

2023

Game On—Copyrighted Tattoos in Video Games as Fair Use

Emilie Smith

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Gaming Law Commons](#), [Intellectual Property Law Commons](#), and the [Law and Society Commons](#)

Repository Citation

Emilie Smith, *Game On—Copyrighted Tattoos in Video Games as Fair Use*, 106 Marq. L. Rev. 1015 (2023).
Available at: <https://scholarship.law.marquette.edu/mulr/vol106/iss4/8>

This Response or Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact elana.olson@marquette.edu.

GAME ON—COPYRIGHTED TATTOOS IN VIDEO GAMES AS FAIR USE

With its fact-intensive inquiries and limited bright-line rules, copyright law is known for its ambiguity, and courts often differ in their interpretations of various doctrines. The fair use doctrine is no different, and was in fact designed to grant courts discretion in making their determinations, all with the aim of maintaining the true purpose of the copyright law. Recent technologies and popularized forms of art only complicate things, adding rougher terrain to an already confusing landscape.

This Comment explores two relatively recent cases that consider the intersection of tattoos, copyrights, and video games, one stemming from the Southern District of New York and the other from the Southern District of Illinois. To properly consider these cases, this Comment first provides a brief overview of copyright law and the fair use doctrine as it is applied to allegedly infringing uses of copyrighted works. Next, this Comment discusses the copyrightability of tattoos as a general matter. After laying this groundwork, this Comment moves to summarize the two cases this Comment is designed to investigate—Solid Oak Sketches and Alexander—before considering which court “got it right.” Lastly, this Comment considers available avenues for reaching consensus, or, at the very least, creating some type of predictability, in the hopes of providing authors and users with a consistent understanding of what can be permissibly used and what will constitute infringement.

I. INTRODUCTION.....	1015
II. A BALANCING ACT – COPYRIGHT PROTECTION AND FAIR USE	1017
A. The Federal Copyright Act.....	1018
B. The Fair Use Doctrine	1021
III. TATTOOS AS COPYRIGHTABLE SUBJECT MATTER	1026
IV. VIDEO GAMES, TATTOOS, AND FAIR USE	1028
A. <i>Solid Oak Sketches, LLC v. 2K Games, Inc.</i>	1029
B. <i>Alexander v. Take-Two Interactive Software, Inc.</i>	1032
C. Considering the Contradictory Authority—Who Said it Best?...	1035
V. CONCLUSION	1041

I. INTRODUCTION

Copyrights, tattoos, and video games have existed independently for many years, each fulfilling their own unique role in society and the law. Each

managed to coexist without much conflict until somewhat recently, when the three were driven together by the increased prevalence of both tattoos and technology in modern society. These developments have created a small niche in the vast realm of copyright law—tattoo copyrights in digital media. Issues have begun to arise as video game manufacturers in particular, along with other media producers in general, use images and digital avatars of tattooed persons in their products, prompting the owners of copyrights on such tattoos to question whether their exclusive rights are being infringed upon.¹ Very little had been said on this matter, and cases addressing this issue are often settled before a court ruling can be issued.² While some of these settled cases have provided helpful insights, the courts have ultimately been left with limited guidance.³ However, some recent developments in the Southern District of New York and the Southern District of Illinois have sought to shed some additional light on the subject, with each jurisdiction independently considering whether the creation of digital avatars sporting copyrighted tattoos constitutes fair use as a matter of law.⁴ Unfortunately, the two cases reached opposite conclusions, therefore failing to provide any reliable consensus.⁵

Solid Oak Sketches, LLC v. 2K Games, Inc. and *Alexander v. Take-Two Interactive Software, Inc.* relied on similar fact patterns in which a popular video game manufacturer used digital recreations of copyrighted tattoos within their games to create a sense of realism for consumers.⁶ In both cases, fair use, among other things, was mounted as an affirmative defense to the accusations of copyright infringement, and in each case, the courts analyzed this defense in accordance with the contributing factors articulated by statute.⁷ While many hoped that the decisions in these two cases would bring about some consensus as to the applicability of the fair use doctrine in the context of copyrighted tattoos in digital media, the ensuing analytical split instead created a divide and presented more questions than answers. As it stands today, tattoo artists, tattoo copyright owners, and video game developers remain scratching their heads as

1. See *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020); *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 817–18 (S.D. Ill. 2020).

2. 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, 1951 (2015).

3. David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 281 (2013). See generally, e.g., Verified Complaint for Injunctive and Other Relief, *Whitmill v. Warner Bros. Ent. Inc.*, No. 4:11-CV-752 (E.D. Mo. June 22, 2011).

4. *Solid Oak Sketches*, 449 F. Supp. 3d at 333; *Alexander*, 489 F. Supp. 3d at 824.

5. *Alexander*, 489 F. Supp. 3d at 824; *Solid Oak Sketches*, 449 F. Supp. 3d at 350.

6. *Solid Oak Sketches*, 449 F. Supp. 3d at 339; *Alexander*, 489 F. Supp. 3d at 817–18.

7. *Solid Oak Sketches*, 449 F. Supp. 3d at 346–47; *Alexander*, 489 F. Supp. 3d at 818, 820–22.

they attempt to understand their rights and obligations within their jurisdictions and, unfortunate as it may be, clear consensus or direction does not appear to be on the horizon.

This Comment seeks to explain how the *Solid Oak Sketches* and *Alexander* courts applied the fair use doctrine to the set of circumstances they were presented with and offer possible explanations as to why they reached such different conclusions, before considering the future of tattoo copyrights as used in video games and digital media. Part II provides an overview of both the federal Copyright Act and the fair use doctrine, briefly discussing their inception, codification, application, and implications. The requirements and ambiguity of the fair use doctrine are given particular emphasis as they present the key intricacies involved in assessing when the use of copyrighted material is permissible. Part III moves to outline the common understanding that tattoos are copyrightable subject matter, explaining how they adhere to each component of the definition of copyrightable subject matter under the Copyright Act. The primary concern surrounding the copyrightability of tattoos—whether tattoos can be considered fixed in tangible medium of expression—is discussed and responded to with scholarly consensus. Part IV then moves to consider video games, tattoos, and fair use as they interact with one another, and provides outlines of the *Solid Oak Sketches* and *Alexander* decisions. These two cases are then analogized to emphasize their key similarities and differences, and possible explanations for the different conclusions reached by each court are considered. The opinions are critiqued and their impacts are carefully considered. Part V concludes this Comment by discussing potential ways to address the current inconsistencies presented by the *Solid Oak Sketches* and *Alexander* holdings in consideration of the overall purpose and intention of copyright law and the concept of fair use.

II. A BALANCING ACT – COPYRIGHT PROTECTION AND FAIR USE

The intention of copyright law as a whole is to strike a balance between the right of copyright users to access creative works and the right of copyright owners to profit off of their creative efforts.⁸ Striking this balance is not an easy task, especially when considering the fact that the public has an interest in supporting each of these seemingly competing rights.⁹ The first portions of the Copyright Act focus on the rights of creators, outlining what qualifies as a

8. *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (“Copyright law inherently balances the two competing public interests . . . the rights of users and the public interest in the broad accessibility of creative works, and the rights of copyright owners and the public interest in rewarding and incentivizing creative efforts.”). This has been called the “owner-user balance.” *Id.*

9. *Id.*

copyrightable work and the exclusive rights granted to copyright owners.¹⁰ The fair use doctrine seeks to effectuate the second half of the copyright balancing act, focusing on the rights of users with the general aim of giving the public “the widest possible dissemination of ideas and information” while continuing to account for an owner’s right to compensation.¹¹

Both copyright law and the fair use doctrine existed prior to their federal codification, and both have come a long way since their first inception, creating an ample body of history, all aimed at promoting the arts, protecting creators, and developing ways to allow the public to use copyrighted material to its benefit. The following sections seek to provide a brief history of the development and codification of two statutes that are essential to an understanding of copyright law and the availability of an affirmative defense of fair use: The Copyright Act of 1976 and the fair use doctrine.

A. The Federal Copyright Act

Federal copyright protection developed long before the passage of the Copyright Act of 1976,¹² which is the guiding legislation relied upon today. The body of law as a whole was first articulated in Britain’s Statute of Anne in 1710, and was first codified in the United States in 1783 with the passage of Connecticut’s state copyright statute, leading the rest of the country to follow suit.¹³ At the federal level, U.S. copyright law was first implicated in 1788 with the ratification of the United States Constitution, which grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴ From there, legislative action quickly followed

10. See 17 U.S.C. §§ 101–106.

11. *Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (6th Cir. 1980).

12. As a general note, the development of federal copyright law is extensive and includes a multitude of different statutory amendments that both expanded the scope of protection and revised copyright term. A comprehensive history of the development of copyright law is not necessary to achieve the purposes of this Comment and a brief summary suffices. Therefore, some amendments are not explored and others are not explored in particular detail.

13. *Timeline: The 18th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_18th_century.html [<https://perma.cc/S9YB-BBEK>]. The Connecticut copyright statute was entitled “An Act for the Encouragement of Literature and Genius” and granted authors general copyright protection for fourteen years, with one optional renewal period. *First General Copyright Law – Today in History: January 29*, CONN. HISTORY.ORG, <https://connecticuthistory.org/first-general-copyright-law-today-in-history/> [[HTTPS://PERMA.CC/274X-QBH8](https://perma.cc/274X-QBH8)].

14. U.S. CONST. art. I, § 8.

with the passage of the Copyright Act of 1790, modeled off of British law.¹⁵ The first Copyright Act established a limited scope that protected books, maps, and charts for a period of fourteen years, with an optional renewal period of an additional fourteen years.¹⁶ The 1790 Act underwent many amendments in the following century, including the expansion of the period of protection to twenty-eight years and the addition of “historical and other prints,” dramatic works, photographs and visual arts to the categories of protectable works.¹⁷

The next piece of copyright legislation, the Copyright Act of 1909, granted protection to published works affixed with a valid copyright notice, leaving published works without an affixed notice in the public domain.¹⁸ Unpublished works were outside of the purview of federal copyright law and authors had to rely on available state protections.¹⁹ Amendments soon followed, extending copyright protection to motion pictures and later to sound recordings.²⁰ The most recent major revision to federal copyright law came with the Copyright Act of 1976, which stands as our current guiding legislation.²¹ As it reads today, the 1976 Act grants federal copyright protection to “original works of authorship fixed in any tangible medium of expression”²² and grants owners of a valid copyright the exclusive rights to do, and to authorize, various acts regarding their original work, including the rights of reproduction, distribution, performance, display, and preparation of derivative works.²³

By definition, something is copyrightable if it is an (1) original (2) work of authorship that is (3) fixed in a tangible medium of expression.²⁴ The standard for originality was initially set forth by the U.S. Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*, where the court explained that originality simply requires that the work be independently created and that

15. U.S. COPYRIGHT OFF., *supra* note 13.

16. *Id.*

17. *Id.* The addition of “historical and other prints” as a copyrightable work occurred in 1802, dramatic works in 1856, photographs in 1865, and visual art in 1870. *Id.* Additional changes to the Copyright Act in this period included an addition of the exclusive rights of authors to public performance for dramatic works and musical compositions and to create derivative works, establishing copyright relations in foreign contexts, and making alterations to the process required to gain copyright protection. *Id.*

18. *Timeline: 1900–1950*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1900-1950.html [<https://perma.cc/4WNE-V7H7>].

19. *Id.*

20. *Id.*

21. *Id.*; 17 U.S.C. § 102.

22. 17 U.S.C. § 102.

23. *Id.* § 106; *see also* 8 DAVID NIMMER, NIMMER ON COPYRIGHT § 106 (2022).

24. Cummings, *supra* note 3, at 285.

it “possess[] at least some minimal degree of creativity.”²⁵ *Feist Publications* articulates a relatively low standard for originality, explaining that only a slight amount of creativity is required to satisfy the requirement.²⁶ To be a work of authorship, the work must be created “by or under the authority of the author.”²⁷ The term “author” remains undefined by the Copyright Act but is understood to be defined by the actions of an author, who “must write, sculpt, compose the work, or give instructions to another person who physically creates it to be considered an author.”²⁸ The statute articulates multiple creations that are considered works of authorship, including literary, musical, and pictorial works, among others.²⁹ As for the requirement of fixation, something is considered fixed when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³⁰ Mediums such as paper, CDs, DVDs, and MP3 files are all examples of tangible mediums contemplated by the statute.³¹

Copyright protection walks a narrow line, attempting to find a happy medium between two conflicting public policy goals. On one hand, society wants to encourage the creation of new and useful works, and therefore looks to incentivize such creations.³² If a creator is not entitled to some benefit for creating, why would they create? Authors would certainly be less motivated to write if, upon publishing their work to the public, they knew that their work could be replicated and distributed for the profit of another. Not only would a lack of copyright protection financially harm the creators of original works, but it would also inherently deter publication and distribution of works simply because a creator would not want to sacrifice the innate sense of satisfaction and pride they get when they work and, as a result, bring something new into the world. Another societal goal is arguably just as important—to allow society to benefit from new ideas and information.³³ One cannot properly “promote the progress of science and the useful arts”³⁴ if artists have no incentive to create

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

26. *Cummings*, *supra* note 3, at 286.

27. 17 U.S.C. § 101.

28. *Cummings*, *supra* note 3, at 287 (citing 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 2.2.2 (3d ed. 2012)).

29. 17 U.S.C. § 102.

30. *Id.* § 101.

31. Brayndi L. Grassi, *Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms*, 42 MITCHELL HAMLINE L. REV. 43, 53 (2016).

32. OFF. OF THE GEN. COUNS., COPYRIGHT AND FAIR USE: A GUIDE FOR THE HARVARD COMMUNITY 1 (2009).

33. *Id.*

34. *Id.*

or if society cannot use such creations. Therefore, copyright law attempts to strike a balance, offering *limited* protection. Protection is only offered to expressions as opposed to “idea[s], procedure[s], process[es], system[s], method[s] of operation . . . principle[s], or discovery,”³⁵ and facts have consistently been held as noncopyrightable subject matter.³⁶ Furthermore, to prevent any monopolies of ideas, even some expressions may not be protectable if such expression can only be expressed in a limited number of ways.³⁷ Alleged copyright infringers have defenses made available to them by statute, ranging from an argument of invalidity to an invocation of the fair use doctrine, which permits certain uses of copyrighted works.³⁸

Copyright law is essential and prevalent in today’s society, especially considering the increased mediums for creating new and unique works made available by the emergence of the Internet. To incorporate new technology and the creations that stem from such advancements, copyright law is continuously changing as Congress amends current codification to integrate new categories of protected works.³⁹ Due to this ever changing canvas, among other factors, modern copyright law and its application requires a more in-depth explanation and analysis than is required for the purposes of this Comment. Copyright law is replete with questions and intricacies that cannot be, and need not be, fully examined at the present moment. However, an operative understanding of the overall definition of copyrightable subject matter and the intentions of copyright law are essential to grasp the rationale behind considering tattoos as copyrightable.

B. The Fair Use Doctrine

While copyright protection is available to authors, this protection is not inalienable. In particular, a work may be subject to what has been deemed “fair use.” As explained by Congress, fair use allows for “a reasonable portion of a copyrighted work [to] be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner’s market for his work.”⁴⁰ In other words, certain uses of an otherwise protectable copyrighted work is permissible if it’s used for a fair and legitimate purpose.

35. 17 U.S.C. § 102(b); *see also* *Baker v. Selden*, 101 U.S. 99, 107 (1880) (holding that an author of a book explaining a system of book-keeping had a valid copyright on the book but not on the system itself.).

36. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991).

37. *See* *Toro Co. v. R&R Prods. Co.*, 787 F.2d 1208, 1212 (8th Cir., 1986).

38. 4 DAVID NIMMER, NIMMER ON COPYRIGHT §§ 13.04, 13.05 (2021).

39. Grassi, *supra* note 31, at 46.

40. STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (1961).

As best articulated by Justice Souter: “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts’ ”⁴¹ Such fair use was primarily intended to ensure that the creativity copyright law intended to foster was not negated by an unwavering dedication to the copyright protection of original works.⁴² In their report on the general revision of U.S. copyright law in 1961, the register of copyrights outlined multiple uses of copyrighted material that had been deemed “fair” by the courts, including quotations used in a review, criticism or scholarly or technical work, as well as use by teachers and students to illustrate lessons.⁴³

As it was first developed, the fair use doctrine was not codified and was given no precise definition.⁴⁴ Instead, it was developed by the courts over an extended period of time and quickly became an implied limitation on the rights of copyright owners.⁴⁵ The scope of the fair use doctrine was determined by various court rulings and remained, in large part, ill-defined.⁴⁶ In developing the concept of fair use and articulating its application, courts found a variety of different uses of copyrighted material to constitute fair use, including quotations of excerpts in a review or criticism, quotations of short passages in scholarly works, summaries with small quotations in news reports, and reproductions of a small part of a work by teachers for educational purposes.⁴⁷

The Copyright Act of 1976 offered the first codification of the fair use doctrine, giving express statutory recognition to this judge-made rule.⁴⁸ As it reads today, the Copyright Act clarifies that fair use of a copyrighted work, including use by “reproduction in copies or phonorecords or by any other means specified . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research” does not constitute an infringement under the law of copyrights.⁴⁹ In determining whether the particular use of a

41. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST., art. 1, § 8, cl. 8).

42. *Id.* at 577.

43. STAFF OF HOUSE COMM. ON THE JUDICIARY, *supra* note 40, at 24; see Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (“The doctrine of fair use limits the scope of the copyright monopoly in furtherance of its utilitarian objective.”).

44. STAFF OF HOUSE COMM. ON THE JUDICIARY, *supra* note 40, at 2.

45. *Id.*

46. *Id.* at 25.

47. *Id.* at 24.

48. DAVID NIMMER, *supra* note 38, at § 13.05.

49. 17 U.S.C. § 107.

copyrighted work is fair under the circumstances, the statute articulates a four factor test to be considered.⁵⁰ Under this test, courts are to consider:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵¹

These factors are not intended to serve as hardline rules where courts award judgment to the party that wins the majority of factors, but instead provide a guide that allows courts to determine whether a finding of fair use would comport with or undermine the intentions of copyright law.⁵²

Though the Copyright Act provides a codified test for courts to follow when considering fair use and brings the doctrine into a solid definitional framework, it is important to consider the legislative history surrounding the statute when looking to the actual application of the fair use doctrine. In particular, the legislature clearly explains that the statutory definition of fair use was intended to provide a broad explanation of the doctrine and to “restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.”⁵³ The courts therefore remain free to adapt the statutory framework to best accommodate particular cases and situations, granting them wide discretion.⁵⁴ In effect, the fair use doctrine not only allows but requires courts to avoid any rigid application of the statute if such application would harm the type of creativity copyright law is intended to protect and foster.⁵⁵

As it sits today, courts follow a general framework of fair use analysis, pieced together by statute and case law. Courts consider whether the use falls under one of the categories articulated in the preamble of the fair use statute as examples of fair use but, despite the articulation of this consideration, it has been deemed by the courts to be inconclusive,⁵⁶ and therefore, makes up a small (and arguably insignificant) portion of the analysis. Courts will then move to the factors outlined by the Copyright Act, first considering the purpose and

50. *Id.*

51. *Id.*

52. See Leval, *supra* note 43, at 1110.

53. H.R. REP. NO. 94–1479, at 66 (1976).

54. *Id.*

55. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

56. *Id.* at 578. See *supra* note 29 for the categories of fair use articulated in the preamble of the fair use statute.

character of the allegedly infringing use.⁵⁷ Under the first factor, courts consider whether the use is transformative in its purpose and content as well as whether the use is commercial as opposed to educational,⁵⁸ with non-commercial use being theoretically more likely to be considered fair while commercial use is more likely to weigh against a finding of fair use.⁵⁹ The courts then consider the second statutory factor, the nature of the copyrighted work, focusing on whether the copied work is close to what copyright law intends to protect, particularly creative and expressive works.⁶⁰ Next, the courts look to the amount and substantiality of the use in question, considering both quantitative and qualitative measures of the use.⁶¹ When looking at the qualitative measure of the use, courts consider whether what has been taken gets at the “heart” of the original work,⁶² while a consideration of quantitative use is self-explanatory, focusing on the literal quantity of work taken. Lastly, the court considers the effect of the use in question on both actual and potential markets, identifying both the markets available and any potential harms to such markets.⁶³

Despite the codification of the fair use defense, its application remains ambiguous, and many scholars and commentators argue that such ambiguity is detrimental to the effectiveness of fair use as a legal doctrine. David Nimmer, an expert in copyright law who has written a multitude of articles and authored *Nimmer on Copyright*, a standard treatise used in copyright practice,⁶⁴ analogized fair use to a fairy tale in which courts use the articulated statutory factors to explain conclusions they reach on the outset of a case rather than use the factors to guide their analysis.⁶⁵ Nimmer supports this assertion by explaining that, due to the subjective nature of a fair use evaluation,⁶⁶ judges, treatise writers, and commentators have all reached different conclusions regarding the process of deciding fair use cases, many of which depart from the

57. *See id.*

58. *Id.* at 578–79.

59. *U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/2W69-7YA8>].

60. *Campbell*, 510 U.S. at 586.

61. *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564 (1985).

62. *Id.* at 564–65.

63. *Campbell*, 510 U.S. at 590.

64. *David Nimmer*, UCLA L., <https://www.law.ucla.edu/faculty/faculty-profiles/david-nimmer> [<https://perma.cc/2HAP-RBZS>] (last visited May 6, 2023).

65. David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 281 (2003). Nimmer notes that this is not solely the fault of the courts—in creating an uncertain and subjective standard to make fair use determinations, Congress itself set the stage for the inconsistency of the fair use doctrine. *Id.*

66. *Id.*

statutory factors.⁶⁷ Both the formulation of the fair use codification in the Copyright Act, along with the available judicial opinions, play a role in this uncertainty.⁶⁸ The statute fails to properly articulate what fair use determinatively is, instead relying on examples and setting forth “factors to be considered” rather than factors to be adhered to.⁶⁹ The courts do not shed much additional light on fair use as “[t]he field is littered with the corpses of overturned opinions.”⁷⁰ Consistency is absent in the plethora of available case law—decisions are frequently divided and articulate different understandings of the purpose, meaning, and application of fair use, and rulings appear to be based on intuition rather than any clear cut rules.⁷¹ With confusion rampant, and inconsistency as commonplace, there is little predictability when considering whether something will be considered “fair,” leaving copyright owners and copyright users alike uncertain as to their rights.

Despite the ambiguity of the fair use doctrine and its application, some scholarly work indicates that it may not be as unpredictable as some have argued.⁷² Empirical studies by thinkers such as Barton Beebe, Pamela Samuelson, and Matthew Sag all look to what courts say they do during a fair use analysis and what they actually do in an attempt to provide some explanation to a seemingly unexplainable doctrine.⁷³ In his own research, Neil Weinstock Netanel, Professor of Law at UCLA, found that fair use determinations seem to increasingly revolve around transformative determinations (i.e, the first fair use factor, considering the nature and purpose of the allegedly infringing work as it compares to the original).⁷⁴ Netanel found that, in all fair use outcomes from a mix of reported district decisions made up of preliminary injunctions, bench trials, and cross motions for summary judgment, defendants won their cases when the court found that their use of

67. *Id.* at 267.

68. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137–38 (1990) (“Most of the recent commentary . . . concludes that the statute merely made the common law’s uncertainties explicit and that the Supreme Court’s opinions . . . either exaggerate the statutory provisions or disregard them.”); Leval, *supra* note 43, at 1105 (“What is most curious about this [fair use] doctrine is that neither the decisions that have applied it for nearly 300 years, nor its eventual statutory formation, undertook to define or explain its contours or objectives.”).

69. Weinreb, *supra* note 68, at 1139 (citing 17 U.S.C. § 107).

70. *Id.* at 1137.

71. Leval, *supra* note 43, at 1107.

72. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 715 (2011).

73. *Id.* at 720–29.

74. *Id.* at 755.

copyrighted material was transformative.⁷⁵ Such findings indicate that there may be some discernable patterns to the application of fair use, but fail to resolve the multitude of questions surrounding the subject.

Today, the fair use doctrine is considered central to modern copyright law and is heavily relied upon by academics, critics, journalists, teachers, filmmakers, writers, and other professionals, all of whom require some freedom when working with copyrighted materials.⁷⁶ It certainly is not going away and will continue to develop as different courts apply the doctrine to different fact patterns. Whether one adheres to the ideas of commentators such as Nimmer, who find fair use to be inconsistently applied by various courts and scholars, or to any of the suggested methods of fair use decision-making articulated by scholars such as Netanel, there is no doubt that there are many open questions regarding fair use and its application, whether that be existence of any type of reliable methodology or the exact nature of such a methodology.

III. TATTOOS AS COPYRIGHTABLE SUBJECT MATTER

In defining the subject matter of copyright, the statute identifies the following as possible copyrightable works of authorship: “Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural work.”⁷⁷ Tattoos are not among the specified potential categories, though the use of the word “include” makes it clear that the list is non-exhaustive, meaning other works of authorship may be granted copyright protection if the other requirements for copyrightability are met. As discussed in Section II.A, a valid copyright, by definition, requires that a work be an (1) original (2) work of authorship that is (3) fixed in a tangible medium of expression.⁷⁸ It is generally understood by scholars that tattoos meet these requirements.⁷⁹ The only arguable point of contention is whether tattoos

75. *Id.* Netanel found that, from 1995–2000, the defendant won 88.89% of preliminary injunctions, bench trials, and crossed motions for summary judgment when the court found their use of an original work transformative. That percentage increased for the given mix of district court cases in 2001–2005 and 2006–2010 to 100%. *Id.*

76. Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. REV. 1371, 1371 (2011).

77. 17 U.S.C. § 102.

78. *See supra* Section II.A.

79. Grassi, *supra* note 31, at 53; *see also* Cummings, *supra* note 3, at 282 (arguing that tattoos are a logical extension of copyright protection as articulated in the Copyright Act); Commander, *supra* note 2, at 1953 (“[I]f a tattoo possesses a mere modicum of originality, qualifies as a work of

are indeed fixed in a tangible medium of expression, the argument being that, as skin ages and changes, the tattoo alters along with it.⁸⁰ However, given the permanent quality of tattoos, this argument can be dismissed without significant controversy.⁸¹

Case law offers up some additional support for the status of tattoos as copyrightable. In *Reed v. Nike, Inc.*, arising in 2009, litigation surrounding a tattoo copyright first emerged.⁸² A Nike television commercial featured Rasheed Wallace, a forward for the Detroit Pistons, along with a digital recreation of a tattoo on his arm.⁸³ In the commercial, Wallace spoke of the tattoo and its significance.⁸⁴ Reed, the tattoo artist who had designed the featured tattoo, claimed that Nike's digital recreation constituted copyright infringement.⁸⁵ While the case was dismissed,⁸⁶ the arguments set forth brought the matter of tattoo copyrights into consideration. The next case to broach this issue handled a dispute that arose after Victor Whitmill, the artist who inked

authorship, and appears fixed in a tangible medium of expression, it should obtain copyright protection according to the elements listed in the [Copyright] Act.”). A notable exception to this general consensus is seen in 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.15 (2021) (“In short, there may be ample reason to deny copyright protection to tattoos *qua* tattoos. This writer opinined . . . that ‘a body, even as augmented, simply is not subject to copyright protection.’ ”). *See also* Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, at 13, *Whitmill v. Warner Bros. Ent. Inc.*, No. 4:11-CV-752 (E.D. Mo. June 22, 2011).

80. Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, *supra* note 79, at 16; *see also* Cummings, *supra* note 24, at 297 (discussing the implications of human flesh in terms of permanence and usefulness).

81. *See* Commander, *supra* note 2, at 1954; *see also* Olga Khazan, *The Secret to a Tattoo’s Permanence: The Immune System*, ATLANTIC (July 22, 2014), <https://www.theatlantic.com/health/archive/2014/07/the-real-reason-tattoos-are-permanent/374825/> [<https://perma.cc/J3VD-5PA4>] (explaining the immune system’s inflammatory response to tattoo ink, which results in its permanence); Doug Lichtman, *Are Tattoos Eligible for Copyright Protection?*, MEDIA INST. (June 15, 2011), <https://www.mediainstitute.org/2011/06/15/are-tattoos-eligible-for-copyright-protection/> [<https://perma.cc/M3CF-2UXY>] (arguing that the fixation requirement is rarely a hurdle in establishing copyrightable subject matter and that tattoos are clearly fixed); Yolanda M. King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 130 (2013) (arguing that tattoos are fixed in a tangible medium of expression). For greater exploration into the argument against classifying human skin as a tangible medium of expression, *see* Declaration of David Nimmer, at ¶ 25, *Whitmill v. Warner Bros. Ent. Inc.*, No. 4:11-CV-752 (E.D. Mo. June 22, 2011) (“[H]uman flesh cannot serve as the “medium of expression” that Congress intended to embody legally protectible authorship”). *See also* Arrielle S. Millstein, *Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression*, 4 PACE INTELL. PROP. SPORTS & ENT. L.F. 135, 136 (2014).

82. Grassi, *supra* note 31, at 47.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 47–48. Both parties stipulated to the dismissal, indicating that they may have settled outside of court. *Id.*

the distinctive face tattoo on professional boxer Mike Tyson, saw a nearly exact replica of his tattoo in advertisements for the film *The Hangover Part II*.⁸⁷ This tattoo appeared on the face of Ed Helms' character and was used in promotional material for the film prior to its release.⁸⁸ Warner Brothers argued that, though the tattoo was indeed similar, it was not a copy of the one appearing on Mike Tyson's face, and that, as a general matter, "tattoos on the skin are not copyrightable."⁸⁹ The case was settled, meaning no official judicial ruling was reached, but the judge that approved the settlement gave the following statement in their oral opinion on the dispute:

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 copyright law.⁹⁰

This opinion provided the first explicit affirmation by a court that tattoos are indeed copyrightable and cleared up some of the muddled water surrounding the subject. Though the case was settled and, therefore, the statement by the judge remains unbinding, it does provide some judicial support for the academic assertions that tattoos are indeed copyrightable subject matter. However, declaring tattoos as copyrightable does not resolve all of the issues surrounding tattoo copyrights and the use of such copyrighted artwork. Many considerations remain in the balance, including, as explored in this Comment, when copyrighted tattoos that appear on individuals can be used in various forms of media, particularly in video games.

IV. VIDEO GAMES, TATTOOS, AND FAIR USE

Although the doctrine of fair use has a long history in the United States,⁹¹ the idea of tattoos as a popular and socially acceptable form of artistic expression is relatively new, and courts have had little opportunity to directly address issues surrounding the fair use of copyrighted tattoos. While cases have arisen over the past few years, very few have made it to trial and, therefore,

87. Verified Complaint for Injunctive and Other Relief, *supra* note 3, at 5–6.

88. *Id.* at 4.

89. Cummings, *supra* note 3, at 281 (emphasis omitted).

90. Grassi, *supra* note 31, at 59 (citing Noam Cohen, *Tattoo Artist Settles Tyson Dispute with "Hangover 2,"* N.Y. TIMES: MEDIA DECODER (June 21, 2011), <https://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/> [<https://perma.cc/BAU8-GCR4>]).

91. *Supra* Section II.B.

limited judicial holdings are available to help decipher any type of clear application in this context. As a general matter, copying and digitally recreating a tattoo to put into a video game that is made available to the public infringes on a copyright owner's rights as protected by the Copyright Act.⁹² Therefore, the key question is whether such infringement is permissible. The following sections of this Comment aim to provide a general overview of two recently decided cases that consider the role copyrighted tattoos play in video games and whether such use is "fair" as a matter of law.

A. Solid Oak Sketches, LLC v. 2K Games, Inc.

In *Solid Oak Sketches*, the court considered a dispute between Take-Two Interactive Software, a major video game developer that annually releases the basketball simulation game NBA2K, and a licensing company owning valid copyrights on tattoos appearing on the bodies of multiple players within the game.⁹³ To embody the action and atmosphere of a real professional basketball game, Take-Two uses life-like renderings of various NBA players, which include exact copies of the visible tattoos on players Eric Bledsoe, LeBron James, and Kenyon Martin.⁹⁴ Across these three players and their virtual avatars, five separate copyrighted tattoos exclusively licensed to Solid Oak Sketches, LLC, are depicted, but are used in a limited capacity.⁹⁵ Solid Oak Sketches sued Take-Two for their use of the licensed tattoos and, in response, Take-Two argued multiple defenses, including an affirmative defense under the fair use doctrine.⁹⁶

In assessing the facts of the case and the issues at hand, the court had to confront a question that had not yet been fully litigated: How should the fair

92. Commander, *supra* note 2, at 1955 ("Copying the design of a real tattoo and placing it on a digital version of a player in the video game constitutes a reproduction of the tattoo, infringing on the tattoo artist's exclusive reproduction right. Selling millions of copies of the popular video game violates the artist's exclusive right to distribute. Recreating the original tattoo in a digital format explicitly creates a derivative version of the original work, violating the artist's exclusive right to all derivative works.").

93. Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020).

94. *Id.*

95. *Id.* The tattoos took up a small portion of the overall video game data, *id.*, and were only displayed on three out of 400 available player avatars. *Id.* at 348. Those playing the video game were also generally unable to see the tattoos clearly during gameplay as their view was often obstructed by other elements of the game and because the tattoos were depicted in a much smaller size than they appear in real life. *Id.*

96. *Id.* at 339, 343, 346. Take-Two also argued that their use of the tattoos was *de minimis* and was authorized by an implied license. *Id.* at 344–46. The court determined that, as a matter of law, Solid Oaks could not prove that Take-Two's use was substantially similar to the original and therefore, not *de minimis*. *Id.* at 345. The court also concluded that Take-Two was entitled to summary judgment dismissing the plaintiff's claims based on the existence of an implied license. *Id.* at 346.

use doctrine be applied to exact replications of tattoos in video games?⁹⁷ The court first noted that a fair use determination is a “mixed question of fact and law”⁹⁸ that is both “open-ended and context-sensitive,”⁹⁹ but still open to summary judgment when there are no genuine issues of material fact at play.¹⁰⁰ The court then dove into an analysis of fair use under the general framework articulated in the Copyright Act and considered the purpose and character of the use of the tattoos in the video game; the nature of the tattoos themselves; the amount and substantiality of the portion of the tattoos used in the game; and the effect the use of the tattoos in the video game had on the value of the tattoos themselves.¹⁰¹

The court explained that, in analyzing the purpose and character of a use of copyrighted works (i.e., the first factor in the fair use analysis), the determination hinges on whether the use could be characterized as transformative, meaning the use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁰² In deciding whether the use was transformative, the court utilized a test articulated by the Second Circuit in *Bill Graham Archives*¹⁰³ and considered (1) whether the two works have different purposes; (2) the size of the reproductions; (3) whether the expressive value of the reproduction is minimized; and (4) the proportion of the copied material,” in addition to a fifth factor articulated in *Campbell v. Acuff-Rose Music, Inc.*,¹⁰⁴ requiring consideration of (5) whether the use of the copied material was commercial in nature.¹⁰⁵ The court found that all five of these considerations weighed in favor of Take-Two, making the first factor weigh in favor of a finding of fair use.¹⁰⁶ Take-Two’s purpose in displaying the tattoos was to accurately depict each player’s likeness, which was different from the tattoo’s original purpose of expressing the players artistically, and the tattoos as displayed in the video game were much smaller than the tattoos that appeared on the players in real

97. *Id.* at 346–47.

98. *Id.* at 347 (quoting *Swatch Grp. Mgmt. Serv. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 81 (2d Cir. 2014)).

99. *Id.* (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

100. *Solid Oak Sketches*, 449 F. Supp. 3d at 347 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006)).

101. *Id.*

102. *Id.* (citing *Bill Graham*, 448 F.3d at 608).

103. *Id.*

104. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

105. *Solid Oak Sketches*, 449 F. Supp. 3d at 347.

106. *Id.* at 347–48.

life.¹⁰⁷ Furthermore, the expressive value of the tattoos was minimized in the game as they were seen infrequently, unclearly, and were not actually included to represent their expressive value, and the tattoos only made up a small percentage of the video game data, making the proportion of the copied material quite small.¹⁰⁸ Lastly, though Take-Two's use of the tattoos was commercial in nature, such commercial benefit was merely "incidental" as consumers did not buy the game for the tattoos but rather to engage in the interactive experience offered.¹⁰⁹

Moving on in their analysis, the court considered the nature of the copyrighted work under the second fair use factor, utilizing an analysis structure articulated by the Second Circuit in *Blanch v. Koons*,¹¹⁰ which directed the court to consider whether the work was expressive and creative or factual in nature and whether the work was published or unpublished.¹¹¹ The court focused primarily on the first consideration as it was undisputed that the tattoos had previously been published, and reached the conclusion that the tattoos were "more factual than expressive."¹¹² The tattoos were "each based on another factual work or comprise[d] representational renderings of common objects and motifs that are frequently found in tattoos," which weighed in favor of a fair use determination.¹¹³

Under the third fair use factor, considering the amount or substantiality of the portion of the copyrighted work used, the court noted that, under *Bill Graham*, the fact that Take-Two certainly copied the tattoos in their entirety did not preclude a finding of fair use as the exact copying was done "to effectuate the transformative purpose of creating a realistic game experience."¹¹⁴ Furthermore, the court noted that the tattoos were reduced in size, which limited their ability to be seen as well as their impact on the viewer, and that they were

107. *Id.* at 347.

108. *Id.* at 348. In determining that the tattoo's expressive value was minimized in their depiction in the video games, the court also noted that the tattoos were not easily observable and were presented alongside other audio and visual elements. *Id.*

109. *Id.*

110. *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006).

111. *Solid Oak Sketches*, 449 F. Supp. 3d at 348.

112. *Id.*

113. *Id.* The tattoos in question were defined and described by the court as follows: (1) "Child Portrait" was a copy of a baby picture LeBron James provided his tattoo artist with; (2) "330 and Flames Tattoo" was the shading in of an already existing outline of the number 330 and adding flames; (3) "Script with a Scroll, Clouds and Doves Tattoo" was copied from a design in the tattoo artists notebook; (4) "'Wizard' Tattoo" was copied directly from a design that Kenyon Martin saw displayed in the tattoo parlor and consists of a grim reaper holding a basketball; and (5) "Basketball with Stars and Script" was designed by the tattoo artist with input from Eric Bledsoe. *Id.* at 340–41.

114. *Id.* at 349.

barely recognizable within the game, all of which weighed in favor of a finding of fair use.¹¹⁵ In confronting the final factor, the effect of the use on market value, the court articulated precedent, stating that transformative uses “by definition[] do not serve as substitutes for the original work.”¹¹⁶ The court concluded that the fourth factor weighed in favor of a fair use determination because the transformative use of the tattoos in the game could not serve as substitutes for the original work.¹¹⁷ Furthermore, the court reasoned that, because there was no current market for the licensing of tattoos for use in video games or other similar forms of media, and no such market was likely to develop, there was no impact on the marketplace.¹¹⁸ The court ultimately determined that all four factors weighed in favor of fair use and that “no reasonable fact finder could determine that [Take-Two’s] use of the [t]attoos in NBA 2K was not fair use.”¹¹⁹ They therefore held that Take-Two was entitled to such determination as a matter of law.¹²⁰

Broken down to its bare meaning, the *Solid Oak Sketches* court determined that the use of copyrighted tattoos on avatars in video games is fair use. Of course, this is an overgeneralization as many factors were at play but, as a precedent, the court seems to shine a green light for current and future video game developers using exact replications of copyrightable tattoo design, especially when those tattoos are used merely to create a sense of realism and offer an immersive experience.

B. Alexander v. Take-Two Interactive Software, Inc.

The *Alexander* court decided a dispute between tattoo artist Catherine Alexander, who had tattooed professional wrestler Randy Orton, and Take-Two, the creator of the popular video game WWE2K, which depicted Orton as he appears in real life to convey a realistic game-play experience.¹²¹ To properly convey Orton’s likeness, Take-Two copied multiple tattoos that appeared on Orton’s body, which Alexander had valid copyrights to, and digitally reproduced them on Orton’s virtual avatar.¹²² Take-Two moved for summary judgment on the infringement claim, arguing, among other things, that their use

115. *Id.*

116. *Id.* (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014)).

117. *Solid Oak Sketches*, 449 F. Supp. 3d at 350.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812, 817 (S.D. Ill. 2020). Note that the defendant in *Alexander* is the same defendant as in *Solid Oak Sketches*.

122. *Id.* at 817–18.

of Alexander's copyrighted tattoos constituted fair use as a matter of law.¹²³ The *Alexander* court was faced with the same question that was presented to the *Solid Oak Sketches* court: How can the fair use doctrine be applied to the use of copyrighted tattoos in video games? And, like the *Solid Oak Sketches* court, this court was not given much precedent to rely upon.

Noting that the applicability of the fair use doctrine is a "mixed question of law and fact," the court considered the four fair use factors articulated by statute: purpose and character of use; the nature of the work; amount and substantiality; and the effect on the market.¹²⁴ In assessing the purpose and character of Take-Two's use of the tattoos, the court structured its analysis on *Bill Graham Archives v. Dorling Kindersley Ltd.*,¹²⁵ which Take-Two heavily relied upon to argue that their use of the tattoos was so small and so difficult to observe that it was transformative.¹²⁶ The court provided a succinct summary of the determination in *Bill Graham*:

In *Bill Graham*, the Second Circuit Court of Appeals affirmed summary judgment in favor of the defendant publishers of *Grateful Dead: The Illustrated Trip*, a 480-page coffee table book that provides a history of the Grateful Dead through the use of a timeline and over 2000 images. The plaintiff claimed to own the copyright to seven of the images which the defendants reproduced without permission. The court concluded that the first factor weighed in the defendants' favor because their purpose in using the copyrighted image (as historical artifacts to document the Grateful Dead concert events featured in the book's timeline) was plainly different from the plaintiff's dual purposes of artistic expression and promotion—the images were originally used as concert posters to generate public interest in the band's upcoming events.¹²⁷

The court distinguished the *Bill Graham* court's finding that the purpose and character of the coffee table book clearly weighed in favor of a finding of fair use from the present case, reasoning that, unlike in *Bill Graham*, there were material factual disputes as to the purpose and character of the use of the tattoos.¹²⁸ Alexander claimed she created and tattooed the original images to display them on Orton's body and that Take-Two similarly copied the tattoos

123. *Id.* at 818. Take-Two also argued that their use of the tattoos was authorized via an implied license and that the tattoos were a *de minimis* part of the video game. *Id.* at 818, 820, 822–23. The court denied summary judgment on both of these arguments. *Id.* at 820, 823.

124. *Id.* at 820–21 (quoting *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002)).

125. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

126. *Alexander*, 489 F. Supp. 3d 812 at 821.

127. *Id.* (citations omitted).

128. *Id.*

into their video game with the purpose of displaying them on Orton's virtual body, and argued that, contrary to Take-Two's claims, the tattoos were "prominently displayed and clearly visible."¹²⁹ Therefore, the first factor of the fair use analysis weighed against the granting of summary judgment.¹³⁰

The court moved on in its analysis and addressed the second factor, finding the nature of the tattoos to be expressive rather than factual, weighing against a finding of fair use as "[t]he art of creating a tattoo naturally entails creative and expressive efforts."¹³¹ In assessing the third factor, amount and substantiality of the allegedly infringing use, the court noted that the focus of this determination is not on the amount of the work taken but rather "the extent to which the protected elements were copied from the original and whether that amount was needed to further the purpose."¹³² The court did not explicitly make a determination as to whether what was used by Take-Two was too substantial, but notes that, though exact copying does not necessarily preclude a finding of fair use, it does mitigate against such a finding, and articulates each party's arguments on this matter.¹³³ While Take-Two argued that it was necessary to copy each tattoo exactly to convey a sense of realism, Alexander argued that Take-Two failed to make any effort to ensure they only took the parts of the tattoo that would be necessary to create the sense of realism they were aiming for.¹³⁴

As for the fourth and final factor, the court noted that assessing market harm required a consideration of whether frequent and unregulated conduct such as that of the defendant would cause a substantial adverse impact on any market for the original work.¹³⁵ Take-Two argued that Alexander was attempting to create an entirely new market for licensing tattoos, which had not, and likely would not, develop.¹³⁶ In response, Alexander asserted that Take-Two's use of her tattoos would cause other video game manufacturers to take advantage of the opportunity to avoid paying licensing fees by simply arguing that they were attempting to create a sense of realism.¹³⁷ The court explained that market harm was a "matter of degree" and that the importance of the factor "varies depending on the amount of harm and relative strength of the showing on the other

129. *Id.*

130. *Id.*

131. *Id.* at 822.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

136. *Alexander*, 489 F. Supp. 3d 812 at 822.

137. *Id.*

factors.”¹³⁸ Given the fact that the additional factors did not weigh in favor of a finding of fair use as a matter of law, the court ultimately held that a fair use determination as a whole could not be made as a matter of law, and therefore could not be resolved at the summary judgment stage.¹³⁹

The *Alexander* court reached the overall conclusion that, under the facts of the case at hand, the use of copyrighted tattoos on avatars in video games was not fair use as a matter of law.¹⁴⁰ In considering what this decision means in the larger picture of tattoo copyrights in digital game mediums, it is essential to note that refusing summary judgment does not equate to a finding that a certain use was not fair. Rather, the court simply found that there were too many issues of fact at play, which required the perspective and insight of a jury.

C. Considering the Contradictory Authority—Who Said it Best?

Solid Oak Sketches and *Alexander* considered incredibly similar fact patterns. The same defendant, Take-Two Interactive Software, developed video games that aimed to create a realistic and immersive depiction of a professional sporting event.¹⁴¹ To do so, Take-Two used actual professional athletes and digitally recreated their likeness, inserting them into the video game as avatars for players to select.¹⁴² In each case, some of the included professional athletes sported copyrighted tattoos and, to enhance the realistic effect of the game, Take-Two digitally recreated these tattoos and placed them on the avatars within the game, prompting the owners of the copyrights on the tattoos to file suit for infringement.¹⁴³ In neither case did Take-Two have an express license from the copyright owners to utilize the tattoos, and in both cases Take-Two mounted the same defenses: implied license, de minimis use, and fair use.¹⁴⁴ Furthermore, both cases heavily rely on *Bill Graham* when considering whether the purpose and character of the allegedly infringing use was transformative.¹⁴⁵ However, the *Solid Oak Sketches* court and the *Alexander* court reached

138. *Id.* (citing *Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 987 (N.D. Ill. 2019)).

139. *Alexander*, 489 F. Supp. 3d 812 at 822.

140. *Id.*

141. *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020); *Alexander*, 489 F. Supp. 3d at 817.

142. *Alexander*, 489 F. Supp. 3d at 817; *Solid Oak Sketches*, 449 F. Supp. 3d at 339.

143. *Solid Oak Sketches*, 449 F. Supp. 3d at 339; *Alexander*, 489 F. Supp. 3d at 817–19.

144. *Alexander*, 489 F. Supp. 3d at 819–20; *Solid Oak Sketches*, 449 F. Supp. 3d at 343, 346.

145. *Solid Oak Sketches*, 449 F. Supp. 3d at 347; *Alexander*, 489 F. Supp. 3d at 821.

opposite conclusions. In the former, the court found fair use as a matter of law¹⁴⁶ and, in the latter, the court found that there was not fair use as a matter of law.¹⁴⁷

Perhaps most important, at least in the eyes of Neil Weinstock Netanel and his empirical studies on fair use findings,¹⁴⁸ are the court's opposite findings in relation to the first fair use factor, purpose and character, which heavily relies on whether the allegedly infringing use can be considered transformative. As previously mentioned, both courts used *Bill Graham* in their analysis, though they applied it differently.¹⁴⁹ The *Solid Oak Sketches* court explicitly laid out each of the factors used to consider transformative use under *Bill Graham* and underwent an in-depth analysis of each individual factor as it applied to their present case, ultimately finding that the defendant's use of the tattoos was indeed transformative.¹⁵⁰

In contrast, the *Alexander* court compared the facts of its present case with *Bill Graham* as a whole, not mentioning the specific test articulated by the precedent or directly applying any of the factors to the case at hand, and reached the conclusion that the defendant's use was not transformative.¹⁵¹ Perhaps even more interesting is the fact that, in assessing the purpose of both the defendant and plaintiff in creating and replicating the tattoos, both courts identified different purposes. The *Solid Oaks* court found that the purpose of the tattoo artist was to express the players artistically, *in contrast with* the video game manufacturer's purpose of accurately depicting the athlete's likeness.¹⁵² The *Alexander* court believed the tattoo artist's purpose was to display the images on the athlete's body, *similar to* the video game manufacturer's purpose of displaying the images on the athlete's virtual body.¹⁵³

Neither of these interpretations seem irrational or far-fetched—the tattoo artist was certainly attempting to express the athlete artistically through their tattoos, seeing as self-expression is commonly a reason for getting a tattoo in the first place, and, of course, the tattoo artist was aiming to ink the image onto the athlete's body. The same can be said for the courts' interpretation of the video game manufacturers' purpose as they were trying to create a realistic and immersive experience by placing the image of the tattoo on the athlete's virtual avatar. However, though both explanations remain reasonable, they brought

146. *Solid Oak Sketches*, 449 F. Supp. 3d at 350.

147. *Alexander*, 489 F. Supp. 3d at 821–22.

148. See Netanel, *supra* note 72; *supra* notes 72–75 and accompanying text.

149. *Solid Oak Sketches*, 449 F. Supp. 3d at 347; *Alexander*, 489 F. Supp. 3d at 821.

150. *Solid Oak Sketches*, 449 F. Supp. 3d at 347.

151. *Alexander*, 489 F. Supp. 3d at 821.

152. *Solid Oak Sketches*, 449 F. Supp. 3d at 347.

153. *Alexander*, 489 F. Supp. 3d 812 at 821.

about drastically different results. Perhaps this can be attributed to the fact that courts are made of people, who differ in their thinking and understanding of the world around them, or perhaps to the abstract nature of the art of tattoos. No matter how this divergence can be explained, it offers no insight into whether replicating tattoos in video games is *conclusively* transformative use.

Another interesting differentiation between the cases, which is most obvious when holding the two in hand, is their length. The *Solid Oak Sketches* court's fair use analysis appears larger and more comprehensive, spanning across five pages¹⁵⁴ while *Alexander* spans across three.¹⁵⁵ This may be because the *Solid Oak Sketches* court was granting Take-Two's motion for summary judgment¹⁵⁶ and felt a need to better explain their rationale, while the *Alexander* court was less concerned with being comprehensive considering the fact that the fair use issue would be handled by the trier of fact.¹⁵⁷ Another contributing factor is likely the fact that the *Solid Oak Sketches* court elected to go into a more in-depth consideration of *Bill Graham*¹⁵⁸ while the *Alexander* court stuck to a higher-level overview and comparison.¹⁵⁹ Yet another potential explanation is that the *Alexander* court elected to take what could be considered a judicial dodge—rather than making a determination on whether the use of the tattoos in question was fair, the court balked on the question and instead sent the issue along to a jury. While this comports with the emphasis the United States court system places on juries as triers of fact and accommodates the general understanding that fair use is a mixed issue of fact and law,¹⁶⁰ it does not adhere to the overwhelming precedent that shows that fair use can be determined at the summary judgment stage as a matter of law if the facts align.¹⁶¹ Rather than make a clear determination, the *Alexander* court elected not to establish a definitive precedent, sending the matter along to jurors who are likely no better equipped to work their way through the complexities of fair use, which may be viewed as a failure to support the primary purpose of copyright law—“[t]o promote the Progress of Science and useful Arts.”¹⁶²

154. *Solid Oak Sketches*, 449 F. Supp. 3d at 346–50.

155. *Alexander*, 489 F. Supp. 3d at 820–22.

156. *Solid Oak Sketches*, 449 F. Supp. 3d at 350.

157. *Alexander*, 489 F. Supp. 3d at 821, 824.

158. *Solid Oak Sketches*, 449 F. Supp. 3d at 347–48.

159. *Alexander*, 489 F. Supp. 3d at 821.

160. *Solid Oak Sketches*, 449 F. Supp. 3d at 347; *Alexander*, 489 F. Supp. 3d at 821.

161. See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003); *Morris v. Young*, 925 F. Supp. 2d 1078, 1082 (9th Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006); *Hosseinizadeh v. Klein*, 276 F. Supp. 3d 34, 41 (2d Cir. 2017).

162. U.S. CONST. art. I, § 8; *Alexander*, 489 F. Supp. 3d at 824.

This all begs a very important question: How can such starkly different conclusions be reached considering nearly identical fact patterns and reliance on the similar case law? One possible answer can be found in the ambiguity of the fair use doctrine, as discussed in Section II.B.¹⁶³ Scholars such as David Nimmer would most certainly attribute the *Solid Oak Sketches* and *Alexander* courts' differing conclusions to the fairy tale that is the fair use doctrine, which encourages the court to use the statutory fair use factors as a way to explain their conclusions rather than as a decisive guide.¹⁶⁴ Under Nimmer's construction, each court likely made their determination before turning to the statutory factors, meaning the factors themselves had little to no weight. Other academics would similarly fail to reach consistent conclusions given the surplus of scholarly theories surrounding how courts actually decide fair use cases.¹⁶⁵ Perhaps courts do use the fair use factors as a way to support their intuitive conclusions,¹⁶⁶ or perhaps they more systematically reach their conclusions by putting particular emphasis on transformative use determinations¹⁶⁷—the plethora of available articles, theories, and empirical studies point every which way, making a clear determination nearly impossible. This lack of clarity seems to explain how two courts could end up on opposite sides of the spectrum, even when they are based on similar fact patterns and rely on similar case law as precedent. This leaves us with an unsatisfying realization—there was no “right” or “wrong” answer to the question the *Solid Oak Sketches* and *Alexander* courts confronted.

It is important to note that the issues discussed in this Comment are incredibly complex and cannot be fully explored within the confines of these limited pages. The purpose of this Comment is not to exhaustively explain how the doctrine of fair use operates, nor to pinpoint exactly how it should be applied when dealing with tattoos in digital platforms. Instead, this Comment seeks to shed some light on an issue that has slowly but surely gained momentum in U.S. copyright law and to highlight the many difficulties it presents from both a theoretical and practical standpoint. Tattoos are by no means new to society—they appear in everyday life, on celebrities and everyday people alike. As a result of their prevalence, large businesses have stepped into the tattoo copyright game, somewhat inadvertently, by utilizing tattooed individuals in their promotions and advertising, and such use will continue given the increased

163. *Supra* Section II.B.

164. Nimmer, *supra* note 65, at 281.

165. *Id.* at 267.

166. Leval, *supra* note 43, at 1107.

167. Netanel, *supra* note 72, at 755.

popularity and visibility of tattoos.¹⁶⁸ With such uses becoming commonplace, the question of whether large companies using tattooed persons in media campaigns owe anything to tattoo artists or other individuals holding copyrights in tattoos demands an answer.

This is a particularly prevalent consideration in the entertainment industry where, in recent years, filmmakers, television networks, and video game producers have had to come to terms with settling infringement lawsuits as they arise.¹⁶⁹ This practice is not sustainable, and has even been deemed “unreasonable and absurd,” as it would require those in the entertainment industry to work copyright infringement settlements into a budget whenever they elect to use a tattooed actor.¹⁷⁰ Such an outcome could have implications not only on the entertainment industry as a whole, but may affect individuals appearing in all types of media. While it is unlikely that a producer, designer, or programmer would avoid using a famous individual in their production, product, or game due to the presence of a copyrighted tattoo on their body, they may take the presence of tattoos into consideration when considering less prominent roles. Furthermore, in the context of video games specifically, consumers may suffer if recognizable tattoos are omitted from the body of popular players and the realism of the whole experience is decreased by such an inconsistency. Therefore, the issue of tattoo copyrights in media affects more than just copyright owners and users and instead reverberates through many elements of our society.

Though tattoos are generally considered copyrightable,¹⁷¹ the question of their fair use in video games and other forms of digital media remains a large question mark in copyright law. Some hoped that an eventual ruling in *Solid Oak Sketches* would provide some much-needed insight,¹⁷² and perhaps it did, though the *Alexander* decision, which came soon after, once again clouded the waters. This split cannot be blamed solely on the courts. While the *Solid Oak Sketches* and *Alexander* courts each applied the fair use doctrine differently, they did so due to a lack of clarity and predictability in the doctrine itself. However, the fair use doctrine is not meant to be clear and precise considering copyright law’s main objective of encouraging creativity that benefits society. As well stated by Pierre Level in his article, *Towards a Fair Use Standard*, “all

168. Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. INTELL. PROP. L. 29, 70 (2014).

169. Adrianna D. Chronis, *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works*, 104 IOWA L. REV. 1483, 1512 (2019).

170. *Id.* at 1513.

171. *See supra* Section III.

172. Chronis, *supra* note 169, at 1514.

intellectual creative activity is in part of a derivative. There is no such thing as a wholly original thought or invention.”¹⁷³ Creating a conclusive fair use test and utilizing required elements rather than contributing factors would hamper the court’s ability to act in the best interest of society as a whole, which undermines the intention of copyright law. The court must balance society’s interest in new and improved creative works against society’s interest in protecting the creators of original works, and such a balancing act cannot be done with bright-line rules.

Despite the lack of a definitive “right” answer, the argument that digitally recreating tattoos and placing them on the digital avatars of individuals who have such tattoos in real life constitutes fair use as a general matter is largely convincing. Fair use itself is intended to allow copyright law to operate as it was intended, giving individuals the opportunity to utilize copyrighted works in ways that are deemed legitimate and that fulfill the purpose of copyright by promoting artistic and creative progress.¹⁷⁴ Copyright law aims to encourage creativity in ways that benefit society, and video games embody both creativity and societal benefit.¹⁷⁵ Of course, in accordance with the values of copyright law, it is essential to consider the impact categorizing use of tattoos in video games, and in digital media in general, would have on the artists themselves.¹⁷⁶ Tattoo artists would certainly feel the effects of deeming the use of their tattoos in video games “fair” as they would lose out on potential licensing revenue and would lose control over how their work is used. However, a tattoo artist’s primary market is the customers they ink. Therefore, while they would lose some potential licensing revenue, their actual market would likely not be affected, especially considering the fact that someone who wants a tattoo on their body cannot utilize a digitally recreated tattoo as a substitute. In fact, it is completely plausible to believe that allowing video game manufacturers to digitally recreate copyrighted tattoos would increase exposure to the art and the artist, perhaps benefiting the marketplace.

173. Leval, *supra* note 43, at 1109.

174. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).

175. Video game designers and producers must exercise creativity as they create new worlds, design scenery, storyboard, create collaborative gaming features, and produce various illustrations. Kathryn Pomroy, *Components of Video Game Design*, ART CAREER PROJECT (July 1, 2019), <https://theartcareerproject.com/components-video-game-design/> [https://perma.cc/V47P-SPB7]. Society is most certainly affected by, and benefits from, video games, with the industry valued at billions of dollars and demand growing rapidly. *Id.*

176. *See* Triangle Publ’ns, Inc. v. Knight-Ridder Newspapers, Inc., 629 F.2d 1171, 1174 (6th Cir. 1980) (explaining copyright law and the fair use doctrine’s dual purpose of protecting the rights of users and owners alike).

While there is a possibility that allowing such an application of fair use may result in a benefit to tattoo artists and, at the very least, would fail to affect their primary market, video game manufacturers would only suffer if licenses to use copyrighted tattoos were required. Budgets would increase as producers and manufacturers assess licensing costs and prepare for the strong possibility of litigation. In turn, consumers would suffer from a decrease in the amount of released games or an increased price of individual games if production costs increase, or from a less immersive game experience if certain details aimed at enhancing realism are omitted. Such would act against the purposes of copyright law and the fair use doctrine and, in considering the balancing act the two undergo as they attempt to protect both copyright users and copyright owners, users would suffer substantially, all to provide little additional benefit to owners. For this reason, it seems that tattoo copyrights in video games fit squarely within the confines of the fair use doctrine, making the *Solid Oak Sketches* court's ruling most conducive with the purpose of copyright law as a whole.

V. CONCLUSION

Despite the fact that copyrighted tattoos displayed on avatars in video games arguably comports with the fair use doctrine, tattoo artists, copyright owners, and media producers will unfortunately have to await additional instruction from the courts or the legislature before they can feel comfortable assessing whether a particular use is infringing. Creators and users of copyrighted material alike must pay careful attention to their particular jurisdictions and any rulings the courts may hand down while recognizing the inherent risks that arise from such unpredictability. In hopes of mitigating risk, tattoo artists can require customers to sign waiver forms in the hopes of deterring them from commercially displaying their tattoos, especially when their customers are frequently seen in different forms of media. At the other end of the table, those looking to feature or include artistic works in their own productions can thoroughly assess any copyright protections at play, and could even attempt to contact artists at the outset to avoid potential litigation. However, producers and developers may not be properly incentivized to take preventative action as alerting artists of potential rights to compensation could be disadvantageous. Instead of calling attention to potential infringement, users of an artistic work may simply stand by and hope that an artist remain oblivious.

While creators and users continue to grapple with these issues in practice, the government can consider ways to offer up some additional clarification. However, legislative action should be considered and executed with great caution, as codifying a specific standard could greatly inhibit the fair use doctrine's flexibility. Furthermore, in updating the Copyright Act to reflect the

fair use doctrine, the legislature expressed its desire to provide a broad definition that encapsulated the already existing judicial doctrine without making any alterations in its application. Therefore, it seems unlikely that Congress would even have any desire to offer up clearer rules because it would contradict their already stated intentions. While formal legislative action is unlikely, and perhaps even discouraged, administrative guidance may be possible. The U.S. Copyright Office could set forth some guidance that could not only instruct practitioners in their day-to-day operations, but would give courts some more insight into how they would prefer such situations be handed.

While there is potential for legislative or administrative guidance and intervention, it is more likely that the application of the fair use doctrine to copyrighted tattoos in video games and other forms of media will be refined by the courts. Allowing for the courts to further develop these principles will maintain the purposes of copyright law and the fair use doctrine—to provide protection and incentive to authors while simultaneously promoting the public interest. It will also help retain the judge-made nature of the fair use doctrine and accommodate the fact-specific inquiries that are often required when considering the abstract nature of artistic works. Along these lines, it is important that courts aim to set forth clear and well-reasoned opinions that set a given standard in their particular jurisdiction. In the absence of such opinions, copyright owners and users alike, particularly tattoo artists and electronic media developers and providers, will be left to tiptoe around one another as they attempt to navigate this uncertain terrain.

EMILIE SMITH*

* J.D. 2023, Marquette University Law School, B.A. 2019, St. Norbert College. I would like to thank my wonderful fiancé, family, and friends for their endless support and encouragement throughout my time at Marquette University Law School and with the *Marquette Law Review*. I would also like to extend a sincere note of gratitude to Attorney Heidi Thole, who has encouraged and fostered my love of intellectual property law throughout the past few years and assisted in my selection of the topic of this Comment. Lastly, I would like to thank the *Marquette Law Review* for not only giving me the opportunity to share my work, but for their hard work in refining and finalizing this Comment.