TATTOOS: MEANING OF TANGIBLE MEDIUM IN THE 21ST CENTURY

Jessica L. Santiago
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“The mother of excess is not joy but joylessness.”

- Friedrich Nietzsche

Did we ever think that United States would go from a copyright pirate to an overprotective country? This might be exactly the road we are leading towards if protection is granted for tattoo artists to have rights over other people’s bodies. This paper will discuss the implications of such a scenario. Section 102 of the Copyright Act of 1976 (“Act of 1976”) establishes when protection is granted; that is, for “original works of authorship fixed in any tangible medium of expression.” This paper will focus on what has been considered a medium and whether human skin falls into that definition. It will discuss the consequences of classifying human skin as a medium. It will also delve into the impact of current technology and/or media on this issue. Finally, it will propose how an amendment to the Work-for-Hire doctrine might be the necessary solution in determining whether tattoos on human skin should receive copyright protections.

Introduction

Tattoos have been the center of attention lately, partly because of their increasing popularity in society and partly because of the issues that have arisen regarding this topic. However, the practice of tattooing can be traced back to early practices of claiming ownership over another person’s body where, along with branding, tattooing indicated ownership and slave

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status. Now, in the 21st century, tattoos have a different intention and meaning. With tattoos being more commonplace in our society, different corporations have taken advantage of this to incorporate tattoos in their advertising campaigns. As a result, the tattoo artists have begun to bring copyright infringement claims against these corporations for their alleged unauthorized use of the tattoo.

This is where our analysis begins—by deciding whether tattoos are copyrightable. The more specific question this paper will address is whether human skin should be considered a tangible medium. Answering this question is crucial because the number of people getting tattoos is increasing and so are the number of tattoo artists that are claiming copyright infringement.

The Supreme Court has yet to decide on this issue. In fact, those complaints that have been filed

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5 Dana Blanton, FOX News Poll: Tattoos aren’t Just for Rebels Anymore, FOXNEWS, Mar. 14, 2014, http://www.foxnews.com/us/2014/03/14/fox-news-poll-tattoos-arent-just-for-rebels-anymore/ (In 2014, Fox News conducted a poll to determine approximately how many people in United States had tattoos, how that percentage changed throughout the years, and what factors affected these statistics. The poll found that 20% of voters had at least one tattoo. This percentage had increased dramatically since 2007 where the percentage was merely 13. The percentage disparity was even more drastic when it came to individuals with two or more tattoos. This percentage bumped from 8% in 2007 to 14% in 2014. Some factors that affected these percentages were age. People under the age of 45 were shown to be more prone to have tattoos (30%), compared to those over the age of 45 (14%). Another factor that affected was gender, with women (47%) nearly doubling men (25%) in having tattoos. When combining the factors of age and gender the results discovered that men over 65 are three times more likely to have tattoos than women over the same age (14% v. 4% respectively)).
8 See generally Complaint, Reed, No. 3:05-CV-198 (claiming copyright infringement on Rasheed Wallace’s Egyptian Family tattoo); Complaint, Whitmill, No. 4:11-CV-752 (arguing Warner Bros. infringed on Whitmill’s copyright over Mike Tyson’s facial tattoo); Complaint, Escobedo, No. 2:12-CV-2470 (claiming copyright infringement on Carlos Condit’s Lion tattoo); Complaint, Allen, No. 5:12-CV-3172 (alleging Ricky Williams and Electronic Arts, Inc. infringed on Allen’s copyright over Ricky Williams’ arm tattoos).
regarding the issue, for one reason or another, have not been decided on, thus, leaving no precedent to follow.9

Part I of this paper explores the historical significance of branding and tattooing as a method of ownership, punishment, and slave status. Part I then discusses how society could be taking a step back into the past, into the times of ownership and slavery, by allowing tattoo artists to claim rights over the bodies of their clients.

Part II discusses the requirements that a work must meet in order to receive copyright protection.10 It focuses on whether skin is an appropriate tangible medium of expression. This part also discusses some cases that have come to court involving the tattoo copyrightability issue.11 It mentions how these cases were settled or dismissed providing us with no guidance on how to approach the situation.12 Part II then focuses on addressing whether skin is sufficiently permanent as to satisfy the "fixed in a tangible medium of expression" requirement. It determines that although skin is sufficiently permanent, as a matter of public policy tattoos fixed on human skin should not receive copyright protection. It discusses several implications involved in granting tattoos copyright protection; such as, that it would mean that we are going back to the times when tattoos symbolized ownership and slave status, what would happen in cases where a

person has multiple tattoos and decides to be on an advertising campaign, and the impact on the
tattoo industry if people decided not to get a tattoo so that another person does not have claims of
ownership over their bodies.

Part III examines the impact of the ubiquitous nature of the Internet on copyrightability of
tattoos. Further, in Part III, I explore how with the increased accessibility of to the Internet, it is
more likely for people to see a corporation's advertisement campaigns. Finally, I discuss how
tattoo artist are concerned that their works will be exploited without them being appropriately
compensated for it.

Part IV considers the “work for hire” doctrine\(^\text{13}\) as a possible solution to the debate of
whether tattoos on human skin should be considered copyrightable. I will propose that the most
feasible solution will be an amendment to the Act of 1976 for it to include tattoos as an
additional category in the specially commissioned work section of the work-for-hire doctrine.\(^\text{14}\) I
discuss the implications involved in including tattoos as a specially commissioned work, like
giving the client the option to decide who will have rights over his body, making clear between
the client and the tattoo artist which one of them owns the work, and giving the tattoo artist the
option to increase the price of tattoos in exchange for the tattoo artist giving up any rights that he
might have. Finally, I will restate that this is an issue that is not going away; rather, it should be
addressed in order to protect the interests and rights of both the tattoo artist and the client.

I. **Historical Significance of Tattoos and Branding**

Early practices of claiming ownership over another person’s body included branding and
tattooing.\(^\text{15}\) Decades of mistranslation by historians have been the cause of not knowing for sure

\(^{14}\) See generally id. (mentioning only nine categories as works specially ordered or commissioned).
\(^{15}\) See 1 Rodriguez, supra note 3, at 98.
whether branding or tattooing was the preferred practice in specific cultures.\textsuperscript{16} Regardless of what cultures we are discussing, or what was their preferred method, both practices of tattooing and branding, were performed to indicate ownership or punishment.\textsuperscript{17} Today, tattoos have different meanings—art, inspiration, faith, or rebellion.\textsuperscript{18}

There are many implications that follow from granting tattoo artists rights over tattoos on another person’s body. For example, if tattoo artists can claim rights over another person’s body when they apply a tattoo to it, then what will be the difference between claiming ownership over a tattoo and claiming ownership over a brand. Yes, branding is now coming back.\textsuperscript{19} With some individuals getting bored with the practice of tattooing, they have now opted for branding.\textsuperscript{20} Some of the same artists that apply tattoos in their tattoo parlors are now applying brands, as well.\textsuperscript{21} Thus, if copyright is granted in tattoos, why would it not be granted for brands? They are both body modification, both applied by the tattoo artist, and both applied in the tattoo parlor.\textsuperscript{22} And if in fact, both tattoos and brands, are entitled to copyright protection, which in turn means that the tattoo artist has ownership rights over another person’s body, how can an argument be made that we are not taking a step back into the past—into the times of ownership and slavery?

II. \textbf{Requirements for a Work to Receive Copyright Protection}

Whether tattoos are entitled to copyright protection has not been decided. In order to find an answer for this issue it is necessary to look at our legislative history so one can understand whether tattoos were one of the works that the Act of 1976 was intended to protect. Article I,
section 8, clause 8 of the Constitution has given Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

The 1976 version of the Copyright Act as enacted by Congress, grants protection to “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.” Since its enactment, cases developed expanding on the different requirements for copyright protection.

This paper will focus on the medium requirement. More specifically, this paper will try to answer whether skin should be considered an appropriate medium in order for tattoos to receive copyright protection.

A. Skin as a Tangible Medium of Expression

Section 102 of the Act of 1976 states that for a work to receive copyright protection it must be “fixed in a tangible medium of expression.” However, section 101 of the Copyright Act does not define the word “medium.” Furthermore, no cases have been decided on whether skin constitutes a tangible medium of expression.

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23 U.S. Const. art. I, § 8, cl. 8.
25 See generally Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 675 (7th Cir. 1986) (holding that player’s performances, without recording, are not fixed; but once the performances have been recorded, they are fixed in tangible form); Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 364 (Pa. 1990) (holding that white pages lack the required originality and that copyright rewards originality, not effort); Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 462 (S.D. N.Y. 2005) (holding that the different elements in a photograph, as an arrangement, may receive copyright protection).
Merriam Webster defines “tattoo” as an indelible mark fixed upon the body.28 This definition is useful in determining whether human skin qualifies as an appropriate medium, because it tells us that a tattoo is “fixed upon the body.”29 The Act specifies that a work is fixed in a tangible medium of expression when it is embodied in a copy or phonorecord and is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”30 This requirement—fixation in a tangible medium—is also mandated by the Constitution.31

The attention that was once given to the originality requirement is now being focused on the medium requirement. The reason for this shift of attention is that the Act of 1976 does not give us a definition of what constitutes a medium,32 nor do we have cases providing us with a test to determine what qualifies as a medium. Without certain guidelines to determine whether a work should be granted copyright protection, the result would be disparate treatment where some works would receive protection while others do not. We would also be imposing on courts the burden of deciding what is artistic and what is not, which goes against the non-discrimination principle introduced in Bleistein.33 This non-discrimination principal set forth in Bleistein provides that it would be dangerous for judges to determine what is an artistic work worthy of copyright protection and what is not.34

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29 Id.
31 See 1-2 Nimmer on Copyright § 2.01 (2015).
34 See id.
B. Cases

Four tattoo artists have filed complaints for copyright infringement over tattoos: Reed v. Nike; Whitmill v. Warner Bros. Entertainment. Inc.; Escobedo v. THQ, Inc.; and Allen v. Electronic Arts, Inc. Two of these cases were settled, one was dismissed for failure to prosecute, and the other was voluntarily dismissed without prejudice. Interestingly enough, only one of the defendants in these cases tried to make some policy arguments as to why tattoos should not be considered a tangible medium of expression as will be discussed more in detail below. However, whether skin is an appropriate medium for purposes of copyright protection has yet to be decided.

35 See generally Complaint, Reed v. Nike, No. 3:05-CV-198 (D. Or. filed May 29, 2005) (In 1988, Reed v. Nike first addressed the issue of whether tattoos could receive copyright protection. Matthew Reed, the tattoo artist, filed a complaint against Nike and NBA player, Rasheed Wallace, claiming that the tattoo artist had copyright over Wallace’s Egyptian family tattoo. In 2004, the tattoo on Mr. Wallace’s arm was part of an advertising campaign for Nike. In his complaint, the tattoo artist asserted he was “the owner of all right, title, and interest to the original work from which the tattoo . . . was created.” He also asserted that Mr. Wallace reproduced, copied, and adapted the tattoo, without his consent or permission. Finally, Plaintiff argued that if the court was to find that Mr. Wallace was a co-owner, then the tattoo artist is entitled to share in revenue resulting from use.; see also Order of Dismissal, Reed v. Nike, No. 3:05-CV-198 (D. Or. filed May 29, 2005) (The parties settled this case before it went to trial.).


37 See generally Complaint, Escobedo v. THQ, Inc., No. 2:12-CV-2470 (D. Ariz. filed Nov. 16, 2012) (In 2009, Plaintiff Escobedo filed a lawsuit against Mr. Condit claiming he owned the copyright for a large Lion Tattoo that he had drawn and applied on Mr. Condit’s ribcage. Plaintiff asserted in his complaint that Defendant, THQ, Inc., infringed on Plaintiff’s rights by displaying the Lion Tattoo in their UFC Undisputed 2010 and UFC Undisputed 3 games.; see also Clerk’s Judgment, Escobedo v. THQ, Inc., No. 2:12-CV-2470 (D. Ariz. filed Nov. 16, 2012) (Plaintiff’s case was dismissed for failure to prosecute).

38 See generally Complaint, Allen v. Elec. Arts, Inc., No. 5:12-CV-3172 (W.D. La. filed Dec. 31, 2012) (In 2012, Plaintiff Allen brought a lawsuit against Electronic Arts, Inc. and, recognized NFL player, Ricky Williams, claiming copyright infringement. Plaintiff alleged in his complaint that he had applied a tattoo on Mr. Williams’ right and left arms and that that tattoo was featured on the cover of Electronic Arts, Inc.’s NFL Street, Madden NFL 10, and Madden NFL 11 games. Mr. Williams had signed a “Consent to Tattoo or Piercing Procedure and Release of Claims” which indicated that the artwork was Plaintiff’s property.; see also Order, Allen v. Elec. Arts, Inc., No. 5:12-CV-3172 (W.D. La. filed Dec. 31, 2012) (Case was dismissed).


40 See generally Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 14-15, Whitmill v. Warner Bros. Entm’t, Inc., No. 4:11-CV-752 (E.D. Mo. filed Apr. 28, 2011) (making several policy arguments as to whether skin should be considered a tangible medium of expression).

After Reed v. Nike in 1988, the issue of tattoo copyrightability resurfaced in 2003 with Whitmill v. Warner Bros. Entertainment, Inc.\textsuperscript{41} There, tattoo artist, Victor Whitmill, created and applied a “Maori-inspired”\textsuperscript{42} tattoo on Michael Gerard “Mike” Tyson’s face.\textsuperscript{43} Because of Mr. Tyson’s well-known career and personality, this tattoo has come to be very well known and recognized.\textsuperscript{44} Whitmill alleged in his complaint that when he created the tattoo Mr. Tyson signed a release form stating “that all artwork, sketches and drawings . . . and any photographs of [Mr. Tyson’s] tattoo are property of [Whitmill].”\textsuperscript{45} In that same year, Whitmill filed for a copyright registration on the tribal tattoo.\textsuperscript{46} After learning that Defendant, Warner Bros., publicly displayed the tattoo in “The Hangover 2,” and in advertisements and other promotional material, Whitmill brought suit to enjoin Warner Bros. from continuing to infringe on his rights.\textsuperscript{47}

Whitmill, in his complaint, took as a given that human skin was an appropriate medium.\textsuperscript{48} Equally, in Whitmill’s brief in support of his motion for a preliminary injunction, he did not make mention of whether skin qualified as an appropriate medium.\textsuperscript{49} Defendant Warner Bros., on the other hand, gave several policy reasons for why skin should not be considered a

\begin{footnotesize}
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\item[43] See generally Complaint, Whitmill, No. 4:11-CV-752 (arguing Warner Bros. infringed on Whitmill’s copyright over Mike Tyson’s facial tattoo).
\item[46] U.S. Copyright No. VA0001767704 (filed 2003).
\item[47] See Complaint at 1, 4, Whitmill, No. 4:11-CV-752.
\item[48] See id. at 3 (“[Plaintiff] is the sole creator, author, and owner of all [r]ights, including copyright, in the Original Tattoo, which is original and fixed in a tangible medium of expression.”) (emphasis added).
\item[49] Brief in Support of Motion for Preliminary Injunction, Whitmill v. Warner Bros. Entm’t, Inc., No. 4:11-CV-752 (E.D. Mo. filed Apr. 28, 2011) (providing several policy arguments for why skin should not be considered a tangible medium of expression).
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“tangible medium of expression.”50 One of the reasons Warner Bros. gave was that if a tattoo were considered a copyrightable pictorial work it would also qualify as a “work of visual art,”51 which in turn, would mean that if it gains notoriety it could also gain “recognized stature.”52 This, Defendant Warner Bros. argued, could allow “courts to enter injunctions ‘to prevent any destruction of a work of recognized stature,’” thus, preventing Mr. Tyson from removing his tattoo should he decide to do so.53 Another policy argument made was that if Mr. Tyson decided to have an adjacent or overlapping tattoo applied, or to be featured on a magazine article, or even if a television network decided to broadcast one of his boxing matches, all of these would violate Whitmill’s rights to prepare derivative works, his display right, or his performance rights.54

Defendant, Warner Bros., also argued that the tattoo was not protectable because it was not capable of being separated from Mr. Tyson’s head.55 It argued the tattoo was a “useful article.”56 A “useful article” is defined in section 101 of the Act of 1976 as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article . . . .”57 Therefore, because the tattoo could not be separated from Mr. Tyson’s face—the useful article—the tattoo did not meet the separability requirement under section 101, and as a consequence, could not receive copyright protection.58

52 Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 14-15, Whitmill, No. 4:11-CV-752.
53 Id. at 15.
54 Id.
55 Id.
56 Id.
58 Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 17, Whitmill, No. 4:11-CV-752.
This case ultimately settled after Plaintiff’s motion for a preliminary injunction was denied. Although in her order, Judge Perry stated: “[o]f course tattoos are copyrightable,” she did not explain her analysis, nor did she discuss whether skin fell into the definition of tangible medium. The judge’s statement is problematic, because she did not give an explanation for holding the way she did. One is left with no guideline, test, or analysis to apply should this issue arise again.

C. Does human skin satisfy the “sufficiently permanent” requirement?

In determining whether human skin is sufficiently permanent as to satisfy the “fixed in a tangible medium of expression” requirement, we look to the language of the Act of 1976. “Sufficiently permanent” means that it will be present for more that a period of transitory duration. But, is human skin sufficiently permanent? My answer is yes. To answer this question, it is helpful to understand how the application of tattoos works. Tattoos inject dye into the epidermis and dermis, the first and second layer of the skin, respectively. The cells in the epidermis constantly “die and flake off,” making the ink fade away. However, the ink that is inserted in the dermis has no place to go, thus, making the ink remain there permanently. The ink that remains in the dermis is what makes the tattoo permanent. Therefore, although human skin might be considered sufficiently permanent, our inquiry does not end there.

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60 See Order Denying Plaintiff’s Motion for Preliminary Injunction at 3, Whitmill, No. 4:11-CV-752.


62 See id.


64 See Aguirre, supra note 63.

65 See id.

66 See id.
D. Should Tattoos be Considered Copyrightable as a Matter of Public Policy?

The next question to consider is whether tattoos should be considered copyrightable as a matter of public policy. My answer is no. Tattoos, just as brands, have existed throughout history, and their significance in different cultures is a serious one—ownership and slavery.²⁷ Allowing tattoo artists to hold copyright in tattoos appearing on the skin of their clients, no matter if it is only to the portion of one’s body where the tattoo is, is like returning to those days of slavery.²⁸ Some might say this is an extreme view, but is it? One might consider some implications involved in allowing somebody to have rights over another person’s body.

First, one could assume that tattoo artists are granted copyright protection and thus, ownership over the tattoo on another person’s body. Now that branding is regaining popularity,²⁹ granting copyright protection in tattoos could lead to granting copyright protection in brandings. The reason why if one is afforded protection the other would receive it as well is because they are both types of body modification, they are both applied by the tattoo artist, and in many circumstances, they are both applied in the same tattoo parlor.³⁰ Therefore, it would be a tough argument to make to say that tattoos are entitled to copyright protection while brands are not. As mentioned earlier, granting copyright protection to tattoos and brands would mean that tattoo artists would have ownership rights over another person’s body. This in turn, leads to society returning to the times where tattooing and branding were symbol of ownership and slavery, rather than a creative form of expression.

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²⁷ See RODRIGUEZ, supra note 3, at 629; see also 2 RODRIGUEZ, supra note 3, at 98.
²⁹ See Pegg, supra note 19.
³⁰ See id.
Second, one should take into consideration what would happen with people who have their entire body covered with tattoos. Some questions that would arise are: Would those individuals have rights over any part of their body? Should they want to be part of a commercial, for example, would they have to contact every single person who has applied a tattoo on their body to ask for authorization to do what they please with their body? One could further assume the individual goes ahead and participates in an advertisement campaign without contacting all the tattoo artists that have applied tattoos to his body. The courts having to entertain the claims of every single tattoo artist would defeat judicial efficiency.

Third, granting tattoo artists copyright over tattoos could affect the annual revenue resulting from the tattoo industry. In 2012, the annual revenue of the tattoo industry was of 2.3 billion dollars. Additionally, a poll conducted by Fox News demonstrated that in 2014, 20% of voters had at least one tattoo. This was a remarkable difference from the 13% of voters that had at least one tattoo in 2007. With tattoo artists filing complaints against their clients alleging that they have rights over their clients’ bodies, some people may become skeptical of getting tattoos and opt not to do so. If the public decides not to get tattoos because they do not agree with another person having rights over their bodies, this could lead to a great impact on the tattoo industry. Some people might even decide to apply the tattoos themselves so that there is no question as to who is the author, which would most certainly become a health concern.

Granting tattoo artist copyright protection over a tattoo on another person’s body would be setting a troublesome precedent because it would be giving the tattoo artist rights over another

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71 See generally Most Tattooed Man, GUINNESSWORLDRECORD (receiving the World Guinness Record for man with most tattoos), http://www.guinnessworldrecords.com/world-records/most-tattooed-person (last visited, Nov. 4, 2015).
73 Blanton, supra note 5; see also 17 U.S.C.§ 106 (2015).
74 Id.
human being. At some point a line has to be drawn, and the human skin is where that line should be. The implications of allowing tattoo artists to assert ownership claims over another person’s body goes against the very essence of what United States stands for—freedom.

III. Internet’s Impact on Copyright Issues Relating to Tattoos

Merriam Webster defines Internet as “an electronic communications network that connects computer networks and organizational computer facilities around the world.” Internet access is now considered essential to many and the number of Internet users continues to increase. With the amount of people likely to see a corporation’s advertisements online, tattoo artists are concerned that their work will be exploited and they will not be compensated or recognized for it. With Facebook (including Instagram) and Twitter dominating the Internet, businesses and corporations became more interested in promoting their different forms of intellectual property, namely, songs, photographs, advertisements, videos, etc.

The cases that have arisen regarding tattoo copyrights have been of well-known actors or sports players that are bound to have a lot of media attention. In fact, those being sued are those with the highest probabilities to be all over social media on advertisements and commercials.

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78 Evelyn M. Rusli, Facebook Buys Instagram for $ 1 Billion, N.Y. TIMES (Apr. 9, 2012), http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/_r=0 (discussing Facebook’s purchase of Instagram for $1 billion).
making it extremely easy for the public to see these advertisements and commercials, and for companies, like Warner Bros., to generate profit.

IV. Work-for-Hire as the Solution

Assuming tattoos are protectable under § 102 of the Act of 1976, what would be a solution that takes into consideration both the interests of the tattoo artist and those of the individual? A feasible solution would be the “work-for-hire doctrine.” Work-for-hire is defined in § 101 of the Act of 1976 as:

[A] word prepared by an employee within the scope of his or her employment; or

[] a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The Supreme Court made some clarifications as to existing confusion in the interpretation of the work-for-hire doctrine. The Court in Community for Creative Non-Violence v. Reid clarified the appropriate test in determining whether there is an employer-employee relation. It also explained that a specially commissioned work will only be a work made for hire if it falls within one of the nine categories detailed in § 101 of the Act of 1976, and the parties sign a document stating that the work will be a work made for hire.

Scholars go both ways on the issue of whether the work-for-hire doctrine is a plausible solution. Under the first option—a work prepared by an employee within the scope of his

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82 Id.
83 See generally Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (holding that in determining whether an employer-employee relationship has been established for purposes of the work-for-hire doctrine we look at agency law; and that in order for a work to be a specially commissioned work, it has to fall within one of the nine categories of work specially commissioned and be in writing.)
84 See id.
85 See Cummings, supra note at 68, at 314 (explaining that adding tattoos as a category for a specially commissioned work is the best route to take); see also 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, 105 (2003) (discussing there could be an employer-employee relationship between the tattoo artist and the client). But see Yolanda M. King, The Enforcement Challenges for Tattoo Copyright, 22 J. Intell. Prop. L. 29, 44 (2014) (arguing
employment, Cotter and Mirabole have discussed the possibility that the employer-employee relationship would be between the tattoo parlor and the tattoo artist.\textsuperscript{86} Alternatively, they argue that the tattoo artist could be the employee of the client who is retaining the tattoo artist’s services.\textsuperscript{87} King, on the other hand, argues that the agency law factors for establishing an employer-employee relationship under Reid would not support a determination that there is such a relationship between the tattoo artist and the client.\textsuperscript{88} Under the second option—a specially commissioned work—Cotter and Mirabole argue that if a person has many tattoos then an additional tattoo would be a compilation, and thus, would fall under one of the nine categories of specially commissioned works.\textsuperscript{89}

I agree with King that the employer-employee factors do not support a holding that there is an employer-employee relationship between the tattoo artist and the client. Some of these factors are: the right to control the manner and means of the work, who provides the instrumentalities, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects, and the provision of benefits.\textsuperscript{90} When applying these factors in the tattoo context, it is easily ascertainable that there is no relationship. First, the client has no right to control the manner and means in which the tattoo artist applies the tattoo. Although the client indicates what they would like the tattoo to be of and where they would like it, they cannot give the tattoo artist the instructions for applying the tattoo. Second, the client does not bring the tools and instrumentalities to be used. Third, the relationship between the tattoo artist and the client is rather short, lasting only whatever amount of time it takes the tattoo

\textsuperscript{86} See Cotter & Mirabole, supra note 85, at 314.
\textsuperscript{87} See id.
\textsuperscript{88} See King, supra note 85, at 44.
\textsuperscript{89} See id.
\textsuperscript{90} See Reid, supra note 83, at 751-52.
artist to finish the tattoo. Fourth, while the client can decide to get another tattoo with the same
tattoo artist, the client can’t order the tattoo artist to apply a second tattoo on his body, or that the
tattoo artist apply a tattoo on somebody else’s body. Finally, the client does not provide benefits
to the tattoo artist. Taking all these factors into consideration, an argument that there is a
relationship between the tattoo artist and the client under agency law is not convincing. Cotter
and Mirabole’s additional argument that the tattoo parlor would be the employer and the tattoo
artist the employee91 does not take into consideration that many tattoo parlors are independently
owned. Even if the tattoo parlor were not owned by the tattoo artist, this would not be a solution,
because the tattoo parlor would then have ownership rights over the client’s body and we would
be left in the same dilemma.

Cotter and Mirabole’s argument that a tattoo can fall within the specially commissioned
work92 section as a compilation is also a weak one. This argument, does not take into
consideration those situations where a person only has one tattoo.

I believe the most feasible solution would be an amendment to the Act of 1976, more
specifically, an amendment to the work-for-hire doctrine. This will be beneficial to both sides
because it makes clear who the author is and who will have rights over the work, it will eliminate
the monitoring by the tattoo artist to make sure the tattoo isn’t being exploited, it will preserve
the relationship between the tattoo artist and the client, and it will prevent the flooding of courts
with claims of tattoo ownership. Although initially tattoos were not included as one of the nine
categories of specially commissioned work, tattoos were probably not considered when drafting
the Act of 1976 because tattoos were not as big of an issue as they are today. As I mentioned

91 See Cotter & Mirabole, supra note 85, at 314.
92 See id.
earlier, the number of Americans getting tattoos has been increasing exponentially. This means that in 1976, the number of individuals with tattoos were not nearly as many as there are today. Nearly 40 years have passed since the enactment of the Act of 1976, and issues that were not a concern initially, like tattoos, have been the center of attention today.

As Cummings indicates, adding tattoos as a category for a specially commissioned work is the best route to take because (1) it takes into consideration those situations where a client wants a “freehand tattoo” and gives the tattoo artist the general vision of what they would like, which is equivalent of a specially commissioned work; and (2) author’s rights would be vested in the client rather than in the tattoo artist, which would eliminate any human rights implications. A mending the Copyright Act of 1976 would be the best solution not only to put an end to the uncertainty of who owns the tattoo, but also to protect the interests of both the tattoo artist and the client.

V. Conclusion

To say that tattoos do not satisfy the requirements necessary for copyright protection might be a stretch, given that they meet the requirements set forth in section 102 of the Act of 1976. However, while tattoos might meet the requirements for copyright protection, the implications that come along with granting that protection are too serious to overlook. Tattoos carry with them a history of ownership claims, slave status, and mistreatment. It has taken centuries to change what a tattoo means and the public perception that accompanies that meaning. Now, in the 21st century, tattoos have reached, for the most part, a drastically different meaning—art, expression, creativity, inspiration. Granting copyright protection to tattoos, thus

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93 See Blanton, supra note 5.
95 17 U.S.C. § 102 (2015) (For a work to receive copyright protection it must be an original work of authorship that has been fixed in a tangible medium of expression).
making the tattoo artist the copyright owner would take us back to when tattoos signified
ownership and slave status.

Yes, copyright protection is necessary, especially in this era where Internet access is
becoming as essential as any other utility. 96 With increased accessibility to the Internet
individuals and corporations are striving to protect their work. In attempting to protect as much
as they can, copyright may be expanding to dangerous limits. As with all rights, the line must be
drawn somewhere and the human skin is the perfect place to draw that line.

A feasible solution would be amending the Act of 1976 to include tattoos on human skin
as a tenth category of specially commissioned work in the work-for-hire doctrine. This would be
the best solution because not only does it take into consideration the interests of the tattoo artist
as well as the client, but it also makes clear who the owner of the tattoo is.

I want to end this paper with the same line I began with: “The mother of excess is not joy but
joylessness.” 97 Copyright is important, even vital in order to preserve fairness and fair
competition. But too much copyright could become, not the solution, but the problem.

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96 See Andrew Perrin, Americans’ Internet Access: 2000-2015, PEWRESEARCHCENTER (June 26, 2015),
http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/ (stating that in 2015 it was estimated
that 84% of Americans use the Internet).
97 NIETZSCHE & HOLLINGDALE, supra note 1, at 230.