

# COPYRIGHT'S TRYST WITH TATTOOS: NAVIGATING ISSUES OF OWNERSHIP, BODILY AUTONOMY AND PUBLICITY RIGHTS

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## ABSTRACT

*Copyright law has never failed to modernize itself to meet the rapid pace of technological development and welcome into its fold, every new medium of expression. Yet, the conceptualization of the ancient art of tattoos as copyrightable works presents before it a daunting challenge involving the most unique medium ever encountered – the human body. The nature of tattoos creates a situation where the rights of the copyright owner stand heavily conflicted with the rights of the individual who forms the medium for these works. Confronted with this clash, academics have been forced to ask the question of whether tattoos should be granted copyright protection at all. This article explores the question of copyrightability of tattoos within the Indian legal regime. It analyzes the implications of the overlaps between the rights arising out of copyright, bodily autonomy and the right of publicity on celebrities engaged in the sports and entertainment industries. The author disagrees with the notion that copyright over tattoos must necessarily be denied in order to preserve an individual's autonomy. Arguing in favour of a schematic division of rights between the tattoo artist and the individual bearing the tattoo, the article asserts that it is possible to reconcile the various rights without having to defeat copyright law or jeopardize individual autonomy.*

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## INTRODUCTION

Tattooing is an age-old socio-cultural practice that has existed across most parts of the world.<sup>1</sup> In fact, the oldest known tattoo was found on the frozen corpse of a 5,200-year-old Tyrolean Iceman discovered in 1991.<sup>2</sup> Tattoos have served various purposes, from identifying the rank and social status of the individual in Polynesian cultures<sup>3</sup> to simple artistic expressions using the human body as canvas.<sup>4</sup> In some societies, they held religious or spiritual significance and were worn by the likes of priests, healers, etc..<sup>5</sup> Elsewhere, the Greeks and the Romans inked their slaves and prisoners for identification.<sup>6</sup> In India, tattooing has existed since ancient times and is particularly common among tribal communities in the Northeast and Central India.<sup>7</sup> The popularity of this practice has withstood the test of time. Today, the tattoo industry in India is worth approximately 20,000 crores.<sup>8</sup>

Despite such deep-rooted cultural significance, tattoos, as well as body art in general, had largely escaped the scrutiny of intellectual property law until a few years ago. The first time a copyright dispute relating to a tattoo made headlines was when tattoo artist Michael Reed sued Nike for an advertisement that showed glimpses of NBA Championship winner Rasheed Wallace's Egyptian-style tattoo designed by Reed.<sup>9</sup> Subsequently, other copyright disputes involving tattoos, particularly those worn by celebrities have come to light.<sup>10</sup> Needless to say, the increasing interconnectedness of the global community has paved the way for the recognition of tattoos far beyond the immediate vicinity of the tattoo bearers themselves. When the tattoo bearer is a famous person, the tattoo gradually becomes famous with the person and on occasion, becomes powerful enough to enjoy a value of its own. In such situations, the tattoo artist, as creator of the work, may feel the need to partake from the rewards earned by the tattoo.

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<sup>1</sup> Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINNESOTA L. REV. 511, 516 (2013).

<sup>2</sup> Pallab Ghosh, *Oldest tattoo' found on 5,000-year-old Egyptian Mummies*, BBC (Sept. 5, 2020, 02:09 PM), <https://www.bbc.com/news/science-environment-43230202>.

<sup>3</sup> WILFRID DYSON HAMBLY, *THE HISTORY OF TATTOOING* 206–207 (Courier Corporation, 2009).

<sup>4</sup> Leopold Dorfer et al., *A Medical Report from the Stone Age?* 354 LANCET 1023, 1023 (1999).

<sup>5</sup> Juliet Fleming, *The Renaissance Tattoo*, in WRITTEN ON THE BODY 68–70 (Jane Caplan ed., 2000).

<sup>6</sup> C.P. Jones, *Stigma and Tattoo*, in WRITTEN ON THE BODY 1 (Jane Caplan ed., 2000).

<sup>7</sup> Sanchari Pal, *Skin Deep: The Tale of India's Tattoo Tradition*, THE BETTER INDIA (Sept. 5, 2020, 02:30 PM), <https://www.thebetterindia.com/58170/india-tattoo-tradition-history/>.

<sup>8</sup> Prabhjote Gill, *India's ₹20,000 crore tattoo industry's lax standards are putting lives at risk*, (Sept. 5, 2020, 02:47 PM), <https://www.businessinsider.in/indias-tattoo-industry-needs-regulation-and-standards-to-protect-customers-and-artists/articleshow/70835880.cms>.

<sup>9</sup> Ryan Van Dusen, *Rasheed Wallace – Nike Commercial*, YOUTUBE (Sept. 5, 2020, 03:30 PM) <https://www.youtube.com/watch?v=bXPhGf8Bi74>.

<sup>10</sup> Antony Funnell, *Who owns your ink? Tattoos artists turn to lawsuits to protect intellectual property*, ABC NEWS (Sept. 5, 2020, 03:30 PM), <https://www.abc.net.au/news/2016-10-26/tattoos-artists-turn-lawsuits-to-protect-intellectual-property/7961972>.

Copyright law would have perfectly served this purpose by ensuring the artists receive a fair reward, had it not been for the minor problem that the tattoo exists on the body of another individual. Unlike most other kinds of copyrightable work, tattoos are fixed on a medium that enjoys independent existence and legal rights of its own – the human body. Works like music, photography, and literary works are fixed on media that have little value and are usually owned by the authors themselves. To put it simply, copyright subsists over stories – the physical book has little value. It protects compositions and lyrics, whereas the recording device is replaceable. However, the human being on whose body the tattoos are expressed is entitled to certain absolute rights which makes it extremely difficult for the author, i.e., the tattoo artist, to freely exercise her rights under the Copyright regime.

In this complex maze of overlapping rights over the tattoo, the tattoo artist's rights<sup>11</sup> such as those of 'issuing copies' or 'communicating to the public' inevitably clash with the rights of bodily autonomy and publicity rights of the tattoo bearer.<sup>12</sup> This becomes imperative as the popularity of tattoos continues to grow. Celebrities today are getting tattoos and publicizing them in an attempt to build their own brand image.<sup>13</sup> Legal complications arising from copyrighting tattoos would affect not only the 20,000-crore tattoo industry, but also the sports industry, the entertainment industry, broadcasting, gaming, and other industries. In this time of commercialization of tattoos, legal uncertainty over rights could cause losses worth millions. A recent example of this is the case of *Solid Oak v. Take-Two*, a 4-year-long tattoo-copyright battle relating to sports persons featured in a video game.<sup>14</sup> While Indian courts are yet to be approached with such disputes, this example proves that it may not be long before litigations flood their doorsteps.

This article attempts to shed light on the policy implications of application of copyright law over tattoos in India. **Part I** of this article outlines the purpose of copyright protection and provides a broad overview of the limited copyright jurisprudence available with regard to tattoos. **Part II** explains the working of Copyright law in India and inquires whether tattoos would be eligible for its protection. **Part III** discusses the problems that would arise as a result of active enforcement of copyright over tattoos due to the clash of rights provided in the (Indian) Copyright Act, 1957 and constitutional rights available to individuals. Finally, **Part**

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<sup>11</sup> See Copyright Act, 1957 § 14(c) for a list of these rights.

<sup>12</sup> Yolanda King, *The Enforcement Challenges for Tattoo Copyrights*, 22 INTELL. PROP. L. 29, 32 (2014).

<sup>13</sup> Deekshita Baruah, *Changing trends of tattooing in India* INDIAN EXPRESS (Sept. 6, 2020, 06:30 PM)

<https://indianexpress.com/article/lifestyle/fashion/tattoo-trends-in-india-2859271/>.

<sup>14</sup> See Part I for facts of the case.

**IV** explores various models of authorship and ownership that could be employed to resolve the problems discussed in the previous section. Having done so, it argues against the current legal position wherein tattoos, even if found copyrightable, are bound to be denied protection owing to public policy concerns. The article calls for a carefully crafted division of rights driven by a nuanced understanding of intellectual property that would allow all stakeholders to enjoy their share of rights without defeating the goals of copyright law or public policy.

## I. OVERVIEW OF COPYRIGHT JURISPRUDENCE ON TATTOOS

Copyright law protects original expressions by authors in the form of literary, artistic, musical, dramatic, and a number of other kinds of works.<sup>15</sup> The “protection” is in the form of a monopoly which empowers the owner to make decisions as to how the work is to be reproduced, copied, communicated to the public, used for creating derivative works and prevent unauthorized exploitation of the work. This monopoly allows the owner to commercially exploit one’s intellectual creation for a limited period of time after which the work passes into the public domain. The purpose behind this legal protection is to incentivize people to create more which would ultimately benefit the society and the economy.<sup>16</sup> As such, Copyright law appears to be the perfect tool for tattoo artists to protect their designs. In the past two decades, there have been a few cases where tattoo artists have asserted this claim.

### *Reed v. Nike Inc (2005)*

Michael Reed was the man behind Detroit Pistons’ player Rasheed Wallace’s famed Egyptian-style tattoo. Wallace had garnered a lot of accolades after winning the NBA Championship in 2004. The same year, he appeared in a few Nike advertisements which featured a close-up of his tattoo.<sup>17</sup> Reed, claiming to be the sole owner of the copyright over the tattoo sued Nike, Wallace, as well as the agency responsible for the advertisements for infringement, demanding for the profits and damages.<sup>18</sup> This case was ultimately settled between the parties, leaving no judicial opinion on the implications of copyrighting tattoos to be scrutinized.<sup>19</sup>

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<sup>15</sup> R. G. Anand v. Delux Films, AIR 1978 SC 1613 (holding that copyright protects only the expression and not the plot or idea of a play).

<sup>16</sup> Donald G. Richards, *The Ideology of Intellectual Property Rights in the International Economy*, 60 REV. SOCIAL ECON. 521, 534 (2002).

<sup>17</sup> *Supra* note 9.

<sup>18</sup> Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).

<sup>19</sup> Stipulation of Dismissal with Prejudice, *Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Oct. 19, 2005).

*Escobedo v. THQ (2009)*

In July 2009, artist Christopher Escobedo had drawn a lion-head tattoo on the ribs of mixed martial arts fighter Carlos Condit. The next year THQ Inc. released a video game titled, *UFC Undisputed 2010* and a follow up by the name of *UFC Undisputed 3* was released in 2012. Condit was featured shirtless in both games with prominent visuals of his tattoo appearing on screen. Escobedo sued THQ, claiming that he was the sole designer and owner of the tattoo.<sup>20</sup> Escobedo specifically argued that his exclusive rights of direct copying, creating derivative works, distribution, and display were violated when the artists at THQ created a near-exact replica of the tattoo worn by Condit for the game. This matter too, was settled.

*Whitmill v. Warner Brothers Entertainment (2011)*

Victor Whitmill, the artist who designed boxer Mike Tyson's famed tribal face tattoo approached the court seeking an injunction against the release of the movie *The Hangover 2* which featured a character accidentally getting inked with a similar looking tattoo after a night of frolic.<sup>21</sup> Whitmill claimed that he owned all the rights relating to the tattoo and also produced the release form signed by Tyson, which states that "all artwork, sketches and drawings related to my tattoo and any photographs of my tattoo are property of [Whitmill's studio]."<sup>22</sup> Although the request for injunction had been denied, Justice Perry had heavily indicated that Whitmill had a strong case in his favour.<sup>23</sup> Ultimately, this dispute was settled between the parties.<sup>24</sup>

*Solid Oak Sketches v. Take-Two*

Most recently in 2020, the Southern District Court of New York ruled in a case of infringement of tattoos by depiction of the same in video games. 2K Games (a subsidiary of Take-Two Inc.) created the famous NBA 2k basketball video game series which features animated images of players playing the game. To make these images as life-like as possible, characteristic features of each player were incorporated in the animation, including their tattoos. Solid Oak, which had entered into license agreements with the artists who had designed the tattoos of three NBA players, sued Take-Two and 2K Games for copyright infringement through public display of

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<sup>20</sup> Complaint at 2, 6, *Escobedo v. THQ, Inc.*, No. 2:12CV02470 (D. Ariz. Nov. 16, 2012), 2012 WL 5815742.

<sup>21</sup> Verified Complaint for Injunctive and Other Relief at 5, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-752 (E.D. Mo. Apr. 28, 2011), 2011 WL 2038147.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> Matthew Beasley, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1148 (2012).

<sup>24</sup> Noam Cohen, *Tattoo Artist Settles Tyson Dispute with 'Hangover 2'*, N. Y. TIMES: MEDIA DECODER (Jun. 21, 2011, 2:18 PM), <http://mediadecoder.blogs.nytimes.com/2011/06/21/tattoo-artist-settles-tyson-dispute-with-hangover-2/>.

these works in the said video games. The court ruled in favour of Take-Two and 2K Games.<sup>25</sup> It observed that the tattoos in the likenesses were only fleetingly visible in the video games due to the quick movements of the players, making it a case of “*de minimus*” use.<sup>26</sup> It also importantly held that the artists knew that players would be appearing in public and distributing their likenesses through different media, so the players can be said to have received from them, an implied license to do so.<sup>27</sup> The court did not delve into the policy implications of copyrighted tattoos.

While all of these cases are based in the US and saving *Solid Oak*, each was settled out of court, this gives us valuable insights into what kind of celebrity-tattooing disputes could arise in the near future. In India too, several celebrities have tattoos that are widely known to the public and are marketed by them as part of their brand image.<sup>28</sup> In 2011, when the film *Don 2* was released, the leading actor Shahrukh Khan sported a ‘D’ shaped tattoo that he reportedly copyrighted and used for promoting *Don 2* merchandise.<sup>29</sup> Tattoo artists could make strong claims that would pose additional licensing hurdles before celebrities seeking to use their likenesses for a host of commercial endeavors including advertising and use in the video game industry. In *Solid Oak*, the use was held to be *de minimus* and implied license doctrine was relied on to permit it. However, this may not be the solution when the tattoo artist has specifically reserved his rights as in *Whitmill*, or when the appearance of the tattoos is more prominent like in *Reed* or *Escobedo*. The following section examines the copyrightability of tattoos in the Indian copyright regime.

## II. ARE TATTOOS COPYRIGHTABLE IN INDIA?

Among other kinds of expressions, the Copyright Act, 1957 grants protection to “original artistic works.”<sup>30</sup> It defines “artistic works” as paintings, sculptures, drawings (including a diagram, map, chart or plan), engravings or photographs, whether or not any such work possesses artistic quality.<sup>31</sup> While the Act has not expressly characterized tattoos and other

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<sup>25</sup> *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-CV-724-LTS-SDA, 2020 U.S. Dist. LEXIS 53287 (S.D.N.Y. Mar. 26, 2020).

<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.* at 16.

<sup>28</sup> Sukriti Hora, *15 Bollywood Celebrities Who Reflected Their Personalities Through Meaningful Tattoos*, BOOKMYSHOW (Feb. 20, 2018) <https://in.bookmyshow.com/buzz/blog/Movies/15-bollywood-celebs-who-have-tattoos-they-love-to-flaunt>.

<sup>29</sup> Agency, *SRK registers Don 2 tattoo in his name*, INDIAN EXPRESS (July 15, 2011, 11: 43 AM), <http://archive.indianexpress.com/news/srk-registers-don-2-tattoo-in-his-name/817871/>

<sup>30</sup> Copyright Act, 1957 § 13(1)(a).

<sup>31</sup> Copyright Act, 1957 § 2(c).

body art as types of artistic work, they can be interpreted as paintings or drawings. While “engravings” too might seem to have a wide enough ambit to include body art, the statutory definition of the same includes “etchings, lithographs, wood-cuts, prints and other similar works, not being photographs.”<sup>32</sup> The type of works included in the definition is quite different from needle-and-ink art on a human body and gives the impression that the legislature may have only envisaged works on non-living objects. There are two primary requirements for copyrightability: originality and (possibly) fixation.

### A. Fixation

The Act does not prescribe a uniform fixation requirement for all types of works. While dramatic works require fixation, cinematographic works and sound recordings are understood as naturally fixed.<sup>33</sup> Musical works needed to be fixed until an amendment in 1994 did away with the requirement.<sup>34</sup> For other works, the requirement is not specified. In the case of artistic works, there hasn’t been much judicial discussion on fixation so far, possibly because works like sculptures, engravings and architectural works are naturally fixed. However, the Copyright Manual on Artistic Works states that for entry into the Register of Copyrights, a work is to be “fixed in a tangible form.”<sup>35</sup> It must be noted that this prerequisite is for registration and does not imply that copyright *would not subsist* in the absence of such fixation. “Fixation” itself has not been defined anywhere.

US’ Copyright Act of 1976 specifically protects only original works of authorship fixed in any tangible medium of expression.<sup>36</sup> A work is fixed if it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>37</sup> This has led to pertinent questions as to whether the human body qualifies as “tangible medium of expression.”<sup>38</sup> According to Prof. Yolanda King, taking the plain and ordinary meaning of the term, “medium” means a “material or technical means of artistic

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<sup>32</sup> Copyright Act, 1957 § 2(i).

<sup>33</sup> See Copyright Act, 1957 § 2(h).

<sup>34</sup> Copyright (Amendment) Act 2012.

<sup>35</sup> Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, *COPYRIGHT MANUAL ON REGISTRATION OF ARTISTIC WORKS AND INCIDENTAL ISSUES* at 3 [https://copyright.gov.in/Documents/Public\\_Notice\\_inviting\\_reviews\\_and\\_comments\\_of\\_stakeholders\\_on\\_draft\\_guidelines/Artistic\\_Works.pdf](https://copyright.gov.in/Documents/Public_Notice_inviting_reviews_and_comments_of_stakeholders_on_draft_guidelines/Artistic_Works.pdf).

<sup>36</sup> 17 U.S.C. § 102(a) (2012).

<sup>37</sup> *Id.*

<sup>38</sup> Yolanda King, *The Challenges “Facing” Copyright Protection for Tattoos*, 92 OREGON L. REV. 129 (2013).



expression.” He applies this definition to tattoos and concludes that the human body is a material means of artistic expression.<sup>39</sup>

However, other scholars disagree. Prof. David Nimmer claims that the human body functions as a “useful article” meaning that it performs an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.<sup>40</sup> A design on a useful article is protectable if and only to the extent that the design can be identified separately from, and is capable of existing independent of the article. Since tattoos only serve their purpose over human skin, they cannot be copyrighted. Prof. King however insists that since the general public recognizes the aesthetic value of tattoos’ designs separately from any utilitarian function of the human body, they do fulfil the separability requirement.<sup>41</sup>

In India, these complications do not arise because there is no bar on copyrightability due to lack of fixation. Even if such a requirement were to be observed in light of the Copyright Manual, a work of art on the human body would arguably meet the low threshold of fixation in a tangible form.

## **B. Originality**

The scope of the originality requirement under Section 13(1)(a) of the Copyright Act was conclusively determined by the Supreme Court in *Eastern Book Company v. D.B. Modak*.<sup>42</sup> Following the standard laid down by the Supreme Court of Canada,<sup>43</sup> it was held that a work need not be the expression of novel, original or inventive thought, but it must have a “*minimal degree of creativity*.” This is a fairly low threshold to meet.

Applying the standard on tattoos, it can be said that common designs such as skulls, stars, or symbols will not be independently copyrightable. However, commonplace symbols combined together to form a creative pattern or drawn in a customized, unique design would meet the mark since only a minimal degree of creativity needs to be shown. Similarly, patterns or words written in a manner specifically designed for a celebrity are likely to be deemed original. In the US, a similar but slightly higher threshold of creativity is observed. In *Feist Publications Inc. v. Rural Telephone Service Co.*, the US Supreme Court held that a work may satisfy the

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<sup>39</sup> *Id.* at 154.

<sup>40</sup> Declaration of David Nimmer at 3, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11CV00752, 2011 WL 10744102 at 2 (E.D. Mo. May 20, 2011).

<sup>41</sup> King, *supra* note 38 at 159.

<sup>42</sup> *Eastern Book Company v. D.B. Modak* (2008) 1 SCC 1 at ¶32-33.

<sup>43</sup> *CCH Canadian Ltd v. Law Society of Upper Canada*, 2004 SCC 13.



originality requirement if the author made decisions as to arrangement and style.<sup>44</sup> Thus, a work must be independently created by the author - as opposed to being copied from other works, and it must possess at least some minimal degree of creativity.

From an examination of the requirements set forth by the Copyright Act, 1957, it can be safely concluded that tattoos are copyrightable in India. In the following section, we will discuss in detail the problems that will arise due to an overlap of rights arising out of copyright law and other laws if tattoo copyrights are widely sought to be enforced.

### III. IMPLICATIONS OF COPYRIGHTING TATTOOS

The Act provides for two sets of rights, assignable economic rights available under Section 14 and non-assignable author's (moral) rights under Section 57. However, an individual, who may be the bearer of a copyrighted tattoo, enjoys the near-absolute right of bodily autonomy over her skin.<sup>45</sup> Additionally, she also enjoys a right of publicity over their name, likeness, or other indicia of personal identity. As the law presently stands, these rights arising out of different laws are rivalrous. Let us examine the implications of each right clashing with the others and the policy implications thereof.

#### A. Economic Rights

In respect of artistic work, copyright owners have the exclusive right to do or to authorize the reproduction of the work, its communication to the public, to issue its copies, to include it in any cinematographic film and to make adaptations (understood as making derivatives) of the work.<sup>46</sup> In a situation where an artist owns copyright over the tattoo of a celebrity, the former, or any person or organization to whom the copyright has been assigned or licensed, could assert control over the latter's appearances in public, in private, on television or in print, social or mass media if the tattoo becomes visible during the appearance. In particular, if the tattoo is drawn over the arms, face or any commonly visible portion of skin, a casual appearance could lead to an infringement claim against the tattoo bearer. Parallel infringement claims against any third parties such as organizers of events who facilitate the "communication to public" could also be brought. Alternatively, if the tattoo is situated in a more concealed portion of the

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<sup>44</sup> Feist Publications v. Rural Telephone Service Co., 499 U.S. 340, 345 (1991).

<sup>45</sup> Right to bodily autonomy is a recognised human right inherent in every individual. Article 21 of the Constitution of India which guarantees the right to life and personal liberty, encompasses this right. *See generally* NALSA v. Union of India, AIR 2014 SC 1863 ("NALSA").

<sup>46</sup> Copyright Act, 1957 § 14(c).

body such as the back, the copyright owner would have the legal right to compel the tattoo bearer to display it. This is in direct conflict with state policy which endows every individual with the right to wear clothes of one's choice, to visit places and to do with their body, as they please.<sup>47</sup>

While any individual bearing a tattoo could be implicated for such appearances, celebrities such as actors, models, musicians, sportspersons, and the like are at a much greater risk. This is because persons engaged in the entertainment and sports industries usually derive significant monetary compensation (and consequently, a huge part of their livelihood) out of their appearances in films and documentaries, live performances, news shows, sporting and other events which host millions in audience. Having to seek licenses for each appearance would be onerous, cumbersome and financially infeasible. Similarly, being forced to cover a tattoo to avoid liability would be equally difficult, especially if the tattoo is located in a very prominent area such as the face or neck.

### **B. Moral Rights**

Moral rights are those which are specially conferred on authors to be exercised by them alone.<sup>48</sup> They are based on the philosophy that an author's creation is an extension of her personality, giving her moral claim to these creations.<sup>49</sup> The Copyright Act provides two moral rights to the author: the right of attribution and the right of integrity.<sup>50</sup> The right of attribution entitles one to be identified as the author of her work. The right of integrity empowers her to restrain "any distortion, mutilation, modification or other act" in respect of the work if doing so would be "prejudicial to the honour or reputation" of the author. In case such acts are carried out, the author has the right to claim damages.

The right to integrity in particular can have serious implications for tattoo bearers. Theoretically speaking, they could be legally prevented from modifying, altering or adding to a tattoo. Thankfully, a caveat in Section 57 declares that "failure to display a work or to display it to the satisfaction of the author" shall not violate the section. However, Indian courts have

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<sup>47</sup> Ruthann Robson, *India Supreme Court Recognizes TG Constitutional Rights Including Dress*, DRESSING CONSTITUTIONALLY (Sept. 9, 2020, 10:30 PM) <http://www.dressingconstitutionally.com/2014/04/15/india-supreme-court-recognizes-tg-constitutional-rights-including-dress/> discussing NALSA, *supra* note 43.

<sup>48</sup> Michael B Gunlicks, *A Balance of Interests: the Concordance of Copyright Law and Moral Rights in the Worldwide Economy* 11(3) FORDHAM INTEL'L PROP, MEDIA & ENT'T. L. J. 601 (2001).

<sup>49</sup> Calvin D Peeler, *From the Providence of Kings to Copyrighted Things (and French Moral Rights)* 9(2) IND. INT'L & COMP. L. REV. 423 (1999).

<sup>50</sup> Copyright Act, 1957 § 57.

for long championed the cause of artists and adopted a wide interpretation of moral rights.<sup>51</sup> In *Amarnath Sehgal v. Union of India*, the Delhi High Court acknowledged the privileged relationship between an artist and her creation and held the destruction of the sculpture in question to be an extreme form of mutilation.<sup>52</sup> It held that reducing the volume of the author's creative corpus affected his reputation prejudicially.<sup>53</sup> This raises the question of whether a right to integrity claim against a tattoo bearer would prevent her from engaging in laser removal of her tattoo.

This is highly unlikely to be allowed by courts, as it would raise serious human rights concerns. The courts would inevitably resort to the fundamental right to life and liberty under Article 21 of the Constitution which includes the right to bodily integrity and autonomy in order to disallow such a claim.<sup>54</sup> This can be inferred from the case of *Raj Rewal v. Union of India*, wherein the constitutional right to property triumphed over the statutory right to integrity of an architect in his building.<sup>55</sup> This is reassuring from an individual's perspective. However, authors are left at a dead end as this indicates that tattoo artists would be forced to entirely forgo their right to integrity – running counter to the widely supported Hegelian conception of the intellectually forged and morally sacrosanct author-creation relationship.<sup>56</sup>

### C. Right of Publicity

The right of publicity inheres in an individual and prevents the misappropriation of her name, persona, likeness, trait or any other indicia of her personality.<sup>57</sup> India does not have a publicity right statute, but courts have repeatedly recognised the right to be arising out of the right of privacy and freedom of expression in Articles 21 and 19 of the Constitution.<sup>58</sup> At first, publicity right was believed to be inherent in an individual alone and was not seen as assignable.<sup>59</sup> However, later cases have acknowledged practices in the entertainment and advertising industry which engage in commercial exploitation of one's persona and consequently

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<sup>51</sup> *Neha Bhasin v. Anand Raj Anand*, 132 (2006) DLT 196; *See also* *Suresh Jindal v. Rizoli Corriere Della Sera*, AIR 1991 SC 2092; *Fox Star Studios v. Aparna Bhat*, CM (M) 15/2020 decided on 11 Jan. 2020; *Mannu Bhandari v Kala Vikas Motion Pictures Ltd.*, AIR 1987 Del 13.

<sup>52</sup> *Amarnath Sehgal v. Union of India*, 2005 (30) PTC 253 (Del) at ¶56.

<sup>53</sup> *Id.*

<sup>54</sup> *See* *NALSA*, *supra* note 43; *Justice K.S. Puttaswamy v. Union of India*, (2019) 1 SCC 1 (“Puttaswamy”).

<sup>55</sup> *Raj Rewal v Union of India & Ors* CS (COMM) 3/2018, IA No.90/2018.

<sup>56</sup> *See generally*, G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Cambridge University Press 1991).

<sup>57</sup> *ICC Development (International) Ltd. v. Arvee Enters. & Ors.*, 2003 (26) PTC 245 Del (“Arvee”).

<sup>58</sup> *Shivaji Rao Gaikwad v. Varsha Prods.*, (2015) 62 PTC 351 (Madras).

<sup>59</sup> *Arvee*, *supra* note 57.

recognised the right as assignable.<sup>60</sup> Significantly, in 2017, a 9-judge bench of the Supreme Court in *Puttaswamy v. Union of India* held the right to privacy to be a fundamental right.<sup>61</sup> This judgment attributed publicity rights to protection of individual autonomy and personal dignity and observed that “an individual may... prevent others from using his image, name and other aspects of his/her personal life and identity for commercial purposes without his/her consent.”<sup>62</sup>

The right of publicity is wide in scope and its exact contours have not been conclusively defined by courts. As such, the inclusive nature of the right could easily encompass tattoos and other kinds of body art and imagery. Celebrities commonly indulge in brand image building to carve out their unique persona.<sup>63</sup> This includes unique markers of personal imagery such as signature moves or poses, nicknames, gestures and custom designed tattoos which complement their style or personality. Prominently visible tattoos on the body could create a powerful and lasting visual image that becomes indicia of the celebrity's personality, thus coming within the scope of right of publicity.<sup>64</sup> With reference to the right of publicity in the US, Prof. King supports this notion, noting that US Courts have expanded the scope of identity to encompass a wide variety of characteristics of a person, such as style, voice and sound-alike, distinctive phrases, and more.<sup>65</sup> These indicia are used for a host of commercial purposes such as to create a convincing likeness of the celebrity, as seen in the case of video games.

This pits the economic and moral rights of a copyright owner directly against the rights of publicity and bodily autonomy of the tattoo bearer. Empowered by the right to publicity, an individual can authorize the use and the manner of use of her tattoo and make profit out of it. Although unlikely to be upheld in courts, the idea of subjugating this right in favour of copyright would be to give away a portion of one's rights on her personality to another.

There is one interpretation that courts might adopt to maintain a balance. Section 52(1)(u) of the Copyright Act, which lists out the exceptions to copyright infringement in India, declares that if an artistic work is included in a cinematograph film only incidentally, or in the

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<sup>60</sup> Titan Indus. Ltd. v. Ramkumar Jewellers, (2012) 50 PTC 486 (Del.) at ¶4, ¶17.

<sup>61</sup> See *Puttaswamy*, *supra* note 52.

<sup>62</sup> *Id* at ¶625.

<sup>63</sup> Michael Madow, *Private Ownership of a Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 185 (1993).

<sup>64</sup> 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. 98, 137 (2003).

<sup>65</sup> Yolanda King, *The Right-Of-Publicity Challenges for Tattoo Copyrights*, 16 NEVADA L.J. 441, 454 (2016).

background, it is not infringing.<sup>66</sup> This could be the case for video games such as NBA 2k which the US court had found to be showing only fleeting shots of the tattoo.<sup>67</sup> It would also help in cases where a tattoo is involuntarily displayed during sporting events or performances. However, prominent visuals of tattoos appearing in advertisements will not qualify for this exception. Importantly, be it this fair dealing exception under Copyright Act, or the outright rejection of copyright claims owing to policy concerns, it is the artist who is denied compensation for her work.

At present, the law stands to defeat all copyright claims that go against the constitutionally protected rights of the individual. However, depriving an artist almost entirely of her reward cannot be reconciled with the theory of intellectual property protection.<sup>68</sup> Principles of equity as well as copyright law demand that tattoo artists earn remuneration for the work they have created, especially considering that the tattoo contributes to the generation of high revenues for the celebrity tattoo bearer.

#### IV. THE WAY AHEAD: OWNERSHIP AND RIGHT-SHARING ARRANGEMENTS

The Copyright Act holds that the author of a work shall be its first owner, except in certain cases.<sup>69</sup> So far, we have discussed issues that are likely to arise if the tattoo artist holds on to the copyright over her tattoo as a single author. In this section we will examine three other models of copyright ownership and rights-sharing arrangements: Joint authorship, Work-for-hire arrangements and Statutory rights-sharing. We will also evaluate their relative merit in solving the problems discussed in the previous section, assuming that these arrangements are adopted as default rules.

##### A. Joint Ownership

It is noteworthy that on many occasions, celebrities co-design their tattoos and actively contribute to the design by adding personalized elements.<sup>70</sup> In fact, they usually take the call on the design, colour, position of tattoo and overall appearance. So, a tattoo being considered

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<sup>66</sup> Copyright Act, 1957 § 52(1)(u).

<sup>67</sup> Solid Oak, *supra* note 25.

<sup>68</sup> William Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. L. STUDIES 325 (1989).

<sup>69</sup> Copyright Act, 1957 § 17.

<sup>70</sup> Kiran George, *The Copyrightability of Tattoos: Does Artist Interest trump the Right to Bodily Autonomy?* SPICY IP (Sept. 10, 2020, 10:04 AM), <https://spicyip.com/2016/08/the-copyrightability-of-tattoos-ii-does-artist-interest-trump-the-right-to-bodily-autonomy.html>.

a work jointly authored by the artist and the tattoo bearer is not inconceivable. It is possible that tattoo artists might assert that joint authorship was not the intention. This “lack of intent” by both parties would preclude it from being a jointly authored work under US law.<sup>71</sup> However, the Indian Copyright Act does not mandate a requirement of shared intent. It defines “work of joint authorship” as a one produced by the collaboration of two or more authors in which the contribution of individual authors is indistinguishable.<sup>72</sup> To qualify as such, Indian courts look for a “close and active intellectual collaboration” with respect to the final product.<sup>73</sup>

Treating tattoos as works of joint authorship would allow both the stakeholders a share of the rights arising out of copyright law. However, this would not be of much benefit by itself unless an agreement is signed by both delineating the extent of each party’s share of rights and profits over the tattoo. The lack of clear bifurcation of rights, including the moral rights, could lead to litigation between the parties when it comes to authorizing the use of the design. Regardless, the benefit of this model is that even if tattoo-bearers fail to enter into agreements while getting inked this default position allows them to retain a share of the copyright. The parties would be free to negotiate a rights allocation agreement later.

### **B. Work-for-hire under Section 17**

Section 17 deals with situations wherein the author may not be first owner of copyright. Applicable to the present scenario among these are Sections 17(b) and 17(c). Although Section 17(c) only comes into consideration when Sections 17(a) and 17(b) are inapplicable, we shall consider it first and then move to Section 17(b).

Section 17(c) applies “in course of the author’s employment under a contract of service or apprenticeship.” Thus, it will only come into play between a tattoo artist working for a tattooing business, such as a tattoo parlour or franchise owner. Therein, the artist, who is the author, is an “employee” under a “contract of service or apprenticeship,” making the employer-business the owner of the work, in place of the artist.<sup>74</sup> Treating this as the norm does not change the status quo with regard to the clash of rights in any significant way. Since being “in course of employment” is a precondition for this provision, it cannot be read into the relationship between a tattoo artist and a tattoo bearer, as the former is not an “employee” of the latter.

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<sup>71</sup> 17 U.S.C. § 101; *see, e.g.*, *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991) (U.S.).

<sup>72</sup> Copyright Act, 1957 § 2(z).

<sup>73</sup> *Najma Heptulla v. Orient Longman Ltd. & Ors.*, AIR 1989 Delhi 63 at ¶28.

<sup>74</sup> Copyright Act, 1957 § 17(c).

Section 17(b) can be applied in situations by placing the tattoo artist as the author who receives valuable consideration from the tattoo bearer. The provision applies to photographs, paintings, portraits, engravings and cinematograph films which are made “for valuable consideration at the instance of any person.”<sup>75</sup> This person then owns the copyright in the work. If tattoos were to be interpreted as paintings or engravings, they would fit into this section smoothly. It has been suggested before that tattoo be treated as works made-for-hire under this section.<sup>76</sup> This would divest the author of her copyright over the tattoo. In addition to the fundamental rights of bodily autonomy and of publicity, the tattoo bearer would have rights over the tattoo as well. This would enable her to authorize uses of the design in video games, performances and advertisements, and make additional profit out of it.

While this is an improvement over complete defeat of copyright over tattoos (as the situation currently is, due superiority of constitutional rights), it offers little benefit for tattoo artists. Due to the power dynamics being skewed in favour of celebrities, only few tattoo artists would be able to procure compensation fair enough to measure up to the additional revenue the celebrity would be making by licensing her tattoo for the above-mentioned purposes. This is likely to reduce the artists’ incentive for creative pursuit.

### C. Statutory Division of Rights

Another solution may be derived from Prof. King’s suggestions as to the “separability” of the public’s perception of the tattoo’s design from that of its depiction on the human body.<sup>77</sup> The tattoo’s aesthetically perceived design can exist outside of its picturization on the individual’s body as the latter is not an independent whole, but a part or an extension of her personality which owes its existence to its association with the said personality. As such, the two may coexist separately in law and in practice.

Following this principle, it would be possible to amend the law to work out an equitable division of all the rights involved, vesting parts of it, corresponding to the design itself and to the tattoo on the body, in both parties involved. Any such solution must begin with identifying that copyright subsists over tattoos, by including “body art” within the scope of artistic works under Section 2(c). Consequently, a modified version of joint authorship could be crafted out for these works, wherein the scope of the rights held by each of the parties is well demarcated.

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<sup>75</sup> Copyright Act, 1957 § 17(b).

<sup>76</sup> George, *supra* note 70.

<sup>77</sup> King, *supra* note 38 at 159.



The artist would enjoy the rights over the design itself, including the rights to assign, license, create and authorize the creation of derivatives from it and other rights under Section 14(c). However, she would have no rights over the tattoo physically present on the tattoo bearer, or any representations of the tattoo as part of the latter's body. On the other hand, the tattoo bearer would enjoy rights over the tattoo as physically fixed on her body only. She would be able to display or conceal it during appearances, for advertisements and performances, authorize its use for likenesses, photographs, and any other use so far as it is limited to depicting the tattoo as part of her body. She would also have the absolute right to modify or remove the tattoo from her body in accordance with the principles of bodily autonomy, but would not own rights over the design itself or its use on any other surface.

With regard to moral rights, the tattoo artist would enjoy all rights under Section 57 over the design itself and all uses arising from her share of the rights. She must also enjoy the right of attribution with regard to the tattoo over the tattoo bearer's body, such that the latter cannot attribute the work to another person. However, the right of integrity would not apply to the physical tattoo on the body.

This division would ensure that the tattoo-bearer can enjoy her right to publicity and bodily autonomy without any conflict with the Copyright laws. It would ensure equity and fair reward for both parties while encouraging creative endeavours simultaneously.

## CONCLUSION

Previously, some scholars have argued, albeit in context of US copyright law, that copyright cannot be acknowledged to exist over tattoos. They hold that the public policy concerns in allowing artists rights over another individual's body extraordinarily outweigh the utilitarian demands of incentivizing innovation through copyright law.<sup>78</sup> One expert suggests that since tattooing continues to grow in American society, the need to incentivize through intellectual property protection does not arise.<sup>79</sup> Another likens the granting of (intellectual) property rights over an individual's flesh to a modern form of slavery.<sup>80</sup> While these concerns are indeed serious, they presume the existence of a binary between complete denial of copyright over tattoos and the treatment of human flesh as property. In the Indian context, an analysis of the

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<sup>78</sup> Michael C. Minahan, *Copyright Protection for Tattoos: Are Tattoos Copies?* 90(4) NOTRE DAME L. REV. 1713, 1736 (2014).

<sup>79</sup> *Id.*

<sup>80</sup> Arrielle S. Millstein, *Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression*, 4 PACE INTELL. PROP. SPORTS & ENT. L.F. 135, 165 (2014).

various possibilities other than the status quo which completely curtails copyright reveals that the final option of dividing the corpus of rights available under copyright between the stakeholders is a suitable solution to this conflict.

Such a division is fundamentally rooted in conceptualization of the subject of copyright (the design of the tattoo) and the physical object of its manifestation (the human body) as legally separate. While this may not be a principle commonly applied, it is perfectly in line with intellectual property principles. We started this discussion with the consideration of other copyrighted works, i.e., stories and songs which are far more valuable than the media they are expressed in. In these works, all focus of legal rights is the subject itself. In case of tattoos, owing to significant legal rights enjoyed by both the expression and its medium, the monopoly granted by Copyright law can be judiciously divided between the two. Each share would complement the requirement of the party holding it. Splitting the rights between the design itself and its fixation on the body of the bearer would ensure that each stakeholder can enjoy her rights freely, without overlaps and conflicts.

The march of technology would ensure that the importance of tattoos in the sports, entertainment and other relevant industries only grows. A time will come when it will become absolutely necessary to legally determine the fate of copyrighted tattoos. Denying authors their rights then, as the present state of jurisprudence would command, will certainly be a great loss to the thousands of tattoo artists engaged in this industry, possibly stifling creativity. The concerns raised by the experts who argue against copyrighting tattoos are serious, but the solution cannot lie in complete curtailment of rights. Intellectual Property law aims to incentivize and protect creative endeavours. In such a situation, statutory division of the rights presents an equitable solution that would neither challenge constitutional principles nor compromise the goals of copyright law.

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