

## CREATIVE EXPRESSION AND THE HUMAN CANVAS: AN EXAMINATION OF TATTOOS AS A COPYRIGHTABLE ART FORM

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*In Warner Brothers' 2011 film The Hangover: Part II, actor Ed Helms portrays Stu Price, a man who inadvertently gets a tribal tattoo on his face, reminding many moviegoers of boxer Mike Tyson's infamous facial tattoo. Mr. Tyson's tattoo artist sued Warner Brothers, claiming that the film's public display of his work of visual art amounted to copyright infringement. While this particular case was settled out of court, it raises interesting questions regarding the applicability of copyright law to tattoos.*

*This Note addresses the issues introduced by this lawsuit. It begins by discussing the Copyright Act of 1976 and its potential impact on the rights of tattoo artists and their customers. It then proceeds to discuss the worthiness of tattoos as an art form subject to copyright protection. This Note also analyzes the unique human rights implications inherent in affording artists control over art that is permanently affixed to a person. It concludes with a recommendation that fits within the framework of current copyright law, while balancing the rights of the artist to retain control over her creation with the rights of the tattoo recipient to retain bodily autonomy.*

### I. INTRODUCTION

On Memorial Day weekend 2011, *The Hangover: Part II*—the second installment to the highest grossing R-rated comedy in movie history—hit theaters across the United States.<sup>1</sup> Despite a swarm of negative criticism regarding the film's redundant plotline, offensive imagery, and envelope-pushing raunchiness, even renowned film critic Roger Ebert admits “[t]he movie has its share of laughs.”<sup>2</sup> The rest of the world cer-

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1. See Krista Wick, *The Hangover Part II' Premiere Re-unites the Wolf Pack, and Then Some!*, ET ONLINE (May 20, 2011), [http://www.etonline.com/movies/110927\\_The\\_Hangover\\_Part\\_2\\_Premiere\\_Re\\_unites\\_The\\_Wolf\\_Pack\\_and\\_Then\\_Some/index.html](http://www.etonline.com/movies/110927_The_Hangover_Part_2_Premiere_Re_unites_The_Wolf_Pack_and_Then_Some/index.html).

2. Roger Ebert, *The Hangover Part II*, ROGEREBERT.COM (May 24, 2011), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/20110524/REVIEWS/110529989/1001/reviews; see also An->

tainly shared in Mr. Ebert's laughs: *The Hangover: Part II* now holds the record for highest grossing live-action comedy of all time in its opening weekend, raking in over \$85.9 million.<sup>3</sup> The film's director, Todd Phillips, has even announced plans for a third installment in the comedy series—a further testament to the film's financial success.<sup>4</sup>

It appears that *The Hangover: Part II* and its constituents have done quite well for themselves, despite the prolific and varied criticism. Yet unimpressed film critics are hardly the only obstacles that a Hollywood blockbuster may face. As this movie demonstrates, it is possible to encounter an unusual, and perhaps even completely unexpected, issue that can threaten a film's media coverage and potentially its entire reputation. For *The Hangover: Part II* and its releasing studio, Warner Brothers Entertainment, Inc., an issue of this very sort created a speed bump in the film's journey on April 28, 2011—just under one month before its scheduled debut—when S. Victor Whitmill filed a lawsuit against Warner Brothers in federal court.<sup>5</sup>

Mr. Whitmill alleged in his complaint that he is the creator of “one of the most distinctive tattoos in the nation”: the tribal-inspired tattoo that is permanently affixed around the left portion of former world heavyweight boxing champion Mike Tyson's left eye.<sup>6</sup> He further alleged that Warner Brothers, in its film *The Hangover: Part II*, placed a copy of this original tattoo around the left side of the left eye of one of the film's lead actors (Ed Helms, playing the character of Stu Price) without obtaining permission or giving Mr. Whitmill credit.<sup>7</sup> Relying on the Copyright Act of 1976, Mr. Whitmill asserted that releasing the motion picture, promotions, and advertisements adorned with the “virtually exact reproduction” of Mr. Tyson's tattoo amounted to copyright infringement.<sup>8</sup>

While Warner Brothers admitted that the tattoo appearing on Helms's face is “similar” to Mr. Tyson's, they vehemently denied that Helms's tattoo was in any way pirated or copied from it.<sup>9</sup> Perhaps most

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drew Barker, *The Hangover Part II*, VARIETY (May 23, 2011, 12:00 AM), <http://www.variety.com/review/VE1117945291>; Christy Lemire, *Review: Second 'Hangover' Feels Awfully Familiar*, BOSTON.COM (May 23, 2011), [http://www.boston.com/ae/movies/articles/2011/05/23/review\\_second\\_hangover\\_feels\\_awfully\\_familiar](http://www.boston.com/ae/movies/articles/2011/05/23/review_second_hangover_feels_awfully_familiar).

3. Brandon Gray, *Weekend Report: 'Hangover' Gets Higher with Sequel, 'Panda' Loses Weight*, BOX OFFICE MOJO (May 31, 2011), <http://boxofficemojo.com/news/?id=3175&p=.htm>.

4. John Horn, *Todd Phillips Keeps 'Em Laughing*, L.A. TIMES (May 22, 2011), <http://articles.latimes.com/2011/may/22/entertainment/la-ca-todd-phillips-20110522>.

5. See Complaint ¶ 1, Whitmill v. Warner Bros. Entm't. Inc., No. 4:11-cv-752, (E.D. Mo. April 28, 2011), 2011 WL 2038147, at \*1.

6. *Id.*

7. *Id.* ¶¶ 12–15. For a side-by-side image of Mike Tyson's disputed tattoo and Ed Helms's allegedly infringing tattoo, see Sophie Schillaci, *'Hangover II' Tattoo Lawsuit: Warner Bros May Digitally Alter DVDs*, ZAP2IT BLOG (June 9, 2011, 1:17 AM), <http://blog.zap2it.com/pop2it/2011/06/hangover-ii-tattoo-lawsuit-warner-bros-may-digitally-alter-dvds.html>. The image shows Mike Tyson on the left and Ed Helms, as portrayed in *The Hangover: Part II*, on the right.

8. Complaint, *supra* note 5, ¶¶ 1, 13.

9. Answer ¶ 13, Whitmill v. Warner Bros. Entm't Inc., No. 4:11-cv-752 (E.D. Mo. May 19, 2011).

importantly, Warner Brothers makes a statement in the “Additional Defenses” section of its Answer that reaches the deeper issue of Mr. Whitmill’s allegations: “Plaintiff does not own any rights in Mr. Tyson’s tattoo because *tattoos on the skin are not copyrightable*.”<sup>10</sup> This statement, while ostensibly simple, is actually riddled with legal complexities. In fact, the extension of copyright protection to tattoos on human flesh is an issue of first impression—one that is yet to be ruled on by the Supreme Court of the United States—and thus the legal uncertainties are unprecedented and unresolved.<sup>11</sup>

A variety of complex issues are at play here: Is human flesh a “useful article”<sup>12</sup> as defined in § 101 of the Copyright Act, and how does the useful article framework apply to a living being? What happens if a tattoo recipient wants to remove or alter her tattoo? What if a tattooed person wants to display her tattoo publicly or over a broadcasted medium? What are the implications of a tattoo artist retaining control over that person via the author’s rights under the Copyright Act? Do tattoos even qualify as art within the meaning of the United States Constitution?<sup>13</sup>

While Mr. Whitmill and Warner Brothers settled this lawsuit out of court in June 2011 (the details of which remain undisclosed), the issues that the suit raised are still unsettled and, thus, ripe for analysis.<sup>14</sup> Importantly, prior to the Joint Motion for Dismissal being filed, U.S. District Judge Catherine D. Perry, allowed the case to go forward, stating that Mr. Whitmill had “a strong likelihood of success in his claim.”<sup>15</sup> Judge Perry also confidently stated “[o]f course tattoos can be copyrighted. I don’t think there is any reasonable dispute about that.”<sup>16</sup> Thus, it certainly appears that, had there not been an out-of-court settlement, Mr. Whitmill’s claim would have made for interesting legal interpretation and deliberation.

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10. *Id.* at Additional Def. ¶ 2 (emphasis added).

11. See Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 12, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-752 (E.D. Mo. May 20, 2011), 2011 WL 2038149, at \*12 [hereinafter *Def. Memo in Opposition*] (“[T]here is no legal basis for Plaintiff’s radical proposition that a tattoo created in the first instance on a human being is copyrightable at all. There are no reported cases addressing the copyrightability of tattoos. . . .”); Declaration of David Nimmer ¶ 18, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-752 (E.D. Mo. May 20, 2011) (“My review of published [court] decisions has uncovered no case that usefully explicates the issue.”).

12. See 17 U.S.C. § 101 (2006). Useful articles receive copyright protection only to the extent that the artistic features can be separated from the utilitarian features. Therefore, it is important to classify an item early on in order to apply the appropriate analysis. For an overview of copyright law’s treatment of useful articles, see MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 306–07 (4th ed. 2005).

13. See U.S. CONST. art. I, § 8, cl. 8.

14. Matthew Belloni, “*Hangover*” *Tattoo Lawsuit Settled*, REUTERS (June 20, 2011, 10:48 PM), <http://www.reuters.com/article/2011/06/21/us-hangover-idUSTRE75K0DF20110621>; see also Joint Motion for Dismissal, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-752 (E.D. Mo. June 21, 2011); Order of Dismissal, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-752 (E.D. Mo. June 22, 2011).

15. Dave McNary, *Judge OKs Release of ‘Hangover 2’*, VARIETY (May 24, 2011, 8:28 AM), <http://www.variety.com/article/VR1118037530> (internal quotation marks omitted).

16. *Id.*

This Note addresses the many issues that could arise if tattoos were the subject of copyright protection. It does so by evaluating tattoos under the Copyright Act in order to determine whether the Act, in relevant part, can—and should—be logically extended to include this genre. Part II.A details the revolution of copyright law in this country and then examines the Copyright Act, its requirements for copyrightability, important court interpretations, and relevant limiting provisions. Part II.B discusses the *Whitmill* case in greater detail, elaborating on relevant claims and counterclaims.

Part III.A takes the legal provisions discussed in Part II.A and applies them to tattoos in two distinguishable contexts of original creation. Part III.B then delves into tattoos as an art form recognized by the Constitution and addresses important human rights implications of copyright extension to this genre. Finally, Part IV offers a reasoned resolution of the issue, proposing legislation and judicial application in a manner that balances the often-incongruous interests of the various standpoints involved.

## II. BACKGROUND

In order to determine whether the Copyright Act logically applies to tattoos, it is important to first understand the relevant portions of copyright law and its history. Section A examines the law's history, scrutinizes the Act in relevant part, and discusses judicial precedent. Then, Section B looks at the claims and arguments brought in the *Whitmill* case, creating a preliminary lens through which to view these issues.

### A. *The Law of Copyright*

Copyright law has undergone quite a bit of transformation since it was derived from British law at the formation of the Constitution.<sup>17</sup> Despite the changes in logistics and policies over the years, the underlying goal has stayed constant and true to that which was professed by this nation's founders: "To promote the Progress of Science and useful Arts."<sup>18</sup> The following Subsections review copyright law in a historical context, examine the basic requirements for copyrightability, discuss the important "useful article" dilemma, and describe relevant limitations on the rights of the author.

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17. AM. BAR ASS'N SEC. INTELL. PROP. LAW, WHAT IS A COPYRIGHT? 5 (2006) [hereinafter WHAT IS A COPYRIGHT?].

18. U.S. CONST. art. I, § 8, cl. 8.

### 1. *History and Evolution*

Quite generally, “[a] copyright is a property right in an original work of authorship that is fixed in tangible form.”<sup>19</sup> U.S. copyright law, like many other elements of the U.S. legal system, has its roots in pre-colonial Great Britain, where the British government granted exclusive printing rights for certain books to various printing presses.<sup>20</sup> In line with this British ideology, the United States Constitution, as adopted, expressly empowers Congress to regulate copyright issues via Article I, Section 8, Clause 8, which reads: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .”<sup>21</sup>

The term “copyright” quite literally means “the right to make copies.”<sup>22</sup> This, indeed, is a core value of copyright law that reflects a social desire to control unregulated copy and distribution of various works for fear of uncontrollable economic consequences.<sup>23</sup> The term “copyright” is also somewhat of a misnomer.<sup>24</sup> While elements of the law do indeed purport to control replication and distribution of authored works, much of what copyright law has grown and evolved to protect—performance rights, derivative works rights, display rights, and so on—resembles *usage* rights more so than *copying* rights.<sup>25</sup>

Copyright law, like virtually any body of law, has undergone extensive change and evolution over the years. Particularly, and perhaps most obviously, the law has been repeatedly challenged to keep up with changes in technology and new media of expression, especially since the late nineteenth century.<sup>26</sup> Thus, as one may expect, in the last few hundred years, the U.S. system of copyright law has extended far beyond mere restrictions on making copies of books and has grown to cover a much more extensive family of authored works, including most literary, musical, artistic, and digital creations.<sup>27</sup>

The first Copyright Act was passed in 1790 (the 1790 Act) and was modeled on the British Statute of Anne (the book-printing regulatory statute mentioned above).<sup>28</sup> The 1790 Act gave two fourteen-year pro-

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19. WHAT IS A COPYRIGHT?, *supra* note 17, at 5.

20. *Id.*

21. U.S. CONST. art. I, § 8, cl. 8.

22. LEAFFER, *supra* note 12, at 2.

23. *Id.* at 2, 6 (“As revealed in the constitutional language, the dominant idea is to promote the dissemination of knowledge to enhance public welfare. This goal is to be accomplished through an *economic* incentive in the form of a monopoly right given for limited times, and the beneficiary of this monopoly right is the author.”).

24. *Id.* at 2.

25. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 7.0–7.18 (3d ed. 2012) (enumerating and discussing the exclusive rights of copyrighted works).

26. LEAFFER, *supra* note 12, at 4.

27. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT §§ 1.1, 1.13 (3d ed. 2012).

28. *Id.* § 1.13.

tective terms exclusively to authors for charts, maps, and books.<sup>29</sup> Since then, Congress revamped the system of copyright law twice—once in 1909 (the 1909 Act), the result of which was generally described as lacking “clarity, coherence, or precision,” and most recently in 1976, resulting in the more workable and precise laws under which we are governed today (the Copyright Act, or the Act).<sup>30</sup>

The Copyright Act constituted a complete overhaul of existing copyright law and brought about five particularly important changes.<sup>31</sup> First, the Copyright Act completely preempted common-law copyright.<sup>32</sup> It eviscerated the hundreds of years of dual system copyright law, which derived some protections from federal law and others from state common law.<sup>33</sup> That system generated extensive complications in copyright disputes and regulatory decisions, so the Copyright Act was seen as a welcome change in this respect.<sup>34</sup>

Second, the Act replaced the dual-term protection system with a single, greatly extended, and very simplified protection length of “the life of the author plus fifty years.”<sup>35</sup> In 1998, the copyright term was extended yet again when Congress passed the Sonny Bono Copyright Term Extension Act (CTEA).<sup>36</sup> This amendment lengthened the copyright term to “the life of the author plus 70 years” for works created by a single author and “120 years from the year of creation or 95 years from the year of publication, whichever expires first” for a work made for hire.<sup>37</sup>

Third, the Copyright Act overhauled the categories subject to protection.<sup>38</sup> The Act as it exists today establishes eight broad categories: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”<sup>39</sup>

Fourth, the Act imposes limitations on the rights of authors, the most relevant of which is the “fair use” privilege.<sup>40</sup> The fair use privilege,

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29. *Eldred v. Ashcroft*, 537 U.S. 186, 194, 230 (2003).

30. See LEAFFER, *supra* note 12, at 7–9. The Copyright Act of 1976 governs this area of law today. When it is referenced throughout this Note, be aware that it refers not only to the Act itself, but also to any amendments or additions made to it since its inception in 1976.

31. *Id.* at 9–11.

32. MELVILLE B. NIMMER ET AL., *CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY* 35 (7th ed. 2006); see also 17 U.S.C. § 301 (2006).

33. NIMMER ET AL., *supra* note 32.

34. See LEAFFER, *supra* note 12, at 9.

35. 1 GOLDSTEIN, *supra* note 27, § 6.0; see also 17 U.S.C. § 302(a).

36. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 160 (3d ed. 2010).

37. *Id.* (emphasis omitted); see also 17 U.S.C. § 302(a)–(c).

38. LEAFFER, *supra* note 12, at 10.

39. 17 U.S.C. § 102(a) (1976).

40. *Id.* § 107.

which is essentially a codified version of judicial precedent,<sup>41</sup> is a complete affirmative defense in copyright infringement suits.<sup>42</sup> Essentially, as the name suggests, this privilege exempts third-party usage of an otherwise copyrightable work if the use is “fair,” which includes forms of criticism, news reporting, parody, and teaching.<sup>43</sup> The fair use doctrine, including the four criteria courts use when analyzing fair use, is discussed in greater detail in Part II.A.2.e below.<sup>44</sup>

Fifth and finally, the Copyright Act makes copyright ownership divisible.<sup>45</sup> This means that the copyright owner can “now license or assign parts of the copyright to third parties.”<sup>46</sup> In addition, these third parties can bring infringement suits to protect their personal, fractional rights.<sup>47</sup>

## 2. *Criteria for Copyrightable Subject Matter*

17 U.S.C. § 102 establishes the fundamental rules for what can and cannot be protected by federal copyright.<sup>48</sup> Importantly, this Section establishes that there is no formal registration process to secure a copyright—protection attaches as soon as the “original work” is “fixed in any tangible medium of expression.”<sup>49</sup> Thus, the key concepts for deciding whether something has been successfully copyrighted are originality, authorship, and fixation.<sup>50</sup> The Subsections below discuss the intricacies of these factors and also examine relevant accompanying doctrine.

### a. The “Originality” Requirement

Generally, in order for something to be considered “original” for the purposes of copyright protection, it must (1) not have been copied from a different source, and (2) possess at least a “minimal level of creativity.”<sup>51</sup> Over the years, the courts have given some parameters and restrictions to what these terms actually mean in practice.

In order for a work to be original, it must not be copied from another work;<sup>52</sup> however, one may argue that this presents a problem for pho-

41. See H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (stating that the intention of § 107 was “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way”).

42. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (“The drafters . . . structured the [fair use] provision as an affirmative defense requiring a case-by-case analysis.”).

43. 17 U.S.C. § 107.

44. See *infra* Part II.A.2.e.

45. NIMMER ET AL., *supra* note 32, at 393; see also 17 U.S.C. § 201(d).

46. LEAFFER, *supra* note 12, at 11.

47. *Id.*

48. 17 U.S.C. § 102.

49. *Id.* § 102(a); see also H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666 (“[T]wo essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.”).

50. 1 GOLDSTEIN, *supra* note 27, § 2.1.

51. *Id.* § 2.2.1.

52. *Id.*

tographs, painted portraits, and the like, as often, these works capture a scene that initially existed in front of the author's eyes. The Supreme Court tackled this issue early on in 1884, where it held that "the Constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of *original intellectual conceptions* of the author."<sup>53</sup>

Originality can be satisfied if the work is mundane—such as advertising—because even "a very modest grade of art has in it something irreducible, which is one man's alone."<sup>54</sup> Originality can also be found in controversial subject matter or even obscenity, based on the rationale that legal professionals are in no place to "constitute themselves final judges of the worth of [a work]."<sup>55</sup>

In 1991, the Court made an explicit standard for determining originality in *Feist Publications, Inc. v. Rural Telephone Service Co.*: "Original, as the term is used in copyright, means only that [1] the work was independently created by the author (as opposed to copied from other works), and [2] that it possesses at least some minimal degree of creativity."<sup>56</sup> The Court in *Feist* stressed that even the slightest amount of creativity will satisfy the second criterion—even the creativity inherent in the arrangement and compilation of facts, which was the subject of the dispute in that case, may be sufficient.<sup>57</sup>

It is important to note that *Feist* did not go so far as to say that *any* work is copyrightable; in fact, the Court made a point of limiting its scope to make sure that *de minimis* content is not deemed original.<sup>58</sup> The Court noted that "a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent" does not qualify as original within the meaning of copyright law.<sup>59</sup> For instance, "[w]ords and short phrases such as names, titles, slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents" are not copyrightable because these things are, in essence, *de minimis*.<sup>60</sup>

#### b. The "Work of Authorship" Requirement

In addition to being original, a work must also be a "work of authorship" to be copyrightable.<sup>61</sup> This criterion, however, is much less structured than the "original" criterion. In § 102 of the Act, Congress

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

54. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).

55. *Id.* at 251; *see also* *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979) (upholding copyright protection for an obscene film based on the holding in *Bleistein*).

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

57. *Id.*

58. *Id.* at 359.

59. *Id.*

60. 37 C.F.R. § 202.1(a) (2011).

61. 1 GOLDSTEIN, *supra* note 27, § 2.2.2; *see also* 17 U.S.C. § 102(A) (2006).



replaced the term “writings” from the 1909 Act with “works of authorship” and proceeded to list eight broad categories of such works in an illustrative list.<sup>62</sup> It is clear based on legislative intent that these eight categories were not intended to be exhaustive and that Congress aimed to create a flexible standard.<sup>63</sup>

A work of authorship, besides falling into one of the categories enumerated in the Act, requires that the item be created “by or under the authority of the author.”<sup>64</sup> The term “author” is left completely undefined in the Act.<sup>65</sup> This may be because “author” is a relatively straightforward concept, and the *actions* of the author are more crucial to understanding the law—an individual must write, sculpt, compose the work, or give instructions to another person who physically creates it to be considered an author.<sup>66</sup> This includes works made for hire, where the employer or commissioner is regarded as the author within the meaning of the Act, even though she did not physically create the work.<sup>67</sup>

Section 101 of the Act defines works made for hire:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>68</sup>

The relevant section for our purposes is subsection two, which refers to independent contractors and any person not salaried or regularly employed by the commissioning party.<sup>69</sup> In regards to this section, the

62. 17 U.S.C. § 102(a) (listing the eight illustrative types of works which qualify as works of authorship: “(1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works”); *see also id.* § 301; NIMMER ET AL., *supra* note 32, at 50 n.74.

63. H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

64. 17 U.S.C. § 101.

65. COHEN, *supra* note 36, at 117 (“The Copyright Act does not define the term *author*, nor did any of the previous Copyright Acts define this term. Is a definition necessary?”).

66. *See* 1 GOLDSTEIN, *supra* note 27, § 2.2.2.

67. 17 U.S.C. § 201(b).

68. *Id.* § 101.

69. LEAFFER, *supra* note 12, at 191; *see also* BLACK’S LAW DICTIONARY 693 (5th ed. 1979) (defining independent contractor as “[o]ne who renders service in course of independent employment or occupation, and who follows employer’s desires only as to results of work, and not as to means whereby it is to be accomplished”). A “work made for hire” can be found in two situations—in an employer/employee relationship, and in a commissioner/independent contractor relationship. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989). Given the courts’ focus on determinative factors such as “the provision of employee benefits” and “the tax treatment of the hired party,” an artist-recipient relationship would, under virtually all conceivable situations, not amount to an employer/employee relationship within the meaning of the law. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (discussing the five factors “that will be significant in virtually every situation” regarding

Act specifically limits the application of works made for hire to nine categories of works.<sup>70</sup> It is not enough, however, that a work simply falls into one of these categories—the language of the Act specifically requires that the parties agree in writing that they intend the work to be designated a work made for hire.<sup>71</sup> Importantly, *both* parties must sign this written agreement.<sup>72</sup> Nonetheless, courts are split as to whether this agreement must be in writing before the work is created; the only consensus being that *some* form of agreement—oral, written, or implied—must have occurred before the commission of the work, with a writing being established at a later date.<sup>73</sup>

### i. Rights of the Author

Regardless of the method of authorship chosen—whether it is a single-author scenario or a work made for hire—the tangible embodiment is called a “copy” in all instances except that of a sound recording.<sup>74</sup> In addition, an author is empowered with certain rights pertaining to the work created. These rights are enumerated in § 106 of the Act:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies . . . ;
- (2) to prepare derivative works . . . ;
- (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly;
- (5) . . . to display the copyrighted work publicly; and
- (6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.<sup>75</sup>

Authors of visual works of art specifically enjoy separate rights above and beyond those enumerated in § 106.<sup>76</sup> These rights of “attribution and integrity” were established separately from the Copyright Act when Congress enacted the Visual Artists Rights Act of 1990.<sup>77</sup> This

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employee status for purposes of determining a “work made for hire”); *see also* Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 324–25 (2006).

70. 17 U.S.C. § 101.

71. *Id.*

72. *See* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 412 (7th Cir. 1992).

73. *Compare* Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 559–60 (2d Cir. 1995) (stating that a post-creation written agreement is acceptable), *with* Schiller, 969 F.2d at 412 (holding that the parties must manifest a writing before the work is created).

74. *See* United States v. Martignon, 346 F. Supp. 2d 413, 423–24 (S.D.N.Y. 2004) (determining live musical performances are generally not “fixed,” but that sound recordings are generally “fixed” and constitute phonorecords within the meaning of the Act).

75. 17 U.S.C. § 106.

unique and limited legislation was intended to complement the Copyright Act.<sup>78</sup> It includes the rights: “(A) to prevent any intentional distortion, mutilation, or other modification of that work . . . and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”<sup>79</sup> Thus, it appears that while finding a creation to be a work of authorship may be conceptually simple, the rights instilled in an author of a visual work of art are quite complex, vast, and empowering.<sup>80</sup>

c. The “Fixation” Requirement

Lastly, in addition to “originality” and “authorship,” a work must meet the requirement of “fixation.”<sup>81</sup> Section 102(a) of the Copyright Act states that works must be “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>82</sup>

The fixation requirement is crucial to the copyright analysis because, besides helping to determine if the work is copyrightable or not, it determines *when* protection begins, if at all.<sup>83</sup> Fixation simply requires that the work be fixed in a tangible medium of expression—whether this medium is directly perceptible by humans or not.<sup>84</sup> This takes into consideration changes in technology after 1976 that would allow human perception of a work only with the aid of a machine (for example, mp3 files or DVDs).<sup>85</sup>

The medium of expression does not have to be permanent—the Act merely requires that the fixation exist “for a period of more than transitory duration.”<sup>86</sup> Thus, an ice sculpture, a computer hard drive, and even the icing on a birthday cake, are “fixed” within the meaning of the Act.<sup>87</sup>

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76. See 17 U.S.C. § 106A.

77. COHEN, *supra* note 36, at 398; *see also* 17 U.S.C. § 106A.

78. See COHEN, *supra* note 36, at 398–99.

79. 17 U.S.C. § 106A(a)(3).

80. See *id.* § 106A.

81. See *id.* § 102(a).

82. *Id.*

83. See *id.*

84. H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 (“Under the bill it makes no difference . . . whether it is capable of perception directly or by means of any machine or device ‘now known or later developed.’”).

85. LEAFFER, *supra* note 12, at 48, 54.

86. 17 U.S.C. § 101.

87. MARY LAFRANCE, *COPYRIGHT LAW IN A NUTSHELL* 10 (2d ed. 2011).

d. The “Useful Article” Dilemma

Once the requirements of “originality,” “authorship,” and “fixation” have been met, the work is conclusively copyrighted.<sup>88</sup> The next task is to determine what type of work has been created, requiring classification under one of the eight types listed in § 102(a).<sup>89</sup> The relevant classification for purposes of this discussion is that of § 102(a)(5): “pictorial, graphic, and sculptural works.”<sup>90</sup> These works are defined as “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”<sup>91</sup>

Once an item is classified as a “pictorial, graphic, [or] sculptural [work],” there is another complication stemming directly from this requirement that must be remedied. In § 101 of the Act, in the same clause that defines “pictorial, graphic, and sculptural works,” the concept of a medium of expression as a “useful article” is discussed: “[A] useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features *that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.*”<sup>92</sup>

The Copyright Act of 1909 changed the terminology “works of the fine arts” to the broader phrase “works of art,” explicitly extending copyright protection not only to fine art, but also to applied art.<sup>93</sup> In a case decided in 1954, *Mazer v. Stein*, the Supreme Court discussed Copyright Office regulations regarding registration of “works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned.”<sup>94</sup> The Court upheld the regulations, reasoning that an artistic work does not lose copyright eligibility simply because that work is reproduced or embodied in an article of manufacture.<sup>95</sup> The holding in *Mazer* was codified by Congress in § 101 of the Act when the concept of “useful article” was introduced.<sup>96</sup>

While the holding in *Mazer* may make sense in theory, in practice it provides much difficulty. This is largely because in order to extend pro-

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88. 17 U.S.C. § 102(a).

89. *See id.*

90. 17 U.S.C. § 102(a)(5).

91. *Id.* § 101.

92. *Id.* (emphasis added).

93. *See, e.g., Mazer v. Stein*, 347 U.S. 201, 213 (1954) (“The term ‘works of art’ is deliberately intended as a broader specification than ‘works of the fine arts’ in the present statute, [the 1909 Copyright Act,] with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law.” (quoting Arguments on H.R. 19853 Before H. Comm. on Patents and the S. Comm. on Patents, 59th Cong. 8 (1906)).

94. *Id.* at 212 (citation omitted) (internal quotation marks omitted).

95. LAFRANCE, *supra* note 87, at 28.

96. *See Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 921 (11th Cir. 1983) (“Congress intended to codify the existing practice of the Copyright Office with respect to the dichotomy between ornamental and useful articles . . .”).

tection to an artistic creation embodied in a useful article, one must somehow separate the abstract artistic nature from the functional attributes—a connection that is not always easy to recognize, let alone detach.<sup>97</sup>

Courts introduce two distinct ways of determining this separability—the “physical separability” method and the “conceptual separability” method.<sup>98</sup> In *Esquire, Inc. v. Ringer*, the D.C. Circuit advocated application of a physical separability standard.<sup>99</sup> In denying this separation’s existence in uniquely shaped outdoor light fixtures, the court stated that “the fixtures . . . did not contain ‘elements, either alone or in combination, which are capable of independent existence as a copyrightable pictorial, graphic, or sculptural work apart from the utilitarian aspect.’”<sup>100</sup> The artistic shape, unlike *Mazer’s* sculptured statuettes that could be removed from the mechanism of the lamp to which they were attached,<sup>101</sup> was “inextricably fused with its utilitarian function,” and thus not physically separable.<sup>102</sup>

While the physical separability standard of *Esquire* is logical in many respects, it has been largely rejected, not only by commentators, but by courts as well.<sup>103</sup> The much more widely accepted approach is that of conceptual separability initially furthered in *Kieselstein-Cord v. Accessories By Pearl, Inc.*<sup>104</sup> *Kieselstein*, a case that disputed the copyright protection of ornamental belt buckles, based its analysis of separability on the “primary” decorative/aesthetic element of an article versus the “subsidiary” utilitarian functions.<sup>105</sup> Thus, the court furthered a conceptual separability test when it suggested that such separability exists when, even if the article in question does not have any useful function, it would still be marketed as a purely aesthetic piece.<sup>106</sup>

*Carol Barnhart Inc. v. Economy Cover Corp.* further solidified application of the conceptual separability method<sup>107</sup> when it held that clothing display human torso mannequins were not copyrightable because the alleged artistic features were inseparable from the utilitarian function of clothing display.<sup>108</sup> The court specifically distinguished *Kieselstein*: “[In *Kieselstein*,] the artistic and aesthetic features [of the belt buckles] could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article. The unique artistic design was wholly un-

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97. See LEAFFER, *supra* note 12, at 120.

98. See *id.* at 121–25.

99. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 798 (D.C. Cir. 1978).

100. *Id.* at 798–99.

101. See *Mazer v. Stein*, 347 U.S. 201, 202 (1954).

102. LEAFFER, *supra* note 22, at 121.

103. *Id.* at 122.

104. *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d 989, 993 (2d Cir. 1980).

105. *Id.* at 993–94.

106. LEAFFER, *supra* note 12, at 123 (discussing the court’s rationale in *Kieselstein*).

107. But see *id.* (“[T]he majority in [*Carol Barnhart Inc. v. Econ. Cover Corp.*] appeared to return implicitly to a standard of physical separability.”).

108. *Carol Barnhart Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 412 (2d Cir. 1985).

necessary to performance of the utilitarian function.”<sup>109</sup>

Finally, in 2004, the Seventh Circuit, in *Pivot Point International, Inc. v. Charlene Products, Inc.*, reviewed *Kieselstein, Carol Barnhart*, and several other cases, and formulated a workable test for determining conceptual separability.<sup>110</sup> This test is based on the theory forwarded in *Carol Barnhart*, complemented by language from *Brandir International, Inc. v. Cascade Pacific Lumber Co.*—another Second Circuit case that applied *Carol Barnhart* in reaching its conclusion.<sup>111</sup>

The court in *Pivot Point* stated, “[c]onceptual separability exists, therefore, when the artistic aspects of an article can be ‘conceptualized as existing independently of their utilitarian function [*Barnhart*].’ This independence is necessarily informed by ‘whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences [*Brandir*].”<sup>112</sup>

Thus, it would appear that the key to determining whether a useful article contains an artistic fixation that is subject to copyright protection is the ability to separate artistic elements conceptually from the utilitarian elements.<sup>113</sup> This is obviously a very case-specific inquiry that requires application of the wide array of case law on the matter.

#### e. Limitations on the Author’s Rights in a Conclusively Copyrighted Work

Once a work is conclusively copyrighted, the author enjoys the powerful ownership rights discussed in Part II.A.2.b.i above.<sup>114</sup> These rights, however, are not impervious—they can be limited by application of the fair use doctrine.<sup>115</sup> Discussed briefly in Part II.A.1 above, the goal of this doctrine is to act as an exception to what otherwise may be regarded as copyright infringement when a finding of such infringement would undermine “the Progress of Science and useful Arts.”<sup>116</sup>

While Congress included in § 107 a list of uses that may qualify as fair use,<sup>117</sup> this list is not meant to be exhaustive.<sup>118</sup> To provide guidance

109. *Id.* at 419.

110. *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 920–31 (7th Cir. 2004).

111. *See Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987); *Carol Barnhart*, 773 F.2d at 418.

112. *Pivot Point*, 372 F.3d at 931 (quoting *Carol Barnhart*, 773 F.2d at 418 and *Brandir*, 834 F.2d at 1145).

113. *See supra* notes 88–112.

114. *See supra* Part II.A.2.b.i.

115. *See generally* 17 U.S.C. § 107 (2006) (listing examples of uses that may qualify as fair use: “reproduction in copies or phonorecords or by any other means . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright”).

116. U.S. CONST. art. I, § 8, cl. 8; *see Pamela Samuelson, Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2540–42 (2009).

117. 17 U.S.C. § 107.

118. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (“[T]he courts must be free to adapt the [fair use] doctrine to particular situations on a case-by-case basis.”).

to courts in analyzing and applying the doctrine, § 107 includes a list of four factors to apply when determining if something qualifies as fair use:<sup>119</sup>

- (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.<sup>120</sup>

While a court must consider all four of these factors, it need not consider *only* these four—a court can use discretion and consider other issues that it deems particularly relevant.<sup>121</sup> Historically, courts also consider elements such as lack of good faith<sup>122</sup> and industry custom.<sup>123</sup>

These same powerful ownership rights are also limited by the “first sale” doctrine, which states: “[T]he owner of a particular copy or phonorecord lawfully made . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>124</sup> Thus, when a copyright owner distributes or sells copies of her work, a recipient of such copy effectively inherits the right to alienate or abandon it.<sup>125</sup> Implicit in this doctrine is the understanding that a copyright owner loses essentially all control of the particular copy sold.<sup>126</sup> Therefore, it would seem that in practice the rights the author loses are not limited to merely alienation and abandonment, but include an array of other general privileges as well.<sup>127</sup>

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119. See 17 U.S.C. § 107.

120. *Id.*

121. LEAFFER, *supra* note 12, at 475.

122. See *Roy Exp. Co. Establishment v. Columbia Broad Sys., Inc.*, 503 F. Supp. 1137, 1146 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982).

123. See *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980) (considering the fourth factor, which places emphasis on comparative advertising and commercial use, also known as industry custom).

124. 17 U.S.C. § 109(a).

125. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1344 (9th Cir. 1988) (“We recognize that, under the ‘first sale’ doctrine . . . appellant can purchase a copy of the [work] and subsequently alienate its ownership in that [work]. However, the right to transfer applies only to the particular copy of the [work] which appellant has purchased and nothing else.”); see also 17 U.S.C. § 109(a).

126. 1 JOHN W. HAZARD, JR., *COPYRIGHT LAW IN BUSINESS AND PRACTICE* § 7:66 (rev. ed. 2011) (“[T]he ‘first sale’ doctrine . . . provides that after the first sale of a book, film, phonorecord, or other work, the copyright owner loses any authority with regard to that particular copy.” (emphasis added)). Note that the blanket assertion of “any authority” generally doesn’t apply to an author’s display rights. It is largely accepted that an author retains display rights, even with regard to lawfully made copies. See Alexandra Lyras, Note, *Incidental Artwork in Television Scene Backgrounds: Fair Use or Copyright Infringement?*, 2 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 159, 168 (1992).

127. See HAZARD, *supra* note 126.

### B. Whitmill v. Warner Brothers

On April 28, 2011, S. Victor Whitmill filed a complaint in the U.S. District Court for the Eastern District of Missouri against Warner Brothers.<sup>128</sup> This complaint, alleging copyright infringement under the Copyright Act, asserted that Whitmill is “an award-winning visual artist who works in various mediums, including the creation, design, and application of tattoo art to bodies.”<sup>129</sup> In February 2003, Whitmill created and applied an “original and distinctive” tattoo around the outer portion of the left eye of former world champion heavyweight boxer Mike Tyson.<sup>130</sup>

Whitmill’s complaint against Warner Brothers was grounded in the fact that the studio planned to release the film *The Hangover: Part II* that April, and this film—as well as the film’s marketing and promotional materials—contained a “virtually exact reproduction” of Whitmill’s tattoo around the outer portion of the left eye of actor Ed Helms (who portrays the movie character Stu Price).<sup>131</sup> Besides the fact that the tattoo is recurring and important to the plot of the movie, Whitmill emphasized that he had “never been asked for permission for, and [had] never consented to, the use, reproduction, or creation of a derivative work based on [the tattoo].”<sup>132</sup> He asserted that Warner Brothers’s actions, “at the very least, [constituted] reckless copyright infringement in disregard of [his] rights.”<sup>133</sup>

While Warner Brothers admitted that the tattoos appearing on Tyson and Helms are similar, they vehemently denied that Whitmill’s tattoo is copyrightable and that the tattoo on Helms is pirated.<sup>134</sup> Among about sixteen defenses presented by Warner Brothers, one is of particular relevance: “Plaintiff does not own any protectable rights in Mr. Tyson’s tattoo because tattoos on the skin are not copyrightable.”<sup>135</sup>

Whitmill’s Motion for Preliminary Injunction, asking, among other things, to enjoin release of *The Hangover: Part II*, was denied.<sup>136</sup> Nevertheless, the Judge made it clear that she did not deny this motion for lack of merit of Whitmill’s claims.<sup>137</sup> In fact, Judge Perry stated that Whitmill had “a strong likelihood of success” in his claim.<sup>138</sup>

Both parties to this case filed a Joint Motion for Dismissal, which was granted on June 22, 2011.<sup>139</sup> While the terms and details of the dis-

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128. See Complaint, *supra* note 5, ¶¶ 1, 4.

129. *Id.* ¶ 4.

130. *Id.* ¶ 5.

131. *Id.* ¶¶ 12–14.

132. *Id.* ¶ 17.

133. *Id.* ¶ 20.

134. Answer, *supra* note 9, ¶ 16.

135. *Id.* at Additional Def. ¶ 2.

136. Order Denying Preliminary Injunction, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-cv-752 (E.D. Mo. May 24, 2011).

137. See McNary, *supra* note 15.

138. *Id.*

139. Joint Motion for Dismissal, *supra* note 14; Order of Dismissal, *supra* note 14.



missal were not disclosed, there was also no apparent resolution of the novel issues presented in the case, making these issues still unique, unprecedented, and undecided.<sup>140</sup>

### III. ANALYSIS

The extension of copyright protection to tattoos is hardly a single-dimensional matter. The issue is necessarily both a question of (1) whether or not copyright protection *can* be extended, and (2) whether or not copyright protection *should* be extended to tattoos on the human skin. To bestow protection would potentially confer tattoo artists with all the rights of an author of a copyrighted work. In addition, it could create a variety of unintended consequences not only for the world of copyright and its authors, but also for basic human rights.

The following is a discussion of such protection—exploring both positive and negative implications—and how it can potentially alter legal doctrine, the world of artistic creation, and society as a whole. Part III.A applies copyright protection to tattoos, noting two distinguishable scenarios depending on a tattoo’s initial fixation. Part III.B then evaluates tattoos as a socially valuable art form and delves into potentially troublesome implications that this protection would create.

#### A. *Tattoos As a Logical Extension of the Copyright Act*

As discussed in Part II.A.2 above, in order for works to be conclusively copyrighted, they must be “[1] original [2] works of authorship [3] fixed in any tangible medium of expression.”<sup>141</sup> It is important to note that the word “tattoo” is broad in common everyday language and refers merely to some sort of mark on a person’s skin—a tattoo could be a depiction of an immeasurable amount of things.<sup>142</sup> Therefore, it must be decided whether or not *any* tattoo is capable of meeting these three requirements before proceeding further with the analysis.

##### 1. *Originality*

In order to understand the originality of a tattoo, one must look at the nature of the design that is being tattooed—not the mere fact that something is, by definition, a tattoo.<sup>143</sup> It is a logical conclusion that a tattoo would need to satisfy the same “originality” requirements as any other copyrightable work. As discussed briefly in Section II.A.2.a above,

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140. See Belloni, *supra* note 14.

141. 17 U.S.C. § 102(a) (2006); see also *supra* Part II.A.2.

142. *Tattoo*, DICTIONARY.COM, <http://dictionary.reference.com/browse/tattoo> (last visited Dec. 2, 2012) (defining tattoo as “the act or practice of marking the skin with indelible patterns, pictures, legends, etc., by making punctures in it and inserting pigments”).

143. As with all copyrightable works, protection hinges on the originality of the content, not the genre of the work alone. See LEAFFER, *supra* note 12, at 58–62.

originality is interpreted and discussed in great length in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>144</sup> *Feist* explicitly set the bar for originality extremely low: “the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>145</sup> It is also important to note that the *Feist* Court did not include novelty within the definition of originality: “[A] work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.”<sup>146</sup>

It is again necessary to apply *Feist* to the specific tattoo to make sure that it is not of *de minimis* content—content where “the creative spark is utterly lacking.”<sup>147</sup> So, if the tattoo were merely of a name, a slogan, or a familiar design, it appears that it would not be sufficiently expressive to be truly original.<sup>148</sup> In addition, one must also evaluate whether or not the tattoo design amounts to a *scene à faire*—something that is too common, cliché, or stereotyped to embody sufficient originality.<sup>149</sup> Thus, a cliché tattoo (such as a red heart with a couple’s names in the center) is probably too common and familiar of a design to be considered a work of authorship within the meaning of the Act.<sup>150</sup>

Based on the liberal criteria for originality forwarded in *Feist*, it appears that—like all other copyrightable works—the originality of a tattoo depends on it meeting at least a crude level of creativity, even if it is identical to another work (although, in practice this is obviously rather unlikely), as long as it is not a copy of that other work.<sup>151</sup>

## 2. *Work of Authorship*

Because it seems that a tattoo could certainly be considered original, the next task is to decide if it can be a “work of authorship” within the meaning of the Act.<sup>152</sup> It also appears that a tattoo could easily meet this requirement set by § 102(a).<sup>153</sup> This Section of the Act states that “[w]orks of authorship include the following categories . . . (5) pictorial, graphic, and sculptural works.”<sup>154</sup> This is the suggested category for tat-

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144. See *supra* II.A.2.a.

145. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citation omitted).

146. *Id.* at 345.

147. *Id.* at 358–59.

148. 37 C.F.R. § 202.1(a) (2011).

149. *Sinicola v. Warner Bros. Inc.*, 948 F. Supp. 1176, 1190 (E.D.N.Y. 1996) (“Similarities in the works as to these themes, characters, and settings are too general or trivial or are stereotyped expression amounting to unprotectible *scenes a faire*.”).

150. 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, 103 (2003).

151. *Feist*, 499 U.S. at 345–46.

152. 17 U.S.C. § 102(a) (2006).

153. See *id.*

154. *Id.*

toos in the *Whitmill* case, and it is also the most logical choice.<sup>155</sup>

### 3. Fixation

Assuming the tattoo design is sufficiently original, and that it is a valid work of authorship, there remains only one more hurdle—whether the tattoo can be described as “fixed in any tangible medium of expression” within the meaning of the Act.<sup>156</sup> For this portion of the analysis, two scenarios must be considered. The first is a tattoo created on paper, digitally, or on some other medium, *before* it is affixed to the human body. The second is a tattoo created for the first time *directly* on the human body.

#### a. A Tattoo Originally Created Separate from the Human Skin

When determining whether a work is “fixed,” the Act inquires as to whether or not the work can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>157</sup> In a situation where a tattoo is applied to paper or another comparable medium before it is applied to human skin, the fixation requirement is very easily met—it is undisputed that affixing a work to paper qualifies as fixation within the meaning of the Act.<sup>158</sup>

In order for something to be fixed, it must also be “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>159</sup> It is effectively certain that creating the tattoo on a piece of paper or a similar medium is permanent enough to satisfy this requirement, especially considering the courts’ liberal interpretation of permanence, generally requiring that a fixation last no longer than a “mere moment.”<sup>160</sup> If copyright protection were to be extended to tattoos, fixation on paper (or a similar commonly-accepted medium of expression) would create a copyrighted work that the author could rely on when pursuing infringement—even if the courts refused to recognize the same tattoo placed on human

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155. Declaration of David Nimmer, *supra* note 11, ¶ 12 (accepting “pictorial, graphic, and sculptural works” as the correct category in the Act that tattoos would fall under, as evidenced by Mr. Nimmer’s lack of objection to this assertion (quoting 17 U.S.C. § 102(a)(5) (internal quotations omitted))).

156. 17 U.S.C. § 102(a).

157. *Id.*

158. Paper as the most common and obvious means of fixing a work is a basic assumption that copyright law seems to operate under. See ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS 26 (2003) (stating that fixation essentially means that a work must merely be “written down . . . or otherwise captured in some way”); Stefan Hubanov, *The Multifaceted Nature and Problematic Status of Fixation in U.S. Copyright Law*, 11 INTELL. PROP. L. BULL. 111, 118 (2006) (“[A] fixed work is usually associated with something long-lasting, like a book.”).

159. 17 U.S.C. § 101.

160. Hubanov, *supra* note 158, at 118 (“[C]ase law suggests that fixation need not last longer than a mere moment so long as the expression can be perceived by someone.”).

skin as fixed within the meaning of the Act.<sup>161</sup> Because scholars speculate as to whether courts would be willing to recognize fixation on human beings, the existence of the tattoo on paper, or some other comparable medium, could be crucial to securing copyright protection in the first place.<sup>162</sup>

b. A Tattoo Originally Created on the Human Skin

In a situation where the tattoo is created for the first time on the human skin itself, the logical extension of fixation is much less straightforward.<sup>163</sup> Unlike a piece of paper, the human flesh as a medium of expression carries with it complicated implications regarding permanence and its status as a useful article,<sup>164</sup> thus requiring a more thoughtful analysis.

Regarding permanence, while it is true that tattoos are not removable without taking surgical measures<sup>165</sup> (and thus, in that sense, they are permanent), human beings themselves eventually die and the skin deteriorates, giving any tattoo on the flesh a predictable and inevitable time stamp. Thus, it may appear that tattoos initially affixed upon the human flesh are conclusively impermanent. Applying this logic to the concept of permanence as enumerated in the Act, a tattoo upon the flesh may not qualify as a protected fixation.<sup>166</sup>

Nevertheless, as alluded to briefly in Part III.A.3.a above, the Act states that a medium of expression need not necessarily be permanent if it can “be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>167</sup> Considering judicial construction of this phrase, it is extremely likely that the length of a human life would qualify as “a period of more than transitory duration.”<sup>168</sup>

In a case on this very issue, *MAI Systems Corp. v. Peak Computer, Inc.*, the Ninth Circuit found that the ability of a user to view computer software when copied into the computer’s RAM, even though RAM recordings are temporary and vanish once the computer is powered off, was long enough to qualify as “a period of more than transitory dura-

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161. Declaration of David Nimmer, *supra* note 11, ¶¶ 50, 51 (“A different case would arise to the extent that a tattooist first created an image as a template, before inking the subject individual.”).

162. *Id.* ¶ 13 (“[E]xamination of copyright law reveals that [a person’s] head cannot constitute a protectable medium of expression.”).

163. *See id.* ¶¶ 15–16 (“In years past, I tacitly assumed that a tattoo could ‘presumably qualify as a work of graphic art, regardless of the medium in which it is designed to be affixed’ such as ‘human flesh.’ . . . [A]bout a decade ago . . . I began to reconsider that proposition.”).

164. *See supra* Part II.A.2.d; *see also* 17 U.S.C. § 101.

165. *See generally* William Kirby et al., *Tattoo Removal: Wiping the Slate Clean*, *SKIN & AGING* (Feb. 1, 2010), <http://www.the-dermatologist.com/content/tattoo-removal-wiping-slate-clean> (discussing the various forms of tattoo removal).

166. *See* 17 U.S.C. § 101.

167. *Id.*; *see also supra* Part III.A.3.a.

168. 17 U.S.C. § 101; Hubanov, *supra* note 158, at 118.

tion.”<sup>169</sup> The length in time between copying software and powering down the computer, which effectively destroys the copy, could amount to mere seconds, yet the Ninth Circuit found this to be perfectly sufficient.<sup>170</sup> Similarly, a human being could pass away upon leaving the tattoo parlor or live ninety years with the tattoo intact—this type of uncertainty did not dissuade the court in *MAI* from finding adequate fixation, nor would a court be inclined to rule differently regarding a tattoo.<sup>171</sup> So long as the embodiment of a work exists long enough for someone to perceive it, it appears that a court will find it to be conclusively fixed.<sup>172</sup>

The more complex inquiry regarding tattoos created on the human skin stems from the useful article dilemma.<sup>173</sup> Discussed briefly in Part II.A.2.d above,<sup>174</sup> copyright protection for a useful article is limited—it will only be protected to the extent that it “incorporates pictorial, graphic, or sculptural features that *can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.*”<sup>175</sup>

Professor David Nimmer, when commenting on the *Whitmill* case, correctly pointed out that “[f]ar from that physical medium serving solely as the substrate for expression . . . a human head—so long as connected to a body, with a beating heart—is a very useful item, indeed.”<sup>176</sup> It is unlikely that Professor Nimmer’s assertion would be greatly contested—in fact, the same could be said about any portion of the human body on which one could adorn a tattoo.<sup>177</sup> While it is unlikely that Congress considered human flesh when drafting the useful article portion of the Act,<sup>178</sup> it is hard to imagine another item that would so clearly possess utilitarian aspects apart from artistic display. Therefore, in order for a tattoo displayed on the human body to be sufficiently fixed within the meaning of the Act, the tattoo must be decisively separable from the body’s much more dominant, utilitarian aspects.<sup>179</sup>

As discussed above in Part II.A.2.d, two different standards exist for testing useful article separability—physical separability and conceptual separability.<sup>180</sup> Physical separability, generally required only by a minority of courts, is forwarded in the *Esquire* case.<sup>181</sup> *Esquire* held that out-

169. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (quoting 17 U.S.C. § 101).

170. *See id.* at 519.

171. *See id.* For a discussion of the *MAI* case, permanence, and fixation, see generally Ira L. Brandriss, *Writing in Frost on a Window Pane: E-Mail and Chatting on RAM and Copyright Fixation*, 43 J. COPYRIGHT SOC’Y U.S.A. 237 (1996).

172. Hubanov, *supra* note 158, at 118.

173. *See* 17 U.S.C. § 101; *supra* Part II.A.2.d.

174. *See supra* Part II.A.2.d.

175. 17 U.S.C. § 101 (emphasis added).

176. Declaration of David Nimmer, *supra* note 11, ¶ 36.

177. *Id.* ¶ 38 (“For each of us, our own bodies are of supreme worth, making any artwork that a person might happen to own pale into significance by comparison.”).

178. *See id.* ¶ 39.

179. *See* 17 U.S.C. § 101.

180. *See supra* Part II.A.2.d.

181. *See Esquire, Inc. v. Ringer*, 591 F.2d 796, 798 (D.C. Cir. 1978).

door light fixtures were ineligible for copyright because they “did not contain ‘elements, either alone or in combination, which are capable of independent existence . . . apart from the utilitarian aspect.’”<sup>182</sup> Effectively, this narrow approach—which sought “to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design”<sup>183</sup>—implies that the artistic element must be *physically removable* from the article in order for it to be copyrightable.<sup>184</sup>

The defendants in *Whitmill* utilize the *Esquire* approach, arguing that because a tattoo is incapable of being physically separated from the human flesh without “painful laser treatment or skin grafting,” and it would completely cease to exist in any form once removed, it is not physically separable and thus not copyrightable.<sup>185</sup> If the actual, tangible ability to separate the artistic elements from the utilitarian elements is the standard intended in *Esquire*, then the *Whitmill* defendants appear to be correct in their conclusion.<sup>186</sup>

In contrast, it could also be argued that the court in *Esquire* was misapplying congressional intent—the court takes the concept of separability to an unintended extreme. Congress, in its discussion of utilitarian articles and copyright protection which led to the adoption of § 101 of the Copyright Act, asserted that “[u]nless [a utilitarian item] contains some element that, physically or conceptually, *can be identified* as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.”<sup>187</sup> Even though *Esquire* was decided before the enactment of the Act, the court makes a point of taking guidance from the House Report for the 1976 Act, and the court relies on this precise quote.<sup>188</sup> The words “can be identified” are of importance here—Congress did not say the artistic elements “must be separable” or must be removable, but focused their analysis on the ability of the viewer to *identify* a separation—not being able to physically accomplish one.<sup>189</sup>

Perhaps most illustrative of the *Esquire* court’s misinterpretation of the law are the examples Congress gives of utilitarian articles in which the artistic element would receive copyright protection: “[A] carving on the back of a chair or a floral relief design on silver flatware.”<sup>190</sup> Like a tattoo, a carving adorning a chair cannot necessarily be physically separated from the utilitarian portion—the chair—without destroying the artwork (and perhaps the chair as well). Nevertheless, Congress uses this particularly relevant example to show that an inability to separate the art

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182. *Id.* at 798–99.

183. *Id.* at 803 (quoting H.R. REP. NO. 94-1476, at 55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5668–69) (internal quotation marks omitted).

184. *See id.*; LEAFFER, *supra* note 12, at 122.

185. Def. Memo in Opposition, *supra* note 11, at 17–18.

186. *See id.*

187. H.R. REP. NO. 94-1476, at 55 (emphasis added).

188. *Esquire*, 591 F.2d at 803.

189. *See* H.R. REP. NO. 94-1476, at 55; *Esquire*, 591 F.2d at 802.

190. H.R. REP. NO. 94-1476, at 55.

physically does not mean that copyright protection should be per se denied—it is still rather obvious to the observer where the art ends and the utility begins.<sup>191</sup>

This apparent discrepancy likely stemmed from the *Esquire* court's refusal to adopt the theory of conceptual separability that Congress suggested as operating alongside physical separability.<sup>192</sup> While tattoos applied to human skin may have a great deal of difficulty gaining copyright protection under a physical separability standard, the majority view adopts the standard which the *Esquire* court disregarded—the theory of conceptual separability.<sup>193</sup>

The theory of conceptual separability and supporting case law applies much more neatly to tattoos than the theory of physical separability.<sup>194</sup> It establishes a more cognizable separation between artistic and utilitarian functions and thus better supports copyrightability.<sup>195</sup> The most current case forwarding and defining this theory is *Pivot Point*, discussed briefly above in Part II.A.2.d.<sup>196</sup> *Pivot Point* asserts a very workable test for finding conceptual separability: “Conceptual separability exists, therefore, when the artistic aspects of an article can be ‘conceptualized as existing independently of their utilitarian function [*Barnhart*].’ This independence is necessarily informed by ‘whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences [*Brandir*].’”<sup>197</sup>

When applying this test to tattoos on human skin, it appears that they will successfully satisfy the criteria. While it may not be possible to *actually* remove a tattoo from human skin in a way that retains its form and artistic elements,<sup>198</sup> it is quite possible to *conceptually* separate it from the human form—and this is all that is required by the theory of conceptual separability forwarded in *Pivot Point*.<sup>199</sup>

The first portion of the *Pivot Point* inquiry, “[c]onceptual separability exists . . . when the artistic aspects of an article can be ‘conceptualized as existing independently of their utilitarian function,’”<sup>200</sup> would seem to

191. For a discussion of the inadequacies of the “physical separability” approach furthered by *Esquire*, see LEAFFER, *supra* note 12, at 122 (“Physical separability, as adopted by *Esquire*, has been largely rejected by both courts and commentators as being contrary to the intent of Congress.”); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3] (2012) (pointing out that only a very small number of objects could pass the *Esquire* physical separability test).

192. See LEAFFER, *supra* note 12, at 121 (“[T]he court refused to apply the other aspect of the conceptual separability test suggested by the House Report”).

193. *Id.* at 121–22.

194. See generally COHEN, *supra* note 36, at 196–207 (elaborating on the theories of physical separability and conceptual separability).

195. See *id.*

196. See *supra* Part II.A.2.d.

197. *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 372 F.3d 913, 931 (7th Cir. 2004) (quoting *Carol Barnhart, Inc. v. Econ. Cover Corp.*, 773 F.2d 411, 418 (2d Cir. 1985) and *Brandir Int'l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987)).

198. See *supra* notes 185–86 and accompanying text.

199. See *Pivot Point*, 372 F.3d at 931.

200. *Id.* (quoting *Carol Barnhart*, 773 F.2d at 418).

lead to a sensible result regarding tattoos—one can certainly imagine a human being operating in an identical manner in everyday life with or without the existence of a tattoo.

In fact, when considering the scope of utilitarian functions that the average person performs on a daily basis, it is difficult to imagine even one function that a tattoo would assist or facilitate in any way. This is largely due to the fact that a tattoo recipient will generally have lived a long and functional life prior to receiving the tattoo, and she will go about functioning in the same manner after the tattoo is applied, regardless of the new ink etched on her skin. This before-and-after comparison makes the first portion of the *Pivot Point* test an easy standard to satisfy.<sup>201</sup>

Particularly illustrative of this analysis is a quote forwarded by the court in *Carol Barnhart* discussing the copyrightability of unique belt buckles: “[T]he ornamented surfaces of the buckles were not in any respect required by the utilitarian functions; the artistic and aesthetic features could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article.”<sup>202</sup> Similarly, an individual’s tattoo is certainly not required for a human’s utilitarian functions. It is most logical to view that tattoo as having been “superimposed upon” the human form, the epitome of a stand-alone useful article.<sup>203</sup>

Similarly, the second portion of the *Pivot Point* inquiry, “[t]his independence is necessarily informed by ‘whether the design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences,’” is easily satisfied when considering the nature of tattoos and the human form.<sup>204</sup> This is because, in this scenario, the tattoo artist had no part in designing, developing, or creating the useful article itself.<sup>205</sup>

*Brandir* provides a demonstrative example—in that case, copyright of a bicycle rack was denied where the author had designed the *entire* bike rack.<sup>206</sup> This meant that the author was responsible for the totality of the rack’s purposes—both utilitarian and artistic.<sup>207</sup> Thus, *Brandir* was contingent in part on the ability of an observer to identify a point where author intent changed from functional concerns to aesthetic concerns.<sup>208</sup>

When we apply this logic to tattoos placed on human skin, we find that the designer’s artistic judgment is a non-issue. Unlike the bicycle rack in *Brandir*, the designer had no part in creating the utilitarian as-

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201. See *id.*

202. *Carol Barnhart*, 773 F.2d at 419 (emphasis added).

203. *Id.*

204. *Pivot Point*, 372 F.3d at 931 (quoting *Brandir Int’l v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987)).

205. See *id.* (citing *Brandir*, 834 F.2d at 1147).

206. See generally *Brandir*, 834 F.2d at 1146 (discussing copyright of a bike rack that was designed, in its entirety, by a single “author”).

207. See *id.* at 1147.

208. *Id.* at 1145.



pects of the tattooed person—the useful article, the human, existed prior to tattoo application.<sup>209</sup> Therefore, we need not question the independence of the author’s artistic judgment. Because the author had no part in the creation of the utilitarian aspects of this work, design elements and functional influences are inherently independent of one another.

Overall, it appears that a court applying the conceptual separability test to a tattoo originally created on human skin would conclusively find separability, thus solving the useful article dilemma. Nevertheless, despite the fact that conceptual separability is the more logical and widely used standard, it is worth noting that for policy reasons (largely rooted in Thirteenth Amendment concerns), a court may decline to apply conceptual separability and utilize the physical separability standard to ensure that tattoos on human skin are denied copyright protection.<sup>210</sup> These implications are addressed in Part IV below.<sup>211</sup>

#### 4. *Possible Forms of Authorship for a Conclusively Copyrighted Tattoo*

Because it has been established that tattoos can satisfy the three requirements of copyrightability (“[1] original [2] works of authorship [3] fixed in any tangible medium of expression”)<sup>212</sup>, the analysis must shift to the forms of authorship. As discussed in Part II.A.2.b, there are two types of authorship relevant when considering the relationship between tattoo artist and tattoo recipient—“sole authorship” and “work made for hire” authorship.<sup>213</sup>

In a “sole authorship” situation, the tattoo artist would be regarded as the only author, and thus the only person invested with the vast rights enumerated in the Act.<sup>214</sup> In contrast, in a “work made for hire” authorship situation, the analysis assumes that a tattoo recipient is commissioning the tattoo artist to create a work for her.<sup>215</sup> Therefore, in a scenario where the tattoo recipient commissions a tattoo, memorialized in a written agreement and delivered by the artist, the tattoo *recipient*—not the artist—would be the author for purposes of copyright protection.<sup>216</sup>

If a work made for hire were to exist, it must exist under the second subset of the work made for hire doctrine.<sup>217</sup> Under current copyright law, this is problematic—in the independent contractor context, only the specific works that are enumerated in the Act can be works made for

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209. *See id.*

210. Declaration of David Nimmer, *supra* note 11, ¶ 45 (“As applied to tattoos, the only legally cognizable result is to apply the strict requirement of physical separability. Such a construction is necessary to avoid the constitutional infirmity that would arise if the Copyright Act attempted to set at naught the Thirteenth Amendment’s prohibition of badges of slavery.”).

211. *See infra* Part IV.

212. 17 U.S.C. § 102(a) (2006).

213. *See supra* Part II.A.2.b.

214. *See supra* Part II.A.2.b.i.

215. *See* 17 U.S.C. § 101.

216. *Id.* § 201(b).

217. *See id.* § 101.

hire, and tattoos (or anything remotely comparable) are not currently included.<sup>218</sup>

While it appears that tattoos have a solid category in the Act as a “work of authorship,”<sup>219</sup> each type of authorship involved—whether it be a “sole author” or a “work made for hire” author (if it is assumed tattoos can fall into the second category, for the sake of analysis)—carries with it distinguishable pros and cons in this context. These are discussed in the Resolution in Part IV.<sup>220</sup>

### *B. Should Tattoos Be Eligible for Copyright Protection?*

As discussed above in Part III.A, it appears that when we apply the criteria for originality, work of authorship, and fixation, a court could logically find that tattoos are proper “pictorial, graphic, [or] sculptural works” to be afforded copyright protection.<sup>221</sup> Indeed, it even appears that the useful article dilemma associated with this category of works is properly reconciled.<sup>222</sup>

While it seems that copyright protection *can* logically be extended to tattoos, this is an entirely different question than whether or not copyright protection *should* be extended to tattoos. The following Subsections tackle this very issue. First, Subsection 1 discusses legislative intent, defining how courts should decide whether or not something qualifies as “art.” Subsection 1 then goes on to discuss tattoos as an art form, investigating social and historical viewpoints on this genre as a whole and in the context of the art world. Lastly, Subsection 2 enumerates the potential negative consequences that would accompany copyright extension to tattoos.

#### *1. Tattoos As an Art Form*

The United States Constitution delineates the purpose of copyright protection as “promot[ing] the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>223</sup> Those scholars and professionals who support copyright protection for tattoos do not delve into the merits of artistic worth; rather, they seem to accept the artistic worth of tattoos as an affirmative underlying assumption upon which copy-

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218. *Id.* (defining a work made for hire in the independent contractor context only as “a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas”).

219. *See supra* Part III.A.2.

220. *See infra* Part IV.

221. 17 U.S.C. § 101 (internal quotation marks omitted); *see supra* Part III.A.

222. *See supra* notes 198–211 and accompanying text.

223. U.S. CONST. art. I, § 8, cl. 8.

rightability is based.<sup>224</sup> Thus, while it appears that tattoos may be a legitimate subject of copyright protection, it is necessary to evaluate them as a form of artistic expression to assure that they indeed qualify as a form of “useful Art” as envisioned by the drafters of the Constitution.

As Justice Holmes professed in *Bleistein v. Donaldson Lithographing Co.*,

[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . [I]f they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and *the taste of any public is not to be treated with contempt.*<sup>225</sup>

Justice Holmes’s opinion in this early case not only set the stage for a more liberal application of the Copyright Clause of the Constitution, but also expressly makes the point that a court is to defer to the artistic values of the *public* rather than the artistic values of any particular legal professional or standard.<sup>226</sup> Thus, the appropriate lens with which to evaluate tattoos’ artistic worth is one of historical perspective and community value and not necessarily one of legislative history or judicial precedent.<sup>227</sup>

Unsurprisingly, those who have viewed tattoos from a historical perspective regard the practice as both culturally and artistically valuable.<sup>228</sup> The practice of tattooing can be traced as far back in history as the Stone Age (approximately 6000 B.C.), as various European and Egyptian artifacts from this era have been found bearing symbols and markings that suggest use of tattoos.<sup>229</sup> As the practice of tattooing spread to other regions of the world, uses of tattoos became incredibly varied, from decoration and artistic expression, to tribal rank symbolization, and even religious and magical utilization.<sup>230</sup> Some cultures even found it prudent to apply intricate, individualized tattoos as a form of

224. See Cotter & Mirabole, *supra* note 150, at 103–17; Harkins, *supra* note 69, at 318–22; McNary, *supra* note 15 (asserting, regarding the *Whitmill* case, that Mr. Whitmill had “a strong likelihood of success in his claim” and also that “[o]f course tattoos can be copyrighted. I don’t think there is any reasonable dispute about that.” (quoting U.S. District Judge Catherine D. Perry)).

225. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (emphasis added).

226. See *id.*

227. *Id.* at 251.

228. JOHN A. RUSH, *SPIRITUAL TATTOO: A CULTURAL HISTORY OF TATTOOING, PIERCING, SCARIFICATION, BRANDING, AND IMPLANTS* 225 (2005) (“[B]ody modifications of the nature outlined in this work are a symbolic gesture for claiming and exhibiting information about the self and others, that is, one’s group, tribe, or nation. These are visual displays and are part of our . . . heritage, where we opted for visual and auditory displays . . . .”); see generally CLINTON R. SANDERS & D. ANGUS VAIL, *CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING* (rev. & expanded ed. 2008) (giving a book-length discussion of the historical, social, and artistic views of tattoos both in this country and throughout the world).

229. SANDERS & VAIL, *supra* note 228, at 9.

230. *Id.* at 10–11.

identification to be used as official signatures.<sup>231</sup>

When the practice of tattooing made it to the United States and the rest of the Western world in the late nineteenth century, it was accepted with a great deal of prominence and popularity in the American upper class.<sup>232</sup> Nonetheless, this quickly changed in the early twentieth century as the practice came to be viewed as vulgar, unsavory, and disreputable.<sup>233</sup> The same U.S. elite who had regarded the practice as sophisticated not long before had completely changed its opinion, effectively driving tattoos into the underbelly of society by the 1920s.<sup>234</sup>

Until the mid-1960s, tattoos were practiced almost entirely separate from the institution of the professional art world, regarded largely as “crude and highly conventionalized” and reflecting a socially deviant and marginal audience.<sup>235</sup> Yet the last few decades have brought about significant changes in the way tattoos are regarded, as well as in the caliber of work being created.<sup>236</sup> Increasingly, tattoo artists are emerging with university backgrounds, art school backgrounds, or both, using this career path as a form of creative artistic expression.<sup>237</sup>

The art world has recently started to notice the artistic value of tattoos—the designs are making more and more appearances in gallery shows, art museums, and as the topic of discussion of agents, critics, and academics.<sup>238</sup> For instance, in recent years, entire museum exhibits<sup>239</sup>—and even entire museums<sup>240</sup>—that are dedicated exclusively to tattoos have opened to the public. In addition, prestigious academic establishments have begun to recognize the artistic value of tattoos and other body art.<sup>241</sup>

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231. *See id.* at 10.

232. ALBERT PARRY, *TATTOO: SECRETS OF A STRANGE ART AS PRACTISED AMONG THE NATIVES OF THE UNITED STATES* 103 (1933).

233. SANDERS & VAIL, *supra* note 228, at 17.

234. *Id.* at 18.

235. *Id.* at 18–19.

236. *Id.* at 19. *See generally* MARGOT MIFFLIN, *BODIES OF SUBVERSION: A SECRET HISTORY OF WOMEN AND TATTOO* (1997) (discussing tattoos and their development as reputable artistic expression in the United States in recent decades).

237. SANDERS & VAIL, *supra* note 228, at 19 (“[T]he younger artists emphasize creative over economic values, specialize in custom designed—commonly large-scale—tattoos . . . . Congruent with their background and aesthetic orientations, the new tattoo artists draw images from diverse artistic sources.”).

238. *Id.* “The tattooists, as a consequence, profit as their work comes to look like art, is displayed like art, is discussed like art, and is bought and sold as art.” *Id.* at 19–20.

239. *See, e.g., Skin Deep—The Tattoo Exhibition*, ROYAL MUSEUMS GREENWICH, <http://www.rmg.co.uk/visit/exhibitions/past/skin-deep-the-tattoo-exhibition> (last visited Dec. 2, 2012) (“The exhibition brought together a fascinating range of objects to illuminate the development and diversity of tattooing over the past 200 years.”).

240. *See, e.g.,* Ivan Quintanilla, *Tattoos Through Time: A New Museum for Amsterdam*, N.Y. TIMES (Jan. 10, 2012, 6:00 AM), <http://intransit.blogs.nytimes.com/2012/01/10/tattoos-through-time-a-new-museum-for-amsterdam/> (discussing the recent opening of a museum in Amsterdam dedicated entirely to tattoos).

241. *See, e.g.,* SANDERS & VAIL, *supra* note 228, at 159–60 (“A major legitimating event took place in 1983 when the art history department and the Museum of Cultural History at UCLA sponsored an ‘Art of the Body’ symposium . . . .”).

Taking historical and current attitudes into consideration, it appears that the trend is toward acceptance of tattoos as a legitimate art form with growing support from society as a whole. Unlike other more established art forms, however, tattooing still retains some level of stigma as a deviant activity, due largely to its negative history of introduction in the Western world, its unique (and sometimes regarded as distasteful) application process, and its unconventional medium of expression.<sup>242</sup> It is suggested that these are stigmas that the tattoo world must overcome before it can be regarded as a truly legitimate art form.<sup>243</sup>

While there may be merit to this argument of deviancy, a look at the history and current treatment of tattoos as a whole still overwhelmingly lends itself to the conclusion that tattoos deserve recognition as “useful Art” within the meaning of the Constitution.<sup>244</sup> To reiterate Justice Holmes’s guiding words from *Bleistein*, legal professionals are in no place to determine whether or not something is art—these individuals must defer to the public opinion.<sup>245</sup>

It follows, then, that lawmakers should defer to the communities that have increasingly recognized the artistic potential of tattoos over the past fifty years. The growing number of artists with higher education, public and academic notoriety, museum and gallery exposure, and general positive opinions, is evidence of a growing acceptance of tattoos as art.<sup>246</sup> As society values the artistic significance of tattoos, so too should the law, by giving these artists the constitutionally guaranteed benefits derived from “promot[ing] the Progress of . . . [these] useful Arts.”<sup>247</sup>

## 2. *The Negative Consequences of Copyright Protection for Tattoos*

The positive effects of extending copyright protection to tattoos are relatively straightforward. Protection would extend the benefits that authors of a vast variety of other works currently enjoy—namely, the incentive for continued artistic expression and creation.<sup>248</sup> Because works of this sort have a very low copying-to-creating cost ratio, authors will be unwilling to burden themselves with producing creative works without an institution in place to ensure that their work will not be unrestrictedly reproduced and that the author will receive the appropriate recognition.<sup>249</sup>

While tattoo artists, and society in general, will benefit from this

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242. *Id.* at 157–58.

243. *Id.* at 157. For examples of how the media has negatively shaped the perception of tattoos, see *id.* at 216 n.5.

244. See U.S. CONST. art. I, § 8, cl. 8.

245. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

246. See *supra* notes 236–41 and accompanying text.

247. U.S. CONST. art. I, § 8, cl. 8.

248. See Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 220–21.

249. See *id.* at 220–22.

very incentive for creation that they would receive as a part of copyright extension, the inquiry is not this simple. As alluded to in Part III.A.3.b above, the human form is far from a traditional medium of expression,<sup>250</sup> and extending the protections and rights that the Copyright Act guarantees to authors<sup>251</sup> creates a host of unique issues when a human being is involved.

The potential conflict between the rights of the author and the basic human rights of the recipient is problematic to say the least. Professor Nimmer, commenting passionately on human beings as the subject of copyright protection, once professed “[h]opefully, any court presented with such an obscene claim would dismiss it summarily, if on no other basis than the constitutional prohibition on involuntary servitude and other badges of slavery.”<sup>252</sup> The Subsections below address the most pervasive issues that would arise upon extension of this protection—those stemming from tattoo removal, tattoo alteration, and tattoo display.<sup>253</sup>

a. Tattoo Removal, Tattoo Alteration, and the Author’s Rights to Prevent Destruction and Modification

As discussed in Part II.A.2.b.i above, the author of a work of visual art is entitled “to prevent any intentional distortion, mutilation, or other modification . . . and to prevent any [intentional or grossly negligent] destruction” of that work following the Visual Artists Rights Act of 1990.<sup>254</sup> If copyright protection were extended to tattoos, what would happen if the recipient wants to remove or alter a tattoo on her body? The language of § 106A seems to suggest that a court could order the individual not to remove the tattoo, or even order the individual to receive laser removal of alterations or modifications made to it.<sup>255</sup>

These scenarios and the human rights implications that stem from them are a large part of what Professor Nimmer feared when he concluded that copyright protection is inappropriate for the world of tattoos.<sup>256</sup> The core issue here is that copyright protection effectively becomes a means for the control of a person through an author’s ability to control what a person may permanently etch or remove from her skin.<sup>257</sup> This result runs dangerously afoul of the Thirteenth Amendment of the

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250. See *supra* Part III.A.3.b (discussing tattoos originally created on the human skin and the useful article dilemma).

251. See 17 U.S.C. §§ 106, 106A (2006).

252. David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 29 (2001).

253. See *infra* Parts III.B.2.a–b. For commentary on the most pervasive issues regarding copyright protection for tattoos, there is a podcast that discusses these issues in the context of the *Whitmill* case. See Jay Kesan, *Tattoo Rights: The Artist or the Body?*, ILLINOIS PUBLIC MEDIA (Jun. 13, 2011), <http://audio01.will.illinois.edu/legal110613.mp3>.

254. 17 U.S.C. § 106A(a)(3)(A)–(B); see also *supra* Part II.A.2.b.i.

255. See 17 U.S.C. § 106A(a)(3)(A)–(B).

256. Declaration of David Nimmer, *supra* note 11, ¶¶ 47–48.

257. See *id.* ¶¶ 45–48; see also Def. Memo in Opposition, *supra* note 11, at 13–15.

Constitution, as well as basic notions of human dignity and independence.<sup>258</sup> Following the generally recognized idea that no law should be construed in a way that leads to unintended or absurd results,<sup>259</sup> in a society which values individual freedoms and human rights above all else, this potential harm to human rights could prove fatal when deciding whether or not to extend copyright protection to tattoos.

As discussed briefly in Part III.A.3.a–b above, it is important to note that the issues of tattoo removal and alteration apply only to tattoos created originally on the human skin (as opposed to those which were fixed elsewhere initially).<sup>260</sup> A human being who does not have the original tattoo affixed on her skin, but merely has a purchased copy of something created on a separate medium first, is analogous to the purchaser of a best-selling novel—copies can be transferred, drawn on, destroyed, and so on, without adversely affecting the copyright owner’s rights.<sup>261</sup> These principles are implicit in the “first sale” doctrine, which provides that the purchaser of a lawfully made copy gains the rights to alienate, abandon, and generally control that copy.<sup>262</sup> As a result, copyright protection in the original work will subsist regardless of what happens to the purchased copy, as long as the copyholder is not attempting to create a derivative work or in some way profit from the removal or alteration.<sup>263</sup>

#### b. Display Rights and Control Over the Person

The Copyright Act also specifically confers upon a copyright holder affirmative display rights: “[T]he owner of copyright under this title has the exclusive right[] to . . . display [or authorize the display of] the copyrighted work publicly.”<sup>264</sup> If copyright protection were extended to tattoos, what would happen when an individual, adorned with a tattoo, appears on television, in a magazine, or at a public venue? The language of the Act seems to suggest that the tattoo artist may legally prohibit that person from making the public appearance, or at least compel her to cover up the portion of her body displaying the tattoo.<sup>265</sup>

Similar to the issues of tattoo alteration and tattoo removal discussed in Part III.B.2.a above,<sup>266</sup> the potential for an artist to control a person’s public appearances and activities is all too harmful to the ideals

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258. See U.S. CONST. amend. XIII.

259. See, e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 453–55 (1989); *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

260. See *supra* Part III.A.3.a–b.

261. See SCHECHTER & THOMAS, *supra* note 158, at 27. This assertion assumes that an individual is not attempting to make a derivative work, or in some way exploit the underlying work as her own, through her modification.

262. 17 U.S.C. § 109(a) (2006); see also HAZARD, *supra* note 126; *supra* notes 124–27 and accompanying text.

263. See SCHECHTER & THOMAS, *supra* note 158, at 27–28.

264. 17 U.S.C. § 106(5); see also *supra* Part II.A.2.b.i.

265. See 17 U.S.C. § 106(5).

266. See *supra* Part III.B.2.a.

of individual autonomy and freedom.<sup>267</sup> Indeed, Professor Nimmer also addressed display rights when expressing his concerns in the *Whitmill* case.<sup>268</sup>

It is important to note that the issue of display rights may differ from the issues of tattoo alteration and tattoo removal.<sup>269</sup> An author's display rights are subject to an important limitation regarding copies of the original work found in § 109(c) of the Act. Section 109(c) professes that "the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly . . . to viewers present at the place where the copy is located."<sup>270</sup> The language "the owner of a particular copy" implies that display rights attach not only to the original work, but also to any lawfully owned copy of that original<sup>271</sup>—or, in the tattoo realm, to both a work that was first created on the human form (where the recipient is adorned with the original) and a work first created elsewhere (where the recipient is adorned with a *copy* of the original).<sup>272</sup>

Section 109(c) clarifies that display rights apply to both originals and copies; but, upon investigation of this Section's language, one learns that owners of legitimate copies of works also have *their own* set of display rights free from interference by the author.<sup>273</sup> Such an owner can display her copy "to viewers present at the place where the copy is located."<sup>274</sup> Because the intention of copyright law is to prohibit any type of display which may negatively impact the copyright owner's market for reproduction and circulation,<sup>275</sup> a copy owner's display rights are effectively limited by § 109(c) to direct displays, or indirect displays where observers are "present at the place where the copy is located"—generally meaning only live or on-site projected displays.<sup>276</sup> Thus, while this portion of the Act empowers the owner of a copy with a great deal of display rights, it also limits them. Impermissible public display for the owner of a copy would include transmission or communication to a viewer not in

267. See U.S. CONST. amend. XIII; Nimmer, *supra* note 252, at 29–30.

268. See Declaration of David Nimmer, *supra* note 11, ¶¶ 45–48; see also Def. Memo in Opposition, *supra* note 11, at 13–15.

269. See *supra* Part III.A.3.a–b.

270. 17 U.S.C. § 109(c).

271. *Id.* This is the law despite the provisions of the "first sale" doctrine, which, on its face, seems to allow display of lawfully purchased copies. See *id.* § 109(a).

272. See *supra* Part III.A.3.a–b.

273. See 17 U.S.C. § 109(c).

274. *Id.* (emphasis added); see also 2 JOHN GLADSTONE MILLS III ET AL., PATENT LAW FUNDAMENTALS: COMPARISON AND CONTRAST OF TRADE SECRETS, TRADEMARKS, AND COPYRIGHTS WITH PATENTS § 6:121 (2d ed. 2012) ("The exclusive right to display is not applicable against the owner of the 'original' or owners of authorized copies, who have the right to display, publicly or otherwise, the chattels they own.").

275. H.R. REP. NO. 94-1476, at 80 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 93–94.

276. 17 U.S.C. § 109(c); see also SCHECHTER & THOMAS, *supra* note 158, at 137–38; Lyras, *supra* note 126, at 169.



the same *physical* setting as that copy.<sup>277</sup>

Thus, a television broadcast, radio transmission, and any other means of multi-locational communication is not covered under § 109(c).<sup>278</sup> It follows, then, that while a tattoo recipient may be able to avoid individual autonomy constraints in some cases of public display, there is no legal protection for this person's television appearance and the like.

Copyright infringement through unauthorized display of a work in a public forum is not an issue unique to tattoos—any use of a sculpture, book, painting, poster, etc., in even the *background* of a production creates a danger that the displayer is infringing an author's rights.<sup>279</sup> While the implications of displaying a non-living painting in a public forum are not nearly as alarming as those of displaying a human being—whose career, livelihood, and liberty may be at stake<sup>280</sup>—they are certainly analogous.

Because this danger exists for all other copyrightable works, there is nothing that objectively suggests the same implications will not exist if tattoos were the subject of copyright protection.<sup>281</sup> Therefore, the human rights concerns are no less significant when considering these § 109(c) limitations.<sup>282</sup> The scope has merely been narrowed, but it has in no way been eliminated.

### C. Summary

Before proceeding to the Resolution, it is helpful to briefly reiterate the main conclusions reached in the Analysis above. First, it appears that tattoos are fully capable of satisfying the Act's requirements of originality, fixation, and authorship.<sup>283</sup> Thus, as long as a particular tattoo meets these threshold requirements, it can be conclusively copyrighted. This is true regardless if the tattoo is first created on the human skin—in which case it is also highly likely that the tattoo will meet the conceptual sepa-

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277. *Id.*

278. *Id.* at 178–80; see, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 157–58 (1975) (discussing how a broadcast of music by a commercial radio station is a “public performance of that composition for profit—and thus an infringement of the copyright if not licensed”).

279. *Lyras*, *supra* note 126, at 159.

280. It is easy to envision a scenario where an actor, whose career is based on her ability to perform in public venues, may jeopardize her career by getting a tattoo. Because a production studio may seek to avoid any infringement suits, it is likely that they will err on the side of caution when selecting actors, pushing the tattooed actress to the bottom of the hiring pool, regardless of fit or talent. This trend can already be seen with producers and currently copyrighted works:

[M]any producers choose to err on the side of caution by ‘clearing’ (getting authority) and crediting everything they use, or, if clearance is impractical, by not using the work. . . . Often the effort and expense of obtaining clearance and authority, or alternatively, the prospect of costly and lengthy litigation if the work is used without approval, results in removal of the object of debate.

*Id.* at 159–60.

281. See 17 U.S.C. § 106(5) (2006); *Lyras*, *supra* note 126, at 168–70.

282. See 17 U.S.C. § 109(c).

283. See *supra* Part III.A.1–3.

rability standard for useful articles—or if it is first created on some other medium.<sup>284</sup> Second, there are two types of authorship scenarios that may be applicable for tattoos—a traditional “sole authorship” situation or a “work made for hire” authorship situation.<sup>285</sup> Third, it appears that, given history and current social attitudes, courts would accept tattoos as a legitimate art form worthy of protection by the Constitution.<sup>286</sup>

Lastly, there are complex human rights concerns that must be considered when applying copyright protection to tattoos. Regarding a tattoo initially created on the human skin, tattoo alteration, removal, and display create such concerns.<sup>287</sup> Where a tattoo was initially created separate from the human skin, most human rights concerns are eliminated, but tattoo display still causes issues of this sort.<sup>288</sup> The following Resolution synthesizes all of these points, formulating a workable and reasonable solution while considering all competing interests.

#### IV. RESOLUTION

This Resolution proposes two separate procedures for extending copyright protection to tattoos based on location of the initial fixation. Section B proposes the treatment for a tattoo *initially created on the human skin*. This Section classifies this type of tattoo as a modified work made for hire, requiring an addition of language to the Act itself and a waiver of the general writing requirements. Section C proposes the treatment for a tattoo *initially created separate from the human skin*. This Section classifies this type of tattoo as a traditional “sole authorship” work and employs the fair use doctrine to remedy individual autonomy concerns while ensuring proper fairness to the author.

Overall, it is important to note that both procedures assume that the actual *substance* of the tattoo satisfies the foundational requirements of originality, fixation, and work of authorship.<sup>289</sup> In addition, both procedures assume application of the much more widely accepted conceptual separability standard for useful articles.<sup>290</sup> Before delving into the discussion of these procedures, Section A briefly elaborates on the overarching goals of this Resolution. This Part then goes on to distinguish the two applicable tattoo fixation scenarios in order to provide a helpful lens through which to view the copyright procedures themselves.

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284. See *supra* Part III.A.3.a–b.

285. See *supra* Part III.A.4.

286. See *supra* Part III.B.1.

287. See *supra* Part III.B.2.

288. See *supra* Part III.B.2.b.

289. See *supra* Part II.A.2.a–c; see also 17 U.S.C. § 101 (2006) (providing definitions for key words in the Act).

290. See *supra* Part II.A.2.d.

*A. Foundation of the Proposed Dual Procedure System*

The purpose of this Resolution is to strike a proper balance between competing policy goals: (1) recognizing the artistic value of tattoos by properly encouraging their continued expression through copyright protection, and (2) preserving and emphasizing the individual autonomy and personal freedom ingrained in the Thirteenth Amendment and our society as a whole. While this task requires some reconstruction of current copyright doctrine, it is not necessarily the farfetched, unachievable task that Professor Nimmer suggested it was when commenting on the *Whitmill* case.<sup>291</sup>

Two separate procedures are most appropriate in this situation because the type of medium initially used dictates the nature of the work, and thus, the concerns that follow. First, as discussed above in Part III.A.3.b, a tattoo originally created on human skin presents some complex problems.<sup>292</sup> Because the original work is embodied on someone's flesh, and not on a separate non-living medium first, important human rights issues surface regarding tattoo alteration, removal, and display.<sup>293</sup> This is because this particular tattoo is an *original* and not a later-created copy covered by the "first sale" doctrine.<sup>294</sup> So, any change to that person's tattoo effectively changes an original, and heavily protected, work of art.

The second, and likely more common scenario for tattoo application, is one in which a tattoo recipient solicits the tattoo artist to sketch a tattoo before applying it, or picks a tattoo from a book of art already created by the artist. This is also the more appropriate route for tattoo artists who, assuming existence of the scheme discussed in Part IV.B below, want to retain author's rights over the tattoo and, thus, want to avoid a work made for hire relationship.<sup>295</sup>

As discussed in Part III.A.3.a above, a tattoo initially created separate from the human skin is potentially simpler in terms of balancing the artist's and recipient's various interests.<sup>296</sup> Because the tattoo existed in a nonliving medium originally, the tattoo recipient is merely purchasing a lawful copy of an already-existing work, which is accordingly covered by the "first sale" doctrine.<sup>297</sup> Therefore, a tattoo recipient in this scenario generally has fewer legal implications to worry about—she can enjoy more general freedoms as the purchaser of a copy than the purchaser of an original work could.<sup>298</sup> But this is not to suggest that a tattoo recipient

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291. See Declaration of David Nimmer, *supra* note 11, ¶¶ 45–48.

292. See *supra* Part III.A.3.b.

293. See *supra* Part III.B.2.

294. See 17 U.S.C. § 109(a); *supra* notes 124–27 and accompanying text.

295. See *infra* Part IV.B.

296. See *supra* Part III.A.3.a.

297. See *supra* notes 260–63 and accompanying text; see also 17 U.S.C. § 109(a); SCHECHTER & THOMAS, *supra* note 158, at 27–28.

298. See *supra* notes 269–71 and accompanying text.

in this scenario is free from any human rights implications, as the author's display rights still present such concerns.<sup>299</sup>

*B. Appropriate Treatment of a Tattoo Originally Created on the Human Skin*

The appropriate procedure that should be implemented for extending copyright protection to a *tattoo originally created on human skin* is to (1) classify it as a work made for hire under the second subset of § 101 of the Act (which covers the “independent contractor” type relationship), (2) add the explicit category “tattoo originally created on the human skin” to the relevant portion of the work made for hire definition, and (3) completely waive the general requirement that a work made for hire be memorialized in writing by both interested parties.<sup>300</sup>

Per prong (1) of this procedure, designating this type of tattoo as a work made for hire is most appropriate for two reasons. First, in a scenario where a tattoo recipient approaches a tattoo artist asking the artist to etch something freehand on her skin, and likely provides some general idea or vision, it is strongly analogous to that of a hiring party commissioning an independent contractor to create a work—the very situation envisioned in § 101 of the Act.<sup>301</sup> This is a much more logical conclusion than assuming an individual receiving a freehand tattoo is nothing more than a canvas, with no suggestions or input as to what is being etched, or even a choice as to whether or not to receive the tattoo in the first place.

Second, because classification as a work made for hire vests author's rights in the commissioner of the work rather than the actual creator (in this situation, the recipient and not the artist), any human rights implications are effectively eliminated.<sup>302</sup> The issue of an individual needing specific authorization to alter, remove, or display the tattoo publicly<sup>303</sup> becomes a moot point, as the author and the recipient are the same person.

Designating tattoos originally created on human skin as a work made for hire properly reconciles the human rights interests with positive protection interests. There are, however, two specific obstacles—reflected in prongs (2) and (3) of this procedure—that the law must overcome in order to offer this type of protection within the current statutory scheme. First, as discussed above, the current work made for hire definition in the Act only extends this status to nine itemized works, none of

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299. See *supra* Part III.B.2.b.

300. See 17 U.S.C. § 101.

301. See *id.*; SCHECHTER & THOMAS, *supra* note 158, at 98 (“[Regarding the work made for hire definition in § 101,] Congress meant to address the situation of the full-time or conventional employee in the first provision, and the situation of the independent contractor in the second.”).

302. 17 U.S.C. § 201(b) (“In the case of 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 . . . owns all of the rights comprised in the copyright.”); SCHECHTER, *supra* note 158, at 95.

303. See *supra* Part III.B.2.a–b; see also 17 U.S.C. §§ 106(5), 106A(a)(3)(A)–(B).

which are, or are analogous to, tattoos.<sup>304</sup> Thus, in order for protection of this sort to be achieved, a change in current legislation (which prong (2) seeks to effectuate) must occur. “Tattoos originally fixed on human skin” should be a new category added to paragraph (2) of the “work made for hire” portion of § 101 of the Act.<sup>305</sup>

This is not a completely implausible addition. It has been suggested that the current list of nine works included in the Act was not necessarily the result of specific strategy or purpose but rather, was the culmination of various industry representatives effectively persuading Congress to strike a compromise.<sup>306</sup> In addition, by effectuating this addition to § 101, Congress will strike the proper balance between affirmative copyright protection and preservation of human rights, a balance that is crucial to successful promotion of this genre of art.

Second, as discussed above, the work made for hire doctrine requires that an agreement to this effect be memorialized in writing.<sup>307</sup> Nevertheless, the human rights implications are too great to apply this language.<sup>308</sup> Under a “strict interpretation” regime, as seen in *Schiller & Schmidt, Inc. v. Nordisco Corp.*, the parties must memorialize their agreement in writing *before* application of the tattoo to the person.<sup>309</sup> If this is the interpretation applied to these types of tattoos, and a writing is inadvertently omitted, the recipient will be forced to exist as a mere canvas for the tattoo artist’s work. As a result, this artist will be able to control her alteration, removal, or display—the very involuntary control that this Resolution seeks to eliminate.

Even the relaxed approach found in *Playboy Enterprises, Inc. v. Dumas*, where the memorialized writing must simply be executed at some time—whether that be before or after application of the tattoo—does not completely eliminate human rights concerns.<sup>310</sup> While this approach greatly lowers the chances that a tattoo recipient will be caught in a life-altering predicament if a writing is not memorialized before tattoo application, it does not eliminate it. *Playboy* still requires that the agreement be discussed and written *at some point*.<sup>311</sup> Therefore, if an artist and recipient fail to discuss the “work made for hire” relationship at all, individual autonomy consequences would still be at issue—a risk that cannot, and should not, be taken.

Thus, prong (3) best effectuates the purpose of designating the tattoo a work made for hire in the first place, by carving out a special and

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304. 17 U.S.C. § 101; *see supra* notes 217–218 and accompanying text.

305. *See* 17 U.S.C. § 101.

306. *See* SCHECHTER & THOMAS, *supra* note 158, at 98 n.13.

307. 17 U.S.C. § 101; *see also supra* notes 71–73 and accompanying text.

308. *See* *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992) (holding that the parties must manifest a writing before the work is created).

309. *Id.*

310. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 559–60 (2d Cir. 1995) (stating that a post-creation written agreement is acceptable).

311. *Id.*

complete exception for this genre. If there is no writing required at all, the recipient does not risk receiving a tattoo and being caught up in an authorship dispute that could have grim, and entirely unconstitutional, consequences.

*C. Appropriate Treatment of a Tattoo Originally Created Separate from the Human Skin*

The appropriate procedure for extending copyright protection to a *tattoo originally created separate from the human skin* is (1) to extend copyright protection in the standard “sole authorship” scheme, and (2) to treat public display of the tattoo as a fair use, so long as the tattoo’s display is secondary to the recipient’s public appearance purposes.

Regarding prong (1), a work made for hire relationship simply does not exist because the work has been created prior to contact with the tattoo recipient. Because this is the case, it is necessary, and most appropriate, to default to the standard “artist as the sole author” scheme that governs the most basic copyright scenarios.<sup>312</sup> Therefore, unlike in a work made for hire setting, the tattoo *artist* possesses all the rights and privileges vested in an author.<sup>313</sup>

This scheme for tattoos originally created separate from the human skin successfully extends protection to tattoos while eliminating two of the troublesome human rights concerns. Even though the artist retains broad author’s rights here, the status of the tattoo as a purchased copy means that the recipient can freely remove or alter it, as long as she is not attempting to profit by creating a derivative work or the like.<sup>314</sup>

The human rights implications are not completely vanquished, as the recipient must still worry about violating the artist’s display rights.<sup>315</sup> As discussed in Part III.B.2.b above, an author’s display rights are more broad-based than the rights to prevent destruction or alteration and include several restrictions on the display of copies to the public by the copy owner.<sup>316</sup> The recipient of this type of tattoo is not exempt from complying with these display rights, nor is she free from falling victim to the potential individual autonomy consequences that can arise if this scenario is not addressed.

Prong (2) of the proposed procedure seeks to address this specific problem. Because the values of human dignity and individual autonomy are so firmly rooted in this nation’s core, a court would be acting inappropriately if it did not eliminate any potential for a tattoo artist to control a recipient’s public appearances *to any degree*. This is a freedom that

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312. See *supra* Part III.A.4.

313. See 17 U.S.C. §§ 106, 106A (2006).

314. See *supra* Part III.B.2.a.

315. See 17 U.S.C. § 106(5).

316. See *supra* Part III.B.2.b.

cannot logically be forgone under the Thirteenth Amendment.<sup>317</sup>

The most appropriate method for a court to combat this, as is utilized in prong (2), is to call any public appearance of any variety a fair use within the meaning of the Act.<sup>318</sup> As discussed in Part II.A.2.e above, the Copyright Act delineates four *nonexclusive* factors for courts to weigh when determining whether something qualifies as a fair use exempt from control by the author.<sup>319</sup> Prong (2) of the proposed procedure relies on the second factor in the fair use guidelines, “the nature of the copyrighted work,” to compel courts to find any public display of a tattoo by the recipient a fair use.<sup>320</sup>

Because the policy interest in preserving human autonomy is so great in comparison to display rights of an author, and because the “nature” of a tattoo originally created separate from the human skin is that of a piece of art affixed to a human being, this factor would clearly overshadow virtually every other prevailing interest.

In addition, prong (2) also explicitly qualifies the type of public display eligible for a fair use: “so long as the tattoo’s display is secondary to the recipient’s public appearance purposes.” This qualification is included for fairness reasons—while it is undoubtedly good public policy to eliminate a tattoo artist’s control over a recipient, that recipient should not be able to exploit this power. Thus, if a recipient were to go on television for the *specific purpose* of showcasing or discussing the tattoo, the recipient would still need to obtain express authorization by the author to do this.<sup>321</sup> This limitation still allows a person to appear publicly in whatever capacity she desires without unconstitutional restriction while preventing that person from exploiting the tattoo to the detriment of the author.

## V. CONCLUSION

“It is difficult to do much better than to state apodictically that a body, even as augmented, simply is not subject to copyright protection.”<sup>322</sup> The preceding quote, asserted by Professor Nimmer, implicitly communicates the virtually universal social values regarding individual autonomy and control of the person. It implies that there is no reasoning required, and no formula necessary, for society to simply *know* that humans are not to be owned in this, or any, manner. It is the utmost priority ingrained in this culture as a fact of our existence that is not up for debate.

What are we to do, then, with the unfortunate artist who chooses

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317. See U.S. CONST. amend. XIII.

318. See 17 U.S.C. § 107.

319. *Id.*; see also *supra* notes 115–23 and accompanying text.

320. 17 U.S.C. § 107.

321. See *id.* § 106(5).

322. Nimmer, *supra* note 252, at 30.

the human form as her canvas of choice? Does she not deserve some degree of protection for the works that she creates? The above Resolution reconciles the interests of a burgeoning and increasingly respected art form with the most basic and essential human interests. It does this by examining a body of law that was likely never anticipated to apply to humans in the first place. But, as the parties in *Whitmill* demonstrated, the actual need to apply the law in this fashion is not impossible, nor is it farfetched.

By balancing important social policy goals, the artist-recipient relationship, and the text of the law, a compromise that protects human rights while supporting tattoos as an artistic genre is indeed possible. By applying the above Resolution with a constant eye towards preserving individual autonomy, the tattoo community will grow in coming years to experience the same “promot[ion of] the Progress of . . . useful Arts” guaranteed by the Constitution to other types of artists for over two centuries.<sup>323</sup>

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323. U.S. CONST. art. I, § 8, cl. 8.