

“Copyright in Tattoos: What a tangled web we weave”

Associate Professor Alexandra Sims (University of Auckland)

ABSTRACT

Traditionally tattoo artists and their art were at the margins of society. Given tattooing’s marginal status strong social norms governed the tattoo industry and it was regarded as one of IP’s negative spaces: a vibrant industry which operated without the need of IP protection. Now, with the rapid growth of the tattoo industry, its social norms are breaking down and tattoo artists are looking to copyright for protection.

While tattoos are protected by copyright in New Zealand, I argue that the protection afforded to the copyright owner of a tattoo (who will often be the tattoo artist) cannot be the same as that given to a painter whose vehicle is a canvas. This is not to say that tattoo artists are excluded from copyright protection, only that the protection must necessarily be limited. For example, can copyright law be used to prevent a person displaying their tattoos to the world in an advertisement? Curiously the “value” that the tattoo artists have claimed in such situations is attributable not to the skill and genius of the tattoo artist, rather the fame (or notoriety) of the client. Moral rights may also come into play if a client wishes to alter a tattoo inked on them by a well-respected tattoo artist.

Some copyright scholars have suggested that the courts would find implied licences so that infringement does not occur in certain situations. Implied licences are an unsatisfactory solution, however, as they require a pragmatic and reasonable court: something which cannot always be guaranteed. If public policy dictates there should be limits on the protection of tattoos, such limits must be contained in the Copyright Act. Indeed, there is precedence in the Copyright Act for limiting protection to certain types of work. For example, in New Zealand the taking of a photograph of a sculpture if it is in a public place will not infringe copyright in that sculpture. Copyright is a creature of statute. It is not good enough to leave it to the courts to develop the law in this area.