** alerts and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.

