Can an artist sue over a virtual tattoo? It’s complicated



Tattoos are an integral part of many athletes’ images, from singular designs like Mike Tyson’s face tattoo to Kenyon Martin’s or David Beckham’s extensive collections. But as those images get translated into video game form, some artists aren’t happy.

Over the past several years, the creators of two major sports titles have fought protracted lawsuits over their right to use tattoos on avatars of players without paying a fee to the person behind the tattoo. Late last week, one of those suits went to a jury, ending with a payout to the artist. It’s not a clean win for either side, but it does offer a fascinating case of how complicated tattoos and copyright really are.

The athlete here is pro wrestler Randy Orton, a long-running character in 2K Games’ *WWE* series. Back in 2018, Orton’s tattoo artist Catherine Alexander sued 2K parent company Take-Two Interactive for depicting five distinctive tattoos on

Orton's avatar — claiming the game violated her copyright for the tattoos. Take-Two argued that the avatar constituted fair use of the tattoos, but after four years, a jury denied the fair use claim and awarded Alexander $3,750 in compensation.

Without an implied license over your tattoo, just taking a picture could be dicey

The outcome is strikingly different from a similar case involving LeBron James and the *NBA 2K* games. In 2020, Take-Two beat a suit by Solid Oak Sketches, a tattoo licensing company (yes, this is a thing that exists) that held rights to James' ink. A New York judge found the tattoos played only a small ("de minimus" in legal terms) role in *NBA 2K.* On top of that, James had an implied license to let Take-Two make a likeness of him that included his tattoos. The decision seemingly mooted questions about how worried game studios should be about tattoo licensing — an issue that has led some developers to omit players' tattoos from games.

As a *Vice* story from 2017 explains, tattoos are subject to copyright: they're a work of art in a fixed medium, even if that medium is someone's skin. But it's generally accepted that getting a tattoo implicitly grants you some kind of license to display it; otherwise, you might not be able to even pose for a photo without running afoul of copyright. Orton's tattoo artist, after all, didn't sue WWE for frequently broadcasting a video copy of the art.

Tattoo suits often turn on a specific question: whether the art is being separated from its owner's body. Warner Bros., for instance, settled a suit over *The Hangover Part II* that saw one character wake up with a copy of Mike Tyson's tattoo. Artists suing over video games argue that the digital avatars are meaningfully different from taking a photo, something studios like Take-Two obviously dispute. In cases like *WWE 2K*, it's also complicated by features like Create-A-Superstar, which lets players mix and match elements of wrestlers to

create a distinct character — who, like the actor in *The Hangover Part II*, might not carry that implied license.

So what does the *WWE* decision mean? Not necessarily anything monumental. A penalty isn't great for Take-Two, but $3,750 isn't a very scary number for a major game studio or a very rewarding incentive for other artists to adopt Alexander's strategy. The jury trial didn't produce a detailed ruling that a judge in future cases might draw on the way that LeBron James' case did.

But tattoo artists and avatar tech might soon collide in more places than sports games. Companies that push "metaverse" social platforms encourage users, including superstar musicians and other entertainers, to create avatars that look just like them. For many people, that will include tattoos. That means, eventually, more courts may have to take up the issue of who really owns an avatar's ink — and so far, the results are far from cut and dried.

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