

4-4-2019

# TRADING YOUR SKIN IN EXCHANGE FOR A PIECE OF ART: A LEGAL ANALYSIS OF TATTOOS AS COPYRIGHTABLE SUBJECT MATTER

Jessica Hsieh

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

---

## Recommended Citation

Jessica Hsieh, Case Note, *TRADING YOUR SKIN IN EXCHANGE FOR A PIECE OF ART: A LEGAL ANALYSIS OF TATTOOS AS COPYRIGHTABLE SUBJECT MATTER*, 59 SANTA CLARA L. REV. 135 (2019).

Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss1/4>

This Case Note is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com), [pamjadi@scu.edu](mailto:pamjadi@scu.edu).

**TRADING YOUR SKIN IN EXCHANGE FOR A PIECE OF  
ART: A LEGAL ANALYSIS OF TATTOOS AS  
COPYRIGHTABLE SUBJECT MATTER**

*Jessica Hsieh\**

TABLE OF CONTENTS

I. Introduction.....	136
II. Background.....	137
A. An Overview of the Copyright Act of 1976 .....	137
1. Requirements for Copyright Protection .....	138
a. Originality.....	138
b. Works of Authorship .....	139
i. Work Made for Hire.....	140
ii. Joint Works.....	141
c. Fixation.....	141
i. The Useful Article Doctrine.....	142
2. Exclusive Rights Granted to the Author.....	143
a. The Right to Reproduce the Work.....	143
b. The Right to Prepare Derivative Works .....	143
c. The Right to Publicly Display the Work .....	144
i. Implied License.....	144
3. Possible Limitation to Copyright Protection: The First Sale Doctrine .....	145
4. Remedies: Injunctions, Actual Damages, and Statutory Damages .....	146
B. An Introduction to Tattoo Norms .....	147
1. The History of Tattoos in America.....	147
2. Tattoo Artists' Thoughts on the Judicial System .....	148
C. <i>Reed v. Nike, Inc.</i> .....	149
D. <i>Whitmill v. Warner Brothers</i> .....	149
III. Issue.....	150

---

\* B.A. University of California, Los Angeles, J.D. Santa Clara University School of Law. My interest and intrigue in this topic was spurred by the invaluable lectures of Professor Tyler Ochoa who provided me with instrumental insight into copyrightable subject matter. Thank you to my fellow Volume 59 board and staff members for dedicating their time and effort to this Note. Lastly, thank you to my loved ones for their constant support, encouragement, and celebrations throughout the ongoing pursuit of my goals and aspirations.

IV. Analysis.....	151
A. Tattoos As Copyrightable Subject Matter .....	151
1. Tattoos: The Originality Requirement .....	151
2. Tattoos: The Works of Authorship Requirement .....	153
3. Tattoos: The Fixation Requirement.....	153
a. Tattoos: The Useful Article Doctrine .....	154
4. Implications of <i>Reed v. Nike, Inc.</i> and <i>Whitmill v. Warner Brothers</i> .....	155
B. What is the Extent of Protection Then? .....	156
1. Ownership: Is the Tattoo a “Work Made For Hire”? ...	157
2. Alternative Ownership: Joint Work .....	158
3. The Client’s Right to Personal Autonomy .....	159
a. First Fixation on Paper.....	159
i. First Sale Doctrine .....	159
b. First Fixation on a Client’s Skin.....	160
i. Implied License.....	160
4. Why Tattoos Should Receive Copyright Protection ....	161
V. Proposal .....	162
VI. Conclusion.....	163

## I. INTRODUCTION

From its origins as a symbol of Navy enlistment and gang loyalty to today’s millennial-generation trend, tattoos have prevailed in American society since the mid-1900s.<sup>1</sup> The shift in society’s attitude towards tattoos has, in turn, sparked eagerness in people to get “tatted” up.<sup>2</sup> Now, tattoos are seen as a representation of self-expression and creativity. But imagine a scenario in which a couple, excited to take engagement photos to be featured in a magazine, wants to show off their one-of-a-kind, freshly inked “couples tattoo” for everyone to admire. However, right as the photos are to be published, the couple gets slapped with an injunction seeking to prevent the publication of the magazine; alleging that the tattoo artist holds a copyright to their tattoo and, in effect, controls their ability to show it in public. Can the tattoo artist do that?

As tattoos become more prevalent in society, so too, do the concerns of copyright protection afforded to the tattoo artists that create them. Currently, the federal copyright law in America does not explicitly address the topic of tattoos and leaves tattoo artists without a

---

1. Aaron K. Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 522 (2013).

2. Meredith Hatic, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 396, 398 (2013).

viable legal solution. As an alternative, these artists are left to find compensation through cultural norms in the tattoo industry.<sup>3</sup> Though there have been several cases regarding tattoo artists and the want for copyright protection, all have settled before a judge could definitively rule on the matter.<sup>4</sup> However, the issue of a tattoo artist's copyrightability in a tattoo design must now be balanced carefully against the client's self-autonomy and freedom to his or her own skin.

This Note seeks to provide an analysis on how the development of tattoo norms has led to the emergence of copyright issues in the tattoo industry. As a result, the need for copyright protection of tattoos must be balanced against the personal autonomy of a client. For the purposes of this topic, this Note will focus on the copyrightability of custom, original tattoo designs, as opposed to already-famous tattoo designs or "flashes." First, this Note will outline the relevant provisions of copyright law, as well as the history of tattoos in relation to copyright law.<sup>5</sup> Second, it will provide an analysis of tattoos as eligible copyright subject matter, followed by a discussion of the rights afforded to tattoo artists.<sup>6</sup> Finally, this Note will present a solution, giving tattoo artists the option to create an agreement with his or her client without imposing a strict obligation upon an industry that operates mainly through cultural norms.<sup>7</sup>

## II. BACKGROUND

### *A. An Overview of the Copyright Act of 1976*

The U.S. Constitution grants Congress the power to promote the sciences and useful arts by giving authors and inventors, for a limited time, exclusive rights to their original works.<sup>8</sup> Originally created in 1790, the federal Copyright Act has undergone two major revisions in 1909 and 1976, respectively, to accommodate changes and advancement in technology.<sup>9</sup> Due to constant discoveries and technological developments leading to new forms of possible expressive creations, the

---

3. See generally Aaron K. Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013) (explaining how the tattoo industry operates on a complex set of norms not just between tattoo artists, but also between tattoo artists and clients).

4. See Complaint at 4–5, *Reed v. Nike Inc.*, No. CV-05-198 (D. Or. Feb. 10, 2005); see Complaint at 6–7, *Whitmill v. Warner Bros. Entm't. Inc.*, No. 4:11-CV-752, (E.D. Mo. Apr. 28, 2011).

5. See *infra* pp. 3–21.

6. See *infra* pp. 21–34.

7. See *infra* pp. 34–36.

8. U.S. CONST. art. I, § 8, cl. 8.

9. See H.R. REP. No. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660 (stating how technical advances since 1909 have changed the operation of the copyright law).

current Copyright Act of 1976 leaves the phrase “original works of authorship” open for interpretation.<sup>10</sup> The intention was to avoid exhausting the list of possible works that may be granted copyright protection.<sup>11</sup> As a result, new advancements in expressive creations such as computer programs, electronic music, and filmstrips have all been regarded as an extension of copyrightable subject matter.<sup>12</sup> Because the Copyright Act affords authors certain exclusive rights, it is important to determine who owns the tattoo since ownership controls the balance between the rights of the copyright holder and a person’s control of his body.

### *1. Requirements for Copyright Protection*

The current federal Copyright Act, codified as Title 17 of the United States Code, establishes that formal registration of an author’s work is not required in order to secure a copyright.<sup>13</sup> Instead, copyright protection attaches once the piece of original work is “fixed in a tangible medium of expression.”<sup>14</sup> The three main requirements for copyright protection are (1) originality, (2) works of authorship, and (3) fixation.<sup>15</sup>

#### *a. Originality*

Under 17 U.S.C. § 102(a), copyright protection extends to any original works of authorship once it has been fixed in a tangible medium.<sup>16</sup> Although 17 U.S.C. §101 never officially defined “original work,”<sup>17</sup> the Supreme Court has clarified this definition.<sup>18</sup> In general, originality requires only that (1) the author independently created the work, and (2) the work contained “some minimal level of creativity.”<sup>19</sup> The Court has stated that the “originality” requirement is a very low threshold to meet, and that most works will satisfy this requirement “no matter how crude, humble or obvious” the work may be.<sup>20</sup>

Under the first requirement for originality, the Court has stated that originality does not equate to novelty.<sup>21</sup> An original work of authorship

---

10. *Id.* at 51.

11. *Id.*

12. *Id.*

13. *See* 17 U.S.C. § 102 (2018).

14. *Id.* § 102(a).

15. *Id.*

16. *Id.*

17. 17 U.S.C. § 101 (2018) (listing definitions such as a “work of visual art” or a “work made for hire” but not providing a definition for “originality”).

18. *Feist Publ’ns. Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

19. *Id.* at 358.

20. *Id.* at 345.

21. *Id.*

need not be novel.<sup>22</sup> A work may be considered original even if it closely resembles another creator's work, so long as the subsequent author did not substantially copy the previous author's work.<sup>23</sup> Additionally, the second requirement for originality requires that the work contain some level of creativity.<sup>24</sup> The requisite level of a work's creativity is "extremely low; even a slight amount will suffice."<sup>25</sup> It has been stated that this requirement for originality is not a significant concern due to the fact that the vast majority of works possess at least some creative spark.<sup>26</sup>

However, that is not to say that virtually any piece of work will pass muster under these requirements. The Court has clarified that there still remains a small category of works where the "creative spark" may be so lacking or trivial as to essentially be nonexistent.<sup>27</sup> Under these categories, the Court stressed that the facts underlying the creative expression may never be copyrighted, but the originality in the selection and arrangement of facts may necessarily be protected.<sup>28</sup>

#### *b. Works of Authorship*

Along with the requirement that a work be original, it must also be a work of authorship under 17 U.S.C. § 102(a).<sup>29</sup> Under this requirement, Congress provided a general list of eight categories that qualified as "works of authorship," which included (1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>30</sup>

Congress, when amending the Copyright Act of 1976, stressed that the list provided was not meant to be exhaustive.<sup>31</sup> In fact, the history of copyright law has shown gradual expansion in the types of works that

---

22. *Id.*

23. *Id.*

24. *Feist*, 499 U.S. at 345.

25. *Id.*

26. *Id.*

27. *See generally* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (further clarifying that this narrow category of works is limited to the "narrowest and most obvious limits").

28. *Feist*, 499 U.S. at 360.

29. 17 U.S.C. § 102.

30. *Id.*

31. *See* H.R. REP. NO. 94-1476, at 53 (clarifying that the word 'include' as defined in Section 101 of the Copyright Act stresses that the list provided is merely illustrative and not limitative).

would be given copyright protection.<sup>32</sup> Since authors are continuously discovering advanced methods of expressing their creativity, it is impossible to predict the ways in which these new methods of expression will be portrayed.<sup>33</sup> In effect, the Copyright Act was not meant to freeze the scope of copyrightable subject matter.<sup>34</sup>

Since the term “author” is more straightforward, it was not defined in the Copyright Act. Instead, the Court previously defined the term “author” to mean “he to whom anything owes its origin [sic]; originator; maker.”<sup>35</sup> Additionally, an “author” is not limited to the traditional writer, but may be extended to mean an “inventor, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo.”<sup>36</sup>

*i. Work Made for Hire*

Along with this, authorship may be granted to a person who employs another to perform specific or commissioned work in what is called a “work made for hire.”<sup>37</sup> Under this doctrine, a work made for hire arises in two separate instances.<sup>38</sup> A work made for hire can either be “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially . . . commissioned for use as a contribution to a collective work.”<sup>39</sup>

To determine whether a work is made for hire, it is important to first determine whether an employee or an independent contractor created the work.<sup>40</sup> “If an employee created the work, [then the first] part . . . of the definition . . . applies.”<sup>41</sup> To determine whether or not a person is considered an “employee” for the purposes of a work made for hire, the Court has given relevant factors to consider such as employer control over the work, employer control over the employee, and the

---

32. H.R. REP. No. 94-1476, at 51–52.

33. *Id.* at 51.

34. *Id.* (“The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent.”).

35. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57–58 (1884).

36. *Bleistein*, 188 U.S. at 250.

37. 17 U.S.C. § 201 (2018).

38. 17 U.S.C. § 101 (2018).

39. *Id.*

40. U.S. COPYRIGHT OFFICE, CIRCULAR 09: WORKS MADE FOR HIRE 2 (2012), <https://www.copyright.gov/circs/circ09.pdf>.

41. *Id.*

status or conduct of the employer.<sup>42</sup> These factors are not exhaustive and require a case-by-case analysis.<sup>43</sup>

In contrast, if an independent contractor created a specially commissioned work, then the second part of the “work made for hire” definition applies.<sup>44</sup> Under this part, a work created by an independent contractor must fall under one of the nine categories of works listed *and* there must be a written agreement between the parties in order for the work to be considered a work made for hire.<sup>45</sup> Generally, it is harder to meet this definition of a work made for hire because it requires the work to fall under a specific set of nine categories. However, if the work created meets the requirements to fall under a work made for hire, then ownership rights are awarded to “the employer or other person for whom the work was prepared.”<sup>46</sup>

#### *ii. Joint Works*

Another possible form of authorship is when the work created is defined as a “joint work.” Under copyright law, a “joint work” is a piece of work created by at least two authors with the intention that their works be combined into one piece.<sup>47</sup> If joint authorship exists, the authors of the work will be considered co-authors.<sup>48</sup> Under this doctrine, co-authors have an undivided interest in the whole work.<sup>49</sup> Regardless of how much each author contributed, each co-author is entitled to a share in profits obtained from the joint work.<sup>50</sup> This form of authorship will be explored more thoroughly in Part IV of this Note.

#### *c. Fixation*

The first portion of 17 U.S.C. § 102(a) requires that the work be fixed in a tangible medium of expression, now known or later developed.<sup>51</sup> Under this part, fixation is sufficient if the work can be

---

42. *Id.*

43. *See id.* (The Court has not addressed whether these are required factors to establish an employer-employee relationship. Additionally, the Court has held that employer control over the work alone is not the controlling factor.).

44. *Id.*

45. *Id.* at 1.

46. U.S. COPYRIGHT OFFICE, *supra* note 40.

47. 17 U.S.C. § 101.

48. *Copyright Ownership: The Joint Authorship Doctrine*, FINDLAW, <http://corporate.findlaw.com/intellectual-property/copyright-ownership-the-joint-authorship-doctrine.html> (last visited Jan. 25, 2018).

49. *Id.*

50. *Id.*

51. 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later

“perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>52</sup> Here, the language is broad in order to avoid bright line distinctions.<sup>53</sup> The “tangible medium” requirement is satisfied if the embodiment of the work “is sufficiently permanent or stable” to allow the work to be “communicated for a period of more than transitory duration.”<sup>54</sup>

*i. The Useful Article Doctrine*

One possible limitation to the fixation requirement is the “useful article doctrine.” Under this doctrine, any pictorial, graphic, or sculptural work may be granted copyright protection to the extent that the work has artistic craftsmanship.<sup>55</sup> However, any utilitarian or useful aspects of the article may not obtain copyright protection.<sup>56</sup> Thus, copyright protection extends only insofar that the design of a useful article may be identified separately, and is capable of existing independently, from the useful aspects of the object.<sup>57</sup>

The Court recently provided clarification as to the separability of a design and its utilitarian aspects.<sup>58</sup> In general, a design on a useful article is eligible for copyright protection if, “when identified and imagined separately from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium.”<sup>59</sup> To summarize, copyright law protects the work of art whether or not it was first drawn onto a piece of paper and then fixed to

---

developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

52. *Id.*

53. H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 (explaining that the broad language used in 17 U.S.C. § 102(a) was meant to avoid unjustifiable distinctions in mediums since, in many cases, copyrightability rests solely upon the medium of fixation).

54. *Id.* at 53; *see also* U.S. COPYRIGHT OFFICE, COPYRIGHT AUTHORSHIP: WHAT CAN BE REGISTERED 305–06 (2012), <https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf> (The Copyright Office rarely encounters a piece of work that does satisfy the fixation requirement. The Office requires applicants to submit copies that contain a “perceptible copy of the work. However, the Office may . . . refuse registration if the work or the medium of expression only exists for a transitory period of time, if the work or the medium is constantly changing . . .”).

55. 17 U.S.C. § 101.

56. *Id.*

57. *Id.*; *see also* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017) (determining that a design of a useful article only need be imagined separable from the useful article instead of physically separable).

58. *See Star Athletica*, 137 S. Ct. at 1007–08 (resolving the proper test for how to implement 17 U.S.C. § 101’s separability identification requirements by addressing the issue of whether the design of cheerleading uniforms may be identified as separable from the utilitarian aspects of the uniforms).

59. *Id.* at 1012.

a useful article, or vice versa.<sup>60</sup> Thus, a design on a useful article only has to be conceptually separable from the utilitarian aspects of the object.<sup>61</sup>

## *2. Exclusive Rights Granted to the Author*

Once ownership is established, the Copyright Act affords the copyright owner a bundle of rights. The Copyright Act of 1976 gives the owner an exclusive right to (1) reproduce the work; (2) prepare derivative works; (3) publicly display the work; (4) distribute the work; (5) perform the work publicly; and (6) perform sound recordings publicly through means of a digital audio transmission.<sup>62</sup> However, for purposes of this Note in addressing the copyrightability of tattoos, only the first three rights mentioned above are relevant to this analysis and will be discussed further.

### *a. The Right to Reproduce the Work*

Under 17 U.S.C. § 106, copyright owners are granted the exclusive right to reproduce the work in copies.<sup>63</sup> This means that the owner has the right to reproduce a work in a fixed form from which it can be perceived or communicated.<sup>64</sup> Furthermore, a reproduced work must be sufficiently permanent for a period of more than transitory duration.<sup>65</sup>

### *b. The Right to Prepare Derivative Works*

Another right granted to a copyright owner is the exclusive right to prepare any derivative works.<sup>66</sup> A “derivative work” is defined to refer to any translation, dramatization, musical arrangement, or “any other form in which a work may be recast, transformed, or adapted.”<sup>67</sup> The right to prepare derivative works may be seen as broader than the right to reproduce the work since derivative works may take on any form other than the original embodiment.<sup>68</sup> Thus, a copyrighted painting that is

---

60. *See id.* at 1012–13.

61. *Id.* at 1014.

62. 17 U.S.C. § 106 (2018).

63. *Id.*

64. H.R. REP. NO. 94-1476, at 61 (Under the current copyright law, infringement occurs by reproducing the copyrighted work in any substantial part, by duplicating it exactly, or by imitation or simulation. Variations from the copyrighted work could still constitute as infringement if the author’s expression, rather than just the author’s ideas, are taken.).

65. *Id.* at 62.

66. 17 U.S.C. § 106.

67. H.R. REP. NO. 94-1476, at 57, 62.

68. *Id.* (The right to prepare derivative works is broader because reproduction requires a fixation in copies. However, preparation of derivative works, such as ballets or improvised performances, can be infringed even though there is no fixation into a tangible medium.).

subsequently photographed and displayed may constitute infringement of a copyright owner's exclusive right to prepare derivative works.

*c. The Right to Publicly Display the Work*

The last right to note is the right to publicly display any pictorial, graphic, or sculptural works.<sup>69</sup> Under the Copyright Act of 1976, the definition "display" means to show the original work or a copy of the work, either directly or through any other device or process.<sup>70</sup> Additionally, to display a work "publicly" means to display the work in a place where members of the public are capable of perceiving it, either through its original form or not.<sup>71</sup> A display is "public" if it takes place in a space that is open to the public or a place where a substantial number of people other than family is gathered.<sup>72</sup> Thus, the right of public display applies to the original work of art as well as to any reproductions.<sup>73</sup> This right is arguably the most conflicting one when addressing the copyrightability of tattoos.<sup>74</sup> Here, if the tattoo artist is the owner of the copyrighted design, then he or she may very well be able to prevent a client from publicly displaying the tattoo. However, an implied license may be used to address this exclusive right to publicly display the work.

*i. Implied License*

The owner of a copyright has the right to have his or her work publicly displayed.<sup>75</sup> However, in the context of copyright law, an implied license may be granted to another individual.<sup>76</sup> An implied license is a license granted without any express prior agreement negotiated between the parties.<sup>77</sup> In determining whether or not an implied license exists, three factors must be considered:<sup>78</sup> one must consider whether the licensee requested the work, whether the licensor

---

69. 17 U.S.C. § 106.

70. 17 U.S.C. § 101 ("To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.").

71. *Id.*

72. See H.R. REP. NO. 94-1476, at 64 ("Family" in the context of copyright law would include an individual living alone, such that a gathering of the individual's social acquaintances would be regarded as private as opposed to public.).

73. *Id.*

74. *Id.* at 61.

75. 17 U.S.C. § 106.

76. *Copyright Licenses and Agreements*, BITLAW, <https://www.bitlaw.com/copyright/license.html> (last visited Jan. 22, 2018).

77. *Id.*

78. Brayndi L. Grassi, *Entertainment Law: Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms*, 42 WM. MITCHELL L. REV. 43, 63 (2016).

created and delivered the work, and whether the licensor intended that the licensee would utilize the work created.<sup>79</sup>

The objective of an implied license is to grant the licensee a limited right to use the copyrighted work, royalty-free.<sup>80</sup> Generally, implied licenses have been granted in situations when a copyrighted work was created at the request of one person to another.<sup>81</sup> The idea behind an implied license is that the client who requested the commissioned work would not have offered to pay for it unless he could actually use the work for its intended purpose.<sup>82</sup>

### 3. Possible Limitation to Copyright Protection: The First Sale Doctrine

Although copyright protection offers the copyright owner a bundle of rights, the owner may still be held to a few limitations under the Copyright Act of 1976. For purposes of this Note's analysis on tattoos as copyrightable subject matter, only the limitation of the first-sale doctrine will be discussed.

The first-sale doctrine is a specific restriction that may be placed on the exclusive rights granted to copyright owners.<sup>83</sup> Under 17 U.S.C. § 109(c), a person who lawfully obtains a copy of a copyrighted work from the owner receives the right to subsequently display his or her copy publicly to viewers at a location where the copy is located.<sup>84</sup> In effect, the copyright owner's exclusive rights as to *that particular copy* are exhausted.<sup>85</sup> The idea behind this doctrine is to limit the copyright holder's right to control his or her work after the first sale.<sup>86</sup>

---

79. *Id.*

80. *Copyright Licenses and Agreements*, *supra* note 76.

81. *Id.*

82. Rick Sanders, *Implied License Saves the Day (But it Doesn't Always)*, THE IP BREAKDOWN: BLOG (Apr. 22, 2015), <http://ipbreakdown.com/blog/implied-license-saves-the-day-but-it-doesnt-always/>.

83. 17 U.S.C. § 109 (2018); *see also* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-1854 [hereinafter USAM] (The first sale principle privileges do not extend to persons who have unlawfully acquired possession of a copy of the copyrighted work. However, lawful possession of a copy still gives allow the copyright holder to remain the "owner" of any distributed copies.).

84. 17 U.S.C. § 109(c).

85. USAM § 9-1854.

86. *The First Sale Doctrine under Copyright Law*, Intell. Prop. Ctr. (Jan. 10, 2010), <https://theipcenter.com/2010/01/the-first-sale-doctrine-under-copyright-law/>.

#### 4. Remedies: Injunctions, Actual Damages, and Statutory Damages

According to 17 U.S.C. § 502(a), a temporary or permanent injunction is one possible remedy for copyright infringement.<sup>87</sup> A court may grant an injunction seeking to restrain any further copyright infringement when it deems such an injunction necessary.<sup>88</sup> Under this possible remedy, the copyright owner of a tattoo design may seek to enjoin an infringer from copying a tattoo design or from publicly displaying the tattoo.<sup>89</sup> This remedy could raise potential problems regarding a client's personal autonomy in merely walking down a crowded street or his desire to feature the tattoo in subsequent materials.

In cases of copyright infringement, an infringer may alternatively be liable for a copyright owner's actual damages plus lost profits, or statutory damages.<sup>90</sup> Under actual damages, a copyright owner may elect to recover any actual damages suffered as a result of the infringement, including any lost profits the copyright owner sustained.<sup>91</sup> Under this form of remedy, the copyright owner must present proof of the copyright infringer's revenue.<sup>92</sup>

As an alternative remedy, a copyright owner may elect to recover statutory damages instead.<sup>93</sup> Here, different ranges of statutory damages are provided for, which may increase or decrease depending on the infringer's state of mind.<sup>94</sup> Under statutory damages, a copyright owner may recover no amount less than \$750 per infringing work.<sup>95</sup> If the court finds that the infringement was committed willfully, then the court may increase the maximum award of statutory damages to \$150,000 per work.<sup>96</sup> However, statutory damages are only available in cases where

---

87. 17 U.S.C. § 502 (2018).

88. *Id.*

89. *Id.*

90. 17 U.S.C. § 504(b) (2018).

91. *See id.* (When the copyright owner elects for actual damages and profits, the owner may recover actual damages suffered as a result of the infringement. In addition, the copyright owner may recover for any profits of the infringer that are attributable to the infringement which were not calculated into the actual damages.)

92. *Id.*

93. *Id.* at § 504(c)(1) (In the alternative, the copyright owner may recover for statutory damages for all infringements involved in the action. The infringer would be liable for nothing less than \$750 and nothing more than \$30,000. However, if the copyright owner proves willful infringement, then it is in the court's discretion to increase the award of statutory damages to a maximum of \$150,000. There is a presumption of willful infringement if the violator knowingly provided false contact information to a domain name.)

94. *Id.* at § 504(c)(3)(A).

95. *Id.* at § 504(c)(1).

96. 17 U.S.C. § 504(c)(1) (2018).

the copyright owner obtained valid copyright registration of the work before the infringing activity occurred.<sup>97</sup>

### *B. An Introduction to Tattoo Norms*

Societal attitudes toward tattoos have undergone various changes throughout the years. Though the past few decades in America has seen a general increase in acceptance of tattoos, there is still a lingering stigma regarding tattoo artists and people with tattoos.<sup>98</sup> As a result, issues of tattoos and copyright infringement have only just recently become more prevalent in litigation.<sup>99</sup> Thus, it is important to understand the general history of an industry long suppressed by society and forced to operate through cultural norms.

#### *1. The History of Tattoos in America*

Though the practice of body modification with tattoos dates back to as early as 2000 B.C., the practice of tattooing one's body only started to appear in America around the mid-1900s.<sup>100</sup> From its earliest use as symbols of social classification and religious commitment, tattoos migrated to the United States and became a symbol of war veterans and criminal countercultures.<sup>101</sup> Tattoo machinery became more refined in a time of constant technological advancement.<sup>102</sup> In effect, the process of tattoos became faster, cheaper, and much less technically-inclined.<sup>103</sup>

As a result, an increasing number of the working class entered the tattoo industry and began tattooing pre-drawn "flash" images on clients.<sup>104</sup> However, along with the influx of customers and mediocre tattoo artists came unsanitary working conditions and hepatitis outbreaks.<sup>105</sup> Consequently, the reputation of tattoo artists and clients alike began to wane and worsen.<sup>106</sup>

---

97. *Id.* at § 412.

98. *See generally* Perzanowski, *supra* note 1.

99. *See, e.g.*, Complaint, Reed v. Nike Inc., No. CV-05-198 (D. Or. Feb. 10, 2005); Complaint, Whitmill v. Warner Bros. Entm't. Inc., No. 4:11-CV-752, (E.D. Mo. Apr. 28, 2011).

100. Hatic, *supra* note 2, at 398.

101. *Id.*

102. Perzanowski, *supra* note 1, at 520 (The introduction of advanced tattoo machinery allowed for the development of a distinctive American aesthetic. American-style tattoos became characterized by bold black lines with heavy shading and coloring.).

103. *Id.*

104. *See generally id.* (Instead of creating custom designs, tattoo artists almost exclusively tattooed pre-drawn "flashes" on clients. Flash designs would include a range of images such as military insignia, hearts, flowers, daggers, and tigers. Additionally, it was not uncommon for tattooers, upon coming across a new design, to copy it off a client's body.).

105. *Id.* at 521.

106. *See id.*

A couple decades after the tattoo craze declined, the industry took a turn for the better and began reemerging with the influence of skilled and creative tattoo artists such as Sailor Jerry and Don Ed Hardy.<sup>107</sup> A shift in the industry led to a “tattoo renaissance” during the mid-1960s, in which talented and experienced fine artists with higher-level education began to enter the tattoo industry.<sup>108</sup> As new styles and techniques were introduced into the industry, the clientele shifted as well to attract more knowledgeable and artistically inclined people.<sup>109</sup> As a result of the clientele’s increased expectations of a tattoo design, an increase in custom pieces of work could be seen in high-end tattoo shops.<sup>110</sup> Tattoos became a symbol of self-expression and as the value of a tattoo artist’s artistic abilities increased, tolerance for copying an artist’s custom design drastically declined.<sup>111</sup>

## 2. *Tattoo Artists’ Thoughts on the Judicial System*

Born out of a symbol of countercultures and rebellion, the tattoo industry has always been on the margins of society.<sup>112</sup> As a result of being subjected to a history of targeted skepticism and spurn, tattoo artists to this day still share a sense of comradeship with one another.<sup>113</sup> Additionally, a history riddled with no legal protections afforded to the tattoo industry has led to a general distrust by tattoo artists towards the legal system.<sup>114</sup> Currently, tattoo artists operate on a system of cultural norms to enforce protection of custom tattoo designs, and believe that a prejudiced view towards the tattoo industry will always lead to unfair outcomes if left for the judicial system to decide.<sup>115</sup>

---

107. *Id.*

108. Perzanowski, *supra* note 1, at 521.

109. *Id.*

110. *Id.* at 523 (In an interview with an older-generation tattoo artist, he stated it was puzzling that custom designs were beginning to prevail. Coming from the older generation, tattoo work was seen as a way to financially support oneself, rather than as a channel of artistic expression.)

111. *Id.* at 525 (Copying has become a topic of constant concern within the tattoo industry. However, legal assertion of rights is very uncommon. Instead, tattoo artists have developed informal norms to mitigate the effects of copying.)

112. *See id.* at 512–14.

113. *See id.* at 570.

114. *See* Perzanowski, *supra* note 1, at 571 (One tattoo artist that was interviewed stated his distaste for the judicial system. Additionally, many tattoo artists frown upon other tattoo artists resorting to legal system. Tattoo artists state that they govern themselves and follow a spirit of independence.)

115. *See id.* at 570–71.

*C. Reed v. Nike, Inc.*

The first case to ever present the question of whether a tattoo may be copyrightable involved the famous basketball player Rasheed Wallace of the NBA Portland Trailblazers.<sup>116</sup> After moving to Portland, Oregon to play for the Trailblazers, Rasheed Wallace soon contacted Matthew Reed, owner and tattoo artist of TigerLily Tattoo and Design Work.<sup>117</sup> Together, the two discussed the idea of designing an Egyptian-themed family tattoo design to be tattooed onto Rasheed Wallace's upper arm.<sup>118</sup> Once the design had been created and modified to Wallace's liking, Reed inked the design onto Wallace for the price of \$450.<sup>119</sup> Although Reed believed the price was low, he stated that the increased publicity of his business would be fair compensation instead.<sup>120</sup>

However, on February 10, 2005, Reed filed a complaint against Nike, Inc. and Rasheed Wallace after viewing a Nike commercial advertisement, which featured Wallace's tattoo being digitally recreated by computer-simulation.<sup>121</sup> Reed alleged copyright infringement against Nike, Inc. for copying and publicly displaying the copyrighted design without Reed's consent.<sup>122</sup> However, before the case could go to trial, the parties ended up settling the case instead.<sup>123</sup> Although the issue was not definitively addressed, this case presented the possibility of tattoos as being copyrightable subject matter.

*D. Whitmill v. Warner Brothers*

Several years after *Reed v. Nike, Inc.* occurred, another prominent tattoo case came to the forefront of copyright law in the form of the movie *The Hangover Part II* in 2011. In this movie, after another grand bachelor party, the main characters wake up and once again attempt to piece together the remnants of the night before.<sup>124</sup> In this sequel, however, actor Ed Helms wakes up to find a facial tattoo nearly identical to the one of Mike Tyson's.<sup>125</sup> Mike Tyson's facial tribal tattoo was

---

116. Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 315 (2006).

117. *Id.*

118. *Id.*

119. *Id.* at 315-16.

120. *Id.* at 316.

121. See Complaint at 4, *Reed v. Nike Inc.*, No. CV-05-198 (D. Or. Feb. 10, 2005).

122. *Id.*

123. Harkins, *supra* note 116, at 318.

124. Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS L. 1, 1 (2011).

125. *Id.* at 27.

subsequently featured on Ed Helms in various movie posters and trailers for *The Hangover Part II*.<sup>126</sup>

Roughly one month before the nationwide release of the movie, tattoo artist Victor Whitmill filed a complaint against Warner Brothers Studios.<sup>127</sup> In his complaint, Whitmill alleged copyright infringement for the unauthorized copying of his tattoo design and sought to obtain a preliminary injunction to prevent the release of the movie.<sup>128</sup> Although the case quickly settled due to the public interest factors significantly outweighing Whitmill's copyright of the design, this suit still offered some insight into the copyrightability of tattoos.<sup>129</sup> In an oral opinion offered by the judge who oversaw the settlement, Judge Perry stated that "of course tattoos can be copyrighted" and that there was no reasonable dispute about that.<sup>130</sup> Judge Perry then went on to say that it is the tattoo design that is being copyrighted, not the way Mike Tyson uses of his own face.<sup>131</sup>

Judge Perry's oral opinion was the first time any judge had explicitly voiced an opinion regarding tattoos as copyrightable material.<sup>132</sup> Additionally, the judge further made the distinction between the tattoo design and the application of the tattoo design.<sup>133</sup> Though this statement was very brief and succinct, it offered an important step towards viewing tattoos as legitimate material eligible for copyright protection.

### III. ISSUE

In regards to how copyright law interplays with tattoo designs on a person's body, two obstacles must be confronted. First, the threshold issue is whether or not tattoo designs may receive copyright protection at all. Here, conflicting factors such as a tattoo artist's artistic expression

---

126. *Id.*

127. *Id.*

128. Complaint at 7, *Whitmill v. Warner Bros. Entm't. Inc.*, No. 4:11-CV-752, (E.D. Mo. Apr. 28, 2011).

129. Bradley, *supra* note 124, at 1-4 (Although the suit settled quickly, the complaint filed by Whitmill introduced questions regarding intellectual property and tattoos. With tattoos growing in popularity and becoming less taboo in society, these kinds of disputes are likely to increasingly arise.).

130. Grassi, *supra* note 78, at 59 (statement of Judge Perry) ("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.") (citations omitted).

131. *Id.*

132. *Id.*

133. *Id.*

---

must be balanced against the human skin as being a tangible medium for fixation.

In the event that tattoo designs are deemed as copyrightable subject matter, the second issue is the amount of protection that should be afforded to tattoo designs. In this second issue, problems arise due to the fine line between personal autonomy and freedom versus the importance of affording protection for a tattoo artist's work.

Due to the risks that may be imposed upon a client's personal freedom if copyright protection is granted to a tattoo artist, it is important to consider whether copyright protection should be given at all. Tattoo norms govern the tattoo industry, past and present.<sup>134</sup> As a result, people question whether copyright protection will help or hinder tattoo artists.<sup>135</sup> Affording tattoo artists copyright protection to their custom designs may finally open up an avenue to just compensation in an industry that still receives lingering stigma. However, possible protection of tattoo designs leads to conflicts regarding a person's freedom to his or her own body.

#### IV. ANALYSIS

##### *A. Tattoos As Copyrightable Subject Matter*

This section will attempt to determine the applicability of copyright law to tattoo designs by analyzing the requirements of originality, authorship, and fixation as applied to tattoos.

###### *1. Tattoos: The Originality Requirement*

A tattoo must be sufficiently considered "original" within the meaning of 17 U.S.C. §102.<sup>136</sup> Before considering the originality of a tattoo, it is important to understand the difference between a custom-design tattoo as opposed to a "flash" tattoo design. In the tattoo industry, tattoo designs originally came in the form of "flash" designs.<sup>137</sup> A

---

134. See generally Perzanowski, *supra* note 1 (After interviewing fourteen tattoo artists within the industry, it could be seen that the tattoo industry is driven by a set of cultural norms as informal alternatives to intellectual property. These norms arose as a body of self-governance and prevail despite being a profit-driven industry.).

135. Kal Raustiala & Chris Sprigman, *Can You Copyright A Tattoo?*, FREAKONOMICS (May 2, 2011), <http://freakonomics.com/2011/05/02/can-you-copyright-a-tattoo/>. Because of the risk that enforcing a tattoo artist's copyright has on a client's personal freedom, it is important to question whether copyright has a real role in incentivizing tattoo artists to constantly create custom designs.

136. 17 U.S.C. § 102.

137. Jacob Thomas, *What's The Difference Between Custom and Flash Tattoo?*, CHOSENART TATTOO (Oct. 1, 2018), <https://chosenarttattoo.com/difference-custom-flash-tattoo/>.

“flash” tattoo is a pre-drawn design that is readily available in a tattoo shop.<sup>138</sup> “Flash” designs were the original type of tattoos; their first appearance in the United States coincided with the prevalence of military insignia and religious symbols.<sup>139</sup> Now in modern society, “flash” designs can range in the form of hearts with names to skulls and ships.<sup>140</sup>

The second type of tattoos are custom designed tattoos. As stated previously, the rise in technical skills of tattoo artists combined with the increase in higher-educated clients has led to a greater demand in more intricate, custom designs.<sup>141</sup>

When examining these custom-made designs, there is little doubt as to their originality. Originality generally requires a very low threshold, and requires only that the author independently creates the work and that the work contains some amount of creativity.<sup>142</sup> Custom-made tattoo designs have only been increasing in intricacy and creativity.<sup>143</sup> This is, in part, due to the fact that tattoo artists are now emerging with art school degrees, university backgrounds, and the like.<sup>144</sup> When asked about these custom designs, tattoo artists have stated that custom-designed work offers them the opportunity to grow as artists, both technically and creatively.<sup>145</sup> Additionally, the change in cultural attitudes towards tattoos has led to an increase in tattoo artists producing images rivalling work of professionally-trained artists.<sup>146</sup>

Custom-made designs are at the height of originality. Many clients approach certain tattoo artists based on their portfolio because different tattoo artists have distinct artistic styles.<sup>147</sup> Additionally, tattoo artists may occasionally refuse to create a certain design because they believe

---

138. *Id.*

139. Perzanowski, *supra* note 1, at 520.

140. *Id.*

141. *Id.* at 522.

142. *Feist*, 499 U.S. at 358.

143. See Perzanowski, *supra* note 1, at 523 (Tattooers have increasingly been creating unique designs for different clients in order to customize it to the client’s body and tastes. Custom work has given tattoo artists the opportunity to create new pieces of artwork, instead of just inking on pre-designed “flash” images.).

144. David M. Cummings, Note, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 306 (2013).

145. Perzanowski, *supra* note 139, at 583.

146. Television Interview, *Tattoos Still Taboo?*, NPR (May 22, 2013), <https://www.npr.org/2013/05/22/186023466/tattoos-still-taboo> (In an interview with Fatty, a renown tattoo artist, he stated that the main culprit behind a change in cultural attitudes towards tattoos has been media exposure. Tattooing is far more artistic now and good tattoo artists are producing images that could “rival the best work of any canvas painter.”).

147. See Guen Douglas, *The Process of Getting A Custom Tattoo*, TATTOO ARTIST MAG. (Sept. 22, 2011), <http://tattooartistmagazineblog.com/2011/09/22/guen-douglas-tattoos-process-of-getting-a-custom-tattoo-artist-magazine-blog/>.

their skill set may not be a proper fit for the client.<sup>148</sup> However, upon taking a request for a custom design, a tattoo artist may spend hours researching and drawing up a design for his or her client.<sup>149</sup> More so, since originality does not require novelty,<sup>150</sup> a custom design by a tattoo artist who independently draws up a design falls well into the definition of “original.”<sup>151</sup>

### *2. Tattoos: The Works of Authorship Requirement*

Tattoos are sufficiently “original” within the meaning of 17 U.S.C. § 102, but they must also be a “work of authorship.”<sup>152</sup> Under the list of eight broad categories that Congress listed as qualified “works of authorship,” a tattoo would fall under the category of a “pictorial, graphic, or sculptural work.”<sup>153</sup> Though tattoo designs have never been listed as a qualified work under the statute, this stands to be no issue. The previous expansion of copyright protection has been granted to various forms of expression that, though in existence for years, have only “more recently been recognized as creative and worthy of protection.”<sup>154</sup> A tattoo design, whether fixed on a piece of paper first or applied directly to a person’s skin, may still be considered a traditional pictorial representation. Additionally, given Congress’ intention to provide room for technological and creative expansion, tattoo designs would not be limited under the “works of authorship” requirement.<sup>155</sup>

### *3. Tattoos: The Fixation Requirement*

The greatest disagreement regarding a tattoo design’s copyrightability concerns whether or not the skin can be considered a “tangible medium” for fixation. Fixation is sufficient if the work can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>156</sup> Under this requirement, fixation is met if the work is permanent enough such that the work may be communicated for a period of more than transitory duration.<sup>157</sup>

---

148. *Id.*

149. *Id.*

150. *Feist*, 499 U.S. at 345.

151. 17 U.S.C. § 102; *see generally Feist*, 499 U.S. at 341.

152. 17 U.S.C. § 102.

153. *Id.*

154. H.R. REP. NO. 94-1476, at 51.

155. *Id.*

156. 17 U.S.C. § 102.

157. *See supra* Part II.A.1.c; *see also* 17 U.S.C. § 102.

Tattoos may either first be drawn on a piece of transfer paper, or tattooed directly onto the skin.<sup>158</sup> In the first situation where a tattoo design is drawn on a piece of paper beforehand, fixation is considered definitive. By drawing the design onto a piece of paper, this takes on a more traditional form of fixation, which has long been accepted as sufficient.<sup>159</sup> The second situation, where a tattoo design is placed immediately onto the skin, becomes a more debatable situation. The work must be permanent enough such that it may be communicated for more than a period of transitory duration.<sup>160</sup> Here, the human skin as a tangible medium becomes more obscure due to the issue of permanence.<sup>161</sup> All human beings die in due time and along with this, the skin naturally decomposes. Perhaps the skin as a tangible medium is not permanent enough.

However, it is still extremely likely that the duration of a human being's life would qualify as "sufficiently permanent" enough. The Court has previously held that a computer's random access memory ("RAM") is able to fix a work for more than a period of transient duration even though the image is fixed for merely seconds.<sup>162</sup> Tattoos are permanent for at least the length of a client's life.<sup>163</sup> Following this logic, it would suffice to say that a tattoo lasting for potentially years after its fixation to the skin would fall well into satisfying the fixation requirement.<sup>164</sup>

*a. Tattoos: The Useful Article Doctrine*

Although the skin may be considered a permanent enough medium for fixation, the "useful article" dilemma still poses a limitation to fixation. Under this doctrine, copyright protection may be given to the extent that the design of a useful article may be identified separately

---

158. See Douglas, *supra* note 147 (Some tattoo artists spend days or even weeks researching and drawing up a custom design on their own time for a client. This time invested is spent because the tattoo artist cares not just about the finished design, but also about his business.).

159. Cummings, *supra* note 144, at 297 (Paper is the most obvious means of fixation and is a basic assumption of copyright law.) (citing ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 26 (2003)).

160. See *supra* Part II.A.1.c.

161. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.15[C] (2012).

162. *Id.* (The argument that humans are not tangible mediums for fixation because the skin is perishable lacks muster. If computer "RAM" is deemed sufficient enough to fix a work for more than a period of transient duration, then tattoos on the skin should be more than enough.).

163. Bradley, *supra* note 124.

164. Cummings, *supra* note 144, at 298.

from the utilitarian aspects of an object.<sup>165</sup> With this limitation in mind, it is important to determine whether a tattoo may be separable from a body's utilitarian aspects.<sup>166</sup>

Recently, the Court has given more insight into the separability of a design from the utilitarian features of a useful article.<sup>167</sup> The modern separability test states that if a utilitarian article incorporates design features that may be physically or conceptually identified separately as a work of art, then the design itself will be eligible for protection.<sup>168</sup> Under this modern test for separability, copyright protection is given to a pictorial design regardless of if it was first fixed in a utilitarian object or not.<sup>169</sup> Additionally, just as a two-dimensional fine-art piece of work bends to the shape of its canvas, two-dimensional applied-art similarly molds to the contours of the useful article of which it is applied to.<sup>170</sup>

The Court previously stressed that a fresco painting on a dome structure does not lose its copyright protection merely because it was designed to "track the dimensions of the surface."<sup>171</sup> Following this argument, the copyright law protects works of art whether it was first drawn onto a two-dimensional surface and then applied to a three-dimensional surface, or vice versa.<sup>172</sup> Thus, when looking at a tattoo that is applied directly onto a human canvas, it would not matter for separability purposes. Though the tattoo design is shaped to the contours of a person's body, this does not automatically render the design any less protectable as a work of art. A tattoo design fixed on the human skin is capable of being identified separately from the tangible medium.<sup>173</sup> Therefore, a tattoo fixed immediately onto a human body should still be given copyright protection.

#### 4. Implications of *Reed v. Nike, Inc. and Whitmill v. Warner Brothers*

Though no case has made it far enough in the litigation process for a judge to definitively rule on the issue of tattoos as copyrightable subject matter, the previous cases of *Reed v. Nike* and *Whitmill v. Warner*

---

165. 17 U.S.C. § 101 (defining "useful article").

166. See Cummings, *supra* note 144, at 299 (The human body is at the height of a utilitarian article. It would be hard to imagine any other object that is as useful as a human body. Professor Nimmer stated that a human head, as long as attached to a body with a beating heart, is undoubtedly a useful item.) (citations omitted).

167. See *supra* note 58 and accompanying text.

168. *Star Athletica*, 137 S. Ct. at 1011.

169. *Id.*

170. *Id.* at 1012.

171. *Id.*

172. *Id.*

173. NIMMER ON COPYRIGHT, *supra* note 161.

*Brothers* still offer some insight into the matter. With both cases having settled between the tattoo artist and allegedly infringing company, an implication arises that the defendants believed the tattoo artists had viable claims of copyright infringement.<sup>174</sup>

Additionally, Judge Perry in *Whitmill v. Warner Brothers* stated that tattoos could undoubtedly be copyrighted.<sup>175</sup> She clarified that it was not a copyright to the person's body, but merely to the tattoo itself.<sup>176</sup> Moreover, Justice Holmes, in a separate issue regarding "useful art," stated that it was not in the hands of legal professionals to determine whether or not something is considered art.<sup>177</sup> Instead, it is a matter that should be deferred to public opinion.<sup>178</sup>

When looking at public opinion, it is well supported that tattoos are considered "useful art."<sup>179</sup> The praise and reverence given to tattoos continues to increase.<sup>180</sup> With emerging television shows featuring tattoo shops and increasing social media platforms, mainstream society continues to popularize tattoos.<sup>181</sup> Fast-forward to today, thirty-six percent of Americans between ages eighteen and twenty-five have at least one tattoo now.<sup>182</sup> People of all ages have begun tracking down artists globally in order to obtain specific one-of-a-kind pieces of work.<sup>183</sup> Thus, when left to the public opinion, it may be concluded that tattoo designs are unquestionably considered works of art that should be given copyright protection.

#### *B. What is the Extent of Protection Then?*

Although copyright protection may be granted to the tattoo artist for his or her design, it is important to note that the ownership of a copyright is separate and distinct from ownership of the material object

---

174. Jennifer L. Commander, *The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?*, 72 WASH & LEE L. REV. 1947, 1965 (2015).

175. See *supra* note 130 and accompanying text.

176. *Id.*

177. Cummings, *supra* note 144, at 307 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-52 (1903)).

178. *Id.*

179. See Taylor Richardson, *Why Tattoos Are More Socially Acceptable Now*, ODYSSEY MEDIA GRP. (Nov. 21, 2016), <https://www.theodysseyonline.com/tattoos-in-todays-society> (The millennial generation has changed the way society views tattoos. Now, tattoos are seen as walking art instead. The art of tattoos has increasingly become more scientific and advanced with safer procedures.).

180. *Id.*

181. Mik Thobo-Carlsen, *How Tattoos Went From Subculture to Pop Culture*, HUFFINGTON POST: THE BLOG (Oct. 27, 2014), [https://www.huffingtonpost.com/mik-thobocarlsen/how-tattoos-went-from-sub\\_b\\_6053588.html](https://www.huffingtonpost.com/mik-thobocarlsen/how-tattoos-went-from-sub_b_6053588.html).

182. *Id.*

183. *Id.*

in which the art work is embodied in.<sup>184</sup> Thus, even if the copyright owner is someone other than the client, the owner only has an interest in the piece of work, and not in the client's actual body. The difficulty in this situation of copyright protection is that the "canvas" is the client's body. The fixation of the work is the skin and that is when problems of personal autonomy and copyright ownership begin to intertwine.

*1. Ownership: Is the Tattoo a "Work Made For Hire"?*

One pertinent issue concerns the owner of a piece of work. The issue of ownership determines what rights may be granted to a person's body and the author of the work. A relevant doctrine in deciding the issue of tattoo ownership is the "work made for hire" doctrine previously mentioned.<sup>185</sup> Under this doctrine, the tattoo design may be deemed a work made for hire if the tattoo artist was either (1) an employee, or (2) an independent contractor with additional requirements.<sup>186</sup> However, the work created by the tattoo artist would most likely not fall under either category of this doctrine.

The first category of the "work made for hire" doctrine states that an employee may create work in which copyright ownership vests in his or her employer.<sup>187</sup> However, when determining whether an employer-employee relationship exists, it is very unlikely that this relationship exists between a tattoo artist and his or her client. Important factors such as control by the employer over the work and employee, as well as the status or conduct of the employer must be examined.<sup>188</sup> In a typical situation, the client comes into the tattoo parlor with requests for the tattoo artist to create a design. However, it is the tattoo artist that determines the method of payment, the time spent on designing the work, and the resources used in the process. The client does not have control over the tattoo artist in any such way that would imply an employer-employee relationship. Thus, a tattoo artist would not fall under the first category of the "work made for hire" doctrine.

The second category that a tattoo artist may possibly fall under is the "independent contractor" definition of a "work made for hire."<sup>189</sup> Here, a tattoo artist's work may be considered a "work made for hire" if the tattoo artist was an independent contractor and the work was

---

184. 17 U.S.C. § 202 (2018).

185. *See supra* Part II.A.1.b.i.

186. *See supra* Part II.A.1.b.i.

187. *See supra* Part II.A.1.b.i.

188. U.S. COPYRIGHT OFFICE, *supra* note 40, at 2–3.

189. 17 U.S.C. § 101 (defining "work made for hire").

pecially ordered or commissioned.<sup>190</sup> However, in order to be considered an independent contractor, the work created must fall into one of the nine qualifying categories of work,<sup>191</sup> with an additional written agreement created between the client and tattoo artist.<sup>192</sup> However, the traditional tattoo on a client's body does not fall into any of the nine restrictive categories of work. Additionally, a written agreement created beforehand regarding this as work made for hire is unlikely. Copyright law has been shown to take a rather restrictive approach to this doctrine and has only used this doctrine in very narrow circumstances.<sup>193</sup> Thus, a tattoo artist's tattoo for a client is unlikely to be categorized as a work made for hire under either situation.

## 2. *Alternative Ownership: Joint Work*

Another possible form of ownership in the tattoo industry may be one in which the work created is a joint work.<sup>194</sup> If two or more authors create a joint work, then they are considered co-owners of the work with equal copyright ownership.<sup>195</sup> Under this form of ownership however, there must be an intention by both authors to create a joint work.<sup>196</sup> Generally, joint authorship is difficult to obtain since tattoo clients do not typically intend to collaborate strongly with the tattoo artist.<sup>197</sup> Though there is a general collaborative relationship between the tattoo artist and the client, this is a very loose relationship.<sup>198</sup> Clients usually rely on the tattoo artist's expertise and allow the artist to create the design.<sup>199</sup> Thus, when a client enters a tattoo shop and communicates his or her ideas to the artist, no joint ownership is created since ideas themselves are not copyrightable.<sup>200</sup> In conclusion, the tattoo artist will,

---

190. *Id.*

191. U.S. COPYRIGHT OFFICE, *supra* note 40, at 1 (The nine qualifying categories of work include works specially commissioned for use as: (1) a contribution to a collective work; (2) a part of a motion picture or other audiovisual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for tests; or (9) an atlas.).

192. *Id.*

193. Commander, *supra* note 169, at 1970.

194. 17 U.S.C. § 101 (defining "joint work").

195. Harkins, *supra* note 113, at 326 (citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994)).

196. 17 U.S.C. § 101 (defining "joint work").

197. Commander, *supra* note 169, at 1974.

198. Grassi, *supra* note 78, at 51 (Often, the client and artist collaborate in creating the design. The client will usually describe what he wants along with the colors he wants as well. However, a small contribution is insufficient to create a joint work. The client must have made contributions so substantial that the final piece would not be complete without his contribution.).

199. *See id.*

200. 17 U.S.C. § 102(b).

more often than not, be the sole creator and owner of the tattoo design and thus be solely eligible for copyright protection of his or her work.

### *3. The Client's Right to Personal Autonomy*

Though the tattoo artist may have copyright protection in his design, the client's personal autonomy must still be addressed. As previously recognized, there may be a difference in copyright protection for the separate design and the application of the design to the body.<sup>201</sup>

#### *a. First Fixation on Paper*

One method of fixation is when the tattoo artist first draws the tattoo design onto a piece of transfer paper.<sup>202</sup> If first fixation is embodied on a piece of paper, then the first sale doctrine may apply in determining how a client balances his personal autonomy with the tattoo artist's copyright ownership.

#### *i. First Sale Doctrine*

Under the first sale doctrine, any person who lawfully obtains a copy of the copyrighted artwork from the owner acquires the right to display his copy publicly.<sup>203</sup> Thus, the copyright owner's rights as to the particular copy given to a subsequent person are exhausted.<sup>204</sup> If the tattoo design is fixed onto a piece of transfer paper beforehand, then it can be argued that the process of tattooing the design onto the skin subsequently creates a mere copy of the original work. Following this reasoning, the client may then have the right to remove the tattoo from his skin or to have the right to display the tattoo in public since the tattoo is essentially a copy and the tattoo artist has been compensated for the tattoo already.<sup>205</sup> The tattoo design placed onto a client's skin would be a copy of the original design. Once the tattoo artist has been paid for the work, then rights as to that particular copy (on client's skin), are exhausted, as rights go only as far as the first sale.<sup>206</sup> Thus, a tattoo design that is first fixed onto a piece of transfer paper may pose no danger to a client's personal autonomy to freely walk down the streets.

---

201. *See supra* Part II.D.

202. *See* Douglas, *supra* note 147.

203. 17 U.S.C. § 109(c).

204. *See supra* note 83 and accompanying text.

205. Cummings, *supra* note 144, at 309 (A client who has a copy of the tattoo on her skin has merely purchased a copy of the design. The original design was fixed on a separate medium first. This is similar to a customer who purchases a novel. The customer can subsequently transfer, draw on, or destroy his copy without interfering with the copyright owner's rights.).

206. *Id.*

*b. First Fixation on a Client's Skin*

Given the previous situation, what should happen in the case that a tattoo is directly inked onto a client's body instead? In this situation, the design is placed on the client instead of a copy of the design being placed on the client. Here, the client would be the original piece of work and an artist's rights to the work would come into greater conflict with the client's freedom to his or her own body. However, in this case, the idea of an implied license may be applied.

*i. Implied License*

The traditional tangible medium allows an artist to freely limit displays and reproductions of his copyrighted work with ease.<sup>207</sup> However, when the human body becomes the tangible medium, a tattoo artist cannot reasonably expect to have complete control in limiting a client's ability to display the design.<sup>208</sup> When a tattoo artist applies a design to the client's body, it is well known by the artist that the client will be out in public and photographed.<sup>209</sup> In addition to this, clients often choose to tattoo certain body parts because of its visibility to the public.<sup>210</sup> This is done out of the desire for self-expression and growth. Thus, many scholars have recognized the potential harm in allowing an artist to control the client's public appearances and activities since it limits the ideals of personal autonomy and freedom.<sup>211</sup>

It can be understood, then, that in obtaining a tattoo, a client also obtains an implicit license to be seen in public. With many clients choosing tattoo locations that are easily seen by the public, an implied license should be extended to public displays of the tattoo at least.<sup>212</sup> In deciding whether an implied license exists, it must be considered whether the licensee requested the work, whether the creator made the

---

207. 17 U.S.C. § 106.

208. Bradley, *supra* note 124, at 2.

209. *Id.*

210. *Id.*

211. Cummings, *supra* note 144, at 309 (There is a generally accepted idea that the law should be construed to avoid any absurd results. Given a society that puts values such as personal freedom and basic human rights at the height of importance, the issue of providing copyright protection for tattoos could be fatal for personal autonomy.).

212. Orit Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA HIGH TECH. L.J., 275, 277 (2009) (The implied license doctrine sought to resolve "the tension between the owner of a tangible object in which a work is incorporated and the owner of the copyright for that work, and the tension between the creator of a work and his or her transferee." The implied license allows reasonable use of a copyrighted work by one party, by assuming that an implicit consent was given by the copyright owner.).

work, and whether the creator intended that the licensee would make use of the work.<sup>213</sup>

Under these considerations, it is shown that an implied license does exist in this situation. The sole purpose of a client entering a tattoo shop is to request a tattoo from the tattoo artist. Afterwards, the tattoo artist directly inks the design onto the client's skin. The third consideration of whether the creator intended that the licensee would make use of the work is satisfied as well. Tattoo artists generally agree that they own the actual design, but that is as far as the ownership goes.<sup>214</sup> A tattoo is seen as an affirmation of individual freedom and right to own his or her body.<sup>215</sup> Tattoo artist norms show a great trend in respecting personal autonomy.<sup>216</sup> Thus, once a design is inked onto a client's body, tattoo artists acknowledge that control over that specific image shifts to the client.<sup>217</sup> Thus, an implied license to publicly display the tattoo should be granted to a client.

#### *4. Why Tattoos Should Receive Copyright Protection*

In an industry long subjected to societal prejudice, copyright protection has never been considered for tattoos. Most tattoo artists believe that turning to the courts for protection will not truly compensate them and will only lead to distraction.<sup>218</sup> However, copyright protection should be granted to a tattoo design not just for the sake of the artist, but for the client as well. Tattoo artists show a great adherence in respecting a client's personal autonomy and disfavor reuse of any custom tattoo designs.<sup>219</sup> This attitude is upheld by the tattoo industry mostly out of respect for the clients—the people who trustingly request an artist to permanently ink their skin.<sup>220</sup> Clients have expectations of personal and meaningful tattoos.<sup>221</sup> In modern society, tattoos have become extremely personal statements of individuality and tattoo artists have a

---

213. *See supra* Part II.A.2.c.i.

214. Perzanowski, *supra* note 1, at 536 (In a question regarding industry norms regarding rights to control a client's display or use of the tattoo, a tattoo artist stated that the tattoo is an affirmation of one's body. As soon as the tattoo has been inked, then that is as far as control extends. The tattoo artist expressed her distaste in claiming control over a client's use of the tattoo.)

215. *Id.*

216. Perzanowski, *supra* note 1, at 541 (The relationship between a client and tattoo artist is personal and intimate at times. By drawing up a design for a client, it is understood that the design is strictly for the client only. There is an unwritten law stating that the design created is a product of the relationship between a client and his tattoo artist.)

217. *Id.* at 532.

218. Commander, *supra* note 169, at 1964.

219. *See supra* note 216 and accompanying text.

220. *See supra* note 216 and accompanying text; Perzanowski, *supra* note 1, at 555.

221. *Id.*

great desire in protecting these values.<sup>222</sup> Thus, it would benefit both the tattoo artist and the client if copyright protection were afforded to these personal, custom-made designs.

#### V. PROPOSAL

Because tattooers have been repeatedly subject to unconstitutional regulations of their industry, reluctance in relying on the judicial system for just compensation is understandable.<sup>223</sup> This long-held sense of nonconformity and rebellion against the law has, in turn, created industry norms that have, until more recently, acted as the invisible rulebook.<sup>224</sup> Thus, the following proposal attempts to strike a balance between century-old tattoo norms and copyright protection that should finally be awarded to tattoo artists.

In order to upkeep tattoo norms and not impose obligations on an industry guided so heavily by cultural norms, tattoo artists should be given the option to receive royalties of any public exploitation of their work instead of enforcing obligations upon them. Because of constant tension towards the judicial system by an industry that values freedom and creativity born from nonconformity, this proposal allows tattoo artists to stay true to their history of deviating from social norms whilst still giving an available path for compensation.

Under this solution, the tattoo artist owns copyright to the tattoo design by default. Any right to reproduce the design is given to the tattoo artist. However, since a client has the right to display his or her own copy of the tattoo in public, either by the first sale doctrine or through an implied license, a tattoo artist must be afforded compensation for any further exploitation of his or her tattoo design. Thus, a tattoo artist should have the right to receive royalties from a client who features the tattoo for any commercial purposes. Under this proposal, the tattoo artist has the option to create a written agreement prior to inking the client's skin, in which the client must agree to compensate the artist in the form of royalties for any commercial exploitation of his or her tattoo. If the tattoo artist forgoes to utilize this option, then the right to receive royalties is considered waived. Here, featured uses of the tattoo would

---

222. Perzanowski, *supra* note 1, at 555 (The clients now have expectations of personal one-of-a-kind tattoos. Tattoo artists agree that these custom designs have very personal sentiments attached to them. These tattoos are expressions of individuality, or even possibly something sacred. Therefore, when tattoo artists copy other custom designs, it devalues the meaning of the client's tattoo.).

223. *Id.* at 574.

224. See generally Perzanowski, *supra* note 1.

be any situation in which the tattoo becomes the “principal focus of the audience’s attention.”<sup>225</sup>

In the event that a written agreement is created between the artist and the client, it becomes the client’s duty to, in good faith, contact the artist whenever the tattoo is featured for commercial purposes. If the client fails to do so, a breach of agreement will have occurred and the tattoo artist would have the ability to receive damages in either the form of an injunction or lost profits.<sup>226</sup> Additionally, if the tattoo artist registers the tattoo design prior to bringing an infringement claim and is able to prove willful infringement, then the ceiling for recovery in statutory damages may rise to \$150,000 per work infringed.<sup>227</sup> Thus, the remedies available for infringement of an artist’s tattoo design would remain the same under the remedies provided for traditional copyright infringement cases.

This duty imposed upon the client ensures compliance with the terms of the agreement since there is increased risk of noncompliance due to the fact that the tangible medium is the human body, which has the ability to freely move around unrestricted. However, since there is a general consensus by tattoo artists in not wanting to dictate a client’s personal autonomy,<sup>228</sup> creating an option instead of an obligation would be most beneficial. Additionally, this option would most likely only be utilized by artists who tattoo famous people or celebrities. This is because celebrities have a greater chance of having their tattoos featured for commercial purposes. Since tattoo norms indicate a general disfavor in controlling a person’s use of his own body, it is unlikely that tattoo artists would exploit this option. This proposal balances the tattoo artist’s right to compensation with a client’s ability to freely utilize his own body.

## VI. CONCLUSION

The goal of affording copyright protection is to aid in the progress of science and the useful arts. With technology and societal norms constantly developing, so should the attitudes of the judicial system towards tattoos as copyrightable subject matter. Every day, amazing and beautiful works of art are being created, whether through painting, writing, inking, or building. To say that one form of expression is any

---

225. Commander, *supra* note 169, at 1984 (The term “featured” means prominent under the common understanding by courts and governments when interpreting this term.).

226. See *supra* Part II.A.4.

227. See *supra* Part II.A.4; see also 17 U.S.C. § 504(c)(2) (2018).

228. Perzanowski, *supra* note 1, at 555.

less considered as “art” than another would only be a disservice towards the ultimate goal of copyright law.

The hope is to gradually aid this industry, long suppressed by the judicial system, in gaining greater protection for works that have increasingly become more intricate and unique. With the tattoo industry finally coming to a forefront as a more respectable and understandable method of self-expression, it is time to consider affording these tattoo artists just as strong of a copyright protection as afforded to any other type of creator.