

March 2014

## Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression

Arrielle Sophia Millstein

Follow this and additional works at: <https://digitalcommons.pace.edu/pipself>



Part of the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Arrielle S. Millstein, *Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression*, 4 Pace. Intell. Prop. Sports & Ent. L.F. 135 (2014).

Available at: <https://digitalcommons.pace.edu/pipself/vol4/iss1/5>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Intellectual Property, Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

## Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression

### Abstract

This Article argues why human flesh, because of its inherent properties and its necessity for human survival, should not qualify as a tangible medium of expression under the Copyright Act of 1976. Through policy concerns and property law this Article demonstrates why the fixation requirement, necessary to obtain copyright protection of a “work,” must be flexible and eliminate human flesh as an acceptable, tangible medium of expression, to avoid the disastrous risk of the court falling into the role of “21st Century judicial slave masters.”

### Keywords

tattoos, copyright, human flesh

PACE UNIVERSITY  
SCHOOL OF LAW

PACE INTELLECTUAL PROPERTY,  
SPORTS & ENTERTAINMENT  
LAW FORUM

---

Volume 4

Winter 2014

Issue 1

---

*Article*

**Slaves to Copyright:  
Branding Human Flesh as a  
Tangible Medium of Expression**

*Arrielle Sophia Millstein\**

---

\* Arrielle Sophia Millstein, a member of the New York and New Jersey Bars, and a recent Class of 2013 graduate from Widener University School of Law, is working as an intellectual property attorney in Hackensack, New Jersey. She thanks Douglas Wortmon, a truly inspiring friend, who planted the topical seed for this Article, and afforded her his ear as this legal flower started to blossom; and Professor Tonya Evans, for her superior mentorship and guidance, which nurtured the creativity that helped, make this Article a labor of unconditional love.

**Abstract**

This Article argues why human flesh, because of its inherent properties and its necessity for human survival, should not qualify as a tangible medium of expression under the Copyright Act of 1976. Through policy concerns and property law this Article demonstrates why the fixation requirement, necessary to obtain copyright protection of a “work,” must be flexible and eliminate human flesh as an acceptable, tangible medium of expression, to avoid the disastrous risk of the court falling into the role of “21st Century judicial slave masters.”

**Table of Contents**

INTRODUCTION..... 137

I. MOLDING THE MEDIUM: THE HISTORY OF COPYRIGHT’S FIXATION REQUIREMENT ..... 142

    A. *Fixation’s Legislative History* ..... 143

    B. *The Fixation Requirement in the 21st Century* ..... 145

        1. *Permanency* ..... 146

        2. *Transitory Duration* ..... 147

II. DOES HUMAN FLESH QUALIFY AS FIXED IN A TANGIBLE MEDIUM OF EXPRESSION?..... 149

    A. *Permanency*..... 149

    B. *Transitory Duration*..... 152

    C. *Functionality of the Human Flesh*..... 154

III. LEGAL CONFIDENCE IN ONE’S SKIN: INDIVIDUAL RIGHTS IN THE HUMAN BODY ..... 157

    A. *Classifying the Body as Property* ..... 158

    B. *Classifying the Body as a Privacy Interest* .. 161

IV. MODERN SLAVERY THROUGH THE 1976 COPYRIGHT ACT ..... 164

    A. *Virtual Slave Masters* ..... 164

    B. *Slave to the Court: Enforcing Copyright Remedies* ..... 169

---

1. Market Recognition .....	171
2. Lack of Recognition .....	174
CONCLUSION.....	176

**INTRODUCTION**

“Though the earth and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself.” ~ John Locke<sup>1</sup>

The human skin is the body’s largest organ, spanning a total area of twenty-two square feet and weighing an average of eight pounds.<sup>2</sup> The skin constantly regenerates itself, shedding up to one million skin cells daily.<sup>3</sup> Human skin is miraculous; it regulates body temperature, permits sensory stimuli, and provides protection against harmful infections, dehydration, and injury.<sup>4</sup> In addition to the human flesh providing human beings with life, it is a way for many people to demonstrate individual expression,

---

<sup>1</sup> JOHN LOCKE, TWO TREATISES ON GOVERNMENT 209 (London, Printed for R. Butler 1821) (1690).

<sup>2</sup> *Skin*, NAT’L GEOGRAPHIC, <http://science.nationalgeographic.com/science/health-and-human-body/human-body/skin-article.html> (last visited Jan. 31, 2014); *Skin Problems & Treatment Health Center*, WEBMD, <http://www.webmd.com/skin-problems-and-treatments/picture-of-the-skin> (last visited Jan. 31, 2014) [hereinafter *Skin Problems*].

<sup>3</sup> Ed Grabianowski, *How Many Skin Cells Do You Shed Every Day?*, DISCOVERY FIT & HEALTH, <http://health.howstuffworks.com/skin-care/information/anatomy/shed-skin-cells.htm> (last visited Feb. 2, 2014).

<sup>4</sup> See *id.*; see also *Skin Problems*, *supra* note 2.

whether that be through body art, body modifications, unique body piercings, tattoos, skin stretching, plastic surgery, or skin alternation for cultural traditions.

In 2011, Warner Brothers released the much-anticipated sequel, *The Hangover Part II*.<sup>5</sup> The film raked in big bucks at the box office and caused an uproar in the copyright community when one of the characters, Stu Price, wakes up one morning after a wild night in Bangkok, permanently sporting around his left eye a replica of Mike Tyson's infamous, tribal facial tattoo.<sup>6</sup> The scene won laughs globally; however, the tattoo artist who imprinted the tribal art on the heavyweight-boxing champion's flesh, S. Victor Whitmill, was not amused and filed a copyright infringement lawsuit against Warner Brothers on April 28, 2011.<sup>7</sup>

Warner Brothers did not know that when Whitmill tattooed the tribal piece on Tyson's face in February of 2003, Tyson signed a release form that acknowledged, "all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo are property of Paradox-Studio Derma-graphics."<sup>8</sup> Warner Brothers never asked Whitmill for permission to use, reproduce, or create derivative works of Tyson's tattoo in advertising and promotion

---

<sup>5</sup> THE HANGOVER PART II (Warner Brothers 2011); see Jon Reichman & Aaron Johnson, *Hangover Ink*, INTELL. PROP. MAG., July/Aug. 2011, at 28, 28, available at [http://www.kenyon.com/newspublications/publications/2011/~media/Files/Publication%20PDFs/2011\\_IPM\\_JulyAug.ashx](http://www.kenyon.com/newspublications/publications/2011/~media/Files/Publication%20PDFs/2011_IPM_JulyAug.ashx).

<sup>6</sup> Reichman & Johnson, *supra* note 6, at 28.

<sup>7</sup> *Id.*

<sup>8</sup> Verified Complaint for Injunctive and Other Relief at 3, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11CV00752, 2011 WL 2038147, at \*3 (E.D. Mo. Apr. 25, 2011).

of the film.<sup>9</sup>

In addition to alleging copyright infringement, Whitmill filed a preliminary injunction in an attempt to stop Warner Brothers from releasing the film, but the presiding judge denied the injunction, acknowledging that “[Whitmill had a] strong likelihood of prevailing on the merits for copyright infringement.”<sup>10</sup> Warner Brothers and Whitmill eventually settled outside of court, preventing the Eastern District of Missouri from establishing firm legal precedent on the controversial issue of copyrighting tattoos.<sup>11</sup> As scholars and attorneys in the intellectual property field across the country weighed in on this controversy, the question of whether human flesh is copyrightable was at the core of the debate.<sup>12</sup>

The United States Constitution states, “Congress shall have the power . . . [t]o promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>13</sup> Under the 1976 Copyright Act, copyright protection is given to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>14</sup> Originality under the Copyright Act requires the author independently create the work using a low modicum of

---

<sup>9</sup> *Id.* at \*6-7.

<sup>10</sup> Reichman & Johnson, *supra* note 6, at 28.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.*; *see also* Declaration of David Nimmer at 3, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11CV00752, 2011 WL 10744102, at 2 (E.D. Mo. May 20, 2011).

<sup>13</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>14</sup> 17 U.S.C. § 102(a) (2012).

creativity.<sup>15</sup> A work of authorship affixed to human skin would likely be copyrightable as a “pictorial, graphic, or sculptural work,” but its copyrightability hinges on the fixation requirement. This Article will argue why human flesh should not qualify as a “tangible medium of expression” under the Copyright Act of 1976.

The above copyright provisions endow the author with complete property rights to control her work for her lifespan, *plus*, seventy years after her death; only once this period has lapsed does the author lose control over her work.<sup>16</sup> This Article, through policy considerations and basic property and privacy law, specific to the personal rights in an individual’s body, will demonstrate why the fixation requirement must be flexible and categorize human flesh as an intangible medium of expression<sup>17</sup> to avoid the disastrous risk of the court falling into the

---

<sup>15</sup> Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511, 525 (2013) (citing *Feist Publ’n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991)). Works of authorship including: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” 17 U.S.C. § 102(a) (2012).

<sup>16</sup> 17 U.S.C. § 302(a) (2012); see Melissa A. Bogden, Comment, *Fixing Fixation: The RAM Copy Doctrine*, 43 ARIZ. ST. L.J. 181, 186 (2011).

<sup>17</sup> Intangible medium of expression refers to the negative of “tangible medium of expression.” A work of authorship qualifies for copyright protection when “fixed within a tangible medium of expression.” 17 U.S.C. § 101 (2012). However, a work that resides in an intangible medium of expression does not qualify for copyright protection. Throughout this Article, the meaning of intangible medium of expression remains consistent with this footnote’s explanation.

role of “21<sup>st</sup> Century judicial slave masters.”<sup>18</sup>

Part I provides a brief look at the legislative intent behind the Copyright Acts of 1909 and 1976, with particular focus on the reasons the fixation requirement is a necessity for copyright protection. Further, this Part will examine, through precedent and policy, what the legal standard for fixation is in the 21<sup>st</sup> Century, paying special attention to what constitutes a “tangible medium of expression.”

Part II will argue why the human skin does not constitute a “tangible medium of expression,” arguing that the regenerative nature of human skin disallows qualification under the standard laid out by the court for “sufficient permanence.” Additionally, this Part will discuss how through transitory duration’s functional standard, body art, plastic surgery, or a layperson’s tattoo are not reproduced for economic value, differentiating between reproductions by Warner Brothers in *The Hangover Part II* and the makeup designer for the Broadway play, *Cats*. Finally, this Part will argue that above both the requirements of permanency and transitory duration, because human skin is necessary for an individual’s survival, it is a useful article and uncopy-rightable.

Part III addresses the personal rights in one’s own body, discussing an individual’s privacy and property interests set forth in the United States Con-

---

<sup>18</sup> In this Article, I coin the phrase “21<sup>st</sup> Century judicial slave masters.” In terms of this Article, this phrase means that the United States judiciary will act as modern day slave master exercising behavior similar to 19<sup>th</sup> Century slave masters that existed prior to the ratification of the Thirteenth Amendment. However, courts will take on the role of “21<sup>st</sup> Century judicial slave masters” by controlling individuals through the remedial copyright laws.

stitution. Further, this Part looks at these interests' relationship to a copyright holder's property rights, ultimately concluding that an individual's personal rights in her body supersede copyright law.

Part IV will present the dangers that the legal system will face if courts consider human flesh as a viable medium of expression for copyright protection. This Part will examine the Thirteenth Amendment's prohibition on slavery, relating to the property rights endowed to an author for her copyrighted work. Utilizing various policies, this Part will show why normal copyright remedies, enforced by the courts for copyright infringement, can create disastrous consequences leading to modern day slavery. In the 21<sup>st</sup> Century, it becomes necessary, depending on an individual's status, for a person to recognize the arguments below before allowing an ink needle, surgical scalpel, henna brush, or piercing gun to touch the skin.<sup>19</sup>

### **I. MOLDING THE MEDIUM: THE HISTORY OF COPYRIGHT'S FIXATION REQUIREMENT**

Copyright protection under United States copyright law requires that an author must create an original work of authorship, and that work must be fixed in a "tangible medium of expression;" neither can survive without the other.<sup>20</sup> The Copyright Act

---

<sup>19</sup> See Reichman & Johnson, *supra* note 6, at 29.

<sup>20</sup> Laura A. Heymann, *How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide*, 51 WM. & MARY L. REV. 825, 830 ("Under U.S. copyright law, fixation is what creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs."); see also Trotter Hardy, *Introduction to Boundaries of Intellectual Property Symposium*, 51 WM. & MARY L. REV. 825, 842 (2009).

considers a work fixed in a “tangible medium of expression” if:

[I]ts embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.<sup>21</sup>

This statutory language presents two reasons for the existence of the fixation requirement: (1) use of the work by others, creating a permanency to use the work in the future; and (2) the concept of authority, which only considers a work fixed if the author of the original work or her agent physically performs the task of fixation.<sup>22</sup>

### ***A. Fixation’s Legislative History***

The fixation concept is rooted in the printing press; evident through the Supreme Court’s holding in *White-Smith Music Publishing Co. v. Apollo Co.*, that player piano rolls did not constitute copies under the Copyright Act of 1909.<sup>23</sup> The Copyright Act required copies to be recorded in print through “intelligible notion,” because the rolls were only readable

---

<sup>21</sup> 17 U.S.C. § 101 (2012).

<sup>22</sup> See Hardy, *supra* note 20, at 842; see also Perzanowski, *supra* note 15, at 526.

<sup>23</sup> *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

by machine.<sup>24</sup> However, prior to the Copyright Act of 1976, the Copyright Act of 1909 did not make the fixation requirement mandatory to obtain copyright protection, but instead afforded copyright protection to “all the writing[s] of an author.”<sup>25</sup> This broad language demonstrated that although the statutory language did not explicitly state the necessity of fixation, the concept still existed through the methods by which authors obtained copyright protection for their works through either: notice with the presence of the copyright symbol, displayed as ©, on the work, or providing the United States Copyright Office with a copy of the unpublished work.<sup>26</sup>

In 1964, three members of Congress presented a revision to the 1909 Copyright Act, which later became section 102(a) of the 1976 Copyright Act. The proposal discussed the concept of fixation and required original works of authorship be fixed in a “tangible medium of expression” in order to secure copyright protection. Further, the revision, in section 15, explained what constitutes a copy, differentiating between the ownership of the copyright and the material object that the work is first fixed in or embodied.<sup>27</sup> Although the 1964 revision (now the 1965 bill) laid foundation for the new requirement, it

---

<sup>24</sup> Carrie Ryan Gallia, Note, *To Fix or Not to Fix: Copyright’s Fixation Requirement and the Rights of Theatrical Collaborators*, 92 MINN. L. REV. 231, 238 (2007) (quoting *White-Smith Music*, 209 U.S. at 17) (internal quotation marks omitted).

<sup>25</sup> See Hardy, *supra* note 20, at 844.

<sup>26</sup> See *id.*; see also Bogden, *supra* note 16, at 188 (discussing the 1909 Copyright Act’s lack of fixation requirement because copyright protection only extended to specified categories of works listed in the Act: maps, charts, and books).

<sup>27</sup> Hardy, *supra* note 20, at 846 (noting that section 15 later became section 202 of the Copyright Act of 1976).

still lacked a concrete definition for “fixation.” It was not until 1966, after broadcasters and commentators spoke out about whether computer software qualified as fixed, did the Judiciary Committee add what is today’s current definition of fixation to the 1965 bill.<sup>28</sup> Today’s broad fixation definition “was intended to ‘avoid the artificial and largely unjustifiable distinctions . . . under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed.’”<sup>29</sup>

### ***B. The Fixation Requirement in the 21<sup>st</sup> Century***

Scholars agree that fixation’s purpose is to limit the privileges of copyright protection to works in tangible form; intangible works qualify for zero protection.<sup>30</sup> The fixation requirement holds the capability of removing an author’s work from being a mere, unprotectable idea and labels it as one of the many “bundle of sticks” rights a person owns in property.<sup>31</sup>

Fixation, in most cases, is easy to meet, which explains why there is rarely any controversy surrounding the requirement.<sup>32</sup> In a majority of cases, courts acknowledge the fixation requirement, state that it is met, and move on; cases that challenge fixation usually do so based on the case’s particular

---

<sup>28</sup> *Id.* at 847.

<sup>29</sup> *Id.* at 848.

<sup>30</sup> See Reichman & Johnson, *supra* note 6, at 28; see also Declaration of David Nimmer, *supra* note 12, at 9.

<sup>31</sup> See Joshua C. Liederman, Note & Comment: *Changing the Channel: The Copyright Fixation Debate*, 36 RUTGERS COMPUTER & TECH L.J. 289, 312-13 (2010) (“In essence, fixation acts as the ‘trigger’ for copyright protection, removing the work from a mere idea and creates a property that is eligible for copyright protection.”).

<sup>32</sup> Hardy, *supra* note 20, at 849.

facts.<sup>33</sup> However, depending on the subject matter, the fixation requirement can be murky; therefore, fixation can be separated into three elements: (1) the embodiment requirement, in which the work *must* be embodied in a material object; (2) the permanency requirement, mandating that the work is sufficiently stable or permanent to permit perception;<sup>34</sup> and (3) the durational requirement, where the work “*must* remain thus embodied ‘for a period of more than transitory duration.’”<sup>35</sup> Case law provides that problems with fixation arise in both the permanency and durational requirements, leading courts, mostly in the computer technology arena, to further define these two requirements.<sup>36</sup>

### 1. Permanency

The 1976 Copyright Act never required that a copy have “absolute permanence” to be fixed.<sup>37</sup> Permanency only requires – sufficient – not absolute permanence, to satisfy fixation’s meaning under section 102.<sup>38</sup> Courts apply permanency in a functional standard, classifying a reproduction as fixed by depending on “whether action can be performed to or with the reproduction and not arbitrarily on its degree of permanency.”<sup>39</sup>

The Ninth Circuit in *MAI Systems Corp. v.*

---

<sup>33</sup> *See id.* at 850.

<sup>34</sup> *See* Bogden, *supra* note 16, at 188; *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.02[B][2] (2012) (stating that the embodiment and permanency requirement are two separate concepts).

<sup>35</sup> Hardy, *supra* note 20, at 851 (citing *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008)).

<sup>36</sup> *See* Liederman, *supra* note 31, at 298.

<sup>37</sup> *Id.* at 300.

<sup>38</sup> *Id.* at 298-99.

<sup>39</sup> *Id.* at 299.

*Peak Computer Inc.* (“*MAI*”),<sup>40</sup> is to credit for establishing this framework; however, it is a standard used when dealing specifically with Random Access Memory (“RAM”) in a computer. In *MAI*, the Court’s task was to determine whether the unauthorized reproduction of a computer’s temporary memory constituted copyright infringement. The Court held that copies of RAM are fixed because such memory is held long enough for a computer company service to make a diagnosis of the problem with the computer.<sup>41</sup> The Ninth Circuit went further, stating that loading software into a computer creates a RAM copy, allowing the RAM copy to be “perceived, reproduced, or otherwise communicated.”<sup>42</sup>

## 2. Transitory Duration

Like, permanency, a majority of transitory duration’s framework was established through computer technology case law. The Copyright Act, although it mentions that fixation requires a “more than transitory duration,” has no concrete period of time that specifies how long the reproduction must be stored or held in the material object.<sup>43</sup> Courts use a functional approach to analyze transitory duration, focusing on “what should be done with the reproduction” as opposed to the reproduction’s temporariness. This temporal requirement must be applied and inter-

---

<sup>40</sup> *MAI Sys. Corp. v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993). Since the *MAI Systems Corp. v. Peak Computer Inc.* decision, courts across the country have treated the Ninth Circuit’s precedent as controlling authority. See Liederman, *supra* note 31, at 290 n.11.

<sup>41</sup> Liederman, *supra* note 31, at 298.

<sup>42</sup> *Id.* at 299.

<sup>43</sup> *Id.* at 304 (further stating that this was the consensus of the Ninth Circuit in *MAI Systems Corp. v. Peak Computer Inc.*).

preted in the context of the situation.<sup>44</sup>

In 1998, when the Digital Millennium Copyright Act (“DMCA”) was passed, the United States Copyright Office clarified the meaning of transitory duration, reiterating language of the requirement in the 1976 Copyright Act that a copy does not need to last for any specified amount of time.<sup>45</sup> In the DMCA, the United States Copyright Office extended the functional standard for determining transitory duration to encompass the reproductions economic value. “[T]he economic value derived from a reproduction lies in the ability to copy, perceive or communicate it.”<sup>46</sup> Even though the courts established a workable, prevailing view for transitory duration,<sup>47</sup> there is still apprehension on implementing a temporal threshold, laying out how temporary *is* temporary – days, hours, minutes, seconds, or nanoseconds?<sup>48</sup> Transitory duration in the 21<sup>st</sup> Century makes it fundamental to challenge the liberal bounds of this requirement based on a case’s specific factual background.

---

<sup>44</sup> *Id.* at 302. In the late 1990s, courts were at a consensus that a copy could be for “the briefest of existence” in a computer’s RAM and still support a finding of infringement. *Id.* at 303 (citing *Tiffany Design, Inc. v. Reno-Taho Specialty, Inc.*, 55 F. Supp. 2d 1113, 1121 (D. Nev. 1999)).

<sup>45</sup> *Id.* at 303-04.

<sup>46</sup> *See id.* at 304 (stating that by a person making a copy of a product, even if temporary, it clearly demonstrates the realization that the product has economic value).

<sup>47</sup> The Fourth Circuit established the minority test for transitory duration that considers the function/use of the copy requiring both, (1) “[a] qualitative aspect ‘describ[ing] the status of the transition,’” and (2) “[a] quantitative aspect ‘describ[ing] the period during which the function occurs.’” Liederman, *supra* note 31, at 306.

<sup>48</sup> *See id.* at 305.

## II. DOES HUMAN FLESH QUALIFY AS FIXED IN A TANGIBLE MEDIUM OF EXPRESSION?

David Nimmer, a leading scholar on Copyright, states that “live bodies do not qualify as a ‘medium of expression’ sufficient to ground copyright protection.”<sup>49</sup> Professionals in the tattoo industry agree with Nimmer’s logic, believing that “[t]he image [in the skin] is just what happens to be left after you spend a moment in time with a particular person. It’s an intangible object.”<sup>50</sup> This Part will argue why, based on three legal reasons, the human skin is an intangible medium of expression and not copyrightable.<sup>51</sup> The first two arguments will focus on two requirements necessary for an author’s work to be fixed within a “tangible medium of expression:” permanency and transitory duration. The third argument recognizes that although the human flesh may not fit perfectly into the intangible medium of expression category, the skin’s useful and functional nature, further supports why the skin is uncopyrightable.

### A. *Permanency*

Permanency requires sufficient, not absolute, permanence to provide copyright protection to a work

---

<sup>49</sup> Declaration of David Nimmer, *supra* note 12, at 5; William T. McGrath, *Copyright Concerns Come with ‘Hangover’*, CHICAGO DAILY L. BULL. (June 17, 2011), <http://www.chicagolawbulletin.com/Law-Day/2012/04/28/LD-mcgrathforum-2012.aspx>.

<sup>50</sup> See Perzanowski, *supra* note 15, at 588 (internal quotations omitted).

<sup>51</sup> Congress did not intend for the human flesh to serve as a canvas that would embody legally protected authorship. Declaration of David Nimmer, *supra* note 12, at 10.

of authorship.<sup>52</sup> The human body lacks copyright protection in a variety of areas – hair, nails, and cuticles – because of its constant evolution and growth.<sup>53</sup> In this Section, I will argue why the human skin does not meet the standard of sufficient permanence because of the skin’s regenerative nature, making it an inadequate medium of expression.

Many scholars in intellectual property believe that the human skin automatically meets the permanency requirement, deeming the skin a “tangible medium of expression,”<sup>54</sup> but if one examines the anatomy of the flesh, immediate questions of doubt arise concerning the skin’s true permanent nature.

The human skin constantly changes with age, sun exposure, inhalation of toxins, and shedding of dead skin cells on a daily basis.<sup>55</sup> The entire human body consists of 10 trillion cells, with 1.6 trillion of those cells belonging to the human skin.<sup>56</sup> On an hourly basis, humans shed 30,000 to 40,000 skin cells, and in a twenty-four hour period, the flesh sheds almost one million skin cells.<sup>57</sup> Such rapid,

---

<sup>52</sup> See Liederman, *supra* note 31, at 298-99. The dictionary defines sufficient as “adequate for the purpose” or “enough to meet a need or purpose.” *Sufficient*, DICTIONARY.COM, <http://dictionary.reference.com/browse/sufficient?s=t> (last visited Feb. 1, 2014).

<sup>53</sup> Michael M. Ratoza, *More of The Hangover*, U.S. IP L. (May 30, 2011, 9:46 AM), <http://www.us-ip-law.com/2011/05/more-of-hangover.html>.

<sup>54</sup> See Reichman & Johnson, *supra* note 6, at 28; Perzanowski, *supra* note 15, at 525; Dave Fagundes, *Can You Copyright a Nose Job?*, PRAWFS BLAWG (May 28, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/can-you-copyright-a-nose-job.html>.

<sup>55</sup> See *Skin*, *supra* note 2.

<sup>56</sup> Grabianowski, *supra* note 3.

<sup>57</sup> *Id.* Human skin’s shedding process affects tattoos daily because it causes bright and colorful works to fade over time.

consistent, and extensive loss of skin cells cannot logically categorize the skin as sufficiently permanent, as it constantly evolves, leaving its past remnants scattered in the dust, literally.

Another area of the body<sup>58</sup> that unlike the flesh is notably uncopyrightable because it lacks permanency due to its constant growth is hair. The human head holds between 90,000 and 140,000 hair follicles.<sup>59</sup> These follicles grow 0.44 millimeters per day, amounting to about one half of an inch each month, and only six inches per year.<sup>60</sup> Depending on the pigment of a hair follicle, an individual will shed between 30 to 50 single strands of hair per day,<sup>61</sup> a far lower amount than the skin, shedding almost one million cells per day. Although the hair's growth rate is slow, hair stylists cannot claim copyright protection for specific couture hair designs or fashionable new haircuts because the of hair follicle's constant growth and lack of permanence.<sup>62</sup> With the hair's slow growth and minimal shedding process, it is hard to imagine why the hair is not sufficiently permanent enough to qualify as a "tangible medium of expression," but the human skin's extensive shedding and adaptation to the environment, which is far greater than the hair's growth, still allows skin to qualify as sufficiently permanent for body art or tat-

---

<sup>58</sup> Human nails do not meet sufficient permanency because of the nails rapid growth, functional nature, and upkeep of the fingers cuticles. *See id.*; Ratoza, *supra* note 53.

<sup>59</sup> *How Quickly Does Hair Grow?*, TLC (Apr. 1, 2000), <http://tlc.howstuffworks.com/style/question251.htm> (last visited Feb. 2, , 2014).

<sup>60</sup> *Id.*

<sup>61</sup> Cinya Burton, *Does Your Hair Shed Too Much?*, BEAUTYLISH (Dec. 2, 2011), <http://www.beautylish.com/a/vcvrn/hair-shedding>.

<sup>62</sup> Ratoza, *supra* note 53.

toos.

### ***B. Transitory Duration***

Transitory duration has no bright line standard specifying the exact amount of time that a “pictorial, graphic, or sculptural work” must reside in a material object to satisfy the fixation requirement.<sup>63</sup> Instead, courts look to the economic value held in a reproduction.<sup>64</sup> A layperson’s human skin, painted with tattoo ink or restructured to boost one’s self-esteem, clearly does not hold any economic value once the individual walks out of the author’s office. In this Section, I will argue that human skin does not hold economic value under the functionality standard because many individuals do not alter their skin for any purpose other than to please themselves.

Warner Brothers reproduced Mike Tyson’s facial tattoo in advertisement posters for *The Hangover Part II* in an effort to promote<sup>65</sup> the movie’s comedic value and get moviegoers to pay their eight dollars<sup>66</sup> to see the flick on the silver screen. Warner Brothers’ incentive to reproduce Tyson’s facial tattoo on the movie’s character, Stu Price’s face was undoubtedly to generate revenue to boost the film’s economic success at the box office, which it did, allowing the film to gross \$138 million in the United States

---

<sup>63</sup> Liederman, *supra* note 31, at 304.

<sup>64</sup> *See id.*

<sup>65</sup> *See* Verified Complaint for Injunctive and Other Relief, *supra* note 8, at 5, 7.

<sup>66</sup> *Average Movie-Ticket Price Edges Up to a Record \$7.93 for 2011*, L.A. Times Blog (Feb. 9, 2012), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/02/average-movie-ticket-price-2011.html>. An average movie ticket cost \$8.00 in 2011 when *The Hangover Part II* was released. Today, in 2014, movie tickets across the United States probably range from \$8.00 to \$20.00.

alone.<sup>67</sup> Warner Brothers' reproduction of Tyson's tattoo to achieve economic heights does not compare to the reasons a layperson gets a tattoo. Individuals do not walk into a tattoo parlor to get "inked" in an effort to economically exploit the tattoo artist's work, but rather to get a piece of artwork on their skin that either represents a lost loved one, signifies a military brotherhood, embraces one's faith or culture, symbolizes a life-changing event, or just for the love of art; the list goes on.<sup>68</sup> The personal reasons an individual decides to get "inked" and the very nature of a tattoo do not logically demonstrate that reproduction of the product, in this case the tattoo, was for economic value.<sup>69</sup>

In *Carell v. Shubery Organizations*,<sup>70</sup> the United States District Court for the Southern District of New York awarded copyright protection for the makeup designs of the Broadway sensation, *Cats*, to the play's makeup artist, Candace Anne Carell. The court granted copyright protection because Carell's makeup designs were fixed to the faces of the *Cats* actors.<sup>71</sup> However, the constant reproduction of

---

<sup>67</sup> Nikki Finke, *Biggest Memorial Weekend B.O. Ever!*, DEADLINE HOLLYWOOD (May 30, 2011), <http://www.deadline.com/2011/05/hangover-part-2-opens-with-9m-10m-thursday-midnight-screenings-on-its-way-to-125m/>.

<sup>68</sup> Michael R. Mantell, *The Psychology of Tattoos: You Think It, They'll Ink It: Why People Get Tattoos*, SAN DIEGO MAG. (Aug. 2009), <http://www.sandiegomagazine.com/San-Diego-Magazine/August-2009/The-Psychology-of-Tattoos/>; *Why Do People Get Tattoos?*, TATTOOED ENGINEER (May 26, 2011), <http://www.thetattooedengineer.com/2011/05/26/why-do-people-get-tattoos/>.

<sup>69</sup> See Liederman, *supra* note 31, at 304.

<sup>70</sup> *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000).

<sup>71</sup> *Id.* at 247. *Infra* Part IV.B.2.

Carell's makeup designs in *Cats* held pure economic value; had the actors not donned the makeup designs that transformed each of them into human cats, the show would not have grossed a record \$380 million in sales.<sup>72</sup> Although the economic value resides in the transformative makeup designs for this theatrical Broadway play, performed on one of the most famous stages in the country, an individual does not apply makeup on a daily basis or opt to get plastic surgery for its economic value. Individuals want, and get, plastic surgery to increase their self-esteem, improve unwanted imperfections, or make them happier in their lives.<sup>73</sup> If transitory duration's functional standard dictates that the reproduction of a "pictorial, graphic, or sculptural work" must hold economic value to pass the fixation requirement, then a layperson's reasoning, stated above, for surgically altering or decorating his or her skin does not qualify for copyright protection under transitory duration, further deeming the human flesh as an intangible medium of expression.

### ***C. Functionality of the Human Flesh***

In the 21<sup>st</sup> Century, individuals around the world utilize and transform their skin for cultural traditions or plain aesthetics, through body art, unique body piercings, tattoos, skin stretching, body modifications, and plastic surgery. However, human skin does not only serve as a surface for creative dec-

---

<sup>72</sup> Jessee McKinley, 'Cats,' *Broadway's Longevity Champ*, to *Close*, N.Y. TIMES, Feb. 20, 2000, <http://www.nytimes.com/2000/02/20/us/cats-broadway-s-longevity-champ-to-close.html>.

<sup>73</sup> Daniel J. DeNoon, *Who Gets Plastic Surgery and Why*, WEBMD (Aug. 20, 2005), <http://www.webmd.com/healthy-beauty/news/20050830/who-gets-plastic-surgery-why>.

oration and sculptural purpose, but also serves as a useful article having more purpose than just as a material object meant to hold an author's work.<sup>74</sup>

The Copyright Act defines a useful article as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information,”<sup>75</sup> meaning that when a material object has at least one other purpose than as a surface for an author's original work, it constitutes a useful article.<sup>76</sup>

In the recent *The Hangover Part II* case, David Nimmer gave a deposition for Warner Brothers.<sup>77</sup> He discussed a “spectrum of non-expressive utility” that helps determine the level of usefulness a material object can hold, in relation to the human head, which functionally is comparable to human flesh.<sup>78</sup> The spectrum's first level provides an example of a surface holding the least amount of functionality – a painting – which holds no purpose other than to depict the painting.<sup>79</sup> The second level is a material substrate that does have functionality, along with aesthetic purpose – the belt buckle.<sup>80</sup> At the spectrum's final level resides Mike Tyson's head, providing minor aesthetic purposes due to Tyson's celebrity status, that are clearly outweighed by the immensely important functions that the head holds because it harbors the brain.<sup>81</sup>

Human skin falls on Nimmer's final level of

---

<sup>74</sup> See Declaration of David Nimmer, *supra* note 12, at 10.

<sup>75</sup> 17 U.S.C. § 101 (2012).

<sup>76</sup> Declaration of David Nimmer, *supra* note 12, at 8.

<sup>77</sup> See *id.*

<sup>78</sup> *Id.* at 10.

<sup>79</sup> *Id.* at 9.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

the “spectrum of non-expressive utility,” having minimal aesthetic purposes, paling in comparison to the skin’s functions.<sup>82</sup> The human skin consists of layers of cells, glands, and nerves, functioning as our connection to the world and an outer layer of protection against the atmosphere’s elements and microbes.<sup>83</sup> The skin has six primary functions that logically demonstrate why flesh falls on the final level of Nimmer’s spectrum: (1) heat regulation, fluctuating the temperature of the body depending on the environment it’s in; (2) absorption, that limits the amount of foreign substances that enter the body; (3) secretion by the sebaceous glands, which produces oil that helps maintain the skin’s health; (4) protection provided by fat cells that keep an individual’s internal organs safe from trauma and acts as a barrier, preventing against invasion by harmful bacteria; (5) excretion of waste materials through perspiration; and (6) sensation that allows, through nerve endings, for individuals to experience atmospheric temperature, touch, pain, and pleasure.<sup>84</sup>

The human skin serves as much more than just a useful article; without the skin and its various functions the human body would literally evaporate.<sup>85</sup> The amount of life preserving functions that the human skin produces clearly indicates that Congress lacked any intention of labeling human flesh as an article; therefore, demonstrating why aside from

---

<sup>82</sup> *Id.* at 10.

<sup>83</sup> See *Skin Problems*, *supra* note 2; see also *Skin*, *supra* note 2.

<sup>84</sup> *The Functions of Human Skin*, PCA SKIN, [http://www2.pcaskin.com/functions\\_of\\_human\\_skin.aspx](http://www2.pcaskin.com/functions_of_human_skin.aspx) (last visited Feb. 1, 2014).

<sup>85</sup> See Declaration of David Nimmer, *supra* note 12, at 9; see also *Skin*, *supra* note 2.

the “tangible medium of expression,” the skin is not copyrightable.<sup>86</sup>

### III. LEGAL CONFIDENCE IN ONE’S SKIN: INDIVIDUAL RIGHTS IN THE HUMAN BODY

After the ratification of the Thirteenth Amendment, which abolished slavery on December 6, 1865,<sup>87</sup> the days that human beings were the property of others ended, or so we think. Today, although the definitional term of slavery<sup>88</sup> does not currently exist in this country, there is confusion surrounding

---

<sup>86</sup> See Declaration of David Nimmer, *supra* note 12, at 10. Nimmer explains further that it is necessary to look outside the “tangible medium of expression” when looking to see if the copyrighted work is afforded copyright protection. Copyright protection for “pictorial, graphic, or sculptural [works] that can be identified *separately* from, and are capable of existing independently of, the utilitarian aspects of the article.” *Id.* at 11. Nimmer’s theory of separability is that the copyright protection is only afforded to works that are “physically separable” from the medium. Nimmer demonstrates this concept with the tattoo on Mike Tyson’s face, reasoning that the tribal tattoo is not “physically separable” from the heavyweight champion’s face because the tattoo became part of his body. The only copy of the tribal tattoo resides around Tyson’s left eye, imprinted in his face; Whitmill never drew the tattoo on paper, but rather drew the tattoo directly on Tyson’s face. *Id.* at 8, 11.

<sup>87</sup> *Primary Documents in American History: 13th Amendment of the Constitution*, LIBR. OF CONG., <http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html> (last visited Feb. 1, 2014).

<sup>88</sup> Slavery is defined as “a civil relationship whereby one person has absolute power over another and controls his life, liberty, and fortune.” *Slavery*, DICTIONARY.COM, <http://dictionary.reference.com/browse/slavery?s=ts> (last visited Feb. 1, 2014).

the law of the body.<sup>89</sup> The uncertainty of the laws categorizes the human body as either property, quasi-property, or merely a subject of constitutional privacy rights.<sup>90</sup> However, both property and privacy rights – in the context of the human body – protect two of the same interests: “the right to possess one’s own body and the right to exclude others from it.”<sup>91</sup> Although these interests are similar, the main difference resides in the transferability of rights to others, which draws a thin line between an individual selling her body to a third party and self-ownership. This presents a problem, not only during life, but after death as well, specifically when dividing rights between close family and the interests of strangers that hold copyright interest in another’s skin.<sup>92</sup>

This Part will discuss these two similar privacy and property interests in the human body, and their relationship to a copyright holder’s property rights, demonstrating why many scholars suggest that an individual’s personal rights in her own body supersede copyright law.<sup>93</sup>

### ***A. Classifying the Body as Property***

Traditionally, property rights consist of a “bundle of rights” (also conceptualized as a “bundle of sticks”) owned by the person relative to the particu-

---

<sup>89</sup> See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 363 (2000).

<sup>90</sup> *Id.* at 363.

<sup>91</sup> *Id.* at 366-67.

<sup>92</sup> *Id.* at 369.

<sup>93</sup> Reichman & Johnson, *supra* note 6, at 28 (stating that this logic applies to tattoos and plastic surgery).

lar object.<sup>94</sup> These rights include:

the right to possess one's property, the right to use it, the right to exclude others, the right to transfer ownership by gift or by sale, the right to dispose of one's property after death, and the right not to have one's property expropriated by the government without payment or compensation.<sup>95</sup>

The United States Supreme Court consistently holds that the most essential "stick" in the "bundle of rights" is an individual's right to exclude others.<sup>96</sup> Further, "property rights are body rights that protect the choice to transfer."<sup>97</sup> Its importance is relevant when discussing copyright protection in relation to an individual's property rights in her own body.<sup>98</sup> Traditionally, property law does not recognize the human body as concrete property; therefore looking at the Framers' intent behind the Fourth and Fifth Amendments of the Constitution, coupled with the philosophical opinion by John Locke, will help establish a framework for establishing an individual's rights in her body.<sup>99</sup>

The Framers of the United States Constitution

---

<sup>94</sup> Rao, *supra* note 89, at 389. Each "right" or "stick" in the bundle represents a particular property right held by an individual.

<sup>95</sup> *Id.* at 370.

<sup>96</sup> *Id.* at 424.

<sup>97</sup> *Id.* at 367 n.16.

<sup>98</sup> *See id.* at 367.

<sup>99</sup> Paul Filon, *Who Owns You? Property Right in the Human Body*, SPRIEGEL & ASSOC. (Feb. 15, 2010), <http://gotopatentlawfirm.com/2010/02/15/who-owns-you-property-rights-in-the-human-body/>.

never intended property's "bundle of rights" to include property rights or interests in the human body.<sup>100</sup> This intention is prevalent in the language of the Fourth<sup>101</sup> and Fifth Amendments,<sup>102</sup> which indicate people are improper mediums in which to hold any property interests.<sup>103</sup> Compared to the Framers' intent, a copyright holder's proprietary control over his or her work, constitutionally, could not extend to works in human flesh because individuals are protected by privacy *not* property interests in their body.<sup>104</sup>

One of the great philosophers, John Locke,<sup>105</sup> expands on the Framers' intent that an individual cannot hold property interest in another's body, with one of the first influential theories on the subject matter. Locke's theory explicitly states that the human body is a form of property controlled by its owner, endowing that individual with *all* ownership of property rights that reside in human skin.<sup>106</sup> His be-

---

<sup>100</sup> Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX L. REV. 209, 220 (1990).

<sup>101</sup> *Infra* Part III.B.

<sup>102</sup> U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property.").

<sup>103</sup> Bray, *supra* note 100, at 220-21 (people and property are two distinct categories).

<sup>104</sup> *Id.* at 221.

<sup>105</sup> John Locke is known for being one of the greatest European philosophers in the 17<sup>th</sup> Century. Locke graduated from University of Oxford in the United Kingdom, England and was a prestigious medical researcher. His most famous and widely recognized work is *The Second Treatise of Government*, published in *Two Treatises of Government*. William Uzgalis, *John Locke*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2012), available at <http://plato.stanford.edu/archives/fall2012/entries/locke/>.

<sup>106</sup> Rao, *supra* note 89, at 367.

lief is that an individual “literally owns one’s [own] limbs.”<sup>107</sup> His widely recognized theory, coupled with the Framers’ intent, solidifies that the only individual capable, under the law, of owning property rights in the human body is the person whom possesses its physical being. Furthermore, the United States government codified this argument by passing the Thirteenth Amendment, which prohibits individuals from owning another individual as property.<sup>108</sup>

With all the above evidence, an author’s property rights in a work are seemingly protected by copyright law, specifically when an author creates a “pictorial, graphic, or sculptural work” using the human skin as her canvas. Logically, this right cannot trump the fundamental rights of the Constitution that allows individuals to exclude others from holding a proprietary interest in the body.

### ***B. Classifying the Body as a Privacy Interest***

Like property rights, privacy rights encompass a “cluster of personal interests.”<sup>109</sup> However, the United States Constitution protects an individual’s privacy rights, rather than the basic rules of property under the Fourth Amendment,<sup>110</sup> which states that American citizens have the right “to be secure in their persons, houses, papers, and effects.”<sup>111</sup> Privacy consists of two fundamental rights: (1) personal privacy, also known as bodily integrity, and (2) relation-

---

<sup>107</sup> *Id.* at 367 n.19 (quoting Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982)) (internal quotations omitted).

<sup>108</sup> U.S. CONST. amend. XIII § 1. *Infra* Part IV.

<sup>109</sup> Rao, *supra* note 89, at 389.

<sup>110</sup> *Id.* at 387.

<sup>111</sup> U.S. CONST. amend. IV; *see* Bray, *supra* note 100, at 220.

ship privacy.<sup>112</sup> This Section will focus on the first principal, the personal right to privacy that provides an individual the right to restrict third parties from intruding or physically altering the individual's human body.<sup>113</sup>

“[P]rivacy envisions the body as an integral Part of the person”<sup>114</sup> entitling the human body to protection because it is a physical embodiment of the person.<sup>115</sup> Professor Daniel Ortiz,<sup>116</sup> explains that constitutional privacy rights establish “a sphere of individual dominion,” disallowing interference of others without consent and creating a “dominion over oneself. It defines a sphere of self-control, a sphere of decision-making authority about oneself, from which one can presumptively exclude others.”<sup>117</sup>

Such complete control over one's body collides head on with permitting human skin to stand as a “tangible medium of expression.”<sup>118</sup> The collision of rights presents itself if a court orders an injunction<sup>119</sup> forcing an individual sporting a copyright holder's body art, tattoo, or piercing, to – or not to – remove

---

<sup>112</sup> Rao, *supra* note 89, at 388.

<sup>113</sup> *Id.* at 389.

<sup>114</sup> *Id.* at 444.

<sup>115</sup> *Id.* at 445.

<sup>116</sup> Professor Daniel Ortiz received his Juris Doctor from Yale Law School in 1983. He currently teaches constitutional law and legal theory at Virginia Law School. *Daniel R. Ortiz*, U. VA. SCHOOL OF L.,

<http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbI/1196477> (last visited Feb. 1, 2014).

<sup>117</sup> Rao, *supra* note 89, at 428.

<sup>118</sup> See Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 121-22 (2003).

<sup>119</sup> *Infra* Part IV.A.

the author's work.<sup>120</sup> Copyright owners hold moral rights under the Visual Artists Rights Act ("VARA"), which protects the integrity of their work from destruction, alterations, and distortions.<sup>121</sup> However, any injunction favoring the copyright holder in respect to another's bodily integrity would create a "substantial bodily intrusion" under the Fourth Amendment.<sup>122</sup>

Supreme Court precedent demonstrates why such a standard is applicable in *Winston v. Lee*.<sup>123</sup> The court ruled that ordering a bullet lodged in the defendant's chest be surgically removed from his body, for evidentiary purposes, despite the accused's objections, constituted an "extensive intrusion" on the defendant's fundamental interests of personal privacy and bodily integrity interests.<sup>124</sup> The Supreme Court's holding brings to light the lack of differences between an injunction ordering surgical removal of a tattoo through laser surgery and one ordering the surgical removal of a bullet from a person's body. To allow a copyright holder to obtain a remedy ordering surgical removals of this nature not only gives the copyright holder a right to control another person by invading on their privacy rights, it also provides the author with more rights than those laid out in the 1976 Copyright Act.<sup>125</sup> Therefore, a copyright holder's property rights in a work imprinted on another's skin should never supersede an individual's fundamental privacy rights to resist third

---

<sup>120</sup> Cotter & Mirabole, *supra* note 118, at 121.

<sup>121</sup> 17 U.S.C. § 106A (2012).

<sup>122</sup> Cotter & Mirabole, *supra* note 118, at 123.

<sup>123</sup> *Winston v. Lee*, 470 U.S. 753 (1985); Rao, *supra* note 89, at 396.

<sup>124</sup> *Lee*, 470 U.S. at 753; Rao, *supra* note 89, at 396.

<sup>125</sup> See Cotter & Mirabole, *supra* note 118, at 121.

party invasions or physical alterations of their body.

#### IV. MODERN SLAVERY THROUGH THE 1976 COPYRIGHT ACT

The Thirteenth Amendment of the United States Constitution states, “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>126</sup>

Copyright is a constant balancing act; its largest challenge centers around the author’s right to control her property versus the amount of access that is in the public’s interest.<sup>127</sup> The balance of these interests presents a huge problem under the Thirteenth Amendment, particularly when enforcing the control an author holds over their work in another’s skin under section 106,<sup>128</sup> and the court’s ability to issue injunctive relief for infringements of an author’s work under section 106A,<sup>129</sup> also known as VARA.<sup>130</sup> The consequences of enforcing these rights would defy the Thirteenth Amendment’s prohibition of servitude, rehashing slavery and putting courts in the position of “21<sup>st</sup> Century judicial slave masters.”<sup>131</sup> The Section below will examine the disastrous effect, while showing why Congress should relax the fixation requirement.

##### A. *Virtual Slave Masters*

Today, unlike 200 years ago, the human race

---

<sup>126</sup> U.S. CONST. amend. XIII, § 1.

<sup>127</sup> Bogden, *supra* note 16, at 187.

<sup>128</sup> 17 U.S.C. § 106 (2012). *Infra* Part IV.A.

<sup>129</sup> 17 U.S.C. § 106A (2012). *Infra* Part IV.B.

<sup>130</sup> *See supra* note 122 and accompanying text.

<sup>131</sup> Declaration of David Nimmer, *supra* note 12, at 4, 11.

believes slavery to be repugnant and even difficult to fathom how human beings were once considered property of another individual.<sup>132</sup> Although the public has current distaste for the slavery that occurred 200 years ago, the possibility of modern day slave masters, today, is very real in the intellectual property arena. Modern intellectual property apologists say that, “the work themselves are not property, but the right to use them are.”<sup>133</sup> This quote, in short, exemplifies the dangers of allowing copyright’s fixation requirement to label human skin as a valid “tangible medium of expression.” Such dangers lie within the exclusive rights granted to an author after the fixation requirement is satisfied, which allows the copyright holder to control the uses of her work.<sup>134</sup> As noted, hereinabove, section 106 grants the copyright owner exclusive rights: (1) to reproduce the copyrighted work; (2) to prepare derivative works (known as adaptation rights); (3) to publish the copyrighted work by distribution; (4) to perform the copyrighted work; (5) to publicly display the copyrighted work; and (6) to perform the copyrighted work publicly through digital audio transmission.<sup>135</sup> These rights give the creator complete control of over what is done with their work.

Copyright protection affords a copyright holder property rights in that particular work. If the author owns a work it gives that owner the right to control that property to the extent of the exclusive rights

---

<sup>132</sup> Nina Paley, *Redefining Property: Lessons from American History*, QUESTIONCOPYRIGHT.ORG (2009), [http://questioncopyright.org/redefining\\_property](http://questioncopyright.org/redefining_property) (last visited Nov. 3, 2012).

<sup>133</sup> *Id.*

<sup>134</sup> See Hardy, *supra* note 20, at 859.

<sup>135</sup> 17 U.S.C. § 106 (2012).

granted in section 106.<sup>136</sup> However, I believe that if the author's work resides in another individual's human skin, it could permit the copyright holder to control the daily activities of any human being that bears an author's intellectual property. The lack of boundaries set forth in the Copyright Act could result in authors ordering individuals to refrain from appearing on television or stopping people from getting their pictures taken,<sup>137</sup> bringing into play the potential for plastic surgeons, professional piercers, or tattoo artists to become modern day slave masters, dictating the literal moves that an individual can make on a daily basis.

*The Hangover Part II* case presented a close example of this dilemma because Tyson, prior to getting his facial tattoo, signed a general tattoo release agreement with his tattoo artist, Whitmill. The release agreement stated, "I [Mike Tyson,] understand that all artwork, sketches, and drawings related to my tattoo and any photographs of my tattoo are property of Paradox-Studio of Dermagraphics."<sup>138</sup> This release limits Tyson's ability to display his face in public;<sup>139</sup> and based on this language, Whitmill holds property rights in any photographs taken of Tyson's face. Although minimal, this language still

---

<sup>136</sup> See Hardy, *supra* note 20, at 858.

<sup>137</sup> See *Can You Copyright the Human Body?: Transcript*, ON THE MEDIA (June 3, 2011), <http://www.onthemediasite.org/2011/jun/03/can-you-copyright-human-body/transcript/>.

<sup>138</sup> Verified Complaint for Injunctive and Other Relief, *supra* note 8, at Exhibit 3 (Tattoo Release Form). Whitmill ultimately sued only Warner Brothers for violating his exclusive rights through using, reproducing, creating a derivative work, and putting the tribal tattoo on public display in its advertising. *Id.* at 6-7.

<sup>139</sup> See Perzanowski, *supra* note 15, at 529.

gives Whitmill the authority to prevent magazines from publishing pictures taken of Tyson and even may require magazines to compensate him for the use of a photograph of the heavyweight champion.

This dilemma is comparable to a 19<sup>th</sup> Century slave code – “no slave shall be allowed to work for pay”<sup>140</sup> – that has the realistic capability of creeping its way into copyright law. In Whitmill’s authoritative position as the copyright owner of Tyson’s facial tattoo, it allows him to control Tyson’s career moves and receive compensation for Tyson’s labor. This control of property rights in any author’s work, not just Whitmill, has the capability to negatively influence a person’s livelihood,<sup>141</sup> dictating the class standard and means that an individual bearing an author’s copyrighted work can live. Such control mirrors the 19<sup>th</sup> Century slave master’s control over a person, allowing the copyright author to reap all the benefits of an individual’s labor while financially crippling the individual bearing the author’s work.<sup>142</sup>

Rasheed Wallace, an NBA player, appeared in a Nike commercial where he explained the meaning behind the tattoos that reside on both of his arms.<sup>143</sup> The commercial zoomed in on the player’s Egyptian inspired tattoo of his family, recreating it through

---

<sup>140</sup> See CHARLES M. CHRISTIAN, *BLACK SAGA: THE AFRICAN AMERICAN EXPERIENCE: A CHRONOLOGY* 27-28 (1998).

<sup>141</sup> “Publicity enables a person to profit from their public persona by selling or otherwise exploiting commercially *intangible* body assets.” Rao, *supra* note 89, at n.30.

<sup>142</sup> David Nimmer “worried that the derivative work right could give Whitmill some say over other tattoos Tyson might choose to apply to his face.” Perzanowski, *supra* note 15, at 529; see Declaration of David Nimmer, *supra* note 12.

<sup>143</sup> Robjv1, *Rasheed Wallace NBA Finals Nike Commercial*, YOUTUBE (June 26, 2010), <http://www.youtube.com/watch?v=RqmRu34PXrU>.

computerized simulation.<sup>144</sup> Wallace's tattoo artist Matthew Reed saw the commercial and sued Wallace<sup>145</sup> for contributory infringement based on the basketball star claiming ownership rights in his tattooed skin.<sup>146</sup> Reed asserted his reproduction and public display rights against Wallace for making a career decision to appear in the Nike commercial, which for a professional athlete is normal publicity.<sup>147</sup>

Reed's attempt to control Wallace's tattooed forearm, demonstrates the dangers of a copyright holder becoming a modern day slave master when owning property interest in another's skin. Reed's charge of contributory infringement against Wallace shows how Reed attempted to reinforce his proprietary ownership and dictate the ways that Wallace can use his own arms in advertisements. Reed's slave master tendencies, like Whitmill's with Tyson's facial tattoo, have the capability to affect Wallace's likelihood of sustaining future publicity and income, comparable to the slave code in the 19<sup>th</sup> Century that banned slaves from receiving compensation for their labor.

The problem does not stop with the original author of a copyright from holding the capability to prevent an individual bearing their work of author-

---

<sup>144</sup> See Reed v. Nike, Inc., No. CV 05 198 2005 WL 1182840 (D. Or. Feb. 10, 2005); see also Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 316 (2006).

<sup>145</sup> Reed also sued Nike, Inc. and the advertising agency that came up with the commercial's concept. Harkins, *supra* note 144, at 316.

<sup>146</sup> See *id.* at 317.

<sup>147</sup> See *id.* at 316.

ship in public, but copyrights, like all property, can constantly be sold to non-authors. Consequently, strangers, unknown to the individual bearing any work of authorship on the human skin, could appear and limit the individual from using her body in a way that constitutionally endowed to her.<sup>148</sup>

Looking at copyright's largest challenge of balancing interests, permitting Congress to believe that human skin as a viable medium of expression is acceptable does not balance a copyright owner's interest against the interests of the public, but deems the author's property rights more important than the freedom of the American people. Ignorance of this potential problem could lead to copyright holders becoming modern day slave masters, controlling every move of individuals bearing their work on their skin.

### ***B. Slave to the Court: Enforcing Copyright Remedies***

The problematic reality of courts favoring a copyright holder's work in another's skin, whether that be body art, tattoos, body modification, plastic surgery, or body piercings, resides in the court's remedial enforcement, specifically injunctive relief, of an author's moral rights.<sup>149</sup> Section 106A, known as VARA, provides copyright owners, of visual works, morals rights protecting the integrity and attribution of their work of authorship from, "(A) any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,"<sup>150</sup> and "(B) any destruction of a work of recognized stature, and any intentional or grossly

---

<sup>148</sup> Fagundes, *supra* note 54.

<sup>149</sup> Cotter & Mirabole, *supra* note 118, at 119.

<sup>150</sup> 17 U.S.C. § 106A(a)(3)(A) (2012).

negligent destruction of that work is a violation of that right.”<sup>151</sup>

The list of legal concerns is extensive and invades an individual’s basic constitutional rights. First, an author’s copyright protection in another’s skin could result in a court preventing the individual, to whom the body belongs, from obtaining another plastic surgeon or tattoo artist to modify the poor workmanship of the original author as that would violate the copyright holder’s adaptation rights.<sup>152</sup>

Courts could prevent individuals from going out in public or force one to cover up an area on the body containing the copyright holder’s work; this presents a real dilemma if the individual is a celebrity because such an order could prevent that person from appearing on television, magazine covers, or films.<sup>153</sup> Further, courts have the power to order the individual bearing the copyright holder’s work to retain or remove a tattoo, causing the individual to forever wear an unwanted piece of work or undergo laser removal surgery, possibly leaving permanent remnants of the tattoo on the bearer’s body through scarring.<sup>154</sup> The arguments below show why a court should not order the above remedies and deem human flesh as an intangible medium of expression, avoiding the American court system from being la-

---

<sup>151</sup> 17 U.S.C. § 106A(a)(3)(B) (2012).

<sup>152</sup> See Cotter & Mirabole, *supra* note 118, at 120.

<sup>153</sup> See Declaration of David Nimmer, *supra* note 12, at 12; see also Cotter & Mirabole, *supra* note 118, at 120.

<sup>154</sup> See Declaration of David Nimmer, *supra* note 12, at 12.

Courts wanting to avoid being labeled slave masters and violating an individual’s constitutional rights may opt to avoid injunctive relief by ordering relief in the form of monetary damages. See also Cotter & Mirabole, *supra* note 118, at 122.

beled as a “21<sup>st</sup> Century judicial slave master.”<sup>155</sup>

### 1. Market Recognition

It is evident that human flesh serves an aesthetic purpose,<sup>156</sup> as a means for individual expression, and a basis for survival. The 1976 Copyright Act does not make mention of whether skin is a “tangible medium of expression” or generally copyrightable,<sup>157</sup> but the market of those individuals that adorn human flesh with colors and individualism hold a uniform consensus on the subject.<sup>158</sup> I will demonstrate why Congress should declare skin as an intangible medium of expression based on the tattoo and piercing<sup>159</sup> industry’s aversion to copyright ownership

---

<sup>155</sup> This remedy problem does not just arise with the courts, but also with third parties. Under VARA a copyright holder’s property rights in another’s skin does not just involve individuals bearing the author’s work, but, in context of tattoos, can implicate third party doctors hired to remove unwanted artworks. See Timothy C. Bradley, *The Copyright Implications of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS L. 1, 2 (2011), available at <http://www.coatsandbennett.com/images/pdf/the-copyright-implications-of-tattoos.pdf>. For example, Mike Tyson hires a doctor to perform laser tattoo removal on his face because he wants to rid himself of his infamous facial tattoo. Once Tyson’s doctor starts to laser off Tyson’s tattoo, he becomes susceptible to liability under VARA for destruction of another copyright holder’s work. *Id.* at 2-3; Fagundes, *supra* note 54.

<sup>156</sup> See Bradley, *supra* note 155, at 2.

<sup>157</sup> See Declaration of David Nimmer, *supra* note 12, at 15.

<sup>158</sup> See Perzanowski, *supra* note 15, at 532.

<sup>159</sup> Marisa Kakoulas, *The Tattoo Copyright Controversy*, BME ZINE.COM (Dec. 8, 2003), <http://news.bme.com/2003/12/08/the-tattoo-copyright-controversy-guest-column/> (Professional piercer, Martin William McPherson comments on courts issuing injunctions for copyright infringement of tattoos stating that it, “[s]ounds dangerously like State control over our bodies, . . . Isn’t that what many of us are fighting against? Aren’t we

in a client's skin.

Tattoo artists uniformly acknowledge that after finishing a client's tattoo, complete control over that tattoo shifts to the client's "bundle of sticks."<sup>160</sup> Artists in the tattoo industry recognize the individuality and constitutional freedoms that clients possess in their bodies, which is why the inking industry throws its section 106 exclusive rights out the window, and embraces ownership rights that specifically favor their clients. Tattoo artists do not care to have a "piece of the pie" after their clients walk out the door of their tattoo shop. Typical tattoo artists do not file copyright infringement lawsuits when a client reproduces their tattoo for commercial purposes, uploads a picture of their new ink to a social media website to show the world, walks around in public with their inked skin on display,<sup>161</sup> or sends a photograph of their permanent, meaningful, artwork to a magazine for publication.<sup>162</sup>

---

(some of us) trying to claim our bodies as our own?" (internal quotations omitted)).

<sup>160</sup> See Perzanowski, *supra* note 15, at 532.

<sup>161</sup> "[A] tattoo artist cannot reasonably expect to control all public displays of his or her work." Bradley, *supra* note 155, at 2. The tattoo artist, Matthew Reed, tattooed Rasheed Wallace, an NBA player. Reed later sued for copyright infringement, however, prior to this suit, he "expected that the tattoo would be publically displayed on Wallace's arm and conceded that such exposure would be considered common in the tattoo industry." Harkins, *supra* note 144, at 316.

<sup>162</sup> See Perzanowski, *supra* note 15, at 537 (rehashing a tattoo artist's positive and not legally entangling story when one of his clients wanted to put the image of his tattoo on the front cover of his upcoming compact disc). *Contra* tattoo artists are not of a consensus that a client can take the tattoo design and use the tattoo as work for a clothing line disconnected to from the body. One tattoo artist said: "if [a client] wanted to then take [the tattoo design] and give it to a graphic artist and have him turn

When asked the question of whether a tattoo artist had any control over a client's tattoo, the response of a female tattoo artist captured the essence of my arguments set forth in Part III:

It's not mine anymore. You own that, you own your body. I don't own that anymore. I own the image, because I have [the drawing] taped up on my wall and I took a picture of it. That's as far as my ownership goes. [Claiming control over the client's use of tattoo is] ridiculous. That goes against everything that tattooing is. A tattoo is an affirmation that is your body . . . that you own your own self, because you'll put whatever you want on your own body. For somebody else [(the tattoo artist)] to say, "Oh no, I own part of that. That's my arm." No, it's not your . . . arm, it's my [(the tattoo bearer's)] . . . arm. Screw you."<sup>163</sup>

Tattoo artists encourage clients to incorporate future work into present tattoos or destroy and replace original tattoos executed badly by an artist, disregarding their moral rights in section 106A.<sup>164</sup> The tattoo industry does not seek permission from the original tattoo artist of a new client, to make corrections or incorporations to an unacceptable piece of ink, as is necessary in formal copyright law to create

---

it into an image [for a commercial use], then I'd feel like I should get some kind of compensation for it. But if it was just a photo of the tattoo, even if it's the centerpiece [of an advertisement], I'm OK with that." *Id.* at 538.

<sup>163</sup> Perzanowski, *supra* note 15, at 536 (alterations in original). Tattoo artists looked for new clients to gain prior client's permission when the new client wants an identical custom tattoo already "inked" on a prior client. *Id.* at 539.

<sup>164</sup> *See id.* at 25.

a derivative work.<sup>165</sup> This industry norm further demonstrates that professionals in the field of body art believe that any property rights in a client's tattooed limbs reside exclusively in the client's "bundle of rights." Although the tattoo industry's response to ownership of the client's artwork covered limb legally, in the copyright world, is viewed as the copyright author informally waiving<sup>166</sup> her section 106 and 106A rights, it still demonstrates that the industry acknowledges formal copyright law, but will not adhere to it. Congress should recognize this country-wide lack of adherence and deem an individual's skin as an intangible medium of expression belonging to the individual whom it literally protects.

## 2. Lack of Recognition

Did Congress really want copyright law to cover human skin?<sup>167</sup> The Copyright Act as of 1976 did not list tattoos as a "pictorial, graphic, or sculptural work" capable of gaining copyright registration.<sup>168</sup> The Act's lack of guidance in providing copyright protection to tattoos can lead to the inference that Congress never intended for human skin to pass as a valid "tangible medium of expression" because of the potential slavery implications.<sup>169</sup> In 1955, when Congress first decided to revise the 1909 Copyright Act,

---

<sup>165</sup> *See id.* at 26.

<sup>166</sup> For an author to effectively waive his or her rights the waiver must be: (1) "reflected in a written instrument signed by the artist," (2) "expressly agreeing to the waiver, and" (3) "specifically identifying the work and uses of the work to which the waiver applies." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[D] (2012)

<sup>167</sup> *Can You Copyright the Human Body?*, *supra* note 137.

<sup>168</sup> Declaration of David Nimmer, *supra* note 12, at 15.

<sup>169</sup> *See id.* at 16.

Congress compiled seventeen volumes of legislative materials, and not one volume contained a single reference to human skin.<sup>170</sup>

The judicial system has *never* had the privilege to decide a case dealing with human skin's copyrightability.<sup>171</sup> The courts came close in the 2000 case, *Carell v. Shubery Organization, Inc.*,<sup>172</sup> holding in a motion to dismiss that the plaintiff's makeup designs for the actors in the Broadway play *Cats* "contain[ed] the requisite degree of originality, and are fixed in a tangible form on the faces of the *Cats* actors."<sup>173</sup> However, on this matter the parties settled outside of court.<sup>174</sup> Two more cases, *Whitmill v. Warner Brothers Entertainment, Inc.* and *Reed v. Nike, Inc.*,<sup>175</sup> held the capability of putting meat on this legal issue, but both parties in these cases settled outside of court, just as in *Carell*. The judge hinted in *Whitmill* that tattoos and human skin can receive copyright protection, but this statement holds *no* weight until it appears in an opinion by a judge establishing legal precedent.<sup>176</sup>

The lack of intent and evidence by Congress to label human skin as a "tangible medium of expression" in the 1976 Copyright Act, in addition to the passing of the Thirteenth Amendment, demonstrates Congress' avoidance of the issue based on the disas-

---

<sup>170</sup> *See id.*

<sup>171</sup> This statement is true for both before and after the passing of the 1976 Copyright Act.. *Id.* at 17.

<sup>172</sup> *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000).

<sup>173</sup> *Id.* at 247.

<sup>174</sup> Reichman & Johnson, *supra* note 6, at 29.

<sup>175</sup> *Reed v. Nike, Inc.*, No. CV 05 198 2005 WL 1182840 (D. Or. Feb. 10, 2005).

<sup>176</sup> *See* Reichman & Johnson, *supra* note 6, at 29.

trous consequences that such a label could create. Congress needs to recognize its lack of recognition, along with the tattoo industry's recognition that skin belongs to the individual that possesses and resides in it. Congress must label human skin an unacceptable medium for copyrights in order to avoid the courts from indemnifying people bearing tattoos, piercings, or undergoing plastic surgery into copyright-based slavery for the life of the tattoo artist, piercer, or plastic surgeon, plus seventy years after the death of the creator.<sup>177</sup>

### CONCLUSION

Congress' lack of recognition and the judiciary's inability to establish legal precedent surrounding the copyrightability of human flesh conjures up the opinions of many scholars in the intellectual property field to speak out about the disastrous consequences of branding human skin as a "tangible medium of expression." Based on the arguments throughout this Article, Congress must produce legislation amending the 1976 Copyright Act to explicitly categorize skin as an intangible medium of expression in an effort to avoid the fatality of courts establishing "pictorial, graphic, or sculptural works" in skin as copyrightable, allowing judges to act as "21<sup>st</sup> Century judicial slave masters."

---

<sup>177</sup> 17 U.S.C. § 302 (2012) (codifying that the life of the author plus seventy years provision only applies only to works created on or after January 1, 1978).