

## Tattoo You

**Author :** Michael Madison

**Date :** January 23, 2013

Aaron Perzanowski, *Intellectual Property Norms in the Tattoo Industry*, Wayne State University Law School Research Paper No. 12-14, available at [SSRN](#).

Tattooing has gone mainstream. In the introduction to *Intellectual Property Norms in the Tattoo Industry*, Aaron Perzanowski lets the facts speak for themselves: “An estimated twenty-one percent of adults in the United States—more than sixty-five million Americans—have at least one tattoo. For those under the age of 40, that percentage nearly doubles. Not surprisingly, the tattoo business is booming. By some estimates, the U.S. tattoo industry generates \$2.3 billion in annual revenue.”

Small wonder, then, that Perzanowski has tackled the originality and copying norms adopted by the communities of tattooers, extending in certain respects – and distinguishing in others – recent work on informal IP norms among stand-up comics, fashion designers, French chefs, magicians, roller derby queens, and fans of jam bands. The first great contribution that Perzanowski makes in this paper is assembling and describing a collection of qualitative data about the relationship between formal IP rules and informal norms among yet another group of people with their own distinct sets of creative and copying practices. It’s not surprising, perhaps, that despite the mainstream popularity of tattooing, tattooers continue to regard themselves as outsiders, pirates even, and that they have little use for or reliance on formal IP rules. Yet unlike their counterpart comics, designers, chefs, and magicians, tattooers have ample opportunity to integrate their work with copyright law. Tattoos are copyrightable subject matter, and infringement claims, while rare in practice, are hardly unimaginable legally.

What makes this paper compelling is that Perzanowski goes beyond the instinct to look at informal anti-copying norms in tattooer communities primarily as substitutes for or complements to formal copyright law. The insight offered by earlier work on comics, fashion designers, and so on has been that copyright’s formal structure is often overbroad, because creative communities may thrive even when copyright falls short. Informal social norms can pick up the slack, guiding creative practice and policing copying where needed. The lesson is specific: efforts to extend and broaden copyright law in those domains may cause more harm than good.

The lesson in *Intellectual Property Norms in the Tattoo Industry*, and its second great contribution, is broader. Norms guiding creative practice and copying can be constitutive of groups themselves, quite independent of their members’ places and times. That’s a point that cyberlaw scholarship has argued strenuously for decades but primarily from a theoretical perspective. Cyberlaw scholars have often wanted it to be true more often than they have managed to demonstrate it with evidence. Work on open source software developers has come closest to documenting the point,<sup>1</sup> but open source communities are constituted legally by the structure of open source software licenses, making the independent role of the group itself somewhat difficult to dis-entangle. Perzanowski takes us from free software coders to tattooers, from one group of self-conscious outsiders to another. And we re-learn what Mencken taught with infant baptism. We need not merely believe in the existence of communities defined by creative and anti-copying practices that specifically depart from formal legal norms. We’ve seen it done. For good measure, we see it in among practitioners of an art that consists of the antithesis of the disembodied, dematerialized communication and expression that usually defines the Internet. As one of the tattooers quoted in this paper said, “A tattoo is an affirmation that it is your body, ... that you own your own self, because you’ll put whatever you want on your own body.”

To illustrate the point, the article reports and analyzes more than a dozen in-person qualitative interviews with a diverse group of tattooers throughout the United States, identified through snowball sampling. It situates the results in a brief

but illuminating history of tattoo art and an overview of the market structure of contemporary tattooing. Communities of tattooers distinguish between custom tattooers, who collaborate with their clients in designing and applying bespoke tattoos – subject to relative strict anti-copying norms – and older-style street tattooers, who trade mostly in flash or books of standard designs that are meant to be re-used. Perzanowski teases from his interviews a series of core creative and anti-copying norms. One group of norms can be clustered around the idea that tattooers rely heavily on the autonomy interests of their clients in creating custom designs and in protecting those designs from re-use. A second group can be clustered around the acceptance of flash as a re-usable commodity. A third group centers on acceptance of borrowing ideas and even details from visual art found in other media. Perzanowski never overstates his case; the history of tattooing and distinctions between custom tattooers and classic tattooers give the piece a lot of useful nuance without undermining the integrity of the picture of the discipline as a whole. Tattooers are creators and copyists, but they have clients. Their norms honor all three dimensions of their practice.

The piece analyzes these norms via the framework introduced by Robert Ellickson.<sup>2</sup> Ellickson situated his study of Shasta County cattle ranchers in a theory of social norms supported by tight-knit communities characterized by lots of repeat workaday interactions. He concluded that the ranchers' norms were sustained because they were welfare-enhancing from the community's standpoint. Perzanowski likewise argues that tattooers constitute a tight-knit community (he invokes the metaphor of a medieval guild to describe the apprenticeship obligations of new trainees and the suggestion of some interviewees that the group has gotten too open and too big), that their norms emerged from workaday interactions, and that tattooers' norms are welfare-enhancing in the sense that the norms preserve the integrity of the group *qua* group, particularly in the extent to which the group cultivates a market that supplies unique custom tattoos. Individual tattooers could profit by defecting, but they don't, because defection would undermine demand for unique tattoos. A system of informal norms supplies a cheaper and easier way to police the market than a comparable anti-copying regime policed by formal IP rules or by a system of anti-copying contracts with clients.

As careful and disciplined as this piece is from an intellectual property standpoint, its broader themes warrant greater attention by readers. Perzanowski's efforts to analyze tattooer practices in Ellicksonian terms may fall a little short, I think, on their own terms. First, as Perzanowski notes, tattooers themselves do not see themselves as dealing in creative objects or things. He writes: "As [tattooers] see it, they are in a service profession. They sell an experience, perhaps even an attitude. Clients don't pay for a drawing; they pay for the time the tattooer spends rendering that image on their skin." If the hypothesis is that Ellicksonian norms in the tattoo industry are explainable as substitutes for enforcement of formal IP rules as incentives for the production of creative objects, then the fact that the artists see themselves as service providers rather than (or in addition to) object producers means that the relevant norms may be doing different work. Second, as Perzanowski emphasizes throughout the piece, tattooers are not in the creative and copying business only for themselves; they are bound, even at times obligated ethically, to the autonomy of their clients. That complicates the social welfare calculus associated with tattooer norms. Third, it is a little speculative to treat tattooers as a close-knit community of the sort that Ellickson experienced and anticipated. As the piece makes clear, there are thousands and thousands of tattooers in the United States alone. It is likewise clear that their "community" is not so much tight-knit as it is loosely grouped by shared history and training, increasingly mediated (like many distributed groups) by online experiences, and linked by tattooers' self-imposed outsider status, by a particular set of economic expectations (some linked to custom designs, some to flash), and by shared perspectives on their art. IP scholarship (and Cyberlaw scholarship, too) should take those insights to heart. It would do well to continue to explore how IP norms drive group identity, as well as how group identity drives IP norms.

1. See **Christopher M. Kelty**, *Two Bits: The Cultural Significance of Free Software and the Internet* (2008).
2. See **Robert C. Ellickson**, *Order Without Law: How Neighbors Settle Disputes* (1991).

Cite as: Michael Madison, *Tattoo You*, JOTWELL (January 23, 2013) (reviewing Aaron Perzanowski, *Intellectual Property Norms in the Tattoo Industry*, Wayne State University Law School Research Paper No. 12-14, available at SSRN), <https://ip.jotwell.com/tattoo-you/>.