

2013

Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos

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Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos

Cover Page Footnote

J.D. Candidate, Fordham University School of Law, May 2013; B.B.A., University of Miami, 2010. Many thanks to Ryan Fox and Tiffany Miao for their dedication and to Sasha Segall, Hannah Steinblatt, and the rest of the IPLJ staff for their hard work and thoughtful contributions to this Note. Thank you to Professor Joel Reidenberg for his guidance and insight. Special thanks to my family and friends for their unwavering patience and support.

Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos

Meredith Hatic*

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INTRODUCTION

Humans have marked their bodies with tattoos for thousands of years, with the earliest examples appearing on female mummies dating back to 2000 B.C.¹ Originally used as a therapeutic means of relieving joint pain and as a permanent form of amulet during pregnancy, use of tattoos has evolved into a way of marking people as belonging to different classes, religious sects, and even professions.² While some cultures tattooed only their criminals,

¹ Cate Lineberry, *Tattoos: The Ancient and Mysterious History*, SMITHSONIAN MAGAZINE (Jan. 1, 2007), <http://www.smithsonianmag.com/history-archaeology/tattoo.html>.

² *Id.*

others used the permanent markings as a fashion statement.³ In America in the mid-1900s, tattoos developed a reputation as the mark of American countercultures, sailors and World War II veterans.⁴ Today, many of these religious and personal reasons continue to motivate the practice of tattooing.

The issue of intellectual property rights in images fixed on human bodies seems odd considering the constitutional right to do as we please with our own bodies.⁵ Only two lawsuits have ever been brought alleging infringement of copyright in a tattoo. In the first case, in 2005, tattoo artist Matthew Reed sued NBA star Rasheed Wallace for the unauthorized use of the tattoo Reed designed for, and applied to, Wallace, in an advertising campaign for Nike.⁶ Reed claimed that both Nike and the advertising firm Weiden + Kennedy violated the copyright Reed held in the “Egyptian Family Pencil Drawing” tattooed on Wallace’s arm.⁷ The parties ultimately settled out of court.⁸

The second tattoo infringement case made it only slightly further in the litigation process. In May 2011, Missouri tattoo artist Victor Whitmill sued Warner Brothers for the use without permission of Whitmill’s copyrighted tattoo—originally fixed on the face of the boxer Mike Tyson—on actor Ed Helms’ face in *The Hangover Part II*.⁹ In the United States District Court for the Eastern District of Missouri, Chief Judge Catherine D. Perry recognized Whitmill’s copyright interests in the tattoo, but found that the harm to the public interest that would result if the

³ *Id.*

⁴ Cassandra Franklin-Barbajosa, *Tattoo: Pigments of Imagination*, NATIONAL GEOGRAPHIC MAGAZINE (Dec. 2004), http://ngm.nationalgeographic.com/ngm/0412/online_extra.html.

⁵ See *infra* notes 30, 154–157 and accompanying text.

⁶ See generally Complaint, Reed v. Nike, CV 05 198, 2005 WL 1182840 (D. Or. 2005) [hereinafter Reed Complaint].

⁷ Associated Press, *Artist Sues over Use of Tattoo*, ESPN.COM (Feb. 16, 2005), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

⁸ Noam Cohen, *On Tyson’s Face, It’s Art. On Film, a Legal Issue.*, N.Y. TIMES, May 20, 2011, <http://www.nytimes.com/2011/05/21/business/media/21tattoo.html?page-wanted=2&seid=auto&smid=tw-nytimes>.

⁹ Matthew Belloni, *Warner Bros. Settles “Hangover II” Tattoo Lawsuit (Exclusive)*, THE HOLLYWOOD REPORTER (June 20, 2011, 1:39 PM), <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377>.

preliminary injunction sought by Whitmill were granted outweighed any such interests.¹⁰ Accordingly, she denied Whitmill's motion for an injunction, ensuring the release of *The Hangover Part II*.¹¹

Both *Reed* and *Whitmill* implicated numerous interests: the copyright interests of the tattoo artist, the copyright interests of the subject, the right of a person to control his body, and the interests of the public in reaping the benefits of artist creativity. These cases also illustrate two main copyright infringement problems that may arise with tattoos: (1) the direct copying of a popular copyrighted tattoo onto another "canvas" (in *Whitmill*, the direct copying of Whitmill's design onto Helms's face without permission); and (2) the appearance of an original tattoo in a subsequent work (for example, Tyson's appearance in the movie and Wallace's appearance in the commercial could violate the owner's exclusive rights to reproduce the work and to display the work publicly).¹²

Resolving the conflicts among the various parties' interests and resolving issues of tattoo infringement requires first addressing the copyrightability of tattoos and then, assuming tattoos are in fact copyrightable, determining the ownership interests in the tattoo.

This Note will focus on conflicts that arise with regard to original tattoo designs, as opposed to tattoos featuring already-copyrighted or trademarked images. The analysis and argument will consider only those issues that arise when an original tattoo design is copied onto another person or is featured in a subsequent work. This Note argues that when considering such issues, courts should balance the interests of the artist, the human subject, and the general public. Ultimately, courts resolving tattoo

¹⁰ Yvette Joy Liebesman, *Copyright and Tattoos: Hangover II Injunction Denied, but the Copyright Owner Got Some Good News Too*, TECHNOLOGY & MARKETING LAW BLOG (May 24, 2011), http://blog.ericgoldman.org/archives/2011/05/copyright_and_t.htm.

¹¹ *See id.*

¹² Two of a copyright owner's six exclusive rights include the right to reproduce and to display the work publicly. 17 U.S.C. §§ 106(1), 106(5). While Whitmill *could* have claimed an infringement of this right by Tyson's appearing in the film, Whitmill has granted Tyson permission to make such appearances. He has, however, denied Tyson the right to reproduce the work in other forms. *See* Liebesman, *supra* note 10.

infringement cases should afford thinner copyright protection to tattoos than they would to other copyrighted works. Part I outlines the provisions of copyright law relevant to the analysis of the copyrightability of tattoos. Part II illustrates the conflicts that arise among the various interests at stake, explains what courts have done when faced with these conflicts, and notes several problems that arise in tattoo infringement cases. Part III proposes a solution to these conflicts and offers a guide to future courts addressing the issues of copyright interests in body tattoos.

I. COPYRIGHT LAW UNDER THE COPYRIGHT ACT OF 1976

This Part reviews the provisions of copyright law relevant to the analysis of copyrights in the tattoo context, including types of copyrightable work, forms of copyright ownership, exclusive rights of copyright owners, the doctrine of fair use, and remedies for infringement. It also provides a background of the policy underlying modern copyright law and an overview of the goals of the 1976 Copyright Act.

A. Policy Underlying the Copyright Act

The United States Constitution grants Congress the power to promote science and the useful arts by granting copyright ownership to authors of original works.¹³ The main goal of providing authors with a limited monopoly in the rights to their creations is to stimulate and incentivize artistic creativity for the good of the general public.¹⁴ Thus, in the analysis of copyrights and tattoos, public interest plays an important role, in addition to the interests of the artist and the subject.¹⁵

For purposes of copyright law, a work is “created” the first time it is fixed in a copy.¹⁶ Ownership of the work vests initially

¹³ See U.S. CONST. art. I, § 8, cl. 8.

¹⁴ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹⁵ For example, public interest weighed heavily in Judge Perry’s decision to deny Whitmill’s request for a preliminary injunction in *Whitmill v. Warner Bros.* See Liebesman, *supra* note 10.

¹⁶ 17 U.S.C. § 101 (2006).

in the author who transcribes an idea into a fixed, tangible expression that is entitled to copyright protection.¹⁷ If an expression meets this requirement, section 106 of the Copyright Act grants the author a number of exclusive rights in the work.¹⁸ The author may then transfer ownership of all or some of these rights to another party.¹⁹ For example, the author may retain the right to prepare derivative works, but may transfer the rights to distribute and reproduce the original work to someone better suited to maximize the benefits of those rights. Therefore, permitting the transfer of some exclusive rights helps to ensure their most effective use. Defining the author, and thus the owner, of a tattoo is especially critical because of the potential conflict between the exclusive rights of a copyright owner and the right of a subject to control his own body.

B. Classifying the Work

Section 102 of the 1976 Copyright Act defines the eight eligible categories of copyrightable works.²⁰ How a work is categorized is important because certain works are subject to different protections and exclusive rights.²¹

Tattoos most likely fall under the category of pictorial, graphic or sculptural works.²² Such works include two- and three-dimensional works of “fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”²³ A tattoo is, quite literally, applied art (although copyright law

¹⁷ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). This principle tends to indicate that ownership vests in the artist who physically creates the work, however, parties other than the actual creator may be an author for purposes of copyright law and thus an owner. See discussion *infra* Part I.C.

¹⁸ 17 U.S.C. § 106 (2006).

¹⁹ 17 U.S.C. § 201(d) (2006).

²⁰ 17 U.S.C. § 102 (2006).

²¹ For example, owners of pictorial, graphic and sculptural works do not enjoy the right to publicly perform their work, 17 U.S.C. § 106(4), and owners of works of visual arts are entitled to the right of attribution and integrity, 17 U.S.C. § 106A.

²² 17 U.S.C. § 102(a)(5).

²³ 17 U.S.C. § 101.

contemplates a different meaning for the term “applied art”).²⁴ For purposes of categorization, a tattoo is undoubtedly graphic art applied to a three-dimensional canvas and thus may be classified as a pictorial, graphic or sculptural work.

If a tattoo meets certain statutory requirements, it could qualify as a “work of visual art.”²⁵ To be a work of visual art, the work must exist in a single copy or in a “limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”²⁶ Original tattoos that exist in a single “copy” could be deemed a work of visual art. However, an artist who applies the same image to more than one subject would have to sign and consecutively number each of the works. Given the “canvas” on which tattoo artists transcribe their work, it would be highly burdensome to comply with these requirements. Thus, it seems unlikely that original tattoos appearing in more than one copy could qualify as works of visual art.

Whether a tattoo is a pictorial, graphical or sculptural work or a work of visual art is significant to the extent that the classification affects rights to which the owner of the work is entitled. An owner of a work of visual art is entitled to the exclusive rights under section 106 and, additionally, the right of attribution and integrity under section 106A.²⁷ An owner of a pictorial, graphical or sculptural work is entitled only to the exclusive rights under section 106, and does not enjoy the right to publicly perform the work.²⁸

C. Determining Ownership

It is important to note that ownership of a copyright, or ownership of any of the exclusive rights of a copyright, “is distinct from ownership of any material object in which the work is

²⁴ See *id.*; see also H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5667–68 (distinguishing works of “applied art,” protectable under the Copyright Act, from works of “industrial design,” which are not afforded protection).

²⁵ See 17 U.S.C. § 101 (definition of “work of visual art”).

²⁶ *Id.*

²⁷ 17 U.S.C. §§ 106, 106A (2006).

²⁸ 17 U.S.C. § 106.

embodied.”²⁹ Accordingly, even if the author and owner for purposes of copyright law is deemed to be someone other than the human subject, that owner only has an interest in the work, and not in the body of the subject. Even though a tattoo artist who is the owner of a copyrighted tattoo on another person has no direct property interest in that person, in exercising some of his exclusive rights, the owner’s rights will nevertheless interfere with the subject’s constitutional right to control his own body.³⁰

Depending on the circumstances surrounding the tattoo’s creation, the “author” of the tattoo, for purposes of determining initial ownership, could be the tattoo artist (or his employer, in the work-for-hire context), the human subject, or both.³¹ In the first situation, the artist is the sole author and owner. In this scenario, the tattoo artist is a sole proprietor who, much like a painter or photographer, owns all of copyright interests in the work from the moment it is fixed on the subject.

In a second possible scenario, the tattoo is a joint work, meaning that two or more authors prepared the work with the intention that their contributions would merge into “inseparable or interdependent parts of a unitary whole.”³² For example, a subject contributes specific ideas about, or rough sketches of, what the tattoo should look like and an artist, literally, embodies those ideas in the subject.³³ Authorship is not the same as merely making a copyrightable contribution to a work.³⁴ Thus, in a joint work arrangement, the authors must also *intend* that their individual contributions be merged into one whole work.³⁵ Authors of a joint

²⁹ 17 U.S.C. § 202 (2006).

³⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (recognizing a constitutional right to personal autonomy).

³¹ See 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, 104–07 (2003).

³² 17 U.S.C. § 101 (2006).

³³ This process of both parties making creative contributions occurs frequently in the tattoo context. See, e.g., Reed Complaint, *supra* note 6, at 3–4.

³⁴ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 1999).

³⁵ 17 U.S.C. § 101; see *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994) (noting that the fact that several parties contributed contemporaneously is insufficient to satisfy the intent requirement); see also *Kaplan v. Vincent*, 937 F. Supp. 307, 316 (S.D.N.Y. 1996) (outlining two factors helpful in determining whether the

work co-own the copyright in the work.³⁶ In the tattoo context, this ownership arrangement presents the fewest interferences with the subject's constitutional right to control his own body; it allows each owner to use or to license the use of the work so long as he accounts to the other co-owners for any profits derived from such use or licensing.³⁷

In a third possible situation, the tattoo is a "work made for hire." A work made for hire is a work either prepared by an employee within the scope of his employment, or "specially ordered or commissioned for use as a contribution to a collective work."³⁸ For purposes of copyright ownership, the employer—or the other person for whom the work was prepared—is considered the author, unless the parties have agreed otherwise in a signed written instrument.³⁹ A tattoo that is a work made for hire might exist in two different scenarios. In the first, the tattoo parlor that employs the artist might claim that the work is one made for hire because it was created within the scope of the artist's employment with the company. In this case, the tattoo parlor company is the author for purposes of copyright ownership. In the second scenario, the tattoo may constitute a work made for hire if the subject specially ordered or commissioned the work for use as a contribution to a collective work.⁴⁰ Conceivably, one could argue that a body bearing multiple tattoos is a "collective work," and by specially commissioning another tattoo, the multi-tattooed subject could be the author of the work-for-hire tattoo, provided the parties signed the requisite written instrument. However, this example hinges on the classification of multiple tattoos on a human body as

parties had the requisite intent: whether each party intended all parties be identified as co-authors and how the parties "regarded themselves in relation to the work").

³⁶ 17 U.S.C. § 201(a) (2006).

³⁷ See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

³⁸ A "collective work" is a work in which a number of contributions, that constitute separate and independent works, are assembled into a collective whole. 17 U.S.C. § 101. A work for hire arrangement only exists, however, "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." *Id.*

³⁹ 17 U.S.C. § 201(b).

⁴⁰ 17 U.S.C. § 101.

a “collective work,” which might be a somewhat far-fetched classification.⁴¹

D. Exclusive Rights

The 1976 Copyright Act grants copyright owners six exclusive rights with regard to their copyrighted works: (1) to reproduce the work; (2) to prepare derivative works based on the work; (3) to distribute the work; (4) to perform the work publicly; (5) to display the work publicly; and (6) to perform the work publicly by means of a digital audio transmission.⁴² The fourth right—to perform the work publicly—would not apply if a tattoo is deemed a pictorial, graphical or sculptural work, but would apply if it is a work of visual art.⁴³ The sixth right—public performance—is irrelevant to the analysis of copyrighted tattoos.

1. The Right to Reproduce

The first exclusive right under section 106 grants copyright owners the right “to reproduce the copyrighted work in copies⁴⁴ or phonorecords.”⁴⁵ There are two threshold requirements associated with the reproduction right: the fixation requirement and the intelligibility requirement. To meet the fixation requirement, the embodiment of the work must be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴⁶ To satisfy the intelligibility requirement, it is necessary that the fixed work “can be perceived, reproduced, or otherwise communicated either directly, or with the aid of a machine or device.”⁴⁷ Tattoos are permanently embodied in a person’s skin; therefore, they may

⁴¹ Arguably, each tattoo on a single subject could constitute a “separate and independent work.” 17 U.S.C. § 101. The problem in making this argument is establishing that the individual works are assembled into a “collective whole,” in the way that individual articles are assembled into the collective work of a newspaper. *Id.*

⁴² 17 U.S.C. § 106.

⁴³ *Id.*

⁴⁴ “Copies” consist of material objects in which the work is fixed. 17 U.S.C. § 101.

⁴⁵ 17 U.S.C. § 106.

⁴⁶ 17 U.S.C. § 101.

⁴⁷ *Id.*

be perceived for more than a period of “transitory duration”⁴⁸ and satisfy the fixation requirement. Furthermore, people perceive tattoos directly—simply by looking at them—thus, they also satisfy the intelligibility requirement. Tattoos are both fixed and intelligible; therefore, an owner of a copyrighted tattoo would enjoy the right to reproduce.

2. The Right to Prepare Derivative Works

A derivative work is a work based on preexisting material that may be “recast, transformed, or adapted.”⁴⁹ The Supreme Court has recognized that the underlying material must be copyrightable for a work based on that material to qualify as a derivative work under the statute.⁵⁰ The language of the statute itself also establishes the requirement that the underlying work be copyrightable; under section 106, the copyright owner has the exclusive right “to prepare derivative works *based upon the copyrighted work*.”⁵¹ Thus, to create a derivative work of a tattoo, the preexisting tattoo must be copyrightable.

A derivative work consists of modifications, which, as a whole, represent an “original work of authorship.”⁵² The Second Circuit has held that a derivative work is independently copyrightable if it is “sufficiently original,”⁵³ and established a two-prong test for determining whether a subsequent work is copyrightable as a derivative work.⁵⁴ First, the original aspects of the derivative work must be “more than trivial.”⁵⁵ Second, the original aspects of the subsequent work must reflect the degree to which it relies on the preexisting work and must not affect the scope of the copyright

⁴⁸ *Id.*

⁴⁹ 17 U.S.C. § 101.

⁵⁰ *See Stewart v. Abend*, 495 U.S. 207 (1990).

⁵¹ 17 U.S.C. § 106 (emphasis added).

⁵² 17 U.S.C. § 101.

⁵³ *See Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 782 (2d Cir. 1994).

⁵⁴ *See Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 909 (2d Cir. 1980). The Ninth Circuit has also adopted this two-prong approach to evaluating the copyrightability of derivative works. *See Entm't Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1220 (9th Cir. 1997).

⁵⁵ *See Durham*, 630 F.2d at 909.

protection in the preexisting material.⁵⁶ Under the originality standard articulated above, to create a derivative work of an original tattoo, an artist would need to do more than simply “touch up” the work. Under the Second Circuit’s test, assuming that the modifications or additions to a tattoo are sufficiently original and substantial to rise to the level of an independently copyrightable work, it is possible to create a derivative work of a tattoo.

Where a tattoo artist is also the owner of the copyright in a tattoo, as one of his exclusive rights he is entitled to prepare derivative works of that tattoo. In this scenario, enforcing the artist’s right to prepare derivative works could give rise to several problems given the constitutional right of a person to control his or her body.⁵⁷

3. The Right to Distribute

Copyright owners also enjoy the right to distribute copies of their work to the public “by sale or other transfer of ownership, or by rental, lease, or lending.”⁵⁸ Because of the nature of the medium in which the tattoo is fixed, distribution in the tattoo context is decidedly different than distribution in the context of more traditional media such as books or computer software. This right is unlikely to be infringed in the tattoo context given that tattoos are fixed upon human skin. However, in the practice of tattooing, artists often create sketches or stencils of their designs. If an artist copyrights a particular tattoo and fixes that image in a separate and independently copyrightable tattoo sketch or stencil, he may claim his exclusive right to distribute copies of the stencils to other tattoo parlors or artists.

4. The Rights to Perform Publicly and to Display Publicly

Owners of pictorial, graphic and sculptural works are entitled to the exclusive right to display the work publicly, but not to perform the work publicly.⁵⁹ Owners of works of visual art enjoy

⁵⁶ *See id.*

⁵⁷ *See* discussion *infra* Part III.B.

⁵⁸ 17 U.S.C. § 106(3).

⁵⁹ 17 U.S.C. § 106(4)–(5).

both the right to perform and to display their works publicly.⁶⁰ However, this is a distinction without any significance in the context of tattoos; whether the author is entitled to the right to publicly perform makes no difference because tattoos cannot be “performed.”⁶¹

Regardless of whether the tattoo is pictorial, graphic or sculptural or one of visual art, the owner has the exclusive right to have the work displayed in public. Where the tattoo artist is also the copyright owner, enforcement of this right will present a significant conflict with the subject’s right to bodily autonomy. In the absence of an implied license to have his tattoo publicly visible, a subject would infringe the artist’s right under section 106(4) or section 106(5) any time he appears in public.⁶² To avoid such infringement, the subject would need to cover the tattoo when venturing into the public realm. Of all of the rights granted to copyright holders, enforcement of the right to display publicly presents the greatest likelihood of interfering with a subject’s right to personal autonomy.⁶³

5. The Rights of Certain Authors to Attribution and Integrity

While the right to attribution and integrity is not one of the six exclusive rights granted to copyright owners under section 106, it is a right enjoyed by authors of works of visual arts.⁶⁴ Under this right, an owner of a tattoo classified as a work of visual art is entitled to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”⁶⁵ It is unlikely that many tattoos would meet the statutory requirements of a work of visual art. However, where

⁶⁰ *See id.*

⁶¹ “To ‘perform’ a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.” 17 U.S.C. § 101.

⁶² *See discussion infra* Part III.C.2.

⁶³ *See infra* Part III.C (discussing why this right should belong to the human subject either implicitly or by written instrument before tattoo’s creation).

⁶⁴ 17 U.S.C. § 106(A).

⁶⁵ 17 U.S.C. § 106A(a)(3)(A). “The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.” 17 U.S.C. § 106A(b).

a tattoo does qualify as such a work, the right to attribution and integrity afforded to the owner of the work could present additional conflicts with the subject's right to bodily autonomy. Arguably, where a tattooed subject decided to alter his tattoo, or perhaps even remove it, the artist (if he were the owner) would have the right to prevent such a modification. As with the enforcement of an artist/owner's right to public display, enforcing the right to attribution and integrity could potentially conflict with the subject's constitutional right to control his own body.

E. Fair Use as a Defense

In some cases, the doctrine of fair use⁶⁶ may be a relevant defense to the unauthorized use of a copyrighted tattoo.⁶⁷ In such instances, the conflicts between an artist/owner's enforcement of his exclusive rights and the subject's right to control his body may be resolved by invoking a fair use defense.

The Supreme Court has recognized fair use as a safeguard in copyright law for balancing the interests of copyright owners in controlling their works with the free speech and expression interests of both subsequent authors and the general public.⁶⁸ Section 107 of the 1976 Copyright Act provides that the use of a copyrighted work for purposes such as "criticism, comment, news reporting, teaching . . . scholarship, or research" generally does not infringe the copyright.⁶⁹ Essentially, fair use allows authors to draw upon preexisting works for purposes of criticizing,

⁶⁶ Courts consider four relevant factors when determining whether the unauthorized use of a copyrighted work is nonetheless a non-infringing 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 in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for or value of the copyright work. 17 U.S.C. § 107 (2006). The fair use doctrine is not a bright line test and requires case-by-case analysis. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Furthermore, no one factor is dispositive. *See id.*

⁶⁷ For example, in *Whitmill v. Warner Bros.*, Warner Brothers argued that its unauthorized use of Whitmill's copyrighted tattoo on Helms' face was a non-infringing fair use because it parodied Tyson's original tattoo. *See* Warner Bros. Memo. in Opposition to Plaintiff's Motion for Prelim. Injunction, *Whitmill v. Warner Bros. Entm't*, No. 4:11-cv-752 (E.D. Mo. 2011) [hereinafter *Warner Bros. Memo.*].

⁶⁸ *See* *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

⁶⁹ 17 U.S.C. § 107.

disseminating news, teaching or commentary in order to further Congress's and the Copyright Act's goals of promoting science and the useful arts and stimulating creativity.⁷⁰

Fair use of a copyrighted tattoo is most likely to occur in the form of parody or in the course of news reporting. For instance, in television shows such as *Saturday Night Live*, or in comedic films such as *The Hangover Part II*, filmmakers might directly copy a well-known tattoo in order to conjure up the original work and to comment on or criticize either the preexisting work or the subject on which it appears.⁷¹ In such cases, it is likely the use would qualify as a protected parody of the original work. Additionally, in instances where a paparazzo photographs a visibly tattooed celebrity and publishes the photo without permission, such "use" of the original work could also be protected as a fair form of news reporting.⁷²

F. Remedies

A copyright owner must register his copyright before an infringement occurs to be eligible to receive statutory damages and attorney's fees under section 504(c).⁷³ Section 412 of the Copyright Act aims to ensure that such damages are reserved for those infringers who had constructive notice that the work upon which they infringed was protected by a valid copyright, which is presumed upon the owner's registration of the work.⁷⁴

G. Actual Damages

A copyright owner may recover actual damages suffered as result of infringement, as well as the infringer's profits that are attributable to the infringement and that are not considered in

⁷⁰ See U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 107.

⁷¹ See, e.g., *Campbell*, 510 U.S. 569, 591–94 (holding that the potentially infringing artist's song was a valid parody that necessarily mimicked the original song in order to criticize and comment on it).

⁷² See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (deeming newsworthy the day-to-day actions of public figures).

⁷³ 17 U.S.C. § 412 (2006).

⁷⁴ See *Johnson v. Jones*, 149 F.3d 494, 505 (6th Cir. 1998).

computing the actual damages.⁷⁵ Generally, courts aim to award damages proportionate to the copyright owner's damages, and no more.⁷⁶ In *Whitmill*, Whitmill sought both compensatory damages as well as the portion of Warner Brothers' profits from *The Hangover Part II*.⁷⁷ Had the case reached the stage where the court would calculate damages, Whitmill could have potentially received any actual damages resulting from the infringement, as well as a portion of Warner Brothers' profits from the film that the court deemed attributable to the infringement of Whitmill's tattoo. However, for a plaintiff to be entitled to damages for indirect profits from the unauthorized use of infringing material, there must be a "legally sufficient causal link" between the infringement and any subsequent indirect profits.⁷⁸

H. Statutory Damages

If an owner registered his copyright prior to the infringement then, before a final judgment is rendered, the owner may choose to recover statutory damages instead of actual damages and profits in an amount of no less than \$750 and no more than \$30,000.⁷⁹ Infringement plaintiffs tend to select statutory damages in cases where there are no actual damages, where actual damages are particularly difficult to calculate, or where actual damages are considerably less than statutory ones. In tattoo infringement cases, actual damages would likely be considerably lower than the range of damages available through the statute. For example, courts have

⁷⁵ 17 U.S.C. § 504(b). A successful infringement plaintiff may receive a portion of direct profits attributable to the infringing material as well as indirect profits attributable to the infringing work. *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 (9th Cir. 1985) (finding that plaintiff was entitled to a portion of defendant's net revenue from the show that featured the infringing material, as well as a portion of indirect profits attributable to the infringing material, including profits from related hotel and gambling operations).

⁷⁶ *See, e.g., Frank Music Corp.*, 772 F.2d at 517–20. (conducting extensive mathematical analysis to determine proportion of defendants' profits attained due to infringing material).

⁷⁷ *See* Complaint, *Whitmill v. Warner Bros. Entm't*, No. 4:11-cv-752, 2011 WL 2038147 at 8 (E.D. Mo. Apr. 28, 2011) [hereinafter *Whitmill Complaint*].

⁷⁸ *See Mackie v. Rieser*, 296 F.3d 909, 915 (2002).

⁷⁹ 17 U.S.C. § 505(c)(1) (2006). Should a court find the infringement was committed willfully, the court may, in its discretion, increase the statutory damages award to not more than \$150,000. 17 U.S.C. § 505(c)(2).

awarded actual damages for loss of customers due to infringement,⁸⁰ lost licensing fees due to infringement,⁸¹ and lost royalty payments due to infringement.⁸² None of these losses, however, seem relevant in the tattoo context. It seems highly unlikely that Reed would have lost customers as a result of Nike's commercial featuring Wallace's Egyptian tattoo. If anything, such infringement was the "exposure" Reed hoped to benefit from by having his work fixed to a popular NBA player.⁸³ Thus, in tattoo cases where actual damages are extremely low, difficult to prove or nonexistent, infringement plaintiffs may still recover monetary damages under the statutory provisions.

I. Injunctive Relief

Under the 1976 Copyright Act, a court may grant a temporary or permanent injunction where it deems such relief reasonable to prevent copyright infringement.⁸⁴ Under the Supreme Court's holding in *eBay v. MercExchange*, courts must evaluate the traditional four factors considered in injunctive relief before granting a final injunction.⁸⁵ In the tattoo context, injunctive relief could be sought to prevent, inter alia, the unauthorized copying of the work onto other canvases, the release of subsequent works featuring the tattoo, and the attempt of the original subject to modify or remove the work. Each of these requests would create a

⁸⁰ See, e.g., *Regents of the Univ. of Minn. v. Applied Innovations*, 685 F. Supp. 698, 711–12 (D. Minn. 1987).

⁸¹ See, e.g., *Cream Records, Inc. v. Jos. Schlitz Brewing Co.*, 754 F.2d 826, 829 (9th Cir. 1985) (finding copyright owner entitled to recover value of license where unauthorized use eliminated owner's opportunity to license song).

⁸² See, e.g., *Softel, Inc. v. Dragon Med. and Scientific Commc'n Ltd.*, 891 F. Supp. 935, 944 (S.D.N.Y. 1995) (awarding actual damages for lost royalty payments plaintiff would have received for use of its source code in the absence of infringement).

⁸³ See Associated Press, *Artist Sues Over Use of Tattoo*, ESPN.COM (Feb. 16, 2005), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

⁸⁴ 17 U.S.C. § 502 (2006).

⁸⁵ 547 U.S. 388, 391 (2006). To be entitled to injunctive relief, a plaintiff must show: (1) that it suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for the injury; (3) that considering the balance of the hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. See *id.* at 391–92. While this case arose in the patent context, the Court noted that the rule established in *eBay* is consistent with the treatment of injunctions under the Copyright Act. *Id.* at 392.

great deal of conflict with not only the public interest in benefitting from artist creativity and in exercising the right of free expression, but also with the constitutional right to control one's own body.⁸⁶ Because of these conflicts, courts should be especially wary of granting injunctive relief to tattoo infringement plaintiffs.

II. CONFLICTS OF INTERESTS

Part II examines the interests at stake in cases of copyrighted tattoos and illustrates the conflicts that arise among these various interests. This Part also highlights how courts have handled conflicts among the parties' interests. Finally, Part II examines the policy arguments for and against granting tattoos the same degree of copyright protection as more traditional works.

A. *Two Infringement Scenarios*

The two lawsuits involving the unauthorized use of a copyrighted tattoo⁸⁷ present the two main infringement problems that may arise with original art works tattooed on human bodies: (1) the direct copying of the original tattoo onto another person or medium of expression, and (2) when the artist is also the copyright owner, the appearance of the original subject bearing the tattoo in a subsequent work without permission of the owner.⁸⁸

B. *Tattoos, Copyrights, and the Courts*

Interestingly, very little case law exists in the realm of copyrights and tattoos. Indeed, *Whitmill* is only the second lawsuit in which a tattoo artist sued for copyright infringement of a work of body art.⁸⁹ In *Whitmill*, despite openly empathizing with the

⁸⁶ See *infra* Parts II.C–D.

⁸⁷ See generally Reed Complaint, *supra* note 6; Warner Bros. Memo., *supra* note 67.

⁸⁸ While in this case *Whitmill* did not actually sue Mike Tyson for appearing in the film without permission, this potential infringement claim is one that *could* arise in cases similar to this one. See Liebesman, *supra* note 10. This was the issue in *Reed*.

⁸⁹ See Matthew Heller, *Tyson Tattoo Creates Legal Headache for "Hangover 2,"* ON POINT NEWS (May 1, 2011), <http://www.onpointnews.com/NEWS/Tyson-Tattoo-Creates-Legal-Headache-for-Hangover-2.html>. Also in 2005, artist Louis Molloy, who applied nine of soccer star David Beckham's tattoos, threatened to sue Beckham when he discovered Beckham wanted to use some of the tattoos in an advertising campaign. See

tattoo artist Whitmill, Judge Perry of the Eastern District of Missouri denied the artist's request to enjoin the release of *The Hangover Part II*, finding that the public interest in having the film released far outweighed Whitmill's copyright interests in his tattoo design.⁹⁰ In the other tattoo copyright infringement case, *Reed v. Nike*, the parties settled.⁹¹ Although the case was never litigated, examining this lawsuit's facts reveals that similar conflicts among interests arise in cases of alleged infringement of tattoos.

1. *Whitmill v. Warner Brothers*

In 2003, Victor Whitmill designed an original tattoo for the former heavyweight champion Mike Tyson.⁹² On the day Whitmill applied the tattoo to Tyson's face, Tyson signed a "Tattoo Release Form" acknowledging, "all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics."⁹³ Although ownership vests in the author at the time of fixation,⁹⁴ Whitmill did not officially register his work with the Copyright Office until April of 2011.⁹⁵ In 2009, Tyson appeared in *The Hangover*, a movie released by Warner Brothers.⁹⁶ Whitmill did not object to Tyson's appearance in the film or to the use of Tyson's tattoo in the advertising and promotion for the film.⁹⁷ In 2011, Tyson appeared in *The Hangover Part II*, the sequel to *The Hangover*.⁹⁸ In *The Hangover Part II*, one of the main characters, played by

Fiona Cummins & Sharon Feinstein, *Exclusive: I Own Beck's Tattoo . . . and I'll Sue*, DAILY MIRROR (June 27, 2005), <http://www.mirror.co.uk/celebs/news/2005/06/27/exclusive-i-own-beck-s-tattoo-and-i-ll-sue-115875-15668908>.

⁹⁰ See Noam Cohen, *Citing Public Interest, Judge Rules for "Hangover II"*, N.Y. TIMES (May 24, 2011, 4:05pm), <http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii>.

⁹¹ See Cohen, *supra* note 8.

⁹² See Heller, *supra* note 89.

⁹³ See Whitmill Complaint, *supra* note 77, at 3.

⁹⁴ See, e.g., *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

⁹⁵ Warner Bros. Memo., *supra* note 67, at 9.

⁹⁶ *Id.* at 5–6.

⁹⁷ *Id.* at 6.

⁹⁸ *Id.* at 5–7.

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actor Ed Helms, appears in the film bearing an almost identical facial tattoo to that of Mike Tyson.⁹⁹



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Warner Brothers used footage of Helms sporting the tattoo in its trailer for the film and in other advertising and promotional materials.¹⁰¹ Subsequently, Whitmill filed a complaint against Warner Brothers alleging copyright infringement of his original tattoo.¹⁰² In his complaint, Whitmill sought a preliminary and a permanent injunction, enjoining Warner Brothers from using the tattoo on Ed Helms' face "in the Movie and otherwise."¹⁰³ Whitmill also sought compensatory damages and an award of Warner Brothers' profits resulting from the alleged infringement.¹⁰⁴

⁹⁹ *Id.* at 8.

¹⁰⁰ David Kravets, *Warner Bros. Sued for Using Mike Tyson's Tattoo in New Movie*, WIRED (May 2, 2011, 2:54 PM), <http://www.wired.com/threatlevel/2011/05/infringing-tattoo>.

¹⁰¹ Warner Bros.' Memo., *supra* note 67, at 8.

¹⁰² *See generally* Whitmill Complaint, *supra* note 77.

¹⁰³ *See id.*

¹⁰⁴ *See id.*



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In his action, Whitmill sued only Warner Brothers and brought no claim against Tyson.¹⁰⁷ Thus, the second infringement situation—where a copyrighted tattoo on a person appears in a subsequent work without the owner’s permission—is not at issue here. The court’s decision in *Whitmill* is quite brief and sheds light only on how to handle an instance of direct copying of an original tattoo without permission of the copyright owner.

C. The Parody Defense

Warner Brothers argued first that tattoos should not be entitled to any copyright protection.¹⁰⁸ Alternatively, Warner Brothers argued that even if the court recognized a copyright interest in the tattoo, the film’s use of the tattoo was permissible under the fair use doctrine and thus did not infringe upon Whitmill’s copyright.¹⁰⁹ Judge Perry rejected Warner Brother’s defense of fair use.¹¹⁰ She ruled that the “tattoo” on Ed Helms’ face in the

¹⁰⁵ *The Hangover Part II* (2011), THE INTERNET MOVIE DATABASE (last visited Oct. 11, 2012), <http://www.imdb.com/title/tt1411697>.

¹⁰⁶ *The Hangover Part 2 Poster: Ed Helms*, ABOUT.COM (last visited Oct. 11, 2012), <http://movies.about.com/od/thehangover2/ig/Hangover-2-Posters/Ed-Helms-Poster.htm>.

¹⁰⁷ Warner Bros. Memo., *supra* note 67, at 18; *see* Liebesman, *supra* note 10.

¹⁰⁸ Warner Bros. Memo., *supra* note 67, at 13.

¹⁰⁹ Kal Raustiala & Chris Sprigman, *Can You Copyright a Tattoo?*, FREAKONOMICS (May 2, 2011, 2:00 PM), <http://www.freakonomics.com/2011/05/02/can-you-copyright-a-tattoo>.

¹¹⁰ *See* Matthew David, *Tyson Tattoo Trouble*, LIKELIHOOD OF CONFUSION (May 25, 2011), <http://www.likelihoodofconfusion.com/tyson-tattoo-trouble>. Should this case have been appealed and a different court have the fair use analysis, Warner Brothers may

film was an exact copy that “did not comment on the artist’s work or have any critical bearing on the original composition.”¹¹¹ Because there was no change to the tattoo, there was no parody.¹¹² In her rejection of Warner Brothers’ fair use defense, Judge Perry also noted that the use of the tattoo on Helms’ face was not necessary to the movie plot and that Warner Brothers used the tattoo extensively in its marketing and promotion of the movie.¹¹³ She also found that the plaintiff met his burden of proving irreparable harm by showing the “loss of control over his design.”¹¹⁴

D. *Balancing the Interests*

Ultimately Judge Perry ruled that the “balancing of the equities and the harm to the public if the injunction were granted” weighed in favor of Warner Brothers.¹¹⁵ She recognized that Whitmill had a copyright interest in the tattoo and that his interest was infringed by Warner Brother’s use, but excused the use anyway on the grounds of “public interest.”¹¹⁶ It is interesting that though she excused the use and denied the injunction, she did so in the name of public interest instead of using the statutory excuse of fair use—especially where the parody argument was arguably quite strong.

Whitmill illustrates that the underlying policy behind the Copyright Act—to promote science and the useful arts for the overall benefit of the public—supports heavily weighing the public

have a better chance of asserting its transformative use defense. *See, e.g.*, Yvette J. Liebesman, *Copyright and Tattoos: Hangover II Injunction Denied, but the Copyright Owner Got Some Good News Too—Whitmill v. Warner Bros.*; ERIC GOLDMAN: TECH & MKTG. LAW BLOG, (May 24, 2011), http://blog.ericgoldman.org/archives/2011/05/copyright_and_t.htm.

¹¹¹ *See id.* This finding indicates that Judge Perry rejected Warner Brothers’ argument that the subsequent use of the tattoo was transformative under the first prong of the fair use defense. *See* 17 U.S.C. § 107 (2006).

¹¹² *See* David, *supra* note 110.

¹¹³ *See* Liebesman, *supra* note 10. These notes suggest that Judge Perry determined that the commercial nature of the use and the lack of transformativeness of the use weighed against a finding of fair use. *See* 17 U.S.C. § 107.

¹¹⁴ Joe Mullin, *Tyson Tattoo Lawsuit: Studio’s Defenses Are ‘Silly’, Says Judge*, PAIDCONTENT.ORG (May 24, 2011, 5:20 PM), <http://paidcontent.org/article/419-judge-shows-sympathy-for-plaintiffs-in-tyson-tattoo-case>.

¹¹⁵ *See* Liebesman, *supra* note 10.

¹¹⁶ *See id.*

interest when determining whether to grant injunctive relief to a tattoo infringement plaintiff.

E. Reed v. Nike

While the lawsuit involving the Oregon tattoo artist Matthew Reed and the tattoo on the NBA star Rasheed Wallace was never litigated, the facts reveal that similar interests are implicated in other cases involving a subsequent, unauthorized use of a copyrighted tattoo.

1. The Facts

The only tattoo copyright infringement case besides *Whitmill v. Warner Bros.* involved tattoo artist Matthew Reed, who sued Nike and an advertising company after Nike used the design that he had created for NBA player Rasheed Wallace in an advertising campaign.¹¹⁷ In 1998, Reed met with Wallace to discuss the art design that would become the tattoo.¹¹⁸ During the initial meeting, Wallace signed an “Information and Release Document,” which was the only written agreement between the parties and which did not mention any assignment of Reed’s copyright interest in the work.¹¹⁹ In a second meeting, Wallace proposed changes to the sketch Reed had drawn¹²⁰ and, over course of three sessions, Reed applied the tattoo to Wallace.¹²¹ Wallace paid Reed \$450, which Reed considered a low price but believed was worth the exposure he and his business would get from his tattoo appearing on an NBA player.¹²²

¹¹⁷ See Heller, *supra* note 89.

¹¹⁸ See Reed Complaint, *supra* note 6, at 3–4.

¹¹⁹ *Id.* at 3.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 3–4.



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In 2004, Reed learned that Wallace's tattoo was featured as part of a Nike advertising campaign.¹²⁵ Reed was never contacted about the use of his original artwork in the form of Wallace's tattoo in the commercial.¹²⁶ Reed had registered a copyright for the "Egyptian Family Pencil Drawing" that was the basis of the tattoo he applied to Wallace's arm.¹²⁷ Reed sued Nike and the advertising firm Weiden + Kennedy, alleging that the defendants "copied, reproduced, distributed, adapted and/or publicly displayed" his copyrighted work without his consent.¹²⁸

2. The Conflicts

This case involves conflicting interests among the copyright ownership interests of the artist, the right to publicity of the subject, and the right of the public to benefit from subsequent works featuring a unique and noteworthy tattoo on a popular basketball player.

In this case, Reed was the sole author and owner of the copyrighted tattoo. While Wallace and Reed worked together to develop the design, their mere collaboration was insufficient to establish intent to create a joint work or to establish a work for hire arrangement.¹²⁹ Because Reed was the sole owner of the copyrighted work and Nike and its advertising agency used it in a

¹²³ *Rasheed Wallace*, THE ATHLETE TATTOO DATABASE (last visited Oct. 11, 2012), <http://athletetattooDATABASE.com/Rasheed+Wallace>.

¹²⁴ *Id.*

¹²⁵ See Reed Complaint, *supra* note 6, at 4.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See *id.* at 4–5.

¹²⁹ See discussion *supra* Part I.C.

subsequent work without Reed's permission, the use infringed Reed's exclusive rights.

Through the right of publicity, Wallace had an interest in promoting his own name and likeness, including the part of his body featuring his tattoo. The right of publicity is "the inherent right of every human being to control the commercial use of his or her identity."¹³⁰ Here, while Reed undoubtedly held a copyright interest in the tattoo and thus had a right to prevent unauthorized reproduction, public display or derivative works, Wallace also undoubtedly had a right to exploit his persona—including his tattoo—in his endorsement deal with Nike. Likewise, Nike had an interest in exploiting Wallace as a spokesperson for its products, including featuring the elements of his persona that make him a popular athlete and thus an effective Nike representative. Finally, the public arguably had an interest in viewing a work featuring an interesting tattoo on a popular professional basketball player.

While this case settled out of court, had it reached litigation, the court would have needed to consider all these competing interests and not only the copyright interest of the artist. In tattoo cases, because of the nature of the medium in which the copyrighted work is fixed, interests including the right to publicity and the constitutional right to control one's body must weigh more heavily in determining whether infringement occurred and in deciding whether to award damages or injunctive relief than in cases involving more traditional copyrighted works.

F. Policing Problems

Two hypothetical situations developing the problems of direct copying and featuring a copyrighted tattoo in a subsequent work will elucidate issues surrounding the policing of infringement in tattoo cases.

¹³⁰ J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 1:3 (2d ed. Mar. 2011); see *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413 (9th Cir. 1996) (defining the right of publicity as meaning, in essence, "that the reaction of the public to name and likeness, which may be fortuitous or which may be managed and planned, endows the name and likeness of the person involved with commercially exploitable opportunities") (citation omitted).

First, to illustrate the direct copying problem: a teacher in Tallahassee, Florida who is an avid Manchester United fan gets a replica of David Beckham's guardian angel tattoo inked across his back. In this scenario, few people will know about the tattoo, and few will care that it is an unauthorized copy of an original work. Here, the direct copying of the angel tattoo onto the teacher's body undoubtedly infringes upon tattoo artist Louis Molloy's copyright of the angel tattoo,¹³¹ but who will police this infringement? Furthermore, which party committed the infringement in this case—the teacher or the tattoo artist who applied the image to the teacher?

Second, to illustrate the problem of featuring a copyrighted tattoo in a subsequent work: a paparazzo snaps a picture of Heidi Klum in which her wave and star tattoo is clearly visible, and sells it to *People Magazine*, who publishes the photo. In this case, assuming Heidi's tattoo is copyrighted, is there infringement? Or is this a fair use of the tattoo because it is being reproduced in the course of reporting the "news" of a public figure's day-to-day activities? If it is infringement, however, who was the infringer—the photographer, the magazine, or both? Again: who will police this type of infringement?

G. First Amendment Problems

A major problem with the copying of tattoos and fair use is that to properly parody a tattooed person for purposes of criticizing or commenting on them, a large portion, if not all, of the tattoo will need to be copied.¹³² For example, to effectively "conjure up" Mike Tyson, a subject must bear the tribal facial tattoo that has become inextricably linked with Tyson's persona.¹³³ A different tattoo or a tattoo in a different place would simply not be as compelling and may not even evoke the subject of the parody. In this example, so long as the use of the original Tyson tattoo is for

¹³¹ See *Tattoo Jam 2011*, BIZARRE MAG, http://www.bizarremag.com/weird-news/tattoos-body-art/11188/tattoo_jam_2011.html (last visited Nov. 13, 2011).

¹³² See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588–89 (1994) ("When parody takes aim at a particular work, the parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable.").

¹³³ *Id.*

purposes of criticizing or commenting on the original work, the use should qualify as fair under section 107.¹³⁴

Judge Perry's fair use analysis in *Whitmill* presents some fair use and First Amendment concerns. In her discussion, Judge Perry determined that Warner Brother's use of Tyson's tattoo was not sufficiently transformative under the first prong of the fair use analysis because the image that appeared on Helms' face was nearly identical to the original work.¹³⁵ However, this finding seems to misinterpret the fair use analysis established in section 107 and developed by United States courts. While the amount of the copyrighted work copied in the Mike Tyson case was arguably one hundred percent, the purpose and character of the use was imitation for comic effect that created a new work making "ridiculous the style and expression of the original."¹³⁶ *The Hangover Part II* is a comedy about a bachelor party in Thailand gone awry.¹³⁷ A running joke in both films centers on the main characters' dicey run-ins with Mike Tyson, who plays himself.¹³⁸ Based on the definition of parody,¹³⁹ the goal of the Copyright Act to stimulate artist creativity, and the public policy supporting findings of fair use to encourage freedom of expression, Judge Perry should have found fair use of the tattoo in this case. If her analysis and outcome is applied in future cases similar to this one, the standard for and burden of establishing fair use will be significantly higher. If subsequent authors are not allowed to copy copyrighted tattoos, even in the name of a parody or fair use, this

¹³⁴ The policy behind finding uses such as these to be fair uses stems from the desire to promote both artist creativity as well as the freedom of speech and expression. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹³⁵ See David, *supra* note 110.

¹³⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580–81 (1994); *Roger v. Koons*, 960 F.2d 301, 309–10 (2d Cir. 1992) ("Parody . . . is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original.").

¹³⁷ See *The Hangover Part II (2011)*, INTERNET MOVIE DATABASE (May 26, 2011), <http://www.imdb.com/title/tt1411697>.

¹³⁸ Cohen, *supra* note 8.

¹³⁹ See *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

restriction could have serious ramifications on the ability to exercise the freedom of speech and expression.¹⁴⁰

III. MEMORIALIZE THE AGREEMENT, BALANCE THE INTERESTS

Part III suggests some solutions that might mitigate the conflicts among interests that arise in tattoo infringement cases and offers a guide to future courts addressing the issues of copyright interests in body tattoos. The threshold question that must be addressed when determining the interests of tattoo artists and tattoo bearers is, are tattoos even copyrightable? Then, it must be asked, whether tattoos are or are not copyrightable, is, should they be copyrightable? It seems that as long as tattoos meet the statutory requirements, they should be afforded at least some copyright protection. However, given the interests implicated in tattoo cases (most notably, the interest of a human subject in controlling his own body), copyrighted tattoos should not enjoy the same degree of protection as other copyrighted works.

A. *Can You Copyright a Tattoo?*

Before *Whitmill v. Warner Brothers* in 2011, no court had ever directly addressed the question as to whether copyrights are in fact copyrightable.¹⁴¹ However, there is some statutory guidance regarding this issue. The Copyright Act explicitly establishes the requirements for copyright protection: the work must be an “original work of authorship” and it must be “fixed in a tangible medium of expression.”¹⁴² If tattoo designs that satisfy the originality requirement were fixed on paper or on a canvas, they

¹⁴⁰ Joe Mullin, *Should Copyright Apply to Mike Tyson's Facial Tattoo?*, PAIDCONTENT.ORG (May 2, 2011, 2:50 PM), <http://paidcontent.org/article/419-mike-tyson-tattooist-tries-to-block-hangover-2-with-copyright-suit>.

¹⁴¹ David Post, *For the “Life Imitates Law School Exam” File: Tattoo Copyright*, THE VOLOKH CONSPIRACY (May 25, 2011, 11:16 am), <http://volokh.com/2011/05/25/for-the-life-imitates-law-school-exam-file-tattoo-copyright>. Without analyzing the issue, Judge Perry simply accepted tattoos as copyrightable works and moved on to the remainder of the analysis. See David, *supra* note 110 (quoting Judge Perry as insisting, “[o]f course tattoos can be copyrighted . . . I don’t think there is any reasonable dispute about that”).

¹⁴² 17 U.S.C. § 101 (2006).

would undoubtedly receive copyright protection. Thus, the difficult question is whether a human body qualifies as a “tangible medium of expression” for purposes of earning copyright protection.¹⁴³

Based on the statutory language, the human body does seem to qualify as such a medium. Under the 1976 Copyright Act, a work is “fixed in a tangible medium of expression” when the embodiment of the work in a material object is “sufficiently permanent . . . to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.”¹⁴⁴ Tattoos are permanently fixed onto a person’s skin and thus can be perceived by others for more than “transitory duration.” They are at least perceivable for the duration of the human subject’s lifetime. Assuming that such a time period qualifies as “more than transitory,” tattoos can satisfy the statutory requirements and should be entitled to at least some protection under the Act.

Part of addressing the question “are tattoos copyrightable?” involves determining what constitutes the original work. There are two possible original work determinations in the tattoo context: the sketch, stencil or drawing that precedes the application of the tattoo, and the body tattoo itself. Usually, before permanently applying the image to the subject, tattoo artists prepare the image in the form of a sketch or drawing or create a tattoo stencil known as a “flash.”¹⁴⁵ The drawings, sketches or stencils can be independently copyrightable providing they comply with the statutory requirements of originality and fixation.¹⁴⁶ Arguably, if an artist copyrighted an image fixed in the form of a tattoo stencil and then applied that image onto a human subject, he would be creating a derivative work of the original stencil in a different medium.¹⁴⁷ In this case, the derivative body tattoo would be based on a copyrighted work as required by the statute,¹⁴⁸ and would

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *What Is Tattoo Flash?*, ESSORTMENT, <http://www.essortment.com/tattoo-flash-29579.html> (last visited Nov. 29, 2011).

¹⁴⁶ 17 U.S.C. § 102(a) (2006).

¹⁴⁷ *See supra* Part I.D.2.

¹⁴⁸ 17 U.S.C. § 106 (2006).

consist of sufficient modifications (i.e., transcribing it onto a new medium) as to make it an “original work of authorship.”¹⁴⁹ This scenario—where the tattoo is merely a derivative work of an original stencil, sketch or drawing—seems to eliminate many of the concerns associated with a tattoo subject appearing in public or in subsequent works. In this situation, the subject has a nonexclusive license¹⁵⁰ to “use” original work embodied in the drawing or stencil.¹⁵¹

In a second possible situation, the creation of a tattoo on a human body might not constitute a derivative work of an original sketch or drawing, but an original work in and of itself. Few would argue that Picasso’s *Guernica* is merely a derivative work simply because he sketched out several versions of it before committing the final copy to a canvas. Similarly, a tattoo stencil, while potentially an independently copyrightable work, need not be defined as the original work from which the subsequent body tattoo is derived. Where the tattoo itself is the original work, the human subject would not be a licensee of an original work, but rather would be the medium in which an original work is fixed and expressed. This scenario is the one in which the conflicts outlined above arise.¹⁵²

The amount and degree of conflicting interests that arise in the situation where the artist is the owner and the tattoo is the original work beg the question: Even if tattoos are copyrightable, should they be?

B. Should You Be Able to Copyright a Tattoo?

In *Whitmill v. Warner Bros.*, the noted copyright scholar David Nimmer submitted an affidavit on behalf of defendant Warner Brothers arguing that the human body cannot qualify as a “medium

¹⁴⁹ 17 U.S.C. § 101.

¹⁵⁰ A nonexclusive license is an implied license that does not require a written agreement and does not transfer any ownership of the copyrighted work to the licensee. See *I.A.E., Inc. v. Shaver*, 74 F.3d. 768, 775 (7th Cir. 1996).

¹⁵¹ See discussion *infra* Part III.C.2.

¹⁵² See discussion *supra* Part II.

of expression” for purposes of the 1976 Copyright Act.¹⁵³ Because a human body is the material object in which a tattoo is fixed, as opposed to a piece of paper or a DVD, the analysis of copyrightability and the extent of copyright protection allowed must necessarily be different for tattoos than that of traditional copyrightable works. However, because tattoos satisfy the statutory requirements for copyrightability, as explained above, it would be unwise to completely dismiss their copyright protections simply because the “medium of expression” is the human body.

Tattoos present a unique problem not implicated in other forms of copyrightable works, primarily because the material object in which the work is fixed is a human body. Because a body is involved, some of the rights of copyright owners of tattoos will necessarily interfere with the constitutionally recognized right to control one’s body.¹⁵⁴ For example, if the artist is the copyright owner, his exclusive right to prepare derivative works based on the original work might suggest that he is free to alter or modify the tattoo at will.¹⁵⁵ However, the right to prepare such works clearly conflicts with the subject’s right to bodily autonomy.¹⁵⁶ Furthermore, if the artist is the copyright owner and the tattoo is classified as a work of visual art, the owner has the right to prevent any “intentional distortion, mutilation, or other modification” of the work that would prejudice his “honor or reputation.”¹⁵⁷ Again, if the artist were allowed to enforce this right against a subject who wishes to modify or remove the tattoo, the enforcement would interfere with the subject’s constitutional right to control his body.

¹⁵³ Declaration of David Nimmer, *Whitmill v. Warner Bros. Entm’t*, No. 4:11-cv-752 (E.D. Mo. May 20, 2011). These statements seem odd considering that in his copyright treatise (*Nimmer on Copyright*), Nimmer claims the exact opposite. See Joe Mullin, *Tyson Tattoo Lawsuit: Studio’s Defenses Are “Silly,” Says Judge*, PAIDCONTENT.ORG (May 24, 2011, 5:20 PM), <http://paidcontent.org/article/419-judge-shows-sympathy-for-plaintiffs-in-tyson-tattoo-case>.

¹⁵⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

¹⁵⁵ See 17 U.S.C. § 101 (2006).

¹⁵⁶ *Perry v. St. Francis Hosp.*, 886 F. Supp. 1551, n.9 (E.D. Kan. 1995) (noting that Congress has defined “human organ” to include skin) (citing 42 U.S.C. § 247e(c)(1) (2006)).

¹⁵⁷ 17 U.S.C. § 106A(a)(3)(A) (2006).

Both of these examples suggest that, if courts were to treat the rights of copyright owners of tattoos the same as the rights of other copyright owners, subjects would not be allowed to have their tattoos modified by another artist or to have their tattoos removed entirely. These restrictions on the subject's abilities would create a significant conflict between the subject's right to bodily autonomy and the copyright interests of the artist. This conflict unique to tattoos indicates that copyright protection of tattoos should be enforced differently—and to a lesser extent—than that of other copyrightable works.

C. Solving the Tattoo Infringement Problems

There are two ways of solving the potential infringement problems associated with tattoos. First, requiring a written agreement at the time the tattoo is applied would clarify questions of ownership and would allow the parties to determine what may be done with the original work. Alternatively, in situations where a copyrighted tattoo appears in subsequent works without the owner's permission (assuming the artist is the owner), courts should recognize an implied license for the subject to appear in such works.

1. Writing Requirement

Requiring a written instrument or a contract detailing who owns the work and providing what the subject can do with the work would eliminate a great deal of confusion in tattoo copyright infringement cases. This solution seems best suited to the problems caused by cases involving celebrity tattoos, which seem to be the most likely to occur given the highly visible nature of celebrities and the popularity of unique tattoos among celebrities. Public figures and celebrities negotiate deals and sign contracts to do basically everything in their lives, from endorsement deals, to public appearances, to roles in television shows, movies, and advertisements. Requiring them to sign a contract or agreement when they get tattoos would not place a great burden on them and would resolve many of the conflicts that arise between their constitutional interests and tattoo artists' intellectual property interests. The written agreement would define the ownership

rights in the tattoo and dictate what the subject is entitled to do with regards to the tattoo. For example, the agreement could allow a subject to alter, modify or remove his or her tattoo without the artist/owner's permission, but could require that the subject obtain permission if he or she wishes to appear in a commercial heavily featuring the tattoo (such as in *Reed*).

In the case of celebrity tattoos, a writing requirement might impose an undue burden on tattoo artists, who, unlike many celebrities and public figures are not often equipped with an agent, a manager and several attorneys, to counsel them every time they apply a celebrity tattoo. However, given the amount and types of conflicts that arise in tattoo infringement cases involving a high-profile celebrity, this may be a burden worth imposing to ensure that ownership of the exclusive rights is clear.

A writing requirement would not pose a substantial burden for non-celebrities who get tattoos, either. At least one state has statutory requirements under its health laws stipulating that the subject signs an informed consent form before receiving a "body art procedure."¹⁵⁸ At the time the subject signs his consent form, he could easily sign some kind of basic agreement recognizing, for example, that the intellectual property interests in the tattoo belong to the artist or to the tattoo parlor but that as the subject, he is purchasing a license to display the work in public and to employ other tattoo artists to prepare derivative works. In rare instances where the subject wants to negotiate the assignment of the intellectual property interests in the tattoo, a writing requirement might impose a greater burden by adding time to the tattooing process, and perhaps by requiring the parties to seek counsel.

a) Defining Ownership

Requiring a signed written instrument in the case of tattoos would allow ownership to be more easily defined: first, by explicitly stating the intent of the parties with regard to ownership, and second, by satisfying the written requirement of works made for hire (should this be the ownership arrangement into which the parties desire to enter).

¹⁵⁸ See MINN. STAT. § 146B.06(3) (2011).

b) Work For Hire

A work for hire arrangement with the subject as the author and owner would solve many of the problems that arise from the conflict between copyright ownership interests and the right of a person to control his or her own body.¹⁵⁹ If the subject is the owner, he may freely modify or even remove the tattoo without infringing on a copyright. It may be difficult and rare for a subject to qualify as both the author and owner of a work for hire tattoo, but in some situations, it seems certain subjects may meet the statutory requirements. A work for hire is either prepared by an employee within the scope of his employment or is a work “specially ordered or commissioned for use as a contribution to a collective work.”¹⁶⁰ Where an already-tattooed person commissions or specially orders another tattoo, his body, with multiple tattoos, could arguably be classified as a “collective work.”¹⁶¹ Although this interpretation of a collective work may be a bit of a stretch, in such a situation, the multi-tattooed subject could become the author of the new tattoo should the parties agree to a work for hire arrangement and commemorate the agreement in a written instrument signed by them.¹⁶² In this scenario, the subject, as the author, would have the exclusive rights outlined in section 106 and could, if he so chose, transfer some of his rights to the tattoo artist.¹⁶³ For instance, if the subject and the artist had an ongoing relationship, the subject might grant the artist the right to prepare any derivative works¹⁶⁴ (for example, altering or adding to the tattoo in the future). Requiring a written instrument before the creation of an original tattoo would allow parties wishing to enter

¹⁵⁹ See *Casey*, 505 U.S. at 851.

¹⁶⁰ A “collective work” is a work in which a number of contributions that constitute separate and independent works, are assembled into a collective whole. 17 U.S.C. § 101 (2006). A work for hire arrangement only exists, however, “if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” *Id.*

¹⁶¹ See *supra* Part I.C.

¹⁶² 17 U.S.C. § 201(b) (2006).

¹⁶³ 17 U.S.C. § 201(d).

¹⁶⁴ See 17 U.S.C. § 106 (2006).

into a work for hire relationship to clearly express this intent and to satisfy the written requirement of the work for hire provision.¹⁶⁵

c) Joint Work

Another ownership arrangement that would eliminate many of the constitutional concerns with bodily autonomy, and simultaneously preserve the creative interests of the artists, is a joint work arrangement. When dealing with original tattoo designs, oftentimes the subject will have the original idea for the tattoo and will collaborate with the artist to finalize the design.¹⁶⁶ For example, in the case with NBA star Rasheed Wallace, Wallace presented the artist, Matthew Reed, with his idea for an arm tattoo featuring an Egyptian family.¹⁶⁷ Reed drew several sketches and, throughout the design development process, Wallace commented on and suggested changes to the sketches of the design.¹⁶⁸

Joint works require the intention of both parties to merge their separate copyrightable contributions into a single, unitary whole.¹⁶⁹ If the artist and subject collaborated during the design process, contributed copyrightable elements to the final product, and intended their efforts to be merged into a single piece, they would both be authors of the final product and would be co-owners with equal rights for the purposes of copyright law.¹⁷⁰ As a co-owner, each party may use, or license someone else to use, the work, provided that he account to the other co-owners for any profits derived from such use or licensing.¹⁷¹ Signing an agreement memorializing this joint work understanding would clarify the rights of both parties and would eliminate many of the problems of an artist's exclusive ownership rights conflicting with the subject's right to control his own body. For example, the subject would be permitted to appear in subsequent works, to find a different artist to prepare derivative works and to allow others to copy the tattoo for

¹⁶⁵ 17 U.S.C. § 201(b).

¹⁶⁶ See Reed Complaint, *supra* note 6, at 3–4.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 17 U.S.C. § 101 (2006).

¹⁷⁰ 17 U.S.C. § 201(a).

¹⁷¹ See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

a licensing fee without infringing any of the exclusive rights under section 106.

d) The Exclusive Rights Breakdown

Negotiating and signing a written agreement between the artist and subject would also afford the parties the opportunity to transfer ownership of certain exclusive rights.¹⁷² Even if the artist was deemed the author and thus was initially vested with all copyright ownership rights, through a written instrument he might transfer some of the particular rights, the enforcement of which might present the greatest conflict with the right to bodily autonomy. This arrangement would consequently mitigate many of these conflicts. For instance, the artist might choose to transfer the right to prepare derivative works to the subject to avoid interfering with the subject's right to control his or her own body. Further, he could transfer the right to publicly display the work to preserve the subject's right to publicity.

e) Implied Nonexclusive License

In cases where there is no written agreement and an artist copyright owner claims infringement of his copyright for the use of the tattoo in a subsequent work, courts should recognize an implied nonexclusive license for the subject to appear in such works.¹⁷³ Under section 204 of the Copyright Act, transfers of copyright ownership must be in writing.¹⁷⁴ However, nonexclusive licenses may be granted orally or may be implied from conduct.¹⁷⁵ Some courts have recognized that an implied license results when (1) the purported licensee requests the creation of the work, (2) the copyright owner creates the work and delivers it to the licensee,

¹⁷² See 17 U.S.C. § 201(d).

¹⁷³ The Copyright Act permits copyright holder to grant nonexclusive implied copyright licenses. See *Foad Consulting Grp. v. Musil Govan Azzalino*, 270 F.3d 821, 825–26 (9th Cir. 2001). See also MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 10.03 (1989).

¹⁷⁴ 17 U.S.C. § 204 (2006).

¹⁷⁵ See 3 NIMMER, *supra* note 173, § 10.03[A], at 10–36; see also *Psyhoyos v. Pearson Educ., Inc.*, 855 F. Supp. 2d 103, 119 (S.D.N.Y. 2012).

and (3) the copyright owner intends the licensee to use the work as the licensee does.¹⁷⁶

A licensor-creator of a work who grants a nonexclusive implied license does not transfer ownership of his copyrighted work to the licensee;¹⁷⁷ he merely allows the licensee to use the work in a particular way.¹⁷⁸ For instance, in the hypothetical situation where a paparazzo snaps a photo of a celebrity bearing a tattoo and then sells it to a newspaper that publishes the photo, courts should recognize an implied nonexclusive license for subjects to appear in such works. To find otherwise would be to require that celebrities with tattoos cover up their body art every time they appear in public or would require publishers of such images to modify the images each time they published them. Not only is this unreasonable and unduly burdensome, but also in the case of facial tattoos such as Mike Tyson's, it would be nearly impossible. If a subject has a nonexclusive license to display his tattoo, he has an affirmative defense to a claim of copyright infringement by the artist/owner.¹⁷⁹

Failing to recognize an implied license in instances where tattooed subjects appear in public or in subsequent works would counter the frequent goal of tattoo artists of using their subjects as free promotion for their skill and business. For example, artist Matthew Reed admitted he took a lower-than-usual fee for his Egyptian tattoo on Rasheed Wallace's arm because he knew that he would benefit from the exposure of having his work displayed on a popular NBA player's body.¹⁸⁰ Additionally, declining to acknowledge an implied license would impede subjects' abilities to display themselves to the public in the way they desire and would prevent them from "using" a work for which they paid.

Perhaps the only instance in which an implied license to display the copyrighted work should not be recognized in the

¹⁷⁶ See, e.g., *Estate of Roberto Hevia v. Portrio Corp.*, 602 F.3d 34 (1st Cir. 2010); *Psihoyos*, 855 F. Supp. 2d.

¹⁷⁷ See *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996).

¹⁷⁸ See *id.*

¹⁷⁹ See *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990).

¹⁸⁰ Associated Press, *Artist Sues over Use of Tattoo*, ESPN.COM (Feb. 16, 2005), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

absence of a formal agreement is where the use of the copyrighted tattoo is for a commercial purpose. For instance, in the Rasheed Wallace tattoo case, Reed sued Nike for prominently featuring the tattoo in an advertising campaign designed to promote Nike products.¹⁸¹ This use was for a blatantly commercial purpose, whereas the featuring of Mike Tyson and Ed Helms bearing Tyson's tattoo in *The Hangover Part II* was at best for the indirect commercial purpose of making a more valuable film. Where the subject or other party gains financially from the commercial exploitation of the copyrighted tattoo, an implied license to use the work seems inappropriate.¹⁸²

f) Remedies

Monetary damages in the form of actual and statutory damages present few problems in the tattoo infringement context. Injunctive relief for infringement of tattoos stands to present the greatest amount of constitutional problems and thus should be used sparingly, if at all.

g) Actual and Statutory Damages

Awarding statutory damages to an artist copyright owner for unauthorized direct copying of his design seems fair. However, looking at the Mike Tyson case, for example, there may be many difficulties in calculating actual damages in these situations. To be entitled to actual damages in a copyright infringement case, a copyright owner must show damages suffered as a result of the infringement and the infringer's profits attained as a result of the infringement.¹⁸³ Showing actual damages resulting from the direct

¹⁸¹ See Heller, *supra* note 89.

¹⁸² See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (noting that courts do not sustain fair use claims under section 107 where the secondary use "can fairly be characterized as a form of 'commercial exploitation,' i.e. where the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material"). Although *American Geophysical's* discussion of commercial exploitation was in the fair use context, the reasoning is analogous to the implied license context; courts should not recognize an implied nonexclusive license to "use," without authorization, a copyrighted tattoo where the subsequent user (the subject) directly and conspicuously profits from that unauthorized use.

¹⁸³ 17 U.S.C. § 504(b) (2006).

copying onto Ed Helms' face as well as in the instance of Mike Tyson appearing in the film without permission seems difficult, if not impossible. Further, none of the traditionally recognized forms of actual damages occurred in either of these instances.¹⁸⁴

However, in cases where a person commissions a copyrighted tattoo from someone other than the owner and without the permission of the owner, actual damages in the amount of the tattoo application fee could be easily calculated, and the owner would be entitled to at least those damages, on the grounds of lost customers.¹⁸⁵ In cases of the second instance of infringement (the featuring of a copyrighted tattoo in a subsequent work), the problem of calculating actual damages arises once more. In cases where there are no actual damages, or actual damages are difficult to calculate, certain infringement plaintiffs may recover under statutory damages.

Only those owners who registered their copyrights in their tattoos before infringement occurred are entitled to statutory damages.¹⁸⁶ Where the court finds willful infringement, it may, in its discretion, raise the maximum amount of statutory damages from \$30,000 to \$150,000 for each work it finds to have been infringed.¹⁸⁷

2. Injunctive Relief

Certain types of injunctions, namely those that would interfere with a person's right to control his own body, should not be granted to plaintiffs in tattoo infringement cases, even where the court finds infringement. For example, if the artist is the owner of the copyright, he should not be able to demand that a subject cover up the tattoo when appearing in public or in movies, advertisements, or photos on the grounds that it interferes with his exclusive right to display the work publicly. He also should not be entitled to an injunction demanding the removal of a tattoo that has been altered without his permission on the grounds that it has

¹⁸⁴ See *supra* Part I.F.2.

¹⁸⁵ See, e.g., *Regents of the Univ. of Minn. v. Applied Innovations*, 685 F. Supp. 698, 711–12 (D. Minn. 1987).

¹⁸⁶ 17 U.S.C. § 412 (2006).

¹⁸⁷ 17 U.S.C. § 505(c)(2) (2006).

infringed his right to prepare derivative works. Allowing such injunctive relief would unreasonably and impermissibly interfere with the constitutional right of the subject to control his own body.

In assessing requests to enjoin the release of works such as movies or advertisements that feature a copyrighted tattoo, courts should consider the public interest in addition to the interests of the owner and the subject. For example, in Whitmill's case, Judge Perry appropriately balanced all the competing interests. She recognized Whitmill's copyright interest in the Tyson tattoo, but also recognized that the public interest in having *The Hangover Part II* released far outweighed any intellectual property interest he had in the work.¹⁸⁸ In other words, when evaluating requests for injunctions in cases like this, courts must remember that the Copyright Act aims not only to provide an incentive to create and to protect such creations, but also to promote subsequent creative works that build upon existing original works.

CONCLUSION

Due to the unique interests associated with, and constitutional problems raised by tattoos, their copyright protection must be treated differently than that of more traditional copyrightable works. Requiring, or at least encouraging, written instruments in conjunction with tattoo creation, or recognizing implied nonexclusive licenses in original tattoos would help to mitigate these conflicts.

¹⁸⁸ Cohen, *supra* note 90.