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Copyright in Tattoos:

What a tangled web we weave

Associate Professor Alex Sims – APCA Conference 27-28 November 2015, Auckland

or



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The case for why tattoo artists' rights must be limited under the Copyright Act

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Social Norms

Traditionally tattoo artists did not seek copyright protection, social norm that tattoo artists did not copy, if they did would result in being blacklisted / public shaming – tattooing was on of the negative spaces – untouched by IP law

But, times are changing

In the US some lament that it isn't clear that tattoo artists are protected, argument made that they should be protected:

“The work of tattoo artists is just as entitled to copyright protection as other works of art.”

Perception that tattoo artists are treated differently because tattoos artists traditionally operated at the margins of society (indeed in the US tattooing was illegal until relatively recently – only legalized in Oklahoma in 2006!)

Why are the norms breaking down?

Money

Eg, in the Tyson case (*Hangover 2* movie),
US\$30m was claimed!

Problems with the protection of tattoos?

Let us count (some) of the ways...

1. If a tattoo artist copies another tattoo artist's copyright protected work onto a client, normal remedy for infringement = delivery up so infringing copies can be destroyed. Doesn't quite work with humans! Closest thing would be removal of tattoo, ie laser removal or skin graft.
2. If a client or a third party wants to use a photograph/film etc of herself with the tattoo, tattoo artist's permission would be required
3. If an actor played the client in a movie or video game, action figure etc portrayed the client, tattoo artist's permission would be required
4. Moral rights in tattoos. Could a tattoo artist object if a client decided to make changes to the tattoo...

Important note to bear in mind

The cases were not spawned because of the genius of the tattoo artist, rather the value of the tattoos lies in the value of the wearers of the tattoos.

Public Policy

In NZ the argument is not whether tattoos are protected by copyright, rather we will be increasingly dealing with the unfortunate consequences of such protection and something legislative needs to be done to ameliorate it.

There are sound public policy reasons against limiting the rights of tattoo artists as we saw in “Problems with the protection of tattoos”.

There is nothing unique in limiting protection to copyright owners (and moral rights owners), eg the following are excluded from the right of integrity:

computer programmes, computer generated works and
typeface designs

Are tattoos protected by copyright in NZ?

Short answer =

Probably yes

Long answer =

The tattoo often have been drawn on paper (or designed on a computer) before it is inked on = drawing

Alternatively if not designed and drawn before hand (ie Tyson example), could be a painting (it is ink applied to a surface, ie skin – not analogous with *Merchandising Corporation of America Inc v Harpbond Ltd* – Adam Ant case)

Or an artistic work -

While artistic works are defined as **meaning** a number of things, graphic works is a broad category and is not exhaustive (graphic works includes any painting, drawing etc.)

Who owns the copyright?

Depends:

Normal rule = the person who creates the tattoo (the author) is first owner of copyright (unless the client provided the tattoo artist a detailed drawing that the tattoo artist copied)

But, commissioning rule (in NZ):

If painting (or drawing), then the person asking for a custom tattoo has commissioned the tattoo and would be the owner, unless there was an agreement to the contrary = so all comes down to the contract between the client and the tattoo artist

If nothing in the contract: common for client and tattoo artist to work together closely on the design = joint ownership and also each has moral rights

If not jointly created (or client input minimal) tattoo artist will own the copyright and have the moral rights

Possible defenses under the Copyright Act?

Incidental use:

Very narrow and would not provide defence in Nike case and certainly not in Mike Tyson case or characters in computer games

Implied licence?

Vaver has suggested* the courts could use an implied licence:

“having paid for the tattoo, Mr Tyson expected he would have the right to allow people to photograph him without expecting them to have to pay a further fee to the tattooist.... This implication would be a reasonable implication in the contract between the Mr Tyson & the tattooist.... In Canada, it would also apply to moral rights in the former of an implied waiver allowing the wearer to modify or wipe out the tattoo as he wished (if he could).”

* <http://www.iposgoode.ca/2011/05/legal-hangover-for-warner-bros-over-mike-tyson-tattoo/>

But are there problems with implied licences?

Requires judges to be reasonable/pragmatic – which does not always occur!

And if we think on public policy grounds that tattoo artists rights must be limited, then why not put that into the Copyright Act?

Copyright is a pure creature of statute, not a common law or equitable right that the courts have domain over.

Current situation is uncertain and business wants certainty.

The proposed extent of a tattoo artists copyright

Limits of a tattoo artist's rights:

Ability to stop another tattoo artist copying a substantial part of that tattoo on another person, or using a substantial part of that design for other things.

Clients who have the tattoos on them must be able to use those tattoos freely, ie by having photographs taken with it shown, movies made about them (whether they play themselves or someone else plays them and even depictions of them, ie characters in games, figurines of them etc.)

How to achieve it?

Definition of artistic work in Act altered so that “tattoo” added to create a new subparagraph (iv).

“Tattoo” defined in section 2 as “tattoo includes the insertion of indelible ink into the skin of a person and includes the drawings that underlie the tattoo”.

Tattoo would become one of the listed artistic works in section 2

Next, a specific defence would be required

- (1) Nothing in this Act shall prevent the right of a person (person A) to depict, change, alter or remove a tattoo applied to the skin of person A. Depict means the depiction of the tattoo on the person in situ in any medium by person A or by any other person, regardless of whether person A agreed to that depiction or not.
- (2) For the avoidance of doubt, no remedies shall be awarded for any depiction, change, alteration or removal of the tattoo under subsection (1).
- (3) A person who is tattooed with a tattoo that infringes copyright shall not infringe copyright.
- (4) A term or condition in an agreement concerning a tattoo has no effect in so far as it prohibits or restricts any activity undertaken in accordance with subsection (1).
- (5) Nothing in this section limits the right of an author under section 94.



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