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Warriors, Tattoos and Copyright: The Copyright Issues in "The Hangover 2" and Unexpected Licensing Concerns for Content Producers

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A recent settlement has spared Warner Bros the potential expense of having to alter "The Hangover, Part II" prior to its scheduled home video release. However, the underlying questions raised by S. Victor Whitmill, who has a copyright in Michael Tyson's famous facial tattoo and claims that Warner Bros. infringed that copyright when actor Ed Helms wore a similar tattoo in the film, remain unanswered. The question of whether a valid copyright can exist in a design inscribed on another person's body is a novel one for copyright law. However, while cases involving copyrights in tattoo art may not necessarily be commonplace, the implications of the case illuminate a broader problem for content producers. As copyright protection expands into previously unrecognized forms of artistic expression, such producers much consider whether the copyright clearance process they have in place is adequate to address potentially novel claims in the future. By way of background on the Hangover case, Whitmill created and applied Tyson's tattoo in 2003. At the time, Tyson signed a release acknowledging that Whitmill owned all artwork, sketches, drawings and photographs based on the tattoo. Whitmill then registered a copyright in the tattoo in April 2011. Whitmill's copyright registration suggests that Whitmill registered Tyson's tattoo, rather than the design for the tattoo, as the copyrighted work. In the registration, Whitmill described the work as "Artwork on a 3-D Object" and registered it under the category of "Visual Arts". The Visual Arts category applies to designs where the work only exists in a single copy or in fewer than two hundred sequentially numbered and signed copies suggesting that Whitmill registered tattoo itself, rather than the design for the tattoo, as the copyrighted work. This conclusion is further supported by the fact that Whitmill included a picture of Tyson as a copy of the work, rather than a copy of the design on its own. The design of a tattoo is clearly copyrightable as a pictorial or graphic work under §102(a) of the Copyright Act. However, the Copyright Act also requires a work be fixed in a tangible medium of expression in order for it to be copyrightable. The novelty of Whitmill's copyright claim is that it raises the question of whether a design is copyrightable when the medium in which it is fixed is the

face of another person. Recognizing copyright protection in a tattoo could grant the tattoo artist unintended control over the body of the recipient. The Copyright Act grants certain exclusive rights to the copyright owner, which, in the case of a tattoo, could be interpreted as a form of ownership over the body and image of the tattoo recipient. If Tyson changes the tattoo or adds to it without Whitmill's permission, he could be violating Whitmill's right to create derivative works. Similarly, others who publish images or footage of Tyson could be held liable for violating Whitmill's exclusive reproduction, distribution or performance rights, which may make Tyson liable as a contributory infringer if he authorized these uses of his image. Because the tattoo is so famous, Whitmill may even be able to get a court order preventing Tyson from removing the tattoo under the additional protections works for works of visual art under § 106A (a)(3) of the Copyright Act. In its court papers, Warner Bros. argued that, if the tattoo is copyrightable, its use constituted a parodical fair use of the copyrighted work. Fair use permits certain uses of a copyrighted work without the copyright holder's permission and, though there are no presumptively fair uses, parody has traditionally been granted broader protection under the fair use doctrine than other protected uses. Warner Bros. claimed that the film is poking fun at the toughness and outrageous lifestyle manifested in Tyson's "warrior tattoo" by placing the same tattoo on Helms, who plays a "timid, frightened and milquetoast dentist with a decidedly conservative lifestyle." Despite avoiding an injunction which might have interfered with the film's theatrical release, Warner Bros. still faced the uncertainty of a trial and the possibility of incurring significant and unexpected costs, including the cost of digitally altering the film prior to its home video release. However, whether it would have actually incurred those costs or ultimately prevailed is now merely an academic discussion as the case was settled. Details were not disclosed. In another high profile case, Sony Pictures recently defeated a copyright infringement claim in the Second Circuit Court of Appeals over the copyrightability of blow dryers as weapons in promotional merchandise for the film "Don't Mess with Zohan". Novel claims of copyright protection are becoming more prevalent as developments in technology push copyright law into novel and previously unrecognized forms of expression. This brings us to the larger concern for content producers—how to ensure that there is an adequate clearing process in place to encompass these newly developed forms of protected expression. In an earlier post, we looked at the copyright issues raised by motion capture-based games. Motion capture-based gaming creates one of the first opportunities for large-scale exploitation and monetization of choreographed movement as a separate work. Whether it is a popular dance, a distinctive martial art sequence or a creative yoga position, in order to incorporate it into a game, the game developer must determine whether the particular movement constitutes copyrightable choreography. However, copyright law does not provide a clear line between the types of movements that rise to the level of copyrightable choreography and those that do not. The courts have not provided much additional guidance either. If the work is copyrighted, the developer must seek the necessary licenses, as it would for the music-based interactive games. However, unlike in music, there is no established framework for licensing choreographed works, making the game developer's job much more difficult. Similarly, if tattoos are copyrightable expression, content producers might have to adjust their clearance processes to make sure they're obtaining the necessary licenses. Previously, it may have been sufficient to obtain permission from the individual whose image is being used. Now, content producers may want to consider whether there might be third party rights in that person's image before displaying, altering or even making reference to it, as Warner Bros. did with Helms' tattoo. On the other hand, content producers have also been using novel copyright claims to protect their rights in the new technologies that have been sprouting up around their content. Todd Blatt, a mechanical engineer from Baltimore, created a digital replica of a cube featured in the J.J. Abram's film "Super 8". Within 24 hours of uploading the design to a 3D printing website, Blatt had received a cease and desist letter from Paramount claiming that the design violated Paramount's copyright. Creating physical recreations of on-screen objects is not a new phenomenon, but new technology makes these replicas more accurate and easier to reproduce, which means there will probably be more litigation to come over who owns the rights in this digital merchandise. Our New Media, Entertainment and Technology practice group has extensive experience assisting our clients in understanding and analyzing the impact of new developments in the law on the design, development, implementation and operation of their respective business initiatives across all new media platforms, and we will continue to monitor these and other ongoing developments in copyright and licensing law to keep our clients informed and protected.

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