
Is Skin a Tangible Medium? The Second Circuit Won't Touch *Mourabit v. Klein*, No. 19-2142-CV, 2020 WL 3042131 (2d Cir. June 8, 2020)

By: Lisa Holubar & Adam Reis | June 19, 2020

In a summary order, the Court of Appeals for the Second Circuit recently side-stepped a difficult question currently facing copyright law: whether the human body is a sufficiently tangible medium of expression to warrant copyright protection.

Plaintiff Sammy Mourabit (“Mourabit”), a makeup artist, provided makeup services for a 2013 fashion photoshoot (the “2013 Photoshoot”). Defendant Steven Klein (“Klein”) photographed the 2013 Photoshoot. Two years later, Klein collaborated with Defendants Francois Nars and Shiseido Inc. (“Shiseido”) to create a holiday makeup collection. In promoting the collection, Klein and Shiseido used one of the photographs Klein had taken during the 2013 Photoshoot without crediting Mourabit. In 2018, Mourabit obtained a copyright registration for a drawing of the relevant makeup artistry. Shortly thereafter, Mourabit filed suit in New York state court alleging copyright infringement of the registered drawing, and state law claims of unjust enrichment, unfair competition, and misappropriation based on the alleged misuse of the makeup artistry itself. The case was promptly removed to the Southern District of New York. In a subsequent court filing, Mourabit conceded that his copyright claim should be dismissed, leaving the issue of whether the state law claims were preempted by the Copyright Act. Upon a motion to dismiss by the Defendants, the Court dismissed Mourabit’s copyright claim given his earlier concession and further dismissed his state law claims on the basis that they were indeed preempted.

State law claims are preempted by the Copyright Act if (1) “the claim applies to a work of authorship fixed in a tangible medium of expression and falling within the ambit of one of the categories of copyrightable works,” and (2) “the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law.” The District court found Mourabit’s claims preempted under this test. Mourabit appealed to the Second Circuit on the limited grounds that under the first prong of this test, the makeup artistry (1) does not fall within the scope of one of the categories of protectable works; and (2) the makeup was not fixed in a tangible medium of expression.

For preemption purposes, the first aspect of this challenge requires only that the work fit into one of the copyrightable categories “in a broad sense.” The Court found that the makeup fell within “pictorial, graphical, and sculptural” works, because the makeup is “essentially a painting that is displayed on a person’s face”, thus “potentially subject to copyright protection” and within the “broad ambit” of this category for preemption purposes.

As for the second aspect of this challenge, “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy ..., 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. Mourabit challenged the District Court’s holding on the grounds that human skin is not a sufficiently “tangible medium of expression” and that the makeup as applied was not sufficiently permanent to constitute fixation. The Second Circuit, however, affirmed the decision of the District Court on the basis that the makeup was fixed in the photograph taken by Klein with Mourabit’s authorization, expressly refusing to answer whether skin is a tangible medium of expression.

The Second Circuit’s opinion leaves much to be desired, as the question of whether the human body is a tangible medium of expression is but one of many questions presented by the rise of tattoo and makeup culture. The Court even noted that this question has sparked a “lively academic debate.” Since, as the Court put it, these types of works are essentially paintings on skin, it seems likely that their copyrightability will be confirmed, albeit most likely subject to licenses granted to the owners.