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WHAT DO YOU THINK ABOUT INK? COPYRIGHT, TATTOOS & THE NBA

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I. INTRODUCTION

U.S. District Judge Laura Taylor Swain, while granting summary judgment for the Defendants, ruled that 2K Games could depict the tattoos of NBA players in videogames without infringing the tattoo license owner's copyright protections.[1] Before examining the *Solid Oaks* judgment, it would be valuable to briefly investigate the relationship between tattoos and American jurisprudence.

II. TATTOOS IN LAW AND LIFE

Tattoos have often penetrated the realm of judicial adjudication in the United States. These designs on the skin are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment free speech protection.[2] Tattoos can express a countless variety of messages and serve a wide variety of functions, "including: decorative; religious; magical; punitive; and as an indication of

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1. Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp.3d 333, 339 (S.D.N.Y. 2020).
2. Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1059 (9th Cir. 2010).

identity, status, occupation, or ownership."[3] During criminal investigations, "openly visible" tattoos, showing gang-affiliations, for instance, which are testimonial and self-incriminatory, can be used as evidence without infringing any Fifth Amendment protections.[4]

Perhaps it would be more challenging to name NBA players who do not have tattoos. Most recently, LeBron James honored legend Kobe Bryant with a "Mamba 4 Life" tattoo on his left thigh. Interestingly, it has been reported that roughly 55% of all active NBA players have a tattoo; and 40% of Americans under the age of forty have a tattoo.[5] The unsubtle popularity and intrinsic relation between ink, NBA stars, and fans, in general, must be acknowledged.

With this background, Judge Swain's ruling drew widespread anticipation and attention for having pervasive ramifications for copyright jurisprudence and entertainment law.

III. THE SOLID OAKS RULING

The Defendants developed and annually launched the NBA 2K videogame, which became fastidiously real, including lifelike depictions of NBA players and their tattoos, often giving videogame players audio and video experiences that tend to mimic an actual live game.[6] The Plaintiff held an exclusive license to each of the five tattoos and alleged infringement of its copyright by the Defendant publicly displaying the works in the videogame.[7] The issue before the court was whether the depiction of the tattoos in the videogame licensed by the Plaintiff was an act of copyright infringement.

Judge Swain accepted the Defendant's contention that the depiction of the tattoos would unquestionably fail the "substantial similarity" test. To be substantially similar, the amount copied must be more than *de minimis*.[8] Because the copying of the protected material is so small and trivial, it falls below the quantitative threshold required for actionable copying.[9] The tattoos only appear on three out of over 400 players and not all gameplay includes the players with their tattoos.[10] Even when included, the display of tattoos is small and indistinct, appearing as rapidly moving visual features, and does not appear in the marketing

3. *Id*. at 1061.
4. United States v. Ledbetter, 929 F.3d 338, 363 (6th Cir. 2019).
5. Michael C. Minahan, *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713, 1714 (2014).
6. Solid Oak Sketches, LLC, 449 F. Supp.3d at 333, (S.D.N.Y. 2020).
7. *Id*. at 340.
8. *Id*. at 344.
9. *Id*. at 343–345.
10. *Id*. at 345.

material.[11] The tattoos are reduced in size: a mere 4.4% to 10.96% of real size.[12]

The court also agreed that the Defendants were authorized to use the tattoos because they had an implied license to feature the players' likenesses.[13] The players, thereafter, allowed Defendants to market and depict their likeness in videogames.[14] The Defendants' right to use the Tattoos in depicting the Players derives from these implied licenses, which predates the licenses that the Plaintiff obtained from the tattooists.[15]

The third legal victory for the Defendants was the meticulous finding that the depiction of the tattoos was within the ambit of fair use.[16] The very purpose of displaying the tattoos was to create an accurately palpable resemblance.[17] The usage was transformed to a relatively minute size and comprised an inconsequential portion of the total videogame data: only 0.000286% to 0.000431%.[18] The usage of the tattoos on the *avatars* of the NBA players would not replace or diminish the utility of actual tattoos and cannot be a legitimate substitute by any stretch of the imagination.[19] Plaintiff has fairly conceded that "NBA 2K is not a substitute for the TATTOOS" because purchasing and playing the videogame would not deprive tattoo artists of earning revenue in their market.[20]

IV. LEGAL STATUS OF THE COPYRIGHTABILITY OF TATTOOS

While some quarters have welcomed Judge Swain's equanimous ruling as landmark[21], others anticipate the Plaintiff will exercise further appellate remedies.[22] The discussion about *de minimis* use, implied

11. *Id*. at 345.
12. *Id*. at 345.
13. *Id*. at 346.
14. *Id*. at 346.
15. Id. at 346.
16. Id. at 346.
17. Id. at 347.
18. Id. at 347.
19. Id. at 348.
20. Id. at 350.
21. Eriq Gardner, *'NBA 2K' Publisher Beats Copyright Suit Over LeBron James' Tattoos*, THE HOLLYWOOD REPORTER (Mar. 26, 2020), https://www.hollywoodreporter.com/thr-esq/nba-2k-publisher-beats-copyright-suit-lebron-james-tattoos-1286847 [https://perma.cc/BMR8-YQBR].
22. Michael McCann, *Judge Rules in Favor of 'NBA 2K' Creators in Case Brought by Tattoo Artists*, SPORTS ILLUSTRATED (April 6, 2020), https://www.si.com/nba/2020/04/06/nba-2k-ruling-tattoo-

license to depict elements of likeness, and fair use doctrine, presupposes the existence of a valid copyright. The court did not categorically or explicitly state that tattoos are protectable under copyright law.

"The analysis which must be undertaken to determine if a defendant is entitled to the defense of fair use is very different than the one undertaken to decide if the material is copyrightable."[23] Instead, it appears the courts raised a legal presumption in favor of tattoos being copyrightable. The affirmative defense of fair use "presumes that unauthorized copying has occurred, and is instead aimed at whether the defendant's use was fair."[24] For summary judgment, courts have often assumed that plaintiffs were entitled to copyright protection and there is no dispute that the copying was unauthorized.[25] This approach has been perceived as problematic because the defense of fair use assumes the existence of an infringement.[26] It is unfortunate that in *Harper & Row*, the seminal case on the issue of fair use, the Supreme Court did not attempt to separate the copyrightable from the uncopyrightable. In the words of Justice William J. Brennan Jr., who dissented in *Harper & Row*, the Court majority "[found] no need to resolve the threshold copyrightability issue."[27]

Some sections have argued that there has been no legislative intervention or judicial pronouncement in the United States expressly recognizing tattoos to be protected under copyright law.[28] Although oral observations made by judges during adjudicatory proceedings lack binding authority, Judge Catherine D. Perry provided some clarity on the issue by stating "[o]f course tattoos can be copyrighted. I don't think there is any reasonable dispute about that."[29] Likewise, in obiter, a federal court found that "[t]attoos are generally within the subject matter

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artists#:~:text=Judge%20Swain%20granted%20summary%20judgment,game's%20display%20of%20players'%20tattoos.&text=NBA%202K%20is%20familiar%20to,the%20series%20is%20published%20annually [https://perma.cc/7KC7-3JVE].

23. Merritt Forbes & Co. Inc. v. Newman Inv. Sec., Inc., 604 F.Supp. 943, 951 (S.D.N.Y. 1985).

24. Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012).

25. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 607–608 (2d Cir. 2006); *See also* Compaq Computer Corp. v. Procom Technology, Inc., 908 F.Supp. 1409, 1419 (S.D. Tex. 1995); Sega Enterprises v. Accolade, Inc., 977 F.2d 1510 (9th Cir.1992); Sony Computer Entertainment, Inc. v. Connectix, Corp., 203 F.3d 596 (9th Cir.2000) ("Both Sega and Sony are fair use cases in which copyrightability was addressed only tangentially."); Oracle America, Inc. v. Google Inc., 750 F.3d 1339, 1369 (Fed. Cir. 2014).

26. Wright v. Warner Books, Inc., 953 F.2d 731, 743 (2d Cir. 1991).

27. Harper & Row, Publrs., Inc. v. Nation Enters., 471 U.S. 539, 580 (1985).

28. Arianna D. Chronis, *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works*, 104 IOWA L. REV. 1483 (2019).

29. Lauren Etter, *Tattoo Artists Are Asserting Their Copyright Claims*, ABA J. (Jan. 1, 2014), https://www.abajournal.com/magazine/article/tattoo_artists_are_asserting_their_copyright_claims [https://perma.cc/KC8M-3NST].

of copyrightable works."[30] Judge Swain's ruling might have strong "persuasive value"[31], but does not form a binding precedent that tattoos are copyrightable because the judgment was limited to examining legally permissible usage of presumably protected work.

A. LEGAL BASIS FOR COPYRIGHT PROTECTION OF TATTOOS

The absence of a categorical ruling that tattoos are copyrightable does not preclude them from being protected. Some scholars have convincingly argued that tattoos comfortably meet the (a) originality (independent creativity) and (b) fixation (stably and permanently imprinted on human skin) requirements for federal copyright protection.[32]

Copyright protection subsists "in original works of authorship fixed in any tangible medium of expression".[33] For (a) "originality," the work need only possess "at least some minimal degree of creativity" and novelty is not a requirement.[34] "This relatively low standard of originality is likely to be met by most tattoo artists and may not raise any significant interpretive issues."[35] The originality standard will be applied depending on the tattoo design. Clichéd tattoo designs, such as a heart with a couple's first names inside or ordinary butterflies will not meet the originality standard.[36] For example, the LeBron James tattoo to honor the late Lakers legend Kobe Bryant involved creativity and originality in actually creating a unique design with snakes and roses to supplement the message "Mamba 4 [for] Life." The originality standard for artistic work is well defined and can be applied to tattoo works.

Tattoos also satisfy the requirement of (b) "fixation." The fundamental question is whether human flesh would qualify as a fixed tangible medium. There are two distinct but related requirements: the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium (the "embodiment requirement"), and it must remain thus embodied "for a period of

30. Hayden v. 2K Games, Inc., 375 F.Supp.3d 823, 828 (N.D. Ohio 2019).

31. Thomas Baker, *Breaking Down How NBA 2K Producer Defended Its Rim Against Tattoo Copyright Claims*, FORBES (Mar. 28, 2020), https://www.forbes.com/sites/thomasbaker/2020/03/28/nba-2k-producer-successfully-defends-its-rim-against-tattoo-copyright-claims-but-whats-next/?sh=4cced09535b4 [https://perma.cc/3M3C-7USP].

32. Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129 (2013).

33. 17 U.S.C.A. § 102

34. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).

35. Craig P. Bloom, *Hangover Effect: May I See Your Tattoo, Please*, 31 CARDOZO ARTS & ENT. L.J. 435, 438 (2013).

36. Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 103 (2003).

more than transitory duration" (the "duration requirement").[37] First, it is undisputed that tattoos imprinted on human skin can easily be "perceived" by observers. These designs can even be reproduced through copying or capturing them in a photograph. Second, the idea of permanency is intrinsically related to tattoos. "While it is certainly true that a tattoo may be removed from the human body, it does not wash away with the ease of a wave lapping over the sand on a beach."[38] Scholars mostly agree that "copyright protection can logically be extended to tattoos" when applying the originality, works of authorship, and fixation requirements.[39]

V. CONCLUSION

The ruling should be hailed as a novel and bold contribution towards tattoo-copyright jurisprudence in the United States. It will be interesting to see how other courts rule and respond to Judge Swain's immaculately strong reasoning. Athletes and celebrities must ensure greater vigilance and diligence while getting tattoos. While the legal status of copyright protection of tattoos continues to develop, athletes and celebrities must ensure greater vigilance and diligence while getting tattoos. This can be done through balanced and strong contractual provisions. Videogame production companies should be careful in ensuring that they stay within the bounds of *de minimus* usage. At the same time, it would be appropriate to recall the words of the legendary Californian tattoo artist Don Ed Hardy: "*You put a tattoo on yourself with the knowledge that this body is yours to have and enjoy while you're here. You have fun with it, and nobody else can control (supposedly) what you do with it.*"[40]

37. Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008).

38. Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 154 (2013).

39. Jennifer L. Commander, *The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?* 72 WASH. & LEE L. REV. 1947, 1953 (2015).

40. David Shields, *Body Politic: The Great American Sports Machine 189* (2004), as cited in Michael C. Minahan *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713 (2014).