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## Protection and Enforcement Challenges for Tattoo Copyrights\*

Yolanda M. King\*\*

Good afternoon. I am going to discuss tattoos. And in twelve minutes I am going to try to summarize tattoo copyrights. I intend to combine discussion of a couple of articles I have written. I have written a series of articles on the copyrightability of tattoos, enforcement of tattoo copyrights, and another article on right of publicity, which, time permitting, I may mention briefly at the end of this presentation, but I am focusing on copyright and tattoos for today.<sup>1</sup>

So first I will briefly summarize my first article concerning copyrightability: it addresses the ambiguity regarding protectability of tattoos and the effects of the ambiguity on artists as well of their customers who are the tattoo-bearers. I ultimately conclude that tattoos are copyrightable, but I respond to some interesting arguments by David Nimmer, who is the author of a copyright treatise and was an expert retained by Warner Brothers in *Whitmill v. Warner Brothers*, which I will discuss in a moment.<sup>2</sup> He raises some arguments and he, at least as of now, opines that tattoos are not copyrightable, and I think the opinion is problematic and it will be increasingly problematic as tattoos become more commonplace.

So what is a tattoo? It's defined as to mark the skin with a tattoo.<sup>3</sup> It has an origin of a Tahitian term meaning to mark, an indelible mark or figure fixed upon the body by insertion of a pigment under the skin or by production of scars.<sup>4</sup> So tattoo functions both as a noun and as a verb. It is more prevalent now, I think more noticeable because of tattooing by artists, music artists, athletes, and so you see the prominence of tattoos in the media and you also see more television shows

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1. See, e.g., Yolanda King, *The Right of Publicity Challenges for Tattoo Copyrights*, NEV. L.J. (2016 forthcoming); Yolanda King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. INTEL. PROP. L. 29 (2014); Yolanda King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129 (2013).

2. Declaration of David Nimmer, *Whitmill v. Warner Bros. Entm't, Inc.* No. 4-11 Civ. 752, 2011 WL 10744102 (E.D. Mo. May 20, 2011).

3. "Tattoo," MERRIAM-WEBSTER DICTIONARY (last visited Mar. 8, 2016), [http://www.merriam-webster.com/dictionary/tattoo\[1\]](http://www.merriam-webster.com/dictionary/tattoo[1]) [<https://perma.cc/P6CQ-X8R5>]

4. The Islands of Tahiti, "Tatau," TAHITI TOURISME (last visited Mar. 8, 2016), <http://tahitinoz.co.nz/about-tahiti/culture/tatau-tattoo/> [<https://perma.cc/T5M7-2ENH>].

based on tattoos.

And I give some examples here but there are, I did some research, at least a dozen or more that have been on the air in the past decade. And there is even a TV series that premiered September 21st, I don't know if any of you watched it, it's called "Blindspot," and the main character is a woman who wakes up in a body bag in Times Square and her entire body is covered with tattoos, and each tattoo represents a clue to a crime.<sup>5</sup> And the FBI is working with her to investigate these crimes. I haven't seen the show, but I think it illustrates that tattoos are becoming more and more interesting, and that now they are even writing shows, drama series, that are about tattoos.

So I think that in light of the prominence of them, it is a growing concern that there isn't a clear answer on the copyrightability and enforcement. You have heard discussion today about the requirements, originality and fixation, so I won't go into detail on those points, but we know there must be this minimal level of creativity and that at least some tattoos will fit the requirement.<sup>6</sup> And they must be fixed.<sup>7</sup> And I have included some definition here: "sufficiently permanent or stable to permitted to be perceived, reproduced, or otherwise communicated of period of more than a transitory duration."<sup>8</sup> And certainly tattoos fit that definition. I disagree with Nimmer who argues that tattoos are not sufficiently permanent and compares them to writing in the frost of a windowpane or sand as the water washes it away;<sup>9</sup> certainly they are more permanent than that. If anyone has had to have one removed, then you know they are more permanent than that. So I don't think that those are the issues here, but he does raise an interesting argument about whether the human body can function as a medium.

Is the human body actually a medium? You must have a tangible medium of expression and he argues that it is not a medium. Medium is not defined in the Copyright Act. But, if you look to the dictionary meaning of a medium, I think that human body can function as a medium of expression.

So then you look to the categories of copyrightable subject matter, which were discussed earlier today and that even though the term "include" is used in section 102(a), it seems there are these eight categories and that subject matter must fit within these eight categories.<sup>10</sup> And tattoos would fit within the category of PGS works, and I have included the definition of section 101 here.<sup>11</sup> And I have underlined this language concerning useful articles. I discussed this issue in my

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5. "Blindspot," TV GUIDE (last visited Mar. 8, 2016), <http://www.tvguide.com/tvshows/blindspot/800996/> [<https://perma.cc/3AQY-PWXA>].

6. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355 (1991) (ruling that originality and fixation are requirements to copyrightability).

7. *Id.*

8. 17 U.S.C. § 101 (defining "fixed").

9. Declaration of David Nimmer at 4, *Whitmill v. Warner Bros. Entm't, Inc.* No. 4-11 Civ. 752, 2011 WL 10744102 (E.D. Mo. May 20, 2011).

10. 17 U.S.C. § 102(a).

11. 17 U.S.C. § 101 (defining "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'").

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article because it's another argument raised by Nimmer that the human body is a useful article, and therefore, tattoos are not copyrightable because there isn't any separable copyrightable subject matter.<sup>12</sup>

So I disagree with that even though the tattoos, especially if they are done freehand in the first instance, even if you could make the argument that they are not physically separable, certainly tattoos are conceptually separable from the human body. So I think that these questions are more straightforward.

So then this brings me to some of the copyright cases. The first case, *Reed v. Nike*, the tattoo artist, Matthew Reed, sued Nike, Nike's advertising agency, and Rasheed Wallace, who was an NBA basketball player, for infringement of his tattoo copyright.<sup>13</sup> He had registered his copyright in the tattoo at least a year or two before filing this lawsuit. And he alleged that a computer simulation of his tattoo was an infringement. In the commercial, Rasheed Wallace is discussing the tattoo, which is a depiction of his family, and they are depicted as Egyptian characters, and he is describing the meaning behind the tattoo. And in the commercial his arm is blank, and then it is recreated as he is describing the meaning of his tattoo. So Reed sues for infringement, and he alleges that Nike and the advertising agency are infringing, and that Wallace is a contributory infringer because he represented himself as the exclusive owner of the copyright.<sup>14</sup> Reed at least acknowledges that even if Wallace was a joint author and copyright owner of the work, that he at least owes accounting to Reed. So it was an interesting case, which quickly settled. But it raises questions about authorship and enforcement of tattoos.

The second case was in 2011, and this is the main focus of my article. It's *Whitmill v. Warner Brothers*, and it concerns the tattoo on Mike Tyson's face. Tyson's tattoo artist sued Warner Brothers for infringement because the tattoo was reproduced on the face of Ed Helms in the *Hangover II* movie.<sup>15</sup> So you can see side-by-side Tyson's tattoo and the reproduction on Helms's face. And so Warner Brothers raised the argument that he didn't sue Tyson but he sued them, and they were arguing that it was a parody. There was a preliminary injunction hearing, and the judge actually denied the motion for preliminary injunction, but she did recognize that the tattoos are copyrightable and that the artist seemed to have suffered some damages as the result of the loss of control of his work.<sup>16</sup> And this case quickly settled after that. I think Warner Brothers could see the writing on the wall that the judge was very sympathetic to the tattoo artist in this instance.

So in the interest of time, I will just briefly mention that there have been some

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12. Declaration of David Nimmer at 7-12, *Whitmill v. Warner Bros. Entm't, Inc.* No. 4-11 Civ. 752, 2011 WL 10744102 (E.D. Mo. May 20, 2011).

13. Complaint and Demand for Jury Trial, *Reed v. Nike*, No. 3-2005 Civ. 00198 (D. Or. Feb. 10, 2005).

14. *Id.*

15. Verified Complaint for Injunctive and Other Relief, *Whitmill v. Warner Bros. Entm't*, No. 4-11 Civ. 752, 2011 WL 2038147 (E.D. Mo. Apr. 28, 2011).

16. Hearing on Motion for Preliminary Injunction at 9, *Whitmill v. Warner Bros. Entm't*, No. 4-11 Civ. 752, 2011 WL 11819138 (E.D. Mo. May 24, 2011).

observations that tattoos may fall under works made for hire, and I disagree with that. I think it's a stretch to argue that a tattoo is a work made for hire because typically you don't have that relationship between the tattoo artist and the customer, but certainly there is the possibility that the author is the tattoo artist or the customer or they could be working together and jointly authoring the tattoo and then they would both be able to exploit it and owe an accounting to the other if they are joint authors.<sup>17</sup> And at least in some instances, tattoo customers have entered into agreements with the artist concerning the ownership of the copyright. It's not common but at least in some of the cases there has been an agreement regarding the ownership of the tattoo copyright.

Moving on to enforcement in light of the medium, I opined that yes, tattoos are copyrightable, they can be enforced and should be enforced, but as a result of the artist's choice of the human body as a medium, there is going to be some diminution of the exclusive rights. I discuss moral rights, and I also discuss this diminution because I think under the doctrine of implied license that a tattoo customer can argue that the tattoo artist had intended to grant an implied license to display the work because once you place it on the body of a customer, then it is on public display and there will be number of subsequent displays by the tattoo customer. And in most of the cases in the complaints, the plaintiffs have actually acknowledged that they had some expectation that it would be on display.<sup>18</sup>

I also address the argument of Thirteenth Amendment concerns. Nimmer actually raised it with regard to copyrightability.<sup>19</sup> I don't think it's an issue with copyrightability, but I do address it with regard to enforcement, and that it should not prevent enforcement, but courts can avoid the constitutional concerns through limited reading of the exclusive rights as well as considering fair use and implied license.

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17. 17 U.S.C. § 201(a) ("The authors of a joint work are coowners of copyright in the work.")

18. Complaint and Demand for Jury Trial at 3, *Reed v. Nike*, No. 3-2005 Civ. 00198 (D. Or. Feb. 10, 2005) ("Mr. Reed expected that public display of the tattoo on Mr. Wallace's arm, and such exposure would be considered common in the tattoo industry.")

19. Declaration of David Nimmer at 11, *Whitmill v. Warner Bros. Entm't, Inc.* No. 4-11 Civ. 752, 2011 WL 1074410 (E.D. Mo. May 20, 2011) ("As applied to tattoos, the only legally cognizable result is to apply the strict requirement of physical separability. Such a construction is necessary to avoid the constitutional infirmity that would arise if the Copyright Act attempted to set at naught the Thirteenth Amendment's prohibition of badges of slavery.")