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Are Tattoos Protected By Copyright?

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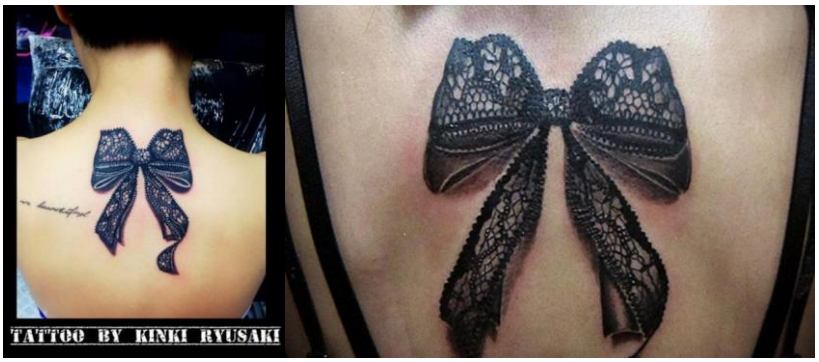

In 2013, 2 tattoo artists, Moon Pang and Kinki Ryusaki were caught up in a spat regarding a black bow tattoo. Moon's client tattooed the said design on her back and shortly thereafter, discovered an exact copy of the tattoo on Instagram, shared by Kinki Ryusaki. Fortunately, Kinki has given due credit to Moon's tattoo parlour, Moonstruck, on a Facebook post and the feud was long put to rest.

This however leads to the question – are tattoos protected by copyright?

Generally, copyright automatically confers protection on a creative work the moment it is created if it is an original work and is fixated on a tangible medium. There are 3 requirements to fulfil under Section 3 of the Copyright Act 1987 (CA) before tattoos could be deemed copyrightable:

1. Is it "artistic *work*"?

2. Does it display originality?

3. Is it fixated on a physical object?

A) Artistic Work

In accordance with Section 7 of the CA 1987, copyright protects literary works, musical works, artistic works, films, sound recordings, and broadcasts irrespective of their quality and purpose for which they are created. This means – a

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random doodle you drew on your textbook whilst zoning out in class, the sappy love song you wrote for your former lover, or a photograph of your morning coffee is all copyrightable.

As such, tattoos, being pictorial in nature, could be considered as "graphic work", which falls under the scope of "artistic work" as per Section 3 of the CA 1987.

B) Originality

The term "original" in Section 7(3)(a) of the CA 1987 does not mean that the work has to be an original or inventive thought. Volume 9 of Halsbury's Laws of England (4th Ed) at para 831 stated that – it is not necessary that:

> *"the work should be the expression of original or inventive thought, for Copyright Acts are not concerned with the originality of ideas, but with the expression of thought…"*

Copyright only protects the expression of the idea, but not ideas *per se*. This idea-expression dichotomy was formulated in *Hollinrake v Truswell* [1894] 3 Ch 420 which explains that:

> "*Copyright… does not extend to ideas, schemes, systems or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed…".*

However, this articulation may seem rather abstract considering that ideas form part of the expression, to which the same view is shared in *Autodesk Inc and Another v Dyason and Ors* (1992) 104 ALR 563. However, it is also noted in *Autodesk* that albeit being "…*difficult to separate ideas from expressionism, it is nevertheless fundamental that copyright protection is only given to the form in which the ideas are expressed and not the ideas themselves...*".

A much clearer explanation perhaps could be found in *Dave Grossman Designs, Inc. v. Bortin,* 347 F. Supp. 1150 (N.D. Ill. 1972):

> *"The law of copyright is clear that only specific expressions of an idea may be copyrighted, that*

> *other parties may copy that idea, but that other parties may not copy that specific expression of the idea or portions thereof. For example, Picasso may be entitled to a copyright on his portrait of three women painted in his Cubist motif. Any artist, however, may paint a picture of any subject in the Cubist motif, including a portrait of three women, and not violate Picasso's copyright so long as the second artist does not substantially copy Picasso's specific expression of his idea."*

This would imply that perhaps copyright does not protect style nor technique and that it protects its subsequent derivative works. The same was held by our Federal Court in *Dura-Mine Sdn Bhd v Elster Metering Ltd & Anor* [2015] 3 MLJ 1 which states that "…*so long as sufficient authorship skills and effort have gone into its creation*…", each artistic work, including the subsequent, derivative forms of it will be protected by copyright.

Could one then argue that by copying, you have put in sufficient labour and hard work to produce the replica, thereby satisfying the elements for establishing copyright? The answer is No!

As aptly cited by the Federal Court in *Dura-mine*:

> *"Interlego AG v Tyco Industries Inc confirms that in the case of derivative works, skill in the copying process is insufficient. The skill, labour and judgment must have resulted in a material change to the expression. Whether there is such a change is a question of fact and degree. This means that if an artist paints an identical copy of the Mona Lisa, he will not have a copyright in his painting, even though great skill is shown in making a clone of the original. Paradoxically, a less skilled artist who is producing his copy of the Mona Lisa turns the enigmatic smile into a frown would probably be able to claim that he has a copyright in his painting as an original artistic work. The changing of the smile into a frown would surely constitute a material change in the expression of the painting."*

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Quoting Picasso, "*good artists copy, great artists steal*". Expression is composed of various elements – composition, colour, framing, narrative, technique etc. Hence, the same could be applied in the realm of tattoos whereby a tattoo artist could "steal" and combine various elements, styles or even adopt techniques from other sources or inspirations to come up with their own, unique expression of the work.

This does not mean that one must make substantial changes to the work to be "original" – but it must be "*visually significant*".

Applying this abstract formula to our hypothetical situation, Moon may be entitled to copyright his tattoo of the black lacey bow in his realism style. However, any artist, including Kinki, may also tattoo a picture of any sort in the realism style, including the lace bow – but it must be a "material change" from the original, making it *"visually significant*". Kinki emulated Moon's design and merely altered it slightly by adding some asymmetry – which may seem like a replica of Moon's design. Hence, it is unlikely to fulfil the "originality" test.

C) Fixation

Under Section 7(3) of the CA 1987, "fixation" means that the work has to be reduced into "*material form*", i.e., it must have sufficient permanence for perception purposes, and absolute permanence is not required. For example, if an idea for a script suddenly pops up in your head and you verbally share this idea with your friend. That idea is not protected by copyright until you put it down on paper (which you should before you friend does it first).

As defined in Merriam-Webster, tattoos are "*a mark, figure, design or work intentionally fixed or placed on the skin*", one that is "*indelible and created by insertion of pigment under the skin*". This definition inevitably leads to the never-ending debate – could human skin be considered as a type of tangible medium of expression required for copyright protection, especially due to its regenerative properties?

In *Merchandising Corporation of America Inc v Harpbond Ltd* [1983] FSR 32, the distinctive facial makeup designed by

Adam Ant was not protectable by copyright as it could be washed off.

This could be distinguished from tattoos which lasts for a long time, albeit possibilities of it fading or warping into a whole other image as they age. Whilst some may argue that is the exact reason why skin is not a tangible medium due to its regenerative properties, which will alter the outlook of the tattoo, reference could be made to the nature of paintings. Due to light, heat, moisture, air pollutants and other external circumstances, paintings will also slowly deteriorate over the years and look different from their original state. However, that does not in any way strip off its eligibility to be protected by copyright. Thus, the skin should be considered a tangible medium, hence fulfilling the fixation requirement.

Conclusion

There is a fine line between "inspiration" and "imitation". It is common in the art industry for artists to draw inspiration from other artists; as Oscar Wilde once said – *imitation is the sincerest form of flattery*. This applies to the tattoo industry as well with clients providing them with reference photos or even designs from other tattoo artists which they happen to stumble upon on the Internet (like in Kinki's case whereby her client provided her Moon's design as a reference photo); be it a tattoo rendition of famous artworks, screen-caps of movies, cartoons or comic books, famous logos – these are instances which are loaded with potential copyright issues. Hence, tattoos ultimately are a grey area in intellectual property law.

There are no decided cases on the copyrightability of tattoos in Malaysia yet. From an academical/theoretical perspective, tattoos will be copyrightable if it fulfils the criteria set out via Section 3 of the CA, i.e. being original and fixated. Thus, tattoo artists could bring legal action against infringers.

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However, would they do so? It depends. Practically, copying or appropriation boils down to a question of ethics or manners in the tattoo industry. As observed from the "feud" between Kinki and Moon, all it took to resolve the feud was for Kinki to give due credit to Moon's design. As Moon noted himself, this fiasco could have been avoided if Kinki had simply asked for his permission. However, should the matter escalate into litigation, Kinki's acknowledgement of Moon's design may not be a valid defence as it would not amount to a fair use of another's work under section 13(2)(a) of the Malaysian Copyrights Act 1987.

Copycats will be shunned by tattoo community members, but in reality, initiating legal action against them would be expensive and time-consuming. Over the years, there seems to be a pattern whereby legal actions are only threatened/taken by tattoo artists if the violation involves a high-profile individual– but there are mixed reviews from the community as some might deem it as a publicity stunt instead.

That aside, tattoos are copyrightable – but whether action will be taken for such infringement is another matter.

Authored by Brenda Loh Ling Li, a pupil from the Firm's Dispute Resolution practice.

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