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The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?

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The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?

Jennifer L. Commander*

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* Candidate for J.D., May 2016, Washington and Lee University School of Law. I thank the ever-insightful program "All Things Considered" on National Public Radio for introducing me to this topic. I extend my deepest gratitude to Professor Sally Wiant for her knowledgeable contributions to this Note regarding Copyright Law, her shaping of my legal writing, and her mentorship and friendship throughout my law school career. I thank my family for their genuine interest and support, not only during this process, but also in all my endeavors. I dedicate this Note to my husband, Keith Gray, whose encouragement and steadfastness made it possible.

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I. Introduction

In August 2014, EA Sports, a gaming empire, released the fifteenth version of Madden NFL, a video game that allows the player to simulate a professional football game using avatar versions of NFL players.¹ The Madden NFL series warrants praise for its immense success—more than 100 million copies sold over the last twenty-five years—and for its realism, as “[t]he NFL superstars definitely look like their real life counterparts would.”² Consistent with the game’s goal to become more realistic with each release, Madden NFL 15 boasted the new addition of one player’s tattoos, while simultaneously adding in some legal issues concerning copyright law.³

1. See Becky Sullivan, *For the First Time, Real Tattoos Make Their Madden Debut*, NPR (Aug. 24, 2014, 6:27 PM), <http://www.npr.org/2014/08/24/342959404/for-the-first-time-real-tattoos-make-their-madden-debut> (last visited Nov. 6, 2015) (noting the release of the newest installment of the Madden series) (on file with the Washington and Lee Law Review).

2. See *id.* (recounting the enormous success of the Madden series and its shift towards increasingly realistic depictions of NFL players); see also Nick Bilton, *Video Game Industry Continues Major Growth, Gartner Says*, N.Y. TIMES (July 5, 2011, 6:55 PM), <http://bits.blogs.nytimes.com/2011/07/05/video-game-industry-continues-major-growth-gartner-says> (last visited Nov. 6, 2015) (emphasizing the video game industry boom that continues to this day, making the video game industry an important player in legal issues) (on file with the Washington and Lee Law Review).

3. See Samit Sarkar, *Why Tattoos Are Just Now Returning to Madden with Madden NFL 15*, POLYGON (June 5, 2014, 3:00 PM), <http://www.polygon.com/2014/6/5/5782540/madden-nfl-15-tattoos-returning-colin-kaepernick> (last

During an interview with *Polygon*, Madden NFL's line producer⁴ Sean Graddy confirmed that concerns about tattoos and copyright prevented tattoos from previously appearing in the popular video game series once it transitioned to high-definition consoles.⁵ Colin Kaepernick, quarterback for the San Francisco 49ers, remains the only player with tattoos in Madden 15, as the process of securing licenses from Kaepernick's tattoo artists took "a fair amount of work."⁶ Madden's desire to depict players' tattoos sparked a flurry of queries regarding the legal ramifications of including replicas of tattoos in the video game, with freshly minted legal scholars concluding both that tattoos deserved copyright protection and that players fundamentally possessed autonomy over their own persons.⁷

visited Nov. 6, 2015) (explaining why Madden has not previously included players' tattoos and how it plans to proceed in securing the necessary licensing to include more players' ink in future Madden games) (on file with the Washington and Lee Law Review).

4. See Brett McKay & Kate McKay, *So You Want My Job: Video Game Producer*, ART OF MANLINESS (Sept. 29, 2010), <http://www.artofmanliness.com/2010/09/29/so-you-want-my-job-video-game-producer/> (last visited Nov. 6, 2015) (describing the tasks of a video game line producer, which include overseeing development of a game) (on file with the Washington and Lee Law Review).

5. See Sarkar, *supra* note 3 (citing Sean Graddy as saying, "It really comes down to a piece of art asset here that could be [copyrighted], frankly, as we've learned over time").

6. See *id.* (describing how Kaepernick first secured permission from his tattoo artists before Madden would consider including his tattoos in the newly released game); see also Darren A. Heitner & Alan Wilmot, *Score a Touchdown, Kiss Your Tattoo, and Get Sued for Copyright Infringement?*, 21 JEFFREY S. MOORAD SPORTS L.J. 299, 318–19 (2014) (recounting how an account management representative at a sports agency company spent thousands of hours researching and cold-calling to obtain partnerships with LeBron James and Kobe Bryant's tattoo artists so he could use their tattoos on merchandise); Joseph Milord, *Colin Kaepernick Will Be the Only Player in Madden 15 with Tattoos*, ELITE DAILY (June 6, 2014, 10:46 AM), <http://elitedaily.com/sports/colin-kaepernick-will-be-the-only-player-in-madden-15-with-tattoos/622374/> (last visited Jan. 5, 2015) (identifying Kaepernick as the only player whose animated avatar will include his own tattoos) (on file with the Washington and Lee Law Review).

7. See, e.g., Kal Raustiala & Christopher Sprigman, *Whose Tattoo Is It Anyway?*, L.A. TIMES (Oct. 6, 2013), <http://www.latimes.com/opinion/op-ed/la-oe-raustiala-tattoo-copyright-20131006-story.html> (last visited Nov. 5, 2015) (opining on the question "who owns a tattoo?" and recognizing the conflicting rights of athletes and tattoo artists) (on file with the Washington and Lee Law Review).

The copyrightability of tattoos, however, does not just affect the booming video game market.⁸ The NFL continues to sign multi-billion dollar contracts to broadcast its games, which also display players' body art.⁹ Professional athletes and their tattoos pop up everywhere: magazines frequently feature players' barely clad bodies, and ESPN even dedicates an entire edition of its magazine to include images of unadorned athletes.¹⁰ Television networks, magazine publishers, and video game creators all need answers regarding their legal exposure when it comes to featuring athletes' tattoos, but not a single court has addressed the issue head-on.¹¹

This Note examines the limited and uncertain cases and scholarship discussing tattoos and concludes that the current precedent provides insufficient guidance in applying copyright protection to tattoos. It addresses this lack of supervision by analyzing the existing scholarship suggestions that justify copyright protection for tattoos and subsequently dismisses those suggestions in favor of an alternative and new position.

8. See Christine Lesicko, *Tattoos As Visual Art: How Body Art Fits into the Visual Artists Rights Act*, 53 IDEA 39, 61 (2013) (noting that a precedential ruling regarding the copyrightability of tattoos would affect the internet's plethora of tattoo art and artist resources, along with other media sources).

9. See, e.g., Kurt Badenhausen, *The NFL Signs TV Deals Worth \$27 Billion*, FORBES (Dec. 24, 2011, 6:13 PM), <http://www.forbes.com/sites/kurtbadenhausen/2011/12/14/the-nfl-signs-tv-deals-worth-26-billion/> (last visited Nov. 6, 2015) (announcing the NFL's nine-year extension to its broadcast packages with Fox, NBC, and CBS, under which the networks will pay approximately sixty percent more than previous agreements) (on file with the Washington and Lee Law Review).

10. See Heitner & Wilmot, *supra* note 6, at 299 (pointing out that, out of the fifty-four photos in the fifth annual Body Issue, nine showcased athletes with extensive body art); Nancy Szokan, *ESPN Magazine Body Issue Shows Off Naked Athletes, Their Muscles and Tattoos*, WASH. POST (July 21, 2014), http://www.washingtonpost.com/national/health-science/espn-magazine-body-issue-shows-off-naked-athletes-their-muscles-and-tattoos/2014/07/21/71930926-0b76-11e4-b8e5-d0de80767fc2_story.html (last visited Nov. 6, 2015) ("We can also see pretty much all of running back Marshawn Lynch (impressive tattoos) and Texas Ranger Prince Fielder (also sporting some dramatic body art as well as a pronounced—and yet not flabby—belly) . . .") (on file with the Washington and Lee Law Review).

11. See Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 129–30 (2013) (remarking on the lack of precedent regarding the copyrightability of tattoos).

Part II discusses the Copyright Act of 1976¹² and debates its applicability to tattoos from a textual perspective.¹³ Part III examines the three major cases involving copyright and tattoos—*Reed v. Nike, Inc.*,¹⁴ *Whitmill v. Warner Brothers Entertainment, Inc.*,¹⁵ and *Allen v. Electronic Arts, Inc.*¹⁶—all of which ended in confidential settlement agreements.¹⁷ Part IV recounts the alternative solutions that the scholarship offers to deal with the public policy problem of giving tattoos copyright protection and criticizes the authorities' approaches; it also introduces a practical solution that the National Football League Players Association (NFLPA) proposed but doubts its actual practicality.¹⁸ Part V presents this Note's suggested approach—denying tattoos copyright protection for all nonfeatured uses of the artwork—and explains the rationale and public policy supporting this novel test.¹⁹

12. 17 U.S.C. §§ 101–1332 (2012).

13. *Infra* Part II. This Note does not venture into the First Amendment issues surrounding tattoo artists and their clients, although courts and scholars have addressed those questions. *See, e.g.*, Alexa L. Nickow, Note, *Getting Down to (Tattoo) Business: Copyright Norms and Speech Protections for Tattooing*, 20 MICH. TELECOMM. TECH. L. REV. 183, 185 (2013) (comparing the unquestioned First Amendment protection for tattoos as symbolic speech with the reluctance of courts to recognize the process of tattooing as speech). *See generally* *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010); *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656 (N.D. Ill. 2008); *Yurkew v. Sinclair*, 495 F. Supp. 1248 (D. Minn. 1980); *State v. White*, 560 S.E.2d 420 (S.C. 2002).

14. Complaint at 1, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Feb. 10, 2005) [hereinafter Nike Complaint].

15. Complaint at 1, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-00752 (E.D. Mo. Apr. 28, 2011) [hereinafter Warner Brothers Complaint].

16. Complaint at 1, *Allen v. Elec. Arts, Inc.*, No. 5:12-CV-03172 (W.D. La. Dec. 31, 2012) [hereinafter Electronic Arts Complaint].

17. *Infra* Part III.

18. *Infra* Part IV.

19. *Infra* Part V.

II. *The Copyright Act of 1976: Questioning Its Applicability to Tattoos*

A. *What the Copyright Act Protects*

The Copyright Act protects “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, either directly or with the aid of a machine or device.”²⁰ The Act goes on to define “works of authorship” more specifically, which relevantly include “pictorial, graphic, and sculptural works.”²¹ Two aspects of the tattooing process warrant analysis under the Act’s framework: the flash design and the final inked-on-skin product.²² The flash “is the collection of designs for tattoos in a tattoo shop; tattoo parlors traditionally display flash on large pieces of paper throughout the shop for customers to select or use as inspiration.”²³ Without a doubt, flash garners copyright protection, as it parallels works that traditionally deserve protection under the Act, such as paintings.²⁴

The copyrightability of tattoos on skin, on the other hand, seems less certain, but scholars generally accept that tattoos meet the requirements set forth in the Act, which explains the lack of discourse questioning that conclusion.²⁵ Textually

20. See Copyright Act of 1976, 17 U.S.C. § 102 (2012) (outlining the subject matter of copyright).

21. See *id.* § 102(a)(1)–(8) (listing the various categories that constitute works of authorship).

22. See JOHN REARDON, *THE COMPLETE IDIOT’S GUIDE TO GETTING A TATTOO* 32 (2008) (differentiating between flash designs and tattoos inked on clients’ skin).

23. See *id.* (noting that flash serves dual purposes: giving clients immediate designs to choose from and serving as good reference material for clients when brainstorming from their own personal inspiration).

24. See 17 U.S.C. § 101 (defining “pictorial, graphic, and sculptural works” to mean “two-dimensional . . . works of fine, graphic, and applied art,” including “prints and art reproductions” and “technical drawings”).

25. See Heitner & Wilmot, *supra* note 6, at 305–06 (“[I]t is commonly accepted that tattoos fall within the ambit categories that qualify for copyright protection.”); Lauren Etter, *Ink Inc.: As Tattoos Become Big Business, Tattoo Artists Are Asserting Their Copyright Claims*, A.B.A. J., Jan. 2014, at 9 (“And now it’s increasingly clear that the law also applies to ink on skin.”); Jacob Gershman, *Athletes’ Tattoo Artists File Copyright Suits, Leaving Indelible Mark*,

speaking, if a tattoo possesses a mere modicum of originality, qualifies as a work of authorship, and appears fixed in a tangible medium of expression, it should obtain copyright protection according to the elements listed in the Act.²⁶ Scholars mostly agree that “copyright protection can logically be extended to tattoos” when applying the originality, works of authorship, and fixation requirements.²⁷

Despite the overwhelming scholarly consensus, some scholars argue that tattoos fail to meet the previously mentioned requirements in order to eliminate the problems associated with tattoos and copyright.²⁸ Clearly, a tattoo inherently possesses some amount of originality, and the law requires only a minimal degree of creativity, making a challenge to this element of copyrightable subject matter nearly impossible to win.²⁹ Tattoos

WALL ST. J. (June 16, 2014, 11:59 PM), <http://www.wsj.com/articles/athletes-tattoo-artists-want-more-skin-in-the-game-1402972074> (last visited Nov. 6, 2015) (“[L]awyers and scholars say there is no obvious reason why tattoo artists shouldn’t be covered by the same rights granted to photographers or other visual artists.”) (on file with the Washington and Lee Law Review).

26. See *supra* notes 20–21 and accompanying text (paraphrasing the Act’s definition of copyrightable subject matter).

27. See David M. Cummings, Note, *Creative Expression and the Human Canvas: An Examination of Tattoos As Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 304 (2013) (separating tattoos into two distinctive categories for analysis of whether they can and should be copyrighted—tattoos based off of a sketch or flash and then applied to the skin compared to tattoos originally created on the skin). This distinction mainly addresses the problematic characterization of human skin as a “useful article,” although courts using the conceptual separability test resolve this dilemma without complication. *Id.* at 302. A “useful article” is a staple article of commerce, which a human body is not. *Id.* As an analogy, the “useful article” exception means that the painting on a canvas garners copyright protection, but the canvas itself does not. *Id.* The debate regarding conceptual separability and useful articles, however, remains ongoing. See Barton R. Keyes, *Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law*, 69 OHIO ST. L.J. 109, 109–10 (2008) (noting that the copyrightability of designs on useful articles remains “one of the most confusing aspects of American copyright law”).

28. See Copyright Act of 1976, 17 U.S.C. § 102 (2012) (outlining the subject matter of copyright under the Act); *infra* note 166 and accompanying text (concluding, for public policy reasons, that the Act does not extend copyright protection to human bodies).

29. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (noting that the requisite level of creativity to qualify for copyright protection is “extremely low”). Although the argument appears very weak, some unoriginal tattoo designs might not meet the minimal degree of creativity required, similar to the telephone directories in *Feist*. See *id.* at 340 (“The constitutional

also objectively qualify as works of authorship because of their pictorial and graphic nature.³⁰

The only realistic challenge to whether tattoos deserve the label of copyrightable subject matter involves their fixed nature, and whether skin qualifies as a tangible medium of expression.³¹ As skin ages, 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.³² Tattoos, however, ultimately possess a rather permanent quality and thus defeat this argument.³³ Skin can most certainly serve as a tangible medium of expression.³⁴ Therefore, challenging whether tattoos meet the requirements for copyrightable subject matter does not successfully answer the question of their protection.

requirement necessitates independent creation plus a modicum of creativity.”). A common example includes an unchanged image of the American flag, which requires no creativity from the tattoo artist whatsoever. This Note does not address these types of tattoos. If a tattoo artist inks a “cultural heritage” or Aboriginal design, such as a Native American symbol, that type of tattoo escapes the categorization as copyrightable subject matter, too. *See* Nash v. CBS, Inc., 899 F.2d 1537, 1540 (7th Cir. 1990) (“No one invents even a tiny fraction of the ideas that make up our cultural heritage.”). These tattoos do not receive copyright protection because the originality belongs to the associated group. *See id.* (denying copyright protection for Nash’s work because he merely analyzed history and culture but failed to add any of his own expression to the work at issue). This Note does not address tattoos implicating cultural heritage issues, either.

30. *See supra* note 21 (defining a work of authorship).

31. *See infra* note 164 and accompanying text (noting Nimmer’s belief that the human body does not, and for public policy purposes cannot, qualify as a medium of expression under the Copyright Act).

32. *See* Declaration of David Nimmer at 6–7, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-CV-00752 (E.D. Mo. May 20, 2011) [hereinafter *Nimmer Declaration*] (determining that if a court found that a tattoo qualified for copyright protection under the Act, then a court could bar the wearer from removing a tattoo or altering the original tattoo in any way, including changes to the wearer’s skin).

33. *See* Olga Khazan, *The Secret to a Tattoo’s Permanence: The Immune System*, *THE ATLANTIC* (July 22, 2014, 10:52 AM), <http://www.theatlantic.com/health/archive/2014/07/the-real-reason-tattoos-are-permanent/374825/> (last visited Nov. 6, 2015) (“The dye gets lodged deep in the skin thanks to hungry anti-inflammatory cells called macrophages.”) (on file with the Washington and Lee Law Review).

34. *But see* *Nimmer Declaration*, *supra* note 32, at 4 (concluding that Mr. Tyson’s head could not constitute a protectable medium of expression).

B. Tattoo Artists' Rights Under the Copyright Act

The owner of a copyright possesses certain exclusive rights, including the right to reproduce the copyrighted work, the right to prepare derivative works based on the copyrighted work, the right to distribute copies of the copyrighted work, and the right to publicly display the copyrighted work.³⁵ The inclusion of tattoos in Madden NFL 15 implicates all of these rights. 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.³⁶ Selling millions of copies of the popular video game violates the artist's exclusive right to distribute.³⁷ 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.³⁸ Finally, and most controversially, whenever

35. See Copyright Act of 1976, 17 U.S.C. § 106 (2012) (listing the rights of the author of a work copyrighted according to the Copyright Act).

36. See 2 PAUL GOLDSTEIN, COPYRIGHT § 7.2 (3d ed. 2014) (noting that limitations on the exclusive right of reproduction generally divide between limitations based on the type of copyrighted work involved and limitations based on the type of use of the copyrighted work). EA Sports' utilization of copyrighted tattoos would invoke both of these types of violations, as pictorial types of works garner more protection and identical copying qualifies as an extremely reprehensible use of a copyrighted work. See *id.* (discussing the differences between limitations on the right to reproduce a copyrighted work).

37. See *id.* § 5.5 (2d ed. 2004) ("Section 106(3) of the Copyright Act gives a copyright owner the exclusive right to distribute, and to authorize others to distribute, 'copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.'"). This right effectively envelops the important right of first publication by preventing all forms of transfer, not just sale. See *id.* (describing the broad coverage of the right to distribute the copyrighted work and emphasizing the importance of this exclusive right to copyright holders).

38. See 17 U.S.C. § 102 (defining a derivative work as "a work based upon one or more pre-existing works," which includes any form in which a work may be recast, transformed, or adapted). A work is not derivative, however, unless it has substantially copied from a prior work. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.01 (Matthew Bender rev. ed., 50th ed. 2014) (distinguishing a new work from a derivative work). Creating a video game version of a copyrighted work qualifies as making an infringing, derivative work. See *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (finding that Micro Star's use of Formgen's MAP files in its own video game with different characters infringed on Formgen's copyright by creating a violative, derivative work).

the recipient of the tattoo appears in public, he violates the artist's right to publicly display the copyrighted work.³⁹ With a mountain of violations to support his claim, the tattoo artist's case appears strong to recover damages for copyright infringement, and the cases discussed in Part III generally agree.⁴⁰

III. (Questionable) Precedent: What the Cases Suggest

A. Reed v. Nike, Inc.

Matthew Reed, an Oregon tattoo artist, and Rasheed Wallace, an NBA basketball player, first interacted in 1998 on a recommendation to Wallace from a fellow athlete.⁴¹ Wallace and Reed met and discussed the artwork that Reed would eventually ink onto Wallace's arm; Wallace provided the initial idea of incorporating an "Egyptian themed family design" into his tattoo, while Reed relied on his education and experience to design the tattoo.⁴² After finalizing the design, Reed created the stencil that would help transfer the agreed-upon drawing onto Wallace's skin.⁴³ Over their next three meetings, Reed applied the design

39. See R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM "Copies,"* 2001 U. ILL. L. REV. 83, 84 (2001) (matching the changes in technology to the previously unappreciated right of public display). Interestingly, the author recognizes that the public display right "create[s] significant problems as more and more works are used in digital form" and that the display right "has the potential to give copyright owners excessive control over the use of their works." *Id.*

40. See 17 U.S.C. § 504 (outlining the various remedies and damages available to a victim of copyright infringement). Importantly, to recover statutory damages, an artist must have registered the copyright before filing suit. See, e.g., *Pye v. Mitchell*, 574 F.2d 476, 479 (9th Cir. 1978) (noting that only a proprietor of a statutory copyright at the time of the acts of infringement can collect damages). In other words, registering for a copyright after the acts of infringement occur makes a potential victim ineligible to recover statutory damages under the Act, and an artist would struggle to prove actual damages as a result of the infringement. *Id.*

41. See Nike Complaint, *supra* note 14, at 3 (describing the initial interaction between Reed and Wallace after recounting Reed's career development).

42. See *id.* (noting who contributed what to Wallace's tattoo).

43. See *id.* (recounting what occurred during the second meeting between Reed and Wallace).

onto Wallace's arm, for which Wallace paid Reed \$450,⁴⁴ an amount Reed considered inadequate except for the "exposure" he believed he might receive as a result of Wallace's fame as an NBA player.⁴⁵

Reed obtained Copyright Registration Number VA 1-265-074 for the "Egyptian Family Pencil Drawing" that he then applied to Wallace's arm using the flash he designed.⁴⁶ Somewhat ironically, Reed admitted in his Complaint that he wanted Wallace to violate his exclusive rights as the registrant of the copyright on the tattoo design by publicly displaying the tattoo at NBA games and garnering Reed widespread recognition for his work.⁴⁷ Reed "believed that he and his business would receive exposure as a result of the tattoo being on an NBA player" and "observed the tattoo during televised NBA games," a public display that Reed describes as "expected" and "common in the tattoo industry."⁴⁸ By indicating his acceptance of some violations of his exclusive rights connected to his copyright, Reed demonstrated reluctance in his argument that the artist must be sole owner of the exclusive

44. As a point of reference, Colin Kaepernick's famed tattoo artist Nes Andrion charges \$120 for every hour that a tattoo takes to ink, with most of Kaepernick's tattoos taking well over four hours to complete. See Scott Soshnick, *Tattoo Artist Nabs \$16 Million in Free Ads with Kaepernick's Ink*, BLOOMBERG (Jan. 30, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-01-30/tattoo-artist-nabs-16-million-in-free-ads-with-kaepernick-s-ink.html> (last visited Nov. 6, 2015) (highlighting the benefits that Kaepernick's tattoo artist received as a result of Kaepernick's high level of exposure) (on file with the Washington and Lee Law Review). Wallace's tattoo took three separate sessions, with an average session lasting between four and six hours. See Julie H. Rose, *Long Tattoo Session*, TATTOO HELP DESK (Sept. 23, 2008, 1:37 AM), <http://tattoohelpdesk.blogspot.com/2008/09/long-tattoo-sessions.html> (last visited Nov. 6, 2015) (describing that a "sleeve," or full arm tattoo, could exceed thirteen hours of work, and that most people cannot sit through more than four hours of tattooing at a time) (on file with the Washington and Lee Law Review). Assuming Wallace's tattooing process took three sessions of four hours each at a price of \$120 per hour, Wallace paid over \$1,000 for the final tattoo.

45. See Nike Complaint, *supra* note 14, at 3–4 (describing the final tattooing process when Reed transferred the collaborative design onto Wallace's skin).

46. See *id.* at 4 (pointing out that Reed did obtain a copyright for the drawing inked onto Wallace's arm).

47. See *id.* (noting that Reed witnessed some public displays of the tattoo by Wallace and actually expected those violations of his exclusive rights).

48. *Id.*

rights.⁴⁹ But in the spring of 2004, things went too far—Reed found out that Nike planned to highlight the tattoo on Wallace’s arm as part of an advertising campaign.⁵⁰

The Nike commercial features two separate tattoos on Wallace’s body: a bulldog not designed or inked by Reed and the Egyptian version of Wallace’s family mentioned above.⁵¹ In the advertisement, Wallace describes both tattoos and their meaning, as a simulated version of the creation process fills them in on his arms.⁵² Reed claimed that neither Nike nor Wallace contacted him about the featured use of his original artwork in the commercial, and he subsequently sued both Nike and Wallace.⁵³ Reed accused Nike of infringing on his copyright by reproducing, distributing, adapting, and publicly displaying his original design without his consent, permission, or authority.⁵⁴

Reed also sued Wallace on two separate counts: first, for contributory infringement⁵⁵ of Reed’s copyright, and second, in

49. *See id.* (admitting that Reed expected and desired some violations of the exclusive rights of reproduction, creating derivative works, publicly displaying, and distributing copies of the copyrighted work).

50. *See id.* (“Mr. Reed became aware that the tattoo he had applied to Mr. Wallace’s arm was being featured as part of an advertising campaign including a commercial for Nike highlighting Mr. Wallace.”).

51. *See* robjv1, *Rasheed Wallace NBA Finals Nike Commercial*, YOUTUBE (June 26, 2010), <http://www.youtube.com/watch?v=RqmRu34PXrU> (last visited Nov. 5, 2015) (showing the Nike commercial featuring Wallace’s tattoos) (on file with the Washington and Lee Law Review).

52. *See id.* (featuring Wallace’s voice, which describes his tattoos as they appear on his arms, using a computer simulation technique).

53. *See* Nike Complaint, *supra* note 14, at 4 (describing Nike’s wrongful conduct as it related to Reed).

54. *See id.* at 4–5 (outlining Reed’s first claim for recovery against Nike).

55. Contributory infringement serves as a “separate avenue for third-party liability in the copyright sphere,” distinct from direct copyright infringement liability. *See* 3 NIMMER & NIMMER, *supra* note 38, § 12.04[A][3] (describing the separate liability of related defendants in copyright infringement actions); G. PETER ALBERT, JR. & AM. INTELLECTUAL PROP. LAW ASS’N, INTELLECTUAL PROPERTY LAW IN CYBERSPACE 172 (2d ed. 2011) (imposing liability for contributory infringement on defendants who are “not directly responsible for the infringing act, but ha[ve] played a significant role in the direct infringement committed by others”); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 545 U.S. 913, 941 (2005) (attempting to accuse Grokster of contributory infringement, although ultimately failing). Contributory infringement can consist of “personal conduct that forms part of or furthers the infringement and contribution of machinery or goods that provide the means to infringe.” NIMMER & NIMMER, *supra* note 38, § 12.04[A][3]. The first type of contributory

the alternative, for an accounting of his share in any revenue Wallace garnered as a result of the use of the tattoo.⁵⁶ Reed's first claim for relief against Wallace accused Wallace of misleading Nike as to the ownership of the intellectual property associated with the tattoo and therefore contributing to Nike's infringement on Reed's copyright.⁵⁷ Alternatively, Reed recognized that if "Rasheed Wallace is the co-owner with [Reed] of the Copyright in the artwork embodied in the tattoo on his upper arm, [Reed] is entitled to share in any revenue realized by Mr. Wallace as the result of any use, other than incidental use, of the tattoo."⁵⁸ With this claim, Reed admitted the possibility that Wallace might have an ownership interest in the tattoo as well, clouding Reed's claim to the exclusive rights associated with his copyright.

Reed filed his original Complaint in February 2005, and the clerk of the court entered an Order of Dismissal of the case in October of that same year.⁵⁹ Some scholars considered *Reed* the

infringement, participation in infringement, occurs when a party, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. *See id.* (denoting liability of a "contributory infringer"). Knowledge that the work in question qualifies as an infringement remains key to finding the first type of contributory infringement. *See id.* ("In sum, then, given knowledge that the work in question constitutes an infringement, then one who causes another to infringe will himself be liable as an infringer . . ."). To reiterate, the Supreme Court described a contributory infringer as someone "in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 437 (1984). The second type of contributory infringement, providing means to infringe, occurs when one, with knowledge, furnishes a copyrighted work to another, who then wrongfully copies from that work. *See* 3 NIMMER & NIMMER, *supra* note 38, § 12.04[A][3][b] (outlining the requirements for contributory infringement by providing means to infringe to another).

56. *See* Nike Complaint, *supra* note 14, at 6–7 (claiming that Wallace advised Nike that he possessed exclusive ownership of the intellectual property rights in connection with the tattoo, contributing to Nike's infringement of Reed's copyright by so doing, and alternatively asserting that Wallace share profits from use of the tattoo with Reed).

57. *See id.* at 6 ("Defendant Wallace's conduct induced, caused or materially contributed to the unauthorized reproduction, adaptation, public display and/or distribution of copies of the Plaintiff's Copyrighted Work without the consent or authority of Plaintiff in violation of Sections 106 and 501 of the Copyright Act . . .").

58. *Id.* at 7.

59. *See id.* at 1 (dating the filing of Reed's Complaint as February 10, 2005); Order of Dismissal at 1, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or.

first case to assert copyright infringement based on a tattoo and believed that the case might open the floodgates for other lawsuits similar in nature.⁶⁰ As evidenced by the lacking precedent and ambiguous law addressing tattoos' copyrightability, *Reed* did no such thing. The case settled out of court, and the settlement agreement remains confidential, just like the following two cases involving tattoos and accusations of copyright infringement.⁶¹

B. Whitmill v. Warner Brothers Entertainment, Inc.

Perhaps the most (in)famous of the tattoo and copyright cases, *Whitmill v. Warner Brothers Entertainment, Inc.* involved the much anticipated release of *The Hangover: Part II* and Mike Tyson's face tattoo⁶² artist, Victor Whitmill.⁶³ Whitmill designed and applied the original tattoo to Tyson's face in 2003, and Tyson signed a release acknowledging that Whitmill would own the artwork and copyright to the tattoo.⁶⁴ Eight years later, Warner Brothers began advertising the release of *The Hangover: Part II*, a sequel to the highly successful *The Hangover*, which depicted three straight-laced friends who had some fun while getting into trouble in Las Vegas.⁶⁵ Both the trailer for the sequel and the

Oct. 7, 2005) [hereinafter Nike Order of Dismissal] (“[T]his action is dismissed with prejudice . . .”).

60. See Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 315, 316 n.5 (2006) (analyzing and predicting what effects *Reed v. Wallace* might have on future copyright infringement cases).

61. See Ira Boudway, *Hey Pro Athletes: Your Tattoo Is Going to Get You Sued*, BLOOMBERG BUS. WK. (Sept. 4, 2013), <http://www.businessweek.com/articles/2013-09-04/hey-pro-athletes-your-tattooed-arms-are-going-to-get-you-sued> (last visited Nov. 6, 2015) (observing that *Reed*'s case settled very quickly after he filed it) (on file with the Washington and Lee Law Review).

62. See Warner Brothers Complaint, *supra* note 15, at Exhibit 4 (depicting Mike Tyson with his face tattoo as a point of reference for the remainder of the Complaint). See generally THE HANGOVER: PART II (Warner Brothers 2011).

63. Warner Brothers Complaint, *supra* note 15, at 1.

64. See *id.* at 2–3 (“Among his creations is one of the most distinctive tattoos in the nation, an original design he created on the upper left side of former world heavyweight champion boxer Mike Tyson's face.”).

65. See *id.* at Exhibit 6 (depicting a poster advertisement of the upcoming

movie poster featured a duplicate of Tyson's tattoo on one of the actor's faces.⁶⁶

Like Reed a few years before him, Whitmill sued Warner Brothers for infringing on his exclusive rights to the original Mike Tyson tattoo under the Copyright Act.⁶⁷ In his Complaint, he asserted that both the trailer and the poster constituted unauthorized copying, distributing, and publicly displaying of the copyrighted work, and that the version of the tattoo used in the film qualified as an unauthorized derivative work.⁶⁸ Whitmill cleverly sought both injunctive and monetary relief, putting Warner Brothers at risk of foregoing the release of the film altogether.⁶⁹

Similar to *Reed*, the parties settled outside of court quickly after the filing of Whitmill's Complaint, partially due to Warner Brothers' request for speediness to avoid delaying the release of the film or having to digitally alter the tattoo throughout the entire film.⁷⁰ In fact, the case settled less than two months after

film *The Hangover: Part II*, which clearly copies Mike Tyson's tattoo); IGN, *The Hangover Part 2: Official Movie Trailer*, YOUTUBE (Apr. 1, 2011), <http://www.youtube.com/watch?v=snlWDffZfyk> (last visited Nov. 6, 2015) (showing the sequel's trailer, which includes the actor with a replica of Tyson's face tattoo for over half of the advertisement's duration) (on file with the Washington and Lee Law Review); see also A.O. Scott, *Dudes Doing Vegas: Eating and Other Stuff*, N.Y. TIMES (June 4, 2009), <http://www.nytimes.com/2009/06/05/movies/05hang.html> (last visited Nov. 6, 2015) (describing the plotline and characters of the first *The Hangover* movie) (on file with the Washington and Lee Law Review).

66. See Warner Brothers Complaint, *supra* note 15, at Exhibit 6 (showing a copied version of Tyson's tattoo on the movie poster for the film); *id.* at 5 (describing the heavy use of the pirated replica in the promotional materials for the film).

67. See *id.* at 7 (claiming that Warner Brothers infringed on all of his exclusive rights to the original tattoo).

68. See *id.* (listing his claims for recovery against Warner Brothers for infringing on his exclusive rights under the Copyright Act).

69. See *id.* at 7–8 (requesting a preliminary injunction on the release of the film but also awards to compensate Whitmill for his monetary damages).

70. See Matthew Belloni, *Warner Bros. Settles 'Hangover II' Tattoo Lawsuit (Exclusive)*, HOLLYWOOD REP. (June 20, 2011, 1:39 PM), <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377> (last visited Nov. 6, 2015) (noting that "Warner's attorneys must have been concerned that [Judge] Perry suggested she saw merit in the case . . . [and] planned to digitally alter the tattoo for the home video version of the film if the case didn't settle quickly") (on file with the Washington and Lee Law Review).

Whitmill filed.⁷¹ Unlike the court in *Reed*, however, the judge assigned to *Whitmill* made statements about the law surrounding copyright and tattoos during a preliminary hearing.⁷² The day before the case settled outside of court, Judge Perry heard arguments on Whitmill's Motion for a Preliminary Injunction to prevent Warner Brothers from releasing the film if it contained any semblance of his copyrighted work.⁷³ Relying on the *Dataphase Systems, Inc. v. C. L. Systems, Inc.*⁷⁴ factors to determine whether to grant a preliminary injunction, Judge Perry denied Whitmill's motion.⁷⁵

Before denying Whitmill the preliminary injunction, Judge Perry addressed the merits of the case, concluding, "I think Plaintiff has a strong likelihood of prevailing on the merits for copyright infringement."⁷⁶ She continued to comment on the merits and criticized Warner Brothers' various defenses to the copyright infringement claim, including Warner Brothers' argument that tattoos were not copyrightable subject matter.⁷⁷ In her strongest statement in favor of Whitmill, Judge Perry stated,

71. See Warner Brothers Complaint, *supra* note 15, at 1 (identifying the filing date as April 28, 2011); Order of Dismissal at 1, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-00752 (E.D. Mo. June 22, 2011) (listing the date of dismissal with prejudice as June 22, 2011, just two months after the date of filing).

72. Compare Nike Order of Dismissal, *supra* note 59, at 1 (settling well in advance of trial and never arguing the legal issues before the judge), with Transcript of Hearing on Motion for Preliminary Injunction at 1, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-00752 (E.D. Mo. June 21, 2011) [hereinafter Warner Brothers Hearing] (transcribing a Hearing on Motion for Preliminary Injunction, during which Judge Perry ruled on several issues pertaining to copyright law and tattoos).

73. See Warner Brothers Hearing, *supra* note 72, at 2 (concluding that the "balance of equities favor[ed]" Warner Brothers when comparing the harms of a preliminary injunction to both parties).

74. 640 F.2d 109 (8th Cir. 1981).

75. See Warner Brothers Hearing, *supra* note 72, at 9 (considering whether to grant Whitmill's preliminary injunction based on the *Dataphase* factors: (1) plaintiff's likelihood of success on the merits, (2) whether plaintiff is threatened with irreparable harm, (3) the balance of equities, and (4) the public interest). "So when I put all the four factors together, I'm going to deny the preliminary injunction." *Id.*

76. *Id.* at 3.

77. See *id.* (pontificating that Whitmill would win on the merits, perhaps to encourage the parties to settle, which they did later that day).

“Most of the defendant’s arguments against [copyright infringement] are just silly. Of course tattoos can be copyrighted. I don’t think there is any reasonable dispute about that.”⁷⁸ The parties settled later that day.⁷⁹

C. Allen v. Electronic Arts, Inc.

This case involved professional football player Ricky Williams, his tattoo artist Scott Allen, and video game empire Electronic Arts, Inc., also referred to as EA Sports.⁸⁰ Ricky Williams visited Crybabies Tattoo, Allen’s place of business, and requested Allen apply a tattoo to his upper arm.⁸¹ In his Complaint, Allen, like Reed before him, admitted that he knew Williams as a professional football player and “assumed he would see his art on television.”⁸² In early 2010, however, Allen saw his tattoo art displayed not just during NFL games but also on the cover of EA Sports’ games, including NFL Street, Madden NFL 10, and Madden NFL 11.⁸³ Like Reed, Allen could accept—and actually expected—some violations of his exclusive rights, but a featured use of a derivative work went too far.⁸⁴ Allen sued EA Sports for violating his exclusive rights and specifically for copying, reproducing, distributing, making an unauthorized

78. *Id.*

79. See ADR Compliance Report at 1, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-CV-00752 (E.D. Mo. June 21, 2011) (indicating that the parties achieved a settlement agreement).

80. See Electronic Arts Complaint, *supra* note 16, at 2 (listing the parties as Scott Allen, a tattoo artist at Crybabies Tattoo, Electronic Arts, Inc., a manufacturer and seller of video games, and Ricky Williams, an NFL player and recipient of a tattoo from Allen).

81. See *id.* (describing the first interaction between Williams and Allen).

82. See *id.* at 3 (admitting that Allen expected to see a public display of his work on Williams on television).

83. See *id.* at 3–4 (noting that the plaintiff “became aware” that EA Sports displayed and used Williams’s tattoo on multiple video game covers); *id.* at Exhibits 2–3 (depicting the cover of NFL Street, Madden NFL 10, and Madden NFL 11, which all included animated replicas of Allen’s tattoo art on Williams’s body).

84. See *id.* at 4 (accusing Electronic Arts of copying, reproducing, distributing, adapting, and publicly displaying the copyrighted work without obtaining consent, permission, or authority from Allen first).

derivative work, and publicly displaying the copyrighted work.⁸⁵ Allen also sued Williams for contributory infringement of his copyright and exclusive rights; in the alternative, he sued Williams for an accounting of his share in the profit from any use of the tattoo as a co-owner of the work.⁸⁶

Allen's Complaint against EA Sports and Williams appears eerily similar to Reed's Complaint against Nike and Wallace—both artists sued a company for use of the copyrighted work in an advertisement, while also suing the recipient of the tattoo for either contributing to the advertisement's infringement or for failing to share profits from their use of the copyrighted work.⁸⁷ Like Reed's suit against Nike and Wallace, Allen ultimately entered into a settlement agreement with EA Sports and Williams, just three and a half months after filing his complaint.⁸⁸

D. What the Cases Mean

Most tattoo artists agree that “turning to the courts for copyright protection would simply not be worth it” because a lawsuit would take too long, cost too much, and distract the artist from his or her work.⁸⁹ Additionally, a lawsuit poses a lot of

85. See *id.* at 5 (citing Copyright Act §§ 106 and 501 as Allen's causes of action against Electronic Arts).

86. See *id.* at 6, 9 (describing Allen's claims against Williams).

87. Compare Nike Complaint, *supra* note 14 (suing Nike for featuring the tattoo in a commercial and suing Wallace for contributing to Nike's infringement or for failing to share profits from the use of the tattoo), with Electronic Arts Complaint, *supra* note 16 (suing EA Sports for featuring the tattoo on the cover of three video games and suing Williams for contributing to EA Sports' infringement or for failing to share profits from the use of the tattoo).

88. See Order at 1, *Allen v. Elec. Arts, Inc.*, No. 5:12-CV-03172 (W.D. La. Apr. 9, 2013) (dismissing the case after plaintiff's motion to do so).

89. See Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CALIF. L. REV. 1137, 1158 (2012) (interviewing tattoo artists to discuss the effectiveness of intellectual property law and its relation to protecting their rights). Most tattoo artists expressed mixed feelings and ignorance regarding lawsuits for unauthorized copying of their artwork, indicating that direct confrontation of other infringing artists occurred more often than resorting to the legal system. See *id.* (relating tattoo artists' reluctance to file lawsuits against one another and their preference to handle matters on their own).

ambiguity and uncertainty for a plaintiff tattoo artist because to date, “no cases concerning the copyrightability of tattoos have gone to trial.”⁹⁰ The fact that all three major cases settled indicates at least some fear on the part of the defendants that tattoo artists have legitimate copyright infringement claims, and Judge Perry’s oral pontificating in the *Whitmill* case seems to support that same conclusion.⁹¹ Alternatively, all the defendants wanted to avoid the nuisance of ongoing litigation and the bad publicity associated with a trial, recognized litigation as a cost of doing business, and could afford to throw settlement money at their copyright problems without any negative effect on their businesses; their settlements do not necessarily demonstrate the validity of the artists’ claims.⁹² Without a trial and a subsequent holding, however, the case law surrounding this topic remains unpersuasive.

IV. The Scholarship’s Alternatives: Failed Proposals to Protect the Interests of Artists, Industries, and Clients

A. Fair Use

In asserting their affirmative defenses to the tattoo artists’ claims of copyright infringement, both Nike and Warner Brothers claimed that their uses of the tattoos constituted fair uses of the copyrighted works.⁹³ Section 107 of the Copyright Act first

90. See King, *supra* note 11, at 129–30 (2013) (addressing the “ambiguity regarding the legal protectability of tattoos and the negative impact such ambiguity has on the rights of tattoo artists and their clients/customers”).

91. See Warner Brothers Hearing, *supra* note 72, at 3 (indicating that Judge Perry believed *Whitmill* would win on the merits in his copyright infringement suit against Warner Brothers).

92. See Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS LAW. 1, 31 (2011) (“[D]isputes will continue to settle before trial, considering that the disputed uses . . . have much at stake, and the incentive to settle quickly is high.”); see, e.g., Belloni, *supra* note 70 (highlighting Warner Brothers’ interest in settling the lawsuit because litigation continued “just days before the film was scheduled to be released,” threatening to damage Warner Brothers’ financial interests in the film).

93. See Answer and Affirmative Defenses to Plaintiff’s Amended Complaint at 6, *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. Apr. 14, 2005) [hereinafter *Nike Answer*] (“Defendants’ alleged conduct constitutes fair use.”); Bradley,

identifies six uses within the scope of the fair use doctrine: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.”⁹⁴ The Act goes on to outline the factors to consider in a fair use analysis, which include: (1) the purpose and character of the use, such as commercial versus nonprofit use of the work; (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 or value of the copyrighted work.⁹⁵ Other authorities have described the defense of fair use as “a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright.”⁹⁶ The authorities agree that Congress, when

supra note 92, at 30 (discussing Warner Brothers’ assertion of the affirmative defense of fair use).

94. See Copyright Act of 1976, 17 U.S.C. § 107 (2012) (listing categories of works that generally meet the fair use test, a defense to copyright infringement).

95. See *id.* (identifying factors to aid in determining whether the use of a work qualifies as fair). This Note primarily focuses on the first factor, the purpose and character of the use, because of the lack of dispute surrounding the other three factors for the fair use of copyrighted tattoos. Most copyrighted tattoos inherently possess some creativity, which limits the fair use defense. See ALBERT & AM. INTELLECTUAL PROP. LAW ASS’N, *supra* note 55, at 197 (“Thus a broader fair use approach applies to works that are information or that stress utility over creativity.”). Madden NFL’s copying of the work appropriates the entirety of the tattoo, not a minimal portion of the work. See *id.* at 198 (“Appropriation of an entire work is often sufficient to preclude a fair use defense.”). Finally, widespread copying and display of the copyrighted work would undoubtedly have a substantial impact on the artists’ market. See *id.* at 199 (noting the importance of the fourth fair use factor and emphasizing that a substantial market impact forecloses fair use as a defense); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 926–31 (2d Cir. 1994) (finding that the fourth factor favored the publishers who sued for copyright infringement, despite evidence of limited effect on the potential market for the copyrighted works). *But see* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (refusing to focus on the fourth factor as the most prudent and imploring courts to avoid treating the fourth factor in isolation, ultimately demanding a weighing test of all four).

96. See 2 GOLDSTEIN, *supra* note 36, § 10:1 (2d ed. 2004) (enhancing the definition of fair use to include “an equitable rule of reason” and a use “allowed as reasonable and customary on the theory that the author must have foreseen it and tacitly consented to it”); see also H.R. REP. NO. 94-1476, at 65 (1976) (illustrating the intended breadth of § 107 with a variety of examples, including quotations of excerpts in a review, quotations in scholarly works, parody,

creating the equitable fair use defense, aimed to confirm the Act's basic goal of putting copyrighted works to their most beneficial uses for the good of the public.⁹⁷

Congress and the courts rely on two overlapping approaches to the fair use defense: a private benefit approach and a public benefit approach.⁹⁸ The primary distinction between the two approaches exists in the first factor of the Act: commercial use versus copying for nonprofit use.⁹⁹ Initially, courts found that any commercial use created a presumption of unfairness because "the user stands to profit from exploitation of the copyrighted material without paying the customary price."¹⁰⁰ A commercial use infringer can rebut the presumption of unfairness by demonstrating certain characteristics of a particular commercial use, as the defendant did in *Sega Enterprises Ltd. v. Accolade, Inc.*¹⁰¹ In *Sega*, the defendant copied the plaintiff's copyrighted software for purposes of reverse engineering it to create its own competing software.¹⁰² Although the defendant's ultimate purpose was commercial, its direct purpose was not, and the court found that the defendant had a legitimate interest in studying certain aspects of the plaintiff's software, and that the

reproductions in libraries to replace part of a damaged copy, and copying a work in legislative or judicial proceedings).

97. See 2 GOLDSTEIN, *supra* note 36, § 10:1 (2d ed. 2004) (noting that the fair use defense does not contradict copyright law's basic goal of harmonizing the claims of individual creators with the benefits to the public).

98. See *id.* (identifying the two primary theories that separate fair use analyses, which emphasize the importance of the first factor for fair use set forth in the Act).

99. See *id.* ("Congress and the courts have reconciled the public good with the claims of individuals through two, overlapping, approaches to the fair use defense."); ALBERT & AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 55, at 190 (conflating Goldstein's bifurcated approach to the fair use defense with the distinction that relies on the question of commercial use).

100. See ALBERT & AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 55, at 190 (identifying the inherent unfairness of profiting from another's copyrighted work); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993) (holding that any commercial use creates a "meaningful likelihood that future market harm exists," regardless of the presence or absence of the other factors).

101. See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) ("However, the presumption of unfairness that arises in such cases can be rebutted by the characteristics of a particular commercial use.").

102. See *id.* at 1523 (describing the defendant's actions that infringed on plaintiff's copyrighted work).

defendant's purpose served the public by disseminating unprotected ideas.¹⁰³

The Ninth Circuit expanded the bounds of the fair use defense in *Kelly v. Arriba Soft Corp.*,¹⁰⁴ when it found a search engine's copying of thumbnail versions of copyrighted images for purposes of indexing a fair use.¹⁰⁵ Ultimately, the court characterized the defendant search engine's use as a "transformative use" because the purpose "of the thumbnail images was to provide an index, which greatly differed from the aesthetic purpose of the images."¹⁰⁶ Fair use requires that the subsequent presentation and use transform the original copyrighted work and serve some alternative purpose from the original, as *Kelly* and later cases such as *Perfect 10 v. Amazon.com, Inc.*¹⁰⁷ emphasized.¹⁰⁸

Despite courts' continual development of the fair use defense, video games, broadcasts, and players cannot successfully assert it to defend their copying and displays of copyrighted tattoos.¹⁰⁹ This defense primarily fails due to the emphasis courts place on the commercial versus nonprofit use factor.¹¹⁰ Clearly, players,

103. *See id.* (holding that the defendant copied "for a legitimate, essentially non-exploitative purpose, and that the commercial aspect of its use can best be described as of minimal significance").

104. 336 F.3d 811 (9th Cir. 2003).

105. *See id.* at 821 (finding that Arriba's reproduction of Kelly's images for use as thumbnails in Arriba's search engine constituted a fair use).

106. *See id.* at 822 (describing the differences between the defendant's transformative use and the artist's original purpose for the copyrighted images then turned into thumbnails).

107. 508 F.3d 1146 (9th Cir. 2007). In this case, the court upheld the validity of Google Images' cataloging and framing of Perfect 10's copyrighted images because Google's use and purpose both qualified as transformative. *See id.* at 1168 ("Google has put Perfect 10's thumbnail images (along with millions of other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public.").

108. *See* ALBERT & AM. INTELLECTUAL PROP. LAW ASS'N, *supra* note 55, at 193 ("As can be seen, fair use requires that the presentation and use be transformative and not simply a verbatim copy that serves the same purpose as the original.").

109. *See, e.g.,* Warner Brothers Hearing, *supra* note 72, at 4 (commenting on the "likelihood of success on the merits analysis of the fair use" defense and doubting its success in such a distinctly commercial case).

110. *See supra* notes 99–100 and accompanying text (describing the

video games, and other related industries profit significantly from the copyright infringements associated with their businesses, and none of the parties at fault can point to a transformative purpose for their uses of the copyrighted work.¹¹¹ Although the scholarship presents fair use as a legitimate solution to the problem of copyright and tattoos, it fails in the situation presented by Madden NFL and professional athletes' careers, which both profit substantially from their infringing activities.

B. Work Made for Hire

The work for hire doctrine presents an alternative possibility to resolve artist and client disputes for commissioned tattoos.¹¹² A work for hire “is a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned to fit within a list of nine categories that treat the tattooer as an independent contractor.”¹¹³ As tattoos do not

importance of the first factor for fair use analysis in the Copyright Act as between commercial and not-for-profit uses of a copyrighted work).

111. See Warner Brothers Hearing, *supra* note 72, at 3 (doubting the effectiveness of Warner Brothers' fair use defense for lack of transforming or parodying the Tyson tattoo in some way, and for the plain fact that Warner Brothers stood to profit heavily from the film). Additionally, the fair use doctrine primarily defends against a single use of a copyrighted work, not multiple infringing uses. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 465 (1984) (Blackmun, J., dissenting) (referencing a Senate report accompanying the Copyright Act of 1976 as preferring single copies and not multiple copies when attempting to assert fair use as a defense).

112. See Meredith Hatic, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 396, 429 (2012) (admitting that using the work-for-hire exception in the Copyright Act to protect tattoo artists and clients is “a bit of a stretch”).

113. See 1 *NIMMER & NIMMER*, *supra* note 38, § 5.03 (“The employer or other person for whom the for-hire work was prepared is considered the author for copyright purposes.”); Nickow, *supra* note 13, at 204 (defining a work for hire in the tattoo context); see also Copyright Act of 1976, 17 U.S.C. § 201(b) (2012) (describing that in the case of a “work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright”). The nine categories for commissioned works that treat the artist as an independent contractor include works

specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture . . . as a translation, as a

satisfy the terms of § 101 of the Act for a work made for hire by an independent contractor, this Note only examines the work made for hire doctrine as it relates to employees working within the scope of employment.¹¹⁴ The statute takes a restrictive approach to the work made for hire doctrine, so if the artist–client relationship does not fall within the Act’s narrow definition of a work made for hire, the client owns the tattoo only if the artist expressly assigns his or her ownership rights to the client.¹¹⁵ Therefore, “[e]ven if the client is contracting with a vendor for materials that will be developed expressly for the client and at the client’s expense, the client will not own the materials.”¹¹⁶ The tattoo artist would be the employee of the tattoo recipient, and the tattoo on the recipient would be the work made for hire.

In *Community for Creative Non-Violence v. Reid*,¹¹⁷ the Court interpreted Congress’s use of “employee” and “employment” in the Copyright Act to include only the terms’ settled and common law definitions, limiting the scope of the terms to the conventional relation of employer and employee.¹¹⁸ *Reid* mandated reliance on common law agency doctrine in the absence of a formal employment agreement, which considers the hiring party’s right to control the manner and means by which the employee creates the product.¹¹⁹

supplementary work, as a compilation, as an instruction text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id. § 101.

114. See 17 U.S.C. § 101 (limiting the work made for hire defense for independent contractors to nine specific categories, none of which include pictorial or graphic works).

115. See Cathy Kiselyak Austin, *U.S. Copyright Act—“Work Made For Hire” Doctrine*, in UNDERSTANDING THE INTELLECTUAL PROPERTY LICENSE 609, 611 (2004) (“If the deliverables do not fall with[in] the statute’s narrow definition of ‘works made for hire,’ the client can own them only if the vendor explicitly assigns its ownership rights to the client.”).

116. *Id.*

117. 490 U.S. 730 (1989).

118. See *id.* at 731 (considering the meaning of “employee” and “employment” as used in the Copyright Act to determine if a work qualified as a work made for hire).

119. See *id.* at 752 (“To determine whether a work is a ‘work made for hire’

The Court then listed other relevant factors to decide if a work qualifies as a work made for hire: the skill required by the employee; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the employee and the hiring party; the method of payment; the business of the hiring party; the provision of employee benefits; and the tax treatment of the employee.¹²⁰ Like Reid, the sculptor in the case, tattoo artists clearly are not employees of their clients but are independent contractors.¹²¹

The Court determined that sculpting was a skilled occupation, that Reid supplied his own tools, that he worked in his own studio and only for Community for Creative Non-Violence (CCNV) for a short period of time, that his payment depended on his completion of a specific job, and that CCNV did not owe payroll or Social Security taxes or provide any employee benefits to Reid.¹²² With a plethora of factors to support its holding, the Court definitively labeled Reid an independent contractor, and because sculptures (like tattoos) fall outside the nine categories in § 101, the work in question was not a work made for hire.¹²³ The similarities between tattoos created for clients and the sculptural work that Reid produced for CCNV are striking and thereby eliminate the work made for hire doctrine as a legitimate defense

within the § 101 definition, a court should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor”); *see also* RESTATEMENT (SECOND) OF AGENCY § 1 (1958) (defining an agency relationship and emphasizing that an agency relationship does not require intent to create an agency relationship); 1 NIMMER & NIMMER, *supra* note 38, § 5.03[B][1][a][iii] (observing the similarity between the Court’s adopted agency test (the right to control the product) and the tests the Court rejected (the hiring party retains the right or actually wields the right to control the product)).

120. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989) (exhausting a list of other factors in the work made for hire analysis).

121. *See id.* (labeling Reid as an independent contractor, not an employee of Community for Creative Non-Violence).

122. *See id.* at 753 (applying the list of factors from § 220(2) of the RESTATEMENT (SECOND) OF AGENCY to Reid and determining his status as an independent contractor and not an employee).

123. *See id.* (noting that the CCNV conceded that the sculptural work could not satisfy the terms of § 101, eliminating the possibility that the sculpture was a work made for hire).

for professional athletes, video games, and other displays of a copyrighted tattoo.¹²⁴

C. Joint Authorship

For some clients, such as Wallace, the authorities suggest joint authorship as a defense.¹²⁵ The Copyright Act specifically addresses works that result from the effort of multiple authors, stating that “[t]he authors of a joint work are co-owners of copyright in the work.”¹²⁶ Section 101 of the Act defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹²⁷ In his famed treatise, renowned copyright scholar Melville Nimmer describes some examples that illustrate the concept of joint works: products of joint authorship, works for which the author transfers copyright to more than one person, a copyrighted work that passes via intestacy or will of the author, a work that gives the renewal rights to a class consisting of more than one person, or a work subject to community property laws in certain states.¹²⁸

Nimmer recognizes the limitations of categorizing joint works and products of joint authorship and instead explains the concept as a product of two distinctive theories: inseparability, which occurs when each author cannot separately identify his or her

124. See Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 534 (2013) (“Custom tattoos are almost certainly not works made for hire as defined by the Copyright Act.”). Cf. 1 NIMMER & NIMMER, *supra* note 38, § 5.03[B][1][a][iv] (suggesting a return to the formalist position that only formal, salaried employees qualify under the work for hire doctrine, despite the Court’s analysis in *Reid*).

125. See Nike Answer, *supra* note 93, at 6 (asserting joint authorship as a defense to Reed’s infringement allegations because of Wallace’s participation in the creative process).

126. See Copyright Act of 1976, 17 U.S.C. § 201(a) (2012) (defining a joint work).

127. See *id.* § 101 (emphasizing the requirement of intent to qualify as a joint work).

128. See 1 NIMMER & NIMMER, *supra* note 38, § 6.01 (describing the circumstances that result in a joint work with multiple owners of a copyright). “A joint work may more properly be defined as one in which the copyright is owned in undivided shares by two or more persons.” *Id.*

contributions, and interdependency, where the authors' contributions become an indivisible whole pursuant to an implied agreement between them.¹²⁹ Intent remains a touchstone for joint works of joint authors—the parties must intend to create a unitary, whole product.¹³⁰ If joint authors possess the requisite intent to create a joint work, the authors can contribute unequally to the ultimate product but still possess equal rights in the product's copyright.¹³¹ To fall within the Act's definition of an author, however, a joint author must supply intellectuality to the project—the law requires more than physical labor.¹³²

Rasheed Wallace asserted joint authorship as an affirmative defense.¹³³ Recall that Wallace proposed the initial concept for his tattoo, including the Egyptian theme and characters, but Reed created the sketch and flash design for the tattoo before its application on Wallace's arm.¹³⁴ This give and take of ideas and

129. See *id.* § 6.02 (noting the two justifications for the principle of joint authorship as works with inseparable contributions by each author and works where the respective contributions depend on each other to produce an indivisibly whole product); see also *Brown v. McCormick*, 23 F. Supp. 2d 594, 605 (D. Md. 1998) (illustrating interdependency when presuming that the lyricist and composer of a song, despite contributing separately identifiable elements of the final product, intended that each have an undivided interest in the combined product of their respective efforts).

130. See 1 NIMMER & NIMMER, *supra* note 38, § 6.03 (describing how the authors must have “the intention that their contributions be merged . . . at the moment in time when the work is created, not some later date”). But see *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268, 270 (2d Cir. 1944) (holding that joint authorship requires each author to intend that his contribution constitute a part of a total work at the time he creates it, not that both authors have the same intention at the same time).

131. See 1 NIMMER & NIMMER, *supra* note 38, § 6.07[A][1] (noting that equal contributions are not required, but more than a de minimis contribution is required to create a joint work).

132. See *id.* § 6.07[A][2] (“Further, the contribution must be one of *authorship* in order to constitute the contributor a joint author.”); *Kyjen Co. v. Vo-Toys, Inc.*, 223 F. Supp. 2d 1065, 1068 (C.D. Cal. 2002) (defining what acts an author must perform to qualify as an author for purposes of determining joint work status).

133. See *Nike Answer*, *supra* note 93, at 6 (“Defendant Wallace is the sole owner, or alternatively a joint author, of the work.”).

134. Compare *Nike Complaint*, *supra* note 14, at 3 (describing the interactions and exchanging of ideas between Wallace and Reed before Reed inking the final tattoo on Wallace's arm), with *Nike Answer*, *supra* note 93, at 3 (admitting that Wallace met with Reed to discuss the design of his tattoo but indicating that Reed aided in the design process and solely applied the final

design suggestions remains commonplace in the custom tattoo world, creating the appearance of joint authorship between the client and the tattooist.¹³⁵ The heavy emphasis on intent to create a joint work between authors, however, undermines this defense.¹³⁶ Tattoo artists' clients do not typically intend to create a joint work and more frequently rely on the artists' expertise to create a final, copyrightable product.¹³⁷ Generally, a client's minimal contribution at the beginning of the creative process, including his or her suggestion of ideas or provision of photographs or inspiration, falls under the *de minimis* exception for joint works, precluding the client from claiming any authorship in the final product.¹³⁸

D. Implied Nonexclusive License

An implied license protects a client from an artist's claim of copyright infringement for simply appearing in public.¹³⁹

tattoo).

135. See Guen Douglas, *The Process of Getting a Custom Tattoo*, TATTOO ARTIST MAG. (Sept. 22, 2011), <http://tattooartistmagazineblog.com/2011/09/22/guen-douglas-tattoos-process-of-getting-a-custom-tattoo-artist-magazine-blog/> (last visited Nov. 6, 2015) (noting that most tattoo artists draw and sketch designs after the initial consultation but do not charge the client for this service) (on file with the Washington and Lee Law Review).

136. See 1 NIMMER & NIMMER, *supra* note 38, § 6.03 (recognizing intent as the touchstone of the joint work doctrine).

137. See Douglas, *supra* note 135 (describing how clients generally “like to give their artist freedom to explore a subject”); Perzanowski, *supra* note 124, at 533 (“Because of their greater familiarity with theories of design and composition, as well as a clearer understanding of the limitations of the medium, tattooers frequently guide their clients toward choices that, while true to the client's original conception, are more likely to translate well into tattoos.”).

138. See 1 NIMMER & NIMMER, *supra* note 38, § 6.07[A][1] (discussing *de minimis* contributions as preventing a contributor from claiming joint authorship of a work); Perzanowski, *supra* note 124, at 535 (pointing out that “the contributions of most clients are unlikely to meet the threshold of authorship” for the joint authorship defense to succeed in the tattoo context).

139. See Hatic, *supra* note 112, at 432 (“If a subject has a nonexclusive license to display his tattoo, he has an affirmative defense to a claim of copyright infringement by the artist/owner.”). For example, if a tattoo artist obtains an implied license for another artist's flash, the artist with the license can copy the design for purposes of transferring it to a client's skin. See Perzanowski, *supra* note 124, at 560 (discussing the widely accepted practice of

Exclusive licenses and other transfers of copyright ownership must occur in writing, and the owner of the rights conveyed must sign the document.¹⁴⁰ An artist can grant or imply a nonexclusive license by spoken word or even mere conduct.¹⁴¹ An implied nonexclusive license does not transfer any ownership interest in the copyrighted work to the licensee but allows the licensee to use the work in ways specified by the licensor.¹⁴²

Scholars praise courts that choose to recognize implied nonexclusive licenses but tend to limit their theory to noncommercial displays of the copyrighted work.¹⁴³ As previously discussed,¹⁴⁴ the highly commercial nature of professional athletes' careers and most related activities excludes the possibility of an implied nonexclusive license serving as a valid defense in copyright infringement cases against them.¹⁴⁵

implied licenses and flash designs). The artist that acquires the license may not, however, copy it for other purposes, such as printing t-shirts or creating competing sheets of flash to sell. *See id.* (noting that these actions would exceed the scope of the implied license and also violate industry norms regarding flash).

140. *See* Copyright Act of 1976, 17 U.S.C. § 204(a) (2012) (requiring certain formalities for the instrument of a conveyance in ownership of a copyrighted work); *see also* 3 NIMMER & NIMMER, *supra* note 38, § 10.03[A][1][a] (listing the cumulative aspects required to successfully convey ownership or rights in a copyright to another in writing).

141. *See* Hatic, *supra* note 112, at 431 (“However, nonexclusive licenses may be granted orally or may be implied from conduct.”).

142. *See id.* at 432 (“If a subject has a nonexclusive license to display his tattoo, he has an affirmative defense to a claim of copyright infringement by the artist/owner.”).

143. *See id.* at 431 (identifying courts that created elements for finding a nonexclusive implied license). The elements relied on by some courts include: (1) the purported licensee requests the creation of the work, (2) the copyright owner creates the work and delivers it to the licensee, and (3) the copyright owner intends the licensee to use the work as the licensee does. *See Hevia v. Portrio Corp.*, 602 F.3d 34, 41 (1st Cir. 2010) (identifying factors that strongly suggest the finding of an implied nonexclusive license, although declining to recognize such a license in the case at hand).

144. *See supra* notes 110–111 and accompanying text (highlighting that the extremely commercial nature of all uses of a copyrighted tattoo prevent clients and industries from relying on the fair use defense).

145. *See* Verified Answer to Verified Complaint for Injunctive and Other Relief at 8, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-00752 (E.D. Mo. May 20, 2011) (claiming that “Warner Bros. ha[d] an implied license from plaintiff to use Mr. Tyson’s tattoo in *The Hangover: Part II*”). Judge Perry doubted the validity of claiming a nonexclusive implied license as a defense, too. *See Warner Brothers Hearing, supra* note 72, at 4 (“[T]here is no evidence at all

Additionally, because an artist can revoke the implied license at any point and due to the limited scope of such license, this solution remains less than ideal for clients and the video game industry.¹⁴⁶

E. The National Football League Players Association's Advice to Players

In response to the uncertainty surrounding the aforementioned defenses, the NFLPA stepped into the role of proactive legal advisor for its members.¹⁴⁷ During the NFL Combine, a training camp for potential professional football players, the Association correctly proposed the most ideal solution.¹⁴⁸ It “advised agents to tell their players that when they get tattoos going forward, they should get a release from the tattoo artist, and if they can track down their former artists, they should get a release” from them as well.¹⁴⁹ Failing to obtain

that Warner Brothers had any kind of license implied or otherwise to use the tattoo, and so Warner Brothers' use of the tattoo was unauthorized . . .”).

146. See Craig P. Bloom, Note, *Hangover Effect: May I See Your Tattoo, Please*, 31 CARDOZO ARTS & ENT. L.J. 435, 470 (2013) (“An implied license is generally revocable by the copyright owner.”); Perzanowski, *supra* note 124, at 560 (highlighting the failures of the implied license as a protection due to its limited scope).

147. See Heitner & Wilmot, *supra* note 6, at 322 (“NFLPA officials started advising players to get copyright waivers or licenses from their tattoo artists as a result of Stephen Allen’s lawsuit against EA Sports and former NFL running back Ricky Williams for use of a tattoo on NFL Street video game covers.”); Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013, 8:01 AM), <http://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/> (last visited Nov. 6, 2015) (noting the appreciation of players towards the NFLPA for warning them about their potential liability but insisting that the NFLPA “should have been on top of it earlier”) (on file with the Washington and Lee Law Review).

148. See Heitner, *supra* note 147 (discussing the various suggestions the NFLPA makes to new players at the NFL Combine to prevent tattoo issues from surfacing in the future for players, teams, sponsors, and other industry participants).

149. *Id.*; see also Bradley, *supra* note 92, at 31 (“Encourage both tattoo artists and tattoo recipients to sign copyright agreements outlining the relative transfer or retention of tattoo intellectual property rights.”); Heitner & Wilmot, *supra* note 6, at 320 (urging athletes to seek a transfer of right in the copyright prior to the ink drying but recognizing that this transfer might cause artists to

releases from tattoo artists may result in the NFLPA requiring a player to indemnify the NFLPA and its associated companies from any and all claims made by the player's tattoo artists.¹⁵⁰ The NFLPA, however, recognizes that forcing players to obtain signed releases every time they want a new tattoo remains wildly unrealistic and therefore requires an alternative.¹⁵¹

V. A Better Solution: The Featured Use Test

A. Reiterating the Problem: Valid yet Competing Interests

Clearly, the competing and contradicting rights of the player, the artist, and the video game pose serious dilemmas for the development of copyright law in this arena.¹⁵² Players possess their own rights of publicity, which include the ability to choose where they make appearances and which media outlets they allow to use their likenesses.¹⁵³ Tattoo artists, like other authors of creative, pictorial, and graphic works, lawfully deserve some

charge additional fees).

150. See Heitner, *supra* note 147 (describing the NFLPA's lucrative group licensing program that requires heavy legal protection from copyright lawsuits, including lawsuits from players' tattoo artists).

151. See *id.* (hinting that the NFLPA's attempt to reduce its exposure depends on the players carrying the NFLPA's plan through); Bradley, *supra* note 92, at 31 (suggesting that lawyers who represent celebrities and professional athletes should encourage their clients to consult with them before getting tattooed, despite the unrealistic nature of this practice pointer).

152. See King, *supra* note 11, at 130 (identifying a "handful of other copyright lawsuits [that] have shed some light on how the courts might analyze the unique issues that arise in the determination of copyrightability of tattoos and the problems that flow from providing copyright protection to these creative works"); Perzanowski, *supra* note 124, at 530 (recognizing the "parade of horrors" associated with tattoo artists actually obtaining exclusive rights under the Copyright Act as alarming but suggesting that tattoo industry norms and practices resolve the problem); Raustiala & Sprigman, *supra* note 7 (asking if artists should have the right to order their clients to stay off a movie set and deciding that, although copyright law gives that power to an artist, "no court would or should allow it").

153. See Garrett Rice, Note, *Groove is in the Hart: A Workable Solution for Applying the Right of Publicity to Video Games*, 72 WASH. & LEE L. REV. 317, 323-35 (2015) (differentiating between the right of publicity and the right to privacy and emphasizing that the right to publicity "guards an individual's right to profit from his own identity," prohibiting others from exploiting his or her identity without consent).

degree of protection for their designs from the Copyright Act.¹⁵⁴ The video game industry maintains an interest in continuing to enhance the realism in its games, which apparently increases the profitability and popularity of games.¹⁵⁵ While all these rights appear valid, they cannot coexist without imposing on one another.¹⁵⁶ As discussed in Part IV, other authorities attempt to cobble together solutions that only pose further problems for one party or another, thus paving the way for the acceptance of a novel proposal before the ink dries on this pressing issue.¹⁵⁷

B. When All Else Fails

1. The Policy Position: Prioritizing Personal Dignity over Protection for Artists

As a testament to this country's longstanding commitment to personal autonomy, tattoo artists still should not receive any copyright protection for nonfeatured uses of their inked art, even when players inevitably fail to obtain the necessary documentation suggested by the NFLPA.¹⁵⁸ Although most

154. See Warner Brothers Hearing, *supra* note 72, at 3 (“Of course tattoos can be copyrighted. I don’t think there is any reasonable dispute about that.”). *But see* Perzanowski, *supra* note 124, at 537 (interpreting tattoo artists’ norms to “embrace a more robust set of exhaustion rights favoring their clients” instead of themselves).

155. See Cheryl Walker, *Video Games and Realism: Communication Professor Studies Effects on Children*, WAKE FOREST UNIV. (Dec. 22, 2010), <http://news.wfu.edu/2010/12/22/video-games-and-realism/> (last visited Nov. 6, 2015) (noting that “with these games, the enhanced realism also makes the player feel more involved in the game and increases the effect” of actual involvement, which continues as a popular trait of video games) (on file with the Washington and Lee Law Review).

156. See King, *supra* note 11, at 161 (encouraging artists to enforce their rights but ignoring the rights of the “younger generation,” which acquires more tattoos than any other before it).

157. See *supra* Part IV (outlining the variety of suggestions that scholars created to solve the tattoo and copyright dilemma and pointing out each theory’s weak spot as it related to the player, the artist, or the video game).

158. See IOANNIS G. DIMITRAKOPOULOS, *INDIVIDUAL RIGHTS AND LIBERTIES UNDER THE U.S. CONSTITUTION: THE CASE LAW OF THE U.S. SUPREME COURT* 331 (2007) (recognizing that certain matters involving the most intimate and personal choices a person may make obtain constitutional recognition through the Fifth and Fourteenth Amendments). The author goes further by identifying

scholars and lawyers quickly agree that tattoos deserve copyright protection, they also recognize that the “potential for an artist to control a person’s public appearances and activities is all too harmful to the ideals of individual autonomy and freedom.”¹⁵⁹ Without a harsh deviation from previously suggested solutions, “[c]opyright law thereby becomes the instrument to impose, almost literally, a badge of involuntary servitude, akin to the mark which ranchers brand the cattle they own” onto the recipient of a tattoo.¹⁶⁰ Withholding tattoo artists’ copyright protection for nonfeatured uses of their works only occurs if a client cannot successfully rely on other defenses and if the client failed to obtain a release prior to getting inked.

Nimmer recently voiced his support of this conclusion in a memorandum he wrote for Warner Brothers in *Whitmill*, admitting that he “tacitly assumed that a tattoo could ‘presumably qualify as a work of graphic art’” before taking the case.¹⁶¹ His memorandum, however, depicts a drastic departure from his previously held beliefs.¹⁶² To illustrate this shift, Nimmer used the example of Mike Tyson’s face tattoo to demonstrate the absurdity of granting *Whitmill* exclusive rights under the Act for the copyrighted work:

[T]he consequences of recognizing copyright protection for a tattoo include the possibility that a court could order the bearer not to remove it, if it has gained recognized stature; or to order the bearer to undergo laser removal, if he has added an additional tattoo adjacent to it; or to prevent magazine, television, and film coverage of the bearer with the tattoo on

privacy and personal autonomy over one’s self as “the most comprehensive of rights and the right[s] most valued by civilized men.” *Id.* at 333; *see also* Perzanowski, *supra* note 124, at 532 (recognizing that without tattooers’ respect for client autonomy, clients legally have little protection against the artist).

159. *See* Cummings, *supra* note 27, at 309 (arguing first for the copyrightability of tattoos and then addressing display rights and control over the client as separate issues).

160. Heitner & Wilmot, *supra* note 6, at 315.

161. *See* Nimmer Declaration, *supra* note 32, at 2, 4 (submitting a statement on behalf of Warner Brothers discussing his changed views on tattoos and their copyrightability).

162. *See id.* at 4 (changing his position regarding the copyrightability of tattoos).

his face. Further . . . there is no possible way for the bearer of the tattoo to protect herself against those consequences.¹⁶³

Clearly, the interest in protecting intellectual property rights cannot outweigh the immense authority favoring the bearer's personal autonomy, as Nimmer suggested in support of Warner Brothers.¹⁶⁴

2. Considerations When Crafting a New Test

A new, workable test for copyright infringement and tattoos must include considerations and components that correct the current suggestions' weaknesses.¹⁶⁵ First, the test must apply specifically to the tattoo context, recognizing the competing rights of artists and clients, as well as the real life ramifications associated with getting a tattoo.¹⁶⁶ Second, courts must possess the ability to consistently apply the new test to give artists, clients, and video games a clearer standard to rely on in the future.¹⁶⁷ Finally, the new test must encompass the video game

163. *Id.* at 13.

164. *See id.* at 8 (“For all these reasons, human flesh cannot serve as the ‘medium of expression’ that Congress intended to embody legally protectable authorship. For that reason, plaintiff’s claim of copyright over a tattoo on Mike Tyson’s body must be summarily rejected.”).

165. *See supra* Part III (criticizing all the authorities’ suggestions for resolution of the issue of tattoos and copyright). Notice that the authorities all rely on exceptions to the exclusive rights of the artist instead of recognizing the equal importance of the separate and distinct rights of the client. *See id.* (listing fair use, joint works, work made for hire, and implied nonexclusive licenses as the proposed solutions for copyright disputes between clients and artists, all of which carve back at the artists’ exclusive rights but refuse to identify clients’ rights).

166. *See* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 29 (2001) (recognizing the conundrum of the copyrightability of someone’s body but struggling to provide evidence to support the claim, and instead stating “apodictically that a body, even as augmented, simply is not subject to copyright protection”).

167. *See* King, *supra* note 11, at 133 (aiming to “address the ambiguity regarding the protectability of tattoos due to the lack of published court decisions in this area of the law, and [identifying] the negative impact such ambiguity has on the tattoo industry”); Symposium, *International Summit on the Law and Business of Video Games: Legal Threats to Game Developers*, 16 SMU SCI. & TECH. L. REV. 99, 115 (2013) (capturing the response of the senior director of intellectual property at EA Sports to a question regarding copyright

industry while also having wider applications for tattoos in general.¹⁶⁸

3. *The Featured Use Test*

In prioritizing players' rights to live their lives without the concern of copyright infringement lawsuits, artists' rights cannot disappear altogether.¹⁶⁹ This Note proposes a new test to determine which uses of artists' copyrighted works garner legal protection. The featured use test depends upon the nature of the allegedly infringing activity; if use of the artist's tattoo qualifies as featured, the violating parties cannot disclaim liability.¹⁷⁰

The featured use test dictates that incidental, nonfeatured uses of a tattoo will not violate the artist's rights, but when a party consciously chooses to feature an artist's tattoo in a place of prominence, the party's use triggers the artist's exclusive rights. For example, an advertisement prominently featuring an artist's tattoo will always meet the featured use test because of the inherent purpose of advertising—to catch the audience's attention.¹⁷¹ The test honors the constitutional commitment to

liability). The EA representative indicated that EA goes through an extensive legal process before developing a video game, which she indicated “kept [EA] out of trouble, basically.” *See id.* (describing EA's development process for a video game as involving extensive copyright, trademark, and copying analysis).

168. *See generally* Rice, *supra* note 153 (advocating for a different set of rules for the video game industry, due to its unique and technologically progressive nature).

169. *See* King, *supra* note 11, at 132 (categorizing tattoo artists as a group that needs more protection under the law, especially because “no tattoo artist has yet been successful in receiving enforcement by the court of his copyright in a tattoo”).

170. *See* Heitner & Wilmot, *supra* note 6, at 318 (recognizing, timidly, the important differentiation between incidental use and purposeful use of the tattoo). “However, the inherent problem remains in determining whether the artist should benefit from any incidental use of the tattoo in a commercial setting . . . or if his commission should strictly stem from purposeful use of the tattoo . . .” *Id.*

171. *See infra* notes 188–195 and accompanying text (explaining why *Reed* and *Whitmill* both clearly fit within the featured use test); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 578 (2001) (discussing the purposes of advertising, which include promoting a product and obtaining the target audience's attention to sell that product); *see also* Harkins, *supra* note 60, at 332 (explaining that tattoo lore involves artists protecting their work but not favoring featured exposure of their

personal autonomy by eliminating liability for otherwise infringing acts associated with ordinary living.¹⁷² For a professional football player, incidental, nonfeatured uses of his tattoo include inadvertent displays at public events, during game broadcasts and newscasts, and even avatar appearances in video games—activities associated with the player’s lifestyle and career.¹⁷³ Alternatively, featured uses of a player’s tattoo—including purposeful uses in commercials, photographs, and other advertising materials—would violate the artist’s exclusive rights.¹⁷⁴ Support for the rationale of the featured use test comes from a variety of sources.

First, the lexicology behind the word “featured” illustrates its appropriateness in this context. The Oxford English Dictionary defines “featured” as “made a feature or special attraction” and defines its synonym “prominent” as “stand[ing] out so as to catch the attention; notable.”¹⁷⁵ Similarly, the U.S. Department of Labor’s Dictionary of Occupational Titles identifies a “featured player” as one who “receives prominent billing.”¹⁷⁶ The Supreme Court has used “featured” to mean prominence as well, indicating its familiarity with the term.¹⁷⁷ The Copyright Act also uses the

work in advertisements).

172. See *supra* Part V.A (ordering the various competing rights at issue in the copyrightability of tattoos and concluding that personal autonomy trumps creative protections).

173. See GEORGE W. SCHUBERT, RODNEY K. SMITH & JESSE C. TRENTADUE, *SPORTS LAW* 126 (1986) (historicizing the increased “popularity of sporting activities and the athletes who participate in them” and pointing out the importance of advertising and related commercial activities for the sports business).

174. See *infra* notes 188–202 and accompanying text (exploring *Reed*, *Whitmill*, and *Allen* as examples of when featured uses of an artist’s tattoo in promotional materials constituted violations of the artist’s exclusive rights under the Copyright Act).

175. See 5 OXFORD ENGLISH DICTIONARY 791 (2d ed. 1989) (listing a variety of definitions for “featured,” more typically used to describe someone’s appearance); 12 *id.* at 613 (defining “prominence” as “[s]tanding out so as to strike the eye; conspicuous”).

176. U.S. DEP’T OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* 159.047-018 (4th ed., rev. 1991).

177. See *Van Orden v. Perry*, 545 U.S. 677, 689 (2005) (discussing the eminence of Moses and the Ten Commandments in the District of Columbia, including a statue “prominently featured in the Chamber of the United States House of Representatives”); *Harper & Row Publishers, Inc. v. Nation Enters.*,

word to differentiate between various royalty rates.¹⁷⁸ The Act defines “featured music” as “any performance of a musical work, whether live or recorded, that is the principal focus of audience attention,” the same concept this Note uses to define the featured use test.¹⁷⁹

Second, the Second Circuit created a similar test when analyzing whether the inclusion of art behind the scenes in television shows and films constituted copyright infringement or *de minimis* fair use.¹⁸⁰ The court focused on the “observability of the copyrighted work in the allegedly infringing work” and the “prominence” of the copyrighted work in the film or show.¹⁸¹ The Second Circuit used this analysis in the context of artwork in films and television shows, but the distinction between out-of-focus, background use and lengthy, prominent, observable use analogizes nicely to this new test regarding tattoos and copyright.¹⁸² Due to the courts’ and the government’s familiarity

471 U.S. 539, 566 (1985) (noting that although infringing material constituted less than one percent of the work, the infringing material was “prominently featured” and therefore violated the author’s exclusive rights); *United States v. First Nat’l City Bank*, 379 U.S. 378, 536 n.12 (1965) (using the turn of phrase “prominently featured” to indicate the position of preference of a theory in a petition for rehearing).

178. See Copyright Act of 1976, 17 U.S.C. §§ 381.6(b)(1), 253.8(b)(1)(ii)(2) (2012) (using “featured” to describe certain displays that warrant higher royalty rates).

179. See *id.* § 381.6(b)(1) (distinguishing featured music from nonfeatured music, which includes incidental performances).

180. See *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998) (reviewing a video copy of defendant’s movie to determine if the movie met the quantitative threshold for copyright infringement); *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) (“What defendants dispute when they assert that their use of the poster was *de minimis* is whether the admitted copying occurred to an extent sufficient to constitute actionable copying, *i.e.*, infringement.”).

181. See *Sandoval*, 147 F.3d at 217 (“Observability is determined by the length of time the copyrighted work appears in the allegedly infringing work, and its prominence in that work”); *Ringgold*, 126 F.3d at 75 (listing the length of time that the copied work is observable in the allegedly infringing work and the prominence of its inclusion as factors to consider when determining infringement).

182. See *supra* note 181 (describing the two cases in which the Second Circuit has relied on the distinction between background use and featured use to determine if an activity qualified as a fair, *de minimis* use).

with the term “featured” as meaning prominent, its use in this new test is appropriate.¹⁸³

Third, the player’s right of publicity bolsters the validity of the featured use test. The right of publicity protects celebrities’ ability to profit from their own identities and personas.¹⁸⁴ As soon as the ink dries, a tattoo becomes a permanent part of a client’s identity and persona, automatically incorporating into that player’s right of publicity.¹⁸⁵ Any uses of the tattoo incidental to the client’s identity therefore warrant right of publicity protection, which permits the client to require consent before any profits resulting from use of his likeness and image.¹⁸⁶ Featured uses surpass right-of-publicity protection, however, as they no longer merely accompany the client’s identity but become the “principal focus of the audience[’s] attention.”¹⁸⁷

183. See *supra* notes 176–177 and accompanying text (sourcing definitions of “featured” from legal authorities to determine its appropriateness in this Note’s new standard for determining copyright infringement associated with tattoos); see also *Rodney Distribs., Inc.*, 50 F.T.C. 11, 12 (1953) (accusing the corporation and its officers of misrepresenting the manufacturing location of their product by “featured use” of domestic names on the product); *Nat’l Stores*, 49 F.T.C. 1450, 1451 (1953) (alleging that the corporation falsely advertised that it produced its machines domestically by featuring domestic brand names on the machines); *Del Mar Sewing Mach. Co.*, 49 F.T.C. 1257, 1258 (1953) (representing “through the featured use of the words ‘Universal,’ ‘Majestic’ and other well known domestic trade or brand names” that the product remained connected to well known domestic firms); *Merlino v. Schmetz*, 20 A.2d 266, 267 (R.I. 1941) (detailing plaintiff’s allegations as contending that the defendant’s “featured use of these words, in the peculiar setting and circumstances” amounted to unfair competition).

184. See *Rice*, *supra* note 153, at 324–26 (defining the right of publicity using the *Haelan* court’s rationale and Nimmer’s article entitled *The Right of Publicity*).

185. See *Heitner & Wilmot*, *supra* note 6, at 319 (noting ambiguity surrounding the intersection of copyright law, tattoos, and the right of publicity but rightfully characterizing a tattoo as part of a client’s “image and likeness”).

186. See *Rice*, *supra* note 153, at 324 (distinguishing the right of publicity from the right to privacy but emphasizing that the moral right theory of the right of publicity does give a player the right to choose what video games to appear in).

187. See Copyright Act of 1976, 17 U.S.C. § 381.6(b)(1) (2012) (describing “featured music” for the purposes of determining royalty rates for using another’s copyrighted musical work); see also *Heitner & Wilmot*, *supra* note 6, at 319 (“Further, allowing tattoo artists to sue athletes as part of their copyright infringement claims would seem to run contrary to the purpose of the right of publicity.”).

Last, two of the prominent cases analyzed in Part III clearly illustrate the value of the featured use test. In *Reed*, tattoo artist Reed acknowledged his desire for Wallace, the tattoo recipient, to violate Reed's exclusive rights with nonfeatured uses of his tattoo, uses associated with Wallace's career as an NBA basketball player.¹⁸⁸ In his Complaint, Reed distinguished between featured and nonfeatured uses, too, stating, "Plaintiff is entitled to share in any revenue realized by Mr. Wallace as the result of any use, *other than an incidental use*, of the tattoo."¹⁸⁹ Only after Reed became aware that "the tattoo he had applied to Mr. Wallace's arm was being *featured* as part of an advertising campaign" did he institute an infringement suit against both Wallace and Nike.¹⁹⁰

Whitmill presents the same situation, with a slight twist on the facts.¹⁹¹ In *Whitmill*, Warner Brothers chose to feature a copy of Mike Tyson's tattoo on another person altogether, clearly leaving the incidental-use realm by putting a replica of the tattoo on the face of an actor in the film.¹⁹² The plaintiff artist never objected to uses of the tattoo associated with Mike Tyson's lifestyle, which included broadcasted boxing matches, movie appearances, and others.¹⁹³ In fact, Tyson appeared in the series' first installment, *The Hangover*, without any objection from

188. See Nike Complaint, *supra* note 14, at 4 ("Mr. Reed observed the tattoo during televised NBA games in which Mr. Wallace participated as a player. Mr. Reed expected that public display of the tattoo . . ."). Reed considered such exposure both common and desirable in the tattoo industry. See *id.* (describing Reed's positive feelings toward the incidental uses of Wallace's tattoo during NBA broadcasts).

189. *Id.* at 7 (emphasis added).

190. See *id.* (describing how the commercial "features the tattoo filling the screen in a close up," which ultimately led Reed to file suit) (emphasis added); see also *robjv1*, *supra* note 51 (depicting the commercial at issue in the case).

191. See Warner Brothers Complaint, *supra* note 15, at 4 (differing from *Reed* in that the infringer did not feature the tattoo as seen on the original recipient, Mike Tyson, but on someone else altogether).

192. See *id.* (recounting how "the Movie features a virtually exact reproduction of the Original Tattoo, which appears on the upper left side of the Stu Price Character's face, played by actor Ed Helms").

193. See *About Mike Tyson*, MIKE TYSON, <http://www.miketyson.com/about> (last visited Nov. 6, 2015) (retelling Tyson's immense career, which included multiple televised boxing matches, magazine articles featuring Tyson, and cameo appearances in movies) (on file with the Washington and Lee Law Review).

Whitmill.¹⁹⁴ The sequel's use of the tattoo in its advertising and plot line, however, quickly became a featured use, and only at the occurrence of this use did the artist instigate copyright infringement actions against Warner Brothers.¹⁹⁵

The application of the featured use test to *Allen* becomes slightly more nuanced. Like Reed and Whitmill, Allen's Complaint admitted, "Defendant Ricky Williams was known to plaintiff as a professional football player, and [plaintiff] assumed he would see his art on television."¹⁹⁶ Allen also recognized that EA Sports chose to feature "defendant Ricky Williams *and* the tattoo art," which at first glance appears as a use incidental to selecting Williams as the athlete to adorn the cover of the video games.¹⁹⁷ Allen's Complaint, however, explicitly recognizes the difference between featured uses on the covers of the games and Williams's other "incidental use[s]" of the tattoo.¹⁹⁸

An empirical analysis supports the same conclusion regarding the covers of the popular video games.¹⁹⁹ Each cover includes only an avatar of Williams, but each avatar's placement emphasizes Williams's tattoos, transitioning the use from nonfeatured to featured.²⁰⁰ Additionally, EA Sports used the tattoo to advertise the game, just like Warner Brothers' movie posters for *The Hangover: Part II* and Nike's commercial featuring Wallace's tattoos.²⁰¹ Advertisements intentionally grab

194. See Warner Brothers Hearing, *supra* note 72, at 2 (observing that the first movie only showed Mr. Tyson's face, to which Whitmill did not object, but that the second movie used the tattoo on another character's face). Without objection from Whitmill, Mr. Tyson also played a minor role in the sequel. *Id.*

195. See Warner Brothers Complaint, *supra* note 15, at 5 ("The Pirated Tattoo is prominently featured in the marketing and promotional materials for the Movie . . .").

196. Electronic Arts Complaint, *supra* note 16, at 3.

197. See *id.* at Exhibits 2–3 (featuring Ricky Williams on the cover of NFL Street and Madden NFL 10 and 11) (emphasis added).

198. See *id.* at 7 (requesting "[a]n accounting of the revenue realized by Mr. Williams as the result of any use, *other than an incidental use*, of the tattoo" (emphasis added)).

199. See *id.* at Exhibit 2 (positioning Williams's body on the cover of the game so that his tattooed bicep becomes the focal point of the audience's attention).

200. See *id.* (placing Williams on the cover in a manner that emphasizes his tattoos, not just his person).

201. Compare *id.* at 5 (seeking damages according to EA Sports' profits from

the attention of the audience by prominently featuring certain material and almost always result in featured, infringing uses of the tattoo artist's copyrighted tattoo.²⁰²

VI. Conclusion

The state of the law regarding the copyrightability of tattoos demands a new and innovative approach.²⁰³ No court has spoken definitively on the matter, and the utter lack of precedent creates confusion for artists, players, and sports industries alike.²⁰⁴ Scholars attempted to resolve the problem with legally impractical answers—defenses that no client or video game could ever successfully plead.²⁰⁵ Left with no common law or scholarly authority to rely on, the featured use test emerges as the fourth quarter Hail Mary that this predicament desperately needs.²⁰⁶

The featured use test harmonizes the competing interests of the player, the artist, and the video game and presents each constituency with a predictable, workable answer to their respective copyright concerns.²⁰⁷ The test allows video games to include players' body art in nonfeatured, less noticeable ways

featuring plaintiff's work on the cover of its highly successful games), *with* Warner Brothers Complaint, *supra* note 15, at 5 (emphasizing that Warner Brothers featured the infringing version of the tattoo to market and promote the film), *and* Nike Complaint, *supra* note 14, at 4 (objecting to Wallace and Nike creating a commercial that featured Reed's tattoo art without his permission).

202. See *supra* note 171 and accompanying text (explaining the purpose of advertisements and how they inherently become featured uses of an artist's work due to their nature).

203. See Perzanowski, *supra* note 124, at 514 (observing that the law surrounding the tattoo industry must account for "a more complex set of relationships" than other intersections with copyright law).

204. See Warner Brothers Hearing, *supra* note 72, at 2 (addressing orally the merits of plaintiff's copyright infringement case against Warner Brothers and evaluating Warner Brothers' defenses against the suit).

205. See *supra* Part IV (identifying the four most commonly suggested resolutions by other scholars and critiquing them for their lack of practicality for defendants).

206. See *supra* Part V (announcing the featured use test and describing its timeliness and usefulness).

207. See *supra* notes 152–157 and accompanying text (cataloging the interests of the different parties involved in copyrighting tattoos and concluding that not all interests can prevail simultaneously).

without fearing a lawsuit, while simultaneously protecting tattoo artists from exploitative featured uses of their original art. Most importantly, the featured use test removes any doubt about the player's personal autonomy over his lifestyle and career. Courts should adopt this standard while they have the requisite discretion, as the issue remains one of first impression.²⁰⁸

208. See Heitner & Wilmot, *supra* note 6, at 317 (“[U]ntil a case produces a direct order stating how copyright right [sic] law shall apply, all other views are seen as merely dicta for courts to adopt at their discretion.”).