

From Counter-Culture to Copyright: Tattoos and IP Law

Tattoos are far more common today than in the past. In a study by the Pew Research Center from 2010, 23% of Americans have at least one tattoo, while 38% of “Millennials” have at least one, and 32% of “Generation Xers” have at least one and 19% have at least two¹. The widespread depiction therefore of tattoos in all forms of media, from social media, to new media, television, film, and even video games, has given rise to claims involving the artwork displayed in a tattoo. As a result, a new and growing body of law is evolving regarding tattoo copyright issues.

Before we examine the cases addressing these issues, we should first ask how (and, in fact, if) tattoos themselves are copyright eligible. Tattoos functionally are ink insertions between the dermis and epidermis layers of skin. The ink itself artistically may depict pictorial works (the “work”), and can be very creative. Assuming the work arises to the minimum standard of creativity, then the question becomes whether it is also fixed in a tangible medium of expression.

To be eligible for federal copyright protection, a creative work must be fixed in a tangible medium of expression. If a tattoo artist creates a drawing of the work first on paper, that drawing can serve a tangible medium. But what about the tattoo recipient? Does their skin serve as a tangible medium? Can the author reasonably control the use of another human skin? As we will see below, the cases addressing copyrights in tattoo artwork have yet to really speak to this issue, since many of the cases have settled before the courts could render a decision.

In the first known case over copyright in tattoo artwork, artist Matthew Reed sued his client, a professional athlete, the advertising agency who created the commercial, and their client, Nike². The artist registered copyright in his drawing of the tattoo artwork for the athlete, and under an implied license with the athlete agreed that some exposure of the work was permitted since the athlete’s games were broadcast. When the artist saw that an ad agency designing a Nike shoe campaign with the athlete as its focus highlighted the artist’s work, the artist decided that such use was outside the scope of his agreement with the athlete, filed for an injunction, damages and profits, and an accounting of the revenue. The lawsuit settled before it went to trial.

In a case against Warner Brothers Entertainment, artist Victor Whitmill failed in an attempt to enjoin the release of a motion picture entitled, *The Hangover Part II*³. The artist alleged that Mike Tyson, who stars in the film, breached a release with



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the artist over use of his artwork. Tyson has a distinctive tattoo on his face around one eye. The release stated that all artwork, sketches, drawings, and photographs of the tattoo are property of the artist, but permitted public appearances with the understanding that artwork would appear in such media. In his complaint, the artist expressed that use of the artwork in a major motion picture, which replicated the artwork onto a supporting character, was outside of the scope of his release. In her decision to deny the injunction, the judge commented nonetheless that both the tattoo and the artwork can be copyrighted, and Whitmill's claims had a likelihood of succeeding on their merits⁴.

The three most recent cases occur in the game design industry and involve professional athletes. In 2012, artist Stephen Allen sued Electronic Arts and former NFL running back Ricky Williams over depiction of his artwork on the player's biceps in a video game and its packaging, which depicted the artwork on its cover, for *NFL Street*, *Madden NFL 10*, and *Madden NFL 11*⁵. Williams had signed a release agreement with Allen affirming that the artist remained the author and owner of his artwork. The parties settled prior to trial. As a result of the Allen case, the NFL Players Association (NFLPA) officials started advising players in 2013 to get copyright releases or licenses from their tattoo artists⁶.

The same year, artist Chris Escobedo sued game publisher THQ for use of his artwork on professional mixed martial artist Carlos Condit in *Undisputed 2010* and *UFC Undisputed 3*⁷. The artist had registered copyright in the sketches of his artwork. He alleged that he had an implied license with the athlete, who publicly displayed his artwork at fights and sanctioned events, but agreed not to copy or recreate the artwork for commercial purposes. This case was dismissed with prejudice for failure to prosecute.

Most recently, an agency representing artists, Solid Oak Sketches, sued the company that designed a basketball video game entitled, *NBA2K* on claims for copyright infringement related to artwork depicted on LeBron James, Kobe Bryant, and DeAndre Jordan⁸. Artists Shawn Rome, Justin Wright and Tommy Ray Cornett agreed for Solid Oak Sketches to represent them and administer licenses in their respective copyrights to their artwork. Solid Oak offered the video game company a license to the artwork for a fee of \$1.14 million. In turn, the company moved to dismiss statutory damages because the first alleged infringement preceded copyright registration, which the court granted. This is the first case that will apparently proceed to trial on the matter of actual damages, and to determine the company's counterclaims that use of the artwork in their game design is *de minimus* or fair use to proceed without permission from the rights holder.

design, and consults for freelance artists, designers, and theatrical stage productions. Her agency provides music supervision and producer services to productions applying for the Georgia tax credit. Lee produces, writes for, and hosts a YouTube channel, The Lawyer With the Dragon Tattoo, where she teaches independent songwriters and producers how to prepare and pitch their work for placement in moving media, like film, television, and ad campaigns. Her channel is the companion video blog to her podcast, Cinématique™, which showcases music published exclusively by artists on SoundCloud for placement to her network of music supervisors, agents, and related professionals. Lee volunteers as the Programs Chair and Board Member for Women in Film and Television Atlanta and advocates for music creators rights with The Recording Academy®. She started her career as a radio deejay for WRAS Atlanta, Album 88, in 1996.

If the case does proceed to trial, we may finally get a dispositive ruling on the validity of copyrighted artwork in tattoos on individuals. Of course, this ruling of validity and protectability will just be the start, because there will remain many other issues to resolve. Initially, parties have raised *de minimus* and fair use defenses, but there could be others. If human skin is a tangible medium, are images of tattoo artwork infringement? Are some fair use and some infringement? Does it matter if the use is incidental or an advertisement? Can an artist, who expressly owns the copyright in a tattoo require its recipient to cover up the artwork or limit when, where, and by whom it can be seen?

Both of the authors to this article have tattoos. One has discussed this matter with her artist, who has over twenty years of experience, is from a generational family of artists, and owns a parlor. This artist has expressed a common opinion⁹ of copyright-aversion simply because he is pro-client. He would not want to deny the client any right to experience and enjoy his artwork in any way the client pleases. He does not seek to register copyright in his artwork. Indeed, he has created a significant amount of artwork that this author enjoys displaying and using in marketing her creative brand (see YouTube Channel, *The Lawyer with the Dragon Tattoo*).

The other author of this article agrees with the Whitmill judge, that tattoo artists should be allowed to register copyright in their artwork. However, he also believes the law must draw limitations on exclusive use by the artist. An implied license between an artist and client seems sensible for the client to publicly display that tattoo, such as in photographs, videos, social media, and other forms of visual media. However, this author agrees that such use should not extend to commercial use of the work, unless the artist is given an opportunity to negotiate terms with the parties that could lead to further incentives for tattoo artists to create amazing artwork and attract celebrities and athletes who will likely expose them and result in increased business.

This dichotomy is the heart of the copyright law administration, managing a trade off¹⁰ between artistic protection provided by copyright on one hand, and technological innovation (in digital media) on the other. 

Endnotes

1 PEW RESEARCH CTR., MILLENNIALS: CONFIDENT. CONNECTED. OPEN TO CHANGE. 57–58 (2010). Generation X is defined as those thirty to forty-five years old or those born between 1965 and 1980. Millennials are defined as those eighteen to twenty-nine years old or those born between 1981 and 1992.

2 [Reed v. Nike, Inc.](#), No. CV 05 198, 2005 WL 1182840 (D. Or. Feb. 10, 2005).

3 [Verified Complaint for Injunctive and Other Relief at *1, Whitmill v. Warner Bros. Entm't Inc.](#), No. 4:11-cv-00752-CDP (E.D. Mo. Apr. 28, 2011).

4 See Warner Brothers Hearing, *supra* note 72, at 9, 640 F.2d 109 (8th Cir. 1981).
 5 *Allen v. Elec. Arts Inc.*, No. 5:12-cv-03172-SMH-MLH (W.D. La. Dec. 31, 2012), ECF No. 1.
 6 Darren A. Heitner & Alan Wilmot, *Score a Touchdown, Kiss Your Tattoo, and Get Sued for Copyright Infringement?*, 21 JEFFREY S. MOORAD SPORTS L.J. 299, 318–19 (2014).
 7 *Escobedo v. THQ Inc.*, No. 2:12-cv-02470-JAT (D. Ariz. Nov. 16, 2012).
 8 *Solid Oak Sketches LLC v. Visual Concepts LLC et al*, U.S. District Court, Southern District of New York, Civil Action No. 1:16-cv-00724-LTS.
 9 Alexa L. Nickow, Note, *Getting Down to (Tattoo) Business: Copyright Norms and Speech Protections for Tattooing*, 20 Mich. Telecomm. & Tech. L. Rev. 183 (2013).
 10 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 928 (2005).



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