

**Hayden v. 2K Games, Inc.,
629 F. Supp. 3d 736 (N.D. Ohio 2022)**

Year	2022
Court	United States District Court for the Northern District of Ohio
Key Facts	Defendants 2K Games, Inc. and Take Two Interactive Software, Inc. develop and distribute the NBA 2K basketball simulation video game series, which realistically depicts NBA basketball players, including their tattoos. Plaintiff James Hayden, a tattoo artist, alleged that Defendants infringed his copyrighted works—a total of six tattoos inked on NBA players Danny Green, LeBron James, and Tristan Thompson—by reproducing them to depict the players’ likenesses in the video game series. In response to Hayden’s motion for summary judgment, Defendants moved for summary judgment on a number of defenses, including fair use.
Issue	Whether using copyrighted tattoo designs in video games to realistically depict athletes who bear those tattoos constitutes fair use.
Holding	For the first factor, the purpose and character of the use, the court observed that Defendants’ “ultimate purpose is realism” whereas Hayden created body art as a form of personal expression for the players. The court further noted that the parties disputed how prominently the tattoos were displayed in the video games and the extent to which Defendants commercially benefited from including the tattoos in the games. The court concluded that these arguments should be resolved by a jury as reasonable jurors could disagree about whether—or to what extent—the use was transformative and what weight should be accorded to commerciality. For the second factor, the nature of the copyrighted work, even though the expressive nature of the tattoos favored Hayden, the court determined that the tattoos had been “published” when they were permanently affixed to the players’ bodies, which favored Defendants. For the third factor, the amount and substantiality of the use, the court noted that while the tattoos had been rendered in their entirety, since they “appear much smaller than in real life” and because it was questionable how discernible they were among other visual elements during gameplay, the tattoos’ “degree of observability” and the use’s significance to the game as a whole were factual questions to be determined by a jury. For the fourth factor, the effect of the use upon the potential market for or value of the work, the court stated that despite Defendants’ wholesale copying, Hayden “bears the burden of showing that there is a potential market for the use of the Tattoos as they appear in Defendants’ video games,” noting that “a jury could find that the likelihood is less that someone might choose to acquire tattoos from Defendants’ video games, rather than obtain tattoos from [Hayden].” The court ultimately denied summary judgment because genuine disputes of material fact necessitated determination by a jury.
Tags	Computer program; Film/Audiovisual; Painting/Drawing/Graphic
Outcome	Preliminary finding; fair use not found

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