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## That Tattoo on Her Shoulder: The Intersection of Copyright Law & Tattoos

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**THAT TATTOO ON HER SHOULDER: THE INTERSECTION OF  
COPYRIGHT LAW & TATTOOS**

*Kathleen Wills\**

*Abstract*

*Tattoos are a billion-dollar industry that grows as tattoos become globally acceptable. With that market growth comes an incentive for parlor owners and artists to determine what rights they own and assert it against tattooed individuals. Artists upcharge celebrities for tattoos because of the publicity of their work, an example of how the market is adapting to the growing visibility and publicity of tattoos. But there is a cost: most tattooed individuals are not aware of the legal rights others possess, and can assert, against the permanent ink on their own bodies. This is the first paper to discuss the tattoo clients, who could be the least protected when cases on infringing tattoo designs go to court. Further, it discusses the copyrightability of tattoos, the parties with an ownership interest in a tattoo, and how the interactions between artist, client, and parlor shape the analysis for the court.*

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## I. INTRODUCTION

A young woman, eager to get a tattoo of her favorite song lyrics, researches hundreds of music and watercolor tattoos online—Google, Pinterest, Instagram, tattoo websites. She finds a few pictures of tattoos she likes, then adds her own elements like dimensional dots and a color scheme. She buys the sheet music to her favorite songs, selecting about six notes each from the chorus for the base of the tattoo. She selects her shoulder for the tattoo placement, allowing for space and partial visibility. Hunting down a local tattoo artist who specializes in the style, she collaborates with the artist in a consultation. Months later, they sit down again at the tattoo shop, where her artist hands her a sketch of the design, which they adjust. This is the typical process for custom ink.

Both the client and the tattoo artist could be violating copyright law as infringers. Further, each person who gets a tattoo could face liability for rights they do not own to the piece of permanent ink on their body. The intersection of copyright law and tattoos has the potential to significantly impact an entire market. Tattoos are a billion-dollar industry that grows each year as tattoos become increasingly globally acceptable. With that market growth comes an incentive for tattoo parlor owners, tattoo artists, and other creative artists to determine what rights they own and assert them against tattooed individuals. Artists already upcharge celebrities for their public tattoos because of the publicity of their work. This is just one example of how the market is adapting to the growing visibility and publicity of tattoos. But there is a cost: most tattooed individuals, like this Author when she got that

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watercolor music tattoo, are not aware of the legal rights others possess and can assert against the permanent ink on their own bodies.

This Comment addresses various subjects involved at the intersection of copyright law and tattoos. First, it discusses whether tattoos are copyrightable and how the content of the tattoo might change that answer. Second, this Comment discusses the potential rights a copyright holder might be able to assert against someone getting their design tattooed. Third, this Comment discusses the various parties who have an ownership interest in each tattoo, dissecting the interactions between artist, client, and tattoo parlor. Fourth, this Comment discusses what defenses a tattoo client might have, while making recommendations on how clients should take the initiative to protect themselves. Finally, this Comment explains how a court undergoes an infringement analysis.

While the few legal scholars discussing tattoo and copyright law typically agree that tattoos are copyrightable and that the law should protect original creators in their designs, no one is discussing a critical group: the tattoo clients. The very clients who are building the industry could be the least protected if copyright cases on infringing tattoo designs go to court. Thus, this Comment aims to raise awareness about the tattoo process and encourage courts to shape the future case law with the tattoo process and clients in mind.

## II. TATTOOS & COPYRIGHT LAW

The first known use of the word “tattoo” took place in 1777. A tattoo is defined as a “mark, figure, design, or word intentionally fixed or placed on the skin.”<sup>1</sup> Since 1777, the acceptance and popularity of tattoos have grown. In 2019, the tattoo industry yielded 83 million dollars in the United States alone, and that yield is projected to increase to 110 million dollars by 2024.<sup>2</sup> IBISWorld conducted research indicating that this number is even higher: about \$1.6 billion in global revenue.<sup>3</sup> While each generation tends to be more accepting

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1. *Tattoo*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/tattoo> [https://perma.cc/C7KY-HP5D].

2. *Global Tattoo Ink Market 2019 by Manufacturers, Regions, Type and Application, Forecast to 2024*, VERIFIED MARKET REPORTS (Sep. 2019), <https://www.verifiedmarketreports.com/product/global-tattoo-ink-market-2019-by-manufacturers-regions-type-and-application-forecast-to-2024/> [https://perma.cc/2AFL-HGE].

3. *Tattoo Industry Going into 2019*, CHOSEN ART TATTOO, <https://chosenarttattoo.com/tattoo-industry-2018/> [https://perma.cc/ABF8-NZ7K].

of tattoos, young adults primarily seek tattoos.<sup>4</sup> Thus, it is important to educate this eager-to-ink population, and everyone already inked, and those with the power to shape the law on the legal copyright implications of tattoos.

#### A. *Are Tattoos Copyrightable?*

No published opinions exist on the copyrightability of permanent tattoos. Courts have discussed infringement of tattoo flash work—tattoos pre-designed by artists and advertised for clients<sup>5</sup>—in the context of contract breaches and scope of license agreements.<sup>6</sup> A federal judge has opined during a hearing that tattoos are copyrightable.<sup>7</sup> The Copyright Office has issued Certificates of Registration for tattoo designs.<sup>8</sup> There has even been a case asserting copyright infringement based on temporary tattoos.<sup>9</sup>

Despite the bare case law on tattoos, most scholars agree that tattoos are copyrightable. A famous copyright law professor, David Nimmer, originally opined that tattoos were copyrightable as pictorial, graphic, and sculptural (“PGS”) works but changed his opinion as an expert witness in the Mike Tyson Warner Bros. case.<sup>10</sup> In his expert opinion,

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4. *Global Tattoo Ink Market 2019 by Manufacturers, Regions, Type and Application, Forecast to 2024*, VERIFIED MARKET REPORTS (Sep. 2019), <https://www.verifiedmarketreports.com/product/global-tattoo-ink-market-2019-by-manufacturers-regions-type-and-application-forecast-to-2024/> [<https://perma.cc/2AFL-HGE>].

5. *Tattoo Art, Inc. v. TAT Int’l, L.L.C.*, 498 F. App’x 341, 343 (4th Cir. 2012) (Tattoo flash work is defined as: “A tattoo flash is an original drawing or design of a tattoo printed or drawn on a sheet of paper or a poster and often displayed on the walls of tattoo parlors to give customers design ideas for the tattooist to copy.”).

6. *Id.*

7. Judge Catherine D. Perry did not issue a written opinion but explained the court’s ruling and reasoning during the hearing on plaintiff’s motion for a preliminary injunction. See Transcript of Preliminary Injunction Hearing at 2, *Whitmill*, No. 4:11-CV-752 CDP (*motion denied* May 24, 2011) (stating: “... the tattoo itself and the design itself can be copyrighted, and I think it’s entirely consistent with the copyright law.”)

8. *Solid Oak Sketches, Inc. v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020); see also Katie Scholz, IPWATCHDOG, *Copyright and Tattoos: Who owns your ink?*, <https://www.ipwatchdog.com/2018/07/26/copyright-tattoos-who-owns-your-ink/id=99500/> [<https://perma.cc/QY4N-RX2P>].

9. *Gonzales v. Transfer Techs., Inc.*, 301 F.3d 608, 608 (7th Cir. 2002).

10. See Yolanda M. King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 130, 156 (2013) (citing Ann Bartow, *When a Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN (May 25, 2011), <http://madisonian.net/2011/05/25/when-a-treatise-writer-tries-to-reconfigure-copyright-law-to-benefit-a-client/> [<https://perma.cc/DKM6-L5CC>] (stating that Nimmer’s original position was that tattoos were copyrightable but later

Nimmer opined that the human body is not copyrightable. Most other scholars are quick to point out that this testimony departed from his previous opinion that tattoos are copyrightable.

The law does support the copyrightability of tattoos. Under Article I Section 8, Clause 8 of the Constitution, Congress has the power “to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries . . . .”<sup>11</sup> Historically, this is where federal copyright and patent law stems from because of the reference to “authors,” “science,” “writings,” and “discoveries.”<sup>12</sup> Under section 102(a) of the Copyright Act of 1976 (the “Act”), protection subsists in: (1) original (2) works of authorship (3) fixed in any tangible (4) medium of expression.<sup>13</sup> With these legal frameworks in mind, tattoos are copyrightable.<sup>14</sup>

### B. *What is Required to be Copyrightable?*

The first requirement of copyrightability from the statute is “original.” Originality is a low standard in copyright law.<sup>15</sup> The Supreme Court defined originality as a work that was independently created by the author, as opposed to copied from other works, with at least some minimal degree of creativity.<sup>16</sup> The bar for creativity is low, but the law precludes certain items from protection such as blank

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in his deposition, while acknowledging this earlier position, changed his perspective).

11. U.S. CONST. art. I, § 8, cl. 8.; 17 U.S.C. § 102(a) (2012) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”); see Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, FORBES, <https://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/#79663bf34a21>

[<https://perma.cc/PAA3-2MZ3>] (quoting Jeffrey Harrison’s, a copyright law professor at the University of Florida’s Levin College of Law, statement that, “[i]f it is copyrightable on paper, it’s similarly copyrightable on any medium that lasts, including skin.”).

12. King, *supra* note 10, at 148.

13. 17 U.S.C. § 102(a) (2012).

14. 17 U.S.C. §§ 101, 102(a) (2012) (referencing the definition of “Pictorial, graphic, and sculptural works”).

15. Feist Publ’ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 345 (1991).

16. *Id.* (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)) (stating that the “requisite level of creativity is extremely low; even a slight amount will suffice”).

account books.<sup>17</sup> As long as the work was independently created, it is copyrightable without being novel or unique. “[A] minor addition” of independently original expression meets this standard.<sup>18</sup> Further, the commercial nature of a work, which tattoos have, does not prevent originality or copyrightability.<sup>19</sup> Justice Holmes, writing on behalf of the Supreme Court, wrote this famous passage on originality:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.<sup>20</sup>

Tattoos are sufficiently original, and most tattoos, if not all, will meet the creativity threshold. Tattoos also meet the work of authorship requirement. A work of authorship can fall under one or more of several categories. Tattoos fall under PGS works.<sup>21</sup> PGS works, defined in section 101 of the Act, “include two-dimensional and three-dimensional works of fine, graphic, and applied art; photographs, prints and art reproductions; maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”<sup>22</sup> The legislative history shows this definition was intended to be broad.<sup>23</sup>

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17. *Utopia Provider Sys., Inc. v. Pro-Med Clinical Sys., LLC*, 596 F.3d 1313, 1320 (11th Cir. 2010).

18. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

19. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–252 (1903) (finding that the pictorial illustrations on advertisements were eligible for copyright protection, despite being used for a commercial purpose, because there can be an aesthetic and educational value which meets the taste of the public).

20. *Id.* at 251; *see also Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000).

21. 17 U.S.C. § 102(a) (2012). The full categories included in “works of authorship” are: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. While scholars agree that tattoos fall under PGS works in category five, the content of tattoos is nearly indefinite, which will likely play a role in this intersection with copyright law.

22. 17 U.S.C. § 101 (2012).

23. *See Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 972 (6th Cir. 1983) (citing H.R. REP. NO. 94-1476, at 54 (1976), *reprinted in* 1976 U.S. Code Cong. &

Tattoos meet this definition because they are two-dimensional works that are similar to photographs and are a form of graphic art.<sup>24</sup> Articles that have fallen under this category include toys,<sup>25</sup> nose masks,<sup>26</sup> and cheerleading outfits.<sup>27</sup> Some might argue that tattoos are also fine art—similar to paintings and drawings.<sup>28</sup> Regardless of the category, tattoos are closer to applied art than uncopyrightable works of industrial design.<sup>29</sup>

The next requirement is fixation.<sup>30</sup> Fixation is an explicit constitutional requirement of copyright law because a “writing” occurs when it is fixed.<sup>31</sup> This requirement ensures that evidence of proof of creation and infringement exists while delineating state common law protection for unfixated works from those that are protectable under the federal Act.<sup>32</sup> Tattoos meet the fixation requirement and trigger copyright protection at the moment when “original expression is captured in a physical form from which it can be perceived, reproduced, or otherwise communicated.”<sup>33</sup> Fixation must be sufficiently permanent or stable for this perception, reproduction, or communication to occur<sup>34</sup> regardless of whether it is lost or destroyed later. Tattoos are sufficiently permanent and tangible

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Ad. News 5659, at 5667)); *See also* *Mazer v. Stein*, 347 U.S. 201, 213–14 (1954).

24. *See Fine art*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/fine%20art> [https://perma.cc/RM6J-GDSC] (“art concerned primarily with the creation of beautiful objects”); *see also Graphic arts*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/graphic%20arts> [https://perma.cc/Y8FZ-X4XT] (“the fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with them”).

25. *See Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 972 (6th Cir. 1983).

26. *See Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 670 (3rd Cir. 1990).

27. *See Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 489 (6th Cir. 2015).

28. *See generally Mazer v. Stein*, 347 U.S. 201, 212–13 (1954).

29. *See generally Masquerade Novelty, Inc. v. Unique Industries, Inc.*, 912 F.2d 663, 669–70 (3rd Cir. 1990) (explaining the need to draw a clear distinction between copyrightable works of applied art and uncopyrightable works of industrial design).

30. *See* 17 U.S.C. § 101 (2012); *see Kelley v. Chi. Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011).

31. *See U.S. v. Moghadam*, 175 F.3d 1269, 1273–74 (11th Cir. 1999).

32. *Kelley*, 635 F.3d at 303.

33. Douglas Lichtman, *Are Tattoos Eligible for Copyright Protection?*, MEDIA INST. (June 15, 2011), <http://www.mediainstitute.org/IPI/2011/061511.php> [https://perma.cc/X5NW-RTQE].

34. *Kelley*, 635 F.3d at 305 (stating that copyright does not attach to works that are only capable of static of fully permanent natures, acknowledging that “no medium of expression lasts forever”); 17 U.S.C. § 101 (2012).



to meet the fixation requirement because they are designed to be kept for life even if there is fading or stretching over time.

As more visual artists become tattoo artists, the industry standards for tattoos are changing. Some artists, like this Author's artist, provide a sketch to the client of what she believes is her original design, fixed on that paper and copyrightable, before the tattoo is inked on the client's skin.<sup>35</sup> A tattoo's design is tangible in the sketch that artists typically provide to clients before tattooing. Those sketches, like most tattoo designs, are works prepared over time and fixed on a tangible medium of paper.<sup>36</sup> Even if a tattoo is fixed on the human skin for the first time, it is still a "work prepared over a period of time" that is fixed and created. Mike Tyson's tribal tattoo is a popular example of the stability and permanence of tattoos. Finally, while the term "medium" is not defined in the Act, the plain and ordinary meaning of "medium" is a "material or technical means of artistic expression."<sup>37</sup> Courts have found a medium of expression to include film<sup>38</sup> and an audio recording of a conference call.<sup>39</sup> Thus, courts should find that the human body or skin is a "material" commonly used for artistic expression. In fact, tattoo artists often refer to the human skin as a "canvas," which is tangible and a medium of expression.<sup>40</sup>

Therefore, nothing in the Constitution or Copyright Act prevents the copyrightability of tattoos. United States copyright law was amended after the international Berne Convention, which broadened the scope for "literary and artistic works" protectable under copyright law.<sup>41</sup> Now, "every production in the literary, scientific, and artistic

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35. Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1141 (2012) (discussing the industry's norms and tattoo artists' views on copyright law) (this Author's tattoo artist also provided a sketch of the design, based on her visual artist customs).

36. 17 U.S.C. § 101 (2012).

37. King, *supra* note 10, at 154 (citing Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS LAW 1, 2 (2011) ("The human body is a peculiar artistic medium").

38. *Fleet v. CBS Inc.*, 50 Cal. App. 4th 1911, 1919–20 (Cal. Ct. App. 1996).

39. *Swatch Group Mgmt. Servs. v. Bloomberg L.P.*, 808 F. Supp. 2d 634, 636–37 (S.D.N.Y. 2011).

40. *Tattoo Lingo*, INKED, (Jan. 15, 2019), <https://www.inkedmag.com/culture/tattoo-lingo> [<https://perma.cc/TF83-5TQU>]; 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, 138 (2003) ("For millennia, the human body has served as a medium of sublime artistic expression").

41. WIPO, *Berne Convention for the Protection of Literary and Artistic Works*, <https://wipolex.wipo.int/en/text/283698> [<https://perma.cc/43WV-PY2P>].

domain, whatever may be the mode or form of its expression,” is copyrightable in each country that adopted the amendments after Berne.<sup>42</sup> Tattoos fall under this broad definition of artistic work and expression. Because authors of tattoos should be afforded copyright protection in their original designs, clients and other tattoo artists may be infringing on another artist’s original artwork or tattoo designs. Thus, tattoos are likely copyrightable even before the ink hits the skin.

### C. *Limits to What is Copyrightable*

There are elements of works that cannot be protected because it would hinder the progress of science and the useful arts. This applies to both independently created tattoo designs as well as any works that inspire or are a component of a tattoo. The *scenes à faire* doctrine is one limit on an artist’s ability to gain copyright protection for their work. This doctrine usually refers to typical scenes in a genre that a person cannot copyright, such as drinking in a German beer hall.<sup>43</sup> These components are commonplace, standard, and often referred to as foundational building blocks.<sup>44</sup> While traditionally thought of when applied to literary works, the doctrine can apply to music. In those situations, courts look to whether the combination and selection of elements gives an overall impact and effect of substantial appropriation.<sup>45</sup> In an analysis comparing songs, the scholar looks to whether there are relevant differences in what key the original piece was written, the instruments impacting rhythm, and chord progression.<sup>46</sup> The scholar also asks whether the lyrics share similarities in themes, ideas, tempos, or chords.<sup>47</sup> The application of this doctrine depends on the content of the tattoo.

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42. WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), [https://www.wipo.int/treaties/en/ip/berne/summary\\_berne.html](https://www.wipo.int/treaties/en/ip/berne/summary_berne.html) [https://perma.cc/6DCM-MF9B].

43. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir 1980); see also Nicholas Booth, *Backing Down: Blurred Lines in the Standards for Analysis of Substantial Similarity in Copyright Infringement for Musical Works*, 24 J. INTEL. PROP. L. 99, 121 (2016) (citing *Williams v. Bridgeport Music, Inc.*, LA CV13-06084 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*52 (C.D. Cal. Oct. 30, 2014).

44. MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 91 (6th ed. 2014).

45. *Id.* at 91–92; *Williams v. Gaye*, 895 F.3d 1106, 1119–20 (9th Cir. 2018) (this was an issue of genuine material fact in the “Blurred Lines” case).

46. Booth, *supra* note 43, at 121–22.

47. *Id.* at 122.

One court has indicated that some elements alone might not be protectable under *scenes à faire*, but they may be protectable together or in combination. In one case, the “11-note signature phrase, four-note hook, four-bar bass line, 16-bar harmonic structure, and four-note vocal melody” were protectable.<sup>48</sup> With this Author’s watercolor music tattoo, there are differences between the tattoo and the original compositions’ themes and ideas; for example, the music notes are now inked and intertwined with swatches of color that run along the entirety of the staff and lines. The music notes are appropriately sized to the staff, but there is no treble clef or marker indicating when one song ends and the other begins. Without these typical elements of sheet music, it would be challenging for a musician to read the music from this Author’s tattoo and play the intended instruments of vocals or guitar. Inevitably, the *scenes à faire* application overlaps with the substantial similarity analysis of infringement, looking to how identical the songs are to each other. *Scenes à faire* is more readily apparent for tattoo pieces of literary works or characters in which the scenes or elements of a genre can be identified.

Functional features cannot be protected under copyright law either—a principle commonly applied to computer programming cases. Professor Nimmer has argued that the useful article doctrine precludes the copyrightability of tattoos because the human body is a useful article.<sup>49</sup> Section 101 defines a “useful article” as a product “with an intrinsic utilitarian function that is not merely to portray the appearance of the article.”<sup>50</sup> Congress and courts have provided examples of functional features that cannot be protected under copyright law like cards, planes, clothing, and belt buckles.<sup>51</sup> As discussed above, tattoos are PGS works; the useful article of a tattoo must be conceptually separable from the PGS work to be copyrightable.<sup>52</sup> If the human body is the useful article in a court’s analysis, then a tattoo can be separated from the skin beneath it. Tattoos meet the separability test even if they contain useful or

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48. *Id.* at 121 (citing *Williams v. Bridgeport Music, Inc.*, 2014 U.S. Dist. LEXIS 182240, at \*52 (C.D. Cal. Oct. 30, 2014)).

49. King, *supra* note 10, at 156.

50. 17 U.S.C. § 101 (2012).

51. H.R. REP. NO. 94-1476, at 55 (1976); *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 991–93 (2d Cir. 1980).

52. *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1002, 1018 (2017).

functional features.<sup>53</sup> Thus, even if the skin is seen as a useful article, tattoos are copyrightable because they meet the separability test.

Courts also apply the idea-expression dichotomy to copyrightability questions.<sup>54</sup> If one uses the idea of another's work, it does not constitute infringement; copying that involves the use of the art's expression or explanation is infringement.<sup>55</sup> In the Author's shoulder tattoo, the original music composition is clearly copyrightable, but there is an argument that taking the notes out of context renders them simply ideas and the building blocks of music.<sup>56</sup> Courts, however, are very lenient in finding original and creative components of even a limited number or arrangement of notes. Courts have brought a section of the music composition back under copyright protection even when separated from the rest of the work.<sup>57</sup> Thus, "as long as that arrangement is 'qualitatively important' to the work as a whole,"<sup>58</sup> even a small shoulder tattoo of one section of the music sheet could be enough to infringe. In district court, the jury instructions stated: "A portion of a work is qualitatively important if, regardless of its size, it is shown to be very important to that work."<sup>59</sup>

Thus, after removing the components of the original work that are not copyrightable, what is left? Without the staff and line, which are arguably the foundational elements of any musical piece, the tattoo is a few music notes intertwined with substantial swatches of color that distort the readability of the notes. While clients and tattoo artists could argue that what is left is nothing substantially similar to the composition copyright or foundation of the design, it will likely come down to how much of the original work was copied from someone else and whether those elements are the substantive elements of that work, which will weigh into the fair use defense.

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53. *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 483–84 (6th Cir. 2015); *see also* King, *supra* note 10, at 158.

54. 17 U.S.C. § 102(b) (2012); *Baker v. Selden*, 101 U.S. 99, 103 (1879); *Comput. Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992).

55. LEAFFER, *supra* note 44, at 82.

56. Booth, *supra* note 43, at 120 (citing *Williams v. Bridgeport Music, Inc.*, LA CV13-06084 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*51 (C.D. Cal. Oct. 30, 2014)).

57. *Id.* at 121 (citing *Williams v. Bridgeport Music, Inc.*, LA CV13-06084 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*51 (C.D. Cal. Oct. 30, 2014)).

58. *Id.* at 121. (citing *Williams v. Bridgeport Music, Inc.*, LA CV13-06084 JAK (AGRx), 2014 U.S. Dist. LEXIS 182240, at \*51 (C.D. Cal. Oct. 30, 2014)).

59. *Williams v. Bridgeport Music, Inc.*, 2015 U.S. Dist. LEXIS 97262, at \*52-53 (C.D. Cal. Jul. 14, 2015).

### III. WHO OWNS THE TATTOOS ON YOUR BODY

At least one scholar argues that if a tattoo is of a simple design—such as one’s birthdate, a basic geometric shape, or permanent makeup without any artistic features—that tattoo would not be copyrightable because it is not original.<sup>60</sup> Other scholars disagree.<sup>61</sup> This demonstrates how various factors, including the tattoo artist’s skill level and the complexity of the tattoo design, can impact the ownership interest in a copyrightable tattoo design.

#### A. *The Tattoo Process*

Ideas of tattoos are generated in various ways, but often, individuals will go on various search engines and social media platform for ideas. Individuals can do a lot of research and spend a lot of time coming up with the tattoo design based off of other works, tattoos, and their own experiences. There are various styles of tattoos such as: (1) flash;<sup>62</sup> (2) custom work; (3) freehand; (4) realistic; and (5) watercolor.<sup>63</sup> The style of tattoo affects the amount of collaboration between the artist and client. When a client brings the photo(s) to the artist, there is an initial consultation, typically thirty minutes long, where the artist also contributes ideas and shares which components will translate well onto the skin. The two discuss size, color, and placement of the tattoo. Then, the artist takes time to draft a new image based off of the consultation and her independent knowledge. At the next meeting, which can be the first of many sessions or the only day of tattooing, the artist takes the stenciled design, transfers that onto a type of tracing paper, and then practices the design on the skin with a marker. If an individual does not like how the design looks, the marker can be cleaned off with rubbing alcohol, and the process begins again.

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60. King, *supra* note 10, at 150 n.127.

61. Cotter, *supra* note 40, at 98 (citing *Gonzales v. Kid Zone, Ltd.*, 2001 WL930791, at \*1-2 (N.D. Ill. Aug. 15 2001); *Carell v. Shubert Org.*, 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000)) (mentioning that an original pictorial work embodied in a tattoo or a make-up design could be copyrightable).

62. Courts have found flash work to be copyrightable when claims about tattoos arise in the contract or licensing context. *Tattoo Art, Inc. v. TAT Int’l, LLC*, 794 F. Supp. 2d 634, 666 (E.D. Va. 2011) (finding the defendants infringed the plaintiff’s copyright in tattoo flash when defendants created tattoo designs from plaintiff’s registered “books”); *see also* *Gonzales v. Kid Zone, Ltd.*, 2001 WL 1329300, at \*2 (N.D. Ill. Oct. 25, 2001) (finding the tattoo designs shared the same ideas as the plaintiff’s and appropriated the expression, so infringed).

63. *Tattoo Lingo*, INKED, (Jan. 15, 2019), <https://www.inkedmag.com/culture/tattoo-lingo> [<https://perma.cc/TF83-5TQU>].

These variations and steps based on a tattoo's style are critical to the copyright infringement analysis.<sup>64</sup> If the artist uses a stencil or tracing paper, copyright protection of the original tattoo begins at that moment of fixation. If the tattoo style is freehand, there is a greater case for originality in the new tattooed work<sup>65</sup> and a strong case that the tattoo artist, not the user, is the author of the new copyrightable work. That is because in freehand work, the client contributes, at most, the ideas or elements desired in the piece. For almost every other type of tattoo, the artist uses a stencil before inking the skin, which is the requisite fixation for copyright protection based on the originality of the design. If the tattoo is in watercolor style, as this Author's shoulder tattoo is, there are elements such as two-dimensional shapes and swatches of color that substantially change the underlying design for a new aesthetic value. The tattoo artist and this Author would argue the watercolor tattoo is a different work from the sheet music such that ownership is between the client, this Author, and the tattoo artist. Alternatively, the copyright owner in the music composition would argue the tattoo is a derivative work such that the copyright owner also owns the rights to the tattoo. How a court determines what style the tattooed work falls under depends on the originality of the design and the content of the piece. While it would seem that the more complex the tattoo, the less likely the work is derivative of the original, that is not necessarily the case. Most derivative works, which are still owned by the original author, vary dramatically in medium, such as a motion picture of a novel.

### B. *How the Content of the Tattoo Matters*

The intersection between tattoo style and content matters. For example, combining sheet music and a watercolor tattoo style, as this Author did,<sup>66</sup> implicates the rights of the copyright owner in the

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64. Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States* (April 15, 2005) (<http://dx.doi.org/10.2139/ssrn.815116>) [<https://perma.cc/CWV2-FH57>] (“Tattoo artists, of course, do not transfer images in exactly the same way as Xerox’s machines. Some changes to the image in the process of copying will occur due to the medium, here from (typically) a two-dimensional work to the human body.”).

65. Note that although the tattoo can take multiple sittings of several-hours long sessions, the intricate tattooing of a piece may not be sufficiently “recognizable as his own” for the artist to get his own copyrightable work in the tattoo. *Id.* at 9–10 (citing *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1222 (9th Cir. 1997)).

66. Booth, *supra* note 43, at 105–06. There are two separate copyrights for music: (1) in the underlying composition (the “Composition Copyright”), and (2) in

underlying sheet music, but the tattoo style makes a potentially new original copyrightable design that is substantially dissimilar from the original.<sup>67</sup> In other words, by adding creative expression or changing the traditional position and size of music notes, the components in the melody or rhythm<sup>68</sup> have changed such that they are no longer readable on the body. The tattoo content also matters because it implicates the owner of the underlying work, such as the publishers of a music composition. Different copyright owners have different policies on licenses and contracting, which provide other legal avenues for suit.

However, it can be difficult for clients to determine who owns the copyright, if any, in the underlying design for a tattoo. This Author purchased the sheet music online for her tattoo. There are a few of these websites—interestingly growing in popularity for professionally and self-trained musicians—where users can create an account, pay for the sheet music (even accepting Apple Pay), and use it. There is a section on “Terms and Conditions.”<sup>69</sup> For those downloading sheet music, the Terms state:

Content found on or through this Service are the property of Musicnotes, Inc. or used with permission. You may not distribute, modify, transmit, reuse, download, repost, copy, or use said Content, whether in whole or in part, for commercial purposes or for personal gain, without express advance written permission from us.

For those who purchase sheet music through an approved, online vendor such as Musicnotes, the purpose is to ensure that what is

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the sound recording (“Recording Copyright”). Most individuals who get music tattoos fall under the first category, which protects the actual song, rhythm, harmony, melody, the lyrics, style, and future performance rights. There are important legal differences between the two categories of music copyright which can affect the available defenses a tattooed client may have if their tattoo infringes the composition copyright of a music publisher.

67. *Id.* at 108.

68. *Id.* at 109, (citing Erin McKean, *THE NEW OXFORD AMERICAN DICTIONARY* 771, 1058, 1453 (2nd ed. 2005)). Rhythm is the “systematic arrangement of musical sounds, principally according to duration and periodic stress.” Harmony is the “combination of simultaneously sounded musical notes to produce chords and chord progressions having a pleasing effect.” Melody is a “sequence of single notes that is musically satisfying.”

69. *Terms, Privacy and Cookies*, MUSICNOTES <https://www.musicnotes.com/secure> [<https://perma.cc/R78R-GZMF>].

permanently placed on the body is accurate, particularly for those who cannot read music. This potentially falls under the prohibited use of “personal gain,” which the Terms and Conditions section does not define. If one tries to understand the plain and ordinary meaning, as a court would if this case went to trial, getting a tattoo arguably provides a benefit to the user.<sup>70</sup> Interestingly, the Terms page also includes a section on “Copyright Policy.” It does not provide any information on what constitutes infringement of copyright law or if that differs from the personal gain warning above; it merely provides an email address for a section of Musicnotes where copyright owners alleging infringement can reach out to. How a copyright owner can trace a composition copyright back to this source, particularly in tattoo form where watermarks do not exist, is nearly impossible.

Even after buying a license for the song, even though its use for a tattoo is likely outside the scope of the consideration of license terms, the purchaser is not the copyright owner. While a quick search will show that the songwriters are different from the producer and label companies, there is a publisher listed under the “Composition” tab: Alfred Publishing Company, Inc.<sup>71</sup> An investigation to Alfred Music’s website leads one to a section titled “License Requests.” The use of a composition under Alfred Music’s rights for a tattoo would presumably require a “New License Request,”<sup>72</sup> although the response time can take up to forty-five days, and no price is listed. Assuming that Alfred Music is the copyright owner in the underlying basis for the music tattoo, do users have to pay an annual fee for licensing because the tattoo is indefinitely on the human body?<sup>73</sup> Using this Author’s tattoo as an example, there are high search costs from the lack of information readily or publicly accessible, which could be even harder for other works of art.

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70. *Personal Gain*, TRANLEGAL <https://www.translegal.com/legal-english-dictionary/personal-gain> [<https://perma.cc/KP6S-78FG>].

71. *Decode*, MUSICNOTES <https://www.musicnotes.com/sheetmusic/mtd.asp?ppn=MN0070470> [<https://perma.cc/Q56D-8G3Y>].

72. The other option for licensing falls under those judging a festival, competition, or evaluation. Most will fall under the first category, which includes “photocopy, arrangement, print, synchronization, mechanical, sub-publishing, or other requests.” *License Requests*, ALFRED MUSIC <https://www.alfred.com/licensing/> [<https://perma.cc/C3C3-XPDP>].

73. This Author reached out to Alfred Permissions, and was told that as a print administrator, licensing questions for music tattoos was outside the scope. This Author was referred to Warner-Chappell Music, and has been awaiting a response for several weeks.



*C. Assignments, Licenses, and Ownership Interests*

The nature and scope of copyright ownership has become a little clearer under the Act<sup>74</sup> but when applied to the tattoo industry, that clarity wavers. Copyright initially vests in the “author” of a work, but tattoos involve several parties: (1) the tattooed individual; (2) tattoo artist; (3) tattoo parlor; and (4) third parties who, like Alfred Music, might own a copyright in the drawing or inspiration used for the tattoo.<sup>75</sup> More than one person can have an ownership interest in a copyrightable work. These next two principles focus on the interaction between clients and their tattoo artist in original tattoo designs.

1. Work for Hire Doctrine

The work for hire doctrine (“WFH”) applies when works are “created as part of one’s job responsibilities.”<sup>76</sup> There are two categories of works under this doctrine: (1) those made within an employer-employee relationship and (2) those specially ordered or commissioned for use as a contribution to specific types of work.<sup>77</sup> Category one typically refers to the relationship between an employer and employee, and courts look to whether the work was created within the time and space of the job, serving the employer’s interest.<sup>78</sup> If someone merely approves and transcribes a design on the body, that is not enough to establish an employee relationship.<sup>79</sup>

The second type of WFH requires that the tattooed work meet one of nine categories: collective work; as a part of a motion picture or other audiovisual work; as a translation; as a supplementary work; as a compilation; as an instructional text; as a test; as answer material for a test; or as an atlas.<sup>80</sup> Scholars state that tattoos can be a collective

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74. LEAFFER, *supra* note 44, at 191–192.

75. Hatcher, *supra* note 64, at 7.

76. LEAFFER, *supra* note 44, at 192.

77. 17 U.S.C. § 101 (2012).

78. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989). Factors include: the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

79. *See Urbont v. Sony Music Entm’t*, 831 F.3d 80, 89 (2d Cir. 2016).

80. 17 U.S.C. § 101 (2012). The categories for type (2) are: a contribution to a collective work; part of a motion picture; translation; supplementary work; compilation; instructional text; test; answer for an examination; and atlas. A

work, which is a category often used for ownership of freelance artists and writers.<sup>81</sup> Courts have broadly interpreted the definition of collective work, so tattoo clients could argue either the specific piece is one amongst others in a collective work (assuming there are other tattoos) or that the custom tattoo is an assembly of preexisting designs such that the final piece is original. Assuming the client has more than one tattoo, it is unlikely that a court would find one tattoo to be a collective work with the others on one person's body.

The doctrine requires a written agreement, signed by both parties, indicating it is a WFH. Tattoo waivers, before the ink process begins, typically do not specify the transaction as a WFH; most are consent forms that address diseases, tattoo aftercare, and provide a warning that variations can occur because of skin, color, and design.<sup>82</sup> Absent from this language is any mention of the doctrine. At least one scholar states that some parlors are beginning to include language in these consent forms that require clients to assign all potential rights in the work to the parlor.<sup>83</sup> It is debatable whether the client fully understands that someone owns the copyrights to the tattoo on their body. Some parlors place blanket statements on their websites that state, “[w]e reserve the right to any and all artwork on this site and it may not be duplicated for any other use.”<sup>84</sup> In the famous case of Mike

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collective work includes works like encyclopedias, where a number of contributions which each constitute a separate and independent work itself is assembled into a collective whole. A compilation, which includes collective works, is defined as a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

81. Cotter, *supra* note 40, at 106.

82. See generally *Tattoo Release Forms*, ALLEN FINANCIAL INSURANCE GROUP, <https://www.eqgroup.com/tattoo-forms/> [https://perma.cc/8394-PLHQ]; *Sample Tattoo Release Waiver*, PAINFUL PLEASURES (Feb. 06, 2014), <https://info.painfulpleasures.com/help-center/information-center/sample-tattoo-release-waiver> [https://perma.cc/C258-DQTD]; *Waiver, Release and Consent to Tattoo*, <https://news.bme.com/wp-content/uploads/2008/09/tattoorelease.html> [https://perma.cc/95U3-UREB].

83. Nicole Martinez, *Who Owns the Copyright in Your Tattoo Art?*, ARTREPRENEUR ART L. J. (June 3, 2016), <https://alj.artpreneur.com/who-owns-the-copyright-in-your-tattoo-art/> [https://perma.cc/8S5W-KESB]; see also Beasley, *supra* note 35, at 1165 (finding that one waiver included language to the effect of: “I release all rights to any photographs taken of me and the tattoo and give consent in advance to their reproduction in print or electronic form.” “(If you do not initial this provision, please advise and remind your Artist and the Tattoo Studio NOT to take any pictures of you and your completed tattoo!)”). Most parlors are not yet including language explicitly reserving or assigning rights.

84. *General FAQ's*, IDLE HANDS TATTOO EMPORIUM, <https://www.idlehandstattooaryland.com/faqs> [https://perma.cc/8YE7-Q39R].

Tyson's tattoo suit against Warner Brothers, Tyson waived all rights to any artwork, sketches, drawings, and photographs of the tattoo to the parlor.<sup>85</sup> Unless a parlor changes the waiver or a client brings her own, the writing requirement is insufficient for the second type of WFH. One tattoo artist has already sued his client, NFL Player Ricky Williams, and the NFL now requires all players to get releases from their tattoo artists because the NFL could potentially be held liable if a player does not.<sup>86</sup>

Tattoos, as they currently are made and contracted for in the industry, do not fall under either type of the WFH doctrine. If the WFH doctrine did apply, clients might have a stronger argument for an ownership interest to the tattoos on their bodies. Artists can argue they are independent contractors, which legally provides them ownership in the copyright of an original tattoo.<sup>87</sup> In *CCNV*, the court found that a sculptor was an independent contractor because he used his own materials, had the freedom to decide when and how long to work, and received compensation after completing a specific job.<sup>88</sup> Following the application of the factors, if a tattoo artist similarly does not receive traditional employee benefits but more job-specific compensation, there is a strong argument that artists are independent contractors whose work potentially does not fall under WFH. The rights to the copyrightable tattoo design would originally derive from the artist.<sup>89</sup> Clients would not own the copyright in the tattoos on their bodies.

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85. The language from the complaint states that Mike Tyson's signed waiver acknowledged: "that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics." Geoffrey G. Gerber, *Verified Complaint for Injunctive and Other Relief*, [https://www.wired.com/images\\_blogs/threatlevel/2011/05/tysonatattoo.pdf](https://www.wired.com/images_blogs/threatlevel/2011/05/tysonatattoo.pdf) [https://perma.cc/X92U-Q79T]; see also Lisa C. Johnson, Esq., *Before the Ink Dries: Copyright Law & Tattoos*, LEGALZOOM (Oct. 27, 2016), <https://www.legalzoom.com/articles/before-the-ink-dries-copyright-law-tattoos> [https://perma.cc/MT7A-Z69H]; Katie Scholz, IPWATCHDOG (July 26, 2018), *Copyright and Tattoos: Who Owns Your Ink?*, <https://www.ipwatchdog.com/2018/07/26/copyright-tattoos-who-owns-your-ink/id=99500/> [https://perma.cc/5BAQ-YRDP].

86. Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013, 8:01 AM), <https://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/#79663bf34a21> [https://perma.cc/54WS-DLRW].

87. LEAFFER, *supra* note 44, at 197.

88. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752–53 (1989).

89. *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 311 (D. Conn. 2018).

Clients could argue against ownership rights for tattoo artists, citing a line of cases where a person who acts like a stenographer, or merely fixes the work without control, is not the author.<sup>90</sup> This could imply that the better the tattoo artist is at replicating the design the client wants, the harder it is to find an authorship interest in the work.<sup>91</sup> If courts were to find that the mere act of transferring or transforming<sup>92</sup> a design onto the skin is prima facie evidence of originality, this might provide a harder burden for third parties or even clients to prove their originality in the resulting tattoo design. This position is unlikely because the courts have not found that taking an original work and adapting it into another medium is enough original contribution to establish ownership.<sup>93</sup> Alternatively, clients can argue that for certain tattoo designs like custom work, they are the persons “responsible for ‘the existence of those facts of originality, intellectual production, thought, and conception’ within the work that are subject to copyright protection.”<sup>94</sup>

Finally, the tattoo parlor will argue it has an ownership interest in the designs because parlors typically provide some, but not all, materials for the tattoo,<sup>95</sup> maintain health standards,<sup>96</sup> post terms and conditions on the website, and make each individual sign a waiver before tattooing. Courts will have to analyze ownership depending on the contributions of each potential interest and the content of the tattoo. Making parlors responsible for drafting legally appropriate waivers, disseminating it to clients before paying fee deposits, and providing discussions and resources on the intersection with copyright

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90. *Andrien v. S. Ocean Cty. Chamber of Com.*, 927 F.2d 132, 135 (3d Cir. 1991).

91. *Hatcher*, *supra* note 64, at 8.

92. Whether a court finds it an act of transfer or transformation does change the legal impact of liability and ownership.

93. *Enm't Res. Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1222 (9th Cir. 1997).

94. *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 312 (D. Conn. 2018) (citing *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991)).

95. This varies by tattoo shop owner. Some parlors require their artists to provide the machines and color tubes, which could lessen the ownership interest of the parlor if a copyright case goes to court.

96. *OSHA Compliance for Tattoo Parlors*, US BIO-CLEAN, <https://usbioclean.com/osha-compliance-for-tattoo-parlors/> [<https://perma.cc/8TZN-9AJX>].

law could be the most effective form of change and education.<sup>97</sup> Interestingly, one scholar has surveyed tattoo artists about the community's perspective of utilizing copyright law to protect original designs but found that most artists believe courts would be too costly and not worth it.<sup>98</sup> Given the discovery costs to infringing works, it is most efficient for parlors to be at the front of utilizing copyright law to protect original designs, regardless of whether it is a joint work with the client, which is discussed below. That movement seems unlikely to come without more incentive.

## 2. Joint Work

Another opportunity for the client's creative contributions to manifest as an ownership interest rests in the joint work provision of the Act. Joint works are works of authorship created by two or more persons with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.<sup>99</sup> In other words, did each author create her work primarily for the purpose that it be integrated into a joint work in the future? The intent to collaborate must be at the time the contributions became part of a joint work. This would be when the first or final version of the tattoo design is either put on a stencil, a sheet of transferring paper, or the skin. These instances could occur several months apart from each other, but this lapse in time does not prevent the joint work from existing.<sup>100</sup> Scholars and courts disagree over whether each contribution to the work or only the work as a whole must be copyrightable to qualify as a joint work.<sup>101</sup> For example, the Court of Appeals for the Second Circuit believes that each contribution must be copyrightable in the joint work.<sup>102</sup>

The issue of determining the intent to create a joint work is often litigated.<sup>103</sup> Courts look to who owns an interest in the piece (e.g., would they be co-authors of a book), billing and credit arrangements,

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97. Nicole Martinez, *Who Owns the Copyright in Your Tattoo Art?*, ARTREPRENEUR ART L. J. (June 3, 2016), <https://alj.artrepreneur.com/who-owns-the-copyright-in-your-tattoo-art/> [<https://perma.cc/8S5W-KESB>].

98. Beasley, *supra* note 35, at 1158 (discussing the industry's norms and tattoo artists' views on copyright law).

99. 17 U.S.C § 101 (2018).

100. See LEAFFER, *supra* note 44, at 203.

101. Childress v. Taylor, 945 F.2d 500, 506 (2d Cir. 1991).

102. *Id.* at 507.

103. LEAFFER, *supra* note 44, at 205.

and any written agreements.<sup>104</sup> In the tattoo context, courts will likely look at the content of the work and the client's contribution, such as if the client brought the exact artwork transferred to the body.<sup>105</sup> The limited number of interactions between most tattoo artists and their clients, where the client is paying for the tattoo, weighs against a finding of a joint work.

The legal consequences for a joint work in a tattoo would be interesting: the artist and client would be co-owners of the tattoo. Each of the parties could license or use the whole work as she wishes, as long as she accounts for the profits to the other.<sup>106</sup> Between parties who never see each other again, this could be hard.<sup>107</sup> Does the artist have the right to call the client back into the parlor to take other images of the tattoo? What long-term responsibilities relating to proper care of the tattoo, or getting any adjustments or touch ups, exist on behalf of the client to the artist? For these reasons alone, the courts may find against a joint work. However, the courts should remember that “[c]ompensating the creator is not the purpose of copyright law.”<sup>108</sup> Thus, it seems that ownership for an original tattoo rests with the tattoo artist unless a contract specifies otherwise.

### 3. Assignments and Licenses

Copyright law currently allows for divisibility of rights, making it possible to transfer rights and interests between the parties.<sup>109</sup> A transfer is defined as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not

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104. *Childress*, 945 F.2d at 508.

105. Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States* (April 15, 2005) (<http://dx.doi.org/10.2139/ssrn.815116>) [<https://perma.cc/CWV2-FH57>].

106. *See id.*; LEAFFER, *supra* note 44, at 208.

107. Cotter, *supra* note 40, at 110–111 (discussing that the cost of enforcing a copyright against a fan who takes a photo of another tattoo, or anyone who takes an incidental or noncommercial photo (technically, as discussed in section to, a reproduction) of a tattoo, is high and courts are unlikely to enforce copyright law to penalize this behavior).

108. Kayla Mullen, *Applying the De Minimis Exception to Sound Recordings: Digital Samplers are Neither Thieves nor Infringers*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 731, 754 (2017).

109. 17 U.S.C. § 201(d) (2018) (noting that this subsection contains the first explicit statutory recognition of the principle of divisibility of copyright in our law).

it is limited in time or place of effect, but not including a nonexclusive license.”<sup>110</sup> Therefore, any of the exclusive rights under section 106 may be transferred or owned separately.<sup>111</sup> Under section 204, all transfers must be written and signed by the copyright owner to ensure the copyright owner did not inadvertently give away her copyright.<sup>112</sup> An interesting consequence of a transfer is the standing to sue, and an exclusive licensee may sue in her own name for infringement of an assigned right.<sup>113</sup> Licensors must still give consent to transfer an exclusive license.<sup>114</sup> Even where an assignment of the entire right, title, and interest has occurred, the artist can later execute termination rights as the author.<sup>115</sup> This is an unwaivable right that was designed to protect authors from transfers due to an unequal bargaining position.<sup>116</sup>

Nonexclusive licenses do not require a writing because the grantor retains some rights.<sup>117</sup> Nonexclusive licenses can be implied by the conduct of or relationship between the parties.<sup>118</sup> Independent contractors, or even creators of commissioned works, use nonexclusive licenses when a requested work is made and delivered to the client or licensee, intending that the licensee copy and distribute the work.<sup>119</sup> Interestingly, one court found that NBA players with tattoos received a nonexclusive license to use the tattoos as part of their likeness from the artists, and the players who, through the NBA, contracted with a video game maker to use the tattoos granted the game maker an implied license for that use.<sup>120</sup> If there are any questions of contract law, such as whether the license was originally granted, courts will look to state law instead of federal copyright

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110. 17 U.S.C. § 101 (2018).

111. 17 U.S.C. § 201(d)(1) (2018); *Garner v. Nike, Inc.*, 279 F.3d 774, 778–79 (9th Cir. 2002).

112. 17 U.S.C. § 204(a) (2020); *Price v. Fox Ent. Group, Inc.*, 473 F. Supp. 2d 446, 456 (S.D.N.Y. 2007).

113. LEAFFER, *supra* note 44, at 216.

114. *Garner*, 279 F.3d at 778–79.

115. 17 U.S.C. §§ 203, 304(c)–(d) (2020).

116. H.R. REP. NO. 94-1476, at 124 (1976); 17 U.S.C. §§ 203(a)(5), 304(c)(5).

117. *Effects Assocs. Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

118. *Id.*; MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 10.03[A][7], at 10-56.2(2)(h)–10-56.2(2)(i) (Matthew Bender, rev. ed. 2019).

119. *Cohen*, 908 F.2d at 555.

120. *Solid Oak Sketches, Inc. v. 2K Games, Inc.*, No. 16-CV-724-LTS (S.D.N.Y. 2020).

law.<sup>121</sup> Thus, where the tattoo was made or where an infringer displayed the tattoos for promotions<sup>122</sup> will determine what state law applies and potentially impact the likelihood of finding an implied license. For example, California has a liberal standard for parole evidence, while Virginia does not.<sup>123</sup>

Within the tattoo industry, because there are usually no writings between the parlor, the tattoo artist, and the client, there is not an assignment or exclusive license of any of the rights in an original tattoo design. This will continue to be true until the industry standard includes a waiver or release of rights. While some tattoo artists are becoming famous and using that fame to license their designs to clothing lines, such as Ed Hardy, this practice is not yet a norm in the industry.<sup>124</sup> What the industry is doing matters. As courts become more involved in the intersection of tattoos and copyright law, they will look to what the industry norms are and try to understand those norms.<sup>125</sup> Courts will likely find that each tattoo is a nonexclusive license by the tattoo artist to the client to display their tattoo, but this presumes the design is original and owned by the artist (not a third-party music composer). Because the industry standard still allows for perpetual copying of designs, including other tattoo artists' designs (not accounting for any reputational harm or disincentive), there is an implied nonexclusive license, which may even allow sublicenses of one's designs to others for copying. Therefore, ownership interests are incredibly important because they delineate what copyright protection a party can get for their contribution and what proprietary rights can be enforced.

It is important to consider how to educate tattoo clients on how the law might "take away" rights they assumed they owned in the permanent ink on their body. Courts should allow flexibility in the

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121. LEAFFER, *supra* note 44, at 223. (The Copyright Act also discusses priority of ownership between conflicting transfers); 17 U.S.C. § 205(d) (2012).

122. Alexander v. Take-Two Interactive Software Inc., No. 3:18-CV-966-SMY-MAB, 2019 WL 2176321 (S.D. Ill. May 20, 2019).

123. See CAL. CIV. PROC. CODE § 1856 (1982); *cf.* Anden Group v. Leesburg Joint Venture, 377 S.E.2d 452, 452 (Va. 1989).

124. Beasley, *supra* note 35, at 1140–41.

125. See *In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 224 (3d Cir. 1994) (the bankruptcy court looked at industry norms and standards for measuring delinquent practices); see also Roy Export Co. v. CBS, 503 F. Supp. 1137, 1146–47 (S.D.N.Y. 1980) (finding it relevant to consider the industry standards for the copyright fair use defense and first amendment considerations).



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tattoo industry as a market to contract, transfer, or negotiate the rights between parties. The tattoo industry relies on adapting to technology, word of mouth, and sharing ideas. Original designs should have legal protection but with flexibility for clients and tattoo artists to create new expressions without worrying about paying rent to another artist for fundamental or common design elements.<sup>126</sup>

*D. What Copyright Holder Rights Are Potentially Infringed by the Tattoo?*

Most millennials and parents listening to the radio may have heard the famous song by the Chainsmokers featuring Halsey, titled “Closer.” A lyric in the chorus states, “. . . that tattoo on your shoulder.” The shoulder is a very visible and common spot for tattoos. This could implicate more violations of a copyright holder’s exclusive rights in an infringement analysis than a rib or back of the neck tattoo. Thus, some exclusive rights are implicated by the mere fact that a tattoo was created based off of someone’s musical composition or design, and some rights are only implicated by who is able to see or “hear” the tattoo. One court recently allowed a case to proceed against a video game publisher that replicated LeBron James’s tattoo even though it was fair use,<sup>127</sup> while another court allowed a tattoo artist to sue the WWE for holding promotional events and video games displaying the five pieces she tattooed on star Randy Orton.<sup>128</sup> In February 2021, photographer Jeffrey Sedlik sued celebrity tattoo artist Kat Von D and the tattoo parlor she works at for “knowingly infringing” his copyright in the portrait of a jazz musician Miles Davis in her client’s piece; more specifically, Sedlik claims a violation of his reproductive and distributive rights, discussed in detail below, and asserts a unique argument: Kat Von D actively concealed his copyright from the portrait of Miles Davis that she used for the piece.<sup>129</sup> While

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126. See Beasley, *supra* note 35, at 1144.

127. *Solid Oak Sketches, Inc. v. 2K Games, Inc.*, 449 F. Supp. 3d 333 (S.D.N.Y. 2020).

128. *Alexander v. Take-Two Interactive Software Inc.*, No. 3:18-CV-966-SMY-MAB, 2019 WL 2176321 (S.D. Ill. May 20, 2019).

129. Melissa Angell, *Miles Davis Photog Says Kat Von D Tattoo Infringes Photo*, LAW360 (Feb. 8, 2021),

celebrities and their contractually linked corporations are paving the way for courts to decide what rights are infringed and what licenses exist for tattoos, these developments implicate non-famous clients as well.

### 1. Reproduction Right

The reproduction right—the exclusive right to reproduce a copyrighted work in copies or phonorecords—is the most fundamental right.<sup>130</sup> To reproduce another work is to fix the original work in a tangible and relatively permanent form in another material object.<sup>131</sup> As discussed in the Part I of this Comment, a tattoo meets these requirements. By this rationale, the mere act of tattooing a song violates the reproduction right of the copyright owner. It takes little to violate this right. In fact, this fixation of the original does not need to be sold or distributed to others for a violation to occur.<sup>132</sup> The reproduction right can also be violated when the tattoo artist creates the stencil, translates the original onto tracing paper, or uses a marker to get the image from paper to skin.

### 2. Adaptation (or Derivative Work) Right

The adaptation right prevents people from making an unauthorized derivative work of the original. A derivative work is defined as a preexisting copyright work that is recast, reformed, or adapted.<sup>133</sup> While a tattoo with new, creative elements might violate a copyright owner's derivative right, case law indicates that the existence of a violation depends on the content of the tattoo compared to the original work. With this Author's music tattoo of sheet music, it matters

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<https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo>. [<https://perma.cc/9Q9D-DC2B>]; Sedlik v. Katherine Von Drachenberg, Case 2:21-cv-01102, Compl. at 4 (C.D. Cal. 2021).

130. See 17 U.S.C. § 106(1) (2018).

131. *Id.*

132. LEAFFER, *supra* note 44, at 310. This also differs from copying which doesn't need a material object or fixation to violate other rights.

133. 17 U.S.C. § 101. The full definition of derivative work is: a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

whether the original work was identically transcribed or used in a different style such as watercolor. Determining whether the derivative right is infringed is most difficult in “cross media infringement” cases.<sup>134</sup> This occurs when works are adapted to different media. Courts look at how easy it is to recognize the original from the adaptation. If a creative tattoo has a lot of new elements, or the recognizable elements of music notes are resized, it is challenging to read the notes and recognize the original song.<sup>135</sup> Without the lyrics written below music notes or the sound recording playing, it is nearly impossible to use them as composition. Thus, it would be harder to recognize the original, which would affect the analysis.

The adaptation right was added to the list of exclusive rights so that the copyright owner could tap into economic markets outside of the type of work published, like sheet music or compositions. A common example of this is a popular book being recast into a movie.<sup>136</sup> How far does this protection go? There are limits. In a Seventh Circuit case, a third party took Lee’s artwork and put it onto notecards and prints, but the court determined the artwork was not “transformed.”<sup>137</sup> In fact, the court cautioned against making a determination that would lead to “*any* alteration of a work, however slight, requir[ing] the author’s permission.”<sup>138</sup> Otherwise, the court said, the definition of derivative work would “make[] criminals out of art collectors and tourists.”<sup>139</sup>

### 3. Public Display Right

The right of public display applies to all copyrightable subject matter except sound recordings.<sup>140</sup> This right extends to clients who get tattoos that show music lyrics or musical arrangements of notes. Displaying a work means to show a copy of it, either directly or

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134. LEAFFER, *supra* note 44, at 311.

135. There is an interesting exception to the reproduction and adaptation rights that might relate to tattoos under 17 U.S.C. § 113. If a copyrighted exists in a PGS work, which tattoos probably fall under, that portrays a useful object, the copyright does not let the owner then manufacture that object. In other words, if a copyright holder has a copyright in a statue that is then made into a light fixture, they do not get the right to manufacture that lamp. This could apply to the tattoo industry, such that the right in the statute does not extend to the right to make tattoos from it.

136. LEAFFER, *supra* note 44, at 310–11.

137. *Lee v. A.R.T. Co.*, 125 F.3d 580, 582 (7th Cir. 1997).

138. *Id.* (emphasis in original).

139. *Id.*

140. 17 U.S.C. § 106(5) (2018).

through a device.<sup>141</sup> Imagine sitting for a three-hour tattoo and wanting to show your friends! Displaying the work includes showing friends the tattoo in person or uploading a picture to social media. If the tattoo artist takes a photo of the tattoo, which the artist does for their own recordkeeping, the artist could also be in violation of the public display right depending on who sees that picture if the artist does not own the copyright in the work. In fact, if the tattoo artist loves the work she did and posts your photo on her website, the tattoo artist violates the public display right (and reproduction right).<sup>142</sup> If your tattoo artist prints the picture out of your tattoo and gives it to interested people as a sample of her work at her next tattoo expo, this could violate another right of the copyright owner—the distribution right.<sup>143</sup>

The display right is limited by the term “public.” Any online forum meets the definition of “public” because of the Act’s Transmit Clause. Posting to social media is likely a violation.<sup>144</sup> One exception to the public display right involves a legally owned copy under section 109(c), where the owner of a lawfully made copy of another’s copyrighted work can display that copy publicly if it is just one image at a time at the place where the copy is located.<sup>145</sup> If courts were to find that tattoos fall under copyright law and displaying a tattoo online is a violation, then artists and users would argue this limitation applies to tattoos. Thus, if the user ended up getting the rights from copyright owners, like Alfred Music, or if buying the sheet music online through a site like Musicnotes is a legally purchased copy or valid use of a license, then the tattoo client could display her tattoo in person to others because the copy of the legally owned copy rests on her skin. Note that most scholars agree that both the artist and client have an

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141. 17 U.S.C. § 101.

142. Kat Von D posted a picture on her Instagram account of the portrait behind her, clearly as inspiration for the tattooed piece, which is included in the complaint. Melissa Angell, *Miles Davis Photog Says Kat Von D Tattoo Infringes Photo*, LAW360 (Feb. 8, 2021) <https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo>. [https://perma.cc/9Q9D-DC2B]; *Sedlik v. Katherine Von Drachenberg*, Case 2:21-cv-01102, Compl. at 4 (C.D. Cal. 2021).

143. The distribution right of a copyright holder falls under 17 U.S.C. § 106(3).

144. The Transmit Clause was added in the 1976 Copyright Act to define “digital transmission” as to “transmit or otherwise communicate a performance . . . to the public . . . whether the members of the public capable of receiving the performance receive it in the same place or in different places or at the same time or at different times.” 17 U.S.C. § 101.

145. 17 U.S.C. § 109(c).

implied right to display the tattoo. Scholars argue that tattoo artists implicitly give the client the right to display the tattoo because it almost inevitably will happen.<sup>146</sup> This does not necessarily translate to a tattoo design that is not the artist's own work.

While there are several exclusive rights to a copyright owner's work, the three most common rights that a tattoo likely violates are the reproduction, adaptation, and public display rights. Violations of these rights can occur at different times depending on when the tattoo was first fixed or the content of the tattoo. Tattoo artists and clients could violate the public display right for showing their friends a finished piece or advertising their work online. Because of the seemingly endless ways tattoo artists and individuals could face copyright infringement, it is important that courts understand the nature of getting a tattoo, the search costs that exist for individuals looking to get a piece done, and how heavily tattoo artists rely on pictures of their work to gain clients.<sup>147</sup>

#### IV. DOES THE TATTOO INFRINGE ON SOMEONE ELSE'S WORK?

##### *A. Infringement Analysis*

Assuming the tattoo artist owns any copyright in an original tattoo, there are consequences if the tattoo is later found to infringe on a third party's copyright. Copyright infringement occurs when a third party violates any of the owner's exclusive rights set out in section 106 of the Act, including the three examples listed in Part II of this Comment.<sup>148</sup> To prove a *prima facie* case of infringement, the owner must prove that: (1) she owns a valid copyright in the work; (2) the

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146. Nicole Martinez, *Who Owns the Copyright in Your Tattoo Art?*, ARTREPRENEUR ART L. J. (June 3, 2016), <https://alj.artpreneur.com/who-owns-the-copyright-in-your-tattoo-art/> [<https://perma.cc/8S5W-KESB>].

147. Almost every tattoo parlor has a website, and each parlor has several books filled of work previously done by each artist in the shop. For those who walk in wanting a tattoo without an idea, they can see these pictures and likely ask for the same work, or an adaptation of one they see. Most tattoo artists have public social media accounts where they post their favorite works, including the various stages of progression for longer pieces that take many sittings. In recent years, this social media advertising has worked. Individuals will fly nationally or even internationally, including multiple times, to get a tattoo done by an artist with previous experience in their style or content (e.g., watercolor tattoos, or realistic tattoos of people, etc.).

148. 17 U.S.C. § 501; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433–36 (1984).

defendant copied it (“factual copying”); and (3) the copying constitutes an improper appropriation or is “substantially similar.”<sup>149</sup> The first element of this burden is discussed in Part I of this Comment with copyrightability. Next, the copyright owner must show that the defendant did not independently create the work.<sup>150</sup> In many cases, clients pull inspiration for designs online or in person from other pieces, which could be evidence of actual copying.<sup>151</sup> In other cases where the artist free hands the tattoo or sketches the design themselves without accessing another’s work, access to another’s work can be inferred if the original was posted online or is famous. Access is inferred where there is a reasonable opportunity someone viewed or copied the work.<sup>152</sup> Thus, copying can be proven through direct or indirect evidence.<sup>153</sup> Courts also look at whether the works have similarities that are probative of copying.<sup>154</sup> Even if no access can be shown but the two works are so “strikingly similar,” copying can be inferred. For example, if there is no reasonable possibility that a tattoo artist independently created such an original or elaborate design, that original work does not need to be famous or posted online.<sup>155</sup>

Finally, after actual or factual copying is proven, the copyright owner must prove substantial similarity (“legal copying”)—that the tattoo artist or client copied the protectable elements of his work, and a sufficient amount of those elements resulted in the two works being substantially similar.<sup>156</sup> This duality is referred to as a qualitative and quantitative prong to substantial similarity.<sup>157</sup> In other words, what is the “nature” of the copied expression and is it more than *de minimis*?<sup>158</sup> Copying is often a mix of original expression (the dots and color choice and placement for this Author’s tattoo) intermingled with

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149. *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946); *see also* Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 147–48 (2011).

150. *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003).

151. *Penguin Random House LLC v. Colting*, 270 F. Supp. 3d 736, 744 (S.D.N.Y. 2017).

152. *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir. 2017); *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984).

153. *Penguin Random House LLC*, 270 F. Supp. 3d at 744.

154. *Unicolors, Inc.*, 853 F.3d at 985.

155. LEAFFER, *supra* note 44, at 430.

156. *Unicolors, Inc.*, 853 F.3d at 985.

157. *Penguin Random House LLC*, 270 F. Supp. 3d at 745.

158. *Id.* at 744–45.

elements already in the public domain, such as facts or ideas. While verbatim copying is less common than pattern copying, tattoos are a subject matter where verbatim copying more readily occurs. Because uploading pictures of tattoos is quite common, subtle variations of other tattoos (e.g., a stack of books or Disney characters) or even verbatim copying of another's copyrighted material frequently occurs. Pattern similarity is also common, like this Author's music tattoo, but it is hard to define the boundary between an expression, which is protectable, and an idea, which is not.

Different courts use different tests to determine substantial similarity.<sup>159</sup> What test the court uses depends, in part, on the subject matter involved; it is a question for the jury to decide. For music, courts use the "lay listener test." This involves playing the sound recording to the jury and instructing them to focus on the "underlying compositional expression" but ignore the performance elements.<sup>160</sup> For non-music cases, this test is referred to as the ordinary observer or audience test.<sup>161</sup> The court prioritizes the immediate reaction of the jury to determine whether "substantial similarities" between the two works exist, looking for the "subjective reactions of lay observers."<sup>162</sup> Because most tattoos are based on arrangements and patterns of elements, courts will most likely select the lay or ordinary observer test for infringement, measuring the "total concept and feel" between works. A tattoo client can infringe either by copying the entire work verbatim or taking the overall pattern and arrangement of the work.<sup>163</sup> In trial, this would likely involve a blown-up version of each tattoo presented side by side. You can imagine attorneys using these pictures in their closing statements at trial, crossing out the elements that are

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159. *Id.* at 745.

160. Lund, *supra* note 147, at 149. This is the lay listener test, which is the most common test for composition copyright cases but receiving a lot of scholarly criticism from musicians and experts; *see also* Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 731 (4th Cir. 1990) (the court noted that the lay listener's reaction is relevant because that is the intended market and audience of music).

161. Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 139–40 (2d Cir. 1998).

162. LEAFFER, *supra* note 44, at 439–44.

163. Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 985 (9th Cir. 2017). Courts have said that infringement is "not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred or reproduced, with more or less colorable alterations..." Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947).

not protectable in red marker and urging the jury to reach their conclusion for what is left.

### B. De minimis Copying

Copying small amounts of an original work or even works in the public domain is not actionable.<sup>164</sup> This is understood as *de minimis* copying or *de minimis non curat lex*, which translates into “the law does not concern itself with trifles.” If a court were to look at a tattoo and find that the copying was so trivial and insignificant, no liability would result. Interestingly enough, *de minimis* copying arises frequently in music cases. One court has found that infringement could not occur when there is *de minimis* copying of a music composition.<sup>165</sup>

While there is no bright-line rule on how much copying is trivial, one court found a six-note sequence to exceed the *de minimis* threshold and move into the realm of substantial copying.<sup>166</sup> On one hand, for a celebrity’s tattoo that was replicated in a video game, the use of the copyrighted tattoo was *de minimis*.<sup>167</sup> On the other hand, another court has found that if a person copies the “heart” of another’s work, that alone prevents a finding of *de minimis* copying.<sup>168</sup> This Author’s music tattoo (which copies the heart of a music composition) could not be subject to the *de minimis* exception in these jurisdictions. Copyright law is a matter of federal law, and variances in the same tattoo’s liability should not depend on the jurisdiction in which the tattoo was given. If there is consistent confusion on tattoos, fair use, or *de minimis* copying, Congress or the Supreme Court may need to intervene to rectify the potential for consumer forum shopping.<sup>169</sup>

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164. Mullen, *supra* note 108, at 740.

165. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005). However, the Ninth Circuit did not find the Sixth Circuit’s reasoning in *Bridgeport* persuasive. In fact, legal scholars have been criticizing the bright-line rule from *Bridgeport* as stifling creativity and intruding on users. Mullen, *supra* note 108, at 746–47. This protection by the *de minimis* exception does not extend to sound recordings or performances of the song. *See Lund, supra* note 147, at 146.

166. *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987).

167. *Solid Oak Sketches, Inc. v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 353 (S.D.N.Y. 2020).

168. *TufAmerica, Inc. v. Diamond*, 968 F. Supp. 2d 588, 599 (S.D.N.Y. 2013); *see also Elsmere Music, Inc. v. Nat’l Broad. Co.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980).

169. If the Southern District of New York is only one and not the rule for this rule against *de minimis* copying, it would encourage consumers who seem music



*C. Other Legal Considerations: The First Amendment & Right of Publicity*

Should a court intervene on whether she can get a tattoo of a particular design, a client can argue that her right to freedom of speech would be violated by copyright law.<sup>170</sup> Courts have already addressed this argument, finding that it was reasonable for copyright owners to protect their proprietary interests in their copyrights.<sup>171</sup> In fact, a court cited precedent stating “[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property.”<sup>172</sup> The goals of the First Amendment were incorporated into copyright law by the idea-expression dichotomy to reconcile this apparent conflict, which only protects ideas and information in their expressive forms.<sup>173</sup> As a district court found that there are numerous other ways for the defendant to express themselves, a tattoo client would likely not win on a freedom of speech argument in order to use a copyrighted design.

Copyright law does not preempt every right of publicity—a matter governed by state law.<sup>174</sup> There is tension between preventing copyright owners from violating other people’s rights and not permitting licenses of a copyright holder’s rights because of disagreements.<sup>175</sup> The Supreme Court has weighed in, stating that the “right of publicity . . . rests on more than a desire to compensate the performer for the time and effort invested in his act; the protection provides an economic incentive for him to make the investment required to produce a performance of interest to the public.”<sup>176</sup> The right of publicity intersects with tattoos when a client wants to tattoo

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tattoos to only get them in jurisdictions where the law would protect them. Thus, this could shift where tattoo artists who specialize in music tattoos set up their shops. Since U.S. civil procedure aims to end forum shopping, it is likely that this would immediately become an apparent problem for the higher courts or Congress to fix.

170. U.S. CONST. amend. I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

171. *Urantia Found. v. Maaherra*, 895 F. Supp. 1329, 1333 (D. Ariz. 1995).

172. *Id.* at 1333 (citing *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)).

173. *See Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *see also TD Bank N.A. v. Hill*, 928 F.3d 259, 284 (3d Cir. 2019); *Urantia Found.*, 895 F. Supp. at 1333.

174. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1145 (9th Cir. 2006).

175. *Id.*

176. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

the likeness of a celebrity, like Britney Spears. It is also implicated when a client wants to tattoo a celebrity's famous tattoo, like Mike Tyson's tribal face tattoo. Some states, like Pennsylvania, require a showing of commercial value in the alleged "natural person's name or likeness that is developed through the investment of time, effort and money" before this claim can be brought to court.<sup>177</sup> In Illinois, one can protect their "identity," which includes their "(i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice."<sup>178</sup>

As courts become more involved in the tattoo industry, celebrities may begin asserting more of their rights outside of copyright law that intersect with tattoos such as the right of publicity. Additionally, clients can try to creatively adjust old arguments, such as freedom of speech. The success of these other legal considerations will generally reflect precedent that has been handled by courts on the intersection with copyright law.

#### *D. Owner's Liability for the Use of Original Works*

Assuming the tattoo artist is a direct infringer, the liability does not end there. Under the Act, a person can be liable for the infringing acts of another, known as third-party liability.<sup>179</sup> There are two types of third-party liability: (1) contributory liability and (2) vicarious liability. Contributory infringement occurs if the client seeking the tattoo has actively induced the artist to infringe or, knowing the tattoo design infringed, supplied the means for the act to occur.<sup>180</sup> Vicarious liability occurs if someone who supervises the tattoo artist and benefits from the infringing acts becomes liable.<sup>181</sup> The tattoo client can be held contributorily liable for the artist's infringing tattoo by inducing the artist to do the work, paying the artist, and providing the artist with the design. While the client can argue they likely did not know the design was previously copyrighted, ignorance of the law is no defense. The tattoo parlor can be held vicariously liable for the artist's actions because the owner has control over their artists, which photographer Seldik asserts against Kat Von D's parlor, High Voltage Tattoo, for

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177. *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1027 (3d Cir. 2008).

178. *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905, 908 (7th Cir. 2005).

179. LEAFFER, *supra* note 44, at 446.

180. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

181. *Id.* at 261–62.

the violation of his copyrighted work.<sup>182</sup> While parlors could argue that their artists have autonomy as independent contractors and are the only ones communicating with clients, tattoo parlors still have supervisory control.

### 1. Contributory Liability

The content of the tattoo matters for third-party liability. If a client only asked for flash art, there is little evidence of any inducement or participation in the infringing act. There is no way for the client to know that what the artist claims is their own design is actually not. If a client had the artist freehand the design, this same rationale would apply to obviate the client's liability. The moment where collaboration on a design occurs, however, changes this rationale and the client can be legally liable for the tattoo artist's infringement. It might seem unfair that a client who does not know the underlying design was copyrighted could be held liable for inducement. Copyright law instituted third-party liability because the inducer typically has the financial capacity to pay licensing fees and the most efficient ability to end the infringing behavior.<sup>183</sup> In tattoo cases, if a client finds out that the design infringes before the inking begins, the client may select an alternative design. If the ink has already dried, however, a client may never get a tattoo again.

In certain cases, courts found contributory infringement because there was a "material contribution" by the third party. Material contribution has been met when an auction space, for example, profited from venue and food sales during the sale of infringing products.<sup>184</sup> In another case, an online music application met this prong by taking steps to avoid knowledge of infringing acts—known as "willful blindness"—because it provided the site and facilities for the acts to occur.<sup>185</sup> However, as the peer-to-peer file music cases have

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182. Melissa Angell, *Miles Davis Photog Says Kat Von D Tattoo Infringes Photo*, LAW360 (Feb. 8, 2021), <https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo>. [https://perma.cc/9Q9D-DC2B]; *Sedlik v. Katherine Von Drachenberg*, Case 2:21-cv-01102, Compl. at 4 (C.D. Cal. 2021).

183. *See Statement of Marybeth Peters The Reg. of Copyrights before the Comm. on the Judiciary*, COPYRIGHT.GOV (July 22, 2004), <https://www.copyright.gov/docs/regstat072204.html> [https://perma.cc/BF7C-GFLW].

184. *Fonovisa*, 76 F.3d at 263–64.

185. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir 2001).

shown, contributory liability attaches to a third party when they “know or have reason to know” of direct infringement.<sup>186</sup>

Following this reasoning, clients who ask for tattoos of iconic characters like James Bond or use the “Disney” font should reasonably know that these elements could be protected by copyrights. While this is understandable for those involved in the legal profession, it is not intuitive for most individuals seeking tattoos. It is possible that courts will not find contributory liability on behalf of clients where specific knowledge of infringement is required, which would involve a client who actively ignores a copyright. If courts do not find clients contributorily liable, courts may find clients directly liable with the tattoo artist. If the tattoo artist is legally responsible for a tattoo’s copyright infringement, it is almost guaranteed that the client, who provides the need for the service and design idea, will be responsible too.

## 2. Vicarious Liability

Given the financial benefit tattoo parlors receive from the business, the law also holds owners liable for an infringing tattoo. While the business management of parlors varies, many artists pay rent to the owner or share a commission on each piece they do in-house.<sup>187</sup> With parlors becoming a booming business venture,<sup>188</sup> it is important to understand how parlors may be liable, particularly if the parlor is run by someone other than the artists. Vicarious liability stems from agency principles in other areas of the law, such as employer-employee relationships.<sup>189</sup> In the copyright law context, this type of third-party liability attaches to a defendant who has the “right and ability to supervise the infringing activity and also has a direct

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186. *Id.* (quoting *Cable/Home Comm’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845, 846 n.29 (11th Cir. 1990)).

187. *How To Start a Tattoo Parlor*, TRUIC LLC, <https://howtostartanllc.com/business-ideas/tattoo-parlor> [<https://perma.cc/BL9F-STMW>]; see also Jesse Dorris, *Inking the Deal: Why tattoo parlors are a great small-business bet*, SLATE (Oct. 1, 2014, 11:48 PM), <https://slate.com/business/2014/10/tattoo-parlors-a-surprisingly-great-small-business-bet.html> (Oct. 1, 2014) [<https://perma.cc/2TG7-X4F6>].

188. See *Tattoo Parlors Booming, Become \$3 Billion Industry*, ACCESSWIRE (Nov. 16, 2017, 9:19 AM), <https://www.accesswire.com/433664/Tattoo-Parlors-Booming-Become-3-Billion-Industry> [<https://perma.cc/RLN9-M8FP>].

189. *Fonovisa*, 76 F.3d at 261–62.

financial interest in such activities.”<sup>190</sup> Courts heavily weigh a financial benefit and the presence of using infringing works as a draw for consumers. Unlike the auction or peer-to-peer music cases, tattoos are different. This is not a case where clients are looking for fake Gucci shoes or even free songs. Tattoos present a case where clients are paying hundreds to thousands of dollars for permanent ink on their bodies as a personal form of expression. Sometimes this expression involves famous and copyrighted elements that a client has grown up with or been inspired by in life. While the tattoo parlor owner still benefits from this business method, there are nuances to the consumer relationship in the tattoo industry that courts should address and account for. Nevertheless, considering that tattoo parlors have the right to supervise the acts of the artists and have a financial stake in the tattoos, the owners can be vicariously liable for their artists’ work even without knowing or participating in the infringing acts.<sup>191</sup>

## V. DEFENSES FOR A TATTOOED INDIVIDUAL

### A. *Fair Use Defense*

The fair use defense under 17 U.S.C. § 107 is the most important defense in copyright infringement.<sup>192</sup> The Supreme Court has referred to fair use as the “breathing space within the confines of copyright.”<sup>193</sup> After a copyright holder makes a prima facie case that there was copyright infringement, the defendant raises the affirmative fair use defense.<sup>194</sup> Fair use “permit[s] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that law is designed to foster.”<sup>195</sup> The preamble of the statute lists some examples of activities that count as fair use including “criticism, comment, news reporting, teaching, scholarship, or research.”<sup>196</sup> This is not the end of inquiry. For example, parody, while not listed in the

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190. JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY* 527 (4th ed., 2018) (citing *Fonovisa*, 76 F.3d at 263–64).

191. *See Gershwin Publ’g Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159, 1159 (2d Cir. 1971).

192. LEAFFER, *supra* note 44, at 479.

193. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

194. LEAFFER, *supra* note 44, at 488.

195. *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980).

196. 17 U.S.C. § 107 (2012).

preamble, is one of the biggest examples of the fair use defense.<sup>197</sup> In conducting an analysis, the court weighs four factors when determining whether the use of the copyright work is fair and not infringing:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>198</sup>

The first factor evaluates whether the secondary work is “transformative.” A work is transformative when it creates “new information, new aesthetics, [or] new insights and understandings.”<sup>199</sup> Works that neither transform nor create anything of social value are “nonproductive works” used for the same intrinsic purpose for which a copyright owner intended the original to be used.<sup>200</sup> Transformation occurs when a second work alters the first or when a verbatim copy of the original has been used in a different context.<sup>201</sup> The commercial nature of a work does not automatically render it ineligible for the fair use defense but is weighed with all the other evidence.<sup>202</sup> The second factor extends protection to uses of the original that serve the public interest; it also looks at whether the original work was published.<sup>203</sup> The third factor analyzes whether the defendant has taken more of the

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197. Parody is defined as a “literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,” or as a “composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous.” *Campbell*, 510 U.S. at 594.

198. 17 U.S.C. § 107 (2012).

199. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).

200. LEAFFER, *supra* note 44, at 490.

201. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1164–65 (9th Cir. 2007) (citing *Campbell*, 510 U.S. at 579).

202. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

203. *Id.* at 558; *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 431–32 (1984).

original work than is necessary to satisfy its purpose.<sup>204</sup> This factor looks at both the qualitative (substantive) and quantitative (amount) dimensions of copying. In particular, it analyzes whether the copied sections go to the “heart” of the original work.<sup>205</sup> In music cases, the “heart” of the work is typically the refrain or chorus of the song.<sup>206</sup> Finally, the fourth factor looks at whether the second work acts as a substitute for the original work or is a derivative work of the original such that it harms a potential market that the copyrighted owner wanted to break into.<sup>207</sup> The court looks for any loss or decline in license sales because of the second work.

Using this Author’s music tattoo as an example, it is important to understand how this defense applies in this context. Courts will first determine what the meaning of the tattoo is and whether it is one of the listed acceptable forms of fair use. The tattoo might serve as commentary on the original work it is using but it arguably does not. Like parodies, tattoos could become an acceptable medium of fair use despite their absence from the preamble. Tattoos add new aesthetics and insights that, for instance, a black-and-white sheet music did not previously have. Depending on the content, a tattoo can be a productive or transformative work under the first factor. Further, the purpose of the two works is vastly different. One court found that the purpose between uses of the tattoos was different and thus transformative—the famous clients received tattoos to express themselves, while the infringing video game maker displayed the tattoos to accurately depict the players.<sup>208</sup> In this Author’s case, the tattoo’s primary purpose is for imagery, while the composition’s

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204. LEAFFER, *supra* note 44, at 507 (noting that Verbatim copying typically exceeds a fair use purpose).

205. *Harper & Row Publishers, Inc.*, 471 U.S. at 565.

206. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994). Music cases often involve parody, where the court recognizes that the parody must use enough of the original work in order to make its point by commentary and conjure up the image of the original work. *See also* *Bridgeport Music v. UMG Recordings, Inc.*, 585 F.3d 267, 273 (6th Cir. 2009) (noting that a music expert testified at court that the Bow Wow refrain is often licensed by itself, separate from the rest of the song, because it’s so memorable).

207. *Campbell*, 510 U.S. at 577–78.

208. *Solid Oak Sketches, Inc. v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 347 (S.D.N.Y. 2020).

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purpose is to enable the play of music. The tattoo does not serve the same inherent purpose as the original work it is based on.<sup>209</sup>

If tattoos are the subject of a fair use analysis, the court should specify how broadly “purpose” will be defined. Does a music tattoo of someone’s favorite song serve the same purpose as that song, which tried to evoke an emotional feeling from the audience? Or does the sheet music enable musicians to play it? Does a Monet painting and a tattoo of that painting both serve the same purpose—to admire? Tattoos are likely transformative from the original work that prompted the design. Further, despite the commercial transaction between client and artist for the piece, tattoos are not usually commercial in the sense of profitability for clients.<sup>210</sup>

The second factor does not likely weigh heavily into the analysis because most tattoos are not for the education or public interest of others. The third factor is important because tattoos usually go to the “heart” of a work or even the entire work. In this Author’s case, the refrain or chorus from the song “Decode” was tattooed on the Author’s shoulder, which is recognizable by sound recording but not visually by seeing the tattoo. While the notes from the chorus might be the “heart” or qualitative aspect of the original work, quantitatively only six notes were taken. Unless the courts decide that the very nature of getting a tattoo is transformative, the third factor varies greatly depending on the content and size of the tattoo. In this case, this factor likely weighs against fair use. Under the fourth factor, this Author’s tattoo did not harm a current or potential market for Alfred Music publishing. The courts will ask if Alfred Music planned on entering the tattoo market with its music composition, but that is likely negative. By paying for sheet music online, this Author paid an indirect licensing fee through a third-party website, so this tattoo

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209. It’s important to comment on how ideas of tattoos are generated. Often, individuals will go on various search engines and social media platforms, typing in search terms of feelings or things they like and are considering tattooing. Thus, individuals often do a lot of research and spend a lot of time coming up with the design of the tattoo, based off of designs and tattoo designs. When they bring these photos to the artists, there is an initial consultation, typically thirty minutes long, where the artist also contributes ideas and shares what of these components or designs will or will not translate well to the skin. The two discuss size, color of the tattoo, placement of the tattoo. Then, the artist usually takes time to draft a new image based off of the discussion, images the customer leaves with them, and their own independent knowledge and research, which at the next meeting (the first day of tattooing) gets stenciled, sized, and adjusted by collaboration.

210. For famous individuals or celebrities, this might not be the case.



contributed to the publisher's market. In sum, it appears that the music tattoo is likely a fair use of the sheet music because it is transformative and did not cost market harm to the copyright holder, despite its qualitative copying.

### B. *What Should the Tattoo Industry Do?*

Clients and tattoo parlors should take action into their own hands. A client should discuss transferring any rights and creating an express WFH agreement with their artist before getting a tattoo. The parties could discuss their collaboration as a joint work where clients and artists both share rights. After all, “[c]reativity is often the result of collaboration and incorporation of prior works.”<sup>211</sup> A client can ask for a signed release from the tattoo artist.<sup>212</sup> Interestingly, Belgium has found a compromise that might work for artists and clients: the artists keep the right in the tattoo's design, allowing repeat tattoos with the same design, while the client's activities with the tattoo will not be interfered with.<sup>213</sup> This likely presumes the design is original and not infringing.

It is incredibly difficult for a copyright owner of a design or even a tattoo artist to monitor the use of their design or tattoo on non-famous individuals.<sup>214</sup> But with the advancement of social media, public profiles, and even hashtags, this could change. As it is, there will be an increase in search costs as tattoo clients begin to spend time and money trying to discover who owns the copyright in their designs and predict whether their designs fall under the fair use defense. Tattoo copyright law is already beginning to be shaped by celebrities, whose tattoos are easier to keep track of, and artists can find their works incorporated into other valuable ventures.

Parlors should take steps to educate each client about copyright law, beginning with the website, posters, and even providing a script for tattoo artists to use when meeting with their clients during

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211. Mullen, *supra* note 108, at 752.

212. Darren Heitner, *Questions Concerning Copyright Of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013 8:01 AM), <https://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/#79663bf34a21> [<https://perma.cc/KAB9-PRX4>].

213. Mandy Deeley & John MacKenzie, *Tattoos – scope for copyright?*, LEXOLOGY (Sept. 2, 2013), <https://www.lexology.com/library/detail.aspx?g=aa885059-bfef-4381-a68e-35f35f56793c> [<https://perma.cc/WH8T-PH96>].

214. King, *supra* note 10, at 152 (citing Cotter, *supra* note 40, at 99 n.5).

consultations. Artists should determine what elements of their most commonly requested designs are copyrighted. Together, artists and parlor owners can look into allocating costs for licenses to the copyright owners for their most-requested tattoo elements. As for damages, it is unlikely a court would impose tattoo removal of an infringing work or a perpetually annual license for the life of the individual. A court is more apt to issue a lump sum split between the client, artist, and shop owner and enjoin artists from using a copyrighted element in any of their future works.<sup>215</sup> Because no case has been issued on this intersection, every party has a responsibility to look at their tattoos in this legal context.

## VI. CONCLUSION

As the woman with the watercolor music tattoo, it is insightful to understand that tattoos can be original and creative enough to warrant their own copyright protection—but ownership rights vary. An original tattoo is copyrightable to the author as long as it is not someone else's work or design. With most tattoos that are not flash art, there is usually design collaboration between the artist and client. This relationship makes it harder to draw a clear line around authorship. Without expressly agreeing that the work is between an independent contractor and client as a work for hire, courts will likely find that the tattoo artist owns the copyright in an original tattoo. While a client likely has an implied right to take photos and display the tattoo, other rights may be restricted. For clients with larger tattoos or tattoos of popular or famous items, protection from infringement might not apply. Nevertheless, pairing the broad fair use defense, implied licenses, and the realistic challenge of tracking each potentially infringing tattoo, clients and tattoo artists may not need to start deleting their social media posts or hiding their ink. It is time to discuss how tattoos infringe on the rights of copyright owners and spread awareness about the potential legal implications most do not think, or know, could exist.

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215. Photographer Sedlik is asking for a financial lump sum per tattooed piece that infringes his work, attorneys fees, and an agreement that all defendants stop using his work in the future. Melissa Angell, *Miles Davis Photog Says Kat Von D Tattoo Infringes Photo*, LAW360 (Feb. 8, 2021), <https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo> [<https://perma.cc/9Q9D-DC2B>]; Sedlik v. Katherine Von Drachenberg, Case 2:21-cv-01102, Compl. at 4 (C.D. Cal. 2021).