

***No Infringement Intended* Podcast — Can Tattoos Be Copyrighted? The Legal Battle Over Mike Tyson's Iconic Ink**

Hosts: Austin Padgett and Rusty Close

Recorded: January 21, 2025

Aired: May 13, 2025

Austin Padgett:

Come on and come all. Welcome to *No Infringement Intended*, the intellectual property podcast of our law firm, Troutman Pepper Locke. With your host, Rusty Close and me, Austin Padgett. This is a podcast where the bad boys of intellectual property dissect the rules that are worth breaking. Again, still working on that line, but we are the bad boys of IP. That's all you need to know.

While you're sailing in for this episode, please make sure that you're subscribe, and what a great time to light up five stars for your friends over here. We certainly appreciate you listening. A few episodes back, I mentioned that your enthusiasm for this podcast, listeners, well, it caught the eye of firm's management, to keep an eye on us as you know. Long story short, they gave Rusty the title, Chairman of the Firm for a day. He gets on the phone with few ideas and ends up merging the firm with Locke Lord to create the current state of the firm, Troutman Pepper Locke.

Listener, you can consider yourself part of the larger story. Rusty, congrats on your success. Let me ask you an entirely unrelated question. When you were growing up, did your town have an airbrush artist?

Rusty Close:

It's a good question. I grew up in Kennesaw, Georgia, which is known for the slogan, "It's the law in Kennesaw," because there was a law in the books that any house within the city limits had to own a firearm. But as far as I know, we did not have a local airbrush artist. I had to wait until I went to Panama City Beach every year to see the wonderful airbrushed art, hats, t-shirts, tank tops in particular. But unfortunately, I was never allowed to get my own Panama City Beach souvenir. I guess my parents thought we were too good for airbrush souvenirs, which is a little hard to believe, but I never had my own.

Austin Padgett:

I grew up in Milton, Florida. We had this Walmart store that was built in town, and after you walked in, you walk in and to the right. I mean, you got greeted, of course, but you walk in to the right, there was this huge airbrush station, and there were a couple of guys usually working there as artists. But there was one particular dude who was known in town who could really do anything and make it look amazing. I mean, it was really, really good airbrushing.

If you don't know what airbrushing is, it's a tool that uses compressed air to blow paint or ink onto a shirt or some other surface. If you walked up to the station, they had like 20 or so shirts that the artist at the booth had created. The designs at this time usually had Taz, the Tasmanian Devil or Tweety from the Looney Tunes universe, or the LTU for those in the know.

Rusty Close:

Classics.

Austin Padgett:

Yes. Do you remember at least Taz and Tweety being a thing?

Rusty Close:

Absolutely, 100% I do. My favorite anecdote here, I remember I was in college, so we're talking late nineties. I was standing in line at Walmart. I turn around and there's, a worker who has on a Taz hat. And he had flipped up the bill on his Taz hat and written in ballpoint pen, I hate Mondays. It's one of my core college memories was this guy's Taz hat.

Austin Padgett:

That's like a Garfield –

Rusty Close:

Customized.

Austin Padgett:

– crossover. Customized, that's amazing. Oh man. Yes, my hometown was where Tee-ball was invented. Have you ever played that? So, we'd see a lot of airbrushed baseball helmets when it became affordable and desired for kids to wear full helmets. Before that, we would have these like little plastic things that basically went around the back of your head and ears, and left the entirety of the top of your head exposed. I don't know if you remember that or not.

Rusty Close:

Incredible in retrospect.

Austin Padgett:

It really, why bother? You could take your helmet to this artist and they would create custom designs for you. Of course, we never got that done for our helmets at my house. I don't think it was, we were too good for it. I think it was more the expense of that and also kind of the show boaty nature of it. I think I mentioned in the wrestling episode, my mom really got turned off on wrestling when it became kind of the Attitude Era. That's what those designs kind of started

becoming as like, you had helmets with flames and stuff on them. Like, you were faster or something, like you were that good a baseball player on the Tee-ball field. It wouldn't fly at my house.

Rusty Close:

If this was a video podcast, I could walk out to the garage and bring back two Tee-ball softball helmets that are airbrushed, Willa and Harper, with flames, and hearts. And things of that nature.

Austin Padgett:

I love that they have the confidence to wear those.

Rusty Close:

Yes, I think it's almost the lack of confidence not to wear it. You don't want to be the kid who doesn't have it at this point.

Austin Padgett:

Right, that was me. That was me, yes. So, this airbrushing trend didn't last forever. As some people say, we used to be a proper country. Well, moving into the nineties, the airbrush stations and the shops were shuttered. That big area of the Walmart and my hometown changed to just kind of shirts and other retail stuff. I've always wondered what happened to those artists. I suspect that some of them became tattoo artists, and that's where we come to today's topic. Rusty, getting into it, what do you think are the most famous tattoos that you know of?

Rusty Close:

Wow. Let me think here. What would be some famous – what are some of the first tattoos I really remember? Because we grew up in an era where tattoos, you were either like ex-Navy, or maybe had fallen on hard times, and spent some time behind bars. I mean, now, you have people with full sleeve tattoos, neck tattoos, and it doesn't, you don't even bat an eyelash when you see it. I think one of the first ones I really – one that really sticks out to me is when Pamela Anderson got the barbed wire tattoo around her arm when she was starring in the movie *Barb Wire*. It was also at a time where sort of that bicep wraparound tattoo was really a thing. So, that's one that really sticks out in my mind.

Austin Padgett:

Yes, that's a good one. I hadn't thought of that one. The one that I use a lot with my buddies on text chains is the “No Ragerts” meme from *We're the Millers* of just the misspelling of the tattoos, just solid. But perhaps the most famous is Mike Tyson's face tattoo.

Rusty Close:

Oh, yeah.

Austin Padgett:

Rusty, beyond this tattoo that he has on his face, what can you tell our listeners about Iron Mike Tyson?

Rusty Close:

Good grief. I mean, again, well, I think I immediately think of the Nintendo game Mike Tyson's Punch-Out. I think of him coming to the ring, black trunks, black boots, and really ready to annihilate someone. I remember distinctly, we were driving back from Kansas. My great grandparents lived in Kansas. We would drive out there every summer. I remember we were driving home, we stopped at a hotel along the way, and it was the night of the Michael Spinks fight when he knocked out Michael Spinks in 20 seconds or something like that. I just remember thinking to myself, oh, there's poor people that paid for that fight on pay-per-view. What recourse do they have now?

Then, of course, I think of things going a little bit sideways, the biting of Evander Holyfield's ear, certainly legal troubles. Then, I think of his appearance in the classic movie, *The Hangover*.

Austin Padgett:

That brings us to today. So, in 2003, Iron Mike gets in contact with a tattoo artist named S. Victor Whitmill. Tyson has an interview with him where he says he explained that he wanted some parts on his face, but Whitmill says that it's not fitting for Iron Mike. He told Tyson that he's a warrior and needs some signal of that message. Well, Whitmill is known for his expertise in tribal and traditional tattoo styles. His designs often feature this type of intricate pattern and bold lines that draw inspiration from those cultures. Before you ask, I don't have any information that tells me if he was a brush artist or not, but I also don't have any information that he wasn't. So, tying it in our opening here.

Whitmill puts together this design that's inspired by the indigenous Māori people of New Zealand. This culture has this long history, art style known as Tā moko. They use patterns and shapes, they etch them or tattoo them in the skin. The designs are supposed to tell the story and have meaning about family, and history, and the person themselves, maybe their status, that type of thing. Whitmill takes inspiration from his style and develops a design that complements the contours of Tyson's face, and essentially goes around his left eye and then across a little bit of the side of his forehead.

It probably seems like nothing now, like we were talking about, but this was a huge story in 2003, and it's completely different now as we were mentioning. But a tattoo on your face in 2003 was at least popularly seen as unconventional.

Rusty Close:

To say the least, I mean in 2003, this was seen as truly crazy behavior to get a tattoo on your face. Especially – well, I won't say especially. A tattoo on your face, period. This one was – it's sort of a half-moon, crescent moon shape that kind of goes around his left eye, if I'm picturing it correctly. I mean, today, we've got Post Malone, and Jelly Roll, and Lil Wayne, and all these people who have many tattoos on their face. I'm not going to say we've all just sort of accepted it as normal. But in 2003, this was shocking to see.

Austin Padgett:

Yes. I mean, kind of the popular discourse was around sanity of all of this. But when you hear – I mean, Mike Tyson can have his own reasons for doing it, but when you hear him talk about it in the interviews that I've seen on YouTube and others, it's kind of actually well-reasoned. He has all these reasons for things, and he went through this process with Whitmill, not saying it was the most elaborate or thought-out thing, but he has his reasons. So, it's just such a – looking back at it from this angle is just like, you have to put yourself in that perspective because that informs what's going to come next, why it would be funny in a movie.

So, you fast forward to 2009. We were in 2003 when the tattoo happened, fast forward to 2009, and Todd Phillips film, *The Hangover* is released stars Bradley Cooper, Ed Helms, Zach Galifianakis. I won't go too far into it, except to tell you that it was successful enough to spawn two sequels. Undoubtedly, American cinema's best and most important trilogy of films.

Rusty Close:

We would say, the sequels are just beloved. I mean, as compared to the original.

Austin Padgett:

Right, exactly. That's exactly right.

Rusty Close:

Or we might call them a cash grab.

Austin Padgett:

One could call them that, yes, and it works. Well, *The Hangover Part II* is the film we'll focus on. Rusty, have you seen the masterpiece, *The Hangover Part II*?

Rusty Close:

I am nearly certain that I have. I think it takes place in Thailand or in the Far East somewhere, right?

Austin Padgett:

Yes, yes. Let me set the stage for you. It follows the same characters as the first film, as they travel to Thailand for the wedding of the character named Stu, who's played by Ed Helms. After a relatively tame pre-wedding brunch – and I should also mention, Stu's kind of the more strait laced.

Rusty Close:

He was a dentist, I think, maybe, or something along those lines.

Austin Padgett:

Yes, yes. He's like the strait-laced guy.

Rusty Close:

Andy from the office.

Austin Padgett:

Correct. Yes. And it plays that kind of – it's the same type of character. So, they have this pre-wedding brunch and the film then cuts to this group waking up in the seedy hotel room in Bangkok with no memory of the previous night's events. One character's head is shaved, the groom's brother is missing, and importantly, for our purposes, Stu has a tattoo on his face. And as you might have seen, you can guess what tattoo it is. It's a near identical replica of Tyson's face tattoo. And it becomes part of the plot, because like the first film, the characters need to unwind what happened in the previous night. But the tattoo is also something that can't be hidden from the bride or her family, like other shenanigans they might have done. So, it's an important plot point.

Rusty Close:

There's levels of mistakes you can make the night before your wedding.

Austin Padgett:

Right. This thing is featured in the trailer and on the movie posters themselves if I recall correctly. So, you got this tattoo artist, Whitmill. He sees this thing, sues Warner Bros., and claims copyright infringement over his tattoo design for Mike Tyson. So, April 2011, before *The Hangover Part II* is released in late May, so about a month before, Whitmill comes to find about the tattoo being in the movie and he sues the movie studio. The timing of this is important because Whitmill is asking for a preliminary injunction to stop the movie from being released.

Rusty, I'm going to take you back to law school. Preliminary injunction, that sounds important. What is that?

Rusty Close:

Okay. Again, we do not want feedback from our listeners if I don't get this exactly right. But the idea is, this is such a serious situation that the courts need to step in. We don't have time to deal with litigation and let this thing play out. We need you to step in and stop this immediately, because the risk to me, the plaintiff here is so great that we just can't let this go on.

Austin Padgett:

You nailed it. So, it's a big exception to this general rule that courts have the power to issue final judgments and orders after a full hearing. I mean, we have due process. We've got to have, we got to get the merits out there, the parties have to go at it, and then the court's going to find the truth in a final kind of revealing. And this ensures that both parties have the opportunity to present their evidence and arguments before this final decision is made. So, the final decision might be an actual injunction at the end of the case. They may say, "Hey, don't do that." But, as you know, litigation takes a long time. So, you might be years out before you can actually get the relief of making someone knock it off.

The preliminary injunction is this temporary order issued at the early stage of litigation to prevent, like you said, irreparable harm. It's so great that there's no other thing to do except to stop this thing. It has to happen before the court has had the opportunity to fully hear and decide the case.

Rusty Close:

Whitmill saying, "Look, the toothpaste is going to be out of the tube if you let this thing play out."

Austin Padgett:

Right. We cannot unring the bell.

Rusty Close:

Absolutely.

Austin Padgett:

That's right. Yes. So, the purpose of it is to maintain the status quo and prevent harm that can't be remedied, at least by monetary damages alone, because that's usually what you're looking at, is like either some sort of unwinding, like issue an apology, or issue corrective advertising, or pay money, those sorts of things. You do all that later. This is the type of stuff that you can't undo by those types of things. So, there's going to be some sort of special damage that's not prone to the relief in that sort of way.

To get that type of relief, the plaintiff has to show a few things. They have to show a likelihood of success on the merits. That is, they have a high probability of winning on the underlying claim when the case would be ultimately decided. They have to show the irreparable harm that cannot

be adequately compensated by monetary damages. They have to show a balance of the equities, and they have to take in public interest, which both of those go about like, what are we putting the parties through if we stop this thing from happening. Is it helping the public? Is there some sort of interest in it one way or the other?

You can probably gut out both sides' arguments as to the harm to the parties and the public. So, Whitmill's arguing that the release of the film can affect his reputation and the value of his art. And Warner Bros. is pointing to the fact that delaying the release of a major motion picture is very expensive, and creates huge practical difficulties in monetizing the film. The more interesting part for our discussion here is whether Whitmill was actually likely to win this thing. So, let's talk about the merits of this case.

As a copyright plaintiff, Whitmill needs to show two things. He's doing this kind of in a pre-case case, in a sense. If you look at the preliminary injunction, you have to go in and kind of try your case, you don't have to have all the evidence, you haven't gone through discovery. But you have to have kind of like a mini case that happens, so that you can show, "Oh, I might actually win this thing, and I actually have a strong likelihood of winning this thing." To win a copyright case, he needs to show that, one, he owns a copyrighted work, and that the defendant copied that work without permission. So, we'll take those two things in turn that he owns. A copyrighted work and that the defendant copied it without permission.

To get a case off the ground, Whitmill has to register his copyright. I pulled the registration and looked at it, and he names his copyrighted work, quote, "Tribal Tattoo." He says, that was created in 2003, and he published on February 10th, 2003. That's the date Tyson sat in the chair and got the permanent souvenir, as we call it.

Rusty Close:

Can I jump in here? We're calling this a souvenir? That's the right word for a face tattoo?

Austin Padgett:

I've heard people call them permanent souvenirs. I thought it would be a clever turn of phrase to throw in here. I'm realizing now, it didn't work as well as I wanted it to, but –

Rusty Close:

Well, I think it – I mean, it certainly got my attention.

Austin Padgett:

Yes, it's a terrible one.

Rusty Close:

I like to think of Post Malone's permanent souvenirs.

Austin Padgett:

Souvenirs, yes, each of them. I think it has more to do with those trips to regrettable incidents at Panama City Beach on a spring break for some kids.

Rusty Close:

Remember from our last episode, there's aspects of that that are off limits for discussion on this podcast.

Austin Padgett:

There are, and we're just talking generally about people who may have gone there during spring break at any point in time, perhaps 1994.

Rusty Close:

Perhaps.

Austin Padgett:

So, we know that he sat in the chair February 10, 2003. There actually, if you look at the complaint, there're actually pictures of him getting that tattoo in the complaint. It's kind of interesting from a kind of historical pop culture perspective. But here's an interesting copyright point. The author of the copyrighted work owns the copyright to that work. So, there's an important trend called work made for hire that gives authorship and ownership to employers for employees work and in some other cases. But generally speaking, the person that created the work gets the ownership. That goes for all types of works. You put pen to paper, you write it, it's yours. Except if there's some limited exceptions and we'll cover those in some future episode, I'm sure. But that's one the mainstays of copyright. It comes into play a lot of times because in order to transfer the work, you have to have a written transfer. That's one of the non-negotiables of the Copyright Act.

A lot of times, Rusty, when you and I look at what a company has, there's something that was written down, and given to them by somebody along the way, but they never assigned it in writing. Now, we've got to figure out, okay, who actually owns this thing, what do we need to do, and jump through some hoops to get this thing in the ownership of the company, do some cleanup, that type of stuff.

But my favorite aspect of it is that, whenever we're out as a family, and we're on vacation, or something, and we're walking down the beach, and going down the boardwalk that's set out to go over the dunes and hit the beach. There's always a family there trying to take a picture, and I'll say, "Hey, can I – I'd be glad to take a picture of all of you, so no one gets left out." They're "Oh, you're the best" and I am. It's a gracious act where I'm taking my time to do that. But one of the things that gives me great joy is knowing that I owned the copyright in that photo that I took of them.

Rusty Close:

Is this a conversation you have with them? We talked about how you like to bring up the commercial jingles at dinner parties. Is this also similarly, "Hey, guys. Just so you know here."

Austin Padgett:

It sounds like something I would do, but it's not. I let them move along with the implied license that they can go post on their social, do whatever they want to do with this photo. But I grinned to myself each time because I know I own that piece of intellectual property that's in their phone.

Rusty Close:

Such satisfaction.

Austin Padgett:

It really is. It's a dark little grimace I give myself each time. In the collaborative process, you can see how this can create some real problems. And I'm sure we'll have an episode about co-authorship and co-ownership at some point, because there's some unique rules there in copyright as well. They tend to come to the forefront when tempers or feelings are at their worst. You think of bands breaking up, and they all worked on the song together, but only one of them wants the royalties for the songs, that kind of stuff.

I only mention this because the Copyright Office has noted in a record where there's a quit claim assignment between Whitmill and Tyson that's filed after this case closed out. It looks like the Copyright Office records are like similar to old school card catalogs that we had growing up, where you pull the card, and gives you a little bit of information about where the book is, and where to find it, and who the author is, that type of stuff. It's that same sort of concept that the Copyright Office, even in their electronic records, that you get a snippet summary of what this thing is.

So, we don't know much more than the fact that between these two, they have what's called a quick claim assignment of copyright and waiver. So, it might be that there was some concern that Mike Tyson could arguably own some rights to the tattoo design because it sounds like they had some sort of back and forth, and it was on his face after all. But it might be that Whitmill assigned the rights to Tyson later for some of the reasons we'll discuss in a few minutes.

Rusty Close:

So do we know the direction of the quit –

Austin Padgett:

We don't.

Rusty Close:

Okay, we just know there was one.

Austin Padgett:

They put party one, party two, and just – I'm sure there's some protocol that they have, but I've seen it both ways, where a sign order is in one place. So, what we'd have to do is like, go actually get the document, which will cost some money, and we just don't have that budget yet from the brass to, to front, but maybe we'll have a follow up episode.

Rusty Close:

After the success of the merger that I came up with, and executed on, you'd think we could get a couple of dollars thrown our way.

Austin Padgett:

It will happen sooner or later. So, we'll have to have a follow-up episode. I'm sure that's what they're hoping for us, is that, let's see how they do with no funds, and then, we'll throw some money, real money at this, and see where these guys can take this thing.

Rusty Close:

Then, we will argue over ownership of it.

Austin Padgett:

That's right. That's right. But from what we know, Whitmill came up with the design and owns the copyright to it. Let's just assume that for this case. I just wanted to note that there's a record at the copyright office that has something to do with this.

Rusty Close:

Can I ask this? Did he file for the registration contemporaneously with doing the tattoo or is it something he did years later, and said, "Hey, but I did this back in 2003?"

Austin Padgett:

I think it comes later. I'd have to go back.

Rusty Close:

Because you can do that, right? You can file later.

Austin Padgett:

You can.

Rusty Close:

Okay. In that situation, are you just attesting to the fact that I did it in 2003.

Austin Padgett:

Yes. You give them the date of publication and creation, and then you make an attestation at the end of the truthfulness of the statements in your application. But yes, you've got to get the registration to get your lawsuit off the ground. That's a requirement for –

Rusty Close:

That's a lot of times what happens. You see that it's filed many years after the fact, but it's because, some sort a problem has come up. And, "Oh, crap, now, I got to file this thing so I can then file a lawsuit."

Austin Padgett:

Yes, I've got to go paper this thing up. The benefit of that is that you can make the paper right to your lawsuit. I mean, it doesn't happen often, but sometimes, someone will file something, and it doesn't say the exactly right thing, or maybe the artist went and filed it himself, and then gave graciousness. "Oh, so and so owns part of this too." Starts creating some real problems. That happens.

I should mention real quick that the Copyright Act does give some advantages if you file in a timely manner. When you do certain things with the work, like publish it, and it starts a timer on you as to when you can get your filing in a timely manner. If you do it before the infringement happens, then you get some advantages anyway. But there can be intervening, if you launch a huge movie perhaps, and then a bunch of people take that movie and they videotape it in the theater, and then, they go and post it on their own channel or something. All of a sudden, that can happen very quickly.

Well, the Copyright Act gives you some leeway between the release and when you have to get that registration filed before you lose some of the benefits of getting the registration in a tightly manner. Well, we'll go through that at some point because it comes up in some cases here and there. But it doesn't really matter for our purposes here.

We know that Whitmill came up with this design, owns a copyright to it. Keep in mind there's a threshold to what can be copyrighted as well. The work has to be original. That's the word, and it has to be fixed in a tangible medium. So, there's originality and the fixation requirements. The fixation at issue is the actual tattoo on Tyson's face. It's not a prior drawing, what's claimed in the lawsuit, and on the face of the registration or the actual kind of the 3D rendering of the tattoo onto Tyson's face. We'll talk about that, but the originality requirement is also interesting.

Someone might look at the tattoo and say, "Oh, it's just some curvy lines around his eye." But the creativity requirement for this aspect of stuff is just so low to get a copyright. The originality requirement doesn't mean that you have to create something entirely new under the sun. It just means that it has to be your creation, and it needs to have some modicum of creativity, which again, in the very name, is not much. Some types of phone directories can meet that, has been found in cases.

Those are Whitmill's assertions on the first question about copyright ownership. But we also need to think about whether there's an authorized copying. We know from the filings that Whitmill did not give permission to Warner Bros. or any other party related to film. So, the movie itself more or less acknowledges that this is the Tyson tattoo, and because that's the funny part about it, that Stu, the straight-laced character as Mike Tyson, who's just kind of known for being on the edge. This is the tattoo on his face. So, the tattoo is clearly a reproduction.

So Warner Bros. comes in with a Lee Corso style, "Not so fast," and they bring in their own heavyweight. Rusty, if I say *Nimmer on Copyright*, do you know what I'm talking about?

Rusty Close:

It's a good question. I think I do. If I think back to law school, I believe that's sort of the textbook that we used for at least the copyright class that I took.

Austin Padgett:

Yes. Yes. When lawyers research an issue for a client, they have a number of type of resources, one of which is legal treatises, and their titles often take the form of last name on topic. That's the format. So, I used to pass *Couch on Insurance* in our firm's library, and I just love that title. There was another one called *Chitty on Contracts*. So, you see some fun stuff across the library shelves when you go by the firm's library. I don't know if we even have those shelves anymore.

Rusty Close:

I unfortunately think it's a thing of the past.

Austin Padgett:

I think so. Used to be one of my great joys in life, was to go down there, and hide out. where I could actually get some work done without the phone ringing.

Rusty Close:

A great use of commercial real estate.

Austin Padgett:

Absolutely. Well, *Nimmer on Copyright* is a large-scale legal treaty on, you guessed it, copyrights, and has several different authors and contributors, if I remember right. But Melville Nimmer was the chief architect and David Nimmer, his son, took it over. And that David Nimmer is who shows up for Warner Bros. as an expert to testify on the copyright at issue. It's an interesting choice because David Nimmer, who I'll just call Nimmer from now on has made some statements that he thinks the tattoos probably do fit the bill as a fixation of the work. So, we're going back about this fixation requirement, about being on somebody's face, a person's face. Is that a fixation for purposes of the Copyright Act?

So, David Nimmer has previously had some statements that say – and he's an authority, keep in mind. I mean, he's the author, and named author on this treatise that he's kind of come down through his dad.

Rusty Close:

Sure, the family business.

Austin Padgett:

Right. So, Warner Bros. brings him in, but they do so, so he can renounce his prior beliefs. I'm guessing that the plaintiff had made some sort of hey about, "Even David Nimmer agrees with us." So, Warner Bros. goes and finds David Nimmer, brings him in to recant the whole thing, but it's really interesting. It's a great read, his expert testimony.

Rusty Close:

He's recounting whether or not a tattoo on your face is actually a fixation?

Austin Padgett:

Yes. Is it copyrightable?

Rusty Close:

Hard to imagine how it's not.

Austin Padgett:

Yes. I might be able to convince you. So, he provides this expert declaration, and it says, just as I said, he once thought that a tattoo could presumably be considered a fixation. After all, it's not going anywhere. That's the essence that the exact essence of a tattoo and what makes the "No Ragerts" meme so funny.

Rusty Close:

If your parents have ever told you any reason not to get a tattoo, it is because it is permanent.

Austin Padgett:

That's right That's right. But now, he's reconsidered, and he says this, I'll just read it, "In reviewing this case, I have given intense consideration to the question that occupied those few paragraphs of my 2001 exposition." That's the document that had this statement in it that he once believed the fixation would occur. "For all the reasons detailed in this declaration, I reaffirm my earlier conclusion that live bodies do not qualify as a medium of expression sufficient to ground copyright protection."

There's this concept of that you have to have a substrate, that you have to have something to put the expression, whether it be your computer hard drive, a piece of paper or parchment, but there's some –

Rusty Close:

Stone tablet.

Austin Padgett:

Stone, exactly. Lightning coming down from the mountain. But there are these concepts of like, okay, what if you remember when you would pass by the buses in school, and they'd be so filthy, and you could draw totally appropriate imagery and things onto the bus? Does that count? Is that a proper fixation of expression? What if you write something in the sand at the beach that the tide is just going to come and sweep away that night? What if it's a frosted windowpane? That type of thing. Those things are probably not fixations. They're not the type of thing, the type of substrate that lends itself to what we're trying to do here and incentivize through copyright. That's what Nimmer's trying to get at.

Rusty Close:

I can follow those examples. Now, convince me how the skin is not one.

Austin Padgett:

It's a more unique example because of the implications of what can happen in litigation. So, Nimmer goes on and says, he hasn't found any case directly on point and tries to distinguish the cases that might have offered some insight into the issue. He mentions later that he couldn't find any mention in the legislative record for the Copyright Act to show that Congress was even thinking about tattoos.

Rusty Close:

Yes, real shock.

Austin Padgett:

Yes. Yes. I mean, they talk about so much these days. But all that aside, the most interesting parts is where he warns about what we're to do if Whitmill actually does have a copyright in a tattoo. He mentions that Whitmill could have some sort of injunction over Tyson's face that copyright law, this is his quote, I'll just read it. "Copyright law thereby becomes the instrument to impose almost literally a badge of involuntary servitude akin to the mark with which ranchers brand the cattle they own." Let me take you through what it means. So, Whitmill could have another claim to Tyson's ability to change the design, because when you design something, you're the owner, and people can't make derivative works out of it. That's in the bundle of rights that we covered a few episodes back.

If Tyson decides, "Oh, I don't like this particular design anymore, I need to change it." He potentially has some limitations on what he can do to the tattoo on his face. Nimmer also says that, Whitmill potentially has a claim to any media outlet that publishes a picture or video of Tyson's face. Nimmer acknowledges that Whitmill tries to come back and says, "Oh, well, I get it. That's not a problem. I've given Tyson a broad license to the tattoo design, and we don't have to worry about that." But Nimmer's point is that, the court's acknowledgment of ownership to the rights in a tattoo design, even if they are licensed in the Whitmill case, that they're not kind of this big involuntary servitude problem. It creates a finding by the court to that effect, creates a potential for these kind of human being specific issues. That's why the skin, Nimmer's argument is, is that, the skin isn't like other parchment paper in that sense.

Rusty Close:

I don't hate the rationale here, and I can follow it. I also really hate the rationale here.

Austin Padgett:

I get it. Yes, it's tough because it's clearly a fixation of some sort. It's the matter of the substrate, and where does that leave you if you're a tattoo artist, or is your art completely delegitimized by the fact that you're doing the nature of what you're doing. The piece that I love the most about this is, is that, Nimmer actually seems to have given what you call intense consideration to the issue. The declaration is really interesting to read, and we get a lot of interesting questions as intellectual property attorneys anyway. But the best are these types, where they intersect with what it means to be human. It's coming up again in all this AI stuff. But that's the essence of it, is that it's a human being specific thing that the skin is a different type of substrate, that if we allow a copyright to happen here, that we have particular issues that can arise because of the enforceability of a copyright.

Rusty Close:

I don't want to be purely cynical here, and I don't want to besmirch the great Mr. Nimmer, but I just have to think I wonder how much it cost for him to have such intense consideration on this issue. I'm not saying we should audit his tax records or bank accounts. But it seems to me that, I could have a lot of intense consideration about a lot of issues if I was properly incentivized.

Austin Padgett:

That, and particularly when you're being brought in, and you've previously stated the opposite of what you're saying now, your consideration better be very intense.

Rusty Close:

Woof, yes.

Austin Padgett:

It has to be the most intense because these needs – are you going to flip – flip-flopping used to be a really big problem. Go back to 2003, that time period, face tattoos and flip-flopping where the two big things people cannot abide. I'll leave that there for right now. So, Warner Bros. also makes this set of arguments about their fair use, parody, satire, and first amendment rights. This is like "The Cooler Wars." I think we should probably have some sort of follow-up episode, maybe not exactly on this case, but we can talk about it at least through these issues, and we'll revisit those topics. Future episode, maybe we'll do the 2 Live Crew case, something like that.

Ultimately, we'll never know the answers to all these questions. So, remember that this was set up at the preliminary injunction stage, not a full trial on the merits. The court issues an order that denies the preliminary injunction. The judge indicates that she considered Whitmill was likely to succeed at trial on the claims but determines that preventing the release of the film is just too great a burden. So, Warner Bros. has spent tens of millions of dollars on promotion, and already released prints of the film to theaters, which have already sold tickets in anticipation of the release. It would be a huge thing to unwind. And on that factor, that's a problem.

Rusty Close:

How brokenhearted would you have been when you're standing there waiting on opening night to find out, "What do you mean I can't see *The Hangover II* tonight? I've been waiting for this moment?"

Austin Padgett:

Right. Weeks ago, I bought these tickets.

Rusty Close:

I've been standing in line for three nights to get the prime seat.

Austin Padgett:

Right. I need a good laugh at Ed Helms having that face tattoo.

Rusty Close:

But the court essentially says, "Look, my man, Whitmill, you can be made whole with money. We can let this play out. We don't have to do this preliminary injunction."

Austin Padgett:

Right. So, this is kind of often the case, but the opinion seems to cut kind of both ways. Remember, this is kind of like a mini case that's happening. So, the judge is basically kind of giving you the fireworks of what's going to happen at the end here. She is saying, "Hey, I think, Whitmill might actually have a case here to win." That's the likelihood of success? I find it likely. It's the other factors that are unique to this stage that she says, "But we're going to find a way to fix." She has to telegraph the whole thing, but it's possible that if he wins at the end, we can fix this by doing something other than preventing the release of this film. So, it cuts both ways. It permits Warner Bros. to release the film, but it also has some warnings about the potential for issuing a permanent injunction at the end against future distribution of the film.

The parties settled the case after the lawsuit or after the preliminary injunction order came down. So, the case is concluded. So, we'll never, we'll never really know. That's often dissatisfying if you're looking for a certainty or a definite rule out of it. But, I mean, we covered a lot of things today. So, what did we learn? Well, for us, this is mostly about the types of works that can be protected. So, we're looking at tattoos and the court in this case seems to have found that, yes, tattoo meets copyrightability. It's a fixation, original, all that sort of stuff.

Then, we've also talked about litigation tactics, and preliminary injunctions, and ordering movie tickets, all those sorts of things. What we didn't get to cover is, one, whatever happened to those airbrush artists, we'll never really know. Two, we haven't talked about Mike Tyson's persona, his name, image, and likeness, or NIL if you're following kind of college football or college athletics. That's often a virtue at the right of publicity as well, kind of in the legal realm. We'll have a future episode covering a lot of those aspects, but that's it for this episode. Rusty, you got anything to add?

Rusty Close:

Yes, I mean, we don't know how this played out. That's always so frustrating because you want to know, did Warner Bros. pay him \$5 million, whatever it is. These settlements are often confidential. Did you think about going to Whitmill's Instagram, see how he's living these days? I mean, are there pictures of jet skis, and are there signs that he's really living the life, that he's earned on Warner Bros.' dollar?

Austin Padgett:

It's a follow-up assignment. So, once we get some summer interns, I'll have them dive deep.

Rusty Close:

I can't wait to see that on the assignment portal for a summer associate. Review Whitmill, the tattoo artist's Instagram.

Austin Padgett:

Yes, kind of creeping on Whitmill. Maybe we can get them on a future episode and see how life is going. Maybe get some behind the scenes. But that's a high hope. We'll see if firm management will let us get something like that.

Rusty Close:

Once we get the budget.

Austin Padgett:

That's exactly right. Well, thanks everyone for listening. Be sure to like and subscribe. If you would, give us a five-star rating to help everyone know what we're up to here on *No Infringement Intended*.

Copyright, Troutman Pepper Locke LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper Locke. If you have any questions, please contact us at troutman.com.