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## Copyright concerns give moviemaker a 'Hangover'

Major movie studios are usually exceedingly careful about "clearing" the content of their films before advertising and releasing the film. Legions of lawyers and other employees make sure the studio acquires all the necessary permissions to use the copyrighted material of others before it appears in the movie. Sometimes an item falls through the cracks, such as background artwork or a piece of music. For example, in the 1995 movie "12 Monkeys," starring Bruce Willis and Brad Pitt, the set design for one of the scenes was copied from a book of the plaintiff's drawings without permission, resulting in a preliminary injunction and a quick settlement. See *Woods v. Universal Studios, Inc.*, 920 F.Supp. 62 (S.D.N.Y. 1996).

In this year's Memorial Day blockbuster, "The Hangover: Part II," an unusual piece of art slipped through the studio's clearance process, though it was more like a sinkhole than a crack. The artwork was not a painting or sculpture; it was a tattoo. To be precise, it was former boxing champ Mike Tyson's famous facial tattoo. Tyson, with his tattoo, played an important role in "Hangover I," an immensely popular buddy film from 2009, in which three "heroes," including actor Ed Helms (aka Andy Bernard on "The Office"), go to Las Vegas for a bachelor party and wake up the next day with no memory of the various embarrassing deeds they engaged in the night before. Same story in "Hangover II," but this time the boys are in Thailand and Helms ends up with a tattoo on his face. Yes, it is the same as Mike Tyson's tattoo and Tyson appears in this film as well and speaks to the tattoo issue. The Tyson-esque tattoo on Helms' face was a key theme or device in "Hangover II" and not an incidental bit of shtick. It was also a prominent feature of the millions of dollars of advertising and promotion for the film.

As expected, "Hangover II" was a box-office sensation, but it almost didn't happen, thanks to the tattoo. Shortly before the scheduled release of the movie, S. Victor Whitmill, a tattoo artist and the



### Inside IP Law

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creator of Tyson's tattoo, filed a copyright infringement suit against Warner Bros. Entertainment seeking a preliminary injunction to prevent the release of the movie. Warner Bros.' problem was that, although it obtained Tyson's permission to use his image and likeness, it never obtained permission from Whitmill to reproduce the tattoo on Helms' face in the movie or in its advertising campaign.

Whitmill alleges that he created and applied the tattoo to Tyson's face in 2003 and that Tyson signed a release acknowledging that "all artwork ... relating to the tattoo" is the property of Whitmill. Whitmill claims the tattoo is original and that he has never copied it onto anyone else and has never authorized Warner Bros. to copy it or make derivatives.

This case is a copyright professor's dream. The issues range from the fundamental (Is a tattoo copyrightable?) to the bizarre (Is a human head a "useful article" under the Copyright Act and, if so, is a facial tattoo physically or conceptually separable from said useful article so as to warrant copyright protection?). Copyright aficionados will enjoy the fact that David Nimmer, one of the great minds in modern copyright law and current author of the leading treatise on the subject, submitted a declaration in support of Warner Bros., opining that Whitmill's creation is not

protected under the Copyright Law. The drama of the Nimmer declaration is that it departs markedly from some statements in his own treatise as to whether a tattoo can be copyrightable. A footnote in Nimmer's treatise assumes that a tattoo could "presumably qualify as a work of graphic art, regardless of the medium in which it is designed to be affixed" such as "human flesh." See 1 "Nimmer on Copyright" §1.01 [B][1][i] n. 392. In his declaration, he asserts that he began to reconsider that assertion about a decade ago and that after intense consideration he has concluded that "live bodies do not qualify as a 'medium of expression' sufficient to ground copyright protection." The treatise will no doubt be updated to reflect Nimmer's recent thinking. In this respect, footnotes in a treatise are like tattoos — they can be removed if absolutely necessary, but it hurts.

Another question that comes to mind is whether Whitmill's graphic design is in fact "original" as required by the statute. In copyright parlance, originality means that a work was not merely copied from another and has at least a modicum of creativity. This tattoo, identified in the copyright registration by the title "Tribal Tattoo," is purportedly "inspired by" designs of the indigenous Maori tribe in New Zealand. In fact, some New Zealanders have expressed outrage that a U.S. artist would be so presumptuous as to seek millions of dollars in compensation for a tattoo based on a Maori design.

Another major defense asserted by Warner Bros. is that the use of the tattoo in the movie is a parody and permitted under the fair use doctrine. Warner claims that the parodic intent is clear and that it "pokes obvious fun at the specific 'warrior' symbol and the serious intentions of Tyson's tattoo as a personal and cultural expression." The plaintiff will no doubt emphasize the hugely commercial nature of the copying and the effect on the market for the original work, namely that the unlicensed use deprives him of revenues. If the court, after a trial on the merits,

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finds the defendant's use to be a genuine comment on the original work, the parody claim may prevail. See, e.g., *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (finding a movie poster featuring Leslie Nielsen in "Naked Gun 33 1/3: The Final Insult" to be a parody of a famous Annie Leibovitz photograph). If the court thinks the parody claim is no more than a post-hoc rationalization for free-riding on the value of another's copyrighted work, the defense will likely fail. See, e.g., *Dr. Seuss Enterprises v. Penguin Books USA Inc.*, 109 F.3d 1394 (9th Cir. 1997) (finding defendant's post-hoc characterization of the work as a parody "completely unconvincing" when it published a book about the O.J. Simpson trial in the style and imagery of "The Cat in the Hat").

The tattoo case came before Judge Catherine D. Perry in federal court in St. Louis in May on the plaintiff's motion for preliminary injunction. Warner Bros. had submitted compelling evidence of the cataclysmic financial harm it would suffer if the release of the movie during one of the biggest movie weekends of the year were enjoined. Testimony showed that \$77 million of the \$81 million media marketing budget had already been expended. The money spent on advertising and promotion would be wasted if the show did not go on as planned. In contrast, Warner Bros. argued, Whitmill can be adequately compensated by a money damage award if he ultimately prevails in the litigation.

The court agreed with Warner Bros. on the balance of harms and refused to enjoin

the release of the movie. The ruling may be bittersweet for Warner, however. Perry is allowing the case to go forward on an expedited basis. In issuing her oral ruling in open court, Perry expressed the view that Whitmill had a "strong likelihood of success" on the merits and that Warner Bros.' defenses were "just silly," adding "of course tattoos can be copyrighted." She also expressed skepticism about Warner's parody defense.

With its initial box office success being secured (it raked in a record-setting \$105 million on Memorial Day weekend), it sounds like it might be time for Warner Bros. to think carefully about settlement. And Mr. Whitmill might consider whether he should share some of his eventual proceeds with the Maori tribesmen.