

**Alexander v. Take-Two Interactive Software, Inc.,
No. 18-CV-966-SMY, 2024 WL 4286349 (S.D. Ill. Sept. 25, 2024)**

Year	2024
Court	United States District Court for the Southern District of Illinois
Key Facts	Plaintiff Catherine Alexander, a tattoo artist, inked multiple tattoo designs on World Wrestling Entertainment, Inc. (“WWE”) professional wrestler Randy Orton’s upper body. Video game developers Take-Two Interactive Software, Inc., 2K Games, Inc., 2K Sports Inc., and Visual Concepts Entertainment worked with WWE (collectively, “Defendants”) to create the WWE 2K collection of video games that feature realistic depictions of WWE wrestlers. Take-Two copied and reproduced the Alexander tattoos to produce an accurate digital likeness of Orton in the video games. Alexander sued for infringement of the tattoo designs and moved for summary judgment. On a cross-motion, Defendants raised three affirmative defenses including fair use. After denying Defendants’ motion due to material factual disputes precluding a finding of fair use, the matter went to trial where a jury found for Alexander. Defendants subsequently moved for judgment as a matter of law, asserting fair use and that Alexander did not prove actual damages.
Issue	Whether reproducing tattoo designs inked on an athlete for use in a video game to realistically depict that athlete’s likeness and decorate other custom avatars is fair.
Holding	Considering the first factor, the purpose and character of the use, the court noted that Defendants used the tattoos not only to replicate Orton’s likeness, but also for their expressive value. Of particular significance to the court, the video games had a “Create-a-Superstar” tool where users could apply the tattoos to their own custom avatar. Because Defendants’ “clearly commercial” use went beyond depicting Orton, the court concluded that “[a] reasonable jury could have found that this factor favored Alexander.” On the second factor, the nature of the copyrighted work, the court rejected Defendants’ argument that the tattoos were at best minimally protected by copyright law, noting that Alexander has a copyright for five of Orton’s tattoo designs. The court determined that this factor could favor Alexander because “the art of creating a tattoo naturally entails creative and expressive efforts” and here there was sufficient evidence of Alexander’s creative process. The court likewise concluded that the third factor, the amount and substantiality of the work used, could favor Alexander. Although Defendants argued that it was necessary to “copy each tattoo in its entirety to depict real life accurately,” the court noted that this assertion was belied by the use in the custom avatar tool as well as trial evidence that Defendants had altered the tattoo designs of other wrestlers featured in the game to avoid infringing those works. Considering the fourth factor, the effect of the use on the potential market for or value of the work, the court observed that Alexander had not previously licensed her tattoo designs and that Defendants provided un rebutted expert testimony that the market for licensing tattoos in video games did not exist and was unlikely to be developed. Absent any evidence of market harm, the fourth factor favored Defendants. Nonetheless, because the first three factors “weighed against a finding of fair use,” the court determined that it was not unreasonable for the jury to conclude that fair use did not excuse Defendants’ copying. Defendants’ motion for judgment as a matter of law was accordingly denied.
Tags	Computer program; Painting/Drawing/Graphic
Outcome	Fair use not found

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