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IP: Will Copyright Law Give Warner Bros. a Hangover?

A TATTOO ARTIST'S CLAIM OF COPYRIGHT INFRINGEMENT COULD COST MOVIE STUDIO MILLIONS.

By all accounts, Warner Bros. new movie, "The Hangover Part II," is a wild success on the road to becoming a box office blockbuster. Like the movie's premise, however, periods of euphoria can often lead to a painful hangover. What could cause Warner Bros.' hangover? Believe it or not, it's all about copyright law.

As was widely reported last week, Victor Whitmill, a Missouri "tattoo artist," brought an action against Warner Bros. seeking to stop the Memorial Day weekend opening of "The Hangover Part II." While District Court Judge Catherine Perry ultimately decided to let the movie open on schedule, Warner Bros. is not out of hot water. In fact, the comments Perry made at the injunction hearing should make Warner Bros. think about stocking up on Alka-Seltzer.

The dispute centers on a unique tattoo that Whitmill created for former heavyweight champion boxer Mike Tyson. Tyson appeared in the original "Hangover" movie sporting the tattoo, and "The Hangover Part II" features another character, played by Ed Helms, adorned with a tattoo similar to Whitmill's unique tattoo design. Whitmill argues that Warner Bros.' use of the tattoo design on Helms constituted copyright infringement. While the copyrightability of a tattoo may seem like a novel question, tattoo art certainly fits squarely within the definition of copyrightable subject matter.

Under United States copyright law, an individual automatically receives a copyright (literally the right to make copies) for any of his or her "original works of authorship

fixed in any tangible medium of expression." Section 102 is interpreted fairly literally, so if you doodle on your napkin at dinner, you have the right to prohibit others from copying your doodle. This is true even if don't own the napkin!

Because copyrights can exist in so many things (pictures, sculptures, artwork, music, etc.), filmmakers routinely go through efforts to ensure they have the rights to copy the things that appear in their films. This clearance effort is time consuming and expensive, often amounting to more than 10 percent of the entire cost of a film.

With this background, it is easy to see why Whitmill stands to reap a significant windfall from the "Hangover Part II." Whitmill's design is an original work fixed in a tangible medium of expression (i.e., Tyson's face) and Warner Bros. copied it by placing it on Helms' face in its movie and promotional materials.

In opposing the injunction, Warner Bros. made several "creative" arguments, including that tattoos cannot be copyrighted, that the copying was "fair use," that Tyson had an implied license to allow the copying, and finally, that Whitmill's failure to object to the first movie stopped him from objecting to the second. Perry reportedly dismissed each of these arguments as "just silly." Perry went on to indicate that Whitmill has a strong likelihood of succeeding on his copyright infringement claim at trial. It appears that the only thing that prevented Perry from stopping the release of the movie was her concern for the vast number of third parties (theater owners, etc.) that would be harmed by an injunction and her belief

that Whitmill's harm could be adequately remedied by a monetary judgment.

It seems that the only remaining question is how much Warner Bros. will have to pay Whitmill. Apparently, Whitmill's pre-suit demand was \$30 million. With the positive signals from Perry and the massive success of "The Hangover Part II," that number will certainly go up. Not a bad payday for an afternoon's work at the tattoo parlor!

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