

## Owning the Body

### *Creative Norms in the Tattoo Industry*

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Twenty-one percent of adults in the United States—more than 65 million Americans—have at least one tattoo; for those under age forty, that percentage nearly doubles.<sup>1</sup> Not surprisingly, the tattoo business is booming, generating billions of dollars in annual revenue.<sup>2</sup> Like more familiar creative industries, the tattoo industry capitalizes on market demand for original creative works. Yet 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 counterparts in most other creative industries, tattooers nearly uniformly reject formal legal mechanisms for resolving disputes over ownership and copying. 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. Instead, tattooers rely on a set of informal social norms to regulate their creative production.

### A History of Tattoos

The five-thousand-year history of tattooing, from prehistoric societies to the contemporary tattoo industry, and 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.

In 1991, climbers in the Italian Alps stumbled upon the frozen corpse of Otzi, the Tyrolean Iceman, a 5,300-year-old mummy adorned with fifty-seven simple geometric tattoos.<sup>3</sup> The Iceman was not alone among prehistoric tattoo collectors. Egyptian mummies dating back to 2100 BC were tattooed, as were a Scythian corpse from 500 BC and a thousand-

year-old Peruvian specimen, both of which bore elaborate depictions of animals.<sup>4</sup> Ancient Israelites, Persians, Greeks, and Romans all encountered or practiced tattooing.<sup>5</sup> And in Japan, evidence of tattooing dates to the third century BC.<sup>6</sup>

Aside from the Picts, the pre-Roman inhabitants of modern-day Scotland, Europeans showed little interest in tattoos until Captain James Cook returned to Europe after his second circumnavigation with accounts of Tahitian “tattowing”:

Both sexes paint their Bodys, Tattow, as it is called in their Language. This is done by inlaying the Colour of Black under their skins, in such a manner as to be indelible. . . . The instrument for pricking it under the Skin is made of very thin flatt pieces of bone or Shell. . . . One end is cut into sharp teeth, and the other fastened to a handle. The teeth are dipped into black Liquor, and then drove, by quick sharp blows struck upon the handle with a Stick.<sup>7</sup>

Initially, the European tattooed class comprised primarily sailors, soldiers, and adventurers. But by the nineteenth century, wealthy Europeans were eager to join the tattooed aristocracy with the likes of Queen Olga of Greece, the Duke of York, Lady Randolph Churchill, and King Oscar II of Sweden.<sup>8</sup>

In the United States, Martin Hildebrandt opened the first professional tattoo shop in 1846 in New York.<sup>9</sup> And in 1891, New Yorker Samuel O’Reilly invented the tattoo machine, a device that fundamentally reshaped the process of tattooing.<sup>10</sup> The introduction of electric machinery made tattooing cheaper, faster, and less painful. It also helped develop a distinctive American aesthetic characterized by bold black lines, heavy shading, and a limited color palette emphasizing red, blue, and green.

Tattooers in the United States were generally from the same working-class backgrounds as their clients and typically had no prior art training. Rather than create custom artwork for their clients, tattooers of this era worked almost exclusively from collections of pre-drawn images called “flash.” Designs included military insignia, ships, hearts, flowers, skulls, daggers, snakes, tigers, Christian icons, and scantily clad women. When a tattooer came across an appealing new design, he copied it—

sometimes directly off of the body of a willing client—and added it to his stock of flash.

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. But in the postwar 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. And unsanitary conditions in some tattoo shops raised serious public health concerns. After reported hepatitis outbreaks, many state and local governments began to heavily regulate tattooing or ban it altogether.

This period was marked by creative stagnation. Tattooers still relied largely on the same collection of flash designs that were prominent at the turn of the century. These simple, badge-like images met the needs of tattooers, who considered themselves craftsmen, with little interest in artistic expression for its own sake. And it met the needs of clients, whose tattoos often communicated group membership or commemorated milestones through established iconography. But creative torpor set the stage for a fundamental shift.

Beginning in the 1960s, tattooers began to reconceptualize their work. Norman Keith Collins, better known as Sailor Jerry, was among the first and most important tattooers to challenge prevailing practices. 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, in stark contrast to the prevailing approach of unsystematically scattering small standalone images across the body.<sup>11</sup>

Over the next few decades, the innovations of Sailor Jerry and protégés like Cliff Raven and Don Ed Hardy helped bring about three interlinked shifts in the industry that led to what some have called the tattoo renaissance. First, a new generation of tattooers was drawn to the industry because of its potential for artistic innovation. Experienced and trained fine artists began to see tattooing as a viable and legitimate career path. 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. Third, the client base of the industry became more affluent, better educated, and developed higher expectations of technical skill and originality.

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

As a result of these changes, the tattoo industry today is defined 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 flat rate. Most simple flash designs can be tattooed in well under an hour, sometimes as quickly as a few minutes. Thousands of tattoo shops in the United States fit this basic model.

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 a nondescript building, the shop features minimal signage. Rather than accept walk-ins, tattooers book appointments several months in advance. 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. 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, as well as more elaborate custom work. Since tattooers learn on the job through apprenticeship, they commonly start with simple flash designs, developing the skills necessary for more complex custom designs over time. 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.

## Tattoos and Copyright

Before turning to those industry norms, we should consider the treatment of tattoos under copyright law. Copyright requires originality, that a work is independently created and reflects a modicum of creativity—and fixation—that a work is sufficiently permanent to endure for more than a transitory duration.<sup>12</sup>

In the case of a custom tattoo, 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. But line drawings lack the shading, color, and three-dimensionality often found in the final tattoo.

Line drawings fall squarely within the Copyright Act's definition of "pictorial, graphic, and sculptural" works. 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. Tattoos then, like their pencil and paper counterparts, are subject to copyright protection.

In litigation over Mike Tyson's facial tattoo, copyright treatise author David Nimmer filed an expert witness declaration that challenged this seemingly straightforward result.<sup>13</sup> Victor Whitmill, who tattooed a Maori-inspired design on Tyson's face, sued Warner Brothers after that design was reproduced on the face of comedian Ed Helms in *The Hangover II*. Nimmer, adopting a position inconsistent with his own treatise, argued that Whitmill was not entitled to copyright protection for Tyson's tattoo. Comparing it to a frosty window pane or wet sand as the tide approaches, Nimmer suggested that skin does not qualify as a tangible medium of expression. 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 as a separate basis for denying protection. Pictorial, graphic, or sculptural elements incorporated into a utilitarian article are protectable only to the extent they are physically or conceptually separable from the underlying article. Although Tyson's tattoo is easily divorced from his skin as a conceptual matter, Nimmer insisted that "the only legally cognizable result is to apply the strict requirement of physical separability." Otherwise, he claimed the Copyright Act would "set to naught the Thirteenth Amendment's prohibition of badges of slavery."<sup>14</sup>

At the root of Nimmer's startling equation of willing recipients of tattoos with slaves is a concern that copyright protection could grant Whitmill control over Tyson's public displays of the tattoo as well as reproductions of it in photographs or video. Although the court characterized Nimmer's legal arguments as "silly," these potential consequences are indeed alarming.<sup>15</sup> Luckily, copyright law offers courts many tools aside from the blunt instrument of protectability that they could, and almost certainly would, use to avoid this parade of horrors. 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.

## Tattoos and Norms

Copyright suits between tattooers and their clients, or suits between two tattooers, are virtually non-existent. Not a single reported decision addresses a copyright claim brought by a tattooer against a client or a fellow tattooer. And the only such case ever filed in the United States—brought by tattooer Matthew Reed against his client, NBA athlete Rasheed Wallace, Nike, and Wieden+Kennedy after his tattoo was featured prominently in a Nike ad—was eventually settled.<sup>16</sup>

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.<sup>17</sup> None had been involved in a formal copyright dispute. Most were dismissive of the notion of bringing a suit against a client or another tattooer. As one interview subject colorfully put it, a tattooer who sued another for copying would be "labeled kind of a wiener with thin skin." This attitude reflects



the norms governing both the creative process and the tattooer-client relationship.

Both during and after the design process, tattooers consistently demonstrate a respect for client autonomy. Client input helps shape the design of a custom tattoo. And once an image is created on the client's skin, tattooers uniformly acknowledge that control over the image, with some limited exceptions, shifts to the client.

The design process typically begins with a consultation, where the client presents a basic description of their idea for the tattoo. Because of their greater familiarity with design and composition, as well as a clearer understanding of the limitations of the medium, tattooers frequently guide their clients' choices. After settling on subject matter, style, and composition—typically with significant input from the tattooer—the client pays a small cash deposit before the tattooer draws the design. The deposit fee is then deducted from the eventual hourly-rate price of the tattoo. As a result, tattooers do not ultimately charge clients for their time and effort in creating a design.

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 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.

Custom tattoos are almost certainly not works made for hire as defined by the Copyright Act.<sup>18</sup> And while some could be considered joint works, clients typically contribute uncopyrightable ideas, not protected expression.<sup>19</sup> The law would treat most custom tattoo designs as works created by the tattooer alone. 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 feel necessarily a strong ownership over [my custom designs], because a lot of the time it's not necessarily my original idea. It's stuff that I'm being commissioned for, so I see myself as more of a paid artist to bring visions to life.”

Tattooers invariably express a commitment to the clients' autonomy over their bodies and the tattoos that have become an integral part of them. 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 the industry norm:

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

Copyright law limits the author's right to control a work after a transfer of ownership of a copy of that work. Notably, the Copyright Act provides that the owner of a copy of work is entitled to display that work publicly.<sup>20</sup> Tattooers embrace an even more robust set of exhaustion rights favoring their clients. In addition to public displays of their tattoos, they acknowledge clients' rights to post images of their tattoos to their Facebook profiles, for example, or even reproduce a picture of the tattoo for commercial purposes. Tattooers also recognize that clients are free to create new works that incorporate or even destroy their original designs. New 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.

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 exist at the edge of the client autonomy norm and may prove more likely to spur formal enforcement efforts. For example, tattooer Christopher Escobedo filed suit against the developer of *UFC Undisputed 3*, a video game featuring Escobedo's client, mixed martial arts fighter Carlos Condit.<sup>21</sup> Escobedo alleged that the game infringed his copyright by including a digital representation



of the lion tattoo he created on Condit's torso. The developer's use of the lion tattoo arguably transgressed the limits of the client autonomy norm because its use was detached from the client's body. More recently, a similar suit alleged infringement when the video game *NBA 2K16* accurately depicted the tattoos of NBA stars like LeBron James and Kobe Bryant.<sup>22</sup> The merging pattern suggests that when use is made by third parties outside of the tattoo community, where the client is not named as a defendant, and significant economic value is at stake, the general norm disfavoring litigation may be particularly susceptible to erosion.

Those rare cases aside, 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 it also relies on shared assurances against copying.

Tattooers uniformly reported an industry norm against the copying of custom designs. Indeed, that norm is so strong that it extends to the tattooer's reuse of her own designs on subsequent clients. As 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." Although this tacit agreement is not acknowledged expressly, tattooers refuse to reapply the same design without explicit permission from the original client.

Likewise, every tattooer interviewed 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." Also 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 subsequently copied by other tattooers provides examples of both literal and close copying.<sup>23</sup> The first photo shows the original design Douglas tattooed on her client; The second photo depicts a literal copy created by another tattooer. As the images demonstrate, every element of the original custom tattoo was appropriated. The subject matter, composition, outline, shading, color choices, text, and even placement on the body were copied. Of course, given the hand-fashioned nature of tattoos, not to mention variations in



At left, an original custom tattoo; in center, a verbatim copy; at right, a close copy.

skin tone and body shape among clients, no two tattoos are ever identical. Although the tattoo depicted in the third photo offers some variations on the original custom design, tattooers would recognize it as a close copy that violates industry norms.

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. 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.”

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. Some 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. Others try to insulate themselves from the potential influence, conscious or subconscious, of other tattoo designs. But most tattooers are not quite so troubled by the prospect of non-literal borrowing. The tattoo industry is steeped in tradition. And while tattooers value innovation, they simultaneously demonstrate reverence for traditional tattoo aesthetics. Clients are likewise drawn to the rich iconography of tattoo history.

Because of the constraints of the form, drawing from the common pool of traditional design elements is often inevitable. “[T]attooing and the imagery within the industry, it’s so homogenous and everything is so iconic. You can’t just stake claim to something like that.” 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.”<sup>24</sup> 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.<sup>25</sup>

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.”<sup>26</sup> Many tattooers embrace the role influence and inspiration play in the creative process. Even for tattooers who create new custom designs for each client, true originality is often more myth than reality: “Everything

we're doing is copying. Everything I've ever done is copying. Everything I've done is inspired by somebody else. I'm not doing anything new that [other tattooers] haven't done 20 years ago. I don't feel ashamed about it 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 "[i]f someone takes something I've done and [he is] inspired by it, takes it, reworks it, and makes it even better[,] [t]hat's not going to make me upset. That's going to make me say, dude, I can step it up too."

Not only do tattooers vary in what they consider a copy; they also exhibit a range of responses to copying. Custom tattoos are generally private works. Therefore, they are less susceptible to copying than mass media products. For this reason, many tattooers were skeptical of the rise of tattoo magazines in decades past because they posed an increased risk of copying.<sup>27</sup> But today, images of custom tattoos are more accessible than ever. Tattooers and tattoo shops post photos of their work on their websites; clients share photos of their tattoos on social media; and Tumblr and Pinterest feature thousands of photos of custom tattoos, often without attribution to either the tattooer or the client. This widespread availability of custom tattoo images—combined with an influx of inexperienced tattooers and clients—has resulted in a marked increase in literal and close copying within the tattoo industry.

The majority of tattooers shared at least one anecdote of their custom tattoo designs being copied. In most of these stories, the Internet played a role in enabling both access to the original tattoo and detection of the copy. Technology also plays a role in the 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, enforcement efforts are increasingly digital.

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 against copyists.

One tattooer, after describing a scenario in which a custom sleeve—a tattoo occupying the client’s entire arm, from shoulder to wrist—was traced by another tattooer, explained, “[y]ou can’t control other people. . . . 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. Another tattooer suggested that a common response to minor instances of copying is “teasing” or “calling each other out” in a way that acknowledges the borrowing without any direct accusation of wrongdoing. Less affably, another tattooer 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:

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

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,” “blacklist[ing],” 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: “[S]ocially, you’re screwed. In the community, you’re screwed. Being part of the community is a really strong, important part of your growth.”

One tattooer described her experience being publicly accused of copying in a widely read blog post:

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

For tattooers, norms are often identity constitutive. Violating industry norms not only runs the risk of community disapproval, it also undermines a tattooer's self-conception. External enforcement efforts may be less important when, as here, community members have internalized norms. While most custom tattooers take seriously both community disapproval and harms to self-conception, the norm against copying does not apply with the same force in street shops. In many ways, the street shop stands as a holdover of the pre-renaissance tattoo world. In terms of training, outlook, and socioeconomics, street shop tattooers often share more in common with midcentury tattooers than with contemporary custom tattooers. 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], was 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:

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

As a result, copying of custom designs is more prevalent in street shops. Tattooers with artistic aspirations are less likely to copy. "Any-



body 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, the anti-copying norm exerts significant influence.

The variety of responses to violations of the anti-copying norm reflects the assortment of perceived harms tattooers associate with copying. Some tattooers subscribe to Charles Caleb Colton's aphorism: "Imitation is the sincerest [form] of flattery."<sup>28</sup> 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: clients have expectations of a unique, personal tattoo. Tattooers describe custom designs as imbued with "very personal sentiment," an "express[ion of] . . . individuality," or even something "sacred." 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 [was] receiving some sort of personal gain . . . socially."

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 that might be tattooing and doing the same kind of style for, say, \$20 less." Other tattooers, however, were dismissive of the notion of direct financial harm from copying. First, unless two tattooers operate in the same city, they rarely

compete for the same clients. 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.

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 "struggle," "effort," and "guesswork" involved in designing a custom tattoo. By tracing the results of another tattooer's labor, the copyist is "just lazy." 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 appropriate responses to those harms, and even the precise contours of impermissible copying, tattooers regard literal or close copying of custom tattoo designs as a clear violation of industry norms. In contrast, copying from other works of visual art is a standard and accepted practice within the tattoo industry.

Readymade 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 United States, 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. Tattooers might also share flash designs with one another or copy them from their clients' bodies.<sup>29</sup> Early on, tattooers like Lew Alberts recognized the potentially lucrative market in flash designs and began selling sheets of tattoo designs.<sup>30</sup> Tattooers still produce flash today. It is marketed and sold on the Internet, through tattoo supply catalogs, and at tattoo conventions across the country.

When Lew Alberts began selling sheets of flash at the turn of the twentieth century, he did not include an end user license agreement. 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 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 now 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 and to make alterations to the original design by adding, subtracting, or substituting elements or by altering the color palette. As one tattooer explained, “[y]ou do whatever you want to do with it. You can tattoo that on anybody however you want to do it.” None of these rules are communicated in writing. Instead, they are “sort of handed down and understood” through observation of daily industry practice. But there are limits. Copying flash images to print t-shirts or competing sheets of flash would 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.”

Like flash, 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 commercial art as the basis for a tattoo, and most continue to tattoo such images on occasion. Rather than choosing a pre-designed image from the tat-

too shop wall, many clients today arrive at the shop with a pre-designed image located through Google. Tattooers frequently steer clients toward a custom design inspired by the reference material, whether to satisfy their own artistic impulse or to 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 as a design intended to be replicated, rather than created for a single use. Discussing tattoos of 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: “[T]his is something that is pounded into our lives from an early age. Mickey Mouse. So how does society . . . expect us not to take these images and make them our own.”

Aside from the sense that commercial art images are fair targets of reproduction, many tattooers 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.” In copyright terms, they see their work as transformative:

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

It’s hard to say whether a tattoo based on a piece of visual art would constitute a fair use under copyright law. But the rationale tattooers provide for this sort of copying is notable for how closely it echoes the Supreme Court’s definition of transformation as “altering the first [work] with new expression, meaning, or message.”<sup>31</sup>

Tattooers also echo the market harm inquiry under fair use.<sup>32</sup> Because of the specialized technical skill necessary to execute even the simplest design, tattooers understand themselves as operating in completely different markets than painters, photographers, and illustrators. In other words, a tattoo is simply not a market substitute for other forms of visual art. When asked how she justified tattooing images created by visual artists, one tattooer responded, “Because that person is not a tattooer. . . . Van Gogh can’t tattoo *Starry Night* on you, but I can.”

Others explain why the norm against copying does not extend to visual artists in terms of group identity. Since they see themselves as a countercultural group existing largely outside of the traditional art world, tattooers are especially unlikely to extend their norms to artists operating within the mainstream. As one tattooer told me, “[W]hen it’s a painting or an illustration, it’s not another tattooer’s work. So in that sense, it’s not another pirate you may run across one day. It’s a square, a regular artist.”

### Explaining Tattoo Norms

Descriptively, copying within the tattoo industry is governed entirely by internal industry norms. But why have tattooers developed this particular set of norms? And more fundamentally, why did they develop norms rather than rely on existing formal law? No single narrative fully explains these developments. Instead, the best explanation attributes the emergence of tattoo industry norms to the confluence of 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. Tattooers are not motivated to create, maintain, and enforce norms because of substantive barriers to legal protection. They 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. But practical barriers to effective enforcement could influence reliance on norms. Chief among

those barriers is cost. Copyright enforcement is an expensive proposition. But the same is true for most non-institutional copyright owners. And copyright law anticipates the risk of under-enforcement by allowing recovery of statutory awards far in excess of actual damages.<sup>33</sup>

The most important barrier to legal enforcement within the tattoo industry is cultural. Most tattooers expressed skepticism about the law and the judicial system. 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 skeptical than most. First, tattooers embrace and celebrate their status as outsiders who reject established social conventions. Second, tattooers and their industry have endured regulations that prohibited their trade within neighborhoods, cities, and entire states.

Because of the outsider mentality many tattooers share, they are 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 a conscious rejection of prevailing social conventions. 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.” To many tattooers, 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.”

In addition, the heavy-handed regulation and criminalization of tattooing colors the industry’s perception of the legal system. In the 1940s, state and local authorities began to impose minimum age requirements on tattooing and to more carefully monitor sanitary conditions.<sup>34</sup> After the 1959 death of a recently tattooed client from hepatitis, New York City banned tattooing altogether.<sup>35</sup> Criminal bans across the country followed. 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 client safety. Nonetheless, tattooing remained illegal in New York City until 1997 and was not legalized in South Carolina and Oklahoma until the mid-2000s.<sup>36</sup> Today, tattooers are still subject to local bans and restrictive zoning ordinances that place tattoo shops on par with strip clubs and pawn shops.<sup>37</sup>

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 tattooing as “a barbaric survival, often associated with a morbid or abnormal personality” and asserted 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.”<sup>38</sup> In 2010, the Ninth Circuit became the first federal appellate court to recognize tattooing as expression protected by the First Amendment when it struck down a ban on tattoo shops in Hermosa Beach.<sup>39</sup> That decision, while marking a notable departure from prior judicial attitudes toward tattooing, still reflected hints of the hostility that marred earlier opinions. In a begrudging concurrence, Judge Noonan insisted that the court was “not bound to recognize any special aesthetic, literary, or political value in the tattooist’s toil and trade.”<sup>40</sup>

Tattooers also worry that asserting copyright interests in their own creations might attract unwanted attention from copyright holders whose works are routinely copied by tattooers. By resolving their internal disputes through informal means, tattooers lessen legal scrutiny. More generally, tattooers fear that formal law will open the door to increased legal oversight. 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 these cultural features of the tattoo industry, economics offer a separate set of explanations. 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 selling them to as many paying customers as possible. Very little of what happens in the tattoo industry follows this basic framework. Commercial flash artists fit easily within the reproduction-and-sale business model. But the street shops where those designs are transferred to clients do not. Street shops are in the business of serial reproduction of copyrighted works, but like the local copy shop, they make their income by offering reproduction 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. Because of the emphasis clients place on bespoke tattoos, a custom tattoo derives its value largely from the fact that it will not be reproduced.

The classic Demsetzian analysis predicts that formal or informal property rights emerge when their benefits outweigh their costs, either because the value of exclusivity increases or the cost of enforcement drops.<sup>41</sup> The tattoo industry 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, enforcement costs plummeted. This story tells us why tattooers would be motivated to assert a claim against copyists. But it doesn't explain why tattooers have opted for informal social norms rather than formal law.

Propertization alone doesn't explain tattoo industry norms because they arise out of collective rather than personal interests. Robert Ellickson, in his foundational study of Shasta County ranchers, suggested that informal norms take root when three conditions are satisfied: the relevant community is close knit, the norms govern workaday affairs, and the norms enhance the collective welfare of the community.<sup>42</sup> Each of these three requirements is met in the tattoo industry.

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 it. Through a combination of workplace gossip, conversations at tattoo conventions, and technology-mediated discussion, tattooers have created a decentralized network for the exchange of industry information, including accusations of copying. And that exchange of information carries profound social and professional consequences.

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

Most importantly, tattoo norms enhance the welfare of the community. 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 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 develops economic value.

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 use the images on their bodies. Tattooers who upset those settled expectations run the risk of undermining the market. If clients who desire bespoke tattoos fear that their design will be 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 some other symbol of youthful rebellion. 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 demand and the increase in transaction costs associated with defectors.

Ellickson's framework also helps explain why street shops are less likely to follow industry norms. To the extent street shop tattooers are part of the same community as custom tattooers, they are on its fringes. And because their clients are, as a rule, less interested in one-of-a-kind designs, street shop tattooers are insulated from the erosion of market demand that results from copying. In other words, the norm against copying is not obviously welfare enhancing for street shop tattooers.

However, given the nebulous distinction between street and custom tattooing and the mobility of individual tattooers along that professional spectrum, it would be easy to overstate the incentives for defection.

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 because of the social stigma and economic consequences attached to highly visible tattoos.<sup>43</sup> For similar reasons, most tattoo shops turn away customers seeking tattoos associated with gangs or hate groups. In the aggregate, those norms discourage short-term personal economic gains for the sake of the collective maintenance of industry-wide interests.

These same self-protective instincts sometimes translate into exclusionary anti-competitive practices. In some ways, the tattoo industry resembles an informal guild.<sup>44</sup> It maintains trade secrets. It regulates entry into the profession. And it excludes potential competitors in order to limit competition. These efforts offer a supplemental explanation for tattoo industry norms, particularly the norm against copying custom designs.

Tattooing has long been an “old, magical art” characterized by secrecy. It 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. Until very recently, this information was shrouded in mystery. As one tattooer described previous generations, “[T]hey were like magicians; they were able to hold onto those secrets of how to tattoo.” 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, most tattooers learned through apprenticeship.

Tattoo equipment and supply distributors, eager to exploit the untapped market of aspiring tattooers, challenged this long-standing secrecy by marketing pre-assembled tattoo machines, ready-made pigments, and instructional materials. Today, the widespread availability of information on the Internet further disrupts the traditional control tat-

tooers exerted over the secrets of their trade. Some tattooers expressed concern about the impact of this free flow of information:

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

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, and 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 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 intellectual property protection.

## Conclusion

Because tattoo industry norms are largely a function of idiosyncratic cultural and market characteristics, we may question what they can teach us about intellectual property more generally. But 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.

An ideally calibrated intellectual property system would provide just enough incentive to prompt the creation of new works. 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 upfront costs or greater threats of appropriation. And they create against different backdrops of non-legal and even non-pecuniary incentives. But the rights intellectual property law confers are insensitive to fluctuations in the incentives necessary to induce creative production. Intellectual property protections are uniform, and that uniformity comes at a cost.<sup>45</sup>

To the extent norms form part of the backdrop of existing non-legal incentives, they suggest a more modest need for the additional legal incentives of intellectual property. Tattooers create new original designs because clients and their social code demand them. Even if tattooers were denied copyright altogether, these non-legal incentives suggest that their creative output would remain unchanged. Tattooers, like chefs, roller derby enthusiasts, and other creators should remind policymakers that incentives for creative production take many forms. An intellectual property policy structured around the expectations of a handful of publishers and distributors in a handful of legacy industries is one that neglects the prospect of new creative dynamics and markets in favor of inertia.

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. But technology has made copying cheaper, easier, and faster, threatening the fundamental premise of this business model. Because the tattoo industry relies on a very different strategy to extract value from its original works, it may offer some lessons for other creative industries seeking to wean themselves from over-reliance on control over the reproduction of copies.

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 the client and tattooer to spend many hours in a physically—and occasionally emotionally—intimate setting. As a result, clients look for interpersonal skill as well as artistic and technical expertise when choosing a tattooer.

This chapter does not advocate that the music, film, and publishing industries jettison their current business models in favor of one patterned on Sailor Jerry. But taking service and experience seriously could help copyright-reliant industries adapt to new market conditions. Some traditional copyright holders have already begun to embrace the shift from distributing mass-produced copies to providing customized, personalized service. Other industries are emphasizing those aspects of their offerings that remain difficult to copy. The gaming industry's focus on online multiplayer games, for example, can be viewed as an effort to entice consumers with services and experiences that are far harder to duplicate than the static contents of a disc. 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.

#### NOTES

This chapter is based on "Tattoos & IP Norms," originally published at 98 *Minnesota Law Review* 511 (2013).

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- 12 See 17 U.S.C. §102.
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- 16 Stipulation of Dismissal with Prejudice, *Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Oct. 19, 2005).
- 17 In 2012, I conducted interviews with fourteen tattooers across the United States. Many of those interviews are quoted throughout this chapter.
- 18 See 17 U.S.C. §101 (defining works made for hire).
- 19 See *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1069–71 (7th Cir. 1994); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000).
- 20 17 U.S.C. §109(c).
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