

Judge Calls Game for 2K Games, Implicitly Gives NBA Players Greenlight to Show Off Tattoos

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by Ryan Meyer

Tattoos have been around since ancient times, all around the world, for over 5000 years. See [article](#). Nonetheless, it's probably fair to say that when Congress drafted each version of the Copyright Act, its members were thinking more about how to protect ink on the surface of paper rather than ink just below the surface of a living person's skin. Accordingly, it is interesting to see how courts apply copyright law to tattoo-related matters, such as in the recent *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA (S.D.N.Y. March 26, 2020). In that opinion, Judge Laura Taylor Swain dismissed a copyright claim that would have prevented video game companies from creating realistic, virtual depictions of famous, tattooed athletes without first obtaining a license from the owners of those tattoos. This was a win for persons having a tattoo in a displayable area, as well as companies who create images of those persons.

In *Solid Oak*, the plaintiff was not a tattoo artist or studio but a company that had exclusively licensed designs from tattoo artists that said tattoo artists had inked onto the bodies of NBA players Eric Bledsoe, LeBron James, and Kenyon Martin. Defendants 2K Games, Inc. and Take-Two Interactive Software depicted realistic digital representations of these players, complete with their tattoos, in their popular NBA 2K series of basketball simulation video games. Solid Oak filed suit alleging that these realistic digital depictions infringed their exclusive license to the copyrighted tattoos.



Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation

The Defendants had already attempted to dismiss Solid Oak's infringement claim twice—once in a motion to dismiss and again in a motion for judgment on the pleadings—but the Court denied both motions. The third time, a motion for summary judgment, turned out to be the charm. In a well-reasoned opinion, Judge Swain granted the motion and put an end to Solid Oak's win streak for three reasons.



First, the Defendants' use of the tattoos was *de minimis*. The NBA 2K games have about 400 available players, and the tattoos in question appear on only three players. The average game is unlikely to include any of those players. Even when they do appear, their tattoos are only 4.4% to 10.96% of their actual size and are generally distorted due to movement, shading, camera angles, etc. Thus, Judge Swain concluded that no reasonable fact finder could find that the Defendants' use of the tattoos was substantially similar to the copyrighted works.

Second, the Defendants have an implied license to include the tattoos when showing the

players' likenesses. The Court explained that when the players' requested the tattoos which were then designed by the artists and inked on to the players' skin, the tattoo artists knew and understood that the tattoos would be copied and distributed as part of the players' likenesses during public games, on TV, and in other media. The tattoo artists never attempted to limit these licenses, and they were granted before the tattoo copyrights were licensed to Solid Oak. Thus, when the players granted Defendants a right to include their likenesses in their games, this included the right to depict them with their tattoos.

Third, Defendants' use of the tattoos is protected by fair use. The Court noted that the tattoos were included in the games for the sole purpose of accurately depicting the players. Moreover, the tattoos appear only rarely in the game, and when they do they are small and very difficult to recognize, and at most incidental to the commercial value of the game. Moreover, none of the tattoo artists testified that the tattoos were unique or had particularly expressive features since they contained only common tattoo motifs or were copied from images that the artists did not create, such as a photograph of LeBron James's son. Since the Court also found that Defendants' use of the tattoos is unlikely to impact any market for the tattoos, all fair use factors weighed in Defendants' favor. Although Judge Swain's decision did not end with the sound of a buzzer, the season was over for Solid Oak. Thus, the Court averted a future where tattoo-concealing long-sleeve turtlenecks and tights became part of the standard NBA uniform.

Some might consider this to be a niche decision given the subject matter, but remember that about 30% of Americans have at least one tattoo, and the NBA 2K series, which is just one of many video game sports series, has sold many tens of millions of copies. Moreover, this decision has implications beyond realistic depictions of tattooed people in video games. Not only does it potentially relate to any person who uses their likeness as an asset and needs to be able to control it (e.g., professional athletes, actors, Instagram influencers, etc.), it also relates to broadcasters, sports associations, and other media companies, etc. who want, or need, to be able to portray people as they are, ink and all.