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COMMENTS

NOT A TABOO USE OF TATTOOS: WHY USING UNAUTHORIZED REPLICAS OF PROFESSIONAL ATHLETE TATTOOS IN VIDEO GAMES CONSTITUTES FAIR USE

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INTRODUCTION

The popularity of video games in the United States today is undeniable. According to a 2018 survey conducted by the Entertainment Software Association, sixty-four percent of American households contained at least one video game console, and sixty percent of Americans admitted to playing video games daily.¹ Video game adaptations of professional sports leagues, namely international soccer (FIFA)², the National Football League (NFL), and National

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1. ENT. SOFTWARE ASS'N, 2018 ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 4 (2018), https://www.theesa.com/wp-content/uploads/2019/03/ESA_EssentialFacts_2018.pdf.

2. Jason Wilson, *FIFA 19 and FIFA 18 had 45 Million Unique Console and PC Players in EA's Fiscal 2019*, VENTURE BEAT (May 7, 2019), <https://venturebeat.com/2019/05/07/fifa-19-and-fifa-18-had-45-million-unique-console-and-pc-players-in-eas-fiscal-2019/>.

Basketball Association (NBA), have become wildly popular among gamers.³ Of the twenty-five best-selling video games of 2018, five of them were adaptations of professional sports leagues.⁴ These video games allow players to simulate what it is like to be a professional athlete. Due to the meteoric rise in popularity for these types of video games, the NBA recently became the first professional sports league in the United States to sponsor and operate their own esports league.⁵ Thanks to significant enhancements in technology, the designers are now attempting to further develop these video games by making them more realistic. In order to achieve this goal, both Madden, the popular NFL video game series, and 2K, the popular NBA video game series, began including tattoos displayed on the video game avatars that match the tattoos of the professional athletes. As a result, some tattoo artists have attempted to bring a cause of action against video game creators for tattoo copyright infringement.⁶ However, video game creators can defend themselves in these lawsuits if they satisfy the requirements for the fair use doctrine. But until a court decides a case such as this, the question remains—Can video game creators successfully argue the fair use doctrine when using professional athlete tattoos in their video games?

The purpose of this comment is to illustrate that video game creators would more likely than not prevail in a copyright infringement action regarding their use of professional athlete tattoos in their games because a fair use analysis will likely weigh in the creators' favor. Use of these tattoos is likely fair mainly because the video game creators are transforming the original purpose that professional athletes have in getting their tattoos. This Comment will be separated into three sections. The First Section will attempt to answer whether

3. Brian Mazique, 'NBA 2K18' Was the Highest-Selling Sports Game of 2017 in the United States, FORBES, Feb. 12, 2018, <https://www.forbes.com/sites/brianmazique/2018/02/12/nba-2k18-was-the-highest-selling-sports-game-of-2017-in-the-united-states/#321d799f6565>.

4. Michael B. Sauter, *Popular Video Games 2018: The 25 Best-Selling Titles For the Year*, USA TODAY, Dec. 13, 2018, <https://www.usatoday.com/story/tech/gaming/2018/12/13/popular-video-games-2018-25-best-selling-titles-year/38672903/> (The third highest selling video game in 2018 was "FIFA 19" for PlayStation 4, which is the incredibly popular video game adaptation of international professional soccer. "FIFA 19" for PlayStation 4 sold close to 5 million copies in the United States alone.).

5. Solomon Warsio, *NBA Leaps on Esports Bandwagon with New League*, REUTERS (Mar. 22, 2018), <https://www.reuters.com/article/us-esports-usa/nba-leaps-on-esports-bandwagon-with-new-league-idUSKBN1GZ0A1>.

6. See Jonathan Stempel, *Lawsuit Over LeBron James, NBA Stars' Tattoos in Video Games Can Proceed*, REUTERS (March 30, 2018), <https://www.reuters.com/article/us-take-two-lawsuit-nba-tattoos/lawsuit-over-lebron-james-nba-stars-tattoos-in-video-games-can-proceed-idUSKBN1H61MZ> (commenting on the current ongoing lawsuit between Solid Oak Sketches, a tattoo parlor that has created several tattoos for NBA players and 2K games, creators of the popular NBA 2K video game); Alexa Ray Corriea, *Tattoo Artist Suing EA Over Replication of NFL Player's Tattoos in 2004 Game*, POLYGON (Jan. 10, 2013), <https://www.polygon.com/2013/1/10/3859356/tattoo-artist-suing-ea-over-depiction-of-nfl-players-tattoos-in-2004>.

tattoos as an artform are copyrightable subject-matter. The Second Section will explore the current statutory and case law of the fair use doctrine. Finally, the Third Section will complete a fair use doctrine analysis, which will likely conclude that video game creators' use of professional athlete tattoos in video games is fair.

I. TATTOOS AS COPYRIGHTABLE SUBJECT-MATTER

As of the completion of this comment, there has not been a case deciding whether tattoos are copyrightable subject-matter. Complaints alleging copyright infringement of tattoos have been filed before, however each issue resulted in an out-of-court settlement.⁷ The federal statute governing copyright issues is the Copyright Act of 1976. Section 102(a) of the Copyright Act determines whether a work is copyrightable subject-matter, and would in turn be granted copyright protection.⁸ Copyrights protect, "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."⁹ This means that in order for something like a tattoo to be considered copyrightable subject-matter, it must meet three requirements. First, the tattoo must be original, meaning the work was created solely by the author seeking copyright protection.¹⁰ Second, the author must have created the work using at least a minimum level of creativity, which is an extremely low bar to satisfy.¹¹ Finally, the work must be fixed in a tangible medium of expression.¹² Generally, tattoos are able to easily satisfy the first two requirements for copyrightable subject-matter because tattoos are inherently creative, and they are mostly created by the tattoo artist and/or the elements person receiving the tattoo.¹³

While the first two are easily established, there is an issue regarding whether human skin can be considered a fixed medium of expression. According to the Copyright Act, "[a] work is 'fixed' . . . when its embodiment in a copy . . . is

7. David M. Cummings, Note, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 281 (2013); 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, 1956–64 (2015) (Part III of this Comment discusses how three cases about tattoo copyrightability were all settled.).

8. 17 U.S.C. § 102(a) (2018).

9. *Id.*

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

11. *Id.*

12. 17 U.S.C. § 101 (2018).

13. While most tattoos are created by the artist and/or person receiving the tattoo, others are copies of previous tattoos. Copied tattoos probably do not satisfy the minimum creativity requirement and would, therefore, not be copyrightable subject-matter.

sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁴ There is ongoing debate whether skin can be considered a fixed medium because as people age, their skin naturally changes.¹⁵ This would mean a tattoo will not always appear as it was originally intended for the duration of a person’s life. Due to this concern, it is important to distinguish tattoos into two types: (1) tattoos that are first drawn on skin, and (2) tattoos that are first drawn on another medium before being transferred to skin.¹⁶ While there is still an ongoing debate, it would be difficult to say that tattoos first drawn on skin are copyrightable subject-matter because of the previously mentioned fixation issue.¹⁷ But the second type of tattoo is probably copyrightable subject-matter due to the notion that it was permanently fixed on a piece of paper, computer program, etc. before being transferred to skin.¹⁸ Even though there has not yet been a court decision expressly stating that either type of tattoo discussed above is copyrightable, this would probably be the likely result.

Finally, in order to be copyrightable subject-matter, a tattoo must fall within one of the eight categories of works of authorship listed in the statute.¹⁹ One of the works of authorship categories is “pictorial, graphic, and sculptural works.”²⁰ This work of authorship is meant to, “include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, and models.”²¹ A tattoo clearly is a two-dimensional work of fine, graphic art, meaning tattoos would fall into this work of authorship category. In conclusion, a tattoo that is first drawn separate from skin is probably a copyrightable work based on the text of section 102(a) of the Copyright Act and should therefore be granted copyright protection.

14. § 101.

15. See Chandel Boozer, Comment, *When the Ink Dries, Whose Tatt is it Anyway?: The Copyrightability of Tattoos*, 25 JEFFREY S. MOORAD SPORTS L.J. 275, 303 (2018); Commander, *supra* note 6, at 1954 (“As skin changes, stretches, shrinks, burns, and varies pigments, a tattoo on that changing skin morphs as well, calling into question whether a tattoo can ever be fixed.”).

16. Michael C. Minahan, Note, *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713, 1728 (2015).

17. *Id.* at 1735 (“[T]he human body is not an ‘object,’ [meaning] it would not qualify as a ‘copy’ in which a work can be fixed.”).

18. Cummings, *supra* note 6, at 313.

19. 17 U.S.C. § 102(a)(1–8).

20. § 102(a)(5).

21. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08 (Matthew Bender, Rev. Ed 2019).

II. CURRENT STATUTORY AND CASE LAW FOR THE FAIR USE DOCTRINE

One of the affirmative defenses that can be used in a copyright infringement lawsuit is the fair use doctrine.²² Section 107 of the Copyright Act states that fair use is a limitation on the exclusive rights that a copyright owner enjoys.²³ “[F]air use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright.”²⁴ Even though using professional athlete tattoos in video games does not fit in one of the uses listed in the statute, it is important to note that this list is not exhaustive.²⁵

Fair use is an accepted and equitable doctrine because it, “permits courts to avoid rigid application of the copyright statute when . . . it would stifle the very creativity that law is designed to foster.”²⁶ According to Peter Menell

The fair use doctrine, developed over centuries of jurisprudence, has served two vital functions: (1) balancing the interests of pioneering authors and those who use their work as an input for cumulative creativity; and (2) as a safety valve for freedom of expression, The doctrine has evolved substantially over the course of copyright’s history and undoubtably will continue to adapt to changes in the creative arts and the broader society.²⁷

In order to conduct a fair use analysis, there are four factors that require careful consideration: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion taken, and (4) the harmful market effect.²⁸ The first factor, the purpose and character of the use, is arguably the most important of the four factors when conducting a fair

22. Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) (Fair use is an affirmative defense to copyright infringement that requires a case-by-case analysis.).

23. 17 U.S.C. § 107 (2018).

24. *Id.*

25. *Id.* The phrase “for purposes *such as*” expressed in § 107 proves this list is not exhaustive. *Id.* (emphasis added).

26. Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found. v. American Broad. Co., 621 F.2d 57, 60 (2nd Cir. 1980)).

27. PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 752 (2018) (citing Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 20-23 (2001)).

28. § 107.

use analysis. There are two considerations to contemplate when analyzing this fair use factor. The first consideration is whether or not the infringing work was used for commercial purposes.²⁹ Using a copyrighted work for commercial purposes tends to weigh against that action being fair use.³⁰ While this consideration is important, it is not the central focus of the first factor. The second consideration, which is the central focus, is whether the infringing work “supersedes” the original work, or whether it is “transformative” by altering the original work with “new expression, meaning, or message.”³¹

The Supreme Court highlighted the importance of the transformative use consideration when it held that the more transformative the purpose of use is for a secondary work, the less significant the other fair use factors will be in weighing a fair use decision.³² If an infringer uses a copyright-protected work in a way that transforms the original purpose of the protected work, then it is more likely than not the infringer’s use is fair. The goal of copyright law is to promote science and the arts, and in general that promotion is facilitated when original works are transformed into new works.³³ The purpose and character of the use factor is not dispositive in the fair use analysis, but it is the primary reason that justifies fair use as an affirmative defense to a copyright infringement claim.³⁴

Because the first factor is not dispositive, the other three factors must be considered in order to complete the fair use analysis. The second factor, which is the nature of the copyrighted work, also has a few considerations. The first consideration is determining if the original work is factual or fictional in nature. Infringement of factual works is more fair than infringing works of fiction because facts are known to the public and are not fabricated by a single person.³⁵ Another consideration of the second fair use factor is to answer whether a work is published or unpublished. While infringing an unpublished work tends to weigh against a finding of fair use, section 107 of the Copyright Act expressly states that use of an unpublished work is not presumptively unfair.³⁶

29. *Id.*

30. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985).

31. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994); Richard Stim, *Fair Use: What Is Transformative?*, NOLO, <https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html> (last visited Apr. 24, 2020).

32. *Campbell*, 510 U.S. at 579.

33. *Id.*

34. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

35. See *Harper & Row*, 471 U.S. at 563 (explaining that the law places a greater need on the dissemination of factual versus works of fiction.).

36. 17 U.S.C. § 107 (2018) (“The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”).

The third fair use factor examines how much of the original work was used by the infringing work. A proper analysis of this factor requires not only a look into the quantity of the original work taken, but also a look into the quality of the work taken.³⁷ Judge Learned Hand stated as much when he said, “no plagiarist can excuse the wrong by [only] showing how much of his work he did not pirate.”³⁸ The quantitative inquiry looks into the percentage of the original work used by the alleged infringing work. If the infringing work used a greater percentage of the original work, it leans toward unfair use. The qualitative inquiry looks into whether the alleged infringing work took the “heart of the [work],” which is the critically important aspect of the work that serves as the work’s essence of meaning.³⁹ The more the infringing work steals the meaning and essence of an original work, the more likely it is that use is unfair.

The final factor in a fair use analysis is the harmful market effect resulting from the unauthorized use of a copyright-protected work. To evaluate the effect that an infringing work has on the market, it is a requirement to consider the harm to both the actual market and harm to any potential markets.⁴⁰ Evaluating the harm to actual markets requires an analysis of the extent to which the infringing work harmed the original work’s value in its intended market. Evaluating a potential market involves determining if there is harm to a “traditional, reasonable, or likely to be developed market[.]”⁴¹ A copyright holder has the right to receive royalties for licensing their work, but, “[if] a court automatically [] conclude[d] in every case that potential licensing revenues were . . . impaired simply because the [infringer] did not pay a fee for the right to engage in use, the fourth factor would always favor the copyright holder.”⁴² Even though some of the fair use factors are more important to the analysis than others, all four factors require exploration, and the result of whether use is fair is determined after all the factors are explored.⁴³

There is plenty of case law involving the fair use doctrine, but there is little case law regarding the issue this comment addresses. The first two cases

37. *Campbell*, 510 U.S. at 587 (clarifying that this factor analysis, “calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”).

38. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2nd Cir. 1936).

39. *Harper & Row*, 471 U.S. at 565 (The District Court stated that “The Nation”, which is the alleged infringing work in this case, stole “essentially the heart” of the plaintiffs’ drafted, but unpublished, autobiography of President Gerald R. Ford.).

40. *Id.* at 568.

41. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2nd Cir. 1993) (citing *Campbell*, 510 U.S. at 592.).

42. *Id.* at 929 n.17 (emphasis omitted).

43. *Campbell*, 510 U.S. at 578.

discussed apply the fair use analysis to various different works, and the final three cases discussed involve tattoo copyright infringement claims.

A. Campbell v. Acuff-Rose Music, Inc.

The Supreme Court used this case to establish a very important rule for fair use analysis: If a new work is more transformative in its purpose, then the other fair use factors carry less weight in a case-by-case analysis.⁴⁴ In *Campbell*, the Supreme Court gave an illustration of how to properly complete a fair use analysis. In 1964, Roy Orbison wrote the song “Oh, Pretty Woman” and gave the copyright to Acuff-Rose Music.⁴⁵ 2 Live Crew, a popular rap group, released a song called “Pretty Woman” in 1989 with the intent to satirize the original Orbison song.⁴⁶ After “Pretty Woman” sold almost a quarter of a million copies, Acuff-Rose Music sued 2 Live Crew and their record company for copyright infringement.⁴⁷

When analyzing the first factor, the Court said, “[t]he central purpose of this investigation is to see, . . . whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or . . . whether and to what extent the new work is ‘transformative.’”⁴⁸ The Court expressly dictates the importance of transformative purpose to the fair use analysis by stating, “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁴⁹ Also, the Court overturned the notion that, “every commercial use of copyrighted material is presumptively . . . unfair,” and held that the commercial purpose of a new work is merely one consideration of the first fair use factor.⁵⁰ Even though “Pretty Woman” was made for commercial purposes, that does not automatically mean the purpose of the parody was unfair.⁵¹ Because the intent of the 2 Live Crew song was to parody the original Orbison song, that purpose was transformative, and therefore the first factor weighed in favor of fair use.⁵²

The Supreme Court also considered the other fair use factors of the analysis. Because “Oh, Pretty Woman” was a creative and fictional work, the second

44. *Id.* at 579.

45. *Id.* at 572.

46. *Id.*

47. *Id.* at 573.

48. *Id.* at 579.

49. *Id.*

50. *Id.* at 584.

51. *Id.* at 585, 594.

52. *Id.* at 584.

factor weighed towards a finding of unfair use.⁵³ For the third fair use factor, the Court said that 2 Live Crew took the “heart of the [work]” when it used the same introductory bass guitar riff and the first line of lyrics as the original song.⁵⁴ However, parodies need to take enough of the original work in order for others to recognize the new work as a parody.⁵⁵ The Court held that 2 Live Crew took no more than what was necessary from the heart of “Oh, Pretty Woman,” and therefore the use weighed in favor of being fair.⁵⁶ Finally, the Court could not render a decision regarding the fourth fair use factor due to a lack of evidentiary evidence.⁵⁷ Acuff-Rose Music had the exclusive right to create a non-parody rap version of “Oh, Pretty Woman,” which would be considered a derivative work, but Acuff-Rose Music never submitted evidence that the 2 Live Crew song harmed the potential non-parody rap music market.⁵⁸ After completing the analysis, the Court held that it was not presumptively unfair of 2 Live Crew to use parts of “Oh, Pretty Woman” in their song.⁵⁹

*B. Bill Graham Archives v. Dorling Kindersley, Ltd.*⁶⁰

While this case is factually different from the issue discussed in this comment, its principles can be applied. In this case, Kindersley published a coffee book entitled *Grateful Dead: The Illustrated Trip*, which outlined the history of the band “Grateful Dead.”⁶¹ The book used over 2000 images placed in chronological order to illustrate the history of the band.⁶² Of the images used in the book, Bill Graham Archives (“BGA”) owned the copyrights to seven of them (“the seven images”).⁶³ The seven images were originally used to promote Grateful Dead on several concert posters.⁶⁴ When Kindersley used the seven images in the book without BGA’s permission, BGA brought a cause of action for copyright infringement.⁶⁵

53. *Id.* at 586.

54. *Id.* at 588.

55. *Id.*

56. *Id.* at 587 (instructing the district court to determine the quantitative analysis upon remand).

57. *Id.* at 593–94.

58. *Id.* at 593.

59. *Id.* at 594.

60. 448 F.3d 605 (2nd Cir. 2006).

61. *Id.* at 607.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (Kindersley initially sought permission from BGA to use the seven images before publishing the book, but both parties could not agree on terms of a license fee agreement.).

After analyzing the first factor, the court held that use of the seven images was fair because the purpose for using them was different from their original purpose of use.⁶⁶ BGA originally used the seven images for promotional purposes and as a symbol of Grateful Dead's artistic expression, and that was clearly distinct from Kindersley's biographical purpose of using the seven images to illustrate the band's career on a timeline.⁶⁷ Next, the court held that the second factor weighed towards unfair use because the posters were a work of fiction.⁶⁸ However, it is important to note that the court recognized the nature of the copyrighted work factor carries minimal weight if a fictional work is used for a transformative purpose.⁶⁹

The court decided that the third factor also weighed in favor of fair use.⁷⁰ While Kindersley used the seven images in their entirety in the book, that does not automatically result in the use not being fair.⁷¹ The court stated, "even though [the seven images] are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size."⁷² In addition, the third factor favored fair use because Kindersley used the seven images in their entirety to further the transformative purpose of the book.⁷³

When analyzing the fourth factor, both parties stipulated there was no harm to the actual market for poster image sales.⁷⁴ The court also held there was no harm to a potential market because the book is part of a transformative market, and BGA did not suffer a loss of licensing fees in the transformative market.⁷⁵ Because three of the four factors weighed in favor of fair use, the court concluded that use of the seven images was fair.⁷⁶

*C. Solid Oak Sketches v. 2K Games, Inc.*⁷⁷

This case serves as the overall inspiration for this Comment. Solid Oak is a tattoo artist that owns the copyrights to the tattoos for several NBA players,

⁶⁶ *Id.* at 609.

⁶⁷ *Id.*

⁶⁸ *Id.* at 612.

⁶⁹ *Id.* (citing *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 586 (1994)).

⁷⁰ *Id.* at 613.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 614.

⁷⁵ *Id.* at 615.

⁷⁶ *Id.*

⁷⁷ No. 16-CV-724-LTS-SDA, 2018 WL 1626145 (S.D.N.Y. Mar. 30, 2018).

including LeBron James, Eric Bledsoe, and Kenyon Martin.⁷⁸ 2K Games and Take-Two are the creators of the popular video game series “NBA 2K,” which is video game series that “depicts basketball with realistic renderings of different NBA teams, *including lifelike depictions of NBA players and their tattoos.*”⁷⁹ Solid Oak filed suit against 2K Games and Take-Two, alleging that Solid Oak owned the copyright to five tattoos on James, Bledsoe, and Martin, and 2K Games and Take-Two infringed on Solid Oak’s rights when they used the tattoos in “NBA 2K14,” “NBA 2K15,” and “NBA 2K16.”⁸⁰ 2K Games filed a motion to dismiss on several grounds, including fair use.⁸¹ Court denied the motion because a fair use analysis is a factual determination, and therefore cannot be established at this point in the proceedings.⁸² It is important to note that this case is ongoing as of the completion of this comment. If it is not settled, the decision of this case will give a long-awaited answer regarding whether there is a cause of action available for tattoo copyright infringement.

*D. Whitmill v. Warner Brothers Entertainment, Inc.*⁸³

Prior to *Solid Oak*, this was arguably the most prominent and publicized case involving tattoo copyright infringement. Whitmill was the tattoo artist that created Mike Tyson’s face tattoo, which is one of the most recognizable tattoos in existence.⁸⁴ Tyson and Whitmill agreed that upon completion of the tattoo, Whitmill would own the artwork and copyright of the tattoo.⁸⁵ Warner Brothers copied and used the Tyson face tattoo in their movie, “The Hangover: Part II,” without Whitmill’s permission.⁸⁶ Warner Brothers also used the tattoo extensively in promoting and advertising the film.⁸⁷ The reason this lawsuit was so publicized was due to the fact that the movie in question was a sequel to the very popular movie, “The Hangover,” and this lawsuit would have delayed

78. *Id.* at *1.

79. *Id.* (emphasis added).

80. *Id.*

81. *Id.*

82. *Id.* at *5.

83. Verified Complaint for Injunctive and Other Relief, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-CV-752 (E.D. Mo. April 28, 2011), 2011 WL 2038147.

84. *Id.* at ¶ 1.

85. *Id.*

86. *Id.* at ¶¶ 1, 13.

87. *Id.* at ¶ 1.

release of the film until the matter was resolved.⁸⁸ In the end, this case was settled in order not to delay to movie release.⁸⁹

*E. Allen v. Electronic Arts, Inc.*⁹⁰

Finally, this case is factually similar to both *Solid Oak* and the overall issue this comment addresses. In 2003, Stephen Allen gave a tattoo to Ricky Williams, an NFL all-pro running back who played for the Miami Dolphins.⁹¹ Allen was excited to create the tattoo because his artwork would be seen by millions when Williams played in televised games.⁹² Electronic Arts (“EA”) used Williams’s tattoo on the covers of “NFL Street,” “Madden NFL 10,” and “Madden NFL 11” without contacting Allen.⁹³ Allen brought suit against EA alleging that it infringed on his exclusive rights when EA replicated the tattoo in their games.⁹⁴ However just like the previous two cases, this case was resolved in an out-of-court settlement.⁹⁵

III. FAIR USE ANALYSIS OF USING PROFESSIONAL ATHLETE TATTOOS IN VIDEO GAMES

This analysis will be split into five sections. The first four sections are an analysis of each of the four fair use factors. The factors will be discussed in a different order than is listed in section 107 of the Copyright Act. Each fair use factor will be discussed in order of importance from least to greatest regarding professional athlete tattoo use in video games. After each factor is discussed, the final section will balance each of the factors in order to determine the likely result of whether use of professional athlete tattoos in video games constitutes fair use.

88. Noam Cohen, *Citing Public Interest, Judge Rules for ‘Hangover II’*, N.Y. TIMES, May 24, 2011, <https://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/> (“All signs pointed to a settlement and the judge herself was encouraging those efforts.”).

89. Matthew Belloni, *Warner Bros. Settles ‘Hangover II’ Tattoo Lawsuit*, HOLLYWOOD REP, June 20, 2011, <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377>.

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

91. *Id.* at ¶¶ 7, 10.

92. *See id.* at ¶ 10

93. *See id.* at ¶¶ 10–12.

94. *Id.* at ¶ 17.

95. Commander, *supra* note 6, at 1964.

A. Nature of Work

As a review, this factor examines whether the original work taken by an alleged infringer is either factual in nature or fictional in nature. The Supreme Court said, “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”⁹⁶ Therefore, if a work is factual, it is probably fair to use in other works. If it is fictional, it is probably not fair to use in other works. The reasoning behind this is fictional works require creative thinking in order to produce something that does already not exist in nature, whereas factual works are created by studying and analyzing things currently existing in nature that are accessible to more than one person. In addition to determining whether a work is factual or fictional, another important consideration is whether the original work was published or unpublished. The Supreme Court in *Harper & Row* held that it would be presumptively unfair to take a work that is unpublished.⁹⁷ However, section 107 of the Copyright Act made an amendment superseding this presumption by stating, “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the [] factors.”⁹⁸ This means that even though using an unpublished work leans more towards unfair use, it is no longer presumptively unfair and must be one consideration in the fair use analysis.

The nature of the work factor would likely weigh against the use of professional athlete tattoos in video games being fair. The tattoos of professional athletes are, on the whole, fictional graphics or depictions that either the athlete or tattoo artists came up with themselves, or the tattoo is something that is already established as fiction to the rest of the world. Also, all tattoos in general, are not published. Since the tattoos are unpublished, it also would probably lean against fair use. Therefore, a court would probably conclude that the nature of the work factor in an analysis regarding the use of professional athlete tattoos in video games weighs against fair use.

However, the second circuit in *Bill Graham Archives* stated that the nature of the work factor is of limited importance in a fair use analysis when an original work is being used for a transformative purpose, which is a consideration of the purpose of use factor.⁹⁹ The purpose of use factor will be discussed later in this comment, however video game creators have a transformative purpose in using professional athlete tattoos because the creators desire to make the video games more realistic and life-like. Therefore, because the tattoos are being used for a

96. *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

97. *Id.* at 564.

98. 17 U.S.C. § 107 (2018).

99. *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2nd Cir. 2006) (citing *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 586 (1994)).

transformative purpose, the nature of the work factor in this analysis carries very little weight with respect to the other three factors of the fair use doctrine analysis.

B. Amount and Substantiality of Portion Used

Analyzing this fair use factor for tattoo use in video games is dependent on whether a court decides to strictly follow the analysis completed by the second circuit in *Bill Graham Archives v. Dorling Kindersley*. A proper analysis of this fair use factor requires an exploration of both the quantity and quality of the original work taken by the infringing work.¹⁰⁰ The quantitative inquiry looks into the percentage of the original work that was taken by the alleged infringing work, and the qualitative inquiry looks into whether the alleged infringing work took the heart of the original work.¹⁰¹ Applying this fair use factor to professional tattoo use in video games, the creators are recreating the tattoos in their entirety in order to make their games more realistic. Because of this, video game creators are using one hundred percent of the professional athlete tattoos, which weighs against a finding of fair use. For the qualitative analysis, the Supreme Court in *Harper & Row* said, “the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material.”¹⁰² Since video game creators are completely replicating the athlete tattoos in their games, it is likely to be determined that the video game creators are taking the entire “heart” of the professional athletes’ tattoos. Based off this analysis, it is likely that the amount and substantiality factor weighs against fair use.

However, if the amount and substantiality factor in this issue were to strictly follow the analysis used in *Bill Graham Archives*, then it is likely this factor would actually lean in favor of fair use. Recall in *Bill Graham Archives* that Kindersley significantly reduced the size of the original seven images to use them in the book.¹⁰³ The court held that, “even though [the seven images] are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size.”¹⁰⁴ The *Bill Graham Archives* court also stated it was fair for Kindersley to use the entirety of the seven images in order to further the transformative purpose of the book.¹⁰⁵

100. *Campbell*, 510 U.S. at 587.

101. *Harper & Row*, 471 U.S. at 564–65.

102. *Id.* at 565.

103. *Bill Graham Archives*, 448 F.3d at 611.

104. *Id.* at 613.

105. *Id.*

Strictly following that court's analysis for the amount and substantiality factor would probably result in favor of using professional athlete tattoos in video games being fair. Similar to Kindersley in *Bill Graham Archives*, video game creators obviously reduce the size of the tattoos depicted in the games to proportionately portray the professional athletes in the games. Also, like Kindersley in *Bill Graham Archives*, video game creators are using the entirety of professional athlete tattoos in order to further their transformative purpose. As previously stated, video game creators transform the original purpose of professional athlete tattoos by using them to create a more realistic experience for their consumers. If people who play the video games only see a partial tattoo of a professional athlete, then it will not give that player the same realistic gaming experience desired by the video game creators. Therefore, if the amount and substantially fair use factor does not strictly follow the analysis used by the second circuit in *Bill Graham Archives*, then it is likely that analysis will weigh against fair use. But if the *Bill Graham Archives* analysis of the amount and substantiality factor is strictly followed, then it will probably lean towards use of professional athlete tattoos in video games being fair.

C. Harm to Actual and Potential Markets

The Supreme Court has previously stressed the importance of this factor when completing a fair use analysis.¹⁰⁶ To evaluate this factor, one must consider harms suffered by the original author in both the actual market and any potential markets.¹⁰⁷ It is important to examine the extent to which the use of a work damages the sales and revenues the original author suffered in a relevant market when evaluating actual market harm. This factor applied to professional athlete tattoo use in video games weighs heavily in favor of the use being fair.

Tattoos generally are not used in the actual market unless they are so distinct that a vast majority of people could recognize the tattoo upon seeing it.¹⁰⁸ Unlike professional athletes in the past, it is much more common for athletes today to have a visible tattoo on their body. It is also common for athletes today to have more than one visible tattoo, and some athletes even have their bodies completely covered with tattoos. The increase in athletes that have more than one tattoo visible on their body hampers the ability for a specific tattoo to be distinguishable and stand out from all the other tattoos.

106. *Harper & Row*, 471 U.S. at 566.

107. *Id.* at 568.

108. An example of such a distinct tattoo would be Mike Tyson tattoo located above his left eye. As previously discussed in this comment, the tattoo was so famous that it was used in the widely-popular "Hangover: Part II" movie. See Verified Complaint for Injunctive and Other Relief, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-752 (E.D. Mo. April 28, 2011), 2011 WL 2038147.

In addition, the infringing works that merely substitute the original work often cause the most harm to the actual market. Video game adaptations of professional athlete tattoos are not a substitute because they are used by the game creators for a different purpose. Because sports video games are not a substitute for the professional athlete tattoos, using the tattoos in the games does almost no harm to the actual market. Therefore, the harm to the actual market in using professional athlete tattoos in video games is likely minimal at best, maybe even non-existent.

Regarding potential market analysis, it is likely that there is no harm to the potential market of using professional athlete tattoos in video games because it is highly unlikely that such a market will ever exist. When evaluating harm to potential markets, the Supreme Court said that a market can only be considered a potential market if it is one that is, “traditional, reasonable, or likely to be developed.”¹⁰⁹ Currently, there is no evidence that video games will become a “traditional, reasonable, or likely to be developed market” for professional athlete tattoos. Because the harm to the actual market is minimal at best due to an increase in the amount of athlete tattoos in professional sports, and because video games will likely never become a “traditional, reasonable, or likely to be developed” market for professional athlete tattoos, the harm to actual and potential markets factor likely weighs in favor of fair use.

D. Purpose of Use

The importance of this factor when completing a fair use analysis cannot be understated. The Supreme Court said as much when it held that this factor could carry the most weight in a fair use analysis.¹¹⁰ This fair use factor attempts to determine the motive of an infringing work when it uses an original work. Throughout the history of the fair use doctrine, this factor has consistently been the central point of copyright infringement decisions heard by the Supreme Court. At first, the only consideration for this fair use factor was whether the use of an original work was for a commercial or noncommercial purpose.¹¹¹ The Supreme Court in *Sony* held that use of an original work for a commercial or profit-making purpose is presumptively unfair.¹¹² This meant that there was no case-by-case analysis that balanced the four fair use factors if an original work was used by an infringer to make a profit.

109. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930 (2nd Cir. 1994).

110. *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 579 (1994) (stating that a transformative purpose for using an original work carries more weight than the other fair use factors in a case-by-case analysis).

111. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–51 (1984).

112. *Id.*

Ten years after that decision, the Supreme Court overturned that and held that a commercial or non-commercial purpose is not dispositive, but instead is only one consideration of the purpose of use factor in the fair use analysis.¹¹³ In addition to considering whether the use was for commercial purposes, the main inquiry for this factor is whether the alleged infringing work merely, “supersede[s] the objects’ of original creation,”¹¹⁴ or whether it is transformative in purpose from the original work.¹¹⁵ The Court expressed that use has a transformative purpose when it, “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹¹⁶ A secondary work is not required to add something unique in order to be transformative, but rather the secondary work can be used for a different purpose than what was intended by the original work.¹¹⁷ The important takeaway regarding the first fair use is if a work is transformative in its purpose, that factor alone, while not dispositive, becomes the most important factor when completing a fair use analysis.¹¹⁸

Regarding the use of professional athlete tattoos in video games, the purpose of use factor is the most compelling reason that use of the tattoos likely constitutes fair use. First, a professional athlete’s original purpose in receiving a tattoo must be determined. It can be understood that the main purpose for anyone getting a tattoo is to reflect their unique expression and personality. Professional athletes in particular have a wide range of motives and meanings behind their tattoos, including a tribute to their family,¹¹⁹ a reminder of their career success,¹²⁰ an indication of how far they have come in life,¹²¹ or a symbol of their unique personality.¹²² LeBron James, who is one of the most popular

113. *Campbell*, 510 U.S. at 584.

114. *Id.* at 579 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841)).

115. *Id.* (citing *Leval*, supra note 33, at 1111).

116. *Id.*

117. *Id.*

118. *Campbell*, 510 U.S. at 579.

119. SI Staff, *NFL Players Explain the Meaning Behind Their Tattoos*, SPORTS ILLUSTRATED, Sept. 22, 2017, <https://www.si.com/nfl/photo/2017/09/22/tattoos-nfl-players-themmqb> (Dak Prescott, the quarterback for the Dallas Cowboys, received a tattoo of a cartoon lion that his mother, Peggy, used to quickly draw for him throughout his life. Prescott said the tattoo has very special meaning to him because Peggy died of cancer in 2013. Also, Kareem Jackson, a strong safety for the Houston Texans, got his daughter’s footprints tattooed on his ribcage to inspire him to work hard every day.).

120. *Id.* (Malik Jackson, a defensive tackle for the Jacksonville Jaguars, has tattoos of tally marks on his leg to commemorate every sack he recorded in his career.).

121. *Id.* (Richie Incognito, a former NFL offensive lineman, received a tattoo of a phoenix to symbolize how he was able to overcome tough times in his life.).

122. *Id.* (Taylor Lewan, an offensive tackle for the Tennessee Titans, has a stick figure of a man tattooed on the outside of his right hand, who he affectionately refers to as his “right hand man.”).

and influential professional basketball players in the world, once said, “[e]ach of my tattoos was created to showcase parts of my life and things that are important to me. . . . My tattoos are a part of my persona and identity; if I am not shown with my tattoos, it wouldn’t really be a depiction of me.”¹²³ Therefore, a professional athlete’s purpose in getting a tattoo covers a wide range of reasons that highlight their unique personality and expression.

After the purpose of the original author is established, the purpose of use factor analysis requires an explanation of the infringing work’s purpose for using the original work. Video game creators use professional athlete tattoos in their games for the purpose of giving their consumers a more realistic and immersive gaming experience. New technology has allowed video game characters and avatars to become so realistic that it is almost as if the video game characters are actual human beings.¹²⁴ Video game adaptations of professional sports today have turned living rooms into virtual courts or fields, which is a major shift from the when these sports video games were first created in the 1980s.¹²⁵ Using professional athlete tattoos makes the video games more realistic for the consumers because many professional athletes actually have visible tattoos in real life. The video game market is currently the highest revenue-generating entertainment form in the world,¹²⁶ and technological advancements that create more realistic video games are most likely a major contributing factor. Video game creators are using the tattoos of professional athletes in order to produce a more realistic playing experience for their consumers.

After establishing the purpose of video game creators for using professional athlete tattoos in their games, it is indisputable that the video game creators’ purpose constitutes transformative use. As a reminder, the purpose for athletes getting their tattoos is to showcase their personality and expression. It is clear that designing a more realistic gaming experience is a new purpose that alters the meaning of the original tattoos’ purpose, which conforms with the Supreme

123. Eriq Gardner, *LeBron James Testifies in Video Game Suit*, HOLLYWOOD REP., Aug. 24, 2018, <https://www.hollywoodreporter.com/thr-esq/lebron-james-i-thought-i-had-right-license-what-i-look-like-1137315>.

124. Chris Morris, *Video Games: New Graphics Tech Makes Hyper Realistic Characters*, FORTUNE, Mar. 22, 2018, <http://fortune.com/2018/03/22/epic-games-siren-hyper-realistic-characters-video-games/>.

125. See Christian Prieto, *The Evolution of Sports Video Game Graphics*, HIGHSNOBIETY (Dec. 11, 2013), <https://www.highsnobiety.com/2013/12/11/evolution-of-sports-video-game-graphics/>.

126. Angelo M. D’Argenio, *Statistically, Video Games Are Now the Most Popular and Profitable Form of Entertainment*, GAMECRATE (Jul. 10, 2018), <https://www.gamecrate.com/statistically-video-games-are-now-most-popular-and-profitable-form-entertainment/20087> (Video games have surpassed television in terms of generating revenue. Television earned \$105 billion dollars in revenue, which was down eight percent from the previous year, but video games earned \$116 billion dollars in revenue, which was up over ten percent from the previous year.).

Court definition of transformative use.¹²⁷ Using the tattoos in video games does much more than merely supersede the original purpose tattoos because the creators are not including the tattoos to showcase the various personalities of the tattooed athletes. Instead, the creators are using the tattoos in order to produce more life-like gaming experiences.

Because the video game creators transform the original use of the professional athlete tattoos, it is important to remember that the gravity of the purpose of use factor in this case is much heavier than the weight of the other fair use factors in determining the analysis.¹²⁸ Therefore, the fact that video game creators can establish a transformative use weighs substantially in favor of fair use.

Finally, in order to properly analyze the purpose of use factor, it is important to examine the other consideration: whether the use is of a commercial nature. Because commercial use is no longer presumptively unfair, it is now only a minor consideration of the purpose of use factor analysis. Although it is generally not fair to use a copyrighted work for profit-making purposes, this consideration carries minimal clout compared to establishing transformative use. While it is true that video game creators intend to make a profit, the creators do not expect their games to make profits solely because they use the adaptations of professional athlete tattoos. It is highly unlikely that consumers are purchasing video game adaptations of professional sports simply because the games accurately depict professional athlete tattoos. Consumers are purchasing these games because they want their gaming experience to be as realistic as possible. Using the professional athlete tattoos is only one microscopic detail that creators use to manufacture a wholly realistic gaming experience. Using the tattoos as part of an overall commercial purpose probably weighs against fair use, but because the video game creators satisfy the definition of transformative use, the weight in favor of fair use drastically trumps the weight in favor of unfair use in this factor analysis.

E. Balancing of Factors

After carefully considering each of the four fair use factors, the final step of the analysis is to balance all the factors in order to determine whether a copyright infringement can constitute fair use. In this issue, the nature of work factor likely weighs against fair use. The amount and substantiality of the original work will likely favor fair use if the *Bill Graham Archives* analysis is strictly followed, but if not the factor will likely weigh against fair use. The harm to actual and

127. *Campbell v. Acuff-Rose, Inc.*, 510 U.S. 569, 579 (1994) (“[Transformative use] adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”).

128. *Id.*

potential markets factor probably weighs in favor of fair use. Finally, the purpose of use factor weighs in favor of fair use. In a worst-case scenario, two factors conclude that using professional athlete tattoos is unfair use, and the other two factors conclude that using the tattoos is fair. However, it is important to mention that the two factors weighing in favor of fair use, especially the purpose of use factor, are substantially more important to the analysis than the two factors against fair use. The Supreme Court has previously stated the importance of the harm to actual and potential markets fair use factor.¹²⁹ Also if transformative use is established, which tattoo use in video games probably does, then that factor carries more importance than any of the other fair use factors.¹³⁰ Since the two most important factors of analysis will likely weigh in favor of fair use in this issue, video game creators more likely than not will satisfy the requirements of the fair use doctrine, meaning use of professional athlete tattoos in video games constitutes fair use.

CONCLUSION

Given the above fair use analysis, legal action involving tattoo copyright infringement in video games, including the ongoing legal dispute over the “NBA 2K” video game,¹³¹ would likely result in concluding the tattoo use is fair. When deciding whether a specific professional athlete tattoo is allowed copyright protection, it is important to distinguish tattoos that are first drawn on skin from tattoos that are first drawn separate from skin. If it is first drawn separate from skin, then the tattoo is more likely to be copyrightable subject-matter.

Video game creators using the tattoos is probably fair mainly because their purpose for using the tattoos is transformative, and there is practically no harm to any actual or potential markets. The original purpose of the tattoo reflects the expressions of professional athletes in order to give them a unique overall appearance. Video game creators use the tattoos to make their video games more realistic and factually accurate, which constitutes a transformative use. Transformative use carries a substantial weight in the fair use analysis, meaning that the other fair use factors have less comparative significance. Even though replicating the entirety of the tattoos in a game weighs against fair use, the nature of work factor is marginal to the analysis. If a court strictly follows the fair use analysis used by the second circuit in *Bill Graham Archives*, the amount and

129. *Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 566-67 (1985) (internal citations omitted).

130. *Campbell*, 510 U.S. at 579.

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

substantiality factor weighs in favor of fair use. The final fair use factor, harm to actual and potential markets, also weighs in favor of fair use. Harm to the actual market is minimal at best because the vast amount of professional athlete tattoos has diluted the ability for a specific tattoo to be distinct. Also, using professional athlete tattoos in video games cannot harm potential markets because video games likely will never become a “traditional, reasonable, or likely to be developed market” for professional athlete tattoos. Therefore, video game creators will likely succeed on a copyright infringement claim for using professional athlete tattoos in video games because its actions establish fair use, which is an affirmative defense. Using professional athlete tattoos in video games is not taboo.