The Tattoo That Sings: Soundwave Technology and Copyright Law

Kathleen Wills*

The tattoo industry yielded 83 million dollars in the United States in 2019, and this revenue is projected to increase to 110 million dollars by 2024. With a booming industry comes a new trend, one that implicates intellectual property law: Soundwave Tattoos, the tattoos that sing. Skin Motion, the company that converts a user-uploaded audio file into a design, charges users for access to a phone application that scans the tattoo to play it aloud. But clients are using commercial songs, downloading a famous song to play it from their bodies, forever. This trend matters because emerging technologies and applications continue to implicate copyright law through unauthorized uses of another's work. This Article discusses the intersection of law, technology, and the tattoo industry, and how this intersection impacts the legal liability of the tattoo client, artist, and company.

 The author would like to thank Professors Sean O'Connor and J. Devlin Hartline for their guidance and feedback on this Article. This article was written as a hypothetical analysis based on the publicly available facts and law at the time. The material and information contained within this Article are for general information purposes only.

I. Introduction

A new trend in the tattoo industry is the Soundwave Tattoo, a tattoo you can hear. Skin Motion is the company that runs the process that converts a user-uploaded audio file into a design; the design, coined as a "Soundwave Tattoo," is the product.[1] After clients visit a licensed Skin Motion tattoo artist for the soundwave design piece, clients pay an annual fee for access to the Skin Motion phone application.[2] The app scans the tattoo in order to play the audio file out loud.[3] While this technology adds a new dimension to traditional two-dimensional tattoos, there are legal implications, particularly with copyright law. Soundwave Tattoo clients have used commercial songs for their tattoo pieces.[4] For example, clients will download an audio file from the Beatles so they can play that song from their body. One reviewer of this tattoo trend explained, "[w]henever you want to impress someone at a party, you just need to whip your phone out, boot up the Skin Motion app, and play back the recording of Limp Bizkit's 'Rollin'[,] which you had permanently tattooed onto your body."[5] One user blogged about their Soundwave Tattoo of the song "43% Burnt" by The Dillinger Escape Plan: "this was one of the songs that motivated me to pick up a guitar and start my own band."[6] The Soundwave Tattoo process involves "a combination of audio processing, image recognition, computer vision, and cloud computing on top of a custom built proprietary platform using Javascript and Python to create a mixed reality experience."[7] As reviewers have described, the tattoo is a QR code with the application as a scanner.[8]

The Soundwave trend in the tattoo industry intersects with copyright law. As demonstrated, many tattoo clients are using copyrighted sound

---

1. *FAQ*, SKIN MOTION, http://skinmotion.com/faq#faq-sw-music (last visited May 13, 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. James Hennessy, *What the Hell Are Those Playable Sound Wave Tattoos, and Are They Legit*, PEDESTRIAN (Apr. 10, 2018), http://www.pedestrian.tv/tech-gaming/skin-motion-playable-sound-tattoos/.
6. Ariel Nunez & Bryan VanGelder, *Skin Motion App Turns My Tattoo into Sound Waves*, CNET (Mar. 13, 2018, 5:00 AM), http://www.cnet.com/news/skin-motion-app-soundwave-tattoo-i-tried-it/.
7. *FAQ*, *supra* note 1.
8. Rain Noe, Explaining How Those "Soundwave" Tattoos Actually Work, CORE77 (Mar. 23, 2018), http://www.core77.com/posts/75648/Explaining-How-Those-Soundwave-Tattoos-Actually-Work ("The app then connects that clip with the visual representation of the soundwave you're getting tattooed onto you. When you scan it, the app then recognizes the soundwave visually, in the manner of a QR code, and spits out the connected audio.").

recordings of popular songs for their tattoos. From the initial upload of the audio file to the playback feature of the Skin Motion phone app, copyright owners of commercial songs are having their rights violated. Clients may face direct liability for this infringement, but the responsibility does not end there. Tattoo artists and Skin Motion may also face secondary liability for their knowledge in or participation of their client's infringing use. This Article will explain Soundwave Technology and the rights it violates if there is unauthorized use of another's work. Additionally, this Article analyzes relevant caselaw from copyright cases in the entertainment industry and discusses the persuasiveness of Skin Motion's arguments if a lawsuit occurred. Finally, this Article discusses the various types of liability and how the related caselaw impacts the likelihood of the tattoo client, artist, and Skin Motion's legal liability.

II. SOUNDWAVE TATTOO TECHNOLOGY

When Soundwave Tattoos play back an audio file, the copyright owners of the underlying sound recording and the compositions' rights are violated. As a result, the creator of the Soundwave Technology for the Skin Motion platform may be liable for these violations. Skin Motion has attempted to limit its liability for the platform proactively.[9] The website explicitly states that the company presumes clients own the copyrights in the file they upload.[10] In fact, the website warns clients not to upload commercially produced music in order to maximize the quality of the sound playback.[11] Skin Motion's entire advertising campaign features videos of musicians uploading tracks of their own songs or a family member's voice.[12] Clients are required to upload the audio file to an individual account that generates a stencil of the soundwave design for the tattoo artist.[13] This step intentionally limits the tattoo artist's involvement regarding the underlying audio file the client selects. The design of the soundwave cannot be adjusted by the client in any way; clients and artists can only "add elements around or inside" the soundwave.[14] The tattoo's design is simple, with minimal adjustments for size and height based on body placement.

9. *FAQ*, *supra* note 1.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

There are only a limited number of licensed Skin Motion artists.[15] These artists are partners of Skin Motion and are required to undergo training and pass a quiz on the correct way to create a Soundwave Tattoo.[16] Additionally, Skin Motion provides its licensed tattoo artists with marketing guidelines that detail the proper and improper uses of the Skin Motion and Soundwave Tattoo trademarks.[17] The artists must follow these marketing guidelines "when promoting their affiliation with Skin Motion in all marketing communications."[18] This distinction is intentionally designed with the law in mind: to preserve the marks if either is challenged as generic or descriptive under trademark law. Further, any artist's marketing material intended for TV, advertisements, or campaigns "must be approved by Skin Motion before publication or broadcast."[19]

Skin Motion also requires its licensed tattoo artists to enter into a work for hire license agreement, meaning that any ownership interest the artist has for her contributions to the tattoo is owned by the company.[20] Artists must take "all steps reasonably necessary to assist [the company] in securing, recording, documenting and perfecting all rights in the [c]ontributions" or tattoos.[21]

The audio file to be uploaded has a maximum duration of thirty seconds.[22] This is intentionally designed to limit the substantive aspects of infringement if a lawsuit were brought. For example, if a client were to upload a commercial song, this limited duration would weigh in favor of a fair use defense[23] or even *de minimis* use.[24] Nevertheless, there can be no amount of time that prevents infringement or damages to a copyright owner if the substance of the work was copied.[25] If Skin Motion intends

15. *Id.*

16. *Id.*

17. *Marketing Guidelines*, SKIN MOTION, http://skinmotion.com/marketing-guide (last visited May 13, 2021).

18. *Id.*

19. *Id.*

20. *Tattoo Artist License Agreement*, SKIN MOTION, http://skinmotion.com/license-agreement (last visited May 13, 2021).

21. *Id.*

22. *Id.*

23. *See* 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . .").

24. *See* Newton v. Diamond, 388 F.3d 1189, 1192-93 (9th Cir. 2004) (explaining that in order for an unauthorized use of software to be actionable as infringement, the use must be significant).

25. *See* Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 124 (2d Cir. 2014) (holding that an infringement claim does not accrue until the copyright holder discovers the infringement).

to become an industry standard by creating a market for Soundwave Tattoos, it will likely need to expand or work with other spinoff companies. If Soundwave Tattoos expand as a trend amongst various businesses or models, the tattoo designs become proprietary, and Skin Motion would be profiting off of a system that allows copyright infringement of others' works. In fact, since Skin Motion creates a single soundwave design per audio file, it essentially creates an image identifier in the design of each audio file. Thus, it is foreseeable that spinoff websites or other programs would seek interoperability or licensing from Skin Motion. While this might not fall under a copyright remedy, a court will likely adjust remedies based on other principles, such as unjust enrichment.

The Skin Motion phone application operates like a perpetual license that the client must pay for. Once the tattoo is complete, the client is required to pay a $39.99 one-time activation fee and a $9.99 yearly fee in order to play back the Soundwave tattoo on the Skin Motion app.[26] In sum, the client has paid tattoo costs, application operating costs, as well as an annual license fee for the Skin Motion application. This financial benefit weighs against Skin Motion since the copyright owner is losing profit from this market. Interestingly, Skin Motion has applied for a patent, stating:

> Our patent pending platform is built using Google Cloud Platform and engineered with modular components so that everything is interchangeable. The frequency that new api's, frameworks, codecs and devices are coming out means that by preserving our users' data, we will be able to deliver it through the most advanced distribution channels and interfaces as augmented reality technology advances.[27]

Given the company's extensive use of marketing and license agreements, disclaimers, guidelines, and a patent application, the Skin Motion team and creator Nate Siggard[28] appear to be highly educated on the intersection of the Soundwave Tattoo technology with various sectors of intellectual property law.

---

26. *FAQ*, *supra* note 1.
27. *Id.*
28. *About Me*, NATE SIGGARD, http://natesiggard.com (last visited May 13, 2021).

III. PROTECTING MUSIC UNDER COPYRIGHT LAW

Congress began protecting musical works in 1831[29] in the form of compositions, or sheet music, under copyright law.[30] Certain rights, like the public performance right, were only extended to copyright owners in musical works (a composition), and not to authors of sound recordings (performances of a song).[31] In 1972, Congress amended copyright law in order to protect sound recordings.[32] Thus, two types of music copyright exist: (1) in the underlying composition, known as the "Composition Copyright" and (2) in the sound recording, known as the "Recording Copyright."[33] The Composition Copyright protects the sheet music or the actual song, including the song's rhythm, harmony, melody, lyrics, style, and future performance rights.[34] Owners of these compositions also retain a license to publicly perform the song.[35] Sound Recordings, also known as the Recording Copyright are works that result from the "fixation of a series of musical, spoken, or other sounds."[36]

A. The Implicated Rights of a Copyright Owner by Soundwave Tattoos

Copyright owners have several exclusive rights; however, the rights most relevant to Soundwave Tattoos are reproduction, adaptation, public performance, and display rights. Any digital transmission of a song violates the public performance right of the owner in a sound recording and may also violate the reproduction right. Given the nature of a tattoo client uploading a thirty-second music file to the Skin Motion application for Soundwave Tattoos, it's important to understand what rights are violated for both the composition and sound recording rights.

---

29. Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 28 COLUM. J.L. & ARTS 1, 6 (2004).

30. R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 240-41 (2001).

31. *Id.* at 245.

32. Sound Recording Amendment, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

33. *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF., http://www.copyright.gov/register/pa-sr.html (last visited May 13, 2021).

34. *Id.*

35. David Ratner, *Music 2.0—The Future of Delivering Music Digitally*, 4 U. DENV. SPORTS & ENT. L.J. 136, 147 (2008).

36. 17 U.S.C. § 101.

1. Reproduction Right

The most fundamental right, the reproduction right, is defined as the exclusive right "to reproduce [a] copyrighted work in copies or phonorecords."[37] To reproduce another work is to fix the original work in a tangible and relatively permanent form in another material object.[38] The act of uploading a copyrighted song to Skin Motion without the owner's consent violates the reproduction right of the copyright owner. It is important to note that both rights, in the sound recording and the composition, are embodied in the song or phonorecord.[39] Sound recordings, however, receive less protection under copyright law than other subject matter including the musical compositions in the same material.[40] Nevertheless, uploading the exact same file of the commercial song to Skin Motion's website violates the reproduction right in both the composition and sound recording.

The scope of the reproduction right is limited by the compulsory license of Section 115 of the Copyright Act.[41] This license was expanded in 1996 to include digital recordings distributed by digital transmissions but does not include sound recordings.[42] Thus, compulsory licensing, also known as the "mechanical license" allows someone other than the owner to remake the original recording. Once the copyrighted work has been released or distributed to the public, any individual that obtains a compulsory license, for a fee, can make or distribute recordings of the copyrighted work.[43] After a copyright owner's first public sale or distribution of a nondramatic musical work such as songs, that music is now "fair game" to those who want to make independent recordings of the work.[44] The compulsory license does not apply if the individual did not pay the appropriate fee or if the client wants a thirty-second playback of a motion picture soundtrack, opera recording, or medley of Broadway

37. 17 U.S.C. § 106(1); *see also* MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 307 (6th ed. 2014).
38. 17 U.S.C. § 101.
39. 17 U.S.C. § 114(c).
40. 17 U.S.C. § 114(b); *see also* LEAFFER, *supra* note 37, at 322.
41. 17 U.S.C. § 115.
42. LEAFFER, *supra* note 37, at 387 (referring to The Digital Performance Right in Sound Recordings Act of 1995).
43. 17 U.S.C. § 115(a)(1).
44. LEAFFER, *supra* note 37.

songs.[45] However, the individual could still reach out to the copyright owner of a dramatic work to receive permission for private use.[46]

If Soundwave Tattoo clients wanted to tattoo their own cover of a commercial song, the reproduction right violation would fall under this license exception. A court would likely balance this exception with the copyright owner's interest.[47] The client cannot make substantial changes in the melody or fundamental character of the original song, or it would infringe the owner's adaptation right.[48] Before a client can obtain this license for their soundwave piece, she must work with the Copyright Office and file a complying notice that is served on the copyright owner(s).[49]

2. Public Performance Right

The public performance right under Section 106(4) of the Copyright Act protects the owner's right to "perform the copyrighted work publicly" in literary, musical, audiovisual, and other works.[50] In 1909, the Act was amended to recognize a limited public performance right, which was later expanded by the 1976 Act.[51] The copyright owner has the exclusive right to public performances of their work. Section 101 defines "publicly" as "to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered."[52] Public performances even include semipublic places where people outside the normal circle of the family are around, which could be as few as twenty-one people.[53] Whether a freshly tattooed client uses her Skin Motion application to play thirty seconds of her favorite song, forever tattooed on her body in a soundwave design, violates the public performance right of the copyright owners will depend. If the tattoo client is in a private place or surrounded by a limited number of family or friends when the tattoo sings, she would not be infringing the public performance right.[54] If she is at a public park or bar, then she would

45. 17 U.S.C. § 115(b)(1).
46. 17 U.S.C. § 115(a)(1).
47. *See id.*
48. LEAFFER, *supra* note 37.
49. *Id.*
50. 17 U.S.C. § 106(4).
51. Act. of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075.
52. 17 U.S.C. § 101.
53. Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc., 712 F. Supp. 1257, 1260 (S.D. Tex. 1989).
54. 17 U.S.C. § 101.

be infringing.[55] In other words, playing the Soundwave Tattoo in public places violate this right regardless of the audience's size or makeup.[56]

Additionally, a public performance can occur by transmission online. Any online forum meets the definition of "public" because of the Act's Transmit Clause. [57] Posting to social media is likely a violation; recently, a tattoo artist's post on social media was the main support for one photographer's copyright suit in the underlying inspiration for the piece.[58] A client posting a video of their soundwave tattoo online would violate the public performance right of the composition. For sound recordings, the public performance right in the Copyright Act is limited. The performance of sound recording publicly is not infringement if it is a broadcast transmission.[59] The Digital Performance Right in Sound Recordings Act (DPRSRA) added a limited performance right in sound recordings by digital audio transmission.[60] The Skin Motion/Soundwave process might be classified as sound recordings that are transmitted, depending on whether Skin Motion keeps a local copy of the thirty-second audio file on a server or the person's device. Public performances under DPRSRA include online transmissions like streaming music online or listening to music on the radio:[61] "by means of any device or process, whether the members of the public [are] capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times."[62] As with the reproduction right, Congress limits the performance right of sound recordings through compulsory licensing provisions.[63] There is an exception under Section 109(c) of the Copyright Act where the owner of a lawfully made copy of another's copyrighted work can publicly display that copy if it's just one image at a time at the

55. Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 158 (3d Cir. 1984).

56. *Id.*

57. The Transmit Clause was added in the 1976 Copyright Act to define "digital transmission" as to "transmit or otherwise communicate a performance . . . to the public . . . whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. § 101.

58. *See* Complaint at 33-76, Sedlik v. Von Drachenberg, No. 2:21-CV-01102 (C.D. Cal. Feb. 7, 2021).

59. 17 U.S.C. § 114.

60. LEAFFER, *supra* note 37 (referring to The Digital Performance Right in Sound Recordings Act of 1995).

61. Reese, *supra* note 30, at 244-45.

62. *Id.* at 244; 17 U.S.C. § 101.

63. 17 U.S.C. § 114(d)(2).

place where the copy is located.[64] If buying the song online through a site like iTunes counts as a legally purchased copy or valid use of a license, then playing that same file of the song through the Skin Motion phone application might fall under this exception to the violation.

3. Public Display Right

Under Section 106(5), copyright owners have a public display right, which includes showing a copy of the work, either directly or by means of a film, slide, television image, or any other device or process.[65] Interestingly, the public display right does not apply to sound recordings, but it does include musical compositions, both of which are involved in Soundwave Tattoos.[66] This right is also limited by the word "public," and works can also be publicly displayed online, even if it's done within the home.[67] The United States Court of Appeals for the Ninth Circuit has found that providing an embedded link with a thumbnail photo violates the copyright owner's public display right in that original photo.[68] In that case, the problem occurred because the photo was stored electronically on another person's computer.[69] This applies to Soundwave Tattoos because it's highly probable the audio file is stored electronically to the person's phone through the application. If a court finds that Skin Motion "makes available" the song that a client uploads, either on its website or through the application, it could violate the distribution right.[70] Innocent intent is not a defense.[71]

Section 109(c) limits the scope of the owner's display right such that the owner of a lawfully made copy of a song may display that copy publicly to viewers present at the place where the copy is located.[72] Thus, if a client purchases one copy of Lady Gaga's song "Poker Face," the client would argue that she can play the song through the Skin Motion application, particularly if the file could be stored on the phone so that it is not a transmission.[73] Interestingly, one court has found that making

64. 17 U.S.C. § 109(c).
65. 17 U.S.C. §§ 101; 106(5).
66. *See id.*
67. Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552, 1557 (M.D. Fla. 1993).
68. Perfect 10, Inc. v. Amazon.com, Inc., 508 F. 3d 1146, 1160 (9th Cir. 2007).
69. *Id.*
70. Capitol Recs., Inc. v. Thomas-Rasset, 579 F. Supp. 2d 1210, 1218-19 (D. Minn. 2008).
71. Costello Publ'g Co. v. Rotelle, 670 F.2d 1035, 1044 (D.C. Cir. 1981).
72. 17 U.S.C. § 109(c).
73. Notably, it would be the same client who bought the song legally who is having Skin Motion save, potentially another copy, of that audio file on their phone locally.

another digital copy between computers of the same sound recording was not a "lawfully made" copy and precluded the first sale doctrine exception.[74] Since a client uploads the file from a local place to Skin Motion, which is then stored either in the cloud or on that person's phone through the application, the distribution right could be violated for both the sound recording and composition; section 109(a)'s exception[75] wouldn't apply either. Therefore, the application of this exception depends on whether a court would find that Skin Motion's system makes the file available to the public or if a download by another client is needed. While other limitations to the public display right reside in Section 110, they are less applicable.[76]

4. Adaptation Right

A copyright owner has the right to prevent another from adapting the original work in a different medium in a way that is "recast, reformed, or adapted."[77] This is referred to as a derivative work under the adaptation right, which includes a translation, abridgment, sound recording, or musical arrangement without the copyright owner's consent.[78] The purpose of this right is to allow owners to exploit markets other than the one in which the first publication of the work occurred. One can imagine how lucrative movie deals are for book authors, which fall under derivative works of the original novel.[79] Without the book, the movie it is based on would not be made.

Similarly, without the underlying commercial song, it is arguable whether most clients would have sought out the unique Soundwave Tattoo concept. While Skin Motion will cite all the clients who got their grandmother's voice tattooed on their body, the natural response is: how many Soundwave Tattoos are based on a commercial song? Would Soundwave Tattoos be lucrative without the use of commercial songs? Even if tattoo artists or Skin Motion's program adds their own authorship to the Soundwave Tattoo designs, the adaptation right requires recognition and remedy to the copyright owner.[80] The United States District Court for

74. *See* Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).
75. 17 U.S.C. § 109(a).
76. 17 U.S.C. § 110.
77. 17 U.S.C. § 101; 106(2).
78. 17 U.S.C. § 106.
79. *See* DC Comics v. Towle, 802 F.3d 1012, 1026 (9th Cir. 2015).
80. LEAFFER, *supra* note 37.

the Eastern District of New York has found a violation of the adaptation right even when the underlying work did not appear in the derivative one.[81] In that case, a manual that provided answers to a different book's physics questions was derivative.[82] Soundwave Tattoo designs do not resemble the music composition of the underlying song, nor would anyone know which sound recording it is linked to without hearing it out loud. Nevertheless, it is very likely a derivative work of the underlying song. Skin Motion might argue that the design is functional, without creative expression, but if it independently wants to use intellectual property to protect its designs, that argument would harm them.[83]

There are a variety of rights that clients are violating when they upload a commercial song to the Skin Motion. In fact, many of these rights violate both the Recording and Composition Copyrights. While some rights aren't violated until the client takes further action after the tattoo is complete, the reproduction right is violated the moment the file is uploaded to the Skin Motion system—the first step of the Soundwave Tattoo process. While Skin Motion is taking legal steps to protect themselves from liability, there isn't enough information to protect or educate the clients about their liability.

B. Infringement

1. Direct Infringement

Does a Soundwave Tattoo infringe the underlying copyrighted song? To prove a prima facia case of infringement, the copyright owner must prove: (1) she owns a valid copyright in the work; (2) the defendant copied it; and (3) the copying constitutes an improper appropriation or is "substantially similar" to the original work.[84] If the tattoo client takes the downloaded file of a Beatles song, the copyright in that song is presumably owned by someone other than the client; the client copied the song. To prove the defendant copied the work, the copyright owner must show that the defendant did not independently create the work.[85] Since the thirty-second audio file of a commercial song was not likely created by the tattoo

81. *See* Addison-Wesley Publ'g Co. v. Brown, 223 F. Supp. 219, 228 (E.D.N.Y. 1963).

82. *Id.*

83. Whatever copyright that Skin Motion would file for in the originality of the design could be thin, since it would only extend to the original or incremental expression. 17 U.S.C. § 103(b); *see also* Schrock v. Learning Curve Int'l, Inc., 586 F.3d 513, 521 (7th Cir. 2009).

84. LEAFFER, *supra* note 37; Jamie Lund, *An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement*, 11 VA. SPORTS & ENT. L.J. 137, 147-48 (2011).

85. 17 U.S.C. § 114(b); LEAFFER, *supra* note 37.

client, the copyright owner must show the client had access to it. In this case, the client uploads the song file to the Skin Motion website, so accessibility and copying are presumed.

The third element of the infringement test is substantial similarity.[86] The copyright owner must show that the client used a sufficient amount of the protectable elements of the work such that the two works are substantially similar.[87] This is ultimately for the jury to decide. With Soundwave Tattoos, while the uploaded file may be copyrighted by the Beatles, the soundwave design is not. If the Soundwave Tattoos are even copyrightable,[88] it would be a copyright owned by Skin Motion.[89] Thus, it is up to the copyright owner to determine whether the client's underlying song is theirs, which would either happen from hearing the playback in person or from a video posted online. For Soundwave Tattoo infringement cases, verbatim copying occurs when the client takes the same file of a commercial song and uploads it to the Skin Motion website.[90] Therefore, it is likely the defendant can prove direct infringement by the client, if the client even contests infringement at all.

Soundwave clients should act cautiously. The Recording Industry Association of America (RIAA) has been suing individual infringers since 2003.[91] The United States Court of Appeals for the Eight Circuit affirmed the district court's finding of willful infringement of the user who shared over fifty songs to others through a peer-to-peer (P2P) music file sharing system.[92] The court noted that with the advancement of technology, online file-sharing has become a problem that has led to a decrease in industry jobs and artists.[93] While the copyright owner may be losing licensing revenue from an unauthorized use of their song, it is unclear whether this rationale would apply to Soundwave Tattoos: a user is using an audio file, potentially bought under Section 109's exception for a private benefit.

---

86. LEAFFER, *supra* note 37.

87. *Id.*

88. Under section 102(a) of the 1976 Copyright Act (Act), protection subsists in (1) original (2) works of authorship (3) fixed in any tangible (4) medium of expression.

89. This is especially since the Tattoo Artist license specifies that the tattoo artist is giving all rights to Skin Motion as a work for hire.

90. LEAFFER, *supra* note 37. Courts have said that "infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred or reproduced, with more or less colorable alterations." Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947).

91. Ratner, *supra* note 35, at 145.

92. Capitol Recs., Inc. v. Thomas-Rasset, 692 F.3d 899, 906-07 (8th Cir. 2012).

93. *Id.* at 908.

There is no downstream peer that benefits from a free thirty-second song on the client's body, even if this use violates several exclusive rights. Nevertheless, a soundwave client that uses a copyrighted song for their audio file meets the test and is likely a direct infringer because of their unauthorized copying which infringes a variety of a copyright owner's exclusive rights.

2. Secondary Liability

Once the copyright owner proves the tattoo client is the direct infringer, the next question becomes: what liability does Skin Motion and its tattoo artists have? While both parties can argue the website and software are decentralized such that they do not know what thirty-second audio files each client is uploading, is that enough to exempt it from liability? This Author conducted a small experiment and created two accounts on Skin Motion's website, uploading the exact same thirty-second audio file of a commercial song. The exact same soundwave design was generated by the stencil maker. Therefore, it appears that Skin Motion's system has the ability to recognize each audio file and generate the same soundwave design across clients. In other words, everyone who uploads Lady Gaga's "Poker Face" to the system will get the same soundwave design for the tattoo. This is relevant because it's foreseeable and reasonable to assume that licensed Skin Motion tattoo artists will be able to recognize a soundwave design and know, without the client even mentioning it, if and which commercial song is being used. It's quite likely that the Skin Motion tattoo artists are involved in the making of potentially hundreds of pre-designed stencils that the system then assigns to each use of a song. These are considerations for the court in determining the liability of the tattoo artist for infringing designs.

There are two types of secondary liability: (1) contributory liability and (2) vicarious liability. Contributory liability occurs if Skin Motion (a) knew or had reason to know of the infringement of its tattoo clients and (b) materially contributed to the infringement.[94] Skin Motion meets both the "knowledge" and "material contribution" prongs because the website/system processes a client's audio file and then assigns one specific design for each use of that audio file/song.[95] When a client uses a commercial song and the system recognizes the song, Skin Motion knows

94. A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001); Capitol Recs., Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 646 (S.D.N.Y. 2011).

95. Faulkner v. Nat'l Geographic Soc'y, 211 F. Supp. 2d 450, 473 (S.D.N.Y. 2002) (citing *A&M Recs., Inc.*, 239 F.3d at 1020).

or should have known of the infringing activity at that time.[96] By providing a consistent soundwave design for that song, it "materially contributes" to each infringing use of that song because, without "the site and facilities" for the clients' direct infringement, the soundwave tattoo could not occur.[97] The design and processing of the audio file operates on the Skin Motion website.[98] Thus, Skin Motion is likely contributory liable for infringing uses of its soundwave tattoo technology.

The complicated cases occur when the defendant has only contributed the materials or equipment to the infringer.[99] For tattoo artists, who contribute the ink and their skill to the client, it's debatable whether they meet the elements for contributory liability. If the tattoo artist knows the client is seeking a soundwave for an unauthorized use of a commercial song, continuing to tattoo the soundwave may lead the artist to secondary infringement.

Vicarious liability occurs if someone who supervises the tattoo artist and benefits from the infringing act becomes liable.[100] Someone who has the right or power to supervise the acts of a client's direct infringement and has a financial stake in it can be vicariously liable even without knowledge or direct participation in those acts.[101] Since the tattoo artists waive all ownership interest in the work for hire agreement, it's probable that Skin Motion will also face allegations of vicarious liability. Both the tattoo artist and Skin Motion benefit financially from the client; the artist reaps the cost of the tattoo while Skin Motion reaps the annual fees from the phone application. Skin Motion is the entity that has the right to supervise the client and tattoo artists' actions; it requires each licensed tattoo artist to undergo training and sign several contracts. It runs the software behind translating the audio file into a stencil for a soundwave tattoo design; it also runs the program behind the function that scans the soundwave tattoo to play back the audio file through the phone application. Recently, a photographer filed a copyright infringement suit against the famous tattoo artist, Kat Von D, and the tattoo studio she works for, High Voltage Inc., for copying his portrait of musician Miles Davis in

96. *Faulkner*, 211 F. Supp. 2d at 474.

97. *A&M Recs., Inc.*, 239 F.3d at 1022 (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996)).

98. Perfect 10, Inc. v. Visa Int'l. Assoc., 494 F.3d 788, 799-800 (9th Cir. 2007).

99. LEAFFER, *supra* note 37, at 446.

100. *Id.*

101. *Id.*

a client's tattoo.[102] This argument, as predicted, alleges secondary liability for both the tattoo artist and the studio. Thus, there is a strong case Skin Motion is vicariously liable for the direct infringement of the clients.

C. Audio Transmission Types Affect Skin Motion's Liability

It is likely that the tattoo client is a direct infringer of a copyrighted work, the tattoo artist, who signed a waiver to Skin Motion, is involved in the court's analysis for secondary liability, and Skin Motion faces contributory or vicarious liability for its website and system that generates a soundwave design for each song file that is tattooed. In order to understand how the court would analyze Skin Motion's secondary liability for infringing soundwave tattoos, there are various cases in the related music and entertainment industries to analyze.

1. Digital and Download Transmissions

A digital phonorecord delivery (DPD) is a digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord.[103] When a user downloads an MP3 file for a song from a website, a digital transmission of a sound recording is involved.[104] As the MP3 file is stored on the user's computer, that file is referred to as a phonorecord.[105] Websites with available song downloads usually agree to a compulsory mechanical license because otherwise they infringe an author's copyright in the sound recording.[106] Download transmissions of recorded music and DPDs, without a copyright owner's permission violate the reproduction right[107] and the public distribution right[108] since RAM storage is involved.[109] The law is less clear for small portions of sound recordings. Since soundwave tattoos involve only thirty seconds of playback, they might classify as incidental DPDs with only temporary RAM storage and thus not be classified as reproductions.[110] It's possible that a court would find that even incidental DPDs would require infringers to pay a licensing fee. Download

102. Complaint at 33-76, Sedlik v. Von Drachenberg, No. 2:21-CV-01102 (C.D. Cal. Feb. 7, 2021).
103. Reese, *supra* note 30, at 243.
104. *Id.*
105. *Id.*
106. *Id.*
107. 17 U.S.C. § 106(1).
108. 17 U.S.C. § 106(3).
109. Reese, *supra* note 30, at 252-53.
110. *Id.* at 256.

transmissions might also constitute a public performance right violation, such as when a file is played over a computer's speakers.[111]

Live broadcasts and streaming services are being served takedown notices for their users' unauthorized and infringing material. Twitch, Amazon's popular streaming gaming service, was sued over pirate broadcasts of sports games it allegedly did not own the exclusive rights to.[112] While Twitch's attorney argues that the streaming service is passive and the software is unable to change the content of its users, it's unclear if that argument will win in court.[113]

Periscope, Twitter's streaming application, has terms and conditions that specifically prohibit the use of copyrighted content without permission and cites its cooperation with the DMCA provisions to avoid secondary liability.[114] With the search costs to sift through massive amounts of streaming data, it's unclear whether copyright owners will sue the individual users of these services; companies will hesitate to sue their own customers.[115]

Skin Motion would likely make this argument if sued, and its success would depend on whether streaming services are insulated from secondary liability of its users' content. Given Skin Motion's consistent marketing against the use of commercial music for client's soundwaves, it's likely the company is not paying any licensing fees for popular music. Presumably, the client has to download the file of their song before uploading that file to the Skin Motion website for their tattoo stencil. Thus, any infringing activity the client does by using an author's copyrighted sound recording occurs before Skin Motion's products are used. This means clients would have to independently seek a license from the original song's copyright owner, potentially costing the client annual fees from the owner along with the annual fees for access to the tattoo's Skin Motion playback application. If Periscope can successfully persuade a court that its terms and conditions exempt it from secondary liability of its users' infringing acts, Skin Motion will follow suit.

---

111. *Id.* at 259.

112. *Twitch Sued for £2.1bn Over Premier League by Russian Firm*, BBC NEWS, http://www.bbc.com/news/technology-50809222 (last visited May 13, 2021).

113. *Id.*

114. *Periscope Terms and Conditions*, PERISCOPE, http://www.periscope.com/terms-and-conditions/ (last visited May 13, 2021).

115. *See generally* Dina Bass, *Microsoft Adds Patent Suit Protections for Cloud Customers*, BLOOMBERG LAW (Feb. 8, 2017, 12:55 PM), http://news.bloomberglaw.com/business-and-practice/microsoft-adds-patent-suit-protections-for-cloud-customers.

2. Peer to Peer Sharing of Music Files

Individual web users share files from their hard drives with each other using P2P programs such as Napster.[116] The sharing of these music files infringes a copyright owner's reproduction right, but not necessarily the public performance right.[117] There is a line of P2P cases regarding the liability for these platforms that will be instructive for Skin Motion and its Soundwave software. In the 1984 Betamax case, the United States Supreme Court discussed the staple article of commerce doctrine, where an article that is capable of substantial non-infringing use does not impose liability on its manufacturer or distributor.[118] There, it was enough for a manufacturer of a program to show "that the product or service is *capable* of substantial non-infringing uses, not whether it is currently used in a non-infringing manner."[119] Skin Motion can easily argue that the intended and predominant use of the Soundwave Tattoos program is to allow users to playback their original songs or grandma's voice. This shows their technology is capable of and has substantial non-infringing uses.

In 2001, however, the United States Court of Appeals for the Ninth Circuit found Napster, the software allowing unauthorized P2P sharing of commercial music files, contributory liable for their users' infringement.[120] Napster had sufficient knowledge that its users were using the software to infringe on the copyright owner's sound recordings.[121] Skin Motion can do a quick search, as this Author did, to find that its clients are using the Soundwave Tattoo to playback commercial songs.[122] While the tattoo artist might never have to ask the client which file they uploaded to the website to generate the stencil design, it would be highly unlikely the client does not express what it is she is tattooing on her body. As for Skin Motion, there must be a mechanism where it gets alerts about commercial files being uploaded or checks individual uploads. Thus, it would be likely that under *Napster, Inc.*, Skin Motion would have sufficient knowledge of their user's infringing uses.

---

116. Reese, *supra* note 30, at 262.

117. *Id.*

118. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 419-20 (1984).

119. Smith v. BarnesandNoble.com, Inc., 143 F. Supp. 3d 115, 124 (S.D.N.Y. 2015) (quoting Capitol Recs., LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013)).

120. A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001).

121. Ratner, *supra* note 35, at 139.

122. *See, e.g.*, James Hennessy, *What the Hell Are Those Playable Sound Wave Tattoos, and Are They Legit*, http://www.pedestrian.tv/tech-gaming/skin-motion-playable-sound-tattoos/ (last visited Apr. 1, 2018); VanGelder & Nunez, *supra* note 6.

Even if Skin Motion were to argue that it does not host any copies of the files that users upload to the website, that argument would fail. In 2003, the United States Court of Appeals for the Seventh Circuit rejected this argument by Aimster; a spin-off application of Napster with slight modifications.[123] That case revised the U.S. Supreme Court's ruling in *Sony Corp. of America v. Universal City Studios, Inc.* where the Court required the service provider to show actual, not potential, non-infringing uses.[124]

Software operators then built Grokster by basing its software updates on the holdings from both *A&M Recs., Inc. v. Napster, Inc.*, and *In re Aimster Copyright Litigation*.[125] This system had no central server for users to share files or information; users only directly communicated with each other's computers.[126] Instead of finding that Grokster had no knowledge (and thus, could not be contributorily liable for its users' infringing acts), the Court found that Grokster did have knowledge and took steps to encourage old Napster clients to infringe.[127] Secondary liability can attach to distributing a product that encourages infringing uses.[128] Skin Motion has learned from *Grokster* and is doing the exact opposite—it's actively encouraging users to not infringe. This could be the missing piece of the P2P puzzle that could end with a ruling where a software manufacturer is not contributorily liable for the client's infringing uses. There is an argument that, while Skin Motion does not allow users to share files with each other, it might have knowledge that the program is being used for infringing uses. It's unclear whether the court will find Skin Motion analogous to the P2P file-sharing system, but if it does, Skin Motion will not be able to escape secondary liability.

3. Cloud Locker

The new trend in music storage is the digital locker system, or cloud-based programs.[129] One case involved a sample of an e-book that was legally licensed to be downloaded and set up through digital lockers by

123. *In re* Aimster Copyright Litig., 334 F.3d 643, 646 (7th Cir. 2003).

124. *Id.* at 649; *see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

125. MGM Studios, Inc. v. Grokster Ltd., 545 U.S. 913, 924 (2005).

126. *Id.* at 920.

127. *Id.* at 925.

128. *Id.* at 940 n.13.

129. Stephen M. Kramarsky, *Infringement in the Cloud: SDNY Addresses Digital Storage Lockers*, N.Y.L.J. (2015).

Barnes and Noble.[130] The United States District Court for the Southern District of New York found that Barnes and Noble was not contributorily liable for its customer's alleged copyright infringement of the sample.[131] There was no "volitional conduct" element for the creator of the digital locker system to be held liable. The unique outcome of the case, given the evolution of P2P and download transmission cases, was because the party had a license to put copyrighted content in the digital lockers.[132] Without volitional conduct, Barnes and Noble was not liable for infringement of the reproduction right.[133] Here, if Skin Motion did seek licenses in preparation for any potential infringing uses of its clients, that could save it from liability. It would be interesting for Skin Motion to compare their website system to a digital locker system, arguing that while their system could be "the means to accomplish an infringing activity," that alone is not enough for the knowledge or volitional conduct elements of contributory liability.[134]

Interestingly, cloud lockers might fall under the safe harbor provisions under the Digital Millennium Copyright Act (DMCA), Section 512.[135] Section 512(k) defines Online service providers (OSP) as entities that offer transmission or connections for digital online communications, either between users or material the user chooses, without modifying the content of that material.[136] While this might seem to exclude Skin Motion's app, courts have read this statutory definition broadly.[137] As shown below, it would be beneficial for Skin Motion to argue it is an OSP and benefit from the exemption to liability.

One relevant case demonstrating the intersection of cloud lockers and digital transmission is *Capitol Records, Inc. v. MP3tunes, LLC*.[138] In that case, the defendants were MP3tunes.com, a website that sells artists' songs in a file format with a storage service that allows users to store music files in personal online storage lockers.[139] Compatible with various third-party features, users can transfer the song file on a third-party server to the user's

130. *See* Smith v. BarnesandNoble.com, Inc., 143 F. Supp. 3d 115 (S.D.N.Y. 2015).
131. *Id.* at 122.
132. *Id.* at 123.
133. *Id.*
134. *Id.* at 124.
135. Jon Baumgarten & Noah Gitterman, *First Looks at Copyright and the Cloud—Recent "Locker" Decisions Probe Infringement Liability and Safe Harbor Issues*, LEXIS NEXIS LEGAL NEWSROOM (2011) (referring to 17 U.S.C. § 512).
136. 17 U.S.C. § 512(k).
137. *See, e.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010).
138. *See* Capitol Recs., Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627 (S.D.N.Y. 2011).
139. *Id.* at 633.

locker.[140] The system is sophisticated enough to create hashtags for the same songs, even if uploaded by different users.[141] The court in the Southern District of New York differentiated users into two categories: "(1) users who know they lack authorization and nevertheless upload content to the [I]nternet for the world to experience or copy, and (2) users who download content for their personal use and are otherwise oblivious to the copyrights of others."[142] Clients who upload commercial songs for their Soundwave Tattoos likely fall into the latter category, particularly if they bought the original file. The court found that MP3tunes met the threshold requirements to qualify for the safe harbor provision of the DMCA.[143]

Even if an entity qualifies as an online service provider, a critical component of whether it can qualify for the safe harbor is whether the OSP "had actual knowledge that the material on its websites infringed another's copyrights, or was aware of facts and circumstances, i.e., it saw "red flags," that made such infringement apparent."[144] If a reasonable person would understand that the sites operate or link to pirate sites (or pirated music), the safe harbor cannot apply.[145] It is not the OSP's burden to investigate whether its users are using unauthorized materials, particularly when the infringing works are "a small fraction of works" posted elsewhere.[146] The court highlighted that MP3tunes's online storage system "utilizes automatic and passive software to play back content stored at the direction of users. That is precisely the type of system routinely protected by the DMCA safe harbor."[147] Finally, the court said that any economic benefit enjoyed by the OSP must be attributable to the infringing activity, such as when the infringing activity enhances the sale.[148] In *MP3tunes*, there were significant non-infringing uses and the website did not promote any infringing uses.[149] Thus, the court found that MP3tunes qualified as an

140. *Id.* at 633-34.
141. *Id.* at 634.
142. *Id.* at 638.
143. *Id.* at 639.
144. *Id.* at 643 (citing Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 520-21 (S.D.N.Y. 2010)).
145. *Id.* at 644.
146. *Id.*
147. *Id.* at 650.
148. *Id.*
149. *Id.* at 645.

OSP and the safe harbor, so it was only contributory liable for infringing songs that they were notified of but did not remove from users' accounts.[150]

Applying *MP3tunes* to Skin Motion could be incredibly helpful for the company. Skin Motion can argue that it qualifies as an OSP if there is a notice and takedown procedure for copyright owners to contact them if they discover a tattoo infringes their work.[151] At this time, neither Skin Motion nor Nate Siggard is registered as an agent for this process with the Copyright Office.[152] However, if that changes and Skin Motion successfully argues that it is an OSP, any infringing acts of their tattoo clients do not transfer to it.[153] It is possible that Skin Motion saves the audio file that each user uploads to an individual cloud locker, later accessible by the phone application when the tattoo is scanned. What is less clear, however, is how much knowledge Skin Motion has that its clients are using infringing songs. It likely matches MP3tunes's "automatic and passive" system where, in these thirty-second files, it is not aware of where the file originates from. Unfortunately, it is harder for copyright owners to determine if a Soundwave Tattoo plays their copyrighted sound recording since they would have to hear or watch a video of a tattooed client playing the tattoo back. Despite the consistent advertising campaign by Skin Motion against using commercial music, it clearly economically benefits from clients who seek to use their program in an infringing manner. Like MP3tunes.com, Skin Motion can be exempted from secondary liability of its tattooed clients' infringing activities using their program if it's an OSP meeting the requirements.[154]

After analyzing the arguments and trends in music and other streaming copyright infringement cases, Skin Motion is likely liable for its users' actions. If Skin Motion chooses not to argue, or cannot prove, that it is protected under the safe harbor provision of the DMCA, it must argue that its services are capable of and are substantially used for non-infringing purposes. If Skin Motion can successfully compare its services to a cloud locker system, it is likely not liable for the infringing acts of its clients. It

150. *Id.* at 650-51.

151. This is one of the threshold requirements to qualify as an OSP, the notice and takedown procedure to terminate repeat infringers. Further, the OSP must have a system to identify and protect copyrighted works. Whether either of these requirements are met is unclear from Skin Motion's website.

152. *Digital Millennium Copyright Act*, http://dmca.copyright.gov/osp/search.html;jsessionid=B98C81FE7A9DABDCF19C13CDE4D4585F?key=skin+motion&action=search (last visited May 13, 2021).

153. LEAFFER, *supra* note 37, at 459-60.

154. *Id.* at 457.

might successfully argue that its clients are using copyrighted works for their personal or private use and try to argue that it does not have the requisite knowledge to have materially contributed to the client's actions.

Following the holdings from the P2P music sharing cases, Skin Motion appears to be trying something different—it's actively encouraging users not to infringe. It's unclear how this will affect the knowledge requirement of secondary liability. Skin Motion, following *Aimster* and the Betamax case, can show actual non-infringing use, starting with founder and first client Nate Siggard and ending with the examples on its website.

If the court finds Skin Motion similar to streaming services with its playback feature on the application clients pay for, that could be problematic. If Skin Motion stores a user's audio file on that client's phone or through the account on the phone's application, this system parallels offline streaming. This stored file would be an unauthorized copy. Further, like streaming services, soundwave clients can upload any file, regardless of whether they own the rights to it. Since recent lawsuits against popular streaming services have not reached a written court opinion, it's unclear how persuasive the argument that clients, not the service entity, are committing digital transmissions are. Regardless, clients are committing digital transmissions that violate the reproduction right and, potentially, the public performance right. Courts might find it more effective to require Skin Motion to seek licenses from copyright music entities to compensate owners. Since clients are likely direct infringers and Skin Motion is composed of legally educated artists and individuals, it's likely secondarily liable for the clients' actions.

D. Other Legal Considerations

If a copyright owner cannot bring a copyright law claim against Skin Motion for Soundwave Tattoo designs that use her original song as an underlying work, it's possible to pursue other legal claims if the federal Copyright Act does not preempt them.[155] This depends on which elements are required to prove a state unjust enrichment or misappropriation claim and whether that is qualitatively different from a copyright infringement claim.[156] In some states, misappropriation falls under unfair competition claims. The United States Court of Appeals for the Second Circuit has

155. 17 U.S.C. § 301.

156. Briarpatch Ltd. v. Phoenix Pictures, Inc., 373 F.3d 296, 306 (2d Cir. 2004).

found unjust enrichment and competition claims preempted by the Act.[157] For analysis purposes, the law in New York requires three elements for unjust enrichment: (1) the defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.[158] Courts have discussed that state law should have the flexibility to afford remedies, even if remedies are granted under equity principles, so it's worth investigating which states would support such a claim.[159] If such a claim is not preempted, copyright owners can argue that Skin Motion has financially profited off of tattoos with designs based on their underlying song, at their expense. It is arguably unfair to allow Skin Motion to continue to profit off of these uses. Thus, copyright owners should pursue various civil remedies for infringement of their works.

IV. CONCLUSION

Soundwave Tattoos create interesting implications for copyright law. Users have the unfettered ability to upload thirty-seconds of any audio file, including files they do not own the rights to. That transmission violates the owners' exclusive rights of the Recording and Composition Copyright in the song. While Skin Motion's software translates this into a soundwave design that clients provide to a licensed tattoo artist, the elements of the audio file are not visually apparent on the tattoo's design.[160] It is only after the client pays an annual licensing fee to use the phone application that the client can hear their specific audio recording.[161] This playback feature potentially violates additional rights, such as the copyright owner's adaptation, public performance, and reproduction rights. Skin Motion, as the entity that runs the phone app, system, and website, may argue that it and the tattoo artists do not know whether the uploaded audio file is authorized. This is unlikely. Unless clients seek personal licenses from each copyrighted owner of a song, and that assumes clients understand that they should, discussions happen between tattoo artist and client. Clients are almost guaranteed to tell their tattoo artist what their soundwave song is of and potentially even test the playback application in front of them. It's unclear whether Skin Motion has an alert system for

157. *Id.*

158. Clark v. Daby, 300 A.D.2d 732, 751 (N.Y. 2002).

159. Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918); H.R. Rep. No. 94–1476, at 132 (1976).

160. *FAQ*, *supra* note 1.

161. *Id.*

files that, upon a scan, seem to violate a copyrighted song (similar to YouTube's system for audio files on videos).[162]

Each of these components weighs into a court's analysis of Skin Motion's secondary liability for a client's direct infringement of a copyrighted work. The success of these arguments varies based on which system Skin Motion can persuasively compare itself to, such as DPDs, peer-to-peer music sharing, streaming, or cloud locker services. Each of these systems frequently face litigation over whether they are liable for their users' content as they are the entities providing the platform and materials to those users. Tattoo clients seeking Soundwave Tattoos should proceed with caution. A thirty-second audio recording of your favorite song violates aspects of copyright law. Further, if Skin Motion is held liable for their Soundwave technology, it could affect the playback ability of the Soundwave Tattoo—the sole reason the client got permanent ink of a soundwave to begin with. It would be unfortunate if Skin Motion had to shut down its services and deny access to the very clients who paid potentially hundreds of dollars for a tattoo that no longer sings. While copyright law serves to protect copyright owners who contribute valuable original works to society, it's important to understand the intersection of competing interests of tattoo clients and other groups implicated by Soundwave Tattoos.

162. *Submit a Copyright Takedown Notice*, YOUTUBE, http://support.google.com/youtube/answer/2807622 (last visited May 13, 2021).