

## Tattoo Copyrights May Finally Get Their Day In Court

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After more than a decade of conjecture, debate and closed-door settlements, a tattoo copyright infringement lawsuit may finally go to trial. On Feb. 1, 2016, licensing company Solid Oak Sketches LLC filed a complaint against Visual Concepts LLC, 2K Games Inc. and Take-Two Interactive Software Inc. for copyright infringement in the U.S. District Court for the Southern District of New York.



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Solid Oak is the exclusive licensor of tattoos displayed on the bodies of National Basketball Association players who appear in the "NBA 2K16" video game. The company entered into copyright licensing agreements with tattoo artists Shawn Rome, Justin Wright and Tommy Ray Cornett. These artists have inked tattoos on some of the NBA's star players, namely LeBron James, Eric Bledsoe and Kenyon Martin. The players appear in the video game, including the cover, and in advertising for the game. The tattoos are displayed and visible on the players' bodies. Accordingly, Solid Oak alleges that the developers, marketers and distributors of the "NBA 2K16" video game are infringing its exclusive right to publicly display its copyrighted tattoos. With much of the copyright world now watching, not to mention those living at the crossroads of the sports and gaming worlds, the courts are about to weigh in — finally.

Federal copyright law protects original works of authorship fixed in any tangible medium of expression. Tattoos are copyrightable works because they meet the two requirements of copyrightability: originality and fixation. The U.S. Supreme Court set forth the modern standard of originality, which is composed of two modest requirements of independent creation of the work by the author and a minimal level of creativity. The tattoos at issue in the Solid Oak lawsuit seem to meet the "minimally creative" requirement. If the tattoo artists who assigned their rights to Solid Oak independently created their works, meaning that they did not actually copy the tattoos from another source, then they are original. The tattoos are fixed in a tangible medium of expression — the human body (and possibly on paper before the human body). Therefore, the requirements of copyrightability appear to be satisfied.

Federal copyright law classifies copyrightable works into several categories. Tattoos are categorized as pictorial, graphic and sculptural ("PGS") works. In fact, Solid Oak cites my first article on the copyrightability of tattoos, "The Challenges 'Facing' Copyright Protection for Tattoos" (Oregon Law Review, Vol. 92, 2013), as support for this proposition. Tattoos are not subject to any exclusions from this category of copyrightable subject matter so tattoos are copyrightable PGS works.

This lawsuit is the latest of a number of tattoo copyright lawsuits filed in the past several years. A 2011

lawsuit concerning one of the most well-known tattoos in this country — the tattoo on the face of former heavyweight champion (and, among other things, actor) Mike Tyson — likely motivated other tattoo artists to become more aggressive in the enforcement of their rights. Tattoo artist S. Victor Whitmill sued Warner Bros. Entertainment Inc. for the company's reproduction of the tattoo onto the face of another actor in the movie "The Hangover Part II" and further reproduction, distribution, and public display of the tattoo in promotion and advertising of the movie. Although the judge denied Whitmill's aggressive motion to enjoin distribution of the movie, she stated that tattoos are copyrightable and acknowledged that Whitmill had a strong likelihood of prevailing on his copyright infringement claim. Shortly thereafter, the parties reached a settlement and dismissed the case.

Since that time, other tattoo artists have sued video game developers, marketers and distributors for copyright infringement based on reproduction, distribution, and display of the artists' tattoos on the bodies of professional athletes who appear in these video games. In December 2012, tattoo artist and copyright owner Stephen Allen filed a complaint against Electronic Arts Inc. and former National Football League player Ricky Williams because tattoos on Williams' arms appeared in EA's video games. The parties dismissed the case in April 2013. In November 2012, tattoo artist Christopher Escobedo filed a similar lawsuit against THQ Inc. Escobedo alleged copyright ownership of a lion tattoo on the ribcage of professional mixed martial artist Carlos Condit, and Escobedo claimed that THQ infringed his copyright when Condit, and the tattoo, appeared in two of the UFC Undisputed video games. Subsequently, THQ filed bankruptcy. The bankruptcy court awarded \$22,500 to Escobedo. Escobedo appealed the award, and then the parties reached an undisclosed settlement.

Prior to filing suit, Solid Oak attempted to negotiate a licensing agreement with Take-Two, but the parties failed to reach an agreement. In fact, Solid Oak used Escobedo's \$22,500 award and Take-Two's publicly available sales information as the basis for the calculation of its licensing fee for Take-Two. Unlike the other lawsuits, the plaintiff is a licensing company, instead of a tattoo artist, and the company made multiple attempts to negotiate with the defendants before filing a lawsuit. Solid Oak has less of a personal connection to the copyrighted works at issue and a sour history with the defendants. Perhaps this will be the case that does not settle.

If this case proceeds to trial and Solid Oak succeeds in establishing its tattoos as copyrightable works and enforcing its rights in those works against the defendants, then there will be more tattoo copyright lawsuits to come. Once a court finds a company, especially a highly publicized video game manufacturer, developer or marketer, has infringed a tattoo copyright, other copyright owners will be more vigorous in the enforcement of their rights.

Unfortunately, the tattoo industry has been historically reluctant to rely on the legal system and those norms are unlikely to change anytime soon. So, even with a favorable Solid Oaks outcome, I would not expect to see a flood of new tattoo-artist-driven lawsuits. However, a visible and prolonged court proceeding, regardless of outcome, would encourage companies to negotiate more quickly with those tattoo copyright owners who assert their rights to license tattoos like any other copyrightable works used by third parties. While Solid Oak could not reach such an agreement prior to the lawsuit, companies will be surely motivated to agree to more generous licensing fees if they know tattoo copyright owners will file copyright infringement lawsuits and potentially prevail.

Having the courts engage in this matter is arguably the best way to establish a set of operating principles for digital game developers to work with (rather than against) the artists and players upon whom the industry has become so heavily reliant.

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