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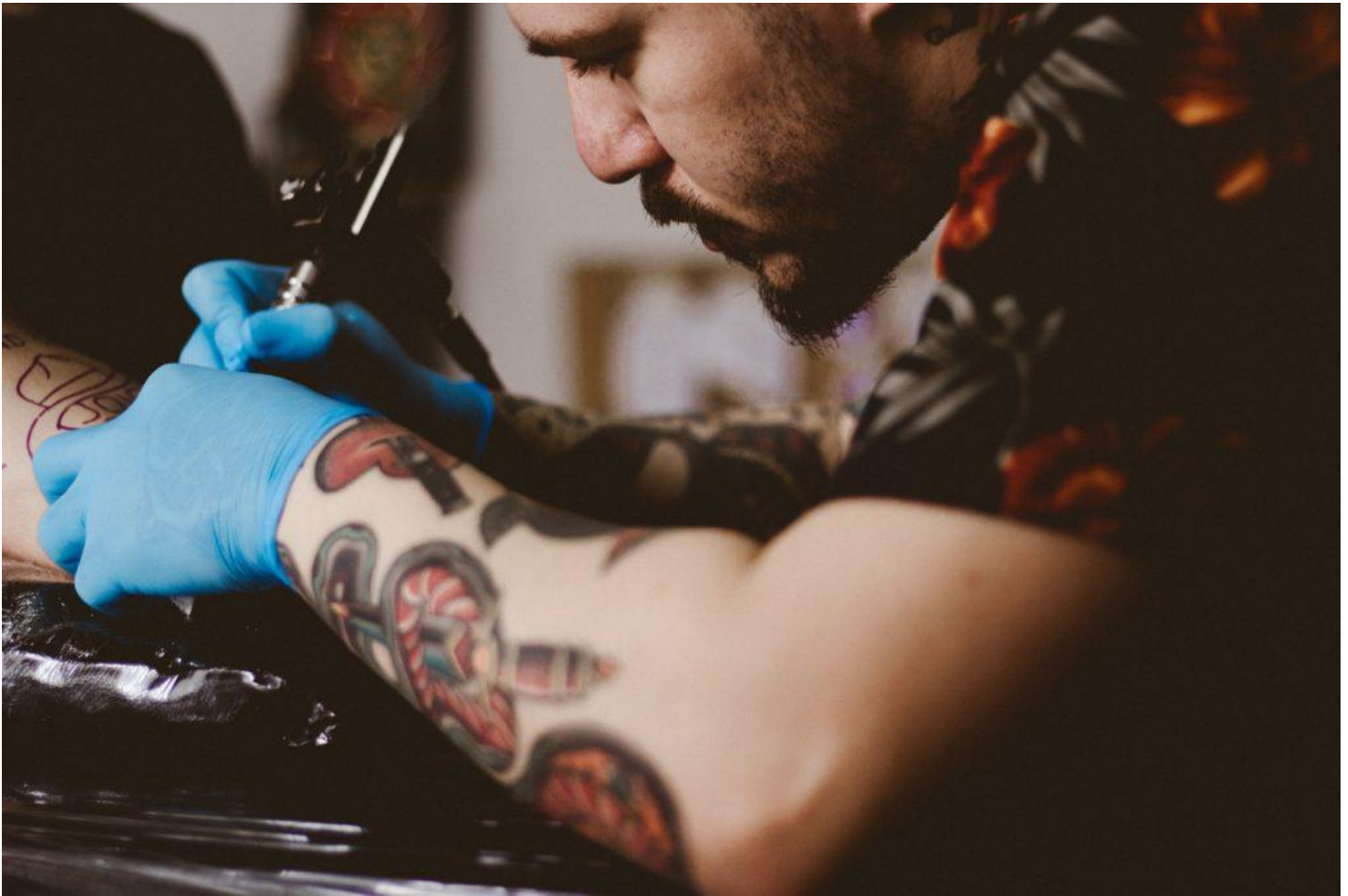
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# Your Body Owns the Tattoo!

BY [HABEEB SHEIKH](#)/ ON APRIL 5, 2020



Put yourself in the shoes of someone who receives a new tattoo. Eager to share the design with friends, you start snapping pictures of the fresh body art. You send a text alongside the pictures saying, "Check out *my* new tattoo!" Ordinarily, one may not question your ownership here. But legal questions may arise in a situation where a videogame company profits off the videogame avatar of a tattooed celebrity like LeBron James.<sup>[1]</sup> The issue becomes whether the tattoo artist has copyright protections over the art, or does it belong to the individual whose body bears the ink. There is a strong argument to be made that a court must consider the client's personal autonomy and freedom to the tattooed individual's own body.<sup>[2]</sup>

Before delving into the ownership of one's own body, it's important to balance this against the original work of the author. The Copyright Act of 1976 (the "Act") protects "original works or authorship fixed in any tangible medium of expression" and amongst the categories of original works offered protection are pictorial, graphic, and sculptural works ("PGS works").<sup>[3]</sup> One could make the argument that tattoos are original works, presumably because this requirement only asks that artists foster a minimal level of creativity in the production of their work.<sup>[4]</sup> Further, tattoos are fixed in a medium that is a human body. Lastly, tattoos

could satisfy the category of PGS works and are not subject to exclusions from the works covered under the Act.<sup>[5]</sup> It is possible that a tattoo artists' work meets all of requirements for copyrightability under the Act. The ownership rights of a tattoo are rarely litigated in courts,<sup>[6]</sup> but when cases of these sorts do arise, "parties assume the copyright ownership is vested in the tattoo artist."<sup>[7]</sup>

The issue gained attention a few years ago in a copyright infringement lawsuit brought by tattoo artist Victor Whitmill against Warner Brother Entertainment.<sup>[8]</sup> Whitmill created a tattoo on the upper left side of Mike Tyson's face and that same body art was depicted in *The Hangover Part II*. Whitmill alleges that use of the tattoo in the motion picture and related advertisements was unauthorized and an infringement of his copyright.<sup>[9]</sup> Although the case settled, Judge Catherine D. Perry, who oversaw the case, stated "Of course tattoos can be copyrighted... the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law."<sup>[10]</sup>

Because a formal judicial remedy was not rendered in the Hangover II tattoo lawsuit, the question of who owns the tattoo remained open for courts to address. Recently, District Court Judge Laura Taylor Swain weighed in on the issue to some extent.<sup>[11]</sup> In *Solid Oak Sketches, LLC v. Visual Concepts, LLC et. al*, Plaintiff brought a copyright action in the Southern District of New York against Take-Two Interactive Software.<sup>[12]</sup> Defendants release a videogame, NBA 2K, annually that offers "lifelike depictions of NBA players and their tattoos." Plaintiffs sued because Defendants are publicly displaying the copyrighted work that Plaintiff owns.<sup>[13]</sup> The Court granted Defendants' Motion for Summary judgment for a few reasons. For one, the Court noted that "no reasonable trier of fact could find the Tattoos as they appear in NBA 2K to be substantially similar to the Tattoo designs licensed to Solid Oak."<sup>[14]</sup> Further, the Court wrote that the players featured in the NBA 2K series "had implied licenses to use the tattoos as elements of their likenesses" and "directly or indirectly gave defendants the license to use their likenesses."<sup>[15]</sup> This case may have come out another way if any part of the NBA 2K game placed a huge emphasis on the tattoos and it could be shown that profits are sufficiently arising out of use of the tattoos. While *Solid Oak Sketches* sheds some light on the issue of who owns the tattoo, another case is currently pending in front of a federal judge in Illinois where World Wrestling Entertainment ("WWE") and Take-Two Interactive Software, Inc. are being sued for depicting tattoos on the videogame avatars of wrestlers like Randy Orton in the WWE 2K videogame series.<sup>[16]</sup>

Perhaps the aforementioned WWE case will settle the longstanding dispute of who actually owns a tattoo. Going forward, parties should opt for a deeper analysis of the rights an individual has over their own body in copyright infringement actions for unauthorized use of a tattoo. When balancing the protection an artist is afforded over their own artwork against the personal autonomy an individual has over their own body, it would be absurd to give less importance to an individual's freedom. Law should not be construed to produce absurd results, especially "in a society which values individual freedoms and human rights above all

else.”<sup>[17]</sup> Section 106 grants exclusive rights to an artist, enabling them to produce derivative creations and reproductions of the work.<sup>[18]</sup> But it’s odd that the artist will have exclusive rights over an individual’s body. People get tattoos so that they can show them off. Celebrities are constantly in the media and have their tattoos photographed on a regular basis. To place a burden on someone like Lebron James, forcing him to remove the tattoos from his likeness is a heavy one. The NBA 2K case protects an individual’s expression to get the tattoo they want and creates safety measures for individuals in media industries to depict those tattoos.<sup>[19]</sup> In the event a court addresses an issue similar to the one in the 2K case, the scale should tip in favor of an individual’s freedom as opposed to giving an artist protection.

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<sup>[1]</sup> *Solid Oak Sketches, LLC v. Visual Concepts, LLC et. al*, No. 16-CV-724-LTS-SDA (S.D.N.Y. March 26, 2020).

<sup>[2]</sup> Jessica Hsieh, *Trading Your Skin in Exchange for A Piece of Art: A Legal Analysis of Tattoos As Copyrightable Subject Matter*, 59 Santa Clara L. Rev. 135, 151 (2019).

<sup>[3]</sup> Copyright Act of 1976, 17 U.S.C. § 102.

<sup>[4]</sup> See Yolanda M. King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 Or. L. Rev. 129, 149 (2013).

<sup>[5]</sup> *Tattoo Copyrights May Finally Get Their Day In Court*, <https://www.law360.com/articles/788694/tattoo-copyrights-may-finally-get-their-day-in-court>.

<sup>[6]</sup> Meredith Hatic, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 Fordham Intell. Prop. Media & Ent. L.J. 396, 413 (2012)

<sup>[7]</sup> Ariana D. Chronis, *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works*, 104 Iowa L. Rev. 1483 (2019).

<sup>[8]</sup> S. Victor WHITMILL, Plaintiff, v. WARNER BROS. ENTERTAINMENT INC., Defendant., 2011 WL 2038147 (E.D.Mo.).

<sup>[9]</sup> *Id.*

[10] See King, *supra* note 3 at, 142.

[11] *Solid Oak Sketches, LLC*, No. 16-CV-724-LTS-SDA, at 3.

[12] *Id.*

[13] *Id.* (the tattoos are depicted on NBA players Eric Bledsoe, LeBron James, and Kenyon Martin ... in versions 2K14, 2K15, and 2K16 ... of Defendants' basketball simulation video game")

[14] *Id.* at 13.

[15] *Id.* at 16.

[16] See Jan Wolfe, *Case alleging WWE's copyright infringement of wrestler's tattoos advances* (March 20, 2020), Reuters, <https://www.reuters.com/article/ip-copyright-tattoo/case-alleging-wwes-copyright-infringement-of-wrestlers-tattoos-advances-idUSL1N2BD0FW>

[17] David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U.Ill.L. Rev. 279, 306 (2013). 145. Perzanowski, *supra* note 139, at 583.

[18] 17 U.S.C § 106.

[19] See *NBA 2K Beats Copyright Case Over LeBron's Tattoos* (March 26, 2020), Law360, <https://www.law360.com/articles/1257547/nba-2k-beats-copyright-case-over-lebron-s-tattoos>.