SKIN-DEEP:

THE COPYRIGHTABILITY OF TATTOOS AND ADDRESSING THE AMBIGUITY OF SOUTH AFRICAN COPYRIGHT LAW ON TATTOOS

Sharé Hassan

HSSHA020

2022

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law (LL.M.) in Intellectual Property in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

Faculty of Law

Commercial Law

UNIVERSITY OF CAPE TOWN

Supervisor: Doctor Lee-Ann Tong

30 June 2022

TABLE OF CONTENTS **PAGE**

PLAGIARISM DECLARATION

"This thesis/dissertation has been submitted to the Turnitin module (or equivalent similarity and originality checking software) and I confirm that my supervisor has seen my report and any concerns revealed by such have been resolved with my supervisor."

Name: Sharé Hassan

Student number: HSSSHA020

Date: 28 June 2022

Word Count: 25103

Signature: 

Turnitin report approved subject to reducing it to below 30% by:

Supervisor: Lee-Ann Tong

Date: 1 July 2022

Signature: 

ACKNOWLEDGEMENTS

I would like to thank the following people, without whom I would not have been able to complete this dissertation, and without whom I would not have made it through my master's degree.

First and foremost, I must express my very profound gratitude to my parents for providing me with the opportunity to further my studies, for providing me with unfailing support and continuous encouragement throughout my years of study and through the process of researching and writing this dissertation. It is through their strength, perseverance and will to give me the best that they could manage that I am able to stand here today. Thank you for carrying me through life, for protecting me and for believing that I could overcome all obstacles in my path. This accomplishment would not have been possible without them. Thank you.

My most profound appreciation goes to Dr Lee-Ann Tong, my supervisor, for her time, effort, and understanding in helping me succeed in my studies. Her vast wisdom and wealth of experience have inspired and assisted me throughout my degree. Thank you for providing guidance and feedback throughout this dissertation.

To my family and friends, both near and far, you should know that your constant support and encouragement was worth more than I can express on paper.

Last but certainly not least, I would like to praise and thank the Almighty who has granted countless blessing, knowledge, and opportunities, so that I have been finally able to accomplish the thesis and for getting me through all the difficulties that came across my path.

ABSTRACT

"My body is my journal, and my tattoos are my story." – Johnny Depp

Would it ever occur to you that a third party could claim ownership of your skin? That could be the case with art that has been inked into your skin, namely a tattoo.

Although copyright law is an established and codified field of law, there are a few novel sub-categories that remain equivocal and unaddressed by South African courts. As a result of an erratic, expeditiously evolving society, new fields emerge and become rampant enough to cause unexpected problems as the law tries to catch up. The application of copyright law to tattoos is a particularly timely example, and the focus of this dissertation.

Is a tattoo copyrightable? Who is the owner of the tattoo copyright? What rights does an owner possess? Can an owner enforce copyright, and if so, what is the scope of such enforcement? Infringements occur in what and how many ways? These are not the questions that come to mind when getting a tattoo. Despite the lack of court decisions in this area of the law, this dissertation concludes that tattoos indeed satisfy the requirements of copyrightability in South Africa — originality and reduction to material form. It also discusses the copyrightability of tattoos, the parties with an ownership interest in a tattoo, potential infringements and remedies. This dissertation concludes by exploring proposed solutions to the ambiguity regarding tattoos within copyright law.

While the focus of this thesis is on South African law, due to limited research and a lack of judicial guidance on tattoos in the South African context, South Africa will be compared to the US to provide additional insights into where South Africa falls short and where we may seek guidance from the US approach to fill the lacunae in our law.

CHAPTER 1: INTRODUCTION

1.1 Background

A young man, excited to get his first tattoo of his favourite song lyrics, searches the internet for numerous musical notes and watercolour tattoos — Tattoo websites, Instagram, Pinterest, Google. He finds images of tattoos he likes but includes his personal touches, such as a colour scheme. He purchases sheet music for his favourite lyrics. He chooses his chest as the location for the tattoo, allowing for slight visibility. He seeks out a tattoo artist who is an expert in this style and consults with him. After a few weeks, they return to the tattoo parlour, where his artist shows him a sketch of the design which is tweaked slightly.

This depicts the standard procedure for custom tattoos. Both the tattoo artist and client may be infringers under copyright law. Any person who gets a tattoo may face liability for exercising rights to the permanent ink on their body that they do not own.

The intersection between intellectual property law and tattoos may potentially affect an entire market. “Tattoos are a multibillion-rand industry that is growing every year as tattoos become more widely accepted around the world.”[1] “With market growth comes an incentive for tattoo parlour owners, tattoo artists, and other creative artists to figure out what rights they have and assert them against tattooed people.”[2] Because of the publicity surrounding their work, artists are already charging celebrities higher prices for allowing the tattoo to be displayed in public. This indicates that the market is slowing adapting to the market growth and accepting the display of tattoos. However, it comes at a price: most persons looking to get a tattoo, like this client in the example above, are unaware of the legal rights that others have and can be asserted against the permanent ink on their own bodies.

While South Africa lacks court decisions in this area of law, various judgements in the United States have asserted or inferred that “an original pictorial work embodied in a tattoo is eligible for copyright protection.”[3] However, we are unaware of definitive case

[1] Cvetkovska “Tattoo Statistics to Intrigue, Impress & Even Encourage” (11 April 2021) Available at: https://moderngentlemen.net/tattoo-statistics/ (accessed 2022-06-29).
[2] *Ibid*.
[3] *Gonzales v. Kid Zone*, Case No. 00 C 3969 (N.D. Ill. Aug. 15, 2001) and *Carell v. Shubert Org.,* 104 F. Supp. 2d 236, 247 (S.D.N.Y. 2000).

law that have discussed and provided judgement on the unauthorised reproduction of copyrighted words or symbols in tattoos.

Buildings and architectural designs, as well as computer programs and video games, are examples of copyrightable works. Furthermore, copyright law appears to be explicit in protecting original paintings and other types of creative works. But what if the art is embodied on a person's body rather than a canvas?

The application of standard legal doctrine to tattoos raises troubling questions. Is it a violation of the tattoo artist's right, for example, to photograph a person's tattoo in public? Would changing the tattoo violate the tattooist's exclusive right to create adaptation works, as well as his moral rights? What remedy is there if the tattoo itself is infringing? Can the court grant a court order forbidding an inked individual from appearing in public, force them to cover up, or have an infringing tattoo removed? Would this order violate constitutional rights to privacy, bodily integrity and autonomy, or free speech?

These questions have not been addressed by the courts, which creates a great deal of uncertainty, especially given the permanence of a tattoo. Furthermore, there have been no decisions in South African courts dealing with this type of copyright infringement, making tattoo copyright unique.

Currently, Sandton is Africa's wealthiest high-rise enclave, with more than 20 tattoo parlours in the surrounding suburbs, as do South Africa's three other major cities of Pretoria, Cape Town, and Durban. The body art industry is increasing with a roughly 700 parlours nationwide turning over approximately R60 million a year.[4] Bear in mind that it does not include tattoos that are done informally. While ink tattoos are the most common form of contemporary body art, humans have been adorning their bodies for aesthetic or ritualistic purposes for centuries. The manifestations of human body art and body modification are endless. Body art has been discovered by anthropologists

[4] Schmidt “The Rise of SA’s Tattoos Industry” (19 March 2020) Available at: https://www.businesslive.co.za/fm/life/art/2020-03-19-the-rise-of-sas-tattoos-industry/ (accessed 2021-04-20).

to exist in every culture on the planet,[5] even museums have even started featuring exhibits on tattoo art.[6]

In addition, it is very rare to find a celebrity without some form of tattoo and a lot of them have special meanings to them. From local celebrity DJ Zinhle to Nasty C, many South African celebrities can be seen sporting tattoos.

Tattoo inks are used in tattooing and are made up of pigments mixed with a carrier. Tattoo inks come in a variety of colours that can be thinned or mixed together to create different colours and shades. “With tattoo prices starting around R500 and rising to R1 200 or more per hour for larger works, a popular studio could make R80 000 or more per month.”[7] Prices vary depending on where you live, the artist's level of experience, their hourly rates, and whether or not it is a custom tattoo. Larger tattoos may necessitate more than one session. A larger design with a lot of detail or colour may require two sessions, whereas an entire sleeve may require months (and hundreds to thousands of rands) to complete. A simple tattoo, such as a heart, should only take about 5 minutes.[8]

As a result, it's easy to understand why artists are upset when their works are copied without proper acknowledgement or consent, because most people do not realize the amount of effort that goes into even the most basic design. It usually takes hours, days, or even weeks to design a nice-looking, one-of-a-kind tattoo. The specific tattoo was intended to be one-of-a-kind and copying it would diminish the personal value of the original tattoo.

1.2 Purpose and Scope of Research

This dissertation focuses on tattoos on human skin rather than tattoo artists' drawings, "flash art," or other forms of art used as inspiration for tattoos. As a result, throughout

---

[5] Free Tattoo Designs “Body Art” (n.d.) Available at: http://www.freetattoodesigns.org/body-art.html (accessed 2021-04-29).
[6] The British Tattoo History Museum https://www.tattoo.co.uk/tattoo.co.uk2/museum.html#:~:text=The%20British%20Tattoo%20History%20Museum,his%20first%20professional%20tattoo%20studio.&text=Early%20in%202002%20part%20of,National%20Maritime%20Museum%20in%20Greenwich, National Maritime Museum, *Skin Deep: A History of Tattooing* (exhibition, Mar. 22, 2002 to Sept. 30, 2002) http://www.nmm.ac.uk , Daredevil Tattoo Museum https://www.daredeviltattoo.com/museum and The Baltimore Tattoo Museum https://www.baltimoretattoomuseum.com/.
[7] safacts “How much does a tattoo ink cost in South Africa?” (n.d.) Available at: https://safacts.co.za/how-much-does-tattoo-ink-cost-in-south-africa/ (accessed 2022-04-15).
[8] *Ibid*.

this dissertation, the term "tattoo" refers to the actual work applied to human skin rather than an embodiment of the work in any other form.[9]

The line between "inspiration" and "imitation" is thin. It is common in the art world for artists to draw inspiration from other artists. Oscar Wilde once said, *"Imitation is the sincerest form of flattery."*[10] This is also true in the tattoo industry, with clients providing reference photos or even designs from other tattoo artists that they happen to come across on the Internet. Tattoo renditions of famous artworks, screencaps of movies, cartoons, or comic books, and famous logos are all examples of potential copyright violations. As a result, tattoos are ultimately a grey area in intellectual property law.

As a result of a rapidly changing society, new areas emerge and become prevalent enough to cause unexpected problems as the law tries to catch up.[11] Because there is no definitive court ruling declaring tattoos to be copyrightable, the purpose of this dissertation is to discuss and analyse the requirements for copyright as they apply to tattoos. Based on the analysis, it will be determined whether tattoos meet the requirements for copyright and are thus protected. When it is determined that tattoos are copyrightable, issues of ownership and infringement may arise.

Tattoos are becoming more popular, and tattoo parlours now provide customers with a wide range of designs to choose from, as well as the option to request a custom design. In this context, one intriguing question is whether a tattooed person owns the copyright in their tattoo. In South Africa, unless the tattoo's copyright was assigned in writing, the answer is usually no.

Subject to a few exceptions,[12] various parties may be involved in the tattoo's creation. This may cause confusion as to who owns the copyright in the tattoo. This dissertation will clear up any confusion by discussing the various scenarios that could occur and ultimately determining who the owner is.

---

[9] It is imperative to note that the skin is regarded as the material form as opposed to another artistic work i.e., flash. This means that artists draw directly on skin. Furthermore, even if the linework is a copy, other elements, such as the shading and colours, may be unique.

[10] "Imitation is the sincerest form of flattery that mediocrity can pay to greatness." - Oscar Wilde, https://www.goodreads.com/quotes/558084-imitation-is-the-sincerest-form-of-flattery-that-mediocrity-can

[11] Because of technological advancement, databases have become vulnerable to unauthorised access, reproduction, adaptation, and publication. The possibilities for recompiled and derived products exceed the original owner's imagination, let alone knowledge. See Brown, Bryan & Conley "Database Protection in a Digital World" (1999) 6 *Richmond Journal of Law & Technology 2.*

[12] S15 of 98 of 1978.

Although many people believe they can do whatever they want with their tattoos, they technically cannot. Under the South African Copyright Act,[13] a tattoo would most likely be classified as an artistic work,[14] and thus only the owner of the work may reproduce or adapt it.[15] As a result, whenever someone photographs their tattoo and posts it on social media, they are infringing on the copyright of the work's owner, as this constitutes a reproduction of said work.

When requesting a custom design based on an image found on the Internet, such as the Rolling Stones logo, the same principles apply. Although it may be adapted and thus considered a new work, it would still be infringing the original work's owner's copyright, as this constitutes an adaptation and an infringement of the original work. When in doubt, create an original work without referencing any other works, and the artist should assign the copyright in the work in writing – if they are willing to do so.

Although copyright law may not be the first thing on someone's mind when visiting a tattoo parlour, it is something to consider. Otherwise, they may be in for some expensive laser surgery.

This dissertation will further explore ways in which infringement occurs and the remedies available to an artist should infringement occur. This is important to note since it is the copyright owner who brings the potential claim, all of which will be discussed in the foregoing chapters.

This dissertation also bemoans the deficiency of court rulings on tattoo-related copyright lawsuits and proposes a solution for establishing a more structured, standardized approach to tattoo copyrights. The purpose of this dissertation is to address the ambiguity regarding eligibility for copyright surrounding the protectability of tattoos due to a lack of published court decisions in this area of the law as well as the ambiguity regarding ownership interests and potential infringements.

Although there is academic research regarding tattoos, “there exists a lack of research in the South African context, especially with regard to tattoos as popular culture.”[16]

---

[13] 98 of 1978.
[14] S1(1)(iii) of 98 of 1978.
[15] S7(a) and (e) of 98 of 1978.
[16] Roux, S. (2015). *A multisemiotic analysis of ‘skinscapes’ of female students at three Western Cape Universities*. [Thesis] pp.1–302. Available at: http://etd.uwc.ac.za/xmlui/handle/11394/5034 (accessed 2022-04-27).

"There is also an increasing popularity of tattoos in South Africa with a lack of research in the field."[17] While the emphasis of this thesis is within South African law, due to limited research and absence of judicial guidance on tattoos in the South African context, South Africa will be compared to the US to provide additional insights to see where South Africa falls short, if at all, and could seek guidance from the US approach to fill the lacunae in our law. Whilst it is acknowledged that the US law is different to South African law, the purpose of making reference is because unlike South Africa, the issue of tattoo copyrights has arisen in the US. Furthermore, the US has case law to draw inference from and allows discussion. It is important to note that it is not a direct comparison.

1.3 Overview of Dissertation

Chapter 2 provides a background and defines the most common type of body art, commonly referred to as a "tattoo." It briefly examines how tattoos are perceived and interpreted in society, specifically in South Africa. It also discusses the different types of tattoos and the process in which it is created.

Chapter 3 examines the dialect of the Copyright Act 98 of 1978 to establish whether the statute is applicable to tattoos. This chapter examines whether tattoos satisfy the originality requirement (the first essential element of copyrightability), as well as the level of originality required to be eligible as copyrightable works. This chapter then investigates how this chosen form of art affects the analysis of the work's copyrightability and considers whether tattoos and the human body classify as material form — the Act's second essential element of copyrightability. Once it has been established that tattoos are copyrightable, ownership and infringement issues may arise. This will also be discussed. While this dissertation focuses on why tattoos should be afforded copyright protection, there is a brief counterargument as to why tattoos may not be copyrightable.

Chapter 4 will examine the United States copyright law and whether copyright protection is extended to tattoos. The purpose of this chapter is to compare the US copyright law with South African law to determine, if any, the gaps in our law and how South Africa could seek guidance from the US.

---

[17] Bergh "Tattooing as memorial pragmemes" (2018) *Pragmemes and Theories of Language Use* 585 – 600.

Thus far, cases concerning the copyrightability of tattoos have yet to go to trial in South Africa. However, in the United States, the *Whitmill* case,[18] which reached the preliminary stage, and a few other copyright lawsuits, have clarified how the courts may analyse the distinctive issues that may arise in the determination of tattoo copyrightability, and the problems associated with granting copyright protection to this form of art. The purpose of this chapter is to examine the most important legal battles on the subject to create a comprehensive case study of this subject based on the practical aspects of the disputes that have reached the courts. As a result, the various circumstances of each case will be examined, as will the various arguments of the parties and the court's position on these arguments. While it is acknowledged that the US law is not the same as South African law, the purpose of this analysis is that if South Africa is faced with issues of this nature, the courts may seek guidance from the US and apply their principles and application to our system. This will be analysed in Chapter 5.

Finally, based on this examination and after gathering the various arguments, the current situation will be summarised and a personal conclusion regarding the copyrightability of tattoos and potential challenges relating to ownership and infringement will be assessed. This dissertation concludes by exploring proposed solutions to the ambiguity regarding tattoos within copyright law.

[18] No. 4:11-CV-00752 (E.D. Mo. 2011).

CHAPTER 2: WHAT IS A TATTOO?

To determine whether a tattoo can be afforded copyrightability, the notion of a tattoo first needs to be discussed.

Captain James Cook's accounts of his travels in Polynesia introduced the term "tattoo" into the English language.[19] Cook observed Tahitians engaging in the practice of "tattowing" in 1769 and described it as follows:

> *"Both sexes paint their Bodys, Tattow, as it is called in their Lan-guage. This is done by inlaying the Colour of Black under their skins, in such a manner as to be indelible… The colour they use is lamp black, prepar'd from the Smoak of a Kind of Oily nut, used by them instead of Candles. The instrument for pricking it under the Skin is made of very thin flatt pieces of bone or Shell… One end is cut into sharp teeth, and the other fastened to a handle. The teeth are dipped into black Liquor, and then drove, by quick sharp blows struck upon the handle with a Stick…"*[20]

Cook's journeys mark the start of contemporary tattoo history. Tattooing, on the other hand, developed in cultures all over the world long before Cook's exploits captivated the European public.

The word "tattoo" derives from the Tahitian term "ta tua," meaning "to mark."[21] A "tattoo" is "an indelible mark or figure fixed upon the body by insertion of pigment under the skin or by production of scars."[22]

Tattooing is becoming more popular in South Africa, but it has a history of negative connotations in Western culture.[23] While society in general is becoming more accepting of tattooing, the legal community has been slow to recognize this form of art as protectable work. There is no definitive ruling that this type of art is copyrightable

---

[19] Dan Hunter "Tattoo Etymology: The Origin of the Word "Tattoo"" (1 January 2021) Available at: https://authoritytattoo.com/tattoo-etymology/ (accessed 2021-12-09).
[20] Cook "Captain Cook's Journal During His First Voyage Around the World Made in H.M Bark Endevour" (1893) *A Literal Transcription of the Original MSS. With Notes and Introduction* 1768 – 1771.
[21] Pickup "Ta Tau: where the word tattoo comes from" (25 November 2016) Available at: https://www.telegraph.co.uk/films/moana/tatau-where-tattoo-comes-from/ (accessed 2021-06-09).
[22] *Tattoo*, MERRIAM-WEBSTER Available at: http://www.merriam-webster.com/dictionary/tattoo (accessed 2021-06-09) (reporting that the first known use of the word "tattoo" took place in 1777).
[23] Naude, Jordaan, and Bergh "My Body is My Journal, and My Tattoos are My Story: South African Psychology Students' Reflections on Tattoo Practices" (2019) *Current Psychology* 38.

or protected. Furthermore, tattooed individuals and tattoo artists have historically not considered themselves to be members of the intellectual property community.

Because tattoo artists have traditionally not considered themselves to be members of the intellectual property community, this community has been deafeningly silent on claims of copyright infringement. To date, no cases have been filed in South African courts, and only a few cases have been filed in the United States. Similarly, only a few cases have been enforced by court in the United States, namely, *Solid Oak Sketches, LLC v. 2K Games, Inc., 449 F.Supp.3d 333 (S.D.N.Y.2020)* where it was found that there was copyright but that the alleged infringement was fair use; and *Catherine Alexander v. Take-Two Interactive Software, Inc, 489 F.Supp.3d812 (S.D. Ill. 2020)* where it was found that there was copyright and that the alleged infringement could not be excused as fair use. Tattoo artists may be hesitant to seek legal redress due to the scarcity of tattoo copyright cases, as well as a lack of judicial recognition of tattoo protectability.

Tattoos are visual phenomena that elicit a wide range of emotions, from fascination and admiration to revulsion and fear. Tattoos draw attention and pique people's interest in the meanings behind them. Contrary to the 1800s when tattoos denoted being a criminal or a deviant, biker gangs and ruffians, [24] tattoos are now worn by people all over the globe. Today, tattooing is viewed more positively as a means of expressing one's identity.

The practice of tattooing decorative designs on the skin has recently gained social acceptance in South Africa and, more broadly, in Western culture,[25] particularly among the younger generation. Tattoos are now considered an acceptable and desirable art form. As a result of society's growing acceptance of tattoos, tattoo studios have become a burgeoning contributor to South Africa's small business landscape.[26] “One

[24] InkHappened “How is tattooing in South Africa? Talking with Embla Holm” (10 February 2021) Available at: https://inkhappened.com/tattooing-in-south-africa-interview/ (accessed 2021-12-09).
[25] Cotter and Mirabole “Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art” *(*2003) 10 *UCLA Entertainment Law Review* 138.
[26] Kretzmann “Tattooing inks its way into the small business sector” (1 April 2018) Available at: https://www.news24.com/fin24/entrepreneurs/news/tattooing-inks-its-way-into-the-small-business-sector-20180401-2 (accessed 2021-12-08).

estimate claims that 38 percent of adults between the ages of 18 and 29 have at least one tattoo."[27]

Tattooing is also becoming more popular for medical and cosmetic purposes.[28] Tattooing is frequently, and most importantly for this dissertation, a form of self-expression for both the tattoo artist and the client.[29] Scholars of the practice of tattooing have referred to the tattoo as "the repository and expression of 'unconventional, individualistic' values" and "the only form of human expression we have left that has magic to it."[30]

2.1 The Types of Tattoos

As confirmed in Chapter 1, this dissertation is limited to tattoos applied to the body, as opposed to paper. The type of tattoo may also influence the level, if any, of protection afforded to tattoos. For example, an original designed tattoo would be afforded protection as opposed to "flash" tattoos where an individual chooses from a portfolio open to the public.

Tattoos that are "generic" or "flash" are those that are displayed in shops and tattoo parlours or can be found in an album. While some flash art is protected, these are frequently common designs that fall into the public domain.[31] These common designs are unlikely to be considered original, thus failing the first requirement of copyright protection. As a result, there is no conflict over its copyrightability in South Africa or the United States.

The second category is "contemporaneously placed tattoos", which are "tattoos that are designed on the body without prior thought. There is no special design, and no

---

[27] Fagan "Why people get tattoos" (3 September 2019) Available at: https://www.psychologytoday.com/za/blog/head-games/201909/why-people-get-tattoos (accessed 2021-12-02).
[28] De Cuyper, Cotapos and Springerlink (Online Service (2010). *Dermatologic Complications with Body Art : Tattoos, Piercings and Permanent Make-Up*. Berlin, Heidelberg: Springer Berlin Heidelberg.
[29] Henry "OPINION: Tattoos are a way to express creativity" (11 November 2020) Available at: https://dailyevergreen.com/93268/opinion/opinion-tattoos-are-a-way-to-express-creativity/ (accessed 2021-12-01).
[30] Caplan (2000) *Written on the body : the tattoo in European and American history* Princeton, N.J.: Princeton University Press.
[31] Hunter "What is a flash tattoo?" (27 November 2021) Available at: https://authoritytattoo.com/what-is-a-flash-tattoo/ (accessed 2022-05-01).

predesigned stencil or frame is used."[32] This is a freestyle tattoo that was created by the tattoo artist using his own creativity and without any premade instructions.

The final category is "preliminary-sketched tattoos", which are "previously created stencils or designs that are made after thinking and then drawn on the person's body." [33] This method necessitates preparation on the part of the artist.

We shall exam the copyrightability of the "contemporaneously-placed" and "preliminary-sketched" tattoos.

2.2 The Tattoo Process

Tattoo inspiration can be found in a variety of places, but most people look for it on the internet and social media platforms. Individuals can do extensive research and devote a significant amount of time to developing a tattoo design based on other works, tattoos, and their own experiences. There are various styles of tattoos such as flash, freehand, realistic, watercolour and custom work.[34] The extent of collaboration between the artist and the client is affected by the tattoo style. When a client brings the photo(s) to the artist, the artist offers suggestions and shares which elements will work well on the skin. They talk about the tattoo's size, colour, and placement. Based on the consultation and her own experience, the artist then devotes time to creating a new image.[35] Even though the finer details will not be on the transfer paper, it will have the major line work and details encapsulated in the final design. After dampening the skin, the artist will apply the transfer and tattoo over the transfer's mark.[36] If a person is not happy with the outcome of the design, the process can be repeated after cleaning the marker with rubbing alcohol.[37]

These variations and steps based on the style of a tattoo are critical in determining copyright infringement.[38] "If the artist uses a stencil or tracing paper, the copyright

---

[32] Lexforti "Tattoos and Copyright: Can getting inked lead you to the Court?" (8 October 2020) Available at: https://lexforti.com/legal-news/tattoos-and-copyright/ (accessed 2022-06-29).
[33] Noonan, How Tattoos Fit within the realm of Copyright Law: Do We Finally Have a Lawsuit That Will Provide Some Clarity (2017) 47 N. Ky. L. Rev. 205.
[34] Lichtenstein "A Comprehensive Guide to Every Type of Tattoo" (21 April 2021) Available at: https://www.byrdie.com/tattoo-art-styles-3189583 (accessed 2022-01-16).
[35] Rupert E. Jennings *Choosing the Right Tattoo* (2012) 109 – 110.
[36] *Ibid*.
[37] Kristensen "The Technique and Craftsmanship of Tattooing in the Professional Tattoo Parlour" 2015 48 *The Practise of Tattooing* 31-36.
[38] Hatcher, J.S (2005) Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States *SSRN Electronic Journal*. doi:10.2139/ssrn.815116.

protection of the original tattoo begins at the moment of fixation. The case for originality in the new tattooed work is stronger if the tattoo style is freehand."[39] In addition, "the artist is the author of the new copyrightable work, not the client because in freehand work, the client only contributes any ideas or elements desired in the piece,"[40] and, which will be explained in Chapter 3, copyright does not exist in ideas. Almost all other types of tattoos necessitate using a stencil prior to inking the skin, as this is required for copyright protection based on the design's originality. Elements such as two-dimensional shapes and colour swatches significantly alter the underlying design, resulting in a new aesthetic value. [41] Based on the uniqueness of the design and the content of the piece, a court determines what style the tattooed work belongs to. While it may appear that the more detailed the tattoo, the less likely it is to be a forgery, this is not always the case. The form of most derivative works, which are still owned by the original author, varies greatly. [42]

[39] *Ibid* 9-10.
[40] Kristensen *The Practise of Tattooing* 31-36.
[41] *Ibid*.
[42] *Ibid*.

CHAPTER 3: COPYRIGHT LAW UNDER THE COPYRIGHT ACT 98 OF 1978

The tattoo is finally complete, and the customer is overjoyed with the outcome. The artist has been paid and the customer is ready to flaunt his new tattoo to the world. However, the question is, does he actually OWN the tattoo inked on HIS body? According to the principles of copyright law, the answer may be a resounding no.

For instance, copyright exists for a tattoo if it is original and reduced to a material form (which it very arguably is when it is inked into your skin). In the case of artistic works, the artist or creator of the work, namely the tattoo artist, owns the copyright,[43] not the person on whom the tattoo appears, regardless of whether the latter has paid for their tattoo. In short, when you pay your tattoo artist, you are paying for the tattoo itself, not the copyright subsisting in it.[44]

In the age of "if it's not on camera, it didn't happen" and social media, simply snapping your new tattoo and showing it off is an infringement of copyright [45] and could land you in hot water and open to a lawsuit, especially if consent was not obtained from the artist. However, it is critical to first determine whether a tattoo is in fact eligible for copyright protection.

The purpose of this chapter is to identify the general principles of copyright law as it relates to artistic works. Once the general principles have been discussed, the applicability of the principles against tattoos and the copyright law provisions pertinent to the analysis of copyright in the tattoo context, such as types of copyrightable work, forms of copyright ownership, exclusive rights of copyright owners and remedies for infringement will be examined. The overall purpose is to establish whether a tattoo is copyrightable, affording it protection. Once this has been established, concerns related to ownership of copyright and infringement may arise and will further be discussed.

This chapter will also form the basis of comparison and differences, if any, between the US copyright law and the South African copyright law to compare where South Africa falls short and could seek guidance for further protection.[46] But before devolving

[43] S1(a) of 98 of 1978.
[44] Smalberger “Copyright in tattoos – a prickly legal question” (2019) Mondaq. Available at: https://www.mondaq.com/southafrica/copyright/1067086/copyright-in-tattoos-a-prickly-legal-question (accessed 13 January 2023).
[45] S7(b) of 98 of 1978.
[46] The US comparison will be discussed in Chapter 4.

further, copyrightable works will be discussed below to determine whether a tattoo will fall into one of the seven eligible categories as each category is subject to different protections, exclusive rights and exceptions.

3.1 The Nature of Copyright

Copyright distinguishes an artist's physical output from the right to the art itself.

Former Durban Art Gallery curator, Jill Addleson, gave an informative talk on copyright saying:[47]

> *"There is nothing daunting about the definitions of copyright; what is daunting, however, is that to infringe copyright law is to court legal disaster. Only the copyright owner may reproduce the work. Anyone who publishes intellectual works without permission has infringed copyright."*

In *Video Parktown North (Proprietary) Limited vs Paramount Pictures Corporation* 1986 2 SA 623 (T), the nature of copyright was described as follows:

> *"When he who harbours an idea, by dint of his imagination, skill, or labour, or some or all of them, brings it into being in tactile, visible, or audible form, capable thereby of being communicated to others as a meaningful conception or apprehension of his mind, a right or property in that idea immediately comes into existence. The proprietary interest in that object of knowledge is the ownership of it and is called 'copyright'."*[48]

The Copyright Act protects several categories of works.[49] "Copyright is a set of exclusive legal rights given to the author or creator of an original work – including the right to reproduce, publish the work if it was hitherto unpublished, adapt and include the work in a cinematograph film or a television broadcast."[50] "The purpose of granting authors a limited monopoly over their works is to encourage and incentivize artistic creativity for the benefit of the general public."[51] Thus, in analyzing tattoo copyright, the artist, the subject and public interest must be considered. [52]

---

[47] Addleson, Jill 2005 Paper given at the SAMA KZN Branch meeting, Pietermaritzburg: UKZN, (3-4 November 2005).
[48] *Video Parktown North (Proprietary) Limited vs Paramount Pictures Corporation* 1986 2 SA 623 (T) at para 631G-632B.
[49] S2(1) of 98 of 1978.
[50] S7 of 98 of 1978.
[51] Du Bois (2018) Justificatory Theories for Intellectual Property Viewed Through the Constitutional Prism *Potchefstroom Electronic Law Journal*, 21, pp.1–38. doi:10.17159/1727-3781/2018/v21i0a2004.
[52] *Ibid*.

3.2 Classifying the Work

Section 2(1) of the Copyright Act 98 of 1978 defines several categories of copyrightable works. The classification of a work is important because different works are afforded different protections and exclusive rights.

Tattoos fall under the category of artistic works.[53] Such works include "paintings, sculptures, drawings, engravings and photographs, works of architecture, being either buildings or models of buildings, or works of artistic craftsmanship."[54] A tattoo would most likely be classified as a drawing for classification purposes, namely the design of the tattoo and the actual process of applying the tattoo.

It may be argued that a tattoo is a drawing just inked on a different medium, human flesh, as opposed to paper. Because it is technically just drawings, like most other art forms, design can be considered an art form in and of itself. The distinction is that these designs are intended for tattooing on skin.

The classification of a tattoo as a drawing is important because it affects the rights to which the owner of the work is entitled. Section 7 of the Act grants an owner exclusive rights, which means that only the owner of the work may reproduce or adapt it.[55]

3.3 Requirements

To determine whether tattoos meet the criteria for copyrightable subject matter, it is necessary to first provide a detailed outline of the copyright requirements.

Certain requirements must be met for works to be protected by copyright. A distinction is made between a work's *inherent* and *formal* requirements. However, before delving into said requirements, it is important to note that no formalities are prescribed for the creation of copyright. Copyright, unlike patents, trademarks, or registered designs, is not a registered right.[56] Instead, once an original work is reduced to material form, copyright is transferred to the author.[57]

---

[53] S2(1)(c) of 98 of 1978.
[54] S1(1)(iii) of 98 of 1978.
[55] S7(a) of 98 of 1978.
[56] This is the general, however there are exceptions contained in S21 of the Act 98 of 1978.
[57] Polak (2009) *Copyright and Digital Music Collections in South Africa* [Thesis] pp.1–263. Available at: https://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/1253/Polak_F_2009.pdf?sequence=1&isAllowed=y (accessed 2023-01-18).

Copyright subsists in original works of authorship by a qualified person, including artistic works that are reduced to material form.[58] Regarding artistic works, copyright protection applies to the life of the author including fifty years from the end of the year in which the author dies.[59] The purpose is to grant the owner the opportunity to exploit and profit from the protected work which motivates further creativity and innovation.[60]

3.3.1 Originality

Over time, South African courts have carried out the task of defining originality under the Act from various authorities.[61] The South African definition of originality appears to have been aligned with the British "sweat of the brow" approach by the courts. The importance of originality in determining authorship of a work cannot be overstated. A person does not become an author simply by copying the work of another person.[62] The work itself does not necessarily have to be unique to be afforded protection.[63] Another author may improve or refine a work that is protected by copyright. “Even if the improvement or refinement infringed on the original work's copyright, it will be eligible for copyright on condition that the subsequent author's original and substantial work is the actual improvement or refinement of the original work.”[64] When elements of a previously authored work appear in a subsequent work, this does not always imply that the work is a copyright infringement and thus ineligible for copyright protection. [65]

Copyright exists in a work even if all its features existed prior to its creation, provided the required level of skill and labour went into its creation. In *Marwick Wholesalers v Hallmark Hemdon*[66] the court determined that:

[58] S2(2) of 98 of 1978.
[59] S3(2)(a) of 98 of 1978.
[60] Dean and Dyer (2014) *Dean & Dyer, introduction to intellectual property law* Cape Town, South Africa: Oxford University Press 41.
[61] *Kalamazoo Division (Pty) Ltd v Gay* [1978] (2) SA 184 (C); *Northern Office Micro Computers (Pty) Ltd v Rosentein* [1981] (4) SA 123 (C); *Saunders Valve Co Ltd v Klep Values (Pty) Ltd* [1985] (1) SA 646 (T); *Waylite Diaries CC v First National Bank Ltd* [1995] (1) SA 645 (A).
[62] *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* [2006] SCA 39 (RSA).
[63] Information and Communication Technology Services ‘’ What is copyright?’’ (2010) Available at: http://www.icts.uct.ac.za/Copyright_101 (accessed 2021-12-01).
[64] S2(3) of 98 of 1978.
[65] Peter Ramsden *A Guide to Intellectual Property Law* (2011) 27.
[66] *Marwick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd* 1999 JOC 707.

> *"The requirement of originality for copyright vesting does not require that the work be unique or inventive. Instead, the work must be the result of the author's own labour and skill, rather than a copy of another work."*[67]

The threshold for originality is set low. As such, a work must not have been copied but rather through the "sweat of the brow" of the author.[68] In *Appleton v Harnischfeger Corporation*[69] the court ruled:

> "…*Originality refers to original skill or labour in execution… It must in some measure be due to the application of the author's own skill or labour."*[70]

Although the standard of originality is low,[71] originality must be determined from the perception of the work in its entirety, and not individual components of the work.[72]

There is the High Court judgment in the case of *National Soccer League t/a Premier Soccer League v Gidani (Pty) Ltd* [73] which involved the defendant allegedly infringing on the plaintiff's "annual and/or weekly soccer fixtures or lists." The existence of copyright in the works, which involves the question of originality, was one of the issues the court had to decide. The High Court also stated that:

> *"In certain circumstances, extensive effort in making a compilation may be enough to render it original, even where less skill is involved."*[74]

This point of view implies that, under the Act, circumstances may abound in which more than extensive effort is required to clothe a work in the toga of originality. Indeed, the view expressed by the High Court, per Berger AJ, in the case of *Moneyweb (Pty) Ltd v Media24 Ltd & Fadia Salie*[75] appears to confirm this.

3.3.2 Material Form

---

[67] *Marwick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd* 1999 JOC 707.
[68] Dean, O.H and Dyer, A (2014) *Dean & Dyer, introduction to intellectual property law* Cape Town, South Africa: Oxford University Press 53.
[69] 1995 (2) SA 247 (A).
[70] *Ibid*.
[71] Group, G.L (n.d.) International Comparative Legal Guides [online] International Comparative Legal Guides International Business Reports Available at: https://iclg.com/practice-areas/copyright-laws-and-regulations/south-africa#:~:text=The%20standard%20for%20originality%20is (accessed 2021-06-01).
[72] *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at par 16.
[73] [2014] 2 All SA 461.
[74] *Ibid* at para 36.
[75] [2016] 3 All SA 193.

Furthermore, the work must also be reduced to material form. “A work is not eligible if it has not been written down, recorded, or otherwise reduced to material form.”[76] *Northern Office Micro Computers v Rosenstein* corroborated that “copyright does not subsist in ideas or thoughts.”[77]

3.3.3 Qualified Person

For formal requirements to be met, the work must first be made or published in South Africa or a member country of the Berne Convention by a qualified person. Section 3(1)(a) defines a qualified person *“…in the case of an individual, a person who is a South African citizen, or is domiciled or resident in the Republic.”* Copyright shall be afforded on an artistic work if it was first published in South Africa or a member country of the Berne Convention.

If a work meets the above criteria, the Act grants the author certain exclusive rights in the work.[78] However, the owner has the option of transferring ownership of all or some of these rights to another party through assignment, testamentary disposition or operations of law.[79] Identifying the owner of a tattoo is important due to the potential conflict between a copyright owner's exclusive rights and a subject's right to autonomy of his own body.

3.3.4 The Human Body: A Form of Expression?

An artistic work shall be eligible for copyright if it is original, [80] and the work has been written down, recorded, represented in digital data or signals or otherwise reduced to material form.[81]

Neither the language of reduced to material form in section 2(2) of the Copyright Act[82] nor the legislative history of the Act imposes any restrictions on the copyrightability of a work fixed in a specific form, nor does it specify the specific manner in which an artistic work must be reduced. There is no additional guidance in the statute regarding limitations on the protection of various forms. Furthermore, no published decisions

[76] S2(2) of 98 of 1978.
[77] 1981 (4) SA 123 at 129B-E.
[78] S7 of 98 of 1978.
[79] S22(1) of 98 of 1978.
[80] S2(1)(c) of 98 of 1978.
[81] S2(2) of 98 of 1978.
[82] 98 of 1978.

appear to address copyright limitations based on the form of fixation. While the statute establishes the requirement of being reduced to material form, no manner of expression is specified. This may be open to interpretation.

The more pertinent question is not whether the human body is a protectable form, but whether a tattoo on the human body qualifies as being reduced to material form.[83]

3.3.5 Reasons Why Tattoos May Not Be Copyrightable

Notwithstanding the above, extending copyright protection to tattoos is not a simple task. The requirements for copyright have previously been discussed, as have the reasons why, at first glance, tattoos meet the requirements and should be protected by copyright. However, there are several general reasons why tattoos may not be copyrightable.

As previously stated, the Act requires that a work be original[84] and reduced to material form[85] to be granted copyright protection under the statute. Tattoos are typically created by a tattooist residing in South Africa (unless one goes overseas to get a tattoo). A tattoo is also only created once the ink gets tattooed into the skin, prior to this, the tattoo does not exist, thereby satisfying first publication in South Africa,[86] fulfilling the qualified person requirement. Tattoos have the creative spark required to pass the low originality threshold because they are an expression of an idea through a niche technique, tattooing, and the expression is original and unique (although it is not a requirement for copyright), satisfying the requirement for originality.[87]

Next, the reduced to material form requirement.[88] This simply means "any type of notation, either done by hand, printing, typewriting, or any other similar method, including electronic or digital means."[89] The argument for tattoos being fixed is that "the work is permanent to the human eye because it cannot be removed from the body

[83] Millstein (2014) Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression *Pace Intellectual Property, Sports & Entertainment Law Forum*, [online] 4(1), p.135 Available at: https://digitalcommons.pace.edu/pipself/vol4/iss1/5 (accessed 2022-04-18).
[84] S2(1)(c) of 98 of 1978.
[85] S2(2) of 98 of 1978.
[86] S4(1)(a) of 98 of 1978.
[87] S2(1)(c) of 98 of 1978.
[88] S2(2) of 98 of 1978.
[89] Maluleke "Is my work original enough?" (7 June 2019) Available at: https://www.golegal.co.za/original-works-copyright-act/ (accessed 2022-01-15).

without extreme measures."[90] The counterargument is that human skin is not permanent because it changes over time, and while the work is permanent to the human eye, the skin is constantly changing.[91] A tattoo on changing skin morphs as it stretches, shrinks, burns, and changes pigments, calling into question whether a tattoo can ever be fixed to satisfy the material form requirement.

3.3.6 Is There A Difference Between Ink to Paper and Ink to Skin?

Another argument against tattoo protection is that when a tattooist applies a tattoo to a person, the process by which the tattoo image remains formed in the skin is complicated. [92] The ink supposedly stays in the dermis, the skin's deeper layer, but not all of it does.[93] The ink that remains takes approximately two to four weeks to settle, and even then, it does not completely settle into the dermis.[94] Throughout the life of a tattooed person, their body attacks the tattoo by sending macrophages to the tattooed area to "eat" the ink while other cells absorb the ink.[95] The tattoo gradually fades as the person's body attacks the ink throughout their life, and all of the ink never technically settles.[96]

Furthermore, sun exposure may hasten the slow fading process caused by the body's immune system. [97] Tattoos are also susceptible to weight gain, weight loss and age which may cause the tattoo's appearance to be distorted by stretching or shrinking.[98] Finally, there is no guarantee that the tattoo ink will be accepted by the skin, as the

---

[90] KischIP "Can Tattoos Be Protected By Copyright?" (18 October 2013) Available at: https://www.kisch-ip.com/can-tattoos-be-protected-by-copyright (accessed 2022-01-15).
[91] Scientific American "If the cells of our skin are replaced regularly, why do scars and tattoos persist indefinitely?" (21 October 1999) Available at: https://www.scientificamerican.com/article/if-the-cells-of-our-skin/ (accessed 2022-01-15).
[92] Griffin "Tattoos stay so long in the skin because the body thinks that it is under attack" (4 April 2016) Available at: https://www.independent.co.uk/news/science/tattoos-permanent-why-how-last-forever-ink-body-best-forever-a6967296.html (accessed 2022-01-16).
[93] *Ibid*.
[94] *Ibid*.
[95] *Ibid*.
[96] *Ibid*.
[97] Hill "Tattoo blues: What happens to your skin art as you age?" (13 August 2016) Available at: https://www.mercurynews.com/2011/09/16/ tattoo-blues-what-happens-to-your-skin-art-as-you-age/ How to Avoid Tattoo Fading, Sharpologist (3 March 2018) https:// sharpologist.com/2014/03/avoid-tattoo-fading.html Available at: (accessed 2022-01-16).
[98] Fredrick "What Happens to Tattoos When You Get Fat?" (n.d) Available at: www.leaf.tv/articles/what-happens-to-tattoos-when-you-get-fat/ (accessed 2022-01-16).

body may reject certain harmful chemicals, causing raised bumps on the tattooed skin and even requiring tattoo removal.[99]

"Because of the natural processes that can influence tattoos on human flesh, it is difficult to pinpoint the exact moment of fixation to the skin, and the appearance of tattoos is too inherently variable to provide a baseline for determining questions of copyright creation and infringement." [100]

It is important to note that the legislature most likely did not intend to include the human body in the definition of "copy." Because the human body is alive, the legislature most likely did not intend to include human skin among the forms in which a copyrightable work could be embodied.

The reasons why tattoos are copyrightable and why it is not has been discussed. The argument presented will determine whether a tattoo is subject to copyright protection. However, according to the copyright requirements, a tattoo satisfies them. As a result, there is no compelling reason for the courts to deny tattoos copyright protection.

Once it has been established that a tattoo is afforded copyright protection, ownership and infringement may arise, which will be discussed below.

3.4 Ownership

3.4.1 Determining Authorship and Ownership: Tattoo Artist or Client?

As previously mentioned, the owner of a tattoo is afforded certain rights. Therefore, it is important to establish who owns the copyright in the tattoo.

Section 21(1)(a) of the Act states that "*copyright vests in the author or, in the case of a work of joint, authorship, in the copyright co-authors of the work*."[101] Paragraph (a) of the definition of "author" states that *"the author is the person who first makes or creates the work."*[102]

---

[99] Skin Artists "Allergic Reaction from Tattoo—Prevention" (n.d.) Available at: http://www.skin-artists.com/tattooallergy-preventive.html (accessed 2022-01-16).
[100] *Ibid*.
[101] S21(1)(a) of 98 of 1978.
[102] S1 of 98 of 1978.

In South Africa, the owner of copyright has the exclusive right by statute to perform certain specified acts in relation to their work, or allowing specific persons to do so, thereby preventing unauthorised persons from performing those acts.[103]

Depending on the circumstances surrounding the tattoo's creation, the initial "owner" of the tattoo may be the tattoo artist (or, in the case of an employment context, his employer), the human subject, or both. The implications for work ownership differ depending on the type of authorship. Before delving into the various authorships, it's critical to understand the difference between authorship and ownership.

Assuming that tattoos are copyrightable, it is critical to understand that a person can own a tattoo but not the copyright. The client is the owner of the tattoo by virtue of having it as part of their body. Simply inking the tattoo onto the client's body does not transfer any tattoo copyright. Therefore, the tattoo artist is protected under copyright law and is entitled to the exclusive rights to that design.[104]

As previously stated, the author of a "work" is usually the owner. The author is the person who creates the work, either entirely by himself or with the assistance of another person. When a copyrightable work is created, the author uses his or her intellectual ability to create the work. As a result, the Act recognizes the authors' efforts and grants authorship rights to the creator.

There is, however, a clear distinction between the person who creates and is the author of the work and the person who owns the work once it is created. For example, section 21(1)(b) states that "*where an artistic work is made by an author in the course and scope of his employment by the proprietor of newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be the owner of the copyright in the work insofar as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published…*"[105]

[103] S7 of 98 of 1978.
[104] Swanlund "Tattoo Copyright - Protecting Tattoo Designs" (30 June 2016) Available at: https://www.linkedin.com/pulse/tattoo-copyright-protecting-designs-matthew-swanlund (accessed 2022-06-29).
[105] S21(1)(b) of 98 of 1978.

Delineating the various types of authorship will help answer the question.

3.4.2 Sole Authorship and Joint Authorship

“The author is the person who first makes or creates the work.”[106] By definition, this could mean that two people own the copyright in a tattoo if they both designed and tattooed their client, which is a possibility, especially if the design is large and intricate.

The concept of sole authorship is most obvious when, for example, the purported tattooist is the sole artist of a tattoo. Sole authorship occurs when one person creates a work entirely on their own. But what if the tattoo was created by more than one person? Another possibility is that the work is a collective work, which means that "it is a work produced by the collaboration of two or more authors in which the contribution of each author is inextricably linked to the contribution of the other author or authors." [107] For this to materialise, both the individual and the artist must contribute independently to the creation of the tattoo.[108]

For example, a consultation may take place in which the artist and the client discuss specific concepts to incorporate into the tattoo. If two parties do not contribute significantly to an indivisible whole, there is no joint authorship in the work and no joint ownership in the copyright. But if two or more parties are deemed to be joint authors of a work, they will each receive an equal inheritable and devisable interest in the work.

The Act defines joint authorship in section 1 as “*a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.”* It appears that joint authorship exists where two or more people collaboratively "make" or "create" a work by way of inseparable contributions. This was confirmed in *Peter-Ross v Ramesar 2008 (4) SA 168 (C).*

Burger SC proposed that to be considered a joint author, the collaborators' contributions must be "significant." In the statutory definition of *"work of joint authorship,"* the word "*significant*" is not used. “The cases in which the term has been

[106] S1 of 98 of 1978 (paragraph (a) of the definition of “author”).
[107] S1 of 98 of 1978 (defining “work of joint authorship”).
[108] Patel “Copyright and Related Issues: Who Owns Copyright?” (n.d.) Available at: https://libguides.wits.ac.za/c.php?g=145331&p=956631 (accessed 2021-05-12).

used appear to convey the idea that the contribution should not be so minor as to be dismissed as de minimis."[109]

The court went over two scenarios. In the first case, someone may create a work by dictating to a scribe, whereas in the second case, someone may orally express an idea that another then reduces to material form.

Desai J then made the following important statement:

> *"In between these two situations are a variety of scenarios where it would be unwise to focus exclusively on contributions to the physical expression of the work. One such case is where two persons agree they will research and co-author an article. The ideas are quite obviously more important to the collaborators if the article is on a scientific topic. If they research and settle on the ideas to be recorded and it is left to one of them to produce a draft, there seems to be no reason why they should not be recognised as having jointly "made" or "created" the draft."[110]*
>
> *"Where the ideas to be recorded are the product of collaborative endeavour and the one has undertaken the physical recording of the ideas the collaborators could properly be regarded as having jointly "made" or "created" the work."[111]*

As previously stated, tattoo copyright allows for joint ownership if both parties contribute significantly to the design. Furthermore, it is confirmed that the client and the artist may have joint authorship where it is established from the beginning that the tattoo will be a collaboration and the client orally express his ideas about a design which the tattooist then reduces to material form, i.e., tattoos the ink onto the client.

3.4.3 Course and Scope of Employment

As abovementioned, the author is generally the owner, however this is subject to exceptions listed in section 21.[112]

Copyright created by an employee in the course and scope of his employment is automatically transferred to the employer. It is widely assumed that "course and scope" means "related to the employee's work."

[109] *Peter-Ross v Ramesar 2008 (4) SA 168 (C) at* para 17.
[110] *Ibid* at para 18 and 19.
[111] *Ibid* at para 18 and 19.
[112] 98 of 1978.

For example, if '*A'* is a tattoo artist employed at East Coast Tattoo,[113] a tattoo parlour, then he shall only enjoy authorship rights over his tattoo designs. The first owner shall be the owner of East Coast Tattoos.

However, the author shall be the owner of any copyright subsisting in the work in all other respects under the Act's sections 3 (relating to nationality, domicile or residence, and duration of copyright) and 4 (relating to copyright by reference to country of origin).[114]

Furthermore, "if a work is created during the author's employment by another person under a service or apprenticeship contract, that other person is the owner of any copyright subsisting in the work under section 3 or 4 of the Act."[115] A tattoo artist, for example, who is just starting out, may enrol in an apprenticeship. A tattoo apprenticeship is a training program in which students are trained by experienced tattoo artists in all aspects of tattooing clients. Students observe tattoo artists to learn their techniques, then progress to greater responsibility by practicing on simulated skin, working with clients under close supervision, and eventually tattooing independently.[116] The company or person providing the apprenticeship will be the owner of all the apprentices' designs and tattoos. Similarly, if a tattoo artist is an employee in the company, the company will own the employees designs and tattoos because it was created in the course and scope of employment.

3.5 Exclusive Rights

Once copyrightability and ownership have been established, the owners of the copyright are granted certain exclusive rights. The Copyright Act 98 of 1978 grants the owners of artistic copyright works six exclusive rights over their copyrighted works*: "(1) to reproduce the work; (2) publishing the work if it was hitherto unpublished; (3) including the work in a cinematograph film or a television broadcast; (4) causing a television or other programme, which includes the work, to be transmitted in a diffusion*

[113] East Coast Tattoos Available at: https://eastcoasttattoos.co.za/.
[114] S21(1)(b) of 98 of 1978.
[115] S21(1)(b) of 98 of 1978.
[116] Indeed Editorial Team "How To Get a Tattoo Apprenticeship To Start Your Career" (21 October 2021) Available at: https://www.indeed.com/career-advice/finding-a-job/how-to-get-tattoo-apprenticeship (accessed 2022-04-21).

service; (5) making an adaptation of the work; and (6) in relation to an adaptation of the work, any of the acts specified above."[117]

The term "*reproduction*" is defined in section 1 of the Act in relation to the various categories of work protected by the Act. With respect to artistic works, a reproduction includes *"a version produced by converting the work into three-dimensional form or if it is in three-dimensions, by converting it into two-dimensional form."*[118] A reproduction includes a reproduction made from a reproduction.

The Act gives a broad definition to reproduction. It guards against both material and non-material infringement.[119] In the case of reproductions of artistic works, particularly drawings, infringement can occur when one copies the drawing itself or the three-dimensional actualisation of the drawing, the latter being an indirect copy of the original drawing.

In *Galago Publishers (Pty) Ltd & another v Erasmus*[120] it was held that for a copyright infringement to have occurred it must be shown that:

> *1. "There is sufficient objective similarity between the alleged infringing work and the original work for the former to be described as a reproduction or copy of the latter; and*
>
> *2. The original work was the source from which the alleged infringing work was derived. There must be a direct or indirect causal connection between the original work and the alleged infringing work. The enquiry must be whether the defendant copied the plaintiffs' work, or is it an independent work."*[121]

If the above tests are not met, there has been no copying of a substantial portion of the protected work and thus no infringement. "Copyright infringement does not occur when a work is very similar to, or even identical to, another work, but the creator created the second work independently and without reference to the other work."[122]

---

[117] S7 of 98 of 1978.
[118] S1 of 98 of 1978 (defining "reproduction"). .
[119] S23(2)(a) – (d) of 98 of 1978.
[120] *Galago Publishers (Pty) Ltd & another v Erasmus* 1989 (1) SA 276 (A).
[121] Peter Ramsden *A Guide to Intellectual Property Law* 58.
[122] Blignaut "Copyright litigation in South Africa: Overview" (n.d.) Available at: https://uk.practicallaw.thomsonreuters.com/w0121995?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (accessed 2022-06-10).

The Act states that an adaptation in relation to artistic works "includes a transformation of the work in such a manner that the original or substantial features thereof remain recognizable."[123]

The adaptation right prevents unauthorized derivative works of the original from being created.[124] While a tattoo containing new, creative elements may infringe on a copyright owner's derivative right, US case law (discussed in the following Chapters) indicates that the existence of a violation is dependent on the tattoo's content in comparison to the original work. The basis of referring to US case law is that South African courts have not yet been faced with tattoo copyright cases.

The right to adapt is included in exclusive copyright rights. Consider an author who makes a film adaptation of his or her book (original work) (adaptation work). What if a client wants to turn their tattoo into a sleeve, in which one or more tattoos encircle the entire arm? In the case of a sleeve, the individual tattoo artist's tattoo becomes part of a larger whole and may be changed slightly or significantly, implying that the adaptation is effective.

3.5.1 Moral Rights

Once the copyrightability of tattoos is recognised, the issue of moral rights must be considered. In terms of Article 6*bis* of the Berne Convention, it states that the author has "the right to claim authorship of the work".[125] As previously mentioned, the author is the person who first makes or creates the work.

In copyright law context, a "*moral right*" is a personal right that is attached to the author, allowing the author to receive appropriate recognition when his/her work is used and, to some extent, dictating how an author's work is treated by others.[126] Section 20 states that *"the author shall have the right to claim authorship in the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other*

[123] S1 of 98 of 1978 (defining "adaptation").
[124] Levenstein and Tucker "Introduction To The Law Of Copyright - Copyright - South Africa" (6 December 2005) Available at: https://www.mondaq.com/southafrica/copyright/36570/introduction-to-the-law-of-copyright (accessed 13 June 2022).
[125] Berne Convention, Article 6*bis*.
[126] Ya-fan Wong "Moral Rights in the Context of Copyright Law in South Africa" (6 May 2015) Available at: https://dommisseattorneys.co.za/blog/moral-rights-in-the-context-of-copyright-law-in-south-africa/ (accessed 2022-04-25).

modification of the work where such action is or would be prejudicial to the honour or reputation of the author..."[127] This right applies to artistic works.

The moral rights include the right to paternity, which is "the right to claim authorship of the work", and the right to integrity, which is "the right to object to any distortion, mutilation, or other modification of the work that is or would be detrimental to the author's honour or reputation."[128]

It is important to remember that moral rights in artistic works can only exist if they have copyright in South Africa in the first place.

Moral rights, like many other personal rights, can be waived by the author and chosen not to be enforced. Although the Act makes no provision for the waiver of moral rights, good practice requires that any waiver of moral rights be in writing.[129]

The moral rights of the author are distinct from the copyright that exists in a work.[130] This is supported by the fact that "an assignment of copyright in a work, even if it is of full and complete copyright, does not transfer the author's moral rights to the assignee."[131] Moral rights invariably attach to the author throughout his life which terminates upon the person's death and are analogous to, or in the nature of, his personality rights derived from common law.[132] Misuse of a work may give rise to a claim of copyright infringement, moral rights infringement, or both in some cases. For example, if a work is almost verbatim reproduced without permission and the derived work is claimed to be the work of another person, the author's copyright and paternity rights may be violated.

In contrast, with the permission of the copyright owner, an adaptation of a work may be made with no copyright infringement; however, the adaptations may infringe the author's right of integrity if modifications are made that are detrimental to the author's

[127] S20 of 98 of 1978.
[128] Article 6 of the Paris Convention for the Protection of Industrial Property 1883.
[129] Ya-fan https://dommisseattorneys.co.za/blog/moral-rights-in-the-context-of-copyright-law-in-south-africa/.
[130] Dean *Protection of the Author's Moral Rights in South Africa* 1996 39.
[131] Dean *Protection of the Author's Moral Rights in South Africa* 39.
[132] *Ibid*.

honour or reputation.[133] Infringement to moral rights is treated as an infringement of copyright under Chapter 2.[134]

Claiming any or all of these rights in relation to a work of body art, on the other hand, would be difficult. It is unclear how an artist would enforce the attribution right other than by etching her name on the individual. However, this is not a common practice in the tattoo community, and while people may grow accustomed to wearing signed tattoos in the future, it appears unlikely for the time being. As previously stated, "the artist has a claim against any distortion, mutilation, or other modification of the work that is or would be detrimental to the author's honour or reputation."[135]

However, this is not a simple task. The average tattoo artist may struggle to demonstrate that his reputation or the reputation of his work is strong enough to support an assertion of the integrity right. An established tattoo artist who tattoos famous figures, on the other hand, is more likely to be well-known, making it easier to determine his reputation.

However, because tattoos are typically permanent unless surgical removal is performed, modifying one may jeopardize the tattoo artist's moral rights. Courts may be more willing to hear claims involving intentional tattoo modification. Nonetheless, we believe the artist's chances of obtaining relief under section 20(1) against a prejudicial modification are, at best, remote.

3.5.2 Assignment and Licenses

That being said, the Act provides for assignment and licenses. *"Copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law."*[136] "A copyright assignment or testamentary disposition may be limited to only some of the acts over which the copyright owner has exclusive control over, or to only a portion of the copyright's term."[137] However, "it must be in writing signed by or on behalf of the assignor, the licenser or, in the case of an exclusive sublicence, the exclusive sub licenser."[138] A non-exclusive licence, on the other hand,

[133] *Ibid*.
[134] S20(2) of 98 of 1978.
[135] S20(1) of 98 of 1978.
[136] S22(1) of 98 of 1978.
[137] S22(2) of 98 of 1978.
[138] S22(3) of 98 of 1978.

"can be written or oral, or inferred from conduct, and can be revoked at any time; however, a licence granted by contract cannot be revoked, either by the person who granted the licence or his successor in title, except as provided in the contract or by a subsequent contract."[139]

When a person gets tattooed, exclusive and non-exclusive licenses must be issued. Despite a millennia-long history, the legal community has yet to develop an adequate system for determining copyright ownership in tattoos. This unwillingness, combined with the pervasiveness of technology and social media, may render almost every tattooed person an infringer, preventing them from engaging in activities like commercials or films to more mundane activities like posting photographs on Instagram, without a complicated trial.[140] If implemented, the solution would grant an individual an implied license to certain exclusive rights, as well as the ability to do whatever they wanted with their body and the ink placed on it, such as display it in photos and videos while leaving other uses of the image unaffected.[141]

3.6 Remedies

A final set of issues concerns the appropriate remedies for copyright or moral rights infringement in tattoos.

Only the South African High Courts can enforce copyright claim. There are no specialised copyright courts. This means that the presiding officer's knowledge of copyrights may vary from case to case.[142] Copyright litigation is in accordance with civil procedure. The copyright owner whose rights were infringed is the plaintiff or claimant (usually the artist) and the alleged infringing person is the defendant (usually the client).[143] "In the case of joint ownership of a copyright a co-author may not sue for damages resulting from infringement of the copyright without joining the other co-author(s) or making a case for entitlement to sue alone."[144]

---

[139] S22(4) of 98 of 1978.
[140] Ulscht "Copyright Ownership and the Need for Implied Licenses in the Realm of Tattoos" (2014) *Law School Student Scholarship* 596 https://scholarship.shu.edu/student_scholarship/596 (accessed 2022-06-29) 3.
[141] *Ibid*.
[142] H Blignaut https://uk.practicallaw.thomsonreuters.com/w0121995?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 2.
[143] *Ibid*.
[144] *Feldman NO v EMI Music Publishing SA (Pty) Ltd 2010* (1) SA 1 (SCA).

The author or owner can take legal action to stop infringements of their rights. Artists can seek redress for infringements committed by anyone, but particularly by the client. Copyright infringement is actionable under section 23 and 24 of the Act.[145] "Any action for such infringement is by way of relief in damages, interdict, delivery of infringing copies or plates used or intended to be used for infringing copies, or otherwise shall be available to the plaintiff as in any corresponding proceedings for infringements of other proprietary rights."[146] However, the last remedy is the least applicable regarding body art remedies.

In general, infringement occurs when another party uses the art and displays it or uses it through reproduction and distribution without obtaining permission from the owner of the copyright. Because the art is on a person's body, this is usually permanent and there is no stopping once the art has been tattooed on. An infringement lawsuit, on the other hand, can prevent the person from continuing with tattooing others with the same art. Furthermore, by incurring damages that translate to compensation for the use of the art will deter the person from continuing with tattooing others without the required consent.

Actual damages, which must be proven by the plaintiff, can include either lost profits or lost royalties.[147] "The amount of the damages must, as far as possible, be that amount of money that will put the plaintiff in the same position he would have been in if the infringement had not occurred."[148] Damages may also include license fees that the defendant would have had to pay if the infringement had continued, and the amount spent by the plaintiff in proving the infringement.[149]

In the typical body art case, however, the plaintiff (tattoo artist) may have difficulty proving a significant loss of profits or (unless the artist charges very high fees) significant lost royalties attributable to the infringement. Otherwise, in order to recover

[145] 98 of 1978.
[146] S24 of 98 of 1978.
[147] Valle, H.S.F.L.-F.N.D. and Ripley-Evans, J. (n.d.). *In a nutshell: claiming damages in South Africa | Lexology* www.lexology.com. Available at: https://www.lexology.com/library/detail.aspx?g=29bd0e60-3488-4493-b564-439c0b9a9f56 (accessed 2021-05-25).
[148] Ramsden *A Guide to Intellectual Property Law* 69.
[149] *Ibid*.

an award of the defendant's (client's) profits, the plaintiff must establish a reasonable nexus between those profits and the infringement.[150]

Notwithstanding the above, the Act provides a solution in this regard in section 24 (1A) of the Act which provides for the court to award royalties in lieu of damages. Section 24 (1A) provides that "a reasonable royalty is in lieu of damages and creates a substantive remedy which does not require proof of damages to calculate the royalty."[151]

In terms of interdict relief, a court could presumably prevent an infringing party from infringing again in the future. To grant a final interdict, our courts have held that the following evidence must be presented:

> *"The plaintiff/applicant (tattoo artist) has established the subsistence of a clear right of copyright in respect of the work(s) relied upon; the defendant/respondent (client) has infringed that right; and there is an absence of similar protection by any other remedy*."[152]

However, an interdict may be problematic in this context. The preceding discussion depicts various ways the individual may be infringing, such as "modifying a work of body art in violation of the author's adaptation rights or moral rights; publicly displaying an infringing tattoo or makeup design; or, possibly, destroying a tattoo in violation of the author's moral rights" (although this seems unlikely). Could a court forbid someone from changing a tattoo that is permanently attached to his body unless it is removed? Could a court order the removal of a tattoo if doing so would mean destroying a recognized work of art? Could a court order the removal of an infringing tattoo, or at the very least bar the person from displaying the work in public? This is unlikely as it is a discretionary remedy of an exceptional nature that is not available to a litigant who possess an alternative remedy, [153] and constitutional issues may arise.

Imposing an interdict may infringe the constitutional right of freedom of expression.[154] Perhaps the need to use certain copyrighted texts or images to express your point of

---

[150] Khumalo "South Africa: Infringement of Copyright" (18 February 2020) Available at: https://www.mondaq.com/southafrica/copyright/894384/infringement-of-copyright#:~:text=i)%20Firstly%2C%20there%20must%20be,copyrighted%20work%20(causal%20link (accessed 2021-05-25).
[151] S24(1A) of 98 of 1978.
[152] Dean and Dyer *Introduction to intellectual property law* 38.
[153] Prest (1996) *The Law and Practice of Interdicts* Lansdowne: Juta, Erschienen 204.
[154] S16(1) of the Constitution of the Republic of South Africa, 1996.

view would take precedence over the owner's copyright, or at the very least strengthen the argument that an interdict, rather than damages, would sweep too far. Another possible basis for a constitutional challenge is an interdict ordering the client to remove, not remove, alter, or refrain from publishing a tattoo i.e. showing off his tattooed body in public would violate some constitutional right to human dignity[155] and the right to privacy.[156] While arguments based on the constitutional right to privacy are rarely successful, it may be worthwhile in an appropriate case to investigate the limits of the government's power to force someone to remove or cover up an offending tattoo. Again, even if the constitutional reasoning fails in the end, a court seeking to avoid a constitutional issue may choose the damages-only option. Notably, prohibiting illegal searches and seizures could bolster the privacy argument.[157] Tattoo removal may be considered a "substantial bodily intrusion" that violates a person's reasonable expectation of privacy.[158]

While recent case law does not address these current issues, courts may be hesitant to order tattoo removal, especially if the accused can demonstrate the resulting pain and discomfort. It's unclear whether an order to simply cover up an offending tattoo would be considered equally intrusive, though the privacy concerns raised above may be sufficient for a court to refuse to issue an interdict.

[155] S10 of the Constitution of the Republic of South Africa, 1996.
[156] S14 of the Constitution of the Republic of South Africa, 1996.
[157] Criminal Procedure Act 51 of 1977.
[158] S28(1)(b) of 51 of 1977.

CHAPTER 4: COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE

The Intellectual Property Clause in Article I of the U.S. Constitution expressly grants Congress the authority to establish federal copyright law. Article I, Section 8, Clause 8 states 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"*.[159] Because of the references to "authors," "science," "writings," and "discoveries," this is where federal copyright and patent law originated historically.[160] Under section 102(a) of the Copyright Act of 1976 (the "Act"), protection subsists in: *"(1) original (2) works of authorship (3) fixed in any tangible (4) medium of expression."*[161] Tattoos are copyrightable under these legal frameworks. As a result, the legal framework in the United States directly from its constitution demands the protection of artistic works and leaves the rest of the law to determine how this protection will be conferred. This chapter will go over the elements of copyright, how to establish ownership of a copyright, and the exclusive rights granted to a copyright owner.

The purpose of this chapter is to determine whether tattoos are copyrightable in terms of the elements of copyright and how the US Copyright Act differs, if at all, from the South African Copyright Law and how South Africa could seek guidance to address the gap in our law.

4.1 The Copyright Act 1976: What is Required to be Copyrightable?

The Copyright Act of 1976 is the fundamental legal text governing intellectual property rights. It emphasizes 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,

[159] National Archives (2018) *The Constitution of the United States: A Transcription* National Archives Available at: https://www.archives.gov/founding-docs/constitution-transcript (accessed 2022-04-18).
[160] King (2013) *The Challenges 'Facing' Copyright Protection for Tattoos* papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802292 (accessed 2022-04-20) at 148.
[161] 17 U.S.C. § 102(a) (2012).

reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[162]

At this point, the law refers to the requirement that the work of art be fixed in a medium that can be perceived by humans in any way. Section 106, on the other hand, contains a list of copyright owners' exclusive rights. These rights include *"the right to reproduce, distribute, display, and create derivatives of their copyrighted work."* [163]In addition, section 201 mentions that *"copyright in a work protected under this title vests in the author or authors of the work".*[164]

The main argument in support of copyright in tattoos is that a tattoo meets all of the requirements of the basic definition of a copyrightable work.[165]

4.1.1 The Originality Requirement

"Originality" is the first requirement of copyrightability. Originality has a low threshold in copyright law.[166] Originality, according to the Supreme Court, is defined as

> *"A work created independently by the author rather than copied from other works, with at least some degree of creativity."*[167]

Providing the work was created independently, "it is copyrightable even if it is not novel or unique." [168] "[A] minor addition" of independently original expression meets this standard.[169] Furthermore, the commercial nature of a work, as is the case with tattoos, does not preclude originality or copyrightability. [170] This famous passage on originality was written by Justice Holmes on behalf of the Supreme Court:

> *"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to*

---

[162] 17 U.S.C. § 102(a) (2012).
[163] 17 U.S.C. §106 (2012).
[164] 17 U.S.C. §201 (2012).
[165] King (2013) *The Challenges 'Facing' Copyright Protection for Tattoos* papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802292 at 132.
[166] *Feist Publ'ns, Inc. v. Rural Tel. Serv*., 499 U.S. 340, 345 (1991).
[167] *Ibid*. (stating that the "requisite level of creativity is extremely low; even a slight amount will suffice").
[168] *Ibid*.
[169] *Alfred Bell & Co. v. Catalda Fine Arts, Inc*., 191 F.2d 99, 103 (2d Cir. 1951).
[170] *Bleistein v. Donaldson Lithographing Co*., 188 U.S. 239, 251–252 (1903) (determining that, despite their commercial use, pictorial illustrations on advertisements are eligible for copyright protection because they have aesthetic and educational value that appeals to the public's taste).

miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."[171]

Original drawings that are turned into physical works of art are also well established as being protected by copyright. Tattoos are sufficiently unique, and the majority, if not all, will pass the creativity test. An artist's original sketch more than meets the requirement for originality.[172]

However, one could argue that a book of flash drawings is not distinctive enough to warrant copyright protection because the images are well-known images regardless of whether it was created by the artist or not.[173] While flash book images are well known, they can still be considered original if *Feist's* logic is applied. Minor changes to the standard flash drawing are usually made by each tattoo artist, such as changing the tattoo's colour, shading, alignment, and placement on the body.[174] All these factors can combine to result in arrangement changes that are consistent with *Feist*, satisfying the requirement for originality.

4.1.2 The Fixation Requirement

Fixation is the next requirement.[175] "Fixation is an unequivocal constitutional requirement of copyright law because a "writing" occurs when it is fixed."[176] Tattoos satisfy this requirement and trigger copyright protection once the "original expression is captured in a physical form from which it can be perceived, reproduced, or otherwise communicated."[177] "Fixation must be sufficiently permanent or stable to allow this perception, reproduction, or communication to take place"[178] irrespective of whether it is later lost or destroyed. Tattoos satisfy this requirement since their purpose is to be kept for life, even if they fade or stretch over time.

---

[171] *Ibid* at 251.
[172] *Feist Publ'ns, Inc. v. Rural Tel. Serv*., 499 U.S. 340, 345 (1991) at 346.
[173] Bloom (2012) Hangover Effect: May I See Your Tattoo, Please *Cardozo Arts & Entertainment Law Journal* 31, p.435 Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/caelj31&div=21&id=&page= (discussing the originality standard).
[174] Jodie Michalak "The Timeless Art of the Flash Tattoo" (18 February 2022) Available at: https://www.byrdie.com/what-is-tattoo-flash-3189612 (accessed 2022-05-07).
[175] 17 U.S.C. § 101 (2012).
[176] *U.S. v. Moghadam*, 175 F.3d 1269, 1273–74 (11th Cir. 1999).
[177] Lichtman, D (n.d.) *Are Tattoos Eligible for Copyright Protection?* The Media Institute. Available at: http://www.mediainstitute.org/IPI/2011/061511.php (accessed 2022-11-07).
[178] 17 U.S.C. § 101 (2012).

4.1.3 Tangible Medium

The third requirement is “tangible medium”. The work must be “fixed in any tangible medium.”[179] Paper, canvas, CDs, DVDs and even MP3 files are all tangible mediums that are granted copyright protection.[180] The human body, similarly, would sufficiently be classified as tangible to satify this requirement.[181]

As a result, nothing in the Constitution or the Copyright Act precludes tattoos from being copyrighted. “Following the international Berne Convention, which broadened the scope of "literary and artistic works" protectable under copyright law in the United States, copyright law in the United States was amended.”[182] Now, “every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression,” is copyrightable in each country that adopted the amendments after Berne.[183] Tattoos are an example of artistic work and expression. Clients and other tattoo artists may infringe on another artist's original artwork or tattoo designs because tattoo authors' original designs should have copyright protection. As a result, tattoos are likely to be copyrightable even before the ink is applied to the skin.

4.2 *Establishing Copyright Ownership*

The Act clarifies the nature and scope of copyright ownership,[184] but when applied to the tattoo industry, that clarity wanes. The "author" of a work initially owns the copyright, but tattoos may involve various parties, namely: (1) the tattooed individual; (2) the tattoo artist; (3) the tattoo parlour; and (4) third parties who may own a copyright in the drawing or inspiration used for the tattoo.[185] An ownership interest in a copyrightable work can be held by more than one person.

4.2.1 Authorship

---

[179] 17 U.S.C. § 102(a).
[180] *Ibid*.
[181] Cummings (n.d.) *CUMMINGS.DOCX (DO NOT DELETE) CREATIVE EXPRESSION AND THE HUMAN CANVAS: AN EXAMINATION OF TATTOOS AS A COPYRIGHTABLE ART FORM* Available at: https://illinoislawreview.org/wp-content/ilr-content/articles/2013/1/Cummings.pdf at 297.
[182] WIPO “Berne Convention for the Protection of Literary and Artistic Works” (n.d.) Available at: https://wipolex.wipo.int/en/text/28369 accessed (2022-05-01).
[183] WIPO “Summary of the Berne Convention for the Protection of Literary and Artistic Works” (1886) Available at: https://www.wipo.int/treaties/en/ip/berne/summary_berne.html accessed (2022-05-01).
[184]Leaffer *UNDERSTANDING COPYRIGHT LAW* (2014) 91 6 191 – 192.
[185] Hatcher “*Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States”* (15 April 2005) Available at: http://dx.doi.org/10.2139/ssrn.815116 https://perma.cc/CWV2-FH57 (accessed 2022-06-29) 7.

"The person asserting the copyright must be the author of the work created."[186] If the artist created the design specifically for the client, this requirement would be simple to establish in tattoos. If it was a standard flash design, the artist would have copyright only in the elements he changed or added to the new design if he did not create the original flash art.[187]

When the client claims he assisted in the design of the tattoo, the authorship requirement becomes entangled in the murky waters of copyright. Client and artist frequently collaborate, the client tells the artist what he wants the tattoo to look like, the colours he wants, the placement of the tattoo. The artist incorporates those ideas into a design, utilizing his artistic license to ensure that the tattoo looks good and fits the body shape. Who owns the copyright in this case? Is it only the artist because he made it? Just the client because he came up with the idea? Or perhaps both? As co-authors, they would most likely share copyright ownership. Because ideas are not copyrightable, the client cannot own the copyright on his own.[188] The client, on the other hand, could claim ownership of the design decisions he made, such as colour, size, and placement. To be regarded as a co-author of the copyright, the client must be the author of the work and intend for his contribution to be inseparable from the finished work. [189] "Co-authors have an undivided interest in the entire copyright, which they can transfer or assign. "[190]

Furthermore, "the copyright cannot be licensed without the consent of the other author, and both authors can file an infringement claim."[191] "However, a copyrightable contribution alone is insufficient to trigger joint authorship. To be afforded join authorship, both authors must either agree that the work was jointly created or the contribution must be so substantial that the work would not be complete without the

[186] 17 U.S.C. § 102(a) (2012).
[187] Feist Publ'ns, 499 U.S. at 348 ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.").
[188] 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
[189] 17 U.S.C. § 101 ("A 'joint work' is 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.")
[190] *Bencich v. Hoffman*, 84 F. Supp. 2d 1053, 1056 (D. Ariz. 2000) ("Co-owners of a copyright are generally treated as tenants in common, with each co-owner having an independent right to use or license the use of the work, subject to a duty of accounting to the other co-owners for any profits.").
[191] Hatic "Who Owns Your Body Art? The Copyright and Constitutional Implications of Tattoos" (2012) *FORDHAM INTELL. PROP. MEDIA & ENT L.J* 396 404.

contribution."[192] Under this approach, if the client only made colour and arrangement suggestions, he would most likely not be considered an author enough to be considered a co-author in the joint work. To reap the benefits of joint authorship, the client must contribute ideas to the tattoo design that are "significant enough that the design would not be possible without those suggestions."[193] In the case of a song, where the music and lyrics are inextricably linked, this is easy to determine, but it can be more difficult in the case of a tattoo. Any tattoo artist can claim that he could have created the same design on his own, rendering the client's contribution irrelevant. If the client's contribution was insufficient to qualify him as a co-author, the tattoo artist would own the design's copyright entirely. However, if the client can demonstrate that he came in with a rough sketch for the tattoo artist to work from, this may be sufficient to make the client an author in the sense of joint authorship.

Furthermore, a work of authorship can fall under one or more of several categories. Tattoos fall under PGS works.[194] PGS works, defined in section 101 of the Act, *"include two-dimensional and three-dimensional works of fine, graphic, and applied art; photographs, prints and art reproductions; maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.*"[195]

Tattoos fall under this category because they are two-dimensional and a type of graphic art. [196] Some may argue that tattoos, like paintings and drawings, [197] are fine art. Tattoos, regardless of category, are closer to applied art than uncopyrightable works of industrial design. [198]

4.2.2 Works Made for Hire

[192] *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000).
[193] Hatic *FORDHAM INTELL. PROP. MEDIA & ENT L.J* 430.
[194] 17 U.S.C. § 102(a) (2012). Categories included in "works of authorship" are: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audio-visual works; (7) sound recordings; and (8) architectural works."
[195] 17 U.S.C. § 101 (2012).
[196] See Fine art, MERRIAM-WEBSTER Fine art Definition & Meaning - Merriam-Webster ("art concerned primarily with the creation of beautiful objects"); see also Graphic arts, MERRIAM-WEBSTER, Graphic arts Definition & Meaning - Merriam-Webster ("the fine and applied arts of representation, decoration, and writing or printing on flat surfaces together with the techniques and crafts associated with them").
[197] *Mazer v. Stein*, 347 U.S. 201, 212–13 (1954).
[198] *Masquerade Novelty, Inc. v. Unique Industries, Inc*., 912 F.2d 663, 669–70 (3rd Cir. 1990).

The main argument against tattoos being copyrightable by the artist is that "they are works created for hire, and thus the copyright is owned by either the client or the artist's employer."[199] "A work made for hire is one that is created as part of an employee's job or one that is "commissioned" by a client who hires the independent contractor to perform the task, and the agreement is in writing."[200] If the tattoo artist was employed by a parlour, the artist would almost certainly have a contract stating any tattoos made while working for the parlour were works made for hire, and that the parlour owns such works and all designs created during the course of employment. Here, the tattoo parlour, not the artist, would own the copyright in the works and designs. Where the client or a third party commits an infringement, the parlour is the plaintiff, not the artist. This arrangement is not advantageous to the artist; however, if the parlour owned all of the designs the artist created and the artist was fired or left the parlour, the artist would be unable to use those same designs without the parlour's permission, or the artist would be infringing the parlour owner's copyright rights.

When a client commissions a work from an artist, critical questions about this doctrine arise. [201] "The work must be used as a contribution to a collective work or a compilation, and the agreement must be memorialized in a signed writing between the parties."[202] Because of the nature of the tattoo industry, both of these requirements are problematic.[203]

Firstly, if a client requests only one tattoo, which is common, the artist can contend that the single tattoo is not part of a collective work or a compilation and thus does not fall under the definition of work for hire.[204] If the client already has a tattoo, they can argue that the new one will complement their existing artwork, fulfilling the definition of work for hire.[205] This is a subjective debate based on the number of existing tattoos, the tattoos' location, and whether all tattoos share a common theme.[206] Trying to

[199] 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.").
[200] 17 U.S.C. § 101.
[201] *Ibid*.
[202] *Ibid*.
[203] Kyle Alan Ulscht, Copyright Ownership and the Need for Implied Licenses in the Realm of Tattoos, L. SCH. STUDENT SCHOLARSHIP (2014) *eRepository @ Seton Hall* Available at: https://scholarship.shu.edu/.
[204] Hatic *FORDHAM INTELL. PROP. MEDIA & ENT L.J* 404.
[205] *Ibid*.
[206] *Ibid*.

establish whether the new tattoo will add to the client's existing tattoo would be a court matter, making it difficult to establish a hard and fast rule for determining whether a work for hire exists.[207]

The writing requirement in the definition of work for hire may also be problematic as the tattoo industry is not particularly concerned with paperwork, and many clients are unaware of, or lack the foresight to prepare, a work for hire agreement before going under the needle. Even if the client had brought a work for hire agreement, they would be unlikely to get the artist to sign it unless there was something in it for the artist as well. If an artist inks a celebrity, the artist may benefit from free promotion and publicity, enticing them to sign the agreement; however, this arrangement is unlikely for a non-famous person.

4.2.3 Assignments and Licenses

Copyright initially belongs to the author (the hiring party in a work made for hire) or authors (e.g., a joint work) of the work. Ownership in copyrights, like other property rights, is transferable.[208] Additionally, *"any of the exclusive rights specified in section 106 may be transferred and owned separately."*[209] Section 204(a) of the Copyright Act sets forth the requirements of a valid transfer:

> *"A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."*[210]

Analysing that section, transfer may be "by operation of law" or "in writing."

Section 204(a) does not define the phrase "by operation of law," nor does case law assist. A few courts have interpreted it to mean *"transfers by bequest, bankruptcy, mortgage foreclosures, and the like.*"[211] This narrow interpretation would presumably

---

[207] Rudyk & Davie *"*Body Modification: The Case of Tattoo Copyright*"* (2014) *EDUC. COUNCIL FOR JOURNALISM & MASS COMM* 1 - 15.
[208] 17 U.S.C. § 201(d)(1) (2000) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.").
[209] 17 U.S.C. § 201(d)(2) (2000) ("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.").
[210] S204(a) of 98 of 1978.
[211] *Taylor Corp. v. Four Seasons Greetings*, LLC, 403 F.3d 958, 963 (8th Cir. 2005).

benefit only a party defending against a tattooist's copyright action in unusual circumstances.

There are two requirements for the "in writing" distinction for a transfer under section 204(a). To begin, “the writing does not have to be a magnum opus or an epistle: a one-line pro forma statement will do.”[212] Section 204(a) states that “a note or memorandum” may transfer the copyright. As a result, “the document does not even need to include the term "copyright" or any specific language as long as the writing or writings indicate that the parties intended to transfer a copyright interest.”[213]

Secondly, the copyright transferor or his agent must sign the writing that transfers the interest in the copyright. An oral assignment later confirmed in writing, on the other hand, may validate the transfer from the start (at least against an outsider to the assignment, e.g., the accused infringer).[214]

Unlike an exclusive license or the exclusive rights associated with a transfer under section 204(a), “a copyright holder can grant an implied nonexclusive license through an oral agreement.”[215] “Nonexclusive licenses may be implied by the conduct of or relationship between the parties.”[216] As a result, a defendant may claim to have a valid license to use copyrighted works. A license, however, is not always the panacea for defending against a copyright infringement suit. “Firstly, the owner of the original copyright has the sole right to create derivative works and secondly, the use of copyrighted material beyond the scope of the license is an infringement.”[217]

Interestingly, and which will be discussed in Chapter 6, in Solid Oak Sketches, the court held that “NBA players with tattoos received a nonexclusive license from the artists to use the tattoos as part of their likeness, and that players who contracted with a video game maker to use the tattoos through the NBA granted the game maker an implied license for that use.”[218]

---

[212] *Lyrick Studios, Inc. v. Big Idea Prods., Inc*., 420 F.3d 388, 392 (5th Cir. 2005).
[213] *ITOFCA, Inc. v. MegaTrans Logistics, Inc*., 322 F.3d 928, 931 (7th Cir. 2003).
[214] *Billy-Bob Teeth, Inc. v. Novelty, Inc*., 329 F.3d 586, 592 (7th Cir. 2003).
[215] 17 U.S.C. § 101 (2000) (“A ‘transfer of copyright ownership’ is an assignment, . . . exclusive license . . . or any of the exclusive rights [under section 106] comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.”).
[216] Nimmer *Nimmer On Copyright* (2019) 10-56.
[217] *Liu v. Price Waterhouse*, LLP, 302 F.3d 749, 754 (7th Cir. 2003)
[218] *Solid Oak Sketches, Inc. v. 2K Games, Inc*., No. 16-CV-724-LTS (S.D.N.Y. 2020).

Because there is usually no paperwork in the tattoo industry, “there is no assignment or exclusive license of any of the rights in an original tattoo design.”[219] This will endure until the industry standard starts including a waiver or releases some of the rights. While some tattoo artists, such as Ed Hardy, are becoming famous and using their status to license their designs to clothing lines, this is not yet the industry standard.[220] What the tattoo industry does is important. “As courts become more involved in the intersection of tattoos and copyright law, they will look for and try to understand industry norms.”[221] Courts are likely to rule that each tattoo is granted a nonexclusive license to the client by the tattoo artist allowing them to display their tattoo, while still ensuring the design is original and owned by the artist.[222] “Because the industry standard still allows perpetual copying of designs, including those of other tattoo artists, there is an implied nonexclusive license, which may even allow sublicenses of one's designs to others for copying.”[223] As a result, “ownership interests are crucial because they define what copyright protection a party can obtain for their contribution and what proprietary rights can be enforced.”[224]

It is critical to consider educating clients about how the law may "revoke" rights they believed they had in the permanent ink on their body. “Courts should allow parties to contract, transfer, or negotiate rights in the tattoo industry as a market.” [225] Technology, word of mouth, and the exchange of ideas are all important in the tattoo industry. Original designs should be legally protected, but clients and tattoo artists should be able to create new expressions without having to rent out fundamental or common design elements to another artist.[226]

4.3 The Copyright Owner’s Exclusive Rights

[219] Beasley “Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists” (2012) *California Law Review* 1141 1140.
[220] Beasley *California Law Review* 1141.
[221] *Roy Export Co. v. CBS*, 503 F. Supp. 1137, 1146–47 (S.D.N.Y. 1980) (finding it relevant to consider the industry standards for the copyright fair use defence and first amendment considerations).
[222] Ulscht, K (2014) Copyright Ownership and the Need for Implied Licenses in the Realm of Tattoos. *Student Works* Available at: https://scholarship.shu.edu/student_scholarship/596 (accessed 2022-06-27).
[223] Ulscht https://scholarship.shu.edu/student_scholarship/596 7.
[224] *Ibid*.
[225] Beasley *California Law Review* 1144.
[226] *Ibid*.

The copyright owners are afforded exclusive rights in the copyrighted work under the Copyright Act. The exclusive “right to reproduce the copyrighted work, create derivative works based on it, distribute copies of it, and publicly display” [227] is among these.

In addition to these rights, “the copyright owner also has the right to authorize or license others to use selected exclusive rights,”[228] such as allowing the client to publicly display the tattoo. In addition, ownership of a work's copyright "may be transferred in whole or in part by any means of conveyance or by operation of law" and is inheritable and devisable.[229]

Along with the Copyright Act's rights, the Visual Artists Rights Act of 1990 (VARA) was enacted. “It protects an author's moral rights in a work.” [230] VARA's protections are limited to the authors of "works of visual art."[231] VARA-protected works of visual art are defined as *"a painting, drawing, print, or sculpture existing in a single copy, in a limited edition... signed and consecutively numbered by the author.*"[232]

VARA includes safeguards like the right to attribution and the right to integrity. “The author of a work has the right to claim authorship of their work, to prevent the author's name from being used in relation to any work not created by the author, and to prevent the author's name from being used in relation to their work if that work has been modified, distorted, or mutilated in a way that would be detrimental to the author's honour or reputation.”[233] The right to integrity is intended “to protect not only the physical integrity of the work, but also the author's creative integrity.”[234] As a result, the right to integrity is meant to *"prevent any intentional distortion, mutilation, or other modification of th[e] work which would be prejudicial to [the author's] honour or reputation,"* as well as *"any destruction of a work of recognized stature."*[235]

---

[227] 17 U.S.C. §106(1)–(3), (5).
[228] 17 U.S.C. §106.
[229] 17 U.S.C. §201(d)(2).
[230] 17 U.S.C. §106A.
[231] *Ibid*.
[232] 17 U.S.C. § 101.
[233] 17 U.S.C §106A(a)(1)–(2).
[234] Lesicko “Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act” (2013) *IDEA* 39 51.
[235] 17 U.S.C. §106A(a)(3)(A)–(B).

VARA's moral rights to the author are subject to several restrictions. To begin, "any alteration to a work of visual art caused by time or the nature of the materials used in the work is not a violation of the statute."[236] Second, VARA does not protect any changes made to a work of visual art as a result of conservation efforts or public presentation.[237] The third exception bars protection "if a work of visual art is used in conjunction with a work that is exempt from VARA under a subsection of §101."[238]

The rights granted under VARA, unlike the exclusive rights granted under the Copyright Act, *"are not transferable; however, they may be waived."*[239] A valid waiver must be expressly stated in writing, signed by the author, and identifying the specific rights waived.[240]

4.4 Comparison between South African Copyright Law and US Copyright Law

The Copyright Act 98 of 1978 governs South Africa, while the Copyright Act of 1976 governs the United States. Both Acts share and differ in ways that will be discussed further below.

Section 2(1) of the Copyright Act 98 of 1978 defines the seven eligible categories of copyrightable works. Tattoos fall under the category of artistic works.[241] A tattoo would most likely be classified as a drawing for classification purposes. Similarly, original drawings that are turned into physical works of art in the United States are protected by copyright. Tattoos are distinctive enough, and the vast majority, if not all, will pass the creativity test. Both jurisdictions would most likely classify tattoos as drawings.

In South Africa, copyright subsists in original works of authorship by a qualified person, including artistic works that are reduced to material form. The threshold for originality is set low. Although the standard of originality is low,[242] originality must be determined from the perception of the work in its entirety, and not individual components of the

---

[236] 17 U.S.C. § 106A(c)(1).
[237] 17 U.S.C. § 106A(c)(2).
[238] 17 U.S.C. § 106A(c)(3).
[239] 17 U.S.C. § 106A(c)(1).
[240] *Ibid*.
[241] S2(1)(c) of 98 of 1978.
[242] Bergenthuin and Gibson "South Africa: Copyright Laws and Regulations 2020" (15 October 2019) Available at: https://iclg.com/practice-areas/copyright-laws-and-regulations/south-africa#:~:text=The%20standard%20for%20originality%20is,by%20copyright%20in%20South%20Africa.&text=Furthermore%2C%20the%20author%20of%20a,of%20the%20Copyright%20Act%20No. (accessed 2021-06-01).

work.[243] Similarly, "originality" is the first requirement of copyrightability in the United States. Originality is a low standard in copyright law, [244] as it is in South Africa. Even if the work is not novel or unique, it is copyrightable as long as it was created independently. This standard is met by "[a] minor addition" of independently original expression. [245]

The next requirement in both jurisdictions is that the work must be reduced to material form. In the US, 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".*[246] The law refers to the requirement that the work of art be fixed in a medium that can be perceived by humans in any way. At this point, the US allows for more interpretation in terms of "medium". If the work is fixed in a medium that can be perceived by humans, it will satisfy this requirement, regardless of the manner. This means that there is more likelihood for tattoos to be accepted as satisfying the material form requirement and being afforded protection.

Furthermore, "a work is not eligible if it has not been written down, recorded, or otherwise reduced to material form."[247] Likewise, "copyright does not subsist in ideas or thoughts."[248] This is also confirmed in the US.[249]

When it comes to the language of the Acts, as mentioned, the language and legislative history of the Act does not impose any restrictions on the copyrightability of a work fixed in a specific form, nor does it specify the specific manner in which an artistic work must be reduced. The fixation requirement is also required in the US.[250] "Because a "writing" occurs when it is fixed, fixation is an explicit constitutional requirement of copyright law."[251] Tattoos meet the fixation requirement and trigger copyright

---

[243] *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81, at par 16.
[244] *Feist Publ'ns, Inc. v. Rural Tel. Serv*., 499 U.S. 340, 345 (1991).
[245] *Alfred Bell & Co. v. Catalda Fine Arts, Inc*., 191 F.2d 99, 103 (2d Cir. 1951).
[246] 17 U.S.C. § 102(a) (2012).
[247] S2(2) of 98 of 1978.
[248] 1981 (4) SA 123 at 129B-E.
[249] 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.").
[250] 17 U.S.C. § 101 (2012).
[251] *U.S. v. Moghadam*, 175 F.3d 1269, 1273–74 (11th Cir. 1999).

protection at the moment when “original expression is captured in a physical form from which it can be perceived, reproduced, or otherwise communicated.”[252] Fixation must be sufficiently permanent or stable to allow this perception, reproduction, or communication to take place[253] regardless of whether it is later lost or destroyed. By this definition, tattoos are sufficiently permanent and tangible to satisfy the fixation requirement. This once again makes it easier for tattoos to be granted copyright protection in the US.

In the US, the final requirement for a valid copyright is that the work be “fixed in any tangible medium.”[254] As a result, nothing in the US Constitution or the Copyright Act prevents tattoos from being copyrighted. Copyright law in the US was amended in accordance with the broadened scope of "literary and artistic works" in terms of the international Berne Convention [255] Now, “every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression,” is copyrightable in each country that adopted the amendments after Berne.[256] Tattoos fall under the scope of artistic work and expression. By and large, these two Acts are similar. A key difference, however, is that the US Copyright Act was amended in accordance with the broadened scope of "literary and artistic works" in terms of the international Berne Convention. South Africa could take heed of this amendment to further broaden the categories of works that may fall into the category of “literary and artistic works”. This amendment may eliminate any confusion and provide clarity as to which category a tattoo belongs to.

Copyright vests in the author or, in the case of a work of joint, authorship, in the copyright co-authors of the work.[257] Section 1 states that “*the author is the person who first makes or creates the work*.”[258] The Act defines joint authorship in section 1 as “*a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.”*[259]

---

[252] Lichtman, D *Are Tattoos Eligible for Copyright Protection?* (15 June 2011) *The Media Institute* Available at: http://www.mediainstitute.org/IPI/2011/061511.php.
[253] 17 U.S.C. § 101 (2012).
[254] 17 U.S.C. § 102(a).
[255] WIPO “Berne Convention for the Protection of Literary and Artistic Works” (n.d.) Available at: https://wipolex.wipo.int/en/text/28369 (accessed 2022-05-01).
[256] WIPO “Summary of the Berne Convention for the Protection of Literary and Artistic Works” (1886) Available at: https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (accessed 2022-05-01).
[257] S21(1) of 98 of 1978.
[258] S1 of 98 of 1978 (defining “author”).
[259] S1 of 98 of 1978 (defining “works of joint-authorship”).

However, this is subject to exceptions listed in section 21.[260] Copyright created by an employee in the course and scope of his employment is automatically transferred to the employer. Furthermore, if a work is created while the author is employed by another person under a service or apprenticeship contract, that other person is the owner of any copyright in the work under sections 3 or 4 of the Act.

Similarly, in the US, section 201 mentions that "copyright in a work protected under this title vests in the author or authors of the work".[261] Therefore, the person asserting the copyright must be the author of the work created.[262] As joint authors, they would most likely have co-ownership of the copyright. "To be considered a joint owner of the copyright, the client must be an author of the work and intend for each author's contribution to be joined into inseparable parts of the finished work."[263] A work created for hire is one created as part of an employee's job or one that is "commissioned" by a client who hires the independent contractor to perform the task, and the agreement is in writing. [264]

As seen above, this right and concept is very similar in both jurisdictions.

Section 7 of the South African Copyright Act grants an owner of visual art exclusive rights.[265] Copyright Act provides for assignment and licenses. *"Copyright shall be transmissible as movable property by assignment, testamentary disposition or operation of law."*[266] An assignment or testamentary disposition of copyright may be limited to only some of the acts over which the owner of the copyright has exclusive control, or to only a portion of the copyright's term.[267] In the US, section 106 contains a list of copyright owners' exclusive rights. These include *"the right to reproduce the copyrighted work, create derivative works based on it, distribute copies of it, and publicly display it."*[268] *"Along with the exclusive right to exercise these rights, the copyright owner also has the right to authorize or license others to do so."*[269] In

[260] 98 of 1978.
[261] 17 U.S.C. §201 (2012).
[262] 17 U.S.C. § 102(a) (2012).
[263] 17 U.S.C. § 101 ("A 'joint work' is 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.")
[264] 17 U.S.C. § 101.
[265] S7(a) – (f) of 98 of 1978.
[266] S22(1) of 98 of 1978.
[267] S22(2) of 98 of 1978.
[268] 17 U.S.C. §106(1)–(3), (5).
[269] 17 U.S.C. §106.

addition, ownership of a work's copyright "may be transferred in whole or in part by any means of conveyance or by operation of law" and is inheritable and devisable.[270] This right is similar in both jurisdictions.

The final similarity between the two jurisdictions is the concept of moral rights. In terms of Article 6*bis* of the Berne Convention, it states that the author has "the right to claim authorship of the work".[271] The moral rights include the right to paternity, which is *"the right to claim authorship of the work"*, and the right to integrity, which is *"the right to object to any distortion, mutilation, or other modification of the work that is or would be detrimental to the author's honour or reputation."*[272]

In the US, Congress enacted the Visual Artists Rights Act of 1990 (VARA), which protects an author's moral rights in a work.[273] VARA includes safeguards like the right to attribution and the right to integrity. The author of a work of visual art has "*the right to claim authorship of his or her work, to prevent the author's name from being used in relation to any work of visual art not created by the author, and to prevent the author's name from being used 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 detrimental to the author's honour or reputation."* [274]

As seen above, both jurisdictions contain similar requirements. The fundamental requirements of originality and fixation is evident in both Acts. Both jurisdictions would most likely classify tattoos as drawings. The originality requirement threshold is low, and copyright is not granted in ideas in both jurisdictions. Both jurisdictions state that copyright vests in the author of the work and in case of joint authorship, copyright vests in the co-authors, subject to several exceptions. Both jurisdictions granted exclusive rights to the owner. Similarly, both Acts provide for the option of assignment and licenses. Lastly, both Acts protect the right to claim authorship of the work and the right to object to any distortion, mutilation, or other modification of the work that is or would be detrimental to the author's honour or reputation.

[270] 17 U.S.C. §201(d)(2) any of the individual exclusive rights may be transferred and owned independently of the others.
[271] Berne Convention, Article 6*bis*.
[272] Article 6 of the Paris Convention for the Protection of Industrial Property 1883.
[273] 17 U.S.C. §106A.
[274] 17 U.S.C §106A(a)(1)–(2).

By and large, both Acts have similar provisions regarding copyright protection. One of the key differences is that the US as amended their Act to broaden the scope of “literary and artistic works”. South Africa should note this amendment as it provides certainty that a tattoo does fall into one of the categories of works afforded protection.

South Africa could take heed of this slight difference the US has in their system and implement it into the South African system to prepare the courts for tattoo copyright litigation.

Based on this analysis, South African courts may interpret tattoo copyright litigation in a similar manner that US courts do because the Acts have similar copyright requirements. South African courts can analyse the interpretation and reasoning in US case law and implement it should the courts face similar issues. The only difference is that South Africa has not had the opportunity to do so.

CHAPTER 5: (Questionable) Precedent: What the Cases Suggest?

In South African courts, tattoo copyright is a matter of first impression, and no lawsuit has yet gone to trial. Individual lawsuits have been filed in the United States by several tattoo artists asserting that "their tattoo, or at least the drawings on which a subsequent tattoo was based, was copyrightable, that they owned the copyright, and that their exclusive rights had been violated."[275] However, all these cases were either settled or dismissed, resultantly, the question regarding tattoo copyrightability remains unanswered. [276]

As society evolves, "the courts must consider how new – or, in the case of tattoos, newly accepted – forms of art and technologies fit into the existing intellectual property regime."[277] Since no cases regarding the copyrightability of tattoos have gone to trial in South Africa, we shall turn to the US to provide judicial guidance in this regard. While it is acknowledged that the US judicial system is different to that of South Africa, the purpose of this analysis is that if South Africa is faced with issues of this nature, the courts may seek guidance from the US and apply their principles and application to our system.

5.1 Tattoo Artists' Rights under the Copyright Act

Copyright holders have certain exclusive rights, such as "the right to reproduce the copyrighted work, adapt works based on the copyrighted work, distribute copies of the copyrighted work, and publicly display the copyrighted work."[278] All of these rights are implicated by the inclusion of tattoos in a video game, for example *Madden NFL 22*. Copies of real tattoo designs placed on a digital version of a video game player constitute tattoo reproduction, which infringes on the artist's exclusive reproduction right. When millions of copies of a video game are sold, the artist's exclusive distribution right is violated. Reproducing the original tattoo in digital format creates an explicit derivative version of the original work, which infringes the artist's exclusive right to all derivative works.

---

[275] Gourgoulianni "The Copyrightability of Tattoos: A Practical Examination of Law Cases" (2020) *Journal of Education and Culture Studies* 4 2 69 – 73.
[276] *Ibid* at 69 – 73.
[277] *Ibid* at 70.
[278] S7 of 98 of 1978.

Tattoo artists are increasingly enforcing their copyrights against businesses and persons who use their tattoos without permission. The cases discussed below were all settled, and no one had the opportunity to argue whether or not copyright should be extended to tattoos. However, with numerous violations to back up an artist's claim, the tattoo artist's case for recouping copyright infringement damages appears strong, as illustrated in the cases below.

As previously mentioned, tattoo copyrightability claims have not yet gone to trial in South Africa. Resultantly, the cases below pertain to the US. While the law is not entirely the same and the cases concern celebrities, the concept and analysis of the may assist and give direction to South African courts when faced with similar copyright infringement claims by artists.

5.2 Whitmill v. Warner Brothers Entertainment, Inc.

Whitmill v. Warner Brothers Entertainment, Inc.,[279] the high-profile case in the US between tattoo artist Victor Whitmill and the studio that produced the film *The Hangover Part II* is an example of an artist who understands the importance of asserting intellectual property rights against unauthorized copying.[280] The tribal ink tattoo on a main character's face became famous because it is a replica of one worn by former heavyweight champion Mike Tyson, but the filmmakers did not obtain permission from the tattoo artist to use it.[281] Whitmill claimed that Tyson signed a release acknowledging "that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo were the property of Whitmill, who was doing business as Paradox-Studio of Dermagraphics." [282]

Furthermore, Whitmill, an award-winning visual artist, stated that "the artwork he inked on Tyson's face is one of the most distinctive tattoos in the country."[283] Whitmill did not create the original design on paper or with any other "traditional" medium.[284] The

[279] No. 4:11-CV-00752 (E.D. Mo. 2011).
[280] Rawlence, N.-A (2019) *IP and counterculture: Who owns a tattoo?* Lexology Available at: https://www.lexology.com/library/detail.aspx?g=b8b5f437-caa5-42d9-b62c-b00bf95114d8&filterId=34c4eb16-18f1-47ec-b8fc-72c4c2c57f0 (accessed 2022-06.23).
[281] *Ibid*.
[282] King "The Challenges "Facing" Copyright Protection for Tattoos" 2013 92 *Oregon Law Review* 139.
[283] Complaint at 1, *Whitmill v. Warner Bros. Entm't, Inc*., 2011 WL 2038147 (E.D. Mo. Apr. 28, 2011), *dismissed*, No. 4:11-CV-752 CDP (E.D. Mo. June 22, 2011).
[284] Whitmill Hearing Transcript at 17–18 (first session, May 23, 2011) (Whitmill testifying that what he drew on Tyson's face was not a copy from a book).

design was based primarily on Tyson's face.[285] Resultantly, this case questions "whether copyright protection is derived from the creation of a unique work of authorship fixed on human flesh."[286]

Whitmill asserted that "Warner Bros. infringed upon his copyright due to the production company's unauthorised[287] copying of the tattoo onto the face of another actor in the film."[288] Whitmill further claimed that his copyright was infringed by Warner Bros. "through its unauthorised copying, distribution[,] and public display of the Pirated Tattoo in advertising and promotion for the Movie and by making an unauthorised derivative work—namely, the Pirated Tattoo—that is based upon and copies virtually all of the copyrightable subject matter of the Original Tattoo."[289]

Even though the two parties eventually settled, Warner Bros was so concerned when the lawsuit was filed that it said in a court filing that "the studio would digitally alter the facial design for the DVD release."[290] In addition, in the preliminary hearing, the judge made observations that supported granting tattoos copyright protection.[291] Judge Perry sympathised with the tattoo artist stating that Whitmill had a "strong likelihood of prevailing on the merits for copyright infringement."[292] The Judge expanded on her analysis of Whitmill's likelihood of success on the merits in connection with Warner Bros. "fair use or parody defence", stating "Warner Bros. reproduction of Whitmill's tattoo did not comment on the artist's work or have any critical bearing on the original composition. There was no change to this tattoo or any parody of the tattoo itself."[293] The Judge also advised that "using other tattoos besides Whitmill's could have achieved the same purpose."[294]

---

[285] *Ibid*.
[286] Whitmill Hearing Transcript at 71 (second session, May 23, 2011) (Defendant's counsel asserting that it was a "case of first impression—whether you can have a copyright on human flesh").
[287] "Mr. Tyson appeared in the first Hangover movie, as well as in an advertising poster for the first Hangover movie, according to Warner Bros., and thousands of images of Mr. Tyson, with Mr. Tyson's tattoo, have appeared in magazines, television, and on the internet since February 10, 2003."
[288] Whitmill Complaint, *supra* note 285.
[289] *Ibid*.
[290] Rawlence https://www.lexology.com/library/detail.aspx?g=b8b5f437-caa5-42d9-b62c-b00bf95114d8&filterId=34c4eb16-18f1-47ec-b8fc-72c4c2c57f06.
[291] Transcript of Hearing on Motion for Preliminary Injunction at par 3, *Whitmill*, No. 4:11-CV-00752 (E.D. Mo. June 21, 2011) (stating how Judge Perry believes "Whitmill has credible claim on merits").
[292] Cohen "Citing Public Interest, Judge Rules for 'Hangover II" (24 May 2011) Available at: https://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/ (accessed 2021-06-09).
[293] *Ibid*.
[294] Whitmill Hearing Transcript, *supra* note 285, at par 4.

In response to Whitmill's tattoo on Tyson's face, Judge Perry stated that tattoos are copyrightable:

> *"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, as the defendant argues, 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."*[295]

Based on the above, it seems that at least one court recognizes that tattoos are copyrightable and should be protected. However, the case was dismissed by the parties after the court denied Whitmill's preliminary injunction motion to enjoin the release of *The Hangover Part II.*[296] Resultantly, the *Whitmill* case was unsuccessful in providing a written precedent supporting the copyrightability of tattoos.

5.3 Reed v. Nike, Inc.

In *Reed v. Nike, Inc.*[297] tattooist, Matthew Reed, filed a lawsuit against Nike, Inc., Rasheed Wallace, Weiden + Kennedy for copyright infringement. Reed created and inked an Egyptian-style tattoo covering the upper arm of Wallace. Reed then saw Wallace in an advertisement, which he did not mind, his issue was that the advertisement derailed the tattoos meaning. "A close-up of the tattoo showed the tattoo being created by a computerized simulation with a voice-over from Wallace explaining the tattoo's meaning."[298]

Reed filed a suit for copyright infringement[299] after seeing the advertisement and applied to register copyrights for the tattoo drawings.[300] Along with the direct infringement claim, Reed claimed that Wallace contributed to the infringement of his copyright by advising Nike and Weiden + Kennedy that Wallace owned all intellectual property rights to the tattoo. Despite Wallace's contention that he contributed to the design by suggesting the initial theme and making changes to Reed's sketches, the

---

[295] *Ibid*.
[296] Order of Dismissal, *Whitmill*, No. 4:11-CV-752 CDP (E.D. Mo. June 22, 2011).
[297] No. 3:05-CV-00198 (D. Or. 2005).
[298] King *Oregon Law Review* 142.
[299] *Ibid*.
[300] Complaint*, Reed v. Nike, Inc*., 3:05-CV-00198, 2005 WL 1182840 (D.Or. Feb. 10 2005) (dismissed Oct. 19, 2003) [hereinafter Reed Complaint] (alleging infringement of Copyright Registration Number VA 1-265-074).

claim established that Reed, the tattoo artist, had "the right to assert copyright infringement based on that tattoo."[301]

During his initial consultation with Reed, Wallace signed a release. The "Information and Release Document" demanded disclosure of "any of Wallace's medical or skin conditions, as well as certification that, among other things, Wallace freely consented to having the tattoo applied and released the tattoo parlour from any liability."[302] Nonetheless, "there was no mention of an assignment or license of Reed's copyright interest in the work in the agreement."[303] In fact, the document made no mention of ownership interests in the artwork, sketches, drawings, or tattoo that resulted.

Reed claimed "Nike and Weiden + Kennedy were infringing his copying, reproduction, distribution, adaptation, and public display rights and that Wallace committed contributory infringement,"[304] by Wallace portraying himself as the exclusive owner of the tattoo to both Nike and in the advertisement.[305] Reed sought "a permanent injunction,[306] actual damages and profits,[307] prejudgment interest,[308] costs and attorney's fees."[309] Ultimately, this case, which preceded *Whitmill v. Warner Bros. Entertainment, Inc.*, was also dismissed[310] pursuant to a settlement agreement.[311]

Even though Reed filed for copyright infringement until 2005, one practitioner considers this case as "perhaps the first case to assert copyright infringement based on a tattoo."[312] In 2006, Christopher A. Harkins, a practicing attorney speculated that the case "may signal a floodgate for other lawsuits of its kind and may inspire creative theories of copyright infringement against other defendants in the media, sports, and

---

[301] Rawlence https://www.lexology.com/library/detail.aspx?g=b8b5f437-caa5-42d9-b62c-b00bf95114d8&filterId=34c4eb16-18f1-47ec-b8fc-72c4c2c57f06.
[302] Reed Complaint, *supra* note 299, at Exhibit A.
[303] *Ibid* at par 3.
[304] No. 3:05-CV-00198 (D. Or. 2005). ("Reed accused Nike of infringing on his copyright by reproducing, distributing, adapting, and publicly displaying his original design without his consent, permission, or authority.")
[305] Rawlence https://www.lexology.com/library/detail.aspx?g=b8b5f437-caa5-42d9-b62c-b00bf95114d8&filterId=34c4eb16-18f1-47ec-b8fc-72c4c2c57f06.
[306] Reed Complaint, *supra* note 299, at par 5.
[307] *Ibid* at par 6.
[308] *Ibid* at par 7.
[309] *Ibid*.
[310] *Ibid*.
[311] Stipulation of Dismissal with Prejudice, *Reed*, No. 05-CV-198 BR (D.Or. Oct. 19, 2005).
[312] Harkin, C "TATTOOS AND COPYRIGHT INFRINGEMENT: CELEBRITIES, MARKETERS, AND BUSINESSES BEWARE OF THE INK" 2006 10 *Lewis & Clark Law Review* 315.

entertainment industries."[313] Since *Reed v. Wallace*, there has been a trickle rather than a flood of tattoo copyright cases. If tattoo artists file only one or two of these lawsuits every few years, it is unlikely that a case will go to trial anytime soon.

5.4 Solid Oak Sketches v. 2K Games Inc.

More recently, in *Solid Oak Sketches, LLC v. 2K Games, Inc., No. 16-CV-724-LTS-SDA, 2020 WL 1467394 (S.D.N.Y. Mar. 26, 2020),* the Southern District of New York issued the first authoritative court decision on the interaction between tattoos and copyright. Solid Oak Sketches, a company that owns the copyright to various NBA super-star players' tattoos such as LeBron James, Kobe Bryant, Eric Bledsoe, and Kenyon Martin, has sued the creators of the popular game *NBA 2K, 2k Games Inc.* and *Take-Two Interactive Software Inc. Solid Oak* claimed that the athlete's tattoos were depicted without their permission. The issue was that the defendants' depicted in the *NBA 2K* games five tattoos appearing on three different NBA players, three of which were on LeBron James' body. The defendants used full-body scanners to photograph the three players from all angles in order to accurately represent them in their virtual avatars.[314] In various versions of the game, the defendants reproduced and displayed eight tattoo designs inked on five different NBA players.[315]

In 2012, the plaintiff signed Copyright License Agreements with the artists who created the tattoos depicted in the *NBA 2K* series, which granted the plaintiff "all rights and permissions to reproduce the designs."[316] In June and July of 2015, the U.S. Copyright Office's U.S. Register of Copyrights issued Certificates of Registration for the tattoo designs. The plaintiff contacted the defendants on 8 July 2015 to discuss the allegedly infringing use of copyrighted tattoo designs in the *NBA 2K* game series. Ultimately, the defendants dismissed the discussions and continued to make video games with the now-copyrighted tattoos.[317]

---

[313] Harkin *Lewis & Clark Law Review* 315.
[314] Gourgoulianni *Journal of Education and Culture Studies* 72.
[315] Complaint (Docket Entry No. 1 ("Compl.") No. 16-CV-724-LTS-SDA, 2020 WL 1467394 (S.D.N.Y. Mar. 26, 2020).
[316] *supra note* 314 at par 33,36-37.
[317] Google.co.za (2016) *SOLID OAK SKETCHES, LLC v. 2K GAMES, INC., Dist. Court, SD New York 2016 - Google Scholar* Available at: https://scholar.google.co.za/scholar_case?case=8242721186240256113&q=Solid+Oak+Sketches+v.+2K+Games+Inc&hl=en&as_sdt=2006&as_vis=1# (accessed 2021-06-09).

In August 2018, the defendants sought summary judgment, requesting that *Solid Oak's* copyright infringement suit be dismissed entirely. Their motion was based on several arguments, including the claim that "the use of the tattoos—which purportedly accounted for.000286-000431% of each game's total data package—was a *de minimis use*, and thus not actionable." [318] The defendants' video game expert offered the same testimony, claiming that the tattoos were a "fractional, fleeting part of *NBA 2K*."[319] Their argument also reasoned that:

> *"(i) the tattoos only appeared on three of the 400+ players available in the game, and (ii) those that play the NBA 2K games do not even see the tattoos clearly during gameplay for a variety of reasons, including because of their small depiction on a T.V. screen and because the players on whom the tattoos appear move quickly and erratically in the games."*[320]

Secondly, the defendants claimed that all four fair use factors favoured a fair use ruling. Concerning the purpose and character of the use, the defendants contended that it was transformative in the sense that the purpose was "nothing more than to create a realistic game." [321] The tattoos were based on pre-existing works that lacked creativity, and the tattoos had already been published prior to their inclusion in the game.[322] The defendants claimed that the tattoos in the game were much smaller than in real life in terms of quantity and materiality.

Lastly, the defendants argued that "there is no reasonable, traditional, or likely to be developed market for licensing the rights to use tattoos in a video game" — indeed, *Solid Oak* never presented evidence of any prior license in which a tattoo image was licensed in a video game, let alone where, as in this case, the person bearing the tattoo had already provided consent to reproduce his likeness.[323]

---

[318] JD Supra (n.d.) *Slowly Resolving the Uncertainty Surrounding Tattoos and Copyright Law: Solid Oak Sketches V. 2k Games and Take-Two* Available at: https://www.jdsupra.com/legalnews/slowly-resolving-the-uncertainty-58856/ (accessed 2021-10-28).
[319] *Ibid*.
[320] *Ibid*.
[321] *Ibid*.
[322] SOLID OAK SKETCHES, LLC, Plaintiff, v. 2K GAMES, INC. and TAKE-TWO INTERACTIVE SOFTWARE, INC., Defendants https://scholar.google.co.za/scholar_case?case=8242721186240256113&q=Solid+Oak+Sketches+v.+2K+Games+Inc&hl=en&as_sdt=2006&as_vis=1#[2].
[323] JD Supra (n.d.) *Slowly Resolving the Uncertainty Surrounding Tattoos and Copyright Law: Solid Oak Sketches V. 2k Games and Take-Two* Available at: https://www.jdsupra.com/legalnews/slowly-resolving-the-uncertainty-58856/ (accessed 2021-10-28).

Based on the foregoing, the defendants' third claim was that they obtained an implied license and that the use was authorized. The chain of authorisation began with the players and tattoo artists' hopes that the tattoos would become inseparable from the players' respective bodies, images, likenesses, and identities, resulting in the players being granted an implied license.[324] Supporting this, "the defendants submitted declarations from both the players and the artists stating that once the tattoos were inked onto the players' bodies, they were granted the right to display and recreate those tattoos as part of their likenesses."[325] With that implied license, "the players granted the NBA the right to license their likenesses to third parties, and the defendants obtained permission from the NBA and the players to use those respective likenesses in *NBA 2K*."[326]

The defendants' infringement occurred in 2013 with the release of *NBA 2K14*[327] but the plaintiff did not register the tattoo designs with the United States Copyright Office until 2015.[328] As a result, the defendants' alleged infringement began before the works were registered. The plaintiff, on the other hand, maintains that, "despite the applicability of section 412 of the Act, they are entitled to statutory damages and attorneys' fees because the *2K16* version of the game was released after the plaintiff's copyright registration and constituted a separate instance of infringement giving rise to a separate claim." [329] The plaintiff also claimed that "there was no ongoing or continuous series of infringements because the defendants only created two infringing games prior to registering the tattoos and because the time span between the release of the earlier infringing 2K games and the release of *2K16* was long enough that the release of *2K16* constituted a separate act of infringement."[330]

---

[324] *Ibid*.
[325] SOLID OAK SKETCHES, LLC, Plaintiff, v. 2K GAMES, INC. and TAKE-TWO INTERACTIVE SOFTWARE, INC., Defendants https://scholar.google.co.za/scholar_case?case=8242721186240256113&q=Solid+Oak+Sketches+v.+2K+Games+Inc&hl=en&as_sdt=2006&as_vis=1#[2].
[326] The fourth defence was that Solid Oak could not meet the originality requirement for copyright protection because Solid Oak was unaware of the tattoos' creations and the tattoos were based on pre-existing works. However, the Court did not address this argument in its decision.
[327] *supra note* 314 at Exhibit B.
[328] *Ibid* at par 34-35,38.
[329] SOLID OAK SKETCHES, LLC, Plaintiff, v. 2K GAMES, INC. and TAKE-TWO INTERACTIVE SOFTWARE, INC., Defendants https://scholar.google.co.za/scholar_case?case=8242721186240256113&q=Solid+Oak+Sketches+v.+2K+Games+Inc&hl=en&as_sdt=2006&as_vis=1#[2].
[330] *Ibid*.

The plaintiff relied heavily on a single Second Circuit decision to support their argument, which held that a post-registration act of infringement is not "deemed to have commenced before registration if the infringing activity ceased for an appreciable period of time."[331] In this case, the gap between the pre-registration infringement in *2K15* and the post-registration infringement in *2K16* was only one year, which does not constitute a "appreciable period of time" in this context. Furthermore, “the fact that there were only two pre-registration infringing games is insignificant because Section 412's bright-line rule prohibits statutory damages and attorneys' fees for any infringement prior to registration.”[332]

Furthermore, the plaintiff contended that the *2K16* updates distinguished it as a work distinct from previous iterations of the game. However, if the same defendant violates the same protected work in the same way that it did prior to the work's registration, the post-registration infringement is considered to be the continuation of a series of ongoing infringements.[333] As a result, the same defendants allegedly and continuously infringed on the plaintiff's tattoo designs. The pre- and post-registration versions are identical; the only significant differences are title and visual updates, as well as graphical improvements.

The plaintiff also claimed that *2K16* is a separate act of infringement as it was filed within the three-year limitation period of the copyright law. The plaintiff relied on cases that stated that each act of infringement causes a distinct harm that gives rise to an independent claim for relief, [334] arguing that this reasoning must also apply to statutory damages. However, the plaintiff did not cite authority to support the claim that this general principle overrides the clear provisions of Section 412 in cases where the original infringement occurred prior to copyright registration.[335]

Finally, the plaintiff argued that the *2K16* infringement was wilful because it occurred after they informed the defendants of the copyrighted tattoo designs, and that the Court must differentiate the *2K16* infringement from prior infringements. However, because wilfulness is irrelevant to the Section 412 analysis, this argument is moot.

---

[331] *Troll Co. v. Uneeda Doll Co*., 483 F.3d 150, 159 (2d Cir. 2007).
[332] *Shady Records, Inc. v. Source Enters., Inc.,* 2005 WL 14920 at par 22.
[333] *Irwin v. ZDF Enterprises GmbH*, 2006 WL 374960 at par 6.
[334] *Stone v. Williams*, 970 F.2d 1043, 1049-50 (2d Cir. 1992).
[335] *C.A. Inc. v. Rocket Software, Inc*., 579 F. Supp. 2d 355, 362-63 (E.D.N.Y. 2008).

By accepting the defendants' motion and dismissing *Solid Oak's* copyright infringement claim, the Court provided some long-awaited guidance on these issues. For starters, the Court ruled that the defendants' use was insignificant because "no reasonable trier of fact could find the tattoos as they appear in *NBA 2K* to be substantially similar" to the tattoo designs licensed by *Solid Oak*. The Court referred to the defendants' evidence numerous times to demonstrate that the players with the tattoos were unlikely to be included in "average gameplay," and that even if they were, "the tattoos were small, not clearly displayed, and indistinguishable to the average user."[336]

Finally, the Court explicitly acknowledged *Solid Oak's* failure to submit any evidence to support its claim that *NBA 2K* "employed[ed] the video game's features to focus, angle the camera on, or make the subject tattoos more prominent."[337] As a result, "the record only revealed that the defendants' use of the tattoos in *NBA 2K* did not meet the quantitative threshold of substantial similarity, and thus was de minimis use and not actionable infringement."[338]

The Court then determined that *Solid Oak* could not succeed on its infringement claim because the defendants' use of the tattoos in *NBA 2K* was authorised.[339] Recognising a lack of precedent defining the precise situations forming an implied license, the Court referred to other courts and found implied non-exclusive licenses were formed "where one party created a work at the request of the other and handed it over, intending that the other copy and distribute it."[340] The evidence established that the tattoo artists granted the NBA players an implied license to use their tattoos as part of their likenesses, and that those implied licenses were formed before *Solid Oaks* was granted its own tattoo licenses. Furthermore, because the defendants had obtained the necessary licenses to use the players' likenesses in *NBA 2K* (directly from the players and indirectly from the NBA), they were allowed to incorporate the players' tattoos into their likenesses.[341]

---

[336] *Ibid* at par 6-7.
[337] *Ibid* at par 7.
[338] *Ibid* at par 7.
[339] *Weinstein Co. v. Smokewood Entm't Grp.*, LLC, 664 F. Supp. 2d 332, 344 (S.D.N.Y. 2009).
[340] *Ibid*.
[341] JD Supra https://www.jdsupra.com/legalnews/slowly-resolving-the-uncertainty-58856/.

Finally, the Court found the defendants' argument about fair use convincing. Concerning the first factor, the Court determined that the defendants' use was transformative—the purpose of displaying the tattoos in *NBA 2K* was *"completely different"* from the original purpose of the tattoos - a way for the players to *"express themselves through body art."*[342] The defendants, on the other hand, used the tattoos to accurately represent the players in their game. This, combined with the smaller size of the tattoos in *NBA 2K*, the tattoos' minimal expressive value, and the fact that the tattoos were only an "insignificant portion" of *NBA 2K*, all favoured the use to be transformative.[343]

The defendants were also favoured by the second fair use factor, despite the fact that this required the Court to analyse each of the five tattoos, which resulted in its finding that they were each "more factual than expressive because they are each based on another factual work or comprise representational renderings of common objects and motifs that are frequently found in tattoos."[344] The Court determined that the third fair use factor was neutral because the defendants' use of the entire tattoo collection was done solely and necessarily to achieve the transformative goal of creating an accurate video game.[345] Fourth, having established that the use is transformative, the defendants' use could not deprive *Solid Oak* of significant revenues, demonstrating that there is no evidence to support the notion that a market for licensing tattoos in video games will develop. Even if it did, the Court claimed that due to a lack of rights to the players' likenesses, *Solid Oak* would be unable to profit from such a market. [346]

5.5 The Nexis of the cases

Aside from *Solid Oak*, the fact that the aforementioned cases were settled lends support to the idea that the defendants were concerned that the tattoo artists had legitimate copyright claims. The defendants, on the other hand, may have agreed that settling was the most efficient way for them to manage their respective businesses. Notably, some tattoos were drawn or stencilled before tattooing, whereas others were

[342] *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA, 2020 WL 1467394 at par 8.
[343] *Ibid* at par 9.
[344] *Ibid*.
[345] *Ibid* at par 11.
[346] *Ibid* at par 11.

not.[347] The distinction between tattoos that were placed concurrently and those that were preliminarily sketched will influence whether a tattoo should be protected by copyright.[348] Another distinction is that some tattooists claim that those who have tattoos are contributory infringers, which raises the question of whether an implied license exists when a tattoo artist tattoos a celebrity customer.[349] Finally, most tattoo artists are concerned about third-party profiteering from their work, which raises the question of whether implied licenses extend to third parties.[350]

Furthermore, the Court in *Solid Oak* never explicitly stated whether a tattoo artist can correctly claim to own a copyright in a design he inked onto another person's body, and its decision is heavily influenced by case-by-case considerations. This is significant for South Africa because each case would be decided on its own merits rather than using a "blanket" approach. While the opinion does not provide the definitive guidance that some have sought, it does provide useful insight into the circumstances that will heavily influence whether the use of a tattoo constitutes infringement, [351] such as: "(i) the origins of the tattoos at issue; (ii) the nature of the relationship between the tattoo artists and their clients; and (iii) the medium and manner in which the allegedly infringing copies of the tattoos appear,"[352] all of which would be applicable to our judicial system. In addition, factors such as the fair use defence may impact the outcome. While the South African judicial system does not provide for fair use doctrine yet, should the Copyright Amendment Bill become effective, this argument may become a reality since it essentially aims to protect the interest of creators of works whilst widening the scope of fair use of copyrighted works.

Moreover, if an infringer can prove that the tattoo is transformative i.e., the purpose of displaying the tattoos is different from the purpose for which the tattoos were originally created, this may sway the court in their favour. These are key aspects which can be adapted from the US to the South African system.

---

[347] Minahan "Copyright Protection for Tattoos: Are Tattoos Copies?" 2015 90 *Notre Dame Law Review* 1728.
[348] Minahan *Notre Dame Law Review* 1726.
[349] *Ibid*.
[350] Commander "The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?" 2015 72 *Washington and Lee Law Review* 1722.
[351] JD supra https://www.jdsupra.com/legalnews/slowly-resolving-the-uncertainty-58856/#_ftn9.
[352] *Ibid*.

Furthermore, the use of implied non-exclusive licenses may help to prevent copyright infringement. Copyright can be assigned and transmitted as movable property under section 22(1) through assignment, testamentary disposition, and operations of law. This is useful when one party creates a work at the request of another and gives it to the other with the intent that the other copy be used and distributed, as in the *Solid Oaks* case. A client who wishes to use his tattoo for a purpose that may infringe on the rights of the tattoo artist should obtain the necessary licenses and signed consent.

Tattoo copyright is a modern legal battle that has not been resolved yet. As a result, each case's various parts have their own set of arguments. Tattoo artists work hard to show that tattoos are works of art that are protected by intellectual property rights. They believe tattoo artists are the creators of original works because they ink the tattoos. As a result, they believe that prior to each use of the tattoos, permission should be obtained. However, the defendants in both cases believe that depicting tattoos is permissible under fair use. They contend that, even if the tattoo is not a commission, the person who has it inked on his body owns it. They believe that asking tattoo artists for permission to depict their tattoos in any way, is unacceptable.

As previously stated, no definitive court ruling has been reached that could provide a resolution to this ongoing legal battle. The vast majority of cases were settled out of court. As a result, the court was unable to conduct a comprehensive investigation into the matter. However, as in the previous case involving tattoos inked on famous NBA players, the court did not dismiss the case immediately, instead requesting more information about the specific depiction of the tattoos in the game *NBA 2K.* The court stated unequivocally that it intends to conduct a thorough investigation and appears to view tattoo artists as having copyright to a tattoo.

However, given the importance of the disputed uses, such as Nike ad campaigns and major motion pictures, and the incentive to settle quickly, such disputes appear likely to be settled before trial in the future.[353] As a result, it may be some time before the courts make a substantive decision on these issues. While actor Ed Helms purposefully parodied the Tyson tattoo in *The Hangover Part II*, “far more incidental

[353] ilr.law.uiowa.edu (n.d.) *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works | Iowa Law Review - The University of Iowa* Available at: https://ilr.law.uiowa.edu/print/volume-104-issue-3/the-inky-ambiguity-of-tattoo-copyrights-addressing-the-silence-of-u-s-copyright-law-on-tattooed-works at 4.

uses, such as a tattooed celebrity or even a tattooed bystander appearing briefly in a film, may result in future litigation."[354]

Consideration of these issues may yield useful practice recommendations for South Africa. If you represent celebrity or potential celebrity clients, encourage them to consult with you before getting visible tattoos. An outright assignment of all copyrights in the tattoo is desirable if the tattoo artist agrees. "Given the artist's increased status as a result of working on a celebrity, such an assignment is likely to be far easier to obtain before than after the tattoo is applied." [355] Even if your client is not a celebrity but is likely to be approached for endorsements for any reason, or if the client will be featured in any marketing materials, such a job would be highly desirable.

Copyright agreements outlining the transfer or retention of tattoo intellectual property rights should be encouraged for clients and tattoo artists to sign. By making the "implied license" explicit, tattoo artists and recipients alike could better define their rights and avoid costly litigation.

However, the case law on this subject remains unconvincing in the absence of a trial and subsequent decision. Without such cases on file, the courts will be unable to resolve and expand this area of the law, making the success of tattooists in prosecuting copyright claims highly unpredictable. "Tattoo artists' work is just as entitled to copyright protection as other works of art; however, such artists—who are already discouraged by the difficulty of monitoring unconsented use of their work by third parties[356]—may be further dissuaded from enforcing their copyrights due to the courts' failure to recognize tattoo art as copyrightable subject matter, combined with the history of society's marginalization of their works and the derogatory view of the people."[357] As a result, tattoo artists' control over their work will deteriorate further.

Members of the tattoo community will avoid copycats but taking legal action against them would be costly and time-consuming. As seen above, there appears to be a pattern whereby tattoo artists only threaten/take legal action if the violation involves a

[354] *Ibid*.
[355] *Ibid*.
[356] *Ibid*.
[357] *Ibid*.

high-profile individual– but there are mixed reactions from the community as some may see it as a publicity stunt instead.

Aside from that, tattoos are copyrightable – the question is whether action will be taken for such infringement.

CHAPTER 6: A PROPOSED SOLUTION TO THE AMBIGUITY REGARDING TATTOOS WITHIN COPYRIGHT LAW

Even though there are no definitive court opinions or statutes about tattoo copyrightability in South Africa or the United States, it appears that most sources are in agreement that tattoos are copyrightable. So, now that the question of whether tattoos can be copyrighted has been answered, what does the future hold for tattoo artists? How can they ensure the protection of their rights? What can people do to ensure that they can freely display their tattoos without fear of being sued by the artists who created them? The answer could be found in waiver forms, which must be signed before a single drop of ink is applied to skin. Another efficient and effective solution is to amend current statutory provisions that address tattooed works specifically.

6.1 Recommendations

6.1.1 Waiver Forms

Tattoo copyright lawsuits are becoming more common, so clients should be cautious of being sued for displaying their tattoos in public or online. To alleviate this fear, the solution could be to have the artist sign a waiver prior to inking to allow the client to display the tattoo publicly as well as in other forms such as movies and advertisements, if the client is a celebrity.[358]

If artists are mostly cooperative, clients may soon be required to bring a waiver to their tattoo appointments. Ideally, this would resolve many of the issues that tattoo artists have encountered in the past, but realistically, some artists may object to signing the waiver.

6.1.2 What Should Be in the Tattoo Artist's Waiver?

What should be included in waivers to protect the artists copyright if clients do not bring one to the appointment?

Basically, the artist can include a clause stating that "the artist retains all rights to the tattoo design's copyright. [359] If, as previously proposed, "the copyright in the application

[358] Grassi, B (2016). Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms *Mitchell Hamline Law Review* 42(1) Available at: https://open.mitchellhamline.edu/mhlr/vol42/iss1/8 60 - 66 (accessed 2022-06-29).
[359] Grassi *Mitchell Hamline Law Review* 66.

is treated as a separate copyright with separate owners," [360] the artist will retain the copyright in the tattoo's design while leaving ownership of the tattoo's application open. A client, for example, acknowledges and agrees that the artist is the author and sole owner of all rights contained in the tattoo design in perpetuity. [361]

However, this could be a significant change in the waiver form. Currently, the majority of waivers only discuss the risks of getting a tattoo and asserting that the client is an adult and agrees that the artist is not liable for any health consequences that may result from the tattoo.[362]

Certain waivers are appropriate because they include clauses stating that "the tattoo artist owns any photographs of the client taken during the tattoo process and that the photographs remain the property of the tattoo artist or the shop."[363] This clause is useful for establishing ownership of the tattoo artist's photographs, but not of the tattoo itself.

A waiver signed by an artist should make some attempt to address the tattoo's copyright. The artist can include a clause that addresses both the design and the application to be thorough. Artists should use language that ensures the artist owns all rights to the tattoo's design and artwork if they want to protect their copyright and have a waiver that every client is likely to sign. Because most people do not read anything before signing, the artist will usually have no trouble getting the client to sign these waivers. [364]

Tattoo artists, on the other hand, may encounter difficulties if a particularly astute client arrives at an appointment with a waiver that grants him copyright rights that conflict with the artist's waiver. The law of contract in South African affords parties the freedom to enter into a contract and who they wish to enter with *(pacta sunt servanda).*[365] The general requirements for a legally enforceable contract are consent, good faith, and the sanctity of contract. The contractual freedom of parties also offers them freedom to choose the terms of their contract. Part of these terms is the freedom to incorporate

---

[360] Grassi *Mitchell Hamline Law Review* 66.
[361] *Ibid*.
[362] Allen Financial Insurance Group "Tattoo Release Forms & Permanent Cosmetic Forms" (2018) Available at: https://www.eggroup.com/tattoo-forms/ (accessed 2022-01-04).
[363] Waiver Forever "How to Write a Bulletproof Tattoo Consent and Release Form" (n.d.) Available at: https://blog.waiverforever.com/tattoo-waivers/ (accessed 2022-01-04).
[364] *Ibid*.
[365] S48 of Consumer Protection Act 68 of 2008.

exemption clauses or waivers in contracts.[366] If the parties do not agree on the waiver, the parties will not contract with each other. Then the client would leave and neither party can go to court to force an artist to sign their waiver.

But like most things in life, negotiations boil down to money. The tattoo artist may refuse the tattoo if the client refuses to sign the waiver. Artists would have more clout in this situation if they could afford to decline a tattoo, but if the client is famous, the artist may lose that clout, as well as any recommendations the client might give if the work is satisfactory.[367]

"More comprehensive waivers will make future legal battles easier to determine for a judge, because that judge will have the pleasure of ruling on the first tattoo copyright infringement case, and his or her plate will be full of different opinions, theories, and dicta to consider." [368]

6.1.3 Assignment and Licenses

To address this budding issue, the law should presume that when a tattoo artist tattoos a person, the tattoo artist grants that person an implied license to use the tattoo and the underlying design within the tattoo in a limited number of ways, such as posting an image online or showing off the tattoo in public.

By introducing exclusive and non-exclusive licenses for tattoo application, tattoo artists would be able to continue profiting from their work without interfering with an individual's ability to market their likeness, both through tattoo application and licensing the underlying image. There will be people who oppose granting tattooed people implied licenses. Their argument would be that "tattoos are not copyrightable; and that if they were, a client would own at least a partial interest in the tattoo and thus would not need a license, and that involving the law in the tattoo community goes against the tattoo community's preferred norms."[369] However, "current legal trends indicate that tattoos are copyrightable, that those problems will arise even if a client

---

[366] Tromp, J. (2014). *Freedom of contract and the enforceability of exemption clauses in view of section 48 of the Consumer Protection Act*. [PDF] pp.1–83. Available at: https://repository.nwu.ac.za/handle/10394/15957#:~:text=The%20Act%20does%20not%20address,to%20rely%20on%20exemption%20clauses (accessed 2023-01-23).
[367] Grassi "Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms" (2016) *Mitchell Hamline Law Review* 42 1 43 – 60. Available at: https://open.mitchellhamline.edu/mhlr/vol42/iss1/8
[368] *Ibid*.
[369] Ulscht https://scholarship.shu.edu/student_scholarship/596 20.

has a joint interest in the tattoo and that avoiding the legal community is no longer the tattoo community's preferred norm."[370]

6.1.4 A Definitive Court ruling that Tattoos are Copyrightable

If a court decides unequivocally that tattoos are protected by copyright, the law will become much more standardized and easier to apply. As a result, artists, show business, and tattooed individuals will be more aware of their legal rights and responsibilities. Any concerns about an overburdening of the court as a result of such a decision are unfounded. As stated previously in previous chapters, the tattoo artist community's culture and norms indicate a reluctance to resort to litigation in cases of design copying.

True, it can be difficult at first to distinguish between cases involving "aggrieved artists" and merely "opportunists." This issue, however, will gradually fade as opportunists learn that the courts will not rule in their favour due to established guidelines.

6.1.5 What Can the Tattoo Industry Do?

Customers and tattoo parlours ought to contribute. Before getting a tattoo, a client should talk to their artist about transferring certain rights and signing a written agreement. The parties could discuss their collaboration as a collaborative work in which both the clients and the artists have equal rights. A client may request that the tattoo artist sign a release form. Belgium has found a solution that may benefit both artists and clients: *"the artists retain ownership of the tattoo's design, allowing repeat tattoos with the same design, while the client's activities with the tattoo are not hampered."*[371] This likely assumes the design is original and not infringing. South Africa should take heed of this and attempt to implement this in the industry. The artist might want to put agreements in place before he fixes the tattoo to the customer permanently, particularly if he is going to commercialise his image. The above clause may be included in the waiver forms or a separate agreement where both parties' are signatories. By reducing this to writing, it reduces disputes in the future and reduces the cost of disputes if it does end up in a legal dispute. Reducing it to writing also helps

[370] *Ibid*.
[371] Mandy Deeley & John MacKenzie "*Tattoos – scope for copyright?* (2 September 2013) Available at: https://www.lexology.com/library/detail.aspx?g=aa885059-bfef-4381-a68e-35f35f56793c (accessed 2022-05-24).

if one party "forgets" the terms and provisions of the agreement. This helps prevent "selective memory."

Furthermore, as discussed above, the agreement may be in the form of a licence or assignment from the original owner. A licence allows the original artist to retain ownership of the art, whilst also profiting from its (specified and controlled) use by others (its licensees), while an assignment is a written contract that will ensure that all rights in the work are assigned, and any rights that cannot be assigned (such as the artist's right to be identified, known as ‘moral rights’) are waived.

It is extremely difficult for the owner of a design's copyright, or even a tattoo artist, to monitor non-famous people's use of their design or tattoo. This may change as social media, public profiles, and even hashtags become more popular.[372]

Parlours should take steps to educate each client about copyright law, even if it’s a brief discussion. Whether they display it on their website, business cards or posters. They may even read a script out with all this information during consultations. Artists should determine which elements of their most popular designs are protected by copyright. Artists and tattoo parlour owners can collaborate to determine the cost of licensing their most-requested tattoo elements to copyright holders.[373]

In terms of monetary damages, a court is unlikely to order tattoo removal or a perpetually annual license for the individual's entire life. A court is more likely to award the client, artist, and shop owner a lump sum and forbid artists from using a copyrighted element in any future works.[374]

6.2 Conclusion

The question was whether the seeming shortcomings of South African copyright law in sufficiently safeguarding the rights of copyright owners meant that the current copyright legislative framework falls short of the goal of securing an artist's intellectual property rights, necessitating the development of copyright law. In this regard, the both

[372] Wills https://doi.org/10.37419/JPL.V7.I4.3 661.
[373] *Ibid* at 662.
[374] Photographer Sedlik is asking for a financial lump sum per tattooed piece that infringes his work, attorneys fees, and an agreement that all defendants stop using his work in the future. Melissa Angel “Miles Davis Photog Says Kat Von D Tattoo Infringes Photo” (8 February 2021) Available at: https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo (accessed 2022-05-24).

South Africa and the United States of America's copyright legislative framework are important to consider because South Africa's research and judicial guidance on tattoos in the South African context are limited. Based on an examination of both copyright legislative frameworks, this dissertation contends that copyright protection must be developed through the implementation of the above-mentioned feasible recommendations to pre-empt tattoo copyright disputes.

If tattooed individual is the actual sole author of their tattoo, this would allow the individual to hold the exclusive copyright without any potential for meritorious third-party copyright infringement claims against them. If the client is the sole author, they have the remedies encapsulated in section 27 at their disposal.[375]

The client wearing the tattoo may also have joint ownership rights if they contribute more than just ideas to the design process. They may actively participate in the refinement of a design, for example, by deleting some aspects and drawing the features of the replacement with the tattooist. If this is the case, the client has access to the same remedies as the tattoo artist.

If a third-party has an authorship, and thus ownership, stake in the copyright of the tattoo, the client can rely on the fact that they received an implied license from the copyright owner (usually the tattoo artist) to use the image of the tattoo. A tattooed individual has received an implied license from the copyright owner because the tattoo artist has created the work at the individual's request, delivered the work to the individual by tattooing it onto their body, and the tattoo artist fully intends for that person to use the tattoo. Should the Copyright Amendment Bill be enacted, a client may also rely on the fair use defence to escape infringement allegations.

Tattoos can be distinctive and original enough to be afforded their own copyright protection, however ownership rights may vary. On condition that it is not another person's work or design, an original tattoo is copyrightable to its author. Most non-flash art tattoos involve collaboration between the artist and the client on the design. Because of this relationship, defining authorship is more difficult, but courts will almost certainly rule that the copyright in an original tattoo is owned by the author. While the

[375] 98 of 1978.

client's implied right to photograph and display the tattoo is likely, other rights may be restricted.

Nonetheless, when implied licenses are combined with the realistic challenge of tracking down each potentially infringing tattoo, there may not be a need to start deleting social media posts or covering up ink. It is time to start raising awareness of how tattoos can infringe on the rights of copyright owners and the potential legal repercussions the majority of people do not think, or know, could exist.

BIBLIOGRAPHY

Aalmuhammedv. Lee, 202 F.3d 1227,1232 (9th Cir. 2000).

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

Allen Financial Insurance Group. (2018). *Tattoo Insurance & Body Piercing Forms*. [online] Available at: https://www.eqgroup.com/tattoo-forms/ [Accessed 4 Jan. 2022].

Baltimore Tattoo Museum (n.d.). *HOME*. [online] BmoreTattooMuseum. Available at: https://www.baltimoretattoomuseum.com/ [Accessed 29 Apr. 2021].

Beasley, M. (2012). *WHO OWNS YOUR SKIN: INTELLECTUAL PROPERTY LAW AND NORMS AMONG TATTOO ARTISTS*. [online] pp.1137–1182. Available at: https://southerncalifornialawreview.com/wp-content/uploads/2018/01/85_1137.pdf [Accessed 17 Nov. 2021].

Bencich v. Hoffman, 84 F. Supp. 2d 1053, 1056 (D. Ariz. 2000).

Bergh, L. (2016). Tattooing as Memorial Pragmemes. In: Allan, K., Capone, A., Kecskes, I. (eds) Pragmemes and Theories of Language Use. Perspectives in Pragmatics, Philosophy & Psychology, vol 9. Springer, Cham. https://doi.org/10.1007/978-3-319-43491-9_30.

Billy-Bob Teeth, Inc. v. Novelty, Inc.,329 F.3d 586, 592 (7th Cir. 2003).

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239,251–252 (1903).

Blignaut (n.d.). *UK Home*. [online] Practical Law. Available at: https://uk.practicallaw.thomsonreuters.com/w0121995?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 [Accessed 10 Jun. 2022].

Bloom, C.P. (2012). Hangover Effect: May I See Your Tattoo, Please. *Cardozo Arts & Entertainment Law Journal*, [online] 31, p.435. Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/caelj31&div=21&id=&page=.

C.A. Inc. v. Rocket Software, Inc., 579 F. Supp. 2d 355, 362-63 (E.D.N.Y.2008).

Caplan, J. (2000). *Written on the body : the tattoo in European and American history*. Princeton, New Jersey: Princeton University Press.

Christa De Cuyper, Maria Luisa Cotapos and Springerlink (Online Service (2010). *Dermatologic Complications with Body Art : Tattoos, Piercings and Permanent Make-Up*. Berlin, Heidelberg: Springer Berlin Heidelberg.

Commander, J. (2015). *Most Skin in the Game? Most Skin in the Game? The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?* [online] Available at: https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4480&context=wlulr.

Conley, J.M., Brown, M.M. and Bryan, R.M. (2000). Database Protection in a Digital World: Why the United States Should Decline to Follow the European Model. *Information & Communications Technology Law*, 9(1), pp.27–60. doi:10.1080/136008300111592.

Cook, J. (1893). Captain Cook's Journal during his First Voyage Round the World. *Notes and Queries*, [online] s8-III(73), pp.399–399. doi:10.1093/nq/s8-iii.73.399a.

Cotter, T.F. and Mirabole, A.M. (2003). Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art. *UCLA Entertainment Law Review*, 10(2). doi:10.5070/lr8102027045.

Cummings, D. (n.d.). *CUMMINGS.DOCX (DO NOT DELETE) CREATIVE EXPRESSION AND THE HUMAN CANVAS: AN EXAMINATION OF TATTOOS AS A COPYRIGHTABLE ART FORM*. [online] Available at: https://illinoislawreview.org/wp-content/ilr-content/articles/2013/1/Cummings.pdf.

Cvetkovska, L. (2021). *27 Tattoo Statistics to Intrigue, Impress & Even Encourage*. [online] Modern Gentlemen. Available at: https://moderngentlemen.net/tattoo-statistics/ [Accessed 29 Jun. 2022].

Daredevil Tattoo (n.d.). *Museum*. [online] Daredevil Tattoo. Available at: https://www.daredeviltattoo.com/museum [Accessed 29 Apr. 2021].

Dean, O.H. and Dyer, A. (2014). *Dean & Dyer, introduction to intellectual property law*. Cape Town, South Africa: Oxford University Press.

Du Bois, M. (2018). Justificatory Theories for Intellectual Property Viewed Through the Constitutional Prism. *Potchefstroom Electronic Law Journal*, 21, pp.1–38. doi:10.17159/1727-3781/2018/v21i0a2004.

Facebook, A. (n.d.). *Flash vs. Custom Tattoos*. [online] Byrdie. Available at: https://www.byrdie.com/what-is-tattoo-flash-3189612 [Accessed 7 May 2022].

Fagan, A. (2019). *Why People Get Tattoos | Psychology Today South Africa*. [online] www.psychologytoday.com. Available at: https://www.psychologytoday.com/za/blog/head-games/201909/why-people-get-tattoos [Accessed 2 Dec. 2021].

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

FeldmanNO v EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA).

Fredrick, H. (n.d.). *What Happens to Tattoos When You Get Fat?* [online] LEAFtv. Available at: https://www.leaf.tv/articles/what-happens-to-tattoos-when-you-get-fat/ [Accessed 16 Jan. 2022].

Free Tattoo Designs (n.d.). *Body Art | Body Painting, Piercings, History, Photos, Body Modification, Branding*. [online] www.freetattoodesigns.org. Available at: http://www.freetattoodesigns.org/body-art.html [Accessed 29 Apr. 2021].

Galago Publishers (Pty) Ltd & another v Erasmus 1989 (1) SA 276 (A).

Google Scholar (2016). *SOLID OAK SKETCHES, LLC v. 2K GAMES, INC., Dist. Court, SD New York 2016 - Google Scholar*. [online] Google.co.za. Available at: https://scholar.google.co.za/scholar_case?case=8242721186240256113&q=Solid+Oak+Sketches+v.+2K+Games+Inc&hl=en&as_sdt=2006&as_vis=1# [Accessed 9 Jun. 2021].

Gourgoulianni, S. (2020). The Copyrightability of Tattoos: A Practical Examination of Law Cases. *Journal of Education and Culture Studies*, 4(2), p.p67. doi:10.22158/jecs.v4n2p67.

Grassi, B. (2016). Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms. *Mitchell Hamline Law Review*, [online] 42(1), pp.60–66. Available at: https://open.mitchellhamline.edu/mhlr/vol42/iss1/8 [Accessed 29 Jun. 2022].

Griffin, A. (2016). *The slightly disgusting reason that tattoos stay in your body forever*. [online] The Independent. Available at: https://www.independent.co.uk/news/science/tattoos-permanent-why-how-last-forever-ink-body-best-forever-a6967296.html [Accessed 16 Jan. 2022].

Group, G.L. (n.d.). *International Comparative Legal Guides*. [online] International Comparative Legal Guides International Business Reports. Available at: https://iclg.com/practice-areas/copyright-laws-and-regulations/south-africa#:~:text=The%20standard%20for%20originality%20is [Accessed 1 Jun. 2021].

Harkin, C "TATTOOS AND COPYRIGHT INFRINGEMENT: CELEBRITIES, MARKETERS,AND BUSINESSES BEWARE OF THE INK" 2006 10 *Lewis & Clark Law Review* 315.

Hatic, M. (2013). Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos. *Fordham Intellectual Property, Media and Entertainment Law Journal*, [online] 23(1), p.396. Available at: https://ir.lawnet.fordham.edu/iplj/vol23/iss1/7/ [Accessed 25 Jan. 2023].

Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd [2006] SCA 39 (RSA).

HENRY, M. (2020). *OPINION: Tattoos are a way to express creativity*. [online] The Daily Evergreen. Available at: https://dailyevergreen.com/93268/opinion/opinion-tattoos-are-a-way-to-express-creativity/ [Accessed 1 Dec. 2021].

Hunter, D. (2020). *What Is A Flash Tattoo? (With Examples)*. [online] AuthorityTattoo. Available at: https://authoritytattoo.com/what-is-a-flash-tattoo/ [Accessed 1 May 2022].

Hunter, D. (2021). *Tattoo Etymology: The Origin of the Word 'Tattoo'*. [online] AuthorityTattoo. Available at: https://authoritytattoo.com/tattoo-etymology/ [Accessed 9 Dec. 2021].

Carell v. Shubert Organization, Inc. [2000] 104 F.Supp.2d 236.

Gonzales v. Kid Zone [15AD] 00 C 3969 (United States District Court, N.D. Illinois, Eastern Division).

ilr.law.uiowa.edu. (n.d.). *The Inky Ambiguity of Tattoo Copyrights: Addressing the Silence of U.S. Copyright Law on Tattooed Works | Iowa Law Review - The University of Iowa*. [online] Available at: https://ilr.law.uiowa.edu/print/volume-104-issue-3/the-inky-ambiguity-of-tattoo-copyrights-addressing-the-silence-of-u-s-copyright-law-on-tattooed-works.

Indeed Editorial Team (2021). *How To Get a Tattoo Apprenticeship To Start Your Career*. [online] Indeed Career Guide. Available at: https://www.indeed.com/career-advice/finding-a-job/how-to-get-tattoo-apprenticeship [Accessed 21 Apr. 2022].

Information and Communication Technology Services (2010). *Copyright 101 | Information and Communication Technology Services*. [online] Uct.ac.za. Available at: http://www.icts.uct.ac.za/Copyright_101 [Accessed 1 Dec. 2021].

InkHappened (2021). *How is tattooing in South Africa. Interview with Embla Holm*. [online] inkhappened.com. Available at: https://inkhappened.com/tattooing-in-south-africa-interview/ [Accessed 9 Dec. 2021].

Irwin v. ZDF Enterprises GmbH, 2006 WL 374960.

ITOFCA,Inc. v. MegaTrans Logistics, Inc.,322 F.3d 928, 931 (7th Cir. 2003).

JD Supra (n.d.). *Slowly Resolving the Uncertainty Surrounding Tattoos and Copyright Law: Solid Oak Sketches V. 2k Games and Take-Two*. [online] JD Supra. Available at: https://www.jdsupra.com/legalnews/slowly-resolving-the-uncertainty-58856/ [Accessed 28 Oct. 2021].

Kalamazoo Division (Pty) Ltd v Gay [1978] (2) SA 184 (C).

Khumalo (2020). *Infringement Of Copyright - Copyright - South Africa*. [online] www.mondaq.com. Available at: https://www.mondaq.com/southafrica/copyright/894384/infringement-of-copyright#:~:text=i)%20Firstly%2C%20there%20must%20be [Accessed 25 May 2021].

King, Y. (2013). *The Challenges 'Facing' Copyright Protection for Tattoos*. [online] papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802292 [Accessed 20 Apr. 2022].

KischIP (2013). *Can Tattoos Be Protected By Copyright?* | *Kisch IP*. [online] www.kisch-ip.com. Available at: https://www.kisch-ip.com/can-tattoos-be-protected-by-copyright [Accessed 15 Jan. 2022].

Kretzmann, S. (2018). *Tattooing inks its way into the small business sector*. [online] Business. Available at: https://www.news24.com/fin24/entrepreneurs/news/tattooing-inks-its-way-into-the-small-business-sector-20180401-2 [Accessed 25 Jan. 2023].

Kristensen, L. (2005). The Technique and Craftsmanship of Tattooing in the Professional Tattoo Parlour. *Tattooed Skin and Health*, [online] pp.31–36. doi:10.1159/000369176.

Lesicko, C. (2013). Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act. *IDEA: The Intellectual Property Law Review*, [online] 53, p.39. Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/idea53&div=6&id=&page= [Accessed 9 Mar. 2022].

Levenstein, E. and Tucker, R. (2005). *Introduction To The Law Of Copyright - Intellectual Property - South Africa*. [online] www.mondaq.com. Available at: https://www.mondaq.com/southafrica/copyright/36570/introduction-to-the-law-of-copyright [Accessed 25 Apr. 2022].

Lexforti (2020). *Tattoos and Copyright: Can getting inked lead you to the Court?* [online] LexForti Legal News & Journal. Available at: https://lexforti.com/legal-news/tattoos-and-copyright/ [Accessed 29 Jun. 2022].

Lichtenstein, I. (2021). *A Comprehensive Guide to Every Type of Tattoo*. [online] Byrdie. Available at: https://www.byrdie.com/tattoo-art-styles-3189583 [Accessed 16 Jan. 2022].

Lichtman, D. (n.d.). *Are Tattoos Eligible for Copyright Protection?* [online] The Media Institute. Available at: http://www.mediainstitute.org/IPI/2011/061511.php. [Accessed 7 Nov. 2022].

Liu v.Price Waterhouse, LLP,302 F.3d 749, 754 (7th Cir. 2003).

LyrickStudios, Inc. v. Big Idea Prods., Inc.,420 F.3d 388, 392 (5th Cir. 2005).

Maluleke, P. (2019). *Is my work original enough to satisfy the Copyright Act?* [online] Insights into The Law in South Africa | Welcome to Go Legal. Available at: https://www.golegal.co.za/original-works-copyright-act/ [Accessed 15 Jan. 2022].

Marwick Wholesalers (Pty) Ltd v Hallmark Hemdon (Pty) Ltd 1999 JOC 707.

MasqueradeNovelty, Inc. v. Unique Industries, Inc., 912 F.2d 663, 669–70 (3rd Cir. 1990).

Mazer v. Stein, 347 U.S. 201, 212–13 (1954).

Millstein, A. (2014). Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression. *Pace Intellectual Property, Sports & Entertainment Law Forum*, [online] 4(1), p.135. Available at: https://digitalcommons.pace.edu/pipself/vol4/iss1/5 [Accessed 18 Apr. 2022].

Minahan, M. (2015). Copyright Protection for Tattoos: Are Tattoos Copies? *Notre Dame Law Review*, [online] 90(4), p.1713. Available at: https://scholarship.law.nd.edu/ndlr/vol90/iss4/12/.

Moneyweb (Pty)Limited v Media 24 Limited and Another [2016] ZAGPJHC 81.

National Archives (2018). *The Constitution of the United States: A Transcription*. [online] National Archives. Available at: https://www.archives.gov/founding-docs/constitution-transcript [Accessed 18 Apr. 2022].

Naudé, L., Jordaan, J. and Bergh, L. (2017). 'My Body is My Journal, and My Tattoos are My Story': South African Psychology Students' Reflections on Tattoo Practices. *Current Psychology*, [online] 38(1), pp.177–186. doi:10.1007/s12144-017-9603-y.

Nimmer, D. (2019). *Nimmer on Copyright*. [online] store.lexisnexis.com. Available at: https://store.lexisnexis.com/products/nimmer-on-copyright-skuusSku10441 [Accessed 28 Jan. 2022].

Noam Cohen (2011). *Citing Public Interest, Judge Rules for 'Hangover II'*. [online] Media Decoder Blog. Available at: https://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/ [Accessed 9 Jun. 2021].

Noonan, T. (2017). How Tattoos Fit within the Realm of Copyright Law: Do We Finally Have a Lawsuit That Will Provide Some Clarity. *Northern Kentucky Law Review*, [online] 44, p.205. Available at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/nkenlr44&div=19&id=&page= [Accessed 25 Jan. 2023].

Northern Office Micro Computers (Pty) Ltd v Rosentein [1981] (4) SA 123 (C).

Paris Convention for the Protection of Industrial Property 1883.

Patel, A. (n.d.). *LibGuides: Copyright and Related Issues: Who Owns Copyright?* [online] libguides.wits.ac.za. Available at: https://libguides.wits.ac.za/c.php?g=145331&p=956631 [Accessed 12 May 2021].

Peter-Ross v Ramesar 2008 (4) SA 168 (C).

Pickup (2016). Where does the word tattoo come from? *The Telegraph*. [online] 30 Nov. Available at: https://www.telegraph.co.uk/films/moana/tatau-where-tattoo-comes-from/ [Accessed 9 Jun. 2021].

Polak, F. (2009). *Copyright and Digital Music Collections in South Africa*. [online] UKZN, pp.1–263. Available at: https://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/1253/Polak_F_2009.pdf?sequence=1&isAllowed=y [Accessed 18 Jan. 2023].

Prest, C.B. (1996). *The law & practice of interdicts*. Lansdowne: Juta, Erschienen.

Ramsden, P.A. (2011). *A guide to intellectual property law*. Claremont South Africa: Juta.

Rawlence, N.-A. (2019). *IP and counterculture: Who owns a tattoo?* [online] Lexology. Available at: https://www.lexology.com/library/detail.aspx?g=b8b5f437-caa5-42d9-b62c-b00bf95114d8&filterId=34c4eb16-18f1-47ec-b8fc-72c4c2c57f0 [Accessed 23 Jun. 2022].

Reed v. Nike, Inc. No. 3:05-CV-00198 (D.Or. 2005).

Roux, S. (2015). *A multisemiotic analysis of 'skinscapes' of female students at three Western Cape universities*. Thesis. pp.1–302.

Royal Museums Greenwich (n.d.). *Royal Museums Greenwich | Home*. [online] www.rmg.co.uk. Available at: http://www.nmm.ac.uk [Accessed 29 Apr. 2021].

Roy Export Co. v. CBS, 503 F. Supp. 1137, 1146–47 (S.D.N.Y. 1980).

Rudyk, B & Davie, W "Body Modification: The Case of Tattoo Copyright" (2014) *EDUC. COUNCIL FOR JOURNALISM & MASS COMM*1 - 15.

safacts (n.d.). *How Much Does Tattoo Ink Cost In South Africa*. [online] 2023/2024. Available at: https://safacts.co.za/how-much-does-tattoo-ink-cost-in-south-africa/ [Accessed 15 Apr. 2022].

Saunders Valve Co Ltd v Klep Values (Pty) Ltd [1985] (1) SA 646(T).

Schmidt, M. (2020). *The rise of SA's tattoos industry*. [online] BusinessLIVE. Available at: https://www.businesslive.co.za/fm/life/art/2020-03-19-the-rise-of-sas-tattoos-industry/ [Accessed 20 Apr. 2020].

Scientific American (1999). *If the cells of our skin are replaced regularly, why do scars and tattoos persist indefinitely?* [online] Scientific American. Available at: https://www.scientificamerican.com/article/if-the-cells-of-our-skin/ [Accessed 15 Jan. 2022].

Shady Records, Inc. v. Source Enters., Inc., 2005 WL 14920.

Shepherd and Wedderburn LLP - John MacKenzie (2013). *Tattoos – scope for copyright?* [online] Lexology. Available at: https://www.lexology.com/library/detail.aspx?g=aa885059-bfef-4381-a68e-35f35f56793c [Accessed 24 May 2022].

Smalberger, N. (2019). *Copyright In Tattoos | A Prickly Legal Question - Copyright - South Africa*. [online] www.mondaq.com. Available at: https://www.mondaq.com/southafrica/copyright/1067086/copyright-in-tattoos-a-prickly-legal-question [Accessed Jan. 13AD].

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

Stone v. Williams, 970 F.2d 1043, 1049-50 (2d Cir. 1992).

Tattoo Club of Great Britain (n.d.). *Tattoo History Museum | Collection of Lionel Titchener*. [online] www.tattoo.co.uk. Available at: https://www.tattoo.co.uk/tattoo.co.uk2/museum.html#:~:text=The%20British%20Tattoo%20History%20Museum [Accessed 29 Apr. 2021].

Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 963 (8th Cir. 2005).

The Constitution of the Republic of South Africa, 1996.

The Constitution of the United States, 1787.

The Consumer Protection Act 68 of 2008

The Copyright Act No. 98 of 1978.

The Criminal Procedure Act 51 of 1977.

Troll Co. v. Uneeda Doll Co., 483 F.3d 150, 159 (2d Cir. 2007).

Tromp, J.A. (2014). *Freedom of contract and the enforceability of exemption clauses in view of section 48 of the Consumer Protection Act*. [online] repository.nwu.ac.za. Available at: https://repository.nwu.ac.za/handle/10394/15957#:~:text=The%20Act%20does%20not%20address [Accessed 23 Jan. 2023].

Ulscht, K. (2014). Copyright Ownership and the Need for Implied Licenses in the Realm of Tattoos. *Student Works*. [online] Available at: https://scholarship.shu.edu/student_scholarship/596 [Accessed 29 Jun. 2022].

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

Valle, H.S.F.L.-F.N.D. and Ripley-Evans, J. (n.d.). *In a nutshell: claiming damages in South Africa | Lexology*. [online] www.lexology.com. Available at: https://www.lexology.com/library/detail.aspx?g=29bd0e60-3488-4493-b564-439c0b9a9f56 [Accessed 25 May 2021].

Video Parktown North (Proprietary) Limited vs Paramount Pictures Corporation 1986 2 SA 623 (T).

WaiverForever (2019). *How to Write a Bulletproof Tattoo Consent and Release Form - WaiverForever*. [online] WaiverForever Blog. Available at: https://blog.waiverforever.com/tattoo-waivers/ [Accessed 4 Jan. 2022].

WayliteDiaries CC v First National Bank Ltd[1995] (1) SA 645 (A).

Weinstein Co. v. Smokewood Entm't Grp., LLC, 664 F. Supp. 2d 332, 344 (S.D.N.Y. 2009).

Whitmill v. Warner Brothers Entertainment, Inc. No. 4:11-CV-00752(E.D. Mo. 2011).

WIPO (n.d.). *WIPO Lex*. [online] www.wipo.int. Available at: https://wipolex.wipo.int/en/text/28369 [Accessed 1 May 2022].

www.law360.com. (2021). *Miles Davis Photog Says Kat Von D Tattoo Infringes Photo - Law360*. [online] Available at: https://www.law360.com/articles/1353165/miles-davis-photog-says-kat-von-d-tattoo-infringes-photo [Accessed 24 May 2022].