Fixation on Flesh: Why Tattoos Should Not Garner Copyright Protection

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INTRODUCTION

In a world where technology is advancing at a staggering rate,[1] intellectual property is becoming an ever more important area of legal practice.[2] This is especially evident when it comes to copyright law, as new technology has provided innovative ways for individuals to express themselves.[3] As technology has evolved and individuals have innovated new methods of expressing themselves, Congress has stepped in to ensure that such expressions are explicitly afforded sufficient copyright protection.[4] However, one method of expression in particular that has been around for centuries,[5] yet still has not received explicit protection by copyright laws in the United States, is human tattoos.[6]

Historically, there has been a social stigma surrounding permanent tattoos, which is a potential explanation for the lack of copyright protection for the form of body art up to this point.[7] Nonetheless, tattoos have become a very prominent form of expression and the social stigma that has historically surrounded them is no longer a concern for many people.[8] As a result of the rise in popularity of tattoos, many have posited that they should be protected by copyright laws.[9]

Indeed, since the turn of the 21st century, there have been a handful of lawsuits filed by tattoo artists (tattooists) asserting copyright infringement of the artwork that they tattooed onto other individuals.[10] In most of these cases, the tattoo in question was etched into the skin of a celebrity, and the celebrity subsequently entered into a business agreement allowing a company to exploit the celebrity's likeness.[11] As the celebrity's likeness includes his or her tattoos the company using the celebrity's likeness displayed the tattoo in some form or another.[12] As a result, the tattooists in these cases have sued the companies using the celebrities' likenesses for copyright infringement of the tattooed art.[13]

Examples of some of the more notorious cases addressing this issue include *Reed v. Nike, Inc.*, which revolved around a Nike advertisement featuring professional basketball player Rasheed Wallace;[14] *Whitmill v. Warner Bros. Entertainment Inc.*, which focused on the use of Mike Tyson's famous tribal tattoo in the movie *The Hangover Part II*;[15] and *Solid Oak Sketches, LLC v. 2K Games, Inc.*, which is still ongoing and is centered around the depiction of the tattoos of several professional basketball players, including LeBron James, in the NBA 2K video game series.[16] Due to the fact that these cases have involved high profile celebrities and athletes, there have been a large amount of attention and speculation about whether tattoos as depicted on human flesh can garner copyright protection.[17] Unfortunately for legal scholars, however, no court has ever decided the issue, as all cases surrounding the issue have either settled or remain ongoing.[18]

Due to the lack of legal precedent addressing this issue, this article will seek to establish that tattoos cannot be protected under the United States' current copyright laws. Part I will give an overview of the relevant facts of the three aforementioned cases. Part II will discuss the relevant copyright laws and argue why tattoos do not fit under them. Part III will discuss the policy implications that would result from affording tattoos copyright protection.

I. Unresolved Issue of First Impression: Do Tattooed Individuals Have the Right to Market Themselves?

Perhaps it is no coincidence that three of the most notorious instances of tattooists filing lawsuits for copyright infringement of their tattoos have involved athletes with celebrity status.[19] After all, athletes have a national audience, are often pursued by large companies to be the faces of advertising campaigns, and tattoos are highly prevalent among athletes.[20] Nonetheless, copyright laws do not take celebrity status into consideration, and thus affording copyright protection to tattooists for artwork that is tattooed on an individual could have widespread implications, regardless of the fame or notoriety of the individual receiving the tattoo. Thus, in analyzing this issue, it is helpful to look at the facts surrounding some previous cases to understand from what situations a tattoo infringement lawsuit is likely to arise.

A. 2005: *Reed v. Nike, Inc.*

The first of the three most well-known tattoo copyright infringement lawsuits this century is *Reed v. Nike, Inc.*[21] In that case, National Basketball Association (NBA) player Rasheed Wallace met with the plaintiff, Matthew Reed, to discuss a tattoo that Wallace hoped to get on his arm.[22] After discussing the details that Wallace wanted the tattoo to have, Reed drew up several sketches and after changes were proposed by Wallace, Reed presented a final sketch that suited Wallace.[23] Reed then created the tattoo stencil and completed the application of the tattoo to Wallace over a three-session period.[24]

In exchange for the tattoo, Wallace paid Reed $450, which, although Reed thought the fee was low for that tattoo, he "believed that he and his business would receive exposure as a result of the tattoo being on an NBA player."[25] Despite being well aware of the national spotlight that the tattoo would garner as a result of Wallace being an NBA player, there was never any discussion between the two parties regarding copyright ownership over the artwork.[26]

Upon completing the tattoo, Reed recalled seeing the tattoo on television while watching Wallace play in games for the Portland Trailblazers on several occasions.[27] Fast forward several years to 2004, and Wallace entered into an agreement with Nike to do a commercial, which involved a close up view of the tattoo and an explanation by Wallace of its meaning.[28] Upon discovering the commercial, Reed filed suit against Nike, Wallace, and Weiden+Kennedy, a company that partnered with Nike in relation to the commercial, for copyright infringement.[29]

Despite the filing of the lawsuit, the application of copyright law to these facts is unclear, as the parties to the suit ultimately reached a settlement agreement.[30] Nonetheless, the litigation did provide an insight into how tattooists view the work that they do. Additionally, it showed that when tattooed individuals commercialize their likeness through television commercials and other media featuring the tattoos, they may be opening themselves and the companies doing the advertising up to copyright infringement suits.

B. 2011: *Whitmill v. Warner Bros. Entertainment Inc.*

Merely six years after *Reed* settled, another high-profile tattoo copyright infringement case arose.[31] This time the lawsuit involved tattoo artist Victor Whitmill, who sued for infringement of his design of the famous tribal tattoo that is on former heavyweight champion boxer Mike Tyson's face.[32] However, unlike Wallace and Reed, Whitmill and Tyson agreed that Whitmill would own the copyright of Tyson's tattoo.[33]

In 2009, Warner Bros. released the comedy film *The Hangover*, which featured Mike Tyson as himself in a small cameo role.[34] Subsequently, Warner Bros. released the sequel, *The Hangover Part II* in 2011, which not only featured Mike Tyson again, but also featured one of the characters from the first movie waking up hung over with a tattoo identical to Tyson's.[35] In advertising the sequel, Warner Bros. prominently featured the replica tattoo in the movie posters and other promotional materials.[36] Since Whitmill had "never consented to, the use, reproduction, or creation of a derivative work based on his Original Tattoo," he sued Warner Bros. for copyright infringement.[37]

In response, Warner Bros. argued, *inter alia*, that Whitmill did not own a valid copyright in the tattoo because human skin as a tangible medium would yield absurd results and does not fit within the definitions of the current copyright laws.[38] However, the merits of the case were not reached by the court, as the parties settled.[39] As a result, it is unclear how the court would have treated Warner Bros.' arguments and decide the issue.[40] Notwithstanding the settlement, this case showed that tattooists are of the opinion that any unauthorized recreation of a tattoo for which they have a copyright will abridge their copyright protections, even if the re-creation is affixed to the flesh of another human being.

C. 2016: *Solid Oak Sketches, LLC v. 2K Games, Inc.*

A short five years after *Whitmill* was filed, a company called Solid Oak Sketches (Oak) filed suit against 2K Games, Inc. (2K) and Take-Two Interactive Software, Inc. (Take-Two) for infringing on several tattoos for which Oak held licenses.[41] The licenses pertained to several different tattoo designs that were designed by several different tattooists, each of whom granted Oak licenses for their respective tattoos.[42]

Take-Two is a major video game developer and publisher that wholly owns 2K, which is a video game publisher that produces the annual NBA 2K video game series.[43] Each year, the NBA 2K game improves its graphics, and with this improvement has come increasingly realistic depictions of the actual NBA players whom the game seeks to portray.[44] To make the game as realistic as possible, 2K has even depicted the players with accurate recreations of their tattoos.[45]

As a result of such recreations, however, Oak has claimed that Take-Two and 2K have infringed on the copyrights of the tattoos that were licensed to them, which include the tattoos of LeBron James, Kobe Bryant, Kenyon Martin, DeAndre Jordan, and Eric Bledsoe.[46] In response, 2K and Take-Two have posited several arguments in opposition to Oak's claim, one of which cites to public policy concerns that would result from allowing copyrights for tattoos.[47] While this lawsuit is still ongoing, it appears optimistic that the issue as to the copyrightability of tattoos may be determined.[48] Nonetheless, until that answer comes, we are left speculating as to what kind of protections tattoos may actually garner.

II. Tattoos Do Not Fit Under Current Copyright Laws

Under 17 U.S.C. § 102(a), a work will garner copyright protection if it is an "original work[] of authorship fixed in any tangible medium of expression . . . from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[49] A work is considered "original" if it "was independently created by the author and it possesses at least some minimal degree of creativity."[50]

Moreover, 17 U.S.C. § 102(a) stipulates that a work of authorship may fit into one of eight categories, one of which consists of "pictorial, graphic, and sculptural works."[51] This category of works is defined to include "two-dimensional and three dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."[52] Such a work will be considered "fixed in a tangible medium of expression" if its "embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[53]

In applying this legal framework to tattoos, it is certainly clear that tattoos fit into the "pictorial, graphic, and sculptural works" category of works of authorship, as tattoos are two-dimensional and could be described as either graphic art[54] or an art reproduction, in the case of a tattoo that was first designed on something other than the skin.[55] It is also certainly clear that a tattooist's artwork can be an original work of authorship, as many tattooists will often discuss tattoo ideas with clients and independently draw sketches that creatively express such ideas.[56]

This exact scenario was on display in *Reed*, wherein Wallace met with Reed to discuss his "Egyptian Family" tattoo idea and after several sketches and adjustments Reed created the final version of the tattoo design.[57] Admittedly, such a tattoo ***design*** can be copyrighted, as tattoo designs are original works of authorship and they are usually embodied on some form of paper or digital medium.[58] However, when a tattooist's original work of authorship is subsequently transferred onto human flesh, it fails to satisfy the requirement that the work be "fixed in a tangible medium," and thus tattoos are not copyrightable.

Although not directly applicable, *Kelley v. Chicago Park District* is instructive by analogy in illustrating why tattoos do not satisfy the fixation requirement of copyright law.[59] In that case, an artist named Chapman Kelley, with the permission of the Chicago Park District, installed a public display of wildflowers in downtown Chicago.[60] This display featured a large variety of different colored wildflowers arranged in a pattern as designed by Kelley and was "promoted as living art."[61] When the flowers finally bloomed and the public was able to see the display, Kelley's work received widespread acclaim.[62] Unfortunately for Kelley, however, over the years the display become difficult to maintain and the Chicago Park District reduced its size to make it more manageable.[63] As a result of the modification, Kelley filed suit against the Chicago Park District, claiming that it violated his moral rights in his work.[64]

In resolving this issue, the United States Court of Appeals for the Seventh Circuit's main focus was on both the authorship and fixation requirements.[65] In analyzing these requirements, the court readily acknowledged that in the case of gardens, it is indeed a human author who "determines the initial arrangement of the plants in a garden."[66] However, the court then elaborated, "[t]o the extent that seeds . . . can be considered a 'medium of expression,' they originate in nature, and natural forces . . . determine their form, growth, and appearance."[67] Ultimately, the court deemed that "[a]lthough [seeds] are tangible and can be perceived for more than a transitory duration," they are not "stable or permanent enough" to satisfy the fixation requirement, because a garden's appearance is inherently variable so the moment of fixation is unascertainable.[68] As a result, the court deemed that Kelley's wildflower display was not copyrightable.[69]

Despite the fact that *Kelley* addresses the copyrightability of flower gardens as opposed to tattoos, there are similarities between gardens and tattoos in the context of copyright fixation that make the *Kelley* court's rationale applicable to tattoos by analogy. As with the arrangement of plants in a garden, the "human author" of tattoos "determines the initial arrangement" of the ink in a tattoo. However, also much like gardens, "[t]o the extent that" skin is a medium of expression, it "originate[s] in nature, and [to an extent] natural forces [can] determine [the] form, growth, and appearance" of tattoos on the skin.[70]

When a tattooist gives an individual a tattoo, the way that the tattoo image is able to stay formed in the skin is complicated.[71] The ink is supposed to stay in the dermis, which is the deeper layer of the skin, but not all of the ink stays in that deeper layer.[72] Furthermore, the ink that does actually stay in the dermis takes about two to four weeks to settle, and even then the ink does not completely settle into that deeper layer.[73] Throughout the entire life of the tattooed individual, his or her body attacks the tattoo by sending cells called macrophages to the site of the tattoo to "eat" the ink while other cells absorb the ink.[74] As the individual's body attacks the ink throughout his or her life, the tattoo slowly fades and all of the ink never technically settles.[75]

Moreover, this slow fading process caused by the body's immune system has the potential to speed up from exposure to the sun.[76] In addition to sun exposure tattoos are also at the mercy of weight gain and loss, as well as age, both of which can cause distortion of the tattoo's appearance by stretching or shrinking it.[77] Finally, there is no guarantee that the skin will even accept the tattoo ink that is deposited in the body, as sometimes the body rejects certain chemicals as being harmful, which can cause the tattooed skin to form raised bumps and even mandate the removal of the tattoo.[78]

As a result of these natural processes that can influence tattoos on human flesh, it is difficult to pinpoint the exact moment that fixation to the skin has occurred, and the appearance of tattoos is "too inherently variable to supply a baseline for determining questions of copyright creation and infringement."[79] Although some might ar-

gue that when an individual receives a tattoo, the tattoo can be "perceived for more than a transitory duration," the natural processes that influence tattoo ink cause tattoos to not be "stable or permanent enough to be called 'fixed'" for copyright purposes.[80]

III. Providing Copyright Protection for Tattoos Is Against Public Policy

In addition to the fact that tattoos cannot be considered "*fixed* in a tangible medium," tattoos should not be given copyright protection because doing so would also implicate several public policy concerns. One such concern is that extending copyright protection to tattoos would cause individuals to forfeit economic opportunities. For example, in *Solid Oak Sketches v. 2K Games,* Solid Oak sued 2K for recreating and displaying the tattoos of several NBA stars, such as LeBron James.[81] Allowing Solid Oak to prevail on its copyright infringement suit would put 2K Games, James, and other NBA stars on notice that display of these tattoos could open them up to liability for copyright infringement. As a result, 2K Games and other corporations might choose not to enter into business agreements with James and other stars, and the athletes might think twice before entering into agreements that feature their tattoos.

This scenario could affect corporations and tattooed individuals outside the sports and entertainment world as well, and in turn would result in various corporations and tattooed individuals forfeiting economic opportunities. For example, while tattoos are becoming more commonplace and accepted within society, there is still somewhat of a stigma surrounding them in the workplace.[82] As a result, some people may choose to have regrettable tattoos from their youth removed, as was done by actor Mark Wahlberg.[83] However, due to the protection against destruction of visual art, if tattoos are copyrightable, individuals may have to forgo a job opportunity if their tattoo artists are stubborn enough.[84]

More important than the freedom to contract implication is that allowing copyright protection to tattoos would lead to "thousands of standalone copyrights"[85] and potentially flood the courts with infringement claims. This concern is best illustrated by the court's reasoning in *Garcia v. Google*, where it discussed the copyrightability of individual scenes.[86] In that case, the plaintiff was an actor who claimed that her performances in select scenes of a film were copyrightable separately from the film as a whole.[87] In holding that the plaintiff was not likely to succeed on the copyright claim, the court discussed the burden that would follow from providing copyright protection and stated "[u]ntangling the complex, difficult-to-access, and often phantom chain of title to tens, hundreds, or even thousands of standalone copyrights is a task that could tie the distribution chain in knots."[88]

Likewise, applying this logic to tattoos, it is clear that incorporating various tattooed individuals into a different copyrightable works "would pose a huge burden if each of the thousands of [tattooed individuals] could [trigger] an independent copyright [claim by tattooists]."[89] As a result, copyright protection for tattoos would have the potential to open the floodgates for infringement litigation and implicate the public policy concern for judicial economy.[90]

CONCLUSION

Based on the foregoing, it is clear that tattoos do not fall under the copyrightable subject matter that Congress envisioned when implementing the current copyright system. Much like the wildflower display in *Kelley*, tattoos are not sufficiently "fixed" on human skin to satisfy the copyright requirements. Furthermore, allowing copyright protection for tattoos would implicate several public policy concerns, including freedom of contract and judicial economy. As a result, when a court is finally presented with the opportunity to reach a decision on the copyrightability of tattoos, it should decline to extend copyright protection.

Endnotes

1. *See In the age of disruptive innovation, adaptability is what matters most*, The Globe and Mail (Mar. 29, 2018), *available at* https://www.theglobeandmail.com/report-on-business/small-business/sb-managing/in-the-age-of-disruptive-innovation-adaptability-is-what-matters-most/article24369582/ ("We live in a period of staggering technological change."); Ryan Barton, *Technology's Explosion: The exponential growth rate*, Mainstay Technologies (Jan. 22, 2013), *available at* https://www.mstech.com/technologys-explosion-the-exponential-growth-rate/ ("Technology is innovating and expanding at an exponential rate.").
2. *See GlobeRanger Corporation v. Software AG United States of America, Inc.*, 836 F.3d 477, 484 (5th Cir. 2016) (noting the increasing importance of intellectual property); the Honorable Kathleen M. O'Malley, *Interesting Times at the Federal Circuit*, 63 Am. U. L. Rev. 949, 956 (2014) (noting that the increasing importance of intellectual property law is underscored by the Supreme Court's recently increased interest in the area).
3. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. Sch. L. Rev. 63, 177 ("The rate and direction of technological innovation in content storage reproduction, distribution, and encryption will significantly affect the path of copyright law."); I. Trotter Hardy, *Copyright and "New-Use" Technologies*, 23 Nova L. Rev. 659, 662 (1999) (discussing how new technologies provide new forms of expression that raise copyright questions).
4. *See* Benjamin W. Rudd, *Notable Dates in American Copyright 1783-1969*, 28 The Q. J. of the Libr. Of Cong. 137, 139. 141 (1971), *available at* https://copyright.gov/history/dates.pdf (noting, *inter alia*, Congressional enactment to extend copyright laws to photographs in 1865 and motion pictures in 1912); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).
5. Kelly-Ann Weimar, *A Picture Is Worth a Thousand Words: Tattoos and Tattooing Under the First Amendment*, 7 Ariz. Summit L. Rev. 719, 721-25 (2014) (tracing the history of tattoos back to ancient times).

6. *See* Matthew Beasley, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. Cal. L. Rev. 1137, 1151 (2012) ("[T]raditional copyright remedies are difficult to apply to tattooing."); Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. Intell. Prop. L. 29 (2014) (discussing whether copyright law applies to tattoos and the challenges associated with enforcing copyright rights in tattoos).

7. *See* David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. Ill. L. Rev. 279, 307 (2013) (discussing how the negative stigma that has traditionally surrounded tattoos has caused tattoos to not be viewed as a legitimate art form).

8. *Id.* ("[I]t appears that the trend is toward acceptance of tattoos as a legitimate art form with growing support from society as a whole."). *See also* Adrienne Green, *Watching Tattoos Go From Rebellious to Mainstream*, The Atlantic (Oct. 12, 2016), *available at* https://www.theatlantic.com/business/archive/2016/10/tattooings-shifting-identity/503693/ (discussing the growing prominence of tattoos and noting that "nearly 40 percent of [Millennials] have one").

9. *See* Cummings, *supra* note 7, at 307 ("[C]urrent treatment of tattoos as a whole still overwhelmingly lends itself to the conclusion that tattoos deserve recognition as "useful Art" within the meaning of the Constitution."); King, *supra* note 6, at 161 (making the case that tattoos should be protected under copyright law).

10. *See* Bonnie Eslinger, *WWE, Take-Two Slammed for Wrestler's Tattoos in Game*, Law360 (Apr. 18, 2018, 2:48 PM), *available at* https://www.law360.com/articles/1034642/wwe-take-two-slammed-for-wrestler-s-tattoos-in-game; Zachary Zagger, *'NBA 2K16' Maker Hit With IP Suit Over Tattoos In Game*, Law360 (Feb. 1, 2016, 9:41 PM), *available at* https://www.law360.com/articles/753397; Pete Brush, *Tyson Tattoo Guru Sues Warner Bros. Over 'Hangover 2'*, Law360 (Apr. 29, 2011, 6:14 PM), *available at* https://www.law360.com/articles/242391; *Artist sues Wallace over use of tattoo*, ESPN (Feb. 16, 2005), *available at* http://www.espn.com/espn/sportsbusiness/news/story?id=1992812.

11. *See* Eslinger, *supra* note 10; Zagger, *supra* note 10; Django Gold, *Tattoo Artist Says THQ Used Copyrights Ink in UFC Games*, Law360 (Nov. 20, 2012 3:32 PM), *available at* https://www.law360.com/articles/395416/tattoo-artist-says-thq-used-copyrighted-ink-in-ufc-games; *Artist sues Wallace over use of tattoo*, *supra* note 10.

12. *See* Eslinger, *supra* note 10; Zagger, *supra* note 10; Gold, *supra* note 11; *Artist sues Wallace over use of tattoo*, *supra* note 10.

13. *See* Eslinger, *supra* note 10; Zagger, *supra* note 10; Gold, *supra* note 11; *Artist sues Wallace over use of tattoo*, *supra* note 10.

14. Complaint, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).

15. Complaint, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011).

16. Complaint, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016).

17. *See* Katie Scholz, *Copyright and Tattoos: Who owns your ink?*, IPWatchdog (July 26, 2018), *available at* https://www.ipwatchdog.com/2018/07/26/copyright-tattoos-who-owns-your-ink/id=99500/; Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, Forbes (Aug. 14, 2013, 8:01 AM), *available at* https://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/; Lauren Etter, *Tattoo artists are asserting their copyright claims*, ABA J. (Jan. 2014), *available at* http://www.abajournal.com/magazine/article/tattoo_artists_are_asserting_their_copyright_claims/.

18. *See* Scholz, *supra* note 17 ("Unfortunately, there are no cases to date that definitively answer the questions around copyright infringement and tattoos.").

19. Complaint, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016); Complaint, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011); Complaint, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).

20. Rachel Arthur, *The Marketing Power of Sports' Stars*, The New York Times (Apr. 4, 2016), *available at* https://www.nytimes.com/2016/04/05/fashion/sports-athletes-marketing.html (discussing the prevalence of the use of athletes for marketing campaigns); Gretchen Reynolds, *How Tattoos Might Affect Your Workout*, The New York Times (July 26, 2017), *available at* https://www.nytimes.com/2017/07/26/well/move/how-tattoos-might-affect-your-workout.html ("[T]attoos are popular with athletes. By some estimates, at least half of male collegiate and professional basketball players have tattoos that cover much of their chest and arms. The incidence seems to be high among football and soccer players and many other athletes as well.").

21. *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).

22. Complaint at 3, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).

23. *Id.*

24. *Id.*

25. *Id.* at 4.

26. *Id.* at 3.

27. *Id.* at 4.

28. *Id.*

29. *Id.* 4-6.

30. Order of Dismissal, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).

31. *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011).

32. Verified Complaint for Injunctive and Other Relief (hereinafter "Complaint") at 1, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011).

33. *Id.*

34. *See* Peter Travers, *Hot Movie Cameo: Mike Tyson*, Rolling Stone (June 3, 2009, 8:36 PM), *available at* https://www.rollingstone.com/movies/movie-news/hot-movie-cameo-mike-tyson-113419/; *The Hangover*, IMDB, *available at* https://www.imdb.com/title/tt1119646/?ref_=ttfc_fc_tt (last visited Oct. 23, 2018).

35. Noam Cohen, *On Tyson's Face, It's Art. On Film, a Legal Issue*, The New York Times (May 20, 2011), *available at* https://www.nytimes.com/2011/05/21/business/media/21tattoo.html.

36. Complaint at 4-5, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011).

37. *Id.* at 6-7.

38. Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (hereinafter "Warner Bros Opp.") at 13-18, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011).

39. *See* Order of Dismissal, *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011); Sean Livesey, *Skin Is In: Narrow Copyright Protection of Tattoos Featured in Video Games*, Rich. J. L. & Tech. (Nov. 26, 2016), *available at* https://jolt.richmond.edu/2016/11/26/skin-is-in-narrow-copyright-protection-of-tattoos-featured-in-video-games/.

40. *See* Livesey, *supra* note 39.

41. Second Amended Complaint at 1, 7-8, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016).

42. *Id.* at 7-8.

43. *Id.* at 2-4.

44. *See* Ryan Nagelhout, *NBA 2K18's Graphics Upgrade Over 2K17 is Pretty Remarkable Side By Side*, Uproxx (Aug. 4, 2017), *available at* https://uproxx.com/dimemag/nba-2k18-graphics-comparison-

nba-2k17/ ("The point of a yearly video game is for it to get better with each edition. The game modes, the game physics and—perhaps most importantly—the graphics should always get better as the years go by."); Brian Tong, *How NBA 2K18 got its insane next-gen graphics*, CNET (Aug. 8, 2017, 8:01 AM), *available at* https://www.cnet.com/news/how-nba-2k18-got-its-insane-next-gen-graphics/.

45. *See* Second Amended Complaint at 3-4, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016).
46. *Id.* at 1, 5-7.
47. Memorandum of Law in Support of Defendants-Counterclaimants 2K Games, Inc. and Take-Two Interactive Software, Inc.'s Motion for Summary Judgment (hereinafter "2K's MSJ") at 22, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016).
48. *See* Jonathan Stempel, *Lawsuit over LeBron James, NBA stars' tattoos in video games can proceed*, Reuters (Mar. 30, 2018, 2:42 PM), *available at* https://ca.reuters.com/article/sportsNews/idCAKBN1H61MZ-OCASP ("A federal judge on Friday rejected a request by the maker of the popular NBA 2K video game series to dismiss a lawsuit over its depiction in the games of tattoos belonging to LeBron James and other [NBA] stars.").
49. 17 U.S.C. § 102(a).
50. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).
51. 17 U.S.C. § 102(a)(5).
52. 17 U.S.C. 101.
53. *Id*.
54. *Graphic Arts*, Merriam-Webster's Online Dictionary, 2018, https://www.merriam-webster.com/dictionary/graphic%20arts ("[T]he fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with them.").
55. 17 U.S.C. § 101.
56. Guen Douglas, *Guen Douglas: The Process of Getting A Custom Tattoo*, Tattoo Artist Mag. (Sep. 22, 2011), *available at* http://tattooartistmagazineblog.com/2011/09/22/guen-douglas-tattoos-process-of-getting-a-custom-tattoo-artist-magazine-blog/ (discussing the process of designing a custom tattoo).
57. Complaint at 3, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005).
58. *See id.* at 4 ("Mr. Reed has been issued Copyright Registration Number VA 1-265-074 for the Egyptian Family Pencil Drawing that was the basis for the tattoo applied to Mr. Wallace's arm.").
59. *See* 635 F.3d 290 (7th Cir. 2011).
60. *Id.* at 291.
61. *Id.* at 291, 293 (noting that Kelley selected "between 48 and 60 species of self-sustaining wildflowers" and "designed the initial placement of the wildflowers so they would blossom sequentially, changing colors throughout the growing season and increasing in brightness towards the center of each ellipse").
62. *Id.* at 293.
63. *Id.* at 294-95.
64. *Id.* at 295.
65. *Id.* at 303 ("The real impediment to copyright here is not that Wildflower Works fails the test for originality but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright.").
66. *Id.* at 304.
67. *Id.*
68. *Id.* at 305.
69. *Id.* at 306.
70. *Id.* at 304.
71. Andrew Griffin, *Tattoos stay so long in the skin because the body thinks that it is under attack*, The Independent (Apr. 4, 2016, 10:00 PM), *available at* https://www.independent.co.uk/news/science/tattoos-permanent-why-how-last-forever-ink-body-best-forever-a6967296.html.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *See* Griffin, *supra* note 71; Angela Hill, *Tattoo blues: What happens to your skin art as you age?*, The Mercury News (Aug. 13, 2016, 2:04 PM), *available at* https://www.mercurynews.com/2011/09/16/tattoo-blues-what-happens-to-your-skin-art-as-you-age/; *How to Avoid Tattoo Fading*, Sharpologist (Mar. 3, 2014), *available at* https://sharpologist.com/2014/03/avoid-tattoo-fading.html.
77. *See* Hill, *supra* note 71; Hans Fredrick, *What Happens to Tattoos When You Get Fat?*, Leaftv (last visited Oct. 28, 2018), *available at* https://www.leaf.tv/articles/what-happens-to-tattoos-when-you-get-fat/; *Tattoos: Understand risks and precautions*, Mayo Clinic (Mar. 3, 2018), *available at* https://www.mayoclinic.org/healthy-lifestyle/adult-health/in-depth/tattoos-and-piercings/art-20045067; *Body Changes & Tattoos*, Skin Artists (last visited Oct. 28, 2018), *available at* http://www.skin-artists.com/tattoos-body-changes.htm.
78. *See Allergic Reaction from Tattoo—Prevention*, Skin Artists (last visited Oct. 28, 2018), *available at* http://www.skin-artists.com/tattoo-allergy-preventive.htm.
79. *Kelley v. Chicago Park District*, 635 F.3d 290, 305 (7th Cir. 2011).
80. *Id.*
81. Second Amended Complaint at 1, 5-7, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 1:16-cv-00724 (S.D.N.Y. Feb. 1, 2016).
82. Hannah Brown, *Stigma around tattoos in professional world a form of workplace discrimination*, Collegiate Times (May 4, 2018), *available at* http://www.collegiatetimes.com/opinion/stigma-around-tattoos-in-professional-world-a-form-of-workplace/article_9beb4aac-4f25-11e8-9258-936dc3e3d38b.html.
83. *See* Leah Simpson & Donna McConnell, *Pain and gain! Mark Wahlberg shows off results of Bob Marley tattoo he had removed . . . to deter his children*, Daily Mail (Apr. 12, 2012), *available at* https://www.dailymail.co.uk/tvshowbiz/article-2128718/Mark-Wahlberg-shows-results-Bob-Marley-tattoo-removed--deter-children-inking-up.html.
84. 17 U.S.C. § 106A(a)(3)(B).
85. *See Garcia v. Google, Inc.*, 786 F.3d 733, 743 (9th Cir. 2015).
86. *Id.*
87. *Id.* at 736-37.
88. *Id.* at 743.
89. *Id.* at 743.
90. *See Judicial Economy*, Black's Law Dictionary (10th ed. 2014).

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