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## Article

### Tattoos & IP Norms

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## INTRODUCTION

Twenty-one percent of adults in the United States—more than sixty-five million Americans—have at least one tattoo.<sup>1</sup> For those under age forty, that percentage nearly doubles.<sup>2</sup> Not surprisingly, the tattoo business is booming. By some estimates, the U.S. tattoo industry generates \$2.3 billion in annual revenue.<sup>3</sup> Once the mark of sailors, convicts, and circus performers, the tattoo has infiltrated mainstream society.<sup>4</sup>

Despite its countercultural origins, the tattoo industry shares much in common with other, more familiar creative industries.<sup>5</sup> Fundamentally, it capitalizes on market demand for original creative works.<sup>6</sup> Yet as public goods, the value of those works is readily appropriable through copying.<sup>7</sup> Predictably, copying is both a practical reality and a source of concern within the industry.<sup>8</sup> But unlike their counterparts in most other creative industries, tattooers nearly uniformly reject formal legal mechanisms for adjudicating claims over ownership and

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1. See *One in Five U.S. Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), [http://www.harrisinteractive.com/vault/Harris%20Poll%2022%20-Tattoos\\_2.23.12.pdf](http://www.harrisinteractive.com/vault/Harris%20Poll%2022%20-Tattoos_2.23.12.pdf).

2. See *Tattooed Gen Nexters*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Dec. 9, 2008), <http://pewresearch.org/daily-number/tattooed-gen-nexters> (noting that 36% of adults between eighteen and twenty-five and 40% of those between twenty-six and forty currently have, or previously had, a tattoo).

3. Max Chafkin, *King Ink*, INC. (Nov. 1, 2007), <http://www.inc.com/magazine/20071101/king-ink.html>. This estimate, based on 2007 data, likely significantly underestimates current industry revenue.

4. In its modern form, “a tattoo is created by injecting ink into a person’s skin. To do this, an electrically powered tattoo machine, often called a gun, moves a solid needle up and down to puncture the skin between 50 and 3,000 times per minute. The needle penetrates the skin by about a millimeter and deposits a drop of insoluble ink into the skin . . .” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010).

5. Cf. Ivan Quintanilla, *Tattoos Through Time: A New Museum for Amsterdam*, N.Y. TIMES, Jan. 10, 2012, 6:00 AM, <http://www.intransit.blogs.nytimes.com/2012/01/10/tattoos-through-time-a-new-museum-for-amsterdam/> (discussing an Amsterdam museum opening dedicated exclusively to tattoo art).

6. See generally David Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279 (2013) (arguing that tattooers’ work is capable of satisfying the statutory requirements for copyrightability).

7. *Id.* at 307.

8. See Interview with Subject 2, Compiled Transcripts with Anonymous Tattooers at 19 (May 5–June 1, 2012) (on file with author).

copying.<sup>9</sup> Although tattoos fall squarely within the protections of the Copyright Act, copyright law plays virtually no part in the day-to-day operation of the tattoo industry.<sup>10</sup> Instead, tattooers rely on a set of informal social norms to structure creative production and mediate relationships within their industry.<sup>11</sup>

Following in the tradition of earlier scholarship exploring the intersection of intellectual property law and social norms,<sup>12</sup> this Article sets out with three objectives: to provide a descriptive account of the norms related to creative production within the tattoo industry; to explain both the industry's choice to forego formal assertions of legal rights and the particular content of the norms it has embraced; and to consider the implications of this case study for intellectual property law and policy more generally.

But this Article differs from much of the prior work on intellectual property and social norms in two ways. First, the tattoo industry norms reported here represent the first example of market-driven informal alternatives to intellectual property law that emerged despite fully applicable formal protections. Unlike norms that emerge in the shadow of some barrier to meaningful intellectual property protection,<sup>13</sup> tattoo industry norms function as an informal system of community govern-

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9. Practitioners in the tattoo industry refer to themselves by a number of terms, including "tattooists," "tattoo artists," and "tattooers." See Interview with Subject 1, *supra* note 8, at 16; *id.* with Subject 13 at 144. While these terms sometimes reflect subtle shades of meaning, I will refer to them as "tattooers," the term most commonly used by my interview subjects.

10. See *infra* Part II.A.

11. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661 (1996) (explaining that norms exist when members of a group are obligated to do something under certain conditions or face some sanction).

12. See, e.g., David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCIENCE 187 (2008); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property without Law*, in LAW & MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008).

13. See Loshin, *supra* note 12, at 125–30; Fauchart & von Hippel, *supra* note 12, at 187–91; Oliar & Sprigman, *supra* note 12, at 1799–1805; see also Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 322–25 (2011).

ance that developed despite an applicable body of formal law.<sup>14</sup> And unlike norms governing nonmarket behavior, tattoo industry norms prevail despite the same profit motive characteristic of many creative fields.<sup>15</sup>

Second, tattoo industry norms are unique because they must account for a more complex set of relationships than those observed in earlier case studies. Tattooers must establish norms that govern not only their interactions with each other, but with clients who play an important role in the creation and use of their works as well.<sup>16</sup> Further complicating matters, aside from copying within their industry, tattooers are faced with the question of the propriety of copying outside of it.<sup>17</sup> This overlapping complex of relationships between tattooers, clients, and the broader art world yields a correspondingly rich, nuanced, and perhaps contradictory set of creative norms.<sup>18</sup>

Part I of this Article offers a brief history of the practice of tattooing—beginning with its widespread use in early civilizations, then turning to its colonial reincorporation into the West, and the recent emergence of the “tattoo renaissance.”<sup>19</sup> This Part will also introduce the basic structure and vocabulary of the contemporary tattoo industry.

After establishing the doctrinal applicability and practical irrelevance of formal copyright law to tattoos, Part II catalogs the norms that structure the tattoo industry. To develop this descriptive account, I conducted fourteen in-person qualitative interviews in early 2012 with tattooers throughout the United

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14. See *infra* Part II.

15. David Fagundes, for example, has described the norms governing roller derby pseudonyms. See Fagundes, *supra* note 12, at 1108–31. Because such *noms de guerre* are registerable as service marks, those norms serve as an alternative to, rather than a substitute for, formal law. *Id.* at 1114–15. But they emerge in large part because of the non-market volunteerism that defines the roller derby community. *Id.* at 1140–43.

16. See Interview with Subject 2, *supra* note 8, at 19.

17. Others have described norms that distinguish between obligations owed to those within a community and obligations owed to those outside of it. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 156 (2007) (discussing norms within fan communities).

18. See *Tattoos Conquer Modern Art as Needles and Ink Replace Brushes*, THE GUARDIAN, Jan. 22, 2010, <http://www.theguardian.com/world/2011/jan/23/tattoo-artists-new-york> (discussing the “intimate client relationships” maintained by tattooers and the tattoo industry’s “fractured” interaction with the modern art world).

19. See generally Arnold Rubin, *The Tattoo Renaissance*, in MARKS OF CIVILIZATION 233 (Arnold Rubin ed., 1988).

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States, identified through snowball sampling relying on existing industry contacts.<sup>20</sup> In terms of geography, gender, experience level, work environment, style, and clientele, these interviews capture a diverse, if not necessarily representative, cross section of perspectives within the tattoo community.<sup>21</sup>

These interviews revealed five core norms. First, tattooers as a rule recognize the autonomy interests of their clients both in the design of custom tattoos and their subsequent display and use. Second, tattooers collectively refrain from reusing custom designs—that is, a tattooer who designs an image for a client will not apply that same image on another client. Third, tattooers discourage the copying of custom designs—that is, a tattooer generally will not apply another tattooer’s custom images to a willing client. Fourth, tattooers create and use pre-designed tattoo imagery, or “flash,” with the understanding that it will be freely reproduced. Finally, tattooers generally embrace the copying of works that originate outside of the tattoo industry, such as paintings, photos, or illustrations. In some ways, these norms unintentionally echo familiar concepts from copyright law, but they differ from formal law in important respects as well.

Part III offers a number of complementary explanations for the content of tattoo industry norms and the industry’s reliance upon them. Both the culture and economics of the tattoo industry gave rise to its particular set of norms. Tattooers share a disdain for authority and a history of harsh legal regulation that renders them generally hostile to the legal system. Perhaps more importantly, as a deeply client-driven enterprise, the tattoo industry is sensitive to consumer expectations. Those expectations provide strong incentives for the development of norms in order to preserve the industry’s collective interest in the continued viability of the market for custom tattoos. Finally, tattoo norms also erect barriers to entry to the increasingly crowded field of tattooers, revealing the guild-like nature of the industry.

Part IV concludes by considering the broader lessons the tattoo industry offers for intellectual property law and policy. The tattoo industry’s success reveals the importance of custom-

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20. Snowball sampling is a “nonrandom sampling technique . . . in which survey subjects are selected based on referral from other survey respondents.” KEN BLACK, BUSINESS STATISTICS FOR CONTEMPORARY DECISION MAKING 230 (4th ed. 2004).

21. See Interview with Subject 2, *supra* note 8, at 1.

izing creative goods to deter widespread copying and of bundling easily copied creative goods with difficult-to-copy personal services.

### I. A HISTORY OF TATTOOS

The term “tattoo” entered the English language through Captain James Cook’s accounts of his travels in Polynesia.<sup>22</sup> In 1769, Cook witnessed Tahitians engaged in the practice of “tattooing” and described it as follows:

Both sexes paint their Bodys, *Tattoo*, as it is called in their Language. This is done by inlaying the Colour of Black under their skins, in such a manner as to be indelible . . . . The colour they use is lamp black, prepar’d from the Smoak of a Kind of Oily nut, used by them instead of Candles. The instrument for pricking it under the Skin is made of very thin flatt pieces of bone or Shell . . . . One end is cut into sharp teeth, and the other fastened to a handle. The teeth are dipped into black Liquor, and then drove, by quick sharp blows struck upon the handle with a Stick . . . .<sup>23</sup>

Cook’s account marks the beginning of the modern history of the tattoo.<sup>24</sup> But tattooing developed in cultures across the globe long before the European public became fascinated with Cook’s adventures.

This Part briefly traces the five-thousand-year history of tattooing, from evidence of its use in pre-historic societies to the contemporary, technology-mediated tattoo industry. This historical grounding, particularly the dramatic shift in American tattooing over the last five decades, is central to understanding the attitudes and norms surrounding copying within the industry today.

#### A. THE ORIGINS OF TATTOOING

In 1991, climbers in the Italian Alps stumbled upon the frozen corpse of the Tyrolean Iceman, a 5300-year-old mummy adorned with fifty-seven simple geometric tattoos made from a pigment derived from soot.<sup>25</sup> The Iceman was not alone among

22. C.P. Jones, *Stigma and Tattoo*, in WRITTEN ON THE BODY 1 (Jane Caplan ed., 2000).

23. WILLIAM J. L. WHARTON, CAPTAIN COOK’S JOURNAL DURING HIS FIRST VOYAGE ROUND THE WORLD MADE IN H.M. BARK ‘ENDEAVOUR,’ 1768–71: A LITERAL TRANSCRIPTION OF THE ORIGINAL MSS. WITH NOTES AND INTRODUCTION 93 (1893).

24. Jones, *supra* note 22, at 1.

25. Maria Anna Pabst et al., *The Tattoos of the Tyrolean Iceman: A Light Microscopical, Ultrastructural and Element Analytical Study*, 36 J. ARCHAEOLOGICAL SCI. 2335, 2335 (2009); Jennifer Viegas, *Oetzi Iceman’s Tattoos Came from*

pre-historic tattoo collectors. Egyptian mummies dating back to 2100 B.C. were tattooed with a “dark, blackish-blue pigment applied with a pricking instrument, perhaps consisting of one or more fish bones set into a wooden handle.”<sup>26</sup> A Scythian mummy from 500 B.C. bore elaborate depictions of animals on the arms and back.<sup>27</sup> And a thousand-year-old Peruvian mummy featured “ornamental tattoos depicting stylised apes, birds, and reptiles on the forearms, hands, and lower legs.”<sup>28</sup>

Tattooing was practiced throughout the ancient world. In Japan, the evidence dates to at least the third century B.C.<sup>29</sup> The admonition in Leviticus—“[n]ever mark your skin with tattoos”—suggests the practice was known among the Israelites.<sup>30</sup> The Persians passed tattooing on to the Greeks, who used the term “stigmata” to describe images “inscribed on the face or some other part of the body . . . by pricking the places with needles, wiping away the blood, and rubbing it in . . . the [ink] preparation.”<sup>31</sup> The Greeks, in turn, passed the practice on to the Romans.<sup>32</sup>

The social meanings of these early tattoos were as diverse as the cultures that created them. Some tattoos were purely ornamental.<sup>33</sup> Others had ceremonial or religious functions.<sup>34</sup> Still others are thought to have served therapeutic purposes.<sup>35</sup> Some indicated high rank or social status,<sup>36</sup> whereas Greek and

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*Fireplace*, DISCOVERY NEWS (July 17, 2009, 12:48 PM), [http://www.nbcnews.com/id/31965532/ns/technology\\_and\\_science-science/t/oetzi-iceman-tatoos-came-fireplace/#.UjjhvaXujnp](http://www.nbcnews.com/id/31965532/ns/technology_and_science-science/t/oetzi-iceman-tatoos-came-fireplace/#.UjjhvaXujnp).

26. Jones, *supra* note 22, at 2 (quoting Richard S. Bianchi, *Tätowierung*, in LEXICON DER ÄGYPTOLOGIE 145–46 (W. Helck & E. Otto, VI ed., 1986)).

27. See Pabst, *supra* note 25, at 2337.

28. Leopold Dorfer et al., *A Medical Report from the Stone Age?*, 354 LANCET 1023, 1023 (1999).

29. See MARGO DEMELLO, BODIES OF INSCRIPTION: A CULTURAL HISTORY OF THE MODERN TATTOO COMMUNITY 72 (2000); DONALD RICHIE & IAN BURUMA, THE JAPANESE TATTOO 11 (1980).

30. LEVITICUS 28:19 (New Living Translation).

31. Jones, *supra* note 22, at 4–5 (quoting AETIUS AMIDENUS, TETRABIBLON 8, 12; Alessandro Olivieri, *Corpus Medicorum Graecorum VIII/2* (Berlin, 1950), pp. 417–18).

32. Jones, *supra* note 22, at 4–11.

33. Dorfer et al., *supra* note 28, at 1023.

34. See Juliet Fleming, *The Renaissance Tattoo*, in WRITTEN ON THE BODY 68–70 (Jane Caplan ed., 2000); Jones, *supra* note 22, at 13 (noting that tattoos were often part of Christian pilgrimages to the Holy Land).

35. See Dorfer et al., *supra* note 28, at 1023 (noting the close correspondence between tattoos on mummified remains and acupuncture points).

36. See WILFRID DYSON HAMBLY, THE HISTORY OF TATTOOING 206–07

Roman “stigma” were reserved for prisoners and slaves.<sup>37</sup> Over the centuries that followed, tattoos continued to serve many of these same functions.

#### B. COLONIALISM & TATTOOS IN THE WEST

Tattooing was practiced in the British Isles long before Cook’s excursions to Polynesia. The Picts, the pre-Roman inhabitants of modern-day Scotland, “receive[d] their name from their painted . . . bodies, because they are marked by tattoos of various figures made with iron pricks and black pigment.”<sup>38</sup> And in the early seventeenth century, Native Americans re-exposed the British to tattooing.<sup>39</sup> Europeans of this period encountered tattoos in Africa and Asia as well, apparently “without being tempted to try it for themselves.”<sup>40</sup>

That changed when Cook returned to Europe after his second circumnavigation, bearing not only accounts of Polynesian tattooing but a living example of it. Omai, a tattooed native of the island of Raiatea, arrived in England in 1774 onboard one of Cook’s ships.<sup>41</sup> Omai became something of a sensation; “newspapers printed his life story, the most celebrated artists painted his portrait, the popular theatre made him into a hero and a box-office hit, and learned men counted it an honor to shake his hand . . . .”<sup>42</sup> More importantly, he “sparked a tattooing vogue among the English aristocracy.”<sup>43</sup>

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(2009) (noting the “status-giving” function of tattoos in Polynesian cultures).

37. Jones, *supra* note 22, at 5.

38. SAINT ISIDORE (OF SEVILLE), *THE ETYMOLOGIES OF ISIDORE OF SEVILLE* 198 (Stephen A. Barney et al. trans., 2006); *see also* JOHN SPEED, *THE HISTORY OF GREAT BRITAIN 167* (1611) (“The Britaines . . . by means of artificial incisions of sundry formes have from their childhood divers shapes of beasts incorporate upon them; and having their markes deeply imprinted within their bodies . . .”).

39. SAMUEL PURCHAS, *PURCHAS HIS PILGRIMAGE* 955 (1617) (describing Algonquian women who would “pounce and raze their bodies, leggs, thighes, and armes, in curious knots and pourtraytures of fowles, fishes, beasts and rub a painting into the same, which will never will out.”); *see also* Fleming, *supra* note 34, at 69 (noting that “pouncing” and “razing” were English terms for tattooing used until the mid-eighteenth century).

40. *Id.* at 67.

41. Harriet Guest, *Curiously Marked: Tattooing and Gender Differences in Eighteenth-Century British Perceptions of the South Pacific*, in *WRITTEN ON THE BODY* 83 (Jane Caplan ed. 2000).

42. Stephan Oettermann, *On Display: Tattooed Entertainers in America and Germany*, in *WRITTEN ON THE BODY* 196 (Jane Caplan ed., 2000).

43. Fleming, *supra* note 34, at 67.



Initially, the European tattooed class comprised primarily sailors, soldiers, and adventurers who traveled to Tahiti, New Zealand, and other far-flung locales.<sup>44</sup> Cook's own crewmembers were among the first Europeans to return with traditional Polynesian tattoos.<sup>45</sup> And tattooing quickly spread throughout the British military.<sup>46</sup>

By the nineteenth century, European fashionable society was "gripped by a tattoo craze."<sup>47</sup> Sutherland Macdonald and Ted Riley opened tattoo studios where wealthy Londoners eagerly joined the newly tattooed upper class with the likes of Queen Olga of Greece, the Duke of York, Lady Randolph Churchill, and King Oscar II of Sweden.<sup>48</sup>

In the United States, Martin Hildebrandt opened the first professional tattoo shop in 1846 in New York.<sup>49</sup> Early U.S. tattooers like Hildebrandt and Gus Wagner relied on the same basic techniques and hand tools used for thousands of years.<sup>50</sup> But in 1891, another New York tattooer, Samuel O'Reilly, invented the tattoo machine, a device that fundamentally re-

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44. DEMELLO, *supra* note 29, at 49.

45. *Id.* at 45; Harriet Guest, *Curiously Marked: Tattooing, Masculinity, and Nationality in Eighteenth Century British Perceptions of the South Pacific*, in *PAINTING AND THE POLITICS OF CULTURE: NEW ESSAYS ON BRITISH ART 1700–1850*, at 130–31 (John Barrell ed., 1992) (describing the "inauguration of the nautical tradition" of tattooing in the eighteenth century).

46. For example, Lord Roberts, who was tattooed during his military service in Burma, encouraged tattoos among his officers. James Bradley, *Body Commodification? Class and Tattoos in Victorian Britain*, in *WRITTEN ON THE BODY* 145 (Jane Caplan ed., 2000).

47. *Id.* at 145–46.

48. *Id.* Of course, tattoos were not found exclusively among members of high society. During this period, relatively crude and inexpensive tattoos could be found among "sailors, dockers, and other rough diamonds"—as well as criminals and convicts—throughout Europe. *Id.* at 141 (quoting GEORGE BURCHETT, *MEMOIRS OF A TATTOOIST* 13,139 (1958)); *see also* Jane Caplan, *National Tattooing, Traditions of Tattooing in Nineteenth-Century Europe*, in *WRITTEN ON THE BODY* 156–57 (Jane Caplan ed., 2000) (discussing tattoos among German and Italian criminals); Hamish Maxwell Stewart & Ian Duffield, *Skin Deep Devotions: Religious Tattoos and Convict Transportation to Australia*, in *WRITTEN ON THE BODY* 118 (Jane Caplan ed., 2000); Abby M. Schrader, *Branding the Other/Tattooing the Self: Bodily Inscription among Convicts in Russia and the Soviet Union*, in *WRITTEN ON THE BODY* 184–85 (Jane Caplan ed., 2000); DEMELLO, *supra* note 29, at 50.

49. DEMELLO, *supra* note 29, at 49.

50. Alan Govenar, *The Changing Image of Tattooing in American Culture, 1846–1966*, in *WRITTEN ON THE BODY* 214–15 (Jane Caplan ed., 2000).

shaped tattooing.<sup>51</sup> The introduction of electric machinery made tattooing cheaper, faster, and less painful.<sup>52</sup> It also helped develop a distinctive American aesthetic characterized by “strong black line . . . heavy black shading; and a dab of color” from a limited palette emphasizing red, blue, and green.<sup>53</sup>

Tattooers in the United States were generally from the same working class backgrounds as their clients<sup>54</sup> and typically had no prior art training.<sup>55</sup> Rather than create custom artwork for their clients, tattooers of this era worked almost exclusively from collections of pre-drawn images called “flash.”<sup>56</sup> Designs included military insignia, ships, hearts, flowers, skulls, daggers, snakes, tigers, Christian icons, and scantily clad women.<sup>57</sup> These same images, or minor variations on them, hung on the walls of nearly every tattoo shop of the era.<sup>58</sup> When a tattooer came across an appealing new design, he copied it—sometimes directly off of the body of a willing client—and added it to his stock of flash.<sup>59</sup> Some enterprising tattooers, first among them Lew Alberts and Charlie Western, sold sheets of flash to other tattooers.<sup>60</sup>

The combination of the electric tattoo machine and simple, pre-made flash designs enabled the industry to capitalize on the popularity of tattoos during the Interbellum period.<sup>61</sup> In many ways, the tattoo industry was structured around the needs of soldiers and sailors who frequented tattoo shops in large groups with limited leave time.<sup>62</sup> “Sailors came in,” one tattooer told me, “and you cranked them out as quickly as you [could] because they’re all on leave. The financial impetus was

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51. See U.S. Patent No. 464,801 (issued Dec. 8, 1891). Charlie Wagner patented improvements on O'Reilly's device in 1904. See U.S. Patent No. 768,413 (issued Aug. 23, 1904).

52. Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in WRITTEN ON THE BODY 240 (Jane Caplan ed., 2000); DEMELLO, *supra* note 29, at 50.

53. DEMELLO, *supra* note 29, at 50.

54. See Rubin, *supra* note 19, at 234; R.I. Geare, *Tattooing*, SCI. AM., Sept. 12, 1903, at 190.

55. DEMELLO, *supra* note 29, at 51; Rubin, *supra* note 19, at 234.

56. DEMELLO, *supra* note 29, at 52–53; Govenar, *supra* note 50, at 217.

57. DEMELLO, *supra* note 29, at 52; Govenar, *supra* note 50, at 218–19.

58. DEMELLO, *supra* note 29, at 52.

59. *Id.*

60. Govenar, *supra* note 50, at 217.

61. DEMELLO, *supra* note 29, at 59.

62. See DEMELLO, *supra* note 29, at 63–65.

there to crank those [tattoos] out.”<sup>63</sup> Soldiers and sailors during the World Wars also bolstered the popularity of tattooing among the general public and helped set trends in terms of tattoo style, subject matter, and placement.<sup>64</sup>

But in the post-war period, the popularity of tattoos began to wane. Many soldiers returning from World War II realized that their tattoos were not as enthusiastically accepted outside of the military.<sup>65</sup> And unsanitary conditions in many tattoo shops raised serious public health concerns.<sup>66</sup> Tattooers failed to sterilize equipment, used the same needles on successive customers; and drew ink from a shared container.<sup>67</sup> After reported hepatitis outbreaks, many state and local governments began to heavily regulate tattooing or ban it altogether, forcing many tattooers either out of town or out of business.<sup>68</sup>

Although tattooing continued, both in licensed shops and unlicensed back rooms, garages, and basements, the post-war period was a time of creative stagnation. Tattooers still relied largely on the same collection of flash designs prominent at the turn of the century.<sup>69</sup> But this period of creative stagnation and dwindling popularity set the stage for a fundamental shift in the industry.<sup>70</sup>

### C. THE TATTOO RENAISSANCE

For more than a century, the U.S. tattoo industry was defined by flash. These simple, badge-like images offered tattooers a source of popular, ready-made designs that could be quickly and consistently applied to their customers.<sup>71</sup> Flash met the needs of tattooers, who considered themselves craftsmen or tradesmen, with little interest in artistic expression for its own sake.<sup>72</sup> And it met the needs of clients, whose tattoos often

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63. Interview with Subject 6, *supra* note 8, at 54.

64. DEMELLO, *supra* note 29, 63–65.

65. *Id.* at 66–67; Govenar, *supra* note 50, at 229.

66. *See, e.g.*, DEMELLO, *supra* note 29, at 62.

67. *Id.* at 62.

68. Govenar, *supra* note 50, at 229–32. For more on the legal regulation of the tattoo industry, see *infra* Part III.A.

69. *See* Govenar, *supra* note 50, at 217.

70. *See* Rubin, *supra* note 19, at 235–36.

71. DEMELLO, *supra* note 29, at 196 n.4.

72. *See* CLINTON R. SANDERS, CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING 86 (2008); *see also* Rubin, *supra* note 19, at 233–35.

communicated group membership or commemorated milestones through established iconography.<sup>73</sup>

But beginning in the 1960s, tattooers began to reconceptualize their work.<sup>74</sup> Norman Keith Collins, better known as Sailor Jerry, was among the first and most important tattooers to challenge prevailing practices.<sup>75</sup> Influenced by Japanese tattoo traditions, he sought to elevate tattoo artistry in the United States by creating elaborate, stylistically and thematically consistent tattoos that incorporated the entire human body as a canvas.<sup>76</sup> Tattoos tailored to a particular human form in the Japanese tradition stood in stark contrast to the typical American approach of unsystematically scattering small standalone images across the body.<sup>77</sup>

Over the next few decades, the innovations of Sailor Jerry and protégés like Cliff Raven<sup>78</sup> and Don Ed Hardy<sup>79</sup> helped bring about three interlinked shifts in the industry that led to what some have called the tattoo renaissance.<sup>80</sup> First, a new generation of tattooers was drawn to the industry because of its potential for artistic innovation and expression. Experienced and trained fine artists, many with graduate-level education, began to see tattooing as a viable and legitimate career path.<sup>81</sup> Second, the creative output of the tattoo industry changed as a result of the influx of artistically inclined tattooers. New techniques and styles that drew on influences ranging from cubism to graffiti began to emerge.<sup>82</sup> Third, the client base of the industry underwent a transformation. As clients became more affluent, better educated, and more knowledgeable about tattoos and art generally, they developed higher expectations of technical skill and originality.<sup>83</sup>

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73. “When you had gone five thousand miles at sea, you got a bluebird on your chest. When you’d gone ten thousand, you got the second bird on the other side.” DEMELLO, *supra* note 29, at 64 (quoting Doc Webb).

74. Rubin, *supra* note 19, at 233–35.

75. DEMELLO, *supra* note 29, at 73–74.

76. Rubin, *supra* note 19, at 236–37; *see also* DEMELLO, *supra* note 29, at 72–75.

77. *See* Rubin, *supra* note 19, at 233–35 (describing the “international folk style” of tattooing that characterized the early U.S. tattoo industry).

78. *Id.* at 236–41.

79. *Id.* at 241–45.

80. *Id.* at 233–36.

81. *Id.* at 235; SANDERS, *supra* note 72, at 19.

82. *See* DALE RIO & EVA BIANCHINI, TATTOO 12 (2004).

83. *See* Rubin, *supra* note 19, at 235; *see also* DEMELLO, *supra* note 29, at 92.

These three changes gave rise to the most important development in the industry from the perspective of creative norms—custom tattooing.<sup>84</sup> Rather than simply offer their clients a selection of flash from which to choose, tattooers increasingly created unique bespoke designs for individual clients, customized for both their tastes and their bodies.<sup>85</sup> Custom work provided tattooers an opportunity to create new pieces of original art instead of re-inking old designs. To the older generation of tattooers, who saw their work primarily in financial rather than artistic terms, the choice to devote time and energy to custom designs was puzzling. As one tattooer described:

That's how the old timers made their money, repeating stuff over and over again. When the new school guys came around, when I came around, and started doing original [one-of-a-kind] artwork on everybody, the old timers looked at me like "Dude, you are crazy. Why do you want to do that? We've got plenty of designs that sell great."<sup>86</sup>

As a result of these changes, the tattoo industry today is defined by two very different paradigms.<sup>87</sup> The street shop fits comfortably with the common public conception of a "tattoo parlor."<sup>88</sup> A garish neon sign flickers above the entrance.<sup>89</sup> The walls are papered with flash designs. Clients walk in off of the street without appointments, select the image of their choice, and are tattooed by whichever tattooer happens to be free at the moment.<sup>90</sup> Clients are often charged a pre-determined, cash-only flat rate.<sup>91</sup> Most simple flash designs can be tattooed in well under an hour, sometimes as quickly as a few minutes.<sup>92</sup> Hundreds, likely thousands, of tattoo shops in the United States fit this basic model.<sup>93</sup>

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84. See Enid Schildkrout, *Inscribing the Body*, 33 ANN. REV. ANTHROPOLOGY 319, 336 (2004) ("As more and more middle-class people were tattooed, and as artists with formal art training in other media entered the profession . . . custom work increasingly replaced flash . . .").

85. See *id.*

86. Interview with Subject 7, *supra* note 8, at 58.

87. See, e.g., INKIES TATTOO STUDIO, <http://www.inkiestattoo.com> (last visited Nov. 2, 2013) (describing the tattoo shop as "high-end").

88. See Interview with Subject 1, *supra* note 8, at 8.

89. See, e.g., FINELINE, <http://www.finelinetattoo.com> (last visited Nov. 2, 2013).

90. See, e.g., Interview with Subject 9, *supra* note 8, at 81–82.

91. See, e.g., SANDERS, *supra* note 72, at 143.

92. See, e.g., Interview with Subject 6, *supra* note 8, at 54.

93. As of 2007, an estimated 15,000 tattoo shops operated in the United States. See Chafkin, *supra* note 3.

Less familiar to the public imagination is the high-end custom tattoo shop. Skull & Sword, a respected shop in San Francisco, is one example.<sup>94</sup> Located on the second floor of nondescript building, the shop features minimal signage.<sup>95</sup> Rather than accept walk-ins, tattooers book appointments several months in advance.<sup>96</sup> Instead of flash hanging on the walls, each tattooer's portfolio of custom tattoos is available for viewing.<sup>97</sup> Custom tattoo clients are charged an hourly rate for the time spent applying the tattoo. At high-end shops, rates between \$150 and \$250 per hour are not uncommon—again, cash only.<sup>98</sup> A sizable custom tattoo can take many hours to complete, often requiring multiple appointments over the course of months.<sup>99</sup>

Most tattoo shops, and most tattooers, operate somewhere along a spectrum between these two paradigms, providing a combination of small, simple, pre-designed tattoos and more elaborate custom work.<sup>100</sup> Since most tattooers learn on the job through an apprenticeship, they commonly start with simple flash designs, developing the skills necessary for more complex custom designs over time.<sup>101</sup> And because they work in both milieus, many tattooers self-consciously play the roles of both creator and copyist, a duality that informs and complicates industry norms surrounding creative production.<sup>102</sup> Tattooers work in a medium that has a long history of widely accepted copying of a corpus of shared images and iconography.<sup>103</sup> That tradition, however, conflicts with the premium placed on originality as custom tattooing developed.

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94. SKULL & SWORD, <http://www.theskullandsword.com> (last visited Nov. 2, 2013).

95. *Skull & Sword*, CITY-DATA.COM, <http://www.city-data.com/businesses/212287593-skull-sword-san-francisco-ca.html> (last visited Nov. 2, 2013).

96. SKULL & SWORD, *supra* note 94.

97. *Id.*

98. “Cash only” is perhaps the only truly universal rule in the tattoo industry. *See, e.g.*, SANDERS, *supra* note 72, at 105, 143.

99. Interview with Subject 13, *supra* note 8, at 154.

100. *See, e.g., id.* with Subject 12 at 130 (explaining the grey area between tracing tattoos and creating new work).

101. As one tattooer explained, “When you are first starting off and learning to tattoo you don’t get to be picky. You don’t get to choose. Because you are trying to learn, you have to practice.” Interview with Subject 7, *supra* note 8, at 57.

102. *See, e.g.*, Interview with Subject 12, *supra* note 8, at 130 (explaining that the tattooer had not been “doing anything [other prominent tattooers] had not been doing for 20 years”).

103. *See, e.g.*, DEMELLO, *supra* note 29, at 37, 53.

## II. LAW, NORMS &amp; TATTOOS

A tattoo, like any other original work fixed in a tangible medium, is protected by copyright law. And like the other public goods that copyright law protects, tattoos are susceptible to unauthorized reproduction.<sup>104</sup> Once a tattooer creates a design and applies it to the skin of a client—particularly if an image of the tattoo is published on the internet or in print—non-rivalry and non-excludability lead to predictable results.<sup>105</sup> Copying is a topic of perennial concern within the tattoo industry.<sup>106</sup> But copyright lawsuits or other formal assertions of rights are exceedingly rare. Instead, tattooers have developed a set of informal norms to structure the creative process and relationships within their industry.<sup>107</sup> This Part, after addressing the applicability of formal copyright protection, describes the key norms that have emerged within the industry.

## A. FORMAL LEGAL PROTECTION FOR TATTOOS

In the absence of some applicable exclusion or limitation,<sup>108</sup> copyright law protects “original works of authorship fixed in any tangible medium of expression . . . .”<sup>109</sup> Originality requires that a work is independently created rather than copied from preexisting material, and that it reflect a modicum of creativity.<sup>110</sup> Although the standard for originality is low, its evaluation turns on both an objective analysis of the work and an examination of the process by which it was created.<sup>111</sup>

The fixation requirement ensures that the work is embodied in a physical form “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated

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104. See 17 U.S.C. § 101 (2012).

105. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 40 (6th ed. 2011).

106. See, e.g., Interview with Subject 1, *supra* note 8, at 6–7 (explaining that copying is only acceptable within certain circumstances).

107. See, e.g., *id.* with Subject 12 at 130 (stating that tattooing is “not reinventing the wheel,” everything is based on copying).

108. See, e.g., 17 U.S.C. § 101 (2012) (“[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”).

109. *Id.* § 102(a).

110. See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

111. *Id.* at 346–47.

for a period of more than transitory duration.”<sup>112</sup> Fixation serves two functions. It helps reduce problems of proof by insisting on a durable record of the protected work.<sup>113</sup> Fixation also helps ensure that works are preserved and disseminated for the benefit of future generations.<sup>114</sup>

In the case of a custom tattoo, the question of copyrightability must be addressed with regard to two distinct but related works. Tattooers occasionally ink an image free-hand directly on a client’s skin.<sup>115</sup> But more often, they create a detailed line drawing of the tattoo design on paper.<sup>116</sup> Once the line drawing is prepared, the tattooer copies it to a stencil, which when transferred to the client’s skin serves as a template for tattooing the outline of the design.<sup>117</sup>

Although the line drawing forms the basis for the tattoo, it differs from the final product on the client’s skin in important ways.<sup>118</sup> A drawing on paper is a two-dimensional representation. Depending on the location of the tattoo, the client’s body transforms that flat image to a three-dimensional work.<sup>119</sup> Particularly for tattoos thoughtfully designed to take advantage of the shape of the client’s body, the shift to three dimension can dramatically alter the appearance of the tattoo.<sup>120</sup> More generally, line drawings often lack the shading and color typically added to the final tattoo.<sup>121</sup> If the tattoo embodies creative expression not reflected in the line drawing, it is probably best considered a derivative work in copyright terminology.<sup>122</sup> But where the tattooer simply transfers the line drawing to the body without adding or altering its expression, the tattoo is properly understood as a mere reproduction.<sup>123</sup>

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112. 17 U.S.C. § 101 (2012).

113. See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 730–34 (2003).

114. See Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1094–95 (2010).

115. Interview with Subject 9, *supra* note 8, at 82.

116. See *id.* with Subject 9 at 82–83.

117. See *id.*

118. See *id.* with Subject 1 at 12.

119. *Id.* with Subject 8 at 71.

120. See *id.* with Subject 8 at 71–72.

121. *Id.* with Subject 7 at 64.

122. See 17 U.S.C. § 101 (2012).

123. *Id.*



Line drawings fall squarely within the Copyright Act's definition of "pictorial, graphic, and sculptural" works.<sup>124</sup> A pencil or ink drawing on paper satisfies the fixation requirement. So assuming the work is not merely a copy of a preexisting work and reflects some amount of creativity, the line drawing is eligible for copyright protection. This result is neither surprising nor controversial.

The same basic analysis would seem to hold for the tattoo as applied to a human subject. To the extent the tattoo is independently created and satisfies the low bar for creativity, it is original.<sup>125</sup> And as your mother has no doubt warned you, tattoos are permanent. An indelible representation of a work easily meets the statute's demand for a work "fixed in a tangible medium of expression."<sup>126</sup> Tattoos then, like their pencil and paper counterparts, appear to be appropriate subjects of copyright protection.<sup>127</sup>

But a recent dispute over Mike Tyson's facial tattoo gave one commentator an opportunity to challenge this seemingly straightforward result.<sup>128</sup> In 2003, Victor Whitmill tattooed an abstract image, inspired by Maori *moko*,<sup>129</sup> on the face of former

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124. See *id.* §§ 101, 102(a).

125. See *Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–47 (1991).

126. *Id.*

127. The existing literature on copyright in tattoos either assumes or concludes as much. See Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137 (2012); Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97 (2002); David Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279 (2013); Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313 (2006); Christine Lesicko, *Tattoos as Visual Art: How Body Art Fits into the Visual Artists Rights Act*, 53 IDEA 39 (2013); Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. (forthcoming 2013).

128. See Declaration of David Nimmer at 18, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-cv-00752 (E.D. Mo. May 20, 2011) [hereinafter *Nimmer Declaration*] ("For copyright protection in tattoos to arise, Congress would have to act anew, in the manner of its 1980 amendment to the Copyright Act to afford protection to computer software and its 1990 amendment to the Copyright Act to afford protection to architectural works.").

129. See generally Peter Gathercole, *Contexts of Maori Moko*, in *MARKS OF CIVILIZATION* 171 (Arnold Rubin ed., 1988).

heavyweight boxing champion Mike Tyson.<sup>130</sup> Tyson subsequently appeared in the Warner Brothers film *The Hangover*. In that film's sequel, the same tattoo design was reproduced on the face of comedian Ed Helms as evidence of a night of drunken decision-making.<sup>131</sup> Whitmill, after seeing promotional materials for the film featuring his design, sued Warner Brothers to enjoin the release of the film.<sup>132</sup>

In an expert witness declaration, David Nimmer<sup>133</sup> offered a number of legal conclusions suggesting that Whitmill was not entitled to copyright protection for Tyson's tattoo.<sup>134</sup> Despite affirming in his oft-cited copyright treatise that a tattoo could "qualify as a work of graphic art, regardless of the medium in which it is designed to be affixed" including "human flesh,"<sup>135</sup> Nimmer argued in his capacity as an expert that Tyson's skin did not qualify as a tangible medium of expression, comparing it to a frosty window pane or wet sand as the tide approaches.<sup>136</sup> But those quintessential examples of transitory media are a far cry from the lifelong fixation of a tattoo.<sup>137</sup>

More plausibly, Nimmer pointed to the useful article limitation on pictorial, graphic, and sculptural works as a separate basis for denying protection.<sup>138</sup> The useful article doctrine precludes copyright protection for products whose purpose is utilitarian rather than expressive, largely eliminating copyright

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130. Complaint at 2, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-cv-00752 (E.D. Mo. Apr. 28, 2011).

131. *Id.* at 4.

132. *Id.* at 4–5. Whitmill's copyright registration covers "artwork on [a] 3-D object" presumably because he created the tattoo directly on Tyson's face without first drawing the design on paper. See TRIBAL TATTOO, No. VA0001767704, available at [http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1&Search%5FArg=va0001767704&Search%5FCODE=REGS&CNT=25&PID=FRK-tCFkHI5cOIoxALv0Rr\\_iVMY&SEQ=20130918145100&SID=1](http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?v1=1&ti=1&Search%5FArg=va0001767704&Search%5FCODE=REGS&CNT=25&PID=FRK-tCFkHI5cOIoxALv0Rr_iVMY&SEQ=20130918145100&SID=1).

133. Nimmer has updated and revised *Nimmer on Copyright* since 1985. See *David Nimmer*, IRELL & MANELLA LLP, <http://www.irell.com/professionals-51.html> (last visited Nov. 2, 2013).

134. See generally Nimmer Declaration, *supra* note 128.

135. Nimmer Declaration, *supra* note 128, at 4 (citing NIMMER ON COPYRIGHT § 1.01[B][1][i] n.392 (1999)).

136. Nimmer Declaration, *supra* note 128, at 4; see also Ann Bartow, *When a Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN.NET (May 25, 2011), <http://madisonian.net/2011/05/25/when-a-treatise-writer-tries-to-reconfigure-copyright-law-to-benefit-a-client> (noting Nimmer's reversal).

137. See Nimmer Declaration, *supra* note 128, at 9.

138. *Id.* at 7–11.

protection for industrial design.<sup>139</sup> Pictorial, graphic, or sculptural elements incorporated into a useful article are protectable only to the extent they are physically or conceptually separable from the underlying article.<sup>140</sup> Mike Tyson's face, as Nimmer rightly noted, serves a primarily utilitarian, biological function.

But applying the standard test for separability, Tyson's tattoo is easily divorced from his skin as a conceptual matter.<sup>141</sup> Nimmer insisted, however, that "the only legally cognizable result is to apply the strict requirement of physical separability."<sup>142</sup> Otherwise, he claimed the Copyright Act would "set to naught the Thirteenth Amendment's prohibition of badges of slavery."<sup>143</sup>

At the root of Nimmer's startling equation of willing recipients of tattoos with slaves is a concern over certain remedies available to a successful copyright plaintiff.<sup>144</sup> As he noted, copyright protection could grant Whitmill control over Tyson's public displays of the tattoo<sup>145</sup> as well as reproductions of it in photographs or video.<sup>146</sup> Nimmer worried that the derivative work right could give Whitmill some say over other tattoos Tyson might choose to apply to his face.<sup>147</sup> And in the unlikely event the tattoo qualifies as a "work of recognized stature" under the Visual Artists Rights Act, Tyson could be prevented from destroying or removing it.<sup>148</sup>

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139. Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983) ("Copyright law has reluctantly embraced a variety of works embodied in utilitarian objects, while simultaneously purporting to exclude the general province of industrial design.").

140. *Brandir Int'l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1143 (2d Cir. 1987).

141. *See id.* at 1145 ("[W]here design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists."); *see also* King, *supra* note 127.

142. Nimmer Declaration, *supra* note 128, at 11.

143. *Id.*

144. *See id.* at 5–6.

145. *See* 17 U.S.C. § 106(5) (2012) (granting the copyright holder the exclusive right to publicly display the work).

146. *See id.* § 106(1) (granting the copyright holder the exclusive right to reproduce the work).

147. *See id.* § 106(2) (granting the copyright holder the exclusive right to prepare derivatives based on the work).

148. *See id.* § 106A(a)(3)(B) (granting the author of a work of visual art the right "to prevent any destruction of a work of recognized stature").

Although the court characterized Nimmer's arguments as "silly," these potential consequences are indeed alarming.<sup>149</sup> Luckily, copyright law offers courts many tools aside from the blunt instrument of protectability that they could, and almost certainly would, use to avoid this parade of horrors. These include narrow readings of exclusive rights,<sup>150</sup> fair use,<sup>151</sup> first sale and related exhaustion doctrines,<sup>152</sup> implied license,<sup>153</sup> and equitable discretion over injunctive relief.<sup>154</sup> But there is another reason of far more practical importance why Nimmer's fears were unwarranted: the scenarios he envisioned are fundamentally at odds with the established norms of the tattoo industry.<sup>155</sup>

Copyright suits between tattooers and their clients, or suits between two tattooers, are virtually non-existent.<sup>156</sup> Most of the copyright litigation involving tattoos centers around tattoo-inspired designs used on clothing or other merchandise.<sup>157</sup>

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149. See Joe Mullin, *Tyson Tattoo Lawsuit: Studio's Defenses Are 'Silly,' Says Judge*, PAIDCONTENT (May 25, 2011), <http://paidcontent.org/2011/05/25/419-judge-shows-sympathy-for-plaintiffs-in-tyson-tattoo-case/>. The parties subsequently agreed to dismiss the suit under the terms of an undisclosed settlement. See David Kravets, *Hangover Tattoo Infringement Lawsuit Settles*, WIRED, June 22, 2011, 2:15 PM, <http://www.wired.com/threatlevel/2011/06/tattoo-flap-settled>.

150. See Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879 (2007).

151. See 17 U.S.C. § 107 (2012).

152. See *id.*; see also Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067, 2107 (2012).

153. See *infra* Part II.E; see also Michael Grynberg, *Property Is a Two-Way Street: Personal Copyright Use and Implied Authorization*, 79 FORDHAM L. REV. 435, 454 (2010).

154. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 486, 505 (2001) ("It hardly follows from [a finding of infringement] that an injunction . . . must issue."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, n.10 (1993) (describing how the goals of copyright law are "not always best served by automatically granting injunctive relief"); see also *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (noting that issuing patent injunctions "in accordance with the principles of equity" is "consistent with [the Court's] treatment of injunctions under the Copyright Act").

155. See, e.g., Interview with Subject 3, *supra* note 8, at 40.

156. Whitmill, it should be stressed, did not bring a suit against his client. Tyson prominently displayed his tattoo in the first *Hangover* and other subsequent paid public appearances, including his current one man show on Broadway, without any objection from his tattooer. See Michael Wilson, *For Tyson, a 'Vulnerable' Performance Outside the Ring*, N.Y. TIMES, June 19, 2012, at A20.

157. See *Crispin v. Audigier*, 839 F. Supp. 2d 1086, 1088 (C.D. Cal. 2011) (discussing that tattoo designs were used on apparel, jewelry, and other merchandise); *Tattoo Art, Inc. v. Tat Int'l L.L.C.*, 711 F. Supp. 2d 645, 647 (E.D.

Occasionally tattooers sue each other on non-copyright grounds.<sup>158</sup> And rarely, non-copyright litigation arises between tattooers and their clients.<sup>159</sup>

But not a single reported decision addresses a copyright claim brought by a tattooer against a client or a fellow tattooer. And the available record reveals only one such case even being filed in the United States.<sup>160</sup> In 2005, Portland tattooer Matthew Reed filed a complaint against his client, Rasheed Wallace, a former player for the NBA's Portland Trailblazers.<sup>161</sup> Reed tattooed a custom image of an Egyptian family on Wallace's arm, for which Wallace paid Reed \$450.<sup>162</sup> Six years later, the advertising firm Wieden+Kennedy prominently featured Wallace's tattoo in an advertising campaign for Nike.<sup>163</sup> Reed, who had not authorized the use of the tattoo in the ad campaign, registered a copyright in his drawing of the design and filed an infringement complaint against Nike, Wieden+Kennedy, and Wallace, which was eventually dismissed after a joint stipulation.<sup>164</sup> Notably, although Reed's client was named as a party, it was the prominent use of the tattoo in the ad campaign and not Wallace's regular public displays of it that triggered the suit.<sup>165</sup>

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Va. 2010) (noting flash designs licensed for use as airbrush stencils); S.T.R. Indus. v. Palmer Indus., 1999 WL 258455 (N.D. Ill. Apr. 9, 1999) (explaining that tattoo themed designs applied to pool cues).

158. See, e.g., Quidgeon v. Olsen, 2011 U.S. Dist. LEXIS 42309, at \*2-3 (C.D. Ill. Apr. 19, 2011) (explaining a trademark dispute between competing tattoo shops).

159. See, e.g., Minnifield v. Ashcraft, 903 So. 2d 818, 820 (Ala. Crim. App. 2004) (demonstrating the invasion of privacy claim against tattooer for publishing photo without permission).

160. See Complaint, Reed v. Nike Inc., No. 05-CV-198 BR (D. Or. Feb. 10, 2005).

161. *Id.* A similar dispute arose in the United Kingdom over the use of footballer David Beckham's tattoos in an ad campaign. See Noam Cohen, *On Tyson's Face, It's Art. On Film, A Legal Issue.*, N.Y. TIMES, May 21, 2011, at A1.

162. Complaint, *Reed*, *supra* note 160.

163. *Id.*

164. Stipulation of Dismissal with Prejudice, Reed v. Nike, Inc., No. 05-CV-198 BR (D. Or. Oct. 19, 2005).

165. For a detailed discussion of *Reed*, see Harkins, *supra* note 127. Recently, Rick Genest a heavily tattooed model with distinctive facial tattoos settled a dispute with the producers of the television series *American Horror Story* over alleged copyright and likeness rights. Matthew Belloni, *Fox Settles 'American Horror Story' Legal Spat Over 'Zombie Boy' Tattoo (Exclusive)*, HOLLYWOOD REPORTER (Oct. 16, 2012), <http://www.hollywoodreporter.com/thr-esq/foxs-american-horror-story-zombie-379219>.

Nonetheless, simply by bringing suit, Reed operated outside of the accepted norms of the tattoo industry.<sup>166</sup> None of the tattooers I interviewed had registered copyrights in their custom designs or knew other tattooers who had, although most were aware that they could.<sup>167</sup> None had been involved in a formal copyright dispute or knew other tattooers who had.<sup>168</sup> Most were dismissive of the notion of bringing a suit against a client or another tattooer.<sup>169</sup> As one interview subject colorfully put it, a tattooer who sued another for copying would be “labeled kind of a wiener with thin skin.”<sup>170</sup>

Tattooers were somewhat more sympathetic to leveraging formal legal rights, as Whitmill did, to target unauthorized use of their designs on apparel or other merchandise.<sup>171</sup> But on the whole, they were reluctant to endorse reliance on the judicial system even under those circumstances.<sup>172</sup> In part, this reluctance is an outgrowth of general misgivings about the legal system.<sup>173</sup> But as the rest of this Part demonstrates, it is largely an expression of more specific norms governing the creative process and the tattooer-client relationship.

#### B. CLIENT AUTONOMY

Both during and after the design process, tattooers consistently demonstrate a respect for client autonomy.<sup>174</sup> To varying degrees, client input helps shape the design of a custom tattoo.<sup>175</sup> And once an image is created on the client’s skin, tattooers uniformly acknowledge that control over that image, with some limited exceptions, shifts to the client.<sup>176</sup>

The design process typically begins with a consultation, where the client presents the tattooer with a basic description

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166. See Interview with Subject 2, *supra* note 8, at 19; *id.* with Subject 3 at 40; *id.* with Subject 6 at 50, 55–56; *id.* with Subject 11 at 110–11.

167. See, e.g., *id.* with Subject 1 at 14.

168. See, e.g., *id.* with Subject 3 at 40; *id.* with Subject 7 at 64.

169. *Id.* with Subject 2 at 26; *id.* with Subject 6 at 50; *id.* with Subject 11 at 110–11.

170. *Id.* with Subject 2 at 26.

171. *Id.* with Subject 6 at 52–53, 55–56.

172. *Id.* with Subject 2 at 26; *id.* with Subject 6 at 50; *id.* with Subject 11 at 110–11.

173. See *infra* Part III.

174. Interview with Subject 11, *supra* note 8, at 111; *id.* with Subject 12 at 128.

175. *Id.* with Subject 6 at 48–49; *id.* with Subject 10 at 96.

176. *Id.* with Subject 12 at 128.

of the imagery they envision for their tattoo.<sup>177</sup> Those initial descriptions vary in their specificity: “sometimes the customers bring a lot to the table with the design element. Other times they have no feedback and they’re just really open-minded . . . .”<sup>178</sup>

Typically, the consultation is the beginning of an ongoing conversation between tattooer and client.<sup>179</sup> Because of their greater familiarity with theories of design and composition, as well as a clearer understanding of the limitations of the medium, tattooers frequently guide their clients toward choices that, while true to the client’s original conception, are more likely to translate well into tattoos.<sup>180</sup> After settling on basic questions of subject matter, style, and composition, the tattooer typically requires the client to pay a small cash deposit before drawing up the design.<sup>181</sup> The deposit fee is then deducted from the eventual hourly-rate price of the tattoo.<sup>182</sup> As a result, tattooers do not ultimately charge clients for their time and effort in creating a design.<sup>183</sup>

Once the tattooer draws an initial design, clients typically have an opportunity to request edits or revisions.<sup>184</sup> Most tattooers expect to make such changes.<sup>185</sup> As one interview subject explained, “I don’t even get the line drawing finished all the way, so I don’t fall in love with it too much. Because once you fall in love with it, you don’t want to make any changes. And sometimes you can go in a direction that’s just not right [for the client].”<sup>186</sup> Even after the client and tattooer agree on

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177. *Id.* with Subject 10 at 96; *id.* with Subject 11 at 108.

178. *Id.* with Subject 9 at 82.

179. *Id.* with Subject 11 at 108.

180. *See id.* with Subject 9 at 92; *id.* with Subject 11 at 108, 119.

181. *Id.* with Subject 2 at 19; *id.* with Subject 6 at 49; *id.* with Subject 7 at 57.

182. “In order for them to get that tattooed from me, I need to do the artwork. That’s part of the service. They’re putting down the deposit, and assuming they’re not having me make 50 million revisions, it will eventually come off the price of the tattoo.” *Id.* with Subject 3 at 141.

183. *See id.* with Subject 6 at 49; *id.* with Subject 7 at 57; *id.* with Subject 13 at 141.

184. *See id.* with Subject 7 at 57; *id.* with Subject 9 at 81; *id.* with Subject 11 at 108; *id.* with Subject 12 at 125; *id.* with Subject 13 at 140.

185. *See supra* Interview Subjects accompanying note 184.

186. *Id.* with Subject 7 at 57. But a small minority of tattooers refuse to make edits. “I never redraw stuff, which is a weird rule. I always assume that if someone doesn’t like the way that I’ve drawn something that they just shouldn’t get [the tattoo] from me.” *Id.* with Subject 3 at 28.

the line drawing, other choices, such as color schemes, often involve client input.<sup>187</sup>

Because custom tattoos are both commissioned and collaborative,<sup>188</sup> a copyright lawyer would be tempted to consider the tattooer-client relationship through the lenses of works made for hire and joint authorship.<sup>189</sup> Although strands of both of these approaches can be found in the thinking of tattooers, neither maps onto the norms of the tattoo industry particularly well. In short, application of these doctrines would suggest that tattooers are generally the sole copyright owners of the designs they create. But that level of control would conflict with the deeply engrained norm of client autonomy.

Custom tattoos are almost certainly not works made for hire as defined by the Copyright Act.<sup>190</sup> A work made for hire is either: (1) a work created by an employee within the scope of her employment, or (2) a specially commissioned work that falls within one of nine enumerated categories and is subject to an express written agreement designating the work as one made for hire.<sup>191</sup> Under standard common law agency principles, tattooers are not the employees of their clients.<sup>192</sup> And although custom tattoos are specially commissioned, they are not among the enumerated statutory categories eligible for treatment as works made for hire.<sup>193</sup> In addition, signed agreements that

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187. *Id.* with Subject 7 at 57–58; *id.* with Subject 12 at 125; *id.* with Subject 13 at 140.

188. *E.g., id.* with Subject 12 at 125 (explaining a woman that described the tattoo that she wanted, but left it up to the tattooer to draw).

189. *See generally* 17 U.S.C. § 101 (2012) (discussing works made for hire and joint authorship).

190. *Id.*

191. *Id.*

192. They may, however, be considered employees of the tattoo shop under some circumstances. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (1989) (“To determine whether a work is for hire under the Act, a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor.”). In one anomalous scenario, model Amina Munster registered the custom design created for her by tattooer, Tim Kern, as a work made for hire, apparently under the misapprehension that Kern qualified as her employee. *See Amina Munster, Tattoos and Copyright*, TATTOODLES (Mar. 31, 2006), <http://www.tattoodles.com/magazine/editorial/147>.

193. *See* 17 U.S.C. § 101 (identifying the categories of works eligible as specially commissioned works made for hire).



contemplate copyright ownership are practically unheard of in the tattoo industry.<sup>194</sup>

Perhaps not surprisingly, the formal conclusions of copyright law do not dictate how tattooers conceptualize their ownership interests in their work.<sup>195</sup> As one tattooer explained, “I don’t feel necessarily a strong ownership over [my custom designs], because a lot of the time it’s not necessarily my original idea. It’s stuff that I’m being commissioned for, so I see myself as more of a paid artist to bring visions to life.”<sup>196</sup>

Joint authorship likewise presents an imperfect fit between copyright doctrine and tattoo industry norms. A joint work is one “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>197</sup> The highly collaborative tattoo design process is strongly suggestive of the requisite intent. But the contributions of most clients are unlikely to meet the threshold of authorship.<sup>198</sup> According to most courts, in order to be considered an author for joint work purposes, a party’s contribution must be independently copyrightable.<sup>199</sup> Although each tattoo features a mix of contributions from tattooer and client, clients typically contribute uncopyrightable ideas, not protected expression.<sup>200</sup>

Formal law would treat most custom tattoo designs as works created by the tattooer alone.<sup>201</sup> Nonetheless, the design process is deeply, and understandably, sensitive to client preferences.<sup>202</sup> Clients, after all, exercise the final choice over

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194. See, e.g., Interview with Subject 1, *supra* note 8, at 12; *id.* with Subject 2 at 24–25; *id.* with Subject 5 at 46.

195. See *id.* with Subject 12 at 125.

196. *Id.*

197. 17 U.S.C. § 101.

198. See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069–71 (7th Cir. 1994); see also *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (explaining that the Copyright Act “requires each author to make an independently copyrightable contribution” (internal quotation marks omitted)).

199. See *Erickson*, 13 F.3d at 1069–71; see also *Aalmuhammed*, 202 F.3d at 1231.

200. “[The client’s] contribution is their idea . . . so pretty valuable stuff. Sometimes they have next to nothing to offer, yet them just being willing and an open vehicle and canvas for what I can provide them is a lot as well.” Interview with Subject 1, *supra* note 8, at 3. See also 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”).

201. See *supra* notes 197–200 and accompanying text.

202. See, e.g., Interview with Subject 2, *supra* note 8, at 22; *id.* with Subject 10 at 96.

whether the design is ultimately transformed from a drawing on paper to a tattoo on the body.

Once that transformation occurs, tattooers invariably express a commitment to the clients' autonomy over their bodies and the tattoos that have become an integral part of them.<sup>203</sup> Far from seeing them as slaves or "cattle," tattooers recognize the freedom and individuality of their clients.<sup>204</sup> When asked whether she had any right to control the display, reproduction, or other use of a client's tattoo, one tattooer offered the following response, which accurately captures both the substance and fervor of the industry norm:

It's not mine anymore. You own that, you own your body. I don't own that anymore. I own the image, because I have [the drawing] taped up on my wall and I took a picture of it. That's as far as my ownership goes. [Claiming control over the client's use of the tattoo is] ridiculous. That goes against everything that tattooing is. A tattoo is like an affirmation that it is your body . . . that you own your own self, because you'll put whatever you want on your own body. For somebody else to say, "Oh no, I own part of that. That's my arm." No, it's not your fucking arm, it's my fucking arm. Screw you.<sup>205</sup>

Copyright law limits the author's right to control a work after a transfer of ownership of a copy of that work.<sup>206</sup> The first sale doctrine, which terminates the distribution right after a lawful transfer of title in a copy, is the most familiar example of copyright law's exhaustion principle, but not the only one.<sup>207</sup> Section 109(c) of the Copyright Act, for example, provides that the owner of a copy of work is entitled to display that work publicly.<sup>208</sup> As a result, when Mike Tyson walks down the street or appears on Broadway, he runs no risk of infringement. But the Copyright Act does not generally extend to the owner of a copy any unique privilege to reproduce the work or create derivatives based on it.<sup>209</sup>

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203. *Id.* with Subject 11 at 111; *id.* with Subject 12 at 128.

204. Nimmer Declaration, *supra* note 128, at 5 ("Copyright law thereby becomes the instrument to impose, almost literally, a badge of involuntary servitude, akin to the mark with which ranchers brand the cattle they own.").

205. Interview with Subject 12, *supra* note 8, at 128 (internal quotation marks omitted).

206. *See infra* notes 207–09 and accompanying text.

207. 17 U.S.C. § 109(a) (2012).

208. *Id.* § 109(c).

209. *But see id.* § 117 (enabling owners of copies of computer programs to create derivative works and reproductions). The common law rule of copyright exhaustion also extends beyond the statutory limitations to embrace unauthorized reproductions and derivatives under limited circumstances. *See generally* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA

Tattooers, in contrast, embrace a more robust set of exhaustion rights favoring their clients.<sup>210</sup> In addition to public displays of their tattoos, they acknowledge clients' rights to reproduce images of their tattooed bodies, whether by uploading images to their Facebook profiles, submitting photos for publication in tattoo magazines, or even reproducing a picture of the tattoo for commercial purposes.<sup>211</sup> As one tattooer recounted, "I've had guys say, 'I'm getting ready to put out a CD and I want to put [a picture of my tattoo] on the CD cover.' That's flattering. As far as I'm concerned, they own their arm. They own that piece of work."<sup>212</sup>

Tattooers also recognize that clients are free to create new works that incorporate or even destroy their original designs.<sup>213</sup> New designs frequently use the client's existing tattoos as a starting point for expansion, regardless of who did the original work.<sup>214</sup> And clients with poorly executed tattoos often ask more skilled tattooers for a "coverup"—a new tattoo that entirely conceals the existing one.<sup>215</sup> None of the tattooers with whom I spoke expressed any reservation about these widespread practices.<sup>216</sup> Assuming these new tattoos would constitute derivative works in the first place, tattoo industry norms would seem more forgiving than formal copyright law, which places the creation of derivative works within the copyright holder's discretion.<sup>217</sup>

But under prevailing industry norms, not all client uses are acceptable.<sup>218</sup> Tattooers distinguish between uses of the tattoo as applied to the body, which are universally accepted, and uses of the tattoo design as a work disconnected from the body, which are subject to greater skepticism.<sup>219</sup> For example, one tattooer told me:

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L. REV. 889 (2011).

210. See Interview with Subject 8, *supra* note 8, at 68 (stating that the individual receiving the tattoo commissioned the work, thus the tattooer does not believe that he has "rights" over it).

211. Interview with Subject 1, *supra* note 8, at 14–15; *id.* with Subject 5 at 45; *id.* with Subject 8 at 68; *id.* with Subject 10 at 98.

212. *Id.* with Subject 8 at 68.

213. See *supra* Interview Subjects accompanying note 211.

214. Interview with Subject 8, *supra* note 8, at 69.

215. *Id.*; see also *id.* with Subject 6 at 54; *id.* with Subject 7 at 62–63.

216. *E.g.*, *id.* with Subject 8 at 69.

217. 17 U.S.C. § 106(2) (2012).

218. See Interview with Subject 2, *supra* note 8, at 21; *id.* with Subject 13 at 142.

219. See *id.* with Subject 2 at 21; *id.* with Subject 13 at 142.

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If [a client] wanted to then take [the tattoo design] and give it to a graphic artist and have him turn it into an image [for a commercial use], then I'd have a problem with that, or at least I'd feel like I should get some kind of compensation for it. But if it was just a photo [of the tattoo] . . . even if it's the centerpiece [of an advertisement], I'm OK with that.<sup>220</sup>

Although copyright litigation remains quite rare in the tattoo industry, disputes situated at the edge of the client autonomy norm may prove the most likely to spur formal enforcement efforts.<sup>221</sup> Tattooer Christopher Escobedo recently filed suit against the developer of *UFC Undisputed 3*, a video game featuring Escobedo's client, mixed martial arts fighter Carlos Condit.<sup>222</sup> Escobedo alleged that the game infringed his copyright by including a digital representation of the lion tattoo he created on Condit's torso.<sup>223</sup>

The developer's use of the lion tattoo arguably transgressed the limits of the client autonomy norm because its use while in connection with a digital representation of Condit, was detached from the client's body.<sup>224</sup> However, Escobedo's decision to sue departs from the background norm against litigation.<sup>225</sup> In cases such as this one or the *Hangover 2* dispute—where use is made by a third party not subject to the substantive norms of the tattoo community, the client is not named as a defendant, and significant economic value is at stake—the general norm disfavoring litigation may be particularly susceptible to erosion.<sup>226</sup>

Those rare cases aside, tattoo industry norms place a premium on establishing and maintaining the relationship between the tattooer and the client.<sup>227</sup> As one interview subject put it, "To get a great tattoo, it's a full surrender into trust and faith in the tattooer."<sup>228</sup> In part, that relationship of trust is fa-

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220. *Id.* with Subject 13 at 142.

221. Complaint, Escobedo v. THQ, Inc., No. 2:12-cv-02470 (D. Ariz. Nov. 16, 2012).

222. *Id.*

223. *Id.* at 2–4.

224. See Interview with Subject 2, *supra* note 8, at 21; *id.* with Subject 13 at 142.

225. See *supra* note 165 and accompanying text.

226. See Interview with Subject 1, *supra* note 8, at 15–16; *id.* with Subject 2 at 21; *id.* with Subject 3 at 31–32.

227. See *id.* with Subject 1 at 3; *id.* with Subject 11 at 108.

228. *Id.* with Subject 1 at 3.

cilitated by the tattooer's recognition of client autonomy.<sup>229</sup> But as the next section demonstrates, those obligations to the client manifest themselves in other, ongoing ways.

### C. REUSING CUSTOM DESIGNS

Tattooers are frequently asked to replicate their own custom designs on subsequent clients.<sup>230</sup> After perusing a tattooer's portfolio, a new client—typically a tattoo novice—will identify a custom design tattooed on an existing client and ask the tattooer for the same tattoo.<sup>231</sup> As a rule, tattooers refuse to apply one client's custom tattoo to a second client.<sup>232</sup> Those requests are most often met with the frank response, “No. [That's] someone else's tattoo.”<sup>233</sup>

The norm against reuse of custom designs is rooted in three primary concerns: the tattooer's own artistic interest in variety,<sup>234</sup> the original client's expectation of a one-of-a-kind tattoo,<sup>235</sup> and an obligation to develop a design that more closely suits the needs of the second client.<sup>236</sup>

Most custom tattooers take pride in their ability to create distinct tattoos for each of their clients.<sup>237</sup> One tattooer told me she “would never put a custom tattoo that [she] created for an individual client on another client . . . because . . . [she] th[ought] it [would] compromise [her] integrity as a tattooer, and just as an artist in general.”<sup>238</sup> Another interview subject explained the reluctance to reuse designs in simpler terms: “[I]t's no fun . . .”<sup>239</sup>

Aside from creative self-interest, tattooers expressed “empathy” or “respect” for and an “ethical duty” to clients who en-

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229. See, e.g., *id.* with Subject 11 at 108 (explaining that tattooers take suggestions from the client because ultimately it is his/her tattoo).

230. E.g., *id.* with Subject 6 at 49; *id.* with Subject 10 at 97; *id.* with Subject 12 at 126.

231. See *supra* Interview Subjects accompanying note 230.

232. See *supra* Interview Subject accompanying note 230.

233. Interview with Subject 6, *supra* note 8, at 49.

234. See *id.* with Subject 6 at 49 (“I just don't want to. I've already done that tattoo.”).

235. See *id.* with Subject 7 at 58 (explaining that an existing tattoo can be used as inspiration).

236. *Id.* with Subject 2 at 19; *id.* with Subject 5 at 42–43.

237. See *id.* with Subject 1 at 5–6; *id.* with Subject 11 at 109.

238. *Id.* with Subject 11 at 109.

239. *Id.* with Subject 2 at 19.

trust them to design and apply custom tattoos.<sup>240</sup> Some see their obligation in almost contractual terms.<sup>241</sup> One tattooer told me, “I designed that custom for that person with an understanding. The agreement I basically made with them was that this design was for that person and that person alone.”<sup>242</sup> But these understandings are not acknowledged expressly.<sup>243</sup>

Still other tattooers think of their duty as an outgrowth of the collaborative design process.<sup>244</sup> Reusing a custom tattoo is wrong because the tattooer is not solely responsible for the design: “The unwritten law [against reusing custom designs] says that this is a product of the relationship between [the tattooer] and [the client].”<sup>245</sup>

Tattooers take this norm against reuse seriously, refusing to reapply the same design unless they receive explicit permission from the original client, as one anecdote illustrates:

I tattooed a rock star [with a custom design that incorporated his daughter’s name]. And I had his wife come in and ask for the exact same tattoo. “It’s my daughter too, I love the way you designed it.” And I told her “you need to call him and ask him. If you call him and he’s okay with it, then I’ll do it.” But because it’s a design we came up with together, it was an agreement that we had.<sup>246</sup>

This sense of obligation extends to the second client as well.<sup>247</sup> Since most first time clients are unfamiliar with the process at custom tattoo shops—or even the distinction between street and custom shops—tattooers often find themselves playing the role of educator.<sup>248</sup> First time clients, familiar with the flash-driven stereotype of a tattoo shop, are often unaware that they can commission a customized design.<sup>249</sup> Others lack familiarity with design principles and vocabulary and feel ill equipped to describe their ideas.<sup>250</sup> Tattooers often treat re-

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240. *Id.* with Subject 2 at 19; *id.* with Subject 11 at 109; *id.* with Subject 12 at 126.

241. *Id.* with Subject 13 at 141.

242. *Id.*

243. *See id.* with Subject 13 at 142 (explaining “I can do something like that. What are the elements that you really like about it?”).

244. *Id.* with Subject 1 at 3.

245. *Id.*

246. *Id.* with Subject 7 at 64.

247. *See id.* with Subject 5 at 42–43 (stating that there is a general agreement that exact tracing of another tattoo is off limits).

248. *See id.* with Subject 6 at 48 (explaining to first timers that an exact tracing cannot be done because it is someone else’s tattoo).

249. *Id.*

250. *Id.* with Subject 11 at 107.

quests to repeat a custom design as a starting point for evaluating the client's true interests.<sup>251</sup> One tattooer's response to such requests offers an example of this approach:

I'll tell them that's somebody else's tattoo. So we can be inspired by their work. You've got to be inspired by something. And I'll try to get more specific. What is it that you like about it? [Is] [i]t the blue, do you like the way it's drop shadowed, is [it] the subject matter? What is it in particular? So when you find that out, most people don't want to copy other people's tattoos. They really don't.<sup>252</sup>

The custom design process can take many forms.<sup>253</sup> Some designs are primarily the work of the tattooer,<sup>254</sup> others are largely dictated by specific client input,<sup>255</sup> and still others are true collaborations.<sup>256</sup> But regardless of the particulars of the design process, tattooers agree that reusing a custom design on another client contravenes industry norms.<sup>257</sup>

Adherence to the norms respecting client autonomy and disfavoring reuse of custom designs is widespread within the tattoo industry.<sup>258</sup> These client-centered norms are non-controversial in part because the behaviors they proscribe are clearly defined.<sup>259</sup> As discussed below, the broader norm against copying the custom designs of other tattooers—though widespread—gives rise to more frequent disagreement because its precise contours are far more open to interpretation.

#### D. COPYING CUSTOM DESIGNS

The norm against copying custom tattoo designs, while widely shared among tattooers, is susceptible to a range of interpretations.<sup>260</sup> Although literal copying of another tattooer's custom design clearly violates the norm,<sup>261</sup> tattooers vary considerably in their evaluation of more subtle forms of copying

251. *Id.* with Subject 7 at 58; *id.* with Subject 12 at 131.

252. *Id.* with Subject 7 at 58.

253. *Id.* with Subject 3 at 27–28.

254. *Id.*

255. *Id.* with Subject 6 at 48–49.

256. *Id.* with Subject 3 at 28; *id.* with Subject 5 at 45.

257. *E.g.*, *id.* with Subject 2 at 19–20; *id.* with Subject 3 at 34.

258. *See id.* with Subject 11 at 111; *id.* with Subject 3 at 27–28; *id.* with Subject at 12 at 128.

259. *See supra* Interview Subjects accompanying note 258.

260. *See* Interview with Subject 1, *supra* note 8, at 5; *id.* with Subject 6 at 51.

261. *See supra* Interviews Subjects accompanying note 260.

that borrow abstract rather than literal design elements.<sup>262</sup> These differing estimations of the line separating impermissible copying from permissible inspiration, transformation, and evolution result in disputes between tattooers.<sup>263</sup>

This section will explore approaches to non-literal copying within the tattoo industry, the variety of informal enforcement mechanisms employed by tattooers when norm violations occur, and the assortment of perceived harms that motivate those responses.

### 1. Defining Copying

Every tattooer interviewed agreed that literal copying of another tattooer's custom design transgresses industry norms.<sup>264</sup> Literal copyists, considered "the lowest of the low" among tattooers, are referred to as "tracers,"<sup>265</sup> "biters,"<sup>266</sup> and "hacks"<sup>267</sup> and closely associated with "scratchers," a derogatory term for tattooers with limited artistic and technical skill.<sup>268</sup> Likewise derided are tattooers who, while they may redraw or refine elements of a design, closely reproduce the basic subject matter, composition, and style of a custom tattoo.<sup>269</sup>

A custom tattoo designed by Guen Douglas subsequently copied by other tattooers provides examples of both literal and close copying.<sup>270</sup> Figure 1 below shows the original design

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262. See Interview with Subject 1, *supra* note 8, at 5; *id.* with Subject 6 at 51.

263. See, e.g., *id.* with Subject 3, at 40 (recounting a Facebook feud between the subject and another tattooer).

264. See *id.* with Subject 2 at 19–20; *id.* with Subject 3 at 34.

265. Interview with Subject 12, *supra* note 8, at 130.

266. See *id.*

267. *Id.* with Subject 12 at 132.

268. SANDERS, *supra* note 72, at 34.

269. See Interview with Subject 11, *supra* note 8, at 112 (stating that a tattooer that bluntly copied another design has no ethics).

270. Guen Douglas, *How to Avoid Tattoo Plagiarism*, TAM BLOG (Mar. 15, 2012), <http://tattooartistmagazineblog.com/2012/03/15/guen-douglas-how-to-avoid-tattoo-plagiarism>.



Douglas tattooed on her client; Figure 2 depicts a literal copy created by another tattooer.<sup>271</sup>

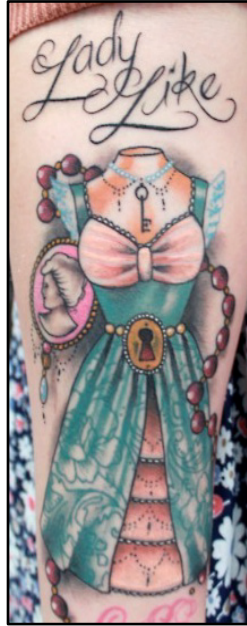


Fig. 1

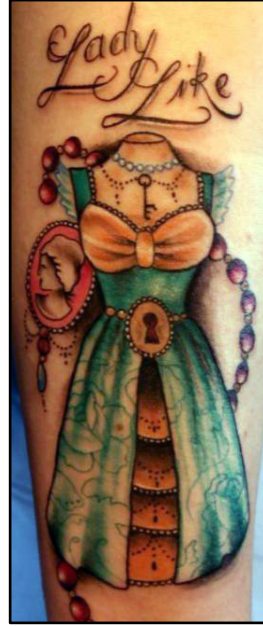


Fig. 2

As the images demonstrate, every element of the original custom tattoo was appropriated.

The subject matter, composition, outline, shading, color choices, text, and even placement on the body were copied. Of course, given the hand-fashioned nature of tattoos, not to mention variations in skin tone and body shape among clients, no two tattoos are ever identical.<sup>272</sup> But these two images represent the extreme of literal copying within the medium.<sup>273</sup>

271. *Id.*

272. Interview with Subject 8, *supra* note 8, at 71.

273. See Douglas, *supra* note 270 (discussing the difference between the sharing of ideas amongst peers and the replicating of a previously commissioned art piece on a new client as-is).

Although the tattoo depicted in Figure 3 offers some variations on the original custom design in terms of color and text, most tattooers would recognize it as a close copy that violates industry norms.<sup>274</sup>

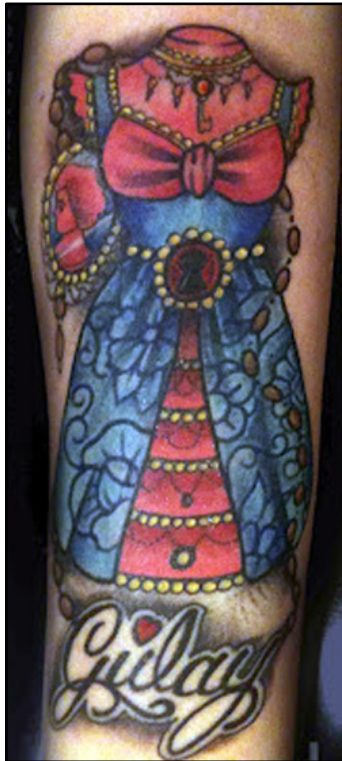


Fig. 3

These examples of literal or close copying present uncontroversial violations of industry norms.<sup>275</sup> At the other end of the spectrum, tattooers generally treat purely abstract ideas, defined in terms of subject matter or style, as free for the taking.<sup>276</sup> In one tattooer's estimation, "Maybe it's your idea, maybe it's your client's idea, but you just don't have ownership over that idea. It existed before your tattoo. So to say [for example],

274. See Interview with Subject 7, *supra* note 8, at 61–62; *id.* with Subject 11 at 112; Douglas, *supra* note 270.

275. See Interview with Subject 2 *supra* note 8, at 19–20; *id.* with Subject 3 at 34.

276. See, e.g., *id.* with Subject 12, at 131.

‘That’s my owl and hourglass,’ is just stupid.”<sup>277</sup> Between these two extremes, however, tattooers lack any widely accepted definition of impermissible copying.<sup>278</sup>

Interview subjects consistently referred to the wide swath of borrowing, situated between literal tracing and drawing upon common themes or ideas, as a grey area.<sup>279</sup> Whether a particular instance of borrowing runs counter to industry norms hinges on the particular facts and circumstances surrounding the design of the tattoos at issue, rendering *ex ante* determinations difficult.<sup>280</sup> As one tattooer explained, “In that grey area, there isn’t a line until someone draws it. But that’s always retroactive. The line is identified as being crossed after the fact. You can’t identify it.”<sup>281</sup>

Within this grey area, tattooers are sensitive to the risk of treading too closely to another custom design.<sup>282</sup> In response, some adopt strategies to reduce the risk of running afoul of the anti-copying norm.<sup>283</sup> When faced with a client who asks for a copy of a custom tattoo, they deconstruct—or in their words “dissect[]” or “reverse engineer[]”—the design to isolate the particular elements that appeal to the client and create a new design.<sup>284</sup>

Others try to insulate themselves from the potential influence, conscious or subconscious, of other tattoo designs.<sup>285</sup> One tattooer said that if a client brings in a photo of another tattoo as a reference for a new design, “I don’t even want to look at that. Don’t put that in the back of my head, I don’t want to see

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277. *Id.*

278. *See id.* with Subject 12 at 130–31.

279. *See id.* with Subject 2 at 41 (arguing that it is impossible to distinguish “copying” from “not copying”).

280. *See id.* with Subject 6 at 51 (stating that if a tattooer is copying from a photograph that is different than copying from another person’s tattoo).

281. *Id.* That description of the elusive line separating idea from expression calls to mind Learned Hand’s apothegm. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930) (“Nobody has ever been able to fix that boundary [between idea and expression], and nobody ever can . . . [W]hile we are as aware as any one that the line, wherever [sic] it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases . . . [w]hatever may be the difficulties *a priori*.”).

282. *See* Interview with Subject 2, *supra* note 8, at 41 (explaining that he would not send his portfolio to anyone for fear that it would be copied).

283. *See id.* with Subject 6 at 50–51 (noting that some tattooers purposefully do not copy).

284. *Id.* with Subject 5 at 50; *see also id.* with Subject 4 at 42–43.

285. *See id.* with Subject 2 at 19.

it.”<sup>286</sup> Others studiously avoid looking at the work of other tattoos as a general rule to avoid undue influence. Otherwise, “you’ll draw from [other custom designs] subconsciously, no matter what.”<sup>287</sup>

But most tattooers are not quite so troubled by the prospect of non-literal borrowing.<sup>288</sup> Many see some degree of copying as an unavoidable, and occasionally desirable, consequence of the creative process.<sup>289</sup> The tattoo industry is steeped in tradition. And while more recent crops of tattooers have distanced themselves, on a technical level, from the primitive work of generations past,<sup>290</sup> they simultaneously demonstrate a certain reverence for traditional tattoo aesthetics.<sup>291</sup> Clients are likewise drawn to the rich iconography of tattoo history.<sup>292</sup> Daggers, ships, and roses—although drawn with more artistry—remain staples within the contemporary tattoo industry.<sup>293</sup>

Because of the constraints of their milieu, drawing from the common pool of traditional design elements is often inevitable.<sup>294</sup> “[T]attooing and the imagery within the industry, it’s so homogenous and everything is so iconic. You can’t just stake claim to something like that.”<sup>295</sup> Or as another tattooer put it, referring to the ornamental fish common in traditional Japanese tattooing, “a koi is a koi is a koi.”<sup>296</sup> In light of those constraints, tattooers recognize that claims of similarity between custom designs must be tempered by the influence of stylistic and subject-matter conventions.<sup>297</sup>

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286. *Id.*

287. *Id.* with Subject 12 at 136. This worry is similar to the theory of subconscious copying adopted by the court in *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

288. See Interview with Subject 12, *supra* note 8, at 130; see also *id.* with Subject 11 at 113.

289. See *id.* with subject 11 at 113 (discussing the benefits of learning from other tattooers).

290. See *id.* with Subject 6 at 53 (noting that tattooers have become more advanced in their tattooing abilities compared to tattooers of the “tattoo renaissance”).

291. See *id.* with Subject 12 at 130 (discussing some of his inspirations).

292. See *The Meaning of Old School Tattoos*, TATTOO JOY (2012), <http://tattoojoy.com/meaning-old-school-tattoo.htm> (discussing tattoo history).

293. See Interview with Subject 12, *supra* note 8, at 130.

294. See *id.* with Subject 11 at 113.

295. *Id.*

296. *Id.*

297. See *id.* with Subject 1 at 15 (discussing the difference between custom designs by style versus custom design influenced by subject matter).

The *scènes à faire* doctrine in copyright law is premised on a similar insight.<sup>298</sup> Courts have acknowledged that where two works both contain elements common to a given setting or genre, “infringement cannot be based on those elements alone (or principally) but instead on the elements that are not inevitable in the genre in question.”<sup>299</sup> Just as “drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx,”<sup>300</sup> traditional American tattoos are likely to depict swallows, anchors, and roses with bold outlines and bright colors.<sup>301</sup> As Figure 4 illustrates, such tattoos often share much in common even in the absence of copying. To the extent a custom tattoo fits within the confines of a genre, tattooers see them as less susceptible to claims of copying.<sup>302</sup>



Fig. 4

The notion of a shared commons of established tattoo styles and imagery helps explain some exceptions to the general norm against copying. One interview subject told me:

If [the artist is] dead, you can copy it. If that person has been around a long time and is highly respected and revered, and he was a trailblazer of a certain style, it just goes without saying that people are going to have to follow that in order to find their own way. . . .<sup>303</sup>

As discussed below, these exceptions also reflect tattooers’ ideas about the kinds of harm the anti-copying norm is meant

298. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:24 (2013).

299. *Id.*

300. Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986).

301. See Art Rivera, *Old School Tattoos: History, Examples, Symbolism, New Ways of Usage*, DESIGN FLOAT BLOG (June 7, 2013) <http://www.designfloat.com/blog/2013/06/07/oldschool-tattoos/>.

302. Interview with Subject 1, *supra* note 8, at 3.

303. *Id.* with Subject 1 at 5.

to protect against.<sup>304</sup> However, it is also indicative of a recognition that copying is sometimes a necessary component of the creative process.

The skepticism tattooers express about originality is not limited to traditional tattoo imagery.<sup>305</sup> Regardless of subject matter or style, they see copying as integral to their creative enterprise.<sup>306</sup> In part, this attitude reflects the eagerness with which tattooers have mined other cultures, media, and art forms to satisfy client demands.<sup>307</sup> As Ed Hardy, one of the early pioneers of contemporary tattooing, explained, “tattooing is the great art of piracy. . . . Tattoo artists have always taken images from anything available that customers might want to have tattooed on them.”<sup>308</sup>

Many tattooers embrace the role influence and inspiration play in the creative process. Even for tattooers who create new custom designs for each client, true originality is often more myth than reality:

Everything we’re doing is copying. Everything I’ve ever done is copying. Everything I’ve done is inspired by somebody else. I’m not doing anything new that [other tattooers] haven’t done 20 years ago. . . . I don’t feel ashamed about it [sic] and I don’t feel bummed out on that.<sup>309</sup>

Others see copying as a form of creative dialog that should not only be accepted but celebrated.<sup>310</sup> One tattooer explained that “[i]f someone takes something I’ve done and [he is] inspired by it, takes it, reworks it, and makes it even better[,] [t]hat’s not going to make me upset. That’s going to make me say, dude, I can step it up too.”<sup>311</sup>

Tattooers agree that literal and close copying violate industry norms.<sup>312</sup> But outside of those easy cases, tattooers exhibit a range of attitudes when their custom designs share common elements.<sup>313</sup> Some see any degree of conscious or subconscious

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304. See *infra* Part II.D.3.

305. See Interview with Subject 12, *supra* note 8, at 130–31 (discussing copying a new style or technique).

306. *Id.*

307. See Benson, *supra* note 52, at 242.

308. *Id.* at 243 (quoting Don Ed Hardy).

309. Interview with Subject 12, *supra* note 8, at 130.

310. See *id.* with Subject 7 at 61.

311. *Id.*

312. *Id.* with Subject 5 at 43.

313. See *id.* with Subject 8 at 70 (discussing different reactions tattoo artists have).

borrowing as something to be avoided, while others embrace the influence of their peers.<sup>314</sup> Not surprisingly, tattooers faced adopt a range of stances when confronted with copying.<sup>315</sup>

## 2. Detection & Enforcement

Custom tattoos are inherently private works.<sup>316</sup> Aside from the client's social acquaintances and customers browsing the tattooer's portfolio, few people have occasion to view a custom tattoo.<sup>317</sup> Therefore, they have been less susceptible to copying than the mass media products at the center of most copyright litigation. For this reason, many tattooers were skeptical of the rise of tattoo magazines in decades past because they posed an increased risk of copying.<sup>318</sup> But today, images of custom tattoos are more accessible than ever.<sup>319</sup> Tattooers and tattoo shops post photos of their work on their websites; clients share photos of their tattoos on social networks like Facebook; and microblogging sites like Tumblr and Pinterest feature thousands of photos of custom tattoos, often without attribution to either the tattooer or the client.<sup>320</sup> This widespread availability of custom tattoo images—combined with an influx of inexperienced tattooers and clients—has resulted in a marked increase in literal and close copying within the tattoo industry.<sup>321</sup>

The majority of tattooers shared at least one anecdote of their custom tattoo designs being copied by another tattooer in violation of the anti-copying norm.<sup>322</sup> In most of these stories, the internet played a role in enabling both access to the original tattoo and detection of the copy.<sup>323</sup> Tattooers often discover cop-

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314. Compare *id.* with Subject 3 at 34 (“I don’t believe in homage at all.”), with *id.* with Subject 8 at 70 (“I would feel flattered.”).

315. See *id.* with Subject 8 at 70.

316. See *id.* with Subject 7 at 62 (explaining that the tattoo will only be seen on the tattooed person).

317. See *id.*

318. See DEMELLO, *supra* note 29, at 34–37.

319. See Interview with Subject 9, *supra* note 8, at 83 (discussing accessibility of tattoos on the internet).

320. See, e.g., #tattoo, TUMBLR (Sept. 26, 2013, 11:35 AM), <http://www.tumblr.com/tagged/tattoos> (illustrating numerous tattoos and tattooers at work).

321. See SANDERS, *supra* note 72, at 175–76 (explaining inexperienced tattooers and copying).

322. See, e.g., Interview with Subject 9, *supra* note 8, at 88 (describing a time when his tattoo of a lion ended up on TUMBLR on a girl that he never tattooed).

323. See *id.*

ies when clients, friends, or other tattooers recognize a copied design and bring it to their attention.<sup>324</sup> None of the tattooers with whom I spoke have actively searched for copies of their work.<sup>325</sup>

Technology also plays a role in the various enforcement mechanisms employed by tattooers.<sup>326</sup> Face to face responses to copying do sometimes occur if two tattooers happen to work in the same city or encounter each other at one of the many tattoo conventions across the country.<sup>327</sup> But because of the national and international scope of the tattoo industry, email, Facebook, and tattoo-specific online discussion boards are increasingly the loci of enforcement efforts.<sup>328</sup>

When tattooers encounter what they consider copies of their work, they typically adopt one of three basic strategies: inaction, direct communication, or negative gossip.<sup>329</sup> Many tattooers, typically those with more than a decade of experience, told me that, while they recognize that copying is inconsistent with the norms and expectations of the industry, they have no interest in pursuing any recourse, formal or informal, against copyists.<sup>330</sup> One tattooer, after describing a scenario in which a custom sleeve—a tattoo occupying the client’s entire arm, from shoulder to wrist—was traced by another tattooer explained, “[y]ou can’t control other people. If you try to live your life controlling other people, good luck with that. It’s disheartening, but you have to let that stuff go.”<sup>331</sup>

Other tattooers communicate directly with copyists.<sup>332</sup> These conversations range from the friendly to the overtly confrontational.<sup>333</sup> Some veteran tattooers see instances of copying as

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324. See *id.* with Subject 11 at 111 (noting that his friend relayed instances of copying that were discovered at a tattoo convention).

325. *Id.*

326. See *id.* with Subject 12 at 132 (discussing an internet response to copying).

327. See *id.* with Subject 13 at 150 (describing an altercation at a convention).

328. See Beasley, *supra* note 127, at 1172–73 (describing how tattoo artists use the internet to search for copying).

329. See *id.* at 1166–68.

330. See, e.g., Interview with Subject 7, *supra* note 8, at 60 (explaining that tattooers do not “do anything” because “imitation is the highest form of flattery”).

331. *Id.*; see also Beasley, *supra* note 127, at 1168.

332. Beasley, *supra* note 127, at 1168.

333. See Interview with Subject 12, *supra* note 8, at 134 (describing a range of reactions from playful teasing to intense anger).



an opportunity to educate their less experienced colleagues.<sup>334</sup> One tattooer said he “might politely or tactfully offer some guidance” to someone who copied his design, in hopes that the copyist would change his behavior and grow as an artist.<sup>335</sup> Another tattooer suggested that a common response to minor instances of copying is “teasing” or “calling each other out” in a way that acknowledges the borrowing without any direct accusation of wrongdoing.<sup>336</sup> Less affably, other tattooers described sending “[a] strongly worded email” to confront a copyist.<sup>337</sup>

One subject reported a minor physical altercation between two tattooers over allegations of copying, but physical violence in the tattoo industry today is uncommon.<sup>338</sup> Several interview subjects, however, spoke of the very real threat of violence in earlier eras of tattooing:

[T]here are nicer people who are tattooing now. That in turn makes people less scared to rip somebody off, because they maybe haven't been in the tattoo world long enough to ever have that fear that someone might break their hand or something, which people did when I first started tattooing.<sup>339</sup>

As tattooers with art school degrees replaced bikers and ex-convicts,<sup>340</sup> instances of physical violence, arson, and other extreme consequences of violating community norms disappeared.<sup>341</sup>

Today, rather than grievous bodily harm, the primary consequence tattooers face for copying is negative gossip.<sup>342</sup> Tattooers mention “public shaming,” “blacklist[ing],” and “shit talking” as the most common means of responding to copyists.<sup>343</sup> Despite its size and geographic scope, many interview subjects described the tattoo industry as a tight-knit communi-

334. See *id.* with Subject 1 at 15 (stating that rather than taking a copying matter to court, tattooers will educate others on the taboos surrounding copying).

335. *Id.*

336. *Id.* with Subject 12 at 134.

337. *Id.* with Subject 2 at 22.

338. *Id.* at 23.

339. *Id.* with Subject 3 at 39.

340. See *id.* with Subject 11 at 122 (discussing a change in tattoo artists' demographics).

341. See *id.* with Subject 7 at 62–63 (“In the old days there were definitely consequences. You couldn't set up shop. If you copied a flash instead of paying for it, they'd break your hands, beat you up, burn your shop down, tell everyone I know that you are a rip off artist.”).

342. See Beasley, *supra* note 127, at 1167.

343. Interview with Subject 2, *supra* note 8, at 22, 23; *id.* with Subject 7 at 62. See also Beasley, *supra* note 127, at 1167–68.

ty.<sup>344</sup> As a result, gossip can have serious social and professional consequences: “[S]ocially, you’re screwed. In the community, you’re screwed. . . . Being part of the community is a really strong, important part of your growth . . . .”<sup>345</sup>

This gossip spreads primarily among tattooers; clients are rarely in a position to know that a tattooer has earned a reputation for copying.<sup>346</sup> So although they may feel a sense of social isolation, copyists rarely experience any direct financial harm as a result of negative gossip.<sup>347</sup> But occasionally, tattooers will make a more public stand against perceived copying.<sup>348</sup> One tattooer described her experience being publicly accused of copying in a widely read blog post:

I cried in my bed for like three weeks and didn’t leave. I was devastated. . . . [H]e said, “Boycott her tattooing. She doesn’t deserve to tattoo. She’s a hack tattooer.” I mean, those are strong statements. Then, to go on his blog or whatever and see what [other] people wrote about me. I’m a girl. I’m sensitive. I fucking cried for weeks.<sup>349</sup>

Although several tattooers recounted instances of confrontation, negative gossip, public shaming, and the like, many took a notably lax attitude toward the enforcement of industry norms.<sup>350</sup> Even when their own work was copied in a manner that violated community norms, they did little to pursue the copyist.<sup>351</sup> This might suggest that tattoo industry norms are inconsistently enforced, or perhaps that the attitudes and practices in the industry are merely behavioral regularities and not norms at all. But for tattooers, like many other groups, norms are often identity constitutive.<sup>352</sup> Violating industry norms not only runs the risk of community disapproval, it also undermines a tattooer’s self-conception.<sup>353</sup> External enforcement ef-

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344. See Interview with Subject 10, *supra* note 8, at 102 (noting that a tattooer will be ostracized from the tattooer “circle” if he/she is found copying).

345. *Id.* with Subject 1 at 9.

346. See *id.* with Subject 2 at 23 (explaining that clients may not be aware, but within the industry, artists get blacklisted).

347. See *id.* with Subject 13 at 150 (describing the success of artists known for copying).

348. See *id.* with Subject 12 at 133.

349. *Id.*

350. See, e.g., *id.* with Subject 9 at 88 (discussing an instance when the subject’s work was copied).

351. See *id.*

352. See generally Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (challenging widely held understandings of “rationality, choice, and freedom,” and arguing that behavior is a function of norms).

353. See Interview with Subject 11, *supra* note 8, at 109 (discussing his “in-

forts may be less important when, as here, community members have internalized norms.<sup>354</sup>

While most custom tattooers take seriously both community disapproval and harms to self-conception, the norm against copying does not apply with the same force in street shops.<sup>355</sup> In many ways, the street shop stands as a holdover of the pre-renaissance tattoo world. In terms of training, outlook, and socioeconomics, street shop tattooers often share more in common with midcentury tattooers than contemporary custom tattooers.<sup>356</sup> Whereas the custom tattoo community emphasizes artistry and originality, the street shop mentality focuses on speed, efficiency, and client turnover.<sup>357</sup>

These two environments inculcate very different sets of values.<sup>358</sup> Tattooers who learn their craft in a custom shop are taught to avoid copying.<sup>359</sup> One tattooer explained that the “one moral thing [he] got out of [his apprenticeship], was that you just don’t copy anybody’s work.”<sup>360</sup> But a tattooer who started out at a street shop was exposed to a different set of values:

[W]hen I first started tattooing I was at a street shop with real old salty guys. They had absolutely no problem ripping people off, at all, ruthlessly. To the point where I remember one of the guys that was teaching me to tattoo being like, “Well, if they didn’t put it on the Internet, they wouldn’t want it stolen.”<sup>361</sup>

As a result, literal and close copying of custom designs are more prevalent in street shops.<sup>362</sup> Tattooers with artistic aspirations are less likely to copy.<sup>363</sup> “Anybody at a certain level isn’t going to try to copy. Only the guys at the bottom rung are going

tegrity as a tattooer”).

354. Cooter’s claim that norms do not exist absent internalization is difficult to square with norm systems that appear to function primarily on the basis of external enforcement. See Cooter, *supra* note 11, at 1665. Nonetheless, both norm internalization and external sanctions can reinforce one another. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376–78, 381 (1997).

355. Interview with Subject 13, *supra* note 8, at 145.

356. See generally DEMELLO, *supra* note 29, at 97–135 (describing class and status distinctions within the tattoo community).

357. See Interview with Subject 13, *supra* note 8, at 145 (“They’re just fucking banging shit out, it’s like, to get it done quick and efficiently.”).

358. See *id.*

359. See *id.* with Subject 10 at 97 (explaining that real artists of any medium do not copy or trace).

360. *Id.*

361. *Id.* with Subject 12 at 135.

362. See *id.* at 135–36.

363. See *id.* with Subject 7 at 60.

to be willing to do that.”<sup>364</sup> And tattooers who operate in the street shop environment are less responsive to the threat of negative gossip among custom tattooers.<sup>365</sup> As one tattooer told me, “usually those scratchers don’t give a hoot about the morality, or any sort of industry consequences.”<sup>366</sup> But for those who aspire to maintain or achieve a sense of belonging and recognition within the broader tattoo community, including many tattooers currently working in street shops, the anti-copying norm exerts significant influence.<sup>367</sup>

### 3. The Harms of Copying

The variety of responses to violations of the anti-copying norm reflects the assortment of perceived harms tattooers associate with copying. Some regard copying as a compliment;<sup>368</sup> others are concerned that copying injures their clients.<sup>369</sup> For many tattooers, interests in attribution and artistic integrity are at the root of the norm against copying custom designs.<sup>370</sup> But tattooers also talk about the financial harms of copying, sometimes as a matter of competitive pricing, but more often in terms of free riding.<sup>371</sup> The harms tattooers articulate, in turn, offer a window into the underlying explanations for both the content of tattoo industry norms and the more fundamental choice to forego formal legal enforcement.

Some tattooers subscribe to Charles Caleb Colton’s aphorism: “Imitation is the sincerest [form] of flattery.”<sup>372</sup> They see copies of their custom tattoos as recognition of the power and appeal of their designs.<sup>373</sup> But for most tattooers, copying inflicts some combination of financial and dignitary harm.<sup>374</sup>

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364. *Id.*

365. *See id.* with Subject 12 at 135 (describing her experience at a street shop).

366. *Id.* with Subject 2 at 20.

367. *See id.* with Subject 12 at 135–36 (discussing her struggle to gain acceptance while working in a street shop).

368. *Id.* with Subject 8 at 70.

369. *Id.* with Subject 7 at 60.

370. *See id.* with Subject 11 at 114 (explaining that the greatest aspect of being a tattooer is being creative).

371. *See id.* with Subject 12 at 130 (saying “[t]hat’s the biggest thing, it’s just lazy”).

372. C. C. COLTON, *LACON: OR, MANY THINGS IN FEW WORDS; ADDRESSED TO THOSE WHO THINK 113* (London et al. eds., 1820).

373. *See* Interview with Subject 9, *supra* note 8, at 88.

374. *See id.* with Subject 12 at 134 (discussing a tattoo artist’s reaction to perceived copying).

Many object to copying for the same reason they refuse to reuse their own custom designs: clients have expectations of a unique, personal tattoo. Tattooers describe custom designs as imbued with “very personal sentiment,” an “express[ion of] . . . individuality,” or even something “sacred.”<sup>375</sup> As a result, when a tattooer copies a custom design, it erodes the value of the client’s one-of-a-kind tattoo.

Tattooers see themselves as personally injured by copying as well.<sup>376</sup> When their designs are copied, they are denied some measure of “notoriety,” “awareness,” or “respect” they would have otherwise derived from a successful tattoo.<sup>377</sup> In the words of one tattooer, “I think the initial harm was somebody else getting credit for something that I created. So someone else [was] receiving some sort of personal gain . . . socially.”<sup>378</sup> This interest in attribution is also evident in the complaints tattooers vocalize when images of tattoos they created are posted on the internet without credit.

The financial impact of copying is at the fore for many tattooers.<sup>379</sup> Because they charge hourly rates, the amount of cash in a tattooer’s pocket at the end of each day depends on the number of clients booked and the complexity of the tattoos executed.<sup>380</sup> Worries over business lost to copyists, therefore, can be felt acutely.<sup>381</sup> Many tattooers “are concerned about [copying] because they think it’s money being taken out of their mouth . . . because there’s a guy down the street now that might be tattooing and doing the same kind of style for, say, \$20 less.”<sup>382</sup> This risk of “underselling”—tattooing the same imagery at a lower price—explains why some tattooers take copying so seriously.<sup>383</sup>

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375. *Id.* with Subject 11 at 115; *id.* with Subject 7 at 62.

376. *See id.* with Subject 1 at 7 (explaining that copying is deeper than a personal financial issue; copying goes against tradition).

377. *Id.*

378. *Id.* with Subject 11 at 114.

379. *See id.* with Subject 12 at 134 (discussing how the copyist will charge significantly less than the original tattooer, compromising the original tattooer’s profitability).

380. *See id.* with Subject 8 at 68 (discussing how payments by the hour work practically).

381. *Id.* at 73.

382. *Id.*

383. *Id.* with Subject 12 at 134.

Other tattooers, however, were dismissive of the notion of direct financial harm from copying.<sup>384</sup> First, unless two tattooers operate in the same city, they rarely compete for the same clients.<sup>385</sup> While some clients do travel to work with a preferred tattooer, most seek services close to home.<sup>386</sup> Second, well established tattooers, whose designs are most likely to be copied, are often booked with a full slate of appointments many months in advance and therefore may not have the capacity to serve the copyist's client.<sup>387</sup> But at least one tattooer rejected this rationalization, explaining:

[People] view tattooers on these different tiers. They have these ideas of big name people and, "This person's OK to rip off . . ." because they assume that some guy's booked a year ahead and it doesn't affect him . . . [T]he people who ripped me off were . . . less accomplished than me so they felt like that was justified. Like, "Oh, whatever, you work at this great shop. You're a big name guy." I'm like, No, I'm not. We probably pay the same amount of rent.<sup>388</sup>

Despite disagreement over the magnitude of direct financial losses attributable to copying, the consensus among tattooers is that creating original designs entails significant opportunity costs.<sup>389</sup> Tattooers talked about the "hard earned time," "struggle," "effort," and "guesswork" involved in designing a custom tattoo.<sup>390</sup> By tracing the results of another tattooer's labor, the copyist is "just lazy."<sup>391</sup> In terms familiar to copyright law, the tracer merely sought "to avoid the drudgery in working up something fresh."<sup>392</sup> By free riding on the efforts and opportunity costs of their peers, tracers inflict perceived harms on other tattooers:

If it's something that took me four hours to draw . . . they're cutting out all that drawing time by just tracing an image of it. They're not putting any effort, whereas I spent hard earned time that I wasn't hanging out with my boyfriend or walking the dog because I was up all night working on this tattoo design that someone else copied.<sup>393</sup>

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384. *See id.* at 135.

385. *See* Beasley, *supra* note 127, at 1172.

386. *See* Interview with Subject 11, *supra* note 8, at 121 (discussing the rarity of client's willingness to travel).

387. *Cf. id.* with Subject 13 at 139 (discussing that the copyist adversely affects the profit margins of the established tattooer).

388. *Id.* with Subject 3 at 34.

389. *See id.* with Subject 2 at 22 (explaining that much time and energy goes into the creation of a new tattoo).

390. *Id.* with Subject 2 at 21–22.

391. *Id.* with Subject 12 at 130.

392. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

393. Interview with Subject 2, *supra* note 8, at 21.

Although opinions differ on the harms copying imposes, the appropriate responses to those harms, and even the precise contours of impermissible copying, tattooers regard literal or close copying of custom tattoo designs as a clear violation of industry norms.<sup>394</sup> In contrast, and as the next two sections discuss, tattooers agree that copying from other works of visual art is a standard and accepted practice within the industry.<sup>395</sup>

#### E. COPYING FLASH

Pre-designed flash images, in contrast to custom tattoos, are copied freely within the tattoo industry, with the implicit understanding that those who acquire a copy of a flash design are entitled to reproduce it on as many clients as they choose.<sup>396</sup> However, the unstated rules surrounding flash impose some important limits on its use as well.<sup>397</sup>

For most of its history in the United States, flash served as the lifeblood of the tattoo industry.<sup>398</sup> Even after the dramatic rise of custom tattooing in recent decades, flash continues to play a major role in street shops.<sup>399</sup> And more recently, the industry has witnessed a resurgence of traditional flash imagery among the more discerning clientele typically associated with higher end custom shops.<sup>400</sup>

Historically, tattoo shops acquired their collections of flash in a number of ways.<sup>401</sup> Young tattooers and apprentices were expected to draw new designs and contribute them to the shop.<sup>402</sup> As one tattooer recounted, “If you were the new up and coming tattoo artist, you made flash that you gave to the owner and it sat in the shop. ‘Here is [sic] some designs I drew that I think everyone can do.’”<sup>403</sup> Tattooers might also share flash designs with one another or copy them from their clients’ bod-

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394. See *id.* at 22–23 (explaining that tattooists known for copying may be banned from conventions and shops).

395. See, e.g., *id.* with Subject 12 at 137 (“Van Gogh can’t tattoo Starry Night on you but I can.”).

396. *Id.* with Subject 2 at 24.

397. See *id.* with Subject 3 at 29 (“[T]here’s also an unspoken thing . . . that you wouldn’t really do it the same.”).

398. See DEMELLO, *supra* note 29, at 52–53.

399. *Id.* at 92.

400. Interview with Subject 7, *supra* note 8, at 63–64.

401. See *id.* at 63.

402. *Id.*

403. *Id.*

ies.<sup>404</sup> Early on, tattooers like Lew Alberts recognized the potentially lucrative market in flash designs and began selling sheets of tattoo designs to those not interested in or capable of drawing their own.<sup>405</sup> Many shops were eager to pay for these images since the greater their stockpile of flash, the more appealing shops were to potential clients.<sup>406</sup>

Tattooers still produce flash today.<sup>407</sup> It is marketed and sold on the internet, through tattoo supply catalogs, and at tattoo conventions across the country.<sup>408</sup> A typical sheet of flash, as illustrated in Figure 5 below, contains five or six designs. A collection of five to ten unique sheets of flash designs sells today from roughly \$50 to \$250.<sup>409</sup> In addition to full-color renderings, contemporary flash is often packaged with separate line drawings of each design to save tattooer the trouble of tracing outlines.<sup>410</sup>



Fig. 5

404. DEMELLO, *supra* note 29, at 53.

405. *Id.* at 52.

406. *See id.* (stating that the early tattoo supply business was highly competitive).

407. *Id.* at 92.

408. Interview with Subject 1, *supra* note 8, at 8.

409. *Id.*

410. *Id.* with Subject 6 at 50.



When Lew Alberts began selling sheets of flash at the turn of the twentieth century, he did not include an end user license agreement to define the permitted uses of his designs.<sup>411</sup> Contemporary designers and retailers of flash are similarly silent on the question of precisely what rights are transferred when a tattooer purchases flash.<sup>412</sup> While this failure to clearly articulate the scope of the license accompanying flash would strike professionals in many creative industries—and certainly their lawyers—as a troubling oversight, tattooers express no hesitation about what the purchase of flash entails.<sup>413</sup>

They describe flash as meant “to be replicated.”<sup>414</sup> In their understanding, “if you purchase a set [of flash] . . . you now have purchased rights to tattoo these images should someone want them.”<sup>415</sup> Purchasing flash entitles the tattooer to copy that design on as many customers as choose it.<sup>416</sup> Ownership of flash also entitles the tattooer to make alterations to the original design by adding, subtracting, or substituting elements or by altering the color palette.<sup>417</sup> As one tattooer explained, “[y]ou do whatever you want to do with it. You can tattoo that on anybody however you want to do it.”<sup>418</sup>

None of these rules are communicated in writing.<sup>419</sup> In fact, they are rarely even spoken.<sup>420</sup> None of the tattooers I interviewed could recall a conversation during which the rules surrounding flash were explained to them.<sup>421</sup> Instead, those rules are “sort of handed down and understood” through observation of daily industry practice.<sup>422</sup>

Copyright law would most likely consider the practices surrounding flash as a matter of implied license.<sup>423</sup> An implied

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411. See DEMELLO, *supra* note 29, at 52 (stating that flash merely contained the original artist’s signature).

412. Interview with Subject 5, *supra* note 8, at 43.

413. *Id.* with Subject 2 at 24.

414. *Id.* with Subject 10 at 101.

415. *Id.* with Subject 2 at 24.

416. *Id.* with Subject 1 at 11.

417. *See id.* at 10.

418. *Id.*

419. *Id.* with Subject 2 at 24.

420. *Id.* with Subject 5 at 43.

421. *E.g., id.* with Subject 8 at 77 (“I was never really told that, but I think that if you know that you’re walking into a tattoo shop and there are designs on the wall, you know that’s what it’s for.”).

422. *Id.* with Subject 2 at 24.

423. *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:131 (2013).

license can arise when a work is created for and delivered to a licensee for a specified use, such as when an architect draws plans for a homeowner.<sup>424</sup> More generally, a copyright owner may grant a nonexclusive license through conduct “from which [the] other [party] may properly infer that the owner consents to [his] . . . use.”<sup>425</sup> Given the long history of flash and the established expectations of both buyer and seller, a court would likely treat the sale of flash as strong evidence of the intent necessary for an implied license.<sup>426</sup>

But that license is limited in some notable respects.<sup>427</sup> Buying flash means that a tattooer is free to copy the design for the purposes of transferring it to a client’s skin.<sup>428</sup> Copying it for other purposes—for example, to print t-shirts or competing sheets of flash bearing the design—would exceed the scope of the implied license from a legal perspective and, more importantly, violate the industry norms surrounding flash: “If you buy [flash] from a guy and when he leaves town you color copy it and give it to everyone in town, he’s going to be pissed. ‘I sold it to you. You’re the only one who can use it.’ You don’t do that.”<sup>429</sup>

The treatment of flash provides a useful foil to the norms surrounding custom tattoo designs.<sup>430</sup> More importantly, it offers a preview of the attitude toward other forms of visual art among tattooers.

#### F. COPYING OTHER VISUAL ART

Unlike flash, which is created and marketed with the tattoo market in mind, works of fine and commercial art are not sold to tattooers with the expectation that they will form the basis of tattoos.<sup>431</sup> Nonetheless, tattooers routinely copy works

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424. *Id.*

425. *De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927).

426. *Cf.* 2 PATRY, *supra* note 423, § 5:131 (finding that courts require a “meeting of the minds”).

427. *See* Interview with Subject 10, *supra* note 8, at 101 (stating that a tattooer can use a flash to tattoo, but cannot “take it to kinko’s and color copy it and start selling it.”).

428. *Id.*

429. *Id.*

430. *E.g., id.*

431. *Cf. id.* with Subject 11 at 119–20 (describing the difference between tattoos and other visual arts).

of visual art.<sup>432</sup> Although at first glance this attitude may seem inconsistent with the strong norm against copying non-flash tattoo designs, the distinctions tattooers draw between copying within their industry and outside of it reveal a great deal about their conception of the underlying wrong copying represents.<sup>433</sup>

Every tattooer with whom I spoke had used a piece of fine or commercial art as the basis for a tattoo.<sup>434</sup> A few tattooers at high-end custom shops no longer reproduce other works of visual art for clients, but most continue to tattoo such images on occasion.<sup>435</sup> Requests to tattoo paintings, photos, or illustrations are so common that some tattooers described them as serving the role traditional flash once played.<sup>436</sup> Rather than choosing a pre-designed image off of the tattoo shop wall, many clients today arrive at the shop with a pre-designed image located through Google.<sup>437</sup> Tattooers frequently steer clients toward a custom design inspired by the reference material, whether to satisfy their own artistic impulse or ensure a better quality result for the client.<sup>438</sup> But if a client insists on simply copying a reference, most tattooers will relent.<sup>439</sup>

The reluctance to copy works of visual art has little to do with any concern over the rights of the original artist.<sup>440</sup> In many ways, tattooers see any work other than a custom tattoo in much the same way they see flash—a design intended to be replicated, rather than created for a single use.<sup>441</sup> Discussing tattoos of cartoon characters, one tattooer told me, “Disney designs weren’t drawn for tattoos. [They are] icons . . . . Where as custom tattoo design, that was drawn for that human being.

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432. *Id.* with Subject 9 at 92.

433. *See id.* with Subject 7 at 62 (distinguishing between paintings or other illustrations and tattooers’ work).

434. *E.g., id.* with Subject 7 at 61–62; *see generally id.* (containing all interview transcripts).

435. *Compare id.* with Subject 10 at 100 (explaining that only custom designs are available), *with id.* with Subject 7 at 67 (noting that both custom and visual art reproductions are available).

436. *Id.* with Subject 3, *supra* note 8, at 28.

437. Interview with Subject 5, *supra* note 8, at 42.

438. *E.g., id.* with Subject 12 at 131 (explaining that tattooers do not want to be shown an image off the internet).

439. *See id.* with Subject 5, at 43 (stating that when the tattooer is presented with a picture, he will agree to do something *similar* to it).

440. *See id.* with Subject 6 at 52 (focusing on distinction between mediums as opposed to original artists rights).

441. *See id.* with Subject 11 at 120 (describing the acceptance that work will be appropriated when you become an artist).

It's totally different."<sup>442</sup> Another tattooer used the same example to illustrate what he saw as the natural consequence of media saturation, explaining: "[T]his is something that is pounded into our lives from an early age. Mickey Mouse. So how does society . . . expect us not to take these images and make them our own . . . ."<sup>443</sup>

Aside from the sense that commercial art images are fair targets of reproduction, many tattooers are skeptical of the notion that turning a painting, photograph, or illustration into a tattoo is merely an act of reproduction.<sup>444</sup> Interview subjects talked about the "interpretation" or "translation necessary in order to make a painting a tattoo."<sup>445</sup> They stressed that such a translation is "not a reproduction" or "just ripping off an image and photocopying it or [using] some [other] mechanical means."<sup>446</sup> In copyright terminology, they see their work as transformative.<sup>447</sup>

Tattooers were consistent in emphasizing the difference between human creation and mechanical reproduction.<sup>448</sup> Because of the inescapably manual process of creating a tattoo, an exact reproduction is impossible.<sup>449</sup> And because of the medium of fixation, even the most skilled tattooer cannot literally copy another work of visual art:

I'm not a photocopier and this isn't like painting on a wall where I can go and get these exact pigments and it's got a white background so it doesn't show up that way. It's going to be seen through your skin, it's going to age. I'll do my best. I just let them know I'm not a fucking Xerox machine.<sup>450</sup>

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442. *Id.* with Subject 1 at 12.

443. *Id.* with Subject 6 at 51.

444. *Id.* with Subject 6 at 51; *Id.* at 52.

445. *Id.* with Subject 2 at 25.

446. *Id.* with Subject 6 at 51.

447. The fair use doctrine permits otherwise infringing use of a protected work when the social benefit of a use outweighs the potential harm it presents to the copyright holder. *See Stewart v. Abend*, 495 U.S. 207, 236 (1990) (noting that the fair use doctrine "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (citation omitted)). The fair use analysis strongly favors uses of a work that "add something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . ." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

448. *E.g.*, Interview with Subject 13, *supra* note 8, at 151.

449. *See id.*; *id.* with Subject 9 at 92.

450. *Id.* with Subject 13 at 151.

Given these inherent characteristics of the process, tattooers see themselves as adding something new even when they set out to faithfully translate a piece of visual art into a tattoo:

[T]he skill of tattooing is refining something into a tattooable image. Tattoos are tattoos. Paintings are paintings. And you have to make one into the other . . . . An oil painting looks good because it's . . . layered and has a certain sheen to it. It will never look like that on skin. But when you reinterpret it . . . it's like developed a new meaning and developed a new power behind it.<sup>451</sup>

Whether a tattoo based on a piece of visual art would constitute a fair use under copyright law is a difficult question to answer in the abstract.<sup>452</sup> But the rationale tattooers provide for this sort of copying is notable for how closely it echoes the Supreme Court's definition of transformation as "altering the first [work] with new expression, meaning, or message."<sup>453</sup>

A distinct justification for copying mirrors another element of the traditional fair use analysis. In the multifactor fair use analysis, courts consider the impact of the defendant's use on the market for the original work.<sup>454</sup> To the extent the new work serves as a market substitute for the original, fair use is less likely.<sup>455</sup> Because of the specialized technical skill necessary to execute even the simplest design, tattooers understand themselves as operating in completely different markets than painters, photographers, and illustrators.<sup>456</sup> In other words, a tattoo is simply not a market substitute for other forms of visual art.<sup>457</sup> When asked how she justified tattooing images created by visual artists, one tattooer responded, "Because that person is not a tattooer. They can't do the tattoo for you. I can do the

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451. *Id.* with Subject 9 at 92.

452. *Cf. Campbell*, 510 U.S. at 575 (describing the tension between protecting copyrighted material and the necessity of "borrowing" in art).

453. *Id.* at 579.

454. *See* 17 U.S.C. § 107(4) (2012) (listing the fourth factor in Fair Use analysis as "the effect of the use upon the potential market for or value of the copyrighted work").

455. *See Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (noting that under the fourth factor, the court's "concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work" (citation omitted)).

456. Interview with Subject 7, *supra* note 8, at 62.

457. *See id.* ("[A painter] can't tattoo anyways, and so his work is fair game . . . .").

tattoo for you . . . Van Gogh can't tattoo Starry Night [sic] on you but I can."<sup>458</sup>

Relatedly, some tattooers explain why the norm against copying does not extend to visual artists in simple terms of group identity.<sup>459</sup> Those within the tattoo industry benefit from its norms; those outside of it do not.<sup>460</sup> Tattooers regard other visual artists as a "completely separate community."<sup>461</sup> Tattooers owe some obligation to each other, or at the very least face consequences within their community for running afoul of its norms.<sup>462</sup> But since they see themselves as a countercultural group existing largely outside of the traditional art world, tattooers are especially unlikely to extend the same courtesies to artists they view as operating within the mainstream.<sup>463</sup> As one tattooer told me, "[W]hen it's a painting or an illustration, it's not another tattooer's work. So in that sense, it's not another pirate you may run across one day. It's a square, a regular artist."<sup>464</sup>

The near total absence of efforts by copyright holders to target tattooers for reproducing works of visual art likely reinforces this norm.<sup>465</sup> Tattooers reject the possibility that their use of works of visual art could expose them to copyright liability as remote.<sup>466</sup> That assessment appears to be warranted. A single unreported case, dismissed for lack of personal jurisdiction, addresses allegations that a tattoo infringes another copyrighted work.<sup>467</sup> There, the author of a short literary work entitled "Laundry Money" sued rapper Soulja Boy for his allegedly

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458. *Id.* with Subject 12 at 137. Indeed, many tattooers argue that rather than causing market harm, they are bringing valuable exposure and attention to the original artist. They see tattoos as a "form of flattery" or "advertising." *Id.* with Subject 8 at 75. Some tattooers discussed the use of their own works of fine art as the basis for tattoos. They were flattered, thought it was "cool," or at worst saw it as "not a big deal." *Id.* with Subject 7 at 60; *id.* with Subject 9 at 89; *id.* with Subject 1 at 5.

459. *See id.* with Subject 11 at 120–21.

460. *See id.* at 121.

461. *Id.*

462. *See id.* with Subject 2 at 22 (describing the consequences of breaking norms in the tattoo community).

463. *See id.* with Subject 12 at 138 ("[W]e don't want to be part of mainstream society.").

464. *Id.* with Subject 7 at 62.

465. *See id.* with Subject 3 at 41 (suggesting that tattoo artists would take copying more seriously if they were sued).

466. *See, e.g., id.* with Subject 11 at 119.

467. *Brown v. Way*, No. 10-13016, 2011 U.S. Dist. LEXIS 87362, at \*2 (E.D. Mich. Aug. 5, 2011).

infringing tattoo.<sup>468</sup> Although none of my interview subjects had heard of that case, several recounted a widespread story within the industry concerning lawsuits reportedly filed by the Walt Disney Company against George Reiger, the “Disney Tattoo Guy.”<sup>469</sup> Reiger, an avid Disney fan, has reportedly covered 87% of his body in tattoos depicting various Disney characters.<sup>470</sup> Despite the common wisdom within the tattoo industry, however, Disney has neither sued nor threatened to sue Reiger for his collection.<sup>471</sup> This suggests that tattooers may, in fact, overestimate the practical risk of copyright liability.

Rights holders, particularly large ones like Disney, are likely aware of the use of their works within the tattoo industry.<sup>472</sup> The absence of enforcement against tattooers and their clients is therefore probably not the result of a mere lapse in policing.<sup>473</sup> Instead, it appears to be a deliberate choice to forego enforcement efforts.<sup>474</sup> Identifying instances of infringement poses practical difficulties, but rights holders have targeted other small businesses that present similar practical hurdles to enforcement.<sup>475</sup>

But there are at least two reasons rights holders might treat tattooers differently from other small businesses that engage in occasional infringement. First, tattoos are an expres-

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468. *Id.*

469. Mark Eades, *Disney Tattoo Guy: Removing Tattoos for Love*, ORANGE COUNTY REG., Nov. 18, 2010, <http://ocresort.ocregister.com/2010/11/18/disney-tattoo-guy-removing-tattoos-for-love/61876/>.

470. *Interviews: The Disney Tattoo Guy*, B3TA, <http://www.b3ta.com/interview/disney/> (last visited Nov. 2, 2013).

471. *Id.* (“No comment from [Disney] it’s a catch 22 situation. They allow me to have the tattoos, but won’t publically back me because they don’t want anyone else [to] have similar tattoos”).

472. *See id.* In addition to copyright claims, rights holders would likely bring claims for trademark infringement against tattooers. This Article will not assess the merits of those claims other than to remind the reader that the relevant standard is the likelihood of consumer confusion as to source or sponsorship of the allegedly infringing good or service.

473. *See id.*

474. *See id.* (noting that Disney gets “a lot of free advertising”).

475. Jennifer Delson, *Got a License for the Pinata?*, L.A. TIMES, June 19, 2005, <http://articles.latimes.com/2005/jun/19/local/me-pinata19> (noting infringement lawsuits filed by Disney against vendors of unlicensed piñatas); Peter Elkind, *Stop Copying That Mickey, or We’ll Shoot! Why You Can’t Have Your Cartoon-Character Cake and Eat It Too*, FORTUNE, Dec. 29, 1997, [http://money.cnn.com/magazines/fortune/fortune\\_archive/1997/12/29/235894/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/1997/12/29/235894/index.htm) (noting Disney’s efforts, usually in the form of cease-and-desist letters, targeting bakeries selling unlicensed birthday cakes).

sion of a deep commitment to the underlying work.<sup>476</sup> A Harry Potter birthday cake is the sign of a casual fan; a Harry Potter tattoo is the mark of a lifelong devotee.<sup>477</sup> The same is true of the sports team and band logo tattoos that are a staple at many street shops. Rights holders may be reluctant to discourage such expressions of zealotry for fear of alienating those consumers who are presumably most likely to stand in line with cash in hand to purchase sequels, spinoffs, and licensed merchandise.<sup>478</sup>

Second, although copyright holders have shown a willingness to license authorized apparel, birthday cakes, and even piñatas,<sup>479</sup> we have yet to see a line of Disney-licensed tattoo flash designs.<sup>480</sup> Given the negative associations tattoos still conjure in many segments of society, the tattoo market is not one we should expect many rights holders to enter in the near future.<sup>481</sup> And because rights holders have opted out of this market, unlicensed tattoos give rise to no measurable economic harm.<sup>482</sup> With those two factors in mind, it is hardly surprising that rights holders have ignored potential infringement in the tattoo industry.

This policy of benign neglect, coupled with the refusal of tattooers to avail themselves of legal process, means that copying within the tattoo industry is governed entirely by internal industry norms.<sup>483</sup> As this Part has described, those norms re-

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476. See *Interviews: The Disney Tattoo Guy*, *supra* note 470.

477. See *id.*

478. Rights holders are not uniform in their response to potential infringement by dedicated fans, sometimes tolerating or even encouraging such behavior and at other times suppressing it. See Steven A. Hetcher, *Using Social Norms to Regulate Fan Fiction and Remix Culture*, 157 U. PA. L. REV. 1869, 1887–91 (2009) (describing the competing strategies of rights holders in response to fan creation).

479. See *supra* note 475 and accompanying text.

480. See *Interviews: The Disney Tattoo Guy*, *supra* note 470.

481. Cf. *People With Tattoos Are Perceived to be Less Credible than Those Without*, EXAMINER, Sept. 11, 2010, <http://www.examiner.com/article.people-with-tattoos-are-perceived-to-be-less-credible-than-those-without> (summarizing research on perceptions of people with tattoos). For similar reasons, the use of works of visual art as templates for tattoos can lay a strong claim to fair use under the fourth factor. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (limiting derivative markets to those the copyright owner “would in general develop or license others to develop”).

482. *Campbell*, 510 U.S. at 569 (focusing on the market of the rights holder).

483. E.g., Interview with Subject 5, *supra* note 8, at 43 (explaining that everyone “that gives a shit” shares the industry’s understanding).



spect client autonomy in the creation and use of tattoos, discourage duplication of custom tattoo designs by both the original tattooer and copyists, and generally treat flash designs and works of visual art as freely available raw material for tattoos. The next Part moves from describing these norms to explaining them.

### III. EXPLAINING TATTOO NORMS

This Part begins by addressing two related questions. First, why have tattooers developed the particular set of informal norms described above? Second, and more fundamentally, why did they develop any system of norms rather than rely on the existing formal structure of copyright law? No single narrative fully explains these developments. Instead, the best explanation attributes the emergence of tattoo industry norms to the confluence of complementary cultural and economic forces.<sup>484</sup> As a community, tattooers share a deep skepticism of the legal system.<sup>485</sup> And as an informal guild, tattooers share a collective economic interest in both preserving market demand for their services and restraining entry by new competitors.<sup>486</sup>

Remarkably, the contours of formal law appear to play no appreciable role in the development of IP norms in the tattoo industry.<sup>487</sup> In their study of French chefs, Fauchart & von Hippel conclude that “inadequate or unsatisfactory” existing intellectual property protections are among the key “conditions favorable to norm-based IP systems.”<sup>488</sup> Studies of other creative communities have likewise ascribed some causal weight to the unavailability of meaningful formal legal protection.<sup>489</sup>

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484. See generally *id.* with all Subjects (providing insight into tattoo artist culture).

485. See *id.* with Subject 1 at 15–16 (stating that using the legal system would be too costly, but also would be an “overdone” remedy for such “a small scale thing”).

486. Cf. *Workers in the Informal Economy*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALPROTECTION/EXTLM/0,,contentMDK:20224904~menuPK:584866~pagePK:148956~piPK:216618~theSitePK:390615,00.html#papers> (last visited Nov. 2, 2013) (describing the importance of market pressures in less regulated areas).

487. See, e.g., Interview with Subject 3, *supra* note 8, at 40 (having never registered a tattoo image created).

488. Fauchart & von Hippel, *supra* note 12, at 199.

489. See Oliar & Sprigman, *supra* note 12, at 1789–90 (“The absence of lawsuits [between rival comedians] is not terribly surprising . . . [C]opyright law does not provide comedians with a cost effective way of protecting the essence of their creativity.”); see also Loshin, *supra* note 12, at 130–34 (describ-

But tattooers are not motivated to create, maintain, and enforce norms because of substantive barriers to legal protection.<sup>490</sup> As discussed above, tattoo designs, whether fixed on paper or on human skin, are works embraced by copyright.<sup>491</sup> And while some tattoo industry norms—most notably, those dealing with what copyright lawyers would call questions of initial ownership—materially differ from the outcomes dictated by formal law, there is no evidence to suggest any appreciation within the tattoo community of the finer points of the works-made-for—hire or joint-authorship doctrines.<sup>492</sup> Tattooers do not rely on norms as a second-best alternative to a legal system that denies them protection or leads to substantive outcomes that they reject.<sup>493</sup> As discussed below, tattooers express skepticism about the legal system, but their attitude toward law is best described as indifferent as a matter of day-to-day practice.<sup>494</sup>

This relationship between formal law and tattoo industry norms provides some confirmation of the dynamics within the roller derby subculture described by Fagundes.<sup>495</sup> There, despite the availability of trademark protection, athletes developed an elaborate set of rules and procedures for claiming pseudonyms.<sup>496</sup> Although Fagundes attributes the emergence of those naming norms to the community's emphasis on group identity and volunteerism, tattoo industry norms help to confirm a more generalizable principle.<sup>497</sup>

Aside from doctrinal hurdles to protection, practical barriers to effective enforcement could influence reliance on norms. Chief among those barriers is cost. Although obtaining copyright protection involves little or no cost,<sup>498</sup> enforcement is an

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ing the inadequacy of copyright, patent, and trade secret doctrines from the perspective of magicians).

490. See Interview with Subject 1, *supra* note 8, at 12 (stating that tattoos are different from something you would copyright or patent).

491. See *supra* Part I.A.

492. The evidence suggests the opposite. See Munster, *supra* note 192.

493. See Interview with Subject 1, *supra* note 8, at 14–15.

494. See *id.*

495. See Fagundes, *supra* note 12, at 1097.

496. *Id.* at 1115–21.

497. *Id.* at 1140–43.

498. Copyright protection subsists from the moment an original work is fixed. See 17 U.S.C. § 102 (2012). Registration, though a statutory prerequisite for filing suit, is not required to establish a copyright interest. See 17 U.S.C. §§ 408, 504 (2012). The online registration fee for a basic claim in an original work begins at thirty-five dollars. See U.S. COPYRIGHT OFFICE, <http://www>

expensive proposition.<sup>499</sup> A few tattooers mentioned the cost of legal enforcement as one reason among many they would avoid judicial process. One suggested that it would require “George Lucas money” to “go around suing everybody and have a fleet of people online 24/7 looking for copyright infringement.”<sup>500</sup> The market value of any particular work is unlikely to justify such expenses.<sup>501</sup> But the same is true for most non-institutional copyright owners.<sup>502</sup> Painters, photographers, and poets all face similar economic obstacles to enforcement of their statutory rights, and yet we do not generally consider them to be operating outside of the basic framework of copyright law as a result.<sup>503</sup> Indeed copyright law anticipates the risk of underenforcement by allowing recovery of statutory awards far in excess of actual damages and attorney’s fees.<sup>504</sup>

Rather than substantive or practical, the most important barrier to legal enforcement within the tattoo industry is cultural.

#### A. TATTOO CULTURE

Most tattooers expressed some degree of skepticism about the law, the judicial system, or the notion of leveraging that system to assert their rights.<sup>505</sup> Misgivings about litigation are not uncommon in society at large, but there are at least two

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.copyright.gov/docs/fees.html (last visited Nov. 2, 2013).

499. The average cost of copyright litigation ranges from \$216,000 to proceed through discovery when less than one million dollars is in controversy to two million dollars to proceed through trial when more than twenty-five million dollars is at stake. Steven M. Auvil & David A. Divine, *Report of the Economic Survey*, AM. INTELL. PROP. LAW ASS’N, July, 2011, at 31.

500. Interview with Subject 13, *supra* note 8, at 149; *see also* Beasley, *supra* note 127, at 1158.

501. *Cf.* Interview with Subject 1, *supra* note 8, at 15 (claiming that legal action would not be affordable given the little money being made from a particular design).

502. In theory, the notice and takedown provisions introduced by the Digital Millennium Copyright Act drastically reduced enforcements costs for authors whose works are reproduced online. *See* 17 U.S.C. § 512 (2012).

503. Of course, some of these creative communities may well have displaced formal law through their own sets of norms. The absence of any informed sense of how creators within these fields operate reveals the degree to which IP law rests on assumptions about creative production instead of a foundation of empirical evidence.

504. *See* 17 U.S.C. § 504.

505. Other studies of creative communities governed by norms have noted similar antipathy toward the law. *See* Fagundes, *supra* note 12, at 1137 (describing the relationship between roller derby names and national and international trademark regulations).

reasons to suspect that tattooers as a group are more inclined toward skepticism of the legal process. First, tattooers embrace and celebrate their status as outsiders who operate without regard to established social conventions.<sup>506</sup> Second, tattooers and their industry have endured a history of targeted enforcement of regulations that effectively prohibited their trade in neighborhoods, cities, and entire states.<sup>507</sup>

Tattooers describe contemporary American culture as generally “too litigious” and “lawsuit happy.”<sup>508</sup> And they express distrust in the ability of the judicial system to arrive at fair outcomes. “[T]he results of the legal system,” one interview subject told me, “have little to do with what’s right or wrong. I think anyone with half a brain can see that.”<sup>509</sup>

Some tattooers are particularly dismissive of what they see as the rise of intellectual property lawsuits in recent years. One tattooer told me such disputes are “really silly. It[s] basically just a society on it’s [sic] way down and we’re tur[n]ing on each other and suing each other. It’s petty, and it’s bullshit.”<sup>510</sup> Within the tattoo industry, hiring a lawyer or filing a lawsuit to assert intellectual property rights suggests an “inflated ego” or confirms your status as a “prima donna” or simply “a dick.”<sup>511</sup>

Because of the outsider mentality many tattooers share, they appear to be predisposed to skepticism about the law.<sup>512</sup> They talk about tattooing existing on the periphery of “respectable society” and operating within a framework that does not “conform to normalcy.”<sup>513</sup> Despite the recent popularity of tattoos, the act of covering the majority of one’s body with tattoos remains a conscious rejection of prevailing social conventions.<sup>514</sup>

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506. Interview with Subject 11, *supra* note 8, at 122.

507. See, e.g., Govenar, *supra* note 50, at 228–29 (discussing age regulations imposed on the tattoo industry as a result of health and sanitation concerns).

508. Interview with Subject 10, *supra* note 8, at 98; *id.* with Subject 13 at 143.

509. *Id.* with Subject 6 at 55.

510. *Id.* at 50.

511. *Id.* with Subject 8 at 79; *id.* with Subject 12 at 138; *id.* with Subject 13 at 143.

512. *Id.* with Subject 11 at 122.

513. *Id.*

514. *But cf.* Brendan O’Neill, *Tattoos Were Once a Sign of Rebellion—Now They Are Evidence of Craven Conformity to Cultural Norms*, THE TELEGRAPH, Aug. 9, 2012, <http://blogs.telegraph.co.uk/news/brendanoneill2/100175760/tattoos-were-once-a-sign-of-rebellion-now-they-are-evidence-of-an-individuals>

Regardless of whether tattooing breeds this outsider attitude or it results instead from self-selection, tattooers see themselves as standing apart from mainstream society, even as their work gains a foothold in it. As one tattooer described his compatriots, “We’re pirates. This is a fringe art form, no matter what they want to say. It’s not a regular square job. It’s not a normal way to make a living.”<sup>515</sup> Their position at the margins is tied to a sense of detachment from established mechanisms of social control, which in turn reinforces a preference for self-governance. One tattooer’s response to a hypothetical peer who turned to formal law to resolve a dispute over copying sums up this attitude: “We govern ourselves. . . . So step off your high horse and un-hire your lawyer.”<sup>516</sup>

In addition to its countercultural spirit of independence, the tattoo industry rejects formal law out of a shared sense of history.<sup>517</sup> Although the biker and ex-convict contingent of the tattoo community has been largely displaced by generations of tattooers with clean criminal records, many within the industry continue to see the legal system as a threatening presence: “[C]oming from the time I started, there [were] a lot of people engaged in a lot of illegal activities. . . . [A] lot of people [in the tattoo industry] are always going to have a problem with any kind of law enforcement or authority like that.”<sup>518</sup> Even for tattooers whose run-ins with the law are limited to the occasional parking ticket, the history of regulation and criminalization of the tattoo industry colors their perception of the legal system.<sup>519</sup>

Public health concerns over unsanitary conditions in many tattoo shops provided the original impetus for laws regulating the industry in the mid-twentieth century. In the 1940s, state and local authorities began to impose minimum age requirements on tattooing and more carefully monitor sanitary conditions.<sup>520</sup> After the 1959 death of a recently tattooed client from

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-craven-conformity-to-cultural-norms/ (arguing that getting tattoos is no longer a rejection of social norms).

515. Interview with Subject 7, *supra* note 8, at 64.

516. *Id.* with Subject 12 at 138.

517. *See, e.g., id.* with Subject 8 at 79 (describing why many tattooers have a problem trusting law enforcement).

518. *Id.* with Subject 8 at 79.

519. *See SANDERS, supra* note 72, at 94–95 (observing that tattooers are suspicious of the legal system as a result of harassment by local lawmakers and law enforcement officials).

520. Govenar, *supra* note 50, at 228–29.

hepatitis,<sup>521</sup> New York City, Nassau, and Suffolk counties banned tattooing altogether.<sup>522</sup> Criminal bans by state and local governments across the country followed, including cities in Arkansas, Connecticut, Indiana, Massachusetts, Michigan, Ohio, Oklahoma, Tennessee, Wisconsin, and Virginia.<sup>523</sup> While some of these early bans may have been a justifiable response to a threat to public health, the tattoo industry long ago demonstrated its ability to ensure a safe, hygienic environment for clients.<sup>524</sup> Nonetheless, tattooing remained illegal in New York City until 1997<sup>525</sup> and was not legalized in South Carolina and Oklahoma until 2004 and 2006 respectively.<sup>526</sup>

Even in the absence of statewide prohibitions, tattooers are still subject to local bans and restrictive zoning ordinances that place tattoo shops on par with strip clubs and pawn shops.<sup>527</sup> South Carolina, for example, requires proof that a local zoning ordinance explicitly identifies tattoo shops as a permitted use before its health department will issue the required license.<sup>528</sup>

Tattooers have challenged various state and local restrictions on constitutional grounds with mixed success.<sup>529</sup> One of the first courts to hear such a challenge described “the decoration, so called, of the human body by tattoo designs” as “a barbaric survival, often associated with a morbid or abnormal personality” and noted “one-third of the admissions to the U. S.

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521. In the early 1940s, tattooer Harry Lawson unsuccessfully sought to prevent such outbreaks by advocating for regulating hygiene in tattoo shops. *Id.* at 226.

522. *Id.* at 232; Thomas J. Lueck, *On the Tattoo Map, It's the Sticks: New York Plays Catch-Up at First Skin Art Convention*, N.Y. TIMES, May 16, 1998, at B1.

523. Govenar, *supra* note 50, at 232.

524. See *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1252 (D. Minn. 1980) (describing sterilization procedures used by tattooers).

525. Lueck, *supra* note 522.

526. *Governor Set to Ink Bill Legalizing Tattoo Trade in Oklahoma*, FIRST AMENDMENT CENTER (May 6, 2006), <http://www.firstamendmentcenter.org/governor-set-to-ink-bill-legalizing-tattoo-trade-in-oklahoma>.

527. See Gary Nelson, *State High Court Hears Mesa Tattoo Zoning Case*, USA TODAY, Mar. 28, 2012, [http://www.usatoday30.usatoday.com/USCP/PNI/Valley%20&%20State/2012-03-28-PNI0328met-tattoocasePNIBrd\\_ST\\_U.htm](http://www.usatoday30.usatoday.com/USCP/PNI/Valley%20&%20State/2012-03-28-PNI0328met-tattoocasePNIBrd_ST_U.htm); Adam Townsend, *Tattoo Parlors Slated for Prohibition in Downtown S.C.*, SAN CLEMENTE PATCH (May 20, 2011), <http://sanclemente.patch.com/groups/business-new/s/p/tattoo-parlors-slated-for-prohibition-in-downtown-sc>.

528. See *Zoning Requirements for Tattoo Facilities*, S.C. DEPT OF HEALTH & ENVTL. CONTROL, <http://www.scdhec.gov/health/licen/hltattoo zoning.pdf> (last visited Nov. 2, 2013).

529. *Yurkew v. Sinclair*, 496 F. Supp. 1248 (D. Minn. 1980); *Grossman v. Baumgartner*, 17 N.Y.2d 345 (1966).

Public Health Hospital at Lexington, Kentucky, for drug addiction were tattooed. If the addict was also a sexual deviant, the incidence of tattooing was markedly higher.<sup>530</sup>

Courts considering First Amendment challenges to restrictions on tattooing have taken one of three approaches.<sup>531</sup> Most courts have held that tattooing is neither speech nor expressive conduct and thus not entitled to First Amendment protection.<sup>532</sup> Others treat tattooing as conduct rather than pure speech but acknowledge that it is imbued with expressive purpose and therefore subject to First Amendment scrutiny.<sup>533</sup> More recently, the Ninth Circuit struck down a ban on tattoo shops in Hermosa Beach, holding that “tattooing is purely expressive activity rather than conduct expressive of an idea.”<sup>534</sup> Like the processes of writing, painting, or playing an instrument, the court recognized that “the entire purpose of tattooing is to produce the tattoo,” an expressive work squarely within the protections of the First Amendment.<sup>535</sup>

The Ninth Circuit’s decision, while marking a notable departure from prior judicial attitudes toward tattooing,<sup>536</sup> still reflected hints of the hostility that marred earlier opinions. In a

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530. *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338, 338 n.1 (App. Div. 1964), *aff’d*, 17 N.E.2d 345 (1966) (holding that a New York City Health Code provision banning tattooing except when performed by a licensed physician was a constitutional exercise of police power).

531. See Ryan J. Walsh, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1075–82 (2011) (describing the various approaches courts have adopted to analyzing tattooing under the First Amendment).

532. See, e.g., *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 659–60 (N.D. Ill. 2008) (holding that “the act of tattooing is not constitutionally-protected free speech” because it is conduct that lacks an “intent to convey a particularized message”); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980) (“Wherever the amorphous line of demarcation exists between protected and unprotected conduct for First Amendment purposes, the Court is convinced that tattooing falls on the unprotected side of the line.”); *State v. White*, 560 S.E.2d 420, 423 (2002) (“Unlike burning the flag, the process of injecting dye to create the tattoo is not sufficiently communicative to warrant protections and outweigh the risks to public safety.”).

533. See, e.g., *Commonwealth v. Meuse*, No. 9877CR2644, 1999 WL 1203793, at \*3 (Mass. Super. Nov. 29, 1999).

534. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010); see also *Coleman v. City of Mesa*, 284 P.3d 863, 869 (Ariz. 2012) (adopting the rule from *Anderson v. City of Hermosa Beach* and holding that tattooing is protected by the First Amendment).

535. *Anderson*, 621 F.3d at 1062.

536. In rejecting the separation between an expressive work and the process that created it, the court favorably compared tattoos to both the Declaration of Independence and the Sistine Chapel. *Id.*

begrudging concurrence Judge Noonan conceded that the court was “bound to protect the First Amendment value at issue” but insisted that it was “not bound to recognize any special aesthetic, literary, or political value in the tattooist’s toil and trade.”<sup>537</sup>

Tattooers have been subject to unforgiving and frequently unconstitutional regulations of both their profession and their speech for more than sixty years.<sup>538</sup> In light of this history, their reluctance to turn to the judicial system to vindicate their interests in their expressive works is understandable.<sup>539</sup> But tattooers are troubled by the notion of inviting judicial scrutiny for another reason.<sup>540</sup> They worry that the introduction of formal law into the tattoo industry will open the door to a range of unintended consequences.<sup>541</sup> As one tattooer explained:

If you want to [pursue legal action], that’s fine. But I don’t want to hear any pissing and moaning when you have to fill out contracts for every fucking person you tattoo. Stuff like that, there’s going to be a ripple effect from it. It’s just getting the government more involved—or any legal body more involved—in something that we’ve had a lot of freedom with and everyone’s enjoyed.<sup>542</sup>

Aside from the costs of formalizing the tattooer-client relationship, tattooers might reasonably worry that asserting copyright interests in their own creations might attract unwanted attention from the many copyright holders in the broader art world whose works are routinely copied by tattooers. By resolving their internal disputes through informal means, tattooers reinforce the notion that their creations are somehow apart from markets for commercial reproductions of most concern to copyright holders.<sup>543</sup>

Taken together, these cultural features of the tattoo industry—its deeply engrained sense of nonconformity and its historically strained relationship with the law—provide an explanation for the emergence of industry norms that might be sufficient, but is far from complete. Tattooers, though they value creativity, innovation, and independence, are fundamentally

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537. *Id.* at 1069 (Noonan, J. concurring).

538. *See generally* Anderson v. City of Hermosa Beach, 621 F.3d 1061 (9th Cir. 2010); Grossman v. Baumgartner, 17 N.Y.2d 345 (1966).

539. *See generally* Interview with Subject 8, *supra* note 8, at 79 (describing why many tattooers have a problem trusting law enforcement).

540. *Id.* at 156.

541. *Id.*

542. *Id.*

543. *See id.* with Subject 6 at 55 (explaining that to take legal action against someone who copies your tattoo requires a focus on money that many tattooers lack).



market actors. Any account of the development of tattoo industry norms has to consider the economics of contemporary tattooing.<sup>544</sup>

## B. TATTOO ECONOMICS

The economics of the tattoo industry differ from those of traditional copyright-reliant industries in important ways. The publishing, music, and film industries make money by creating original works and offering them to the public<sup>545</sup>. Sometimes the work is distributed in copies; sometimes it is performed or displayed publicly.<sup>546</sup> In either case, the goal is to attract as many paying readers, listeners, or viewers as possible—in short, to have a hit.<sup>547</sup> Broad public access, conditioned on some form of payment, is at the heart of these business models.<sup>548</sup>

Very little of what happens in the tattoo industry follows this basic framework.<sup>549</sup> Commercial flash artists, who generate tattoo designs and sell copies through industry publications and internet sites, fit easily within the reproduction-and-sale business model.<sup>550</sup> But the street shops where those designs are transferred to clients do not.<sup>551</sup> Few of the flash designs in any street shop are generated in-house.<sup>552</sup> So while street shops are in the business of serial-reproduction of copyrighted works, they are more analogous to the local copy shop than the local

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544. See *infra* Part III.B.

545. See, e.g., *Kanye West Announces “The Yeezus Tour,”* BILLBOARD (Sept. 6, 2013, 9:44 AM), <http://www.billboard.com/articles/columns/the-juice/5687102/kanye-west-announces-the-yeezus-tour> (reporting that Kanye West’s original album “Yeezus” sold 327,000 copies in the first week after release).

546. See *id.* (announcing that Kanye West will perform his original album “Yeezus” during his upcoming concert tour).

547. Cf. Mark F. Schultz, *Fear & Norms & Rock & Roll: What Jam Bands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 657 (2006) (arguing that the music industry needs more than mere “one-hit wonders” to stay financially viable in the age of copying).

548. Cf. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY* 6 (2012) (noting that copyright laws enable industries, such as publishing, music and film, to have control over copying in order to encourage innovation); *id.* (noting that illegal copying is dismantling the music industry’s old business model).

549. See, e.g., Interview with Subject 6, *supra* note 8, at 56 (noting an intrinsic difference between other art forms and tattooing).

550. See *id.* with Subject 1 at 10–11 (describing flash tattoo sales).

551. *Id.* (noting that buying flash enables a tattooer to make as many copies as they want).

552. *Id.*; *id.* with Subject 2 at 24.

book publisher.<sup>553</sup> They make their income by offering copying services, not by selling or licensing copies of their original works.<sup>554</sup>

The custom tattoo shop is even further removed from prevailing copyright-reliant business models.<sup>555</sup> Custom tattooing developed as the result of the feedback loop between tattooers seeking greater opportunity for creative freedom and clients looking for unique and original designs.<sup>556</sup> After decades of custom tattoos and a recent flood of tattoo-centric reality television programming, custom designs are a firmly established expectation among clients.<sup>557</sup> “The consciousness of the tattoo community and the client is so much higher than it used to be ten years ago,” one tattooer told me. “Now everybody wants a custom tattoo.”<sup>558</sup> Another explained that because “we live in such a custom tattoo time, anyone that emails you about a tattoo assumes that you’re going to draw something for them. . . . [Clients] want to make the monkey dance.”<sup>559</sup>

Because of the emphasis clients place on bespoke tattoos, the custom tattoo market is far more circumspect when it comes to copying than traditional copyright-reliant industries.<sup>560</sup> For those industries, the value of the work is proportional to its reproduction.<sup>561</sup> In order to harness that value, exclusive rights limit reproduction to the copyright holder or its

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553. Because shops that rely on flash are likely operating under implied license, they are largely insulated from liability.

554. See Interview with Subject 8, *supra* note 8, at 67 (describing the work of a street shop tattooer as a “service”).

555. See, e.g., *id.* with Subject 2 at 24 (noting that custom shops keep hardly any flash).

556. See, e.g., *id.* with Subject 6 at 54 (discussing the recent trend in the tattoo industry toward custom designs).

557. See, e.g., Angel Cohn, *Best Ink: Will This Be a Stain on Oxygen’s Permanent Record?*, TELEVISION WITHOUT PITY (Mar. 28, 2012), <http://www.televisionwithoutpity.com/telefile/2012/03/best-ink-will-this-go-down-in.php> (noting two tattoo-based competition shows airing on the Oxygen and Spike networks); *‘Tattoo School’ Reality Series Coming to TLC*, HUFFINGTON POST (May 3, 2012), [http://www.huffingtonpost.com/2012/05/03/tattoo-school-tlc\\_n\\_1475235.html](http://www.huffingtonpost.com/2012/05/03/tattoo-school-tlc_n_1475235.html) (noting that four tattoo-related reality shows have aired on TLC alone).

558. Interview with Subject 7, *supra* note 8, at 61.

559. *Id.* with Subject 3 at 30.

560. *Id.* with Subject 10 at 97 (“I don’t replicate any of my drawings on anybody else.”).

561. *Id.* with Subject 8 at 75 (“A logo, for example, is in some sense made to be reproduced . . . . You’re going to put it on as many things as you can convince people to buy.”).

licensees.<sup>562</sup> But a custom tattoo derives its value largely from the fact that it will not be reproduced, even by the tattooer who created it. Reproduction is not limited to the rights holder; it is precluded altogether.<sup>563</sup> As described below, the tattoo industry's recognition of client demands for unique designs helps explain the development of its norms.

### 1. Norms as Collective Self-Interest

The classic Demsetzian analysis predicts that formal or informal property rights emerge when their benefits outweigh their costs, either because the value of exclusivity increases or the cost of enforcement drops.<sup>564</sup> The tattoo industry presents a narrative that fits reasonably well within this model. As client demand for custom tattoos increased, so did the harm tattooers felt from appropriation of their designs.<sup>565</sup> And as technology facilitated both the detection of copying and the spread of negative gossip within the geographically dispersed tattoo community, enforcement costs plummeted.<sup>566</sup>

This story tells us why tattooers would be motivated to assert a claim, either formal or informal, against copyists.<sup>567</sup> But it doesn't explain why tattooers have opted consistently for informal social norms rather than the formal property-like rules of copyright law.<sup>568</sup> So while it's easy to see why a tattooer would seek to protect his own work against copying, his commitment to enforcing norms when the work of another member of the community is copied is not captured by the Demsetzian model.<sup>569</sup>

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562. See RAUSTIALA & SPRIGMAN, *supra* note 548, at 6 ("Innovation requires rules that allow creators to control who can make copies—either by making copies themselves, or selling licenses to others. Creators, in short, need a monopoly over the right to make copies.").

563. See, e.g., Interview with Subject 2, *supra* note 8, at 16 (asserting that the tattooer would not *exactly* replicate their own tattoo design).

564. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967) (arguing that property rights arise in response to changes in the costs and benefits of using and protecting resources).

565. See Interview with Subject 2, *supra* note 8, at 21–22 (describing the financial harm of having someone copy your tattoo).

566. See *id.* at 22–23 (discussing technology-related ways that people become blacklisted by the tattoo community for copying).

567. See, e.g., *id.* with Subject 6 at 50 (asserting that people who seek legal recourse for copied designs are after money).

568. *Id.* with Subject 9 at 94 (claiming that hiring a lawyer to respond to copied material is "ridiculous").

569. See Katherine J. Strandburg, *Who's in the Club: A Response to Oliar and Sprigman*, 95 VA. L. REV. BRIEF 1, 4–5 (2009) (noting the need for an

Propertization alone doesn't explain tattoo industry norms because they arise out of collective rather than personal interests. Robert Ellickson, in his foundational study of Shasta County ranchers, suggested that informal norms take root when three conditions are satisfied: the relevant community is close knit, the norms govern workaday affairs, and the norms enhance the collective welfare of the community.<sup>570</sup> Each of these three requirements is met in the tattoo industry.

Ellickson defined a close knit community as "a social network whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events."<sup>571</sup> Although it is geographically dispersed, the tattoo industry bears the hallmarks of a close-knit community. Indeed, more than one interview subject used that precise language to describe their industry.<sup>572</sup> Through a combination of workplace gossip, conversations at regional and national tattoo conventions, and technology-mediated discussion, tattooers have created a decentralized network for the exchange of industry information, including accusations of copying.<sup>573</sup> And as discussed above, that exchange of information carries profound social and professional consequences for tattooers accused of transgressing community norms.<sup>574</sup>

The questions governed by tattoo industry norms are workaday issues, ones tattooers confront professionally on a daily basis: how to collaborate with clients; how to respond to client requests for tattoo designs that originate from flash, prior custom work, or commercial art; and how to define their relationship with the images they apply to their clients.<sup>575</sup>

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analysis of why IP social norms develop to account for the "dual potential roles" of community members as both "creators" and "thieves").

570. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991) ("[M]embers of a close knit-group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another." (footnote omitted)).

571. *Id.* at 181.

572. *See, e.g.*, Interview with Subject 1, *supra* note 8, at 8–9 (discussing the importance of being part of a tattoo community).

573. *See id.* at 9–10 (noting that the community hears about a copier online, through word of mouth, or at conventions).

574. *See supra* Part II.D.2.

575. *See, e.g.*, Interview with Subject 2, *supra* note 8, at 18–19 (discussing the relationship between the rules against copying and client interactions on a daily basis).

Most importantly, tattoo norms enhance the welfare of the community.<sup>576</sup> Ellickson understood welfare-maximizing norms as those that minimize both transaction costs and deadweight loss associated with unexploited trade.<sup>577</sup> From a tattooer's short-term perspective, defection from the norm against copying is an attractive strategy.<sup>578</sup> By free riding on the efforts of another custom tattooer, she can avoid the opportunity cost associated with drawing up an original design, and because she is paid only for the hours spent tattooing, her compensation holds constant.<sup>579</sup> Similar incentives could encourage a tattooer to violate the norm favoring client autonomy. By extracting rents from a client whose public display or other use of the tattoo develops economic value, the tattooer appears to benefit from a windfall.

But once client expectations are taken into account, those short-term strategies reveal themselves as collectively harmful.<sup>580</sup> Clients expect unique tattoos, and they expect considerable freedom to display and use the images on their bodies.<sup>581</sup> Tattooers who upset those settled expectations run the risk of undermining the market for custom tattoos.<sup>582</sup> If clients who desire bespoke tattoos fear that their design will be subsequently tattooed on other clients, or perhaps even worse, that a design they thought was custom-designed was in fact a copy of a preexisting tattoo, they may well spend their money on a motorcycle or some other symbol of youthful rebellion instead.<sup>583</sup> Likewise, if clients worry that their tattooer will assert some control over their use of the tattoo, they will either insist on contractual guarantees against such interference, demand lower prices to offset this risk, or simply opt out of the tattoo mar-

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576. *See id.* with Subject 1 at 8–9 (describing what copying does to one's ability to participate in the tattoo community and the benefit of being in such a community).

577. ELLICKSON, *supra* note 570, at 184.

578. Interview with Subject 3, *supra* note 8, at 33 (noting that money and a lack of enforcement are benefits to copying—"At the end of the day, [the copyist] knows they can [copy]").

579. *See id.* with Subject 7 at 58 (noting how "the old timers" made money through copying).

580. *See id.* at 61 (describing the "individual spirit" of tattooing).

581. *Cf. id.* with Subject 2 at 21–22 (noting that when a client purchases a tattoo, they have the right to display it).

582. *Cf. id.* with Subject 7 at 62 (discussing the fact that people who seek custom tattoos want an original design that will not be copied).

583. *Cf. id.* with Subject 13 at 142 (discussing the unspoken agreement between client and tattooer that the tattoo is original and will not be copied).

ket altogether.<sup>584</sup> For the tattoo industry, the creation and enforcement of informal norms is a small price to pay for avoiding the erosion of client demand and the increase in transaction costs associated with defectors.<sup>585</sup>

Ellickson's framework also helps explain why street shops are less likely to follow tattoo industry norms. To the extent street shop tattooers are part of the same community as custom tattooers, they are on its fringes. The social power custom tattooers wield over one another is less potent within the street shop community because it deemphasizes creativity and originality.<sup>586</sup> And because their clients are, as a rule, less interested in one-of-a-kind designs, street shop tattooers are insulated from erosion of the custom tattoo market that results from violations of the anti-copying norm.<sup>587</sup> In other words, the norm against copying is not obviously welfare enhancing for street shop tattooers as a subgroup of the wide tattoo community.<sup>588</sup> However, given the nebulous distinction between street and custom tattooing and the mobility of individual tattooers along that professional spectrum, it would be easy to overstate the incentives for defection.<sup>589</sup>

Other non-IP norms within the tattoo industry confirm that collective self-interest motivates tattooers. Tattooers generally accept a number of self-imposed restrictions that are best understood as efforts to preserve the reputational and economic interests of the profession as a whole.<sup>590</sup> For example, most tattoo shops refuse to tattoo clients' faces and—until recently—hands because of the social stigma and economic consequences

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584. *Id.*

585. This explanation is consistent with norms outside of the IP context that emerge when a group derives collective economic benefit from them. *See, e.g.,* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

586. *See generally* Interview with Subject 8, *supra* note 8, at 65–80 (discussing the tattoo industry from the perspective of a street shop tattooer).

587. *Cf. id.* at 66 (noting that a tattoo is a luxury item, and therefore, the client should get what they want).

588. *Id.*

589. *See id.* with Subject 2 at 24 (identifying the blurred line between custom tattooing and street shops).

590. *See* Rubin, *supra* note 19, at 233. *See also* #*electricalivia*, TUMBLR (Sept. 26, 2013, 12:08 PM), <http://electricalivia.tumblr.com/post/51739086191/hand-neck-finger-face-tattoos>.

still attached to highly visible tattoos.<sup>591</sup> For similar reasons, most tattoo shops turn away customers seeking tattoos associated with gangs or hate groups.<sup>592</sup> Those norms could be seen as expressions of tattooers' own personal preferences.<sup>593</sup> However, in the aggregate, they discourage short-term personal economic gains for the sake of the collective maintenance of industry-wide market demand.<sup>594</sup> But as described below, these same self-protective instincts sometimes translate into exclusionary anti-competitive practices.

## 2. Norms as Exclusionary Practices

In some ways, the tattoo industry resembles an informal guild.<sup>595</sup> It maintains trade secrets.<sup>596</sup> It regulates entry into the profession.<sup>597</sup> And relatedly, it excludes potential competitors in order to limit competition.<sup>598</sup> These efforts offer a supplemental explanation for tattoo industry norms, particularly the norm against copying custom designs.<sup>599</sup>

The tattoo industry has long been characterized by secrecy.<sup>600</sup> Tattooing requires a host of arcane technical knowledge

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591. See Rubin, *supra* note 19, at 233. See also #*electricalivia*, *supra* note 590.

592. Interview with Subject 13, *supra* note 8, at 151.

593. See *id.*

594. Cf. *id.* with Subject 7 at 61 (observing that the aversion to copying in the tattoo community is connected to client desires for custom tattoos).

595. *Id.*

596. See ROBERT P. MERGES, FROM MEDIEVAL GUILDS TO OPEN SOURCE SOFTWARE: INFORMAL NORMS, APPROPRIABILITY INSTITUTIONS, AND INNOVATION 5–7 (2004) (describing the role medieval guilds played in protecting trade secrets).

597. *Id.* (describing apprenticeship systems within guilds).

598. See Gary Richardson, *Guilds, Laws, and Markets for Manufactured Merchandise in Late-Medieval England*, in EXPLORATIONS IN ECONOMIC HISTORY 41 (2004) 1, 1–2 (citing NORMAN CANTOR, MEDIEVAL READER 278 (1994) (noting that “craft guilds’ . . . main purpose and activity was narrow regulation of industrial productivity in order to restrain competition”)); DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 134 (1981) (noting the “guilds organized to protect local artisans . . . [and preserve] local monopolies against encroachment from outside competition”).

599. Norms of exclusion can be particularly powerful and attractive to a community. See RUSSELL HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT 107 (1995) (arguing that the most powerful norms benefit group members at the expense of non-members).

600. See Rubin, *supra* note 19, at 233–34; SANDERS, *supra* note 72, at 70.

traditionally unavailable to the general public.<sup>601</sup> Historically, tattooers built and repaired their own equipment and mixed their own pigments, to say nothing of the technique necessary to execute a passable tattoo without causing a client inordinate pain.<sup>602</sup> Until very recently, this information was shrouded in mystery.<sup>603</sup> As one tattooer described past generations of tattooers, “[T]hey were like magicians; they were able to hold onto those secrets of how to tattoo.”<sup>604</sup> Another said of tattooing: “[I]t’s this old, magical art. It’s behind the curtain.”<sup>605</sup>

By guarding this information closely, tattooers were able to carefully limit entry into the trade.<sup>606</sup> For most of the history of tattooing in the United States, tattooers learned either through a time consuming process of trial and error, or, more commonly, through an apprenticeship with an established tattooer.<sup>607</sup> There were no tattoo schools, no how-to guides, no correspondence courses, and no YouTube videos.<sup>608</sup>

Tattooers even withheld information from each other. One tattooer explained, “Tattoo artists would never share information. They would tell you wrong information. Sailor Jerry was notorious for that. He’d hide little things in his drawings or leave little things out.”<sup>609</sup> As more skilled artists took up tattooing, anti-competitive concerns drove further efforts to maintain secrecy: “[The old timers] were afraid that if everybody knew that information, the quality level would go up so high, they couldn’t compete. Because they weren’t very good artists.”<sup>610</sup>

Tattoo equipment and supply distributors, eager to exploit the untapped market of aspiring tattooers, challenged this longstanding secrecy by marketing pre-assembled tattoo machines, ready-made pigments, and instructional materials.<sup>611</sup>

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601. See Rubin, *supra* note 19, at 235 (explaining how tattooers not only use flash, but create custom designs from other cultures, understand how to properly outline and color tattoos, and practice safe sanitation techniques).

602. See *id.* at 233–34.

603. *Id.* at 234 (listing the books, newsletters, and conventions which now disseminate tattoo trade secrets).

604. Interview with Subject 7, *supra* note 8, at 59.

605. *Id.* with Subject 8 at 78.

606. See Rubin, *supra* note 19, at 234 (describing the “small nucleus” of secretive independent leaders who controlled the industry).

607. SANDERS, *supra* note 72, at 70.

608. *Id.*

609. Interview with Subject 7, *supra* note 8, at 59.

610. *Id.*

611. See DEMELLO, *supra* note 29, at 110.



Today, the widespread availability of information on the Internet further disrupts the traditional control tattooers exerted of the secrets of their trade.<sup>612</sup> Some tattooers expressed concern about the impact of this free flow of information:

[P]eople are being too open with stuff . . . [b]ecause there's too many people . . . . [P]eople are too accepting [and] just let people into the industry . . . . There are way too many people in the industry now. It used to be tattooers were fucking rich . . . . [Y]ou did well for what you did, and it's not like that anymore.<sup>613</sup>

One way to understand the norm against copying is as an effort to reconstruct something akin to the entry barriers secrecy once provided. Custom tattooing involves two distinct skill sets. First, it requires technical skill—that is, a working understanding of how to translate a given design onto the client's body.<sup>614</sup> A good tattooer must understand how to operate her machine, the choice between various needle configurations, and the unique characteristics of human skin, among other specialized knowledge. Second, custom tattooing requires the ability to conceive of and execute original designs.<sup>615</sup> In addition to an understanding of composition, color theory, and a variety of artistic styles, custom design requires creativity, imagination, and time.<sup>616</sup>

Old school tattooers limited market entry by controlling access to technical information necessary to develop this first set of skills.<sup>617</sup> Today's tattooers, though they have largely lost control over those once valuable trade secrets, can rely on the second set of skills to regulate their trade. By emphasizing original designs, in part through the anti-copying norm, custom tattooers have shaped the market in a way that reduces competition from street shop tattooers and new market entrants who may have technical skill but lack the talent or inclination to create one-of-a-kind designs for their clients.

Taken together, skepticism about the legal system, the collective interest in satisfying client expectations, and the desire

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612. See, e.g., *Learn How to Tattoo Step by Step on Video!*, LEARN HOW TO TATTOO (Sept. 17, 2013), <http://learn-tattoo.com> (advertising books, software, and videos teaching how to tattoo).

613. Interview with Subject 9, *supra* note 8, at 94.

614. See Rubin, *supra* note 19, at 235 (noting the “careful attention” tattooers demonstrate when working).

615. *Id.*

616. See *id.* at 235 (noting “outstanding artists usually charge by the hour”).

617. *Id.*

to limit competition within the trade explain why the tattoo industry relies on norms rather than formal intellectual property protection and why its norms reflect the particular set of obligations described above. The next Part turns to the broader implications of tattoo industry norms for intellectual property law and policy.

#### IV. LESSONS FROM THE TATTOO INDUSTRY

Because tattoo industry norms are largely a function of idiosyncratic cultural and market characteristics, we might expect them to resist generalizable insights. Outside of other communities or industries with deeply rooted antagonism toward the legal system, the cultural origins of tattoo industry norms tell us little about whether and how we should expect intellectual property norms to develop elsewhere. Nonetheless, two features of the tattoo market offer broadly applicable lessons. First, the tattoo industry's client-driven incentive structure reinforces the notion that formal intellectual property protection imposes uniformity costs when it ignores the creative dynamics within particular communities. Second, the tattoo industry's focus on the provision of personal services, rather than the multiplication and sale of copies, might serve as a useful model for other creative industries struggling with the ubiquity of copying.

##### A. THE ROLE OF NON-LEGAL INCENTIVES

Copyright and patent exclusivity exist to spur the creation of public goods that would go unproduced but for those legally constructed incentives because of the ready appropriability of their value by competitors.<sup>618</sup> An ideally calibrated intellectual property system would provide just enough incentive to prompt the creation of new works.<sup>619</sup> Any incentives beyond the bare minimum impose unnecessary costs on the public in the form of

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618. See generally F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001) ("The foundation for the American patent system is purely economic."); Perzanowski & Schultz, *supra* note 209, at 2110 (explaining the economic incentive theory for copyright).

619. See William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1249 (1998) (arguing copyright should "give creators enough entitlements to induce them to produce the works from which we all benefit but no more"); Glynn S. Lunney, Jr., *Patent Law, the Federal Circuit, and the Supreme Court: A Quiet Revolution*, 11 SUP. CT. ECON. REV. 1, 5 (2004) (suggesting patent protection should be conferred only to the "precise extent[] necessary to secure each individual innovation's *ex ante* expected profitability").

higher prices, reduced availability, and restrictions on the use of creative works.<sup>620</sup>

Not all creators require the same incentives. Some face higher upfront costs or greater threats of appropriation.<sup>621</sup> And they create against different backdrops of non-legal and even non-pecuniary incentives.<sup>622</sup> These conditions, and thus optimal incentives, vary from author to author, perhaps even from work to work.<sup>623</sup> And they vary considerably from industry to industry.<sup>624</sup>

But the rights intellectual property law confers are insensitive to fluctuations in the incentives necessary to induce creative production.<sup>625</sup> Intellectual property protections are uniform. An author who will create only if promised a significant return on her opportunity costs receives the same level of copyright protection as one who creates purely out of a love for her craft.<sup>626</sup> By creating and enforcing rights without regard to context, intellectual property imposes uniformity costs through both over- and under-incentivizing innovation.<sup>627</sup>

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620. See generally Fred Anthony Rowley, Jr., *Dynamic Copyright Law: Its Problems and a Possible Solution*, 11 HARV. J.L. & TECH. 481, 487 (1998) (explaining the dangers of overbroad copyright protection, and even declaring that such protection leads to “legal constraints upon the ability of individuals to think about, discuss, and examine . . . ideas and facts”).

621. See Kieff, *supra* note 618, at 724–25 (describing the unique challenges of the biotechnology industry which faces incredibly high initial research and development costs).

622. See generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623, 624 (2011) (arguing “[n]ew strains of thinking in the fields of economics, psychology, and business management studies now debunk the long-venerated” thought that people only create for economic incentives).

623. See Michael W. Carroll, *One for All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. U. L. REV. 845, 856 (2006) (describing how copyright law grants the same protection to any type of literary work, including different types of software).

624. *Id.* at 857 (“Even when all creators within an industry or technological field face roughly the same type and magnitude of appropriability problem, the magnitude and type of problem will certainly vary among industries and technological fields.”).

625. See *id.* at 846–47 (describing the costs imposed by uniform intellectual property law given the variation in creative practices among industries); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575 (2003) (noting the inefficiency of uniform patent law in light of differing costs of innovation across industries).

626. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 522–27 (2009) (discussing the roles of compulsion and love in the creative process).

627. See Carroll, *supra* note 623, at 847.

As Oliar and Sprigman point out in their study of standup comics, social norms highlight these uniformity costs and may provide limited relief from them.<sup>628</sup> To the extent norms form part of the backdrop of existing non-legal incentives, they suggest a more modest need for the additional legal incentives of intellectual property. Standup comedians produce new original material in the absence of meaningful copyright protection in part because community norms reward that behavior.<sup>629</sup> Because tattoo industry norms serve as an alternative to formal law rather than a substitute for it, they underscore the importance of non-legal incentives even more dramatically.

There are two interrelated sources of non-legal incentives in the tattoo industry. First, and most directly, tattooers create new original designs because clients demand them.<sup>630</sup> In order to attract clients willing to pay for their tattoo services, tattooers produce designs at no direct cost to the client.<sup>631</sup> Tattoo industry norms are partly an outgrowth of that market demand for unique designs. But once those norms are established, they reinforce the existing market-based incentives with social ones.

Where non-legal incentives—whether norm-based or market-based—pervade a creative community, the risk of uniformity costs from over-protection is particularly high, and we should be particularly skeptical about the need for copyright protection. Even if tattooers were denied copyright altogether, these non-legal incentives suggest that their creative output would remain unchanged.

So while existing copyright doctrine surely protects tattoos, they would likely be excluded under a copyright regime more attuned to the realities of creative production.<sup>632</sup> The tattoo industry is far from alone in this regard. Nor is it especially deserving of exclusion. State laws,<sup>633</sup> local building codes,<sup>634</sup> pri-

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628. Oliar & Sprigman, *supra* note 12, at 1840–41.

629. *Id.*

630. Interview with Subject 13, *supra* note 8, at 145.

631. See Rubin, *supra* note 19, at 235 (noting the initial consultation is “gratis”).

632. See *Tattoo Art Inc. v. TAT Int’l LLC*, 498 F. App’x 341 (4th Cir. 2012) (per curiam) (affirming copyright infringement of a tattoo).

633. See James Grimmelmann, *Copyright, Technology, and Access to the Law: An Opinionated Primer* (June 19, 2008), <http://james.grimmelmann.net/essays/CopyrightTechnologyAccess>.

634. *Id.*

vate standards,<sup>635</sup> publicly financed research,<sup>636</sup> and perhaps even sure-fire blockbuster movies<sup>637</sup> are all susceptible to similar critiques.

While tattoo industry norms highlight the problem of uniformity costs, they might also mitigate them. Among the costs of over-protection are the expense and strain on the judicial system associated with enforcement of intellectual property rights. But tattoo industry norms include a built-in safeguard against those costs: the meta-norm of rejecting reliance on formal legal rights.<sup>638</sup> So long as tattooers and other creative communities continue to resolve their disputes internally, they avoid imposing the shared public costs of adjudication and enforcement. In short, some of the risks of over-protection may dissipate if the members of a creative community consistently disclaim formal rights.

Tattooers, like standup comedians, chefs, and roller derby enthusiasts, should remind policymakers that incentives for creative production take many forms. An intellectual property policy structured around the expectations of a handful of publishers and distributors in a handful of industries that rose to prominence in the last century is one that neglects the prospect of new creative dynamics and markets in favor of inertia. And as the next section discusses, the tattoo industry—despite its status as one of humanity’s oldest forms of creativity—may offer copyright-reliant industries hints at a new way forward.

#### B. CUSTOMIZATION & SERVICE

Embedded in our copyright system are assumptions about the business models of creative industries. The copyright system envisions a world in which rights holders produce copies of their works and distribute them to the public.<sup>639</sup> But technology has made copying cheaper, easier, and faster, threatening the

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635. See Pamela Samuelson, *Questioning Copyright in Standards*, 48 B.C. L. REV. 193 (2007).

636. See Samuel E. Trosow, *Copyright Protection for Federally Funded Research: Necessary Incentive or Double Subsidy?*, 22 CARDOZO ARTS & ENT. L.J. 613 (2004).

637. See Mike Masnick, *Does Batman Need Copyright Protection?*, TECHDIRT (July 20, 2012, 8:24 AM), <http://www.techdirt.com/articles/20120719/18025319772/does-batman-need-copyright-protection.shtml>.

638. See Rubin, *supra* note 19, at 234 (mentioning that leaders in the tattoo field solve their own legal problems and create requisite legal systems).

639. See Michael J. Madison, *of Coase and Comics, or, the Comedy of Copyright*, 95 VA. L. REV. IN BRIEF 27, 34 (2009).

fundamental premise of this business model.<sup>640</sup> Using a number of strategies, rights holders have responded with mixed results. They have waged war on intermediaries that enable or facilitate alleged infringement.<sup>641</sup> They have targeted their own customers in massive litigation dragnets.<sup>642</sup> They have encumbered their products with digital rights management technologies that simultaneously decrease their value and alienate consumers.<sup>643</sup> Because the tattoo industry relies on a very different strategy to extract value from its original works, it may offer some lessons for other creative industries seeking to wean themselves from over-reliance on control over the reproduction of copies.

Two facts about the tattoo industry separate it from most copyright-reliant industries. First, as discussed above, the contemporary tattoo industry emphasizes custom, one-of-a-kind designs rather than mass production.<sup>644</sup> Second, tattooers do not sell products. As they see it, they are in a service profession. They sell an experience, perhaps even an attitude. Clients don't pay for a drawing; they pay for the time the tattooer spends rendering that image on their skin. As one tattooer told me, "The image is just what happens to be left after you spend a moment in time with a particular person. It's an intangible object."<sup>645</sup> A custom tattoo requires the client and tattooer to spend many hours in a physically—and occasionally emotionally—intimate setting. As a result, clients look for interpersonal skill as well as artistic and technical expertise when choosing a tattooer:

I'm a cute, young, friendly girl. That is the difference . . . [My co-workers] are all grumpy old men. When people get tattooed by me, they're paying for a whole experience. They're like, "Oh, she's really fun; she's really sweet; she's really cute; she's upbeat; she's silly. I'm going to get this fun, cute tattoo. It's great."<sup>646</sup>

640. See Perzanowski & Schultz, *supra* note 209, at 2068 (describing how technology instantaneously helps us infringe copyright, even unintentionally).

641. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

642. See Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L. J. 565, 602–05 (2009).

643. See Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BGM Rootkit Incident*, 22 BERKELEY TECH. L. J. 1157 (2007).

644. See Rubin, *supra* note 19.

645. Interview with Subject 7, *supra* note 8, at 64.

646. *Id.* with Subject 12 at 128.

Because tattooers provide value through client experience and service rather than the mere provision of copies, they resemble some other notable outliers in the world of intellectual property business models. Jambands, most notably the Grateful Dead, earned their reputation and their fortune not through the sale of records, but through live performance.<sup>647</sup> “The Grateful Dead made each show a unique experience, presenting a unique set list and improvising heavily.”<sup>648</sup> Much like custom tattooers, the value the Grateful Dead provided was a function of a customized experience largely immune from mass reproduction.

Tattooers also share something in common with companies that monetize open source software. Because the software itself is typically available at no charge, open source firms often derive revenue not from selling copies, but by providing ancillary training and support services customized to meet the needs of each client.<sup>649</sup> Much like these open source firms, we could describe tattooers—who charge for their time but not their drawings—as giving away the recipe but opening a restaurant that will execute it.<sup>650</sup>

This Article does not advocate that the music, film, and publishing industries jettison their current business models in favor of one patterned on the Grateful Dead or Sailor Jerry. But taking service and experience seriously could help copyright-reliant industries adapt to new market conditions.<sup>651</sup>

Some more traditional copyright holders have already begun to embrace the shift from distributing mass-produced copies to providing customized, personalized service. Former major label recording artist Mike Doughty recently began selling unique, personalized recordings of his song “Dogs/Demons.”<sup>652</sup>

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647. See Schultz, *supra* note 547, at 669.

648. *Id.*

649. See Ronald J. Mann, *Commercializing Open Source Software: Do Property Rights Still Matter?*, 20 HARV. J.L. & TECH. 1, 34 (2006) (arguing that the “open source model leans ineluctably toward services firms”); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 834 (2001) (noting that “[t]he purchaser. . . does not buy the actual product, which is available free of charge, but instead pays for . . . services”).

650. See Scafidi, *supra* note 649, at 832 (citing ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 165 (1999)).

651. See RAUSTIALA & SPRIGMAN, *supra* note 548, 179–184 (2012) (noting the role experience and personal service play in limiting copying in food, movie, and music industries).

652. Mike Masnick, *Musician Mike Doughty Offers Unique Copy of His*

Each recording incorporates its date, location, and the full legal name of the purchaser.<sup>653</sup> In addition, purchasers can choose between three keys for their recording, all for a mere \$543.09 per copy.<sup>654</sup>

Doughty's experimental business model is at least in part an exercise in performance art. But other industries are emphasizing those aspects of their offerings that remain difficult to copy. The gaming industry's focus on online multiplayer games can be viewed as an effort to entice consumers with services and experiences that are far harder to duplicate than the mere contents of a disc.<sup>655</sup> Even the resurgence of 3D movies demonstrates Hollywood's awareness of the need to offer customers an experience that they cannot replicate at home.<sup>656</sup> Tattooing, because it has always functioned primarily as a service industry, and one that made the transition from mass production to bespoke craftsmanship decades ago, illuminates one path forward for other creative industries frustrated by the ever-decreasing value of the copy.

#### CONCLUSION

The tattoo, though formally embraced by the copyright system, fits rather awkwardly in any property regime. "Where classical economic theory recognizes three types of property: the intellectual, the real . . . and the movable . . . tattoo announces itself as a fourth type: a property that is at once mobile and inalienable."<sup>657</sup> Although they are unlikely to express themselves in terms of property theory, tattooers see their work as a *sui generis* amalgam of art, commerce, and human tradition. Perhaps then, it is not entirely surprising that they have opted to regulate this unique form of expression with rules crafted and enforced within their community.

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*New Song, Personalized to Each Buyer, for \$543.09*, TECHDIRT (Dec. 11, 2012, 8:01 PM), <http://www.techdirt.com/blog/casestudies/articles/20121207/10023821309/musician-mike-doughty-offers-unique-copy-his-new-song-personalized-to-each-buyer-54309.shtml>.

653. *Id.*

654. *Id.*

655. See generally Brandon Dixon, *Does Every Game Have to Have Multiplayer?*, EPICSLASH (May 1, 2012), <http://www.epicslash.com/does-every-game-have-to-have-multiplayer> (noting the ubiquity of online multiplayer games).

656. See generally Mike Cameo, *The Comeback of the 3D Film: A New Trend for a New Decade of Films*, YAHOO VOICES (Jan. 18, 2010), <http://voices.yahoo.com/the-comeback-3d-film-trend-new-5287419.html> (noting the resurgence of 3D theatrical releases).

657. Fleming, *supra* note 34, at 66–67.



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The norms tattooers have developed serve a number of overlapping purposes. They protect both the relationship between tattooer and client and the underlying assertion of personal sovereignty the tattoo represents by guaranteeing client autonomy. They simultaneously preserve tradition by encouraging the use of flash designs and encourage innovation by protecting custom designs from copying. And they give tattooers valuable tools for cultivating market demand for their services and controlling competition within their trade.

But the value of these norms is not confined to tattooers and their clients. They offer the rest of us something as well. They demonstrate that the assumptions upon which we base intellectual property law are empirically untested and myopically focused on a tiny sliver of overall creative production defined by legacy business models. But the tattoo industry's ability to withstand dramatic shifts in its means of creative production in recent decades suggests that other industries can successfully evolve to meet the changing demands of consumers. And finally, the persistence of tattooing across cultures, continents, and millennia reminds us that the human need for creative production transcends the contingencies of markets and law.