

A License for One’s Likeness Does Not Include Tattoos, Illinois Federal Court Finds

Alexander v. Take-Two Interactive, No. 3:18-cv-00966 (S.D. Ill. Sep. 30, 2022)

By: Reid Huefner & Alexa Tipton | October 24, 2022

In an unexpected decision, a jury in the Southern District of Illinois found that it was not fair use to reproduce the images of a WWE wrestler’s tattoos in a video game in order to accurately portray the wrestler’s likeness. The outcome of this case directly conflicts with *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F.Supp.3d 333 (S.D.N.Y. 2020), wherein the same defendants were granted summary judgment when that court held that the video game company’s reproduction of the professional basketball players’ tattoos was both fair use and *de minimis* in nature.

Catherine Alexander inked the 5 tattoos at issue in this case on Randy Orton, a WWE professional wrestler. They include tribal tattoos on Orton’s forearm, a Bible verse on his arm, a dove, a rose, and a skull. To replicate Orton’s likeness in *WWE 2K*, a video game featuring a realistic depiction of WWE wrestling, Take-Two digitally reproduced Orton’s tattoos. Take-Two received a license from WWE to replicate Orton’s likeness. This license required WWE to review Orton’s tattoos to ensure accuracy to Orton’s likeness and reject Orton’s videogame persona if it was absent of tattoos or if they were different from Orton’s actual tattoos. In a motion for summary judgment mirroring the motion that the defendants filed in *Solid Oak Sketches*, Take-Two argued that Alexander impliedly licensed Orton to disseminate the tattoos as part of Orton’s likeness, the use of the tattoos is fair use, the use of the tattoos was *de minimis*, and that Alexander cannot show that she is entitled to damages or profits. Here, though, the district court denied Take-Two’s motion for summary judgment. After a five-day trial, the jury found that Take-Two failed to prove that its use of the tattoos constituted fair use and, instead, found Alexander entitled to \$3,750 in actual losses as a result of Take-Two’s use of her work; but the jury did not find any of Take-Two’s profits attributable to the use of Alexander’s tattoos.

The *Solid Oak Sketches* court (located in the 2nd Circuit) had held that the videogame creator’s use of the copyrighted tattoos was sufficiently transformative to constitute fair use and was also *de minimis* use. That court determined that the purpose for which the tattoos were originally created was a form of self-expression but the purpose of the reproduction was to accurately depict the players’ likenesses and further noted the size of the tattoos is significantly reduced, the expressive value of the tattoos is minimized, the tattoos are an inconsequential portion of the game, and finally, the tattoos are indistinguishable during gameplay. But here, in *Alexander*, the court rejected Take-Two’s motion for summary judgment regarding fair use on the grounds that it was a question of fact and law for which summary judgment was improper. 489 F. Supp. 3d 812. In also denying summary judgment of *de minimis* use, the court questioned whether it was even a legitimate defense in the Seventh Circuit and noted it is more appropriate for when the copying is of “small and usually insignificant portions” of a work, not “wholesale copying” of the “entir[e work] as occurred here.” *Id.* at 823.

Given the small size of the damages award, it is an open question whether Take-Two will appeal this verdict to try to reconcile this *Alexander* decision in the 7th Circuit with the previously decided *Solid Oak Sketches* case in the 2nd Circuit. Alternatively, more light may be shed on this issue—and on “transformative use,” generally—when the Supreme Court releases its opinion this fall in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.