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Case 3: Miles and Miles and Miles

In 1989, Jeffery Sedlik took a photographic portrait of the legendary jazz musician Miles Davis. In 2017, Katherine von Drachenberg, the tattoo artist known as Kat Von D, used the image as a reference to create a Miles Davis tattoo for a client. She then published photos of the tattoo to her Instagram account where she is followed by 900,000 accounts. Sedlik, who owns the copyright on the image, claims that the tattoo and the photos posted on social media infringe on that copyright.

Copyright owners like Sedlik are granted the rights to copy, publicly display, and create derivatives of their works. This protection lasts for the life of the author or artist plus seventy years. A photograph, such as the one at issue, is protected by copyright. Limited use of copyrighted works is allowed under the legal doctrine of Fair Use. Fair Use is a complex legal rule that involves considering the nature of the use, the nature of the work, the amount of the original work copied, the commercial impact, and whether its new use is transformative, i.e., whether it exists in a completely different manner than the original. All factors must be balanced and no single factor is determinative. Copyright owners may charge others to license their works, which gives them the opportunity to monetize those works. Sedlik has said that he believes the image in question had been licensed for use as a tattoo in the past.

There is no dispute that Von D used the original photograph in her creative process. In part, she created the tattoo by tracing the original photo. However, Von D argues that her version adds something new to the image: By changing the black background and adding waves of smoke around the image, Von D claims to have added the appearance of movement and a feeling of melancholy not present in the original.

Some claim a ruling against Von D could have a chilling effect on the tattoo industry and they cite expert testimony that it is standard practice to not seek permission to use a copyrighted work as the basis of a tattoo. A ruling in favor of Sedlik might make tattoo artists wary of tattooing their clients' requests.

Perhaps more seriously, some see this lawsuit as a threat to bodily integrity and personal expression arguing that a ruling for Sedlik would mean that showing one's tattoo in public would be a copyright infringement. Further, a tattoo is often deeply meaningful to its owner and what one chooses to have tattooed can say much about who one is and what one values. If those seeking tattoos must be wary of copyright law, it could limit their self-expression.

Contributed by Matthew Mangum, Clinical Assistant Professor of Business Law at Texas A&M University–San Antonio.



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