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Dunked in Ink: Ohio Jury Rules in Favor of Implied License Copyright Defense



A jury in the Northern District of Ohio found that defendants 2K Games, Inc. and Take-Two Interactive Software, Inc. had an implied license to recreate NBA players' tattoos in the avatars of the video game NBA 2K. This is a summary of the April 19, 2024, decision and an examination of the intersection of copyright law, tattoos, and video games.

How It Started

Tattoo artist and co-owner of Focused Tattoos Jimmy Hayden has inked the tattoos of several famous NBA players and registered copyrights in those tattoos. In December 2017, Hayden sued defendants over the use of tattoos he made for LeBron James, Danny Green, and Tristan Thompson, which were reproduced on the players' avatars in a video game made by Take-Two: NBA 2K.^[1] Hayden originally asserted six tattoos.^[2] One of defendants' affirmative defenses was fraud, asserting that four of Hayden's copyright registrations contain inaccuracies because they incorporate pre-existing works or lack originality to warrant their own registration.^[3]

Defendants argued that they received permission from players James, Thompson, and Green to include their tattoos on the avatar in making the video game such that returning a verdict in favor of Hayden would undercut a player's ability to license his own likeness.^[4] That permission, the exhibits mention, comes from the voluntary scanning of the players by photogrammetry into the game. Indeed, one executive's declaration explains that the NBA players granted the NBA and the NBA Players Association "the right to license their likenesses to third parties," which, in turn, granted Take-Two a license to use the players' likenesses in the video game NBA 2K.^[5]

In February 2021, the court ordered the parties to submit briefing on the "impact of the U.S. Supreme Court case" *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, which had been argued in October 2022 but not yet decided.^[6] *Warhol* involved the fair-use defense and an alleged copier's "transformative" use in copyright cases.^[7]

In May 2023, after reviewing the parties' trial briefs, the court continued the case until further order, as it then asked the parties for questions to submit to the U.S. Copyright Office pursuant to 17 U.S.C. § 411 in light of defendants' fraud defense.[\[8\]](#)

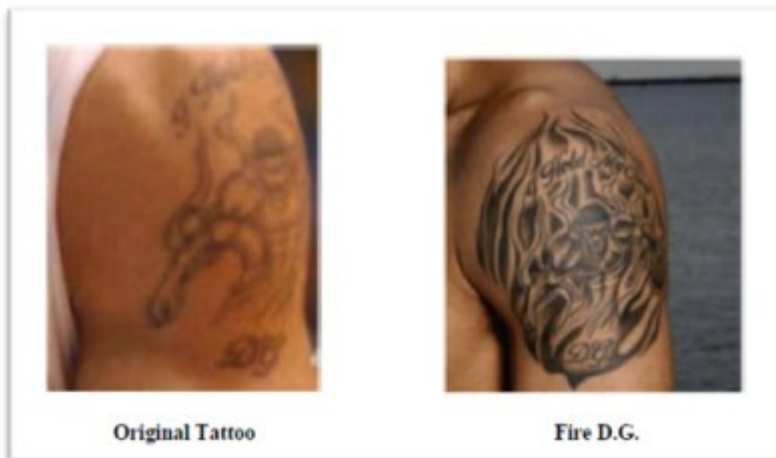
The Copyright Office's Response

The factual issues underlying defendants' defense precluded a full entry of summary judgment. Indeed, the court referred several of the parties' questions to the Register of Copyrights to assess whether each of the four challenged tattoos—those challenged for fraud—would have been registered if it was known "that the application was based upon or incorporated preexisting material."[\[9\]](#) Counsel from the U.S. Department of Justice appeared on the Register's behalf in August 2023.[\[10\]](#)

First, the "Lion" tattoo inked on LeBron James in 2008 was registered with the Copyright Office in September 2016. For this piece, LeBron had brought Hayden his own picture of what he wanted inked and requested that Hayden do something similar. It was inspired by the Venetian Resort's logo.



Second, the "Fire D.G." tattoo inked on Danny Green in 2012 was registered in August 2017 and subject to a supplementary registration filed in July 2019 on the "flames" design, creation, and placement of the larger piece.



Third, the "Scroll D.G." tattoo inked on Danny Green in 2012 was registered in August 2017 and subject to a supplementary registration filed in July 2019 on the "design elements around the scroll."



For both the Scroll D.G. and Fire D.G. pieces, Hayden added to existing tattoos inked by another artist.[\[11\]](#)

Fourth, the "Brother's Keeper T.T." tattoo inked on Tristan Thompson in 2012 was registered in August 2017. Hayden did not exclude Michelangelo's "Creation of Adam" work from his application, although it inspired the piece.



Ultimately, the Register responded that it "would not have registered the tattoo designs if it had known" that there was an "appreciable amount" of public domain material or third-party material, which was not excluded by the applicant from registration.[\[12\]](#) The Register added that Hayden may file supplementary registration applications to properly exclude the unclaimed material. The court, however, found that such supplementations would have an effective date of July 30, 2019—almost two years after the suit was filed. Furthermore, the court was unpersuaded that Hayden did not know that public domain material needed to be excluded, in part because a law firm filed the applications, and there are significant guidance materials available.[\[13\]](#)

In light of this evidence, Judge Christopher Boyko excluded the four challenged tattoos from the suit, thereby limiting the action to two tattoos.

The parties ultimately arrived at trial in April 2024.

Trial

During the trial, Hayden's counsel acknowledged that Hayden had been compensated for the use of the tattoos. For example, Hayden provided that Warner Bros. compensated him when LeBron James appeared in the movie "Space Jam 2."[\[14\]](#)

The jury found that defendants proved, by a preponderance of the evidence, that they had an implied license and ruled in defendants' favor.[\[15\]](#)

This case is not the first time that the issue of tattooed avatars (representing real people) in video games has been litigated for copyright infringement.

The First Suit for Take-Two

In 2016, another company sued Take-Two over the use of tattoos on players LeBron James, DeAndre Jordan, Eric Bledsoe, and Kenyon Martin in a video game. The company said it had licensing agreements for the tattoos. The judge found that each of the fair-use factors weighed in favor of the fair-use defense, and Take-Two won this suit.[\[16\]](#) First, the court found that the use of the tattoos in the game were transformative because the purpose of the tattoo designs differed "entirely" from their original purpose of expression through body art.[\[17\]](#) Second, the court found that the "reduction in size" of the tattoos in the video game made them too small and distorted to recognize or observe. Third, the tattoos' expressive value was minimized by the game because the tattoos are just one of many elements and only serve to recreate the players' likeness. Fourth, the court found that the tattoos were inconsequential and do not appear on most players. Finally, while the video game's purpose was commercial, and so were the original tattoos, the game's marketing materials did not feature the tattoos and thus, were merely incidental to the game's value.

The Second Suit for Take-Two

In 2022, a different tattoo artist sued Take-Two for its use of five tattoos she inked on professional WWE wrestler Randy Orton that appeared in a WWE 2K video game. The jury entered a verdict in her favor with monetary damages after finding that defendants' use of the tattoos in the video game was not fair use.[\[18\]](#)

The Second Suit for Hayden

The parties in this most recent case are not strangers. Hayden has a pending lawsuit against the same defendants for their use of the tattoos he inked on LeBron James, Danny Green, and Tristan Thompson in the video game NBA 2K21—a later version of the game described above. This case was stayed pending the outcome of the April 2024 trial involving earlier NBA 2K video games. Judge Boyko decided against consolidating the cases because the plaintiff's motion was submitted too late, and Hayden possessed information about NBA 2K21 to have timely asserted it.[\[19\]](#)

Other Tattoo and Video Game Cases

In 2012, a tattoo artist sued Electronic Arts over the use of a tattoo inked on former NFL player Ricky Williams, which was reproduced in the video game NFL Street. The complaint was mailed to the Register of Copyrights.[\[20\]](#) The case was voluntarily dismissed by the artist, Allen.[\[21\]](#) The next year, a different tattoo artist, Escobedo, sued THQ for a tattoo he inked on fighter Carlos Condit, which appeared in the video games UFC Undisputed 2 and 3.[\[22\]](#) The case was dismissed from the District of Arizona with prejudice for failure to prosecute, but THQ removed the tattoos from Condit's character in the game and shortly thereafter filed for bankruptcy in U.S. Bankruptcy Court for the District of Delaware.[\[23\]](#) Interestingly, THQ challenged the merits of the tattoo artist's copyright claim in filings before the Bankruptcy Court, and the tattoo artist also responded and objected to THQ's debtor motion.[\[24\]](#)

In these cases, the players whose tattoos are at issue can submit affidavits for consideration. For example, LeBron has made clear that he often supplies pre-existing material to the artists of his tattoos, which is a fairly common practice.[\[25\]](#) He previously testified that:

My understanding is that the 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 I had the right to license what I look like to other people...My tattoos are a part of my personal identity; if I am not shown with my tattoos, it wouldn't really be a depiction of me.[\[26\]](#)

These types of tattoo cases have become common enough that the NFL Players Association began advising players to get copyright waivers from their tattoo artists.[\[27\]](#) A similar handoff happens in basketball; the NBA players license their likeness to the NBA and NBA Players Association, which, in turn, license the likeness to Take-Two.[\[28\]](#)

What About the Right to Publicity?

On one side of the court is the tattoo artist, and on the other side is the video game maker. Missing from the suit is the player whose skin is in the game, yet these cases affect the sports stars and their right to publicity.

These cases raise a series of interesting questions. What is the balance between artists' rights and the rights of celebrities and video game manufacturers? Can a tattoo artist's copyright prevent their inked customer from commercial opportunities, like being recreated as an avatar in a video game? If so, how often would the inked customer have to seek their artist's permission to be seen in public with the piece?

These questions implicate the right of publicity, which is governed by state law right.[\[29\]](#) The common law right of publicity "grants celebrities an exclusive right to control the commercial value of their names and to prevent others from exploiting them without permission."[\[30\]](#) Essentially, it is the inherent right to control the commercial use of one's own identity.[\[31\]](#) At least one scholar has discussed that the right of publicity and First Amendment applies to tattoos.[\[32\]](#) While there are not yet clear answers, each verdict or decision builds to the growing body of law.

Takeaways

These cases demonstrate the increasing frequency with which courts are hearing cases involving the intersection of tattoos and copyright law. It also underscores a growing complexity between copyright ownership, right of publicity, and contract law. As recommended by the NFL Players Association, professional sports players should seek copyright waivers from their tattoo artists. Indeed, a greater percentage of NBA players have tattoos than American adults (56% versus 35%), although millennials are inked at higher rates (47%), closer to the statistics of NBA players.[\[33\]](#) But this logic applies more broadly to any social media influencer, public figure, or celebrity.

For those individuals who have already been inked without an explicit contract and then find their likeness subject to a copyright infringement suit, the most recent verdict suggests that defendants (in these cases, the video game makers) should raise an implied license affirmative defense. Since the defense of a license is "implied," inked customers should testify about their right to display their tattoos and the process of how they conceived of and sought out their tattoos.

For applicants seeking to register a copyright, it's important to consider whether any of the art that inspired the work should be explicitly excluded from registration, whether the client provided their own ideas for the piece,

or if the piece includes public domain material or material owned by another. A possible solution for inaccuracies may include filing a later supplemental registration, but that could affect the timing for asserting an infringement claim.

Endnotes

[1] Nicole Carpenter, [Take-Two wins lawsuit over LeBron James' tattoos](#), *Polygon* (April 19, 2024).

[2] *Hayden v. 2K Games, Inc.*, Complaint, D.I. 1, Case No. 1:17-cv-2635 (N.D. Ohio Dec. 18, 2017).

[3] *Hayden v. 2K Games, Inc.*, Opinion and Order, D.I. 251 at 3-5, Case No. 1:17-cv-2635 (N.D. Ohio Jan. 24, 2024).

[4] *Hayden v. 2K Games, Inc.*, Memorandum Of Law In Support Of Defendants 2k Games, Inc. and Take-Two Interactive Software, Inc.'s Motion For Summary Judgment, D.I. 101-1, Case No. 1:17-cv-2635 (N.D. Ohio Oct. 25, 2021).

[5] *Hayden v. 2K Games, Inc.*, Memorandum Of Law In Support Of Defendants 2k Games, Inc. and Take-Two Interactive Software, Inc.'s Motion For Summary Judgment, D.I. 101-5, Case No. 1:17-cv-2635 (N.D. Ohio Oct. 25, 2021).

[6] *Hayden v. 2K Games, Inc.*, Amended Scheduling Order, D.I. 202 at 2, Case No. 1:17-cv-2635 (N.D. Ohio Feb. 1, 2023).

[7] Wills & Holt, *The Legal Future of Tattoos: A Jury Rules Against Copyright Infringement*, *JD Supra* (Feb. 12, 2024).

[8] *Supra* note 3.

[9] *Supra* note 3.

[10] *Hayden v. 2K Games, Inc.*, Notice of Filing the Response of the Register of Copyrights, D.I. 231, Case No. 1:17-cv-2635 (N.D. Ohio Aug. 21, 2023).

[11] *Supra* note 3.

[12] *Hayden v. 2K Games, Inc.*, Response of the Register of Copyrights To Request Pursuant to 17 U.S.C. § 411(b)(2), D.I. 231-1, Case No. 1:17-cv-2635 (N.D. Ohio Aug. 21, 2023).

[13] *Supra* note 5, at 10-14.

[14] *Supra* note 1.

[15] *Hayden v. 2K Games, Inc.*, Special Interrogatories and Verdict Forms, D.I. 336, Case No. 1:17-cv-2635 (N.D. Ohio Apr. 19, 2024).

[16] Good, [LeBron James' tattoos get NBA 2K16 maker sued for copyright infringement](#), *Polygon* (Feb. 2, 2016).

[17] *Solid Oak Sketches, LLC v. 2K Games, Inc.*, Memorandum Op. and Order, D.I. 164, Case No. 1:16-cv-724 (S.D.N.Y. 2020).

- [18] *Alexander v. Take-Two Interactive Software, Inc.*, Verdict Form, D.I. 298, Case No. 3:18-cv-966 (S.D. Ill. 2022).
- [19] *Hayden v. 2K Games, Inc.*, Order, D.I. 245, Case No. 1:17-cv-2635 (N.D. Ohio Oct. 27, 2023).
- [20] *Allen v. Elecs. Art, Inc.*, Report, D.I. 3, Case No. 5:12-cv-03172 (W.D. La. 2013).
- [21] Corriea, [Tattoo artist suing EA over replication of NFL player's tattoos in 2004 game](#), *Polygon* (Jan. 10, 2013).
- [22] *Escobedo v. THQ Inc.*, Case No. 2:12-cv-2470 (D. Ariz. 2012).
- [23] Farokhmanesh, [Tattoo artist sues THQ over UFC Undisputed 3](#), *Polygon* (Nov. 17, 2012); see also [Chiappardi, Game Co. THQ Wants \\$4M Tattoo IP Claim Out Of Ch. 11 Vote](#), *Law360* (June 26, 2013).
- [24] *In re THQ Inc.*, Case No. 12-cv-13398, D.I. 784, Debtors' Motion For Entry Of An Order Estimating The Claim Filed By Christopher Escobedo For All Purposes And Establishing Disputed Interim Distributions Reserve With Respect Thereto (D. Del. Bankr. 2013); see also D.I. 867, Response And Objection To Debtor's Motion For Entry Of An Order Estimating The Claim Filed By Christopher Escobedo For All Purposes And Establishing Disputed Interim Distributions Reserve With Respect Thereto (D. Del. Bankr. 2013).
- [25] Wills, That Tattoo on Her Shoulder: The Intersection of Copyright Law & Tattoos, 7 *Tex. A&M J. Prop. L.* 622, 633-34 (2021).
- [26] *Solid Oak Sketches, LLC v. 2K Games, Inc.*, Declaration of LeBron James, D.I. 134, Case No. 1:15-cv-724 (S.D.N.Y. Aug. 24, 2018).
- [27] Raustiala & Sprigman, [Whose tattoo is it anyway?](#), *LA Times* (Oct. 6, 2013).
- [28] *Supra* note 5.
- [29] *Infra* note 35 (citing Louis Altman & Malla Pollack, Callman On Unfair Competition, Trademarks & Monopolies § 22.32 (Thomson Reuters 4th ed. 2015)).
- [30] *Infra* note 35 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1003–04 (2d Cir. 1989)).
- [31] *Infra* note 35 (citing J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (Thomson Reuters 2015)).
- [32] King, The Right-Of-Publicity Challenges for Tattoo Copyrights, 16 *NEV. L.J.* 441 (April 1, 2016).
- [33] McCann, [Judge Rules in Favor of 'NBA 2K' Creators in Case Brought by Tattoo Artists](#), *Sports Illustrated* (Apr. 6, 2020).

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