

Paint It Black: Copyright concerns around tattoos' portrayal in media

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Art can come in many forms and styles, from acrylics on canvas to watercolor paints on paper. Tattoos are no different, with the human body serving as the vessel for self-expression inherent in this medium of illustration.¹ Thus, it comes as no surprise that a lot of public figures across fields—be it sports or entertainment—have tattoos to better express themselves, sometimes even to profess love for their significant other/family.² However, as much as the art is appreciated, there is also a fair bit of dispute that arises out of tattoos and their use by celebrities. This piece looks at the trend of litigation initiated by tattoo artists against developers of mixed media, specifically video games where tattooed celebrities are featured. Through this article, I look to address how courts have sought to balance the rights vested with tattoo artists for their designs with publicity rights licensed by celebrities for their portrayal in video games.

Towards the end of 2022, acclaimed American rapper CardiB celebrated a major legal victory. . The issue in question? Copyright litigation that stemmed from the use of tattoos. In Cardi B's case, the controversial tattoos in question appeared on the photo cover of her album *Gangsta Bitch Music Vol. I* (2017), where a shirtless male with back tattoos was featured in a compromising position.³

Tattoo-based litigation stemming from perception in media has made a number of headlines in the past several years, from the aforementioned CardiB album cover to actor Ed Helms' face tattoo in *Hangover II*⁴ to the realistic rendering of players in NBA video games.⁵ The general principle is that tattoos are eligible for copyright protection as original artistic works and the author—the tattoo artist—would be the first owner of the copyright. Under this legal regime, the tattoo artist is at liberty to license such use of the copyright as they deem fit. Previously, tattoo artists were apprehensive about asserting their rights. This can be attributed to two reasons: (1) lack of clarity as to whether copyright accrues in tattoo designs given the fixation and originality requirements in copyright law and (2) uncertainty over how often these tattoos on celebrities would feature as-is in media, which adds ambiguity as to whether the tattoo is actually portrayed.⁶ However, with improved technologies as to realistic rendering and a growing awareness amidst the tattoo artist community about litigation where copyright is asserted,⁷ there has been increased vigilance on the part of tattoo artists when their artistic designs are utilized without permission. In the CardiB case, the court found that there was no likeness between the person

¹James Ricci, "The Point is Self-Expression, say Tattoo Enthusiasts," *LA Times*, Jan 4, 2004, <https://www.latimes.com/archives/la-xpm-2004-jan-04-me-tattoo4-story.html>.

²Joshua St. Clair, "A Guide to David Beckham's 60 Plus Tattoos," *Men's Health*, May 6, 2021, <https://www.menshealth.com/entertainment/a36339426/david-beckham-tattoos/>.

³Dylan Smith, "Federal Judge Refuses to Reconsider Jury's Verdict in Cardi B Back Tattoo Lawsuit," *Digital Music News*, Dec 28, 2022, <https://www.digitalmusicnews.com/2022/12/28/cardi-b-back-tattoo-lawsuit-appeal/>.

⁴Alex Passa, "Warner Bros Almost Had to Delay the Hangover Part II Release because of a lawsuit from Mike Tyson's Tattoo artist," *The Things*, Dec 17, 2022, <https://www.thethings.com/warner-bros-almost-delayed-the-hangover-release-due-to-a-lawsuit-from-mike-tysons-tattoo-artist/#the-copyright-tattoo-lawsuit-wasn-39-t-the-only-one-the-hangover-ii-faced>.

⁵See *Solid Oak Sketches v. 2K Games*, 449 F. Supp. 3d 333 (2020 S.D.N.Y).

⁶See generally 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). Accessible at: <https://ilr.law.uiowa.edu/print/volume-104-issue-3/the-inky-ambiguity-of-tattoo-copyrights-addressing-the-silence-of-u-s-copyright-law-on-tattooed-works>.

⁷See generally Yolanda M. King, "The Challenges 'Facing' Copyright Protection for Tattoos," 92 *OR. L. REV.* 129, 160 (2013).

whose back was tattooed and the actual mixtape cover – the use was held to be transformative and there was no actual harm.⁸ The Ed Helms case involved a copyright claim by Missouri-based artist, Victor Whitmill, for the face tattoo sported by Ed Helms, which bore a striking resemblance to the tattoo sported by celebrity boxer Mike Tyson. At one point in time, distribution company Warner Brothers had anticipated digitally altering the movie pre-release so as to not feature the tattoo⁹. While this case ended with a mutually-agreed upon settlement between the parties, it is yet another example of the consequences of violating tattoo copyright in this day and age.¹⁰

The portrayal of celebrities and their tattoos in media forms that heavily replicate real-life or render realistic copies of environments, people, and circumstances pose interesting questions. One such legal consideration is how courts ought to balance the relationship between a celebrity's right over their own image and image licensing with the copyright that vests with tattoo artists inking these celebrities. In the case of *Solid Oak Sketches v. 2K Games*,¹¹ the District Court of the Southern District of New York ruled in favor of 2K Games, the video game publisher. Plaintiff Solid Oak Sketches, a licensing company, brought a copyright infringement claim against the defendant for reproducing basketball players in their video game's gameplay. The plaintiff alleged that the depiction of the basketball players, which was inclusive of players' tattoos, constituted an infringement of the tattoo design and the copyright owned by the tattoo artist. The defenses relied on by 2K Games were three-pronged: fair use, *de minimus* use, and implied license. In arguing for fair use, 2K Games claimed that the tattoo's appearance had a different meaning and message in the video game as opposed to its regular occurrence on the celebrity and that there were no marked effects on the tattoo artist. For *de minimus* use, 2K Games argued that the tattoo appeared for only a short period of time and even then, it appeared blurry and hardly discernable. Lastly, with regards to the implied license claim, 2K Games argue that the tattoo artists, in tattooing the celebrities, were aware that the ink would become a part of the celebrity's identity on public display. Ultimately, the court found the implied license claim most convincing, emphasizing that tattoo artists were indeed well aware of their tattoos being on public figures who were likely to appear in the media. This understanding suggests a non-exclusive license from the tattoo artist when a celebrity's personality rights are licensed. Thus, despite the absence of an explicit exclusive agreement between publisher and artist, creators have to accept that copyrights are unenforceable in these scenarios.¹²

Although the *Solid Oaks* case does not address the issue of copyrightability of tattoos explicitly, it made it abundantly clear that when tattoo artists ink celebrities known to feature in mass media, the artists must be aware of their artwork being on display. Thus, copyright claims are rather restrictive when in conflict with the notoriety-based rights of celebrities. One positive way to look at this would be to consider that this contributes to the goodwill of the tattoo artist themselves, resulting in the imitation of similar designs or even increased business via the fame

⁸Supra n. 1.

⁹Kevin Jagnauth, "Warner Bros. Planning To Digitally Alter Ed Helms Tattoo In 'The Hangover Part II' Due To Lawsuit," *Indiewire*, Jun 9, 2011, <https://www.indiewire.com/2011/06/warner-bros-planning-to-digitally-alter-ed-helms-tattoo-in-the-hangover-part-ii-due-to-lawsuit-118147/>.

¹⁰Matthew Belloni, "Warner Bros. Settles 'Hangover II' Tattoo Lawsuit (Exclusive), The Hollywood Reporter," *Hollywood Reporter*, Jun 20, 2011, <https://www.hollywoodreporter.com/business/business-news/warner-bros-settles-hangover-ii-203377/>.

¹¹ *Solid Oak Sketches v. 2K Games*, 449 F. Supp. 3d 333, 346 (S.D.N.Y. 2020).

¹²*Id.*

garnered from the celebrity endorsement. That said, the creative genius that claims credit may not be at ease.

Waters get even murkier with more recent rulings. In *Alexander v. Take Two Interactive Software Inc.*¹³, the tattoo artist Catherine Alexander claimed copyright infringement of her tattoo designs due to the unlicensed depiction of WWE professional wrestler Randy Orton's tattoos in the WWE 2K game series. Akin to the *Solid Oak Sketches* case, Take Two relied on fair use, *de minimus* use, and implied license. When the case proceeded to trial, the jury found in favor of Alexander, awarding her damages of USD \$3,750 for lack of fair use.¹⁴

A possible critique of this ruling revolves around the idea of giving full discretion to a jury to answer questions pertaining to fair use. It may be true that juries find it harder to adhere to precedent on fair use and are inclined to vote with their emotions. However, what adds to the intrigue of this case is the apparent disregard of the implied license defense, something that was heavily relied on in the *Solid Oak* court's reasoning. This also deviates from *Solid Oak* because it indicates that the copyright of the tattoo artist would take precedence over the licensed personality rights.

Finally, one more case worth mentioning is that of *Hayden v. 2K Games*,¹⁵ which arose from a complaint that was first filed as early as 2017 before the District Court of Ohio. The plaintiff, a tattoo artist, had filed for copyright infringement over the designs of his tattoos that were depicted in the defendant's NBA basketball simulation series. Much like *Solid Oak*, the defendants here also relied on fair use, *de minimus* use, and an implied license from the tattoo artist. However, the judge was also of the view that these questions warranted a jury trial,¹⁶ one that we must all watch out for in the next coming months.

Given how different district courts have exercised their own discretion and applied the law as they see fit, one is only left wondering why one case (*Solid Oak*) was adjudicated against the tattoo artist whereas the other two cases were allowed to proceed to a jury trial, with one upholding the rights of the tattoo artist over that of the celebrity. An interpretation in allowing cases to proceed to a jury trial is that it would expose the disputable subject matter to diverse perspectives, resulting in a verdict that is more consistent with diverse societal views. Certainly, jurisdiction plays a key role, with New York's right of publicity claims not being grounded in common law but the civil rights act¹⁷ and several precedents set in favor of celebrity's publicity rights. But given how two different district-level courts have taken opposing views, one is left with more confusion. Perhaps if the *Hayden Games* case leans a certain way, adding authority by sheer number to one end of the reasoning, it will add some clarity for future courts to consider. In my view, a way to reduce the number of disputes would be to shift from the implied license that courts have to read into and circumstantially interpret to an explicit license, during the time that the celebrity is getting tattooed. Nevertheless, the courts in the year 2023 have some big and difficult questions to answer.

¹³Alexander v. Take-Two Interactive Software, Inc., 489 F. Supp. 3d 812 (S.D. Ill 2020).

¹⁴Marie Dealessandri, "Tattoo artist wins copyright claim against Take-Two," *Games Industry Biz*, Oct. 4, 2022, <https://www.gamesindustry.biz/tattoo-artist-wins-copyright-claim-against-take-two>.

¹⁵Hayden v. 2K Games, 375 F. Supp. 3d 823 (N.D. Ohio 2019).

¹⁶Hayden v. 2K Games, 2022 U.S. Dist. LEXIS 170098.

¹⁷ See generally Dori Ann Hanswirth and Kyle Schneider, "Using One's Image and Personality, Part I: Free Speech or Right of Publicity Violation?, International Trademark Association," Sep. 30, 2020, <https://www.inta.org/perspectives/features/using-ones-image-and-personality-part-i-free-speech-or-right-of-publicity-violation/>.