

## Inttl Innove

# COPYRIGHT IN TATTOOS

### **INTRODUCTION**

Since time immemorial, humans have progressed exponentially and left behind an imprint on this planet on account of their resourcefulness, creativity and ingenuity. From the early days of the industrial revolution to new gadgets and technologies being made every day, the cornerstone of our evolution as a species lies in our ability to adapt and overcome obstacles through our creativity and imagination. In the modern day and age, a brilliant example of these traits can be found in the intellectual property such as trade marks, copyright, designs, patents and geographical indications. Globalization as well as recognition of intellectual property rights across the globe have shone a new light on these types of IP rights and the various nuances that have to be addressed with while dealing with such assets. The subject of this particular article seeks to cover the aspect of Copyright, more specifically to shed some light on some of the potential issues and probable solutions pertaining to Copyright in tattoos. But in order to delve deeper, it would be helpful to remind ourselves what falls under the ambit of copyrightable material and what aspects are relevant in deciding this.

### **COPYRIGHT LAW IN INDIA**

What all material can a person claim to have an exclusive right over has been defined in Section 13 of The Copyright Act, 1957 (hereinafter “Act”) and it states that copyright shall subsist in any original artistic, musical, dramatic and literary works, cinematography films and sound recordings. Section 14 of the Act comprehensively defines copyright as being a bundle of exclusive rights in relation to reproducing, issuing copies, performing or communicating to the public, etc., any of the works mentioned in Section 13. “Artistic work” as defined under Section 2(c)(i) of the Act includes paintings, sculptures, drawings (including a diagram, map, chart or plan), engravings or photographs.

## TATTOOS AND THEIR INTERSECTION WITH COPYRIGHT LAW

The origin of tattoos can be traced back to 5000 years ago, with there being more evidence of prominence of tattoos in Egyptian culture dating back to circa 2000B.C.<sup>1</sup> Tattoos have existed with humans fulfilling a variety of purposes ranging from a status symbol or mere adornments to being the representation of counter-culture and rebellion. These days, tattoos have gained quite a bit of prominence with certain stigmas associated with them being removed and more importantly due to the technology and accessibility of getting a tattoo being easier than before. It has been reported that as of 2019, the Indian tattoo industry was generating approximately Rs. 20,000 crores annually (USD 2.4 billion).<sup>2</sup> Considering that tattoos are in the nature of paintings, drawings and engravings, the subject matter of a tattoo can be protectable under the Act should the remaining requirements for obtaining a copyright therein are complied with. The legal status of tattoos as protected works of art was further confirmed when Shah Rukh Khan was reported to have obtained a design registration for the tattoo of the letter “D” as featured in his movie “Don 2”.<sup>3</sup> Though this may have been a marketing gimmick and to preserve rights for the future of the franchise, the registration of the tattoo clearly shows that any tattoos which are original artistic works are liable to be protected in Indian law. Thus, under Section 17 of the Act, the creator of any original artistic work applied as a tattoo is the owner of the copyright and the bundle of rights associated therewith.

## TATTOOS OF ALREADY COPYRIGHTED WORKS

However, not every tattoo can be an original artwork. If the customer approaches an artist and asks the artist to make a tattoo of a work which is already the subject matter of a copyright registration obtained by another person, the same may constitute copyright infringement. In such a situation, there are various different aspects which would need to be proven in a Court of law to establish infringement, such as substantial similarity between the original work and the tattoo, whether the tattoo had transformed the original work into a completely new work on account of added subject matter or variations in drawing as well as whether there was any commercial use of the tattoo. For instance, in a recent matter *Jeffery B. Sedlik vs. Katherine Von Drachenberg, et. Al.*<sup>4</sup> instituted before a district Court in California, a photographer named Jeff Sedlik claimed that a tattoo artist named Kat Von D had infringed on his copyrighted work based on unauthorized reproduction, distribution, display, and derivative use. Sedlik had conceived and created a photograph of the legendary jazz musician Miles Davis in 1989 and the said photograph had been licensed to magazines and for merchandise and on account of dissemination was widely known to the public. Kat Von D had made a tattoo of the said portrait on a customer and had posted it on her social media accounts which admittedly garnered a fair bit of attention and praise for her skills. In an order passed on 31.05.2022, the Court held that the issues of substantial similarity, transformativeness and commercial use being triable issues. However, the Court also observed that while the pose in the photograph clicked by Sedlik could not be protected, the wide array of decisions leading up to the portrait such as the lighting choices, camera angles, etc. are protectable and as such the portrait is entitled for “broad protection” of copyright. The matter has proceeded to trial and a decision will hopefully be reached in the near future.

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[1] “Tattoos: The Ancient and Mysterious History”, Smithsonian Magazine, <https://www.smithsonianmag.com/history/tattoos-144038580/>

[2] “India’s ₹20,000 crore tattoo industry’s lax standards are putting lives at risk”, Business Insider, <https://www.businessinsider.in/indias-tattoo-industry-needs-regulation-and-standards-to-protect-customers-and-artists/articleshow/70835880.cms>

[3] “SRK registers Don 2 tattoo in his name”, The Indian Express, <http://archive.indianexpress.com/news/srk-registers-don-2-tattoo-in-his-name/817871/>

[4] Order of Central District Court of California dt. 31.05.2022, <https://copyrightlately.com/pdfviewer/sedlik-v-von-drachenberg-summary-judgment-order/>

Indian law has also set out tests for copyright infringement being the “total concept and feel test” and the “extrinsic-intrinsic” test for determining substantial similarity. Though no such cases have been filed in India yet, considering the recent judgement pertaining to protection of personality rights of Mr. Amitabh Bachhan including his name, image and voice, it is only a matter of time before the issue of an already registered copyrighted work being infringed on account of substantial reproduction as a tattoo is brought before the Courts.

## **TATTOOS OF ORIGINAL ARTWORK**

The second facet of copyright in tattoo lies in the tattooing of original artistic works which have been created by the artist themselves. As per Section 17 of the Act, the artist of the original artistic work being its author shall be the first owner of such work. However, it is also pertinent to note that along with being conferred the status of an owner of a copyright, the artist shall also be given the bundle of rights enumerated in Section 14 of the Act. A conflict is given rise in this situation on account of a very unique issue, that the tattoo being an original artwork has been reproduced and painstakingly drawn on the skin of the tattoo bearer. One of the rights conferred onto the copyright holder is the right to communicate to public the copyrighted work. It is easy to see how the application of such a right of communicating to the public of a copyrighted work on another human being would inextricably mean the artist being given a right to control and regulate the activities of the tattoo bearer in one form or another. Such rights of control and regulation would be in violation of the fundamental rights granted by Articles 19 and 21 of the Indian Constitution.

Another aspect which would require consideration is the ownership rights of the tattoo residing with the tattoo bearer. For any customer to receive a tattoo from an artist, the customer would be required to pay a consideration or a fixed amount depending on the size, details and technique to be utilized in applying the tattoo. As per Section 17(c) of the Act, in case of a work made in course of the author’s employment under contract of service or apprenticeship, the ownership shall vest with the employer in absence of any agreement stating contrary thereto. It can be argued that the act of getting a tattoo forms an implied agreement between the customer and the tattoo artist, wherein a proposal of getting a particular design or tattoo is put forth by the customer and the same is accepted by the artist in return for consideration, and therefore the very act of getting a tattoo from an artist would form an implied agreement thus invoking Section 17(c) of the Act.

One additional aspect which has the potential to turn the abovementioned argument around is that of having an original artwork applied to the body of a celebrity. Generally speaking, a vast majority of tattoo bearers get the tattoo for personal use. However, a minority of tattoo bearers are celebrities whose likeness is used for commercial gain. Many sportspeople, actors and other famous persons in the entertainment industries sport tattoos. On account of the very nature of their careers, it is inevitable that the tattoo would be featured in a movie, photograph, video game, etc. In such a situation, can the tattoo artist invoke his ownership rights and seek royalty from the celebrity on account of the tattoo being used for commercial gain or can the artist seek to regulate the celebrity’s activities or communication of the copyrighted work to the public claiming the same would fall under the ambit of a reasonable restriction to the fundamental rights? In addition to citing infringement of his/her fundamental rights, the celebrity bearing such a tattoo may also claim that since the tattoo is on his skin and is a part of who the celebrity is, the tattoo should now be considered as a part of the personality rights of such celebrity. Though these such claims remain hypothetical in India, they are being put to test in the United States of America. In a recent matter of *James Hayden vs. 2K Games Inc, et. Al.* instituted before the Northern District Court of Ohio, James Hayden, a tattoo artist had claimed that six of his original artworks applied as tattoos to famous NBA players LeBron James, Tristan Thompson and Danny Green had been infringed by the video game developer by featuring the said tattoos in their NBA video game without permission, authorisation and consent from the artist.

Hayden alleged that showing the tattoos made by him in the game amounted to unauthorised digital reproduction of his copyrighted work and that such reproduction is intended for commercial use. In an opinion and order passed on 20.09.2022,<sup>5</sup> the Court gave its preliminary observation that Hayden's works were original and were entitled to protection. The matter is now proceeding to trial to decide on aspects of substantial similarity, commercial use, fair use and transformativeness. However, it appears that there is some conflict in the decisions arrived at by the Ohio Court and the New York District Court. In a similar litigation instituted by Solid Oak Sketches LLC, a tattoo licensing company against 2K Games Inc., the New York Court granted the game developers' motion for summary judgement and dismissed the action on the grounds of de minimis use (use of the tattoos in the game were too small, indistinct and obstructed by other elements in the game), implied license agreement between the NBA players and the artist and fair use of the original artwork. In another matter before the Arizona District Court filed for infringement of copyright in tattoos of wrestlers in the WWE game, the Court observed that the issues of de minimis use, commercial gain, implied license and fair use are issues which are required to be proven in trial.<sup>6</sup>

Possibly the most famous of all such cases is the action taken by S. Victor Whitmill against Warner Bros. Entertainment Inc. for copyright infringement of his original artwork. Whitmill, the artist who created Mike Tyson's iconic face tattoo, alleged that the reproduction of the tattoo on Edward Helms' face constituted copyright infringement. However, the matter was settled out of court.

## CONCLUSION

Though there haven't been any reported litigation concerning the infringement of copyright and tattoos in India, considering the growth and popularity of this industry, it seems to be only a matter of time before the Courts in India are sought to adjudicate on this dispute. The intersection of the world of tattoos with copyright, the associated rights granted by virtue of being the copyright owner and how all such rights should be implemented in harmony with all other relevant laws is an exercise that will need to be taken up by the Courts. It seems that an easy solution to such disputes may as well be the simplest one, to enter into a contract which clearly defines the rights and obligations of each party and what shall be the consequences of the obtaining the tattoo. Though seemingly impractical, there may be various alternatives to entering into a full-fledged licensing/user agreement for every single tattoo such as the tattoo artist clearly informing how they monetize their original artworks or any form of written understanding between the artist and customer recognizing ownership rights of the tattoo. It will truly be fascinating to see how the Indian Courts would adjudicate on such disputes and what precedent would bind all future tattooing transactions.

*Disclaimer: The information contained in this article is provided for informational purposes only, and should not be construed as legal advice on any subject matter.*

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[5] James Hayden vs. 2K Games Inc., [https://www.docketalarm.com/cases/Ohio\\_Northern\\_District\\_Court/1--17-cv-02635/Hayden\\_v.\\_2K\\_Games\\_Inc.\\_et\\_al/193/](https://www.docketalarm.com/cases/Ohio_Northern_District_Court/1--17-cv-02635/Hayden_v._2K_Games_Inc._et_al/193/)

[6] Catherine Alexander vs. 2K Games Inc. et. al., <https://copyrightlately.com/wp-content/uploads/2020/10/Catherine-Alexander-v.-Take-Two-Interactive-MSJ-Order.pdf>

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