

WHO OWNS A TATTOO? LESSON FROM SOLID OAK SKETCHES, LLC V. 2K GAMES, INC. AND TAKE-TWO INTERACTIVE SOFTWARE, INC.

ARTICLE

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I. WHO OWNS THE TATTOOS?

We often think of tattoos as part of a person's image and nothing more. This view, however, tends to reduce the importance of tattoo artists in the creative process of making tattoos. While tattoos are fixed on a person's skin, they are often created by a person, other than the individual, who ends up keeping it. This particularity creates a peculiar dichotomy with intellectual property rights. On the one hand, a person has a right to their image and how it is represented. On the other hand, copyright protection is a constitutional right granted to authors who create original works of art. To an individual who does not monetize their image and the person who creates their tattoos, this distinction might not be of great importance. However, this peculiarity gains importance with the ability of a person to monetize their image which, by extension, might include their tattoos.

Professional athletes have an increasing ability to monetize their image and everything that it entails. For this reason, professional athletes normally license their image to different companies, including the leagues or event organizers. As a result, some people have begun to question the meaning of what licensing one's image includes. As professional athletes, these people are always in the public eye, at least during their playing careers, and image rights have been gaining importance as a way for athletes to increase their income from non-sport related activities, like commercials or promotions. While the norm is for athletes to license their image rights to anyone they want, tattoo artists have recently been actively attempting to participate in those revenues. Their argument, in summary, is that tattoos are original works of art created by them, simply fixed on the athletes' bodies; therefore, if an athlete has the right to monetize the tattoos with their image, the tattoo artists should get paid for their share of the copyrights. The counterargument, by every other party, has always been that athletes have a right to their image and, as such, over their tattoos, since their image includes the tattoos and stripping them of the right to be accurately depicted with their tattoos infringes on their image rights.

II. COPYRIGHTS

A. *Copyright Statutes & Regulations*

Copyrights are a collection of rights granted by law to the authors of original artistic or literary works from the moment that the original work is fixed on a tangible medium of expression.¹ Copyright protection is grounded in the U.S. Constitution and arises out of Article I, Section 8, Clause 8 of the U.S. Constitution, which states that Congress shall have power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”² The U.S. Constitution set the framework for original works of authorship to obtain federal protection of limited scope and duration.³

The U.S. Constitution, however, is far from being the only statute regulating and granting copyrights. In 1976, Congress passed the Copyright Act of 1976 (Copyright Act),⁴ which is still operative today, and remains the most important copyright law source, with a series of amendments and additions meant to expand the Act to new technologies and developments.⁵ Copyrights have evolved over time to such lengths that new laws have been passed in order to protect these rights from the ever-changing nature of technology. Namely, the Digital Millennium Copyright Act of 1998 (DMCA) is a law that was passed to aid authors looking to protect their works online and to lessen the liability of online service providers, with the condition that they take measures to avoid or minimize copyright infringement.⁶ Lastly, but still of utmost importance, international conventions, such as

¹ JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW CASES AND MATERIALS 1* (2020).

² U.S. CONST. art. I, § 8, cl. 8.

³ FROMER & SPRIGMAN, *supra* note 1, at 1.

⁴ Copyrights Act, 17 U.S.C. § 101 (2018).

⁵ FROMER & SPRIGMAN, *supra* note 1, at 4.

⁶ Digital Millennium Copyrights Act (DMCA), Pub. L. No. 105-304, §1, 112 Stat. 2860 (1998).

the Berne Convention of the World Intellectual Property Organization (WIPO), have become exceedingly significant due to the ease with which original works can travel internationally and how susceptible to infringement creative works are worldwide.⁷

WIPO (originally BIRPI, named WIPO in 1970) was born in 1893 as a member state-led, intergovernmental organization headquartered in Geneva Switzerland, with the two main objectives of promoting the protection of intellectual property worldwide and ensuring the cooperation among intellectual property treaty signatories.⁸ In the United States, Congress created the U.S. Copyright Office in 1897 to “register claims of copyright, and to serve as a recordkeeper for related functions, such as the recordation of transfers of copyright ownership.”⁹

B. *Origins of U.S. Copyright Law*

To understand U.S. Copyright Law, it is important to recognize that it comes from the 1500s to 1700s in England.¹⁰ Copyright law was not a necessity until the invention of the printing press between 1440 and 1450 by German goldsmith and inventor Johannes Gutenberg.¹¹ Following the invention of the printing press, bookmakers began to see unauthorized copying as a legitimate threat, and this unfolded in the printers joining together to organize a guild called the Stationers’ Company, chartered by the Crown in 1557.¹² The Stationers’ Charter created a monopoly on book production, where the Stationers’ Company had the exclusive right to print works in the United Kingdom and search and destroy books reproduced by printers that didn’t belong to the Stationers’ Company.¹³ This monopoly resulted in censorship and protection for the publishers, not the authors and, as a result, drew great opposition. In his 1644 *Areopagitica*, John Milton famously argued against pre-publication licensing and censorship.¹⁴ Due to mounting pressure, by the 1690’s Parliament no longer favored the monopoly and allowed the licensing and censorship provisions to lapse.¹⁵ Consequently, publishers successfully advocated for a licensing system for the authors instead of the publishers themselves, resulting in what

7 WIPO, *Berne Convention for the Protection of Literary and Artistic Works*, <https://www.wipo.int/treaties/en/ip/berne/> (last accessed August 1, 2020).

8 WIPO, *Summary of the Conventions Establishing the World Intellectual Property Organization (WIPO Convention 1967)*, https://www.wipo.int/treaties/en/convention/summary_wipo_convention.html#:~:text=WIPO's%20two%20main%20objectives%20are,the%20treaties%20that%20WIPO%20administers (last accessed August 1, 2020).

9 FROMER & SPRIGMAN, *supra* note 1, at 4.

10 *Id.* at 6.

11 Hellmut E. Lehman-Haupt, *Johannes Gutenberg, German Printer*, <https://www.britannica.com/biography/Johannes-Gutenberg> (last accessed August 1, 2020).

12 Ronan Deazley, *Commentary on the Stationer’s Royal Charter 1557*, http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1557 (last accessed August 1, 2020).

13 Jeremy Norman, *The Guild of Stationers is Founded. It is Eventually Granted a Monopoly*, <https://www.historyofinformation.com/detail.php?id=21> (last accessed August 1, 2020).

14 JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 29 (1644).

15 See RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775)* (2004).

became known as The Statute of Anne in 1710.¹⁶ The Statute of Anne,¹⁷ granted authors the assignable right to control the printing and reprinting of books, registered with the Stationers' Company for a fourteen-year term, renewable once, instead of in perpetuity.¹⁸ This argument was rejected by the Court when it established that the copyrights over published works are subject to the limits of the statute.¹⁹

Strong similarities, in the way the Statute of Anne and the U.S. Constitution's Copyright and Patent Clause are phrased, lead to the conclusion that the U.S. Constitution's clause was strongly influenced by the Statute of Anne. In particular, both seem to have been drawn up with a similar purpose in mind, with "the encouragement of learning,"²⁰ in the Statute of Anne and "[t]o promote the Progress of Science and useful Arts,"²¹ in the U.S. Constitution. This purpose, influenced by the Statute of Anne, was carried over to the Copyright Act of 1790, entitled an act for the encouragement of learning. The Copyright Act of 1976,²² overhauled copyright legislation in the United States (U.S.) at the time and remains the norm today, as amended.

C. Copyrights Subject Matter

The Copyright Act states that copyright protection applies only to "original works of authorship fixed in any tangible medium of expression,"²³ and that works of authorship include (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works (defined as "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans");²⁴ (6) motion pictures and other audiovisual works; (7) sound recordings, and (8) architectural works.²⁵ Section 102 of the Copyright Act states that ideas are not protected under the law, the protection is only for the expression of those ideas; "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."²⁶

¹⁶ J.A. Downie, *Periodicals, The Book Trade and The 'Bourgeois Public Sphere'* 14 MEDIA HIST. 261, 262 (2008).

¹⁷ Statute of Anne, 8 Ann. c. 21.

¹⁸ The publishers argued, but ultimately lost in *Donaldson v. Becket*, 98 Eng. Rep. 257 (H.L. 1774), that the fourteen-year term was a mere supplement to the perpetual right they had enjoyed prior to the enactment of the Statute of Anne.

¹⁹ Karl-Erik Tallmo, *The History of Copyright: A Critical Overview with Source Texts in Five Languages*, <http://www.copyrighthistory.com/anne3.html> (last accessed August 1, 2020).

²⁰ Statute of Anne, *supra* note 17.

²¹ U.S. Const. art. I, § 8.

²² Copyrights Act, 17 U.S.C. § 102 (2018).

²³ *Id.*

²⁴ *Id.* § 101.

²⁵ *Id.* § 102a.

²⁶ *Id.*

i. Fixed

Copyrights exist from the moment an original work is *fixed* in a tangible medium of expression. The term *fixed* can be derived from the U.S. Constitution, which grants authors an “exclusive Right to their respective Writings.”²⁷ Although not a conclusive interpretation, the Supreme Court of the United States has held that “writings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.”²⁸ Furthermore, for policy reasons, fixation would still be necessary to ensure adequate copyright protection. Primarily, to create and disseminate works of art or literature, fixation provides a way to preserve and disseminate works.²⁹ Secondly, fixation ensures that copyrights over a work are fully defined.³⁰ Finally, fixation provides an evidentiary role in the event of copyright infringement claims.³¹ Section 101 of the Copyright Act provides guidance on when a work is *fixed* in a tangible medium of expression, by saying that it occurs “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³²

ii. Originality

Only *original works of authorship* are awarded copyright protection. The Court has tackled the subject of originality in numerous occasions, even before the Copyright Act,³³ but in 1991 the Court finally decided on the issue of originality in the landmark case of *Feist Publications*.³⁴ In this case, Feist Publications Inc. (Feist), a publishing company, wanted to publish a telephone directory that included the area that Rural Telephone Service Company Inc. (Rural) provided telephone services to, as well as a telephone directory mandate by state regulations. Rural denied Feist a license to use the listings that they compiled, but Feist used them anyway and Rural sued for copyright infringement. The Court then proceeded to analyze the concept of originality as a *sine qua non* requirement of copyright protection:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativi-

27 U.S. CONST. art. I, § 8.

28 *Goldstein v. California*, 412 U.S. 546, 561 (1983).

29 Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 773-79 (2001).

30 Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L. J. 683, 730 (2003).

31 Lydia Pallas Loren, *Fixation as Notice in Copyright Law*, 96 B.U. L. REV. 939, 959 (2016).

32 17 U.S.C. § 101.

33 See *Burrow-Giles Lithographic Co. v. Napoleon Sarony*, 111 U.S. 53 (1884); *George Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); and *Alfred Bell & Co. v. Catalda Fine Arts* 191 F.2d 99 (2d Cir. 1951).

34 *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

ty is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, “no matter how crude, humble or obvious” it might be. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.³⁵

The threshold for the originality requirement has been set extremely low, and most works will satisfy the requirement with minimal effort, something that has held throughout the years.³⁶

iii. Derivative Works

The concept of *originality*, although essential to copyright protection, has its limitations contained in the Copyright Act. One of the main exceptions to the concept of originality is the protection of *derivative works* as defined in Section 101 of the Copyright Act. A derivative work is “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”³⁷ The Copyright Act, in Section 103, allows for derivative works to receive copyright protection while still acknowledging that these works come from preexisting materials:

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.³⁸

In *L. Batlin & Son, Inc. v Jeffrey Snyder*,³⁹ the Court addressed the issue of originality in derivative works. Citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, the Court concluded

³⁵ *Id.* at 345-46.

³⁶ See *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008), and *Chapman Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011).

³⁷ 17 U.S.C. § 101.

³⁸ *Id.* § 103.

³⁹ *L. Batlin & Son, Inc. v. Jeffrey Snyder*, 536 F.2d 486 (2d Cir. 1976) (citing *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951)) (*en banc*).

that “[t]he test of originality is concededly one with a low threshold in that ‘(a)ll that is needed . . . is that the ‘author’ contributed something more than a ‘merely trivial’ variation, something recognizably ‘his own.’”⁴⁰ This left the door open for copyrighting derivative works as long as they contain essential elements of originality from the new author.⁴¹

iv. Ideas

Ideas are not copyrightable by the own text of the Copyright Act, “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁴² Since ideas are not protected under copyright law, the *expression* of these ideas is what is protectable.⁴³ This principle of Copyright law traditionally translates to one idea having multiple forms expression and each form of expression being protectable in its own right, even if it belongs to different authors.

D. Copyright Ownership

i. Copyright Ownership v. Authorship

Copyrights are rights granted to the copyright owner, who can be the author as well, but that is not always the case. The Copyright Act provides two alternatives for initial copyright ownership to arise; (1) initial ownership, and (2) works made for hire.⁴⁴ Initial ownership, as defined, is when the copyrights fall on the author(s) of the work, while works made for hire, as defined, are situations where an “employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁴⁵ Section 201 of the Copyright Act also clarifies that works made by more than one author, when copyrights are vested on initial ownership, are co-owned by all authors in what is known as a *joint work*.⁴⁶

ii. Joint Work

According to the Copyright Act, a *joint work* “is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”⁴⁷ Co-ownership of the copyrights of a joint work is

⁴⁰ *Id.* at 490.

⁴¹ See *Daniel Schrock v. Learning Curve International, Inc.*, 586 F.3d 513 (7th Cir. 2009).

⁴² 17 U.S.C. § 102 (2018).

⁴³ See, *Erickson v. Blake*, 839 F. Supp. 2d 1132 (D. Or. 2012).

⁴⁴ 17 U.S.C. § 201 (2018).

⁴⁵ *Id.*

⁴⁶ See, 52 U.S.P.Q. 2d 1609 (S.D.N.Y. 1999); *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2014) (en banc).

⁴⁷ 17 U.S.C. § 101 (2018).

merely the default rule when creating joint works, as provided by the Copyrights Act, but this default can be altered by agreement between the parties.⁴⁸ However, in the absence of such agreement, the default rule states that each co-owner owns an identical, undivided interest in the complete work and each co-owner has an autonomous right to use each of the rights in the work or license use of the work without the other co-owners approval.⁴⁹

iii. Work Made for Hire

The Copyrights Act defines a *work made for hire* as one of only two possibilities:

(1) a work prepared by an employee within the scope of his or her employment, or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.⁵⁰

Therefore, a work made for hire is either specifically made for hire under the aforementioned circumstances or made within the scope of an employment contract.⁵¹

Works that are specifically ordered or commissioned, as defined in the Copyright Act, must meet two requirements to be considered works for hire. First, the work must fit under one of the nine specific types of works listed in the Act, meaning it must be specifically ordered or commissioned to be used as (1) a contribution to a collective work; (2) as a part of a motion picture or other audiovisual work; (3) as a translation; (4) as a supplementary work; (5) as a compilation; (6) as an instructional text; (7) as a test; (8) as answer material for a test, or (9) as an atlas.⁵² Second, the parties must agree, in writing, that the work is considered a work for hire, and such agreement must be signed by both

⁴⁸ H.R. REP. NO. 1476, at 121 (1976).

⁴⁹ See *Karen Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061 (7th Cir. 1994), and *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 1999).

⁵⁰ 17 U.S.C. § 101 (2018).

⁵¹ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), and *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994).

⁵² 17 U.S.C. § 101 (2018).

parties.⁵³ The absence of either one of the requirements is enough for the work to not be considered a work for hire.

E. Formalities, Duration, and Rights

i. Formalities

Copyrights exist from the moment an original work is fixed onto a tangible medium of expression, meaning that, other than originality and fixation, copyrights in the U.S. no longer have any other formalities to exist. The Copyright Act of 1976 transformed the U.S. system from a conditional copyright system to an unconditional system, where formalities are voluntary and only play a minimal role.⁵⁴ Yet, formalities are still important to understand due to their continued use, their prospective nature, and the fact that they still exist in some ways.

Before the Act of 1976, the U.S. system granted copyrights only to published works, which meant that the rights arose entirely from publication, not fixation, or in the alternative, with registration for unpublished works.⁵⁵ Under the previous system, state law would protect works before their publication and once published, the works forfeited state law protection for federal copyright law.⁵⁶ With the abandonment of the *publication* requisite for federal protection, copyright law adopted the *fixation* standard prospectively, meaning that publication is still relevant, but much less so especially if the works claim protection under the Copyright Act of 1976, as amended.

Between 1790 and 1988 with the Berne Convention, copyright law in the U.S. required the inclusion of a copyright notice to grant protection. A valid notice consisted of: (1) the word *Copyright*, *Copr.*, or the copyright symbol ©; (2) the copyright owner's name, and (3) the date of first publication.⁵⁷ Under the 1909 statute, works that did not include the copyright notice upon publication moved into the public domain,⁵⁸ but under the 1976 statute, a missing copyright notice can be cured with a reasonable effort "made to add notice to all copies. . . that are distributed to the public in the United States after the omission has been discovered."⁵⁹ When the U.S. acceded to the Berne Convention, the copyright notice requirement changed dramatically, because the Berne Convention bars formalities as a condition of copyright protection.⁶⁰ The 1976 Act's provisions on copyright notice remained in place, but the accession to the Berne Convention made these notices optional:

⁵³ See *Playboy Enter., Inc. v. Dumas*, 53 F.3d 549, 560 (2d Cir. 1995), and *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 413 (7th Cir. 1992) (for opposing views on the timing of the signed agreement); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 (9th Cir. 2003) (for opposing views on the wording of the agreement).

⁵⁴ FROMER & SPRIGMAN, *supra* note 1, at 169 (2020).

⁵⁵ *Id.* at 170.

⁵⁶ *Id.*

⁵⁷ Copyright Act of 1909, Pub. L. No. 60-349, §§ 9, 18-20, 35 Stat. 1075 (1909); Copyright Act of 1976, 17 U.S.C. § 401(b) (1976).

⁵⁸ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1077 (1909).

⁵⁹ Copyright Act of 1976, 17 U.S.C. § 405(a)(2) (1976).

⁶⁰ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7, 102 Stat. 2853 (1988).

Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.⁶¹

This change guaranteed that even though a copyright notice offers more protection, in the form of diminishing an infringer's claim of innocent infringement, an absent copyright notice does not affect a work's copyright protection.

In the U.S., copyrights arise from the creation of a work, not from its registration, but this has not always been the case. Under the 1909 statute, registration was optional until the final year of the first copyright term; if registration occurred in that time frame, the owner would be entitled to a second identical term, if not, the work would become public domain.⁶² The 1909 statute also made registration a prerequisite to maintaining a copyright infringement lawsuit,⁶³ a requirement that was kept in place through the 1976 Act.⁶⁴ This 1976 Act also added incentives for registering copyrights. Under the 1976 statute, a copyright owner could recover statutory damages and attorney's fees for a copyright infringement lawsuit if the work was registered before the infringement began.⁶⁵ This Act of 1976 also established that registration is *prima facie* evidence of copyright ownership.⁶⁶ This 1976 Act remains in place today as registration is still a prerequisite to an infringement suit.

ii. Duration

Copyright duration is one of the aspects of copyright law that has changed the most throughout the years. Under the 1790 statute, copyrights had fourteen years of protection from the date of publication, renewable for fourteen additional years.⁶⁷ In 1909, the protection was expanded to twenty-eight years from the date of initial publication, renewable for twenty-eight more years at the end of the term.⁶⁸ The 1976 Act, added nineteen years to the protection of pre-1978 works, and aligned them with those under the 1976 Act, to bring the protection to seventy-five years. The term expanded to ninety-five possible years for pre-1978 works, under the Sonny Bono Term Extension Act, which added twenty more years for these works.⁶⁹ The Copyright Renewal Act of 1992, prospectively made the renewal term automatic for all works published from 1964 to 1977.⁷⁰

61 17 U.S.C. § 401(a) (2018).

62 §§ 23-24, 35 Stat. 1075 (1909).

63 *Id.* at § 12.

64 17 U.S.C. § 411(a) (1976).

65 *Id.* at § 412.

66 *Id.* at § 410(c).

67 Copyright Act of 1790, Pub. L. 1-15, 1 Stat. 124 (1790).

68 Copyright Act of 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1080 (1909).

69 Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2828 (1998).

70 Copyright Renewal Act, Pub. L. 102-307, 106 Stat. 264 (1992).

The Copyright Act of 1976 made two important changes to calculate the duration of a copyright: (1) protection starts at fixation instead of publication, and (2) copyright protection under the 1976 Act runs for the life of the author plus fifty years, instead of a fixed term,⁷¹ now seventy years as a result of the Sonny Bono Term Extension Act in 1998.⁷² Due to the complexities created by the 1976 Act's changes on duration, important provisions were included on *joint works*' duration and *works for hire*. For joint works, "the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death."⁷³ Meanwhile, for works made for hire, the Copyright Act provides protection for ninety-five years from the year of first publication, or 120 years from the year of creation of the work, whichever concludes first.⁷⁴

iii. Exclusive Rights

Copyrights are exclusive rights conferred upon the copyright owner for an original work of authorship, the Copyright Act spells out these rights in Section 106:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁷⁵

The rights are exclusive to the copyright owner, but they are not unlimited, as Sections 107 to 122 of the Copyright Act set out specific limitations to these rights.⁷⁶

⁷¹ Copyright Act of 1976, 17 U.S.C. § 302 (1976).

⁷² 112 Stat. 2827 (1998).

⁷³ 17 U.S.C. § 302(b) (2018).

⁷⁴ *Id.* at § 302(c).

⁷⁵ *Id.* at § 106.

⁷⁶ *Id.* at §§ 107-122.

F. Copyright Infringement

i. Elements of Infringement

Copyright infringement is the act of using any of these rights without permission from the copyright owner.⁷⁷ In copyright law, two elements constitute copyright infringement: (1) copying in fact (also referred to as *actual copying*), and (2) copying in law (also referred to as *substantial similarity*).⁷⁸ Copying in fact requires a demonstration of the use of some elements present in the copyright owner's work to establish that the defendant, as a matter of fact, copied the plaintiff's work.⁷⁹ If the defendant did in fact copy elements of the plaintiff's work, the second element must also be present for the claim to be actionable, copying in law.⁸⁰ Copying in law, thus requires a showing of sufficient copying, both in quantity and quality.⁸¹

The Courts have often combined the two elements into the single element of *copying*, but their analysis distinguished between *copying in fact* and *copying in law*. Copying in fact requires proof of access, while copying in law evaluates the quantity and quality of the copying.

ii. Copying in Fact

Copying in fact is the evaluation of the facts surrounding two similar or identical works to determine if the latter was in fact copied, mainly by determining if the alleged infringer had access to the work. In *Three Boys Music Corporation*,⁸² the Court noted the circumstantial nature of proof of copyright infringement and mentioned that in such cases:

A copyright plaintiff must prove (1) ownership of the copyright, and (2) infringement—that the defendant copied protected elements of the plaintiff's work. Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had “access” to the plaintiff's work and that the two works are “substantially similar.”⁸³

In *Ronald H. Selle v. Barry Gibb*,⁸⁴ the Court held that “[a]s a threshold matter, therefore, it would appear that there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer.”⁸⁵ The Court's determination clearly delineated that access is not a given fact

⁷⁷ *Definitions*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-definitions.html> (last accessed August 1, 2020).

⁷⁸ FROMER & SPRIGMAN, *supra* note 1, at 220 (2020).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Three Boys Music Corporation v. Michael Bolton*, 212 F.3d 477 (9th Cir. 2000).

⁸³ *Id.* at 481.

⁸⁴ *Ronald H. Selle v. Barry Gibb*, 741 F.2d 896 (7th Cir. 1984).

⁸⁵ *Id.* at 901.

and that access is just one more piece of circumstantial evidence, not damning by itself. The Court stated:

[T]wo works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement. Therefore, if the plaintiff admits to having kept his or her creation under lock and key, it would seem logically impossible to infer access through striking similarity. Thus, although it has frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.⁸⁶

However, a striking similarity standard has been adopted as proof of copying in fact. “In some cases, the similarities between the plaintiff’s and defendant’s work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation.”⁸⁷ This standard, however, is seldom used. In *Price v. Fox Entertainment Group, Inc.*,⁸⁸ the Court determined that although the two movies were similar, “there could be no striking similarity to establish copying in fact as a matter of law.”⁸⁹

iii. Copying in Law

Copying in law requires an element of quantity as well as quality. The copying in law element can be seen in three contexts: (1) *de minimis copy*; (2) *substantially similar copy*, and (3) *exact copy*.⁹⁰

a. De Minimis Copy

Two main circumstances that are often considered *de minimis* copying: (1) using an entire work that appears to be an insignificant part of the new work, or (2) copying a minimal part of the original work.⁹¹ In *Itoffee R. Gayle v. Home Box Office, Inc.*,⁹² the Court begins by explaining the concept of *de minimis* in relation to copyright law:

Significantly, demonstrating substantial similarity requires showing both that work copied was “protected expression” and “that the amount that

⁸⁶ *Id.*

⁸⁷ *Arnstein v. Porter*, 154 F.2d 464, 468-69 (2d Cir. 1946).

⁸⁸ *Price v. Fox Entertainment Group, Inc.*, 499 F. Supp. 2d 382 (S.D.N.Y. 2007).

⁸⁹ FROMER & SPRIGMAN, *supra* note 1, at 230.

⁹⁰ *Id.* at 231.

⁹¹ *Id.*

⁹² *Itoffee R. Gayle v. Home Box Office, Inc.*, 126 U.S.P.Q.2d 1760 (S.D.N.Y. 2018).

was copied is more than *de minimis*.” In the copyright arena, *de minimis* can “mean what it means in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences,” or it can mean “that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.” In analyzing similarity, courts assess “the extent to which the copyrighted work is copied in the allegedly infringing work,” with a work’s “observability” being paramount. Observability turns on “the length of time the copyrighted work is observable as well as factors such as focus, lighting, camera angles, and prominence.” The assessment is to be made from the viewpoint of an “average lay observer.”⁹³

The Court states that even after having copied a work in fact, the analysis is not over, and an examination of quality and quantity follows. Under the *de minimis* approach, a work can be copied into another work, but because the copying is not substantially necessary to the new work, or just a small part of the new work, it might not be considered infringement. This *de minimis* doctrine flows from a well-known concept in federal law, and thus, its application to copyrights is considered an appropriate conclusion.

b. Substantially Similar Copy

The counterpart of *de minimis copying* is a substantially similar copy. Substantially similar copying is an act of copying that necessarily leads to the conclusion of a *copying in law*.⁹⁴ “Generally, an allegedly infringing work is considered substantially similar to a copyrighted work if ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.’”⁹⁵ The test is whether an average person would be able to look at the two works and determine that one is a copy of the other.⁹⁶

c. Exact Copy

“Exact copies”, save for limited exceptions, necessarily lead to the conclusion of *copying in law*. The Copyrights Act uses sections 107 to 122 to establish the limitations on liability for “exact copies”, which are used in conjunction with the *de minimis* exception set out by the courts. The main limitation to liabilities for the exact copying of a creative work is the *Fair Use exception*.⁹⁷

⁹³ *Id.* at 2.

⁹⁴ FROMER & SPRIGMAN, *supra* note 1, at 235.

⁹⁵ *Judi Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

⁹⁶ See *Saul Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987); *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corporation*, 562 F.2d 1157 (9th Cir. 1977); *Wanda A. Cavalier v. Random House, Inc.*, 297 F.3d 815 (9th Cir. 2002), and *Jacobus Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018).

⁹⁷ Copyrights Act, 17 U.S.C. § 107 (2018).

G. Fair use

Fair use is the most widely used exception to copyright infringement. The origin of first use in the U.S. is thought to originate *Folsom v. Marsh*.⁹⁸ There, the Court resolved the question of “whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs,”⁹⁹ and set forth the first set of requirements for fair use to apply. Then, the Court stated that they must “often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹⁰⁰ This analysis has been developed over the years to establish when fair use has been demonstrated, resulting in Section 107 of the Copyright Act, which codified the exceptions:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁰¹

All of these factors must be considered by the courts, and no factor by itself is the decisive one. This list is also non-exhaustive, which means that courts can, and tend to, look at other factors as well, in addition to the ones listed in Section 107.¹⁰² In *Perfect 10, Inc. v Amazon.com, Inc.*,¹⁰³ the court notes the importance of transformative use in the analysis, and citing *Campbell*,¹⁰⁴ “the more transformative the new work, the less will be the signifi-

⁹⁸ *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

⁹⁹ *Id.* at 348.

¹⁰⁰ *Id.*

¹⁰¹ Copyrights Act, 17 U.S.C. § 107 (2018).

¹⁰² In depth analysis of the fair use doctrine exceeds the scope of this writing, for more on fair use see *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985); *Luther R. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2nd Cir. 2006); and *Andrea Blanch v. Jeff Koons*, 467 F.3d 244 (2nd Cir. 2006).

¹⁰³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹⁰⁴ *Campbell*, 510 U.S. at 579.

cance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁰⁵ Meaning that the transformative use factor is heavily considered by the courts when determining fair use. The court goes on to say that “even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work,”¹⁰⁶ which cements the idea that although fair use is a case-by-case analysis, the transformative nature of a new work that copies an existing work will weigh heavily in favor of fair use, even when the new work is an exact copy of the existing work.¹⁰⁷

H. *Implied License*

Copyright law allows authors to transfer their copyrights, collectively or individually. The matter regarding the copyright transfer is specifically codified in Section 201(d) Transfer of Ownership of the Copyright Act:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.¹⁰⁸

Supplemented by the definition of the *transfer of copyright ownership* contained in Section 101, which states that it “is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”¹⁰⁹ Furthermore, Section 204 defines how to transfer a copyright, stating that “[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent.”¹¹⁰ Taken all these elements together, a copyright may be transferred by its owner, in whole or in part, with the signing of a written contract.

Since nonexclusive licenses are not considered transfers of copyright ownership, these licenses can be effective, even without fulfilling the requirements detailed in Section 204(a). This means they can be crafted verbally, or they can be implied through conduct.

¹⁰⁵ *Perfect 10*, 508 F.3d at 1166.

¹⁰⁶ *Id.* at 1165.

¹⁰⁷ See *The Authors Guild v. Google, Inc.*, 804 F.3d 202 (2nd Cir. 2015).

¹⁰⁸ 17 U.S.C. §201(d) (2018).

¹⁰⁹ *Id.* at § 101.

¹¹⁰ *Id.* at § 204(a).

“Though exclusive licenses must be in writing, 17 U.S.C. § 204, grants of nonexclusive licenses need not be in writing, and may be granted orally or by implication.”¹¹¹ Although the Court has, in fact, agreed that implied licenses are valid and binding, there are some requirements that must be fulfilled in order for these licenses to exist. The Court has held that:

[A]n implied license is granted when “(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the licensor intends that the licensee-requestor copy and distribute his work.” . . . The last prong . . . is not limited to copying and distribution; instead we look at the protected right at issue. . . .¹¹²

The validity of implied licenses, then, does not depend on a written contract, but on the existence of these three elements. Such a license is irrevocable and nonexclusive by nature, and should be considered as a contract. “If an implied license accompanied by consideration were revocable at will, the contract would be illusory.”¹¹³ Thus an implied license, nonexclusive and irrevocable by nature, exists if the three factors are present and a written contract is not necessary.¹¹⁴

III. IMAGE RIGHTS

In the U.S., image rights emerge from the right of publicity. The right of publicity is mainly a state law right that comes out of the right to privacy, recognized by the Supreme Court in *Griswold v. Connecticut*.¹¹⁵ In *Griswold*, the Court found that there is an implied right to privacy in the U.S. Constitution.¹¹⁶ The Restatement of Torts expressly identifies four forms of violations of the right to privacy: (1) intrusion; (2) appropriation of name or likeness; (3) unreasonable publicity, and (4) false light.¹¹⁷ In *Haelan*, the Court said that in addition to and independent of that right of privacy:

[A] man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would

¹¹¹ *Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 754 (9th Cir. 2008).

¹¹² *Id.* at 754-55 (citation omitted).

¹¹³ *Id.* at 757 (citation omitted).

¹¹⁴ See also *Baisden v. I’m Ready Productions, Inc.*, 693 F.3d 491, 501 (5th Cir. 2012); Christopher M. Newman, *What Exactly Are You Implying?: The Elusive Nature of the Implied Copyright License*, 32 *CARDOZO ARTS & ENT. L.J.* 501, 502 (2014); *Korman v. HBC Florida, Inc.*, 182 F.3d 1291 (11th Cir. 1999).

¹¹⁵ *Griswold v. State of Connecticut*, 381 U.S. 479 (1965).

¹¹⁶ *Id.*

¹¹⁷ *RESTATEMENT (SECOND) OF TORTS* §§ 652A - 652I (AM. LAW. INST. 1977).

feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.¹¹⁸

The Court has made an effort to distinguish between the right of publicity and the right to privacy, and although they originate from the same constitutional provision, they protect vastly different concepts. “[P]laintiff, in its capacity as exclusive grantee of player’s “right of publicity,” has a valid claim against defendant if defendant used that player’s photograph during the term of plaintiff’s grant and with knowledge of it.”¹¹⁹ In *Zacchini v. Scripps-Howard Broadcasting Co.*,¹²⁰ the Supreme Court upheld this right, and stated that “the protection [of the right to publicity] provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”¹²¹

The *right of publicity* is the right that any individual has to regulate any commercial use of their name, image and likeness —sometimes referred to as NIL Rights or Image Rights.¹²² Although many states recognize the right of publicity, it is a state law based right, which means that the definitions and protections surrounding this right vary by state.¹²³ While the laws vary between states, “the most common elements for the right of publicity are: (1) [u]se of someone’s name, identity, likeness or persona; (2) [t]hrough which use the defendant received a commercial advantage; (3) [t]he use was made without the person’s consent; and (4) [t]here is injury to the plaintiff.”¹²⁴ These common elements have made the right of publicity clash frequently with the First Amendment right to freedom of expression.¹²⁵ In the case of a clash between rights, the courts have decided to focus on the *transformative use test*, similar to the fair use analysis in copyrights.¹²⁶ Under this test, the analysis falls on whether the use of the image or likeness is sufficiently transformative in use, meaning used in such a different way that it becomes an expression of the expressions of the alleged infringer rather than the unauthorized use of an individual’s image.¹²⁷

IV. HISTORY OF TATTOOS

Tattoos have seemingly been around forever, and they are a permanent form of body art that can be found, with various meanings, in numerous cultures and societies world-

¹¹⁸ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2nd Cir. 1953).

¹¹⁹ *Id.* at 869.

¹²⁰ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

¹²¹ *Id.* at 576.

¹²² *Right of Publicity*, USLEGAL, <https://definitions.uslegal.com/r/right-of-publicity/>. (last accessed November 1, 2020).

¹²³ See Ind. Code Ann. § 32-36-1-7 (West 2020).

¹²⁴ Alex Schulman, *Image Rights, Personality Rights and the Right of Publicity in the US and the EU*, JAYARAM LAW (Jul. 26 2019), <https://www.jayaramlaw.com/blog/2019/07/image-rights-personality-rights-and-the-right-of-publicity-in-the-us-and-the-eu/>.

¹²⁵ See *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

¹²⁶ *Id.*

¹²⁷ *Id.*

wide.¹²⁸ The earliest history of tattoos can be traced back to between 3370 B.C. and 3100 B.C., but they might even go back further.¹²⁹ “Humans have marked their bodies with tattoos for thousands of years. These permanent designs —sometimes plain, sometimes elaborate, always personal— have served as amulets, status symbols, declarations of love, signs of religious beliefs, adornments and even forms of punishment.”¹³⁰ From several archeological findings of inscriptions inked on bodily remains, it can be concluded that “the first tattoos were made using soot or ash from fireplaces.”¹³¹

Tattoos have different meanings depending on the era and the culture, while some cultures see tattoos as marks of pride, some other cultures see them as barbaric.¹³² The ancient Chinese used to tattoo the Chinese symbol for *prisoner* on convicted criminals’ faces up until the 18th to 19th century, to inform the members of society to stay away.¹³³ In the Philippines, tattoos were used to celebrate rank and accomplishment, while in Egypt, tattoos represented class and were mainly worn by women.¹³⁴ “In Samoa, tattoos are used to mark leadership roles in society and represent a dedication to the culture and endurance of the painful procedure.”¹³⁵ In ancient Rome, slaves were marked with tattoos to show that they had paid their taxes.¹³⁶ “Tattoos were not very common or socially acceptable until the mid 20th century. Up until this time, they were reserved for a small population, mainly those in the entertainment industry. Fully tattooed people became a popular attraction in and of themselves.”¹³⁷ During the 1970s, tattoos became more mainstream and popular, and no longer carried the stigma of being for outcasts of society.¹³⁸ The popularity of tattoos has only continued to increase with time and in today’s society, tattoos are prevalent worldwide.

V. CASE LAW INVOLVING TATTOOS

Even with tattoos having been used for such a long time, the issue of copyrights in tattoos is a fairly recent one, taking place mostly within the U.S. Until recently, no court decision had specifically dealt with the matter, and up until about fifteen years ago, no court had even been presented with a case involving rights over tattoos. Unsurprisingly, the issue

¹²⁸ Laakkonen, *Athletes v Artists: Who Owns the Ink?*, LEXSPORTIVA (Dec. 10, 2019), <https://lexsportiva.blog/2019/12/10/tattoos/>.

¹²⁹ *Id.*

¹³⁰ Cate Lineberry, *Tattoos: The Ancient and Mysterious History*, SMITHSONIAN MAGAZINE (Jan. 1, 2007), <https://www.smithsonianmag.com/history/tattoos-144038580/>.

¹³¹ Laakkonen, *supra* note 128.

¹³² *History of Tattooing-View of Tattooing History*, HISTORY OF TATTOOS, <http://www.historyoftattoos.net/tattoo-history/history-of-tattooing/> (last accessed May 2, 2020).

¹³³ Laakkonen, *supra* note 128.

¹³⁴ *History of Tattoos*, *supra* note 132.

¹³⁵ Laakkonen, *supra* note 128.

¹³⁶ Dan Hunter, *History and Origin of Tattoos*, AUTHORITY TATTOO <https://authoritytattoo.com/history-of-tattoos/> (last accessed May 2, 2020).

¹³⁷ *Id.*

¹³⁸ Laakkonen, *supra* note 128.

emerged as a byproduct of the rise in popularity of sports and the effects of technological developments in sports viewership and reach. With technology expanding, sports gaining popularity, and more money being passed around in the world of sports than ever, it's no wonder people are claiming rights over tattoos, either as part of their image or as artists of the works.

A. *Reed v. Nike, Inc.*

In 2005, the first case regarding copyright ownership of tattoos arose in *Reed v. Nike, Inc.*¹³⁹ Rasheed Wallace, a professional basketball player for the Portland Trailblazers of the National Basketball Association (NBA), had met with tattoo artist Matthew Reed, with the idea of having Reed design a tattoo for him.¹⁴⁰ After some back and forth regarding the design, the two sides finally agreed on the tattoo, and it was done over a three-session period.¹⁴¹ Wallace paid \$450 for the tattoo, which Reed thought was a low price, but agreed to it anyway because he “believed that he and his business would receive exposure as a result of the tattoo being on an NBA player.”¹⁴² No discussion over ownership of the artwork ever took place between the parties, despite both of them knowing the national exposure the tattoo would get.¹⁴³

In 2004, Wallace, then a player for the Detroit Pistons, signed a contract with Nike to do a commercial that involved a close up of the tattoo and Wallace explaining its meaning.¹⁴⁴ Reed saw the commercial and filed a lawsuit against Nike and Wallace for copyright infringement.¹⁴⁵ The case ultimately settled out of court and no court decision was ever issued.¹⁴⁶ Nonetheless, the case opened the door for tattoo artists to file lawsuits over copyright infringement of tattoos they have created, especially on celebrities and people with large platforms, where the tattoos are highly visible.

B. *Whitmill v. Warner Bros. Entertainment Inc.*

Since 2003, former heavyweight champion boxer, Mike Tyson, has had a tribal tattoo on his face, designed by Victor Whitmill. In 2011, this famous tattoo was the center of another lawsuit involving the copyrights on tattoos, except in this instance, both the athlete and the tattoo artist had agreed that the artist owned the copyright on the tattoo.¹⁴⁷ The issue in this case revolved around the movie *The Hangover II*, released in 2011 by Warner Bros., as a sequel to their hit 2009 movie, *The Hangover*.¹⁴⁸

¹³⁹ *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Oct. 7, 2005).

¹⁴⁰ *Id.* at *2.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-CV-752 (E.D. Mo. Jun. 22, 2011).

¹⁴⁸ *Id.* at *1.

In Warner Bros. 2009 original *The Hangover*, Mike Tyson had a small role that featured him on camera in various moments in the film. In the 2011 sequel, Mike Tyson had a small role again, but this time one of the other movie characters was featured with a tattoo identical to Tyson's tribal face tattoo. To advertise the movie, Warner Bros. utilized the image of the replica tattoo in all types of promotional material and all mediums.¹⁴⁹ Whitmill "never consented to, the use, reproduction, or creation of a derivative work based on his Original Tattoo," and filed a lawsuit against Warner Bros. for copyright infringement.¹⁵⁰ For Whitmill, this case was not about Tyson or his image rights, this case was about the unauthorized use of his art, for which he held the copyrights.¹⁵¹ Amongst Warner Bros. arguments was the issue of the validity of the copyrights in question. Warner Bros. argued that there cannot be a valid copyright on tattoos because human skin cannot be considered a tangible medium of expression.¹⁵² This case ultimately settled and no court decision was rendered,¹⁵³ but the idea of protecting an artist's work of art, regardless of the medium used to create it, was solidified.

C. *Escobedo v. THQ Inc.*

In 2009, Christopher Escobedo, an Arizona tattoo artist, and Carlos Condit, a popular mixed martial arts fighter, agreed on the terms for Escobedo to tattoo a lion on Condit's ribcage.¹⁵⁴ Escobedo first sketched the work on paper before tattooing Condit.¹⁵⁵ In February 2012, THQ released the video game *UFC Undisputed 3*, which was a follow-up to their successful 2010 videogame *UFC Undisputed 2010*, both of which prominently featured a computer rendered version of Condit.¹⁵⁶ This computer rendering of Condit featured his rib cage lion tattoo, created by Escobedo.¹⁵⁷ On February 24, 2012, Escobedo registered his sketch of Condit's lion tattoo with the Copyright Office and on November 16, 2012, Escobedo filed a lawsuit against THQ, Inc. for copyright infringement.¹⁵⁸ Escobedo alleges that he granted Condit an implicit license to display the tattoo on his body, but that he did not authorize any reproduction of the work.¹⁵⁹ The claim was dismissed by the court for failure to prosecute, which means that the plaintiff simply abandoned the suit without withdrawing it, so no decision was rendered in this case.¹⁶⁰

¹⁴⁹ *Id.* at *3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *1.

¹⁵² Warner Bros. Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 13-18, Whitmill v. Warner Bros. Entertainment Inc., No. 4:11-CV-752 (E.D. Mo. Jun. 22, 2011).

¹⁵³ Order of Dismissal, Whitmill v. Warner Bros. Entertainment Inc., No. 4:11-CV-752 (E.D. Mo. Jun. 22, 2011), 2011 WL 11706563.

¹⁵⁴ Escobedo v. THQ Inc., No. 2:12-CV-02470 (D. Ariz. Dec. 11, 2013).

¹⁵⁵ Complaint, Escobedo v. THQ Inc., No. 2:12-CV-02470 (D. Ariz. Dec. 11, 2013), 2012 WL 5815742, at *2.

¹⁵⁶ *Id.* at *2-3.

¹⁵⁷ *Id.* at *3.

¹⁵⁸ *Id.* at *4-5.

¹⁵⁹ *Id.* at *4.

¹⁶⁰ Escobedo v. THQ Inc., No. 2:12-CV-02470 (D. Ariz. Dec. 11, 2013).

VI. SOLID OAK SKETCHES, LLC v. 2K GAMES, INC. AND TAKE-TWO INTERACTIVE SOFTWARE, INC.

A. Facts

In 2016, Solid Oak Sketches,¹⁶¹ filed a lawsuit against 2K Games, Inc., and Take-Two Interactive Software, Inc., developers of the popular NBA 2K videogame series, for alleged copyright infringement.¹⁶² The lawsuit by Solid Oak Sketches centered on the use of tattoo designs, for which Solid Oak Sketches owns the licenses, in the popular videogames.¹⁶³ Solid Oaks Sketches allegations were based on tattoos on three NBA players, mainly, the complaint emphasized five tattoos depicted on the avatars linked to LeBron James, Kenyon Martin, & Eric Bledsoe in the 2K14, 2K15 and 2K16 NBA videogames created by 2K Games and Take-Two Interactive Software (Defendants).

According to Nina Jablonski, an expert for the Defendants, “[t]attoos have been a part of human expression for thousands of years. In modern day, tattoos like the Tattoos at issue in this litigation ‘reflect the personal expression of the person bearing the tattoo and are created for that purpose.’ The Tattoos reflect the Players’ personal expression.”¹⁶⁴ The Defendants purport to argue that tattoos are part of a person’s image and expression, not simply a work of art on a canvas. On the other side, Solid Oak Sketches holds a valid and exclusive license for each of the tattoos in question, although that license only extends to works already fixed on the skin, and Solid Oak Sketches “is not licensed to apply the tattoos to a person’s skin, and Solid Oak does not hold any publicity or trademark rights to the Players’ likenesses.”¹⁶⁵ NBA players have given the NBA a license as part of their Collective Bargaining Agreement (CBA) with the league.¹⁶⁶ This license includes the right for the NBA to further license, to third-parties, players’ likeness, which the NBA did in their agreement with Take-Two Interactive Software.¹⁶⁷ LeBron James and Kenyon Martin, two of the players named in the lawsuit, have also expressed themselves in favor of Take-Two Interactive Software’s use of their likeness under the license the NBA gave them.¹⁶⁸

Five tattoos were at issue in the lawsuit: three on LeBron James and one on each of Eric Bledsoe and Kenyon Martin. According to the artists’ own statements, they understood the concept behind creating these tattoos for professional athletes as part of their images and the resulting publicity that would fall upon the works from the athletes’ popularity:

¹⁶¹ Solid Oak Sketches, LLC is a company that holds exclusive licenses from tattoo artists who have done work on prominent NBA players.

¹⁶² Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333 (D.N.Y. 2020).

¹⁶³ *Id.* at 339.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 340.

¹⁶⁶ National Basketball Association, *Collective Bargaining Agreement* (July 1, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

¹⁶⁷ *Solid Oak Sketches, LLC*, 449 F.Supp. 3d at 340.

¹⁶⁸ *Id.*

1. *Lebron James's Child Portrait Tattoo* was inked by Justin Wright from a picture provided by Lebron.¹⁶⁹ Wright “knew and intended that when [Mr. James] appeared in public, on television, in commercials, or in other forms of media, he would display the Child Portrait Tattoo,”¹⁷⁰ and he had the intention of having the tattoo “become a part of Mr. James’s likeness,”¹⁷¹ which according to Wright implied that Lebron was always “free to use ... as he desire[d], including allowing others to depict it, such as in advertisements and video games.”¹⁷²
2. *Lebron James's 330 and Flames Tattoo*, inked by Deshawn Morris, was created by “shading in the outline of, and adding flames to, the number ‘330,’ which had already been inked on Mr. James’s arm.”¹⁷³ From Morris’ own statement, he knew that Lebron was an NBA player when he inked the tattoo, and that it was highly likely that it was going to appear in public and in other forms of media, like videogames.¹⁷⁴ Furthermore, Morris stated that he had the intention of the tattoo becoming a part of Lebron’s image and likeness, and that he intended for the tattoo to be displayed by Lebron publicly.¹⁷⁵
3. *Lebron James's Script with a Scroll, Clouds and Doves Tattoo* was inked by Deshawn Morris as well, from a design in his sketchbook, to which he has retained the license and did not license to Solid Oak Sketches.¹⁷⁶
4. *Kenyon Martin's Wizard Tattoo* was inked by Thomas Ray Cornett, and copied “directly from a pre-existing design.”¹⁷⁷ “Cornett did not design the tattoo.”¹⁷⁸ In his own statement, Cornett said he intended for the tattoo to be displayed publicly and become a part of Martin’s image and likeness, and “knew and intended that the tattoo would need to be included if anyone were to create a rendition of Mr. Martin’s likeness, such as in art or video games.”¹⁷⁹
5. *Eric Bledsoe's Basketball with Stars and Script*, inked by Mr. Cornett, “was designed by Mr. Cornett with Mr. Bledsoe’s direction and input.”¹⁸⁰ Cornett also knew and intended for the tattoo to become a part of Bledsoe’s image and likeness, and knew the tattoo would be included in any interpretations of Bledsoe’s likeness.¹⁸¹

The videogames at issue all come from the same NBA 2K series, which, although much shorter in duration than actual NBA games, include many aspects of an NBA game that are

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 341.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

made to accurately resemble an actual game, such as the courts and the players.¹⁸² In pursuing their goal of simulating an NBA game as accurately as possible, Take-Two Interactive Software included the tattoos at issue, along with many others, in NBA 2K “to accurately depict the physical likenesses of the real-world basketball players as realistically as possible.”¹⁸³ These tattoos, for many reasons, are not seen clearly during gameplay and 2K does not feature them separate from the players’ renditions.¹⁸⁴ Tattoos comprise only a small portion of the video game data. “[O]nly 0.000286% to 0.000431% of the NBA 2K game data is devoted to the Tattoos. When a Tattooed player is selected, the Tattoos are depicted on a computer or television screen at about 4.4% to 10.96% of the size that they appear in real life.”¹⁸⁵ This small amount of data dedicated to tattoos, coupled with other elements, such as the fast-paced moving nature of the game, makes the tattoos unidentifiable or unclear for most of the game. As such, the tattoos have not been integral to the games’ marketing strategy, and the games’ success is not predicated on their depictions of the tattoos.¹⁸⁶

Solid Oak Sketches argued that the Defendants used their copyrighted works without their authorization, meaning without a license from them. As such, the court analyzed Solid Oak Sketches’ history in licensing tattoos and found that “Solid Oak has not profited from licensing the Tattoos,”¹⁸⁷ has never licensed the tattoos for video games, nor created a video game that shows the tattoos.¹⁸⁸ Historically, tattoos are not licensed individually for use in video games, considering that tattoos are not the main selling point of video games, a market for licensing tattoos to videogame makers is not likely to develop at all.¹⁸⁹ Furthermore, Solid Oak Sketches, by way of its owner Mathew Siegler, agreed that they did not have the right to use players’ “publicity or trademark rights”¹⁹⁰ and “would ‘need permission from the players . . . to not infringe on their right of publicity,’ in order to move forward with a business selling ‘dry wick apparel’ bearing the Players’ tattoos.”¹⁹¹

B. Court’s Analysis

The Court moved to analyze the claims by both parties in order to determine if there was in fact a copyright infringement. The Defendants argued three defenses against the claims: (1) *de minimis use*; (2) *implied license*, and (3) *fair use*.

i. *De Minimis Use*

The court focused on the similarities between the original work and the new work. “In order to establish a claim of copyright infringement, a plaintiff with a valid copyright must

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 341-42.

¹⁸⁵ *Id.* at 342.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 343.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

demonstrate that: (1) the defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectible elements of plaintiff's."¹⁹² *De minimis* is the threshold for determining if the use was substantial or not, since substantial use is more than *de minimis*. "To establish that the infringement of a copyright is *de minimis*, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial 'as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'"¹⁹³ As restated by the Courts numerous times, the quantitative element to a *de minimis* analysis regards (1) the amount of the work copied, (2) the amount of time that the work can be seen in the allegedly infringing work, and (3) other factors like 'focus, lighting, camera angles, and prominence'.¹⁹⁴ In determining substantial similarity or *de minimis* use, the court will consider whether an "average lay observer" would recognize the new work as being copied from an earlier work.¹⁹⁵

The Court, in its analysis of the case at hand, determined that "no reasonable trier of fact could find the Tattoos as they appear in NBA 2K to be substantially similar to the Tattoo designs licensed to Solid Oak."¹⁹⁶ In the Court's opinion, the quick nature of the game, the small size of the tattoos, and the lack of the tattoo's presence on the game's marketing materials makes the tattoos difficult to identify for the average lay observer and player of the game.¹⁹⁷ With this, the Court decides that, although the tattoos are being used in the game itself, its use should be considered *de minimis* and not substantial.

ii. Implied License

One of the Defendant's main arguments was that they were authorized, by way of an implied license, to use the tattoos in the games, when they were granted the use of the players' likenesses.¹⁹⁸ Solid Oaks Sketches disagreed with this position arguing that the expectation of the tattoo artists about the tattoos becoming part of the clients' likenesses played "no role in copyright law,"¹⁹⁹ and that when they obtained the licenses to the tattoos, any restrictions on their ability to commercially exploit them should have been included in the agreements.²⁰⁰

The Court then reasoned that the facts support only one conclusion: the tattoo artists granted the players nonexclusive licenses to integrate and use the tattoos, created by them, as part of their images and likenesses, before granting any right to Solid Oak Sketches.²⁰¹ The Court held:

¹⁹² *Id.* (citing *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 63 (2d Cir. 2010)).

¹⁹³ *Id.* at 344 (citing *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998)).

¹⁹⁴ *Id.* (citing *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997)).

¹⁹⁵ *Id.* at 344.

¹⁹⁶ *Id.* at. 345.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 346.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

According to the declarations of Messrs. Thomas, Cornett, and Morris, (i) the Players each requested the creation of the Tattoos, (ii) the tattooists created the Tattoos and delivered them to the Players by inking the designs onto their skin, and (iii) the tattooists intended the Players to copy and distribute the Tattoos as elements of their likenesses, each knowing that the Players were likely to appear “in public, on television, in commercials, or in other forms of media.”²⁰²

Unless the players had been asked to limit the display of these works, they had implied licenses to use these tattoos as part of their images.²⁰³ The Defendants’ rights, according to the ruling, were obtained directly from the players, whose rights “predate the licenses” that were obtained by Solid Oak Sketches.²⁰⁴ Therefore, since Defendants’ rights to use the players’ images and likenesses predates Solid Oak Sketches’ licenses, there can be no claim, by the plaintiff, against these rights.

iii. Fair Use

Defendants’ argument of fair use, although disputed by the plaintiff for lack of evidence, is not without merit, and the Court analyzes every fair use factor before making a determination.

iv. Purpose and Character of the Use

Citing *Campbell v. Acuff-Rose*,²⁰⁵ and *Bill Graham Archives*,²⁰⁶ the Court determined that the NBA 2K use of the tattoos is transformative, using the four-part test; “(i) whether the two works have different purposes, (ii) the size of the reproductions, (iii) whether the expressive value of the reproduced material is minimized, and (iv) the proportion of copied material,”²⁰⁷ coupled with the commercial or non-commercial nature of the work.²⁰⁸ While the games use exact copies of the tattoos, their purpose when displaying these tattoos is “entirely different from the purpose for which the tattoos were originally created.”²⁰⁹ Originally, the tattoos were designed to allow the players to express themselves through them.²¹⁰ The NBA 2K games replicate the tattoos to accurately recreate the players and the

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

²⁰⁶ *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605, 608 (2nd Cir 2006).

²⁰⁷ *Solid Oak Sketches, LLC.*, 449 F. Supp. 3d at 347 (citing *Bill Graham Archives*, 448 F.3d 605, 608 (2nd Cir 2006)).

²⁰⁸ *Campbell*, 510 U.S. at 569.

²⁰⁹ *Solid Oak Sketches, LLC.*, 449 F. Supp. 3d at 347.

²¹⁰ *Id.*

tattoos are merely incidental, and not particularly discernible.²¹¹ The Defendants rightfully argued that the tattoos in the videogames were significantly smaller (4.4% to 10.96%) than their actual size.²¹² Due to the nature of gameplay in 2K games and the size reduction, these tattoos are barely discernible, and as such, the second element of the test is met.²¹³ In the 2K games, the Court stated that the expressive value of the tattoos is minimized, since they are infrequently and imprecisely observable.²¹⁴ The evidence proved to the Court that “the Tattoos were not included for their expressive value, but rather to most accurately recreate certain NBA players’ likenesses.”²¹⁵

The fourth part of the test is fulfilled to the Court’s satisfaction due to the tattoos constituting only an inconsequential portion of the game, since they only cover three out of 400 available players and take up only 0.000286% to 0.000431% of total game data.²¹⁶ Meaning that the proportion of the copied material was too miniscule to affect the original work. Finally, the Court made the distinction between the 2K games being of commercial nature and held that the tattoo images were merely incidental to the commercial value of the game.²¹⁷ This distinction is important because the consumers of the game do not buy the game for the tattoos on players’ bodies.²¹⁸

v. Nature of the Copyrighted Work

When analyzing the nature of a copyrighted work, in order to determine if the fair use exception applies, the courts must consider two factors: “(1) whether the work is expressive or creative . . . or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.”²¹⁹ Solid Oak Sketches agreed that the works were previously published, and satisfied one part of the test.²²⁰ The second part of the test, the Court argued, is satisfied because “tattoo designs are more factual than expressive because they are each based on another factual work or comprise representational renderings of common objects and motifs that are frequently found in tattoos.”²²¹ “None of the tattooists stated in his declaration that the Tattoos were based on unique or expressive features. To the contrary, the tattooists each stated that the Tattoos copied common tattoo motifs or were copied from designs and pictures they themselves did not create.”²²² The Court then concluded that there is no

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 347-48.

²¹⁴ *Id.* at 348.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (citing *Blanch v. Koons*, 467 F.3d 244 (2nd Cir. 2006)).

²²⁰ *Id.* at 348.

²²¹ *Id.*

²²² *Id.* at 349.

evidence to support that the tattoos were “sufficiently ‘expressive’ or ‘creative’”²²³ and thus, this factor weighed in favor of fair use.

vi. Amount and Substantiality of the Use

The next step in the fair use analysis is to consider “whether the secondary use employs more of the copyrighted work than is necessary, and whether the copying was excessive in relation to any valid purposes asserted under the first factor.”²²⁴ In its decision, the Court understood that, although the tattoos were exact copies of the entire tattoos, their purpose in using the tattoos was transformative, to create a realistic gaming experience.²²⁵ The Court stated that it would have been against Defendants’ purpose, in creating the video game, to not copy the works completely and that they do copy the entirety of the works, while pursuing the aforementioned transformative purpose, by reducing the size of these images, such that “the visual impact of their artistic expression [was] significantly limited.”²²⁶ To the satisfaction of the Court, this factor also weighed in favor of finding fair use.

vii. Effect on the Market

The last factor to consider in finding *fair use* is the effect that the allegedly infringing work has on the market, or potential market, of the copyrighted work.²²⁷ Of note, the Courts had already decided that “[t]ransformative uses do not cause actionable economic harm.”²²⁸ The Court found that since there is no reasonable way to conclude that a videogame, like 2K, could be a substitute for tattoos, use of the tattoos in the game does not impair the copyright holder of significant revenues.²²⁹ Furthermore, the Court reasoned that since Solid Oak Sketches could not actually monetize the licenses, because they could not use the player’s images or publicity rights, there was no evidence to prove that there was an actual market, or even a potential market, being hampered by the videogame.²³⁰

viii. Fair use?

The Court finds that, after thorough analysis, all four fair use factors weighed in favor of the Defendants.²³¹ It is the Court’s determination that “no reasonable fact finder could determine that Defendants’ use of the Tattoos in NBA 2K was not fair use.”²³²

²²³ *Id.*

²²⁴ *Id.* (citing *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2nd Cir. 2014)).

²²⁵ *Id.* at 349.

²²⁶ *Id.* (citing *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2nd Cir 2006)).

²²⁷ *Id.*

²²⁸ *Id.* (citing *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2nd Cir. 2014)).

²²⁹ *Id.* at 350.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

VII. WHO OWNS THE TATTOOS?

On Mar. 26, 2020, Judge Laura Taylor Swain of the U.S. District Court for the Southern District of New York issued a ruling, granting summary judgment in favor of 2K Games and Take-Two Interactive Software. The Court essentially said that 2K and Take-Two Interactive Software did not infringe on Solid Oak Sketches copyrights over the tattoos with the NBA 2K videogames. The ruling, based on the *de minimis*, *implied license*, and *fair use* analysis, is the first ruling on matters of tattoo copyrights since all other cases have settled out of court. The ruling did not set a precedent for the use of tattoos in any medium, but it is a guiding light as to where courts might look when deciding future cases on the subject matter.

As of this ruling, leagues might look to reinforce their CBA's with wording that includes tattoos, player contracts might do the same, and even tattoo artists might be more careful when tattooing someone, especially someone famous. While not binding and certainly debatable, in the clash between image rights and copyrights, the first court to rule on the matter has sided with image rights wholeheartedly. The analysis is an interesting one and could have taken many different avenues, while the *implied license* and *de minimis* analysis were pretty much expected, the *fair use* analysis caught some by surprise. If taken literally, tattoo artists might see their copyrights over tattoos lose value significantly, and it could create a slippery slope. This decision's ripple effects will be felt long after the decision was handed down, time will only tell what developments in intellectual property law arise from this case.