

THE
AM LAW LITIGATION DAILYLitigators of the Week: Kirkland Beats Videogame
Copyright Claim From LeBron James' Tattoo Artist

By Ross Todd

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Our Litigators of the Week are **Dale Cendali** and **Josh Simmons** of **Kirkland & Ellis**. After litigating for more than six years on behalf of videogame maker Take-Two Interactive Inc., they beat back a lawsuit from tattoo artist James Hayden who claimed the company infringed copyrights for images he'd inked onto LeBron James' shoulders. Federal jurors in Cleveland last week found that the company had an implied license to include the tattoos in its depiction of James in the *NBA 2K* basketball game.

Lit Daily: Who was your client and what was at stake?

Joshua Simmons: Dale and I, along with our partners **Chris Ilardi**, **Yungmoon Chang** and **Miranda Means**, represented Take-Two Interactive Inc. and its subsidiary 2K Games Inc. Take-Two is one of the world's leading video game publishers. It has multiple labels including Rockstar Games, 2K Games, Private Division, and Zynga. 2K Games is well known for creating sports video games, like *WWE 2K*, *Lego 2K Drive*, and *PGA Tour 2K*, as well as publishing fantasy games, like *Marvel's Midnight Suns* (as a comic book fan, highly recommended) and *Borderlands*. This case involved the depiction of real-world tattoos in *NBA 2K*, a world-renowned, immersive basketball simulation game.

Dale Cendali: In terms of what was at stake, the case involved a tattooist who had tattooed LeBron James in 2007 wanting to change both



Courtesy photos

Dale Cendali, left and Joshua L. Simmons, right of Kirkland & Ellis.

copyright law and accepted tattoo industry practices such that any time Mr. James was depicted in public or in media, he or the media companies depicting him needed to come back to the plaintiff for permission and payment if they wanted to depict him realistically with his tattoos. We see the jury's verdict as very important for any media company that wants to depict people how they look in real life. It is also an important decision for anyone who has ever gotten a tattoo and might have otherwise worried about their freedom to show their bodies with their tattoos. And it is a good development for tattoo artists, as a contrary verdict could have discouraged people from getting tattoos at a time when the art form is flourishing.



NBA superstar LeBron James depicted in the game NBA 2K21.

How did this case come to you and the firm?

Cendali: Josh and I are privileged to have represented Take-Two for over a decade. With regard to the issue of depicting tattooed people in video games, we previously won a case involving similar issues called *Solid Oak Sketches v. 2K Games*. In that case, the Southern District of New York granted Take-Two summary judgment, holding that depicting NBA players with their tattoos in NBA 2K was non-infringing under the implied license, *de minimis* use, and fair use doctrines. We also represent Take-Two in an ongoing case involving *WWE 2K* in the Southern District of Illinois, in which the plaintiff requested \$27.3 million, but was awarded only \$3,750 in actual damages and none of Take-Two's profits.

Simmons: In addition to those cases, we represented Take-Two in a series of precedent-setting lawsuits involving video game "mods," which are computer programs that alter video games to allow users to cheat and perform other unauthorized actions. In particular, in *Take-Two v. Zipperer*, the court entered preliminary and permanent injunctions against one such mod creator.

Cendali: We consider ourselves so lucky to have worked with the company and its amazing in-house team all of these years. Not only is the company cutting-edge when it comes to its games, but

it also has some of the smartest lawyers I've ever met with deep industry experience. On this particular case, we worked hand-in-hand with General Counsel **Daniel Emerson**, Senior Vice President and Deputy General Counsel **Peter Welch**, and Vice President & Counsel **Justyn Sanderford**. We really couldn't have done it without them.

Who was on your team and how have you divided the work?

Simmons: I am sure that everyone that wins Litigator of the Week thinks that they have the best team, but I am here to tell you that, on this case, it really is true. Due to the COVID pandemic as well as a few other twists and turns, it took a little over six years to get to trial. As a result, when we started working with Chris Ilardi and Miranda Means on the case, they were both associates in our IP litigation group. Today, they both are partners. They both wore multiple hats at trial, but Chris took the lead on developing our damages strategy, and Miranda led the survey team. Chris did the direct examination of our damages expert, and Miranda did the direct examination of our video game expert and argued the Rule 50 motions. They both impressed with their mastery of both the law in this area and the facts of this case.

Cendali: In addition to our own partners, **Matthew Cavanagh** from **McDonald Hopkins** served as local counsel throughout the case. He also cross-examined the plaintiff's market expert. As we approached trial, we also added to the team our partner Yungmoon Chang, who worked with me on the cross of the plaintiff and preparing our witnesses for their testimony. And it should not be overlooked that **Julien Crockett** and **Josh Berlowitz**, two associates in our department, also played critical roles in working with our witnesses. We also had an amazing team of paralegals and other staff members.

Simmons: And Dale and I were there too! Dale presented stirring opening and closing statements, did the key cross-examination of the plaintiff and his survey expert, and did the direct of our survey expert.

Cendali: Meanwhile, Josh did the direct examination of Take-Two's head of marketing, cross examined the plaintiff's damages expert, and negotiated the jury instructions. Josh and I also were in constant communication throughout the trial, discussing how best to present the case to the jury.

How were you able to narrow this particular case before it went to trial?

Simmons: When the case originally was filed, the plaintiff had many more claims than ended up at the trial. His initial complaint had a state-law unjust enrichment claim concerning tattoos for which he did not have copyright registrations. We moved to dismiss, and the court held that his claim was preempted by the Copyright Act. He also had a claim under the Visual Artists Rights Act in his first complaint, but we pointed out that VARA has an exception for audiovisual works, like video games, so he dropped it. And he sought a declaratory judgment that Take-Two should have credited him for having created the tattoos, but the court held there was no case or controversy between the parties on that issue.

Cendali: With the case narrowed, we headed into discovery. During that process, we discovered that for four of the six tattoos, the plaintiff had made misrepresentations about the preexisting materials on which the tattoos were based. For example, one tattoo was based on the Sistine Chapel, another copied a playing card from the Venetian Hotel, and others were actually extensions and embellishments of prior tattoos. Pursuant to 17 U.S.C. § 411(b), the Court referred the issue to the Copyright Office, which filed a brief explaining that, if it had known about the misrepresentations, it would not have registered the tattoos. As a result, the court dismissed them from the case, leaving only the two that were at issue in this trial.

What were your key trial themes and how did you try to drive them home with the jury?

Cendali: As I said when I started my opening statement, we saw this case as being “about

Take-Two's artistic expression in creating realistic video games and LeBron James' personal freedom to show his own body.” Throughout the trial, we tried to develop evidence that fell into either of those two buckets, whether it was about how realistic and robust *NBA 2K* is or whether it was about what these tattoos meant to Mr. James and how, when the plaintiff inked him, there was no conversation between the two men about Mr. James needing to come back for permission. Moreover, we showed that this was consistent with industry practice such that a tattooed person is not forever tied to the tattooist. In my view, no tattooist should have veto power over how a tattooed person decides to show off their body—and that's what I told the jury in my closing statement!

How did you go about teaching the jury about implied license and fair use—some pretty complex copyright concepts?

Simmons: The only time that you can get to address the law directly is in the court's jury instructions and in the closing statement. That being said, I think that people can understand that, when someone gets tattooed and no one says anything about needing to get permission from the tattooist after you leave the tattoo parlor, the tattooed person has the right to appear in public and in the media. That's really what the implied license is. So, we walked the jury through why LeBron James chose to get tattooed with this specific, personal imagery; what was said—or wasn't said—about Mr. James continuing to appear in media with these tattoos; and how long it took the plaintiff from the inkings until he decided to register his copyrights and to file suit. To us, the fact that Mr. James had appeared in *NBA 2K* video games since 2003 showing his tattoos, four years before he was inked in these tattoos, and continued to appear in them until the present showed the understanding that he had the right to authorize Take-Two to depict him with his tattoos.

Cendali: In contrast to the intuitive nature of implied license, fair use is a little trickier because

so much of it is judge-made law. I have spent most of my career developing the law of fair use.

Simmons: In fact, Dale delivered Columbia Law School's Horace S. Manges Lecture on Litigating Fair Use two weeks before we left for trial.

Cendali: But you don't get to start a trial with an hour-long lecture on fair use, and you can't hand jurors 50 years of cases, and ask them to read and understand them before you start the trial. What you can do though is show the jury the complex, realistic world that Take-Two had created in *NBA 2K*, the minimal use of the tattoos just to depict LeBron James realistically, and the lack of any harm to the plaintiff. In addition, when I had my opportunity to address the jury directly in my closing statement, I was able to walk them through each jury instruction and how the evidence supported Take-Two's defenses, including by pointing out that the nature of the work favors fair use where tattoos are permanently inked on someone's skin and are thus fundamentally different from buying a painting to hang on the wall.

Lebron James testified via videotaped deposition. How helpful was that testimony to your case?

Cendali: Mr. James' testimony was extremely helpful. He explained in detail that one of his tattoos was to honor his mother, Gloria, and the other was to celebrate his four friends. Mr. James then talked through the fact that neither the plaintiff nor any other tattooist had ever said one word about needing the tattooist's permission to show his tattoos and that, in his view, he could show his tattoos as he wished as they were a part of his body. It really was moving.

Video game depictions continue to become more and more realistic. What can video game developers take from this verdict and this line of tattoo cases?

Simmons: When it comes to implied license, we think the law is clear: unless a tattooist tells you at the time that you are inked that there are

conditions on depicting the tattoo, you should have the right to depict yourself and allow others to depict you in media. We hope that brings comfort to tattooed people as well as any media or entertainment company that wants to depict them accurately. It just doesn't make sense for the law to require someone who wants to appear in public, in photographs, in television or, yes, a video game to cover their tattoos if they don't want to.

Cendali: As to fair use, the law is similarly clear that you can use a copyrighted work as a biographical or historical anchor to realistically depict the world, as long as you do so in a reasonable way. Given that everyone agrees (including the plaintiffs in these cases) that there is no market for depicting real-world tattoos in video games on the people that bear them in real life, and after so many years it is clear that no such market is likely to exist, we think that this is fair use too.

What will you remember most about this trial?

Simmons: Well, one thing that you can't beat is that the first day we arrived in Cleveland to prepare for trial was the day of the full eclipse, and Cleveland was in the path of totality. So, we got off the plane, checked in at the hotel, and went outside to look up at these two celestial bodies crossing paths. It wasn't your typical start to trial, but it was pretty cool. I also will remember watching our eloquent witnesses and extremely talented colleagues present at trial—every single person, whether at counsel table or not, led our team to achieve this honor.

Cendali: We got matching eclipse T-shirts and that type of team spirit was emblematic of the whole trial. Everyone was unselfishly and cheerfully willing to help teammates no matter how late at night. We take a lot of pride in our friendly and cohesive teams and we think it makes a difference in the courtroom. And of course, it led to a fun final dinner after the verdict when we got temporary tattoos!