Copyright Law

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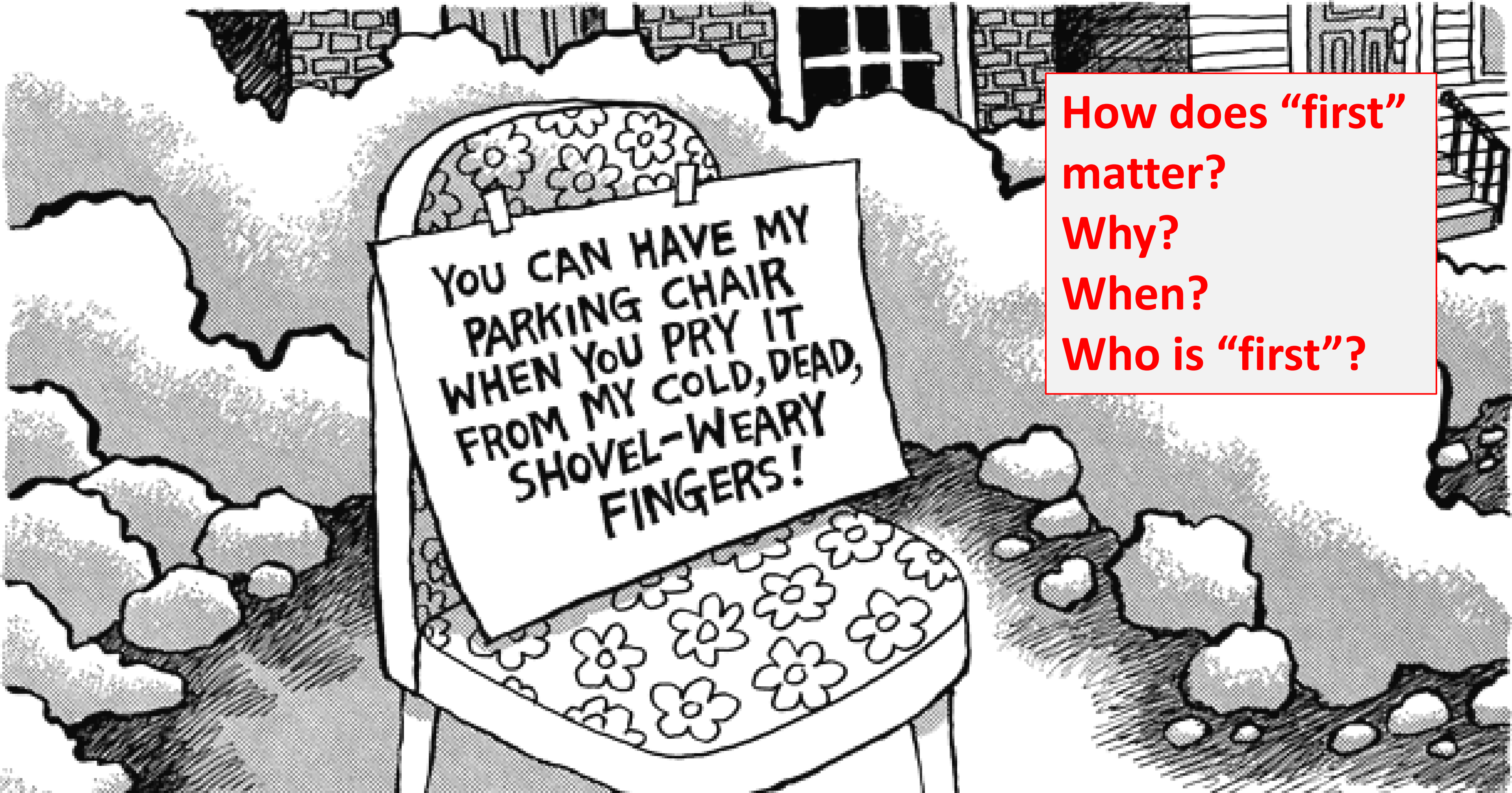
Topics:

- Copyrightability
- Section 102(a) of the Copyright Act
- Fixation of the Work of Authorship as a Prerequisite for Copyright Protection

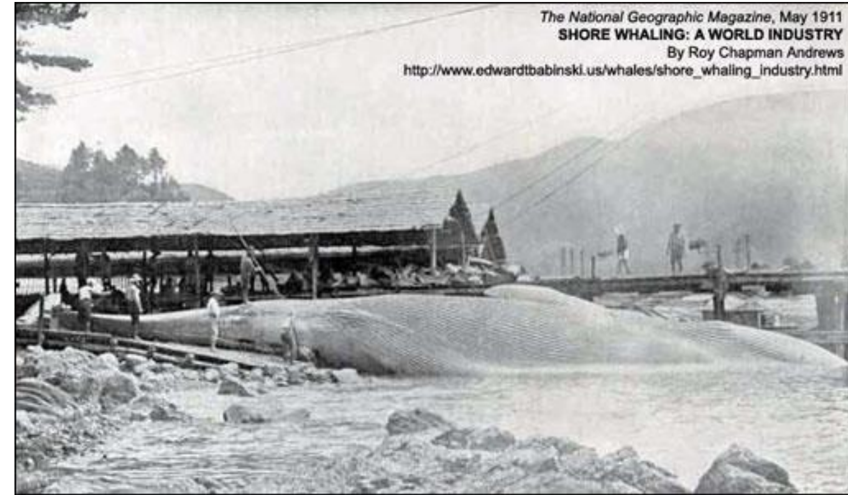


How does "first" matter?
Why?
When?
Who is "first"?

Understand the stories of [property] law, especially "incentive/access"
Characters [heroes? villains?], plots, themes, genres, settings, props, and so on.
What steps matter? Who benefits? Who suffers?
For example – here: Being first (discovery or invention)? Investing labor?
Staking a claim? How? Affirmatively/explicitly? Relying on tradition and inertia?
For each story: who is included, excluded, and how, and by whom?

A quick refresher that points us back to elementary principles of tangible (chattel) property law and the role(s) of "first":

Pierson v. Post (NY 1805) (ownership of a wild animal turns on 'occupancy'; here, 'industry and labour' was employed in apprehending and killing the fox. Mere pursuit did not suffice.



Ghen v. Rich (D. Mass 1881) ("the iron holds the whale"; per local custom, pursuit (*industry and labour*) was sufficient to uphold a claim to a harpooned whale that was beached, over the rival claim of the person who found and sold it)

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The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material: Copyright encourages the production of … what? When? Why? How?

Constitution:

Congress shall have the power "to promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their . . . writings. (U.S. Const., Art. I, sec. 8, cl. 8)

Statute:

"Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

17 U.S.C. § 102(a) (2022) (note "medium neutrality" implied by the text)

Only "original works of authorship" are covered by ©; they must be "fixed" in a tangible medium, per US law (but not most non-US copyright law). Why "fixed"? Incentive/access framing, then …

1. **Historical reasons:** Copyright was invented for books. Congressional authority is limited to "writings." These were understood to be material items. Copyright was long limited to "published" works; as of the 1976 Act, copyright is expanded to "fixed" works, whether published or not, in order to implement "medium neutral" policies. Unpublished (old)/"unfixed" (today) works are not covered (mostly) by federal copyright law – only (if at all) by state law.
2. **Cultural reasons:** Copyright law exists to promote the production and distribution of durable knowledge. Copyright law exists to promote access to and re-use of knowledge over time. Distribution/access is easily comprehensible in terms of physical objects.
3. **Economic reasons:** Copyright owners rely on control over physical objects (access, $$$) to create and manage markets. Also, copyright owners rely on existence of markets in physical objects to identify, measure harm from distribution of competing copies.
4. **Evidentiary reasons:** Requiring physical objects encourages copyright owners to document what they own as creative works, and it permits the legal system to identify fact/scope of infringement.

How should the fixation requirement be applied in an era of de-materialized "works" – computer programs, collections of works/data, streaming content?

What *things* does copyright encourage the production of? Even a "fixed" work is protected by copyright only if it is an "original work of authorship", per US and non-US law. Why?

1. **Novel ("original") things are good:** During the Enlightenment and after, it came to be believed that society and culture could improve ("progress") and that improvement could come via the development and distribution of new (and, perhaps, improved) works. "Originality" was linked to "novelty"; patent and copyright share an interest in new things. Through the 19th century, copyright courts sometimes referred to the "inventions" of an author.
2. **Making original "things" is good:** The connection between cultural progress and production of expressive works is also tied to the emergence of the idea that an author might produce intangible "works" akin to a the physical "works" produced by a craftsman. In the early 1600s, English "play"wrights were mocked for producing "works." Later, in cultural terms, *authors* (e.g., Shakespeare) rather than *producers* (e.g., the Chamberlain's Men) came to be viewed as the sources of valuable originality.
3. **Focus on "originality" helps us see the virtues of second comers:** Cultural progress depends heavily on continued access to works by later generations of authors and others. To call something un-"original" is a way of expressing a policy judgment that favors strong next-generation claims of access.
4. **Focus on originality incentivizes good market behavior:** If culture and society value the new, then copyright should exist to incentivize and reward the production of new things (works), and piracy of new works should be deterred / sanctioned [punished].

The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material:

Learn to parse the statutory text. Here: "fixation"

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"A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. . . ." 17 U.S.C. § 101 (2022)

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Creative works that are included (potentially subject to ©):
Books, plays, poems, photographs, sculpture, painting, drawings, motion pictures, sheet music, musical recordings (as fixed versions of compositions), architectural drawings, dance notation

Creative works that are excluded (not potentially subject to ©):
Live musical performances; improvised live works such as comedy, blues, and jazz; "directing"; un-notated dance; classroom lectures

Keys:
Fixed versions of live works (recordings) may be protected by © if the recording is authorized, but the © belongs to the author(s) of the recording and is limited to the recording; © does not cover the source

The private problem: the structure of copyright law as a solution to *free riding* problems that cause *underproduction* of certain material: What is included & what is excluded by a focus on "works" that are "fixed" – special solutions for valuable works:

Copyright in live broadcasts:
"A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. **A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission**." 17 U.S.C. § 101 (2022)

Copyright-style protection (but not copyright) in concert bootlegs:
Anti-bootlegging provisions found in 17 U.S.C. § 1101 authorize remedies against one who "fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation." *But note: the anti-bootlegging provisions are not part of copyright law; they are add-ons to deal with the fact that these works are otherwise excluded from copyright law.*

Fixation problems: Computer memory and transience

Williams Electronics, Inc. v. Artic Int'l, Inc. (3d Cir. 1982)

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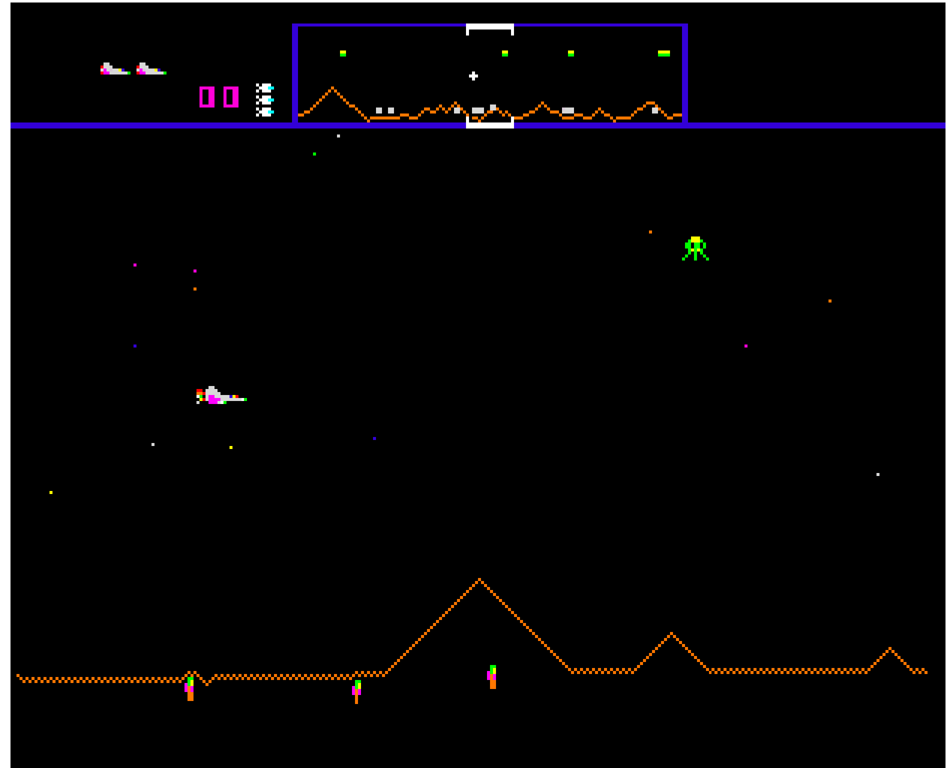
What is the "work of authorship"?
What type of work is it? *(see the categories listed in § 102(a))*
Is the work "fixed in a tangible medium of expression"?
[Is it "original"?]

"**Audiovisual works**" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. 17 U.S.C. § 101 (2022)



released 1980

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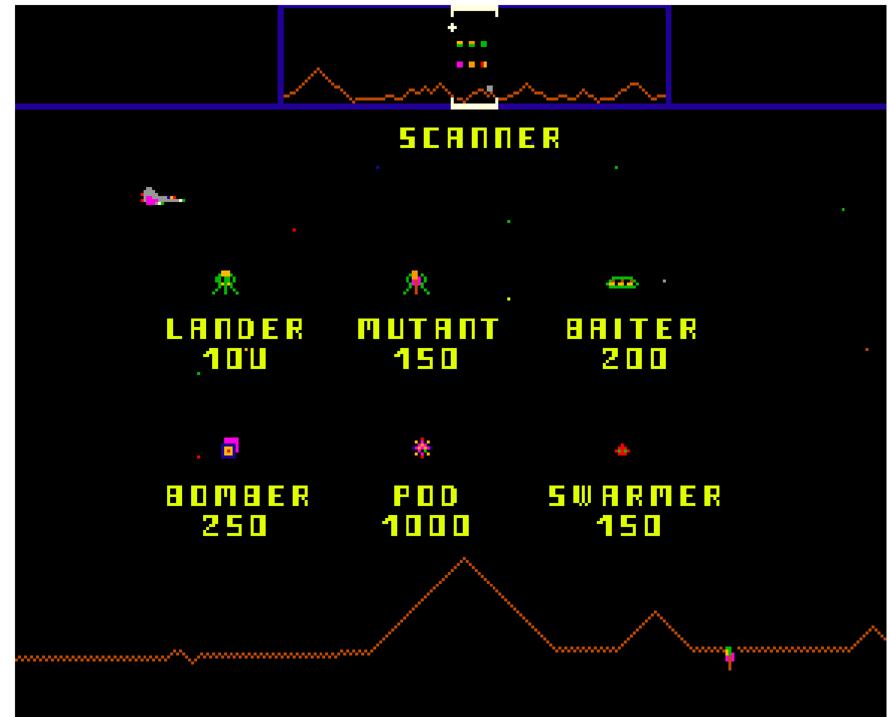
Is the work “fixed in a tangible medium of expression”?

Cf. *Cablevision* (“transient” works): fixation = embodiment + duration

[Is it “original”?]



Fixation problems:

Works that move, change, evolve, and decay with and without human intervention

Kelley v. Chicago Park District (7th Cir. 2011)

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Jeff Koons, "Puppy," 1997
Guggenheim Museum Bilbao (Spain)

Fixation problems:

Are makeup designs “fixed” in a “tangible medium of expression”?

Argue from the statute

Argue from questions of policy implications and the © claimant’s ability to challenge other uses (reproduction, public performance / display)

Argue from “this is like [or unlike] other similar [different] examples”

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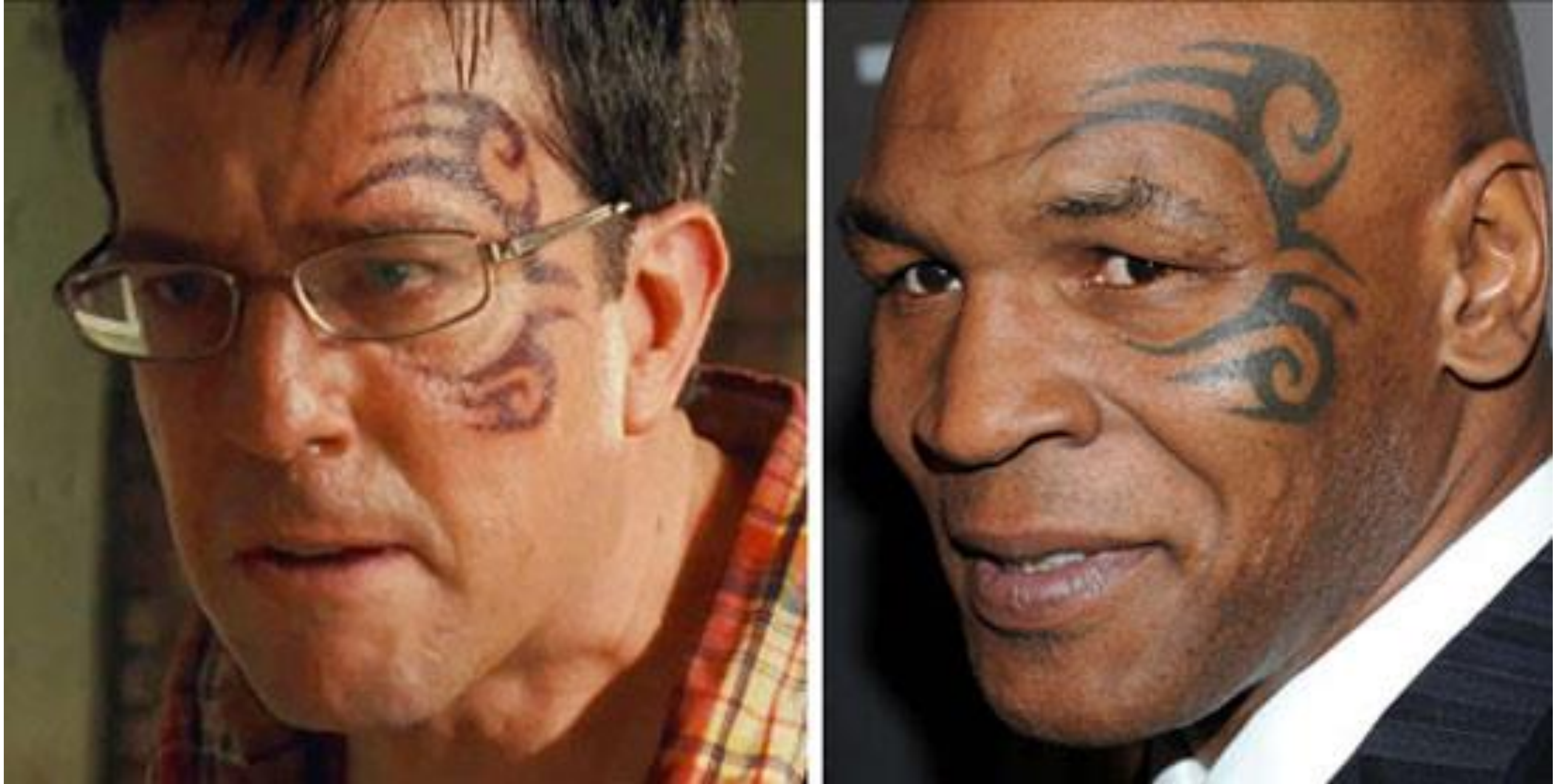
Argue from questions of policy implications and the © claimant’s ability to challenge other uses (reproduction, public performance / display)

Argue from “this is like [or unlike] other similar [different] examples”

Fixation problems:

Can a tattoo artist obtain a copyright in tattoo design?

Is the human skin a “medium of expression”?



S. Victor Whitmill v. Warner Bros.

(*re* Hangover Part II (2011))

Fixation problems:

Can a chef obtain a copyright in an entrée? Is food fixed in a tangible medium of expression?

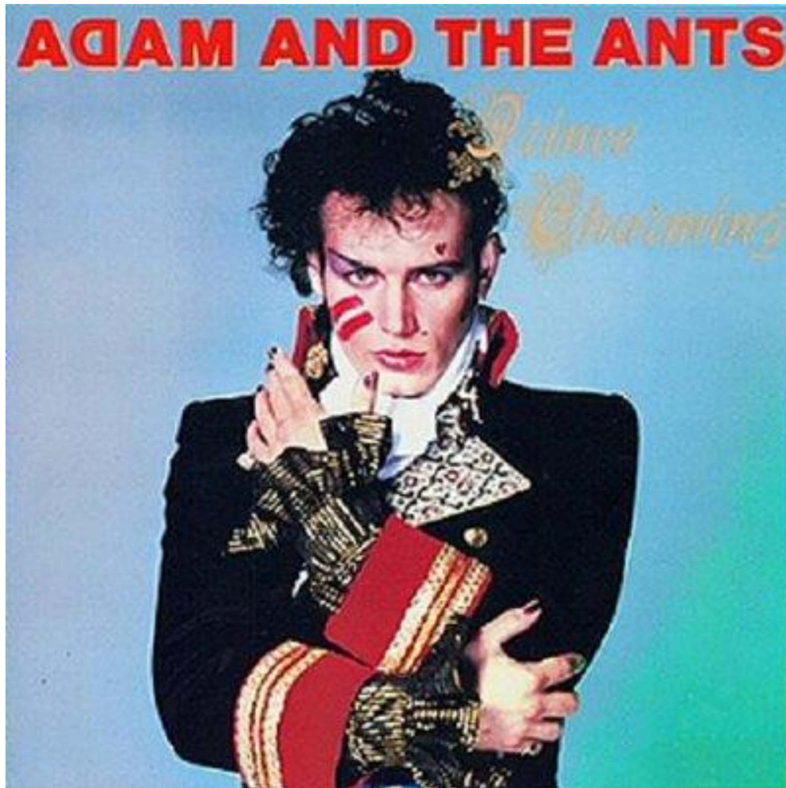
Kim Seng Co. v. J&A Importers, Inc. (C.D. Cal. 2011)

Illustrations from @theartofplating on Instagram

Outside the US, similar problems of the scope of © arise:

These are argued on the basis of "sufficient permanence" under the statutory question, "is this a copyright work?"

Komesaroff v. Mickle and Others (1988) (Australian law) ("moving sand pictures") →



← **Merchandising Corp. of America v. Harpbond (1983) (UK law) (is facial makeup a "work"?)**

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ANDERSEN