
TATTOOS AND COPYRIGHT: CAN GETTING INKED LEAD YOU TO THE COURT?

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ABSTRACT

Today, getting a tattoo is a method to express one's identity and creativity. There is a piece of you in your tattoo. It is a component of your sense of identity because you choose it and its location on your body to stand for something unique about you. However, are you really the owner of it, or may someone else genuinely be the rightful owner of this very private aspect of you? Recent high-profile incidents involving celebrities, their tattoo artists, and third parties to whom the celebrities were hired have generated a lot of discussion on this topic. The tattoo artists assert that it is actually a copyright violation to display the image of their tattoo without their consent, as would occur if a celebrity appeared in an advertisement or video game. This paper examines the legislation and its potential implications for you and your tattoo. The article addresses how tattoo artists' ownership rights could affect the rights of the person who has the tattoo. It can be troublesome when artists restrict the bearer from deleting, changing, or even publishing their work—especially when it comes to famous people. This article discusses the difficulties in identifying copyright in tattoos, which are frequently done in a loose and informal manner, making it difficult to identify copyright ownership.

Keywords: *Consent, Copyright, Creativity, Ownership Rights and Tattoo.*

1. INTRODUCTION

According to the Oxford Dictionary, a tattoo is "an image or design that is permanently inked with coloured ink into small holes pierced into the skin of a person. "The word "tattoo" is derived from the Tahitian term "tatua," which translates as "to mark". A tattoo is defined as "a permanent sign or pattern placed on an individual's body through administration of colour below the layer of skin or by generating scars".¹

Tattoos have been visible on the bodies of people from many different cultures for millennia. The oldest tattooed human skin has been found on Tzi the Iceman, who lived between 3370 and 3100 BC². In recent years, the practice of tattooing artistic designs on the skin has become more socially acceptable in the United States and, generally speaking, in Western society. Tattooing is increasingly employed for cosmetic purposes, both medical and non-medical. Tattooing is frequently a means of self-expression for both the tattoo artist and the customer, which is most pertinent to this article.³

Although it has a history of unfavourable connotations in Western culture, tattooing has grown in popularity in the United States. While the general public is becoming more accustomed to the practise of getting tattoos, the legal profession (especially corporate IP property holders who might be named as defendants in copyright disputes involving tattoos) has been slow to acknowledge this form of art as a legally protected body of work.

Additionally, the judicial system has been hampered by the continued stigma that tattoos hold among inked individuals and tattoo artists; relatively few instances have been brought before a federal court. In actuality, no tattoo artist has ever been successful in having a tattoo's copyright enforced by a court. Tattoo artists may be reluctant to seek redress in court due to the dearth of tattoo copyright cases and the lack of judicial acknowledgement of the protectability of tattoos.

2. ARE TATTOOS PROTECTED UNDER COPYRIGHT LAW?

¹ Janet S. Fedorenko, Susan C. Sherlock and Patricia L. Stuhr, *A Body of Work: A Case Study of Tattoo Culture*, 25 VISUAL ARTS RES. (1999)

² *Id.*

³ Payel Ghosh, *Tattoo: A Cultural Heritage*, 16 ANTROCOM J. ANTHROPOLOGY 295, 299-301 (2020)

The answer is yes, tattoos are protected under copyright laws. When Victor Whitmill, the creator of Mike Tyson's famous facial tattoo, filed a lawsuit against Warner Bros. for using an imitative tattoo on an entertainer in *Hangover II*, the world's attention was first drawn to the copyrightability of tattoos. Since then, there has been a heated debate about tattoo artists' copyright about their tattoos, including topics like ownership and fair use.

Picture and graphic works are protected by copyright as long as they are fastened to a tangible object and exhibit originality⁴. The expression must meet two requirements: it must be original to the author (i.e., it cannot be plagiarised), and it must have at least a minimal level of creativity. Tattoos should be eligible for copyright protection because copyrights are provided to artistic forms of expression on tangible or physical media.

On the other hand, Indian law does not specifically include the requirement for a tangible medium of expression, unlike the analogous statute in the U.S., which mandates that pictorial, graphic, and sculptural copyrightable works must be unique works of authorship fixed on a tangible medium of expression⁵. However, since tattoos are permanent and the human body is the tangible medium of expression, any concerns about tattoos not being copyrightable work should be dispelled. If we're talking about the copyrightability of tattoos, originality is the most important component because, without it, copyright doesn't exist. It should be noted that the discussion here only pertains to original and personalized tattoos. All other tattoos are not covered by the application of copyrights to tattoos. Standard tattoos that may be found in catalogues or on tattoo parlour walls are not to be considered in this.

3. WHETHER HUMAN SKIN IS A MEDIUM OF EXPRESSION?

The Copyright Act states that for any work to be copyrightable, it needs to be "fixed in any material form of expression, respectively, now known or later developed, from which [the expression] can be understood, duplicated, or else conveyed, either directly or with the aid of a machine or device". Fixed work has two prerequisite criteria, according to how courts have interpreted it. In order to be perceived and reproduced, the work must first be realised in a certain media. Second, the work should remain in the medium for a longer time than just a

⁴ Sofia Gourgoulianni, *The Copyrightability of Tattoos: A Practical Examination of Law Cases*, 4 J. EDUC. & CULTURE STUDIES (2020)

⁵ *Id.*

"transitory" amount of time. A piece of work cannot be considered "fixed" unless these two requirements are met. The Copyright Act doesn't define "medium" in any way. A "plain and ordinary" interpretation of the statute is used when a term stated in it is not defined. When a phrase used in a statute is left undefined, it can be interpreted in a "plain and ordinary" way. In this context, "a method or way of expressing something" is the definition of "medium" in its "plain and ordinary" sense. The human body unquestionably qualifies as a medium for artistic expression if this notion is applied to tattoos.⁶

4. DO YOU OWN YOUR TATTOO?

You "own" your tattoo in the sense that you have physical ownership of it forever because it is visible on your flesh, but you do not legally own the rights to the picture, thus you are not permitted to use it for commercial purposes or in any other way to make money⁷. Despite the fact that this appears simple, it can occasionally be challenging, particularly for famous people and other important figures.

5. WHO OWNS THE COPYRIGHT OVER YOUR TATTOO?

A creator's legal right to control how their work is used or copied is known as copyright. However, if we presume it is the same as all other sorts of artwork, then the person who designed the tattoo holds the copyright unless they consent to sell or give the rights away. There is very little legal precedent regarding tattoos. If you created or designed the tattoo yourself, you are the owner of the copyright because the tattoo artist only inked your design onto your body. The ownership of the copyright is murky, though, if you ask a tattoo artist to do a special design for you based on your own ideas. On the basis of earlier instances involving other sorts of art, it is likely that it would be joint ownership. Even if you did not create your tattoo and it is unique, the owner of the copyright is typically the tattoo artist. This means that, in accordance with copyright law, they are qualified to receive any royalties from the use of the tattoo's image.

⁶ Minahan, Michael C., *Copyright protection for tattoos: are tattoos copied*, 90 NOTRE DAME L. REV. 1713 (2014)

⁷ Meredith Hatic, *Who Owns Your Body Art: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELLECTUAL PROP. MEDIA & ENTMT'L. L.J. 396 (2012)

To defend the copyright rights of tattoo artists, it may be argued that, like painters, they also produce works of art and have the right to copyright them in order to preserve their originality. Similar to the case of *Christopher Escobedo v. THQ Inc.*⁸, where the gaming company was sued by Mr. Conduit's tattoo artist, the tattoo bearer may hardly own the art or creation, but the copyrights of the design or creation or art may still rest with the tattoo artist. A certain amount of royalty may be paid to the artist for replication or fusion of this piece of art on different mediums, such as computer games.

Generally speaking, the author of a work is regarded as the original owner of the copyright, as stated in Section 17 of the Indian Copyright Act, 1957⁹.

Because a tattoo is considered an artistic work under the Copyright Act of 1957, the tattoo artist, not the tattoo recipient, is regarded as the tattoo's proprietor.

The Indian Copyright Act, 1957's Section 14(c)(ii) merely states that the copyright holder has the right to disseminate the work to the public¹⁰. It is important to keep in mind that this clause on communicating artistic works to the public only refers to "artistic works," which implies that tattoo artists are only entitled to the rights of the body of the tattoo bearer who has received the tattoo under Section 14.

One could argue that the tattoo artist has the right to oversee and limit the behaviour of the tattoo wearer, which is clearly in violation of the liberties that are guaranteed to us by Articles 19 and 21 of the Indian Constitution.¹¹

5.1 Tattoo Bearer as the owner of Tattoo

Since the tattoo is the sole property of the tattoo artist, only that tattoo artist is entitled to use the tattoo's copyright. However, the person who has the tattoo and chooses to wear it on his body has other options for acquiring tattoo ownership in the following ways

5.1.1 Independent contract

⁸ *Escobedo v. THQ Incorporated*, 2:12-CV-02470

⁹ Copyright Act, 1957, § 17, No. 14, Acts of Parliament, 1957 (India)

¹⁰ Copyright Act, 1957, § 14(c)(ii), No. 14, Acts of Parliament, 1957 (India)

¹¹ INDIA CONST. arts. 19 & 21

The tattoo artist and the tattoo wearer enter into a contract stating that the tattoo artist will perform his or her services as an independent contractor. This contract includes a section about proprietary information that specifies who will hold the work output, such as sketches, notes, moral rights, etc. The person who has the tattoo, for whom the job has been done in accordance with the contract, is given all of these rights and interests.

5.1.2 Assignment under the Copyright Act:

Section 18 of the Copyright Act discusses assignment¹², which means that the owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign the copyright to any person, either entirely or in part, provided that the assignment of the copyright in any future work takes effect only when the work is created.

5.1.3 Relinquishment: In Section 21 of the Act, the author's ability to renounce copyright is discussed¹³. In this scenario, the author is the tattoo artist, who may waive all or any of the rights protected by the copyright in the work (in this case, the tattoo) by notifying the Registrar of Copyrights in the manner specified.

5.1.4 License: According to Section 30 of the Act, any interest in the right may be granted by the owner of the copyright in an existing work or the potential owner of the copyright in an upcoming work by a written licence signed by him or by his duly authorised representative¹⁴.

5.1.5 Moral Rights

According to Section 57 of the Indian Copyright Act, an author of a work has both moral and commercial rights¹⁵.

Here, the right to integrity is particularly crucial since the author of a piece of work may pursue legal action if it is altered in any way that compromises their honour or reputation. In the famous case of *Raj Rewal v. UOI*¹⁶, the court ruled that something that cannot be seen cannot impair the author's reputation. This was in reference to an architect who had tried to

¹² Copyright Act, 1957, § 18, No. 14, Acts of Parliament, 1957 (India)

¹³ Copyright Act, 1957, § 21, No. 14, Acts of Parliament, 1957 (India)

¹⁴ Copyright Act, 1957, § 30, No. 14, Acts of Parliament, 1957 (India)

¹⁵ Copyright Act, 1957, § 57, No. 14, Acts of Parliament, 1957 (India)

¹⁶ *Raj Rewal v. Union of India*, CS(COMM) 3/2018

stop the demolition of a building he had designed, claiming that the loss of his creative product would harm his reputation. This can be understood as meaning that since section 57 does not specifically forbid tattoo removal, the person who has one cannot be prevented from covering it up or getting rid of it entirely.

The issue of tattoos poses public policy challenges because it has the potential to grant the artist total control over their creation, including the person who is glued to or painted on with it. To put it another way, if an artist has complete autonomy over their creation through a tattoo, they may also be able to control the person who receives it.

6. COPYRIGHT V/S PUBLICITY

The publicity rights are a well-known legal protection for "renowned people" against any misuse or appropriation of their name, likeness, or other similar conflicts with their own unique identities¹⁷. The term "personality rights" refers to a broad category of legal protections granted to a person's persona, which is defined as their likeness, name, talents, traits, and fan base. In the current environment, the real concern with regard to publicity rights and copyrights is what would happen if a tattoo artist sued a celebrity for violating his rights about a tattoo. The owner shall be granted the right to issue copies, reproduce, make adaptations, or disseminate the work to the public if the artistic work so granted copyright is original. The person's right to privacy will be violated if the tattoo artist tries to exert these rights by copying his creation.

7. INFRINGEMENT

Generally speaking, copyright infringement happens when someone uses a piece of art for display, reproduction, or distribution without first getting permission from the rightful owner of the work. Because the artwork is on a person's body, tattoos are typically permanent. Once the artwork is inked on the flesh, there is no way to stop. However, where there is solid proof supporting infringement, the infringement action can prevent the person from continuing to tattoo others with the same design and the artist can also demand damages or compensation for the same. However, if the author has not registered the work with the Copyright Office, he or she is not permitted to file a lawsuit for infringement.

¹⁷ Yolanda King, *The Right-of-Publicity Challenges for Tattoo Copyrights*, 16 NEVADA L. J. (2016)

8. OUTLOOK OF COURTS

The question of whether a tattoo made on a person in the first instance can be protected by copyright is one that the courts have not yet decided. A federal judge from the United States District Court for the Eastern District of Missouri orally discussed her views on the copyrightability of tattoos in *Whitmill v. Warner Bros. Entertainment, Inc.*,¹⁸ despite the fact that there are no published opinions that address the matter.

8.1 A. *Whitmill v. Warner Bros. Entertainment, Inc.*

On April 28, 2011, S. Victor Whitmill filed a complaint with the United States District Court for the Eastern District of Missouri against Warner Bros. Entertainment Inc. According to Whitmill's complaint, on February 10, 2003, he "designed and inked an original and distinctive tattoo to the upper left side of the face of the former, World Heavyweight Champion Boxer "Mike Tyson". On the same day, Tyson allegedly agreed to a release in which he acknowledged Whitmill as the proprietor of "all artwork, sketches, and drawings related to his tattoo and any photographs of his tattoo". Whitmill was working under the name Paradox-Studio of Demographics at the time. Award-winning visual artist Whitmill said the tattoo on Tyson's face "is one of the most distinctive tattoos in the country."

Whitmill did not sketch the first design on paper or in any other "traditional" way. The design was created at first on Tyson's face. A first-impression issue brought up by the Whitmill case is whether copyright protection derives from the production of an original work of authorship fixed on human flesh¹⁹. Whitmill claimed that Warner Bros. violated his copyright because the production company inappropriately used a tattoo that belonged to him on the face of another actor in *The Hangover Part II*. Whitmill continued by claiming that Warner Bros. had violated his copyright "by its unpermitted copying, distribution, and public display of the Pirated Tattoo in advertising and promotion for the Movie and by making an unpermitted derivative work-namely, the Pirated Tattoo-that is based upon and copies virtually all of the copyrightable subject matter of the Original Tattoo.

¹⁸ A. *Whitmill v. Warner Bros. Entertainment, Inc.*, 4:11-CV-00752

¹⁹ Chavi Chhiber, *Copyright Issues vis-a-vis Tattoos or other forms of Body Art; Lacunae in Indian Laws in light of Judicial Pronouncements regarding the same in the USA*, 2 J. LEGAL RSCH. & JURIDICAL SCI. (2015)

Even though Whitmill owned the copyright to the tattoo, Warner Bros. claimed that the fair use theory provided it the legal right to use the tattoo in *The Hangover II*. A limited number of uses of copyrighted artwork are permitted under the fair use doctrine, which is an exception to the copyright law's exclusive rights. This is done without first obtaining permission from the original artist. This idea has been used in a variety of circumstances, including when someone recreates content owned by another rights holder in order to parody it, to refute claims of copyright infringement. Warner Bros. claimed that the tattoo on Helm's face in *The Hangover II* was a parody of Tyson, who had a cameo in the film. Judge Perry called Warner Bros' fair use defence "silly." She concluded that "there was no parody" and that the use of "the entire tattoo in its original form, not in parody form" had been blatantly illegal. However, before the case went to trial, Warner Bros. and Whitmill "amicably" resolved the copyright infringement claim.

8.2 Solid Oak Sketches, LLC v. 2K Games, Inc.²⁰

The NBA 2K basketball simulation video game is updated and released annually by the defendants 2K Games, Inc., and Take Two Entertainment.²¹ The NBA basketball players in this game are shown accurately, down to their tattoos. Defendants, according to the plaintiff, Solid Oak Sketches, LLC, breached its copyrighted work by showing five tattoo designs written on three NBA players in various incarnations of the video game. This, the plaintiff claims, is done by showing depictions of these tattoos in public. In this case, the question was whether it was acceptable to use a tattoo pattern to depict an athlete's appearance in a video game. By granting the Defendants' motion and rejecting Solid Oak's claim of copyright infringement, the Court's well-reasoned decision provided some long-needed clarification on these issues. First, the Court determined that the usage by the Defendants was minimal because "no reasonable trier of fact could find the tattoos as they appear in NBA 2K to be substantially similar" to the tattoo designs that Solid Oak had licenced. The Court frequently cited the proof provided by the Defendants to demonstrate that the players with the tattoos were not likely to be involved in "average gameplay," and that even if they were, the tattoos were small, poorly visible, and unnoticeable to the average user.

²⁰ Solid Oak Sketches, LLC v. 2K Games, Inc., 2020 U.S. Dist. LEXIS 53287

²¹ Chavi Chhiber, *supra* note 20

The Court's well-reasoned ruling gave some long-needed clarification on these issues by allowing the Defendants' request and dismissing Solid Oak's allegation of copyright infringement. Initially, the Court found that the Defendants' usage was modest since "no reasonable trier of fact could find the tattoos as they appear in NBA 2K to be substantially similar" to the tattoo designs that Solid Oak had licenced, according to the court. The tattooed gamers were not likely to be participating in "average gameplay," and even if they were, the tattoos were small, dimly visible, and invisible to the ordinary user, according to the court's analysis of the evidence presented by the Defendants.

Finally, the Court found it abundantly plain that Solid Oak had not provided any evidence to support its assertion that NBA 2K "employed a wide variety of the video game's features to focus, position the camera's lens on, or make the subject tattoos more noticeable". The evidence only supported the defendants' position that their use of the tattoos in NBA 2K was of a de minimis nature and hence immune from liability since it failed to meet the quantitative bar of substantial resemblance.

8.3 Reed Vs Nike²²

As the owner of TigerLily Tattoo and Design Works in Portland, Oregon, Matthew Reed filed a complaint on February 25, 2005, claiming copyright violations against NBA player Rasheed Wallace, sports retail giant Nike, Inc., and advertising agency Weiden + Kennedy. The initial accusation, in this case, was that Mr. Wallace had violated the rights of his artist by making copies, disseminating, and using the tattoo in public (Nike Ads) without first obtaining consent from the copyright owner of the tattoo. Reed added that Wallace assisted in the infringement by making Weiden and Nike believe he was the only owner of the copyright for the Wallace tattoo. Reed also asserted that he was entitled to a share of Wallace's earnings from the Nike advertisements that included Wallace's tattoo. In this instance, an out-of-court settlement was made.

9. CONCLUSION

The majority of the time, copyright concerns have not been thought to apply to tattoos. The bulk of tattoo cases lack legal precedents, and the few tattoo copyright infringement cases that have been litigated have been settled out of court, so the law governing tattoos and their

²² Reed v. Nike, Inc., 17 Civ. 7575 (LGS)

copyright is still unclear. To avoid copyright issues, it is generally advisable for individuals who wish to use their tattooed image for commercial purposes to seek permission from the tattoo artist and obtain a written license agreement. This helps clarify the rights and responsibilities of both parties and minimizes the risk of copyright infringement claims.

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