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## Trypanophobia: The Scary World of Tattoos and the Law

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# TRYPANOPHOBIA: THE SCARY WORLD OF TATTOOS AND THE LAW

DALTON PRIMEAUX

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*“As a tattoo is grounded on living skin, so its essence emotes a poignancy  
unique to the mortal human condition.” – V. Vale*

## INTRODUCTION

Imagine the judge strikes his gavel and so opines the defendant and the tattoo artist who injected ink into the defendant's dermis in the form of Snoopy are both hooligans, degenerates, and most devastating, infringers.

As ordered by the court via the plaintiff's injunction, the defendant can no longer display adorable little Snoopy on his forearm and will need to get it removed. The gavel strikes again, a group of people surround the defendant and manhandle him into position. One person retrieves the defendant's forearm and forcibly extends it. While another, brandishing a razor-sharp scalpel, scrapes the skin where Snoopy once lived off the defendant's arm. The artist silently cries as the skinner tosses the removed flesh to the plaintiff, who catches it in both hands with a wink and a smile. The defendant faints on the courtroom floor from blood loss.

Unfortunately, for the sake of entertainment, this paper will not explore that as a court case. Instead, the Snoopy example depicts one of the completely irrational fears that haunt the body art community in America. Along with courts ordering involuntary removal of infringing tattoo art, artists and patrons alike shops closing, lost jobs, and debilitating legal damages.

However, there is an argument that body art will be present in modern culture as long as humans continue to embrace notions of autonomy, confidence, individualism, and self-expression. Whether these fears are rational or not, the law would be doing a disservice to the roughly 60 million people in America who have tattoos, body art, or work in the industry if they do not employ a more lenient approach to body art infringement, with the individual's self-expression weighed most heavily, and the modification of the subject's body identified as a commissioned work.<sup>1</sup>

Why would commissioning a canvas from a painter be any different than a tattoo artist or piercer? These are artists and professionals called to work on a project by an individual who trusted them.<sup>2</sup> The individual is seeking a new way to express themselves, whether it be decorating the space or the body they live in.<sup>3</sup>

Are tattoos considered copies under the Copyright Act of 1976? And if so, who owns the copyright? Are there merits to copyright protection of body art and tattoos?

Courts have not yet had to confront these hard questions, and the mystery that lies in these unanswered questions makes artists and customers uneasy.<sup>4</sup> The difficulty of monitoring the subject and others' subsequent use of their designs may discourage many artists from attempting to enforce or even

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1. Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup and Other Body Art*, 10 UCLA ENT. L. REV. 97, 106 (2003).

2. *Id.* at 104.

3. *Id.* at 135.

4. *Id.* at 100.

register their copyrights.<sup>5</sup> And mark holders may have not made an issue of others' incorporation of their intellectual property into body art out of concern that doing so would irritate the body art community.<sup>6</sup> High cost of policing these uses may also be a factor.<sup>7</sup>

But without substantial case law, how can lawyers anticipate rulings, or most importantly, alleviate their body artist clients' fears? This paper aims to answer just that. First, this paper will explore the current legal landscape of Copyright Law and how it interacts with body art. Then, it will investigate unique legal issues embedded in body art. It will conclude with a bold assertion that will anticipate the legal future of body art.

## I. CURRENT LEGAL LANDSCAPE OF COPYRIGHT LAW AND BODY ART

The law can act as a crystal ball, allowing us to peer into the future and anticipate a sweeping change in an industry or practice. But first, we must take the time to understand the current landscape and how we got here.

Body art has become a big business.<sup>8</sup> There has been an increase in the number of tattoo shops in the U.S. from about 300 in the 1970s to more than 4,000 in 1999.<sup>9</sup> The U.S. tattoo industry is estimated to generate \$2.3 billion in annual revenue.<sup>10</sup> It is likely foreseeable that more people will begin asserting intellectual property rights in their works of body art, or against the unauthorized use of their intellectual property in others' body art.<sup>11</sup>

### A. History of Body Art and Tattoos

To say skin is not a tangible medium would be ignoring hundreds, even thousands, of years of body art traditions. Tattoos predate 2000 B.C.<sup>12</sup> Since then, people have used tattoos to show dedication to their faith, as a form of status, and as a physical manifestation of art.<sup>13</sup>

In 1991, hikers found a 5300-year-old mummy in the Alps. The frozen corpse was embellished with more than fifty tattoos, inked with a pigment

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5. *Id.* at 100-01.

6. *Id.* at 101.

7. *Id.*

8. *Id.*

9. *Id.*

10. See Aaron Perzanowski, *Tattoos and IP Norms*, 98 MINN. L. REV. 511, 512 (2013); Cotter & Mirabole, *supra* note 1; Max Chafkin, *King Ink, Inc.* (Nov. 1, 2007), <http://www.inc.com/magazine/20071101/king-ink.html> [https://perma.cc/72YA-MVMC].

11. Cotter & Mirabole, *supra* note 1, at 101.

12. Chandel Boozer, *When the Ink Dries, Whose Tatt Is it Anyway? The Copyrightability of Tattoos*, 25 JEFFREY S. MOORAD SPORTS L.J. 275, 275 (2018).

13. *Id.*

derived from soot.<sup>14</sup> Egyptian mummies dating back to 2100 B.C. were tattooed with a pricking instrument, believably comprised of fish bones set into a wooden handle.<sup>15</sup> A Scythian mummy from 500 B.C. had elaborate illustrations of animals on its arms and back.<sup>16</sup> Similarly, a thousand-year-old Peruvian mummy had ornamental tattoos showcasing stylized birds and reptiles on its arms, hands, and legs.<sup>17</sup> Evidence dates to at least 300 B.C. in Japan.<sup>18</sup>

The scolding in Leviticus says “never mark your skin with tattoos” which suggests the practice was at least a familiar idea among the Israelites.<sup>19</sup> Tattooing was done by the Persians as well as the Greeks, who in turn passed the practice on to the Romans.<sup>20</sup> Some tattoos denoted high social status, but Greek and Roman tattoos were reserved for prisoners and slaves.<sup>21</sup> Where some tattoos were purely ornamental, others had ceremonial or even therapeutic purposes.<sup>22</sup>

Captain James Cook is said to have introduced the term “tattoo” into the English language through his accounts of his travels to Polynesia around 1769, where he witnessed Tahitians engaged in tattooing.<sup>23</sup> Both Tahitian men and women inlaid black ink, derived from smoke and ash, by way of a flat piece of bone or shell struck to pierce the skin.<sup>24</sup> While tattooing developed in cultures across the globe, Cook’s tales captivated the public, marking the beginning of the modern tattoo.<sup>25</sup> After Captain Cook’s second circumnavigation, he returned as a living example of body art.<sup>26</sup> In 1774, Omai, a tattooed native of the island of Raiatea, arrived in England on board Cook’s

14. See Perzanowski, *supra* note 10, at 516; Maria Anna Pabst et al., *The Tattoos of the Tyrolean Iceman: A Light Microscopical, Ultrastructural, and Element Analytical Study*, 36 J. ARCHAEOLOGICAL SCI. 2335, 2335 (2009); Jennifer Viegas, *Oetzi Iceman's Tattoos Came from Fireplace*, DISCOVERY NEWS (July 17, 2009), <http://www.nbcnews.com/id/wbna31965532> [https://perma.cc/3L7H-P3LR].

15. See C.P. Jones, *Stigma and Tattoo*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 1 (Jane Caplan ed., 2000).

16. Perzanowski, *supra* note 10, at 517; Pabst et al., *supra* note 14, at 2337.

17. Perzanowski, *supra* note 10, at 517. Leopold Dorfer et al., *A Medical Report from the Stone Age*, 354 LANCET 1023, 1023 (1999).

18. Perzanowski, *supra* note 10, at 517; Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* 72 (2000).

19. *Leviticus* 28:19 (New Living Translation); See Perzanowski, *supra* note 10, at 517.

20. Perzanowski, *supra* note 10, at 517; C.P. Jones, *Stigma: Tattooing and Branding in Greco-Roman Antiquity*, 77 J. OF ROMAN STUDIES 139, 141 (1987).

21. Perzanowski, *supra* note 10, at 517-18; C.P. Jones, *supra* note 20, at 140.

22. Perzanowski, *supra* note 10, at 517; Dorfer et al., *supra* note 17, at 1023.

23. Perzanowski, *supra* note 10, at 516; Jones, *supra* note 15, at 142.

24. JAMES COOK, CAPTAIN COOK’S JOURNAL DURING HIS FIRST VOYAGE ROUND THE WORLD MADE IN H.M. BARK “ENDEAVOUR,” 1768-71: A LITERAL TRANSCRIPTION OF THE ORIGINAL MSS. WITH NOTES AND INTRODUCTION 93 (William J. L. Wharton ed., 1893) (photo. reprt. 1981); Perzanowski, *supra* note 10, at 516.

25. See Perzanowski, *supra* note 10, at 516. See Juliet Fleming, *The Renaissance Tattoo*, 31 RES: ANTHROPOLOGY AND AESTHETICS 34, 39 (1997).

26. Perzanowski, *supra* note 10, at 518; Harriet Guest, *Curiously Marked: Tattooing and Gender Differences in Eighteenth-Century British Perceptions of the South Pacific*, in WRITTEN ON THE BODY 83 (Jane Caplan ed. 2000).

ship.<sup>27</sup> Omai became an instant celebrity.<sup>28</sup> Renowned artists painted him, theatres made him into a box-office hit, and respected aristocrats considered shaking his hand to be an honor.<sup>29</sup> Most importantly, he sparked a tattooing movement among the English gentry.<sup>30</sup> By the nineteenth century, ink-slinging was in vogue. Europe's fashionable society was engrossed with tattoos.<sup>31</sup> An English tattoo artist of the late 19th century, Sutherland Macdonald, opened a tattoo shop where wealthy people joined the newly tattooed upper class with the likes of the Duke of York, Lady Randolph Churchill, and King Oscar II of Sweden.<sup>32</sup>

In 1846, an early tattoo artist, Martin "Old Martin" Hildebrandt, opened the first American tattoo shop in New York.<sup>33</sup> During this time, U.S. tattoo artists relied on the same basic methods and tools used for thousands of years.<sup>34</sup> And in 1891, another New York-based artist, Samuel O'Reily, invented the electric tattoo machine, a device that profoundly reshaped tattooing.<sup>35</sup> The electric device's introduction to the field made tattooing inexpensive, faster, and less painful.<sup>36</sup> It also facilitated the development of a distinctive American aesthetic in tattoos characterized by strong lines, heavy shading, and a limited palette.<sup>37</sup>

Tattoo artists worked almost exclusively from collections of pre-drawn images of military insignia, hearts, skulls, snakes, and scantily clad women called "flash." These designs hung on the walls of nearly every tattoo shop of the time, and when an artist came across an appealing new design, they copied it.<sup>38</sup> The amalgamation of these simple, pre-made designs, coupled with the electric tattoo machine, enabled the industry to capitalize on the popularity of tattoos during the Interbellum period.<sup>39</sup> Soldiers and sailors who frequented tattoo shops in large groups with limited leave time also strengthened the popularity of tattooing and helped set style trends.<sup>40</sup> However, after the war, the popularity of tattoos began to decline.<sup>41</sup> Many soldiers returning home realized that their tattoos were unacceptable outside of the military.<sup>42</sup> Plus, the unsanitary conditions in many tattoo shops raised grave

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27. Perzanowski, *supra* note 10, at 518.

28. *Id.*

29. *Id.*

30. *Id.*; Fleming, *supra* note 25, at 39.

31. Perzanowski, *supra* note 10 at 519; James Bradley, *Body Commodification? Class and Tattoos in Victorian Britain*, in WRITTEN ON THE BODY 145 (Jane Caplan ed., 2000).

32. See Perzanowski, *supra* note 10 at 519.

33. *Id.*; DeMello, *supra* note 18.

34. See Perzanowski, *supra* note 10 at 519.

35. See U.S. Patent No. 464,801 (issued Dec. 8, 1891); Perzanowski, *supra* note 10.

36. See Perzanowski, *supra* note 10 at 519-520.

37. *Id.* at 520.

38. *Id.*; DeMello, *supra* at note 18.

39. See Perzanowski, *supra* note 10 at 520.

40. *Id.*

41. *Id.* at 521.

42. *Id.*

health concerns.<sup>43</sup> After hepatitis outbreaks, many states began heavily regulating or banning tattooing.<sup>44</sup>

Beginning in the 1960s, tattoo artists began to reconceptualize their work.<sup>45</sup> Norman Collins, known as Sailor Jerry, promoted artistry in the U.S. tattoo industry by creating elaborate and thematically consistent tattoos that incorporated the entire human body as a canvas, inspired by Japanese tattoo culture of the time.<sup>46</sup> Over the next few decades, the innovations of Sailor Jerry and his proteges, like Don Ed Hardy, helped bring major changes to the industry.<sup>47</sup>

Experienced fine artists, many with graduate-level educations, began to see tattooing as a reasonable career path.<sup>48</sup> As clients became more affluent and knowledgeable about tattoos and art, they established higher expectations of skill and originality.<sup>49</sup> These changes led to the development of custom tattooing.<sup>50</sup> This provided artists an opportunity to create new pieces of original art.<sup>51</sup>

Consequently, the contemporary tattoo industry involves two different models. One, the common conception of a tattoo shop, where clients walk in off of the street without appointments, select a flash from the sheets hanging on the wall, and are tattooed by whichever artist happens to be free.<sup>52</sup> The second less familiar model is the high-end custom shop.<sup>53</sup> Rather than walk-ins, artists book appointments several months in advance.<sup>54</sup> Instead of flash hanging on the walls, each artist has a portfolio of custom tattoos available to peruse.<sup>55</sup>

## B. The Growing Popularity and Acceptance of Tattoos

As mentioned earlier, in the United States alone there has been an astounding increase in the number of tattoo shops.<sup>56</sup> Tattoos have grown in popularity through the years, becoming less taboo, and today more than 20 percent of all Americans and nearly 40 percent of millennials have at least one tattoo.<sup>57</sup> It has also been reported that two percent of Americans have a

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43. *Id.*

44. *Id.*

45. *Id.* at 522; *See also* Arnold Rubin, *The Tattoo Renaissance*, in MARKS OF CIVILIZATION 14-15 (1988).

46. *See* Perzanowski, *supra* note 10 at 522.

47. *See infra* text accompanying note 59 for Don Ed Hardy's rise to fame in the fashion industry.

48. *See* Perzanowski, *supra* note 10 at 522.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 524.

54. *Id.*

55. *Id.*

56. Cotter & Mirabole, *supra* note 1 at 101.

57. Boozer, *supra* note 12.



body piercing, other than an earring, and four percent have both body piercings and tattoos.<sup>58</sup>

Tattoos are part of mainstream culture in the United States. This is especially true among younger generations. While 23 percent of Americans have at least one tattoo, 32 percent of “Generation Xers” have at least one, and 38 percent of millennials have at least one. [Nineteen] percent of millennials have at least two. Movie stars and sports stars now commonly have several tattoos. Chart-topping pop star Lady Gaga announced the title of her most recent album by tattooing it on her body and flashing the tattoo at Los Angeles International Airport. Eighteen-year-old Disney starlet Demi Lovato thanked her fans for their support by tattooing “Stay Strong” on her wrist. In 2005, the cable television channel TLC began broadcasting the reality TV show *Miami Ink*, which followed the events of a tattoo shop in Miami Beach, Florida. *Miami Ink*’s success led to spinoffs in Los Angeles, London, and Rio de Janeiro. Along with, and indeed aided by, the success of the reality TV shows, the modern U.S. tattoo industry is a multi-billion-dollar industry.<sup>59</sup>

Some tattoo artists have become world-renowned and have been able to enter into other creative markets.<sup>60</sup> Ed Hardy, Sailor Jerry’s apprentice, is possibly the most famous.<sup>61</sup> Hardy licensed his artwork to an apparel marketer, and the clothing line has become rather profitable.<sup>62</sup> Another is Katherine Drachenberg, known as Kat Von D.<sup>63</sup> After starring in *Miami Ink* and *LA Ink*, she launched a clothing line of her own, created a line of makeup with the Sephora makeup company, and wrote two bestselling books.<sup>64</sup> Mark Machado, also known as Mister Cartoon, is a Los Angeles-based tattoo artist who began tattooing in the mid-1990s.<sup>65</sup> He rose to fame after tattooing Eminem.<sup>66</sup> Machado has since painted tattoo-inspired artwork for Vans, Nike, Rockstar Games, and MetroPCS.<sup>67</sup> With their prominence and profitability, tattoos will not be outside the bounds of formal intellectual property law for long.

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58. David Whelan, *Ink Me, Stud*, 23 AM. DEMOGRAPHICS 9 (Dec. 1, 2001).

59. Matthew Beasley, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1138-39 (2012).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1139. See *infra* text accompanying note 126 for Kat Von D’s involvement in a copyright lawsuit.

64. Beasley, *supra* note 59 at 1139-40.

65. *Id.* at 1140.

66. *Id.*

67. *Id.*

### C. Copyrightable: Basic Statutory Requirements by Copyright Act of 1976

The Copyright Act of 1976 forms the basis of copyright law in the United States today, implementing fundamental changes in many aspects of copyright law. It took effect on January 1, 1978, and provides legal protection for original works of authorship, including literary, artistic, musical, and dramatic works. The act protects original works fixed in a tangible medium of expression, including books, movies, music, software, and other creative works. The act includes limitations and exceptions to copyright, such as the doctrine of first sale, library, and archive exceptions, as well as provisions for accessible formats for the visually impaired.

When copyright subsists in a work of body art, it affords the author of the work various exclusive rights, including reproduction, adaptation, public display, and moral rights. Nevertheless, copyright laws can be a funny thing. Copyright subsists in jewelry and fabric design.<sup>68</sup> Although in some cases, like *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,<sup>69</sup> courts held that a jeweled bee pin is uncopyrightable, reasoning that there were so few ways of expressing the underlying idea that the idea merged with the expression. Generally, however, copyright does not subsist in clothing design, although it may exist in some fanciful costumes and masks.<sup>70</sup>

We may assume that if the artist draws the tattoo on tattoo transfer paper, the drawing on the paper would be entitled to protection under the Copyright Act.<sup>71</sup> The transfer of the tattoo from paper to skin would probably be considered a derivative work, but it could be an original creation if the artist takes artistic liberties in conforming the transfer to the geography of the skin.<sup>72</sup> But, based on the above examples, we know that copyright law is much more nuanced and methodical. So, let us dig deeper.

#### 1. *Is a Tattoo a Copy?*

Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression. A work must meet requirements of authorship, originality, and fixed to be considered a copy.<sup>73</sup> A human being or a legal entity must create the copy.<sup>74</sup> This means that someone or an organization must have produced

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68. See *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759 (2d Cir. 1991).

69. 446 F.2d 738 (9th Cir. 1971) (holding that where idea and expression are indistinguishable, copying the expression would not be barred by copyright).

70. See *Silvertop Associates, Inc. v. Kangaroo Manufacturing, Inc.*, 319 F.Supp.3d 754, 760 (D.N.J., 2018) (stating that a copyright was issued for a banana costume).

71. Christine Lesicko, *Tattoos as Visual Art: How Body Art Fits into The Visual Artists Rights Act*, 53 IDEA 39 (2013).

72. *Id.*

73. 17 U.S.C. § 101.

74. *Id.*

the work intentionally and have a claim of ownership over it.<sup>75</sup> Without authorship, a work cannot be considered a copy.<sup>76</sup>

Originality refers to the requirement that the work must possess a certain level of creativity or novelty.<sup>77</sup> It should demonstrate some level of independent intellectual effort or original expression by the author.<sup>78</sup> In other words, the work should not be a mere reproduction or imitation of existing works, but rather contain some unique elements that distinguish it from others.<sup>79</sup>

To be considered a copy, the work must be fixed in a tangible form.<sup>80</sup> It must be recorded or embodied in a medium that allows it to be perceived, reproduced, or communicated over time.<sup>81</sup> A work is fixed when it is captured by or under the authority of an author in a sufficiently permanent medium such that the work can be perceived, reproduced, or communicated for more than a short time.<sup>82</sup> The fixation requirement ensures the work is concrete and can be stored and shared.<sup>83</sup> These requirements collectively define the boundaries of what constitutes a copy, distinguishing it from other forms of expression or reproduction.<sup>84</sup> Some examples of fixed forms include writings, digital files, audio or video recordings, and paintings.<sup>85</sup>

In *Gonzales v. Kid Zone*, the court held that an artist's pictorial works, including depictions of the Virgin Mary, eagles, and national flags were copyrightable, and thus infringed when incorporated into the defendant's transfer tattoos.<sup>86</sup> The artist brought suit when the designer prepared, and the marketer began to sell tattoos strikingly similar in design to the artist's works.<sup>87</sup> The court found the tattoos were not only intended to reproduce "the flavor of the art," but intentionally appropriated the expression of the artist.<sup>88</sup> The court however did not find the infringement to be willful.<sup>89</sup> An infringement of a copyrighted work is willful if the infringement is done knowingly or with reckless disregard of the rights of the copyright owner, and may result in a potentially higher award of statutory damages.<sup>90</sup> A single individual cannot appropriate ideas and concepts. However, the essence of copyright law

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75. *Id.*

76. 17 U.S.C. § 101.

77. *Id.*

78. *Id.*

79. 17 U.S.C. § 101.

80. *Id.*

81. *Id.*

82. 17 U.S.C. § 101.

83. *Id.*

84. *Id.*

85. 17 U.S.C. § 101.

86. *Gonzales v. Kid Zone, Ltd.*, No. 00-3969, 2001 WL 930791, at \*1, 2 (N.D. Ill. Aug. 15, 2001).

87. *See id.* at \*3.

88. *Id.* at \*3.

89. *See id.* at \*2.

90. *Id.* at \*3.

is to protect specific expressions of ideas, even common ones.<sup>91</sup> Nonetheless, there was no evidence of any commercial exploitation of the infringing work, so the court awarded the minimum statutory damages under 17 U.S.C. § 504 (c)(1) of \$750 per infringement and denied the artist's request for attorney's fees.<sup>92</sup> The artist's motion for judgment was granted and \$3000 in damages was awarded.<sup>93</sup> Even though the tattoos in *Gonzales* were temporary and not permanently injected under the skin, the court unequivocally deemed the designs protectable and unquestionably identified them as copies.<sup>94</sup> Although *Gonzales* did not set a precedent explicitly within the domain of intellectual property law pertaining to tattoos, its emphasis on tattoos, even though temporary and not permanently injected under the skin, serves as an amusing and lighthearted illustration in this paper to improve understanding of the IP concept of a 'copy.'

In *Carell v. Shubert*, the parties agreed that the make-up designs were copyrightable, and that the creator of these designs was entitled to copyright protection even if she did not apply the makeup to the show's performers.<sup>95</sup> Similar to *Gonzalez*, the designs were temporarily showcased on the skin. However, the copyright resides within the creation of the design, not in the permanence of the design. The copyright exists when fixed, but not destroyed when removed.

This action arises out of a dispute concerning the copyright in makeup designs created for the cast of the Broadway musical *Cats*. Plaintiff filed an action, asserting claims for copyright infringement, false designation of origin, antitrust violations, and an accounting for profits, arising out of defendants' use and publication of the designs.<sup>96</sup> The court in *Carell* stated that the designs contain the requisite degree of originality, and are fixed in tangible form on the faces of the *Cats* actors.<sup>97</sup>

Although some body art designs lack the minimal originality necessary to sustain copyright protection, others are so common that they would be considered *scène à faire* (French for "scene to be made") and hence not subject to copyright protection.<sup>98</sup> Under the widely accepted theory, tattoos can indeed meet each requirement. An original pictorial work embodied in a tattoo would appear to be copyrightable if fixed in a tangible medium of expression such as a human body.<sup>99</sup>

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91. *Id.* at \*4.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Carell v. Shubert Org.*, 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000).

96. *Id.*

97. *Id.*

98. *See id.*; *see also* *Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 US 340, 358 (1991).

99. *Cotter & Mirabole, supra* note 1; 17 U.S.C. § 102.

## 2. *Ownership*

Once a work is eligible for copyright protection, it becomes imperative to ascertain the rightful owner of the copyright, who will then possess the rights granted under the provisions of the copyright law. The Copyright Act provides that initial ownership of the copyright in a protected work vests in the author or authors of the work.<sup>100</sup> The copyright owner is granted certain exclusive rights in the copyrighted work under the Copyright Act.<sup>101</sup> These include the exclusive right to reproduce the copyrighted work, to prepare derivative works based on the work, to distribute copies of the work, and to display the work publicly.<sup>102</sup> Along with the exclusive right to exercise these rights, the copyright owner also possesses the right to authorize or license others to exercise these exclusive rights.<sup>103</sup> Moreover, one can transfer their copyright ownership in whole or in part by any means of conveyance or by operation of law and is inheritable and devisable.<sup>104</sup>

When multiple people are involved in the creation or production of a work, copyright protection exists in works that represent the original intellectual conceptions of the authors.<sup>105</sup> The Copyright Act defines a joint work as 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.<sup>106</sup> The courts examine various factors to determine whether two or more individuals intended to be joint authors of a piece of work.<sup>107</sup> These factors include delegation of decision-making authority, how the parties represented themselves in the work, and written agreement details.<sup>108</sup> The courts also considered the outward signs that demonstrate the parties' intention to be coauthors.<sup>109</sup> Ultimately, if the court establishes that multiple parties are joint authors, they will share an equal stake in the work, which can be inherited and transferred.<sup>110</sup> Additionally, the consent of all coauthors will be necessary for any assignment or exclusive licensing of the work.<sup>111</sup>

The Copyright Act also provides that the copyright in a work prepared by an employee may belong to the employer if the work qualifies as a work made for hire. To qualify as a work made for hire, a work must either be prepared by an employee within the scope of employment or specially

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100. 17 U.S.C. § 201.

101. *Id.*

102. 17 U.S.C. § 106.

103. 17 U.S.C. § 201(d).

104. *Id.*

105. 17 U.S.C. § 101; See Michael C. Minahan, *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713 (2015).

106. 17 U.S.C. § 101.

107. *Id.*

108. *Id.*

109. *Id.*; Minahan, *supra* note 105 at 1719.

110. Minahan, *supra* note 105 at 1719.

111. *Id.*

ordered for use in a collective work, so long as the parties expressly agree that the work is a work made for hire. The work made for hire doctrine may still apply if the hired party is determined to be an independent contractor as long as they satisfy the two requirements.<sup>112</sup> First, the purpose of the work must be for use as a contribution to a collective work, and secondly, the parties must expressly agree that the work will be considered a work for hire.

Alongside the rights bestowed by the Copyright Act, Congress passed the Visual Artists Rights Act of 1990 (VARA), which establishes safeguards for an author's moral rights about a work.<sup>113</sup> The protections granted by VARA are restricted to authors of "works of visual art."<sup>114</sup> In Title 17 of the United States Code a "work of visual art" is defined as a painting, drawing, print, or sculpture existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.<sup>115</sup>

A work of visual art does not include any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; any work made for hire; or any work not subject to copyright protection under this title.<sup>116</sup>

Compared to the exclusive rights granted under the Copyright Act, the rights granted under VARA are not transferable.<sup>117</sup> The granted rights may be waived instead.<sup>118</sup> An author must sign a legitimate waiver, clearly outlined in a written document that specified the particular rights being relinquished or waived.<sup>119</sup>

If a court determines tattoos to be copyrightable, the author of the tattoo must be named; this can be the tattoo artist, the tattoo recipient, or both.<sup>120</sup> To qualify as a work made for hire, the tattoo artist would have to either act as a client's employee acting within their employment scope or as an

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112. *Id.* at 1719-20; 17 U.S.C. § 101

113. Minahan, *supra* note 105 at 1721.

114. *Id.*

115. 17 U.S.C. § 101; Minahan, *supra* note 105 at 1721.

116. 17 U.S.C. § 101.

117. 17 U.S.C. § 106(A); Minahan, *supra* note 105.

118. 17 U.S.C. § 106(A)(e); Minahan, *supra* note 105 at 1722.

119. Minahan, *supra* note 105 at 1722.

120. *Id.* at 1729.

independent contractor.<sup>121</sup> Since a tattoo is most likely not a work for hire, it must be either a work of sole authorship or a joint work.<sup>122</sup> However, a tattoo is unlikely a joint work since the client is unlikely to be considered a person making an independently copyrightable contribution to the creation of the tattoo.<sup>123</sup> The tattoo artist and the client could intend to coauthor and cocreate the tattoo, but it is more likely that the tattoo artist views themselves as the sole tattoo author.<sup>124</sup> If a tattoo artist is the sole author, the artist would be vested with the exclusive rights to do and to authorize the exercise of the rights granted by copyright.<sup>125</sup>

#### D. Fair Use

In *Jeffrey B. Sedlik v. Katherine Von Drachenberg*, tattoo artist Kat Von D produced a tattoo for a client based on a copyright-protected image.<sup>126</sup> She asserted that the tattoo was protected under fair use while defending against a copyright infringement claim.<sup>127</sup>

The Copyright Act of 1976 includes the fair use doctrine as a defense to copyright infringement.<sup>128</sup> Fair use is intended to prevent the rigid application of copyright law and allows certain secondary works to be exempt from liability.<sup>129</sup> The fair use provision encompasses purposes such as criticism, comment, news reporting, teaching, scholarship, or research, although it is not limited to these categories.<sup>130</sup> Courts consider four statutory factors when determining fair use: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect on the potential market for the copyrighted work.<sup>131</sup> Courts may also consider other non-statutory factors relevant to the specific case.<sup>132</sup> The fair use doctrine strikes a balance between protecting the rights of creators and promoting innovation and creativity.<sup>133</sup>

The dispute in *Sedlik* revolves around a photograph of Miles Davis taken by Jeffrey Sedlik, which gained fame for the jazz legend's depiction.<sup>134</sup> Kat Von D, a celebrity tattoo artist, created a tattoo of the Davis portrait for

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121. *Id.*

122. *Id.* at 1730.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Jeffrey B. Sedlik v. Katherine Von Drachenberg*, No. 21-1102, 2022 WL 17886029 (C.D. Cal. 2022).

127. *Id.*

128. 17 U.S. Code § 107.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Jeffrey B. Sedlik v. Katherine Von Drachenberg*, No. 21-1102, 2022 WL 17886029, at \*2 (C.D. Cal. 2022).

Blake Farmer.<sup>135</sup> Sedlik filed a copyright infringement suit against Von D, but she argued that the tattoo qualified as fair use.<sup>136</sup> Von D claimed that the tattoo was highly transformative, as it held personal significance for Farmer and created a new expression by being permanently imprinted on a human body.<sup>137</sup>

She argued that the tattoo is transformative because it presents a new expression, meaning, or message that is personal to the receiver of the tattoo. This personal significance comes from Farmer's college studies of jazz music in college and ongoing identification with Davis as Farmer "remains an avid listener of jazz and Miles Davis's music."<sup>138</sup> Von D also argued that tattoos inherently create a new expression, meaning, or message by being permanently imprinted on a human body. Tattoos have personal meanings that may not be immediately obvious to someone unfamiliar with the significance of the tattoo to its wearer.<sup>139</sup>

Von D furthermore raised the issue of an individual's fundamental rights to bodily integrity and personal expression, stating that imposing copyright liability on tattoo recipients would infringe on their due process rights.<sup>140</sup> The district court found visual differences between the tattoo and the original photograph, suggesting potential transformative qualities, but rejected the arguments about the inherent transformative value of tattoos.<sup>141</sup> The court left the purpose and character factor and the market effects factor for trial and did not address Von D's bodily autonomy argument.<sup>142</sup>

## II. UNIQUE LEGAL ISSUES EMBEDDED IN BODY ART OF 1976

Body art presents us with a unique set of legal issues. Although intellectual property rights and copyright infringement are prominent aspects that this paper focuses on, there are also legal concerns regarding the health and safety regulations surrounding the practice of body art.<sup>143</sup> Jurisdictions often have specific guidelines and licensing requirements to ensure proper sanitation, hygiene, and equipment sterilization.<sup>144</sup>

Another area of legal significance is the consent and age requirement for individuals receiving body art, particularly in cases involving minors.

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135. *Id.* at \*3.

136. *Id.* at \*9-10.

137. *Id.* at \*4.

138. *Id.* at \*8

139. *Id.*

140. *Id.* at \*32.

141. *Id.*

142. *Id.* at \*39.

143. See Policy Statement on Body Art, NAT'L ENV'T HEALTH ASS'N (November 2021), <http://www.neha.org/Images/resources/NEHA-Policy-Statement-Body-Art-Final-Nov-2021.pdf> [<https://perma.cc/EKA7-6MBK>].

144. See Everett Lehman & Amy Mobley, *Body Art*, CTR. FOR DISEASE CONTROL & PREVENTION: NIOSH SCIENCE BLOG (Feb. 4 2008), <http://www.blogs.cdc.gov/niosh-science-blog/2008/02/04/body-art> [<https://perma.cc/DUK2-SQAB>].



Ensuring informed consent, adhering to age restrictions, and documenting consent forms are crucial to avoid legal complications.<sup>145</sup>

Furthermore, issues related to discrimination and freedom of expression may arise, as individuals with visible body art may face prejudice or encounter restrictions in professional or public settings.<sup>146</sup>

Tattoos provide information when examined visually, aiding the police in assessing their location, design, colors, and other physical characteristics to identify individuals seen in video surveillance.<sup>147</sup> Additionally, tattoos can be valuable in identifying a deceased person when other methods are not applicable.<sup>148</sup> Unlike databases relying on fingerprints, facial images, DNA, or dental records, tattoos can be recognized by many people, including family members, acquaintances, co-workers, and tattoo artists, even if the person in question doesn't have a recorded profile.<sup>149</sup> Tattoos offer valuable information concerning gang affiliation, religious beliefs, prior convictions, and the duration of time spent in jail.<sup>150</sup> With the advancement of digital technology, law enforcement can now identify individuals by capturing an image of their tattoos and discerning groups of people who share similar body art.<sup>151</sup> This technology is known as "Tattoo Recognition Technology," and it represents an emerging field within biometrics.<sup>152</sup>

Navigating these unique legal issues embedded in body art calls for a comprehensive understanding of intellectual property law, health regulations, consent requirements, and the protection of individual rights.

#### A. Publicity Rights and Likeness

Concerning intellectual property issues, several disputes are idiosyncratic to body art. One of these legal issues is whether an individual may reproduce an image of a tattoo on their body in the process of reproducing their likeness in an animated or other similar form.<sup>153</sup>

Before the recent case of *Solid Oak Sketches, LLC v. 2k Games*, no federal court had examined the copyright implications of recreating a tattooed

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145. See NH Rev Stat § 314-A:8 (2015) ("Branding and tattooing a person under the age of 18 is prohibited"); Florida Statutes § 381.0075 (2023) (Regulation of body-piercing salons).

146. See Leyuan Ma, *The Legality of Tattoo Discrimination in Employment*, PRINCETON LEGAL J. (Jan. 3, 2023), <https://www.legaljournal.princeton.edu/the-legality-of-tattoo-discrimination-in-employment> [https://perma.cc/4E59-YZLJ].

147. Samuel D. Hodge, Jr. & John Meehan, *Tattoo Recognition Technology is Gaining Acceptance as a Crime-Solving Technique*, 42 N ILL. U. L. REV. 125 (2021).

148. *Id.* at 125.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

individual's likeness, whether through animation or similar means.<sup>154</sup> This led television networks, magazine publishers, and video game creators to want clarity on their legal responsibilities when featuring athletes with tattoos.<sup>155</sup> The lawsuit primarily revolved around the depiction of tattoos in a specific video game, NBA 2K16, marketed as "the most complete basketball game that 2K ever delivered."<sup>156</sup>

During its initial release, NBA 2K16, developed by 2K Games, Inc., achieved remarkable sales, exceeding 4 million copies sold.<sup>157</sup> According to Solid Oak Sketches' complaint, a significant contributing factor to 2K's success was the highly promoted "improved tattoo customization" feature showcased on the company's social media platforms.<sup>158</sup> These tattoos were present on NBA athletes LeBron James, Eric Bledsoe, and Kenyon Martin.<sup>159</sup> The tattoo artists later licensed these designs to Solid Oak Sketches, entitling them to receive royalties.<sup>160</sup> Subsequently, James, Bledsoe, and Martin granted permission for their likenesses to be used in the 2K video game.<sup>161</sup> Solid Oak Sketches argued that tattoos meet the statutory definition of copyrightable works, and in this instance, the tattoo artists held the copyrights to the tattoos, which they later transferred to Solid Oak.<sup>162</sup> Solid Oak believed that the digital reproduction of these tattoos within NBA 2K16 amounted to an infringement of the original copyrights owned by the tattoo artists and subsequently acquired by Solid Oak.<sup>163</sup>

However the court ruled in favor of the defendant, concluding that the publisher did not infringe on Solid Oak Sketches' tattoo copyrights when depicting those tattoos on basketball players within the game.<sup>164</sup> First, the court deemed the use of the tattoos as *de minimis*, meaning the impact was so minimal or insignificant that it did not constitute copyright infringement.<sup>165</sup> Second, the court determined that the basketball players had an implied license to use and display the tattoos as part of their likeness, making the use in the video game permissible.<sup>166</sup> Finally the court found that tattoos use in the video game qualified as fair use, which is a legitimate and lawful

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154. Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020). See John Tyler Stocking, *From Otzi the Iceman to Chris the Birdman: Tattoos as Persona, Not Property*, 26 RICH. J. L. & TECH. 1 (2020).

155. Stocking, *supra* note 154 at 5.

156. Complaint at ¶ 13-15, Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F. Supp. 3d 333 (S.D.N.Y. 2020) (No.16-CV-00724).

157. Stocking, *supra* note 154 at ¶ 15.

158. *Id.*

159. Solid Oak, 499 F. Supp. at 339.

160. *Id.* at 340.

161. *Id.*

162. *Id.* at 339-40.

163. *Id.*

164. Solid Oak, 449 F. Supp. at 353.

165. *Id.* at 344.

166. *Id.* at 346.

application of copyrighted material for purposes such as criticism, commentary, or reporting.<sup>167</sup>

When deciding whether athletes had an implied license to use their tattoos as part of their likeness for commercial purposes, the court concluded that tattooists grant nonexclusive licenses to the players.<sup>168</sup> The court ruled based on admissions by the artists that they knew they were tattooing professional basketball players likely to appear in various media and that the tattoos would become part of their likenesses.<sup>169</sup> The court fixated on these specific facts rather than exploring broader existential issues.<sup>170</sup> Solid Oak disagreed with the defendant, stating that artists' subjective beliefs shouldn't influence copyright law.<sup>171</sup> However, the court's decision was likely influenced by fears of hindering a person's free use of their own body and raised concerns about people with tattoos losing autonomy over their bodies.<sup>172</sup> The court refused to extend absolute copyright protection to all works fixed on someone else's body.<sup>173</sup> This decision could have a major impact as it links publicity rights to the implied license defense in copyright cases related to publicity matters.<sup>174</sup>

### CONCLUSION

Tattoos have experienced a revival in modern culture. Formerly associated with sailors, counterculture, crime, and danger, today they are seen as art and a status symbol. Similar to its popularity when introduced to the West by Omai in the 1700s, and endorsed by celebrities and athletes, tattooing is now more popular than ever. And as technology and sanitation practices improve, tattoos are expected to further in popularity.

Tattooed individuals still own their image and skin, but ultimately, they should not own the design tattooed into their skin without a license or work-for-hire arrangement. Selling temporary tattoos that match a person's real tattoos, tattooing the design on another person's skin, or selling a shirt with the tattoo designs separated from the person's skin would infringe on the copyright of the artist who created the design, absent a licensing agreement.

When deciding on an intellectual property controversy that revolves around tattoos, courts should consider the work as a piece of art and as a unique practice with its history and traditions.

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167. *Id.* at 347, 350.

168. *Solid Oak*, 449 F. Supp. at 346.

169. *Id.*

170. *See infra* text accompanying note 172.

171. *Solid Oak*, 449 F. Supp. 3d at 346.

172. Max Budowsky, *Solid Oak Sketches v. 2K Games Sends a Shockwave Through Licensing Law*, 75 U. MIAMI L. REV. (2020), <https://lawreview.law.miami.edu/solid-oak-studios-v-2k-games-sends-shockwave-licensing-law/#:~:text=In%20ruling%20for%20the%20defendant,in%20the%20video-game%20constituted%20fair> [https://perma.cc/FL8C-WHPT].

173. *Id.*

174. *Id.*

The court in *Sedlik* missed a chance to clarify the position of tattooing as an art form within copyright law and to reduce legal exposure for tattoo artists and their clients.<sup>175</sup> To be transformative, a work must convey a distinct artistic purpose, separate from its source material. Changing the medium, as in copying an image as a tattoo, is not enough to be transformative.

Tattoos are inherently transformative because they evoke the wearer's experiences, commitment to displaying the image for a lifetime, and the significance of that image to their identity.<sup>176</sup> This objective significance, reflecting the wearer's identity, makes every tattoo transformative, regardless of the wearer's subjective beliefs.<sup>177</sup>

Simply copying the image as a tattoo does not make it transformative. There must be something to give the tattoo a distinct purpose. Tattoos hold personal significance for the wearer, as Kat Von D noted in *Sedlik*.<sup>178</sup> However, relying exclusively on personal significance as the standard for transformation would lead to any secondary use of art being considered transformative based on individual interpretations.<sup>179</sup>

In essence, a tattoo becomes an indissoluble part of the individual who carries it, eternally expressing something intrinsic to their identity. The difference between a tattoo and a painting lies in bodily permanence, which gives a tattoo a qualitatively distinct and objective significance.<sup>180</sup> As recognized by the court, a tattoo indicates a strong commitment by the bearer to the displayed message or image.<sup>181</sup> By permanently engraving the tattoo onto their skin, the bearer expresses how important the text or image is to them, choosing to display it every day for the rest of their life.<sup>182</sup>

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175. See generally Jeffrey B. Sedlik v. Katherine Von Drachenberg, No. 21-1102, 2022 WL 17886029 (C.D. CAL. 2022).

176. David Doktorman, Sedlik v. Drachenberg: *Is a Body Merely a Canvas?*, U. CHI. L. REV. ONLINE (Feb. 20, 2023) <https://lawreviewblog.uchicago.edu/2023/02/20/doktorman-tattoo-fair-use/> [<https://perma.cc/LXU6-Q4ZJ>] (“The tattoo inevitably invokes the wearer: it calls to mind the pain they endured in being inked, the gravity of committing to a lifetime display of the image, and the significance of that image to the person’s identity. It is precisely the objective significance that every tattoo has in reflecting the wearer’s identity that renders them inherently transformative, rather than the subjective belief of the wearer”).

177. See *Sedlik*, 2022 WL 17886029 at \*8; See Doktorman, *supra* note 173; See Budowsky, *supra* note 169.

178. See *Sedlik*, 2022 WL 17886029 at \*8.

179. See Budowsky, *supra* note 169.

180. See Budowsky, *supra* note 169.

181. See generally *Sedlik*, 2022 WL 17886029.

182. See Budowsky, *supra* note 169.