

# INKED AND PROTECTED: AN EXAMINATION OF INTELLECTUAL PROPERTY RIGHTS IN THE TATTOO INDUSTRY

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## Abstract

*In recent years, tattoos have become a trend. Over time, tattoos which were once a part of culture and tradition have developed themselves as an emerging fashion trend India has a golden history of tattooing which touches back over 5000 years. One of the major areas tattoos are linked to is intellectual property rights. Even though the tattoo is intellectual property it is violated without legal consequences. A trend has been seen where tattoo artists are claiming their copyright over the use of their tattoos in various advertisements featuring the celebrity to whom they applied their art. A few important questions discussed are that who is an owner of a tattoo copyright? and if it would lead to copyright infringement. Further moral rights and publicity rights are also discussed along with judgments that have set the precedent to identify the solution for this discussion. Regardless of rulings, no court has ever determined whether tattoos are copyrightable, and the majority of instances resulted in an out-of-court settlement. The tattoo artist is the owner under the Copyright Act and the bearer can obtain ownership unless there was no prior agreement with the artist discussing the owner of the copyright. Lastly, Tattoo artists should come up with cordial solutions like signing an agreement with the tattoo bearer to avoid copyright infringement cases being brought up. This solution could be the best possible way to solve the underlying issue without discrepancies.*

**Keywords:** Tattoo, Intellectual Property Rights, Copyright, Ownership, Moral Rights, Publicity Rights.

## 1. Introduction

Legal Experts have always been conversant that tattoos, body piercings, or, unnatural hair colors are unprofessional. Notwithstanding this, pioneers have persevered in the era of self-expression and have truly cherished the revolution. As iconic as it seems

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to be, there is a niggling issue. We live in an economy where everything is commercialized and body art is no exception. Being a law student on one hand and a tattoo owner on the other, I always wonder who truly owns a tattoo and if there are any boundaries to what you can have shown on your body. Under Copyright law, trademark law, and the right of publicity, this question is not at all absurd and is quite intriguing. A few judgments have held or implied that an innovative graphic work personified in a tattoo is eligible for copyright protection.<sup>1</sup> Tim Parks in his book<sup>2</sup> wrote, “You will only have Copyright in a Society that places a very high value on the individual, the individual intellect, the products of individual intellect.” Originality is the main and the most essential ingredient if we talk about the copyrightability of tattoos, without originality copyright doesn’t exist. In this paper, I would be focused mostly on matters relating to tattoos but my analysis would edge to copyright, trademark, and copyright issues along with attempting to understand the legal framework in India and Internationally and compare it to the current tattoo-related jurisprudence and its possible interpretations.

## 2. The Fundamental Tenets of Intellectual Property Rights

In my opinion, one of the core beliefs of intellectual property rights is that it allows ordinary people and businesses to protect and preserve their assets and products. Keeping this in mind, a question arises if a tattoo becomes a personal asset if it can and if it should be protected. There are many kinds of IP rights, including trademarks, copyrights, patents, geographical indications, and designs. In this area, we concentrate on Copyright. Whenever a ‘work’ that qualifies for protection is created and fixed copyright arises automatically. To photograph someone with a tattoo, even in a public setting, for instance. Would the subject’s subsequent modification of their tattoo be considered a violation of the tattoo artist’s exclusive right to create a derivative work based on their moral rights? Could a court order someone with body art not to appear in public, to cover up the tattoo, or to have it removed in this situation if the tattoo is itself infringing? What would be the appropriate remedy in this situation? Does a law like that not go against the freedom of expression, privacy, and integrity of the body? It is likely to cause confusion or weaken the mark under trademark law if a branded image or logo is applied

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<sup>1</sup> *Gonzales vs. Kid Zone, Ltd.*, 2001 WL 930791.

<sup>2</sup> Tim Parks, *Where I’m Reading From: The Changing World of Books* 24 (New York Review Books, New York, 12<sup>th</sup> May, 2015)

commercially to a person's body? In this situation, will the artist and subject both be liable or will it only be the artist? The right of publicity, which prohibits commercial but not creative uses of a person's name, image, or other indications of identity, is a subject of ongoing controversy.

### 3. Is a tattoo a Copyrightable Work?

Firstly, to begin with, what is a tattoo? "An inedible mark or figures established upon the body by the insertion of pigment under the skin or by the formation of scars" is a common definition of a tattoo."<sup>3</sup> In the meantime, there has been a recent trend of tattoo artists asserting their copyright over the usage of their tattoos in countless advertising and video games that include the celebrity to whom they applied their art. The fact that the majority of cases were settled out of court explains why no court has yet determined whether tattoos are copyrightable.

The individual case that is currently under litigation and the judgment is yet to come is *Solid Oak's Case*<sup>4</sup>. The case's circumstances are established as being one where three basketball players each have five distinctive tattoos on their bodies. The court in this case determined that the producer of the well-known basketball videogame NBA 2K did not violate the tattoo copyrights of Solid Oak Sketches, a firm that licenses tattoos when they depicted those tattoos on basketball players in their game.

For three reasons, the court ruled in favour of the defendant and concluded that the usage of the tattoos did not infringe on Solid Oaks Copyright, being:

- i. the use was de minimis<sup>5</sup>;
- ii. the players had an implied license to use and display the tattoos as part of their likeness and
- iii. the use of the tattoos in the videogame constituted fair use.

The athlete's capacity to "commercially exploit the underlying artwork" as part of their likeness was at the crux of the controversy over whether there was indirect permission to use the tattoos. Yet, the court had little trouble concluding that the tattoo

<sup>3</sup> Copyright Alliance, "Tattoos" available at: [https://copyrightalliance.org/ca\\_faq\\_post/tattoos-copyright/](https://copyrightalliance.org/ca_faq_post/tattoos-copyright/) (last visited on January 25, 2023).

<sup>4</sup> *LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333 (S.D.N.Y. 2020).

<sup>5</sup> Merriam Webster Dictionary "De Minimis" available at: <https://www.merriam-webster.com/dictionary/de%20minimis> (last visited on January 25, 2023).

artists had given the players the non-exclusive rights required to utilize the tattoos as a part of their likenesses. Solid Oak attempted to combat this by arguing that tattoo artists are subjective to expectations about whether a tattoo would become a part of their client's likeness and should not play a role in copyright law.<sup>6</sup> The court instead drew a line by refusing to extend absolute copyright protection to works that are fixed on another human being's body. Regrettably, the courts could not convincingly answer a spin on their decision. The Court did not talk about how the fame or status of the canvas affected the indirect license defense. The court focused mainly on the subjective expectation of the tattoo artists about the tattoo becoming a part of the canvas likeness.<sup>7</sup> Further, Copyright under the US Code<sup>8</sup> is defined as "exists in original works of authorship, including pictorial works that are fixed in a tangible medium of expression."

According to The Indian Copyright Act, 1957, under Section 2(c)<sup>9</sup>

"(i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a work of architecture; and" (iii) any other work of artistic craftsmanship."

Thus, from the above definition, it can be deduced that artistic work includes engraving, inscribing, sculpting, painting, or even a photograph. Now that the tattoos are inscribed onto any individual's skin are considered a fixed tangible medium.<sup>10</sup> Further, Section 13 (1)<sup>11</sup>, states that artistic creations in India can be copyrighted. As a result, any tattoo design that exhibits sufficient creativity and is printed on physical media may be protected by copyright.

### 3.1 Has a Tattoo been Copyrighted in India before?

India's history with tattoos begins in the 1980s when "Pachabottu", "Pachakuthu." and "Gonad" tattoos, which were permanent ink, were popular in the

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<sup>6</sup> *Supra* note 4 on 3.

<sup>7</sup> *Ibid.*

<sup>8</sup> 17 U.S.C. § 102 (1996).

<sup>9</sup> The Indian Copyright Act, 1957 (act 14 of 1957), s. 2(c).

<sup>10</sup> Amruta Mahuli, "Tattoos as Intellectual Property- An Indian Perspective," *available at*: [https://www.mondaq.com/india/trademark/625750/tattoos-as-intellectual-property--an-indian-perspective#\\_ftnref1](https://www.mondaq.com/india/trademark/625750/tattoos-as-intellectual-property--an-indian-perspective#_ftnref1). (last visited on January 25, 2023).

<sup>11</sup> *Supra* note 9, s.13(1).

country's northern and southern regions.<sup>12</sup> Tattoos were regarded as a sort of body alteration in which an artwork was produced by permanently or transiently altering the pigment of the skin by injecting dyes, pigments, and inks into the layer of the skin. Since tattoos on people's skin are regarded as fixed tangible media, they satisfy the requirements of the Indian Copyright Act for being an artist's work. In India, for his 2011 film "Don 2," star Shah Rukh Khan received the copyright to the letter "D" from India's registrar of Copyrights.<sup>13</sup> This demonstrates unequivocally that any tattoo design that exhibits sufficient originality and is printed on physical media is protected by copyright and may be protected by it.

#### 4. Who owns our tattoo?

We presume that a tattoo is ours when we get one. After all, we paid the artist to engrave it on our body and it is inked on our skin. Given that the tattoo is on a part of our body, why aren't we the owners? We might also wonder if it violates copyright when someone else copies it or draws inspiration from it in relation to all the aforementioned concerns. So, unless the copyright in the tattoo was expressly granted to the individual in writing, the answer to the issue of whether the tattooed person owns the copyright on their tattoo is no. Before we get into great depth on tattoo ownership, it is important to note that only unique and custom-made tattoos are the subject of this debate because they fall under the purview of copyright. Standard tattoos that can be found in a catalogue or on the walls of a tattoo parlour should not be regarded as such. Above everything, originality is the principal ingredient without which the concept of copyright does not exist. According to *Section 14(c)(ii)*<sup>14</sup>, the Copyright Holder is entitled to disseminate the work to the public. It is important to note that this facility only refers to "artistic work," i.e., the tattoo bearer's body that has been inked with the tattoo, and that Section 14 only permits the tattoo artist to restrict repetitions of the artistic work in other intermediates. This facility is related to the public announcement of artistic work.

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<sup>12</sup> R. K. Dewan & Co. "Intellectual Property in T(H) AT TOO", available at: <https://www.legal500.com/developments/thought-leadership/intellectual-property-in-t-h-at-too/>. (last visited on January 25, 2023).

<sup>13</sup> Agencies, "SRK registers Don 2 tattoo in his name", available at: <http://archive.indianexpress.com/news/srk-registers-don-2-tattoo-in-his-name/817871/> (last visited on January 25, 2023).

<sup>14</sup> *Supra* note 9, s.14(c)(ii).

#### 4.1 Arguments in favour of tattoo owners.

The question of whether the current legal system is capable of effectively regulating this emerging sector has been posed by the ongoing evolution of technology and art forms as well as the emergence of new markets like the tattoo business. There is a perplexing contradiction between who owns the tattoo and the fundamental freedom of an individual because there is no specific legislation governing tattoos and no legal precedents. To start this discussion, in India, as discussed above, tattoos can be protected by copyrights under artistic work provided they satisfy the statutory conditions that are “original work” and “fixed in a tangible medium”. Therefore, according to me, Under Article 19 and Article 21<sup>15</sup> of The Constitution of India, when the tattoo artist will regulate his artwork which would comprise the medium on which the tattoo is fixed, which is our body would violate an individual’s fundamental rights. The fact that the tattoo artist is a hired employee, in which case the tattoo carriers would possess the authorship rights, is another point in their favour, under, Section 17(c)<sup>16</sup> in the lack of a written agreement between the parties, it may be said that the tattoo wearer, who functions as a sort of employee of the tattoo artist, is the original owner of the copyright. The majority of tattoo artists actually hold the belief that once the client pays for the tattoo, he automatically owns it and all associated rights. Moreover, a tattoo owner might become the proprietor of a tattoo by:

- i. **Independent Contract Agreement:** The tattoo artists and the person getting the ink sign a contract committing him or her to work as an independent contractor. This contract includes an exclusive information clause that specifies who will own the tattoo as a product. The tattoo recipient, for whom the work was completed by the contract is given all of these rights and interests.
- ii. **Obligation under the Copyright Act:** Under the terms of the act, the owner of the copyright in an already published work, the prospective owner of the copyright in an already published work, or the prospective possessor of the copyright in a upcoming work may allocate the copyright to any person, in whole or in part, with

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<sup>15</sup> The Constitution of India, art. 19, 21.

<sup>16</sup> *Supra* note 9, s.17(c).

the caution that, in the case of an obligation of copyright in a future work, the assignment will only take effect after the creation of the work.<sup>17</sup>

- iii. **Relinquishment:** The act mentions the author's ability to renounce the copyright. The author in this instance is the tattoo artist, who has the right to renounce all for all of the copyrights associated with the tattoo by appropriately notifying the copyrights registrar.<sup>18</sup>
- iv. **License:** According to the licensing provisions of the act, any interest in a right may be granted by the owner of the copyright to an existing work or the potential owner of the copyright to any future works by way of a written license signed by him or by his properly authorised representative.<sup>19</sup>

### 5. Judicial Precedents to bring out the relevance of Copyrightable Tattoos

Fortunately, or unfortunately, there has been not a single case of copyright infringement concerning tattoos in India. On the other hand, international cases have laid down a stable precedent in relevance to the issue of copyrightable tattoos. One of the most famous United States of America cases was that of *S. Victor Whitmill vs Warner Bros Entertainment*<sup>20</sup>. The ex-boxer Mike Tyson's facial tattoo served as the inspiration for this lawsuit. Victor Whitmill, a tattoo artist, filed a lawsuit against Warner Brothers in 2011 alleging copyright infringement after the movie studio used his artwork in "The Hangover Part III" and all of its advertising. However, according to Whitmill, Tyson did not bring in a design of his own and the tattoo was created by him freehand immediately into his face. The US Courts, however, determined that a work does not have to be original for it to be protected by copyright, even if the principles and ideas are widely used.<sup>21</sup>

Whether or not a person is a celebrity, when a work of art is placed on a visible portion of their body, it serves as an indirect permission stating that as long as the tattoo remains on the individual, it has become a part of their identity and they are free to move anywhere they like. Tyson's tattoo was eventually cleared up as to who owned it thanks to Whitmill's thoughtfulness in letting Tyson show it off. The use of the tattoo design was

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<sup>17</sup> *Supra* note 9, s.18.

<sup>18</sup> *Supra* note 9, s.21.

<sup>19</sup> *Supra* note 9, s.30.

<sup>20</sup> *S. Victor Whitmill vs. Warner Bros Entertainment Inc*, 4:2011cv00752.

<sup>21</sup> Legal Information Institute, "US Code", available on: <https://www.law.cornell.edu/uscode/text/17/102> (last visited on January 25 2023).

satirical in nature, according to Warner Bros., and as a result, qualified as fair use in accordance with American law, they further stated in their defence. As a result of this lawsuit, famous people have started getting their own agreements to make sure that the rights to their tattoos don't cause any issues.

Due to this situation, concerns about the public policy about tattoos increased because they might give the artist power over their artwork, which will include the subject of the tattoo or drawing. Mike Tyson won't be able to provide the impression in public, for example, if the tattoo artist is granted the exclusive right to reproduce, create unoriginal works, distribute copies, and exhibit the tattoo in public. For a person like him whose significant income is public appearances would affect him financially, which lands us back to the violation of the fundamental rights of the tattoo owner in the real sense.<sup>22</sup>

The second landmark case was the famous Nike Tattoo Case. *Reed vs. Nike*<sup>23</sup> is often considered to be the first case to allege copyright infringement over a tattoo. In 2004 Reed became aware of a Nike advertisement created by Weiden Kennedy featuring Wallace. On February 25, 2005, an Oregon tattoo artist named Matthew Reed filed a lawsuit against Nike and NBA basketball player Rasheed Wallace over Wallace's appearance in a Nike advertisement. Wallace described each tattoo's inspiration and purpose in the campaign, which included two of his tattoos. Reed complained that Wallace and Nike had violated his copyrights without his consent and without even letting him know about the campaign. In addition, Reed created a tattoo for Wallace in 1998 and inked it on his upper arm. After the tattoo was finished, Reed acknowledged seeing the Wallace tattoo on Wallace while watching NBA games on television. He also acknowledged that he anticipated that this public display of the Wallace Tattoo and subsequent exposure to it would eventually be beneficial to his business.

The commercial featured a full-screen representation of Wallace's tattoo, a computer-generated replica of the ink, and Wallace's voiceover explaining the tattoo's significance. Upon his discovery of the commercial, Reed filed a claim for infringement with the copyright office, listing the pencil sketch that served as the basis for the Wallace tattoo. Reed claimed to be the only proprietor of the original artwork from which the

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Reed v. Nike, Inc*, 05/CV/198 BR (D.Or.Oct. 19, 2005).



tattoo on Mr. Wallace's arm was derived, together with all related rights, titles, and interests. Reed asserted that Reed was entitled to payment for any profits Wallace had from the use of the Wallace tattoo in the Nike advertising if Wallace was a joint author and hence a co-owner of the copyright in the Wallace tattoo. In addition to seeking financial compensation from Wallace, Weiden+Kennedy, and Nike, Reed also sought injunctive remedy from these companies. Yet, the case was finally resolved without a trial.<sup>24</sup>

In assumption keeping the above-mentioned landmark judgments in mind, when the tattoo bearer is a celebrity, the tattoo becomes closely associated with her or his image and persona. Many celebrities co-design the tattoos adding elements that complement their personality. These tattoos then become influential visual images that people associate with celebrities, often representing them and their brands. When tattoos become signs or distinguishing marks of a celebrity's personality, they step into the realm of publicity rights.

## 6. Publicity Rights

### 6.1. What are Publicity Rights?

According to the International Trademark Association, the right of publicity protects against the theft of a person's name, likeness, or other indications of their personal identities, such as a nickname, false name, voice, signature, likeness, or photograph, by any other person for commercial advantage. In the case of *Puttaswamy*, Judge Kaul remarked, "The Right of publicity implicates a person's interest in autonomous self-definition, which forbids others from interfering with the meanings and values that the public links with her,"<sup>25</sup> when discussing personality rights. As a result, an individual has little power to consent to the commercial use of his appearance or other distinctive qualities. This is when the copyright problem first appears.

### 6.2. The Possibility of Publicity Rights Under Intellectual Property Laws

In the sphere of intellectual property legislation, publicity rights have recently received a significant amount of attention. Celebrity rights, which are rights relating to a

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Justice K.S. Puttaswamy vs. Union of India*, (2017) 10 SCC 1.

person's personality, have sporadically also been used to refer to these rights. They can be accurately described as a person's ability to change how effectively their identity is used. The importance of a celebrity's reputation as a public figure is enormous, both intrinsically and financially. Hence, protecting one's right to prevent others from abusing it or profiting unjustly from it becomes crucial for a celebrity. In India, the safety presented under personality rights is not particularly clear, as no independent statute or body governs it. There have been efforts to recognize publicity rights as independent rights.<sup>26</sup> Few High Courts have also recognized these rights which are discussed on public figures by them having developed a status and a personality that grants commercial value to the individual.

In the case of *ICC Development vs. Arvee Enterprises*<sup>27</sup>, the court decided that the right to privacy applies to anybody or to "any indications of a person's personality like his name, personality attribute, signature, voice, etc." in terms of publicity rights. The court went on to say that the right to publicity belongs to the individual, and only he has the right to benefit from it. The common law protection against passing off was inspired by the idea of publicity rights, which many courts have documented and implemented. Furthermore, the publicity rights of the tattoo wearer would be infringed upon if tattoo artists were granted copyright over their designs in India, either totally or as joint authors with them.<sup>28</sup> The person's right to publicity would be violated if the tattoo artist decided to use these rights. The tattoo wearer would theoretically have publicity rights on the tattoo if the tattoo artist assigned or licenced his or her rights to them. This would imply that the celebrity was paying royalties to enjoy what was in fact his or her own.

### 7. Query of Moral Rights

A writer or artist of their work also has moral rights in addition to economic ones. The right to integrity is explained in Section 57, which covers the concept of moral

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<sup>26</sup> N. R. Narimant, "A cause celebre: Publicity Rights in India", *SCC Online*, available at: <https://www.sconline.com/blog/post/2022/01/24/a-cause-celebre-publicity-rights-in-india/> (last visited on February 1, 2023).

<sup>27</sup> *ICC Development (International Ltd.) v. Arvee Enterprises & Anr.*, 2003 (26) PTC 245.

<sup>28</sup> R. Sachdeva & H. Sharma, "Tattoos and Intellectual Property Rights- An Indian Perspective", *Manupatra*, (2021), available at: <https://articles.manupatra.com/article-details/Tattoos-and-Intellectual-Property-Rights-An-Indian-Perspective> (last visited on February 2, 2023).

rights.<sup>29</sup> One of the most significant moral rights granted to an author by this Section is the right to integrity. The author may file a lawsuit if any deception, deformation, alteration, or another method in connection with the work is detrimental to their honour or reputation. In the case of *Raj Rewal vs the Union of India*<sup>30</sup>, moral rights and constitutional rights were at odds with one another. In one instance, an architect fought to have a building he designed demolished, claiming that the loss of his creative corpus could not affect the author's reputation because it cannot be seen. The first thing to take away from *Raj Rewal* is that since Section 57's purview does not expressly forbid removal, it cannot forbid tattoo owners from covering up or erasing their ink. Does this raise another doubt about a celebrity's ability to get rid of a tattoo?<sup>31</sup> This is also addressed by the case in question.

Unlike all other copyrighted works, architectural work is connected to the land, which, in accordance with the Delhi High Court, is a property in and of itself and confers ownership rights to its owner. Nevertheless, the bulk of prominent cases concerning this topic have been settled out of court. Thus the law surrounding tattoos and their copyright are still unclear despite our results. In India, the right to privacy and to one's reputation is seen as two sides of the same coin. The standing of personality rights has been strengthened by the Supreme Court through instances like *Puttaswamy*.<sup>32</sup>

Additionally, by applying the *Raj Rewal* Principle, it can be assumed that publicity rights would in all circumstances defeat the tattoo artists' moral and economic rights arising from the Act.<sup>33</sup> The way the law currently stands in India, a tattoo artist, despite having Copyright over his designs would be left with no way of enforcing them. Hence, the next time we visit a tattoo parlour, we won't just have to consider the design, reputation, and safety; we also need to make sure to read the terms and conditions of the tattoo artist or the tattoo studio. Discussions about intellectual property rights are essential. In conclusion, because tattoos are seen as essential to a celebrity's brand and image, it is crucial for them to study the terms and conditions before feeling the temptation to get inked.

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<sup>29</sup> *Supra* note 9, s.57.

<sup>30</sup> *Raj Rewal vs. Union of India & Ors*, [CS(COMM) 3/2018, with IA Nos. 90 and 92 of 2018].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Supra* note 22 at 8.

<sup>33</sup> *Ibid.*

## 8. Trademarking of Tattoos

Fundamentally, a Trademark distinguishes one's past services or products from the other's selling or giving similar goods or services. Therefore, a question also arises as to if one can trademark a tattoo. The answer to that is, yes, a tattoo can be trademarked. The justification for this is that any artwork you produce and use to distinguish your goods or services may be utilised as a logo. If you decide to use a tattoo as part of your logo, you have the same legal rights to protect it as you would any other picture. Consequently, when one gets a trademark or logo inked on oneself, given the formerly mentioned point, the odds of them aiming to confuse any individual from people in general of being the inventor of the specific product or good or service are rare or unusual.

However, in some contexts, staff members are encouraged to obtain tattoos of the association's logos or taglines. On the other hand, there are some circumstances when one can wind up receiving a cease and desist notice for tattooing a trademark without the right licence, like in the case of the New York coffee shop owner who received a cease and desist notice for violating the trademark, "I (heart) NY for inking",<sup>34</sup> and "I [Coffee cup] NY" on his knuckles. To avoid the legal situation and litigation, the title holder for the aforementioned condition agreed to a number of conditions set forth by the claimed authentic owner, including restrictions on the use of photographs of his inked knuckles and the blue-penciling of the café's logo which just so happened to be the inked knuckle from the café's window pane.

Although it is important to highlight that the café owner did not copy the logo's design exactly as it is, it is also important to emphasise that there was no direct violation of the trademark. It is also to be noted that the image of a tattoo is subject to the same rules and restrictions that any other image or logo would be. This simply implies that the tattoo cannot be extremely generic and must be distinctive in order to distinguish your products.<sup>35</sup> However, if the tattoo artist does not demand a bogus connection to you, trademarking a tattoo will not prevent other private individuals from having a similar

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<sup>34</sup> Jo Adetunji, "The Conversation, who owns your tattoo? Maybe not you", *available at*: <https://theconversation.com/who-owns-your-tattoo-maybe-not-you-56050>. (last visited on January 28, 2023).

<sup>35</sup> Xavier Morales, Esq, "The Trademarking of a tattoo", *available at*: <https://secureyourtrademark.com/can-you-trademark/trademark-a-tattoo/>. (last visited on January 28, 2023).

tattoo.<sup>36</sup> Because trademarks protect competitors from misappropriating materials, the tattoo artist cannot be a rival in the market. Consequently, it may be concluded that trademarking a tattoo will not in any way bother its previous owners. It is quite doubtful that we would be able to obtain a trademark for that tattoo if any businesses or organisations have already made prior claims to it.

## 9. Infringement of Tattoos

### 9.1 Copyright Infringement

Copyright infringement occurs when an individual displays a copyrighted piece without the permission of the author. Now, a question that arises when we talk about this topic is if there is a difference between buying a Nike item from an official shop or having that same Nike tattooed on the Human body. In the first situation, the exclusive license belongs to the original owner of Nike, who is the creator and the owner of the copyright and the company will be paid, but on the other hand in the second situation, the money only goes to the tattoo artist. Now on the other hand, if someone makes a fake Nike item and tries to sell it, the shop will be charged with unlawful actions. Nonetheless, if a tattoo artist specializes in Nike tattoos and is his only source of income, no law would protect Nike in that case.

When it comes to copyright, an infringement case typically arises when another party utilises the artwork without first getting consent from the true owner of the copyrighted work and then shows it, reproduces it, or distributes it. Because the artwork is on a person's body, a tattoo is typically permanent. After the artwork is inked on the flesh, there is no way to stop. However, even if there is strong evidence of infringement, the infringement action cannot stop the person from continuing to tattoo others with the same design. The tattoo artist may also seek damages or compensation for the same.

However, the artist can only file a claim for infringement if the work has been registered with the Copyright Office; otherwise, the claim will be barred. When someone uses a copyrighted work without the author's consent, it is considered a copyright violation.<sup>37</sup> Contrary to common opinion, the moment a work is written, recorded, or

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<sup>36</sup> *Ibid.*

<sup>37</sup> Government of India, "Handbook of Copyright Law", Department for Promotion of Industry and Internal Trade, Ministry of Commerce and Industry, available at: <https://copyright.gov.in/Documents/handbook.html> (last visited on February 1, 2023).

otherwise fixed in a tangible form, as was demonstrated above, it is protected under the provisions of the Copyright Act. If the copyright hasn't been registered, the owner cannot file a lawsuit for copyright infringement. According to current legislation, some tattoos may violate copyrights as a whole.<sup>38</sup> In most cases, the copyright owners must demonstrate that the duplicated work devalues the original or its prospective market. The customer, on the other hand, is less likely to be accused of infringement because his use of the work is typically not commercial and won't typically have an impact on its market or worth.<sup>39</sup> Now we know, some works fall under the ambit of public domain, i.e., they are not protected by the Copyright Act and therefore are not subject to infringement claims, but this becomes an exception under the topic of copyright infringement.

## 9.2 Trademark Infringement

Taking the above example into consideration, trademark owners cannot stop the forged production of their products, there are too many fake trademark products all around the Internet. Wearing a tattoo of a well-known trademark is not an act of infringement and it should not confuse the consumer. There is only one way to violate trademark law by making a profit from that tattoo.<sup>40</sup> Therefore, brand obsessives getting inked up with their favourite logos isn't unheard of but these obsessives might be putting themselves in hot water. In the meantime, almost anything can be trademarked, tattoos are certainly fair game.<sup>41</sup>

## 10. Conclusion

Tattoo copyrightability is a truly contemporary legal dispute that has not yet been resolved. As a result, every case's various component each have their own arguments. The argument put out by tattoo artists is that ink should be regarded as an artistic creation covered by intellectual property rights. In my view, this topic is a difficult proposition since artists are usually freelancers and not employees of the tattoo bearers which was recognized in the case of *Solid Oak sketches vs. 2k Games*<sup>42</sup>. However, as we discussed

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<sup>38</sup> *Ibid.*

<sup>39</sup> Molly Sawyer, "Do Tattoos Infringe on Copyrights" available at: <https://smallbusiness.chron.com/tattoos-infringe-copyrights-48743.html>. (last visited on January 28, 2023).

<sup>40</sup> C. Thomas and M. Angela, "Intellectual Property Rights in Tattoo, Makeup, and other Body Art" *UCLA Entertainment Law Review* (2003).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Supra* note 4 at 3.

in detail above owing to the status of publicity rights in India, this would present the same problem of finding a license to exercise rights that already belong to the tattoo bearer, aside from the problems outlined above. When it comes to copyrights and trademarks, tattoos are not a black-and-white issue. There is still a lot of debate and questions which are left unanswered. It is extremely doubtful that the average tattooed individual will ever be the subject of major litigation, so all customers and the artist must pay attention to the issues surrounding this topic. Therefore, in my opinion, the owner of the tattoo should be the bearer, not the artist. Yet, it is made clear that the tattoo artist is the owner of the copyright by Section 2(c) and Section 17 of the Act. Regardless of legal implications, if there is no written agreement between the tattoo artist and us about ownership of the copyright, we, the tattoo wearer, can gain the copyright. There is crystal clarity with all the above-mentioned cases and as well as the Shahrukh Khan tattoo article being granted copyright registration that tattoos are indeed copyrightable property. In my opinion, tattoo artists should come up with a cordial solution for their clients. If needed, an agreement could be signed for clarity as to who shall be the owner of the tattoo. This might be the greatest option for preventing copyright infringement claims from being made. We could look forward to moving towards a more streamlined and cohesive framework in the future.