

BEFORE THE INK IS DRY: BODILY AUTONOMY AND TATTOO COPYRIGHT IN VIDEO GAMES

Abstract: Tattoos are unique amongst copyrightable forms of expression because, by virtue of being drawn onto human canvases, they necessarily require that the artist grant an implied license to the tattooed individual. By this license, a tattoo is integrated with the tattooed individual's overall likeness, with all the associated rights that follow. In recent years, a trio of federal district court decisions have attempted to demarcate the metes and bounds of the implied license for tattoos, specifically in the realm of video games. On March 26, 2020, in *Solid Oak Sketches, LLC v. 2K Games, Inc.*, the U.S. District Court for the Southern District of New York held that the reproduction of the defendant's tattoos in a video game was de minimis, covered by an implied license, and protected by fair use as a matter of law. The litigation sparked national interest and gave rise to subsequent lawsuits on the same issue in other jurisdictions. On September 26, 2020, in *Alexander v. Take-Two Interactive Software, Inc.*, the District Court for the Southern District of Illinois held that the reproduction of athletes' tattoos in video games was not necessarily protected by implied license or fair use; rather, the question was a matter of fact for juries to consider at trial. On September 20, 2022, in *Hayden v. 2K Games, Inc.*, the District Court for the Northern District of Ohio came to the same conclusion as *Alexander*. Although this issue has not yet reached the appellate level, the disagreement necessitates clearer guidance in the law. This Note argues that the Southern District of New York's approach should be adopted by the federal courts because it comports with the concept of bodily autonomy and most efficiently accomplishes the policy goals of copyright.

INTRODUCTION

Humanity's preoccupation with corporeal alteration—including tattooing, scarification, piercing, and numerous forms of binding—dates back to at least the dawn of recorded history, when nascent cultures around the world began to adopt ritualistic body modification.¹ Since then, cultural opinions on tattoos

¹ See W.D. HAMBLY, THE HISTORY OF TATTOOING AND ITS SIGNIFICANCE 14–15, 18–19 (1925) (pointing to the diffuse distribution of body modification practices across the world thousands of years ago); Marina Perper, Adam S. Aldahan, John P. Tsatalis & Keyvan Nouri, *Modifications of Body Surface: Piercings, Tattoos, and Scarification*, 56 INT'L J. DERMATOLOGY 351, 351–52 (2017) (tracing scarification practices to Australian Aborigines circa 60,000 BCE); Gerry Mackie, *Ending Foot-binding and Infibulation: A Convention Account*, 61 AM. SOCIO. REV. 999, 999–1001 (1996) (identifying foot binding as a traditional form of body modification in Imperial China and Sudanic Africa). Anthropologists debate the religious significance of tattooing to various neolithic societies, with some scholars emphasizing priests' role in tattoo and body scarification rituals and others suggesting that

have vacillated from obligatory acceptance to outright prohibition.² In the United States today, tattoos are far from the taboo they were once considered to be.³ As of 2019, nearly one in three Americans are tattooed, with the average tattooed survey respondent bearing four tattoos.⁴

Although the average person need not worry about the labyrinthine world of copyright doctrine, the growing coterie of tattooed celebrities has raised a question for legal scholars and tattoo artists alike: When an athlete, pop singer, or movie star is tattooed, what rights in the tattoo do they inherit from the designer?⁵ Similar to a painter or novelist, tattoo designers are entitled to a unique set of exclusionary property rights—the famed “bundle of sticks”—that ostensibly govern where, when, and how their creations are depicted or reproduced.⁶ Unlike a painter or novelist, however, the tattoo artist’s canvas is an-

the modifications served more ornamental purposes. HAMBLY, *supra*, at 16. The archaeological distribution of tattoos suggests that the practice may have originated in Northern Africa before migrating to other cultures in far-flung locales such as China and Babylon. *Id.* at 14. The oldest confirmed instance of tattooing belongs to Ötzi, the “Iceman” preserved by an Alpine glacier near the border of Italy and Austria; his 61 tattoos date back to around the year 3250 B.C. Marilyn Scallan, *Ancient Ink: Iceman Ötzi Has the World’s Oldest Tattoos*, SMITHSONIAN (Dec. 9, 2015), <https://www.si.edu/stories/ancient-ink-iceman-otzi-has-worlds-oldest-tattoos> [<https://perma.cc/BSJ3-K5UP>].

² See *Leviticus* 19:28 (King James) (“Ye shall not make any cuttings in your flesh for the dead, nor print any marks upon you: I am the LORD.”); see also Thomas Hobbs, *Will Tattoos Finally Be Accepted as Art?*, BBC (Aug. 17, 2022), <https://www.bbc.com/culture/article/20220817-will-tattoos-finally-be-accepted-as-art> [<https://perma.cc/2J6Y-8KFL>] (noting the shift in American attitude toward tattoos from counterculture signifier to mainstream artform).

³ See Guy Trebay, *Tattoos Gain Even More Visibility*, N.Y. TIMES (Sept. 24, 2008), <https://www.nytimes.com/2008/09/25/fashion/25tattoo.html> [<https://perma.cc/7VCC-YCFY>] (noting the increased acceptance of tattoos, piercings, and other forms of body modification during the early 2000s).

⁴ Chris Jackson, *More Americans Have Tattoos Today Than Seven Years Ago*, IPSOS (Aug. 29, 2019), <https://www.ipsos.com/en-us/news-polls/more-americans-have-tattoos-today> [<https://perma.cc/Y49W-XALZ>]. In a 2019 survey, 30% of Americans reported having tattoos—a staggering 9% leap since Ipsos last conducted this survey in 2012. *Id.* According to the pollster, 92% of tattooed Americans do not regret their decision to be tattooed, suggesting that the practice has grown in acceptance, especially in the last decade. See *id.* (noting a marked increase in acceptance since 2012). Americans under the age of 55 today are nearly twice as likely to be tattooed as their older counterparts. *Id.* Demographic factors such as gender have an outsized effect on tattoo acceptance: 38% of American women have tattoos, whereas just 27% of American men have tattoos. Katherine Schaeffer & Shradha Dinesh, *32% of Americans Have a Tattoo, Including 22% Who Have More Than One*, PEW RSCH. CTR. (Aug. 15, 2023), <https://www.pewresearch.org/short-reads/2023/08/15/32-of-americans-have-a-tattoo-including-22-who-have-more-than-one/> [<https://perma.cc/DKU3-FUYR>]. Two in five Black Americans are tattooed, whereas just under a third of White Americans are tattooed. *Id.* Americans in lower income brackets are twice as likely to be tattooed as individuals in higher income brackets. *Id.* More than half of all LGBTQIA+ Americans are tattooed. *Id.*

⁵ See *Celebrity Tattoos for All Your Ink Inspiration, from the Subtle to the Spectacular*, ELLE (Oct. 19, 2023), <https://www.elle.com/uk/fashion/trends/g15723/celebrity-tattoos/> [<https://perma.cc/2JLQ-EDWD>] (identifying a number of tattooed celebrities that run the gamut from supermodel-influencers like Chrissy Teigen to soccer superstar David Beckham and pop idol Adam Levine).

⁶ See *Are Tattoos Protected by Copyright?*, COPYRIGHT ALL., <https://copyrightalliance.org/education/qa-headlines/tattoos-copyright/> [<https://perma.cc/UQ4W-3ZAP>] (analogizing tattoos to

other human being with bodily autonomy (although that concept is not universally accepted).⁷ Every individual has the right to authorize or prevent commercial use of their name and likeness—a protection known as the “right of publicity”—and that right has led some courts to develop the notion of an implied license in tattoo transactions, by which the tattoo becomes integrated into the patron’s likeness for copyright purposes.⁸

A handful of federal district courts across the nation have attempted to answer this question and arrived at different conclusions, highlighting the demand for guidance from higher courts.⁹ Part I of this Note provides back-

other legally-recognized forms of copyrightable art). The question of whether tattoos are protected under copyright is somewhat ambiguous; the closest statutory category seems to be “pictorial, graphic, and sculptural works,” the catch-all bucket for paintings, drawings, photographs, and statuary. See Copyright Act of 1976, 17 U.S.C. § 102(a)(6) (listing the non-exhaustive categories of works that typically enjoy copyright protection). Some legal writers have suggested that, in the absence of a decisive court ruling on the subject, Congress should add a new statutory category to explicitly encompass tattoos. See Arianna D. Chronis, *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works*, 104 IOWA L. REV. 1483, 1515 (2019) (suggesting that human skin should qualify as a “tangible medium” under the Copyright Act).

⁷ See Alexis Druchas, *In America, Is Bodily Autonomy a Human Right?*, CNN (June 3, 2021), <https://www.cnn.com/2021/06/03/opinions/bodily-autonomy-abortion-access-transgender-health-paxton-smith-druchas/index.html> [<https://perma.cc/M75F-3NL8>] (questioning whether Americans have a constitutional right to bodily autonomy in 2023). Emboldened legislators have attempted to curtail access to abortion services, contraception, and gender-affirming healthcare across the United States. See *id.* (noting attempts by twenty-two state legislatures to limit gender-affirming medical care and the shifting jurisprudence on abortion). Despite its politicization in the United States, the United Nations considers bodily autonomy to be a fundamental human right. See *Bodily Autonomy: A Fundamental Right*, UNFPA (Mar. 16, 2022), <https://www.unfpa.org/press/bodily-autonomy-fundamental-right> [<https://perma.cc/T2QR-VTGJ>] (stressing the importance of bodily autonomy in achieving true gender equality, a stated goal of the organization).

⁸ See *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979) (holding that an individual may create a commercial property interest in their own likeness which can be licensed to third parties for exploitation during the individual’s lifetime); see also *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 346 (S.D.N.Y. 2020) (holding that implied non-exclusive licenses are granted when the work in question is created at the request of another and physically transferred with the understanding that it will be publicly distributed). The Southern District of New York has held that tattoo artists create their work with the understanding that it will necessarily be displayed in public, especially in case of a celebrity client. See *Solid Oak Sketches*, 449 F. Supp. 3d at 346 (reasoning that a tattoo given without that right would open the recipient to legal liability). Although the right of publicity largely aims to mitigate economic harm, it also serves to protect more intangible interests, such as the avoidance of embarrassment and reputational damage. See Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1345–46 (2009) (noting, however, that the judicially-available relief is often insufficient to remedy reputational harm).

⁹ Compare *Solid Oak Sketches*, 449 F. Supp. 3d at 346–50 (holding that reproductions of copyrighted tattoos in the NBA 2K video game were de minimis and entitled to fair use as a matter of law), with *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 821–23 (S.D. Ill. 2020) (holding that the question of whether the reproduction qualified as de minimis or fair use was a matter of fact for the jury to decide), and *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 745–49 (N.D. Ohio 2022) (essentially arriving at the same conclusion as the Southern District of Illinois—that ques-

ground on the history of copyright vis-à-vis tattoos and summarizes the facts and outcomes of three federal district court cases that have dealt with instances of digitally-animated reproductions of tattooed athletes.¹⁰ Part II weighs the competing views of the three federal district courts on whether questions of fair use, de minimis use, and implied licenses are matters of fact within the jury's purview or matters of law for the courts to decide.¹¹ Part III argues for the approach taken by the District Court for the Southern District of New York, opting to leave these questions to the discretion of judges and ensuring that tattooed celebrities can continue to license their likenesses without fear of litigation.¹²

I. COPYRIGHT AND TATTOOS IN THE DIGITAL AGE

The framers of the U.S. Constitution considered intellectual property protection vital to the economic well-being of the fledgling nation, such that they included patent and copyright control in Congress's enumerated powers.¹³ At its core, copyright is an economic and utilitarian philosophy that seeks to incentivize the creation and proliferation of creative works for the greater good.¹⁴ Congress passed the country's first Copyright Act in 1790, and legislators have continued to amend the law periodically as new industries and technologies develop.¹⁵ The last major overhaul of copyright law was the passage

tions of fair use, implied license, and de minimis use are all factual matters that should be decided by a reasonable jury).

¹⁰ See *infra* notes 13–134 and accompanying text.

¹¹ See *infra* notes 135–194 and accompanying text.

¹² See *infra* notes 195–212 and accompanying text.

¹³ See U.S. CONST. art. I, § 8, cl. 8 (reserving the power to grant monopolies of limited duration to inventors and authors). The Intellectual Property Clause, as it is sometimes known, is unique because it is the only clause in the Constitution that specifically describes the power itself as well as its purpose (“To promote the Progress of Science and the useful Arts”). See *ArtI.S8.C8.1: Overview of Congress's Power Over Intellectual Property*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C8-1/ALDE_00013060/ [<https://perma.cc/3RJW-HU2E>] (reflecting an economic philosophy, unlike the other articles of the Constitution). James Madison considered copyright and patent fundamental to the nation's well-being, and scarcely dwelled on it when justifying the proposed enumerated powers in *The Federalist No. 43*. See *THE FEDERALIST NO. 43* (James Madison) (writing that Great Britain had already enacted such a system, and the clause provided an obvious benefit to the States by centralizing intellectual property).

¹⁴ See Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 435–37 (2007) (writing that the legislative intent behind copyright law is to strike a balance between increasing access to creative works and ensuring that authors can reasonably profit from their labor in return). Some legal scholars have expressed doubt that modern copyright doctrine accomplishes the incentivization goals laid out by the founders. See Raymond Shih Ray Ku, Jiayang Sun & Yiyang Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright's Bounty*, 62 VAND. L. REV. 1667, 1673 (2009) (empirically demonstrating that the relationship between the number of new works produced and the strictness of copyright law is random and unpredictable at best).

¹⁵ See Copyright Act of 1790, ch. 15, 1 Stat. 124 (granting authors the exclusive right to publish, print, and copy their works for fourteen years, with the option of renewing for a grand total of twenty-eight years of copyright protection).

of the Copyright Act of 1976, which sought to address copyright's applicability to new media like television and radio.¹⁶

Section A of this Part provides a brief overview of copyright law in the United States generally, including the statutory requirements for and exceptions to copyright protection.¹⁷ Section B of this Part explores a few of the affirmative defenses available to defendants facing claims of copyright infringement.¹⁸ Finally, Section C describes the factual background and procedural posture of *Solid Oak Sketches, LLC v. 2K Games, Inc.*, *Alexander v. Take-Two Interactive Software, Inc.*, and *Hayden v. 2K Games, Inc.*, three recent federal district court cases that highlight a growing divide in the understanding of tattoo copyright.¹⁹

A. Statutory Requirements for Copyright

Copyright confers several exclusionary rights to authors and their assignees, such as the right to reproduce the protected work and the right to publicly distribute or display said work.²⁰ In order to qualify for copyright protection under federal law, a work must be an “original work[] of authorship fixed in any tangible medium of expression.”²¹ Copyrightability can thus be broken

¹⁶ See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of the U.S. Code) (expanding copyright protection to include technologies like audiovisual recordings and motion pictures). In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which included several provisions protecting copyright on the early internet. See Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) (establishing a copyright infringement safe harbor for internet service providers and prohibiting the circumvention of copyright encryptions). When the DMCA was passed, Yahoo was the world's most popular search engine and Google was just a noun. See James Mull, *Part 2: The History of Search Engines from 1999–2002*, LINKEDIN (Jan. 20, 2023), <https://www.linkedin.com/pulse/part-2-history-search-engines-from-1999-2002-james-mull/> [<https://perma.cc/6WCG-2PFZ>] (noting that Google eventually supplanted Yahoo's popularity in the early years of the new millennium). Subsequent developments in artificial intelligence and social media have completely changed the internet landscape and copyright law has struggled to keep pace. See Victor M. Palace, *What if Artificial Intelligence Wrote This?: Artificial Intelligence and Copyright Law*, 71 FLA. L. REV. 217, 222–25 (2019) (stressing the urgent need for Congress to legislate in the era of ChatGPT and other generative AIs); see also Taylor E. MacDonald, Note, *A Tale of Two TikTok Titans: Copyright in the Age of Social Media Platforms*, 65 B.C. L. REV. (forthcoming June 2024) (highlighting the sudden influx of fan-created adaptations of copyright-protected works on platforms like TikTok).

¹⁷ See *infra* notes 20–33 and accompanying text.

¹⁸ See *infra* notes 34–66 and accompanying text.

¹⁹ See *infra* notes 67–134 and accompanying text.

²⁰ See 17 U.S.C. § 106 (enumerating the rights of copyright owners in works of various mediums, such as choreography and music).

²¹ *Id.* § 102(a). Fixation is a key requirement for valid copyright protection; a work must be “sufficiently permanent” such that it may be seen or heard “for a period of more than transitory duration.” See *id.* § 101 (requiring relative permanence such that the work is capable of being perceived). Newer technologies such as video games or digital music streaming have strained the definition of fixed work because such works become “fixed” as the images or music notes are transmitted (when a movie is played, for instance). See *id.* (clarifying that fixation occurs “simultaneously with [a work's] transmis-

down into two discrete requirements: fixation and originality.²² Put another way, provided that a tattoo is both fixed and original, it will receive copyright protection under the Copyright Act of 1976.²³

Although cases dealing with tattoo copyright are scant—understandably, given the turnabout in attitudes toward the medium over the last few decades—the consensus among legal scholars is that tattoos easily fulfill the fixation requirement as soon as ink meets skin.²⁴ Tattoos are (relatively) permanent designs that fulfill all the statutory requirements for fixation: They exist on a tangible medium for a period longer than a mere transitory duration, and are clearly discernible on the human skin.²⁵ Thus, a tattoo artist may confidently rest assured that their creations are fixed works of authorship.²⁶

Originality, on the other hand, requires independent creation of the work by the author(s) and a modicum of creativity.²⁷ Independent creation simply means that the author actually created the work without copying from another; presumably, a tattoo artist designing their own tattoos from scratch would clear this hurdle.²⁸ As for creativity, courts have long-relied on a lenient standard,

sion”); see also *Williams Elecs., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 870 (3d Cir. 1982) (holding that video games qualify as fixed audiovisual works regardless of the player’s control over the display of images if the displayed images are substantially identical from play to play).

²² See *Requirements for Copyright Protection*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/requirements-for-copyright-protection/> [<https://perma.cc/M3WV-H224>] (characterizing the two basic criteria as relatively low bars to clear).

²³ See 17 U.S.C. § 102(a)(5) (granting copyright protection to graphical works that are fixed and original).

²⁴ See Doug Lichtman, *Are Tattoos Eligible for Copyright Protection?*, MEDIA INST. (June 15, 2011), <https://www.mediainstitute.org/2011/06/15/are-tattoos-eligible-for-copyright-protection/> [<https://perma.cc/A7YK-8FW6>] (drawing a distinction between fixation and permanence and arguing that tattoos are clearly fixed to a tangible medium for more than a transitory period). Whether the tattoo can be removed is irrelevant to the analysis of copyrightability. *Id.* Some scholars have suggested that the skin itself is the issue, claiming that the human body cannot serve as a tangible medium of expression for copyright purposes, but Professor Lichtman disagrees. *Id.*

²⁵ See *id.* (making the case for the copyrightability of tattoos).

²⁶ See 17 U.S.C. § 101 (defining “[p]ictorial, graphic, and sculptural works” as “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models”). The *Oxford English Dictionary* defines tattooing as “form[ing] permanent marks or designs upon the skin by puncturing it and inserting a pigment or pigments.” *Tattoo*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/198125> [<https://perma.cc/S835-AF9X>].

²⁷ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (holding that the originality factor requires an “extremely low” degree of creativity). The Court recognized that nearly every work will easily clear this hurdle, regardless of the work’s simplistic nature or its creator’s aesthetic tastes. *Id.*

²⁸ See *id.* at 345–46 (writing for the majority, Justice O’Connor contrasted originality and novelty; unlike in patent, where an invention’s novelty is paramount, copyright may extend to two identical paintings that are created independently of each other, so long as no copying occurred). Discerning the “author” of a tattoo can be a murky inquiry depending on the amount of input the tattoo recipient has in the tattoo’s design; in some cases, the recipient could qualify as a joint author with equal rights in the finished product. See *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061, 1070–72 (7th Cir. 1994)

refraining from wading into debates of artistic or aesthetic merit.²⁹ Provided that the work represents even the tiniest amount of creativity on the author's part, it fulfills the originality requirement for copyright.³⁰

Once an original work is fixed in a tangible medium, copyright vests in the author (or the author's assignee), granting them all the associated rights instantaneously.³¹ In 1884, in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court defined "author" as one "to whom anything owes its origin."³² Extending this to the practice of tattooing, a tattoo artist that designs and eventually creates a tattoo would be considered the author of the work, with the ability to prevent third-parties from copying or reproducing the design for themselves within the term of the copyright.³³

B. Copyright Infringement and Its Affirmative Defenses

Copyright infringement is defined as the unlawful violation of the exclusive rights enumerated in the Copyright Act of 1976.³⁴ In order to prove copyright infringement, a plaintiff must first demonstrate that actual copying took place, and if so, that the copying rose to the level of improper appropriation.³⁵

(opting to apply Professor Paul Goldstein's "copyrightability" test of joint authorship). According to Professor Goldstein's test, a joint author is granted co-ownership of a final copyright-protected work so long as their contribution would be entitled to protection when severed from the copyrighted amalgam. *Id.*

²⁹ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (holding that judges do not great art critics make and upholding copyright in a series of crude circus poster advertisements). Justice Holmes warned that judges should try to remain as objective and neutral as possible, especially in cases involving art. See *id.* (reasoning that some artwork may seem striking and boundary-pushing to one viewer and off-putting or primitive to another, but ultimately declaring that it is not the domain of the Court to make such distinctions).

³⁰ *Id.* at 250.

³¹ See *What Is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> [<https://perma.cc/T84L-2VBS>] (vesting copyright at the moment of creation but requiring registration and deposition of the work in the Library of Congress in order to enforce the copyright in litigation).

³² See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884) (holding that a photographer who exercises control over the depiction of their subject is an author for purposes of copyright). In that case, the Court held that a portrait photographer possessed a valid copyright in a series of photographs, given that he was responsible for posing his subject, dressing the set, and designing the lighting; although the camera itself facilitated production, Sarony was considered the photographs' creator by exerting control over the end-product. *Id.* at 60.

³³ See 17 U.S.C. § 106 (granting the exclusive right to copy and reproduce original creative works to their original author).

³⁴ See *id.* § 501(a) (entitling copyright holders to sue infringers if the rights conferred under § 106 are violated). These rights include the power to produce copies, to create derivative works/adaptations, to publicly perform, and to publicly display the work. See *id.* § 106 (adapting the rights available to an artwork depending on the medium of expression).

³⁵ See *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946) (outlining the two-step test for copyright infringement). Arnstein was a contemporary of the famed composer Cole Porter and a notoriously chronic litigant that frequently tilted at windmills, finding copyright infringement of his work even where none existed. See Gary Rosen, *Plagiarized or Original: A Playlist for the Contested Music*

Copying can be shown in one of two ways: (1) by the defendant's direct admission or (2) by a preponderance of circumstantial evidence establishing that the defendant had access to the infringed work and that the allegedly infringing work is "substantially similar" to the original.³⁶ As the level of proven access to the original work by the allegedly infringing defendant increases, the burden of evidence for similarity between the two works decreases, and vice versa.³⁷ For example, if a songwriter were accused of copying a hit song that spent weeks at the top of the charts, courts may assume that the defendant had greater access to the song and require a lower evidentiary showing of similarity between the two works (that is to say, courts may be more likely to find copying occurred even if the similarities are slight).³⁸

If a plaintiff can prove copying by a preponderance of evidence, the next issue of fact is whether the copying rose to the level of improper appropriation.³⁹ Courts often employ an "ordinary observer test," analyzing the accused work through the lens of an average member of the work's intended audience.⁴⁰ If the ordinary observer would tend to find substantial similarity be-

of Ira B. Arnstein, OXFORD UNIV. PRESS (Jan. 22, 2013), <https://blog.oup.com/2013/01/ira-arnstein-spotify/> [<https://perma.cc/D7U9-3ZGG>] (quoting composer Irving Berlin, another victim of Arnstein's litigiousness: "our system . . . gives everyone their day in court" but "Arnstein is stretching his day into a lifetime").

³⁶ See *Arnstein*, 154 F.2d at 468 (defining the various ways that a plaintiff can prove that an alleged infringer copied the original work).

³⁷ See *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) (holding that, in the absence of direct evidence that an alleged infringer had access to a copyrighted work, access may be proven by circumstantial evidence of striking similarity that precludes the possibility that the defendant did not have access); see also *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177, 179 (S.D.N.Y. 1976) (holding that access may be imputed to a copyright defendant in cases where there is striking similarity between the two works). In *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, ex-Beatle George Harrison was accused of copying The Chiffons' hit 1963 song, "He's So Fine." 420 F. Supp. at 178. Although The Chiffons' assignee, Bright Tunes, was unable to definitively prove that George Harrison had heard the song before, the court assumed that he had because, in part, of the vast radio airplay that "He's So Fine" received contemporaneously with peak Beatlemania. See *id.* at 179 (suggesting that artists working within a given field keep up with emerging trends and the work of contemporaries).

³⁸ See *Bright Tunes*, 420 F. Supp. at 179 (noting the inverse relationship between access and similarity in cases of copyright infringement).

³⁹ See *Arnstein*, 154 F.2d at 468–69 (cementing improper appropriation as the second-level of analysis of a copyright infringement claim once copying has been proven). The Second Circuit clarifies that evidence of particularly striking similarity may support both inferences of copying and improper appropriation, but that is not necessary. See *id.* at 469 (holding that definitive proof of access in conjunction with weaker evidence of similarity would also suffice).

⁴⁰ See *Dawson v. Hinshaw Music, Inc.* 905 F.2d 731, 733 (4th Cir. 1990) (developing the notion of the "ordinary observer test" of substantial similarity). *Dawson* marked a critical evolution in copyright jurisprudence, shifting the test from an ordinary lay observer to an ordinary observer that represents the intended audience of the work. See *id.* at 735–36 (acknowledging that the average person may not be suited toward discerning between two similar works in particularly arcane and esoteric mediums). The Fourth Circuit concluded that the ordinary lay observer is not always equipped to gauge the similarity of certain specialty works, such as musical arrangements. *Id.*

tween the two works, the jury will find the infringer liable.⁴¹ Would-be infringers may yet rejoice, because there are a number of affirmative defenses at their disposal to defeat a claim of copyright infringement, including fair use, implied license, and de minimis use, each raised by the defendants in the trio of federal district court cases and discussed in the following subsections.⁴²

1. Fair Use

The most well-known defense to copyright infringement is the fair use doctrine, under which otherwise unlicensed reproductions of copyrighted works are allowed in limited circumstances, such as news reporting and academic scholarship.⁴³ The policy behind the fair use doctrine was succinctly put by Lord Ellenborough over two hundred years ago: “one must not put manacles upon science,” which is to say that scientific and artistic progress necessarily and inevitably builds on preceding work.⁴⁴ To raise the affirmative defense, defendants must prove that fair use applies by a preponderance of the evidence; courts apply a four-factor test to decide if the defendant’s work qualifies.⁴⁵ The four factors—purpose and character of the use, nature of the work, amount and substance of the work used, and the potential effect on the market for the original—are weighed in turn, with no one factor being dispositive.⁴⁶

The first factor, the purpose and character of the use, is perhaps the most important and hotly-contested.⁴⁷ Courts tend to look more favorably on non-

⁴¹ See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (holding that the ordinary observer may be “disposed to overlook” subtle differences between two similar works, supporting an inference of improper appropriation). If the ordinary observer would regard two works as having the same aesthetic appeal, improper appropriation may be assumed. *Id.*

⁴² See 17 U.S.C. § 107 (providing the statutory basis for the affirmative defense of fair use); *infra* notes 43–66 and accompanying text (discussing the three defenses).

⁴³ See 17 U.S.C. § 107 (listing the following purposes that per se qualify for fair use of copyrighted material: criticism, comment, news reporting, teaching, scholarship, or research). The list is non-exhaustive and merely serves as a helpful guidepost for evaluating fair use claims. See *id.* (noting that the ultimate arbiter is the outcome of the four-factor test). See generally Sopan Deb, *Kat Von D Wins Copyright Trial Over Miles Davis Tattoo*, N.Y. TIMES (Jan. 31, 2024), <https://www.nytimes.com/2024/01/27/arts/kat-von-d-miles-davis-tattoo-copyright-trial.html> [<https://perma.cc/G7HD-RRV9>] (asserting fair use as a defense in a tattoo copyright infringement suit); Cade Metz, *OpenAI Says New York Times Lawsuit Against It Is ‘Without Merit’*, N.Y. TIMES (Jan. 8, 2024), <https://www.nytimes.com/2024/01/08/technology/openai-new-york-times-lawsuit.html> [<https://perma.cc/TX9V-W9LB>] (relying on fair use as a defense to claims of copyright infringement).

⁴⁴ See Leon R. Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 211 (1954) (characterizing fair use as a compromise between authors’ rights and the betterment of society).

⁴⁵ See *Folsom v. Marsh*, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841) (establishing an early precedent for the four-part test for fair use).

⁴⁶ See *id.* (originating the holistic nature of analysis of the four factors, which would go on to become the foundation of the fair use doctrine).

⁴⁷ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 529–30, 532–33 (2023) (revising the previous understanding of work that qualifies as “transformative” for the purposes of the first factor). The Supreme Court now states that, for use to qualify as transformative (and

commercial and not-for-profit uses, and less favorably on defendants that are actively profiting off of the infringement.⁴⁸ Judges will also consider whether the use is “transformative,” that is, whether the infringing use can be reasonably perceived as embodying a distinct artistic purpose from the original work.⁴⁹ More transformative uses, such as parody, are given wider latitude regarding the other factors.⁵⁰ For example, musical parodist and accordion virtuoso “Weird Al” Yankovic is free to reproduce the melodies of hit songs because his new (and, in this author’s humble opinion, improved) versions embody transformative use; what once served an expressive, artistic purpose is now deployed for a comic and satirical purpose.⁵¹

The second factor examines the nature of the copyrighted work: Does it serve a creative or imaginative purpose, or does it convey factual subject mat-

thereby fair), it must have “a further purpose or different character,” distinct from the original source material. *Id.* The Court reasoned that the purpose or character of a secondary work is a matter of degree that should be weighed against the commerciality of the use. *Id.*

⁴⁸ See *Blanch v. Koons*, 467 F.3d 244, 253–54 (2d Cir. 2006) (reinforcing the role that the commercial/non-commercial purpose factor plays in a fair use inquiry). The Second Circuit makes clear that whether a use is transformative is the primary consideration for the first prong; a particularly transformative use may still be eligible for the fair use defense regardless of its commercial nature. See *id.* (reaffirming the holistic nature of the four-factor test).

⁴⁹ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609–10 (2d Cir. 2006) (holding that the repurposing of rock concert posters to serve as chronological and biographical signifiers in a coffee table book about the psychedelic jam band the Grateful Dead was a sufficiently transformative use that entitled the defendant to the fair use defense). The term “transformative use” was first adopted in 1990 and it has gradually but steadily devoured fair use jurisprudence as a defense in copyright litigation; transformative use was discussed in 100% of fair use cases in 2009, compared to only 5% of cases in 1992. See Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 173–75 (2019) (denoting Justice Souter’s use of the phrase in *Campbell v. Acuff-Rose* as the watershed moment in the popularization of transformative use). Transformative use continues to play a role in copyright litigation; it was discussed in 88% of fair use cases in 2016. *Id.*

⁵⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579–80 (1994) (suggesting that parody and satire have “an obvious claim to transformative value,” and thus fair use). The Court understands that parody, by its very definition, must mimic and borrow from the source material to achieve its purpose. See *id.* at 580–81 (noting that, for parody to have an effect, the audience must recognize the primary work that the secondary work lampoons). The word parody comes to us from the Greek *parodia*, meaning a poem that runs counter to or against another; it was initially used to refer to a specific genre of lyric poetry that mocked the popular epic poems of the day. See F.J. Lelièvre, *The Basis of Ancient Parody*, 1 GREECE & ROME 66, 66 (1954) (tracing the etymology of parody and its application to ancient Greek drama); *Parody*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/parody_n2?tab=etymology#etymology [<https://perma.cc/KBA3-YMAH>] (providing the etymology for parody: “παρὰ-παρὰ-prefix¹ + ὁδὴ ode n.”).

⁵¹ See *Campbell*, 510 U.S. at 584 (holding that a parody song’s commercial release is not per se evidence of unfair use). The rap group 2 Live Crew enjoyed a minor success in “Pretty Woman,” a humorous send-up of Roy Orbison’s 1964 hit “Oh, Pretty Woman” that featured the original melody and crude modern lyrics. *Id.* at 573. After attempting and failing to seek a license from Acuff-Rose Music, Inc., 2 Live Crew released the song anyway, ensuring that the line “Big hairy woman you need to shave that stuff” lives on in the Supreme Court record. *Id.* at 595.

ter?⁵² Use of work that is more factual in nature is more likely to be considered fair, because facts are inherently uncopyrightable and are thus afforded less protection.⁵³

The third factor is the amount—and substantiality—of the copyrighted work used.⁵⁴ If a work is copied in its entirety, it is much more difficult to prove fair use; however, small portions of a work may be held ineligible for fair use if said portions get to the “heart” of the work.⁵⁵ That is not to say that a work copied in its entirety is foreclosed from asserting fair use per se.⁵⁶ The analysis turns on whether an argued transformative use copied only as much as deemed appropriate to accomplish its purpose.⁵⁷

The fourth and final factor is the effect on the potential market of the copyrighted work; if the use has had, or will have, a negative effect on the original author’s ability to economically exploit their work, the asserted fair use defense is more likely to fail.⁵⁸ Courts are especially sympathetic to unau-

⁵² See *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 558 (1985) (holding that there is a tangible social benefit to the dissemination of factual material, favoring fair use of more fact-oriented works). The Court, however, was quick to point out that Nation had overstepped their bounds and copied more than the basic excerpts necessary to convey the relevant facts in the source material. See *id.* at 559 (considering whether the underlying work was published or not at the time that the material was copied).

⁵³ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (upholding the concept that facts and ideas are inherently uncopyrightable, while preserving the general copyrightability of compilations of fact, assuming that the compilation is arranged according to some amount of creative decision-making).

⁵⁴ See *Bill Graham*, 448 F.3d at 613 (finding that even wholesale copying of a work in its entirety does not necessarily defeat claims of fair use, provided the use is sufficiently transformative).

⁵⁵ See *Harper*, 471 U.S. at 564–65 (finding that, although the copied portions of a manuscript were relatively insubstantial compared to the work in its entirety, even a small excerpt that qualitatively embodies a larger work may be denied fair use).

⁵⁶ See *Bill Graham*, 448 F.3d at 613 (finding fair use for a transformative work that copied the source in its entirety). Bill Graham was a concert promoter who helped to popularize the Grateful Dead in the 1960s and 1970s by designing and distributing posters around the Haight-Ashbury scene in San Francisco. See Gary Kamiya, *One Weekend in S.F. Kicked Off the Haight-Ashbury Hippie Era. This Is What It Was Like*, SAN FRANCISCO CHRON. (Oct. 29, 2021), <https://www.sfchronicle.com/vault/portalsofthepast/article/One-weekend-in-S-F-kicked-off-the-Haight-Ashbury-16573535.php> [<https://perma.cc/9S38-LD7B>] (situating Bill Graham as an early architect of the LSD-infused subculture alongside merry prankster Ken Kesey). Dorling Kindersley (DK) is known for their illustrated reference books. See *Bill Graham*, 448 F.3d at 607 (indicating that the purpose of their book in question as “captur[ing] the eye and inform[ing] the reader”). DK wanted to use Bill Graham’s posters to evoke, for reference purposes, the psychedelic style of the Grateful Dead; although DK ended up using the whole of a poster designed by Graham, the overall use was transformative enough to escape liability. *Id.* at 613.

⁵⁷ See *Bill Graham*, 448 F.3d at 613 (noting that some transformative uses, such as the inclusion of old graphical art for historiographical purposes, necessitate complete inclusion of the underlying work).

⁵⁸ See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994) (holding that “substantial harm” to the value of a copyrighted work undermines claims of fair use). Texaco maintained a few subscriptions to scientific journals for research and development purposes, but had a corporate policy of freely encouraging photocopying, resulting in vast internal proliferation of articles

thorized use where there is no readily-available market or means to license the use.⁵⁹ If the original author has made a habit of easily licensing their work, the infringer's failure to seek a license would disfavor arguments of fair use.⁶⁰

2. Implied License

The existence of a non-exclusive license between the copyright owner and the licensee destroys the owner's ability to sue the licensee for copyright infringement.⁶¹ Although a written licensing agreement is the safest and most straightforward course of action for non-authors hoping to make use of copyrighted works, it is not a requirement, because a court may find a so-called "implied license" between the parties.⁶² Implied licenses are most frequently found where the original work is created at the request of one party and is subsequently turned over to said party, with the intent or understanding that the work will be publicly distributed or copied.⁶³

3. De Minimis Use

De minimis use is a unique defense in copyright litigation because it refutes the allegation of improper appropriation while necessarily admitting that intentional copying took place.⁶⁴ Essentially, the defendant must prove that their use of the protected work was so minor or trivial that it fails to rise to the level of substantial similarity required to prove improper appropriation took

well beyond the number of subscriptions they paid for. *Id.* at 915. The Second Circuit suggested that Texaco simply "purchase one more subscription for each of its researchers," ensuring that the copyright holder reaps the economic benefit. *See id.* at 932 (maintaining that individual, personal photocopying might still count as fair use, but foreclosing that option for larger institutions with the means of simply licensing the original work).

⁵⁹ *See id.* at 928–30 (holding that neither side was favored as to the fourth factor because it was unlikely that a potential market for licensing individual journal articles would develop).

⁶⁰ *See id.* at 930 (holding that the existence of a licensing market for photocopied journal articles would weigh in favor of the journal publisher in a fair use determination).

⁶¹ *See Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (holding that the existence of a non-exclusive license would preclude the plaintiff's ability to sue for copyright infringement).

⁶² *See id.* (requiring that transfers of copyright be memorialized in writing but allowing licenses to be written or implied by conduct or oral agreement).

⁶³ *See id.* at 559 (surmising that a conclusion to the contrary would imply that the contributions of a contracted party to a larger work are essentially valueless). Cohen had contracted with Effects Associates for special effects work on his latest motion picture, paying a substantial sum of \$56,000. *Id.* The Ninth Circuit assumed that an implied license was granted because Cohen would not have paid that sum if he lacked the right to incorporate the commissioned special effects work into his new movie. *Id.*

⁶⁴ *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (holding that de minimis use defeats copyright infringement claims and should be determined before conducting a fair use analysis). The doctrine is derived from the Latin axiom *de minimis non curat lex*, or "the law does not concern itself with trifles." 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.01(G) (Matthew Bender, rev. ed. 2023).

place.⁶⁵ Observability of the protected work is the key factor of a de minimis use defense; if the copied portion of the protected work is obscured or out-of-focus in the alleged infringing work, a fact finder is more likely to find that the de minimis use doctrine applies.⁶⁶

C. Legal and Procedural Background of the Tattoo Cases

In 2020, in *Solid Oak Sketches*, the district court for the Southern District of New York heard its first case concerning reproductions of copyrighted tattoos in video games.⁶⁷ The litigation sparked two prominent copycat suits in Ohio and Illinois that raised the same question (in nearly identical contexts) against the very same defendant.⁶⁸ In each case, the defendant countered with the three defenses of fair use, implied license, and de minimis use, hoping that one of the three arguments would win the day at the summary judgment stage.⁶⁹

1. Background of Solid Oak Sketches

2K Games is a video game publisher best known for their popular series of sports-based video games, including *NBA 2K* and *WWE 2K*.⁷⁰ The company was founded in 2005 as a subsidiary of Take-Two Interactive Software, one of the world's largest video game publishers, perhaps best known for creating the *Grand Theft Auto* series.⁷¹ 2K Games publishes an annual installment of their

⁶⁵ See *Sandoval*, 147 F.3d at 217 (establishing that de minimis use occurs when the copying “falls below the quantitative threshold of substantial similarity”).

⁶⁶ See *id.* (determining observability of a copyrighted work by looking to the length of display time, as well as its overall prominence in the infringing work). Factors that the court may look at to determine a visual work's prominence include lighting and framing. *Id.*

⁶⁷ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 350 (S.D.N.Y. 2020) (holding that fair use permitted digital reproduction as a matter of law).

⁶⁸ See Adrienne Kendrick, *This Year Is Poised to Be a Landmark One for Tattoo Copyright Litigation*, IPWATCHDOG (Jan. 7, 2023), <https://ipwatchdog.com/2023/01/07/year-poised-landmark-one-tattoo-copyright-litigation/> [<https://perma.cc/YHJ8-W8K6>] (suggesting that these two courts seemed receptive to the notion of applying stronger copyright protection for tattoo artists).

⁶⁹ Compare *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 818 (S.D. Ill. 2020) (answering the question of whether use of a real-life tattoo in a video game falls under one of the three affirmative defenses as a matter of law), with *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 741 (N.D. Ohio 2022) (same).

⁷⁰ See *2K Games Portfolio*, 2K GAMES, <https://www.2k.com/en-US/games/> [<https://perma.cc/V2L8-SZSE>] (listing their popular sports franchises, alongside other popular series like *Bioshock* and *Borderlands*). Although their sports franchises are among their best-selling, 2K Games publishes a diverse catalogue of games that run the gamut from first-person shooters to turn-based strategy games. *Id.* *Bioshock*, a dystopian first-person shooter set in the submerged city of Rapture, is revered by gamers for its “game-changing ‘Would You Kindly?’ twist” and is generally regarded as one of the best video games of all-time. See *The Top 100 Video Games of All Time*, IGN (Feb. 2, 2024), <https://www.ign.com/articles/the-best-100-video-games-of-all-time> [<https://perma.cc/P3DK-KLNJ>] (ranking it 18th, sandwiched between the post-apocalyptic *The Last of Us* and the Soulslike *Bloodborne*).

⁷¹ See David Adams, *Take Two Buys Visual Concepts*, IGN (June 17, 2012), <https://www.ign.com/articles/2005/01/25/take-two-buys-visual-concepts> [<https://perma.cc/BS2K-E3MB>] (reporting

NBA 2K series, in which players can simulate basketball games using teams and players in the National Basketball Association (NBA).⁷²

In order to accurately simulate a real-life NBA game, 2K Games goes to great efforts to ensure that each new installment depicts the current league of NBA players with lifelike accuracy, down to the smallest detail.⁷³ Beyond the players themselves, the games also include a host of other components meant to give the illusion of an actual basketball game, such as television announcer play-by-play and the roar of the crowd.⁷⁴ As part of their NBA collective bargaining contract, NBA players are required to grant the league a license to use their likeness, including the right to then further license their likeness to third-parties (for example, licenses to television networks for broadcast purposes);

that Take-Two purchased the rights to develop video games for Major League Baseball for \$24 million). The *Grand Theft Auto* series itself takes a satirical look at American culture, often featuring thinly veiled allusions to prominent celebrities and nationwide brands. See Simon Parkin, *Will the Remastered Grand Theft Autos' American Satire Hold Up?*, THE GUARDIAN (Oct. 18, 2021), <https://www.theguardian.com/games/2021/oct/18/remastered-grand-theft-auto-gta> [<https://perma.cc/N8TN-F4C8>] (describing the series' trademark snark as "mostly aimed at the vacuity and cruelty of late-stage capitalism in America"). Coincidentally, Rockstar Games (the Take-Two subsidiary responsible for development of the *Grand Theft Auto* series) was also recently accused of unauthorized reproduction of the tattooed likeness of one Lawrence Sullivan in their upcoming installment *Grand Theft Auto VI*. Ethan Gach, *'Florida Joker' Demands \$2 Million Over GTA 6 Parody, Red Dead 2 Actor Fires Back*, KOTAKU (Dec. 11, 2023), <https://kotaku.com/gta-6-florida-joker-voice-read-dead-redemption-2-1851089419> [<https://perma.cc/FA2N-23U7>]. Sullivan, better known as the "Florida Joker," has tattooed his face in ill-advised homage to Jared Leto's performance as the Clown Prince of Crime in *Suicide Squad*. *Id.*

⁷² *Solid Oak Sketches*, 449 F. Supp. 3d at 339. The 2K23 edition of the series includes WNBA players for the first time—a landmark development in this space. Eric Seitz, *Why the 2K23 WNBA Edition Matters for the Future*, GAMERANT (July 8, 2022), <https://gamerant.com/nba-2k23-wnba-edition-important-representation-possible-future-impact/> [<https://perma.cc/L6V7-K277>]. The annual release model for sports video games has chagrined gamers for decades at this point, with some critics arguing that new editions are largely reiterative and fail to add anything meaningful. See Brian Shea, *It's Time for Sports Video Games to Abandon the Annual-Release Model*, GAME INFORMER (Jan. 4, 2022), <https://www.gameinformer.com/opinion/2022/01/04/its-time-for-sports-video-games-to-abandon-the-annual-release-model> [<https://perma.cc/7GN4-F9FR>] (encouraging developers to release downloadable title updates instead of requiring consumers to repurchase essentially the same product with minor changes year after year).

⁷³ See *Solid Oak Sketches*, 449 F. Supp. 3d at 341–42 (accepting that Take-Two's ultimate goal is to recreate an NBA game as accurately as possible for gaming audiences). The Nintendo Entertainment System, one of the earliest pioneers in the home video game console market, had a maximum resolution of 256x240 pixels. Andrew Cunningham, *The NES: How It Began, Worked, and Saved an Industry*, ARSTECHNICA (Dec. 9, 2021), <https://arstechnica.com/gaming/2021/12/time-to-feel-old-inside-the-nes-on-its-30th-birthday/> [<https://perma.cc/EK4G-RNVZ>]. In comparison, the current generation of consoles can run on 8K resolution televisions, equivalent to 7680x4320 pixels. Kyle Orland, *Are We on the Verge of an 8K Resolution Breakthrough in Gaming?*, ARSTECHNICA (May 26, 2022), <https://arstechnica.com/gaming/2022/05/does-the-world-really-need-8k-resolution-game-consoles/> [<https://perma.cc/T8L9-EQV3>].

⁷⁴ See *Solid Oak Sketches*, 449 F. Supp. 3d at 341–42 (noting that the game includes a host of components meant to realistically convey the experience of a real-life NBA game, down to hyper-accurate sounds of sneakers on the basketball court).

the NBA subsequently grants 2K Games a license to use the likenesses of their players.⁷⁵

Tattoos are a common sight at NBA games today; nearly fifty-five percent of the 2021–2022 league roster (341 out of 618 players) were inked.⁷⁶ In order to best represent the likenesses of the league’s players, 2K Games digitally replicates the visible tattoos with a high degree of fidelity.⁷⁷ Three players featured in *NBA 2K14*, *NBA 2K15*, and *NBA 2K16* bore tattoos that were exclusively licensed to plaintiff Solid Oak Sketches by the artists that designed them: LeBron James, Kenyon Martin, and Eric Bledsoe.⁷⁸

The tattoos depicted in the *NBA 2K* series play a minor role in the game-play itself, comprising no more than 0.000431% of the game’s code.⁷⁹ Given the constraints of television and computer screens, the tattoos themselves are scaled down to no more than a tenth of the dimensions that they have in real life.⁸⁰ Furthermore, the tattoos themselves appear fleetingly on screen and are often difficult to perceive, as players quickly move about the court and are frequently blocked by other players.⁸¹

Given that evidence, defendant 2K Games entered a motion for summary judgment, seeking to dismiss the copyright infringement claim on three theo-

⁷⁵ See *id.* at 346 (suggesting that such a licensing arrangement is a standard business practice for the NBA, and that the NBA was fully within their rights to sublicense their players’ likenesses to 2K Games).

⁷⁶ See Nick DePaula, *Inked Up: How NBA Players Embraced Tattoos and Changed the Game*, ANDSCAPE (June 1, 2022), <https://andscape.com/features/how-nba-players-embraced-tattoos-and-changed-the-game/> [<https://perma.cc/DFR4-4S2Q>] (suggesting that just thirty years ago, tattoos were a rarity in the league, with tattooed players like Dennis Rodman developing reputations as outlier rebels). Today, however, NBA players are more likely than not to have visible tattoos; Damian Lillard, point guard for the Milwaukee Bucks, has called tattoos a “part of the league.” *Id.*

⁷⁷ See *Solid Oak Sketches*, 449 F. Supp. 3d at 347 (accepting that *NBA 2K* games feature exact replicas of the players’ tattoos in order to maximize the “general recognizability” of characters in the game).

⁷⁸ *Id.* at 340–41. James, for the uninitiated, is considered by many (including himself) to be the GOAT—or greatest of all-time—NBA player to grace the court. See Philip Ellis, *LeBron James Revealed the Moment He Thinks He Became the NBA’s GOAT*, MEN’S HEALTH (Feb. 28, 2022), <https://www.menshealth.com/entertainment/a39260283/lebron-james-nba-goat/> [<https://perma.cc/J7ND-2UAM>] (“I just felt like, ain’t nobody better than me at this. I felt like Jay-Z when he made *The Blueprint*”).

⁷⁹ *Solid Oak Sketches*, 449 F. Supp. 3d at 342. The defendant’s expert witness stated in his declaration that the precise amount of data occupied by the tattoos in the game was somewhere in the range of 0.000286% to 0.000431%. *Id.*

⁸⁰ See *id.* (contending that, given the distant point-of-view of the game’s camera, the tattoos are never more than 10.96% of their size in reality).

⁸¹ See *id.* (finding that the tattoos were “[a]t no point . . . discernible” during screenings of game-play footage). The Southern District of New York was convinced that the animated depictions of the players’ tattoos were subordinate to the basketball game itself, and of lesser importance to the game’s consumers. See *id.* (assuming that the average video gamer is not motivated to purchase the game based solely on the players’ appearances).

ries.⁸² First, defendant argued that their use of the tattoos in the *NBA 2K* games was de minimis, which is to say, so insignificant that it failed to rise to the level of infringement.⁸³ The Southern District of New York agreed and granted summary judgment to 2K Games, holding that a reasonable fact finder could not conclude that defendant's use of the tattoos was substantially similar to the original tattoos themselves.⁸⁴ Although the tattoos were included in their entirety, their small size and indiscernible prominence to the ordinary gamer entitled defendant to summary judgment in their favor nonetheless.⁸⁵

2K Games also argued that they were entitled to summary judgment on the basis of an implied license between the players and the tattoo artists that inked them.⁸⁶ The court inferred that tattoo artists necessarily confer a non-exclusive license to their clients, understanding that the tattoo will be incorporated into the clients' likenesses for public display.⁸⁷ This inference was supported by the sworn testimony of the tattoo artists, with each admitting that they understood the celebrity status of the NBA players and expected the tattoos to be displayed as part of their likenesses.⁸⁸

Finally, 2K Games entered a counterclaim to have their use of the tattoos in their video game series declared fair.⁸⁹ The court applied the four-factor test and ultimately concluded that 2K's use of the tattoos was indeed fair.⁹⁰ Although 2K's use was clearly commercial in purpose, the court found that the use of the tattoo's was transformative in character.⁹¹ LeBron James had his tattoos created for personal, expressive purposes, whereas 2K Games was motivated by a desire to faithfully depict LeBron's likeness and to create a recognizable facsimile.⁹²

⁸² See *id.* at 339 (relying on theories of de minimis use and implied license). In addition, they sought a counterclaim declaration of fair use. *Id.* at 346.

⁸³ See *id.* at 345 (arguing that the tattoos' length of display and prominence in the video game was so minor as to necessitate summary judgment).

⁸⁴ See *id.* (pointing out that the tattooed players in question only represented three of the over four hundred players to choose from, and that most games were unlikely to feature even one of the three tattooed players).

⁸⁵ See *id.* (accepting de minimis use as a defense against copyright infringement).

⁸⁶ See *id.* at 346 (holding that an implied license may be found in cases of commissioned work, provided that the work is handed over to the commissioner and the creator intends for the commissioner to copy and distribute the work freely).

⁸⁷ See *id.* (finding that, in the absence of an explicit request by the artist to limit display, the receiver of a tattoo is understood to have received an implied, non-exclusive license in the tattoo).

⁸⁸ See *id.* at 340 (understanding that the three tattoo artists—Justin Wright, Deshawn Morris, and Thomas Ray Cornett—swore that the non-exclusive, implied license would extend beyond regular television appearances to include video games and other digital reproductions of their work).

⁸⁹ *Id.* at 346.

⁹⁰ *Id.* at 350.

⁹¹ *Id.* at 348.

⁹² See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (finding transformative use when the infringer reduces the size of the work such that it no longer serves the purpose of the original source material). The tattoos had been reduced to merely a tenth of their nor-

On the nature of the copyrighted work, the court (somewhat surprisingly, given their often-personal nature) found that the tattoos were more “factual than expressive,” favoring fair use.⁹³ One of LeBron James’ tattoos, “Child Portrait,” was copied directly from a photograph of his son as a child; the other tattoos used basic, representational tattoo motifs, such as flames and basketballs, which were likewise considered more factual than expressive.⁹⁴

Although the entirety of the tattoos was reproduced in the games, the court held that the third factor also favored the defendant.⁹⁵ In this case, 2K Games necessarily had to include the complete tattoos in order to fully realize their transformative use; copying merely half of the players’ tattoos would not serve their ultimate purpose of simulating likenesses.⁹⁶

Finally, the court applied the fourth factor, looking to the potential effect on the market for Solid Oak’s tattoos.⁹⁷ Solid Oak conceded that a copy of *NBA 2K* did not serve as a market substitute for the tattoos themselves (potential clients would not opt for the video game instead of the tattoo).⁹⁸ Furthermore, the court decided that the development of a hypothetical new market for video game developers to license tattoos from tattoo artists was highly unlikely to materialize.⁹⁹ With all four factors favoring the defendant’s fair use, 2K Games’ counterclaim succeeded, and the final nail was hammered into Solid Oak’s pine box.¹⁰⁰

2. Background of *Alexander*

Less than a year after the District Court for the Southern District of New York granted summary judgment in *Solid Oak Sketches*, the Southern District

mal size, suggesting they no longer served an expressive purpose. See *Solid Oak Sketches*, 449 F. Supp. 3d at 348 (contending that the tattoos could no longer serve a purely expressive purpose at the reduced scale of a video game).

⁹³ *Solid Oak Sketches*, 449 F. Supp. 3d at 348–49.

⁹⁴ See *id.* (finding that common tattoo motifs are per se uncreative because the tattoo artist is merely copying a preexisting design). One of LeBron’s tattoos, “330,” emblazons the area code of his hometown (Akron, Ohio) across his right forearm. See *LeBron James’ 24 Tattoos & Their Meanings*, BODY ART GURU, <https://bodyartguru.com/lebron-james-tattoos/> [<https://perma.cc/Q57Z-4NRF>] (claiming that LeBron first sported the tattoo during his fourth season with the NBA).

⁹⁵ *Solid Oak Sketches*, 449 F. Supp. 3d at 349.

⁹⁶ See *Bill Graham*, 448 F.3d at 613 (standing for the proposition that “copying the entirety of a work is sometimes necessary” to have fair use).

⁹⁷ *Solid Oak Sketches*, 449 F. Supp. 3d at 349–50.

⁹⁸ See *id.* at 350 (holding that an infringing use will only deprive the copyright owner of profit where the infringing use is a market substitute for the original).

⁹⁹ See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 928 (2d Cir. 1994) (holding that the burden falls to the plaintiff to prove that a market would likely develop if fair use was denied to the infringer).

¹⁰⁰ See *Solid Oak Sketches*, 449 F. Supp. 3d at 353 (ruling in favor of 2K Games and allowing their ongoing use of copyrighted tattoos in their video games).

of Illinois took up an eerily similar case.¹⁰¹ In 2020, in *Alexander*, the court arrived at precisely the opposite holding of the Southern District of New York, denying summary judgment on fair use, implied license, and de minimis use as matters of law.¹⁰²

Between 2002 and 2008, plaintiff Catherine Alexander inked six tattoos on professional WWE wrestler Randy Orton.¹⁰³ Take-Two and their wholly owned subsidiary 2K Games developed the popular *WWE 2K* series, which simulates professional wrestling matches in quite the same way as the *NBA 2K* series simulates professional basketball games.¹⁰⁴ As part of WWE's licensing agreement with Take-Two, Orton's likeness was digitally replicated, including the six tattoos created by Alexander.¹⁰⁵

Having had success with their legal strategy in *Solid Oak Sketches*, Take-Two used the same playbook in Illinois.¹⁰⁶ First, defendant argued that Alexander had granted an implied license to Orton to incorporate the tattoos into his own likeness.¹⁰⁷ Although the tattoos were created by Alexander at the request of Orton, the plaintiff questioned the scope of the implied license.¹⁰⁸ Orton had the right to appear in certain media, such as television, and display his tattooed likeness, but Alexander denied having granted the unlimited right to sublicense her tattoos for third-parties to copy.¹⁰⁹ The court concluded that the scope of the implied license was a triable matter of fact and refused to grant summary judgment as a matter of law.¹¹⁰

¹⁰¹ *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 817–18 (S.D. Ill. 2020).

¹⁰² *Id.* at 822–23.

¹⁰³ *Id.* at 817. Orton is considered one of the greatest wrestlers of his generation, having attained the title of World Champion at the scant age of 24 (the youngest to ever do so). See Sourav Mahanty, *Looking at Randy Orton's Case for the GOAT in WWE*, THE SPORTSTER (May 7, 2022), <https://www.thesportster.com/randy-orton-case-goat-wwe/> [<https://perma.cc/PEV4-Z6Y5>] (tracing Orton's lengthy stint with WWE, from reviled heel to all-timer face).

¹⁰⁴ *Alexander*, 489 F. Supp. 3d at 817–18.

¹⁰⁵ See *id.* (describing Take-Two's process of reproducing athletes' tattoos as "photo reference," by which the developer makes a "'rote' recreation" of a pre-existing photograph); see also Michael Weyer, *10 Interesting Facts Behind Randy Orton's Tattoos*, THE SPORTSTER (Dec. 20, 2023), <https://www.thesportster.com/wwe/randy-orton-tattoos-interesting-facts-wwe/> [<https://perma.cc/C5EX-8ZQ8>] (showing photo references of Orton's iconic tattoos).

¹⁰⁶ Compare *Alexander*, 489 F. Supp. 3d at 820 (asserting fair use, implied license, and de minimis use as affirmative defenses to copyright infringement), with *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020) (same).

¹⁰⁷ See *Alexander*, 489 F. Supp. 3d at 820 (citing *Cohen* in determining whether an implied license was created by the parties' course of conduct).

¹⁰⁸ See *id.* (arguing that Orton had taken advantage of, and impermissibly expanded, his right to exploit his own likeness).

¹⁰⁹ See *id.* (drawing a distinction between the incidental copying of the tattoos in, say, television appearances, and the purposeful reproduction of tattoos in video games).

¹¹⁰ See *id.* (finding that a reasonable juror could determine that video game appearances were a sublicensing right that Orton could not assume he was granted when he had the tattoo created).

Turning to fair use, the court again refused to grant summary judgment to the defendant.¹¹¹ Unlike in *Solid Oak Sketches*, Alexander persuasively argued that Take-Two's use of the tattoos was insufficiently transformative: Alexander's purpose in inking the tattoos was to merely display them on Orton, and Take-Two shared that purpose.¹¹² The court quickly dispensed with the second factor, holding that tattoos are clearly meant to embody a creative, rather than factual, purpose, weighing against fair use.¹¹³

Because Take-Two had wholesale copied Orton's tattoos for reproduction in their game, the court held that the third factor weighed against fair use.¹¹⁴ The court did note, however, that copying the entirety of a protected work does not preclude fair use as a matter of law—it merely weighs against it.¹¹⁵ Having found that the first three factors weighed against the finding of fair use as a matter of law, the Southern District of Illinois glossed over the fourth factor; Take-Two argued that Alexander was attempting to create a market for tattoo licensing out of thin air, but the court refused to take a stance on the potential market harm.¹¹⁶

Most damning of all, the court expressed doubt about the viability of the de minimis use defense.¹¹⁷ There is no precedent within the Seventh Circuit applying the defense to claims of copyright infringement, and as such, the district court refused to allow its use in this case.¹¹⁸

In September 2022, the case proceeded to trial, resulting in a jury verdict in favor of Alexander, awarding damages totaling \$3,750.¹¹⁹ Although the ultimate award was a mere pittance—\$71 per month since the case began—the

¹¹¹ *Id.* at 821–22.

¹¹² *See id.* (determining that the issue of transformativeness was best left to the jury). The parties hotly-contested the purpose of their use, with Take-Two using the same strategy that seemed to work in *Solid Oak Sketches*; they claimed that Alexander's purpose in inking Orton's skin was personal expression, but Alexander argued that her purpose was merely to display an image on Orton's body. *Id.*

¹¹³ *See id.* at 822 (holding that tattoos are naturally expressive and finding that Alexander exerted creative control over the final designs).

¹¹⁴ *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820–21 (9th Cir. 2003) (holding that fair use is more likely to be found when the infringing party uses only “as much as is necessary” to achieve their purpose).

¹¹⁵ *See id.* (suggesting that, if the entirety of a work is required, wholesale copying may be allowed under fair use).

¹¹⁶ *See Alexander*, 489 F. Supp. 3d at 822 (finding that the first three factors weighed against fair use as a matter of law, thus neglecting to analyze the fourth factor).

¹¹⁷ *See id.* at 823 (finding defendant's particular de minimis use argument lacking and suggesting that the defense itself may not have a place in copyright).

¹¹⁸ *Id.* It remains an open question whether the Seventh Circuit accepts the de minimis use defense, given that the Circuit has never validated the defense. *See id.* (finding no cases within their jurisdiction that referenced the doctrine).

¹¹⁹ *Alexander v. Take-Two Interactive Software, Inc.*, No. 00966-SMY, 2022 WL 16721977, at *1 (S.D. Ill. Sept. 30, 2022). The jury held that Alexander had suffered \$3,750 in lost profit but did not find that Take-Two had profited from the inclusion of the tattoos in their games. *Id.*

verdict struck a blow against Take-Two's fair use claims and represented a somewhat pyrrhic victory for tattoo artists.¹²⁰

3. Background of *Hayden*

The most recent court to pick up the question of tattoo copyrights in video games was the District Court for the Northern District of Ohio.¹²¹ In 2022, in *Hayden*, the court arrived at a similar determination to the Southern District of Illinois in *Alexander*, denying summary judgment to 2K Games and delivering a second blow to the video game industry.¹²² Tattoo artist James Hayden was responsible for six tattoos that appeared in editions of the *NBA 2K* series, including three that appeared on LeBron James.¹²³

2K Games again attempted to have summary judgment granted on the grounds of de minimis use, but the court refused to rule on the observability of the tattoos as a matter of law, in contrast to the Southern District of New York's more confident tack.¹²⁴ Rather, the court ruled that the question of whether the tattoos that were copied in their entirety were substantially visible on screen during gameplay was an issue of fact for the jury to determine.¹²⁵

The court was similarly skeptical on the applicability of the fair use doctrine.¹²⁶ On the character and purpose factor, the court determined that reasonable fact finders could disagree on the defendant's alleged transformative use, and thus refused to enter summary judgment for the defendants.¹²⁷ The Northern District of Ohio agreed with the Southern District of Illinois on the second factor, holding that the nature of the copyrighted work was indisputably ex-

¹²⁰ See Aaron Moss, *Tattoo Artist's Trial Win Is a Loss for Bodily Autonomy, Free Speech*, COPY-RIGHT LATELY (Oct. 2, 2022), <https://copyrightlately.com/tattoo-artist-trial-victory-copyright-lawsuit/> [<https://perma.cc/X3VJ-ZGUB>] (summarizing that, in the wake of the verdict, fair use of tattoos has been cast into doubt, even though the actual damages were low). Moss argues that the verdict is likely to have a chilling effect on the video game industry and, in the absence of guidance from higher courts, developers might need to err on the side of seeking permission from tattoo artists. *Id.*

¹²¹ *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 742 (N.D. Ohio 2022).

¹²² Compare *id.* at 746–49 (denying summary judgment on fair use, implied license, and de minimis use), with *Alexander*, 489 F. Supp. 3d at 820 (denying summary judgment on the same grounds).

¹²³ *Hayden*, 629 F. Supp. 3d at 741.

¹²⁴ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 345 (S.D.N.Y. 2020) (shutting down the plaintiff on all three of the defense's theories). Whereas the Southern District of New York happily leapt in to declare 2K's use of tattoos de minimis as a matter of law, the Northern District of Ohio was more reticent, preferring to leave that determination for the jury. See *Hayden*, 629 F. Supp. 3d at 745–46 (treating the issue as a matter of fact).

¹²⁵ See *Hayden*, 629 F. Supp. 3d at 745–46 (adding that, in addition to relative observability, courts will look to whether the use will diminish the monetary value of the copyrighted work).

¹²⁶ See *id.* at 746–47 (refusing to grant summary judgment on the question of fair use).

¹²⁷ See *id.* (suggesting that 2K's use of the tattoos was transformative but preferring to leave that determination to the jury).

pressive and creative, thus favoring the plaintiff.¹²⁸ The third factor, amount and substantiality of use, was also determined to be a matter of fact for the jury to decide.¹²⁹ Although the tattoos were used in their entirety, the court refused to wade into the debate over how observable they were during the average game session or how vital the tattoos were in accomplishing 2K's goals.¹³⁰

The court was most loquacious on the final fair use factor, the effect on the potential market of the tattoos.¹³¹ Although the court was persuaded by 2K Games' argument that digital reproductions of tattoos were not proper substitutes for actual, real-life tattoos, it declined to rule on the subject as a matter of law.¹³² Rather, it concluded that Hayden should have a chance to present evidence of a potential market for tattoo licensing before a jury.¹³³

On the final defense of implied license, the Northern District of Ohio again reached the same conclusion as the Southern District of Illinois, questioning whether Hayden had intended the implied license granted to his clients to extend to digital reproductions of his copyrighted tattoos in video games.¹³⁴

II. DEVELOPERS ON THE DEFENSIVE

These three cases come at a particularly exciting time in U.S. copyright law, given the courts' diverging application of the doctrines of fair use and transformative use.¹³⁵ A perceived split between the Second and Ninth Circuits over the applicability of the transformative use test and simmering disagreement between the federal district courts over whether copyright issues are resolvable as questions of fact, law, or some combination of the two necessitate

¹²⁸ See *id.* at 747 (holding that tattoos are per se creative and expressive and weighing the second prong in the plaintiff's favor).

¹²⁹ See *id.* (admitting that the tattoos are used in their entirety, but questioning whether they are reasonably observable as a matter of fact).

¹³⁰ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820–21 (9th Cir. 2003) (finding that wholesale copying might be necessary to affect the ultimate goal of the infringer).

¹³¹ *Hayden*, 629 F. Supp. 3d at 748.

¹³² See *id.* (reducing the relative importance of the fact that 2K used the entirety of Hayden's tattoos because Hayden had failed to prove that a potential market for tattoo licensing existed).

¹³³ See *id.* at 749 (denying summary judgment on fair use as a matter of law).

¹³⁴ See *id.* at 748–49 (holding that intent to create an implied license is an issue of fact for the jury).

¹³⁵ See Kevin Madigan, *Supreme Court Struggles with Warhol's Transformative Use Theory*, COPYRIGHT ALL. (Oct. 13, 2022), <https://copyrightalliance.org/supreme-court-struggles-warhol-transformative-use-theory/> [<https://perma.cc/P3QP-C9FS>] (noting that even the Supreme Court had difficulty grappling with the definition of fair use during oral arguments). The Supreme Court's decision in the *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* case has cast a pall over our traditional understanding of fair use; in light of the Court's 2021 decision in *Google v. Oracle*, the Andy Warhol Foundation asked the Court to provide clearer guidance on what constitutes transformative use. See *id.* (perceiving a conflict between the Supreme Court and the Second Circuit's jurisprudence on transformative use). At issue in the case was the question of whether a difference in message or meaning between source material and derived work is per se sufficient to satisfy the first factor of a transformative use analysis. See *id.* (questioning the legality of unlicensed derivative works).

higher intervention.¹³⁶ Without further guidance from higher courts, video game developers and digital artists will continue to face uncertainty as to their legal liability when reproducing tattoos.¹³⁷ This issue will only raise more concerns in the near future, as the video game industry's annual gross revenue overtakes that of the global film industry and the North American sports industry combined, showing no signs of slowing.¹³⁸

Copyright litigation is highly contextual and fact-specific, resisting bright line tests.¹³⁹ The highest purpose of copyright is the promotion of science and the arts.¹⁴⁰ As a result, the paramount factor in any copyright inquiry is whether the Constitution's end goal is served by condoning (or prohibiting) an infringement under fair use, implied license, or *de minimis* use.¹⁴¹ Therein lies the rub: By pitting the rights of tattoo artists against the rights of video game

¹³⁶ See Blake Brittain, *Google/Oracle Doesn't Affect Warhol Fair-Use Ruling, 2nd Circ Says*, REUTERS (Aug. 24, 2021), <https://www.reuters.com/legal/transactional/googleoracle-doesnt-affect-warhol-fair-use-ruling-2nd-circ-says-2021-08-24/> [<https://perma.cc/3M6F-CYY7>] (summarizing the arguments distinguishing the Second Circuit's decision in *Goldsmith* from the *Oracle* case). Google struck a blow against Oracle when the Court held that Google's copying of Oracle's software code was fair use because it was a new use of the source code to serve an altogether different purpose (even though the code itself was substantially similar to the original). *Id.* Goldsmith argued that the ruling was severely limited to utilitarian works like computer code, and that it should not apply to artistic works. *Id.*; see also Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 297 (2019) (arguing that fair use is a mixed question of fact and law that requires deferential review of factual findings).

¹³⁷ *Compare Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 345 (S.D.N.Y. 2020) (finding that the tattoos were *de minimis* because no reasonable jury could find substantial similarity between the real-life and video game versions), *with Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 823 (S.D. Ill. 2020) (categorically denying the *de minimis* use defense in general, and in this case specifically because the tattoos were reproduced in their entirety, without regard to their size).

¹³⁸ See Wallace Witkowski, *Videogames Are a Bigger Industry Than Movies and North American Sports Combined, Thanks to the Pandemic*, MARKETWATCH (Jan. 2, 2021), <https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combined-thanks-to-the-pandemic-11608654990> [<https://perma.cc/VX2A-DHKS>] (noting that global video game revenues hit nearly \$180 billion in 2020, contrasting with the global film industry's \$100 billion and North American sports industry's \$75 billion). Sales have been bolstered by tremendous growth in the mobile gaming market, the release of the next generation of video game consoles, and the rise of the games-as-a-subscription model, as epitomized by Microsoft's Game Pass and Sony's PlayStation Plus. *Id.*

¹³⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994) (calling for a detailed, case-by-case analysis in copyright cases dealing with questions of fair use and reiterating that all four fair use factors must be considered in any such inquiry).

¹⁴⁰ See U.S. CONST. art. I, § 8, cl. 8 (justifying the great public cost of copyright as a tradeoff to foster progress and creativity).

¹⁴¹ See *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (holding that the four fair use factors are merely suggestive, rather than dispositive, of the outcome in copyright analyses). The drafters of the Copyright Act intended to maintain the common law understanding of fair use, which prefers holistic analysis over "rigid application." *Id.* Where application of the law would stifle or chill the creative impulse, courts must apply a flexible and fact-dependent standard. See *id.* (citing *Campbell*, 510 U.S. at 577) (reinforcing the holistic value of the four-factor test).

developers, courts are in the unfortunate position of having to choose between two parties that tend to engage in worthwhile artistic pursuits.¹⁴²

The main point of contention between the federal district courts adjudicating these three cases is whether—and to what extent—judges should defer to juries in their capacity as trier of fact in copyright cases when considering summary judgment.¹⁴³ Whereas the Southern District of Illinois and Northern District of Ohio were reluctant to grant summary judgment on any of Take-Two's defenses as a matter of law, the Southern District of New York confidently ruled in the video game developer's favor, preventing the issues from ever reaching a jury.¹⁴⁴

Part II of this Note contrasts the disparate approaches of the federal district courts, focusing on their analyses of the three affirmative defenses offered by Take-Two.¹⁴⁵ Section A of this Part considers the applicability of the de minimis use defense in New York, Ohio, and Illinois, where it seems to have fallen into disfavor.¹⁴⁶ Section B of this Part focuses on the metes and bounds of implied licenses in copyright, with particular regard to tattoos and the subject of bodily autonomy.¹⁴⁷ Finally, Section C of this Part delves into the ever-developing thicket of fair use doctrine.¹⁴⁸

A. Big Enough to Fail: The De Minimis Use Doctrine

By invoking the de minimis use defense, a copyright defendant essentially admits to a trivial amount of intentional copying that does not rise to the actionable level of infringement, known as “substantial similarity.”¹⁴⁹ In de-

¹⁴² Compare Hobbs, *supra* note 2 (highlighting the art world's growing acceptance of tattooing and body modification as an avant-garde artform), with Abigail Tucker, *The Art of Video Games*, SMITHSONIAN MAG. (Mar. 2012), <https://www.smithsonianmag.com/arts-culture/the-art-of-video-games-101131359/> [<https://perma.cc/YX79-45Z8>] (noting the modern artistic convergence of video games and motion pictures, another medium that was belittled as low art in its nascency). The Supreme Court has, as a matter of law, classified video games as an artform worthy of First Amendment protection. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 789 (2011) (drawing positive comparisons between video games and other media that are routinely considered artful and creative, including film and literature).

¹⁴³ Compare *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 345 (S.D.N.Y. 2020) (exercising judicial discretion by granting summary judgment on all three defenses), with *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 823 (S.D. Ill. 2020) (failing to find any objective, factual basis for summary judgment), and *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 749 (N.D. Ohio 2022) (denying summary judgment).

¹⁴⁴ See *Solid Oak Sketches*, 449 F. Supp. 3d at 345 (holding that no reasonable juror could possibly find that impermissible infringement occurred).

¹⁴⁵ See *infra* notes 149–194 and accompanying text.

¹⁴⁶ See *infra* notes 149–164 and accompanying text.

¹⁴⁷ See *infra* notes 165–177 and accompanying text.

¹⁴⁸ See *infra* notes 178–194 and accompanying text.

¹⁴⁹ See *Ringgold v. Black Ent. Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (drawing a distinction between “probative similarity,” or proof that copying occurred, and “substantial similarity,” or

termining whether the copied material is sufficiently insignificant, courts that recognize the defense will look at both the qualitative and quantitative amount of copying.¹⁵⁰ That is to say, an accused work may copy relatively little, quantitatively speaking, and still be found to infringe if it gets to the substance of the original work.¹⁵¹ When it comes to visual works, such as a photograph or tattoo, the quantitative analysis also factors in the original work's observability in the accused work.¹⁵² De minimis use analysis bears a striking resemblance to the third factor of the fair use analysis, but the two should not be confused or substituted for one another.¹⁵³

In 1997, in *Ringgold v. Black Entertainment Television, Inc.*, the Second Circuit conducted a de minimis use analysis and found that the accused was not entitled to use it as a defense for the copying.¹⁵⁴ The case revolved around a poster depicting a copyrighted "story quilt" stitched by Faith Ringgold and an episode of the sitcom *Roc* that featured the poster in the background of a handful of scenes.¹⁵⁵ The poster was visible in the center of frame nine times throughout the episode, although never for more than five seconds at a time, and not totaling thirty seconds altogether.¹⁵⁶ Although the Court noted that the poster was out-of-focus and never more than eighty percent visible during the

proof that infringement occurred). Unfortunately, the Second Circuit notes that the term "substantial similarity" has a double meaning in copyright; in addition to referring to the level at which copying amounts to infringement, it has also been used to refer to the level of similarity that suggests copying has occurred when only access has been proven (well before the infringement analysis begins). *See id.* (using the term exclusively in reference to the former).

¹⁵⁰ *See id.* at 75 (contrasting the qualitative ideas that a work expresses with the quantitative amount of a work that is copied, i.e., the number of words lifted by a copier relative to the entire work).

¹⁵¹ *See Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564–65 (1985) (finding infringement even where a relatively small number of words were copied, because the "heart of the book" was among them). Harper & Row had contracted with former President Gerald Ford to publish a memoir, which they intended to excerpt to *Time Magazine*. *Id.* at 542. A magazine called *The Nation* scooped *Time* by printing verbatim around 300 words of the 500-plus pages of the memoir without permission. *Id.* at 543. Although the number of words copied was minor relative to the entirety of the memoir, the Supreme Court still found infringement. *See id.* at 569 (determining that the verbatim excerpt nevertheless epitomized the heart of the work).

¹⁵² *See Ringgold*, 126 F.3d at 75 (citing factors such as "focus, lighting, camera angles, and prominence" when determining the observability of a work).

¹⁵³ *See id.* at 76 (preferring to conduct de minimis analysis before reaching for fair use as a possible defense). Courts prefer to avoid fair use analysis because it requires a much broader and more time-intensive analysis. *Id.*

¹⁵⁴ *See id.* at 78 (remanding for further consideration of the four fair use factors).

¹⁵⁵ *Id.* at 72–73. The quilt, known as "Church Picnic," depicts the Black American experience in the early 1900s across twelve panels. *Id.* at 72. The work, owned by the High Museum of Art in Atlanta, was reproduced and sold as a poster in their gift shop. *Id.* Evidently, the poster appealed to the producers of *Roc*, who used it as set dressing during a church-set scene. *Id.* at 73.

¹⁵⁶ *Id.* at 73. The Second Circuit notes that nothing in the "dialogue, action, or camera work" draw's attention to "Church Picnic," suggesting that a copied work's observability depends in part on its boldness relative to other aspects of the copying work. *See id.* at 73, 76 (finding that the poster was "plainly observable").

longest segment, the fact that it was at least somewhat observable across nine segments was convincing, and summary judgment on de minimis use was denied.¹⁵⁷

The Southern District of New York relied on the Second Circuit's reasoning in *Ringgold* when applying the de minimis use analysis in *Solid Oak Sketches, LLC v. 2K Games, Inc.*¹⁵⁸ Unlike in *Ringgold*, where the copyrighted poster was at least somewhat discernible in the background of the television program, the Southern District of New York held that the players' tattoos never amounted to more than "undefined dark shading," indistinguishable amidst the frenetic pace of the game.¹⁵⁹ Thus, even though each of the copyrighted tattoos was reproduced in its entirety by 2K Games (suggesting a great deal of quantitative copying), the court nevertheless found no infringement because of their insignificance relative to the rest of the observable game.¹⁶⁰

Ironically, the Northern District of Ohio and the Southern District of Illinois also cited the Second Circuit's decision in *Ringgold* before reaching the opposite conclusion as the Southern District of New York.¹⁶¹ The Southern District of Illinois honed in on the quantitative component of the analysis in particular, ignoring the observability factors promulgated by the Second Circuit; the Court categorically denied the de minimis use defense because the tattoos were reproduced in their entirety in *NBA 2K*.¹⁶² The Northern District of Ohio employed a more laissez-faire approach; although it acknowledged that the observability of the tattoos would factor into any proper de minimis use analysis, it refused to actually conduct the analysis in practice.¹⁶³ Accord-

¹⁵⁷ *Id.* at 76–77.

¹⁵⁸ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 344 (S.D.N.Y. 2020) (lending credence to the *Ringgold* observability factors).

¹⁵⁹ See *id.* at 345 (holding that no reasonable fact finder could find substantial similarity between the original tattoos and their tiny, blurry digital reproductions). Note, however, that the Southern District of New York based this determination on an arranged video of *NBA 2K* gameplay proffered by the defendant, without playing the game themselves. *Id.*

¹⁶⁰ See *id.* (pointing out that the vast majority of games played in *NBA 2K* may not even feature the tattoos in the first place).

¹⁶¹ *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 822–23 (S.D. Ill. 2020); *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 745 (N.D. Ohio 2022). Although the *Ringgold* decision does not bind either district court, the fact that Illinois and Ohio both cite it speaks to the decision's stature among legal scholars; it serves as one of the foremost illustrations of the de minimis doctrine. See *Alexander*, 489 F. Supp. 3d at 822–23 (noting that the Seventh Circuit has yet to explicitly acknowledge the defense and expressing doubts as to its viability there).

¹⁶² See *Alexander*, 489 F. Supp. 3d at 823 (suggesting that the doctrine is almost always used to defend the copying of small portions of copyrighted works rather than so-called "wholesale" copying). This reading of de minimis seems antithetical to the Second Circuit's understanding as expressed in *Ringgold*; that case hinged on the observability of the original work, not merely the amount shown. See 126 F.3d at 76 (suggesting that even a work copied in its entirety could be classified as a de minimis use).

¹⁶³ See *Hayden*, 629 F. Supp. 3d at 749 (rejecting summary judgment and sending the matter of observability to the jury).

ing to the Ohio court, observability is a question of fact best suited for the jury—jury members can act as better stand-ins for the “average lay observer” than a district court judge.¹⁶⁴

B. Because of the Implication . . . : Implied Licenses in Copyright

The Copyright Act only extends liability to those who use a copyrighted work without authorization.¹⁶⁵ It logically follows that, when a copyright owner authorizes use of their work, they waive the right to bring a lawsuit for infringement against the authorized party.¹⁶⁶ The most familiar form of copyright licensing is the exclusive license, by which an author transfers one or more rights in a copyrighted work to a third party.¹⁶⁷ Non-exclusive licenses, however, are given more latitude by the courts, and may be implicitly created by oral agreement without a written record.¹⁶⁸

Chief among considerations in an implied license analysis is the intent of both parties.¹⁶⁹ Implied licenses are typically found to exist in a particular set of circumstances: when one party (the licensee) requests creation of a copyrighted work from another party (the licensor), and the creator intends for the work to be copied and distributed.¹⁷⁰

¹⁶⁴ See *id.* at 746 (holding that the de minimis use defense necessarily fails when the lay observer notices substantial similarities when comparing an original work with an infringing copy). This holding stands in stark contrast with the ruling by the Southern District of New York, where the court ruled on the observability of the players’ tattoos as a matter of law. See *Solid Oak Sketches*, 449 F. Supp. 3d at 345 (holding that no reasonable jury would find that the tattoos were plainly observable in the first place).

¹⁶⁵ See 17 U.S.C. § 501 (extending liability for infringement to any party that violates the exclusive rights granted by § 106).

¹⁶⁶ See *Great Minds v. FedEx Off. & Print Servs., Inc.*, 886 F.3d 91, 94 (2d Cir. 2018) (holding that authorization to use a copyrighted work includes grants of otherwise exclusive rights protected by copyright). For instance, an author might grant a license to their publisher, allowing said publisher to sell and distribute their works (an otherwise protected right of authors). *Id.*

¹⁶⁷ See *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990) (invalidating transfers of copyright ownership unless explicitly made in writing). By forcing the parties to contract in writing, courts minimize the risk of misunderstanding and ensure that the parties understand their legal liability if they fail to meet the agreed-upon terms. See *id.* (rejecting the argument that the film industry customarily makes handshake agreements without resorting to contract).

¹⁶⁸ See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 820 (S.D. Ill. 2020) (holding that a jury may use objective evidence of intent to determine whether an implied license has been created).

¹⁶⁹ See *Cohen*, 908 F.2d at 558 (holding that the defendant necessarily was granted an implied license to incorporate special effects footage into a movie he had made). Defendant argued that, per Hollywood custom, an oral agreement sufficed to establish an implied license, and the Ninth Circuit agreed. *Id.*

¹⁷⁰ See *Weinstein Co. v. Smokewood Ent. Grp., LLC*, 664 F. Supp. 2d 332, 344 (S.D.N.Y. 2009) (citing *Cohen*, 908 F.2d at 558) (holding that the creator must have knowledge and intend that their copyrighted work be used for other purposes in order to create an implied license).

In *Solid Oak Sketches*, the Southern District of New York presumed that tattoo artists fall within this narrow band of circumstances.¹⁷¹ When a client requests a tattoo be created on their body, there is a tacit understanding that the tattoo will incorporate into their likeness, with the artist forsaking their ability to control its distribution.¹⁷² The three players at the heart of the case were already well-known at the time of their tattooing, and had already contracted with the NBA (including the grant of the right to use their likeness for commercial and promotional purposes).¹⁷³ Finding that a reasonable factfinder would infer the creation of an implied license, the Southern District of New York ruled as a matter of law and granted summary judgment.¹⁷⁴

Unlike in *Solid Oak Sketches*, where the tattoo artists openly admitted their knowledge and intent, the artists in *Alexander v. Take-Two Interactive Software, Inc.* and *Hayden v. 2K Games, Inc.* claimed that they never intended for their work to be incorporated into novel forms of digital media, such as video games.¹⁷⁵ In the eyes of the Southern District of Illinois, even if an implied license were granted, the next logical question would be ascertaining the extent to which the license applies, and whether the tattoo client can sublicense that right to other third parties.¹⁷⁶ The Northern District Court of Ohio followed a similar line of reasoning, maintaining that “[i]ntent is a fact question” and declining to grant summary judgment before the matter reached a jury.¹⁷⁷

¹⁷¹ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 346 (S.D.N.Y. 2020) (positing that, when a famous athlete asks to have a tattoo created, there is a high presumption of implied license, because the artist understands that the tattoo is highly likely to appear in other media as a part of the athlete’s likeness).

¹⁷² See *id.* (reasoning that tattoo artists might be able to circumvent this presumption by requesting that the client limit the display of tattoos, but whether this is a viable argument remains to be seen).

¹⁷³ See *id.* (finding that an implied license between artist and client pre-dated the license granted by the original artists to *Solid Oak Sketches*, thus waiving *Solid Oak Sketches*’ right to sue the original clients).

¹⁷⁴ *Id.* The most dispositive fact was the declaration of the tattoo artists, themselves, who each swore to have known and intended that their client display their work in “other forms of media,” ostensibly including digital video games. See *id.* (citing to their depositions in determining that an implied license existed).

¹⁷⁵ See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 820 (S.D. Ill. 2020) (drawing a distinction between a celebrity’s right to use their own likeness for commercial purposes and the right to use a copyrighted work in “unlimited” ways, such as reproduction in video games); see also *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 748–49 (N.D. Ohio 2022) (accepting that the players likely had license to display the tattoos in most forms of media, like television and film, but making an exception for video games).

¹⁷⁶ See *Alexander*, 489 F. Supp. 3d at 820 (refusing to draw a conclusion as a matter of law and characterizing the question as a “triable issue of fact” for the jury to consider).

¹⁷⁷ See *Hayden*, 629 F. Supp. 3d at 749 (declining to rule on the question of *Hayden*’s intent because the parties did not explicitly negotiate the tattoo’s appearance in video games).

C. All Is Fair in Love and Copyright: Fair Use and Transformation

In all three cases, 2K Games and Take-Two Interactive Software raised fair use as a possible defense to infringement, claiming that their use of the tattoos was fundamentally transformative and in service of different goals.¹⁷⁸ Unlike the *de minimis* use doctrine or implied license argument, the courts seem to agree that fair use is a mixed question of fact and law, resolvable on summary judgment only when a single conclusion could be reached by a reasonable jury.¹⁷⁹

In 2006, in *Bill Graham Archives v. Dorling Kindersley, Ltd.*, the Second Circuit took up fair use doctrine and held that summary judgment was appropriate where there were no genuine issues of material fact.¹⁸⁰ In that case, Dorling Kindersley (DK) used promotional concert posters of the Grateful Dead without authorization from the original artist, Bill Graham.¹⁸¹ The lower court applied the four-factor test of fair use and granted DK summary judgment; the Second Circuit affirmed after applying the test for themselves.¹⁸²

The Second Circuit focused on the first factor, purpose and character of the use, with particular focus on the transformative nature of the infringing work.¹⁸³ Whereas Bill Graham's original purpose and intent was to create an expressive, graphical work to promote the sales of concert tickets, DK had an altogether separate purpose, i.e., to present the poster as a historical artifact along a chronological timeline for educational purposes.¹⁸⁴ Although a copyrighted work might begin its life as a vehicle of personal expression entitled to full-throated protection, the law makes room for a work to evolve over time,

¹⁷⁸ See *Solid Oak Sketches*, 449 F. Supp. 3d at 347 (contrasting the tattoos' original purpose—personal expression via body art—and 2K Games' purpose in copying the tattoos—accurate depiction of a famous athlete, such that their digital avatar would be recognizable to the audience).

¹⁷⁹ See *Alexander*, 489 F. Supp. 3d at 821 (citing *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 560 (1985)) (ultimately refusing to resolve the fair use question as a matter of law because of several factual disputes); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 81 (2d Cir. 2014) (describing fair use as a mixture of fact and law).

¹⁸⁰ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) (holding that, in the absence of genuine issues of fact, the appellate court is entitled to *de novo* review of issues of law).

¹⁸¹ *Id.* at 607.

¹⁸² See *id.* at 615 (finding that the four factors, taken holistically, favored DK's fair use of the concert posters). Although the second factor—nature of the work—weighed against DK on account of the poster's original creative purpose, the fact that the defendant did not exploit its artistic value lessened the factor's importance to the overall analysis. *Id.*

¹⁸³ *Id.* at 608–12.

¹⁸⁴ See *id.* at 610–11 (analogizing DK's use of the concert poster to the hypothetical use of clips from copyrighted motion pictures in a biographical film depicting an actor's life). If an infringing work employs the original copyrighted work for reference purposes, precedent suggests fair use; however, an infringing work that employs the original copyrighted work for intrinsic entertainment or artistic purposes would be infringing. *Id.*

and to take on new and different purposes, such as serving as a historical or biographical reference.¹⁸⁵

The Southern District of New York relied on *Bill Graham* in determining that 2K Games' use of the tattoos was ultimately transformative, and therefore protected from claims of copyright infringement.¹⁸⁶ First, the court drew a distinction between the purpose and character of the use; although the tattoos were originally created for expressive purposes, their use in *NBA 2K* was intended to make the digital avatars more lifelike and recognizable, serving biographical interests.¹⁸⁷ Second, like in *Bill Graham*, the court was moved by the fact that the work was significantly reduced in size, holding that the smaller depiction—no more than ten percent of the original scale—inherently stripped the work of its original expressive purpose.¹⁸⁸ When a reproduction of a work is distorted and reduced in size such that it offers a mere “glimpse” of its original expressive purpose, transformative use is very likely to be found as a matter of law.¹⁸⁹

On this point, the Southern District of New York and the Ohio and Illinois district courts diverge; the Southern District of Illinois expressed skepticism that Alexander's purpose in inking the tattoos was distinct from Take-Two's purpose in reproducing them.¹⁹⁰ Alexander asserted that her purpose in producing the tattoos was merely to display the images on Orton's body, and that Take-Two shared that purpose when they modelled Orton's avatar in the video game.¹⁹¹ The court was sympathetic to the argument, and held that it represented an issue of material fact that prevented summary judgment in Take-Two's favor.¹⁹²

Although that line of reasoning seems rooted in semantics—not to mention it raises the philosophical question of whether a photo of a tattoo and a tattoo itself are equally expressive—it also convinced the Northern District of

¹⁸⁵ See *id.* at 611 (holding that the combination of a timeline, text, and the poster, among other images, resulted in a transformative collage that served more historical, non-expressive purposes).

¹⁸⁶ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 347–48 (S.D.N.Y. 2020) (suggesting that the reproduction of a celebrity's tattoos in a video game serves a similar referential purpose as Bill Graham's poster).

¹⁸⁷ See *id.* at 347 (suggesting that the tattoos serve different goals for the tattooed athlete and the video game developer). The tattooed athlete is ostensibly motivated by a desire to express themselves, whereas the video game developer is motivated by fidelity to real life. *Id.*

¹⁸⁸ See *id.* (noting that the small size of the tattoos in the video game sufficed for recognition but prevented the user from fully appreciating the expressive qualities of the work).

¹⁸⁹ See *Bill Graham*, 448 F.3d at 611 (holding that thumbnail-sized images of works of art are typically transformative, given their reduced size and pronounced difficulty to observe).

¹⁹⁰ See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 821 (S.D. Ill. 2020) (sympathizing with the plaintiff's argument that their work was not necessarily motivated by expressive desire, but rather the mere desire to depict art on Orton's body).

¹⁹¹ See *id.* (disputing whether a tattoo artist's goals and the goals of a video game developer are all that dissimilar).

¹⁹² *Id.* at 822.

Ohio to deny summary judgment to 2K Games.¹⁹³ Erring on the side of factual dispute, the court held that reasonable jurors could theoretically disagree about the transformative nature of the tattoos' use in *NBA 2K*, in stark contrast to the Southern District of New York's approach.¹⁹⁴

III. THE S.D.N.Y. TAKES THE COMMONSENSE APPROACH

Although none of these three federal district cases has been reviewed by the circuit courts, the issue of whether tattoo artists retain rights in their creations vis-à-vis their depiction in video games has all the makings of a proper circuit split.¹⁹⁵ In these tattoo cases, the interests of two groups engaged in worthwhile artistic pursuits—tattoo artists and video game developers—are pitted against one another, and prescient questions about bodily autonomy are raised.¹⁹⁶ When the canvas walks, talks, and thinks for itself, can the artist still lay claim to it?¹⁹⁷

Understandably, the Ohio and Illinois federal district courts tread lightly on the subject, preferring to wash their hands of having to decide as a matter of law by leaving it up to the jury.¹⁹⁸ New York, on the other hand, acted decisively by granting summary judgment for the video game developers, proclaiming that no reasonable juror could determine that actionable copying had occurred.¹⁹⁹ Considerations of fairness and due process would favor the Ohio and Illinois approach, ensuring that every tattoo artist receives their day in court to be heard, but considerations of judicial efficiency and reasonableness favor New York's approach.²⁰⁰ Given a choice between the two, New York's approach in *Solid Oak Sketches, LLC v. 2K Games, Inc.* is the clear winner, en-

¹⁹³ See *Hayden v. 2K Games, Inc.*, 629 F. Supp. 3d 736, 747–48 (N.D. Ohio 2022) (maintaining that all four factors of the fair use analysis brought up genuine issues of fact that required the attention of a jury).

¹⁹⁴ See *id.* at 7 (finding the possibility of reasonable disagreement over whether the reproduced tattoos' small size and observability would rise to the level of transformative use).

¹⁹⁵ See *supra* note 9 and accompanying text (noting that the three district courts have disagreed about whether the affirmative defenses are matters of law or fact).

¹⁹⁶ See *supra* note 7 and accompanying text (questioning whether a fundamental right to bodily autonomy exists in the United States).

¹⁹⁷ See Kara Weisenstein, *A Lawyer Explains Who Really Owns Your Tattoos*, VICE (Oct. 11, 2017), <https://www.vice.com/en/article/yw37g7/a-lawyer-explains-who-really-owns-your-tattoos> [<https://perma.cc/A3ZD-EGGQ>] (supporting the video game developers' argument that a tattoo is made with a broad implied license for its use).

¹⁹⁸ See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 817 (S.D. Ill. 2020) (denying summary judgment as a matter of law); *Hayden*, 629 F. Supp. 3d at 747–48 (denying summary judgment).

¹⁹⁹ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 350 (S.D.N.Y. 2020) (holding that fair use did not apply to 2K's use of the tattoos).

²⁰⁰ See Justin Hughes, *The Respective Roles of Judges and Juries in Copyright Fair Use*, 58 HOUS. L. REV. 327, 352 (2020) (distilling the debate into a question of whether copyright and fair use cases are too fact-specific for judges to rule as a matter of law).

sureing that new, creative, and—most importantly—transformative uses of copyrighted works may continue without fear of reprisal.²⁰¹

The Southern District of New York’s approach can be best categorized as employing a “commonsense” approach.²⁰² On the de minimis use argument, the key factor is observability, and not merely the quantitative amount of the work copied; although the copyrighted tattoos were incontrovertibly copied in their entirety by 2K Games, *Bill Graham Archives v. Dorling Kindersley, Ltd.* stands for the notion that this fact is not dispositive.²⁰³ Even when a copyrighted work is copied in its entirety, if the average audience never notices—and it is unlikely that a gamer would notice, given *NBA 2K*’s frantic pace—no injury has been sustained, and the copying is not actionable.²⁰⁴

Regarding implied license, the Southern District of New York once again epitomizes the commonsense approach: Without implied license, celebrities would be precluded from tattooing their body without severely limiting their ability to profit from their likeness, a fundamental and protected right.²⁰⁵ The other courts seem to suggest that tattoo artists are free to discuss the terms of an explicit license with their clients at the beginning of their business relationship if they so choose, but the default approach should respect the tattoo industry’s custom of implied license.²⁰⁶

Fair use is perhaps the strongest and most conclusive of the three arguments, because reproduction of LeBron James’ tattoos in a video game serves the same transformative purpose as a photograph of Mr. James that also depicts his tattoos.²⁰⁷ A tattoo begins life as an expressive work of body art, but once merged with the likeness of a public figure, it becomes necessary to include the tattoo in any accurate depiction of said public figure’s appearance.²⁰⁸ By doing so, 2K Games does not co-sign the original artistic or expressive intent, but

²⁰¹ See *Solid Oak Sketches*, 449 F. Supp. 3d at 346–47 (upholding fair use of copyrighted work in certain context-specific circumstances, such as news reporting and criticism).

²⁰² See *id.* at 345 (appealing to the concept of common reasonableness when determining whether use of a copyrighted work is de minimis).

²⁰³ See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611 (2d Cir. 2006) (holding that even a mere reduction in size could be enough to transform a work from its original purpose into something new).

²⁰⁴ See *Solid Oak Sketches*, 449 F. Supp. 3d at 345 (granting summary judgment on the de minimis use defense because players were unlikely to notice the tattoos during gameplay and because a tattoo in a video game is not a market replacement for a tattoo in real life).

²⁰⁵ See *Lugosi v. Universal Pictures*, 603 P.2d 425, 428 (Cal. 1979) (enshrining the right of publicity and commercial exploitation of an individual’s likeness).

²⁰⁶ See *Solid Oak Sketches*, 449 F. Supp. 3d at 346 (pointing out that the tattooed NBA players were neither asked by their tattoo artists about, nor did they ever consent to, a limitation on how and where they could publicly display their new tattoos).

²⁰⁷ See *id.* at 347 (agreeing that 2K’s purpose in depicting the tattoos was more referential and fueled by a drive toward realism and accuracy, rather than an expressive purpose).

²⁰⁸ See *id.* at 346 (suggesting that a tattoo artist’s reasonable expectation once a tattoo is applied is that the work merges with the client’s likeness).

creates something different altogether—a facsimile whose only value is derived from its representational fidelity to real life.²⁰⁹

A troubling side effect of the contrary view is the creation of a tattoo licensing market that does not currently exist.²¹⁰ The decisions in *Alexander v. Take-Two Interactive Software, Inc.* and *Hayden v. 2K Games, Inc.* seem to endorse the ability of tattoo artists to seek royalties from any subsequent work featuring their tattooed clients.²¹¹ The Southern District of New York correctly pointed out that such a market is extremely unlikely to develop any time soon.²¹²

CONCLUSION

The past three years have seen a marked uptick in litigation concerning the reproduction of real-world tattoos in virtual video games across the country. Although new technologies raise novel concerns for copyright, there is no reason to assume that established and traditional notions of fair use, implied license, and de minimis use would not apply in this context. The Southern District Court of New York, with its vast background in copyright litigation, was well-equipped to dispense with these issues on summary judgment using its discretion.

Humans have engaged in body modification for thousands of years, with no signs of stopping anytime soon. It seems unnecessary and imprudent to suddenly grant tattoo artists a new property interest in their work on the back of a modern technology bearing only a tangential relationship to tattooing. The Southern District of New York has taken a pro-defendant approach, ensuring that artistic progress may continue and keep pace with the technology of the day.

SEAN DOOLITTLE

²⁰⁹ See *id.* at 347 (finding transformative use by 2K Games and granting summary judgment).

²¹⁰ See *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 822 (S.D. Ill. 2020) (dismissing Take-Two's concern that the denial of summary judgment would endorse the creation of a licensing marketplace for tattoos, at least as far as video games were concerned).

²¹¹ See *id.* (tacitly suggesting that a jury should decide whether Alexander has the right to seek licensing fees from her celebrity clients).

²¹² See *Solid Oak Sketches*, 449 F. Supp. 3d at 350 (stating that no reasonable juror could foresee a market for such a licensing regime developing, and thus, finding little risk of economic harm to tattoo artists).