TATTOOS AS VISUAL ART: HOW BODY ART FITS INTO THE VISUAL ARTISTS RIGHTS ACT

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ABSTRACT

While tattoos and tattoo artists have existed for millennia, the medium has only recently become the subject of legal attention in the intellectual property world. As tattoos increase in mainstream popularity throughout the U.S. and the world, and tattoo artists become celebrities in their own right, tattoo artists have begun to seek protection of their art in the courts. Although no U.S. federal court has yet ruled on whether tattoo art falls under the protections of copyright law, artists are nonetheless beginning to file suits that might soon allow courts to consider that issue. This article provides a brief history of tattoo art and three cases that have been filed by tattoo artists seeking relief for copyright infringement of their works. The article goes on to discuss whether tattoos fit into the Copyright Act, and, as an extension, whether tattoo artists might be afforded the rights provided under the Visual Artists Rights Act. Ultimately, this article argues that tattoo art should be afforded protections under the copyright statute and the Visual Artists Rights Act within the statute, but that because of the medium on which tattoo art is placed, the full panoply of rights provided by both are unrealistic for tattoos.

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I. INTRODUCTION

Tattoos are an ancient art that have recently become mainstream in America. Despite tattoos' commonality and popularity in the United States right now, courts have not decided whether this art form is protected under traditional copyright laws. While at least three cases have been brought in federal court arguing that tattoo art should be copyrightable and that the tattoo artist should have rights in those copyrighted tattoos, no court has had the opportunity to make a precedential ruling. In addition, although some people find tattoos to be one of the original forms of "fine art," no tattoo artist has attempted to acquire protections under the Visual Artists Rights Act, a relatively new part of the copyright statute that grants to certain visual artists rights of attribution and integrity.

This paper will first give a summary of the history of tattoo art and its transformation in the United States from underground counterculture to a mainstream form of self-expression. Then the author will analyze whether and how tattoos fit into the requirements of traditional copyright law. In addition, this paper will give an overview of the purpose, elements, and remedies under the Visual Artists Rights Act (VARA or "the Act") and will analyze whether tattoos fit into the requirements of the Act. The paper will also detail some of the possible implications if tattoo artists attempt to seek protections under the Act.

Additionally, the author will explore issues with the enforcement of the remedies provided for under VARA if tattoo artists are found to be protected by the Act. Finally, this paper will suggest and explore possible alternative protections for artists both within and outside of current laws and will discuss whether the law should be concerned with the tattoo industry at all.

This paper is meant to begin a conversation in the literature because tattoo artists have attempted to protect their work under the Copyright Act (and will continue to do so) and may wish to argue that their work is covered by VARA. Hopefully, this work generates a robust exploration and discussion of whether and how VARA might cover these works.

II. TATTOOS IN AMERICA

Although only recently mainstream in the United States, tattoos have been a part of some cultures for more than 6000 years.[1] "[T]he earliest surviving examples of tattooed human skin come from 12th-Dynasty Egypt (c. 1938–c. 1756 BC), but representational evidence suggests that tattooing was practiced in Predynastic and Early Dynastic Egypt (c. 4500–c. 2575 BC)."[2] Sailors in the eighteenth century found cultures in the South Pacific where people's skin was decorated with tattoos.[3] Those sailors were generally in awe of the tattoo art and brought back examples to King George's court in England.[4]

Traditionally, tattoos and other body markings were symbolically located and represented an individual's place in a social group or community.[5] "Tattooing in preindustrial societies dominantly relates the tattooed person to a social group or totemic clan, age or sex category, secret society or warrior association."[6]

Tattoos in Europe and North America remained connected with members of the armed services and prisoners up until the end of the twentieth centu-

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1 Hoag Levins, *The Changing Cultural Status of the Tattoo Arts in America: A Report*, TATTOOARTIST.COM (1997), http://www.tattooartist.com/history.html; *see* 30 THE DICTIONARY OF ART 366 (Jane Turner ed., 1996).

2 30 THE DICTIONARY OF ART, *supra* note 1, at 366.

3 Caitlin A. Johnson, *Tattooed America: The Rise of Skin Art*, CBSNEWS (Feb. 11, 2009, 5:49 PM), http://www.cbsnews.com/2100-3445_162-2135698.html.

4 *Id.*

5 Lorrie Blair, *Tattoos and Teenagers: An Art Educator's Response*, ART EDUC., Sept. 2007, at 39, 41; *see* CLINTON R. SANDERS, CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING 9–12 (1989).

6 Levins, *supra* note 1 (quoting 2 THE ENCYCLOPEDIA OF RELIGION 270 (Mircea Eliade ed., 1987)).

ry.[7] With the popularity of the counterculture in the 1960s, tattoos became more socially acceptable.[8] By the 1970s, "a new, 'modern' tattoo art scene surfaced across the U.S. as an expanding group of artists combined fine art disciplines with fantasy motifs executed in the lush, highly detailed tattooing style of the Japanese."[9] In addition, during the 1960s and '70s, electronic media, extensive tourism, increased emphasis on individuality, and improvements in the safety and technique of professional tattooing increased the art's popularity in the United States.[10]

Since their initial surge in popularity, tattoos have only become more popular. In 1982, the Governor's Office of California issued a proclamation stating, "The tattoo is the primal parent of the visual arts. . . . It has re-emerged as a fine art attracting highly trained and skilled practitioners."[11] In addition, tattoos increasingly became recognized as a form of fine art. In 1989, *Esquire Magazine* reported, "The new-style tattooee doesn't merely pick out a design from the tattooer's wall; he has an image in mind when he arrives at the studio and then discusses it with the tattooer, much as an art patron commissions a work of art."[12]

In 1997, *U.S. News & World Report* did a story on the growing popularity and acceptability of tattoos, stating that the body art "ha[s] become widely acceptable, . . . [appearing] on celebrities, in toy stores (the Tattoodles doll), and as games on the Internet."[13] In addition to its acceptability in society in general, tattoos have also earned a regular place in museums, galleries, and art journals.[14]

In 2009, a CBS News story reported that an American Academy of Dermatology study found that 36% of Americans between the ages of 18 and 29

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7 *Id.* (quoting 30 THE DICTIONARY OF ART, *supra* note 1, at 366).

8 *Id.*

9 *Id.*

10 *Id.*(quoting 2 THE ENCYCLOPEDIA OF RELIGION 270 (Mircea Eliade ed., 1987)).

11 *Id.* (quoting Edmund G. Brown Jr., A Proclamation by the Governor of the State of California (Nov. 12, 1982)).

12 Levins, *supra* note 1 (quoting John Berendt, *That Tattoo*, ESQUIRE, Aug. 1989, at 32).

13 Mary Lord, *A Hole in the Head? A Parent's Guide to Tattoos, Piercings, and Worse*, U.S. NEWS & WORLD REP., Nov. 3, 1997, at 67.

14 Holland Cotter, *From Sacred to Sensual: Italian Paintings, 1400 to 1750*, N.Y. TIMES, Feb. 13, 1998, at E39; David Ebony, *Tony Fitzpatrick at Adam Baumgold*, ART IN AM., July 1997, at 95, 95; Carl MacGowan, *Outings: Some Lessons From the Self-Taught*, NEWSDAY, Apr. 5, 1998, at G13; Levins, *supra* note 1 (stating that "in 1986, the National Museum of American Art, a part of the Smithsonian, added pieces of tattoo design work to its permanent art collection").

have at least one tattoo.[15] In addition, the article stated that "[a]ccording to a recent Harris poll, 16 percent of all Americans have at least one tattoo."[16] Not only have celebrities and professional athletes increased the popularity and normalcy of tattoos, television shows such as TLC's *Miami Ink*, *L.A. Ink*, and *New York Ink* have brought the experience of a tattoo parlor into Americans' living rooms.[17]

Also, while in the past patrons would go to their local tattoo shop when they sought a new tattoo, now people travel across the country to visit the shops of famous tattoo artists. For example, Paul Booth, an artist at Last Rites Tattoo Theatre in New York City, has a waiting list that is two-and-a-half years long.[18]

Tattoos do not seem to be waning in popularity either. Tattoo artist Michelle Myers told CBS News, "Some people define it as a trend, but I would say it's more like when women started wearing slacks. It wasn't a trend, it just became acceptable."[19]

III. THE INTERSECTION OF TATTOOS AND COPYRIGHT LAW

With the popularity and acceptability of tattoos in the mainstream, it is natural for disputes to arise concerning the ownership of the tattoo and what rights that owner has in the artwork. Copyright law has traditionally been used by rights holders to preclude others from copying, distributing, reproducing, or publicly displaying the rights holder's work. Three recent cases brought by tattoo artists have argued that tattoos are copyrightable and that the artists should have rights in their work under the copyright statute.

The first case, brought in 2005, involved a tattoo artist claiming copyright infringement and contributory copyright infringement against an NBA player, Nike, and Nike's advertising agency.[20] The alleged copyright infringement arose when the NBA player, Rasheed Wallace, allowed Nike and Nike's advertising agency to use an image of Wallace's tattoo in a commercial.[21] In the commercial, a close-up of Wallace's tattoo was shown being outlined by a computerized simulation while Wallace explained the meaning of the tattoo in a

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15 Johnson, *supra* note 3.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *See* Complaint at 4, 5, Reed v. Nike, Inc., No. 05-CV-198-BR (D. Or. dismissed Oct. 7, 2005).

21 *Id.* at 4.

voice over.[22] When the tattoo artist, Matthew Reed, found out about the commercial, he filed an application to register the copyrights for the artwork related to Wallace's tattoo.[23] Reed then filed a lawsuit in the United States District Court for the District of Oregon.[24] The case was confidentially settled shortly after it was filed.[25]

Six years later, in 2011, the second case directly involving copyright infringement of a tattoo was brought by a tattoo artist, alleging that Warner Brothers infringed the artist's copyright in Mike Tyson's face tattoo when the company used a replica of the tattoo on actor Ed Helms' face in *The Hangover Part II*.[26] The artist in that case, S. Victor Whitmill, created Tyson's face tattoo in 2003.[27] When he created Tyson's tattoo, he had Tyson sign a release declaring "all artwork, sketches and drawings related to my tattoo and any photographs of my tattoo are property of Paradox-Studio of Dermagraphics."[28] In 2011, Warner Brothers used the image of Helms with a similar tattoo in its advertisements for the upcoming release of *The Hangover Part II*, as well as throughout the movie.[29] Whitmill sued Warner Brothers for copyright infringement, seeking monetary damages and an injunction to stop the release of the film.

Judge Catherine Perry of the U.S. District Court for the Eastern District of Missouri denied Whitmill's request for an injunction,[30] but she said in court, "If I look at the likelihood of success on the merits, I think plaintiff has a strong likelihood of prevailing on the merits for copyright infringement."[31] The case settled and the court granted the parties' joint motion to dismiss the suit with prejudice on June 22, 2011.[32]

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22 *Id.*; *see also* Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).

23 Harkins, *supra* note 22, at 316.

24 *See* Complaint, *supra* note 20, at 1.

25 Harkins, *supra* note 22, at 317–18.

26 Verified Complaint for Injunctive and Other Relief at 1–2, Whitmill v. Warner Bros. Entm't Inc., No. 4:11-cv-752 (E.D. Mo. dismissed June 6, 2011); Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS L. 1, 27 (2011).

27 Bradley, *supra* note 26, at 29, 30.

28 *Id.* (quoting Verified Complaint for Injunctive and Other Relief, *supra* note 26, at Exhibit 3).

29 *Id.* at 26–27.

30 Order, Whitmill v. Warner Bros. Entm't Inc., No. 4:11-cv-752 (E.D. Mo. dismissed June 6, 2011).

31 Hearing on Motion for Preliminary Injunction at II-3:11–13, Whitmill v. Warner Bros. Entm't Inc., No. 4:11-cv-752 (E.D. Mo. dismissed June 6, 2011).

32 Order, *supra* note 30.

Despite Judge Perry's statement that Whitmill had a good case for copyright infringement and that similar cases are becoming increasingly popular, no court has yet had the opportunity to decide whether tattoos are copyrightable and if they are, which rights apply and who owns those rights.

The most recent copyright case involving a tattoo artist was filed on November 16, 2012 in the U.S. District Court for the District of Arizona. In that case, tattoo artist Chris Escobedo sued THQ Inc., a video game developer and publisher, for allegedly using, in one of its games, an "exact reproduction" of a lion tattoo Escobedo tattooed on professional mixed martial artist Carlos Condit in July 2009.[33] An answer by the defendant had not been filed at the time this paper was submitted for publication.

A. Are Tattoos Copyrightable?

In order to be protected under the Copyright Act, a work must fall into one of a number of categories prescribed by the act.[34] Tattoos most likely fall under the "pictorial, graphic, and sculptural works" category of Section 102(a) of the Copyright Act.[35] In addition to fitting into one of the categories in Section 102(a), the work must also be an "original work[] of authorship fixed in any tangible medium of expression."[36]

Although skin is always changing, tattoos generally stay visible on a person's skin for his or her entire life. Therefore, courts would likely consider tattoos "fixed in a tangible medium."[37] In addition, while not all tattoos would be considered "original works," courts have found that the "creativity threshold for protection is very low, as only 'independent creation plus a modicum of creativity' is required."[38] Therefore, most tattoos designed by either the customer

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33 Complaint at 3, Escobedo v. THQ Inc., No. 2:12-cv-02470-JAT (D. Ariz. filed Nov. 16, 2012).

34 17 U.S.C. § 102(a) (2006).

35 The other categories into which works of authorship can fall are: literary works; musical works; dramatic works; choreographed works; motion pictures or other audiovisual works; sound recordings; and architectural works. *Id.*

36 *Id.*

37 If the tattoo is first drawn on tattoo transfer paper, the drawing on the paper would definitely be entitled to protection under the Copyright Act. The transfer of the tattoo from paper to skin would probably be considered a derivative work, but might be considered an original creation if the artist takes a large amount of artistic liberties in conforming the transfer to the geography of the skin.

38 Bradley, *supra* note 26, at 28 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991)).

or the tattoo artist would be creative enough to be considered "original works of authorship."

Because these are the only three requirements for a work to have protection under the copyright statute, it is likely that tattoos would be found to be copyrightable under Section 102 of the Copyright Act.

B. Who Owns the Rights to a Tattoo?

When a work falls under the Copyright Act, the Act initially gives certain rights to the owner of the copyrighted work.[39] The owner of a copyright is the author, unless the work is a joint work or a "work made for hire."[40] When considering the ownership of tattoos, the author, and therefore the initial owner of the copyright, could be the tattoo artist, the artist's employer, the customer, or a combination of the three.

If the work is created solely by the tattoo artist, such as by free-handing a design on the customer or by drawing a design on tattoo transfer paper without specific input from the customer, the artist would be considered the author of the work and initially would own the copyright in that work.[41]

Alternatively, if the artist and the customer independently contribute to the design of the tattoo, either by each drawing or expressing ideas or by the customer bringing in an original drawing and asking the artist to use that drawing or elaborate on it, the two would be co-authors and would both have rights in the work.[42]

In addition, if the artist works for a tattoo shop and is not the owner of that shop, he or she might have a contract or agreement that vests the copyright of any of the artist's work in the shop instead of in the individual artist.[43]

Although the initial copyright ownership belongs to the "author," the owner of the copyright can assign, transfer, or license his or her rights in the copyright to anyone else at any time.[44] Because of this, a tattoo shop might require its artists to assign their copyrights to the shop as part of the employment agreement signed by the artist when he or she begins working at the shop. In addition, a shop or artist might require the customer to assign his or her rights in

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39 17 U.S.C. § 106.

40 *Id.* § 201.

41 *See* Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 104 (2003).

42 *Id.* at 105.

43 *Id.*

44 17 U.S.C. § 201(d).

the tattoo or artwork to the shop or the artist prior to beginning work on the tattoo as a condition of the agreement to create the tattoo.

In addition to the ownership provisions provided for in Sections 201(a) and (d) of the Copyright Act, Section 201(b) of the Act provides separate rules for if a work is considered a "work made for hire."

C. Is a Tattoo a "Work Made for Hire"?

If a work is to be considered a "work made for hire," the work must fit into the statutory provision provided for in Section 201(b) of the Copyright Act. That section states that if a work is a work made for hire, the "employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[45]

The Copyright Act also provides a definition of a work made for hire in Section 101. In the first part of the statutory definition, the Act states that a work made for hire is "a work prepared by an employee within the scope of his or her employment."[46] Alternatively, the definition provides that a work made for hire can also be "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."[47]

A tattoo created by an artist who is employed by a tattoo shop might be considered a work made for hire under the first part of the statutory definition of a work made for hire.[48] In order to determine whether an artist is an "employee," courts look to a list of factors to determine "whether the commissioning party had the right and ability to control the manner and means by which the product is made."[49] These factors include:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether

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45 *Id.* § 201(b).

46 *Id.* § 101.

47 *Id.*

48 *See id.*; *see also* Cotter & Mirabole, *supra* note 41, at 105.

49 Cotter & Mirabole, *supra* note 41, at 105.

> the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[50]

Because of the large number of factors to consider, the determination as to whether a work is created by an "employee" is fact specific and must be determined in each individual case.[51]

Tattoo artists generally have specific skills and have some discretion as to their working conditions and lengths; because of this, many of these factors lean towards a tattoo artist being considered an independent contractor instead of an employee, even if the artist works at a tattoo shop.[52]

Another way an artist could be considered an "employee" is that the customer might consider the artist his or her employee for purposes of the tattoo the customer has commissioned from the artist.[53] Considering the factors above, it is even more likely in this situation that the artist would be considered an independent contractor, especially when looking at "the level of skill involved, the ownership of the artist's tools, whether the subject has the right to assign the artist to other projects, and how the parties have structured their relationship for tax and employment law purposes."[54]

Finally, the second part of the statutory definition of "work made for hire" includes works that are to be included in a collective work.[55] One instance where this might come up is if a customer is creating a "sleeve" tattoo, where the customer gets several tattoos done on his or her arm to create the look of a shirtsleeve. If the customer is commissioning individual artists to create individually copyrightable tattoos that fit together to form a larger tattoo, those individual tattoos might be considered a work made for hire under the statutory definition.[56]

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50 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) [hereinafter *CCNV*].

51 *See id*.

52 Cotter & Mirabole, *supra* note 41, at 106.

53 *Id.*

54 *Id.* (citing *CCNV*, 490 U.S. at 751–52; Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 86 (2d Cir. 1995)).

55 17 U.S.C. § 101 (2006).

56 *Id.*; *see also* Cotter & Mirabole, *supra* note 41, at 106–07.

However, in order to be a work made for hire and for the customer to be the owner of the copyright, the statute requires that the artist and the customer "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[57]

Therefore, under both sections of the definition of a work made for hire, it is unlikely that a tattoo would be considered such. However, because the determination of whether a work is a work made for hire is a fact specific inquiry in each case, there is a possibility that a court could find that a tattoo falls under the statutory definition and would be considered to be a work made for hire.[58]

D. What Rights Does the Owner Have in the Tattoo?

Although determining the ownership of the copyright in a tattoo might be somewhat difficult, at least one person owns the rights in the tattoo conferred by the Copyright Act. The Copyright Act gives a so-called "bundle of rights" to the copyright owner. Those rights include the rights to (1) reproduce a work, (2) prepare derivative works, (3) distribute copies of the work, (4) perform the work publicly, and (5) display the work publicly.[59]

Generally, the author of a work or owner of the copyright, if they are different, has the right to do those things to the exclusion of all others absent a license or transfer of the rights.[60] However, tattoos are different from most artwork in that they are generally visible anytime the person with the tattoo is out in public, unless the tattoo is in a location that is usually covered by clothing or hair. Therefore, "[t]he norms of tattooing . . . necessitate that some of these rights must pass at least partially to the tattoo recipient through an implied license."[61]

Because many people who get tattoos get them on areas of their bodies that are visible to the public so that others can see the tattoos and observe the wearer's self-expression, the tattoo artist should know that his or her work is going to be seen publicly, photographed, and videotaped during the wearer's

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57 17 U.S.C. § 101.

58 *See* Harkins, *supra* note 22, at 325.

59 17 U.S.C. § 106.

60 *See id.*

61 Bradley, *supra* note 26, at 29 (citing Kal Raustiala & Chris Sprigman, *Can You Copyright a Tattoo?*, FREAKONOMICS (May 2, 2011), http://www.freakonomics.com/2011/05/02/can-you-copyright-a-tattoo/).

life.[62] "T[his] implied license therefore must extend at least to public display and limited reproduction via photographs and videotaping."[63]

In addition, copyright owners generally have the right to prepare derivative works.[64] A derivative work could include a modification or addition to a tattoo on someone's body.[65] While these modifications and additions seem like they would need to be included in the implied license given to the wearer of the tattoo, these actions bring up issues related to potential moral rights granted to the artist by Section 106A of the Copyright Act.[66]

IV. THE VISUAL ARTISTS RIGHTS ACT (VARA)

While copyright law in the United States traditionally only protected an artist from economic exploitation, with the passage of the Visual Artists Rights Act (VARA or "the Act")[67] in 1990, Congress granted artists moral rights in their visual arts in addition to the economic rights provided for in the rest of the copyright statute.[68]

A. What Kinds of Works Does VARA Cover?

VARA provides two moral rights to artists subject to limitations set out in Section 113(d) of the Copyright Act.[69] Those two moral rights are rights to attribution and integrity.[70] One of the most important limitations to VARA, as evidenced by its name, is that it only applies to certain types of art.[71] "[P]rotection is limited to works of visual art and more specifically to works of 'fine art.'"[72]

In order to be considered a work of visual art protectable under VARA, the work must comply with the statutory definition found in Section 101 of the

62 *See id.*

63 *Id.*

64 17 U.S.C. § 106.

65 Bradley, *supra* note 26, at 29.

66 *Id.*; *see* 17 U.S.C. § 106A.

67 17 U.S.C. § 106A.

68 Dana L. Burton, Comment, *Artists' Moral Rights: Controversy and the Visual Artists Rights Act*, 48 SMU L. REV. 639, 639–40 (1995).

69 17 U.S.C. § 106A(a); *see* Nenutzka C. Villamar, Comment, Carter v. Helmsley-Spear *and the Visual Artists Rights Act of 1990*, 3 U. BALT. INTELL. PROP. L.J. 167, 168 (1995).

70 17 U.S.C. § 106A(a); *see also* Villamar, *supra* note 69, at 168.

71 Burton, *supra* note 68, at 642.

72 *Id.* (citing 17 U.S.C. § 101 (stating the definition of a "work of visual art")).

Copyright Act. The first part of the definition is the part most relevant to tattoos. It states that a work of visual art is "a painting, drawing, print, or sculpture, existing in a single copy;" a limited edition print signed by the author and consecutively numbered; or a sculpture with similar quantity limitations.[73] The second part of the definition discusses photographic works used for display in an exhibition.[74]

In addition to defining what a work of visual art is under the statute, the Act includes a definition of what a visual work of art is not.[75] None of these prohibitions are relevant to tattoos except that a work of visual art cannot include a work made for hire or "any work not subject to copyright protection."[76]

B. What Rights Does VARA Confer?

> VARA confers to artists of certain visual arts rights to attribution and integrity. The right of attribution enables an artist to claim authorship of his or her work, to preclude the use of the artists' names as author if not the creator of the work, and to disavow authorship of a work that has been distorted, mutilated or otherwise modified if prejudice to the author's honor or reputation would otherwise result.[77]

The second right, the right to integrity, is designed not only to protect the physical integrity of the work, but also to protect the artistic integrity of the creator.[78] "The right of integrity enables an artist to prevent distortion, mutilation, or other modification of his or her work if done intentionally and if it would be prejudicial to the artist's honor or reputation."[79] In order to qualify for the right to integrity, "the destruction [or modification] must be intentional or grossly negligent, and the work must be of 'recognized stature.'"[80]

One problem with the statute is that Congress failed to define what it meant by "prejudicial to the artist's honor or reputation" and what it meant by "recognized stature."[81] Therefore, courts must rely on precedent from previously decided cases to determine what Congress meant by those terms. In *Carter v.*

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73 17 U.S.C. § 101.

74 *Id.*

75 *Id.*

76 *Id.*; Cotter & Mirabole, *supra* note 41, at 112.

77 Burton, *supra* note 68, at 643 (citing 17 U.S.C. §§ 106A(a)(1)(A), (a)(1)(B), (a)(2)).

78 Villamar, *supra* note 69, at 169.

79 Burton, *supra* note 68, at 643 (citing 17 U.S.C. § 106A(a)(3)(A)).

80 Villamar, *supra* note 69, at 170 (citing 17 U.S.C. § 106A(a)(3)(B)).

81 *Id.*

Helmsley-Spear,[82] the court deduced the meaning of those terms by considering the plain meaning of the statute's language, the intent of the legislature and policy considerations, among other things.[83]

After considering those sources, the court in *Carter* determined that whether "intentional distortion, mutilation, or modification" of the work would be "prejudicial to the artist's honor or reputation" was better rephrased as "whether such alteration would cause injury or damage to [the] plaintiff's good name, public esteem, or reputation in the artistic community."[84] The court went on to say that in order to determine the artist's public esteem or reputation in the community, it would weigh testimony of artists and art critics brought in by the parties.[85] "A court will base its findings primarily on the credibility of the witnesses as opposed to rendering subjective judgments on the merit of a certain work of art."[86]

In *Carter*, the court also interpreted the "recognized stature" requirement by taking into account "the context of VARA's underlying policy of preserving cultural artifacts."[87] Therefore, the court created a two-part test to determine whether the work is of a "recognized stature." This two-part test required that the plaintiff show: "(1) that the visual art in question has 'stature,' i.e., is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."[88]

In addition to the clarifications to the statute made by the Southern District of New York in *Carter*, there are several exceptions to the attribution and integrity rights provided for by VARA.[89] First, modifications resulting because of the natural aging or change of the materials used or because of time do not fall under the protection of the statute's right of integrity.[90] Second, if the work is damaged during conservation or public presentation, the work is not considered destroyed, distorted or mutilated under VARA unless the damage occurs as a result of gross negligence.[91] Finally, if a work is used in connection with a

82 861 F. Supp. 303 (S.D.N.Y. 1994).

83 See *id.* at 323; *see also* Villamar, *supra* note 69, at 177.

84 *Carter*, 861 F. Supp. at 323; Villamar, *supra* note 69, at 176.

85 *Carter*, 861 F. Supp. at 323–24; Villamar, *supra* note 69, at 177.

86 Villamar, *supra* note 69, at 177; *see Carter*, 861 F. Supp. at 324.

87 *Carter*, 861 F. Supp. at 324–25; Villamar, *supra* note 69, at 178.

88 *Carter*, 861 F. Supp. at 325.

89 *See* 17 U.S.C. § 106A(c) (2006).

90 *See id.* § 106A(c)(1).

91 *Id.* § 106A(c)(2).

work that is excluded as a work of art under 17 U.S.C. § 101(A), neither the right of integrity nor the right of attribution apply to that work.[92]

Rights conferred by VARA cannot be transferred like other rights granted in the Copyright Act, but VARA rights can be waived.[93] In order for a waiver to be enforceable, it must be expressly detailed, in writing, the specifics of the work and which uses of the work fall under the waiver.[94] If the work is a joint work, a single creator can waive all of the rights for all of the creators.[95]

C. Remedies Provided by VARA

VARA provides the same remedies as the rest of the Copyright Act when rights provided by VARA are violated, with the exception that the criminal penalties provided for in a copyright infringement action are unavailable for a violation of VARA.[96]

The available remedies include injunctions,[97] impounding and disposition of infringing articles,[98] the award of damages and profits,[99] and the award of costs and attorney's fees.[100] In addition to those remedies, VARA's right of attribution and integrity includes a built-in remedy; it "enables an artist to prevent distortion, mutilation, or other modification of his or her work if done intentionally and if it would be prejudicial to the artist's honor or reputation."[101] This is generally accomplished through an injunction stopping the destruction or modification of the work. Or, if the work has already been modified or destroyed, remedies including money damages or restoration might be available.

V. How Do Tattoos Fit into VARA?

VARA is still a relatively new part of the Copyright Act, and therefore there have not been a large number of cases litigated in that area. So far, there have been no cases litigated regarding tattoos under either the copyright in-

92 *See id.* § 106A(c)(3); *see also id.* § 101.

93 *Id.* § 106A(e)(1).

94 Burton, *supra* note 68, at 643–44; *see* 17 U.S.C. § 106A(e)(1).

95 17 U.S.C. § 106A(e)(1).

96 *Id.* §§ 501–06; *see* Burton, *supra* note 68, at 645.

97 17 U.S.C. § 502.

98 *Id.* § 503.

99 *Id.* § 504.

100 *Id.* § 505.

101 Burton, *supra* note 68, at 643 (citing 17 U.S.C. § 106A(a)(3)(A)); *see supra* Part IV.B.

fringement provisions of the Copyright Act or the moral rights provisions of VARA. All cases that have been brought have been settled out of court prior to any decisions by judges. Therefore, this area of the law has not yet been determined with any definite answers.

A. Are Tattoos Covered By VARA?

At first glance, it seems that tattoos would fall under the definition of a work of visual art as defined in Section 101 of the Copyright Act. As the law stands today, the only two issues that would preclude tattoos from being considered under VARA are if tattoos were deemed by a court not to be protectable under the Copyright Act or if the particular tattoo was found to be a work made for hire.

If we assume for purposes of this analysis that tattoos are copyrightable and that the particular tattoo in question is not a work made for hire, the next step would be to determine whether a tattoo would fit under the definition of a work of visual art. Tattoos seem to fit under the first part of the definition: "a painting, drawing, print, or sculpture, existing in a single copy."[102] Tattoos also do not seem to be precluded by the definition of works that do not qualify as works of visual art.[103] Finally, tattoos are considered by some to be fine art,[104] and therefore would fit with the intention of VARA to protect works of fine art.

1. The Right of Attribution

If we first consider the right of attribution, tattoo artists would seem to qualify for that right under VARA. As is stated above:

> The right of attribution enables an artist to claim authorship of his or her work, to preclude the use of the artists' names as author if not the creator of the work, and to disavow authorship of a work that has been distorted, muti-

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102 17 U.S.C. § 101; *see supra* Part IV.A.

103 A work of visual art does not include-- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title.

17 U.S.C. § 101.

104 *See supra* Part II.

> lated or otherwise modified if prejudice to the author's honor or reputation would otherwise result.[105]

While the right of attribution might not seem like a big deal to some tattoo artists, with the recent increase in popularity and even celebrity[106] of certain artists, those artists might be very interested in protection of their work via the right of attribution. This is especially true when that work is on the skin of a celebrity and appears in photographs, movies, and other pictorial works. Attribution of a popular tattoo on a celebrity could bring celebrity, popularity, and/or increased business and credibility to the tattoo artist.

In addition, a well-known tattoo artist who tattoos a celebrity or other notable individual might want to disassociate him or herself from the tattoo if the tattoo wearer has done something to modify or mutilate the tattoo so that it is no longer indicative of the work product that the artist customarily produces.

Therefore, tattoos seem to fall under VARA, and the right of attribution seems to be an important right that tattoo artists should be entitled to under the law.

2. The Right of Integrity

If a tattoo is considered separate from the medium on which it is placed, so that it is simply an ink drawing divorced from the skin, it seems to fit into the definition of VARA without a doubt, and therefore the author would be granted the right of integrity as defined in Section 106A of the Copyright Act. The right of integrity "enables an artist to prevent distortion, mutilation, or other modification of his or her work if done intentionally and if it would be prejudicial to the artist's honor or reputation."[107]

As is discussed above, in order for an artist to enforce this right, the artist must show that the destruction or modification of the work was "prejudicial to the artist's honor or reputation," which has been clarified by the courts as, "whether Defendant's alterations to the [w]ork would 'cause injury or damage to the plaintiff's good name, public esteem, or reputation in the artistic community.'"[108] In order to prove this in court, the artist must provide testimony by a credible witness to this effect.[109] The court will not independently determine

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105 Burton, *supra* note 68, at 643 (citing 17 U.S.C. §§ 106A(a)(1)(A)–(a)(2)).

106 *See supra* Part II.

107 Burton, *supra* note 68, at 643 (citing 17 U.S.C. § 106A(a)(3)(A)).

108 Villamar, *supra* note 69, at 177 (quoting Carter v. Helmsley-Spear, 861 F. Supp. 303, 323 (S.D.N.Y. 1994) (citations omitted)).

109 *See Carter*, 861 F. Supp. at 323–24.

whether the alteration caused damage to the artist's reputation or even whether the artist has a reputation to damage.

In addition, in order to receive the right of integrity, the work alleged to have been damaged must be of a "recognized stature." In *Carter*, the court articulated a two-part test that must be satisfied in order to show that the work is of a "recognized stature." The plaintiff must show: "(1) that the visual art in question has 'stature,' i.e., is viewed as meritorious, and (2) that this stature is 'recognized' by art experts, other members of the artistic community, or by some cross-section of society."[110]

Again, in order to prove the work is of a "recognized stature," the artist must present witness testimony either by "art experts, other members of the artistic community, or by some cross-section of society."[111] Because many modern tattoo artists have considerable artistic skill, and because there is a large community of tattoo artists throughout the United States, it is likely that this requirement would be easily met by an artist seeking to protect his or her moral rights in a tattoo.

Therefore, based on a reading of the statute and the current status of tattoos as a form of art in the United States, it seems that tattoos would fit into VARA in certain circumstances and that tattoo artists would qualify for moral rights protections.

B. Fair Use, Constitutionality, & Enforcement

Despite this likelihood that tattoos fit into VARA, there are several issues that might preclude tattoos from VARA protections. Those remaining issues include the fair use doctrine, privacy and other constitutional rights of the wearer of the tattoo, and the difficulty of enforcing some of the remedies that VARA provides to artists who have had their moral rights violated.

1. The Fair Use Doctrine

The provisions of VARA are explicitly subject to Section 107 of the Copyright Act, which is the fair use provision. "Fair use is an affirmative defense [to copyright infringement] used to justify limited copying without the copyright owner's permission, and permits courts 'to avoid rigid application of

110 *Id.* at 325.

111 *Id.*

the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[112]

The fair use doctrine permits limited copies in a number of circumstances, including for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[113] If the use fits into one of those or a similar category, a four-factor test is applied to determine whether the use is a fair use. Those four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[114]

In order to determine whether the use should be considered fair use, courts generally weigh the factors.

The first factor leans in favor of the user if the use of the work in questions is "transformative."[115] A use is considered "transformative" if it "involve[es] new expression or commentary, as opposed to bare copying."[116] Transformative uses include parodies and uses that benefit the public.[117]

The second factor, "the nature of the copyrighted work," gives greater protection to works that have more creativity.[118] Therefore, in the case of tattoos, a tattoo that is created by an artist from his or her own mind would be presumably less susceptible to a fair use defense than a tattoo of a flower copied from nature that the artist referenced for the tattoo.

The third factor, the "amount and substantiality" factor, takes into account how much of the work the user seeking a fair use defense actually used.[119] This factor is especially relevant in music when an artist "samples" a part of a song from another artist, and in writing, when a user takes a part of a book or story and uses it in another work or medium. When considering tattoos, it

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112 Bradley, *supra* note 26, at 30 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)).

113 17 U.S.C. § 107 (2006).

114 *Id.*

115 *Campbell*, 510 U.S. at 579; Bradley, *supra* note 26, at 30.

116 Bradley, *supra* note 26, at 30 (citing *Campbell*, 510 U.S. at 578–79).

117 *See Campbell*, 510 U.S. at 579.

118 *Id.* at 585; Bradley, *supra* note 26, at 30.

119 *Campbell*, 510 U.S. at 586; Bradley, *supra* note 26, at 30; *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

would be difficult to use only part of a tattoo unless the tattoo had distinct parts that were independent but fit together to form the entire artwork.

Finally, the fourth factor, the effect on the market value, depends on whether the user's copy of the original would take away the potential market for the original.[120] In the case of tattoos, there is unlikely to be any change in the potential market of the tattoo because a tattoo is an original, even if artists use similar designs and methods to produce the tattoo. However, if a tattoo artist had a specific style of tattoo art that was unique to that artist, he or she could argue that tattoos mimicking that style would violate copyright. If the copycat artist's tattoos gain a portion of the original tattooist's market share, the copycat's work might not be considered a fair use.

Although VARA's rights and the rights provided by the rest of the copyright statute are distinct, VARA is subject to fair use limitations.[121] While not ultimately clear how fair use and VARA would conflict in the case of tattoos, it is important to keep in mind that the fair use factors must be considered when determining a VARA claim.

2. Constitutionality of VARA Remedies for Tattoo Artists

While fair use might not preclude a tattoo artist from being protected under VARA, the constitution might limit the remedies available for a tattoo artist who finds his or her work has been altered or destroyed by the tattoo wearer. General copyright infringement damages do not pose a problem for violations of VARA in the context of tattoos. However, remedies available for violations of the right of integrity pose issues.

Generally, the remedy allowed for a violation of an artist's right to integrity is that the artist is entitled to prevent the modification or destruction of the artwork.[122] However, when considering the media on which tattoos are placed, problems arise as to whether an artist has the right to determine how another person will treat his or her own skin and whether the wearer of the tattoo has constitutional rights that conflict with VARA's provisions.

The first constitutional right that potentially conflicts with VARA remedies for artists is the right to privacy as first articulated in 1891 in *Union Pacific Railway Co. v. Botsford*.[123] In that case, Justice Gray articulated that "[n]o right is held more sacred . . . than the right of every individual to the possession

120 *Campbell*, 510 U.S. at 590.

121 17 U.S.C. § 106A (2006).

122 *Id.*

123 141 U.S. 250, 251 (1891).

and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[124] Although that case, which stood for the right to refuse a physical examination from a doctor, has been discussed negatively since it was decided, the Supreme Court has discussed the right to privacy and personhood in several other cases, including *Griswold v. Connecticut*,[125] *Eisenstadt v. Baird*,[126] and *Roe v. Wade*.[127]

Because of this constitutional right to privacy, it is very unlikely that a court would require or even allow an artist to force a tattoo wearer to keep a tattoo that the wearer wants removed or modified, or to restore or modify a tattoo that the wearer has had changed in the case that it was "prejudicial to the artist's honor or reputation."

Another issue that could potentially come up if an artist attempts to enforce his or her right of integrity is that "our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona."[128] In *Moore v. Regents of University of California*, Judge Mosk, in his dissent, discussed that respect, stating that one of its manifestations is "our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation . . . was the institution of slavery."[129] Judge Mosk went on to state that while the Fourteenth Amendment abolished slavery, the same situation arises "wherever scientists or industrialists claim . . . the right to appropriate and exploit a patient's tissue for their sole economic benefit."[130]

Because of society's respect for the human body, a court could find that the control of art on another person's body that would be potentially allowed by the enforcement of an artist's right of integrity would come uncomfortably close to breaking the constitutional prohibition on slavery. In addition, even if courts would not be willing to analogize the right of integrity in tattoos to slavery, allowing that kind of control of another person's body would surely offend the "ethical imperative to respect the human body" that Judge Mosk discussed in

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124 *Id.*; *see* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1117 (2002).

125 381 U.S. 479, 484 (1965) (holding that a statute criminalizing contraceptives for married people was unconstitutional because the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments created "zones of privacy"); *see* Solove, *supra* note 124, at 1117 n.159.

126 405 U.S. 438, 453 (1972) (holding that a statute criminalizing contraceptive use by unmarried couples was unconstitutional for the same reasons as stated in *Griswold*).

127 410 U.S. 113, 154 (1973) (holding that the decision to have an abortion is protected by the constitutional right to privacy).

128 Moore v. Regents of Univ. of Cal., 793 P.2d 479, 515 (Cal. 1990) (Mosk, J., dissenting).

129 *Id.*

130 *Id.*

Moore. Therefore, it is unlikely that a tattoo artist would be able to reap the benefits of the right of integrity provided for by VARA in regard to a tattoo on someone else's body.

C. Alternative Protections for Artists

While a tattoo artist might not be able to prevent a customer from altering or removing a tattoo that the artist created, the right of publicity doctrine might be able to grant an artist rights similar to the right to attribution if Congress or the courts determine that tattoos do not qualify for VARA protections. "Under the right of publicity doctrine, an individual has the right to control the commercial exploitation of certain aspects of his or her persona, such as name, picture, and likeness . . . ."[131]

Tattoo artists might be able to use this right of publicity doctrine to prevent others from capitalizing on their persona and work, such as if another artist claims that he or she created a tattoo or if a celebrity claims that the artist created a tattoo that was later changed or mutilated, making the work appear to be of lesser quality than the work for which the artist is known. This cause of action can also be used if another person is attempting to use the same name as the artist in order to gain fame or commercial advantages. Remedies for an action for the violation of the right of publicity include injunctive relief and monetary damages.[132] However, the right of publicity doctrine is only recognized in about half of the states.[133] Even the states that recognize the tort are inconsistent in their application of the doctrine, which makes it an unreliable option for protection.[134]

Another option for artists who wish to protect their work is to contract with their customers prior to creating the tattoo to assign certain rights either to the customer or to the artist. While many tattoo shops already require customers to sign a release prior to beginning the tattooing, many times the paperwork does not mention copyrights. While the contract could not be unconscionable[135]

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131 Brittany A. Adkins, Comment, *Crying Out for Uniformity: Eliminating State Inconsistencies in Right of Publicity Protection Through a Uniform Right of Publicity Act*, 40 CUMB. L. REV. 499, 499–500 (2009/2010). The right of publicity doctrine was born from the right of privacy in the early 1900s. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

132 31 THOMAS PHILLIP BOGGESS, CAUSES OF ACTION 2D § 37, at 121 (2006).

133 Adkins, *supra* note 131, at 500–01.

134 *Id.* at 524.

135 Contracts can be considered "unconscionable" if one party has such an extreme power over the other party that the contract is unreasonably biased or if one party does not have the right

in any way, artists could require customers to assign copyrights in the tattoo to the artist and could probably require the customer to sign an agreement that the customer will not associate the tattoo with the artist if the tattoo is mutilated or changed by someone other than the original artist.

Finally, some artists have argued that tattoos should not be subject to copyright and artists do not need any legal protections.[136] One artist is reported as saying:

> Tattooing as an artistic culture is highly derivative and once an image is out in the community it is fair game for reproduction. We take art from all cultures and all styles and transform them into skin art. It is impossible to make two absolutely identical tattoos, and even if the client asks for a copy they will get their artist's version of it, based on subtle changes to fit their body and the artist's competence.[137]

Because tattoos are generally derivative of other art forms and cultural reproductions, tattoos might be best served by being left open for all to use and interpret.

In addition, the tattoo community, while not as counterculture as it once was, might still prefer to refrain from involving lawyers in its art and business. For example, tattoo artist Pat Fish said, "[Lawyers] will look for those who want to celebrate their status as victims, and those of us who want to live lives of creativity will suffer."[138]

VI. CONCLUSION

While some tattoo artists might feel that the law has no place inside the tattoo community and culture, ultimately, by bringing lawsuits against potential infringers, some artists have made the law an issue for tattoo artists throughout the United States. Although artists might not seek copyright protection for their tattoo art, VARA could potentially provide a right that is invaluable to most artists: the right of attribution.

The right of attribution is especially important as the Internet and the media make tattoo art and artists increasingly popular and well-known. In addition, with the proliferation of celebrities in this "YouTube generation," an artist

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to choose whether or how to enter into the contract. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2011).

136 Marisa Kakoulas, *The Tattoo Copyright Controversy*, BME NEWS (Dec. 8, 2003), http://news.bmezine.com/wp-content/uploads/2008/09/pubring/guest/20031208.html.

137 *Id.*

138 *Id.*

might not be able to predict when a client, or the artist him or herself might be catapulted into the public eye. Tattoo artists are increasingly reaching celebrity status and might need ways to prevent others from attempting to misappropriate or violate their rights in their work and their identities as artists.

Therefore, while VARA's right of integrity is an improper protection for tattoo artists because of their medium, the right of attribution should be a fundamental right granted to all artists in order to protect their art and livelihood from being misappropriated. How such an argument would fare in a court remains to be seen, and further exploration into the relationship between tattoo artists and VARA will shed additional light on this topic.