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Is Your Birthday Suit an Intangible Medium of Expression or Are You Bound to the Shackles of Copyright Law?

BY [WEBMASTER](#) / ON SEPTEMBER 29, 2013

Arrielle Millstein, J.D., Widener University School of Law 2013

(For more extensive treatment of this topic, including policy considerations as to why Congress should amend the [1976 Copyright Act](#) to classify human flesh as an intangible medium of expression, see – “Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression” in the forthcoming issue of the [Pace Intellectual Property, Sports, & Entertainment Law Forum](#)).

Human flesh is miraculous; it is the body’s largest organ weighing in at eight pounds, and measuring a total of twenty-two square feet. The skin not only functions as a protectant from life’s daily elements through its regenerative qualities, but also serves as a means for individuals to demonstrate self-expression; whether that is through body modifications, plastic surgery, tattoos, unique body piercings, skin stretching, or skin alterations for cultural traditions.

In 2009, an Arizona tattoo artist, Christopher Escobedo, tattooed [Carlos Condit](#), an Ultimate Fighting Champion (“UFC”), with a lion tattoo on his rib cage. Due to Condit’s newly established fame resulting from twenty-eight career victories in the UFC, THQ Inc., a video game publisher, featured Condit in UFC Undisputed 2010. Like all Xbox360 and PlayStation 3 games in the 21st Century, Condit’s three-dimensional character was identical to his real life persona, right down to the intricate details of Escobedo’s lion tattoo. Escobedo followed the recent tattoo artist trend by [registering the lion tattoo](#) and [filing suit against THQ Inc. in 2012 for copyright infringement](#).

You may be asking yourself, why has this writer just given me a mini biology lesson in conjunction with professional sports news? Well, the basics of human anatomy are essential for understanding why skin is insufficient to qualify as a tangible medium of expression acceptable under the 1976 Copyright Act. Under the Copyright Act, copyright protection is given to original works of authorship that are fixed within a tangible medium of expression. The fixation requirement mandates that: (1) embodied in a material object; (2) the work is sufficiently, not absolutely, permanent to permit perception; and (3) that the work exist for a period of more than a transitory duration. The [Digital Millennium Copyright Act](#) extended the meaning of transitory duration to encompass the economic value of a reproduced work of authorship.

As discussed above, the human skin has regenerative qualities; these qualities are the very reasons that prevent human flesh from holding true permanence. Out of human skin’s 1.6 trillion cells, every day individuals shed one million of those skin cells preventing flesh from being a suitable means of permanence because of its constant evolution. If you are weary about this logic, compare it to human hair, a well-known intangible medium of expression. The human head, depending on an individual’s hair color, will shed anywhere from 30 to 150 strands of hair a day, a number that varies in greatness from human skin, but still prevents hairstylists from copyrighting any couture hair design.

Human flesh is prevented from meeting fixations temporal requirement due to its lack in economic value. [THQ Inc.](#)’s reproduction of Condit’s lion tattoo in UFC Undisputed 2010, was a marketing technique that many video game publishers use today when depicting professional athletes in order to increase sales revenue. Video game publishers know that consumers get a thrill out of feeling as though they are the actual undefeated UFC fighter or the Superbowl winning quarterback in virtual reality. However, THQ Inc.’s economic incentives for reproducing Condit does not compare to the reasons why Condit first decided to get a lion tattooed across his rib cage. Like Condit, when a layperson walks into a tattoo parlor to get a piece of artwork permanently engraved on their skin, their incentives are not to economically exploit the artist, but rather, for personal reason.

Copyright protection affords a copyright holder certain property rights in her work of authorship; if an author owns a work, it gives her the right to completely control that property’s every move. If human skin is deemed an acceptable tangible medium of expression, the ramifications in the legal field could imitate a form of modern-day slavery. Imagine a court granting a request for injunctive relief that prevents an individual from receiving laser tattoo removal surgery because the copyright holder objects to the destruction of his work that resides on a patch of skin on the tattoo bearer’s body. The legal ramifications for destruction of body modification copyright are endless, particularly if the defendant is a celebrity. Without legal precedent from the Judiciary or legislation from Congress, people will need to think about the threat of litigation before going “under the knife,” piercing their ears, or even allowing a tattoo needle to touch their skin.

Congress cannot sit on this issue any longer; it needs to take a deeper look at the body modification industry's market recognition on this topic. Further, it must look at the legislative history of the Copyright Act and determine whether Congress intended for human skin to be copyrightable. Based on the above arguments, it is pertinent that Congress amend the 1976 Copyright Act to include human skin as an intangible medium of expression.

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