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John Tyler Stocking

University of Louisville Brandeis School of Law

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**From Ötzi the Iceman to Chris the Birdman:
TATTOOS AS PERSONA, NOT PROPERTY**

By: John Tyler Stocking*

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* J.D. Candidate, 2020, University of Louisville Brandeis School of Law. B.A., 2016, Union University. The author would like to thank Professor John T. Cross for his guidance and for sparking his passion for intellectual property, as well as Professor Leslie W. Abramson for his mentorship in the legal writing process. The author would also like to thank his parents, John and Pam Stocking, and his wife, Emily Stocking, for their constant love and support. Finally, the author would like to thank the editors and staff of the Richmond Journal of Law & Technology for their efforts in editing this article.

I. INTRODUCTION

“All my tattoos, they’ve been thought out, thought over, been a work in progress for at least a year before I’ve got them. So I’m not walking into a tattoo shop, picking tattoos off a wall. It’s something that means something to me. It’s something that I believe in.”¹

– Colin Kaepernick, former NFL quarterback

[1] For over 5,000 years, humans have etched markings into their skin in the form of tattoos.² These markings have served to indicate status, strengthen commitments, portray beliefs, tout affiliations, or express one’s personality—at least the personality one wishes to portray to others.³ For some, tattoos are a “modern coat of arms,” meant to tell the world about the individual, while for others, tattoos serve as more of a personal reminder to that individual.⁴

¹ Sean Gregory, *Don’t Call Him a Freak: Colin Kaepernick Opens up on Quarterback Sociology, Tattoos, Adoption*, TIME KEEPING SCORE (July 25, 2013), <http://keepingscore.blogs.time.com/2013/07/25/dont-call-him-a-freak-colin-kaepernick-opens-up-on-quarterback-sociology-tattoos-adoption/> [<https://perma.cc/ZD2S-95HN>] (discussing the criticism of having tattoos as the face of an N.F.L. franchise).

² See Cate Lineberry, *Tattoos: The Ancient and Mysterious History*, SMITHSONIAN.COM (Jan. 1, 2007), <https://www.smithsonianmag.com/history/tattoos-144038580/> [<https://perma.cc/N8TC-XTE6>] (describing a tattooed frozen mummy known as “the Iceman” who was carbon dated to approximately 5,200 years).

³ See *id.*; DERRICK WATKINS & RICHARD ASHBY, GANG INVESTIGATIONS: A STREET COP’S GUIDE 47–50 (Jones & Bartlett Publishers eds. 2007) (describing the use of a tattoo as a sign of allegiance and commitment to a gang).

⁴ William Lee Adams, *Christian Louboutin and the Art of Desire*, TIME (Mar. 26, 2012), <http://style.time.com/2012/03/26/christian-louboutin-and-the-art-of-desire/> [<https://perma.cc/J389-8DYT>].

[2] Regardless of the motivating factors for spending hours in a tattoo chair, those who choose to get tattoos make a deeply personal decision that will stick with them for the duration of their lives. The finality of this commitment, however, has not deterred Americans from tattoo parlors, as over forty percent of Americans under the age of forty have at least one tattoo.⁵

[3] Tattoos are even more prevalent within celebrity and professional athlete circles.⁶ Over half of the players in the National Basketball Association (N.B.A.) have at least one tattoo, and on some N.B.A. teams, seventy-five percent of their players or more have at least one tattoo.⁷ From Chris “Birdman” Andersen’s colorful “FREE BIRD” tattoo across his neck and his wing tattoos on his arms⁸ to LeBron James’ “CHOSEN 1” tattoo across his back,⁹ many players in the N.B.A. have distinct tattoos that have become a part of their persona in the minds of basketball fans.¹⁰

⁵ See Max Gomez, *Researchers Working on Smart Tattoos That May One Day Monitor Health*, CBSNEWYORK (Dec. 17, 2018), <https://newyork.cbslocal.com/2018/12/17/smart-tattoos-cu-tech-tattoo-carson-bruns/> [<https://perma.cc/4RSL-3MVP>].

⁶ See Mike Wilson, *What Ethan Swan Learned from Tracking Every Tattoo in the N.B.A.*, FIVETHIRTYEIGHT (June 6, 2014), <https://fivethirtyeight.com/features/what-ethan-swam-learned-from-tracking-every-tattoo-in-the-nba/> [<https://perma.cc/RM7Z-FH8B>].

⁷ See *id.*

⁸ See Chris Tomasson, *Chris Andersen’s Tattoos Tell the Story of His Life Journey*, FOX SPORTS (June 8, 2013), <https://www.foxsports.com/other/story/chris-andersens-tattoos-tell-story-of-his-life-journey-060813> [<https://perma.cc/TV58-74GV>].

⁹ See Jesse Washington, *The Magazine Cover LeBron James Got Tatted on His Back*, UNDEFEATED (Feb. 15, 2017), <https://theundefeated.com/features/cover-stories-lebron-james-sports-illustrated-2002-all-star/> [<https://perma.cc/8FZZ-5D7P>].

¹⁰ See, e.g., Des Bieler, *Wait, What? Forbes Says Heat Have the NBA’s Best Fans*, WASH. POST (Jan. 21, 2015), https://www.washingtonpost.com/news/early-lead/wp/2015/01/21/wait-what-forbes-says-heat-have-the-nbas-best-fans/?utm_term=.c69fd92fcfb9 [<https://perma.cc/8N3T-7ZMV>]; Rodger Sherman, *This Child Is Dressed*

In the case of the “Birdman”—who estimates that over three-fourths of his body is covered in ink¹¹—a large portion of his fan base is infatuated with his larger-than-life aura, as shown by young fans with temporary tattoo sleeves and the large cardboard wings held by fans in the stands to match Andersen’s tattooed arms.¹² For a player who went undrafted, missed thirty-two dunk attempts in a single dunk contest, was banned from the N.B.A. for two years for drug use, and averaged just a shade above five points per game in his career,¹³ Andersen has been able to connect with fans unlike any other role player.¹⁴ His tattoos tell a story—his story. His story behind the “FREE BIRD” tattoo is that “[n]o matter what happens, you can’t hold me down for too long, ‘cause I’m a get back to flight!”¹⁵ Who, however, should capitalize on the goodwill that Andersen has gained from his colorful tattoos? Should Andersen’s tattoo artist retain any rights to the colorful design in Andersen’s skin?

up as Chris ‘Birdman’ Andersen: Tattoos and All, SBNATION (May 26, 2014), <https://www.sbnation.com/lookit/2014/5/26/5753066/this-child-is-dressed-up-as-chris-birdman-andersen> [<https://perma.cc/MG4X-6WJM>].

¹¹ See Tomasson, *supra* note 8.

¹² See Bieler, *supra* note 10; Sherman, *supra* note 10.

¹³ See Ben Leibowitz, *A Timeline of Chris ‘Birdman! Birdman!’ Andersen’s Bizarre NBA Career*, BLEACHER REP. (May 23, 2013), <https://bleacherreport.com/articles/1658380-a-timeline-of-chris-birdman-birdman-andersens-bizarre-nba-career> [<https://perma.cc/3V56-C7LG>].

¹⁴ See *generally Birdman’s Ready for War*, INKED (Apr. 23, 2015), <https://www.inkedmag.com/culture/birdmans-ready-war> [<https://perma.cc/UM5Q-S6SM>] (discussing the likelihood of picking Andersen as a person’s favorite player on a roster with players like Dwyane Wade and Chris Bosh).

¹⁵ Colin Ward-Henninger, *The 20 Best Tattoos in Sports History*, BLEACHER REP. (June 3, 2011), <https://bleacherreport.com/articles/721046-the-20-best-tattoos-in-sports-history> [<https://perma.cc/ZU6H-ARW6>].

[4] Similarly, LeBron James, one of the most decorated players in N.B.A. history, had the phrase “CHOSEN 1” tattooed on his back after appearing on the front cover of Sports Illustrated magazine while he was still in high school.¹⁶ Most recently, the tattoo was at the center of Nike’s 2018 summer commercial that aired during the N.B.A. playoffs with the tagline: “‘It’s one thing to put words on your back. It’s another to live up to them.’”¹⁷ Is James’ tattoo copyrightable? If so, does James own the copyright, or does it belong to Sports Illustrated because of the author who came up with the phrase for the cover? Does it belong to the tattoo artist who etched the tattoo into James’ skin? Can the tattoo be licensed for apparel?

[5] While tattoos are often well thought out at the outset, the planning is geared toward ensuring that the individual is happy with the tattoo both in the immediate future and in the long term.¹⁸ However, this article proposes that for a celebrity or professional athlete, under the current copyright framework, an ill-chosen tattoo will be far from the biggest regret in the planning process if the celebrity fails to consider the copyright implications of the tattoo.

[6] First, this article will review the history of tattoo copyright infringement litigation by exploring the use of tattoos in advertisements and movies, in video games, on apparel, and on the skin of others. Next, it will apply copyright case law to determine whether tattoos are subject to

¹⁶ See Washington, *supra* note 9.

¹⁷ See Zack Schlemmer, *Nike Debuts Epic LeBron James ‘The Tattoo’ Commercial with a CGI Young LeBron*, FOOTWEAR NEWS (May 31, 2018, 12:02 PM), <https://footwearnews.com/2018/focus/athletic-outdoor/nike-lebron-james-commercial-chosen-one-tattoo-young-lebron-1202568462/> [<https://perma.cc/LR2Z-XNEU>].

¹⁸ See Tess Catlett, *What You Need to Know Before Getting a Tattoo*, HEALTHLINE (Dec. 19, 2017), <https://www.healthline.com/health/getting-a-tattoo-guide-what-to-expect> [<https://perma.cc/A8FT-45BN>] (discussing the short-term and long-term considerations for getting a tattoo).

copyright protection and who should retain the rights in different circumstances. Then, it will discuss whether tattoos need to be assigned and how personal autonomy impacts this decision, also discussing future issues that will arise in professional sports leagues until courts rule on tattoo copyrightability. Finally, this article will make recommendations based on these findings to limit future litigation in this area and to protect the persona of athletes.

II. HISTORY: TATTOO COPYRIGHT INFRINGEMENT LITIGATION

A. *Reed v. Nike, Inc.*

[7] In 2005, celebrities and athletes were put on notice, for the first time, of the possibility of being involved in litigation because of a tattoo on their very own skin, even a tattoo that they paid for and played a role in creating.¹⁹ This notice came in the form of a complaint filed by tattoo artist Matthew Reed against Nike, members of Nike's advertising team, and N.B.A. star Rasheed Wallace for copyright infringement.²⁰ The alleged infringement centered around a thirty-second Nike commercial that focused on Wallace's tattoo.²¹ The commercial featured a close-up of the tattoo that Reed etched into Wallace's skin, and as the camera panned across the tattoo, Wallace described the meaning of the tattoo.²² The commercial also showed a re-creation of the tattoo being etched into Wallace's skin through the use of computer generated graphics, which is important because this portion of the commercial truly qualified as a

¹⁹ See Complaint & Demand for Jury Trial at 2–4, *Reed v. Nike, Inc.*, No. 3:05-CV-198 (D. Or. Feb. 10, 2005).

²⁰ See *id.* at 1–2.

²¹ See *id.* at 4.

²² See *id.*

reproduction instead of as an image or video of Wallace's tattoo as it existed on Wallace's skin.²³

[8] Interestingly, Reed agreed to tattoo Wallace at a discounted rate of \$450 because of the "exposure" that Reed would receive as a tattoo artist from displaying his work, an Egyptian-style family tattoo, on a topflight athlete like Wallace.²⁴ Reed seemingly did not mind capitalizing on the publicity garnered from the basketball world until a big company like Nike also wanted a piece of the attention.²⁵ Reed tattooed Wallace in 1998, and N.B.A. fans watched Wallace play in arenas all over the country with the tattoo in plain sight.²⁶ The display of the tattoo during televised games and on trading cards apparently did not bother Reed, but in 2004 when the advertisement aired, Reed decided to file the complaint.²⁷

[9] This case concluded with a confidential settlement, so Rasheed Wallace's tattoo left athletes and tattoo artists with more questions than answers.²⁸ In 2018, however, Nike once again turned to the tattoo of N.B.A. player LeBron James for the centerpiece of a commercial.²⁹ This

²³ See Jennifer L. Commander, *The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?*, 72 WASH. & LEE L. REV. 1947, 1958 (2015).

²⁴ See *id.* at 1957.

²⁵ See Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).

²⁶ See *id.*

²⁷ See *id.*

²⁸ See Stipulation of Dismissal with Prejudice, *Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Oct. 19, 2005).

²⁹ See Schlemmer, *supra* note 17.

time, the tattoo was never displayed on the athlete's body, but instead, it appeared as a sketch on a piece of paper.³⁰ Maybe Nike learned its lesson about reproducing a tattoo in a computer-generated format, or maybe it was coincidental that the commercial focused on the time leading up to the etching of the tattoo and not the time after. Because *Reed* ended in a settlement, it is difficult to determine whether the case played any role in Nike's future advertisement plans.

B. *Whitmill v. Warner Brothers Entertainment, Inc.*

[10] The outcome of *Whitmill v. Warner Brothers Entertainment, Inc.* in 2011 was the same as the outcome in *Reed*: a settlement for an undisclosed amount.³¹ However, it is what led to the settlement that sets *Whitmill* apart as a crucial case for evaluating the ability to copyright tattoos.³²

[11] In *Whitmill*, the plaintiff claimed that the reproduction of a tattoo that he designed for boxer Mike Tyson in "The Hangover Part II" constituted copyright infringement.³³ In the popular movie, on a drunken

³⁰ *See id.*

³¹ *See* Alternative Dispute Resolution Compliance Report, *Whitmill v. Warner Bros. Ent. Inc.*, No. 4:11-cv-752-CDP (E.D. Mo. dismissed Jun. 21, 2011) (ADR report dismissing the case); Ryan Davis, *Warner, Artist Settle 'Hangover' Tattoo Copyright Suit*, LAW 360 (Jun. 21, 2011), <https://www.law360.com/articles/252614/print?section=ip> [<https://perma.cc/9A2L-EQ4Q>].

³² *See* Yolanda M. King, *Copyright Protection of Tattoos*, in NON-CONVENTIONAL COPYRIGHT: DO NEW AND ATYPICAL WORKS DESERVE PROTECTION? 111, 120 (Enrico Bonadio & Nicola Lucchi eds., 2018) [hereinafter NON-CONVENTIONAL COPYRIGHT].

³³ *See* Complaint & Demand for Jury Trial at 7, *Whitmill v. Warner Bros. Ent. Inc.*, 4:11-cv-752-CDP (E.D. Mo. Apr. 28, 2011).

night in Las Vegas, one of the characters, Stu, received a tattoo identical to the one that Whitmill etched on Mike Tyson's face.³⁴

[12] After hearing arguments during a preliminary hearing in the case, Judge Catherine D. Perry decided not to grant a preliminary injunction in favor of Whitmill, but she did explain that she thought he could win the case on the merits.³⁵ Her opinion was based on her belief that tattoos could receive copyright protection.³⁶ She stated:

Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face, as the defendant argues, or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law.³⁷

While this case did not set a precedent for future cases, it did increase the belief that a tattooist could obtain a copyright for a tattoo.³⁸

C. Escobedo v. THQ

[13] In 2012, an Arizona tattoo artist, Christopher Escobedo, joined the list of tattoo artists who have asserted a claim in the foggy and mysterious

³⁴ *See id.* at 4.

³⁵ *See* NON-CONVENTIONAL COPYRIGHT, *supra* note 32.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *See id.* at 120.

realm of tattoo copyright infringement.³⁹ Escobedo filed a lawsuit based on the reproduction of a tattoo that he designed and etched on the torso of Ultimate Fighting Championship (U.F.C.) fighter, Carlos Condit.⁴⁰ The tattoo, which was of a lion, appeared in a digital format in the videogame UFC Undisputed 3 on the body of the video game character that was designed to represent Condit.⁴¹

[14] Like the tattoo cases that came before *Escobedo*, the case never reached trial, but a bankruptcy court did assess Escobedo's damages at \$22,500, the amount that Condit was paid to appear in the videogame.⁴² Escobedo was not pleased with this number, and he sought the value of a hypothetical license based on a royalty per game sold.⁴³ However, after Escobedo appealed the valuation of the damages, the parties settled for an undisclosed amount, adding another case to the catalog of cases that settled without setting a precedent for tattoo copyrights.⁴⁴

³⁹ See Complaint & Demand for Jury Trial at 4, *Reed v. Nike, Inc.*, No. 3:05-CV-198 (D. Or. Feb. 10, 2005); Bryan Wiedey, *Lawsuit Filed over Copyrighted Tattoos on Players in NBA 2K16*, SPORTINGNEWS (Feb. 2, 2016), <http://www.sportingnews.com/us/other-sports/news/lawsuit-filed-over-copyrighted-tattoos-on-players-in-nba-2k16-lebron-james-kobe-bryant/15pm9g4a2xfdr1xkz6hnfjry3h> [<https://perma.cc/2M4X-PABT>].

⁴⁰ See Complaint, *Escobedo v. THQ Inc.*, No. 2:12-cv-02470 (D. Ariz. Nov. 16, 2012).

⁴¹ See *id.*

⁴² See Eriq Gardner, '*NBA 2K*' Videogame Maker Sued for Copyright Infringement Over *LeBron James' Tattoos*, HOLLYWOOD REP. (Feb. 1, 2016), <https://www.hollywoodreporter.com/thr-esq/nba-2k-videogame-maker-sued-861131> [<https://perma.cc/NR8J-P3DF>].

⁴³ See Matt Chiappardi, *Tattoo Artist Appeals Slashed IP Claim in THQ Bankruptcy*, LAW 360 (Sept. 11, 2013), <https://www.law360.com/articles/471802/tattoo-artist-appeals-slashed-ip-claim-in-thq-bankruptcy> [<https://perma.cc/4S6Z-QHXB>].

⁴⁴ See Wiedey, *supra* note 39.

D. Solid Oak Sketches, LLC v. Visual Concepts, LLC

[15] Since the 2012 *Escobedo* case, there still has not been a court decision regarding the copyrightability of tattoos, but there is widespread hope that a 2016 case may provide the opportunity for a court to pass down a ruling.⁴⁵ *Solid Oak Sketches, LLC v. Visual Concepts, LLC* is similar to *Escobedo* in that the complaint is based on the re-creation of tattoos for use in a video game.⁴⁶ This time, however, the video game at issue is NBA 2K16, which was billed as “the most complete basketball game that 2K ever delivered.”⁴⁷ 2K Games, Inc. sold more than 4 million copies of NBA 2K16 in its first week after being released,⁴⁸ and according to Solid Oak Sketches’ complaint, 2K’s success was in large part due to the “improved tattoo customization” which was promoted on 2K’s social media accounts.⁴⁹

[16] The tattoos at issue were etched into the skin of N.B.A. athletes LeBron James, Eric Bledsoe, and Kenyon Martin; the tattoo artists later

⁴⁵ See Thomas Baker, *NBA 2K Tattoo Copyright Suit Offers Two Compelling Legal Arguments, but Only One Seems Practical*, FORBES (Jan. 4, 2019), <https://www.forbes.com/sites/thomasbaker/2019/01/04/lebron-smartly-sides-with-the-producers-of-nba-2k-in-tattoo-copyright-case-but-will-that-be-enough/#3ae852157663> [<https://perma.cc/84CG-EBRT>].

⁴⁶ See Complaint & Demand for Jury Trial at 3, *Solid Oak Sketches, LLC v. Visual Concepts, LLC*, No. 1:16-cv-00724 (S.D.N.Y. Feb 1, 2016) [hereinafter *Solid Oak Complaint & Demand*].

⁴⁷ *Id.* at 3.

⁴⁸ Eddie Makuch, *NBA 2K16 Breaks Records With 4 Million Copies Shipped in Under One Week*, GAMESPOT (Oct. 2, 2015, 7:35 AM), <https://www.gamespot.com/articles/nba-2k16-breaks-records-with-4-million-copies-ship/1100-6431093/> [<https://perma.cc/5R7G-G6DL>].

⁴⁹ See *Solid Oak Complaint & Demand*, *supra* note 46.

licensed these designs to Solid Oak Sketches in exchange for royalties.⁵⁰ Subsequently, James, Bledsoe, and Martin licensed their images to be used in the 2K video game.⁵¹

[17] The plaintiff, Solid Oak Sketches, asserted that tattoos fall within the statutory definition for copyrightability and that the tattoo artists owned the copyrights in the tattoos in this case and later assigned those copyrights to Solid Oak.⁵² This argument centers around the belief that the athletes' agreements to license their likenesses to Visual Concepts, LLC for use in the videogame did not include their tattoos because the athletes did not own copyrights in their tattoos.⁵³ Further, Solid Oak asserted that the reproduction of the tattoos in a digital format in NBA 2K16 infringes upon the copyrights originally owned by the tattoo artists and later obtained by Solid Oak.⁵⁴

[18] The defendants attempted to get the case dismissed on a fair use argument due to the minimal use of the tattoos in the game,⁵⁵ but Judge Laura Taylor Swain declined to grant the declaratory motion, stating that more evidence was needed to apply the "average lay observer" analysis

⁵⁰ See *id.* at 5, 13.

⁵¹ See Paul Tassi, 'NBA 2K16' Studio Sued Over LeBron James and Kobe Bryant's Copyrighted Tattoos, FORBES (Feb. 2, 2016, 4:14 PM), <https://www.forbes.com/sites/insertcoin/2016/02/02/nba-2k16-studio-sued-over-lebron-james-and-kobe-bryants-copyrighted-tattoos/#76b45e4974d2> [<https://perma.cc/BV5H-CNPX>].

⁵² See Solid Oak Complaint & Demand, *supra* note 46, at 5.

⁵³ See *id.* at 3.

⁵⁴ See *id.*

⁵⁵ See Eriq Gardner, *Take-Two Argues Tattoos in 'NBA 2K' Are Fair Use*, HOLLYWOOD REP. (Aug. 10, 2017, 8:32 AM), <https://www.hollywoodreporter.com/thr-esq/take-two-argues-tattoos-nba-2k-are-fair-use-1028357> [<https://perma.cc/6DH8-5QFA>].

for *de minimis* use.⁵⁶ This test would determine the “visibility and prominence” of the tattoos on screen.⁵⁷ Judge Swain reasoned that it would be impossible to apply this test without more evidence because of the “countless possible game permutations that are dependent on individual players’ choices.”⁵⁸ As both parties continue to gather evidence to enhance their arguments, there is a growing belief—or at least some hope—that this case will be the first tattoo copyright case to reach trial.⁵⁹

III. ANALYSIS

A. Is a Tattoo Copyrightable? Are All Tattoos Copyrightable?

[19] The Copyright Act of 1976 (“Copyright Act”) protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁶⁰

[20] Although previous cases have not conclusively determined whether a tattoo can receive the protection of a copyright, they have highlighted the importance of the issue.⁶¹ Further, the complaints, arguments, and statements in the prior cases have even offered a small

⁵⁶ See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA, 2018 WL 1626145, at *4 (S.D.N.Y. Mar. 30, 2018).

⁵⁷ See *id.* at *3.

⁵⁸ *Id.*

⁵⁹ See *Baker*, *supra* note 45.

⁶⁰ Copyright Act of 1976, 17 U.S.C. § 102(a) (2018).

⁶¹ See *NON-CONVENTIONAL COPYRIGHT*, *supra* note 32, at 120.

glimpse into the mindsets of lawyers, athletes, tattoo artists, and some judges on the issue.⁶² By analyzing the requirements of the Copyright Act and prior non-tattoo related copyright cases and viewing the analysis in light of the tattoo-related cases discussed above, a clearer view of tattoo copyrightability will emerge.

1. Copyrightable Subject Matter

[21] In order to qualify for copyright protection, the work to be copyrighted must be a “work of authorship”, which means that it must fit within one of the eight categories enumerated in section 102(a) of the Copyright Act.⁶³ Tattoos fit squarely under the fifth category of “pictorial, graphic, and sculptural works,” as tattoos can be easily equated to paintings and drawings which also fit under this category.⁶⁴

2. Originality

[22] Next, in order to be eligible for copyright protection, a work must be original.⁶⁵ Originality in copyright means that a work must be “independently created” and not copied from another source.⁶⁶ Originality also requires that the work have a “modicum of creativity,” which means

⁶² *See id.*

⁶³ *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (2018).

⁶⁴ *See id.* at § 102(a)(5).

⁶⁵ *See id.* at § 102(a).

⁶⁶ *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

that it has to have “at least some minimal degree of creativity.”⁶⁷ According to the Supreme Court’s opinion in *Feist Publications, Inc. v. Rural Telephone Service Co.*, “the vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble, or obvious’ it might be.”⁶⁸

[23] With tattoos, the question then becomes whether an artist designed the tattoo or copied the tattoo from a pre-existing work.⁶⁹ Even if a tattooist designs a tattoo that has already been designed by another artist, the tattooist may still obtain a copyright as long as he was ignorant of the pre-existing work when he designed the tattoo.⁷⁰ Copyright law differs from patent law because in patent law there is no “independent creation” defense.⁷¹ In contrast, in copyright law, a party can rebut a presumption of copyright infringement by asserting that the work was independently created.⁷²

[24] The originality requirement does not bar a tattoo from being copyrighted any more than any other work.⁷³ As long as the tattoo is

⁶⁷ *See id.* at 345–46 (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

⁶⁸ *Id.* at 345 (citing NIMMER, § 1.08[C] [1]).

⁶⁹ *See id.* at 345.

⁷⁰ *See id.* at 346 (citing *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936)).

⁷¹ *See* Harold Eric Pahlck, *Independent Creation Defense and Patent Law*, in LAW SCHOOL STUDENT SCHOLARSHIP 282, at 1–2 (2013) (arguing that patent law may benefit from an independent creation defense to infringement).

⁷² *See id.* at 4–7.

⁷³ *See id.* at 809, 811 (suggesting that independent discovery would also be a defense in a tattoo copyright infringement case).

minimally creative and original as to the tattoo artist, the originality requirement should not stand in the way of an artist receiving a copyright for a tattoo.

3. Fixation

[25] The final gatekeeper for copyrightability is that the work must be “fixed in [a] tangible medium of expression,”⁷⁴ which is the most difficult hurdle for tattoos because of the changing and aging of skin over time.⁷⁵ However, this hurdle still does not offer a great argument against the ability to receive a copyright in a tattoo.

[26] Fixation occurs when a work “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁷⁶ Fixation is a relatively low standard; random-access memory (RAM) recordings with the potential to vanish⁷⁷ and writings on paper⁷⁸ that can fade or be destroyed by water or fire have been held to be fixed for “more than a transitory duration.”⁷⁹ In contrast, tattoos are intended to be permanent and are often used to

⁷⁴ See Copyright Act of 1976, 17 U.S.C. § 102 (2018).

⁷⁵ See Tess Adamakos, *5 Ways to Protect Your Tattoos from Aging: Although Your Tattoo Is Permanent, it Doesn't Mean it Will Look the Same Forever*, INKED (Apr. 29, 2019), <https://www.inkedmag.com/original-news/best-ways-to-protect-your-tattoos-from-aging> [<https://perma.cc/2EG8-YD3X>].

⁷⁶ See Copyright Act of 1976, 17 U.S.C. § 101 (2018).

⁷⁷ See *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 519 (9th Cir. 1993).

⁷⁸ See David Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 297 (2013).

⁷⁹ See *id.* at 298–299.

reinforce life-long commitments.⁸⁰ From tattoos depicting a significant other's name to gang related tattoos representing a commitment to a lifetime of crime, people from all socioeconomic statuses recognize the permanence of a tattoo.⁸¹

[27] Further, almost every state requires parental consent or parental presence in order for a minor to receive a tattoo because of a tattoo's permanence and the "aesthetic commitment . . . require[d]."⁸² Other states have an outright prohibition on the tattooing of minors, further enforcing the widespread understanding that tattoos are permanent for all intents and purposes.⁸³

[28] For many people, a tattoo marks the achievement of a life-long goal, and the tattoo's permanency is illustrated through the painful and costly efforts necessary for removal or to cover up the tattoo with a new tattoo.⁸⁴ While tattoos may fade with time, in many cases the ink lasts far longer than the commitments or achievements that served as the

⁸⁰ See Olga Khazan, *The Secret to a Tattoo's Permanence: The Immune System*, THE ATLANTIC (Jul. 22, 2014), <https://www.theatlantic.com/health/archive/2014/07/the-real-reason-tattoos-are-permanent/374825/> [<https://perma.cc/J9S5-A25G>].

⁸¹ See Lineberry, *supra* note 2.

⁸² See Sarah LeTrent, *Tattoos and Piercings: How Young is Too Young*, CNN (Sept. 12, 2013, 6:07 PM), <https://www.cnn.com/2012/07/06/living/too-young-tattoo/index.html> [<https://perma.cc/TFK5-7N6X>].

⁸³ See *Tattooing and Body Piercing: State Laws, Statutes and Regulations*, NAT'L CONF. ST. LEGISLATURES (Mar. 13, 2019), <http://www.ncsl.org/research/health/tattooing-and-body-piercing.aspx> [<https://perma.cc/4G6H-HAT5>] (comparing states that require parental consent with states that have an outright prohibition on tattooing minors).

⁸⁴ See Lauren Chan, *What I Wish I Knew Before Starting Tattoo Removal*, GLAMOUR (Jan. 24, 2019), <https://www.glamour.com/story/tattoo-removal-cost-what-is-it-like> [<https://perma.cc/FPV7-Y5K6>] (estimating that tattoo removal takes more than a year and costs \$463 per session).

motivation to get a tattoo in the first place.⁸⁵ For an example, look no further than the left shoulder blade of ex-University of Louisville basketball coach Rick Pitino, bearing a bold red and black old English “L” tattoo commemorating the 2013 NCAA basketball championship.⁸⁶ Although Pitino’s tattoo artist offered to cover Pitino’s tattoo with a new tattoo after the championship was vacated by the NCAA,⁸⁷ Pitino’s tattoo has lasted longer than both the banner at the KFC Yum! Center, where the Louisville basketball team plays home games, and the championship title that the banner represented.⁸⁸ If a writing on a piece of paper that is capable of fading or being destroyed qualifies as fixed for “more than a transitory duration,” then surely a tattoo, expected to last a lifetime barring laser removal treatment, meets the fixation threshold.⁸⁹

B. Who Owns the Copyright?

[29] After all of the previous cases with the potential to determine whether a tattoo can be copyrighted ended in a settlement, *Solid Oak Sketches, LLC v. Virtual Concepts, LLC* has the potential to finally settle this area of law, or at least offer a more complete framework from which

⁸⁵ See Cristina Everett, *Tat’s Embarrassing! Eva Longoria’s Tattoos Are Painful Reminder of Failed Marriage with Tony Parker*, DAILY NEWS (Nov. 19, 2010, 3:36 PM), <https://www.nydailynews.com/entertainment/gossip/tat-embarrassing-eva-longoria-tattoos-painful-reminder-failed-marriage-tony-parker-article-1.452190> [<https://perma.cc/546G-Z9ZC>].

⁸⁶ See Ricky O’Donnell, *Rick Pitino’s Tattoo Artist Is Happy to Help Him Vacate His Louisville Championship Ink*, SBINATION (Feb. 20, 2018, 2:18 PM), <https://www.sbnation.com/college-basketball/2018/2/20/17032622/rick-pitino-tattoo-louisville-championship-q-a-adam-ponds-artist-shop> [<https://perma.cc/53ZH-VVX6>].

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See Cummings, *supra* note 78.

to operate.⁹⁰ However, the case has unfortunately moved at a slow pace, and it has mainly focused on whether the use of tattoos in the NBA 2K video game was *de minimis* and would therefore qualify as fair use.⁹¹ Instead of focusing on the motions that have been filed in this case and the arguments that have been made thus far, this article will focus on the larger scale issue: If a tattoo is copyrightable, who owns the copyright?

[30] The four tattoos on the skin of LeBron James that are at issue in *Solid Oak Sketches* can serve as examples of the implications of the different ways in which a tattoo design is created.⁹² In a declaration filed in the Southern District of New York in this case, LeBron James made it clear that, for each of the four tattoos at issue, he had spoken with the tattoo artist about what he wanted depicted in the tattoo, and that he often “supplied pre-existing material” that he wanted to be tattooed.⁹³ These “pre-existing materials” included a lion’s head from the back of a deck of playing cards and a photograph of his child.⁹⁴ The four tattoos at issue can be separated into two categories: those for which James “supplied pre-existing materials,” and those for which he only discussed the subject matter of the tattoo with the tattoo artist.⁹⁵ Under the Copyright Act there is a large distinction between these two categories.⁹⁶

⁹⁰ See Baker, *supra* note 45.

⁹¹ See *id.* As of March 2020, this case is still pending. See *id.*

⁹² See Declaration of LeBron James, *Solid Oak Sketches v. 2K Games, Inc. & Take-Two Interactive Software, Inc.*, (S.D.N.Y. 2018) (No. 1:16-cv-00724-LTS-SDA).

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See Copyright Act of 1976, 17 U.S.C. § 101 (defining derivative works).

[31] In addition, there are two more categories that should be added to cover the full spectrum of possibilities: personal sketches by the person receiving the tattoo and full reliance on the tattoo artist by the person receiving the tattoo. By adding these two situations, the original two categories are further broken down into four situations: (1) a situation in which a client brings a personal sketch for the design of a tattoo; (2) a situation in which the client brings pre-existing material for the design of a tattoo; (3) a situation in which conversations between a client and a tattoo artist lead to the design for a tattoo; and (4) a situation in which the client fully relies on artist for the design of a tattoo. Each of these situations will be discussed in turn below.

1. Personal Sketch

[32] Often, a person draws a rough sketch to bring to a tattoo consultation. Tattoo designs that begin as sketches by the person receiving the tattoo could arguably be copyrightable by the tattoo artist if the work becomes a “transformative work.”⁹⁷ This fair-use argument would be based on the idea that the final work is so different from the original sketch that it constitutes a whole new work.⁹⁸ The final design would have to “supersede the objects of the original creation” and alter the original work by creating a “new expression, meaning or message.”⁹⁹ However, it is likely that in this situation, the work would be a derivative work and therefore the tattoo owner would retain the copyright over the work.¹⁰⁰ A

⁹⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁹⁸ See *id.*

⁹⁹ Nancy Wolff & Kenneth Swezey, *How Much Is Too Much? Transformative Works vs. Derivative Works: Photographer Wins Appropriation Art Copyright Case*, COWAN, DEBATES, ABRAHAMS & SHEPARD LLP (Sept. 1, 2011), <https://cdas.com/how-much-is-too-much-transformative-works-vs-derivative-works-photographer-wins-appropriation-art-copyright-case/> [https://perma.cc/2BMB-HEG7].

¹⁰⁰ See *id.*

derivative work merely “recasts, transforms, or adapts an original work into a new mode of presentation,”¹⁰¹ so as long as the tattoo design was original as to the tattoo owner, and the owner fixed the sketch in a tangible medium by affixing it to a piece of paper, the tattoo owner would be entitled to the copyright.¹⁰²

[33] While not asserted by LeBron James in his declaration, if James had brought a sketch of the tattoo mentioned in paragraph 8 of the declaration (the “330” tattoo with flames), and the design was otherwise copyrightable, then James would own the copyright.

2. Pre-existing Material

[34] Pre-existing material, whether copyrighted or not, cannot qualify for a copyright because the work will not be original as to the artist.¹⁰³ The Supreme Court, in *Feist*, explained that “a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”¹⁰⁴

[35] As mentioned above, if two people independently create the same work, they may both own a copyright in the work, but by directly copying a work, or even being aware of the work and preparing a derivative work, the work is no longer eligible for copyright protection for the second author.¹⁰⁵ In fact, if the pre-existing material is copyrighted, a tattoo artist

¹⁰¹ *Id.*

¹⁰² See Copyright Act of 1976, 17 U.S.C. § 102(a) (2018).

¹⁰³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

¹⁰⁴ See *id.* at 346.

¹⁰⁵ See *id.* (describing the possibility of two separate copyrights in the same poem).

may be a copyright infringer by etching the copyrighted material into the client's skin.¹⁰⁶

[36] In James' declaration, paragraph 5 and paragraph 6 involve pre-existing material that James took to the tattoo shop.¹⁰⁷ For the tattoo in paragraph 5, James brought a photo of his child and told the artist to make the tattoo "as realistic . . . as possible."¹⁰⁸ On the other hand, for the tattoo in paragraph 6, James brought a deck of cards that he found at a hotel where he stayed.¹⁰⁹ Neither of these tattoos were independently created by the tattoo artist or James, so neither the tattoo artist nor James could claim copyright protection in the tattoo as the copying was intentional and not 'fortuitous.'¹¹⁰

[37] While the copyright in the pre-existing photo of James' child was most likely licensed to James or already belonged to James or a family member, the Lion tattoo could prove more complicated. After deciding that the tattoo artist could not obtain a copyright in pre-existing material, the question would be whether the tattoo artist infringed the copyright in the lion image on the deck of cards. James has never said what brand of playing cards the tattoo was based on, but by searching through possible hotel logos, it appears that the tattoo is similar to the Ritz-Carlton logo.¹¹¹

¹⁰⁶ See Matthew Beasley, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1138, 1160 (2012) (explaining the widespread lack of worry from tattoo artists who tattoo copyrighted material on people).

¹⁰⁷ See Declaration of LeBron James, *supra* note 92.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *Feist Publ'ns*, 499 U.S. at 346.

¹¹¹ See generally Armin, *New Logo and New Identity for Ritz-Carlton*, BRAND NEW (Nov. 9, 2015), https://www.underconsideration.com/brandnew/archives/new_logo_and_

While the purpose of this article is not to analyze potential infringement on the part of tattoo artists, these artists should nonetheless be cognizant of potential claims for tattooing pre-existing copyrighted material into a person's skin.

3. Conversations Leading to a Design

[38] In paragraph 8 of James' declaration, James explained a situation in which he knew generally what he wanted to be tattooed, but leaned on the artist for stylistic decisions and the fixation of the design, as James did not bring a sketch or any pre-existing material to the tattoo shop.¹¹² Under the Copyright Act, arguments can be made for "works for hire" arrangements, but because tattoo artists are not employees of their clients and are usually considered independent contractors, a written agreement would be necessary.¹¹³ In this situation, there was no such agreement. Further, written agreements usually must be executed prior to the creation of the work at issue.¹¹⁴

[39] Although it could be argued that conversation alone could contribute to the creation of a work of art such that the speaker would be entitled to a copyright, the reality is that the tattoo artist in this situation created the work of art for all intents and purposes.¹¹⁵ Therefore, absent an

identity_for_the_ritz_carlton.php [<https://perma.cc/3EKU-YSMH>] (displaying the Ritz-Carlton's logo).

¹¹² See Declaration of LeBron James, *supra* note 92.

¹¹³ See Christopher Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of The Ink*, 10 LEWIS & CLARK L. REV. 313, 324–325 (2006).

¹¹⁴ See *id.* at 325.

¹¹⁵ See Copyright Act of 1976, 17 U.S.C. § 102(a) (2018) ("Copyright protection subsists . . . in original works of authorship . . .").

agreement to the contrary, the tattoo artist would own the copyright in the design.

4. Reliance on Artist

[40] Finally, in paragraph 7 of James' declaration, he explains a situation in which he wanted to incorporate doves into his tattoo, but he relied fully on the tattoo artist to come up with the design.¹¹⁶ The final version of the design involved script scrolls and clouds, which are common in the tattoo industry, but based on James' declaration, James did not have much input in the design process other than that "he wanted to incorporate doves."¹¹⁷ In a situation like this, it seems relatively straightforward under the current copyright framework that if the tattoo is copyrightable, the copyright would belong to the artist who designed the tattoo and not the person who allowed the artist's work to be etched into their skin.¹¹⁸

IV. RESOLUTION: IS THE CURRENT FRAMEWORK CORRECT? WHAT ARE THE FUTURE IMPLICATIONS?

[41] Under the language and traditional reading of section 102 of the Copyright Act, tattoos should be copyrightable, but what implications does this have when talking about the skin of another human? After deciding that tattoos are eligible for copyright and determining who owns the copyright in common situations, the next question is whether someone should be able to own a copyright in another person's skin. How should the interests of both the tattoo author and the copyright owner be balanced?

¹¹⁶ See Declaration of LeBron James, *supra* note 92.

¹¹⁷ *Id.*

¹¹⁸ See Copyright Act of 1976, 17 U.S.C. § 102 (2012).

[42] The endorsement-heavy developments in the N.B.A. help to highlight the importance of personal autonomy in the realm of tattoo copyright because they illustrate the importance of being able to display, modify, and alter or destroy one's own tattoos.¹¹⁹ However, these developments also highlight the reality that until courts articulate a framework for analyzing tattoo copyrights, it will be impossible to deal with the newest tattoo issues on the horizon.

[43] In the late 1990's, a scrappy point guard named Allen Iverson entered the N.B.A. and changed the culture of the league, in large part because of the ink on his skin.¹²⁰ Iverson brought a defiance to the N.B.A.'s push for a clean-cut and 'professional' league.¹²¹ On one occasion, an N.B.A.-published magazine even airbrushed Iverson's tattoos on the front cover of the magazine so that they were no longer visible.¹²² Like Chris Andersen and LeBron James, Iverson has his nickname, "The

¹¹⁹ See generally *Damian Lillard Got a New Tattoo to Let You Know 'Hulu Has Live Sports'*, COMPLEX (Feb. 17, 2019) [hereinafter *Damian Lillard's New Tattoo*], <https://www.complex.com/sports/2019/02/damian-lillard-new-tattoo-hulu-live-sports> [<https://perma.cc/VV32-PQPJ>] (discussing a commercial by Hulu of an NBA player getting a Hulu advertisement tattooed on his arm).

¹²⁰ See Harry Cheadle, *A Brief History of Tattoos in the NBA*, VICE (May 17, 2011), https://www.vice.com/en_us/article/8gmmm4/a-brief-history-of-tattoos-in-the-nba [<https://perma.cc/RGJ2-C37Y>].

¹²¹ See *id.*

¹²² See *id.*

Answer,” inked on his arm,¹²³ and he is credited as being the athlete that sparked the tattoo explosion in the N.B.A.¹²⁴

[44] Simultaneously, as the N.B.A. grew in popularity, advertising and brand recognition through N.B.A. streams were at a premium.¹²⁵ This push drove a wedge further between the league’s fixation on professionalism and the expressive personalities and style choices of the athletes.¹²⁶ As the league has continued to develop and the regulations placed on players’ stylistic choices have relaxed,¹²⁷ the expressive nature of tattoos has evolved from helping to create a persona for athletes to also creating advertisement space for the brand identity of athletes.¹²⁸ While advertising

¹²³ See Allen Iverson, ESPN THE LIFE (2002), http://www.espn.com/thelife/allen_iverson.html [<https://perma.cc/FS35-EL64>]; Luke Petkac, *The Best and Worst Tattoos on NBA Playoff Ballers*, BLEACHER REP. (May 23, 2013), <https://bleacherreport.com/articles/1648928-the-best-and-worst-tattoos-on-nba-playoff-ballers> [<https://perma.cc/L6FF-GAJK>].

¹²⁴ See Des Bieler, *Allen Iverson Admits One of His Tattoos is Just Covering Up an Older, Less Interesting Tattoo*, WASH. POST (May 21, 2015, 10:33 PM), <https://www.washingtonpost.com/news/early-lead/wp/2015/05/21/allen-iverson-admits-one-of-his-tattoos-is-just-covering-up-an-older-lamer-tattoo/> [<https://perma.cc/YUV2-JWP7>].

¹²⁵ See Andrew Heisel, *Op-Ed: The NBA is Turning its Players into Running, Jumping Billboards*, L.A. TIMES (Sept. 29, 2017, 4:00 PM), <https://www.latimes.com/opinion/op-ed/la-oe-heisel-nba-ads-on-jerseys-20170929-story.html> [<https://perma.cc/QY3U-JD7Y>].

¹²⁶ *Id.*

¹²⁷ See Cam Wolf, *NBA Players Can Now Wear the Coolest Sneakers in the World — on the Court*, GQ (Aug. 29, 2018), <https://www.gq.com/story/nba-sneaker-rule-change> [<https://perma.cc/NQ4T-EMPG>] (demonstrating that the N.B.A. began to relax its dress code and writing that in 2018, the N.B.A. announced that players would be allowed to wear “whatever color sneakers they like, whenever they like.”).

¹²⁸ See Heisel, *supra* note 125.

largely involves trademark issues, these developments have copyright implications within the tattoo market because of the creative nature of tattoo designs that have the potential to qualify as “works of authorship.”¹²⁹

[45] As branding and advertising in the N.B.A. have exploded, players have created their own brands¹³⁰ and have even inked company names and logos onto their bodies.¹³¹ With the increase in the marketability of athletes, should players be able to capitalize on their fame through advertising with tattoos? Should athletes be able to “destroy” their tattoos when an endorsement relationship fails? What if the advertisements conflict with other corporate sponsors of the N.B.A. or another league?

A. “Hulu Has Live Sports”: Paid to Endorse?

[46] In 2019, Portland Trailblazers star Damian Lillard received a tattoo on his left forearm of a phrase from Hulu’s latest marketing campaign: “Hulu has live sports.”¹³² Hulu’s commercial shows Damian Lillard in a tattoo parlor talking with his lawyers about a contract centered around the Hulu tattoo.¹³³ The tattoo artist asks Lillard, “Can I at least change the font?” and Lillard’s attorney responds, “If you want to get sued.”¹³⁴ While

¹²⁹ See Copyright Act of 1976, 17 U.S.C. § 102 (2012)(a).

¹³⁰ See *infra* para. [49] and note 141.

¹³¹ See *infra* para. [52] and note 149.

¹³² See *Damian Lillard’s New Tattoo*, *supra* note 119.

¹³³ See *id.*

¹³⁴ Barry Janoff, *Hulu Has Live Sports, Pays Endorsers Lillard, Embiid, Giannis to Say So*, NYSportsJournalism.com (Feb 16, 2019, 6:15 PM), <http://nysportsjournalism.squarespace.com/embiid-giannis-get-hulu-money/tag/sports-marketing> [<https://perma.cc/U6TM-XD5Q>].

this commercial accomplishes Hulu's purpose of informing consumers and causes most viewers to laugh, it also brings up a serious issue for the future of tattoo copyrights.

[47] The owner of a copyright possesses six exclusive rights: (1) the right to reproduce the work; (2) the right to prepare derivative works based on the original work; (3) the right to distribute copies of the work; (4) the right to publicly perform the work; (5) the right to publicly display the work; and (6) the right to perform sound recordings.¹³⁵ Under the Visual Artists Rights Act of 1990 (VARA), authors of "works of visual art" receive additional "moral rights" including the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."¹³⁶ Tattoos fit squarely under the protection of VARA under section 101 as a type of drawing that exists in a single copy.¹³⁷

[48] A decision that tattoos are copyrightable carries with it implications based on the rights discussed above. For example, if a tattoo advertising contract is enforced, then a company like Hulu can own a property right in a person's skin.¹³⁸ Once athletes are free to turn their bodies into billboards in exchange for advertising dollars, what happens when the contractual relationship falls apart?¹³⁹

¹³⁵ Copyright Act of 1976, 17 U.S.C. § 106 (2018).

¹³⁶ Michael Minahan, *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713, 1721 (2014); *see also* 17 U.S.C. § 106A(a)(3)(A)–(B) (2018).

¹³⁷ Copyright Act of 1976, 17 U.S.C. § 101 (2018).

¹³⁸ *See Damian Lillard's New Tattoo*, *supra* note 119.

¹³⁹ *See Heisel*, *supra* note 125.

B. Triple B's: Trouble in "Pair of Dice"

[49] Building on the above situation, take for example Lonzo Ball, one of the most talked about players in the N.B.A., in large part because of his father's outlandish statements.¹⁴⁰ Ball created a brand, Big Baller Brand (BBB), with his father instead of signing with a big shoe brand like Nike when he joined the N.B.A.¹⁴¹ Shortly thereafter, Ball got a tattoo of the company logo, the "triple B's" tattooed on his arm.¹⁴² After Ball's business manager allegedly stole over 1.5 million dollars from him, Ball had his tattoo covered and turned into a tattoo of a pair of dice.¹⁴³ In a situation like this involving a copyrighted tattoo, would the owner of the tattoo be liable for altering his body art?

[50] Before athletes begin entering contracts for advertising through tattoos, it is critical that they consider the long-term implications of allowing companies to own a property right in their skin. It is difficult to believe that while athletes are making these commitments, no court has decided whether tattoos can receive a copyright or who would own the copyright.¹⁴⁴ Once courts make this decision, they will be forced to catch up with the developing issues in the tattoo realm.

¹⁴⁰ See Chris Haynes, *Sources: Lavar Ball Still Calling the Shots for Lonzo*, YAHOO! SPORTS (Apr. 5, 2019, 9:57 AM), <https://sports.yahoo.com/sources-la-var-ball-still-calling-the-shots-for-lonzo-135707835.html> [<https://perma.cc/AP8W-2XMA>] (discussing Lavar Ball's control over his son's basketball career).

¹⁴¹ *Id.*

¹⁴² See Pete Blackburn, *Lonzo Ball Covered up His Big Baller Brand Tattoo with a Terrible Pair of Dice*, CBSSPORTS.COM (Mar. 27, 2019, 1:48 PM), <https://www.cbssports.com/nba/news/lonzo-ball-covered-up-his-big-baller-brand-tattoo-with-a-terrible-pair-of-dice/> [<https://perma.cc/WM5D-CUB9>].

¹⁴³ *See id.*

¹⁴⁴ *See Baker, supra* note 45.

C. Supreme: Control over Display

[51] Finally, it is important to remember that a copyright is a negative right, meaning that it gives the author the right to exclude others from exercising rights.¹⁴⁵ Likewise, just because an author has a copyright does not mean that the author cannot be prevented from displaying his work.¹⁴⁶ N.B.A. champion J.R. Smith, who is largely known for being told by President Obama to “put a shirt on” following his week-long championship celebration, was told by the N.B.A. that he would be fined if he did not cover up a company tattoo during games.¹⁴⁷ Smith is well-known for his tattoos, and a company even sold shirts of Smith’s tattoos that made it look like the person wearing the shirt had Smith’s tattoos.¹⁴⁸

[52] In 2018, Smith received a tattoo of the word “Supreme” representing a popular streetwear company.¹⁴⁹ Although he was not asked

¹⁴⁵ See Stephan Kinsella, *Intellectual Property Rights as Negative Servitudes*, CTR. FOR THE STUDY OF INNOVATIVE FREEDOM (June 23, 2011), <http://c4sif.org/2011/06/intellectual-property-rights-as-negative-servitudes/> [<https://perma.cc/S3FQ-2U69>].

¹⁴⁶ See *id.*

¹⁴⁷ See Jordan Fabian, *Obama Tells NBA Star JR Smith to Put a Shirt on*, THE HILL (June 24, 2016, 11:08 AM), <https://thehill.com/homenews/administration/284780-obama-tells-nba-star-jr-smith-to-put-a-shirt-on> [<https://perma.cc/3F6X-CEEX>] (detailing the conversation with President Obama); Dave McMenamin, *JR Smith Says NBA Will Fine Him for New Tattoo of Supreme Brand Logo*, ESPN (Sept. 29, 2018), https://www.espn.com/nba/story/_/id/24837112/jr-smith-cleveland-cavaliers-says-nba-threatened-fine-new-tattoo [<https://perma.cc/U2U4-9PAD>].

¹⁴⁸ See Jack Moore, *You Can Now Buy a T-Shirt of J.R. Smith’s Tattooed Torso*, GQ (June 28, 2016), <https://www.gq.com/story/jr-smith-t-shirt-tattoos> [<https://perma.cc/7Q8C-D8S5>].

¹⁴⁹ See Cody Benjamin, *J.R. Smith Explains Why He Wasn’t Paid for Giant Supreme Tattoo Advertisement on His Calf*, CBSSPORTS.COM (Aug. 20, 2018, 12:42 PM),

by Supreme to get the tattoo, the N.B.A. would not allow Smith to display the tattoo during games because of the league's conflicting sponsorship agreements.¹⁵⁰ As athletes consider tattoo endorsements, they should remember that the N.B.A. and other leagues have the power to fine them for displaying tattoos that conflict with the league's sponsorship agreements.¹⁵¹

V. CONCLUSION

[53] Although tattoos fit within the language of the Copyright Act and potentially meet all of the requirements for copyright protection, the implications of the ability to own a portion of another person's skin outweigh the purposes of copyright protection: "to promote the progress of science and useful arts."¹⁵² A tattoo design is clearly separable from a human's skin, and to the extent that ownership of a copyright in a tattoo would infringe on a person's right to capitalize on their persona, the copyright should include an implied license to display the tattoo publicly, alter the tattoo, or even destroy the tattoo.¹⁵³ The right to reproduce the tattoo or prepare derivative works should be dependent upon whether the tattoo is displayed separate from or on the body of the person in the

<https://www.cbssports.com/nba/news/j-r-smith-explains-why-he-wasnt-paid-for-giant-supreme-tattoo-advertisement-on-his-calf/> [<https://perma.cc/E5RY-2NVT>].

¹⁵⁰ See *id.*; Michael McCann, *Could the NBA Force J.R. Smith to Cover up His Supreme Tattoo?*, SI.COM (Sept 30, 2018), <https://www.si.com/nba/2018/09/30/jr-smith-supreme-tattoo-nba-rules> [<https://perma.cc/W5BU-8HEC>].

¹⁵¹ See *id.*

¹⁵² U.S. CONST. art. I, § 8, cl. 8.

¹⁵³ See Yolanda M. King, *Protection and Enforcement Challenges for Tattoo Copyrights*, 39 COLUM. J.L. & ARTS 437, 439–440 (2016) (arguing that tattoos are at least conceptually separable from the human body).

reproduction.¹⁵⁴ A person's right to their own image should allow them the opportunity to license their image to companies.¹⁵⁵ This should include their whole image, even their tattoos, but only to the extent that their tattoos are a part of the reproduction and not the *essence* of the reproduction.¹⁵⁶ A sports video game should fall within the category of works that center around an athlete's image and not the specific tattoo design existing separately from the athlete. Regardless of the *de minimis* nature of the use, tattoos displayed on the skin of the athlete, even a computer-generated version of the athlete, should not constitute copyright infringement, assuming that the athlete licensed their image to the video game company.

[54] Without Chris Andersen's tattoos, "Birdman" is just Chris Andersen, and it would make no sense to portray Andersen without his tattoos as he would hardly be recognizable without them; they have become part of his persona.¹⁵⁷ On the other hand, selling temporary tattoos that match Andersen's tattoos, tattooing the design in another person's skin, or selling a shirt with Andersen's tattoo designs separated from Anderson's skin would infringe on the copyright of the tattoo artist, absent a licensing agreement.¹⁵⁸ Tattooed individuals still own their image and

¹⁵⁴ *See id.*

¹⁵⁵ *See* Declaration of LeBron James, *supra* note 92.

¹⁵⁶ *See id.*

¹⁵⁷ *See* Leah Goldman, *Here's What the Heat's Chris 'Birdman' Andersen Looked Like Before He Was Covered in Tattoos*, BUS. INSIDER (May 8, 2013, 3:42 PM), <https://www.businessinsider.com/chris-birdman-andersen-before-tattoos-2013-5> [<https://perma.cc/WGU6-WA42>].

¹⁵⁸ *Cf.* King, *supra* note 153, at 439–40 (arguing that tattoos are copyrightable and should be enforced, but acknowledging that “[A]s a result of the artist’s choice of the human body as a medium, there is going to be some diminution of the exclusive rights . . . I think under the doctrine of implied license that a tattoo customer can argue that the tattoo artist had intended to grant an implied license to display the work. . . .”).

skin, but they should not own the design that is in their skin without a license or work-for-hire arrangement.

[55] Ideally, athletes from any professional league will follow the advice of the National Football League Players Association (NFLPA) and negotiate a license with their tattoo artists prior to receiving a tattoo, at least in the short term.¹⁵⁹ However, in the long term, courts should find that an implied license exists that protects a professional athlete's persona and image and gives athletes rights over the tattoo designs as they exist in their skin. Under this framework, the artists' designs are also protected because the artists retain rights in their designs in all mediums where the tattoo is displayed separate from the skin of the athlete.

[56] In his declaration, LeBron James got to the heart of the issue when he stated, "I always thought that I had the right to license what I look like . . . My tattoos are a part of my identity; if I am not shown with my tattoos it wouldn't really be a depiction of me."¹⁶¹ Tattoos should not elicit a property right in another person's skin, and copyrights should not stop athletes from capitalizing on their personas or being portrayed as they are.

¹⁵⁹ See Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013, 8:01 AM), <https://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/#6e0378154a21> [<https://perma.cc/4HGL-EXN6>] (reporting that the NFLPA recommended players track down tattoo artists and obtain releases for tattoos received in years past).

¹⁶¹ See Declaration of LeBron James, *supra* note 92.