Copyright Infringement Claims for Tattoos?

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Eric Vaughn-Flam Esq., the General Counsel for the Internationalist, shares the association's legal perspectives and opinions for today's ever changing global advertising landscape.

One might think we own an unfettered right to our own skin. But when people get tattoos, they are having an artist create a copyrightable work on their face, body, and limbs. This poses a problem when tattooed people are featured in advertising and have not secured rights to the tattoos. Amazingly, tattoo artists are increasingly filing suit for copyright infringement against companies that feature their handiwork on celebrities and athletes without first obtaining permission. The copyright requirement of fixation in a tangible medium includes an artwork created on a human canvas, and thus is an enforceable copyright.[1] When people with tattoos are featured in advertising, advertisers need to secure the rights to the tattoos as well.

In two recent notable cases, tattoo artists sued for copyright infringement after their artwork appeared in a commercial and motion picture. In 2004, Matthew Reed inked a design he created on former NBA professional basketball player Rasheed Wallace. Nike subsequently used Wallace's likeness in advertisements prominently featuring the tattoo. Reed brought suit the following year against the NBA and ad-firm Weiden & Kennedy for direct copyright infringement as well as contributory infringement against Wallace.[2] In a similar case, tattoo artist S. Victor Whitmill, who inked Mike Tyson's infamous face tattoo, filed a copyright infringement claim against Warner Bros. Entertainment in 2011.[3] The studio's picture, "The Hangover Part II" featured a character with a face tattoo nearly identical to Whitmill's tattoo. Copyright infringement suits have expanded to include tattoos featured in other commercial works.[4]

If, however, the tattoo artist took the design from a stencil book for example, the defense of lack of originality may be available. Similarly, if the customer provided the design for the tattoo, the tattoo may be considered a work-for-hire, meaning that the tattoo artist is not the author for copyright purposes.[5]

Advertisers would do well to follow the lead of the NFLPA, which has begun to advise football players to obtain copyright waivers or licenses from tattoo artists. Of course, tattoos can just be covered or airbrushed to avoid the problem altogether. So the next time an advertiser wants to cast the likes of Colin Kaepernick or David Beckham, beware the infringement liability that lurks on the inked epidermis.

[1] 17 U.S.C. § 102.

[2] *Reed v. Nike, Inc.*, 2005 WL 1182840 (D.Or.).

[3] *Whitmill v. Warner Bros. Entertainment, Inc.*, 2011 WL 2038149 (E.D.Mo.).

[4] *Escobedo v. THQ, Inc.*, 2012 WL 5815742 (N.D.Ill.).

[5] Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Business Beware of the Ink*, 10 Lewis & Clark L. Rev. 313 (2006).