SLAVES TO COPYRIGHT: BRANDING HUMAN FLESH AS A TANGIBLE MEDIUM OF EXPRESSION

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INTRODUCTION

“Though the Earth and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to, but himself.” ~ John Locke

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. The skin constantly regenerates itself, shedding two to three million skin cells daily. Human skin is miraculous; it regulates body temperature, permits sensory stimuli, and provides protection against harmful infections, dehydration, and injury. In addition to the human flesh providing human beings with life, it is a way for many people to demonstrate individual expression, 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 II*. The film racked in big bucks at the box office and caused uproar in the copyright community when one of the characters, Stu Price, wakes up one morning after a wild night in Bangkok.

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4 See id. See also *Skin Problems, supra* note 2.
permanently sporting around his left eye a replica of Mike Tyson’s infamous, tribal facial tattoo.6 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, 2011.7

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 Dermagraphics.”8 Warner Brothers never asked Whitmill for permission to use, reproduce, or create derivative works of Tyson’s tattoo in advertising and promotion of the film.9

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.”10 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.11 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.12

The United States Constitution states, “Congress shall have the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the

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6 Id. at 28.
7 Id.
9 Id. at 6.
10 Reichman & Johnson, supra note 5, at 28.
11 See id.
exclusive right to their respective writings and discoveries.”¹³ Under the 1976 Copyright Act, copyright protection is given to “[1] original works of authorship [(2)] 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.”¹⁴ Originality under the Copyright Act requires the author independently create the work using a low modicum of creativity.¹⁵ 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 paper 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.¹⁶ This paper, 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

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¹³ U.S. CONST. art. 1, § 8, cl. 8.
intangible medium of expression,\textsuperscript{17} to avoid the disastrous risk of the court falling into the role of “21\textsuperscript{st} century judicial slave masters.”\textsuperscript{18}

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\textsuperscript{st} 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 \textit{Hangover II} and the makeup designer for the Broadway play, \textit{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 uncopyrightable.

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 Constitution. 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

\footnotesize{\textsuperscript{17} 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. 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.}

\footnotesize{\textsuperscript{18} In this Article, I coin the phrase “21\textsuperscript{st} 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\textsuperscript{th} century slave masters that existed prior to the ratification of the Thirteenth Amendment. However, courts will take on the role of “21\textsuperscript{st} century judicial slave masters” by controlling individuals through the remedial copyright laws.}
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 21st 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.19

PART 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.20 The Copyright Act 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.21

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.22

A. Fixation’s Legislative History

19 See Reichman & Johnson, supra note 5, at 29.


22 See Boundaries of Intellectual Property, supra note 20, at 842. See also Perzanowski, supra note 15, at 15-16.
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.*,\(^{23}\) that player piano rolls did not constitute copies under the Copyright Act of 1909. The Copyright Act required copies to be recorded in print through “intelligible notion,” because the rolls were only readable by machine.\(^{24}\) 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.”\(^{25}\) This broad language demonstrated that although the statutory language did not explicitly state fixations necessity, the concept still existed through the methods by which authors obtained copyright protection for their works by: notice with the presence of the copyright symbol, © on the work, or providing the Copyright Office with a copy of the unpublished work.\(^{26}\)

In 1964, three Congress members 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.\(^{27}\) Although the 1964 revision (now the 1965 bill) laid foundation for the new requirement, it still lacked a concrete definition for “fixation.” It was not until 1966, after broadcasters and commentators spoke out about whether computer

\(^{23}\) *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

\(^{24}\) 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).

\(^{25}\) See *Boundaries of Intellectual Property*, supra note 20, at 844.

\(^{26}\) See id. See also *Bogden*, supra note 16, at 188 (discussing how the 1909 Copyright Act lacked the fixation requirement because copyright protection only extended to specified categories of works listed in the Act: maps, charts, and books).

\(^{27}\) *Boundaries of Intellectual Property*, supra note 20, at 846 (section 15 later became the Copyright Act of 1976’s section 202).
software qualified as fixed, did the Judiciary Committee in 1966 add what is today’s current
definition of fixation to the 1965 bill.  

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.’”

B. The Fixation Requirement in the 21st 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. 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.

Fixation in most cases, is easy to meet, which explains why there is rarely any
controversy surrounding the requirement. 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 facts. 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; and (3) the durational requirement, where the work “must remain thus embodied

28 Id. at 847.
29 Id. at 848.
30 See Reichman & Johnson, supra note 5, at 28. See also Declaration of David Nimmer, supra note 12.
31 See Joshua C. Liederman, Note & Comment: Changing the Channel: The Copyright Fixation Debate, 36
32 Boundaries of Intellectual Property, supra note 20, at 849.
33 See id. at 850.
34 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).
‘for a period of more than transitory duration.’”\(^{35}\) 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.\(^ {36}\)

\(i.\) **Permanency**

The 1976 Copyright Act never required that a copy have “absolute permanence” to be fixed.\(^ {37}\) Permanency only requires—sufficient—not absolute permanence, to satisfy fixation’s meaning under section 102.\(^ {38}\) 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.”\(^ {39}\)

The Ninth Circuit in *MAI Systems Corp. v. Peak Computer Inc.* (“MAI”),\(^ {40}\) 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.\(^ {41}\) 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.”\(^ {42}\)

\(ii.\) **Transitory Duration**

\(^{35}\) *Boundaries of Intellectual Property*, *supra* note 20, at 851 (citing Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 127 (2d Cir. 2008)).

\(^{36}\) See Liederman, *supra* note 31, at 298.

\(^{37}\) Id. at 300.

\(^{38}\) Id. at 298-99.

\(^{39}\) Id. at 299.

\(^{40}\) MAI Sys. Corp. v. Peak Computer Inc., 991 F.2d 511 (9th Cir. 1990). Since the *MAI Systems Corp. v. Peak Computer Inc.* decision courts across the country have treated the Ninth Circuits precedent as controlling authority. See Liederman, *supra* note 31, at n.11.

\(^{41}\) Liederman, *supra* note 31, at 298.

\(^{42}\) Id. at 299.
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.\(^{43}\) 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 interpreted in the context of the situation.\(^{44}\)

In 1998, when the Digital Millennium Copyright Act (“DMCA”) passed, the Copyright Office clarified the meaning of transitory duration, more clearly, reiterating language of the requirement in the 1976 Copyright Act that a copy does not need to last for any specified amount of time.\(^{45}\) In DMCA, the 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.”\(^{46}\) Even though the courts established a workable, prevailing view for transitory duration,\(^{47}\) there is still apprehension on implementing a temporal threshold, laying out how temporary is temporary, days, hours, minutes, seconds, or nanoseconds.\(^{48}\) Transitory duration in the 21st century makes it fundamental to challenge the liberal bounds of this requirement based on a case’s specific factual background.

\(^{43}\) Id. at 304 (further stating that this was the consensus of the Ninth Circuit in *MAI Systems Corp. v. Peak Computer Inc.*).

\(^{44}\) 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-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1121 (D. Nev. 1999)).

\(^{45}\) Id. at 303-04.

\(^{46}\) 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).

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

\(^{48}\) See *id.* at 305.
PART 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.” Professors 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.” This section will argue why, based on three legal reasons, the human skin is an intangible medium of expression and not copyrightable. 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 of authorship. The human body lacks copyright protection in a variety of areas—hair, nails, and cuticles—because of its constant evolution and growth. 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.

50 See Perzanowski, supra note 15, at 66.
51 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 7.
Many scholars in intellectual property believe that the human skin automatically meets the permanency requirement, deeming the skin a “tangible medium of expression,” 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 on a daily basis sheds dead skin cells. The entire human body consists of 10 trillion cells, with 1.6 trillion of those cells belonging to the human skin. 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. Such rapid, 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. Below, examines another area of the body that unlike the flesh is notably uncopyrightable because it lacks permanency due to its constant growth.

The human head holds between 90,000 and 140,000 hair follicles. These follicles grow 0.44 millimeters per day, amounting to about a half of an inch each month, and only six inches per year. Depending on the pigment of a hair follicle, an individual will shed between 50 to 130 single strands of hair per day, 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

55 See Skin, supra note 2.
57 Id. Human skin’s shedding process affects tattoos daily because it causes bright and colorful works to fade over time.
58 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.
60 Id.
follicle’s constant growth and lack of permanence.\textsuperscript{62} 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 tattoos.

\subsection*{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.\textsuperscript{63} Instead, courts look to the economic value held in a reproduction.\textsuperscript{64} 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 \textit{The Hangover II’s} advertisement posters in an effort to promote\textsuperscript{65} the movie’s comedic value and get moviegoers to pay their twelve dollars\textsuperscript{66} 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

\begin{footnotesize}
\begin{enumerate}
\item Ratoza, \textit{supra} note 53.
\item Liederman, \textit{supra} note 31, at 304.
\item See \textit{id.}
\item See \textit{Verified Complaint for Injunctive and Other Relief, supra} note 8, at 5, 7.
\item \textit{Current Average Price of a Movie Ticket?}, \url{http://wiki.answers.com/Q/Current_average_price_of_a_movie_ticket} (last visited Nov. 16, 2012) ($12 is the average price of a movie ticket in New York City. Movie tickets across the United States probably range from $10 to $12).
\end{enumerate}
\end{footnotesize}
the film to gross $138 million in the United States alone.\textsuperscript{67} 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.\textsuperscript{68} 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, the tattoo, was for economic value.\textsuperscript{69}

In \textit{Carell v, Shubery Organizations},\textsuperscript{70} the United States District Court for the Southern District of New York awarded copyright protection for the makeup designs of the Broadway sensation, \textit{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 \textit{Cats} actors.\textsuperscript{71} However, the constant reproduction of Carell’s makeup designs in \textit{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.\textsuperscript{72} Although the economic value resides in the transformative makeup designs for this theatrical play, performed on the most famous stage in the country, Broadway, 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


\textsuperscript{69} See Liederman, supra note 31, at 304.

\textsuperscript{70} Carell v, Shubery Org., Inc., 104 F. Supp. 2d 236 (S.D.N.Y. 2000).

\textsuperscript{71} Id. at 247, \textit{Infra} Part IV.B.ii.

surgery to increase their self-esteem, improve unwanted imperfections, or make them happier in their lives.\textsuperscript{73} 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’s, 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\textsuperscript{st} 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 decoration 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.\textsuperscript{74}

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,”\textsuperscript{75} 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.\textsuperscript{76}

In the recent \textit{Hangover II} case, David Nimmer gave a deposition for Warner Brothers. 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 the human flesh. The spectrum’s first level provides an example of a surface holding the least amount of functionality—paintings—which holds no purpose other than to depict the painting.

\textsuperscript{74} See Declaration of David Nimmer, \textit{supra} note 12, at 9.
\textsuperscript{75} 17 U.S.C. § 101.
\textsuperscript{76} Declaration of David Nimmer, \textit{supra} note 12, at 8.
The second level is a material substrate that does have functionality, along with aesthetic purpose—the belt buckle. 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.77

Human skin falls on Nimmer’s final level of the “spectrum of non-expressive utility,” having minimal aesthetic purposes, paling in comparison to the skin’s functions. 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.78 The skin has six primary functions that logically demonstrate why flesh falls on the final level of Nimmer’s spectrums; (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 organ 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.79

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.80 The amount of life preserving functions that the human skin produces clearly indicates that Congress lacked any intention of

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77 Id. at 9.
78 See Skin Problems, supra note 2. See also Skin, supra note 2.
80 See Declaration of David Nimmer, supra note 12, at 9. See also Skin, supra note 2.
labeling the human flesh as an article; therefore, demonstrating why aside from the “tangible medium of expression,” the skin is not copyrightable.\textsuperscript{81}

\textbf{PART III: LEGAL CONFIDENCE IN ONE’S SKIN: INDIVIDUAL RIGHTS IN THE HUMAN BODY}

Since the ratification of the Thirteenth Amendment, abolishing slavery on December 6, 1865,\textsuperscript{82} the days where human beings were the property of others ended, or so we think. Today, although the definitional term of slavery\textsuperscript{83} does not currently exist, there is confusion surrounding the law of the body.\textsuperscript{84} The laws uncertainty categorizes the human body as either, property, quasi-property, or merely a subject of constitutional privacy rights.\textsuperscript{85} 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.”\textsuperscript{86} 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 death as well, specifically when dividing rights between close family and the interests of strangers that hold copyright interest in another’s skin.\textsuperscript{87}

\textsuperscript{81} \textit{See} Declaration of David Nimmer, \textit{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 \textit{separately} from, and are capable of existing independently of, the utilitarian aspects of the article.” \textit{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. \textit{Id.} at 8, 11.


\textsuperscript{83} Slavery is defined as “a civil relationship whereby one person has absolute power over another and controls his life, liberty, and fortune.” \textit{Slavery}, \textit{DICTIONARY.COM}, http://dictionary.reference.com/browse/slavery?s=ts (last visited Nov. 2, 2012).


\textsuperscript{85} \textit{Id.} at 363.

\textsuperscript{86} \textit{Id.} at 366-67.

\textsuperscript{87} \textit{Id.} at 368.
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.\(^8\)

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 particular object.\(^9\) 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 of compensation.\(^10\)

The United States Supreme Court consistently holds that the most essential “stick” in the “bundle of rights” is an individuals’ right to exclude others.\(^11\) Further, “property rights are body rights that protect the choice to transfer.”\(^12\) Its importance is relevant when discussing copyright protection in relation to an individual’s property rights in her own body.\(^13\) 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 around an individual’s rights in her body.\(^14\)

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\(^8\) Reichman & Johnson, *supra* note 5, at 28 (stating that this logic applies to tattoos and plastic surgery).

\(^9\) Rao, *supra* note 84, at 389. Each “right” or “stick” in the bundle represents a particular property right held by an individual.

\(^10\) *Id.* at 370.

\(^11\) *Id.* at 424.

\(^12\) *Id.* at n.5.

\(^13\) *See id.* at 367.

The Framers of the United States Constitution never intended property’s “bundle of rights” to include property rights or interests in the human body.95 This intention is prevalent in the language of the Fourth96 and Fifth Amendments,97 which indicates people are improper mediums to hold any property interests in.98 Compared to the Framer’s intent, a copyright holder’s proprietary control over their work, constitutionally, could not extend to works in the human flesh because individual’s are protected by privacy not property interests in their body.99

One of the great philosophers, John Locke,100 expands on the Framer’s 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.101 His belief is that an individual “literally owns one’s [own] limbs.”102 His widely recognized theory, coupled with the Framer’s 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. Additionally, the United States government codified this argument by passing the Thirteenth Amendment, which prohibits individuals from owning another individual as property.103

With all the above evidence an author’s property rights in a work in copyright law, specifically when an author creates a “pictorial, graphic, or sculptural work” using the human

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96 Infra Part III.B.
97 U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property.”).
98 Bray, supra note 95, at 220-21 (people and property are two distinct categories).
99 Id. at 221.
100 John Locke is known for being one of the greatest European philosophers in the seventeenth 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. John Locke, STAN. ENCYCLOPEDIA OF PHIL. (Sept. 2, 2001), http://plato.stanford.edu/entries/locke/ (last modified Jul. 10, 2012).
101 Rao, supra note 84, at 367.
102 Id. at n.19.
103 U.S. CONST. XIII § 1. Infra Part IV.
skin as her canvas, cannot logically 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.” However, the United States Constitution protects an individual’s privacy rights, rather than the basic rules of property under the Fourth Amendment, which states that American citizens “have the right of the people to be secure in their persons, houses, papers, and effects.” Privacy consists of two fundamental rights: (1) personal privacy, also known as bodily integrity, and (2) relationship privacy. This part 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.

“[P]rivacy envisions the body as an integral part of the person” entitling the human body to protection because it is a physical embodiment of the person. Professor Daniel Ortiz, explains that constitutional privacy rights establish “a sphere of individual dominion” disallowing interference by 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 preemptively exclude others.”

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104 Rao, supra note 84, at 389.
105 Id. at 387.
106 U.S. CONST. amend. IV. See Bray, supra note 95, at 220.
107 Rao, supra note 84, at 388.
108 Id. at 389.
109 Id. at 444.
110 Id. at 445.
112 Rao, supra note 84, at 428.
Such complete control over one’s body collides, head on, with permitting human skin to stand as a “tangible medium of expression.” The collision of rights presents itself if a court orders an injunction forcing an individual sporting a copyright holder’s body art, tattoo, or piercing, to or not to remove the author’s work. Although, copyright owners hold moral rights under the Visual Artists Rights Act (“VARA”), protecting the integrity of their work from destruction, alterations, and distortions, any injunction favoring the copyright holder in respect to another’s bodily integrity would create a “substantial bodily intrusion” under the Fourth Amendment.

Supreme Court precedent demonstrates why such a standard is applicable in Winton v. Lee. 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, personal privacy and bodily integrity interests. 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 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, but also provides the author with more rights than those laid out in the 1976 Copyright Act. Therefore, a copyright holder’s property rights in a work imprinted

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114 Infra Part IV.A.
115 Cotter & Mirabole, supra note 113, at 121. Infra Part IV.B.
117 Cotter & Mirabole, supra note 113, at 123.
118 Winston v. Lee, 470 U.S. 753 (1985); Rao, supra note 84, at 396.
119 Lee, 470 U.S. at 753; Rao, supra note 84, at 396.
120 Cotter & Mirabole, supra note 113, at 121.
on another’s skin should never supersede an individual’s fundamental, privacy rights to resist third party invasions or physical alterations of their body.

PART 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.”

Copyright is a constant balancing act; its largest challenge centers around the author’s right to control her property, against the amount of access in the public’s interest. 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; and the court’s ability to issue injunctive relief for infringements of an author’s work under section 106A, also known as VARA. The consequences of enforcing these rights would defy the Thirteenth Amendment’s prohibition of servitude, rehashing slavery and putting courts in the position of “21st century judicial slave masters.” 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 believes slavery to be repugnant and even hard to fathom how human beings were once considered property of another individual. 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.

121 U.S. CONST. amend. XIII, § 1.
125 Cotter & Mirable, supra note 113, at 119.
126 Declaration of David Nimmer, supra note 12, at 4, 11.
Modern intellectual property apologists say that, “the work themselves are not property, but the right to use them are.”\textsuperscript{128} 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 allow the copyright holder to control the uses of her work.\textsuperscript{129} As noted, hereinabove, section 106 grants the copyright owner these exclusive rights: (1) reproduction of the copyright work; (2) the preparation of derivative works (adaptation right); (3) the right to publication by distribution; (4) performance rights; (5) publically display the work; and (6) perform the work public through digital audio transmission. These rights give the creator complete control of over what is done with their work.\textsuperscript{130}

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 granted in section 106.\textsuperscript{131} 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,\textsuperscript{132} bringing into play the potential for plastic surgeons, professional piercer, or tattoo artists to become modern day slave masters, dictating the literal moves an individual can make on a daily basis.

\textsuperscript{128} Id.
\textsuperscript{129} See Boundaries of Intellectual Property, supra note 20, at 859.
\textsuperscript{130} 17 U.S.C. § 106(1)-(6).
\textsuperscript{131} See Boundaries of Intellectual Property, supra note 20, at 858.
The Hangover 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 Dermographics.”¹³³ This release limits Tyson’s ability to display his face in public,¹³⁴ based on this language, Whitmill holds property rights in any photographs taken of Tyson’s face. Although minimal, this language still 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 19th century slave code—“no slave shall be allowed to work for pay”¹³⁵—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 his labor. This control of property rights in any author’s work, not just Whitmill, has the capability to negatively influence a person’s livelihood,¹³⁶ dictating the class standard and means that an individual bearing an author’s copyrighted work can live. Such control mirrors the 19th century slave master’s control

¹³³ 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. ¹³⁴ See Perzanowski, supra note 15, at 19. ¹³⁵ Treatment of Slaves in the United States, WIKIPEDIA, http://en.wikipedia.org/wiki/Treatment_of_slaves_in_the_United_States#cite_note-Christian.2C_pp_27-28-30 (last visited Nov. 7, 2012). ¹³⁶ “Publicity enables a person to profit from their public persona by selling or otherwise exploiting commercially intangible body assets.” Rao, supra note 84, at n.30.
over a person, allowing the copyright author to reap all the benefits of an individual’s labor while crippling, financially, the individual bearing the author’s work.  

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. The commercial zoomed in on the player’s Egyptian inspired tattoo of his family, recreating it through computerized simulation. Wallace’s tattoo artist Matthew Reed saw the commercial and sued Wallace for contributory infringement based on the basketball star claiming ownership rights in his tattooed skin. 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.

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 arm 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 19th century that banned slaves from receiving compensation for their labor.

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137 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 19. See Declaration of David Nimmer, supra note 12.

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


140 Reed also sued Nike, Inc. and the advertising agency that came up with the commercial’s concept. Harkin, supra note 122, at 316.

141 See Harkins, supra note 139, at 317.

142 See id. at 316.
The problem does not stop with the original author of a copyright from holding the capability to prevent an individual bearing their work of authorship 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.143

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 holder’s 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.144 Section 106A 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,”145 and “(B) any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.”146

143 Fagundes, supra note 54.
144 Cotter & Mirabole, supra note 113, at 119.
The list of the real 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, whom the body belongs to, from obtaining another plastic surgeon or tattoo artist to modify the poor workmanship of the original author because it violates the copyright holder’s adaptation rights.\footnote{Cotter & Mirabole, supra note 113, at 120.} Courts could prevent individuals from going out in public or force one to cover up an area on the body which the copyright holder’s work resides on; this presents a real dilemma if the individual is a celebrity because such an order could prevent the person from appearing on television, magazine covers, or films.\footnote{See Declaration of David Nimmer, supra note 12, at 12. See also Cotter & Mirabole, supra note 113, at 120.} Further, courts have the power to order the individual bearing the copyright holder’s work to or not to remove a tattoo, causing the individual to forever wear an unwanted piece of work or undergo laser removal surgery, inevitably leaving permanent remnants of the tattoo on the bearer’s body through scarring.\footnote{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 Cotter & Mirabole, supra note 113, at 122.} 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 labeled as a “21st century judicial slave master.”\footnote{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. 3, 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.} i. \textit{Market Recognition}

It is evident that human flesh serves an aesthetic purpose,\footnote{See Bradley, supra note 150, at 2.} 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, but the market of those individual’s that adorn human flesh with colors and individualism hold a uniform consensus on the subject. I will demonstrate why Congress should declare skin as an intangible medium of expression based on the tattoo and piercing market’s aversion to copyright ownership in a client’s skin.

Tattoo artists uniformly acknowledge after finishing a client’s tattoo, complete control over that tattoo shifts to the client’s “bundle of sticks.” 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 to the world, walks around in public with their colored skin on display, or sends a photograph of their permanent, meaningful, artwork to a magazine for publication.

152 See Declaration of David Nimmer, supra note 12, at 15.
153 See Perzanowski, supra note 15, at 22.
154 Marisa Kakoulas, The Tattoo Copyright Controversy, BMEZINE.COM (Dec. 8, 2003), http://news.bme.com/wp-content/uploads/2008/09/pubring/guest/20031208.html (Professional piercer, Martin William McPherson comments on courts issuing injunctions for copyright infringement of tattoos stating that it, “[I]t ’[s]ounds dangerously like State control over our bodies,’ . . . ‘Isn’t that what many of us are fighting against? Aren’t we (some of us) trying to claim our bodies as our own?’”).
155 See Perzanowski, supra note 15, at 22.
156 “[A] tattoo artist cannot reasonably expect to control all public displays of his or her work.” Bradley, supra note 150, at 2. The tattoo artist, Matthew Reed, tattooed Rasheeda 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 139, at 316.
157 See Perzanowski, supra note 15, at 25 (rehashes 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 it into an image [for a commercial use], then I’d feel like I should get
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 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.”

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. 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 a derivative work. 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 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 countrywide, lack of adherence and deem an individual’s skin as an intangible medium of expression, belonging to the individual whom it protects.

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158 See id. at 24-25. 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 26.

159 See id. at 25.

160 See id. at 26.

161 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)
ii. Lack of Recognition

Did Congress really want copyright law to cover human skin?\textsuperscript{162} The Copyright Act as of 1977 did not list tattoos as a “pictorial, graphic, or sculptural work” capable of gaining copyright registration.\textsuperscript{163} 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.\textsuperscript{164} In 1955, when Congress first decided to revise the 1909 Copyright Act, Congress compiled seventeen volumes of legislative materials, and not one volume contained a single reference to human skin.\textsuperscript{165}

The judicial system has never had the privilege to decide a case dealing with human skin’s copyrightability.\textsuperscript{166} The courts came close in the 2000, case Carell v. Shubery Organization, Inc.,\textsuperscript{167} 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.”\textsuperscript{168} However, on this matter the parties settled outside of court.\textsuperscript{169} Two more cases Whitmill v. Warner Brothers Entertainment, Inc. and Reed v. Nike, Inc.,\textsuperscript{170} held the capability of putting meat on this legal issue, but both parties in these cases settled outside of court. 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.\textsuperscript{171}

\textsuperscript{162} Can You Copyright the Human Body?, supra note 132.
\textsuperscript{163} Declaration of David Nimmer, supra note 12, at 15.
\textsuperscript{164} See id. at 16.
\textsuperscript{165} See id.
\textsuperscript{166} This is true for before the passing of the 1976 Copyright Act and after. Id. at 17.
\textsuperscript{167} 104 F. Supp. 2d 236 (S.D.N.Y. 2000).
\textsuperscript{168} Id. at 247.
\textsuperscript{169} Reichman & Johnson, supra note 5, at 29.
\textsuperscript{170} Reed, 05-cv-198.
\textsuperscript{171} See Reichman & Johnson, supra note 5, at 29.
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 disastrous 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 it. Congress must label human skin an unacceptable medium, 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.172

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 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 “21st century judicial slave masters.”

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172 17 U.S.C. § 302(a) (applies only to works created on or after January 1, 1978).