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COPYRIGHT PROTECTION FOR TATTOOS: ARE TATTOOS COPIES?

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You put a tattoo on yourself with the knowledge that this body is yours to have and enjoy while you're here. You have fun with it, and nobody else can control (supposedly) what you do with it.

—Don Ed Hardy[1]

INTRODUCTION

The practice and ritual of tattooing human skin has existed in all parts of the world and in most cultures for thousands of years.[2] The modern history of tattooing in Western cultures can be traced to the voyages of Captain James Cook to the South Pacific, where sailors encountered various Polynesian tribes among which tattooing was, and remains today, an important cultural practice and spiritual ritual.[3] When these sailors, many of whom had adorned their bodies with tattoos, returned to Europe, they ignited an interest in tattooing known as the "tattoo rage," which spread through nineteenth-century Europe. This interest in tattooing eventually crossed the Atlantic Ocean to America[4] and, by 1891, due in large part to the development of the

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1 DAVID SHIELDS, BODY POLITIC: THE GREAT AMERICAN SPORTS MACHINE 189 (2004).

2 AARON DETER-WOLF & CAROL DIAZ-GRANADOS, DRAWING WITH GREAT NEEDLES xi–xii (2013) ("A Chinchorro mummy from Chile dated to 6000 BC exhibits a 'mustache' tattoo on its upper lip, while still other instances of . . . tattoos have been documented on ancient fleshed remains from Siberia, western China, Egypt, Greenland, Alaska, and throughout the Andes.").

3 CLINTON R. SANDERS, CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING 14 (1989) ("Cook introduced the Tahitian word 'ta-tu' meaning 'to strike' or 'to mark' and soon 'tattoo' became the common term.").

4 *Id.* at 16 ("The first professional tattooist to practice in the United States was Martin Hildebrand. . . . By the 1890s Hildebrand had opened an atelier on Oak Street in New York.").

first electric tattoo machine by American tattoo artist Samuel O'Reilly, the practice of tattooing began to permeate American society.[5]

During the early era of tattooing in America, tattoos were generally associated with sailors, criminals, and circus performers—the artistic value of tattoos received minimal, if any, recognition. In recent decades, tattoos have moved from their counterculture origins into mainstream American society, garnering an appreciation as a valid form of art. Today, tattoos are displayed prominently on the bodies of celebrities and athletes,[6] and they have been the subject matter of exhibits at museums and art galleries.[7] Television shows such as *Miami Ink* and *Ink Master* have increased the popularity of tattoos as an art form and have contributed to their increasing social acceptance.[8] As of 2012, approximately twenty-one percent of Americans had at least one tattoo;[9] for Americans under forty years of age, the percentage with at least one tattoo rose to almost forty percent.[10] This increase in the popularity and prevalence of tattoos has led to an estimated tattoo industry annual revenue growth of 2.9% between 2009 and 2014, resulting in an approximate revenue of $3.4 billion.[11]

Tattoo artists are aware of the purpose and protections of the United States' intellectual property regimes.[12] Recently, tattoo artists have initiated lawsuits alleging their possession of intellectual property rights in their works under the United States' copyright regime. Since 2005, three individual tat-

5 *Id.* (noting how the development of the electric tattoo machine "increased the rate at which tattooing diffused in [American] society"); *see* U.S. Patent No. 464,801 (filed Jul. 16, 1891). Charlie Wagner improved upon O'Reilly's tattoo machine design in 1904. *See* U.S. Patent No. 768,413 (filed Apr. 19, 1904). Variations of the electric tattoo machine are still utilized by tattoo artists in the present day.

6 *See* Caitlin Johnson, *Tattooed America: The Rise of Skin Art*, CBS NEWS (Oct. 29, 2006, 11:24 AM), http://www.cbsnews.com/news/tattooed-america-the-rise-of-skin-art/2/.

7 *See, e.g.*, *Perseverance: Japanese Tattoo Tradition in a Modern World*, JAPANESE AM. NAT'L MUSEUM, http://www.janm.org/exhibits/perseverance/ (last visited Mar. 9, 2015); *Tattoo: Flash Art of Amund Dietzel*, MILWAUKEE ART MUSEUM, http://mam.org/exhibitions/details/tattoo.php (last visited Mar. 9, 2015).

8 *See* Johnson, *supra* note 6. *See generally Ink Master*, SPIKE, http://www.spike.com/shows/ink-master (last visited Mar. 9, 2015); *Miami Ink*, TLC, http://www.tlc.com/tv-shows/miami-ink (last visited Mar. 9, 2015).

9 *One in Five U.S. Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/970/ctl/ReadCustom%20Default/Default.aspx. This percentage has increased by seven percent since 2008. *Id.*

10 *Id.*; *see also Millennials: A Portrait of Generation Next*, PEW RESEARCH CTR. (Feb. 2010), http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf (indicating that thirty-eight percent of Millennials have at least one tattoo, while thirty-two percent of Generation Xers and fifteen percent of Baby Boomers respectively have at least one tattoo).

11 SARAH TURK, IBISWORLD INDUSTRIAL REPORT OD4404, TATTOO ARTISTS IN THE US 4 May 2014, at 4 ("[I]n the five years to 2014, [tattoo] industry revenue is expected to grow at an annualized rate of 2.9% to $3.4 billion, including a 1.6% growth in 2014.").

12 *See* Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1164–66 (2012).

too artists have brought lawsuits alleging copyright infringement of their works—either of tattoos based upon preliminary drawings or tattoos created contemporaneous to their application in the client's skin. The first two cases, *Reed v. Nike, Inc.*[13] and *Whitmill v. Warner Brothers Entertainment, Inc.*,[14] settled without going to trial; the third case, *Escobedo v. THQ, Inc.*,[15] was dismissed for lack of prosecution. After these cases, questions regarding the applicability of the copyright laws to tattoos remain unanswered. While the basic application of the copyright statute indicates tattoos are likely copyrightable subject matter, the courts should be cognizant of the negative policy implications that could arise should tattoos be granted copyright protection.

The focus of this Note is on tattoos on human skin, not on a tattoo artist's drawings, "flash art," or other forms of art utilized by tattoo artists as inspiration for a tattoo.[16] Therefore, as a preliminary matter, throughout this Note, the term "tattoo" shall be intended to mean the actual work applied to human skin rather than an embodiment of the work in any other form.

This Note argues that, although "flash art" and other drawings upon which a tattoo may be based are likely copyrightable subject matter under the Copyright Act of 1976[17] (Copyright Act), the policy implications of granting copyright protection to tattoos militate against extending such protection. To avoid these consequences, the copyright statute should be interpreted as failing to include the human body as a "copy" within the scope of the Copyright Act and, therefore, tattoos would not be subject to the protection of the Act.

Part I provides a background on the statutory framework of the Copyright Act, including the requirements for copyrightable subject matter, copyright ownership, and the exclusive rights granted by the Copyright Act to the copyright owner. Part II provides an overview of three cases in which tattoo artists have alleged that their tattoos, or their drawings upon which a subsequent tattoo are based, are copyrightable subject matter. These tattoo artists have alleged infringement of their works based upon a subsequent reproduction or display of their tattooed work.

Part III begins by addressing whether, as a preliminary matter, a tattoo would generally meet the Copyright Act's copyrightability requirements. Part III then presents several negative policy issues that would likely arise should copyright protection be extended to tattoos. It concludes by arguing that

13 Complaint, Reed v. Nike, Inc., (No. CV–05–198) (D. Or. dismissed Oct. 19, 2005), 2005 WL 1182840.

14 Verified Complaint for Injunctive and Other Relief, Whitmill v. Warner Bros. Entm't, Inc., No. 4:11–CV–752 (E.D. Mo. dismissed June 22, 2011).

15 Complaint, Escobedo v. THQ Inc., (No. 2:12–CV–02470–JAT) (D. Ariz. dismissed Dec. 11, 2013), 2012 WL 5815742.

16 For a discussion of the intellectual property issues surrounding "flash art" and the copying of other visual art by tattoo artists, see Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 557–67 (2013).

17 17 U.S.C. §§ 101–1309 (2012).

tattoos are not "copies" as defined under the Copyright Act and therefore, they are not subject to copyright protection.

I. U.S. COPYRIGHT LAW

The Intellectual Property Clause in Article I of the U.S. Constitution expressly grants Congress the authority to establish federal copyright law.[18] In the United States, copyright law is an area regulated exclusively by the federal government pursuant to the Copyright Act. The Copyright Act grants copyright protection to "original works of authorship fixed in any tangible medium of expression"[19] that fall within one of eight enumerated categories of "works of authorship."[20] This Part will discuss the elements of copyrightable subject matter, how ownership of a copyright is established, and the exclusive rights conferred by the Copyright Act upon a copyright owner.

A. Copyrightability

Under § 102(a), federal copyright protection is extended to "original works of authorship fixed in any tangible medium of expression."[21] In other words, § 102(a) requires the satisfaction of two elements for a work to be considered copyrightable: fixation and originality. The following subsections provide an overview of these two requirements.

1. The "Fixation" Requirement

The first requirement of copyrightable subject matter is fixation, which requires a work of authorship to be "fixed in any tangible medium of expression."[22] The primary function of the fixation requirement is to establish the point in time at which a work exists that may be eligible for copyright protec-

18 U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

19 17 U.S.C. § 102(a).

20 *Id.* § 102(a)(1)–(8). The works of authorship include "literary works"; "musical works"; "dramatic works"; "pantomimes and choreographic works"; "pictorial, graphic, and sculptural works"; "motion pictures and other audiovisual works"; "sound recordings"; and "architectural works." *Id.*

21 *Id.* § 102(a). Under § 102(b), there is no copyright protection for "any idea, procedure, process, system, method of operation, concept, principle, or discovery." Section 102(b) establishes a third requirement for copyrightability, the restriction of copyright protection to expression and not ideas; however, it is unlikely to be implicated when the work in question is a tattoo. Therefore, this discussion will be focused on the requirements of § 102(a).

22 *Id.* Fixation in a tangible medium of expression occurs when "a work is . . . embodi[ed] in a copy or phonorecord [when], by or under the authority of the author, [it] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration." *Id.* § 101.

tion.[23] The medium in which the work is fixed is irrelevant to the analysis of fixation, as the Copyright Act was intended to encompass a broad scope of mediums of expression from paint on canvass to those mediums that require the assistance of technology to enable human perception, as in the case of computer software.[24] The duration of fixation need only be for "more than transitory duration,"[25] which means the fixation requirement may be satisfied even if the fixation is temporary.[26]

2. The "Originality" Requirement

The second requirement of copyrightable subject matter is originality, which limits the grant of copyright protection to "original works of authorship."[27] When drafting the Copyright Act, Congress purposely adopted the phrase "works of authorship"[28] rather than utilizing the constitutional terms "Writings" and "Authors"[29] with the express intention of "avoid[ing] exhausting the constitutional power of Congress to legislate in this field"[30] by making the scope of the copyright statute narrower than the authority granted to Congress by the Constitution. In addition, Congress purposely left the phrase "original works of authorship" undefined with the intention of incorporating into the Copyright Act the definition of originality that had been developed through the courts' prior copyright jurisprudence.[31] Therefore, the interpretation of the current originality standard may be based upon caselaw preceding the Copyright Act.

In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[32] the Supreme Court articulated the current definition of originality. Remarking that originality is the *sine qua non* of copyright law, the Court promulgated a two-prong

23 H.R. REP. NO. 94-1476, at 52–53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665–66, 1976 WL 14045 ("[T]he concept of fixation is important since it . . . determines whether the provisions of the statute apply to a work . . . .").

24 *Id.*; *see, e.g.*, MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 519 (9th Cir. 1993) (holding a copy of computer software created in RAM to be fixed under the Copyright Act).

25 17 U.S.C. § 101.

26 *See MAI Sys.*, 991 F.2d at 518–19 (holding that the creation of a copy of computer software in RAM for the purposes of conducting maintenance on the computer is of sufficient duration even though the copy is deleted once the computer is shut off); *see also* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 129 (2d Cir. 2008) (holding that the reproduction of copyrighted work in a network buffer for a "fleeting 1.2 seconds" did not satisfy the fixation requirement).

27 17 U.S.C. § 102(a).

28 *Id.*

29 U.S. CONST. art. I, § 8, cl. 8.

30 H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664, 1976 WL 14045.

31 *Id.* ("The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the [Copyright Act of 1909, as amended].").

32 499 U.S. 340 (1991).

originality standard, which requires that "the work [be] independently created by the author . . . and that it possesses at least some minimal degree of creativity."[33] The Court elaborated further that "the requisite level of creativity is extremely low" and that most works will satisfy the requirement "as they possess some creative spark, no matter how crude, humble or obvious it might be."[34] The *Feist* standard presents a relatively low hurdle for copyrightability. When conducting an originality analysis, the artistic merit of the work in question is not to be considered by the court.[35] "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the author. No large measure of novelty is necessary."[36] Furthermore, "a 'copy of something in the public domain' will support copyright if it is a 'distinguishable variation.'"[37]

In many circumstances, a work of authorship will most certainly consist of an author's independently created expression that satisfies the requisite threshold level of creativity. At the opposite end of the spectrum, cases may arise where it is equally certain that works, such as letters or common geometric shapes, have not been created independently by the author and do not have the necessary minimum amount of creativity.[38]

B. Establishing Copyright Ownership

Once a work has been determined to be copyrightable, it is necessary to identify the proper owner of the copyright who will possess the rights conferred by the copyright statute. Section 201(a) provides that initial ownership of the copyright in a protected work vests in the author or authors of the work.[39] The following subsections will provide an overview of the forms of authorship recognized by the Copyright Act.

1. Sole and Joint Authorship

The concept of sole authorship is most clear when, for example, the purported author is the single writer of a novel or painter of a painting. But what if multiple people are involved in the creation or production of a work?

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33 *Id.* at 345.

34 *Id.* (internal quotation marks omitted).

35 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.").

36 Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (footnote omitted) (quoting Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–58 (1884)).

37 *Id.* (quoting Gerlach-Barklow Co. v. Morris & Bendien, 23 F.2d 159, 161 (2d Cir. 1927)).

38 *See* 37 C.F.R. § 202.1 (2012) ("The following are examples of works not subject to copyright . . . (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring . . . .").

39 17 U.S.C. § 201(a) (2012). The term "author" has never been statutorily defined.

Copyright protection subsists in works that are "representatives of [the] original intellectual conceptions of the author."[40] Even if the efforts of numerous people are utilized to produce a work, a work may only have one author who was the single person to whom the "original intellectual conceptions" of the work may be attributed.[41] Whether this is the case is not always clear, and disputes over authorship are often the basis for litigation, requiring the courts to conduct a fact-intensive inquiry to differentiate between works of sole authorship and joint works.

The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[42] While the circuit courts are not in complete agreement on the proper method for determining joint authorship, several courts require that each "author's" contribution to the work be independently copyrightable and that each purported author intended to be coauthors of the work.[43] This requirement would seem to be consistent with the Copyright Act's requirement that to obtain a copyright, a person must be an author under the statute.

When considering whether two or more people intended to be joint authors of a work, the courts have considered factors such as the delegation of decision-making authority, how the parties billed or credited themselves with respect to the work, and the content of written contracts.[44] Courts also consider the objective manifestations of intent of the parties to be coauthors.[45] Ultimately, if two or more parties are determined to be joint authors of a work, they will receive an equal interest in the work that is both inheritable and devisable. Furthermore, permission of all coauthors will be required for an assignment or exclusive licensing of the work.

2. "Works Made for Hire"

The Copyright Act provides that the copyright in a work prepared by an employee may belong to the employer if the work qualifies as a "work made

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40 *Sarony*, 111 U.S. at 58.

41 *See id.*; *see, e.g.*, Ashton-Tate Corp. v. Ross, 916 F.2d 516, 522–23 (9th Cir. 1990) (holding a software developer was not a joint author of a computer spreadsheet program because he did not make an independently copyrightable contribution); Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, No. 97 Civ. 9248(HB), 1999 WL 816163, at *4 (S.D.N.Y. 1999) (holding that a documentary filmmaker stated a claim for infringement of his copyright in the documentary footage even though the plaintiff did not actually conduct the photography).

42 17 U.S.C. § 101; *see, e.g.*, Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991) (holding that lack of intent by both parties to be joint authors precluded a finding of joint authorship).

43 *See* Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000); Thomson v. Larson, 147 F.3d 195, 200 (2d Cir. 1998); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994).

44 *See, e.g.*, *Thomson*, 147 F.3d at 202–05.

45 *See, e.g.*, *Aalmuhammed*, 202 F.3d at 1234–35.

for hire."[46] To qualify as a work made for hire, a work must either be prepared by an employee within the scope of his or her employment or specially ordered for use in a collective work, so long as the parties expressly agree that the work is a "work made for hire."[47]

The Copyright Act does not define either the term "employee" or the phrase "scope of employment," which has required the courts to interpret this statutory language. In *Community for Creative Non-Violence v. Reid*,[48] the Supreme Court held that the term employee carries its common law agency meaning, promulgating twelve factors that should be considered by a court when determining whether a hired party is an employee under agency law.[49] Subsequent caselaw has identified two of the factors—the provision of employee benefits to, and the tax treatment of, the hired party—as the most significant.[50]

If a hired party is not an employee under *Reid*, the "work made for hire" doctrine may still apply if the hired party is determined to be an independent contractor; however, two requirements must be satisfied. First, the purpose of the work must be for use as a contribution to a collective work that falls within one of the categories enumerated in § 101.[51] To satisfy the second requirement, the parties must expressly agree that the work will be considered a "work made for hire."[52]

C. The Copyright Owner's Exclusive Rights

The owner of a copyright under the Copyright Act is granted certain exclusive rights in the copyrighted work. These include the exclusive right to reproduce the copyrighted work, to prepare derivative works based on the work, to distribute copies of the work, and to display the work publicly.[53]

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46 17 U.S.C. § 101 ("A 'work made for hire' is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.").

47 *Id.*

48 490 U.S. 730 (1989).

49 *Id.* at 751–52 (explaining that factors include "the hiring party's right to control the manner and means by which the product is accomplished . . . 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" (footnotes omitted)).

50 *See, e.g.*, Aymes v. Bonelli, 980 F.2d 857, 862–63 (2d Cir. 1992).

51 17 U.S.C. § 101. Other categories include motion picture or other audiovisual work, translation, instructional text, test, answer material for a test, and an atlas. *Id.*

52 *Id.*

53 *Id.* § 106(1)–(3), (5).

Along with the exclusive right to exercise these rights, the copyright owner also possesses the right to authorize or license others to exercise these exclusive rights.[54] Furthermore, the ownership of the copyright in a work "may be transferred in whole or in part by any means of conveyance or by operation of law" and is inheritable and devisable.[55]

In addition to the rights granted under the Copyright Act, Congress enacted the Visual Artists Rights Act of 1990 (VARA), which provides protections for an author's moral rights in a work.[56] The protections granted by VARA are restricted to authors of "work[s] of visual art."[57] Works of visual art protectable under VARA are defined under § 101 as "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition . . . signed and consecutively numbered by the author."[58]

The protections granted by VARA include the right of attribution and the right to integrity. The right of attribution bestows upon the author of a work of visual art the right to claim authorship of his or her work, to prevent use of the author's name in relation to any work of visual art not created by the author, and to prevent use of the author's name in relation to his or her work of visual art if that work has been modified, distorted, or mutilated in a way that would be prejudicial to the author's honor or reputation.[59] The right to integrity not only protects the physical integrity of the work, but is also meant to protect the creative integrity of the author.[60] Therefore, the right of integrity is intended to "prevent any intentional distortion, mutilation, or other modification of th[e] work which would be prejudicial to [the author's] honor or reputation" as well as "any destruction of a work of recognized stature."[61]

There are several limitations on the moral rights conferred upon the author under VARA. First, any modification of the work of visual art that is the result of the passage of time or the nature of the materials used in the work does not amount to a violation of the statute.[62] Second, any modifica-

54 *Id.* § 106.

55 *Id.* § 201(d)(1). Under § 201(d)(2) any of the individual exclusive rights may be transferred and owned independently of the others.

56 *Id.* § 106A.

57 *Id.*

58 *Id.* § 101. The § 101 definition of work of visual art is rather lengthy, providing certain protections for photographic images and sculpture, as well as providing a listing of works that do not qualify as works of visual art. The quoted excerpt is the part of the definition relevant to this Note.

59 *Id.* § 106A(a)(1)–(2).

60 *See* Christine Lesicko, *Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act*, 53 IDEA 39, 51 (2013).

61 17 U.S.C. § 106A(a)(3)(A)–(B). Whether a work is of "recognized stature" may be determined by a two-part test which asks whether the visual art in question is viewed as meritorious and whether the visual art is recognized by art experts, members of the art community, or some cross-section of society. *See* Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999) (quoting Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 (S.D.N.Y. 1994)).

62 17 U.S.C. § 106A(c)(1).

tion of the work of visual art that is the result of conservation efforts or public presentation likewise does not fall within the protections of VARA.[63] The third exception denies protection if a work of visual art is used in connection with a work that is excluded from VARA under a subsection of § 101.[64]

Unlike the exclusive rights granted under the Copyright Act, the rights granted under VARA are not transferable; however, they may be waived.[65] A valid waiver must be expressly provided in a written instrument signed by the author and identifying the specific rights waived.[66]

II. THE CASES

The copyrightability of tattoos under the Copyright Act is an issue of first impression in the courts, and, as of yet, no lawsuit has proceeded to trial. Since 2005 three tattoo artists have brought individual lawsuits alleging that their tattoo—or at least the drawings upon which a subsequent tattoo were based—were copyrightable subject matter, that they were the owners of the copyright, and that their exclusive rights had been infringed. Each of these cases has been either settled or dismissed, leaving this question unanswered. American society is constantly progressing in the area of "Science and useful Arts,"[67] which requires the courts to consider how new—or in the case of tattoos, newly accepted—forms of creative expression and technologies fit into the existing intellectual property regime. While it could be argued that resolution of the questions presented in the following cases is analogous to the courts' task of determining how other forms of expression fit into the copyright law, there is one marked difference—in these cases, the "tangible medium of expression"[68] involved is human skin.

A. Reed v. Nike, Inc.*: The Rasheed Wallace Tattoo*

On February 25, 2005, Matthew Reed, a Portland, Oregon tattoo artist and owner of TigerLily Tattoo and Design Works, brought a lawsuit in the U.S. District Court for the District of Oregon against sports retail giant Nike, Inc., NBA star Rasheed Wallace, and advertising agency Weiden + Kennedy, alleging copyright infringement.[69] In 1998, Reed, with Wallace's input, designed a tattoo (the "Wallace tattoo") and applied it to Wallace's upper arm.[70] Before tattooing Wallace, Reed made several sketches and drawings that would become the basis for the tattoo.[71] After the tattoo had been com-

63 *Id.* § 106A(c)(2).
64 *Id.* § 106A(c)(3).
65 *Id.* § 106A(e)(1).
66 *Id.*
67 U.S. CONST. art. I, § 8, cl. 8.
68 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . .").
69 *See* Complaint, *supra* note 13, at 2.
70 *Id.* at 3.
71 *Id.*

pleted, Reed admitted to observing the Wallace tattoo on Wallace during televised NBA games, but admitted that he expected this public display of the Wallace tattoo and that such exposure would benefit his business.[72]

In 2004, Reed became aware of a Nike television commercial, created by Weiden + Kennedy, featuring Wallace.[73] The commercial included a full-screen depiction of the Wallace tattoo, a computerized recreation of the tattoo, and a voiceover by Wallace "describing the tattoo and its meaning."[74] Upon discovering the commercial, Reed registered the pencil drawing that was the basis for the Wallace tattoo with the Copyright Office and then brought his claim for infringement.[75]

Reed's complaint alleged that he was "the owner of all right, title and interest to the original artwork from which the tattoo on Mr. Wallace's arm was created."[76] In his first claim for relief, Reed alleged copyright infringement against both Nike and Weiden + Kennedy for "cop[ying]," "reproduc[ing]," "distribut[ing]," "adapt[ing]," and "publicly display[ing]" the Wallace tattoo without his permission.[77] It should be noted that while Reed's complaint alleges infringement of the "Wallace tattoo," the alleged infringement was actually of his initial drawings, not the tattoo on Wallace's arm.

Reed's second and third claims for relief were alleged against Wallace individually. In this second claim, Reed alleged contributory infringement against Wallace for causing Nike and Weiden + Kennedy to believe that Wallace was the exclusive owner of the copyrights in the Wallace tattoo and to

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72 *Id.* at 3–4 ("[S]uch exposure would be considered common in the tattoo industry.").

73 *Id.* at 4.

74 *Id.*

75 *Id.*; *see* Copyright Registration Number VA 1-265-074, entitled "Egyptian Family" (Aug. 11, 2004). Reed was required to register his artwork to be able to bring civil infringement action. 17 U.S.C. § 411(a) (2012) ("[N]o civil action for infringement of the copyright . . . shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

76 Complaint, *supra* note 13, at 4.

77 *Id.* at 4–5. Reed alleged infringement of exclusive rights granted by his copyright in the tattoo under 17 U.S.C. § 501(a), which states that "[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a) . . . is an infringer of the copyright or right of the author, as the case may be." 17 U.S.C. § 501(a). In relevant part, under § 106 the owner of a copyright has the exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . . (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works . . . to display the copyrighted work publicly . . . .

17 U.S.C. § 106(1)–(3), (5).

subsequently infringe Reed's exclusive rights.[78] In his third claim for relief, Reed alleged, in the alternative, that, if Wallace was a joint author and therefore a co-owner of the copyright in the Wallace tattoo, Reed was entitled to an accounting for profits obtained by Wallace for the use of the Wallace tattoo in the Nike commercial.[79]

Reed requested damages from Nike, Weiden + Kennedy, and Wallace and injunctive relief against Nike and Weiden + Kennedy.[80] However, the case was ultimately settled before going to trial.[81]

B. Whitmill v. Warner Bros.*: The Mike Tyson Tattoo*

On April 25, 2011, S. Victor Whitmill, a tattoo artist formerly from Las Vegas, Nevada, brought suit in the U.S. District Court for the Eastern District of Missouri against Warner Brothers for copyright infringement.[82] In 2003, Whitmill tattooed an "original and distinctive" design on the left side of Mike Tyson's face (the "Tyson tattoo").[83] Unlike the tattoos at issue in *Reed* and *Escobedo*, which were based upon preliminary sketches and drawings, Whitmill never made any drawings prior to tattooing Tyson's face.[84] Several years after tattooing Tyson, Whitmill discovered that Warner Brothers planned to release the motion picture *The Hangover 2*, in which the character portrayed by actor Ed Helms has a face tattoo identical to the Tyson tattoo.[85] Warner Brothers had also released movie posters and other advertisements depicting Helms's character with the allegedly infringing tattoo.[86]

Whitmill alleged that he created the Tyson tattoo contemporaneously with tattooing it in Tyson's face, that the Tyson tattoo was subject to copyright protection once applied to Tyson, and that he was the owner of the copyright.[87] Furthermore, prior to Whitmill creating the Tyson tattoo, Tyson signed a release stating "all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio of Dermagraphics," Paradox-Studio of Dermagraphics being the name under

78 Complaint, *supra* note 13, at 5–6. The doctrine of contributory infringement is derived from common law principles and is well established in copyright law. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement." (citing Gershwin Publ'g. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971))).

79 Complaint, *supra* note 13, at 6–7.

80 *Id.* at 7.

81 Stipulation of Dismissal with Prejudice at 1, Reed v. Nike, Inc., No. 05–CV–198 BR (D. Or. Oct. 19, 2005).

82 Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 1–2.

83 *Id.* at 2.

84 Plaintiff's Memorandum in Support of His Motion for Preliminary Injunction at 2, Whitmill v. Warner Bros. Entm't Inc., No. 4:11–CV–752 (E.D. Mo. Apr. 28, 2011).

85 Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 4.

86 *Id.* at 4–5.

87 Plaintiff's Memorandum in Support of His Motion for Preliminary Injunction, *supra* note 84, at 5–6.

which Whitmill was doing business at the time.[88] Whitmill registered the copyright in the Tyson tattoo with the Copyright Office by submitting photographs of the tattoo in 2011 after learning about *The Hangover 2* and immediately prior to bringing his lawsuit.[89]

Whitmill's complaint alleged that Warner Brothers infringed his copyright by "copying," "distribut[ing]," and "publicly display[ing]" the Tyson tattoo in promotional materials, as well as by creating a derivative work without his permission.[90] Whitmill requested injunctive relief seeking that Warner Brothers be enjoined from continued infringement,[91] as well as monetary damages.[92] Although the case settled before reaching trial,[93] Judge Catherine Perry, when ruling on Whitmill's motion for preliminary injunction, indicated that she believed Whitmill had "a strong likelihood of prevailing on the merits for copyright infringement"[94]:

> Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face . . . or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law . . . .[95]

C. Escobedo v. THQ, Inc.*: The Condit Tattoo*

On November 16, 2012, Christopher Escobedo, a Phoenix, Arizona tattoo artist, filed a lawsuit in the U.S. District Court for the District of Arizona against video game developer THQ, Inc. alleging copyright infringement.[96] In 2009, Escobedo tattooed a large depiction of a lion (the "Condit tattoo") on the ribcage of Carlos Condit, a popular mixed martial artist.[97] Prior to

88 Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 3 (alteration in original). When Whitmill tattooed Tyson, he was doing business as Paradox-Studio of Dermagraphics. *Id.* at 3.

89 *See* Copyright Registration Number VA 1-767-704, entitled "Tribal Tattoo" (Apr. 19, 2011).

90 Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 7–8. Whitmill alleged infringement under § 501 of his exclusive rights under § 106 granted by his copyright in the Tyson tattoo.

91 *Id.* at 7. Not only did Whitmill seek an injunction to stop Warner Brothers from continuing its use of the Tyson tattoo in promotional materials for *The Hangover 2*, but he also sought an injunction enjoining the release of the movie with the depiction of the tattoo. *Id.* at 8.

92 *Id.* at 8.

93 Order of Dismissal, Whitmill v. Warner Bros. Entm't Inc., No. 4:11–CV–752 (E.D. Mo. June 22, 2011).

94 Transcript of Hearing on Motion for Preliminary Injunction at 3, Whitmill v. Warner Bros. Entm't Inc., No 4:11–CV–752 (E.D. Mo. June 21, 2011).

95 *Id.*

96 Complaint, *supra* note 15, at 1–2.

97 *Id.* at 2.

tattooing Condit, Escobedo first sketched the Condit tattoo on paper,[98] which became the basis for the subsequent tattoo. On February 24, 2012, Escobedo registered his sketch of the Condit tattoo with the Copyright Office.[99]

In February 2012, THQ released the video game *UFC Undisputed 3*, for both the Xbox360 and PlayStation 3 gaming systems, as a follow-up to its 2010 release of *UFC Undisputed 2010*.[100] Both video games included a computer-generated character representing Condit that could be selected for use during the gameplay—the Condit character featured a reproduction of the Condit tattoo.[101] When the Condit character was selected for use by the game-player, the character, with the Condit tattoo, was displayed prominently in different features of the gameplay.[102]

In his complaint, Escobedo alleged he had granted Condit an implied license to display the Condit tattoo on his body[103] but that he did not authorize any reproduction of the tattoo.[104] Escobedo alleged copyright infringement[105] against THQ for violating his "reproduction,"[106] "derivative works,"[107] "distribution,"[108] and "display"[109] rights by including the Condit tattoo on the Condit video game character.

Escobedo requested monetary damages consisting of an accounting by THQ of its profits earned by the alleged infringement.[110] However, the case was dismissed by the district court, with prejudice, for failure to prosecute.[111]

III. Copyright Protection and Tattoos

To warrant copyright protection, a work must satisfy the "fixation" and "originality" requirements of § 102(a). Undertaking a basic application of the statute, it seems that tattoos would satisfy these requirements.[112] As dis-

98 *Id.*

99 Copyright Registration Number VA-1094-747, entitled "Lion Tattoo" (Feb. 24, 2012).

100 *See* Complaint, *supra* note 15, at 3; *UFC Undisputed 3*, THQ, http://www.thq.com/us/ufc-undisputed-3/360 (last visited Mar. 11, 2015).

101 *See* Complaint, *supra* note 15, at 3.

102 *Id.* at 3–4.

103 *See id.* at 6.

104 *Id.*

105 *See* 17 U.S.C. § 501(a) (2012).

106 *See* Complaint, *supra* note 15, at 6; 17 U.S.C. § 106(1).

107 *See* Complaint, *supra* note 15, at 6; 17 U.S.C. § 106(2).

108 *See* Complaint, *supra* note 15, at 6; 17 U.S.C. § 106(3).

109 *See* Complaint, *supra* note 15, at 6; 17 U.S.C. § 106(5).

110 *See* Complaint, *supra* note 15, at 7.

111 Minute Entry, Escobedo v. THQ, Inc., No. 2:12–CV–2470 (D. Ariz. Dec. 11, 2013).

112 In addition to the arguments made in this Note, there is a strong argument that human skin is not a "tangible medium of expression" under the Copyright Act; however, addressing that issue is beyond this Note's scope. For an analysis of that issue see Arrielle Sophia Millstein, *Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression*, 4 Pace Intell. Prop. Sports & Ent. L.F. 135, 140 (2014).

cussed previously in Section II.C, at a hearing to rule on Victor Whitmill's motion for a preliminary injunction, Judge Catherine Perry, appraising Whitmill's possibility of success on the merits stated, "[o]f course tattoos can be copyrighted. I don't think there is any reasonable dispute about that."[113] Judge Perry stated further that, "[t]hey are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face . . . or saying that someone who has a tattoo can't remove the tattoo or change it."[114] It is true that granting a copyright for the Tyson tattoo is not copyrighting Tyson's face; however, it is not so obvious that there would be no restriction on Tyson's use of his face or his ability to alter the tattoo. In fact, granting a copyright in the Tyson tattoo could have the opposite effect.

A tattoo is widely recognized as permanent. Unless a person decides to have his or her tattoo surgically removed, the tattoo will remain in the individual's skin for the duration of his or her life.[115] It could be argued that a human being will eventually die, however, the span of a human life should satisfy the requirement of fixation for "more than [a] transitory duration."[116]

To satisfy the originality requirement, a tattoo must be independently created and must exhibit more than a de minimis amount of creativity. Undoubtedly, in many circumstances, a tattoo will consist of a tattoo artist's independently created expression that possesses the necessary level of creativity. On the opposite end of the spectrum, for example when a tattoo consists of words or common geometric shapes such as a heart or clover, it is likely that the work would not have been independently created by the tattoo artist and would not meet the minimum requirements for creative expression.[117]

Although the above application of the Copyright Act seems to indicate that, in general, tattoos could be copyrightable subject matter, the resolution of the issue should not be as obvious as Judge Perry would make it seem. First, it is important to recognize that there is a distinction between a tattoo and the drawings, sketches, or other works of art upon which a tattoo is based. Section A of this Part will discuss this distinction. Second, granting copyright protection to tattoos will have far more significant consequences than granting protection to most other works of art. These negative policy implications will be discussed in Section B of this Part. Finally, Section C will make the argument that the copyright statute could be interpreted so as to

113 Transcript of Hearing on Motion for Preliminary Injunction, *supra* note 94, at 2.

114 *Id.* at 2.

115 *See Laser Tattoo Removal*, WEBMD, http://www.webmd.com/skin-problems-and-treatments/laser-tattoo-removal (last visited Mar. 11, 2015) (discussing laser tattoo removal as the most effective surgical procedure for removing unwanted tattoos).

116 17 U.S.C. § 101 (2012).

117 *See* 37 C.F.R. § 202.1 (2012) ("The following are examples of works not subject to copyright . . . (a) Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring . . . .").

not include tattoos within the purview of the Copyright Act, therefore avoiding the negative implications discussed.

A. The Tattoo/Drawing Distinction

When a person meets with a tattoo artist to be tattooed, the tattoo artist may use several different methods to develop the concept for the tattoo. In some cases, the client will bring in photographs or drawings that the client wants reproduced in a tattoo.[118] In other instances, the tattoo artist's client will choose a design from the tattoo artist's existing "flash" collection.[119] For a more custom or unique tattoo, a client might present the tattoo artist with his or her ideas for a tattoo then work with the tattoo artist to develop a preliminary drawing which will become the basis for the subsequent tattoo.[120] In contrast, for those more trusting clients, a tattoo artist may choose to create a tattoo contemporaneously with the tattooing of the client, without basing the tattoo on any prior work.[121] As will be discussed, the distinction between a tattoo and the preliminary works upon which a tattoo is based is important.

Section 102(a) extends federal copyright protection to "original work[s] of authorship fixed in any tangible medium of expression."[122] When a tattoo artist creates a drawing or sketch upon which a subsequent tattoo is based, assuming the drawing satisfies the § 102(a) "fixation" and "originality" requirements, the drawing or sketch will likely be subject to copyright protection.[123] The fact that the drawing or sketch is later reproduced in a tattoo should not factor into the analysis—the drawings should not be considered to be different than any other artistic drawing.

In both *Reed* and *Escobedo*, the tattoo artists each based their tattoos upon drawings and sketches they created prior to applying the tattoos to their respective clients.[124] Assuming for the purposes of this Note that these preliminary drawings satisfied § 102(a), Reed and Escobedo likely owned the copyrights in their drawings. In fact, both tattoo artists, prior to initiating their respective lawsuits, registered their drawings with the Copyright Office.[125] While the artists' lawsuits alleged infringement of their tattoos, the alleged infringement is more properly characterized as an infringement of their drawings, not the completed tattoo. Therefore, when Reed and Escobedo allege the ownership of a copyright and infringement of their rights, it is not a copyright in the tattoo, but a copyright in the preliminary drawings.

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118 *See* Beasley, *supra* note 12, at 1162.

119 *Id.* In such a case it is possible that the tattoo artist does own the copyright in the "flash" art.

120 *Id.*

121 *Id.*

122 17 U.S.C. § 102(a) (2012).

123 *See* Perzanowski, *supra* note 16, at 526–27.

124 *See* Complaint, *supra* note 13, at 3; Complaint, *supra* note 15, at 2.

125 *See* Copyright Registration, *supra* note 75; Copyright Registration, *supra* note 99.

The question of copyrightability in a case like *Whitmill* is complicated by the fact that there were no copyrightable preliminary drawings upon which the Tyson tattoo was subsequently based.[126] Therefore, when Whitmill registered his work with the Copyright Office, his registration was for the tattoo fixed on Mike Tyson's face, not a prior drawing or sketch fixed on a piece of paper.[127]

B. Implications of Copyrightable Tattoos

The distinction highlighted in the above Section will have an impact on the analysis of the implications of granting copyright protection to tattoos. The analysis of authorship and extension of rights provided by the Copyright Act and VARA will differ depending upon whether the work in question is a preliminary drawing or a tattoo. Analysis with respect to preliminary drawings should not differ markedly from analysis of any other drawing under the Copyright Act.[128] In comparison, analysis as to tattoos is more complicated and may indicate that, as a policy matter, tattoos should not be granted copyright protection. The focus of this Section is on highlighting several of the implications of granting copyright protection to tattoos as opposed to preliminary drawings.

1. Tattoo Artist Control over the Client

Assuming that a court determines tattoos to be copyrightable, it becomes necessary to determine the author of the tattoo, which will likely be the tattoo artist, the tattoo recipient, or possibly both. As previously discussed, there are three possible forms of authorship that must be considered: "sole authorship," "joint authorship," and "work made for hire."[129]

To qualify as a "work made for hire," the tattoo artist would have to qualify as either an employee of his or her client acting within the scope of his or her employment or as an independent contractor.[130] First, since a tattoo artist is not likely to be found to be the employee of his or her client under the common law agency standard promulgated by *Community for Creative Non-Violence v. Reid*,[131] the first possibility of qualifying under the doctrine does not apply. Second, for a tattoo artist to qualify as an independent contractor under the second option of the "work made for hire" doctrine, the tattoo must be for use as a contribution to a collective work and the tattoo artist and client must agree that the tattoo is a "work made for hire."[132]

126 *See* Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 2.

127 *See* Copyright Registration, *supra* note 99.

128 Since the focus of this Note is on copyrightability of tattoos and not the preliminary drawings, this point will not be examined further.

129 *See supra* subsections I.B.1–2.

130 17 U.S.C. § 101 (2012).

131 490 U.S. 730 (1989).

132 17 U.S.C. § 101.

This prong will likely not be satisfied since a tattoo is generally not intended to be incorporated into a collective work.[133]

Since a tattoo is most likely not a "work made for hire," it must be either a work of "sole authorship" or a "joint work." A tattoo is unlikely to be a "joint work" since the client probably could not be found to have made an independently copyrightable contribution to the creation of the tattoo. It is possible that the tattoo artist and the client could both intend to be coauthors of the tattoo; however, it is more likely that the tattoo artist would view himself or herself as the sole author of the work. Therefore, since a tattoo is most likely not a "work made for hire" or a "joint work," if it is copyrightable, it must be a work of "sole authorship." If a tattoo is a work of "sole authorship," the sole author would be the tattoo artist. In that case, the tattoo artist would be vested with "the exclusive rights to do and to authorize" the exercise of the rights granted in § 106.[134] As a policy matter, this raises significant public policy concerns since the grant of copyright protection in a tattoo could enable the tattoo artist to control not only his or her artwork, but the person on whom it is "fixed."

To realize the breadth of this problem, it is helpful to consider a hypothetical example. Since the facts in *Whitmill* involve the creation of a tattoo contemporaneously with the tattooing,[135] that case will be utilized here. The rights that would be granted to Whitmill if he were to be granted copyright protection in the Tyson tattoo would include the sole right to "reproduce" the tattoo, "prepare derivative works" based on the tattoo, "distribute copies" of the tattoo, and "display the [tattoo] publicly."[136] Allowing Whitmill the right, for example, to do or authorize the public display of the tattoo highlights the public policy problem.

The term "to display" is defined in the Copyright Act as "to show a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially."[137] To display a work "publicly" under the Copyright Act means to "display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[138] The work can also be displayed publically by transmitting or communicating a display of a work, such as by television or film, to the public.[139]

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133 However, it might be argued that tattooing a person who has numerous tattoos created by multiple tattoo artists could constitute a contribution to a "collective work."

134 17 U.S.C. § 106. In the case of a joint work, certain rights granted to the tattoo artist may be limited by the rights of the client.

135 *See* Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 1.

136 17 U.S.C. § 106(1)–(3), (5).

137 *Id.* § 101.

138 *Id.*

139 *Id.* ("[T]o transmit or otherwise communicate a . . . display of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.").

The problem that would arise if Whitmill were to be granted copyright protection, and thus the display rights, in the Tyson tattoo, would be that he could control Tyson's appearances in public, including Tyson's personal appearances, television appearances, appearances in film, and appearances in print media.[140] Since Whitmill would have the "exclusive right[ ] . . . to authorize"[141] the public display of the Tyson tattoo, Whitmill would also possess the right to exclude and could effectively force Tyson to forego public appearances or, when appearing in public, to cover the tattoo. If Tyson were to choose to infringe Whitmill's copyright by publicly displaying his tattoo, he could be subject to monetary damages for any actual damages suffered by Whitmill, as well as to an accounting for the profits earned by such infringement.[142] Furthermore, should Tyson appear on television or in a motion picture, the television network or film studio could be subjected to infringement liability.

Since Tyson is a celebrity/athlete who likely derives significant income from his appearances in person, on television, and in films, forcing him to forego these public appearances could have a significant impact on his ability to earn an income. A similar consequence is likely if Tyson were forced to cover the tattoo, especially since the tattoo is located prominently on his face. Requiring Tyson to cover his face could have a serious impact on his earning potential, not to mention his ability to function normally in everyday life. Additionally, if television networks or film studios face the prospect of copyright infringement liability, Tyson might find it difficult to secure work in the first place. While these issues might be of greater concern to celebrities and other public figures, it is not inconceivable that non-celebrities might encounter similar problems should tattoos be granted copyright protection. Until Congress recognizes a celebrity exception to the copyright law, this distinction should be irrelevant.

2. Tattoo Artist's Moral Rights Versus Client's Autonomy

As discussed in Section I.C, the VARA provides protections for an author's moral rights, including the right of attribution and the right to integrity.[143] VARA grants the author the right to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to [the author's] honor or reputation" as well as "any destruction

140 Each of these appearances could also implicate the other exclusive rights granted by the Copyright Act, which might be infringed by Tyson or a third party such as a television network.

141 17 U.S.C. § 106.

142 *Id.* § 504(b) ("The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.").

143 Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.

of a work of recognized stature."[144] Essentially, VARA prohibits changing or destroying a copyrighted work of visual art.

If tattoos are granted copyright protection, the tattoo artist would be granted the rights conferred by VARA. VARA would prohibit the recipient of the tattoo from altering, modifying, or destroying his or her tattoo, unless granted permission by the tattoo artist. This would include prohibiting laser removal of a regretted tattoo, the covering of a tattoo with a second tattoo, or even adding to a tattoo. In each of these cases, the court could enjoin the tattoo recipient from taking any of these actions and make the tattoo recipient pay the tattoo artist damages for any alteration of the tattoo.

As was also demonstrated in subsection III.B.1, if tattoos were found to be copyrightable, the rights conferred by VARA would carry significant human rights implications related to the ability of the tattoo artist to control a client's freedom to make choices with respect to his or her body. Granting one person such controlling authority over another person by virtue of the copyright law would be in direct conflict with the Thirteenth Amendment's express grant of individual freedom and autonomy.[145] Furthermore, it most certainly would be beyond the intended scope of the Copyright Act or VARA. The conflict that would arise between VARA and basic human rights should be sufficient to warrant extreme caution when considering the copyrightability of tattoos and could be the basis for concluding that tattoos should not be granted copyright protection.

C. Are Tattoos Copies?

What if a "copy" of the Tyson tattoo never existed? "Copies" are defined in § 101 as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[146] To satisfy the "fixation" requirement for copyrightable subject matter, a work must be "embodi[ed] in a copy,"[147] therefore, if there is no "copy" of a work the fixation requirement cannot be satisfied and the work is not copyrightable subject matter under the Copyright Act.

By defining "copies" as "material objects," Congress likely did not intend to include human skin within the category of mediums in which a copyrightable work could be embodied. In ordinary, everyday usage of the word "objects," most people would not include human beings or their skin within the definition. Rather, an object is generally understood, consistent with its dictionary definition, as being "a thing that you can see and touch and that is not alive."[148] This understanding is supported by the legislative history of

144 17 U.S.C. § 106A(a)(3).

145 U.S. CONST. amend. XIII, § 1.

146 17 U.S.C. § 101.

147 *Id.*; *see supra* subsection I.A.1 (discussing the fixation requirement).

148 *Object*, MERRIAM-WEBSTER, h115ttp://www.merriam-webster.com/dictionary/object (last visited Mar. 11, 2015).

the Copyright Act, which does not make any reference to tattoos or to a human body being utilized as a "copy" for the purpose of obtaining a copyright.[149] Examination of the copyright statute as a whole also indicates that inclusion of the human body as a "copy" would require absurd interpretation of other provisions.

For example, § 407 requires that the owner of a copyrighted work deposit, with the Library of Congress, two copies of the work.[150] It should be fairly obvious that copies of a tattoo could be made on paper, which could then easily satisfy this deposit requirement. But if the human body is included with the purview of things that could be "copies" under the Copyright Act, the human body would be included as a "copy" that could be placed on file with the Library of Congress. Of course, placing a human body on file with the Library of Congress would not be possible. What this highlights is that inclusion of the human body as a "copy" would lead to strange results, indicating Congress likely never contemplated nor intended for the human body to be a "copy" for the purpose of the Copyright Act.

Another example that indicates Congress likely did not intend to include the human body within the definition of "copies" can be found in relation to the first sale doctrine. Ownership of the material object in which a copyrighted work is fixed does not confer any of the exclusive rights granted by the Copyright Act.[151] However, the first sale doctrine, which provides that "the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy,"[152] provides an exception to this rule. In addition to the authority "to sell or otherwise dispose of" the copy of a work, the first sale doctrine also provides that, "[n]otwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled . . . to display that copy publicly . . . to viewers present at the place where the copy is located."[153] Though it would seem that the exceptions granted by the first sale doctrine could be employed to provide a remedy for the policy problems discussed in Section III.B,[154] deeper analysis demonstrates not only that application of the doctrine to tattoos would be also strained, but also provides further support for the argu-

149 Declaration of David Nimmer at 16, Whitmill v. Warner Bros. Entm't, Inc., No. 4:11–CV–752 (E.D. Mo. dismissed June 22, 2011).

150 17 U.S.C. § 407(a)(1). The publication requirement is satisfied once copies of the work are distributed to the public "by sale or other transfer of ownership." *Id.* § 101.

151 17 U.S.C. § 202 ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work. . . .").

152 *Id.* § 109(a).

153 *Id.* § 109(a), (c).

154 Since § 109(c) only allows for display to "viewers present at the place where the copy is located," it would still preclude Tyson from displaying the tattoo on television or in film. *Id.*

ment that tattoos do not qualify as "copies" under the Copyright Act. If this is true, tattoos would not be subject to copyright protection.

Returning to the Whitmill example[155] and assuming, arguendo, that Mike Tyson's face qualifies as a "copy," Tyson's ownership of his face would not confer upon him any of Whitmill's exclusive rights in the Tyson tattoo. Before Tyson's face was tattooed by Whitmill, Tyson was undoubtedly the owner of his face. By tattooing Tyson, Whitmill certainly did not obtain ownership of Tyson's face.[156] Therefore, since Whitmill never held title to the "copy" of the Tyson tattoo, he could not sell or otherwise convey title of that copy to Tyson as required for the first sale doctrine to apply.[157] This difficulty in applying the first sale doctrine—a difficulty which is caused by the fact that a tattoo is fixed on a human being and not on a transferable, inanimate object—supports the conclusion that the first sale doctrine, and the Copyright Act in general, did not contemplate granting protection to tattoos.

Another impediment to the application of the first sale doctrine in this hypothetical is the limitation of the doctrine found in § 109(d) which provides that "[t]he privileges prescribed by subsection[ ] . . . (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy . . . by rental, lease, loan, *or otherwise*, without acquiring ownership of it."[158] Once again, application of the first sale doctrine to tattoos is strained because tattoos, unlike a painting, sculpture, or novel, are created on human flesh as opposed to an item of personal property. As discussed above, Tyson likely never parted with the title to his skin before, during, or after being tattooed by Whitmill. However, it could be argued that by allowing himself to be tattooed by Whitmill, Tyson granted some interest in his skin to Whitmill. This may seem extreme, but what if there was an agreement?

In *Whitmill*, Tyson signed a release acknowledging "that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of [Whitmill]."[159] It is not clear how a court would construe this agreement. A court may find that the clause is only meant to reserve the intellectual property rights in Whitmill's works to Whitmill. However, use of the terms artwork, sketches, and drawings seems to include the physical embodiment of Whitmill's works, which in this case would also include Tyson's face. While such a contract would likely be held invalid under the Thirteenth Amendment, if copyright protection were to be

155 *See supra* Section III.B.

156 Under the Thirteenth Amendment, there is no circumstance in which Whitmill could legally obtain ownership of Tyson's face. *See* U.S. CONST. amend. XIII, § 1.

157 *See* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1355 (2013) ("[O]nce a copy . . . has been lawfully sold (or its ownership otherwise lawfully transferred), the buyer of that *copy* and subsequent owners are free to dispose of it as they wish.").

158 17 U.S.C. § 109(d) (emphasis added).

159 *See* Verified Complaint for Injunctive and Other Relief, *supra* note 14, at 3 (first and second alterations in original).

granted to tattoos, it is not impossible that a court would have to address similar issues.

Since, under the foregoing interpretation of the Copyright Act, the human body is not an "object," it would not qualify as a "copy" in which a work can be fixed. When a tattoo is created contemporaneously with its application to human skin, the fixation requirement cannot be satisfied because, per the requirements of the Copyright Act, there is no resultant copy of the work. Therefore, a tattoo cannot be the subject of copyright protection. This interpretation of the statute will solve most of the aforementioned copyright issues arising in the realm of tattoos with respect to tattoos created contemporaneously to their application to a person's skin and will impact the infringement analysis for tattoos based upon a tattoo artist's drawings.

In the case of tattoos created as they are applied to a person's skin, since the resultant tattoo would not be embodied in a "copy," there would be no copyright protection available for the tattoo. Therefore, the tattoo artist would have no intellectual property rights in the tattoo that could restrict the client's or a third party's use of the tattoo. Furthermore, since no copyright protection would be available in the first instance, the client would also have no intellectual property rights in the tattoo he or she received. Any person would be free to utilize the tattoo in ways that, if the tattoo were copyrightable, would infringe upon the copyright owner's exclusive § 106 rights.

One possible negative consequence of this interpretation is that tattoo artists who create tattoos based upon other copyright protected works will be protected from liability for infringement because the resultant tattoo will not qualify as a "copy" as required for copyright infringement.[160] Although creating a sort of "safe harbor" for tattoo artists could be a potential concern for copyright owners, the difficulty of identifying persons with tattoos depicting copyrighted work and the costs of initiating a lawsuit against such persons would likely outweigh the benefits of taking such action. Furthermore, if a lawsuit were brought alleging that a person's tattoo infringes upon a copyrighted work, concerns, similar to those that were discussed in this Note,[161] would arise regarding the courts' ability to fashion an appropriate remedy.[162] Finding that tattoos are not "copies," and therefore not copyrightable subject matter, would also address these problems.

For tattoos that are based upon a preliminary drawing, the analysis is not as straightforward and infringement liability might not be completely precluded. A tattoo artist may own the copyright in his or her preliminary drawings;[163] however, the replication of the drawing in tattoo form will not create

160 For example, since a tattoo is not a "copy," if a tattoo artist were to create a tattoo depicting Mickey Mouse, the tattoo artist would not be liable for infringing upon Disney's copyright in that iconic character.

161 *See supra* Section III.B.

162 A court could conceivably require a person to keep the tattoo covered, or even more extreme, order surgical removal of the tattoo.

163 *See supra* text accompanying note 123.

a "copy" of the preliminary drawing within the meaning of the statute since the replication is not embodied in a "material object." Therefore, the tattoo artist will have no intellectual property rights in the tattoo and no right to control the subsequent display of the tattoo. Either the client or third party could display the tattoo without violating the Copyright Act, since violation of the § 106 display right requires showing a "copy" of a protected work.[164] As to the other § 106 rights, however, holding that a tattoo is not a "copy" may not foreclose the possibility of infringing upon the tattoo artist's copyright in his or her preliminary drawing. If the recipient of a tattoo or a third party were to reproduce the depiction embodied in a tattoo that was created contemporaneously with its application in the recipient's skin there would be no infringement. However, when the tattoo is based upon a preliminary drawing, the tattoo artist may possess the copyright in the preliminary drawing and it may be possible that the reproduction could be found to infringe upon that preliminary drawing. The same infringement analysis would be applicable with respect to the other § 106 rights.[165] Therefore, determining whether a tattoo was first conceived of while being applied to a person's skin or whether it was based upon a preliminary drawing or other copyright protected work will be critical for the infringement analysis.

In sum, holding a tattoo not to be a "copy," and therefore not copyrightable subject matter under the Copyright Act, will eliminate the possibility of infringement with respect to tattoos created contemporaneously with their application in human skin. In cases involving a tattoo based upon a tattoo artist's copyright-protected preliminary drawing, the possibility of infringement will not be eliminated, but rather, the scope of possible conduct that will result in infringement will be narrowed.

CONCLUSION

One of the purposes of the Copyright Act is to provide incentives for authors to create new works by awarding them a limited monopoly over their works so as to "promote . . . Progress."[166] This goal of copyright law certainly seems applicable to tattoo artists; however, extending copyright protection to tattoo artists may not provide much of an additional incentive for the creation of tattoos.[167] In light of the fact that tattoos and tattooing are gaining increased popularity in American society, it is not altogether clear that copyright protection is necessary to "promote . . . Progress" in tattoo works.

Regardless, the prospect of extending copyright protection to tattoos carries with it serious policy implications that are not present with other works of art—most significantly the potential for incursion upon individuals' basic human rights—that likely trump the benefits gained by granting tattoo artists copyright protection. When a future court is required to determine

164 *See* 17 U.S.C. § 101 (2012).

165 This would not apply to the "performance" rights listed in § 106.

166 U.S. CONST. art. I, § 8, cl. 8.

167 *See* Perzanowski, *supra* note 16, at 586.

whether tattoos are copyrightable subject matter, the proper course should be to deny copyright protection. Rather than attempting to determine whether tattoos meet the § 102 requirements for copyrightability or engaging in equitable balancing to determine whether granting copyright protection to tattoos would violate public policy, courts should look to the definition of "copies" provided by the Copyright Act. That definition should be interpreted as requiring fixation in an inanimate object and not to include the human body. By interpreting the statute in this manner, the court will be able to decide that tattoos are not copyrightable subject matter protected by the Copyright Act.