

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Viktoria Mazur

Copyright protection of tattoo

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Supervisor: Pawan Kumar Dutt, M.A.

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Viktoria Mazur

(signature, date)

Student code: 154003HAJB

Student e-mail address: vichkou@gmail.com

Supervisor: Pawan Kumar Dutt, PhD:

The paper conforms to requirements in force

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ABSTRACT

The intellectual property shall be protected. Despite the fact that tattoo is an intellectual property it is violated without legal consequences. In this graduation thesis I have posed two important questions. Who is an owner of a tattoo copyright? And why having tattoo may lead to a copyright infringement? If client and tattoo artist are creating a tattoo together then both of them are copyright owners, to be secured from the copyright infringement it is necessary to conclude a contract between parties or to sign a release. If tattoo artist is an owner of a copyright and his client is using his tattoo for any financial gain without permission of a copyright owner, it constitutes a copyright infringement. There were plenty of cases (Whitmill v. Warner Bros Entertainment Inc. and Allen v. Electronic Arts Inc.) where the copyright for tattoo was infringed and the court refused to the defendants who were copyright holders of tattoos used in purposes of earnings such as advertisements, films or other public displays. As a research method I chose quantitative one. Since most of the information can be taken from cases, I am considering the case law study as a research method.

Keywords: copyright, copyright infringement, tattoo, ownership, protection.

INTRODUCTION

The field of law to be discussed in this graduation thesis is a copyright. Copyright is a protection for any kind of intellectual properties and original works produced by humans, it applies to literary, dramatic, musical, and artistic works. In that list are also included: broadcasts, sound recordings, films and typographical arrangements of published editions, which are protected under the Copyright, Designs and Patents Act 1988. The copyright not only protects original works but also provides author with the possibility of controlling the use of the copyrighted works. Such control is provided and regulated by the economic rights. Copyright provides the owner of a copyright with two different rights, one of them is already mentioned as an economic right and the other is a moral right. The difference is simple, when economic right is obviously dealing generally with financial matters, moral rights are those which make an author of a work to be the owner of the copyright. However, there are some situations when the author of the work would not be the exclusive owner of the copyright.

There is an enormous amount of people aged from 18 to 40¹, who are wearing at least one tattoo, the tattoo copyright infringement is of more relevance than it may appear. Who is an owner of a tattoo copyright? There is a big problem in understanding if the work is belonging to a person who is wearing a tattoo or a person who gets a tattoo done, or even both of them. There is always a client and a tattoo artist, sometimes it is just a tattoo artist and sometimes both put some effort in creation of that artwork. The tattoo made solely by a tattoo artist gives him an exclusive ownership of a copyright. Why having tattoo may lead to a copyright infringement? A person wearing a tattoo, who is not an author of artwork, needs a permission from the owner of the copyright to put that part of the body, where the tattoo is done, on the display for the purposes of earnings, either it is a photo that is published in a magazine² or a scene in a film. So far, there are several case laws considering the people who wanted to get a profit from magazines and movies but could not because of the permission that they did not request.

¹ Beasley, Matthew. Who owns your skin: Intellectual Property Law and norms among tattoo artists, *Southern California Law Review*, 2012, p 1138.

² Martinez, Nicole. Who Owns the Copyright in Your Tattoo Art?, *Art Law Journal*, 2016.

In the USA there was a Whitmill v Warner Bros Entertainment Inc. case³, where the tattoo artist of Mike Tyson has sued Warner Brothers for the copyright infringement because in the film the design of the actor's tattoo was too similar to the one that Tyson is wearing. Other case law is Reed v. Nike, where there have also been a claim for copyright infringement. However, such permissions are given, they can be easier controlled if the client of a tattoo artist is a celebrity. If that person is not a celebrity or a public persona but is an ordinary client, it would be very hard to control whether the copyright is under protection or not. Here it comes to the problem itself, an infringement of copyright on tattoo is a part of everyday life of tattoo artists, there are a lot of clients who are coming with a photo of some celebrity and ask to create the identical or similar to it.

³ Whitmill v. Warner Bros. Entertainment Inc., No. 4:11-cv-00752 (28.04.2011)

1. HISTORICAL BACKGROUND

Tattoos have a long historical background. Notwithstanding the fact that there is no information on when and where a first tattoo in the world was done, there are tribal tattoos which go back to decades - to at least the primitive society, who used those tattoos not only as accessories but it was a sign of tribe and pointed out the communal affiliation. The first tattoo that people discovered was documented in the Ancient Egypt more than 6000 years ago. The reasons for making a permanent drawings on bodies as a common practice were not clear but as the time is extended more and more people were filling their skin up with tattoos all over the world. Then the meaning of a tattoo started to change from the social status, in Ancient Greece and Rome tattoos were considered as a stigma for the criminals. Furthermore, in the soviet period tattoos were persecuted because of the fact that during the beginning of the 20th century there was formed an illegal community of people whose distinguishing features were graphic arts on a body. The prohibition on tattoo was signed into law, the supreme measure of punishment was execution. In the United States of America tattoos were prohibited in all states by law through to 2004.⁴ However, within the context of the everyday world taking into consideration the democracy and human rights that protect people, tattoos are not a subject to prohibition in most parts of the world. Tattoo is now more than an ethnical sign, but it acquires an art value.

⁴ Perzanowski, Aaron. Tattoos and IP Norms, Minnesota Law Review, 2013. p 55.

2. THEORETICAL FRAMEWORK

The issue should be discussed from different points of view and legislations, but emphasis will be on US Copyright Act. In European Union there is no common regulation that takes the control of the copyright. This is the reason why US Copyright Act of 1976 should be applied. In European Union there is only The Copyright Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. However, in 2016, there was a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market which would play its role in the problem discussed in future and should also be included into the work. In order to understand the problem in more or less global sense, there should be comparison with other countries. Therefore, Copyright, Designs and Patents Act 1988 of UK will be discussed in this thesis for comparison purposes.

2.1. US Copyright Act

Tattoo is a result of human activities and it pretends to be an intellectual property, since in parallel with painting it is a type of visual art. It is known that artistic works should be protected by copyright under Copyright Act of 1976, section 102 in US and Copyright, Designs and Patents Act 1988, section 4 in UK. There are some conditions that should be accomplished in order to consider a work as an artistic, so as it would eventually be protected by copyright. In US legislation section 102(a) states that “copyright protection subsists.....in original works of authorship fixed in any tangible medium of expression⁵”. Thus, in order to be regarded as copyrightable the work should be created solely and exclusively by the author and it should be externalized in a copy. From the first sight the tattoo meets the criteria of an artistic work in

⁵ Harkins, Christopher. Tattoos and Copyright Infringement, 10 Lewis & Clark Law Review, 2006, p 318-322.

accordance with Copyright Acts as it is created by a tattoo artist and the work is fixed on human body.

On the one hand, the fixation requirement is fulfilled since a tattoo is fixed in “any tangible medium of expression” in this particular case it is fixed in a skin. On the other hand, section 101 of the US Copyright Act requires a “fixation” to be in a copy, according to list of definitions provided by section 101, copy is a “material object”. Such definition leads to vagueness and difficulty in understanding the scope of a material object as such. It is hard to understand if it includes either human body or skin and if they can be considered as material objects since there is no definition in a Copyright Act. Mostly, “object” is not something alive and if to regard a human body as unsuitable⁶ within the meaning of an object then it can not be a copy. Consequently, if artistic work does not have a copy⁷, then the fixation requirement is not accomplished and the work can not be considered copyrightable, therefore it cannot be called an artistic work. Preliminary drawings are copyrightable, however the following and emanating tattoos created on basis of those sketches will not constitute a copy. If registered copyright on tattoo is based on preliminary drawing then person has a protection of a flash tattoo. Therefore, if tattoos are not contemplated as copies then tattoo artists would be forfeited their rights to be protected by copyright and exclusive rights resulting from it. But if not to take into consideration the vagueness of the “material object” then tattoo can be discerned from now forth as a copyrightable object. Moreover, there was a case when skin was considered as a tangible medium of expression for the makeup copyright which was held on human face by court decision.⁸

2.2. UK Copyright Act

Copyright protection is given automatically⁹ to the author of a work without any costs and for 70 years¹⁰ after the death of its owner. CDPA provides with a list of works that can be considered as

⁶ Millstein, S. Arrielle. Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression, Pace I.P., Sports & Entertainment Law Forum, 2014, p 140-142.

⁷ See Article 407(a) of Copyright Law of the United States .

⁸ See Carell v. Shubert Org., 104 F. Supp.2d 236 (S.D.N.Y. 2000).

⁹ See Section 155 of Copyright, Designs and Patents Act 1988.

¹⁰ See Section 12 of Copyright, Designs and Patents Act 1988.

artistic ones but this list is not an exhaustive one, which means that if tattoos are not included into the list, it does not mean they are excluded from it. To receive copyright protection, a work must meet three requirements: It must be original, it must be fixed and it must be a work of authorship. There are identical requirements in order to qualify the creation as an artistic work in US Copyright Act and the UK Copyright Act. However, there are differences in understanding those requirements. Under the Copyright, Designs and Patents Act 1988, it is likely that a tattoo will be classed as an ‘artistic work’ under section 4. In the UK there is a common law, which means that primary source of legislation are court’s decisions and secondary is constitution. There was a court decision about “originality” where the judge stated that work may be considered original if it is created by “knowledge, literary skills, labour, judgement or taste”¹¹ of the author. However, in 2012 “originality” was changed within the meaning of UK law by the European Court of Justice¹², when it was alleged that it is not enough to be made by the author and solely with his effort to be granted a copyright protection, but the artistic work should be filled with creativity. In most cases it can be supposed that tattoos, if they are considered as original artistic work, will be subject to copyright and the owner of copyright is generally the person who created the work. Therefore, where skill and judgement have gone into the creation, there will be copyright over the image. “Image” represents a record of a work presented in any form which is required in order to be copyrightable. However such requirement was only for literary, musical and dramatic works before the case¹³ in Australia that could not provide an artistic work with the copyright protection for lack of permanence because work was illustrated on sand. There is no problem with the meaning of “fixation” as in US, since artistic work may be fixed anywhere comprising human body or skin. When it comes to an authorship it also seems easier than in US Copyright law. With regard to UK Copyright Act, the person who creates work becomes its author and subsequently the copyright owner. If a client comes to tattoo salon and chooses one of the flash arts presented there, then tattoo artist becomes the author of a work. When client makes a design for a tattoo himself and for the tattoo artist there is only left to make a tattoo then the owner of a copyright will be the client. However, there are situations when custom tattoos¹⁴ are made it is not always clear who would own copyright.

¹¹ See *Macmillan And Company Ltd. vs K. And J. Cooper* LR 51 Ind App 109, 1923.

¹² See C-604/10 - *Football Dataco and Others*, 2012.

¹³ See *Komesaroff v Mickle & Others*, 1988.

¹⁴ Cummings, David. *Creative Expression and the human canvas: An examination of tattoos as a copyrightable art form*, *Illinois Law Review*, 2013, p 298-303.

There should be drawn a line between tattoo artists and architects and their works. On the surface, it is not clear what is in common between those two fields of works, but after it ends up with the comprehension that the only difference is that one of those fields is protected to the right degree and the other is not. There can be illustrated a simple situation when person hires an architect or a designer to modify or create something new in or outside of the house. Every client that pays money wants his or her design to be unique, they do not want to see the same design in a magazine, on a TV or even in other neighbour's house, who is also a client of the same architect. Architect or designer prepares a plan for a house considering all client's preferences in shapes and colours, and after preparing it could be even modified in accordance with client's wishes, because he or she pays for that work and wants it to be done perfectly. This is the same as a tattoo artist who is getting ready the preliminary drawing for his client in accordance to client's considerations. However, notwithstanding the fact that situations are sufficiently the same, tattoos are not granted with copyrights but the designs for buildings¹⁵ are. Usually it is an architect who is doing all the work suggesting to client different materials and designs, though sometimes there are clients that have a precise and detailed view of what they want. What happens if that person tells the designer all his ideas, will he be considered as an owner of work or not? There was a case¹⁶ when the similar situation happened, the author was one but the executor was the another person. The instruction was such detalized that it was enough to cause the joint authorship. It can also happen to tattoo artist that is making a tattoo to a client of his precise description of an image and it would also mean that client and tattooist become co-owners of a work.

2.3. The legal concept of a tattoo

There are flash tattoos (flash art) and custom tattoos¹⁷The distinction between those types of a tattoo should be made. The flash tattoo can be explained as a preliminary drawing of a tattoo itself, in case laws like *Allen v. EA Sports* and *Escobedo v. THQ*, flash tattoos were likely to

¹⁵ Kingsbury, Anna. Copyright Law, Designs Law, and the Protection of Public Art and Works on Public Display, *Waikato Law Review*, 2007, p 93.

¹⁶ See *Cala Homes (South) v Alfred McAlpine Homes East Ltd*, 1995.

¹⁷ Sims, Alexandra. The perils of full copyright protection for tattoos, *European Intellectual Property Review*, 2016, p 570-576.

become a basis for copyright protection. Flash art is not made exclusively for a client. Those drawings are shown to clients providing the tattoo choice set for understanding of skills and scope of a tattoo artist. Thus, it is obvious that flash tattoo has nothing to do with the tattoo, it is drawing and when it is referred to copyright protection, flash art would be copyrighted as others drawings and paintings. The custom tattoo is a permanent artistic work which is done not on a paper but on a human body. Custom tattoo is the one that is done with an input of a client, his ideas or even designs. Such tattoos are filled with more creativity and originality, they are unique and there can not be a second tattoo which would look identical or similar to it. For example, in the *Whitmill v. Warner Brothers Entertainment, Inc.* case Whitmill has registered a copyright on a tattoo itself but not a flash art. But since custom tattoos are created by both tattoo artist and a client it brings uncertainty in realisation of the ownership issues.

In order to be protected the tattoo should have an author¹⁸, there are three types of authorship: sole, joint and work made for hire. It comes to the most important question of this thesis - authorship and ownership of a copyright. There can only be the one author to the work and mostly it is a person who afterwards is granted an ownership of a copyright, for instance a sculptor or a painter has created his masterpieces on his own as well as science fiction or novel writers which would have a sole authorship over their works. In a number of original works, such as musical works and broadcasts, there can be more than one person who has put an effort in creation of the work. Then the authorship should be divided among people participated in a work, such authorship is called joint and in respect of it each person should be granted an ownership of a copyright of a part he is attributed to. It could be supposed that tattoos are made with regard to joint authorship since the client creates the idea of a tattoo and a tattoo artist gets it done. There are quite many occasions when tattoo artist and a client cooperated in order to create a tattoo, they were both working on initial sketches and were making changes to design, but the effort of a client sometimes is not enough so as he could be considered as author of the work. To qualify an authorship as a work made for hire there are two possibilities: either the tattooist should be an employee of a client or “a work should be ordered for use as a contribution to a collective work”¹⁹. However, both alternatives here are not applicable. It is obvious that client is

¹⁸ King, Yolanda. *The Right-of-Publicity Challenges for Tattoo Copyrights*, *Journal of Intellectual Property Law*, 2016, p 36-47..

¹⁹ See U.S.C. §101.

not likely to become an employer²⁰ to the tattooist and a tattoo is hardly to be done as a contribution to a collective work. If it is not a joint authorship and not a work made for hire then it is probably a sole authorship.

If you own a copyright of a tattoo on other person's body you are entitled to exclusive rights in US as well as economic and moral rights in UK. As it was discussed above, economic rights provide the owner with the rights to control the use of their copyright. But those rights are not provided with regard to tattoos, since persons wearing tattoos may put them on display whenever they want and other people may copy them without legal consequences. It is a well-known fact that inconformity with economic or exclusive rights constitute a copyright infringement. In the context of tattoo, owner of a copyright is granted with authorised control over the medium on which the artistic work is presented²¹ and in case of tattoo it is a human body. Economic rights include six different rights that have one in common, they lead to gain: the right to reproduce, the right to rent and lend, the right to distribute, the right to perform, right to communicate to public and the right to adapt the work. While "the bundle of rights" consists of five rights which respectively are: right to reproduce, right to make derivative works, right to distribute, right to perform, and right to publicly display²². Exclusive rights are almost identical to economic rights and if an owner of a tattoo would like to exercise these rights it would probably lead to violation of human rights²³. For instance, the right to communicate to public which involves the right to empower the public display may provide the owner of a copyright with a control on the appearances on TV, advertisements in magazines, photoshoots and any other public appearances. This means that person wearing a tattoo would be obliged to ask for permission in order to lead a public life. This mostly affects celebrities, since control of their lives would be profitable to tattoo artists because they make a lot of appearances every day and if the tattoo is done on uncovered place like face, then any gain of celebrity connected to public appearances would be partly a gain of tattoo artist. If celebrity would not ask the permission then it would constitute a copyright infringement and he or she would be subjected to pay monetary damages.

²⁰ Grassi, Brayndi. Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms, *Mitchell Hamline Law Review*, 2016, p 53.

²¹ Minahan, C.Michael. Copyright Protection for Tattoos: Are Tattoos Copies?, *Notre Dame Law Review*, 2015, p 1729-1731.

²² See 17 U.S.C. § 106.

²³ Elie, Samantha. Whose Tattoos? Body Art and Copyright (Part I), *Center for Art Law at the Benjamin N. Cardozo School of Law*, 2016, p 5.

It is evident that violation of economic rights constitute a copyright infringement. What happens if moral rights will be violated, will it constitute a copyright infringement as well? Under Visual Artists Rights Act (VARA) of 1990, which is US law giving protection to artist's rights, any "intentional modification or destruction of a work"²⁴ should be prevented, though any violation of that right is an infringement of copyright protection. How to understand if person is provided with moral rights or not in accordance with VARA? It applies only to list of works of visual art, which is provided by Title 17 of the U.S. Code, Section 101 and Section 602 of VARA. A work of visual art is "a painting, drawing, print, sculpture or still photographic image existing in a single copy or in a limited edition of 200 copies or fewer". There is also information on what a work of visual art does not include, those are works that are excluded from the list of works of visual art: "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication.....any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container". If tattoo artist have the moral right under VARA in accordance with being appropriate as a work of visual art, the tattoo should not be modified by other tattoo artists or surgically removed, which falls within the ambit of a destruction²⁵. No artistic work made for hire can be protected by copyright and VARA²⁶.

There was presented the Proposal for a Directive by the European Commission²⁷ on 14th of September 2016 together with the Communication for the promotion of a fair, efficient and competitive European economy based on copyright in the digital single market and the SAT-CAB Regulation as part of the package on copyright in the digital single market strategy.

Taking into account the new digital and cross-border uses of content, the Commission has set itself the objective of further harmonizing the legal framework applicable to copyright and related rights. The Proposal, made up of 24 articles, contains a series of measures that go from

²⁴ See Section 603 of Visual Artists Rights Act of 1990.

²⁵ Freshman, Daniel. Virtual Reality Meets Body Ink, Columbia Science and Technology Law Review, 2014, p 3.

²⁶ Lesicko, Christine. Tattoo as visual art: How the body fits into the Visual Artists Rights Act, IDEA: The Intellectual Property Law Review, 2013, p 51-54.

²⁷ 2016/0280 (COD)

aid for the digitization of out-of-commerce works, so as to make them available across borders, the use of text and data mining technologies (TDM), the creation of a related right for journalists.

There is the value gap in law which main idea is that the protected materials uploaded online generate an unfair distribution of revenue between the different online players. To some extent the proposal may also affect the copyright of the tattoos. Nowadays, the use of internet is widely spread. In the same way the use of content sites, such as Facebook and Instagram, where a large quantity of information is uploaded by the users, not by the site owners. The new legislation will ask those service providers to implement an adequate technology (content recognition systems) in order to identify works possibly protected by copyright. In such cases it is necessary to have a cooperation between service providers and rightholders, in order to properly identify their content. These technologies need also to give the possibility to rightholders to get information about the use of their content covered by an agreement for the use of their work.

Article 13 of the proposal for the directive, would strengthen the protection for the copyright owners, requiring the portals that make the diffusion of digital materials to adopt measures aimed at ensuring compliance with the agreements concluded with the owners for the use of their works, as well as to prevent certain contents being made available on their services. Article 13 in particular addresses the obligation towards Member States to define the cooperation between service providers and rightholders in order to use the best practices. In order to facilitate the conclusion of the license agreements required for the publication of the material. Article 10 provides a special trading mechanism for each EU Member State in which they have to ensure that the parties can use the assistance of an impartial and experienced body that provides assistance in negotiating and supporting the conclusion of the agreements, especially in case of difficulties concerning licensing of copyright. Therefore the EU legislators intend to pursue: on the one hand, imposing the signing of licensing agreements to eradicate the "abusive" uses of copyrighted works - essentially in order to guarantee an adequate remuneration to those who hold the rights - and, on the other hand, facilitate the parties in the negotiations and in the conclusion of the agreements related to copyright, also through the intervention of a specific authority which can act as intermediaries or even in the prevention of litigation.

The copyright holders seldom open a court case in order to get recognized their right due to the cost of litigation. The implementation of a specific authority could also decrease the gap between a single artist and multimillion company with more economic possibility to fight. The use of content recognition technologies as a part of the process could definitely help the rightholders of tattoos to promptly identify the unauthorized reproductions mostly through photos in the social media. In addition, the same law can have a positive effect also in marketing purposes. The copyright owner can enter into contract with the service provider in order to put his name or link in his protected content identified on the portal via the recognition technologies. The use of content recognition technologies is something not new in the internet. Such systems are efficiently used in order to detect and prevent cases of child pornography, nudity, extreme violent or extremist contents.

However, the new regulation brings a lot of critics. Summarizing, in order to fill the “value gap” the Article 13 was created, the rightholder should be provided with all of the lawful revenues that he is connected to with the help of the service providers that would be checking their platforms for object of infringements. The service providers among others need to filter user upload and set agreements with copyright owners in order to ensure that their legal rights are efficiently respected and enforced. On the other side, those measures violate the right of users since the new directive can destroy the freedom of expression of users. Moreover, the proposal for a directive does not define clear rules of how dealing with transformative art. In our case, for example, where user upload a modified version of a copyrighted tattoo. Thus, this proposal for a directive can greatly modify the way how in Europe users share informations online.

One problem could be also connected with the proportionality of the proposal for the directive. The proposal says that the way to protect copyright infringement is to filter all the user-uploaded content. Thus, all data uploaded should be subjected to filtering – a big system filter - against fundamental right of the European law. The directive does not set any transparency requirement regarding the technology used or the way filters can be applied, only impose transparency in informing rightholders, but no any obligation towards users. The failure of any reference to remixed art can be a problem since the regulation framework does not explain how to deal with such cases.

3. CASE LAW

There are some cases that provide information on the subject of tattoo artists that were trying to get damages for the copyright infringement of their artistic work, however all of them have been either settled or dismissed²⁸. It should be started with the case that was probably mostly publicized and which was not based on any preliminary drawings, accordingly registered copyright was of a tattoo but not a “flash” art. In 2011 Victor Whitmill, the tattoo artist of Mike Tyson, sued Warner Brothers for the utilization of his Māori-inspired²⁹ tattoo (hereinafter Tribal tattoo³⁰) in film *The Hangover: Part II*. With the help of Copyright Office, Whitmill has registered Tribal tattoo by attaching the photo of original tattoo placed on Tyson’s face. One of the actors was wearing the identical tattoo on the same part of a face as Tyson does and there were also some references to him during the film and he also was taking part as an actor playing himself in previous film of the *Hangover*. After creation of Tribal tattoo Whitmill asked to sign release of rights in respect of his work which means that the studio where he had been working on that moment was the sole owner it. The claim was not based on a flash tattoo in view of the fact that Whitmill was creating Tribal tattoo at the same time as making it. Victor requested the injunction of the release of the movie as well as monetary damages. The judge Catherine Perry marked that tattoos and its designs “can be copyrighted” but the parties brought themselves on settlement agreement.

One of the first cases in the field of infringement of copyrights for tattoos is *Reed v. Nike*³¹. Matthew Reed with some input of Rasheed Wallace has created a tattoo. Reed and Wallace agreed that Wallace may leave his tattoo uncovered while playing since displaying of a tattoo³²

²⁸ King, Yolanda. The Challenges “Facing” Copyright Protection for Tattoo,’ *Journal of Intellectual Property Law*, 2013, p 129-130.

²⁹ Lai, J. Christine. Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience, *European Intellectual Property Review*, 2014, p 261.

³⁰ Copyright Registration Number VA 1-767-704 “Tribal tattoo”.

³¹ *Reed v. Nike*, No. 1:2017cv07575 (04.10.2017)

³² McCarty, J. Paul. *Skin in The Game: Tattoos, Copyright and Professional Athletes*, *Mississippi Sports Law Review*, 2017, p 101-102.

could benefit Reed's business. In 2004 Wallace was invited to Nike promotion on TV, but it constituted a description and explanation of his tattoos which were taken a close-up. Reed registered the tattoo sketches in a Copyright Office which became a basis for two of his claims for copyright infringement. There were three claims, in the last one Reed demanded monetary damages from Wallace, advertising agency Weiden + Kennedy and Nike, and an interim measures against two latter ones. Reed considered Wallace as a co-owner of a copyright and he was convinced that all of the gain that is somehow connected to public appearance while the tattoo is not covered grants Reed the right to claim profit from it. Case was settled without even going to trial.

The tattoo artist of NFL player Ricky Williams, Stephen Allen brought suit against Electronic Arts, Inc.,³³ who used his copyrighted work in their game without a permission. Allen was aware of the fact that Williams would be displaying the tattoo in public as in Reed v. Nike case and he admitted it. However when Allen got abreast of the fact that Williams as well as Williams tattoo were featured on several covers of EA Sports video games³⁴, he considered that as copyright infringement since it violated his right to reproduce, right to distribute and right to display on public his artistic work. Allen made two claims: first one was for copyright infringement and second was to demand the share profits that Williams has gained through the advertisements from the use of the tattoo. This case as two other ones was dismissed.

Another is Escobedo v. THQ Inc. case³⁵. Christopher Escobedo a tattoo artist of Carlos Condit sued THQ for the use of his tattoo in a video game UFC Undisputed 3. Tattooist is the author of a tattoo and the owner of a copyright, he registered his sketches of a tattoo with a Copyright Office. Escobedo provided Condit with a license to display the tattoo on his body. However, his right to reproduction was violated since in the game there was a character of Condit with the tattoo. Escobedo based his claim on preliminary drawing and asked for monetary damages including the profit that THQ gained through the release of a game. The case was dismissed for lack of prosecution.

³³ Allen v. Electronics Arts, Inc., No. 5:2012cv03171 (31.12.2012).

³⁴ Heitner, Darren and Wilmot, Alan. Score a Touchdown, Kiss Your Tattoo, and Get Sued for Copyright Infringement?, Jeffrey S. Moorad Sports Law Journal, 2014, pp 307.

³⁵ Escobedo v. THQ Inc., No. 2:12-CV-02470-JAT (11.12.2013).

In 2012, the Supreme Judicial Court of Arizona took a decision in a case *Coleman v. City of Mesa*³⁶ that tattoo is a visual art and it is a subject to protection in accordance with First Amendment, which guarantees the free speech in USA. Tattoo artists Ryan and Letitia Coleman were trying to open a tattoo salon but they could not do that because of the local laws. They claimed that their rights to free speech were violated. The judge Scott Bales marked that the only difference between a tattoo and a preliminary drawing is the fact that one is illustrated on skin and other on paper.

There could have also been a legal proceeding between David Beckham and his tattoo artist Louis Molloy for unauthorised display of a tattoo by Beckham for a promotional campaign. However, they had a settlement agreement and the case did not go to trial.

The point of the cases on copyright infringement of tattoo is the same, cases have in common a tattoo artist which submits a claim against a multimillion dollar companies. Tattoo artists in all of the cases are the owners of a copyright for tattoo, some of artists made a contract with their clients, some not, but consequences of all of the cases are the same. All of them were settled before going to trial, tattoo artists were simply paid an amount of money that fit them. Reed was paid 450 dollars for a tattoo and that price already included an implied nonexclusive license³⁷ to “expose” the tattoo. However, depending on case³⁸, the statutory damages vary from 200 to 150 000 dollars³⁹. But since tattoo artists are not paid huge amount of money, they are not motivated to spend several years and spend money for lawsuit⁴⁰ not being sure that they are going to win the lawsuit, this is the reason why they agree on settlement agreements. Comparing the price for tattoo and compensation for copyright infringement, since the average price of tattoo is approximately 500 dollars, then the compensation is 300 times more valuable.

³⁶ *Coleman v. City of Mesa*, No. CV-11-0351-PR (7.09.2012).

³⁷ O'Connor, Elaine. *New Ink: The Perils of Superimposing Copyright Law on the Tattoo Industry*, *Westminster Law Review*, 2013, p 19-22.

³⁸ See 17 U.S.C. § 504.

³⁹ Hatic, Meredith. *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*. *Fordham Intell. Prop. Media & Ent. Law Journal*, 2013, p 433-434.

⁴⁰ Commander, L. Jennifer. *The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game*, *Washington and Lee Law Review*, 2015, p 1964-1965.

Unfortunately for other tattoo artists, the Whitmill's case had a potential to be the precedent of first tattoo copyright infringement case, but was also settled. Balance of the tattoo is featured and the problem is that of course the tattoo becomes an inseparable part of human's image. The purpose of use of the tattoos in advertisements, games and films in case law was not to highlight the person itself but his tattoo, like in cases Reed v. Nike, where the advertisement was taking 30 seconds and 75 percent of video was in an enlarged view of a tattoo and its story. Whitmill v. Warner Brothers, where the tattoo became predominant, since the connection that was created between the actor and the Tyson was no longer in Tyson being a boxer but in his tattoo, which clearly represents him. It is the first thing that person thinks about when thinks about the boxer. Notwithstanding the fact that Mike Tyson was playing a role in a previous film and his face was covered with tattoo at that time, he was not sued by Whitmill for some reasons. The tattoo on his face was not highlighted and was not shown with a close view, Tyson was considered as himself, since tattoo is a part of his image he should not take it off in order to protect a copyright. Thus, a tattoo in a second film is not covering Tyson's face, but other person's. Since that, it may be supposed that it infringes the copyright only when the purpose of showing is to get monetary benefit of a tattoo. There was another copyright infringement case where there was no specific purpose to violate the right to reproduce the work these is a case Davis v. The Gap Inc., where Davis sued The Gap Inc. for the illegal display (an advertisement) of the photo of designed by his eyeglasses put on model who was wearing The Gap clothes, but court alleged that such reproduction does not constitute the copyright infringement since it is trivial.

4. COPYRIGHT INFRINGEMENT V. TRADEMARK INFRINGEMENT

Is there a difference between buying a Hello Kitty item from an official shop or having that same Hello Kitty tattooed on human body? In the first situation the exclusive license belongs to Sanrio Co. Ltd., who is the creator and the owner of the copyright and the company will be paid, in the second situation the money only go to the tattoo artist, no royalties for the use of work should be paid. If someone makes a fake Hello Kitty toys and clothes for children and tries to sell it, the shop will get shut down. However, if there is a tattoo artist who specializes in Hello Kitty tattoos and that is how he or she makes an entire income, there is no law that would protect Sanrio in that case but it does not differ that much from making a T-shirt or a toy. However, not any big company would be really interested in people wearing the tattoos of their trademark, this is even a free advertising, which is now popular floating around the Internet. There are more and more people that sell parts of their body for advertising purposes in eBay. There are lots of DOTCOM tattoos that people are wearing nowadays. Trademark owners can not stop counterfeit production of their products, there are too many fake trademark products either Hello Kitty or any other goods all around the Internet. Wearing a tattoo of a well-known trademark is not an act of infringement and it should not confuse⁴¹ the consumer. There is only one way to violate the trademark law, through making a profit from that tattoo.⁴²

⁴¹ Johnson, Shontavia. BRANDED: Trademark Tattoos, Slave Owner Brands, And The Right To Have "Free" Skin, Michigan Telecommunications and Technology Law Review, 2016, p 235.

⁴² Cotter, Thomas and Mirabole, Angela. Written on the Body: Intellectual Property Rights in Tattoo, Makeup, and other Body Art, UCLA Entertainment Law Review, 2003, p 123-125.

5. CONCLUSION

If someone tattooed wants to be in a movie or be on TV, he or she has to get the permission from the tattoo artist who created those tattoos. If person wants to be in a magazine and there would be photos of his/her tattooed body or parts of it, the permission also should be given. Under that photo in a magazine there should be written an author of the tattoos in the same way as it is written a designer, makeup artist, hairstylist as well as the photographer under a photo of a model in a fashion magazine. Without the permission no public display can be done, despite the fact that it is his or her body, that person is not holding a copyright for tattoo. But this is when speaking about celebrities, not public people may infringe copyright without consequences until they make a profit from the work that they do not own.

I had two main questions discussed in the thesis. Who is an owner of tattoo copyright? And why having tattoo may lead to a copyright infringement? There may be two kinds of authorship: sole and joint. In the case of sole authorship, tattoo artist would be owner of copyright, tattoo artist and client make an agreement on use of tattoo in this context. Accordingly, in joint authorship, both tattoo artist and a client would be owners of copyright. Every owner of copyright has his economic rights, which include right to perform, and right to publicly display. If the sole authorship is attributed to tattoo artist and a client violates the right to publicly display a tattoo it would constitute a copyright infringement. Because only owner may use his economic rights without asking permission. However, it is hard to control if clients follow this permission rule or not if that person do not lead a public life. It would be much easier to control economic rights with the release of the directive on copyright in the Digital Single Market proposed by the European Parliament and the Council. Article 13 of the proposal for a directive would play a relevant role in solving the problem of control. Service providers would provide copyright owners, by a preliminary request, with information about the use of their works. This may be reached by content recognition technologies that would recognize works and then report about

conjunction.

LIST OF REFERENCES

Articles

- Beasley, Matthew. (2012). Who owns your skin: Intellectual Property Law and norms among tattoo artists. – *Southern California Law Review*, Vol. 85, Nr. 4, 1138-1182.
- Bradley, Timothy. (2011) The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court. – *ABA's Entertainment & Sports Lawyer*, Vol. 29, Nr. 3, 1-5.
- Commander, L. Jennifer. (2015). The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game. – *Washington and Lee Law Review*, Vol. 72, Nr. 4, 1947-1988.
- Cotter, Thomas and Mirabole, Angela. (2003). Written on the Body: Intellectual Property Rights in Tattoo, Makeup and other Body Art. – *UCLA Entertainment Law Review*, Vol. 10, Nr. 2, 97-138.
- Cummings, David. (2013). Creative Expression and the human canvas: An examination of tattoos as a copyrightable art form. – *Illinois Law Review*, Vol. 2013, Nr. 1, 279-323.
- Elie, Samantha. (2016). Whose Tattoos? Body Art and Copyright (Part I). – *Center for Art Law at the Benjamin N. Cardozo School of Law*, 1-5.
- Freshman, Daniel. (2014). Virtual Reality Meets Body Ink. – *Columbia Science and Technology Law Review*, 1-7.
- Grassi, Brayndi. (2016). Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms. – *Mitchell Hamline Law Review*, Vol. 42, Nr. 1, 43-69.
- Harkins, Christopher. (2006). Tattoos and Copyright Infringement. – *10 Lewis & Clark Law Review*, Vol. 10, Nr. 2, 313-332.
- Hatic, Meredith. (2013). Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos. – *Fordham Intell. Prop. Media & Ent. Law Journal*, Vol. 23, Nr. 1, 396-435.
- Heitner, Darren and Wilmot, Alan. (2014). Score a Touchdown, Kiss Your Tattoo, and Get Sued for Copyright Infringement? – *Jeffrey S. Moorad Sports Law Journal*, Vol. 21, Nr. 2, 299-322.

- Johnson, Shontavia. (2016). BRANDED: Trademark Tattoos, Slave Owner Brands, And The Right To Have "Free" Skin. – *Michigan Telecommunications and Technology Law Review*, Vol. 22, Nr. 2, 225-269.
- King, Yolanda. (2013). The Challenges “Facing” Copyright Protection for Tattoo. – *Journal of Intellectual Property Law*, Vol. 92, 129-161.
- King, Yolanda. (2016). The Right-of-Publicity Challenges for Tattoo Copyrights. – *Journal of Intellectual Property Law*, Vol. 16, 441-466.
- Kingsbury, Anna. 2007. Copyright Law, Designs Law, and the Protection of Public Art and Works on Public Display. – *Waikato Law Review*, Vol. 15, 78-94.
- Lai, J. Christine. (2014). Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience. – *European Intellectual Property Review*, Vol. 37, Nr. 4, 261-262.
- Lesicko, Christine. (2013). Tattoo as visual art: How the body fits into the Visual Artists Rights Act. – *IDEA: The Intellectual Property Law Review*, Vol. 53, Nr. 1, 39-62.
- Martinez, Nicole. 2016. Who Owns the Copyright in Your Tattoo Art? – *Art Law Journal*.
- McCarty, J. Paul. (2017). Skin in The Game: Tattoos, Copyright and Professional Athletes. – *Mississippi Sports Law Review*, Vol. 4, Nr. 1, 95-122.
- Millstein, S. Arrielle. (2014). Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression. – *Pace I.P., Sports & Entertainment Law Forum*, Vol. 4, Nr. 1, 135-176.
- Minahan, C. Michael. (2015). Copyright Protection for Tattoos: Are Tattoos Copies?. – *Notre Dame Law Review*, Vol. 90, Nr. 4, 1713-1737.
- O’Connor, Elaine. 2013. New Ink: The Perils of Superimposing Copyright Law on the Tattoo Industry. – *Westminster Law Review*, Vol. 3, Nr. 1, 1-29.
- Perzanowski, Aaron. (2013). Tattoos and IP Norms. – *Minnesota Law Review*, 511-591.
- Raustiala, Kal and Sprigman, Christopher. (2013). Whose tattoo is it anyway? – *Los Angeles Times*.
- Sims, Alexandra. (2016) The perils of full copyright protection for tattoos. – *European Intellectual Property Review*. Vol. 38, Nr. 9, 570-576.

Normative Documents

The United States Code.

Copyright, Designs and Patents Act 1988 S.I. 2005/1515, S.I. 2006/346.

Copyright, Designs and Patents Act 1976.

Title 17 of the United States Code or Visual Artists Rights Act.

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593, final - 2016/0280 (COD).

Court Decisions

Louisiana Western District Court, 5:2012cv03171, *Allen v. Electronics Arts Inc.*, 31.12.2012.

United States District Court of Arizona, 2:12–CV–02470–JAT, *Escobedo v. THQ Inc.*, 11.12.2013.

New York Southern District Court, No. 1:2017cv07575, *Reed v. Nike* 04.10.2017.

Missouri Eastern District Court, No. 4:11-cv-00752, *Whitmill v. Warner Bros. Entertainment Inc.* 28.04.2011.

Cala Homes Ltd and Others v. Alfred McAlpine Homes East Ltd, No. 5508, FSR 818, 30.10.1995.

Carell v. Shubert Org., No. 99 Civ. 4997, 104 F. Supp. 2d 236, 27.07.2000.

Coleman v. City of Mesa, No. CV-11-0351-PR, 284 P.3d 863, 07.09.2012.

Komesaroff v Mickle & Others, No. 10, RPC 204 01.05.1988.

Macmillan And Company Ltd. v. K. And J. Cooper LR 51 Ind App 109 1923.

Court Decision, 01.03.2012, *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*, C-604/10, EU:C:2012:115.