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Tattoo Artist and Tattoo Bearer's Rights under the Law

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ABSTRACT

Nowadays, tattoos are a way to express one's identity and self-expression. According to Indian law, tattoos fall under the category of artistic works. Artists want the same protection after they have created a tattoo as they do with paintings and drawings

The article discusses how tattoo artists possessing ownership rights over tattoos might impair the bearer's rights. Artists may limit the bearer from removing, modifying, or even publicizing their work, which can be problematic, especially in the case of celebrities. Often, people perceive tattoos to express a person's personality by attaching them to the tattoos. For this reason, direct copying may lead to identity theft.

For tattoo artists to enforce their rights, they face many challenges, as well as constitutional limitations. Since both tattoo bearers and tattoo artists have rights depending on what is agreed upon, it is essential to discuss the ownership and rights in advance.

It is my opinion that tattoo artists deliver services and receive compensation for the effort, work, and ideas they produce. Therefore, they shouldn't enforce their rights over a tattoo and rather forfeit it. They should also maintain a friendly relationship with the bearer. This article addresses the challenges the owner of tattoo copyright may face if they try to enforce their rights in court. Lastly, the article examines the complexities in determining the copyright in tattoos since tattoos are often created in a fluid and informal manner, which makes determining ownership of the copyright difficult.

I. INTRODUCTION

Every corner of every tourist place has a tattoo shop, whether it's a stall or a professional tattoo studio. Tattoos have been skyrocketing in India, from celebrities to sportspeople to a commoner; tattoos are quite common and are in style these days. Formerly, it was a means of identifying a group or community, but now it is like an expression of self-identity.

Tattoos are tangible designs that are physically engraved on a human body. Tattoos are a commitment to both tattoo artists and tattoo bearers, as, for one, it is their hard work and

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creativity, and for the other, it is their body that will bear the tattoo. Like painters or illustrators, even tattoo artists would want the right to protect their work.

Artistic works such as paintings and sculptures are protected under Section 2 (c) of the Indian Copyright Act of 1957. Tattoos are a form of artistic expression, and protection of the work is not based on its quality but on its expression of the idea. This safeguards both the interests of the creator and their work. Artistic work encompasses any painting, sculpture, drawing, engraving, photograph, work of architecture, or any other work of artistic craftsmanship regardless of whether the same possesses artistic quality. The tattoo is drawn on a three-dimensional canvas and thus may be classified as a pictorial, graphical, or sculptural work.

Registration of the design isn't necessary after the tattoo is made; the work is automatically protected by the Indian Copyright Act. It means if most of the extensive work is original, either on paper or directly on the skin, the tattoo artist possesses the right to regulate, promote and replicate. A pictorial representation of the tattoo is necessary for a copyright application for the tattoo. If the artist is still alive, it is imperative to seek permission beforehand so that there is no copyright infringement or infringement of any moral rights since copyright begins at the moment the work is created and ends 70 years after the death of the artist. For this reason, tattooing Picasso's artwork will not constitute copyright infringement.

II. THREE CRITERIA FOR THE TATTOO TO BE COPYRIGHTABLE

Originality, fixed medium, and authorship are the three criteria for obtaining copyright under the Indian Copyright Act of 1957.

(A) Originality is the *sin quo pro* of copyright law. It is important to claim copyright over the designs. It also gives exclusive rights to use, reproduce and adapt. This means anyone who wants to use the work would have to seek the permission of the first owner² to use the work and may also have to pay a royalty to the owner. To be considered original work, it has to be the individual's creation and requires a level of creativity on the part of the artist. Being different or unique is not a principal requirement, but it does have to be more than mere copying. It means even if an artist has shown a small amount of creativity from his side, it will be his original work and copyrightable. Here it is important to note that tattoo consisting of dates, name, or very common signs like the heart, which do not require sufficient skill or is very simple, won't be considered original and won't be eligible for copyright protection. Tattoos can be a way of self-expression, so copying the design can be considered identity theft.

² Indian copyright act 1957, Section 17.

When we looked into the case of Sam Penix, the coffee shop owner who tattooed the letters I [coffee mug] NY on his knuckles and used this as his shop's logo, however, he was slammed by a notice for infringing the I [heart] NY trademark which belonged to The New York State Department of Economic Development. The plaintiff settled the lawsuit and agreed to no publicity and other terms and conditions to avoid litigation. Yet, if we look carefully, there was no actual copying from the coffee shop owner's side. He replaced [heart] with [coffee mug], which shows creativity even if minimal, so the coffee shop could keep its logo. This case demonstrates that tattoos can be protected if they pass the criterion for copyrightable property.

(B) Another requirement is that the medium should be fixed either in the traditional form such as paper or on the skin as body art, or both. Fixing means transferring it into a tangible medium. Thus, things like fireworks cannot claim copyright protection. Fixation helps in commercializing the work and claiming copyright. Considering tattoos can be permanent and semi-permanent/temporary, how does one ensure the copyright of one's art is protected? As an example, many makeup artists are creating videos on Instagram using different makeup styles, but will they be able to claim copyright over it, as makeup can be removed and it does not last permanently. Since makeup is applied to the skin, it is fixed but not permanent.

According to **Elizabeth White's** paper, "**The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content,**" she discusses the *fixation requirement in the United States and its impact on User Generated Content like Facebook statuses, tweets, and photographs. In her article, she addresses the question of whether content online can be regarded as tangible considering that it can be wiped out easily*³. Content is stored for some time following deletion, but there is no consensus yet on how long it stays in transit, and there are not many cases to set the legal precedent.

In the case of *Canadian Admiral Corp v Rediffusion Inc. and Attorney-General of Canada*⁴, it was held that *for a copyright to exist in work, it must be expressed in some material form, capable of identification, and having more or less of a value*. Instead of using the term permanent, the fixation requirement is interpreted as something more than transitory. Only Canadian Copyright Laws, to some extent, give scope to semi-permanent work. Unless your work is documented in writing or otherwise, it cannot be protected under UK law. Nowhere in the Berne Convention for the Protection of Literary and Artistic Works, 1887, it is stated that only permanent works are protected by copyrights. In the Indian Copyright Laws, there is no

³Samyukta Shankar, *all you need to know about copyright over makeup*, <https://blog.ipleaders.in/all-you-need-to-know-about-copyright-over-makeup/>.

⁴Canadian Admiral Corp v. Rediffusion Inc. and Attorney-General of Canada [1954] Ex. C.R. 382.

mention of tangible works, just material form, but it doesn't specify anything about semi-permanent or permanent works like makeup.

(C) Lastly, the artist must be the author for a tattoo to be copyrightable. As defined by the Supreme Court⁵, *an author is anyone who contributes to a work of science or literature; one who originates something; one who makes something. An author is a person who conceptualized the whole design, a mastermind is behind the entire design, and this works in the case of a tattoo.* A key concept to note is that owning a tattoo doesn't mean owning the design of the tattoo. The owner of the tattoo is the person on whose body the tattoo is drawn, and the owner of the copyright is the author of the design, one who used his creativity and his ideas to draw the designs. Due to the uniqueness of the medium on which tattoo is fixed, the concept of ownership and authorship can get confusing. Thus, it is important for the court to first determine the owner of the copyright as; ownership and authorship are two different terms about tattoos and can be two separate entities. The tattoo artist and the owner of the tattoo can be coauthors of the tattoo in cases where the owner of the tattoo contributed more than an idea for the design.

Therefore, a tattoo can be registered if all three parameters are met. Don 2, the movie starring Shah Rukh Khan, for example, featured the letter D tattooed on the actor, and this was granted copyright in 2011. It demonstrated sufficient originality and was fixed on a tangible medium.

III. PUBLICITY RIGHTS OF THE TATTOO BEARER

The tattoo on someone's body today is more than just a design; it signifies the individual's identity; they are flaunted, photographed, and publicized. It has become a strong symbol of fame. Among such tattoos are Mike Tyson's facial tattoo, Angelina Jolie's arm tattoo of the geographical coordinates of her children's birthplaces and her husband Brad Pitt, Bani J and Indian VJ arm tattoo, or Saif Ali Khan's tattoo of Kareena's name. Tattoos move way beyond mere protection under copyright law, but it also acquires protection under the right of publicity laws⁶.

As stated in Section 14(c), the owner's six exclusive rights include the right to reproduce and display the work publicly. The court held in *ICC Development (International) Ltd. v. Arvee Enterprises and Anr.*⁷ that *publicity rights result from the right to privacy and inhere in an individual or their "personality indicia, such as their name, personality traits, signatures, etc."*

⁵ Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

⁶ Amruta Mahuli, Tattoos as Intellectual Property- An Indian Perspective, <https://www.mondaq.com/india/trademark/625750/tattoos-as-intellectual-property-an-indian-perspective>.

⁷ ICC Development (International) Ltd. v. Arvee Enterprises and Anr.2003 (26) PTC 245.

The Court further ruled, “*The right of publicity belongs exclusively to the individual, who alone is entitled to profit from it.*” The right of publicity is widely regarded as a kind of IP right that protects a person against wrongful use of their name, likeness, or other identifiers.

The heavyweight boxing champion Mike Tyson is also known for having tattoos on his left side of the face. Due to its notoriety and popularity, Tyson’s facial tattoo was the subject of a lawsuit brought against Warner Bros. Entertainment: *Whitmill v. Warner Bros. Entertainment, Inc.*⁸. Victor Whitmill, the tattoo artist, claimed that Warner Bros. infringed his copyright of the “original and distinctive”⁹ tattoo. There was unauthorized copying of the tattoo seen in “The Hangover 2” on actor Ed Helm, which was originally drawn on Mike Tyson’s face. Warner Brothers used the tattoo for promotional materials and the trailer for the movie. Whitmill sought compensatory damages and an award of Warner Brothers’ profits resulting from the alleged infringement, as well as a preliminary and permanent injunction discouraging Warner Brothers from using the tattoo on Ed Helms’ face in the movie and elsewhere. The defendant’s counsel argued that the tattoo was a parody and the use of the tattoo is a satire of men’s behaviour, specifically aggression, masculinity, and strength of Mike Tyson, the bearer of the copyrighted tattoo, and the other movie character’s lack of these qualities. Warner Brothers chose to use the tattoo because it conveyed attributes associated with Tyson’s likeness. It is interesting to see how a tattoo associated with someone’s likeness becomes a part of their identity and defines their personality. It also sheds light on how to direct copying of a famous tattoo without permission on another canvas leads to litigation.

Copyright for a tattoo is not an easy task, as unlike painting on canvas, there are two parties involved, and the effort can be contributed by either party. It is a fair question to ask whether the artist has the right to autonomous control over the design since he drew it but if so, he will have control over the recipients. He would be able to control and limit the public display of the tattoo.

In cases of celebrities, it can be unreasonable to ask them to take prior approval every time. For instance, it will not be reasonable to expect Priyanka Chopra to wear gloves when she shoots or attends galas because she has a tattoo of Daddy’s little girl on her hand. If she agrees to cooperate with an artist who engraved this tattoo has the rights to the tattoo and limits the display of his artwork and wants the tattoo bearer to take prior approval before the public

⁸ Complaint ¶ 1, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-CV-752 CDP (E.D. Mo. Apr. 28, 2011), dismissed (E.D. Mo. June 22, 2011) [hereinafter *Whitmill Complaint*] (tattoo artist alleging infringement of copyright in tattoo design).

⁹ See *Whitmill Complaint*.

display, she will be prohibited from showing her tattoo, and since she has one on her hand, she will most likely be required to wear gloves whenever she appears in public. However, if she failed to comply, she would be liable for financial compensation or royalty payments to the artist. Her public exhibit would then be affected as she would be accountable to him every time. A tattoo bearer's freedom of expression will be impeded, and it will violate Article 19 and Article 21 of the Indian Constitution. Given that we are free to do with our bodies whatever we like, the issue of intellectual property rights in images fixed on human bodies seems odd.

In tattoo cases, because of the nature of the medium in which the copyrighted work is fixed, interests including the right to publicity and the constitutional right to control one's body must weigh more heavily in determining whether infringement occurred and in deciding whether to award damages or injunctive relief than in cases involving more traditional copyrighted works.

IV. THE ENFORCEMENT CHALLENGES FOR TATTOO COPYRIGHTS

Tattoo work is a contract between the owner and the tattoo bearer wherein the tattoo artist provides service. In regards to tattoo ownership, it is wise to discuss beforehand who will own the drawing, moral rights, etc.; the specific terms between artist and bearer would reduce the risk of tattoo copyright and avoid future difficulties. Many celebrities have made their tattoo artists sign waivers or assignment deeds allocating all rights over their design to them. Negotiations did beforehand help avoid any possible lawsuits regarding copyright infringement. If the tattoo artist agrees, then the tattoo bearer will be able to communicate and publicize as he wishes. But if a tattoo artist has the copyright and the tattoo bearer decides to alter or remove the tattoo, the artist can prevent such modification.

Signed agreements are rare; however, in Whitmill¹⁰, Mike Tyson signed an agreement acknowledging that *all artwork, sketches, and drawings related to tattoos and any photographs of tattoos are property of "Paradox-Studio of Demographics."*

Even if the contract is drawn, there is a possibility of infringement, mostly due to the fluidity and informality of the process of tattoo creation. But enforcing the rights on tattoos without infringing constitutional rights is very difficult.

If the artist of the tattoo has the right to restrict the bearer from altering, modifying, or doing anything to the tattoo will also be a violation of that bearer's rights. In most cases, tattoos are permanent, but they can be surgically removed or modified, but the bearer cannot do it. It means, then, that once the artist has the copyright, he now owns that part of the tattoo bearer's

¹⁰ *Id.*

skin.

The government's power to force someone to cover their genitals in public does not mean it can force a tattoo wearer to wear a long-sleeve shirt or the World's Most Tattooed Woman to wear a burka in public¹¹.

Furthermore, finding people who are copying the original work is difficult. In a country with 1.4 billion people, there are more tattoo artists, with tattoo parlours in every corner, and all the designs are easily accessible since Instagram and Pinterest both exist. There is no way that an original owner can stop every copycat. Even if the original owner catches the copycats, he cannot suit everyone who is making unauthorized copies of his work.

V. CONCLUSION

Every original product encounters counterfeiting, theft, and plagiarism in this highly competitive sector. Since all these things harm people's originality, these infringements should be recognized by law as infringements of intellectual property¹².

A person can get anything tattooed on his skin because it's his body. If he doesn't need permission for piercing, he doesn't need permission for inking on his body. He can tattoo a cat, Hello Kitty, or SpongeBob. It's the choice of the tattoo bearer. Tattoo artists charge for their laborious work and their service, and not the content. He charges for the work he does and for the instruments he uses. For classes he may have taken, he will reimburse the cost.

It is my opinion that tattoos are more than just art. They represent significant work by the artist. Even if he is copying the design, he is investing time and working on it to make it exactly like the original. And tattoo artists, once they have drawn the tattoo, should forfeit their rights. Tattoo artists should also understand that they need to relinquish their control over their inked creation and accept the general use of their tattoos. Tattoo artists and tattoo bearers should restrain themselves from using the tattoo for profit-making and commercialization, but aside from that, once the author is paid for their work, he or she should give the rights to the tattoo bearer. In this way, the relationship between artist and bearer will remain friendly, and there will be no litigation.

¹¹Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, <https://escholarship.org/uc/item/77j602d0>.

¹² How to protect small-scale luxury cosmetics brands' IP, <https://www.redpoints.com/blog/how-to-protect-cosmetics-brands-ip/>.