**Think Before You Ink:**

**Copyright Implications Facing Tattooed Individuals**

A lot has changed since 1988 when Electronic Arts (EA) made its debut release of Madden Football, their award winning game franchise that produces an annual blockbuster[[1]](#footnote-1); however, EA’s one constant has been their commitment to realism[[2]](#footnote-2). EA first thought up a football videogame back in 1984, but technological limitations prevented EA from producing a genuine experience[[3]](#footnote-3).

"If it isn't 11 on 11, it isn't real football," said John Madden, a former NFL coach and long time NFL broadcaster, reflecting on EA’s original suggestion to produce a 7-on-7 version of football.[[4]](#footnote-4) "I'm not putting my name on it if it's not real."[[5]](#footnote-5)



After twenty-five versions and 100 million copies sold, EA has done a lot to keep the Madden seal of approval and make their game as realistic as possible.[[6]](#footnote-6) As new technologies avail themselves, EA looks to use them to up the realism factor. One such improvement was the inclusion of every NFL player’s actual face.[[7]](#footnote-7) Another improvement was supposed to be the inclusion of every player’s actual tattoos; however, EA’s legal team had the game developers pump the breaks.[[8]](#footnote-8)

Collin Kaepernick’s tattoos will be the only ones featured in this year’s version of Madden; however, it is due to a lack of copyright licensing rights and not a lack of graphic rendering technology.[[9]](#footnote-9)

EA already secures many rights in order to produce their game. They license John Madden’s name and likeness—to the tune of $2-million per year—to continue to operate under the franchise’s name. [[10]](#footnote-10) EA also pays the National Football League (NFL) and NFL Players Association (NFLPA) $50-million per year to have exclusive rights to the subject matter of their game—the players and teams.[[11]](#footnote-11) But in EA’s pursuit of the most authentic virtual-football experience, they may have overlooked some much-needed rights.

"We want to be as authentic as possible, so we were pleased that Colin was able to secure the rights to [his] tattoos," said Seann Graddy, EA’s senior producer in charge of Madden.[[12]](#footnote-12) "In this game, we only have Colin's tattoos, but we'd love to secure the rights to the tattoos of other players in the future."[[13]](#footnote-13)

EA’s pursuit of ultra-realism in its Madden franchise might be curtailed by the copyrights of the tattoo artists that gave the players’ their ink. Tattoo artists, likely realizing the value of licensing rights, have come out of the woodwork in recent years to flex their presumptive copyright interests in the artwork they placed on others’ bodies.

It is a strange concept that one possibly does not have exclusive ownership over their skin. As strange as it may sound, the rights conferred to a copyright owner may do exactly that.

In this article, the legal issues surrounding tattoos and their copyrights will be examined. First, the focus will be on the popularity of tattoos in society and why clear rules for tattoo artist-recipient rights do not exist yet. Next, the focus will turn to the ability of tattoo artists to obtain a copyright in their work and what rights a copyright confers to the artist. After, the focus turns to the available defenses a tattoo recipient may raise, including the right of publicity, implied licensing, joint authorship, fair use, and the work for hire doctrine. Last, there will be a discussion of the threats celebrities face in receiving a tattoo, the likely outcomes via litigation, and possible solutions, whether judicially or legislatively reached, to ensure equity.

**I. Lack of Clear Tattoo Laws Despite Their Widespread Popularity**

Much like the medium in which they are fixed, tattoos are here to stay. There are 45 million Americans that have tattoos. [[14]](#footnote-14) Rather than a status symbol reserved for circles of rebels, 40% of today’s households have at least one member with a tattoo.[[15]](#footnote-15) This widespread acceptance of tattoos is most notable in their popularity amongst younger generations. [[16]](#footnote-16) While only 11% of 50 to 64 year old people have tattoos, over one-third of the population ages 18 to 25 (36%) and 30 to 39 (38%) have tattoos.[[17]](#footnote-17)

As the number of tattooed Americans rises, one would imagine that a clear rule would emerge. Although such a rule does not exist, the absence of one is explainable. The law has already developed in regard to expressive works. Copyright law addresses one’s ability to protect an original work and confers a set of rights to its creator. The law has also developed in regard to rights transferred to purchasers of works. Accordingly, legislators have been led to believe that appropriate laws and safeguards are already in place to handle the medium of tattoos; however, the tattoo medium is unique in that the author’s canvas is that of human skin. Typical considerations of fairness and equity are inapplicable to a situation in which one exercises rights over another’s body.

While copyright law could provide an adequate framework for the development of tattoo artist-recipient law, the courts are yet to hear a case that would allow them to do so. The lack of judicial opinions is not due to non-existence of tattoo related disputes. Over the last three years, several lawsuits emerged that dispute the intellectual property of tattoos.

1. ***The Hangover II* Movie – *S. Victor Whitmill v. Warner Brothers* (2011)**

Warner Brothers, the movie studio responsible for producing *The Hangover,* had a rude awakening to rival that of its morning-after movie franchise. After including Mike Tyson and his tattoo in the first film, Ed Helms’s character, Stu, woke up in the second film, *The Hangover II*, with a face full of regret and tattoo artwork. Warner Brothers did not expect that the inclusion of Tyson or his tattoo would land them in a legal battle.

In 2011, about a month before the release of *The Hangover II*, S. Victor Whitmill, the tattoo artist that created Tyson’s facial tattoo, sued Warner Brothers for copyright infringement due to the use of the tattoo in their movies.[[18]](#footnote-18) Whitmill had applied the tattoo to Tyson’s face back in 2003, before the release of either of Warner Brothers’ films.[[19]](#footnote-19) The litigation posed a serious problem for Warner Brothers, who used Tyson in the first film and prominently displayed his tattoo on Helms face in the second film and its promotional materials. Under 17 U.S.C. §502, Warner Brothers faced the possibility of the courts granting Whitmill injunctive relief, which could prevent them from distributing promotional materials with Helms and potentially shutdown the movie until the infringement could be removed.

The end result of the dispute was that it was settled prior to reaching a judicial opinion. Warner Brothers faced the costly possibility of having to reshoot the film to remove the infringement or at least recreate, reprint, and redistribute promotional materials featuring Helms and the tattoo. With a release date planned for a holiday weekend, Warner Brothers stood to loose millions of dollars if the release was delayed – even more once actual damages were determined. [[20]](#footnote-20) However, Warner Brothers was aided by the potential defense of parody fair use and by Whitmill’s failure to register his design until April 19, 2011.[[21]](#footnote-21) The holes in Whitmill’s case and the need of Warner Brothers to avoid an injunction helped bring the parties toward electing for settlement.

1. **THQ’s *UFC Undisputed* Videogame – *Chris Escobedo v. THQ* (2012)**

On the heels of the media buzz surrounding Whitmill’s decision to sue Warner Brothers, Chris Escobedo made his decision to sue THQ, a videogame developer, for copyright infringement.[[22]](#footnote-22) THQ produced a mixed martial arts (MMA) videogame for the Ultimate Fighting Championship (UFC). [[23]](#footnote-23) The game featured Carlos Condit, a prominent athlete in the sport, along with his tattoo of a lion on his ribcage; that lion tattoo having been the work of Escobedo.[[24]](#footnote-24)

“It’s an exact replica of my art,” said Escobedo during an interview regarding his lawsuit.[[25]](#footnote-25) “That’s like a $5,000 tattoo that I got no recognition for.”[[26]](#footnote-26)

Once again, the matter was resolved before a court could rule on the copyright issues. THQ was experiencing financial problems and filed for bankruptcy.[[27]](#footnote-27) The result was that a bankruptcy court was tasked with determining the value of the claim to continue the bankruptcy proceedings.[[28]](#footnote-28) The judge determined that the value of the case was $22,500, which is the amount Condit was paid for his publicity rights in the game.[[29]](#footnote-29) The value earmarked by the judge was substantially less than what Escobedo stood to receive had he elected statutory damages for the copyright infringement.[[30]](#footnote-30) The case dissipated before copyright law could be distinguished for the tattoo medium.

1. **EA’s *NFL Street* Cover – *Stephen Allen v. EA* (2012)**

EA had reason to be cautious of including tattoos in their latest Madden video game. Coming on the heels of the Condit tattoo case, EA experienced their own lawsuit courtesy of tattoo artist Stephen Allen.[[31]](#footnote-31) Back in 2004, EA came out with a playground-style, arcade version of football that they titled *NFL Street*, after their successful *NBA Street*franchise.[[32]](#footnote-32) EA chose to feature a drawing of Ricky Williams, a former NFL player, on the cover of their game; the cover art also featured Williams’ actual tattoos.[[33]](#footnote-33) Although the game had existed for nearly a decade, Allen had only become aware of the unauthorized use of his work in 2010.[[34]](#footnote-34)

Once more, the matter was resolved before a judicial opinion was reached. The case resulted in Allen requesting dismissal of the case.[[35]](#footnote-35) Accordingly, the courts—yet again—were unable to distinguish copyright law for the tattoo medium.

1. **Explaining the Absence of a Judicial Opinion**

As has been shown, the lack of a judicial ruling that sheds light on tattoo copyright law is not due to a lack of issues presented. The primary roadblock to legal clarity has been the decision of parties to settle their case prior to the courts issuing their opinion. The likely reason parties are attuned to settle is that the risk-reward of going to trial is unappealing to the defendants. Tattoo artists have a good case for establishing that they hold a copyright in their work; it is a risky proposition for a defendant to roll the dice on prevailing on the finding of an affirmative defense. Instead, the large corporations being sued have been willing to reach into their deep pockets to shell out a settlement check. The statutory damages for copyright infringement accelerate this process by allowing the defendants to set a price on their infringement. For plaintiff tattoo artists, the settlement is a sure thing rather than the far riskier prospect of gambling on a court’s determination of actual damages. At this point in time, the gap between parties has not been large enough to forgo the risks associated in pursuing a final judgment.

**II. Ability of Tattoo Artists to Gain the Rights Granted by Copyright Protection**

Copyright protection is undoubtedly obtainable by tattoo artists. As is covered shortly, tattoo artists meet minimum requirements to be afforded copyright protection. The court in the *Hangover II* case concerning Tyson’s tattoo shares this opinion.

“Of course tattoos can be copyrighted,” said Judge Catherine D. Perry, Federal District Court of St. Louis, the judge who heard *The Hangover II* dispute.[[36]](#footnote-36) “I don’t think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson’s face, or restricting Mr. Tyson’s use of his own face, as the defendant argues, or saying that someone who has a tattoo can’t remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it’s entirely consistent with the copyright law.” [[37]](#footnote-37)

Although Judge Perry is a single voice in a matter that has yet to reach a written opinion, all signs point to that tattoo designs are copyrightable. The question is just how does tattoo artwork meet the requirements for copyright protection and which rights does the artist retain given that the chosen medium makes use of human skin.

1. **Tattoo Artist’s Ability to Obtain Copyright Protection**

Copyright law is meant to protect certain types of inventions within intellectual property. The Copyright Act of 1976, which is codified as title 17 of the United States Code (17 U.S.C.), stands as the framework for copyright law.[[38]](#footnote-38) Under §102 of the act, copyrights protect “original works of authorship.” The floor for originality, however, is rather low. Only a mere “spark” or “minimal degree” of creativity is required to be an original work[[39]](#footnote-39), which includes:

 “(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.”[[40]](#footnote-40)

Tattoo artwork likely falls under category number five, “pictorial, graphic, and sculptural works” (a.k.a. “PGS”). Under §101, PGS works are defined as follows:

“‘Pictorial, graphic, and sculptural works’ include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”[[41]](#footnote-41)

One can imagine that Judge Perry viewed tattoo artwork as a PGS work when stating that she believed tattoos were copyrightable[[42]](#footnote-42); the very definition of a tattoo is “an indelible mark or figure fixed upon the body . . ..”[[43]](#footnote-43)

Although tattoos appear to fit one of the defined categories, there are other requirements that the tattoo must meet to gain copyright protection. An original work must also be “fixed in any tangible medium of expression from which they can be perceived, reproduced, or otherwise communicated.”[[44]](#footnote-44) “A work is ‘fixed’ in a tangible medium of expression when [(1)] its embodiment in a copy or phonorecord, [(2)] by or under the authority of the author, [(3)] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”[[45]](#footnote-45)

Tattoos are certainly fixed in a medium of expression. The tattoo artwork at question is undoubtedly embodied in a copy trough placement onto a human body. Although human life is not permanent, one would be hard pressed to argue against a person’s skin as being insufficiently permanent or stable for purposes of the statute. After all, tattoos are a “permanent mark of temporary insanity.”[[46]](#footnote-46)

1. **The Rights Obtainable By Tattoo Artists**

Copyrights grant their authors a wide array of rights. These rights include:

(1) the right to reproduce;

(2) the right to prepare derivative works;

(3) the right to distribute copies;

(4) the right to perform publicly;

(5) the right to display publicly; and

(6) the right to perform publicly by means of a transmission.[[47]](#footnote-47)

At this time, the only rights that have come into question during tattoo copyright disputes are the right to reproduce and the right to publicly display. Public display rights are brought into question due to the fact that many tattoos are purchased for the very purpose of showing off the work to others. The right to reproduce is also questioned under theories of work for hire doctrine, joint authorship, first sale doctrine, and implied licenses. While people may insist that these rights do not exist because of the unique qualities of tattoo artwork, the rights are still retained by the author of the work unless a valid defense exists.

In addition to rights conferred by copyright law, tattoo artists may attempt to secure so-called “moral rights” unavailable to the majority of copyrighted works. Moral rights, while common in Europe, are typically neglected in the United States’ legal system; however, the U.S. has attempted to comply with European norms by establishing the Visual Artists Rights Act (VARA) of 1990.[[48]](#footnote-48) VARA grants the following rights[[49]](#footnote-49):

1. the right to attribution;
2. the right to removal of attribution in event of distortion or mutilation;
3. the right to prevent intentional distortion, mutilation, modification, that would prejudice honor or reputation; and
4. the right to prevent destruction of works of recognized stature.

However, these rights are narrowly tailored to limit widespread application.

While a tattoo artist might enjoy the rights granted by, it is doubtful that any court would be willing to extend the act to tattoo artwork. The act was narrowly tailored as to not include more than was intended, and tattoos are not specified as an “visual art.”[[50]](#footnote-50) Additionally, a court would be hard pressed to recognize controversial moral rights of an artist so that they may exercise domain over another’s body. It is unfathomable that a court would find itself ruling in for tattoo artists over recipients in such a manner as to represses the fundamental right of free dominion over one’s own body.

1. **Methods of Protecting Rights and the Available Remedies**

There are several methods for protecting rights conferred by copyrights as well as available remedies under the premise of copyright infringement[[51]](#footnote-51). A copyright holder may request civil measures including injunctive relief[[52]](#footnote-52); seizure, impoundment or destruction of the infringing materials[[53]](#footnote-53); monetary relief, either actual damages and lost profits or statutory damages[[54]](#footnote-54); and costs and damages if the copyright is timely registered[[55]](#footnote-55). Additionally, criminal proceedings may occur for certain infringements.[[56]](#footnote-56)

**III. Possible Defenses to an Artist’s Prima Facie Case**

Copyright law is well established for generic application to works of art. The framework allows for clear understanding as to what is copyrightable. This is likely the reason for Judge Perry’s strong sentiment in support of tattoo copyrights; however, the case never reached a written opinion that could weigh in on the availability and application of defenses. Instead, all feasible defenses must be analyzed in order to develop a clearer understanding of tattoo copyrights.

1. **Work For Hire Doctrine**

The work for hire doctrine is the first of several available defenses based on ownership of the copyright. Initially, ownership of the copyright is vested with the author, or authors.[[57]](#footnote-57) One exception to this general rule is if the work was a work made for hire.[[58]](#footnote-58) The work for hire defense focuses on ownership of the copyright under a theory akin to that of agency.

A work for hire is statutorily defined and narrowly construed. There are two situations in which a work is considered a work for hire.[[59]](#footnote-59) The first situation is one in that the author of the work is an “employee within the scope of his or her employment.”[[60]](#footnote-60) The second situation is one in that the work is “specially ordered or commissioned”; however, commissioned works are limited to ones that either: “a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional 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.”[[61]](#footnote-61)

In regard to tattoo artwork, it appears that neither of the work for hire situations are present. First, it is seldom true that the tattoo’s recipient employs their tattoo’s artist, as there is one tattoo parlor per 2,100 tattooed Americans.[[62]](#footnote-62) Even in cases where the tattoo is paid for in terms of the artist’s time, the compensation terms for the tattoo’s payment can hardly classify the tattoo artist as the employee of the recipient. Second, a tattoo does not constitute a commissioned work within the confines of a work for hire.

There appears to be only one way in which a tattoo can be a work for hire[[63]](#footnote-63). The definition of a work for hire provides an option in which the parties can “expressly agree in a [signed] written instrument”[[64]](#footnote-64) that the work created is a work for hire. Such a written instrument is unlikely to be forgotten in the midst of a litigated dispute. In many situations, the only written instrument between the parties is the basic tattoo consent form that includes a health risks waiver. Because the tattoo artist, or the artist’s agent or employer, is the one who likely drafted the form, it is highly unlikely that such a written instrument would contain express content that would subordinate the artist’s rights in the created work.

1. **First Sale Doctrine**

The first sale doctrine provides a defense to tattoo recipients for public display rights. Essentially, the first sale doctrine, as codified under Section 109, provides tattooed individuals with the ability to display their tattoos in public without the authorization of the copyright holder[[65]](#footnote-65); however, this legally prescribed ability to display the work without authorization is extremely limited.

The first sale doctrine, in regard to display rights of tattoos, only protects one’s right to appear in public. Much like the right a sell the work follows it, the right of display follows the physical manifestation of the authorized copy. A work may be displayed or projected publicly so long as the “viewers [are] present at the place where the copy is located.”[[66]](#footnote-66) This provides relief for people in terms of wardrobe decisions when stepping into public places. On the other hand, there is no protection in terms of photographs, videos, videogames[[67]](#footnote-67), or similar forms of replication or transmission because the authorized copy is not present in these situations.

1. **Joint Authorship**

Joint authorship is another defense based on co-ownership of the copyright. When authors jointly create a work, they hold an undivided interest in the work.[[68]](#footnote-68) [[69]](#footnote-69) The jointly held interest in the work allows either party to market or use the work as they deem fit.

Although joint authorship provides a possible defense for tattoo recipients, joint authorship must be established and is not presumed.[[70]](#footnote-70) The statutory language provides that parties must merely intend for their contributions to merge into a whole.[[71]](#footnote-71) However, the United States Court of Appeals determined that a mere literal interpretation would have unintended consequences:

“[A]n inquiry so limited would extend joint author status to many persons who are not likely to have been within the contemplation of Congress. For example, a writer frequently works with an editor who makes numerous useful revisions to the first draft, some of which will consist of additions of copyrightable expression. Both intend their contributions to be merged into inseparable parts of a unitary whole, yet very few editors and even fewer writers would expect the editor to be accorded the status of joint author, enjoying an undivided half interest in the copyright in the published work.”[[72]](#footnote-72)

In recognition of this concern, the court established that the party claiming joint authorship exists “bears the burden of establishing that ... the co-author[ ] (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors.”[[73]](#footnote-73)

Here, it appears unlikely the majority of tattoo recipients meet the burden for establishing joint authorship. This can be shown through the use of three hypothetical situations common to the purchase and application of a tattoo.

 First, imagine a situation in which a person visits a tattoo parlor and selects a design from the parlor walls or from inside a design book belonging to the parlor. The design is pre-created and merely requires the artist to apply it to the recipient’s skin. Even if the recipient were to suggest the combination of multiple designs or ways to tweak the a singular design, there is nothing that suggests that the recipient’s input is independently copyrightable. There is also nothing that suggests that the artist’s inclusion of the recipient’s ideas was done so with the intention to become co-authors of the resulting work.

Next, imagine a situation in which a person visits a tattoo parlor and discusses a tattoo idea with the artist. Perhaps the idea is to include a biblical verse on a scroll wrapped around a cross to signify the recipient’s connection with their religion. In no way does the artist have a copyright in the biblical verse or a cross; however, the actual byproduct of the artist’s creation of the recipient’s vision is copyrightable. While the idea for what to design came solely from the recipient, the work created is the vision and interpretation of the artist. Since ideas are not copyrightable, the only copyrightable contribution is that of the tattoo artist; the tattoo, therefor, is the copyright of the artist.

Last, imagine a situation where someone with artistic flair comes into a tattoo parlor with a design that *they* created. The artist, aware of the limitations of the human skin in receiving tattoo ink, makes a few tweaks to preserve the customer’s design. The tattoo artist then applies the tattoo to the customer’s skin. To what result? Unlike the prior examples, the tattoo recipient has copyright ownership. As the recipient created the tattoo design, they have a copyrightable contribution, as the design believably would meet threshold requirements for creativity. The mutual intent to be co-authors is present and shown by the recipient creating their own design and bringing it to the artist.[[74]](#footnote-74) If anything, it would appear that the recipient possesses sole ownership and that the tattoo artist merely applied the work of the recipient. Accordingly, this situation appears to be the only one in which co-authorship is a defense for tattoo copyrights.

1. **Implied Licensing**

Implied licensing is a defense based upon access to the rights conferred to the copyright holder. The argument is that the tattoo artist licenses the work to the recipient. If the work is licensed, the use of the work is authorized and is not infringing. Implied licenses are those granted without a written agreement. While an exclusive license needs to be in writing, a non-exclusive license may be granted orally or impliedly.[[75]](#footnote-75)

In 2008, the Ninth Circuit, in Asset Mktg. Sys., Inc. v. Gagnon, clarified the law for implied licenses. They “held that an implied license is granted when ‘(1) a person (the licensee) requests the creation of a work, (2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it,and (3) the licensor intends that the licensee-requestor copy and distribute his work.’”[[76]](#footnote-76) As to the last prong, proof of intent is not limited to copying and distribution but extends to use, retention, and modification as well.[[77]](#footnote-77)

In the case of tattoos, there is little confusion to be had over the first two elements of an implied license. A person that wishes to obtain a tattoo goes to a tattoo parlor in order to gain the services of a tattoo artist. Upon arrival and before receiving a tattoo, a conversation between the recipient and the artist must be had to decide upon a tattoo design. The design of the tattoo is prepared at the request of the recipient[[78]](#footnote-78), the licensee. The tattoo artist, the licensor, has made the work for the recipient so that they may create a sale. After some consent paper work is signed, the artist then delivers the work by applying it to the recipient’s body. Thus, the first two elements of the test have been satisfied.

While the first two elements appear to be met, there remains confusion in regard to the application of implied licenses to tattoo copyrights. The “touchstone for finding an implied license . . . is intent.”[[79]](#footnote-79) The relevant standard for intent is the objective intent at the time of creation and delivery of the work.[[80]](#footnote-80) In determining intent, an element looked at is “whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.”[[81]](#footnote-81) Additionally, implied licenses have been found where the work is considered worthless without such a license.[[82]](#footnote-82)

In regard to tattoos, it appears that the intent element is met. It is hard to argue that a tattoo recipient would be willing to forego the transaction if their body was permanently subjected to the control of their artist. Unlike other mediums, tattoo artwork is attached to the body. Enforcing a tattoo artist’s copyright is done to the detriment of the recipient’s free will. Although the burden of proof typically rests with the party wishing to establish an implied license[[83]](#footnote-83), it appears necessary to impose the burden of proof upon the tattoo artist due the exercise of control over another human. Further, one logically assumes that the tattoo artist grants the recipient the right to continue their life unhindered by the burden of their new adornment. If this was not the case, tattoo artwork would be counterintuitive as one would pay *someone else* to exercise control over *their own* body. Such control would likely render the work to be worthless rather than merit financial compensation on the part of the recipient.

1. **Fair Use**

Another defense available to tattoo recipients is that of “fair use.” “Fair use” is an affirmative defense to copyright infringement that recognizes situations in which the goal of promoting free expression and creativity is better served by allowing use rather than prohibiting it.[[84]](#footnote-84) “[Fair use] is a means of balancing the need to provide individuals with sufficient incentives to create public works with the public's interest in the dissemination of information.”[[85]](#footnote-85)

The fair use defense can be found in Section 107. The statute provides four factors for consideration in determining the availability of fair use:

“(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

 (2) the nature of the copyrighted work;

 (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

 (4) the effect of the use upon the potential market for or value of the copyrighted work.”[[86]](#footnote-86)

A finding for, or against, the availability of “fair use” is based upon the totality of the circumstances.[[87]](#footnote-87)

In analyzing the first element, there are three factors to consider. These factors are “(1) whether use was productive;  (2) whether use was commercial;  and (3) whether alleged infringer's conduct was proper.”[[88]](#footnote-88) The Supreme Court rules in favor of fair use where the use is productive.[[89]](#footnote-89) In regard to commercial purpose, it does not *per se* eliminate fair use[[90]](#footnote-90); however, the courts are in agreement that a commercial purpose presumptively makes usage of the work unfair.[[91]](#footnote-91) This presumption can be rebutted by “the characteristics of the use”[[92]](#footnote-92), including the function of the use.[[93]](#footnote-93) “[The] relevant question is not whether sole motive of the use is monetary gain but whether user stands to profit from exploitation of copyrighted material without paying the customary price.”[[94]](#footnote-94)

In regard to the first element’s application to tattoos, it appears that it is favorable to a finding of fair use. Use of a tattoo tends to serve a productive purpose by enabling the recipients to express themselves freely. So long as their expression, through use of their tattooed body, does not amount to little more than a literal copying of the copyrighted work, it would appear to be proper to allow the expression. Conversely, it would appear improper to allow the copyright holder to prohibit another’s ability to express him or herself or make a living through use of their own body. However, the most important factor is that the use does not exploit the copyright “without paying the customary price.” As tattoos are paid for with the intention of being draped across one’s body, subsequent use of the copyright by mere use of one’s body does not exploit the bargain originally struck in purchasing the work.

The second element, however, is unfavorable in its application to tattoos. The inquiry regarding the nature of the work focuses upon “locating work, according to its nature, on spectrum from factual works to fiction or fantasy.”[[95]](#footnote-95) “When the nature of copyrighted works is creative, as opposed to informational, use of those works is less likely to be deemed fair use.”[[96]](#footnote-96) Because the nature of the disputed use is typically the exact copying of the author’s creative work, the element weighs against fair use in regard to tattoos.

It appears that the third element, as applied to tattoo copyrights, favors fair use. Although the alleged infringement is typically an exact duplicate of the original work, substantial copying does not preclude a finding of fair use.[[97]](#footnote-97) “In considering amount of copyrighted work copied . . . the court does not focus solely on quantum of material copied, but must determine whether amount copied is reasonable in relation to purpose of copying.”[[98]](#footnote-98) The attachment of the work to the body makes it essential—therefor reasonable—to include the work in order to accurately depict the person to whom the work is attached. While an argument can be made that the tattoos may be covered or removed from depictions of the person whom adorns them, it seems entirely unreasonable to impose such burdens, or their associated expenses, upon the individual. Such impositions pose a grave threat to free expression by placing substantial barriers in the way of the exercise of first amendment rights.

The last element also seems to favor a finding of fair use in regard to tattoos. Fair use is found when the use does not materially impair the marketability of the copyrighted work.[[99]](#footnote-99) The use is declared unfair if the use impairs the marketability, fulfills the demand of the original, or diminishes the author’s sales.[[100]](#footnote-100) Here, the use brought into question is not the actual tattooing of the work to another person; the depiction of a tattoo on another’s body does not magically place the tattoo on one’s own. The author’s sales cannot decline, as the opportunity for his employment is not diminished; the market for tattoo purchases has not changed. Therefor, the only argument that remains is impairment of the marketability of the work. There is not a threat of impairment due to widespread use because the tattoo remains attached to only one person. As for parody or criticism, the court declines to find infringement upon such grounds.[[101]](#footnote-101) Thus, there appears to be no argument that supports a finding for material impairment as to the author’s marketability of their work.

Since the majority of the elements considered lean in favor of the recipient, tattoo usage, when used in depicting the recipient, appears to be protected by fair use. The use is merely to depict the recipient; any depiction of the artwork is incident to such depiction and is not done solely to retransmit the copyrighted work. A finding against fair use would grant an unintended windfall that allows the artist to either impose his will upon recipients or request compensation in excess of the bargain struck when applying the tattoo.

**F. Right of Publicity**

The right of publicity may also provide a defense to copyright infringement. The right of publicity is a bundle of rights public figures possess, in lieu of a right to privacy. While the previous discussions have focused on affirmative defenses to copyright infringement, the right of publicity acts as a defense to damages.

There is no federal statute for the right of publicity. It is a state created right that varies—both in terms and outright recognition—from jurisdiction to jurisdiction. Because the right of publicity is a state right, federal copyright law preempts it where it is “equivalent to any of the rights specified in §106.”[[102]](#footnote-102) Although federal copyright law does not preempt all of the rights granted by the right of publicity[[103]](#footnote-103), it is preempted in regard to addressing copyright infringement. The right at question is the protection of a copyrighted image. Therefor, any application of the right of publicity to tattoo copyrights is limited to mitigating damages.

The right of publicity mitigates damages by establishing the value of the work’s use. The use of the work is merely incidental as it is attached to the celebrity’s body. The work is famous because of *who* it is attached to, *not* because of the work itself. When the celebrity is shown with the work, they are compensated because of their exclusive right in their likeness. Because the value is not based on the work, an author cannot expect to be compensated identically. The best they can hope for is a small portion of the total value of the likeness that can be directly attributed to the addition in value due of the author’s work. Anything in excess of this amount unjustly enriches the author to the detriment of the celebrity’s ability to earn from his or her own pursuits. By determining the value of the use, the celebrity can reduce the valuation of actual damages.

**IV. Moving Forward – Likely Outcomes, A Possible Solution, and Advice**

It is clear that there are good arguments on both sides of a tattoo dispute. Tattoo artists firmly believe that they have a copyright in their tattoo artwork. This opinion is shared by Judge Perry in one of the only pieces of judicial insight on this issue; however, the tattoo is affixed to the recipient’s skin and has become synonymous with their body. Any subsequent use of the work is merely the result of the chosen medium. As such, tattoo recipients believe they have done nothing wrong. A court can hang its hat on a number of defenses available to recipients to rule in their favor if the court so chooses. Since there is a clear right to which valid defenses exist, a celebrity, or anyone wishing to make use of their likeness, must proceed with caution.

1. **Likely Outcomes**

The risk-reward dichotomy is what currently dictates manner in which tattoo disputes are resolved. Litigation has only two outcomes: (1) The tattoo artist prevails in establishing infringement and is awarded statutory or actual damages; or (2) The tattoo recipient prevails on an affirmative defense that deems the use permissible. The polarity of outcomes in litigation sets the stakes to “all-or-nothing.” The lack of intermediary outcomes has caused parties to choose settlement in resolving their dispute.

The biggest appeal to settlement is the guaranteed use of the work. A simple truth is that the party accused of infringement would like to continue use of the work. In the disputes given as examples, the work is inseparably intertwined with the finished product of movies and videogames. The cost of removing an infringement could financially cripple the associated business venture that makes use of the work. Accordingly, settlement provides the alleged infringer with a means of securing an agreement that allows their continued use of the work.

For the foreseeable future, settlement will continue to be the only means of resolution. Parties are driven to settlement because there is no definitive legal authority, and there is no definitive legal authority because parties always settle. Alleged infringers will settle for an amount less than the total cost of: (a) removing the infringement from a product; (b) the statutory or actual damages; and (c) the attorneys’ fees associated with going to trial. This amount represents the total risk associated with losing at trial and being barred from use of the work. The total risk—adjusted for by the strengths of either party’s case—appears to be in excess of what is needed to secure a licensing agreement. Therefor, parties will continue to settle until an artist refuses to lower their demands to less than that of the adjusted total risk.

1. **Possible Solution**

A possible solution to tattoo disputes is for the party licensing the use of their likeness to indemnify the party receiving the license. The party with the tattoo is in the best position to know whether or not the use of the tattoo is permitted. The value of the license would be substantially reduced if the licensee had the burden of discovering the identities of the licensor’s tattoo artists and inquire as to their retained rights in the work. Instead, an indemnity agreement places the onus on the party granting the license to ensure that they have a legal right for which they are selling a license. The solution would be akin to requiring the disclosure of a known lien against their likeness for which a license is granted.

1. **Advice**

With the current amount of uncertainty in the law associated with tattoo copyrights, it should go without saying that individuals with tattoos, or those wishing to acquire them, should proceed with caution. There is the potential for substantial liability by having a tattoo; however, there are some steps that one can take to protect themselves.

One method of protection is to acquire a waiver from the tattoo artist. It is entirely likely that this method will not come without cost. If a person already has the tattoo, a waiver likely cannot be obtained without payment for the right. If a person has yet to acquire the tattoo, a waiver will likely increase the total cost of the tattoo. Either way, the tattoo artist is unlikely to waive rights in their work without some means of compensation.

The last means of protection is to not have an artist’s tattoo. For those who have yet to acquire a tattoo, this is a simple solution. One can either forego acquiring tattoos all together or seek an artist who is willing to grant a waiver. As for those who already have tattoos, laser tattoo removal or use of a cover up tattoo might be a means of protecting themselves against their tattoo artist. As VARA is unlikely to ever apply to tattoo artwork due to its affixation to the human body, tattoo artists do not have a right to prevent destruction of their artwork. While the solution may be physically painful, it may be effective in terms of the reducing ones exposure to liability.

In sum, one should think long and hard about getting a tattoo. A tattoo is a permanent decision to receive a work of art that is currently accompanied by substantial legal uncertainty. It is best to avoid tattoos indefinitely unless the artist grants a waiver.

1. *See* "Madden: The $4 Billion Video Game Franchise." CNNMoney. September 5, 2013. Accessed September 19, 2014. http://money.cnn.com/2013/09/05/technology/innovation/madden-25/. [↑](#footnote-ref-1)
2. *See* Michaels, Al. "IGN Presents the History of Madden." IGN. August 8, 2008. Accessed September 19, 2014. http://www.ign.com/articles/2008/08/08/ign-presents-the-history-of-madden. [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. Id. [↑](#footnote-ref-4)
5. Id. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. "How Madden NFL Turns Players into Pixels." SBNation.com. Accessed September 19, 2014. http://www.sbnation.com/2014/8/25/6056683/madden-15-nfl-video-game-making-of. [↑](#footnote-ref-7)
8. *see* Rovell, Darren. "New 'Madden': Deal Done In ink." ESPN. June 5, 2014. Accessed September 19, 2014. http://espn.go.com/nfl/story/\_/id/11036778/madden-15-feature-san-francisco-49ers-qb-colin-kaepernick-tattoos. [↑](#footnote-ref-8)
9. Id. [↑](#footnote-ref-9)
10. *See* "Madden: The $4 Billion Video Game Franchise." CNNMoney. September 5, 2013. Accessed September 19, 2014. http://money.cnn.com/2013/09/05/technology/innovation/madden-25/. [↑](#footnote-ref-10)
11. Id. [↑](#footnote-ref-11)
12. Id. [↑](#footnote-ref-12)
13. Id. [↑](#footnote-ref-13)
14. *See* "Tattoo Statistics." Statistic Brain RSS. Accessed September 18, 2014. http://www.statisticbrain.com/tattoo-statistics/. [↑](#footnote-ref-14)
15. *See* "Infographic: America's Love for Tattoos Grows - NBC News." NBC News. Accessed September 18, 2014. http://www.nbcnews.com/nightly-news/infographic-americas-love-tattoos-grows-n95486. [↑](#footnote-ref-15)
16. *See* "Tattooed Gen Nexters." Pew Research Center RSS. Accessed September 18, 2014. http://www.pewresearch.org/daily-number/tattooed-gen-nexters/. [↑](#footnote-ref-16)
17. Id. [↑](#footnote-ref-17)
18. *See* Bradley, Timothy. "ENTERTAINMENT AND SPORTS LAW: The Copyright Implications of Tattoos." ABA. Accessed September 19, 2014. [↑](#footnote-ref-18)
19. Id. [↑](#footnote-ref-19)
20. Id. [↑](#footnote-ref-20)
21. Id. [↑](#footnote-ref-21)
22. *See*  "Copyright in Tattoo Case: Escobedo v. THQ, Inc." Digital Media Law Project. Accessed September 19, 2014. http://www.dmlp.org/blog/2012/copyright-tattoo-case-escobedo-v-thq-inc. [↑](#footnote-ref-22)
23. Id. [↑](#footnote-ref-23)
24. Id. [↑](#footnote-ref-24)
25. *see* Boudway, Ira. "Hey, Pro Athletes: Your Tattoo Is Going to Get You Sued." Business Week. Accessed September 20, 2014. [↑](#footnote-ref-25)
26. Id. [↑](#footnote-ref-26)
27. *See* "Tattoo Artist Looks to Show Value of Copyright Claim Against Videogame Publisher." The Hollywood Reporter. Accessed September 20, 2014. http://www.hollywoodreporter.com/thr-esq/tattoo-artist-looks-show-value-625509. [↑](#footnote-ref-27)
28. Id. [↑](#footnote-ref-28)
29. Id. [↑](#footnote-ref-29)
30. 17 U.S.C. §504 [↑](#footnote-ref-30)
31. *see* "Ricky Williams and EA Getting Sued For NFL Street Tattoo." Operation Sports. Accessed September 20, 2014. http://www.operationsports.com/news/599456/ricky-williams-and-ea-getting-sued-for-nfl-street-tattoo/. [↑](#footnote-ref-31)
32. Id. [↑](#footnote-ref-32)
33. Id. [↑](#footnote-ref-33)
34. Id. [↑](#footnote-ref-34)
35. *see* Complaint, Allen v. Elec. Arts Inc., No. 5:12-cv-03172-SMH-MLH (W.D. La. Dec. 31, 2011). [↑](#footnote-ref-35)
36. *See* "Citing Public Interest, Judge Rules for 'Hangover II'" LexisNexis. Accessed September 20, 2014. http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/. [↑](#footnote-ref-36)
37. Id. [↑](#footnote-ref-37)
38. Although the Digital Millennium Copyright Act and Copyright Term Extension act have modified the Copyright Act of 1976, these modifications have not altered copyright law with respect to current issues in its application to tattoos. [↑](#footnote-ref-38)
39. *See* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991). [↑](#footnote-ref-39)
40. *See* 17 U.S.C. §101 [↑](#footnote-ref-40)
41. *see* 17 U.S.C. §101 [↑](#footnote-ref-41)
42. *See* "Citing Public Interest, Judge Rules for 'Hangover II'" LexisNexis. Accessed September 20, 2014. http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/. [↑](#footnote-ref-42)
43. *see* "Tattoo." *Merriam-Webster Dictionary*. [↑](#footnote-ref-43)
44. *See* 17 U.S.C. §102(a) [↑](#footnote-ref-44)
45. *See* definition of “fixed,” 17 U.S.C. §101 [↑](#footnote-ref-45)
46. The quote is without attribution; it has circled the Internet and speech and is adopted into the commons. [↑](#footnote-ref-46)
47. *See* 17 U.S.C. §106 [↑](#footnote-ref-47)
48. Esworthy, Cynthia. "A Guide to the Visual Artists Rights Act." Harvard Law Journal. Accessed September 20, 2014. http://www.law.harvard.edu/faculty/martin/art\_law/esworthy.htm. [↑](#footnote-ref-48)
49. *Id* [↑](#footnote-ref-49)
50. *See* 17 U.S.C. §101 [↑](#footnote-ref-50)
51. *See* 17 U.S.C. §501 [↑](#footnote-ref-51)
52. *See* 17 U.S.C. §502 [↑](#footnote-ref-52)
53. *See* 17 U.S.C. §503 [↑](#footnote-ref-53)
54. *See* 17 U.S.C. §504 [↑](#footnote-ref-54)
55. *See* 17 U.S.C. §505 [↑](#footnote-ref-55)
56. *See* 17 U.S.C. §506 [↑](#footnote-ref-56)
57. *See* 17 U.S.C. §201(a) [↑](#footnote-ref-57)
58. *See* 17 U.S.C. §201(b) [↑](#footnote-ref-58)
59. *See* 17 U.S.C. §101 [↑](#footnote-ref-59)
60. Id. [↑](#footnote-ref-60)
61. Id. [↑](#footnote-ref-61)
62. *See* "Tattoo Statistics." Statistic Brain RSS. http://www.statisticbrain.com/tattoo-statistics/ (accessed September 21, 2014). [↑](#footnote-ref-62)
63. This statement is made in regard to the general public and not situations in which the tattoo recipient is the employer of the tattoo artist. [↑](#footnote-ref-63)
64. 17 U.S.C. §101 [↑](#footnote-ref-64)
65. 17 U.S.C. §109(c) and 17 U.S.C. §109(e) [↑](#footnote-ref-65)
66. 17 U.S.C. §109(c) [↑](#footnote-ref-66)
67. *See* 17 U.S.C. §109(e) [↑](#footnote-ref-67)
68. *See* Childress v. Taylor, C.A.2 (N.Y.) 1991, 945 F.2d 500, 20 U.S.P.Q.2d 1191; *see also* Pye v. Mitchell, C.A.9 (Cal.) 1978, 574 F.2d 476, 198 U.S.P.Q. 264. [↑](#footnote-ref-68)
69. While each party maintains the rights to a joint work, joint authors are still subject to accounting to one another. (*see* Kaplan v. Vincent, S.D.N.Y.1996, 937 F.Supp. 307.) [↑](#footnote-ref-69)
70. *See* Price v. Fox Entertainment Group, Inc., S.D.N.Y.2007, 473 F.Supp.2d 446. [↑](#footnote-ref-70)
71. *See* Childress v. Taylor, 945 F.2d 500, 501 (2d Cir. 1991) [↑](#footnote-ref-71)
72. *See* Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998) [↑](#footnote-ref-72)
73. Id. [↑](#footnote-ref-73)
74. Co-authorship agreement does not need to be in writing. (*See* Childress v. Taylor, 945 F.2d 500, 501 (2d Cir. 1991)) [↑](#footnote-ref-74)
75. *See* 17 U.S.C. §204 [↑](#footnote-ref-75)
76. *See* Asset Mktg. Sys., Inc. v. Gagnon, 542 F.3d 748, 754-55 (9th Cir. 2008), *citing*

Effects Associates, Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990) [↑](#footnote-ref-76)
77. Asset Mktg. Sys., Inc. v. Gagnon, 542 F.3d 748, 754-55 (9th Cir. 2008) [↑](#footnote-ref-77)
78. There may be an exception to this if the design is pre-created by the tattoo artist. Although the work must be recreated in order to be applied, or delivered, the court may look unfavorably upon such a situation, as the work was not *originally* created at the request of the licensee-recipient. [↑](#footnote-ref-78)
79. John G. Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 40 (1st Cir. 2003) [↑](#footnote-ref-79)
80. *See* Asset Mktg. Sys., Inc. v. Gagnon, 542 F.3d 748, 756 (9th Cir. 2008) [↑](#footnote-ref-80)
81. *See* Id., *citing* Nelson-Salabes, Inc. v. Morningside Dev., LLC,284 F.3d 505, 516 (4th Cir.2002) [↑](#footnote-ref-81)
82. *See* Design Options, Inc. v. BellePointe, Inc., 940 F. Supp. 86, 91 (S.D.N.Y. 1996) [↑](#footnote-ref-82)
83. *See* Atkins v. Fischer, 331 F.3d 988, 991 (D.C. Cir. 2003) [↑](#footnote-ref-83)
84. *See* Robinson v. Random House, Inc., 877 F. Supp. 830 (S.D.N.Y. 1995) modified, (S.D.N.Y. Mar. 26, 1995) [↑](#footnote-ref-84)
85. *See* Hustler Magazine Inc. v. Moral Majority Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) [↑](#footnote-ref-85)
86. *See* 17 U.S.C. §107 [↑](#footnote-ref-86)
87. *See* Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977) [↑](#footnote-ref-87)
88. *See* Rubin v. Brooks/Cole Pub. Co., 836 F. Supp. 909, 916 (D. Mass. 1993); *citing* Penelope v. Brown*,* 792 F. Supp. 132, 136 (D. Mass. 1992) [↑](#footnote-ref-88)
89. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985) [↑](#footnote-ref-89)
90. *See* Consumers Union of United States, Inc. v. General Signal Corp., C.A.2 (N.Y.) 1983, 724 F.2d 1044, rehearing denied 730 F.2d 47, *certiorari denied* 105 S.Ct. 100, 469 U.S. 823, *on remand* 664 F.Supp. 753. [↑](#footnote-ref-90)
91. *See* Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993) [↑](#footnote-ref-91)
92. *See* Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522 (9th Cir. 1992), *citing* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir.1986) [↑](#footnote-ref-92)
93. Finding for fair use when the function is different. *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir.1986). [↑](#footnote-ref-93)
94. *See* Rubin v. Brooks/Cole Pub. Co., 836 F.Supp. 909 (D.Mass.1993). [↑](#footnote-ref-94)
95. *See*  Lotus Development Corp. v. Borland Intern., Inc., (D.Mass.1993) 831 F.Supp. 223. [↑](#footnote-ref-95)
96. *See* Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993) [↑](#footnote-ref-96)
97. *See* Rubin v. Brooks/Cole Pub. Co., 836 F.Supp. 909 (D.Mass.1993). [↑](#footnote-ref-97)
98. *See* Belmore v. City Pages, Inc., 880 F. Supp. 673, 677 (D. Minn. 1995) [↑](#footnote-ref-98)
99. *See* Advanced Computer Servs. of Michigan, Inc. v. MAI Sys. Corp., 845 F. Supp. 356, 366 (E.D. Va. 1994) [↑](#footnote-ref-99)
100. *See* Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526, 1539 (C.D. Cal. 1985) aff'd, 796 F.2d 1148 (9th Cir. 1986). [↑](#footnote-ref-100)
101. The court distinguishes “[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.” *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994)*, citing* Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986). [↑](#footnote-ref-101)
102. *See* Baltimore Orioles, Inc. v. Major League Baseball Players Association, 805 F.2d 663 (7th Cir. 1986). [↑](#footnote-ref-102)
103. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (Supreme Court recognizes right of publicity and rules that one may not appropriate “a performer’s entire act.”) [↑](#footnote-ref-103)