

INTELLECTUAL PROPERTY NORMS IN THE TATTOO INDUSTRY

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INTRODUCTION

An estimated twenty-one percent of adults in the United States—more than sixty-five million Americans—have at least one tattoo.¹ For those under the age of 40, that percentage nearly doubles.² Not surprisingly, the tattoo business is booming. By some estimates, the U.S. tattoo industry generates \$2.3 billion in annual revenue.³ Once the mark of sailors, convicts, and circus performers, the tattoo has infiltrated mainstream society.⁴

Despite its countercultural origins, the tattoo industry shares much in common with other, more familiar creative industries. Fundamentally, it capitalizes on market demand for original creative works. But as public goods, the value of those works is readily appropriable through copying. Predictably, copying is both a practical reality and a source of concern within the industry. But unlike their

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¹ See Harris Interactive, *One in Five U.S. Adults Now Has a Tattoo* (Feb. 23, 2012), http://www.harrisinteractive.com/vault/Harris%20Poll%202022%20-Tattoos_2.23.12.pdf.

² See Pew Research Center for the People & the Press, *36% - Tattooed Gen Nexters*, DATABANK (July 22, 2012), <http://pewresearch.org/databank/dailynumber/?NumberID=237> (noting that thirty-six percent of adults between 18 and 25 and forty percent of those between 26 and 40 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).

counterparts in most other creative industries, tattooers nearly uniformly reject formal legal mechanisms for adjudicating claims over ownership or copying.⁵ 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.⁶ Instead, tattooers rely on a set of generally accepted, informal social norms to structure and mediate relationships within their industry.⁷

Following in the tradition of previous work exploring the intersection of intellectual property law and social norms,⁸ 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 substance of those norms and the choice to forego formal assertions of legal rights; 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, unlike norms that emerge in the shadow of some barrier to meaningful intellectual property protection, tattoo industry norms function as an informal system of community governance that developed despite an applicable body of formal law. Others have identified emergent social norms

⁵ Practitioners in the tattoo industry refer to themselves by a number of terms, including “tattooists,” “tattoo artists,” and “tattooers.” 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.

⁶ See *infra* Part II.A.

⁷ See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PENN. 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).

⁸ See, e.g., 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); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORGANIZATION SCIENCE 187 (March 2008); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property without Law* in LAW & MAGIC: A COLLECTION OF ESSAYS (Christine A. Corcos ed., 2010); David Fagundes, *Talk Derby to Me: Emergent Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012).

that stand in for law when doctrinal or practical limitations preclude effective legal protection.⁹ More recently, David Fagundes described the norms governing roller derby pseudonyms.¹⁰ Because such *noms de guerre* are registrable as service marks, those norms served as an alternative to, rather than a substitute for, formal law.¹¹ But they emerged in large part because of the non-market volunteerism that defines the relevant community.¹² 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.

Second, tattoo industry norms are unique because they must account for a more complex set of relationships than those observed in earlier case studies. Not only must tattooers establish norms that govern their interactions with each other, but with clients who play an important role in the creation and use of their works as well. Further complicating matters, aside from copying within their industry, tattooers are faced with the question of the propriety of copying outside of it.¹³ 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.

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 reimportation into the West, and the recent emergence of the “tattoo renaissance.”¹⁴ This Part will also introduce the basic structure and vocabulary of the contemporary tattoo industry.

Part II begins by outlining the application of formal copyright doctrine to tattooing and concludes that both tattoo designs and tat-

⁹ See Oliar & Sprigman, *supra* note 8; Fauchart & von Hippel *supra* note 8; Loshin, *supra* note 8; see also Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317, 322–25 (2011).

¹⁰ See Fagundes, *supra* note 8.

¹¹ *Id.* at 1114–15.

¹² *Id.* at 1140–43.

¹³ 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 L. & CONTEMP. PROBS. 135, 156– (2007) (discussing norms within fan communities).

¹⁴ See generally Arnold Rubin, *The Tattoo Renaissance* in MARKS OF CIVILIZATION 233 (Arnold Rubin ed., 1988).

toos as applied to the human body qualify for copyright protection. But Part II is primarily dedicated to cataloging the norms that structure the tattoo industry. To develop this descriptive account, I conducted more than a dozen in-person qualitative interviews with tattooers throughout the United States, identified through snowball sampling relying on existing industry contacts.¹⁵ In terms of geography, gender, experience level, work environment, style, and clientele, they capture a diverse, if not necessarily representative, cross section of perspectives within the tattoo community.

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.

Part III turns from description to analysis. It offers a number of complementary explanations for the contours 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 averse to the legal system. As a deeply client-driven enterprise, the tattoo industry is sensitive to consumer expectations. Those expectations provide strong incentives for development of norms that preserve the collective interest in continued viability of the market for custom tattoos. Tattoo norms also erect barriers to entry to the increasingly crowded field of tattooers, revealing the guild-like nature of the industry. Finally, Part III considers the broader lessons the tattoo industry offers for intellectual property law and policy.

¹⁵ Snowball sampling is a “nonrandom sampling technique ... in which survey subjects are selected based on referral from other survey respondents.” KEN BLACK, *BUSINESS STATISTICS: CONTEMPORARY DECISION MAKING* 226 (2009).

I. A HISTORY OF TATTOOS

The term “tattoo” entered the English language through Captain James Cook’s accounts of his travels in Polynesia.¹⁶ In 1769, Cook witnessed Tahitians engaged in the practice of “tattowing” and described it as follows:

Both sexes paint their Bodys, *Tatton*, as it is called in the 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 in black Liquor, and then drove, by quick sharp blows struck upon the handle with a Stick....¹⁷

Cook’s account marks the beginning of the modern history of the tattoo. 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 fro-

¹⁶ C.P. Jones, *Stigma and Tattoo* in WRITTEN ON THE BODY 1 (Jane Caplan ed., 2000).

¹⁷ 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).

zen corpse of the Tyrolean Iceman, a 5300 year old mummy adorned with fifty-seven simple geometric tattoos made from a pigment derived from soot.¹⁸ The Iceman is not alone among 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.”¹⁹ A Scythian mummy from 500 B.C. bore elaborate depictions of animals on the arms and back.²⁰ And a thousand-year-old Peruvian mummy featured “ornamental tattoos depicting stylised apes, birds, and reptiles on the forearms, hands, and lower legs.”²¹

Tattooing was practiced throughout the ancient world. In Japan, the evidence dates to at least the third century B.C.²² The admonition in Leviticus—“do not mark your skin with tattoos”—suggests the practice was known among the Israelites.²³ The Persians passed tattooing on to the Greeks, who used the term “stigmata” to describe images “inscribed on the face or other part of the body ... by pricking the places with needles, wiping away the blood, and rubbing it in ... the [ink] preparation.”²⁴ The Greeks, in turn, passed the practice on to the Romans.²⁵

The social meanings of these early tattoos were as diverse as the cultures that created them. Some tattoos were purely ornamental.²⁶ Others had ceremonial or religious functions.²⁷ Still others are

¹⁸ Maria Anna Pabst, et al., *The Tattoos of the Tyrolean Iceman: A Light Microscopical, Ultrastructural and Element Analytical Study*, 36 J. ARCHAEOLOG. SCI. 2335 (2009); Jennifer Viegas, *Oetzli Iceman's Tattoos Came from Fireplace*, DISCOVERY NEWS (July 17, 2009), dsc.discovery.com/news/2009/07/17/iceman-tattoos.html.

¹⁹ Jones, *supra* note 16, at 2.

²⁰ *Id.*

²¹ Leopold Dorfer, et al., *A Medical Report from the Stone Age?* 354 LANCET 1023 (1999).

²² See MARGO DEMELLO, BODIES OF INSCRIPTION 72 (2000); DONALD RICHIE & IAN BURUMA, THE JAPANESE TATTOO 11 (1989).

²³ LEVITICUS 28:19 (New Living Translation).

²⁴ Jones, *supra* note 16, at 4-5 (quoting AETIUS AMIDENUS, TETRABIBLON).

²⁵ Jones, *supra* note 16, at 4-11.

²⁶ Dorfer, *supra* note 21.

²⁷ See Juliet Fleming, *The Renaissance Tattoo* in WRITTEN ON THE BODY 69 (Jane Caplan ed., 2000); Jones, *supra* note 16 (noting that tattoos were often part of Christian pilgrimages to the Holy Land).

thought to have served therapeutic purposes.²⁸ Some indicated high rank or social status,²⁹ whereas Greek and Roman “stigma” were reserved for prisoners and slaves.³⁰ 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, “received their name from their painted bodies, because they are marked by tattoos of various figures made with iron pricks and black pigment.”³¹ And in the early seventeenth century, native Americans re-exposed the British to tattooing.³² Europeans of this period encountered tattoos not only in the Americas, but Africa and Asia as well, apparently “without being tempted to try it for themselves.”³³

That changed when Cook returned to Europe after his second circumnavigation of the globe, 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.³⁴ Omai became something of a sensation; “newspa-

²⁸ See Dorfer, *supra* note 21 (noting the close correspondence between tattoos on mummified remains and acupuncture points).

²⁹ See WILFRID DYSON HAMBLY, *THE HISTORY OF TATTOOING* 206-207 (2009) (noting the “status-giving” function of tattoos in Polynesian cultures).

³⁰ Jones, *supra* note 16.

³¹ *THE ETYMOLOGIES OF ISIDORE OF SEVILLE, SAINT ISIDORE (OF SEVILLE)* 198 (Stephen A. Barney trans., 2006); see also JOHN SPEED, *THE HISTORIE OF GREAT BRITAIN* 167 (1611) (“the Brittaines ... 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”).

³² SAMUEL PURCHAS, *PURCHAS HIS PILGRIMAGE* 955 (1617) (describing Algonquian women who would “pounce and raze their bodies, legs, thighes, and armes, in curious knots and portraytures of fowles, fishes, beasts and rub a painting into the same, which will never will out”). “Pouncing” and “razing” were English terms for tattooing used until the mid-eighteenth century. Fleming, *supra* note 27, at 69.

³³ *Id.* at 67.

³⁴ Harriet Guest, *Curiously Marked: Tattooing and Gender Differences in*

pers 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.”³⁵ More importantly, he “sparked a tattooing vogue among the English aristocracy.”³⁶

Initially, the European tattooed class comprised primarily sailors, soldiers, and adventurers who traveled to Tahiti, New Zealand, and other far flung locales. Cook’s own crew were among the first Europeans to return with traditional Polynesian tattoos.³⁷ And tattooing quickly spread throughout the British military.³⁸

By the nineteenth century, European fashionable society was “gripped by a tattoo craze.”³⁹ Sutherland Macdonald and Ted Riley opened tattoo studios where wealthy Londoners eagerly joined the “newly tattooed upper class” with the likes of Edward, Prince of Wales, the Duke of York, Lady Randolph Churchill, and King Oscar II of Sweden.⁴⁰

Eighteenth-century British Perceptions of the South Pacific in WRITTEN ON THE BODY 83 (Jane Caplan ed., 2000).

³⁵ Stephan Oettermann, *On Display: Tattooed Entertainers in America and Germany*, in WRITTEN ON THE BODY 196 (Jane Caplan ed., 2000).

³⁶ Fleming, *supra* note 27, at 67.

³⁷ DEMELLO, *supra* note 22, 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 130-131 (John Barrell ed., 1992) (describing the “inauguration of the nautical tradition” of tattooing in the eighteenth century).

³⁸ 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).

³⁹ *Id.* at 145-46

⁴⁰ *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 tattooer George Burchett). See also Jane Caplan, *National Tattooing: Traditions of Tattooing in Nineteenth-century Europe* in WRITTEN ON THE BODY 156 (Jane Caplan ed., 2000) (discussing tattoos among German and Italian criminals); Abby M. Schrader, *Branding the Other/Tattooing the Self: Bodily Inscription among Convicts in Russia*

In the United States, Martin Hildebrandt opened the first professional tattoo shop in 1846 in New York.⁴¹ Early U.S. tattooers like Hildebrandt and Gus Wagner relied on the same basic techniques and hand tools used for thousands of years.⁴² But in 1891, another New York tattooer, Samuel O'Reilly, invented the tattoo machine, a device that fundamentally reshaped tattooing.⁴³ The introduction of electric machinery made tattooing cheaper, faster, and less painful.⁴⁴ It also helped develop a distinctive American aesthetic characterized by “strong black lines...; heavy black shading; and a dab of color” from a limited palette emphasizing red, blue, and green.⁴⁵

Tattooers in the United States were generally from the same working class backgrounds as their clients⁴⁶ and typically had no prior art training.⁴⁷ Rather than create custom artwork for their clients, tattooers of this era worked almost exclusively from collections of pre-drawn images called “flash.”⁴⁸ Designs included military insignia, ships, hearts, flowers, skulls, daggers, snakes, tigers, Christian icons, and scantily clad women.⁴⁹ These same images, or minor variations on them, hung on the walls of nearly every tattoo shop of the era. 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

and the Soviet Union in WRITTEN ON THE BODY 184-85 (Jane Caplan ed., 2000); 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).

⁴¹ DEMELLO, *supra* note 22, at 49.

⁴² Alan Govenar, *The Changing Image of Tattooing in American Culture 1846-1966*, in WRITTEN ON THE BODY 214-15 (Jane Caplan ed., 2000).

⁴³ 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).

⁴⁴ DEMELLO, *supra* note 22, at 50; 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).

⁴⁵ *Id.*

⁴⁶ See Rubin, *supra* note 14, at 234; R.I. Geare, *Tattooing Among Savages*, SCI. AM., 12 Sept. 1903, at 190 (“Among us, the art of tattooing is left to the lower class; so it is a degraded art”).

⁴⁷ DEMELLO, *supra* note 22, at 51; Rubin, *supra* note 14, at 234.

⁴⁸ *Id.* at 52-53. Govenar, *supra* note 42, at 217.

⁴⁹ *Id.* at 218-19; DEMELLO, *supra* note 22, at 52.

to his stock of flash.⁵⁰ Some enterprising tattooers, first among them Lew Alberts and Charlie Western, sold sheets of flash to other tattooers for use in their shops.⁵¹

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. 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.⁵² “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 there to crank those [tattoos] out.” 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.⁵³

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.⁵⁴ And unsanitary conditions in many tattoo shops raised serious public health concerns. Equipment was not sterilized; the same needles were used on successive customers; and ink was taken from a shared container.⁵⁵ 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.⁵⁶

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.⁵⁷ But this period of creative stagnation and dwindling popularity set the stage for a fundamental shift in the industry.⁵⁸

⁵⁰ *Id.*

⁵¹ Govenar, *supra* note 42, at 217.

⁵² See DEMELLO, *supra* note 22, 63-65.

⁵³ *Id.* at 63.

⁵⁴ *Id.* at 66-67; Govenar, *supra* note 42, at 229.

⁵⁵ DEMELLO, *supra* note 22, at 62.

⁵⁶ Govenar, *supra* note 42, at 229-32. For more on the legal regulation of the tattoo industry, see *infra* Part III.A.

⁵⁷ Govenar, *supra* note 42, at 217.

⁵⁸ See Rubin, *supra* note 14, at 235-36.

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. Flash met the needs of tattooers, who considered themselves craftsmen or tradesmen, with little interest in artistic expression for its own sake.⁵⁹ And it met the needs of clients, whose tattoos often communicated group membership or commemorated milestones through established iconography.⁶⁰

But beginning in the 1960s, tattooers began to reconceptualize their work.⁶¹ Sailor Jerry was among the first and most important tattooers to challenge prevailing practices.⁶² 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.⁶³ 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.⁶⁴

Over the next few decades, the innovations of Sailor Jerry and protégés like Cliff Raven⁶⁵ and Don Ed Hardy⁶⁶ helped bring about three interlinked shifts in the industry that led to what some have called the tattoo renaissance.⁶⁷ First, a new generation of tattoo-

⁵⁹ CLINTON R. SANDERS, *CUSTOMIZING THE BODY: THE ART AND CULTURE OF TATTOOING* * (2008); *see also* Rubin, *supra* note 14, at 233-35.

⁶⁰ “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.” Doc Webb, *Sailors ‘N’ Tattoos*, 3 *TATTOO-TIME* 10 (1985).

⁶¹ Rubin, *supra* note 14, at 233-35.

⁶² Sailor Jerry was born Norman Keith Collins. DEMELLO, *supra* note 22, at 73.

⁶³ Rubin, *supra* note 14, at 233-35; *see also* DEMELLO, *supra* note 22, at 72-75.

⁶⁴ *See* Rubin, *supra* note 14, at 233-35 (describing the “international folk style” of tattooing that characterized the early U.S. tattoo industry).

⁶⁵ *See id.* at 236-41.

⁶⁶ *See id.* at 241-45.

⁶⁷ *See* Rubin, *supra* note 14, at 233-236.

ers were 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.⁶⁸ 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.⁶⁹ Third, the client base of the industry underwent its own 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.⁷⁰

These three changes gave rise to the most important development in the industry from the perspective of creative norms—the rise of custom tattooing.⁷¹ Rather than simply offer their clients a selection of flash from which to choose, tattooers increasingly created unique designs for individual clients, customized for both their tastes and their bodies.⁷² 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.”

As a result of these changes, the tattoo industry today is de-

⁶⁸ *Id.* at 235; SANDERS *supra* note 59, at 19.

⁶⁹ See DALE RIO & EVA BIANCHINI, TATTOO 12 (2005).

⁷⁰ See Rubin, *supra* note 14, at 235; see also DEMELLO, *supra* note 22, at 92.

⁷¹ See Enid Schildkrout, *Inscribing the Body*, 33 ANN. REV. ANTHRO. 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”).

⁷² *Id.*

fined by two very different paradigms. The street shop fits comfortably with the common public conception of a “tattoo parlor.” A garish neon sign flickers above the entrance. 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. Clients are often charged a pre-determined, cash-only flat rate. Most simple flash designs can be tattooed in well under an hour, sometimes as quickly as a few minutes. Hundreds, likely thousands, of tattoo shops in the United States fit this basic model.⁷³

Less familiar to the public imagination is the high-end custom tattoo shop. Skull & Sword, a respected shop in San Francisco, is one example. Located on the second floor of nondescript building, the shop features minimal signage. Rather than accept walk-ins, tattooers book appointments several months in advance. Instead of flash hanging on the walls, each tattooer’s portfolio of custom tattoos is available for viewing. 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.⁷⁴ A sizable custom tattoo can take many hours to complete, often requiring multiple appointments over the course of months.

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. 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.⁷⁵ 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.

⁷³ As of 2007, an estimated 15,000 tattoo shops operated in the United States. *See* Chafkin, *supra* note 3.

⁷⁴ “Cash only” is perhaps the only truly universal rule in the tattoo industry. SANDERS, *supra* note 59, at 105.

⁷⁵ 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.”

II. LAW, NORMS & 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. 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.⁷⁶ Copying is a topic of perennial concern within the tattoo industry. 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. 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

Copyright law protects “original works of authorship fixed in any tangible medium of expression.”⁷⁷ If a work is original and fixed, copyright attaches unless the work falls within one of the defined exclusions from copyrightable subject matter.⁷⁸

Originality requires that a work is independently created rather than copied from preexisting material, and that it reflect a modicum of creativity.⁷⁹ 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.

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 for a period of more than transitory duration.”⁸⁰ Fixation serves two functions. It helps reduce problems of proof by insisting on a durable record of the protected work.⁸¹ Fixation also helps ensure that works are pre-

⁷⁶ See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (2011).

⁷⁷ 17 U.S.C. § 102(a).

⁷⁸ See *id.* § 102(b).

⁷⁹ See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

⁸⁰ 17 U.S.C. § 101.

⁸¹ See Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J.

served and disseminated for the benefit of future generations.⁸²

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 freehand directly on a client's skin, but more often they create a detailed line drawing of the tattoo design on paper. 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.

Although the line drawing forms the basis for the tattoo, it differs from the final product on the client's skin in important ways. 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. Particularly for tattoos thoughtfully designed to take advantage of the shape of the client's body, the shift to three dimensions can dramatically alter the appearance of the tattoo. More generally, line drawings lack the shading and color typically added to the final tattoo. The tattoo, then, embodies creative choices not reflected in the line drawing. In copyright terminology, the completed tattoo is derivative of the line drawing, and should be considered a separate work.⁸³

Line drawings fall squarely within the Copyright Act's definition of "pictorial, graphic, and sculptural" works.⁸⁴ 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. 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."⁸⁵ Tattoos, like their pencil and paper counterparts, appear to be appropriate subjects of copyright protection.⁸⁶

683, 730–34 (2003).

⁸² See Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1094-95 (2010).

⁸³ 17 U.S.C. § 101.

⁸⁴ See 17 U.S.C. §§ 101 & 102(a).

⁸⁵ *Id.*

⁸⁶ The scant scholarly literature on copyright in tattoos either assumes

But a recent dispute over Mike Tyson's facial tattoo gave one commentator an opportunity to challenge this seemingly straightforward result.⁸⁷ In 2003, Victor Whitmill tattooed an abstract image, inspired by Maori *moko*,⁸⁸ on the face of former heavyweight boxing champion Mike Tyson.⁸⁹ 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. Whitmill, after seeing promotional materials for the film featuring his design, sued Warner Brothers to enjoin the release of the film.⁹⁰

In an expert witness declaration, David Nimmer⁹¹ offered a number of legal conclusions suggesting that Whitmill was not entitled to copyright protection for Tyson's tattoo.⁹² Despite affirming in his authoritative 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,"⁹³ Nimmer argued that Tyson's skin did not

or concludes this result. See 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); Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Business Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313 (2006).

⁸⁷ 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) ("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").

⁸⁸ See generally Peter Gathercole, *Contexts of Maori Moko* in MARKS OF CIVILIZATION 171 (Arnold Rubin ed., 1988).

⁸⁹ Complaint at 2, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-cv-00752 (E.D. Mo. April 28, 2011).

⁹⁰ *Id.* 4-5. Whitmill's copyright registration covers "artwork on 3-D object" presumably because he created the tattoo directly on Tyson's face without first drawing the design on paper. See Certificate of Registration VA 1-767-704 (April 19, 2011).

⁹¹ Nimmer has updated and revised *Nimmer on Copyright* since 1985. See David Nimmer, <http://www.irell.com/professionals-51.html>

⁹² See generally Declaration of David Nimmer, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-cv-00752 (E.D. Mo. May 20, 2011) [hereinafter Nimmer Declaration].

⁹³ NIMMER ON COPYRIGHT 1.01[B][1][i] n.392.

qualify as a tangible medium of expression, comparing it to a frosty window pane or wet sand as the tide approaches.⁹⁴ But those quintessential examples of transitory media are a far cry from the lifelong fixation of a tattoo.

More plausibly, Nimmer pointed to the useful article limitation on pictorial, graphic and sculptural works as a separate basis for denying protection.⁹⁵ The useful article doctrine precludes copyright protection for products whose purpose is utilitarian rather than expressive, largely eliminating copyright protection for industrial design.⁹⁶ 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.⁹⁷ 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.⁹⁸ Nimmer, however, asserted that "the only legally cognizable result is to apply the strict requirement of physical separability."⁹⁹ Otherwise, he claimed the Copyright Act would "set to naught the Thirteenth Amendment's prohibition of badges of slavery."¹⁰⁰

At the root of Nimmer's equation of willing recipients of tattoos with slaves is a concern over certain remedies available to a suc-

⁹⁴ Nimmer Declaration at 4. *See also* Ann Bartow, *When A Treatise Writer Tries to Reconfigure Copyright Law to Benefit a Client*, MADISONIAN (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).

⁹⁵ Nimmer Declaration at 7-11.

⁹⁶ Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983) (noting that "copyright law has reluctantly embraced a variety of works embodied in utilitarian objects, while simultaneously purporting to exclude the general province of industrial design").

⁹⁷ *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987).

⁹⁸ *See id.* at 1145 (explaining that "where design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences, conceptual separability exists").

⁹⁹ Nimmer Declaration at 11.

¹⁰⁰ *Id.*

cessful copyright plaintiff.¹⁰¹ As he noted, copyright protection could grant Whitmill control over Tyson's public displays of the tattoo¹⁰² as well as reproductions of it in photographs or video.¹⁰³ Nimmer worried that the derivative work right could give Whitmill some say over other tattoos Tyson might choose to apply to his face.¹⁰⁴ 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.¹⁰⁵

Although the court regarded Nimmer's arguments as "silly," these potential consequences are indeed alarming.¹⁰⁶ 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,¹⁰⁷ fair use,¹⁰⁸ first sale and related exhaustion doctrines,¹⁰⁹ implied license,¹¹⁰ and equitable discretion over injunctive

¹⁰¹ *Id.* at 5-6.

¹⁰² *See* 17 U.S.C. § 106(5) (granting the copyright holder the exclusive right to publicly display the work).

¹⁰³ *Id.* § 106(1) (granting the copyright holder the exclusive right to reproduce the work).

¹⁰⁴ *Id.* § 106(2) (granting the copyright holder the exclusive right to prepare derivatives based on the work).

¹⁰⁵ *Id.* § 106A (granting the author of a work of visual art the right "to prevent any destruction of a work of recognized stature").

¹⁰⁶ *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), <http://www.wired.com/threatlevel/2011/06/tattoo-flap-settled>.

¹⁰⁷ *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

¹⁰⁸ *See* 17 U.S.C. § 107.

¹⁰⁹ *See* 17 U.S.C. § 109; *see also* Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion & the Personal Use Dilemma*, 96 MINN. L. REV. ___ (2012).

¹¹⁰ *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, 451 (2010).

relief.¹¹¹ 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.

Copyright suits between tattooers and their clients, or suits between two tattooers, are virtually non-existent.¹¹² Most of the copyright litigation involving tattoos centers around tattoo-inspired designs used on clothing or other merchandise.¹¹³ Occasionally tattooers sue each other on non-copyright grounds.¹¹⁴ And rarely, non-copyright litigation arises between tattooers and their clients.¹¹⁵

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 2005, Portland tattooer Matthew Reed filed a complaint against his client, Rasheed Wallace, a former player for the NBA’s Portland Trailblaz-

¹¹¹ See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (U.S. 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, (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”).

¹¹² 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.

¹¹³ See *Crispin v. Audigier*, 2011 U.S. Dist. LEXIS 151150 (C.D. Cal. Dec 12, 2011) (designs used on apparel, jewelry and other merchandise); *Tattoo Art, Inc. v. Tat Int’l*, 711 F. Supp. 2d 645 (E.D. Va. 2010) (flash designs licensed for use as airbrush stencils); *S.T.R. Industries v. Palmer Industries*, 1999 WL 258455 (N.D. Ill. April 9, 1999) (tattoo themed designs applied to pool cues).

¹¹⁴ See, e.g., *Quidgeon v. Olsen*, 2011 U.S. Dist. LEXIS 42309 (C.D. Ill. April 19, 2011) (trademark dispute between competing tattoo shops).

¹¹⁵ See, e.g., *Minnifield v. Ashcraft*, 903 So.2d 818 (Ct. Civ. App. Ala. 2004) (invasion of privacy claim against tattooer for publishing photo without permission).

ers.¹¹⁶ Reed tattooed a custom image of an Egyptian family on Wallace's arm, for which Wallace paid Reed \$450.¹¹⁷ Six years later, Wallace's tattoo was featured prominently in an advertising campaign for Nike produced by advertising firm Wieden+Kennedy.¹¹⁸ 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.¹¹⁹ 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.¹²⁰

Nonetheless, simply by bringing suit, Reed operated outside of the accepted norms of the tattoo industry. 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. None had been involved in a formal copyright dispute or knew other tattooers who had. And the vast majority were dismissive of the notion of bringing a suit against a client or another tattooer. As one interview subject colorfully put it, one tattooer who sued another for copying would be "labeled kind of a wiener with thin skin."

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. But on the whole, they were reluctant to endorse reliance on the judicial system even under those circumstances. In part, this reluctance is an outgrowth of general misgivings about the legal system.¹²¹ 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. To varying degrees, client input helps shape the design of a custom tattoo. And once an

¹¹⁶ Complaint, *Reed v. Nike Inc.*, No. 05-CV-198 BR (D. Or. Feb. 10, 2005).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Stipulation of Dismissal with Prejudice, *Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Oct. 19, 2005).

¹²⁰ For a detailed discussion of *Reed*, see Harkins, *supra* note 86.

¹²¹ See *infra* Part III.

image is created on the client's skin, tattooers uniformly acknowledge that control over that image, with some limited exceptions, shifts to the client.

The design process typically begins with a consultation, where the client presents the tattooer with a basic description of the imagery they envision for their tattoo. 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."

Typically, the consultation is the beginning of an ongoing conversation between tattooer and client. 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 towards choices that, while true to the client's original conception, are more likely to translate well into tattoos. 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. The deposit fee is then deducted from the eventual hourly-rate price of the tattoo.¹²² As a result, tattooers do not ultimately charge clients for their time and effort in creating a design.

Once the tattooer draws an initial design, clients typically have an opportunity to request edits or revisions. Most tattooers expect to make such changes. 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.]"¹²³ Even after the client and tattooer agree on the line drawing, other important decisions, like color choice, often involve client input.

Because custom tattoos are both commissioned and collaborative, a copyright lawyer would be tempted to consider the tattooer-client relationship through the lenses of works made for hire and

¹²² "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."

¹²³ A small minority of tattooers refuses to make edits. "I never re-draw 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."

joint authorship. 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. 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.¹²⁴ Under standard common law agency principles, tattooers are not the employees of their clients.¹²⁵ And although custom tattoos are specially commissioned, they are not among the enumerated statutory categories eligible for treatment as works made for hire.¹²⁶ In addition, signed agreements that contemplate copyright ownership are practically unheard of in the tattoo industry.

Perhaps not surprisingly, the formal conclusions of copyright law do not dictate how tattooers conceptualize their ownership interests in their work. As one tattooer explained, “I don’t necessarily feel 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 an artist paid to bring visions to life.”

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 con-

¹²⁴ 17 U.S.C. § 101.

¹²⁵ *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-751 (U.S. 1989) (holding that “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 (March 31, 2006), <http://www.tattoodles.com/magazine/editorial/147>.

¹²⁶ *See* 17 U.S.C. § 101 (identifying the categories of works eligible as specially commissioned works made for hire).

tributions be merged into inseparable or interdependent parts of a unitary whole.”¹²⁷ 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. According to most courts, in order to be considered an author for joint work purposes, a party’s contribution must be independently copyrightable.¹²⁸ Although each tattoo features a mix of contributions from tattooer and client, clients typically contribute uncopyrightable ideas, not protected expression.¹²⁹

Formal law would treat most custom tattoo designs as works created by the tattooer alone. Nonetheless, the design process is deeply, and understandably, sensitive to client preferences. Clients, after all, exercise the final choice over 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. Far from seeing them as slaves or “cattle,” tattooers recognize the freedom and individuality of their clients.¹³⁰ 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

¹²⁷ *Id.*

¹²⁸ *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069-71 (7th Cir. Ill. 1994); *see also Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (the Copyright Act “requires each author to make an independently copyrightable contribution”).

¹²⁹ “[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.” *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea”).

¹³⁰ *Nimmer Declaration* 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”).

as far as my ownership goes. [Claiming control over the client's use of tattoo] is ridiculous. That goes against everything that tattooing is. A tattoo is 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.

Copyright law limits the author's right to control a work after a transfer of ownership of a copy of that work. 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.¹³¹ 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.¹³² 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.¹³³

Tattooers, in contrast, embrace a more robust set of exhaustion rights favoring their clients. 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. 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."

Tattooers also recognize that clients are free to create new works that incorporate or even destroy their original designs. New

¹³¹ 17 U.S.C. § 109(a).

¹³² *Id.* § 109(c).

¹³³ *But see id.* § 117 (enabling owners of copies of computer programs to create derivative works and reproductions). The common law of copyright exhaustion also extends beyond the statutory limitations to embrace unauthorized reproductions and derivatives. *See generally* Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011).

designs frequently use the client’s existing tattoos as a starting point for expansion, regardless of who did the original work. And clients with poorly executed tattoos often ask more skilled tattooers for a “coverup”—a new tattoo that entirely conceals the existing one. None of the tattooers with whom I spoke expressed any reservation about these widespread practices. Assuming these new tattoos would constitute derivative works in the first place, tattoo industry norms would seem more forgiving than formal copyright law.

But under prevailing industry norms, not all client uses are acceptable. 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. For example, one tattooer told me:

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.

On the whole, tattoo industry norms place a premium on establishing and maintaining the relationship between the tattooer and the client. As one interview subject put it, “To get a great tattoo, it’s a full surrender into trust and faith [in the tattooer].” In part, that relationship of trust is facilitated by the tattooer’s recognition of client autonomy. 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. 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. As a rule, tattooers refuse to apply one client’s custom tattoo to a second client. Those requests are most often met with the frank response, “No. That’s someone else’s tattoo.”

The norm against reuse of custom designs is rooted in three primary concerns: the tattooer’s own artistic interest in variety, the original client’s expectation of a one-of-a-kind tattoo, and an obliga-

tion to develop a design that more closely suits the needs of the second client.

Most custom tattooers take pride in their ability to create distinct tattoos for each of their clients. One tattooer told me she “would never put a custom tattoo that I created for an individual client on another client ... because I think it compromises my integrity as a tattooer, and just as an artist in general.” Another interview subject explained the reluctance to reuse designs in simpler terms: “It’s no fun.”

Aside from creative self interest, tattooers share “empathy” or “respect” for and an “ethical duty” to clients who entrust them to design and apply their custom tattoos. Some see their obligation in almost contractual terms. 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.” These understandings are not written and are rarely even spoken. Still other tattooers think of their duty as an outgrowth of the collaborative design process. 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].”

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 well:

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, and I love the way you designed it.” 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.

This sense of obligation extends to the second client as well. 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. First time clients, familiar with the flash-driven stereotype of a tattoo shop, are often unaware that they can commission a customized design. Others lack familiarity with design principles and vocabulary

and feel ill-equipped to describe their ideas. Tattooers often treat requests to repeat a custom design as a starting point for evaluating the second client's true interests. 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 it 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.

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

Adherence to the norms respecting client autonomy and disfavoring reuse of custom designs is widespread within the tattoo industry. These client-centered norms are non-controversial in part because the behaviors they proscribe are clearly defined. 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

Unlike client-centered norms, the norm against copying custom tattoo designs, while widely shared among tattooers, is susceptible to a range of interpretations. Although literal copying of another tattooer's custom design clearly violates the norm, tattooers vary considerably in their evaluation of more subtle forms of copying that borrow abstract rather than literal design elements. Predictably, differing perceptions of the line separating impermissible copying from permissible inspiration, transformation, and evolution result in disputes between tattooers.

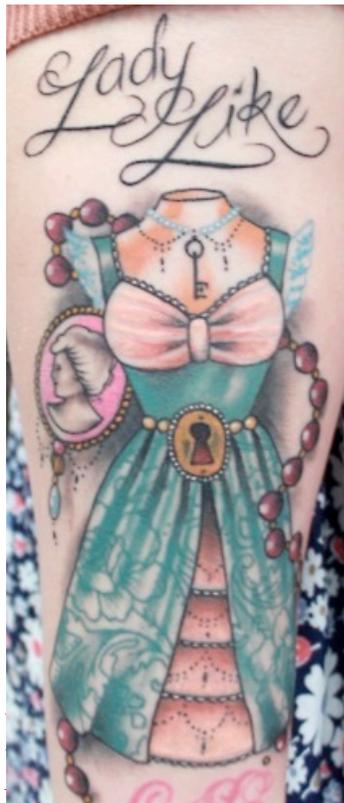
This section will explore approaches to non-literal copying

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. The Difficulty of Defining Copying

Every tattooer with whom I spoke agreed that literal copying of another tattooer's custom design transgresses industry norms. Literal copyists, considered "the lowest of the low" among tattooers, are referred to as "tracers," "biters," and "hacks" and closely associated with "scratchers," a derogatory term for tattooers with limited artistic and technical skill.¹³⁴ Equally 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.

A custom tattoo designed by Guen Douglas and its subsequent copying by other tattooers provides examples of both literal and close copying.¹³⁵ Figure 1 below shows the original design Douglas tattooed on her client; Figure 2 depicts a literal copy created by another tattooer.



¹³⁴ 69, at 34.
¹³⁵ *Avoid Tattoo Plagiarism*, TATTOO MAGAZINE (March 15 2012), <http://tattoomagazine.com/2012/03/15/guen-douglas-how-to-avoid-tattoo-plagiarism>.

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 literally. Of course, given the hand-fashioned nature of tattoos, not to mention variations in skin type and body shape among clients, no two tattoos are ever identical. But these two images represent the extreme of literal copying within the medium.

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.



Figure 3

These examples of literal or close copying present uncontroversial violations of industry norms. 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. 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], 'That's my owl and hourglass' is just stupid." Between these two extremes, however, tattooers lack any widely accepted definition of impermissible copying.

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. 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. 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."¹³⁶

Within this grey area, tattooers are sensitive to the risk of treading too closely to another custom design. In response, some adopt strategies to reduce the risk of running afoul of the anti-copying norm. 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 that shares little in common at the literal level with the original reference material.

Others try to insulate themselves from the potential influence, conscious or subconscious, of other tattoo designs. One tattoo-

¹³⁶ That description of the elusive line separating idea from expression calls to mind Learned Hand's apothegm:

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, where ever 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*.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

er 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 it.” 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.”¹³⁷

But most tattooers are not quite so troubled by the prospect of non-literal borrowing. Many see some degree of copying as an unavoidable, and occasionally desirable, consequence of the creative process. 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, they simultaneously demonstrate a certain reverence for traditional tattoo aesthetics. Clients are likewise drawn to the rich iconography of tattoo history. Daggers, ships, and roses—although drawn with more artistry—remain staples within the contemporary tattoo industry.

Because of the constraints of their milieu, drawing from the common pool of traditional design elements is often inevitable. “Tattooing 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.” Or as another tattooer put it, referring to the ornamental fish common in traditional Japanese tattooing, “A koi is a koi is a koi.” 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.

The *scènes à faire* doctrine in copyright law is premised on a similar insight. 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.”¹³⁸ Just as “drunks, prostitutes, vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx,” traditional American tattoos are likely to depict swallows, anchors, and roses with bold outlines and bright colors.¹³⁹ As Figure 4 illustrates, such tattoos often share much in common even in the absence of copying. To the extent a custom tattoo fits

¹³⁷ This worry is similar to the theory of subconscious copying adopted by the court in *Bright Tunes v. Harrisongs*, 420 F. Supp. 177 (S.D.N.Y. 1976).

¹³⁸ 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 4:24 (2010).

¹³⁹ *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

within the confines of a genre, tattooers see them as less susceptible to claims of copying.



Figure

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

If that person's 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.

As discussed below, these exceptions also reflect tattooers' ideas about the kinds of harm the anti-copying norm is meant to protect against.¹⁴⁰ However, it is also indicative of a sense that copying is sometimes a necessary component of the creative process.

The skepticism tattooers express about originality is not limited to traditional tattoo imagery. Regardless of subject matter or style, they see copying as integral to their creative enterprise. In part, this attitude reflects the eagerness with which tattooers have mined other cultures, media, and art forms to satisfy client demands. 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."¹⁴¹

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

¹⁴⁰ See *infra* Part II.C.3.

¹⁴¹ Benson, *supra* note 44, at 243 (quoting Don Ed Hardy).

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 twenty years ago. I don't feel ashamed about it, and I don't feel bummed out on that.

Others see copying as a form of creative dialog that should not only be accepted but celebrated. One tattooer explained that “if someone takes something I've done and they are inspired by it, take it, rework it, and make it even better, that's not going to make me upset. That's going to make me say I can step it up too.”

Outside of literal and close copying, tattooers exhibit a range of attitudes when their custom designs share common elements. Some see any degree of conscious or subconscious borrowing as something to be avoided, while others embrace the influence of their peers. Not surprisingly, tattooers faced with examples of copying respond in a correspondingly nonuniform way.

2. Detection & Enforcement

Custom tattoos are inherently private works. Aside from the client's social acquaintances and customers browsing the tattooer's portfolio, few people have occasion to see a particular custom tattoo absent wider publication. Therefore, they have been less susceptible to copying than the mass media products at the center of most copyright litigation. Many tattooers were skeptical of the rise of tattoo magazines in decades past because they posed an increased risk of copying.¹⁴² But today, images of custom tattoos are more accessible than ever before. Tattooers and tattoo shops post photos of their works on their websites; clients share photos of their tattoos on social networking sites 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.¹⁴³ This widespread availability of custom tattoo images—combined with an influx of inexperienced tattooers and clients as the popularity of tattooing grew—has resulted in a marked increase in literal and close

¹⁴² See DEMELLO, *supra* note 22, at 34-37.

¹⁴³ See, e.g., <http://www.tumblr.com/tagged/tattoos>.

copying within the tattoo industry.

The majority of tattooers with whom I spoke shared at least one anecdote of their custom tattoo designs being copied by another tattooer in violation of the anti-copying norm. In most of these stories, the internet played a role in enabling both access to the original tattoo and detection of the copy. Tattooers often discover copies when clients, friends, or other tattooers recognize a copied design and bring it to their attention. None of the tattooers with whom I spoke have actively searched for copies of their work.

Technology also plays a role in the various enforcement mechanisms employed by tattooers. 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. But because of the national and international scope of the tattoo industry, email, Facebook, and tattoo-specific online discussion boards are increasingly the locus of enforcement efforts.

When tattooers encounter what they consider copies of their work, they typically adopt one of three basic strategies: inaction, direct communication, or negative gossip. 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. One tattooer, after describing a scenario in which an entire custom sleeve—a tattoo occupying the client’s entire arm, from shoulder to wrist—was traced by another tattooer explained, “You 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.”

Other tattooers communicate directly with copyists. These conversations range from the friendly to the overtly confrontational. Some veteran tattooers see instances of copying as an opportunity to educate their less experienced colleagues. 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. 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 accusation of wrongdoing. Less affably, other tattooers described sending “a strongly worded email” to confront a copyist.

One subject reported a minor physical altercation between two tattooers over allegations of copying, but physical violence in the

tattoo industry today is uncommon. Several interview subjects, however, spoke of the very real threat of violence in earlier eras of tattooing:

There 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.

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

Today, rather than grievous bodily harm, the primary consequence tattooers face for copying is negative gossip. Tattooers mention “public shaming,” “blacklisting,” and “shit talking” as the most common means of responding to copyists. Despite its size and geographic scope, many interview subjects described the tattoo industry as a tight-knit community. As a result, gossip can have serious social and professional consequences: “Socially, you're screwed. In the community, you're screwed.... Being part of the community is a really important part of your growth.”

This gossip spreads primarily among tattooers; clients are rarely in a position to know that a tattooer has earned a reputation for copying. So although they may feel a sense of social isolation, copyists rarely experience any direct financial harm as a result of negative gossip. But occasionally, tattooers will make a more public stand against perceived copying. 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. He 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 and see what other people wrote about me. I'm a girl. I'm sensitive. I fucking cried for weeks.

While most custom tattooers take the threat of community disapproval seriously, the norm against copying does not apply with

the same force in street shops. In many ways, the street shop stands as a holdover of the pre-renaissance tattoo world. Street shop tattooers often share more in common in terms of training, outlook, and socioeconomics with midcentury tattooers than contemporary custom tattooers.¹⁴⁴ Whereas the custom tattoo community emphasizes artistry and originality, the street shop mentality focuses on speed, efficiency, and client turnover.

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

When 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.”

As a result, literal and close copying of custom designs is more prevalent in street shops. Tattooers with artistic aspirations are less likely to copy. “Anybody at a certain level isn’t going to try to copy. Only the guys at the bottom rung are going to be willing to do that.” And tattooers who operate in the street shop environment are less responsive to the threat of negative gossip among custom tattooers. As one tattooer told me, “usually those scratchers don’t give a hoot about the morality, or any sort of industry consequences.” 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, avoiding copying is key.

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; others are con-

¹⁴⁴ See DEMELLO, *supra* note 22, at 97-135. (describing class and status distinctions within the tattoo community).

cerned that copying injures their clients. For many tattooers, interests in attribution and artistic integrity are at the root of the norm against copying custom designs. 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. The harms tattooers articulate 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."¹⁴⁵ They see copies of their custom tattoos as recognition of the power and appeal of their designs. But for most tattooers, copying inflicts some combination of financial and dignitary harm. Many object to copying for the same reason they refuse to reuse their own custom designs: client expectations of a unique, personal tattoo. Tattooers describe custom designs as imbued with "very personal sentiment," an "express[ion of] individuality," or even "sacred." 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. When their designs are copied, they are denied some measure of "notoriety," "awareness," or "respect" they would have otherwise derived from a successful tattoo. In the words of one tattooer, "I think the initial harm was somebody else getting credit for something that I created. So someone else receiving some sort of personal gain ... socially." 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. 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. Worries over business lost to copyists, therefore, can be felt acutely. 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 who might be tattooing the same kind of work for \$20 less." This risk of "underselling"—tattooing the same imagery at a lower price—explains why some tattooers take copying so seriously.

Other tattooers, however, were dismissive of the notion of direct financial harm from copying. First, unless two tattooers oper-

¹⁴⁵ CHARLES CALEB COLTON, *LACON, OR, MANY THINGS IN A FEW WORDS: ADDRESSED TO THOSE WHO THINK* 114 (1824).

ate in the same city, they rarely compete for the same clients. While some clients do travel to work with a preferred tattooer, most seek services close to home. 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. But at least one tattooer rejected this rationalization, explaining:

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

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. Tattooers talked about the "hard work," "struggle," "effort," and "guesswork" involved in designing a custom tattoo. By tracing the results of another tattooer's labor, the copyist is "just lazy." In terms familiar to copyright law, the tracer merely sought "to avoid the drudgery in working up something fresh."¹⁴⁶ 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.

Although opinions differ on the harms copying imposes, the

¹⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1993).

appropriate responses to them, and even the precise contours of impermissible copying, every tattooer with whom I spoke regarded literal or close copying of custom tattoo designs as a clear violation of industry norms. In contrast, and the next two sections discuss, every tattooer with whom I spoke agreed that copying from other works of visual art is a standard and accepted practice within the industry.

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. However, the unstated rules surrounding flash impose some important limits on its use as well.

For most of its history in the U.S., flash served as the lifeblood of the tattoo industry. Even after the dramatic rise of custom tattooing in recent decades, flash continues to play a major role in street shops. 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.

Historically, tattoo shops acquired their collections of flash in a number of ways. Young tattooers and apprentices were expected to draw new designs and contribute them to the shop. 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 are some designs I drew that I think everyone can do.’” Tattooers might also share flash designs with one another or copy them from their clients’ bodies. 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. Many shops were eager to pay for these images since the greater their stockpile of flash, the more appealing shops were to potential clients.

Tattooers still produce flash today. It is marketed on the internet, through tattoo supply catalogs, and sold in person at tattoo conventions across the country. 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 sell today from roughly \$50 to \$250. 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.



Figure

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. Contemporary designers and retailers of flash are similarly silent on the question of precisely what rights are transferred when a tattooer purchases flash. 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.

They describe flash as “meant to be replicated.” In their understanding, “if you purchase a set [of flash], you have purchased rights to tattoo these images should someone want them.” Purchasing flash entitles the tattooer to copy that design on as many customers as choose it. 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. As one tattooer explained, “You do whatever you want to do with it. You can tattoo that on anybody, however you want to do it.”

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

Copyright law would most likely consider the practices surrounding flash as a matter of implied license. An implied 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.¹⁴⁷ 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.”¹⁴⁸ 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.

But that license is limited in some notable respects. Buying flash means that a tattooer is free to copy the design for the purposes of transferring it to a client’s skin. 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.

The treatment of flash provides a useful foil to the norms surrounding custom tattoo designs. More importantly, it offers a preview of the attitude towards 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. Nonetheless, tattooers routinely copy works of visual art. 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.

Every tattooer with whom I spoke had used a piece of fine or

¹⁴⁷ 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:131 (2010).

¹⁴⁸ *De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927).

commercial art as the basis for a tattoo. 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. Requests to tattoo paintings, photos, or illustrations are so common that some tattooers described them as “the new flash.” 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. Tattooers frequently steer clients towards a custom design inspired by the reference material, whether to satisfy their own artistic impulse or ensure a better quality result for the client. But if a client insists on simply copying a reference, most tattooers will relent.

The reluctance to copy works of visual art has little to do with any concern over the rights of the original artist. 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. Discussing tattoos of Mickey Mouse and other cartoon characters, one tattooer told me, “Disney designs weren’t drawn for tattoos. They are icons. Where a custom tattoo design, that was drawn for that human being. It’s totally different.” Another tattooer used the same example to illustrate what he saw as the natural consequence of media saturation, explaining: “This 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.”

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. Interview subjects talked about the “interpretation” or “translation necessary in order to make a painting a tattoo.” 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.” In copyright terminology, they see their work as transformative.

Tattooers were consistent in emphasizing the difference between human creation and mechanical reproduction. Because of the inescapably manual process of creating a tattoo, an exact reproduction is impossible. 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.

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:

The 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 developed a new meaning and developed a new power behind it.

Whether a tattoo based on a piece of visual art would constitute a fair use under copyright law is an impossible question to answer in the abstract. 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."¹⁴⁹

A distinct justification for copying mirrors another element of the traditional fair use analysis. Under the fourth fair use factor, courts consider the impact of the defendant's use on the market for the original work.¹⁵⁰ To the extent the new work serves as a market substitute for the original, fair use is less likely.¹⁵¹ 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. In other words, a tattoo is simply not a market substitute for other forms of

¹⁴⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1993).

¹⁵⁰ *See* 17 U.S.C. § 107(4) ("the effect of the use upon the potential market for or value of the copyrighted work").

¹⁵¹ *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") (internal citations omitted).

visual art. 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 tattoo for you. Van Gogh can’t tattoo *Starry Night* on you, but I can.”¹⁵²

Relatedly, some tattooers explain why the norm against copying does not extend to visual artists in simple terms of group identity. Those within the tattoo industry benefit from its norms; those outside of it do not. Tattooers regard other visual artists as a “completely separate community.” Tattooers owe some obligation to each other, or at the very least face consequences within their community for running afoul of its norms. 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. As one tattooer told me, “When 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.”

The near total absence of efforts by copyright holders to target tattooers for reproducing works of visual art likely reinforces this norm. Tattooers reject the possibility that their use of works of visual art could expose them to copyright liability as remote. That assessment appears to be warranted. A single reported case, dismissed for lack of personal jurisdiction, addresses allegations that a tattoo infringes another copyrighted work.¹⁵³ There, the author of a short literary work entitled “Laundry Money” sued rapper Soulja Boy for his allegedly infringing tattoo.¹⁵⁴ 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.”¹⁵⁵ Reiger,

¹⁵² 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.” 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.”

¹⁵³ *Brown v. Way*, 2011 U.S. Dist. LEXIS 87362 (E.D. Mich. Aug. 5, 2011).

¹⁵⁴ *Brown v. Way*, 2011 U.S. Dist. LEXIS 87404 (E.D. Mich. Mar. 31, 2011).

¹⁵⁵ Sarah Tully, *Disney Tattoo Guy: Removing Tattoos for Love*, ORANGE COUNTY REGISTER (Nov. 18, 2010), <http://ocregister.com/>

an avid Disney fan, has reportedly covered 87% of his body in tattoos depicting various Disney characters.¹⁵⁶ Despite the common wisdom within the tattoo industry, however, Disney has neither sued nor threatened to sue Reiger for his collection.¹⁵⁷ 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.¹⁵⁸ The absence of enforcement against tattooers and their clients is therefore probably not the result of a mere lapse in policing. Instead, it appears to be a deliberate choice to forego enforcement efforts. Identifying instances of infringement poses practical difficulties, but rights holders have targeted other small businesses that present similar practical hurdles to enforcement.¹⁵⁹

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 expression of a deep commitment to the underlying work. A Harry Potter birthday cake is the sign of a casual fan; a Harry Potter tattoo is the mark of a lifelong devotee. 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

2010/11/18/disney-tattoo-guy-removing-tattoos-for-love/61876/.

¹⁵⁶ *The Disney Tattoo Guy*, <http://www.b3ta.com/interview/disney/>.

¹⁵⁷ *Id.* (“No comment from [Disney] - it’s a catch 22 situation. They allow me to have the tattoos, but won’t publically [sic] back me because they don’t want anyone else have similar tattoos”).

¹⁵⁸ 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.

¹⁵⁹ Peter Elkind, *Stop Copying That Mickey, or We’ll Shoot! Why You Can’t Have Your Cartoon-Character Cake and Eat It Too*, FORTUNE (December 29, 1997), http://money.cnn.com/magazines/fortune/fortune_archive/1997/12/29/235894/index.htm (noting Disney’s efforts targeting bakeries selling unlicensed birthday cakes); 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).

consumers who are presumably most likely to stand in line with cash in hand to purchase sequels, spinoffs, and licensed merchandise.¹⁶⁰

Second, although copyright holders have shown a willingness to license authorized apparel, birthday cakes, and even piñatas,¹⁶¹ it is difficult to imagine a line of Disney-licensed tattoo flash designs. Given the negative associations tattoos still conjure in many segments of society, the tattoo market is not one we should reasonably expect most rights holders to enter in the near future.¹⁶² And because rights holders have opted out of this market, unlicensed tattoos give rise to no measurable economic harm. 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. As this Part has described, those norms respect 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 answering 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

¹⁶⁰ 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).

¹⁶¹ *See supra*, note 159.

¹⁶² 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”).

developments. Instead, the best explanation attributes the emergence of tattoo industry norms to the confluence of complementary cultural and economic forces. As a community, tattooers share a deep skepticism of the legal system. 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.

Remarkably, the contours of formal law appear to play no appreciable role in the development of IP norms in the tattoo industry. 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.”¹⁶³ Studies of other creative communities have likewise ascribed some causal weight to the unavailability of meaningful formal legal protection.¹⁶⁴

But tattooers are not motivated to create, maintain, and enforce norms because of substantive barriers to legal protection. As discussed above, tattoo designs, whether fixed on paper or on human skin, are works embraced by copyright.¹⁶⁵ 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.¹⁶⁶ 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. As discussed below, tattooers express skepticism about the legal system, but their attitude towards law is best described as indifferent as a matter of day-to-day practice.

This relationship between formal law and tattoo industry norms provides some confirmation of the dynamics within the roller derby subculture described by Fagundes. There, despite the availability of trademark protection, athletes developed an elaborate set of

¹⁶³ Fauchart & von Hippel, *supra* note 8, at 199.

¹⁶⁴ See Oliar & Sprigman, *supra* note 8, 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 8, at 130–34 (describing the inadequacy of copyright, patent, and trade secret doctrine from the perspective of magicians).

¹⁶⁵ See *supra* Part I.A.

¹⁶⁶ The evidence suggests the opposite. See Munster, *supra* note 125.

rules and procedures for claiming pseudonyms.¹⁶⁷ 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.¹⁶⁸ Intellectual property norms can develop, among both market and non-market actors, regardless of the availability of meaningful formal legal rights.¹⁶⁹

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,¹⁷⁰ enforcement is an expensive proposition.¹⁷¹ A few tattooers with whom I spoke 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." The value of any particular work is unlikely to justify such expenses.¹⁷² But the same is true for most non-institutional copyright owners.¹⁷³ Painters, photog-

¹⁶⁷ Fagundes, *supra* note 8, at 1115-21.

¹⁶⁸ *Id.* at 1140-43.

¹⁶⁹ In some sense, the term "intellectual property norms" is a projection of a legal-centric explanation of creative behavior. My interview subjects rarely invoked a property framework to explain or describe their social norms.

¹⁷⁰ Copyright protection subsists from the moment an original work is fixed. *See* 17 U.S.C. § 102. Registration, though a statutory prerequisite for filing suit, is not required to establish a copyright interest. *See* 17 U.S.C. §§ 408 & 504. The online registration fee for a basic claim in an original work begins at \$35. *See* <http://www.copyright.gov/docs/fees.html>.

¹⁷¹ The average cost of copyright litigation ranges from \$216,000 to proceed through discovery when less than \$1 million is in controversy to \$2 million to proceed through trial when more than \$25 million is at stake. AIPLA, REPORT OF THE ECONOMIC SURVEY (2011).

¹⁷² The statutory damages provisions of the Copyright Act are intended to overcome the financial disincentives for authors of relatively low-value works to assert their rights. *See* 17 U.S.C. § 504(c). None of my interview subjects indicated any awareness of these provisions.

¹⁷³ In theory, the notice and takedown provisions introduced by the Digital Millennium Copyright Act drastically reduced enforcement costs for authors whose works are reproduced online. *See* 17 U.S.C. § 512.

raphers, and poets all face similar economic obstacles to enforcement of their statutory rights. But we do not generally consider them to be operating outside of the basic framework of copyright law as a result.¹⁷⁴ Rather than substantive or practical the most important barrier to legal enforcement within the tattoo industry is cultural.

A. Tattoo Culture

Most of the tattooers with whom I spoke expressed some degree of skepticism about the law, the judicial system, or the notion of leveraging that system to assert their rights.¹⁷⁵ Misgivings about litigation are not uncommon in society at large, but there are at least two reasons to suspect that tattooers as a group are more inclined towards skepticism of the legal process. First, tattooers embrace and celebrate their status as outsiders who operate without regard to established social conventions. 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.

Tattooers describe contemporary American culture as generally “too litigious” and “lawsuit happy.” And they express distrust in the ability of the judicial system to arrive at fair outcomes. “The 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.”

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 its way down, and we’re turning on each other and suing each other. It’s petty, and it’s bullshit.” 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.”

Because of the outsider mentality many tattooers share, they

¹⁷⁴ Of course, some 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.

¹⁷⁵ Other studies of creative communities governed by norms have noted similar antipathy towards the law. *See* Fagundes, *supra* note 8, at 1137.

appear to be predisposed to skepticism about the law. They talk about tattooing existing on the periphery of “respectable society” and operating within a framework that does not “conform to normalcy.” Not surprisingly, most tattooers are heavily tattooed. Despite the recent popularity of tattoos, the act of covering the majority of one’s body with tattoos remains, to some degree, a conscious rejection of prevailing social conventions. 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.” 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.”

In addition to its countercultural spirit of independence, the tattoo industry rejects formal law out of a shared sense of history. 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:

Coming 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.

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.¹⁷⁶

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

¹⁷⁶ See SANDERS *supra* note 59, at 94-95 (observing that tattooers are suspicious of the legal system as a result of harassment by local lawmakers and law enforcement officials).

and more carefully monitor sanitary conditions.¹⁷⁷ After the 1959 death of a recently tattooed client from hepatitis,¹⁷⁸ New York City, Nassau, and Suffolk counties banned tattooing altogether.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ Nonetheless, tattooing remained illegal in New York City until 1997.¹⁸² And two statewide tattoo bans persisted until the mid-2000s. The first legal tattoos were performed in South Carolina and Oklahoma in 2004 and 2006 respectively.¹⁸³

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.¹⁸⁴ 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.¹⁸⁵

¹⁷⁷ Govenar, *supra* note 42, at 228-229.

¹⁷⁸ In the early 1940s, tattooer Harry Lawson unsuccessfully sought to prevent such outbreaks by advocating for regulating hygiene in tattoo shops. *Id.* at 226.

¹⁷⁹ *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.

¹⁸⁰ Govenar, *supra* note 42, at 232.

¹⁸¹ See *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1252 (describing sterilization procedures used by tattooers).

¹⁸² *Id.*

¹⁸³ See *Governor Set to Ink Bill Legalizing Tattoo Trade in Oklahoma*, <http://www.firstamendmentcenter.org/governor-set-to-ink-bill-legalizing-tattoo-trade-in-oklahoma> (May 6, 2006).

¹⁸⁴ See Gary Nelson, *State High Court Hears Mesa Tattoo Zoning Case*, USA TODAY (March 28, 2012), http://www.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.*, PATCH (May 19, 2011), <http://sanclemente.patch.com/articles/tattoo-parlors-slated-for-prohibition-in-downtown-sc>.

¹⁸⁵ See *Zoning Requirements for Tattoo Facilities*,

Tattooers have challenged various state and local restrictions on constitutional grounds with mixed success. 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 that “one-third of the admissions to the U. S. 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.”¹⁸⁶

Courts considering First Amendment challenges to restrictions on tattooing have taken one of three approaches.¹⁸⁷ Most courts have held that tattooing is neither speech nor expressive conduct and thus not entitled to First Amendment protection.¹⁸⁸ Others treat tattooing as conduct rather than pure speech but acknowledge that it is imbued with expressive purpose.¹⁸⁹ 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

<http://www.scdhec.gov/health/licen/hltattooing.pdf>.

¹⁸⁶ *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (1964) *aff'd*, 17 N.Y.2d 345 (1966) (holding New York City Health Code provision banning tattooing except when performed by a licensed physician was a constitutional exercise of police power).

¹⁸⁷ 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).

¹⁸⁸ See, e.g., *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*, 348 S.C. 532, 538, 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”); *Hold Fast Tattoo, LLC v. City of N. Chicago*, 580 F. Supp. 2d 656, 659-60 (N.D. Ill. 2008) (holding that “that the act of tattooing is not constitutionally-protected free speech” because it is conduct that lacks an “intent to convey a particularized message”).

¹⁸⁹ See, e.g., *Com. v. Meuse*, 9877CR2644, 1999 WL 1203793 (Mass. Super. Nov. 29, 1999).

expressive of an idea.”¹⁹⁰ 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.¹⁹¹

The Ninth Circuit’s decision, while marking a notable departure from prior judicial attitudes towards tattooing, still reflected hints of the hostility that marred earlier opinions.¹⁹² In a 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.”¹⁹³

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

Aside from the costs of formalizing the tattooer-client rela-

¹⁹⁰ *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010); *see also* *Coleman v. City of Mesa*, 228 Ariz. 240, 254 (Ariz. Ct. App. 2011) (holding “that a tattoo, the act of tattooing, and the business of tattooing constitute pure speech entitled to the highest level of protection under our state and federal constitutions”).

¹⁹¹ *Anderson*, 612 F.3d at 1062.

¹⁹² 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.*

¹⁹³ *Id.* at 1069 (Noonan, J. concurring)

tionship, 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.

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 market actors. Any account of the development of tattoo industry norms has to consider the economics of contemporary tattooing.

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. Sometimes the work is distributed in copies; sometimes it is performed or displayed publicly. In either case, the goal is to attract as many paying readers, listeners, or viewers as possible—in short, to have a hit. Broad public access, conditioned on some form of payment, is at the heart of these business models.

Very little of what happens in the tattoo industry follows this basic framework. 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. But the street shops where those designs are transferred to clients do not. Few of the flash designs in any street shop are generated in-house. 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 book publisher.¹⁹⁴ They make their income by offering copying services, not by selling or licensing copies of their original works.

The custom tattoo shop is even further removed from prevailing copyright-reliant business models. Custom tattooing devel-

¹⁹⁴ Because shops that rely on flash are likely operating under implied license, they are largely insulated from liability.

oped as the result of the feedback loop between tattooers seeking greater opportunity for creative freedom and clients looking for unique and original designs. After decades of custom tattoos and a recent flood of tattoo-centric reality television programming, custom designs are a firmly established expectation among clients.¹⁹⁵ “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.” 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.”

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. For those industries, the value of the work is proportional to its reproduction. In order to harness that value, exclusive rights limit reproduction to the copyright holder or its licensees. 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. 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.¹⁹⁶ The tattoo industry presents a narrative that

¹⁹⁵ See, e.g., “*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 (noting that four tattoo-related reality shows have aired on TLC alone); Angel Cohn, *Best Ink: Will This Be a Stain on Oxygen’s Permanent Record*, TELEVISION WITHOUT PITY (March 28, 2012), <http://www.televisionwithoutpity.com/tefile/2012/03/best-ink-will-this-go-down-in.php> (noting two tattoo-based competition shows airing on the Oxygen and Spike networks).

¹⁹⁶ See 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

fits reasonably well within this model. As client demand for custom tattoos increased, so did the harm tattooers felt from appropriation of their designs. And as technology facilitated both the detection of copying and the spread of negative gossip within the geographically dispersed tattoo community, enforcement costs plummeted.

This story tells us why tattooers would be motivated to assert a claim, either formal or informal, against copyists. But it doesn't explain why tattooers have opted consistently for informal social norms rather than the formal property-like rules of copyright law. 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 a competitor's work is copied is not captured by the Demsetzian model.¹⁹⁷

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 they enhance the collective welfare of the community.¹⁹⁸ 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."¹⁹⁹ 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. Through a combination of workplace gossip, conversations at regional and national tattoo conventions, and technology-mediated discussion, tattooers have

resources).

¹⁹⁷ See Katherine J. Strandburg, *Who's in the Club: A Response to Oliar and Sprigman*, VA. L. REV. IN BRIEF 1, 4-5 (2009) (noting the need for an account of the development of IP social norms to account for the "dual potential roles" of community members as both "creators" and "thieves").

¹⁹⁸ ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991) (observing that "members of a close knit group develop and maintain norms whose contents serve to maximize the aggregate welfare that members obtain in their workaday affairs with one another").

¹⁹⁹ *Id.* at 181.

created a decentralized network for the exchange of industry information, including accusations of copying. And as discussed above, that exchange of information carries profound social and professional consequences for tattooers accused of transgressing community norms.²⁰⁰

The questions governed by tattoo industry norms are 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.

Most importantly, tattoo norms enhance the welfare of the community. Ellickson understood welfare maximizing norms as those that minimize both transaction costs and deadweight loss associated with unexploited trade.²⁰¹ From a tattooer's short-term perspective, defection from the norm against copying is an attractive strategy. 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. 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. Clients expect unique tattoos, and they expect considerable freedom to display and use the images on their bodies. Tattooers who upset those settled expectations run the risk of undermining the market for custom tattoos. 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. 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 market altogether. 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 in-

²⁰⁰ See *supra* Part II.D.2.

²⁰¹ ELLICKSON, *supra* note 198, at 184.

crease in transaction costs associated with defectors.²⁰²

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. 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. In other words, the norm against copying is not obviously welfare-enhancing for street shop tattooers as a subgroup of wide tattoo community. However, given the often 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.

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. For example, most tattoo shops refuse to tattoo clients' faces and—until recently—hands.²⁰³ For similar reasons, most tattoo shops turn away customers seeking tattoos associated with gangs or hate groups. Those norms could be seen as expressions of tattooers' own personal preferences. But in the aggregate, they discourage short-term personal economic gains for the sake of the collective maintenance of industry-wide market demand. 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

²⁰² 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).

²⁰³ See Rubin, *supra* note 14, at 233.

guild.²⁰⁴ It maintains trade secrets.²⁰⁵ It regulates entry into the profession.²⁰⁶ And relatedly, it excludes potential competitors in order to limit competition.²⁰⁷ These efforts offer a supplemental explanation for tattoo industry norms, particularly the norm against copying custom designs.²⁰⁸

The tattoo industry has long been characterized by secrecy.²⁰⁹ Tattooing requires a host of arcane technical knowledge traditionally unavailable to the general public. 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.²¹⁰ Until very recently, this information was shrouded in mystery. As one tattooer described past generations of tattooers, “They were like magicians; they were able to hold on to those secrets of how to tattoo.” Another said of tattooing: “It’s this old, magical art. It’s behind the curtain.”

By guarding this information closely, tattooers were able to carefully limit entry into the trade. 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.²¹¹ There were no tattoo schools, no how-to guides, no correspondence courses, and no

²⁰⁴ *Id.*

²⁰⁵ See Robert P. Merges, *From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation* 5-7 (Nov. 13, 2004) (describing the role medieval guilds played in protecting trade secrets).

²⁰⁶ *Id.* (describing apprenticeship systems within guilds).

²⁰⁷ See NORMAN CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* 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 that “guilds organized to protect local artisans . . . [and preserve] local monopolies against encroachment from outside competition”).

²⁰⁸ 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).

²⁰⁹ See Rubin, *supra* note 14, at 233-34; SANDERS, *supra* note 59, at 70.

²¹⁰ See Rubin, *supra* note 14, at 233-34.

²¹¹ SANDERS, *supra* note 59, at 70.

YouTube videos.²¹²

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.” 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.”

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.²¹³ Today, the widespread availability of information on the internet further disrupts the traditional control tattooers exerted of the secrets of their trade.²¹⁴ Some of the tattooers I interviewed expressed concern about the impact of this free flow of information:

People are being too open with stuff ... because there’s too many people. People 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. You did well for what you did, and it’s not like that anymore.

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. A good tattooer must understand how to operate her machine, the choice between various needle configurations, the unique characteristics of human skin, among other specialized knowledge. Second, custom tattooing requires the ability to conceive of and execute original designs. In addition to an understanding of composition, color theory, and a variety of artistic styles, custom design requires creativity, imagination, and

²¹² *Id.*

²¹³ See DEMELLO, *supra* note 22, at 110.

²¹⁴ See, e.g., <http://learn-tattoo.com>.

time.

Old school tattooers limited market entry by controlling access to technical information necessary to develop this first set of skills. 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 to limit competition within the trade explain why the tattoo industry relies on norms rather than formal IP protection and why its norms reflect the particular set of obligations described above. The next section turns to the broader implications of tattoo industry norms for intellectual property law and policy.

C. Some 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 towards the legal system, the cultural origins of tattoo industry norms tell us little about whether and how we should expect IP 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.

1. 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. An ideally calibrated intellectual property system would provide just enough incentive to prompt the creation of

new works.²¹⁵ Any incentives beyond the bare minimum impose unnecessary costs on the public in the form of higher prices, reduced availability, and restrictions on the use of creative works.

Not all creators require the same incentives. Some face higher up front costs or greater threats of appropriation. And they create against different backdrops of non-legal and even non-pecuniary incentives.²¹⁶ These conditions, and thus optimal incentives, vary from author to author, perhaps from even work to work.²¹⁷ And they vary considerably from industry to industry.²¹⁸

But the rights intellectual property law confers are insensitive to fluctuations in the incentives necessary to induce creative production.²¹⁹ 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.²²⁰ By creating and enforcing rights without regard to context, intellectual property imposes uni-

²¹⁵ 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 (2003) (suggesting patent protection should be conferred only to the “precise extent[] necessary to secure each individual innovation’s ex ante expected profitability”).

²¹⁶ See generally Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1746343>.

²¹⁷ See Michael W. Carroll, *One For All: The Problem of Uniformity Cost in Intellectual Property Law*, 55 AM. UNIV. L. REV. 845, 856 (2006).

²¹⁸ *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”).

²¹⁹ *Id.* at 846–47 (2006) (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 (noting the inefficiency of uniform patent law in light of differing costs of innovation across industries).

²²⁰ 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).

formity costs through both over- and under-incentivizing innovation.²²¹

As Oliar and Sprigman point out in their study of stand up comics, social norms highlight these uniformity costs and may provide limited relief from them.²²² To the extent norms form part of the backdrop of existing non-legal incentives, they suggest a more modest need for the legal incentives of the formal intellectual property system. Stand up comedians produce new original material in the absence of meaningful copyright protection in part because community norms reward that behavior.²²³ 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. In order to attract clients willing to pay for their tattoo services, tattooers produce designs at no direct cost to the client. 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 are 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 tattoos are surely protected as a matter of existing copyright doctrine, they would likely be excluded under a copyright regime more attuned to uniformity costs and the realities of creative production. The tattoo industry is far from alone in this regard among the many creative fields encompassed by the copyright system. Nor is especially deserving of exclusion. State laws,²²⁴ local building codes,²²⁵ private standards,²²⁶ and publicly financed re-

²²¹ Carroll, *supra* note 217.

²²² Oliar & Sprigman, *supra* note 8, at 1840-41.

²²³ *Id.*

²²⁴ See James Grimmelman, *Copyright, Technology, and Access to the Law: An Opinionated Primer*, <http://james.grimmelman.net/essays/CopyrightTechnologyAccess> (June 19, 2008).

²²⁵ *Id.*

search,²²⁷ and perhaps even sure-fire blockbuster movies²²⁸ 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 the tattoo industry is the rejection of formal legal rights. 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 their rights.

Tattooers, like stand up 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 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 a new way forward.

2. Customization, Service & Creative Production

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.²²⁹ But technology has made copying cheaper, easier, and faster, threatening the fundamental premise of this business model. Rights holders have responded with a number

²²⁶ See Pamela Samuelson, *Questioning Copyright in Standards*, 47 B.C. L. REV. 193 (2007).

²²⁷ See Samuel E. Trosow, *Copyright Protection for Federally Funded Research: Necessary Incentive or Double Subsidy?*, 22 CARDOZO ARTS & ENT. L.J. 613 (2004).

²²⁸ Mike Masnick, *Does Batman Need Copyright Protection?*, TECHDIRT (July 20, 2012), <http://www.techdirt.com/articles/20120719/18025319772/does-batman-need-copyright-protection.shtml>.

²²⁹ See Michael J. Madison, *Of Coase and Comics, Or, The Comedy of Copyright*, 95 VA. L. REV. IN BRIEF 27, 34 (2009).

of strategies, with mixed results. They have waged war on intermediaries that enable or facilitate alleged infringement.²³⁰ They have targeted their own customers in massive litigation dragnets.²³¹ They have encumbered their products with digital rights management technologies that simultaneously decrease their value and alienate consumers.²³² Because the tattoo industry relies on a strategy to extract value from its original works very different from the dominant approach, 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. 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." A custom tattoo requires 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's 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."

²³⁰ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *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).

²³¹ Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L. J. 565, 602-605 (2009).

²³² See Deirdre K. Mulligan & Aaron K. Perzanowski, *The Magnificence of the Disaster: Reconstructing the Sony BGM Rootkit Incident*, 22 BERKELEY TECH. L. J. 1158 (2007).

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. Jam bands, most notably the Grateful Dead earned their reputation and their fortune not through the sale of records, but through live performance.²³³ “The Grateful Dead made each show a unique experience, presenting a unique set list and improvising heavily.”²³⁴ 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.²³⁵ 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.²³⁶

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.

Some more traditional copyright holders have already begun to embrace the shift from distributing mass-produced copies to providing customized, personalized service. The emergence of the cloud computing and software-as-a-service models offer one exam-

²³³ See Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jam-bands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 669 (2006).

²³⁴ *Id.*

²³⁵ See Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 834 (2001) (noting that “the purchaser ... does not buy the actual product, which is available free of charge, but instead pays for ... services”); 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”).

²³⁶ See ERIC S. RAYMOND, *THE CATHEDRAL & THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* 136 (2001).

ple.²³⁷ The gaming industry's focus on online multiplayer games can also be viewed as an effort to emphasize services and experiences that are far harder to duplicate than the mere contents of a disc.²³⁸ Even the resurgence of 3D movies demonstrates Hollywood's awareness of the need to offer customers an experience that they cannot replicate at home.²³⁹ 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."²⁴⁰ 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.

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 and respect tradition by encouraging the use of flash

²³⁷ See Gurudatt Kulkarni *et al.*, *Cloud Computing-Software as Service*, 2 INT'L J. COMPUTER TRENDS AND TECH. 178 (defining software-as-a-service as "a model of software deployment where an application is hosted as a service provided to customers across the Internet").

²³⁸ See 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).

²³⁹ See 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).

²⁴⁰ Fleming, *supra* note 27, at 66-67.

designs and encourage innovation and experimentation 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 small handful of industries with legacy business models. But the tattoo industry's ability to withstand drastic 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 need for creative production transcends the contingencies of markets and law.