



of ink and cool jazz: california jury finds for defendants in copyright infringement case

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On Friday, January 26, 2024, a jury in the Central District of California rendered a verdict holding that celebrity tattoo artist Kat Von D and related entities did not infringe photographer Jeffrey Sedlik's copyrighted photo of Miles Davis by tattooing Davis's image onto a friend's arm. The jury found that the works were not substantially similar.

Plaintiff Jeffrey Sedlik filed a complaint against Defendant Katherine Von Drachenberg in February of 2021, alleging copyright infringement, vicarious copyright infringement, contributory copyright infringement, and removal of copyright management information in violation of 17 U.S.C. § 1202. The complaint alleged that Kat Von D made unauthorized reproductions and derivatives of the Miles Davis portrait by posting an image of herself on Instagram tattooing a replication of the Miles Davis portrait onto her friend Blake Farmer's arm. Sedlik further claimed that Kat Von D posted and circulated images and videos containing the allegedly duplicated image of Miles Davis in tattoo form.

Both parties moved for summary judgment on the copyright infringement claim, as to which the defendants asserted the affirmative defense of fair use. In ruling on the motions, Judge Fischer conducted a fair use analysis, considering and weighing the determinative factors: "(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." 17 U.S.C. § 107. The Court found that Defendants had "met their burden of showing the Tattoo has a purpose or meaning distinct from that of the Portrait by virtue of the way Kat Von D changed its appearance to create what she characterizes as adding movement and a more melancholy aesthetic." But because Plaintiff raised a triable issue in response, the Court found that the



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decision as to whether the Tattoo was transformative was more appropriately left to a jury. The Court also found, after weighing all the fair use factors, that the issue of fair use as to the Tattoo and the associated social media posts was more appropriately left to a jury. However, the Court stayed the case pending the Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

After the Supreme Court issued its ruling in *Warhol*, the district court held that there had been a material change in controlling law, and that the defendants' tattoo was not transformative, such that an issue of disputed material fact existed as to fair use.

After a trial, an eight-member jury decided that the defendants' tattoo was not substantially similar to Plaintiff's photograph of Miles Davis and therefore did not infringe a copyright. Thus, on the main issue, the jury avoided a verdict that would have implicated the *Warhol* ruling. While Plaintiff also argued that the appearance of his photograph in the social media posts showing his photo in the background as Kat Von D worked infringed his copyright, the jury found that use to be fair use—consistent with a number of prior, pre-*Warhol* cases.

Had the jury reached the fair use issue, the case might have been an indication of how the *Warhol* decision might have a practical application. As it stands, district courts post-*Warhol* have reached divergent conclusions about how much, if at all, the Supreme Court case has changed the law.