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## Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms

Brayndi L. Grassi

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## COPYRIGHTING TATTOOS: ARTIST VS. CLIENT IN THE BATTLE OF THE (WAIVER) FORMS\*

Brayndi L. Grassi<sup>†</sup>

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\* An earlier version of this article first appeared in an online post made by the author. See Brayndi Grassi, *Copyright in Tattoos, Artist vs. Canvas*, INFRINGE THAT! CURRENT ISSUES MEDIA & ENT. L. (Dec. 20, 2013), <http://www.infringethat.com/2013/12/20/copyright-in-tattoos-artist-vs-canvas>. The article has since undergone significant research, revision, and substantive additions.

† B.A., New York University, 2011 and J.D., New York Law School, 2015. She was recently admitted to the New Jersey and New York Bars. She works for Terri Baker, a solo practitioner entertainment attorney in New York specializing in music law and representing a wide range of musicians. She is also the proud wearer of three tattoos.

## I. INTRODUCTION

A few decades ago, a tattoo was something you got in one of three places: in jail, in the Navy, or as part of your initiation into a motorcycle gang.<sup>1</sup> Today, tattoos are something you get as a form of self-expression, on your eighteenth birthday, on a drunken whim, or on a reality television show hosted by Dave Navarro.<sup>2</sup> Tattoo culture has gone from being taboo to trendy and now everyone, and some people's mother, has one.<sup>3</sup>

Normally, the process of getting a tattoo is straightforward. You do some research and choose a shop near you that adheres to the basic standards of cleanliness. Then you either walk in or make an appointment with a tattoo artist to go over what you want and where, and you either sit for the tattoo right then and there, or you make an appointment to come back. If you are not a creative sort of person you can also choose a pre-drawn design from a "flash" book filled with well-known images the artist has done countless times before.<sup>4</sup> However, before the artist will put a drop of ink into your skin you have to sign a waiver, which usually includes a fair amount of legal jargon most people cannot understand. The waiver says that the human canvas understands the risks involved in getting a tattoo, the tattoo is permanent, and the human canvas releases the artist and their shop from liability for any side effects or complications arising from the tattoo.<sup>5</sup>

In the near future, these waivers could include additional provisions that state the artist retains the right to the copyright in the design of the tattoo. These changes, if implemented, will likely be the result of a recent increase in the exposure of the interaction between copyright law and tattoos, which started in the early 2000s and has been gaining exposure steadily since.<sup>6</sup> While there is no

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1. See Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 512 (2013).

2. *Ink Master*, SPIKE, <http://www.spike.com/shows/ink-master> (last visited Feb. 8, 2016).

3. Perzanowski, *supra* note 1, at 512.

4. See *What Are Tattoo Flash?*, WISEGEEK, <http://www.wisegeek.com/what-are-tattoo-flash.htm> (last visited Feb. 8, 2016).

5. *Tattoo Waiver and Release Form*, 727 TATTOO (Aug. 8, 2015), <http://727tattoo.com/downloads/tattoo-release-form.pdf>.

6. See, e.g., *Stipulation of Dismissal with Prejudice*, Reed v. Nike, Inc., No.

definitive case law for tattoo artists to hang their hats on, there have been legal opinions that can pave the way for a new age in both copyright law and in the tattoo field.<sup>7</sup> This could make getting a tattoo a more cautious decision for some people, especially celebrities and athletes.

The main argument in most of the litigation surrounding tattoos is whether the tattoo design is copyrightable, and if so, what rights does the artist have in the tattoo if the waiver is silent and there was no separate agreement.<sup>8</sup> Many agree that the design itself is indeed copyrightable. However, murkiness arises in determining whether a tattoo can be considered a work made for hire, in which case the client would retain all the rights, and whether any public use of the tattoo could fall under the fair use defense.<sup>9</sup>

The problem of determining whether a tattoo is copyrightable is compounded by the fact that U.S. copyright law is already convoluted. It is difficult to determine rights and liabilities in cases involving a medium, such as a painting that is explicitly covered by the law, but it gets even more difficult when the medium is not explicitly covered and the canvas that the artist is working on is a living human being.

Whether or not tattoos are copyrightable or can expose celebrities to potential litigation, the exposure this issue is getting combined with the growing popularity of tattoos will certainly lead to a change in the process of getting a tattoo and signing the waiver. Smart artists will include a clause that grants them the copyright in perpetuity. Smart clients, especially celebrity clients, will bring their own waiver for the artist to sign, stating the tattoo is a work for hire and the client retains all the rights in the design. The next battle will be figuring out how to reconcile these forms to keep both the artist and the client happy.

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05-CV-198 BR (D. Or. Oct. 19, 2005).

7. See generally Timothy Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS LAW. 26 (2011) (describing whether tattoos are copyrightable through an analysis of case history).

8. See David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 280–81 (describing tattoo copyrights in relation to Whitmill's copyright claim for the tattoo on Mike Tyson's left eye as it was portrayed in the movie, *The Hangover Part II*).

9. See 17 U.S.C. § 107 (2012).

## II. BRIEF HISTORY OF COPYRIGHT LAW IN NEW MEDIUMS

U.S. copyright law was born when the Federal Constitution was ratified and included in Article I, Section 8, the clause that allowed Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>10</sup> When the first federal copyright law was codified in 1790, the only things that were protected under the law were books, maps, and charts.<sup>11</sup> Over the next 107 years, five different classes of works were added to the protected list of works, including prints, music, dramatic compositions, photographs, and works of art.<sup>12</sup> In the 118 years after that, five more classes of protected works were added, including motion pictures, computer programs, architectural works, mask programs, and vessel hulls, the last of these new protected classes was added in 1998.<sup>13</sup>

Between when copyright law was codified in 1790 until 1998 when the last class of protected works was added, the theme was that, when a new technology emerged that did not fit into a pre-existing category of protected works, the law was amended to add that class within a reasonable amount of time. For example, motion pictures were added as a protected class in 1912.<sup>14</sup> The first establishment where motion pictures could be viewed for a price opened in New York in 1894.<sup>15</sup> A mere eighteen years after the first public release of a motion picture, it was added as a protected work in the federal copyright law.<sup>16</sup> In terms of updating and changing the law, that is reasonably quick.

Tattoos are by no means a new invention, and even their popularity and prevalence in society has been growing steadily for decades. If the U.S. Copyright Office sticks to its trend of adding new mediums in a reasonable amount of time, then tattoos should

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10. U.S. CONST. art. I, § 8, cl. 8.

11. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., <http://copyright.gov/circs/circ1a.html> (last visited Feb. 8, 2016) [hereinafter *Copyright History*].

12. *Id.* (identifying that music was “added to works protected against unauthorized printing and vending” in 1831; however, protection against unauthorized public use was not added until 1897).

13. *Id.*

14. *Id.*

15. *Movie Timeline*, INFOPLEASE.COM, <http://www.infoplease.com/ipea/A0150210.html> (last visited Feb. 8, 2016).

16. *Copyright History*, *supra* note 11.

be on Congress' radar as a medium that is both worthy and in need of protection. Even if the U.S. Copyright Office was waiting for litigation to arise before adding tattoos as a protected class, it has already been ten years since the first litigation arose involving a copyright in a tattoo.<sup>17</sup>

### III. FIRST INSTANCE OF COPYRIGHTS IN TATTOOS: *REED V. NIKE, INC.*

The first instance of litigation over a copyright in a tattoo arose in 2005 when Detroit Pistons forward, Rasheed Wallace, appeared in a Nike commercial that showed a digital recreation of the Egyptian-style tattoo on his upper right arm, with his commentary explaining the significance of the tattoo.<sup>18</sup> Matthew Reed, the tattoo artist that designed and inked the Egyptian-style tattoo back in 1998, saw the commercial and immediately filed for copyright registrations in the design.<sup>19</sup> Reed then filed a lawsuit against Nike, Wallace, the ad agency, and Weiden and Kennedy who helped create the commercial.<sup>20</sup> In the complaint, Reed alleged that Nike infringed his copyright by digitally recreating the tattoo in the commercial, which was the equivalent of copying it.<sup>21</sup> Reed also named Wallace as a defendant individually and sued him on the basis of contributory infringement because he allowed Nike to use the tattoo, knowing that Reed was the "owner" of the tattoo design.<sup>22</sup>

The case was dismissed, with both parties stipulating to the dismissal,<sup>23</sup> which presumably means that they settled out of court. This case is important because it marked the first time that a tattoo artist asserted his copyright in a tattoo design and presumably prevailed. The mere fact that the case likely settled shows that Nike and Wallace thought there was at least some merit to Reed's claim. The lack of any further litigation is the first inkling that there may

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17. See *infra* Part III.

18. robjv1, *Rasheed Wallace NBA Finals Nike Commercial*, YOUTUBE (June 26, 2010), <https://www.youtube.com/watch?v=RqmRu34PXrU>.

19. See *Public Catalog: Egyptian Family*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov> (search in search bar under registration number for "VA0001236392"; then follow "Egyptian Family" hyperlink under "Full Title").

20. Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).

21. *Id.*

22. *Id.* at 317.

23. Stipulation of Dismissal with Prejudice, *supra* note 6.

be some basis for believing that there is a valid copyright in a tattoo design and any person that infringes that right can be held liable.

One thing about this case that Nike should have touched on more was that Reed acknowledged that he knew he would be getting exposure from Wallace's tattoo and even expected to benefit from it.<sup>24</sup> Reed only started having a problem when Nike featured the tattoo in a commercial.<sup>25</sup> Could Nike have argued that Reed assumed the risk of the tattoo being used? Reed's acknowledgment of the potential benefit the tattoo could bring him shows that he knew that Wallace was famous when he made the tattoo. Reed waited six years to register the copyright.<sup>26</sup> Reed should have taken preventive measures by having Wallace sign a waiver stating that Reed owned the design, and Reed should have registered the copyright when the tattoo was done.

Even though *Reed* did not give us the benefit of a judicial opinion,<sup>27</sup> it sparked the idea that tattoos can be copyrighted. Since then, the issue has been written about and commented on by a number of legal scholars, blogs, and journalists.<sup>28</sup> The arguments on each side of the debate are important and well-founded in both copyright and constitutional law.

#### IV. ARE TATTOOS COPYRIGHTABLE?

A main question that *Reed* posed was whether or not Reed had a valid copyright in the tattoo design that was permanently fixed to Wallace's arm.<sup>29</sup> There was no definitive answer<sup>30</sup> and arguments for both sides have been established in the years since 2005, though we

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24. See Associated Press, *Artist Sues Wallace over Use of Tattoo*, ESPN (Feb. 16, 2005), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

25. See *id.*

26. Harkins, *supra* note 20, at 316.

27. See generally Stipulation of Dismissal with Prejudice, *supra* note 6 (indicating the case was resolved by an agreement to dismiss).

28. See, e.g., Meredith Hatic, *Who Owns Your Body Art? The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT L.J. 396, 418–20 (2012); Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 INTELL. PROP. L. 29, 32 (2014).

29. Complaint Copyright Infringement Accounting at 4, *Reed v. Nike, Inc.*, No. 05-CV-198 (D. Or. Feb. 10, 2005), 2005 WL 1182840.

30. Stipulation of Dismissal with Prejudice, *supra* note 6 (indicating no definitive answer due to stipulation between parties).

are not much closer to a conclusive answer than we were ten years ago.<sup>31</sup>

The Copyright Act states that a valid copyright exists “in original works of authorship fixed in any tangible medium of expression.”<sup>32</sup> Thus, to have a valid copyright your work must show four things: (1) that it is original, (2) that you are the author of the work, (3) that the work is fixed, and (4) that it is fixed in a tangible medium.<sup>33</sup>

With that definition in mind, let’s examine the arguments for and against copyrighting a tattoo.

#### A. *Tattoos Meet All of the Requirements of the Copyright Act*

The biggest argument in support of copyright in tattoos is that a tattoo meets all of the requirements of the basic definition of a work that is copyrightable.<sup>34</sup>

##### 1. *Originality*

The first requirement is that the work of authorship be original.<sup>35</sup> Traditionally, this is a very low bar and a work will be deemed original so long as it is not a verbatim copy of another work and it is not merely utilitarian.<sup>36</sup> The Supreme Court famously set forth in *Feist Publications, Inc. v. Rural Telephone Service Co.* that a compilation of facts may satisfy the originality requirement if the author made decisions as to arrangement and style.<sup>37</sup> It is also well established that original drawings that are turned into physical works of art are also protected by copyright.<sup>38</sup> Applied to tattoos, an

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31. See *infra* Part IV.

32. 17 U.S.C. § 102(a) (2012).

33. See *id.*

34. See Yolanda M. King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 132 (2013); see also Daniel Freshman, *Virtual Reality Meets Body Ink*, COLUM. SCI. & TECH. L. REV. (Oct. 28, 2014), <http://www.stlr.org/2014/10/28/virtual-reality-meets-body-ink>.

35. See King, *supra* note 34, at 148.

36. See *id.* at 149 n.167.

37. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991) (“Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.”).

38. See, e.g., *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).



original sketch that an artist draws more than meets the originality requirement.<sup>39</sup>

One may argue, however, that the book of flash drawings would not be original enough to enjoy copyright protection because they are well-known images that the artist may or may not have created.<sup>40</sup> While it is true that flash book images may be well known (images such as a rose, skull and cross bones, a cross, or a dagger are common in the tattoo industry) they can still be deemed original if you apply the logic from *Feist*. Typically each tattoo artist will make slight changes to the standard flash drawing, including changing the color, shading, alignment, and placement of the tattoo on the body.<sup>41</sup> All of these things can amount to changes in arrangement consistent with *Feist* thus satisfying the originality requirement.

## 2. Authorship

The second requirement for a valid copyright is that the person asserting the copyright must be the author of the work created.<sup>42</sup> In tattoos, this requirement would be easy to establish if the artist created the design specifically for the client. If it was a common flash design, however, the artist would only have a copyright in the elements that he changed or added to the new design if he did not draw the original flash art.<sup>43</sup>

The authorship requirement runs afoul of the murky waters of copyright when the client maintains that he had a hand in the design of the tattoo. Many times, the relationship between the client and the artist is a collaborative one, with the client describing what he wants, what colors he wants, and where he wants the tattoo. The artist takes those ideas and put them into a design using his own artistic liberty to make the tattoo look good and fit with the shape of the body. In this case, who owns the copyright? Just the

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39. See *Feist Publ'ns*, 499 U.S. at 346.

40. See generally Craig P. Bloom, *Hangover Effect: May I See Your Tattoo, Please*, 31 CARDOZO ARTS & ENT. L. J. 435, 438 (2013) (discussing the originality standard).

41. See *What Are Tattoo Flash?*, *supra* note 4.

42. See 17 U.S.C. § 102(a) (2012).

43. See *Feist Publ'ns*, 499 U.S. at 348 ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.").

artist because he drew it? Just the client because he thought of it? Or both? The answer is likely that they would have a co-ownership in the copyright as joint authors. The client cannot own the copyright on his own because ideas themselves are not copyrightable.<sup>44</sup> However, the client could claim ownership in the design choices that he made, such as color, size, and arrangement. In order for the client to be considered a joint owner of the copyright, he has to be an author of the work and have the intention that each author's contribution be joined into inseparable parts of the finished work.<sup>45</sup> The co-authors of a joint work enjoy an undivided interest in the entire copyright and can transfer or assign their interest.<sup>46</sup> Additionally, the copyright cannot be licensed without the consent of the other author, and both authors can bring a claim for infringement.<sup>47</sup> "However, a copyrightable contribution alone is insufficient to trigger joint authorship. To be afforded joint authorship, both authors must either agree that the work was jointly created or the contribution must be so substantial that the work would not be complete without the contribution."<sup>48</sup> Under this approach, if the client only contributed suggestions to the color and arrangement, he likely would not be considered an author sufficient enough to be considered a co-author in the joint work. In order to reap the

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44. See 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

45. See *id.* § 101 ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.").

46. See *Bencich v. Hoffman*, 84 F. Supp. 2d 1053, 1056 (D. Ariz. 2000) ("Co-owners of a copyright are generally treated as tenants in common, with each co-owner having an independent right to use or license the use of the work, subject to a duty of accounting to the other co-owners for any profits.").

47. See *id.*; Hatic, *supra* note 28, at 404.

48. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000).

We hold that authorship is required under the statutory definition of a joint work, and that authorship is not the same thing as making a valuable and copyrightable contribution. We recognize that a contributor of an expression may be deemed to be the "author" of that expression for purposes of determining whether it is independently copyrightable. The issue we deal with is a different and larger one: is the contributor an author of the joint work within the meaning of 17 U.S.C. § 101.

*Id.*

benefits of joint authorship, the client would have to contribute things to the design of the tattoo significant enough that the design would not be possible without those suggestions.<sup>49</sup> This would be easy to determine in something like a song, where the music and lyrics cannot easily exist without one another, but in the case of a tattoo, it can be harder to determine. Any tattoo artist can argue that he could have come up with the same design on his own, so any contribution the client would offer can be seen as insignificant. If the client's contribution was not significant enough to make him a co-author, then the tattoo artist would own the copyright in the design outright. On the other hand, if the client could show that he came in with a rough sketch for the tattoo artist to base the design off of, this could be enough to make the client an author in the sense of a joint authorship.

### 3. *Fixation*

The third requirement for a valid copyright is that the work be fixed.<sup>50</sup> A work is fixed if it is permanent enough to be perceived for a period of time longer than a transitory duration.<sup>51</sup> Transitory duration has to be more than a fleeting perception of the work.<sup>52</sup> For example, the Second Circuit has found that the transfer of television images over a DVR system in 1.2-second increments was fleeting enough and thus insufficiently fixed.<sup>53</sup> In the case of tattoos

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49. Hatic, *supra* note 28, at 430 (“Joint works require the intention of both parties to merge their separate copyrightable contributions into a single, unitary whole.”).

50. See 17 U.S.C. § 102(a).

51. See *id.* § 101 (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).

52. See *id.* (“A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ . . . if a fixation of the work is being made simultaneously with its transmission.”).

53. See *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008).

Given that the data reside in no buffer for more than 1.2 seconds before being automatically overwritten, and in the absence of compelling arguments to the contrary, we believe that the copyrighted works here are not “embodied” in the buffers for a period of more than transitory duration, and are therefore not “fixed” in the buffers.

though, as the waiver points out, they are permanent and essentially cannot exist for a period of transitory duration by their very nature.<sup>54</sup> The tattoo becomes a permanent fixture on the client's body and is perceptible until it is removed or fades.<sup>55</sup>

#### 4. *Tangible Medium*

The final requirement for a valid copyright is that the work be "fixed in any tangible medium."<sup>56</sup> Paper, canvas, CDs, DVDs and even MP3 files are all tangible mediums that are granted copyright protection.<sup>57</sup> Similarly, the human body would be sufficiently tangible to meet this requirement.<sup>58</sup>

#### B. *Tattoos Are Works Made for Hire*

The main argument against tattoos being copyrightable by the artist is that they can be deemed works made for hire, and therefore, either the client or the artist's employer owns the copyright.<sup>59</sup> A work made for hire is a work that is created by an employee in the course of their employment or a work that is "commissioned" by a client who hires the independent contractor to perform the task, and the agreement is specified in a signed writing.<sup>60</sup> If the tattoo artist was an employee of the shop that he

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*Id.*

54. See King, *supra* note 34, at 154–55.

55. See *id.*

56. 17 U.S.C. § 102(a).

57. See *id.*

58. See Cummings, *supra* note 8, at 297 (describing the fixation requirement for tangible medium).

59. See 17 U.S.C. § 201(b). "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." *Id.*

60. *Id.* § 101.

A "work made for hire" is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

*Id.*

worked in, he would likely have a contract that stated that any tattoos he made while employed by the shop would be works made for hire, and the shop would be the owner of such works and all the designs created while the artist was employed. In this case, the tattoo shop, not the artist, would own the copyright. In the case of infringement by the client or a third party, the plaintiff would just be the shop instead of the artist. This arrangement would not be very beneficial for the artist; however, if the shop owned the copyright in all of the designs the artist created and the artist was fired or left the shop, then he would not be able to use those same designs without the shop's permission, otherwise he would be committing infringement.

Important questions surrounding work made for hire are triggered when a client commissions a work from an artist.<sup>61</sup> The definition of this type of work made for hire states that the work must be used as a contribution to a collective work or a compilation and the agreement must be memorialized in a signed writing between the parties.<sup>62</sup> Both of these requirements prove problematic in the realm of tattoos based on the nature of the business.<sup>63</sup> First, if a client comes in and only wants to get one tattoo, which is typical, the artist can argue that the single tattoo is not part of a collective work or a compilation and would not therefore fall under the work for hire definition.<sup>64</sup> If however, the client already has a tattoo, the client can argue that the new one will contribute to the art they already have, which satisfies the work for hire definition.<sup>65</sup> This argument is subjective and based on the amount of previous tattoos, the location of all the tattoos, and whether or not there is a general theme among all of the tattoos.<sup>66</sup> Trying to determine whether the new tattoo will contribute to the art the client already has would be a matter left to the court, which would make it hard to establish a bright line rule for determining whether a work for hire exists.<sup>67</sup>

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61. See *id.*

62. *Id.*

63. Kyle Alan Ulscht, *Copyright Ownership and the Need for Implied Licenses in the Realm of Tattoos*, L. SCH. STUDENT SCHOLARSHIP (2014), [http://scholarship.shu.edu/student\\_scholarship/596/](http://scholarship.shu.edu/student_scholarship/596/).

64. See Hatic, *supra* note 28, at 404.

65. *Id.*

66. See *id.*

67. See generally R. Brandon Rudyk & William R. Davie, *Body Modification: The*

The writing requirement from the second statutory definition of work for hire would prove problematic because the tattoo industry is not overly concerned with the paperwork-end of their business and many clients do not know, or have the forethought, to prepare a work for hire agreement before sitting for a tattoo.<sup>68</sup> Even if the client had the forethought to bring a work for hire agreement, she would likely have a hard time getting the artist to sign off on it, unless there was something that benefitted the artist as well. If the client were a celebrity, the artist could get free promotion from word-of-mouth recommendations that could entice them to sign the agreement, but for a non-famous person, there would be no reason for the artist to sign the work for hire.

*C. The Tattoo Artist Would Own a Piece of Your Body*

Another argument against allowing tattoos to be copyrighted is that the artist would own a piece of the client's body for the duration of the copyright, which, in the United States, is the life of the author, plus seventy years.<sup>69</sup> If the tattoo artist had a copyright in the tattoo on the client's body, then the tattoo artist could theoretically exercise his rights to alter the work or make a derivative work from it.<sup>70</sup> The artist could also distribute or exploit his copyright,<sup>71</sup> which could affect the client's quality of life.<sup>72</sup>

In order to combat these legitimate fears, it could be helpful to consider copyright in tattoos the same way that music is copyrighted, with two separate copyrights that can have different authors.<sup>73</sup> In each song that is created, there is a copyright in the

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*Case of Tattoo Copyright*, SW. EDUC. COUNCIL FOR JOURNALISM & MASS COMM., Fall 2014, at 1, 15.

68. The author has experienced this through her personal interactions with the tattoo industry.

69. 17 U.S.C. § 302(a) (2012) ("Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.").

70. *Id.* § 106(2).

71. *Id.* § 106(3).

72. Bloom, *supra* note 40, at 439. "The result is *control by tattoo*, which some believe amounts to *involuntary servitude* or a form of ownership in the body of another." *Id.* (emphasis added).

73. R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 239 (2001) ("[A]ny single piece of recorded music usually embodies two separate copyrighted works

music and lyrics (known as the musical composition)<sup>74</sup> and a copyright in the sound recording (which includes the musician's recorded performance of the song).<sup>75</sup> Each of these copyrights is distinct from the other and can be defended separately. The copyrights each can, and usually do, have different combinations of authors.<sup>76</sup> For example, if Taylor Swift did not write any of her own music or lyrics, she would have no authorship in the musical composition copyright, but would have an authorship in the sound recording copyright that protects her specific performance of the song. Thus, if someone else independently records the same music and lyrics in her own voice, Taylor Swift would not be a party to the infringement action since only the musical composition copyright is infringed. Additionally, the authors of the musical composition would theoretically have all of the exclusive rights afforded them by a copyright to record or distribute the music and lyrics without Taylor Swift's permission. These rights are usually limited by a written agreement, but would exist absent one.

In the case of tattoos, separate copyrights could be created in the design of the tattoo and the application of the design on the person's body. The design copyright would be similar to the musical composition copyright in that it could be copied by the artist, and the artist would have all of the exclusive rights in the design. In addition, the author would not need to worry about obtaining the client's permission when he or she wanted to exercise those rights. The artist could also defend the copyright in the design against infringement without involving the client. The copyright, in the application on the client's body, would be similar to the sound recording copyright in that there can be only one unique copyright for this one application and the client could share in a part of this copyright. In this case, infringement could only be pursued if the tattoo as applied on that specific client is what is being infringed instead of merely the design. Creating this

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... and each right in each work may be owned by a different entity.”).

74. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS 1 (2012), <http://www.copyright.gov/circs/circ50.pdf>.

75. U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (2014), <http://copyright.gov/circs/circ56.pdf> (“Sound recordings are defined in the law as ‘works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work.’”).

76. King, *supra* note 34, at 37.

dichotomy in tattoo copyrights would allow the artist the autonomy to protect his or her original designs, and it would give the client the autonomy to make decisions about his own body.

Overall, it would appear that tattoos do meet all the requirements to fall under the protection of U.S. copyright law. Accordingly, artists should be allowed to register and defend their designs against infringement. There are also innovative ways to protect both the client and the artist and their respective autonomy with respect to the artist's design and the client's body.

## V. TATTOOING CELEBRITIES AND COPYING INFAMOUS TATTOOS

Since it appears that tattoos can indeed be protected by copyright law, this means that any infringement can be enforced in court. However, tattoo infringement cases are not likely to arise from the average Joe getting a tattoo and wearing it around, but the infringement cases will likely crop up, and have already, when famous people get tattoos and they are exploited in various ways. Two cases after *Reed v. Nike, Inc.* involving celebrities and athletes and their tattoos provide a good starting point for predicting where future lawsuits will go in this area.

### A. Whitmill v. Warner Brothers Entertainment Inc.

The first case after *Reed v. Nike, Inc.* was filed in April 2011 by a Missouri tattoo artist, Victor Whitmill, after he noticed an almost exact replica of one of his tattoos gracing the promotional posters for *The Hangover Part II*.<sup>77</sup> Mr. Whitmill originally tattooed Mike Tyson's face in February 2003 with an original and distinctive tattoo.<sup>78</sup> Before Mr. Whitmill applied the tattoo, Mr. Tyson signed a release that stated that all of the artwork and drawings of the tattoo are the ownership of Mr. Whitmill, and that any photographs of the tattoo are his as well.<sup>79</sup> Warner Brothers was the company that produced and released the sequel to the wildly popular film *The*

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77. Verified Complaint for Injunctive and Other Relief at 5, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-752 (E.D. Mo. Apr. 28, 2011), 2011 WL 2038147.

78. *Id.* at 2.

79. *Id.* at 3. "Mr. Tyson signed a release form acknowledging 'that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics.'" *Id.* (alteration in original).



*Hangover*.<sup>80</sup> In the sequel, *The Hangover Part II*, Ed Helms' character receives a tattoo that is a near exact replica of Mr. Tyson's face tattoo. The tattoo also appears in the promotional posters for the movie.<sup>81</sup> Before the movie was released, Mr. Whitmill brought suit against Warner Brothers to enjoin it from using the tattoo in any promotion and in the movie itself.<sup>82</sup> Mr. Whitmill claimed that Warner Brothers infringed his copyright on the tattoo design by copying the design and applying it to another's face—something that even Mr. Whitmill had not done after he tattooed Mr. Tyson.<sup>83</sup>

In the opening paragraph of his complaint, Mr. Whitmill acknowledged that this case has nothing to do with Mr. Tyson or his use of his own face and the tattoo.<sup>84</sup> All of the infringement allegations concerned the design of the tattoo and the artwork that Mr. Whitmill created.<sup>85</sup> Mr. Whitmill alleged that Warner Brothers copied his design almost exactly when it applied the same design and in the same location as one of its characters in the movie.<sup>86</sup> Mr. Whitmill supported his allegations by offering evidence of the validity of his copyright through a valid registration that he received from the U.S. Copyright Office on April 19, 2011.<sup>87</sup>

In his prayer for relief, Mr. Whitmill asked for a preliminary injunction to stop Warner Brothers from releasing the movie and using any more promotional material with the tattoo displayed, he also sought money damages for his injuries and the profits from Warner Brothers' unjust enrichment from the use of the tattoo.<sup>88</sup> The case was eventually settled and the movie was allowed to be released, but the judge who authorized the settlement offered an oral opinion about her thoughts on the validity of Mr. Whitmill's arguments.<sup>89</sup> The judge stated:

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80. *Id.* at 1 (identifying Warner Brothers as a party in the infringement suit regarding Mr. Tyson's tattoo and the display in the movie *The Hangover Part II*).

81. *Id.* at 5.

82. *Id.* at 3–4.

83. *Id.* at 4, 7.

84. *Id.* at 1.

85. *Id.*

86. *Id.* at 4.

87. *Id.*

88. *Id.* at 3–4.

89. Noam Cohen, *Tattoo Artist Settles Tyson Dispute with 'Hangover 2'*, N.Y. TIMES: MEDIA DECODER (June 21, 2011, 2:18 PM), [http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/?\\_r=2](http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/?_r=2).

Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face, as the defendant argues, or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law.<sup>90</sup>

This statement was the first time that any judge or other official has explicitly stated that he or she believes tattoos to be copyrightable and additionally acknowledged the difference between the design and the application of the tattoo.<sup>91</sup>

This is a major step towards legitimizing tattoos as a copyrightable medium. It is also important that the judge acknowledged that the tattoo on Mr. Tyson's face is separate from the design.<sup>92</sup> This dichotomy is important because it will determine what arguments will succeed in future cases and what arguments will not. It appears that both the judge and Mr. Whitmill agree that the application of the tattoo on human flesh cannot be later controlled by the artist.<sup>93</sup> That would give the artist some control over the client's life, which would be both absurd and not at all in line with traditional notions of justice.

When a case finally does get before a judge in the future, this judge's statements regarding Mr. Tyson's tattoo will help shape the opinion and lend a hand in determining the validity of the copyright and whether or not it had been infringed.

#### B. Escobedo v. THQ, Inc.

The second case was filed in November 2012 by Arizona tattoo artist Christopher Escobedo against THQ, Inc., the manufacturer of the video game *UFC Undisputed 3*, alleging that THQ copied Mr. Escobedo's tattoo design that he inked on mixed martial arts

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90. *Id.*

91. Declaration of David Nimmer at 6, *Whitmill v. Warner Bros. Entm't Inc.*, No. 4:11-CV-752 (E.D. Mo. May 20, 2011), <http://www.docslide.us/documents/whitmill-v-warner-brothers-declaration-of-david-nimmer.html> ("My review of published [court] decisions has uncovered no case that usefully explicates the issue.").

92. Cohen, *supra* note 89.

93. *See id.*

fighter Carlos Condit back in July 2009.<sup>94</sup> The tattoo, depicting the head of a lion, was tattooed onto Mr. Condit's ribs and Mr. Escobedo claimed that he was the sole creator and designer of the drawing and was the sole tattoo artist.<sup>95</sup> In May 2010, THQ released a video game titled, *UFC Undisputed 2010* and released a follow up game in February 2012 titled, *UFC Undisputed 3*.<sup>96</sup> Mr. Condit appears as a character in both games and throughout the various rounds of play, he is shirtless and the lion tattoo on his ribs is visible and identifiable.<sup>97</sup>

Mr. Escobedo claimed that THQ infringed his copyright by creating a copy of the tattoo for use in the game and he claimed that Mr. Condit infringed his copyright by allowing the tattoo to appear in the game without Mr. Escobedo's permission.<sup>98</sup> Mr. Escobedo has a visual material copyright registration in the lion tattoo design that was registered on February 24, 2012, a mere ten days after the *UFC Undisputed 3* game was released, and almost three years after the tattoo was originally inked onto Mr. Condit.<sup>99</sup> Specifically, Mr. Escobedo claimed that his exclusive rights under 17 U.S.C § 106 dealing with direct copying, derivative works, distribution, and display were violated when the artists at THQ created a rendering of Mr. Condit for the game with an exact replica of the tattoo included.<sup>100</sup> In his request for relief, Mr. Escobedo asked the court to grant him an accounting from THQ for the period covering all of their infringing activity, actual damages and lost profits from the infringing activity, and any other damages the court saw fit.<sup>101</sup> Mr. Escobedo originally sought \$4 million in damages,<sup>102</sup> but decreased the amount to \$438,000 after he consulted with a copyright expert, and a bankruptcy judge lowered his possible recovery to \$22,500, which was the amount that Mr. Condit was paid for appearing in the game.<sup>103</sup> The case was

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94. Complaint at 2, 6, *Escobedo v. THQ, Inc.*, No. 2:12CV02470 (D. Ariz. Nov. 16, 2012), 2012 WL 5815742.

95. *Id.* at 2.

96. *Id.* at 3.

97. *Id.* at 3–4.

98. *Id.* at 2, 6.

99. *Id.* at 2.

100. *Id.* at 6.

101. *Id.* at 2.

102. Freshman, *supra* note 34.

103. Matt Chiappardi, *Tattoo Artist Appeals Slashed IP Claim in THQ Bankruptcy*, LAW360.COM (Sept. 11, 2013, 10:13 PM), <http://www.law360.com/articles/471802>

eventually settled out of court for an unknown amount.<sup>104</sup> Although there was no opportunity for a judge to give an opinion on the copyrightability of the tattoo design, Mr. Escobedo's actions and arguments provide good insight into where similar cases could be heading.

Mr. Escobedo's actions in registering his copyright only after it had been infringed are suspect, pointing to the fact that he may not believe that his claim could have stood up without a registration. It is well established, that in a copyright infringement case, the first thing that the plaintiff must show is that they have a valid copyright in the object being infringed.<sup>105</sup> A copyright registration is not needed to prove the validity of the copyright,<sup>106</sup> but it is *prima facie* evidence of a valid copyright<sup>107</sup> since the U.S. Copyright Office has to approve all proper registrations.<sup>108</sup> Mr. Escobedo waited to register the copyright in his lion tattoo until it was being infringed and he needed to prove that it was valid.<sup>109</sup> This shows that he (or, more importantly, his lawyers) felt that without the registration he did not stand a good chance of convincing a judge that he had a valid copyright in the tattoo. While this may be a slightly shady tactic, it is a legitimate fear. No tattoo infringement case has gone before a judge, so without a registration the lawyers would need to convince a judge that the copyright was valid and as a case of first impression it would be quite the uphill battle.<sup>110</sup> On

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/tattoo-artist-appeals-slashed-ip-claim-in-thq-bankruptcy.

104. Freshman, *supra* note 34.

105. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:4, Westlaw (database updated Sept. 2015).

106. See *Brooks-Ngwenya v. Indianapolis Pub. Sch.*, 564 F.3d 804, 806 (7th Cir. 2009) ("Compliance with the registration requirements . . . is not a condition of copyright protection . . .").

107. 17 U.S.C. § 410(c) (2012).

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

*Id.*

108. *Id.* § 410(a) ("[T]he Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.").

109. See Complaint, *supra* note 94, at 2.

110. See Ira Boudway, *Hey, Pro Athletes: Your Tattoo Is Going to Get You Sued*, BLOOMBERG BUS. (Sept. 4, 2013), <http://www.bloomberg.com/bw/articles/2013>

the other hand, because Mr. Escobedo had a registration, the lawyers already had *prima facie* evidence that a valid copyright existed and therefore only had to prove the other elements of an infringement case.<sup>111</sup>

Another insightful consequence of this tactic is the fact that Mr. Escobedo was successful in obtaining a copyright registration in the first place. The visual materials registration number VAu001094747 was registered on February 24, 2012, and is titled “Lion tattoo.”<sup>112</sup> The registration does not detail whether it covers merely the design or the application of the tattoo itself, or both, but the fact that the U.S. Copyright Office granted the registration showed that it believed that the tattoo was sufficient enough to meet the requirements for protection<sup>113</sup> and is a major step in the right direction.

Mr. Escobedo’s arguments in the complaint show which types of infringing use claims are likely to be successful going forward and which are not. In the complaint, Mr. Escobedo specifically points out that he “impliedly licensed” the tattoo to Mr. Condit to display publicly.<sup>114</sup> With this sentence, Mr. Escobedo recognized that he cannot legitimately dictate what Mr. Condit does with his own body, a fear that many tattoo clients have if their artists retain the copyrights in the tattoos.<sup>115</sup> Mr. Escobedo also acknowledged that due to Mr. Condit’s popularity, the tattoo would be displayed

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-09-04/hey-pro-athletes-your-tattooed-arms-are-going-to-get-you-sued (“Defendants are leery of letting these claims get before a jury because the damages could be costly.”).

111. See 17 U.S.C. § 410(c) (“[R]egistration made before or within five years after first publication of the work shall constitute *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate.”).

112. *Public Catalog: Lion Tattoo*, U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov> (search in search bar under registration number for “VAu001094747”).

113. See 17 U.S.C. § 410(a).

When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.

*Id.*

114. Complaint, *supra* note 94, at 6.

115. See, e.g., Bloom, *supra* note 40, at 439. “The result is *control by tattoo*, which some believe amounts to *involuntary servitude* or a form of ownership in the body of another.” *Id.* (emphasis added).

publicly at UFC fights and other events.<sup>116</sup> This implied license argument is one that can be an ace in the pocket for clients having to defend the use of their own tattoo as it appears on their body. Normally, finding an implied license to use a copyrighted work is a difficult thing to prove, as the court pointed out in *Estate of Hevia v. Portrio Corp.*<sup>117</sup> The test for determining whether an implied license exists is a three prong one: “whether the licensee requested the work, whether the creator made and delivered that work, and whether the creator intended that the licensee would copy and make use of the work.”<sup>118</sup> In the case of different forms of copyrighted work, like music or films, this test may be hard to prove,<sup>119</sup> but in the case of tattoos, all three prongs are inherent to the tattoo process.<sup>120</sup> Each client requests the work, the tattoo artist makes and delivers that work by the very process of tattooing, and the artist intends for the client to make use of the work—otherwise, the artist would not have any business. The only aspect of the test that may be hard for a client to show is the third prong that says that the artist intended for the licensee to copy the work.<sup>121</sup> In the literal sense, it is almost impossible to show that an artist intends for the client to copy the tattoo and use the design elsewhere, but a crafty lawyer could argue that the client copies the tattoo every time that he or she is photographed or appears publicly with the tattoo on display. Any photograph of the tattoo is a copy,<sup>122</sup> and it would be absurd for an artist to suggest that a client cannot be photographed showing the tattoo, especially a famous client. This argument, combined with the easily satisfied first two prongs, shows

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116. Complaint, *supra* note 94, at 6.

117. 602 F.3d 34, 41 (1st Cir. 2010) (citing *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 40 (1st Cir. 2003)) (“We do not mean to suggest that implied licenses are an everyday occurrence in copyright matters. The opposite is true: implied licenses are found only in narrow circumstances.”).

118. *Id.* (citing *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284 F.3d 505, 514 (4th Cir. 2002)).

119. See PATRY, *supra* note 105, § 5:131 (“As with any affirmative defense, the party asserting an implied license bears the burden . . .”).

120. See Bradley, *supra* note 7, at 29.

121. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 956 (11th Cir. 2009) (“[C]ourts should look at objective factors evidencing the party’s intent.”).

122. See 17 U.S.C. § 101 (2012) (“‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

that a client having to defend his use of his own tattoo can likely use this argument to defeat an infringement claim for use of the actual tattoo. Mr. Condit did not have to use this argument because Mr. Escobedo admitted that there was an implied license in the tattoo itself.<sup>123</sup>

The arguments Mr. Escobedo used to support his claim are all arguments that claim the design of the tattoo was infringed, not the tattoo on Mr. Condit's ribs.<sup>124</sup> Specifically, Mr. Escobedo claims that the THQ artist's digital representation of the tattoo was an infringing use in violation of his copyright in the design.<sup>125</sup> Making another copy of his design—separate from the tattoo itself—falls more squarely into the traditional realm of copyright infringement and would be easier for a judge to determine if the copyright was infringed.

The difference is important for the future of tattoo copyright infringement cases. Even though the *Escobedo* case settled, it gives some insight into what sorts of arguments plaintiffs should pursue and which ones they should avoid. Mr. Escobedo chose specifically to differentiate between the design and the tattoo, which shows that the two should be treated separately.<sup>126</sup> As stated above, there is likely an implied license in every tattoo,<sup>127</sup> so any plaintiff would be unwise to try and argue there is not. Since the design is more similar to a traditional work of art, the usual arguments for an infringement case are more likely to be successful.

Even though the *Escobedo* case settled without an opportunity for a judge to weigh in, the case is helpful for future plaintiffs.<sup>128</sup> It illuminates what sorts of arguments are likely to be taken seriously and which would seem frivolous. Mr. Escobedo's registration of the copyright is also helpful in that it shows the U.S. Copyright Office considers tattoos a copyrightable material, which demonstrates prima facie evidence of the validity of the copyright.<sup>129</sup>

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123. Complaint, *supra* note 94, at 6.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See supra* notes 17–20 and accompanying text (discussing implied licenses).

128. *See* Status Hearing Minutes, *Escobedo v. THQ, Inc.*, No. 2:12CV02470 (U.S. Dist. Ct. Ariz. Nov. 16, 2012) (explaining that neither the plaintiff nor defendant appeared in court for the scheduled hearing).

129. *See* 17 U.S.C. § 410(a) (2012); *Public Catalog: Lion Tattoo*, *supra* note 112.

## VI. WHERE DO WE GO FROM HERE? BATTLE OF THE (WAIVER) FORMS

Despite the fact that there are no legal opinions or statutes on the issue of tattoo copyrightability, it would seem that the vast majority of sources agree that tattoos can be copyrighted, and they have been already.<sup>130</sup> So now that the question of whether tattoos can be copyrighted is answered, the next one is, where do tattoo artists go from here? How can they ensure that their rights are protected, especially when tattooing famous celebrities and athletes? On the flip side, what can celebrities and athletes do to ensure they can freely display their tattoos without fearing a lawsuit from their artists? The answers lie in the paperwork that is signed before a drop of ink is even applied to skin: the waiver forms. Problems arise, however, when both a client and an artist have forms that do not mesh. The question then becomes, which form wins?

### A. *Preemptive Measures for Human Canvases*

With tattoo copyright lawsuits becoming more and more prevalent, celebrity clients should be more wary of being sued if they display their tattoos or allow them to be displayed in commercials and advertising campaigns. One step to alleviate this wariness is to have the artist sign a waiver before doing the tattoo that allows the client to display the tattoo publicly and in other mediums, such as video games and commercials.

This is something that the NFL Players' Association (NFLPA) has already taken preemptive steps to achieve.<sup>131</sup> Prior to the 2013 NFL season, the NFLPA advised their players to get such a waiver from their artists for any future tattoos, and even encouraged players who already had tattoos to try and get their artists to sign a waiver after the fact.<sup>132</sup> An IP lawyer opined, "Anything you can do to prevent headaches is always good . . . . Give them a signed football or something."<sup>133</sup> While this may be a blunt statement, it is accurate in pinpointing what is needed to get the artists to agree to these waivers: money or exposure.

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130. See Cummings, *supra* note 8, at 304.

131. See Boudway, *supra* note 110.

132. *Id.*

133. *Id.*



Now, an artist who is tattooing a non-famous person would likely never agree to a waiver of this nature. Even though the chances of any lawsuit are slim, artists would have nothing to gain from signing away their rights in the tattoo. In the case of a famous client, however, the chances of a lawsuit are greater and artists can benefit from the exposure of having their work displayed on a celebrity, so they would be more open to signing away some of their rights. Apparently the NFL players who have attempted to get these waivers have been largely successful.<sup>134</sup> If artists are largely cooperative, then in the near future it could become commonplace for celebrity clients to go to their tattoo appointments armed with a waiver. Ideally, this could alleviate many problems that the tattoo artists have faced in the cases so far, but realistically there will likely be artists that refuse to sign the waiver or insist on their own with conflicting language.

*B. What Should Be in the Tattoo Artist's Waiver?*

If clients do not come to the appointment armed with a waiver, what can artists include in their waiver to protect their copyright? Simply put, the artist can merely include a clause that states that the artist retains all of the rights in the copyright in the design of the tattoo. This would ensure that the artist holds the copyright in the design of the tattoo, but would leave open the ownership of the application of the tattoo, if, as suggested above, the copyright in the application is considered a separate copyright and would have separate owners.<sup>135</sup> However, this may be a bit of a drastic change in the waiver form. Right now most waivers only include language that talks about the risk of getting a tattoo and language that the client warrants he or she is an adult and agrees to hold the artist harmless from any health consequences that could arise from the tattoo.<sup>136</sup>

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134. See *id.* “Football players have not reported any trouble getting waivers so far.” *Id.* George Atallah, the assistant executive director of external affairs at the NFLPA, remarked that “[p]layers are doing it” and “[t]attoo artists are cooperating.” *Id.* In Atallah’s words, “[I]f there is a little extra money exchanged for the license, then so be it.” *Id.*

135. For example, Client acknowledges and agrees that Artist shall be deemed the author and exclusive owner of the tattoo design throughout the universe, in perpetuity of all the rights comprised in the copyright thereof.

136. *Consent to Tattoo Procedure*, PROF. PROGRAM INS. BROKERAGE, [http://www.ppibcorp.com/clientforms/consent\\_tattoo.pdf](http://www.ppibcorp.com/clientforms/consent_tattoo.pdf) (last visited Feb. 8, 2016).

Certain waivers are on the right path and include clauses that state that the artist owns any photos of the client taken during the tattoo process, and that the photos remain the property of the tattoo artist or the shop.<sup>137</sup> This clause is helpful in securing the ownership of the photos taken of the tattoo by the artist, but not the tattoo itself.

On the opposite end of the spectrum, some waivers, like the application to be a human canvas on Ink Master, make the client warrant that Ink Master essentially owns everything that the canvas provides to Ink Master in the process of becoming a human canvas.<sup>138</sup> This includes everything from the photos that the applicant uploads for the application, to any photos or video footage taken of the human canvas in the process of filming the show.<sup>139</sup> This type of waiver is definitely over inclusive and really will only be signed by someone crazy enough to agree to be a human canvas on a reality show about getting tattoos. This sort of language

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137. *Ta727oo Customer Information*, TA727OO, <http://727tattoo.com/downloads/tattoo-release-form.pdf> (last visited Feb. 8, 2016).

I hereby grant irrevocable consent to and authorize the use of any reproduction by 727 TATTOO, any and all photographs which are taken this day of me, negative or positive proof which will be hereby attached for any purposes whatsoever, with out further compensation to me. All negatives, together with the prints, video, or live internet stream shall become and remain the property of 727 TATTOO, solely and completely.

*Id.*

138. *Human Canvas Application*, INK MASTER 7 CASTING, <http://www.inkmastercasting.com/human-canvas-application.html> (last visited Feb. 8, 2016)

I understand that any and all material that I provide to Producer in connection with this application, including, without limitation, photographs (collectively the "Materials") shall be owned solely and exclusively by Producer including all rights therein upon submission by me and Producer shall have the right to use any such Materials in any manner, or assign the right to use such Materials, in any manner, in any media, worldwide in perpetuity in connection with INK MASTER, including the advertising and promotion thereof. I hereby fully release Producer and its assigns from any claims related to such use of the Materials and waive any right to equitable or injunctive relief in connection with such use.

*Id.*

139. *Id.*

would not work in every day practice if the tattoo artist wanted to stay in business.

The norm going forward should be something in the middle between all of these waivers. An artist's waiver should definitely endeavor to address the copyright in the tattoo in some way. If the artist wants to be all-inclusive, he can include language that covers both the design and the application. But, if *Escobedo* is any indication, there is likely an implied license in the application of the tattoo.<sup>140</sup> If artists want to protect their copyright and have a waiver with a chance of being signed by every client, they should use language that ensures the artist has all rights in the copyright in the design and artwork of the tattoo. For the most part, the artist will not have any problems getting the client to sign these waivers, since most people do not read things before they sign them.

However, tattoo artists may face issues if they have a particularly savvy client who walks into an appointment with a waiver that grants him the rights in the copyright that conflict with the artist's waiver. This will create a tattoo battle of the forms, and it will either be up to a court to decide which form wins out, or the client and artist can negotiate which form controls amongst themselves. Like most things in life, a negotiation may come down to money. If, like the NFL athletes, the client insists on having his waiver control, he could incentivize the artist to sign it with more money or some other kind of exposure or publicity. For artists, if the client refuses to sign their waiver, they can simply refuse to do the tattoo. In this case, artists would have more leverage if they can afford to turn down a tattoo, but if the client is famous, the artist could lose that leverage if the publicity is important to the artist, along with any recommendations the client could give if the client is happy with the work.

Ultimately whose form will win out in the battle of the forms will depend on all parties involved, but regardless of the potential battle, both artists and clients should be more prepared when they go in for a tattoo session. The waivers on both sides should be more comprehensive in detailing what rights are granted and what rights are signed away on both sides. Having more comprehensive waivers will ensure that future legal battles will be easier for a judge to determine, since that judge will have the pleasure of ruling on the

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140. See *supra* notes 117–20 and accompanying text (discussing implied licenses).

first tattoo copyright infringement case, and his or her plate will be full with various opinions, theories, and dicta to consider.

## VII. CONCLUSION

In conclusion, the waters of tattoos and copyrights are murky and uncharted. There have been several cases brought to court, but sadly none have had the opportunity to get to trial and allow a judge to offer an opinion on the copyrightability of tattoos.<sup>141</sup> The U.S. Copyright Office has given us some hints because it has granted several registrations for tattoos, but right now there is no black letter rule for artists or clients to hang their hat on. It would seem from the language of the Copyright Act and the sentiments of one judge who gave her oral opinion on tattoos, that they are indeed copyrightable. However, until there is a judicial opinion or an amendment to the statute, all the artists and clients can do is ensure their rights are protected through the waivers that they sign before getting a tattoo. These waivers are the artists' and clients' best defense if they want to ensure their rights are protected. While the future of tattoos and copyrights is uncertain, one thing is certain: it is definitely an issue that will be at the forefront of the intellectual property legal spectrum for the immediate future as tattoos become more and more common and in the limelight.

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141. See *supra* Part V.