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## NOTE

# GETTING DOWN TO (TATTOO) BUSINESS: COPYRIGHT NORMS AND SPEECH PROTECTIONS FOR TATTOOING

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*What level of First Amendment protection should we afford tattooing? General public consensus formerly condemned tattoos as barbaric, but the increasingly diverse clientele of tattoo shops suggests that tattoos have become more mainstream. However, the law has struggled to adjust. The recent proliferation of municipal near-bans on tattooing has brought tattooing to the forefront of First Amendment debates, with cases such as Anderson and Coleman leading the way toward recognizing tattooing as pure speech. Tensions between formal and informal copyright norms in the tattoo industry further highlight the collaborative and expressive nature of the artist-customer relationship and its resulting products, revealing a need for more robust First Amendment protection. This Note examines the three primary schools of thought in First Amendment–tattoo jurisprudence and advocates for full speech protections for tattooing by requiring courts to apply strict scrutiny to all content-based speech regulations. This approach would better align with existing informal copyright norms by encouraging further creation of expressive speech and avoiding subjective judicial inquiries.*

## INTRODUCTION

With the recent rise and threat of municipal regulations potentially encumbering the production of tattoos, tattoo artists currently rely on First Amendment speech protections to adequately protect their work. These regulations reflect an increasingly outdated public consensus that typically associates tattoos with “barbaric” and “morbid or abnormal personalit[ies].”<sup>1</sup> Today, however, over twenty percent of American adults now have one or

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1. See *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (App. Div. 1964).

more tattoos.<sup>2</sup> Tattoos continue to attract a wider range of customers as they are increasingly used to commemorate special events or signify important personal beliefs.<sup>3</sup> In an interview with NPR, the owner of Fatty's Custom Tattoos in Washington, D.C. stated that "in the last 10 years tattooing has become mainstream[,]" and that his customer base has shifted to include high profile clients such as judges, lawyers, and priests.<sup>4</sup> As societal acceptance of tattoos increases, the approach of the law to tattooing as a protected form of expression must continue to adjust in turn. The current spectrum of viewpoints as to whether tattooing deserves protection as an act of speech remains somewhat disjointed, but the recent case *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) sheds light on why tattooing should receive full speech protections. This Note seeks to expand on *Anderson's* protective approach by addressing the following questions: Should expressive conduct receive less First Amendment protection than the act of displaying expression? How many speakers are involved in each act of tattooing, and whose expression should courts seek to protect? What tensions exist between informal copyright norms and formal copyright law, and what unforeseen constitutional implications might the latter's literal application create?

Over the past few years, news publications have begun to support tattoos as powerful speech-like symbols, and courts have addressed tattoo-based claims with increasing frequency. In September 2012, the *New York Times* ran a piece about Holocaust survivors' relatives getting matching number tattoos to memorialize the Holocaust and fuel further discussions about racism and tolerance.<sup>5</sup> In October 2012, a California appellate court ruled that a defendant's probation restriction forbidding the defendant from obtaining new gang-related tattoos was overbroad under the First Amendment.<sup>6</sup> Although the court rewrote the restriction to pass constitutional muster, the ruling implied that tattoos often serve as symbolic speech and restrictions on receiving tattoos could result in a violation of the constitutional right to freedom of expression.<sup>7</sup>

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2. Samantha Braverman, Sr., *One in Five Adults Now Has a Tattoo*, HARRIS INTERACTIVE (Feb. 23, 2012), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/970/ctl/ReadCustom%20Default/Default.aspx>.

3. Matthew Alan Cherep, Comment, *Barbie Can Get a Tattoo, Why Can't I?: First Amendment Protection of Tattooing in a Barbie World*, 46 WAKE FOREST L. REV. 331, 331 (2011).

4. *See Tattoos Still Taboo?*, NPR (May 22, 2013, 12:00 PM), <http://www.npr.org/2013/05/22/186023466/tattoos-still-taboo>.

5. *See* Jodi Rudoren, *Proudly Bearing Elders' Scars, Their Skin Says 'Never Forget'*, N.Y. TIMES, Sept. 30, 2012, at A1.

6. *See* David L. Hudson, Jr., *Calif. Court Modifies Probation Rule on Gang-Related Tattoos*, FIRST AMENDMENT CENTER (Oct. 19, 2012), <http://www.firstamendmentcenter.org/calif-court-modifies-probation-rule-on-gang-related-tattoos>.

7. *People v. Huerta*, No. H037455, 2012 WL 4857345, at \*6 (Cal. Ct. App. Oct. 15, 2012).

Although the First Amendment affords tattoos protection as symbolic speech, protection for the process of tattooing is a more recent judicial trend. Two recent cases in particular, *Anderson* and *Coleman v. City of Mesa*,<sup>8</sup> demonstrate some courts' burgeoning willingness to recognize the actual act of tattooing as pure speech or protected expressive activity. These discussions of tattooing as speech raise complicated questions about the boundaries of expression and the number of speakers involved in any given tattoo transaction, leading this Note to contrast the First Amendment's concept of the "speaker(s)" with copyright law's concept of the "author(s)." Copyright vests initially in the "author" of a work of authorship, granting that party (or parties) with specifically enumerated rights.<sup>9</sup> Similarly, First Amendment law protects speakers' expressions, making the determinations of authorship and speakership critical to the protection of the various rights at stake. But such determinations may prove complicated and even conflicting in the client-tattooer relationship when applying formal copyright law too literally. Rather, this Note argues that in tattooing, where each act likely involves a collaborative process between two or more speakers and authors, the multiple layers of expression at hand demand full speech protections. This approach supports *Anderson's* First Amendment legacy and better aligns with the tattoo industry's informal, communal copyright norms.

Part I of this Note examines the three primary schools of thought in First Amendment–tattoo jurisprudence, analyzing the strengths and weaknesses of each approach and related proposals. It further delineates the relevant First Amendment framework surrounding the process of tattooing and its future implications, viewed through the lens of two recent cases: *Anderson* and *Coleman*. Part II describes existing intellectual property norms in the tattoo industry and argues that lawmakers should seek to understand and incorporate these norms into existing First Amendment theories in order to adequately protect freedom of expression. Part III lays out my proposed solution to the tattooing-as-speech problem in media law, suggesting that courts take an "Anderson-Plus" approach that applies full First Amendment protections to tattooing. I argue that courts should look beyond the text of speech regulations to determine whether they are content-based as a practical matter before applying the appropriate level of scrutiny, in order to more fully protect those speakers' expressions deserving of First Amendment protection. Such an approach would more accurately square with existing informal copyright norms by focusing on encouraging further creation and respect for tattooing as an ancient art form, avoiding the problematic implications of formal copyright law.

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8. *Coleman v. City of Mesa*, 284 P.3d 863, 870 (Ariz. 2012) (en banc).

9. 17 U.S.C. § 201(a) (2012); *id.* § 106.

I. THREE SCHOOLS OF THOUGHT IN FIRST AMENDMENT-TATTOO  
JURISPRUDENCE: EXISTING PROBLEMS AND PROPOSALS

The First Amendment, as applied to the states through the Fourteenth Amendment, bans laws that abridge the freedom of speech.<sup>10</sup> Although the First Amendment clearly includes pure speech, not everything that communicates an idea counts as “speech.” Conduct intending to express an idea is constitutionally protected only if it meets the *Spence* test, which applies to expressive conduct. The *Spence* test states that conduct will only be protected by the First Amendment if it is “sufficiently imbued with elements of communication”—that is, if there is “[a]n intent to convey a particularized message” and “the likelihood [is] great that the message [will] be understood” by viewers.<sup>11</sup> The government generally has wider latitude in restricting expressive conduct than it has in restricting written or spoken words.<sup>12</sup>

Courts and scholars have taken three categorically distinct approaches to tackling the tattooing-as-speech problem in media law.<sup>13</sup> The first and most widely discussed approach—the *Anderson* and *Coleman* approach—holds that the act of tattooing is purely expressive activity fully protected by the First Amendment, subject to reasonable time, place, and manner regulations. A second pre-*Anderson* approach holds the opposite, finding that tattooing is not protected by the First Amendment because it is not itself expressive conduct. Before *Anderson*, many courts drew a distinction between the product and the process of tattooing, holding that the physical process is conduct subject to *Spence*’s “sufficiently imbued” test.<sup>14</sup> These courts have further concluded that tattooing fails the *Spence* test because it is not intended to convey a particular message and is not sufficiently communicative.<sup>15</sup> A third

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10. U.S. CONST. amend. I; *Anderson*, 621 F.3d at 1058.

11. *Spence v. Washington*, 418 U.S. 405, 409–12 (1974).

12. *Anderson*, 621 F.3d at 1058–59 (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

13. A fourth approach—treating tattooing as protected expressive conduct or symbolic speech that must pass intermediate scrutiny under *O’Brien*—is discussed in *infra* notes 24–25 and accompanying text. For further insight to this approach, see *Massachusetts v. Meuse*, No. 9877CR2644, 1999 WL 1203793, at \*1 (Mass. Super. Ct. Nov. 2, 1999) and *Lanphear v. Massachusetts*, No. 99-1896-B, 200 Mass. Super. LEXIS 711, at \*11 (Super. Ct. Oct. 20, 2000) (both cases are discussed in depth in Ryan J. Walsh, Comment, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1079–80 (2011)); see also Cherep, *supra* note 3, at 333 (contending that tattooing is protected symbolic speech and that government regulations should be subjected to intermediate scrutiny, leaving artists free to create their expressions subject only to regulations that protect the public from serious health risks).

14. *Anderson*, 621 F.3d at 1059–60.

15. *Id.* at 1060. The *Anderson* court cites *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008), for the proposition that “[t]he act of tattooing is one step removed from the actual expressive conduct” because it is not the process itself which allows each customer to express a particularized message. *Anderson*, 621 F.3d at 1060. It further cites *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253–54 (D. Minn. 1980), which held that “the actual process of tattooing is not sufficiently communicative” to fall within the scope of First Amendment protection because “there has been no showing that the normal observer

approach refuses to treat tattooing categorically as either protected or unprotected activity and instead turns to a case-by-case inquiry.<sup>16</sup> This moderate approach, as seen in *Mastrovincenzo*, is currently gaining support in scholarly commentary. The following subsections will discuss the strengths and problems of each approach.

*A. The Anderson Approach: Tattooing is Purely Expressive Activity That is Fully Protected by the First Amendment.*

This first approach, which aims to recognize tattooing as purely expressive activity, is the approach taken by the courts in *Anderson* and *Coleman*. However, even courts holding that tattooing is fully protected by the First Amendment concede that this protection is not absolute.<sup>17</sup> They find tattooing subject to reasonable time, place, and manner regulations.<sup>18</sup> Compared to the *Spence* test, which only protects conduct “sufficiently imbued with elements of communication,” this *Anderson* approach features increased scrutiny by requiring “reasonable,” non-content-based regulations that allow alternative channels of communication, instead of mere regulations with a rational relation to the government’s health and safety interest.<sup>19</sup>

In *Anderson* (later revisited in *Coleman*), the court strived to determine whether the act of tattooing is either (1) purely expressive activity, akin to writing, or (2) conduct that merely contains an expressive component, akin to burning a draft card.<sup>20</sup> Categorizing tattooing within this schema drastically affects the level of protection it receives, since pure speech-oriented analysis would allow a greater amount of tattooing to survive regulations. For example, if tattooing is purely expressive, the conduct is entitled to full

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. . . would regard the process of injecting dye into a person’s skin through the use of needles as communicative.” *Anderson*, 621 F.3d at 1060.

16. *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006).

17. *See, e.g., Anderson*, 621 F.3d at 1059 (even purely expressive activity may be subject to reasonable time, place, and manner restrictions).

18. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). This test asks whether the restriction is (1) “justified without reference to the content of the regulated speech”; (2) is “narrowly tailored to serve a significant governmental interest”; and (3) “leave[s] open ample alternative channels for communication of the information.” *Anderson*, 621 F.3d at 1059. Laws that foreclose entire mediums of expression pose a danger to freedom of speech and are almost never reasonable restrictions. *Id.* (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Supposedly, the reasonable time, place, and manner restrictions test is a lower level of scrutiny than strict scrutiny’s “compelling state interest,” but as a practical matter, I struggle to see how these similar tests could result in different outcomes. *Id.* at 1063.

19. For example, in *Anderson*, the court disagreed with the City’s argument that tattoo artists could employ designs on canvas or t-shirts as alternatives to skin, reasoning that “[p]recisely because of [various signs’] location[s], such signs provide information about the identity of the ‘speaker[.]’ . . . [which] is an important component of many attempts to persuade.” *Anderson*, 621 F.3d at 1066 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 54, 56 (1994)).

20. *Id.* at 1059; *see also United States v. O’Brien*, 391 U.S. 367, 376 (1968).

First Amendment protection. Consequently, the conduct can be regulated only through reasonable time, place, and manner restrictions.<sup>21</sup> If, instead, tattooing is conduct with an expressive component, it will be protected under the First Amendment only if it meets the *Spence* “sufficiently imbued” test.<sup>22</sup> If the “sufficiently imbued” test is satisfied, a city ordinance is governed by *O’Brien’s* intermediate scrutiny.<sup>23</sup> The four-part test announced in *O’Brien* analyzes restrictions on protected expressive conduct and is less demanding than those tests established for regulations of pure speech.<sup>24</sup> In *O’Brien*, the Court held that a restriction on protected expressive conduct is constitutional “[1] if it is within the constitutional powers of the Government; [2] it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”<sup>25</sup> If, on the other hand, tattooing is *not* sufficiently imbued with expressive elements but is merely “conduct with an expressive component,” then the correct inquiry is whether a city’s regulation is rationally related to a legitimate governmental interest.<sup>26</sup>

### 1. The Anderson Opinion: Recognizing Tattooing as Pure Speech

In the widely-discussed 2010 case *Anderson v. City of Hermosa Beach*, tattoo artist Johnny Anderson filed a lawsuit arguing that the City’s ordinance effectively banning tattoo parlors was facially unconstitutional under the First and Fourteenth Amendments.<sup>27</sup> The district court granted summary

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21. *Anderson*, 621 F.3d at 1059 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); see *supra* note 18???? (discussing the reasonable time, place, and manner test in greater detail). Note that *Anderson* did not contend that the City’s municipal ban was a content-based restriction on speech, since the City banned all tattoo parlors and not just those conveying a particular kind of subject matter. Had such a claim been raised, the court would have subjected the regulation to strict scrutiny. *Anderson*, 621 F.3d at 1059 n.4.

22. *Anderson*, 621 F.3d at 1059 (citing *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

23. *Id.*; see *infra* note 25 and accompanying text (discussing the *O’Brien* intermediate scrutiny test).

24. *Anderson*, 621 F.3d at 1059.

25. *O’Brien*, 391 U.S. at 377.

26. *Anderson*, 621 F.3d at 1059 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)).

27. *Id.* at 1057. While the County generally permitted tattooing businesses, Hermosa Beach itself did not. *Id.* Section 17.06.070 of the municipal code provided: “Except as provided in this title, no building shall be erected, reconstructed or structurally altered, nor shall any building or land be used for any purpose except as hereinafter specifically provided and allowed in the same zone in which such building and land is located.” HERMOSA BEACH, CAL., MUN. CODE § 17.06.070 (2007), available at <http://www.hermosabch.org/index.aspx?page=418>. No provision of Hermosa Beach’s zoning code permitted tattoo parlors, and as a result, tattoo parlors were implicitly banned under § 17.06.070. See *Anderson*, 621 F.3d at 1057. The zoning provision of the Code provided for a wide variety of commercial uses,

judgment to the City,<sup>28</sup> finding that the act of tattooing was not protected expression under the First Amendment “[b]ecause, although it is non-verbal conduct expressive of an idea, it is not ‘sufficiently imbued with the elements of communication’” to receive First Amendment protection under the *Spence* test.<sup>29</sup> The district court reasoned that since the customer has “ultimate control over which design she wants tattooed on her skin[,]” the tattoo artist therefore “does not convey an idea or message discernible to an identifiable audience[,]” so tattooing did not meet the *Spence* test.<sup>30</sup> Applying a rational basis review to the City’s ordinance, the court held that “[g]iven the health risks inherent in operating tattoo parlors, . . . the City ha[d] a rational basis for prohibiting tattoo parlors.”<sup>31</sup>

On appeal, the Ninth Circuit reversed. Beginning with tattoos themselves, the court found that tattoos are “form[s] of pure expression entitled to full constitutional protection.”<sup>32</sup> Taking judicial notice of “the skill, artistry, and care” demonstrated by modern tattooists, the court reasoned that “the Constitution looks beyond written or spoken words as mediums of expression”<sup>33</sup> and “a form of speech does not lose First Amendment protection based on the kind of surface it is applied to.”<sup>34</sup> Although health and safety concerns may be “relevant to the governmental interest *potentially justifying*

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ranging from movie theaters and restaurants to adult businesses and gun shops, but did not mention tattoo parlors. HERMOSA BEACH, CAL., MUN. CODE § 17.26.030 (2007), available at <http://www.hermosabch.org/index.aspx?page=439>. The expansive list of allowed commercial ventures suggests an intentional omission by the City’s legislature, indicating that the City does not consider tattooing to be a desirable or legitimate commercial use. *Id.* In fact, on November 20, 2007, the City’s Planning Commission passed a resolution against amending the Code to permit tattoo parlors, making explicit the ban against tattoo parlors in § 17.06.070. See *Anderson*, 621 F.3d at 1057.

28. *Anderson*, 621 F.3d at 1058. The district court initially dismissed the case for ripeness concerns, arguing that *Anderson* had not sought permission to operate a tattoo parlor under the “similar use” provision in the administrative procedures provided in the City’s Code, which allows the community development director “to permit a commercial use not listed in the zoning code if this use ‘is similar to and not more objection[able] than other uses listed.’” *Id.* at 1057. *Anderson* then filed a request with the community development director asking for a finding of “similar use” that would allow him to open a tattoo parlor; however, his request was denied, thereby prohibiting *Anderson* from opening a tattoo parlor in the City. *Id.*

29. *Anderson*, 621 F.3d at 1058. The *Spence* test applies to expressive conduct and states that such conduct will only be protected by the First Amendment if it is “sufficiently imbued with elements of communication”—that is, if there is “[a]n intent to convey a particularized message” and “the likelihood [is] great that the message [will] be understood” by viewers. *Spence*, 418 U.S. at 409-11.

30. *Anderson*, 621 F.3d at 1058.

31. *Id.* at 1055.

32. *Id.* at 1061.

33. *Anderson*, 621 F.3d at 1060 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 569 (1995)).

34. *Id.* at 1061.

a restriction on protected speech,” this consideration is not relevant “to whether the speech is constitutionally protected.”<sup>35</sup>

Turning to the tattooing process, the *Anderson* court similarly concluded that the process of tattooing is purely expressive activity that may be protected under the First Amendment.<sup>36</sup> The court reasoned that the *Spence* test only limits “processes that do *not* produce pure expression but rather produce symbolic conduct” that does not on its face necessarily convey a message.<sup>37</sup> The court also emphasized that “neither the Supreme Court nor [the Ninth Circuit] has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) . . .”<sup>38</sup> The court reasoned that tattooing is a process much like writing. The process itself is not intended to “symbolize” anything; rather, its purpose is to produce a tattoo (just as writing is intended to produce an essay).<sup>39</sup> Since the tattooing process is “inextricably intertwined with the purely expressive product (the resulting tattoo),” it is entitled to full First Amendment protection. The fact that a tattooist provides a service does not make the process any less expressive, because the process of tattooing necessarily involves the application of the artist’s creative talents as well.<sup>40</sup>

Having determined that the process of tattooing receives First Amendment protection, the *Anderson* court held the City’s total ban on tattooing was an unconstitutional restriction on free expression.<sup>41</sup> In addition to finding the City’s regulation broader than necessary to achieve the government’s cited interest in safety,<sup>42</sup> the court held that the City’s regulation unconstitutionally “foreclosed a venerable means of communication that is both unique and important,” and one which “often carries a message quite distinct” from other media.<sup>43</sup> Significantly, *Anderson* means that “complete municipal bans

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35. *Id.*

36. *Id.* at 1060. The Ninth Circuit further held that “[t]he tattoo *itself* . . . and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.” *Id.* The court determined that the fact that the City’s ban relates to tattooing *businesses* rather than the tattooing process itself does not affect whether the regulated activity is afforded First Amendment protection. *Id.* at 1062–63. The fact that artists receive compensation does not, and should not, alter the calculus. *Id.* at 1063; *see also* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (“It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”). Regardless of any accompanying commercial aspect, tattoos still express ideas, make statements, and “affect public attitudes” by encouraging thoughtful contemplation and discussion among their viewers. *Anderson*, 621 F.3d at 1063 (citing *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007)).

37. *Id.* (citing *Cohen v. California*, 403 U.S. 15, 18 (1971)).

38. *Id.*

39. *Id.* at 1062.

40. *Id.*

41. *Id.* at 1059, 1063.

42. *Id.* at 1065 (citing *Ward*, 491 U.S. at 798, 800 (1989)).

43. *Id.* at 1066 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 54, 56 (1994)).

on tattoo parlors are now illegal in the nine states under the Ninth Circuit's jurisdiction," which encompasses approximately 19.93 percent of the U.S. population.<sup>44</sup> Although *Anderson* provides significant breathing room in favor of tattooing and eliminates the threat of overbroad regulations in some states, other jurisdictions remain free to employ less-protective methods.

## 2. The Coleman Opinion: Support for Anderson's Approach

Decided almost exactly two years after *Anderson*, the Arizona Supreme Court case *Coleman v. City of Mesa* sheds new light on First Amendment–tattoo jurisprudence and expands the territory for judicial debate as to what level of First Amendment protection tattooing should be afforded. *Coleman* builds on the tattoo-protective approach provided by *Anderson* by holding that the business of tattooing constitutes pure speech. Although *Coleman* is a state case outside of the Ninth Circuit's jurisdiction, and therefore not bound by *Anderson*,<sup>45</sup> the case illustrates a growing trend among courts toward recognizing tattooing as protected expressive activity.

In *Coleman*, the City Council rejected an application for a permit to operate a tattoo parlor, citing concerns that it was not appropriate for the location or in the neighborhood's best interests.<sup>46</sup> On appeal, the *Coleman* court agreed with *Anderson* that tattooing is purely expressive activity fully protected by the First Amendment.<sup>47</sup> Finding it "incontrovertible" that a tattoo itself is pure speech, the court pointed to the Supreme Court's recognition of a vast range of First Amendment–protected expressive activity, "including parades, music, paintings, and topless dancing."<sup>48</sup> Like the *Anderson* court, the *Coleman* court found that an expression's protected status cannot depend upon the medium chosen for its expression, and that the process of tattooing is expressive activity.<sup>49</sup>

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44. Matthew Beasley, Note, *Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists*, 85 S. CAL. L. REV. 1137, 1175–76 (2012).

45. See David L. Hudson, Jr., *Tattoos are Pure Speech, Ariz. Appeals Court Rules*, FIRST AMENDMENT CENTER (NOV. 7, 2011), <http://www.firstamendmentcenter.org/tattoos-are-pure-speech-ariz-appeals-court-rules>. The *Coleman* court reversed and remanded the trial court's decision, directing the trial court to evaluate the Colemans' free speech claims. See *Coleman v. City of Mesa*, 284 P.3d 863, 874 (Ariz. 2012).

46. *Coleman*, 284 P.3d at 866. Mesa City Code requires tattoo parlors and other specified businesses (including piercing salons and pawn shops) to obtain a permit in order to conduct business within the City. See MESA CITY CODE § 11–6–3(B) (2012). A permit serves as a "discretionary authorization" that the City Council may issue after a public hearing if it finds that the proposed activity will accord with and is not harmful to "adjacent properties or the neighborhood in general." *Coleman*, 284 P.3d at 867–68.

47. *Coleman*, 284 P.3d at 869 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 568–70 (1995) ("['P]urely expressive activity' and 'pure speech' . . . refer not only to written or spoken words, but also to other media (such as painting, music, and film) that predominantly serve to express thoughts, emotions, or ideas.")).

48. *Id.* at 869–70 (citing *Hurley*, 515 U.S. at 569; *Anderson*, 621 F.3d at 1060).

49. *Id.* at 870 (citing *Anderson*, 621 F.3d at 1061–62; *State v. White*, 560 S.E.2d 420, 425 (S.C. 2002) (Waller, J., dissenting)). Tattooing constitutes expressive activity since a tat-

In response to the Colemans' claim that the First Amendment protects the right of tattoo artists to engage in creative expression by operating tattoo parlors, the City countered that the court need not determine whether tattooing is constitutionally protected expression because "generally applicable zoning laws may apply to otherwise protected activities" without violating any free speech rights.<sup>50</sup> However, the unconvinced court reasoned that "[t]he fact that a permit scheme may also apply to non-protected activities does not insulate it from constitutional challenge when applied to protected speech."<sup>51</sup>

*Coleman* builds on the tattoo-protective approach provided by *Anderson*, similarly holding that because tattoos are pure speech, the business of tattooing "also constitutes pure speech."<sup>52</sup> Since the case has been sent back to the trial court to evaluate the Colemans' free speech claims, that court will be tasked with evaluating whether the City imposed a reasonable time, place, and manner restriction in denying the permit, or whether its regulation was not narrowly tailored to its municipal goals. No matter how the lawsuit ultimately plays out, the Arizona decision played a significant role in recognizing tattooing as a form of expression that deserves of First Amendment protection.<sup>53</sup>

### 3. The Anderson Approach: Discussion and Criticism

*Anderson* and *Coleman* take an important step toward recognizing tattooing as fully protected speech. Both involve an interesting twist: there is no regulation on the tattooing activity itself, but rather the regulation regards the very establishment of tattoo parlors.<sup>54</sup> Although not the focus of this Note, it is important to briefly highlight that without such regulations, the

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too "involves expressive elements beyond those present in 'a pen-and-ink' drawing, inasmuch as a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo's relatively permanent image." *Id.* This reflection explains why the court was not persuaded by contrary "No-Protection Approach" decisions such as *Hold Fast Tattoo* and *Yurkew* (see *infra* Part I.B), which rely on the *Spence* test to determine that tattooing is not protected by the First Amendment.

50. *Id.* at 868. The City cited *Leathers v. Medlock*, 499 U.S. 430, 447–49 (1991), which found no "First Amendment difficulties" in applying a general tax to the media, and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986), which held that the closing of an adult bookstore (where solicitation of prostitution occurred) was not precluded by the First Amendment.

51. *Id.* at 868; see, e.g., *Thomas v. Chic. Park Dist.*, 534 U.S. 316 (2002) (involving a challenge to a city ordinance requiring permits for large-party events in public parks).

52. See Hudson, Jr., *supra* note 45.

53. *Id.*

54. Both cases provide key examples of local governments using zoning restrictions as a way to functionally ban the activity of tattooing before it can take place, arguably using licensing as a prior restraint. The *Anderson* and *Coleman* opinions refrain from using any language directly related to "prior restraints," leaving open the possibility of continued restraints via similar ordinances that grant city officials discretion to determine which businesses are in the best interests of the community. See Carly Strocker, Comment, *These Tats Are Made for Talking: Why Tattoos and Tattooing Are Protected Speech Under the First Amendment*, 31 LOY.

tattooing-as-speech debate would not have arisen in the judicial arena. These regulations, combined with the framework courts have developed to address competing speech interests, point to the need for a clearer division between the available tiers of First Amendment scrutiny. Primarily, courts need to address the distinction between “purely expressive activity” (subject to “reasonable” time, place, and manner restrictions) and “expressive conduct” (subject to the *Spence* test).<sup>55</sup> Treating all tattooing as purely expressive activity, in line with *Anderson* and with the informal copyright norms discussed in Part II.B, would avoid these complicated inquiries and better protect the act of tattooing and the resulting tattoos by recognizing multiple speakers and multiple authors.

Despite the uncertainties of its future application, the *Anderson* approach—recognizing tattooing as purely expressive activity—has received support from numerous voices. For example, in her Note, Laura Markey agrees that tattooing is a purely expressive activity, but criticizes the refusal of prior courts to define the extent of constitutional protection given to tattoos as artistic expression.<sup>56</sup> Arguing that the “First Amendment would mean little if it allowed the government to ban any speech it finds perverse or undesirable,”<sup>57</sup> Markey dismisses the history of negative connotations imparted upon tattoos, including the now largely-quieted concerns about hepatitis and views of tattoo-bearers as having “morbid or abnormal personalit[ies].”<sup>58</sup> In particular, Markey argues against *Spence*’s expressive conduct test because the “separation of tattooing and the resulting tattoos” is “illogical.”<sup>59</sup> Markey advocates for formal government regulation of tattooing and the repeal of all local bans on the practice, commending the *Anderson* court for “not assign[ing] more importance to the government interest of

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L.A. ENT. L. REV. 175, 206–07 (2011) (advocating for stricter constitutional review of tattoo bans that resemble prior restraints).

55. Conduct with expressive components can be fairly heavily regulated under *O’Brien*. For a discussion of the *O’Brien* test, see *supra* note 25 and accompanying text. If not sufficiently imbued with elements of communication, regulations need only be rationally related to a legitimate governmental interest. *Anderson*, 621 F.3d at 1059 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981)). This distinction may mean that a great deal of otherwise protectable speech will arbitrarily fall into the heavily-regulated category, since the “health and safety” government interest will almost always pass rational basis and often even intermediate scrutiny.

56. Laura Markey, *Repairing the Rusty Needle: Recognizing First Amendment Protection for Tattoos*, 21 KAN. J.L. & PUB. POL’Y 310, 321 (2012) (citing *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980)) (arguing that the appropriate level of protection “should not have been a mere intrigue; it should have been obvious”).

57. *Id.* at 322.

58. *Id.* at 315-16 (citing *Grossman v. Baumgartner*, 254 N.Y.S.2d 335, 338 (App. Div. 1964)).

59. *Id.* at 324-25

public safety than was necessary in context” and urging other courts to follow the Ninth Circuit’s persuasive opinion in the future.<sup>60</sup>

Similarly, commentator Carly Strocker presses for adherence to *Anderson* going forward, arguing that “tattooing, a process inexplicably linked to the creation of tattoos, must be protected with the same fervor as the process that creates any other pure speech.”<sup>61</sup> Strocker adamantly argues against anti-tattooing zoning laws because “courts [in support of such bans] fail to consider the fact that prohibiting legal tattoo parlors within city limits pushes tattoo parlors underground.”<sup>62</sup> This result ironically increases the health risks associated with tattooing, the very risks that these zoning laws are supposedly designed to prevent.<sup>63</sup> Furthermore, Strocker suspects that “localities justify the enactment of their respective ordinances by citing the health and safety of their citizens while also alluding to the ‘unsavory clientele prone to crime’ that the localities perceive tattoo shops attract,”<sup>64</sup> with little if any consideration granted to the speech-related activity at stake. Although she might press for an even more expression-protective result than that afforded in *Anderson* and argue that the ordinance in *Anderson* should have been declared unconstitutional as a prior restraint on protected speech, Strocker nonetheless supports *Anderson*’s steps toward recognizing and protecting tattoos and tattooing as a historically-rooted form of speech.<sup>65</sup>

When courts subject a ban that is seemingly facially neutral—but actually content-based and potentially animus-driven—to the lower level of scrutiny, this classification can have far-reaching implications on the underlying parties and tilt the constitutional burden undeservedly in the defendant-municipality’s favor. My suspicions of animus echo those of Markey and Strocker, and implicitly, those of the *Anderson* court. Although I applaud the *Anderson* and *Coleman* courts for recognizing the expression and artistry inherent in tattooing, this approach still leaves too much room for governments to justify regulations or even prior restraints on the business of tattooing by disingenuously citing health and safety concerns.<sup>66</sup> By acknowledging

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60. *Id.* at 328.

61. Strocker, *supra* note 54, at 175.

62. *Id.* at 179-80.

63. *Id.*

64. *Id.* at 179 (citing Marcel Honoré & Colin Atagi, *Ruling May Affect Cities’ Policies on Tattoo Parlors*, DESERT SUN, Sept. 10, 2010, at A1).

65. *Id.* at 207.

66. Of course, the burden placed on cities to justify safety regulations should not be overly high where the cited concerns are truly justified (supported by insufficient monitoring resources or suspicion of unlicensed or unethical practitioners, for example, and not merely a proxy for animus). Judge Noonan’s concurrence in *Anderson* mirrors this sentiment, insisting that health considerations necessarily allow a higher degree of regulation for tattooing than, say, for the press. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010). An ideal approach would appropriately balance genuine health and safety concerns with tattooists’ First Amendment right to engage in protected expression. For a discussion of “Higher Sanitary Standards” in the tattoo industry since the 1990s and current health risks

that health and safety concerns may be “relevant to the governmental interest *potentially justifying* a restriction on protected speech,” but that they are not relevant “to whether the speech is constitutionally protected,” the *Anderson* court slyly implies its disapproval of other courts’ reasoning in past tattoo cases.<sup>67</sup> The court’s observation suggests that other courts have conflated the determination of constitutional protection with the determination of whether the governmental interest justifies restrictions, thereby often allowing health and safety concerns to automatically foreclose any significant discussion on the threshold issue of whether the speech should be protected. *Anderson* is thus instructive for courts in future related cases, redirecting the inquiry first toward whether the speech is entitled to protection and then toward the amount of restrictions that may be placed on such speech.

As the other approaches indicate, some judges might still take issue with *Anderson*’s recognition of tattooing as pure speech. Judge Noonan disagreed with some of the court’s analysis in his concurrence, arguing that while tattooing may be purely expressive, it is not always so—“[c]ontext is all” in making this determination.<sup>68</sup> Judge Noonan further observed that “while we are bound to protect the First Amendment value at issue, we are not bound to recognize any special aesthetic, literary, or political value in the tattooist’s toil and trade.”<sup>69</sup> But to counter objections that the pure speech categorization seems radical, the majority opinion does not advocate for special recognition of the tattooist’s trade—it merely expresses desire for equal recognition and protection to that received by other expressive mediums, such as writing and painting.

Since the majority holds that tattooing is akin to writing, it should (and does) follow in the majority’s opinion that tattooing is equally deserving of protection as writing. And is it not true that while *writing* may be purely expressive, it is not always so? The logical extension of Judge Noonan’s objection would be to apply his context-dependent inquiry equally to all forms of expressive activity, as arguably context matters in all mediums of communication in determining whether that speech is purely expressive or merely contains a secondary expressive component. However, such a solution would collapse the bridge created by the majority between tattooing and the resulting tattoos, and would subject the amount of First Amendment protection received by tattooing (and other creative processes) to an inefficient and unpredictable case-by-case inquiry. The difficulties with this approach will be discussed in Part I.C.

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related to tattooing, including whether tattooing is still as dangerous as it used to be, *see* Markey, *supra* note 56, at 317–19, 325–26; *see also* Strocker, *supra* note 54, at 200–01 (arguing that “even if [ink-related] health hazards had once been sufficient to outweigh the full First Amendment protection of the tattoos’ expression, they are no longer categorically so.”).

67. *See supra* note 35 and accompanying text.

68. *Anderson*, 621 F.3d at 1068.

69. *Id.* at 1069.

B. *The No-Protection Approach: Tattooing is Unprotected Because it is Neither Expressive Conduct nor Pure Speech.*

Although most courts are willing to concede that tattoos themselves have expressive or speech-like qualities, some courts have applied an approach which treats the “speech-like nature of tattoos [as] entirely irrelevant.”<sup>70</sup> By defining the threshold inquiry as “‘whether the actual process of tattooing, as opposed to the image conveyed by the tattoo itself,’ is sufficiently communicative,”<sup>71</sup> this approach effectively precludes tattooing from recognition as expressive activity and from eligibility for First Amendment protection. Since “the normal observer or even the recipient [of the tattoo] would [not] regard the process of injecting dye into a person’s skin through the use of needles as communicative,” the process is therefore not sufficiently communicative under *Spence*.<sup>72</sup> The following three cases illustrate this approach, concluding that tattooing does not merit First Amendment protection.

In *Yurkew v. Sinclair*,<sup>73</sup> a federal district court considered a constitutional challenge to a ruling issued by a state agency prohibiting tattooists from renting space on state fairgrounds.<sup>74</sup> Yurkew argued that his unique form of tattooing—which “involv[ed] the use of symbolic imagery, creative design and complex technique”—qualified as expressive art.<sup>75</sup> Yet what Yurkew saw as “an integrated expressive act”—including the creation of the design, its skilled application, and the image on the customer’s skin—the court viewed merely as a “mechanical process.”<sup>76</sup> Tattooing was therefore not expressive conduct under *Spence* and did not merit First Amendment protection.<sup>77</sup>

Nearly two decades later, the South Carolina Supreme Court faced a similar question and reached an analogous conclusion. In *State v. White*, tattooist Robert White challenged a state statute that prohibited tattooing unless performed by a licensed physician in cosmetic or reconstructive surgery.<sup>78</sup> Applying the *Spence* test, the court similarly concluded that the plaintiff did not make “any showing that the *process* of tattooing is communicative enough to automatically fall within First Amendment protection.”<sup>79</sup> The court further found that “the process of injecting dye” was “not sufficiently communicative to . . . outweigh the risks to public safety.”<sup>80</sup> Justice

70. Walsh, *supra* note 13, at 1084.

71. *Id.* (citing *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980)).

72. *Id.*

73. *Yurkew*, 495 F. Supp. 1248.

74. Walsh, *supra* note 13, at 1076 (citing *Yurkew*, 495 F. Supp. at 1249).

75. *Id.* (citing *Yurkew*, 495 F. Supp. at 1249).

76. *Id.* at 1077.

77. *Id.* (citing *Yurkew*, 495 F. Supp. at 1254).

78. *Id.* (citing *State v. White*, 560 S.E.2d 420, 421 (S.C. 2002)).

79. *White*, 560 S.E.2d at 423.

80. *Id.*

Waller dissented, arguing that tattooing does constitute expressive conduct under *Spence*; for if a painter who creates an image on canvas has produced “art” and engaged in First Amendment–protected “speech,” there is “no reason why a tattoo artist who creates the same image on a person’s body should be entitled to less protection.”<sup>81</sup> Yet Justice Waller’s dissent is distinguishable from *Anderson* because he refrained from classifying the process of tattooing as pure speech, and instead treated it as expressive conduct subject to the *Spence* analysis.<sup>82</sup>

In *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008)—a case factually similar to *Coleman*, but with an opposite outcome—the plaintiff applied for a special-use permit under the City’s zoning law to open a tattoo studio.<sup>83</sup> The City ultimately denied the plaintiff’s application, citing tattooing as “not the kind of business” it wanted.<sup>84</sup> Applying the *Spence* test, the court found that the act of tattooing failed the first prong of the test because the act itself lacked an intent “to convey a particularized message.”<sup>85</sup> Comparing tattooing to a sound truck—which “enables each customer to express a particularized message” via a loudspeaker-equipped advertising truck—the court held that “[t]he act of tattooing is one step removed from actual expressive conduct.”<sup>86</sup> Therefore, there could not be any “message” to be understood by viewers under the second prong of the *Spence* test. Accordingly, the court held that the act of tattooing was not entitled to First Amendment protection.<sup>87</sup>

The non-integrative approach taken by these courts goes against Supreme Court precedent, which suggests that courts should take an integrative approach—“viewing the speech-producing activity as an inextricable part of the speech itself”—when determining whether particular conduct merits First Amendment protection.<sup>88</sup> Otherwise, extending the non-integrative

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81. *Id.* at 425.

82. Walsh, *supra* note 13, at 1078.

83. *Hold Fast Tattoo, LLC v. City of N. Chi.*, 580 F. Supp. 2d 656, 660 (N.D. Ill. 2008).

84. *Id.* at 658. The City’s admission that a tattoo parlor was “not the kind of business” it wanted sounds strikingly like animus. But since the court held that the act of tattooing was not constitutionally-protected free speech, there was no fundamental right at issue, and the City’s zoning regulation easily passed the required rational basis test as being “substantially related to [the City’s] municipal planning goals.” *Id.* at 660 (citing *St. John’s United Church of Christ v. City of Chi.*, 502 F.3d 616, 637–38 (7th Cir. 2007)). Among others, these goals included the now familiar “health and/or safety of the community,” and the “character, stability, or intended development” of the City’s business district. *Id.* at 660-61.

85. *Id.* at 660.

86. *Id.*

87. *Id.*

88. Walsh, *supra* note 13, at 1084; *see, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92 (1989) (taking an integrated approach and asking whether instrumental music was protected speech where a city ordinance prohibited a concert sponsor from amplifying its sound levels, rather than first asking whether the process of amplification was sufficiently communicative without regard to the expressive end of such process—music).

*Spence* approach to its logical conclusion, “the argument would rob almost all . . . speech of [its] constitutional protection,” because when the law facially prohibits merely a type of conduct, but that conduct does not convey a “particularized message,” that conduct fails the *Spence* test and falls outside the First Amendment’s protection.<sup>89</sup> In any case, the meaning of “sufficiently imbued with elements of communication” from *Spence* is unclear and provides little guidance to courts. Making this inquiry necessarily involves delving into the subjective intent of the tattoo artist: did the artist intend through the process of tattooing to engage in purely expressive activity? Or did the act of tattooing merely contain an expressive component—primarily an act of business, but indirectly resulting in expression on behalf of the customer? A stronger and more efficient approach would avoid such subjective inquiries.

*C. The Individualized Approach: Courts Should Utilize a Case-By-Case Inquiry.*

A third approach would require courts to consider each tattooing situation on a case-by-case basis, introducing an objective inquiry. Commentator Ryan Walsh supports this option, arguing that “[i]nstead of taking the Anderson-Yurkew categorical approach, courts should—on a case-by-case basis—ask whether each claimant’s form of tattooing amounts to artistic self-expression,” an analysis to be performed “in the tradition of Mastovincenzo [sic] and White,” inquiring “whether the claimant-tattooist has objectively manifested an intent to engage in artistic self-expression.”<sup>90</sup> Walsh draws a distinction between old-school “commercial” tattooing and the modern “fine art” approach utilized by tattoo artists, designing his case-by-case test to “deny constitutional protection to those tattooists whose motives are purely commercial (and not at all expressive), while granting protection to those tattooists who conceive of their work as aesthetically communicative.”<sup>91</sup> According to Walsh, commercial-shop tattooing has two distinguishing characteristics which suggest that it is not a form of expression: (1) commercial shops limit customers’ design choice to standardized stock images, and (2) tattooing requires only technical skills, not creative ability.<sup>92</sup> Fine-art tattooing, on the other hand, is uniquely marked by two aesthetic and speech-like characteristics: (1) it emphasizes creativity and expression, and (2) its tattooists tend to be professionally trained in art schools.<sup>93</sup> But how are courts supposed to distinguish between the commercial and fine-art approaches without some sort of “expert” testimony from tattoo artists? Many tattoo

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89. Walsh, *supra* note 13, at 1086.

90. *Id.* at 1066.

91. *Id.*

92. *Id.* at 1089.

93. *Id.* at 1090.

parlors employ a combination of both approaches, demonstrating a willingness to work with customers to create original designs as well as offering books of standard “flash” designs for customers to peruse as a baseline for creativity. Walsh’s schema does not account for this hybrid form of tattoo shop.<sup>94</sup> Moreover, his argument rests on the faulty premise that it is not possible for tattooists to make a living off of creating “fine-art” tattoos. Once this premise fails (as it should), the two paradigms of tattoos are conflated and Walsh’s thesis becomes severely challenged. The fact that money exchanges hands does not make the resulting product any less expressive, as precedent has established.<sup>95</sup>

Walsh’s argument contains further fallacies. Walsh agrees with *Anderson*’s premise that “a proper First Amendment analysis of an allegedly expressive activity ought not to separate the process of creating the expression from the final product—the expression itself—to determine whether the activity merits protection.”<sup>96</sup> If Walsh means to say that the process should always be viewed in light of the resulting expression, how does he account for a situation in which the process is not deemed to be expressive? In other words, if tattooing and the resulting tattoo are not to be analyzed separately, does that mean that if the process of tattooing is not deemed to be expressive (based on the tattooist’s lack of objective manifestation of intent to engage in artistic self-expression), then the resulting tattoo necessarily cannot be deemed expressive? This argument fails because tattoo bearers seek tattoos largely for the very purpose of expressing some sort of personal message.<sup>97</sup> In other words, Walsh’s argument fails to take into account the fact that there may be multiple “speakers” in any tattoo transaction. It is true that there may be only one act of artistic creation—the process of tattooing—but arguably, the tattoo bearer communicates a message to public viewers on a daily basis through her own walking, talking skin. Given collaboration with customers on the design which they desire, it is impossible for 100 percent of any tattoo to be completely original to that tattooist or indicative of the tattooist’s own expression alone.<sup>98</sup> So if Walsh concedes that the process of tattooing and the tattoo itself are intertwined and should be examined to-

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94. Perhaps recognizing this weakness in his argument, Walsh does concede that “reaching the right result in a tattooing case is [not] simply a matter of putting a claimant’s methods in the right box—fine art or commercial. Rather . . . the inquiry centers on artistic expression: Can the claimant be said to speak through her tattooing?” *Id.* at 1093.

95. See e.g., *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010); see also *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (“It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”).

96. Walsh, *supra* note 13, at 1065.

97. Obviously, this argument makes an exception for tattoo bearers who have been forced to bear a particular mark or who drunkenly consented.

98. For a discussion of the relational and intellectual property norms in the tattoo industry, see *infra* Part II.

gether,<sup>99</sup> perhaps his “objective intent” inquiry should be broadened to jointly examine both the tattooist’s and the tattoo bearer’s intentions to engage in artistic expression.

Of course, discerning such objective intent would be difficult for courts, given the lack of existing judicial standards and a historical uneasiness vis-à-vis courts wrestling with the seemingly *subjective* debate over what forms of speech can be deemed “worthy” as art. The *Coleman* court failed to be persuaded by a similar case-by-case approach, such as that used by the court in *Mastrovincenzo v. City of New York*.<sup>100</sup> In *Mastrovincenzo*, the Second Circuit concluded that the sale of clothing painted with graffiti was protected by the First Amendment because “the disseminators of that clothing [were] genuinely and primarily engaged in artistic self-expression” rather than “a chiefly commercial exercise.”<sup>101</sup> Yet the *Coleman* court wisely points out that *Mastrovincenzo*’s case-by-case approach does not apply to “paintings, photographs, prints and sculptures [that] always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection,” particularly if one agrees that tattoos are akin to paintings.<sup>102</sup> This classification aside, a case-by-case inquiry would simply be difficult to administer and could have the effect of banning a good deal of otherwise protected speech if the question of “whether a particular artist could engage in tattooing” would be turned over to a licensing official to assess “whether the proposed work is ‘predominantly expressive[.]’”<sup>103</sup> Furthermore, the fact that tattoo artists sometimes use standard patterns does not diminish the available First Amendment protection because it “does not make the resulting tattoo any less expressive.”<sup>104</sup>

Although Walsh’s proposal and the *Mastrovincenzo* test offer an innovative solution to draw judicial attention away from the troubling initial conduct-versus-speech categorization employed in cases like *Yurkew* and *White*,

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99. Walsh, *supra* note 13, at 1083 (“This Comment argues that the Yurkew approach, distinguishing the ‘product’ of tattooing from the physical activity that produced it, is wrong. If tattoos are themselves purely expressive, then the process by which they are made is also purely expressive, for the same reason that, because works of literature are expressive, so too is the creative activity of writing them.”).

100. *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006). The court here outlined a three-part inquiry to determine whether a product is predominantly expressive: (1) the court should “consider whether that item also has a common non-expressive purpose or utility”; (2) if the court finds that an item has both expressive and non-expressive purposes, it must determine which purpose dominates; and (3) if an item is found to be predominantly expressive, the court must “take into account other factors that shed light on how and why an object is being sold or disseminated.” *Id.* at 95–96.

101. *Id.* at 91.

102. *Coleman*, 284 P.3d at 871 (citing *Mastrovincenzo*, 435 F.3d at 92).

103. *Id.* (citing *Mastrovincenzo*, 435 F.3d at 92).

104. *Id.*; *see, e.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995) (finding that a speaker “does not forfeit constitutional protection” by failing “to generate, as an original matter, each item featured in the communication.”).

it problematically redirects that attention toward a province which many courts have acknowledged to be particularly ill-suited to judicial determination: what is art?<sup>105</sup> Walsh attempts to avoid this problem by suggesting guideline factors for courts to consider when making findings of an objective manifestation of intent to engage in self-expression, including “sociological evidence concerning the significant differences in modern tattooing styles,” the use of flash images on the parlor walls, and the tattooist’s professional or artistic training.<sup>106</sup> Even though Walsh admits that his proposal “is not a one-size-fits-all solution,” further development of his objective approach might meet his goal of “extend[ing] constitutional protection only to those meriting it.”<sup>107</sup>

Despite its critics, the pure speech approach continues to gain traction in the legal community, avoiding the challenging subjective inquiries of the no-protection and individualized approaches. An *Anderson*-like inquiry appropriately questions regulations that restrict tattooing and provides more robust First Amendment protection, mirroring the collaborative informal copyright norms discussed in Part II.

## II. INTELLECTUAL PROPERTY NORMS IN THE TATTOO INDUSTRY

### A. Copyright and Tattoos

An author gains copyright protection when she fixes an original work in any tangible medium of expression, including pictorial works.<sup>108</sup> When determining whether an author has acquired copyright protection, disputes may arise regarding whether the work is “original” and whether it is “fixed.”

In order to be “original,” a work of authorship need only possess “at least some minimal degree of creativity.”<sup>109</sup> Under *Feist Publications, Inc. v. Rural Telephone Service Co.*, even a slight amount of creativity will suffice, so long as the work “possess[es] some creative spark.”<sup>110</sup> Originality in the copyright context does not mean novelty; rather, a work may be original despite a close resemblance to other works if the similarity is the not the

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105. Walsh, *supra* note 13, at 1094–95; *see, e.g., Mastrovincenzo*, 435 F.3d at 90 (avoiding resolving whether plaintiffs’ goods fit within “broader societal definitions of ‘art,’ a famously malleable concept the contours of which are best defined not by courts, but in the proverbial ‘eye of the beholder.’”); *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253–54 (D. Minn. 1980) (recognizing that “courts are ill equipped to determine such illusory and imponderable questions” as whether tattooing is an art form and refraining from making that determination). However, this is not to say that such difficulty “warrant[s] placing all visual expression in limbo outside the reach of the First Amendment’s protective arm[;]” the courts must grapple with the inquiry of what constitutes protected expression. *See Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

106. Walsh, *supra* note 13, at 1098.

107. *Id.* at 1098–99.

108. 17 U.S.C. § 102(a) (2012).

109. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

110. *Id.*

result of copying.<sup>111</sup> In other words, originality refers to the independent origin of a given work. Since originality is a judicially determined concept, the separation between originality and novelty is desirable in order to maintain some semblance of objectivity and thereby prevent an unreasonably high bar to copyright protection. As Justice Holmes once aptly stated, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”<sup>112</sup> Given the low bar for creativity, most tattoos meet the originality requirement.<sup>113</sup>

A work is “fixed” when its embodiment is “sufficiently permanent . . . to permit it to be perceived . . . or otherwise communicated for a period of more than transitory duration.”<sup>114</sup> Under the plain language of the copyright statute, tattoos inked on the human body constitute sufficiently permanent displays of images to satisfy the fixation requirement and merit copyright protection, as long as they also meet the originality test outlined above. Assuming that the fixation standard appropriately applies to tattoos, laser removal of a tattoo would not render the tattoo any less transitory than physical destruction of a painting after its creation. Accordingly, copyright protection subsists in tattoos that constitute fixed, original works of authorship, with the bulk of any controversy focusing on authorship.

### 1. Copyright Ownership

Copyright vests initially in the “author” of a work of authorship.<sup>115</sup> When copyright does subsist in a tattoo, the author is entitled to benefit from a statutory list of exclusive rights, including the rights to reproduce the work, to prepare derivative works, to distribute copies, and to display the copyrighted work publicly.<sup>116</sup> The determination of authorship therefore establishes which party—or parties—receives these rights.

Depending on the circumstances, the tattooer, the client, or both may be considered the author. Four potential authorship situations may arise through the application of a tattoo: (1) sole author in the tattooer; (2) joint authorship in the tattooer and client; (3) a work for hire that deems the commissioner to be the author; and (4) sole author in the customer.

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111. *See id.*

112. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

113. Overly cliché tattoos—such as a heart with a dagger inside, which is likely an unprotectable *scène à faire*, or “stock” image common to the tattoo trade—may not meet the originality requirement. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

114. *Id.* § 101.

115. *Id.* § 201(a).

116. *Id.* § 106.

Where the tattooer uses a human “canvas” to create an artistic work as she chooses, the tattooer is the clear author, analogous to a portrait painter.<sup>117</sup> In this first authorship situation, the tattooer is the sole author. The portrait painter owns the copyright to her work, even if the work includes the image of another person, or another person owns the material object on which the work is embedded.<sup>118</sup> But in the case of the tattooer, the material object is a human body, making the analogy a bit trickier to comprehend, with potentially disconcerting consequences for human autonomy when literally applied. Yet whether the canvas is inanimate or living flesh, formal copyright law provides that “[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”<sup>119</sup> For those unconvinced by the painter analogy, the plain language of this clause provides reassurance that copyright ownership grants rights in the material object and not in the adorned subject’s body.<sup>120</sup>

When a work is commissioned, however, authorship can be more complicated. In this second authorship scenario, the resulting tattoo may be viewed as a “joint work,” meaning that it is “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>121</sup> This result requires both the client and the tattooer to contribute independently copyrightable expression to the resulting tattoo.<sup>122</sup> The authors of a joint work are co-owners of copyright in that work.<sup>123</sup> In the tattoo context, joint authorship allows each owner to use or to license the work, provided the owner accounts to other co-owners for any profits.<sup>124</sup>

A second authorship possibility for commissioned tattoos is the “work for hire,” in which case ownership vests initially in the commissioning party

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117. Thomas F. Cotter & Angela M. Mirabole, *Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art*, 10 UCLA ENT. L. REV. 97, 104 (2003).

118. *Id.*

119. 17 U.S.C. § 202 (2012).

120. *But see* Meredith Hatic, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 396, 403 (2012) (explaining that in exercising some exclusive rights, “the owner’s rights will nevertheless interfere with the subject’s constitutional right to control his own body”); *but cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (recognizing a constitutional right to choices of personal dignity and autonomy). For a brief discussion of the unintended and perhaps unconstitutional consequences of a literal application of copyright law to public displays of tattoos, see *infra* Part II.B.2.

121. 17 U.S.C. § 101.

122. Cotter & Mirabole, *supra* note 117, at 105 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000)).

123. 17 U.S.C. § 201(a).

124. *See* Hatic, *supra* note 120, at 404; *see also* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (7th Cir. 1994).

or the employer—not the tattoo artist.<sup>125</sup> This analysis can result in either a third authorship scenario where the commissioner is the author, or a fourth authorship scenario where the customer is the author. A work for hire is a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned to fit within a list of nine categories that treat the tattooer as an independent contractor.<sup>126</sup> Under the first prong of the work for hire test, if the creating tattoo artist is an employee of a tattoo shop and creates the original tattoo within the scope of his or her employment, then the employer for whom the work is prepared is considered the author unless the parties have otherwise agreed in a signed writing.<sup>127</sup> In the absence of a clear, written contract that assigns copyright ownership to either the employer or the employee, a court must determine whether the artist is an employee using common-law agency doctrine.<sup>128</sup> The court must consider whether the commissioning party had the right and ability to control that manner by which the tattoo was made, influenced by factors such as: the level of skill required; the source of the tools utilized; the location of the work; the duration of the relationship between the employer and the artist; the provision of employee benefits; and the tax treatment of the hired party.<sup>129</sup> Some of these factors, such as the degree of skill involved in the tattoo's application, might weigh in favor of classifying the tattoo artist as an independent contractor.<sup>130</sup>

The “work for hire” doctrine can also apply to independent contractors if two conditions are met. First, the work must fit within one of the nine categories enumerated in 17 U.S.C. § 101.<sup>131</sup> Second, the parties must “expressly agree in a written instrument signed by them that the work shall be considered a work made for hire,”<sup>132</sup> in which case the commissioning party

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125. See 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

126. See *id.* § 101 (defining “work made for hire”). Under this section, the nine categories for commissioned works include works “specially ordered or commissioned for use as 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, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” *Id.*

127. *Id.* § 201(b).

128. Beasley, *supra* note 44, at 1143 (citing *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989)).

129. *Reid*, 490 U.S. at 751-52; Cotter & Mirabole, *supra* note 117, at 105-106.

130. Cotter & Mirabole, *supra* note 117, at 106.

131. See 17 U.S.C. § 101 (defining “work made for hire”). However, meeting this condition would require the commissioning party to establish that the tattoos at issue constitute specially commissioned works as part of a “collective work.” Even if the tattooer contributes an original tattoo to a subject’s existing set of tattoos, it is doubtful that this could be classified as a collective work. See Hatic, *supra* note 120, at 404-05.

132. 17 U.S.C. § 101.

would own the copyright. In the absence of such an agreement, the independent tattooer would be deemed the author.

A tattoo might meet the definition of a work for hire in several situations. For example, the tattoo shop that employs an artist might claim that the artist's work product is a work for hire because her tattoos are made in the scope of her employment.<sup>133</sup> Or, the client might claim an exclusive copyright on the theory that she paid the artist to create the tattoo, making the tattoo a work for hire prepared by the artist within the scope of her employment.<sup>134</sup> Yet even if the tattoo is not a work for hire, the employer or commissioning party could demand that the artist assign the copyright as a condition of providing services.<sup>135</sup> Although complicated, establishing authorship has important implications in terms of the level of protection provided to the parties and the rights afforded to the copyright holder under 17 U.S.C. § 106. The next section highlights discrepancies between the outcomes suggested by the plain language of formal copyright law and the informal copyright norms held and practiced by tattooers.

### B. *Tattooers and the Law: Tensions Illustrated*

Tensions between tattoo industry norms regarding artists' and customers' expectations of protected speech and how formal copyright law and courts treat such speech abound.<sup>136</sup> Perhaps surprisingly, "[c]opyright suits between tattooers and their clients, or suits between two tattooers, are virtually non-existent," with the exception of two post-millennial lawsuits to be discussed within this section.<sup>137</sup> The lack of related case law likely stems from law professor Aaron Perzanowski's observation that "[a]s a community, tattooers share a deep skepticism of the legal system,"<sup>138</sup> preferring to avoid filing formal legal complaints. This skepticism is arguably justified in light of the long history of targeted zoning regulations that have practically banned tattooists' trade,<sup>139</sup> as well as tattooists' "celebrat[ion of] their status as outsiders who operate without regard to established social conven-

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133. Cotter & Mirabole, *supra* note 117, at 105.

134. *Id.* at 106.

135. *Id.* at 107.

136. See Aaron Perzanowski, *Tattoo & IP Norms*, 98 MINN. L. REV. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2145048](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145048) (discussing the doctrinal hurdles and practical barriers to enforcement that shape the relationship between formal law and tattoo industry norm).

137. *Id.* at 19.

138. *Id.* at 48, 50.

139. When viewed in light of this history, in which interactions between the tattoo industry and U.S. law have largely been confined to health regulations, the relative dearth of interactions between tattooing and intellectual property law may seem less surprising. See Beasley, *supra* note 44, at 1146–47.

tions.”<sup>140</sup> As a result, “tattooers have developed a set of informal norms to structure the creative process and relationships within their industry.”<sup>141</sup>

Yet the very existence of these norms, and the respect given by artists to each customer’s autonomy, implies that tattoo artists view the process of tattooing as inextricably intertwined with the resulting tattoos. As discussed in Part I, these norms are somewhat reflected in the recent tattoo landmark cases *Anderson* and *Coleman* to the extent that the cases’ integrative approach toward tattooing and tattoos indirectly acknowledges the existence of multiple speakers in any given tattoo transaction: the artist and the customer. But as Perzanowski notes, *Anderson*, “while making a notable departure from prior judicial attitudes towards tattooing, still reflect[s] hints of the hostility that marred earlier opinions,” particularly in Judge Noonan’s “be-grudging” concurrence.<sup>142</sup>

Although “[t]attooers [are] somewhat more sympathetic to leveraging formal legal rights . . . to target unauthorized use of their designs on apparel or other merchandise,” their reluctance to endorse the judicial system stems largely from “more specific norms governing the creative process and the tattooer-client relationship.”<sup>143</sup> For example, although formal copyright law would treat most custom designs as works created by the tattooist alone, the consultation and design process is very collaborative and “sensitive to client preferences,” since clients “exercise the final choice over whether the design is ultimately transformed from a drawing on paper to a tattoo on the body.”<sup>144</sup> Interestingly, most tattooists take a broad view of their customers’ rights with respect to public display and reproduction of the images on their tattooed bodies, which are formally exclusive rights of the copyright holder (perhaps the tattooist, but the ownership debate abounds).<sup>145</sup> Although some artists might be offended if a customer sought to make a broad commercial use of the artist’s design, overall, “tattoo industry norms place a premium on establishing and maintaining the relationship between the tattooer and the client.”<sup>146</sup>

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140. Perzanowski, *supra* note 136, at 50.

141. *Id.* at 14.

142. *Id.* at 54; *see Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

143. Perzanowski, *supra* note 136, at 21; *see, e.g., Verified Complaint for Injunctive and Other Relief, Whitmill v. Warner Bros. Entm’t*, No. 4:11-cv-752 (E.D. Mo. Apr. 28, 2011) (protecting a tattoo design from being reproduced in a movie) [hereinafter *Whitmill Complaint*].

144. Perzanowski, *supra* note 136, at 23.

145. 17 U.S.C. § 106 (2012) (listing the exclusive rights of copyright holders); Perzanowski, *supra* note 136 at 24-25. Like any other original pictorial work that is fixed in a tangible medium, tattoos are protected by copyright law. 17 U.S.C. § 102(a)(5); *id.* at 14. Yet perhaps unsurprisingly, “the formal conclusions of copyright law do not dictate how tattooers conceptualize their ownership interests in their work.” *Id.* at 23.

146. Perzanowski, *supra* note 136, at 26.

Despite the informal norms that have developed in the tattoo industry, occasionally an act of alleged infringement sees its day in court (although unsuccessfully, to date). The following cases help illustrate how ineffectually formal intellectual property law has responded and might continue to respond to the constantly increasing visibility of tattooing.

### 1. Reed v. Nike, Inc.: Tattooer Sues Client for Copyright Infringement

In 1998, NBA player Rasheed Wallace had just been traded to the Portland Trailblazers. Matthew Reed, a self-employed and renowned tattoo artist based in Portland, met with Wallace to discuss ideas for Wallace's tattoo.<sup>147</sup> Wallace suggested his own ideas for meshing an Egyptian-themed family design with a stylized sun in the background while Reed listened, took notes, and made sketches.<sup>148</sup> Wallace asked for a few changes, which Reed incorporated into the final drawing. Wallace paid \$450 for the tattoo, a price which Reed considered low but agreed to accept given the great amount of exposure he would receive from the tattoo being on an NBA player.<sup>149</sup> Notably, before inking the tattoo onto Wallace's upper right arm, the parties failed to execute any written agreement transferring ownership to Wallace of any rights in the tattoo design.<sup>150</sup>

In 2004, Wallace won an NBA championship as a player for the Detroit Pistons.<sup>151</sup> During the championship run, Reed saw the tattoo highlighted in an advertising campaign promoting Nike products in a national television broadcast and all over Nike's website.<sup>152</sup> The advertisement featured the tattoo filling the screen in a close up, followed by "the tattoo and the process of its creation . . . simulated by a computerized method with a voice over by Mr. Wallace describing the tattoo and its meaning."<sup>153</sup> Reed sued Nike, Wallace, and the advertising agency for copyright infringement in 2005.<sup>154</sup> In his complaint, Reed alleged that he was the sole "owner of all right, title and interest to the original artwork from which the tattoo on Mr. Wallace's arm was created" and that the defendants "copied, reproduced, distributed, adapted and/or publicly displayed" Reed's copyrighted work without his

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147. See Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 LEWIS & CLARK L. REV. 313, 315 (2006).

148. *Id.* at 315; Associated Press, *Artist Sues Wallace over Use of Tattoo*, ESPN (Feb. 16, 2005, 1:54 PM), <http://sports.espn.go.com/espn/sportsbusiness/news/story?id=1992812>.

149. Harkins, *supra* note 147, at 316; Associated Press, *supra* note 148.

150. Harkins, *supra* note 147, at 315.

151. David DuPree, *Pistons Win First NBA Title in 14 Years, Finish Lakers 100-87*, USA TODAY (June 16, 2004, 3:31 AM), [http://usatoday30.usatoday.com/sports/basketball/games/2004-06-15-finals-game5\\_x.htm](http://usatoday30.usatoday.com/sports/basketball/games/2004-06-15-finals-game5_x.htm).

152. Harkins, *supra* note 147, at 316.

153. Complaint ¶ 15, Reed v. Nike, Inc., No. 05-CV-198 (D. Or. Feb. 10, 2005) [hereinafter Reed Complaint].

154. See *id.* ¶¶ 1, 17; Beasley, *supra* note 44, at 1147.

consent.<sup>155</sup> Reed's direct claim against his client Wallace violated the informal norms underlying the collaborative client-artist relationship. Perhaps Reed's actions can be explained by what he perceived as a golden opportunity to make an unexpected profit—one which was potentially undeserved or unintended through a copyright lens, whether or not Reed was truly the sole owner.

Although the parties dismissed the case in October 2005 without leaving any definitive guidance for tattoo jurisprudence,<sup>156</sup> the *Reed* case effectively demonstrates the competing interests involved in copyright infringement, from the client's right to publicity and the artist's right of ownership to the public's right to benefit from subsequent works featuring an original tattoo.<sup>157</sup> Had the case reached litigation, the court would necessarily have faced the daunting task of balancing all of these competing interests, a more complicated inquiry than in traditional copyright cases where the medium is not the human body.<sup>158</sup> This judicial challenge is perhaps one reason why tattooers have developed a set of informal expectations to avoid the courts altogether whenever possible.

## 2. Whitmill v. Warner Bros.: Tattooer Sues Company for Copyright Infringement

In 2003, tattoo artist Victor Whitmill designed an original tattoo for former heavyweight champion Mike Tyson, resulting in a claim, similar to the one in the *Reed* case, against Warner Brothers Entertainment.<sup>159</sup> On the day Whitmill created the tattoo, Tyson signed a release acknowledging "that all artwork, sketches and drawings related to [his] tattoo and any photographs of [his] tattoo [were] property" of Whitmill's studio.<sup>160</sup> The now famous tribal tattoo on the left side of Tyson's face featured prominently in the Warner Bros. 2011 blockbuster *The Hangover 2* and its accompanying marketing materials, where one of the main characters—played by Ed Helms—gets a tattoo on the left side of his face that almost exactly copies Tyson's tattoo.<sup>161</sup> Whitmill sued Warner Bros. for copyright infringement, alleging that he was the sole creator and author of the tattoo and producing Tyson's

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155. Reed Complaint, *supra* note 153, ¶¶ 19, 21. In addition to seeking an injunction against both companies, Reed also requested actual damages and profits earned by the defendants pursuant to 17 U.S.C. § 504(b). *Id.* ¶¶ 25–26. He further demanded an accounting of any revenue realized by Wallace as the result of any use, other than an incidental use, of the tattoo, as well as a share of the revenue realized by Wallace from his exploitation of the co-owned property. *Id.* ¶¶ 37–39.

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

157. Hatic, *supra* note 120, at 419.

158. See *id.* at 419–20.

159. See Whitmill Complaint, *supra* note 143, ¶¶ 5, 11–22.

160. *Id.* ¶ 7.

161. See *id.* ¶¶ 12–16.

signed release form.<sup>162</sup> Despite openly stating her sympathies toward Whitmill, Judge Perry of the Eastern District of Missouri denied Whitmill's request to enjoin the release of *The Hangover 2*, finding that the public interest tilted in favor of Warner Brothers.<sup>163</sup>

While *Whitmill* settled out of court just like *Reed*, both cases nonetheless illustrate similar conflicts among the interests that arise in tattoo infringement cases and raise complicated questions about the extent to which copyright holders' 17 U.S.C. § 106 rights should be read literally. Of the section 106 rights, the owner's right to publicly display the work presents the greatest likelihood of directly interfering with the subject's constitutional right to personal autonomy.<sup>164</sup> Where the tattooer is deemed the sole owner of a tattoo, a literal reading of this right would conceivably require customers to refrain from showing their tattoos in public in order to avoid violating section 106(5).<sup>165</sup> But arguably, at least, such a holding would not fall within the intended consequences of the Copyright Act since it would amount to "control by tattoo," bearing an uncomfortable resemblance to involuntary servitude.<sup>166</sup> Constitutional arguments aside, the informal norms discussed above render it unlikely that tattooers would attempt to bring such a claim in violation of the collaborative tattooer-customer relationship. Furthermore, the norms suggest the existence of an implied license that forms at the time of a tattoo's creation, including the right to display the tattoo publicly during the normal course of life and to make alterations to the design.<sup>167</sup> Although not formally recognized by the law, such norms help attenuate autonomy concerns and deter infringement claims that would otherwise completely undermine the purposes of getting tattoos.<sup>168</sup>

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162. See generally *id.* at 7-8 (seeking a preliminary and a permanent injunction as well as compensatory damages and an award of Warner Bros.'s profits resulting from the alleged infringement).

163. See Noam Cohen, *Citing Public Interest, Judge Rules for "Hangover II"*, N.Y. TIMES (May 24, 2011, 4:05 PM), [http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2011/05/24/citing-public-interest-judge-rules-for-hangover-ii/?_r=0) ("[A]ll over the country people would be losing money if I were to enjoin this movie.(").

164. See Hatic, *supra* note 120, at 408.

165. *Id.*

166. See Craig P. Bloom, Note, *Hangover Effect: May I See Your Tattoo, Please*, 31 CARDOZO ARTS & ENT. L.J. 435, 439 (2013) (arguing the statutory rights vested in a copyright holder do not amount to involuntary servitude since the act of receiving a tattoo is almost always a voluntary decision).

167. *Id.* at 460-63 (discussing the test for implied licenses laid out in *Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990), which requires a design request, design delivery, and intent to grant a license). Given the permanent nature of tattoos, the tattoo artist presumably understands that when a customer leaves the shop, "the sole power to direct how the tattoo is used no longer resides" with the tattooer. *Id.* at 464.

168. *Id.* at 463.

C. *The Need to Reform the Norms: A New Constitutional Theory of  
Tattoo Protection*

As the above discussion suggests, the application of formal legal doctrine to body art could have broad and disturbing implications, given the use of the human body as the medium in which the copyrighted works are fixed. For example, what is the appropriate remedy if a tattoo is itself infringing? Could a court properly order that person to remove or cover up the tattoo without violating constitutional norms of privacy, bodily integrity, or free speech?<sup>169</sup> Courts have not yet tackled these difficult questions, perhaps due to the difficulty of monitoring tattoo subjects and their bodies, as well as concern on behalf of tattooers that bringing claims against their famous clients would aggravate fans and harm their businesses.<sup>170</sup> Although the answers to these challenging questions fall beyond the scope of this Note, raising them suggests that a multiplicity of speakers and authors exist in each tattoo transaction.

The law should address the ambiguities currently present in tattoo protection, particularly encouraging the creation of tattoos by protecting the *process* of tattooing. In Part III, I argue that future tattoo jurisprudence should reflect and give deference to the collaborative client-tattooer relationship, taking affirmative steps toward applying an integrative approach à la *Anderson* and *Coleman*. Such an approach would adequately protect the complexities, norms, and relationships inherent in the tattoo industry. In general, lawmakers and policymakers should be “respectful of the norms that have developed among tattoo artists,”<sup>171</sup> and should allow changes in the tattoo industry to inform further development of related laws in order to more accurately protect freedom of expression and to encourage the creation of new works of art deserving of copyright protection. The following Part bridges the gap between First Amendment and copyright discussions of tattoo jurisprudence, advocating for a multi-speaker, circumstantial approach that better coordinates with the authorship inquiries under copyright law.

III. RECONCILING COPYRIGHT AND FIRST AMENDMENT NORMS FOR  
ROBUST TATTOOING PROTECTION

The act of tattooing can have a cathartic effect upon customers who seek meaningful designs that signify personal accomplishments or milestones, as well as on the tattooers who use customers’ stories as inspiration to create the collaborative designs. When premeditated, taking such permanent action serves as an indicator of commitment and self-control. Emotional catharsis can also result from tattoos that symbolize a painful memory from one’s past, with the act of tattooing signifying the “healing” of that past wound

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169. Cotter & Mirabole, *supra* note 117, at 100.

170. *See id.* at 101.

171. Beasley, *supra* note 44, at 1176–77.

through permanency, acceptance, and helping the bearer begin or complete the grieving process.<sup>172</sup> The tattooer-customer relationship therefore creates an “exchange of energy” that results in expression on behalf of both the tattooer and the customer.<sup>173</sup> Consequently, a constitutional theory that embraces tattooing as pure speech would better recognize the emotive and collaborative nature of these tattoo transactions, protect multiple speakers’ expressions, and align with informal copyright norms.

I propose that courts should take an approach that expands on *Anderson*’s recognition of tattooing as pure speech by reevaluating and increasing the level of scrutiny that should be applied to municipal near-bans on tattooing. Particularly, courts should scrutinize “content-neutral” bans at the highest level. In both *Anderson* and *Coleman*, the courts found that the regulations—which effectively banned all tattoo parlors (either by omission or by granting the city council virtually unfettered discretion, respectively)—were not content-based, because they did not ban only those parlors conveying a particular kind of subject matter.<sup>174</sup> But banning an entire category of speech seems to be the very definition of a content-based restriction, especially if such speech is prohibited before it can even be created and disseminated. Accepting the established premise that tattoos constitute pure speech, an intentional ban on the conduct leading up to the creation of that pure speech necessarily bans all tattoo-related content. Viewed as a pragmatic matter, then, such purportedly “content-neutral” bans might not be so evenhanded. Affording the act of tattooing fuller First Amendment protec-

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172. See generally Marisa Gwidt, *Tattoos for Catharsis*, BUZZ (May 25, 2012), <http://readbuzz.com/arts/2012/tattoos-for-catharsis> (providing personal examples about the psychology of pain in tattooing).

173. See Shawn Loeffler, *Interview: Kat Von D*, ASKMEN, [http://www.askmen.com/celebs/interview\\_250/288b\\_kat\\_von\\_d\\_interview.html](http://www.askmen.com/celebs/interview_250/288b_kat_von_d_interview.html) (last visited Oct. 4, 2013) (discussing how through the dynamic exchange, celebrity tattooer Kat Von D has learned many valuable life lessons from her clients and shared in their personal emotional stories).

174. See *supra* Part I.A. For example, I would argue that the zoning regulation in *Anderson* is one which could pass as content-neutral, but which in reality was artfully drafted to specifically exclude those types of businesses that the local government did not deem to be in its best interests (by including an exhaustive list of specifically-allowed types of businesses). If such a regulation were actually content-neutral, then as a practical matter, it would not result in a total ban on a particular kind of activity. Content-based regulations must pass strict scrutiny, meaning that they are “necessary to serve a compelling state interest” and are “narrowly drawn to achieve that end[.]” *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1063 (9th Cir. 2010) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)). Where the claim is not that the regulation is content-based, however, the level of scrutiny is somewhat lower: the regulation must only be a reasonable time, place, or manner restriction on restricted speech. This test asks whether the restriction is (1) “justified without reference to the content of the regulated speech”; (2) is “narrowly tailored to serve a significant governmental interest”; and (3) “leave[s] open ample alternative channels for communication of the information.” *Anderson*, 621 F.3d at 1064 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

tion via increased judicial skepticism would help level the playing field for tattoos as an expressive medium that is every bit akin to writing or painting.

My solution requires courts to apply strict scrutiny to all content-based speech regulations, which will require courts to look beyond the actual text of the regulation to its practical or intended effects. I will call this the “*Anderson-Plus*” approach to tattooing protection. As a practical matter, judges (and future First Amendment jurisprudence) would benefit from immersion in the detailed and relationship-oriented norms of the tattoo industry and its history of targeted regulations in order to bring a more balanced view to the courtroom. In conjunction with revisiting the proper scrutiny inquiry, the *Anderson-Plus* approach would protect not only tattooists’ right to engage in their trade, but also the right of potential customers to engage in protected expression. Specifically, it would protect the latter right by ensuring that tattoo parlors are (1) safe and appropriately-regulated to comply with health standards (i.e., not forced underground)<sup>175</sup> and (2) not altogether prohibited under unreasonable zoning regulations or licensing restrictions. Although some may argue that it is not the judge’s role to pause and consider the driving forces behind a given regulation’s drafting, a more thoughtful analysis of the appropriate level of scrutiny in each case (by both attorneys and judges) would help ensure that our resulting case law protects the expression of the parties who deserve it the most. Such below-the-surface inquiries are, I believe, necessary in order to continue granting tattooing the full speech protections established in *Anderson*.

#### A. *First Amendment Implications*

A broader swath of tattooing activities would receive stronger First Amendment protection under the *Anderson-Plus* approach. But since only a small percentage of American courts are currently bound by *Anderson* and *Coleman*, many others remain free to categorize tattooing as conduct rather than expressive activity or pure speech. In the latter category of courts, this threshold inquiry as it exists gives too much discretion to judges to make this initial classification, with inadequate guidelines for determining how and when to apply the vague legal standards provided by the relevant First Amendment cases. From the drastically different outcomes discussed in each of the three approaches in Part I, it is evident that the initial conduct-versus-expressive activity classification can have dire consequences on the judicial fate of the tattooing process, the underlying businesses, and tattoo artists’ and their clients’ abilities to engage in expression by producing tattoos. A judge opposed to tattooing as a general matter can easily frame the issue by declaring tattooing to be expressive conduct, thus subjecting it to the *Spence* test and finding that it is not “sufficiently imbued” with communicative elements.

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175. See Strocker, *supra* note 54, at 205.

The counter-argument is that a more tattoo-friendly judge could just as easily frame the issue by declaring tattooing to be protectable expressive activity, with similarly unguided discretion beyond this initial classification. But the *Anderson-Plus* approach does not seek to radically change the existing paradigms. Instead, requiring courts to apply strict scrutiny to all content-based speech regulations would serve to place tattoos and the process of tattooing on equal First Amendment grounds with paintings and the process of painting. *Anderson-Plus* merely aims to level the playing field for different mediums of the same expressive nature by urging judges to treat speech-related regulations with an appropriate level of skepticism when applying existing constitutional laws.

### B. Copyright Implications

The *Anderson-Plus* approach enhances the current copyright legal landscape surrounding tattoos by recognizing the complexities inherent in multi-speaker transactions. The recognition of both tattoos and the process of tattooing as deserving of First Amendment protection better squares with the existing authorship regime under copyright law. For example, the questions asked under a First Amendment analysis (Who is the speaker? Whose speech should be protected?) might be viewed as analogous to the determination of authorship under copyright law. Just as a First Amendment inquiry should look beneath the surface of each speech regulation to identify the amount and origins of the banned speech, copyright law looks to the individual circumstances of each case in order to determine authorship. To return to the tattoo versus painting analogy, a tattoo deserves no less First Amendment or copyright protection than a painting.<sup>176</sup> A commissioned painting or tattoo would receive no less First Amendment or copyright protection than one an artist independently designed, although the resulting authors would differ based on the applicable sole author, joint author, or work for hire analysis. Extending this reasoning via the pure speech protections of the *Anderson-Plus* approach would logically align with copyright's low bar to originality, thereby allowing the continued production and expression of a fuller range of copyrightable images as well as client and tattooer speech.

Additionally, affording tattooing a higher level of First Amendment protection may have the long-term consequence of making the accompanying copyright protection for the resulting tattoos more robust, since if the art form is deemed worthy of the law's protection on one ground, this effect is more likely to carry over to other areas of the law. In this manner, the *Anderson-Plus* approach helps bridge the gap between existing First Amendment and copyright tattoo norms.

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176. See notes 39–41, 109–114 and accompanying text.

## CONCLUSION

Despite its “countercultural origins,” the tattoo industry does not significantly differ from other creative industries like painting or publishing, in that it “capitalizes on market demand for original creative works.”<sup>177</sup> Tattooers should therefore receive the same robust speech protections as writers or painters. Cases like *Anderson* and *Coleman* have taken commendable steps toward recognizing and protecting tattoos and tattooing as historically-rich forms of speech deserving of First Amendment protection, suggesting that the finished products are worthy of formal protections as well. The *Anderson-Plus* approach outlined above expands on this perspective by applying a higher level of scrutiny to all content-based speech regulations. It would also provide an additional safeguard to ensure that municipal regulations are not being used as prior restraints that place “unbridled discretion in the hands of government official[s] or agenc[ies],”<sup>178</sup> thus granting First Amendment protection to a fuller range of deserving, creative expression. This approach would further integrate the spirit of informal copyright norms into tattoo jurisprudence by recognizing the multiple layers of expression and authorship involved in each tattoo transaction. As speech protection for tattooing continues to develop, the *Anderson-Plus* approach will save judges from facing the unguided task of struggling to apply formal copyright doctrine and subjective inquiries to tattoos themselves, embodied on a living canvas rather than an inanimate work.

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177. Perzanowski, *supra* note 136, at 3.

178. See Strocker, *supra* note 54, at 206 (quoting *Voigt v. City of Medford*, No. 2005-00163F, 2007 WL 738750, at \*3 (Mass. Super. Ct. Jan. 30, 2007)).