

## Novel Suit Over Tattoos In Video Games Likely To Fade

Tattoo artists who inked up LeBron James and other [NBA](#) superstars are suing the company behind the popular "NBA 2K" basketball video games for copyright infringement for accurately depicting the stars' tattoos in the game. It's a novel claim — and one experts say is almost certain to fail.

The lawsuit, filed in New York federal court by tattoo licensing firm Solid Oak Sketches LLC against game studio [Take-Two Interactive Software Inc.](#), claims eight different designs that artists etched on James, Kobe Bryant and other superstars are protected by federal copyrights.

A demand letter attached to the lawsuit shows that Solid Oak offered to let the game producers use the tattoos in the game this year in exchange for \$819,000, or perpetually for \$1.14 million. Apparently, Take-Two politely declined.

They were probably right to do so. There's almost no hard case law on the issue of tattoo copyrights, but experts say Take-Two has a number of compelling arguments as to why the case might be a legal air ball.

"While there has been no decision squarely addressing this issue, allowing a tattoo artist to, essentially, control the use or portrayal of a person's body would be an absurd outcome," said Jennifer Lloyd Kelly, a partner with [Fenwick & West LLP](#) and an expert in video game law. "No court is going to allow this."

## Questions Over Copyright Claims

At the very outset, there are fundamental open questions about whether a tattoo artist can even claim a copyright on a design he or she etched onto the body of another person.

The closest thing to case law on the issue is a 2011 preliminary injunction ruling from a federal judge that said the tattoo artist behind former professional boxer Mike Tyson's famous face tattoo could likely win a copyright case against the producers of "The Hangover 2" for stamping the same design on actor Ed Helms' face for the film, but the case settled prior to an actual ruling.

David Nimmer, author of the widely read "Nimmer on Copyright" treatise, believes that another person's flesh is not the kind of medium over which copyright control can be granted. In a filing in the "Hangover" case, he warned that no court had ever extended copyright protection to tattoos and that doing so would render the person "a virtual slave" to the artist.

"A magazine article that features a picture of Mr. Tyson's face violates the copyright owner's display right," Nimmer warned, calling the case "unprecedented" and "dangerous." "A television network that broadcasts Mr. Tyson's boxing match violates the copyright owner's performance right."

Many other questions pop up when you start to dig into whether an artists like those who sued Take-Two can protect a tattoo with copyright.

Is a tattoo separable from the underlying "useful article" — the body — to which it is attached? If not, it cannot be copyrighted. Is the "dominant author" of a tattoo the artist, or the recipient who chose to have it created, paid for it, and chose the design and the size? If it's the recipient, the

artist couldn't claim an enforceable interest in the work.

"There are a lot of different ways that you can get to the conclusion that this is not copyrightable," said Dean R. Cheley, a partner with entertainment firm Donaldson & Callif. "The idea is this just isn't the type of thing that the Copyright Act was meant to protect."

### **Fair Use and the First Amendment**

When hit with intellectual property allegations, the First Amendment has been a go-to for video game companies in the past. It's worked well with trademarks and trade dress, less so with right of publicity claims from athletes.

In the copyright space, the First Amendment issue is likely to manifest itself as a fair use argument: For the purpose of creating an accurate depiction of basketball players, Take-Two used fleeting images of the artists' tattoos in a way that wouldn't harm their ability to market them.

"The First Amendment and fair use will likely be the go-to defense," said Jonathan H. Blavin, a partner with [Munger Tolles & Olson LLP](#) who specializes in video game law. "That to make something realistic, you have to be able to use depictions of tattoos or other objects that appear in the real world in your game."

### **Implied License**

There's also a decent case to be made that the tattoo artists who inked the NBA players gave them an implied license to display their works.

Implied license arguments are tricky, because the scope of the such licenses are often construed quite narrowly. And it would be more case by case than the other defenses available to Take-Two, since the game maker would need to explain why each artist gave the impression that the recipients had the right to display the work.

But, in the current context, such an argument "might resonate," said J. Michael Keyes, a partner with [Dorsey & Whitney LLP](#).

"When a tattoo artist etches a tattoo onto King James, for example, that artist has every reason to know that pictures, video and all sorts of reproductions of it are going to take place because that tattoo is now, quite literally, part of the athlete," Keyes said.

Solid Oaks is represented by Darren Heitner of Heitner Legal PLLC and Matthew M. Spritz.

Counsel information for the defendants was not immediately available.

The case is Solid Oak Sketches LLC v. Visual Concepts LLC et al., case number [1:16-cv-00724](#), in the U.S. District Court for the Southern District of New York.