

# Tattoo Toss-up – Artist’s Copyright Claims Fail Against NBA Video Game Publishers

May 9, 2024 – *The TMCA*

by Brok Humbert

Tattoos and copyright law have once again crossed paths, as an Ohio jury recently concluded that the creators of the NBA 2K series had an implied license to use an artist’s designs that he tattooed on LeBron James. Even before reaching the jury, however, the artist may have doomed his case simply by not properly registering the copyrights in his tattoo designs.

## Related People

- Brok Humbert

## Related Capabilities

- Trademark, Copyright + Advertising
- Intellectual Property Litigation



The popular video game series NBA 2K features realistic simulations of basketball, with a user directing on-court strategy and taking control of individual players. Though its original 1999 release included representations of stars such as Allen Iverson that are pixelated by today’s standards, recent installments in the series include highly detailed

character models that speak, perspire, and show players' real-life tattoos.

In late 2017, artist James Hayden filed a complaint against game publishers 2K Games Inc. and Take-Two Interactive Software Inc., asserting the publishers had improperly incorporated six tattoos he had inked on James and fellow players Danny Green and Tristan Thompson. In response, the publishers argued that Hayden failed to properly register the designs with the U.S. Copyright Office prior to filing the complaint. Although artists and creators do not need to register a copyrighted work to own rights in it, federal registration is a requirement to assert copyrights in federal court. See our earlier post on this issue. Furthermore, owners must properly exclude any material from their application for which they cannot claim ownership, such as preexisting works and material already in the public domain.

In Hayden's case, four of the asserted copyrights incorporated material belonging to third parties or the public domain, such as the image depicted on Thompson's back of two fingertips touching in the style of Michelangelo's "The Creation of Adam."



Hayden attempted to correct these mistakes by filing supplementary copyright registrations, but only after two years from initially filing the complaint. He also did not update his complaint accordingly. As a result, the court excluded these tattoos from the case, leaving only two designs sported by James.

Evaluating the remaining designs, a jury later concluded that 2K Games Inc. and Take-Two Interactive Software Inc. had an implied license to use James' tattoos in the video game. In rendering the verdict, the jury appears to have followed the court's prior statement that Hayden had licensed to James the right to use and display the tattoos on his body simply by placing them on him, and James had licensed the right to use his likeness (including the tattoos) to the game publishers via the NBA and its Players Association. It is unclear whether the jury would have ruled differently on the four excluded designs, but the game publishers' deft argumentation highlights not only the value of experienced IP trial counsel, but also the importance of shrewd filing strategy.