

ISSN: 2582-2942



# LEXFORTI

Legal Journal

Vol-II Issue- I

October, 2020

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of LexForti Legal Journal. The Editorial Team of LexForti Legal Journal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of LexForti. Though all efforts are made to ensure the accuracy and correctness of the information published, LexForti shall not be responsible for any errors caused due to oversight otherwise.



## EDITORIAL BOARD

### Editor in Chief

Rohit Pradhan  
Advocate Prime Dispute  
rohit@lexforti.com

### Editor in Chief

Sridhruti Chitrapu  
Member | CiArb  
sridhruti@lexforti.com

### Editor

Nageshwar Rao  
Professor (Banking Law)  
47+ years of scholarly experience

### Editor

Dr Rajanikanth M  
Assistant Professor | Management  
Symbiosis International University

### Editor

Foram Thakar  
Assistant Professor | LJ School of Law



## EDITORIAL BOARD

**Editor**

Nandita Reddy  
Advocate Prime Dispute

**Editor**

Romi Kumari  
Student Editor

**Editor**

Shubhangi Nangunoori  
Student Editor



## ABOUT US

LexForti Legal News and Journal offer access to a wide array of legal knowledge through the Daily Legal News segment of our Website. It provides the readers with latest case laws in layman terms. Our Legal Journal contains a vast assortment of resources that helps in understanding contemporary legal issues. LexForti Legal News and Journal also offers Certificate courses. Whoever register for the course is provided the access to the state of the art E-portal. On completion of all the module and Test, candidate will be given Certificate of Accomplishment of Course. Be sure to make the most of it. LexForti Legal News and Journal is also proud to announce that we have made India's first Legal News android application which contains Daily Legal News, Legal Journal and Certificate Courses, everything in 4 MB.



**Tattoos and Copyright: Can getting inked lead you to the Court?**

**Shruti Shukla**

## INTRODUCTION

---

Tattoos which once was a part of culture and tradition, over the time has developed itself as an emerged sector of fashion. The trend for getting inked is tremendously increasing and the average age of the same is decreasing. 38% of millennials in America have at least one tattoo and 19% have at least two. These figures are themselves the trend. Also, getting tattooed seems to be an essential need in today's fashion and sports industry. Be it a singer, dancer, model, player of football, basketball, cricket, to even athletics or MMA's, you'll find all the players expressing themselves through tattoos. Thus, it is no wonder that the modern U.S. tattoo industry is a multi-billion-dollar industry.

The perfect example of this commercial scope can be understood by the massive success of the NBA 2K video game series. To give a more real feel to its players, the developers reproduced the tattoos worn by the players of National Basketball Association (NBA) in real life to virtual life. The effect of this change was tremendous. The sale jumped by a massive 169%.<sup>1</sup> Media reports claimed that one of the reasons for such increased sales was the player personas embossed with tattoos that made the game even more real to play. However, this win was not undisputed. 2K Sports, Take-Two and Visual Concepts had to face a lawsuit by Solid Oak, who claimed to own the copyright for these tattoos that was reproduced in the game and resulted in such great increase of sales. Solid oaks complained that five players of the game carry six tattoos over which Solid Oaks own the copyright and all of them were unlawfully reproduced and were also featured on the cover art advertisement. Solid Oaks seeked compensation for unlicensed use of their tattoos by the game owners.

Since past few years, a trend is seen when tattoo artists are actually claiming their copyright over the use of their tattoos in various advertisement and video games featuring the celebrity on whom they applied their art. However, no court has ever confirmed whether tattoos are copyrightable, and a reason for the same is that most of the cases ended up with an out of court settlement. Only the Solid Oak's case is currently under litigation and the judgement is yet to come. Without any precedence and clear law over the subject matter, only assumptions can be made of what the possible position of copyright over tattoos could be. In India, fortunately or unfortunately, we have no cases filed on lines of this trend. But, as it has been a tradition to look towards the west for any uncertain law, this research aims to find clarity over the U.S. position and fit it in terms of our Indian Copyright Act.

---

<sup>1</sup> Tyler Noonan, How Tattoos Fit within the realm of Copyright Law: Do We Finally Have a Lawsuit That Will Provide Some Clarity, 47 N. Ky. L. Rev. 205 (2017)

To understand the proper position of copyright over tattoos, it is important to analyse the following points first:

- (i) Are tattoos copyrightable?
- (ii) If yes, under what subject matter does it fall?
- (iii) Then, who happens to be the author and owner respectively?
- (iv) What are the defences available in case of a copyright infringement suit?
- (v) What case laws are present to substantiate the law?
- (vi) How does our Indian act fit in this concept if at all it does?

### **IS TATTOO COPYRIGHTABLE?**

---

There is no clear case law existing to look upon for an answer to this question. A decision on this would affect many industries that are driven by celebrity's persona. The answer to this question might be that if a tattoo or tattoo design has become so popular among the public at large that the first thought a person get by seeing the tattoo design is in relation to the player over whom that tattoo is inscribed, then may be yes, the tattoo is copyrightable. But who owns it? The player or the tattoo artist who created that tattoo? This question still falls in grey area.

There are three different types of tattoos to focus upon:

- (i) The '**generic tattoos**', which are displayed at the shops and tattoos parlour or could be found in their album. These tattoos are not original work of any one person and thus, fall in public domain. As they are not original, there is no conflict over its copyrightability either in U.S. or in India.
- (ii) The second category is that of '**contemporaneously-placed tattoos**', which are the tattoos that are designed on the spot without any prior thinking applied to it. No special designing is done and use of any predesigned stencil or frame is not made. This is a free style tattoo and is created by the tattoo artist without any premade instructions by his own creativity.
- (iii) The last category is '**preliminary-sketched tattoos**' which are previously created stencil or designs that are made after thinking and later the same is drawn on the body of the person. This method involves a preparation from the end of tattoo artist.<sup>2</sup>

---

<sup>2</sup> ibid



We would test the copyrightability of the “contemporaneously-placed” and “preliminary-sketched” tattoos. First would test according to the U.S. law and then would check the Indian position.

For a work to be a copyrightable subject matter under U.S. act it should be the “*Original work of authorship fixed in any tangible medium of expression...from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device.*”<sup>5</sup>

### **REQUIREMENT 1: FIXED:**

For a work to be fixed, it must be embedded for “more than one transitory duration”<sup>4</sup> Now one can easily say that the tattoo is obviously permanently designed over body thus, is sure to be fixed. But there are again two arguments, one supporting and the other one opposing it. The argument in support says that as the copyright law intend to cover more and more mediums over which the work can be fixed and hence this argument is useless. But the people who oppose claim that as the skin is continuously changing with time and is aging, hence the work cannot be considered to be fixed and thus, the tattoos are not copyrightable.

### **REQUIREMENT 2: ORIGINAL:**

In the case of “**Feist Publications v. Rural Telephone Service Co.**” the “**two-prong test**” was established. This test was used to test the originality of a work. The two principles of this test were as follows:

- (1) The work should be the “independent creation of the author”.
- (2) The work must possess “modicum of creativity.”<sup>5</sup>

However, this is a fairly low standard to meet. Thus, if an artist has created the tattoo on his own, it becomes original.

### **REQUIREMENT 3: WORK OF AUTHORSHIP:**

According to **Section 102 of the U.S. Copyright Act**, eight acts would be considered as work of authorship. Among these eight works, tattoo falls under “pictorial, graphic and sculptural works” and

---

<sup>3</sup> 17 U.S.C § 102(a)

<sup>4</sup> Further, "the fixation requirement may be satisfied even if the fixation is temporary."

<sup>5</sup> This requires that the work "possesses at least some minimal degree of creativity."

“architectural works”<sup>6</sup>. Three types of author have been mentioned in the Act. They are (a) Sole Author (b) Joint Author and (c) Work-for-Hire. The tattoo artist would easily be the sole author, sometimes the client can claim joint authorship but instances are few<sup>7</sup>. To discuss upon is the third category i.e. “Works made for hire” it can be further divided into two (i) Employee-Employer relationship (ii) Independent contractor. By precedents established in case *“Community for creative non-violence v. Reid”*, it is unlikely to give the status of “employee” to tattoo artist, and thus, further work for hire relationship. Independent contractor-created works are produced when and entity or person “specially ordered or commissioned a work.”<sup>8</sup> Following the requirements mentioned in the act for work-for-hire relationship to establish between the artist and the client it is very difficult for the client to prove any such relationship because the client lacks the authority under the agency law for a tattooist to be categorised as an employee and tattoos would not satisfy the prong of “collective work” and thus fail to fulfil the independent contractor test.

## POSITION IN INDIAN CONTEXT

---

Section **13** of the Indian Copyright Act says,

Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,

(a) **Original** literary, dramatic, musical and artistic works;

Thus, the only criteria our act lays down is **“original work.”** Thus, if a tattoo artist has created a design out of his own intellect independently, then it would be original. There is no necessity of fixation under our act but it is obvious that it could exist only after it is fixed and whatever work is included in the definition of **“artistic work”** under **section 2(c)** of Copyright Act can exist only after they are fixed. For authorship, **Section 2(d)(iii) and (vi)** says that the author of an artistic work is the “artist” and “the person who causes the work to be created” in case of a computer-generated work. Thus, **in case of preliminary-sketched tattoo, the drawing drawn by the tattoo artist as**

---

<sup>6</sup> Supra 1

<sup>7</sup> A tattoo is unlikely to be a 'joint work' since the client probably could not be found to have made an independently copyrightable contribution to the creation of the tattoo. It is possible that the tattoo artist and the client could both intend to be co-authors of the tattoos; however, it is more likely that the tattoo artist would view himself or herself as the sole author of the work."

<sup>8</sup> 17 U.S.C § 101

**his preparation is sure to be protected under Indian Copyright Act because drawings form an artistic work and if that work is original it is sufficient to be copyrightable irrespective of that he created the drawing by his hand or with the aid of a computer.**

Out of the three categories of tattoos mentioned above, position on two things is quite clear, (i) generic tattoos are not copyrightable, and (ii) at least drawing made in preliminary tattoo is protected. What is left is contemporary tattoo and the tattoo which is result of the preliminary tattoo on the skin of the client.

In case of contemporary tattoo, the argument that comes forward is that under what category of work should it be placed? It can come under the purview of artistic work if we consider it to be either a **“painting” or “drawing” or “engraving”**

The interpretation for painting and drawing is not given in our act but for engraving we have **Section 2(i)** of Copyright Act saying that **“engravings includes etching, lithograph, wood-cuts, prints and other similar works, not being photographs”**

Following the literal sense and the developing new form of tattoo with the name of “etching tattoos” in which tattoos are created using dark and light lines, Also the other name of etching tattoo is “wood-cut” tattoo<sup>10</sup> which actually prints the tattoo on the skin from a wooden block. **If judiciary accepts this, then some tattoos can fall in the category of engraving.**

---

<sup>9</sup> Section 2(i) The Copyright Act 1957

<sup>10</sup> A woodcut is created by painstakingly etching parts of a wooden block, using special metal tools, to make a picture. Once the woodcut is complete, you can make a print by painting the woodcut and pressing it onto a surface so that the chipped away parts create a light and dark effect image. Dating back to the 1400s, you don't have to go far to find this traditional illustration style – it's on most banknotes and on the walls of most churches. The woodcut style translates particularly well into tattoo design. Often using one colour (the best one – black) the designs contrast against even the darkest of skin tones, making the piece pop. Thin, tight lines and shading ensure the design retains a high level of detail and just like woodcut art, they are made to last.



**Related Cases of infringement complaint:**

All the cases settled out of court and thus, did not provide a chance to address the issue whether “Copyright should be extended to tattoos.”

**CASE 1:**

**MIKE TYSON’S CASE: WHITMILL V. WARNER BROTHERS ENTERTAINMENT, INC.**



<sup>11</sup> Image accessed from: <https://www.refinery29.com/en-gb/woodcut-tattoo-ideas-styles#slide-5>

This is the most famous case ever filed for tattoo and copyright related to it. The famous Mike Tyson got his face tattooed from a tattoo artist named Victor Whitmill. The tattoo fell in the category of ‘contemporaneously placed tattoos’ as it was Whitmill’s freehand tattoo. Later a Hollywood movie produced by Warner Brothers featured the tattoo on the face of its lead actor and also publicised it largely. This led to the tattoo artist filing a copyright infringement suit alleging Warner Brothers of copying, distributing, displaying, and making unauthorized derivative work for unlawfully recreating a design(tattoo) which was created by him on Mike Tyson’s face in various advertisements without taking his permission. The case was settled out of court.

What is to be noted here is that during the early hearings of the case, the Judge made comments that were in favour of covering tattoos under copyright protection.<sup>12</sup> She made a just point that the tattoo artist is anyhow not restricting the manner in which Mike Tyson uses his face or whether he ever changes/alters the tattoo, but only the point that yes, tattoos can be copyrighted. In this case, the artist got a release signed right after the tattoo was created that all the designs and art work would be his property. Also, he got the design registered later, thus it is very clear the separating the tattoo from Mike Tyson face and reproducing it somewhere else was an infringement of the artist’s copyright on drawings.”



---

<sup>12</sup> Chandel Boozer, When the Ink Dries, Whose Tatt Is It Anyway: The Copyrightability of Tattoos, 25 Jeffrey S. Moorad Sports L. J. 275 (2018)

**CASE 2:**

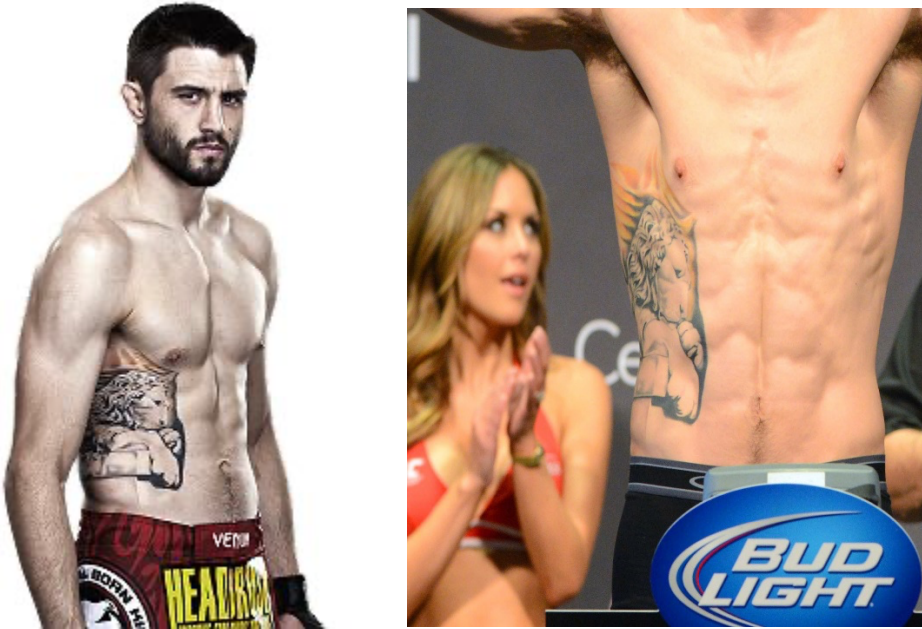
**RASHEED WALLACE: REED V. NIKE, INC.**



American Basketball player Rasheed Wallace asked tattoo artist Matthew Reed to create an Egyptian-style tattoo on his upper arm. Later when Matthew say Rasheed's picture in an advertisement which he did not mind, but when he observed that the advertisement was focussing more over the tattoo than Rasheed. Wallace took the issue to court over how the tattoo was used and sued Wallace and the advertisement agency for violation of his copyright. The case was settled between the parties out of court.

### CASE 3:

#### CAROLOS CONDIT: ESCOBEDO V THQ INC<sup>13</sup>



This was also a similar case to others where a tattoo artist named Christopher Escobedo, sued the developers THQ of a video game when they digitally replicated the “Lion” tattoo drawn by him on the body of Carolos Condit without his permission. This tattoo was not instantaneously made on Carolos body but was drawn with the help of a stencil which was also designed by Christopher. **What is interesting here is that he never pulled in Carolos in the litigation as he already granted Carolos and implied licence to display his tattoo.** “The case was later dismissed for failure to prosecute.”<sup>14</sup>

### CASE 4:

#### RICKY WILLIAMS: ALLEN V. ELECTRONIC ARTS, INC.

The football player Ricky Williams got tattooed by a tattoo artist named Scott Allen, on his upper arm. Later when various football video games were created, picture of Ricky was printed on the cover for advertisement. This picture clearly displayed his tattoo made by Scott. He the sued the video game

---

<sup>13</sup> No. 2:12-CV-02470 (D. Ariz. 2012)

<sup>14</sup> Supra 12

company for violation of his copyright by means of ‘copying, reproducing, distributing, publicly displaying and by making derivative works. Not only this, Scott also sued Williams for contributory infringement. He demanded from Williams, his share into the profits that he earned from any use of the tattoo as a co-owner of the work. The case was later settled amongst the parties.

### **CASE 5: THE ONLY CASE ONGOING A LITIGATION**

#### **SOLID OAK SKETCHES V. 2K SPORTS:**

2K sports made the famous video game series “NBA 2K” which digitally created famous NBA football players and also exact copies of their tattoo. Solid Oak company approached the various tattoo artists involved in creating the tattoos of these players and convinced them to fight a copyright infringement case on their behalf in return of royalties. Later, they send a notice to the 2K sports company and offered them out of court settlement on generously negotiable terms which they denied. Later the company filed a proper lawsuit for copyright infringement which they probably might win. If this lawsuit completes, it would be the first established case on copyrightability of tattoos.

#### **MADDEN NFL AND THE APPROACH OF NFLPA:**

*“The NFLPA (National Football League Players Association) has taken note of these copyright issues as well, urging players to get waivers, licenses, or assignments from their tattoo artists for all public appearances. According to Sporting News, the NFLPA’s caution could also be a contributing factor to Madden NFL’s lack of tattoo-covered players. In 2014, the NFLPA notified players that, absent express written permission, their tattoos would not appear in products such as video games, on merchandise or in advertising where the art has to be reproduced. This puts the burden on the players, if they want their tattoos to be shown off, then they need to be the ones to put forth the effort to obtain the proper licensing.”<sup>15</sup>*

This action in itself shows that the dial is turned towards copyright in tattoos.

#### **NEXUS OF THE CASES:**

The fact that all the cases got settled out of court even when the parties opposite to the tattoo artists were of decent means substantiate the fact that the tattoo artist were at a better position and thus, copyright might exist in their work. Most of them got the drawings registered in the copyright office

---

<sup>15</sup> Supra 1



which itself made the other party infringer for digitally reproducing the tattoos without a license or consent of the copyright owner. Also, if one reads the detailed contentions of both the parties in various cases, the case seemed to heavily favour the tattoo artists. At many instances, the infringers removed or edited the tattoo that was infringing the copyright.

### **DEFENCES IN CASE OF INFRINGEMENT:**

Four defences can be claimed by the tattooed clients and the alleged infringers:

- (i) Fair Use
- (ii) Tattoos cannot be copies
- (iii) Implied Licences
- (iv) Public Policy Concerns

### **FAIR USE:**

If we refer the U.S. Copyright Act, it clearly gives us immunity in the form of “fair use” under which a copyrighted work can still be used for some important and non-profit purposes such as “comment, criticism, news reporting, teaching, research and scholarship”. The copyright act mentions additional factors to analyse fair use criteria.

- (i) What is the purpose of use?
- (ii) What is the nature of the copyrighted work being used?
- (iii) How does using the work effect the potential market?
- (iv) The percentage and amount of similarity among the copyrighted work and used/reproduced work.

Thus, as far as the tattoo is not used within the limits of above-mentioned criteria's then it would not be considered as a defence. The use of tattoos in the movie or video game was definitely not for the purpose of criticism, comment, news or teaching. Indeed, the purpose was purely commercial. Also, the nature was also to attract the customers. The effect of the video game on the potential market was a money-money situation for the makers of the video games and the tattoos acted as one of the key attractive factors to sweep in customers. Also, the fact that the tattoos were created exactly and with precision brings in substantial similarity also.

## **TATTOOS ARE NOT COPIES:**

The most prominent argument around tattoos and their copyrightability is that “as the human skin does not fulfil the criteria/statutory requirement under the U.S. Copyright Act to be a copy, thus, tattoos cannot be granted copyright protection. The act defines copies as material objects. Also, while these laws were being drafted, the drafters probably could not have thought human skin to be considered as a material object someday. People also say that human skin, is a surface that is constantly aging and is not same on any two days. This also brings it out of the purview of being a material object.<sup>16</sup>

## **IMPLIED LICENCES:**

Implied licences are those, that are agreed to as it is. This might be expressed or via conduct. The U.S. Copyright Act states clearly that transfer of ownership must be made in writing. But, if we talk about non-exclusive implied licences, fulfilment of this criteria is not essential. This is the most affirmative defence that is taken widely around. As via conduct some licences are themselves created.

3 questions are asked when taking defence of non-exclusive implied licence.

- (1) First to check whether the owner of copyright granted an implied licence or not.
- (2) Whether the manner in which the licence was used was within the scope of the licence or not.
- (3) Thirdly, at the time of the infringing conduct, whether the implied licence was existing or revoked.

It is also checked that who all are the parties covered under the licence. Whether it cover only the person who carries the tattoo or also any 3<sup>rd</sup> party.

We can understand this by an example. Escobedo was the tattoo artist of Condit, but he sued THQ Inc. because the licence did not extend to third parties.

“A benefit of the non-exclusive license defence for celebrities is that celebrities can argue that tattooists give an implied license to display the tattoo, and no infringement occurs because of the license. However, a setback for third parties is that an implied license probably does not extend to third parties because a tattooist gives the implied license solely to the celebrity.”<sup>17</sup>

---

<sup>16</sup> Darren A. Heitner; Alan Wilmot, Score a Touchdown, Kiss Your Tattoo, and Get Sued for Copyright Infringement, 21 Jeffrey S. Moorad Sports L. J. 299 (2014)

<sup>17</sup> Jessica Torres, Tattoos: Meaning of Tangible Medium in the 21st Century, 7 Widener J.L. Econ. & Race 62 (2016)

In reference to whether implied licence applies in case of third parties, the implied licence can be revoked until a consideration is paid. The client who pays for the tattoo thus, pays consideration and here the implied licence becomes irrevocable. But no such consideration is received from the third party and thus, is still revocable in nature.

### **QUESTION OF PUBLIC POLICY IN CASE OF CELEBRITY TATTOO:**

There are two predominate public policy arguments against permitting tattoo artists of celebrities having copyrights to their work:

- (1) Celebrities have a basic right of publicity;
- (2) As any other person, a celebrity also has the most essential right to be the owner of his own body and use it according to his own will.

The two important issues that these arguments address are: Firstly, “When a tattoo is so widely famous among the people that whenever people see the tattoo or its design, they immediately relate it to the celebrity and vice-versa. And Secondly, if any project highlights the tattoo in such a manner that the tattoo becomes the prime attraction and thus, infringers the right of the tattoo artist. Can the tattoo artist here stop the celebrity from such use of the tattoo?”

**Referring to the U.S. case of Haelan Laboratories v. Topps Chewing.** In this U.S. case, Judge Jerome Frank coined the term ‘**right to publicity**’ in an effort to distinguish it from the ‘**right of privacy**’. Judge Frank stated that when the personality of celebrities is used by businesses, then those celebrities have all the right to get benefitted by them. It is as simple as ‘give and take’. Celebrities sell their persona in return of financial gains. Thus, unauthorised use of his persona will cause both, financial loss and his commercial value.

A celebrity’s identity or persona is how they make money, and personas can include iconic marks, attire, and even tattoos. When the tattoos become so inseparable to a celebrity, that both of them get recognition from either of them, then the tattoo essentially becomes the celebrity's identity and is eligible for protection under the right of publicity.

Also, each human being has the fundamental right ‘not to be enslaved’. Just because the celebrity got himself tattooed, this should not enable the tattoo artist to decide that how, when and how much should a celebrity show/expose his body in order to hide or display the tattoo.

“Another policy argument is that every individual has the fundamental right to not be enslaved. The Copyright Act gives copyright owners the right to display their works. If copyright is extended to tattoos, tattoo artists will be able to prevent a celebrity from making public appearances or even request that a celebrity cover their tattoos.”<sup>18</sup>

---

<sup>18</sup> Supra at 16

## WHO IS THE OWNER OF COPYRIGHT IN A TATTOO?

### “CONCLUSION AND SUGGESTIONS”

---

In case of **preliminarily-created tattoos**, the **copyright subsists with the designs** and thus, due to implied license policy, the person who owns the tattoo over his body can make public appearances or normally exploit and show the tattoo in daily course of use. In case of advertisement and commercials done by a celebrity, if the tattoo happens to be the substantial part of the commercial, the tattoo artist being the author and owner of copyright would be **entitled to royalties**.

Whenever the **tattoo is recreated** for which a physical design is registered in the copyright office, and such recreation is to gain monetary benefits, either licence should be issued or permission from the copyright owner should be taken, because, it is purely a reproduction of his work and that too for purely commercial purposes. Different U.S. case laws substantiate this claim. The copyright does exist over the design but the ownership of copyright on the **tattoo on the body** would go to the tattoo artist only if:

- (i) the body is considered to be a **medium** and
- (ii) the tattoo is considered to be a **copy**.

Otherwise, the owner is the person only who owns the body. This is something that has to be established by the court. This right of owner can also be prevented by various **constitutional provisions and intent of the congress**.

Considering the **Indian Position**, one thing that should be clear at the first place is that only original tattoos should be protected, Standard tattoos in catalogues and the ones hung on the walls of a parlour and is **generic should not be protected**. Secondly, in case of preliminarily created tattoos, the design of tattoo is sure to get protected under **“artistic work”**<sup>19</sup> being “drawings.”<sup>20</sup> The creation of original tattoo includes time, skill and creativity of the tattoo artist and hence deserves protection. The author by virtue of definition of “Author”<sup>21</sup> hence is the tattoo artist. In 2011, **Shah Rukh Khan got his tattoo** that he temporarily wore for the movie Don registered in the copyright office seeking copyright protection. Now if the design got protection by the copyright office, then the position of Indian Law

---

<sup>19</sup> Section 2(c), The Copyright Act 1957

<sup>20</sup> *ibid*

<sup>21</sup> Section 2(d)(iii) and (vi), The Copyright Act 1957

is also quite clear. Also, in case of the tattoo applied on the body, if that comes under **“engraving-by virtue of being an etching”** which it probably is not, but it can be a print, that too some types of tattoo, then it would also be an artistic work. And violation of his work would be liable for infringement of his rights under **Section 14(c)(ii)** of Copyright Act. Not the justice would be to strike a balance between Article 14 of Copyright Act and Article 19 and 21 of the Indian Constitution.

**Section 17** of The Copyright Act can facilitate this escape. According to Section 17 the author of the work would be the first owner of a copyright. But, **Section 17(c)** mentions that in case of **“work made in course of employment under a contract of service or apprenticeship”** in absence of an agreement to contrary, the employer would be the owner of copyright. But this clause would only apply in case of employer-employee relationship which as aforesaid, is difficult to establish here. **Section 17(b)** makes the person who pays **“valuable consideration”** for a painting, portrait or engraving would be the owner of copyright in such a case, but this clause would only give immunity to the person who got tattooed only if a tattoo is considered to be any of these three.

**This conclusion that I am making is based simply on assumptions. Thus, in quest of getting my doubts cleared and to do justice to this research, I queried the Indian Copyright Office through mail. The questions I raised to them were as follows:**

- (i) Under which subject matter can tattoos be categorized so that a copyright can be granted in it. Is it an artistic work? If yes, then under which subhead shall we fit it in? a painting, a sculpture, a drawing, an engraving or a photograph.
- (ii) Who owns the copyright over a tattoo made on the body of the person getting tattooed?
- (iii) If the tattoo artist owns the copyright, can he restrict the person from publishing or showing off the tattoo in public? If so, the celebrities would not be able to publicly show their tattoos
- (iv) As per section 17, the first owner of copyright is the author of the work, who here is the tattoo artist. But would this relationship of tattoo artist and the customer fall under either Section 17(c) or 17(d)?
- (v) If it falls under Section 17(c), under which subject matter are we categorizing it? (a) an engraving, or (b) a painting.
- (vi) Or would it fall under a contract of service or apprenticeship by virtue of Section 17(c), because then the person getting tattooed would be the employer and hence, the owner of copyright. This would probably solve all the conflict and also set an exception that might not be present in U.S. Copyright Act also.

**To which, I got the following reply (Their answers are marked in Red):**

“1. Under which subject matter can tattoos be categorized so that a copyright can be granted in it. Is it an artistic work? If yes, then under which subhead shall we fit it in? a painting, a sculpture, a drawing, an engraving or a photograph.

*Yes, the tattoos will be categorized as an artistic work. And it will be categorized as a drawing according to the section 2(c) of the Copyright Act, which states ““artistic work” means, (i) a painting, a sculpture, a **drawing** (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship”.*

2. Who owns the copyright over a tattoo made on the body of the person getting tattooed?

*The person who had tattooed over his/ her body became the owner of the tattoo made. However, the author’s special rights will stay with the author.*

3. If the tattoo artist owns the copyright, can he restrict the person from publishing or showing off the tattoo in public? If so, the celebrities would not be able to publicly show their tattoos.

*In case the tattoo artist owns the copyright, if taking a valuable consideration, cannot restrict the person from publishing or showing off the tattoo in public as the person is copyright owner according to section 17 (b).*

4. As per section 17, the first owner of copyright is the author of the work, who here is the tattoo artist. But would this relationship of tattoo artist and the customer fall under either Section 17(c) or 17(d)?

*Indeed, the tattoo artist is the author of the work and this condition would fall under 17(b) of the Copyright Act, 2013.*

5. 5. If it falls under Section 17(c), under which subject matter are we categorizing it? (a) an engraving, or (b) a painting.

*The work first created as a drawing.*

6. 6. Or would it fall under a contract of service or apprenticeship by virtue of Section 17(c), because then the person getting tattooed would be the employer and hence, the owner of copyright. This would probably solve all the conflict and also set an exception that might not be present in U.S. Copyright Act also.

*This analogy is not applicable in this case.”*

**The explanation of Copyright Office makes the matter even more ambiguous because,**

*"if a tattoo has been categorized as a drawing, the how come they are placing it under the purview of Section 17(b)? as Section 17(b) exhaustively applies only to 5 cases i.e.*

*(i) a painting*

*(ii) a portrait*

*(iii) a cinematographic film*

*(iv) an engraving and*

*(v) a photograph*

*then how can a tattoo which as per copyright office is a drawing, fall under this clause?"*

**This question was left unanswered by the copyright office but one thing is understood that the position is not very clear to them also as their reply has two points that are contradictory to each other.**

**It is quite obvious that there is no clear position established till now regarding to copyrightability over tattoos. In United States the litigation for the same has started but here in India it seems we have to wait more to get our questions answered in this interesting field of law. But on the basis of my personal research, I conclude that the owner of copyright in both the design and the tattoo on body is the tattoo artist only and there exists an implied licence between the client and the artist that the tattoo would be communicated to the public by the person getting tattooed. This clause remains irrevocable by virtue of consideration paid to the tattoo owner. If ever a situation to commercialise the tattoo arises, the based on the four factors of fair use doctrine, the decision would be taken and accordingly a licence would be issued if necessary. In other circumstances, the tattoo owner can use the tattoo as he desires to. Also, one very basic step to avoid all these confusion and future litigation can be that the person getting tattooed can get a release signed by the tattoo artist for a fair sum of consideration.**

**"Till then, yes, getting inked can actually lead you to the court if not acted sensibly."**