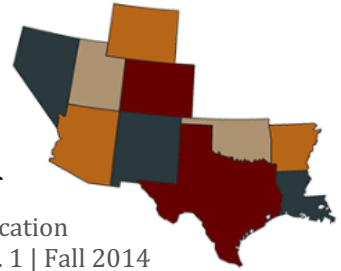


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### **ABSTRACT**

This paper explores the now-dismissed case of Louisiana artist, *Stephen Allen v. Electronic Arts, Inc., & Ricky Williams*. This case, filed on December 31<sup>st</sup> 2012, went before the U.S. District Court for the Western District of Louisiana. No ruling was reached but the application of contradictory precedents indicates the need for clarification. Additionally, fairness requires that the 1976 Copyright Act be revised in order to allow for art that falls within a “gray” area of the artistic world. This paper argues that the 1989 Supreme Court landmark case of *Community for Creative Non-Violence v. Reid* demonstrates in its application of the balancing test for determining the relationship between “employee” and “work made for hire” status that athletes should be forewarned of the potential for litigation when it comes to their body artwork.

## INTRODUCTION

No longer is a stretched piece of canvass nailed to a wood frame considered the only way in which an artist can capture his creation. Body modification and specifically tattoo design and engraving, has become a fashion accessory of lasting popularity for young people, especially “new millennials,” who seek to be stylish, musicians appealing to a youthful fan base, or aspiring athletes who have the talent and profile to compete in the national spotlight. While these artistic creations painfully sewn under the skin have seen a checkered past, their future is even murkier under copyright law. They have been used to identify thieves, symbolize tribal status, or protect the soul from external demons in ancient days. Today, trendsetters, celebs and athletes may feel quite left out if they are not sporting some form of radical flames on their forearms, religious or oriental icons on their torsos and necks in a full array of colorful shapes, sizes and iconography.

On December 31, 2012 a suit<sup>1</sup> was filed by Stephen Allen, a tattoo artist and owner of Crybabies Tattoo in Shreveport Louisiana, against Electronic Arts, Inc., (EA) Sports, and Ricky Williams. His complaint accepted under the jurisdiction of the U.S. District Court for the Western District of Louisiana but later dismissed, alleged that EA Sports and Ricky Williams, infringed Allen’s copyright by depicting the famed NFL running back’s right bicep with his original tattoo work, widely viewed on the cover of the video game called “NFL Streets”.<sup>2</sup> Ricky Williams, a former New Orleans Saints and Miami Dolphin running back, paid Allen \$200 in 2003 to ink part of this piece, and Williams testified that he employed multiple tattoo artists in to effect the final original creation for his muscled arm that appeared to have much in common with this gaming cover.

Granted the framers of the U.S. Constitution had remarkable foresight concerning the nature of law for the promotion of the useful arts, but could not have envisioned the creative tattoos and

celebrity status of artwork intersecting with intellectual property concerns. Since the rise of such litigation, creative artists are seeking financial compensation for the use of their work, and necessarily want to protect their body modification art from secondary uncompensated uses, even though they may claim that their craft qualifies simply as “work made for hire.” The object of this paper is to analyze whether the art of tattoo creation should be viewed as a commissioned piece – simply a “work made for hire” that falls beyond the reach of intellectual property rights of the creator – or a sustaining source of income for the artist.

The Copyright Act of 1976<sup>3</sup> offers direction in defining the employee and private contractor status in “work made for hire” agreements, but it also places the “burden of proof” on the defendant in “fair use” cases when there is an allegation of copyright infringement (Jackson). In order to clarify this argument for legal purposes, this paper juxtaposes conflicting rulings in terms of the “balancing test” set out in *Community for Creative Non-Violence v. Reid*.<sup>4</sup> This study also will look at other common law cases in copyright jurisprudence that has a bearing on this issue following a short sketch of this form of artwork’s origins and evolution.

### ***A Brief History of Tattoo***

Humans have permanently marked their bodies for thousands of years (Lineberry, 2007). These decorative designs have been used to protect the body during childbirth, ward off evil spirits, and convey eternal love (Fletcher, 2005). Joann Fletcher, research fellow in the department of archaeology at the University of York in Britain, describes the earliest known tattooed human as an iceman, nicknamed “Otzi”, discovered in the area between the Italy-Austria borders in 1991. Dr. Fletcher confirms, with carbon dating, he lived 5,200 years ago, and was adorned with small tattoos presumably to alleviate joint pain (2005). Although tattooing, as an artistic expression, seems to have surfaced independently worldwide (Lineberry, 2007),

Europeans were exposed to the practice after an expedition voyage by James Cook, in 1769, to the Polynesian Islands. The term “tatatau” or “tattau”, meaning to hit or strike, gave the west its modern term of tattoo (Fletcher, 2005).

Tattoo copyright infringement gained worldwide recognition on April 28, 2011 when S. Victor Whitmill sued Warner Brothers Entertainment, Inc.<sup>5</sup> and sought an injunction to prevent the movie release of *The Hangover Part II*. The movie depicted the exact duplication of an original tattoo Whitmill created for the former heavyweight boxing champion Mike Tyson, who played a cameo role in the first movie. In this motion picture sequel, the artwork appears after a night of bachelor party debauchery in Bangkok Thailand, when actor Ed Helms awakens with a painfully red tribal tattoo wrapped around his eye (Bostwick, 2009).

On May 24, 2011, Judge Catherine D. Perry issued an oral opinion denying S. Victor Whitmill a preliminary injunction in this legal action against Warner Brothers<sup>6</sup> (Burchart, 2011). In accessing the question at hand, Judge Perry reviewed the four factors set out in *Dataphase Systems v. C L Systems, Inc.*,<sup>7</sup> which include a showing of: (1) plaintiff’s likelihood of success on the merits; (2) whether the plaintiff is threatened with irreparable harm; (3) the balance of equities; and (4) the public interest involved. Despite this adverse preliminary ruling, Judge Perry opined that Whitmill would “probably win” this case due to his due diligence in obtaining a release from Tyson prior to his work (Burchart 2011).

### ***Copyright Act of 1909***

Every sophomore student of law in the United States is aware that Article I, Section 8 of the U.S. Constitution<sup>8</sup> was authored to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,” and that was based on the Statute of Anne dating back to 1710. This

first copyright act, which became the bases of copyright protection, had a two-fold purpose: create a limited term in which authors and creators had protection for their work, and allow those publications and creations to be available in a “public domain” to foster creativity.<sup>9</sup>

Even though the Copyright Act of 1909<sup>10</sup> did not expressly mention commissioned work, it was generally understood that the rights of copyright were held with the hiring party (Nimmer & Nimmer, 1992). It states clearly “the word ‘author’ shall include an employer in the case of a work made for hire.”<sup>11</sup> The work made for hire doctrine allows under certain circumstances that the law shall deem the employer as the copyright holder even if he or she did not create the work, thus allowing the employer to exercise certain rights of ownership.<sup>12</sup>

During the Silver Age of comics, legendary artist Jack Kirby (1917-1994), created iconic figures for millions of comic book fans. Contemporary motion picture studios have capitalized on Kirby’s creations with huge financial profits from characters that he created including Spider-Man, the X-Men, Iron Man, the Avengers, and the Mighty Thor (Hart, 2011). On September 16, 2009, Kirby’s heirs served Marvel Comics, Inc. with copyright termination notices for 45 comics published between 1958 and 1963 (Hart, 2011).<sup>13</sup> During cross motions for summary judgment, the Southern District Court of New York sided with Marvel, ruling that Kirby’s works were “works for hire” under the Copyright Act of 1909. The district court’s opinion stated:

At the outset, it is important to state what this motion is not about. Contrary to recent press accounts and editorials, this case is not about whether Jack Kirby or Stan Lee is the real “creator” of Marvel characters, or whether Kirby (and other freelance artists who created culturally iconic comic book characters from Marvel and other publishers) were treated “fairly” by companies that grew rich off the fruit of their labor. It is about whether Kirby’s work qualifies for work-for-hire, under the Copyright Act of 1909, as interpreted by the courts, notably the United States Court of Appeals for the Second Circuit. If it does, then Marvel owns the copyright in the Kirby Works, whether that is “fair” or not. If it does not, then the Kirby Heirs have a statutory right to take back

those copyrights, no matter the impact on a recent corporate acquisition or on earnings from blockbuster movies made and yet to be made.<sup>99</sup>

### ***Copyright Act of 1976***

Melville Nimmer (1992) considered the foremost authority on copyright law asserted, the 1976 Copyright Act created a clear distinction between artistic works produced as a matter of employment, and those artistic works that were created on commission.<sup>14</sup> In order to determine if a work is a “work-made-for-hire” under the 101 definition, the court determines if the work was prepared by an employee or an independent contractor. Once an independent contractor designation has been determined, the work can fall under one of the nine categories: (1) A contribution to a collective work; (2) a part of a motion picture or other audio-visual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) answer material for a test; (9) and an atlas.

Additionally, the Copyright Act of 1976 outlines the principles of *fair use*.<sup>15</sup> It protects secondary uses of a copyrighted work including reproduction and copies such as “phonorecords” for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, all of which are not regarded as infringement of copyright. The law further outlines four factors to be considered in determining fair use: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>16</sup>

### ***Fair Use***

In *Folsom v. Marsh*, three printers Folsom, Wells, and Thurston brought a case against Marsh, Capen, and Lyon booksellers.<sup>17</sup> This 1841 landmark case brought before the Massachusetts Circuit Court, established the ownership to copyrighted work for the first time. The case concerned two separate biographical works about George Washington. The first one was a massive twelve-volume work, with an eleven-volume supplement, published by biographer Jared Sparks. The defendant, Reverend Charles Upham, wrote an 866 page condensed version of George Washington's life. Of the 866 pages, 353 were letters and papers copied verbatim from Sparks 11 volume supplement. The legendary Judge Story quotes the following:

No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the reviews for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the court is approaching the dividing middle line which separates the one from the other. So, it has been decided that a fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author...But, then, what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.<sup>18</sup>

This case served to establish the four factors test set out in the United States Copyright Act of 1976 Title 17 U.S.C. § 107.<sup>19</sup>

In *Harper & Row Publishers v. Nation Enterprises*, the United States Supreme Court established that “fair use” was not a defense to appropriate someone's work, regardless of



whether that person was a famous political figure, for the accounting of a historical event.<sup>20</sup> In a 1977 memoir, then President Gerald Ford licensed the publication of his works to Harper & Row Publishing. In his written account, he outlined his decision to pardon the impeached Richard Nixon.

Harper & Row contracted with Time magazine for the publication of excerpts from these Ford memoirs. Prior to Time's publication and release of its magazine, The Nation magazine published 300 to 400 words verbatim without permission from Ford, Harper & Row, or Time. Based on a clause within its contract, Time magazine withdrew from the agreement forcing Harper & Row to sue the Nation magazine for copyright infringement. Nation's defense centered on the fact that Presidents Ford and Nixon were both public figures and Ford's pardoning of Nixon was of vital historical interest. Nation asserted that these memoirs were protected under the Copyright Act of 1976's "fair use" principles.<sup>21</sup>

In a 6-3 decision, Justice O'Connor noted that the right of first publication was a strong right, and that there is no "public figure" exception to copyright protection. The Court held that Nation magazine verbatim use of memoirs was not considered "fair use," and the Court concluded that the four factors outlined in the Copyright Act of 1976 were not satisfied.<sup>22</sup>

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court ruled that commercial parody can qualify as "fair use" regardless of the money earned on the use of the parody.<sup>23</sup> In 1994 members of the rap group 2 Live Crew, Fresh Kid Ice, Mr. Mixx, and Brother Marquis composed a song called "Pretty Women" which was a parody of the Roy Orbison's famous ballad called "Oh, Pretty Woman." Although the group's managers requested permission to sample parts of Orbison's song, upon denial of licensing rights by Acuff-Rose Music, the group produced and

released the parody. After two years of distribution and sales totaling a million copies, Acuff-Rose Music sued Luke Skywalker Records for copyright infringement.<sup>24</sup>

The Supreme Court, in a unanimous decision, ruled that parody is only one element in considering fair use. Justice David H. Souter, writing the opinion in this 9-0 decision, in favor of Campbell stated “The Court of Appeals erred in resolving the fourth section 107 factor, the effect of the use upon the potential market for or value of the copyrighted work.”

### ***The “Agency Test”***

In *Community for Creative Non-Violence v. Reid*<sup>25</sup> the Supreme Court ruled that there were two distinct categories for which the work made for hire doctrine applies. In 1985, a Washington based organization, Community for Creative Non-Violence (CCNV), which strove to eliminate homelessness in the Washington D.C. area, commissioned sculptor James Earl Reid.

Representatives of CCNV entered into an oral agreement with Reid to produce a sculpture depicting homelessness and have it displayed during a 1985 Christmas pageant in Washington.

CCNV representatives visited Reid in his Baltimore, Maryland studio on numerous occasions in order to oversee this commissioned work, make suggestion regarding the base, and access his progress. Upon his completion of the work, CCNV paid Reid for his final installment at their agreed-upon price. Reid attached the sculpture to the base and delivered it for the ceremonial unveiling. Neither party discussed the matter of copyright ownership, while both parties filed competing copyright registrations for the artwork.

The District Court originally ruled in favor of CCNV, holding that the statue was a “work made for hire” under the Copyright Act of 1976, 17 U.S.C. § 101<sup>26</sup> and as a result was owned exclusively by CCNV under section 201 (b),<sup>27</sup> which vests copyright ownership of works for hire

in the employer or other person for whom the work is prepared, unless there is a written agreement to the contrary.<sup>28</sup>

The Court of Appeals reversed this decision concluding that the sculpture was not a “work made for hire,” according to the definition of 101, because an employee of CCNV did not produce the statue. In addition, the court ruled that the artwork did not satisfy the second subsection of the 101, listed as 101(2), since sculpture is not listed as one of the nine categories of commissioned works.<sup>29</sup>

In 1989 the Supreme Court ended the longstanding controversy about the “right” interpretation of the “work made for hire” doctrine by adopting an agency test (Jacob, 2008). The Court detailed in its opinion section 220(2) of the Restatement Second of Agency,<sup>30</sup> the definition of both “employee” and “private contractor.” The list as described by the Court contains thirteen non-exclusive factors: (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required to perform the work; (3) the source of the instrumentalities and tools used to create the work; (4) location of the work; (5) the duration of the relationship between the parties; (6) the right to assign additional projects to the hired party; (7) the extent of the hired party’s discretion over when and how long to work; (8) the method of payment; (9) the hired party’s role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provisions of employee benefits; and (13) the tax treatment of the hired party. By applying these factors above the Court ruled that Reid was not an employee but an independent contractor, and thus was entitled to the copyright registration.<sup>31</sup>

***The Inconsistent “Fair Use” and “Agency Test”***

Revisions to the Copyright Act of 1976 are needed on multiple levels. The Supreme Court of the United States, by describing “fair use” as an “affirmative defense” in *Campbell v. Acuff-Rose Music, Inc.*, places the burden of proof on the defendant, to prove that “fair use” was not an infringement (Jackson). Subsequently, American copyright owners frequently make claims of infringement in the hope that users will refrain from usage of copyrighted material, rather than spend money on a defense (Peloso). This tactic forces authors to seek licenses and pay royalties for works which would likely be classified as “fair use,” and has created increasing confusion regarding the correct interpretation of “fair use” as a “right” or “defense” (Peloso).

Assaf Jacob points out in his 2008 paper, *Tort Made for Hire – Rethinking the CCNV Case*, the inconsistencies that surround the agency test and his belief that “the unified concept of the agency test is only an illusion” (Jacob 2008). Jacob argues that applying the “agency test” in multiple areas of law creates “multi-feedbacks” which are “the byproducts of applying the same or similar definitions to different areas of law and those interpretations influence the interpretation in copyright law” (Jacob 2008).

Some courts were aware of this problem even before the attempted unification of the CCNV ruling, which is evident in The Supreme Court, noted this illusion in *NLRB v. Hearst Publication, Inc.*,<sup>32</sup> by stating:

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether a person doing work for others fall in one class or the other. Unfortunately this is not true, only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as “the test” for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an

employer-employee relationship and what is clearly one of independent entrepreneurial dealing.<sup>33</sup>

These contradictory rulings are evident in two cases (Jacob, 2008). In *Roeslin v. District of Columbia*,<sup>34</sup> Roeslin was hired, in 1986, by the Department of Employee Services (D.O.E.S.), in the position of Labor Economist for the term of four years. Judge Harold Greene in his opinion explained the nature of Roeslin's duties:

As the Labor Economist, Roeslin was assigned three tasks: (1) to improve employer response rate to the CES survey; (2) to expand the CES sample size; (3) to develop industry and occupational employment projections. His job description listed his duties as: (1) planning and carrying out projects for collecting detailed economic data; (2) evaluating and adapting necessary statistical methods for the preparing of data; (3) planning, organizing and operating programs (i.e. projects) for the collection, verification and presentation of data; (4) selecting the most appropriate statistical methods; (5) preparing estimates of employment and unemployment; and (6) preparing various reports and studies. He had discretion in determining how to carry out these duties.<sup>35</sup>

After a convention trip in 1988, Roeslin approached his boss, Groner, and explained an idea of a computer program to help automate some of the manual systems currently in place. Upon hearing Roeslin's idea, Groner stated that he felt the idea was neither feasible nor desirable by the department, because of future plans to implement an ACES mainframe system within the office. With his own money, Roeslin purchased a personal computer, software, programming books, and began developing what would be called the DC-790 system, exclusively from his home with his personal funds. Roeslin spent more than 3000 hours creating different modules and using hypothetical test data to complete his personal project in January of 1991. During the completion of each module Roeslin would use the DC-790 software in his daily office work.

There was no dispute whether Roeslin was an employee of D.O.E.S., but the question raised pertained to the earlier CCNV precedent -- was his development of the DC-790 software within

the scope of a “work made for hire” under his employment agreement. The court ruled in favor of Roeslin and found that the D.O.E.S infringed on his DC-790 copyright.

In contrast the decision reached about the programming created by Miller in *Miller v. CP Chemical, Inc.*,<sup>36</sup> was part of his day-to-day responsibilities as a lab supervisor. Miller had designed a computer program that calculated complex math, and helped to maximize the efficiencies of the CP Chemical lab. This software development decreased the likelihood of errors in the lab, and simplified Miller’s job, but even though Miller developed this program, on his own time, while employed at CP, he believed that was not within the scope of his employment -- to develop computer programs. The court concluded otherwise.

Creating somewhat more confusion in the work-for-hire area, are the increasing numbers of home office users and telecommuters (Jackson). More and more companies are allowing employees to work from home and they necessarily use their own personal computers, even though it was necessary in order to complete their job tasks. About 46.4% of the 19.8 million people who work from home at least one day a week reported that they did so in order to “finish or catch up on work” (Jackson). Often employers have no written policies or agreements regarding ownership of original works created by employees away from the office, during their “off time” (Jackson), which has produced litigation in the realm of intellectual property.

The decision in *Avtec Systems, Inc., v. Peiffer*<sup>37</sup> did not resolve the work-from-home controversy, but did add to the case law favoring one precedent. Avtec, a space related computer services government contractor hired Peiffer to write computer programs involving satellite orbits. He developed a separate, satellite simulations program, which he labeled his beta version .309, while working from home on his personal time, personal computer, and with no additional

compensation from Avtec. During the course of development, co-workers helped debug the program and his boss also suggested additions to the program.

Peiffer spent 83 hours incorporating the changes into a version 2.05, and used the program in a performance appraisal to lobby for a \$5,000.00 bonus. Pfeiffer secretly sold his 2.05 version to Avtec's competitor Kisk-Kisk, who then sold it to their clients. Avtec, upon hearing this news, immediately registers copyright on the .309 version, and brings suit against Pfeiffer and Kisk-Kisk for misappropriation of a trade secret arguing that Peiffer was an employee of Avtec, and therefore it was a work for hire. The appellate court vacated both decisions of the lower court and looked instead to *Community for Creative Non-Violence v. Reid*,<sup>38</sup> which held that there are a number of factors that need to be weighed to determine if someone is an employee. The *Restatement (Second) of Agency*, § 228<sup>39</sup> states:

- (1) Conduct of a servant is within the scope of employment if, but only if:
  - (a) It is of the kind he is employed to perform;
  - (b) It occurs substantially within the authorized time and space limits;
  - (c) It is actuated, at least in part, by a purpose to serve the master, and
  - (d) If force is intentionally used by the servant against another, the use of force is not un-expectable by the master.
- (2) Conduct of the servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authored time or space limits, or too little actuated by a purpose to serve the master.<sup>40</sup>

The decision found that even though the work Peiffer performed “was work of the type for which he was hired,” it was not created inside of the time and space constraints by his employer; nor was Peiffer motivated by a purpose to serve his master (Peloso, 2009).

**“Test” Within a “Test”**

Confusion ensues within the courts, when there are no clear lines drawn as to how to weigh the factors set out in *Community for Creative Non Violence v. Reid* (Peloso, 2009). There are a number of cases that have applied the CCNV test in determining whether a software developer is an employee or subcontractor (Scott, 2013). Judges are thus attempting to make a “test” within a “test” as evidenced by *Aymes v. Bonelli*<sup>41</sup> (Jacob, 2008).

Bonelli hired Aymes to write computer programs for his company. Aymes was sometimes paid by the project and sometimes paid hourly, but there existed no written agreement between the two parties on who owned the copyrights. Bonelli didn’t pay for Aymes health insurance or withhold taxes from his proceeds. After a dispute, Aymes claimed copyright ownership of his work, while Bonelli claimed he was an employee under 17 U.S.C. § 101(1).<sup>42</sup> Aymes argued he was an independent contractor under 17 U.S.C. § 101(2).<sup>43</sup> The trial court found in favor of Bonelli, weighing the factors in CCNV equally and then adding them up like a soccer scorecard. The appellate court reversed, however, stating the factors should not be weighted equally, and that some factors should carry a heavier weight, as outlined below:

The factors should not merely be tallied but should be weighed according to their significance in the case...Some factors... will often have little or no significance in determining whether a party is an independent contractor or an employee. In contrast, there are some factors that will be significant in virtually every situation. These include: (1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party. These factors will almost always be relevant and should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship.<sup>44</sup>



In *Carter v. Helmsley-Spear, Inc.*,<sup>45</sup> the plaintiffs, John Carter, John Swing, and John Veronis created art and sculpture under the name of Jx3. They entered into a contract with SIG Management to design, manufacture, and install permanent art within their building in Queens, New York. The artists were given full authority on the design, color, and style of the artwork, but SIG could direct its placement. Carter et al. retained all ownership of copyright.

After fulfilling its one year agreement, SIG extended the contract twice. Under the new contract the plaintiff would receive a bi-weekly paycheck, enjoy employee benefits, and receive supplies during their 40-hour week. During the third contracted year Helmsley-Spear took over management of the property. The new firm informed the artists that their services were no longer needed, and the new owners planned to remove all the artwork from the building. The artists believed that this was a mutilation of their art, and filed for injunctive relief under the Visual Artists Rights Act of 1990 (VARA).<sup>46</sup> The District Court for the Southern District of New York, the Second District, granted the artists an injunction and prohibited the arts removal, however, the Second Circuit Court of Appeals found the sculptures a “work made for hire” under the thirteen factor test in *Community for Creative Non-Violence v. Reid*.

### ***Conclusion***

The current Copyright Act of 1976 and subsequent balancing test of CCNV must be modified in order to take into consideration these precedents and clarify these “grey” areas of artwork. Because body modification and specifically tattoos are not listed as one of the nine possible “works made for hire,” as artistic pieces found under 1976 Copyright Act, the law appears to be somewhat of a muddle.

Prior to the case dismissal, the *Carter v. Helmsley* decision would seem to argue in favor of the tattoo artist for Rick Williams and EA Sports. If by ruling that Carter’s work was *not* a “work

made for hire” contractor and in fact Carter was an employee of SIG Management, then under VARA, Helmsley-Spear would not be able to remove the art from the building or renovate their offices (Jacob, 2008). Likewise, Ricky Williams would not be able to remove the tattoo from his physical arm or make changes of any kind; otherwise he might be violating the same measure.

If the tattoo work by Allen had been judged a “work made for hire,” then Williams could legally modify his own body or remove the tattoo completely, if he decided to do so. Tattoo removal is a well-known option for members of the body modification industry and their customers. It is commonly understood that the everlasting sentiment one proclaims in fleshly ink through names, words or icons proudly unfurled on their body’s display can be removed long before the end of time. Not to be overlooked is also the fact that multiple tattoo artists have been known to work on the same artistic piece. Some artists specialize in outlining while others specialize in coloring and shading. Such divisions of labor are made to completely cover an existing tattoo with new work. Would this be considered a “mutilation” under VARA, if the work is not considered a “work made for hire?”

Stephen Allen did not create the artwork until Ricky Williams asked him to do so. Williams, not Allen, spent countless days training to become the athlete he did and secure the video game promotional agreement with Electronic Arts Sport, Inc. The basic purpose of the protection of a copyright is to promote creativity. The current confusing array of case precedents are making, professional athletes and celebrity figures, intimate owners of someone else’s artistic expression, and have given rise to warnings from attorneys and even the NFL about the perils of litigation for being both famous and artistic in terms of visible tattoos. As one lawyer noted, the image of San Francisco 49ers Quarterback Colin Kapernick kissing his tattooed bicep should be a reminder artists can sue for thousands of dollars in damages per infringing use of their artwork.

Notes & Cases

1. Stephen Allen v. Electronic Arts Inc. et al., case number 5:12-cv-03172
2. Id.
3. U.S. Copyright Act 1976 (17 U.S.C.)
4. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
5. S. Victor Whitmill v. Warner Bros. Entertainment, Inc. 4:11-cv-752
6. Id.
7. Dataphase Systems, Inc. v. C L Systems, Inc. 640 F. 2d 109 –Court of Appeals, 8<sup>th</sup> Circuit 1981
8. U.S. Constitution Article 1 § 8
9. Id.
10. U.S. Copyright Act of 1909 (17 U.S.C. 26; repealed 1978)
11. Id.
12. Melville B. Nimmer & David Nimmer, Nimmer on Copyright §7.62 (1992)
13. Marvel Worldwide, Inc. v. Kirby, No 10 Civ. 141(CM), 2010 WL 1655253 (S.D.N.Y. Apr. 14, 2010)
14. Copyright Act of 1976 U.S.C. 101
15. Id.
16. Id.
17. Folsom v. Marsh (C.C.D. Mass) (No. 4,901)
18. Id.
19. U.S. Copyright Act of 1976 Title 17 U.S.C. §107
20. Harper & Row Publishers v. Nation Enterprises 471 U.S. 539 (1985)
21. U.S. Copyright Act of 1976 Title 17 U.S.C. §107
22. Id.
23. Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994)
24. Id.
25. Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
26. Copyright Act of 1976, 17 U.S.C. § 101
27. Copyright Act of 1976, 17 U.S.C. § 201 (b)
28. Id.
29. Copyright Act of 1976, 17 U.S.C. § 101(2)
30. Copyright Act of 1976, 17 U.S.C. § 202(2)
31. Id.
32. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)
33. Id.
34. Roeslin v. District of Columbia 921 F. Supp. 793 (D.D.C. 1995)
35. Id.

36. *Miller v. CP Chemicals, Inc.*, 808 F. Supp. 1238 (D.S.C. 1993)
37. *Avttec Systems, Inc. v. Peiffer* 21 F.3d 568 (4<sup>th</sup> Cir. 1994)
38. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)
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40. *Id.*
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