Copyright: Definition And Law In Australia

Copyright is a type of intellectual property which protects particular forms of expression regarding literary, dramatic, musical or artistic works. In Australia, the Australian Copyright Law is governed in the Copyright Act 1968 (Cth) and gives the owner exclusive right to do certain things in regards to their copyrighted material. One form of art that has been largely considered as outside the realm of copyright are tattoos. Tattoos have caused great controversy as to whether or not they are copyrightable as they operate within a grey area, blending the lines as to what can or cannot be copyrighted and the infringements in place. This essay will address the ambiguity in regards to the legal protectability and copyright of tattoos in regards to both the rights of the tattoo artist as well as the client. Further, this essay will argue that whilst tattoos do meet most requirements of copyrightability in Australia, there are challenges presented which impede on a tattoo artists ability to enjoy the full panoply of rights and remedies that authors and copyright owners of other artistic works have.

Traditionally tattoos were displayed on the bodies of various cultures throughout the world, lending themselves to symbolise a cultural or ritualistic aspect. However, with the exponential growth in social media and the increasing popularity of tattoos, the tattoo industry is also increasing exponentially in value. In Australia, 14.5% of individuals have tattoos, 2000 individuals work in the Australian tattoo industry and there are 987 tattoo businesses nationally. Therefore, the issue of copyright in tattoos has never been more prevalent than in recent years due to it being heavily regulated by social norms.

Under the Copyright Act 1968 (Cth) it is clear that tattoos can have several types of owners. Issues of ownership differ vastly between the two types of tattoos, that is, flash tattoos and custom tattoos. Flash tattoos are drawn on paper by the tattoo artist and can be displayed in the shop for inspiration. Most commonly, as outlinlined it section 35 of the Copyright Act 1968, the individual who created the tattoo will be the first copyright owner. However, as evident in section 35 (4) of the Copyright Act 1968, if an individual is under employment, in this case, a tattoo artist under employment of a tattoo parlor, this could mean that the employer could be classified as the owner instead, unless specified differently in the employee contract. This strand of copyright ownership was most noticeably outlined in the Redrock Holdings Pty Ltd v Hinkley (2001) case whereby a dispute was made and ownership was granted not to the creator, but to Redrock, as the creator was classified as an ‘employee’. On the other hand, custom tattoos are specifically designed for the client and therefore may lead to joint ownership. This is due to the collaboration between the tattooist and client whereby the tattooist will draw initial sketches and the client may offer suggestions before it is finalised. Furthermore, if a client came in with a photograph or painting they wanted to be replicated then the initial photographer or painter would be classified as the tattoo’s copyright owner. In any case, the author and the maker owns the copyright.

Notwithstanding the above, tattoos also need to fit within the definition of a not only a ‘work’ but also a ‘material form’ to be properly afforded copyright protection. As depicted in section 189 of the Copyright Act 1968, it is evident that tattoos fall within the category of an ‘artistic work’. More specifically, they could be classified as a drawing or illustration, however, may be considered an engraving if it was more exhaustively defined due to the use of needles.

Moreover, tattoos also seem to meet the requisites for being a material form for an artistic work. As the skin, despite being an organic material form, is still a form of storage. In spite of this, the Australia court has not definitively decided as to whether a tattoo on skin satisfies the ‘material form’ requirement. In the USA however, a case regarding singer Adam Ant concluded that his face paint was not capable of being considered ‘artistic work’. An issues of this ‘gray area’ in which tattoos operate in copyright arises with the idea of having an organic material such as skin as a material form. For example, if the individual with the tattoo dies, leaving the skin with the tattoo to decompose, would this impact the 70 year copyright available to the tattoo artist, especially if they themselves were still alive or deceased?.

The originality of the tattoo is also a highly important factor as to whether or not copyright may be granted. Tattoos may be considered original if they have the required skill and effort and are not directly or indirectly copied from someone else. For example, Krueger Transport Equipment Pty Ltd v Glen Cameron Storage & Distribution Pty Ltd (2008) highlighted that original artistic works can attract copyright and can authorise infringement. As governed in the Section 31 of the Copyright Act 1968, if an original tattoo has indeed been created as an artistic work in material form, the copyright owner is given the rights to reproduce the work in material form, publish the work and communicate that work to the public. However, the author will have the moral rights over the tattoo, regardless of the ownership of copyright. That is, they have the right to integrity, attribution and to not be falsely attributed as the artist. The tattoo artist may waive their rights however given that clients sign a contract prepared by the tattoo artist and not the client, it is unlikely that the contract will contain clauses with waive their moral rights.

While a tattoo can meet the requirements of copyrightability in Australia, the possibility for suing for copyright infringement by the tattoo artist is also not very likely. Courts have witnessed several cases regarding infringement of tattoos over the years however most were settled out or dropped. The tattoo artist for David Beckham, for example, threatened to sue Beckham if he featured his tattoo in a campaign, however the case was presumably settled. The Copyright Act 1968 highlights that breaking any of the copyright owners legal rights will result in infringement. However, although this would be the case for standard creative works, tattoos yet again cause issues and operate within a ‘grey area’. Tattoo infringement issues would specifically need to be considered in a variety of contexts, specifically in regards to reproducing and publishing the copyright owners exclusive rights to their work. For example, would simply photographing a person with their tattoo and posting on social media be considered an infringement?. In the Allen v Electronic Arts Inc case, Ricky Williams clearly infringed the copyright held by his tattoo artist. However, as the tattoo was directly on his bicep, questions had to be raised about the ethical issues in regards to remedies. This is because a normal remedies would hinder his ability to portray his body in public and online for the rest of his life, breaching standard human ethics. Furthermore, more ethical issues would arise if his social media accounts were private as maintaining a private account is a human right as outlined in the Social Media Code of Ethics. These ethical would therefore also be problematic for earning the ability to apply for a remedy as 60% of Australians use social media daily. However, if the tattoo was not real and was instead only a temporary tattoo then a remedy may be granted. This is evident in the Whitmill v Warner Bros Entertainment Inc who did reach the preliminary injunction stage and would have been granted that remedy if societal needs and desires had not come into play (30).

The remedies for breach of the right of integrity are also problematic in regards to tattoos. Even if the client owns the copyright in the tattoo or jointly owns copyright in the tattoo, the tattoo artist’s enforcement of her moral rights could result in the client being limited as to what she

wished to do with her tattoo. Unless the tattoo artist has waived her moral rights, the right of integrity may come into play if the client decides to make changes or additions or even touch-ups to her tattoo. If the tattoo artist has a reputation, as many tattoo artists do, and the change or addition damages the reputation of that tattoo artist, the original tattoo artist could sue for a breach of their right of integrity. The remedies for breach of the right of integrity are problematic. In Snow v Eaton Centre Ltd the aggrieved author was granted an injunction, in that case removing Christmas decorations that adorned his majestic flying geese sculptures. Therefore Ethical issues arise for not only legal remedies but also moral remedies as removing an alteration to a tattoo would be rather more invasive: it is not a simple procedure to remove alterations to tattoos. Moral rights are not the only occasion when remedies raise concerns.

Hard copy facsimile, in relation to a literary, dramatic or artistic work, means a facsimile which is in a material form and from which the work is visible to a human being without the use of any device.

The law surrounding tattoos, copyright and the unfettered protection of them is yet to be decided in Australia. Whilst tattoos do seemingly meet most of the requirements of copyrightability in Australia it is evident that until further legislations can be made, they will continue to operate within a ‘grey area’. Also, within this area ethical issues continue to cause serious boundaries towards granting tattoos the same remedies that over creative works are given, and this in unlikely to change. Therefore, tattoo artists, unless serious amendments are made to the Copyright Act 1968, or new legislations are made, will be unlikely to enjoy the full panoply of rights and remedies that authors and copyright owners of other artistic works have.

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