

Copyright Issues in Tattoos

Part 1: Does copyright exist in tattoos

The issue: can a tattoo be copyrighted 'work'

Would a tattoo be covered by the *Copyright Act*?

If there is copyright does the tattoo artist or the tattoo bearer have copyright to the tattoo after it is on the tattoo bearers body?

Can there be reproductions of the tattoo, such as on another canvas or in the media?

Tattoos as a copyright

The question: Is a tattoo copyrightable?

To explain the concepts in the first part of this presentation we will be using a hypothetical throughout:

Valerie is a tattoo artist. Valerie tattoos a drawing of a face on her famous client arm.



Starting point - the Copyright Act

Tattoos would likely fall under the copyright act under the category of artistic work. The court in *DRG* explains that artistic works are works that find expression in a visual medium.

5 (1) As subject to this Act, **copyright** shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and **artistic work** if any one of the following conditions is met:

- **(a)** in the case of any work, whether published or unpublished, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country

Valerie's tattoo would be considered an expression in a visual medium.

Other considerations for copyright

Fixation

- While a fixation requirement is not expressly set out in the Copyright Act, the court in *Rediffusion* sets out that the work must be fixed in a tangible form.
- Valerie's tattoo is tangible

Originality

- *CCH Canadian LTD* sets out that to be original work, it is an exercise of skill and judgement that is more than a purely mechanical exercise
- The originality of a tattoo would need to be decided on a case-by-case basis.
- Valerie would need to show some intellectual effort went into creating the tattoo but does not need to show it is the only tattoo of a face created by simple lines

Expression

- Set out in *Kenrick & Co*, facts and ideas are not copyrightable
- Valerie's tattoo is not merely a fact or idea

Authorship

The question: Who has the ownership rights to the tattoo?

The starting presumption in the *Copyright Act*, is that the author of the work is the first owner of the copyright, s.13.1. Even though the tattoo bearer paid for the tattoo, the tattoo artist may be considered an independent contractor and therefore remain the proprietor of copyright. The tattoo bearer may be in possession of the tattoo but that does not automatically mean they own the rights to the tattoo.

If the tattoo artist is the owner to the copyright, than they should be able to limit reproduction of the tattoo.

If Valerie is the creator and designer of that tattoo she would have rights to the copyright of the tattoo. The celebrity would likely not be allowed to create fan merch using the tattoo as the design.

Moral Rights in Copyright

Question: Does the tattoo artist have moral rights in relation to their work?

If the tattoo bearer prominently displays the tattoo in an unfavourable light, such as an unsavoury ad, does the tattoo artist have moral rights to possibly allow restrictions on the ad being displayed?

Moral rights include rights to attribution (right to choose to have a name associated with the work or not), reputation/honour (right to integrity of the work, protection from modification or distortion) and right to association (right to prevent association of the work with a cause or product harmful to your moral reputation).

Under moral rights, if it is established that Valerie was the author of the tattoo and had original ownership, Valerie may be able to try to prevent the celebrity from prominently featuring the tattoo in an ad that prominently goes against Valerie's views.

Moral rights in the Copyright Act

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

28.1 (1) The author's or performer's right to the integrity of a work or performer's performance is infringed only if the work or the performance is, to the prejudice of its author's or performer's honour or reputation,

- (a) Distorted, mutilated or otherwise modified; or
- (b) Used in association with a product, service, cause or institution.

Other Jurisdictions

While the issue of copyright of tattoos is not prominently seen in Canadian courts, there have been interesting developments in other jurisdictions.

- USA: In *Alexander v Take-Two Interactive Software, Inc (2000)*, a tattoo artist sued a video game maker for copying the tattoos the artist had done on a WWE wrestler into the game. The wrestler had licensed the use of their likeness to the WWE who in turn licensed it to the video game company. The artist was found to have valid copyright to the tattoos and that the tattoos were copied into the video game. The court did not find there was a valid implied license between the artist and the tattoo bearer.
- Belgium: In *JDH v JM (2009)*, the court found that a tattoo artist owns the copyright of their tattoo, however it is limited by personality rights of the tattoo bearer. The tattoo bearer has the right to remove or alter their tattoo and the right to display their tattoo.

Final Thoughts

What about the tattoo bearer. Once tattooed the tattoo is now a part of them, and potentially they identify with it. What can they do?

- Courts would need to consider the rights of the tattoo bearer and whether they would trump in part the rights of the copyright holder.
- Since the tattoo does not fit into one of the categories of fair dealing, the tattoo bearer may need to argue they have license (explicit or implicit) to use and reproduce the work due to the tattoo being a part of them.

While courts may be hesitant to restrict the tattoo bearers use of the tattoo, a tattoo artist who has been established to own the copyright to their tattoo could still go after other reproductions of their work.

Copyright Issues in Tattoos

Part 2: Tattoo passes as a licensed alternative

The issue: when copyrighted 'work' is used as tattoos

People get all sorts of visuals tattooed, not just work by their tattoo artist. These can include:

- Characters/visuals from films, fiction, series, other copyrighted work
- Work by artists that are not the tattoo artist
 - Famous, older art in the public domain - no copyright issue
 - More current protected by copyright
 - Artist has given (implied/explicit) consent
 - Artist gives consent with conditions
 - No consent
 - No comment

Tattoos of characters/visuals from work

The question: Is the tattoo a 'substantial part' of the copied work?

As we know from case law such as *Cinar*, what is copied must be a substantial part of the copyrighted work for it to constitute infringement.

- Whether there has been substantial copying focuses on whether the copied features constitute a substantial part of the plaintiff's work – not whether they amount to a substantial part of the defendant's work [para 39 in *Cinar*]

Consider the many tattoos of Disney characters. Would an image of Winnie the Pooh for instance be considered a "substantial part" of the copyrighted work (in this case the films)?



Practical consequences of infringement and remedies

Even if a person were to get a tattoo that infringes a copyrighted work, there is not much legally that can be done to remedy the infringement aside from having the tattoo not be displayed.

Assuming the tattooed person is not a famous figure, an order for the copyright-infringed tattoo to not be displayed is hardly enforceable.

Starting point - the Copyright Act

3 (1) For the purposes of this Act, *copyright*, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

- **(a)** to produce, reproduce, perform or publish any translation of the work,

It is sometimes unclear whether tattoos constitute infringement

Could the tattooing of copyrighted work fall under 29.22(1)?

Reproduction for private purposes

- **29.22 (1)** It is not an infringement of copyright for an individual to reproduce a work or other subject-matter or any substantial part of a work or other subject-matter if
 - **(a)** the copy of the work or other subject-matter from which the reproduction is made is not an infringing copy;
 - **(b)** the individual legally obtained the copy of the work or other subject-matter from which the reproduction is made, other than by borrowing it or renting it, and owns or is authorized to use the medium or device on which it is reproduced;
 - **(c)** the individual, in order to make the reproduction, did not circumvent, as defined in section 41, a technological protection measure, as defined in that section, or cause one to be circumvented;
 - **(d)** the individual does not give the reproduction away; and
 - **(e)** the reproduction is used only for the individual's private purposes.

The problem: consent of the creator/copyright owner is not always clear

4 possible situations:

1. Artist gives consent
 - Ancillary issues: Can moral right be waived? Can consent be given and then withdrawn later?
2. Artist gives consent with conditions
3. Artist explicitly does not give consent
4. Artist is silent on the issue

1. Artist gives consent

- Posting and encouraging of their artwork as tattoos on other people implies consent
- Sometimes artists explicitly states that they are okay with their work being tattooed



2. Artist gives consent with conditions

- What does “consider” mean in this context? Is the person obligated to buy something from the artist’s online shop? Is this an unilateral contract?
- Some artists specify that anyone who wants to get their work tattooed send a photo of the tattoo to the artist and/or tag them. This explicitly invokes their **moral right**:



14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

Tattoo passes as a possible solution

As we know, copyright can be sliced and diced in any way by the copyright holder. Some artists whose works translates well into tattoos have been selling “tattoo passes” - a license which allows the buyer to reproduce the art onto their own body as a tattoo.

Assignments and licences

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent.

Some examples of tattoo passes

tattoo pass

a blessing for you to carry my art on your earthly vessel

\$77 CAD

Add to Cart

FAQs

WHAT IS A TATTOO PASS?

a tattoo pass is an act of direct exchange between the creator and you. The artist gets credited (\$) for the use of their artwork and you get permission (♥) to use their artwork for a tattoo. buying a tattoo pass is getting consent.

WHAT DO I RECEIVE?

immediately: a blessing and non-exclusive rights of a **single artwork** for a **one time use** for the sole purpose of reproducing it **on your own body** as a permanent tattoo.

long term: love and gratitude for help creating, supporting and operating a system that pays artists for their work fairly and honestly ♥.

you do not receive: a physical item, image files, or consultations. **You do not receive the rights to change, edit, or combine artworks. For modifications you must contact for a custom design.**

WHY DOES ONE NEED A TATTOO PASS?

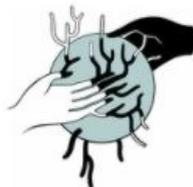
legally: art is protected under copyright laws and using it without permission is considered stealing. A tattoo pass grants you and your tattoo artist the permission required to legally and rightfully reproduce artwork in the form of a permanent tattoo.

spiritually: for all art that you carry on your body, it is highly recommended for you to ethically acquire and deserve it. You do not want to engrave stolen spirits and infuse unintended energies into your body and life.

morally: personally, what brings me sorrow as an artist is not the lack of financial compensation but the lack of respect and safety we provide each other. I feel violated and disrespected when my work is misused or stolen. If one steals work for a permanent tattoo, every moment until their body leaves us, I am subsequently being hurt without a say.

WILL THERE BE REPEATED TATTOOS?

yes. The tattoo pass consent is non-exclusive and other people



Some examples of tattoo passes



about
art offerings

📷 f ✉

join the mailing list

enter the portal

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Ink Pass

\$100

I'm honored and thankful that you have decided to carry one of my creations on your skin. Purchasing the Ink Pass will allow you the transfer of rights to choose any of my *already created* illustrations for your tattoo use.

There are no prints or passes shipped.

Custom design inquiries please email hello@merakilabbe.ca

All my love.

add to cart

Implications of tattoo passes

- While beneficial to independent artists, entertainment companies could also conceivably start charging tattoo passes for license to tattoo their copyrighted materials
- The existence of explicit licenses to get copyrighted work tattooed could be potentially lucrative - the existence of a license would also mean that the copyright owner has taken a stance on the issue of whether or not their work can be reproduced on the human body
 - Are there ethical issues to the commercialization of body art? Should companies have power over people's bodies and how they present themselves based on contract law?

Inkbox - Temporary tattoo licenses

Inkbox is a Canadian company that collaborates with tattoo artists and sells temporary tattoos

Inkbox artists (who are often tattoo artists but not always) upload designs - in effect giving license for use of their work as temporary tattoos

- Can be thought of as 'temporary tattoo passes'
- Can be thought of as an aggregator of licenses

Perhaps this can be an e-commerce model for licensing art for permanent tattoos

The screenshot shows the Inkbox website interface. At the top right, there are links for 'Student Discount', 'Rewards', and 'Help'. The main header features the 'INKBOX' logo and a search bar. Below the header is a navigation menu with categories: 'SHOP' (highlighted), 'CUSTOM', 'COLLABS', 'TRENDING', 'FREEHAND INK', 'SALE', and 'HOW IT WORKS'. The main content area is divided into three columns: 'SHOP' with a list of product types (Best Sellers, New Tattoos, Instagram Bundles, Finger Packs); 'TOP CATEGORIES' with a list of design themes (Flowers, Solar System, Geometric, Hearts, Animals, Quotes); and 'SIZES' with a list of dimensions (1'x1", 2'x2", 3'x3", 4'x4", 5'x2", 6'x3", 7'x2"). Below these columns are sections for 'BY STYLE' (Minimal, Realism, Traditional, Blackwork, Ignorant), 'FREEHAND INK' (Pro Kit, 0.5oz Shading Ink, 1oz Freehand Ink, 0.5oz Freehand Ink, All Freehand Ink), and 'ACCESSORIES' (Moisturizer, Gift Cards). On the right side, there are two featured collections: 'The Rupri Kaur Collection' with a description 'A celebration of the skin you're in. Experience the poet, illustrator, and author's work now through tattoos.' and 'Lifted Voices' with a description 'We're highlighting some of the best artists out there - bold, brilliant, Black creators who make art worth a double-take.' Both collections have 'Shop Collection ->' and 'Learn More ->' links.

Final thoughts

- At the very least, if an artist elects to sell tattoo passes, it will clarify the issue of whether the tattooing of their work infringes copyright
 - The existence of tattoo passes can be evidence of infringement if a case goes to court
- Even with tattoo passes, and leaving aside the freedom of expression debate of whether the inking of people's bodies should be regulated (by another person and/or by the court), remedies for the non-consensual tattooing of another's work onto a person's body is hard to enforce - meaning that tattoo passes work somewhat on an honor system
- The issue of copying works into tattoos in large part came about with the popularization of image sharing over the internet/social media
 - If tattoo passes are to develop as an efficient way of regulating/licensing this, it will likely utilize principles of e-commerce