



The legal future of tattoos – selected problems. An analysis of the case of Jeffrey B. Sedlik v. Katherine Von Drachenberg (Kat von D.)

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Abstract. Tattoos represent a multi-billion dollar industry that continues to experience growth (Global Tattoo Ink Market By Type..., 2024). In light of the expansion of this market, it is imperative to delineate the precise rights and responsibilities of tattoo parlour proprietors, artists, and their clientele. In practice, the majority of individuals with tattoos are unaware of their rights and obligations. It is not yet common practice for a client to request a release of liability signed by the tattoo artist. It is also important to recall that it is exceedingly challenging for the copyright holder of a design, or even a tattoo artist, to regulate the utilisation of the design. The paper examines the most significant case law pertaining to the legal protection of tattoos. The article employs the most recent and pivotal case law on the legal aspects of tattooing. Despite the analysis conducted (case law and literature on the subject), it is not feasible to derive consistent rules that could be applied in analogous cases.

Keywords: tattoo, Copyright Law, Property Rights, implied license, fair use.

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INTRODUCTION

Tattoos are not only a form of self-expression, but also art. Tattoos are drawings that are usually protected by copyright. Copyright law affects what designs tattooists can paint on people and how their own artwork is used. This can lead to legal disputes. It is not the role of the law to act as a crystal ball, allowing us to see into the future and predict changes in the body art industry. By analysing case law, including Sedlik v Kat von D, it is possible to predict whether the commercial licensing of an image derived from a photograph for use in another form is a use for a different purpose and different from the original photograph. For example, the use of a photograph as a reference image for a realistic tattoo is a permissible use. Indeed, it is important to determine whether it is a

transformative use (transformative uses are those that add something new, with a different purpose or character, and do not replace the original use of the work)¹.

For years, tattoo artists have initiated legal action against a range of entities, including brands, advertising agencies, film studios and video game developers, for the unauthorised use of their tattoo designs. This has involved the infringement of the tattoo author's copyright by placing an image of a person in a computer game. One notable case is that of Catherine Alexander v. World Wrestling Entertainment Inc. and Take-Two Interactive Software Inc. (Grossman, Volk, 2020). Another example is that of Alexander v. Take-Two Interactive Software, Inc. (18-cv-966-SMY (S.D. Ill. Sep. 22, 2022) and the case of Victor Whitmill, the designer of the famous tattoo on Mike Tyson's face, who filed a lawsuit against Warner Brothers for copyright infringement, claiming that Warner Brothers used his tattoo in The Hangover Part II commercials (Hadley, 2020). However, the case of Jeffrey Sedlik v. Kat Von D represents the inaugural instance in which a tattoo artist has been sued for utilising the work of another individual as the basis for a tattoo design. It is beyond dispute that tattoo designs are protected by copyright. However, there are concerns within the tattoo industry and among the general public about the appropriation of photos and other works of art in tattoos. Regardless of the outcome of the appeal, Kat Von D's case is significant not only for the tattoo artist but above all for the multi-billion dollar tattoo industry.

JEFFREY B. SEDLIK V. KAT VON D.

On 26 January 2024, a federal jury in California ruled that tattoo artist Kat Von D had not infringed the copyright of a photograph of jazz artist Miles Davis, taken by Jeffrey Sedlik. The jury concluded that Kat Von D's tattoo of the jazz musician was not substantially similar to Sedlik's portrait, and that Sedlik's portrait was protected by the fair use doctrine. Nevertheless, as early as 22 May 2024, Jeffrey Sedlik's legal counsel filed an appeal that wholly contested the verdict rendered in January of this year.

The rationale behind Sedlik's legal action against Kat Von D was the alleged infringement of copyright pertaining to his photographic depictions of Miles Davis. In 1989, Sedlik devised and executed a portrait of Davis in a pose known as the "Shh" pose, with a single finger positioned in front of his mouth against a dark background, with shadows traversing the image. Subsequently, he licensed the photograph to *Jazziz* magazine for editorial use, while also granting a separate licence for the use of the portrait in paintings, illustrations, T-shirts, magazines, films, television programmes, sculptures and advertisements. Sedlik was thus able to do this because the copyright owner is vested with the exclusive right to permit or prohibit the utilisation of the work for any reason, at any price, and at any time during the period of protection.

In 2017, Kat Von D published an image on her Instagram account depicting herself tattooing a portrait of Miles Davis on her acquaintance, Blake Farmer. It should be noted that Farmer was not sued and was not a party to the case. Additionally, the image featured a portrait of the jazz artist Sedlik in the background². She performed this service without remuneration (in her testimony, she indicated that she had not charged for tattoos since 2012). Subsequently, the photograph was disseminated on other social media platforms.

Despite the initiation of legal proceedings concerning the legal protection of tattoos, these were typically resolved through out-of-court settlements, without the issuance of a court decision. In this case, the following issues

¹ Photographs are generally considered to be creative works deserving of copyright protection. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60, 4 S.Ct. 279, 28 L.Ed. 349 (1884). The protected, original elements of photography include 'the setting of the subject, the lighting, the angle, the choice of film and camera, the development of the desired facial expression, and almost every other variation'. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). But 'aspects [of a photograph] that necessarily arise from the photographer's idea of photography' or 'choice of a particular concept' are not protectable. *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005).

² https://www.instagram.com/explore/locations/215543954/high-voltage-tattoo/?utm_source=ig_embed&ig_rid=a9cf8a58-8715-41ad-b968-1626ea526a76.

require resolution: whether Kat Von D's tattoo constitutes fair use. What claims does Sedlik have in this regard? It would be beneficial to ascertain whether there is, in fact, a practice of licensing tattoo designs. It is pertinent to inquire whether the client who commissioned the design (and who has actually tattooed Miles Davis's likeness on his body) will also be sued.

Additionally, Sedlik's complaint referenced an online video in which Kat was observed utilising a light table to position tracing paper over the portrait, subsequently transferring or tracing the portrait in pencil. In essence, Sedlik's allegations can be distilled into four key points: (1) the application of a tattoo to Farmer's arm, (2) the creation of a linear pattern (essentially a tracing of a photograph), which was employed as a template for the transfer of the drawing to Farmer's skin, (3) the publication of the photographs on social media, which documented the process of tattooing Farmer's arm (referred to as 'process photos'), and (4) the posting on social media of a photograph of the completed tattoo (referred to as the 'finished photo'). Sedlik advanced the argument that the tattoo design constituted an unauthorised derivative work and that the defendant (and her company) had infringed his copyrighted work by reproducing it without permission, distributing it, displaying it and using it as the basis for further works. Kat Von D mounted a defence on the grounds of fair use. Although Von D's tattooing process could be considered to constitute copying, she did not copy any of the protected elements of the portrait. Consequently, there was no copyright infringement. Additionally, she advanced the argument that the tattoo constitutes fair use, primarily on the grounds that the work is transformative and non-commercial (Werbin, 2014, February). In one of its judgments, the Supreme Court determined that the application of the principle that commercial use is inherently unfair is unacceptable. Conversely, the guiding principle should be that the more transformed or modified a new work is, the less significance should be attributed to other factors, such as commercialism, that may otherwise be deemed to militate against the recognition of such activity as fair use. This is in accordance with the ruling in the case of *Patrick Cariou v. Richard Prince*, United States Court of Appeals, Second Circuit, 714 F.3d 694 (2013)³.

FAIR USE DOCTRINE

As Pierre N. Leval notes in his article, transformative use must be productive and must employ the quoted material in a different manner or for a distinct purpose than that of the original. A citation of copyrighted material that is only minimally modified or that results in the republication of the original is likely to fail the transformation test. Nevertheless, if the secondary use enhances the original, if the cited material is employed or transformed to generate new information, new aesthetics, or new insights, this is precisely the type of activity that the doctrine of fair use protects (Leval, 1990).

The doctrine of fair use permits the utilisation of another's copyrighted material without the original author's permission, but only in specific circumstances, including criticism, commentary, news reporting, teaching, parody, scholarship, and research. In evaluating the question of fair use, the court considered four factors, as set forth by the House of Representatives and Congress. (31 December 2023). 17 U.S.C. § 107 – Limitations on exclusive rights: The doctrine of fair use is a legal concept that permits the use of copyrighted material without the permission of the original author, provided that certain conditions are met. [Government]. The United States Government Publishing Office⁴ [:] (1) The purpose and nature of the use (whether the use is for commercial or non-commercial purposes and whether the use is "transformative", meaning that it adds something new, with a different purpose or other than the purpose of the original work), (2) the nature (3) the quantity and importance of the material used in comparison to the entire copyrighted work, and (4) the effect of the copyrighted work on the potential market (Hibnick, 2002, August 16).

³ https://cyber.harvard.edu/people/tfisher/cx/2013_Cariou.pdf.

⁴ <https://www.govinfo.gov/app/details/USCODE-2023-title17/USCODE-2023-title17-chap1-sec107>.

OTHER RELEVANT ISSUES

Nevertheless, despite the application of these regulations, it is still possible to obtain disparate and varying outcomes. Furthermore, the case law is also inconsistent. In the case of *Solid Oak Sketches, LLC v. 2K Games, Inc.* In the case of 449 F.Supp.3d 333 (SDNY 2020), the court was tasked with determining whether the defendant company, 2K Games, a video game producer owned by Take-Two Interactive Software, had infringed upon the copyright of NBA players LeBron James, Eric Bledsoe and Kenyon Martin. This was in relation to the highly realistic depiction of their tattoos in an NBA 2K basketball game.

In practice, each of the athletes provided consent to the National Basketball Association (NBA), which then granted the defendant company, 2K Games, permission to utilise the athletes' likenesses in the game. Nevertheless, Solid Oak Sketches (a collective of tattoo artists) asserted that 2K Games infringed copyright by depicting the tattoos of these players without a licence from Solid Oak Sketches. 2K Games, however, asserted that the utilisation of tattoos was minimal and constituted fair use. The court ruled in favour of 2K Games on the grounds that: 1. The use of tattoos by 2K Games was found to be negligible, constituting only 0.000286% to 0.000431% of the entire game data. 2. The use was deemed transformative, as it was necessary to convey a realistic image of the players' likenesses. The role of tattoos in the marketing of NBA 2K was found to be insignificant, and their use did not negatively impact the market for Solid Oak Sketches. This was determined in the case of *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333 (S.D.N.Y. 2020). In this instance, the court ruled in favour of the tattoo artists. In contrast, the court reached a wholly different conclusion in the case of *Catherine Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812 (S.D. Ill. 2020) (Markin, 2023; Perzanowski, 2023). In this case, the plaintiff (a tattoo artist) filed a lawsuit against Take-Two, the creator of WWE 2K, claiming that Take-Two infringed six copyrighted tattoos created by Alexander, which she had tattooed on the body of professional wrestler Randy Orton. These tattoos were reproduced in the realistic portrayal of Randy Orton in the WWE 2K video game series. Take-Two adopted the same legal strategy as in the previous case. However, the court reached a different conclusion. The court ruled that, although Take-Two had obtained a licence from Orton to utilise his likeness in the game and although replicating Orton's tattoos was essential to provide a realistic gaming experience, Take-Two's use of the artists' tattoos was not protected by the fair use doctrine. The court determined that the use was not transformative, as it served the same purpose as Alexander's, namely, to adorn Orton's body. Furthermore, Take-Two did not transform the copyrighted tattoos but rather copied them in Orton's avatar. Consequently, the court ruled in favour of the tattoo artist (who had been out of practice for several years at the time) in this case [*Catherine Alexander v. Take-Two Interactive Software, Inc.*, 489 F. Supp. 3d 812 (S.D. Ill. 2020)]

In the case of Jeffrey Sedlik, however, the court considered the purpose and nature of the contested artwork. It concurred with Kat Von D that the artist had introduced movement and shadows of smoke to the background, which constituted a substantial departure from the original work. Nevertheless, he did not concur with the assertion that the tattoo was non-commercial, despite the absence of any form of remuneration for the tattoo artist. As Sedlik had previously observed, Kat Von D also benefited indirectly from the publicity generated by the tattoo, which was widely shared on social media. Additionally, Blake Farmer, the proprietor of the tattoo, provided testimony regarding its commercial character. However, the court declined to permit Blake Farmer to elucidate the rationale and symbolism of the tattoo (Case 2:21-cv-01102-DSF-MRW Document 201 Filed 01/11/24 Page 4 of 7 Page ID #:4101).

Miles Davis' heirs have not joined the lawsuit against Kat von D. Kat von D herself, in posts on her social media, thanked Miles Davis' family for their support during the trial (knowing how absurd the lawsuit was). She trusts that Miles Davis would have loved Blake's tattoo and hated that this lawsuit happened at all⁵.

⁵ <https://www.instagram.com/thekatvond/reel/C2ve5IRPpjY/>.

In regard to the nature of the work protected by law, the court determined (to the detriment of Sedlik) that the photograph of Miles Davies in question had been widely distributed and that the photographer had granted multiple licenses for its use. The tattoo created by Kat Von D was a standalone piece that was inspired solely by Sedlik's photograph. The assessment of the situation could have been conducted in a different manner had the photograph taken by Sedlik not been previously disseminated⁶. This is in accordance with the precedent set by the case of *Harper & Row v. Nation Enterprises*, 471 U.S.

In order to prove copyright infringement, it is necessary to demonstrate two things: firstly, that the defendant possesses a valid copyright, and secondly, that the original components of the work have been copied. In this case, there was no dispute as to the fact that Sedlik held a valid copyright to the portrait of Miles Davies. With regard to the second requirement, the court applied a two-part test in order to determine whether there was substantial similarity between the two works. This comprised an external and an internal test.

The external test entails a comparison of the objective similarities of specific expressive elements in the works, with a distinction made between protected and unprotected material in the copyrighted work. In contrast, the internal test considers the similarity of the expression from the perspective of an ordinary, reasonable observer. The internal test was conducted by a jury, who inquired whether the typical observer could discern substantial parallels between the two works (Sedlik's photograph and Kat Von D's tattoo) when considering the overarching concept and emotional tone.

With regard to the question of similarity between the two works, the court concluded that the common elements, including the theme and pose of Miles Davis making the "Shh" sign, were not protected by copyright. The court subsequently determined that the combination of selected elements, such as Sedlik's choices in lighting and camera angles, were protected. However, he was ultimately unconvinced that the two works were objectively similar due to the presence of differences in other elements, such as the light and shadows on Davis's face or the depiction of Davis's hairline, as well as differences in the shape and representation of the eyes (Childers, 2024, 29 January).

During the course of the proceedings, Sedlik sought to present himself as an expert witness⁷. In this way, he sought to rebut the testimony of Catherine Monty and David Lane. Monty and Lane were permitted to present testimony in the tattoo industry licensing case solely for the purpose of establishing that Kat Von D's actions lacked the requisite intent. However, the court determined that while Sedlik may possess experience in establishing licensing standards for the tattoo industry, he was unable to demonstrate any expertise regarding the industry's standards regarding intentional copyright infringement. Consequently, he is not qualified to provide testimony regarding the necessity of tattoo artists obtaining licenses (Case 2:21-cv-01102-DSF-MRW, Document 201, Filed 01/11/24, Page 2 of 7, Page ID #:4099)

In a recent court hearing, Kat Von D, a prominent figure in the tattoo industry, asserted that there is no established practice within the industry of applying for licenses. She further elaborated that "no one ever asks for

⁶ *Harper & Row, Publishers, Inc. v. Nation Enterprises* - The Supreme Court found that The Nation's use of verbatim portions (300 words) of an unpublished manuscript of US President Gerald Ford was not fair use. *Harper & Row v. Nation Enterprises*, 471 U.S. 539. <https://caselaw.findlaw.com/court/us-supreme-court/471/539.html>; 539 O'Connor, S. D. & Supreme Court Of The United States. (1984) U.S. Reports: *Harper & Row v. Nation Enterprises*, 471 U.S. 539. [Periodical] Retrieved from the Library of Congress, <https://www.loc.gov/item/usrep471539/>.

⁷ He has served as a consultant or expert witness in a multitude of copyright cases, a considerable number of which pertained to the defence against allegations of photographic copyright infringement. He has provided testimony before congressional committees on a diverse array of proposed copyright reforms and has been a regular presenter at copyright-related events organised by the US Copyright Office, the Department of Commerce and other government agencies. His work has concentrated on the protection of photographers from attempts, such as those by the Andy Warhol Foundation in this case, to disassociate fair use from its fundamental principles and expose artists such as Goldsmith to an increased incidence of piracy of their work. In *AWF v. L. Goldsmith*, Sedlik filed an amicus curiae opinion. The decision in that case may have had an impact on his own case, which was then on hold pending the outcome of this case. https://www.supremecourt.gov/DocketPDF/21/21-869/233420/20220815113050649_21-869%20Amicus%20Brief%20of%20Jeffrey%20Sedlik.pdf, p. 2-3.

permission," a statement that was reported by Clough on January 24, 2024. Conversely, Sedlik's legal counsel presented the jury with a licensing agreement between the photographer and tattoo artist Bryan Vanegas. However, it is challenging to conclude that this constitutes sufficient evidence to prove the existence of a market for licensing agreements based on this single case. Kat Von D and her attorneys indicated that they could present evidence that would disprove the hypothesis that the license points to a derivative market in the tattoo industry for photographic references. This evidence would include testimony that:

1. Vanegas did not submit an application for a licence prior to utilising Sedlik's photograph as a reference for a tattoo.
2. The inauthentic nature of the licence application.
3. The absence of a signature from Vanegas on the licence. Furthermore, the case does not provide sufficient evidence to conclude that Vanegas should be held liable for the alleged licensing agreement (Case 2:21-cv-01102-DSF-MRW Document 201 Filed 01/11/24 Page 7 of 7 Page ID #:4104).

FIFTH FACTOR OF FAIR USE

In this case, a novel approach was taken in attempting to apply the fifth factor of fair use, which is not explicitly stated in Article 107 of the Copyright Act. This factor pertains to the fundamental right of Kat Von D's (Blake Farmer) client to personal expression and bodily integrity. Tattoos and the process of tattooing are forms of pure expression that are fully protected by the First Amendment to the United States Constitution. In light of these considerations, individuals are guaranteed the right to bodily integrity, which encompasses the right to determine control over their own body. When assessing the permissibility of utilising Miles Davis's photograph for a tattoo, it is essential to consider, in addition to the existing criteria, Blake Farmer's fundamental right to decide how to express himself through permanent marks on the body (Moss, 23 January 2024). There is a general consensus that the tattoo itself constitutes "speech" under the First Amendment. The Supreme Court has consistently held that the Constitution transcends written or spoken words as a means of expression. Tattoos may consist of words, realistic or abstract images, symbols, or combinations thereof. All of these forms of pure expression are entitled to the full protection of the First Amendment. Tattoos can express a myriad of messages and serve a multitude of functions, including those related to decoration, religion, magic, penalties, and the indication of identity, status, occupation, or property (Anderson v. City of Hermosa Beach, 621 F. 3d 1051 (Court of Appeals, 9th Circuit, 2010)⁸.

In his lawsuit, Sedlik put forth a proposal for "hypothetical royalty damages" (Sedlik v. Drachenberg, Plaintiff's Resp. and Obj.). Trial Brief at 2-3 (C.D. Cal. 23 January 2024) The basis for the damages is the amount that a willing buyer would be reasonably obligated to pay to a willing seller at the time of infringement for the infringer's actual use of the plaintiff's work. No specific compensation was sought, nor was a compensation expert presented.

The case presents several principles that may prove useful in future instances of a similar nature. (1) The description of how the tattoo was made is irrelevant to determining whether a portrait was copied.

- (2) Tattoos have inherently distinct meanings.
- (3) The tattooing process requires artistic skills and techniques other than photography.
- (4) The personal meaning that a client may attribute to his or her tattoo is irrelevant to the infringement.
- (5) Tattoos are a form of personal expression.

⁸ https://scholar.google.com/scholar_case?case=14021105998238153243; Hyde (2011).

AWF V. L. GOLDSMITH

Prior to the Court's final decision (in *Sedlik v Kat Von D*) in January 2024, the Court issued a stay of execution on 21 November 2022 in light of the US Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v Goldsmith*. The facts of the Warhol case were relevant to the issues considered in *Sedlik v Kat Von D*. The issue in the Warhol case was whether Andy Warhol's "Orange Prince", an image of musician Prince that he apparently based on a magazine cover by photographer Lynn Goldsmith, constituted fair use. In making its assessment, the Supreme Court considered only the first of the four factors of the fair use doctrine, which are usually considered in determining whether use of copyrighted material is permissible. The Court explained that the commercial nature of the work in question is not in itself a basis for concluding that the use is unfair. However, the commercial nature of the work is a factor to be taken into account. In summary, the Court held that the fair use doctrine did not apply because both Warhol's and Goldsmith's paintings had a primarily similar commercial purpose. This was a departure from the way courts usually analyse fair use, as it shifted the focus from the content of the specific work to whether the purpose of the secondary use was different from the original use. Subsequently, following the Supreme Court's ruling against Warhol, Judge Fischer lifted the stay in the *Sedlik* case in May 2023.

MOLLY CRAMER CASE

Even before *Sadlik v. Kat von D*. was decided, another tattoo artist, Molly Cramer (the person known as "Tiger King's tattoo artist"), lost a copyright infringement lawsuit against Netflix (*Cramer v. Netflix, Inc.*, Civil No. 3:22-cv-131, 2023 WL 6130030 (W.D. Pa. 18 September 2023)). Ownership of original works of art, such as a tattoo, belongs to the creator (i.e., the tattoo artist). The copyright in a tattoo belongs to the tattooist, even though the tattoo is physically on another person's body. The tattoo in question was the result of a competition organised by the tattooist at the beginning of the pandemic. To supplement her income, she devised a competition in which her social media followers could buy vouchers for future tattoos and vote for one of several designs that would eventually be tattooed on the artist's husband. The winner of the competition was a tattoo of Joe Exotic, inspired by the first series of the documentary *Tiger King*. Netflix then used the image of the tattoo for about 2.2 seconds in one of the episodes of *Tiger King*'s second season. Cramer then sued Netflix for \$10 million. The court ultimately ruled against the tattoo artist, finding that Netflix's use was a "fair use". It found that the multimedia use of the tattoo image was 'criticism', 'comment' or 'opinion' and therefore 'did not constitute copyright infringement' (Grasser, 2023; Murphy, 2023; Chintalapoodi, 2023).

CONCLUSION

It is not feasible to extrapolate rules from the *Sedlik v. Katherine Von Drachenberg* case that can be universally applied to other cases, given the exceptional nature of this case. The majority of tattoos are commissioned for a fee, which benefits both the artist and the tattoo parlor. This is in contrast to the case of *Kat Von D*, where the tattoo was done without compensation. This may impact the initial fair use factor, which pertains to the "commercial nature" of utilising another's work. Secondly, *Kat Von D* is the sole proprietor and/or majority stakeholder in *High Voltage Tattoo, Inc.*, which was the subject of litigation in this case. In contrast, other tattoo parlours may have multiple proprietors or contractual arrangements with artists in the capacity of independent contractors. Thirdly, it was the jury, based on written opinions, that resolved the issue by stating that the tattoo was not substantially similar to the portrait. This was in accordance with the Jury Instructions in the case of *Sedlik v. Drachenberg*, as recorded in the ECF. Case No. 2:21-cv-01102 (C.D. Cal. 2024), item 219.

In the case of *Sedlik v von Kat von D*., the court did not decide whether a tattoo artist could enforce his copyright, but whether a tattoo could infringe the copyright of a third party (Cascone, 2022). *Sedlik* is the first case of a third party, in this case a photographer, claiming that a tattoo artist's use of her copyrighted photograph as a

reference image should be considered an infringement. Sedlik is the first case of a third party (in this case a photographer) arguing that a tattoo artist using a copyrighted photograph as a reference image should be considered an infringer. The consequence of this case is a wider debate about the unlicensed use of copyrighted images by tattoo artists. Kat von D's victory is a victory for the tattoo industry, where artists often use images without permission at the request of their clients. The chilling effect on artistic expression may have been caused by the Warhol ruling. Only time will tell what lasting impact Warhol will have on future copyright disputes, and whether the Kat von D ruling will be the basis for other court rulings (particularly in the context of purely commercial use) (HodgsonRuss, 2024).

It would be prudent for artists (tattooers) and their clients to give due consideration to the necessity of concluding tattoo contracts that encompass the costs associated with obtaining a licence to utilise the design in question. In terms of damages, it is unlikely that a court will order the removal of a tattoo as a result of copyright infringement⁹. Because of the need to ensure a fair trial, it is more likely that the court will order the tattoos to be covered up¹⁰. It is also more probable that he would award a lump sum of money in compensation. It is essential to consider the legal protection of tattoos, particularly with regard to the medium in which they are created, from both a doctrinal and a legal standpoint. Nimmer posits that the human body is a useful article, and thus tattoos are not copyrightable insofar as there is no copyrightable subject matter that can be separated from the body. Furthermore, it is challenging to concur with the assertion that tattoos lack durability and can be easily removed by water. It is evident that tattoos have a greater longevity than other forms of artwork, particularly when one considers the invasive nature of the tattoo removal procedure [Declaration of David Nimmer at 7-12, *Whitmill v. Warner Bros. Entertainment, Inc.*; 4-11 Civ.752, 2011 WL 10744102 (E.D. Mo. 20 May 2011)]. Conversely, tattoos cannot be physically separated from the human body. In considering the legal protection of a tattoo, one might inquire whether the human body can truly be regarded as a carrier or medium. Such a medium is not explicitly defined within the Copyright Act. In accordance with the definition set forth in Article 102(a), tattoos would fall within the category of PGS works (that is, two-dimensional or three-dimensional works of painting, graphic art, and sculpture) (King, Y. M., 2016).

It would be prudent for tattoo parlours to implement measures to educate their clientele on copyright law. This could be achieved through the use of informative website content, posters, and even the provision of a script for tattoo artists to utilise during client consultations. Additionally, it would be beneficial for artists to ascertain which elements of their most frequently requested designs are protected by copyright law.

REFERENCES

- Bailey, J. (2023, May 18). *How the Warhol Ruling Could Change Fair Use*. <https://www.plagiarismtoday.com/2023/05/18/how-the-warhol-ruling-could-change-fair-use/>.
- Baumgartner, P. (2018, February 21). 'Un-Tattoo You': Russian Convict's Swastikas To Be 'Confiscated'. *Radio Free Europe*, available at: <https://www.rferl.org/a/russia-prisoner-nazi-tattoo-confiscation-remove-self/29055107.html>.
- Cascone, S. (2022, June 24). A Photographer is Suing Tattoo Artist Kat Von D After She Inked His Portrait of Miles Davis on a Friend's Body. *Artnet News*, available at: <https://news.artnet.com/art-world/a-photographer-is-suing-tattoo-artist-kat-von-d-after-she-inked-his-portrait-of-miles-davis-on-a-friends-body-2135112>.
- Childers, C. (2024, January 29). *Verdict Reached in Kat Von D Copyright Trial Over Tattoo*. https://loudwire.com/kat-von-d-trial-alleged-copyright-miles-davis-portrait/?utm_source=tsmclip&utm_medium=referral.

⁹ „District court Judge Vladimir Mitrofanov ordered a 1,000-ruble fine (\$18) against R.R. Gabidullin -- an inmate at the No. 6 federal prison colony -- and for his tattoos to be "confiscated...in the form of self-removal [from] his body two images similar to Nazi symbols.” -- Baumgartner (2018).

¹⁰ Schwartz (2010), Section A, Page 18 of the New York edition with the headline: Extreme Makeover: Criminal Court Edition; Ferrara (2016).

- Chintalapoodi, P. (2023, December 8), *Court Dismisses Netflix “Tiger King” Tattoo Copyright Case*. <https://www.chiplawgroup.com/court-dismisses-netflix-tiger-king-tattoo-copyright-case>.
- Clough, C. (2024, January 24). 'Nobody' Gets Photo Licenses For Tattoos, Kat Von D Testifies. Law360. <https://www.law360.com/articles/1789869>.
- Clough, C. (2024, January 26). *Kat Von D's Miles Davis Tattoo Didn't Infringe Photo, Jury Says*. Law360. <https://www.law360.com/articles/1790793/kat-von-d-s-miles-davis-tattoo-didn-t-infringe-photo-jury-says>.
- Ferrara, D. (2016, July 25). Neo-Nazi gets makeover to hide tattoos from jury. *Las Vegas Review-Journal*, available at: <https://www.reviewjournal.com/crime/homicides/neo-nazi-gets-makeover-to-hide-tattoos-from-jury/>.
- Grasser, J. P. (2023, November 29). People Don't Come to See the Tattoo, They Come to See the Show. *Global IP and Technology Law Blog*, available at: <https://www.lexology.com/library/detail.aspx?g=e1ebb768-f174-44c9-9c06-0091c7266a1f>.
- Grossman, D., & Volk, M. (2020, September 26). *Alexander v. Take-Two Interactive Software, Inc.*. <https://www.loeb.com/en/insights/publications/2020/10/alexander-v-taketwo-interactive-software>.
- Hadley, M. (2020). Whitmill v Warner Bros. and the visibility of cultural appropriation claims. *European intellectual property review*, 42, 223-229.
- Hibnick, M. (2002, August 16). *Kat Von D Tattoo Infringement Case Moves Toward Trial*. <https://copyrightalliance.org/kat-von-d-tattoo-infringement-case-trial/>.
- HodgsonRuss (2024, April 24). *The Battle After Warhol: Tattoos as Artwork or Infringement?*, available at: <https://www.hodgsonruss.com/printpilot-publication-the-battle-after-warhol-tattoos-as-artwork-or-infringement.pdf?1732644450>.
- Hyde, R. (2011). *Preserving Access to Tattoos: First Amendment Trumps Municipal Ban in Anderson v. City of Hermosa Beach*. <https://digitalcommons.law.byu.edu/lawreview/vol2011/iss1/9>.
- King, Y. M. (2016). Protection and enforcement challenges for tattoo copyrights. *Columbia Journal of Law & the Arts*, 39(3), 437-440.
- Leval, P.N. (1990). Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111.
- Markin, G. (2023, February 3). *Proprietary Ink: How One Tattoo Artist Took Take-Two to the Mat Over Unauthorized Use of Replica Tattoos on Wrestlers in WWE 2K Games*. <https://www.jdsupra.com/legalnews/proprietary-ink-how-one-tattoo-artist-1225716/>.
- Moss, A. (2024, January 23). *Kat Von D Tattoo Infringement Trial Begins (and Ends!): What You Need To Know*. <https://copyrightlately.com/kat-von-d-tattoo-infringement-trial-begins-what-you-need-to-know/>.
- Murphy, Brian. (2023, September 25). *The Girl with the Tiger King Tattoo Loses Copyright Infringement Lawsuit Against Netflix*. <https://advertisinglaw.fkks.com/post/102io9r/the-girl-with-the-tiger-king-tattoo-loses-copyright-infringement-lawsuit-against>.
- O'Connor, S. D. & Supreme Court Of The United States. (1984) U.S. Reports: Harper & Row v. Nation Enterprises, 471 U.S. 539. [Periodical] Retrieved from the Library of Congress. <https://www.loc.gov/item/usrep471539/>.
- Perzanowski, A. (2023, January 13). Tattoos, Norms, and Implied Licenses. *107 Minnesota Law Review Headnotes (2023, Forthcoming)*, U of Michigan Public Law Research Paper No. 23-014. <http://dx.doi.org/10.2139/ssrn.4324090>.
- Schwartz, J. (2010, December 6). Extreme Makeover: Criminal Court Edition. *The New York Times*, available at: <https://www.nytimes.com/2010/12/06/us/06tattoo.html>.
- Werbin, B. (2014, February). *The 'Transformation' of Fair Use After Prince v. Cariou*. <https://www.herrick.com/publications/the-transformation-of-fair-use-after-prince-v-cariou/>.
- Wills, K. (2021). That tattoo her shoulder: the intersection of copyright law & tattoos. *Texas A&M Journal of Property Law*, 7(4), 622-662.
- Wills, K., & Holt, T. L. (2024, February 12). *The Legal Future of Tattoos: A Jury Rules Against Copyright Infringement*, available at: <https://www.perkinscoie.com/en/news-insights/the-legal-future-of-tattoos-a-jury-rules-against-copyright-infringement.html#Fex>.