Insights: Alerts

Legal Concerns With Influencers' Tattoos On Social Media: The Ball Is Still In The Air, And The Ink Is Not Dry

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When dealing with influencers, advertisers must manage a wide range of legal issues, including limiting risks around any tattoos that may appear on an influencer's body. A 2011 case involving the assertion of a copyright interest in Mike Tyson's famous face tattoo brought by the tattoo artist against the producers of the movie The Hangover Part II highlighted this issue. Since then, the legal world has seen a number of claims brought by tattoo artists and their representatives. The latest in this line of cases ended in March 2020, when a video game maker prevailed at summary judgment in a lawsuit brought on behalf of artists of tattoos appearing on the bodies of professional basketball players . See *Solid Oak Sketches LLC v. 2K Games, Inc.*, 1:16-cv-00724-LTS-SDA (S.D.N.Y. Mar. 26, 2020).

But this dismissal should not be viewed as an "all clear" signal when dealing with tattoos. Despite the outcome in the *Solid Oak* case, the advertising and legal community, as well as the entertainment industry, still cannot say with certainty whether a tattoo artist may assert legal claims based on their artwork appearing on the human bodies of their subjects. Indeed, many related questions still remain, such as: how can influencers freely monetize themselves and their images? If the influencers, themselves, do not own the copyright in their tattoos, do advertisers infringe by accurately depicting the influencer? What uses or images of tattoos on an influencer's body incur legal risk to an advertiser? Must all tattoos appearing on an influencer's body be altered or covered to avoid an infringement claim? In such an environment, advertisers retaining the services of influencers who show their bodies and, thus, their tattoos while promoting the advertiser's products or services must still address the risk that the tattoo artist who inked the influencer could assert an infringement claim.

While the *Solid Oak* order does not dispose of these questions, it at least provides some useful guidance for advertisers seeking to protect themselves from potential claims. The court first analyzed whether the appearance and use of the basketball players' tattoos constitute *de minimis* use, and concluded in the affirmative. This conclusion arose from several key facts, including that the tattoos appear on only three out of over 400 players in the video game, typical game play is unlikely to actually show the tattoos because the tattoos are small, and the players move very quickly in the game. The tattoos are also not featured in any marketing materials for the game. Thus, one takeaway for advertisers is that, when influencers are showing their bodies and the advertiser's brand or product, specific tattoos should not be highlighted or emphasized in the imagery or video content.

The court next looked at whether the tattoo artist gives their client, here the basketball players, an implied license. The court ultimately concluded, based on the facts before it, that an implied license was granted to the players, because (a) the players requested the tattoos, (b) the tattoo artists inked the design into the players' skin, and (c) the tattoo artists knew that the players were likely to appear in public, on television, in commercials, and would in other ways commercialize their bodies.

Most influencers do not rise to the level of fame reached by professional basketball players. It is also logical to assume that influencers do not explain to their tattoo artists that the influencer intends to use their own body in a commercial manner, and that any tattoo may be included in a commercial image on behalf of an advertiser. Therefore, the implied license argument may be weaker with respect to most influencers.

One of the most relevant takeaways from the *Solid Oak* case is how the court viewed the fair use defense and, specifically, the nature of the use of the tattoos. Even though the video game included exact copies of the tattoo designs, the purpose was not to highlight the tattoos, but to copy the basketball players as realistically as possible. Accordingly, for advertisers, it is likely that the more an influencer's image focuses on a particular tattoo, the stronger the argument is that the tattoo was used to bring attention to and sell the advertiser's product. In other words, zooming in on or emphasizing a tattoo increases risk, while zooming out reduces it. Given the importance of such details, advertisers would do well to negotiate image approval rights prior to the influencer's social media posts, to better ensure that the images do not focus specifically on or highlight a particular tattoo.

In the end, the *Solid Oak* court appears to have reached the right conclusion in dismissing the tattoo artists' claims under the particular facts of that case. Fact patterns will differ, however, and advertisers dealing with influencers should incorporate tattoo-risk mitigation clauses into their influencer agreements, as well as make sure their social media teams do not focus an influencer's image on a specific tattoo, no matter how unique or attention-grabbing it may be. Of course, it would be terrific if advertisers could work only with influencers that have obtained express license grants from all tattoo artists that have inked their bodies, but we do not yet live in that world.

Quick Takeaways:

- Train the marketing team to understand the copyright implications around tattoos
- Include in influencer contracts representations, warranties, and indemnities by the influencer if the influencer's body has tattoos that could support a copyright infringement claim
- If the influencer has a particularly striking tattoo, if possible go directly to the tattoo artist and obtain a release
- Do not focus or zoom in on a particular tattoo in an image or video used specifically to promote the advertiser's product or service

If you have any questions or concerns about contracting or dealing with influencers, on social media platforms or otherwise, please feel free to contact us. Kilpatrick Townsend's Advertising and Marketing team is deeply committed to helping its clients integrate their social media and advertising programs into their business strategies, and addressing their bigger marketing, customer relations, and risk management issues, along with regulatory compliance.