
NOTES

WHO OWNS YOUR SKIN: INTELLECTUAL PROPERTY LAW AND NORMS AMONG TATTOO ARTISTS

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TABLE OF CONTENTS

I. INTRODUCTION.....	1138
II. INTELLECTUAL PROPERTY.....	1142
A. COPYRIGHT LAW.....	1142
B. TATTOO ARTISTS' FORAYS INTO INTELLECTUAL PROPERTY LAW	1146
1. <i>Reed v. Nike Inc.</i> : The Rasheed Wallace Lawsuit	1147
2. <i>Whitmill v. Warner Bros.</i> : The Mike Tyson Lawsuit	1148
3. The Artist Legal Alliance	1149
III. LITERATURE REVIEW	1151
A. LEGAL ACADEMIA ON TATTOOS.....	1151
B. SOCIAL NORMS SCHOLARSHIP	1153
C. NORMS-BASED INTELLECTUAL PROPERTY.....	1154
IV. TATTOO ARTISTS AND IP PROTECTION	1157
A. FLASH BOOKS AND FLASH ART	1157
B. THE REALITY OF FORMAL IP LAW: INEFFECTIVE AND IGNORED	1158
V. TATTOO ARTISTS' SOCIAL NORMS	1161
A. GETTING A TATTOO	1161

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B. PROFESSIONAL TATTOO ARTISTS SEE THEMSELVES AS “ARTISTS”	1162
C. ARTISTS’ DESIRE TO ADVANCE AS ARTISTS IS ONE DISINCENTIVE TO COPYING	1163
D. TATTOO ARTISTS ARE AWARE OF IP RIGHTS	1164
E. THE PROHIBITION ON PHOTOGRAPHY OF ARTWORK INSIDE TATTOO PARLORS	1166
F. TATTOO ARTISTS’ EFFORTS TO REDUCE UNAUTHORIZED COPYING	1167
G. TATTOO ARTISTS’ TRANSFORMATIVE USE NORM	1169
VI. ASSESSMENTS	1170
A. ASSESSING SOCIAL NORMS	1170
B. ASSESSING THE PROSPECTS FOR FORMAL INTELLECTUAL PROPERTY LAW IN TATTOOING	1171
1. Intellectual Property of Tattoos and the Internet	1171
2. Professionalization of the Tattoo Industry	1173
3. Other Laws Have Changed in Response to the Changing Tattoo Industry	1173
VII. GENERAL PROPOSALS AND CONCLUSIONS	1176

I. INTRODUCTION

You think it, I ink it.

—Saying of tattoo artists.

Tattoos are part of mainstream culture in the United States. This is especially true among younger generations. While 23 percent of Americans have at least one tattoo, 32 percent of “Generation Xers” have at least one, and 38 percent of millennials have at least one.¹ 19 percent of millennials have at least two.² Movie stars and sports stars now commonly have several tattoos.³ Chart-topping pop star Lady Gaga announced the title of her most

1. PEW RESEARCH CTR., MILLENNIALS: CONFIDENT. CONNECTED. OPEN TO CHANGE. 57–58 (2010). Generation X is defined as those thirty to forty-five years old or those born between 1965 and 1980. Millennials are defined as those eighteen to twenty-nine years old or those born between 1981 and 1992.

2. *Id.*

3. For a list of celebrity tattoos, see *Celebrity Tattoos*, THE VANISHING TATTOO, http://www.vanishingtattoo.com/celebrity_tattoos_a.htm (last visited Apr. 19, 2012). Sports writer Ken Berger explains that one of basketball-star Allen Iverson’s legacies can be seen “in the tattoos that Iverson forced onto our television screens and magazine covers.” Ken Berger, *Iverson’s Hunger, Kobe’s Passion Highlight Landmark ’96 Class*, CBSSPORTS.COM (Feb. 18, 2011),

recent album by tattooing it on her body and flashing the tattoo at Los Angeles International Airport.⁴ Eighteen-year-old Disney starlet Demi Lovato thanked her fans for their support by tattooing “Stay Strong” on her wrist.⁵ In 2005, the cable television channel TLC began broadcasting the reality TV show *Miami Ink*, which followed the events of a tattoo shop in Miami Beach, Florida.⁶ *Miami Ink*’s success led to spinoffs in Los Angeles, London, and Rio de Janeiro.⁷ Along with, and indeed aided by, the success of the reality TV shows,⁸ the modern U.S. tattoo industry is a multi-billion dollar industry.⁹

A few tattoo artists have become famous, and have leveraged their fame to enter into other creative and profitable markets. Don Ed Hardy is perhaps the most famous. Hardy is a San Francisco based tattoo artist who licensed his artwork to clothing marketer Christian Audigier in 2004; the Ed Hardy clothing line has become quite successful and profitable.¹⁰ Another is Katherine Drachenberg, known as Kat Von D. After becoming the star of *Miami Ink* and *LA Ink*, she launched a clothing line with her High Voltage Tattoo parlor,¹¹ created a line of makeup with the Sephora

<http://www.cbssports.com/nba/story/14708086/iversons-hunger-kobes-passion-highlight-landmark-96-class>. Iverson began his NBA career in 1996. *Id.*

4. Annie Lubin, *Lady Gaga Flashes New Tattoo of Unicorn with New Album Title ‘Born This Way’ Wrapped Around It*, N.Y. DAILY NEWS, Sept. 15, 2010, http://articles.nydailynews.com/2010-09-15/gossip/27075463_1_lady-gaga-unicorn-new-tattoo.

5. Laurie Isola, *Demi Lovato Shows Off Post-Rehab Tattoos*, S.F. GATE, Mar. 16, 2011, http://www.sfgate.com/cgi-bin/blogs/dailydish/detail?entry_id=85173.

6. See *Miami Ink*, IMDB, <http://www.imdb.com/title/tt0472014/> (last visited Apr. 19, 2012).

7. See *LA Ink: About the Show*, TLC, <http://tlc.howstuffworks.com/tv/la-ink/about-la-ink.htm> (last visited Apr. 23, 2012); *London Ink*, <http://www.yourdiscovery.com/realtime/londonink/> (last visited Apr. 23, 2012); Kelly S., *New Tattoo Reality TV Show—Rio Ink*, RANK MY TATTOOS, <http://mag.rankmytattoos.com/new-tattoo-reality-tv-show-rio-ink.html#more-1405> (last visited Apr. 19, 2012).

8. Santa Barbara-based tattoo artist Gilbert Salas said that he predicts that tattooing will become mainstream, explaining that “Kat Von D changed everything.” Interview with Gilbert Salas, Tattoo Artist, Underground Tattoo, in Pomona, Cal. (Jan. 23, 2011). Kat Von D was the star of *Miami Ink* and *LA Ink*, and currently owns High Voltage Tattoo in Los Angeles, where *LA Ink* was formerly filmed. *Id.*

9. Max Chafkin, *King Ink*, INC. MAGAZINE, Nov. 1, 2007, available at <http://www.inc.com/magazine/20071101/king-ink.html>. Since the tattoo industry is so fragmented, it is difficult to develop reliable estimates as to approximately how much Americans spend on tattoos every year. *Id.* Chafkin estimates that “tattooing in America is a \$2.3 billion business.” *Id.*

10. Jesse Hamlin, *Don Ed Hardy’s Tattoos Are High Art and Big Business*, S.F. GATE, Sept. 30, 2006, http://articles.sfgate.com/2006-09-30/entertainment/17312720_1_tattoo-parlor-body-art-first-tattoo; Jonathan Marino, *Iconix Brand Buys Half of Hardy*, MERGERS & ACQUISITIONS, May 5, 2009, available at <http://www.themiddlemarket.com/news/-192943-1.html>; *About Christian Audigier*, <http://christianaudigier.com/aboutus.html> (last visited Apr. 23, 2012).

11. KAT VON D’S HIGH VOLTAGE TATTOO, <http://highvoltageatattoo.com/> (last visited Apr. 19, 2012).

makeup company,¹² and wrote two bestselling books.¹³ A third is Mark Machado, a Los Angeles-based tattoo artist known as Mister Cartoon. Machado began tattooing in the mid-1990s, later becoming famous after he tattooed the infamous rapper Eminem.¹⁴ Since then, Machado has painted tattoo-inspired artwork for Vans, Nike, several apparel companies, and Rockstar Games, and has also collaborated in designing a cell phone for MetroPCS.¹⁵

On a smaller scale, some tattoo parlors are following Ed Hardy's example and branching out into their own apparel lines.¹⁶ Island Tattoo, based in San Diego, has an apparel website that sells t-shirts inspired by Polynesian tribal tattoo designs.¹⁷ Perhaps a sign of things to come, Island Tattoo dedicated more of its booth space at the Los Angeles Body Art Expo to its t-shirts than to its tattoo chairs.¹⁸

Other tattoo artists are hoping to expand their tattooing businesses. Starlight Tattoo owner Mario Barth has made it "his goal . . . to build the Starbucks of tattoo parlors."¹⁹ When he owned five Starlight tattoo parlors in 2007, Barth said that he employed thirty people and generated seven million dollars in revenue per year.²⁰ He has since opened a Starlight parlor in Las Vegas and envisions shops in every major world city.²¹ Atomic Tattoos is also attempting to embark on a national expansion plan.²²

12. Kat Von D, SEPHORA, http://www.sephora.com/browse/brand_hierarchy.jhtml?brandId=5905 (last visited Apr. 19, 2012).

13. Jennifer Schuessler, *Inside the List*, N.Y. TIMES, Feb. 8, 2009, at BR18, available at <http://www.nytimes.com/2009/02/08/books/review/InsideList-t.html>; *Best Sellers*, N.Y. TIMES BOOK REV., Nov. 14, 2010, available at <http://www.nytimes.com/best-sellers-books/2010-11-14/hardcover-advice/list.html>.

14. Michele Norris, *Mister Cartoon's Growing Tattoo Empire: East L.A. Artist's Work a Favorite of Top Music Stars*, NPR (Jan. 1, 2003), <http://www.npr.org/templates/story/story.php?storyId=895768>.

15. Emily, *History of Mister Cartoon Sneaker Collaboration*, FRESHNESS MAGAZINE, July 1, 2009, <http://www.freshnessmag.com/2009/07/01/history-of-mister-cartoon-sneaker-collaboration/>; *Mister Cartoon*, SA STUDIOS GLOBAL, <http://www.sastudiosglobal.com/mgmt/collective/> (last visited Apr. 23, 2012) (follow "Mister Cartoon" hyperlink).

16. Interview with Chad Burns, Tattoo Artist, Island Tattoo, in San Diego, Cal. (Jan. 23, 2011).

17. See ISLAND TAT, <http://islandtat.com/> (last visited Apr. 19, 2012).

18. LA Body Art Expo, Pomona Fairgrounds in Pomona, Cal. (Jan. 23, 2011), as observed by the author.

19. Chafkin, *supra* note 9.

20. *Id.*

21. MARIO BARTH'S STARLIGHT TATTOO LAS VEGAS, <http://www.starlighttattoolasvegas.com/> (last visited Apr. 19, 2012); Chafkin, *supra* note 9.

22. Press Release, Atomic Tattoos and Piercings, Tampa Bay Based Atomic Tattoos Opens First Mall Location, Sets the Stage for National Growth (Jan. 2010), <http://www.atomictattoos.com/home/press-releases/242-atomic-tattoos-opens-first-mall-location.html>.

Atomic Tattoos owns and operates fourteen tattoo parlors, including parlors in Orlando, Tampa Bay, and Milwaukee.²³ In October 2010, Atomic Tattoos received an *Inc. Magazine* award as one of the fastest growing privately held companies for 2010.²⁴ Atomic Tattoos claims to be the largest tattoo retailer in the United States.²⁵

Despite their prominence and profitability, tattoos are still largely outside the bounds of formal intellectual property law. However, tattoo artists have developed some social norms which, in some respects, mirror formal intellectual property law.²⁶ Thus far, though, there has been little investigation into these norms, and for the most part, tattoo artists have paid little attention to formal intellectual property laws.

Therefore, this Note seeks to bridge some of the gaps in the understanding between the existing theoretical analyses of formal intellectual property law as applied to tattoos and how intellectual property law and tattoo norms operate in practice. This Note examines these relationships as related by the twenty-three interviewed tattoo artists. Twenty of these artists are based in Southern California. Accordingly, this Note is not a scientific analysis. In addition, this Note is not the last word on intellectual property issues in the tattoo world. Rather, this Note seeks to shed light, in a respectful manner, on an emerging issue for an increasingly mainstream part of U.S. culture.

Part II touches on copyright law, the most relevant parts of the intellectual property regime as applied to tattoo artists. Part II also discusses three instances of tattoo artists attempting to use formal copyright law to protect their art. Part III reviews other writings on tattoos and intellectual property, social norms, and other communities that have adopted norms-based intellectual property regimes. Part IV explains that tattoo artists view formal intellectual property law as ineffective, and consequently, they ignore it. Part V lays out tattoo artists' social norms, and draws parallels between some of these norms and formal intellectual property law. Part VI assesses tattoo artists' norms, and concludes that they are too weak to prevent widespread copyright violations. Part VII

23. *About Atomic Tattoos and Body Piercing*, ATOMIC TATTOOS, <http://www.atomictattoos.com/about-us.html> (last visited Apr. 19, 2012).

24. *Atomic Tattoos Company Profile*, INC., <http://www.inc.com/inc5000/profile/atomic-tattoos> (last visited Apr. 19, 2012). *Inc. Magazine* profiled Atomic Tattoos as part of its *Inc. 5000 List*, which ranks the fastest growing privately held companies in the United States. *About Inc.com*, INC., <http://www.inc.com/about/index.html> (last visited April 5, 2012).

25. See Press Release, *supra* note 22.

26. For example, some norms are designed to prevent unauthorized copying. See *infra* Part V.

concludes and provides a few proposals to both tattoo artists and policymakers in order to prepare for what will likely be the inevitable entry of formal intellectual property law into the tattoo industry.

II. INTELLECTUAL PROPERTY

A. COPYRIGHT LAW

Copyright law is designed to protect artists and their art. Literature, music, and visual art are all public goods;²⁷ copyright law provides artists with control over the copying and dissemination of their creative works based on the theory that without such protection, artists would underproduce these public goods. U.S. law has responded to this concern since the beginning of the Republic, as the copyright and patent clause in the United States Constitution illustrates: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁸ Granting limited monopoly power, then, has long been seen as the proper vehicle to incentivize artists to continue to create. In other words, copyright law balances one market failure, anticipated underproduction of public goods, with another, monopoly. Determining where to establish the balance between the two market failures is a dominant tension underlying copyright law.

Copyright law is most suited for protecting artists while patents are more useful for protecting scientists and their discoveries. Copyright law is codified in federal statutes that reflect the doctrinal focus on art: “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁹ Works of authorship subject to protection include literary works, musical works, and pictorial, graphical, and sculptural works.³⁰

An artist need not apply for a copyright or file documentation with the

27. A public good is defined as “[a] product that one individual can consume without reducing its availability to another individual and from which no one is excluded. Economists refer to public goods as ‘non-rivalrous’ and ‘non-excludable’. National defense, sewer systems, public parks and basic television and radio broadcasts could all be considered public goods.” *Public Good Definition*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/p/public-good.asp> (last visited Apr. 19, 2012).

28. U.S. CONST. art. I, § 8, cl. 8.

29. 17 U.S.C. § 102(a) (2006).

30. *Id.*

United States Copyright Office (“USCO”) in order to benefit.³¹ By creating an original work of art fixed in a tangible medium of expression, the artist owns the copyright in that work. Filing with the USCO can help prove first authorship, but as discussed in Part V of this Note, less formal means of proving first authorship for copyright purposes also exist.

For copyright purposes, determining authorship of a commissioned work can be complicated. If the creating artist is an employee and creates the original work of art within the scope of his or her employment, “the employer or other person for whom the work was prepared is considered the author for purposes of this title . . . unless the parties have expressly agreed otherwise in a written instrument signed by them.”³² In *Community for Creative Non-Violence v. Reid*, the Supreme Court noted that Congress did not define “employee” for the purposes of copyright ownership.³³ In the past, when Congress used the term “employee” without defining it, as is the case in the copyright statutes, the Supreme Court concluded that “Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”³⁴ The Court performed a fact-intensive inquiry to determine whether the artist, Reid, was an “employee.”³⁵ A clear, written contract assigns copyright ownership and avoids such an inquiry.

This “work made for hire” doctrine can also apply to independent contractors. Two conditions must be met. First, the work must fit within one of the nine categories enumerated in 17 U.S.C. § 101: “a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas.”³⁶ Second, the parties must “expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”³⁷

Although establishing “authorship” can be complicated, once authorship is established, copyright protection affords rather strong rights to the author. The copyright owner has the exclusive right to reproduce the copyrighted works, to prepare derivative works based on the original, and

31. *Id.* § 408(a) (“registration is not a condition of copyright protection”). See 17 U.S.C. § 302(a) (2006) (not requiring or specifying that a copyright be documented in order to receive copyright protection).

32. *Id.* § 201(b).

33. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

34. *Id.* at 740.

35. *Id.* at 749–51.

36. 17 U.S.C. § 101 (defining a “work made for hire”).

37. *Id.*

to distribute and sell copies of the copyrighted works.³⁸ The copyright owner also has the right to authorize and license any of those exclusive rights to others, and can sell the intellectual property interest in the copyright as he or she sees fit.³⁹

Turning to the scope of copyright, copyright law protects expressions of ideas, not ideas themselves.⁴⁰ Extending monopoly rights over an entire idea would either (1) prohibit artists other than the copyright owners from drawing inspiration from the artwork to create their own, new expressions, or (2) force other artists to pay monopoly rent to the copyright holder.⁴¹ Either possibility would likely stifle artistic innovation. Distinguishing between an idea and an expression of that idea is another central tension in copyright law. In addition, determining where a piece of art fits on the spectrum between idea and expression, and therefore determining whether copyright protections apply, is a standards-based inquiry. An analysis of the specificity of the copyright claim is required for this inquiry.⁴²

For example, Elayne Angel, who is famous among tattoo artists and enthusiasts,⁴³ has a tattoo of two angel-style wings drawn with black ink covering her back.⁴⁴ The wings have 144 feathers, they do not cover her spinal cord, and they begin near the top of her trapezius and flow down to her buttocks where the right wing meets a heart with the word “slave” written inside.⁴⁵ Describing her tattoo with this specificity supports the

38. *Id.* § 106.

39. *Id.*

40. *Baker v. Selden*, 101 U.S. 99, 105 (1879) (holding that copyright of a book describing a novel accounting system did not prevent others from designing accounting books based on plaintiff’s description).

41. *See Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675, 678–89 (1st Cir. 1967) (“When the uncopyrightable subject matter is very narrow, so that the topic necessarily requires, if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.”) (internal quotation marks omitted).

42. *See, e.g., Baker*, 101 U.S. at 102 (carefully considering the distinction between a book that explains a system and the “art which it is intended to illustrate”); *Brandir Int’l Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (conducting a detailed analysis of whether a copyright was valid by examining whether artistic expression could be separated from utility).

43. *See infra* Part V.D.

44. Photograph of Elayne Angel’s Wings, RINGS OF DESIRE, <http://www.ringsofdesire.com/wingsregistration/tattoo.htm> (last visited Apr. 19, 2012). Angel’s tattoo was trademarked. SLAVE, Registration No. 2,645,270. Angel even took the step of having the ® symbol tattooed on her back to bolster her trademark claim. Exploring the issues implicated by the tattooing of trademarked symbols and art is an avenue for further investigation. This Note focuses on copyright issues because successful tattoo artists create their own art instead of copying. *See infra* Part V.

45. SLAVE, Registration No. 2,645,270.

proposition that her tattoo is worthy of copyright protection. Protecting her design does not monopolize angel-style wings, or wings generally, let alone the idea of drawing permanent artwork on the human body. Thus, granting protection to her tattoo is not stifling artistic innovation as to any of these artistic themes. This is consistent with general copyright protection, which encompasses a specific expression of an idea. The Constitution and general U.S. intellectual property theory tell us that Angel, and possibly her tattoo artist, should be able to reap the benefits of their creativity.

Copying Angel's tattoo exactly, therefore, is literal copyright infringement.⁴⁶ The tattoo is an original work of authorship, fixed on a tangible medium of expression: her body. While not written in the copyright statute, nonliteral copyright infringement is also forbidden.⁴⁷ And indeed it must be for copyright law to have any relevance.⁴⁸ If there were no doctrine of nonliteral infringement, an artist could make an identical copy of Angel's wing design but draw 143 feathers instead of 144. Without a doctrine of nonliteral infringement, this nearly exact copy would satisfy copyright law and severely diminish the value of Angel's art, which is valuable in large part because of its uniqueness.

Evaluating nonliteral copyright infringement is a standards-based inquiry.⁴⁹ Courts have to decide first whether there was actual copying. If a tattoo artist could prove that he had never seen or heard of Angel's tattoo, but merely developed the drawing on his own, the artist could not be held legally liable for nonliteral infringement.⁵⁰ If there is some actual copying, however, a court would then need to evaluate whether one of the many exceptions to copyright protection applies.⁵¹

"Fair use" is one significant exception to the monopoly power given to copyright owners.⁵² "[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use),

46. 17 U.S.C. § 501 (2006).

47. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) (explaining that copyright protection is not limited to literal copying of the text, and finding that two plays with similar characters and stories, but different characteristics, did not constitute copyright infringement).

48. *See id.* at 121 ("It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations.").

49. *See, e.g., id.* (noting that the question of whether one has engaged in "fair use" of copyrighted material depends on whether the copyright infringement is "substantial.").

50. *See Arnstein v. Porter*, 154 F.2d 464, 469 (2d Cir. 1946) (discussing how access to the original material relates to the issue of copying).

51. 17 U.S.C. §§ 107–122 (2006).

52. *Id.* § 107.

scholarship, or research, is not an infringement of copyright.”⁵³ Fair use allows artists to briefly copy parts of protected works of art to create new art.⁵⁴ The Supreme Court has explained that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, to promote the Progress of Science and useful Arts.”⁵⁵ Therefore, monopoly protections do not extend to preventing all copying of protected work.

Transformative use is one type of fair use. Most of the tattoo artists interviewed for this Note support a norm very similar to transformative use. Formal transformative use focuses on the first factor under 17 U.S.C. § 107: the purpose and character of the copying use. Monopoly protection does not extend to truly transformative use, since copyright is designed to promote the creation of new art.⁵⁶ To determine whether a work is a transformative use such that it qualifies for the fair use defense, a court investigates “whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.”⁵⁷ Both fair use and its subdoctrine, transformative use, are standards-based inquiries.⁵⁸ As with much of copyright law, there are few bright-line rules as to when some copying becomes too much copying.

B. TATTOO ARTISTS’ FORAYS INTO INTELLECTUAL PROPERTY LAW

As the interactions between the tattoo industry and U.S. law are mostly confined to state and local health codes,⁵⁹ it is perhaps unsurprising

53. *Id.*

54. In evaluating whether copying of copyrighted material is fair use, courts look at four non-exhaustive factors: “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.*

55. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting U.S. CONST. art. I, § 8, cl. 8.) (alterations omitted) (internal quotation marks omitted).

56. *Id.* at 579 (explaining that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

57. *Id.* (alterations omitted) (citations omitted) (internal quotation marks omitted).

58. See Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States* 6-10 (2005) (unpublished manuscript) (on file with author) for discussion and rejection of the idea that drawing artwork on a human body is itself a transformative use.

59. See *infra* Part VI.B.3. One notable exception is police agency use of photographs of arrestees’ tattoos for identification purposes, which implicates Fourth Amendment and jury bias issues. See *Schmidt v. City of Bella Villa*, 557 F.3d 564, 572 (8th Cir. 2009); *United States v. Blasingame*, 219 F. App’x 934, 944–46 (11th Cir. 2007).

that there have been few interactions between tattooing and intellectual property law. There have been three such forays, however, that might foreshadow how formal intellectual property law will respond to the growth and prominence of tattooing.

1. *Reed v. Nike Inc.*: The Rasheed Wallace Lawsuit

Rasheed Wallace is a retired National Basketball Association (“NBA”) star.⁶⁰ In 1998, Wallace was a member of the Portland Trail Blazers.⁶¹ While living in Portland, Wallace reportedly hired tattoo artist Matthew Reed to tattoo a unique “Egyptian Family Pencil Drawing” on his upper right arm.⁶²

In 2004, Wallace won an NBA championship as a member of the Detroit Pistons.⁶³ During that year, Wallace was featured in Nike advertisements, which prominently included the Egyptian Family tattoo.⁶⁴ Reed alleged that he noticed his work being featured during 2004.⁶⁵ In 2005, Reed sued Nike and Wallace, as well as Weiden + Kennedy, the advertising agency behind the Nike advertisement, for copyright infringement.⁶⁶ In March 2005, Reed filed for and received a copyright on the drawing from the USCO.⁶⁷

In his complaint, Reed alleged that he was the sole owner and creator of the original artwork from which the tattoo on Wallace’s arm was created.⁶⁸ Reed requested damages and profits earned by Nike and Weiden + Kennedy as a result of the alleged infringement in the advertisement under 17 U.S.C. § 504(b).⁶⁹ He also requested an injunction against both companies, in addition to damages against Wallace.⁷⁰ Finally, he requested an accounting of the revenue realized by Wallace as a result of the artwork,

60. Chris Forsberg, *Celtics Waive Rasheed Wallace*, ESPNBOSTON.COM (Aug. 11, 2010, 11:10 AM), <http://sports.espn.go.com/boston/nba/news/story?id=5453540>.

61. *Artist Sues Wallace over Use of Tattoo*, ESPN (Feb. 16, 2005, 1:54 PM), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

62. *Id.* For a picture of Wallace’s Egyptian Family tattoo, see *Rasheed Wallace*, ATHLETE TATTOO DATABASE, <http://athletetattooDATABASE.com/Rasheed+Wallace> (last visited Apr. 19, 2012).

63. *Finals 2004*, NBA.COM, <http://www.nba.com/finals2004/> (last visited Apr. 19, 2012).

64. Complaint at ¶¶ 14–15, *Reed v. Nike, Inc.*, No. CV 05 198, 2005 WL 1182840 (D. Or. Feb. 10, 2005) [hereinafter *Reed Complaint*].

65. *Id.*

66. *Id.*

67. *Id.* It was appropriate that Reed filed for the copyright after filing suit, since copyright attaches from the date of creation of a piece of art rather than to the formal filing of a copyright registration with the United States Copyright Office. See 17 U.S.C. § 302(a) (2006).

68. *Reed Complaint*, *supra* note 64, at ¶¶ 10–13.

69. *Id.* at ¶ 25.

70. *Id.*

and demanded a share of any such revenue.⁷¹

Unfortunately for tattoo jurisprudence, the parties settled and the court dismissed the case.⁷²

2. *Whitmill v. Warner Bros.*: The Mike Tyson Lawsuit

Six years after the Rasheed Wallace lawsuit, tattoo artist S. Victor Whitmill brought a similar claim against Warner Bros. Entertainment.⁷³ Whitmill is the tattoo artist who tattooed boxer Mike Tyson's famous tribal tattoo on the left side of Tyson's face.⁷⁴ Whitmill sued Warner Bros. shortly before the release of the 2011 blockbuster *The Hangover 2*.⁷⁵ One of the main characters in *The Hangover 2*, played by actor Ed Helms, gets a tattoo on the left side of his face that is almost an exact copy of Tyson's tattoo.⁷⁶ Whitmill sued for copyright infringement, claiming that he was the sole creator and author of the tattoo and accordingly owns "all rights, including copyright, in the Original Tattoo, which is original and fixed in a tangible medium of expression."⁷⁷ Whitmill also produced the release form signed by Tyson, which states that "all artwork, sketches and drawings related to my tattoo and any photographs of my tattoo are property of [Whitmill's studio]."⁷⁸

The court denied Whitmill's request for a preliminary injunction to stop the release of *The Hangover 2*.⁷⁹ Nevertheless, Judge Catherine Perry also "said that Mr. Whitmill had a 'strong likelihood of prevailing on the merits for copyright infringement' and that most of the arguments put forth by Warner Bros. were 'just silly.'"⁸⁰ Like the Rasheed Wallace lawsuit, the Mike Tyson lawsuit settled and the case was dismissed.⁸¹

71. *Id.* at ¶ 38.

72. Stipulation of Dismissal with Prejudice at *1, *Reed v. Nike, Inc.*, No. 05 CV 198 BR (D. Or. Oct. 19, 2005).

73. Verified Complaint for Injunctive and Other Relief at *1, *Whitmill v. Warner Bros. Entm't Inc.*, No. 4:11-cv-00752-CDP (E.D. Mo. Apr. 28, 2011) [hereinafter *Whitmill Complaint*].

74. *Id.*

75. *Id.*

76. TMZ.COM, <http://ll-media.tnz.com/2011/04/29/0429-mike-tyson-tattoo-bn.jpg> (last visited Apr. 18, 2012).

77. *Whitmill Complaint*, *supra* note 73, at *3.

78. *Id.* at Exh. 3.

79. Order at *1, *Whitmill v. Warner Bros. Entm't Inc.*, No. 4:11-cv-00752-CDP (E.D. Mo. May 24, 2011) (denying Plaintiff's request for preliminary injunction).

80. Noam Cohen, *Citing Public Interest, Judge Rules for 'Hangover II,'* N.Y. TIMES, May 24, 2011, 4:05 PM, <http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/>.

81. Order of Dismissal at *1, *Whitmill v. Warner Bros. Entm't Inc.*, No. 4:11-cv-00752-CDP

3. The Artist Legal Alliance

The Artist Legal Alliance (“ALA”) is a third example of tattoo artists using formal copyright law to protect their artwork. The now-defunct ALA sent Digital Millennium Copyright Act⁸² (“DMCA”) take-down notices⁸³ to online merchants eBay and Craigslist in an effort to stop the sale of bootlegged tattoo flash art.⁸⁴ The ALA claims that “[f]or over seven years, the ALA worked to help enforce and protect the copyrights of tattoo flash artists world-wide on the internet.”⁸⁵ ALA supporter Rand Johnson reported that the ALA “shut down literally thousands upon thousands of auctions on eBay that infringe on artist’s copyrights.”⁸⁶ The group was controversial, however, as they allegedly sent take-down notices against legitimate sellers and copyright owners selling their own work.⁸⁷ One artist claimed that the ALA “doesn’t do too much research before they complain, they didn’t look to see that I’m legitimate. Now my eBay account is closed, pending an official investigation . . . all because I don’t want to support their organization.”⁸⁸ Another artist said that ALA take-down notices were simply a bid by ALA to increase membership, as “[e]very time [the ALA] pull[s] something, the person who posted it gets an email or a letter offering them to join the ALA, at a cost, of course.”⁸⁹

The ALA explains that its reasoning behind abandoning its DMCA campaign “involves the difficult and ever-changing landscape of copyright protection and enforcement on the internet.”⁹⁰ According to the ALA, the organization’s goal faced three specific obstacles: eBay policy and current legal precedent, the need for authorization to represent certain copyright

(E.D. Mo. June 22, 2011).

82. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

83. DMCA take-down notices require websites to remove unauthorized copies of infringing material when notified by the copyright owner. 17 U.S.C. § 512 (2006). Websites are liable for copyright infringement if they do not comply with properly presented take-down notices. *Id.*

84. ARTIST LEGAL ALLIANCE, <http://artistlegalalliance.com/> (last visited Jan. 18, 2012) (inoperative website) (on file with author); Robert Watson, *Tattoo Artists in Uproar over Attacks on Copyright Infringement Claims: How the Artist Legal Alliance Does More Harm Than Help*, YAHOO.COM ASSOCIATED CONTENT (April 11, 2007), http://www.associatedcontent.com/article/202468/tattoo_artists_in_uproar_over_attacks.html?cat=17. Flash art, or “tattoo flash,” was traditionally a stereotypical tattoo printed on paper and designed for rapid tattooing. It is typically displayed in binders and display racks at tattoo parlors.

85. ARTIST LEGAL ALLIANCE, *supra* note 84.

86. Interview by Tattoofinder.com with Rand Johnson (Feb. 2008), <http://tattoos-101.tattoofinder.com/rand-johnson-interview-february-2008>. Johnson is a Minnesota-based tattoo artist. *Id.*

87. Watson, *supra* note 84.

88. *Id.*

89. *Id.*

90. ARTIST LEGAL ALLIANCE, *supra* note 84.

holders, and a lack of resources.⁹¹

The ALA describes the eBay take-down policy as cumbersome and ineffective at preventing distribution of unauthorized flash art. The ALA complains that eBay's policy "only satisf[ies] the bare minimum required to comply with US law in regards to their handling of bootlegged goods."⁹² The ALA similarly criticizes the *Tiffany (NJ) Inc. v. eBay, Inc.* decision, which held that eBay was not liable for contributory trademark infringement unless it continued to provide services to a specific individual who it knows, or has reason to know, is selling counterfeit merchandise.⁹³ Next, the ALA also claims that it was only able to enforce copyrights with take-down notices when authorized to do so by the creating artists, since the DMCA dictates that the enforcement of copyright is the burden of the copyright holder.⁹⁴ As discussed above, though, at least two tattoo artists allege that the ALA did not wait for authorization. Finally, the ALA explains that it was a volunteer-only organization, and thus did not have the resources or manpower to continue to monitor Craigslist and eBay.⁹⁵

The ALA reflects efforts by tattoo artists to use modern copyright law to protect their work in the face of Internet and digital technology that makes copying easy. It is worth emphasizing that the take-down notices were directed at flash drawings; original drawings have always been protected by copyright law. The ALA does not claim, nor does research suggest, that it ever filed suit against individuals tattooing pirated drawings.

The difficulty, if not impossibility, of pursuing every infringer, rather than taking legal action against "nodes" like eBay and Craigslist, parallels the efforts of the Recording Industry Association of America and the Motion Picture Association of America. Both attempted to sue individual music and movie downloaders to stop piracy in the early 2000s, but have more recently come to focus on networks that allow users to post and share pirated content.⁹⁶ The ALA was never well-funded or well-organized, and

91. *Id.*

92. *Id.*

93. See *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 514–15 (S.D.N.Y. 2008), *aff'd in relevant part*, 600 F.3d 93, 108–09 (2d Cir. 2010). The ALA's analysis conflates trademark infringement with copyright infringement.

94. ARTIST LEGAL ALLIANCE, *supra* note 84.

95. *Id.*

96. For example, MGM Studios brought copyright infringement claims against Grokster, a company that distributed free software allowing computer users to share copyrighted files through peer-to-peer networks. *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005). Similarly, Viacom brought copyright infringement claims against YouTube, a company that operates a website that allows users to

was thus unable to effectively use the existing copyright regime to protect tattoo artists. Perhaps this is not surprising, since much of the significant copyright jurisprudence of the last ten years, as well as the DMCA, was pursued and funded by the large music and movie content industries.

Having examined copyright law, the next Part reviews existing literature on tattoos, social norms, and social-norms based intellectual property regimes.

III. LITERATURE REVIEW

A. LEGAL ACADEMIA ON TATTOOS

Little has been written about intellectual property rights and wrongs in tattooing. Thomas Cotter and Angela Mirabole engaged in a theoretical discussion on how copyright law might apply to tattoos and concluded that “the use of copyrighted works of authorship, trademarked symbols, or indicia of personal identity in works of body art may give rise to a number of thorny problems, some of which implicate constitutional rights.”⁹⁷ They explained how the “work made for hire” doctrine might apply to tattoo artists and their clients, and also explained how, alternatively, tattoo artists might qualify as independent contractors.⁹⁸ They also discussed how the law might respond to copyright infringement by tattoo artists who draw copyrighted images, and they brought up an important problem mentioned by several tattoo artists interviewed for this Note: traditional copyright remedies are difficult to apply to tattooing.⁹⁹ Presciently, they discussed unauthorized reproductions of copyrighted body art via photography or filming of a tattooed subject, predicting some of the issues raised in both the Rasheed Wallace lawsuit and the Mike Tyson lawsuit.¹⁰⁰

John Vukelj discussed the trademark law implications of the NBA’s ban on tattoo advertising.¹⁰¹ Vukelj argued that the NBA would likely win a trademark confusion claim¹⁰² against players who advertised via tattoos

upload video files. *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), *aff’d in part, rev’d in part, vacated in part*, Nos. 10-3270-cv, 10-3342-cv, 2012 U.S. App. LEXIS 6909 (2d Cir. Apr. 5, 2012).

97. 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, 138 (2003).

98. *Id.* at 105–07.

99. *Id.* at 118–123.

100. *Id.* at 108.

101. John Vukelj, *Post No Bills: Can the NBA Prohibit Its Players From Wearing Tattoo Advertisements?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 507 (2005). Vukelj did not address *Reed v. Nike, Inc.* in his piece.

102. 15 U.S.C. § 1125 (2006).

on their bodies.¹⁰³ Vukelj posited this is especially so if a player tattooed an advertisement for a competitor to one of the NBA's sponsors; for example, if a player had a Pepsi logo tattooed on his arm while the NBA is sponsored by Coca-Cola.¹⁰⁴

Christopher Harkins examined the Rasheed Wallace lawsuit and analyzed how copyright law might apply to tattoo advertising.¹⁰⁵ Harkins argued that tattoos are eligible for copyright protection and that tattoo artists can obtain and enforce copyrights.¹⁰⁶ He concluded that tattoo artists may begin to bring lawsuits when celebrities whom they have tattooed accept lucrative sponsorship deals that expose their tattoos in advertisements.¹⁰⁷ As a result, Harkins argued, before getting a tattoo, anyone with a reasonable expectation of fame should obtain a written document from their tattoo artist transferring ownership of the copyright in the artwork.¹⁰⁸

Jordan Hatcher examined copyright issues of tattoos and proposed that tattoo artists clarify ownership of copyrights in tattoos they draw.¹⁰⁹ Hatcher predicted that "cases and issues concerning tattoos and intellectual property may soon become more commonplace," and he argued that tattoos are subject to formal copyright law.¹¹⁰ Hatcher also pointed out an awkward situation that might arise if the right to transfer ownership of a copyright, which is a traditional right under copyright law, is strictly applied to the law governing tattoos: a third party, such as a motion picture studio, could end up owning rights to a permanent drawing on an actor's body.¹¹¹ Hatcher recommended that tattoo artists and their clients simplify

103. Vukelj, *supra* note 101, at 522–24.

104. *Id.* at 520. Vukelj also points out that the NBA is not a state actor, and thus, the constitutional issues mentioned in footnote 264, *infra*, do not apply to NBA players.

105. Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313 (2006).

106. *Id.* at 318–19.

107. *Id.* at 332. Harkins also claims that "[i]n years past, copyright protection was a non-issue or ignored because tattooists were either too reticent to sue a customer or too complacent to challenge tattoo lore, favoring any and all available exposure for their work." *Id.* As tattoo artists explained, "tattoo lore" involves artists' protecting their work, and some prominent tattoo artists certainly do not "favor any and all exposure for their work." *See infra* Part V.

108. *Id.* at 328.

109. *See generally* Jordan S. Hatcher, *Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States* (2005) (unpublished manuscript) (on file with author).

110. *Id.* at 5–7.

111. *Id.* at 19–20. Similarly, in *Whitmill*, defendant Warner Bros. argued that granting tattoos copyright protection would necessarily give tattoo artists other traditional rights granted to copyright owners: preventing the destruction of a work of recognized stature under 17 U.S.C. § 106A(a)(3)(b),

tattoo copyright ownership through contracts that establish “[c]lear, one-person ownership, whenever possible, [to] avoid future difficulties.”¹¹²

B. SOCIAL NORMS SCHOLARSHIP

Modern social norms legal scholarship began with Robert Ellickson’s book *Order Without Law*.¹¹³ Ellickson studied cattle ranchers in Shasta County, California, and reported that cattle ranchers settled animal trespass disputes and common fence boundary disputes via informal norms rather than laws governing those disputes.¹¹⁴ Ellickson found that the cattle ranchers were a close-knit group, which contributed to the effectiveness of social norms in controlling individual ranchers’ behaviors.¹¹⁵ The cross-cutting relationships between members of a close-knit group “help members maintain a gossip network through which to pass information about how particular members acted in the past in particular social interactions.”¹¹⁶ As discussed in Part V, gossip is also part of the tattoo artists’ arsenals in protecting their works.

Richard McAdams addressed the interactions between the law and social norms.¹¹⁷ McAdams proposed an “esteem theory” of social norms, theorizing that norms arise when: (1) “there is a consensus about the positive or negative esteem worthiness” of engaging in an activity, (2) “there is some risk that others will detect whether one engages” in an activity, and (3) “the existence of this consensus and risk of detection is well-known within the relevant population.”¹¹⁸ Furthermore, McAdams defended the relevance of social norms in legal analysis because, among other reasons, “sometimes norms and law influence each other.”¹¹⁹ Thus, as

and preventing infringement of the artist’s right to prepare derivative works under 17 U.S.C. § 106(2). Warner Bros.’ Memorandum in Opposition to Plaintiff’s Motion for Preliminary Injunction at 14–15, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-cv-752 (E.D. Mo. May 20, 2011). In other words, according to Warner Bros., if tattoos are subject to copyright protection, a client could neither remove nor alter a tattoo. *Id.*

112. Hatcher, *supra* note 109, at 21.

113. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

114. *Id.* at 52–53, 71.

115. *Id.* at 184–89.

116. *Id.* at 181.

117. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) [hereinafter McAdams, *Norms*]. See generally Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 254–57 (2008) (describing the academic literature in the Law and Society and Law and Economics fields, focusing on their differences regarding social norms, game theory, methodological approaches, and subject matter).

118. McAdams, *Norms*, *supra* note 117, at 358.

119. *Id.* at 347.

courts take up intellectual property tattoo cases in the years to come, the resulting decisions might influence how tattoo artists perceive appropriate mechanisms to protect their artwork.

Social norms are not confined to close-knit groups.¹²⁰ Indeed, social norms do exist among “loose-knit groups” as well as “intermediate-knit groups.”¹²¹ Prevailing social norms among loose-knit and intermediate-knit groups can have significant policy implications. For example, Lior Strahilevitz analyzed how social norms might apply to individuals’ decisions to conserve water during a drought.¹²²

The book and articles discussed above are by no means the only examples of social norms literature. All three illustrate, however, that groups often regulate behavior without resorting to legal remedies; indeed, some groups regulate behavior in the absence of any legal regime.

C. NORMS-BASED INTELLECTUAL PROPERTY

Several groups of entertainers and artists use social norms to protect their intellectual property. In some cases existing law is not helpful, while in others existing law is nonexistent.¹²³

For instance, elite French chefs rely on a norms-based intellectual property (“IP”) system to protect their valuable recipe-related IP.¹²⁴ Since the universe of elite French chefs is small and familiar, esteem among peers is very important to the chefs, and thus, chefs find adherence to their social norms to be very important.¹²⁵ Negative gossip provides strong

120. Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 369 (2003).

121. *See id.* at 365.

122. *Id.* at 367.

123. Some creators even benefit by ignoring traditional intellectual property considerations. *See generally* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (examining IP norms in fashion design, and concluding that piracy assists top fashion designers); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006) (explaining that while jambands encourage fans to record their live shows and share their recordings on the Internet, jamband fans adhere to norms that prevent unauthorized reproductions of bands’ studio recorded material).

124. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 2, 187 (2008). The authors explain that social norms protecting recipes are analogous to patent law, in that chefs allow creators to exclude others from preparing an original recipe even though all the information required to make a recipe is publicly available, and also analogous to copyright law, in that recipes are a form of expression of an idea. *Id.* at 188.

125. *Id.* at 193.

disincentives to exactly copy a recipe developed by another chef, to share proprietary recipe information without permission, or to neglect to acknowledge the author of a recipe.¹²⁶ Offending chefs are likely to find themselves unable to discuss recipes with their peers, let alone ask for help in the future.¹²⁷

Like chefs, stand-up comedians also attempt to protect their material through social norms.¹²⁸ Because “formal copyright law does not offer effective protection to stand-up comedians. . . . [c]omedians have responded by organizing an informal system of IP norms that stands in for the formal law and regulates ownership, transfer, and appropriation [of jokes and routines].”¹²⁹ Stand-up comics were mostly aware that the copyright law regime applied generally to their form of creative work: the joke, or comedic routine.¹³⁰ Nevertheless, consistent with a theme repeated by several tattoo artists interviewed for this Note, stand-up comics “widely agreed that copyright law and copyright lawsuits were, for the most part, unhelpful as a means of countering instances of joke stealing.”¹³¹ Stand-up comedians instead attempt to protect their creations via private action.¹³²

Significantly, comics’ norms deviate from formal copyright law in several ways. Comics’ norms are much less tolerant of the idea / expression dichotomy, as comics regard joke-concept stealing as unacceptable even at high levels of generality.¹³³ Comics’ norms also have no time limitation after which it is permissible to copy another comic’s jokes, whereas the copyright statutes dictate that copyrighted works become public domain seventy years after the author’s death.¹³⁴ Similarly, there is no concept of “joint authorship” among stand-up comics, and there is no licensing of jokes from one comic to another.¹³⁵ Conversely, there is a norm among

126. *Id.*

127. *Id.* at 193–94.

128. 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, 1866 (2008).

129. *Id.* at 1840.

130. *Id.* at 1810–11.

131. *Id.* at 1811.

132. Comics’ enforcement begins with direct face-to-face confrontations, which the parties usually sort out amicably. *Id.* at 1814–15. If no amicable resolution results, however, alleged joke stealers face significant social sanctions in the form of gossip and other comics refusing to appear on the same bill as the alleged thief, which can significantly hamper their ability to book gigs. *Id.* at 1817–18. Finally, aggrieved comedians sometimes threaten to engage in violence, retribution which “enjoy[s] considerable legitimacy within the comedic community.” *Id.* at 1820.

133. *Id.* at 1823.

134. *Id.* at 1823–24; 17 U.S.C. § 302(a) (2006).

135. Oliar & Sprigman, *supra* note 128, at 1827–28.

comics somewhat akin to fair use, in that routine stealing by young comedians is either ignored or dealt with less severely.¹³⁶ Young comedians, then, are given more space to develop their comedic voices early in their careers.¹³⁷

Magicians also use social norms to protect their magic tricks.¹³⁸ Copyright protection does not apply to magic tricks since they are a method,¹³⁹ and patent protection is not used because registering for a patent would require magicians to reveal their secrets to the public.¹⁴⁰ The most analogous IP framework for magicians is likely trade secrets, but trade-secret protection is also insufficient to protect magicians.¹⁴¹ Magicians have instead developed norms. For example, “[t]he first person to publish or prominently perform a trick gets credit for inventing it.”¹⁴² Magicians are encouraged to develop improvements and new versions of previously shared work, but are expected to acknowledge the original inventor.¹⁴³ In addition, magicians often share secret tricks and techniques with each other.¹⁴⁴ Magicians are expected to keep these secrets within their community however, and a strong norm dictates that magicians “[n]ever expose a secret to a non-magician.”¹⁴⁵ Magicians use open letters, gossip, and social shunning to enforce their norms on other magicians.¹⁴⁶ These same tools can also lead to effective boycotts against manufacturers who reveal secret tricks to the public.¹⁴⁷ As commentator Jacob Loshin summarizes, “this norm-based system of IP protection has developed its own set of IP rights uniquely suited to the special demands of the magic community.”¹⁴⁸

Having examined the existing literature, the next section examines copyright issues relating to flash art and explains that tattoo artists largely ignore formal intellectual property law.

136. *Id.* at 1829.

137. *Id.*

138. Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123, 124 (Christine A. Corcos ed., 2010).

139. 17 U.S.C. § 102(b) (2006).

140. Loshin, *supra* note 138, at 132.

141. *Id.* at 132–34.

142. *Id.* at 136.

143. *Id.*

144. *Id.* at 137.

145. *Id.*

146. *Id.* at 137–38.

147. *Id.* at 138.

148. *Id.* at 124.

IV. TATTOO ARTISTS AND IP PROTECTION

A. FLASH BOOKS AND FLASH ART

Tattoo artists' flash art books are copyrighted. The artwork printed on the flash books' pages is original art fixed in a tangible medium of expression.¹⁴⁹ All five of the flash books reviewed by the author had regular copyright notices on their edition pages. For example, the edition page of *Cranial Visions* states, "© 2010 Memento Publishing . . . All rights reserved. No part of this book may be copied or reproduced in any manner whatsoever: electronic, mechanical photocopy, recording, etc. Without written permission from the author . . . no photos from this book may be copied or reproduced in any shape or form."¹⁵⁰ Copyright notices like this reflect that the art inside the book, then, is copyrighted. A book of original art being copyrighted is neither surprising nor controversial, as it is one type of artistic expression that fits squarely within the copyright paradigm. As the copyright notice in *Cranial Visions* suggests, reproducing the art in any manner is a copyright violation. Reproducing it by tattooing it on a person's body does not change the infringing nature of the copying.¹⁵¹

Courts that have faced copyright lawsuits over flash designs have affirmed that flash art is covered by copyright law. In *Tattoo Art, Inc. v. TAT Int'l, LLC*, the court analyzed the alleged copyright infringement of flash tattoo art as a court would analyze a typical copyright-based breach of license claim.¹⁵² In *Gonzales v. Kid Zone, Ltd.*, the court assessed a copyright infringement claim based on exact copies of flash designs that appeared in an offending magazine advertisement.¹⁵³ And in *Owens v. Ink Wizard Tattoos*, the court treated flash designs as typical corporate property in a claim alleging conversion of corporate property for personal use.¹⁵⁴ None of these courts questioned whether flash art was copyrightable, nor did any of the defendants in these three cases argue that flash art could not be copyrighted.

149. It therefore conforms to the requirements of 17 U.S.C. § 102 (2006).

150. MIKE DEVRIES ED., *CRANIAL VISIONS: EXPLORING THE SKULL THROUGH ARTISTIC INTERPRETATION*, MEMENTO PUBLISHING (2010). See also JOSE LOPEZ, *LOWRIDER TATTOO FLASH*, MEDIAFRIENDS (2010).

151. See Hatcher, *supra* note 109, at 6–10 (arguing that tattooing copied art is no different than drawing the art in other media, and is thus copyright infringement).

152. *Tattoo Art, Inc. v. TAT Int'l, LLC*, 711 F. Supp. 2d 645, 647–49 (E.D. Va. 2010).

153. *Gonzales v. Kid Zone, Ltd.*, No. 00 C 3969, 2001 U.S. Dist. LEXIS 17579, at *2 (N.D. Ill. Aug. 14, 2001).

154. *Owens v. Ink Wizard Tattoos*, 533 S.E. 2d 722, 723–24 (Ga. 2000).

B. THE REALITY OF FORMAL IP LAW: INEFFECTIVE AND IGNORED

Although copyright laws protect flash books, tattoo artists interviewed for this Note uniformly agreed with José Lopez's comment that turning to the courts for copyright protection would simply not be worth it.¹⁵⁵ Addressing unauthorized copying of his art, another artist stated succinctly that "there's nothing you can do about it."¹⁵⁶ Lopez related that a copyright lawsuit would take too long, would cost too much money, and most importantly, would distract him from his work.¹⁵⁷ Lopez expressed mixed feelings when asked whether his thinking would change if an infringer were making hundreds of thousands of dollars by copying his work.¹⁵⁸ He explained that if this were the case, he would consider taking legal action.¹⁵⁹ He also said, though, that if his art becomes so popular and successful that a bootlegger is making a lot of money from it, he might not worry about the copying because it must also be true that he is making even more money.¹⁶⁰ Lopez also said that "we all contributed to [bootlegging] at one point or another," whether by downloading music, watching pirated DVDs, or copying flash designs.¹⁶¹

Mike Cole explained that tattooists who copy his and other well-known artists' works directly are usually small-time amateurs.¹⁶² He said that they often tattoo out of garages or apartments and make very little money, and that accordingly, a copyright lawsuit "[is] not worth it[;] you can't squeeze blood from a turnip."¹⁶³ Cole's turnip comment is reminiscent of the skepticism expressed by the Artist Legal Alliance about the ability of lawyers and the legal system to enforce tattoo artists' copyrights. As the ALA website explained, "There is a joke: the only one who wins when something goes to court is the lawyers."¹⁶⁴

The ALA experience also demonstrates that the Internet has made it easy to post unauthorized copies of tattoos. Many tattoo artists interviewed

155. Interview with José Lopez, Founder and Manager, Lowrider Tattoo, in Fountain Valley, Cal. (Jan. 19, 2011).

156. Interview with Jason Paul, Art & Soul Tattoo Co., in L.A., Cal. (Jan. 18, 2011).

157. Interview with José Lopez, *supra* note 155.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Interview with Mike Cole, Tattoo Artist, Jeff Johnson Tattoo, in Pomona, Cal. (Jan. 23, 2011).

163. *Id.*

164. ARTIST LEGAL ALLIANCE, *supra* note 84.

mentioned new technology as one reason why copyright law is ineffective. One artist said that he had posted a few flash designs online and knew that they would probably be copied because as “with anything online . . . once it’s up there it’s fair game for getting ripped off.”¹⁶⁵ Lopez echoed these sentiments, explaining that “it’s too easy to bootleg flash books” for any effective enforcement.¹⁶⁶

Artist Gustavo Rimada agreed that the Internet made it easy to bootleg artwork.¹⁶⁷ He posts samples of his work on his website, and he said that he is aware that sometimes people download them and make unauthorized copies.¹⁶⁸ Rimada knows of two different companies in South America that have downloaded his artwork from the Internet and sold unauthorized copies.¹⁶⁹ He explained that there was nothing he could do about this, legally.¹⁷⁰ With that point, Rimada touches on a challenge for intellectual property protection in the Internet age: the difficulties of enforcing intellectual property laws internationally. Rimada also commented that he would take legal action against a company in the United States if it was making a significant amount of money from his work.¹⁷¹

Many artists also mentioned that printouts from Internet copies they have seen are usually of lower quality than the original pieces¹⁷² drawn by the artists. According to the artists, in other words, mass-marketed copying—and especially printing technology—has not progressed such that an Internet connection enables people to download high-quality tattoo art. For instance, Chad Burns said that he has seen low quality copies of his artwork online.¹⁷³ More specifically, Burns explained, the line work on

165. Interview with Joshua Franks, Tattoo Artist, Tower Tattoo, in Pomona, Cal. (Jan. 23, 2011).

166. Interview with José Lopez, *supra* note 155.

167. Rimada designs and draws tattoo-themed art, but does not tattoo himself. Interview with Gustavo Rimada, Flash Art Artist, Arte De Gustavo, in Pomona, Cal. (Jan. 23, 2011). *See also* GUSTAVO RIMADA: FINE ART, <http://www.artedegustavo.com/> (last visited April 19, 2012) (providing links for a biography, upcoming shows, a portfolio, and an online store).

168. Interview with Gustavo Rimada, *supra* note 167.

169. *Id.*

170. *Id.*

171. *Id.*

172. In this way, tattoos are different than music. It is easy to download near-CD quality music from the Internet. *Copyright Conundrum*, PBS ONLINE NEWS HOUR FORUM (June 2003), <http://www.pbs.org/newshour/forum/june03/copyright9a.html> (quoting Matt Oppenheim, senior vice president of business and legal affairs for the Recording Industry Association of America, as saying “[o]n the Internet however, it is extremely easy to download [music] and the audio quality is near CD”). A popular method for downloading online music and other copyrighted material is through the use of a BitTorrent client. *See* Julianne Pepitone, *50,000 BitTorrent Users Sued for Alleged Illegal Downloads*, CNNMONEY (June 10, 2011, 3:59 PM), http://money.cnn.com/2011/06/10/technology/bittorrent_lawsuits/index.htm.

173. Interview with Chad Burns, Tattoo Artist, Island Tattoo, in Pomona, Cal. (Jan. 23, 2011).

these copies tends to be fuzzy, and might also be too deep and shaky, as well as too rough.¹⁷⁴ Carl Nguyen mentioned that the quality is not the same, explaining that while “lines can get drawn,” drawing is better in person.¹⁷⁵

Besides being largely unable to prevent tattoo artists from copying each other’s artwork, formal intellectual property law does not prevent tattoo artists from tattooing copyrighted or trademarked art. Mike Cole explained that tattoos of celebrity likenesses are common.¹⁷⁶ Carl Nguyen reported that he is not at all worried about tattooing something that is copyrighted.¹⁷⁷ Eddie Herrera said that tattoos, by their very nature, represent admiration, “unless it’s a demon ripping the head off of Mickey Mouse.”¹⁷⁸ Herrera also commented that “if someone is willing to put a logo on their skin, it should be OK.”¹⁷⁹

Herrera’s co-worker, Danny, said that he has considered whether tattooing copyrighted art or trademarked logos is problematic.¹⁸⁰ He reported that it is impossible to regulate, however.¹⁸¹ So many people have tattoos of protected art, he said, that there is simply nothing copyright or trademark owners can do about it.¹⁸² Specifically, he mentioned Hello Kitty’s popular Japanese bobtail cat, explaining that it is a very common tattoo among young women.¹⁸³ Presumably, none of those young women asked for (or asked their tattoo artist to request) permission from Hello Kitty’s parent company, Sanrio.¹⁸⁴ For his part, Danny explained that he averages about three to five tattoos a day and estimates that he tattoos a sports logo about once every three months.¹⁸⁵ He related that there are tattoo fads that ebb and flow, like particular sports logos or movie or television characters that are popular for a short time.¹⁸⁶ For example, when

174. *Id.*

175. Interview with Carl Nguyen, Tattoo Artist, Federal Tattoo, in Pomona, Cal (Jan. 23, 2011).

176. Interview with Mike Cole, *supra* note 162.

177. Interview with Carl Nguyen, *supra* note 175.

178. Interview with Eddie “Edd” Herrera, Store Manager and Tattoo Artist, Prix Body Piercing, in Pasadena, Cal. (Jan. 28, 2011).

179. *Id.*

180. Interview with Danny, Tattoo Artist, Prix Body Piercing, in Pasadena, Cal. (Jan. 28, 2011).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Company Information*, SANRIO.COM, http://www.sanrio.com/about/company_information (last visited Apr. 19, 2012).

185. Interview with Danny, *supra* note 180.

186. *Id.*

the Los Angeles Lakers won their second consecutive NBA championship in June 2010, Danny said he noticed an increase in requests for Lakers logos.¹⁸⁷

With copying being so common, and only scant interactions between tattoo art and the courts, it is unsurprising that several artists explained that they and their peers are not worried about legal sanctions. As the artists interviewed pointed out, it would be very difficult for tattoo artists to identify people who had paid infringing artists to tattoo the original artists' work on their bodies. Furthermore, the original artists would have no remedy against people bearing tattoos of unauthorized copies of the artists' work. Indeed, as Cotter & Mirabole point out, a court ordering intensive and painful tattoo laser-removal surgery conflicts with constitutional precepts of bodily autonomy and privacy.¹⁸⁸ More immediately, three tattoo artists expressed their feeling that tattoo removal is too extreme a remedy for their liking; thus it is unlikely that tattoo artists would even pursue it. If any remedy were to be applied, then, it would almost certainly be damages, but it is unclear what damages a court would assess.¹⁸⁹

Initiating action against infringing artists would seem to be more practical. Detection problems abound here too, though, since in many cases original tattoo artists are unlikely to know that their work has been copied.¹⁹⁰ There is nothing analogous to an Internet protocol address log that would allow tattoo artists to track artists who tattoo unauthorized copies of their artwork. And again, several tattoo artists interviewed agreed that those who copy their designs likely do not have the money to make a lawsuit worth the time and effort.

V. TATTOO ARTISTS' SOCIAL NORMS

A. GETTING A TATTOO¹⁹¹

Tattoo artists make appointments with their clients to draw tattoos,

187. *Id.*

188. Cotter & Mirabole, *supra* note 97, at 100.

189. As discussed below, this is potentially more relevant with athlete and celebrity tattoos. *See infra* Part VI.B.1.

190. Matthew Reed likely brought his action against Rasheed Wallace and Nike in large part because Wallace was seen in public with his shoulders exposed on a nightly basis. *See* Reed Complaint at ¶¶ 14–15, *Reed v. Nike, Inc.*, No. CV 05 198, 2005 WL 1182840 (D. Or. Feb. 10, 2005) (noting that Reed observed Wallace's tattoo exposed during NBA games and then observed a Nike commercial featuring and describing Wallace's intricate tattoo). If Wallace was a professional baseball player, or played in any other sport where athletes' jerseys cover their shoulders, his tattoo would have received significantly less exposure.

191. The author's interviews with various tattoo artists provided the material for this Part.

and most will also tattoo walk-in clients.¹⁹² Clients often bring in photographs or drawings which they want copied exactly, or from which they want the tattoo artist to base his or her conceptual framework in creating a new drawing to be tattooed. Other clients choose from the dozens of flash drawings in books, binders, and display screens that tattoo parlors make available. Words, names, and letters are also popular choices. Some clients walk into tattoo parlors with ideas and work with the artist to develop and draw their concepts on paper before the drawing is transferred onto skin. All tattoo artists interviewed require their clients to sign waivers, which inform clients that tattooing is permanent and can pose health risks including infections, and waive artist liability for clients' allergic reactions.¹⁹³ In the words of Mike Cole, the waivers mean that the artist "[is] liable for nothing."¹⁹⁴

B. PROFESSIONAL TATTOO ARTISTS SEE THEMSELVES AS "ARTISTS"

One social norm prevalent among professional tattoo artists is that they consider themselves to be "artists" and consider their tattooing to be "art." Chad Burns explained that there is a difference between "tattooists" and "artists," and that this distinction is known and recognized among artists.¹⁹⁵ Burns said that tattooists draw on skin, while artists create artwork.¹⁹⁶ Thus, artists take their work seriously and dedicate themselves full time to their art. Amateur tattooists are often derisively referred to as "scratchers," meaning that they scratch a person's skin rather than apply a clean and smooth tattoo.

Indeed, tattoo artist Bill Hannong considers himself to be an artist, and Hannong's political lobbying efforts in Florida speak to this difference: Hannong's successful lobbying codified some of the distinctions between professional tattoo artists and amateur scratchers.¹⁹⁷ Hannong reported that he is happy that scratchers have been shut down by Florida health officials, since their shoddy work and often unsanitary working environments hurt

192. In contrast, Mark Machado, also known as Mr. Cartoon, only tattoos by appointment. MISTERCARTOON.COM, <http://www.mistercartoon.com/contact.html> ("The way my studio is set up . . . everything is by appointment only.") (last visited Apr. 19, 2012).

193. See, e.g., Lowrider Tattoo, Consent Release and Waiver Form; Prix Body Piercing Waiver (on file with author).

194. Interview with Mike Cole, *supra* note 162.

195. Interview with Chad Burns, *supra* note 173.

196. *Id.*

197. Telephone Interview with Bill Hannong, Past President, Florida Professional Tattoo Artists Guild (Feb. 18, 2011) (Hannong is the contact person for the organization). See also *infra* Part VI.B.3.

his and other serious artists' reputations.¹⁹⁸

Nate Fierro said that he is thankful that he tattoos at a famous tattoo parlor.¹⁹⁹ As a result, he has enough work to pick clients whose chosen tattoos are within his style range and let him innovate.²⁰⁰ José Lopez also expressed his preference for clients who want him to tattoo "art."²⁰¹ Lopez considers himself an artist and said that his art has let him go all over the world to places like New York and Spain.²⁰² Lopez's description of himself as an artist appears accurate since during his interview, Lopez was tattooing a large Michelangelo-inspired angel figure²⁰³ on a client's forearm. The tattoo he was painting was not simply a few lines or a Chinese character—it was a layered and detailed multicolored drawing, with crisp borders and a depth that reflects Lopez's skill, discipline, and years of experience.²⁰⁴

More than any other norm among tattoo artists, the fact that they see themselves as artists lends support to protecting their work with formal intellectual property law. At least theoretically, intellectual property is central to art. More specifically, copyright law is best situated in protecting artists and their art. Thus, since they are artists, tattooists should enjoy legal protections designed to promote their success.

C. ARTISTS' DESIRE TO ADVANCE AS ARTISTS IS ONE DISINCENTIVE TO COPYING

A few tattoo artists²⁰⁵ explained that they would not copy other artists' work because copying would not contribute to their artistic advancement. One artist explained that copycats are not true artists. Accordingly, he would rather draw his own work. However, he would draw whatever art a client wanted if they brought it into his parlor. Gilbert Salas explained that he is doing well now, so he can afford to focus on his own style rather than copying.²⁰⁶ Mike Cole said that he has no respect for "copy machines" who

198. *Id.*

199. Interview with Nate Fierro, Tattoo Artist, High Voltage Tattoo, in Hollywood, Cal. (Feb. 23, 2011).

200. *Id.*

201. Interview with José Lopez, *supra* note 155.

202. *Id.*

203. Perhaps unsurprisingly, Grim, from Goodfellas Tattoo, said that many tattoo artists look up to renaissance art. Interview with "Grim," Tattoo Artist, Goodfellas Tattoo, in Pomona, Cal. (Jan. 23, 2011).

204. The author did not obtain this client's name, but would like to thank him for his patience.

205. To protect artists' confidences, some names are omitted from the following sections.

206. Interview with Gilbert Salas, Tattoo Artist, Inkfatuation Inc. Tattoos, in Pomona, Cal. (Jan. 23, 2011).

do not create their own designs.²⁰⁷ Cole also said that now, because he is an established artist, he only does his own work.²⁰⁸ He commented, though, that he “started out like the others, tattooing Mickey Mouse and The Tasmanian Devil.”²⁰⁹

Nate Fierro agreed with Cole’s sentiments.²¹⁰ If a client comes to him and requests a tattoo of a sports logo or a celebrity likeness, Fierro prefers to refer them to “someone who needs work.”²¹¹ Fierro instead chooses clients based on which clients’ tattoos will allow him to progress as an artist.²¹² Three other artists also mentioned that they began their careers by tattooing simple and popular designs, but have since progressed. While another artist, José Lopez, expressed his preference for work that allows him to advance as an artist as well, he also said that for him, tattooing is also a job, and if someone is willing to pay high rates for him to tattoo a basic celebrity likeness, he will.²¹³

Fierro’s comment about referring clients to less-established or newer tattooists underscores the extent to which formal copyright law might be ineffective. Along with Lopez, Fierro is one of the two best-known artists interviewed for this Note. If other successful artists similarly refuse simple sports logo or celebrity likeness work and refer it to artists “who need work,” many content holders face bleak prospects indeed in recovering damages via formal copyright or trademark law as new tattooists probably lack financial resources.

D. TATTOO ARTISTS ARE AWARE OF IP RIGHTS

All twenty-three tattoo artists interviewed agreed with a basic premise underlying intellectual property law: an artist should get credit for his work. Several expressed frustration with others copying their work. Most reported that they had learned of instances where other tattooists had directly copied their work. José Lopez commented that “it happens to everyone.”²¹⁴ Gilbert Salas reported that he was afraid that someone else would try to copyright his original tattoo artwork.²¹⁵ Mark Machado wrote

207. Interview with Mike Cole, *supra* note 162.

208. *Id.*

209. *Id.*

210. Interview with Nate Fierro, *supra* note 199.

211. *Id.*

212. *Id.*

213. Interview with José Lopez, *supra* note 155.

214. *Id.*

215. Interview with Gilbert Salas, *supra* note 206.

that he lets his lawyers handle copying and bootlegging issues, and as far as he and his tattoo parlor are concerned, “we defiantly have opinions . . . but choose to keep them to ourselves.”²¹⁶ Machado declined the author’s request to be interviewed.²¹⁷

Several artists said that Elayne Angel had copyrighted the Angel Wings tattoo on her back.²¹⁸ She is known among tattoo artists as the first person to copyright a tattoo;²¹⁹ no artists interviewed for this Note knew of anyone else. Three artists did report, however, that they had heard of artists informally copyrighting a tattoo design by making a color photocopy of the design, sealing it in an envelope, and mailing it to themselves. The dated postmark would thereby provide evidentiary support to a claim by the artist that he was the original author of the design. All three of these artists independently referred to this method as the “poor man’s copyright.”²²⁰

In addition, some tattoo artists’ waivers contain clauses similar to the one at issue in the Mike Tyson lawsuit. For example, the “R3n3gad3 Tattoo” waiver includes a clause which says:

I release all rights to any photographs taken of me and the tattoo and give consent in advance to their reproduction in print or electronic form. (If you do not initial this provision, please advise and remind your Artist and the Tattoo Studio NOT to take any pictures of you and your completed tattoo!).²²¹

This clause does not explicitly reserve rights to the artist or studio, as Mike Tyson’s waiver did.²²² As the parenthetical sentence suggests, the clause is

216. Email from Mark Suroff, Bus. Manager, SA Studios, to the author (Jan. 27, 2011) (on file with author). The author respectfully suggests that “defiantly” may be a typo for “definitely.”

217. The author was told by another tattoo artist that Machado had been impersonated by copycats looking to capitalize on Machado’s fame as a celebrity tattoo artist. Interview with José Lopez, *supra* note 155. Machado did not confirm or deny this in his email to the author.

218. Indeed, this is how the author learned about Angel. *See, e.g.*, Interview with Eddie “EdD” Herra, *supra* note 178.

219. In fact, though, Angel trademarked her tattoo, and did not formally copyright it. *See supra* note 44.

220. A postage stamp is much cheaper than USCO fees. The USCO charges \$35 for an online registration of a basic claim in an original work of authorship, \$50 for a paper filing of the same claim, and \$65 for registration of a group of published photographs. U.S. COPYRIGHT OFFICE - FEES, <http://www.copyright.gov/docs/fees.html> (last visited Apr. 19, 2012).

221. Waiver, Release and Consent to Tattoo, R3n3gad3 Tattoo (on file with author). Other tattoo studios maintain waiver forms with similar language. *E.g.*, Consent Release and Waiver Form, Lowrider Tattoo (on file with author) (“I release all the rights to any photographs taken, and give my complete advance consent for their reproduction in any print or electronic form, or exhibition in any venue.”). *But see* Prix Tattoo Release Form (on file with author) (containing no discussion of intellectual property rights in the tattoo).

222. *See infra* note 78 and accompanying text.

most directly designed to prevent clients from bringing claims against their artists and studios for displaying pictures of their tattoos, and this is likely the reason why some tattoo artists include a similar clause in their waivers. Nonetheless, if a client were to initial this clause, the artist would own rights to a particular derivative use of the artwork—photographic reproduction. Finally, it is worth noting that of the twelve clauses on the “R3n3gad3 Tattoo” waiver, this is the only clause that clients are expressly given the option of not initialing.²²³ Although the waiver clauses reflect an awareness of one facet of copyright ownership, not every tattoo artist includes them or makes clients sign them. These clauses are better understood as artists wanting to avoid liability rather than as a serious mechanism to protect derivative work ownership.

E. THE PROHIBITION ON PHOTOGRAPHY OF ARTWORK INSIDE TATTOO PARLORS

One norm that all six tattoo parlors visited follow is not allowing patrons to photograph the tattoo art available for viewing in the tattoo parlor. Prix Body Piercing, for example, has a sign near the front door prohibiting all photography inside the parlor. Eddie Herrera explained that his shop has this rule because they are afraid that someone could take a picture of a drawing or set of drawings and then “go to their buddy and have him tattoo it.”²²⁴ Goodfellas Tattoo also prohibits photography inside its parlor, as the manager explained that he paid a lot to buy the flash art on display.²²⁵ That investment would not have been worth it if someone could browse his flash art only to copy the flashes for free.

It is worth noting that some of the art on the wall rack displays at Prix Body Piercing, and most of the flash art on display at Goodfellas Tattoo, is not original to those two parlors’ artists. Both shops prominently display dozens of the famous “Sailor Jerry” designs, including sailors’ anchors, drawings of Betty Boop, stylized American flags, and eagles.²²⁶ Thus, the prohibition of photography inside the parlors is directed at protecting the value of the investments that parlors have made in flash art books.²²⁷ It is

223. Waiver, Release and Consent to Tattoo, R3n3gad3 Tattoo, *supra* note 221.

224. Herrera explained that it is also for customer privacy. Interview with Eddie “EdD” Herrera, *supra* note 178.

225. Interview with “Grim,” *supra* note 203.

226. See SAILOR JERRY TATTOOS, <http://www.sailorjerry.com/tattoos/> (last visited Apr. 20, 2012).

227. One tattoo artist reported that he sells his flash books for \$250. Based on a search at Amazon.com, flash books seem to be sold across a wide price spectrum, with some listed at under \$15 and some priced at \$245. AMAZON.COM BOOKS, <http://www.amazon.com/books-used-books->

not expressly directed towards protecting the parlors' artists' original art. Another artist explained, though, that he would certainly not allow a potential customer in his parlor to take pictures of the original art in his portfolio.

F. TATTOO ARTISTS' EFFORTS TO REDUCE UNAUTHORIZED COPYING

Tattoo artists reported a few different methods that they use to try to stop unauthorized copying. First and foremost, a few tattoo artists reported that they have badmouthed copycats. Almost all the artists interviewed said that they had heard negative copycat gossip about other artists. One artist explained that direct copying is highly frowned upon, and that since the artists in Southern California know each other, it is hard to do under the radar. Another estimated that there are roughly one hundred elite tattoo artists in Southern California,²²⁸ and that it is a tight-knit community. Therefore, badmouthing can be especially effective at shaming copycats. Tattoo artists who want to progress in their craft rely in some measure on the esteem of their peers, especially if they want to start their own tattoo parlor. Starting their own parlor is a sign of independence and establishment in the tattoo community. A third artist explained that if he caught someone copying his art, he would confront them personally and tell them that he would never refer clients to them if they continued to copy his work. Badmouthing among tattoo artists appears similar to the strategies employed by elite French chefs and magicians.²²⁹

Tattoo artists also reported creative Internet-based badmouthing. One artist explained that his favorite badmouthing technique is to post pictures of his original artwork next to a picture of unauthorized copies on his Facebook.com page, as well as on the "wall"²³⁰ of the copycat's Facebook.com page. He also posts the side-by-side pictures on the walls of any mutual friends. He explained that his next step is to monitor the copycat's wall, and then quickly repost the pictures after the copycat takes them down. He includes disparaging comments along with the pictures. Several other artists had either seen or heard about Facebook.com or MySpace.com badmouthing. Besides shaming, social network badmouthing could be damaging to tattoo artists since many use

textbooks/b/ref=sa_menu_bo7/190-1287771-9468167?_encoding=UTF8&node=283155 (search "tattoo flash books").

228. As discussed in this Part, tattoo artists' attempts to prevent unauthorized copying are geographically focused.

229. See *supra* Part III.C.

230. A Facebook wall is the space on users' profiles on which friends post messages and pictures for users and their friends to see.

Facebook.com and MySpace.com to advertise to their potential clients and to show off their work.²³¹

Another artist mentioned a time-honored enforcement technique: face-to-face confrontation. The artist interviewed reported that a tattooist had opened up a shop down the street from his, and the artist interviewed had been tipped off by a friend that the new parlor was using his flash art as its own original art. The artist interviewed reported that he went to the copycat shop and demanded they stop using the art or pay the artist a fee. The copycat shop chose to stop using the art. The artist interviewed also commented that a tattooist at the copycat parlor claimed to have bought the copies of the flash art from a friend.

The same artist explained that on a separate occasion, a different copycat was punched in the face when confronted about copying. The artist had sold the copycat one of his flash books, only to learn that the purchaser was photocopying the flashes and selling them as his own. The copycat was unaware that the artist knew he was selling the bootlegged flashes and returned to the artist's shop to purchase a different flash book. The tattoo artists' friends locked the door, confronted the copycat (who the artist reported immediately seemed ashamed) and a physical altercation ensued. The artist was quick to explain that this had only happened once; no other artist interviewed had even heard of using physical violence to prevent copying.

On the other hand, some artists interviewed said that they do nothing about copycats. One mentioned that he "doesn't get worked up about it," unlike some others. Another said he does not care about copying because copycats are not artists, and not worth pursuing. Rejecting one theoretical tenant of intellectual property—original expression—another artist said that he is not worried about copying because everything has been recycled. Several said that they interpret copying as a compliment. One Southern California artist specifically said that he had seen a picture of a copy of his work that had been tattooed by a San Francisco artist and that he felt flattered. He has also seen pictures of copies of his work on the East Coast and in Mexico, and feels that the copying is a testament to his success as an artist.

231. See, e.g., *Carlox Tattoo Artist*, FACEBOOK.COM, <http://www.facebook.com/pages/CARLOX-TATTOO-ARTIST/259015207315> (last visited Apr. 20, 2012); *Brian Benenatti Tattoo Artist*, FACEBOOK.COM, <http://www.facebook.com/pages/Brian-Benenatti-Tattoo-Artist/138775188435> (Apr. 20, 2012).

His comments here reveal another aspect of tattoo artists' social norms: the tattoo artists interviewed were only concerned with copycats in their geographic area. Almost all the tattoo artists interviewed are based in Southern California, and their comments suggest that the only copying they are worried about is that by other Southern California tattoo artists. For instance, the artist who spoke about his face-to-face confrontation with another artist was concerned about the copycat in large measure because the copycat had a shop down the street. His fear of copycats was that they would use his work to take business away from him locally. The artist who said that copying was hard to do under the radar because the Southern California tattoo community is relatively tight-knit was presumably not worried about tattoo artists from outside Southern California.

G. TATTOO ARTISTS' TRANSFORMATIVE USE NORM

Tattoo artists support other artists using their work so that the other artists can create their own original designs. Most tattoo artists interviewed approve of others using their art as inspiration. Most also reported that at some point in their careers, they have used other artists' works as inspiration.

One artist said that he is comfortable with other tattoo artists using his work as a reference. Another similarly explained that he has no problem with tattoo artists using his art and style for inspiration. When asked when "inspiration" became "copying," this artist said that he did not think there was an exact boundary in his mind. A third said that he likes it when artists are inspired by his work and add their own twist to his style. He also mentioned that sometimes clients bring in copies of other artists' work. When that happens, he will make some changes and run with it.

This norm mirrors the formal fair-use defense to copyright infringement. Artists take an original piece of art and make changes and innovations to tailor the art and the client's ideas to their own style. In so doing, they create new art. Ideally, the artist changes the original enough that the resulting tattoo can be called an original work itself. As to whether the copying was too much copying, there is no fixed line in either tattoo artists' minds or formal copyright law. It would seem that tattoo artists would perform their own candid assessments as to whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."²³²

232. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

VI. ASSESSMENTS

A. ASSESSING SOCIAL NORMS

Tattoo artists' social norms are effective at keeping established artists who work in the same geographic area from copying one another. Tattoo artists see themselves as artists, want to progress in their art, and know each other such that gossip and badmouthing are effective deterrents to blatant copying. Applying formal sanctions to this group seems unnecessary.

Aside from the group of established tattoo artists, though, the social norm regime does not appear effective at preventing unauthorized copying. Mark Machado's policies are one specific example. The fact that Machado has lawyers who handle copying and bootlegging issues²³³ shows that he does not trust norms alone to protect his reputation or to protect his work from copying.²³⁴ Machado's turn to the law is reasonable, since the tattoo industry is fragmented, and detection problems abound. As both Robert Ellickson and Richard McAdams argue, the threat of detection is important for social norms to function effectively.²³⁵ Furthermore, there are apparently an abundance of scratchers who will tattoo copied art, and tattoo artists' norms of shaming and criticizing copycats only target other local artists.²³⁶

Besides gossip, tattoo artists do not engage in the norms-based enforcement strategies that other communities have adopted to protect their IP. As several tattoo artists interviewed for this Note explained, and as the author observed, there was a wide range of skill on display at the Los Angeles Body Art Expo. It is possible, then, that established tattoo artists could take a cue from stand-up comics and refuse to appear at any such conventions with artists who copy.²³⁷ No tattoo artists interviewed mentioned this, and it seems that the community is too fragmented and

233. See Email from Mark Suroff, *supra* note 216.

234. A tattoo artist with lawyers also demonstrates his sophistication as a businessman and is yet more evidence that tattooing has moved into the mainstream.

235. See *supra* Part III.B.

236. Relying on geographically limited norm-based enforcement would be especially problematic for Los Angeles-based Machado, who was recently the artist-in-residence at the Marcel at Gramercy, an upscale New York City boutique hotel. Diane Cardwell, *Well-Appointed Guest Rooms, and Tattoo Suite Down the Hall*, N.Y. TIMES, Nov. 21, 2010, available at <http://www.nytimes.com/2010/11/22/nyregion/22tattoo.html>.

237. See Olliar & Sprigman, *supra* note 128, at 1817–19 (describing how comics sometimes retaliate against alleged thieves by refusing to appear on the same “bill” as the thief, thereby refusing to perform in the same lineup as them). For an example of a tattoo convention, see BODY ART EXPO, <http://www.bodyartexpo.com/MAIN.PHP> (last visited Apr. 20, 2012).

loose knit for this to be effective. Moreover, unlike magicians, tattoo artists lack an equivalent to a manufacturer of props, which they could boycott to discourage copying. Tattoo artists could try to pressure ink manufacturers or tattoo needle manufacturers to stop selling to known copycats, but such secondary targeting would require a much higher level of organization and coordination than is present among today's tattoo artists.

There is also little to no public knowledge about the two related problems that tattoo artists mentioned about getting a tattoo from copied art. First, tattoo seekers do not know that downloading a picture from the Internet and printing it out usually results in lower line-work quality than an original piece of art. Second, tattoo seekers apparently think that they can get the same quality tattoo from a copying scratcher as from an established artist. In the words of one artist, "the public thinks they get the same quality work for \$60 as they could for \$200." It is certainly possible that these two problems are self-serving exaggerations made by established artists.²³⁸ Leaving that aside, a higher level of public consciousness regarding relative tattoo quality is required if the established artists' social norms are to effectively curtail unauthorized copying from scratchers and amateur tattooists.

B. ASSESSING THE PROSPECTS FOR FORMAL INTELLECTUAL PROPERTY LAW IN TATTOOING

As the ALA demonstrated, formal intellectual property protections have thus far been ineffective at deterring widespread unauthorized copying. This ineffectiveness, along with the continuing mainstreaming of tattoos and the accompanying professionalization of the tattoo industry, suggests that formal intellectual property protections will become a larger part of the tattoo universe.

1. Intellectual Property of Tattoos and the Internet

Presently, formal copyright liability is most likely an issue for athletes and celebrities who are photographed often. It would be relatively easy for tattoo artists to find pictures online of athletes or celebrities they had tattooed. It would also be easy for an enterprising attorney to find an aspiring celebrity tattoo artist and file a Victor Whitmill-like lawsuit against the athlete's or celebrity's sponsors whose advertisements or performances featured the tattoos.²³⁹ Hatcher and Harkins both argue that

238. If more tattoo seekers avoided scratchers in favor of more-established artists, the established artists would have more clients to pay their higher rates.

239. See e.g., Nike Basketball, *Nike Basketball: LeBron Rise*, YOUTUBE (Oct. 24, 2010),

celebrity clients should insist on ownership of the copyrights in their tattoos to foreclose any such lawsuits.²⁴⁰ Similarly, if a celebrity or athlete were to be tattooed by a literal or conceptual copycat, the original artist could easily find out if the offending tattoo is featured in advertisements or promotional materials available online and bring suit against both the celebrity and the copycat.

However, the Internet is developing such that a much broader swath of tattoo artists might be able to locate copycat tattoo art. There are dozens of websites on the Internet for tattoo enthusiasts that allow people to post pictures of their tattoos.²⁴¹ One example is local tattoo conventions, which have their own websites that include photo gallery web pages of tattoos displayed and purchased at the conventions.²⁴² As artists are most concerned with copycats from their local areas, convention gallery websites are one online resource where artists can search for copycat tattoo art. Another example is tattoo magazine websites. *Inked Magazine's* website includes a user gallery that allows visitors and fans to post pictures of their tattoos.²⁴³ The *Inked* user gallery gives submitters the option, but does not require them, to include the name and location of their tattoo artists.²⁴⁴ The gallery also allows users to describe their tattoos with "tags." Tags are words that describe the tattoo, and allow the words to appear on a list of pictures of tattoos on the website with pictures of other tattoos that have the same tag.²⁴⁵

Thus, if an artist was suspected of copying other artists' designs or flashes, victims could search *Inked Magazine's* website for any users who submitted photographs provided by clients of the suspected copycat. Although some tags are unhelpful, like "arm" or "portrait," searching several more specific tags together could help artists police websites that include tags. The Facebook.com and Myspace.com tattoo group websites

<http://www.youtube.com/watch?v=cdtejCR413c>. Ironically, in this LeBron James Nike commercial, one scene shows James in a medical office having one of his back tattoos removed. *Id.*

240. Hatcher, *supra* note 109, at 21; Harkins, *supra* note 105, at 328.

241. See, e.g., *Tattoo Gallery 1*, TATTOO PICTURE DESIGNS, <http://www.tattoo-picture-designs.com/tattoo-gallery.asp> (last visited Apr. 20, 2012); *Tattoos - Where's My Ink*, FACEBOOK.COM, <http://www.facebook.com/tattoos.wheres.my.ink?ref=mf> (last visited Apr. 20, 2012).

242. SEATTLE TATTOO EXPO, <http://www.seattletattooexpo.com/gallery/> (last visited Apr. 20, 2012); BODY ART EXPO, <http://www.bodyartexpo.com/MAIN.PHP> (last visited Apr. 20, 2012).

243. *Event Gallery*, INKED, <http://www.inkedmag.com/gallery/> (last visited Apr. 20, 2012).

244. *User Tattoo Gallery*, INKED, http://www.inkedmag.com/gallery/user_submitted/upload/ (last visited Apr. 20, 2012).

245. For example, one tattoo on the *Inked Magazine* User Gallery had the following tags: "portrait, monster, realism, black & gray, arm." *Id.*

mentioned in Part V.F do not include tags, nor do they include fields crediting the tattoo artist. Thus, with current search-engine technology, searching these web pages for copied art would be time consuming and difficult.

In the near future, though, tattoo artists may have a new tool to search for copied art: Google Image Swirl. Google is developing an image searching tool which, if successful, will soon allow users to search by images themselves.²⁴⁶ Presently, users can only search for images by searching for words that describe them.²⁴⁷ Google Image Swirl would allow tattoo artists to search by images of their original art, and thus potentially arm tattoo artists with a significant new copycat detection tool.

2. Professionalization of the Tattoo Industry

As discussed in Part I, tattoos are now increasingly mainstream and the tattoo industry is professionalizing. To repeat Hatcher's prediction, this professionalization will likely produce "deep pockets" that would make tattoo artists and their parlors attractive candidates for infringement suits.²⁴⁸

Chain tattoo parlors, like Starlight Tattoo and Atomic Tattoos, as well as the most famous artists, have reason to be concerned. Those chains operate several parlors, are located in different states, and each employs dozens of tattoo artists. Starlight Tattoo owner Mario Barth has announced both that Starlight Tattoo boasts a multi-million dollar revenue stream and that he manages Starlight Tattoo like a businessman.²⁴⁹ In addition, famous artists like Mark Machado and Kat Von D could also face infringement claims. Both are well known and have branched out from tattooing, cashing in their tattoo-world fame to sign cross-branding deals. Even though the artists interviewed are not concerned with formal intellectual property law, the potential for a lucrative damage award against a profitable parlor might change their minds.

3. Other Laws Have Changed in Response to the Changing Tattoo Industry

While tattoo artists are currently dismissive of formal intellectual

246. Yushi Jing & Henry Rowley, *Explore Images with Google Image Swirl*, GOOGLE RESEARCH (Nov. 23, 2009), <http://googleresearch.blogspot.com/2009/11/explore-images-with-google-image-swirl.html>.

247. *Google Images*, GOOGLE, <http://images.google.com/> (last visited Apr. 20, 2012); *Yahoo! Image Search*, YAHOO!, <http://images.search.yahoo.com> (last visited Apr. 20, 2012); *Bing Images*, BING, <http://www.bing.com/images> (last visited Apr. 20, 2012).

248. Hatcher, *supra* note 109, at 4.

249. Chafkin, *supra* note 9.

property law, the tattoo artists interviewed are quite abreast of the laws that most directly affect them: health codes.²⁵⁰ Health codes are one area of the law that is evolving to accommodate the prominence of tattoos in the twenty-first century United States. Florida tattoo artists like Bill Hannong have been proactive in lobbying the Florida legislature because they believe that Florida boasts an intrusive regulatory scheme.²⁵¹

Hannong, a tattoo artist in Fort Myers, Florida,²⁵² is an active member of the Florida Professional Tattoo Artists Guild (“FPTAG”),²⁵³ a registered nonprofit corporation in Florida.²⁵⁴ Hannong reports that the FPTAG developed productive relationships with Florida legislators.²⁵⁵ He and the FPTAG lobbied the Florida legislature to change Florida’s tattoo regulations, which had required that tattoo artists be supervised by licensed doctors or nurse practitioners.²⁵⁶ Effective 2012, medical professionals’ supervision is no longer required, but tattoo artists must be licensed with the Florida Department of Health and must tattoo at a state-licensed tattoo establishment.²⁵⁷ Hannong explained that his efforts are directed at giving “professional” tattoo artists an established regulatory environment, partly to distinguish professionals from the scratchers, whom he accuses of not operating with appropriate health standards.²⁵⁸ The scratchers, says Hannong, often “have no formal education, and no idea what cross-contamination prevention is.”²⁵⁹

Hannong’s efforts, including working via a registered nonprofit corporation and lobbying legislators, suggests a degree of political

250. Indeed, to the extent that tattooing is regulated, it is regulated by state health codes. Most states delegate regulating tattoo parlors to counties and cities. *See, e.g.*, N.C. GEN. STAT. §§ 130A–283 (1995); CAL. HEALTH & SAFETY CODE §§ 119300–09 (West 2012); DENVER, COLO., CODE OF ORDINANCES ch. 24, art. X, §§ 24-351 to 382 (1998). *See also infra* note 155 and accompanying text.

251. Telephone Interview with Bill Hannong, *supra* note 197. *See generally* Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J., Feb. 7, 2011, <http://online.wsj.com/article/SB10001424052748703445904576118030935929752.html#U401848555757MHE> (exploring the recent movement for and against more regulatory oversight and government licensing).

252. *About Us*, THE AMAZING TATTOO STUDIO, <http://www.billhannong.com/about.html> (last visited Apr. 20, 2012).

253. *Id.*; *Florida Professional Tattoo Artist Guild*, MYPSPACE.COM, <http://www.myspace.com/fptag> (last visited Apr. 20, 2012).

254. FLORIDA SEC’Y OF STATE, FLORIDA PROFESSIONAL TATTOO ARTIST’S GUILD, INC. 2011 NOT-FOR-PROFIT CORPORATION ANNUAL REPORT (2011).

255. Interview with Bill Hannong, *supra* note 197.

256. *About Us*, *supra* note 252.

257. FLA. STAT. § 381.00775 (2010).

258. Interview with Bill Hannong, *supra* note 197.

259. *Id.*

sophistication among tattoo artists in Florida. This sophistication is also another illustration of how both tattooing and tattoo artists are moving into the mainstream. Furthermore, the passage of Florida's tattoo law reform is one example of laws changing to accommodate the prominence and popularity of tattoos.²⁶⁰

Another example was the recent *Anderson v. Hermosa Beach* decision from the Ninth Circuit Court of Appeals.²⁶¹ On First Amendment grounds, the *Anderson* court invalidated a City of Hermosa Beach, California municipal ordinance that prohibited tattoo parlors inside city limits.²⁶² The Ninth Circuit held that “[t]he tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.”²⁶³ In so holding, the Ninth Circuit became the first federal court to publish a decision²⁶⁴ holding that tattoos are protected by the First Amendment, disagreeing with other federal and state courts that had considered the question.²⁶⁵ Presumably, complete municipal bans on tattoo parlors are now illegal in the nine states

260. Press Release, Democratic Office, Florida House of Rep., Rep. Mary Brandenburg Files House Bill 729 on Tattoo Safety (Jan. 19, 2010), available at http://groups.google.com/group/flanewswire/browse_thread/thread/2d64189c525c74bb.

261. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

262. *Id.* at 1055.

263. *Id.* at 1060 (alteration in original). For an analysis and critique of the *Anderson* holding as well as a history of previous First Amendment challenges to tattoo bans, see generally Matthew Alan Cherep, *Barbie Can Get a Tattoo, Why Can't I?: First Amendment Protection of Tattooing in a Barbie World*, 46 WAKE FOREST L. REV. 331 (2011).

264. In an unpublished 2002 order, the United States District Court for the District of Nevada enjoined a Nevada Athletic Commission ban preventing boxers from wearing temporary tattoo advertisements during fights. *Adams v. Nev. Athletic Comm'n.*, No. A 446674, 2002 WL 1967500, at *2 (D. Nev. Mar. 14, 2002). The court based its injunction on First Amendment grounds, explaining that “the ban is not a reasonable time, place and manner regulation of speech and should be preliminary enjoined.” *Id.* at *1. Note that the Nevada Athletic Commission is a public regulatory body, and as such, constitutional protections apply to athletes who perform under its purview. See Vukelj, *supra* note 101, at 536.

265. Compare *Anderson*, 621 F.3d at 1055, with *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008) (finding that tattooing is not protected by the First Amendment). See also *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980) (determining that the “actual process of tattooing is not sufficiently communicative in nature” to be protected by the First Amendment); *State v. Brady*, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986) (finding that “the process of tattooing is neither speech nor even symbolic speech,” so it is not protected by the First Amendment); *People v. O'Sullivan*, 409 N.Y.S.2d 332, 333 (App. Term 1978) (same); *State v. White*, 560 S.E.2d 420, 423–24 (S.C. 2002) (explaining that restrictions on tattooing did not prohibit constitutionally protected conduct under the First Amendment); *Blue Horseshoe Tattoo, V. Ltd. v. Norfolk*, 72 Va. Cir. 388, 390 (Cir. Ct. 2007) (same). Being protected by the First Amendment does not place tattoos outside the bounds of copyright law because the freedom of expression has not been extended to protect expression that infringes lawfully-granted copyrights. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219–20 (2002) (discussing the compatibility of the First Amendment and the Copyright Clause).

under the Ninth Circuit's jurisdiction.²⁶⁶ This is especially significant considering that approximately 19.93 percent of the U.S. population live in the nine states that fall under Ninth Circuit jurisdiction.²⁶⁷

As the FPTAG illustrates, tattoo artists can have a dynamic relationship with the law when tattoo artists believe that it is consequential and meaningful to them and to their business. If tattoo artists begin to see formal intellectual property law considerations as part of their business, it stands to reason that they will take an active role in shaping how a formal intellectual property regime is applied to them.

VII. GENERAL PROPOSALS AND CONCLUSIONS

A few proposals for policymakers and tattoo artists are discussed in this section. While there are certainly many more possibilities for both policymakers and tattoo artists than those mentioned here, both groups should keep two general considerations in mind when attempting to apply formal intellectual property law to tattoos and to tattoo artists. First, policymakers should be respectful of the norms that have developed among

266. It is worth noting that there is a broad spectrum of intrusiveness among different state and municipal tattoo regulations, as well as their enforcement. Like Florida, Tennessee has a comprehensive tattoo code, which includes fourteen specific "critical violations," requires registration with local health departments, requires quarterly inspections, and provides for statewide tattoos licenses. TENN. CODE ANN. §§ 62-38-201 to 211 (1996). By contrast, Idaho's only regulation of tattoos is that no minor under the age of fourteen may be tattooed, and minors ages fourteen to eighteen must have parental consent. IDAHO CODE ANN. § 18-1523 (2004). California requires that tattoo parlors register with the county in which they operate, and requires counties to perform annual inspections of tattoo parlors. CAL. HEALTH & SAFETY CODE §§ 119300-09 (West 2012). However, neither Los Angeles County nor Orange County require anything approaching annual inspections, and in an era of year-after-year budget cuts, it is doubtful that other counties will comply either. In Los Angeles County, which is the most populous county in the United States, there is one county tattoo inspector to monitor at least 300 tattoo parlors and 850 tattoo artists. *See Anderson*, 621 F.3d at 1056. "Many tattoo parlors [in Los Angeles County] have never been inspected and are subject to no regulations other than the requirement to register with the County." *Id.* Indeed, Prix Body Piercing, a tattoo parlor on the famous Colorado Boulevard in Pasadena, California, has been inspected twice in the last eleven years. Interview with Eddie "EdD" Herrera, *supra* note 178. The inspector ensured that there was soap and running water in the bathroom, hand sanitizer in the parlor, and a sterilizer. *Id.* The inspector did not examine whether the sterilizer was plugged in or in working order. *Id.* Tellingly, the "Body Art and Tattoo" link on the "Permits and Licenses" page of the Los Angeles County municipal website has been inoperative since at least March, 2011. LA COUNTY BUSINESS, <http://lacounty.gov/wps/portal/lac/business/> (last visited Apr. 12, 2012) (follow "Permits & Licenses" link; then follow "Body Art and Tattoos" link).

267. *Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/> (last visited Apr. 20, 2012). The total population of Hawaii, Alaska, California, Arizona, Nevada, Oregon, Washington, Idaho, and Montana is about 61,529,667, which is approximately 19.93 percent of the total U.S. population, which was 308,745,538 in 2010. This data excludes the Northern Mariana Islands and Guam. *Id.*; *Map of the Ninth Circuit*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 (last visited Apr. 20, 2012).

tattoo artists. Any policies to address copying should not be drafted in a vacuum and should be informed by tattoo artists' experiences in trying to protect their work. Second, tattoo artists should have some latitude to experiment with how to protect their work within the confines of formal intellectual property law.²⁶⁸ As the DMCA and other efforts to stop illegal music and video downloading have shown, intellectual property doctrines need to be updated when applied to new situations. Protecting tattoo art might require its own innovations, which should be encouraged.

More specifically, policymakers should take tattoo artists seriously. The preconceptions that confine tattoos to sailors and outlaws should be dropped in the face of the fact that about 23 percent of Americans have at least one tattoo.²⁶⁹ Moreover, if present trends continue, almost half of the post-millennial generation will have a tattoo by 2025. If Florida is any indication, it appears that politicians are willing to take tattoo artists seriously;²⁷⁰ the FPTAG's successful experience lobbying the Florida legislature bodes well for professional and productive relationships between tattoo artists and elected officials.

Treating tattoo artists as serious artists means that formal intellectual property protections should apply to them. Thus, policymakers should think about how to help tattoo artists reduce unauthorized copying. Flash books and flash art are an appealing place to start since they fit squarely within the traditional copyright paradigm, and trying to apply protections to actual tattoos could prove much more difficult and controversial.

One way to address flash art copying is for Congress, in collaboration with tattoo artists, to craft an educational campaign designed to raise awareness about copying. The campaign could include testimonials of citizens who regret getting low quality copied tattoos as well as testimonials of tattoo artists explaining why getting a tattoo drawn from a downloaded copy will likely result in an inferior tattoo. The campaign should emphasize the uniqueness of original art. Tattoo seekers are likely to be receptive to arguments about uniqueness since part of the personal

268. The Google Books omnibus settlement was supposed to be a promising example of content owners and copiers (in this case Google) deciding for themselves how to divide up proceeds from the reproduction of intellectual property. Unfortunately, the court recently rejected the settlement agreement. GOOGLE BOOK SETTLEMENT, <http://www.googlebooksettlement.com/> (last visited Apr. 20, 2012). See also *Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 670–72 (S.D.N.Y. 2011) (giving background information and describing the proposed settlement).

269. See PEW RESEARCH CTR., *supra* note 1.

270. The *Anderson* opinion and holding, as well as Judge Perry's comment that Warner Bros.' arguments against tattoos qualifying for copyright infringement are "just silly," reflect that judges are also taking tattoos seriously. See *supra* Part II.B.2.

value of many tattoos is linked to their uniqueness.

Tied to an educational campaign, Congress could also work with existing tattoo enthusiast websites to design a registry of original tattoo art. A registry would help tattoo artists protect their original works and also allow tattoo parlor owners to monitor their artists' work and verify that their artists are not copying.²⁷¹ Additionally, not every tattoo in the registry needs to be copyrighted—artists who truly do not object to copying of their work could use the registry to ensure that no one else copyrights it.²⁷² Finally, a registry would assist tattoo seekers in ensuring that prospective artists designs are truly their own.

Congress could also take a more punitive approach and publicize to tattoo seekers that anyone caught with a copied tattoo would face a fine.²⁷³ Admittedly, detection would pose a serious obstacle. If Google Image Swirl is successful, though, searching online social networks and other web pages might not be prohibitively difficult. Furthermore, tattoo artists themselves might be more motivated to search for copycats if they received a significant portion of any fines charged. And if tattoo seekers knew that they might face (even a small chance of) a fine for commissioning a copied tattoo, it might provide them additional motivation to seek a professional and original artist.

In sum, formal intellectual property law could take several forms when applied to the tattoo universe, and there are many other conceivable regulations. Regardless of how the laws come to be applied, though, intellectual property theory suggests that providing tattoo artists with meaningful protection would allow them to charge more for their work. Specifically, if well-known artists had (closer to) exclusive control of their original art, and did not have to contend with geographically dispersed copycats, the well-known artists would be in higher demand at tattoo conventions since there would be very limited opportunities to get such tattoos otherwise.²⁷⁴ Alternatively, they could adopt Mark Machado's policy and require potential clients to come to their parlors; in Machado's words "[i]f you want my style, you come to LA."²⁷⁵

271. The pictures on any such website would need to be of low quality, and furthermore the website would need to announce that the pictures are low quality and any copying would likely result in a low-quality tattoo. Otherwise the website could do much more harm than good.

272. See *supra* Part V.D and V.F.

273. As discussed in Part IV.B, ordering painful removal surgery is almost unthinkable.

274. The conventions might then charge higher admission prices.

275. MR. CARTOON, <http://www.mistercartoon.com/contact.html> (last visited March 19, 2012).

Apart from when or whether intellectual property laws are applied in any serious fashion, this Note suggests the following proposals that would assist tattoo artists in protecting their work. These proposals could function independently of formal intellectual property law, but could also complement it; to revisit Richard McAdams's theory, laws and social norms can influence each other.²⁷⁶

First, tattoo artists should organize. They should form and broaden associations like the FPTAG across the United States and internationally. By banding together, tattoo artists would be more able to overcome collective action problems that plague loose-knit groups. A more organized group would be better able to employ the social norms discussed above to reduce copying. Additionally, being better organized would allow tattoo artists to have an impact on shaping how intellectual property law comes to be applied to them; the FPTAG's efforts show that tattoo artists can shape laws that directly affect them.²⁷⁷

Second, tattoo artists should also publicize the fact that they are professional artists. Thus, over the next decade, tattoo artists should explain to policymakers,²⁷⁸ to the older generations, and to the more conservative among their own generations that their craft is thoroughly mainstream. Tattoo artists should emphasize that they are indeed artists and that they create original art. The more tattoo artists are able to impart this message on the public, the better their position will be to influence the debate as to how formal intellectual property law should apply to them as artists.

Third, tattoo artists should educate the public about scratchers. Tattoo artists should explain to the public their concerns that pictures downloaded from the Internet often result in blurry lines and imprecise shading. They should emphasize the differences in quality between someone tattooing in their garage and professionals with large portfolios and years of experience.

276. McAdams, *Norms*, *supra* note 117, at 358.

277. Examining which tattoo artists organize together politically and what goals they pursue once organized could raise interesting questions about both the underlying motivations of groups like the FPTAG and the effects of regulation on the tattoo industry. For the view that promoting licensing requirements is simply a way for established businesses to create a barrier to entry for potential competitors, see Simon, *supra* note 251 (“[E]conomists—and workers shut out of fields by educational requirements or difficult exams—say licensing mostly serves as a form of protectionism, allowing veterans of the trade to box out competitors who might undercut them on price or offer new services. ‘Occupations prefer to be licensed because they can restrict competition and obtain higher wages,’ said Morris Kleiner, a labor professor at the University of Minnesota.”).

278. The author wonders how many lawmakers and judges have tattoos. Former Senator and Presidential candidate Barry Goldwater had a tattoo. E.J. Montini, *Political Question for the New Age: Do You Tattoo?*, THE ARIZONA REPUBLIC, June 24, 2005, <http://www.azcentral.com/arizonarepublic/news/articles/0724montini24.html>.

Anyone thinking of getting a tattoo should be told, repeatedly, that the price difference is worth it for a drawing that will be on their body for the rest of their life.

Public education could also include simple ways for tattoo seekers to observe whether a chosen artist is following common-sense health standards. This would keep customers from patronizing some of the true amateurs. Since amateurs are more likely to copy, health standards education is a possible indirect route that tattoo artists could take to shut down copycats. Indeed, tattoo artists could even tie health standards education to an argument about why they should have exclusive control over their art: without illegal copying, tattoo artists could charge a bit more for their work, and they would therefore have more money to spend on keeping their parlors clean and keeping their employees abreast of the latest and best practices in preventing contamination. Whether or not tattoo artists attempt to make this link, health standards education is likely to find wide support and could help professional tattoo artists portray themselves in a positive light outside the tattoo community.

One possibility is for tattoo artists to partner with municipal governments to raise public awareness about health standards. It is certainly in a county's interests that their tattoo parlors are safe and sanitary. In addition, partnering with tattoo artists would be cheaper for counties than trying to enforce tattoo regulations without involving the professional artists. This economic incentive would likely be appealing to cash-strapped counties, like Los Angeles County and Orange County, which are currently unable or unwilling to fund state-mandated supervision of tattoo parlors.²⁷⁹

Finally, tattoo artists could strengthen the connections between themselves and their patrons. Artists and their clients are drawn together, forever. After drawing the tattoo, an artist could easily invite his or her client to join an online networking group. With a larger network, an artist would be more likely to learn of copycats operating near his or her locale and on the Internet. Clients would have an incentive to participate, as cutting down the number of copycats better preserves the uniqueness of

279. See generally Kimberly Edds, *\$5.6 Billion County Budget Avoids Layoffs, Cuts*, ORANGE CNTY. REGISTER, June 28, 2011, <http://totalbuzz.ocregister.com/2011/06/28/5-6-billion-county-budget-avoids-layoffs-cuts/55915/> (describing budgetary concerns of Orange County); Frank Stoltze, *Los Angeles County Faces Budget Deficit, But Seeks to Avoid Layoffs*, 89.3KPCC, Apr. 19, 2011, <http://www.scpr.org/news/2011/04/19/25950/la-county-faces-budget-deficit-seeks-avoid-layoffs/> (describing the budgetary difficulties faced by Los Angeles County).

their body art.

In conclusion, tattoos are a part of mainstream U.S. culture and could soon be a frontier in intellectual property law. Among artists, social norms have developed in the absence of laws. If and when law begins to play a bigger role, the interactions between the laws and the norms will surely be interesting to analyze. In the meantime, the existing social norms are fertile ground for further exploration.

