

# The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works

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## I. INTRODUCTION

Although the law of copyrights is a well-established and codified field, there are a handful of innovative sub-categories that remain ambiguous and unaddressed by courts in the United States. Due to an ever-changing, rapidly evolving society, new areas grow and become prevalent enough to create unforeseen issues as the law struggles to catch up. One incredibly topical example, and the focus of this Note, is the application of copyright law to tattoos, specifically in the context of their depiction on celebrities in various forms of media.<sup>1</sup>

Professor Yolanda M. King<sup>2</sup> briefly describes the societal pattern and impact of the growth and change in attitude toward tattoos:

At one time, tattoo artists and individuals with tattoos were associated with criminals, men in the military, or risqué underground social classes. Today, a young generation enjoys the acquisition of symbolic body art. The demand for tattoo art has transformed the nature of consumerism in this industry, and is therefore changing the perception of the industry and the appeal of its artwork in the eyes of the media and other businesses.<sup>3</sup>

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1. The entertainment outlet that this Note focuses primarily on and provides a major case example of is video games. However, the Note also frequently addresses film in its discussions of tattoo copyright issues.

2. Professor Yolanda M. King is currently an Associate Professor of Law at the Northern Illinois University (“NIU”) College of Law where she teaches entertainment law and other intellectual property law-related courses. *Yolanda M. King*, N. ILL. U. C. L., <https://www.niu.edu/law/about/directory/king.shtml> (last visited Dec. 13, 2018). She is considered an experienced and knowledgeable authority on tattoo copyrights, having practiced as an intellectual property attorney, published several pieces on the law of tattoo copyrights, and delivered presentations on the subject as well, a list of which is available on her biography page of the NIU College of Law’s online Faculty & Staff Directory. *Id.*; see also N. Ill. Univ. Coll. of Law, *From the Community: NIU Law Professor Yolanda M. King Takes Copyright Law “Outside the Box,”* CHI. TRIB. (Sept. 11, 2015, 2:40 AM), <http://www.chicagotribune.com/suburbs/naperville-sun/community/chi-ugc-article-niu-law-professor-yolanda-m-king-takes-copyp-2015-09-11-story.html> (highlighting King’s background, scholarship, and current involvement in intellectual property and entertainment law).

3. Yolanda M. King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 160 (2013) [hereinafter King, *The Challenges*].

In the mere five years since King's article, tattoos have become even more common, and their continuous widespread growth has brought attention to the relevant legal implications. This Note focuses solely on the issues that arise when tattooed celebrities are depicted in various media such as video games or movies.<sup>4</sup> The notoriety and high-profile nature of famous athletes, musicians, and actors creates a host of problems unique to their industries. As a result, this Note will not address the concerns of the tattooed average person.

The increase of tattooed celebrity athletes is particularly problematic when those athletes are prominently featured in video games, an industry that is systematically improving its graphics so the depiction of real-life figures becomes increasingly realistic. The recent spark of tattoo-related copyright infringement litigation highlights the issues that arise from reproductions of tattoos of inked public figures in various media forms, yet this area of the law remains devoid of any published court rulings. The few cases that have been brought either settle or are dismissed, resulting in the courts' continued silence on issues surrounding copyrighting tattoos.

This Note laments the lack of court rulings on tattoo-related copyright lawsuits, expresses concern over the continued ambiguity of the law in this area, and proposes a solution for creating a more structured, standardized approach to tattoo copyrights. Part II provides a brief introduction to the relevant, general concepts of the law of copyrights, moves into a discussion of the copyrightability of tattoos, and finishes with an examination of some tattoo-related lawsuits, including an in-depth discussion of the most recent and viable tattoo copyright case. In doing so, this section hopes to highlight the common issues and elements that arise in tattoo copyrights. Part III identifies the problems associated with unclear copyright laws for tattoos. Next, Part IV proposes a number of statutory additions for Congress to adopt and fit within the current copyright framework that explicitly address tattoos. Finally, Part V concludes.

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4. To be more precise, this Note focuses solely on copyright issues. However, there are recent issues gaining media attention that concern tattooed celebrities (specifically, athletes) and other areas of intellectual property law, such as trademarks. See, e.g., Jacob Bogage, *J.R. Smith Expects to be Fined by the NBA for His New 'Supreme' Tattoo*, WASH. POST (Sept. 29, 2018), <https://www.washingtonpost.com/sports/2018/09/29/jr-smith-expects-be-fined-by-nba-his-new-supreme-tattoo/>; Tyler Lauletta, *Lonzo Ball Forced to Cover Up Tattoo Due to NBA Rules*, BUS. INSIDER (Oct. 12, 2018, 5:47 PM), <https://www.businessinsider.com/lonzo-ball-bbb-tattoo-cover-up-2018-10/>; Michael McCann, *Could the NBA Force J.R. Smith to Cover Up His Supreme Tattoo?*, SPORTS ILLUSTRATED (Sept. 30, 2018), <https://www.si.com/nba/2018/09/30/jr-smith-supreme-tattoo-nba-rules>; Nadra Nittle, *NBA Players Keep Getting Tattoos of Corporate Logos. Now the League is Forcing Them to Cover Up*, VOX (Oct. 18, 2018, 5:10 PM), <https://www.vox.com/the-goods/2018/10/18/17996526/nba-tattoos-jr-smith-supreme-corporate-logos>; Carron J. Phillips, *Phillips: The NBA's Rule on Tattoo Logos Will Always Get Under My Skin*, DAILY NEWS (Oct. 19, 2018, 7:00 AM), <http://www.nydailynews.com/sports/basketball/ny-sports-phillips-nba-tattoo-20181018-story.html>.

## II. COPYRIGHT LAW, TATTOOS, AND CELEBRITY PORTRAYAL IN VARIOUS MEDIA

Before tackling the more specific copyright issues surrounding depictions of tattoos on celebrities portrayed in media, Section A reviews some general background information on copyrights. Section B applies these relevant, general rules of copyright law to tattoos and discusses the legal profession's common attitude toward the copyrightability of tattoos so that, despite the absence of a court ruling, this Note can proceed on the assumption that tattoos do enjoy legal protection. Then, Section C tracks the development of the question at hand by summarizing the background of the portrayal of tattooed celebrities in various forms of media, primarily including video games. This section also provides an examination of some of the tattoo-related lawsuits that have arisen in the last six years, explaining the plaintiffs' claims and tracking their paths to eventual settlement. Finally, Section D closes with an in-depth discussion of how tattoo-related copyright law is closer than ever to a definitive court ruling as a case stands right at the precipice of a trial.<sup>5</sup> Barring any settlement or dismissal, *Solid Oak Sketches, LLC v. 2K Games, Inc.* may be the first to finally establish that tattoos are copyrightable, as well as possibly provide additional rules for structuring this area of the law.<sup>6</sup> Section D explains the facts and procedural history of this case, as well as its current trajectory and possible implications.

### A. BACKGROUND ON GENERAL COPYRIGHT LAW

In the United States, the U.S. Constitution creates and outlines copyright protections.<sup>7</sup> From there, subsequent litigation has further explained these protections by laying out and clarifying specific rights and limitations.<sup>8</sup> Two of the most important pieces of legislation codifying the law of copyrights are the Copyright Act of 1909 and the Copyright Act of 1976,<sup>9</sup> the latter of which is solely used by and referred to in this Note. Copyright protection may be

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5. See Jesse M. Brody, *Court Looks to Ink Decision in Tattoo Copyright Dispute*, MANATT (June 1, 2017), <https://www.manatt.com/Insights/Articles/2017/Court-Looks-to-Ink-Decision-in-Tattoo-Copyright-Di> (tracking the latest developments in the tattoo copyright lawsuit brought by Solid Oak Sketches against Take-Two Interactive Software as "a federal court judge in New York" denied a "motion to dismiss the defendant's counterclaims"); see also David Kravets, *Can a Tattoo on Human Flesh be Copyrighted? We'll Soon Find Out*, ARS TECHNICA (Sept. 13, 2017, 7:00 AM), <https://arstechnica.com/tech-policy/2017/09/can-a-tattoo-on-human-flesh-be-copyrighted-well-soon-find-out> (discussing the possibility that, if it does not settle, the Solid Oak Sketches case may go to trial).

6. Kravets, *supra* note 5.

7. Cydney A. Tune, *Overview of Basic Copyright Law Principles*, 26 LICENSING J. 18, 18 (2006). The U.S. Constitution gives "Congress . . . the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writing and discoveries.'" *Id.* (quoting U.S. CONST. art. 1, § 8, cl. 8).

8. *Id.*

9. *Id.* The Copyright Act of 1976 is codified in 17 U.S.C. §§ 101–810. *Id.* at 18, 26 n.2.

applied to “original works of authorship fixed in any tangible medium of expression, now known or later developed.”<sup>10</sup> As used in copyright law, “original works” refers to works “in which the author used some modicum of creativity,” which merely means that an author uses *some* (however small) amount of creativity rather than copying a work that already exists.<sup>11</sup> The range of categories that comprise “[w]orks of authorship” include “(1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>12</sup>

Establishing the “author” of a work is an essential part of copyright law and the first step in recognizing who possesses copyright ownership over the work.<sup>13</sup> The general rule is that initially, the law confers copyright ownership upon the author or authors of the protected work and, in the case of a joint work, the authors are co-owners.<sup>14</sup> For the most part, identifying the author of a work is straightforward and palpable because, ordinarily, “the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression.”<sup>15</sup> However, this general rule of authorship is not always the case, and an exception exists where the work qualifies as a work made for hire.<sup>16</sup>

With a work made for hire, the label of “author” is assigned to the “other person for whom the work was prepared” rather than the person who actually created the work.<sup>17</sup> Thus, “unless the parties have expressly agreed otherwise in a written instrument,” the copyrights of the work made for hire vest in the person for whom the work was created.<sup>18</sup> There are two types of works that may be classified as works made for hire: (1) a work created within the context of an employer-employee relationship and (2) a commissioned work.<sup>19</sup> This first type of work made for hire is a work “created by an employee . . . within the course and scope of that employee’s job,” explicitly excluding any work

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10. 17 U.S.C. § 102(a) (2012).

11. Tune, *supra* note 7, at 18.

12. 17 U.S.C. § 102(a)(1)–(8).

13. See Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 198 (2014).

14. 17 U.S.C. § 201(a).

15. Vacca, *supra* note 13, at 198 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989)).

16. Tune, *supra* note 7, at 21; see also Vacca, *supra* note 13, at 198–99 (discussing briefly the work made for hire doctrine).

17. 17 U.S.C. § 201(b).

18. *Id.*

19. Tune, *supra* note 7, at 21.

created by the employee on his or her own time.<sup>20</sup> In these cases, the owner of the copyrighted work is the employer.<sup>21</sup>

Secondly, a commissioned or specially ordered work qualifies as a work made for hire so long as it is used “as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.”<sup>22</sup> Furthermore, the Copyright Act also requires that “the parties expressly agree in a written instrument signed by them that the [specially ordered or commissioned] work shall be considered a work made for hire.”<sup>23</sup> If both of these elements are not met, then the commissioned party (the creator of the work), rather than the commissioning party (the party asking for the work to be created), is the owner of the copyright.<sup>24</sup> In other words, a commissioned work does not qualify as a work made for hire, and therefore as an exception to the general rule of authorship, if the requirements of the statute are not met.<sup>25</sup> Additionally, through a common law works made for hire doctrine, a court may conclude, under specific circumstances, that a commissioned work is a work made for hire.<sup>26</sup>

A copyright owner enjoys five exclusive rights over a protected work: “(1) reproduction, (2) adaptation, (3) distribution, (4) public performance, and (5) public displays.”<sup>27</sup> “Reproduction,” as defined by the 1976 Act, refers “to reproduc[ing] the copyrighted work in copies or phonorecords.”<sup>28</sup> The exclusive right to “adaptation” is the right to create “derivative works based on the copyrighted work.”<sup>29</sup> “A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement,

20. *Id.*; see also 17 U.S.C. § 101 (providing the definition of a “work made for hire”).

21. Vacca, *supra* note 13, at 198.

22. 17 U.S.C. § 101.

23. *Id.*; see also Tune, *supra* note 7, at 21 (providing a short explanation of the “work made for hire” doctrine).

24. Tune, *supra* note 7, at 21.

25. *Id.*

26. *Id.* (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).

27. Tune, *supra* note 7, at 19 (citing 17 U.S.C. § 106). Section 106 includes a sixth exclusive right to perform sound recordings publicly through a digital audio transmission. 17 U.S.C. § 106(6).

28. Tune, *supra* note 7, at 19. “Copies” are defined as

material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object . . . in which the work is first fixed.

17 U.S.C. § 101. This term is expressly kept distinct from a “phonorecords,” which is given almost the same definition except the copyrightable work they are concerned with is sounds (“other than those accompanying a motion picture or other audiovisual work”). *Id.* Some examples of a phonorecord are phonograph records, audio tapes, and compact audio discs. Tune, *supra* note 7, at 19.

29. Tune, *supra* note 7, at 19.

dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>30</sup>

“Distribution” means a copyright owner has “the exclusive right to ‘publish’ copies or phonorecords of the copyrighted work by distributing them to the public by sale or other transfer of ownership, or by rental, lease, or lending.”<sup>31</sup> The right to “public performance” means exactly what it sounds like—the copyrighted work may only be publicly performed by the copyright owner.<sup>32</sup> “[P]erform[ing]” a work, as explained by § 101, “means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”<sup>33</sup> The U.S. Code continues by clarifying that

[t]o perform or display a work “publicly” means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>34</sup>

The right to “public[] display[s]” is similarly straightforward, granting a copyright owner “the exclusive right to publicly display a copyrighted work.”<sup>35</sup> Under copyright law, a display *must* be public to be covered by the “display” right afforded to copyright owners.<sup>36</sup> The same definition of “public” as described above and as used in the right to “public performance” is applicable here.<sup>37</sup> The definition of “display” is “to show a copy of [the work], either directly or by means of a film, slide, television image, or any other device or process.”<sup>38</sup> People directly display their tattoos constantly, merely by living their lives and wearing clothing that allows the public to see their tattoos. When a celebrity appears in a film or commercial and a tattoo is visible, he or she is engaging indirectly in a public display of the copyrighted work.

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30. 17 U.S.C. § 101.

31. Tune, *supra* note 7, at 19 (quoting 17 U.S.C. § 101). There are many additional nuances to distribution rights, but they do not play a role in the primary focus of this Note and will therefore not be included here. *Id.*

32. *Id.*

33. 17 U.S.C. § 101.

34. *Id.*

35. Tune, *supra* note 7, at 20.

36. *Id.*

37. *Id.*

38. 17 U.S.C. § 101.

These exclusive rights can be transferred (i.e., sold) or licensed to another party or parties.<sup>39</sup> Copyright ownership “may be transferred [either] in whole or in part.”<sup>40</sup> For example, in a tattooing context, a tattoo artist may grant a client the right to display his copyrighted design, but not the right to reproduce or the right to adapt the design.<sup>41</sup> It is important to recognize that, for a valid transfer of ownership, there must be a written “instrument of conveyance” which must be signed by the transferee.<sup>42</sup> Any oral agreement to transfer copyrights will not be valid or effective.<sup>43</sup>

Copyright owners may also license their exclusive rights in a variety of different ways, through numerous divisions and subdivisions.<sup>44</sup> For instance, a copyright owner may license just one of their exclusive rights, a combination of the five, or all together.<sup>45</sup> All of the different possibilities available to copyright owners makes copyright licensing a very complex subject.<sup>46</sup> The same tattoo artist example given in the last paragraph is applicable here too: A tattoo artist may grant his client license to display the copyrighted work, but this does not inherently grant the client the ability to exercise any other right of copyright protection (such as reproduction or adaptation).<sup>47</sup>

A copyright license is also divided into two categories: exclusive or nonexclusive.<sup>48</sup> An exclusive license exists where “a copyright owner transfers

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39. Nicole Martinez, *Who Owns the Copyright in Your Tattoo Art?*, ART L.J. (June 3, 2016), <https://artlawjournal.com/who-owns-the-copyright-in-your-tattoo-art>; see also Tune, *supra* note 7, at 23 (providing a condensed overview of basic principles of copyright law).

40. 17 U.S.C. § 201(d)(1).

41. This issue is at the heart of disputes over tattoos and who owns what aspect of the designs. It will be revisited and further explored later in the Note. See *infra* Section II.C.

42. 17 U.S.C. § 204(a); see also Tune, *supra* note 7, at 23 (providing a description of the process of transferring copyright ownership).

43. See Tune, *supra* note 7, at 23.

44. *Id.*

45. *Id.* A copyright owner may also limit a license of rights to specific uses or in a specific media or geographical area. *Id.* There are many different ways to divide up rights, making this area of the law quite complicated:

Moreover, each of the copyright owner’s exclusive rights can also be subdivided and licensed to more than one licensee. Thus, for example, the owner of the copyright in a book can unbundle the rights and license the publishing (distribution) rights to one entity and the movie (adaptation) rights to another entity. The copyright owner can [also] divide a single right, such as the distribution right; for example, a copyright owner can grant one entity the right to distribute the work in North America while a different entity is granted the right to distribute the work in Asia, and perhaps a third entity is granted the distribution rights for Europe. And each type of copyrighted work, such as music, software, fine arts, or biotechnology, presents its own complex licensing issues.

*Id.*

46. *Id.*

47. Martinez, *supra* note 39.

48. Tune, *supra* note 7, at 23.

one or more of [his or] her rights but retains at least one other” right.<sup>49</sup> Similar to selling copyrights, an exclusive copyright license is only considered valid if it is in writing and signed by the copyright owner.<sup>50</sup> However, this signed, written agreement may take any form, such as a formal contract, a memorandum, or a letter.<sup>51</sup>

By contrast, a nonexclusive license is created when the copyright owner grants the licensee “the right to exercise one or more of the copyright owner’s rights but that license does not prevent the copyright owner from granting a license to third parties to exercise the same right or rights at the same time or from using the same right(s) him or herself.”<sup>52</sup> An important distinction between an exclusive license and a nonexclusive license is that a nonexclusive license can be created either in writing or orally, and it may also merely be implied from the actions of the involved parties.<sup>53</sup>

One example of a nonexclusive license occurs when a copyright owner has knowledge of someone using her copyrighted work but does not object.<sup>54</sup> In this situation, a nonexclusive license is implied regardless of the absence of an express verbal or written agreement.<sup>55</sup> To put the idea of an implied nonexclusive copyright license in the context of this Note, for example, the common consensus among legal scholars is that, as the copyright owner, “a tattoo artist offers his client an implied license to display the work.”<sup>56</sup> However, it is important to note that “the parties’ rights are not completely protected” in this area of copyright licensing, as “the specific terms of implied licenses are not clear.”<sup>57</sup>

There are a number of limitations on copyright protection,<sup>58</sup> the one most relevant to the topic of this Note being the concept of fair use; the defendants in the tattoo lawsuits that will be the primary focus of this Note use the “fair use” defense to argue that their use of a tattoo was protected. This is a commonly used defense to copyright infringement because “[i]f a court determines that the defendant’s conduct was ‘fair use,’ then no liability . . . arises from such conduct.”<sup>59</sup> Most people with only the faintest idea of copyright law are familiar with the concept of fair use, but it is unfortunately “widely misunderstood.”<sup>60</sup> Under this doctrine, in certain circumstances, one

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Martinez, *supra* note 39.

57. Tune, *supra* note 7, at 23.

58. *Id.* at 24–25.

59. *Id.* at 25.

60. *Id.* at 24.

may “make *limited* use of a copyrighted work[] without permission.”<sup>61</sup> The Copyright Act of 1976 lays out “a four-part balancing test to determine whether any specific unauthorized use of a copyrighted work was a ‘fair use’”<sup>62</sup> and thus exempt from any copyright protections.<sup>63</sup> These four factors set out by § 107 are as follows:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>64</sup>

While a court must take all four of these factors into account, it is not an exhaustive list—a court may take into consideration other issues that it believes are particularly relevant to the present case.<sup>65</sup> “Historically, courts also consider elements such as lack of good faith and industry custom.”<sup>66</sup> One must apply this four-part test on a case-by-case basis and the outcome is often difficult to predict.<sup>67</sup> However, some patterns are discernible; for example, commercial use generally “weighs heavily against a finding of fair use.”<sup>68</sup> Courts also rarely find fair use when the copyright infringement at issue “negatively impacted the potential market for the copyrighted work or the value of that work.”<sup>69</sup>

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61. *Id.*

62. *Id.* at 25.

63. Joseph Rothberg, *Legal Inklings on Ink: Are Tattoos Reproduced in Video Games Fair Use?*, FORBES (Aug. 22, 2017, 10:00 AM), <https://www.forbes.com/sites/legalentertainment/2017/08/22/legal-inklings-on-ink-are-tattoos-reproduced-in-video-games-fair-use>.

64. 17 U.S.C. § 107 (2012); *see also* Tune, *supra* note 7, at 25 (discussing the fair use four-factor test set down by the statute); David M. Cummings, Note, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrighable Art Form*, 2013 U. ILL. L. REV. 279, 293 (indicating that a court is allowed to examine other factors in determining fair use, if it also considers the four factors of § 107); Rothberg, *supra* note 63 (outlining what is included in the fair use four-factor test).

65. Cummings, *supra* note 64, at 293.

66. *Id.* (citing *Roy Exp. Co. Establishment v. Columbia Broad. Sys. Inc.*, 503 F. Supp. 1137, 1146 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982), and *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980)).

67. Tune, *supra* note 7, at 25.

68. *Id.*

69. *Id.*

Another commonly used defense in copyright infringement lawsuits is that the defendant's use of the copyrighted material was *de minimis*.<sup>70</sup> The full legal term of art *de minimis non curat lex* means "the law does not concern itself with trifles."<sup>71</sup> In copyright law, *de minimis* is commonly used as a defense in copyright infringement suits and argues that the "actual copying [at issue] is so trivial that it falls below the required element of substantial similarity."<sup>72</sup> In other words, claiming that the use of a copyrighted work was an "insignificant violation[]" protects the defendant from liability.<sup>73</sup> This concept of "[s]ubstantial similarity" is central to the question of whether a plaintiff has an actionable claim of copyright infringement.<sup>74</sup>

A great deal more can be said about the threshold of substantial similarity in copyright law and the *de minimis* defense. However, for the purposes of this Note, one must simply understand that when the court rules in favor of a defendant's *de minimis* defense, it is permitting the use of the copyrighted material "without even conducting a fair use analysis" because the amount used by the defendant is so small and trivial.<sup>75</sup> One example of a court accepting the *de minimis* defense occurred in a copyright infringement suit

70. See Stephen R. Wilson, *Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?*, 1 J. HIGH TECH. L. 179, 185 (2002).

71. *Id.* (quoting *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)). "*De minimis non curat lex*" is a legal maxim applicable to a variety of legal areas, but for the purposes of this Note, only its use in copyright law will be explained and discussed. *Id.*

72. *Id.* (citing *Ringgold*, 126 F.3d at 74). The *de minimis* doctrine, when viewed in the context of copyright law, has three meanings and applications. *Ringgold*, 126 F.3d at 74. First, *de minimis* can be applied to copyrights as it is used "in most legal contexts: a technical violation of a right so trivial that the law will not impose legal consequences." *Id.* Second, a *de minimis* defense can argue that the "copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying." *Id.* (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A], at 13-27 (1997)). Third, the *de minimis* concept has been considered in analysis of a fair use defense, specifically in determining whether the third factor is satisfied. *Id.* at 75. To review, the third fair use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3) (2012) (emphasis added). Using a *de minimis* argument, the defendant can assert "that the portion used was minimal and the use was so brief and indistinct as to tip the third fair use factor decisively against the plaintiff." *Ringgold*, 126 F.3d at 75.

73. *Ringgold*, 126 F.3d at 74.

74. Wilson, *supra* note 70, at 185 (citing *Ringgold*, 126 F.3d at 75). In determining whether substantial similarity exists, courts note the important, though subtle, differences between "comprehensive non-literal similarity" and "fragmented literal similarity." *Id.* (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 (2001)). First, "[f]ragmented literal similarity occurs when the infringed work incorporates the literal copying of a portion of an original work." *Id.* (citing 4 NIMMER & NIMMER, *supra*, § 13.02[A][2]). On the contrary, "[c]omprehensive non-literal similarity occurs when the infringing work incorporates the overall theme of the original work but there is no literal copying." *Id.* (emphasis added) (citing 4 NIMMER & NIMMER, *supra*, § 13.02[A][1]).

75. *Measuring Fair Use: The Four Factors*, STAN. U. LIBRARIES., [https://fairuse.stanford.edu/overview/fair-use/four-factors/#too\\_small\\_for\\_fair\\_use\\_the\\_de\\_minimis\\_defense](https://fairuse.stanford.edu/overview/fair-use/four-factors/#too_small_for_fair_use_the_de_minimis_defense) (last visited Dec. 15, 2018) (citing RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE & OFF (4th ed. 2010)).

brought against New Line Cinema as the producer and distributor of the movie *Seven*.<sup>76</sup> Artist and photographer Jorge Antonio Sandoval alleged that *Seven* depicted ten of his copyrighted photographs without obtaining his permission to use the reproduced images.<sup>77</sup> In a relatively short opinion, the court ruled “that the defendants’ copying of Sandoval’s photographs [fell] below the quantitative threshold of substantial similarity.”<sup>78</sup> In its holding, the court further explained that the use of Sandoval’s photographs by New Line Cinema in the movie *Seven* was *de minimis* “[b]ecause [the] photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable.”<sup>79</sup>

### B. THE COPYRIGHTABILITY OF TATTOOS

The question of whether tattoos are copyrightable works has not been definitively answered and there have been no authoritative federal court decisions in this area.<sup>80</sup> While tattoo-centered lawsuits have been initiated and many have been high-profile cases, they have all been settled out of court

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76. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 215–16 (2d Cir. 1998).

77. *Id.* at 216. Between 1991 and 1994, Southern California artist and photographer Jorge Antonio Sandoval “created a series of 52 untitled, and highly unusual black and white self-portrait studies.” *Id.* During the course of this case, it was never argued that Sandoval did not possess copyright ownership over the photographs. *Id.* Rather, New Line Cinema asserted a *de minimis* defense and filed a motion for summary judgment, which was granted by the District Court and the case was dismissed on the basis of fair use, without considering the *de minimis* argument. *Id.* at 216–17. On appeal, the U.S. Court of Appeals for the Second Circuit stated that to determine whether the use of a copyrighted work was “*de minimis*[] and therefore not actionable,” there is “no bright-line rule[] for what constitutes substantial similarity.” *Id.* at 217. Instead, courts often review how much of the work was copied and, in cases such as this which involve visual media, analyze “the observability of the copyrighted work in the allegedly infringing work.” *Id.* (citing *Ringgold*, 126 F.3d at 75). When conducting this analysis of observability, the factors considered include (1) the “prominence” of the copyrighted material in the work at issue “as revealed by the lighting and positioning of the copyrighted work,” and (2) “the length of time the copyrighted work appears in the allegedly infringing work.” *Id.* In this case, the court decided that, as a result of reviewing the copyrighted photographs’ observability in the movie scene, “the defendants’ copying of Sandoval’s photographs [fell] below the quantitative threshold of substantial similarity” and the use was therefore *de minimis*. *Id.* at 218. The court distinguished the photographs in the present case from the copyrighted work in *Ringgold v. Black Entertainment Television, Inc.* (where that court ruled the use was not *de minimis*) by asserting that “Sandoval’s photographs as used in the movie are not displayed with sufficient detail for the average lay observer to identify even the subject matter of the photographs.” *Id.*

78. *Id.*

79. *Id.*

80. See Lisa C. Johnson, *Before the Ink Dries: Copyright Law & Tattoos*, LEGALZOOM (Feb. 2014) [hereinafter Johnson, *Before the Ink Dries*], <https://www.legalzoom.com/articles/before-the-ink-dries-copyright-law-tattoos>; see also King, *The Challenges*, *supra* note 3, at 132 (“However, the protectability of tattoos is an area of the law that remains unaddressed by the courts. While a few tattoo artists have filed lawsuits in federal courts, there are as yet no published decisions that address the issue of copyright protection for tattoos on the human body.”).

without a conclusive ruling.<sup>81</sup> However, it is commonly understood and accepted that tattoos can be copyrighted.<sup>82</sup> In a federal court hearing focused around Mike Tyson's famous tribal face tattoo in 2011, the judge stated, "[o]f course tattoos can be copyrighted' . . . 'I don't think there's any reasonable dispute about that.'"<sup>83</sup>

A quick analysis of whether tattoos fit the basic statutory requirements of works that merit copyright protection demonstrates that this common understanding is valid and rooted in law even in the absence of a court ruling. As mentioned in Section A, the rule for what qualifies for copyright protection is divided into three requirements: It must be original, a "work[] of authorship," and "fixed in [a] tangible medium."<sup>84</sup> First, to be an original work, "only a minimum amount of creativity is required" and the author must not copy a pre-existing work.<sup>85</sup> This requirement is easy to meet and even "[t]he Supreme Court has held that most things 'make the grade quite easily' under this very low bar."<sup>86</sup> Next, a "work of authorship" is comprised of a wide range of categories that relevantly includes "pictorial, graphic, and sculptural works."<sup>87</sup> Here, tattoos fit under the "pictorial works" category as they can essentially be thought of in the same way as an ink drawing. Finally, tattoos are unquestionably fixed in a tangible medium of expression. Although perhaps thought of as an unconventional medium, ink on skin is certainly tangible, and the Copyright Act has accounted for novel media such as this through its "now known or later developed" provision.<sup>88</sup>

In the last six years, there has been a large boom in the number of copyright disputes involving tattoos, most of which have been high-profile

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81. King, *The Challenges*, *supra* note 3, at 132 ("In fact, no tattoo artist has yet been successful in receiving enforcement by the court of his copyright in a tattoo."); Johnson, *Before the Ink Dries*, *supra* note 80; Yolanda M. King, *Tattoo Copyrights May Finally Get Their Day in Court*, LAW360 (Apr. 28, 2016, 10:39 AM) [hereinafter King, *Day in Court*], <https://www.law360.com/articles/788694/tattoo-copyrights-may-finally-get-their-day-in-court> ("After more than a decade of conjecture, debate and closed-door settlements, a tattoo copyright infringement lawsuit may finally go to trial."); Kravets, *supra* note 5.

82. See, e.g., Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS LAW., Fall 2011, at 1, 27 ("As works of art, tattoos fall within the realm of copyrights.").

83. Lauren Etter, *Tattoo Artists Are Asserting Their Copyright Claims*, ABA J. (Jan. 2014), [http://www.abajournal.com/magazine/article/tattoo\\_artists\\_are\\_asserting\\_their\\_copyright\\_claims](http://www.abajournal.com/magazine/article/tattoo_artists_are_asserting_their_copyright_claims) (quoting Judge Catherine D. Perry). This case will be further recounted and explored in Section II.C.

84. 17 U.S.C. § 102(a) (2012); see also Cummings, *supra* note 64, at 285–89; Shontavia Johnson, *Why Your Tattoo May Leave You Open to a Copyright Infringement Lawsuit*, RAWSTORY (Aug. 8, 2016, 1:51 PM) [hereinafter Johnson, *Why Your Tattoo May Leave You Open*], <https://www.rawstory.com/2016/08/copyright-and-trademark-laws-mean-your-tattoo-may-leave-you-open-to-an-infringement-lawsuit>.

85. Tune, *supra* note 7, at 18.

86. Johnson, *Why Your Tattoo May Leave You Open*, *supra* note 84 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991)).

87. 17 U.S.C. § 102(a)(5).

88. See *id.* § 102(a).

lawsuits.<sup>89</sup> The question of who owns tattoo copyrights frequently arises in these disputes.<sup>90</sup> Many believe that this “growing body of case law . . . suggests that ultimately it’s the tattoo artist—not the person who bears the tattoo—who owns the rights to that tattoo.”<sup>91</sup> This common proposition that the tattoo artist is the copyright owner is supported by 17 U.S.C. § 201, which states that a copyright-protected work is initially owned by the author of the work.<sup>92</sup> Exceptions to this default rule exist when there is an agreement specifying otherwise or when the work is classified as a “work made for hire.”<sup>93</sup> To reiterate the explanation provided in Section A, works made for hire exist where “the employer or other person for whom the work was prepared is considered the author” and therefore “owns all of the rights comprised in the copyright.”<sup>94</sup> There must also be a written, signed agreement between the parties that the work constitutes a work for hire.<sup>95</sup> Typically, however, in the tattoo-related lawsuits that have arisen, the parties assume that copyright ownership is vested in the tattoo artist.<sup>96</sup> Based on this conclusion and the pattern of increased litigation surrounding tattoo copyrights, lawyers are beginning to predict that it will soon become standard for tattoo parlors to be armed with copyright waivers:

“I don’t doubt that in many larger tattoo parlors it will become standard that some type of document is presented to those who are going to have tattoos put on them stating that those tattoos have been created by the tattoo artist or the parlor,” says entertainment lawyer Jerry Glover of Leavens, Strand, Glover & Adler in Chicago.<sup>97</sup>

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89. Etter, *supra* note 83.

90. See Bradley, *supra* note 82, at 27.

91. Etter, *supra* note 83.

92. 17 U.S.C. § 201(a).

93. *Id.* § 201(b).

94. *Id.*

95. *Id.*

96. One high-profile example is the 2011 *Hangover*-Mike Tyson tattoo case in which the default rule was applied and the copyrights were retained by the tattoo artist. Bradley, *supra* note 82, at 27.

97. Etter, *supra* note 83. Jerry Glover was a partner in the Chicago office of Leavens Strand & Glover, an Entertainment, Media, & IP Law firm. *Jerry Glover: Retired Partner*, LEAVENS STRAND & GLOVER, <http://lsglegal.com/staff/jerry-glover> (last visited Dec. 15, 2018). Glover retired from the firm in 2018 but during his long career, he represented a variety of clients in the entertainment industry, including musicians, writers, directors, and talk show hosts in such areas as film, television, and publishing. *Id.* His leadership in the intellectual property community included serving as a member on the Board of Directors for Lawyers for the Creative Arts and as Chair of the Committee on Intellectual Property for the Chicago Bar Association. *Id.* Glover has also been named Chicago’s “Lawyer of the Year” in Entertainment Law by Best Lawyers twice—once in 2012 and more recently in 2017. *Best Lawyers Names Jerry Glover & Linda Mensch 2017 “Lawyers of the Year” in Entertainment Law in Chicago*, LEAVENS STRAND & GLOVER, <http://lsglegal.com/best-lawyers-names-jerry-glover-linda-mensch-2017-lawyers-of-the-year-in-entertainment-law-in-chicago> (last visited Dec. 15, 2018).

While this author enthusiastically agrees that tattoos should be covered by copyright law, this Note pushes back on the blanket statement that tattoo copyrights vest in the tattoo artists, arguing that it is too simple a conclusion and fails to take into account several unintended consequences, as well as the interests of the inked.<sup>98</sup>

C. SPARK OF LITIGATION SURROUNDING DEPICTIONS OF TATTOOED CELEBRITIES

Once established that tattoos are indeed subject to copyright protections, the next step is understanding the difference this poses between tattoos on the average person and tattoos on celebrities. The possible copyright implications and issues increase when considering a tattooed celebrity because of both their widespread recognition and increased presence in visual representations such as movies, television shows, and video games. The past few years have seen a sharp increase in the number of filed tattoo copyright lawsuits, many of which have been high-profile cases involving celebrities.<sup>99</sup> This trend may soon culminate in a court ruling on a tattoo copyright infringement case “[a]fter more than a decade of conjecture, debate and closed-door settlements.”<sup>100</sup>

As of the writing of this Note, no tattoo copyright infringement lawsuit has gone to trial and produced a definitive court ruling on this area of law. A few high-profile cases have come close, but ultimately ended in settlement and dismissal. One particularly popular lawsuit is *Whitmill v. Warner Bros. Entertainment, Inc.*, commonly known as the Mike Tyson face tattoo case.<sup>101</sup> Former heavyweight champion Mike Tyson’s tribal face tattoo is arguably one of the most well-known and recognizable tattoos in the United States.<sup>102</sup> Its Maori-inspired design was created by tattoo artist S. Victor Whitmill and appeared on the face of Ed Helms’s character in the 2011 film “The Hangover Part II.”<sup>103</sup> The film’s trailer and movie poster prominently featured the tattoo as well.<sup>104</sup>

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98. The full extent of this argument will be further discussed and elaborated on in Parts III and IV.

99. King, *Day in Court*, *supra* note 81.

100. *Id.*

101. *See id.* (referring to *Whitmill v. Warner Bros. Entm’t*, No. 4:11CV00752 (E.D. Mo. dismissed June 22, 2011)).

102. *Id.* The plaintiff’s motion for preliminary injunction states that Whitmill “created what may be the most distinctive tattoo in the nation, namely, the work of art he created and applied onto the upper left side of the face of the former world heavyweight champion boxer Mike Tyson.” Plaintiff’s Memorandum in Support of His Motion for Preliminary Injunction at 1, *Whitmill v. Warner Bros. Entm’t*, No. 4:11-CV-752, 2011 WL 12893042 (E.D. Mo. Apr. 28, 2011).

103. Noam Cohen, *On Tyson’s Face, It’s Art. On Film, a Legal Issue*, N.Y. TIMES (May 20, 2011), <https://www.nytimes.com/2011/05/21/business/media/21tattoo.html>; *The Hangover Part II*, IMDB, <https://www.imdb.com/title/tt1411697> (last visited Dec. 15, 2018).

104. *See* Bradley, *supra* note 82, at 27; *The Hangover Part II*, *supra* note 103.

About a month before the movie's scheduled release, Whitmill sued Warner Brothers Entertainment for copyright infringement,<sup>105</sup> asking a federal district court judge in St. Louis to stop the studio from using the tattoo on the advertising posters and in the movie.<sup>106</sup> The copyright infringement claims arose from the tattoo's reproduction in the movie itself, as well as its "further reproduction, distribution, and public display . . . in promotion and advertising of the movie."<sup>107</sup> Whitmill also demanded monetary damages for the studio's "reckless copyright infringement," asserting that he had "never been asked . . . for permission for, and [had] never consented to, the use, reproduction, or creation of a derivative work based on his Original Tattoo."<sup>108</sup> "[T]he judge denied Whitmill's aggressive motion to enjoin distribution of the movie . . ."<sup>109</sup> However, she made important observations that would prove useful in the area of tattoo copyrights through statements "that tattoos are copyrightable and . . . that Whitmill had a strong likelihood of prevailing on his copyright infringement claim."<sup>110</sup> Nevertheless, not long after, the parties reached a settlement and the case was dismissed without any final ruling on the issues presented.<sup>111</sup>

*Whitmill v. Warner Bros.* is largely considered the starting momentum for the increase in tattoo copyright infringement case law that has arisen in recent years.<sup>112</sup> It is proposed that this case "likely motivated other tattoo artists to become more aggressive in the enforcement of their rights."<sup>113</sup> Since the case's dismissal in June of 2011, there has been a marked trend in tattoo copyright infringement concerning video games:

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105. Bradley, *supra* note 82, at 27.

106. Cohen, *supra* note 103.

107. King, *Day in Court*, *supra* note 81. Whitmill's motion for a preliminary injunction details his claims of infringement on his copyrighted tattoo:

Mr. Whitmill has learned that Defendant Warner Bros. Entertainment Inc. is planning to release a motion picture later this Spring entitled THE HANGOVER 2 (the "Movie") that features an exact reproduction of the Original Tattoo, but on the face of one of the stars of the Movie (the "Pirated Tattoo"). That the Pirated Tattoo plays an important role in the Movie is underscored by Defendant's prominent and repeated use of the Pirated Tattoo in the various promotional and marketing materials it is using to advertise the Movie . . . .

These actions of Warner Bros. already infringe Mr. Whitmill's copyright in the Original Tattoo. If allowed to continue, that irreparable damage will increase exponentially. He thus seeks a preliminary injunction to maintain the status quo and halt the irreparable damage until there can be a trial on the merits.

Plaintiff's Memorandum for Preliminary Injunction, *supra* note 102, at 1–2 (emphasis omitted).

108. Plaintiff's Memorandum for Preliminary Injunction, *supra* note 102, at 1, 3.

109. King, *Day in Court*, *supra* note 81.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

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 videos [sic] games.<sup>114</sup>

One example of just such a case arose in December 2012, when Stephen Allen, a tattoo artist and copyright owner, filed a complaint against Electronic Arts Inc. ("EA") and Ricky Williams, a former National Football League player, for the appearance of Williams's arm tattoos in a depiction of the athlete in EA's video games.<sup>115</sup> This case was dismissed in April of 2013.<sup>116</sup>

A similar lawsuit arose in November 2012, when tattoo artist Christopher Escobedo sued THQ Inc.<sup>117</sup> Carlos Condit, a professional mixed martial artist, was featured in two of THQ's "UFC Undisputed" video games.<sup>118</sup> In these video games, a lion tattoo on Condit's ribcage can be clearly seen, over which Escobedo alleged copyright ownership.<sup>119</sup> Escobedo claimed that THQ infringed his copyright of the lion tattoo when Condit and the tattoo were portrayed in their video games.<sup>120</sup> However, as the pattern of tattoo copyright infringement lawsuits has thus far shown, the case never went to trial nor incurred a final decision.<sup>121</sup> Rather, THQ filed bankruptcy, the bankruptcy court awarded Escobedo \$22,500, Escobedo appealed, and the parties then settled for an undisclosed amount.<sup>122</sup>

Another high-profile tattoo copyright infringement case involving the depiction of athletes' tattoos in video games makes use of these three ultimately unsuccessful attempts to establish case law and directly cites to *Whitmill v. Warner Bros.*<sup>123</sup> This ongoing case, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, is discussed in detail in the following section and provides a focal point for the rest of this Note.

#### D. SOLID OAK SKETCHES, LLC V. 2K GAMES, INC.

Filed in the Southern District of New York on February 1, 2016, *Solid Oak Sketches, LLC v. 2K Games, Inc.* is one of the most recent cases in this area of

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114. *Id.*

115. *Id.* (referring to Complaint for Copyright Infringement and Accounting and Other Relief, Allen v. Elec. Arts, Inc., No. 5:12-CV-3172, 2012 WL 6852208 (W.D. La. Dec. 31, 2012)).

116. *Id.*

117. *Id.* (referring to Complaint, Escobedo v. THQ Inc., No. 2:12-CV-02470, 2012 WL 5815742 (D. Ariz. Nov. 16, 2012)).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Rothberg, *supra* note 63.

the law<sup>124</sup> that may potentially result in a court ruling on several issues surrounding tattoo copyrightability.<sup>125</sup> Originally filed under the title *Solid Oak Sketches, LLC v. Visual Concepts, LLC*, plaintiff Solid Oaks Sketches voluntarily dropped all of its claims against defendant Visual Concepts on April 7, 2016.<sup>126</sup> Now, as the case is poised for potential trial, the two primary defendants are 2K Games, Inc. and Take-Two Interactive Software, Inc. (hereafter referred to as Take-Two).<sup>127</sup> This Note focuses mostly on the actions of Take-Two.

The highly popular video game *NBA 2K16*, released in 2015, features a number of well-known, star NBA players “represented by digital avatars which strive for an accurate reproduction” of the athletes.<sup>128</sup> The reproductions in the video game include celebrity players LeBron James, Stephen Curry, Eric Bledsoe, Kobe Bryant, DeAndre Jordan, and Kenyon Martin—as well as all of

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124. Since the writing of this Note, an additional case has arisen that looks promising in terms of reaching litigation, though it is not welcome news to Defendant 2K Games, Inc. Marc Middleton, *New Details on Randy Orton’s Tattoo Artist Suing WWE & 2K, if Orton Had Ownership or Permission*, WRESTLING INC. (Apr. 24, 2018), <https://www.wrestlinginc.com/news/2018/04/new-details-on-randy-orton-tattoo-artist-suing-wwe-2k-639291>. On April 17, 2018, Catherine Alexander, a tattoo artist from Illinois, filed a lawsuit in the Southern District of Illinois alleging that 2K Games and World Wrestling Entertainment, Inc. (“WWE”) infringed on her copyrights to professional wrestler Randy Orton’s tattoos. *Id.* Alexander has been inking Orton since 2003, and she claims that when she addressed the issue of depicting her designs with WWE in 2009, the company “offered [her] \$450 for the rights to use the designs.” Joshua Gagnon, *Lawsuit Over Randy Orton’s Tattoos Moves Forward*, WRESTLING INC. (Aug. 12, 2018), <https://www.wrestlinginc.com/news/2018/08/lawsuit-over-randy-orton-tattoos-moves-forward-644725>. Alexander declined their offer. *Id.* Her suit also names some other familiar faces as defendants, including 2K Sports, Take-Two Interactive Software, and Visual Concepts Entertainment. Middleton, *supra*. Alexander claims that the tattoos she inked on Orton between 2003 and 2008 “are her original designs and that she never gave the defendants permission to recreate them in WWE video games.” *Id.* Reportedly, Alexander “is asking the court to rule that the tattoos are her copyrighted works, and that the defendants infringed against her.” *Id.* She is also seeking a jury trial and an award of damages. *Id.* WWE and Take-Two moved for dismissal of the case in July, and Take-Two filed a new motion to dismiss on October 23, 2018. Ryan Boysen, *Take-Two Again Blasts IP Suit Over Tattoo in WWE Game*, LAW360 (Oct. 24, 2018, 5:55 PM), <https://www.law360.com/articles/1095123/take-two-again-blasts-ip-suit-over-tattoo-in-wwe-game>. Take-Two’s primary claim, among others listed in the motion, is that “Alexander’s allegations [are] ‘impermissibly vague.’” *Id.* Nevertheless, the court has declared that the deadline for completion of discovery is January 7, 2019, and set a settlement conference for April 16, 2019. Gagnon, *supra*.

125. Bill Donahue, *NBA 2K Moves to Kill ‘Troubling’ Tattoo Copyright Suit*, LAW360 (Aug. 10, 2017, 12:05 PM) [hereinafter Donahue, *NBA 2K*], <https://www.law360.com/articles/953053/nba-2k-moves-to-kill-troubling-tattoo-copyright-suit>.

126. See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16CV-724-LTS, 2016 WL 4126543, at \*1 n.1 (S.D.N.Y. Aug. 2, 2016).

127. Memorandum of Law in Support of Defendants-Counterclaimants 2K Games, Inc. and Take-Two Interactive Software, Inc.’s Motion for Judgment on the Pleadings, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16CV-724-LTS, 2017 WL 4101824, at \*1 (S.D.N.Y. Aug. 9, 2017).

128. Rothberg, *supra* note 63.

their tattoos.<sup>129</sup> An especially notable example displayed in the video game is LeBron's "Lion's Head" tattoo, which fans are familiar with and associate with him as the tattoo's location on his right arm is difficult to miss.<sup>130</sup> This is merely one of several tattoos owned by Solid Oak Sketches that appear in *NBA 2K16*.<sup>131</sup>

As a result of the prominently featured tattoos in the video game, Solid Oak Sketches brought suit against Take-Two, the developer, publisher, and distributor of *NBA 2K16*,<sup>132</sup> alleging copyright infringement from the game's digital reproduction of real-world tattoos over which Solid Oak Sketches has copyright ownership.<sup>133</sup> Specifically, Solid Oak Sketches alleged copyright infringement of five tattoos in its Second Amended Complaint.<sup>134</sup> Solid Oak Sketches maintains its ownership over the tattoos at issue after "purchas[ing] the exclusive rights to license[] from the original tattoo artists."<sup>135</sup> As a result of this purchase of the copyright licenses, Solid Oak Sketches possesses "the legal rights to the recreation of [the] tattoos."<sup>136</sup> Furthermore, Solid Oak Sketches bases its lawsuit on the allegation that it never granted either Take-Two or 2K Games permission to digitally reproduce, distribute, or display the images of the tattoos in the game.<sup>137</sup> Here, a common point of debate in the conversation regarding tattoo copyrights appears: Who is the original owner of the copyright? Was Solid Oak Sketches's purchase of the exclusive rights to license legal? Did the original tattoo artists from which Solid Oak Sketches bought these rights actually have any rights to transfer? This Note pushes back

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129. Chris Cole, *Eric Bledsoe Takes on Suns Fan in NBA 2K16*, AZCENTRAL (Feb. 24, 2016, 8:27 PM), <https://www.azcentral.com/story/sports/heat-index/2016/02/24/eric-bledsoe-takes-suns-fan-nba-2k16/80879048> (describing Bledsoe's experience "play[ing] as the virtual version of himself" in *NBA 2K16*); Kravets, *supra* note 5; Chris Pereira, *NBA 2K16 Continues Trend of Enlisting Celebrities, Consults Spike Lee*, GAME SPOT (June 4, 2015, 12:26 PM), <https://www.gamespot.com/articles/nba-2k16-continues-trend-of-enlisting-celebrities-/1100-6426870> (mentioning that Stephen Curry was featured on *NBA 2K16*'s cover art).

130. See Mike Nepple, *Fair Use Blocks out Copyright Claim over LeBron's Tattoo*, THOMPSON COBURN LLP: IN FOCUS (June 1, 2017), <https://www.thompsoncoburn.com/insights/blogs/in-focus/post/2017-06-01/fair-use-blocks-out-copyright-claim-over-lebron-s-tattoo>.

131. See *id.* In its Second Amended Complaint, Solid Oak Sketches dropped the copyright infringement claim regarding LeBron's "Lion's Head" tattoo, reducing the overall number of disputed copyrights to five. Memorandum Order at 2, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16CV-724-LTS (S.D.N.Y. May 16, 2017).

132. Memorandum Order, *supra* note 131, at 2.

133. Kravets, *supra* note 5; see also Isaac Kaplan, *Why LeBron James Doesn't Own the Rights to His Tattoos*, ARTSY (Oct. 3, 2017, 2:09 PM), <https://www.artsy.net/article/artsy-editorial-lebron-james-rights-tattoos> (discussing the lawsuit brought by Solid Oak Sketches).

134. Memorandum Order, *supra* note 131, at 2. The initial Complaint by Solid Oak Sketches included infringement claims against six tattoos. *Id.* As mentioned in note 131, the infringement claim concerning LeBron's "Lion's Head" tattoo was dropped. *Id.*

135. Kaplan, *supra* note 133; Rothberg, *supra* note 63.

136. Rothberg, *supra* note 63.

137. *Id.*; Kaplan, *supra* note 133.

on the assumption that tattoo copyrights vest in the original tattoo artist.<sup>138</sup> However, due to the absence of any standards or settled law on tattoo copyrights, both parties operated on this assumption that tattoos were like any other copyrightable work, and thus, no one ever questioned Solid Oak Sketches's "rights."

Take-Two responded to the allegations by filing for "a declaratory judgment that the visibility of the tattoos was both fair use and a *de minimis* use," defenses that Solid Oak Sketches in turn moved to dismiss.<sup>139</sup> However, in a Memorandum Order issued on May 16, 2017, U.S. District Court Judge Laura Taylor Swain ruled against Solid Oak Sketches's motion to dismiss the counterclaims, allowing the lawsuit to move forward.<sup>140</sup> This development in the case was particularly meaningful because, rather than subjecting it to the same fate as other previous tattoo copyright cases, it allowed the issue to move a step closer to a final court decision.<sup>141</sup> Judge Swain's decision here sustains the continued hope that this case will finally result in a ruling on the currently unanswered question of whether parties are required to acquire a license "to visually depict a copyrighted tattoo in a video game, movie or television show,"<sup>142</sup> a ruling that is very important to the entertainment industry.

On August 9, 2017, Take-Two filed a motion for judgment on the pleadings and submitted a memorandum in support of its motion.<sup>143</sup> In this memorandum, Take-Two criticizes the implications of Solid Oak Sketches's argument, asserting that a rule based on said argument would mean that "public figures must seek [a copyright owner's] permission every time they appear in public, film, or photographs."<sup>144</sup> This conclusion would allow Solid Oak Sketches, and any other tattoo copyright owner, to demand money "each time that a player bearing one of its tattoos commercializes his likeness, or worse, appears in public, and therefore arguably 'publicly displays' the Tattoos under copyright law."<sup>145</sup> Take-Two implores that the court rule in its favor because to do otherwise "would set a bad precedent affecting all bearers of tattoos and the companies that creatively depict them."<sup>146</sup>

Furthermore, Take-Two appears to attack Solid Oak Sketches's decision to file a lawsuit in the first place, asserting that Solid Oak Sketches "seek[s] a

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138. See *infra* Section IV.B (proposing and discussing that tattoo copyrights should vest in the person with the tattoo rather than the tattoo artist).

139. Brody, *supra* note 5 (emphasis added).

140. *Id.*; see also Memorandum Order, *supra* note 131, at 6 ("For the foregoing reasons, the Counter Defendant's motion to strike counterclaims is denied.").

141. Brody, *supra* note 5.

142. *Id.*

143. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127.

144. *Id.* at 1.

145. *Id.* at 25.

146. *Id.*

‘troubling’ and unprecedented interpretation of copyright law.”<sup>147</sup> Take-Two proclaims that Solid Oak Sketches is an “opportunist” rather than an “aggrieved artist.”<sup>148</sup> The memorandum characterizes this case as mere “profit-making litigation” and suggests that Solid Oak Sketches only “bought the copyrights to a handful of the tattoos that were inked on [several famous] NBA players . . . to assert them against Take-Two.”<sup>149</sup>

Take-Two’s primary arguments for why the case should be dismissed rely on assertions that its use of the tattoos is both *de minimis* and fair use.<sup>150</sup> Under the *de minimis* theory, Take-Two argues that its use of the tattoos in the video game is “so small that it does not count as infringement”<sup>151</sup> in part because “[t]he Tattoos rarely appear in *NBA 2K*” since the video game offers “over 400 other NBA players” to choose from.<sup>152</sup> Additionally, even when a person playing the video game chooses one of the inked players, the tattoos “are not prominent as the game camera generally uses a full court shot with the players’ avatars appearing as small images.”<sup>153</sup> Under the fair use doctrine, Take-Two argues that its use of the tattoos is protected because they were used “in a massive, highly creative video game featuring a virtual world that only uses player tattoos to realistically capture how the players actually look.”<sup>154</sup> This use is easily distinguished from that of a “rival tattooist . . . replicat[ing] a creative design and ink[ing] it on a new person” in real life.<sup>155</sup>

In its response, Solid Oak Sketches counters Take-Two’s accusations of its intentions, stating that its “sole motive for instituting this action is to be made whole for the infringement of the copyrights that it paid money for in exchange for the exclusive licenses that it possesses.”<sup>156</sup> Solid Oak Sketches

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147. Donahue, *NBA 2K*, *supra* note 125 (quoting Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1).

148. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1.

149. *Id.*

150. *Id.*

151. Donahue, *NBA 2K*, *supra* note 125.

152. *Id.* (quoting Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1).

153. *Id.* (quoting Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1–2). The entire argument that Take-Two’s use of the tattoos falls under the *de minimis* doctrine is found on pages 10–13 of its memorandum supporting its motion for judgment on the pleadings. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 10–13.

154. Donahue, *NBA 2K*, *supra* note 125 (quoting Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 2).

155. *Id.* (quoting Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 2). The entirety of Take-Two’s argument of its use of the tattoos falling under the fair use doctrine is found on page 13–25 of its memorandum supporting its motion for judgment on the pleadings. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 13–25.

156. Memorandum of Law in Support of Plaintiff’s Response to Defendants’ Motion for Judgment on the Pleadings at 1, Solid Oak Sketches, LLC v. Visual Concepts, Inc., No. 16CV-724-LTS, 2017 WL 6017666, at \*3 (S.D.N.Y. Sept. 12, 2017).

also refutes Take-Two's mischaracterization of its argument, contending that Solid Oak Sketches simply asserts "that corporate entities that purposefully seek to commercially benefit from the use of the Tattoos be held accountable for their actions and pay a royalty to the rightful owner of the intellectual property."<sup>157</sup>

Additionally, Solid Oak Sketches seeks to discredit Take-Two's primary claims that its use of the tattoos is protected both by the *de minimis* and fair use doctrines of copyright law.<sup>158</sup> Regarding Take-Two's fair use defense, Solid Oak Sketches claims that Take-Two cannot successfully demonstrate that its use of the tattoos in the video game was transformative.<sup>159</sup> Rather than meeting the requirement of "altering the tattoos to the point where [the tattoos are] 'barely recognizable' within the game, [Take-Two's] use appears not to have altered the copyrighted work at all."<sup>160</sup> Solid Oak Sketches contends that "[t]o the Defendants, the video games may replicate how the players appear in real life or allegedly serve as a 'historical anchor,' but it does not transform the original works so that it conveys that message."<sup>161</sup> Instead, Solid Oak Sketches argues "that the Defendants' use of the tattoos is purely commercial and a ploy to enthrall consumers to the realism of the games."<sup>162</sup>

Furthermore, in response to Take-Two's *de minimis* argument, Solid Oak Sketches rejects the premise that the availability of "over 400 other NBA players"<sup>163</sup> lowers a gamer's exposure to the copyrighted tattoos "because, given the customizable nature of the video game experience, it's impossible to say how frequently a gamer would be exposed to the copyrighted work."<sup>164</sup> For example, a gamer could choose a player with one of the copyrighted tattoos and "use them repeatedly . . . and thus be in a position to continuously observe the details of the subject tattoos."<sup>165</sup>

Finally, on March 30, 2018, Judge Swain ruled on Take-Two's motion for judgment on the pleadings and refused to dismiss the lawsuit because the

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157. *Id.* at 2.

158. Dave Simpson, *Tattoo Copyright Holder Says 'NBA 2K' Images Not Fair Use*, LAW360 (Sept. 14, 2017, 8:09 PM), <https://www.law360.com/articles/963977/tattoo-copyright-holder-says-nba-2k-images-not-fair-use>.

159. *Id.* This question of whether the use of a copyrighted work is transformative is one of two sub-factors that must be considered when analyzing the first fair use factor. Memorandum of Law in Support of Defendants-Counterclaims, *supra* note 127, at 15 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994)). Take-Two points out that "[m]ost important to the court's analysis of the first factor is the 'transformative' nature of the work." *Id.* (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006)).

160. Memorandum of Law in Support of Plaintiff's Response, *supra* note 156, at 8 (quoting *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013)).

161. *Id.* at 8-9.

162. *Id.* at 9 (citing *Campbell*, 714 U.S. at 579).

163. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1.

164. Simpson, *supra* note 158.

165. Memorandum of Law in Support of Plaintiff's Response, *supra* note 156, at 17.

issues could not be resolved at this early point.<sup>166</sup> Due to the “unique circumstances”<sup>167</sup> and “countless possible game permutations,” she was unable and unwilling to issue a ruling on Take-Two’s fair use and *de minimis* use defenses at the pleadings stage of the case.<sup>168</sup> Speaking to the *de minimis* use defense, the judge reasoned that there are too many unanswered questions and that the court is unable to reach a decision without additional information:

At this stage of the proceedings, there is no objective perspective as to how the [d]efendants’ video game is generally played, or to what extent certain game features can be or are actually utilized, that would allow this court to make determinations about the choices and subsequent observations of the “average lay observer,” or about the observability and prominence of the Tattoos. The Court is thus unable to conclude without the aid of extrinsic evidence that “no reasonable jury, properly instructed, could find that the two works are substantially similar.”<sup>169</sup>

Judge Swain’s ruling as to Take-Two’s fair use defense was very similar, stating that “[b]ecause of the difficulties inherent in conducting a side-by-side comparison of the video game and the tattoos, further evidence must be considered in connection with the fact-intensive question of the applicability of the fair use defense.”<sup>170</sup> After the judge’s decision to allow the case to continue, Darren A. Heitner, an attorney representing Solid Oak Sketches, applauded the court on its ruling and stated that both he and Solid Oak Sketches “look forward to eventually putting this in front of a jury.”<sup>171</sup> This most recent development indicates that the case is showing no signs of stopping and may well result in the first authoritative court decision in tattoo copyrights. Furthermore, unlike previous tattoo copyright infringement lawsuits, the parties here appear to have no intention of settling the case anytime soon. Back in 2016 when it filed the initial lawsuit, Solid Oak Sketches attached a demand letter in which it offered to allow Take-Two to use the tattoos in its video game either for the year “for \$819,000 or perpetually for

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166. Bill Donahue, *NBA Video Game Co. Can’t Kill Tattoo Copyright Lawsuit*, LAW360 (Mar. 30, 2018, 4:35 PM) [hereinafter Donahue, *NBA Video Game Co.*], <https://www.law360.com/articles/1028359>.

167. *Id.*

168. *Id.* (quoting *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS, 2018 WL 1626145, at \*3 (S.D.N.Y. Mar. 30, 2018)).

169. *Solid Oak Sketches, LLC*, 2018 WL 1626145, at \*4 (quoting Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010)); see also Donahue, *NBA Video Game Co.*, *supra* note 166 (explaining the reasoning behind Judge Swain’s decision).

170. Donahue, *NBA Video Game Co.*, *supra* note 166 (quoting *Solid Oak Sketches, LLC*, 2018 WL 1626145, at \*5).

171. *Id.* (quoting attorney Darren A. Heitner).

\$1.14 million.”<sup>172</sup> However, obviously, Take-Two declined.<sup>173</sup> As it looks like *Solid Oak Sketches, LLC v. 2K Games, Inc.* will break the trend and neither settle nor be dismissed, Heitner’s wish for a crack at trying this case in front of a jury may soon come true.

### III. ISSUES ARISING FROM CONTINUED AMBIGUITY, DIFFICULTY FITTING TATTOOS WITHIN EXISTING LAW, AND COMPETING INTERESTS

Despite the current lack of any published court decisions on the matter, this Note proceeds on the assumption that tattoos are copyrightable and explores the implications that arise from that conclusion, as well as the additional nuances of tattoo copyright law. Although there has yet to be a federal court ruling (or any U.S. court ruling, for that matter) on the issues surrounding this area of copyright law, a substantial amount of practicing attorneys and legal scholars in the field have indicated a common assertion that tattoos enjoy legal protection.<sup>174</sup>

Section A explores the problems that arise in these intermingling areas of copyright, entertainment, and sports law, determining that such issues are two-fold and follow each other in close succession. First, the current ambiguity surrounding tattoos and copyrights is detrimental to all parties involved: the tattoo artists, the celebrity athletes and actors, and the entertainment companies such as film studios, television networks, and video game companies. Second, any attempt to resolve this issue of ambiguity surrounding tattoo copyrights is difficult (or impossible) within the current statutory framework governing copyright law. Finally, Section B examines the differing interests of tattoo artists, inked celebrities, and entertainment companies that all must be properly considered and balanced.

#### A. DIFFICULTIES CREATED BY AMBIGUITY AND THE STRUGGLE TO FIT TATTOOS WITHIN EXISTING COPYRIGHT STATUTES

Without any established rules guiding the behavior of tattoo artists, inked celebrity figures, or entertainment companies, these groups do not know what limits to work in when going about their business. Well-known inked individuals do not know how the tattoos they get might impact their ability to do their job or how to avoid such problems any time they wish to get a new tattoo. Film studios or video game companies do not know which tattoos can be visible in their products or how to manipulate their reproductions to avoid any possible copyright infringement. And tattoo artists do not know how to protect their original designs or even what options are available to them as creators of intellectual property. This last group is especially vulnerable to the

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172. *Id.*

173. *Id.*

174. Kravets, *supra* note 5; *see also* King, *The Challenges*, *supra* note 3, at 132 (“Tattoos appear to meet the requisites of copyright protection . . .”).

difficulties resulting from a lack of defined law in their industry,<sup>175</sup> a claim which is explored in greater detail in Section B.1. Overall, the absence of clear-cut guidelines governing tattoo copyrights results in inefficient industry practices and general confusion over ownership rights.

The primary conflict at hand is reconciling the fairly established and commonly approved notion that tattoos are copyrightable<sup>176</sup> with the troubling realization that tattoos simply do not fit under current copyright statutes. To jam tattoos within certain areas of the existing framework governing U.S. copyright law is impossible and would only lead to a variety of unintended consequences down the road. Human flesh simply cannot, and should not, be treated in the same manner as other tangible media; paper, clay, and fabric do not trigger the same issues of autonomy, dignity, and personhood. For example, as Section IV.C discusses in more detail, some attorneys propose fitting tattoos within the works made for hire doctrine but neglect to consider the possible situations that may arise and generate these unique concerns.

*B. BALANCING THE INTERESTS OF THE TATTOO ARTIST, THE ENTERTAINMENT COMPANIES, AND THE TATTOOED HUMAN IN DETERMINING WHO TATTOO COPYRIGHT LAW SHOULD FAVOR*

In providing a structured system for governing tattoo copyright law, it is important to realize the problems that may emerge when attempting to reconcile the competing interests of the tattoo artist, the inked public figure, and the entertainment companies. On the one hand, the law should not block artists from asserting ownership over original works. On the other hand, it also should not allow copyright owners to exert ownership over the human body to the extent that public figures must get permission any time they appear in an observable setting. Finally, it is unreasonable to expect entertainment companies to function and conduct their business under the constant threat that a copyright infringement suit will pop up and derail the project at the last minute. This section addresses the concerns of each party in turn and the issues that may arise from encroaching on their respective rights.

1. The Creator: Tattoo Artists

At the center of intellectual property law is the desire to protect “original works of authorship,”<sup>177</sup> and this concept extends to the works of tattoo artists even though their medium remains unaddressed by the courts. However,

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175. See generally King, *The Challenges*, *supra* note 3 (discussing the unique nature and particulars of the tattoo industry).

176. See *supra* Section II.B (discussing the copyrightability of tattoos and those who support this notion).

177. See 17 U.S.C. § 102(a) (2012).

because the law of tattoo copyrights has been largely ignored, tattoo artists have remained uninterested in and isolated from the rest of the intellectual property community.<sup>178</sup> In fact, “tattoo artists view formal intellectual property law as ineffective, and consequently, they ignore it.”<sup>179</sup>

While tattoo artists have widely rejected bringing suits under traditional copyright law, the social norms of the tattoo artist community have, for the most part, effectively discouraged any copyright infringements by other tattoo artists.<sup>180</sup> In a series of interviews, “[a] few tattoo artists explained that they would not copy other artists’ work because copying would not contribute to their artistic advancement.”<sup>181</sup> This sentiment is so strong in the tattoo community that artists truly believe “that copycats are not true artists” and they “ha[ve] no respect for ‘copy machines’ who do not create their own designs.”<sup>182</sup> In other words, in the tattoo community, there is no honor in ripping off another artist’s designs, a value which successfully discourages copyright infringement. Unfortunately, “while the tattoo industry’s own social norms-based system is effective at discouraging other ‘established tattoo artists’ from unauthorized reproduction of another artist’s work, this regime is ineffective at preventing copying by other third parties.”<sup>183</sup> This is where the issues at the heart of this Note arise between tattoo artists and entertainment companies such as film studios and video game developers. Until the law of copyrights properly expands to include tattoos, artists will be left in the dark, unaware of their rights in the works they produce—and tattoo artists certainly do deserve some rights in their designs.

Although tattoo artists’ chosen medium complicates things,<sup>184</sup> copyright law should reward tattoo artists for unique and original designs. After all, as the Copyright Clause of the U.S. Constitution espouses, the purpose of copyright law is “[t]o promote the Progress of Science and useful Arts,” and this objective is furthered by artists who create new works of expression.<sup>185</sup> Of course, as with all other artists, the tattoo must meet the originality requirement to qualify for copyright protection.<sup>186</sup> A basic infinity symbol, for instance, is hardly an original tattoo design, but the originality requirement merely requires “a minimum amount of creativity” and refraining from

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178. King, *The Challenges*, *supra* note 3, at 134 n.24 (“Recent interviews with tattoo artists suggest that the tattoo industry disfavors use of intellectual property law as a means of preventing exploitation of their works.” (citing Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1141 (2012))).

179. Beasley, *supra* note 178, at 1141.

180. *Id.* at 1163–64.

181. *Id.* at 1163 (footnote omitted).

182. *Id.* at 1163–64.

183. King, *The Challenges*, *supra* note 3, at 161 n.192 (quoting Beasley, *supra* note 178, at 1170).

184. *See infra* Section III.B.2.

185. U.S. CONST. art. 1, § 8, cl. 8.

186. *See* 17 U.S.C. § 102(a) (2012).

copying a pre-existing work.<sup>187</sup> Thus, in the case of the infinity symbol tattoo, an artist may meet this fairly low bar by, for example, creating the shape of the infinity sign through a colorful, twisting floral or ivy pattern.

Most tattoo artists use original designs for their clients rather than reproduce an already existing image.<sup>188</sup> If the artist created these designs through ink on paper rather than ink on skin, one would have little doubt that the work warrants copyright protection and that the artist is entitled to rights under the law. Should the tattoo artist's choice of medium bar him or her from enjoying the rights that usually attach to original works of authorship?

## 2. The Canvas: Inked Celebrity Athletes, Musicians, and Actors

As practicing attorneys and scholars are increasingly in agreement that ink on skin qualifies as a “tangible medium” under copyright law,<sup>189</sup> does this mean that we lose sight of the fact that this “tangible medium” is still part of the human body? Is the idea that someone can own the tattoo diminished by the fact that it is permanently affixed to another person, or should the mindset be that the inked person is “simply the ‘tangible medium’ upon which those ideas are fixed[?]”<sup>190</sup> Some people have a difficult time comprehending the idea that one can possess ownership over a part of another's body.<sup>191</sup> Well-known professor, writer, and copyright expert David Nimmer<sup>192</sup> takes a sharp stance against the idea that one can own “the copyrights to images appearing on human bodies.”<sup>193</sup> In his expert testimony for the Whitmill case, Nimmer goes so far as to make the argument that such a concept is a violation of the Thirteenth Amendment of the U.S.

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187. Tune, *supra* note 7, at 18.

188. Martinez, *supra* note 39.

189. King, *The Challenges*, *supra* note 3, at 152–54.

190. Rothberg, *supra* note 63.

191. Timothy L. DeGeorge, *Tattoo Artists vs. Actors—Who Owns the Copyright in a Tattoo?*, DEGEORGE LAW LLC (Jan. 19, 2016), <http://degeorgelaw.com/tattoo-artists-vs-actors-who-owns-the-copyright-in-a-tattoo> (“The art is on the actor's skin and it seems unimaginable that someone else would have rights that exist on someone else's skin.”).

192. “David Nimmer, a professor at the UCLA School of Law, author of the well-known treatise *Nimmer on Copyright Law*, and practicing attorney in Los Angeles, California,” is widely considered the foremost expert in copyright law. King, *The Challenges*, *supra* note 3, at 146. “*Nimmer on Copyright*[ ] [is] the standard reference treatise in the field” and has been cited many times by the U.S. Supreme Court, every federal appellate court, numerous state and district courts, and international courts dealing with copyright cases. *David Nimmer*, UCLA LAW, <https://law.ucla.edu/faculty/faculty-profiles/david-nimmer> (last visited Dec. 15, 2018).

193. Kaplan, *supra* note 133. Nimmer provided expert testimony on behalf of the defendants in *Whitmill v. Warner Bros.* in which “he raised several objections to the copyrightability of tattoos.” King, *The Challenges*, *supra* note 3, at 130. However, “the district court [in *Whitmill*] excluded Nimmer's testimony on the basis that it constituted legal opinion.” *Id.*

Constitution<sup>194</sup> because it amounts to slavery and involuntary servitude.<sup>195</sup> The judge in that case rejected this particular argument, simply calling it “silly.”<sup>196</sup> Although Nimmer characterizes the concept in a rather blunt, fairly extreme, and frankly offensive manner, the underlying values are legitimate concerns of granting tattoo artists complete copyright ownership of tattoos. Allowing an artist to exercise exclusive rights over a design permanently fixed on

194. Section One of the Thirteenth Amendment of the U.S. Constitution states: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1.

195. Kaplan, *supra* note 133; *see also* Declaration of David Nimmer at 4, *Whitmill v. Warner Bros. Entm’t, Inc.* at 10, No. 4-11-CV-752, 2011 WL 10744102, at \*6 (E.D. Mo. May 20, 2011) (“[T]attoos fail to qualify as copyrightable because [they are] not fixed in a cognizable ‘medium of expression.’”); Kravets, *supra* note 5 (quoting Declaration of David Nimmer, *supra*, at 5) (explaining Nimmer’s opinion of copyrighting tattoos as a form of “involuntary servitude”). In his declaration to the *Whitmill* court regarding Mike Tyson’s face tattoo, Nimmer listed three “consequences of recognizing copyright protection for a tattoo.” Declaration of David Nimmer, *supra*, at 5. First:

After a court invokes that provision [(referring to 17 U.S.C. § 106A(a)(3)(B) (2012))] to bar him from removing his tattoo, Mr. Tyson literally may not show his own face to the world; that is, he will be required to keep Mr. Whitmill’s handiwork spread across his face, regardless of his own desires. Copyright law thereby becomes the instrument to impose, almost literally, a badge of involuntary servitude, akin to the mark with which ranchers brand the cattle they own.

*Id.* Second, Nimmer argues that if Tyson infringes upon the copyright by getting another tattoo on his face, “he is subject to a court order that the offending work be destroyed.” *Id.* at 5–6 (citing 17 U.S.C. § 106(5)). Nimmer contends that this then means that “[a] court [may] vindicate[] Mr. Whitmill’s statutory rights by ordering laser removal of the unauthorized product . . . allow[ing] the Copyright Act to be perverted, once again, into an instrument rendering Mr. Tyson into a virtual slave.” *Id.* at 6. This overall opinion that tattoos are not copyrightable given “on behalf of Warner Bros. Entertainment in the *Whitmill* case has generated strong criticism from fellow intellectual property scholars.” King, *The Challenges*, *supra* note 3, at 146. For example, Professor Ann Bartow from Pace Law School “wrote on a blog post that Nimmer’s new position concerning the ineligibility of tattoos for copyright protection is a significant departure from his former position set forth in his copyright treatise, which embraced tattoos as copyrightable subject matter.” *Id.* at 146–47 (citing Ann Bartow, *When a Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN (May 25, 2011), <http://madisonian.net/2011/05/25/when-a-treatise-writer-tries-to-reconfigure-copyright-law-to-benefit-a-client>). Even more harshly, Professor Douglas Lichtman from the UCLA School of Law (Nimmer’s own institution) wrote:

I find Nimmer’s declaration shockingly unconvincing. . . . Had he argued that certain copyright remedies are off the table in instances when some otherwise-traditional remedy would (if applied here) constrain significant personal freedoms like the freedom to show one’s own face in public, fine. But Nimmer argued that the tattoo is not eligible for protection because it is not “fixed in a tangible medium of expression” and thus fell short of a threshold requirement that is codified in Section 102(a) of the Copyright Act. That makes no sense.

*Id.* at 147 (quoting Doug Lichtman, *Are Tattoos Eligible for Copyright Protection?*, MEDIA INST. (June 15, 2011), <http://www.mediainstitute.org/IPI/2011/061511.php>).

196. Kaplan, *supra* note 133.

another person's skin infringes on the inked individual's fundamental rights of autonomy and dignity.

Applied more directly to the focus of this Note, granting exclusive rights over a tattoo to the tattoo artist has formidable implications for a celebrity's livelihood and right of publicity. Adopting a rigid view on enforcement of the tattoo artist's rights foists ludicrous expectations and rules upon public figures and celebrities who spend a great amount of time on display in observable settings.<sup>197</sup> For actors and athletes, a fundamental part of their livelihood is appearing live or allowing depiction of their likeness in public venues or in various forms of media. As Take-Two argues, "[i]t simply is not reasonable to expect that, every time an NBA player commercializes his likeness or appears on television or other media, he needs to seek permission from Solid Oak."<sup>198</sup> Such an obligation would have a crippling effect on the careers of famous athletes, musicians, and actors because it would limit their opportunities or expose them to liability every time they attempted to do their job. It is unreasonable to expect these individuals, especially professional athletes like LeBron James who are covered in tattoos, to constantly be vigilant about the visibility of their tattoos and dutifully pay the copyright owner every time their tattoo was depicted somewhere, either intentionally or unintentionally.<sup>199</sup> It is simply not feasible or sensible to impose such a heavy burden on inked celebrity figures.

Additionally, vesting copyright ownership of a tattoo on the tattoo artists infringes upon an inked celebrity's right of publicity. "The [r]ight of [p]ublicity . . . [is] the right to control the commercial use of one's identity" and generally encompasses a person's name, likeness, and image.<sup>200</sup> If a tattoo artist owns exclusive rights in a tattoo on a celebrity's body, it will limit that celebrity's ability to appear in commercials, magazines, video games, and so on. This is another example of encroachment on a celebrity's personhood because a famous individual's brand is important to her livelihood and therefore becomes closely tied with who she is. Celebrity figures work to invest in their sense of self and are often "active participants in the construction of their personas."<sup>201</sup>

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197. See generally Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127 (arguing in part that it would be against public interest to find that there has been copyright infringement via the depiction of famous NBA players' tattoos in Take-Two's video game).

198. *Id.* at 3.

199. "It would be too burdensome for an actor to keep track and pay the tattoo artist each time an artist's work is used in a commercial production, advertising, etc. Having to cover up a tattoo or removing it digitally in order to minimize liability defeats the whole purpose of the actor getting a tattoo in the first place if the actor wants the tattoo for branding purposes." DeGeorge, *supra* note 191.

200. *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Dec. 15, 2018).

201. ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 112 (2010).

### 3. The Industry: Entertainment Companies

On the side of entertainment companies, one problem emerging from the slight increase in lawsuits alleging tattoo copyright infringement concerns the efficiency of the film, television, and video game industries. The majority of copyright infringement cases that have been initiated thus far have ended in the parties settling.<sup>202</sup> This common result is understandable when one considers the particulars of the industry and the specific impact these copyright infringement lawsuits have on entertainment companies. To further explain this point through an example, in the *Whitmill* case, the plaintiff brought suit against Warner Brothers a mere month before its scheduled release of *The Hangover Part II*, the movie at issue.<sup>203</sup> Whitmill filed a motion for a preliminary injunction against Warner Brothers, asking the court to “halt the irreparable damage until there can be a trial on the merits.”<sup>204</sup> A court injunction indefinitely delaying the release of an \$80 million movie<sup>205</sup> is quite damaging to a film studio as it creates a variety of unforeseen problems. It is especially troubling and inconvenient to those involved in the film when a suit is brought within such a shortened timeframe of the movie’s scheduled release.<sup>206</sup>

202. See Cohen, *supra* note 103 (including a quote from “Christopher A. Harkins, an expert on copyright and patents,” stating that, in reference to the *Whitmill* case, “it will be settled out of court, as most of them are”); King, *Day in Court*, *supra* note 81 (discussing how the *Whitmill* and *Escobedo* cases both resulted in settlements).

203. Bradley, *supra* note 82, at 27 (“Just over a month before the scheduled Memorial Day 2011 release of *The Hangover Part II*, on April 25, 2011, S. Victor Whitmill, the tattoo artist who created the Tyson tattoo, sued Warner Brothers in the Eastern District of Missouri . . . for copyright infringement . . .”). Whitmill filed his lawsuit against Warner Brothers on April 28, 2011. See generally Plaintiff’s Memorandum for Preliminary Injunction, *supra* note 102 (filing motion for preliminary injunction on April 28, 2011). The U.S. release date of *The Hangover Part II* was scheduled for May 26, 2011. *The Hangover Part II*, *supra* note 103.

204. Plaintiff’s Memorandum for Preliminary Injunction, *supra* note 102, at 2.

205. *The Hangover Part II*, *supra* note 103.

206. Whitmill addressed any argument regarding the possible harm suffered by Warner Brothers as a result of the lawsuit and injunction, contending that “[t]he [i]njury to [him] [o]utweighs any [t]hreatened [h]arm to Warner Bros.,” and it should therefore not be a factor in the court’s decision. Plaintiff’s Memorandum for Preliminary Injunction, *supra* note 102, at 9.

Moreover, Warner Bros. would suffer little hardship because preliminarily enjoining the Warner Bros. would result only in a delay until Warner Bros. can adequately address Mr. Whitmill’s concerns about the harm cause [sic] by the movie’s depiction of his Original Tattoo. If the injunctive relief requested is granted, Warner Bros. will still be free to distribute other movies, to advertise or to advertise and release a version of *THE HANGOVER 2* that does not use the Pirated Tattoo.

*Id.* (emphasis omitted). Whitmill also adds that the “balance of hardships favors plaintiff because defendant is free to create a non-infringing website and promote its ideas.” *Id.* (citing *Peri Hall & Assocs., Inc. v. Elliot Inst. for Soc. Scis. Research*, 78 U.S.P.Q.2d 1414, 1416 (W.D. Mo. 2006)). The author of this Note does not find this argument convincing as the plaintiff seems to not have a complete or accurate understanding of the film industry. With merely a month left before the movie’s scheduled release date, Warner Bros. would not have time to “adequately address Mr. Whitmill’s concerns.” *Id.* Within this timeframe, all Warner Bros. would have time to do is pay off

It is unreasonable and absurd for the entertainment industry to continue under a system of settling lawsuits and paying copyright owners who bring suit against them merely to continue with a film or video game project unimpeded. It almost seems as if this process will lead to film studios, television networks, and video game companies accounting for the cost of a copyright infringement settlement in their project budgets. Furthermore, this practice creates the danger of increasing cases of “profit-making litigation,” a concept which Take-Two warned the court of in its motion for judgment on the pleadings.<sup>207</sup> When such a pattern is established of all tattoo copyright infringement cases settling, an outcome which is favorable to the plaintiff, it may turn into an invitation for “opportunist[s]” to bring such claims rather than truly “aggrieved artist[s].”<sup>208</sup> Without any published court decisions on the subject, tattoo copyright law will remain unstructured, ambiguous, and vulnerable to exactly what Take-Two accuses Solid Oak Sketches of: individuals purchasing the copyrights to tattoos known to appear in films or video games solely for the purpose of asserting claims of copyright infringement against their ignorant, unsuspecting creators, developers, and distributors.<sup>209</sup>

#### IV. A PROPOSED SOLUTION TO CLEARLY ESTABLISH TATTOOS WITHIN COPYRIGHT LAW

The most efficient, effective solution is to articulate new statutory provisions specifically addressing tattooed works. Section A acknowledges that a published court decision characterizing tattoos as copyrightable would be very beneficial and a great first step in this area of the law, but recognizes that it is unlikely a court will have the opportunity to do so. It also addresses the counter-argument that such a ruling would result in an explosion of litigation, arguing that this concern is unimportant. Section B outlines a proposed solution by providing statutory additions that Congress should adopt to fit tattoos within the existing body of copyright law. These new provisions seek to properly balance the interests of all parties involved in the tattoo and entertainment worlds while providing an efficient and clear foundation. Section C examines one alternative solution proposed by other intellectual property attorneys to include tattoos within the works made for hire doctrine codified in 17 U.S.C. § 201 (b). This solution is unworkable and impractical

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Whitmill in a settlement. A month is also not long enough for Warner Bros. “to advertise and release a version of *THE HANGOVER 2* that does not use the Pirated Tattoo.” *Id.* (emphasis omitted). Furthermore, the issue is not whether Warner Bros. is “free to distribute other movies” (because it unquestionably is), but rather that the time and money has been spent on this particular movie and at the last minute, it seems as if the plug is being pulled. *See id.*

207. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1.

208. *See id.*

209. *See id.* As Take-Two stresses, this current trajectory of tattoo copyright law “is particularly troubling at a time when tattoos are becoming increasingly popular.” *Id.*

due to the unintended consequences that may arise and implicate the exact issues this Note attempts to solve.

A. *A DEFINITIVE COURT RULING THAT TATTOOS ARE COPYRIGHTABLE*

If a court publishes a decision definitively stating that tattoos are indeed copyrightable, the law will be that much more standardized and easy to apply. As a result, tattoo artists, entertainment companies, and inked celebrities will be more aware of their rights and limits within this area of the law. With any luck, *Solid Oak Sketches LLC v. 2K Games, Inc.* will make it all the way to trial without the parties settling and soon provide tattoo copyright law with the authoritative judgment it both craves and requires.

Any worries about an explosion of litigation following such a ruling and overburdening the court is unfounded. As previously discussed in Section III.B.1, the very culture and norms of the tattoo artist community indicate a disinterest in resorting to litigation in situations of design copying.<sup>210</sup> It is true that the challenge of filtering out the cases that feature an “aggrieved artist” plaintiff versus merely an “opportunist” plaintiff may still exist at first.<sup>211</sup> But, as the result of set guidelines and new case law, this issue will lessen considerably over time as the opportunists discover the courts will not rule in their favor. Practicing attorneys and scholars are recognizing this result even now when discussing the merits of the plaintiffs’ cases that have been brought and musing on how the court would rule if the parties had not settled and the cases went to trial.<sup>212</sup>

B. *PROPOSED STATUTORY ADDITIONS TO INCLUDE TATTOOS IN EXISTING COPYRIGHT LAW FRAMEWORK*

While a published court decision would be helpful in solving some of the problems emerging from this unclear current state of the law, it is only half the battle. Furthermore, with an already established trend of parties settling in these cases, a court may never have the opportunity to issue a ruling on tattoo copyrights. Therefore, a possible, and more attractive, solution is for Congress to create statutory additions within federal copyright law that will clearly include tattoos and outline structured rules by which to govern them. As Section III.B has already highlighted, tattoos have no place in the current statutory framework governing U.S. copyright law as any attempt to apply that area to the established rules would result in unforeseen problems. To that end, instead of ignoring the problem or hoping the courts eventually find a way to resolve it themselves, Congress should create and add new sections to the existing copyright law dedicated to specifically addressing tattoos and the

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210. See *supra* Section III.B.1 (explaining and discussing the social norms among tattoo artists and their disconnect from the rest of intellectual property areas).

211. Memorandum of Law in Support of Defendants-Counterclaimants, *supra* note 127, at 1.

212. Bradley, *supra* note 82, at 27, 31–32.

unique copyright issues that accompany them. In doing so, Congress must carefully reconcile the competing, but equally important, interests and rights of tattoo artists, entertainment companies, and the inked public figures who live their lives with the tattoos on their skin.<sup>213</sup>

The following statutory language should be inserted in the indicated existing sections of 17 U.S.C. §§ 101–102 (2012):

§ 101. — Definitions

A “tattoo” is a permanent mark or design on skin created by puncturing the flesh and inserting pigments.<sup>214</sup>

A “tattooist” is a tattoo artist (one who designs a tattoo and permanently affixes it to the skin).

A “tattooed subject” refers to the individual whose skin bears the permanent ink created and affixed by the tattooist.

§ 102. — Subject matter of copyright: In general

(a) . . . Works of authorship include the following categories:

. . . .

(g) tattoos and other similarly indelible forms of body art.

(i) Human skin qualifies as a “tangible medium” as used in section 102(a).

The new definitions and the proposed inclusion of tattoos as a ninth category of “works of authorship”<sup>215</sup> merely provide a foundation for tattoo copyrights, addressing currently unanswered and highly debated questions in this area of the law. With the adoption of these provisions, Congress would finally declare that tattoos are copyrightable material and that human skin is a tangible medium.

However, further supplementary language is necessary to specifically identify and flesh out who exactly enjoys which copyrights. The following new statutory additions should also be adopted and added within the existing body of U.S. copyright law:

§ 106B. — Scope of non-exclusive rights of tattooed works

(a) The tattooist is considered the author and is subject to the rule of initial ownership outlined in section 201(a).

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213. See *supra* Section III.B (balancing the relevant interests of tattoo artists and the people who serve as their “tangible medium”).

214. *Tattoo*, OXFORD ENGLISH DICTIONARY ONLINE (2018), <http://www.oed.com/view/Entry/198125>.

215. See 17 U.S.C. § 102(a) (2012).

(b) Notwithstanding the tattooist's non-exclusive rights under (a), the tattooed subject shall have the following non-exclusive rights:

- (1) to display the tattooed work publicly;
- (2) to reproduce the tattooed work through photography, film, and any other visual media; and
- (3) to utilize the tattooed work in any exercise of the subject's right to publicity.

(c) Duration of Rights. —

- (i) The rights conferred through subsection (a) shall endure for a term consisting of the life of the author plus 70 years after the author's death, at which time they shall default to the public domain.
- (ii) The rights conferred by subsection (b) shall endure for a term consisting of the life of the tattooed subject plus 70 years after the tattooed subject's death.

Statutory supplements like the ones outlined here would provide an appropriate inclusion for tattoos in an otherwise unwelcoming body of copyright law. Furthermore, it would definitively establish rules governing tattoo copyrights and dispel with the ambiguity and uncertainty currently surrounding this area of the law. Now, tattoo artists and inked individuals would clearly know their rights and limitations.

This proposed addition of statutory language to copyright law is the most effective solution because it recognizes that tattoos are a unique work due to their medium, and it accounts for the fact that they should be handled differently than other copyrightable works. The objective of this solution is to grant rights to both the tattoo artist as the creator of the work and to the tattooed subject who deserves autonomy and the freedom to live unhindered by someone else's rights over a part of their body. This is difficult as it requires a separation of different sets of rights. The goal is not to give inked individuals the right to, say, sell shirts with the design that is tattooed on their skin, but rather to grant them the right to appear in a commercial or be featured in a video game as themselves without fear of copyright infringement. At the same time, the statute should reward artists for work that is wholly original without any substantial collaboration with the inked individual. It is not meant in any way to detract from the tattooed individual's rights in his skin; rather, it merely allows the tattoo artist to repurpose the design on merchandise or even on other people. In balancing the interests of the tattoo artists and inked celebrities, these statutory additions ensure that tattoo artists receive their fair share in some way.

Subsection (c) plans for the eventual return of tattoo designs to the public domain, while still upholding the rights of tattooed celebrities for a

reasonable amount of time. The addition of 70 years past the death of the inked individual grants some breathing room for the post-mortem right to publicity provided for in 23 states.<sup>216</sup> The exact configuration here resembles the California state rule providing for a post-mortem right of publicity “to survive 70 years after the death of a celebrity.”<sup>217</sup> This specific term of “70 years” also mimics the general rule for the duration of copyright as stated in 17 U.S.C. § 302(a).<sup>218</sup> The primary concepts behind granting tattooed individuals some rights rather than allowing all rights to be exclusively vested in the tattoo artist are to safeguard the dignity and bodily autonomy of individuals, as well as allow celebrities to continue with their livelihood, unburdened; these rights no longer require protection once the inked individual is deceased and the rights to publicity have reasonably run out. Thus, once the law properly accommodates these unique rights, there is no reason to further afford them special consideration. Using the same line of reasoning, once a tattoo artist is deceased, the law should treat the tattoo design as any other copyrighted work by following the general rule set down in § 302(a) and then shifting the design to the public domain.

C. AN ALTERNATIVE, UNWORKABLE SOLUTION: FITTING TATTOOS WITHIN  
THE “WORKS MADE FOR HIRE” DOCTRINE

Despite the apparent concerns, there are those who hold fast to the belief that tattoos have a place in established copyright law and suggest various areas of the U.S. Code that may be suitable. One common proposal is to apply the “works made for hire” doctrine to tattoo art.<sup>219</sup> To review, a work qualifies as a “work made for hire” when it conforms to one of two situations:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written

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216. See Erik W. Kahn & Pou-I “Bonnie” Lee, “Delebs” and Postmortem Right of Publicity, 8 LANDSLIDE, Jan.–Feb. 2016, [https://www.americanbar.org/publications/landslide/2015-16/january-february/delebs\\_and\\_postmortem\\_right\\_publicity.html](https://www.americanbar.org/publications/landslide/2015-16/january-february/delebs_and_postmortem_right_publicity.html).

217. *Id.*

218. The statute reads as follows: “Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.” 17 U.S.C. § 302(a).

219. See *supra* Section II.A (providing an explanation of the concept of “works made for hire” in copyright law).

instrument signed by them that the work shall be considered a work made for hire.<sup>220</sup>

In the first case, the tattoo artist would be viewed as the employee and the individual seeking a tattoo would function as the employer. Therefore, the ownership rights of the tattoo would vest in the inked individual as the artist's employer. In the second instance, an independent contractor creates the work and it must fit within one of the nine listed categories, as well as fulfill the written agreement requirement.

Some practicing attorneys in the intellectual property and entertainment fields approve of the first option, characterizing the relationship between individuals being inked and their tattoo artists as an employer-employee relationship:

I personally think the actor has superior ownership rights in the artwork as a work made for hire. A work for hire explained simply is where an employer hires an employee for a specific purpose such as creating a tattoo. In a typical work for hire agreement, the employer maintains copyright ownership, not the employee. The Copyright Act addresses the work made for hire concept directly. The originators of the Copyright Act did contemplate this type of employment arrangement related to copyright and I believe it should apply to tattoo recipients and tattoo artists.<sup>221</sup>

However, identifying tattoos on celebrity figures as works created within the context of an employer-employee relationship is a misguided proposition, as current case law suggests that individuals like tattoo artists are not employees. Based on an application of the multi-factor test used in *Community for Creative Non-Violence v. Reid*, a tattoo artist would not fit the definition of an "employee," just as the Court found that Reid, a sculptor, was not an employee.<sup>222</sup>

In *Reid*, the Court identified several factors relevant to determining whether a hired party is an employee, including

the hiring party's right to control the manner and means by which the [work is created] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties . . . whether the work is part of the regular business of the hiring party; [and] whether the hiring party is in business.<sup>223</sup>

The Court conceded that the hiring party (Community for Creative Non-Violence ("CCNV")) had retained enough control over Reid's work to

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220. 17 U.S.C. § 101.

221. DeGeorge, *supra* note 191 (citation omitted).

222. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

223. *Id.* (citations omitted).

guarantee that the finished sculpture met their requirements.<sup>224</sup> However, this is a multi-factor balancing test and no one factor is determinative.<sup>225</sup> The Court continued with the analysis of the other relevant facts and determined that they “weigh[ed] heavily against finding”<sup>226</sup> that Reid was an employee of CCNV:

Reid is a sculptor, a skilled occupation. Reid supplied his own tools. He worked in his own studio in Baltimore . . . . Reid was retained for less than two months, a relatively short period of time . . . . Reid had total discretion in hiring and paying assistants. “Creating sculptures was hardly ‘regular business’ for CCNV.” . . . CCNV is not a business at all.<sup>227</sup>

These factors can be analyzed in and applied to the tattoo context: a tattoo artist is skilled, provides his own supplies and tools, creates the work in his own studio, and the relationship between the parties lasts only within the span of a single day.<sup>228</sup> It is true that an individual getting a tattoo exercises significant control over the design created by the tattoo artist, as well as the placement, to ensure that the result matches their requirements; however, just like in the *Reid* case, this finding is not conclusive and all of the factors must be weighed against each other.<sup>229</sup> Upon further analysis, a person getting tattooed (as the hiring party in this context) is not in business, and tattooing is certainly not part of her regular business. Of course, one might argue that part of a celebrity actor or athlete’s livelihood and business is personal branding, and getting a tattoo can be part of that effort to establish a personal brand. However, even taking that argument into account, balancing all of these factors still results in the conclusion that a tattoo artist is not an employee of an individual getting the tattoo.

Attempting to apply tattoos as works made for hire under prong two of the doctrine—“a work specially ordered or commissioned”<sup>230</sup>—is an unworkable approach as well. The proposition here is that the celebrity individual commissions or specially orders the tattoo design from the tattoo artist and the two parties sign a written agreement stating that the tattoo is considered a “work made for hire.” However, this part of the doctrine only applies to works that belong in one of its nine listed categories: “a contribution to a collective work, as a part of a motion picture or other

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224. *Id.* at 752.

225. *Id.*

226. *Id.*

227. *Id.* at 752–53 (citations omitted).

228. The Court considered two months to be “a relatively short period of time.” *Id.* As the average tattoo session only lasts about five hours, this factor easily weighs against designating tattoo artists as employees of individuals seeking tattoos.

229. *Id.* at 752.

230. 17 U.S.C. § 101 (2012).

audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.”<sup>231</sup> Tattoos obviously do not fit within any of these limited categories.

One proposed solution may be to add another category to this list specifically for tattoos, such as “an indelible form of body art” or something along those lines. While this is tempting, it is merely a quick-fix and neglects to explore the unintended consequences that may arise down the road. For example, this suggestion does not solve the problem of bodily autonomy and the rights that a celebrity should have in their own image. A possible consequence of allowing tattoos to be considered works for hire may arise when one party signs a written agreement with the tattoo artist and commissions a tattoo to be inked on a third party. In this situation, the problem still exists where one has copyright over another person’s body. Again, the law cannot and should not think of human skin in the same manner as other media, such as paper or canvas. Thus, implementing a proposal such as the one suggested here would fail to serve fundamental tenets of autonomy and dignity. Also, in the specific context of this Note, it would severely limit the livelihood of celebrity athletes and actors. The money made from appearing in television broadcasts, video games, films, commercials, etc. would in part flow to the person who owns copyright in a part of the athlete or actor’s body. Or, these celebrity individuals would bear the burden of having to constantly ensure that their tattoo remains covered. Therefore, this proposed solution to add tattoos as a category within the works made for hire doctrine is unworkable and impractical.

## V. CONCLUSION

As tattoos grow increasingly more mainstream and commonplace, it becomes clear that they make up an area of intellectual property that has, until now, been largely ignored. The law of tattoo copyrights has not yet caught up with the increased popularity and prevalence of tattoos, resulting in a number of problems concerning particularly the entertainment and sports industries. The few tattoo copyright infringement claims that have been brought in the last decade all settled before any definitive ruling on the subject could be concluded. The lack of any case law and the absence of any explicit mention of tattoos in copyright statutes result in the ignorance of entertainment companies, celebrity figures, and tattoo artists as to their rights and limitations. Furthermore, tattoos do not fit within the existing statutory framework of copyrights due to the fixation of these designs on human skin, a unique tangible medium which triggers issues of autonomy and dignity. While a published court decision finally acknowledging that tattoos are copyrightable and outlining some guidelines would be helpful, it is unlikely that a court will get the opportunity to make such a ruling, as the parties are

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231. *Id.*

settling in these cases before reaching trial. Therefore, a more appealing solution is for Congress to adopt new statutory additions that include tattoos in copyright law while addressing their unique characteristics.