



A HISTORY OF INTELLECTUAL PROPERTY **IN 50 OBJECTS**

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49 Mike Tyson Tattoo

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MIKE TYSON'S FACIAL tattoo has been described as one of the most distinctive tattoos in North America. It has attracted controversy as an example of the cultural appropriation of *ta moko*, the sacred culturally embedded tattooing practice of the Maori people of Aotearoa/New Zealand. It has also attracted much media attention for its place at the heart of *Whitmill v. Warner Bros.*, a rare litigated instance of a tattooist enforcing their copyright in a tattoo design. More than this, though, Tyson's tattoo is an excellent example of the tensions that emerge over the protection of traditional knowledge, and the difficulty of claiming one truth in an intellectual property world that was born in the Western philosophical tradition, and is only now beginning to come to terms with its colonial heritage.

Mike Tyson's "warrior" tattoo was inked by Las Vegas tattooist S. Victor Whitmill in 2003. From the time of Tyson's first public appearance with the tattoo, Maori activists and scholars were critical of it as a cultural appropriation of *ta moko*. Tyson's tattoo is monochrome, curvilinear, features two spiral shapes, and was placed around his left eye. Whitmill has described the "flow" of Maori art as a design influence, and he created it after showing Tyson pictures of Maori *moko*. In Maori culture, facial *moko* is a privilege reserved for respected cultural insiders, and it represents and embodies the wearer's sacred genealogy and social status. Appropriating an individual's *moko* is profoundly offensive and akin to identity theft.

But the controversy from the original tattoo wasn't the last of it. In THE HANG-

OVER PART II an exact copy of Tyson's tattoo was featured on the face of actor Ed Helms as part of a humorous plot device. Whitmill was outraged, and claimed copyright over his tattoo. In 2011 he sued Warner, arguing that they had violated his exclusive right to authorize derivative works. Whitmill's decision to sue stirred lingering resentments in Aotearoa/New Zealand around the tattoo's cultural content: in response to the litigation, Maori politician Tau Henare tweeted that it was a "a bit rich" that Tyson's tattooist was claiming someone had stolen the design, given that he had copied it from Maori without permission. Maori arts scholar Ngahaia Te Awekotuku's criticism of Whitmill's assertion of copyright ownership was widely reported:

It is astounding that a Pakeha tattooist who inscribes an African American's flesh with what he considers to be a Maori design has the gall to claim ... that design as his intellectual property.

The tattooist has never consulted with Maori, has never had experience of Maori and originally and obviously stole the design he put on Tyson. The tattooist has an incredible arrogance to assume that he has the intellectual right to claim the design form of an indigenous culture that is not his.

Given the Western intellectual property system's miserable colonial record, it should come as no surprise that the claim of cultural appropriation was irrelevant to the trajectory of the *Whitmill* proceedings. Whitmill asserted that he was the author and owner of the copyright in an original

artistic work, comprising the tattoo on Tyson's face. Warner did not dispute that Whitmill created the tattoo or question its provenance, but argued that copyright does not subsist in tattoos. At the preliminary hearing, Judge Perry refused to grant Whitmill's request for a preliminary injunction to prevent the release of the film; but she did accept the basis of Whitmill's claim, stating that "of course tattoos can be copyrighted." As a result she ruled that Whitmill had a strong likelihood of prevailing at trial.

The only time that a connection with *moko* was mentioned was after the preliminary hearing when Warner released a media statement that it would be pursuing pre-trial discovery to determine whether Tyson's tattoo was derivative of preexisting Maori designs. This investigation never eventuated however, as the case settled soon after. In any case, there is no evidence to suggest that Whitmill copied an existing *moko*.

The invisibility of the claim of Maori cultural appropriation and the primacy of Whitmill's rights suggest that copyright law is not interested in the aesthetics of imagery, the source of artistic inspiration, or the possibility of competing cultural rights to indigenous design forms. In legal scholarship, this bias in copyright's functioning is typically attributed to the inherent philosophical conflicts between Western intellectual property systems that are focused on private economic rights and financial gain, and indigenous approaches to intellectual rights and heritage that tend to be centered on collective interests, reciprocal obligations, and respect for natural resources. These divergent underpinnings mean that, in this case, while individual *mokos* are protected by copyright the same as any other tattoo art, copyright's cornerstone principles of limited duration, idea/expression dichotomy, material form, and preference for individual ownership will not protect indigenous cultural imagery and art styles from appropriation by Westerners. Whitmill was legally permitted to adopt the visual markers of *moko* by using curvilinear lines that flow with the contours of the body, a monochrome color scheme, and by placing *koru* motifs

in the negative space—so long as he did not directly copy a substantial part of an existing, copyright *moko*.

At first glance, then, Tyson's tattoo is just another version of the familiar story of Western appropriation of indigenous culture: a taking without remuneration, or even recognition. This age-old story of colonial plunder seems worse when one considers the fact that ownership of traditional knowledge was never mentioned during the *Whitmill* legal proceedings. *Ta moko*, it seems, had been cast into the public domain, a domain where everything is free for Westerners to take without payment.

But a closer look at the controversy that surrounds the tattoo's cultural content revealed that the foundations of the cultural appropriation allegations were contested from within. Some Maori *ta moko* practitioners considered Tyson's tattoo to be an inoffensive tribal design, and the *ta moko* industry was, and is, reasonably open to outsider engagement. Taking and re-using *moko*-inspired tattoo imagery is not necessarily problematic, and the depth of cultural contestation that surrounded Tyson's tattoo illustrates a dynamic discussion that occurs within cultural appropriation claims.

Within Aotearoa/New Zealand there was a strong counterclaim from *ta moko* practitioners that Whitmill created merely a "tribal" tattoo for Mike Tyson, and did not misappropriate *ta moko*. "Tribal" is a Western tattoo genre that offers a contemporary interpretation of traditional Pacific, Asian, and African tattoo imagery. Henriata Nicholas, a female *ta moko* artist and *uhi* practitioner, suggested that Whitmill's design was likely inspired by traditional Maori art, but stated that she couldn't connect it solidly back to her own imagery. Award-winning *ta moko* practitioner Richie Francis considered the design a tribal hybrid: an "intelligent" mix of the Maori *koru* and the solid black of Hawaiian and Tahitian motifs. For Francis, the media reporting of the tattoo as cultural appropriation was, in fact, an indictment of how poorly the media were educated about *ta moko*.

Rangi Kipa, a renowned artist, sculptor and *ta moko* practitioner, did not recog-

nize any Maori elements in the tattoo. He regarded it as heavily influenced by traditional Papua New Guinean tattoos, and said that it had very little to do with *moko*, despite its placement on the face, a placement that implies a Maori connection. It seems then that Tyson's tattoo was not necessarily perceived to be appropriate of Maori culture, even if it was inspired by *moko*, is monochrome, and contains *koru* motifs.

There is also a cultural contest around whether intercultural engagement with *moko* is permitted. *Moko's* circulation as fashion has been criticized by some Maori as inconsistent with *moko's* sacred function and cultural importance. It is suggested that it is inappropriate for cultural outsiders like Tyson to wear *moko*-inspired designs because they have no connection to Maori culture. Yet *ta moko* practitioners themselves appear open to this type of intercultural engagement. They regularly apply *moko* to cultural outsiders. *Ta moko* practitioners might vary in how they conceptualize this work—for example, some use the word *kirituhi* to describe *moko* for outsiders that is devoid of spiritual power—however, it remains the right of the *ta moko* practitioners to conduct their business how they please, including whom they decide to tattoo. This suggests that *moko* is not as closed to outsiders as the Maori cultural appropriation allegations against Whitmill might imply.

It is also unclear whether non-Maori using *moko* as design inspiration is culturally problematic. Reproducing existing *mokos* and ancestral imagery is taboo for Maori and non-Maori alike, but taking cultural imagery is not necessarily troubling to Maori. While some tribes have “signatures,” and use or combine patterns in a certain way, *moko* is not a heraldic device. In Aotearoa/New Zealand, *pakeha* tattooists regularly create *moko*-inspired work and it does not appear that *ta moko* practitioners regard them as direct competitors. Tattoos that are merely *moko*-inspired are perceived to be visually recognizable from the work of insiders, and are generally seen as poor quality. For example, *ta moko* artist Jack Williams likens outsider tattoo work to “a page of spelling mistakes.” He believes

that if a customer values authenticity and wants the real deal, they will seek out an experienced Maori practitioner. Similarly, Rangi Kipa, who describes imitative work as third-rate, does not worry about competition from non-Maori tattooists. He suggests the answer is in *ta moko* artists continuing to innovate and develop their narratives and meanings as they progress. These perspectives suggest that as long as *ta moko* artists are the source of quality *moko*, commissioning outsiders like Whitmill to create imitative work is unlikely to cause financial harm or be misrecognized as authentic, and so cannot threaten Maori cultural integrity.

The cultural appropriation controversy that surrounds Mike Tyson's *moko*-inspired “warrior” tattoo is a fascinating microcosm of the concerns around traditional knowledge, and the inability of the Western-created intellectual property systems to account for all the nuances of other cultures. It is an indication of the gap in intellectual property systems to account for anything other than that which fits into a western ideological framework. Tyson's tattoo, and the furor that surged around it, is as neat a depiction as one could imagine of the problems that occur from the erasure of indigenous cultural imagery and art styles from protection. But it is also a picture of the internal tensions within indigenous cultures, and a consideration of it facilitates a secondary, more complex reading of this cultural terrain as marked by multiple, conflicting cultural perspectives and interests. Cultural appropriation allegations, as well as critiques of law's Western bias, can mask the dynamism of culture.

The simple design in ink means so much more than its face value. ♦

Further Reading

APN Holdings NZ Limited (2003) “Concern Over Ignorant Use of Maori Moko,” *New Zealand Herald*, 27 February. Available at: www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3198136

Leon Tan (2013) “Intellectual Property Law and the Globalization of Indigenous Cultural Expressions: Maori Tattoo and the

Whitmill versus Warner Bros Case,” *Theory, Culture and Society*, 30(3), pp. 61–81.

Whitmill v. Warner Bros, ED D Mo, 4:11-cv-752, 2011.

The quotes from ta moko practitioners used in this chapter are drawn from fieldwork that was conducted in the North Island of Aotearoa/New Zealand in 2012, as part of the author’s PhD project (forthcoming, University of New South Wales, Australia).

