

that tattoos could be protected as “artistic works” under the *Copyright Act* because they are reduced to a material form (whether on the skin, on paper or by way of computer generated graphic), and subject of course to meeting the usual threshold requirements for copyright protection.

No really, your tattoo is not original

In Australia, whether a tattoo will be considered “original” for the purpose of attracting copyright protection, will depend upon the level of skill and effort expended in creating it. This is not a black and white test, rather it is a matter of degree as to whether a tattoo will satisfy the threshold.

By way of example, it is likely that simple, generic tattoos such as a

basic love heart, southern cross or anchor are insufficiently original to attract copyright protection. On the other hand, a more complex design of an anchor tattoo in which the artist had expended skill and effort may well be sufficiently original to attract copyright protection.

Similarly, if a tattoo is merely copied from another source, such as a photograph, film or drawing, not only will it not be considered original, but it may itself amount to copyright infringement if done without the consent of the copyright holder.

Where to from here?

It is clear that copyright can subsist in a tattoo and accordingly, its reproduction, publication or communication to the public can amount to copyright infringement

if done without the consent of the copyright owner, and without the benefit of any copyright exception.

Whether the use in a cinematograph film or television broadcast is merely incidental, such that it is permitted under section 67 of the *Copyright Act* will be a question of fact, to be determined in the context of all the circumstances. Certainly, if the use is akin to the use by Take-Two in this matter, where the tattoos appear on only a few players out of many players and even then, are barely visible at all, let alone properly discernible and are not used in any promotional material, an Australian court may be willing to find that the inclusion is truly incidental to the principal matters represented in the film or broadcast.

2020 CAMLA Young Lawyers Non-publication & Suppression Orders 101 event

By CAMLA Young Lawyer Committee representative **Ellen Anderson** (Solicitor, Addisons)

On 17 September 2020, the CAMLA Young Lawyers hosted another successful webinar, with the support of Ashurst and hosted by Level 22 Chambers. The event was a 101 seminar on non-publication and suppression orders and was very well attended. Excitingly, the shift to virtual events has allowed attendees from States and Territories other than NSW to attend CAMLA Young Lawyer events this year.

The panellists were the deeply knowledgeable and highly entertaining Gina McWilliams (Senior Legal Counsel, News Corp Australia) and David Sibtain (Level 22 Chambers), and was moderated by CAMLA Young Lawyers Chair, Calli Tsipidis (Legal Counsel, FOX SPORTS Australia – Foxtel Group).

The discussion was a combination of real-life experiences and the underlying legal principles

relating to non-publication and suppression orders. With Gina’s first-hand experience regularly working with journalists at News Corp and David having appeared in courts on various occasions to object to the necessity of such orders, the pair were able to offer extremely valuable insight into why these types of orders are made and how they may be objected to.

Some other key topics discussed were:

- How the media become aware that an order has been made.
- Who has a right to be heard.
- The difference between a non-publication order and a suppression order.
- The challenges that the media (and its representatives) face when attempting to understand why an order

has been made, and deciding whether to contest it.

- Examples of where an order might be made but a statutory restraint already exists.

The Young Lawyers Committee is very grateful to Gina and David for giving up their time and sharing their insight. Also, to Calli for moderating the event, and the staff at Level 22 Chambers for hosting the event and ensuring it ran smoothly. Finally, to our Young Lawyer Committee members, Nick Perkins (Senior Associate, Ashurst) and Claire Roberts (Eleven Wentworth), for the significant time and effort they put into organising the event.

A recording of the Non-publication & Suppression orders 101 event can be accessed by CAMLA members at the CAMLA website.