

# The Copyright Implications of Tattoos

## Why Getting Inked Can Get You into Court

BY TIMOTHY C. BRADLEY

In the 2009 blockbuster film *The Hangover*,<sup>1</sup> after a particularly unruly bachelor party in Las Vegas, the film's main characters wake up unable to determine what happened the night before. Upon realizing that they have kidnapped Mike Tyson's tiger, they endeavor to return the tiger to its master. Tyson's subsequent appearance in the film contributes substantially to the protagonists' "What Happens in Vegas . . ." experience, and Tyson's famous facial tribal tattoo (the Tyson tattoo) is featured prominently in Tyson's scenes in the film.

In the 2011 sequel, *The Hangover Part II*,<sup>2</sup> after another bachelor party of epic proportions, the main characters once again wake up in unfamiliar surroundings, and try to piece together their previous night. In *The Hangover Part II*, the character played by actor Ed Helms wakes up with a facial tribal tattoo closely resembling that of Tyson's (the Helms tattoo). The Helms tattoo was featured prominently in the movie poster and trailer for *The Hangover Part II* in early 2011.

Just over a month before the scheduled Memorial Day 2011 release of *The Hangover Part II*, on April 25, 2011, S. Victor Whitmill, the tattoo artist who created the Tyson tattoo, sued Warner Brothers in the Eastern District of Missouri, seeking monetary damages for copyright infringement of the Tyson tattoo, and a preliminary injunction preventing the release of the film. Although the suit quickly settled, Whitmill's complaint raises a number of interesting questions about the often unconsidered intellectual property aspects of tattoos.

As works of art, tattoos fall within the realm of copyrights. The copyrightability of tattoos, the ownership of those rights, and the corresponding application of existing copyright doctrine to tattoos are still largely issues of first impression for the courts. One notable dispute arose in 2005 over recent NBA champion Rasheed Wallace's Egyptian-themed arm tattoo. Nike had aired a commercial showing a close-up of Wallace and his tattoo in which the tattoo was being created by a computerized simulation. The commercial also included a voice-over from Wallace explaining the meaning behind the tattoo.<sup>3</sup> The tattoo artist who had created the Wallace tattoo sued for damages in the U.S. District Court for the District of Oregon, but the case settled quickly before the court had a chance to weigh in on its merits.

In *Gonzales v. Kid Zone, Ltd.*,<sup>4</sup> the Northern District of Illinois found that the unauthorized use of copyright-registered pictorial works on temporary tattoos violated the artist's copyright. However, that case involved temporary tattoos, not permanent tattoos. Also, the dispute was between the artist and a manufacturer, and did not implicate the rights of any temporary tattoo recipients.

As will be described below in greater detail, while it is likely that Whitmill did indeed own the copyrights to the Tyson tattoo, given the facts of the case it is unlikely that he would have been able to obtain substantial damages, or any damages for that matter, from Warner Brothers had the case gone to trial.

### COPYRIGHTABILITY OF TATTOOS

A first issue raised in the dispute over *The Hangover Part II* is whether tattoos are indeed copyrightable, and if so who owns those copyrights. Under § 102 of the U.S. Copyright Act, copyright protection extends to "pictorial, graphic, and sculptural works" that are fixed in a tangible medium.<sup>5</sup> That is, the medium must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."<sup>6</sup> The creativity threshold for protection is very low, as only "independent creation plus a modicum of creativity" is required.<sup>7</sup>

Applying these factors to the Tyson tattoo, tattoos are permanent at least for the life of

the recipient, and are therefore undoubtedly fixed in a tangible medium. Also, the Tyson tattoo was a pictorial work and very likely exhibited at least a "modicum of creativity." While it is likely that some tattoos are so commonplace that they would not even meet the "modicum of creativity" threshold discussed above—such as a generic heart with the word "mom" written across it, or a phrase of the recipient's choosing in a commonplace font—the Tyson tattoo no doubt was unique enough to meet this low threshold.<sup>8</sup> Therefore, absent any exceptions, the Tyson tattoo would indeed be protectable, giving the copyright owner the exclusive right to make copies and derivative works of the tattoo.

Warner Brothers did not concede this point, and instead made the meritless argument that the human body was a "useful article" that should be exempted from copyright protection. For useful articles, such as automobiles and clothing, mechanical or utilitarian functions of the articles are not protectable. Rather, such works are protectable only to the extent that designs of the article incorporate features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.<sup>9</sup>

This line of argument makes sense if the artist created the useful article in question, but in this case Whitmill created only the tattoo and had absolutely nothing to do with the creation of Tyson the person. The Tyson tattoo is far more analogous to an artist applying a mural to a building or a painting to a car. In both of these examples, one cannot sensibly argue that the medium chosen renders the surface artistry to be inseparable from its canvas.

Warner Brothers made much of Whitmill having described the Tyson tattoo in his copyright registration as "Artwork on 3-D object,"<sup>10</sup> and of Whitmill having applied the Tyson tattoo directly to Tyson's face (apparently not using tattoo transfer paper that is often used to prepare an outline of a proposed tattoo prior to application).<sup>11</sup> Had Whitmill instead directed his copyright registration to a two-dimensional rendering of the tattoo (perhaps a copy of transfer paper to be used), he may have been able to more easily avoid this line of argumentation. Nevertheless, given the easily identified differences between Tyson's face and the Tyson tattoo, separability is quite apparent, and Warner Brothers' position against copyrightability is very weak.

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Thus, notwithstanding Warner Brothers' argument to the contrary, tattoos appear to fall squarely within § 102, and are therefore copyrightable.

## OWNERSHIP

Having established that tattoos are copyrightable, the question then arises as to who owns those copyrights—the artist or the recipient.

The default rule is that copyright ownership extends to the artist unless there is an agreement to the contrary or the work in question is a “work for hire.”<sup>12</sup> The “work for hire” designation applies to a narrow set of circumstances, when the work in question is (1) prepared by an employee within the scope of his or her employment; or (2) specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.<sup>13</sup> The second category also requires a written agreement between the parties specifying that the work is a work for hire.<sup>14</sup>

The Tyson tattoo does not fall within any of these categories. First, there was no agreement assigning Whitmill's copyrights to Tyson. Second, regarding the “work for hire” designation, Whitmill was an independent contractor and not an employee of Tyson, the Tyson tattoo does not fall within any of the enumerated categories, and there was no agreement classifying the Tyson tattoo as a work for hire. Thus, the default rule applies and Whitmill, the artist, retains the rights to his work.

Whitmill's ownership claim is further bolstered by a tattoo release signed by Tyson in 2003 at Whitmill's studio. The release was primarily a liability waiver, including statements such as “I am not pregnant,” “I am over 18 years of age,” and “I am not under the influence of drugs or alcohol.” However, the release also included a declaration that “I understand that all artwork, sketches and drawings related to my tattoo and any photographs of my tattoo are property of Paradox-Studio of Dermagraphics.”<sup>15</sup> Thus, although not necessary for Whitmill's ownership claim, the release does strengthen his position.

Having established that the Tyson tattoo is protected by copyright, and that Whitmill owns the copyrights, the question then arises as to what this ownership actually means for Whitmill.

## WHAT RIGHTS ARE CONFERRED BY TATTOO COPYRIGHT?

U.S. copyright laws afford a so-called “bundle of rights” to copyright holders, which include the rights to (1) reproduce a work, (2) prepare derivative works, (3) distribute copies of the work, (4) publicly perform the work, and (5) publicly display the work.<sup>16</sup> Thus, on its face it would seem that Whitmill as a tattoo artist would retain substantial control over Tyson's ability to appear in public, to be photographed, etc. The norms of tattooing, however, necessitate that some of these rights must pass at least partially to the tattoo recipient through an implied license.<sup>17</sup>

The human body is a peculiar artistic medium. In traditional artistic mediums, an artist can expect to limit visibility and reproduction of his or her work. By using the human body as a medium, however, a tattoo artist cannot reasonably expect to control all public displays of his or her works. When a tattoo artist applies a tattoo to an individual, the artist knows that the recipient will likely be seen in public, and will likely during his or her lifetime be photographed and/or videotaped—all of which involve copying the tattoo, implicating the rights of reproduction and public display. This is especially true if the recipient is a celebrity.

Additionally, tattoo purchasers often intentionally choose tattoo locations on their body that are clearly visible to the public, out of a desire to engage in self-expression and share their tattoos with others. Thus, it is implicit in obtaining a tattoo that one expects to be able to be seen and to be photographed. The implied license therefore must extend at least to public display and limited reproduction via photographs and videotaping.

The right to prepare derivative works also is part of the copyright “bundle of rights.” A good example of a derivative work is an author who converts his or her book (original work) into a movie (derivative work). What then if a tattoo recipient wants to convert his or her tattoo into a sleeve, in which a large portion of one's entire arm is surrounded by one or more tattoos? In the case of a sleeve, the individual tattoo artist's tattoo

becomes part of a bigger whole, and may be slightly or significantly changed, and implicates the derivative works right.

Even outside the realm of sleeves, tattoos are sometimes modified. A famous example of this is Johnny Depp's “Winona Forever” tattoo being changed to “Wino Forever” after his breakup with Winona Ryder.<sup>18</sup> This modification is a clear example of a derivative work. Photographs could also be considered derivative works, as they may add additional artistic expression to the original tattoo. Absent the implied license, these uses could be actionable. Therefore, the implied license also must necessarily include at least a limited right to create derivative works.

Beyond these examples that are commonly understood to be permissible under the norms of tattooing, the extent to which additional copying is permitted is questionable. For example, what if a tattoo recipient wanted to have an action figure created, or wanted to star in an animated series as himself or herself, or wanted to have a wax statue of his or her likeness created? Although these things are uncommon for noncelebrities, they are relatively commonplace for many celebrities, and may indeed fall within the implied license.

## MORAL RIGHTS

Once one recognizes the copyrightability of tattoos, the issue of moral rights also must be considered. The Visual Artists Rights Act (VARA) of 1990 affords limited “moral rights” to certain works. Under VARA, artists can control whether their name is attributed to their works of “visual art,” with “visual art” including single copy works (e.g., sculptures, drawings, prints) and limited edition works (e.g., 200 copies or fewer signed and consecutively numbered).<sup>19</sup> If a tattoo is indeed limited, and becomes a “work of recognized stature” within the meaning of the statute, then the artist is able to prevent modification, mutilation, and destruction of his or her work.<sup>20</sup>

This immediately calls into question the actions of laser tattoo removal services, in which doctors perform one of the very acts that VARA seeks to prevent—destruction of a work. Absent the implied license, doctors and patients could be liable under VARA for tattoo removal. This also could arguably apply to some derivative works, such as

the “Wino Forever” conversion discussed above, in which a tattoo is modified from its original design. Thus, the implied license also must necessarily enable the tattoo recipient to modify, mutilate, and/or destruct his or her own tattoo, essentially removing any moral rights that would otherwise be afforded by VARA.

### WARNER BROTHERS’ LIABILITY

The discussion above has focused on the implied license between a tattoo artist and a tattoo recipient. The dispute over *The Hangover Part II*, however, raises the question of whether the implied license extends to third parties. That is, to what extent was Tyson permitted to transfer his rights to Warner Brothers?

The Helms tattoo would seem to be outside of the implied license between Whitmill and Tyson, as Warner Brothers went beyond just filming Tyson and copied the entire Tyson tattoo onto actor Ed Helms—a use not likely contemplated by either Whitmill or Tyson in 2003 when the Tyson tattoo was applied. This is especially true when one considers that Tyson is essentially acting as a canvas for Whitmill. By borrowing a painting from a friend one does not obtain the right to create reproductions of that painting. Similarly, by acting as a canvas, Tyson does not obtain the right to recreate his tattoo on others.

Even though the implied license likely did not extend to Warner Brothers, it is quite likely that Warner Brothers’ use of the Helms tattoo constituted fair use, and even if the Helms tattoo did not constitute fair use it is unlikely that Warner Brothers’ actions would have yielded substantial damages for Whitmill.

### Fair Use

Warner Brothers raised a number of affirmative defenses in its pleadings, including the defense of fair use. Fair use is an affirmative defense used to justify limited copying without the copyright owner’s permission, and permits courts “to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>21</sup> The following factors are considered in a copyright fair use analysis:

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.<sup>22</sup>

The first factor looks to the “purpose and character” of the use, and tends to favor “transformative” uses involving new expression or commentary, as opposed to bare copying.<sup>23</sup> While *The Hangover Part II* was clearly commercial in nature, the film’s use of the Helms tattoo was arguably transformative to the extent that it parodied the Tyson tattoo.

In *The Hangover Part II*, Ed Helms’s character, Stu, wakes up in a drunken stupor not realizing he obtained a facial tattoo closely resembling that of Tyson’s. Upon seeing his reflection, Stu panics and expresses immense regret for having obtained the tattoo. Later in the film, Stu runs into Mike Tyson (who plays himself), and Tyson uses colorful language to tell Stu that he needs to get the tattoo removed.

These scenes comment not only on facial tattoos in general, but also on the Tyson tattoo specifically. The Helms tattoo is completely out of place for Helms’s character Stu, an otherwise reserved dentist with a clean cut, preppy image. The film uses the Helms tattoo to ridicule the face as a tattoo location, and in particular to make fun of the Tyson tattoo as being a classic example of a bad tattoo. While the notion of Stu having any tattoos at all is itself out of place, having a facial tribal tattoo associated with a fierce athlete is particularly outlandish, and this stark contrast is used to poke fun at the Tyson tattoo.

In *Campbell v. Acuff-Rose*, the Supreme Court indicated that the strength of a parody claim rests largely on the extent to which the parody comments on the original work, as opposed to simply providing commentary that has no critical bearing on the substance or style of the original composition.<sup>24</sup> That is, more protection extends to parody that

comments on an original work than would extend to a situation where an original work is copied to comment on something else.<sup>25</sup> As discussed above, *The Hangover Part II* does seem to comment on the Tyson tattoo itself, and not just on tattoos in general. Thus, while Warner Brothers copied essentially the entire Tyson tattoo, it would appear that the first factor would nonetheless weigh in its favor, given the parody and commentary presented in its use of the Helms tattoo.

The second fair use factor looks at the “nature of the copyrighted work,” and acknowledges that certain works are closer to the intended protection of copyright than others. For example, a work of fiction would be afforded greater protection than a factual work. Given that the tattoo was purely artistic, this factor would favor Whitmill. The third factor looks to how much of a work was copied. Given that the entirety of the Tyson tattoo appeared to be incorporated into the Helms tattoo, this factor too would likely favor Whitmill.

The fourth and final factor looks to the effect of the use in question upon the potential market for the copyrighted work. *The Hangover Part II* would seem to have no negative effect upon the potential market value for Whitmill’s tattoo. Whitmill would be hard-pressed to explain how *The Hangover Part II* diminished his ability to apply the Tyson tattoo to other individuals, or to otherwise market the tattoo in other ways. If anything, *The Hangover Part II* increased Whitmill’s stature and visibility as a tattoo artist, effectively increasing the value of the Tyson tattoo. Therefore, this fourth factor would likely favor Warner Brothers.

According to this analysis, the factors seem evenly split between Warner Brothers and Whitmill. However, under the first factor, the more transformative that a new work is, the less significance that is placed on the remaining fair use factors that may otherwise weigh against a finding of fair use.<sup>26</sup> With this in mind, it seems quite likely that Warner Brothers would have ultimately prevailed on its fair use defense.

### Damages

Under U.S. copyright laws, copyright owners are entitled to either (1) actual damages and profits of the infringer, or (2) statutory damages.<sup>27</sup> Statutory damages vary between \$750 and \$30,000 for each work infringed, and can be as much

as \$150,000 if willfulness can be demonstrated. Statutory damages can be quite attractive in many instances, as the copyright owner need not show any actual damages, and the awards can be substantial. In the Recording Industry Association of America (RIAA) mp3 file sharing lawsuits, for example, statutory damages requests were common, as each mp3 constituted a work copied, and the RIAA did not need to demonstrate any harm stemming from peer-to-peer copying.

For Whitmill, however, only one work was copied, and Whitmill did not even request statutory damages, instead seeking “monetary damages sufficient to compensate Plaintiff,” “Defendant’s profits and unjust enrichment realized from its infringement,” and also attorney fees. Had the case proceeded to trial, the timing of Whitmill’s copyright registration would have adversely affected his ability to collect damages.

Under U.S. copyright laws (and pursuant to the participation of the United States in the Berne Convention), a copyright registration is not required to establish rights in a work.<sup>28</sup> However, a registration is required before initiating a copyright infringement suit.<sup>29</sup>

Under 17 U.S.C. § 412, no award of statutory damages or of attorney’s fees shall be made for “any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work” (emphasis added). Whitmill applied the tattoo to Tyson in 2003, but did not obtain a copyright registration until April 19, 2011, less than a week before filing suit. This time lapse is far more than three months, and Warner Brothers had no doubt begun filming *The Hangover Part II* at least as far back as 2010. Thus, Warner Brothers’ alleged act of infringement commenced before, not after the effective date of Whitmill’s registration. Therefore, Whitmill would have been unable to obtain statutory damages (had he requested them) or attorney fees.

Additionally, regarding Warner Brothers’ profits, under 17 U.S.C. § 504(b), “[t]he 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” (emphasis added). As discussed above, it is very unlikely that *The Hangover Part II* would have diminished the market value of Whitmill’s tattoo. That is, as a result of the film, Whitmill would not have been making any less money from the tattoo. If anything, the film would have increased Whitmill’s stature and have increased his commercial viability as a tattoo artist.

Also, Whitmill would have been hard pressed to identify what portion of profits from *The Hangover Part II* would have stemmed from the Tyson tattoo. The same comedic effect in the film could likely have been obtained with any facial tattoo even remotely resembling that of Tyson. It seems unlikely that moviegoers would see a poster for *The Hangover Part II* and go see the movie specifically because of Whitmill’s specific tattoo being featured. Thus, if the case had proceeded to trial, Whitmill would likely have been able to demonstrate copyright ownership, but he would have had considerable hurdles to overcome to obtain significant damages.

#### WHAT NOW?

As tattoos continue to grow in popularity, and as tattoos continue to become less taboo and more common in public and in the workplace, these types of disputes are increasingly likely to arise. This is especially true of celebrities, such as Angelina Jolie and Rihanna, who are getting very identifiable tattoos, and are getting them in increasingly visible places.

It also seems likely, however, that such disputes will continue to settle before trial, considering that the disputed uses, such as Nike ad campaigns and major motion pictures, have much at stake, and the incentive to settle quickly is high. Thus, it may be some time before we see the courts weighing in substantively on these issues.

It is also worth noting that while *The Hangover Part II* intentionally parodied the Tyson tattoo using actor Ed Helms, it is possible that far more incidental uses, such as a tattooed celebrity or even a tattooed bystander appearing briefly in a film, may be cause for litigation in the future.

With this in mind, useful practice pointers can be gleaned from thinking about these issues. For those representing clients who are celebrities or potential celebrities, encourage those clients to consult with you prior to obtaining tattoos—especially ones that are particularly visible. If the tattoo artist will agree, an outright assignment of all

copyrights in a tattoo is desirable. Given the increase in stature that the artist may achieve by working on a celebrity, such an assignment would likely be far easier to obtain before a tattoo has been applied than after. Even if your client is not a celebrity, but is for any reason likely to be sought after for any endorsements, or if the client is likely to appear in marketing materials of any sort, such an assignment would also be very desirable.

For those representing tattoo artists, encourage them to consider filing copyright registrations sooner rather than later. Also, consider counseling them to file for a registration on the prepared artwork that precedes the application of a tattoo. This could help diffuse policy arguments against the human body as an artistic medium by shifting the focus to a traditional pictorial work on paper.

Additionally, encourage both tattoo artists and tattoo recipient clients to sign copyright agreements outlining the relative transfer or retention of tattoo intellectual property rights. By making the “implied license” explicit, tattoo artists and recipients alike could more clearly define their rights and avoid disputes requiring costly litigation. ♦

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#### ENDNOTES

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