



court sides with video game producer over the use of athlete's tattoos

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On March 26, 2020, the district court for the Southern District of New York issued a landmark ruling in a case closely followed by the film, video game, sports and tattoo industries. Where for several years the only direct precedent on the issue of expressive tattoos in expressive works was limited to early rulings in cases like that involving *The Hangover* or relegated to settlements, *Solid Oak Sketches, LLC v. 2K Games, Inc.* firmly resolved all doubt. In the ruling, the court granted the defendant video game publishers' motion for summary judgment on three separate grounds, finding that the defendants' depiction of basketball superstars' tattoos in a "NBA2K" video game was: (1) a "de minimis" use, (2) allowed under the players' implied license given by the tattoo artists, and (3) a fair use. This decision comes almost exactly two years after Judge Swain denied the defendants' motion to dismiss the claims.

On the first ground, the court looked to precedent regarding "de minimis" use principles in other contexts. Ultimately, the defendants' video evidence convinced the court that NBA2K's depiction of tattoos on basketball superstars LeBron James, Kenyon Martin and Eric Bledsoe (and none of the other over 400 available players in the game) was "de minimis" and therefore "no reasonable trier of fact could find the Tattoos as they appear in NBA 2K were substantially similar to the Tattoo designs licensed to Solid Oak." The court found that the small size and distorted angles of the tattoos' display as part of the game play was "indiscernible to the average game user," making the plaintiff's copyright expression insufficiently observable to rise to the level of an actionable taking.

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