

The Challenges “Facing” Copyright Protection for Tattoos

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ABSTRACT

This Article addresses the ambiguity regarding the legal protectability of tattoos and the negative impact such ambiguity has on the rights of tattoo artists and their clients/customers.

* Assistant Professor of Law, Northern Illinois University College of Law. J.D. 2002, Harvard Law School; B.A. 1999, Indiana University-Purdue University at Indianapolis. First, I wish to thank Dean Jennifer Rosato and the Northern Illinois University College of Law whose generous support assisted in the preparation of this Article. Also, thanks to Professors Elvia R. Arriola, Robert L. Jones, Lorraine A. Schmall, and John A. Walton for their editing and suggestions on drafts of this Article. In addition, many thanks to the participants at the Central States Law Schools Association 2012 Scholarship Conference. I am especially grateful to the editors of the *Oregon Law Review* for their time and provision of helpful comments. Finally, I extend much gratitude to my hard-working research assistant, Anne McLean.

Notwithstanding the lack of federal court decisions in this area of the law, this Article determines that tattoos meet the requirements of copyrightability in the United States—originality and fixation in a tangible medium of expression. This Article examines the challenges presented by providing copyright protection for tattoos. In particular, this Article responds to the expert testimony of Professor David Nimmer, the author of a treatise often cited in the field of copyright law, in *Whitmill v. Warner Bros. Entertainment, Inc.* The *Whitmill* case concerns the well-known, prominent tattoo on the face of former heavyweight boxing champion Michael Gerard “Mike” Tyson. In that case, Nimmer opined that tattoos are not copyrightable. While the district court excluded Nimmer’s testimony on the basis that it constituted legal opinion, he raised several objections to the copyrightability of tattoos. This Article not only challenges Nimmer’s conclusion, but also his underlying rationale.

To date, no cases concerning the copyrightability of tattoos have gone to trial. However, the *Whitmill* case, which reached the preliminary injunction stage, and a handful of other copyright lawsuits have shed some light on how the courts might analyze the unique issues that arise in the determination of copyrightability of tattoos and the problems that flow from providing copyright protection to these creative works. This Article concludes with encouragement for tattoo artists to enforce their rights in their artwork in court. The filing of such lawsuits will likely lead to decisions that recognize the protectability of tattoos, which will remove tattoos from the fringes of the law into one of the categories of copyrightable subject matter, and remedy the harm to tattoo artists as a result of exploitation of their works. Such legal precedent will, in turn, empower more tattoo artists to regain control of their works in mass media.

INTRODUCTION

Former heavyweight boxing champion Michael Gerard “Mike” Tyson paid a tattoo artist in 2003 to mark his face with a Maori-style tattoo.¹ The tattoo created an unforgettable image of Tyson and grew to be famous for its beautiful spiral patterns that capture the

¹ Noam Cohen, *On Tyson’s Face, it’s Art. On Film, a Legal Issue.*, N.Y. TIMES, May 21, 2011, at A1. See *Maori Culture*, MAORI.COM, <http://www.maori.com> (last visited Jan. 28, 2012) (stating that the Maori are the indigenous people of Aotearoa New Zealand whose defining cultural aspects include “art, legend, tattoo (moko), performances (notably kapa haka), customs, hospitality and community”).

essence of tribal designs. After receiving the facial tattoo, Tyson continued his boxing career and appeared in various media, including films, television programs, and video games.²

A testament to the notoriety of Tyson’s tattoo was the decision of a major movie studio, Warner Bros. Entertainment, Inc., to place the same tattoo on the face of another actor in *The Hangover Part II*, the sequel of a popular comedic motion picture.³ Tyson’s former tattoo artist, S. Victor Whitmill, then sued, claiming copyright ownership in Tyson’s tattoo and infringement of that copyright by Warner Bros. Entertainment, Inc.⁴ The initial issue in this case will arise in all lawsuits involving an alleged copyright in a tattoo: the validity of the alleged copyright, namely, whether the tattoo meets the copyrightability requirements under federal law.⁵

Copyrightable works are expressed in a variety of forms—from buildings and architectural plans,⁶ to computer programs,⁷ to video games.⁸ Further, federal copyright law seems clear on the protectability of original paintings and many other types of creative works.⁹ However, what if the creative work is embodied not on a canvas, but on an individual’s body?

² *Mike Tyson*, IMDB, <http://www.imdb.com/name/nm0005512/> (last visited June 6, 2013).

³ Complaint at 1, *Whitmill v. Warner Bros. Entm’t, Inc.*, 2011 WL 2038147 (E.D. Mo. Apr. 28, 2011), *dismissed*, No. 4:11-CV-752 CDP (E.D. Mo. June 22, 2011) [hereinafter *Whitmill Complaint*] (involving a tattoo artist alleging infringement of copyright in tattoo design).

⁴ *Id.*

⁵ This Article focuses on the copyrightability of tattoos, not the ownership and enforcement of tattoos, including the particular violations of the Copyright Act that might result from their use. These issues are appropriate subject matter for a separate article.

⁶ See 17 U.S.C. § 102(a)(8) (2012) (including architectural works within the “works of authorship” category, but extending protection only to those works created on or after December 1, 1990); see also 17 U.S.C. § 113 (discussing the scope of exclusive rights in pictorial, graphic, and sculptural works, including architectural plans); 17 U.S.C. § 120 (discussing the scope of exclusive rights in architectural works).

⁷ See 17 U.S.C. § 117. See generally Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. FED. 2D 269 (2005) (discussing many federal court cases involving intellectual property rights in video, electronic, and computer games).

⁸ See 17 U.S.C. § 102; see also 17 U.S.C. § 113; *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007 (7th Cir. 2005) (discussing copyrightable elements of computerized video game after claim of copyright and trade dress infringement by manufacturer against competitor); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992). See generally Buckman, *supra* note 7.

⁹ See 17 U.S.C. § 102 (defining the subject matter of copyright); see also D. NIMMER, 1–2 NIMMER ON COPYRIGHT § 2.08[B][1] (1965) (providing an extensive discussion of the subject matter of copyright and pictorial, graphic, and sculptural works and the degree

Tattoos appear to meet the requisites of copyright protection¹⁰—in some cases, they are original works of authorship, and in almost all instances, they are fixed in a tangible medium of expression—and fit within a category of copyrightable subject matter.¹¹ Over the years, Congress has extended copyright protection to additional categories of subject matter,¹² and copyright law has been extended to protect a multiplicity of media and new technologies as they develop.¹³ Yet, the copyrightability of tattoos is still in question.

Section 102(a) of the Copyright Act of 1976 provides for copyright protection “in original works of authorship fixed in any tangible medium of expression.”¹⁴ Arguably, the protectability of a tattoo is no different from any other creative work that meets the statutory requirements of copyrightability as set forth in 17 U.S.C. § 102(a).¹⁵ However, the protectability of tattoos is an area of the law that remains unaddressed by the courts. While a few tattoo artists have filed lawsuits in federal courts, there are as yet no published decisions that address the issue of copyright protection for tattoos on the human body.¹⁶ In fact, no tattoo artist has yet been successful in receiving enforcement by the court of his copyright in a tattoo.

of creativity required to constitute a work of art). For examples of case law, see *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F.2d 409 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (Justice Holmes discussing the still-prevailing rule regarding the creativity required of a work of art); *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

¹⁰ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

¹¹ Works of authorship must fall under one of several categories of subject matter in order to be eligible for copyright protection, namely, literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. *Id.* Tattoos fall under the category of pictorial, graphic, and sculptural works, which “include two-dimensional 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.” 17 U.S.C. § 101.

¹² *See, e.g.*, 17 U.S.C. § 102(a)(7) (extending federal copyright protection to sound recordings on February 15, 1972); *see also* 17 U.S.C. § 102(a)(8) (extending federal copyright protection to buildings on December 1, 1990).

¹³ *See, e.g.*, 17 U.S.C. § 117 (explaining that it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy).

¹⁴ *See id.* § 102(a).

¹⁵ *See id.*

¹⁶ *See, e.g.*, *Reed v. Nike, Inc.*, No. 3:05-CV-198 BR (D.Or. Feb. 10, 2005) (tattoo artist alleging tattoo design was infringed when it appeared in defendants’ advertisement

The objective of this Article is to address the ambiguity regarding the protectability of tattoos due to the lack of published court decisions in this area of the law, and the negative impact such ambiguity has on the tattoo industry—specifically, the rights of tattoo artists and their clients/customers (hereinafter referred to as “customer” or “client”). This Article traces the evolution of copyright law as it pertains to the protectability of tattoos and identifies unanswered questions regarding this particular type of artwork. Finally, it analyzes the issues and concerns that arise when leaving this area of law unresolved—a failure to protect tattoos as works of art and tattoo artists’ loss of control over their work.

Part I of this Article defines the most popular type of body art, commonly known as a “tattoo.”¹⁷ It briefly explores how body art is viewed and interpreted within society, specifically in the United States. Part II of this Article provides an overview of copyright lawsuits concerning tattoos, particularly the *Whitmill* action; *Reed v. Nike, Inc.*, an earlier copyright lawsuit¹⁸ involving former NBA basketball player Rasheed Wallace, representing one of the first cases to assert copyright infringement of a tattoo;¹⁹ and *Gonzalez v. Transfer Technologies, Inc.*, a case regarding the use of copyrighted designs as temporary tattoos.²⁰

Part III of this Article examines the language of the Copyright Act of 1976—the federal statute protecting artists’ original works—in

featuring the wearer of the tattoo); *see also* Whitmill Complaint, *supra* note 3, at *1 (tattoo artist alleging infringement of copyright in tattoo design).

¹⁷ While the scope of this Article is limited to the copyrightability of tattoos, some scholars have expanded the scope of their analyses beyond tattoos to other forms of body art. *See, e.g.*, 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, 99 n.5 (2003) (acknowledging that while the article focuses on copyright, trademark, and publicity issues relating to tattoos and makeup designs, the “analysis presumably would apply to other forms of body art as well, such as original hair designs or an original arrangement of piercings”).

¹⁸ Complaint, *Reed v. Nike, Inc.*, 3:05-CV-00198, 2005 WL 1182840 (D.Or. Feb. 10 2005) (dismissed Oct. 19, 2003) [hereinafter *Reed Complaint*] (alleging infringement of Copyright Registration Number VA 1-265-074).

¹⁹ *See* Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 315, 316 n.5 (2006). However, after filing the complaint, Reed was issued Copyright Registration Number VA 1-236-392, *Reed*, No. 3:05-CV-198 BR. In light of the issuance of this additional registration, Reed filed an amended complaint alleging that the defendants had also infringed that copyright. *See* *Reed Complaint*, *supra* note 18.

²⁰ *See* *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608 (7th Cir. 2002) (plaintiff alleging copyrights on designs intended to be imprinted on t-shirts were infringed when defendant copied and sold designs as temporary tattoos).

order to determine whether the statute is applicable to tattoos. This Part analyzes the issue of whether tattoos are original works of authorship (the first essential element of copyrightability), including whether tattoos possess the requisite creativity to qualify as copyrightable works.²¹ This Part then explores how the chosen medium affects the analysis of copyrightability of the work and considers whether tattoos are fixed²² in a tangible medium of expression—the second essential element of copyrightability set forth in the Copyright Act.²³

The Article concludes that tattoo artists should seek to protect and enforce the copyrights in their works.²⁴ The filing of such lawsuits will more likely lead to decisions that not only recognize the protectability of tattoos, but also address the harm to the tattoo artists, who are often the copyright owners, as a result of the exploitation of their works.

²¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991) (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”).

²² See 17 U.S.C. § 101 (2012) (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”).

²³ See generally 17 U.S.C. § 102(a) (requiring that works be “original works of authorship fixed in any tangible medium of expression” in order to be copyrightable).

²⁴ Recent interviews with tattoo artists suggest that the tattoo industry disfavors use of intellectual property law as a means of preventing exploitation of their works. Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1141 (2012) (arguing “tattoo artists view formal intellectual property law as ineffective, and consequently, they ignore it”). Alternatively, the industry has created its own norms-based system. *Id.* The effectiveness of such social-norms-based regimes is beyond the scope of this Article, which considers the copyrightability of tattoos. However, it has been determined that the social norms regime is ineffective at preventing violations of tattoo artists’ rights outside of the tattoo industry. *Id.* at 1170. While the majority of tattoo artists may prefer to resolve such disputes without attempting to use copyright law, there are a few tattoo artists who have asserted their rights in an effort to prevent use by media companies. This seems to suggest that at least some of these artists are concerned about widespread exploitation of their works, particularly when it is highly visible to the public, such as in a television advertisement or a motion picture.

I WHAT IS A TATTOO?

The word “tattoo” is derived from the Tahitian term “tatua,” meaning “to mark.”²⁵ A “tattoo” is “an indelible mark or figure fixed upon the body by insertion of pigment under the skin or by production of scars.”²⁶ Tattoos are limited to affixation on the skin, presumably of a human being.²⁷

For centuries, tattoos have been displayed on the bodies of people of various cultures throughout the world.²⁸ The practice of adding decorative designs to the skin has recently gained social acceptance in the United States²⁹ and, as a general rule, has become more commonplace in Western culture.³⁰ Indeed, the technique of tattooing

²⁵ See Randy Schueller, *Tattoo*, in 7 HOW PRODUCTS ARE MADE 384 (Deirdre Blanchfield ed., 7th ed. 2011).

²⁶ *Tattoo*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/tattoo> (last visited Dec. 30, 2011) (reporting that the first known use of the word “tattoo” took place in 1777).

²⁷ This Article does not contemplate any copyright issues relating to the branding of human beings (a practice of some fraternal organizations), livestock, or other animals.

²⁸ See Jane Caplan, *Introduction*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY, at xi (Jane Caplan ed., 2000) (classifying tattooing as “one of many forms of irreversible body alteration, including scarification, cicatrization, piercing and branding, and it is the [*sic*] probably the oldest and most widespread of these” and stating that physical evidence of tattooing dates back to the late fourth millennium B.C. in Europe and about 2000 B.C. in Egypt and “can be found in virtually all parts of the world at some time”); see also Cotter & Mirabole, *supra* note 17, at 138 (“For millennia, the human body has served as a medium of sublime artistic expression.”).

²⁹ See Harkins, *supra* note 19, at 314; Matthew Alan Cherep, *Barbie Can Get A Tattoo, Why Can't I?: First Amendment Protection of Tattooing in A Barbie World*, 46 WAKE FOREST L. REV. 331, 331 (2011) (“The culture of tattoos has shifted greatly over the last fifty years; once seen as symbols of a countercultural movement, tattoos have pushed their way into the mainstream.”); Catherine L. Fisk, *Privacy, Power, and Humiliation at Work: Re-Examining Appearance Regulation as an Invasion of Privacy*, 66 LA. L. REV. 1111, 1142 (2006) (arguing that the meaning of tattoos is changing and discussing the potential message conveyed by employers as a result of hiring a tattooed employee, and arguing that due to the increasing acceptance of tattoos as a means of self-expression, an employer’s ban of visible tattoos may be adverse to the employer’s intended message).

³⁰ See Fisk, *supra* note 29, at 1142 (“The meaning of tattoos appears to be undergoing a significant transition in the contemporary United States. Once considered the favored adornment of sailors of the lowest rank, and later regarded the insignia of renegade motorcyclists and gang members, tattoos are now said to be widely accepted among the younger generation.”). However, with the surge in the practice of tattooing in American culture also comes “second thoughts” decision-making concerning tattoo removal. See Bernadine Healy, M.D., *The Dangerous Art of the Tattoo*, U.S. NEWS (July 25, 2008), <http://health.usnews.com/health-news/family-health/articles/2008/07/25/the-dangerous-art-of-the-tattoo> (“Perhaps not surprisingly, most patients seeking removal are women, prompted by a disproportionate level of psychological stress and even tattoo stigma.”).

is increasingly recognized as a form of art in Western culture.³¹ Tattoo artists may have professional art training, association with the larger art world, specialization in certain types of design work, and an appreciation for the value of the work of other tattoo artists.³²

Since the 1960s, tattooing has transformed into an increasingly commercialized practice with a diverse clientele.³³ The “‘tattoo community’ [is] more visible and more organized, with the development of large scale and well-publicized conventions, an expanding number of magazines, books, and now websites devoted to tattoo art, and—a sure sign of coming of age—publications and museums devoted to the documenting of its own past.”³⁴ A few years ago, it was estimated that there were about 15,000 tattoo parlors in America making more than 2.3 billion dollars annually.³⁵ Other intellectual property scholars have noted a study documenting a dramatic increase in the number of tattoo parlors across the United States—rising from about 300 tattoo parlors in the 1970s to about 4000 in 1999.³⁶ In 2012, this number grew to an estimated 21,000 tattoo parlors in the United States.³⁷

The choice to adorn the body with a tattoo crosses generational lines in the United States, but statistics suggest that the younger the American, the more likely he or she is to have a tattoo.³⁸ Further, a study by the Pew Research Center found that more than one third (thirty-six percent) of Americans ages eighteen to twenty-five have a tattoo; forty percent in the twenty-six to forty range.³⁹ In contrast, the

While the removal of a tattoo is possible, the process is difficult, expensive, painful, and not highly successful. *Id.*

³¹ Juliet Fleming, *The Renaissance Tattoo*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 61 (Jane Caplan ed., 2000) (referring to the growth of tattooing in the West as a “tattoo renaissance”).

³² *See id.*

³³ Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Cotemporary Euro-America*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 240 (Jane Caplan ed., 2000).

³⁴ *Id.*

³⁵ Bruce Kennedy, *In Tattoo Business, Profits are Hardly Skin Deep*, NBC NEWS (Oct. 15, 2010, 2:30 PM) [hereinafter *Tattoo Business*], http://www.msnbc.msn.com/id/39641413/ns/business-us_business/t/tattoo-business-profits-are-hardly-skin-deep/#.

³⁶ *See* Cotter & Mirabole, *supra* note 17, at 101.

³⁷ Bruce Kennedy, *Changed Your Mind About that Tattoo?*, MSN MONEY (Dec. 5, 2012, 3:15 PM), <http://money.msn.com/now/post.aspx?post=dde0eb05-01a1-485c-a13f-3ec71810bb40>.

³⁸ *Tattooed Gen Nexters*, PEW RES. CTR. (Dec. 9, 2008) [hereinafter *Pew Study*], <http://www.pewresearch.org/daily-number/tattooed-gen-nexters/>.

³⁹ *See id.*

study found only about ten percent of people ages forty-one to sixty-four are tattooed.⁴⁰ An online poll taken by Harris Interactive reported that as of January 2012, “one in five U.S. adults has at least one tattoo (21%) which is up from the 16% and 14% who reported having a tattoo when this question was asked in 2003 and 2008, respectively.”⁴¹

Tattooing is increasingly used for medical and non-medical cosmetic applications.⁴² Often, and most relevant to this Article, tattooing is a method of self-expression by the tattoo artist and the client.⁴³ Scholars of the practice of tattooing have referred to the tattoo as “the repository and expression of ‘unconventional, individualistic’ values” and “the only form of human expression we have left that has magic to it.”⁴⁴

Tattooing has gained popularity in the United States, but it has a history of negative associations in Western culture.⁴⁵ While society at large is growing to accept the practice of tattooing as more commonplace, the legal community (including corporate IP rightsholders who may be defendants in tattoo copyright lawsuits) is slow to embrace this form of art as protectable work. In addition, tattooed people and tattoo artists traditionally have not viewed

⁴⁰ *Id.*; see David Whelan, *Ink Me, Stud.*, 23 AM. DEMOGRAPHICS 9, 9 (Dec. 2001) (reporting that “[ten] percent of Americans have or have had a tattoo, [two] percent have a body piercing other than an earring and [four] percent have both”) (quoted in Cotter & Mirabole, *supra* note 17, at n.12).

⁴¹ *One in Five U.S. Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/970/ctl/ReadCustom%20Default/Default.aspx>.

⁴² See Schueller, *supra* note 25, at 386 (“For example, tattoos can be used to obscure the reddish purple birthmarks known as ‘port-wine’ stains. They may also be used to improve the skin color of patients with vitiligo [sic], a disorder that causes the melanocytes in the skin to shut down and stop producing normal skin color. Tattooing is also being used to create permanent makeup, such as eye liner or blush, for burned or disfigured victims.”).

⁴³ Fisk, *supra* note 29, at 1143 (discussing popular culture’s increasing consideration of tattoos and tattooing as expressive activity, yet also recognizing the messages conveyed “are varied, extremely context specific, and change rapidly” and stating further that in a commercial context “[t]he wearer, the employer, and the customer may be conveying and receiving quite different messages”).

⁴⁴ Fleming, *supra* note 31.

⁴⁵ See Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States* 3 (Apr. 15, 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=815116 (stating, for example, that “[i]n the West, many associate tattoos with prisons, biker culture, or gang membership”).

themselves as part of the intellectual property community.⁴⁶ This lingering disfavor of tattoos has impacted the court system—there have been very few cases filed in federal court.⁴⁷ In fact, no tattoo artist has yet been successful in receiving enforcement by a court of his copyright in a tattoo. The paucity of tattoo copyright cases and the absence of a judicial recognition of the protectability of tattoos may further contribute to tattoo artists' reluctance to seek remedies in the courtroom.⁴⁸

II

A DEARTH OF TATTOO COPYRIGHT CASES

Whether a tattoo created in the first instance on a human being can be copyrighted is an unsettled question that courts have yet to address.⁴⁹ While there are no published opinions that resolve the issue of whether tattoos are protected by copyright law,⁵⁰ a federal judge of

⁴⁶ However, this may be changing. *Compare id.* (“The tattoo industry traditionally seems to have viewed itself as outside of intellectual property law (IP), and this may be part of the reason why very little case law has materialized in this area.”), *with* Beasley, *supra* note 24, at 1164–65 (several tattoo artists interviewed by the author stating they view their designs as art and agree with the underlying premise of copyright law, that “an artist should get credit for his work”).

⁴⁷ However, “when body art cases finally make their way into court, judges too will have to take the claims of body artists seriously because, as Justice Holmes once suggested, judges are not art critics.” Cotter & Mirabole, *supra* note 17, at 102.

⁴⁸ These factors may contribute to the tattoo industry’s decision to rely on a norm-based system. *See* Beasley, *supra* note 24.

⁴⁹ *See* Harkins, *supra* note 19, at 332 (“In years past, copyright protection was a non-issue or ignored because tattooists were either too reticent to sue a customer or too complacent to challenge tattoo lore, favoring any and all available exposure for their work.”); *see also* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1769 (2006) (“Until recently there has been little copyright litigation despite an apparent norm of widespread tattoo design copying.”); Cotter & Mirabole, *supra* note 17, at 98–99 (“[W]e are not aware of any cases yet that have discussed the unauthorized reproduction of trademarked words or symbols in tattoos or other body art”); Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction, Declaration of David Nimmer, ¶ 18, *Whitmill*, No. 4:11-CV-752 [hereinafter Nimmer Declaration] (“At the outset, let us consider case law. My review of published decisions has uncovered no case that usefully explicates the issue In terms of cases that treat a plaintiff’s allegation to own an interest, protectable under copyright law, in a tattoo, I have found none.”).

⁵⁰ *See* *Whitmill*, No. 4:11-CV-752 CDP (dismissed E.D. Mo. June 22, 2011); Complaint, *Allen v. Electronic Arts, Inc.*, 5:12-CV-3172, 2012 WL 6852208 (W.D. La. Dec. 31, 2012) (dismissed Apr. 9, 2013); *Escobedo v. THQ Inc.*, 2:12-CV-02470, 2012 WL 5815742 (D. Ariz. Nov. 16, 2012); Ira Boudway, *Hey, Pro Athletes: Your Tattoo Is Going To Get You Sued*, BLOOMBERG BUSINESSWEEK (Sept. 4, 2013), <http://www.businessweek.com/articles/2013-09-04/hey-pro-athletes-your-tattooed-arms-are-going-to>

the United States District Court for the Eastern District of Missouri orally expressed her thoughts on the copyrightability of tattoos in *Whitmill v. Warner Bros. Entertainment, Inc.*⁵¹

A. *Whitmill v. Warner Bros. Entertainment, Inc.*

S. Victor Whitmill filed a complaint against Warner Bros. Entertainment Inc. in the United States District Court for the Eastern District of Missouri on April 28, 2011.⁵² In the complaint, Whitmill alleged that he “created and applied an original and distinctive tattoo to the upper left side of the face of the former, world heavyweight champion boxer Michael Gerard ‘Mike’ Tyson” on February 10, 2003.⁵³ Whitmill also alleged that on the same day, Tyson signed a release acknowledging “that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo” were the property of Whitmill, who was doing business as Paradox-Studio of Dermagraphics.⁵⁴ Further, Whitmill, an award-winning visual artist, stated that the artwork he tattooed onto Tyson’s face “is one of the most distinctive tattoos in the nation.”⁵⁵

-get-you-sued?campaign_id=DN090413 (noting that Escobedo’s complaint is now part of THQ’s bankruptcy proceedings).

⁵¹ See Noam Cohen, *Citing Public Interest, Judge Rules for ‘Hangover II,’* N.Y. TIMES (May 24, 2011, 4:05 PM), <http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/>. Judge Catherine D. Perry did not issue a written opinion, but explained the court’s ruling and reasoning during the hearing on plaintiff’s motion for a preliminary injunction. See Transcript of Preliminary Injunction Hearing at 2, *Whitmill*, No. 4:11-CV-752 CDP (*motion denied* May 24, 2011) [hereinafter *Whitmill Hearing Transcript*]; see also Meredith Hatic, Note, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 396, 423 (2013) (“Before *Whitmill v. Warner Brothers* in 2011, no court had ever directly addressed the question of whether copyrights are in fact copyrightable.”). See generally Plaintiff’s Memorandum in Support of his Motion for Preliminary Injunction, *Whitmill*, No. 4:11-CV-752 CDP [hereinafter *Whitmill Injunction Memo*].

⁵² *Whitmill Complaint*, *supra* note 3, at 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* This statement raises significant questions as to whether this “distinction” is attributable to Whitmill’s artistic or professional skill, Tyson’s fame, the particular style of the tattoo, a combination of these factors, or other considerations. The discussion of the copyrightability of tattoos found in Part III of this Article provides more insight concerning these issues. An analysis of copyright ownership, which is beyond the scope of this Article, is also relevant to the evaluation of such factors.

Whitmill did not sketch the original design on paper or any other “traditional” medium.⁵⁶ The design was created in the first instance on Tyson’s face.⁵⁷ Thus, the *Whitmill* case presents an issue of first impression as to whether copyright protection arises from the creation of an original work of authorship fixed on human flesh.⁵⁸

Whitmill claimed that Warner Bros. infringed upon his copyright based upon the production company’s unauthorized⁵⁹ copying of the tattoo onto the face of another actor⁶⁰ in its motion picture *The Hangover Part II*.⁶¹ Whitmill further claimed that Warner Bros. infringed his copyright “through its unauthorized copying, distribution[,] and public display of the Pirated Tattoo in advertising and promotion for the Movie and by making an unauthorized derivative work—namely, the Pirated Tattoo—that is based upon and copies virtually all of the copyrightable subject matter of the Original Tattoo.”⁶²

Whitmill sought preliminary and permanent injunctions,⁶³ actual damages and profits,⁶⁴ and costs and attorney’s fees.⁶⁵ He moved for

⁵⁶ Whitmill Hearing Transcript, *supra* note 51, at 17–18 (first session, May 23, 2011) (Whitmill testifying that what he drew on Tyson’s face was not a copy from a book).

⁵⁷ *Id.*

⁵⁸ Whitmill Hearing Transcript, *supra* note 51, at 71 (second session, May 23, 2011) (Defendant’s counsel asserting that it was a “case of first impression—whether you can have a copyright on human flesh”).

⁵⁹ The court concluded that the facts were largely uncontested and that “[n]either Tyson nor Warner Brothers sought approval from Whitmill [to reproduce the tattoo] before either movie.” *Id.* at 2. Further, the court determined that Whitmill had not granted Warner Bros. a license, implied or otherwise, to “use the tattoo.” *Id.* at 4.

⁶⁰ Mike Tyson appeared in the *The Hangover* and *The Hangover Part II*. See Verified Answer to Complaint by Warner Bros. Entm’t, Inc., *Whitmill*, No. 4:11-CV-752, at 5, ¶ 15-16 (filed May 20, 2011) [hereinafter Warner Bros. Answer] (“Warner Bros. states that Mr. Tyson appeared, with Mr. Tyson’s tattoo, in the first Hangover movie, as well as in an advertising poster for the first Hangover movie, and that thousands of images of Mr. Tyson, with Mr. Tyson’s tattoo, have appeared in magazines, television and on the internet since February 10, 2003.”) Warner Bros. admitted that Tyson’s tattoo and the tattoo appearing on actor Ed Helms’s face in *The Hangover Part II* are similar, but denied that there was any copyrightable expression in Tyson’s tattoo or that the tattoo on Helms’s face was pirated. *Id.*

⁶¹ See Whitmill Complaint, *supra* note 3.

⁶² See *id.* at 7, ¶ 18. While Tyson appeared in both *Hangover* movies, there were no non-Tyson uses of the tattoo in the first movie. Whitmill Hearing Transcript, *supra* note 51, at 2 (May 24, 2011) (Judge Catherine D. Perry noting, “[t]he first movie didn’t do anything except show Mr. Tyson’s face”).

⁶³ Whitmill Complaint, *supra* note 3, at *1 (Whitmill seeking to enjoin Warner Bros. from releasing its motion picture, *The Hangover Part II*, and from making any use of the tattoo in the film or otherwise). See 17 U.S.C. § 502(a) (2012) (“Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section

a preliminary injunction to stop the advertising and release of *The Hangover Part II*, which was due to be released on May 26, 2011.⁶⁶

On May 24, 2011, Judge Catherine D. Perry denied Whitmill’s motion to preliminarily enjoin the release of *The Hangover Part II*.⁶⁷ However, she expressed sympathy for the tattoo artist’s claims, stating that Whitmill had a “strong likelihood of prevailing on the merits for copyright infringement.”⁶⁸ Judge Perry elaborated on her analysis of Whitmill’s likelihood of success on the merits in connection with Warner Bros.’ fair use⁶⁹ or parody⁷⁰ defense, noting Warner Bros.’ reproduction of Whitmill’s tattoo “did not comment on the artist’s work or have any critical bearing on the original

1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”).

⁶⁴ Whitmill Complaint, *supra* note 3, at *1 (Whitmill demanding actual damages and profits from Warner Bros.). See 17 U.S.C. § 504(b) (“The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.”).

⁶⁵ See Whitmill Complaint, *supra* note 3, at *1; see also 17 U.S.C. § 505 (“In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”).

⁶⁶ Whitmill Hearing Transcript, *supra* note 51, at 3 (May 24, 2011).

⁶⁷ See *id.*

⁶⁸ Cohen, *supra* note 51 (Judge Perry conceding “she should have enjoined the studio from releasing the film—a decision that could have cost the studio as much as \$100 million. But ultimately she concluded that the harm to the ‘public interest’ from stopping the release of the movie outweighed the harm to Mr. Whitmill.”).

⁶⁹ 17 U.S.C. § 107 (“In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (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 upon the potential market for or value of the copyrighted work.”). The fair use provision of the Copyright Act also sets forth illustrative categories of noninfringement, such as use for the purposes of “criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, or research.” *Id.*

⁷⁰ The Supreme Court has held that parody may be a fair use within the meaning of § 107 of the Copyright Act. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994). “Modern dictionaries accordingly describe a parody as a ‘literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,’ or as a ‘composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.’” *Id.* at 580.

composition. There was no change to this tattoo or any parody of the tattoo itself.”⁷¹ In addition, Judge Perry suggested that use of other tattoos besides Whitmill’s could have accomplished the same purpose.⁷²

Further, in the context of addressing the tattoo Whitmill inked on the face of Tyson, Judge Perry stated that tattoos are copyrightable:

Of course tattoos can be copyrighted. I don’t think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson’s face, or restricting Mr. Tyson’s use of his own face, as the defendant argues, or saying that someone who has a tattoo can’t remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it’s entirely consistent with the copyright law.⁷³

It appears, therefore, that at least one court considers tattoos to be protectable subject matter under the Copyright Act of 1976. Shortly following the court’s denial of Whitmill’s preliminary injunction motion to enjoin the release of *The Hangover Part II*, however, the parties dismissed the case.⁷⁴ As a result, the *Whitmill* case failed to provide a written precedent in support of the copyrightability of tattoos.

B. Reed v. Nike, Inc.

In 2005, Matthew Reed, a tattoo artist and self-employed graphic artist, filed a complaint in the United States District Court for the District of Oregon against Rasheed Wallace, a player in the National Basketball Association (“NBA”), footwear and sportswear company Nike, and advertising agency Weiden + Kennedy.⁷⁵

Reed alleged that defendants Nike and Weiden + Kennedy directly infringed his copyright in the tattoo affixed on the arm of Wallace in the creation of an advertising campaign for Nike footwear on television and on the Nike website.⁷⁶ The advertisement included a

⁷¹ Whitmill Hearing Transcript, *supra* note 51, at 4.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Order of Dismissal, *Whitmill*, No. 4:11-CV-752 CDP (E.D. Mo. June 22, 2011) (dismissing case with prejudice and ordering each party to bear its own costs and attorneys’ fees).

⁷⁵ Reed Complaint, *supra* note 18.

⁷⁶ *Id.* (stating that the advertising campaign included a commercial, which was televised and accessible via the Internet, that Wallace appeared in that commercial, and that the tattoo was prominently featured as Wallace described the creation and meaning of

close-up of the tattoo and featured the tattoo being created by a computerized simulation with a voice-over from Wallace describing and explaining the meaning of the tattoo.⁷⁷ After Reed saw the advertisement, he filed an application to register copyrights for the drawings related to the tattoo.⁷⁸

In addition to the direct infringement claim, Reed alleged that Wallace contributorily infringed Reed’s copyright by advising Nike and Weiden + Kennedy that Wallace owned all intellectual property rights in the tattoo. Reed alleged a third claim for an accounting to Reed for Wallace’s share of the proceeds from exploitation of the tattoo in the event that Wallace was indeed determined to be a co-owner of the tattoo.⁷⁹

Wallace signed a release during his initial meeting with Reed. The “Information and Release Document” required the disclosure of any of Wallace’s medical or skin conditions and certification that, among other things, Wallace freely consented to having the tattoo applied and released the tattoo parlor from any liability.⁸⁰ However, the agreement did not include any mention of an assignment or license of Reed’s copyright interest in the work.⁸¹ Indeed, the document did not make any reference to ownership interests in the artwork, sketches, drawings, or resulting tattoo.

the tattoo). Reed alleged that he was never contacted by any of the defendants concerning the use of the tattoo in the commercial. *Id.*

⁷⁷ Harkins, *supra* note 19, at 317.

⁷⁸ *Id.* at 316. The U.S. Copyright Office issued Reed two visual art Copyright Registrations (VA 1-265-074 and VA 1-236-392) for the Egyptian Family Pencil Drawings. *Id.*

⁷⁹ Reed Complaint, *supra* note 18, at *3. Specifically, Mr. Reed alleged: “Wallace had a meeting with Mr. Reed to discuss the artwork that would become the tattoo. Mr. Reed listened to the ideas for the tattoo presented by Mr. Wallace[,] . . . took notes and made sketches.” *Id.* Reed then created the artwork and presented it to Wallace and, after further discussion of the artwork and suggested changes by Wallace, Reed then created a stencil constituting “an intermediate step from which the drawing would be transferred to Mr. Wallace’s upper arm.” *Id.*; *see also* 17 U.S.C. § 201(a) (2012); Thomson v. Larson, 147 F.3d 195, 199 (2d Cir. 1988) (“Joint authorship entitles the co-authors to equal undivided interests in the whole work—in other words, each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account to the other joint owner for any profits that are made.”); Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991); Cmty. for Creative Non-Violence v. Reid, 846 F.2d 1485, 1498 (D.C. Cir. 1988) (“Joint authors co-owning copyright in a work are deemed to be tenants in common, with each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby.”), *aff’d without consideration on this point*, 490 U.S. 730 (1989).

⁸⁰ Reed Complaint, *supra* note 18, at Exhibit A.

⁸¹ *Id.* at 3.

Reed sought a permanent injunction,⁸² actual damages and profits,⁸³ prejudgment interest,⁸⁴ and costs and attorney's fees.⁸⁵ Ultimately, this case, which preceded *Whitmill v. Warner Bros. Entertainment, Inc.*, also settled pursuant to a confidential settlement agreement.⁸⁶ On October 19, 2005, the parties agreed to dismiss the case.⁸⁷

Although Reed did not sue for copyright infringement until 2005, one practitioner-scholar considers this case as “perhaps the first case to assert copyright infringement based on a tattoo.”⁸⁸ In 2006, Christopher A. Harkins, a practicing attorney in Chicago, Illinois, speculated that the case “may signal a floodgate for other lawsuits of its kind and may inspire creative theories of copyright infringement against other defendants in the media, sports, and entertainment industries.”⁸⁹ Unfortunately, there has been a trickle, rather than a flood, of tattoo copyright cases since *Reed v. Wallace*. If only one or two of these lawsuits are filed by tattoo artists every several years, it is unlikely that a case will go to trial in the near future.

Without any such cases on the federal judicial docket, the courts will not have the opportunity to resolve this area of the law, thus leaving significant unpredictability as to the success of tattoo artists when pursuing copyright claims. The work of tattoo artists is just as entitled to copyright protection as other works of art;⁹⁰ yet such artists—who are already discouraged by the difficulty of monitoring the unconsented use of their work by third parties⁹¹—may be further dissuaded from enforcing their copyrights due to the lack of

⁸² *Id.* at 5.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.*

⁸⁶ Stipulation of Dismissal with Prejudice, *Reed*, No. 05-CV-198 BR (D.Or. Oct. 19, 2005).

⁸⁷ *Id.*

⁸⁸ Harkins, *supra* note 19, at 315.

⁸⁹ *Id.*

⁹⁰ Cotter & Mirabole, *supra* note 17, at 138 (concluding that tattoo art “deserves the same respect and integrity as more conventional—we dare not say traditional—media such as painting and sculpture”).

⁹¹ *Id.* at 100–01 (stating that “[t]he difficulty of monitoring the subject or others’ subsequent use of their designs may discourage many body artists from attempting to enforce their rights, or even from registering their copyrights (a precondition to filing suit and for obtaining statutory damages)” (citation omitted)); *see also* Beasley, *supra* note 24, at 1161 (“[I]t would be very difficult for tattoo artists to identify people who had paid infringing artists to tattoo the original artists’ work on their bodies.”).

recognition of tattoo art as copyrightable subject matter by the federal courts, coupled with the history of society’s marginalization of their works and the derogatory view of the people who affix such works to their skin.⁹² As a result, tattoo artists will continue to lose control of their works.

C. Gonzalez v. Transfer Technologies, Inc.

While the above-referenced copyright infringement lawsuits filed by tattoo artists have ended in settlement, one published decision has assessed copyright protection in the context of temporary tattoos, namely, *Gonzales v. Transfer Technologies, Inc.*⁹³

In this case, plaintiff David B. Gonzales owned copyrights on several designs intended to be imprinted on T-shirts.⁹⁴ Defendant Transfer Technologies, Inc. reproduced four of plaintiff’s copyrighted designs⁹⁵ that were then sold by the defendant in the form of temporary tattoos.⁹⁶ When the plaintiff discovered the defendant’s conduct, the plaintiff sued for copyright infringement.⁹⁷ After the plaintiff filed suit, the defendant “promptly stopped producing and selling the infringing tattoos.”⁹⁸

The United States District Court for the Northern District of Illinois awarded the plaintiff minimum statutory damages of \$750 for

⁹² See Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 17 (Jane Caplan ed., 2000) (recognizing the double nature of tattoos as fascinating cultural features, which are flaunted in public, television, magazines and other forms of media, but still carry a looming meaning as “signs of degradation, criminality and deviance”); see also Benson, *supra* note 33, at 242 (“It is asserted (with some truth) that, given the attitudes of many towards the tattooed or extensively pierced, to engage in such practices is to place oneself ‘outside society’; more importantly, however, that these practices *in themselves* transgress or negate something central about the kind of person demanded by ‘society’ in late capitalism.”).

⁹³ 301 F.3d 608 (7th Cir. 2002).

⁹⁴ *Id.* at 608.

⁹⁵ *Id.*; see also 17 U.S.C. § 106(1) (2012) (setting forth the exclusive bundle of rights of the copyright owner: “the owner of copyright under this title has the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords”).

⁹⁶ *Gonzales*, 301 F.3d at 608.

⁹⁷ 17 U.S.C. § 501(a) (“Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.”).

⁹⁸ *Gonzales*, 301 F.3d at 608.

each of the infringed copyrights,⁹⁹ a total of \$3000.¹⁰⁰ Yet, the district court declined to award the plaintiff any attorneys' fees¹⁰¹ on the ground that "Transfer's actions, though willful, are not the kind of flagrant behavior that would justify an award of attorney's fees."¹⁰² The plaintiff then appealed the district court's ruling.

On appeal, the Seventh Circuit held that, although the defendant's discontinuance of its willful infringing activities was a point in the plaintiff's favor, this fact alone was not a sufficient basis to deny an award for attorneys' fees.¹⁰³

David Nimmer, a professor at the UCLA School of Law, author of the well-known treatise *Nimmer on Copyright Law*, and practicing attorney in Los Angeles, California, described this case as one "focusing on the *defendant's* conduct, [which] offers no illumination on whether a *plaintiff* may secure copyright protection in a tattoo."¹⁰⁴ Nimmer observed that "copyright protection for tattoos is unprecedented."¹⁰⁵ While it is true that no federal court has recognized the copyrightability of tattoos affixed onto the human body, this observation does not further the resolution of the question of whether such tattoos are copyrightable.

Professor Nimmer's position on behalf of Warner Bros. Entertainment in the *Whitmill* case has generated strong criticism from fellow intellectual property scholars. Ann Bartow, a professor at Pace Law School, wrote on a blog post that Nimmer's new position concerning the ineligibility of tattoos for copyright protection is a

⁹⁹ 17 U.S.C. § 504(c) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.").

¹⁰⁰ *Gonzales*, 301 F.3d at 609 (noting plaintiff was not seeking an award of actual damages).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Nimmer Declaration, *supra* note 49, ¶ 18. Nimmer's observations were set forth in his Declaration in Support of Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction. *Id.* Whitmill filed a motion to exclude David Nimmer's testimony on May 23, 2011 on the grounds that such expert testimony was nothing more than "thinly disguised legal argument and an attempt to circumvent the Court's already generous 40-page limit for Defendant's brief." See Plaintiff's Motion to Exclude Testimony of David Nimmer, *Whitmill*, No. 4:11-CV-752. The court sustained Whitmill's motion. *Id.*

¹⁰⁵ Nimmer Declaration, *supra* note 49, ¶ 19.

significant departure from his former position set forth in his copyright treatise, which embraced tattoos as copyrightable subject matter.¹⁰⁶

Furthermore, Douglas Lichtman, a professor at the UCLA School of Law, wrote:

I find Nimmer’s declaration shockingly unconvincing. . . . Had he argued that certain copyright remedies are off the table in instances when some otherwise-traditional remedy would (if applied here) constrain significant personal freedoms like the freedom to show one’s own face in public, fine. But Nimmer argued that the tattoo is not eligible for protection because it is not “fixed in a tangible medium of expression” and thus fell short of a threshold requirement that is codified in Section 102(a) of the Copyright Act. That makes no sense.¹⁰⁷

Tattoos—like any other creative work—are subject to the modest requirements of copyrightability set forth in Section 102(a) of the Copyright Act of 1976: originality and fixation of the work.¹⁰⁸ As this Article explores in further detail in Part III, there does not appear to be any doctrinal basis for denying copyright protection for tattoos.

III

COPYRIGHTABILITY OF TATTOOS

The U.S. Constitution grants Congress the “Power . . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”¹⁰⁹ This constitutional clause (referred to as the “Patent and Copyright Clause,” “Copyright Clause,” or “Intellectual Property Clause”) gives Congress the power to enact federal copyright statutes.¹¹⁰ Congress and the courts have struggled

¹⁰⁶ Ann Bartow, *When a Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN (May 25, 2011), <http://madisonian.net/2011/05/25/when-a-treatise-writer-tries-to-reconfigure-copyright-law-to-benefit-a-client/> (stating Nimmer admitted in his declaration that he had taken the position that tattoos were copyrightable but later realized his conclusion was wrong, citing a law review article in which he determined that the human body is not copyrightable, outside the context of tattoos).

¹⁰⁷ Douglas Lichtman, *Are Tattoos Eligible for Copyright Protection?*, MEDIA INST. (June 15, 2011), <http://www.mediainstitute.org/IPI/2011/061511.php>.

¹⁰⁸ 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

¹⁰⁹ U.S. CONST. art. I, § 8, cl. 8.

¹¹⁰ *See id.*

to determine the extent of this constitutional grant of authority.¹¹¹ While there has been considerable debate concerning the meaning of the terms “authors” and “writings” in the language of the clause, it is clear that Congress only has authority to protect the works of an “author” that fall into the category of “writings.”¹¹² However, Congress is not obligated to extend the protection accorded to the current broad array of subject matter.¹¹³

Copyright law today is an exclusively federal subject matter.¹¹⁴ For works created on or after January 1, 1978, the Copyright Act of 1976 is the governing law.¹¹⁵ Under the 1976 Act, copyright protection may extend to “original works of authorship fixed in any tangible medium of expression.”¹¹⁶ This Congressional requirement is parsed into two separate requisites for copyrightability. In order to be protected under copyright law, a work must be both “original” and “fixed.”¹¹⁷ The current Copyright Act includes eight categories of works of authorship eligible for copyright protection.¹¹⁸ Each of the requirements of copyrightability and the categories of copyrightable subject matter—as applied to tattoos—are discussed below.

¹¹¹ See Ira L. Brandriss, *Writing in Frost on a Window Pane: E-mail and Chatting on RAM and Copyright Fixation*, 43 J. COPYRIGHT SOC'Y U.S.A. 237, 241 (1996). The Copyright Act of 1976 and the previous federal copyright statutes do not define the term “author.” See Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976). *But see* 17 U.S.C. § 101. However, the courts have broadly interpreted the term. See, e.g., *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (defining “author” as “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature”).

¹¹² See Brandriss, *supra* note 111, at 241–42.

¹¹³ See *id.*

¹¹⁴ ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHT, PATENTS AND TRADEMARKS* 11 (2003).

¹¹⁵ Copyright Act of 1976, *supra* note 111. The Copyright Act of 1976, which provides the basic framework for the current copyright law, was enacted on October 19, 1976. *Id.* As of October 2011, the United States copyright law is codified in chapters one through eight and ten through twelve of Title 17 of the United States Code. See *id.*

¹¹⁶ *Id.*

¹¹⁷ 17 U.S.C. § 102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”).

¹¹⁸ Works of authorship include the following categories: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” *Id.*

A. The Originality of Tattoos

The standard of originality for a copyrightable work is low. When Congress drafted the 1976 Copyright Act, it intended to incorporate, without any modifications, the definition of originality developed by the courts at that time.¹¹⁹

In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court set forth the current definition of originality: “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”¹²⁰

The Supreme Court not only addressed the low standard of originality, but also the breadth of works that should be captured by this standard. In the words of the Court, “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”¹²¹

Therefore, the modern definition of originality is composed of two requirements: independent creation of the work by the author and display of a minimal level of creativity.¹²² Both of these requirements are modest. A copyrightable work need not be unique or novel;¹²³ all that is required is that the author contributes something “recognizably his own.”¹²⁴ Originality “means little more than a prohibition of actual copying.”¹²⁵ In other words, a minor addition of original expression by an author is sufficient to be copyrightable.¹²⁶

¹¹⁹ H.R. Rep. No. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 [hereinafter Copyright Act Congressional Bill] (“The phrase ‘original works of authorship,’ which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.”).

¹²⁰ *Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991) (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)) (Court conceding that the “requisite level of creativity is extremely low; even a slight amount will suffice”).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951).

¹²⁴ *Id.* at 103.

¹²⁵ *Id.*

¹²⁶ In the context of tattoo art, such as the Maori-inspired warrior tattoo at issue in *Whitmill v. Warner Bros.*, this could pose an obstacle to copyrightability due to the possibility that the artwork was copied from tribal art in the public domain or “owned” by another party, perhaps an indigenous culture. See Molly Torsen Stech, “*Anonymous, Untitled, Mixed Media*”: *Mixing Intellectual Property Law with Other Legal Philosophies*

In the context of tattoos, it is unquestionable that at least some such artwork consists of independently created expression by an author.¹²⁷ Regarding the creativity requirement, it is not for the courts to determine the level of creativity expressed in tattoo artwork as compared with other copyrightable works or whether such artwork is in good taste.¹²⁸ It is sufficient that such artwork possesses *some* minimal spark of creativity.¹²⁹

The originality requirement should not present an obstacle to the copyrightability of every tattoo. The more intriguing issues concerning federal copyright protection for tattoo art arise as a result

to Protect Traditional Cultural Expressions, 54 AM. J. COMP. L. 173, 175 (2006) (discussing the concerns with the lack of adequate legal protection provided by U.S. intellectual property laws for traditional cultural expressions). Torsen has observed that the Maori people “do not condone the existence of legal rights for their TCEs without talking about the tribal or clan restraints and obligations imposed on those rights arising from their cultural responsibilities.” *Id.* at 179. She has further noted that the beliefs of indigenous cultures concerning the motivations for creation, use, or appreciation of traditional cultural expressions are not reflected in Western intellectual property laws. *See id.* However, for purposes of this Article, it is assumed that the tattoo artist has, at a minimum, added original artwork to the design that is ultimately affixed to the skin.

¹²⁷ However, this Article posits that a tattoo of one’s date of birth, without any artistic features, would not meet the requisite level of original expression by an author. Nor is a tattoo of a basic geometric shape, such as a circle, oval, or star, copyrightable, unless the selection and arrangement of the geometric shape possesses the minimum level of creativity. *See Glasscraft Door I, L.P. v. Seybro Door & Weathership Co.*, 2009 WL 3460372, *3 (S.D. Tex. 2009). Tattoos used to create permanent makeup, such as eyebrows, lip liner, or a freckle on a person’s face, would also fail to meet the requisite level of originality for a copyrightable work. *See Schueller, supra* note 25, at 386 (discussing the use of tattoos as permanent makeup for burned or disfigured victims).

¹²⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.”).

¹²⁹ Such creative works have even been used by the courts as a means of identification of defendants in criminal cases. *See, e.g., State v. Meade*, 474 S.E.2d 481, 486 (W.Va. 1996) (“Although the parties have cited no cases in this State involving the display of tattoos to the jury by the accused in a criminal case, the existence of tattoos were factors to be considered upon the issue of identification in *State v. Tharp*, 400 S.E.2d 300 (1990), and *State ex rel. Gonzales v. Wilt*, 256 S.E.2d 15 (1979). Nevertheless, cases from other jurisdictions clearly indicate that it is within the discretion of the trial court to require a defendant to display tattoos to the jury in a criminal case, upon the issue of identification. In *Love v. State*, 730 S.W.2d 385 (Tex. Ct. App. 1987), the defendant in an aggravated sexual abuse case was required to remove his shirt ‘so the jury could view his unique body markings.’ The context of the display concerned the identification of the defendant as the assailant, and the Court, in *Love*, held that the display was proper.”).

of the medium on which most tattoos are initially, or eventually, expressed—the human body.¹³⁰

Courts do not seem to question the copyrightability of what is commonly referred to as “tattoo flash”—pre-drawn artwork created by tattoo artists and displayed as examples of their work and as potential ideas for parties interested in receiving a tattoo.¹³¹ Copyrightability of tattoos is not, and should not be, dependent on the medium to which they are affixed. If a tattoo is copyrightable when fixed in the tangible medium of a piece of paper, then it is

¹³⁰ Nimmer Declaration, *supra* note 49, ¶ 41 (positing that even if tattoos were to be protectable under the Copyright Act, protection would not extend to tattoos after “they are incorporated into items (human bodies) that form ‘useful articles’ in the copyright sense”).

¹³¹ Case law discussing the copyrightability of tattoo flash largely addresses disputes that are contractual in nature (mostly involving licensing agreements) and thus are more straightforward. Generally, ownership of tattoo design flash belongs to the artist upon creation. The artist is then free to license the work to third parties. Litigation often arises as to the scope of the licensing agreement. *See, e.g.,* *Tattoo Art, Inc. v. TAT Int’l, LLC*, 794 F. Supp. 2d 634, 666 (E.D. Va. 2011) (holding defendants infringed plaintiff’s copyright in tattoo flash when defendants created tattoo designs from twenty-four of plaintiff’s registered “books” and awarding statutory damages in the amount of \$20,000 for each “book,” totaling \$480,000). *Compare, with* *Beasley, supra* note 24, at 1157 (“Courts that have faced copyright lawsuits over flash designs have affirmed that flash art is covered by copyright law. . . . None of [the] courts questioned whether flash art was copyrightable, nor did any of the defendants in [the] three cases argue that flash art could not be copyrighted.”). However, the cases cited by the author do not support this conclusion. *See id.* For instance, in *Gonzales v. Kid Zone, Ltd.*, 2001 WL 1329300 (N.D. Ill. Oct. 25, 2001), the court found the defendant’s tattoo designs not only “share[ed] the ideas [the plaintiff] wished to convey[, but also] appropriated his expression” and thus were infringing. *Id.* The court makes no broad ruling as to the copyrightability of tattoo flash. *See id.* For further analysis of this case, see discussion *infra* Part II.C. In *Owens v. Ink Wizard Tattoos*, 533 S.E.2d 722, 724 (Ga. 2000), finding the plaintiff’s “property” was stolen by the defendants, the court upholds a preliminary injunction barring the defendants “from photocopying, distributing and using the flash in violation of” a purchase agreement between the plaintiff and the flash artist “that the flash was to be used only by [the plaintiff] and not given or distributed to any other party” but makes no statement regarding flash copyrightability. The court in *S.T.R. Indus., Inc. v. Palmer Indus., Inc.*, 1999 WL 258455 (N.D. Ill. Apr. 9, 1999), explicitly states the issue of the validity of the registered copyright need not be addressed. The lack of case law directly on point is perhaps due to the nature of the medium (the human body). *See* *Cotter & Mirabole, supra* note 17, at 100 (“The difficulty of monitoring the subject or others’ subsequent use of their designs may discourage many body artists from attempting to enforce their rights.”). For a discussion of the practice of tattooing, see *Beasley, supra* note 24, at 1157, 1162 (explaining that “[c]lients often bring in photographs or drawings which they want copied exactly, or from which they want the tattoo artist to base his or her conceptual framework in creating a new drawing to be tattooed . . . [while o]ther clients choose from the dozens of flash drawings in books, binders, and display screens that tattoo parlors make available”); *see also* *Hatcher, supra* note 45, at 4 (explaining that the purpose of tattoo flash is to provide ideas to walk-in customers seeking a tattoo, and that it is typically printed or drawn on paper or cardboard and displayed on the walls of tattoo parlors or in binders).

copyrightable if that tattoo is expressed on the medium of the human skin.¹³²

B. Fixation of Tattoos on the Human Body

In order for a work to qualify for copyright protection under the 1976 Copyright Act, it must be “fixed in *any* tangible medium of expression, now known or later developed, from which [the expression] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹³³ The statute broadly defines a fixed work as one “in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹³⁴

Courts have derived two sub-requirements of fixation from this statutory language: the embodiment requirement and the duration requirement.¹³⁵ The first requirement is that the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, et cetera, from that medium.¹³⁶ The second requirement is that the work must remain embodied in that medium for more than a transitory period of duration.¹³⁷ Unless both of these requirements are met, a work is not “fixed” as defined in the statute.¹³⁸

1. Is the Human Body a Medium of Expression?

Neither the language of the fixation definition set forth in Section 101 of the 1976 Copyright Act¹³⁹ nor the legislative history of the Act place any limitations on the copyrightability of a work fixed in a

¹³² This Article focuses on the copyrightability issues related to tattoos, but it does not address (what are admittedly) a myriad of complexities that would arise from determining infringement of a copyrighted tattoo expressed on the human body.

¹³³ 17 U.S.C. § 102 (2012) (emphasis added).

¹³⁴ 17 U.S.C. § 101.

¹³⁵ *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008) (“[N]o case law or other authority dissuades us from concluding that the definition of ‘fixed’ imposes both an embodiment requirement and a duration requirement.”).

¹³⁶ *Id.* at 127.

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ 17 U.S.C. § 102.

particular type of medium.¹⁴⁰ The statute provides no further guidance regarding limitations on the protection of various media. In addition, outside the context of technology cases, there are no published decisions that seem to contemplate limitations on the copyrightability of works based on the medium of fixation.¹⁴¹ While the statute sets forth the requirement of fixation, and the courts have parsed the fixation definition into the sub-requirements of embodiment and duration, there is simply no mention of any requisite media of expression or requisites that must be met by any of the media of expression exemplified in the legislative history of the Copyright Act.

The more relevant question in the context of the copyrightability of tattoos is not whether the human body is a protectable medium, but whether the human body fits the definition of a medium.¹⁴² The present Copyright Act and case law do not define the term.¹⁴³ When a statutory term is undefined, one must look to the “plain and ordinary”

¹⁴⁰ See Copyright Act Congressional Bill, *supra* note 119, at 52 (“Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device ‘now known or later developed.’”); see also Kelly M. Slavitt, *Fixation of Derivative Works in a Tangible Medium: Technology Forces a Reexamination*, 46 IDEA 37, 52 (2005) (“The legislative history [of the Copyright Act] states that one purpose of the [modified] definition [of fixation] was to resolve the status of live broadcasts reaching the public in unfixed form but being simultaneously recorded, which legislators determined would be fixed if the underlying work was copyrightable, as a motion picture or sound recording. However, ‘fixed’ would not include ‘purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the ‘memory’ of a computer.’”). The legislative history also determined that it makes no difference what the form, manner, or medium of fixation is, only that the embodiment “is sufficiently permanent or stable to permit the work to be perceived, reproduced or otherwise communicated for a period of more than transitory duration.” *Id.*

¹⁴¹ See Slavitt, *supra* note 140, at 97–98 (discussing the difficult questions raised through case law related to new technologies and their continual challenge to the proper interpretation and application of the law especially as applied to the fixation requirement); see also Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 122–23 (2006) (arguing that the Ninth Circuit’s holding in *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993), that a RAM copy lasting just one second is considered fixed “while an ice sculpture that can last for hours (and even for months) is *not* considered fixed, is a very clear indication of strong discrepancy in practical interpretation” (emphasis added)).

¹⁴² See 17 U.S.C. § 101; see also Slavitt, *supra* note 140, at 52.

¹⁴³ See Slavitt, *supra* note 140, at 61 (pointing out that the Copyright Act also “does not specify that a derivative work must be fixed in a tangible medium”).

meaning of the word.¹⁴⁴ In this context, the “plain and ordinary” meaning of the term “medium” is “material or technical means of artistic expression.”¹⁴⁵ If this definition is applied to tattoos, then certainly the human body is a material means of artistic expression.¹⁴⁶

2. *Are Tattoos Sufficiently Permanent or Stable?*

The second threshold requirement is whether there exists sufficient permanence or stability of the work. The application of this requirement to tattoo art has received little scholarly analysis. Professor David Nimmer made the following statement in his declaration filed in support of the defendants in *Whitmill v. Warner Bros. Entertainment*:

Copyright doctrine recognizes that various physical substrates may be inadequate bases to secure protection. Classic examples include writing a literary work in the wet sand before the oncoming tide or inscribing a pictorial work in the frost of a windowpane.¹⁴⁷

While it is certainly true that a tattoo may be removed from the human body, it does not wash away with the ease of a wave lapping over the sand on a beach. Tattoo scholars have referred to the practice of tattooing as “one of many forms of irreversible body alteration”¹⁴⁸ and believe that “the idea of the permanence of the tattoo is critical.”¹⁴⁹ Tattooing is “designed to last forever.”¹⁵⁰

¹⁴⁴ See *id.* at 61 (stating that while many courts and practitioners consult legislative histories when necessary to clarify the meaning of statutory language, this is inappropriate where the plain meaning of a statute is clear). A “legal term of art” is given its peculiar legal meaning; terms that have a unique legal meaning are given the definition found in a lay dictionary. See, e.g., Leslie Erin Wallis, *The Different Art: Choreography and Copyright*, 33 UCLA L. REV. 1442, 1455–56 (1986) (“Fixation, a requirement of statutory copyright protection, is a term of art developed for the 1976 Copyright Act. Although the Constitution speaks of securing rights to an author’s work, fixation is not mentioned in the Constitution nor in any previous copyright legislation.”).

¹⁴⁵ *Medium*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/medium> (last visited Mar. 16, 2012).

¹⁴⁶ See, e.g., Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS LAW. 1, 2 (2011) (“The human body is a peculiar artistic medium.”); Beasley, *supra* note 24, at 1145 (discussing a particular tattoo artist’s own tattoo design inked on her back— “[t]he tattoo is an original work of authorship, fixed on a tangible medium of expression: her body”).

¹⁴⁷ See Nimmer Declaration, *supra* note 49, at 4, ¶ 14; see also D. NIMMER, 1 NIMMER ON COPYRIGHT §§ 1.01[B][2][a], 2.03[B][2] (1965).

¹⁴⁸ See Caplan, *supra* note 28.

¹⁴⁹ Benson, *supra* note 33 (“This, in a culture so committed to constant change and innovation, is surely what lies at the heart of the fear of the tattoo, for it is precisely the permanence of the tattoo, its evocation of the private depths of the self upon the surfaces

Despite the historical and symbolic permanence of tattoos, advancements in laser skin resurfacing technology make them removable.¹⁵¹ However, tattoo removal is not a brief, effortless process. A tattoo is removable through a series of laser treatments over a period of months—a process that is expensive, painful, and not always successful.¹⁵² It is hardly questionable that a tattoo is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”¹⁵³

C. Category of Copyrightable Subject Matter for Tattoos

Section 102(a) of the Copyright Act sets forth eight categories of copyrightable subject matter.¹⁵⁴ Each category of works is entitled to a bundle of rights under Section 106 of the Copyright Act.¹⁵⁵ However, the exclusive rights of the copyright owner of any category of works vary depending upon the categorization of the work. Therefore, the classification of a work of authorship is integral to the determination of the exclusive rights of the owner of the copyright in that work of authorship.

In *Whitmill*, Nimmer testified that *if* tattoos are copyrightable, they would be classified as “pictorial, graphic, and sculptural works,” which are defined in the first sentence of Section 101 of the Copyright Act as “two-dimensional 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.”¹⁵⁶ This Article concurs with Nimmer’s categorization of tattoos as pictorial, graphic, and sculptural works (hereinafter referred to as “PGS works”). However, this Article

of the body and its non-negotiable relationship to that body, that reminds us of the fixed end-point of all this mutability and self-fashioning, our own death.”).

¹⁵⁰ Caplan, *supra* note 28.

¹⁵¹ Bernadine Healy, M.D., *supra* note 30.

¹⁵² *Id.*

¹⁵³ 17 U.S.C. § 101 (2012).

¹⁵⁴ 17 U.S.C. § 102(a); *see supra* text accompanying note 120.

¹⁵⁵ *See* 17 U.S.C. § 106. For example, the owner of a sound recording has the exclusive right “to perform the copyrighted work publicly by means of a digital audio transmission.” *Id.* However, sound recordings are not specifically listed in §§ 106(4) or (5), and the courts have interpreted the statute to exclude the owners of sound recording copyrights from a general right of public performance or the right of public display.

¹⁵⁶ Nimmer Declaration, *supra* note 49, ¶ 27. *See* 17 U.S.C. § 101.

disagrees with Nimmer's rationale and conclusion that the useful article doctrine precludes the copyrightability of tattoos.¹⁵⁷

The second sentence of Section 101 for PGS works further defines and limits the scope of protection for PGS works. The definition provides that:

Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified from, and are capable of existing independently of, the utilitarian aspects of the article.¹⁵⁸

Section 101 defines a useful article as a product "with an intrinsic utilitarian function that is not merely to portray the appearance of the article."¹⁵⁹ Congress has provided examples of useful articles, such as automobiles, airplanes, women's clothing, electronics, and other industrial products.¹⁶⁰ Several circuit court decisions have examined the copyrightability of useful articles, including belt buckles,¹⁶¹ mannequins,¹⁶² and bicycle racks.¹⁶³ Nimmer asserts that a person's head qualifies as "infinitely more of a 'useful article' than does" a number of industrial products.¹⁶⁴ While the human body certainly performs a number of functions, it is highly unlikely that Congress or the courts would characterize a person as a useful article. While Nimmer concedes that Congress never intended for the useful article doctrine to apply to the human body, he continues his analysis of the doctrine as applied to a person.¹⁶⁵

¹⁵⁷ Nimmer Declaration, *supra* note 49, ¶¶ 35–48.

¹⁵⁸ 17 U.S.C. § 101.

¹⁵⁹ *Id.* Congress sought to narrow the scope of the definition of the former, broad regulations of the U.S. Copyright Office, which defined a useful article as "one with utility as its 'sole intrinsic function.'" *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

¹⁶⁰ Copyright Act Congressional Bill, *supra* note 119, at 55.

¹⁶¹ See *Kieselstein-Cord*, 632 F.2d at 991.

¹⁶² See *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411 (2d Cir. 1985).

¹⁶³ See *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

¹⁶⁴ Nimmer Declaration, *supra* note 49, ¶ 37.

¹⁶⁵ Nimmer also presumes that if Congress never intended for the human body to be an article, then Congress must not have contemplated that human flesh would serve as the medium of expression for a copyrightable work. *Id.*

A useful article must meet an additional requirement to qualify as copyrightable subject matter—separability.¹⁶⁶ Congress identified two types of separability: physical and conceptual.¹⁶⁷ As specified in the definition of PGS works, only separable expressive features of useful articles are copyrightable.¹⁶⁸ Therefore, copyright protection would only extend to the PGS element of a useful article, not the overall configuration of the useful article.¹⁶⁹

The Supreme Court addressed the issue of extending copyright protection to useful articles with expressive aspects in 1954 in *Mazer v. Stein*, more than two decades before the enactment of the Copyright Act of 1976.¹⁷⁰ In *Mazer*, the Respondents registered their lamp bases,¹⁷¹ separate from any of the lamp components, with the U.S. Copyright Office.¹⁷² Respondents subsequently sold the statuettes both as lamp bases and as statuettes.¹⁷³ The Court held that the statuettes, even when primarily used as lamp bases, were copyrightable.¹⁷⁴ Thus, the statuettes, which were physically separable from the remainder of the lamp, were protected by copyright law. The *Mazer* case is cited in the legislative history of the 1976 Copyright Act (and Congress sought to codify *Mazer*’s holding in the 1976 Act’s definitions); however, *Mazer* was decided based on

¹⁶⁶ 17 U.S.C. § 101.

¹⁶⁷ Copyright Act Congressional Bill, *supra* note 119, at 55 (“Unless the shape of an automobile, airplane, ladies’ dress, food processor, television set, or any other industry product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”). *See* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (“[T]he problem of determining when a pictorial, graphic, or sculptural feature ‘can be identified separately from, and [is] capable of existing independently of, the utilitarian aspects of the article’ . . . is particularly difficult because, according to the legislative history explored by the court below, such separability may occur either ‘physically or conceptually.’”).

¹⁶⁸ 17 U.S.C. § 101.

¹⁶⁹ Copyright Act Congressional Bill, *supra* note 119, at 55 (“[E]ven if the three-dimensional design contains some [separately identifiable, aesthetic] element . . . copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.”).

¹⁷⁰ *Stein v. Mazer*, 204 F.2d 472, 473 (4th Cir. 1953), *aff’d*, *Mazer v. Stein*, 347 U.S. 201 (1954), *reh’g denied*, 347 U.S. 949 (1954). The effective date of the Copyright Act of 1976 is January 1, 1978.

¹⁷¹ The lamp bases at issue in this case were “three-dimensional statuettes of male and female dancing figures made of semi-vitreous china.” *Stein*, 204 F.2d at 473. Lamps serve an “intrinsic utilitarian function” of providing light.

¹⁷² *Mazer*, 347 U.S. at 203.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 217.

the Supreme Court's interpretation of the U.S. Copyright Office's regulations and the prior Copyright Acts.¹⁷⁵

Assuming that the human body is a useful article, tattoos are not physically separable from a person. The tattoo is not capable of existing independently of the human medium of expression. A tattoo is not akin to a lamp base, which can exist on its own. A tattoo is a sufficiently permanent part of the person's body. Although the process of tattoo removal has become less onerous in recent years, it is difficult and painful to remove a tattoo from the skin.¹⁷⁶ The tattoo must be transferred to another medium of expression, such as paper, in order to exist as an independent work of art. Such transference would constitute a new work, not an independently copyrightable feature of the former work.

A line of cases from the Second Circuit analyzed the issue of conceptual separability. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, for example, the Second Circuit held that designer Barry Kieselstein-Cord's belt buckles were copyrightable because they contained ornamental features that were separable from their subsidiary utilitarian function.¹⁷⁷ The court was persuaded by expert testimony categorizing the buckles as creative art, the public's use of the buckles as ornamentation for parts of the body other than the waist, and the exhibition of the buckles at the renowned Metropolitan Museum of Art.¹⁷⁸ In contrast, the Second Circuit later held in *Carol Barnhart Inc. v. Economy Cover Corp.* that four human torso mannequins were not subject to copyright protection because the artistic features, "e.g., the life-size configuration of the breasts and the

¹⁷⁵ Copyright Act Congressional Bill, *supra* note 119, at 55 ("A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statute or carving is used to embellish an industrial product, or as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art."). *Mazer* "followed a 'contemporaneous and long-continued construction' by the Copyright Office of the 1870 and 1874 Acts as well as the 1909 Act, under which the case was decided." *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 992 (2d Cir. 1980).

¹⁷⁶ Caplan, *supra* note 28.

¹⁷⁷ *Kieselstein-Cord*, 632 F.2d at 993. While the dissent noted the works were aesthetically pleasing belt buckles, he concluded that their ornamental features were inseparable from the important function of buckles "to keep the tops of trousers at waist level." *Id.* at 994 (Weinstein, J., dissenting).

¹⁷⁸ *Id.* at 991, 994. The court also noted the recognition that Barry Kieselstein-Cord had received in the fashion industry, including receipt of "a 1979 Coty American Fashion Critics' Award for his work in jewelry design as well as election in 1978 to the Council of Fashion Designers of America." *Id.* at 991.

width of the shoulders [were] inextricably intertwined with the utilitarian feature, the display of clothes.”¹⁷⁹ The *Barnhart* court distinguished the *Kieselstein-Cord* belt buckles from the human torso forms on the basis that the ornamented surfaces of the buckles were not dictated by the utilitarian function of the useful article.¹⁸⁰ Unlike the human torsos, the belt buckles could perform their utilitarian function without any of the distinctive ornamentation applied to the buckles.¹⁸¹

In assessing the copyrightability of the useful articles at issue in the two aforementioned cases—belt buckles and mannequins—the Second Circuit used two different tests. The *Kieselstein-Cord* court relied on the judgment of elite institutions and public use in non-functional ways,¹⁸² while the *Barnhart* court used the “ordinary use as viewed by the average observer” test¹⁸³ to determine whether there were separate, identifiable design elements. If you apply either test to tattoos, then the conclusion is that tattoos are conceptually separable from the human body.¹⁸⁴ Applying the *Kieselstein-Cord* factors, tattoos have been recognized as works of art by museums,¹⁸⁵ and the general public recognizes the aesthetic value of tattoos, separate from any utilitarian function of the human body. Using the *Barnhart* test, the ordinary use as viewed by the average observer of a tattoo is for purposes other than the utilitarian function of the part of the human

¹⁷⁹ *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 411, 418 (2d Cir. 1985).

¹⁸⁰ *Id.* at 419.

¹⁸¹ *Id.*

¹⁸² *Kieselstein-Cord*, 632 F.2d at 994 (“Indeed, body ornamentation has been an art form since the earliest days, as anyone who has seen the Tutankhamen or Scythian gold exhibits at the Metropolitan Museum will readily attest.”).

¹⁸³ *Carol Barnhart*, 773 F.2d at 419 n.5. Judge Newman’s dissent proposed another test, which would examine whether the useful article stimulated a separable concept in the mind of the beholder other than the utilitarian function. *Id.* at 422 (Newman, J., dissenting). The majority criticized the dissent’s test as “a standard so ethereal as to amount to a ‘non-test’ that would be extremely difficult, if not impossible, to administer or apply.” *Id.* at 419 n.5. The majority concluded that “Congress has made it reasonably clear that copyrightability of the object should turn on its ordinary use as viewed by the average observer.” *Id.* Therefore, the majority disagreed with the dissent that the mannequins could be viewed as anything other than serving a utilitarian function as mannequins. *Id.*

¹⁸⁴ Nimmer’s declaration concluded that only physical separability can apply to tattoos because of the Thirteenth Amendment’s prohibition of slavery. Nimmer Declaration, *supra* note 49, at 11, ¶ 45. While Thirteenth Amendment concerns may be relevant to the breadth of enforcement of a tattoo copyright, this Article fails to see the relevance to the copyrightability of tattoos, particularly the useful articles’ limitation on copyrightability.

¹⁸⁵ See Benson, *supra* note 33.

body on which the tattoo is affixed.¹⁸⁶ In addition, the *Barnhart* court rejected *Barnhart*'s argument that its human torsos were copyrightable because a human torso is traditionally copyrightable.¹⁸⁷ In response to *Barnhart*'s assertions, the court concluded as follows:

We find no support in the statutory language or legislative history for the claim that merely because a utilitarian article falls within a traditional art form it is entitled to a lower level of scrutiny in determining its copyrightability. Recognition of such a claim would in any event conflict with the anti-discrimination principle.¹⁸⁸

The Second Circuit has determined that "traditional works" have not been accorded a lesser scrutiny. This Article posits that a tattoo should not be accorded heightened scrutiny in determining its copyrightability because it does not fall within a traditional art form. Greater scrutiny of tattoos is also in violation of the anti-discrimination principle enunciated by the Supreme Court in *Bleistein v. Donaldson Lithographing Co.*,¹⁸⁹ in which the Court stated that it is "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."¹⁹⁰ It is not the position of the law to judge the aesthetic value of a tattoo. If the tattoo meets the requirements of copyrightability and is conceptually separable from the human body, then it is a copyrightable PGS work.

CONCLUSION

At one time, tattoo artists and individuals with tattoos were associated with criminals, men in the military, or risqué underground social classes. Today, a young generation enjoys the acquisition of symbolic body art. The demand for tattoo art has transformed the nature of consumerism in this industry, and is therefore changing the perception of the industry and the appeal of its artwork in the eyes of the media and other businesses.

¹⁸⁶ See Scheuller, *supra* note 25, at 386. This Article assumes for purposes of the *Barnhart* test that the type of tattoo being evaluated is not permanent makeup, such as eyebrows and the like. A permanent makeup tattoo would likely fail the *Barnhart* test because the tattoo's ordinary use would serve a utilitarian function.

¹⁸⁷ *Carol Barnhart*, 773 F.2d at 418.

¹⁸⁸ *Id.*

¹⁸⁹ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

¹⁹⁰ *Id.*

Tattoo artists should become more vigilant in the enforcement of their rights in order to give the courts an opportunity to protect their artistic work.¹⁹¹ Furthermore, the activities of companies like Warner Bros. Entertainment will become more commonplace if tattoos are not eligible for copyright protection. Media companies are becoming more brazen in their use of tattoo artwork, which will continue to whittle away any control tattoo artists have over their works.¹⁹²

The *Whitmill* case and the few other tattoo lawsuits to date illustrate the challenges in providing copyright protection for tattoos. While Professor Nimmer has raised legitimate concerns relevant to the enforceability of tattoos, such objections do not address the validity of a tattoo copyright. The concerns are a reflection of the challenges of fitting unorthodox creativity into an outmoded analysis of artwork. Although tattoos are unconventional under the traditional understanding of copyright law, there is no support in the text of the 1976 Copyright Act for refusing to protect original tattoos. Therefore, tattoos are copyrightable subject matter.

¹⁹¹ See Cotter and Mirabole, *supra* note 17, at 103 ("When courts do address these issues, they will need to show sensitivity to the specific facts, and in some instances may have to modify standard legal doctrines to account for the competing interests of the body artist, the intellectual property rights owner, and the human subject.").

¹⁹² See Beasley, *supra* note 24, at 1170 (concluding that while the tattoo industry's own social norms-based system is effective at discouraging other "established tattoo artists" from unauthorized reproduction of another artist's work, this regime is ineffective at preventing copying by other third parties).

