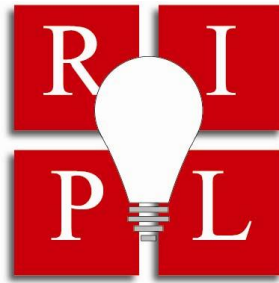


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## THAT OLD FAMILIAR STING: TATTOOS, PUBLICITY, AND COPYRIGHT

MATTHEW W. PARKER

### ABSTRACT

Tattoos have experienced a significant rise in popularity over the last several decades, and in particular an explosion in popularity in the 2000s and 2010s. Despite this rising popularity and acceptance, the actual mechanics of tattoo ownership and copyright remain very much an issue of first impression before the courts. A series of high-priced lawsuits involving famous athletes and celebrities have come close to the Supreme Court at times, but were ultimately settled before any precedent could be set. This article describes a history of tattoos and how they might be seen to fit in to existing copyright law, and then proposes a scheme by which tattoo copyrights would be bifurcated similar to architecture under the Architectural Works Copyright Protection Act.

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## THAT OLD FAMILIAR STING: TATTOOS, PUBLICITY, AND COPYRIGHT

MATTHEW W. PARKER\*

## I. INTRODUCTION

*“Show me a man with a tattoo and I’ll show you a man with an interesting past.”*  
—Jack London.

The creative pursuit is a broadly respected one in cultures all around the world. Though they may differ in how they view it, as a personal creation or a gift to society, they value the creation of new culture. To this end they are protected, whether through national efforts (such as U.S. law) or trans-national ones (such as the Berne Convention), preserving the author’s right to determine how their works are used, sold, and changed. And for nearly all forms of creative works, these traditional protections apply; a painting does not have any rights in and of itself to complain about infringement.

But tattooing, and related body arts both old and new, are media that challenge the traditional protections of reproduction and representation. Limned in human flesh, the tangible medium of a tattoo is possessed of independent rights that might infringe on those of its creator. No other intellectual property medium has rights on its own to express: a canvas cannot speak, and a book cannot decide to appear in an ad for Nike. This cross-rights tension has seen several lawsuits largely pitting the copyright interest against a celebrity’s right of publicity, but none have been resolved in open court. They have all been settled before there could be a definitive ruling.

To that end a new scheme—or more accurately a new frame of reference—is needed for examining the rights involved. Though there are many possible sources, the best parallel comes from a surprising source: The Architectural Works Copyright Protection Act (“AWCPA”). The AWCPA gives rights to both the designer of a building and the physical manifestation of that design—the building itself. By separating out a physical manifestation from a design it creates a standard that can be applied to tattoos: the artist owns the design and drawings while the person owns the physical tattoo.

Part II of this paper discusses a brief history of tattoos as well as copyrights. Part III discusses the specific issues created by the rights tension inherent in tattoos, enumerating which parts of the “bundle” of property rights are impacted. Part IV introduces the Architectural Works Copyright Protection Act, laying out its provisions and highlighting those sections that are relevant to tattoos. Finally,

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Part V explores why the AWCPA Solution is the best solution, both in its own absolute terms and in comparison to other possible solutions.

## II. BACKGROUND

### A. *Brief History of Tattoos*

Tattooing, the art of injecting various forms of ink beneath the skin (sub-dermally), has existed for thousands of years.<sup>1</sup> The word “tattoo” comes from the Tahitian word “tatau”, encountered by James Cook in 1769, a verb which means (appropriately enough) “to mark.”<sup>2</sup> The oldest evidence of a tattoo is from a body recovered from the Italian-Austrian border and “was carbon-dated at around 5,200 years old.”<sup>3</sup> Polynesian tattoos, such as those traditionally practiced within Samoa and New Zealand, date back over 2,000 years.<sup>4</sup> In these societies tattoos were often used to designate rank and serve as a rite of passage, especially for young chiefs.<sup>5</sup> A man would be thought a coward if he refused.<sup>6</sup> In Buddhist countries tattoos have been used for thousands of years and have been sought by both Monks and soldiers for protection from harm.<sup>7</sup> These ancient designs can still be seen on the bodies of monks and soldiers, the religious and the irreligious to this day.

Far from being exclusively Asian or Pacific Islander, tattoos also have a diverse history in the West. Herodotus relates a non-consensual tattooing to pass on a secret message<sup>8</sup> and King Harold II, the last Saxon King of England, had several tattoos which were used to identify his body post-mortem.<sup>9</sup>

Historically, a variety of techniques were used to apply tattoos. The Samoans used a wooden comb dipped in ink and pounded it into the skin,<sup>10</sup> while the Maori of New Zealand used woodcarving tools to carve<sup>11</sup> furrows into the skin and later used gunpowder as a pigment. Traditional Thai Buddhist tattoos involved a needle at the end of a long bamboo rod, which was repeatedly tapped into the skin two or three

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<sup>1</sup> Cate Lineberry, *Tattoos: The Ancient and Mysterious History*, THE SMITHSONIAN MAGAZINE (Jan. 1, 2007) <http://www.smithsonianmag.com/history/tattoos-144038580/>.

<sup>2</sup> *Amazing Facts About Tattoos*, NATIONAL MARITIME MUSEUM (U.K.), <http://www.rmg.co.uk/explore/sea-and-ships/facts/ships-and-seafarers/amazing-facts-about-tattoos> [<http://web.archive.org/web/20130428060438/http://www.rmg.co.uk/explore/sea-and-ships/facts/ships-and-seafarers/amazing-facts-about-tattoos>].

<sup>3</sup> *Id.*

<sup>4</sup> *Skin Stories: The Art and Culture of the Polynesian Tattoo*, PUBLIC BROADCASTING SYSTEM (May 4, 2003) <http://www.pbs.org/skinstories/history/> (hereinafter “PBS History”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Sarah Goldman, *History & Symbolism of the Traditional Thai Tattoo*, PATTAYA DAILY NEWS (Aug. 8, 2010), <http://www.pattayadailynews.com/en/2010/08/08/histroy-symbolism-of-the-traditional-thai-tattoo/> [<http://web.archive.org/web/20100817190948/http://www.pattayadailynews.com/en/2010/08/08/histroy-symbolism-of-the-traditional-thai-tattoo/>].

<sup>8</sup> NATIONAL MARITIME MUSEUM (U.K.), *supra* note 2, at 6.

<sup>9</sup> *Id.*

<sup>10</sup> PBS History, *supra* note 4, at 3.

<sup>11</sup> *Skin Stories: The Art and Culture of the Polynesian Tattoo*, Section: New Zealand, PUBLIC BROADCASTING SYSTEM (May 4, 2003), <http://www.pbs.org/skinstories/history/newzealand.html>.

times per second while the Monks, tattooist, and spiritually supportive onlookers, chant.<sup>12</sup> Modern tattoos are done via a tattoo gun in which “groups of needles are driven up and down at various speeds (approximately 80-150 strokes per second) into and out of the skin.”<sup>13</sup>

When Westerners re-encountered tattoos they had a powerfully negative reaction. Christian missionaries in Polynesia regarded them as a violation of Leviticus 19:28 (“Do not cut your bodies for the dead or put marks on yourselves,”)<sup>14</sup> and advocated their removal by “rubbing the skin with sandstone in the same way that a ship’s deck was scrubbed. This practice was known as ‘holystoning.’”<sup>15</sup> In America, tattoos struggled for years to gain acceptance and were seen as “a bit unsavory. The art was often associated with rowdy sailors or prisoners . . .”<sup>16</sup> In the modern age tattoos have gained mainstream acceptance,<sup>17</sup> especially among millennials, in the United States and across the western world.<sup>18</sup> An English survey found that “a fifth of all British adults have now been inked (as contemporary usage has it). Among 16 to 44-year-olds, both men and women, the figure rises to 29%.”<sup>19</sup>

This popularity has led to at least a matching rise in tattooing among celebrities. While no comprehensive listing of celebrities with tattoos exists (as this would hinge on deciding an absolute cut-off for what is and is not a celebrity, a contentious distinction in and of itself), lists enumerate many of them.<sup>20</sup> It is celebrities that most doggedly pursue their rights of publicity, and thus it is no surprise that they make up the majority of the copyright cases over tattoos that are discussed later.

### B. Copyright

Copyright in the United States is established in Article I of the U.S. Constitution,<sup>21</sup> which grants Congress the authority “To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the

<sup>12</sup> Goldman, *supra* note 7, at 7.

<sup>13</sup> Paul Roe, *Tattoo Techniques and Methods Ancient and Modern*, [http://www.britishinkdc.com/paul\\_tattooing\\_methods.html](http://www.britishinkdc.com/paul_tattooing_methods.html) [[http://web.archive.org/web/20070802011635/http://www.britishinkdc.com/paul\\_tattooing\\_methods.html](http://web.archive.org/web/20070802011635/http://www.britishinkdc.com/paul_tattooing_methods.html)]

<sup>14</sup> NATIONAL MARITIME MUSEUM (U.K.), *supra* note 2, at 6.

<sup>15</sup> *Id.*

<sup>16</sup> Brian Handwerk, *Tattoos—From Taboo to Mainstream*, NATIONAL GEOGRAPHIC NEWS (Oct. 11, 2012), [http://news.nationalgeographic.com/news/2002/10/1011\\_021011\\_taboo.html](http://news.nationalgeographic.com/news/2002/10/1011_021011_taboo.html).

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., Matt Kwong, *Tattoo Culture Making Its Mark on Millennials*, CBC NEWS (CANADA) (Sep. 19, 2012) <http://www.cbc.ca/news/canada/story/2012/09/18/f-tattoos-popularity.html>.

<sup>19</sup> Jon Henley, *The Rise and Rise of the Tattoo*, THE GUARDIAN (U.K.) (Jul. 19, 2010), <http://www.guardian.co.uk/artanddesign/2010/jul/20/tattoos>.

<sup>20</sup> See e.g. *The Best and Worst Celebrity Tattoos*, STYLEBISTRO, <http://www.stylebistro.com/50+Celebrity+Tattoos> (listing 50 different celebrities with tattoos); see also Matt Stopera, *The 35 Worst Celebrity Tattoos*, BUZZFEED (Aug. 12, 2009), <http://www.buzzfeed.com/mjs538/the-35-worst-celebrity-tattoos> [<http://web.archive.org/web/20090816181258/http://www.buzzfeed.com/mjs538/the-35-worst-celebrity-tattoos?>]. Note that these two lists share 12 celebrities, which means together they list 73 different celebrities of varying degrees of fame sporting tattoos.

<sup>21</sup> U.S. Const. art. I, § 8, cl. 8.

exclusive Right to their respective Writings and Discoveries.”<sup>22</sup> This clause serves as the basis of all copyrights and patents granted in the United States. U.S. Copyright law has been further modified a number of times, most recently (and importantly) with the Berne Convention for the Protection of Literary and Artistic Works<sup>23</sup> and the Copyright Term Extension Act of 1998.<sup>24</sup>

The Berne Convention is important for a number of reasons. First, it protects certain architectural works<sup>25</sup> up to and including the building itself, which the U.S. previously had not allowed.<sup>26</sup> The reason for this exclusion was the philosophy that copyright exists to protect art and “useful” creations, such as buildings, are not art except for those features “capable of existing independently as a work of art.”<sup>27</sup> By signing the Berne treaty, the U.S. was binding itself to a system that protected physical buildings, which lead directly to the enactment of the Architectural Works Copyright Protection Act (“AWCPA”).<sup>28</sup> This Act created a set of rights held by both the architect who designed the plans, and the owner of the physical building who has the right to modify or destroy that building at will.<sup>29</sup>

The Copyright Term Extension Act (“CTEA”), also known as the “Sonny Bono Copyright Term Extension Act”<sup>30</sup> or the “Mickey Mouse Protection Act,”<sup>31</sup> modified the Copyright Act of 1976<sup>32</sup> which set the term of a copyright as fifty years past the death of the author.<sup>33</sup> The CTEA extended this to life of the author plus fifty years or 120 years for a work of corporate authorship.<sup>34</sup> This becomes an interesting and unique consideration when looking at tattoos. Even if the tattoo artist is eighty when he creates a tattoo on an eighteen-year-old recipient, and then immediately dies, the rights have a strong possibility of outliving the medium.<sup>35</sup>

These laws set the stage for tension between tattoos and copyright. An artist has a copyright “in original works of authorship fixed in any tangible medium of

<sup>22</sup> *Id.*

<sup>23</sup> Berne Convention for the Protection of Literary and Artistic Works, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) (Jul. 24, 1974), [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_w/o001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_w/o001.html) (hereinafter “Berne Convention”).

<sup>24</sup> Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.) (hereinafter “CTEA”).

<sup>25</sup> Berne Convention, *supra* note 23, Art. 4.

<sup>26</sup> Antoinette Vacca, *The Architectural Works Copyright Protection Act: Much Ado About Something?*, 9 MARQ. INTELL. PROP. L. REV. 111, 113 (2005) (“Until the 1990 changes in architectural protection under the AWCPA, courts continued to interpret *Baker* to allow copyright protection only to the original architectural plans and technical drawings of a building and not to the building itself.”).

<sup>27</sup> *Id.* at 111-112. (“While other arts and artists were protected by copyright, architects were considered to provide a ‘useful’ product, and thus were ineligible for copyright protection. Intellectual property protection is justified as the means of providing an incentive to those who create and invent.”).

<sup>28</sup> Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-06, 104 Stat. 5089, 5133-34 (1990) (codified as amended in scattered sections of 17 U.S.C.).

<sup>29</sup> 17 U.S.C. § 120(b) (2016).

<sup>30</sup> Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

<sup>31</sup> *Id.*

<sup>32</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

<sup>33</sup> *Id.*

<sup>34</sup> CTEA, *supra* note 24, at 24.

<sup>35</sup> Centers for Disease Control, *Life Expectancy*, <http://www.cdc.gov/nchs/fastats/life-expectancy.htm> (The average U.S. life expectancy in 2010 was 78.7 years.).

expression” from the moment it is so fixed,<sup>36</sup> which exists for the duration of their life plus seventy years after their death. It exists fully in the artist even though the medium is, uniquely, a person with rights of their own. It is those rights of the person to display and profit from the display of their body in any way they see fit, within the bounds of the law, which introduces another area of tension.

### *C. Right of Publicity*

Unlike copyright law, there is no national right of publicity.<sup>37</sup> It has been developed on a state-by-state basis that has been described as “spasmodic.”<sup>38</sup> At its heart, however, it is the protection of a person’s right to determine how their image is used, to profit from its authorized use, and to stop unauthorized uses. The two states with the most developed body of law on publicity are (perhaps unsurprisingly) New York and California. California’s law states that “any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”<sup>39</sup> While negatively restricting the ability to take another’s image, by implication the law positively upholds a person’s right to use his or her own image in the legal ways he or she sees fit. People can take their names, voices, and most importantly their likenesses, and profit from them.

This intersects with tattoos when a part of that likeness includes some form of body art. Under the current system a person has a copyrighted image on their body which may wholly belong to another person. Because of that copyrighted image, the law allows that other person to have some say in how the person uses their likeness. They can theoretically mandate that the image be removed from a representation of a person, if not from their actual body, or that they be compensated for its display. Through the act of receiving an original tattoo on their body, a celebrity has given away a piece of their right of publicity to another party who now gets to dictate its use. This runs counter to the goals of the rights of publicity as well as a basic sense of equity.

## III. THE TENSION BETWEEN COPYRIGHT, PUBLICITY, AND TATTOOS

We therefore come to the main problem. A tattoo artist who creates a tattoo has a copyright in that work under the United States Code and the Berne Convention. Currently, the artist has the copyright both in the design as it exists on paper and as the design exists on the flesh of a person. As the holder of that copyright, the artist owns the traditional rights of reproduction, derivative works, and even (theoretically) modification or destruction. Contrasting this is the person on whom the tattoo has been inked. He has the rights of publicity discussed earlier, which vary depending on

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<sup>36</sup> 17 U.S.C. § 102(a) (2016).

<sup>37</sup> Kevin L. Vick & Jean-Paul Jassy, *Why A Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAW. 14, 14 (2011) (“the time has come for a federal right of publicity statute”).

<sup>38</sup> *Id.*

<sup>39</sup> CAL. CIV. CODE § 3344(a) (2016).

which state they are in, and all of the concomitant desires to exercise that right. They may wish to appear on television, in movies, in advertisements, or even in video games. This creates tension between those two sets of rights with the tattoo as the nexus between them, and leads to a surprising variety of cases and an unsettled legal ground.

*A. State of the Case Law (Or Lack Thereof)*

There have been a number of cases involving disputes over tattoos, but there have been mixed messages coming out of the courts and, most importantly, no settled case law to come out of them. The only suit to come to a conclusion other than settlement was for a low dollar amount, and it did not even make it to an appeals court to set regional precedent. The issue remains one of national first impression, conflicting ideas, and a deep need for an equitable solution.

One of the more recent cases involved the film *THE HANGOVER II*,<sup>40</sup> and was decided against the tattoo artist. The first film in the series featured Mike Tyson and his distinctive facial tattoo. The second film “features a character with a similar tattoo” obtained after a night of debauchery.<sup>41</sup> Whitmill, the artist who constructed Mike Tyson’s tattoo, claimed that the tattoo is “one of the most distinctive tattoos in the nation,” and alleges the tattoo in the movie is “a virtually exact reproduction.”<sup>42</sup> Whitmill also laid out how he never licensed his copyrighted design.<sup>43</sup> The motion for a preliminary injunction was denied at the district court,<sup>44</sup> but in denying the injunction the judge made some interesting comments. Judge Catherine Perry “said that Mr. Whitmill had a ‘strong likelihood of prevailing on the merits for copyright infringement’ . . .”<sup>45</sup> The lawsuit, separate from the injunction sought, was settled by Warner Brothers out of court,<sup>46</sup> indicating that the studio was concerned about the validity of the claim or, at the very least, their release date and image.

One of the other major cases on the issue involved basketball player Rasheed Wallace. Wallace, along with his team, won an NBA Championship in 2004 and was subsequently a star in Nike commercials.<sup>47</sup> These commercials featured his tattoo in an image “that filled the screen and then showed the tattoo being created by a computerized simulation with a voice-over from Rasheed Wallace describing and explaining the meaning behind the tattoo.”<sup>48</sup> The tattoo artist, Matthew Reed, filed suit in federal court (under diversity jurisdiction, as Reed had tattooed Wallace when the latter played in Portland) seeking “all of the defendants’ profits, a share of the

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<sup>40</sup> Ryan Davis, *Warner, Artist Settle ‘Hangover’ Tattoo Copyright Suit*, LAW360 (Jun. 21, 2011), <http://www.law360.com/articles/252614/warner-artist-settle-hangover-tattoo-copyright-suit>.

<sup>41</sup> *Tattoo Artist Fails to Stop Release of ‘Hangover’ Sequel*, 23 WESTLAW J. ENT. INDUSTRY 5 (2011).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Matthew Beasley, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1148 (2012).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1147.

<sup>48</sup> Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).



revenue that Wallace received from Nike, pre-judgement interest, an injunction, and actual damages, costs, and disbursements.”<sup>49</sup> This case is interesting because it is emblematic of the many issues facing tattoos. After discussing designs with the artist, Wallace paid \$450 and there was no contract, license, or work-for-hire agreement signed by the parties before the tattoo was completed and the design fixed in the tangible medium of Wallace’s arm.<sup>50</sup> As with the Whitmill case, this case was settled by Nike out of court leaving us with no firm judicial statements on the merits of the case.

Another recent case involves Mixed Martial-Arts fighter Carlos Condit.<sup>51</sup> Condit has a distinctive tattoo on his right ribcage, which appeared on a depiction of his body in two video games produced by the game company THQ.<sup>52</sup> Chris Escobedo, the artist, “claims he stills owns the rights to the image, as he never signed over the copyright to his work. He is now seeking compensation . . . for damages and could receive monetary compensation of [sic] using his artwork without permission.”<sup>53</sup> This case is especially interesting as it doesn’t involve an actual representation of Condit, such as a film or photograph, but a digital representation in a video game. It raises questions not just of ownership of the flesh and what we might consider “normal” reproductions thereof, but also the more attenuated reproduction or derivation of a digital avatar. It raises interesting questions such as whether there is a difference in such a representation between a photo-realistic reproduction and a more stylized one, and if this should represent any difference in copyright or publicity protection. It is the first case in a conceivably far-reaching series of cases involving these rights as the world of digital representation grows more and more. Reports as of the time of this article indicate that the tattoo artist was awarded \$22,500,<sup>54</sup> but it does not appear to have gone beyond the level of the initial lawsuit. There was no appeal, so there is no regional precedent set.

The issue of tattoos appearing in video games came up again in early 2016 when the makers of the popular basketball video game *NBA2K* were sued for copyright infringement related to the tattoos on LeBron James and Kobe Bryant.<sup>55</sup> The interesting development in the *NBA2K* case is that it is the first case where it is not the original artists suing for infringement, but a “copyright licensing company” called Solid Oak Sketches, LLC (“Solid Oak”).<sup>56</sup> Solid Oak offered a license to the creators

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<sup>49</sup> *Id.* at 317.

<sup>50</sup> *Id.* at 316.

<sup>51</sup> Nicholas Howard, *THQ Sued by Tattoo Artist for Possible Copyright Infringement*, THE EXAMINER (Nov. 20, 2012), <http://www.examiner.com/article/thq-sued-by-tattoo-artist-for-possible-copyright-infringement>.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Darren Rovell, *Makers of NBA2k Sued for Using Players’ Tattoos Without Permission*. ESPN (Feb. 1, 2016), [http://espn.go.com/nba/story/\\_/id/14693836/makers-nba2k-sued-graphically-representing-tattoos-players-permission](http://espn.go.com/nba/story/_/id/14693836/makers-nba2k-sued-graphically-representing-tattoos-players-permission).

<sup>55</sup> *Id.*

<sup>56</sup> Complaint at 5-6, Solid Oak Sketches, LLC v. Visual Concepts, LLC, 16-cv-00724 (S.D.N.Y. Feb. 1, 2016). (“The various designs were independently created by various authors . . . who have subsequently signed Copyright License Agreements with Solid Oak Sketches, LLC.”).

of the video game for \$1.14 million.<sup>57</sup> This introduces a realm of licensing and so-called “copyright trolling”<sup>58</sup> into tattoo litigation, where previous cases had been more elementally concerned with artists directly suing alleged infringers. This case has the possibility of rising to a level where circuit or national precedent is set, making it all the more important to come to a greater understanding and standard for the rights involved.

### *B. Why These Tensions Matter*

The fundamental bases for concern over these tensions are economy and equity. In previous decades when tattooing was less common and accepted, it was less important to thoroughly examine their interaction with intellectual property law. However, the tattoo industry in America now earns \$2.3 billion per year from approximately 15,000 tattoo parlors in the country,<sup>59</sup> and that serves as only one facet of the integration of tattoos into society. Twenty-one percent of Americans have tattoos,<sup>60</sup> and they can be seen in almost every facet of society. How they are treated under the law (whether copyright or otherwise) impacts not just the multibillion dollar tattoo industry, but also the \$54 billion sports industry<sup>61</sup> through broadcasting rights, the \$67 billion video game industry,<sup>62</sup> and countless other industries. Without realizing it, there are celebrities and stars worth hundreds of millions of dollars in revenue walking around with tattoos whose display rests on shaky legal ground which may be upset at any time by a court ruling in an unusual way. While the technology certainly exists for film, video games, and television to remove tattoos through digital effects and tattoo concealing makeup exists, for live sporting events this is an untenable solution. Removing every tattoo on every celebrity through makeup or digital effects is, by itself, an additional cost placed on the industry. The economics of the situation alone demand a stable solution grounded in reality.

It also demands a solution based not just in the traditional understanding of intellectual property, but which focuses rather on equity and justice in how it apportions those rights. Tattoos are currently the only art form where the medium has rights it can express on its own and where the rights of the medium and the artist may, and demonstrably have been, at cross-purposes. This all but demands a

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<sup>57</sup> Eriq Gardner, *NBA 2K Videogame Maker Sued for Copyright Infringement Over LeBron James' Tattoos*, THE HOLLYWOOD REPORTER (Feb. 1, 2016) <http://www.hollywoodreporter.com/thresq/nba-2k-videogame-maker-sued-861131>.

<sup>58</sup> See *Copyright Trolls*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/issues/copyright-trolls> (last visited Jun. 24, 2016).

<sup>59</sup> *America's Booming Tattoo Economy: By the Numbers*, THE WEEK (Sep. 20, 2012) <http://theweek.com/articles/472165/americas-booming-tattoo-economy-by-numbers>.

<sup>60</sup> *Id.*

<sup>61</sup> *Total revenue North American sports market from 2009 to 2019 (in billion U.S. Dollars)*, STATISTA (2016), <http://www.statista.com/statistics/214960/revenue-of-the-north-american-sports-market/> (estimating North American sports related revenue for 2013 at 56.7 billion USD, including gate revenue, media rights, sponsorship, and merchandising).

<sup>62</sup> John Gaudiosi, *New Reports Forecast Global Video Game Industry Will Reach \$82 Billion by 2017*, FORBES (Jul. 18, 2012), <http://www.forbes.com/sites/johngaudiosi/2012/07/18/new-reports-forecasts-global-video-game-industry-will-reach-82-billion-by-2017/#a0818261af6c> (relaying a report that includes a total worldwide revenue of 67 billion USD in 2012 for video games).

solution that preserves a person's absolute right to their own body, to do with it as they wish, display it, and profit from said display in whatever way is legal for them to do so. Considering that normally only the artist or the owner has the right to modify or destroy their art, the problem of traditional copyrights with respect to tattoos opens up wide.

It's also important to note that while tattoos are currently the only popular art form that involve these tensions, that is changing. As tattoos have gained acceptance people have turned to other traditional arts, such as scarification,<sup>63</sup> to express themselves which, while currently far less popular than tattoos, suffer the same implications. As technology marches on we can already see the next wave of body modification art: sub-dermal light emitting diode (LED) implants, which are already being tested for both functional and artistic purposes.<sup>64</sup> The situation demands a forward thinking, equity grounded solution that recognizes both the value of the artistic work in the design and the absolute rights of a person in their own flesh. The best, and only, example of how to structure that bifurcation comes from the Architectural Works Copyright Protection Act.

#### IV. THE ARCHITECTURAL WORKS COPYRIGHT PROTECTION ACT

The Architectural Works Copyright Protection Act<sup>65</sup> ("AWCPA") was signed into law on December 1, 1990.<sup>66</sup> It extended copyright protection to architecture and to finished architectural works in ways that had never been seen before in this country.<sup>67</sup> More than that, it demonstrated for the first time that a bundle of intellectual property rights can be bifurcated between two rights holders—the artist (architect) who drew the plans and the actual owner of the building. This is what gives it such value to examining the intellectual property implications of tattoos. It is an explicit legal endorsement of the idea that there can be a significant disconnect between design and medium, just as we see in the distance between drawing and flesh. By examining what the AWCPA says, we can use it to create a firm and fully fleshed out standard for assigning rights to the tattoo artist and the recipient, along the lines of equity.

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<sup>63</sup> *Scars: The Good, the Bad, the Ugly...and the Beautiful?*, QUANTUM HEALTH, <http://www.quantumhealth.com/news/scars.html> [<https://web.archive.org/web/20071114023805/http://www.quantumhealth.com/news/scars.html>] ("As the popularity of tattoos skyrocketed, so did modern scarification practices. 'Scarification artists' create artistic designs on the young and the hip.").

<sup>64</sup> Will Smith, *Under Your Skin: The First Sub-Dermal Implants Get Tested*, TESTED (May 23, 2012) [http://www.tested.com/science/life/44466-under-your-skin\\_-the-first-sub\\_dermal-implants-get-tested/](http://www.tested.com/science/life/44466-under-your-skin_-the-first-sub_dermal-implants-get-tested/) ("They tested a variety of devices equipped with buttons, touch sensors, LEDs, speakers, and vibrating motors both under the skin of the cadaver and on a tabletop, to determine how effective different types of inputs and outputs are when they're implanted under the skin. They also tested inductive charging through the skin and Bluetooth radio transmission through skin.").

<sup>65</sup> 17 U.S.C. § 101 *et seq.* is the overall Copyright law of the United States. The AWCPA amended Title 17 to include architectural works, and added Section 120: Scope of Exclusive Rights in Architectural Works.

<sup>66</sup> Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598 (1992).

<sup>67</sup> *Id.*

What the AWCPA meant was that for the first time, buildings themselves could have copyrights rather than only the drawings, blueprints, and plans which had been protected for years before.<sup>68</sup> Buildings had been excluded on the grounds that they were a “utilitarian work, not worthy of copyright protection.”<sup>69</sup> This changed when the United States signed on to the Berne Convention<sup>70</sup> and “Congress determined that in order for the United States to comply fully with the Berne Convention—which protects architecture alongside other artistic works—American copyright law would have to recognize the artistic value of architecture.”<sup>71</sup> Even then Congress was careful to limit themselves, unwilling to go into protecting everything built by man; the definition of a building in the act applies only to “humanly habitable structures that are intended to be both permanent and stationary.”<sup>72</sup> However they were also careful to include non-habitable but permanent and stationary structures such as “churches, museums, gazebos, and garden pavilions.”<sup>73</sup> It is important to note that it only protects the design, rather than the manifestation, of the building as will be seen below.<sup>74</sup> The AWCPA does not protect any of those specific design elements, meaning that while an innovative use of columns may be protected as part of the design of a building no one can actually copyright columns.<sup>75</sup>

The bill as written also envisioned an almost trademark like two-step process for determining whether or not a building could be protected, requiring original design elements that are not functionally required.<sup>76</sup> While the second part has little relevance to discussions of body art as no part of a tattoo is functionally required, the first part of this test has significant resonance in the proposed standard for tattoos further on.

The most applicable parts of the AWCPA to the problem of tattoos come in the ways in which it limits the traditional copyright holder rights. Most importantly the AWCPA creates a new right of alteration/destruction, and severely limits the copyright holder’s ability to stop reproductions and derivative works.<sup>77</sup>

As the architect is seen as the one who will normally hold or at least theoretically hold the copyright to a building, they could prevent even minor changes to the building under their copyright without limitation. The AWCPA thus grants “the owners of a building embodying an architectural work” the right to, without permission from the copyright holder, “make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.”<sup>78</sup> In fairly clear language the new law laid out that while the owner held a copyright to

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<sup>68</sup> David Shipley, *The Architectural Works Copyright Protection Act at Twenty: Has Full Protection Made a Difference?*, 18 J. INTELL. PROP. L. 1, 8 (2010) (“The copyrightability of architectural plans, blueprints, and renderings was well established long before the passage of the AWCPA in 1990.”).

<sup>69</sup> Winick, *supra* note 66, at 1602.

<sup>70</sup> Berne Convention, *supra* note 23.

<sup>71</sup> *Id.* at 1602-1603.

<sup>72</sup> 37 C.F.R. § 202.11(b)(2) (2016).

<sup>73</sup> *Id.*

<sup>74</sup> Winick, *supra* note 66, at 1617. (“Although the AWCPA protects an overall design of an architectural work, the Act does not protect the individual standard features used in that work.”).

<sup>75</sup> *Id.* at 1618-19.

<sup>76</sup> *Id.* at 1615.

<sup>77</sup> *Id.* at 1622-24

<sup>78</sup> 17 U.S.C. § 120(b) (2016).

the design of the building, he did not control the physical representation of that design in the real world.

But more than simply allowing for the alteration or destruction of the building, the AWCPA also limited an architect's right to how the building is viewed and reproduced. One of the major issues facing the copyrighting of buildings was photographs, video recordings, and film. It would be disastrous to the movie and television industries if they had to obtain the permission of every architect or building owner in Manhattan if they wanted to show a shot of the city. It would be deeply unfair to thousands of tourists if the architect of Seattle's Space Needle were to be allowed to dictate how photographs could be taken of it. To that end the AWCPA severely limits the copyright holder's ability to limit reproduction. It modified Title 17 to include a provision that stated:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.<sup>79</sup>

Note that this limitation does not only apply to private or non-commercial reproductions, but includes commercial ones.<sup>80</sup> Thus both the tourist and the television show are allowed to show panoramic shots of famous American skylines without having to seek permission from the copyright holder. It is in these limitations that Congress chose to draw a new and important line in copyright protections. Congress acted to protect the design of a building while differentiating between that design and its physical representation. The design itself is protected from destruction and reproduction, while the manifestation that—as a consequence of its nature—exists far more fully and permanently (or semi-permanently) in the real world must bow to real world concerns instead of complete protection. Written large in their choices is this differentiation and there is no reason why it should not be applied to other areas that are thematically, if not literally, similar.

## V. SOLUTIONS AND STANDARDS

It is clear that the combination of unsettled laws and rights at tension, if not outright war with one another, means a solution is needed. Our traditional understanding of intellectual property rights demands that the artist who may or may not be the one who holds the needle gun has protection for their creativity, or else we will have no encouragement for said creativity. But our understanding of equity demands that we recognize no person should be able to tell another how they can display their body, save for those demands of law and customary politeness. The best solution is one that allows for both of these realities to co-exist peacefully.

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<sup>79</sup> *Id.* § 120(a).

<sup>80</sup> Winick, *supra* note 66, at 1626. (“Section 120(a) allows the production of even *commercial* representations of architectural works.”) (emphasis in original).

The best solution is the AWCPA solution which is proposed below. It creates rights in the design to be held by the artist and rights in the physical manifestation to be held by the bearer of the tattoo. It also creates a test to determine who owns what share of those rights and further limits some remedies an artist can seek against an infringing body based on equity. By using a currently understood section of IP law, it can be grounded in settled law while being forward-thinking and flexible enough to handle the emerging artistic and scientific possibilities soon to be faced.

However, it is not the only solution and, in order to contrast, several others are presented as well. These solutions include no copyright on tattoos, mandatory assignment, and mandatory co-ownership.

### *A. The AWCPA Solution*

The most important part of the AWCPA is that it allows us to separate the two different “items” involved in copyright disputes over tattoos: the design and the actual tattoo. The AWCPA separates protection of the architect’s right in the design of the building from the building owner’s rights in the physical building. So too does our AWCPA-derived standard start from the assumption that there are (and should be) different rights associated with the design and the physical tattoo. Before we look at the test to determine if there are any rights that may be held by either party, it’s important to understand what rights they can possibly hold. These rights may be limited based on the creativity test outlined below, but represent the maximum.

#### *1. Who Holds What Rights*

There are two people who can hold rights in the tattoo: one of which is a traditional IP right that is alienable and assignable, and the other of which is an equity-based right which is unassignable but is removable. The “artist’s share” belongs to the person who did the creative work in the design or anyone whom they have sold or licensed their share to. The “physical share” belongs to the person who has the tattoo, and cannot be sold or owned by any other person—although it can be destroyed, per the rights listed later in this section. The physical share is also automatic as it is based more in equity than in IP; it cannot ever be lessened except by complete destruction, nor can there be any way of removing it, save for removing the tattoo.

##### *a. Rights of the Artist’s Share*

Assuming that the work passes the creativity test outlined below, the artist holds all traditional IP rights associated with the design. He owns the right to license and merchandise the design (such as selling it on t-shirts or backpacks), to allow or to prevent derivative works to the extent allowable under copyright law, the right to control modifications to the design to the extent allowable under copyright law, and the right to exclude others from using the design subject to limitations.

The artist does not own any rights in the physical manifestation of the design. He cannot stop the recipient of the tattoo from appearing in any medium and displaying the tattoo, nor is he entitled to any profits or compensation for the recipient's appearance in any commercial activity where the tattoo is displayed. He may not control any modification the recipient makes to the physical tattoo including complete change or destruction thereof, such as tattoo removal. He has no say in any licensing that the recipient is involved in at any time for any reason. He gives up all say in the actions of the recipient or the use of the recipient's persona, subject only to the limitation that the recipient may not lie about where he received the tattoo.

There is an additional limitation of the artist's commercial rights, derived from the equitable right of a person to their body, and that is a limitation of available remedies. As a tattoo is an expensive and painful procedure that indelibly marks a body, they are sharply limited in how they may recover for other people wearing their designs. The person who holds the artist's share has the right to seek damages from shops that they can demonstrate are infringing their designs and may have both compensatory and injunctive relief from the shop and the court, but they may not recover any damages or seek any injunctive relief from any person bearing the infringing tattoo. They also have no right to demand or require that a person have an infringing tattoo removed from their bodies by any means, owing to the cost and pain of such a procedure, although they may offer economic incentives to entice them to do so. They can recover damages only from the source of the infringement on their design, not on any physical manifestation of that design.

*b. Rights of the Physical Share*

The tattoo recipient owns all rights related to the display, reproduction, and use of the physical tattoo that she<sup>81</sup> bears. She owns the right to appear in any forum or medium that she desires, whether for personal or commercial purposes, and display the tattoo to the extent that she desires in keeping with her own personal taste (and any laws regarding indecency depending on the location of the tattoo). The tattoo may be filmed, pictured, or reproduced in any way so long as those reproductions are of the tattoo as it appears on the skin of the recipient, although digital 'touchups' as used by the advertising industry will not violate this. She owns the right to license her image for any purpose, personal or commercial, including the display of the tattoo so long as it is representative of the actual tattoo on her actual body.

She does not own the right to license, merchandise, or sell the design of the tattoo off of her body or depictions of her body. She does not hold the right to license the tattoo for any product, merchandise, or depiction that does not include her depicted with it (such as on t-shirts, backpacks, or independent art). She gives up all say in how the artist chooses to use, license, or merchandise the design as it exists independent of the tattoo on her body, nor does she have any interest or financial stake in these dealings or any right to compensation or damages if it is so used.

Furthermore, she does not have any right to seek damages against any person who has the same tattoo inked in their skin, whether or not they did so with the

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<sup>81</sup> Gendered pronoun used for ease.

permission of the tattoo artist, nor may she stop any person from displaying the tattoo on their skin or force them to have it removed.

## *2. The Design Test*

One of the major issues with any copyright in tattoos is that there are hundreds of designs that are commonly used. Whether they are images that exist in the collective consciousness (generic crosses, angels, hearts, etc.) or are actually copyrighted images held by third parties (Disney characters, or flash books of tattoo designs), there are a number of things that can prevent or reassign the artist's share of a copyright in a tattoo. This test is designed to decide who holds the artist's share, and thus the rights in merchandising of the image. Note that per the discussion above, this cannot limit the rights of the physical share nor impact their exercise at all but only serves to determine who holds the rights to the design. The artist's share can be held by the person who owns the physical share, either because they created the design themselves or by sale or assignment. The artist's share can also be held by no one in the case of a public domain image, or an uninvolved third party in the case of an already copyrighted one. The test is a step test, and follows.

### *a. Is the tattoo an unaltered, non-parody or fair use copyrighted image, or a public domain image?*

The first question determines whether or not either of the two people involved in the tattoo (the artist with the needle gun and the recipient) can even hold the artist's share of the copyright. If the image is already copyrighted by a third party and the image does not fall under the fair use or parody standards (which are therefore expressly included in this standard and this test) then whoever owns the copyright in the image similarly owns the artist's share in the tattoo. If it is a public domain image or character then there may be no one to hold the artist's share, although sufficient application of creativity (see steps below) may allow there to still be one. But an unaltered public domain image belongs to the public domain, and an image which isn't a transformed version of a copyright image belongs to the copyright holder.

### *b. Are creative elements present in the design? Are they original?*

This is the first step for all original designs and the step which can allow public domain representations to still have an artist's share. Creativity is, here designed broadly, any unique element or novel representation present in the tattoo. Sufficient background images, modification, or effects may be put to a "generic" image such as a cross to allow the artist to have a copyright, while for a wholly original design the standard is almost universally satisfied. The simplest version of this standard of creativity is: Are the design elements sufficient that it can be recognized as a new creation, even if it is of a common image? The originality requirement is a



recognition that there are some additions that do not move an image out of the public domain, such as adding a depiction of Jesus to a cross to make it a crucifix.

*c. Who provided the original elements? If more than one party did, in what percentage?*

The final step involves determining what percentage each party who contributed design elements actually contributed. Under the AWCPA standard it is possible for more than one person to exercise rights in the design, just as more than one architect can have the rights in a building design. But there should be a cut-off past which one party is a non-voting, but revenue sharing, owner. If more than sixty percent of the design comes from one party, then they are the controlling interest and are solely empowered to make decisions for the design, although they must either compensate the other party for their share or convince them to sell. If the tattoo artist does all the work then they receive all of the copyright. Similarly if the recipient comes in with a fully realized design and simply has it tattooed on to them, then the recipient has the artist's share. In cases of a dispute, it is the court who must decide what meets the standard of a "majority" of the design elements, but there are some broad standards it can follow. A design completely provided by the client means the tattoo artist has no rights in it, if the design was made by the client then the client holds those rights. If it was created by another artist (tattoo or not) then that artist holds the design rights.

If the design is modified from a public or un-owned design, then the question is how much was changed. Changing the field of stars from blue to gold on an American flag is not sufficient to vest rights in the artist, while making a new shape and color design (thus making it effectively a whole new flag) would be. As a rule, minor changes do not alter the ownership of the design rights, while major changes will.

*B. No Copyright*

A second solution would be to simply declare, via legislation, that tattoos are not copyrightable material. No artist would own any stake in their design, and thus the recipient of the tattoo would be completely unfettered in how they can display or profit from it. They would own the only stake in that tattoo, although others could copy it or use it on designs. This would solve the problem of ensuring the person who physically possesses the tattoo has a right in their own body, but at the same time it would open a significant number of other issues.

The largest impact would be the potential drying up of creativity from tattoo artists. Copyright exists to encourage the creative to continue creating by giving them protections, on the belief that they would not keep creating if their designs could be taken and used in any form by anyone else. Faced with this reality it is quite possible that tattoo artists would stop doing any original work, only working with public domain images or designs created completely by the customer. It would become a far more mechanical and less expressive industry, as rampant use of those designs spread and there was less and less reason for an artist to create an image for

a tattoo except for whatever they were directly paid for it (causing the rare original works to cost more as the artist loses out on any possible future stake in the design).

This solution would also significantly harm future art forms, as well as weaken our traditional understanding of intellectual property. While there are certainly reasons why tattoos, scarification, and LED implanted sub-dermal light shows are different than the majority of copyrighted materials, this solution implicitly says that they are so far different as to be out of the realm of IP, which doesn't seem to fit right with how we actually view IP. It also says that we would be willing to look at other traditionally protected areas of IP and start carving them out and possibly not protecting them, which would be discouraging to the market as well as violate how we view property. Additionally, this solution might violate the US's obligations under the Berne Convention.

### *C. Automatic Assignment*

This second solution functions similarly to the "No Copyright" solution listed above, in that it completely divests the rights of the artist. However it does so in favor of automatically giving all of the rights to the recipient of the tattoo. He or she would then have the right not only to appear with the tattoo, but to create designs for merchandise based on the tattoo and license it for others to use commercially. The rights would continue to exist, this solution would just mandate that they be automatically assigned.

This relieves part of the problem of solution B in that it does not completely carve tattoos out of the realm of IP and provides less of a "system shock" to our traditional understanding of IP. However, it still presents many of the same problems associated with solution B. It still provides little to no incentive for the artist to continue their creativity, or to only do so in an environment where they are heavily paid. Thus is still presiding over a general lessening of the creativity in the industry, the exact opposite of what copyright is supposed to do.

It also doesn't pass a test of equity, what one might term a "smell test." It doesn't feel right under our understanding of copyright that someone who does a major creative work should not have any rights in that unless they have agreed to sell them. Forcing them to sell those rights universally, in addition to driving up the cost, violates this basic principle.

### *D. Automatic Joint Ownership*

A fourth solution would be to say that without contracts or assignments to the contrary, tattoos are automatically considered to be jointly owned by the artist and the recipient. This solution would work in some ways similarly to the AWCPA solution above, in that it would differentiate what rights would be held by which party. While they could modify the relationship, as any of these standards could be modified by contract, there would be a basic understanding of rights that would exist without any need for contract or modification.

One significant issue facing this solution is deciding who gets what rights. Does the artist own the right to derivative works because of his design, or does the

recipient own the right of derivative works because it is in his skin? Same with the right of reproduction. And ultimately who owns the majority share in case there is a disagreement is another area that needs to be carefully fleshed out.

Ultimately, the largest problem that faces the joint-ownership solution is that it maintains the philosophy that the design and its physical manifestation are the same thing and should have the same rights, just that those rights should automatically co-exist between the artist and the tattoo recipient. That insistence fails to recognize that there are different rights that the artist and the recipient want to express, and that the best way to allow them to express those rights are to bifurcate them and acknowledge their distinct differences.

## VI. CONCLUSION

Tattoos have been a part of human culture for thousands of years and, as they become more accepted and common, they show little sign of their popularity diminishing. Furthermore, they represent only a portion of a field of body modification for artistic purposes that is likely to grow as technology allows us to customize minute details of our appearance. As they become more widespread, they begin to interact more and more with copyright and intellectual property laws, and there they present a variety of problems. Tattoos and body modification represent the only fields under IP law where the medium has any rights at all and especially where the medium has rights exactly equal to that of the artist. The current situation of uncertain case law and no statutory standard leaves the field open to confusion, differing interpretation, and perhaps even economic destruction if the wrong standard is adopted or a good standard haphazardly introduced. Only by turning to other fields where there is a similar disconnect between design and construct can we find a solution that is both truly equitable and still grounded in how we understand intellectual property, clear the path for ongoing innovation and prosperity in the field, and provide a template for untold future fields. The AWCPA provides the lens by which we can accomplish all of these goals and provide economic, equitable, and legal equality between artists and recipients to allow the field to continue to expand and thrive.