

Case Study

The Copyrightability of Tattoos: A Practical Examination of Law Cases

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Abstract

In the recent years, tattoo has become a trend and, as each subject which becomes a mass product, it has begun concerning areas of science. One of the major areas it is being linked to, is law science and more precisely intellectual property rights. It concerns intellectual property because each tattoo design can be considered as an original work of art protected by law. The major concern of law protection arises from the fact that the tattoos are depicted in other cases for commercial reasons. In this paper we will examine the basic legal dispute as to whether the tattoos can be considered as works of art and as to whether the intellectual property rules can be applied in their case.

Keywords

Tattoo, copyright, intellectual property, law cases

1. Introduction

Without a doubt, law is a vivid science, directly associated to everyday life and affected by its constant evolution and change. Moreover, intellectual property, as far as copyrightable works and their protection is concerned, is a field which is not a matter of creating an exhaustive list of works protected, as art is a field constantly evolving and finding new means of expressing itself and mankind.

A contemporary subject which has concerned intellectual property law during the last decade is the copyrightability of tattoos. More precisely, the two basic questions are, who owns the copyright to the tattoo and which are the permitted uses of it. During the last decade, there have been plenty of lawsuits in the USA coming from tattoo artists concerning the reproduction of tattoos they created, in different media. However, it should be noted that none of these cases have resulted in a definitive court decision as the parts have settled out of court.

In this paper, we will begin by a short analysis of the legal framework concerning copyright. This legal framework is the one also concerning the relationship between tattoo and intellectual property.

Subsequently, our basic goal is to analyze the most important legal battles concerning the subject, in order to create a complete case study of the subject based on the practical aspects of the disputes which have reached courts. Therefore, we will examine the different circumstances of each case, the different arguments of the parties and the position of the court concerning these arguments. Our inspection will not be based only on a theoretical framework, but mostly on a practical one, being concentrated in the specific cases and not in an abstract legal text. Finally, based on this examination, after having gathered the different arguments, we will summarize by assessing the present situation and elaborating a personal conclusion concerning the copyrightability of tattoos and the potential challenges for the future.

2. Legal Framework

Firstly, we should point out that the protection of artistic works with intellectual property rights is based on the Constitution. Article I, Section 8, Clause 8, mentions that “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”. It is, therefore, made clear that the legal framework in the USA demands the protection of artistic works directly from its constitution and leaves the margin to the rest of the law to determine the way in which this protection will be accorded.

The basic legal text governing intellectual property rights is the Copyright Act of 1976. More specifically, it highlights the copyrightable works, the rights attributed and the owner of the works. Section 102 (a) states, that “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”. In this point, the law refers to the need of the work of art to be fixed in a medium which can be perceived in any means by human. Whereas, in section 106, a list of exclusive rights of copyright owners can be found. These rights are reproduction, distribution, display and creating derivatives of their copyrighted work. In addition, section 201 mentions that “copyright in a work protected under this title vests in the author or authors of the work”. However, we should note that the exception for works “made for hire” is provided for in the law. “Works made for hire are works that the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright”. In the case of works made for hire, the law demands a signed agreement, which means that in the absence of such an agreement we cannot consider that we have to do with a “work made for hire” but with a typical work, whose author and copyright owner is its creator. Moreover, section 202 mentions that “any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately”. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title”.

This provision means that the copyright owner can transfer some of the exclusive rights accorded to him, while retaining the rest of them and remaining master of his work. As far as the originality of works is concerned, we should point out, that the Copyright Act mentions that original are the works “in which the author used some modicum of creativity”. In this part, the Copyright Act evokes the fact that an original work should not copy a previous one, but create an entirely new concept.

At this point, we should note that there is an important limitation on copyright protection, the “fair use”, which is often used in legal cases in order to sustain that a tattoo should not be protected. The Copyright Act elaborates four criteria in order to determine the notion of fair use and its lawful application. The four factors are the following: (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. Even though, a court should keep in mind all these four elements, the list is not exhaustive. Therefore, there are also other factors which can be taken into account in a court ruling as far as “fair use” is concerned. Moreover, we should add that each case is judged by its own special circumstances. To sum up, it is clear that copyright protection is crucial for the law and is carefully provided for. However, as time advances, the law faces new challenges and each court ruling concerning these challenges is, finally, based on a special interpretation of the Copyright Act.

3. Case Studies

3.1 Ricky Williams Tattoo Case

In December 2012, Stephen Allen, a Louisiana-based tattoo artist, filled a law suit against video game publisher Electronic Arts and the Miami Dolphins running back, Ricky Williams. The subject of the law suit was a tattoo drawn on Ricky Williams bicep in 2003 which was depicted in the video game NFL Street which was released in 2004 for PlayStation 2, Xbox and GameCube. The tattoo is also depicted on the cover of the video game showing Williams running while holding a football. According to Allen, even though, a couple of years have passed since the release of the video game, he became aware in 2012 that the tattoo he created is used in that way in the video game. This case, ended by Ricky Williams withdrawing his claim in 2013.

Even though this case drew media attention to the subject of the copyrightability of tattoos, there was no definitive court ruling. The law suit, therefore, served the purpose of bringing the subject to the legal forefront. However there was no crucial result as the courts did not have the chance to rule on whether the protection should be granted or not.

3.2 Rasheed Wallace Tattoo Case

In 1998, basketball player, Rasheed Wallace then playing for the Portland Trail Blazers, had a tattoo created on his arm by the tattoo artist, Matthew Reed from “TigerLilly Tattoo” and “DesignWorks” in Portland, Oregon. The tattoo depicted is an Egyptian-themed family design with a king and queen, three

children and a stylized sun in the background. Judging from the special design, it is evident that, Reed created an original tattoo based on an idea of his own and Wallace was charged with 450 dollars in order to ink this tattoo. This tattoo is considered as one of the most distinctive tattoos in NBA. More precisely, it was, also, featured in “Sports Illustrated Kids” as material for a game of matching tattoos with players. In 2004, Matthew Reed filed a lawsuit claiming that the tattoo he owns copyright to and which is depicted on Wallace’s arm was illegally used in a Nike advertisement for basketball shoes, as the advertisement featured Wallace. Matthew Reed demands the dismissal of the advertisement and damages to be paid for this use. More precisely, he claims that his copyright to the “Egyptian Family Pencil Drawing” is violated by the advertisement. Moreover, he adds that he became aware of this use in 2004.

This case was also settled out of court before the case went to trial, approximately eight months after it was filed. Even though, a contract was signed prior to the creation of the tattoo, it did not mention the transfer of copyright. Consequently, it would be hard for the tattoo to be considered a work for hire. This was one of the first cases concerning the copyrightability of tattoos. However, as it was settled quickly without a trial, it did not attract a lot of publicity. It remains, however, important as one of the first cases to reach the US law.

3.3 Carlos Condit Tattoo Case

In 2012 a tattoo artist, Christopher Escobedo sued THQ, the producers of a video game with the title “Ultimate Fighting Championship” (UFC) for copyright infringement, for digitally reproducing and depicting a tattoo he had inked on fighter Carlos Condit’s torso. The tattoo is a special design of a lion inked on the athlete’s ribcage. Escobedo claims that he owns copyright to the tattoo as it is his own original creation. Moreover, he claims that he owns a registration to the particular design. More precisely, he mentions that “People often believe that they own the images that are tattooed on them by tattoo artists. In reality, the owner of the tattoo artwork is the creator of the work, unless there is a written assignment of the copyright in the tattoo art”. In addition, according to the artist the two of them never signed a written agreement mentioning the transfer of the copyright. Thus, the tattoo is not a work for hire and Escobedo is still the owner of the copyright over the image he inked.

However, THQ went bankrupt in the next years and the bankruptcy judge was responsible to value the claim, which was valued at \$22,500, the amount paid to Condit for using his image in the video game. We should note that this is the first case of calculation of the monetary value of a tattoo. However, Escobedo, who had demanded an amount of \$4,16 million which was calculated as 2 percent of all post-bankruptcy petition net sales of the games was not satisfied by the ruling and filled an appeal. His lawyer claimed that Condit was one of the most famous figures of the game as he was the Interim UFC Welterweight champion and, in addition 4,1 million units of the game were sold at the time. Moreover, the tattoo featured in the game for over fifteen minutes in the first level of the game.

As far as the arguments of the two parts are concerned, Escobedo’s lawyer claims that “THQ had literally millions of songs to choose from when deciding what music clips to include in its games”, said the

motion for reconsideration. “There was no restriction on their choice. Thus, they had the opportunity to choose the least expensive music license they could get. To produce a UFC computer game, however, THQ had a limited number of fighters to choose from and had no choice but to either not include the fighter’s tattoo on the avatars or include it. That fact alone would have placed Escobedo in a very different bargaining position than the music publisher and makes it likely that Escobedo would have negotiated a per game royalty rather than a one-time fee”. While, Escobedo in person claimed that “they’re doing it without consulting the original artists, and that’s what makes it illegal”. Consequently, the part of Escobedo, tried to prove that the tattoo was special and original and was the only choice to creating the image of Condit. In addition, the artist considered that he should be held at least as co-author as he inked the tattoo.

Carlos Condit and his lawyer tried explaining to the court that Escobedo did not come up with an original idea of the tattoo but only executed the idea that Condit created. Condit said that “The lion just kind of represents magnanimity and the dominance over his realm”, “The cliché ‘heart of a lion’, all of those things that are accredited to a lion. I really like the picture itself is from a sculpture from the 16th or 17th century, I think the sculpture is in the Vatican. Basically we found the picture, we wanted a statuesque picture, like a statue of a lion and then we turned it into a tattoo. I was pretty upset and disappointed. Him and I had these agreements, and he just kind of came out of left field with that. I guess he saw some dollar signs. Initially he had been really excited that his tattoo was in the video game, he was kind of using that for publicity for himself, which was kind of the idea, which is cool, right on. Get more buzz around your art and tattoo business. I guess when he figured ‘hey maybe I could go make some money another way off of it’ he went for it”. It is evident, that they tried to depict that the claim was unfair as the original idea belonged to Condit and the tattoo artist only originated the lawsuit to gain money.

The answer of the court was that “As THQI demonstrated, the value of Escobedo’s claim must be reduced to reflect (a) the exceedingly low value of a license of a single tattoo to a game depicting more than a hundred fighters, hundreds of tattoos and songs, and myriad other creative elements, (b) the likelihood that a tattoo on another person’s body is not copyrightable, (c) the likelihood that Condit has an implied license to license to THQ his own digital image (including an image of the Lion Tattoo), without restriction by a tattoo artist; and (d) the likelihood that, if the Lion Tattoo is copyrightable, Condit would have to at least be considered a joint author of the tattoo with an equal right to license it to others”. This was the first case in which a court approached to giving a ruling as to if a tattoo is copyrightable. If the appeal court decides definitely, this will be the first time that the value of a copyright issue will be decided.

3.4 Solid Oak VS 2k Case

In February 2016, “Solid Oak Sketches LLC”, a company which owns copyright to the tattoos inked on several NBA super-star players like, LeBron James, Kobe Bryant, Eric Bledsoe and Kenyon Martin, sued “2k Games Inc.” and “Take-Two Interactive Software Inc.”, the creators of the popular game “NBA 2K”. Solid Oak claimed that the athlete’s tattoos were depicted without having obtained the necessary

permissions. “Solid Oak” did not demand actual damages, but, in this case sought statutory damages and attorneys’ fees. Along with the lawsuit, a letter was attached which demanded \$819,000 to grant the permission for annual use of the tattoos or \$1,14 for perpetual use. However, Take-Two did not accept the offer. In addition, the district court held that “Solid Oak” was not entitled to statutory damages and attorney’s fees as the tattoos were registered to the Copyright Office in 2015, according to Section 412 of the U.S. Copyright Act, which mentions that a plaintiff must have registered his design prior to the infringement. This means, that at the time of the lawsuit the designs were not yet registered. In this case, Solid Oak’s main argument was that the depiction of the tattoos constitutes a series of ongoing infringements beginning before the registration and continuing after it.

In 2018, however, a federal judge did not accept to dismiss the case as was demanded by “2k Games Inc.” and “Take-Two Interactive Software Inc.”. The judge, Laura Taylor Swain, mentioned that she wanted to understand in a more complete way how the game is played before coming to a conclusion for the use of the tattoos and the fact of it being considered as fair use or not. She added that she wanted to determine how the “average lay observer” sees the tattoos during the game and how visible they really are. More precisely, she wrote that “The visibility and prominence of the tattoos on screen are affected by countless possible game permutations that are dependent on individual players’ choices. The Court finds that, with respect to the video game at issue, it is not possible to apply the qualitatively-focused ‘average lay observer’ standard”. She also writes that “Because of the difficulties inherent in conducting a side-by-side comparison of the video game and the Tattoos, further evidence must be considered in connection with the fact-intensive question of the applicability of the fair use defense. As the differences between the Tattoos and Defendants’ use in the video cannot be resolved with assurance on a visual comparison of the works alone, Defendants’ fair use of the Tattoos is not so clearly established on the face of the [SAC] as to support dismissal”. As far as the parts’ arguments are concerned, “Take Two” considers that the tattoos are depicted only “fleetingly” and that it is in the context of fair use to depict players as they are in real life. Moreover, they mention that tattoos in NBA2K are “displayed only briefly”; “a small part of the graphical display” when displayed; “sometimes obscured by other graphics”; “not displayed prominently”; and “sometimes displayed out of focus”. Solid Oak’s lawyer mentioned that “It absolutely would have been premature to rule in the opposite fashion, and we look forward to proceeding with the case”. The defendant argued that “If Take-Two’s motion is denied, Solid Oak will be able to use that decision to shakedown each of the publications and television programs in which those players have appeared, as well as any other video game publisher that depicts the Tattoos. “It would be illogical to allow Solid Oak to seek rents each time that a player bearing one of its tattoos commercializes his likeness, or worse, appears in public, and therefore arguably ‘publicly displays’ the Tattoos under copyright law. We know of no case reaching such a result. Doing so here would set a bad precedent affecting all bearers of tattoos and the companies that creatively depict them”.

It is evident; that this case bears a special importance as far as the copyrightability of tattoos is concerned. It is, therefore, the first case in which a court has positioned itself about the subject. The case may still be

at an early stage, however, the court was not assertive as to the fact that nobody cannot own copyright to a tattoo. More precisely, the court sees a possibility of owning copyright to a tattoo and thus it demanded to acquire more information as to the use and visibility of the tattoos at the game in question. It is important to note that even though this decision is not yet definitive, it clearly shows that the courts are ready to negotiate the possibility of owning copyright to a tattoo.

3.5 Mike Tyson Tattoo Case

In the movie “Hangover: Part II” Stu, played by Ed Helms wakes up in Bangkok and has the famous tattoo of Mike Tyson inked on his face without being aware of when and where the tattoo was designed on his face. The Missouri tattoo artist S. Victor Whitmill who had inked the tattoo on the athletes’ face and registered it at the Copyright Office filed a lawsuit against Warner Bros. demanding the recognition of his copyright. His lawyers also judged that the movie should not be screened because of the depiction of the tattoo. According to them, the movie depicts a “virtually exact reproduction” of the tattoo. Whereas, Warner Bros. lawyer claims that “The tattoo qualifies as an original “work of visual art” that may gain “recognized stature”, with the result that a court may enjoin its destruction. See 17 U.S.C. § 106A(a)(3)(B). After a court invokes that provision to bar him from removing his tattoo, Mr. Tyson literally may not show his own face to the world; that is, he will be required to keep Mr. Whitmill’s handiwork spread across his face, regardless of his own desires. Copyright law thereby becomes the instrument to impose, almost literally, a badge of involuntary servitude, akin to the mark with which ranchers brand the cattle they own”. As far as their intention to alter the tattoo for the future DVD release is concerned, he added that “Warner Bros. does not intend to make any use of the allegedly infringing tattoo after the film ends its run in the theaters because Warner Bros. will digitally alter the film to substitute a different tattoo on Ed Helms’s face”. The judge of this case, however, gave her permission for the movie to be screened on the programmed dates. But, she still kept the case alive. Subsequently, Warner Bros. planned to alter the tattoo for the DVD version of the film if the case did not settle. Finally, the case settled out of court some days before the release of the film, with the terms of the settlement staying confidential. More precisely, Whitmill’s attorney stated that “Warner Bros. and Mr. Whitmill have amicably resolved their dispute. No other information will be provided”.

Because of the films’ popularity, this one of the most famous cases concerning the relation between tattoos and copyright which really brought the subject to the legal forefront. However, we should note that still there was no ruling as the two parts settled.

4. Conclusion

The subject of the copyrightability of tattoos is a truly contemporary legal battle which has not yet been decided upon. Therefore, each of the different parts in every case has its own arguments. The part of the tattoo artists tries to prove that the tattoos should be considered as works of art protected by intellectual property rights. In their opinion, tattoo artists are the creators of original works in the sense that they are the ones inking the tattoos. Therefore, they consider that their permission should be acquired before each

use of the tattoos. However, the defendants in each case judge that the depiction of tattoos falls under the context of fair use. They claim that even though the tattoo may not be a work for hire, the person who has the tattoo inked on his body is the owner of it. According to them, it could not be acceptable to seek permission from the tattoo artists each time they want to depict their tattoos in any means.

As we have already noted there has not yet been reached any definitive court ruling which could give a solution to this ongoing legal battle. In the majority of the cases, the parts have settled out of court. Consequently, the court did not have the chance to clearly assess the subject. However, as we have analyzed in our last case concerning tattoos inked on famous NBA players, the court did not immediately dismiss the case, but demanded to examine it after obtaining more information concerning the particular depiction of the tattoos in the game NBA 2K. Concluding, even though the case has not been decided upon, the court shows clearly its intention to examine thoroughly the subject and seems to see the possibility of tattoo artists owning copyright to a tattoo.

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