NOTES

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

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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, KOBES 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 \textit{Miami Ink}, which followed the events of a tattoo shop in Miami Beach, Florida.\(^6\) \textit{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 \textit{Miami Ink} and \textit{LA Ink}, she launched a clothing line with her High Voltage Tattoo parlor,\(^11\) created a line of makeup with the Sephora

\begin{itemize}
  \item[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 \textit{Miami Ink} and \textit{LA Ink}, and currently owns High Voltage Tattoo in Los Angeles, where \textit{LA Ink} was formerly filmed.\(^\text{Id.}\)
  \item[9.] Max Chaikin, \textit{King Ink}, \textit{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.\(^\text{Id.}\) Chaikin estimates that “tattooing in America is a $2.3 billion business.”\(^\text{Id.}\)
\end{itemize}
makeup company, and wrote two bestselling books. 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. 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.

On a smaller scale, some tattoo parlors are following Ed Hardy's example and branching out into their own apparel lines. Island Tattoo, based in San Diego, has an apparel website that sells t-shirts inspired by Polynesian tribal tattoo designs. 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.

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.” 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. He has since opened a Starlight parlor in Las Vegas and envisions shops in every major world city. Atomic Tattoos is also attempting to embark on a national expansion plan.

16. Interview with Chad Burns, Tattoo Artist, Island Tattoo, in San Diego, Cal. (Jan. 23, 2011).
18. LA Body Art Expo, Pomona Fairgrounds in Pomona, Cal. (Jan. 23, 2011), as observed by the author.
20. id.
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

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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; 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).
30. Id.
United States Copyright Office ("USCO") in order to benefit.\textsuperscript{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.”\textsuperscript{32} In \textit{Community for Creative Non-Violence v. Reid}, the Supreme Court noted that Congress did not define “employee” for the purposes of copyright ownership.\textsuperscript{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.”\textsuperscript{34} The Court performed a fact-intensive inquiry to determine whether the artist, Reid, was an “employee.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{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).

\textsuperscript{32} Id. § 201(b).

\textsuperscript{33} Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989).

\textsuperscript{34} Id. at 740.

\textsuperscript{35} Id. at 749–51.

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

\textsuperscript{37} Id.
to distribute and sell copies of the copyrighted works.\textsuperscript{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.\textsuperscript{39}

Turning to the scope of copyright, copyright law protects expressions of ideas, not ideas themselves.\textsuperscript{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.\textsuperscript{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.\textsuperscript{42}

For example, Elayne Angel, who is famous among tattoo artists and enthusiasts,\textsuperscript{43} has a tattoo of two angel-style wings drawn with black ink covering her back.\textsuperscript{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.\textsuperscript{45} Describing her tattoo with this specificity supports the

\textsuperscript{38.} Id. § 106.
\textsuperscript{39.} Id.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{43.} See infra Part V.D.
\textsuperscript{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.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{47} And
indeed it must be for copyright law to have any relevance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{51}

―Fair use‖ is one significant exception to the monopoly power given to
copyright owners.\textsuperscript{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),

\begin{itemize}
\item \textsuperscript{46} 17 U.S.C. § 501 (2006).
\item \textsuperscript{47} See Nichols v. Universal Pictures Corp., 45 F.2d 119 (2nd 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).
\item \textsuperscript{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.‖).
\item \textsuperscript{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.‖).
\item \textsuperscript{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).
\item \textsuperscript{52} Id. § 107.
\end{itemize}
scholarship, or research, is not an infringement of copyright. Fair use allows artists to briefly copy parts of protected works of art to create new art. 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.” 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. 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.” Both fair use and its subdoctrine, transformative use, are standards-based inquiries. 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, 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.
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. In 1998, Wallace was a member of the Portland Trail Blazers. While living in Portland, Wallace reportedly hired tattoo artist Matthew Reed to tattoo a unique “Egyptian Family Pencil Drawing” on his upper right arm.

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

   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. 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). He also requested an injunction against both companies, in addition to damages against Wallace. Finally, he requested an accounting of the revenue realized by Wallace as a result of the artwork.

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.\textsuperscript{71}

Unfortunately for tattoo jurisprudence, the parties settled and the court dismissed the case.\textsuperscript{72}

2. \textit{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.\textsuperscript{73} Whitmill is the tattoo artist who tattooed boxer Mike Tyson’s famous tribal tattoo on the left side of Tyson’s face.\textsuperscript{74} Whitmill sued Warner Bros. shortly before the release of the 2011 blockbuster \textit{The Hangover 2}.\textsuperscript{75} One of the main characters in \textit{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.\textsuperscript{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.”\textsuperscript{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].”\textsuperscript{78}

The court denied Whitmill’s request for a preliminary injunction to stop the release of \textit{The Hangover 2}\.\textsuperscript{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.’”\textsuperscript{80} Like the Rasheed Wallace lawsuit, the Mike Tyson lawsuit settled and the case was dismissed.\textsuperscript{81}

\textsuperscript{71} \textit{Id.} at ¶ 38.
\textsuperscript{72} Stipulation of Dismissal with Prejudice at *1, Reed v. Nike, Inc., No. 05 CV 198 BR (D. Or. Oct. 19, 2005).
\textsuperscript{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].
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{77} Whitmill Complaint, supra note 73, at *3.
\textsuperscript{78} \textit{Id.} at Exh. 3.
\textsuperscript{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 Act\(^\text{82}\) (“DMCA”) take-down notices\(^\text{83}\) to online merchants eBay and Craigslist in an effort to stop the sale of bootlegged tattoo flash art.\(^\text{84}\) 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.” \(^\text{85}\) ALA supporter Rand Johnson reported that the ALA “shut down literally thousands upon thousands of auctions on eBay that infringe on artist’s copyrights.”\(^\text{86}\) The group was controversial, however, as they allegedly sent take-down notices against legitimate sellers and copyright owners selling their own work.\(^\text{87}\) 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.”\(^\text{88}\) 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.”\(^\text{89}\)

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.”\(^\text{90}\) 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).


\(^{83}\) 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.


\(^{85}\) ARTIST LEGAL ALLIANCE, supra note 84.


\(^{87}\) Watson, supra note 84.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) ARTIST LEGAL ALLIANCE, supra note 84.
holders, and a lack of resources.\footnote{Id.}

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 satisfies the bare minimum required to comply with US law in regards to their handling of bootlegged goods.”\footnote{Id.}

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

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.\footnote{ARTIST LEGAL ALLIANCE, supra note 84.}

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.\footnote{Id.}

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.\footnote{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.” 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. 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. 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.

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

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98. Id. at 105–07.
99. Id. at 118–123.
100. Id. at 108.
on their bodies. 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.

Christopher Harkins examined the Rasheed Wallace lawsuit and analyzed how copyright law might apply to tattoo advertising. Harkins argued that tattoos are eligible for copyright protection and that tattoo artists can obtain and enforce copyrights. 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. 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.

Jordan Hatcher examined copyright issues of tattoos and proposed that tattoo artists clarify ownership of copyrights in tattoos they draw. 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. 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. Hatcher recommended that tattoo artists and their clients simplify
tattoo copyright ownership through contracts that establish “[c]lear, one-
person ownership, whenever possible, [to] avoid future difficulties.”

B. SOCIAL NORMS SCHOLARSHIP

Modern social norms legal scholarship began with Robert Ellickson’s
book Order Without Law. 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. Ellickson found that the cattle
ranchers were a close-knit group, which contributed to the effectiveness of
social norms in controlling individual ranchers’ behaviors. 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.”

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. 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.” Furthermore, McAdams defended the relevance of social norms in legal analysis because, among other reasons, “sometimes norms and law influence each other.” 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.
114. Id. at 52–53, 71.
115. Id. at 184–89.
116. Id. at 181.
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. Indeed, social norms do exist among “loose-knit groups” as well as “intermediate-knit groups.” 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. 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.

For instance, elite French chefs rely on a norms-based intellectual property (“IP”) system to protect their valuable recipe-related IP. 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. Negative gossip provides strong

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121. See id. at 365.
122. Id. at 367.
124. Emmanuelle Fauchart & Eric von Hippel, Norms-Based Intellectual Property Systems: The Case of French Chefs, 19 ORIG. 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.
129. Id. at 1840.
130. Id. at 1810–11.
131. Id. at 1811.
132. Id. at 1811. 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.
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.
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. 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.” 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.

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. 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. 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. 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.

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).
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).
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.
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 NEWSHOUR 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.\textsuperscript{174} Carl Nguyen mentioned that the quality is not the same, explaining that while “lines can get drawn,” drawing is better in person.\textsuperscript{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.\textsuperscript{176} Carl Nguyen reported that he is not at all worried about tattooing something that is copyrighted.\textsuperscript{177} Eddie Herrera said that tattoos, by their very nature, represent admiration, “unless it’s a demon ripping the head off of Mickey Mouse.”\textsuperscript{178} Herrera also commented that “if someone is willing to put a logo on their skin, it should be OK.”\textsuperscript{179}

Herrera’s co-worker, Danny, said that he has considered whether tattooing copyrighted art or trademarked logos is problematic.\textsuperscript{180} He reported that it is impossible to regulate, however.\textsuperscript{181} So many people have tattoos of protected art, he said, that there is simply nothing copyright or trademark owners can do about it.\textsuperscript{182} Specifically, he mentioned Hello Kitty’s popular Japanese bobtail cat, explaining that it is a very common tattoo among young women.\textsuperscript{183} Presumably, none of those young women asked for (or asked their tattoo artist to request) permission from Hello Kitty’s parent company, Sanrio.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186} For example, when

\textsuperscript{174} Id.
\textsuperscript{175} Interview with Carl Nguyen, Tattoo Artist, Federal Tattoo, in Pomona, Cal (Jan. 23, 2011).
\textsuperscript{176} Interview with Mike Cole, supra note 162.
\textsuperscript{177} Interview with Carl Nguyen, supra note 175.
\textsuperscript{178} Interview with Eddie “EdD” Herrera, Store Manager and Tattoo Artist, Prix Body Piercing, in Pasadena, Cal. (Jan. 28, 2011).
\textsuperscript{179} Id.
\textsuperscript{180} Interview with Danny, Tattoo Artist, Prix Body Piercing, in Pasadena, Cal. (Jan. 28, 2011).
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{185} Interview with Danny, supra note 180.
\textsuperscript{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,
and most will also tattoo walk-in clients. 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. In the words of Mike Cole, the waivers mean that the artist “[is] liable for nothing.”

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. Burns said that tattooists draw on skin, while artists create artwork. 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. 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...
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. Cole also said that now, because he is an established artist, he only does his own work. He commented, though, that he “started out like the others, tattooing Mickey Mouse and The Tasmanian Devil.”

Nate Fierro agreed with Cole’s sentiments. 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.” Fierro instead chooses clients based on which clients’ tattoos will allow him to progress as an artist. 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.

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.” Gilbert Salas reported that he was afraid that someone else would try to copyright his original tattoo artwork. Mark Machado wrote

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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.” Machado declined the author’s request to be interviewed.

Several artists said that Elayne Angel had copyrighted the Angel Wings tattoo on her back. She is known among tattoo artists as the first person to copyright a tattoo, no artists interviewed for this Note knew of anyone else. Three artists did report, however, that they had heard of artists informally copying 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.”

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!)

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

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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.


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.
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, 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.

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” 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

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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.  

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.

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.”

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 issues\(^\text{233}\) shows that he does not trust norms alone to protect his reputation or to protect his work from copying.\(^\text{234}\) 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.\(^\text{235}\) 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.\(^\text{236}\)

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.\(^\text{237}\) No tattoo artists interviewed mentioned this, and it seems that the community is too fragmented and

\(^\text{233}\) See Email from Mark Suroff, supra note 216.

\(^\text{234}\) A tattoo artist with lawyers also demonstrates his sophistication as a businessman and is yet more evidence that tattooing has moved into the mainstream.

\(^\text{235}\) See supra Part III.B.


\(^\text{237}\) See Oliar & 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. 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. 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. 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. 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. 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. The *Inked* user gallery gives submitters the option, but does not require them, to include the name and location of their tattoo artists. 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.

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.*


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. Presently, users can only search for images by searching for words that describe them. 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.

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. 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
property law, the tattoo artists interviewed are quite abreast of the laws that most directly affect them: health codes. 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.

Hannong, a tattoo artist in Fort Myers, Florida, is an active member of the Florida Professional Tattoo Artists Guild (“FPTAG”), a registered nonprofit corporation in Florida. Hannong reports that the FPTAG developed productive relationships with Florida legislators. 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. 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. 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.

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); DENV. COLO., CODE OF ORDINANCES ch. 24, art. X, §§ 24-351 to 382 (1998). See also infra note 155 and accompanying text.


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

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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.
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 inoperable 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).

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. 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. 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; 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. 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. 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. 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. 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 L.A.”

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.
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.”).

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

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.