
Essay

Tattoos, Norms, and Implied Licenses

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INTRODUCTION

A decade ago, copyright litigation over tattoos was rare.¹ Victor Whitmill made headlines when he claimed that Warner Brothers copied the face tattoo he created for Mike Tyson in its film *The Hangover II*, but the case eventually settled.² More controversially, Matthew Reed sued Nike—alongside his client, NBA star Rasheed Wallace—over an ad that prominently featured tattoos Reed created for Wallace.³ That case also settled.⁴ Perhaps most importantly, Christopher Escobedo filed suit against THQ, the developer of the video game *UFC Undisputed 3*, which accurately depicted mixed martial arts fighter Carlos Condit, including a tattoo Escobedo created for him.⁵ THQ later filed for bankruptcy, and once again, the parties settled.⁶

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1. See generally Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013).

2. Matthew Belloni, “*Hangover*” *Tattoo Lawsuit Settled*, REUTERS (June 20, 2011), <https://www.reuters.com/article/us-hangover/hangover-tattoo-lawsuit-settled-idUSTRE75K0DF20110621> [<https://perma.cc/8X3V-9STA>].

3. Complaint, Reed v. Nike Inc., No. 05-CV-198-BR, 2005 WL 1182840 (D. Or. Feb. 10, 2005).

4. Stipulation of Dismissal with Prejudice, Reed v. Nike, Inc., No. 05-CV-198-BR, 2005 WL 1182840 (D. Or. Oct. 19, 2005).

5. Complaint, Escobedo v. THQ, Inc., No. 12-cv-2470-JAT (D. Az. Nov. 16, 2012).

6. Matt Chiappardi, *Tattoo Artist Appeals Slashed IP Claim In THQ Bankruptcy*, LAW 360 (Sept. 11, 2013), <https://www.law360.com/articles/>

None of these cases established precedent or meaningfully clarified the application of copyright law to tattoos, but they paved the way for a rash of litigation currently working its way through the federal courts that threatens to upend the tattoo industry's longstanding informal norms around ownership and copying. Like *Escobedo*, this crop of cases centers on the use of tattoos to accurately depict professional athletes in video games. Unlike prior cases, these disputes have led to determinations by courts and juries that may shape both law and industry practice. So far, however, the courts have reached inconsistent results on very similar facts.

In the first of these cases, Solid Oak Sketches sued 2K Games and Take-Two Interactive, the makers of the *NBA 2K* video game series.⁷ Solid Oak acquired copyright licenses from Shawn Rome, Justin Wright, and Tommy Ray Cornett for certain tattoo designs they created and inked on their clients LeBron James, Kenyon Martin, and Eric Bledsoe.⁸ Solid Oak contended that by depicting those players with their tattoos within *NBA 2K*, Take-Two infringed the copyrights in the tattoo designs. Notably, Solid Oak's founder, Matthew Siegler, is not a tattooer. According to Rome, Wright, and Cornett, Siegler misrepresented his intentions, claiming that he licensed their designs for a clothing line, not as part of a plan to shakedown a video game developer.⁹ All three tattooers opposed the litigation.¹⁰ In Cornett's words, the copyright claims against Take-Two were "ridiculous" and "completely inconsistent with how . . . [his] work should be used."¹¹ The court apparently agreed. Judge

471802/tattoo-artist-appeals-slashed-ip-claim-in-thq-bankruptcy [https://perma.cc/H947-QPAB].

7. Take-Two Interactive is the parent company of 2K Games. *Subsidiaries of Take-Two Interactive Software, Inc.*, SECS. AND EXCH. COMM'N (last accessed Feb. 6, 2023), <https://www.sec.gov/Archives/edgar/data/946581/000162828018006877/ex-211033118.htm> [https://perma.cc/HQW9-SNSN].

8. Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020).

9. Jason M. Bailey, *Athletes Don't Own Their Tattoos. That's a Problem for Video Game Developers*, N.Y. TIMES, Dec. 27, 2018, <https://www.nytimes.com/2018/12/27/style/tattoos-video-games.html> [https://perma.cc/NT8F-PD4B]; Eriq Gardner, *LeBron James Testifies in Video Game Suit: "I Always Thought That I Had the Right to License What I Look Like"*, HOLLYWOOD REP. (Aug. 24, 2018), <https://www.hollywoodreporter.com/business/business-news/lebron-james-i-thought-i-had-right-license-what-i-look-like-1137315> [https://perma.cc/ZA6M-K66N].

10. Gardner, *supra* note 9.

11. *Id.*

Swain of the Southern District of New York granted summary judgment for Take-Two, holding that use of tattoos was *de minimis*, fair use, and impliedly licensed.¹²

In the wake of Solid Oak's complaint, Cleveland tattooer Jimmy Hayden, who operates Focused Tattoos, brought his own suit against Take-Two and 2K Games. Hayden alleged infringement of six tattoo designs created for LeBron James, Tristan Thompson, and Danny Green.¹³ Factually, Hayden's allegations are nearly indistinguishable from those the court rejected in *Solid Oak*, but Judge Boyko of the Northern District of Ohio was hesitant to resolve them on summary judgment. The questions of *de minimis* use, fair use, and implied license were left for the jury, with a trial date set for May of 2023.¹⁴

Finally, tattooer Catherine Alexander filed her own infringement suit against Take-Two and 2K Games after tattoos she created for her client, professional wrestler Randy Orton, appeared in *WWE 2K*. Take-Two raised the same defenses it relied on in *Solid Oak* and *Hayden*, but their treatment was bungled by Judge Yandle of the Southern District of Illinois. First, the court refused to recognize the *de minimis* use defense.¹⁵ Second, despite both parties requesting jury instructions on the implied license defense, the court failed to provide them.¹⁶ And third, the court left the fair use determination entirely in the hands of the

12. *Solid Oak*, 449 F. Supp. 3d at 353.

13. *Hayden v. 2K Games, Inc.*, No. 17-cv-2635-CAB, 2022 WL 4356211, at *1 (N.D. Ohio Sept. 20, 2022).

14. Sarah Cascone, *Can Tattoos Be Reproduced in Video Games Without an Artist's Permission? An Ohio Jury Will Soon Decide*, ARTNET NEWS, (Sept. 22, 2022), <https://news.artnet.com/art-world/tattoo-video-game-fair-use-lawsuit-trial-2179617> [<https://perma.cc/GV23-AWFQ>].

15. The court doubted that the defense is recognized in the Seventh Circuit, but also rejected its application to these facts since the tattoos were copied in their entirety. *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 822–23 (S.D. Ill. 2020).

16. See Aaron Moss, *Tattoo Artist's Trial Win is a Loss for Bodily Autonomy, Free Speech*, COPYRIGHT LATELY (Oct. 2, 2022), <https://copyrightlately.com/tattoo-artist-trial-victory-copyright-lawsuit> [<https://perma.cc/8MYJ-XUXA>]; Civil Jury Instruction Chart, *Alexander v. Take-Two Interactive Software, Inc.*, 18-cv-00966-SMY (Sept. 30, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.ilsd.78396/gov.uscourts.ilsd.78396.300.0.pdf> [<https://perma.cc/4KLN-KHDJ>]. In an earlier order denying defendants' summary judgment motion, the court determined that there was "a triable issue of fact as to the existence and scope of an implied license," but nonetheless failed to present that question to the jury. 489 F. Supp. 3d at 820.

jury.¹⁷ As the Supreme Court recently clarified in *Google v. Oracle*, however, the “ultimate question” of fair use is a legal determination for the court, not a factual question for the jury.¹⁸ Nor did Judge Yandle offer the jury any opportunity to answer specific subsidiary questions of fact that could have aided the district court or future appellate courts in analyzing the fair use question.¹⁹ In the end, the jury determined Take-Two’s use was not fair, but awarded Alexander a mere \$3,750 in damages.²⁰

This Essay will consider the legal questions raised by this recent flurry of tattoo copyright disputes and their intersection with the industry norms I detailed in prior work.²¹ In particular, I argue that public displays, reproductions, derivative works, and other uses of tattoo designs fall within the scope of a broad implied license when they are employed to accurately depict the body of a tattooed person. Such licenses are widely—if not universally—accepted within the tattoo industry and an expected part of the bargain between the tattooer and her client. More fundamentally, a norm of bodily autonomy is at the core of tattooing as a social practice, and assertions of copyright are inconsistent with this central purpose. The attempted erosion of these norms, while it may serve the short-term interests of a handful of opportunistic plaintiffs, will likely do considerable harm to the tattoo industry more broadly by disrupting reasonable expectations, imposing new administrative costs, and exposing tattooers to greater legal risk.

I. IMPLIED LICENSES FOR TATTOOS

If the use of a copyrighted work is licensed, by definition, it is not infringing.²² Copyright licenses are often express, but they can also be implied by the conduct of the parties and the context

17. See Moss, *supra* note 16.

18. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1199 (2021).

19. See Moss, *supra* note 16.

20. *Id.*

21. Perzanowski, *supra* note 1.

22. See 17 U.S.C. § 106 (granting copyright holders the right to “authorize” uses that fall within their exclusive rights); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007) (a valid license “immunizes the licensee from a charge of copyright infringement,” provided that the licensee uses the copyright as agreed with the licensor.); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (the existence of a license, exclusive or nonexclusive, creates an affirmative defense to a claim of copyright infringement); *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) (“A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement.”).

of their dealings.²³ This Part considers the applicability of the implied license defense to tattoos, with a specific focus on their use in video games. It begins by examining whether the act of tattooing a client, informed by the underlying norms of the industry, supports the existence of an implied license. Next, it turns to the scope of that license, namely what uses it permits and whether it extends to third parties operating with the consent of the client. Finally, it analyzes the revocability of such licenses.

A. ESTABLISHING AN IMPLIED LICENSE

Implied licenses arise under a range of facts. Generally, they are created “where the copyright holder engages in conduct ‘from which the other party may properly infer that the owner consents to his use.’”²⁴ One common pattern for the formation of an implied license is “when one party (1) creates a work at another person’s request; (2) delivers the work to that person; and (3) intends that the person [exercise one or more exclusive rights to] the work.”²⁵ Defendants bear the evidentiary burden of establishing the existence of an implied license.²⁶ But “[w]here only the scope of the license is at issue,” the burden shifts to the copyright holder to show that the use falls outside of it.²⁷

On their face, tattoos would appear to fall squarely within the scope of the implied license doctrine. They are created at the client’s request. That’s true for both custom tattoos—where designs are crafted at the request and with the input of the client—and, to a lesser extent, for flash tattoos—where designs are readymade but placement, color, and execution will differ between

23. Exclusive licenses are considered transfers of ownership and must therefore be in writing. But nonexclusive licenses are not subject to that requirement. *See* 17 U.S.C. §§ 101, 204 (defining “transfer of copyright ownership” and requiring they be “in writing and signed by the owner of the rights conveyed”).

24. *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (citing *De Forest Radio Tel. Co. v. United States*, 273 U.S. 236, 241 (1927) (setting forth requirements for an implied license defense to a charge of patent infringement)) (cleaned up).

25. *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010); *see also* *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 757 (9th Cir. 2008); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990).

26. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995).

27. *Spinelli v. Nat’l Football League*, 903 F.3d 185, 197 (2d Cir. 2018) (quoting *Bourne*, 68 F.3d at 631); *Quinn v. City of Detroit*, 23 F. Supp. 2d 741, 749 (E.D. Mich. 1998).

clients.²⁸ In both cases, those works are delivered to the client in the form of the tattoo inked in their skin. While the law occasionally struggles to determine when a delivery has been made, a design physically and permanently embedded in a client's body is as clear as it gets.²⁹ Finally, the intent of the tattooer, evaluated by the objective circumstances discussed below, strongly indicates that an implied license is inherent in the act of tattooing a client.³⁰

Common sense dictates that clients who pay for tattoos expect to be free to engage in a range of behaviors that would normally implicate the exclusive rights of copyright holders. Clients display their bodies and tattoos publicly.³¹ They make reproductions of the tattoo design when, for example, they take photos and share them on social media, or when their friends and family do the same. They may appear in television, film, or other projects that feature their tattoos. And they may engage in the creation of derivative works when they add new tattoos to their bodies, or when they cover up or remove existing ones.³²

None of these scenarios come as a surprise to professional tattooers. They are well aware and nearly universally accepting of clients' desires to make these uses of their bodies. In the interviews I conducted with tattooers in my prior work, and in the dozens of conversations I've had with tattooers in the decade since, a consistent appreciation of and commitment to clients' bodily autonomy has been a recurring theme.³³ This client autonomy norm is deeply embedded not only in the relationship between tattooers and their clients, but in the underlying meaning and purpose of tattooing as a social and creative practice. As

28. Perzanowski, *supra* note 1, at 520–23.

29. *See, e.g.*, *In re Evans' Estate*, 356 A.2d 778 (Penn. 1976) (discussing how to ascertain delivery of a gift).

30. *Asset Mktg. Sys.*, 542 F.3d at 756 (“The relevant intent is the licensor’s objective intent at the time of the creation and delivery of the software as manifested by the parties’ conduct.”); *see also Effects Assocs.*, 908 F.2d at 558 n.6 (noting that “every objective fact concerning the transaction” supported the finding that an implied license existed).

31. The public display of a tattoo by a client is independently permitted under § 109(c) of the Copyright Act, which allows “the owner of a particular copy lawfully made under this title . . . without the authority of the copyright owner, to display that copy publicly.” 17 U.S.C. § 109(c). This provision, however, has little bearing on the scope of any implied license, since tattooers and clients are unaware of its terms.

32. Perzanowski, *supra* note 1, at 536–37.

33. *Id.*

one tattooer explained to me when I asked whether she had any right to control the display, reproduction, or other use of a client's tattoo:

It's not mine anymore. You own that, you own your body. I don't own that anymore. I own the image, because I have [the drawing] taped up on my wall and I took a picture of it. That's as far as my ownership goes. [Claiming control over the client's use of the tattoo is] ridiculous. That goes against everything that tattooing is. A tattoo is like an affirmation that it is your body . . . that you own your own self, because you'll put whatever you want on your own body. For somebody else to say, "Oh no, I own part of that. That's my arm." No, it's not your fucking arm, it's my fucking arm. Screw you.³⁴

That commitment to client autonomy extends to commercial uses of the clients' bodies. As another tattooer recounted, "I've had guys say, 'I'm getting ready to put out a CD and I want to put [a picture of my tattoo] on the CD cover.' That's flattering. As far as I'm concerned, they own their arm. They own that piece of work."³⁵

Industry norms may not be entirely dispositive in determining the objective intent of the parties, but they are certainly relevant.³⁶ Courts considering the existence of an implied license should "discern[] intent based on the totality of the circumstances"³⁷ and take into account "anything that colors [the parties'] conduct."³⁸ Where industry norms make clear that a particular use requires express permission, courts have rejected implied license defenses.³⁹ And where widespread industry practice suggests no express permission is expected, courts have embraced implied licenses. In *Effects Associates v. Cohen*, for example, the Ninth Circuit held that, in the absence of an express

34. *Id.* at 536.

35. *Id.* at 537.

36. Norms inform the creation of implied licenses outside of the copyright context as well. See *Prior v. White*, 180 So. 347, 355 (1938) ("No doubt one may visit another's place of business from no other motive than curiosity, without incurring liability, unless he is warned away by placard or otherwise." (quoting 2 *Cooley on Torts*, 4th Ed., p. 238, § 248)); see also *Florida v. Jardines*, 569 U.S. 1, 9 (2013) (acknowledging the role of "background social norms" in establishing an implied license to enter curtilage).

37. *Jeffrey A. Grusenmeyer & Assocs., Inc. v. Davison, Smith & Certo Architects, Inc.*, 212 F. App'x 510, 514 (6th Cir. 2007).

38. *Navarro v. Procter & Gamble Co.*, 515 F. Supp. 3d 718, 769 (S.D. Ohio 2021) (citing *Johnson v. Jones*, 149 F.3d 494, 500–01 (6th Cir. 1998)).

39. *Grant Heilman Photography, Inc. v. McGraw-Hill Companies, Inc.*, 28 F. Supp. 3d 399, 402 (E.D. Pa. 2014) (rejecting implied license defense where industry norms and practice indicated express permission was necessary).

license, a special effects maker impliedly licensed the use of footage that it created at the request of a film producer.⁴⁰ Given the reasonable expectations of the parties, delivery of the footage to the producer amounted to an implied license to reproduce and distribute it as part of the final film.⁴¹

Even more explicitly, the court in *Field v. Google* embraced the use of background norms to determine the objective intent of the parties to an implied license.⁴² Field posted some written musings about tea to his personal website and then sued Google for creating cached copies of his webpage as part of its automated indexing of billions of websites. Field's posts were not created or delivered to Google. Nonetheless, the court recognized an implied license for Google's use based on the widespread and well-known norms of internet publishing.⁴³ As the court explained, "Web site publishers typically communicate their permissions to Internet search engines (such as Google) using "meta-tags."⁴⁴ A Web site publisher can instruct a search engine not to cache the publisher's Web site by using a "no-archive" meta-tag[,] . . . a highly publicized and well-known industry standard."⁴⁵ Against this backdrop, by failing to affirmatively opt-out of the industry-wide default rule, Field's "conduct is reasonably interpreted as the grant of a license to Google."⁴⁶ As in *Field*, the widespread norms of the tattoo industry favoring client autonomy ought to guide courts' understanding of the objective intent communicated through the act of tattooing a client.

40. *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990).

41. The court rejected an argument rooted in industry norms with respect to Cohen's claim to own the copyright in the footage. *Id.* at 556. The notion that "moviemakers do lunch, not contracts" could not overcome the statutory requirement for a written transfer. However, the implied license defense can and should take industry practice and background expectations into account.

42. 412 F. Supp. 2d 1106 (D. Nev. 2006).

43. *Id.* at 1109.

44. *Id.* at 1116.

45. *Id.*

46. *Id.* See also Christopher M. Newman, "What Exactly Are You Implying?": *The Elusive Nature of the Implied Copyright License*, 32 *CARDOZO ARTS & ENT. L.J.* 501, 529–31 (2014) ("Sometimes we infer consent from conduct not necessarily because it seems to reflect the owner's actual intent, but because it is customary in a particular context to treat consent as the default."); John S. Sieman, *Using the Implied License to Inject Common Sense into Digital Copyright*, 85 *N.C. L. REV.* 885, 890–91 (2007) ("Google's decision whether to include individual web pages in its index and search results is based on a third type of opt-out system—one enforced only by community norms.").

Norms aside, the evidence in all three of the recent tattoo cases suggests that the tattooers subjectively recognized the existence of implied licenses. As mentioned above, the artists who actually created the tattoos at issue in *Solid Oak*, as opposed to the copyright troll who brought the lawsuit,⁴⁷ objected to the infringement claim and thought it “ridiculous.”⁴⁸ Even Hayden and Alexander, the plaintiffs in the other two suits, acknowledge the basic principle that tattooing a client entails the creation of an implied license. As Hayden stated in a declaration, “There are many ordinary examples in my clients’ lives that may involve showing the tattoos I have created and inked that I would not take issue with, including appearing in public, on stage or in a game, or being photographed, or even appearing on television, for example.”⁴⁹ Likewise, Alexander acknowledged under oath that her clients are free to display and reproduce their tattoos in photos, videos, and other media despite her never granting an express license for those uses.⁵⁰ In short, there is no room for reasonable disagreement as to the existence of implied licenses favoring tattoo clients. The only question is how we should understand their scope.

B. DEFINING THE SCOPE OF AN IMPLIED LICENSE

Copyright holders can narrow the scope of an implied license, but they cannot do so silently. To the extent they intend to constrict an implied license, they bear the burden of communicating any limits to the licensee.⁵¹ Silence cannot overcome the objective manifestation of intent that establishes the implied license.⁵² Hayden and Alexander, for example, may have subjectively intended to allow their clients to display and reproduce their tattoos in person, on television, and on social media while forbidding them from appearing in video games. But they failed

47. See Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 UNIV. COLO. L. REV. 53, 55–56 (2014) (defining “copyright troll”).

48. See Bailey, *supra* note 9; Gardner, *supra* note 9.

49. Hayden v. 2K Games, Inc., No. 17-cv-2635-CAB, 2022 WL 4356211 (N.D. Ohio Sept. 20, 2022), ECF No.109-49 at ¶ 29.

50. Defendant’s Motion for Summary Judgment, 142-17 at 182, Alexander v. Take Two, 2019 WL 8109809(S. D. Ill. Nov. 8, 2019).

51. Bourne v. Walt Disney Co., 68 F.3d 621, 631 (2d Cir. 1995); Spinelli v. Nat’l Football League, 903 F.3d 185, 197 (2d Cir. 2018); Quinn v. City of Detroit, 23 F. Supp. 2d 741, 749 (E.D. Mich. 1998).

52. *Spinelli*, 903 F.3d at 206.

to communicate any such limitations at the time. Indeed, Alexander testified that she never communicated to a client that they needed permission to appear in photographs, film or television projects, or video games.⁵³ In the absence of some clear communication, the plaintiff's subjective intent is irrelevant. What matters is what a reasonable client would understand based on the objective indicia of intent.

According to the Seventh Circuit in *LimeCoral. v. Career-Builder*, “[a]bsent a limitation imposed on the license at the time [the] works were delivered . . . , the license impliedly granted . . . would encompass all of the rights of . . . the copyright holder.”⁵⁴ When a copyright holder delivers the works “without any warning that their further use would constitute copyright infringement,” courts treat such use as falling within the scope of the implied license.⁵⁵ In other cases, courts have looked to the relevant norms and background facts to discern the scope of an implied license.⁵⁶

Industry norms and widespread behavior offer reliable indicators of tattooers' objective intent. Tattooers generally distinguish between uses of a tattoo that are connected to the client's body and uses that are divorced from it.⁵⁷ Whether noncommercial or commercial, tattooers consistently recognize a client's right to display, reproduce, and create derivative works of tattoo designs so long as those uses depict the client's body. Photographs—whether for personal use, social media, or a magazine spread—are covered by this bodily autonomy norm. Likewise, television and movie appearances don't require permission from the tattooer.

The litigation over Mike Tyson's face tattoo is a helpful illustration. Tyson appeared in boxing matches, magazines, ad

53. Defendant's Motion for Summary Judgment, *supra* note 50, at 65–66, 179–83.

54. *LimeCoral, Ltd. v. CareerBuilder, LLC*, 889 F.3d 847, 851 (7th Cir. 2018); *see also* *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010); *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 757 (9th Cir. 2008).

55. *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 777 (7th Cir. 1996); *Latimer*, 601 F.3d at 1235; *Asset Mktg. Sys.*, 542 F.3d at 757 (plaintiff “had to express an intent to retain control over the programs and limit [defendant]'s license if he intended to do so”).

56. *See, e.g.*, *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984). *See also* Mark Marciszewski, *Copyright, Tattoos, and Animated Likeness: Why Size Should Not Matter*, 29 TEX. INTELL. PROP. L.J. 85, 110 (2021).

57. *Perzanowski*, *supra* note 1, at 537.

campaigns, and the first *Hangover* film without any complaint from his tattooer, Victor Whitmill. It wasn't until *The Hangover II*, when Whitmill's design was placed on the face of another actor, that the use fell outside the scope of industry norms, and Whitmill filed suit.⁵⁸ Uses of the tattoo, whether made by Tyson or third parties, were permissible when they depicted Tyson's body. Only when the design was abstracted away from Tyson's body and placed on actor Ed Helms did Whitmill cry foul. This is consistent with prevailing industry norms. Placing a standalone tattoo design on a t-shirt or coffee mug would trigger skepticism and likely complaints from tattooers.⁵⁹ But a client with visible tattoos appearing on a t-shirt or coffee mug would not.⁶⁰

For the current crop of cases, the question is whether use of a tattoo in a video game is sufficiently connected to the client's body to fall within the scope of the autonomy norm. Unlike a public appearance or a television broadcast, a video game does not depict the real-time actions of the client. Video game avatars can be controlled and manipulated to create sequences of events that have not occurred in physical reality. Of course, given the power of editing, special effects, and computer-generated imagery, the same can be said about photographs and movies. Even though in-game imagery may not map perfectly onto real-world actions, video games are designed to accurately depict the bodies of professional athletes. Realism is an important consideration for consumers, who demand increasingly accurate and detailed recreations of their favorite sports.⁶¹ Team rosters, uniforms, arenas, music, crowd noise, and announcers are all faithfully recreated in the current generation of games.⁶² Likewise, developers go to great lengths to reproduce the likenesses of athletes. Those in-game depictions are created by combining an array of digital images to generate accurate three-dimensional avatars of each player, including their tattoos.⁶³ So while the medium may

58. See Belloni, *supra* note 2.

59. Perzanowski, *supra* note 1, at 537.

60. *Id.*

61. Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 349 (S.D.N.Y. 2020).

62. See Michael Abayomi, *7 Most Realistic Sports Games*, GAMER, (May 29, 2022), <https://www.thegamer.com/most-realistic-sports-games> [<https://perma.cc/3XVZ-P2ZR>].

63. Hayden v. 2K Games, Inc., No. 17-cv-2635-CAB, 2022 WL 2662865, at *1 (N.D. Ohio July 11, 2022) (quoting an expert report from Dr. Ian Bogost, who stated, "there is essentially no difference between the replication of the NBA Players' images with a digital camera, whether for a static or motion picture,

be different, the use is fundamentally connected to the client's body.

Any reasonable client would understand that such uses fall within the scope of the implied license established when the tattoo was initially created.⁶⁴ As LeBron James explained in a declaration filed in *Solid Oak*:

My understanding is that my tattoos are a part of my body and my likeness, and I have the right to have my tattoos visible when people or companies depict what I look like I always thought that I had the right to license what I look like to other people for various merchandise, television appearances, and other types of creative works, like video games In the fifteen years since I've been playing professional basketball, this case is the first time that anyone has suggested to me that I can't license my likeness without getting the permission of the tattooists who inked my tattoos. No tattooist has ever told me I needed their permission to be shown with my tattoos, even when it was clear I was a public basketball player.⁶⁵

That's not to say every use of a tattoo within a video game is necessarily covered by an implied license. In addition to realistically depicting Randy Orton's body, *WWE 2K* used the tattoos Alexander created in other ways. The game includes a feature that allows players to create and customize their own wrestler. From height, weight, and body type to hairstyles, clothing, and teeth, players can craft their own unique athlete from a dizzying number of options. The available customizations also include various tattoo designs players can place on their wrestler, among them the tattoos Alexander created for Orton.⁶⁶ The ability to apply Alexander's design to the body of a wrestler other than Orton would very likely fall outside of the client autonomy norm. A court looking to those norms to define the scope of an implied license would therefore be justified in concluding that particular use exceeded the scope of the license. In contrast, a court applying the rule from *LimeCoral*—that an implied license is unlimited in scope unless a restriction is articulated by the copyright

and the rendering of the NBA Players' likenesses in *NBA 2K*. Both involve making a digital file of electronic information to reproduce an image of the NBA Players.”).

64. See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 820 (S.D. Ill. 2020) (“Orton states that he understood the tattoos were his personal expression and that Alexander never told him he needed her permission any time his likeness would be shown with his tattoo visible.”).

65. Gardner, *supra* note 9.

66. Zvi Rosen, *Tattoos and Fair Use – The Alexander v. Take-Two Case*, MOSTLY IP HIST. (Oct. 6, 2022), <https://mostlyiphistory.com/2022/10/06/tattoos-and-fair-use-the-alexander-v-take-two-case> [<https://perma.cc/Y6PE-VCV4>].

holder from the outset—could still find the custom wrestler feature is impliedly licensed.⁶⁷

C. THIRD-PARTY USE UNDER AN IMPLIED LICENSE

Another question that bears on the scope of an implied license is the extent to which it can be exercised by third parties. Even if we agree that Randy Orton enjoys a license to display and reproduce his tattoos, why should the WWE, Take-Two, or any other entity benefit from that license? The short answer is consent.⁶⁸ The holder of an implied license can enlist third parties to aid in otherwise permissible uses of the underlying work. If Orton is licensed to reproduce the tattoo in a photo, for example, a strict requirement that he take that photo himself would frustrate the underlying purpose of the implied license.

As a practical matter, the widely accepted implied licenses tattoo clients enjoy to display and reproduce their tattoos already accommodate third-party-use. There is no “selfie only” limitation under prevailing industry norms. Friends, family, and professional photographers are all permitted to capture images of clients’ bodies with their consent. And social media sites, magazines, and advertisers are free to reproduce and display those images. The same is true for television and film appearances. When LeBron James starred in *Space Jam: A New Legacy*, no one—including his tattooers—suggested the producers, distributors, and exhibitors of the film needed express copyright licenses for his tattoos.⁶⁹ James enjoyed an implied license with respect to his tattoos, and he willingly appeared in the film. Without the ability to partner with third-party contributors, producers, and distributors of various sorts, an implied license for a tattoo would be nearly meaningless for famous people and have very limited value for everyday clients.⁷⁰

At times, courts have suggested that implied licenses only permit use by the person for whom the work was created and to whom it was delivered.⁷¹ In *I.A.E., Inc. v. Shaver*, for example,

67. *LimeCoral, Ltd. v. CareerBuilder, LLC*, 889 F.3d 847, 851 (7th Cir. 2018).

68. In the absence of Orton’s consent, a photographer or publisher would most likely need to rely on a fair use defense.

69. *SPACE JAM: A NEW LEGACY* (Warner Animation Group 2021).

70. See Newman, *supra* note 46.

71. The Ninth Circuit has stated that a licensee has “no right to resell or sublicense the rights acquired unless he had been expressly authorized so to do.” *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002) (quoting 3 Melville

the Seventh Circuit, following the Ninth Circuit in *Effects*, articulated a three-part test for an implied copyright license: “(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.”⁷² But these cases do not stand for the proposition that implied licenses cannot extend to third-party use. They merely reflect the facts of particular disputes that did not squarely raise the possibility of third-party use.

The reported decisions reveal that courts have generally been receptive to third-party uses of implied licenses. Indeed, the Ninth Circuit in *Effects* concluded without undertaking any additional analysis “that *Effects* impliedly granted nonexclusive licenses to Cohen and his production company to incorporate the special effects footage into ‘The Stuff’ and to New World Entertainment to distribute the film.”⁷³ New World, the firm that distributed the film, was a named defendant but had no relationship or communication with *Effects*. Nonetheless, its distribution of the film fell within the scope of the implied license *Effects* granted Cohen.⁷⁴ Presumably, that same analysis would

B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.01 (2001)). But that case addressed express rather than implied licenses. The Court cited no source of authority aside from the Nimmer treatise, which subsequently criticized the holding. 3 *Nimmer on Copyright* § 10.02 (2022) (suggesting “the district and circuit court rulings in *Gardner v. Nike* should not be followed”).

72. I.A.E., Inc. v. Shaver, 74 F.3d 768, 776 (7th Cir.1996) (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558–59 (9th Cir. 1990)); see also *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 755 (9th Cir. 2008); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1235 (11th Cir. 2010).

73. *Effects*, 908 F.2d at 559; see also Newman, *supra* note 46, at 547.

74. *Effects*, 908 F.2d at 559. See also *Latimer*, 601 F.3d at 1235 (implied license granted to manufacturer of customized motorcycles extended to third-party photographer hired by manufacturer); *Reinicke v. Creative Empire LLC*, 38 F. Supp. 3d 1192, 1205 (2014) (concluding plaintiff granted an implied right to sublicense where sublicensing effectuated the purpose of the underlying license); *Morgan v. Hawthorne Homes, Inc.*, 2009 WL 1010476, at *19 (W.D. Pa. 2009) (“An implied nonexclusive license is transferable”); *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 38 (S.D. Tex. 1978) (implied license to a Fire Department to reproduce a map included permission to order reproductions of the map from a third party printer); *Nat’l Ass’n for Stock Car Auto Racing, Inc. v. Scharle*, 356 F. Supp. 2d 515, 525–28 (E.D. Pa. 2005) (implied license to use drawings for creation of a trophy also included the subsequent use of the trophy by a third party); *Foad Consulting Group, Inc. v. Musil Govan Azzalino*, 270 F.3d 821, 832 (9th Cir. 2001) (implied license to reproduce and create derivative

extend to exhibitors, retailers, and others who displayed, distributed, or reproduced the film with Cohen's consent.⁷⁵

Crispin v. Christian Audigier, Inc. offers a more detailed analysis.⁷⁶ Crispin, a tattoo artist, created artwork for the clothing company Audigier, granting it an implied license to reproduce the artwork on apparel. Audigier in turn sublicensed the artwork without Crispin's express permission to New Life, which produced Audigier-branded condoms.⁷⁷ Crispin filed an infringement claim suit against Audigier and New Life. According to the court, the question was "whether the holder of a nonexclusive license must obtain the copyright holder's express permission to sublicense, or whether the right to sublicense can be implied."⁷⁸ Reconciling a number of Ninth Circuit precedents, the court concluded that express permission is not necessary when "the licensee sublicensed others to perform certain work necessary to effectuate the purpose of its own license."⁷⁹ In contrast, an implied sublicense cannot be found if it would "allow the sublicensee to use the intellectual property for a purpose wholly different from, and independent of, the purpose for which the licensee was granted its license."⁸⁰ In other words, the ability of third parties to rely on an implied license depends on its original scope. But there is no formalistic legal rule against sublicensing an implied copyright license.⁸¹

Applying the logic of *Crispin* to the video game litigation suggests that Take-Two is well-positioned to rely on the implied licenses acquired by athletes. Had Randy Orton or LeBron James worked with Trojan to develop a new line of condoms featuring their tattoos as ornamental package designs, Trojan would likely face liability. Under the terms of their implied licenses, the athletes are not entitled to make uses of their tattoos

works based on commercial development plan could be transferred to a third-party successor).

75. See also *Gracen v. Bradford Exch.*, 698 F.2d 300, 303 (7th Cir. 1983) (concluding that "although [licensee] was not expressly authorized to sublicense the copyright [to independent contractors who designed collector plates based on the Wizard of Oz], there can be no serious doubt of its authority to do so.").

76. *Crispin v. Christian Audigier, Inc.*, 839 F. Supp. 2d 1086 (C.D. Cal. 2011).

77. *Id.* at 1088.

78. *Id.* at 1094.

79. *Id.* at 1096 (citing *Foad*, 270 F.3d 821 and *Effects.*, 908 F.2d 555).

80. *Id.*

81. The court ultimately found a triable factual issue. *Id.* at 1097.

that are disconnected from their bodies, and licensees are powerless to transfer rights to third parties that they have not acquired themselves.⁸² But to the extent the video games—or the condoms, for that matter—depict the tattoos as part of the athlete's body, such uses are both within the scope of the initial license and properly sublicensable.

D. REVOCABILITY OF IMPLIED LICENSES

Typically, licensors are free to revoke the licenses they grant.⁸³ But there are at least two theories under which licenses can become irrevocable, precluding the rights holder from withdrawing their implied permission. Invoking a contract theory, several circuits have held that implied copyright licenses are irrevocable when the licensee has “paid consideration.”⁸⁴ According to this reasoning, “if an implied license accompanied by consideration were revocable at will, the contract would be illusory.”⁸⁵ Second, courts might analogize to real property licenses. In that context, courts have held that when a licensee makes investments in reasonable reliance on a grant of permission, the property owner is barred from revoking the license.⁸⁶

82. See, e.g., *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14 (2d Cir. 1976).

83. See *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 275 F. Supp. 2d 552, 558–59 (D. N.J. 2003) (no implied license to stream trailers beyond after notice from copyright holder); *Parker v. Yahoo!, Inc.*, 2008 WL 4410095, at *4 (E.D. Pa. 2008) (implied license revoked by filing lawsuit).

84. *Asset Mktg. Sys., Inc. v. Gagnon*, 542 F.3d 748, 756–57 (9th Cir. 2008); *Lulirama Ltd., Inc. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 882 (5th Cir. 1997); see also *LimeCoral, Ltd. v. CareerBuilder, LLC*, 889 F.3d 847, 851 (7th Cir. 2018) (determining that “[i]n view of [defendant’s] payment for the job brandings, its license would also be irrevocable”); *Avttec Sys., Inc. v. Peiffer*, 21 F.3d 568, 574 n.12 (4th Cir. 1994) (noting that “an implied license is necessarily nonexclusive and revocable absent consideration”); *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 947 (S.D.N.Y. 1997) (“If no consideration was given, the license was revocable . . .”).

85. *Asset Mktg. Sys.*, 542 F.3d at 757 (citing *Lulirama*, 128 F.3d at 882–83). But see Newman, *supra* note 46, at 521–22 (criticizing this view because a breach would entitle the licensee to a damages award).

86. See *Richardson v. Franc*, 233 Cal. Ct. App. 4th 744, 751 (2015) (“a license may become irrevocable when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in reasonable reliance on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor’s knowledge.”); *Stoner v. Zucker* 83 P. 808, 810 (Cal. 1906); *Kapp v. Norfolk S. Ry. Co.*, 350 F. Supp. 2d 597, 611–12 (M.D. Pa. 2004); *Morning Call, Inc. v. Bell Atl.-Pa., Inc.*, 761 A.2d 139, 144 (2000); *Huff v. McCauley*, 53 Pa. 206, 208 (1866); *Raritan Water Power*

Whether couched in terms irrevocability, estoppel, or easement, the upshot is the same.⁸⁷ The original licensor has no power to prevent the licensee's continued use.⁸⁸

Under either theory, implied licenses for tattoos should be deemed irrevocable. The freedom to display, reproduce, and distribute images of one's tattooed body is supported by ample consideration. Clients spend substantial sums on their tattoos, and while personal, private enjoyment of those images is a significant motivator, the expectation that others will see and appreciate them helps explain why clients are willing to pay tattooers hundreds of dollars an hour for their services. A client who was informed by their tattooer that depictions of their body would require permission, which could be unilaterally revoked at any time, would almost certainly choose to spend their money elsewhere.⁸⁹

Clients, particularly those whose likenesses are commercially valuable, also have strong reliance interests. Permanently altering your body on the assumption that you will continue to be able to appear in public, have your photo taken, and appear in various forms of media without obscuring or hiding your phys-

Co. v. Veghte, 21 N.J. Eq. 463, 475 (1869) ("Where improvements of a permanent nature have been made by a person on his own land, the enjoyment of which depends upon a right recognizable by the law, affecting the land of another, and to which his consent is necessary, and where such consent is expressly proved, or necessarily implied from the circumstances, and the improvements have been made in good faith upon it, equity will not permit advantage to be taken of the form of the consent . . . and to defeat such a purpose will, upon proper bill filed, enjoin the licensor from accomplishing his fraud.").

87. See *Richardson*, 233 Cal. Ct. App. 4th at 751 ("[T]he licensor is said to be estopped from revoking the license, and the license becomes the equivalent of an easement.").

88. Christopher Newman offers another property-based theory that reaches the same conclusion. See Newman, *supra* note 44, at 546. He argues that when a copyright holder creates works at a client's request and then transfers property in the form of physical copies of that work to the client "she creates a sort of easement appurtenant of which the dominant tenement is not the copy itself, but the productive enterprise in whose service the copy was created." *Id.* That interest is irrevocable "for as long as the specific project for which the work was created continues to be pursued." *Id.* See also *Wood v. Leadbitter* (1845) 153 Eng. Rep. 351, 355 ("A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.").

89. See *infra* Part II.

ical form is no less an act of reliance than constructing a driveway over your neighbor's property.⁹⁰ And for professional athletes, whose bodies are central to both their public personas and their livelihoods, the case is even stronger. For a wrestler like Randy Orton, who spends the majority of his public life shirtless, tattoos can become an essential aspect of his professional and commercial identity, one carefully crafted and managed over the course of decades. To deny him the right to make use of that identity by revoking an implied copyright license would be deeply inconsistent with his investment-backed expectations, to say nothing of his bodily autonomy. Regardless of the underlying legal theory, the only reasonable conclusion is that, if the client's use is within the scope of the initial implied license, tattooers are powerless to stop it.

II. THE RISKS OF FORMAL COPYRIGHT LAW

When it comes to resolving disputes over depictions of clients' tattooed bodies, the implied license doctrine is a natural fit. It recognizes the reasonable expectations of clients without disregarding tattooers' ongoing interest in controlling unrelated commercial exploitation of their designs. In the long run, maintaining a strong commitment to bodily autonomy serves the interests of both clients and the tattoo industry as a whole. Doing so through informal doctrinal tools, like implied licenses, is preferable to express licenses or other more formal copyright rules. Aside from a longstanding suspicion of legal authority within the industry, the imposition of formal copyright rules on tattooing is likely to increase the costs and legal risks inherent in this creative practice.⁹¹ Indeed, as described below, the self-interested lawsuits brought by plaintiffs like Alexander and Hayden threaten to jeopardize the livelihoods of tattooers across the United States.

From the client's perspective, bodily autonomy is the core purpose and a central underlying assumption of tattooing. Assertions of control by tattooers are, as a result, fundamentally short-sighted. When clients enlist tattooers to modify their bodies, questions of copyright ownership and licenses almost never cross their minds. Clients reasonably expect the freedom to display and reproduce images of their body in whatever way they see fit. Requesting permission or negotiating a license with their

90. See *Richardson*, 233 Cal. Ct. App. 4th at 751.

91. Perzanowski, *supra* note 1, at 569–70.

tattooer is a possibility that almost no client, regardless of their legal expertise, would consider. To the extent that lawsuits like those filed by Alexander and Hayden introduce the specter of copyright restrictions and liability, the appeal of a tattoo is reduced. If you have to worry about your tattooer filing a lawsuit against you or your business partners, you may decide to spend your money on a new haircut or a pair of overpriced shoes instead.

Why not address these risks through express licenses? For famous clients like LeBron James and Randy Orton, this might seem like a sensible solution. If you know or reasonably expect that your likeness will have commercial value, the certainty of a written agreement has some appeal. But the practical reality is more complicated. For one, many famous athletes get the bulk of their tattoos when they are young, well before they enjoy the wealth and easy access to quality legal advice that comes with an established career.⁹² Second, an express agreement runs the risk of undermining the strong implied license defense that exists under current industry practice.⁹³ If as a teenager LeBron James agreed to an express license that allowed him to show his tattoos while in NBA broadcasts, apparel ads, and Pepsi commercials, but was silent about movie roles, would he need to renegotiate before starring in *Space Jam*?

For the average non-celebrity client, express licenses make even less sense. They represent nontrivial transaction costs for tattooers, who would need to hire a lawyer, draft their own

92. See, e.g., Nick DePaula, *Inked Up: How NBA Players Embraced Tattoos and Changed the Game*, ANDSCAPE (June 1, 2022), <https://andscape.com/features/how-nba-players-embraced-tattoos-and-changed-the-game> [https://perma.cc/62KZ-VVQ5]; Gianna Alberti, *Skin in the Game: Athletes and Their Tattoos*, UNIV. PRESS (Oct. 27, 2021), <https://www.upressonline.com/2021/10/skin-in-the-game-athletes-and-their-tattoos> [https://perma.cc/H9AQ-ZLRN]; Mike Zacchio, *Tattoos Gain Acceptance Among Young Athletes* (June 19, 2016), LOHUD, <https://www.lohud.com/story/sports/basketball/2016/06/19/zacchio-tattoos-young-athletes/78538240> [https://perma.cc/C47Q-FY8H].

93. “[U]nder the principle of *expressio unius est exclusio alterius*, the omission of a particular covenant or term from a contract reduced to writing shows an intent to exclude it.” Bentley Funding Grp., L.L.C. v. SK & R Grp., L.L.C., 609 S.E.2d 49, 56 (Va. 2005) (citing First Nat’l Bank v. Roy N. Ford Co, 252 S.E.2d 354, 357 (Va. 1979)). Specifically, “copyright licenses are assumed to prohibit any use not authorized.” Viacom Int’l Inc. v. Fanzine Int’l Inc., 2000 WL 1854903, at *5 (S.D.N.Y. July 12, 2000) (citing S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989)); Gilliam v. Am. Broad. Cos., 538 F.2d 14, 21 (2d Cir. 1976) (a licensee’s authorized conduct is that which is “specifically empowered” by the terms of the license).

terms, or find a suitable boilerplate license in order to address a problem that arises only under exceptionally rare circumstances. Even raising the issue of copyright permission might be enough to scare some potential clients away or to disrupt the relationship of trust tattooers typically try to develop with long-term clients.⁹⁴

Opportunistic plaintiffs like Alexander and Hayden may see the promise of significant awards from deep-pocketed video game publishers, but that thus-far illusory potential comes at a price for the tattoo industry. Formal copyright rules not only reduce demand for tattoos and drive up transaction costs, they also expose tattooers to asymmetrical risks of liability. A tattoo appearing in a video game is an exceedingly rare occurrence. There are well over 100 million Americans with at least one tattoo,⁹⁵ but only about 450 active players in the NBA.⁹⁶ So the chances of a tattooer hitting the proverbial lottery when their client's likeness is reproduced by a company like Take-Two is vanishingly small.

Far more likely, however, are the odds that a tattooer has reproduced copyrighted material in the course of tattooing a client. Thousands of times every day across the United States, tattooers are given reference images by their clients.⁹⁷ These include photographs, paintings, illustrations, album covers, advertisements, team logos, stills from films, poems, and lyrics, among other copyrighted works. Some clients want these works reproduced in exacting detail. Others offer them as sources of inspiration. Many tattooers are more than happy to faithfully reproduce a photograph of your favorite singer, while some prefer to create original artwork. Regardless of individual preferences, reproducing and creating derivative works based on these sorts of reference materials is commonplace.⁹⁸ As Ed Hardy, one

94. Perzanowski, *supra* note 1, at 538.

95. Chris Jackson, *More Americans Have Tattoos Today than Seven Years Ago*, IPSOS (Aug. 29, 2019), <https://www.ipsos.com/en-us/news-polls/more-americans-have-tattoos-today> [<https://perma.cc/XV5X-9ZD4>].

96. Steven G., *How Many Players Are in the NBA? The Ultimate Guide*, Coaching Kidz (last accessed Feb. 7, 2023), <https://coachingkidz.com/how-many-players-are-in-the-nba> [<https://perma.cc/YE4M-M9JG>].

97. See Hannah Denham, *More Indelible than Ink: Tattoo Businesses Flourish Again*, WASH. POST (May 18, 2021), <https://www.washingtonpost.com/business/2021/05/18/tattoo-pandemic-artist-business> [<https://perma.cc/A6TD-RM58>].

98. A look at the Instagram account of Jimmy Hayden reveals tattoos of copyrighted material ranging from comic book characters to professional sports

of the early pioneers of contemporary tattooing, explained, “tattooing is the great art of piracy. . . . Tattoo artists have always taken images from anything available that customers might want to have tattooed on them.”⁹⁹

Even the most litigious of copyright holders have traditionally ignored the use of their works in tattoos.¹⁰⁰ In part, that reflects a desire to avoid alienating their most dedicated fans. But it also reflects the economics of litigation. With limited prospects of significant recovery against individual tattooers, there has been little incentive for companies like Disney or Warner Bros. to identify and pursue potential infringers.

That economic calculus may be on the verge of shifting. First, the introduction of the Copyright Claims Board (CCB) offers a new, low-cost mechanism for copyright holders to assert claims without undertaking expensive litigation in federal court. It remains too early to say what the impact of the CCB will be, but if plaintiffs recover significant sums, it could emerge as an attractive tool for targeting tattooers.¹⁰¹ Second, if media companies see the litigation against Take-Two as a threat to their own releases that feature tattooed actors, musicians, and athletes, they may well adopt a less forgiving stance when it comes to the widespread use of copyrighted references in tattooing. And unlike tattoos, which are almost never timely registered, movies, comic books, and video games will qualify for copyright’s punishingly high statutory damages.¹⁰²

The more formal copyright law intrudes into the tattoo industry, the more likely tattooers are to suffer the consequences. One recent high-profile case illustrates this problem. Jeff Sedlik, a professional photographer, sued Kat Von D, arguably the most famous tattooer in the United States, for creating a tattoo that

logos. See Jimmyblu, INSTAGRAM, <https://www.instagram.com/jimmyblu> [<https://perma.cc/KN4Q-JLSH>].

99. Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in WRITTEN ON THE BODY 243 (Jane Caplan ed., 2000).

100. Perzanowski, *supra* note 1, at 564–66.

101. The Board can resolve disputes of up to \$30,000., *Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/small-claims> [<https://perma.cc/7Z7J-Q29M>].

102. 17 U.S.C. § 504(c) (permitting statutory damages up to \$150,000 per work infringed).

used Sedlik's photo of Miles Davis as a reference.¹⁰³ Von D acknowledges that the tattoo was based on Sedlik's image, but contends that her use was fair.¹⁰⁴ An image of Miles Davis on a client's body arguably conveys a different meaning than that same image reproduced in a magazine, reflecting the client's admiration of the subject. Moreover, Von D contends that her execution of the tattoo, which added "waves of smoke around the perimeter of Miles Davis's hair and hand" contributed to a melancholy sentiment absent from the original image.¹⁰⁵ On the question of market harm, Sedlik claims that he has been approached about licensing the image for tattoos in the past, but acknowledges that Von D's use has not harmed the primary licensing market for the photograph.¹⁰⁶ But before a jury could hear the case, the court issued a stay pending the Supreme Court's resolution of *Warhol v. Goldsmith*, a case that will no doubt shape the fair use analysis.¹⁰⁷ Regardless of the ultimate outcome, the Kat Von D litigation illustrates the asymmetrical risks of strict copyright enforcement for the tattoo industry. Given the fact-intensive nature of the fair use inquiry, future litigation against tattooers will remain a threat.

The tattoo industry is not immune from the normal rules of copyright law. But it involves values beyond copyright's typical economic incentives. When works are incorporated into the human body, the standard restrictions and remedies imposed by copyright law take on new significance because they directly regulate clients' freedom to live their lives, ply their trades, and make themselves visible in the world. Before tattooers attempt to use copyright law to cash in on their clients' likenesses, they should reflect on the likely consequences of that strategy.

103. Aaron Moss, *Kat Von D Tattoo Lawsuit Appears Headed to a Jury*, COPYRIGHT LATELY, (June 2, 2022) <https://copyrightlately.com/kat-von-d-tattoo-lawsuit-appears-headed-to-a-jury> [<https://perma.cc/3BKD-LKZW>].

104. *Sedlik v. Drachenberg*, 2022 WL 2784818 (C.D. Cal., May 31, 2022). She also argues that work is not infringing. The court determined that there were triable issues of fact on the issue of substantial similarity. *Id.*

105. *Id.*

106. *Id.*

107. See *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 142 S. Ct. 1412 (2022).