The Politics of Cultural Appropriation Claims and Law Reform

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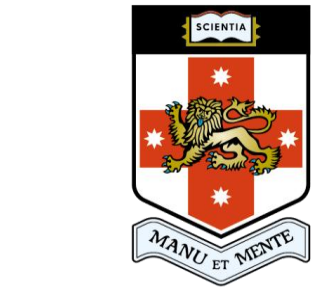
PhD Candidate



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Abstract

This thesis is about cultural appropriation, copyright law, and tattoos. It explores in depth the argument for law reform to prevent the cultural appropriation of Māori and Aboriginal and Torres Strait Islander culture, with a particular focus on the protection of cultural imagery and arts styles. First, the thesis unpacks the nature of cultural appropriation claims as possessive claims, identity claims, and performative utterances. Second, it analyses the ambiguities and contradictions that sit behind cultural appropriation claims, as identified through law reform scholarship and an empirical study of how law interacts with and governs cultural life and artistic practice, with respect to tattoo subculture. Third, it teases out the political stakes of alleging cultural appropriation through a close consideration of historical constructions of cultural difference and intercultural dealings in tattoo in the Pacific region.

Three analytical frameworks of 'performativity', 'law and society', and 'desire for the Other' help frame the inquiry. Doctrinal analysis is utilised to explore private property claims over imagery and arts styles, and contextualise discussion of legal exclusion and inclusion of Indigenous peoples and their artforms. Fieldwork exposes how meaning is made outside of the formal legal frame in the everyday lives of artists, and the dynamism and contest that marks cultural production. Historical analysis provides a deeper understanding of cultural appropriation allegations as performances that construct a very specific relationship between appropriation and the colonial past.

In exploring the intersection of cultural appropriation and law from above, from below, and in historical context this thesis exposes the dynamism of cultural appropriation claims, the challenges of transplanting new legal norms within artistic subcultures, and the politics that is engaged, resisted, and produced by claims of cultural appropriation in the domain of copyright law. Ultimately, it is argued that the justification for, and utility of, legal intervention in local sites that already order creativity, appropriation, and conflict resolution in the shadow of the law is neither as straightforward nor as persuasive as is assumed in reform scholarship.

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Declaration of Originality

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have work at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

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For Delilah and Joseph, with love

… the core of white privilege is the ability to consume

anything, anyone, anywhere.[1]

[1] Linda Martin Alcoff, *Visible Identities: Race, Gender, and the Self* (Oxford University Press, 2006) 217.

Contents

Glossary

Throughout this thesis, I make use of the orthography provided by the online Māori dictionary, provided by Te Whanake Māori Language Online. I do not italicise Māori words. All spellings of Māori words have been cross-checked at *www.maoridictionary.co.nz/*. Most of the meanings used in this Glossary are taken from this dictionary, the rest are from other authoritative sources. Note that where direct quotes are used in the text of this thesis, I directly transcribe the quotation as it appears in the original source. I also transcribe source titles as they originally appeared. This results in some minor variations, for example, in the use of macron accents and italicisation.

haka	a posture dance – vigorous dances with actions and rhythmically shouted words
hapū	kinship group, clan, sub-tribe – section of a large kinship group and the primary political unit in traditional Māori society. A number of related hapū usually shared adjacent territories forming a looser tribal federation (iwi)
iwi	extended kinship group, tribe
kaitiaki	trustee, minder, guard, custodian, guardian, caregiver, keeper, steward
karakia	incantation, ritual chant, charm, spell – a set form of words to state or make effective a ritual activity
kaupapa Māori	Māori approach, Māori customary practice, Māori agenda, Māori principles, Māori ideology – a philosophical doctrine, incorporating the knowledge, skills, attitudes and values of Māori society
kirituhi	skin art, tattooing – non-traditional tattooing that is not done using Māori protocols or imagery
kōrero	discussion, conversation, discourse
koru	spiral motif (in kowhaiwhai patterns and carving)
kōwhaiwhai	painted scroll ornamentation – commonly used on meeting house rafters
mana	prestige, authority, control, power, influence, status, spiritual power, charisma moko: Māori tattooing designs on the face or body done under traditional protocols
manaia	stylised figure used in carving, a bird-like figure
marae	courtyard – the open area in front of the wharenui, where formal greetings and discussions take place. Often also used to include the complex of buildings around the marae

mātauranga Māori	Māori knowledge – the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity and cultural practices. Mātauranga Māori includes forms of expression such as art forms like tā moko
mauri	life principle, life force, vital essential – the essential quality and vitality of a being or entity
moana	sea, ocean, large lake
moko	Māori tattooing designs on the face or body done under traditional protocols
moko kauae	woman with chin moko
pākehā	New Zealander of European descent
puhoru	moko (tattoo) on the thigh
rauru	interlocking spiral design
tā moko	to tattoo, applying traditional tattoo, apply moko
tangata whenua	local people, hosts, indigenous people – people born of the whenua, ie of the placenta and of the land where the people's ancestors have lived and where their placenta are buried
tāniko	to finger weave, embroider
taonga	treasure, anything prized – applied to anything considered to be of value including socially or culturally valuable objects, resources, phenomenon, ideas and techniques
tapu	sacred, prohibited, restricted, forbidden
te reo	Māori language
te hoko upoko	trade in preserved, tattooed heads (upoko tuhi)
tikanga	correct procedure, custom, habit, lore, convention, protocol – the customary system of values and practices that have developed over time and are deeply embedded in the social context
tiki	carved figure, image, in the abstract form of a human
tino rangatiratanga	self-determination, sovereignty, autonomy, domination, rule, control, power
tohunga tā moko	moko expert, tattoo expert
tūpuna	ancestors, grandparents
uhi	moko instrument (for puncturing the skin, moko chisel
upoko tuhi	preserved or decorated head
utu	payment, salary, reciprocity – a concept concerned with the maintenance of balance and harmony in relationships between individuals and groups and order within Māori society, whether through gift exchange or as a result of hostilities between groups. It is closely linked to mana and includes reciprocation of kind deeds as well as revenge

waka taua	war canoe
wairua	spirit, soul
whakairo	carving
whakapapa	genealogy, genealogical table, lineage, descent
whānau	extended family, family group

Chapter 1: Introduction

On the 28 April 2011, an American tattoo artist, S Victor Whitmill, embarked upon legal action that the Smithsonian Museum now lists as the number one in a list of the 10 most famous intellectual property (IP) disputes of all time.[1] Whitmill brought a copyright infringement claim against Warner Bros. alleging that their film, *The Hangover Part II*,[2] featured an unauthorised reproduction of the facial tattoo he created for Mike Tyson.[3]

Whitmill's claim stated that Warner Bros. infringed his copyright in the tattoo by reproducing an almost exact copy on the face of actor Ed Helms' character, Stu Price, in *The Hangover Part II* and then by featuring derivative copies of the tattoo in the film's marketing and promotional materials.[4] In the film, a plot device sees Stu Price waking up in Bangkok shortly before his wedding day with a freshly inked facial tattoo. The use of this tattoo deliberately capitalises on Tyson's links to *The Hangover* franchise.

The case made the Smithsonian's top 10 list because of the perceived conflict between artists' rights and the fair use defence of parody, obiter dictum in the preliminary injunction hearing that suggested that Whitmill had a strong copyright infringement case, and Warner Bros.' willingness to alter the film to substitute a different tattoo on Helms' face for the film's DVD release to avoid a long trial.[5] However, in the South Pacific, this case was perceived to be controversial because of the conflict it highlights between artists' rights, cultural rights, and IP law. Māori activists were highly critical of Whitmill's assertion of copyright in the tattoo design.[6] Māori arts expert Ngahuia Te Awekotuku was particularly scathing in her evaluation of Whitmill's claim, stating '[i]t is astounding that a Pakeha tattooist who inscribes an African American's flesh with what he considers to be a Maori design has

[1] Megan Gambino, 'Ten Famous Intellectual Property Disputes', *Smithsonian.com* (online, 21 June 2011) <https://www.smithsonianmag.com/history/ten-famous-intellectual-property-disputes-18521880/>.
[2] *The Hangover Part II* (Warner Bros. Pictures, 2011). The first *Hangover* film, *The Hangover*, was released in 2009, and the third and final instalment, *The Hangover Part III*, in 2013.
[3] See 'Celebrity Moko Appropriations', Image 43, xvii of this thesis.
[4] S Victor Whitmill, 'Verified Complaint for Injunctive and Other Relief' in *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, 28 April 2011) document 1; see 'General Tattoo and Other', Images 88–9, xxv of this thesis.
[5] Gambino (n 1).
[6] See, eg, 'Tyson's Moko Draws Fire from Maori', *New Zealand Herald* (online, 25 May 2011) <http://www.nzherald.co.nz/news/print.cfm?objectid=10727836>.

the gall to claim ... that design as his intellectual property'.[7] Other commentators on the case noted the tattoo's 'derivative' nature because it was 'based on traditional Maori facial tattoos from New Zealand.'[8] Criticism of the tattoo's cultural content has abounded since it was created in 2003.[9]

In the pages that follow, I argue that *Whitmill's* importance as a copyright infringement case lies not so much in its doctrinal content so much as in the conversation it provokes about artists' rights, subcultural arts practices, and the "colonial" dimensions of seeking inspiration from Indigenous cultural imagery and arts styles. This discussion takes place in the context of a broader discussion of the intersection of cultural appropriation and law and the political activity in asserting a cultural claim. My purpose is to expose law's blindspots in its interactions with culture, challenge our expectations of positive law in this cultural terrain, and further our understanding of the nature of cultural appropriation claims in settler states.

Cultural appropriation is a possessive claim over a tangible or intangible aspect of culture; an objection to a perceived incursion by a cultural outsider.[10] In recent years, Indigenous possessive claims over cultural forms, iconography, and artistic styles in settler states such as Australia and

[7] Ibid.

[8] Brian Clark Howard, 'Release of Hangover 2 Could Be Delayed … After Mike Tyson's Tattoo Artist Sues Over Movie's Spoof Version', *Daily Mail* (online, 23 May 2011) <http://www.dailymail.co.uk/news/article-1389731/S-Victor-Whitmill-sues-Warner-Brothers-Mike-Tyson-tattoo-Hangover-2-delay-movie-release.html>. See also Aaron Glass, 'Legal Ta Moko-Over: Māori Tattooing, Copyright, and "The Hangover 2"', *Material World* (Blog Post, 13 July 2011) <http://www.materialworldblog.com/2011/07/legal-ta-moko-over-maori-tattooing-copyright-and-the-hangover-2/>. A connection between the tattoo and Māori moko was also noted in earlier commentary: see, eg, 'Tyson: Let the Carnival Begin', *Kitsap Sun* (United States, 21 February 2003) B04; 'Analysis: Tyson-Etienne Fight Could be a Flop', *Weekend Edition Saturday* (National Public Radio, 22 February 2003); 'Tyson's Tatts Upset Maori', *Gold Coast Bulletin* (Gold Coast, 28 February 2003) 12; 'They're Wearing Our Heritage', *Waikato Times* (Waikato, 28 February 2003) 8.

[9] See, eg, 'Concern Over Ignorant Use of Maori Moko', *New Zealand Herald* (online, 27 February 2003) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3198136>; 'Celebrity Tattoos Rile Maoris', *The Age* (online, 28 February 2003) <www.theage.com.au/articles/2003/02/27/1046064152066.html>; 'Tyson Tat Criticised', *Sydney Morning Herald* (online, 27 February 2003) <www.smh.com.au/articles/2003/02/27/1046064156056.html>; 'Iron Mike Riles Maoris', *Daily Telegraph* (Sydney, 28 February 2003) 23; 'Maori Academics Take Exception to Mike Tyson's New Facial Tattoo', *Agence France-Presse* (Wellington, 27 February 2003); 'Maori Counter', *Daily Post* (Liverpool, 22 February 2003) 4.

[10] See, eg, James Young and Conrad Brunk, 'Introduction' in James Young and Conrad Brunk (eds), *The Ethics of Appropriation* (Wiley-Blackwell, 2012) 1, 5; Bruce Ziff and Pratima Rao, 'Introduction to Cultural Appropriation: A Framework for Analysis' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 1, 15; Jonathan Hart, 'Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 137, 138.

Aotearoa/New Zealand[11] have multiplied,[12] attracting attention to cultural appropriation in international fora.[13] As the language of property is frequently employed in cultural claims, these claims are widely perceived in academic commentary as a demand for law reform.[14] Yet, their nature as a political phenomenon is rarely closely scrutinised, despite the fact 'that the important questions about cultural appropriation are the political ones.'[15] In academic commentary, resistance to subalternity is projected through a performance of colonial history that links appropriation to present and past injustice,[16] however, the oppressive nature of appropriation is not theorised in depth or with reference to specific histories of peoples and place. The failure to scrutinise the political dimensions of claims obscures a fuller understanding of cultural claiming as a subversive activity that links cultural representation and political representation,[17] and that seeks to foster respect for cultural autonomy. It is argued throughout this thesis that alleging cultural appropriation is a way of resisting the rearticulation of colonialism in law and broader society, and participating in public and hopefully being heard on matters pertaining to past and present injustice.

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[11] Hereafter 'New Zealand'.

[12] For a comprehensive account of cultural appropriation controversies in New Zealand, particularly during the 1990s and early 2000s when the term "cultural appropriation" became increasingly used, see Peter Shand, 'Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion' (2002) 3 *Cultural Analysis* 47, 47–88; *Guarding the Family Silver* (Tawera Productions/Black Pearl Ltd, 2005) <https://www.nzonscreen.com/title/guarding-the-family-silver-2005>.

[13] Most recently in the United Nations: Hilary Bird, 'Cultural Appropriation: Make it Illegal Worldwide, Indigenous Advocates Say', *CBC News* (online, 13 June 2017) <http://www.cbc.ca/news/canada/north/cultural-appropriation-make-it-illegal-worldwide-indigenous-advocates-say-1.4157943>; Andrew O'Reilly, 'UN Debates 'Cultural Appropriation', Trademarking Indigenous Cultural Expressions', *Fox News* (online, 16 June 2017) <http://www.foxnews.com/world/2017/06/16/un-debates-cultural-appropriation-trademarking-indigenous-cultural-expressions.html>; Hannah Ongley, 'The United Nations May Finally Make Cultural Appropriation Illegal', *Vice* (online, 16 June 2017) <https://i-d.vice.com/en_us/article/ywvv5w/the-united-nations-may-finally-make-cultural-appropriation-illegal>.

[14] I return to discuss this in more detail at section 2.1 of this thesis.

[15] Ziff and Rao (n 10) 5. See also Rosemary Coombe, 'The Expanding Purview of Cultural Properties and their Politics' (2009) 5 *Annual Review of Law and Social Sciences* 393, 394–5.

[16] See, eg, Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 20, 21; Aroha Te Pareake Mead, 'Understanding Maori Intellectual Property Rights' (Conference Paper, Inaugural Maori Legal Forum, 2002) 1 <http://news.tangatawhenua.com/wp-content/uploads/2009/12/MaoriPropertyRights.pdf>; Makere Harawira, 'Neo-Imperialism and the (Mis)appropriation of Indigenousness' (1999) 54 *Pacific World* <https://Maori news.com/writings/papers/other/makere.htm>; Toni Liddell, 'The Travesty of Waitaha: The New Age Piracy of Early Maori History' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 32, 42. I return to consider perspectives on appropriation as the "second wave of colonisation" at 2.1.1.1.

[17] Rosemary Coombe, 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 74, 78.

In the chapters that follow, I look at, through, and beyond the literal meaning of cultural appropriation claims as an assertion of possession. This promotes a more holistic appreciation of cultural appropriation and law than is currently apparent in much academic commentary, and provides a platform to better understand law reform discourse surrounding cultural appropriation claims. However, while this thesis engages with law reform discourse throughout, it is not itself a reform project. My primary aim is not to solve the "problem" of cultural appropriation, but to better understand the politics of settler states and the challenges of implementing new legal norms within arts subcultures. With regards to the latter inquiry, I engage a broad conception of law as legality; inclusive of, but not limited to, positive legal rights.[18] This recognises that subcultural dynamics and informal norms can disrupt the regulatory functioning of the formal law. Rather than prioritise analysis of the technical content of copyright law in the research that follows, I seek to engage with, and problematise, the competing constructions of legality that manifest in cultural appropriation disputes.

My intention in this project is to offer a rejoinder to the rights-based scholarship of many IP law academics that critique cultural appropriation as a legal problem that can be redressed by more or better legal rights. In chapter 2, I refer to this as a conventional yet progressive approach to cultural appropriation.[19] This approach reads cultural appropriation as a property claim and focuses on IP law's failure to value the unique context within which Indigenous art is produced, owned and regulated.[20] It directs attention to law's role in the production of cultural harm and the identity politics inherent in demands for legal recognition. However, it also flattens the richness of the intersection between cultural appropriation and law by failing to account for the dynamism of culture, the performativity of cultural claims, the agency of arts practitioners, and the historicity of appropriation allegations.[21] This obscures the identification of the range of competing interests that would need to be balanced if law reform were to better protect Indigenous cultural imagery and arts styles from

[18] I return to explain my approach to law and legality in detail at 1.1.3 of this chapter.
[19] I outline the key features of this scholarship in detail at 2.1 of this thesis.
[20] See section 2.1.1 of this thesis.
[21] For a detailed discussion of the value and limitations of the conventional progressive approach see 2.1.2 of this thesis.

appropriation. In chapters 5 and 6 I use the lived experience of artists and the colonial dynamics that sit behind appropriation, respectively, to discuss the limitations of the conventional progressive approach.

In IP discourse, property is the most familiar framework adopted to investigate the politics of cultural appropriation claims and law reform. Other frameworks include 'performativity', 'law and society', and 'desire for the Other', as developed in chapter 2.[22] Using the latter three frameworks to frame the inquiry in addition to investigating the relevance of property rights to cultural appropriation discourse, allows me to approach the intersection of cultural appropriation and law more broadly than is conventional. My decision to do this was informed by cultural anthropologist and lawyer Rosemary Coombe's provocation that critical reflexivity is needed around issues of rights and culture.[23] As applied to the arts practice of tattoo, with a particular focus on the culturally embedded tattooing practices of the Māori people of New Zealand known as tā moko, my analytical frameworks in addition to a socio-legal methodology inclusive of doctrinal analysis, fieldwork, and historical analysis,[24] enable a multidimensional reading of cultural appropriation. Cultural appropriation is approached as evidencing an unmet legal need, as something that is lived by artists, and as a historically contingent practice reminiscent of colonial injustice.[25] In the process, western law is problematised, as is the conventional progressive discourse that identifies its limitations, allowing for a deeper reflection upon the challenges of transplanting new legal norms in artistic subcultures.

In the remainder of this introductory chapter I will provide a working definition of a number of key concepts and outline significant sites of inquiry. In section 1.1, 'Cultural appropriation and law', I define cultural appropriation as an unstable possessive claim and explain my use of performativity to uncover the layers of meaning inherent in appropriation allegations.[26] I also explain why appropriation is received as oppressive by Indigenous claimants and IP scholars, noting the link between

[22] See sections 2.2–2.4 of this thesis.
[23] Coombe makes this comment in the context of the concept of culture in human rights discourse: Rosemary Coombe, 'Honing a Critical Cultural Study of Human Rights' (2010) 7(3) *Communication and Critical/Cultural Studies* 230, 232.
[24] For the methodology, see chapter 3 of this thesis.
[25] See chapters 4–6 of this thesis, respectively.
[26] For the performativity framework, see also section 2.2 of this thesis.

appropriation and the psychoanalytic language of demand and desire to investigate the ongoing effects of colonialism.[27] I then outline my approach to law and legality as inclusive of the social life of law, the legal consciousness of artists, and informal forms of ordering such as social norms, ethics, and business considerations,[28] so as to better situate my concern with lived experience in local sites of production.

In section 1.2, 'Tattoo, moko and misappropriation in context', I explain my rationale for choosing tattoo and moko and their mutual implication in Māori-inspired tattoo imagery to ground this thesis' analysis of the intersection of cultural appropriation and law. I map the key features of moko, note the pervasive nature of moko misappropriation in New Zealand, and introduce the commercial and sacred features of the moko industry. Then, I briefly map the features of the western tattoo subculture over time, before explaining the nature of tribal tattoos as an Indigenous inspired artistic genre, and its perceived relevance to appropriation as a form of colonial consumption.

In section 1.3 'Thesis structure', I provide a summary of each thesis chapter.

I will now outline my approach to cultural appropriation and law in detail.

1.1 Cultural appropriation and law

1.1.1 Defining cultural appropriation

In scholarly commentary, cultural appropriation is understood to have occurred when a non-authorised cultural outsider takes what is perceived to be cultural property belonging to another culture.[29] Notions of entitlement and theft are manifest.[30] While this general understanding accords with appropriation as received by cultural insiders, the focus on possession promotes a fixed and identifiable vision of culture as clear boundaries around cultural traits, properties, and membership are assumed.[31] This runs counter to the accepted position in contemporary scholarship that culture is a dynamic social intersection marked by contest and contradiction as much as cohesion, and that

[27] For the desire framework, see also section 2.4 of this thesis.
[28] For the law and society framework, see also section 2.3 of this thesis.
[29] See, eg, Young and Brunk (n 10) 2–3.
[30] Ibid 5; Ziff and Rao (n 10) 15.
[31] See Stephen Pritchard, 'Essence, Identity, Signature: Tattoos and Cultural Property' (2000) 10(3) *Social Semiotics* 331, 334.

culture's sites are often mixed or shared.[32] As anthropologist Clifford Geertz advises, culture is best approached semiotically; 'culture is not a power, something to which social events, behaviors, institutions, or processes can be causally attributed; it is a context, something within which they can be intelligibly – that is, thickly – described.'[33]

Throughout this work, I adopt an interpretive view of culture to help identify and analyse the constructed nature of cultural appropriation claims as political claims as much as property claims. The implied assertion of culture as static as against the fluidity of culture as context means that competing entitlements are concealed as the limits of 'inside' and 'outside' culture are frequently more blurred than possessive claims suggest.[34] As art critic Lucy Lippard describes, the borderlands of culture are 'porous, restless, often incoherent territory.'[35] Rather than take the approach of commentators such as Bruns, who construes the essentialised conceptions of culture in claims as engaging 'a form of cultural racism that holds that cultures should be kept pure and apart from each other',[36] I instead focus on the agency inherent in the process of constructing claims. As developed in chapter 2, read as a performative utterance, speaking against appropriation is a way of seizing discursive space in a society that frequently obscures and silences the views of Indigenous peoples.[37] Allegations of cultural appropriation are a political act and subversive regardless of whether the lines they draw around culture are heavily contested because of the way rights claims and assertions are made and reiterated.[38]

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[32] See, eg, '[c]ulture is contested, temporal, and emergent': James Clifford, 'Introduction: Partial Truths' in James Clifford and George E Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (University of California Press, 1986) 1, 19; Renato Rosaldo, 'Ideology, Place, and People Without Culture' (1988) 3(1) *Cultural Anthropology* 77, 87; Jonathan Friedman, *Cultural Identity and Global Process* (Sage, 1994) 73–5; Arif Dirlik, 'Culturalism as Hegemonic Ideology and Liberating Practice' (1987) 6 *Cultural Critique* 13, 14–5. On the academy's shift away from studying discrete conceptions of culture see Renato Rosaldo, 'Whose Cultural Studies?' (1994) 96(3) *American Anthropologist* 524, 526–7.
[33] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 14.
[34] Ziff and Rao (n 10) 3. See also Schneider who describes cultural appropriation claims as 'in a straightjacket of cultural essentialism': Arnd Schneider, 'On 'Appropriation'. A Critical Reappraisal of the Concept and its Application in Global Art Practices' (2003) 11(2) *Social Anthropology* 215, 218.
[35] Lucy Lippard, *Mixed Blessings* (Pantheon Books, 1990) 6.
[36] Andreas Bruns, 'What is Wrong with Copying from Other Cultures? Appropriation, Alienation, and the Moral Evaluation of Copying' (Conference Paper, Copy Ethics: Theory and Practice Conference, Bielefeld University, 11–4 July 2017) 9.
[37] See section 2.2 of this thesis.
[38] Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press, 2012). For more detail, see section 2.2.4 of this thesis. See also Rosemary Coombe, 'Commentary on Michael Brown's

In the chapters that follow, I conceptualise cultural appropriation claims as a speech act and as a performative utterance[39] as well as a possessive claim. I use the term "performative" to describe the act of speaking as an act that brings something into being in and through the saying.[40] As critical theorist Judith Butler notes, '[t]he speech act says more … than it means to say.'[41] In chapter 2, I assert that through repetition, the act of alleging appropriation works to produce, define, and maintain a cultural identity.[42] In conventional scholarship, the unique cultural identity that is produced by cultural claimants is understood to construct a property interest in cultural entitlements and is relied on to inform arguments for differential treatment in law.[43] However, as clear boundaries are inevitably drawn around culture in the face of culture's dynamism, claims are fundamentally unstable and liable to disruption from within as well as without. Conventional scholars tend to ignore this instability. In chapter 4, the Whitmill tattoo controversy is used as a stepping off point to explore some of this contestation in specific, local sites in chapter 5. A site-specific study of tattoo misappropriation reveals that cultural claims are political and strategic, as well as possessive in nature. I return to the utility of the concept of performativity for securing a deeper understanding of the nature of cultural appropriation claims in chapter 2.[44]

Defining cultural appropriation as a performative utterance recognises that what claims do as well as what they say is important in settler states. Acknowledging and investigating the strategic functioning of cultural appropriation claims also recognises the embeddedness of claims in their unique social, cultural, and historical contexts, and in particular, their connection to perceptions of past and continuing colonial injustice.[45] In chapters 4–6, I investigate the way in which claims construct a relationship with the past as well as produce a bounded identity. I then reflect upon how these

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"Can Culture Be Copyrighted?"' (1998) 39(2) *Current Anthropology* 207, 207; Rosemary Coombe, 'Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference' (2005) 1(1) *Law, Culture and the Humanities* 35, 49–52.

[39] See generally JL Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955*, ed JO Urmson and M Sbisa (Oxford University Press, 1975).

[40] Ibid 6, 12.

[41] Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 10.

[42] See section 2.2.3 of this thesis.

[43] See section 2.1.2 of this thesis.

[44] See section 2.2 of this thesis.

[45] Describing appropriation as 'disquieting' and 'painful' and on the need to examine appropriation in historical context: Robert Nelson and Richard Shiff (eds), *Critical Terms for Art History* (University of Chicago Press, 2nd ed, 2003) 172.

constructions can be disrupted by the lived experience and legal consciousness of artists in local sites.[46] Attention to the engagements and tensions between cultural appropriation, colonialism, and lived experience help unpack the conventional expectation flagged in chapter 2 that changing the law will achieve reconciliation and secure predicable behavioural change in this cultural terrain.

1.1.2 Appropriation as asserted and experienced

In this thesis I focus on appropriation as asserted by Indigenous claimants as a culturally intrusive act and power dynamic where the dominant Self takes from the oppressed Other.[47] Examining appropriative acts from the perspectives of those who assert cultural appropriation and are affected by it brings Indigenous perspectives to the fore. I use "Indigenous" as an umbrella term to include Māori peoples as the tangata whenua of New Zealand amongst other first nations peoples affected by colonisation.[48] Privileging Indigenous experience frames appropriation as (at least potentially) alienating, popularising, corrupting and commercially exploiting of Indigenous cultures and as a threat to cultural survival and identity, in the context of ongoing colonialisms.[49] This recognises that appropriative acts 'exceed intention';[50] they are not 'passive, objective, or distinterested, but active, subjective and motivated' actions.[51] "Appropriation", as I deploy the term in the chapters to come, thus captures all actions claimed to be an unwelcome cultural intrusion, including the use of cultural

[46] On the need to pay attention to individual agency when conceiving of appropriation: see generally Schneider (n 34) 225–6.
[47] Ziff and Rao (n 10) 5–7.
[48] When referring to Māori specifically I use the term "Māori". Note the term 'Indigenous' is rarely deployed in New Zealand: see Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012) 6.
[49] See the typology 'cultural exploitation' in Richard Rogers, 'From Cultural Exchange to Transculturation: A Review and Reconceptualization of Cultural Appropriation' (2006) 16 *Communication Theory* 474, 486–90. See also Rebecca Tsosie, 'International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property' in Christoph Beat Graber, Karolina Kuprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012) 221, 237; David Howes, 'Cultural Appropriation and Resistance in the American Southwest: Decommodifying Indianness' in David Howes (ed), *Cross Cultural Consumption: Global Markets, Local Realities* (Routledge, 1996) 138, 138. The material effects of appropriation are considered in detail in section 4.3.3 of this thesis.
[50] Homi Bhabha quoted in 'Cultural Appropriation: A Roundtable' (2017) (Summer) 55(10) *Artforum International* <https://blogs.brown.edu/hiaa-1810-s01-fall-2017/files/2017/08/CULTURAL-APPROPRIATION-A-ROUNDTABLE-artforum.com-in-print.pdf>.
[51] Nelson and Shiff (n 45) 162.

imagery and arts styles as inspiration for independently created works by cultural outsiders. Tribal and Māori-inspired tattoo imagery[52] is a particular focus throughout this thesis.

Defining appropriation as a cultural intrusion by the dominant culture opens up a broader discussion about appropriation and cultural harm. In particular about, (1) copyright law's complicity in reproducing the cultural harms of appropriation, including the distortion and dilution of culture, financial harm, and offence, as considered in chapter 4;[53] (2) the gap that can exist between assertions of harm and artist experiences of appropriation, as identified in chapter 5;[54] and (3) how the power relations that underscore Indigenous-inspired art can 'perpetuate old inequities in new ways',[55] investigated in chapter 6.[56] This latter inquiry involves analysing appropriation as an enactment of colonial desire for the Other, as influenced by cultural critics such as bell hooks and Deborah Root who describe appropriation as an act of colonial consumption.[57] I return to develop the contribution of psychoanalytic and postcolonial insights to this thesis' analytical framing in chapter 2.[58] A combination of perspectives on harm provides insight into the layers of meaning that characterise the political activity that sits behind allegations of cultural appropriation, and, ultimately, how this politics can be internally contested by other cultural members and reinscribed and disrupted in various historical sites, over time.

In taking perceptions of exploitation as the starting point for understanding appropriation, I deliberately simplify the dynamics of this field of cultural interaction. The motivations of appropriators are only considered to the extent that it is relevant to unpacking the power dynamics perceived by those who identify an act of cultural appropriation. I do not consider the benefits of

[52] See 'Tribal Tattoos', Images 28–34 and 'Māori-Inspired Tattoos', Images 36–42, xv–xvi of this thesis.
[53] See section 4.4.3 of this thesis.
[54] See section 5.1 of this thesis.
[55] David Meurer and Rosemary Coombe, 'Digital Media and the Informational Politics of Appropriation' in Atopia Projects (eds) *Lifting: Theft in Art* (Peacock Visual Arts, 2009) 20, 21.
[56] See particularly sections 6.1 and 6.2 of this thesis.
[57] See bell hooks, 'Eating the Other: Desire and Resistance' in *Black Looks: Race and Representation* (Routledge, 2015) 21, 21–39; Deborah Root, *Cannibal Culture: Art, Appropriation, and the Commodification of Difference* (Westview Press, 1996).
[58] See section 2.4 of this thesis.

recontextualisation or the generative or transformative qualities of appropriation generally.[59] Rather, I focus on divergent cultural perspectives around what does and does not constitute appropriation in specific instances of alleged appropriation, of which the Whitmill tattoo is a notable example, in order to deepen our understanding of the dynamism and contestation that sits behind cultural claims. This furthers my purpose in building a bottom-up account of the intersection of cultural appropriation and law and to identify how the political stakes of appropriation vary for different constituencies.

1.1.3 Law and legality as it intersects with cultural appropriation claims

As noted earlier, in this thesis my inquiry into law includes, but is broader than, the content of the formal legal rules and rights. I also focus on the legal meaning-making that takes place in the everyday life of artists, and the routinised patterns of conduct that characterise cultural production, negotiations around appropriation, and conflict resolution.[60] This approach required the use of the distinct but related concepts of "law" and "legality". I use "law" to refer to the positive legal rules and rights that exist within the formal legal sphere, including national law such as statutes and case law, and international law.[61] It is institutional, authoritative, and heteronomous,[62] referring to '*legal* laws and *legal* systems' rather than the full ambit of things that are described as law in broader society.[63] This conception of law is consistent with legal positivism.

Conversely, I use "legality" as a conceptual category to refer to the generative forces that act upon, and are shaped by, cultural practices. This loosely aligns with the approach of legal anthropologists such as Leopold Pospisil who define legality by the four factors of authority, intention of universal

[59] See, eg, Schneider (n 34) 215–29; Nicholas Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific* (Harvard University Press, 1991) chapters 3 and 4, 83–184; Fred Myers, 'Introduction: The Empire of Things' in Fred Myers (ed), *The Empire of Things: Regimes of Value and Material Culture* (School of American Research Press, 2001) 3, 3–61; Gavin Morrison and Fraser Stables, 'Introduction' in Atopia Projects (eds), *Lifting: Theft in Art* (Peacock Visual Arts, 2007) 2. For a comprehensive account of a wide variety of typologies of appropriation see Rogers (n 49) 474–503.
[60] See chapter 5 of this thesis.
[61] See generally HLA Hart, *The Concept of Law*, ed Penelope Bulloch (Clarendon Press, 2nd ed, 1994). Note that while Hart includes international law within the term law, he does not consider it as having the same qualities as the domestic legal system, referring to it as a 'doubtful case[]': at 3. Other positivists reject international law as positive law because, for example, it is set by general opinion rather than from the command of a sovereign: see, eg, John Austin, *The Province of Jurisprudence Determined*, ed WE Rumble (Cambridge University Press, 1995) 171.
[62] Neil MacCormick, 'The Concept of Law and the Concept of Law' in Robert George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1999)163, 163–93.
[63] Scott Shapiro, *Legality* (Belknap Press of Harvard University Press, 2011) 8 (emphasis in original).

application, obligations, and sanctions,[64] rather than mandating the specific form that law must take. While the specific attributes put forward by Pospisil do not confine the approach to legality I take in the pages that follow, this thesis similarly emphasises the need to understand legal phenomenon in context. I support a conception of legality that includes both government and non-government sites of rule-making and rule-enforcing, everyday understandings of law, and habitual patterns and practices.[65] Positive law is included within the more expansive category of legality, but so are other forces that order practices such as norms, ethics, and business considerations.[66] I return to detail my approach to analysing law and legality, with close reference to law and society scholarship, in chapter 2.[67]

Advancing law and legality as related and partially overlapping but nevertheless distinct concepts allows me to explore the complexity of legal power, and identify the limitations of the traditional hierarchical conceptions of law advanced in conventional progressive commentary on cultural appropriation disputes.[68] Legal rules are not always coextensive with the functioning of legality in everyday life. As legal anthropologist Sally Falk Moore observes, 'there is constant struggle between deliberate rule-making and planning, and other more untameable activities and processes at work in the social aggregate'.[69] Changes to the positive law do not always produce direct effects because regulatory control can be temporary, incomplete, or unpredictable.[70] This is evident in the context of

[64] Leopold Pospisil, *Kapauku Papuans and Their Law* (Yale University Publications in Anthropology, No 54, 1958) 258–72; Leopold Pospisil, *The Anthropology of Law: A Comparative Theory* (Harper & Row, 1971) 11–96.

[65] This definition of legality is consistent with that of law and society scholars Susan Silbey and Patricia Ewick who argue that legality is present in the sources of authority and patterns of practices recognised as legal in everyday life: Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998). See also definitions of legality as inclusive of legal consciousness: Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (University of Chicago Press, 1990) 5; Patricia Ewick and Susan Silbey, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1992) 26(3) *New England Law Review* 731, 742.

[66] Sally Falk Moore, 'Law as Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) *Law and Society Review* 719, 719. On the focus of interdisciplinary IP scholarship on norms, ethics, and business considerations, see Kathy Bowrey, 'Methodology: What Should Histories and Theories of IP Be Doing? What Role Should Interdisciplinarity Play?' (Conference Paper, International Society for the History and Theory of Intellectual Property Annual Workshop, 22–4 July 2015).

[67] See section 2.3 of this thesis.

[68] On socio-legal conceptions of law as having the capacity to challenge abstract and positivist legal knowledges: see Margaret Davies, 'Law's Truths and the Truth About Law: Interdisciplinary Refractions' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2003) 65, 79.

[69] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Lit Verlag, 2000) 29. See also Moore, 'Law as Social Change' (n 66) 721.

[70] Moore, *Law as Process* (n 69) 30; Moore, 'Law as Social Change' (n 66) 723.

IP law, where site-specific studies of creative industries like fashion and tattoo have been found to be unresponsive to the incentives that underpin IP right grants and instead ordered by informal norms in the shadow of positive law.[71] In chapter 5, I focus on both law and the legal meaning-making that takes place in everyday life (and their engagement) to problematise the presumed utility and desirability of introducing new legal norms to regulate appropriation, from the perspective of artists.

My decision to consider both law and legality in this thesis required a combination of research methods. As detailed in chapter 3, I adopt doctrinal analysis to investigate perspectives on the unresponsiveness of the formal legal sphere to Indigenous concerns and the case for law reform,[72] and fieldwork to investigate the ordering that takes place in specific sites of cultural production and the extent to which artists see themselves as embedded within the law and desirous of its protections.[73] As doctrinal analysis and fieldwork identify a gap between the priorities of different constituencies around law reform, I selected the third method of historical analysis to investigate why cultural claimants and conventional scholars might perform legality differently or otherwise to artists.[74] Each method performs a complementary function and helps redress some of the limitations of the others. Together, they facilitate a consideration of discourses of legal exclusion, the lived experience of law and appropriation, and the historicity of objections to appropriation as oppressive, allowing this thesis to better appreciate what conventional scholarship captures, as well as misses, about the ways in which culture moves and is negotiated inside and outside of the formal legal system.

My approach to law and legality orientates this thesis to analyse the formal application of IP law to Indigenous cultural imagery and arts styles and what such applications mean for the complexity and performativity of cultural claims, and to examine the ways in which formal and informal sources of

[71] See, eg, Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687, 1687–1777; Aaron Perzanowki, 'Owning the Body: Creative Norms in the Tattoo Industry' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017) 89, 89–177. See generally Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017); Laura Murray, S Tina Piper and Kirsty Robertson, *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press, 2014).
[72] See section 3.1 of this thesis.
[73] See section 3.2 of this thesis.
[74] See section 3.3 of this thesis.

legality order (and fail to order) cultural practices. I do not offer proprietary assessments of specific Indigenous cultural rights and obligations, consider whether the culture that is the subject of a claim is "property" in a technical legal sense, or investigate Indigenous legitimacy of title over particular cultural expressions or objects. There is already an extensive body of work that discusses these issues,[75] and to confine my investigation in this manner would bypass much of the history of racism and alienation that underlies assertions of cultural appropriation,[76] especially by first nations peoples in settler states. Moreover, while construing cultural appropriation as a matter of best title offers insight into the different values ascribed to culture, it says little about appropriation allegations as a performative utterance or how the introduction of new legal norms might fare in shaping more desirable cultural practices.

While I do engage with the formal legal sphere,[77] my focus on legal meaning-making in the chapters to come is distinctly local in nature. This approach aligns with the (albeit limited) academic attention on site-specific studies in IP as a useful means of connecting the discourse around the legal regulation of creativity to creative, cultural and subcultural practices.[78] To this end, I investigate the legal meaning-making of artists in everyday life, as against the meaning-making of the activists who assert appropriation and the conventional scholars who analyse and seek to rectify the failings of the law.[79] I consult artists because they are both creators of culture and stakeholders in cultural imagery and arts styles, and would likely be the direct or indirect beneficiaries of any new legal rights to better protect

[75] For a consideration of legitimacy of title issues: see John Henry Merryman, 'Two Ways of Thinking About Cultural Property' (1986) 80(4) *American Journal of International Law* 831, 831–53; Derek Gillman, *The Idea of Cultural Heritage* (Cambridge, rev ed, 2010). For analysis of the legal character of cultural rights, see the debate between anthropologist Michael Brown and legal scholars Kristen Carpenter, Sonia Katyal and Angela Riley: Michael F Brown, *Who Owns Native Culture?* (Harvard University Press, 2003); Kristen A Carpenter, Sonia K Katyal and Angela R Riley, 'In Defense of Property' (2009) 118(6) *Yale Law Journal* 1022, 1022–5; Michael F Brown, 'Culture, Property, and Peoplehood. A Comment on Carpenter, Katyal, and Riley's "In Defense of Property"' (2010) 17(3) *International Journal of Cultural Property* 569, 569–79; Kristen A Carpenter, Sonia K Katyal and Angela R Riley, 'Clarifying Cultural Property' (2010) 17(3) *International Journal of Cultural Property* 581, 581–98.

[76] See Coombe, 'The Properties of Culture and the Possession of Identity' (n 17) 91.

[77] See particularly chapter 4 of this thesis.

[78] See, eg, Kylie Papparlardo et al, *Imagination Foregone: A Qualitative Study of the Reuse Practices of Australian Creators* (Report, Queensland University of Technology, 2017) <https://eprints.qut.edu.au/115940/2/QUT-print.pdf>; Marta Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart Publishing, 2016); Matthew Rimmer, 'Bangarra Dance Theatre: Copyright Law and Indigenous Culture' (2000) 9(2) *Griffith Law Review* 274, 274–302.

[79] See chapters 4 and 5 of this thesis.

Indigenous cultural imagery and arts styles from appropriation.[80] A consideration of historical subject positions in chapter 6 rounds out the inquiry by contextualising the political stakes of appropriation for the law's critics.

The role of tattoo as legal subject matter in my thesis is also circumscribed. I use tattoo to explore the dynamism of cultural production, tensions around appropriation, and the way in which law understands and hears Indigenous demands. I do not reflect on the nature of tattoo as body art to test the elasticity of copyright principles. There is already a body of literature that explores the issues that tattoo raises because of its nature as a (reasonably) permanent skin art, including: the ethics of a third party having copyright ownership rights over an image that is on another's body, the tattoo wearer's right to wear and display their artwork in normal day to day life, the likelihood of incidental reproductions by third parties given the visibility of tattoos on the body, and if a court could order a tattoo's destruction or removal in the event of infringement or bar somebody from removing or adding to their own tattoo in order to preserve an author's moral rights.[81] While some of these arguments are taken up by the defence in *Whitmill v Warner Bros. Entertainment*[82] (*Whitmill*) and are thus relevant to chapter 4 which examines the property framework in the context of cultural claims, my discussion is limited to what these arguments mean for the visibility of the Māori cultural appropriation claim. In line with obiter comments from the preliminary hearing of *Whitmill* and the weight of lawyerly and

[80] They might also be directly impacted by new restrictions. See chapter 5 of this thesis for artist perspectives on law, appropriation, and cultural production.

[81] See, eg, Thomas Cotter and Angela Mirabole, 'Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art' (2003) 10(2) *University of California Law Review* 97, particularly 104–23; Yolanda King, 'The Challenges "Facing" Copyright Protection for Tattoos' (2013) 92(1) *Oregon Law Review* 129, 152–161; Alexandra Sims, 'The Perils of Full Copyright Protection for Tattoos' (2016) 38(9) *European Intellectual Property Law Review* 570, 572–6; David Cummings, 'Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form' (2013) (Winter) *University of Illinois Law Review* 279, 308–11; Meredith Hatic, 'Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos' (2013) 23 *Fordham Intellectual Property, Media and Entertainment Law Journal* 396, 405–9, 412–3, 425–7; Timothy Bradley, 'The Copyright Implications of Tattoos' (2012) 29(5) *GP Solo* 68, 69. Many of these arguments were initially sketched in online blogs and articles: see, eg, Marisa Kakoulas, 'The Great Tattoo Copyright Controversy', *BMEzine* (Guest Column, 12 August 2003) <http://news.bmezine.com/wp-content/uploads/2008/09/pubring/guest/20031208.html>; Kal Raustiala and Chris Sprigman, 'Can You Copyright A Tattoo?', *Freakonomics* (Blog Post, 2 May 2011) <http://www.freakonomics.com/2011/05/02/can-you-copyright-a-tattoo>; Jordan Hatcher, 'Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States' (Pre-publication draft, 15 April 2005) <http://ssrn.com/abstract=815116>; Pariah Burke, 'Damning the Ink: Tattoo Artist vs. Nike & Rasheed Wallace', *I am Pariah* (Blog Post, 5 March 2005) <http://iampariah.com/blog/creative-pro/tattoo-artist-vs-nike-a-really-bad-idea.php>; Marisa Kakoulas, 'Tattoo Copyright', *Needlesandsins.com* (Blog Post, 4 May 2011) <http://www.needlesandsins.com/2011/05/tattoo-copyright.html>.

[82] (ED Mo, No. 4:11-CV-752, complaint dismissed 22 June 2011).

academic opinion, this thesis proceeds on the basis that tattoos are artistic works protected by copyright.[83]

Having defined the scope of my inquiry into law and legality in this thesis, I will now explain my rationale for selecting tattoo as the lens through which to study the intersection of cultural appropriation and law.

1.2 Tattoo, moko and misappropriation in context

1.2.1 Selection of tattoo

I use tattoo – that is, the artform involving the insertion of ink beneath the skin – to frame my exploration of the complexity of the intersection of cultural appropriation and law, and its political activity, in this thesis. My focus is primarily restricted to tattoos that carry a sophisticated aesthetic.[84] Tattoo is a highly visible, self-expressive body art.[85] It has a long history in both western and Indigenous cultures.[86] In the west,[87] tattoo circulates as an expression of an individual's personal or cultural identity; a commitment to an image, ideal, remembrance, community, fashion or all of the above.[88] In Indigenous contexts, tattoo may also be a living heritage, a sign of cultural identity and a

[83] In her preliminary hearing judgment Judge Perry stated, '[o]f course tattoos can be copyrighted. I don't think there is any reasonable dispute about that': Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (ED Mo, Perry J, 24 May 2011) document 56, 3 (Perry J). For a rare example of academic commentary that comes to the conclusion that tattoos do not subsist in copyright, see Michael Minahan, 'Copyright Protection for Tattoos: Are Tattoos Copies?' (2015) 90(4) *Notre Dame Law Review* 1713, particularly 1732–6.

[84] That is, as opposed to simple scaring and marking related to self-harm and other psychologically motivated performances of identity that do not involve significant aesthetic and design considerations.

[85] See, eg, Atte Oksanen and Jussi Turtianinen, 'A Life Told in Ink: Tattoo Narratives and the Problem of the Self in Late Modern Society' (2005) 13(2) *Auto/Biography* 111, 111–30; Paul Sweetman, 'Anchoring the (Postmodern) Self? Body Modification, Fashion and Identity' (1995) 5(2–3) *Body and Society* 51, 51–76, particularly 66–9; Mary Kosut, 'Tattoo Narratives: the Intersection of the Body, Self-Identity and Society' (2000) 15(1) *Visual Studies* 79, 79–100, particularly 90–3.

[86] See, eg, Aaron Deter-Wolf et al, 'The World's Oldest Tattoos' (2016) 5 *Journal of Archaeological Science* 19, 19–24; Marisa Kakoulas, *Black Tattoo Art: Modern Expressions of the Tribal* (Edition Reus, 2009) 11–14; Jill Fisher, 'Tattooing the Body, Marking Culture' (2002) 8(4) *Body and Society* 91, 92–7. The oldest preserved tattooed skin is on "Otzi the Iceman," who lived approximately 5,300 years ago and bore 61 tattoo marks on his body: Deter-Wolf et al at 21, 22. As Otzi's marks are hypothesised to be medicinal rather than decorative, some scholars put forward Ancient Egypt as the origins of aesthetic tattooing: see, eg, Geoffrey Tassie, 'Identifying the Practice of Tattooing in Ancient Egypt and Nubia' (2003) 14 *Papers from the Institute of Archaeology* 85, 85–101.

[87] I use the term the "west" not as a term of art, but as a general descriptor to refer to pākehā and other non-Indigenous cultures in settler states (eg Australia, New Zealand, the United States) and Anglo-Europe (eg the United Kingdom).

[88] See, eg, Miliann Kang and Katherine Jones, 'Why Do People Get Tattoos?' (2007) 6(1) *Contexts* 42, 42–7; Sweetman (n 85) 51–76; Fisher (n 86) 100–4; Kosut, 'Tattoo Narratives' (n 85) 85–96.

politically-laden expression.[89] This is the case in New Zealand where the revival of tā moko as a cultural practice in the late 20th century coincided with the Māori Arts Renaissance and tino rangatiratanga movements illustrating its cultural and political significance as a sacred, visible practice.[90]

Tattoo's self-expressive function and its representative quality mean that appropriation is frequently received by both Indigenous and non-Indigenous wearers as 'identity theft.'[91] Appropriation is rife in both Indigenous and non-Indigenous contexts and today cultural appropriation allegations are reasonably commonplace. Since the late 1990s, fashion designers such as Paco Rabanne, Jean Paul Gaultier, and Thierry Mugler have been accused of cultural appropriation for their Māori moko-inspired clothing lines, use of stylised mokos in print advertisements, and use of moko-inspired masks on catwalk models in mainstream media.[92] Magazines such as *GQ*, *Tetu*, and *Marie Claire* have also attracted criticism for magazine covers and fashion spreads featuring stylised mokos.[93] In the video game, toy and car industry, moko alongside other aspects of Māori culture like te reo, ancestral

[89] See Alfred Gell, *Wrapping In Images: Tattooing in Polynesia* (Oxford University Press, 2004). In a Māori context specifically: see, eg, Ngahuia Te Awekotuku and Linda Waimarie Nikora, *Mau Moko: The World of Māori Tattoo* (Penguin Books, 2007) 208–9; Ngahuia Te Awekotuku, 'More than Skin Deep: *Ta Moko* Today' in Elazar Barkan and Ronald Bush (eds), *Claiming the Stones/Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* (Getty Research Institute, 2002) 243, 253; Mohi Rua, 'Contemporary Attitudes to Traditional Facial Ta Moko: A Working Paper' in Neville Robertson (ed), *Maori and Psychology: Research and Practice – the Proceedings of a Symposium Sponsored by the Maori and Psychology Research Unity* (Maori and Psychology Research Unit, University of Waikato, 1999) 2. I return to consider the meaning and function of moko at section 1.2.2.1 of this chapter.

[90] See Awekotuku and Nikora, *Mau Moko* (n 89) 116; Tame Iti quoted in Hans Neleman et al, *Moko – Maori Tattoo* (Edition Stemmle, 1999) 129. On the Māori Renaissance: see generally Richard Hill, *Maori and the State: Crown-Maori Relations in New Zealand/Aotearoa, 1950–2000* (Victoria University Press, 2009) 149–53.

[91] See, eg, Shannon Larratt, 'Pop Culture is a Language', *Modblog* (Blog Post, 25 September 2005) <https://news.bme.com/2005/09/25/pop-culture-is-a-language/>; Interview with Hohua Mohi (Marie Hadley, Rotorua, 14 February 2012) (interview and transcript on file with the author). I return to consider perspectives on moko appropriation as identity theft in section 5.1.2 of this thesis.

[92] For the John Paul Gaultier controversy: see 'Moko Use Rude', *Evening Post* (Wellington, 23 January 1995) 5; 'Other Appropriations', Images 49–50, xviii of this thesis. For the Paco Rabanne controversy: see 'Parisian Fashion Offends Maoris', *The Dominion* (Wellington, 23 January 1998) 3; 'Other Appropriations', Image 57, xix of this thesis. For the Thierry Mugler controversy: see 'Fashion Designer's Trick Angers Maori', *Wanganui Chronicle* (Wanganui, 25 January 1999) 9; 'Other Appropriations', Image 59, xix of this thesis.

[93] *GQ* featured soccer player Eric Cantona wearing a stylised moko on its cover in January 1998: see 'Other Appropriations', Image 54, xviii of this thesis; *Tetu* featured footballer Alexis Palisson wearing a stylised moko on its cover in 2011: see 'Other Appropriations', Image 53, xviii of this thesis; *Marie Claire* featured Gemma Ward wearing stylised moko in a fashion feature in 2014: see 'Other Appropriations', Images 51–2, xviii of this thesis. For commentary on these appropriations: see Matthew Martin, 'Moko Experts Slam Magazine Shoot', *The Daily Post* (Rotorua, 19 July 2011); Georgina Stylianou, 'Use of Moko Upsets', *Stuff.co.nz* (online, 18 July 2011) <www.stuff.co.nz/national/5298599/Use-of-moko-upsets>; 'Storm Over Fashion Magazine Moko', *Stuff.co.nz* (online, 26 September 2014) <http://www.stuff.co.nz/life-style/fashion/10548726/Storm-over-fashion-magazine-moko>; Lincoln Tan, 'Fashion Mag's Moko Dubbed "Cultural Insult"', *New Zealand Herald* (online, 25 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11330943>.

stories, and traditional dress, have also attracted censure.[94] I return to consider perspectives on some of these alleged appropriations and cultural harm in chapter 4.[95]

In addition to the interest in reporting cultural appropriation controversies, there is much social interest in IP disputes involving tattoo imagery. Such disputes include tattoo artists objecting to their work being featured in third party advertising campaigns or films or incidentally reproduced in video games,[96] as well as individuals objecting to a third party tattoo artist copying their tattoos onto someone else[97] or the copyright of photographs of themselves (including their tattoos as part of their likeness) being owned by third parties who then license the photos to advertisers without their consent.[98] These disputes do not tend to spill over into the courts. Litigation over copyright infringement in tattoo imagery is rare.[99] The subcultural reluctance to litigate, yet the reception of appropriation as harmful, makes tattoo an ideal microcosm of cultural activity through which to study the intersection of cultural appropriation and law in practice.

[94] See, eg, the controversy surrounding Lego's 'Bionicle' range, the PlayStation video game 'The Mark of Kri', and the 2001 Ford F-150 Lightning Rod Concept Truck that prominently featured a moko-inspired design: *Guarding the Family Silver* (n 12) Part 3; 'Other Appropriations', Images 55–6, 58, 60, xix of this thesis;
[95] See section 4.3.3 of this thesis.
[96] See, eg, the dispute involving tattooist Christopher Escobedo and video game company THQ that concerns the tattoo on UFC fighter Carlos Condit: Christopher Escobedo, 'Complaint' in *Escobedo v THQ* (D Ariz, No. 2:12 – CV-02470-JAT, complaint dismissed 11 December 2013) (*Escobedo*); PR Web, 'Tattoo Artist Files Lawsuit Claiming that THQ Stole His Artwork in UFC Undisputed 3' (Press Release, 16 November 2012) <http://www.prweb.com/releases/2012/11/prweb10144896.htm>; Mike Masnick, 'Tattoo Copyright Strikes Again: Tattoo Artist Sues THQ For Accurately Representing Fighter's Tattoo In Game', *Techdirt* (Blog Post, 7 Dec 2012) <https://www.techdirt.com/articles/20121207/07502921303/tattoo-copyright-strikes-again-tattoo-artist-sues-thq-accurately-representing-fighters-tattoo-game.shtml>.
[97] See, eg, glamour model Amina Munster's objections to her pirate chest tattoo being copied: Shannon Larratt, 'Followup: Tattoo Theft', *BMEzine* (Blog Post, 23 September 2005) <https://news.bme.com/2005/09/23/followup-tattoo-theft/>; Rebecca Tushnet, 'Payment in Credit: Copyright Law and Subcultural Creativity' (2007) 70 (2) *Law and Contemporary Problems* 135, 158.
[98] See, eg, Māori activist Tame Iti's objections to a photograph of himself, including his facial tattoo, being licenced by a security company for an advertisement without his consent: Angela Gregory, 'Iti Used to Sell Security to Elite', *New Zealand Herald* (Auckland, 24 November 2005); Rebecca Quillam, 'Iti Could Have Case Against British Magazine: Expert', *New Zealand Press Association* (24 November 2005).
[99] I have identified six litigated disputes in the United States: *Reed v Nike, Rasheed Wallace, and Weiden & Kennedy* (D Or, No 05-CV-198 BR, complaint dismissed 19 October 2005) (*Reed v Nike*); *Escobedo* (n 96); *Whitmill* (n 82); *Allen v Electronic Arts* (WD La, No. 5:12-cv-03172, complaint dismissed 9 April 2013); *Alexander v Take-Two Interactive Software, 2K Games and World Wrestling Entertainment* (SD Ill, No. 3:18-cv-966, complaint filed 17 April 2018); *Solid Oak Sketches v 2K Games and Take-Two Interactive Software* (SDNY, No. 16CV724-LTS, complaint filed 1 February 2016). I return to discuss social commentary on the tattoo artist's decision to sue for copyright infringment in *Reed v Nike* in section 5.3.4 of this thesis.

1.2.2 Tattoo sites

In this thesis I primarily focus on two tattoo sites to explore cultural dynamics, intercultural engagements, and the politics of cultural appropriation claims and law reform: moko and western tattoo. I draw on both historical and contemporary tattoo practices. My focus on the moko industry and western tattoo subculture was prompted by the *Whitmill* proceedings. Whitmill's copyright infringement claim revitalised the Māori allegations that the "warrior" tattoo designed by Whitmill for Mike Tyson misappropriates tā moko.[100] While the *Whitmill* proceedings did not involve any Māori participants, Whitmill admits that his tattoo design is 'inspired by' moko, although he ultimately categorises it as an example of American tribalism as derived from Borneo and Polynesian influences.[101] "Tribal"[102] is popularly understood to be a western tattoo artistic genre despite its Indigenous themes.[103] Studying activist and artist perspectives on Indigenous-inspired tattoo imagery helps uncover the contestation around inspiration as a form of appropriation. In turn, these perspectives provide an entry point into a broader discussion of the performativity of appropriation allegations and the complex personal politics that sit behind contested cultural claims.

I will now define and explain moko's key features and the nature of western tattoo and tribal tattoos in particular, in more detail.

1.2.2.1 Moko

Moko is Māori cultural tattooing imagery produced by specialist artists called tā moko practitioners.[104] It is a dynamic contemporary artform that is embedded in Māori cosmology. Moko's genesis is explained in the Māori ancestral story of story of Niwarakea, a woman from the underworld and Mataora, her mortal husband:

> Mataora was the husband of Niwareka, who came from the underworld. He abused her, and she fled back to her people. Remorseful and distressed, Mataora set out looking for her. He dressed in his finest garments, and enhanced his already handsome face with colour; he wanted her forgiveness, he missed her, and so he followed her trail.

[100] See section 4.1.2 of this thesis.
[101] Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 23 May 2011) document 55, 17 (SV Whitmill).
[102] Tribal is also known as "neo-tribal". In the chapters that follow, I do not distinguish between tribal as it has developed in different western countries.
[103] See section 5.1.2.1 of this thesis.
[104] See generally, Awekotuku and Nikora, *Mau Moko* (n 89).

> She was with her father, Uetonga, when Mataora arrived, desperate, exhausted, dishevelled, the pigment running with the sweat from his face, smeared and unsightly. Everyone laughed at him. Their skins were incised with rich patterns, and their adornment was forever. And though he was embarrassed and angry, Mataora was humble, too. He begged forgiveness of Niwareka and her family; he begged knowledge of her father. They relented, teaching him the art of tā moko, while Niwareka learned that of taniko, weaving with coloured fibres. And so two important art traditions, taniko and tā moko, were brought back to the world of light and celebrated by humankind for their magic and their beauty. [105]

The story of Niwarakea and Mataora illustrates several key features of moko including its connection to the spiritual world and its revered status. The design of the moko represents and embodies the wearer's social status, mana, and sacred genealogy.[106] The manifestation of ancestry is particularly important. In representing and embodying ancestry, an individual's moko reinforces physical and metaphysical relationships with whakapapa.[107] Whakapapa is an individual's birthright, the key to eligibility in interests in tribal lands, and the right to be associated with a locality.[108] It is also a key tikanga Māori concept that acknowledges the interrelationship of all living things to one another through spiritual and physical connections and common origins in one set of primal ancestors – Ranginui and Papatuanuku, and the necessity of all of life's component parts to exist in a state of balance.[109]

The interconnectedness of moko and whakapapa ensures that each cultural member is linked to those who have come before and those yet to come. As artist and facial moko wearer Te Mariki Williams explains, 'tā moko is a subtle, humble tribute to whakapapa … It embraces the wellbeing of all. Such taonga acknowledges the recipient as a kaitiaki of ancestral lineage who will nurture traditional

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[105] Ngahuia Te Awekotuku, 'Ta Moko: Maori Tattoo' in Roger Blackley, *Goldie* (Auckland Art Gallery; David Bateman, 1997) 109. For another version of this story, see 'The Origin of Tattooing' (1911) 20(80) *The Journal of the Polynesian Society* 167, 167. For a visual representation of this story by tā moko artist Jack Williams, see 'General Tattoo and Other', Image 82, xxiv of this thesis.

[106] See, eg, DR Simmons, *Ta Moko: The Art of Maori Tattoo* (Reed, 1986) 23; Rua (n 89) 2; Ngarino Ellis, '"Ki Tō Ringā Kingā Rākau ā te Pākehā?" Drawings and Signatures of "Moko" by Māori in the Early 19th Century' (2014) 123(1) *Journal of the Polynesian Society* 29, 30–1; Mark Kopua in 'Carved in Skin', *Tales from Te Papa* (Episode 84, Gibson Group, 2009) <https://www.tepapa.govt.nz/discover-collections/read-watch-play/maori/ta-moko-maori-tattoos-history>.

[107] See, eg, Awekotuku and Nikora, *Mau Moko* (n 89) 170–2; Talisa Kupenga, 'Tā Moko Marks Milestone in Whakapapa Journey for NZ Defence Minister', Te Ao Māori News (online, 27 April 2019) <https://teaomaori.news/ta-moko-marks-milestone-whakapapa-journey-nz-defence-minister>; 'Moko Kauae Worn With Mana', *Te Karaka* (Christchurch, Summer 2018) 14.

[108] Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Huia, 2003) 42–3; Mere Roberts, 'Ways of Seeing: Whakapapa' (2013) 10(1) *Sites: A Journal of Social Anthropology and Cultural Studies* 93, 93.

[109] Mead, *Tikanga Māori: Living by Māori Values* (n 108) 5–7, 11–24; Linda Te Aho, 'Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand' (2007) 10 *Yearbook of New Zealand Jurisprudence* 10, 11.

practices for future generations.'[110] Maintaining the integrity of moko is thus vital to intergenerational connectivity, individual wellbeing, cultural wellbeing, and preserving the balance between the spiritual and physical realms. I consider appropriation as a form of harm to cultural integrity and wellbeing in chapter 4.[111]

Visually moko are abstract, typically monochrome, curvilinear designs that incorporate spiral motifs called korus, flow around the contours of the body, and make use of both positive and negative space.[112] While traditionally there were some regional variations in patterns and design application,[113] particularly following the introduction of metals post-contact, moko is not a rigid design form. Patterns are not heraldic devices regulated by tribes,[114] meaning that the personal style and design choices of the individual tā moko artist is the dominant influence on composition.[115] Today, tā moko practitioners usually free draw the design on the subject's body and the subject will then approve the composition prior to the moko being applied.[116] Most practitioners work with electric tattoo guns, however, uhi are still used by those practitioners trained in tapping.[117] Note also that many subjects will consult with family prior to seeking out the services of a tā moko practitioner, but this is not a universal practice.[118] For some, consulting family is more of a request for support rather than a

[110] Te Mariki Williams in 'Tā Moko Rising', *Te Karaka* (Christchurch, Spring 2012)16, 19.
[111] See section 4.3.3 of this thesis.
[112] See 'Moko', Images 11–27, x–xiv of this thesis.
[113] Ngarino Ellis, 'Toitu Te Moko: Maintaining the Integrity of the Moko in the 19th Century and the Work of Gottfried Lindauer' (2018) 192 *Research Institutes in the History of Art Journal* [4]; Henry Ling Roth, 'Maori Tatu and Moko' (1901) 33 *Journal of the Anthropological Institute of Great Britain and Ireland* 29, 50; Simmons, *Ta Moko: The Art of Maori Tattoo* (n 106) 67–8. Regional variations are discernible in the drawings that Sydney Parkinson produced during the first South Seas voyage: see, 'General Tattoo and Other', Images 97–8, xxvii of this thesis.
[114] See, eg, Interview with Hohua Mohi (n 91); Interview with Henriata Nicholas (Marie Hadley, Auckland, 9 February 2012) (interview and transcript on file with the author); Interview with Jack Williams (Marie Hadley, Tokoroa, 14 February 2012) (interview and transcript on file with the author); Te Rangi Hiroa, *The Coming of the Maori* (Māori Purposes Fund Board, 1949) 299; Awekotuku and Nikora, *Mau Moko* (n 89) 68–70.
[115] Hiroa, *The Coming of the Maori* (n 114) 299.
[116] See, eg, Interview with Henriata Nicholas (n 117); 'Maori Tattoo: the Definitive Guide to Ta Moko', *ZealandTattoo* (Web Page) <http://www.zealandtattoo.co.nz/tattoo-styles/maori-tattoo/>.
[117] Henriata Nicholas, one of my fieldwork participants, is known for her use of uhi, as is tā moko artist Inia Taylor. For a demonstration of the tapping technique see Tiki Taane, 'Rihanna Getting Traditional Polynesian Tattoo by Inia Taylor & Assisted by Tiki Taane' (Youtube, 8 October 2013) <https://www.youtube.com/watch?v=ePqfnkzAQjQ>. See also Awekotuku and Nikora, *Mau Moko* (n 89) 143–146.
[118] For a variety of perspectives on consultation see, eg, Awekotuku and Nikora, *Mau Moko* (n 89) 176–80; Neleman et al (n 90) 127; Linda Waimarie Nikora, Mohi Rua and Ngahuia Te Awekotuku, 'Renewal and Resistance: Moko in Contemporary New Zealand' (2007) 17(6) *Journal of Community and Applied Social Psychology* 477, 486–7.

necessary permission. It is the tā moko practitioner's imperative whether to apply a design to a particular person.[119]

While moko can be placed all over the body, facial moko is particularly revered because the head is tapu or sacred in Māori culture.[120] Facial moko is reserved for respected cultural members, typically chiefs or elders.[121] Female facial moko typically involves less coverage of the face than male moko, appearing only on the lips, chin, forehead, or neck leaving the cheeks, nose and eye region bare.[122] Facial moko has also played an important historical, cultural and political role in Māori society. For example, it served as the identifying mark of the Māori signatories to the Treaty of Waitangi.[123] The tattooed heads of loved ones and vanquished enemies known as upoko tuhi[124] were also traditionally preserved and kept as a memento mori or trophies of war.[125] Post-European contact, upoko tuhi were

[119] Neleman et al (n 90) 127.
[120] On the head as tapu: see, eg, Gell (n 89) 247; Perminder Sachdev, '*Mana, Tapu, Noa*: Maori Cultural Constructs With Medical and Psycho-Social Relevance' (1989) 19 *Psychological Medicine* 959, 963. Note that historically, many famous tohunga tā moko were not tattooed because 'they were so highly *tapu* that no one could handle their sacred heads': James Cowan, 'Maori Tattooing Survivals. Some Notes on Moko' (1921) 30(4) *Journal of the Polynesian Society* 241, 244 (emphasis in original). See also Gell: at 259–63.
[121] See, eg, Interview with Richie Francis (Marie Hadley, Skype, 3 April 2012) (interview and transcript on file with the author).
[122] See, eg, Clinton Sanders, 'Marks of Mischief: Becoming and Being Tattooed' (1999) 5(2–3) *Body and Society* 395, 400; Christian Palmer and Mervyn Tano, *Mokomokai: Commercialisation and Desacralization* (International Institute for Indigenous Resource Management, 2004) <http://nzetc.victoria.ac.nz/tm/scholarly/tei-PalMoko-t1-body-d1-d1.html>; 'Moko', Image 11, x of this thesis. For a detailed treatment of the design fields of male and female facial moko (and other placements), see Simmons, *Ta Moko: The Art of Maori Tattoo* (n 106) 24–30.
[123] On moko as a signature on documents: see Horatio Gordon Robley, *Moko; or, Maori Tattooing* (Chapman and Hall Limited, 1896) 10–4; Arthur Saunders Thomson, *The Story of New Zealand: Past and Present – Savage and Civilized* (John Murray, 1859) vol 1, 77; Frank Parsons, *The Story of New Zealand: A History of New Zealand From the Earliest Times to the Present, With Special Reference to the Political, Industrial and Social Development of the Island Common-wealth; Including the Industrial Evolution Dating from 1870, the Political Revolution of 1890, the Causes and Consequences, and the General Movement of Events Throughout the Four Periods of New Zealand History,* ed CF Taylor (CF Taylor, 1904) 14; Ellis, '"Ki Tō Ringā Kingā Rākau ā te Pākehā?" (n 106) 29–66.
[124] Also known as "mokomokai" or "toi moko". "Upoko tuhi" is term used in this thesis because it is the preferred term of Māori arts expert Ngahuia Te Awekotuku: see Ngahuia Te Awekotuku, 'He Maimai Aroha: A Disgusting Traffic for Collectors: The Colonial Trade in Preserved Human Heads in Aotearoa, New Zealand' in A Kiendle (ed), *Obsession, Compulsion, Collection: On Objects, Display Culture and Interpretation* (The Banff Centre Press, Banff, 2004) 77, footnote 25, 91.
[125] Awekotuku and Nikora, *Mau Moko* (n 89) 46–50; Ngahuia Te Awekotoku, 'Memento Mori: Memento Maori – Moko and Memory' (Pre-publication Draft, Māori and Psychology Research Unit, University of Waikato, November 2009) 4 <https://researchcommons.waikato.ac.nz/bitstream/handle/10289/3486/Awekotuku%20Nov09%20Memento%20Mori.pdf?sequence=1&isAllowed=y>. See generally Awekotuku 'He Maimai Aroha' (n 124) 77–91.

produced by Māori as part of a profitable cultural trade known as te hoko upoko.[126] I consider the relationship between that trade and colonial dynamics in detail in chapter 6.[127]

In addition to the special value attributed to facial moko, male moko has long cultural associations with war, martial activity, masculinity, mana and virility.[128] The pain of the moko's application 'ensured the majesty of the art and met the wearer's need for gravitas, menace and erotic impact.'[129] Female moko is primarily aesthetic and motivated by considerations such as beauty, sex appeal, and marriageability.[130] These cultural functions are similar to those of other Polynesian tattooing traditions in countries like Tonga and Samoa, although the aesthetics of those tattoos vary.[131]

In contemporary times, moko is also understood to be a politicised assertion of Māori cultural identity.[132] The revitalisation of traditional Māori artforms during the "Māori Renaissance", including the success of events like the international Te Māori Exhibition in 1984–7 and the waka taua revival during the sesquicentenary celebrations in 1990 at Waitangi, were influential to moko's contemporary circulation as a politicised expression of cultural affirmation and resistance.[133] Today, moko is a means of 'reclaiming a lost taonga – a part of us that was taken away through the process of colonisation, almost to extinction'; a symbol of Māori cultural survival in the face of colonisation and

[126] See generally Awekotuku 'He Maimai Aroha' (n 124) 77–91.
[127] See section 6.3.1 of this thesis.
[128] Awekotuku and Nikora, *Mau Moko* (n 89) 57; 'Moko and Status' in 'Ta Moko – Maori Tattooing', *Te Ara: Encyclopedia of New Zealand* (Web Page) <https://teara.govt.nz/en/ta-moko-maori-tattooing/page-4>;
[129] Awekotuku and Nikora, *Mau Moko* (n 89) 39.
[130] Michael King, 'Moko of the Maori' in *Face Value: A Study in Maori Portraiture* (Exhibition Catalogue, Dunedin Public Art Gallery, 1975) quoted in Awekotuku and Nikora (n 89) 86; Gell (n 89) 265–6.
[131] Gell (n 89) chapter 2. Note also that tā moko historically engaged a different tattoo process to tattoo elsewhere in the Pacific. Chisels rather than combs were used to insert pigment into the skin.
[132] See, eg, Nikora, Rua and Awekotuku, 'Renewal and Resistance' (n 118) 481; Ngahuia Te Awekotuku, 'Ta Moko: Culture, Body Modification, and the Psychology of Identity' (Proceedings of the National Māori Graduates of Psychology Symposium, 2002) 125 <https://researchcommons.waikato.ac.nz/bitstream/handle/10289/869/NMGPS_2002_TeAwekotuku.pdf?sequence=1&isAllowed=y>.
[133] On the relevance of these art events to the revitalisation of moko: see, eg, Awekotuku and Nikora, *Mau Moko* (n 89) 116; Interview with Rangi Kipa (Marie Hadley, Skype, 2 April 2012) (interview and transcript on file with the author). On Te Maori and Maori activism: see generally Nicholas Thomas, *Possessions: Indigenous Art, Colonial Culture* (Thames and Hudson, 1999) 188, 192. Note that contemporary artists were not represented in Te Maori; the exhibition consisted of pre-1860s carvings in wood, bone, and nephrite: at 188.

a spiritual healing.[134] Te Awekotuku and Nikora express these multiple facets of moko's cultural significance:

> Moko has many meanings to those who carry it. Moko is about identity; about being Māori in a Māori place, being Māori in a foreign place, being Māori in one's own land and times, being Māori on Māori terms. It is about survival and resilience. It reflects Māori relationships with others; how they see Māori, and more importantly, how Māori want to be seen.[135]

The cultural importance of moko foregrounds concerns with law's complicity in its appropriation, as discussed in chapter 4.[136]

Today, tā moko artists work in a variety of traditional and commercial settings, including maraes, shop fronts, and tattoo conventions, both in New Zealand and overseas.[137] Cash is the standard payment for moko, whether or not practitioners create for insiders for cultural purposes, or produce art for outsiders such as tourists. [138] Historically, tā moko practitioners enjoyed high status within their communities as skilled artists, were paid in rare food, elegant garments, and prized feathers for their work, and subsequently many accumulated considerable wealth.[139] The commercial value of the work that tā moko practitioners do derives from their cultural knowledge of tikanga, Māori design principles, and their ability to connect to the spiritual realm through their artistry.[140] Moko is valued not only for its aesthetics but its production of culture, within a dynamic cultural framework. This is evident in the observation of tikanga like karakia. Karakia are prayers or incantations that ensure the spiritual safety of the individual who is being marked by moko.[141] It establishes a bond between the person praying and spiritual sources of power, and provides comfort, guidance, and blessings during the application process.[142] In addition, as moko is a taonga that has mauri, practitioners also frequently

[134] Aneta quoted in Awekotuku and Nikora, *Mau Moko* (n 89) 151–2. See also Awekotuku, 'More than Skin Deep' (n 89) 253.
[135] Awekotuku and Nikora, *Mau Moko* (n 89) 208–9.
[136] See section 4.3 of this thesis.
[137] Interview with Jack Williams (n 114); Awekotuku and Nikora, *Mau Moko* (n 89) 130–2.
[138] Awekotuku and Nikora, *Mau Moko* (n 89) 132–4.
[139] Ibid 25–6, 61; Gell (n 89) 246.
[140] See, eg, Interview with Rangi Kipa (n 133). I discuss the latter point in more detail in section 5.1.3.1 of this thesis.
[141] See, eg, Awekotuku and Nikora, *Mau Moko* (n 89) 129–30.
[142] Ibid. See also Cleve Barlow, *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, 1991) 37; Interview with Jack Williams (n 114).

adopt extended consultation processes with their clients to ensure that they are aware of the gravity of the designs on their bodies and their reciprocal obligations to preserve the dignity of the artform.[143]

The cultural practices of practitioners, and the contestation that arises out of the way in which they straddle the commercial and sacred realms is explored in detail in chapter 5. Reflection upon the dynamic operation of the moko industry as a site of tension and contestation as much as cohesion, presents a more nuanced picture of creative production, appropriation, and law than acknowledged in conventional critiques of the exclusionary operation of IP law.

1.2.2.2 Western tattoo subculture

Western tattoo communities can trace their roots to the early modern tattooing practices of the North Americas, Britain and Europe.[144] In these regions tattooing has waxed and waned in popularity over time, but it has always had a consistent presence.[145] In early modern tattooing, simple, representational imagery such as love hearts, dates, names, religious iconography and maritime imagery dominate arts practices.[146] Tattoo was typically a sign of the traveller, of religious conviction, or an assertion of love or loyalty.[147] By the 19th century, particular styles of tattoos became 'highly stereotyped' and so commonplace amongst sailors that they became widely understood signifier of a maritime connection, [148] as discussed in more detail in Chapter 6.[149] Tattooing is not, however, limited

[143] See, eg, Interview with Jack Williams (n 114); Interview with Henriata Nicholas (n 114).
[144] I exclude the cultural tattooing practices of Indigenous peoples from these regions, such as the Inuit, from the definition of "western tattoo communities".
[145] Anna Friedman Herhily, 'Tattooed Transculturites: Western Expatriates Among Amerindian and Pacific Islander Societies, 1500–1900' (PhD Thesis, University of Chicago, 2012) 17. On the continuity of tattoo as a practice of mariners: Ira Dye, 'The Tattoos of Early American Seafarers, 1796–1818' (1989) 133(4) *Proceedings of the American Philosophical Society* 520, 523. Cf views of tattoo as a discontinuous practice, particularly prior to Captain Cook's voyages: see, eg, Jane Caplan, 'Introduction' in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000) xi, xi.
[146] For example, Mediterranean sailors are known to have been tattooed with crucifixes, madonnas, and their own names or the names of loved ones since 'time immemorial' and travellers and pilgrims to have received Jerusalem cross tattoos in the 17th century: see, eg, Charles Pierre Claret de Fleurieu, *A Voyage Round the World, Performed During the Years 1790, 1791, and 1792, by Étienne Marchand* (TN Longman and O Rees, 1801) 149; Jean de Thevenot, *The Travels of Monsieur de Thevenot Into the Levant*, tr Archibald Lovell (Printed by H. Clark, 1687) vol 1, 201–2; William Lithgow, *A Most Delectable, and True Discourse, of an Admired and Painfull Peregrination in Europe, Asia, and Africke* (Nicholas Okes, 1616) 113–4; George Sandys, *A Relation of a Journey Begun An. Dom. 1610 Foure Bookes* (Andrew Crooker, 1637) 200. For a sample of 17th century Jerusalem Cross tattoos, see 'General Tattoos and Other, Images 104 and 106, xxviii of this thesis.
[147] Such diverse meanings are explored in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000).
[148] Ira Dye, 'Early American Merchant Seafarers' (1976) 120(5) *Proceedings of the American Philosophical Society* 331, 354. To gauge the extent of tattooing amongst British sailors at the turn of the 19th century and the

to particular industries or classes. Further, the meanings historically associated with tattoo were not stable. Tattoo was variously associated with adornment, fashion, degeneration, and deviant psychology throughout the 19th century.[150]

Outside of Japan, it was not until the western "Tattoo Renaissance" period of the 1960s and 1970s that tattoo came to be discussed in the west as a fine art.[151] This period of time is marked by tattoo's increasing circulation in consumer culture and the widening demographics of tattoo wearers, an increase in custom work, advances in tattoo technique and style, diversification of design, and improvements to the sanitisation of equipment.[152] Tattooists came to be seen as professional artists and, importantly for this thesis, started experimenting with non-western arts styles and imagery.[153] The 'tribal' artistic genre was subsequently developed and popularised by Filipino American tattooist Leo Zulueta during the 1980s.[154]

Tribal designs offer a contemporary interpretation of cultural tattooing imagery from regions such as the Pacific, East Asia and Africa. They are characterised by their tonal palette, bold black forms,

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types of imagery they wore, see National Maritime Museum ('NMM'): NMM LBK/38 'Letterbook of Captain Edward Rotheram, 1799–1808' <https://collections.rmg.co.uk/collections/objects/506434.html?_ga=1.200765550.1372681657.1468218254>. For a sample of historic maritime-themed tattoo imagery, see 'General Tattoo and Other', Images 101–3 and 105, xxviii of this thesis. For a sample of more contemporary maritime-themed imagery, see 'General Tattoo and Other', Images 107–11, xxix of this thesis.

[149] See section 6.4.2 of this thesis.

[150] See generally Fisher (n 86) 94–7; Josh Adams, 'Marked Difference: Tattooing and its Association with Deviance in the United States' (2009) 30(3) *Deviant Behavior* 266, 267–70. On tattoos and deviant psychology: see, eg, Cesare Lombroso, *Criminal Man*, tr Mary Gibson and Nicole Hahn Rafter (Duke University Press, 2006) 58–62.

[151] On the Tattoo Renaissance generally: see Arnold Rubin, 'The Tattoo Renaissance' in Arnold Rubin (ed), *Marks of Civilization: Artistic Transformations of the Human Body* (Museum of Cultural History, University of California, 1988) 233, 233–64.

[152] Adams (n 150) 270–1.

[153] Daniel Rosenblatt, 'The Antisocial Skin: Structure, Resistance, and "Modern Primitive" Adornment in the United States' (1997) 12(3) *Cultural Anthropology* 287, 301–2.

[154] Zulueta began tattooing professionally in 1981. At that time, he self-published a booklet of his tribal designs, distributing it to tattooists he knew in England, the Netherlands and the United States. This booklet, along with other publications such as Ed Hardy's first issue of the iconic magazine *TattooTime* that contained a feature on "New Tribalism" and included some of Zulueta's work, cemented tribal's arrival as a Western tattoo arts genre. See Leo Zulueta in Devils Delight0666, 'LED ZULUETA' (Youtube, 1 February 2009) 00:01:40–00:02:19 <https://www.youtube.com/watch?v=SuzJjYGYIgM>; 'Season 1, Episode 02', *Tattoo Wars* (Original Productions, 2013) 01:01:44 <https://www.youtube.com/watch?v=swODxWxNZd4>; Marjorie Steel, 'From Taboo to Timeless: Tribal Tattoo Artist Leo Zulueta Makes Waves in Fine Art Community', *Cultured GR* (online, 28 February 2017) <https://cultured.gr/from-taboo-to-timeless-tribal-tattoo-artist-leo-zulueta-makes-waves-in-fine-art-community-14a9b5132158>; Ian Harvey, 'Leo Zulueta's Style of Neo-Tribal Tattooing Made Him Known as the Father of Modern Tribal Tattooing', *The Vintage News* (online, 12 March 2017) <https://www.thevintagenews.com/2017/05/12/leo-zuluetas-style-of-neo-tribal-tattooing-made-him-known-as-the-father-of-modern-tribal-tattooing/>.

aesthetic simplicity, and strong graphic style.[155] Visual impact is maximised through balancing the use of positive and negative space, and strategic placement on the body to complement and enhance the body's musculature.[156] In terms of placement, designs may appear anywhere on the body, but as is common in the western tattoo subculture, the face and hands are usually left bare.[157]

At the time of its inception, tribal was received as a progressive style of art that challenged the Americana "postage stamp" style aesthetic.[158] Its abstract qualities (whether highly stylised or completely non-representational) also signalled a break from conventional western, representational imagery.[159] The 'deeply historic'[160] nature of tribal tattoos contributed to the genre's early (and subsequently enduring) popularity, yet, the genre was considered to be modern.[161] The connection between tribal tattoos and those cultures from which they draw inspiration was depoliticised, with seeking inspiration considered an act of homage rather than appropriation.[162] A discourse of cultural preservation also circulated from the genre's inception, as Zulueta's comments suggest:

> … those [tattoo] traditions are dying out where they originated; the original peoples have no interest in preserving them – they'd rather have a ghetto blaster and a jeep and a pack of Marlboro cigarettes. The Western encroachment has triumphed; all the old men having "primitive"-style tattoos are dead … This is why I really feel strongly about preserving those ancient designs: besides being original art, they might contain talismans for the future, or perhaps encode some cryptic knowledge that could be valuable or illuminating in some way – who knows? But if they're not preserved, we'll never know![163]

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[155] For a sample of Zulueta's tribal tattoo designs, see 'Tribal Tattoos', Images 28–34, xv of this thesis.
[156] Kakoulas, *Black Tattoo Art* (n 86) 22. Zulueta, for example, explains that creating a design that flows with the body is his main concern 'above and beyond the design of the tattoo. It's paramount to me that it fits the body properly': Steel (n 154).
[157] See, eg, Patricia MacCormack, 'The Great Ephemeral Tattooed Skin' (2006) 12(2) *Body and Society* 57, 68–9. Face, neck and hand tattoos are associated with prison tattoos: see Margo DeMello, 'The Convict Body: Tattooing Among Male Prisoners' (1993) 9(6) *Anthropology Today* 10, 10.
[158] This aesthetic involves a collection of small tattoos that are, at most, connected through a motif rather than being closely tied together.
[159] During the 1970s and 1980s there were, for example, oriental-themed designs such as dragons, tigers, and cheongsam girls in the western tattoo lexicon, however, this imagery was representational rather than abstract: see, eg, Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (Duke University Press, 2000) 74.
[160] 'Season 1, Episode 02' (n 154) 0:01:39. See also Dianne Mansfield in Devils Delight0666 (n 154) 00:03:53–00:04:00.
[161] Zulueta, for example, describes his tribal work as 'definitely modern, not based in the past. Inspired by the past—but I've been trying to come from a very contemporary standpoint … My style is from my Western culture': Steel (n 154).
[162] See, eg, Rae Schwarz, 'Tribal Tattoos', *TatRing* (Blog Post, 8 February 2016) <https://tatring.com/tattoo-ideas-meanings/tribaltattoos-2>.
[163] V Vale and Andrea Juno, *Modern Primitives: An Investigation of Contemporary Adornment and Ritual* (RE/Search Publications, 1989) 99. See also tattooist Dan Thome's comments on the tension between the preservation and evolution of designs: at 135. Note that in a later interview Zulueta appears to disavow his

The idea of tribal tattoos as homage, interpretation, modernisation, or act of preservation of Indigenous culture, suggests a problematic 'salvage paradigm'[164] and an anthropological essentialism that compels closer examination. As cultural anthropologist Margo DeMello observes, the tribal artistic genre 'conveyed – however unintentionally –… that the values and mythologies of these [Indigenous] cultures may be appropriated [by individuals] to provide meaning for their own tattoos.'[165] This ethos is developed as a signal of colonialism in the desire framework in chapter 2.[166]

1.3 Thesis structure

In the present, introductory, chapter, I have outlined my approach to cultural appropriation, law and legality, and the political activity that sits behind claims. I have explained my intention to analyse the intersection of cultural appropriation and law beyond conventional progressive accounts, and to deepen understanding of this intersection by attending to the performativity of cultural appropriation allegations, the lived experience of law and appropriation of artists, and the relationship between cultural appropriation and colonialism. I have also provided background information on moko and western tattoo to contextualise the discussion on the appropriation of Indigenous cultural imagery and artistic styles I provide in chapters 4 and 5.

In chapter 2, 'Analytical frameworks,' I outline the three discrete but connected analytical frameworks that guide the key concerns of this thesis. I firstly explain the hallmarks of the conventional progressive approach to reading the intersection of cultural appropriation and law, with close reference to the literature of leading and influential IP scholars including Indigenous Australian lawyer Terri Janke and Moriori[167] barrister Maui Solomon.[168] I note the limitations of the

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position, stating that he 'wasn't seeking to revitalize indigenous culture' through his tattoo work, he was simply 'drawn to the boldness of the art': Kakoulas, *Black Tattoo Art* (n 86) 24.

[164] On the salvage paradigm and art appreciation: see Root, *Cannibal Culture* (n 57) 73–7. On the salvage paradigm generally, see James Clifford, 'The Others: Beyond the 'Salvage' Paradigm' (1989) 3(6) *Third Text* 73, 73–8.

[165] Margo DeMello, *Encyclopedia of Body Adornment* (Greenwood Press, 2007) 277. Here DeMello is commenting specifically on tribal as featured in Don Ed Hardy's New Tribalism edition of *TattooTime.*

[166] See section 2.4 of this thesis.

[167] The Moriori are the Indigenous people of Rēkohu/the Chatham Islands, located to the east of mainland New Zealand.

[168] See section 2.1 of this thesis.

conventional progressive approach for meeting the breadth of this thesis' research questions.[169] Then I explain the nature of each of the three analytical frameworks developed to critically supplement the gaps in the conventional approach and frame the inquiry.[170] These frameworks direct attention to the performativity of cultural claims, the lived experience of law, and the relationship between appropriation and colonial desire. I outline the defining features of each framework using insights drawn from literary, political, feminist, postcolonial and critical cultural theory, and law and society scholarship. I also explain how these frameworks support this thesis' exploration of cultural contestation, legality, cultural practices, and historical attitudes and engagements as factors that produce, reflect, and complicate political activity at the intersection of cultural appropriation and law.

In chapter 3, 'Methodology,' I explain the parameters of my analytical frameworks, which involves a combination of doctrinal analysis of the *Whitmill* legal proceedings, fieldwork interviews with artists, and historical analysis of the colonial gaze and intercultural dealings and trades in tatto over time. Doctrinal analysis aids investigation into how legal institutions frame and purport to regulate cultural life and the material stakes associated with law's complicity in appropriation.[171] However, much cultural complexity sits outside of the formal legal sphere necessitating the selection of other research methods.[172] I selected fieldwork and historical analysis to help unpack some of this complexity. Fieldwork offers insight into the lived experience of law of those artists who directly experience and engage in appropriative practices and thereby, the performativity of appropriation allegations.[173] Historical analysis provides an opportunity to explore the colonial past as produced in cultural claims, and the subversive functioning of claims as part of the cultural politics around identity theft and exploitation.[174] The structure of the remainder of this thesis' structure is informed by each research method in turn.

In chapter 4, 'Property, legal exclusion, cultural harm,' I use doctrinal analysis to analyse the *Whitmill* proceedings as against the cultural appropriation controversy that surrounds Whitmill's Māori-

[169] See section 2.1.2 of this thesis.
[170] See sections 2.2–2.4 of this thesis.
[171] See section 3.1 of this thesis.
[172] See section 3.1.3 of this thesis.
[173] See section 3.2 of this thesis.
[174] See section 3.3 of this thesis.

inspired tattoo design. In this chapter, I frame tattoo as a legal object and cultural appropriation claim that signifies an unmet legal need so as to explore how the legal system receives (or more accurately, does not receive) Indigenous cultural claims over cultural imagery and arts styles. I outline the cultural appropriation allegations against Whitmill and the tattoo wearer Mike Tyson,[175] the trajectory of the *Whitmill* legal proceedings, and how the western bias of copyright's cornerstone principles renders the Māori cultural claim invisible before the law. [176] I then investigate the material stakes of law's complicity in the cultural harms of moko misappropriation, including a loss of Māori control over culture, dilution and distortion of the cultural account, offence, and financial harm, as developed in cultural appropriation commentary,[177] supporting the call for the state to adopt a stronger role in regulating cultural expression. I then investigate how the law reform proposals pertaining to Treaty of Waitangi discourse, heritage reform, copyright reform, and sui generis legislative instruments would redress the abovementioned cultural concerns, were they to be introduced.[178]

In chapter 5, 'Cultural appropriation and law from below,' I explore how examining cultural practices and norms in specific local sites can complicate the property framework developed in chapter 4 and the presumed utility of law reform for creators. In this chapter, I read law, appropriation, and creative activity as a lived phenomenon. I outline artist perspectives on Whitmill's tattoo design and problematic versus acceptable practices so as to challenge the presumed solidity of the property at the heart of cultural appropriation claims. I also explore the relationship between art, culture, and economy to provide a more nuanced view of the problematics of appropriation, as experienced by artists.[179] I then present my own account of how tā moko is currently regulated in New Zealand and discuss the challenges of crafting and imposing different legal norms on this artistic community.[180] Finally, I examine the receptiveness of tattoo subculture to positive law as a regulator of community

[175] See section 4.1 of this thesis.
[176] See section 4.2 of this thesis.
[177] See section 4.3 of this thesis.
[178] See section 4.4 of this thesis.
[179] See section 5.1 of this thesis.
[180] See section 5.2 of this thesis.

life.[181] That discussion complicates the presumed utility of maximal propertisation for securing desirable behaviour change amongst would-be appropriators.

In chapter 6, 'Tattoo and the colonial gaze,' I reconnect discussion of tattoo with the history of colonialism in the Pacific, by investigating the historical record implicated by the performance of colonial history in conventional legal scholarship.[182] This encompasses reading western responses to Pasifika tattoo and tā moko with reference to Enlightenment theories of racial difference, psychoanalytical readings of desire and fascination with the Other, and gendered appreciation of "primitive" masculinity.[183] Identifying how the twin forces of appreciation and objectification have dominated the construction of knowledge about Pacific peoples since the time of early intercultural contact brings to light a way of interrogating the past that propels performative claims of cultural appropriation. However, performative claims of cultural appropriation perform a very narrow version of colonial history, and this is illuminated through my historical analysis of cultural trades in tattooed objects as well as western engagement with Pasifika tattoo, itself.[184] It is argued that a consequence of performing history in law reform discourse is the foreclosure of the possibility of readings of tattoo art outside of the bounds of racialised identity within the confines of settler colonialism. In silencing a history of more subversive activity of cultural claiming, we are simply left with a rearticulation of oppressive dynamics and the very discourse needed to broach the gulf identified between political actors concerned about redressing cultural appropriation and participants in tattoo subculture is stifled.

In chapter 7, 'Conclusion,' I reflect upon this thesis' contribution to the literature and directions for future study. I close by recapping what each chapter of this thesis tells us about the politics of cultural appropriation claims and law reform, and reminding of the need to reconnect legal scholarship with the social and cultural realms if reform discourse is to effectively engage with the dynamism of art, culture, and legality into the future.

[181] See section 5.3 of this thesis.
[182] See section 6.1 of this thesis.
[183] See section 6.2 of this thesis.
[184] See sections 6.3–6.4 of this thesis.

I turn now to this thesis' analytical frameworks to situate this thesis' concerns as an interdisciplinary study of cultural appropriation, copyright law, and tattoo imagery.

Chapter 2: Analytical frameworks

This thesis looks at and beyond conventional progressive critiques to understand the politics of cultural appropriation claims and law reform. In chapters 4, 5 and 6, with the aid of a socio-legal research methodology that includes doctrinal analysis, fieldwork, and historical analysis,[1] I investigate what the conventional approach captures as well as misses about the way in which cultural appropriation claims are performed and culture is produced and negotiated inside and outside of the formal legal frame. My analysis of the reform discourse that characterises conventional scholarship is framed by three distinct analytical frameworks: performativity, law and society, and desire for the Other. Their key features are drawn from diverse disciplines including linguistics, postcolonial studies, anthropology, political theory, feminist theory, and law, particularly law and society scholarship and legal pluralism. In this chapter, my intention is not to survey these literatures in depth or in their entirety, but rather to take from them in order to position this thesis in a particular way. Each framework critically supplements a limitation of the conventional progressive approach's narrow focus on the formal legal exclusion of Indigenous cultural imagery and arts styles from copyright protection and the need for new or better rights. They direct attention to the performativity of alleging appropriation, the nuances of the legal domain, the historical and cultural contingency rights claiming, and the oppressive nature of appropriation as received as an enactment of colonial desire. In turn, this facilitates a deeper sense of the meaning-making in the social, cultural, and legal domains that pertains to the politics of cultural appropriation and reform discourse.

This chapter does not construct an overall theoretical approach or unified theory of cultural appropriation that will be uniformly applied across the following chapters. Rather, the analytical frameworks developed in this chapter draw out the shortcomings of the conventional approach in theory. The methodology chapter that follows sets out the specifics of how this is achieved through the tools of doctrinal analysis, fieldwork, and historical analysis.

[1] For the methodology, see chapter 3 of this thesis.

Chapter 2 comprises four sections. In section 2.1, 'The conventional progressive critique', I outline the key features of conventional progressive scholarship and its contribution to reading and analysing the intersection of cultural appropriation and law. I firstly provide an overview of the key themes and connections that characterise the conventional critique. I closely refer to the work of IP scholars such as Australian barrister Colin Golvan,[2] Australian Indigenous lawyer Terri Janke,[3] Moriori barrister Maui Solomon,[4] and Māori scholar Aroha Mead[5] to outline the complaint of copyright law's western

[2] Particularly Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14(7) *European Intellectual Property Review* 227, 227–32; Colin Golvan, 'Aboriginal Art and the Public Domain' (1998) 9(1) *Journal of Law and Information Science* 122, 122–9; Colin Golvan, 'Protection of Australian Indigenous Copyright: Overview and Future Strategies' (2006) 65 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 10, 10–6.

[3] Particularly Terri Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel and Company, 1998); Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22(2) *University of New South Wales Law Journal* 631, 631–9; Janke, 'Art for Money's Sake' (2000) 25(4) *Alternative Law Journal* 189, 189–91; Terri Janke, 'Guarding Ground: A Vision for a National Indigenous Cultural Authority' (Wentworth Lecture, 22 August 2008) <http://aiatsis.gov.au/sites/default/files/presentations/2008-wentworth-janke-terri-vision-for-national-indigenous-cultural-authority.pdf>; Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (Report,Terri Janke and Company Pty Ltd, 2009) <http://docs.wixstatic.com/ugd/7bf9b4_3346f929752c4f1da9766fb3da148c4c.pdf>; Terri Janke, 'Ensuring Ethical Collaborations in Indigenous Arts and Records Management' (2016) 8 (27) *Indigenous Law Bulletin* 17, 17–21; Terri Janke, 'Indigenous Knowledge and Intellectual Property: Negotiating the Spaces' (2008) 37 *Australian Journal of Indigenous Education* 14, 14–24; Terri Janke, *Indigenous Knowledge: Issues for Protection and Management* (Discussion Paper, 28 March 2018) <https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf>; Terri Janke, *Indigenous Cultural Protocols and the Arts* (Report, Terri Janke and Company Pty Ltd, 2016) <http://qata.qld.edu.au/wp-content/uploads/2016/07/Terri-Janke-Indigenous-Cultural-Protocols-and-the-Arts-1.pdf>; Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Study No. 1, World Intellectual Property Organisation, 2003); Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law* (Background Paper No 12, Law Reform Commission of Western Australia, 2005) <https://www.peacepalacelibrary.nl/ebooks/files/P94-12_background-Janke_Quiggin.pdf>;
Terri Janke, *New Tracks: Indigenous Knowledge and Cultural Expression and the Australian Intellectual Property System* (Issues Paper, 31 May 2012) <https://www.ipaustralia.gov.au/sites/g/files/net856/f/submission_-_terri_janke_and_company_ip_lawyers.pdf>; Robynne Quiggin and Terri Janke, 'How Do We Treat Our Treasures? Indigenous Heritage Rights in a Treaty' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty! Let's Get it Right!* (Aboriginal Studies Press, 2003) 53, 53–71; Jean Kearney and Terri Janke, 'Rights to Culture: Indigenous Cultural and Intellectual Property (ICIP), Copyright and Protocols', *Terri Janke and Company: Lawyers & Consultants* (Web Page, 29 January 2018) <http://www.terrijanke.com.au/single-post/2018/01/29/Rights-to-Culture-Indigenous-Cultural-and-Intellectual-Property-ICIP-Copyright-and-Protocols>.

[4] Particularly Maui Solomon, 'Protecting Maori Heritage in New Zealand' in Barbara Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, 2006) 352, 352–62; Maui Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' in Mary Riley (ed), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Alta Mira Press, 2004) 221, 221–50; Maui Solomon, 'An Indigenous Perspective on the WIPO IGC' in Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, 2017) 219, 219–29; Maui Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' in Sophia Twarog and Promila Kapoor (eds), *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (United Nations, 2004) 155, 155–65; Maui Solomon, 'The Long Journey Home:

bias, the complicity of law in appropriation, and the proposed need for reform to secure greater inclusivity in law. I then explain the utility of this approach for exploring the relationship between cultural claims, the formal legal sphere and identity politics, before identifying its narrow construction of law and culture, prompting my adoption of the three analytical frameworks that follow.

The three sections that follow each develop an analytical framework that responds to the identified limitations of this critique.

In section 2.2, 'Performativity', I develop an analytical framework that reads the static constructions of culture in claims of cultural appropriation and the activity of making an appropriation allegation as politically significant. Cultural claims are more than a possessive claim over culture and do more than expose an unmet legal need; they are productive, performative, and political. In this section, theoretical insights are used to reflect on language as a site of meaning-making, the contingency of identity, and the productivity of claims as alleged. I firstly posit a connection between the language deployed in claims, the dynamism of culture, and political activity. I then describe the nature of

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Return of Our Ancestors' (Paper, World Archaeological Congress, 12 November 2005) <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/solomon_maui_ancestors.pdf>; Maui Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations', *In Motion Magazine* (online, 22 April 2001) <http://www.inmotionmagazine.com/ra01/ms2.html>; Maui Solomon,'Peer Review Report' in World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Table of Written Comments on Revised Objectives and Principles*, WIPO/GRTKF/IC/11/4(b) (3–12 July 2007) Appendix; Maui Solomon,'The Waitangi Tribunal and the Maori Claim to Their Cultural and Intellectual Heritage Rights Property' (2000) 24(4) *Cultural Survival Quarterly Magazine* <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/waitangi-tribunal-and-maori-claim-their-cultural-and>; Maui Solomon, 'Tikanga Maori Framework: A Framework for Protection, Use, Control, and Ownership of Matauranga Maori Me o Rataou Taonga Katoa', *Wai 262* (Web Page) <https://wai262.weebly.com/tikanga-maori-framework.html>.

[5] Particularly Aroha Te Pareake Mead, 'Legal Pluralism and The Politics of Māori Image and Design' (2003) 7(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 34, 34–7; Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 20, 20–9; Aroha Te Pareake Mead, 'Emerging Issues in Maori Traditional Knowledge, Can These Be Addressed by UN Agencies?' (Document PFII/2005/WS.TK/14, UN International TechnicalWorkshop on Traditional Knowledge, Panama City, 21–3 September 2005); Aroha Te Pareake Mead, 'Databases & Other Defensive Measures' (Presentation, WIPO IGC, 27 May 2016) <http://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_16/wipo_iptk_ge_16_presentation_16mead.pdf>; Aroha Te Pareake Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Sharing Indigenous and Local Community Experiences' (Presentation, WIPO IGC, 30 May 2016) <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_30/wipo_grtkf_ic_30_presentation_mead.pdf>; Aroha Te Pareake Mead, 'Understanding Maori Intellectual Property Rights' (Conference Paper, Inaugural Maori Legal Forum, 2002) <http://news.tangatawhenua.com/wp-content/uploads/2009/12/MaoriPropertyRights.pdf>; Aroha Te Pareake Mead, 'The Case for *Sui Generis* Protection for Maori Cultural & Intellectual Property' (Presentation, August 2003) <https://slideplayer.com/slide/4534421/>.

cultural appropriation allegations as a performative utterance, drawing upon, for example, the speech act theory of JL Austin,[6] Judith Butler's reflections on the performative nature of identity and performative politics,[7] and Gayatri Spivak's theory of strategic essentialism and insights into subaltern speech,[8] before reflecting on rights claiming and reform discourse as a performative activity.

In section 2.3, 'Law and society', I develop an analytical framework that expands our understanding of law beyond formal, positive law to comprise a broader understanding of legality. I put forward a bottom-up reading of law as lived experience and, drawing upon the concepts of legal consciousness and legal pluralism,[9] acknowledge that subject positions and experience of legality may differ amongst different constituencies. Rights claimants and conventional scholars can perform legality differently, or otherwise, to artists. This invites a close consideration of the relevance of formal legal rules to the everyday practices and understandings of artists. From the perspective of this analytical framework, the effectiveness of regulating appropriation through more or better legal rights is not assumed but rather put into question.

In section 2.4 of this chapter, 'Desire for the Other', I conclude by developing an analytical framework that advances a reading of the logic or motivation behind cultural appropriation in settler states as driven by desire for the Other. This framework reads appropriation as an enactment of colonial desire. It presents a critical account of identity formation to better understand the historicity of cultural appropriation allegations and the nature of the oppression that sits behind the performance of colonial history in conventional scholarship. Firstly, I explain the relevance of identity as produced

[6] JL Austin, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955,* ed JO Urmson and M Sbisa (Oxford University Press, 1975). See section 2.2.2 of this chapter.
[7] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1999); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997); Judith Butler and Gayatri Chakavorty Spivak, *Who Sings the Nation-State? Language, Politics, Belonging* (Seagull Books, 2010). See section 2.2.3 of this chapter.
[8] Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstructing Historiography' in Ranajit Guha and Gayatri Chakavorty Spivak (eds), *Selected Subaltern Studies* (Oxford University Press, 1988) 3, 3–34; Gayatri Chakravorty Spivak, Donna Landry and Gerard Maclean, 'Subaltern Talk: Interview with the Editors' in Gayatri Chakavorty Spivak, *The Spivak Reader*, ed Donna Landry and Gerard Maclean (Routledge, 1996) 287; Gayatri Chakravorty Spivak, *In Other Worlds: Essays in Cultural Politics* (Routledge, 2006); Gayatri Chakravorty Spivak, *The Post-Colonial Critic: Interviews, Strategies, Dialogues*, ed Sarah Harasym (Routledge, 1990). See section 2.2.1 of this chapter.
[9] For a definition of legal consciousness see, eg, Susan Silbey, 'Making a Place for a Cultural Analysis of Law' (1992) 17(1) *Law and Social Inquiry* 39, 45. For a definition of legal pluralism see, eg Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869, 870. I return to consider the relevance of legal consciousness and legal pluralism in detail at sections 2.3.1 and 2.3.2 of this chapter, respectively.

in claims to the construction of the appropriator as an oppressor. I connect raced hierarchies of cultural value to colonial discourse as a discourse of power and desire, with attention to the insights of postcolonial scholars like Franz Fanon[10] and Homi Bhabha.[11] I then describe appropriative arts practices as an act of colonial consumption with close reference to the writings of cultural critics like feminist scholar bell hooks,[12] before identifying appropriation as engaging a desire for the Other, an assumption of their binary inferiority, and the silencing of the subaltern's capacity to speak in body modification discourses that exhibit a New Age ethos, including the Modern Primitives and tribal tattoos. Cultural identity is performed in cultural claims, but so too is an appropriator identity that engages and reproduces oppressive hierarchies and posits a very specific relationship between the present and the past.

The theoretical perspectives discussed throughout the chapter do not construct a unified or totalising system for analysing cultural appropriation, but rather represent a means of speaking back to the conventional critique. They each supplement a different shortcoming of the conventional position.[13]

I will now outline the hallmarks of the conventional progressive critique of the intersection of cultural appropriation and law with close reference to IP scholarship.

2.1 The conventional progressive critique

Progressives orient their critique to IP as it is constructed in the law. This places the formal legal sphere, its limitations and promises, at the centre of discussion. Some of the particular concerns of this critique are addressed in this thesis' methodology through doctrinal analysis, as explained in more detail in chapter 3.[14] In this section, I will outline the conventional critique with close reference to the work of four leading and influential IP scholars; Colin Golvan, Terri Janke, Maui Solomon, and Aroha Mead. Firstly, however, I will provide a brief biography of each scholar in turn.

[10] Frantz Fanon, *Black Skin, White Masks*, tr Charles Law Markmann (Pluto Press, 1986); Frantz Fanon, *Towards the African Revolution: Political Essays*, tr Haakon Chevalier (Grove Press, 1988) 29, 29–44.
[11] Homi Bhabha, *The Location of Culture* (Routledge, 2010).
[12] bell hooks, 'Eating the Other: Desire and Resistance' in *Black Looks: Race and Representation* (Routledge, 2015) 21, 21–39.
[13] See particularly section 2.5 of this chapter.
[14] See section 3.1 of this thesis.

Colin Golvan is a non-Indigenous Australian barrister with knowledge of copyright issues as they pertain to Indigenous artists. In the late 1980s, he provided legal commentary on an ABC radio program on Aboriginal art-rip offs in the souvenir industry.[15] At that time, Indigenous art was perceived by some government departments to not be sufficiently original to subsist in copyright because its engagement of folklore limited the scope for original expression.[16] Golvan's commentary provided a legal opinion to the contrary. As a result, he was asked by Indigenous artist Lin Onus to provide advice on copyright issues, beginning a long association with Arnhem land artists including his 'lead client' Johnny Bulun Bulun.[17] Soon after, Golvan litigated one of the key Indigenous copyright cases in Australia – *Bulun Bulun v R & T Textiles Pty Ltd.*[18] He has also acted on behalf of Aboriginal artists seeking to manage their copyright from all over Australia, participated in community engagement activities such as delivering seminars and workshops on his experiences in the Indigenous copyright cases,[19] and been involved in other Indigenous rights issues, including the repatriation of Aboriginal remains, in his role on the board of Museums Victoria.[20]

Terri Janke is an Aboriginal and Torres Straight Islander lawyer, consultant, advocate for Indigenous rights, and 'international authority on Indigenous Cultural and Intellectual Property' (ICIP).[21] She was commissioned by AIATSIS to produce the first comprehensive analysis of the relationship between ICIP and Australia's legislative frameworks in *Our Culture: Our Future. Report on Australian*

[15] 'Aboriginal Australia – A Personal Story', *Colin Golvan* (Web Page) <https://www.colingolvan.com.au/law/law-articles-and-essays/159-aboriginal-australia-a-personal-story>.
[16] Attorney General's Department, *WIPO-Australia Copyright Program for Asia and the Pacific* (Australian Government Publishing Service, 1987) 22. Aboriginal artists were understood as a 'mere interpreter[] of traditional stories' rather than artists: Martin Hardie, 'Copywrong', *All Asia Review of Books* (July 1989) 25 quoted in Brad Sherman, 'From the Non-Original to the Ab-Original: A History' in Brad Sherman and Alain Strowel (eds), *Of Authors and Origins: Essays on Copyright Law* (Clarendon Press, 1994) 111, 121. The view that Aboriginal artworks did not subsist in copyright also permeated goverment departments. See '[m]ost Aboriginal artists draw upon pre-existing tradition and a question arises as to whether such works satisfy the requirement of originality': Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (Australian Government Publishing Service, 1981) 13–4. Note that in 1989, this view was definitively rejected in a government report that stated that the *Copyright Act* 'does provide for recognition of copyright in artistic works of individual [Aboriginal] artists': Jon Altman, *The Aboriginal Arts and Crafts Industry: Report of the Review Committee* (Australian Government Publishing Service, 1989) 302.
[17] 'Aboriginal Australia – A Personal Story' (above n 15).
[18] (1998) 41 IPR 513.
[19] 'Aboriginal Australia – A Personal Story' (above n 15).
[20] Ibid.
[21] 'Terri Janke', *Terri Janke and Company: Lawyers & Consultants* (Web Page) <http://www.terrijanke.com.au/team/terri>.

Indigenous Cultural and Intellectual Property Rights (*Our Culture: Our Future*),[22] that included numerous reform proposals to better protect ICIP in a culturally appropriate manner. Janke works in private practice. In addition to producing a significant body of literature dealing with Indigenous IP issues, in terms of volume and importance, Janke has played a key role in drafting protocols and ICIP models in the films, arts, museum and archival sector.[23] She has also acted as a consultant for the World Intellectual Property Organization (WIPO) on the Pacific Traditional Knowledge Act Plan[24] and in 2017 she participated in a roundtable at the WIPO Seminar on Intellectual Property and Traditional Cultural Expressions.[25] She regularly runs workshops and community engagement initiatives aimed at empowering and legally upskilling Indigenous artists and entrepreneurs and helping organisations manage ICIP.[26] Such contributions have been recognised in the broader Indigenous and legal communities. She was recently featured on NITV on a *Living Black* episode,[27] where she was described as an 'expert fighting to protect the intellectual property and cultural rights of Indigenous peoples'.[28] She has received numerous awards for her law and community work

[22] (Michael Frankel and Company, 1998).
[23] Janke, for example, authored the protocols booklets published by the Australia Council for the Arts: Australia Council for the Arts, *Protocols for Producing Indigenous Australian Writing: Writing* (2nd ed, 2007) <https://www.australiacouncil.gov.au/workspace/uploads/files/writing-protocols-for-indigeno-5b4bfc67dd037.pdf>; Australia Council for the Arts, *Protocols for Producing Indigenous Australian Music: Music* (2nd ed, 2007) <https://www.australiacouncil.gov.au/workspace/uploads/files/music-protocols-for-indigenous-5b4bfc140118d.pdf>; Australia Council for the Arts, *Protocols for Producing Indigenous Australian Performing Arts: Performing Arts* (2nd ed, 2007) <https://www.australiacouncil.gov.au/workspace/uploads/files/performing-arts-protocols-for-5b4bfd3988d3e.pdf>*; Australia Council for the Arts, Protocols for Producing Indigenous Australian Media Arts: Media Arts* (2nd ed, 2007) <https://www.australiacouncil.gov.au/workspace/uploads/files/media-protocols-for-indigenous-5b4bfd105bfa3.pdf>; Australia Council for the Arts, *Protocols for Producing Indigenous Australian Visual Arts: Visual Arts* (2nd ed, 2007) <https://www.australiacouncil.gov.au/workspace/uploads/files/visual-protocols-for-indigenou-5b4bfce4b0333.pdf>.
[24] 'Terri Janke' (n 21). See Pacific Traditional Knowledge Implementation Action Plan (2010) <https://sustainabledevelopment.un.org/partnership/?p=7690>.
[25] 'Beware of Bogus Boomerangs: Should We Protect Traditional Cultural Expression That is Deemed to be in the Public Domain?', *Terri Janke and Company: Lawyers & Consultants* (Web Page, 31 August 2017) <http://www.terrijanke.com.au/single-post/2017/08/31/Beware-of-Bogus-Boomerangs-Should-TCE-laws-only-protect-those-things-that-are-not-already-publicly-available>.
[26] See, eg, 'Empowering Aboriginal and Torres Strait Islander Artists Workshop', *Eventbrite* (Web Page) <https://www.eventbrite.com.au/e/indigenous-arts-and-law-workshop-registration-55675295307#>; 'Law Way', *Terri Janke and Company: Lawyers & Consultants* <http://www.terrijanke.com.au/lawway-workshops>; 'True Tracks; a Pathway to Indigenous Engagement', *Eventbrite* (Webpage) <https://www.eventbrite.com/e/true-tracks-a-pathway-to-indigenous-engagement-april-workshop-tickets-56159817526?aff=ebdssbdestsearch>.
[27] 'Cultural Crusader', *Living Black* (National Indigenous Television, 2017) <https://www.sbs.com.au/ondemand/video/887817795791/living-black-cultural-crusader>.
[28] NITV (Facebook Post, 15 March 2017, 3:00PM) <https://www.facebook.com/pg/NITVAustralia/posts/?ref=page_internal>.

including the Commonwealth Attorney-General's Indigenous Lawyer of the Year Award (2012) and NAIDOC Person of the Year Award (2011).[29]

Maui Solomon is a New Zealand based Moriori barrister and Indigenous rights advocate for the recognition of customary and Treaty rights, who specialises in ICIP, environmental law, and land and fishing claims.[30] He has held leadership positions including as the chair of his tribal body, Hokotehi Morioi Trust, and was previously President of the International Society of Ethnobiology that seeks better recognition and protection of ICIP.[31] In his work as a barrister, he has represented Māori tribes from all over New Zealand and other peoples in the Pacific, most notably representing three of the six claimants in the landmark Wai 262 Indigenous Flora and Fauna claim, discussed in chapter 4.[32] In addition to his litigation work, he is an active participant in domestic IP reform politics. For example, he recently presented a keynote address at the 2018 Ngā Taonga Tuku Iho conference on Māori cultural and IP rights,[33] and was one of the featured commentators in the 2002 documentary on the commercial exploitation of Māori culture, *Guarding the Family Silver*, directed by Moana Maniapoto.[34] Solomon has also participated in international Indigenous rights debates on the Convention on Biological Diversity and participated in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) since WIPO's 1998 Facting Finding Mission, the precursor initiative that established the WIPO IGC.[35] Solomon is currently a member of the Intellectual Property Issues in Cultural Heritage (IPinCH) research team.[36]

[29] 'Awards and Recognition', *Terri Janke and Company: Lawyers & Consultants* (Web Page) <http://www.terrijanke.com.au/awards>.
[30] 'Maui Solomon', *IPinCH* (Web Page) <https://www.sfu.ca/ipinch/about/ipinch-people/research-team/maui-solomon/>; 'Maui Solomon', *Ngā Taonga Tuku Iho* (Web Page) <https://www.taongatukuiho.com/speaker/maui-solomon/>.
[31] 'Maui Solomon', *Ngā Taonga Tuku Iho* (n 30).
[32] See section 4.4.1.1 of this thesis.
[33] *Ngā Taonga Tuku Iho* (Web Page) <https://www.taongatukuiho.com/>. Terri Janke and Aroha Mead were also keynote speakers at this conference.
[34] *Guarding the Family Silver* (Tawera Productions/Black Pearl Ltd, 2005) <https://www.nzonscreen.com/title/guarding-the-family-silver-2005>.
[35] Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 228.
[36] 'Research Team', *IPinCH* (Web Page) <https://www.sfu.ca/ipinch/about/ipinch-people/research-team/>.

Aroha Mead, who is Māori, is a policy advisor, Indigenous rights advocate, and scholar, with expertise in Mātauranga Māori.[37] Unlike the other three scholars whose work is drawn closely upon in this chapter to illustrate the conventional progressive critique, Mead has no formal training in western law. However, she has been involved in ICIP and environmental issues for over thirty years at a tribal, national, Pacific regional, and international level.[38] Mead gave evidence on behalf of Ngāti Porou at the Wai 262 claims hearing process,[39] advocated for the introduction for the United Nations Declaration on the Rights of Indigenous People,[40] organised the WIPO-NZ Fact Finding Mission in 1998,[41] organised the Conference[42] that developed the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous* Peoples (1993),[43] has participated in WIPO IGC,[44] and regularly speaks at domestic events on TK and IP issues.[45] Mead has also taken a leadership role in domestic and international organisations, previously serving terms on the International Union for Conservation of Nature (IUCN) Council (2000–2008) and a term as Co-Chair of the Theme on Culture and Conservation.[46] She currently serves as Co-Chair of the Call of the Earth Llamado de la Tierra, and is a member of the IPONZ Trade Marks Māori Advisory Committee and the Repatriation Advisory Panel at the museum Te Papa Tongarewa.[47]

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[37] 'Aroha Te Pareake Mead', *Prabook* (Web Page) <https://prabook.com/web/aroha_te_pareake.mead/190531>.
[38] 'Aroha Te Pareake Mead', *Call of the Earth: Llamado de la Tierra* (Web Page) <https://calloftheearth.wordpress.com/members/aroha-te-pareake-mead/>.
[39] Te Uruoa Flavell, 'WAI 262 – Insights and Perspectives' (Speech, The Māori Party, 10 October 2011) <http://www.scoop.co.nz/stories/PA1110/S00203/wai-262-insights-and-perspectives.htm>.
[40] New Zealand, *Parliamentary Debates*, House of Representatives, 20 April 2010, 10229 (Rahui Katene) <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of>.
[41] Mead, 'Intellectual Property, Genetic Resources' (n 5) 5.
[42] First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples (Whakatane, New Zealand, 12–8 June 1993).
[43] *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous People* (1993) <http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf> (*Mataatua Declaration*). See 'Aroha Te Pareake Mead', *Call of the Earth* (n 38).
[44] See, eg, Aroha Mead, 'Traditional Knowledge, Genetic Resources and WIPO', *IUCN* (Web Page) <https://www.iucn.org/news/commission-environmental-economic-and-social-policy/201608/traditional-knowledge-genetic-resources-and-wipo>.
[45] See, eg, 'Panel Discussion: Protecting Traditional Knowledge in the International Intellectual Property System', *Faculty of Law: Victoria University Wellington* (Web Page) <https://www.victoria.ac.nz/law/about/events/panel-discussion-protecting-traditional-knowledge-in-the-international-intellectual-property-system>.
[46] 'Aroha Te Pareake Mead', *Call of the Earth* (n 38).
[47] Ibid; 'Aroha Te Pareake Mead', *Prabook* (n 37); 'Māori Advisory Committees', *New Zealand Intellectual Property Office* <https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/#trade-marks>.

The conventional progressive critique – as illuminated by the scholarship of the above authors – is useful in conceptualising law's complicity in cultural harm and cultural claims as an identity politics. However, on its own it does not respond to the breadth of this thesis' concerns. As such, after outlining the hallmarks of the conventional approach, I will identify some of the limitations of the assumptions that drive conventional scholarship. This identification accounts for my own subsequent attention to the performativity of cultural claims and the language they deploy, the nuances of the legal domain and legality as created differently by artists and activists, and the relationship between appropriation, desire for the Other and oppression, in the sections that follow.[48]

2.1.1 Legal exclusion and the need for more or better rights

2.1.1.1 A complaint of western bias

The starting point of conventional critiques of the intersection of cultural appropriation and law is that IP law does not recognise the traditional context within which Indigenous art is produced, owned, and managed within communities.[49] As legal regulation is incompatible with traditional values and operates in an exclusionary manner, it is seen as being complicit in appropriation and its harms.[50] That is to say, because there are gaps in the law, Indigenous people cannot always 'meet the requirements of intellectual property laws like copyright, [and] their rights are unprotected and open to exploitation.'[51]

A complaint of western bias is evident in Golvan's scholarship. He was one of the first Australian authors to identify a disjuncture between individual economic rights, as based on an individual creator having a property right in their copyright interest, and Australian Indigenous notions of ownership

[48] See sections 2.2–2.4 of this chapter.
[49] On the usefulness of this starting point to understanding the IP issues faced by Indigenous peoples, see Mead, 'Legal Pluralism' (n 5) 34.
[50] See, eg, 'the Australian legal framework limits the ability of Indigenous people to adequately protect their ICIP from exploitation by outsiders': Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law* (n 3) 8. IP scholar Kathy Bowrey describes this view expressed in IP scholarship as 'conventional': Kathy Bowrey, 'International Trade in Indigenous Cultural Heritage: An Australian Perspective' in Christoph Beat Graber, Karolina Kuprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012) 396, 405. This identification, in part, informed my reference to this body of work as the 'conventional progressive' critique. Also influential was Michael F Brown's description of the 'typical article' on law and intangible heritage: see Michael F Brown, 'Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property' (2005) 12 (1) *International Journal of Cultural Property* 40, 44–5.
[51] Kearney and Janke (n 3).

that are entwined with perpetual land use rights and defined by communal rights and custodial interests.[52] In New Zealand, Solomon advances a similar critique of law's western bias, citing the 'inherent philosophical conflicts' between western IP systems and Māori approaches to intellectual rights and heritage.[53] Solomon construes western IP rights as embodying a capitalist model. A concern with private economic rights, such as the right to exploit for profit and financial gain, and individualism and the needs of corporate legal personalities are preferred to the collective good. Conversely, he sees Māori culture as 'collectively based' and defined by 'obligations to and respect for natural resources' as much as the right to use those resources.[54] The resultant 'fundamental clash…[in] ideological underpinnings'[55] means that the law has 'little time for [the] ritual and respect' that underpins Māori rights and obligations.[56]

In terms of copyright's functioning, the mismatch between Indigenous and western knowledge systems results in the identification and criticism of western bias in cornerstone principles such as the limited time duration, material form requirement, idea/expression distinction, and preference for individual ownership.[57] These principles are seen to entrench the cultural harm of appropriation as Indigenous cultural practices, arts styles, iconography, and ancient imagery fall into the public domain and are free to be appropriated without restriction.[58] This is particularly concerning for sacred

[52] As identifed in the context of the case of *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481: Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 2) 229–30. For another early example of this type of identification see Terri Janke, *Our Culture: Our Future* (n 3) xxiii.
[53] Solomon, 'The Waitangi Tribunal' (n 4). See also Robert Jahnke and Huia Tomlins Jahnke, 'The Politics of Māori Image and Design' (2003) 7(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 5, 5.
[54] Solomon, 'The Waitangi Tribunal' (n 4). See also Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 224; Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 219; Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 4) 155–6.
[55] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 224. See also Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 4); Solomon, 'The Waitangi Tribunal' (n 4).
[56] Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 4). See also Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 224; Solomon, 'The Waitangi Tribunal' (n 4).
[57] Janke, *Our Culture: Our Future* (n 3) xxii–xxiii, 52–63; Janke, 'Indigenous Knowledge and Intellectual Property' (n 3) 15–6; Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law* (n 3) 13–9; Janke, *New Tracks* (n 3) 9–14; Janke, *Beyond Guarding Ground* (n 3) 12–3. See also, eg, Sue Bunting, 'Limitations of Australian Copyright Law in the Protection of Indigenous Music and Culture' (2000) 18 *Context: Journal of Music Research* 15, 15–24; Tami Sokol, 'An Unworkable Reconciliation? Indigenous Artistic Works and the *Copyright Act 1968* (Cth)' (2011) 7(24) *Indigenous Law Bulletin* 22, 22–3.
[58] For example, Golvan identifies, arts styles, rock art, the design of the boomerang, the didgeridoo, and Aboriginal dance (save in notated form) as in the public domain: Colin Golvan, 'Aboriginal Art and the Public Domain' (n 2) 122. For discussion of the inadequacies of the IP system to protect Māori TK in the public

imagery. For Janke, legal protection is insufficient in the instance of the sacred Indigenous Australian wandjina, mimi and quinkin figures and rock art[59] that lacks an identifiable author and/or is owned communally and/or is out of time for copyright protection.[60] For example, in commentary on an appropriation of the wandjina, a spirit figure depicted and regulated by Indigenous communities in the Kimberly region, by a Blue Mountains art gallery in 2010,[61] Janke stated that more 'robust legal protections were needed' to prevent the appropriation of this sacred figure.[62] The appropriative work, a sculpture,[63] did not copy an existing artwork but drew upon the public domain elements of the wandjina. As Janke noted, 'there is nothing to stop a similar situation from occurring again and no guaranteed remedy'[64] under the current IP framework.[65]

Outside of the misappropriation of sacred imagery, there are also concerns about the proliferation of 'bastardised' artistic styles. Janke and Golvan note concerns that the current principles permit the imitation of Indigenous painting styles such as rarkk[66] and x-ray koala bear figures that do not directly infringe copyright but are nevertheless offensive or would infringe Aboriginal law and custom.[67]

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domain, see, eg, Solomon, 'Protecting Maori Heritage in New Zealand' (n 4) 360–1; Tania Waikato, 'He Kaitiaki Mātauranga: Building a Protection Regime for Māori Traditional Knowledge' (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 344, 365.

[59] See 'Australian Imagery', Images 68–9, 71, 72–3, xxi–xxii of this thesis.

[60] See Janke, *Minding Culture* (n 3) 105, 112; Janke, *Our Culture: Our Future* (n 3) 61; Janke, 'Indigenous Knowledge and Intellectual Property' (n 3) 16–7, 20; Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 33–4. See also Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 2) 231; Colin Golvan, 'Aboriginal Art and the Public Domain' (n 2) 125–7; Christoph Beat Graber, 'Aboriginal Self-Determination vs the Propertisation of Traditional Culture: The Case of Sacred Wanjina Sites' (2009)13(2) *Australian Indigenous Law Review* 18, 21–2; Stephen Gray, 'Cultural and Intellectual Property Rights in Rock Art: A Case Study of Australian Indigenous Art' in Bruno David and Ian McNiven (eds), *The Oxford Handbook of the Archaeology and Anthropology of Rock Art* (Oxford University Press, 2018) 971, 971–92.

[61] See generally 'Wading into the Wandjina Controversy', *The Law Report* (ABC Radio National, 29 June 2010) <https://abcmedia.akamaized.net/rn/podcast/2010/06/lrt_20100629_0830.mp3>; 'Wandjina – Protecting Cultural Heritage Through Council Planning Laws', *Artists in the Black* (Web Page) <https://www.aitb.com.au/index.php/case-studies/entry/cultural-heritage-using-council-planning-laws-for-protection-against-unauth/>.

[62] Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 34.

[63] See 'Australian Imagery', Images 74–5, xxii of this thesis.

[64] Ibid. The wandjina sculpture was ultimately ordered to be removed from its position outside of the gallery under a public interest provision in local planning law: *Tenodi v Blue Mountains City Council* [2011] NSWLEC 1183 (21 June 2011).

[65] See, eg, the wandjina-inspired art of Vesna Tenodi that is unlikely to breach Indigenous copyright because it draws on the public domain aspects of wandjinas: 'Australian Imagery', Images 76–7, xxii of this thesis.

[66] See 'Australian Imagery', Image 70, xxi of this thesis.

[67] See Janke, *Our Culture: Our Future* (n 3) 37–8, 60; Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law* (n 3) 8–9; Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 2) 229. Janke notes that both Indigenous and non-Indigenous artists are guilty of such offensive

While misleading and deceptive conduct principles,[68] prevent, for example, the fraudulent marketing of an appropriative product as 'Aboriginal',[69] copying themes or arts styles 'so as to give the overall impression that the work is Indigenous' is not an infringement of copyright.[70] As themes and arts styles are in the public domain, Janke perceives a role for education in raising awareness of cultural protocols, and argues that legally enforceable rights are required to prevent their misuse.[71]

Conventional critiques are also characterised by the positing of a connection between legal exclusion and 'the ideologies of foreign conquest and domination.'[72] Mead is particularly critical of western IP systems as 'the second wave of colonisation;' arguing that law's complicity in appropriation facilitates dispossession and impedes cultural survival.[73] The recognition and protection of ICIP, through the provision of new rights, is perceived to be 'at the heart of the reconciliation process,'[74] yet neither Mead, nor the other three scholars drawn on in this part, elaborate on the link between legal exclusion, appropriation, and colonialism. Rather, their primary focus is on centring and protecting Indigenous culture through legal rights reforms.[75] I return to consider the significance of the link between appropriation and colonialism through the third theoretical framework of desire, below.[76] I will now consider the conventional focus on securing legal inclusion in more detail.

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appropriative practices, particularly when it comes to the unauthorised imitation of arts styles: Janke, 'Art for Money's Sake' (n 3) 190.

[68] *Competition and Consumer Act 2019* (Cth) sch 2, s 18.

[69] Such instances have been prosecuted by the ACCC in Australia: see, eg, *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd* (2009) 263 ALR 487; *Australian Competition and Consumer Commission v Nooravi* [2008] FCA 2021. See discussion in Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 35–7.

[70] Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 35. See also: at 37.

[71] Ibid 47–8.

[72] Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' (n 5) 21. See also Moana Jackson, 'The Property of Māori Intellect: A Review of *The Politics of Māori Image and Design*' (2003) 7(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 32, 32.

[73] Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' (n 5) 21. See also Mead, 'Understanding Maori Intellectual Property Rights' (n 5) 1; Quiggin and Janke, 'How Do We Treat Our Treasures?' (n 3) 53; Solomon, 'The Long Journey Home' (n 4) 5; Makere Harawira, 'Neo-Imperialism and the (Mis)appropriation of Indigenousness' (1999) 54 *Pacific World* <https://Maori news.com/writings/papers/other/makere.htm>; Toni Liddell, 'The Travesty of Waitaha: The New Age Piracy of Early Maori History' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 32, 42; Jahnke and Tomlins Jahnke (n 53) 5, 14.

[74] Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 3) 638. See also: at 631. See also Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 2) 232.

[75] I return to consider various reform proposals in detail in section 4.4 of this thesis.

[76] See section 2.4 of this chapter.

2.1.1.2 Proposed legal solutions to western bias

In addition to identifying the legal exclusion of Indigenous ways of knowing, owning, and creating art and asserting that it reflects colonial injustice, conventional scholarship is characterised by advocacy around redressing exclusion through the introduction of more or better legal rights.[77] In chapter 4, I provide a detailed account of the law reform proposals put forward by Golvan, Janke, Solomon, and Mead that include heritage reforms,[78] copyright reforms,[79] and the introduction of domestic TK regimes.[80] I also consider the Waitangi Tribunal's Wai 262 claim recommendations.[81] While there is much variety in the reform models of conventional scholars, they all seek to recognise Indigenous experience and to limit unauthorised appropriation and related harms. Reform proposals typically put forward rights to secure Indigenous participation in decision-making, protect cultural productions such as imagery and arts styles from unauthorised dealings, and recognise multi-generational and collective interests.[82] However, given that there is scepticism around whether tweaking existing copyright and heritage regimes can overcome their long associations with eurocentrism,[83] conventional authors can preference the introduction of a sui generis statutory rights regime.[84] Stand-alone TK instruments are perceived to provide the 'maximum level of protection' for the values underlying traditional cultural expressions and increased opportunities for economic and cultural

[77] Note that while Golvan's early work does advocate legislative enactment, particularly around the recognition of communal rights of tribal custodians, his later work is more critical of legislative intervention outside of new rights to protect sacred imagery: compare Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 2) 230 and Golvan, 'Aboriginal Art and the Public Domain' (n 2) 127; Golvan, 'Protection of Australian Indigenous Copyright' (n 2) 15.
[78] See section 4.4.2.1 of this thesis.
[79] See section 4.4.2.2 of this thesis.
[80] See section 4.4.3 of this thesis.
[81] See section 4.4.1 of this thesis.
[82] See, eg, Janke, *Our Culture: Our Future* (n 3) xxxvi-xxxviii, 194–6; Janke, 'Respecting Indig**e**nous Cultural and Intellectual Property Rights' (n 3) 636–7; Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 240–1; Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 4). See also Mead's support of *Maataatua Declaration* principles: Mead, 'Emerging Issues in Maori Traditional Knowledge' (n 5) 17–8; Mead, 'Legal Pluralism' (n 5) 37; Mead, 'Intellectual Property, Genetic Resources' (n 5) 2–3, 7.
[83] See Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 240; Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 4); Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 4) 160.
[84] See, eg, '[c]hief among' the needs and expectations of Indigenous peoples in relation to the recognition and protections of their TK and traditional cultural expressions is 'the development of *sui generis* systems': Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 221 (emphasis in original). See also Janke, *Our Culture: Our Future* (n 3) 131. As mentioned earlier, Golvan is much less enthusiastic about sui generis reform than Janke, Solomon, and Mead.

development, through the recognition of customary law.[85] Empowerment is presumed to follow from the opportunity to enforce compliance with Indigenous law.[86]

While there is a clear preference for sui generis regimes, other measures are also recognised as useful in reform commentary. Janke, for example, canvasses diverse options such as negotiating rights under agreement, developing cultural infrastructure such as a National Indigenous Cultural Authority that could control and monitor uses of ICIP, the further use and development of Indigenous cultural protocols for obtaining consent for uses of ICIP, and the establishment of an authenticity trade mark.[87] Her work in particular stresses the value of Indigenous-devised cultural protocols as an adjunct to positive law that is entirely voluntary, in circumstances where political will is perceived to be the major stumbling block for the development and introduction of effective statutory interventions to remedy Indigenous exclusion.[88] As Janke observes, 'new laws take time and require significant political will and support. This has always been a hurdle for laws relating to Indigenous Knowledge.'[89] Non-legal standard-setting instruments are supported as a practical "stopgap" measure. Mead and Solomon have also advocated the introduction of a range of non-legal reform measures, including codes of ethics, guidelines, and protocols to 'educate and persuade voluntary compliance' with preferred ICIP frameworks, alongside their sui generis proposals.[90] I discuss some of the non-legal measures put forward in New Zealand as part of treaty discourse in chapter 4.[91]

Frustration with the domestic political climate has also influenced conventional scholars, particularly Solomon and Mead as participants in WIPO IGC, to actively pursue an international law reform

[85] Mead, 'The Case for *Sui Generis* Protection' (n 5) slides 2, 4, 21. See also Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 221–3.
[86] Solomon, 'Tikanga Maori Framework' (n 4); Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 223, 224.
[87] See Janke, *Our Culture: Our Future* (n 3) 197–207, 226–59; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 3) 637–8; Janke, *Beyond Guarding Ground* (n 3) 15–35; Janke, 'Guarding Ground' (n 3) 27–40, 45–6; Janke, *New Tracks* (n 3) 25–6; Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 117–8; Janke, *Indigenous Cultural Protocols and the Arts* (n 3) 98. For a discussion of the failed Australian NIAAA Label of Authenticity Trade Mark, see Janke, *Minding Culture* (n 3) 134–152. New Zealand has an authenticity trademark, Toi Iho: *Toi Iho* (Web Page) <http://www.toiiho.co.nz/>.
[88] See, eg, Janke, 'Ensuring Ethical Collaborations' (n 3) 20; Kearney and Janke (n 3).
[89] Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 50.
[90] See, eg, Solomon, 'Tikanga Maori Framework' (n 4); Mead, 'Legal Pluralism' (n 5) 37; Mead, 'The Case for *Sui Generis* Protection' (n 5) slide 21.
[91] See section 4.4.1 of this thesis.

agenda. A TK treaty at the global level is seen as a superior source that could bypass the inertia around introducing domestic TK laws in settler states, as well as support the operations of domestic instruments were they to be introduced.[92] According to Mead, this instrument should aim to prevent the misappropriation of TK, help Indigenous peoples control the way in which their TK is used beyond its customary context, promote equitable benefit sharing, and encourage and protect tradition-based creativity and innovation.[93] However, like the domestic sphere, the international arena is also marred by a lack of political will and conventional scholars are sceptical about the possibility of the introduction of meaningful TK rights.[94] The WIPO process has been criticised as 'inappropriate'[95] and as 'stonewalling'[96] by commentators, primarily because Indigenous people only hold "observer" status and are prevented from participating and negotiating fully in the drafting process.[97] As an observer, they cannot vote, or formally present proposals, amendments, or motions.[98] The capacity of Indigenous observers to attend meetings in Geneva, several times per year, is also plagued by limited financial resources.[99] As Gordon states, the limited influence of Indigenous persons in the WIPO TK instrument drafting process implicates 'questions of fairness, equity, and global justice'[100] and raises doubts about the legitimacy of any final instrument,[101] should one be devised in the future.

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[92] See, eg, '[i]f there is an international regime established, this would deal with the misappropriation that is occurring outside of Australia, as well as set standards for the Australian law on protection of Indigenous Knowledge': Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 3) 44. See also Graber (n 60) 27–8.

[93] Mead, 'Databases' (n 5). See also Solomon, 'An Indigenous Perspective on the WIPO IGO' (n 4) 221–2; Solomon, 'Peer Review Report' (n 4) 4. Note that Mead is critical of the WIPO process that she regards as premised on 'property' rather than heritage: Mead, 'Emerging Issues in Maori Traditional Knowledge' (n 5) 20.

[94] In the context of WIPO IGC process, see Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) particularly 224, 226–7; Mead, 'Intellectual Property, Genetic Resources' (n 5) 7–8.

[95] Charles Kamau Maina, 'Power Relations in the Traditional Knowledge Debate: A Critical Analysis of Forums' (2011) 18 *International Journal of Cultural* Property 143, 166.

[96] Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 4) 226.

[97] WIPO Indigenous Caucus, 'Closing Statement from Indigenous Peoples and Local Communities' (Presented at the 13th Session of the WIPO IGC, 2008) <https://www.ip-watch.org/files/IndigenousCaucusClosingStatement.pdf>; Kaitlin Mara, 'Indigenous People Seek Recognition at WIPO Meeting on Their Rights', *Intellectual Property Watch* (online, 23 October 2008) <http://www.ip-watch.org/2008/10/23/indigenous-people-seek-recognition-at-wipo-meeting-on-their-rights/>; Veronica Gordon, 'Appropriation Without Representation: The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore' (2014) 16(3) *Vanderbilt Journal of Entertainment Law and Technology* 629, 629–67, particularly 641–3; 160–1, Maina (n 95) 166–7.

[98] Gordon (n 97) 632, 642.

[99] Ibid 632.

[100] Ibid.

[101] Ibid 644.

While important markers of the conventional approach and the diversity of reform agendas pursued, the international dimension to rights reform and non-statutory reform proposals are outside the scope of this thesis.[102] I deliberately narrow my treatment of conventional critiques to the domestic sphere and formal legal rights because IP law is locally interpreted, a key site of redress politics in settler states, and the immediate implications of unauthorised cultural commodification are experienced in local sites.[103] In chapter 4, I analyse domestic law reform measures as to their likely effectiveness in redressing the western bias of copyright law and the cultural harms of appropriation.[104] I then investigate the political activity that reform discourse appreciates and misses in chapters 5 and 6.

2.1.2 Value and limitations of the conventional critique

The conventional progressive critique of the intersection of cultural appropriation and law is valuable for the connections it posits between a body of law that regulates cultural expression indirectly, cultural practice, and identity politics in settler states. As noted in the previous subsection, as appropriation is received as a cultural threat, greater recognition of the uniqueness of Indigenous culture and its production by the western legal system is perceived by conventional scholars as an opportunity to achieve greater control over culture, bargaining opportunities, and economic entitlements in accordance with cultural priorities. Advocacy that asks for property rights posits a connection between rights reform, protection of culture, and justice in settler states.

Conventional critics seek legal recognition of a property interest in cultural rights and obligations, presumably on the basis of historical connection to the land and prior occupancy. Construing property broadly as a contingent type of social relations[105] renders the Indigenous subject capable of

[102] For a recent treatment of these issues, see Louse Buckingham, 'The Politics of Making Traditional Knowledge Law: Texts, Talk and Theories of Indigenous Engagement' (PhD Thesis, University of New South Wales, 2018).
[103] See generally Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, 1998), particularly 208–47.
[104] See section 4.4 of this thesis.
[105] See, eg, Coombe's definition of property as a 'flexible nexi of multiple and negotiable relationships between persons and things that continually shift to accommodate historical recognitions of prior inequities and current social needs': Rosemary Coombe, 'Commentary on Michael Brown's "Can Culture Be Copyrighted?"' (1998) 39(2) *Current Anthropology* 207, 207–8. For scholarship that adopts a similar broad approach to property, see generally Coombe, *The Cultural Life of Intellectual Properties* (n 103); Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press, 1994); CM Hann, *Property*

recognition within the general conditions or parameters of law. As Butler observes, recognition as a subject depends on being recognisable.[106] The subject must be visible within the dominant terms of reference, which here means to be seen as a property owner. Adopting a property framework positions the western bias of IP law as problematic for mediating cultural claims, but not the formal legal sphere in general. As such, at the heart of the conventional critique is a politics of recognition and identity,[107] and an assumption that more or better rights could secure such recognition.

In linking a body of law that regulates cultural expression (and indirectly, cultural practice) to identity politics in settler states, conventional scholarship provides insight into law reform discourse as a 'politics of justice.'[108] The fact that Indigenous culture is disadvantaged by the institutionalised patterns of cultural value in IP law is unjust.[109] Culture is leveraged as a way to secure 'participatory parity' in the legal system and, thereby, local control over the terms on which culture is protected, produced, and commodified.[110] However, while the conventional critique is valuable for understanding these aspects of the politics of law reform, it nevertheless relies on a narrow conception of culture, cultural claims, and law. In particular, it has blindspots in dealing with the reform demand's performativity, the cultural contestation that can underscore appropriation allegations, and the breadth of the legality considered in this thesis, necessitating the adoption of the three analytical frameworks outlined in the sections that follow.

Reading claims as an unmet legal need, as conventional scholarship does, is to understand allegations of appropriation as presenting a coherent demand on the law. The significance of the essentialist constructs relied on in asserting cultural distinctiveness or the meanings of claims as a performative

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Relations: Renewing the Anthropological Tradition (Cambridge University Press, 1998); Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (Athlone Press, 1999).

[106] Butler, *Excitable Speech* (n 7) 5; Judith Butler, *Frames of War* (Verso, 2009) 5. Note that Butler does not develop a normative theory of recognition in her scholarship.

[107] On the politics of recognition generally: Charles Taylor, 'The Politics of Recognition' in Charles Taylor et al *Multiculturalism: Examining the Politics of Recognition*, ed Amy Gutmann (Princeton University Press, 1994) 25, 25–74. On the nature of identity politics generally: Moya Lloyd, *Beyond Identity Politics: Feminism, Power and Politics* (Sage, 2005) 36–7.

[108] On identity politics as a politics of justice: see generally Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation'in Larry Ray and Andrew Sayer (eds), *Culture and Economy After the Cultural Turn* (Sage, 1999) 25, 34. Compare to Charles Taylor who sees identity politics as a matter of self-realisation: Taylor (n 107) 25–74, particularly 25, 28, 31.

[109] Fraser (n 108) 34.

[110] Ibid 34.

utterance are not investigated. As developed in section 2.2 next, identity is created when claims are iterated.[111] As such, the ownership rights asserted in cultural claims can mask internal contestation and contradiction around permissible versus impermissible cultural practices. Investigating the politics that underpin the possessive language of claims, including the moral and political commitments of claimants as well as other cultural stakeholders is needed.[112] This motivates the first analytical framework of performativity that directs attention to the nature of cultural claims as constructed and performed[113] in recognition of the contingency of the identity claimed.

A further limitation of the conventional focus on legal exclusion and inclusion through the provision of more rights is its narrow treatment of the formal legal sphere. The relevance of the lived experience of law as a site of meaning-making and factor that might complicate the introduction of new legal norms is not considered. However, as law's effect is not always predictable, critical investigation into whether legal inclusion would challenge normativity is needed. A conception of law as legality and as embedded in, rather than sitting outside of, social relations is required, as is close attention to the manner in which legal 'rights are (or are not) exercised and enforced to intervene in everyday struggles over meaning.'[114] It is possible that cultural claimants and conventional scholars construct law differently to the artists that produce culture and negotiate appropriation in day to day life. This motivates the second analytical framework that directs attention to the work that arts practitioners do in creative markets and the lived experience of law, appropriation, and ordering in local sites.[115]

Finally, as noted above, conventional critiques describe law's complicity in appropriation as colonial injustice, however they do not engage closely with how reading appropriation as an oppressive act performs a particular version of colonial history and constructs the identity of the appropriator. Colonialism is simply vaguely associated with the power imbalance inherent in appropriative acts,

[111] See particularly section 2.2.3 of this chapter.
[112] See generally Rosemary Coombe, 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 74, 74–96.
[113] See section 2.2 of this chapter.
[114] Coombe, *The Cultural Life of Intellectual Properties* (n 103) 7.
[115] See section 2.3 of this chapter.

given the relative positioning of the appropriator vis-à-vis the source community,[116] and law's failure to redress the harms of exclusion. A better understanding of the historical contingency of cultural appropriation allegations is needed to contextualise the relevance of colonial dynamics to the subversive activity of rights claiming. The third analytical framework of desire critically supplements this limitation of the conventional approach by investigating how and why appropriation might be perceived to be oppressive outside of the lack of subject status in law. It provides a foundation to reflect on the content of the political speech that sits behind appropriation allegations and the nature of the reform demand as a performative exercise.[117]

I turn now to outlining the first analytical framework of performativity.

2.2 Performativity

This analytical framework seeks to generate further insight into the nature of cultural appropriation claims as political claims. The conventional critique identifies that cultural appropriation engages political issues. For example, Mead states that

> Maori Intellectual property rights is not just a legal issue – when Maori and other indigenous nations refer to ipr [sic] in the context of self-determination and tino rangatiratanga what we are saying is that we acknowledge the political background from which laws and policy are enacted.[118]

However, conventional scholarship does not engage closely with the performativity or politics of alleging appropriation, the significance of the identity that is constructed in claims, or the historical contingency of claiming as a subversive activity. This analytical framework of performativity helps unpack what cultural claims do, how they do it, and what this means for law reform discourse.

In the the subsections that follow, I use reflections upon performativity to direct attention to the construction of cultural claims as an empowering and strengthening moment of political organisation that brings a unique cultural identity into being, and how rights claiming, and its associated reform discourses, are performative exercises.

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[116] See Bruce Ziff and Pratima Rao, 'Introduction to Cultural Appropriation: A Framework for Analysis' in Bruce Ziff and Pratima Rao (eds) *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 1, 5–7.
[117] See section 2.4 of this chapter.
[118] Mead, 'Understanding Maori Intellectual Property Rights (n 5) 1.

2.2.1 Approaching cultural essentialism

In seeking to garner public opinion and build support for reform it is strategically useful for cultural claimants to articulate claims that oversimplify intercultural dynamics. For claimants, conveying political goals is assisted by positing clear boundaries around "inside" and "outside" culture so as to sustain that cultural appropriation – the situation where a non-authorised, cultural outsider takes cultural property belonging to another culture – has taken place.[119] The clarity required around entitlements presents culture as a pre-existing stable entity and cultural boundaries as hard and fast, despite the fact that cultural sites are characterised by contest as much as coherence and cultural sites are often mixed or shared.[120] Janke's scholarship is illustrative of this broader tendency. In outlining the limitations of copyright protection in *Our Culture: Our Future*, she puts forward a strong possessive claim to sacred imagery like mimi and wandjina figures, as well as artstyles like rarrk:[121]

> The Copyright Act does not recognise any continuing right of traditional custodians to limit the dissemination of traditional images or knowledge embodied in art forms after the term of copyright protection has expired. This is the case even though the image or knowledge is of great significance to its traditional custodians and inappropriate use may cause deep offence. The Wandjina image, like the Mimi and Quinkin images, have been reproduced on a wide range of items, including garments. Such reproduction has greatly concerned the traditional custodians of these images. This type of appropriation remains unchecked by existing copyright law.[122]

Janke treats the possessive claims of the various communities as self-evident: the breach of Indigenous law founds the possessive claim, and the existence of the appropriation and the resulting cultural harm gives rise to the need for better rights protections. However, while it is true that the representations of spiritual beings like the mimi and wandjina are strictly regulated in Australian Indigenous communities[123] as are artistic styles like rarrk,[124] the viability of the strong possessive

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[119] James Young, *Cultural Appropriation and the Arts* (Wiley-Blackwell, 2010) 13–14. In the context of Treaty claims in New Zealand: see Hal Levine, 'Claiming Indigenous Rights to Culture, Flora, and Fauna: A Contemporary Case from New Zealand' (2010) 33(S1) *PoLAR: Political and Legal Anthropology Review* 36, 39.

[120] On the open-ended nature of both "culture" and "appropriation" and the difficulties this presents for determing cultural entitlements and when an appropriative act has occurred, see Ziff and Rao (n 116) 2–3.

[121] See, eg, Janke, *Our Culture: Our Future* (n 3) 61, 254. Janke also considers whether rarrk could be protected under amendments to the Designs Act: at 132. See 'Australian Imagery', Image 69–73, xxi-xxii of this thesis.

[122] Janke, *Our Culture: Our Future* (n 3) 61 (citation omitted).

[123] Mimi spirits are depicted in the Northern Territory of Australia, in Arnhem Land and Kakadu: 'Mimi Spirits in Indigenous Culture', *Artlandish: Aboriginal Art Gallery* (Web Page) <https://www.aboriginal-art-australia.com/aboriginal-art-library/mimi-spirits/>. Wandjinas are depicted in the north-west Kimberley region of Western Australia, and in particular the Mowanjum community, outside Derby: Janke, *Our Culture: Our Future* (n 3) 38, footnote 78; 'About', *Mowanjum: Aboriginal Art & Culture Centre* (Web Page)

claim Janke asserts, as received by the western legal system, in each context varies. Mimi and wandjina are representational figures quite unique to their communities, however the defining features of rarrk, an abstract, non-representational cross-hatching style, arguably makes it more difficult to found an exclusive ownership claim under the law as it presently exists. Cross-hatching is a 'style that has been used in art making for many years by most civilisations.'[125] Conventional claims do not tend to acknowledge the difficulties in determining what property might exist clearly within the culture's bounds, and what might exist in a shared cultural space. Cultural property is simply deployed 'as a strategic resource in the politics of identity.'[126]

Viewing cultural claims narrowly as property claims and identity claims encourages the disavowal of cultural dynamism and the productivity of cultural appropriation allegations as a form of rights claiming. Applying an analytical framework characterised by performativity helps conceive of the cultural essentialism deployed in cultural appropriation claims as a significant site of political activity. It reads the static representation of cultural identity as part of a meaningful performance that does something more than demand new or better legal rights. There is political activity in the act of speaking as well as in the content of that speech,[127] and both sites deserve close attention.[128]

Spivak's theory of strategic essentialism[129] provides a useful introduction to the political dimensions of language as an activity and form of political action.[130] According to Spivak, marginalised groups

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<http://www.mowanjumarts.com/about>. On the wandjina in contemporary and traditional Indigenous arts practice: Donny Woolagoodja and Valda Blundell, *Keeping the Wanjinas Fresh* (Fremantle Press, 2015).

[124] Rarrk is primarily used in the North Territory of Australia, particularly Arnhem land: Janke, *Our Culture: Our Future* (n 3) 37–8; 'Cross Hatching Painting – Rarrk', *Kate Owen Gallery: Contemporary Aboriginal Art* (Web Page) <https://www.kateowengallery.com/page/Cross-Hatching-Painting-Rarrk.aspx>.

[125] 'Cross Hatching Painting – Rarrk' (n 124).

[126] Jane Raffan, 'The Crux of the Matter: Manipulating Cultural Property in Aboriginal Rights Debates' (2010) 232 *Art Monthly Australia* 51, 53. Jahnke and Tomlins Jahnke note that ownership is sometimes reluctantly asserted because ownership is a 'concept at odds with Māori cultural values' – however, the threat of leaving cultural resources exposed to exploitation compels its use as a 'protective mechanism': Jahnke and Tomlins Jahnke (n 53) 7.

[127] See, eg, language 'is the stage on which consciousness makes its historical entrances and politics is inscripted': Bryan Palmer, *Descent into Discourse: The Reification of Language and the Writing of Social History* (Temple University Press, 1990) 5. On languge as a political tool and process of persuasion, see Trinh T Minh-Ha, *Woman Native Other: Writing Postcoloniality and Feminism* (Indiana University Press, 1989) 52.

[128] For eg, Spivak advocates approaching the act of speaking and the stated meaning of the words used as separate sources of meaning: Spivak, *The Post-Colonial Critic* (n 8)108.

[129] Spivak, 'Subaltern Studies: Deconstructing Historiography' (n 8) 13.

[130] Note that Spivak has cautioned that it is important 'not to be theoretically committed to [essentialism]': Spivak, *The Postcolonial Critic* (n 8) 11.

strategically adopt essentialist language and representations in order to construct a favourable self-identity and achieve a 'visible political interest'.[131] This suggests that in politically organising, cultural claimants purposefully represent themselves and their constituencies in 'the portrait sense.' [132] The cultural identity they perform is a re-staging rather than a reality.[133] The identity performed is selective (and thus rests on unstable identifications because it can be performed differently),[134] however, its politics is powerful because it secures and reflects a moment of control over representation.[135] The possessive language deployed in cultural appropriation claims is best conceived as an 'ideological vehicle[]' through 'which to assert other interests and voice other concerns.'[136]

Spivak's theory of strategic essentialism does have its limitations, however. It presupposes that cultural claimants are fully aware of their current subject-status as subaltern and consciously practice essentialism in alleging appropriation, which is not assured.[137] It is also unclear whether the conventional scholars that take cultural claims literally in advancing their legal critique, consciously or subconsciously perpetuate this essentialism. Nonetheless, Spivak's theory is useful for contextualising this thesis' inquiry into cultural appropriation claims as a speech act that is deliberate and meaningful. For Spivak, this does not so much call attention to the claiming of a speech status, as it does to the project of eradicating the existence of the subaltern altogether because at present the subaltern 'cannot speak'. [138] Spivak aligns 'speech' with being 'heard' by the dominant group.[139] For

[131] Spivak, 'Subaltern Studies: Deconstructing Historiography' (n 8) 13; Spivak, *In Other Worlds* (n 8) 281.
[132] Spivak, *The Post-Colonial Critic* (n 8) 108.
[133] I return to establish this in more detail in section 2.2.3 of this chapter.
[134] Donna Landry and Gerard Maclean 'Introduction: Reading Spivak' in Gayatri Chakavorty Spivak, *The Spivak Reader*, ed Donna Landry and Gerard Maclean (Routledge, 1996) 1, 6.
[135] Spivak, *In Other Worlds* (n 8) 284–5. Note that Spivak herself does not ascribe agency to every identity claim. Elsewhere, she locates agency in 'accountable reason,' stating that it only manifests when 'one acts with responsibility', 'has assume[d] the possibility of intention,' and assumed 'the freedom of subjectivity': Spivak, Landry and Maclean, 'Subaltern Talk' (n 8) 294.
[136] Coombe, 'Commentary on Michael Brown's "Can Culture Be Copyrighted?"' (n 105) 207. This understands language as a signifying and intersubjective system of meaning practice: see generally Stuart Hall, 'Introduction' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (Sage Publication Ltd, 1997) 1, 1–5.
[137] On self-awareness and subject status see generally Judith Butler, *Giving an Account of Oneself* (Fordham University Press, 2005) 3–40.
[138] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Gawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988) 271, 308. Spivak notes that the fact the subaltern cannot speak is central to the very concept of subalternity; '[t]here is … something of a no-speakingness in the very notion of subalternity': Spivak, Landry and Maclean, 'Subaltern Talk' (n 8) 287, 289.

her, it is only when the subaltern is heard that they will cease to be subaltern, because being heard eradicates the subaltern's invisibility and hence, oppression.[140]

I demonstrate how cultural claims are a form of bringing into speech, through close attention to the performativity of rights claiming below at section 2.2.4. I also extend upon the notion of cultural claiming as a form of resistance against oppression in the third analytical framework of desire at the end of this chapter.[141]

2.2.2 Cultural claims as performative speech

The speech act theory of JL Austin[142] commences my investigation into the various dimensions of meaning produced during the assertion of a cultural appropriation allegation.[143] Austin's theory makes a distinction between language that describes the world that can be empirically tested as true or false, *constative* utterances, and language that performs an action as it is said even though it cannot be

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[139] This leads J Maggio to argue that the question 'can the subaltern speak?' is more accurately a question of 'can the subaltern be heard?': J Maggio, '"Can the Subaltern Be Heard?": Political Theory, Translation, Representation, and Gayatri Chakravorty Spivak' (2007) 32 *Alternatives: Global, Local, Political* 419, 419–43.

[140] Landry and Maclean, 'Introduction: Reading Spivak' (n 134) 6. As Spivak explains, '[n]o activist wants to keep the subaltern in the space of difference. To do a *thing*, to work for the subaltern, means to bring it into speech': Leon de Kock, 'Interview with Gayatri Chakravorty Spivak: New Nation Writers Conference in South Africa' (1992) 23(3) *Ariel: A Review of International English Literatures* 29, 46 (emphasis in original) <http://jan.ucc.nau.edu/~sj6/Spivak%20Interview%20DeKock.pdf>. Spivaks aligns not hearing with the continuation of the colonial project, 'to ignore the subaltern today is, willing-nilly, to continue the imperialist project': Spivak, 'Can the Subaltern Speak? (n 138) 298.

[141] See section 2.4 of this chapter.

[142] Austin (n 6).

[143] Note that other scholars that came later, including John Searle, Jacques Derrida, and Paul de Man are also well known for their speech-act theories: see, eg, John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press, 1969); John Searle, 'Reiterating the Differences: A Reply to Derrida' (1977) 1 *Glyph* 198, 198–208; John Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (Cambridge University Press, 1979); Jacques Derrida, *Limited Inc*, tr Samuel Weber, ed Gerald Graff (Northwestern University Press, 1988); Paul de Man, *Allegories of Reading: Figural Language in Rousseau, Nietzsche, Rilke, and Proust* (Yale University Press, 1979). Derrida and de Man, in particular, propose alternatives to Austin's approach that is characterised by a social approach to language and focus on illocution as dependent on social conventions. Derrida and de Man use deconstruction to focus on locutionary meanings. Conversely, Searle's work mostly affirms, systematises, or refines Austin's speech-act theory, although it occasionally diverges because of his diminished concern with society, as evident in the different value he ascribes to the collective construction of illocutionary felicity. For analysis of scholarly approaches to speech-act theory, see, for example, Sandy Petrey, *Speech Acts and Literary Theory* (Routledge, 1990) 67–8, 139; James Loxley, *Performativity* (Routledge, 2007) chapters 3, 4 and 5; Stanley Fish, 'With the Compliments of the Author: Reflections on Austin and Derrida' (1982) 8(4) *Critical Inquiry* 693, 693–721; Billy Clarke, 'Speech Acts and Literary Theory' (1993) 2(2) *Language and Literature* 151, 151–2. As Austin's concept of the performative is closely referenced by both Butler and Zivi (whose work is discussed in sections 2.2.3 and 2.2.4 of this chapter, respectively) and he has the greatest concern with the social dimensions of language, he was selected as the key theorist through which to explore speech-act theory in this analytical framework.

empirically tested, *performative* utterances.[144] A constative utterance like 'the shoe is on the mat' can be empirically tested as true or false. The shoe is either on the mat or it is not. Conversely, a performative utterance like stating 'I do' during a marriage ceremony cannot be tested as true or false, and yet it remains comprehensible as the act of speaking itself conveys the meaning.[145] Stating 'I do' is performative because when the words are spoken, 'I am not reporting on a marriage, I am indulging in it.'[146] This confirms that to '*say* something is to *do* something.'[147] While 'I do' is not verifiable of itself, its meaning as a commitment to marriage is nevertheless comprehensible (and materially effective, if conventional preconditions are met).[148]

Austin also recognises that the constative and performative dimensions of speech are not mutually exclusive. The speech act does something even when utterances are descriptive and can be empirically tested. Austin thus advocates attention to the 'total speech situation' as a way of reflecting upon what an utterance does in context and the nature of the performance that it entails.[149] This requires reading an utterance as a locutionary, illocutionary and perlocutionary act. The locutionary act refers to what is said; the literal sounds that are made and the words that are used. Austin explains that this 'is roughly equivalent to 'meaning' in the traditional sense.'[150] The illocutionary act refers to what one does *in* saying something. For example, if a person says 'Stop!' they may be issuing an objection or a warning.[151] The perlocutionary act refers 'to what one bring[s] about or achieve[s] *by* saying something', such as 'convincing, persuading, and deterring'. [152] It concerns what happens after the speech. As further developed in section 2.2.4 below and contextualised in the desire framework,[153] I assert that "resisting" oppression is a further possibility of the perlocutionary meaning of speech.

[144] Austin (n 6) particularly 1–7.
[145] Ibid 6.
[146] Ibid.
[147] Ibid 12 (emphasis in original).
[148] The exception is where there is an 'infelicity' in the speech. For example, where there is an 'abuse' or 'misexecution' such as where the party saying 'I do' is insincere (ie because they are already married) or there is a procedural error such as when the 'purported act is vitiated by a flaw or hitch in the conduct of the ceremony: see Austin (n 6) 12–24.
[149] Austin (n 6) 52.
[150] Ibid 109.
[151] Ibid.
[152] Ibid (emphasis in original).
[153] See section 2.4 of this chapter.

Austin's tripartite approach to the meaning-making that can occur during speech provides a useful framework for approaching the variety of meanings inherent in cultural appropriation claims as asserted. A literal interpretation of cultural appropriation claims as a constative utterance suggests that outsiders have committed an unauthorised incursion into cultural life. This may be judged as true or false. However, given the dynamism of culture in the face of essentialised cultural constructs relied on in claims, the "truth" at the heart of a claim is unstable, defying empirical testing. Approaching allegations of appropriation through the total speech situation, and in particular as inclusive of their meaning as a perlocutionary act, provides a deeper understanding of their political activity.

Considering the total speech situation of cultural appropriation allegations is also useful for exposing the nature of the conventional approach to interpreting claims, and its value and limitations in investigating their political activity. Conventional scholars take the literal meaning of cultural appropriation claims as a possessive claim over culture, and use it to reflect upon the legal exclusion of cultural imagery and arts styles from IP protection and the western bias of the law. For example, Maui Solomon characterises the Wai 262 claim as about 'ensuring that appropriate recognition, protection, and provision is made for Maori rights in relation to indigenous flora and fauna….and all knowledge and intellectual property rights that flow from that relationship.'[154] Solomon argues that this relationship that arises from the special status of Māori as tangata whenua is not sufficiently acknowledged by the current legislative framework, necessitating the introduction of new rights to protect 'matauranga Maori from inappropriate use and [ensure] its control by Maori' as necessary.[155] For Solomon, the locutionary meaning of cultural claims like Wai 262 over ICIP as a possessive claim is used to inform their illocutionary meaning as a critique of the law's complicity in appropriation and rejection of the basis of cultural entitlements. While useful in construing the relevance of the legal sphere to the nature of claims as constructed in law reform discourse, the total speech situation reveals an inattention to what claims *do* in the uttering. Conventional scholarship fails to account for the political activity that sits behind the construction of claims and the cultural entitlements they advance, and the subversive activity in alleging appropriation. As discussed in the methodology chapter with

[154] Solomon, 'Protecting Maori Heritage in New Zealand' (n 4) 358.
[155] Ibid.

regards to the utility of fieldwork and historical analysis,[156] paying attention to the dynamic nature of culture and the subversive potential of rights claiming is crucial to advancing a deeper analysis of the political activity of cultural appropriation claims and law reform than is found in conventional scholarship. The total speech situation shows that the essentialised constructs deployed in claims do not confine the meaning of claims to an assertion of possession.

Austin considers the multidimensional nature of the meanings associated with alleging appropriation. However, he does not consider how language constructs the subjectivity of the language user, precluding reflection on the significance of cultural claims as identity claims. In order to better understand the relationship between cultural claiming and cultural identity, and appropriation allegations as a site of political subjectivity that forms the subject, I will now consider Judith Butler's theory of the performative nature of identity.

2.2.3 The identity performed in cultural claims

For Butler, language and the body speak together to produce a political effect through a series of repeated acts.[157] The key premise of Butler's theory that gender identity is performative is that 'words, acts, [and] gestures…produce the effect of an internal core or substance…*on the surface of the body.*'[158] The identity these words, acts, and gestures 'purport to express' is a 'fabrication[] manufactured and sustained through corporeal signs and other discursive means.'[159] Here, Butler suggests that identity does not pre-exist the performance – it is made when it is performed through the re-enactment of social norms and conventions. The performance, as inscribed on the body, gives the effect of an inner identity,[160] however, identity remains an effect and function of a decidedly public and social discourse'.[161] Moreover, as identity is made through the reiteration of social norms, and social norms engage social regimes of power and knowledge, Butler situates the production of the

[156] See sections 3.2 and 3.3 of this thesis.
[157] The body 'acts in excess of what is said, but which also acts in and through what is said': Butler, *Excitable Speech* (n 7) 11.
[158] Butler, *Gender Trouble* (n 7) 173 (emphasis in original). Butler's theory of performativity draws upon a range of philosophical work including the speech act theory of Austin discussed in the previous section and the scholarship of other theorists including GWF Hegel, Louis Althusser, and Jacques Derrida. I discuss some of the Hegelian aspects of Butler's approach to identity in section 2.4.1 of this chapter.
[159] Butler, *Gender Trouble* (n 7) 173.
[160] Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4th ed, 2017) 287–8.
[161] Butler, *Gender Trouble* (n 7)173.

performative subject 'in the complex interplay of discourse, norms, power relations, institutions and practices.'[162] Identity is processual and politicised.

Butler's theory of the performative identity calls attention to the dynamic, contextual, and contingent nature of identity, and its inherent politicisation. While Butler's focus is on the production of gender, her insights may be applied to the production of cultural identity that occurs when conceptions of inside and outside of culture are posited to sustain cultural appropriation claims. Scholars such as sociologist Vikki Bell have recognised that cultures are '*performative* achievements', they, like the gendered identity that Butler discusses, engage social and political relations that reproduce and change.[163] Cultural appropriation claims do not refract an interior, fixed, cultural identity, but produce it. The act of alleging appropriation manifests the hard and fast cultural boundaries that are asserted,[164] and when reiterated, such as through conventional commentary, these boundaries acquire a naturalised effect.[165]

The performative identity provides a lens through which to approach cultural claims as a politicised performance of Indigenous identity; a strategy that deploys essentialised cultural constructs to advance a political interest in the manner perceived by Spivak, discussed earlier.[166] In conventional scholarship, the Indigenous subject that is performed in cultural claims is unique and demands legal recognition because it is excluded from the western legal system. Hence, the starting point of the conventional critique, as identified at 2.1.1, is the divergence between western ways of knowing, owning, and creating, and Indigenous ways of knowing, owning, and creating. For Solomon, the 'fundamental clash…[in] ideological underpinnings' between the western capitalist IP model and the collectively based tikanga Māori framework provides the impetus for reform.[167] Reading the identity constructed in cultural claims as performative helps link claims, the reform demand, and identity

[162] Lloyd (n 107) 27.
[163] Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics and Feminist Theory* (Berg, 2007) 4 (emphasis in original).
[164] Ibid18.
[165] See Butler who states that the becoming of an identity involves a 'laborious process of becoming *naturalized'*: Butler, *Gender Trouble* (n 7) 89 (emphasis in original).
[166] See section 2.2.1 of this chapter.
[167] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 4) 224. See also Solomon, 'The Waitangi Tribunal' (n 4).

politics. The subject that is created in cultural claims is perceived in conventional scholarship to be worthy of special subject-status in law. As the iteration of cultural norms necessarily refracts power relations, the political can also be located in the terms through which identity is articulated.[168]

Conceiving cultural appropriation claims as productive of identity helps draw out the significance of the essentialised constructs deployed in claims, and the connection between cultural claims as both possessive and identity claims. However, it also exposes the limitations of conventional scholarship. Conventional scholarship focuses on the effect of the performance of cultural identity on the provision of legal rights, that is, it provides a rationale for reform, but it does not look behind the performance to the entrenched political conditions that might motivate claims, or consider that cultural identity could be performed differently or otherwise by other constituencies within a culture. As identity is a performance, there is scope for it to be reiterated differently.[169] This means that artists, as producers of culture, can construct identity differently to cultural claimants, and their political motivations in doing so, can differ. The cultural claim on which an iteration of cultural identity rests is a 'scene of agency',[170] even though it is presented as static in conventional scholarship.

Approaching claims as a possessive claim that advances a certain kind of identity politics provides some insight into the political activity inherent in law reform discourse, but it stifles a deeper consideration of cultural dynamism and contestation. As discussed further in the next subsection, it also obscures the stakes of appropriation for different constituencies.

2.2.4 Rights claiming as a performative exercise

Austin's focus on the performativity of language and Butler's focus on the performativity of identity facilitates an inquiry into the nature of cultural appropriation claims as a site of meaning-making, contestation, and identity politics in chapters 4 and 5 of this thesis. Neither scholar, however, directly analyses the performativity of the activity of asserting a rights claim.[171] This lacuna is problematic

[168] See Butler, *Gender Trouble* (n 7) 129.
[169] See 'within the practices of repetitive signifying ... a subversion of identity becomes possible': Butler, *Gender Trouble* (n 7) 185. See also: at xxiii, 140.
[170] Ibid 187.
[171] In *Excitable Speech,* Butler considers the performativity of injurious speech and its socio-historical specificity, however her conception of power is primarily symbolic and she does not reflect on the instability of

because conventional scholars might recognise legal exclusion as a political issue, as Mead does when she states that the current 'ad hoc approach to Maori cultural and intellectual property issues … manifests … a lack of respect for Maori cultural integrity and aspirations',[172] but analysis of the political activity of rights claiming itself, and how conventional scholarship reinscribes this politics with colonial history, is absent. Political theorist Karen Zivi's theory that identity-based appeals to law have both constative and performative dimensions[173] helps redress this limitation by expanding the political inquiry.

Zivi's theory draws on both Austin's speech act theory and Butler's theory of performativity to suggest that utterances that claim a particular right or rights does more than construct a possessive or identity claim – it also has significance as a social, and potentially transformative, practice.[174] As Zivi explains, stating '"I have a right to X" does far more than accurately (or perhaps inaccurately) represent a pre-existing moral, legal, or political reality,' it is 'a complex activity more akin… to telling a story or crafting a particular perspective on the present and the future.'[175] According to Zivi, rights claims more closely resemble aesthetic claims than absolute truths.[176] Their content can both 'contest and constitute the meaning of individual identity, the contours of community, and the forms that political subjectivity take.'[177] Making a demand for rights brings into being the possibility of a new social or political life.[178] As Margaret Davies observes, 'one part of making the imagined future is to perform it now.'[179]

Considering cultural claiming as a subversive activity that can contribute to public discourse helps open up dialogue around the political subjectivity that might motivate the activity of claiming. In particular, the oppressive structures and histories rights claims object to, and seek to transform. When

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speech as it pertains to group claims, their identity politics, or their resistant functioning in detail: Butler, *Excitable Speech* (n 7).

[172] Mead, 'Emerging Issues in Maori Traditional Knowledge' (n 5) 7.

[173] Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship* (Oxford University Press, 2012). Zivi's analysis focuses in particular on rights claiming as an illocutionary and perlocutionary activity.

[174] Zivi (n 173) 8, 51.

[175] Ibid 8–9.

[176] Ibid 50.

[177] Ibid 7.

[178] Butler and Spivak, *Who Sings the Nation-State?* (n 7) particularly 63–8.

[179] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017) 16.

cultural appropriation is described as the "second wave" of colonial injustice by scholars like Mead,[180] colonial politics is asserted as a potential motivator of claiming, albeit in passing. In the process, contemporary arts appropriation is inscribed with the colonial dynamics of land appropriation, and a very particular version of colonial history is performed that unsettles the present.[181] However, conventional scholarship does not, of itself, tell us much about the historical contingency of rights claiming. This prevents a deeper engagement with the political activity that drives, and is represented in, the activity of rights claiming, and how this politics connects (or does not connect) with the political stakes of appropriation for other constituencies like artists. Approaching law reform discourse as a performative exercise,[182] in chapter 6, provides a platform to investigate in detail the relevance of the relationship between cultural appropriation and colonial injustice to the subversive activity of rights claiming. Neverthless, as is apparent in the contestation that underlies cultural appropriation claims, the meanings that circulate in public discourse can be disrupted by the lived experience of actors in the past as much as the present.

I turn now to law and society scholarship to develop an analytical framework that emphasises the need for a more nuanced legal domain to capture how legality manifests and is understood in local sites.

2.3 Law and society

The analytical framework of law and society developed in this section seeks to expand the legal domain performed in the conventional law demand to include the legality that manifests in everyday life and a conception of law that is inclusive of legal pluralism. As noted earlier in the introduction, this thesis utilises a broad understanding of law and legality.[183] An extended legal domain is needed to gauge law's regulatory power over specific, local sites of creative activity, and thus reflect on the significance of the presumed efficacy of rights interventions in law reform discourse.

[180] See, eg, Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' (n 5) 21l; Mead, 'Understanding Maori Intellectual Property Rights' (n 5) 1. See section 2.1.1.1 of this chapter.
[181] On knowledge claims generally as a performance, see in the context of social science: John Law and John Urry, 'Enacting the Social' (2004) 33(3) *Economy and Society* 390, 390–410.
[182] On the usefulness of performativity for understanding what it is that legal discourses are and do, see in the context of the performativity of legal theory: Ben Golder, 'On the Stakes of Legal Performativity' (2019) 43 *Australasian Journal of Legal Philosophy* (forthcoming, paper on file with the author).
[183] See section 1.1.3 of this thesis.

While there is some scepticism on behalf of conventional scholars around legal rights as a panacea to the problem of cultural appropriation and the western bias of the legal system,[184] the reform demand generally assumes that more or better legal rights would be a positive step forward in curbing the appropriation of ICIP, protecting cultural integrity, and empowering traditional owners. Janke, for example, states that '[l]egislative reform and policy initiatives are urgently required to prevent the further erosion of Indigenous cultural identity'.[185] Implicit in this statement is that more law would have the desired effect in stemming undesirable appropriative practices and cultural harm, and that appropriative practices would be inscribed with new legal norms in a predictable way. This constructs a narrow, instrumental view of law as a prohibitory and coercive force, and conceptualises the law-culture relationship as unidirectional.

In this analytical framework I problematise this conventional framing. Legal meaning-making is not confined to the formal legal realm. The meaning of law is articulated in its doing,[186] including when it is created in everyday social life[187] through its constitution and reconstitution, rehearsal and reiteration.[188] Moreover, it is possible for norms, as established through the reiteration of cultural practices, to manifest a plural informal system of law that functions independently or tangentially to the formal legal sphere.[189] This meaning-making "from below" can have resonances back to the juridical realm, and complicate the introduction of new legal norms "from above". The formal law is only 'brought into being, or at least reinforced' by being followed.[190] As such, law's regulatory power

[184] See, eg, 'we acknowledge that it takes more than one action to bring about the chances we are seeking': Mead, 'Understanding Maori Intellectual Property Rights' (n 5) 1. See also Solomon's scepticism of the utility of new rights, as exercised within the bounds of the settler state legal system: Maui Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 4) 161; section 4.4.3 of this thesis.
[185] Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 3) 634. See also, '[r]eform of state and commonwealth legislation is required to give effect to Indigenous customary laws and to provide adequate protection to Indigenous intellectual property and cultural material': Janke and Quiggin, *Indigenous Cultural and Intellectual Property and Customary Law* (n 3) 92; 'unless some form of legislation is instituted to prevent the exploitation of Maori customary images (such as the moko …) this problem will remain': Jahnke and Tomlins Jahnke (n 53) 6.
[186] See generally Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (eds), *Law and Performance* (University of Massachusetts Press, 2018).
[187] See, eg, Anna-Maria Marshall and Scott Barclay, 'In Their Own Words: How Ordinary People Construct the Legal World' (2003) 3 *Law and Social Inquiry* 617, 617–8.
[188] Sarat, Douglas and Umphrey (n 186) 4.
[189] See, eg, Sally Falk Moore, 'Law as Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) *Law and Society Review* 719, 719–46; Sally Falk Moore, *Law as Process: An Anthropological Approach* (Lit Verlag, 2000) chapter 2.
[190] Davies, *Law Unlimited* (n 179) 151.

over cultural practices is an effect rather than a cause of such practices. Reifying the formal law, as conventional scholarship does, is thus unhelpful in understanding how reform might redirect appropriative practices.

In the subsections that follow, I show how attention to the lived experience of law, legal consciousness, and legal pluralism, can advance a more nuanced legal domain than is represented in conventional scholarship.

2.3.1 Lived experience and legal consciousness

From the perspective of law and society literature, law is situated fully in the social sphere; it 'doesn't govern society in either an instrumental or ideological fashion; it is part of social life not above or outside it.'[191] To understand how legal rules interact with cultural practices, it is necessary to look at the entirety of these relationships. Reifying the positive law and its power to effect change, as conventional critiques do, with statements such as 'there is a need to adopt measures to recognise Indigenous cultural and intellectual property rights … Users of Indigenous cultural material should respect these laws',[192] is not helpful.[193] This is because the lived experience of law can diverge from the content of formal legal rules. Meaning-making occurs in the domains of culture in everyday life as much as the legislature or courtroom because individuals participate in the process of constructing legality. Reducing the legal system to the content of legal rules 'tells us very little about how the 'system' work[s] […], and may even be quite misleading.'[194]

Moreover, as legal meaning is formed in the 'dynamic tension' between legal rules and their reception in the social realm,[195] the regulatory effectiveness of legal rules is not assured.[196] It is influenced by individual agency, social structure, and local factors such as relationships, purposes, and settings as

[191] Austin Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition' (1985) 9(1) *Legal Studies Forum* 23, 31.
[192] Janke, 'Respecting Cultural and Intellectual Property Rights' (n 3) 635.
[193] See, eg, we need to 'free ourselves from the knowledges that repeatedly reveal instances of injustice done in the name of the law, but insist that itself is the cure': Sarat, 'Legal Effectiveness and Social Studies of Law' (n 191) 31.
[194] Moore, *Law as Process* (n 189) 4. See also Roger Cotterrell and Austin Sarat, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 38.
[195] John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York University Press, 1996) ix.
[196] Moore, *Law as Process* (n 189) 3.

well as the content of legal rights. When ordering exists in semi-autonomous social fields, pre-existing social arrangements can be effectively stronger than the prohibitory or coercive power of the formal law.[197] Acknowledging the diverse influences upon legal meaning-making helps uncover the mutability of law within and across specific sites and problematises the neatness of the relationship between legal rights and social inclusion posited in conventional critiques. There can be a gap between what legal rules are and how they operate.[198]

Scholars such as Ewick and Silbey emphasise that the legal consciousness of individuals can provide understanding into how law is lived, including why and when law is used as well as when it is not used, and the extent to which individuals see themselves as within law and desirous of its protections.[199] Legal consciousness refers to the ways people make sense of law and legal institutions in everyday life.[200] It is local, contextual,[201] and includes – but is not limited to – the attitudes and beliefs people have about law. Studying legal consciousness can show how individuals 'construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meaning concerning law.'[202] This includes investigating the relevance of legal rules to everyday life and conduct, allowing for speculation on the presumed utility of the reform demand in conventional scholarship.

Legal consciousness scholarship sees the relationship between law and society as co-constituting.[203] Law shapes daily practices, and many legal regulations become naturalised in social life. Equally, society can constitute law or shape new versions of legality though the repeated micro-interactions of

[197] Ibid 58.
[198] Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) *American Law Review* 12, 12–36. This insight is developed in particular in section 5.3 of this thesis.
[199] Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998) 34; Susan Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 326.
[200] See, eg, Silbey, 'Making a Place for a Cultural Analysis of Law' (n 9) 45.
[201] Patricia Ewick and Susan Silbey, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness (1992) 26(3) *New England Law* Review 731,742.
[202] Silbey, 'After Legal Consciousness' (n 199) 334.
[203] See, eg, David Engel, 'Law in the Domains of Everyday Life: The Construction of Community and Difference' in Austin Sarat and Thomas Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1993) 123, 166.

daily life which sets standards and patterns of behaviour.[204] This suggests that law is more dispersed and emergent than acknowledged in conventional critiques. Janke, for example, recognises the potential regulatory power of informal ordering, such as protocols, to set standards around uses of Indigenous cultural material in putting them forward as part of her reform package,[205] but she does not study the legal consciousness of those who would purportedly be restrained or benefited by the sui generis reforms she seeks. Attending to the legal consciousness of artists can tell us about law's presence in the social realm,[206] allowing for reflection upon law's authority with respect to governance of cultural practices, including their redirection. In chapter 5, I use the legal consciousness of artists in combination with a discussion of cultural practices to present a contextual account of the legality that orders local sites of cultural production.[207]

2.3.2 Plural legal forms and routinised cultural practices

Attending to the legal consciousness of artists helps identify the legal meaning-making that takes place outside of the formal legal sphere by individuals. However, while it acknowledges that law emerges constantly in practice,[208] it does not, of itself, expose the way in which legality can manifest in the performance of culture when art is made. Attention to the legality that manifests in routinised cultural practices, such as norms, ethics, and business considerations, is also needed to recognise that practices can be ordered around creativity, appropriation, and conflict resolution in the shadow of the positive law. Legal centralism, the notion that law is only the law of the state, administered by state institutions, and uniform for all persons and to the exclusion of all other law, is 'a myth, an ideal, a claim, an illusion.'[209] The positive law carries ideological power, but it is not the only source of

[204] Marshall and Barclay (n 187) 617–8.
[205] For eg, one of the roles Janke envisages for her proposed National Indigenous Cultural Authority is the development of 'policies and protocols with various industries': Janke, *Our Culture: Our Future* (n 3) 237.
[206] Ewick and Silbey, *The Common Place of Law* (n 199) 34.
[207] Note that it is debateable whether the artist reflections in chapter 5 can be described as a study of legal consciousness per se, although they are revealing of legal meaning-making in everyday life.This is because interviews to elucidate legal consciousness do not typically involve direct questions on or about the law: see, eg, Ewick and Silbey, *The Common Place of Law* (n 199) 26. In my interviews, the legal was a direct focus of some lines of questioning: see section 3.2 of this thesis for a detailed discussion of the fieldwork undertaken. Sample interview questions are provided in Appendices 1 and 2 of this thesis.
[208] Davies, *Asking the Law Question* (n 160) 436.
[209] John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) *Journal of Legal Pluralism and Unofficial Law* 1, 4. See also: at 3.

legality that achieves social order.[210] As scholars like Griffith and Moore explain, it is possible for norms, as established through the reiteration of cultural practices, to function as 'a semi-autonomous social field.'[211] As legality can come "from below" as well as "from above", chapter 5 investigates the subcultural dynamics and norms that characterise local sites of artistic production, critically supplementing both reflections upon legal consciousness and the top-down reading of law evident in the conventional critique.

The ordering power of norms suggests the capacity for plural systems of law – both formal and informal – to 'interact, intersect, and influence' each other in regulating conduct in the same site of cultural production.[212] Legal pluralism is a descriptive framework[213] that alerts to 'the co-existence of multiple systems or forms of law within one geographical space'.[214] It suggests that not all legal orders derive their authority from the state,[215] that some legal ordering exists '*within* the jurisdiction of the state and *in* a relationship with it' but operates outside of formal law,[216] and that individuals can belong 'simultaneously to several different legal communities and move between them.'[217] As noted in chapter 1, norm-based ordering is evident in some creative industries that function largely independently of positive legal rights despite the theoretical applicability of legal rules.[218] The

[210] See, eg, Robert Ellickson, *Order Without Law: How Neighbours Settle Disputes* (Harvard University Press, 1991) 137–47.
[211] Moore, 'Law as Social Change' (n 189) 719–46; Moore, *Law as Process* (n 189) chapter 2; Griffiths (n 209) 38. This recognises that norms are both descriptive and prescriptive, see, eg, Ellickson (n 210) 126.
[212] DJ Galligan, *Law in Modern Society* (Oxford University Press, 2007) 174. See also Merry, 'Legal Pluralism' (n 9) particularly 870, 873; Sally Engle Merry 'Legal Pluralism in Practice' (2013) 59(1) *McGill Law Journal* 1, 3; Martha-Marie Kleinhans and Roderick A Macdonald, 'What is Critical Legal Pluralism?' (1997) 12(2) *Canadian Journal of Law and Society* 25, 31.
[213] Merry, 'Legal Pluralism in Practice' (n 212) 2.
[214] Davies, *Asking the Law Question* (n 160) 410. See also, eg, Merry, 'Legal Pluralism' (n 9) 870.
[215] Davies, *Asking the Law Question* (n 160) 415.
[216] Galligan (n 212) 177 (emphasis in original).
[217] Cotterrell and Sarat, *Law, Culture and Society* (n 194) 35.
[218] See, eg, studies involving the fashion industry, tattoo, chefs, magicians, comedians, and roller derby players: Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687, 1687–1777; Aaron Perzanowski, 'Owning the Body: Creative Norms in the Tattoo Industry' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017) 89, 89–117; Emmanuelle Fauchart and Eric Hippel 'Norms-Based Intellectual Property Systems: The Case of French Chefs' (2008) 19(2) *Organizational Science* 187, 187–201; Jacob Loshin, 'Secrets Revealed: Protecting Magicians' Intellectual Property Without Law' in Christine A Corcos (ed), *Law and Magic: A Collection of Essays* (Carolina Academic Press, 2010) 123, 123–42; Dotan Oliar and Christopher Sprigman, 'There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy' (2008) 94(8) *Virginia Law Review* 1787, 1787–1867; David Fagundes, 'Talk Derby to Me: Emergent

existence of ordering in the 'negative space' suggests that the formal law regulates conduct in some sites more successfully than others.[219] As there is no guarantee that norms will consolidate the rules of the formal legal order, norms can be as determinative of behaviour than the positive law in such sites.[220] I reflect on the regulatory power of the positive law over creative practices in moko and tattoo subculture vis-à-vis the descriptive and prescriptive nature of norms in chapter 5.[221]

Legal pluralism directs attention to the normative commitments of artists to informal legal orders, and these commitments as a potential source of conflict with the reform demand's desire for greater state-based regulation of cultural imagery and arts styles. Allegiance to a normative order can preclude (or limit) allegiance to the formal law.[222] The possibility of conflict and contest means that it is not enough to simply identify the nature of the ordering in a particular site to understand the regulatory power of the formal law therein. Rather, 'attention should be paid to the ways in which different legal orders interact, intersect, and influence each other.'[223] In chapter 5, I take this insight further by recognising the role of legal subjects as participants in normative communities who actively co-create legal meanings – and their own subjectivity – through the iteration of norms.[224] This exposes how creative communities can reflect and resist the meanings ascribed in cultural claims and conventional scholarship.

2.4 Desire for the Other

In this third analytical framework of desire I seek to provide a framework that can help unpack the implicit claims being made about colonial injustice evoked in the performative acts of conventional

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Intellectual Property Norms Governing Roller Derby Pseudonyms' (2012) 90(5) *Texas Law Review* 1093, 1093–1152. See also section 1.1.3 of this thesis.

[219] The term "negative space" refers to the legality that exists in the shadow of the formal law. This term was coined by Christopher Sprigman in an article with Kal Raustiala on IP norms in fashion: Raustiala and Sprigman, 'The Piracy Paradox' (n 218) 1764. On negative space generally: see Christopher Jon Sprigman, 'Conclusion: Some Positive Thoughts on IP's Negative Space' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017) 249, 249–69; Elizabeth Rosenblatt, 'A Theory of IP's Negative Space' (2011) 34(2) *Columbia Journal of Law and the Arts* 317, 317–65.

[220] Davies, *Asking the Law Question* (n 160) 411. Law has a near monopoloy on the legitimate use of force, but it does not have a monopoly on 'various forms of effective coercion': Moore, 'Law as Social Change' (n 189) 721.

[221] See particularly sections 5.3.2 and 5.3.4 of this thesis.

[222] Galligan (n 212) 179. See also Cotterrell and Sarat, *Law, Culture and Society* (n 194) 38.

[223] Galligan (n 212) 174.

[224] Kleinhans and Macdonald (n 212) 38.

progressive scholars. This framework connects discussion of political subjectivity and identity to the appropriation of Indigenous-inspired imagery, as perceived by cultural claimants as an oppressive practice.

Conventional scholars talk to and seek to impact IP categories and doctrinal content, in particular by the call for sui generis rights, yet their law reform demands are driven by a larger political motivation – redressing the ongoing colonial agenda of settler states that remains present within its laws and securing a more positive future for Indigenous people.[225] In Golvan's opinion, '[t]here remains a tremendous amount of work to be done to ensure that the legal system is meaningful to Aboriginal people.'[226] The western bias of IP law as it is currently formulated is expressed in the key doctrinal concepts discussed in detail in chapter 4.[227] However, while conventional scholarship has a general anti-colonial orientation, as noted earlier, the historical contingency of claims is not investigated except as a causal factor in legal exclusion. Colonial injustice is alluded to in the linking of artistic appropriation to land appropriation, but it is not investigated in depth. In this framework, I seek to extend and complement the previous discussion of the reform demand's performativity, to locate the historicity of cultural claims in the relationship between cultural claiming, the colonial gaze, and identity formation.

In this section, I draw upon feminist and postcolonial psychoanalytic theory to read colonialism as a discourse of power and desire, and appropriation as an act that silences the speech of the subaltern. I then draw upon racialised subject positions to inform the interpretation of appropriation as an oppressive act of colonial consumption by cultural claimants, before reflecting upon what these insights mean for contemporary objections to Indigenous-inspired body modification practices.

[225] See, eg, '[t]hese issues have transcended from being questions of ... copyright law into much larger questions concerning the future of Indigenous cultural identity, livelihood, and opportunity. From that perspective, we need to be generous in affording adequate protection to our Indigenous cultures ...': Colin Golvan, 'Combatting Fake Indigenous Art' (Paper, Intellectual Property Research Institute of Australia Seminar, November 2018) <https://www.colingolvan.com.au/law/law-articles-and-essays/167-combatting-fake-indigenous-art>.
[226] Golvan, 'Protection of Australian Indigenous Copyright' (n 2) 15.
[227] See sections 4.2 and 4.3.1 of this thesis.

2.4.1 Identity and colonial discourse

As discussed earlier in this chapter, Butler's theory of performativity sees identity formation as processual, as something that is performed through the reiteration of acts. For Butler, identity is not pre-existing, it is an activity forged in the complex reality of people's lives and histories of political struggle. [228] In theorising identity in this way, Butler draws upon Hegelian thinking,[229] where subject formation comes from a process of internalisation. [230] Both Hegel and Butler dismiss the idea that identity is a stable 'thing'. For Hegel, identity is constructed internally, it is a psychic process generated through multilinear processes of identification.[231] The Self needs a comparator through which to know itself.[232] For Butler, a sense of self is obtained when the Self is aware of itself in relation to others. Butler describes the Self's need for a comparator as an 'identity-in-difference' and a 'difference [that] simultaneously distinguishes and binds'.[233] An understanding of identity as a reiterative, selective activity,[234] in combination with the desire framework developed in this section, helps to isolate the raced dynamics of subject formation in allegations of cultural appropriation. At the same time as cultural claimants perform an Indigenous identity that, according to conventional scholars, requires greater recognition in law, they also produce a very particular vision of appropriators, their motivations, and effects. Cultural claimants read the appropriator identity against a discourse of power that assumes the inferiority of the Other and suppresses the subject of appreciation.

[228] See section 2.2.3 of this chapter.
[229] See GWF Hegel, *The Phenomenology of Mind*, tr J B Baille (ebooks Adelaide, 2011) <https://ebooks.adelaide.edu.au/h/hegel/phenomenology_of_mind/complete.html>.
[230] For a contemporary interlocution of Butler's engagement of Hegelianism: see Vicki Kirby, *Judith Butler: Live Theory* (Bloomsbury, 2006) Chapter 1; Lloyd (n 107) 13–22.
[231] Hegel, *The Phenomenology of Mind* (n 229).
[232] In Hegel's words, 'Ego is the content of the relation, and itself the process of relating. It is Ego itself which is opposed to an other and, at the same time, reaches out beyond this other, which other is all the same taken to be only itself': Hegel, *The Phenomenology of Mind* (n 229). See also Jean Hyppolite, 'Self-Consciousness and Life: The Independence of Self-Consciousness' in GWF Hegel, *Hegel's Dialectic of Desire and Recognition: Texts and Commentary,* ed John O'Neill (State University of New York Press, 1996) 67, 69.
[233] Butler, *Gender Trouble* (n 7) 51, 52.
[234] 'all identities demand a performance and consequently leave something out': Stephanie Adair, 'Unity and Difference: A Critical Appraisal of Polarizing Gender Identities' (2012) 27(4) *Hypatia* 847, 852.

Subjectification is not simply a process of identity formation – it is, more precisely, a practice of racialisation and cultural inferiorisation.[235] The structuring of the Self/Other binary enables and reflects racism and inflicts a form of 'epistemic violence.'[236] In the subaltern Other, the colonial Self creates their own inferior[237]through the repetitive framing of contrasting, mutually exclusive subject forms.[238] The Other is constructed as the pathological opposite of the dominant culture through negative stereotypes, including those that show a primitive nature.[239] Racial stereotypes help structure and stabilise the colonial ideology by generating and naturalising the Other's inferiority and the colonial's ascendency as the civilised complement.[240] That is, the stereotypes posit the condition of possibility for the centralisation of the colonial, and the marginalisation of the colonised. [241] In the process, socio-political domination of the Other is consolidated as they are imagined rather than engaged, and the imposition of colonial systems of administration and instruction are justified.[242] The relationship between the Self and Other is a relationship of power and domination.[243] However, as developed in more detail in the next subsection, the Self/Other binary does not only racialise bodies to maintain the Self's superiority, but also, in the instance of arts and other cultural practices, offers a way of achieving spiritual fulfillment.

The power dynamics inherent in the 'colonial environment… lends itself to the generation of fantasy.'[244] For Bhabha, anxiety around colonisation invokes a 'myth of historical origination.'[245] That

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[235] Stuart Hall, 'The Multiculturalism Question' (Annual Lecture, Political Economy Research Centre, Sheffield, 4 May 2000) 7–8 <http://red.pucp.edu.pe/wp-content/uploads/biblioteca/Stuart_Hall_The_multicultural_question.pdf>.
[236] Spivak, 'Can the Subaltern Speak?' (n 138) 280–1.
[237] See, eg, '*It is the racist who creates his inferior'*: Fanon, *Black Skin, White Masks* (n 10) 93 (emphasis in original); Edward Said, *Orientalism* (Peregrine Books, 1978) 7.
[238] See, eg, Said (n 237) 1–2.
[239] See, eg, in the context of "Orientalism" Said writes, '[t]he Oriental is irrational, depraved (fallen), childlike, "different"; thus the European is rational, virtuous, mature, "normal"': Said (n 237) 40. On stereotyping as a racist practice: see, eg, Louis Miron and Jonathan Xavier Inda, 'Race as a Kind of Speech Act' (2000) 5 *Cultural Studies: A Research Volume* 85, 97. On sterotyping as a signifying practice: see generally Stuart Hall, 'The Spectacle of the "Other"' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (Sage Publication Ltd, 1997) 223, 257–69.
[240] See Derek Hook, 'Paradoxes of the Other: (Post)Colonial Racism, Racial Difference, Stereotype-as-Fetish' (2005) 31 *Psychology in Society* 9, 26.
[241] Spivak, *In Other Worlds* (n 8) 153–4.
[242] Bhabha (n 11) 101; Damien Riggs and Martha Augoustinos, 'The Psychic Life of Colonial Power: Racialised Subjectivities, Bodies and Methods' (2005) 15(6) *Journal of Community and Applied Social Psychology* 461, 468.
[243] Said (n 240) 5.
[244] Hook, 'Paradoxes of the Other' (n 245) 11.

is, of the racial purity of the colonisers and their priority as the natural and deserving occupants of the land.[246] The presence of colonisers as settlers is only legitimate to the extent that the prior claim of the Other to the land is able to be dismissed. The Other is thus constructed as 'entirely knowable and visible,' as different and degenerate, in service of this myth.[247] However, in constructing the Other as lesser, their difference becomes something that is feared. Yet, ironically, in fear lies an attraction to that difference. The colonised other is simultaneously a phobic object and an unconscious attraction.[248] As Fanon explains: '[t]he white man is convinced that the Negro is a beast…Face to face with this man who is "different from himself", he needs to defend himself.…[and in the process the Other becomes] the mainstay of his preoccupations and desires.'[249] This fetish serves a protective function[250] and 'opens the royal road to colonial fantasy'.[251] As identified in chapter 6, desire for the Other mediates the co-present, opposed belief in the Other's primitivity and fascination with their cultural practices.

For the Other, the experience of objectification, as secured through stereotypes, is oppressive. I return to consider stereotypes as productive of a particular type of cultural harm at 4.3.3.2. Stereotypes deny the Other agency, dynamism, and change in their representation.[252] They cannot be shown, or are not allowed, to speak. When the stereotype achieves referential power through its repetition, the Other might also experience psychic effects. [253] They could internalise the stereotype, and come to understand themselves as inferior in its terms. As Fanon explains, '[a]fter having been the slave of the white man' the colonised 'enslaves' him or herself.[254] The internalisation of racism results in a 'neurotic situation;' '[a]s I begin to recognize that the Negro is the symbol of sin, I catch myself

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[245] Bhabha (n 11) 106.
[246] Ibid.
[247] Ibid 101. See also Fanon, *Towards the African Revolution* (n 10) 34–5.
[248] Derek Hook, 'Fanon and the Psychoanalysis of Racism' in Derek Hook (ed), *Critical Psychology* (UCT Press, 2004) 115, 124. Hook refers to this as a site of '*anxious* sexuality': at 124 (emphasis in original). See also Hall, 'The Spectacle of the "Other"' (n 239) 268.
[249] Fanon, *Black Skin, White Masks* (n 10) 170 (citation omitted).
[250] Hook, 'Paradoxes of the Other' (n 240) 17.
[251] Bhabha (n 11) 104.
[252] See, eg, Said (n 237) 208, 308; Bhabha (n 11) 95, 107. Fanon makes this point in the context of exoticism: Fanon, *Towards the African Revolution* (n 10) 35.
[253] Bhabha (n 11) 107.
[254] Fanon, *Black Skin, White Masks* (n 10) 192.

hating the Negro. But then I recognize that I am a Negro.'[255] Achieving subject-status can come at a cost – complicity in their subordination to the colonial discourse.[256] Legal inclusion is not necessarily commensurate with being heard in the manner envisaged by Spivak.

2.4.2 Appropriation, consumption, and subcultural practices

Literature critical of intercultural arts engagements between the coloniser and the colonised understands the colonial gaze as characterised by desire, consumption, and the binary inferiority of the Other.[257] As the act of a racialised colonial body asserting dominance over the colonised Other, appropriation reflects these features. Reading appropriation as a metonym for colonial desire is the key to understanding why it might be received as oppressive by cultural claimants. For the Self to know itself as superior and civilised, the Other, as constructed, must be represented to be inferior and uncivilised. Yet, the Self remains closely connected to the Other they create as a complement, even as the Other is excluded as different. The colonial subject is 'inscribed in both the economy of pleasure and desire and the economy of discourse, dominance and power.'[258] In chapter 6, I explore the historicity of the racialised subject as engaging both desire and oppression.

In the desire framework, appropriation is understood as an act of consumption or 'consumer cannibalism',[259] born out of colonial desire for what the Self perceives itself to lack. It is problematic because it imposes a narrative of the Self's power and privilege over the Other's reality of racial domination.[260] For feminist scholar bell hooks, like Bhabha and Fanon, stereotypes play a facilitative role in the Other's negation, however she perceives the Other, as constructed, as inviting and justifying the Self's appropriation of their cultural practices. The raced Other represents seductive difference and pleasure to the Self. They are stereotyped onto 'a field of dreams' and in harmony with

[255] Ibid 197.
[256] The move from object to subject requires that the Other is 'first established in language' and acquiesce to the categories, terms, and names of the dominant discourse: Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford University Press, 1997) 10–1, 20.
[257] See, eg, hooks (n 12) 21–39; Wendy Rose, 'The Great Pretenders: Further Reflections on Whiteshamanism' in M Annette Jaimes (ed), *The State of Native America: Genocide, Colonization and Resistance* (South End Press, 1992) 403, 403–22; Deborah Root, *Cannibal Culture: Art, Appropriation, and the Commodification of Difference* (Westview Press, 1996).
[258] Bhabha (n 11) 96.
[259] hooks (n 12) 31. See generally Root (n 257).
[260] 'consumer cannibalism … not only displaces the Other but denies the significance of that Other's history through a process of decontextualisation': hooks (n 12) 31. See also: at 36. See also Rose (n 257) 405.

nature and one another.[261] This othering refracts the Self's own disillusionment with contemporary living. Perceiving emptiness within,[262] the Self is attracted to the cultural difference and authenticity of the Other; 'they dream of the inversion of roles.'[263] Consuming an aspect of the Other's culture offers a way of experiencing 'a new delight, more intense, more satisfying than normal ways of doing and feeling'.[264] Appropriation carries the promise of transcendence. However, as the Other remains primitive despite their seductive, natural state, playing out this fantasy is a dangerous act.[265] But danger, too, is seductive; taking from the Other is a testament to the Self's courage and power.[266] So framed by hooks, the appreciation of cultural difference that informs the appropriative act locates the longing for contact with the Other in the structure of colonial oppression as well as an unstable psyche.

The fantasy of otherness and desire to "cross over" described by hooks has been identified by other scholars such as Deborah Root as a 'New Age' phenomenon.[267] The New Age is a spiritual movement and philosophy.[268] It has no founding religious texts; rather, central to it is forging a personal philosophy from multiple cultural influences, and seeking spiritual wholeness or wellness.[269] The 'ancient wisdom' of the Other, and identification with those beliefs, is regarded as having therapeutic effects.[270] As Root explains, '[a] central pretext for the interest in colonized societies is that these cultures – and their aesthetic forms – are somehow less contaminated by modernity than Western culture…'[271] The New Age adherent operationalises and internalises the Other's wisdom through

[261] hooks (n 12) 25.
[262] According to Root, the emptiness motivates the consumption. See, eg,'the cannibal is able to live and grow where there is a void ... an absence … that is necessary to the cohesion and balance of the whole': Root (n 257) 16.
[263] Bhabha (n 11) 63.
[264] hooks (n 12) 21.
[265] Ibid 26.
[266] Ibid 36.
[267] Root (n 257) particularly 87–97.
[268] On New Age philosophy: see generally Guy Redden, 'The Secret, Cultural Property and the Construction of the Spiritual Commodity' (2012) 18(2) *Cultural Studies Review* 52, 54–5; Michael York, 'New Age Commodification and Appropriation of Spirituality' (2001) 16(3) *Journal of Contemporary Religion* 361, 363–4.
[269] Redden (n 268) 56. See, eg, discussion of the philosophies of Deepak Chopra, Ken Wilber, Gary Zukav, and Shakti Gawain in Jennifer Rindfleish, 'Consuming the Self: New Age Spirituality as "Social Product" in Consumer Society' (2005) 8(4) *Consumer Society, Consumption, Markets and Culture* 343, 350–6.
[270] Redden (n 268) 56–7.
[271] Root (n 257) 48.

consumption patterns[272] that involve borrowing and reinterpreting different cultural sources.[273] These incursions are not always welcomed, yet the appropriation of Indigenous spirituality and practices is naturalised in this framework.[274] The goal is personal transformation, to 'become, very literally, the "other" bodies commonly associated with these practices.'[275] While appropriation is understood from within the New Age community as apolitical,[276] it is criticised by some commentators as harmful and engaging a process of 'cultural imperialism.' [277]

New Age sentiments are identifiable in some contemporary subcultural practices,[278] including body modification practices. The Modern Primitives body modification subculture,[279] that emerged in the 1960s and became increasingly popular during the late 1980s and still exists today, exhibits a similar pattern of taking from the Other in an attempt to achieve personal transformation. Modern Primitives embrace a New Age, pan-Indigenous, alternative lifestyle milieu.[280] Tribal body modification practices, including that of tattoo, are seen as a way of tapping into the 'shadowy zone between the physical and the psychic',[281] generating insight that can help the individual become 'complete' or 'integrated.'[282] As one Modern Primitive puts it, mimicking Indigenous practices releases the 'savage within' and provides 'an *antidote'* for co-existing 'with the workaday world.'[283] However, problematically, what is essentially a rejection of rational self-control and openness to other cultures invokes a nostalgic, idealised image of native wisdom and spirituality, leading to allegations of

[272] On the commercial aspects of the New Age movement and its commodification of the spiritual ideas and practices from other traditions: see, eg, Root (n 257) 88–92; Kimberly Lau, *New Age Capitalism: Making Money East of Eden* (University of Pensylvania Press, 2000); Nadia Bartolini et al, 'Psychics, Crystals, Candles and Cauldrons: Alternative Spiritualities and the Question of Their Esoteric Economies' (2013) 14(4) *Social and Cultural Geography* 367, 371–2; York (n 268) 371.
[273] Redden (n 268) 56; Lau (n 272) 3.
[274] York (n 268) 367–8.
[275] Lau (n 272) 3. See also Rose (n 257) 405.
[276] Rose (n 257) 405.
[277] Ibid 404, 406. See also Lau (n 272) 8; Root (n 257) 960; York (n 268) 367–8.
[278] See, eg, the discussion of the appropriation of Native culture in fashion as a countercultural maneouvre that resonates with the New Ager's search for authenticity: Root (n 257) 98–9.
[279] The term "modern primitive" was coined by performer Fakir Musafar to describe 'a non-tribal person who responds to primal urges and does something with the body': Fakir Musafar quoted in V Vale and Andrea Juno, *Modern Primitives: An Investigation of Contemporary Adornment and Ritual* (RE/Search Publications, 1989) 13. See 'General Tattoo and Other', Images 94–6, xxvi of this thesis.
[280] See generally Vale and Juno (n 279).
[281] Vale and Juno (n 279) 4.
[282] Ibid 5.
[283] Anton LaVey quoted in Vale and Juno (n 279) 94 (emphasis in original).

colonialism.[284] Indigenous peoples are stereotyped as ageless, natural, and wise,[285] yet distanced from contemporary politics, as performer and Modern Primitive Fakir Musafar's comments illustrate:

> Although they may appear to be backward, people like Australian aborigines *know* something that people here don't know. And that's the reason they can poke holes in the body, they can tattoo it, they can decorate it – it's all just a joyous loving expression….To not do these things is *not to live* – it's to deny the purpose of why we're here.[286]

The founder of tribal tattoos, Leo Zulueta, invokes a similar stereotype of Indigenous culture when describing tribal tattoo imagery and practices as a pathway to authenticity and spiritual fulfilment in a western 'cultural wasteland.'[287] In the context of Polynesian and Borneo tattoo motifs he comments that

> the designs imply a cosmography and knowledge of the powers inherent in "nature" which those "primitive" peoples knew much more intimately than we do. Their knowledge wasn't written out in encyclopaedia form, and we are left with the *residue* – the symbols of their understanding of the interrelationships, causes and effects in nature.[288]

While these understandings of tattoo practices are not universally embraced within the western tattoo community,[289] or even amongst tribal tattoo enthusiasts,[290] they show how stereotypical representations of Indigeneity reproduce the inferiority of the Other and justify the unauthorised appropriation of their practices. What the Other might want and what harms they might experience from efforts to preserve their imagery or recreate their practices are irrelevant. The subaltern is not permitted to speak, the 'object is not supposed to talk back and shatter the illusion' of their representation.[291] In the process, political struggle is sidestepped and 'accountability and historical

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[284] See Christian Klesse, "Modern Primitivism": Non Mainstream Body Modification and Racialized Representation' in Mike Featherstone (ed), *Body Modification* (Sage, 2000) 15, 34. On stereotyping the "primitive": see, eg, hooks (n 12) 26; Marianna Torgovnick, *Gone Primitive: Savage Intellects, Modern Lives* (University of Chicago Press, 1990) 8–9.
[285] Redden (n 268) 57.
[286] Vale and Juno (n 279) 10–1 (emphasis in original).
[287] Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (Duke University Press, 2000) 88.
[288] Vale and Juno (n 279) 99. Note that in later interviews Zulueta is more culturally sensitive. For example, in an interview in 2000 he expresses his awareness that in some countries like New Zealand it is 'horribly disrespectful to take a tattoo pattern from the Maori and try to reproduce it today': DeMello, *Bodies of Inscription* (n 287) 88.
[289] DeMello, *Bodies of Inscription* (n 287) 181.
[290] Ibid 89. See also Cyril Siorat, 'Beyond Modern Primitivism' in Nicholas Thomas, Anna Cole and Bronwen Douglas (eds), *Tattoo: Bodies, Art, and Exchange in the Pacific and the West* (Reaktion Books, 2005) 205, 211; Nicholas Thomas, 'Embodied Exchanges and Their Limits' in Nicholas Thomas, Anna Cole and Bronwen Douglas (eds), *Tattoo: Bodies, Art, and Exchange in the Pacific and the West* (Reaktion Books, 2005) 223, 226.
[291] Root (n 257) 45. See also: at 47.

connection' denied by imposing a new narrative over the suffering inflicted by the structures of domination.[292] This means that even when an appropriator is sincere in their appreciation of Indigenous culture, their self-identification with Indigenous identity as well as their appropriative act can be received as damaging. It remains framed within a hierarchical system of cultural value and in support of colonial discourse.[293] In chapter 6, I draw upon historical perpectives on Pasifika tattoo and in particular, moko, to explore the oppressive dimensions of appropriation and its historicity.

2.5 Conclusion

This thesis' three analytical frameworks of performativity, law and society, and desire for the Other were developed with a view to exposing some of the complexity and multiple meanings that exist at the intersection of cultural appropriation and law that are unaccounted for or underdeveloped in conventional critiques. Cultural appropriation claims are possessive, performative, and productive, and they engage both the formal and informal legal spheres and the present and the past. Multiple lenses of analysis are therefore appropriate.

Each of the three analytical frameworks that position this thesis analyse the intersection of cultural appropriation and law in a different way. The first framework of performativity reflects on the significance of cultural claiming as a performance of identity that does something regardless of whether a demand on law is made. It directs attention to the significance of the essentialised cultural constructs deployed in claims, cultural claiming as a subversive activity, and reform discourse as a performative exercise. The second framework of law and society uses literatures of legal consciousness and legal pluralism in order to be more attentive to informal legality as well as formal legal rules. It directs attention to the legal meaning-making that can take place outside of the formal legal sphere and that manifests in artistic practices. The third analytical framework of desire for the Other provides a means to more deeply understand the perceived relationship between cultural appropriation and colonial injustice. Through analysis of the Self/Other binary, it directs attention to

[292] hooks (n 12) 25.
[293] Root (n 257) 54. See also, '[t]he desire to cross over is itself coterminous with a colonizing desire of appropriation, even to the trappings of social identity …': Linda Martin Alcoff, *Visible Identities: Race, Gender, and the Self* (Oxford University Press, 2006) 217.

how and why cultural claimants might construct appropriator engagements with Indigenous culture as oppressive. Appreciation of the Other in body modification communities can be perceived to replicate racialised subject positions.

These three frameworks are diverse, yet connected in their function. Each operates as a critical supplement to the conventional critique. The conventional critique reads cultural appropriation claims as a possessive claim and identity politics that requires the rectification of Indigenous exclusion in law. However, it is insufficiently attentive to the nature of cultural claims, the complexity of legality and legal power, and identity as performed and received in claims. This thesis' analytical frameworks position this thesis to gain deeper insight into the politics and meaning-making that takes place inside and outside of the formal legal sphere, in specific sites of production. Complex phenomena are best understood through multidimensional analyses.

I turn now to chapter 3, 'Methodology', to detail how this thesis' three methodological tools – doctrinal analysis, fieldwork, and historical analysis – are used to carry out the work required by this thesis' analytical framings.

Chapter 3: Methodology

As discussed in the previous chapter, in order to capture the complexity of culture, the legal domain, and identity politics, a combination of methodological tools are helpful: doctrinal analysis, fieldwork, and historical analysis. These methods enable the exploration of the phenomenon of tattoos from multiple perspectives: viewed through the eyes of copyright law as property, as a social practice negotiated in everyday life, and through intercultural relations since first contact in the Pacific region.

In Section 3.1 of this chapter, 'Doctrinal analysis', I outline the nature of doctrinal analysis and note its advantages for illuminating the complexity of law, the social expectations of property claims over imagery and arts styles, and legal ideas around the exclusion and inclusion of Indigenous peoples and their artforms. I then discuss the value of having a particular site to explore the implications and limitations of a doctrinal anlaysis, in view of the critique advanced by conventional progressive legal scholars in the previous chapter. *Whitmill* was selected to explore competing cultural ownership claims over tattoo imagery because it is the only reported tattoo copyright infringement action that involves an Indigenous-inspired tattoo.[1] I identify the usefulness of *Whitmill* for exposing law's complicity in appropriation and the nature of the conventional law reform demand, before flagging the limitations of doctrinal analysis as a standalone methodological tool for exploring the breadth of this thesis' research questions. In order to more fully reflect upon the intersection of law and culture in specific local sites and what cultural claims do as well as what they say, fieldwork and historical analysis were also selected.

In section 3.2, 'Fieldwork', I outline the nature of the empirical work I undertook as part of this project and the role it fulfils in this thesis' methodology. Fieldwork is useful to garner insights into the meaning-making that takes place outside the formal legal frame in the everyday,[2] and the dynamism

[1] In the preliminary injunction hearing, Whitmill describes the tattoo 'as kind of inspired by some of the movement you would see in a Maori piece', however he stated that he did not create 'a Maori style tattoo' but rather a tribal tattoo 'derivative of Borneo': Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 23 May 2011) document 55, 16–7 (Whitmill).
[2] On the usefulness of an ethnographic approach to IP for furthering local interpretations of law and understanding of the formal law's force of material enforcement: see Rosemary Coombe, 'Critical Cultural Legal Studies' (1998) 10(2) *Yale Journal of Law and the Humanities* 463, 479.

and contest that marks cultural production. I canvas some of the power dynamics of undertaking qualitative research involving Indigenous peoples as a member of the settler class, before outlining my fieldwork design, recruitment methods, and the interview process. I then outline my approach to data analysis and reporting as involving descriptive analysis and the "realist tales" style of reporting to elevate the voices of participants.

In section 3.3, 'Historical analysis', I discuss why historical analysis was chosen to provide a deeper understanding of cultural appropriation allegations as performances that construct a very specific relationship between appropriation and the colonial past. As an identity claim as well as a property claim, cultural appropriation allegations resist colonialism and produce a political objection to the colonial desire for the Other.[3] I firstly outline how, as an explanatory method, history helps provide insight into the nature and longevity of the colonial gaze as a dynamic of oppressive appreciation of difference over time, and the complexity of historical positionings between Pasifika and western tattoo. Understandings of history are produced and reproduced in cultural claims. Investigating the nature of these understandings helps to connect the doctrinal analysis of the law's treatment of cultural claims to the lived experience of appropriation and law of creators, through considering what is left of the framing of history as protest. I then explain the nature and scope of my historical source selection that uses the South Seas voyages as an outer limit and focal point, and selection of other static sites, markets, and engagements throughout the 19th and turn of the 20th century.

The three methodological tools used in this thesis are complementary and support different aspects of the investigation into the political and legal significance of cultural appropriation claims across the following chapters. Combined, they allow me to advance a more sophisticated understanding of the political activity at the intersection of cultural appropriation and law, the complexity of law and culture's entanglement, and the diversity of meanings attached to cultural claims at this site. This facilitates a deeper understanding of the intersection of cultural appropriation and law than simply reading claims against a discourse of legal exclusion, as is customary in conventional progressive IP scholarship.

[3] See also section 2.4 of this thesis.

3.1 Doctrinal analysis

3.1.1 Rationale for selecting doctrinal analysis

This thesis aims to evaluate what legal framings of cultural claims and the demand for law reform capture – and miss – about the way in which appropriative arts practices are contested and negotiated inside and outside of the formal legal system. As outlined in chapter 2, in conventional, progressive scholarship, doctrinal analysis is deployed so as to construct the legal frame, criticise the western bias of copyright's cornerstone principles, and agitate for more or better legal rights.[4] In chapter 4 of this thesis I deploy a doctrinal analysis of the *Whitmill* legal proceedings as the starting point to consider the meanings, identity politics, and social narratives associated with cultural appropriation claims. As previously discussed, implicit in conventional critiques is the identification of an unmet legal need.[5]

Assessing what conventional critiques understand of the intersection of cultural appropriation and law allows for identification of what they fail to capture. However, using the law's own methods to conduct this inquiry itself fails to consider the contestation and cultural dynamism that sits behind cultural appropriation claims, the legal meaning-making that takes place in local sites, and the productivity of claims as a performative utterance and subversive activity. Fieldwork and historical analysis are also needed to discern this meaning that sits outside of the formal legal frame. These methods are utilised in chapters 5 and 6 in order to fulfil this task.

Good doctrinal scholarship is interrogative; it engages both an interpretive and critical reading of legal texts to render their meanings intelligible.[6] The 'texts' considered typically include published case law, precedent judgments of higher courts, and scholarly works on the law.[7] Doctrinal analysis includes textual analysis of the coherencies, incoherencies, and contradictions in law that typically presents as consistent, as well as analysis of law in practice, including the impact of legal rules on

[4] See section 2.1 of this thesis.
[5] Ibid.
[6] See generally, Nigel Duncan and Terry Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 107, 110–3.
[7] See Mark van Hoecke, 'Legal Doctrine: Which Method(s) For What Kind of Discipline?' in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing, 2011) 1, 11; Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122(Oct) *Law Quarterly Review* 632, 633; Pauline Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing, 2011) 87, 94.

members of society.[8] The latter analysis engages normative discussion.[9] In describing, systematising, and interrogating legal principles and their effects, doctrinal scholarship typically weighs up competing values and interests and makes choices about what would make a "better law" or a better order.[10] This shows that reform is 'at the heart of our legal culture'.[11] The conventional progressive critique, as outlined in chapter 2, is similarly focused on correcting deficiencies in the law.[12] The critical evaluation and interpretation of law complements the search for, and devising of, legal solutions and reform agitation.

The interpretive and critical aspects of legal doctrine and its attention to law's impact, make it a useful method for exploring how doctrine understands disputes, and constructs law's subjects and objects. For this thesis, it is particularly useful for drawing out how critics identify a larger problem with the legal order and the norms of copyright in particular. It also helps to consider how the articulation of new property rights for Indigenous subjects anticipates that a more enlightened formulation of doctrine could more productively regulate cultural practice and society. In chapter 4, the construction of Pasifika tattoo in the *Whitmill* proceedings is used to investigate tattoo imagery as a form of property recognised by copyright law. As the cultural appropriation claim was reported in the media before it was taken up in academic commentary, social commentary is drawn upon in additional to scholarly texts to identify the failings, inconsistencies, and gaps in law's protection of Indigenous cultural imagery and artistic styles.[13] As legal scholar JM Balkin argues, to understand the nature of

[8] 'If the legal scholar is to engage in the traditional task of constructing a coherent picture of law, he or she is wise to address not only the idealised picture of law but also the empirical one': Westerman (n 7) 108. On the usefulness of examining law externally as well internally to understand legal doctrine, see also Roger Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25(2) *Journal of Law and Society* 171, 171–92.
[9] On the normative aspects of legal doctrine: see, eg, Aleksander Peczenik, 'Can Philosophy Help Legal Doctrine' (2004) 17(1) *Ratio Juris* 106, 107; van Hoecke (n 7) 10; McCrudden (n 7) 634.
[10] See, eg, Westerman (n 7) 93–4; Martha Minow's comments on 'doctrinal restatement' in Duncan and Hutchinson (n 6)103.
[11] Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999) 7. See also: at 8, 11.
[12] See section 2.1.1.2 of this thesis.
[13] Lay opinion, media reports, documentary filings, and unreported cases are not used in traditional doctrinal scholarship because the relevance of a text is typically guided by whether it is legally authoritative. Nevertheless, using social commentary to investigate debates in copyright is an accepted method in law and society scholarship. See, eg, 'how people who are not legal scholars frame the use of copyright as they discuss ... [copyright disputes] is a good place to begin to develop a sense for the everyday life of copyright law': Debora Halbert, 'The Everyday Lives of Copyright' in Austin Sarat (ed), *Special Issue: Thinking and Rethinking Intellectual Property* (Emerald, 2015) 119, 121. On the need to look outside of the legal trial or the

law, it is necessary to understand the 'nature of legal understanding' from the perspective of law's subjects.[14]

I will now explain why the *Whitmill* legal proceedings were chosen as the subject of doctrinal analysis.

3.1.2 *Whitmill* as an object of analysis

Whitmill is a District Court case that did not proceed to full trial as it settled after a preliminary injunction hearing. While authoritative decided cases of superior courts are more typically the subject matter of doctrinal analysis, *Whitmill's* selection is nevertheless suitable for this thesis. There are very few litigated tattoo disputes around the world, and no superior court decisions.[15] There have been many allegations of misappropriation of tā moko over the past twenty years, yet no litigated instances of copyright infringement in New Zealand.[16] Looking further afield, in the United States I have identified six litigated disputes over tattoo imagery including *Whitmill*,[17] all of which involve tattoos worn by professional athletes.[18] However, of those disputes, only *Whitmill* involves a tattoo that is non-representational and has a connection with Indigenous cultural imagery or arts styles – the 'American tribal'[19] tattoo that S Victor Whitmill created for Mike Tyson.[20] Since it was created in

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reported case to gauge legal meaning-making: see Rosemary Coombe 'Is There a Cultural Studies of Law?' in Toby Miller (ed), *A Companion to Cultural Studies* (Blackwell Publishers, 2005) 36, 55.

[14] JM Balkin, 'Understanding Legal Understanding – The Legal Subject and the Problem of Legal Coherence' (1993) 103(1) *Yale Law Journal* 105, 106. See also: at 107.

[15] See section 1.2.1 of this thesis. There are, for example, no tattoo copyright infringement cases listed in the "All Case Law Databases" of the World Legal Information Institute (WorldLII) as at 30 July 2019.

[16] As confirmed through a "Case Law Database" search of the New Zealand Legal Information Institute (NZLII) for "moko AND copyright" and "tattoo AND copyright" on the 30 July 2019. On allegations of moko misappropriation generally: see section 1.2.1 of this thesis.

[17] *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, complaint dismissed 22 June 2011); *Allen v Electronic Arts* (WD La, No. 5:12-V-3172, complaint dismissed 9 April 2013); *Alexander v Take-Two Interactive Software, 2K Games and World Wrestling Entertainment* (SD Ill, No. 3:18-cv-966, complaint filed 17 April 2018); *Reed v Nike, Rasheed Wallace, and Weiden & Kennedy* (D Or, No. 05-CV-198 BR, complaint dismissed 19 October 2005); *Escobedo v THQ* (D Ariz, No. 2:12 – CV-02470-JAT, complaint dismissed 11 December 2013); and *Solid Oak Sketches v 2K Games and Take-Two Interactive Software* (SDNY, No. 16CV724-LTS, complaint filed 1 February 2016). Of these disputes, all bar the two *Take-Two* cases settled prior to trial. The litigation in the two *Take-Two* cases is ongoing at at 6 June 2019: 'Solid Oak Sketches, LLC v. Visual Concepts, LLC et al', *Justia Dockets & Filings* (Web Page) <https://dockets.justia.com/docket/new-york/nysdce/1:2016cv00724/452890>; 'Alexander v. Take-Two Interactive Software, Inc.', *Court Listener* (Web Page) <https://www.courtlistener.com/docket/6366855/alexander-v-take-two-interactive-software-inc/>.

[18] The athletes include boxer Mike Tyson, NFL player Ricky Williams, UFC fighter Carlos Condit, wrestler Randy Orton, and basketballers Rasheed Wallace, Kobe Bryant and LeBron James.

[19] This is how Whitmill describes the tattoo during the preliminary injunction hearing: Transcript of Proceedings (n 1) 17 (Whitmill).

2003, this tattoo was described as 'one of the most distinctive tattoos'[21] in the United States, has attracted criticism as the misappropriation of tā moko.[22] As such, despite the case's lack of precedent status, the fact that the legal subject matter in *Whitmill* is an Indigenous-inspired tattoo that is controversially received makes it an ideal starting point for reflecting upon the cultural relationships that are judged insufficient to attract copyright protection in settler states.

In selecting the *Whitmill* legal proceedings as the initial site of analysis in chapter 4, I do not limit my treatment of the case to the preliminary hearing judgment of Judge Catherine Perry. In addition to the preliminary hearing judgment, I draw upon the hearing transcript, legal submissions, and the full range of pre-trial processes, documents, and filings. This was necessary to uncover the subjectivities that law recognises, and the meaning that exists in and between legal and non-legal narratives. Consideration of the full range of pre-trial processes also acknowledges that legal interpretation is not confined to judicial activity; it permeates the process by which disputes become litigated, legal arguments are formed, and resolutions negotiated.[23]

I will now explain the need for a three-part methodology in more detail.

3.1.3 Beyond legal doctrine

In engaging a critical reading of the *Whitmill* legal proceedings, I clarify, in the context of Pasifika tattoos, the technical classification of copyright subject-matter, and the perceived misclassification from the perspective of the law's critics. I am able to render intelligible some of the criticisms of law, particularly its cultural bias and complicity in the cultural harm of appropriation. In chapter 4, doctrinal analysis facilitates critical insight into the property framework that is the object of critique in cultural appropriation claims by conventional progressive scholars. However, while useful in identifying the identity politics associated with cultural claims and the perceived need for more or

[20] The tattoos in the other tattoo copyright infringement proceedings involve representational tattoos, for example Rasheed Wallace's Eyptian-themed tattoo and Carlos Condit's lion tattoo: see, respectively, *Reed v Nike* (n 17); *Escobedo* (n 17).
[21] S Victor Whitmill, 'Verified Complaint for Injunctive and Other Relief' in *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, 28 April 2011) document 1, 1.
[22] I return to consider the controversy that surrounds this tattoo in detail in section 4.1.2 of this thesis.
[23] Coombe, 'Is There a Cultural Studies of Law?' (n 13) 46; Rosemary Coombe, '"Same As it Ever Was": Rethinking the Politics of Legal Interpretation' (1989) 34(3) *McGill Law Journal* 603, 614–5.

better legal rights, doctrinal analysis alone does not meet the breadth of this thesis' concerns. It does not offer a means to explore the complexity of legal power as it manifests in local sites or the deeper political and historical context of the appeal to legal rights. Cultures are contested as often as coherent,[24] and some subcultures and cultural practices are ordered in the shadow of the law.[25] Moreover, cultural appropriation allegations perform resistance to colonialism even as they stake a possessive claim over culture.[26] Lived experience, performativity, and the relevance of colonial desire to appropriation as received require closer examination, necessitating the use of additional research methods. Using the tools of fieldwork and historical analysis to compensate for the limitations of doctrinal analysis brings to life the dynamism, contestation, and complexity that marks the intersection of cultural appropriation and law, within the confines of this thesis' analytical frameworks.[27]

3.2 Fieldwork

3.2.1 Rationale for selecting fieldwork

In this thesis, fieldwork consisting of qualitative interviews is used to investigate the lived experience of cultural appropriation and law within specific creative spheres at a particular point in time: namely, the moko industry and pākehā tattoo industry in the North Island of New Zealand in 2012. This empirical work offers a platform to develop a deeper discussion of the complexity of law and culture as refracted through everyday life, and to reflect upon the significance of the gap that can exist between the political meanings inscribed on cultural claims by conventional critics and how such contests are experienced in local sites. Ethnographic approaches are alert and attentive to subjective experience as a source of knowledge, and well suited to uncovering how the entanglement of law and culture manifests and shapes lived experience and political struggles over meaning in cultural contests

[24] See section 1.1.1 of this thesis.
[25] See section 2.3 of this thesis.
[26] See section 2.2.1 of this thesis.
[27] See chapter 2 of this thesis.

involving IP rights.[28] It offers a way to think critically about not only what law is, but also what it does and does not do when it intersects with cultural practices.

The qualitative interviews undertaken with tā moko practitioners and tattoo artists in New Zealand focus on industry use of Māori cultural imagery and Pasifika art styles. The ambition was to bring to the surface the social life of law and to determine if copyright law was relied upon to regulate artistic practice, as well as to identify if there were any shared norms around creativity or ethical boundaries that confined the artistic choices of individuals or particular groups of arts practitioners. As qualitative interviews are known for opportunities for 'mutual discovery, understanding, reflection and explanation',[29] I anticipated that the turn to the particular could help expose rich detail in the subjective experiences of appropriation and law. I was concerned to introduce specificity around the creative work that is done by artists and the legal issues that face industries in practice. I had not, however, anticipated that artist perspectives would overwhelmingly challenge the foundations of the cultural appropriation claim against Whitmill levied by conventional legal critics,[30] bringing the contestation and performativity that sits behind the possessive language of claims so sharply into relief. I report fieldwork insights in chapter 5, and reflect on the gap identified between artist perspectives and the political activity inherent in cultural claiming through historical analysis of colonial dynamics in chapter 6.

While the interpretive and explanatory functions of fieldwork support this thesis' analytical concerns with local meaning-making and cultural contestation, interviewing Indigenous artists engages power dynamics that require closer examination. Critical and Indigenous methodologies stress that qualitative research that involves Indigenous peoples is 'always already political' and that issues with 'initiation, benefits, representation, legitimacy, and accountability' abound, particularly when that

[28] Coombe, 'Critical Cultural Legal Studies' (n 2) 479. On the benefits of 'thick description' for understanding the law – culture relationship, see generally Naomi Mezey, 'Law as Culture' (2001) 13 *Yale Law Journal and the Humanities* 35, 60–2. See also, Kahn (n 11) 2.
[29] Sarah Tracy, *Qualitative Research Methods: Collecting Evidence, Crafting Analysis, Communicating Impact* (Wiley, 2013) 132.
[30] See particularly section 5.1.1 of this thesis that classifies the cultural content of the Whitmill tattoo from the perspective of artists.

research is undertaken by Western scholars.[31] I will now discuss the relationship between qualitative research and power as a foreground to explaining my attempts to incorporate ethical self-reflexivity, respect, and accountability into my fieldwork design, analysis, and reporting.

3.2.2 Power and positionality: qualitative research involving Indigenous peoples

There is a deep suspicion of the locus of power in research settings, particularly when research is conducted by members of the settler class. Giving voice 'can be a domineering act.'[32] Linda Tuhiwai Smith's criticism of the longstanding relationship between research and oppression is notable. In her text, *Decolonizing Methodologies*,[33] the prevalence of racist and exploitative practices and attitudes that mark research conducted with Indigenous communities, including Māori, by cultural outsiders is mapped.[34] Smith argues that while there have been some shifts in recent years in how non-Indigenous scholars conducting research with Indigenous people or on Indigenous issues position their work, problematic research paradigms persist – prompting calls to decolonise research.[35] While qualitative work might appear to be participatory and elevate Indigenous voices, it can involve oppressive structures and be perceived as a form of 'invasion' because of the researcher's position outside of the communities that they study.[36] This possibility motivated me to better understand how I could ethically conduct my research, including, but not limited to, my empirical work.

For my research framework overall, an ethical approach requires me to acknowledge that my research questions are not aligned with the goals of Indigenous scholars like Janke, Solomon, and Mead, whose scholarship is discussed as exhibiting the hallmarks of the conventional approach in chapter

[31] Norman Denzin and Yvonna Lincoln 'Introduction: Critical Methodologies and Indigenous Inquiry' in Norman Denzin, Yvonna Lincoln and Linda Tuhiwai Smith (eds), *Handbook of Critical and Indigenous Methodologies* (Sage, 2008) 1, 2. See also Russell Bishop, 'Freeing Ourselves From Neo-Colonial Domination in Research – A Maori Approach to Creating Knowledge' (1998) 11(2) *International Journal of Qualitative Studies in Education* 199, 199; Pranee Liamputtong, *Performing Qualitative Cross-Cultural Research* (Cambridge University Press, 2010) 1–4.
[32] Pat Sikes, 'Decolonizing Research and Methodologies: Indigenous Peoples and Cross-Cultural Contexts' (2006) 14(3) *Pedagogy, Culture and Society* 349, 352 (citation omitted).
[33] Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012).
[34] Ibid, particularly chapters 1–5. See also Bishop, 'Freeing Ourselves From Neo-Colonial Domination in Research' (n 31) 200–1.
[35] Smith, *Decolonizing Methodologies* (n 33) 17. See generally Adam Gaudrey, 'Insurgent Research' (2011) 26(1) *Wicazo Sa Review* 113, 113–36.
[36] On inquiry as invasion: see, eg, Eve Tuck and K Wayne Yang, 'Unbecoming Claims: Pedagogies of Refusal in Qualitative Research' (2014) 20(6) *Qualitative Inquiry* 811, particularly 811–3.

2.[37] I do not subscribe to the political agenda of Janke, Solomon and Mead because I have a different subject position and responsibility for the reproduction of the status quo. However, as a lawyer like Janke and Solomon,[38] I share a common language with them and other conventional critics and can provide a useful commentary on what they set out to achieve from that knowledge base. Working at the intersection of law and society, it is possible to develop some critical awareness of colonial power structures and legal institutions from a non-Indigenous viewpoint. However, *how* this is done may well be compromised by many factors, including white privilege, as I will discuss in more detail below.

With respect to conducting fieldwork with tā moko artists and tattoo artists, my ethical obligations are to conduct my inquiry reliably, honestly and respectfully, and report on the law in practice, without misrepresenting the views of participants or causing them distress or harm.[39] My settler identity may pose particular vulnerabilities for Indigenous participants. While the fieldwork was planned and underway before the recent AIATSIS and NHMRC guidelines on the subject were available,[40] my project is generally compliant with these policies. For example, the NHMRC Guidelines' values of integrity, cultural continuity, reciprocity, and respect are reflected in my decision to engage with Indigenous and other subjects whose experience is central to understanding and resolving the problem identified by Indigenous scholars with copyright law's operations, my inclusion of the values, cultures, and priorities of a variety of Indigenous peoples in my work (academics, lawyers, activists,

[37] See section 2.1 of this thesis.
[38] As noted in section 2.1, Mead is a scholar and activist with a research interest in Indigenous cultural and intellectual property issues, however she does not have formal legal training: 'Aroha Mead', *Te Hononga Pūkenga: Māori & Indigenous Researcher Directory* (Web Page) <http://www.tehononga pukenga.ac.nz/user/260>.
[39] See, eg, Australian Government National Health and Medical Research Council and Australian Research Council, *National Statement on Ethical Conduct in Human Research* (2007, updated 2018) [1.1]-[1.13] <https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018#block-views-block-file-attachments-content-block-1>.
[40] Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (2012) <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/ethics/gerais.pdf> (AIATSIS Guidelines); Australian Government National Health and Medical Research Council, *Ethical Conduct in Research With Aboriginal and Torres Strait Islander Peoples and Communities* (revised guidelines, 2018) <https://www.nhmrc.gov.au/about-us/resources/ethical-conduct-research-aboriginal-and-torres-strait-islander-peoples-and-communities> (NHMRC Guidelines).

artists), and my ensuring of trust and openness with research participants through the obtaining of informed and voluntary consent.[41]

The work of critical Indigenous methodology scholars like Smith stress, however, that beyond these guiding values, ethical conduct also requires a critical awareness into one's own power and privilege when undertaking qualitative research. In qualitative interviewing, the style of interviewing I conduct as noted in section 3.2.3, reflexivity is typically achieved by researchers being aware of the power dynamics that permeate the interview process and reporting their own position as non-Indigenous people when undertaking data collection and writing up results.[42] However, the former approach is to some degree unavoidable, and the latter approach in particular is not sufficiently critical.[43] "Confessions" of positionality might recognise the importance of self-reflexivity to research, but they do not, of themselves, guarantee self-awareness, interrogate the power embedded in research, or disrupt power relations.[44] This is because these statements are not performative per se; the declaration of whiteness involves a 'fantasy of transcendence' of racism.[45] This has led commentators such as Tuck and Yang to describe confessions of positionality as disingenuous; 'the flash of positional confession before proceeding as usual.'[46]

Simply stating that I am neither Indigenous nor Māori in the course of conducting interviews or reporting my fieldwork does not effectively grapple with or neutralise the structural privilege that I hold as a member of the settler class when undertaking fieldwork. I ascribe to gender studies scholar Carol-Lynne D'Arcangelis' view that ethical self-reflexivity – which she terms 'radical reflexivity' –

[41] NHMRC Guidelines (n 40) 4–9. I outline my fieldwork planning and design, interview process, and reporting in more detail in the subsections that follow.
[42] On reflexivity as a methodological tool in qualitative research see Wanda Pillow, 'Confession, Catharsis, or Cure? Rethinking the Uses of Reflexivity as a Methodological Power in Qualitative Research' (2003) 16(2) *International Journal of Qualitative Studies in Education* 175, 175–96.
[43] See, eg, Bishop, 'Freeing Ourselves From Neo-Colonial Domination in Research' (n 31) 214.
[44] Andrea Smith, 'Unsettling the Privilege of Self-Reflexivity' in France Winddance Twine and Bradley Gardener (eds), *Geographies of Privilege* (Routledge, 2013) 263, particularly 267–8;
Carol Lynne D'Arcangelis, 'Revelations of a White Settler Woman Scholar-Activist: The Fraught Promise of Self-Reflexivity' (2018) 18(5) *Cultural Studies ↔ Critical Methodologies* 339, 342. On the limitations of self-reflexivity generally, see Kim England, 'Getting Personal, Reflexivity, Positionality, and Feminist Research' (1994) 46(1) *The Professional Geographer* 80, particularly 86.
[45] Sara Ahmed, 'Declarations of Whiteness: the Non-Performativity of Anti-Racism' (2004) 3(2) *Borderlands* [54] <http://www.borderlands.net.au/vol3no2_2004/ahmed_declarations.htm>.
[46] Tuck and Yang (n 36) 814.

offers a more effective means of approaching colonialism in research than simply confessing positionality.[47] For members of the settler class, ethical self-reflexivity involves recognising your role and responsibility in histories of racism as histories of the present, and treating Indigenous peoples as equals rather than as beneficiaries of your 'help'.[48] This encourages solidarity to flow both ways, and means that the researcher is better able to learn from, and flexibly respond to, moments of intercultural engagement.[49] While the goal of my research is not solidarity with either artists or conventional critics but with deepening understanding of the varied and contested interests that sit behind cultural claims and reform discourse, ethical self-reflectivity in my circumstances could involve listening respectfully, being open to dialogue with research participants, researching in a way that is responsive to the insights of participants and refraining from assuming that the views of one individual are representative of the entire community.[50] I have attempted to do this in my empirical work during the stages of fieldwork design, interviewing, and reporting, as discussed in more detail below.

In the context of my research questions, I believe that to avoid consulting Indigenous participants engaged in the cultural activities on which I write would perpetuate a greater injustice than the inevitably of oppressive structures from my privileged positioning.[51] Lived experience (even if unintentionally skewed by myself through the representation that takes place during the research and reporting process[52]) is important to understanding what people expect from law and what law can deliver, particularly for those historically marginalised by the law of the colonisers. I take

[47] D'Arcangelis (n 44) 339–53.
[48] Ibid 349.
[49] D'Arcangelis acknowledges that it is questionable whether rendering visible colonial power stuctures of itself overcomes oppression: D'Arcangelis (n 44) 351.
[50] This is a value identified by Kiri Powick as important for kaupapa Māori research undertaken by pākehā: Kiri Powick, *Māori Research Ethics: A Literature Review of the Ethical Issues and Implications of Kaupapa Māori Research Involving Māori for Researchers, Supervisors and Ethics Committees* (Wilf Malcolm Institute of Educational Research School of Education, University of Waikato, 2002) 42. See also AIATSIS Guidelines (n 40) 4.
[51] See, eg, Principle 10 of the AIATSIS Guidelines that suggests that '[r]esearch on Indigenous issues should incorporate Indigenous perspectives': AIATSIS Guidelines (n 40). In applying Principle 10, researchers should also '[r]ecognise the specialist knowledge of particular community members and their potential contributions to the research endeavour, and involve such persons wherever possible and appropriate': at Principle 10.
[52] Sikes (n 32) 355. Clifford Geertz makes a similar point in relation to representations of empirical work in anthropological writings; Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 15.

responsibility for the research and acknowledge its partiality.[53] While this does not, of itself, dismantle my structural position, it indicates an awareness of my position in the research process and the need for accountability.

I will now outline the features of my fieldwork design in more detail.

3.2.3 Fieldwork planning, design and participants

3.2.3.1 Fieldwork planning and design

My fieldwork was not designed as an anthopological study of tattoo art in New Zealand, but rather to include the voices of those whose practices are being written about in lay and academic commentary and whose voices are mostly absent from this discussion. The first stage of my fieldwork planning and design involved identifying and obtaining 'pre-knowledge' of the subject matter by researching instances of cultural appropriation in New Zealand, the controversy that surrounds the tattoo that S Victor Whitmill created for Mike Tyson, and the cultural importance and significance of moko.[54] I clarified the purpose of my fieldwork to provide detailed insight into the material harms of moko misappropriation, the operations of the moko industry and the western tattoo subculture in New Zealand, including the norms that pertain to the creation of Māori-inspired imagery, and the lived experience of the legal regulation of tattoos as copyright subject matter. The primary questions I identified that I wished to ask fieldwork participants are contained within the 'Sample Fieldwork Questions' document I submitted as part of the University of New South Wales ethics approval process, included in Appendix 1. I revised these questions prior to departing for my fieldwork trip, included in Appendix 2.

During the planning stage, I chose to model my fieldwork on qualitative interviews. Ethnographic interviewing is frequently used in cultural anthropology and sociology to generate fresh theoretical insights into the lives and behaviours of community members; including their personal experiences,

[53] England (n 44) 86–7.
[54] On the importance of obtaining preknowledge of the topic area during fieldwork planning: see James Holstein and Jaber Gubrium, *The Active Interview* (Sage, 1995) 77; Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2nd ed, 2009)106–9.

the cultural meanings they ascribe to their social worlds, and interpersonal dynamics.[55] A series of unstructured interviews with key informants typically takes place over a considerable period of time, during which the interviewer is immersed in the community.[56] While my interviews were concerned with gaining ethnographic insights, a number of adjustments were required in my circumstances because of the tight timelines and resource constraints within which fieldwork needed to be conducted. My interviews are one-off in nature as they were scheduled to take place over a period of 10 days.[57] It was also necessary to traverse a wide range of topics within the interview. As such, I judged a semi-structured interview format[58] using a combination of questions, prompts, and casual conversation with key informants, rather than an unstructured format, to be ideal. Semi-structured interviews support an 'active' interviewing style;[59] they facilitate a balance between focus and improvisation, and are flexible enough for the researcher to be able to respond to new lines of inquiry or encourage the participant to elaborate when desirable. As noted earlier, I account for my lack of embeddedness within the tā moko and pākehā tattoo communities by using interview data to include the voices of artists in discussion of the intersection of cultural appropriation and law, rather than to develop an anthropological case study of tattooing in New Zealand.

Finally, during this early stage, I devised my sampling plan to interview key informants within the tā moko and pākehā tattoo communities. Interviewing key informants was selected as – at least in theory – it is participatory, presenting an opportunity to show respect for ethical research principles. Māori research ethics scholar Kiri Powick, for example, notes that research that is respectful of Māori cultural beliefs and practices ideally includes face-to-face consultations and encounters that allow for the building of trust and the establishment of a connection between the researcher and participants;

[55] Barbara Sherman Heyl, 'Ethnographic Interviewing' in Paul Atkinson et al (eds), *Handbook of Ethnography* (Sage, 2011) 369, 372.
[56] Elizabeth Munz, 'Ethnographic Interview' in Mike Allen (ed), *The Sage Encyclopedia of Communication Research Methods* (Sage, 2017) 454, 454–5; Heyl (n 55) 369, 372.
[57] One-off interviews are not typically considered examples of ethnographic interviewing: Heyl (n 55) 379. footnote 1. Due to time/scheduling constraints, two interviews were ultimately conducted via Skype upon my return to Australia.
[58] On semi-structured interviews generally: see Lioness Ayres, 'Semi-Structured Interview' in Lisa Given (ed), *The Sage Encyclopedia of Qualitative Research Methods* (Sage, 2008) 810, 810–1; Wendy Olsen, *Data Collection: Key Debates and Methods in Social Research* (Sage, 2012) 33–4; Herbert Rubin and Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage, 3rd ed, 2012) 31.
[59] On active interviewing generally: see Holstein and Gubrium (n 54) 76–8.

allows participants to meet on their own terms including choosing the interview setting; and, permits researchers to watch and listen respectfully.[60] I discuss my recruitment strategies in more detail in the next sub-section.

3.2.3.2 Sampling and recruitment

In my fieldwork, I purposively sampled key informants who are proficient artists because they are more likely to be across the controversies in their field. Interviews with key informants from a particular social milieu are a recognised way of gaining quality ethnographic data.[61] Due to time, place, and funding constraints, broadly sampling the tā moko and pākehā tattoo industries was not feasible. I decided instead, within these parameters, to sample those informants who lived and worked in the North Island of New Zealand (in both rural and urban locations). This decision was made for practical reasons given that there is a concentration of practitioners in this region and I was operating under resource constraints.

I included pākehā practitioners within the sample because of my desire to reflect on the appropriation of Māori cultural imagery and arts styles by non-Māori. I anticipated that pākehā tattooists would be aware of such practices and perhaps participate in them, and thus be able to shed light on the norms that order appropriative conduct. Conducting interviews with both groups of artists also recognises that they work within different cultural spaces and perceive their work to be distinct from the other.[62] The implications of this for the reception of Māori-inspired tattoo imagery is investigated in chapter 5.[63]

My selection of prospective participants within each sample group differed. Selection of prospective Māori participants was guided by Ngahuia Te Awekotuku's book *Mau Moko,*[64] the leading scholarly

[60] Powick (n 50) 24–8, particularly 24–5.
[61] See, eg, Heyl (n 55) 369.
[62] Tā moko artists typically classify their work as "moko" and not as part of the broader category of "tattoo": see, eg, Phillipa Moore quoted in Matthew Martin, 'Ta Moko: Art's More Than Skin Deep', *Rotorua Daily Post* (online, 20 July 2011) <https://www.nzherald.co.nz/rotorua-daily-post/news/article.cfm?c_id=1503438&objectid=11035478>; Interview with Richie Francis (Marie Hadley, Skype, 3 April 2012) (interview and transcript on file with the author); Interview with Hohua Mohi (Marie Hadley, Rotorua, 14 February 2012) (interview and transcript on file with the author).
[63] See particularly section 5.1 of this thesis.
[64] Ngahuia Te Awekotuku and Linda Waimarie Nikora, *Mau Moko: The World of Māori Tattoo* (Penguin, 2011).

account of contemporary moko that includes interviews with 13 tā moko artists. Given Awekotuku's deep knowledge of Māori arts, I used her book as the starting point for identifying highly skilled and culturally knowledgeable practitioners who might act as key informants. By comparison, the pākehā sample was constructed from those tattooists who had an online presence and portfolios that included tribal, kiwiana tattoos (eg ferns, kiwi birds, or tattoos of the New Zealand landmass that include, for example, spiral forms), or Māori-inspired works.

I contacted prospective participants via email in the month prior to leaving for New Zealand, inviting their participation in my study. This recruitment strategy was highly ineffective. Most of my emails went unanswered, and prior to my departure, I had scheduled only two interviews – with tā moko artist Henriata Nicholas and pākehā tattooist Pip Russell.

Once I was in New Zealand, participant recruitment was more successful. I adopted the face-to-face recruitment strategy of walk-ins to tā moko and tattoo shops that fit the sample parameters. I generated five interviews from walk-ins. Approximately one in two walk-in interview requests were declined. Of those artists who declined to participate in the study, the typical response was that they were too busy to do an interview. This issue was compounded by the fact that my schedule resulted in me moving from town to town every day or so. While I was able to organise two interviews to be completed via Skype upon my return to Australia,[65] with a more flexible travel itinerary more interviews could likely have been secured. Other artists declined my interview request because they were uninterested in contributing to the project, and one tā moko artist told me that he did not feel comfortable doing an interview because there was another, more senior, artist in town. I subsequently successfully approached that senior artist for an interview. Many of the moko shops were also closed the day I presented. This was not surprising, as on my second day in New Zealand Nicholas had told me that tā moko practitioners are 'elusive' and travel frequently.[66]

[65] With tā moko artists Richie Francis and Rangi Kipa.
[66] Interview with Henriata Nicholas (Marie Hadley, Auckland, 9 February 2012) (interview and transcript on file with the author).

The other recruitment strategy I employed once I was in New Zealand was to ask research participants for leads to other participants that fit the sample criteria. From this opportunistic sampling,[67] I secured three interviews from three leads. This method was successful in narrowing relational distance and encouraging participation, which was particularly important since there were no financial incentives for participation in my study. I also found this technique effective in identifying active community members who were politically-minded. The three interviews subsequently conducted – two of which were with tā moko artists and the other with a pākehā tattooist – generated some of the most meaningful data around contested positionings on a variety of interview themes.

I interviewed 10 key informants in total. Qualitative researcher Sarah Tracy identifies five to eight interviews as pedagogically valuable and suggests that quality is more important than quantity for qualitative data.[68] In my case, 10 interviews were sufficient to find out what I needed to know about the contestation and dynamism that sits behind my interview topics.[69] Five of my participants identify as tā moko artists and the other five as tattooists. Two are female. This gender ratio is generally consistent with the overall population of practitioners in New Zealand, it being male dominated.[70] Of the tā moko artists I interviewed, cultural identification as Māori did not necessarily mirror their ethnic identification. For example, Jack Williams described his background as of 'mixed Polynesian descent;' Samoan, German, and Fijian Scottish on his Father's side and Māori on his Mother's side.[71] Nicholas stated that she has 'mixed blood' but doesn't distinguish between 'both sides of myself.'[72] Of the tattooists I interviewed, four identified as pākehā New Zealander and one as German. Throughout this thesis I will refer to the German practitioner also as pākehā as he is non-Māori of Caucasian descent, living in New Zealand.

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[67] On opportunistic sampling: see generally Jane Ritchie, Jane Lewis and Gilliam Elam,'Designing and Selecting Samples' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage, 2003) 77, 81.
[68] Tracy (n 29) 138.
[69] 'Interview as many subjects as necessary to find out what you need to know': Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2nd ed, 2009) 113.
[70] Awekotuku and Nikora, *Mau Moko* (n 64) 139.
[71] Interview with Jack Williams (Marie Hadley, Tokoroa, 14 February 2012) (interview and transcript on file with the author). Jack Williams is also known and referred to as "Haki" Williams.
[72] Interview with Henriata Nicholas (n 66).

3.2.3.3 Research participant profiles

In support of their status as key informants, the tā moko practitioners: Henriata Nicholas, Rangi Kipa, Richie Francis, Jack Williams, and Hohua Mohi, are amongst the leading Māori artists in New Zealand.[73] Nicholas is a tā moko artist and uhi practitioner who learned under Hawaiian tattooist Keone Nunes.[74] Kipa is a renowned contemporary and traditional artist and sculptor whose works have been exhibited in New Zealand and overseas.[75] Francis is a graphic artist, painter and carver and participated in the 1996 tā moko exhibition *Patua* at Wellington City Art Gallery, curated by Sandy Adsett.[76] Williams was part of the initial "Moko Renaissance"[77] and participated in the famous group tattooing of Tainui women at the Turangawaewae Marae in 2007 as a tribute to the Māori Queen, Te Arikinui Dame Te Atairangikaahu.[78] Mohi was a student of leading expert practitioners Gordon Toi Hatfield and Mark Kopua and has a profile in both Australia and New Zealand.[79] Subsequent to our interview he received a facial moko, indicating his position as a revered cultural member.[80] While each practitioner is a culturally knowledgeable, senior artist, none of the practitioners claimed to represent the interests of any larger cultural groups in their interviews. What participants say is reported as an expression of their personal views and experiences in negotiating their cultural reality. I return to discuss fieldwork reporting in more detail at 3.2.5.

Of the five tā moko artists, at the time of interview only Mohi and Francis worked full-time doing tā moko. The other practitioners pursued a variety of artistic interests. For example, Kipa produces bone

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[73] See 'Fieldwork Participants', Images 1–5, viii of this thesis.
[74] Awekotuku and Nikora, *Mau Moko* (n 64) 142; Interview with Henriata Nicholas (n 66).
[75] Most recently, Kipa was part of the recent *Māori Markings: Tā Moko* exhibition (2019) at the National Gallery of Australia; 'Māori Markings: Tā Moko', *National Gallery of Australia* (Web Page) <https://nga.gov.au/tamoko/>.
[76] Justine Murray, 'Taa Moko Sessions: Richard Francis', *Radio New Zealand* (online, 10 June 2008) <https://www.rnz.co.nz/national/programmes/teahikaa/audio/2018648411/taa-moko-sessions-richard-francis>.
[77] The "Moko Renaissance" refers to the revitalisation of moko that occurred from the 1980s as part of the reclaiming of the mana of tā moko by Māori. At this time moko began increasingly being worn as a political statement as well as a statement of cultural identity. See, eg, 'Contemporary Moko' in 'Tā moko – Māori Tattooing', *Te Ara: Encyclopedia of New Zealand* (Web Page) <https://teara.govt.nz/en/ta-moko-maori-tattooing/page-5>.
[78] 'Tainui Women Put on a Brave Face for Dame Te Ata' *Stuff.co.nz* (online, 31 January 2009) <http://www.stuff.co.nz/waikato-times/news/33838/Tainui-women-put-on-a-brave-face-for-Dame-Te-Ata >; Adam Gifford, 'Tainui Women to Get Moko Kauae', *Waatea News Update* (Blog Post, 6 June 2007) <https://waatea.blogspot.com/2007/06/tainui-women-get-moko-kauae.html >; Interview with Jack Williams (n 69).
[79] Interview with Hohua Mohi (n 62).
[80] See 'Moko', Image 11, x of this thesis. See also 'Hohua & Philippa Mohi', *Waka Huia* (Maori Television, 2017) <https://www.youtube.com/watch?v=2LYFmhUBvJQ>.

carvings and other artworks,[81] and Williams designs meeting houses and experiments with a variety of mediums including glass casting.[82] It is common for these artists to take public art commissions as well as commercial commissions. For example, Nicholas' artwork 'Pūngarungaru' is embedded in the structure of the Point Resolution Bridge in Auckland,[83] and Francis designed the logo for the Aotearoa Body Building Association in 2019.[84] In terms of their tā moko businesses, all five practitioners specialise in curvilinear Māori work[85] and had a diverse clientele, applying their designs to Māori (including those outside of their tribal affiliations), Pasifika, pākehā and tourist clientele. The way in which practitioners think about the work they do for Māori versus the work they do for non-Māori is discussed in chapter 5.[86]

At the time of the interviews, to my knowledge all of the pākehā participants, being Pip Russell, Tim Hunt, Pete Bauer, Elton Buchanan, and Cam Elgan, worked fulltime as tattooists.[87] Elgan worked out of a combined retail, skateboarding, and tattoo shop while the other practitioners worked out of regular tattoo shopfronts. The tattooists had diverse artistic experiences prior to working as tattooists. Russell has a background in screenprinting and apparel,[88] Elgan in design,[89] and Bauer in advertising and video game design.[90] Russell and Hunt in particular appeared to me to be attuned to the political dimensions of their Māori-inspired work. Russell organised the Auckland International Tattoo Festival in 2011,[91] and Hunt worked under the father of tribal tattoos, Leo Zulueta, in America in the early 2000s.[92] In the course of our interviews, both of these tattooists mentioned friendships with tā

[81] See 'General Tattoo and Other', Images 81 and 85, xxiii and xxiv of this thesis.
[82] See 'General Tattoo and Other', Image 83, xxiv of this thesis.
[83] See 'General Tattoo and Other', Image 84, xxiv of this thesis.
[84] See 'General Tattoo and Other', Image 87, xxiv. See also Francis' public art: 'General Tattoo and Other', Image 86, xxiv of this thesis.
[85] For a sample of their moko work, see 'Moko', Images 12–23, x–xiii of this thesis.
[86] See 5.2.2 of this thesis.
[87] See 'Fieldwork Participants', Images 6–10, ix of this thesis.
[88] Interview with Pip Russell (Marie Hadley, Auckland, 8 February 2012) (interview and transcript on file with the author); Emma Whittaker, 'Tattoo Traditions Leave a Mark', *Stuff.co.nz* (online, 25 November 2011) <http://www.stuff.co.nz/auckland/local-news/central-leader/6011973/Tattoo-traditions-leave-a-mark>.
[89] Interview with Cam Elgan (Marie Hadley, Wellington, 16 February 2012) (interview and transcript on file with the author).
[90] Interview with Pete Bauer (Marie Hadley, Auckland, 8 February 2012) (interview and transcript on file with the author).
[91] Whittaker (n 88).
[92] Interview with Tim Hunt (Marie Hadley, Paekakariki Beach, 16 February 2012) (interview and transcript on file with the author); 'About', *Pacific Tattoo* (Web Page) <https://pacifictattoo.co.nz/about/>.

moko practitioners and appeared to be in touch with personal and professional developments in the moko industry.[93] The other tattooists, Buchanan, Bauer, and Elgan seemed to work in a more insulated manner, or at least were less forthcoming about these matters.

Hunt was the only pākehā tattooist I interviewed who solely specialises in abstract, Polynesian-inspired custom work[94] and had a well-established Pasifika as well as pākehā and tourist clientele. The other practitioners worked with both abstract designs, for example producing Māori-inspired work for tourists,[95] as well as Western-style representational tattoos, custom work, and flash designs. In terms of the ethnic breakdown of clientele, it was noted that Māori tended to seek out tā moko artists rather than pākehā tattooists to get tattoo work done.[96] However, those Māori they did tattoo typically appreciated their individual arts style, desired a representational tattoo, or did not have strong tribal links.[97] The market for the services of pākehā tattooists as compared to tā moko practitioners is considered in more detail in chapter 5, in the context of financial harm.[98]

3.2.4 Interview process

The face-to-face interviews took place during the period of 8–19 February 2012. They were conducted in the North Island of New Zealand in Auckland, Rotorua, Tokoroa, Paekakariki and Wellington. Two further interviews were conducted via Skype in April 2012 upon my return to Australia. Both the face-to-face interviews and the Skype interviews followed the same format. Interviews lasted between 0.5–2 hours and were conducted in a semi-structured manner. The face-to-face interviews were conducted in the preferred setting of participants. This was usually the workspace of the practitioner, although I interviewed one practitioner in their friend's tattoo shop, and another at a café. I interviewed Mohi while he was designing a moko for a client.[99]

In conducting the interviews, I attempted to listen respectfully, use appropriate terminology, and remain responsive to new and unexpected findings. During one of my early interviews, I committed

[93] Interview with Tim Hunt (n 92); Interview with Pip Russell (n 88).
[94] For a sample of his work, see 'Māori-Inspired Tattoos', Images 38–40, xvi of this thesis.
[95] See 'Māori-Inspired Tattoos', Images 35–7,41–2, xvi of this thesis.
[96] Interview with Pip Russell (n 88).
[97] Ibid. See also Interview with Tim Hunt (n 92).
[98] See section 5.1.3.4 of this thesis.
[99] See 'General Tattoo and Other', Image 78, xxiii of this thesis.

the faux pas of referring to the moko created by Francis as a 'tattoo'.[100] He patiently corrected me: 'I actually don't do tattoos I do moko!'[101] I learnt from such incidents, and in the instance of the distinction between moko and tattoo, have maintained separate terminology throughout this thesis as a sign of respect for the cultural discriminations made by artists. When interviewing pākehā participants, I used neutral language when asking about copying practices and the problematics of Māori-inspired work. When prompted by participants, I also took on a more collaborative role in conversation,[102] particularly around explaining how copyright applies to tattoo art. Williams, for example, was interested in the applicability of moral rights provisions to his work.[103]

While the one-off nature of interviews impeded the possibility of sustained relationship building, I nevertheless attempted to build rapport with participants at the start of the interviews. Rapport is important for helping the participant feel comfortable and knowledgeable.[104] I began interviews by asking non-threatening, open-ended questions about where the participants were from and their path to moko/tattoo. After these introductory questions, I then asked generative questions[105] around five key areas: the cultural content of Whitmill's tattoo design, the defining features of moko versus tribal tattoos, perceived limitations upon the composition of designs, the design and production process, and attitudes towards appropriation and law.[106] Generative questions aim to build frameworks for discussion; they 'relinquish control to the respondents for the pace and exact topic of the answer.'[107] In the conversation that ensued, I employed hypothetical questions,[108] particularly around responses to various types of appropriation and the likelihood to assert legal rights, questions around participants' motives, behaviours and actions, as well as typology questions[109] to classify certain practices. The flexibility of the semi-structured format in moving the conversation on from unproductive lines of inquiry was invaluable during the interviews, particularly in circumstances where many practitioners

[100] Interview with Richie Francis (n 62).
[101] Ibid.
[102] See generally Tracy (n 29) 142.
[103] Interview with Jack Williams (n 71).
[104] Tracy (n 29) 147.
[105] Ibid.
[106] See Appendix 2 of this thesis for the sample questions I drafted prior to undertaking the interviews.
[107] Tracy (n 29) 147.
[108] Ibid.
[109] Tracy (n 29) 149.

found my copyright questions amusing or irrelevant rather than conversation-provoking. I discuss artist attitudes to legal regulation in chapter 5.[110]

During the interviews, I "validity checked" along the way to ensure that I developed depth in data around controversial issues. I looked for consistencies and inconsistences in approaches to areas of inquiry across interviews. The most pertinent example of this is the discussion that emerged with tā moko practitioners around the value and usefulness of concepts like kirituhi; that is, the variation of moko that is devoid of whakapapa and thus deemed suitable for non-Māori.[111] I explore perspectives on kirituhi in chapter 5.[112] Validity checking also helped me to re-evaluate my own assumptions and remain open to negative evidence.[113] This proved crucial because two of my operative assumptions, namely that tā moko practitioners would support the cultural appropriation allegations reported against Whitmill's tattoo and that tā moko practitioners only work with Māori clientele, were challenged by my fieldwork interviews.[114] I closed my interviews by thanking participants for their time, and asking if they knew any participants they thought would be interested in the study.

After the interviews, I made field notes that mapped pertinent themes, issues and perspectives discussed. A sample of these notes is provided in Appendix 4. I reflected upon these notes prior to undertaking subsequent interviews, and later used them to aid identification of themes and patterns in my data. However, these notes do not provide a source of data themselves in this thesis. Data reporting is limited to the content of the transcribed interviews in line with my aim to elevate Indigenous voice, as described in more detail in the next subsection.

3.2.5 Fieldwork results and reporting

I transcribed most of the interviews immediately after the fieldwork in 2012, and the remainder in early 2013. The transcription process involved cutting out filler words like "um" and "ah" and repetition that did not change the meaning of the expression. As part of the verification process, I

[110] See section 5.3 of this thesis.
[111] See generally Awekotuku and Nikora, *Mau Moko* (n 64) 135–7.
[112] See section 5.2.2 of this thesis.
[113] Michael Angrosino, *Doing Ethnographic and Observational Research* (Sage, 2007) 69.
[114] I return to discuss perspectives on these areas in sections 5.1.1 and 5.2.2 of thesis.

emailed follow-up questions to three participants, seeking insight into various matters that were raised in other interviews, including whether, for example, a non-Māori could create moko if they were suitably trained by a tā moko artist, and the centrality of ethnicity (as opposed to the tattoo's composition) to the classification of the tattoo design as moko, kirituhi or tribal. The follow-up questions I sent to one of the participants are attached in Appendix 3. Only one participant responded to my follow up questions,[115] confirming my earlier observation with regards to participant recruitment that tā moko artists and pākehā tattooists have a clear preference for face-to-face communication. I also shared the interview transcript with one participant who had expressed an interest in receiving their transcription. That participant did not request me to correct the record. While limited, these examples of collaboration are a form of member validation.[116]

I analyse my data using iterative analysis.[117] Iterative analysis is a reflexive process that involves progressive refinement, visiting and revisiting the data, connecting it to emerging insights, and reflecting upon current literature as well as the theories that I bring to the data, for example, around the contestation and dynamism of cultural sites.[118] It helps themes emerge.[119] In terms of process, I began the formal write-up of my results by breaking down transcripts into their component themes and reformatting the data into those themes, with a view to identifying sub-themes and exposing regularities and divergences in perspectives. Yet, the interpretive process itself began much earlier – during the interviews and taking field notes I started to identify and reflect on consistencies and inconsistencies in my dataset, as against my pre-existing knowledge.[120]

Using reflexive processes, I was able to identify patterns in and across the various interview transcripts, and capture some of the complexity of the social worlds participants work within as well as the intersection of those worlds with the assumptions made around cultural practices in cultural

[115] I did not pursue the two participants who declined to respond to my follow-up questions. Their original interviews remain useful sources of data, and are drawn on in chapter 5.
[116] See Heyl (n 55) 376.
[117] See generally Tracy (n 29) 184.
[118] Ibid. See also B Raewyn Bassett, 'Iterative' in Albert Mills et al (eds), *Encyclopedia of Case Study Research* (Sage, 2010) 504.
[119] Bassett (n 118) 504.
[120] On analysis as starting at the beginning of the research process: see Christopher Pole and Sam Hillyard, *Doing Fieldwork* (Sage, 2016) 123.

appropriation claims and academic commentary. Some of these patterns were anticipated by my sample interview questions. Others arose spontaneously during the interviews, confirming the need to remain flexible when engaging with local sites as a cultural outsider. As mentioned in the previous subsection, I was particularly surprised by perspectives on Whitmill's tattoo as an inoffensive non-appropriative design, and the contestation around the concept of kirituhi.

While I am aware that my role as the interviewer co-constructs meaning,[121] my data analysis focuses on the information shared by participants about their social worlds. My primary concern is to address the cultural discriminations that artists use to demarcate problematic versus acceptable practice, and the norms that order creativity, appropriation, and conflict resolution in specific sites, rather than interrogate the internal processes by which views were exchanged and constructed during the conversations.

I report on my data primarily in chapter 5. Chapter 5 reflects upon the lived experience of law and culture by artists. In that chapter, I liberally use verbatim quotations from fieldwork interviews to provide 'thick description'[122] and 'to help tell the story in the community member's own voice.'[123] I also draw upon documentary analysis of scholarly material on moko and tattoo, media articles, and online tattoo enthusiast writings where appropriate to further elucidate the insights, contests and contradictions in interview transcripts.[124] Drawing on secondary sources alongside interview data facilitates iterative analysis, and provides background context to the themes raised in interviews.

Finally, as noted above in relation to my use of field notes, I mostly do not report on my observations and impressions as the researcher as a source of data. Unlike other qualitative methods such as autoethnography,[125] I confine my interview data reporting to the transcripts and only mention my questions when necessary to situate participant responses. My use of frequent, closely edited

[121] See generally Ruthellen Josselson, *Interviewing for Qualitative Inquiry: A Relational Approach* (Guildford Publications, 2013) 1–3.
[122] On thick description: see generally Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 3–30.
[123] David Fetterman, 'Fieldwork' in Lisa Given (ed), *Sage Encyclopaedia of Qualitative Research Methods* (Sage, 2008) 347, 347.
[124] On the usefulness of documentary analysis used in combination with interviews: see Rubin and Rubin (n 58) 27.
[125] See Heewon Chang, *Autoethnography as Method* (Routledge, 2008) particularly Chapter 10.

quotations and the relative absence of the interviewer's voice is inspired by the subgenre of data reporting known as 'realist tales.'[126] Realist tales help the reader 'hear' the voices of the people whose lives are being represented.[127] I adopted this approach to focus attention on the meanings that participants themselves attribute to life experiences, actions, events and practices, as expressed in their own language. While the absence of the authorial "I" could be criticised for presenting my analysis of the data as natural rather than as simply one intepretation of many,[128] I warn against this at the outset of chapter 5 by noting that I present 'my own account' of how tā moko is currently being regulated.[129] The realist tales style of data reporting suits my purpose in focusing attention on participant perspectives, without advancing an anthropological study of moko and tattoo.

While fieldwork secures insight into lived experience, it does not offer a way of analysing the significance of the gap between cultural appropriation as asserted by activists and experienced by artists. Historical analysis was thus selected as the third methodological tool to contextualise the political stakes for different constituencies and the perceived relevance of colonialism to the activity of cultural claiming.

3.3 Historical analysis

3.3.1 Rationale for selecting historical analysis

In chapter 5, fieldwork identifies a gap between law as legal rules and legality as something that is lived. It exposes norms as a powerful regulator of community life.[130] However, it does not offer a means to explore how the relationship between cultural claims and the past might motivate claims, be constructed in order to sustain them, or reproduced inter-generationally. Given that cultural appropriation is regularly described as the final frontier of colonisation,[131] it is worthwhile pursuing

[126] John Van Maanen, *Tales of the Field: on Writing Ethnography* (University of Chicago Press, 2nd ed, 2011) 46, 49.
[127] Angrosino (n 113) 79.
[128] The absence of the author can obscure the subjectivity of the analysis: see, eg, Van Maanen (n 126) 46. Issues of power and representation persist: at 51–4.
[129] For this account, see section 5.2 of this thesis.
[130] See particularly section 5.3 of this thesis.
[131] See, eg, section 2.1.1.1 of this thesis.

the identity constructed in claims as both historically and culturally contingent.[132] As an explanatory method and an interpretive process, history offers a means of entering into experience, interpreting a predicament, and gaining a sense of historical awareness of a particular problem.[133] Attention to history can reveal a deeper insight into the politics that sits behind what cultural claims do in settler states.

I will now outline my approach to historical analysis in detail.

3.3.2 Temporal starting point in the South Seas voyages

The South Seas voyages pre-date the New Zealand becoming a separate colony of the United Kingdom by around 70 years.[134] Neverthless their use as an outer limit and focal point of source selection for the historical analysis undertaken in chapter 6 is appropriate. There is some fluidity around the date at which exercises of colonial authority are evident in New Zealand,[135] and anti-heroic biographies judge Captain Cook according to what happened afterwards and link his achievements with colonisation.[136] Cook's role in Europe's entry into the Pacific, for example through his charting

[132] On the need to consider the historical context of cultural appropriation claims see, eg, Jonathan Hart, 'Translating and Resisting Empire: Cultural Appropriation and Postcolonial Studies' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 137, 143, 165.
[133] See, eg, John Tosh, *The Pursuit of History: Aims, Methods and New Directions* (Routledge, 6th ed, 2015) 28.
[134] New Zealand was established as a Crown colony separate from New South Wales in 1841, following the British government issuing the *Charter for Erecting the Colony of New Zealand* on the 16 November 1840. Note that the *Treaty of Waitangi*, that secured the cession of Māori sovereignty, was signed on the 6 February 1840: see *Treaty of Waitangi* (1840) <http://www.treatyofwaitangi.maori.nz/>.
[135] There is some limited evidence to suggest exercises of colonial authority in New Zealand prior to 1840: see, eg, FM Brookshield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, 2013) 96. Cf legal historian Shaunnagh Dorset's commentary on the case of *R v Doyle* (1 November 1837, Supreme Court of NSW) that suggests that the problem of extraterritorial sovereignty in New Zealand was acknowledged in the years preceding 1840: Shaunnagh Dorsett, 'Metropolitan Theorising: Legal Frameworks, Protectorates and Models for Māori Governance, 1837–1838' (2016) 3 *law&history* 1, 6–9. There are also several references to pre-1840 social forces, such as the missionary presence in New Zealand from 1814, as colonial in nature in academic scholarship. On the interrelationship of the missionary project and colonisation: see, eg Gunson (n 57) 141; Peter van der Veer, 'Introduction' in Peter van der Veer (ed) *Conversion to Modernities: The Globalization of Christianity* (Routledge, 1996) 1, 1–21; Brian Stanley, 'Christian Missions and the Enlightenment: A Reevaluation' in Brian Stanley (ed), *Christian Missions and the Enlightenment* (William B Eerdmans Publishing Company, 2001) 1, 10; Alison Twells, *The Civilising Mission and the English Middle Class, 1792-1850: the 'Heathen' at Home and Overseas* (Palgrave, 2008) 10–2; David Bosch, *Transforming Mission: Paradigm Shifts in Theology of Mission* (Orbis Books,2011) 281– 2.
[136] See, eg, 'Captain Cook … opened Australia to European colonisation and … imposed Eruopean government and law on Aboriginal people': Deborah Bird Rose, 'The Saga of Captain Cook: Morality in Aboriginal and European law' (1984) 2 *Australian Aboriginal Studies* 24, 30; Nicholas Thomas, *Cook: The Extraordinary Voyages of Captain James Cook* (Walker, 2003) xxxii–xxxiii. For a historical reading of Cook as a hero/anti-hero, see Bernard Smith, *Imagining the Pacific in the Wake of Cook's Voyages* (Melbourne University Press, 1992) 225–40. For a more contemporary reading of the same, see Glyndwr Williams, *The Death of Captain*

of the South Seas, documentation of coastlines, harbours, and peoples, and assessments around trade has been described by some commentators as a form of invasion.[137] Others have pointed to the representations of Pacific peoples that circulated in the public imagination following the voyages as directly encouraging (and ultimately increasing) settlement in the Pacific region; firstly sailors, sealers, whalers, and later, missionaries and colonial administrators.[138] Cook's voyages are attributed importance in the sequence of how colonisation happened in New Zealand.

While other voyages have generated data on Pasifika tattoo, including, for example, William Bligh's ill-fated breadfruit voyage of 1787,[139] the South Seas voyages remain most significant for the quantity and quality of the data generated in the form of the written word, images, and objects. Although the ships were fitted out for fighting, they also carried much specialised equipment suitable for preserving natural history specimens and samples and observing and cataloguing their intricate details.[140] Pasifika tattoo, particularly moko, attracted attention in the scholarly accounts, letters, and journals produced during the voyages.[141] The representations of tattoo that are contained therein are a quality source of data for examining attitudes towards, and understandings of, tattoo post-contact in the Pacific region.

In addition to these reasons, the voyages were also selected as an outer limit and focal point of source selection because they are regularly and enthusiastically identified in contemporary tattoo literature as a pivotal moment in the development of the western tattoo subculture. Much secondary research notes that Captain Cook 'discovered' tattoo in the Pacific, assuming that tattoo in England and America was

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Cook: A Hero Made and Unmade (Harvard University Press, 2008) chapter 4. Note also that other men on the South Seas voyagers, notably Joseph Banks, have also been linked with colonialism. Linda Tuhiwai Smith, for example, describes Banks' *Endeavour Journal* as revealing of 'the imperial gaze with which Banks assessed the land and all that was part of it': Smith, *Decolonizing Methodologies* (n 33) 83.

[137] See discussion in Williams, *The Death of Captain Cook* (n 136) 174.

[138] See Smith, *Decolonizing Methodologies* (n 33) 85; Smith, *Imagining the Pacific* (n 136)190–1.

[139] I return to consider the contribution of Bligh's *List of the Mutineers* to understanding around the development of the maritime tattoo norm and the western tattoo lexicon in the years following the South Seas voyages in section 6.4.2 of this thesis.

[140] JC Beaglehole, 'Introduction to the First Voyage' in James Cook, *The Journals of Captain James Cook on his Voyages of Discovery. Volume I, The Voyage of the Endeavour 1768–1771*, ed JC Beaglehole (Hakluyt Society, 1955, ebook by Ashgate Publishing, 2015) cxxiii, cxxxvi–cxxvii. The botanist Joseph Banks' luggage is illustrative. Banks, who self-funded his passage on the *Endeavour*, travelled with a naturalist (Daniel Solander) and assistant naturalist (Herman Sporing) amongst his retinue and brought a rumoured £10,000 worth of luggage on board. That luggage included storage equipment, preserving liquids, machines for catching insects, fishing implements, and magnifying glasses: Patricia Fara, *Sex, Botany and Empire: The Story of Carl Linnaeus and Joseph Banks* (Icon Books, 2003) 79.

[141] See sections 6.2.1 and 6.2.2 of this thesis.

a discontinuous practice prior to the voyages and that upon sailors seeing tattoo in the Pacific, the Western tattoo subculture spontaneously developed.[142] The perceived centrality of the voyages for the development of western tattoo practice further justifies their selection for investigating historical perspectives on, and intercultural engagements in, this artform in chapter 6.

I turn now to outline the parameters of my source selection in detail.

3.3.3 Source selection

The sources selected for historical analysis are primarily written documents, in recognition of the fact that written texts have a referential function and reflect features of the social world and are accorded a privileged place in the western history canon.[143] Within the category of "written documents", I include academic texts (e.g. Enlightenment theories of racial and cultural difference, academic treatises published by the naturalists aboard the ships) and first person accounts produced during or out of the voyages, such as official and unofficial voyage accounts, private journals, and letters. As I trace historical perspectives on tattoo over time, archival material on the tattoo lexicon, in addition to newspaper articles, voyager accounts, and missionary writings, are also included within the category of written documents. These texts were selected to shed light on the development of the maritime tattoo norm and cultural trades in mokoed objects. Finally, I also included some visual texts within the source selection, namely the Māori portraiture of CF Goldie (1870–1947), in order to reflect upon colonial attitudes to Māori at the turn of the 20th century.[144] Goldie, born in 1870, is perhaps New

[142] See, eg, '[a]lthough tattooing had been practiced in antiquity and the Middle Ages, it was largely forgotten among Europeans until the second half of the 18th century. Voyagers returning from the South Seas in the 1770s and 1780s … revived the painful practice': Edward Gray, *Making of John Ledyard: Empire and Ambition in the Life of an Early American Traveler* (Yale University Press, 2007) 128; '[t]attooing, as it is now practiced in western countries, originated as a consequence of European expansion in the Pacific … the enthusiasm demonstrated by European sailors for tattooing, which surfaced from the very first moment that European sailors and Polynesians came into contact with one another, suggests that this form of bodily decoration was employed spontaneously …': Alfred Gell, *Wrapping In Images: Tattooing in Polynesia* (Oxford University Press, 2004) 10. For further examples, see Anna Friedman Herhily, 'Selected Perpetuations of the Cook Myth' in 'Tattooed Transculturites: Western Expatriates Among Amerindian and Pacific Islander Societies, 1500-1900' (PhD Thesis, University of Chicago, 2012) Appendix A, 454–5.

[143] See, eg, Tosh (n 133) 73; Robert Nerkhofer, *Beyond the Great Story: History as Text and Discourse* (Harvard University Press, 1995) 20; Dominick LaCapra, 'Rethinking Intellectual History and Reading Texts' (1980) 19(3) *History and Theory* 245, 245–76; Gary Mcculloch, *Documentary Research: In Education, History and the Social Sciences* (Routledge, 2004).

[144] See 'Moko', Images 24–7, xiv of this thesis.

Zealand's best known pākehā artist.[145] Goldie, who had a studio in Auckland from 1898 and painted until 1841, is most famous for his 'photo-realist' style portraits of tattooed Māori.[146] In chapter 6, I use Goldie's Māori portraiture, along with his biographies and contemporary arts commentary, to reflect upon the projection and reproduction of colonial narratives of Māori as "primitive" warrior people.

With the exception of the Goldie paintings, the sources selected for historical analysis are written. My decision to focus on written documents was deliberate. Not only are voyager writings, for example, readily available in Australia online through the National Library of Australia,[147] and published works that concern early New Zealand history readily available through the New Zealand Electronic Text Centre,[148] but I was interested in understanding first impressions of tattoo practices. As noted earlier, much contemporary research on tattoo assumes that seeing tattoo in the Pacific region was an important moment of intercultural contact, leading to tattoo operating as a key symbol of cultural difference in the west. The primary sources selected provide insight into how tattoo was read as a cultural practice amongst other cultural practices, and subsequently how and to what extent historical ways of looking at, and engaging with, cultural tattoos enact the colonial desire, noted by scholars like hooks and Root, over time.[149]

Three specific parameters were used to select sources that draw out the continuities and discontinuities in how the colonial gaze has been constructed historically. The first parameter was thinking around racialised identity in the years immediately prior to, and during, the time of the South Seas voyages. This parameter was used to select sources that could offer insight into how voyaging to the Pacific was eagerly anticipated as an opportunity to view the Pacific "primitive", considered an

[145] Roger Blackley, *Goldie* (Auckland Art Gallery; David Bateman, 1997) 1; Roger Blackley, 'Goldie, Charles Frederick', *The Dictionary of New Zealand Biography* (Web Page, 1996) <https://teara.govt.nz/en/biographies/3g14/goldie-charles-frederick>; Leonard Bell, 'The Colonial Paintings of Charles Frederick Goldie in the 1990s: The Postcolonial Goldie and the Rewriting of History' (1995) 9(1) *Cultural Studies* 26, 26; 'Birthday Honours', *Auckland Star* (Auckland, 3 June 1935).
[146] Blackley, 'Goldie, Charles Frederick' (n 145).
[147] 'South Seas: Voyaging and Cross-Cultural Encounters in the Pacific (1760-1800)', *National Library of Australia* (Online Information Resource) <http://southseas.nla.gov.au/index.html>.
[148] 'New Zealand Electronic Text Collection', *Victoria University of Wellington Library* (Online Information Resource) <http://nzetc.victoria.ac.nz/>.
[149] On appropriation as colonial consumption: see section 2.4.2 of this thesis.

earlier version of the western Self.[150] The sources that are used in chapter 6 that fit this selection criteria are academic in nature, including, for example, classificatory systems of humankind that reflect monogenesis notions such as that all humanity shares the same original parents, and the "Progress of Man" continuum.[151]

The second parameter was material generated during and out of the South Seas voyages that includes representations of Pacific peoples and their cultural practices including tattoo, and reports of intercultural engagements between voyagers and Islander tattooists. This parameter was used to select sources that could provide insight into early attitudes to Pasifika tattoo and moko more specifically,[152] and to compare and contrast these attitudes to those that surround physical engagements in tattoo.[153] The sources that are used in chapter 6 that fit this selection criterion are primarily scholarly and non-scholarly voyage accounts and journals and they are authored by officers, scientists, and sailors who attended the three South Seas voyages.

The third parameter was sources that feature responses to moko as a signifier of primitivity and object of trade over time,[154] including how moko affected the western tattoo lexicon in the years immediately following the South Seas voyages.[155] This parameter was selected to provide insight into different sites of colonial dynamics and to bridge first contact perspectives with contemporary perspectives on appropriation as a form of colonial consumption. The sources that are used in chapter 6 that fit this selection criteria are mostly 19th century sources: personal writings and travel accounts of New Zealand that include descriptions of moko, missionary accounts and journals that note moko as a hindrance to religious conversion, newspaper articles that, for example, report on the upoko tuhi trade and Goldie's Māori portraiture, and archival material (and secondary accounts of such material) that reflect on the impact of exposure to Pacific imagery on the western tattoo lexicon. Other sources that support and reflect on the continuity of moko, such as the Goldie portraits, and the pre-modern western tattoo in a variety of contexts (e.g. religious, travel, martime) are also selected.

[150] See section 6.1.2 of this thesis.
[151] These sources will be discussed later in section 6.1.2 of this thesis.
[152] See sections 6.2.1 and 6.2.2 of this thesis.
[153] See section 6.3.1 of this thesis.
[154] See sections 6.2.3 and 6.3 of this thesis.
[155] See section 6.4.2 of this thesis.

3.3.4 Analysis and use of data

My data analysis focuses on identifying the forces of appreciation and objectification in the construction of Pacific peoples and their tattoo practices, and continuities and discontinuities in representations and practices over time. In addition to analysing the literal meaning of texts, I reflect upon the affect and judgment of the writer.[156] That is, on the the emotional effect of an event (for example, desire, fascination, or disdain for Pacific Others and their practices), as well as the frameworks and meanings used to appraise human behaviour (for example, discourses that construe tattoo as disfigurement or as a subversive activity incompatible with baptism). Attention to the deeper meanings of the language used in texts as well as the literal words used helps identify the myths, fantasies and desires of the Self for the Other and test my hypothesis that historical attitudes and engagements shed light on the political activity that underpins the making of a performative claim today.

The past that is ultimately constructed in chapter 6 presents one story – of many possible stories – about the colonial gaze, and its constituent elements of desire and primitivity, on tattoo over time. In discussing a range of representations and events, I conceive of them as part of historical process. Constructing this historical narrative necessarily involves some 'imaginative engagement with the mentality and atmosphere of the past'[157] and presents a simplification of the treatment of cause and effect. Causation is always more 'multiple and many layered' than any historical writing suggests.[158] Yet, while a simplification of historical reality,[159] organising the historical field into different moments of significant occurrence in chapter 6 tells us something about the performance of colonial history in conventional scholarship and oppression, and the ways in which racialised accounts of identity have been inscribed and reinscribed differently in different historical sites and over time.

3.4 Conclusion

[156] On affect and judgment: see generally Caroline Coffin, *Historical Discourse: The Language of Time, Cause and Evaluation* (Continuum, 2006) 141.
[157] Tosh (n 133) 157.
[158] Ibid 127.
[159] Ibid 129.

This tripartite methodology was devised to meet the diverse demands of this thesis' research questions, as confined by this thesis' analytical frameworks. To expose the lived experience of law, the performativity of cultural claims, and the significance of appropriation being received as an enactment of colonial desire, a combination of research methods was needed. Doctrinal analysis, fieldwork, and historical analysis recognise the complexity of the intersection of cultural appropriation and law that can be read by and beyond the law's own methods. Cultural claims are productive regardless of whether they make a demand upon the law, and that legality is not confined to the formal legal sphere. Using fieldwork to investigate the lived experience of artists and historical analysis to investigate the relationship between claims and the colonial past compensates for the limitations of doctrinal analysis in these respects. In the context of this study, all three methods are needed to advance a site-specific study of IP and culture, and appreciate the diverse, shifting, and contested meanings and political activity associated with cultural appropriation claims.

I turn now to chapter 4 to investigate the relationship between property, legal exclusion, and cultural harm and the contribution of conventional progressive critiques to understanding the intersection of cultural appropriation and law. Chapter 5 will then draw closely upon fieldwork to reflect upon the lived experience of artists and the cultural contestation that sits behind claims, after which chapter 6 will use historical analysis to investigate what claims do when they resist colonial injustice.

Chapter 4: Property, legal exclusion, cultural harm

Claims of cultural appropriation are performative utterances that are historically and culturally contingent. Claims compel law reform, strengthen abject identities, and resist the colonial gaze. This chapter analyses the property framework that is the object of the conventional progressive critique, to expose which of this meaning-making is prioritised by conventional scholars at the intersection of cultural appropriation and law. In this chapter, I analyse the *Whitmill* proceedings and the controversy that surrounds Whitmill's tattoo to expose the doctrinal reasons identified as the cause of law's failure to protect Indigenous cultural property appropriately. Within this critique there is a call to action to redress the exclusionary operation of law. The social and political implications of this way of reading the intersection of cultural appropriation and law are taken up in the following chapters.

This chapter proceeds in four sections. Section 4.1, 'The controversial origins of Whitmill's tattoo', provides background information on the creation of Whitmill's tattoo design and its reception as the cultural appropriation of tā moko. This content is used to measure the receptiveness of law to cultural claims over Indigenous-inspired imagery in section 4.2. I explain the contestation that surrounds the Whitmill tattoo, including the nature of the Māori cultural appropriation claim and its connection to the *Whitmill* legal proceedings. I next outline Whitmill and Tyson's perspectives on the design composition, before attending to the cultural appropriation allegation that circulated in New Zealand media within days of Tyson's first public appearance, its subsequent deployment in a variety of settings, and reinvigoration following Whitmill's lodgment of a copyright infringement claim against Warner Bros.

With close reference to the *Whitmill* legal proceedings, section 4.2, 'Tattoos in the domain of copyright law', shows how tattoo is constructed as a legal object, striking out references to the broader social narratives identified in section 4.1 that circulate around Māori-inspired imagery. Firstly, I identify the nature of the legal arguments deployed in support of Whitmill's claim against Warner Bros., including his authorship and ownership of an original artistic work and Warner Bros.' infringement of his copyright in the film *The Hangover Part II*. Next, I consider the key features of

Warner Bros.' defence that tattoos do not, and cannot, subsist in copyright, and that even if they did, that their use of the tattoo is excused by their publicity rights contract with Tyson.[1] I discuss the reception of these legal arguments by Judge Perry at the preliminary injunction hearing, including her reasoning around the denial of Whitmill's injunction request and obiter comments on the subsistence of copyright in tattoos. Finally, I discuss why it was that while the question of whether the tattoo design copied a pre-existing image emerged shortly prior to settlement, its status as "Māori-inspired" was mostly irrelevant to the *Whitmill* legal proceedings.

In section 4.3, 'Concerns over the invisibility of the Māori claim within copyright law', I reflect upon the social effects of the legal frame identified in section 4.2 that excludes recognition of a Māori cultural appropriation claim. This helps identify the value of the conventional critique for identifying legal exclusion and mobilising reform. Drawing upon reported instances of cultural appropriation in New Zealand and conventional progressive scholarship that explains, criticises, and reflects upon the western bias of copyright's cornerstone principles, I discuss what is perceived to be at stake from the exclusion of Indigenous cultural imagery and arts styles from copyright protection. I firstly examine the gap between Māori tikanga and the rationale underpinning IP, before discussing the impact of the lack of IP rights in cultural imagery and arts styles for Māori exercises of control over culture. I then examine the complicity of law in the various cultural harms such as cultural distortion and dilution, offence, and financial harm to contextualise the perceived need for legal inclusion.

In Section 4.4, 'The push for law reform', I consider the nature of the reform demand that responds to the issues identified in section 4.3 with attention to both the Australian and New Zealand jurisdiction. I outline the recommendations of the Waitangi Tribunal in the New Zealand Wai 262 Treaty claim, the key features of Australian heritage and copyright reform proposals, and the sui generis reform proposals of conventional scholars. I analyse whether the features of the reforms proposed could, as a matter of practice, redress the breadth of concerns outlined in section 4.3 around the exclusion of Indigenous cultural imagery and arts styles from copyright law. I discuss how the conventional reform

[1] I specifically exclude discussion of the other defences advanced around estoppel, fair use (parody), and the tattooed head as a useful article in this chapter. I focus on the primary defences advanced by Warner Bros. around copyright subsistence in tattoos, and the licence between Tyson and Warner Bros.

proposals observe and value the unique nature of Indigenous culture that is important to recognise in a postcolonial future. However, I raise a concern for how the reform proposals would impact upon the dynamism of culture and the need for both protective and economic rights. The strengths and weaknesses of the proposals are illustrated with a reflection on the significance of the reform demand for understanding the identity politics inherent in rights claiming with reference to Aboriginal imagery and tā moko.

This chapter concludes that analysing cultural appropriation claims from the perspective of the law's critics helps identify the formal law's failings and the identity politics that sits behind calls to redress legal exclusion. However, that there is a need to more fully consider the performativity of the reform demand, in particular the political activity that manifests outside of agitation for legal inclusion. The reform demand assumes the efficacy of the formal legal rights proposed to transform behaviours, without considering everyday legal meaning-making and the pre-existing forms of legality that might already regulate artistic practices in local sites. In chapter 5, I explore tattoo subculture in detail and examine the lived experience of cultural appropriation and law within North Island tattoo communities. In chapter 6, I further interrogate the broader political context of law reform claims by offering a reading of South Sea inspired tattoo art as a medium of cultural exchange in the context of settler colonialism.

I will now outline the circumstances in which Whitmill received his Māori-inspired tattoo, before discussing the property rights framework that the tattoo was read against in the *Whitmill* proceedings.

4.1 The controversial origins of Whitmill's tattoo

4.1.1 The creation of a tattoo for Mike Tyson's left eye region

In the lead up to a highly anticipated world title fight with Lennox Lewis in 2002, boxer Mike Tyson was asked if he planned to do anything differently if he won his third title. He responded, 'Oh, God, if I win the title, I might tattoo my face.'[2] This statement was widely reported. Lewis defeated him via

[2] Bill Pennington, 'As Bout Nears, Tyson Displays Charming Side', *New York Times* (online, 6 June 2002) <http://www.nytimes.com/2002/06/06/sports/boxing-as-bout-nears-tyson-displays-charming-

knockout in the eighth round.[3] Nevertheless, eight months later Tyson walked into a tattoo parlour in Las Vegas and hired tattooist S Victor Whitmill to create and apply a facial tattoo. [4]

Tyson originally requested a design of hearts and diamonds.[5] However, a week later Whitmill showed him pictures of Māori moko, and Tyson agreed to an abstract curvilinear 'warrior' design.[6] According to Whitmill, on the day he created the design he was 'kind of inspired by some of the movement that you would see in a Māori piece,' yet he did not create a 'Maori style tattoo.'[7] Instead, he executed the work in a style he felt more comfortable with – American tribalism as derived from Borneo and Polynesian influences.[8] Whitmill duly tattooed the design around Tyson's left eye and Tyson signed a 'Tattoo Release' document confirming Whitmill's copyright ownership of the image.[9] The completed design wraps around Tyson's left eye, utilises a collection of curvilinear lines, and features two spiral shapes in the negative space between the pigmented lines.[10]

A week later, Tyson's facial tattoo was unveiled during a fight against Clifford "The Black Rhino" Etienne.[11] In post-fight news conferences, Tyson described the tattoo as 'Mayan'[12] and 'a New

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side.html?mcubz=0>. See also Joe Saraceno, 'Tyson Shows Good-Guy Side with Kids', *USA Today* (online, 6 June 2002) <https://usatoday30.usatoday.com/sports/comment/saraceno/2002-06-06-saraceno.htm>.

[3] Patrick Connor, 'June 8, 2002: Lewis vs Tyson', *The Fight City* (Web Page, 8 June 2018) <https://www.thefightcity.com/june-8-2002-lewis-vs-tyson-mike-tyson-lennox-lewis-muhammad-ali-george-foreman-evander-holyfield-heavyweight-championship/>.

[4] Whitmill had previously tattooed Tyson with a picture of Che Guevara on his ribs: Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 23 May 2011) document 55, 14 (SV Whitmill).

[5] Transcript of Proceedings (n 4)15 (SV Whitmill). Tyson has elsewhere stated that he wanted his face to be 'covered in stars': Donald McRae, 'Mike Tyson: All I Once Knew Was How to Hurt People. I've Surrendered Now', *The Guardian* (online, 25 January 2014) <https://www.theguardian.com/sport/2014/jan/24/mike-tyson-interview-pain-escape-violent-past>.

[6] Transcript of Proceedings (n 4)15–7 (S V Whitmill); 'Mike Tyson: The Real Story Behind My Tattoo', *Indepth with Graham Bensinger* (Graham Bensinger, 1 December 2012) <https://screen.yahoo.com/mike-tyson-real-story-behind-190521076.html>.

[7] Transcript of Proceedings (n 4) 17 (S V Whitmill).

[8] Ibid. For examples of Bornean tattoos see 'General Tattoo and Other,' Images 91 and 93, xxv of this thesis. For a side by side comparison of Bornean tattoo and Whitmill's design see Images 91–2, xxv of this thesis.

[9] The release does not specifically mention the words "copyright" or "intellectual property" however its purpose to confirm Whitmill's ownership of IP rights is clear: see 'Paradox-Studio of Dermagraphics: Tattoo Release Form' in S Victor Whitmill, 'Verified Complaint for Injunctive and Other Relief' in *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, 28 April 2011) document 1, Exhibit 3.

[10] See 'Celebrity Moko Appropriations', Image 43, xviii of this thesis.

[11] To give an indication of the degree of exposure of the viewing public to the tattoo's first public appearance, the fight was purchased by 100,000 viewers on pay-per-view. As at July 2017, one upload of the fight had been viewed on YouTube 4.5 million times.

[12] Jim Masilak, 'Fighters Warm up with Mind Game – Different Demeanors Put on Stage During Weigh-in' *The Commercial Appeal* (Memphis, 21 February 2003).

Zealand tattoo'[13] and his trainer described it as an 'African tribal thing.'[14] Five years later, Tyson described his tattoo as being representative 'of a New Zealand warrior tribe called the Māoris.'[15] While to Whitmill the design is 'American tribal', a genre he describes as a 'melting pot for a variety of styles',[16] and to Tyson and his inner circle the design has pan-indigenous cultural references, to Māori commentators like Māori arts scholar Professor Ngahuia Te Awekotuku and Māori politician and academic Dr Pita Sharples, who commented on the design within a week of the Etienne fight, the tattoo is misappropriative of tā moko.[17]

The nature of the cultural appropriation claim will now be considered in more detail.

4.1.2 Cultural appropriation claim against Whitmill

Reports of the controversial nature of Whitmill's design and its placement on Tyson's face circulated almost contemporaneously with Tyson's appearance in the Etienne fight. Reported on in news media in Oceania, Tyson's identity as a controversial public figure was initially objected to as much as the tattoo's nature as an unauthorised and illegitimate use of Māori culture. Sharples criticised the tattoo, stating that he did not like seeing a design similar to moko on Tyson because of the latter's criminal past.[18] Michelle Erai, a Māori gender studies academic, associates Sharples' objection with the fear that Tyson's personal history of violence against women (for example, Tyson's conviction for sexual assault of Desiree Washington and alleged physical and sexual abuse of his ex-wife, actress Robyn Givens) would be associated with Māori cultural practices.[19] I will return to consider the connection

[13] Chris Mirams, 'Moko Expert KOs Tattoo' *Dominion Post* (Wellington, 22 February 2003) 3.
[14] 'Sidelines', *Ottawa Citizen* (Ottawa, 18 February 2003).
[15] *Tyson* (Sony Pictures Classics, 2008). See also 'Mike Tyson: The Real Story Behind My Tattoo' (n 6).
[16] Transcript of Proceedings (n 4) 17 (SV Whitmill).
[17] See 'Concern Over Ignorant Use of Maori Moko', *New Zealand Herald* (online, 27 February 2003) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3198136>; 'Celebrity Tattoos Rile Maoris', *The Age* (online, 28 February 2003) <www.theage.com.au/articles/2003/02/27/1046064152066.html>; 'Tyson Tat Criticised', *Sydney Morning Herald* (online, 27 February 2003) <www.smh.com.au/articles/2003/02/27/1046064156056.html>; 'Iron Mike Riles Maoris', *Daily Telegraph* (Sydney, 28 February 2003) 23; 'Maori Academics Take Exception to Mike Tyson's New Facial Tattoo', *Agence France-Presse* (Wellington, 27 February 2003); 'Maori Counter', *Daily Post* (Liverpool, 22 February 2003) 4.
[18] 'Concern Over Ignorant Use of Maori Moko' (n 17); 'Celebrity Tattoos Rile Maoris' (n 17); 'Tyson Tat Criticised' (n 17); 'They're Wearing Our Heritage', *Waikato Times* (Waikato, 28 February 2003) 8.
[19] Michelle Erai, '"If I Win the Title, I Might Tattoo my Face." Mike Tyson as Māori Cultural Artefact?' in Guillermo Delgado and John Brown Childs (eds), *Indigeneity: Collected Essays* (New Pacific Press, 2012) 54, 70.

between violence and the cultural harm of negative stereotypes at 4.3. Other commentators such as Awekotuku objected to the tattoo more generally as the misappropriation of tā moko.[20]

Following the flurry of media reporting in 2003, the design Whitmill tattooed on Tyson was associated with colonialism in academic commentary. In support, Erai explains that upon viewing the tattoo on Tyson's face in the first *Hangover* film she

> experienced a kind of double-take. My first response was defensive, a fear prompted by the colonial teleology of cultural appropriation – the ongoing loss of land, language and identity begun within historical encounters on the "beaches" of Aotearoa/New Zealand, formalized in the 1840 Treaty of Waitangi, and continuing today despite the resilience and resistance of those who hope to preserve "Māori culture" as an act of sovereignty.[21]

According to Erai, this diminishes moko and 'the people that treasure[] it.'[22] I return to consider the relationship between arts appropriation and colonialism in chapter 6.

The tattoo also became increasingly referred to in passing in a variety of contexts as an example of inappropriate and offensive moko misappropriation. Commentators listed the tattoo alongside other controversial tattoos, particularly performer Robbie's Williams arm tattoo[23] created by Māori tā moko artist Te Rangitu Netana, as an example of the 'pillaging' of tā moko. For example, during the third reading of the Protected Objects Amendment Bill 2005 (NZ), Sharples criticised the use of moko as a fashion statement by western celebrities including Robbie Williams and Mike Tyson, whose tattoo he describes as having a 'distinctive Māori influence.'[24] For some commentators, the involvement of celebrities like Tyson with moko presented a problem of commercial exploitation,[25] while for others it

[20] 'Concern Over Ignorant Use of Maori Moko' (n 17); 'Celebrity Tattoos Rile Maoris' (n 17); 'Tyson Tat Criticised' (n 17).
[21] Erai (n 19) 55.
[22] Ibid.
[23] See 'Celebrity Moko Appropriations', Images 45–46, 48, xviii of this thesis.
[24] New Zealand, *Parliamentary Debates*, House of Representatives, 2 August 2006, 4654 (Pita Sharples) <http://www.parliament.nz/en-nz/pb/debates/debates/48HansD_20060802_00001323/protected-objects-amendment-bill-—-third-reading>. Other commentary also refers to the problematic nature of Mike Tyson's tattoo alongside that of Robbie Williams. See, eg, Ngahuia Te Awekotuku and Linda Waimarie Nikora, *Mau Moko: The World of Māori Tattoo* (Penguin, 2011) 223; Maui Solomon, 'Peer Review Report' in World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Table of Written Comments on Revised Objectives and Principles*, WIPO/GRTKF/IC/11/4(b) (3–12 July 2007) Appendix, Footnote 89, 16; 'They're Wearing Our Heritage' (n 18) 8.
[25] See, eg, Daphne Zografos, *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar, 2010) 74.

was a problem of a lack of cultural entitlement or competency. [26] I return to analyse the controversy surrounding celebrity and outsider involvement in moko in chapter 5 at 5.2.2.

While the controversy in the early years focused on the connection between Tyson's person as undesirable and the tattoo, once Whitmill filed his claim against Warner Bros. in 2011 the focus of objections shifted to the cultural content of the design. Once again, media in Oceania reported allegations of misappropriation.[27] Whitmill's tattoo design was received as an unwelcome cultural intrusion and his assertion of copyright particularly disrespectful and rude. Whitmill's rights over the image were questioned by Māori politician Tau Henare on social media, who commented that '[t]he tattooist moaning about the breach of copyright copied it off Māori. Bit rich to be claiming someone stole his "design."'[28] Awekotuku expanded upon her previous allegation of cultural appropriation, and was particularly scathing in her evaluation of Whitmill's claim:

> It is astounding that a Pakeha tattooist who inscribes an African American's flesh with what he considers to be a Māori 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 that he put on Tyson.
>
> The tattooist has an incredible arrogance to assume he has the intellectual right to claim the design form of an indigenous culture that is not his.[29]

The irony of Whitmill pursuing a copyright infringement claim in a design that is visually similar to Māori moko imagery was also argued in tattoo enthusiast blog posts and forums that discussed the *Whitmill* case.[30] One lay commentator asserted that Whitmill did not deserve any rights '[s]ince he stole the design from the Māori people of Aotearoa.'[31] Another stated that Whitmill could not

[26] See, eg, Toon Van Meijl, 'Māori Intellectual Property Rights and the Formation of Ethnic Boundaries' (2009) 16(3) *International Journal of Cultural Property* 341, 342.
[27] Outside of Oceania, news media rarely mentions that the content of the design is contested by Māori.Overseas tattoo blogs and forums are, however, more attuned to this contestation.
[28] 'Tyson's Moko Draws Fire from Maori', *New Zealand Herald* (online, 25 May 2011) <http://www.nzherald.co.nz/news/print.cfm?objectid=10727836>.
[29] Ibid.
[30] See, eg, 'I always thought Mike's ink was a traditional Maori warrior tattoo. Although surely not copyrighted, didn't the artist rip it off from them?': Anonymous on Matthew Belloni, 'Mike Tyson Tattoo Artist Sues Warner Bros. to Stop Release of 'Hangover 2', *Hollywood Reporter* (online, 29 April 2011) <https://www.hollywoodreporter.com/thr-esq/mike-tyson-tattoo-artist-sues-183716>.
[31] Anonymous on Belloni (n 30).

reasonably claim an IP right in a design that has connections to Māori moko.[32] Yet others questioned Whitmill's entitlement to copyright because of the lack of originality of the design given its traditional connections and tribal features.[33]

Both academic and lay commentary on the *Whitmill* proceedings that notes a connection between Whitmill's tattoo design and Māori culture tends to imply that Whitmill copied an existing design. However, no source image has ever been identified. It is most likely that the theft referred to in appropriation allegations is the unauthorised adoption of a recognisably Māori design form.[34] My analysis in the remainder of this chapter proceeds on the basis that it is the tattoo's Māori inspiration that is objected to in cultural appropriation commentary as theft of culture, supporting a Māori ownership claim over moko, its defining features, and cultural motifs.

The property rights framework that is relevant to this claim, as instantiated in the *Whitmill* legal proceedings, will now be considered before the issues identified with this legal frame are considered in section 4.3.

4.2 Tattoos in the domain of copyright law

The copyright infringement proceedings that Whitmill instigated against Warner Bros. occurred eight years after Whitmill created the tattoo for Tyson. *Whitmill* is unrelated to the Māori cultural

[32] Pseudonym on Mike Masnick, 'Maori Angry About Mike Tyson's Tattoo Artist Claiming to Own Maori-Inspired Design', *Techdirt* (Blog Post, 26 May 2011) <https://www.techdirt.com/articles/20110525/23052014438/Maori-angry-about-mike-tysons-tattoo-artist-claiming-to-own-Maori-inspired-design.shtml>.

[33] See, eg, Suzanne Lainson on Masnick, 'Maori Angry About Mike Tyson's Tattoo Artist Claiming to Own Maori-Inspired Design' (n 32). Others questioned the originality of tribal tattoos generally, see Anonymous on Belloni (n 30); Mark Tratos, 'Iron Mike's Tattoo May be Giving Warner Brothers Entertainment a Hangover', *American University Intellectual Property Brief* (Blog Post, 1 May 2011) <www.ipbrief.net/2011/05/01>.

[34] The visual similarity between Whitmill's tattoo and moko motifs supports this inference, as does its position on the face. See, eg, United States tattooist Vince Hemingson's comments:

> Within Tyson's facial tattoo it is possible to discern two spiral patterns very similar to the fern frond, or koru, that is a repeating motif common to Maori art, including tattooing or "moko", painting, and carving, in both wood, bone and greenstone. A traditional Maori tattoo artist - - the tohunga ta moko - - could produce two different types of pattern: that based on a pigmented line, and another, the puhoro, based on darkening the background and leaving the pattern unpigmented as clear skin.
>
> Tyson's facial "tribal tattoo" generally follows the Maori rules laid out for facial "moko" or tattoos. Tyson's tattoo follows the contours of his face, enhancing the contours of his face and tracing the natural "geography", for example lines along the brow ridge; the major design motifs are symetrically placed within opposed design fields: lines are used in certain areas where spirals are not used; two types of spirals are used - - the koru which is not rolled up and has a "clubbed" end, and the rolled spiral … Tyson's tattoo appears to be based around a pair of puhoro koru.

Vince Hemingson, 'Mike Tyson's Facial Tattoo – A Maori Inspiration?', *Vanishing Tattoo* (Web Page) <http://www.vanishingtattoo.com/tattoo/celeb-tyson.htm>. See also Leon Tan, 'Intellectual Property Law and the Globalization of Indigenous Cultural Expressions: *Māori* Tattoo and the Whitmill versus Warner Bros. Case' (2013) 30(3) *Theory Culture and Society* 61, 64.

appropriation claim in the sense that the Māori claimants are not parties to the action. Nevertheless, examining the legal framings deployed in these proceedings show how tattoos as legal subject matter are regulated and the irrelevancy of cultural interests to the legal rights that are conferred and protected within the formal legal sphere. I will firstly examine the nature of Whitmill's claim, before attending to Warner Bros' defence, how these legal arguments were received by Judge Perry at the preliminary hearing, and the circumstances of the case's settlement prior to trial. I will then briefly touch on the relationship between copyright law and aesthetics to contextualise the formal law's inattention to the cultural content of Indigenous-inspired imagery in assessing the legal criteria of copyright.

4.2.1 Whitmill's claim

On the 28 April 2011, Whitmill commenced a copyright infringement action against Warner Bros. for their unauthorised use of the tattoo design he created for Mike Tyson in *The Hangover Part II*. In the film, a plot device sees character Stu Price, played by actor Ed Helms, receiving a facial tattoo during a wild night of partying prior to his wedding. Whitmill's claim alleges that Warner Bros. used a virtually 'exact reproduction'[35] of his tattoo design on the face of Helms and in the film's marketing and promotional materials without an express or implied license to do so, infringing his exclusive right to authorise derivative works. [36] Whitmill sought a preliminary and permanent injunction to restrain Warner Bros. from making any use of the tattoo, compensatory damages, an award of profits, and costs.[37]

In his claim, Whitmill provides supporting evidence that he is the author and copyright owner of the tattoo design as an original work of authorship. In copyright legislation an original work of authorship fixed in a tangible medium of expression is a form of personal property that provides the owner with certain exclusive rights, including the right to reproduce the copyrighted work, and to licence these

[35] Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 4. Both literal and non-literal copying is prohibited in the United States. See *Copyright Act of 1976,* 17 USC § 501; *Nichols v Universal Pictures*, 45 F 2d 119, 121 (2nd Cir, 1930).
[36] Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 4–5, 7. For a side by side comparison of Whitmill's tattoo design and the tattoo used by Warner Bros. in the *Hangover: Part II* see 'General Tattoo and Other', Image 88, xxv of this thesis.
[37] Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 7–8.

rights.[38] In Whitmill's case, he drew the tattoo design on Tyson's face with a marker, before tattooing it.[39] Line drawings in ink fall within the definition of 'pictorial, graphic, and sculptural' works, protected as subject matter of copyright.[40] Whitmill's claim asserts that the final tattoo, as applied to Tyson, is an original work of authorship because it is a drawing fixed in a tangible medium of expression on Tyson's face and meets the requisite ('extremely low'[41]) level of creativity to qualify for copyright protection. Photographs documenting the tattoo's application are included in his originating process showing its original creation,[42] as is the Tattoo Release document signed by Tyson that acknowledges that the tattoo and related drawings are the property of Whitmill's tattoo studio.[43]

As Tyson is a renowned public figure and holds publicity rights in his image which would conceivably include permanent tattoo markings, Whitmill's complaint seeks to avoid discourse around the relevance of the drawing as a tattoo. The complaint specifically rejects the relevance of Tyson's identity to his copyright claim, '… [t]his case is not about Mike Tyson, Mike Tyson's likeness, or Mike Tyson's right to use or control his identity. This case is about Warner Bros. appropriation of Mr Whitmill's art and Warner Bros' unauthorized use of that art, separate and apart from Mr. Tyson.'[44] In any case, the fact the drawing is a tattoo on skin is presumably irrelevant to the subsistence of copyright, as copyright legislation encompasses a broad scope of mediums of expression. Drawing is defined without reference to the medium of expression beyond its first instantiation in a tangible form for 'more than transitory duration.'[45] The legal point of origin of Whitmill's property right was the moment he reduced the design to a tangible form. As he did not copy the image and added some of his own expression to the work it meets the minimum degree of creativity required for copyright to

[38] *Copyright Act of 1976,* 17 USC §§ 102, 106. Copyright ownership can also be transferred in whole or in part. See § 201(d)(1).
[39] Transcript of Proceedings (n 4) 17 (SV Whitmill). Texta markings on Tyson's face can be seen in one of the photographs accompanying his originating claim: Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 3. See 'General Tattoo and Other', Image 90, xxv of this thesis.
[40] Line drawings fall within the definition of 'pictorial, graphic, and sculptural works' under § 101 of the *Copyright Act of 1976,* 17 USC that includes two and three dimensional works of 'fine, graphic, and applied art'. Section 102(a)(5) confirms that pictorial, graphic and sculptural works are subject matter of copyright.
[41] *Feist Publications v Rural Telephone Service,* 499 U.S. 340, 345 (1991) (*Feist*).
[42] See, eg, 'General Tattoo and Other', Image 90, xxv of this thesis.
[43] 'Paradox-Studio of Dermagraphics: Tattoo Release Form' in Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) Exhibit 3.
[44] Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 1.
[45] See the definition of a work 'fixed' in a tangible medium of expression: *Copyright Act of 1976,* 17 USC § 101.

subsist. In the United States, originality requires independent creation – that the work originated from the author – plus a 'minimal degree of creativity'.[46] Whitmill's artistic inspiration in originating the tattoo and the artistic merit of the resultant work is irrelevant to this test.

As the author and copyright owner of an original artistic work, Whitmill's rights to prevent reproduction of the image are presented as straightforward in Whitmill's originating process. The remainder of the claim stresses the likelihood of copyright infringement. It argues that Warner Bros. had access to Tyson's tattoo at all relevant times, and that at no time had Whitmill himself reproduced the design nor permitted anybody else to license the image or otherwise copy the image.[47] Warner Bros.' conduct is infringing and unauthorised.

4.2.2 Warner Bros. defence

Warner Bros. led a number of defences in opposition to Whitmill's claim including an estoppel and fair use parody argument.[48] However, the primary defence was that tattoos do not, and cannot, subsist in copyright and that therefore there was no copyrightable expression in Whitmill's tattoo design. [49] In their defence filing, Warner Bros. argued that copyright in tattoo imagery is a novel legal issue as there is no legal precedent for ownership of a tattoo design.[50] As Whitmill did not cite any authorities supporting the assumption that tattoos are protected by copyright, copyright protection of the image is erroneously assumed. Warner Bros. argued that skin cannot support a copyright in any event because rights subsistence is tantamount to granting ownership over the human body.[51] Thus, the relevant property and point of legal origin referenced by Warner Bros. was not the drawing of the design in the abstract, but the tattoo as worn by Mike Tyson. For Warner Bros.' it was pivotal that Whitmill had not

[46] *Feist* 499 U.S. 340, 345 (1991).
[47] Whitmill, 'Verified Complaint for Injunctive and Other Relief' (n 9) 4, 6–7.
[48] As noted at the start of this chapter, these defences are outside the scope of consideration. I focus on Warner Bros.' defence as it pertains to copyright subsistence and their licence agreement with Tyson.
[49] Warner Bros., 'Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction' in *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, 20 May 2011) 13–8.
[50] Ibid 2, 13.
[51] Ibid 13.

sketched or stenciled the design on paper prior to applying it to Tyson's skin. The design in the abstract simply did not exist prior to its instantiation as a tattoo.[52]

In support of their position that tattoos do not subsist in copyright, Warner Bros. led expert testimony by legal scholar David Nimmer that an otherwise copyright image loses protection once it becomes a tattoo because live bodies do not qualify as a medium of expression. He compared skin to a frosty window pane or wet sand as the tide approaches because it changes over time.[53] According to this argument, even if Whitmill had first sketched the design 'the image would give the tattooist no right to control the application of that same image to other individuals'[54] because of its transitory nature on the body.

In addition to the skin not qualifying as a tangible medium of expression, Nimmer's testimony also argues that extending copyright protection to tattoo works is unjustifiable because it would lead to a suite of troubling results under the *Copyright Act*, amounting to the conferral of control over another's body.[55] In Whitmill's case, recognising copyright subsistence would mean that he owned 'a copyright in Tyson's face.'[56] Tyson would infringe Whitmill's right to derivative works if he chose to add to the tattoo, potentially resulting in him being ordered to remove the offending addition, and any time pictures of Tyson's face were published or broadcast, a violation of Whitmill's right to display the work would occur, thus making Tyson a contributory infringer of Whitmill's rights.[57] Warner Bros. argued that these results were untenable.

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[52] This rests on a distinction being drawn between a tattoo and preliminary works on which it is based. See also Michael Minahan, 'Copyright Protection for Tattoos: Are Tattoos Copies?' (2015) 90(4) *Notre Dame Law Review* 1713, 1728–9.

[53] 'Declaration of David Nimmer' in Warner Bros., 'Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction' (n 49) Exhibit 6, 4. For an argument that skin is not a tangible medium of expression because of its 'regenerative nature': see Arrielle Millstein, 'Slaves to Copyright: Branding Human Flesh as a Tangible Medium of Expression' (2014) 4(1) *Pace Intellectual Property, Sports and Entertainment Law Forum* 135, 149–51. Note that the view that skin is not a tangible medium of expression is atypical in academic commentary, particularly because copyright has been found to subsist in makeup designs: *Carell v Shubert*, 104 F Supp 2d 236 (SDNY, 2000).

[54] 'Declaration of David Nimmer' (n 53) 13.

[55] Ibid 5–6. See also Warner Bros.' statement that recognising copyright would 'permit one person (or entity) to own a physical attribute of another person': Warner Bros., 'Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction' (n 49) 12.

[56] Warner Bros., 'Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction' (n 49) 13.

[57] Ibid 15; 'Declaration of David Nimmer' (n 53) 5–6.

In the event that Whitmill's design subsisted in copyright, Warner Bros. contended in the alternative that their use of the imagery was authorised by their publicity rights contract with Tyson and his implied license as the tattoo-wearer to exploit the design as part of his image.[58] A term in Warner Bros. contract with Tyson for the *Hangover* films states that Tyson gives his express permission for Warner Bros. to use his 'likeness … in connection with the distribution, exhibition, advertising and other exploitation of the Picture.'[59] As such, Warner Bros. argued that Tyson held an implied licence from Whitmill that extended to him permitting the copying of the tattoo onto another actor's face, and that they acted within the scope of this licence when using the tattoo in the *Hangover* because Tyson's likeness includes his facial tattoo.[60] Their infringing behaviour was thus excused by a combination of Tyson's underlying implied licence as a tattoo wearer to display and exploit his tattoo and their subsequent licensing of Tyson's publicity rights.

4.2.3 Preliminary injunction hearing: oral judgment

The case subsequently proceeded to a preliminary injunction hearing. Whitmill's motion to have Nimmer's expert testimony excluded as it constituted a thinly disguised 'legal argument' was sustained by Judge Perry.[61] Judge Perry agreed that Nimmer's deposition on the inability of tattoos to subsist in copyright is a legal opinion 'on what copyright law should be' rather than expert testimony. She stated that she did not think that Whitmill's claim raised any novel or complex legal issues justifying the testimony's inclusion.[62] That is, there was no complexity or novelty to the property claim over the tattoo as a drawing. In copyright, property exists in the right to control reproduction. The legal property protected is the right to determine whether, and under what circumstances, the original work may be used by others.[63] As Warner Bros. did not seek Whitmill's approval to use the

[58] Warner Bros., 'Warner Bros.' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction' (n 56) 25–8.
[59] Ibid 27.
[60] Ibid.
[61] Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 24 May 2011) document 57, 59 (Perry J).
[62] Ibid; 'Courtroom Minute Sheet' in *Whitmill v Warner Bros. Entertainment* (ED D Mo, 4:11-cv-752, 23 May 2011).
[63] See the exclusive rights held by the copyright owner: *Copyright Act of 1976,* 17 USC §106.

tattoo before the film, Judge Perry considered the legal issues straightforward.[64] In focusing on the property claim rather than subsistence, Judge Perry conflates expression of the design in the abstract with its application on Mike Tyson's body. Thereafter, she refers to protection of the tattoo in lieu of or alongside the copyright in the artistic work, neatly avoiding discussion of the origin of the creation except in a reductionist manner.

In considering whether the circumstances warranted the granting of a preliminary injunction to prevent the release of *The Hangover Part II*, Judge Perry held that while Whitmill had a high likelihood of success on the merits of his case and had suffered irreparable harm, the balance of hardships and public interest favoured Warner Bros.[65] To be successful in receiving a preliminary injunction, a plaintiff must establish the likelihood of success on the merits of the case, that they are threatened with irreparable harm, that the balance of hardships between the parties favours their case, and that the public interest is served by the granting of relief.[66] Preliminary injunctions are available to prohibit the committing, or the continuation of the committing of, copyright infringement and require the balancing of competing arguments for or against protection, including consideration of the public interest.[67] Injunctive relief is a dominant form of redress for breaches of property rights in IP.[68] In denying Whitmill's preliminary injunction request, Judge Perry stymied Whitmill's right to control reproduction before the case was heard at a full trial.

Yet, overall Judge Perry was quite supportive of the strength of Whitmill's copyright infringement claim. In addressing Whitmill's likelihood of success on the merits, Judge Perry agreed that Whitmill

[64] See Judge Perry's summary of the case: Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 24 May 2011) document 56, 2 (Perry J).
[65] Transcript of Proceedings (n 64) 6–8 (Perry J).
[66] *Dataphase Systems v C L Systems*, 640 F 2d 109 (8th Cir, 1981). See also *eBay v MercExchange*, 547 U.S. 388, 391–2 (2006). While *eBay* arose in the context of patents, the court noted that its treatment of injunctions is consistent with the *Copyright Act of 1976*: at 392.
[67] Both temporary and final injunctions are available in copyright infringement actions: *Copyright Act of 1976*, 17 USC § 502. The granting of an injunction often induces parties to settle: see, eg, Andrew Stewart et al, *Intellectual Property in Australia* (Lexis Nexis, 2017) 58.
[68] This remedy is not automatic on the finding of likelihood on the success of copyright infringement: see, eg, Transcript of Proceedings (n 64) 5 (Perry J). However, injunctions are frequently awarded (following consideration of the relevant legal principles) in these circumstances due to the inadequacy of legal remedies in cases involving copyright infringement: at 5. See generally H Tomas Gomez-Arostegui, 'What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement' (2008) 81(6) *Southern California Law Review* 1197, 1197–1280.

had a 'strong' likelihood of prevailing against Warner Bros.[69] She described the legal arguments put forward by Warner Bros. on copyright subsistence as 'silly' [70] and expressly rejected Warner Bros.' argument that skin is incapable of supporting a copyright:

> Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face, as the defendant argues, or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law …[71]

Accordingly, she did not attend to the publicity rights issue and framed Whitmill's property claim narrowly:

> it's clear that Whitmill created this tattoo as an original piece for Mr. Tyson, and when he did it, Tyson signed a document saying that Mr. Whitmill kept the rights. Neither Tyson nor Warner Brothers sought approval from Whitmill before either [Hangover] movie … Then of course the second movie does use the tattoo on another character's face. It's the same tattoo.[72]

As 'there is no evidence at all that Warner Bros. had any kind of license implied or otherwise to use the tattoo'[73] and there was no parody of the tattoo itself,[74] Perry J held that Whitmill had a strong likelihood of prevailing on the merits for copyright infringement.[75]

Judge Perry also agreed that irreparable harm was shown.[76] In addressing the question of whether Whitmill had shown that he would suffer irreparable harm from the failure to issue the injunction, Judge Perry also agreed with Whitmill's submissions that if the film was released he 'will continue to lose control' over the right to control the work's reproduction, and that this harm is difficult to quantify with money damages.[77] However, in assessing whether the balance of hardships favoured the granting of the injunction, Judge Perry decided against Whitmill.[78] She considered that the millions of dollars that Warner Bros. had invested into marketing, advertising and distributing the film and the 'very large' harm they would suffer if the injunction weighed more heavily than Whitmill's

[69] Transcript of Proceedings (n 64) 3 (Perry J).
[70] Ibid.
[71] Ibid.
[72] Ibid 2 (Perry J).
[73] Ibid 4 (Perry J).
[74] For a discussion of the fair use parody arguments in *Whitmill* see Yolanda King, 'The Enforcement Challenges for Tattoo Copyrights' (2014) 22 *Journal of Intellectual Property Law* 29, 57–63.
[75] Transcript of Proceedings (n 64) 3 (Perry J).
[76] Ibid 6 (Perry J).
[77] Ibid.
[78] Ibid 7 (Perry J)

substantially less serious hardship; Warner Bros. appropriated only one tattoo design and its use in *The Hangover* did not affect the subsistence of Whitmill's business.[79] Moreover, that the public interest in consumers seeing the film and in protecting non-parties from losing money from the film's enjoinment weighed more heavily than the public interest in protecting copyrights:

> The public interest does favor protecting the thousands of other business people in the country as well as Warner Brothers, and not causing those nonparties to lose money, and I think it would be significant, and I think it would be disruptive. I think that tilts the public interest in favor of Warner Brothers on this because all over the country people would be losing money if I were to enjoin this movie.[80]

For these hardship and public interest reasons, Judge Perry denied Whitmill's request for an injunction to enjoin the release of the film despite the strength of his copyright infringement case and the existence of irreparable harm. Given that by the time of the trial the film would already be showing in theatres, this decision effectively confined Whitmill to a pecuniary remedy at trial. As noted in the next section, the case settled soon after.

4.2.4 Post-hearing developments

After the preliminary injunction hearing, Whitmill lodged an emergency motion for an expedited scheduling conference. In response, Warner Bros. indicated that they would be pursuing expert discovery on the issue of whether Tyson's tattoo 'is derivative of pre-existing Maori designs.'[81] This was the only time throughout the litigation proceedings that one of the parties noted that a connection with Māori cultural content might be relevant to the legal issues in the case. This line of inquiry was not pursued further, however, as approximately 3 weeks later the case settled for an undisclosed amount prior to trial.[82] The film was not subsequently digitally altered for the cinema or DVD release.

What remains is that throughout the trajectory of the *Whitmill* proceedings, both parties to the action and the judge who ran the preliminary proceedings managed the evidence in such a way that avoided having to discuss the cultural implications of a competing Māori copyright claim being asserted from

[79] Ibid 6 (Perry J). See also: at 7.
[80] Ibid 8 (Perry J).
[81] Warner Bros., 'Memorandum in Opposition to Plaintiff's Proposed Scheduling Plan' in *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, 6 June 2011) document 51, 6.
[82] The parties participated in a settlement conference on the 17 June 2011. The case was dismissed on the 22 June 2011: 'Whitmill v. Warner Bros. Entertainment Inc.', *Justia Dockets & Filings* (Web Page) <https://dockets.justia.com/docket/missouri/moedce/4:2011cv00752/113287/>.

the other side of the Pacific. The origins and signification of the image could have been discussed by the plaintiff in the originating process. However, the originality threshold means that Whitmill was able to simply state that the tattoo was original because he created it and show two photographs documenting its application to Tyson's face. An objective analysis of the work and the process by which it was created shows some creativity on behalf of Whitmill.[83] The tattoo is not comparable to a pre-existing, unchanged image of a common symbol that is not copyrightable because the creative spark is utterly lacking.[84] Whitmill's artistic inspirations were not relevant to the origination of the work of authorship.

In their defence filings, Warner Bros. could have questioned the derivative nature of the tattoo. However, they too accepted that it met the originality threshold and chose to instead question the subsistence of copyright in tattoos generally. During the preliminary hearing, Whitmill disclosed that he was inspired by moko in creating the tattoo, yet Warner Bros. chose not to cross-examine him on the cultural content of the image or on his creative process, but rather on his purported reason for seeking the injunction. Their cross-examination refuted that Whitmill was concerned with losing control over the image, and asserted that his desire was simply to extract a large settlement.[85] For the defence too, the Māori cultural content was irrelevant.

In her preliminary judgement, Judge Perry could have addressed concerns around ownership when assessing the likelihood of Whitmill's claim's success on the merits. However, she simply accepted that 'Whitmill created this tattoo as an original piece for Mr. Tyson', that the Tattoo Release document confirms his rights, and that neither Tyson nor Warner Bros. sought approval from Whitmill before the film.[86] To Judge Perry, Whitmill's authorship and ownership of the tattoo was straightforward, as was Warner Bros.' infringement of Whitmill's copyright.

As such, at each stage of the proceedings, including its preliminary adjudication, no reasons were given for failing to provide salient evidence that touched on the aesthetics of the tattoo itself. The fact

[83] *Feist* 499 U.S. 340, 346–7 (1991).
[84] Ibid 359.
[85] Transcript of Proceedings (n 4) 37–8 (FJ Sperling).
[86] Transcript of Proceedings (n 64) 2 (Perry J).

that the design was Indigenous-inspired was not directly raised as potentially limiting Whitmill's rights during the proceedings. The competing Māori claim was neither tendered in evidence nor raised as potentially bearing on the issues at trial. And even if it had been – copyright can subsist in infringing imagery,[87] meaning that the case between Whitmill and Warner Bros. would not have been disrupted.

I will now consider how and why Whitmill's artistic inspirations were irrelevant to the *Whitmill* proceedings.

4.2.5 Copyright law and aesthetics

Throughout the *Whitmill* proceedings, the tattoo's construction as a legal object was disconnected from the broader social narratives that query the cultural content and ownership of imagery. This is not, however, surprising given that courts distance themselves 'from the appearance of aesthetic subjectivity',[88] and copyright principles present as culturally neutral.[89] Although different common law jurisdictions have different technical formulations, there is a similar lack of interest in engaging in aesthetic judgment within the law. The definition of pictorial, graphic and sculptural works does not connote any implied criterion of qualitative value.[90] The lowest common denominator approach to originality invokes a relatively straightforward factual determination around whether a work is the

[87] The *Copyright Act of 1976,* 17 USC § 103 provides that copyright subsists in 'derivative works', that is, in works that use pre-existing material in which copyright subsists. The copyright in the infringing work will, however, only extend to the new material contributed by the author to the work, and not 'to any part of the work in which such material has been used unlawfully': see *United States Copyright Law: Title 17 of the United States Code* (eLangdell Press, 2013) Chapter 1; *American Greetings v Kleinfab,* 400 F Supp 228, 232-233 (1975), discussing *Nimmer on Copyright*.

[88] John Fowles, 'The Utility of a Bright-Line Rule in Copyright Law: Freeing Judges from Aesthetic Controversy and Conceptual Separability in *Leicester v Warner Bros.*' (2005) 12(2) *University of California, Los Angeles Entertainment Law Review* 301, 304. See also, the discussion of 'avoidance techniques' in Christine Haight Farley, 'Judging Art' (2005) 79(4) *Tulane Law Review* 805, 836–9.

[89] Note that while copyright jurisprudence may present in this way, critical scholarship suggests that the influence of aesthetics and subconscious aesthetic choices upon decision-making is inevitable, in particular when assessing substantive part copyright infringement, fair use, and joint authorship: see, eg, Fowles (n 88) 307–8; Farley (n 88) 833–6; Alfred Yen, 'Copyright Opinions and Aesthetic Theory' (1998) 71(2) *Southern Californian Law Review* 247, 247–302, particularly 249–50, 298, 301; Brian Soucek, 'Aesthetic Judgment in Law' (2018) 69(2) *Alabama Law Review* 381, 428–37; Justine Pila, 'Copyright and its Categories of Original Works' (2010) 30(2) *Oxford Journal of Legal Studies* 229, 241–2; Robert Gorman, 'Copyright Courts and Aesthetic Judgments: Abuse or Necessity?'(2001) 25(1) *Columbia Journal of Law and Arts* 1, 12–19; Robert Walker and Ben Depoorter, 'Unavoidable Aesthetic Judgements in Copyright Law: A Community of Practice Standard' (2015) 109(2) *Northwestern University Law Review* 343, 344–7, 367–8.

[90] *Feist* 499 U.S. 340, 345 (1991); Amy Cohen, 'Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments' (1990) 66(1) *Indiana Law Journal* 175,179–184; Soucek (n 89) 427.

product of independent origination rather than a value judgment,[91] and few independently created works fail to qualify as original.[92] Determining copyright infringement inevitably has evaluative dimensions,[93] yet the legal frame in this regard, like with subsistence, presents as quite closed to normative discussion. As judges' are not supposed to be art critics,'[94] there is an increasing reliance on expert evidence to determine proof of copying.[95]

For the *Whitmill* proceedings, judicial disavowal of aesthetics within copyright law means that, because where the Warner Bros. reproduction is arguably a literal copy of Whitmill's tattoo, the primary inquiries are factual: whether the work originated from Whitmill so that he is recognisable as its owner, and whether Warner Bros. had access to the tattoo and actually copied it. Neither of these inquiries directs attention to the cultural content of the source work. Moral questions around the ethics of seeking inspiration from Indigenous cultural imagery and arts styles in settler states are therefore irrelevant to the legal criteria and hence not permitted to influence judicial interpretation and determination. These questions are excluded from the formal legal sphere.

In these circumstances, it is unsurprising that the cultural content of Whitmill's tattoo as inspired by Māori moko went unexamined in the *Whitmill* legal proceedings. Yet, whether or not the invisibility of the Māori competing ownership claim is surprising, conventional critiques identify copyright law's disavowal of aesthetics as having specific, harmful effects for Indigenous peoples. In the next section, I identify the western bias of copyright's cornerstone principles, the legal marginalisation of Indigenous cultural imagery and arts styles, and the cultural harms of appropriation. This discussion

[91] Gorman (n 89) 2.
[92] Soucek (n 89) 427.
[93] Cohen (n 90) 178; Shyamkrishna Balganesh, 'The Normativity of Copying in Copyright Law' (2012) 62(2) *Duke Law Journal* 203, 206, 215–21.
[94] Rebecca Tushnet, 'Judges as Bad Reviewers: Fair Use and Epistemological Humility' (2013) 25(1) *Law and Literature* 20, 29. See Justice Holmes' caution against judging artistic merit: '[i]t would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits' in *Bleistein v Donaldson Lithographing,* 188 U.S. 239, 251 (1903). *Bleistein* concerned whether advertisements could be considered 'art' in which copyright subsists. For a discussion of this proposition and how it is used by judges to avoid engaging with aesthetic questions, see Farley, 'Judging Art' (n 88) 815–9.
[95] See, eg, Vernon Johnson, 'Use of Expert Testimony in Copyright Infringement Cases' (2002) 14(7) *Intellectual Property and Technology Law Journal* 8, 9–10; Balganesh (n 93) 217; Michael Der Manuelian, 'The Role of Expert Witness in Music Copyright Infringement Cases' (1988) 57(1) *Fordham Law Review* 127, 129, 131; Soucek (n 89) 437.

illuminates how and why cultural appropriation presents as a pressing legal problem requiring legal intervention in conventional critiques. The nature of law reform proposals is considered at 4.4, and the broader implications of the demand for law reform is unpacked in chapter 5.

4.3 Concerns over the invisibility of the Māori claim within copyright law

4.3.1 Western bias, and the gap between copyright and tikanga

The ineffectiveness of western IP regimes to protect Indigenous cultural imagery and arts styles in a culturally appropriate way is well documented in New Zealand in conventional critiques. As outlined in chapter 2 with reference to the insights of Maui Solomon and Aroha Mead, IP rights are criticised as facilitating ongoing colonialism and offering a poor fit for Māori interests because of their individualistic commercial focus.[96] IP regimes are regarded as incompatible with tikanga Māori principles because of their different philosophical underpinnings and rationale.[97] This critique is evident in art historian Leon Tan's discussion of the *Whitmill* case.[98] He argues that the acceptance of Whitmill's copyright ownership over the design during the preliminary injunction hearing illustrates the conflict between cultural rights and IP laws and 'exposes a fundamental incompatibility between differing concepts of creation, different philosophies of art and artistic agency.'[99]

Tan's critique identifies a disjuncture between the values underpinning IP and Indigenous cosmologies including that of the Māori. The conventional critique typically emphasises that the western legal tradition places importance on the exploitation of resources that are ascribed economic value through the allotment of rights and interests.[100] Conversely, Māori tikanga involves a 'spiral' of ethics' or interwoven values that 'contain an identifiable core' and emphasise the interconnectedness

[96] See section 2.1.1.1 of this thesis.
[97] Ibid.
[98] Tan (n 34) 61–81.
[99] Ibid 67. See generally Tania Waikato, 'He Kaitiaki Mātauranga: Building a Protection Regime for Māori Traditional Knowledge' (2005) 8(2)*Yearbook of New Zealand Jurisprudence* 344, 365; *Guarding the Family Silver* (Tawera Productions/Black Pearl Ltd, 2005) Part 3 <https://www.nzonscreen.com/title/guarding-the-family-silver-2005>.
[100] Brian Garrity, 'Conflict between Maori and Western Concepts of Intellectual Property' (1999) 8(4) *Auckland University Law Review* 1193, 1193–4, 1201–2.

of all knowledge identified as taonga.[101] Taonga encompasses both the tangible and intangible aspects of property, and is traditionally protected by tapu.[102] As tikanga is not a prescriptive hierarchy like Western law and evidences a more holistic approach to IP management including the need to respect kaitiaki relationships and consider the interests of future generations,[103] the conventional critique queries the usefulness of IP rights, as currently stated, to fully protect Māori cultural practices such as tā moko and associated cultural imagery and arts styles from appropriation.

IP's emphasis on individualism and value-adding is regarded as particularly inappropriate in a Māori context. The notion of copyright as property carries with it the owner as a rights asserting individual.[104] This is perceived to disrupt the expression of collective or community embedded claims because IP laws do not acknowledge the customary basis of knowledge or collective models of ownership.[105] This problem is exacerbated by the fact that, as Aroha Mead observes, IP rights only legitimate acquisition and vest where 'peoples 'add' to what has existed for generations.'[106] This means that appropriative creations that draw on TK in the public domain subsist in IP, but the underlying knowledge does not. TK is treated as 'common' property or the 'common heritage of mankind' rather than IP and deserving of protection, leaving much culture, including moko as an arts style and common cultural motifs like the koru, in the public domain.[107]

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[101] New Zealand Law Commission, *Māori Custom and Values in New Zealand Law* (Study Paper No 9, 2001) 29 <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20SP9.pdf> (citation omitted).
[102] S Te Marino Lenihan, 'A Time for Change: Intellectual Property Law and Maori' (1996) 8(1) *Auckland University Law Review* 211, 212–3.
[103] See, eg, Garrity (n 100) 1202.
[104] See, eg, Alexandra George, *Constructing Intellectual Property* (Cambridge University Press, 2012) 174–5.
[105] See, eg, Maui Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' in Sophia Twarog and Promila Kapoor (eds), *Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions* (United Nations, 2004) 155, 155; Garrity (n 100) 1205; Moana Jackson in *Guarding the Family Silver* (n 99) Part 2. Even when individualistic rights are held in Māori culture, individuals tend to exercise rights akin to a kaitiaki or guardian rather than act as "owners" of a particular source of spiritual power. The kaitiaki relationship is based on respect and understanding of the wairua or spirit of the taonga. It is not a means to an end as an economic source of wealth: see, eg, Garrity: at 1199; Joan Metge, *Commentary on Judge Durie's Custom Law* (Unpublished Paper for the Law Commission, 1996) 3 quoted in New Zealand Law Commission (n 101) 29. See also Jessica Lai, *Indigenous Cultural Heritage and Intellectual Property Rights: Learning From the New Zealand Experience?* (Springer, 2014) 60–1.
[106] Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 20, 23.
[107] Ibid. See also Brigitte Vezina, 'Are They In or Are They Out? Traditional Cultural Expressions and the Public Domain?: Implications for Trade' in Christoph Beat Graber, Karolina Kuprecht and Jessica Lai (eds),

The divergence between the rationale of IP and tikanga means that Indigenous cultural imagery and arts styles are only indirectly protected through the rights attached to individual Māori. They are otherwise relegated to the public domain and not protected from unauthorised appropriation. This positioning of Indigenous cultural imagery and arts styles within the public domain is secured by the operation of copyright's cornerstone principles. As noted with reference to the views of Janke and Golvan in chapter 2, the limited time duration of IP rights means that there is a lack of protection for sacred imagery and ancestral works. The fact that ancestors are not legal persons in whom copyright can subsist secures public access in spite of the cultural controls over the property.[108] Time limitations are also incompatible with the ongoing nature of cultural obligations, tapu restrictions, the recognition of the needs of future generations in artistic practices, and kaitiaki relationships.[109] As the Waitangi Tribunal recognises, this means that even when copyright limits uses of a taonga work, kaitiaki do not have a 'means to prevent uses of taonga works that are culturally offensive.'[110]

Other cornerstone principles also secure public access to Māori cultural imagery and arts styles through their positioning in the public domain. As explained in section 4.2, originality is required for copyright to subsist. The originality standard required in New Zealand is even lower than that of the the modicum of creativity standard in the United States.[111] Copyright does not discriminate between the original works produced by community members in accordance with tradition, and the

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International Trade in Indigenous Cultural Heritage: Legal and Policy Issues (Edward Elgar, 2012) 196, 198–9 (citations omitted); Jessica Lai, 'Maori Culture in the Modern World: Its Creation, Appropriation and Trade' (i-call Working Paper No 2, University of Luzern, September 2010) 25–6 <https://www.unilu.ch/fileadmin/shared/Publikationen/lai_maori-culture-in-the-modern-world.pdf>; Tshimanga Kongolo, 'Intellectual Property and Misappropriation of the Public Domain' (2011) 33(12) *European Intellectual Property Review* 780, 786, 791; Robert Jahnke and Huia Tomlins Jahnke, 'The Politics of Māori Image and Design' (2003) 7(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 5, 16.

[108] Peter Drahos and Susy Frankel, 'Indigenous Peoples' Innovation and Intellectual Property: The Issues' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (Australian National University E Press, 2012) 1, 9; Robert Jahnke in *Guarding the Family Silver* (n 106) Part 2.

[109] Garrity (n 100) 1204–6; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) 39 (Wai 262 Report).

[110] Wai 262 Report (n 109) 39.

[111] 'The threshold test for originality is not high. The determining factors is whether sufficient time, skill, labour, or judgment has been expended in producing the work': *University of Waikato v Benchmarking Services Ltd* (2004) 8 NZBLC 101, 561 (CA) [27].

misappropriated works produced by outsiders.[112] Both can be protected as original when they meet the threshold;[113] there is no hierarchy of value that privileges authenticity and respects the faithful reproduction of traditional expressions.

The idea/expression dichotomy that underscores the requirement of material form for copyright to subsist is also problematic. This dichotomy means that ideas are not subject to copyright protection, but their expression in a material form is copyrightable.[114] For Māori cultural imagery, this means that motifs like the koru, tikis, and manaias, as well as arts styles like puhoru may be treated as 'ideas' rather than as the 'expression' of an idea, meaning that they are available for all to use in the public domain.[115] The underlying knowledge is not protected and copying is permitted. As Lixinski argues, the 'economic exploitation of these resources is bound to happen asymmetrically.'[116] The cultural bias and power dynamics that sit behind the idea/expression dichotomy is also observed by IP scholar Susy Frankel in her discussion of the haka 'Ka Mate' that is frequently reproduced both inside and outside New Zealand. As a taonga, Ka Mate's underlying matauranga Māori is seen as analogous to an idea and, as such, the dance is not protected by copyright law despite concerns around unauthorised, offensive, and commercial uses by cultural outsiders.[117] The operation of the idea/expression dichotomy ascribes a public dimension to culture. Yet, as Frankel and Richardson's case studies

[112] Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* (WIPO, 2010) 25 <https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf>.

[113] Note, however, that '[a] work is not original, however, if: (a) it is, or to the extent that it is, a copy of another work; or (b) it infringes the copyright in, or to the extent that it infringes the copyright in, another work': *Copyright Act 1994* (NZ) s 14(2). That is, a misappropriated work will only subsist in copyright in those parts that are original (ie not copied).

[114] 'The originality that is required by the Act relates to the manner in which the claimant to the copyright has expressed his thought or ideas. The Act does not require that the work be novel in form but that it should originate from the author and not be copied from another work': *Wham-O Manufacturing v Lincoln Industries Ltd* [1984] 1 NZLR 641, 664.

[115] This issue is exacerbated by the fact that copyright infringement tests allow the copying of insubstantial parts of copyright works: *Copyright Act 1994* (NZ) s 29. On the idea/expression dichotomy and traditional cultural expressions see Torsen and Anderson (n 112) 29–30. On the availability of taonga works in the public domain see Susy Frankel, 'A New Zealand Perspective on the Protection of Mātauranga Māori (Traditional Knowledge)' in Christoph Beat Graber, Karolina Kuprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012) 439, 454.

[116] Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013) 200.

[117] Frankel, 'A New Zealand Perspective' (n 115) 454–5; Susy Frankel, 'Trademarks and Traditional Knowledge and Cultural Intellectual Property Rights' in Graeme Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar Press, 2007) 433, 440; Susy Frankel and Megan Richardson, 'Cultural Property and "the Public Domain": Case Studies From New Zealand and Australia' in Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, 2009) 275, 280–3.

demonstrate, even when Indigenous persons are willing to share their knowledge, this willingness is not, from their perspective, commensurate with the knowledge's public domain status.[118] Cultural interests and public interests frequently diverge,[119] facilitating appropriation as an unwelcome cultural intrusion.

The western bias of copyright's cornerstone principles has led critics like Maui Solomon to question whether copyright can ever protect the creative works of Māori in a culturally appropriate manner because of the way in which it approaches property rights and misconceives of the legal object from a Māori perspective. In his opinion, even when IP is strategically exercised by Māori its use is incompatible with Māori cultural values because taonga are typically collectively owned.[120] Reducing cultural rights and obligations to terms that the law, as currently framed, can understand does not provide scope for 'kaitiaki to protect the things that are precious to everyone' in a 'Māori way'. [121] Hence, the conventional preference is for law reform. Sui generis rights are perceived to be most capable of reflecting Indigenous aspirations because they do not 'squeeze Māori things into a [pākehā] system which is not ours and which is actually damaging to use.'[122] However, there is concern that sui generis rights, like other piecemeal reform measures, would simply re-enact the violence of colonisation and assimilationist policies because rights would be enforced through colonial institutions like the courts.[123] I return to consider the nature of proposed reforms and their limitations for redressing the unmet legal need of Māori IP protection in section 4.4.

[118] Frankel and Richardson, 'Cultural Property and "the Public Domain"' (n 117) 275–92.
[119] Kathy Bowrey and Jane Anderson, 'The Politics of Global Information Sharing: Whose Cultural Agendas are Being Advanced?' (2009) 18(4) *Social and Legal* Studies 479, 480.
[120] 'Backchat' (Television 1, 2000) cited in Steve Jackson and Brendan Hokowhitu, 'Sport, Tribes, and Technology: The New Zealand all Blacks Haka and the Politics of Identity' (2002) 26(2) *Journal of Sport and Social Issues* 126, 136.
[121] Moana Maniapoto in *Guarding the Family Silver* (n 99) Part 3.
[122] Moana Jackson in *Guarding the Family Silver* (n 99) Part 3.
[123] On the problematics of rights enforcement through the western legal system: see, eg, Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 161; Kathy Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy in the Indigenous Art Market: What Should We Expect From the Western Legal System?' (2009) 13(2) *Australian Indigenous Law Review* 35, 36. On conforming to legal categories as a form of colonial violence: Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Duke University Press, 1998) 232.

4.3.2 A loss of Māori control over expression of cultural identity

Having in 4.3.1 explained the perceived ethnocentricity of copyright's cornerstone principles and the gap between the rationale of IP and tikanga, in this subsection I explore the ramifications of Indigenous cultural imagery and arts styles being relegated to the public domain and freely available for use without restriction. The lack of copyright protection over Indigenous cultural imagery is perceived to allow 'others to steal, misappropriate, and ridicule' Māori collective knowledge.[124] For example, in the course of Tan's discussion of *Whitmill*, he objects to law's failure to do anything about 'non-Maori artists with no relation to *Maori* culture or the country of New Zealand ... creating '*Maori*-inspired' tattoos for commercial clients.'[125] Here Tan implicitly asserts that the legal position, as characterised by an absence of legal rights, is complicit in the unauthorised use of Māori culture and that this impedes cultural autonomy.

In conventional scholarship, legal rights are aligned with cultural control and sovereignty over cultural practices. As culture is itself a taonga, local control is perceived as necessary to enforce desirable conditions under which culture is represented and alienated.[126] As one Māori activist explains, '*[w]e* are the authors and keepers of our culture and determine what is good for us, not outsiders using our cultural and intellectual property for their entertainment.'[127] For tā moko artist Inia Taylor, the power to withhold culture is critically important to his practice: '*Westerners come along with this attitude: 'why don't you want to show this to us? We can make a beautiful book!' And we're sitting back thinking: whoopdee-f**king-do, we don't want to sit on anybody's coffee table! We want to keep our culture to ourselves*'.[128] I return to consider the openness of tā moko practitioners to outsider engagements in chapter 5.

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[124] Waikato (n 99) 365.
[125] Tan (n 34) 62 (emphasis in original).
[126] See, eg, '… we should realise that the issue is control. Maori must be able to determine the appropriateness of the use being made of our cultural heritage. To permit otherwise would be to deprive Maori of their identity': Lenihan (n 102) 214. See also Maui Solomon, 'Protecting Maori Heritage in New Zealand' in Barbara Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, 2006) 352, 360, 361.
[127] Kataraina on *BZ Power Forum* (Forum Post, 12 September 2001) quoted in Rosemary Coombe and Andrew Herman, 'Rhetorical Virtues: Property, Speech, and the Commons on the World-Wide Web' (2004) 77(3) *Anthropological Quarterly* 559, 566 (emphasis in original).
[128] JM Wilson, 'Ta Moko', *A Wondering Minstrel* (Blog Post, 6 July 2003) <http://awanderingminstreli.tripod.com/tamoko.htm> (emphasis in original).

There is a perception that once TK is in the public domain there is little chance of being able to control it or to exercise tino rangatiratanga.[129] For example, Janke and Quiggin state:

> Copyright has had the effect of granting exclusive individual rights to ICIP material that was in the past orally transmitted or performance based, as part of the cultural process. The copyright owners can make this information publicly available, alter and adapt it, digitise and authorise others to reproduce this ICIP material without having to consult the original custodians of this ICIP material. This is a concern for Indigenous people because it moves ICIP out of the hands of Indigenous people.[130]

The public domain status of much Indigenous cultural expression is, as noted earlier in chapter 2, regarded as particularly problematic for sacred knowledge and motifs that are strictly regulated within some Indigenous communities. Outside of confidential information principles that offer some protection of secret knowledge,[131] the lack of IP or sui generis protection for sacred imagery means that cultural insiders have little capacity to make critical decisions such as 'what ought to be held in reserve, and the ability to say what is able to be commercially used in a sustainable way.'[132] Tan's commentary on the *Whitmill* legal proceedings is illustrative. He suggests that respecting Māori sovereignty over tā moko includes restricting outsiders copying (public domain) motifs or patterns and preventing the use of the term '*moko*'.[133] In conventional critiques, the provision of new forms of property rights that effectively move culture out of the public domain is seen as a useful way of protecting cultural interests.

IP's western bias also has significant effects on cultural control because it effectively reserves legal privileges to third party rights holders like Whitmill over kaitiaki. As Hirini Moko Mead explains, '[Māori] artists need to be the main exponents and protectors of the wairua of our art. They enhance it

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[129] See, eg, Waikato (n 99) 365; Ambelin Kwaymullina, 'Research, Ethics, and Indigenous Peoples: An Australian Indigenous Perspective on Three Threshold Considerations for Respectful Engagement' (2016) 12(4) *AlterNative: An International Journal of Indigenous Peoples* 437, 446.
[130] Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (Report, 10 May 2006) 12 <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/terry_janke_icip.pdf>.
[131] *Foster v Mountford* (1976) 14 ALR 71. See Christoph Antons, '*Foster v Mountford*: Cultural Confidentiality in a Changing Australia' in Andrew T Kenyon, Megan Richardson and Sam Ricketson (eds), *Landmarks in Australian Intellectual Property Law* (Cambridge University Press, 2009) 110, 110–25.
[132] Graham Hingangaroa Smith quoted in 'Controlling Knowledge: The Implications of Cultural and Intellectual Property Rights. An Interview with Graham Hingangaroa Smith' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 16, 19.
[133] Tan (n 34) 68–9 (emphasis in original).

and ensure the essential Māori aspect is never lost.'[134] Placing rights in the hands of cultural outsiders is dangerous because they are unlikely to exercise those rights in the same manner as insider artists who hold kaitiaki rights and responsibilities.Their use may be inappropriate or offensive.[135] In addition, neither consent for seeking inspiration nor benefit-sharing back to the source culture are mandated under copyright law.[136] Moreover, third party rights are perceived to interfere with Indigenous artists leveraging culture to secure economic or cultural goals.[137] Tan, for example, describes Whitmill's exclusive rights and his subsequent assertion of those rights to extract a settlement from Warner Bros. as impeding Māori 'political, economic, social and cultural self-determination' and the 'free pursuit of economic, social and cultural development.'[138] Cultural imagery and arts styles are cultural *and* economic assets of source communities and their creators, and successful exploitation on culturally appropriate terms offers a means to alleviate the poverty and socio-economic disadvantage of Indigenous communities.[139] The rights that attach to appropriative artworks are not mediated through the source community, affecting cultural autonomy.

Third party rights are also problematic because they impede members' access to their culture, which has been particularly well documented in the instance of TK catalogued by anthropologists.[140] As Maui Solomon explains, while there are examples of Indigenous people using the IP system to protect their works and underlying TK, there are far more cases of non-Indigenous people using the IP to take ownership over the same. For Solomon, this creates 'an untenable situation whereby Indigenous peoples cannot legally access their own knowledge.'[141] An oft cited example of this access issue in

[134] Hirini Moko Mead, 'Māori Art Restructured, Re-examined, and Reclaimed' (1996) 2(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 1, 7.
[135] Wai 262 Report (n 109) 39.
[136] Ibid 39–40.
[137] Tan (n 34) 68.
[138] Ibid.
[139] Torsen and Anderson (n 112) 14.
[140] See, eg, the Ngāti Kahungunu's objections to the copyright ownership of Te Papa Press over the works produced by ethnographer Elsdon Best. Best's works sourced data from the Tuhoe people about various aspects of their history and culture during the early 20th century: see Hal Levine, 'Claiming Indigenous Rights to Culture, Flora, and Fauna: A Contemporary Case from New Zealand' (2010) 33(S1) *PoLAR: Political and Legal Anthropology Review* 36, 43. See also Wai 262 Report (n 109) 40.
[141] Maui Solomon, 'An Indigenous Perspective on the WIPO IGC' in Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, 2017) 219, 220.

New Zealand commentary involves Māori performer Moana Maniapoto.[142] In 2002, Maniapoto was prevented from releasing a self-titled music album in Europe because a third party had trademark rights over her name 'Moana.'[143] Reflecting upon her experience of being 'locked out' from using her name, Maniapoto stated that her experience 'brought it home in a very personal way' how much Māori culture and language is appropriated by foreign companies.[144] While acknowledging that the rights-holder had legal grounds to contest her album name, Maniapoto was concerned that her first name, a Māori word,[145] was treated as if it was in the public domain leaving it vulnerable to be 'harvested' by an outsiders

> despite the wee fact that such cultural icons sprang from the intellect of Maori ancestors and iwi for example. And somehow it's legally okay for companies to trademark indigenous words, symbols etc and use them without ever engaging with indigenous communities about whether the usage is appropriate, let alone welcome.[146]

Trademark registration of Indigenous words and symbols by cultural outsiders is not necessarily as easily achieved as Maniapoto's comments suggest. Indigenous indicia could be refused registration because it is descriptive rather than distinctive, because sole ownership cannot be established, or because indicia that are significant to Indigenous peoples are restricted from registration within the jurisdiction.[147] However, Indigenous words are less likely to be considered as descriptive outside of

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[142] See, eg, Solomon, 'Protecting Maori Heritage in New Zealand' (n 126) 360. Another oft-cited example involves the concern that Lego would trademark the Māori words that they used in their 'Bionicle' range: *Guarding the Family Silver* (n 99) Part 2; Andrew Osborn, 'Maoris Say Lego Has No Right to Use Their Words', *The Guardian* (online, 31 May 2001) <https://www.theguardian.com/media/2001/may/31/marketingandpr.internationalnews>. I return to discuss the Bionicle appropriation in the context of offence in section 4.3.3.2 of this thesis.

[143] Moana Maniapoto, 'A Brand-New Princess of Colour – is it Black and White?', *E-Tangata* (online, 20 November 2014) <http://www.e-tangata.co.nz/news/a-brand-new-princess-of-colour-%E2%80%93-is-it-black-and-white>; 'Moana's Name Copyrighted in Germany', *New Zealand Herald* (online, 23 August 2002) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=2350858>. Note that the latter article mistakenly characterises this as an issue of copyright rather than trademark.

[144] *Guarding the Family Silver* (n 99) Part 1.

[145] Moana is a unisex name of Māori, Hawaiian and Polynesian origin that means 'ocean' or 'sea': 'Moana', *BabyNames.com* (Web Page) <https://www.babynames.com/name/Moana>; 'Moana', *The Name Meaning* (Web Page) <https://www.thenamemeaning.com/moana/>.

[146] Maniapoto (n 143). In the trademark owner's opinion, their IP rights 'did not disturb any cultural life in New Zealand or wherever' because the use of the word was in Germany only: Joerg Fischer in *Guarding the Family Silver* (n 99) Part 1.

[147] Jurisdictions such as New Zealand and Canada prevent the registration of particular indicia used in commerce when Indigenous peoples regard them as culturally inappropriate or misappropriative of culture: *Trade Marks Act 2002* (NZ) s 17(1)(c); *Trade-marks Act 1985*, RSC 1985, c T-13, s 9. Note, however, that the right to object falls short of cultural ownership and control of words. For a discussion of the New Zealand *Trade Marks Act* and Māori trade marks, see see Terri Janke, *Indigenous Knowledge: Issues for Protection and Management* (Discussion Paper, 28 March 2018) 55

the home jurisdiction. The registration of a German "Moana" trademark then appears to have prevented Maniapoto as a cultural insider from having full access to Māori culture in the course of her music trade overseas. Trademarks are a form of personal property and owners have monopoly rights within the jurisdiction that can affect the freedoms of third parties. I return to consider the offensive nature of third party exploitation of Indigenous culture in subsection 4.3.3.2 below.

Applying Maniapoto's insights to Whitmill's tattoo design and the copyright context suggests that Whitmill's copyright ownership rights might be problematic for tā moko artists. They could be locked out from using substantially similar patterns or motifs in their own work, or risk copyright infringement if they do so. However, this assumes that tā moko artists perceive the Māori-inspired creations of outsiders to be relevant to the work that they do. The relationship between moko and inspired imagery is interrogated in chapter 5.

I will now examine further perspectives on the effects of law's complicity in appropriation, to contextualise the perceived necessity of reform identified in conventional accounts.

4.3.3 Perceptions of cultural harm

As discussed in the previous part, in conventional commentary the western bias of the formal legal frame renders cultural claims over cultural imagery and arts styles invisible. A practical consequence of this is that third parties can hold rights in artistic works that use the public domain elements of Indigenous culture, which can impede cultural control over those elements in a variety of ways. In this part, I develop a deeper understanding of the material effects of law's complicity in appropriation, as perceived by cultural claimants. Harm is typically only referred to in passing by conventional claimants. For example, Janke states that

> [t]he commercialisation of Indigenous intellectual and cultural property has often been done without repsect for Indigenous cultures, without consent or legal Indigenous control and

<https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf>. On the use (and limitations) of trademark law to police and protection indigenous words, phrases and symbols, see, eg, Olivia Greer, 'Using Intellectual Property Laws to Protect Indigenous Cultural Property' (2013) 22(3) *Bright Ideas* 27, 28–30.

> without sharing of benefits with Indigenous communities. Indigenous cultural heritage has often been distorted for commercial interests. This in turn is leading to its erosion.[148]

In this subsection, I consider typologies of harm in more detail by examining how the failure to propertise cultural rights poses a threat to cultural integrity and individual well-being, as identified in cultural appropriation commentary. I will firstly discuss the harms of distortion, dilution and recontextualisation, before discussing offence, stereotypes, and financial harm. A deeper understanding of cultural harm contextualises the significance of the unmet legal need and the mobilisation for reform in conventional critiques.

4.3.3.1 Distortion, dilution and recontextualisation

Unauthorised appropriation manifests threats to cultural integrity through the harms of distortion, dilution and recontextualisation.

There is a concern that appropriative works produce a distorted representation of culture because outsiders are not qualified cultural members. As author Jannisse Browning, who is of Native American and African descent writes, outsider work is inevitably distortive no matter how well-meaning or well-researched because outsiders 'have not been forced to continually combat white oppression like we have.'[149] The circulation of works that distort culture can have a 'corrosive' effect on cultural integrity and, by extension, cultural identity.[150] Apart from being offensive to the first cultural owners, the circulation of distorted works is also problematic when they are misrecognised as authentic. Misconstructions become part of the cultural account, polluting cultural practices and cultural identity. This is already an issue within these communities where members may be alienated from traditional lands and communities and lack contact with the surviving Indigenous knowledge systems because of the cultural impact of colonialism.[151] Over time, artists and community members may find it difficult to identify authentic traditional forms and concepts, preventing them from

[148] Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22(2) *University of New South Wales Law Journal* 631, 632.
[149] Janisse Browning, 'Self-Determination and Cultural Appropriation' (1991) 15(4) *Fuse* 31, 33.
[150] Bruce Ziff and Pratima Rao, 'Introduction to Cultural Appropriation: A Framework for Analysis' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 1, 9. See also Thomas Hurka, 'Questions of Principle: Should Whites Write About Minorities?' *The Globe and Mail* (Canada), 19 December 1989, A8; Lai, 'Maori Culture in the Modern World' (n 107) 14–5; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 632.
[151] See Lai, 'Maori Culture in the Modern World' (n 107) 4, 14–5.

effectively exploring, revealing or concealing the layers of symbol and meaning that previously informed the cultural world.[152] New creations are debased, and thereafter become the new standard for authenticity in the community. Distorted representations can thus saturate, dilute and distort insider understandings and expectations of culture, resulting in 'tears … in the fabric of a group's cultural identity.'[153]

Applying these insights to Whitmill's tattoo suggests that its circulation as a Māori-inspired design could dilute Māori culture. As Whitmill lacks cultural competency, the tattoo distorts and misconstructs Māori culture. There is a risk that it could be misrecognised as authentic by both insiders and outsiders, and thereafter have a dilutory effect on Māori culture. As Māori designer Johnson Witehira speculates, the position of the tattoo on a celebrity face is probative of the possibility of cultural dilution: 'Tyson is someone with a large presence on the world stage – probably more than Maori do themselves. So if he has a tattoo which he's calling Maori, then you can see how that could change perceptions about what Maori things really are.'[154] In these circumstances there could be nothing authentic 'left for the future, for the future generations.'[155]

In addition to the harms occasioned by distortion and dilution, recontextualisation also causes harm to cultural integrity. Unlike the claims of distortion and dilution that focus on the ways in which misappropriations can affect insider understandings of culture, the claim of recontextualisation focuses on the process of how circulating culture into new contexts can damage the source material's integrity through its repositioning.[156] Recontextualisation subverts underlying knowledge systems by stripping away cultural meanings and infusing undesirable meanings. It suggests there are risks to

[152] Howes refers to this threat as a problem of both the '*dilution of tradition*' and the unauthorised '*dissemination of tradition*': David Howes, 'Cultural Appropriation and Resistance in the American Southwest: Decommodifying Indianness' in David Howes (ed), *Cross Cultural Consumption: Global Markets, Local Realities* (Routledge, 1996) 138, 143 (emphasis in original). See also James Young, *Cultural Appropriation and the Arts* (Wiley-Blackwell, 2010) 25.
[153] Ziff and Rao (n 150) 9.
[154] John McCrone, 'Sharing the Taonga: Who Owns Maori Intellectual Property?', *Stuff.co.nz* (online, 8 April 2016) <https://www.stuff.co.nz/national/78443390/Sharing-the-taonga-who-owns-Maori-intellectual-property>.
[155] Jane Kelsey in *Guarding the Family Silver* (n 99) Part 3. On intergenerational loss of knowledge generally, see Natalie Stoianoff and Alpana Roy, 'Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation' (2015) 41(3) *Monash University Law Review* 745, 775–6.
[156] David Meurer and Rosemary Coombe, 'Digital Media and the Informational Politics of Appropriation' in Atopia Projects (eds) *Lifting: Theft in Art* (Peacock Visual Arts, 2009) 20, 20.

divorcing culture from its context and treating imagery and arts styles as 'some kind of pattern book' or a 'way of inserting symbolic weight.'[157] This is particularly the case when the misappropriation is commercially motivated and/or trivialises the cultural significance of that which is appropriated. As Emmaline Matagi explains in her discussion of Pasifika tattoo misappropriation as costume, '[i]t is not OK to use something that our ancestors created as your entertainment' as it turns culture 'into an accessory for your own fun … therefore changing the true meaning of the item.'[158] I return to discuss offence in the next subsection.

In New Zealand, there have been a number of objections to the recontextualisation of the koru. The koru, a spiral shape reminscent of an unfurling fern frond[159] is a key motif used in Māori artforms like kōwhaiwhai, whakairo, and tā moko. It carries connotations of new life, renewal, and a return to the point of origin.[160] In the 1980s and early 1990s there were Māori challenges to the co-option of Māori motifs into the "bicultural" New Zealand public domain and their subsequent use as a branding device and mark of New Zealand geographical and cultural distinctiveness.[161] For example, in 1986 Māori arts scholar Ngahuia Te Awekotuku objected to Air New Zealand's use of the koru symbol in their logo.[162] Awekotuku said that commercially using an element of Māori design as if it holds no intrinsic meaning turns the koru into a 'plastic symbol'.[163] Outsiders using Māori artistic taonga like the koru

[157] Adam Gifford, 'High Risk Business of Cultural Borrowing', *New Zealand Herald* (online, 14 December 2005) <https://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=10359797>.
[158] Emmaline Matagi, 'How to Dress Your Pākehā Child Up as Maui or Moana Without Appropriating Pasifika Culture', *The Spinoff* (online, 1 February 2017) <https://thespinoff.co.nz/parenting/01-02-2017/how-to-dress-your-pakeha-child-up-as-maui-or-moana-without-appropriating-pasifika-culture/>. On the harm of the recontextualisation (and commercialisation) of moko: see Kingi Gilbert quoted in Solomon, 'Protecting Maori Heritage in New Zealand' (n 126) 360.
[159] See 'Other Appropriations', Image 62, xx of this thesis.
[160] 'The Koru', *Te Ara: Encyclopedia of New Zealand* (Web Page) <https://teara.govt.nz/en/photograph/2422/the-koru>.
[161] See, eg, Peter Shand, 'Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion' (2002) 3 *Cultural Analysis* 47, 47–88, particularly 50–1. For a contemporary perspective on the koru as part of the New Zealand biculture see Frankel and Richardson, 'Cultural Property and "the Public Domain"' (n 117) 285.
[162] See 'Other Appropriations', Images 63–64, xx of this thesis.
[163] 'Ngahuia Te Awekotuku in Conversation with Elizabeth Eastmond and Priscilla Pitts' (1986) 1 *Antic* 44, 52. Cf Mead, 'Māori Art Restructured, Re-examined, and Reclaimed' (n 134) 4–5. For a more recent discussion of the association of Air New Zealand with appropriation discourse see Julie Cupples and Kevin Glynn, 'Postcolonial Spaces of Discursive Struggle in the Convergent Media Environment' in Paul Adams et al (eds), *Communications/Media/Geographies* (Routledge, 2017) 52, 70–5.

with limited understanding of their significance risk reapplication 'in ways that distort their original meaning and purpose.'[164]

The discourse surrounding such recontextualisation controversies has been mainstream in New Zealand for decades and permeates appropriation art.[165] Also illustrative is commentary around pākehā modernist artist Gordon Walters' geometric interpretation of the Māori koru motif. Walters' abstract art is characterised by bold, clean lines, repetition, and a limited colour scheme that emphasise his play with the stem and bulb form of the koru. Many of Walters' paintings use Māori titles such as 'Te Whiti',[166] 'Karakia', and 'Mahuika'.[167] While he exhibited some of his koru works as early as 1966 at the Auckland City Art Gallery, Walters' use of the koru motif did not become controversial until the 1980s following art and cultural history paradigm shifts. In 1986, Ngahuia Te Awekotuku criticised Walters' painting 'Mahuika' for its 'repeated and consistent and irrefutable exploitation and *colonizing* of that [*koru*] symbol.'[168] She further stated: 'I am mortified by the deliberate, and, I think, quite promiscuous and irresponsible plundering of Māori motifs – designs, forms, myths, and all those areas that pākehās have done.'[169]

Six years later, criticism of Walters' art was reinvigorated following its inclusion in the Sydney Museum of Contemporary Art's 1992 exhibition *Headlands: Thinking Through New Zealand Art*. In the catalogue of the *Headlands* exhibition, Rangihiroa Panoho advanced a similar critique of Walters' work to Awekotuku. He stated that Walters' work divested the koru 'of meaning and imperfection and distanc[ed] it from its cultural origins.[170] Panoho ultimately recommended that such cultural

[164] Joan Metge, *Kōrero Tahi: Talking Together* (Auckland University Press, 2001) 3. See also Frankel and Richardson, 'Cultural Property and "the Public Domain"' (n 117) 286.
[165] See, eg, the jewellery of artist Warwick Freeman that is concerned with the politics of cultural exchange and the reappropriation work *Kiss the Baby Good-Bye* (1994) by Māori artist Michael Parekowhai: 'Koru Whistle', *Museum of New Zealand: Te Papa Tongarewa* (Web Page) <https://collections.tepapa.govt.nz/object/938750>;
[166] See 'Other Appropriations', Image 66, xx of this thesis.
[167] See 'Other Appropriations', Image 67, xx of this thesis. It does not appear that Walters used the Māori titles to connote any culturally specific meanings. Many of Walters' titles were Wellington street names and were likely chosen to allude to Māori in a general way: Nicholas Thomas, *Possessions: Indigenous Art, Colonial Culture* (Thames and Hudson, 1999) 150.
[168] 'Ngahuia Te Awekotuku in Conversation with Elizabeth Eastmond and Priscilla Pitts' (n 163) 48 (emphasis in original).
[169] Ibid 48.
[170] Rangihiroa Panoho, 'Maori: At the Centre, on the Margins' in Mary Barr (ed), *Headlands: Thinking Through New Zealand Art* (Museum of Contemporary Art, 1992) 124, 130.

borrowings between Māori and pākehā should cease, and Māori should 'resume control, re-establish boundaries for appropriation and move taha Māori (things Māori) back to the centre.'[171] Despite the fact that Walters intended his work as an exploration of form rather than a comment on cultural politics,[172] his recontextualisation of the koru has been received as culturally harmful. Recontextualisation can strip away the TK base of cultural motifs or distance them from their cultural context, facilitating the inscription of undesirable outsider meanings.

Thinking about these ideas in the context of the Whitmill tattoo suggests that this appropriation could be culturally harmful because it distances moko from its cultural context. Awekotuku, for example, criticises the connection between moko and fashion, arguing that Whitmill's practice contributes to the trivialisation of this sacred artform.[173] Other commentators, such as tattoo historian Juniper Ellis, note connections between the Whitmill tattoo and discourses of the 'exotic' because Tyson understands his tattoo to have pan-Indigenous references.[174] Ellis explains that descriptions of the tattoo as a 'warrior tattoo' or generic tribal design does not 'come very close to the actual cultural or geographical origins of the designs … As a result, the particular histories and genealogies of the patterns are lost.'[175] I examine the tension between commercialisation and cultural integrity in more detail in chapter 5.

4.3.3.2 Offence, stereotypes, financial harm

Cultural appropriation is also perceived to cause harm to cultural members in their individual capacity through its manifestation of offence, stereotypes, and financial harm.

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[171] Ibid 124.

[172] See, eg, Walters' comments on his work 'Kahukura' (1968) that suggests an affinity with American abstraction: 'Kahukura', *Te Ara: Encyclopedia of New Zealand* (Web Page) <http://www.teara.govt.nz/en/artwork/42942/kahukura>. See also Robert Leonard, 'Gordon Walters: Form Becomes Sign' (2006) 44(2) *Art and Australia* <http://robertleonard.org/gordon-walters-form-becomes-sign/>; Francis Pound, *The Invention of New Zealand: Art and National Identity, 1930–1970* (Auckland University Press, 2009) 317. Note that Walters' work was generally received as a celebration of the koru by Māori modernist artists at its inception in the 1960s, rather than a cheapening of it: Thomas, *Possessions* (n 167) 154.

[173] 'Moko 'Exploitation' Causes Concern', *New Zealand Herald* (online, 3 November 2003) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=3532027>.

[174] Juniper Ellis, *Tattooing the World: Pacific Designs in Print and Skin* (Columbia University Press, 2008) 196. See also, '[p]eople from overseas get Māori inspired tattoos, it's like there is a hunger for the 'exotic'': Brad McIver quoted in Janelle Cheesman, 'The Resurrection of Tā Moko Raises Questions for Maori', *Tangatawhenua.com* (online, 22 October 2015) <http://news.tangatawhenua.com/2015/10/ta-moko-maori/>.

[175] Ellis, *Tattooing the World* (n 174) 196.

That cultural appropriation is offensive is a common objection to the practice.[176] The appropriator presents as entitled; they treat Indigenous cultural imagery and arts styles 'as goods lying about in the public domain ready to the hand of any entrepreneur with something to sell.'[177] This attitude is perceived to be offensive, regardless of what use is ultimately made of the property. Responses to Lego's 'unauthorised' and 'inappropriate' use of Māori and Polynesian words in the naming of characters and concepts in their 'Bionicle' range[178] are illustrative.[179] Māori activist 'Kataraina', who posted on an online forum criticising the appropriation, described it as an offensive abuse of Māori language 'given that our whole culture is built into the language, our spirituality is tied into the words.'[180] She expressed her anger and disgust that 'so many Maori words [were] used for nothing other than a kids' game'.[181]

Offence appears to have most impact, striking 'at a person's core values and sense of self',[182] when appropriations are commercial in nature, parody spiritual or religious beliefs, sexualise culture, or associate it with undesirable traits or social ills.[183] In the instance of moko misappropriation, offence is frequently asserted in commercial settings where simulated, stylised mokos are used to advertise or

[176] See, eg, Terri Janke, *Our Culture: Our Future. Report on Australian Indigenous Cultural and Intellectual Property Rights* (Michael Frankel and Company, 1998) 19. On the relationship between profound offence and cultural appropriation generally see Young (n 152)129–51.
[177] Nell Jessup Newton, 'Memory and Misrepresentation: Representing Crazy Horse in Tribal Court' in Bruce Riff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers, 1997) 195, 197. Philsopher Linda Martin Alcoff identifies this attitude as 'the core of white privilege': Martin Alcoff, *Visible Identities: Race, Gender, and the Self* (Oxford University Press, 2006) 217.
[178] See 'Other Appropriations', Image 56, xix of this thesis.
[179] Maui Solomon quoted in Kim Griggs, 'Lego Site Irks Maori Sympathizer', *Wired* News (online, 21 November 2002) <https://www.wired.com/2002/11/lego-site-irks-maori-sympathizer/>. On the Bionicle dispute generally, see Coombe and Herman (n 134) 559–72; Angela Gregory, 'Fantasy Toys Spark Legal Game Between Maori Group and Lego', *New Zealand Herald* (online, 31 May 2001) <https://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=192380>; Osborn (n 142); 'Maori Accuse Lego of Cultural Piracy', *Daily Telegraph* (Sydney, 31 May 2001) 29.
[180] Kataraina on *BZ Power Forum* (n 127) 566.
[181] Ibid 564.
[182] James Young and Conrad Brunk, 'Introduction' in James Young and Conrad Brunk (eds), *The Ethics of Appropriation* (Wiley-Blackwell, 2012) 1, 5.
[183] See, eg, the controversy involving Phillip Morris' use of 'Maori Mix' to promote a line of cigarettes sold under its L & M brand in Israel. 'Maori Mix' was objected to as profoundly offensive given the health challenges affecting Māori people: 'Maori Mix Cigarettes in Israel Ignites Row', *New Zealand Herald* (online, 13 December 2005) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10359703>; Shane Bradbrook,'Statement to Altria Group from Shane Bradbrook' (Press Release, 28 April 2006) <http://www.scoop.co.nz/stories/GE0604/S00093/statement-to-altria-group-from-shane-bradbrook.htm>.

sell a product.[184] A number of moko misappropriations that have occurred outside of New Zealand have been objected to as offensive, including designer Paco Rabanne's 1998 Spring/Summer collection that featured a metallic and leather, moko-inspired 'Māori wedding' creation,[185] Thierry Mugler's use of moko-inspired masks on the faces of catwalk models to promote his spring/summer haute couture collection in 1999,[186] designer Jean Paul Gaultier's use of models adorned with facial mokos to promote his range of clothes and sunglasses in advertisements featured in European issues of *Vogue* magazine in 2007,[187] and Australian magazine Marie Claire's 2014 recreation of the Gaultier appropriation featuring Australian model Gemma Ward, swathed in layers of tartan, wearing a headdress, posed seductively on a chair, with a stylised moko on her chin.[188] These appropriations do not infringe copyright because they draw upon public domain aspects of Māori cultural imagery and arts styles rather than copy an existing work.

Outside of the problematic connection with fashion, simulated mokos are offensive because they herald a 'breakdown in the signifying chain that constitutes meaning.'[189] As Maui Solomon explains, conjuring up a moko that does not exist and has not been earned is problematic because '[t]he tau moko is not just the individual lines on the face; it tells a whole story of that person's heritage, of the marae of the tribe … It's part of that collective right … The person carries all of that mana, all of that heritage, all of that tradition.'[190] Offence can be perceived when a breach of tikanga occurs, such as, placing a facial moko on someone that is not sufficiently learned or respected in the community[191] or

[184] See, eg, Paul Ward, 'Moko: Te Māori Ki Te Ao', *NZ Edge* (online, April 2002) <http://www.nzedge.com/features/ar-moko.html>; 'Moko in Vogue', *NZ Edge* (online, 13 September 2007) <http://www.nzedge.com/news/moko-in-vogue/>; Michael Field, 'Gaultier's Design on Moko', *The Press* (Christchurch, 13 September 2007); *Guarding the Family Silver* (n 99) Part 1; Lincoln Tan, 'Fashion Mag's Moko Dubbed "Cultural Insult"', *New Zealand Herald* (online, 25 September 2014) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11330943>; Katie Kenny, 'Storm Over Fashion Magazine Moko', *Stuff.co.nz* (online, 26 September 2014) <http://www.stuff.co.nz/life-style/fashion/10548726/Storm-over-fashion-magazine-moko>.
[185] See 'Other Appropriations', Image 57, xix of this thesis.
[186] See 'Other Appropriations', Image 59, xix of this thesis.
[187] See 'Other Appropriations', Images 49–50, xviii of this thesis.
[188] See 'Other Appropriations', Images 51–2, xviii of this thesis.
[189] Jay Scherer, 'Promotional Culture and Indigenous Identity: Trading the Other' in Brendan Hokowhitu and Vijay Devadas (eds), *The Fourth Eye: Māori Media in Aotearoa New Zealand* (University of Minnesota Press, 2003) 42, 49, discussing the views of Maui Solomon on simulated mokos used in commercials.
[190] 'Backchat' (n 120) 136.
[191] Darryl on Masnick, 'Maori Angry About Mike Tyson's Tattoo Artist Claiming to Own Maori-Inspired Design' (n 32).

when moko is used for commercial gain and worn 'without any proper understanding' of its cultural significance.[192] In 2018, pākehā woman Sally Anderson, was accused of cultural appropriation and criticised for using her moko kauae,[193] applied by tā moko artist Inia Taylor, as part of the branding of her lifecoaching website.[194] For academic Leonie Pihama, a kaupapa Māori researcher and educator who wears a moko kauae, the Anderson moko falls foul on both these accounts and it 'smacks of white privilege'.[195]

Commentary that stresses the offensive nature of moko misappropriation suggests that Whitmill's design is problematic, whether or not it directly copies existing Māori imagery or motifs. In addition to Whitmill and Tyson's lack of connection to Māori culture, Whitmill appears to breach tikanga by tattooing Tyson on the face. Facial moko is typically only applied to elders,[196] and Tyson is neither Māori nor sufficiently learned in Māori culture for a facial moko to be appropriate.

The way in which an appropriation can perpetuate cultural stereotypes is also perceived to be offensive. Stereotypes affect an individual's personal experience of identity.[197] As Taylor explains, 'a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves.'[198] This harm is expressed in commentary on Disney's film *Moana* that is alleged to appropriate Pacific mythology. In the film, the demigod Maui, who is a key figure in Polynesian mythology including that of the Māori, is depicted as a large man. Commentators objected to Disney's depiction of Maui's size as

[192] Pip Hartley quoted in Tony Wall, 'Life Coach Sally Anderson Faces Backlash Over Her Facial Moko, Removes it From Branding', *Stuff.co.nz* (online, 22 May 2018) <https://www.stuff.co.nz/national/104094136/Life-coach-Sally-Anderson-faces-backlash-over-her-facial-moko-removes-it-from-branding>.
[193] See 'Other Appropriations', Image 61, xix of this thesis.
[194] 'Pākehā Life Coach Sally Anderson Faces Backlash Over Māori Facial Tattoo', *Newshub* (online, 22 May 2018) <https://www.newshub.co.nz/home/new-zealand/2018/05/pakeha-life-coach-sally-anderson-faces-backlash-over-maori-facial-tattoo.html>; 'Pākehā Woman With Tā Moko Accused of Cultural Appropriation', *New Zealand Herald* (online, 24 May 2018) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12057551>; Wall (n 192).
[195] 'Pākehā Woman With Tā Moko Accused of Cultural Appropriation' (n 194).
[196] See, eg, Interview with Richie Francis (Marie Hadley, Skype, 3 April 2012) (interview and transcript on file with the author).
[197] See, eg, Donna Granbois and Gregory Sanders, 'Resilience and Stereotyping: The Experiences of Native American Elders' (2012) 23(4) *Journal of Transcultural Nursing* 389, 390; Stuart Hall, 'The Spectacle of the "Other"' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (Sage Publication Ltd, 1997) 223, 263; Young (n 152) 107.
[198] Charles Taylor, 'The Politics of Recognition' in Charles Taylor and Amy Gutmann (eds) *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) 25, 25.

stereotypical as it feeds into the long tradition of Hollywood images of Pacific Islanders of '*laughing, dancing, or feasting'* and is inaccurate.[199] The general view is that Maui was a 'trickster' and 'hero' but not the 'buffoon' Disney presents.[200] In addition to being criticised as offensive because of the health challenges facing Pacific peoples,[201] Maui's stereotypical representation was also argued to affect the self-conception of Pacific peoples, particularly children. As Karlo Mila, a poet of Tongan, Palagi[202] and Samoan heritage who was born in New Zealand, explains:

> The Disney heavyweight Māui will cast a wide, long and triple-XL shadow over every image that's preceded him and every Māui to come. And there is no doubt that he will become a part of the bits and pieces that our young boys use to make sense of who they are and what they are capable of in the world.[203]

As noted earlier at 4.1.2, one of the objections to Whitmill's design is that Tyson's reputation as a violent man associates moko with a violent stereotype. An association between moko and violence is particularly problematic for Māori peoples because during moko's renaissance moko was linked to two gangs, the 'Mongrel Mob' and 'Black Power', where it was used for 'intimidation'.[204] Much work has been done by tā moko practitioners to remove the stigma of facial moko and its links with violence in the public imagination.[205] The placement of Whitmill's design on Tyson's face could thus

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[199] Tevita Ka'ili,'We Are Moana, We Are Maui', *Change.org* (Petition, 30 July 2016) <https://www.change.org/p/walt-disney-we-are-moana-we-are-maui> (emphasis in original).

[200] Teresia Teaiwa quoted in Associated Press, 'Why Moana is Drawing Criticism in the South Pacific', *New York Post* (online, 30 November 2016) <http://nypost.com/2016/11/30/why-moana-is-drawing-criticism-in-the-south-pacific/>. See also Marama Fox quoted in 'Disney Pulls Offensive "Moana" Halloween Costume', *USA Today* (online, 21 September 2016) <http://www.usatoday.com/story/life/movies/2016/09/21/disney-moana-costume-maui/90814040/>; Karlo Mila, 'Karlo Mila: Why Disney's Maui is so Wrong', *E-Tangata* (online, 9 July 2016) <http://e-tangata.co.nz/news/karlo-mila-why-disneys-maui-is-so-wrong>; Nicholas Jones, 'Labour MP Jenny Salesa Says Disney Portrayal of Maui in Moana Movie Sends Wrong Message', *New Zealand Herald* (online, 23 June 2016) <http://m.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11662159>.

[201] Ka'ili (n 199).

[202] This is a Samoan term used to describe foreigners, typically Caucasians.

[203] Mila (n 200).

[204] Interview with Richie Francis (n 196). Cf gang members who describe their uptake of moko as a positive assertion of Māori identity, a 'protest against the government', and a 'political statement of autonomy and freedom': see, eg, Martin Cooper and Sam Utatao quoted in Hans Neleman et al, *Moko – Maori Tattoo* (Edition Stemmle, 1999) 133.

[205] During the Moko Renaissance, moko was put 'onto teachers, lawyers and people of society of high rank, so that people started to see moko in a different light': Interview with Richie Francis (n 196). See also Barbara Sumner, 'From Their Reactions, I See Who People Really Are', *Independent* (online, 23 August 1999) http://www.independent.co.uk/arts-entertainment/from-their-reactions-i-see-who-people-really-are-1114508.html; Linda Waimarie Nikora, Mohi Rua and Ngahuia Te Awekotuku, 'Renewal and Resistance: Moko in Contemporary New Zealand' (2007) 17(6) *Journal of Community and Applied Social Psychology* 477, 485.

be perceived as problematic because Tyson's reputation for violence could signal a turn away from the high esteem that moko is held in the wider Māori community.

The association of moko with positive stereotypes is also potentially problematic. Suzann Shown Harjo, the Indigenous activist who initiated the legal challenge to the use of the name 'Redskins' by the football team of that name in Canada,[206] argues that 'a stereotype, whether it is the drunk in the gutter stereotype, which is inaccurate and undesirable, or a stereotype about bravery and nobility, which is unattainable for many people, is not useful.'[207] Stereotypes of strength and bravery are frequently associated with Māori culture. Tyson refers to his tattoo as a New Zealand 'warrior' tattoo, suggesting that this connection is drawn.[208] While it is difficult to discern whether perpetuating a warrior stereotype exerts pressure on Māori to conform to an unattainable identity, the association between moko and strength likely contributes to moko's popularity, and thereby, its amenability to appropriation. This is evident in the misappropriation of tā moko in the Playstation game, 'The Mark of Kri', for the character Rau who wears a facial tattoo.[209] As one of the makers of the game explained, '[w]hat we really liked about Māori tradition and Māori art was the tattoos and markings and we felt that when you put those onto a warrior, he immediately looked tougher and more serious.'[210]

A final criticism of cultural appropriation is that 'it [i]s an economic issue.'[211]Appropriation is perceived to foreclose opportunities for cultural members, to divert an income stream away from cultural members, and to flood the market with rival products to the detriment of local markets.[212]

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[206] See, eg, Susan Shown Harjo, 'Fighting Name-Calling: Challenging "Redskins" in Court' in C Richard King and Charles Freuhling (eds), *Team Spirits: The Native American Mascots Controversy* (University of Nebraska Press, 2001) 189, 189–207; Mark S Nagel and Daniel A Rascher, 'Washington "Redskins" – Disparaging Termor Valuable Tradition?: Legal and Economic Issues Concerning *Harjo v. Pro-Football, Inc*' (2007) 17(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 789, 789–803.
[207] Interview with Suzann Shown Harjo (Catherine Crier, CNN Transcript # 62, 27 May 1992) quoted in Newton (above n 177)198.
[208] See *Tyson* (n 15); 'Mike Tyson: The Real Story Behind My Tattoo' (n 6).
[209] See 'Other Appropriations', Image 55, xix of this thesis.
[210] Jay Beard in *Guarding the Family Silver* (n 99) Part 2.
[211] Denise Cuthbert, 'Beg, Borrow or Steal: The Politics of Cultural Appropriation' (1998) 1(2) *Postcolonial Studies* 257, 259. See also Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 147) 71.
[212] See, eg, Daphne Zografos Johnsson, 'The Branding of Traditional Cultural Expressions: To Whose Benefit?' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (Australian National University E Press) 147, 150–1; Ziff and Rao (n 150) 14; Rico Adjrun,

Janke, for example, has criticised the production of fake Aboriginal tourist products, such as plastic boomerangs painted in styled dots and Aboriginal iconography, as disrupting cultural markets and taking 'away legitimate opportunities from Aboriginal and Torres Strait Islander arts and crafts practitioners.'[213]

Of great concern is that there is no benefit back to the source community. There is an expectation of royalities when cultural material is appropriated and used, particularly in commercial products.[214] For example, in Disney's alleged misappropriations in *Moana* it was observed that

> [t]he film was not initiated nor will it be owned by Hawaiian, or Samoan, or Maori, or other Polynesian people. The story was not written by screenwriters of our communities, nor illustrated by artists of our communities … The profits will not benefit our communities nor advance our languages, institutions or local economies. This is straight-up cultural appropriation.[215]

Maui Solomon's comments on The Mark of Kri's appropriation of tā moko express a similar concern:

> This Playstation game will potentially be adding millions, if not tens of millions, of dollars. So where's the tangible acknowledgment from the users of that knowledge that hey, yeah this has added significant value here to our commercial product. We should acknowledge that by sharing some of the benefits of that commercial return with the Māori community.[216]

In Whitmill's case, his actions in creating a Māori-inspired tattoo could be perceived as economically harmful to Māori practitioners because of the financial benefits of Tyson's commission payment, and also because the Warner Bros. settlement accrued to a cultural outsider. Tan, for example, argued that 'it is difficult to see why he [Whitmill] (or Warner Bros. for that matter) should financially benefit in any way from a 'creation' that owes a great deal as an image to *ta moko.*'[217] In chapter 5, I investigate

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'Indigenous Art: How Fake Works Disrupt the Market and Disempower Local Artists', *ABC News* (online, 5 October 2016) <http://www.abc.net.au/news/2016-10-05/how-fake-works-are-disrupting-the-indigenous-art-market/7904640>. Cf James Young, who questions the assumption that appropriation restricts the economic opportunities of insiders: Young (n 152) 114–8.

[213] Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 147) 38–9 (citation omitted).

[214] See, eg, Janke, *Our Culture: Our Future* (n 176) 17–8.

[215] Noelani Goodyear-Ka'opua quoted in Don Wallace, '"Moana" is Turning Culture into Cash – Here's Why it Matters for Hawai'i', *Honolulu* (online, 2 December 2016) <http://www.honolulumagazine.com/Honolulu-Magazine/December-2016/Moana-is-Turning-Culture-into-Cash-Heres-Why-it-Matters-for-Hawaii/>.

[216] *Guarding the Family Silver* (n 99) Part 2. When Jay Beard, the CEO of Bottlerocket Productions, was asked whether he would consider establishing a scholarship or internship for young Māori designers with funding from the profits of The Mark of Kri, he responded '[w]e couldn't possibly do that': Maniapoto (n 143).

[217] Tan (n 34) 68 (emphasis in original).

the implications of the assumption that tā moko practitioners and tattooists are competitors in the same market.[218]

I will now reflect on the law reform proposals put forward in conventional commentary that seek to redress the exclusionary operation of the law and minimise the cultural harms of distortion, dilution, recontextualisation, offence, stereotypes, and financial harm.

4.4 Law reform proposals

To read the *Whitmill* proceedings through a conventional, progressive lens is to understand the property rights framework of formal western copyright law to function as a discourse of legal exclusion. In the previous section, I discussed the material stakes of rights being held by third parties and the cultural harms of appropriation, from the perspective of cultural claimants and conventional scholars. In this section, I aim to identify whether the conventional reform demand is an effective response to the legal needs that have been identified. That is, whether more or better rights as put forward in law reform proposals, could effectively secure legal inclusion and attenuate some or all of the harms occasioned by the formal law's complicity in appropriation.

Reform offers the promise of inclusion, and a chance to rectify the power imbalance inherent in cultural appropriation. However, the fulfilment of this promise is not a given. In this section I critically reflect upon the nature of the kinds of rights recommended by the Waitangi Tribunal in the Wai 262 Report in New Zealand, and the conventional scholarship of Golvan, Janke, Solomon, and Mead, and whether they offer a holistic solution to the problem of cultural appropriation as framed as a possessive and identity claim. I consider how cultural inclusion is purportedly effected under each reform model before discussing the hypothetical applicability of the rights to the examples of wandjina imagery and moko. This helps to identify the strengths and limitations of each model in protecting cultural imagery and arts styles from appropriation, in line with the concerns discussed earlier in this chapter.

[218] See section 5.1.3.4 of this thesis.

I selected the Wai 262 Report in this section as an additional site of reform commentary because of the way in which the different legal process in Australia and New Zealand has shaped the reform dialogue in each jurisdiction. In Australia, there is no treaty that regulates the Crown's relationship with Indigenous people,[219] unlike in New Zealand where the Treaty of Waitangi provides a foundation for grievances to be brought against the Crown.[220] As such, in Australian commentary it is typical for existing heritage and IP legislation to be identified as pertinent sites of reform (in addition to a sui generis instrument), and in New Zealand, redress options are framed within the Treaty claims process (in addition to a sui generis instrument). Despite these different foci, discussing both Australian and New Zealand reform proposals is appropriate in this section. Australia and New Zealand share a settler nation-status and colonial history, though they have distinct features and politics. As established at 2.1, both jurisdictions have a history of IP advocacy around Indigenous issues. In addition, the IP laws of Australia and New Zealand are similar,[221] and there is a shared academic IP community[222] and an "Oceanic" reference point in WIPO discussions.[223] As the political context and framing of law's limitations is built in academic discourse *and* regional advocacy, the differences

[219] In Australia, contemporary treaty discourse is framed as a constitutional law issue. As the politics that surround the constitutional implications of the recent Uluru Statement (2017) shows, there is much resistance from the Australian government to a constitutionally enshrined Indigenous body in Australia and/or entrenching the active and ongoing recognition of Indigenous voice on matters pertaining to law and policy: see, eg, Barnaby Joyce and James Paterson quoted in Daniel McKay, 'Uluru Statement: A Quick Guide', *Parliament of Australia* (Web Page, 19 June 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement>; Laura Tingle, 'Uluru Statement Recognises an Institutional Dilemma. How Will Parliament React?', *Financial Review* (online, 30 May 2017) <https://www.afr.com/news/politics/uluru-statement-recognises-an-institutional-dilemma-how-will-parliament-react-20170530-gwgdf0>; Megan Davis et al, 'The Uluru Statement From Heart, One Year On: Can a First Nations Voice Yet Be Heard', *ABC Religion and Ethics* (Web Page, 26 May 2018) <https://www.abc.net.au/religion/the-uluru-statement-from-heart-one-year-on-can-a-first-nations-v/10094678>.

[220] *Treaty of Waitangi* (1840) <http://www.treatyofwaitangi.maori.nz/>. Specifically, through the Waitangi Tribunal that was established in 1975 to hear Māori grievances against the Crown regarding their failure to uphold Treaty guarantees: *Treaty of Waitangi Act 1975* (NZ), particularly s 6. Note that the Tribunal's role is investigative and advisory, and its primary remedy is providing recommendations on claims brought by Māori.

[221] This frequently results in cross-jurisdictional discussion and comparisons in IP literature: see, eg, Frankel and Richardson, 'Cultural Property and "the Public Domain"' (n 117) 275–92; Matt Rimmer, 'Introduction: Mapping Indigenous Intellectual Property' in Matt Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015) 1, 1–44, particularly 24–6; Lai, *Indigenous Cultural Heritage and Intellectual Property Rights* (n 105).

[222] For example, the Australasian IP Academics community, that is comprised of Australian and New Zealand academics, holds a conference every 18 months.

[223] See, eg, Terri Janke's report for WIPO: Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (Study No. 1, World Intellectual Property Organisation, 2003).

between the two jurisdictions (as well as their similar support for sui generis initiatives) is useful for understanding the political content of legal criticisms and the law reform demand.

In the subsections that follow, I firstly discuss the Wai 262 Report's recommendations for the protection of taonga works and IP,[224] before focusing on Australian heritage and copyright proposals. The fourth and final subsection deals with sui generis proposals in both jurisidictions, as Janke, Mead, and Solomon are motivated by similar concerns, despite putting forward independent proposals.

I turn now to discussing New Zealand reform discourse.

4.4.1 New Zealand

4.4.1.1 Wai 262 claim and the Waitangi Tribunal recommendations

In New Zealand, domestic reform agitation primarily occurs either in the context of the Treaty claims process or independently as a TK/sui generis reform initiative. In this subsection, I consider recommendations put forward in treaty discourse, in the context of the Wai 262 claim.[225] The Wai 262 claim is most significant for this thesis' focus on cultural appropriation because it involved a Māori claim over TK (including the TK that pertains to art), cultural property, and intellectual rights to this knowledge and property. It also triggered the first Tribunal inquiry to specifically address the Treaty relationship beyond the settlement of grievances concerning, for example, land and fishing rights.[226]

In 1991, claimants from six Māori iwi,[227] three of which were represented by Maui Solomon[228] whose conventional scholarship is discussed in detail throughout this chapter, commenced claim number 262 in the Waitangi Tribunal seeking the protection of TK and ICIP, in accordance with their property rights over 'taonga katoa', all of their treasures, as guaranteed in the Treaty of Waitangi.[229] The Wai 262 claim has been described as a claim about 'who (if anyone) owns or controls Maori culture and

[224] Wai 262 Report (n 109) Chapter 1.
[225] Ibid.
[226] Te Uruoa Flavell, 'WAI 262 – Insights and Perspectives' (Speech, The Māori Party, 10 October 2011) <http://www.scoop.co.nz/stories/PA1110/S00203/wai-262-insights-and-perspectives.htm>.
[227] The claimants were from Ngāti Kuri, Te Rarawa, Ngāti Koata, Ngāti Porou, Ngāti Wai, and Ngāti Kahungunu.
[228] Wai 262 Report (n 109) vii.
[229] *Treaty of Waitangi* (n 220) Article 2 (Māori text).

identity.'[230] In the claim, it was argued that culture, flora, and fauna are taonga, and that the Crown is under an obligation to protect this taonga, in accordance with Māori property rights.[231] The Crown countered this claim by stating that culture, flora and fauna do not sustain property rights under New Zealand law, that IP law does not sustain the protections sought by kaitiaki, and that they are therefore not under any obligation to affirmatively protect such Māori rights.[232] Hearings took place between 1998 and 2007, and in 2011, the Waitangi Tribunal released its report in response to the claim.[233] The Tribunal found that culture, flora, and fauna are taonga in which 'Māori interests' vest and that the Treaty is relevant to the question of the protection of taonga works.[234] That is, that the protection of taonga works is within the purview of the Crown-Māori relationship. In addition to identifying the lack of protection of taonga works under IP law in accordance with the kaitiaki interest in chapter 1,[235] the Tribunal put forward recommendations for law reform to better protect taonga works within the current legal framework,[236] noting that the economic well-being of Māori and the 'objective of capturing – not squandering – Māori potential,' depended on the introduction of appropriate policy and reforms.[237]

The Tribunal proposed the introduction of a legal instrument that was separate from the IP system, but *not* a sui generis intervention. They considered it vital that this new instrument 'speak to the existing IP framework … [and] affect how copyright arise[s]', and have the capacity to 'impact upon the rights within that system in appropriate circumstances.'[238] As such, a system that grants 'a series of protections that are beyond the current parameters of IP law, but which work together with that system so as to resolve any conflict'[239] was proposed. The Tribunal recommended that this legal instrument provide for two rights: a right to require consultation with, or the consent of, kaitiaki in the

[230] Wai 262 Report (n 109) 17.
[231] For a summary of the claimats' concerns see Wai 262 Report (n 109) 39. See also 'The Wai 262 Claim by Six Maori Tribes', *In Motion Magazine* (online, 22 April 2001) <http://www.inmotionmagazine.com/nztrip/ms1.html>.
[232] For a summary of the Crown's concerns with the claim see Wai 262 Report (n 109) 40.
[233] Wai 262 Report (n 109).
[234] Ibid 50.
[235] Ibid 29–39. See also section 4.3 of this chapter on concerns with the limitations of IP law.
[236] Wai 262 Report (n 109) 52–5.
[237] Ibid xviii.
[238] Ibid 52.
[239] Ibid.

commercial use of taonga works and mātauranga Māori; and, the right to prohibit the offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori.[240] Taonga works are 'products of mātauranga Māori', they have kaitiaki, whakapapa, kōrero, and mauri.[241] The Tribunal lists the discipline of tā moko as containing taonga works.[242] Conversely, taonga-derived works are 'works that have a Māori element to them, but those elements are generalised or adapted'.[243] Such works can include a combination of Māori and non-Māori elements, and draw upon or be inspired by either taonga works or the mātauranga Māori underlying those works.[244] The Tribunal notes that Gordon Walters' painting 'Painting No.1' as an example of a taonga-derived work.[245] It uses a koru motif in a repetitious play on form, but it is otherwise unconnected to taonga works created by Māori. It has 'no whakapapa, no kōrero, and no kaitaiki'.[246] A stylised moko would fall within the category of taonga-derived works as it lacks mauri but has recognisable Māori elements. The Tribunal noted that remedies should be available 'in the usual way' for breaches of the two rights they propose, [247] presumably damages and injunctions.

To support the exercise of these rights, the Tribunal recommended the simultaneous introduction of a commission whose role is to administer the new protections, maintain a register of kaitiaki for taonga works, and develop and maintain 'best-practice guidelines for the use, care, protection, and custody of taonga works, taonga-derived works, and mātauranga Māori.'[248] The Tribunal anticipated that such guidelines would serve an educative function, help to encourage culturally appropriate practices[249] and, presumably, aid the imposition of new legal norms. Finally, as the Tribunal construes the appropriation of ICIP as both a domestic and an international issue, they also recommended the development of an international strategy to encourage the uptake of minimum standards of protection

[240] Ibid.
[241] Ibid 44.
[242] Ibid. See also: at 23.
[243] Ibid 47.
[244] Ibid.
[245] Ibid. See 'Other Appropriations', Image 65, xx of this thesis.
[246] Wai 262 Report (n 109) 47.
[247] Ibid 52.
[248] Ibid.
[249] Ibid 53.

in the international community in future.[250] I return to consider artist perspectives on the introduction of a cultural authority to regulate cultural practices, and the factors that complicate the imposition of new legal norms in the context of the moko, in chapter 5.[251]

In recommending the introduction of the two rights that would require consultation in the commercial use of taonga works and mātauranga Māori, and a means to prohibit the offensive or derogatory public use of taonga works, taonga-derived works, and mātauranga Māori, the Tribunal framed the unmet Māori legal need more narrowly than the conventional critics. The Tribunal stated that the Māori concern is 'around derogatory or offensive public use and commercial exploitation of mātauranga Māori and taonga works, and [that] this is the area on which the law should focus.'[252] While these concerns intersect with the concerns noted earlier around the unauthorised, offensive use of sacred imagery, the financial harms of unauthorised use, and the lack of Māori control over ICIP, the rights do not recognise 'Maori interests' as a property right, and they stop well short of recognising Māori ownership over cultural imagery and arts styles.[253] The benefits of these recommendations are limited.

For contemporary moko, the first right would ensure that consent would need to be obtained before a moko's commercial use, such as by another tattooist or an individual wishing to reproduce the imagery onto t-shirts for sale. Moko are imbued with whakapapa and mauri and have a kaitiaki – either the artist or the wearer depending on the stage of the design[254] – and are therefore taonga works.[255] If permission was not obtained and the moko was appropriated, damages would be a useful remedy in the instance of tattoo misappriation,[256] and damages and/or an injunction in the event of the reproduction onto t-shirts. Note that the artist, as kaitiaki of the moko design before the tattoo is

[250] Ibid 52. This is because '[w]e are not so naïve as to think that the introduction of Treaty-compliant domestic regime would solve all the problems for taonga works and mātauranga Māori': at 52.
[251] See section 5.2 of this thesis.
[252] Wai 262 (n 109) 50.
[253] See Moana Jackson's criticism of the Wai 262 Report, discussed in Flavell (n 226).
[254] Wai 262 (n 109) 31.
[255] Wai 262 (n 109) 23, 44.
[256] An injunction would lack efficacy as it would occur after the fact. Once a tattoo is applied, it is near permanent and the appropriation cannot really be undone bar an order for painful laser removal which is unlikely to be granted. On tattoo removal as an unlikely remedy in the context of copyright infringement: see Thomas Cotter and Angela Mirabole, 'Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art' (2003) 10(2) *University of California Law Review* 97, 100.

completed on the skin of the client, may already, however, hold strong IP rights in the design as a copyright work.[257] The proposed right would not provide any additional remedial benefits, but it would potentially encourage consultation prior to the use of imagery and associated licensing fees, and the opportunity for practitioners to educate would-be appropriators on culturally appropriate uses. The individual – as kaitiaki once the design is tattooed onto their body[258] – would, however, gain access to remedies that they would not have otherwise enjoyed under copyright unless they were joint authors of the moko, through the consultation right. Note also, that assuming that ancestral moko in the public domain has a kaitiaki, this consultation right could be used to refuse commercial ventures that are deemed to be inappropriate, such as the the replication of ancestral moko on, for example, shower curtains as occurred in 2016.[259] This type of use could also be actioned under the derogatory public use right. The Wai 262 Report does not provide a definition of 'public use' but lists Māori designs on toilet bowls as an example.[260] The reproduction of ancestral moko, that has mauri and embodies whakapapa on something as banal as shower curtains, that is, like toilet bowls, a commercial product, could arguably satisfy this standard.

The derogatory public use right also applies to taonga-works.[261] It is unclear whether Whitmill's tattoo that was Māori-inspired – but, as is argued in the next chapter, is widely understood by practitioners as a tribal tattoo and not appropriative[262] – would fall within the definition of taonga-works. However, offensive stylised mokos more generally could be prohibited under this right. As such, the magazine covers of *GQ* and *Tetu*, and the fashion spreads in *Vogue* and *Marie Claire*, that

[257] ie when the commissioning rule provided in section 21(3) of the *Copyright Act 1994* (NZ) does *not* apply. In New Zealand, the commissioning rule applies to commissioned art. It results in clients being the first copyright owner of custom imagery that is made pursuant to a commission, where there is an agreement to pay. I return to consider the significance of the commissioning rule for copyright ownership and the practice of tā moko artists in section 5.3.2 of this thesis.
[258] Wai 262 (n 109) 31.
[259] 'Portraits on Shower Curtains "Profoundly Hurtful"', *Radio New Zealand* (online, 21 June 2016) <https://www.radionz.co.nz/news/te-manu-korihi/306885/portraits-on-shower-curtains-%27profoundly-hurtful%27>.
[260] Wai 262 Report (n 109) 47.
[261] Ibid 48.
[262] See section 5.1.1 of this thesis.

featured stylised mokos,[263] could be prohibited under this right, were these magazines sold in New Zealand. This appears to be quite a powerful right to prevent the cultural threat of offence.

While the drafting of these rights seems capable of disrupting, to some degree, law's complicity in appropriation, the Tribunal's recommendations are also notable for what they specifically exclude from protection. Non-commercial uses of taonga works are not prohibited.[264] The requirement of consent for the use of taonga works does not operate retrospectively.[265] There are no rights to prevent the non-derogatory uses of taonga-derived works,[266] meaning that third partes can still acquire and exercise IP rights in works that use public domain aspects of Māori culture, including cultural imagery and arts styles. This means that the use of a motif like the koru, for example, that is central to moko, could only be prohibited when it is offensive. While koru appropriations have been described as derogatory by some activists, as discussed earlier at 4.3.3.1, it appears highly unlikely given this motif's extensive use throughout New Zealand as a sign of geographical distinctiveness, that a painting like Walters' Painting No.1 or the Air New Zealand logo, would meet the required standard of offence, as mediated through a settler state court. Access to culture issues, from third parties acquiring IP rights in works that have Māori elements, would thus remain.

The Waitangi Tribunal's recommendations are widely praised for their 'forward looking framework for the recognition and protection of Māori intellectual property rights.'[267] However, the proposed rights do not deal with the breadth of Indigenous concerns discussed earlier in this chapter. Nevertheless, they would address *some* concerns, paving the way for an improved recognition of Māori identity within the law.

[263] See 'Other Appropriations', Images 49–54, xviii of this thesis.
[264] Wai 262 Report (n 109) 50.
[265] Ibid.
[266] Ibid 49.
[267] See, eg, Joshua Hitchcock, 'Recognising Māori Intellectual Property is Essential for International Trade', *The Spinoff* (online, 15 September 208) <https://thespinoff.co.nz/atea/25-09-2018/recognising-maori-intellectual-property-is-essential-for-international-trade/>. Note that this praise is not universal. As noted earlier, prominent Māori rights advocate and lawyer, Moana Jackson criticised the report upon its release: see Flavell (n 226).

At the time of writing, the Crown has not responded to the Wai 262 Report despite repeated calls for them to do so.[268] This highlights that the Tribunal has the power to make recommendations but not to enact them. [269] The opportunity to have a grievance heard within the treaty claims process is valuable in raising public awareness of ICIP issues. However, the official subject status of Māori as equal Treaty partners is evidently not commensurate with being heard. As the granddaughter of one of the original claimants states, '[w]e are constantly trying to forge a relationship, in a space where the Crown doesn't actually know how to have a relationship.'[270]

I will now examine Australian law reform proposals, before returning to discuss the sui generis proposals of conventional scholars that pertain to both jurisdictions.

4.4.2 Australia

4.4.2.1 Heritage reform

In Australia, reforming domestic heritage legislation was proposed by Golvan and Janke in the 1990s as an option to achieve a more inclusive legal framework,[271] given the western biases of existing IP law. Australia is not a signatory to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (*ICH Convention*)[272] and, as such, has a very narrow definition of heritage. Today, under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*ATSIHP Act*), for example, heritage protects the relationship between persons, areas and objects of 'significance to Aboriginals in

[268] See, eg, JanR, 'Enact the Recommendations of the WAI 262 Report', *Ideas for Open Government Partnership Actions* (Web Page, 2 June 2018) <https://www.opengovpartnership.nz/what-is-an-open-government-partnership-action/enact-the-recommendations-of-the-wai-262-report>. The desire to see progress in this area was a key driver of the Taonga Tuku Iho conference in 2018, that marked 25 years since the commencement of the Wai 262 claim. As noted in chapter 2, Janke, Solomon, and Mead were keynote speakers at this conference: see section 2.1 of this thesis.

[269] Note that binding recommendations can be made by the Waitangi Tribunal in limited circumstances to secure the return of certain Crown-owned lands to the claimant group: see *Treaty of Waitangi Act 1975* (NZ) s 8A(2). However, this power is not relevant to the Wai 262 claim. The recommendations made in the Wai 262 Report were all non-binding.

[270] Sheridan Waitai, granddaughter of Saana Murray of Ngāti Kuri, quoted in Leigh-Marama McLachlan, 'Government Accused of Ignoring Waitangi Tribunal Reports', *Radio New Zealand* (online, 7 December 2018) <https://www.radionz.co.nz/news/te-manu-korihi/378413/government-accused-of-ignoring-waitangi-tribunal-reports>.

[271] Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (1992) 14(7) *European Intellectual Property Review* 227, 230–1; Janke, *Our Culture: Our Future* (n 176) 154–6.

[272] United Nations Educational Scientific and Cultural Organization, *Text of the Convention for the Safeguarding of the Intangible Cultural Heritage* <https://ich.unesco.org/en/convention> (*ICH Convention*).

accordance with Aboriginal traditions.'[273] Writing in 1992, when the relevant conception of heritage in ATSIHP protected 'Aboriginal places, Aboriginal objects, and Aboriginal folklore'[274] Golvan proposed expanding the definition of 'folklore'[275] to specifically include artistic works as they are understood in the *Copyright Act*, excluding any notion of a time limitation to heritage protection as exists in copyright law.[276] Under s 10(1)(a) of the *Copyright Act*, then as now, the meaning of 'artistic work' included a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not'.[277] Golvan also recommended extending the role envisaged for Aboriginal communities under the *ATSIHP Act*, to secure greater decision-making power, in particular so that they could advise the Minister that an aspect of heritage requires protection under the Act and have standing to pursue a civil right of action when heritage is at risk of destruction.[278]

Like Golvan, Janke also proposes that a more holistic definition of Indigenous cultural heritage (ICH) that includes the intangible aspects of objects and sites be introduced into heritage legislisation,[279] including artistic works and underlying symbols and designs,[280] and that local communities of origin have rights as the owners of ICH.[281] This latter change would effectively devolve decision-making power away from the Minister or departmental Director-General, in circumstances where the State is usually the legal owner of heritage.[282] Janke also proposes that management processes that permit

[273] See the definition of 'significant Aboriginal object' and 'Aboriginal tradition': *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*ATSIHP Act*) s 3(1).
[274] See definition of 'Aboriginal cultural property': *ATSIHP Act* s 21A (reprinted as at 28 February 1991).
[275] At this time, 'Aboriginal folklore' was defined to mean 'traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal traditions': *ATSIHP Act* s 21A (reprinted as at 28 February 1991).
[276] Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 231.
[277] See the definition of 'artistic work': *Copyright Act 1968* (Cth) s 10(1).
[278] Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 231. Under the *ATSIHP Act*, the role of Aboriginal communities is currently limited to filing a complaint with the Minister, who has no obligation to declare an object protected: *ATSIHP Act* ss 12, 16. See Jake Phillips, 'Australia's Heritage Protection Act: An Alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore' (2009) 18(3) *Pacific Rim Law and Policy Journal* 547, 568.
[279] Janke, *Our Culture: Our Future* (n 176) 156.
[280] Ibid 11; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 633.
[281] Ibid 156.
[282] While this has historically been the default ownership position under heritage legislation in Australia, there is some recognition of traditional owners as the owners of heritage in heritage legislation, particularly as the owners of Aboriginal ancestral remains and sacred or secret objects: see, eg, the *Aboriginal Heritage Act 2006* (Vic) s 12(1)(a); *Aboriginal Cultural Heritage Act 2003* (Qld) s 15, 19, 20.

Indigenous advocacy around heritage interests be introduced, so as to recognise the cultural rights and responsibilities of local Aboriginal communities, owners, and custodians.[283]

Janke and Golvan's proposals deploy a concept of heritage that is inclusive of rights to ownership of land, resources, knowledge, legal systems, and art.[284] This is consistent with the shift in international heritage law towards protecting intangibles,[285] and would allow for the indirect recognition of the unique relationship between Indigenous peoples and their land, culture, and creative works, fostering greater inclusion of the unique nature of Indigenous identity in law. The broadening of the definition of heritage within domestic heritage legislation would be a particularly beneficial protective mechanism for ICH that is not fixed in material form such as Indigenous arts styles and cultural imagery like the wandjina that is akin to an 'idea' and currently falls into the public domain.[286] At present, the law is complicit in the appropriation of these intangibles.[287] As intangible heritage rights do not require a creation to be fixed in a tangible form, they recognise that the communal nature of cultural interests as a single (or joint) identifiable author is not required, and protections are not time-limited because heritage is, by its nature, practiced across generations,[288] conceptually they align the cultural interest in control over art with a heritage interest. In these circumstances, additional heritage rights appear to offer a good fit with Indigenous needs to preserve the cultural integrity of this material for past, present, and future generations.[289]

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[283] Janke, *Our Culture: Our Future* (n 176) 156. See also, the proposed heritage rights in Robynne Quiggin and Terri Janke, 'How Do We Treat Our Treasures? Indigenous Heritage Rights in a Treaty' in Australian Institute of Aboriginal and Torres Strait Islander Studies (ed), *Treaty! Let's Get it Right!* (Aboriginal Studies Press, 2003) 53, 70–1.

[284] See Janke, *Our Culture: Our Future* (n 176) 11–2; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 633; Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 231.

[285] Under the *ICH Convention* art 2(1), ICH is defined as including the 'expressions' 'knowledge', and 'skills' that are 'transmitted from generation to generation that provides cultural members with a sense of identity and continuity'. ICH that manifests in the domain of 'social practices' and 'traditional craftsmanship' are specifically included with the definition: at art 2(2).

[286] See Golvan's discussion of wandjina cave paintings: Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 231. For an example of a wandjina cave painting, see 'Australian Imagery', Image 72, xxii of this thesis.

[287] See section 2.1.1.1 of this thesis.

[288] Lixinski (n 116) 185–6.

[289] Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (1993) [26] <http://www.refworld.org/pdfid/3b00f4380.pdf>.

Nevertheless, heritage rights would not regulate the use of Indigenous arts styles and imagery in the public domain per se, but provide a mechanism to contest their destruction. As such, heritage reform would primarily address concerns around cultural distortion and dilution of sacred imagery, as noted earlier in this chapter, but it would not provide a holistic scheme to redress cultural appropriation en masse. A further limitation of heritage reform is that heritage rights are a preservation right not a property right – providing no direct additional opportunities for economic empowerment.[290] While heritage is less conducive to economic analysis than IP assets[291] making it difficult to hypothesise what the economic effects of rights grants would be, it is clear that both cultural integrity and direct opportunities for selective commodification are sought by cultural members.[292] Janke and Golvan's proposals do not offer a fix-all model to redress all of the concerns identified in the previous section.

Outside of their heritage definition reforms, Janke and Golvan's attempts to secure greater decision-making power for Indigenous communities and custodians is consistent with the desire for greater cultural control over cultural resources. At present, while Aboriginal people can generally apply to the Minister to take action under the various heritage acts,[293] they have no standalone right to compel protection of cultural heritage.[294] The civil right proposed by Golvan would be independently held by communities, appearing to bypass these difficulties and foster the conditions for *greater* cultural autonomy over heritage. Under Golvan's proposal, an Indigenous community could apply for an injunction to restrain the destructive use (or proposed use) of imagery of cultural significance or seek

[290] Note that heritage violations can have economic effects; a court can orders costs of rehabilitation or restoration under the various heritage acts, but this is the limit of the damages payments available: see, eg, *Aboriginal Cultural Heritage Act 2003* (Qld) s 27(1).
[291] Angela Dimery, 'Heritage Regulation and Property Rights' (2013) 17 *New Zealand Journal of Environmental Law* 195, 228.
[292] See, eg, Janke, *Our Culture: Our Future* (n 176) 1, 61.
[293] See, eg, *ATSIHP Act* ss 9, 10. Note, however, that since the 1990s, processes and policies at an agency level have mostly favoured consultation between heritage agencies and traditional owner groups. This consultation has not always been satisfactory, however: National Native Title Tribunal, *Indigenous Cultural Heritage Schemes in Victoria, Queensland and the Northern Territory: An Overview* (Report, May 2009) 6–7.
[294] This has led to criticisms that the discretion on behalf of decision-makers like the Minister means that legislative operations and effects can be unpredictable and decision-making prone to political considerations: see, eg, Elizabeth Evatt, 'Overview of State and Territory Heritage Legislation' [1998] *Indigenous Law Bulletin* 82 <http://www.austlii.edu.au/au/journals/IndigLawB/1998/82.html>. A recent study of the *ATSIHP Act* found that fewer than 5% of applications from Aboriginal people's result in successful declarations under the Act: discussed in Nicola Winn and Paul Tacon, 'Managing the Past in Northern Australia: Challenges and Pitfalls for Indigenous Communities, Rock Art and Cultural Heritage' (2016) 9(2) *Heritage and Society* 168, 174.

damages if a breach of their rights occurred. [295] As such, if the public domain aspects of a sacred image like the wandjina was appropriated and used, for example, in a culturally inappropriate advertising campaign, an injunction, as supported by evidence of cultural harm that shows the appropriation's destructive effects, could restrain its use.[296] However, while useful in theory, the very thing that makes such a right useful to Indigenous communities – the devolution of power away from government decision-makers to local communities – makes the likelihood of such rights being introduced, implausible.

To date, neither of Golvan nor Janke's reform proposals have have been introduced in their entirety, although there has been improved decision-making capacity reserved to Indigenous communities in some jurisdictions[297] and since 2016 in Victoria, intangible cultural heritage, including artworks,[298] that are only known to the community, are protected from commercial use by outsiders.[299] The operation of the *Aboriginal Heritage Act 2006* (Vic) s 79G means that secret rock paintings could be protected from being reproduced commercially on t-shirts, if they are recorded on the Register of Aboriginal Intangible Heritage.[300] A breach of s 79G includes penalties for both individual and corporate offenders.[301] However, despite this protection, the commercial use of the public domain aspects of Aboriginal imagery remains permissable under this Act where the general features of

[295] Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 231. In the current *ATSIHP Act*, an injunction may be ordered under s 26, however general damages are not available.
[296] As noted earlier, this remedy would mostly lack efficacy in the instance of tattoo misappropriation. An injunction would be granted after the fact.
[297] For example, greater advisory rights have been introduced in Qld, see *Aboriginal Cultural Heritage Act 2003* (Qld) ss 9, 10, 12. Also notable is s 148 of the *Aboriginal Heritage Act 2006* (Vic), that provides that a 'registered Aboriginal party', has, amongst other functions, the functions of acting as 'a primary source of advice and knowledge' for the Minister ... on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered' and 'to apply for interim and ongoing protection declarations': s 148 (a), (f). Note that in other jurisdictions, such as Western Australia, Indigenous involvement in management and decision-making remains very limited: see *Aboriginal Heritage Act 1972* (WA). For example, under s 28, the Aboriginal Cultural Material Committee does not require Aboriginal members, indicating a limited mandate for securing Indigenous participation in heritage decision-making.
[298] Visual arts fall within the definition of Aboriginal intangible heritage in the Act: *Aboriginal Heritage Act 2006* (Vic) s 79B(1).
[299] *Aboriginal Heritage Act 2006* (Vic) s79G.
[300] Ibid s 79C.
[301] Ibid s 79G (1)(2).

images are widely known, putting them outside of the definition of Aboriginal intangible heritage.[302] The heritage Acts in other jurisdictions do not include intangibles as objects of protection.[303]

As Australian conventional scholars seek positive rights, as well as protective rights to protect ICIP, I will now consider copyright law amendments that aim to redress the economic dimensions of appropriation.

4.4.2.2 Copyright law reform

The reform of domestic copyright regimes so that they operate in a more inclusionary manner is another reform option put forward in Australia by Golvan and Janke.[304] The support for domestic copyright reform reflects the view that 'the machine should not be discarded when it is found ineffectual for all cultures; rather, the machine should be reconstructed such that it works for all cultures'.[305] As discussed in chapter 4, one of the concerns of conventional scholars with copyright law's western bias is its preference for individual rights.[306] Golvan and Janke's copyright reform proposals aim to redress this aspect of the law's cultural specificity, and in so doing, recognise the unique Indigenous ways of knowing, owning, and creating art in law.

Under the *Copyright Act*, acts of joint authorship are required for communally-held rights to subsist.[307] This standard requires that the 'contribution of each author is not separate from the

[302] See *Aboriginal Heritage Act 2006* (Vic) s 4 which states that 'Aboriginal intangible heritage' has the meaning given by s 79B. Section 79B states that Aboriginal intangible heritage includes rituals and visual arts, and any 'intellectual creation or innovation' based on such intangible heritage: at 79 B(1)(2). However, the definition does not include 'anything that is widely known to the public': at 79B(1).

[303] See the definition of 'significant Aboriginal object' in the *ATSIHP Act* s 3: the definition of 'Aboriginal cultural material' in the *Aboriginal Heritage Act 1972* (WA) s 4; the definition of 'significant Aboriginal object' in the *Aboriginal Cultural Heritage Act* 2003 (Qld) s 10; the definition of 'Aboriginal object' in the *Aboriginal Heritage Act 1988* (SA) s 3; the definition of 'protected object' in the *Aboriginal Heritage Act 1975* (TAS) s 7; the definition of 'object' and 'Aboriginal object' in the *Heritage Act 2004* (ACT) ss 8, 9; and the definition of 'object' in the *Heritage Act 2011* (NT) s 7. Note that in some instances, specific ancestral rock art paintings could be indirectly protected when they are located in a significant Aboriginal area: see, eg, the definition of 'Aboriginal cultural heritage' that includes evidence 'of archaeological or historical significance, of Aboriginal occupation of an area of Queensland': *Aboriginal Cultural Heritage Act* 2003 (Qld) s 8.

[304] Janke, *Our Culture: Our Future* (n 176) 113–31; Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 636; Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 230.

[305] Megan Carpenter, 'Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community' (2004) 7(1) *Yale Human Rights and Development Journal* 51, 53.

[306] See section 4.3.1 of this chapter.

[307] See the definition of 'work of joint authorship': *Copyright Act 1968* (Cth) s 10(1). See also ss 31, 32, 78–83 (particularly ss 78, 79) that show the nature of the communal rights held, and that such works subsist in copyright.

contribution of the other author'.[308] This means that customary law does not found communal ownership of copyright merely because the author uses ritual knowledge in their expression.[309] In his early scholarship, Golvan proposed the introduction of communal notions of ownership 'attaching to a tribe as represented by the relevant tribal custodians, being rights which might sit alongside the individual copyright rights of artists' to rectify this issue. [310] His proposed communal right is informed by Indigenous notions of collaboration that includes the role of ancestors and elders in authorising and sanctioning the work,[311] thus positing a more culturally appropriate standard of ownership that recognises the unique context within which Indigenous art is created.

While Golvan proposed the introduction of communal ownership rights, Janke's copyright reform proposal is instead concerned with the recognition of communal moral rights, and in particular, the right of integrity for preventing the derogatory uses of Indigenous culture. Janke advocates for the introduction of a new sub-category of property in 'Indigenous cultural works', defined as a work of cultural significance to Aboriginal and Torres Strait Islander people that is governed by customary laws around use and reproduction.[312] This category of works would conceivably cover wandjina artworks that are created in accordance with Indigenous law, such as those produced by Mowanjum

[308] See the definition of 'work of joint authorship': *Copyright Act 1968* (Cth) s 10(1).
[309] *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513, 525. In *Bulun Bulun*, while the presiding judge von Doussa J accepted that the painting in question was created in accordance with the customary law of the Ganalbingu people and expressed their ritual knowledge, he confirmed that copyright is 'entirely a creature of statute'. See discussion of this aspect of von Doussa J's reasoning in Kathy Bowrey, 'The Outer Limits of Copyright Law – Where Law Meets Philosophy and Culture' (2001) 12(1) *Law and Critique* 75, 81–3. Note that von Doussa J ultimately recognised the communal interests of the Ganalbingu people in the artwork through equity. The artist was considered a fiduciary for the community: at 531. The practical implication of such equitable rights are, however, limited because, as Janke notes, 'it does not confer on the community any direct proprietary interests in the copyright or the underlying traditional ritual knowledge': Janke, *Indigenous Knowledge: Issues for Protection and Management* (n 147) 32. It appears the rights would only prove useful in circumstances where the author of a work created with ritual knowledge has died and the trustee of the deceased's estate refuses to take the action required by the clan: Colin Golvan, 'The Protection of *At the Waterhole* by John Bulun Bulun: Aboriginal Art and the Recognition of Private and Communal Rights' (2010) 80 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 38, 47.
[310] Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 230. Note that while Golvan does advocate for copyright reform, his preference is to expand the protection afforded by heritage regimes to include artistic works (without the time limitations of copyright): at 230–1. See section 4.4.2.1 of this chapter.
[311] Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' (n 271) 230. Note that broadening the joint authorship definition could also secure this result.
[312] Janke, *Our Culture: Our Future* (n 176) 126.

artist Donny Woolagoodja.[313] Janke proposes that where ownership of an Indigenous cultural work is communal rather than individual, perpetual communal moral rights of attribution and cultural integrity vest in Indigenous owners.[314] Like Golvan, Janke is here concerned with displacing the preference for individual rights in the extant *Copyright Act* in the context of Aboriginal and Torres Strait Islander art.

Both Golvan and Janke's proposals seek rights in accordance with one of the cultural priorities identified earlier in this chapter, the byproduct of which would be legal recognition of the unique communal nature of Indigenous culture and arts production. Under Golvan's proposal, if the individual copyright owner was unwilling or unable to protect the interests of traditional owners, the traditional owners could, as holders of the communal property rights, independently take action for copyright infringement. Under Janke's proposal, if the copyright owner of an 'Indigenous cultural work' was unable or unwilling to restrain its derogatory treatment, as assessed on grounds of reasonableness, the traditional owners could independently take action for the infringement of the communal moral right of integrity. Both of these types of rights would provide the relevant communal owners access to copyright remedies, including damages or an injunction to restrain the infringement or reverse the derogatory treatment.[315] Communal rights are thus valuable for their protective potential. The monopolies they secure can be leveraged to exclude others and, thereby, disrupt the threat posed by the cultural harms of distortion, dilution, and offence.[316] As IP scholar Kathy Bowrey argues, copyright law provides a foundation for 'very strong empowerment of owners'.[317]

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[313] See 'Australian Imagery', Image 73, xxii of this thesis. Donny Woolagoodja is a renowned Kimberly artist of the Worrora people. His wandjina art featured in the opening ceremony of the 2000 Olympic Games in Sydney: 'Donny Woolagoodja', *Mowanjum: Aboriginal Art and Culture Centre* (Web Page) <http://www.mowanjumarts.com/portfolio/donny-woolagoodja >. See also the wandjina art of Leah Umbagai: 'Australian Imagery', Image 71, xxi of this thesis. Note that Umbagai recently stated that she has stopped depicting the wandjina in her art 'because she is upset about seeing so many people misappropriating the Wandjina': Sophia O'Rourke and Leah McLennan, 'Kimberley Artists Contemplate Legal Action Over Misappropriation of Sacred Wandjina Figure', *ABC News* (online, 16 February 2019) <https://www.abc.net.au/news/2019-02-16/kimberley-artists-legal-action-over-wandjina-misappropriation/10813488>.

[314] Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 636. Janke elsewhere proposes that only Indigenous cultural works that currently subsist in copyright should be covered by communal moral rights, suggesting a time limited right: Janke, *Our Culture: Our Future* (n 176) 131.

[315] See *Copyright Act 1968* (Cth) s 115, 197(1)AZA.

[316] See Lixinski (n 116) 179; Antony Taubman, 'Preface: Indigenous Innovation: New Dialogues, New Pathways' in Peter Drahos and Susy Frankel (eds), *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (Australian National University E Press) xv, xvii.

[317] Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy' (n 123) 36.

Communally-owned images could then be exploited by persons authorised to do so under Aboriginal and Torres Strait Islander law, in the same manner as a traditional copyright.

To date, neither of Janke nor Golvan's proposed reforms has taken place. There was some legislation proposed to secure the extension of individually held moral rights to Indigenous communities in 2003 in Australia – the Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003 (Cth) (ICMR Bill)[318] – however, it was not passed into law.[319] The exposure draft of the ICMR Bill that was circulated amongst stakeholders was heavily criticised as privileging the interests of users and shifting the balance away from Indigenous communities.[320] While there have been no legislative developments since, the call for communal moral rights reform continues.[321]

If communal rights reforms took place in the manner envisaged by Golvan and Janke, the western bias of copyright's focus on individual rights could be reduced (assuming that drafting issues, such as those apparent in the ICMR Bill, were resolved). However, communal rights reform only affects ownership rights for those works that already vest in copyright. It does not affect the material that exists in the public domain. Third parties could still hold rights in works created using Indigenous cultural imagery and arts styles. As such, a wandjina-inspired artwork created by someone outside of

[318] The Bill's stated purpose was to provide Indigenous communities with a 'means to prevent unauthorised and derogatory treatment of works that embody community images or knowledge': Liberal Party of Australia, *The Howard Government: Putting Australia's Interests First: Election 2001 — Arts for All* (Policy Document, 2001) 21 quoted in Jane Anderson, 'The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill' (2004) 27(3) *University of New South Wales Law Journal* 585, 597. As drafted, the Bill required five conditions to be met before communal rights of attribution and integrity would arise: (i) The work must be 'made'; (ii) it must draw on the traditions, beliefs, observances or customs of the community; (iii) it must be covered by an agreement between the author and the community; (iv) the community's connection with the work must be acknowledged with notice shown on the work; and (v) a written notice of consent must have been obtained by the author from everyone with an interest in the work.

[319] The Bill was also never tabled.

[320] See, eg, Jane Anderson, 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' [2004] 15 *Indigenous Law Bulletin* 8, 8–14; Jane Anderson, 'Indigenous Communal Moral Rights Bill – Failure of Language and Imagination' (2004) 17(2) *Australian Intellectual Property Law Bulletin* 26, 26–30; Samantha Joseph and Erin Mackay, 'Moral Rights and Indigenous Communities', *Art + LAW* (online, 30 September 2006) <https://www.artslaw.com.au/articles/entry/moral-rights-and-indigenous-communities/>; Erin Mackay, 'Indigenous Traditional Knowledge, Copyright and Art – Shortcomings in Protection and an Alternative Approach' (2009) 32(1) *University of New South Wales Law Journal* 1, 8–10; Terri Janke and Robynne Quiggin, *Indigenous Cultural and Intellectual Property: The Main Issues for the Indigenous Arts Industry in 2006* (Report, 10 May 2006) 16–21 <https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/terry_janke_icip.pdf>.

[321] See, eg, Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Indigenous Art – Securing the Future: Australia's Indigenous Visual Arts and Craft Sector* (Report, June 2007) Recommendation 24, xii (*Securing the Future*).

a traditional context[322] would still vest copyright in a third party, failing to disrupt the concerns around a loss of access to, and control over, culture, discussed earlier in this chapter. Communal moral rights would also be powerless in restraining derogatory wandjina-inspired artworks.[323] This is because it is the relationship between the community and the work that enlivens the communally-held rights, rather than the image's composition itself. If created outside of the traditional context, so long as the work did not infringe the copyright of an existing wandjina artwork, the community would have no right to control or remedy this appropriation.[324] Although it does not offer a cure-all for the breadth of Indigenous concerns around law's complicity in appropriation, communal rights reform might secure greater recognition of the unique nature of Indigenous identity in copyright law allowing Indigenous owners to exploit economic rights without undue competition from cultural interlopers in some circumstances.

The limitations of these proposals might make it seem that the problem is simply one of *not enough* new legal rights proposed by Golvan and Janke to address the breadth of Indigenous concerns with cultural appropriation. Yet, IP scholars are typically very cautious about extending 'copyright protection too far and unnaturally'.[325] This is because copyright depends on the continuing existence of the public domain,[326] and the incentives embedded in IP law are perceived as potentially damaging to the integrity of culture by undermining or replacing customary practices and values.[327] In part, for

[322] Such as the controversial wandjina artworks created by Croatian-Australian Vesna Tenodi: see 'Australian Imagery', Images 76–7, xxii of this thesis.
[323] Such as the sculpture 'Wanjina Watchers in the Whispering Stone', created by Ben Osvath and commissioned by Vesna Tenodi, discussed earlier in section 2.1.1.1 of this thesis. See 'Australian Imagery', Images 74–5, xxii of this thesis.
[324] Note that in 2015, the Mowanjum community registered a trademark of wandjina imagery to bolster thier legal position under the western legal system and prevent unauthorised use of the wandjina in trade: O'Rourke and McLennan (n 313).
[325] Staniforth Ricketson and Chris Creswell, *The Law of Intellectual Property: Copyright, Design and Confidential Information* (Thomson Legal and Regulatory, n.d.) [14.132]. See also Robert Paterson and Dennis Karjala, 'Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples' (2003) 11(2) *Cardozo Journal of International and Competition Law* 633, 646–52, particularly 648–9.
[326] J Janewa OseiTutu, 'A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law' (2011) 15(1) *Marquette Intellectual Property Law Review* 147, 207–8; Christine Haight Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' (1997) 30(1) *Connecticut Law Review* 1, 56.
[327] Michael Halewood, 'Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection' (1999) 44 *McGill Law Journal* 953, 991; Farley, 'Protecting Folklore of Indigenous Peoples' (n 326) 56–7.

these reasons, sui generis reform is the preferred option of conventional scholars. I will now consider the sui generis proposals of Janke, Solomon and Mead.

4.4.3 Sui generis legislation

As noted in chapter 2, amongst Australian and New Zealand conventional scholars who advocate for law reform there is a clear preference for a sui generis legislative instrument.[328] A sui generis right or regime refers to one that is 'of its own kind'.[329] That is, designed for a specific circumstance or purpose that sits apart from the IP system, although it can refer to new IP (or IP-like) rights.[330] With underlying drafting principles of 'respect, informed consent, negotiation, full and proper attribution, and benefit sharing,'[331] starting from first principles is perceived to offer the most flexible means to centre Indigenous law and, in so doing, protect cultural integrity, secure opportunities for commercial exploitation, and maintain guardianship relationships, rights, and obligations in line with cultural priorities.[332] In the context of cultural imagery and arts styles more specifically, conventional scholars typically seek rights that recognise 'cultural ownership in Indigenous visual arts' and underlying TK, and, in particular, a right of prior consent to ensure that suitable use of cultural material occurs.[333] Sui generis proposals are thus not only sought to effect the legal recognition of the unique, communal

[328] See section 2.1.1.2 of this thesis. Sui generis reform has been recommended to address the perceived shortcomings of copyright in a number of submissions to inquiries and reports in Australia and New Zealand: see, eg, *Securing the Future* (n 321); Arts Law Centre of Australia, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee, *Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (2006) 11, 14 <http://www.aph.gov.au/SEnate/committee/ecita_ ctte/completed_inquiries/2004-07/indigenous_arts/submissions/ sub36.pdf>; Arts Law Centre of Queensland, Submission to the Senate Environment, Communications, Information Technology and the Arts Committee, *Inquiry into Australia's Indigenous Visual Arts and Craft Sector* (2006) 3 <http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_ inquiries/2004-07/indigenous_arts/submissions/sub45.pdf>; Wai 262 Report (n 109) 52.

[329] William Stewart, 'Sui Generis' in *Collins Dictionary of Law* (Collins, 2006) <https://legal-dictionary.thefreedictionary.com/sui+generis>.

[330] World Intellectual Property Organization, *Intellectual Property Needs and Expectations of Traditional Knowledge: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* (Report, April 2001) 24–5. IP-like rights are often sought by conventional scholars: see, eg, '[s]uch [sui generis] rights should be premised on the understanding that Indigenous customary laws concerning the use and diseemination of cultural material are similar to intellectual property laws and the rights of intellectual property rights-holders': Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 635.

[331] Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 635. See also: at 636.

[332] See, eg, Maui Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' in Mary Riley (ed), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (Alta Mira Press, 2004) 221, 240–1; Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 160; Kanchana Kariyawasam and Scott Guy, 'Intellectual Property Protection of Indigenous Knowledge: Implementing Initiatives at National and Regional Levels' (2007) 12(2) *Deakin Law Review* 105–6, 114.

[333] See, eg, Janke, *Our Culture: Our Future* (n 176) 131.

nature of Indigenous identity, to provide a work-around to the western bias of copyright that disadvantages Indigenous interests, and to provide a more comprehensive rights schedule than that sought by the Waitangi Tribunal, but also to secure affirmative rights that vest cultural control over the conditions in which appropriation occurs. This mechanism, in theory, offers a means to minimise the cultural threat of appropriation to cultural integrity and well-being.

The sui generis proposals of conventional scholars vary, although they seek similar types of rights. Janke's proposal contains a number of aspirational, perpetually held rights, including:

- The right to own and control ICIP and benefit commercially from its exploitation;
- The right to control the commercial use of ICIP in accordance with Indigenous law and cultural rights and obligations;
- The right to prevent derogatory, offensive and fallacious uses of ICIP; and
- The right to have a say in the preservation and care, protection, management and control of contemporary cultural expressions such as rituals, legends, and the designs used in, for example, art, weaving, dances, songs and stories. [334]

Janke specifically directs that there be no requirement of material form before rights subsist,[335] and that remedies similar to those available under IP law for infringements of rights, and penalties for breaches of cultural rights and criminal sanctions for serious offences such as the destruction of sacred material, be available when infringement occurs.[336]

In her support of the *Mataatua Declaration*,[337] Mead advocates for similar rights to Janke including rights that recognise collective ownership, protect against debasement or culturally significant items,

[334] Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (n 148) 634–5; Janke, *Our Culture: Our Future* (n 176) chapter 18. Janke also proposes that sui generis provisions prohibit the wilful distortion and destruction of cultural material, prevent misrepresentations of source material, allow for payments to Indigenous owners when commercial use occurs, and provides special protection for sacred and secret materials should be included in the instrument: Janke, *Our Culture: Our Future*: at 195.
[335] Janke, *Our Culture: Our Future* (n 176) 194.
[336] Ibid 196.
[337] *Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous People* (1993) <http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf> (*Mataatua*

and that have a multi-generational coverage span to protect cultural integrity over time.[338] She also stresses the need for a requirement of free, prior, informed consent of TK knowledge holders when TK is used, and 'measures to ensure that indigenous knowledge isn't declared public domain by default … even if this requires including retroactive provisions.'[339]

Solomon proposes a flexible system developed by Māori based on tikanga that reflects Māori cultural values and ethos.[340] He seeks the introduction of sui generis rights that acknowledge, protect and promote the rights and obligations of Māori to 'manage, utilise and protect resources in accordance with Maori cultural values and preferences'.[341] This includes rights that accommodate collective rights, the rights of 'Maori artists, carvers, musicians and designers', and regional and marae level interests.[342] Recognising that the interests of individuals and groups can conflict under tikanga and/or be contested within the community, Solomon also proposes the introduction of an administrative body that assists Māori in the formulation of policies to aid them in their role as kaitiaki of their taonga, including around commercial exploitation, as necessary.[343] In addition to fostering consensus, he proposes that this body could also function as the principal point of contact for those wishing to access and exploit Māori TK for commercial gain and promote education about Māori cultural values

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Declaration). While legally non-binding in its current form, it is regarded an 'important standard-setting instrument' and inspiration for law reform: see Quiggin and Janke (n 283) 60. In New Zealand, the Declaration has been suggested to have added 'pressure on the New Zealand government to address Maori intellectual property concerns': Robert Paterson, 'Taonga Maori Renaissance: Protecting the Cultural Heritage of Aotearoa/New Zealand' in James Nafziger and Ann Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (Martinus Nijhoff Publishers, 2009) 107, 123.

[338] Aroha Te Pareake Mead, 'Emerging Issues in Maori Traditional Knowledge, Can These Be Addressed by UN Agencies?' (Document PFII/2005/WS.TK/14, UN International TechnicalWorkshop on Traditional Knowledge, Panama City, 21–23 September 2005) 17–8; Aroha Te Pareake Mead, 'Legal Pluralism and the Politics of Māori Image and Design' (2003) 7(1) *He Pūkenga Kōrero: A Journal of Māori Studies* 34, 37; Aroha Te Pareake Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Sharing Indigenous and Local Community Experiences' (Presentation, WIPO IGC, 30 May 2016) 2–3 <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_30/wipo_grtkf_ic_30_presentation_mead.pdf>. See also *Mataatua Declaration* (n 337) Recommendation 2.5.

[339] Mead, 'Intellectual Property, Genetic Resources and Associated Traditional Knowledge' (n 338) 7.

[340] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 332) 240–1; Maui Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations', *In Motion Magazine* (online, 22 April 2001) <http://www.inmotionmagazine.com/ra01/ms2.html>; Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 160.

[341] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 332) 240; Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 340).

[342] Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 342). See also Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 160.

[343] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 332) 242; Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 340); Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 161.

and their application within a modern day context.[344] This proposal is similar to that advanced in the Wai 262 Report[345] and as recently promoted for Australia by IP scholar Natalie Stoianoff and others.[346] Like the Waitangi Tribunal, Solomon thus seeks to influence behavioural norms of those outside the community, centralise and encourage compliance with the permissions process, and foster informed decision-making amongst kaitiaki in his reform proposal.

Sui generis reform commentary advances a dialogue around finding mechanisms for inclusion in the existing legal order premised on strong ownership rights. The unmet legal need is construed as the need to compel outsiders to submit to the regulatory power of insiders. Rights that accord with Indigenous law and recognise the unique nature of cultural obligations are deemed most capable of meeting this need. However, the rights that are sought reflect an unconventional property rights claim. The rights have no term, its object need not be fixed or original, and licences are determined by collective procedure. They do not strike the balance of copyright between owners and uses of copyright material.[347] Rather, the purpose of the rights is to secure a monopoly over decision-making as it pertains to cultural resources, presumably to respond effectively to the unequal distribution of power within the international IP system.

While Janke, Mead, and Solomon do not elaborate on the legal object of protection, it is presumably the cultural connection between Indigenous peoples, arts, land, and identity, as asserted and based on prior occupancy and social organisation including the existence of law, the historical use of resources, and the continuing cultural importance of practices and artistic expressions to identity.[348] As tā moko is an important cultural practice that embodies tikanga concepts like whakapapa, it appears that moko

[344] Solomon, 'Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities' (n 332) 242; Solomon, 'Intellectual Property Rights and Indigenous Peoples Rights and Obligations' (n 340); Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 161.
[345] See section 4.4.1.1 of this chapter.
[346] Fiona Martin et al, 'An International Approach to Establishing a Competent Authority to Manage and Protect Traditional Knowledge' (2019) 44(1) *Alternative Law Journal* 48, 48–55.
[347] Ejan Mackaay, 'Sui Generis Rights on Folklore Viewed from a Property Rights Perspective' (IDEAS Working Paper Series from RePEc, June 2011) 20–1 <https://cirano.qc.ca/files/publications/2011s-52.pdf>. As such, sui generis rights risk constraining the creativity of cultural insiders as well as cultural outsiders.
[348] For a discussion of historical use of resources and their cultural importance as underpinning sui generis Indigenous rights in a Canadian context, see Michael Ilg, 'Culture and Competitive Resource Regulation: A Liberal Economic Alternative to Sui Generis Aboriginal Rights' (2012) 62(3) *University of Toronto Law Journal* 403, 407–13.

motifs like the koru could fall within the scope of imagery that could be protected by sui generis rights. While conventional commentary does not detail how sui generis rights 'would have practical impact' and affect the creation of works and commercial dealings in arts markets in practice,[349] it appears that if a tattooist wished to create a tattoo that embedded korus, they would have to seek permission (and presumably enter into a licence agreement and pay a licence fee) from a representative body or designated kaitiaki prior to creating and applying the tattoo design onto a client's face. If their proposed use was deemed inappropriate from the perspectives of Māori stakeholders, it could be refused. If the tattoo was created despite the lack of permission, compensation could be sought as per Janke's proposal. If the tattoo was used outside of the terms of an agreement, for example, if it was reproduced in a film as had occurred in *Whitmill,* an injunction could be sought to prevent the release of the film or its streaming in New Zealand. In theory, the requirements of consultation and prior permission and access to legal remedies, works neatly to secure a new regulatory structure to control access to Indigenous culture: the Indigenous-inspired tattoo would either (1) not have been created; (2) been created with permission; (3) not complied with these rights, and been subject to legal action and the available remedies. This control is, however, limited to the domestic sphere. Domestic sui generis instruments would not protect overseas held material or apply to uses outside the jurisdiction.

A further limitation is that the necessity for clearly framed, broadly applicable rights tends to promote a homogenous view of Indigenous peoples and community interests within and across cultural sites of creative production,[350] and '[i]dealised views of what traditional knowledge is'.[351] Such concerns were evident in the Pacific following the drafting of the regional sui generis regime, the *Model Law for the*

[349] Kathy Bowrey, 'International Trade in Indigenous Cultural Heritage: An Australian Perspective' in Christoph Beat Graber, Karolina Kuprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, 2012) 396, 423.

[350] See Kathy Bowrey, 'Alternative Intellectual Property?: Indigenous Protocols, Copyleft and New Juridifications of Customary Practices'(2006) 6 *Macquarie Law Journal* 65, 95, footnote 112.
Note that Mead has expressed concern that TK policies and programs recognise 'the diversity of indigenous experience' and do not 'lock […] indigenous traditional knowledge into a narrow framework that causes even harsher detriments': Aroha Te Pareake Mead, 'Emerging Issues in Maori Traditional Knowledge, Can These Be Addressed by UN Agencies?' (Document PFII/2005/WS.TK/14, UN International TechnicalWorkshop on Traditional Knowledge, Panama City, 21–3 September 2005) 3.

[351] Miranda Forsyth, 'Cultural Economics and Intellectual Property: Tensions and Challenges for the Region' (2015) 2 (2) *Asia and the Pacific Policy Studies* 356, 365–6. See also Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy' (n 123) 43.

Protection of Traditional Knowledge and Expressions of Culture 2002.[352] In addition, due to the dynamism of culture, the fact that TK is often shared and widely distributed among communities,[353] and historic disruptions to cultural entitlements and obligations caused by settlement,[354] it may also be difficult to identify who the beneficiaries of rights should be[355] and what the content of those rights and obligations are, particularly with regards to when and how TK should be accessed and commercialised and who should benefit.[356] In chapter 5, I return to discuss the specific challenges that regulating moko would pose, were a sui generis instrument to be introduced.[357]

There are also significant concerns around the potential for sui generis rights to conflict with IP rights. This goes to the very purpose of the proposed rights, which is to empower Indigenous individuals and communities to better manage, protect, and exploit their property in a cultural appropriate manner in circumstances where outsiders can accrue rights in authorised works produced with public domain cultural materials. However, a notable limitation of sui generis reform commentary is that there is no significant attention to how sui generis rights would intersect with existing IP regimes and marry with international obligations.[358] Solomon endorses the position of the WIPO IGC Indigenous Consultative Forum that in the instance of legislative conflict between a TK instrument and IP law, the TK rights should prevail,[359] but this is not particularly helpful as a practical guide to conflict resolution. In what

[352] *Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002* <https://www.wipo.int/edocs/lexdocs/laws/en/spc/spc002en.pdf>. Miranda Forsyth, for example, argues that the framing of regional sui generis rights has had consequences for how TK is presented and understood as 'a static body of knowledge handed down from generation to generation by a community localised in a particular place'. She also criticises the Model Law as glossing 'over internal community differences' and 'whittling away…roles for customary institutions': Forsyth, 'Cultural Economics and Intellectual Property' (n 351) 365–6.

[353] See, eg, Forsyth, 'Cultural Economics and Intellectual Property' (n 351) 362–3; Manuel Ruiz Muller, *Protecting Shared Traditional Knowledge: Issues Challenges and Options* (Issue Paper No 39, International Centre for Trade and Sustainable Development, 2013) 2 <https://www.ictsd.org/sites/default/files/research/2013/11/protecting-shared-traditional-knowledge.pdf>.

[354] On the impact of colonisation on TK rights entitlement see Miranda Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: The Challenge of Localism' (2011) 29(3) *Prometheus* 269, 278.

[355] See Kariyawasam and Guy (n 332) 114. On the fluidity of group membership as a regulatory challenge, see generally Miranda Forsyth, 'How Can Traditional Knowledge Best Be Regulated?: Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach' (2013) 25(1) *The Contemporary Pacific* 1, 4–11.

[356] Forsyth, 'How Can Traditional Knowledge Best Be Regulated? (n 355) 1–2.

[357] See section 5.2. of this thesis.

[358] See Lai, *Indigenous Cultural Heritage and Intellectual Property Rights* (n 105) 208; Stoianoff and Roy (n 155) 781. For example, Janke simply states that sui generis legislation 'should consider how it will interact with existing copyright and intellectual property laws; for example, perhaps the legislation should apply only to Indigenous cultural works outside of copyright period – where copyright does not exist.': Janke, *Our Culture: Our Future* (n 176) 195.

[359] Solomon, 'An Indigenous Perspective on the WIPO IGC' (n 141) 220.

circumstances would a copyright owner's rights be defeated by the sui generis rights of cultural owners over, for example, an embedded koru motif, and what rights would be held by each stakeholder in the event that a third party infringed the copyright in the appropriative work? Is the TK cultural authority superior to domestic courts; does the domestic court defer to a factual determination by the cultural authority that the purported lawful use is ultra vires? Would that arrangement be constitutional? These issues would clearly require resolution prior to the introduction of a sui generis instrument.[360]

Effective drafting is not the only hurdle that must be overcome for the link between law and the cultural harm of appropriation to be disrupted. Formally holding rights and the practical efficacy of those rights as exercised within the settler state legal system are not the same thing. As such, while the operative assumption of conventional critiques is that if legal rights are introduced, a reordering of society and reinvigoration of Indigenous culture will result,[361] it must be remembered that the interpretation of any new sui generis law would, under current constitutional frameworks, ultimately vest in the courts and associated legal personnel and not in Indigenous communities.[362] What is sought from law and what law can deliver when seeking to make good on its claim of inclusion is not assured, prompting the examination of the relationship between formal law and cultural practices in chapter 5.[363] Moreover, like any right mediated through the settler state legal system, a sui generis instrument 'risks marginalising Indigenous people'[364] and constructing the Indigenous subject at the cost of their subjugation.[365] Being heard in the manner envisaged by Spivak, discussed earlier at 2.2.1,

[360] Frankel, 'A New Zealand Perspective' (n 115) 439, particularly 456–7; Kariyawasam and Guy (n 332)114–5; Halewood (n 327) 995.
[361] See '[t]he premise of calls for reform, not usually articulated, appears to be that an 'adequate' legislative framework will change behaviour outside the legal system. Or at least, that legislation is a necessary precursor or support to those changes': Andrew T Kenyon, 'Copyright, Heritage and Australian Aboriginal Art' (2000) 9(2) *Griffith Law Review* 303, 320 (citation omitted).
[362] Solomon, 'Strengthening Traditional Knowledge Systems and Customary Laws' (n 105) 161; Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy' (n 123) 36.
[363] See section 5.3 of this thesis.
[364] Bowrey, 'Economic Rights, Culture Claims and a Culture of Piracy' (n 123) 36.
[365] See generally, '[t]he paradox, then, is that rights that entail some specification of … inequality lock us into the identity defined by our subordination, and rights that eschew this specificity not only sustain the invisibility of our subordination but potentially even enhance it': Wendy Brown, 'Suffering the Paradoxes of Rights' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002) 420, 423. The possibility of subjugation, even with legal recognition, leads some commentators to advocate for the recognition of Indigenous customary law as a plural legal order: see Meghana RaoRane, 'Aiming Straight: The Use of

requires more than achieving subject status in law – it requires the subaltern to cease to be subaltern. That is, it requires true inclusion. In chapter 6, I attend to cultural claiming as a form of resistance against colonial oppression to reflect on the historical contingency of the subaltern position, from the perspective of cultural claimants.

4.5 Conclusion

Australian and New Zealand reform proposals seek to recognise, protect, and in some instances commercially exploit cultural interests in TK and artistic expressions that are characteristic of a distinct cultural identity. They further conversations about legal inclusion, how it might be best secured, and what cultural needs are most pressing in responding to appropriation. Each reform proposal has its distinct limitations for recognising the unique nature of the Indigenous identity claimed in law and disrupting law's complicity in appropriation. However, while they are not a cure-all, the reforms proposed by conventional scholars do suggest potentially valuable ways of altering existing power dynamics.

In this chapter I investigated the ways in which the *Whitmill* legal proceedings intersect with broader social and legal narratives around appropriation and its harms, as well as particular law reform proposals. Examining the Māori cultural appropriation claim over the Whitmill tattoo understands the excluded legal object as an assertion of rights ownership over a Māori-inspired tribal tattoo created by a pākehā. The western copyright frame suppresses identification of this competing property claim, authorising the cultural appropriation of the Other's culture. Western law is seen to not only facilitate a misappropriation of Māori property, but to produce significant cultural harms to Māori.

Legal exclusion generates a certain form of identity politics at the intersection of cultural appropriation and law in settler states. Reform initiatives involve an assertion of Indigenous identity and cultural autonomy that requires recognition by the law. Yet, in the process of seeking to redress cultural harm and law's complicity in appropriation, law reform discourse encourages an instrumentalist view of law and a homogenous view of culture, without examining the relevance of

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Indigenous Law to Protect Traditional Cultural Expressions' (2006) 15(3) *Pacific Rim Law and Policy Journal* 827, 844–7.

historical subject positions to perceptions of oppression. The unpredictability of law's effect on appropriative practices, the internal contestation that can sit behind cultural claims, and the the cultural politics of claiming as a performative political intervention all go unexamined.

As characterised by an identification of legal exclusion and competing models of rights, the conventional critique reads some, but not all, of the political activity at the intersection of cultural appropriation and law. To extend analysis of the complexity of law and culture and the contingency of rights claiming, in the chapters that follow I will approach the intersection of cultural appropriation from below (chapter 5), and then in historical context (chapter 6).

I turn now to chapter 5 to empirically explore how law interacts and governs cultural life and artistic practice in everyday life, with respect to tattoo subculture.

Chapter 5: Cultural appropriation and law from below

In the previous chapter I investigated the centrality of property rights to conventional responses to cultural appropriation claims. That chapter provided insight into the significance of reading cultural claims as a possessive claim and identity claim within a formal law framework, the perceived cultural harm of law's exclusionary operations, and the scope of the law reform proposals advanced to remedy the western bias of copyright law. In the next two chapters I seek to reflect more fully on the lived experience of law, appropriation, and cultural production, and the historicity of the political activity that motivates allegations of cultural appropriation. This expands the scope of my inquiry from IP law's regulation of art as cultural property to the ordering that exists in local sites and the political stakes of appropriation for different constituencies within a culture. In the course of my discussion in the next two chapters, I engage the analytical frameworks of performativity, law and society, and desire that I introduced in chapter 2.

In this chapter, I approach the intersection of cultural appropriation and law from below, using the empirical insights of tā moko practitioners and pākehā tattooists working in the North Island of New Zealand into their artistic practices and lived experience. How arts practitioners see property does not necessarily correspond to any of the constructions of their practice found in the accounts discussed in chapter 4, yet this is not accidental or the result of ignorance. Cultural practices and processes are not devoid of law merely for the reason that they do not mirror the content of formal legal rights. On the contrary, and in line with the insights of the analytic framework of law and society that I laid out in chapter 2, legality is present in the norms, ethics, and business considerations that manifest in everyday practices. Throughout this chapter I investigate how the subcultural dynamics and the legal meaning-making that takes place in everyday life can challenge constructions of appropriation in cultural claims, and complicate the introduction and enforcement of new legal norms. In the next chapter, I explore in detail the complexity that sits behind the apparent contradictions and tensions around cultural ownership and identity found in tattoo art that I expose and narrate in this chapter.

The present chapter has three sections. In section 5.1, ‘Contest and contradiction: reassessing the conventional objections to Whitmill’s tattoo’, I challenge the presumed solidity of the property at the heart of cultural appropriation claims and identify appropriation allegations as more than simply a claim that is empirically true or false. I firstly outline artist perspectives on Whitmill’s tattoo design. Fieldwork participants have various explanations of the Whitmill tattoo, yet in my study none sees it as a cultural intrusion or exploitative. It is consistently described as a ‘tribal’ tattoo, where ‘tribal’ refers to a distinctly western tattoo genre. Next, I draw upon the nuances of how arts practitioners see their world and practice, particularly as they relate to appropriation and perceptions of cultural harm, to draw out the performativity of claims whose locutionary meanings may, but are often not, mirrored in the understandings of artist practitioners. The artists interviewed present an alternate account of the relationship between art, culture, economy, and the value of imagery to that previously discussed. In addition to reminding us of the performativity of cultural claims, this also has implications for the operation of the reforms outlined in the previous chapter. Property claims over cultural imagery and arts styles as described by progressive lawyers might find little support in artist communities, because artists perform culture differently or otherwise to cultural claimants.

In section 5.2, ‘Regulatory challenges’, I present my own account of how tā moko is currently being regulated, considering the dynamism of cultural production and internal contestation around culturally appropriate practice as factors that could complicate the practical efficacy of the law reforms sought in chapter 4. I discuss artist identifications of the cultural issues underlying the making and displaying of moko, including how tā moko artists conceptualise their participation in intercultural engagement and the rules that regulate the production of moko. The routinised practices that order conduct in this site suggest that significant drafting issues would need to be resolved prior to subjecting moko to additional regulation. I suggest that the boundaries around culture advanced by cultural claimants, and that are relied on by conventional scholars, are quite porous in this site, suggesting the need to look behind essentialist framings if law reform is to speak to the artist communities it seeks to regulate.

Section 5.3, ‘Perspectives on law and legality’, assesses the regulatory power of the formal law, as refracted through the legal consciousness of tā moko artists and pākehā tattooists and the legality that

exists in local sites, to reflect upon the likely impact of transplanting a new legal framework that regulates moko and its unauthorised use. A law's efficacy depends on its prohibitory power as well as its usefulness for rights holders. As such, in this section, I consider whether tā moko artists are desirious of the formal law's protections, and whether pākehā tattooists, as would-be appropriators, see positive law as a relevant regulator of community life. I reflect on responses to moko appropriation, attitudes to copyright ownership, how desirable conduct outside of rights enforcement is fostered by tā moko artists, and the relevance of the western tattoo subculture's preference for self-governance for formal legal regulation of appropriative practices.

This chapter concludes that some level of engagement with the artists who would purportedly benefit from, or may unknowingly or deliberately transgress perceived cultural rights of the Other (as envisaged by cultural claimants), is needed to appreciate the potential reach of conventional scholarship that seeks to change behaviour and shape the lived experience of law and culture. As culture can be iterated differently by different stakeholders and legality is not limited to the formal legal sphere, introducing new legal rights is not necessarily commensurate with the empowerment of subjects or shaping more desirable appropriative conduct.

I will now outline perspectives on Whitmill's tattoo design.

5.1 Contest and contradiction: reassessing objections to Whitmill's tattoo as appropriative and culturally harmful

Much of the critical discussion of the Whitmill tattoo controversy takes at face value that Whitmill's design is moko-inspired and therefore potentially misappropriative of tā moko.[1] It treats arts styles as a property interest and assumes that there is a cultural interest in restraining outsiders seeking inspiration from Māori cultural imagery. However, while a conventional reading of Whitmill's tattoo assumes that the tattoo breaks clear cultural rules, it does not actually ask creators with close

[1] See, eg, Leon Tan who classifies the Whitmill tattoo as '*Maori*-inspired' and refers to it as 'the cultural appropriation of *ta moko* by an American tattoo artist', and Michelle Erai who describes the tattoo as 'tribal' and refers to the Māori cultural appropriation claim as a 'challenge to Mike Tyson's right to wear the *moko*' : Leon Tan, 'Intellectual Property Law and the Globalization of Indigenous Cultural Expressions: *Māori* Tattoo and the Whitmill versus Warner Bros. Case' (2013) 30(3) *Theory Culture and Society* 61, 62, 75 (emphasis in original); Michelle Erai, '"If I Win the Title, I Might Tattoo my Face." Mike Tyson as Māori Artifact?' in Guillermo Delgado and John Brown Childs (eds), *Indigeneity: Collected Essays* (New Pacific Press, 2012) 54, 54, 58 (emphasis in original).

knowledge of moko how they classify this work or what cultural rules it breaks. As cultural sites and their attendant practices are in reality often much more contested than acknowledged in broad "brushstroke" cultural claims of ownership,[2] empirical work with arts practitioners can help expose the dynamism of cultural production, appropriation, and intercultural engagement.

In this section, I seek to illuminate the contest and contradiction that can surround cultural claims, with respect to the bounded property that, it is asserted, needs protection in order to prevent cultural harm. In Whitmill's case, this entails a discussion of whether the tattoo is considered by those who are immersed in the reading of tattoos as appropriative or harmful. After examining perspectives on Whitmill's tattoo, I will consider general perspectives on appropriation and cultural harm. This discussion shows that the cultural world within which moko is produced, managed, and intersects with pākehā tattoo, paints a very different picture of appropriation and cultural harm from below, than is apparent from the analysis presented in chapter 4 that draws upon conventional legal scholarship.

5.1.1 The Whitmill tattoo

As already foreshadowed in Chapter 4, media reporting on objections to Whitmill's tattoo design presents an almost unanimous picture of the image as culturally appropriative.[3] Yet, while a connection with Māori culture was recognised by two tā moko artists as noted below, none of my fieldwork participants, either Māori or pākehā, used the language of theft, exploitation, or the term "cultural appropriation" to describe Whitmill's tattoo design or its design influences. Artist perspectives align most closely with Whitmill's understanding of the design as an American tribal tattoo.[4] The property that lies at the heart of cultural claims can be internally contested by different stakeholders within a culture.

When asked about the relationship between Whitmill's tattoo design and moko, my fieldwork participants had a variety of responses, yet their responses all challenge the position of cultural

[2] See section 2.2.1 of this thesis.
[3] See section 4.1.2 of this thesis. I identified only one newspaper article that including a quote that questioned whether the Whitmill tattoo incorporates Māori elements: Chris Mirams, 'Moko Expert KOs Tattoo' *Dominion Post* (Wellington, 22 February 2003) 3.
[4] Transcript of Proceedings, *Whitmill v Warner Bros. Entertainment* (Eastern District Court of Missouri, Perry J, 23 May 2011) document 55, 17 (SV Whitmill).

claimants that the tattoo misappropriates tā moko. Tā moko artist Richie Francis bluntly responded, 'I got no comment because it's not moko.'[5] When pressed about the cultural content of the design, he described it as a tribal 'hybrid;' an 'intelligent' mix of the Māori koru and the solid black of Hawaiian and Tahitian motifs.[6] Tā moko artist Henriata Nicholas also recognised a Māori connection, stating that she thinks it likely that Whitmill was inspired 'by traditional Māori art' in composing the design, however, stated that she cannot connect the design 'solidly back' to the moko that she creates.[7]

Other participants questioned whether Whitmill's design incorporates any Māori cultural content at all. Pākehā tattooist Pip Russell rejected that the spiral shapes in Whitmill's design are korus: '[a] koru is supposed to be open, it's got this energy kind of through it … It's the whole thing, a new life …Whereas that piece on his head, I've never seen a Māori with something like that.'[8] For Russell, Whitmill's design is 'tribal' because it lacks the 'internal flow' of Māori work.[9] Tā moko artist Rangi Kipa also rejected the view that Whitmill's design incorporates Māori design elements, describing the tattoo as 'a long cry from anything that I would interpret as being moko.'[10] He describes it as inspired by Papua New Guinean traditional tattoos that have 'subsequently been re-named as tribal.'[11] Kipa comments:

> the interesting thing about that whole Mike Tyson moko was that, and I'm not sure whether he was confused before he got it or whether he got confused after [he got] it, but essentially it's got very little to do with moko. Other than the fact…[that] having it on someone's face…implies that it's got something to do with Māori moko.[12]

Pākehā tattooist Tim Hunt similarly thought that the controversy over the tattoo was stimulated by its placement on Tyson's face: 'I guess…because it was on his face you could say it was like a Māori

[5] Interview with Richie Francis (Marie Hadley, Skype, 3 April 2012) (interview and transcript on file with the author).
[6] Ibid.
[7] Interview with Henriata Nicholas (Marie Hadley, Auckland, 9 February 2012) (interview and transcript on file with the author).
[8] Interview with Pip Russell (Marie Hadley, Auckland, 8 February 2012) (interview and transcript on file with the author).
[9] Ibid.
[10] Interview with Rangi Kipa (Marie Hadley, Skype, 2 April 2012) (interview and transcript on file with the author).
[11] Ibid.
[12] Ibid.

design, but that's about as far as it really goes.' [13] Hunt regards tribal tattooist Leo Zulueta's work as a prominent design influence because it 'looks a little bit like it could be a cultural tattoo but it's not.'[14]

In response to my question about the cultural content of the design, Mohi simply laughed. He couldn't understand why anyone would believe that the tattoo was 'moko from … the Mayan people of New Zealand!'[15]

In addition to challenging whether Whitmill committed an act of appropriation at all, some fieldwork participants identified that the cultural appropriation allegations against Whitmill were politically-driven and performative, rather than motivated by a theft of culture. Francis described the media representations of the tattoo as cultural appropriation as 'uninformed'.[16] In his opinion, the media are 'uneducated about that artform [tā moko]. You know, they… [try to] make it political and all that. Whereas us as artists just say straight out no it's not [moko].'[17] Kipa stated that he avoids the politics of appropriation debates because the wrongfulness alleged is 'never as clean cut' as is reported – people 'draw broad conclusions from the beginning.'[18] Pākehā tattooist Pete Bauer dismissed the interest of cultural claimants in the tattoo. According to him, the tattoo would not have attracted any controversy but for Tyson's high profile: '[i]f he was Mr No Man who never ever won a boxing title or anything nobody would give a shit, you know. I mean, who would give a fuck about Mike Tyson ['s tattoo]? You know, it's just because he was a champion.'[19] For these artists, the claim against Whitmill is not simply false; it is imbued with politics as a performative utterance.

Responses to the Whitmill tattoo show the diversity of connections that can be made between Māori-inspired art like Whitmill's and Māori tradition. What constitutes cultural appropriation – including

[13] Interview with Tim Hunt (Marie Hadley, Paekakariki Beach, 16 February 2012) (interview and transcript on file with the author).
[14] Ibid. Note that Leo Zulueta himself has recognised aspects of his style in the Whitmill tattoo. He considers both Whitmill's design and his own work as a 'modern interpretation' of Māori design: Mirams (n 3) 3. To compare Zulueta tattoo style with that of the Whitmill tattoo, see 'Tribal Tattoos', Images 28–34, xv of this thesis; 'Celebrity Moko Appropriations', Image 43, xvii of this thesis.
[15] As noted earlier at 4.1.1, Tyson's described the tattoo as 'Mayan' in 2003: Jim Masilak, 'Fighters Warm up with Mind Game – Different Demeanors Put on Stage During Weigh-In' *The Commercial Appeal* (Memphis, 21 February 2003).
[16] Interview with Richie Francis (n 5).
[17] Ibid.
[18] Interview with Rangi Kipa (n 10).
[19] Interview with Pete Bauer (Marie Hadley, Auckland, 8 February 2012) (interview and transcript on file with the author).

whether seeking inspiration from an artform is appropriative – is subject to contestation from within a culture as well as without. It is possible for cultural claimants to construct a cultural violation that exists apart from, or only minimally connected with, the arts practices that validate a cultural claim. I will return to consider the political significance of the activity of rights claiming in chapter 6.

I will now build understanding of the framework within which tā moko practitioners think about appropriation, to develop a more detailed account of how lived experience can challenge the foundations of cultural claims, and, in turn, disrupt the conventional reform demand.

5.1.2 Understanding appropriation from below

5.1.2.1 Māori inspired tattoo imagery and appropriation

Media reports of the Whitmill tattoo as appropriative, in addition to the reform proposals that seek to better protect cultural imagery and arts styles from appropriation, suggest that cultural outsiders seeking inspiration from cultural imagery when creating a new tattoo design is problematic.[20] However, the tā moko artists I interviewed did not consider Māori-inspired tattoo imagery, of itself, an unauthorised intrusion into culture, or at least, not particularly troubling. Nicholas, for example, states that she is happy for her patterns to go out into the world and 'evolve'; she is only 'precious about the content and the substance of the reason why I've created it.'[21] Her personal and spiritual connection to the original imagery is important,[22] but she does not seek to limit the subsequent development of her work – a tattoo can be both 'Māori-inspired' and unproblematic to some cultural members. Tā moko artist attitudes towards direct copying, however, are markedly different, as discussed in more detail below.

For other artists, the classification of Māori-inspired imagery, like the Whitmill tattoo, as a "tribal" tattoo is most important for understanding why it is not perceived to be culturally threatening. Tribal tattoos are identified as a distinctly western tattoo art, despite their crossover with cultural tattoo imagery from regions that include Polynesia. As pākehā tattooist Russell explains, tribal involves fat, black lines whereas 'Māori work is kind of detailed, it tells a story and it can be fine, it can be fat, it

[20] For perspectives on cultural harm see section 4.3.3 of this thesis.
[21] Interview with Henriata Nicholas (n 7).
[22] Ibid.

can be shaded. Like there's so many different patterns in it. And the negative space tells the story … tribal doesn't tell a story.'[23] Pākehā tattooist Hunt describes tribal tattoos as 'beautifully executed' with 'perfect lines' and 'visual power' but 'empty;' '[t]hey're cool and they're beautiful but there's a certain whole ingredient that is missing . There's no depth to it, it doesn't actually say anything or mean anything.'[24] For tā moko artist Kipa, tribal tattoos lack empathy with the physiognomy of the recipient, the designs are just laid out 'hoping … that it's going to fit', whereas in Māori work, the body has a greater influence on the layout of the design.[25] He describes Whitmill's tattoo as 'just dropped on' Tyson's face. [26] Kipa further explains that moko has much more detail in its composition than tribal tattoos. When your proximity to a moko changes, your eyes are

> able to deduce lines instead of straight block colour. And then there's a whole lot of other pattern that is inside and it gives you another level of meaning…as you get closer, those things become a bit discernible and you start to discern other things. And that therein lies the secret of moko. It is being able to have a multitude of layers of meaning that reveal themselves [more and more as you change]… your proximity to them.[27]

In describing the Whitmill tattoo as tribal, the artists I interviewed are identifying it as visually distinct from moko. Moko may be its model,[28] but the tattoo lacks moko's harmony and unity. In addition to disrupting conventional perspectives on the Whitmill tattoo as appropriative, the perceived visual distinctiveness of tribal designs has ramifications for the harm of cultural dilution, as discussed in the next subsection.

To the tā moko practitioners I interviewed, far more troubling than the circulation of Māori-inspired – but western – tattoo imagery, is the direct reproduction of existing moko. Copying an existing moko is a profoundly offensive identity theft. As Mohi explains, 'if somebody got this exact piece and put it on somebody else … that's when it starts getting a bit heavy … cus in essence you're stealing that person's whakapapa, you're stealing their genealogy and some of their stories.'[29] Francis explains that

[23] Interview with Pip Russell (n 8).
[24] Interview with Tim Hunt (n 13).
[25] Interview with Rangi Kipa (n 10).
[26] Ibid.
[27] Ibid.
[28] On the nature of commodity objects and the relationship between models and series generally: see Jean Baudrillard, *The System of Objects*, tr James Benedict (Verso, 1996) 147–77.
[29] Interview with Hohua Mohi (Marie Hadley, Rotorua, 14 February 2012) (interview and transcript on file with the author).

copying the moko on his body 'would be very insulting … I wouldn't like it if someone else had my moko … It's personal.'[30] He also queries why an appropriator would want to walk around 'with someone else's whakapapa on them' anyway because 'they've lost the whole essence of the reason why they're getting [moko].'[31] Nicholas was genuinely confused about why someone would be motivated to copy moko because they would 'not [be] connected to' the design on their body:

> Because for me I would need to be connected to it in some way. Not just because … it's beautiful and … it's just something that I've taken and I want it printed on. I wouldn't do that. Like if I saw somebody doing that … I guess I would be affected. And I would still ask, why, how are you connected with that, why would you want that? Why?[32]

In addition to interfering with the link between moko and identity, direct reproduction is problematic because it disrupts the balance between the physical and spiritual worlds. As Jack Williams explains, in 'a spiritual, cultural way you know, when someone takes something that don't belong to them, it has a repercussion in other [realms].'[33] Williams explains that during the Moko Renaissance, the inappropriate copying of ancestral mokos, such as those featured in the Goldie portraits discussed in chapter 6, caused harm:

> It was quite common that people were taking the old photographs, the old images…and copying straight off portraits of chiefs that lived, you know, 120 years ago … Well when that happened … those people paid a price cus they copied a signature of a chief that lived 120 years ago, which was information particular to that chief … depicting his mana, his cultural [role], his heritage, his genealogy – and so all these people in prison that were getting moko done, a lot of them went crazy and died violent deaths, you know. A lot of psychiatric sort of consequences … those things you don't hear about. [34]

He advocates education around the danger of copying ancestral designs for Māori and non-Māori alike as '[y]ou just can't take things.'[35] Nicholas further explains that she has experienced spiritual harm as an artist when the moko she creates is directly copied:

> there's another level to [appropriation] … and it goes a little bit deeper and that's that spiritual level where most of us are based because of our culture. So that's ingrained in us … the way I see my patterns is, every pattern that I have been taught, that I've been inspired to create, that I've collaborated with others, these have a whakapapa and genealogy. And so I

[30] Interview with Richie Francis (n 5).
[31] Ibid.
[32] Interview with Henriata Nicholas (n 7).
[33] Interview with Jack Williams (Marie Hadley, Tokoroa, 14 February 2012) (interview and transcript on file with the author).
[34] Ibid.
[35] Ibid.

> can trace a particular pattern that I've done on someone through my own genealogy of how my learning began. So in that genealogy of learning is that spiritual connection. And so it does hurt if that's misappropriated … It hurts me as an artist, but also hurts me too for my creative process and my spiritual connection to it. And you don't really talk about those things overly in terms of how am I going to make it right? Or how am I going to help to make it right? Can I help to make it right? ... it's a hard one to kind of negotiate through unless you have a really good understanding as an artist of your artform and how it sits within your identity … Your cultural identity, your personal identity, your creative identity.[36]

From the perspective of the tā moko artists I interviewed, appropriation can cause serious threats to the relationship between moko and individual identity and harm to artists and wearers. However in Whitmill's case, as he did not copy an existing moko, these harms are avoided. This disrupts the thrust of the reported cultural appropriation claim and shows how different constituencies within a culture can report on, and experience, appropriation differently. Conventional scholars, in advocating for reform, do not consider the possibility that some types of appropriation – such as seeking inspiration from moko in a general way – are unproblematic for some cultural members.[37]

I will now examine pākehā perspectives on appropriate uses of moko, to further contextualise how moko appropriation is understood differently by artists working in New Zealand to cultural claimants.

5.1.2.2 Pākehā practices and perspectives

My fieldwork with pākehā tattooists suggests that their understandings of permissible and impermissible uses of moko largely accord with the expectations of tā moko artists. Pākehā tattooists routinely produce Māori-inspired tattoo imagery, however, they self-report that they respect the strict prohibition on reproducing existing mokos. This suggests some existing dialogue across Māori and pākehā arts communities that should be taken into account by those asserting a need for additional legal protections. While cultural claimants might object to Māori-inspired tattoo art, pākehā tattooists regularly produce it, and this conduct appears to be, at least tacitly, authorised by tā moko artist perspectives on appropriation and cultural harm.

[36] Interview with Henriata Nicholas (n 7).
[37] Note that the Wai 262 Report does, however, differentiate between the appropriation of "taonga works" and "taonga derived works", suggesting a hierarchical conception of presumed harm: see *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011).

All of the pākehā tattooists I interviewed stated that they knew of the Māori prohibition on copying ancestral mokos, and tried to respect this rule in their own practice. Hunt, for example, explained that he avoids replicating patterns with cultural significance in his designs: 'traditional tattoo patterns – that's something that I wouldn't touch.'[38] Bauer similarly notes that pākehā practitioners should not 'make tattoos with meaning … It's not okay to do the old school moko.'[39] With the exception of tattooing ancestral moko and swastikas, Bauer will 'tattoo anything you want![40] Elgan explains that he often gets requests from 'primarily white [people] … with no knowledge or appreciation of the Māori culture' to copy someone elses' moko but that he has 'no interest in bastardising what is quite an important part of historical Māori culture.'[41] He explains that he only tattoos existing moko designs when a client comes in with a custom design created by a Māori that is culturally knowledgeable.[42] This suggests he is comfortable contributing to the creation of the work as a technician but not as an artist.

As part of their attempt to observe the prohibition on copying existing mokos, pākehā tattooists also demonstrated a clear preference to create tattoos devoid of whakapapa and without cultural meaning. Russell, who describes her work as 'swirly tribal' in style,[43] avoids using 'regional patterns' in her own work, particularly in the positive space because that's where she believes tribal variations and ancestry are often located.[44] Russell states that she is permitted to work with 'certain patterns' 'in the negative space,' such as a particular Ngāpuhi pattern that she finds aesthetically pleasing.[45] However, when using this pattern she is careful to not create work that looks 'too Māori, because I'm not Māori.'[46] Usually, she 'just make[s] up' her own 'fairly generic' patterns and uses natural shapes such as leafs in her designs.[47]

[38] Interview with Tim Hunt (n 13).
[39] Interview with Pete Bauer (n 19).
[40] Ibid.
[41] Interview with Cam Elgan (Marie Hadley, Wellington, 16 February 2012) (interview and transcript on file with the author).
[42] Ibid.
[43] Interview with Pip Russell (n 8). See 'Māori-Inspired Tattoos', Images 36–7, 41–2, xvi of this thesis.
[44] Interview with Pip Russell (n 8).
[45] Ibid.
[46] Ibid.
[47] Ibid.

Hunt also tries to create designs without embedded whakapapa information. While he does not categorise his work as kirituhi, a tourist form of moko I return to discuss in the next subsection, Hunt explains that the 'concept is sort of what I follow' as 'I have to do things differently because I'm not Māori myself.'[48] When Māori clients request designs with cultural meaning, Hunt refers them on to knowledgeable tā moko practitioners or practitioners from their tribal region.[49]

Bauer is careful to tell his customers that his Māori-inspired tattoos have 'no meaning.' [50] Yet, when asked what he would do if a customer requested extra lines so that the tattoo might be read as containing cultural meaning, he said he would 'take the piss out of…[them] and do it.'[51] For Bauer, business considerations affect the way in which he might package or describe a Māori-inspired design,[52] however, he is cognisant of the problematics of copying pre-existing imagery and claiming a direct connection between his work and moko. He states that he 'never did a facial Māori tatt, ever'.[53]

While they vary, pākehā tattoist perspectives suggest that design content is self-regulated in a manner generally perceived to respect Māori cultural interests. In particular, pākehā tattooists are aware of the prohibition on direct copying.[54] In these circumstances, the patterns of conduct that pākehā tattooists report seem to fit well with the expectations of tā moko artists, and suggest that the introduction of new legal norms to protect sacred imagery, such as out-of-copyright ancestral mokos, would simply continue extant practices within both industries. Nevertheless, there is a discernible conflict between what pākehā tattooists believe to be appropriate to create, and what cultural claimants state is an appropriate engagement with Māori culture. This tension has spilled over into daily life for two of my pākehā fieldwork participants, who noted that, on occasion, their Māori-inspired work has attracted negative comments from Māori. Pākehā tattooist Russell states that every now and again she gets

[48] Interview with Tim Hunt (n 13).
[49] Ibid. Hunt states that those who return, tend to prefer the 'contemporary' aesthetic of his style: at Ibid.
[50] Interview with Pete Bauer (n 19).
[51] Ibid.
[52] For an example of one of Bauer's Māori-inspired designs see 'Māori-Inspired Tattoos', Image 35, xvi of this thesis.
[53] Interview with Pete Bauer (n 19).
[54] Hunt refers to this prohibition as an 'unspoken code in New Zealand': Amber-Leigh Woolf, 'Tattoo Artists Calling for Right to Have Copyright on Their Work', *Stuff.co.nz* (online, 22 May 2018) <https://www.stuff.co.nz/national/103947902/tattoo-artists-calling-for-right-to-have-copyright-on-their-work>.

some ‘interesting reactions from Māori’ for her tribal designs.[55] One time after one of her screen-printing designs won a fashion award, she was physically attacked and ‘punched in the face by a guy’ who called her a ‘white imperialist.’ [56] She explains that ‘he thought what I was doing was Māori … Just because it was swirls and was blackwork.’[57] Buchanan similarly explained that he has ‘encountered racism [from Māori] being that I’m pākehā doing … Māori[-inspired] tattooing.’ [58] He finds this criticism disappointing given that

> I’ve done a huge amount of research and study in order to make sure what I’m doing is correct … and really I’ve put a lot of respect into tattooing, whether it be Japanese or Māori so that I’m, you know, I’m respecting my client, I’m respecting myself, I’m respecting the artwork.[59]

This suggests that Buchanan thinks his close study of moko should overcome any criticism of his designs as ill-informed or inappropriate, in circumstances where seeking inspiration from Māori imagery within the tattoo industry is normalised.

The social reception of the work of Russell and Buchanan suggests there is some community support for the position of cultural claimants and conventional scholars that seeking inspiration from cultural imagery and arts styles, as occurred in the instance of Whitmill’s tattoo, is problematic. However, the introduction of legal rights that prohibit this practice (at least without prior consent) would need to overcome existing norms that authorise this practice within two tattoo communities. From the perspective of the artists I interviewed, the cultural claims that object to Māori-inspired imagery operate most clearly as a performative claim that shores up cultural identity rather than a legal claim that supports the need for new legal rights. I will now consider tā moko artist perspectives on cultural harm in detail, to further develop this position.

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[55] Interview with Pip Russell (n 8). See ‘Māori-Inspired Tattoos’, Images 36–7, 41–2, xvi of this thesis.
[56] Interview with Pip Russell (n 8).
[57] Ibid.
[58] Interview with Elton Buchanan (Marie Hadley, Rotorua, 12 February 2012) (interview and transcript on file with the author).
[59] Ibid. Cf tā moko artist Taryn Beri who states that study, by itself, is insufficient to foster respectful engagement with Māori culture:

> If you are in the business of using Māori art and design in your work, and you do not have any Māori whakapapa, it is your duty and responsibility to learn properly (directly from a Māori expert, not a book, the internet or another non-Māori artist) and know well what you are doing, and show the proper respect and acknowledgement to the culture that the designs you are using belong to – Māori culture.

Taryn Beri, ‘The Difference Between ‘Kirituhi’ and ‘Moko’, *Taryn Beri: Tā Moko + Māori Art + Collections* (Blog Post, 10 April 2015) <http://www.tarynberi.com/blog/2015/4/10/the-difference-between-kirituhi-and-moko>.

5.1.3 Cultural harm in context

In the previous section I showed that, from the perspective of artists, the cultural appropriation complaint against Whitmill fails to read the artwork itself and the context within which it is created and managed with any subtlety, and in reality operates more as a performative claim than as a possessive one. In this section, I develop an alternative reading of the nexus between Māori-inspired imagery and cultural harm. I do this in the context of perspectives on harm in four key areas of inquiry: moko as a commercial service; tribal tattoos; the standard of work produced within the moko industry; and, financial harm.

5.1.3.1 Moko and commercial contexts

In conventional commentary, identification of the western bias of the law involves distinguishing cultural production from the commercial underpinnings of copyright principles.[60] Commercialisation is also discussed as a key source of cultural harm.[61] In combination, this discussion suggests the distance of tā moko from commercial practices, and that, to the extent that this relationship exists, it could be inherently problematic for cultural integrity. In this subsection I show that tā moko artists are creators of sacred culture *and* commercial service providers, and that they do not perceive the commercial dimensions of the artform to denigrate moko's power. While tā moko is a lucrative business,[62] the commercial demand for, and success of, skilled practitioners, has not resulted in the commodification of moko. As explained below, tā moko artists maintain moko's sacred features through their spiritual connection to the artfrom, creating a product that is unique to the individual and their whakapapa, and the performance of rituals, even when creating in settings similar to a western tattoo shop.

[60] See section 2.1.1.1 of this thesis.
[61] See section 4.3.3 of this thesis.
[62] While it varies on the type and size of the work, practitioners generally charge between $150-$200 per hour: see eg, Ngahuia Te Awekotuku and Linda Waimarie Nikora, *Mau Moko: The World of Māori Tattoo* (Penguin Books, 2007) 133. Kipa notes that new practitioners are attracted to the industry because they can make $200 per hour, and that he 'feels comfortable charging $150 per hour' because he worked for free for the first eight years of his career: Interview with Rangi Kipa (n 10). The commercial success of many tā moko artists today resonate with the high status and wealth enjoyed by tā moko artists in the past: see section 1.2.2.1 of this thesis.

Tā moko today is applied in a mixture of commercial and traditional settings.[63] Some artists work from fixed locations such as home studios or in shop fronts like pākehā tattooists. Others travel, applying moko on location in marae, or work at tattoo conventions or overseas in Australia or Europe where demand for moko is high.[64] Williams, for example, explains that he has worked on the spectrum from commercial shops where 'four hours later you walk out the door' to being in a meeting house with elders and family present, prayers and rituals followed and a feast after its completion.[65] While he prefers to work in more traditional settings because 'the energy is different', and the process is 'more intimate, more personal' instead of, 'I'm open at 10 o'clock',[66] he is adamant that it is 'the right of the tā moko artist' to conduct their business however they wish.[67]

While tā moko artists have their preferred ways of working, the moko produced in more westernised settings like tattoo shops are not perceived to be an inferior product or to distort culture. Part of the reason for this is that designing and applying moko is a personal service that emphasises the connection between the artist and wearer. This is reflected in the attention artists pay to relationship-building. As Nicholas explains, forging a collaborative relationship with her clients is vital so that 'the sharing of the story [that is incorporated into the moko] becomes easier'.[68] She explains her 'refined' design process:

> in my process … I talk to them about their reason why [they are getting a moko], then patterns sort of form, and then I just sort of go through the placement on the skin, and what would suit and what shapes would suit it, and then I fill it up with patterns pertaining to the story. And so I'll go through my creative process in that space and time, it could be a week, it could be a day, it could be a couple of months, and until I've got something that I like and that I can see how everything runs in together … Then I'd digitise it [the moko design], then flick them an email and say this is what this means, this is what this means, you know, this is what it's going to look like on your body. What do you think? Have you got any comments? Do we need to make any changes? And then we meet and then I'll draw it on their skin and

[63] Awekotuku and Nikora, *Mau Moko* (n 62) 130–2; Interview with Jack Williams (n 33).
[64] Awekotuku and Nikora, *Mau Moko* (n 62) 130–2, 134.
[65] Interview with Jack Williams (n 33).
[66] Ibid. He further explains:

> that's the whole thing about when you go into…a marae, and you're doing work on someone's face, and you've got 10 old ladies, 10 old dears, and they're chanting … and this is facial work and they wait for you to finish and then you have the big reveal, she sits up and she's almost born a new person … Everyone's crying like someone's born, like a baby's being [born], holding up this baby, you know, it's real … You can't recreate that here [gestures to the tattoo shop where the interview is taking place].

[67] Interview with Jack Williams (n 33).
[68] Interview with Henriata Nicholas (n 7).

> we'll say okay, is this really what you want? And then … I talk about costs after. It's all about the creation of the design.[69]

Williams also stresses the importance of the consultation process, stating that it is absolutely essential that the consultation is done right, 'so everything is in harmony' when the moko is applied, and no 'corruption' permeates the process.[70] His process includes educating his clientele about the artform and the significance of what they wear on their bodies: 'it's part of our integrity towards this art form that we've got to try and teach someone about the artform. No matter how much or how little they know about it … so before you design for them you … explain it before they get it done. Or explain it afterwards, you know?'[71] The practices of Williams and Nicholas suggest that the modernisation of the tā moko industry has not resulted in the 'upheaval of tradition'[72] or the obsolescence of authentic work.[73] The creation of moko is not an anonymous mass market transaction, regardless of any commercial features of daily practice.

In addition to the role of relationships in preserving the integrity of the artform, tā moko artists also engage sacred rituals during the moko's application, maintaining the artform's spiritual power. Prior to beginning their work, they will typically say a karakia or ritual prayer.[74] Williams explains that karakia 'opens up all those creative … pathways for me' and helps him connect with the person he is applying moko to.[75] Karakia also creates an environment 'where someone can really zone out, you know, and almost meditate, you know, so they can get through…this ordeal, that [rite of] passage.'[76] The maintainance of such ritual practices also, according to Kipa, drives the commercial demand for

[69] Ibid.
[70] Interview with Jack Williams (n 33).
[71] Ibid.
[72] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, tr JA Underwood (Penguin, 2008) Theses One.
[73] Jean Baudrillard, 'The System of Objects' in John Thackara (ed), *Design After Modernism: Beyond the Object* (Thames and Hudson, 1988) 171, 174. Note that the personal connection between artist and client contributes to understanding around why stylised mokos like those mentioned earlier in chapter 4 (namely, in the fashion and advertising industries) are perceived to be problematic. Stylised mokos are a form of anonymous commercial exchange that is not mediated through a Māori artist; the important relationship between artist and client is wholly absent.
[74] Awekotuku and Nikora, *Mau Moko* (n 62) 129–30.
[75] Interview with Jack Williams (n 33).
[76] Ibid.

moko.[77] Tā moko practitioners 'have a level of power to be able to engage people and … to be able to service their need for ritual.'[78] As Kipa further explains:

> in the last 10 years out of the last 20 years that I've been tattooing … I've come to recognise the privilege of my role. As more non-Māori started to come to me, I've started to realise that it's actually got very little to do about ethnicity but … it's got more to do with me being a … catalyst to generate a ritual … [When the client] comes to me … they don't want any old tattoo. They actually want to come and have a discussion and have an emotionally-laden issue that they've brought with them be manifested in something that's meaningful, in a meaningful way on them.[79]

Moko is thus identified as retaining its 'real power', in spite of its popularisation and circulation as a 'tourist product.'[80] I return to discuss perspectives on intercultural engagements in moko in detail at 5.2.2.

While the relationship between the power of moko and its commercialisation is not problematic from the perspective of the tā moko artists I interviewed, the pursuit of commercial opportunities by tā moko practitioners has been criticised on occasion by other cultural members. For example, in 2011 Kipa was commissioned to design a stylised rauru image that tells a Māori creation story for a new range of men's and women's underwear for the brand Jockey.[81] Kipa asserts his right to create such an image for commercial consumption: 'I haven't sold the integrity of the artform out. The work is good work.'[82] Yet his commission was criticised by Te Rara leader Haami Piripi, and others such as Ngāti Hauā artist Victoria Campbell who has stated that commercial uses of Māori motifs on products like underwear is distortive of culture.[83] While for Kipa, the cultural integrity of moko is ensured by the aesthetics and skill evident in his work, for others the association of moko with a commercial product

[77] Interview with Rangi Kipa (n 10). See also: 'a lot of Europeans now, or the tourists that are travelling the world are looking for experiences. They're looking for spiritual experiences and moko is one way they can go through an experience where they feel the spirit of the people … And so, yeah, I think that's one of the biggest reasons why they want moko is, apart from the aesthetics': Interview with Richie Francis (n 5).
[78] Interview with Rangi Kipa (n 10).
[79] Ibid.
[80] Barbara Sumner, 'From Their Reactions, I See Who People Really Are', *Independent* (online, 23 August 1999) <http://www.independent.co.uk/arts-entertainment/from-their-reactions-i-see-who-people-really-are-1114508.html>. Reggie Walker-Small, a tattooist of Māori and pākehā descent, also challenges that tourists cheapen moko, arguing that they have a positive impact on the industry: Emma Dangerfield, 'Tattoo Artist Takes Global View of Tribal Art', *Stuff.co.nz* (online, 18 September 2017) <https://www.stuff.co.nz/the-press/news/north-canterbury/96817349/tattoo-artist-takes-global-view-of-tribal-art>.
[81] See 'General Tattoo and Other', Image 80, xxiii of this thesis.
[82] Jonathan Milne, 'Wai 262 and Maori Ownership Rights', *Listener* (online, 1 October 2011) <http://www.noted.co.nz/archive/listener-nz-2011/wai-262-and-Maori-ownership-rights/>.
[83] Ibid; Victoria Campbell, 'Submission to the Waitangi Tribunal' (Document Q1, 2006) 3–4 discussed in Wai 262 Report (n 37) 41.

affects its mana. Cultural members can approach harm very differently. There are diverse cultural perspectives on innovation and the commercial practices that take place within the tā moko industry,[84] regardless of whether the dual role of artists as creators of sacred culture and commercial service providers is normalised within the industry. I return to consider contested perspectives on intercultural engagements at 5.2.

5.1.3.2 Threats to cultural integrity

In chapter 4, tribal tattoos are read as a class of artworks that might be misrecognised as the work of a tā moko artist, thus causing cultural dilution.[85] However, as noted earlier at 5.1.1, tribal tattoos are perceived to be visually distinct from moko. In addition to tribal being perceived to be a distinctly western tattoo style, inspired work is recognisable, according to tā moko artists, because it is inferior. As Kipa explains:

> I still look at people's work that try to tattoo Māori stuff overseas and it still looks fuckin' third rate! They just … don't see enough of our stuff, and they don't understand its relationship to carving, and they don't understand its relationship to weaving. And because they don't understand those relationships they don't, therefore, understand the design principles that are located within those other sister artforms which directly influence moko.[86]

Williams also finds Māori-inspired tattoos to be recognisable as the work of outsiders because of its poor quality.[87] He explains that even though he is frequently able to identify which tā moko artist's work has influenced the work of an outsider because tā moko artists are so distinctive in their styles, 'for me to my eye, it's like oh! It looks wrong, you know?'[88] He likened such work to 'a page of spelling mistakes' and notes that 'if it was a piece of sheet music, it wouldn't be very nice to listen to.'[89] Even in New Zealand, where pākehās have more exposure to Māori art and design principles,

[84] It is not clear whether these contested perspectives are markedly different to disagreements about authentic arts practice and commercialisation of art found in other artistic subcultures. See, eg, in the context of the graffiti subculture: Marta Iljadica, *Copyright Beyond Law: Regulating Creativity in the Graffiti Subculture* (Hart Publishing, 2016), particularly 270–2. Note also that the tension between the dual roles of creative artist and practical business person is also acknowledged in the instance of western tattoo: Clinton Sanders and Angus Vail, *Customizing the Body: The Art and Culture of Tattooing* (Temple University Press, 2008) 27.
[85] See section 4.3.3.1 of this thesis.
[86] Interview with Rangi Kipa (n 10).
[87] Interview with Jack Williams (n 33).
[88] Ibid.
[89] Ibid. I mentioned this analogy to pākehā tattooist Tim Hunt in the course of our interview. Hunt stated that this criticism could likely be directed at his own Polynesian-inspired designs because Williams has 'got much more deeper understanding than me … but I still stand by what I do … [because] I try to work within the

my informants reported that it was uncommon for misrecognition to take place. As Russell states, 'I think most Māori see Māori-inspired work and they know that it's done by a pākehā'.[90]

Fieldwork perspectives support the view that Māori-inspired work is unlikely to be mistaken for authentic moko and result in cultural dilution. However, tā moko artists did raise another potential influence upon cultural integrity that was not canvassed in conventional scholarship – the respect shown to the moko by its wearer. The mana of an individual moko is maintained through the spirituality and integrity of the wearer.[91] The reciprocal obligations of moko wearers to respect themselves and the art they wear on their body[92] suggests that harm, as manifested in local sites, is not simply an insider/outsider issue, but linked to the conduct of the individual moko wearer. As Williams notes, you have to be mindful about how you conduct yourself when you're wearing a moko.[93]

Tā moko artist perspectives on the reception of performer Robbie Williams and musician Ben Harper's mokos, applied in 1998 and 2000 respectively, are illustrative of the harm an individual can do to the spirit of the taonga.[94] Both Williams and Harper are non-Māori celebrities whose mokos were created and applied by renowned tā moko practitioners.[95] Williams' moko was created by Te Rangitu Netana and Harper's by Gordon Toi Hatfield, respectively. Williams' moko attracts significantly more critical comment than Harper's.[96] His reputation for debauchery and his 'bad boy image'[97] is likely relevant to perceptions of cultural harm.[98] As tā moko artist Williams

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knowledge that I do have': Interview with Tim Hunt (n 13). For a sample of Hunt's work see See 'Māori-Inspired Tattoos', Image 38–40, xvi of this thesis.

[90] Interview with Pip Russell (n 8).

[91] For example, 'being free of smoke, drugs, alcohol and violence': Te Mariki Williams in 'Tā Moko Rising' (2012) (Spring) *Te Karaka* 16, 19. See also, Awekotuku and Nikora, *Mau Moko* (n 62) 181. This requirement goes back to the ancestral story of Mataora that is described in section 1.2.2.1 of this thesis: see Alfred Gell, *Wrapping In Images: Tattooing in Polynesia* (Oxford University Press, 2004) 255. When Mataora returns from the underworld wearing moko, he promises not to mistreat Niwaraka and declares his intention to 'adopt in the future the ways of this world and its works': Hoani Te Whatahoro in S Percy Smith (ed), *The Lore of the Whare-Waananga, or, Teachings of the Maori College on Religion, Cosmogony and History* (Printed for the Society by T Avery, 1913) 72–3, 189–90 cited in Awekotuku and Nikora, *Mau Moko* (n 62) 14.

[92] Awekotuku and Nikora, *Mau Moko* (n 62).

[93] Interview with Jack Williams (n 33).

[94] See, 'Celebrity Moko Appropriations', Images 44–8, xvii of this thesis.

[95] For a photograph of Harper's moko being applied, see 'Celebrity Moko Appropriations', Image 47, xvii of this thesis.

[96] See, eg, Awekotuku and Nikora, *Mau Moko* (n 62) 222–3.

[97] See, eg, '"I Nearly Didn't Make It" Says Pop Star Robbie Williams', *7.30 Report* (Australian Broadcasting Corporation, 20 February 2014) <http://www.abc.net.au/7.30/content/2013/s3949124.htm>.

explains,'[i]t'd be off-putting if I was to see Robbie Williams in a video cavorting with you know some [laughs] … With some, you know, prostitutes or something like that, I think it'd be disrespectful and distasteful.'[99] By comparison, Harper has a much more conservative social profile. He is known for his charitable works, photographs of his moko are frequently accompanied by text that shows his understanding of his moko's meaning, and he is known to have an affinity with New Zealand.[100] As Nicholas explains, these factors tend towards showing that Harper has respect for the mana of the moko that he wears.[101] Williams confirms that Ben Harper carries 'what he's been given' well.[102] He exhibits the required 'sense of responsibility' towards the artform.[103] I will return to contested perspectives on outsiders wearing moko at 5.2.2.

The actions of moko-wearers might pose a greater threat to cultural integrity than Māori-inspired work that is recognisable as a poor, western imitation. This suggests the usefulness of localised, market-specific accounts of cultural harm to better understand the nature of cultural threats, and how they might best be redressed.

5.1.3.3 The harm of 'rubbish work'

In the previous section, I raised that maintaining the cultural integrity of moko is not simply an insider/outsider issue. This section continues that observation, noting that of great concern to tā moko artists is the quality of work created by other, less skilled, cultural insiders. Quality work is not guaranteed by a Māori ethnicity; care, skill, and training are required.

The tā moko artists I interviewed are highly motivated to produce quality moko because of its 'role in the resurrection of social, cultural, political and economic cultural integrity' in the Māori community.[104] Quality artistry is linked to cultural revitalisation and survival. As Kipa explains, creating '[r]eally good moko' is the 'big picture that we're after' as it 'restor[es] our native face back

[98] Interview with Henriata Nicholas (n 7). Williams is frequently photographed nude, with his moko visible: see, eg, 'Celebrity Moko Appropriations', Image 46, xvii of this thesis.
[99] Interview with Jack Williams (n 33).
[100] See, eg, Interview with Henriata Nicholas (n 7); Stephen Jewell, 'Ben Harper's Curious Kiwi Connection', *New Zealand Herald* (online, 28 March 2003) <https://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=3301034>.
[101] Interview with Henriata Nicholas (n 7).
[102] Interview with Jack Williams (n 33).
[103] Ibid.
[104] Interview with Rangi Kipa (n 10).

to our people again.'[105] In addition to securing 'cultural recovery', producing fine art is also a way of showing that 'our journeys are no less significant' than the journeys of ancestors.[106] Moko is a source of cultural pride and affirmation – a living art of a living people.

The importance of high quality work to tā moko artists means that the poor quality work of untrained artists, who also call themselves tā moko artists, is highly concerning. Kipa objects to the involvement of unskilled Māori practitioners in the industry: 'I fucking struggle with these guys that just have only learnt to wipe their arse and they're out there doing lines on people. And they're charging 200 bucks an hour, and they don't give anything back!'[107] He further explains:

> And I tell you what, when you see the way that some of them, if you go through Facebook and then look at some of the tattoos, fuck! Their work is shocking! And to say to me that that, oh because that person is Māori that gives their work some level of priority over somebody else who's spent a long time learning but is pākehā … I'm sorry. And in some ways that fights against my primary obligation back to my own community to cover their arses but I've been a practising artist for too long to see too many mediocre and bullshit practising artists, to not have any empathy for them … in our old days these people who are the arse end of practitioners ... wouldn't have been tolerated! […]
>
> I don't suspend my expectations of people doing the best that they possibly can…just because they are Māori.[108]

Williams also laments the existence of poor-quality work within the moko industry, stating that 'the standard's dropped quite a lot.'[109] He explains that when he sees moko in the street, if it's good he'll 'take a glance and I'll look away … cus I know that looks good. It's got nice flow, it's nice and harmonious. I might get a glimpse of some of the detail and appreciate it. But if I see bad work I just stare at it … When I see bad work … it just doesn't make sense … the images in there' don't go together.[110] He attributes the proliferation of poor quality work to the ease with which tattoo machines and equipment can be purchased through the internet: '[s]o over in Australia, you know, there might be a third generation Māori boy sitting in Perth or, you know, in Brisbane. Never been home [or] doesn't come home much, never been brought up in the culture, but they're doing tā moko.'[111] Such

[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Interview with Jack Williams (n 38).
[110] Ibid.
[111] Ibid.

practitioners are not taught traditional patterns and the mythological origins of different stories, impairing the quality of their work.

The comments of Williams and Kipa suggest that the problem of poor quality work is widespread. This is also affirmed by the fact that skilled tā moko artists are frequently approached to fix the poor quality work of other, less skilled, practitioners. Francis, for example, states that when he sees 'rubbish work' on his relatives he tries to fix it, '[e]ven though they've made their own uninformed decision to go to that sort of backyard scratcher.'[112] Kipa estimates that when he works in Australia, he spends up to 70% of his time fixing up poor quality work. He does not enjoy this type of work 'because it ruins my moko as well.'[113] However, he does it because he feels sorry for those whose bodies have been 'ruined' by inexperienced Māori-identifying practitioners.[114]

Kipa believes that the circulation of quality work can resolve the issue posed by poor-quality moko. To him, the more quality moko that is seen, the more discerning consumers will become:

> So the thing for me is that it's better for us to put up imagery that sets a standard in someone's mind. And they go fuck! That is really, really beautiful. It sits on the person really well, it just looks like it fits them. And in their mind it sets a standard and it sets a paradigm of what they're after for themselves … whatever we do it's got to be the best that you can possibly do for your recipient because when they get older their family and their grandkids are going to say … "Tell me about your moko, show me where I am koro." And if their fuckin' moko's a mess and it looks like shit, there's nothing more shameful.[115]

The proximity of cultural insiders to moko means that they are capable of causing the artform harm. This is unaccounted for in the conventional perspectives on cultural harm discussed in chapter 4.

5.1.3.4 Demand for outsider work and harm

In the previous subsections I showed that cultural harm does not necessarily result from the commercial dimensions of contemporary tā moko, that the cultural harm of dilution from the circulation of Māori-inspired tattoos is not perceived to be a live issue by tā moko artists, and that the actions of cultural insiders can be problematic for cultural integrity. In this subsection I explore whether the demand for Māori-inspired work is perceived by tā moko artists to cause financial harm.

[112] Interview with Richie Francis (n 5).
[113] Interview with Rangi Kipa (n 10).
[114] Ibid.
[115] Ibid.

This responds to the concern raised in chapter 4 around outsiders distorting the market for authentic cultural products, and affecting the income of insider artists.[116]

Tā moko artists show a degree of ambivalence around the work of outsider tattooists, particularly those based overseas, which provides insight into financial harm. Williams, for example, states that he 'doesn't really care what a tattoo artist sitting in Germany's doing, you know, copying our stuff … there's very little I can do to monitor […] [it anyway] …'.[117] Others are more concerned about developments in overseas markets. Francis, for example, attended a London tattoo convention in 2008 on behalf of the New Zealand Arts Council, to investigate whether it would be useful for tā moko artists to go overseas and educate European tattooists about the culture that sits behind moko. While he spoke to tattooists at the convention doing Māori-inspired work[118] about Māori culture,[119] which, from Francis' point of view, was essentially a polite request that the overseas tattooists 'leave it up to us and let us do the moko',[120] he does not describe their designs as offensive or financially harmful. Rather, Francis described the tattooists as 'top artists' who worked with a variety of styles and cultural imagery such as the 'koi carp fish', 'Chinese dragon,' and 'native American Indian' 'red, black and white eagles'. [121] He believes that to them, Māori-inspired work is just 'the flavour of the time.'[122]

Some tā moko artists might prefer that overseas tattooists don't create Māori-inspired tattoos, however, the popularity of this work is not necessarily perceived to cause financial harm to tā moko businesses. This is not because the overseas tattooists service a clientele outside of the reach of tā moko artists but because non-Māori are perceived to be discerning consumers who are willing to travel to New Zealand to receive moko. Williams is confident that if a consumer values authenticity

[116] See section 4.3.3.2 of this thesis.
[117] Interview with Jack Williams (n 33). Cf 'I don't have a problem with the commercial side [of moko], as long as we (Maori) are doing it. I do have an issue with other people overseas doing it': Rangi Kipa quoted in David Brooks, 'Maori Tattoos Getting Under the World's Skin', *Sydney Morning Herald* (online, 13 June 2010) <https://www.smh.com.au/world/maori-tattoos-getting-under-the-worlds-skin-20100613-y5hq.html>.
[118] Francis estimates that 75% of the tattooists at the convention had Māori-inspired work in their portfolio folders: Interview with Richie Francis (n 5).
[119] He found them 'very receptive' to learning about Māori culture 'so that they could back their work up a little bit more and get more depth in their delivery': Interview with Richie Francis (n 5).
[120] Interview with Richie Francis (n 5).
[121] Ibid.
[122] Ibid.

and wants the 'real deal,' they will seek out an experienced Māori practitioner.[123] Francis states that tourists come 'all the way to New Zealand to receive moko ... they come here and one of their bucket list or their checklist is to get a moko from Māori, you know. Rather than go somewhere in Amsterdam and get something that looks like a moko but it's not.' [124]

Kipa agrees that the availability of Māori-inspired work does not threaten the viability of moko businesses.[125] In his opinion, so long as tā moko artists continue 'developing our narratives and developing our stories and developing our meanings as we go along' the market for moko will remain strong:

> everyone else [other tattooists] ends up having to follow because we're the source [of moko] … If we're not the source then look we're in shit stream. But we are the source. We have people that come from overseas to get moko from us. They come all the way over here. I've had people from Italy, I've had people from the US, I've had people from all over come because they want to come to the source, you know … They don't want to go Amsterdam and get it from some Dutch dude that doesn't know diddly squat about diddly squat, you know? They come here because we're the source. This is where moko comes from and we're in control of moko and it's as simple as that. [126]

He reflects that he might have a different opinion about the financial harm of the demand for Māori-inspired work 'if we [tā moko artists] were sitting around here twiddling our thumbs and Amsterdam was busy, but it's not that way … We're busy.'[127] Western tattooists are perceived to service a different market to tā moko practitioners. This confines the putative financial harm of outsider work that is raised in conventional critiques.

Artist perspectives on financial harm, like the harm associated with commercialisation, the misrecognition of inspired-work, and threats to cultural integrity, showcase the way in which lived experience can disrupt the connections drawn in conventional scholarship around the availability of moko imagery and arts styles in the public domain and cultural harm. Law reform proposals do not speak to such perspectives. Outsider actions are not necessarily as problematic for creators of culture as they are for other community stakeholders. The significance of this gap is contextualised in chapter

[123] Interview with Jack Williams (n 33).
[124] Interview with Richie Francis (n 5).
[125] Interview with Rangi Kipa (n 10).
[126] Ibid.
[127] Ibid.

6 that uses historical perspectives to investigate the political stakes of cultural appropriation for cultural claimants.

In the next section, I move on from discussing the contested perspectives on appropriation and harm to considering the regulatory challenges that would need to be faced were law reform to take place, as is desired by conventional scholars. This section stresses the usefulness of local perspectives on cultural production for understanding the dynamism of the property at the heart of cultural claims, and the micro-issues that face the regulation of cultural imagery and arts styles in practice.

5.2 Regulatory challenges

In the previous section I showed how my informants classify cultural wrongs, including how as an outsider tribal tattoo, Whitmill's tattoo's status as both appropriative and harmful is disputed. There can be a gap between artists' lived experience of appropriation and the threats posed by different practices, and the boundaries drawn around culture iterated by cultural claimants and relied on in conventional scholarship. In this section, I conduct a reading of the fluidity of cultural practices and the world within which tā moko practitioners create their art in order to expose some of the issues that would need to be confronted if there were to be additional legislative oversight over cultural production. Engaging closely with cultural practices as they currently exist presents a more complex reading of moko as legal subject matter in ways that have not been fully appreciated in conventional literature. The task of law reform in practice suggests the need to consult the communities that law reform would affect.

I will firstly present perspectives around entitlements to create and receive moko, before outlining the rules that regulate the creative choices of practitioners, and how appropriation is managed in everyday life by practitioners. This discussion identifies the fluidity of cultural rules that shape production, the agency of artists, and local understandings of permissible versus impermissible intercultural dealings, as factors that are relevant to legislative drafting. The efficacy of law reform endeavours, in circumstances where legal ordering already exists in sites of creative activity, is separately considered at 5.3.

5.2.1 Entitlement to create moko

One of the objections to the Whitmill tattoo was that Whitmill was a 'Pakeha tattooist' who had 'never consulted with Māori' or 'had experience of Maori'.[128] This implies that Whitmill was not qualified or entitled to use moko to create a Māori-inspired tattoo, in breach of cultural rules. Protecting tā moko from appropriation in accordance with cultural rules around production would thus conceivably require a clear statement around who can and who cannot create moko or draw inspiration from existing imagery. As developed in this subsection, from the perspective of tā moko artists, cultural competency is related to, but not contingent on, the ethnicity of the practitioner as Māori. This means that regulating practitioner entitlement would need to rely on factors other than ethnicity.

Contemporary tā moko artists typically become culturally competent by developing their design base, technical prowess, and knowledge of 'Māori language, genealogies and connections to the land.'[129] This is often secured through informal tā moko apprenticeships[130] and/or experience in other Māori artforms.[131] As Hohua Mohi explains:

> you can read a million books and still not know what it's about, you know? To me, there's no academic way to study moko, hey. That's like, you're not really gonna learn how to paddle a canoe by reading about it … You're not gonna learn how to be the best fisherman if you don't get wet … it's all about the doing of it. And [with] moko … you have to live it, hey![132]

Language competency is perceived to be highly relevant to skills acquisition. As Francis explains, 'if you can speak our language then you can understand our culture. It's like a lot of cultures, if you know their language then you can understand their culture a lot better. And a whole lot of our stuff, our arts, comes out of our language as well.'[133] Nicholas similarly notes the importance of 'a knowledge base of the word moko' because moko is 'a language based artform.'[134] Once the requisite

[128] Ngahuia Te Awekotuku quoted in 'Tyson's Moko Draws Fire from Maori', *New Zealand Herald* (online, 25 May 2011) <http://www.nzherald.co.nz/news/print.cfm?objectid=10727836>.
[129] Interview with Richie Francis (n 5).
[130] Awekotuku and Nikora, *Mau Moko* (n 62) 123–4.
[131] For example, Rangi Kipa went to carving school and developed his knowledge base in wood carving, before 'jump[ing] sideways into a different media' and taking up tā moko*;* Interview with Rangi Kipa (n 5). See also Awekotuku and Nikora, *Mau Moko* (n 62) 118–20.
[132] Interview with Hohua Mohi (n 29).
[133] Interview with Richie Francis (n 5).
[134] Interview with Henriata Nicholas (n 7).

degree of proficiency is achieved, practitioners exhibit 'the ability to … pull things together or to take things apart' and manifest cultural 'notion[s] of accountability' and reciprocity.[135]

While fieldwork insights suggest a need for immersion in Māori culture to achieve cultural competency in tā moko, they do not of themselves suggest that Māori ethnicity determines entitlement. When I asked tā moko practitioners whether a cultural outsider could create moko, their responses were equivocal. Francis believes that 'a non-Māori would find it hard to call themselves a moko artist because he [sic] doesn't understand fully the culture.'[136] Williams states that even if a pākehā had the same training and knowledge as himself, he would classify their work as 'moko-inspired'.[137] He states that there's 'varying degrees' of ritualisation that mark moko's production.[138] Presumably, he sees such work as ranking lower on this scale than his own.

While Francis and Williams' perspectives suggest that ethnicity is key to (withholding) cultural competency, other fieldwork participants conceded the possibility that a cultural outsider might possess the requisite qualities to competently create moko. Kipa believes it is 'fucking fraud' to 'use the imperatives of ethnicity as the guiding factor about how to judge a person.'[139] He states that it is possible for non-Māoris to develop the requisite degree of proficiency: 'there may be somebody out there that exists within the community, and that has a relationship with the Māori community, that is respected by the Māori community.'[140] However, he does not 'imagine that there's many of them if there is.'[141]

[135] Interview with Rangi Kipa (n 10).
[136] Interview with Richie Francis (n 5).
[137] Interview with Jack Williams (n 33).
[138] Ibid.
[139] Interview with Rangi Kipa (n 10).
[140] Ibid.
[141] Ibid. German tattooist Volker Kloth is the only tattooist I identified in the course of my researchthat might have the requisite degree of skill and cultural knowledge to be considered a tā moko practitioner, despite his non-Māori ethnicity. Kloth claims to have undertaken an apprenticeship with tā moko practitioner Ahahi Colin Taylor (his wife's adoptive father) and to have permission to create moko: see Marisa Kakoulas, *Black Tattoo Art: Modern Expressions of the Tribal* (Edition Reus, 2009) 414. I have not identified any commentary that contradicts Kloth's self-identification.

Nicholas states that she would 'find it quite funny' if a pākehā described their work as moko and was making 'that connection' in their work. [142] She said that, 'I'd go, okay! Then tell me how you're related to that. You've got to be related to the work, in some form.'[143] However, she does note that historical use of moko patterns might result in an individual having a legitimate claim to using such patterns in their work.[144] Nicholas explains that during the Moko Renaissance 'some really, really, good artists, non-Māori artists' 'who have worked in the tattoo industry for a number of years' played an important role in revitalising moko.[145] They 'were the first ones that our people went to in terms of … getting work done [saying] I want you to do this.'[146] She states that 'for them it was like a breaking down of [cultural boundaries], or breaking through' and that unless they were 'given permission by the people to do that pattern, I guess they wouldn't touch it. But they were, and they've done those patterns for a number of years.'[147] While such instances were instigated by Māori, rather than driven by a pākehā's self-identification as a tā moko artist, they show how cultural competency to create moko is more complex than simply a matter of birth. Perspectives on entitlement complicate the ease with which the artist beneficiaries of the proposed new rights could be ascertained.

5.2.2 Entitlement to wear moko

Drawing boundaries around acceptable cultural practices would also require consideration of the extent to which outsider engagement with moko as a client of a tā moko artist, is permissible. As discussed in chapter 4, another criticism of Whitmill's tattoo design was its placement on the body of Tyson, a non-Māori.[148] There is a view that moko is only to be worn by cultural insiders and that outsider engagement is 'rude,' disrespectful and a bastardisation of Māori spirituality and culture.[149] Yet, the hard line that is drawn against outsider engagement in such commentary rarely accounts for

[142] Interview with Henriata Nicholas (n 7).
[143] Ibid.
[144] Ibid.
[145] Ibid. Wellington tattooist Roger Ingerton, who is pākehā, is a notable example. Ingerton was approached by a number of Māori to tattoo facial moko in the late 1970s. He did his last facial moko in 1980 – at this time, the tā moko industry had sufficiently grown that he was able to refer clients on to Māori practitioners: Awekotuku and Nikora (n 62) 92.
[146] Interview with Henriata Nicholas (n 7).
[147] Ibid.
[148] Ngahuia Te Awekotuku quoted in 'Tyson's Moko Draws Fire from Maori' (n 128).
[149] Kat quoted in Karen Hudson, 'Ta Moko (Maori Tattoo) When Imitation is the Sincerest Form of Insult', *Tangatawhenua.com* (online, 2 February 2012) <http://news.tangatawhenua.com/2012/02/ta-moko-maori-tattoo-when-imitation-is-the-sincerest-form-of-insult-2/>.

the fact that, as Awekotuku recognises, 'Maori artists are sharing this art – they are marking the foreign bodies.'[150] My fieldwork identified that for many tā moko artists, intercultural engagement is perceived to be a permissible part of their day to day work. This divergence in perspectives on permissible practices would need to be confronted by regulators, particularly in circumstances where my research suggests that artists would resist interference in the running of their businesses.[151]

My informants said that it is the practitioner's prerogative to apply a design to an individual, whether they are Māori or not. As Nicholas states, 'I do moko on all different types of people.'[152] When asked if she sees moko as just for Māori people, she responded, '[n]ot the moko that I do, no.'[153] The most important thing to her is that the design 'relates to' the recipient and translates aesthetically 'on their skin.'[154] Their ethnicity is irrelevant. Williams, who also tattoos non-Māori, states 'I treat everyone the same, you know. Just because this person's not Māori doesn't mean I'm going to give them the budget, sort of [job]! You know, there's a standard, you know, I want every piece to look good.'[155] Similarly, Kipa notes that his integrity, motivation and practice 'doesn't change on the basis of somebody's ethnicity.'[156] However, he recognises that he has 'differing responsibilities when it comes to my own community, when I'm doing moko amongst my own people…but you know, that's because there's a different paradigm there … But that doesn't stop me from doing moko, from telling the same stories with the same symbols when I'm tattooing pākehā people.'[157] Elton Buchanan, a pākehā tattooist, rather cynically observes that '[e]very Māori tā moko artist that I know is quite willing to tattoo tourists … You know, because that dollar's there.'[158]

The key controversy to emerge from fieldwork interviews was not whether tā moko practitioners tattoo pākehās and tourists at all, but whether they conceptualise the imagery they apply to cultural

[150] Ngahuia Te Awekotuku, 'The Rise of the Maori Tribal Tattoo' *BBC* (online, 21 September 2012) <http://www.bbc.com/news/magazine-19628418>.
[151] See section 5.2.3.1 of this chapter, below.
[152] Interview with Henriata Nicholas (n 7).
[153] Ibid.
[154] Ibid.
[155] Interview with Jack Williams (n 33).
[156] Interview with Rangi Kipa (n 10).
[157] Ibid.
[158] Interview with Elton Buchanan (n 58).

outsiders as sacred or a tourist artform. This turns on whether they use the term "kirituhi" to describe the work they do on non-Māori. Kirituhi is a modern term coined by the Te Uhi a Mataora Committee,[159] an arts collective of tā moko practitioners, that means 'skin art'.[160] It refers to designs created by tā moko practitioners that are regarded as appropriate for outsiders as they are devoid of whakapapa and lack spiritual power.[161] Tā moko practitioner Francis, who uses the term kirituhi, explains that kirituhi 'looks like moko but it's not quite moko;' it is simply 'writing on the skin with Māori motif.'[162] Francis states that when he designs kirituhi he uses generic imagery, lots of korus, and none of the tribal grouping patterns because the recipient does not 'have the genealogy that connects them to those patterns.'[163] I return to consider perspectives on the geographical distinctiveness of moko patterns at 5.2.3.1. For Francis, his design composition changes depending on the ethnicity of his clients.

While secondary research suggests that, like Francis, many tā moko practitioners find the concept of kirituhi useful as a design boundary,[164] the other tā moko practitioners I interviewed do not use the term kirituhi to describe their own work for non-Māori clientele, suggesting the potential for contestation, were a similar discrimination relied on when regulating intercultural dealings. Williams states that 'when I explain something to a client whether they're non-Māori or Māori, everything to me is tā moko.'[165] Mohi also states that he 'doesn't believe in' kirituhi as 'to me there's only moko. You know, it doesn't matter who you are and where you're from…there's only moko.'[166] He explains:

> moko's only job is to tell the person's story. They just read everything that's on the inside that makes that person up and then brings it to the outside, it's an outward display of what already belongs on the inside of the person. So it doesn't matter where you're from, or who you are, if you've got a story to tell, then moko does that. There's no kirituhi to me … everyone's got a mountain, everyone is tied to the land that they're from … And that's my true belief of what

[159] 'Committees: Te Uhi a Mataora', *Te Uhi a Mataora Committee* (Web Page) <https://www.maoriart.org.nz/committee.html>. Note that fieldwork participant, Richie Francis, is a committee member.
[160] Interview with Richie Francis (n 5).
[161] See, eg, tā moko artist Turumakina Duley quoted in Awekotuku and Nikora, *Mau Moko* (n 62) 135.
[162] Ibid.
[163] Ibid.
[164] For example, Mark Kopua,Turamakina Duley, and Taryn Beri: see, eg, Awekotuku and Nikora, *Mau Moko* (n 62) 135; MokoAke, 'Kirituhi' (Facebook, 28 May 2018) <https://www.facebook.com/MarkKopua/>; Beri (n 59).
[165] Interview with Jack Williams (n 33).
[166] Interview with Hohua Mohi (n 29).

> moko is. You can't call it something else, you know … You can call a cat a dog but it's still going to miaow, you know?[167]

Nicholas also sees the distinction between moko and kirituhi as purely conceptual. She states that kirituhi 'looks like moko, smells like moko, is recognisable as moko, but isn't moko because of the skin it sits on – namely non-Māori skin.'[168] As a specialist, for her moko is 'about the artform first' and so she questions why she should call it anything different – 'it's my art form.'[169] She finds it

> interesting that Māori artists would make a distinction … I guess it's just their knowledge background and how they've been brought up. Because I've been brought up with there not being a distinction … I have mixed blood so why would I distinguish [my work based on ethnicity and] make a barrier between both sides of myself?[170]

Kipa similarly explained:

> I don't change my colour or I don't change my language of conversation just because you're a pākehā and a person over there is Māori ... of course, if they speak Māori then we can speak Māori and that's fine, but it doesn't change [my work]. So the transmission of knowledge might be in a different language but it doesn't change my motivations ... [or] the meaning. I can draw the same meaning out in the English language.[171]

For those artists that reject the distinction between moko and kirituhi, there is a belief that the term is used by other practitioners to foster an image of legitimate practice because, as Nicholas informed me, 'you cop a lot of flack for lots of different things' as a tā moko artist.[172] Kipa states that using the word kirituhi to describe your work allows practitioners to 'avoid the politics of the debate' about the appropriateness of moko for non-Māori.[173] Williams similarly recognises that kirituhi exists to 'give[] us permission to work outside of our culture. So when our own ask why are you up in Germany doing this work? Why you doing it on them? We can turn around and say, we're not doing moko! We're doing kirituhi! [laughs]'.[174] In Mohi's opinion, '[k]irituhi is a phrase that they coined up in order to make non-Māori be able to get moko …'.[175]

The usefulness of the concept of kirituhi is contested. However, regardless of what label artists use for tattooing cultural outsiders, moko is not as closed to outsider engagement as might be presumed from

[167] Ibid.
[168] Awekotuku and Nikora, *Mau Moko* (n 62) 135.
[169] Interview with Henriata Nicholas (n 7).
[170] Ibid.
[171] Interview with Rangi Kipa (n 10).
[172] Interview with Henriata Nicholas (n 7).
[173] Interview with Rangi Kipa (n 10).
[174] Interview with Jack Williams (n 33).
[175] Interview with Hohua Mohi (n 29).

objections to the celebrity tattoos of individuals like Mike Tyson and Robbie Williams, discussed in chapter 4. Cultural claimants might object to tā moko artists working with cultural outsiders, yet this practice is normalised within the tā moko industry, complicating the regulation of this aspect of practice.

5.2.3 Regulating design content and composition

5.2.3.1 Internal regulation of moko production

The dynamism of tā moko further complicates the task of regulating culturally permissible designs. As Mohi explains, moko is 'very organic'; it is a 'living breathing thing.'[176] While there are clear norms prohibiting moko's direct reproduction,[177] around who may receive facial moko,[178] and where moko is placed on the face for males and females,[179] practitioners perceive few, if any, restrictions around design content and composition. As the appropriateness of a moko's composition is not measured against strict parameters, legislating (and enforcing) clear cultural rules around transgressive conduct would likely prove difficult in practice.

The lack of rules around artistic production is illustrated by the tangential nature of an individual's tribal affiliations to the imagery they wear on their body. Patterns are not heraldic devices.[180] Some tribes have 'signatures' and might use or combine patterns in a certain way, mostly due to the influence of the distinct, localised style of carving schools,[181] but it is not possible to definitively 'read' a moko for tribal information.[182] When, for example, viewing a puhoro '[y]ou can have an

[176] Ibid.
[177] See section 5.1.2.1 of this chapter.
[178] See, eg, Interview with Richie Francis (n 10). See also section 1.2.2.1 of this thesis.
[179] See section 1.2.2.1 of this thesis. See also 'Moko', Image 11, x of this thesis.
[180] Interview with Hohua Mohi (n 29); Interview with Henriata Nicholas (n 7); Interview with Jack Williams (n 33); Te Rangi Hiroa, *The Coming of the Maori* (Māori Purposes Fund Board, 1949) 299; Awekotuku and Nikora, *Mau Moko* (n 62) 68–70.
[181] Carving schools have distinct, localised styles. During the Moko Renaissance whakairo was a key source of inspiration for moko: Interview with Jack Williams (n 33).
[182] As Mohi explains, 'contrary to popular belief, moko is not a hieroglyph hey ... So it tells a story but really the story that a moko says is pretty much a contract of agreeance between the designing it and the person receiving it and that persons ancestors': Interview with Hohua Mohi (n 29). See also Interview with Jack Williams (n 33); 'Māori Markings: Tā Moko' (2019) 215 *Artonline* <https://nga.gov.au/artonline/215/default.cfm#tamoko>. Cf tā moko artist Mark Kopua who states that he is able to read a moko for tribal information. However, he bases this off the fact that there very few tā moko artists who do facial work, their personal styles are recognisable, and he knows what regions they typically work in, facilitating an educated guess about the identity of the moko wearer: Mark Kopua in 'Carved in Skin', *Tales from Te Papa* (Episode 84, Gibson Group, 2009) <https://www.tepapa.govt.nz/discover-collections/read-watch-play/maori/ta-moko-maori-tattoos-history>.

inkling as to where it's from', but 'you've really got to take into factors other things' such as '[w]ho trained the person that did it'.[183]

The artists I interviewed reported that artists are quite distinctive in their styles, and that they usually develop 'their own generic based pattern [as] they have their own take on the artform' rather than simply draw on traditional imagery.[184] As Nicholas reflects:

> there is a myriad of patterns that you draw from that are traditionally based. But as an artist, you are always wanting to create new and different and slightly your own sort of take on it. So to a certain degree it's almost always stories that we get from different people to make up their design, you change those patterns. So you do have a base … [but] it's a really small, thin base. But then you have this wider perspective of all the other patterns that you draw from and so it's kind of traditionally inspired rather than traditional.[185]

Artists also vary considerably in their approach to design. Some artists, like Kipa, consider themselves 'purists' and have built a reputation around specialising in older styles.[186] Other artists prefer to push traditional boundaries by, for example, using colour in their designs.[187] While he does not himself use non-traditional colours, Kipa applauds those that do: 'even now our people are getting into colour. Because they've got sick to death as practitioners of just doing black and white. So you know, we're starting to actually colonise the coloniser![188] Attitudes to "fusing" moko with other cultural tattoo imagery also vary. One of my fieldwork participants, Mohi, is reluctant to mix moko motifs with outsider imagery, such as Polynesian patterns from Samoa or Tonga, because his knowledge and training is all in moko and 'a line's not just a line' with this type of tattooing – it is important to keep spiritually 'safe'.[189] Conversely, Williams, who is of mixed Polynesian descent, states that he is adept at fusion, although he usually keeps the essence and the inspiration of his work mostly Māori.[190] Williams sees the fusion of moko and other Pacific tattooing traditions as natural given the genealogical and historical connections between Polynesian peoples.[191]

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[183] Interview with Hohua Mohi (n 29).
[184] Interview with Henriata Nicholas (n 7).
[185] Ibid.
[186] See 'Moko', Image 21, xiii of this thesis.
[187] Interview with Rangi Kipa (n 10).
[188] Ibid. See Hohua Mohi's use of a bright sky blue in one of his mokos: 'Moko', Image 14, xi of this thesis.
[189] Interview with Hohua Mohi (n 29).
[190] Interview with Jack Williams (n 33).
[191] Ibid.

The agency of tā moko practitioners in developing their own styles signals the dynamism of moko and the likely difficulty in discerning transgressive designs. According to Nicholas, the dynamism of moko complicates any attempts at internal regulation because patterns 'are just recurring and changing and multiplying.'[192] She asks, 'how do you manage that?'[193] Moreover, she questions how 'do you manage even the artists themselves, Māori artists? How do you manage them and say well actually you can't do that pattern on that, because it's actually a chin moko, and you can't do a chin moko on that …'[194] Nicholas explains that the arts collective Te Uhi was set up to 'to kind of facilitate that [management] process', however:

> nothing really has been formulated to directly relate it into copyright and directly say well okay, these patterns are from this tribe, these are the artists that connect to that tribe so if there [are] any patterns that you see outside of that, we need to manage that relationship then these are the people that you need to call on. But even for our sub-tribe back home, there's Ngahuia [Te Awekotuku], my brother and myself who are the foremost artists in our hapū [and] we don't even get contacted when there's anything to do with moko in our sub-tribe. Or anything related to the appropriation of taonga that was created for moko. So it's kind of a funny thing …[195]

The agency of artists also raises the possibility that they might resist the regulation of their practices by a centralised cultural authority, were this reform introduced alongside new or better statutory rights as is recommended by the Waitangi Tribunal.[196] Kipa states that no cultural authority will ever be able to 'steal the power away from the practitioner' and tohunga will not 'give a fuck about what any supposed authoritative body says' because '[w]e are the caretakers of the artform.'[197] Not all stakeholders see external regulation of cultural artforms as needed or desirable, complicating future attempts to introduce new legal rights, even where they purportedly benefit artists as creators of culture.

5.2.3.2 Porous cultural boundaries and competing entitlements

As discussed earlier in this chapter, artists perceive moko to be visually distinctive from Māori-inspired and tribal imagery. While it might be easy to discern whether a tattoo is a moko or not, it is a

[192] Interview with Henriata Nicholas (n 7).
[193] Ibid.
[194] Ibid.
[195] Ibid.
[196] See section 4.4.1.1 of this thesis.
[197] Interview with Rangi Kipa (n 10).

comparatively more difficult task to assess whether the individual components that make up a moko, such as curvilinear motifs like the koru, are culturally distinctive. This is because many cultures use spiral forms in their art.[198] It may be that there are competing entitlements to ostensibly Māori cultural forms, complicating the task of fencing off the cultural imagery and motifs associated with moko as the exclusive property of Māori for the purposes of law reform.

In rejecting that Whitmill's design was appropriative, some of the pākehā fieldwork participants commented on the visual similarity of curvilinear Māori motifs like the koru and the plant-based spiral motifs of other cultures. In Buchanan's opinion, there is overlap between moko's curvilinear design forms, cultural imagery from the Marquesas and Tahiti, Celtic knotwork, and traditional Nordic tattoos that all use spirals and other 'natural occurring images that have been put together.'[199] Russell similarly noted the commonality of curvilinear linework in art around the world that is inspired by 'plants that unfold in that sort of spiral form'.[200] She further identified that Tibetans and Thais have 'very similar' patterns to tā moko, as does 'ancient European architecture.'[201] This similarity leads Russell to comment that 'you're dreaming if you think you can copyright the koru.'[202] The Māori practitioners I interviewed tended to agree with the existence of competing entitlements to some of moko's forms. Kipa explains that Māori are 'not exclusive owners of spirals.'[203] Williams agrees, '[i]t's not mine. I didn't invent a koru … I didn't invent the frond …'.[204] Mohi posits a close connection between cultural motifs and the natural world that could also complicate an ownership claim: '[e]very motif, every part of moko' was 'grabbed from the universe that the person that did the moko saw … all the patterns are from the earth that they saw and looked at.'[205] Cultural outsiders

[198] See, eg, 'I tend to use the spiral a lot … I think that's an eternal symbol, encompassing all different cultures all over the world from ancient times, so I don't feel it's a rip-off for me to use that symbol': Leo Zulueta quoted in Margot DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (Duke University Press, 2000) 87. See also Interview with Pip Russell (n 8); Interview with Elton Buchanan (n 58).
[199] Interview with Elton Buchanan (n 58).
[200] Interview with Pip Russell (n 8).
[201] Ibid.
[202] Ibid. I previously discussed debates around the ownership of the koru in appropriation discourse at 4.3.3.1.
[203] Interview with Rangi Kipa (n 10).
[204] Interview with Jack Williams (n 33). Williams regards Māori ancestors as the creators of this artform.
[205] Interview with Hohua Mohi (n 29). This relationship also informs the perception that such forms are in the public domain: see, eg, Kelly Buchanan, *New Zealand: Māori Culture and Intellectual Property Law* (Report, Law Library of Congress, 2010) 7; Susy Frankel and Megan Richardson, 'Cultural Property and "the Public Domain": Case Studies from New Zealand and Australia' in Christoph Antons (ed), *Traditional Knowledge,*

could be independently inspired by similar naturally occurring shapes. The possibility of competing cultural entitlements over common moko motifs also challenges the presumed solidity of the property at the heart of cultural appropriation claims.

In this section, I considered some of the site-specific problematics of regulating moko. However, even if the above-discussed complications were successfully navigated, the utility of introducing the new legal rights that are sought is not assured. As such, I will now consider perspectives on law and legality in the moko industry and the western tattoo subculture, to better grasp the regulatory power of the formal law in these sites and speculate on the challenges that might be faced if new legal norms were transplanted into these communities.

5.3 Perspectives on law and legality

So far in this chapter, I have shown that the lived experience of artists can provide insight into the nuances that sit behind cultural disputes that are obscured in the essentialist framings of cultural claims and conventional IP scholarship. In this section, I extend the focus on lived experience from the insights of artists into appropriation, cultural harm, and cultural production, to the lived experience of law. I consider the ways in which legal meaning-making outside the formal legal sphere could disrupt the power of the statutory rights proposed by conventional scholars. Conventional scholarship assumes that law reform to better protect cultural imagery and arts styles is workable, without considering how receptive the relevant communities might be to greater regulation of their art.[206] In communities ordered by informal sources of legality, positive law can be a weak regulator of creative practices.[207]

In this section, I will firstly consider how tā moko artists respond to and manage appropriation, before examining their attitudes towards the rights they currently hold as copyright owners, and how they

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Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region (Kluwer Law International, 2009) 275, 286.

[206] See section 2.3.1 of this thesis.

[207] See, eg, in the fashion and tattoo industries: Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92(8) *Virginia Law Review* 1687, 1687–1777; Aaron Perzanowki, 'Owning the Body: Creative Norms in the Tattoo Industry' in Kate Darling and Aaron Perzanowski (eds), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press, 2017) 89, 89–177.

protect their art from direct copying outside of the formal legal sphere. This discussion prompts reflection upon whether new rights would be empowering for beneficiaries or met with resistance due to extant (non-formal) legal norms. I will then shift the focus to pākehā tattooists as would-be appropriators, identifying that the community preference for self-governance has significant potential to disrupt the conventional presumption that greater legal inclusion would result in more desirable practices.

5.3.1 Responding to moko appropriation

As noted at 5.1.1, tā moko artists do not tend to regard Māori-inspired imagery, like the tattoo Whitmill created, to be appropriative. Yet, the direct copying of existing moko is perceived to be highly problematic.[208] In this subsection, I discuss responses to direct copying in order to gauge the extent to which tā moko artists use, or are desirous of, the protections of the formal law.

The tā moko artists I interviewed have had their work appropriated, some by cultural insiders and others by outsiders. As Kipa observes, 'Māori people are just as capable of copying Māori designs or anybody elses' designs.'[209] Yet, despite the high incidence of appropriation within the industry and outside of it, tā moko artist responses to appropriation rarely involve assertions of legal rights, suggesting that conflict is mostly managed and resolved outside of the formal legal sphere.[210] No copyright infringement actions have been commenced by a tā moko artist against another artist or commercial appropriator. Tā moko artists are typically litigation-averse, and litigation is not perceived to be worthwhile particularly for artist-to-artist infringement. When presented with the hypothetical situation of his work being copied, Williams stated that he 'wouldn't give them [the appropriator] a [laughs], you know, I want to see you in court!'[211] The reluctance of artists to engage with the formal legal sphere is not only a matter of IP ownership infringing community norms, which is discussed in the next subsection, but also a pragmatic understanding of the extent of appropriation within the tattoo

[208] See section 5.1.2.1 of this chapter.
[209] Interview with Rangi Kipa (n 10).
[210] Note, however, that Kipa has threatened a competitor with legal action for falsely claiming to have been the first person to produce coloured resin tiki, an artform he pioneered. That action did not proceed to court: see Interview with Rangi Kipa (n 10).
[211] Interview with Jack Williams (n 33).

industry. As Kipa explains, when the Moko Renaissance was in its infancy, some of the founding tā moko artists sat down and discussed the politics of IP rights, but '[w]e realised that if we went down that litigious path we were never going to win. We were just going to spend millions of dollars and there's no way to prosecute everybody.'[212]

Rather than rely on any legal rights they might hold as copyright owners when their work is copied,[213] tā moko artists are likely to do nothing or discuss the issue informally with the appropriator. Francis states that in the past when his work was copied by a Māori organisation, he just 'let it go' because he 'wasn't up to date with the legal rights and all that back then.'[214] However, he reports that today he would be more active in verbalising his objection and 'shutting it [the infringement] down.'[215] He states that he'd 'try and speak up about it' but he would still avoid 'big, long lawsuits and everything like that.'[216] Nicholas also states that dialogue is her preferred response to appropriative conduct, explaining that when her cousin appropriated one of her screen printing designs and had it tattooed in Tahiti, she would have liked the opportunity to say, 'maybe we should create something for yourself if you want it done.'[217] When the appropriator is also a tā moko practitioner, sanctions are likely to be imposed in addition to dialogue, such as negative gossip. As Williams states, 'word would get around'.[218] Gossip appears to have prohibitory force given that this market is small and geographically bounded and tā moko artists 'don't want to be seen to be copying'.[219] Regardless of who commits the transgression, the formal IP rights of artists as creators of original artistic works are not leveraged as part of the resolution of disputes. I return to consider attitudes towards copyright ownership and the relevance of the default ownership rules around commissioned art to ownership norms, in the next subsection.

[212] Interview with Rangi Kipa (n 10).
[213] I return to discuss copyright ownership, and in particular, the operation of the comissioning rule and its relevance to custom tattoo imagery at section 5.3.2 of this chapter.
[214] Interview with Richie Francis (n 5).
[215] Ibid.
[216] Ibid.
[217] Interview with Henriata Nicholas (n 7).
[218] Interview with Jack Williams (n 33).
[219] Ibid.

Clients regularly request tā moko artists to copy existing moko onto their bodies. As Mohi explains, the extent of appropriation requests is symptomatic of the tattoo industry generally:

> Some people will look and see what they like the look of and they want it. And pretty much, [with] tattoo and the tattoo world, that's how tattoos are. You walk into a shop and you see something you like and you take it. You know? ... Usually the people that do it are people that don't really know [about the significance of personalised imagery] and haven't been told about what things are … oh this is the world of wants, hey. This is the world of I get that [points at art on the wall].'[220]

The normalisation of this conduct in the tattoo industry at large is at odds with the views of tā moko artists discussed earlier, namely that directly reproducing moko is problematic.[221] As such, while averse to formal legal interventions, my informants reported that they actively try to minimise copying within the moko industry. Artists will typically refuse to accede to such requests and seek to redirect appropriative conduct. Francis outright refuses appropriation requests: 'I wouldn't do it because I just say to them well, do you know who wears this and what does it mean, and who did the moko, and that stuff?'[222] Other practitioners, such as Mohi, will note the style of the moko and 'incorporate that sort of feeling into the moko [he designs for the client] … but still keep it very much mine.'[223]

Redirecting conduct has very little to do with concerns about copyright infringement. It is regarded as an opportunity for educating the client about the value of personalised imagery. As Williams explains:

> I always say to them I won't do the exact image, but I'll try and have the same sort of influence, the same sort of appearance, but it will be unique to you. And that's what you want to give, you know? You don't want to have the same design that 10 other blokes are walking around with! You know?[224]

Nicholas similarly approaches copying requests as an opportunity for education.[225] When a family member asked her to reproduce one of her screenprint designs as a chest moko, she responded:

> I go okay, so tell me your reason why. And she goes, because I just like the pattern, I like the korero … being the waka and … as you're going forward the water's moving past your body and those are the patterns that sort of symbolise that. And you're embracing all that. I said

[220] Interview with Hohua Mohi (n 29).
[221] See section 5.1.2.1 of this chapter.
[222] Interview with Richie Francis (n 5).
[223] Interview with Hohua Mohi (n 29).
[224] Interview with Jack Williams (n 33).
[225] Interview with Henriata Nicholas (n 7).

> okay, what we really need to do is relate it right back to you … this is … my korero, my pattern that I created for that particular event. So we have to talk about you, and what you feel is appropriate and what you would like to have, you know, because it's on your skin! You have to know about it. It's not putting a stamp on you, my stamp on you … [She] didn't understand anything about how it would be related to your skin … All those thoughts and feelings and inspirations need to be attached to it. And so working with her through that, we finally created something that was personally hers and nothing really like [what] I had [previously] created.[226]

Nicholas concedes that educating clients about the value of customised designs can be 'a hard one' when they are set in their mind on the design they want.[227] Yet, she has a clear priority to avoid reproduction, even of her own imagery.

Tā moko artists perceive a role in maintaining the personal significance of moko to the wearer and discouraging appropriation; however, they exercise this role outside of the formal legal sphere. As such, even when ethical norms around copying align with law's anti-copying norms, the content of formal legal rights is not influential upon practitioner conduct. I will now reflect on attitudes to copyright ownership in detail to further draw out the weakness of the formal law as a regulator over practices in this industry.

5.3.2 Attitudes towards copyright ownership

None of the tā moko artists I interviewed have asserted copyright in any of the moko they have created, either through commencing legal action or as part of an out of court dispute resolution process. For Francis and Kipa it is a conscious choice not to threaten litigation when infringement occurs, while Mohi, Nicholas and Williams do not perceive themselves to have ownership rights in the imagery they create. The first instance highlights that being a rights holder does not necessarily empower artists, and the second instance that there can be a gap between the law as stated, and understandings of rights in everyday life.

Knowledge of copyright law does not appear to result in any greater tendency to negotiate rights in imagery or engage with the formal legal system. Francis, for example, stated that he is the legal owner of some of the imagery he creates.[228] Yet, he avoids discussing copyright ownership with his clients

[226] Ibid.
[227] Ibid.
[228] Interview with Richie Francis (n 5).

even though he knows '[t]hey may think that cus they wear it, they own it now.'[229] In addition, as noted in the previous subsection, Kipa does not find asserting IP rights a particularly useful response to appropriation, given the extent of the appropriation that occurs and the low financial payoff of litigation.[230]

By comparison to these artists, the other tā moko artists I interviewed did not consider themselves to be the copyright owners of the moko they create. As noted earlier in chapter 4, in some instances of custom imagery created in New Zealand, this position is likely to be legally correct. In New Zealand, unlike in the United States and Australia where there are more restrictive commissioning rules that do not apply to drawings as a category of artistic works,[231] the principles around commissioned art result in clients being the first copyright owner of custom imagery that is made pursuant to a commission, where there is an agreement to pay.[232] The commissioning rule applies to commissioned drawings and paintings, and therefore presumably covers preliminary sketches of tattoos as well as the rendering on the skin.[233] As the commissioning rule is the default rule for first ownership of copyright, it suggests that where a custom moko is created for a client for a sum of money and applied to their skin, they will be the copyright owner, unless the contractual agreement between the tā moko artist and the client states the contrary.[234] However, where a moko is created for free, the design was created prior

[229] Ibid.
[230] Interview with Rangi Kipa (n 10).
[231] *Copyright Act of 1976*, 17 USC § 101 ("work for hire" doctrine); *Copyright Act 1968* (Cth) s 35(5).
[232] *Copyright Act 1994* (NZ) s 21(3). Note that there was a Bill put forward in 2009 to remove the commissioning rule so that the author was the default owner of all commissioned works under s 21(1): Copyright (Commissioning Rule) Amendment Bill 2008 (NZ). The Bill was withdrawn on 16 April 2009.
[233] Alexandra Sims, 'The Perils of Full Copyright Protection for Tattoos' (2016) 38(9) *European Intellectual Property Law Review* 570, 571; Kirsten Ferguson, 'Tattoos and Copyright…Who Owns Your Tattoo?, *Rainey Collins Lawyers* (Web Page, 5 June 2018) <https://www.raineycollins.co.nz/your-resources/articles/tattoos_and_copyright_who_owns_your_tattoo>.
[234] *Copyright Act 1994* (NZ) s 21(4). See generally, Sims, 'The Perils of Full Copyright Protection for Tattoos' (n 233) 571; Alexandra Sims 'Copyright in Tattoos: What a Tangled Web We Weave' (Conference Paper, Asian Pacific Copyright Association Conference, Victoria University, Auckland 27–8 November 2015); Ferguson (n 233); Angharad O'Flynn, 'But Who Owns That Tattoo?', *New Zealand Law Society* (Web Page, 4 May 2018) <http://www.lawsociety.org.nz/practice-resources/practice-areas/intellectual-property/but-who-owns-that-tattoo>. My research suggests that the use of contracts that include IP provisions is rare within both the tā moko industry and the western tattoo subculture, as these communities do not have a high concern for legality. See also O'Flynn: at Ibid.

to the commission, or the payment is for the physical embodiment of the copyright work rather than for the copyright,[235] the usual rule that the author is the first owner of the copyright will apply.[236]

The tā moko artists I interviewed who do not see themselves as copyright owners in the work they create – Nicholas, Mohi, and Williams – do not make a distinction between commissioned versus non-commissioned work, between custom or pre-existing imagery, or between their contractual versus their default rights. Their position on ownership varies, but is primarily informed by the close relationship between the client and the moko that embodies and represents their ancestry, not the intricacies of s 21 of the *Copyright Act 1994* (NZ). Nicholas, for example, perceives herself to have ownership rights over the initial drawings she does of the moko design, but that these rights end '[o]nce the pattern is created' on the skin.[237] At that point, the design belongs to the client: 'it's their thing.'[238] Mohi sees the clients' ownership as vesting the minute the design 'leaves the pen' because the moko 'was never mine to begin with.'[239] In addition to to the highly personal and identity-affirming nature of moko, such attitudes are likely influenced by the nature of kaitiaki obligations. As is stated in the Wai 262 Report, '[f]or the traditional art of tā moko, the tohunga themselves are the primary kaitiaki of the mātauranga, although once the tā moko is done, responsibility transfers to the wearer …' .[240] For the artist, kaitiaki obligations to protect the integrity of tā moko do not extend to a perpetual, positive obligation to protect individual works – individuals are vested with responsibility for protecting the moko on their bodies. As such, it is conceivable that artists might perceive guardianship rights to trump any rights of the artist to the designs in the abstract.

Artist aversion to the formal legal sphere, whether or not they perceive themselves to be IP rights-holders, has flow-on effects for managing the threat of appropriation. The artists I interviewed tended

[235] For a discussion of what amounts to a "commission" (and conversely, what will not amount to a "commission"): see *Pacific Software Technology Ltd v Perry Group Ltd* [2003] NZCA 398 [55]–[60].
[236] *Copyright Act 1994* (NZ) s 21(1). Unless the moko is a work of joint authorship, in which case both the artist and the client will hold the copyright as joint-owners. However, as tā moko artists usually work autonomously in creating designs for their clients, the contribution of the artist is likely to be distinct from that of any suggested changes from the client: see *Copyright Act 1994* (NZ) s 6.
[237] Interview with Henriata Nicholas (n 7).
[238] Ibid.
[239] Interview with Hohua Mohi (n 29).
[240] Wai 262 Report (n 37) 31. See also: at 44 where tohunga are described as the kaitiaki of the discipline of tā moko.

to only actively protect their works from appropriation during the design stage and not seek to control end-uses by moko wearers. None used contract terms that sought to limit end-uses. For Nicholas, this was because she is at her 'most creative' during the design stage.[241] Once the design is applied, she is not 'too precious about them [the moko wearer] going and selling it and doing other things to it'.[242] She explains, 'it's theirs to do whatever they want … They can go and bastardise it however they want or they can keep it honourable and pass it on to their siblings or their family and have it as, you know, a family sort of tradition, the beginning of a tattoo … to be passed on to the generations [that follow].'[243] Nevertheless, Nicholas states that if a client did choose to commercially appropriate their moko she would question whether she had done 'enough educating for that person to make sure that that didn't happen.'[244]

Mohi expressed a similar opinion, stating that end-uses by the moko wearer are 'their business' because

> [a]t the [end of the] day, it's in the blood … How they look after it, and … how they treat it. Well you would hope that they would listen to what you say but at the end of the day that's their moko, that's got nothing to do with me. The minute they walk out it's theirs, it's not mine. I can't do nothing about it. [245]

Williams stated that he has a priority for the moko he creates to be treated with respect, but doesn't seek to control end-uses:

> when I deal with someone and … they pay me for my skill to do some artwork on them. Do some tā moko. So when they receive that and we do that transaction, whether it's gonna be in money or … if we trade, once they walk out that door, you know, I expect them to use a little bit of integrity because it belongs to them [but] once they walk out that door it belongs to them. Not to me. Cus we've just finished a transaction.[246]

While Williams does not regard himself as the copyright owner of the moko he creates, he did note that he would 'expect recognition' as the creator of a moko if it was published in a tattoo magazine or

[241] Interview with Henriata Nicholas (n 7).
[242] Ibid.
[243] Ibid.
[244] Ibid.
[245] Interview with Hohua Mohi (n 29).
[246] Interview with Jack Williams (n 33).

used in a film like *The Hangover Part II*.[247] As Williams states, this is because public recognition is the key to his business' success:

> cus one way that we survive is people … identify your artwork. And when other people see your art, see your art walking around in the street, they ask that person, who done that? And that's how we survive … If I was to see my artwork in a movie, I'd expect some recognition. I'd expect, you know, an interview from an American journalist, oh we heard you were the artist! And we'd like to put your photo in the tattoo magazine, this is the man! I'd expect that.[248]

Williams' expectations suggest some synergy with moral rights of attribution,[249] although Williams himself was not aware prior to the interview that he held such rights.[250] Williams did not indicate whether he would pursue the legal enforcement of such rights, were they to be infringed.[251]

The ownership norms that exist in the tā moko artist community are varied. However, when read together, they suggest minimal concern with the formal legal sphere. This does not mean, however, that artists are resigned to appropriation by other artists and commercial appropriators. Many take measures to limit the circulation of imagery from which a quality copy could be made, as will now be discussed.

5.3.3 Encouraging desirable conduct outside of rights enforcement

Appropriation might not be contested in legal forums, but many tā moko artists engage in image management in the shadow of the law. Artists are particularly concerned with restricting access to 2D photographs of moko from which a quality copy could be made. To prevent copies of the moko he wears on his buttocks and back, Francis only has a low-resolution image of it on his Facebook page.[252] He otherwise has an active social media presence.[253] Other artists advise their clients to be careful about the nature of the imagery they post online. Mohi, for example, reported that:

> usually you say if you want to put photographs up, don't put photographs up of every single angle of the thing so people can't copy it. Obviously … this is the world of people having family overseas so they want their moko to be seen by their family. So they'll put it up on

[247] Ibid.
[248] Ibid.
[249] *Copyright Act 1994* (NZ) s 94.
[250] Interview with Jack Williams (n 33).
[251] Ibid.
[252] Interview with Richie Francis (n 5).
[253] See, eg, Toiariki Contemporary Ta Moko (Facebook) <https://www.facebook.com/toiariki/>.

> their Facebook or something like that, you know, look this is my new moko, have a look. But as long as you don't do up close of everything, as long as it's about here [gestures an arm length] … so they can't get the whole picture, that's okay, you know what I mean?[254]

Williams also warns his clients to 'be careful and protect what you're wearing … But you know, if you want to put it up on Facebook that's up to you' because 'it belongs to you now.'[255] Not all artists broach such matters with their clients. Francis, for example, does not discuss image management with his clients because you 'can't really stop people ripping it off anyway.'[256] Kipa similarly notes the inevitably of copying if images are available online, stating that he does not bother using copyright notices on pictures of the moko he creates because other artists 'don't give one flying fuck about whether you write on it, please don't copy.'[257] In his opinion, the only way to avoid unauthorised reproduction is to not post images online.[258]

Williams' approach to image management ascribes to this reasoning. He manages appropriation by restricting his online presence:

> People always ask me, have you got a website? I've been tattooing for 13 years. I don't have a website. I'm not on the web. There's a couple of the older guys that actually don't [have an online presence]. You know, you won't find any of their images. They don't have their own sites or anything … I come across clients [that] I've done [work on] and I see they're on Facebook and stuff … But for me that's one way that I can protect my [work], that's one way of safeguarding [my work, making sure] it's not accessible globally.[259]

Williams recognises that 'a marketing person' might regard his decision as 'cutting your throat' because of the marketing power of the internet to 'build a clientele' but insists that he has already 'got a clientele.'[260]

While artists might go about limiting appropriation in various immediate ways, at a macro level they also seek to effect change by educating the broader domestic and international community about the problematics of copying moko. As noted earlier at 5.1.3.4, Francis attended a London tattoo

[254] Interview with Hohua Mohi (n 29).
[255] Interview with Jack Williams (n 33).
[256] Interview with Richie Francis (n 5).
[257] Interview with Rangi Kipa (n 10).
[258] Ibid.
[259] Interview with Jack Williams (n 33). In March 2019, I conducted an internet search to see whether any of Williams' moko was publically available online. I located a handful of images on Facebook: see, eg, 'Fieldwork participants', Image 4, viii of this thesis; 'Moko', Image 23, xiii of this thesis. However, this falls far short of having an online portfolio of work that is publically accessible.
[260] Interview with Jack Williams (n 33).

convention in 2008 with the intention of assessing opportunities for educating European tattooists about moko and its significance to Māori.[261] Williams also believes that Māori have a responsibility to communicate opinions around appropriation globally 'so people have an awareness'of the community norm that prohibits direct reproduction.[262] Mohi and Francis expressed similar sentiments in news media in 2011 in response to the use of a photograph of a stylised moko on the face of French rugby player Alexis Palisson in the magazine *Tetu*.[263] Tā moko practitioners might not necessarily see themselves as the potential holders of copyright in the imagery they create, but they do think deeply about how appropriation might best be minimised within the industry and in the broader community. In this respect, their motivations align with conventional scholars, although they do not ascribe the formal law any instrumental value in carrying out this task.

I will now sketch some broader considerations that could affect the implementation of new legal rules on a much larger class of tattoo professionals.

5.3.4 Tattoo subculture and the preference for self-governance

As canvassed earlier in this chapter, pākehā tattooists regularly draw upon moko as an inspiration for their Māori-inspired designs.[264] While tā moko artists appear to tolerate such incursions and do not find them particularly harmful, this conduct is caught within the scope of some law reform proposals that seek to regulate the use of cultural imagery and arts styles by cultural outsiders.[265] Examining the legal consciousness of pākehā tattooists provides insight into the extent to which positive law currently regulates subcultural practices, allowing for speculation on the likely efficacy of introducing new legal norms that prohibit cultural referencing.

[261] Interview with Richie Francis (n 5).
[262] Interview with Jack Williams (n 33).
[263] Matthew Martin, 'Moko Experts Slam Magazine Shoot', *The Daily Post* (Rotorua, 19 July 2011). See 'Other Appropriations', Image 53, xviii of this thesis.
[264] See section 5.1.2.2 of this chapter.
[265] Law reform proposals are considered in detail at section 4.4 of this thesis.

Tattoo, like tā moko, is mostly ordered outside of the formal legal sphere. Litigation is rare,[266] suggesting that Whitmill's assertion of IP rights is an outlier, rather than the norm. The aversion to litigation reflects the view. As pākehā tattooist Buchanan states, IP rights only

> hold value if you have money and are willing to go through the courts in order to take somebody through the ringer … Is it worth spending 10 million dollars to recoup one hundred million dollars? Yes. Is it worth spending a million dollars to recoup one hundred thousand dollars? Not usually, you know, so.[267]

In addition to the small scale of much infringing conduct and the costs of litigation, avoiding appropriation is seen as a matter of 'ethics and manners' rather than a legal matter.[268] Throughout my interviews, pākehā tattooists consistently referred to legal rights as irrelevant to their everyday practices and to conflict resolution. As Bauer, the most law-averse of all my participants explains, 'tattooing has nothing to do with copyright' because it's a 'fucking tatt' and '[i]t's complete nonsense to apply it to tattoos, you know, cus it's on a body, man!'[269] In his opinion, 'copyright can fuck off' because the tattoo is 'on a single person and it's mostly covered.'[270] In these circumstances, as IP scholar Aaron Perzanowski observes, '[t]he most important barrier to legal enforcement within the tattoo industry is cultural.'[271]

Bauer's aversion to copyright is fairly typical of the western tattoo industry as a whole. In the western tattoo subculture, authors' default copyrights in the original imagery they create are widely considered to be non-existent, or at least subsidiary to the tattoo wearer's right to display their own body with impunity.[272] Not only are authorial assertions of rights – whether through filing a legal action, or

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[266] As noted earlier, I have identified six litigated disputes, all of which were commenced in the United States: *Whitmill v Warner Bros. Entertainment* (ED Mo, No. 4:11-CV-752, complaint dismissed 22 June 2011); *Reed v Nike, Rasheed Wallace, and Weiden & Kennedy* (D Or, No 05-CV-198 BR, complaint dismissed 19 October 2005); *Escobedo v THQ* (D Ariz, No. 2:12 – CV-02470-JAT, complaint dismissed 11 December 2013); *Allen v Electronic Arts* (WD La, No. 5:12-cv-03172, complaint dismissed 9 April 2013); *Alexander v Take-Two Interactive Software, 2K Games and World Wrestling Entertainment* (SD Ill, No. 3:18-cv-966, complaint filed 17 April 2018), and *Solid Oak Sketches v 2K Games and Take-Two Interactive Software* (SDNY, No. 16CV724-LTS, complaint filed 1 February 2016).

[267] Interview with Elton Buchanan (n 58). See also Matthew Beasley, 'Who Owns Your Skin: Intellectual Property Law and Norms Among Tattoo Artists' (2012) 85(4) *Southern California Law Review* 1137, 1158. The emotional effort of commencing litigation and subcultural scepticism about the law are also noted as factors that inform the subcultural reluctance to sue: Interview with Pip Russell (n 8); Perzanowski (n 207) 108.

[268] Interview with Pip Russell (n 8).

[269] Interview with Pete Bauer (n 19).

[270] Ibid.

[271] Perzanowki (n 207) 108.

[272] These attitudes resonate with that of some tā moko artists described earlier in section 5.3.2 of this chapter.

informally asserting a rights violation – extremely rare, they are routinely rejected by other subcultural members even when a reproduction is obvious. For example, in *Reed v Nike*[273] copyright infringement was manifest – the tattoo in question was featured in an advertisement, digitally erased, then slowly drawn on while the tattoo wearer explained the meaning of the tattoo[274] – however, the tattooist's rights assertion drew strong criticism. One commentator online wrote:

> What I do with my tattooed body is MY business. I pay the artist for his work, and that service is complete. Mr. Reed needs to let it go. He got paid, and nobody has copied his work by using it in an ad. It's a compliment that his art work was central to an ad like that. I don't see the harm in it, I see him as petty and ego driven … and I find it sad … How about some basic respect for the PEOPLE who allow themselves to be the permanent bearers of your talent?[275]

Another lay commentator argued:

> The artwork may be Reed's original creation, but it is not on canvas, t-shirt, or side of a building; it's on *a man's skin.* Claiming rights and damages from third-party entities who casually displayed that man's skin, inclusive of the tattoo or not, is Reed trying to claim ownership of *a part of a human being.*[276]

These comments resonate with Warner Bros.' defence in *Whitmill* that conflated Whitmill's ownership of the copyright in the tattoo with the ownership of Tyson's body, particularly the testimony of copyright expert and textbook author, David Nimmer, discussed earlier in chapter 4.[277] They show that the legal claims to own tattoo imagery inscribed on the body are popularly understood to be illegitimate claims upon the *identity* upon which the imagery is inked. However, this is not the same as the legal reasoning based in contract as an assignment of property. The tattoo wearers are not reported as copyright owners because they commissioned the work,[278] but rather because the tattoo is

[273] (D Or, No 05-CV-198 BR, complaint dismissed 19 October 2005). Note that this case settled for an undisclosed amount prior to trial.
[274] For a scholarly consideration of the issues in this case see Christopher Harkins, 'Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink' (2006) 10 *Lewis and Clark Law Review* 313, 313–32.
[275] Lara on Pariah Burke, 'Damning the Ink: Tattoo Artist vs. Nike & Rasheed Wallace', *I am Pariah* (Blog Post, 5 March 2005) <http://iampariah.com/blog/creative-pro/tattoo-artist-vs-nike-a-really-bad-idea.php> (emphasis in original).
[276] Anonymous on Burke (n 275) (emphasis in original).
[277] Nimmer did not refer to any empirical work to support his arguments.
[278] In the United States, artistic works such as drawings are not included within the categories of works to which the work for hire doctrine applies: *Copyright Act of 1976,* 17 USC § 101(2). Note also, that for a commissioned work to be a work for hire, the parties must expressly agree in a written contract that the work shall be considered a work for hire: at § 101(2).

self-expressive. The tattoo is entwined with or inseparable from the wearer's identity; hence, they are perceived to own it.[279]

Further to the argument that copyright owners *should not* be allowed to assert their copyright, is the subcultural perception that copyright owners *do not deserve* copyright. Tattooists who decide to litigate are labelled as petty and ego driven as noted above, or greedy or disrespectful for commencing actions.[280] This is particularly the case when they sue their clients. For example, pākehā tattooist Elgan described Louis Molloy, David Beckham's tattooist, as 'lame' for threatening to sue Beckham, whose guardian angel tattoo was featured in an underwear advertisement.[281] Elgan said Molloy should have just considered the reproduction 'good advertising.'[282] He also commented on Whitmill's decision to sue Warner Bros. in similar terms, 'busy tattooists don't make bad money … it just sounds like greed to me.'[283] There is a clear subcultural preference for the tattoo-wearer's autonomy over the reproduction rights of artists.[284]

Examining attitudes towards the copyright held by other artists, when creating tattoo art, are also illustrative of the status of the positive law as a weak regulator in this community. When creating tattoo imagery for their clientele, it is rare for artists to turn their minds to copyright infringement. Hunt, for example, states that 'you don't think copyright at all' when designing an individual's tattoo.[285] The potential for copyright infringement 'doesn't even enter your head … I just think about my own personal integrity as an artist more than anything else.'[286] For many western tattoists, copying

[279] This position on ownership is similar to that of some of the tā moko artists discussed ealier at section 5.3.2 of this thesis.
[280] Perzanowki (n 207) 108.
[281] Interview with Cam Elgan (n 41).
[282] Ibid.
[283] Ibid.
[284] Alexa Nickow, 'Getting Down to (Tattoo) Business: Copyright Norms and Speech Protections for Tattooing' (2013) 20(1) *Michigan Telecommunications and Technology Law Review* 183, 206.
[285] Interview with Tim Hunt (n 13).
[286] Ibid. There is a perception that '[a]n honourable artist who was confident in their creativity would never put their hand to such an endeavor': Brandon on Shannon Larratt, 'Followup: Tattoo Theft', *BMEzine* (Blog Post, 23 September 2005) <https://news.bme.com/2005/09/23/followup-tattoo-theft/>. See also 'an ethical artist won't attempt an exact replica. Even though they stand to profit by doing it': Elayne Angel quoted in Marisa Kakoulas, 'The Great Tattoo Copyright Controversy', *BMEzine* (Guest Column, 12 August 2003) <http://news.bmezine.com/wp-content/uploads/2008/09/pubring/guest/20031208.html>.

is a sign of inferior practice.[287] Copyists are referred to as 'scratchers' or 'hacks',[288] and like in the tā moko community, subject to gossip that infers they are poor artists.[289] The force of moral norms suggests that tattooists with artistic aspirations are less likely to copy because they wish to 'maintain a sense of belonging and recognition within the … tattoo community'.[290]

Nevertheless, ideal conduct is tempered by business considerations. For pākehā tattooist Bauer, customer satisfaction drives his conduct more so than artist norms or legal prohibitions: '[y]ou know what I think? I really honestly think that people have to walk out of my shop being happy. Okay, and that's the main thing.'[291] Given the extent of appropriation requests of clients,[292] a tension can arise between giving the client what they want, running a successful business, and maintaining artistic integrity. Buchanan reflects on the pressure to appropriate as a pragmatic business consideration, stating that 'really few people would admit it, but you've gotta pay for your shop' and that 'you can say no [to customers], which we do, but at the end of the day you do have bills to pay. Like most people.'[293] It appears that while clients continue to request direct reproductions, some tattooists will continue to copy custom imagery in violation of both community ethics and morals and legal rights and interests.

In addition to ethics, morals, and business considerations shaping perceptions of appropriate creative practice, some artists believe that copyright infringement rules are not applicable to tattoo appropriation because tattoo art falls 'into a [legal] grey area'.[294] This is because 'the artist's hand and the recipient's body [is perceived to] personalize the [end] product.'[295] As Elgan explains, the process of tattooing is perceived to transform a 2D image, even when the copying is exact:

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[287] See, eg, Perzanowski (n 207) 97; Beasley (n 267) 1168.
[288] Perzanowski (n 207) 97; Beasley (n 267) 1162.
[289] Ibid 101; Beasley (n 267) 1167.
[290] Perzanowki (n 207) 103. See also: at 102.
[291] Interview with Pete Bauer (n 19).
[292] See, eg, '[e]veryday, people go into tattoo shops asking for a tattoo similar to something they saw on someone else': Jersey on Larratt, 'Followup: Tattoo Theft' (n 286).
[293] Interview with Elton Buchanan (n 58).
[294] Ibid.
[295] Mary Kosut, 'An Ironic Fad: The Commodification and Consumption of Tattoos' (2006) 39(6) *The Journal of Popular Culture* 1035, 1043.

> it's really hard to replicate an image from a photo because of the wrap around … Like if it's … a sleeve, there is no photo that you're going to be able to trace that is the whole sleeve, unless you connect together a very extensive collection … There's no surface on your entire [body], even the back … that's flat that will give you a picture you can trace straight from.[296]

This seems to suggest that only perfect copies are problematic from a legal point of view, which is far removed from legal tests of substantive infringement.[297] For their own art, the difficulty in rendering a quality copy without access to a 2D drawing from which to trace, means that some pākehā artists are not overly concerned by infringing conduct because the copy will not be as good as the original. Bauer, for example, describes his work as 'uncopyable'because he does not sketch his designs on paper prior to drawing them directly on the body:

> I draw things on people and I tattoo them … it's actually really hard for other people to copy my work … Cus it's not on a on a sheet of paper ... Cus I draw shit up on people, you know. Like I use like three, four different colours of paint, light to dark, and then I draw shit up on their arms and it takes ages and hours and then I tattoo that shit. It means the only way to copy that artwork is take a photo and trace it but that will never ever be as cool as the 3D version …[298]

The comparative ease with a quality copy can be made from a 2D sources means that, like tā moko artists, pākehā tattooists engage in a form of image management outside of the formal law sphere. For example, Buchanan seeks to prevent his in-store portfolios from being photographed with large copyright notices and security cameras in operation,[299] and Elgan tells his clients' friends that they can photograph the tattoo being applied, but need to be careful that none of the art on his walls (the line drawings of the custom tattoos he has created) is photographed.[300]

The legal consciousness of pākehā tattooists and their routinised cultural practices show that the ordering of this subculture around creativity, appropriation, and conflict resolution occurs in the shadow of the formal law. The legal rights held by tattooists as creators appear to be irrelevant to their

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[296] Interview with Cam Elgan (n 41).
[297] The *Copyright Act 1994* (NZ) s 29 provides that copyright infringement occurs when a person does a 'restricted act' in relation to the work as a whole or any substantial part of it. This captures a much broader range of infringing conduct than simply the making of a perfect copy.
[298] Interview with Pete Bauer (n 19).
[299] In Globus Tattoo, Buchanan's tattoo shop, I personally observed three prominent copyright notices. The most extensive stated:

> You Are Being Recorded. No Photos or Designs are to Be Taken. You will be Charged With Theft. Cell Phones and Cameras Are NOT ALLOWED in the portfolio area. Cameras are allowed in the tattoo Application Area Only with client permission. Filming and photos of friends being tattooed is acceptable.

(emphasis in original): at Ibid.
[300] Interview with Cam Elgan (n 41).

lived experience, as are the legal rights of others when designing imagery. Although community norms are at times similar to the content of formal legal rights, this industry self-regulates without a view to legal rights and obligations. The threat of litigation transgresses community norms around ownership, and carries little coercive power.

In circumstances where the formal law is a weak regulator of subcultural practices, it appears unlikely that the introduction of new rights to better protect Indigenous imagery from appropriation would have a predictable effect on tattooists who currently create Māori-inspired imagery. The strength of the legal norms in this community presents significant challenges for transplanting new norms and redirecting tattooists away from seeking inspiration from moko.

5.4 Conclusion

Conventional calls for law reform and greater enforcement of rights have been advanced on the assumption that their introduction would resolve the issue of cultural appropriation. This positioning is performative. In taking cultural appropriation claims at face value without examining the dynamics of appropriation within specific, local markets, conventional scholars continue the deliberate simplication of culture evident in appropriation allegations and erase internal contestation and conflict. As a result, conventional reform proposals project an over-simplified vision of the coherence of the property at the heart of cultural appropriation claims and presume that if this property were protected through more or better rights, more desirable legal norms will follow. However, what constitutes appropriation and cultural harm can be contested by creators, the boundaries of cultural property can be fluid, and legality can already exist in local sites. These factors complicate the need for reform, the possibility of effective legislative drafting, and the efficacy of any introduced legal rights. The failure to closely attend to lived experience in local sites is a serious limitation of the conventional approach.

In drawing out the specific nuances of creative production and attitudes towards intercultural engagement, law, and appropriation, this chapter has profiled the complexity and cultural ambiguities that sit behind cultural appropriation claims and law reform responses that seek to redress legal

exclusion. There can be a gap between cultural claims and the lived experience of artists. Cultural members can perform legality otherwise or differently. The intrusiveness of seeking inspiration from another culture is not self-evident, nor is the cultural harm of such actions. In addition, even when cultural claims find support within a community, regulating a dynamic artform, particularly when artists show much agency in their everyday practice, is likely to be a difficult task. The property at the heart of cultural claims resists reduction into the expression of neat legal rights and prohibitions. Finally, the legality that already orders local sites can disrupt the regulatory power of the formal law. The efficacy of law reform to redirect appropriative conduct, and its desirability to those who would presumably be the beneficiaries of new rights, the artists who create cultural imagery and who are the guardians of underlying TK, should not be presumed.

This chapter shows some of what conventional scholarship misses of the intersection of cultural appropriation and law. However, the lived experience of artists does not offer a means to reflect on the significance of the politics located in the space between the competing characterisations of the Whitmill tattoo by artists and cultural claimants. Cultural claimants do not simply hold different views about law and appropriation to artists – they allege appropriation as part of a subversive activity that objects to historical and continuing colonial injustice. As such, in the next chapter I use the performance of colonial history in conventional scholarship to investigate the political stakes of appropriation from the perspective of cultural claimants.

Chapter 6: Tattoo and the colonial gaze

As an activity that seeks to carve out a space for the subaltern to be heard on matters pertaining to their oppression, alleging appropriation is performative and subversive. This is the case regardless of whether individual claims are empirically true or false. The performativity of cultural claims evidences a moment of production. In reiterating a unique cultural identity, cultural claims produce that identity as well as distinguish that identity from what it is not. In seeking to assert themselves against the coloniser, cultural claimants thus have some effect on colonial epistemologies because, in resisting the oppression of the coloniser, they in turn construct the oppressive identity of the coloniser. Conventional legal scholarship does not deconstruct the link between cultural claims and identity.[1] An oppressive dynamic to experiences of appropriation is evident in the work of Janke, Solomon, Mead and others who perform colonial history in the reform demand,[2] but this history is partial, undefined, and unexplored. Conventional commentary does not tell us much about the resistant functioning of claims or how claimants engage in identity formation as part of a subversive politics.

In this chapter, I seek to explore and problematise the performance of colonial history in the law reform demand of conventional scholars so as to better understand the perceived relationship between cultural appropriation and colonialism, and the political activity that underpins the linking of history to performative claims. In conventional scholarship, law reform is presumed capable of effecting Indigenous inclusion in law and redressing previous injustice;[3] however, the historical dimensions of this injustice and the cultural politics of claims is not critically evaluated. As cultural claiming is a historically and culturally contingent activity, this site of meaning-making compels greater consideration. A better understanding of how cultural difference was constructed by those historically viewing, trading, and engaging in tattoo, helps to contextualise the political stakes for different constituencies at the intersection of cultural appropriation and law. It seeks to bridge the gap identified between the views of cultural claimants discussed in chapter 4, and the lived experience of artists in chapter 5. However, as historical intercultural dealings are as dynamic as contemporary

[1] See section 2.1.2 of this thesis.
[2] See section 2.1.1 of this thesis.
[3] See section 2.1.1.2 of this thesis.

intercultural dealings, the historical frame also refracts – rather than resolves – some of the contradictions and tensions around cultural ownership and identity found in tattoo art today.

This chapter has four parts. In section 6.1, 'Cultural appropriation and colonial injustice', I reflect on what is implicitly asserted by conventional scholars when cultural appropriation is described as a form of colonisation. I consider how transposing a discourse of violence and land acquisition to the cultural sphere links cultural appropriation to the historical embodiment of notions of racial superiority and entitlement. Drawing upon the framework outlined in chapter 2, in particular the discussion of desire and the Self/Other binary, I show why cultural appropriation claims might entail resistance to the re-enactment of colonial oppression. The following section complicates this story, focusing on the historical record as it pertains to tattoo.

Contemporary tattoo commentators like William Cummings suggest that tattoo was singled out as a fascinating marker of cultural difference for the South Seas voyagers.[4] In section 6.2, 'Reading tattoo', I examine representations of Pasifika tattoos in voyager accounts, and query the historical accuracy of this perspective. I observe that Pasifika tattoos were not typically read against overt ideas of racial inferiority. However, tā moko was closely associated with a discourse of desire and primitivity during the voyages. The colonial voyager was attracted to the masculinity of mokoed Māori men, at the same time as the practice was perceived to be both disfiguring and a skilled artform. I trace these equivocal readings of moko over time and into the 18th century, suggesting that the increasing presence of missionaries in New Zealand led to a hardening of oppressive aspects of racialised subject positions. Desire for the Other became less pronounced at this time, with the Other's cultural practices increasingly marking him as a phobic object, and resulting in the active suppression of male moko in the years immediately prior to, and after, cession in 1840.

In section 6.3, 'Of object and subject', I shift the gaze from moko as a cultural practice that was observed by voyagers and colonisers to its relevance as a good that was featured on commodities, as

[4] William Cummings, 'Orientalism's Corporeal Dimension: Tattooed Bodies and Eighteenth Century Oceans' (2003) 4(2) *Journal of Colonialism and Colonial History* 10.1353/cch.2003.0039. See also, eg, 'Carved in Skin', *Tales from Te Papa* (Episode 84, Gibson Group, 2009) <https://www.tepapa.govt.nz/discover-collections/read-watch-play/maori/ta-moko-maori-tattoos-history>.

facilitated by Māori participation in the creation of exotica and art objects. Māori were not only observed by colonisers, intercultural engagements and participations occurred. I firstly consider the performance of Māori identity in te hoko upoko, the trade in Māori tattooed heads, as well as the identity that was received by those who fed the demand for the heads. I then consider the intercultural relations that led to the creation of CF Goldie's Māori portraits, and how the portraits have been received and resisted over time as part of colonial discourse by art critics, scholars, and Māori. Together, the discussion of upoko tuhi and Māori portraits provides insight into the performance of raced subject positions, and how they were subverted by Māori agency. The lived experience of historical subject positions presents a more complex history than is acknowledged in performative accounts.

In section 6.4, 'Discontinuities, shared space, and tattoo', I continue the focus on the lived experience of intercultural dealings to investigate tattoo as a practice that was engaged in by voyagers. Tattoo was not only observed in the Pacific, or featured on objects that could be bought and sold, it was also something that was experienced in the flesh. I consider voyager accounts of tattoo uptake and reflect on European motivations for getting a tattoo in the Pacific. Tattoo uptake appears to have reinflected extant western practices and been a recognition of the superior skills of Islander tattooists, rather than enacted desire for the Other. This raises the possibility of tattoo as occupying a shared cultural space during the voyages. I then consider the nature of the western tattoo lexicon in the years following the voyages to gauge the impact of exposure to Pacific imagery upon the western tattoo subculture. This discussion highlights the lack of historical connectivity between western and Pacific imagery. It also shows that the oppressive dynamics perceived today in tribal tattoos are quite dissimilar to the intercultural dealings in tattoo at first contact and that which subsequently defined mariner tattoo subculture.

This chapter concludes that sitting behind the performance of history in the conventional reform demand is a rich and varied account of historical subject positions. Racialised subject positions do not wholly account for the agency of the Other within the colonial relationship, nor the different ways in which actors historically engaged in cultural trades. The performativity of cultural claims might resist

historical injustice as part of a subversive politics, but it also reproduces a flattened account of history and identity that cannot bridge the gap between politics and lived experience.

6.1 Cultural appropriation and colonial injustice

6.1.1 The performance of history in conventional critiques

As discussed earlier in chapter 4, part of the impetus for law reform in conventional progressive scholarship is the chance to rectify the power imbalance inherent in cultural appropriation.[5] Appropriative acts are perceived to interfere with local control over culture, and threaten cultural integrity and well-being.[6] IP law plays a facilitative role in cultural appropriation,[7] because it provides no rights to control the unauthorised use of cultural property and, from an Indigenous perspective, assigns legal rights to the wrong parties.[8] The extent of appropriation combined with a permissive legal framework has been described as fostering the 'second wave of colonisation' by conventional scholars like Mead.[9] Indigenous-inspired tattoo imagery is regarded as part of this colonial teleology. Gender studies academic, Michelle Erai, for example, associates Whitmill's tattoo with the 'ongoing loss of land, language and identity begun within historical encounters on the "beaches" of Aotearoa/New Zealand.'[10]

In linking arts appropriation to colonisation, conventional scholars are doing more than asserting that appropriation is unjust. They are articulating a particular version of colonial history that connects the taking of land to the taking of arts styles.[11] The redress sought by cultural claimants concerns matters

[5] See section 4.4 of this thesis.
[6] See sections 4.3.2 and 4.3.3 of this thesis.
[7] See sections 2.1.1.1 and 4.3.1 of this thesis.
[8] See section 4.3.2 of this thesis.
[9] Aroha Te Pareake Mead, 'Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific' in Leonie Pihama and Cherryl Waerea-i-te-Rangi (eds), *Cultural and Intellectual Property Rights: Economics, Politics & Colonisation* (Moko Productions, 1997) vol 2 20, 21; Aroha Te Pareake Mead, 'Understanding Maori Intellectual Property Rights' (Conference Paper, Inaugural Maori Legal Forum, 2002) 1 <http://news.tangatawhenua.com/wp-content/uploads/2009/12/MaoriPropertyRights.pdf>. See also section 2.1.1.1 of this thesis.
[10] Michelle Erai, '"If I Win the Title, I Might Tattoo my Face." Mike Tyson as Māori Cultural Artefact?' in Guillermo Delgado and John Brown Childs (eds), *Indigeneity: Collected Essays* (New Pacific Press, 2012) 54, 55.
[11] Hence Mead's description of arts appropriation as the 'second wave' of colonisation. The 'first wave' was the land appropriation that left Māori 'landless and marginalized': Mead, 'Understanding Maori Intellectual Property Rights' (n 9) 1. On the connection between cultural appropriation and land appropriation generally, see, eg, Perry Hall, 'African-American Music: Dynamics of Appropriation and Innovation' in Bruce Ziff and

that go beyond IP law, to the foundations of colonisation itself. Alleging appropriation seeks a space to heard on how contemporary arts practices reproduce problematic relationships from the past; however, conventional scholars do not actively interrogate the history of these cultural dynamics or how they connect with concerns in the present.

The discussion of desire as outlined in chapter 2 offers a means of thinking through the connection between cultural appropriation and colonialism that is posited by law's critics, but not investigated.[12] The mindset that legitimates the coloniser's presence as the true owner of the land, Bhabha's myth of 'historical origination',[13] is the same mindset that authorises the mining of the Other's cultural practices. Both are underpinned by the Self's self-entitlement, their assumption of ascendency over the Other, and the de-politicisation of their takings.[14] The Self/Other binary is oppressive, as is its enactment through the 'consumer cannibalism'of the Other's spirituality and practices.[15] Oppression does not result simply from the crafting of negative stereotypes that represent the Other while suppressing their agency. It also results from their construction as a phobic object and mainstay of desire.[16] The Other might be inferior, but they are also attractive to the Self. Negating the other is a site of perverse pleasure, a brush with the 'primitive',[17] and a self-referential attempt to find unity within the Self.[18] The appropriator's personal cultural mediation embodies a hierarchy that authorises appropriation, silences the subaltern, and displaces the Other's reality of racial domination with a narrative of the Self's power, privilege, and desire.[19]

Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 31, 33; Lenore Keeshig-Tobias, 'Stop Stealing Native Stories' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 71, 72.

[12] See section 2.4 of this thesis.

[13] Homi Bhabha, *The Location of Culture* (Routledge, 2010) 106.

[14] See section 2.4.2 of this thesis.

[15] See, eg, bell hooks, 'Eating the Other: Desire and Resistance' in *Black Looks: Race and Representation* (New York: Routledge, 2015) 21, 21–40.

[16] Frantz Fanon, *Black Skin, White Masks*, tr Charles Law Markmann (Pluto Press, 1986)170; Derek Hook, 'Fanon and the Psychoanalysis of Racism' in Derek Hook (ed), *Critical Psychology* (UCT Press, 2004) 115, 124.

[17] hooks (n 15) 26.

[18] In the context of the appropriation of cultural practices see, eg, Deborah Root, *Cannibal Culture: Art, Appropriation, and the Commodification of Difference* (Westview Press, 1996).

[19] See, eg, hooks (n 15) 25; Rosemary Coombe, 'The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination' in Bruce Ziff and Pratima Rao (eds), *Borrowed Power: Essays on Cultural Appropriation* (Rutgers University Press, 1997) 74, 91; Wendy Rose, 'The Great Pretenders:

In advancing cultural claims as a continuation of colonial injustice as well as a demand upon the law, conventional scholars participate in meaning-making beyond identifying, and seeking to rectify, legal exclusion. They join with cultural claimants in resisting the hierarchical structures that activate the colonial gaze, as applied through a framework of desire for the Other. However, as noted earlier, conventional scholars do not elaborate on the links between past and present injustice. They simply allude to oppressive dynamics by performing contemporary claims as part of a long history of colonial injustice. In order to better understand how the racialised subject positions captured by postcolonial scholars resonate with the colonial gaze on tattoo in the past, it is necessary to examine historical sites for constructions of cultural difference. However, prior to doing this, I will first historicise the western interest in other cultures to show that the phenomenon postcolonial scholars describe is not a new development in the western canon of racial thinking.

6.1.2 Historical dimensions of the contemporary western interest in other cultures

As developed in chapter 2, appropriation is intimately related to the self-construction of identity.[20] The Self/Other binary helps the Self to achieve self-consciousness and supports their perceived entitlement to take the cultural property of the Other. In an attempt to become 'less contaminated by modernity'[21] and achieve unity within, some colonisers like the Modern Primitives participate in subcultural practices, whereby the Other is literally inscribed on the body of the Self.[22] Postcolonial ideas about identity construction are also identifiable in western perspectives on tribal tattoo imagery.[23] At the inception of the tribal arts genre, its founder Leo Zulueta stated the importance of preserving the sacred 'cryptic knowledge' of cultural others in his tattoo designs as a 'talisman[] for the future.'[24] For Zulueta, wearing an Indigenous-inspired tattoo offers the possibility of embodying TK and achieving spiritual fulfilment in a western 'cultural wasteland.'[25] Reading appropriation as

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Further Reflections on Whiteshamanism' in M Annette Jaimes (ed), *The State of Native America: Genocide, Colonization and Resistance* (South End Press, 1992) 403, 405.

[20] See section 2.4 of this thesis.

[21] Root (n 18) 48.

[22] See section 2.4.2 of this thesis.

[23] Ibid.

[24] V Vale and Andrea Juno, *Modern Primitives: An Investigation of Contemporary Adornment and Ritual* (RE/Search Publications, 1989) 99.

[25] Margo DeMello, *Bodies of Inscription: A Cultural History of the Modern Tattoo Community* (Duke University Press, 2000) 88.

part of a process of identity construction and desire frames the western interest in Indigenous cultural practices as self-referential as well as oppressive. The Other is not consulted about their practices, nor whether they object to their imagery being mimicked. In being stereotyped, they are represented rather than heard.

Linking appropriative works to ideologies of domination, as conventional critics like Mead, Janke, and Solomon do,[26] suggests some synergy between oppression today and oppression in the past. Examining historical perspectives on the western interest in other cultures provides a starting point for investigating the relevance of colonial politics to appropriation allegations. In the sections that follow I examine the historicity of the desire framework of oppression and objectification, as it pertains to tattoo during and after the South Seas voyages in various sites.

The western interest in other cultures has a long history. In the mid-18th century, racial difference and cultural difference was understood within the same framework. The term "race" was used in a global sense to denote a 'people' or 'tribe',[27] meaning that racial differences encompassed both physical and cultural traits. For example, Douglas notes skin colour, language, religion, customs, and level of 'civility' as factors relevant to conceptions of race at the time of the South Seas voyages.[28] Racial thinking was premised on all humanity sharing a common ancestry, that is, on monogenism.[29] Monogenism reflects the notion that '[a]ll men belong to one species; and the men of all times, of all generations, and of every climate, are descended from the same original stock'.[30] The dominance of monogenist understandings of race meant that racial diversity was explained by reference to a race's

[26] See section 2.1.1.1 of this thesis.
[27] Michael Banton, *Racial Theories* (Cambridge University Press, 2nd ed, 1998) 5; Bronwen Douglas, 'Voyages, Encounter, and Agency in Oceania: Captain Cook and Indigenous People' (2008) 6(3) *History Compass* 712, 716; Bronwen Douglas, 'Climate to Crania: Science and the Racialization of Human Difference' in Bronwen Douglas and Chris Ballard (eds), *Foreign Bodies: Oceania and the Science of Race 1750-1940* (ANU Press, 2008) 33, 34–6.
[28] Douglas, 'Climate to Crania' (n 27) 35.
[29] Polygenesist explanations of humankind's diversity did exist at this time, but they were comparatively rare: see, eg, discussion in Douglas, 'Climate to Crania' (n 27) 48, footnote 52.
[30] Carl von Linné and Charles Stewart, *Elements of Natural History: Being an Introduction to the Systema Naturae of Linnaeus: Comprising the Characters of the Whole Genera, and Most Remarkable Species; Particularly of All Those That Are Natives of Britain, with the Principal Circumstances of their History and Manners* (C Stewart and Co, 1801) vol I, 72.

degree of civilisation and perceived behaviour and appearance, rather than biology.[31] Eighteenth century naturalists who studied racial diversity were concerned with classifying humankind into types,[32] ranking those types on the 'Progress of Man' continuum that stretches from the uncivilised state of nature to modern, civilised society, and theorising human development across the stages.[33] Ethnographic observations were relied on to rank "primitive" cultures at an earlier stage of evolution than the "civilised" west. Comparisons were primarily made with the 'civilised' societies of Europe or that of the ancients.[34] These rankings later informed imperial policy on a peoples' appropriate treatment by the colonial regime.[35]

As all humanity shared common parents, racial difference was explained by naturalists as the result of external factors such as climate, history, or food and lifestyle variations, rather than biological inheritance.[36] For example, climate was thought to affect the different manners, character traits, and

[31] Bronwen Douglas, 'Novus Orbis Australis': Oceania in the Science of Race, 1750–1850' in Bronwen Douglas and Chris Ballard (eds), *Oceania and the Science of Race 1750–1940* (ANU Press, 2008) 99, 104. Race became increasingly discussed as a heredity biological attribute at the end of the 18th century and with the development of the biological sciences in the 19th century: see, eg, Douglas, 'Climate to Crania' (n 27) 37–44; Bronwen Douglas, 'Notes on 'Race' and the Biologisation of Human Difference' (2005) 40(3) *Journal of Pacific History* 331, 331, 336–8.

[32] See, eg, Carl von Linné (also known as Linnaeus) who divided the human species into four varieties: *americanus* (American Indian), *europaeus* (Europeans), *asiaticus* (Asian), and *afer* (African). Stewart's discussion of *Systema Naturae* adds a fifth category of 'South Sea Islanders': Linné and Stewart (n 30) 72. Note that prior to the Voyages naturalists were concerned with the differences, not only between human 'types' but between humans, animals, and plants. The distinctive characteristics of different 'specimans' were explained genealogically. Linné, for example, placed humankind, homo sapiens, at the top of the animal Kingdom ('indisputably lord of the inferior creation') becase of 'his use of reason': Linné and Stewart (n 30) 70.

[33] See, eg, '[t]here is […] in human society, a natural progress from ignorance to knowledge, and from rude, to civilized manners, the several stages of which are usually accompanied with peculiar laws and customs. Various accidental causes, indeed, have contributed to accelerate, or to retard this advancement in different countries': John Millar, *The Origin of the Distinction of Ranks* (J Murray, 3rd ed, 1779) 5. See also Adam Ferguson, *An Essay on the History of Civil Society* (Boulter Grierson, 1767). For a later treatment of the Progress Continuum see, eg, Lewis Henry Morgan, *Ancient Society or Researches in the Lines of Human Progress From Savagery Through Barbarism to Civilization* (Henry Holt and Company, 1877) chapter 1. Morgan states that Polynesians occupied the 'middle state of savagery' when they were 'discovered' by European voyagers: at 10.

[34] See, eg, the discussion of the the work of naturalist JR Forster, who attended the second South Seas voyage, in Nicholas Thomas, '"On the Varieties of the Human Species": Forster's Comparative Ethnology' in Johann Reinhold Forster, *Observations Made During a Voyage Round the World*, ed Nicholas Thomas, Harriet Guest and Michael Dettelbach (University of Hawai'i Press, 1996) xxiii, xxv.

[35] Nicholas Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (Princeton University Press, 1994) 101.

[36] See, eg, Linné and Stewart (n 30) 72; Georges Louis Leclerc Buffon, *Barr's Buffon. Buffon's Natural History Containing A Theory of the Earth, A General History of Man, of the Brute Creation, And Of Vegetables, Minerals, Etc.*, tr J S Barr (T Gillet, 1807) vol 4, 350; Oliver Goldsmith, *A History of the Earth and Animated Nature* (Blackie and Son, 1856) vol 1, 209, 217; Johann Friedrich Blumenbach, *A Manual of the Elements of Natural History*, trans RT Gore (W Simpkin and R Marshall, 1825) 16. See also the post-second South Seas voyage writings of naturalist JR Forster, who writes that 'climate, food, and peculiar customs' have an effect 'upon the colour, size, habit, and form of body, and certain defects, excesses, or modification of the parts'

degree of civilisation of different peoples.[37] Around the time of the third South Seas voyage, Falconer argued that civilisation was best generated by the intermediate climates of Europe, and in particular, that England cultivated ethics, a 'spirit of examination and enquiry,'[38] and 'attentive, polished and elegant' women due to its climate.[39] Such climate theories assumed that movement up the Progress Continuum could be effected (over the course of centuries) by, for example, a kinder, intermediate climate, better nourishment, or 'more civilized manners'.[40]

In the 18th century, a people's primary means of production was also thought to be a key influence upon, or an indicator of, civility.[41] In stadial theory, the civility of a society was ranked according to their method of subsistence rather than other factors, such as their customs or physical features.[42] Four key stages of human development were hypothesised: (1) the hunting stage; (2) the shepherding stage; (3) agricultural practices and cultivation; and (4) commercialisation.[43] Each subsequent stage was perceived to be a development from and improvement upon the previous, with the agricultural stage seen as the turning point in a culture's civilisation because it resulted in the division of labour and permanent dwellings, both of which were perceived as necessary for commerce to develop.[44] According to naturalist JR Forster, cultivating crops and caring for animals evidenced 'invention' and

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although 'climate alone does not produce such extraordinary effects': Johann Reinhold Forster, *Observations Made During a Voyage Round the World* (1996) ed Nicholas Thomas, Harriet Guest, and Michael Dettelbach (University of Hawai'i Press, 1996) 182.

[37] See, eg, Oliver Goldsmith's description of the fourth variety in the human species, 'the negroes of Africa': '[t]he climate seems to relax their mental powers … They are, therefore, in general, found to be stupid, indolent, and mischievous': Goldsmith (n 36) 213. See also Anthony Pagden, *The Enlightenment: And Why It Still Matters* (Oxford University Press, 2013) 117. Note that "climate" was a very elastic concept at this time, being used to denote the social environment (eg modes of education and political forms) as well as the natural environment: Georg Forster, *A Voyage Round the World*, ed Nicholas Thomas and Oliver Berghof (University of Hawai'i Press, 2000) vol 1, xxxiv.

[38] William Falconer, *Remarks on the Influence of Climate : Situation, Nature of Country, Population, Nature of Food, and Way of Life, on the Disposition and Temper, Manners and Behavior, Intellects, Laws and Customs, Form of Government, and Religion, of Mankind* (C Dilly, 1781) 73.

[39] Ibid 48.

[40] Goldsmith (n 36) 218. See also Johann Reinhold Forster, *Observations Made During a Voyage Around the World on Physical Geography, Natural History, and Ethnic Philosophy* (G Robinson, 1778) vol 1, 182.

[41] See, eg, Ronald Meek, *Social Science and the Ignoble Savage* (Cambridge University Press, 1976) 12.

[42] Ibid 6.

[43] See, eg, Adam Smith, *The Glasgow Edition of the Works and Correspondence of Adam Smith: V: Lectures on Jurisprudence*, ed Ronald Meek, David Raphael, and Peter Stein (Oxford University Press, 1978); John Millar, *Observations Concerning the Distinction of Ranks in Society* (T Ewing, 1771); Henry Homes, *Sketches of the History of Man: In Two Volumes* (W Creech, W Strahan and T Cadell, 1776); Ronald Meek, 'Smith, Turgot, and the "Four Stages" Theory' (1971) 3(1) *History of Political Economy* 9, 9–27; Meek, *Social Science and the Ignoble Savage* (n 41), particularly chapter 4.

[44] Smith (n 43) 14; Homes (n 43) 47–8; Nathaniel Wolloch, 'The Civilizing Process, Nature, and Stadial Theory' (2011) 44(2) *Eighteenth-Century Studies* 245, 253–4.

'social feelings … rendered polished and refined'.[45] This production mode leads 'mankind to the highest degree of content' and 'perfect happiness.'[46] His son, naturalist Georg Forster, a minor at the time of the second voyage, similarly stated in his post-voyage writings that 'the introduction of black cattle and sheep' to Tahiti would 'doubtless increase the happiness of its inhabitants' and be conducive to 'the improvement of their intellectual faculties.'[47]

At the time of the voyages and the years that followed, the presence or absence of (a recognisable) system of religion was also used as a marker of human difference, and relevant to the degree of civility ascribed to a culture.[48] There was an assumption that non-western people were "heathens" and their 'religious systems at best superstitions' and 'devoid of any trace of God.'[49] Observations of behaviour and cultural practices like idolatory, human sacrifice, infanticide, cannibalism, and sexual promiscuity confirmed that Pacific Others were immoral.[50] For example, the missionary Thomas Haweis warned against interpretations of the Pacific as a paradise, stating that 'amidst ... enchanting scenes, savage nature still feasts on the flesh of its prisions, appeases its Gods with human sacrifices – whole societies of men and women live promiscuously, and murder every infant born among them'.[51] Yet, at the same time, as all individuals were equal before God by virtue of their common parentage, the capacity for religious belief was perceived to be universal.[52] This combination of factors – a

[45] Johann Reinhold Forster, *Observations Made During A Voyage Around the World* (n 49) 374.
[46] Ibid 375.
[47] Georg Forster, *A Voyage Round the World* (n 37) 12. This book drew upon his father's voyage journals: at xxviiii.
[48] See Helen Gardner, 'The 'Faculty of Faith': Evangelical Missionaries, Social Anthropologists, and the Claim for Human Unity in the 19th Century' in Bronwen Douglas and Chris Ballard (eds), *Oceania and the Science of Race 1750–1940* (ANU Press, 2009) 259, 259–82.
[49] Brian Stanley, 'Christian Missions and the Enlightenment: A Reevaluation' in Brian Stanley (ed), *Christian Missions and the Enlightenment* (William B Eerdmans Publishing Company, 2001)1, 8. See, eg, '[t]he New Zealanders, though remarkably superstitutious, have no gods that they worship; nor have they any thing to represent a being which they call god': William Yate, *An Account of New Zealand; And of the Formation and Progress of the Church Missionary Society's Mission in the Northern Island* (RB Seeley and W Burnside, 2nd ed, 1835) 141.
[50] See Jane Samson, 'Ethnology and Theology: Nineteenth-Century Mission Dilemmas in the South Pacific' in Brian Stanley (ed), *Christian Missions and the Enlightenment* (William B Eerdmans Publishing Company, 2001) 99, 102–3; Jeffrey Cox, *The British Missionary Enterprise Since 1700* (Routledge, 2008) 135; Niel Gunson, *Messengers of Grace: Evangelical Missionaries in the South Seas 1797–1860* (Oxford University Press, 1978) 196–7.
[51] Thomas Haweis, 'Sermon Preached at the Spa Fields Chapel, 22 September 1795' in Thomas Haweis et al, *Sermons, Preached in London at the Formation of the Missionary Society, September 22, 23, 24, 1795* (T Chapman, 1795) 12–3.
[52] David Bebbington, *Evangelism in Modern Britain: A History from the 1730s to the 1980s* (Unwin Hyman, 1989) 16–7, 27–8, 60; Samson (n 50) 102; Gardner (n 48) 260; Alison Twells, *The Civilising Mission and the*

depraved state and a capacity for redemption – justified missionary expansion into areas such as the Pacific region.[53] Religious conversion offered a means to redeem "the fallen",[54] and because Evangelical religion presupposed a Christian civil society,[55] to progress towards a more civilised state by, for example, living in modern houses and engaging in western agricultural practices.[56] Conversion and civilisation (or more specifically, civilisation in the manner of the west) was, in John and Jean Comaroff's words, 'two sides of the same coin, two related means of "trading up," of accumulating merit and honoring the Glory of God.'[57]At 6.2.3, I discuss how the missionary concern with fostering outward signs of Christian faith impacted upon the practice of tā moko.

My brief account of these three strands of monogenist thought – climate theory, stadial theory, and Christian theology – does not purport to offer a comprehensive survey of racialised subject positions at the time of the South Seas voyages. It does, however, provide an introduction to the academic and social interest in the region, and why the South Seas voyages were eagerly anticipated by naturalists as an opportunity to view primitive man and, in the process, understand more about the pre-history of western cultures.[58] According to John Douglas, the editor of Cook's third voyage journals, the 'untrodden ground' of the South Seas made its inhabitants 'a fit soil whence a careful observer could collect facts for forming a judgment, how far unassisted human nature will be apt to degenerate; and in what respects it can ever be able to excel.'[59] The western interest in the Other as a primitive form of

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English Middle Class, 1792–1850: the 'Heathen' at Home and Overseas (Palgrave, 2008) 11; Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press, 1982) 19.

[53] See, eg, '[t]heir situation of mental ignorance and moral depravity strongly impressed on our minds the obligation we lay under to endeavor to call them from darkness into marvallous light': James Wilson, *A Missionary Voyage to the Southern Pacific Ocean 1796–1798* (T Chapman, 1799) 3.

[54] See, eg, 'only the Gospel can set them free': MS 176/2 Samuel Marsden, *Journal: Reverend Samuel Marsden's Second Visit to New Zealand* (1819, University of Otago, transcript by TM Hocken) 11 <https://marsdenarchive.otago.ac.nz/MS_0176_002#page/64/mode/1up>.

[55] Andrew Walls, *Missionary Movement in Christian History: Studies in the Transmission of Faith* (Orbis Books, 1996) chapter 7.

[56] See, eg, Marsden, *Journal* (n 54) 10–1. The potential for human progress was also used by missionaries to gain support for their work in Britain: Cox (n 50) 135.

[57] John Comaroff and Jean Comaroff, *Of Revelation and Revolution: The Dialetics of Modernity on a South African Frontier* (University of Chicago Press, 1997) vol 2, 8. See also David Bosch, *Transforming Mission: Paradigm Shifts in Theology of Mission* (Orbis Books, 2011) 276.

[58] Twells (n 52) 185. On studying Indigenous cultures as a way of better understanding the 'earliest' period of human development generally: see, eg, Meek, *Social Science and the Ignoble Savage* (n 41) 7.

[59] John Douglas, 'Introduction' in James Cook, *A Voyage to the Pacific Ocean. Undertaken, by the Command of His Majesty, for Making Discoveries in the Northern Hemisphere. To Determine The Position and Extent of the West Side of North America; its Distance from Asia; and the Practicability of a Northern Passage to Europe.*

the western Self resonates with the subcultural interest in Indigeneity discussed in the desire framework. The Other is objectified, assumed to be inferior because they are different, and positioned to gratify the Self's needs; in this instance for knowledge about themselves. However, unlike in the desire framework, missionary engagements in the Pacific were not simply self-referential. Missionary goals of conversion and assimilation informed missionary perspectives on tā moko as a "heathen" practice, which subsequently affected local practices, as discussed at 6.2.3. The Other was not only to be taken from, but to be moulded in the image of the civilised, believing Self.

I will now consider readings of tattoo during the South Seas voyages and in the years following to the signing of the Treaty of Waitangi in 1840, in order to discern how Pasifika tattoo was approached as a signal of cultural difference and to examine the relevance of assumptions of European superiority over the "natives" to its representations.

6.2 Reading tattoo in the Pacific

6.2.1 Voyager accounts of Pasifika tattoos

Much commentary on the South Seas voyages and Pacific Islanders, such as the Ra'iatean man Ma'i, who travelled to Britain on board the *Adventure* at the conclusion of the second voyage, states that tattoos were a key and most fascinating indicator of cultural difference to Europeans.[60] Cummings, for example, writes that '[n]othing exemplified all that Europeans found fascinating, repellent, appealing and absurd about these island societies and their inhabitants as effectively and concisely as tattoos.'[61] However, with the exception of moko discussed in more detail below, there is surprisingly little in

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Performed Under the Direction of Captains Cook, Clerke, and Gore, In His Majesty's Ships the Resolution and Discovery. In the Years 1776, 1777, 1778, 1779, and 1780 (H Chamberlaine et al, 1784) vol 1 i, lxxiii. The physical isolation of the Pacific Islands was regarded particularly significant: see, eg, Charles de Brosses, *Histoire Des Navigations Aux Terres Australes* (1756) discussed in Pagden, *The Enlightenment: And Why it Still Matters* (n 37) 180.

[60] See, eg, Cummings (n 4); Enid Schildkrout, 'Inscribing the Body' (2004) 33 *Annual Review of Anthropology* 319, 327; DeMello, *Bodies of Inscription* (n 25) 47; Clinton Sanders and Angus Vail, *Customizing the Body: The Art and Culture of Tattooing* (Temple University Press, 2008) 14–5; Harriet Guest, 'Curiously Marked: Tattooing and Gender Difference in Eighteenth-Century British Perceptions of the South Pacific' in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000) 83, 87; Harriet Guest, *Empire, Barbarism, and Civilisation* (Cambridge University Press, 2007) 72, 75. On body art and tattoo as a sign of the colonised or exotic Other generally: see Marc Blanchard, 'Post Bourgeois Tattoo: Reflections on Skin Writing in Late Capitalist Societies' (1991) 7(2) *Visual Anthropology Review* 11, 13; Catherine Lutz and Jane Collins, *Reading National Geographic* (University of Chicago Press, 1993). Note that Mai'i is also known as "Omai".

[61] Cummings (n 4).

voyager travel accounts that supports the view that tattoo was perceived as a shocking or exciting practice of cultural Others. As will be seen from the discussion that follows, tattoo was not typically afforded any particular status as an indicator of cultural difference, much less assigned significant value as a signal of primitivity.

As the South Seas voyagers moved throughout the Pacific, tattoo generally invited only brief comment and neutral language in travel accounts. For example, assistant naturalist to the Forsters during the second voyage, Anders Sparrmann, described the visually powerful, bold Marquesan (French Polynesian) tattoos in benign terms: '[t]hey [the Marquesans] seemed to live chiefly by fishing and were heavily tattooed with motives representing fish.'[62] JR Forster's description of Marquesan tattoos is similarly neutral: '[t]he Natives were all naked, had their bodies almost all over punctured in circles, scrolls, chequerwise in lines & in various manners.'[63] On the rare occasions when tattoo imagery was praised or criticised in voyager accounts, it was usually done so quite briefly. For example, Gilbert observed a few representational designs of 'various small figures of men, dogs, birds' amongst the tattoos of Tongans, however, he considered them to be 'badly executed upon their arms and legs.'[64] The aesthetics of some imagery may have disappointed, but such commentary does not reveal that voyagers were particularly confronted with what they saw, as Cummings suggests.

By and large, tattoo was constructed as a minor marker of cultural difference, amongst other traits such as the Islanders' physical appearance. John Rickman's account of the Cook Islanders is fairly typical:

> [They are] above middle stature, most of them seemingly from five feet ten inches, to six feet six inches; well-made, tattowed, and like those of the friendly isles, were without cloathes,

[62] Anders Sparrman, *A Voyage Round the World with Captain James Cook in H.M.S. Resolution*, tr Huldine Beamish and Averil MacKenzie-Grieve (Robert Hale, 1953) 121. See 'General Tattoo and Other', Image 99, xxvii of this thesis.
[63] Johann Reinhold Forster, *The 'Resolution' Journal of Johann Reinhold Forster, 1772-1775*, ed Michael Hoare (Hakluyt Society, 1982) 485.
[64] George Gilbert, *Captain Cook's Final Voyage: The Journal of Midshipman George Gilbert,* ed Christine Holmes (Caliban Books, 1982) 56.

> except a kind of apron which circles their wastes, reaching little more than half way down their thighs. Both men and women were armed with spears …' [65]

In this account, tattoo is recognised as a marker of cultural difference that was shared by other Islander peoples, but that it was not afforded any particular weight amongst other characteristics. Tattoo either did not excite the European imagination as much as is assumed, perhaps because tattoo was itself an extant practice of mariners, as discussed at 6.4.1, or if it did, writings on the topic were muted by the fact-gathering nature of the interactions that took place. This has significance for the operation of racial subject positions at this time. While Pacific inferiority might have been assumed by voyagers in line with the extant thinking around racial difference, there was no particularly oppressive element to the gaze on Pasifika tattoos at this time, over and above the oppression of being an object of racial fact-finding. However, as discussed in the next section, moko often drew more attention from voyagers, and the constructions of cultural difference it supports reflects a discourse of desire and oppression.

6.2.2 Reading moko during the South Seas voyages

Compared to readings of other Pacific tattoo traditions by the South Seas voyagers, moko circulated as an explicit and important ethnographic signifier. Tā moko was readily recognised as an expressive artform and associated with discourse of Māori bravery and savagery. The meaning of the imagery was mostly not, however, speculated upon. Tattoo was primarily read as an extension of Māori males; warriors who exhibited a desirable, yet fearsome, masculinity.

In voyager accounts, Māori were observed to be a 'strong, raw boned well made people' with 'ferocious and frightful countenances.'[66] The Māori was admired and feared in equal measure. A marine on the third voyage, John Ledyard, praised Māori masculinity in his journal, writing that '[w]hen a New Zealander stands forth and brandishes his spear the subsequent idea is (and nature

[65] John Rickman, *Journal of Captain Cooks Last Voyage to the Pacific Ocean on Discovery, Performed in the Years 1776, 1777, 1778, 1779: Second Edition* (E Newberry 1781) 82.
[66] James Cook, *Journal of Remarkable Occurrences Aboard His Majesty's Bark Endeavour, 1768–1771* (transcription from original manuscript copy, Manuscript 1, National Library of Australia, 2004) 209. See also Gilbert (n 64) 26.

makes the confession) there stands a man.' [67] However, for others, the Māori male provoked anxiety; they were a 'desperate, fearless, Cannibal[]'[68] who had a 'bestial appetite' and a 'devilish greed for rapaciousness or revenge.'[69] Nevertheless, the South Seas voyagers exhibited a perverse attraction to the image of the Māori cannibal as well as the Māori warrior.[70] There are many descriptions of pantomimes or confessions of cannibalism noted in voyager accounts, some of which were the result of experiments set up voyagers.[71] For example, voyagers on the second voyage found a human head, roasted the flesh, and fed it to two Māori youths to test whether they were cannibals.[72] The voyager interest in strong, brave, bodies and in practices like cannibalism reflects curiosity and attraction to the foreign at the same time as an assumption of western superiority over the "savage".

Tattoo played a role in the narrative of Māori bravery and savagery. Through tattoo, difference was ambivalently constructed: a sign of ferocity, and in the abstract, aesthetically pleasing, albeit disfiguring when worn on a person's face. After a violent encounter during the first landfall in New Zealand, Joseph Banks wrote of observing the body of a 'middle sizd man tattowd in the face on one cheek only in spiral lines'.[73] The surgeon William Monkhouse, who also inspected the body, speculated that the purpose of the man's facial tattoo was 'to give fierceness to the Visage.'[74] Other

[67] John Ledyard, *The Last Voyage of Captain Cook: The Collected Writings of John Ledyard*, ed James Zug ((National Geographic Society, 2005) 7.
[68] John Elliot and Richard Pickersgill, *Captain Cook's Second Voyage: The Journals of Lieutenants Elliott and* Pickersgill, ed Christine Holmes (Caliban Books, 1984) 18.
[69] Sparrman (n 62) 108. See also Johann Reinhold Forster, *Observations Made During A Voyage Around the World* (n 40) 238.
[70] Gananath Obeyesekere, '"British Cannibals": Contemplation of an Event in the Death and Resurrection of James Cook, Explorer' (1992) 18(4) *Critical Inquiry* 630, 641.
[71] For a particularly comprehensive description of Māori cannibalism see John Hawkesworth, *An Account of the Voyages Undertaken by the Order of His Present Majesty, for Making Discoveries in the Southern Hemisphere, and Successively Performed by Commodore Byron, Captain Wallis, Captain Carteret, and Captain Cook, in the Dolphin, the Swallow, and the Endeavour: Drawn from the Journals Which Were Kept by the Several Commanders, and From the Papers of Joseph Banks, Esq*. (James Williams, 1775) vol 2, 203–4.
[72] Sparrman (n 62) 426. Contemporary scholars attribute the success of such experiments to Māori awareness of the British fascination with cannibalism and their engagement in cannibalism as a performance: see, eg, Nicholas Thomas, *Cook: The Extraordinary Voyages of Captain Cook* (Walker, 2003) 214; Shirley Lindenbaum, 'Thinking about Cannibalism' (2004) 33 *Annual Review of Anthropology* 475, 483.
[73] Joseph Banks, *The Endeavour Journal of Joseph Banks, 1768–1771* (derived from the State Library of NSW's 1998 transcription of Joseph Banks's Endeavour Journal, National Library of Australia, 2004) vol 2, 18 <http://southseas.nla.gov.au/journals/banks/17691008.html>.
[74] William Brougham Monkhouse, 'Journal of William Brougham Monkhouse' in James Cook, *The Journals of Captain James Cook on his Voyages of Discovery. Volume I, The Voyage of the Endeavour 1768–1771,* ed JC Beaglehole (Hakluyt Society, 1955, ebook by Ashgate Publishing, 2015) Appendix IV 564, 566.

voyagers stated that the effect of moko was to make its wearer 'look frightfull in war'[75] and that the facial moko of chiefs greatly added 'to the natural ferocity of their countenances'.[76] Such representations align with the interpretation of Māori as a warlike people and touch upon the social function of moko for men, for whom moko was a sign of their reputation as a man of mana and standing as a revered cultural member, amongst its other functions.[77]

As noted above, voyager accounts of moko also support a strong fascination with moko's aesthetics and the artistic skills it showcased. The complexity and symmetry of its patterns are praised. Joseph Banks wrote in March 1770 that the faces of Māori are 'most remarkable, on them they by some art unknown to me dig furrows in their faces a line deep at least and as broad, the edges of which are often again indented and most perfectly black.'[78] He stated that it was 'impossible to avoid admiring the immence Elegance and Justness of the figure in which it is form'd.'[79] Banks likened moko's spiral designs to 'the foliages of old Chasing upon gold or silver; all these finishd with a masterly taste and execution'.[80] Artist Sydney Parkinson similarly described Māori faces as 'tataowed, or marked either all over, or on one side, in a very curious manner' with 'fine spiral directions like a volute [] being indented in the skin'.[81] The bravery of moko's recipients was also praised by voyagers due to the painful application process that involved scarification. Banks described those receiving moko as bearing their pain with fortitude and noted scarification channels up to one-sixteenth part of an inch deep.[82]

To some extent, moko appears to have been read by voyagers in line with the Māori understanding of its significance as 'a heroic adornment.' [83] However, moko's placement on the face was confronting to European observers. Joseph Banks saw no contradiction in complimenting the elegance of moko

[75] Banks (n 73) vol 2, 179.
[76] Gilbert (n 64) 56.
[77] See section 1.2.2.1 of this thesis.
[78] Banks (n 73) vol 2, 178–9.
[79] Ibid vol 2, 179. See also Hawkesworth (n 71) 256.
[80] Banks (n 73) vol 2, 179. See similar comments in relation to Māori carving: Johann Reinhold Forster, *Observations Made During A Voyage Around the World* (n 40) 238.
[81] Sydney Parkinson, *A Journal of a Voyage to the South Seas in His Majesty's Ship, The Endeavour* (Stanfield Parkinson, 1773) 90. The word curious is used in this quote in its 18th century sense, meaning accurate, careful, neat, or elegant: Samuel Johnson, *A Dictionary of the English Language* (WG Jones, 3rd ed, 1768) 54.
[82] Banks (n 73) vol 1, 294, vol 2, 31.
[83] James Cowan, *The Māori: Yesterday and Today* (Whitcombe and Tombs Limited, 1930) 138.

patterns but stating that its overall effect was to make Māori 'most enormously ugly'.[84] Drawing from Captain Cook's journals and Banks' papers, John Hawkesworth similarly expresses this contradiction: 'though we could not but be disgusted with the horrid deformity which these stains and furrows produced in the "human face divine," we could not but admire the dexterity and art with which they were impressed.'[85] The cultural difference constructed in representations of moko and the men who wore them was equivocal,[86] oscillating between a reading of the Māori warrior as brave, fierce, artistically skilled, and disfigured.

This ambivalence reflects to some degree the dynamism of desire and oppression that continues to mark contemporary postcolonial accounts of the Self/Other binary, as well as Enlightenment racial thinking that presumed the Pacific occupied a lower position on the Progress Continuum than the "civilised" Self. The South Seas voyagers appear to have assumed and asserted their own superiority when reading moko but, despite themselves, were also fascinated with, and desirous of, the racialised identity of the Other and their cultural practices. Racial difference, as theorised by Enlightenment scholars, positioned Islanders as a source of insight into the pre-civilised self. However, the spontaneous desire exhibited by the voyagers in personally observing the distinctive features of Pacific peoples went beyond an interest in manifestations of markers of civility or primitivity. The cultural difference of the tattooed Māori male was a site of desire, yet also rendered him a phobic object. I will now examine how the objectification that underscored the reading of moko shifted over time, into the 19th century.

6.2.3 Reading moko into the 19th century

In the midst of increasing European settlement in New Zealand, the oppressive aspects of racialised subject positions hardened, leading to the framing of the Other not just as a silent inferior, but as an inferior whose difference needed to be actively suppressed. Following the South Seas voyages, the aesthetics of moko imagery continued to attract some admiration amongst settlers and travellers to

[84] Banks (n 73) vol 2, 179.
[85] Hawkesworth (n 71) 256.
[86] The female Māori primitive drew much less attention in voyager accounts.

New Zealand. Moko was recognised as a skilled art[87] and tohunga tā moko were compared to famous English portrait painters like Sir Thomas Lawrence.[88] For example, Reverend William Yate, who dissuaded Māori converts from being tattooed, nevertheless described the 'volutes' or spiral forms he saw as 'perfect specimens' with a design regularity that is 'mechanically correct.'[89] As a practice that showcased cultural difference, moko became increasingly read as an indicator of barbarism and heathenism. It was not simply read as a sign of the 'ignoble primitive', at a time when Enlightenment thinking on racial difference shifted towards a 'less subtle denigration of those whose physical inferiority and moral faults were unmistakeable',[90] but re-read as a rejection of the new, assimilated, social order.

The establishment of missions from 1814 in New Zealand appears to have had significant impact in this development in the reading of moko. As part of their conversion and assimilation goals, some missionaries actively suppressed culturally distinctive practices,[91] particularly from the 1840s,[92] and ultimately this was a significant contributor to the decline of male moko, along with other stressors such as land confiscation.[93] The Reverend Samuel Marsden, for example, who preached the first sermon in New Zealand on Christmas Day in 1814, dissuaded Māori converts from this 'very foolish and ridiculous custom', imploring a man called 'Korrokorro' to 'lay aside the barbarous customs of his country, and adopt those of civilized nations.'[94] Openly hostile representations of moko are evident from this time. After briefly presenting his wrist to a tā moko artist so he could experience

[87] See, eg, Arthur Saunders Thomson, *The Story of New Zealand: Past and Present – Savage and Civilized* (John Murray, 1859) vol 1, 75; Augustus Earle, *A Narrative of Nine Months' Residence in New Zealand in 1827; Together with a Journal of a Residence in Tristan D'Acunha. An Island Situated Between South America and the Cape of Good Hope* (Longman et al, 1832) 138.
[88] Earle (n 87) 137–8.
[89] Yate (n 49) 148. Like the South Seas voyagers, he was impressed by the 'most painful' application process, noting that the Māori 'pay dearly, in suffering, for the beauty which it [moko] is supposed to impart': at 148.
[90] Thomas, *Colonialism's Culture* (n 35) 77–8 (citation omitted).
[91] Implicit in much missionary activity in the early 19th century was that indigenous cultural practices and customs had to be changed: see Merete Falck Borch, *Conciliation, Compulsion, Conversion: British Attitudes Towards Indigenous Peoples 1763–1814* (Rodopi, 2004) 282.
[92] Twells (n 52) 180.
[93] Ngahuia Te Awekotuku and Linda Waimarie Nikora, *Mau Moko: The World of Māori Tattoo* (Penguin Books, 2007) 64; Ngahuia Te Awekotuku 'Ta Moko: Maori Tattoo' in Roger Blackley, *Goldie* (Auckland Art Gallery; David Bateman, 1997) 109, 112. See also Thomson (n 87) 77–8.
[94] Marsden, *Journal* (n 54) 35.

what the application process felt like,[95] John Liddiard Nicholas, a travelling gentleman scholar who accompanied Marsden's 1814 visit wrote:

> It is to be hoped that this barbarous practice will be abolished in time among New Zealanders, and that the missionaries will exert all the influence they are possessed of to dissuade them from it. The mind revolts at the idea of seeing a fine manly face as any in the universe thus shockingly disfigured; and producing associations similar to what may be imagined of so many fiends.[96]

Such representations hardened the narrative of disfigurement in the writings of some of the South Seas voyagers, noted earlier. It has been suggested by contemporary scholars that missionary hostility towards tattoo was related to Christian disapproval of body markings.[97] In the Old Testament, Leviticus 19:28 states '[y]e shall not make any cuttings in your flesh for the dead, nor print any marks upon you: I am the Lord!' which has been interpreted as prohibiting tattoo.[98] However, as the Christian meanings of tattoo are equivocal,[99] with tattoo understood as a permissible sign of religious observance and as sign of paganism at various times, it is possible that missionary opposition to moko

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[95] He found the process extremely painful: John Liddiard Nicholas, *Narrative of a Voyage to New Zealand Performed in the Years 1814 and 1815 in Company with the Rev. Samuel Marsden, Principal Chaplain of New South Wales* (James Black & Son, 1817) vol 1, 360.

[96] Nicholas, *Narrative of a Voyage to New Zealand* (n 95) 360–1. Nicholas also wrote that moko was 'an unnecessary infliction' with 'no one purpose of obvious utility', and that it makes Māori 'appear truly hideous': at 360. See also the missionary George Bennet who describes male Māori faces as 'hideous from their tatauings': George Bennet, Letter reproduced in the *Devizes and Wiltshire Gazette* (Devizes and Wiltshire, England, 2 June 1825) 1.

[97] Particularly following the Protestant Reformation: see Schildkrout (n 60) 324. The key evidence cited for religious disapproval is Emperor Constantine's banning of tattoo in 330AD after his conversion to Christianity because the human face should not be defiled, and the edict of Pope Hadrian I issued at the Ecumenical Council at Nicea in 787AD that banned tattoo amongst Catholics as a barbaric practice: see, eg, Adrienne Mayor, 'People Illustrated: In Antiquity Tattoos Could Beautify, Shock, or Humiliate' (1999) 52(2) *Archaeology* 54, 54; Filippo Pesapane et al, 'A Short History of Tattoo' (2014) 150(2) *JAMA Dermatology* 145, 145; Samuel Steward, *Bad Boys and Tough Tattoos: A Social History of the Tattoo with Gangs, Sailors, and Street-Corner Punks* (Harrington Park Press, 1990) 186. Note that Hadrian's ban is typically read as excluding religious-themed tattoos as they brought spiritual rewards: see, eg, Juliet Fleming, 'The Renaissance Tattoo' (1997) 31 *Anthropology and Aesthetics* 34, 48. Cf Juniper Ellis, *Tattooing the World: Pacific Designs in Print and Skin* (Columbia University Press, 2008) 13. After the ban, small devotional signs such as pilgrim tattoos continued. See Pesapane et al: at 145.

[98] This interpretation is contested, particularly by contemporary theologians who suggest that Leviticus 19:28 prohibits the imitation of heathen practices rather than tattoo, and that the purpose of this prohibition was to persuade the people of Israel to not follow the pagan mourning practices of the Canannites: see, eg, 'Christian Tattooing – Part 1' *Tattoo Symbol* (Web Page) <http://www.tattoosymbol.com/christian/christian1.html>; 'Are Catholics Prohibited From Getting Their Body Tattooed?', *Christianity Stack Exchange* (Web Page, 2016) <http://christianity.stackexchange.com/questions/51006/are-catholics-prohibited-from-getting-their-body-tattooed>.

[99] See, eg, Schildkrout (n 60) 324; Sarah Bond, 'Tattoo Taboo? Exploring the History of Religious Ink and Facial Tattoos', *Forbes* (online, 9 September 2016) <https://www.forbes.com/sites/drsarahbond/2016/09/09/ahistoryofreligioustattoos/#6e0ad93172fe>; Anna Felicity Friedman, 'Inside the World's Only Surviving Tattoo Shop for Medieval Pilgrims', *Atlas Obscura* (online, 18 August 2016) <https://www.atlasobscura.com/articles/inside-the-worlds-only-surviving-tattoo-shop-for-medieval-pilgrims>.

in the 19th century had more to do with the failure it indicated of a convert to fully accept God's word and assimilate, than the offensiveness of tattoo to the Christian faith. As a highly visible practice, the application of moko was a symbolic rejection of the 'British paths of decency and good order'deemed necessary for the transition to a 'civilised' life.[100] For the Church Missionary Society (CMS) that enforced an evangelise-to-civilise program from around the 1820s in New Zealand,[101] conversion to Christianity was seen as the first step to civilisation.[102] For a conversion to be considered successful, 'a changed heart had to be shown in a changed way of life.'[103] It was not enough that Māori became Christian, they needed to wholly adopt the ways of the colonisers for the religious conversion to be regarded complete.[104] Undertaking moko visibly disrupted the path to civilisation, challenged the authenticity of conversion and, in some instances, was perceived to be a 'signal of revolt against the existing government of which Christianity is the avowed basis.'[105]

Into the 1830s, missionaries reported that a large portion of converts were 'still addicted to the superstitions and observances of their forefathers'[106] and continued to be tattooed even after baptism.[107] Mission tattoo bans were introduced. As Revered Yate reports, '[i]n all the Mission Stations, tattooing has been forbidden … any person coming to live with us is no more to submit himself to such a savage and debasing performance.'[108] While such tattoo bans were common

[100] William Williams and Jane Williams, *The Turanga Journals 1840-1850: Letters and Journals of William and Jane Williams, Missionaries in Poverty Bay*, ed Frances Porter (Price Milburn for Victoria University Press, 1974) 41.

[101] Prior to this time, the CMS program was the reverse: civilise-to-evangelise. See, eg:

> Till their attention is gained, and moral and industrious Habits are induced, little or no progress can be made in teaching them the Gospel. I do not mean that a native should learn to build a Hut or make an Axe before he should be told anything of Man's Fall and Redemption, but that these grand Subjects should be introduced at every favourable opportunity while the Natives are learning any of the simple Arts.

Samuel Marsden, *Marsden and the New Zealand Mission: Sixteen Letters*, ed P Havard-Williams (University of Otago Press, 1961) 15.

[102] Williams and Williams (n 100) 43.

[103] Ibid 45. See also: at 41.

[104] On the missionary fear of insincere conversions: see, eg, Peter van der Veer, 'Introduction' in Peter van der Veer (ed), *Conversion to Modernities: The Globalization of Christianity* (Routledge, 1996) 1, 1–21.

[105] James Montgomery, *Journal of Voyages and Travels by the D Tyermand and G Bennet* (Crocker and Brester, 1832) vol 1, 93.

[106] Yate (n 49) 81.

[107] An example is reported by CMS missionary William Williams in Williams and Williams (n 100) 432.

[108] Yate (n 49) 150. Mission bans on tattoo were also evident elsewhere in the Pacific: see Ellis, *Tattooing the World* (n 97) 96–132.

throughout New Zealand, tā moko was not illegal in New Zealand at this, or any other, time.[109] Nevertheless, missionary disapproval appears to have had the desired suppressing effect. Body markings became increasingly incompatible with achieving success in the emergent colonial society.[110] As Arthur Thomson explained in 1859, '[t]attooing is now going out of fashion, partly from the influence of the missionaries, who described it as the Devil's art, but chiefly from the example of the settlers and the numerous personal ornaments commerce has placed within the reach of all the industrious.'[111] By the second half of the 19th century and the end of armed hostilities between Māori and pākehā, moko, amongst males in particular, was in serious decline.[112] As Palmer

[109] The *Tohunga Suppression Act 1907* (NZ) has been interpreted as making the work of tohunga tā moko illegal: see, eg, Ngarino Ellis, 'Toitu Te Moko: Maintaining the Integrity of the Moko in the 19th Century and the Work of Gottfried Lindauer' (2018) 192 *Research Institutes in the History of Art Journal* [11]; Chantal Kwast-Greff, 'Shared Place and Maimed Bodies: Flesh of the Past, Soul of the Future (or Vice-Versa) in *Once Were Warriors'* in Stella Borg Barthet (ed), *Shared Waters: Soundings in Postcolonial Literatures* (Rodopi, 2009) 75, 81. However, while the Act has been elsewhere critiqued as an assertion of colonial dominance, see, eg, Mamari Stephens, 'A Return to the Tohunga Suppression Act 1907' (2001) 32(2) *Victoria University Wellington Law Review* 437, 437–62, its provisions did not prohibit tohunga tā moko practicing or tattoo. It sought to regulate the practices of tohunga of traditional medicine and and prevent prophecy: *Tohunga Suppression Act 1907* (NZ) Preamble. Tattoo was, however, legally regulated elsewhere in the Pacific. In the Marquesas, for example, an ordinance was introduced in 1858 that 'banned tattooing, orgies, fermenting coconut juice and dessicating corpses': Mark Berg, 'French Military Rule in the Marquesas, 1842–1890' (Thesis, 1983) 10 <https://evols.library.manoa.hawaii.edu/bitstream/10524/49250/1/Berg_French%20Military%20rule%20in%20the%20Marquesas_1983_ocr.pdf>. See also: at 11, 21. In the Society Islands (ie French Polynesia), tattooing was forbidden by civil law when the codes were first introduced, and then later, forbidden only to church members: Gunson (n 59) 305.

[110] Michael King, 'Moko and C.F. Goldie' (1975) 84(4) *The Journal of the Polynesian Society* 431, 438; Alfred Gell, *Wrapping In Images: Tattooing in Polynesia* (Oxford University Press, 2004) 262–3; Ellis, 'Toitu Te Moko' (n 109) [10]; Linda Waimarie Nikora, Mohi Rua and Ngahuia Te Awekotuku, 'Wearing Moko: Maori Facial Marking in Today's World' in Nicholas Thomas, Anna Cole and Bronwen Douglas (eds), *Tattoo: Bodies, Art, and Exchange in the Pacific and the West* (Reaktion Books, 2005) 190, 193.

[111] Thomson (n 87) 77–8. See also George French Angas, *Polynesia; A Popular Description of the Physical Features, Inhabitants, Natural History, and Productions of the Islands of the Pacific. With an Account of Their Discovery, and the Progress of Civilisation and Christianity Amongst Them* (Society For Promoting Christian Knowledge, 1866) 146.

[112] Note that there a brief surge in male moko uptake in the 1860s at the start of the Māori Wars: Te Rangi Hiroa, *The Coming of the Maori* (Māori Purposes Fund Board, 1949) 300; Michael King, *Moko: Maori Tattooing in the 20th Century* (David Bateman, 2008) 83; Linda Waimarie Nikora, Mohi Rua and Ngahuia Te Awekotuku, 'In Your Face: Wearing Moko – Maori Facial Marking in Today's World' (Conference Paper, 'Tatau/Tattoo: Embodied Art and Cultural Exchange Conference, Victoria University, 21–23 August 2003) 5–6. Māori women were less vulnerable to these pressures, and they continued to engage in facial moko throughout the 19th century: King, 'Moko and C.F. Goldie' (n 110) 439; King, *Moko: Maori Tattooing in the 20th* Century: at 84. By the 1930s, moko kauae was a 'rare sight in most districts': JC, 'A Vanished Art. The Maori Moko Last of the Tattooed Men', *Auckland Star* (Auckland, 9 November 1935) 40.

and Tano argue, '[t]he loss of the moko was a part and parcel of the larger degradation of Maori society.'[113]

Forces of assimilation, including the disruption of Māori social order and loss of land, in addition to the missionary gaze on tattoo, had tangible effects on Māori cultural practices like tā moko.[114] After the South Seas voyages, the oppressive functioning of racialised subject positions increased. Moko was perceived not only as something that disfigured the wearer – it was a practice that needed to be suppressed. The construction of cultural difference in missionary readings of moko provides insight into what historical attitudes and their effects cultural claimants might be resisting when they state a possessive cultural claim. However, of their own, western readings of moko do not tell us much about how desire manifested in the consumption patterns of colonisers. As such, in the next subsection I will consider how Māori participated as subjects and objects in intercultural trades with colonisers.

6.3 Of subject and object

In chapter 5, I showed the importance of considering the agency of actors engaged in cultural production for grasping lived experience and meaning-making outside of the formal legal frame. In this subsection, I seek to better understand how the lived experience of the subaltern historically intersected with, reproduced, or conflicted with, colonial history as performed in conventional scholarship. I examine two sites where objects that featured moko were made with the participation of Māori – te hoko upoko and the creation of the Māori portraits of CF Goldie – to better understand their complex motivations grounded in the experience of surviving colonialism. When positioned as subjects as well as objects in the colonial discourse, a more nuanced understanding of the operations of the Self/Other binary and the discourse of desire and oppression within intercultural engagements is exposed.

[113] Christian Palmer and Mervyn Tano, *Mokomokai: Commercialisation and Desacralization* (International Institute for Indigenous Resource Management, 2004) <http: //nzetc.victoria.ac.nz/tm/scholarly/tei-PalMoko-t1-body-d1-d1.html>.
[114] Horatio Gordon Robley, *Moko; or, Maori Tattooing* (Chapman and Hall Limited, 1896) 123.

6.3.1 Te hoko upoko

In 1770, Joseph Banks purchased an upoko tuhi at Queen Charlotte Sound for the price of a 'pair of old Drawers of very white linen.'[115] A trade developed in tattooed Māori heads 40 years later.[116] They were first offered for sale in Sydney in 1811,[117] and by the 1820s, the trade was of a commercial scale.[118] The market for upoko tuhi was fuelled by perverse attraction to the Māori's 'passionate abandon',[119] the value of the heads as a 'macarbre souvenir'[120] and curio, and the scientific value of the heads to naturalists, and later, to craniologists and other pseudo scientists interested in skull measurements.[121] Tattoo contributed to the shocking visual effect of the heads, but the heads were not perceived as an object through which tattooing as a custom of the Māori could be studied, until after around 1870.[122]

The sale of upoko tuhi transformed what was a traditional cultural practice of the Māori for the market.[123] Pre-European contact, Māori kept upoko tuhi for various reasons including as trophies of war or in memorial of deceased leaders or loved ones.[124] During peace negotiations between warring

[115] Banks (n 73) vol 2, 209. The purchase occurred in coercive circumstances. Banks states that the Māori chief he obtained the head from 'was very jealous of shewing' him any tattooed heads, and only parted with one after he was threatened with a musket: at 209.
[116] Upoko tuhi were created using a sophisticated process of embalming that retained the shape and character of facial moko: see, eg, Robley (n 114) Chapter 11; George Bennet, 'The Mode of Preparing Human Heads Among the New Zealanders, with Some Observations on Cannibalism' (1831) 2 *The Journal of the Royal Institution of Great Britain* 215, 216–7.
[117] The first head to be sold in Sydney was stolen by a 'seaman named Tucker' from Māoris at Riverton: 'When Heads Were Traded', *The Australian Woman's Mirror* (Sydney, 11 June 1946) 4; See also Robley (n 114) 169.
[118] Palmer and Tano (n 113). Sydney offered the main market for the heads, which were sold on the street, and then onsold overseas: see Robley (n 114) 171; 'Trade in Human Heads', *Australian Town and Country Journal* (Sydney, 19 June 1897) 17; 'Dealing in Human Heads', *Evening News* (Sydney, 12 October 1895) 3.
[119] Amiria Henare, *Museums, Anthropology and Material Exchange* (Cambridge University Press, 2005) 71.
[120] Phillip Walsh, 'Māori Preserved Heads' (1894) 27 *Transactions and Proceedings of the New Zealand Institute 1868–1961* 610, 613. See also Awekotuku and Nikora, *Mau Moko* (n 93) 48; Henare, *Museums, Anthropology and Material Exchange* (n 119) 71.
[121] See, eg, Barbara Creed and Jeanette Hoorn, 'Introduction' in Barbara Creed and Jeanette Hoorn (eds), *Body Trade: Captivity, Cannibalism and Colonialism in the Pacific* (Routledge, 2001) xiii, xv; Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012) 86.
[122] See, eg, Owen Jones, *The Grammar of Ornament* (Bernard Quaritch, 1868) 13; MUS-1996-6-1 'Letter from Mr Cheeseman to Professor WH Flower of June 19th 1882' in *Auckland Institute Letter Book, 1882–1890* (Auckland Institute and Museum Library) 114 quoted in Fiona Cameron, 'Shaping Maori Identities and Histories: Collecting and Exhibiting Maori Material Culture at the Auckland and Canterbury Museums from the 1850s to the 1920s (PhD Thesis, Massey University, 2000) 46; JW Powell, *Fourth Annual Report of the Bureau of Ethnology to the Secretary of the Smithsonian Institution 1882–83* (Government Printing Office, 1886) 75–6; 'Major-General Robley's Collection of Māori Heads', *Otago Witness* (Otago, 24 December 1902) 46.
[123] See, eg, Walsh (n 120) 614; Yate (n 49)134.
[124] See, eg, Ngahuia Te Awekotuku, 'He Maimai Aroha: A Disgusting Traffic for Collectors: The Colonial Trade in Preserved Human Heads in Aotearoa, New Zealand' in A Kiendle (ed), *Obsession, Compulsion, Collection: On Objects, Display Culture and Interpretation* (The Banff Centre Press, Banff, 2004) 77, 80–1;

tribes, upoko tuhi trophies were often returned as part of the dispute settlement.[125] Retaining the upoko tuhi of loved ones reflects the closeness and identification with ancestors that is typical of the Māori cosmology.[126] However, following growing demand for Pacific curios upon the return of the South Seas voyagers to England, Māori began to trade the heads commercially.[127] The trade was supplied by the heads of enemies and slaves.[128] Selling the head was a mark of contempt and a sign of the business acumen of the trader, who traded the heads for muskets, along with other goods like flax.[129] Some chiefs profited immensely from the trade after waging war on their neighbours.[130] Once the heads were sold to traders, they were exported and on-sold for around 20 pounds each, although by 1826, a glut in the market meant that prices had dropped to around 2 pounds.[131] During the peak trading period of 1820–1831 more than 200 heads were circulated worldwide, many of which ended up in popular museum collections in the United States and Europe.[132]

Awekotuku and Nikora, *Mau Moko* (n 93) 46–7; Robley (n 114) 133–4; Walsh (n 120) 611; Bennet (n 116) 215–6.

[125] Robley (n 114) 134–5; Walsh (n 120) 613– 4; Marsden, *Journal* (n 54) 35; Palmer and Tano (n 113).

[126] Palmer and Tano (n 113). On moko and Māori cosmology, see section 1.2.2.1 of this thesis.

[127] Awekotuku, 'Ta Moko: Maori Tattoo' (n 93) 111.

[128] Yate (n 49) 130–1; Hiroa, *The Coming of the Maori* (n 112) 300.

[129] Walsh (n 120) 614; Steve Gilbert, *Tattoo History: A Source Book* (Juno Books, 2000) 68; Robley (n 114) 167; Palmer and Tano (n 113); Bennet (n 116) 217; Frank Parsons, *The Story of New Zealand: A History of New Zealand From the Earliest Times to the Present, With Special Reference to the Political, Industrial and Social Development of the Island Common-wealth; Including the Industrial Evolution Dating from 1870, the Political Revolution of 1890, the Causes and Consequences, and the General Movement of Events Throughout the Four Periods of New Zealand History*, ed CF Taylor (CF Taylor, 1904) 12. At one point, the going rate to purchase one musket from European traders was two upoko tuhi, or a tonne of potatoes, or a shipload of flax: David Lewis and Werner Forman, *The Maoris: Heirs of Tane* (Orbis, 1982) 93. Frank Parsons, *The Story of New Zealand: A History of New Zealand From the Earliest Times to the Present, With Special Reference to the Political, Industrial and Social Development of the Island Common-wealth; Including the Industrial Evolution Dating from 1870, the Political Revolution of 1890, the Causes and Consequences, and the General Movement of Events Throughout the Four Periods of New Zealand History*, ed CF Taylor (CF Taylor, 1904) 12.

[130] Particularly Hongi Hika and Pomare of Ngāpuhi: Awekotuku and Nikora, *Mau Moko* (n 93) 48. American naval officer and explorer Charles Wilkes reports that 'the chief Shougi' also 'made large sums' through trading upoko tuhi: Charles Wilkes, *Narrative of the United States Exploring Expedition During the Years 1838, 1839, 1840, 1841, 1842* (Ingram, Cooke and Co, 1852) vol 1, 311.

[131] This brought upoko tuhi 'within the reach of the middle classes': T Dunbabin, 'A Strange Trade: Deals in Māori Heads. Pioneer Artists', *The Sun* (Sydney, 21 January 1923) 19. On the drop in price in the 1820s, see also Robley (n 114) 168.

[132] Ellis, *Tattooing the World* (n 97) 94; Awekotuku, 'He Maimai Aroha' (n 124) 85; Ngahuia Te Awekotuku, 'Mata Ora: Chiseling the Living Face: Dimensions of Maori Tattoo' in Elizabeth Edwards, Chris Gosden, Ruth Phillips (eds), *Sensible Objects: Colonialism, Museums and Material Culture* (Berg, 2006) 121, 127. For an account of the heads held by museums (and private citizens) at the turn of the 20th century: see Robley (n 114) 183–204. Robley's famous private collection of 35 upoko tuhi was acquired by the Natural History Museum in New York in 1908: 'Weird Heads of Mason's Greet New York: Unique Collection from New Zealand Bearing Strange Emblems of Savagery Added to Natural History Museum', *New York Times* (New York, 21 July 1907) C4; Awekotuku, 'He Maimai Aroha' (n 124) 86; Hiroa, *The Coming of the Maori* (n 112) 301.

The demand for upoko tuhi resonates with the preoccupation with, and perverse attraction to, the "savagery" of Māori men. Reports of how Māori supplied the burgeoning market for upoko tuhi are illustrative. It was reported that Māori traders tattooed slaves with random motifs and then killed them[133] or alternatively, killed them and applied the tattoos post-mortem.[134] George Angas, a naturalist and painter, blamed European demand for post-mortem tattooing: '[t]o the shame of Europeans thus engaged, it must be told, that so eager were they to procure these dried heads for sale in England and elsewhere, that many chiefs were persuaded to kill their slaves, and tattoo their faces after death, to supply this unnatural demand'.[135] Other commentators suggested that this practice was driven by Māori business acumen. Reverend John Wood reported that purchasers were sometimes permitted to select the head they wanted while the person still lived:

> One of my friends lately gave me a curious illustration of the trade in heads. His father wanted to purchase one of the dried heads, but did not approve of any that were brought for sale, on the ground that the tattoo was poor, and not a good example of the skill of the native artists. The chief allowed the force of the argument, and, pointing to a number of his people who had come on board, he turned to the intending purchaser, saying, "Choose which of these heads you like best, and when you come back I will take care to have it dried and ready for your acceptance."[136]

The reporting of such incidences, if true, suggests that traders were flexible in meeting the unique needs and preferences of their consumers. However, even if the account is a boast or false, it appears that colonisers were interested in the intricacies of the trade's supply and their privileged position to direct that supply.

Tales of pre-purchased heads, killing slaves, and the practice of post-mortem tattooing support the perception that Māori barbarity and cruelty was bound up in the market for upoko tuhi. Following

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[133] Cf Samuel Marsden, who wrote in 1819 that he 'of no instance of any ever being killed … for the purpose of selling their Heads to Europeans or other nations. The Heads which are cured and sold, are those of the slain in war, which are not intended to be returned to their friends': Marsden, *Journal* (n 54) 37–8.
[134] Dunbabin (n 131); Robley (n 114) 189; Powell (n 122) 76; Henry Ling Roth, 'Maori Tatu and Moko' (1901) 33 *Journal of the Anthropological Institute of Great Britain and Ireland* 29, 44–7. A recent study undertaken on nineteen upoko tuhi held in French museums supports that post-mortem tattooing for commercial purposes was practiced. The study reports that only seven of the 19 upoko tuhi in its sample had solely ante-mortem tattoos: Philippe Charlier et al, 'Maori heads (Mokomokai): the Usefulness of a Complete Forensic Analysis Procedure' (2014) 10(3) *Forensic Science, Medicine, and Pathology* 371, 378.
[135] Angas (n 111) 159–60.
[136] John George Wood, *The Natural History of Man: Being an Account of the Manners and Customs of the Uncivilized Races of Men* (G Routledge and Sons, 1870) 120. See also Frederick Maning, *Old New Zealand: Being Incidents of Native Customs and Character in the Old Times by a Pakeha Maori* (Smith, Elder and Co, 1863) 58–9.

concerns that such practices were encouraged by the middlemen traders that bought the heads and transported them to or through New South Wales,[137] the importation of heads into New South Wales was banned in 1831 on humanitarian grounds.[138] The Government Order that introduced the ban provided a penalty of 50 guineas,[139] and was successful in quelling the international dimensions of the trade.[140] There were no prosecutions under the Order.[141]

[137] Particularly in the wake of two publicised conflicts between Māori and colonial traders in upoko tuhi. The first incident involved Joe Rowe, a trader in heads in Kapiti, who was killed in January 1831 following his refusal to return the heads of two chiefs from Taupo to their family members. Rowe's head was severed before being preserved in the manner of upoko tuhi. Shortly after, the master of trading vessel the *Prince of Denmark*, purchased some heads in the Bay of Islands. When passing through Tauranga, the master showed the heads to local Māori who recognised their relatives. Once the *Prince of Denmark* arrived in Sydney, 12 heads were sold which caused much scandal because the Māori subsequently petitioned Governor Darling for the return of the heads. Prominent colonisers such as Reverend Marsden asked Governor Darling to intervene. The Government Order to ban the importation of the heads to NSW specifically orders those in possession of the heads imported by the *Prince of Denmark* to deliver them up so that they could be restored to their relatives. See Alexander McLeay, 'Government Order No 7' in New South Wales, *Sydney Gazette and the New South Wales Advertiser*, 16 April 1831, 2; 'Governor Darling to Viscount Goderich', 13 April 1831, Despatch No. 37 in *Historical Records of Australia. Series 1. Governors' Despatches to and From England*, ed Frederick Watson **(**Library Committee of the Commonwealth Parliament, 1923) vol 16, 241; Robley (n 114) 178–80; 'When Heads Were Traded' (n 117) 4; Nigel Palethorpe, 'Trade in Human Heads', *The Sun* (Sydney, 18 July 1948) 7; 'Advance Australia: Sydney Gazette', *The Sydney Gazette and New South Wales Advertiser* (19 April, 1831) 2; 'March of Intellect in New South Wales', *The Sydney Monitor* (Sydney, 16 April 1831) 4; Awekotuku, 'Mata Ora' (n 132) 126; 'The Sydney Herald', *The Sydney Herald* (Sydney 25 April 1831) 2.

[138] McLeay (n 137) 2. The Government Order states that 'such disgusting traffic tends greatly to increase the sacrifice of human life amongst savages': at 2. Te hoko upoko was compared to the slave trade by Governor Darling: 'Governor Darling to Viscount Goderich' (n 137) 241. The prohibition on the trade was received into New Zealand law when New Zealand became a separate colony, and it remained in force until 1896: *New South Wales Laws Adopted Act 1841* (4 Victoriae 1841 No 1); Palethorpe (n 137) 'Trade in Human Heads', *The Sun* (Sydney, 18 July 1948) 7.

[139] Wilkes (n 130) 311; Angas (n 111) 160. Robley states that the fine was 40 pounds Robley (n 114) 181.

[140] The international dimensions trade is reported to have much slowed by 1831and completely ceased by 1855. See Wilkes (n 130) 311; Richard Taylor, *Te Ika A Maui, or, New Zealand and its Inhabitants: Illustrating the Origin, Manners, Customs, Mythology, Religion, Rites, Songs, Proverbs, Fables, and Language of the Natives; Together with the Geology, Natural History, Productions, and Climate of the Country, its State as Regards Christianity, Sketches of the Principal Chiefs, and their Present Position* (Wethheim and Macintosh, 1855)154. It is difficult to ascertain, however, how much the threat of law acted as an incentive for moral conduct at this time. Commentators list other factors such as the deaths of Hongi Hika and Pomare, two prolific Māori agents in the trade, in 1828 and 1826 respectively as other potential contributors to the dampening of the trade: see, eg, Awekotuku and Nikora, *Mau Moko* (n 93) 49; Awekotuku, 'He Mamai Aroha' (n 124) 85; Awekotuku, 'Mata Ora' (n 132) 126–7.

[141] Note that while one prosecution is noted by journalist Nigel Palethorpe, the case mentioned involves Captain Stewart, master of the brig *Elizabeth.* Stewart's charges relate to being an accessory to murder of Māori in New Zealand (for his participation in a tribal war) and not to importing the heads into New South Wales: Palethorpe (n 137) 7. A charge under the Order, however, was threatened in the 1870s against the curator of the Canterbury museum, Julius Van Haast, for displaying an upoko tuhi. The display was objected to by Māori. No prosecution eventuated, but the Attorney General issued an opinion that Darling's Government Order was good law in New Zealand and Haast was instructed to remove the offending exhibit: Robley (n 114) 168–9.

For the Māori that supplied the trade, it appears that it offered a pragmatic solution to intertribal violence and the need to amass objects to trade with Europeans for firearms and ammunition.[142] The trade peaked in the 1820s at which time there was increasingly regular intercultural contact in New Zealand following the steady arrival of sealers, whalers, traders, and missionaries from the turn of the 19th century.[143] Māori traders were clearly aware of the European fascination with curios and trading the heads of enemies and slaves presented an opportunity for advancement.

Te hoko upoko exhibits the hallmarks of the desire for, and denigration of the Other apparent in the western reading of moko in the early 19th century. However, while the missionaries were disturbed by moko uptake at this time, the market for upoko tuhi was thriving. While demand resulted from an oppressive understanding of Māori barbarity and a desire to own that difference, this does not capture the complexity of subject positions at play in this trade. The Māori response in supplying the market suggests a degree of opportunism that disrupts a simplistic account of them being objectified and oppressed. While exoticism and denigration were key to framings of upoko tuhi, Māori agency facilitated the trade in tattoo as object to some degree and in so doing, acquiesced to, but in the process subverted, racial dynamics for the benefit of their communities.

Today, te hoko upoko is perceived as a historical injustice inflicted on the Māori that commodified the heads, devalued traditional cultural practices,[144] and through the circulation of heads as artefacts, contributed to the 'imperial ideologies and campaigns which would bring about the colonisation of New Zealand.'[145] The continuing retention of heads and other human remains by museums and private collections is also part a broader politics of redress of past wrongs and self-determination.[146] However, a closer look at the historical dimensions of the trade indicates an even more complex

[142] 'It was the desire to possess muskets for self-preservation, and the facility for exchanging dried heads for firearms that led up to this traffic': Robley (n 114) 168–9.
[143] On trading and settlement patterns in New Zealand and early settlements, see Michael King, *The Penguin History of New Zealand* (Penguin, 2003) chapter 9; Parsons (n 129) 4, 8, 19–20.
[144] See, eg, Palmer and Tano (n 113); Erai (n 10) 68–9.
[145] Henare, *Museums, Anthropology and Material Exchange* (n 119) 106. In 2006, the Mokomokai Education Trust estimated that there were 127 heads in foreign museums and 70 in private collections overseas: Te Awekotuku, 'Mata Ora' (n 132) 127.
[146] Henare, *Museums, Anthropology and Material Exchange* (n 119) 95.

politics of Māori survival in the context of frontier war and relentless settler encroachment.[147] The survival of some marae and extending kinship groups occurred at the cost of others. The trade in enemy heads was opportunistic,[148] however in producing and selling upoko tuhi, Māori did not sell the heads of their ancestors. Instead, they leveraged cultural practices in the service of the market to create a new product that met their need for muskets. Though some readers may baulk at the suggestion, a parallel of sorts can be drawn with moko and kirituhi today. For those that find the concept of kirituhi useful like tā moko artist Richie Francis,[149] kirituhi provides them with a means to work interculturally and produce a tourist product that is distinct from the sacred art they produce for cultural members.[150] Though the te hoko upoko trade was predatory on other iwi, the Māori that traded the heads created a product that helped secure their economic and political survival in the context of a colonial invasion.

The consumption of the Other, through their objectification, is not always, or simply, an enactment of a dynamic of desire and oppression. The effects of intercultural engagements under colonialism can be more unpredictable in local sites. Some subjects, though an objectified Other, are capable of subverting oppressive binaries to their own advantage even as they submit to them.

I will now examine tensions around lived experience and constructions of cultural difference in a later time frame, related to the creation of, and circulation of, the Māori portraits of CF Goldie.

6.3.2 Goldie's Māori portraits

In the previous subsection, I identified that attention to the actions of historical actors complicate the narrow performance of history by conventional legal scholars. In this subsection, I continue this theme by further identifying the equivocal nature of the historical record by focusing on the colonial painter CF Goldie and his Māori portraits. Goldie's paintings can be interpreted as a historical representation of racialised identity, as a form of participatory engagement directed by a colonial

[147] Christina Thompson, 'Smoked Heads' in Drusilla Modjeska (ed), *The Best Australian Essays 2006* (Black Inc, 2006) 23, 25–6.
[148] 'It was the Maoris who took and preserved these heads; it was the Europeans who bought and sold them': Thompson (n 147) 26. See also Awekotuku, 'He Maimai Aroha' (n 124) 89.
[149] Interview with Richie Francis (Marie Hadley, Skype, 3 April 2012) (interview and transcript on file with the author).
[150] See subsection 5.2.2 of this thesis.

artist, and as a welcome and accurate rendering of Māori ancestors. In discussing these shifting readings of Goldie's portraiture, I am able to show more of the complexity of the colonial frameworks through which intercultural dealings can be understood.

Charles Frederick Goldie is one of New Zealand's best known and successful pākehā artists.[151] At the turn of the 20th century, at a time when Māori were characterised as a 'dying race' and 'all but a few of the tattooed heroes of the lawless and picturesque years of early European occupation had gone to join their ancestors',[152] Goldie began producing portraits of tattooed Māori.[153] Goldie primarily produced his portraits through commerce with Māori sitters, rather than painting from photographs.[154] The themes and compositions of Goldie's portraits are quite limited in their range, given that there are around 120 portraits in total.[155] Goldie's models are typically the elderly, lost in dreams or memory, and tired, and as such, the paintings have been interpreted as evoking nostalgia for the passing of old ways.[156] I will consider their reception in more detail below. The paintings Goldie produced were not Māori-commissioned works, but rather a high priced commodity produced for the pākehā market.[157]

Goldie's Māori portraits offer a realist reproduction of Māori identity, of which tattoo was a key part. However, rather than being interpreted as art by contemporary commentators, they were originally

[151] Roger Blackley, *Goldie* (Auckland Art Gallery; David Bateman, 1997) 1; Roger Blackley, 'Goldie, Charles Frederick', *The Dictionary of New Zealand Biography* (Web Page, 1996) <https://teara.govt.nz/en/biographies/3g14/goldie-charles-frederick>; Leonard Bell, 'The Colonial Paintings of Charles Frederick Goldie in the 1990s: The Postcolonial Goldie and the Rewriting of History' (1995) 9(1) *Cultural Studies* 26, 26; 'Birthday Honours', *Auckland Star* (Auckland, 3 June 1935).

[152] Brett's Christmas Annual of 1922 quoted in Gordon Brown, 'Charles Frederick Goldie: The Artist and his Age' (1974) 5(2) *Art Galleries and Museum Association of New Zealand News* 39, 40.

[153] Goldie produced his first Māori portrait 'Kawhene from Mangere' in 1892. The bulk of his work was produced in two periods between 1905 and 1916, and a later period between 1928 and 1940: see, eg, Blackley, *Goldie* (n 151) 6. Between 1901 and 1920 Goldie exhibited approximately 100 portraits at the Auckland Society of Arts' annual exhibitions: Leonard Bell, *The Maori in European Art: A Survey of the Representation of the Maori by European Artists From the Time of Captain Cook to the Present Day* (Reed, 1980) 110. He used a core of about 13 models for his paintings: at 72.

[154] LC Lloyd 'Charles Frederick Goldie – The Technical Aspect' (1974) 5(2) *Art Galleries and Museum Association of New Zealand News* 36, 36.

[155] Ibid 36. See also Bell, *The Maori in European Art* (n 153) 70. For a sample of Goldie's work see 'Moko', Images 24–27, xiv of this thesis.

[156] See, eg, Michael Dunn, *New Zealand Painting: A Concise History* (Auckland University Press, 2003) 36; Leonard Bell, 'Looking at Goldie: Face to Face with 'All' 'e Same t'e Pakeha' (1996/1997) 6(4) *Voices: The Quarterly Journal of the National Library of Australia* 52, 54. Note that very few of the subjects of the portraits have a direct gaze, enforcing the paintings' melancholic and/or dream-like characteristics and presenting the subjects as passive: Bell, *The Maori in European Art* (n 153) 70.

[157] Blackley, *Goldie* (n 151) 46. By comparison, the other well-known Māori portrait painter of this period, Gottfried Lindauer, works were often commissioned by Māori: see, eg, Ellis, 'Toitu Te Moko' (n 109) [16].

understood as only of interest from an anthropological point of view.[158] For example, the painting 'Patara Te Tuhi' was described by a contemporary critic as all 'hard fact and conventionalism' with 'no artistic fancy either in the manipulation or the arrangement.'[159] The accuracy of the rendering meant that the portraits were valued as a lens through which to 'look into the past',[160] however, as an ethnographic object, the portraits were judged only suitable for museum display.[161] Nevertheless, regardless of their contested status as art, the paintings commanded fine art prices and were commercially successful.[162] They were very popular in mainstream New Zealand society at the turn of the twentieth century[163] and had a high price point for the time.[164] Most of Goldie's paintings sold for around 150–180 guineas.[165] By way of comparison, Auckland Society of Arts exhibition paintings usually cost around a guinea.[166] The discourse that sits behind the paintings as an historical record of the Māori, their equivocal interpretation as a perpetuation of colonial discourse, and the circumstances within which they were created, provide insight into the variety of subject positions that can be read into representations of Māori and colonial dynamics at this time.

The dying nature of the Māori race was repeatedly associated with the justification for Goldie's work by his contemporaries. Throughout the 19th century and following the increased settlement of New Zealand, there was a dramatic decline in the Māori population, partly because of introduced diseases such as tuberculosis and typhoid.[167] The second half of the 19th century was marked by the

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[158] Blackley, *Goldie* (n 151) 26.
[159] CN Baeyertz quoted in Brown (n 152) 39. See 'Moko', Image 27, xiv of this thesis.
[160] DR Simmons, 'Charles Frederick Goldie – Maori Portraits' (1974) 5(2) *Art Galleries and Museum Association of New Zealand News* 37, 37–8. See also 'Portrait for Salon', *Auckland Star* (Auckland, 14 December 1935) 8.
[161] See, eg, a Wellington critic's comment in 1911: 'to my mind these heads, painted with such photographic, meticulous detail, are more suitable for a museum of ethnology and anthropology than for the walls of an art gallery': quoted in Blackley, *Goldie* (n 160) 26.
[162] Roger Blackley, *Goldie* (n 151) 40–1; Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 26–7; Ken Gorbey, 'Charles Frederick Goldie' (1974) 5(2) *Art Galleries and Museum Association of New Zealand News* 35, 35. Goldie's painting 'A Noble Relic of a Noble Life' (1942) was sold for more than NZ$1.3 million in 2016: 'Last Charles Frederick Goldie Painting Sells at Auction', *Stuff.co.nz* (online, 7 April 2016) <https://www.stuff.co.nz/entertainment/arts/78620984/last-goldie-painting-sells-at-auction>.
[163] Bell, 'Looking at Goldie' (n 156) 56.
[164] Blackley, *Goldie* (n 151) 25.
[165] Note that the prices often exceeded this amount. For example, in 1935 his painting 'Memories' was sold for 250 guineas: 'Auckland Artist. Mr. C.F. Goldie's Work', *Auckland Star* (Auckland, 1 May 1935) 8.
[166] Blackley, *Goldie* (n 151) 40.
[167] It is estimated that by 1850, diseases such as tuberculosis and typhoid had caused a 60% reduction in the population of Māori: Herewini Ngata, 'A Glimpse into the Life of a Man' (unpublished paper, The Centenary Celebrations of the First Māori University Graduation, Christchurch, June 1994) 4–6 cited in Ngapine Allen,

'dispossession, depopulation, despondency, desperation and depression' of the Māori.'[168] In these circumstances, anthropological notions of Māori as a 'dying race' gained currency.[169] While evidence that the decline of the 19th century had ceased was available by the turn of the 20th century, the perspective of the imminent decline of the Māori continued in mainstream society.[170] For example in 1907, Archdeacon Walsh said that '[t]he Maori has lost heart and abandoned hope. It [the race] is sick unto death, and is already potentially dead'.[171]

This discourse had significance for the interpretation of Goldie's paintings by his contemporaries. A reviewer in the *Auckland Star* described Goldie's first painting, 'Kawhena from Mangere',[172] in the following terms:

> Not knowing the original, one cannot say whether it is a good portrait of the individual or the reverse, but as a picture of a type it is very fair. The painter has managed to fix in the eyes something of that expression of conscious mental inferiority which lurks in the eyes of the more intelligent of the lower animals and in semi-civilised man.[173]

At the other end of Goldie's career, there was a greater willingness to recognise his artistic skills, however, his portraits continued to be interpreted as a record of the Māori in the face of their imminent demise. In 1935 when Goldie was awarded the Order of the British Empire, the *Auckland Star* described the impact of his work: '[h]is great pictures of Māori men and women will be "Old

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'Māori vision and the Imperialist Gaze' in Tim Barringer and Tom Flynn (eds), *Colonialism and the Object: Empire, Material Culture and the Museum* (Routledge, 2012) 144, 147. See also Katrina Ford, 'Race, Disease and Public Health: Perceptions of Māori Health' in Mark Jackson (ed), *The Routledge History of Disease* (Routledge, 2017) 239, 240–1.

[168] Ngata (n 167) 147.

[169] See, eg, '[t]he Maoris are dying out, and nothing can save them. Our plain duty, as good, compassionate colonists, is to smooth down their dying pillow. Then history will have nothing to reproach us with': Walter Buller quoted in Te Rangi Hiroa, 'The Passing of the Māori' (1924) 55 *Transactions and Proceedings of the Royal Society of New Zealand 1868–1961* 362, 362. Buller estimated that only a 'remnant' of the Māori race would remain after the turn of the 20th century: at 362.

[170] Blackley, *Goldie* (n 151) 50. See also Smith, *Decolonizing Methodologies* (n 121) 88. Note that CF Goldie's brother William published an article in 1901 refuting the predictions that Māori were dying out: Blackley, 'Goldie, Charles Frederick' (n 151); Dunn (n 156) 36; Bell, 'Looking at Goldie' (n 156) 66.

[171] Archdeacon Walsh quoted in Hiroa, 'The Passing of the Māori' (n 169) 362.

[172] See 'Moko', Image 24, xiv of this thesis.

[173] 'Academy of Arts', *Auckland Star* (Auckland, 12 December 1892) 3. Goldie ultimately received a silver medal for 'Kawhena from Mangere': Blackley, *Goldie* (n 151) 6.

Masters" – and connoisseurs will fight for them in Christie's and elsewhere, perhaps when none of the race he perpetuates are here.'[174]

Later commentators, such as DR Simmons, have suggested that Goldie's portraits were driven by the 'need to capture people from a changing age on canvas.'[175] While Goldie was keenly aware of the difficulty in locating tattooed subjects because of the aging population of moko wearers,[176] it is unclear whether he was motivated to preserve Māori culture when he painted. Neverthless, the connection between Goldie's works and the effects of colonisation has informed their contemporary reinterpretation as a lens through which European fantasies about Māori people can be viewed.[177] Michael King reflects upon the construction of cultural difference in Goldie's portraits:

> Some of the more romantic, especially those that include native costume, imply noble savages. Others contain strong doses of sentimentality and jingoism in their suggestion of a formerly self-reliant race now confused ("Pipi Puzzles"), brooding over spiritual defeat ("Thoughts of a Tohunga") and facing extinction ("One of the Old School"). There is also considerable condescension in the suggestions of an inability to master language ("Allee Same Te Pākeha") and a people one step removed from heathenish practices (tattooing itself and titles like "The Last of the Cannibals"). [178]

According to King, the paintings show the Māori as the urban pākehā wanted to see him and remember him – they conform to a popular concept of what a traditional Māori should look like.[179] Others describe the paintings as 'an embarrassing legacy of colonial times',[180] and as exposing a racist agenda.[181] Of particular relevance is that their static themes and strong sense of nostalgia show none of the contrasting extremes of 'sordidness and vigorous recovery' that characterises Māori life in this

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[174] 'O.M', *Auckland Star* (Auckland, 5 June 1935) 6. See also 'Mr. Goldie has made a notable contribution to the history of a generation of Maoris which is rapidly passing': 'Auckland Artist. Mr. C.F. Goldie's Work', *Auckland Star* (Auckland, 1 May 1935) 8; 'Mr. C.F. Goldie … has captured so faithfully the likenesses of vanishing types of Maori": 'Birthday Honours', *Auckland Star* (Auckland, 3 June 1935) 6.
[175] Simmons, 'Charles Frederick Goldie – Maori Portraits' (n 160) 37.
[176] For example, Goldie urged a colleague to come on a joint painting/recording trip to Urewera country in 1916, stating, '[y]ou must not delay getting as much material as possible, such can only be procured from the old Maori, who in a very short [time] will be a thing of the past. It is surprising how quickly they are dying off': Letter from CF Goldie to Alfred Hill, 23 October 1916 quoted in Blackley, *Goldie* (n 151) 29.
[177] Blackley, *Goldie* (n 151) 47. This is also the case with Goldie's painting 'The Arrival of the Maoris' (1898) with Louis Steele, that has been interpreted as projecting the fantasy that the Māori were immigrants like the British: see, eg, Roger Blackley, 'Louis J. Steele and Charles F. Goldie The Arrival of the Maoris in New Zealand' (2001) 7(5) *Emerging Infectious Diseases* 914, 914.
[178] King, 'Moko and C.F. Goldie' (n 110) 431 (punctuation in original). See 'Last of the Cannibals' at 'Moko', Image 25, xiv of this thesis.
[179] Gorbey (n 162) 36.
[180] Blackley, *Goldie* (n 151) 37.
[181] Ibid 45.

period,[182] leading art history scholar Leonard Bell to argue that the 'old time Maori' image Goldie portrayed was simply a product of his own creation.[183]

Against this framework of objectification and sentimentalisation, Goldie's Māori portraits appear to reflect the stereotypical ways of viewing, desiring, and romanticising the primitive remarked upon in the writings of postcolonial scholars like Bhabha and Root. However, unlike the New Age positioning of the Other as wise, here the Other is presented as in a state of decline and eventual death. This representation is thus symbolic of the success of the colonial project, the realisation of the Other's inferiority and inability to thrive in the new social order. The survival of the Māori in the face of colonisation is silenced by their static representation across a collection of 120 paintings. Nevertheless, this reading itself silences the circumstances in which the paintings were created, and their contemporary celebration by many Māori as an accurate likeness of ancestors and as a valuable record of historical moko.[184]

Until around 1916, Goldie paid Māori to sit for his paintings. After this time, he worked from photographs, for want of sitters due to the aging population of moko wearers.[185] The sitters were paid for their time with a daily stipend that was open to negotiation.[186] Goldie also often provided meals and, at times, paid for their accommodation if they were from outside of Auckland where he had his studio.[187] One sitter, Kamariera Te Hautākiri Wharepapa, is known to have requested that Goldie pay higher remuneration and provide better accommodation for himself and his wife.[188] Goldie biographer Roger Blackley lists this, amongst other examples, as evidence that Māori were 'entrepreneurs who participated – on their own terms – in the art economy and culture of their time.'[189]

[182] King, 'Moko and C.F. Goldie' (n 110) 432. See also Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 26; Bell, 'Looking at Goldie' (n 156) 54–5.
[183] Bell, *The Maori in European Art* (n 153) 72; Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 26.
[184] Blackley, *Goldie* (n 151) 44.
[185] Ibid 56.
[186] Ibid 19.
[187] Ibid. See also Blackley, 'Goldie, Charles Frederick' (n 151).
[188] Roger Blackley, *Galleries of Maoriland: Artists, Collectors and the Māori World* (Auckland University Press, 2018) 251.
[189] Ibid.

To Goldie, the creation of his paintings involved collaboration with Māori, rather than a strict business relationship.[190] The models were 'happy to accept payment' and on 'occasion expressed delight over the finished works.'[191] While the paintings Goldie produced were never intended for a Māori audience, the response of contemporary Māori to Goldie's portraits, including the descendents of the sitters, is often positive.[192]Admired as true or faithful representations of Māori reacting to the impact of colonisation,[193] the paintings are revered as a taonga and as irreplaceable images of their ancestors.[194] The faithful renditions of the moko of the sitters also means that the paintings have been recognised as of value to those concerned with tā moko and its revival.[195]As the sitters came from a variety of regions, their moko is varied, and thus showcase the styles of different artists and regional influences like carving schools.[196] The use of the paintings to better understand tā moko signals a form of reappropriation, iven that, as Bell notes, '[r]epresentations that were central to the colonialist cultural and ideological edifice have also been used to affirm Maori values and fortify Maori culture.'[197]

While today there is much concern about the reproduction of ancestral portraits and their commercialisation on inappropriate goods, particularly since the expiry of Goldie's copyright,[198] the high esteem with which Goldie's paintings are held, and the apparent respectful relations that underscored their making, evidences a counter-reading of the paintings that complicates the presumed oppressive operations of the Self/Other binary. The participation of Māori in the creation of the portraits does not appear to have been stereotypically exploitative.[199] The same accuracy that led to Goldie's equivocal reception by art critics and anthropological categorisation, is praised as a quality

[190] Simmons, 'Charles Frederick Goldie – Maori Portraits' (n 160) 38; Blackley, *Goldie* (n 151) 46.
[191] Blackley, *Goldie* (n 151) 46. Cf Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 36. It is uncertain whether the sitters knew of Goldie's plans to later produce replicas for sale. See Blackley: at 48.
[192] Blackley, *Goldie* (n 151) 46; Awekotuku and Nikora, *Mau Moko* (n 93) 67.
[193] Blackley, *Goldie* (n 151) 44–5.
[194] Bell, *The Maori in European Art* (n 153) 72; Leonard Bell, *Colonial Constructs: European Images of the Maori, 1840–1914* (Auckland University Press, 1992) 257–8; Blackley, *Goldie* (n 151) 57; Awekotuku and Nikora, *Mau Moko* (n 93) 67; Jacquie Clarke, 'C.F.Goldies: The Old Master Revisited' (1998) 38 *New Zealand Geographic* <https://www.nzgeo.com/stories/c-f-goldie-the-old-master-revisited/>.
[195] Blackley, *Goldie* (n 151) 47; King, 'Moko and C.F. Goldie' (n 110) 432, 439–40; Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 29.
[196] Blackley, *Goldie* (n 151) 47.
[197] Bell, *Colonial Constructs* (n 194) 256.
[198] Blackley, *Goldie* (n 151) 48–9.
[199] Cf Bell, 'The Colonial Paintings of Charles Frederick Goldie' (n 151) 36.

rendering of ancestors and their moko. In these circumstances, the objectification of Māori inherent in the paintings can be reinterpreted as a valuable historical record and used to affirm and celebrate the very culture that was predicted to die out. Regardless of whether a discourse of desire and oppression can be overlaid easily onto Goldie's portraits, their construction of cultural difference is open to be interpreted through an alternate discourse of respect and cultural survival. Political agency is present, even when the themes of the paintings assume it to be stifled.

In the next section, I continue to investigate the complexity of intercultural dealings and colonial discourse by examining tattoo as not only something that was written about by colonisers or rendered in art, but as something that was engaged in by the South Seas voyagers and others, particularly mariners.

6.4 Discontinuities, shared space and tattoo

In asserting that cultural appropriation is the "second wave of colonisation", conventional scholars construct historical continuities between the past and the present. The earlier sections showed that this account of history is supported by a narrow reading of the historical record, and that other accounts that are more inclusive of the agency of historical actors and their complex responses to interactions in the Pacific, are possible. In this section, I analyse the historical site that is most directly related to Indigenous-inspired tattoo practices today – the engagement of tattoo on the body – to consider the relationship between past and present dealings in tattoo as a site of action. This presents an alternative reading of the historical relationship between western and Pasifika tattoo practices in the Pacific.

6.4.1 Tattoo in the Pacific

Much tattoo literature assumes that upon sailors seeing tattoo in the Pacific, the Western tattoo subculture spontaneously developed.[200] This interpretation suggests that western tattoo arose out of a dramatic, sudden appropriative moment. However, prior to the South Seas voyages, tattoo was known to both mariners and Western society more generally. The practice waxed and waned in popularity at

[200] See, eg, '[w]ith the Voyages of Discovery Europeans rediscovered this form of personal adornment': Hanns Ebensten, *Pierced Hearts and True Love* (Derek Verschoyle, 1953) 14.

various times,[201] however, as historian Ira Dye asserts, it was a 'common and well-established practice' of European seafarers 'at the time of Cook's voyages, and before.'[202] Dye speculates that tattoo practices were an evolution of the pilgrim custom of obtaining a tattoo, and likely encouraged by the contact that seafarers had with the Eastern Mediterranean area, where tattoo was popular. [203] Mediterranean mariners are known to have practiced the custom of 'drawing on their skin, indelible figures of crucifixes, Madonas [sic]. &c. or of writing on it their own name and that of their mistress' since time immemorial.[204] They created their tattoos by pricking the skin with a needle, covering it with gunpowder, and setting it on fire: 'the explosion, which causes both the smoke and the particles of powder to penetrate into the skin,' creates the drawing 'in a blue colour that nothing can ever efface.'[205] The existence of tattoo amongst other social groups prior to and at the time of the voyages, including convicts, runaways, and travellers,[206] and the transient nature of the seafaring population, suggests that it likely that tattoo was known to, if not a practice of, at least some of the voyagers aboard Cook's ships prior to making landfall in the Pacific. In addition to likely affecting the way in which cultural tattoos were observed in the Pacific as simply one of many traits of Islanders, as discussed earlier at 6.2.1, extant practices also likely affected the willingness of mariners to engage in tattoo in the Pacific during the voyages and in the years that followed.

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[201] Particularly in the early modern period: Joanna White, 'Cross-Cultural Bodies Through Space: European Travellers, Permanent Body Marking, and Liminality' in Kristy Buccieri (ed), *Body Tensions: Beyond Corporeality in Time and Space* (Inter-Disciplinary Press, 2014) 73, 73. See also Anna Friedman Herhily, 'Tattooed Transculturites: Western Expatriates Among Amerindian and Pacific Islander Societies, 1500–1900' (PhD Thesis, University of Chicago, 2012) 17. On the continuity of tattoo in European societies generally: Ira Dye, 'The Tattoos of Early American Seafarers, 1796–1818' (1989) 133(4) *Proceedings of the American Philosophical Society* 520, 522. Cf the description of western tattoo as a discontinuous or fragmented practice in Jane Caplan, 'Introduction' in Jane Caplan (ed), *Written on the Body: The Tattoo in European and American History* (Princeton University Press, 2000) xi, xi.

[202] Ira Dye, 'Early American Merchant Seafarers' (1976) 120(5) *Proceedings of the American Philosophical Society* 331, 354 (citation omitted). See also Dye, 'The Tattoos of Early American Seafarers' (n 201) 522, 523; Joanna White, 'Marks of Transgression: The Tattooing of Europeans in the Pacific Islands' in Nicholas Thomas, Anna Cole and Bronwen Douglas (eds), *Tattoo: Bodies, Art, and Exchange in the Pacific and the West* (Reaktion Books, 2005) 72, 73.

[203] Dye, 'Early American Merchant Seafarers' (n 202) 354, footnote 89. For an example of two pilgrim tattoos, see 'General Tattoo and Other', Images 104 and 106, xxviii of this thesis.

[204] Charles Pierre Claret de Fleurieu, *Voyage Round the World, Performed During the Years 1790, 1791, and 1792*,tr Étienne Marchand (TN Longman and O Rees, 1801) vol 1, 149.

[205] Ibid. Another known historical application method involved the use of coal dust: see, eg, Jean de Thevenot, *The Travels of Monsieur de Thevenot into the Levant*, tr Archibald Lovell (H Clark, 1687) vol 1, 201.

[206] On the tattoos of criminals and runaways in the mid-18th century: see, eg, Gwenda Morgan and Peter Rushton, 'Visible Bodies, Power, Subordination and Identity in the Eighteenth-Century Atlantic World' (2005) 39(1) *Journal of Social History* 39, 39–64. For traveller accounts of tattoo: see, eg, Thevenot (n 205) 201–2; William Lithgow, *A Most Delectable, and True Discourse, of an Admired and Painfull Peregrination in Europe, Asia, and Africke* (Nicholas Oakes, 1616) 113–4.

There are only limited direct references to tattoo uptake during the South Seas voyages in voyager accounts and most are brief. Nevertheless, there is detail in the historical record to support the view that exposure to Pasifika tattoo was about taking advantage of the skills of tattooists and marking individual and collective identities, rather than experiencing the primitive or incorporating them onto the body, as is suggested in postcolonial critiques of the Modern Primitives and tribal tattoos today.

During the first voyage, it is known that the artist Sydney Parkinson, able-bodied seaman Robert Stainsby, and unnamed others were tattooed in and/or around Tahiti.[207] Parkinson's comments in his journal suggest pre-existing knowledge of western tattoo practices prior to observing tattoo in this region. Parkinson recorded in his journal that:

> The natives are accustomed to mark themselves in a very singular manner, which they call tataowing … they perform the operation with an instrument having teeth like comb, dipped in the juice [of a plant], with which the skin is perforated [] Mr Stainsby, myself, and some others … underwent the operation, and had our arms marked: the stain left in the skin, which cannot be effaced without destroying it, is that of a lively bluish purple, similar to that made upon the skin by gun-powder.[208]

Parkinson's reference to gun-powder suggests his knowledge of the tattoo process used by mariners, described early in the context of Mediterranean mariners. Prior to the opening of the first professional tattoo studios in England in the 1890s, British and American sailors typically received their tattoos aboard ships, the designs made with sail-making needles and gunpowder or soot from cooking pots serving as ink.[209] This resulted in crude and simplistic designs.[210] The skills of Islander tattooists, even before the introduction of metal tools in the Pacific, would likely have excited voyagers like Parkinson and Stainsby, with the possibility of more intricate, detailed designs. The Other was perhaps valued as a skilled service provider.

In addition to likely appreciating the talent of Islander tattooists, the voyagers aboard Cook's ships appear to have also been motivated to receive tattoo as a souvenir of their travels and as a self-

[207] Parkinson (n 81) 25; Gilbert (n 64) 56.
[208] Parkinson (n 81) 25.
[209] Friedman Herhily (n 201) 43. On the professionalisation of tattoo see Sanders and Vail (n 60) 16–7.
[210] See 'General Tattoo and Other', Image 102, xxviii of this thesis. The invention of the electric tattoo machine in 1891 by Samuel O'Reilly greatly increased the consistency and quality of tattoo art. O'Reilly called his device the 'tattaugraph': US Patent Application No 464801, filed 16 July 1891 (Ceased 8 December 1908) <https://patents.google.com/patent/US464801A/en>.

expressive mark.[211] This continues the practice of traveller tattoos evident in the west, for example, during pilgrimages to Jerusalem and Bethlehem.[212] During the second voyage, there is a reliable account of tattoo uptake described in the teenage able bodied seaman John Elliot's journal. Inspired by the Polynesian star tattoos[213] of the warriors of Bora Bora, the Arioi, Elliot and his messmates John Whitehouse, Richard Grindall, Bowles Mitchel, and Henry Roberts 'determined on having a compleat Star drawn and then Tattowed with black, the same way as the Natives are tattowed, upon our left Breast, and … we all underwent it and have each a very handsome Star … the size of a Crown Piece.'[214] Elliot describes the tattoo as a means of 'connecting us together, as well as to commemorate our having been at Otaheite.'[215] Elliot clearly admired the Arioi, however, for him the tattoo does not appear to have been about engaging the exoticism of the other (although outsiders might interpret it this way), but about bonding and being marked as an adventurer alongside his friends.[216] He explains that the group thereafter called themselves the 'Knights of Otaheite' and 'intended to keep this Badge to ourselves, yet we no sooner began to Bathe, than it had spread halfway through the Ship.'[217] The high status of tattoo in the Pacific and its placement on the bodies of warriors appears to have encouraged Elliot and others' interest[218] but not driven appropriative aesthetics as part of their consumption.[219] Elliot's lament shows that he was primarily interested in maintaining the personal and collective connection he and his friends had to the imagery as a symbol of their travels.

A notable exception to the largely self-expressive nature of tattoo uptake in the Pacific is, however, found in the unauthorised journal of John Rickman, an officer on board the *Discovery* during the third voyage. Rickman's journal includes an account of an extensive moko being applied to a would-be deserter, an unnamed youth who had embarked on a love affair with a young Māori girl named

[211] White, 'Cross-Cultural Bodies through Space' (n 201) 74–5.
[212] On pilgrim tattoos generally: see AT Sinclair, 'Tattooing – Oriental and Gypsy' (1908) 10(3) *American Anthropologist* 361, 362–6, 379; Fleming (n 97) 48–50. For Jerusalem cross pilgrim tattoos, see 'General Tattoo and Other', Images 104 and 106, xxviii of this thesis.
[213] For a contemporary version of this tattoo: see 'General Tattoo and Other', Image 100, xxvii of this thesis.
[214] Elliott and Pickersgill (n 68) 20.
[215] Ibid.
[216] See White, 'Cross-Cultural Bodies Through Space' (n 201) 75.
[217] Elliott and Pickersgill (n 68) 20.
[218] See generally Gell (n 110) 10.
[219] Cf Harriet Guest who writes that identifying a chivalric order with the 'esoteric orders of the men of Bora Bora' 'stain[ed] the Europeans with a kind of exotic perversion of domestic and national identity': Guest, *Barbarism, and Civilisation* (n 60) 101. See also: 90.

'Ghowannahe'.[220] Rickman writes that the youth and the girl, being much in love, took measures to 'render themselves agreeable' to each other.[221] The youth submitted to 'ornamenting his person after the fashion of her country,' by being 'tattowed from head to foot'.[222] The girl, in turn, decorated herself and furnished her hair with combs in a manner that would have done 'honour to an European beauty.'[223] While a detailed, dramatic tale of a star-crossed love affair, Rickman's account is likely to be an exaggeration or outright fabrication, at least in terms of the tattooing aspect of the story. Moko does not typically extend the whole breadth of the body, and a moko of this size would have needed to have taken place over numerous sittings. This timeline is implausible given the short time the *Discovery* made landfall in New Zealand.[224] However, regardless of whether the tattoo is fictional, this story has value for its depiction of a voyager embracing cultural tattooing. It contains elements of fantasy.[225] Yet it seems that the youth's primary purpose in being tattooed was to become more attractive to his partner and achieve social standing in Māori society.[226] As later beachcombers who were purposefully tattooed also recognised, tattoo was a way to achieve social status and transact within, and with, Islander communities.[227] In these circumstances, it appears that the youth's cultural tattoos were not about becoming the Other, but about improving his standing within the Other's community. This is different to the Modern Primitives, who do not seek to become an honourary Islander – rather, they seek more fulfilling experiences within their own community through tattoo.[228]

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[220] The love story between the youth and Ghowannahe spans 16 pages: Rickman (n 65) 57–73.
[221] Rickman (n 65) 58.
[222] Ibid.
[223] Ibid.
[224] White, 'Cross-Cultural Bodies Through Space' (n 201) 89, endnote 25; Guest, *Empire, Barbarism, and Civilisation* (n 60) 129.
[225] Guest, *Empire, Barbarism, and Civilisation* (n 60) 236.
[226] Ibid 76.
[227] See, eg, the understanding of one of the *Bounty* mutineers' understanding of their cultural tattoos:

> I was tattooed, not to gratify my own desire, but theirs; for it was my constant endeavour to acquiesce in any little custom which I thought would be agreeable to them, though painful in the process, provided I gained by it their friendship and esteem, which you may suppose is no inconsiderable object in an island where the natives are so numerous. The more a man or woman there is tattooed, the more they are respected; and a person having none of these marks is looked upon as bearing an unworthy badge of disgrace, and considered as a mere outcast of society.

Peter Heywood quoted in John Barrow, *The Eventful History of the Mutiny and Piratical Seizure of HMS Bounty its Causes and Consequences* (John Murray, 1831) 143–4. On beachcombers and their tattoos generally: see Friedman Herhily (n 201).
[228] See section 2.4.2 of this thesis.

A consideration of the tattoo lexicon in the years following the South Seas voyages is further instructive on the intersection of western and Pacific tattoo in the Pacific, and in particular the impact of voyaging upon western practices.

6.4.2 Tattoo Lexicon Post-South Seas Voyages

The content of the western tattoo lexicon in the years following the South Seas voyages supports the view that western tattoo practices did not develop alongside a lingering fascination with, or consumption of, Pasifika imagery. The maritime tattoo norm solidified after the voyages, however, it appears that exposure to Islander motifs did not have a sustained impact upon Western tattoo design composition, as detailed below.

Approximately 20 years after the *Endeavour* first set sail, the ship the *Bounty,* captained by Lieutenant William Bligh, commenced an expedition to Tahiti to gather breadfruit trees and transport them to the West Indies. Upon leaving Tahiti after a five month layover, men led by Master's Mate Fletcher Christian mutinied in April 1789. Bligh and 18 others were forced from the ship into an open launch. A year later after Bligh's return to England, the Admiralty dispatched a ship to apprehend the mutineers.[229] The *List of Mutineers* Bligh drafted to aid in their apprehension[230] itemises the mutineers' distinguishing marks and thereby supports the contribution of voyaging to the development of an increasingly visible maritime tattoo norm.

Bligh's List gives an indication of the extent of tattooing amongst mariners who had travelled to the Pacific region and the types of designs they wore. Twenty two of the 25 mutineers were tattooed.[231] Of those that were tattooed, many were described as '[v]ery much tatowed', such as Peter Heywood,[232] suggesting that multiple tattoos were common and the practice likely highly visible by this time in mariner subculture. In addition, whilst Bligh's descriptions are sometimes vaguely stated, such as a simple 'is tatowed', much design content is specifically described.[233] Stylised western motifs

[229] See generally Richard Hough, *Captain Bligh and Mr Christian: The Men and the Mutiny* (EP Dutton, 1973).
[230] MS 5393 William Bligh, *List of Mutineers* (1789, National Library of Australia) <http://www.fatefulvoyage.com/notebook/desc0.html>.
[231] Bligh (n 230).
[232] Ibid.
[233] Ibid.

such as a 'heart with Darts', initials, names and dates are noted as distinguishing marks on the mutineers' bodies,[234] similar to the tattoo iconography noted by scholars as common on convicts, runaways, and mariners pre-Cook's voyages.[235] Some more elaborate imagery is also evident amongst this group. For example, Bligh describes James Morrison as having the motto of the Knights of the Order of the Garter, 'Honi Soit Qui mal y Pense,' tattooed on his leg.[236]

Most of the design content specifically described by Bligh appears to be western in nature. However, at least one mutineer (and likely a few more) had at least some cultural designs. Bligh describes John Millward, an Able Seaman, as '[v]ery much Tatowed in Difft parts' and having 'under the Pit of the Stomach' a 'Taoomy or Breast plate of Otaheite' – a feathered Tahitian gorget.[237] In addition, other mutineers such as Fletcher Christian, Isaac Martin, James Morrison, and George Stewart are described as having a star tattoo on their left breast,[238] potentially suggesting a connection with the Polynesian star tattoo Elliott and his friends received on the second voyage.[239] Tattoo scholar Anna Friedman argues that the placement of other tattoos whose design content is not specified also possibly indicates Pasifika imagery. She writes that the backside tattoos of Fletcher Christian, Matthew Quintal, and George Stewart might have been Tahitian designs given that tattooing this area of the body was common in Tahiti.[240]

Millward's tattoo and, to a lesser extent, the star and backside tattoos of the other mutineers, provide support for the inference that commerce between voyagers and local practitioners occurred during landfall in Tahiti and that tattooists continued to tattoo cultural outsiders after the South Seas voyages. Whilst it cannot be stated with any certainty that Western imagery was also tattooed by Islander practitioners as there are no before and after descriptions of the men's distinguishing marks, there is a possibility that this occurred.[241] It is known, however, that some Islanders shifted their design

[234] Ibid. See 'General Tattoo and Other' Image 105, xxviii of this thesis for a sample of mariner tattoos a decade after the mutiny.
[235] Morgan and Rushton (n 206) 39–64, particularly 49–50; Fleurieu (n 204)149.
[236] Bligh (n 230).
[237] Ibid.
[238] Ibid.
[239] White, 'Cross-Cultural Bodies through Space' (n 201) 75.
[240] Friedman Herhily (n 201) 205. See also Dye, 'The Tattoos of Early American Seafarers' (n 201) 522–3.
[241] See, in the context of the western imagery tattooed by Tahitians: White, 'Marks of Transgression' (n 202) 74.

practices following intercultural contact in the region,[242] suggesting the adaptability of Pacific tattooists. Later voyagers to the Pacific in the 19th century noted that the tattoo designs of Islanders included 'rifles and cannons and dates and words commemorating the origin and death of chiefs'.[243] Tattoo scholar, anthropologist Margo DeMello, speculates that '[t]hese newer designs were probably introduced to the Polynesians by Cook's crew'.[244] The relationship between Pacific practitioners and their western clientele appears to have been defined by flexibility, agency, and adaptation, rather than an objectified gaze on the Other, overlaid with assumptions of primitivity.

By the 1790s and at least by the turn of the 19th century, both American and English maritime tattoos followed 'a conventionalized format' in terms of a limited design composition, placement on the body, and frequency of appearance.[245] The imagery tattooed continued to reflect mostly western tastes, meanings and iconography of tattoos, as prior to the South Seas voyages. For example, names, initials, dates and designs such as man, woman and child, mermaids, anchors, hearts, stars and crucifixes remained common.[246]

It was not until the 1960s and 1970s that flash and custom imagery began to increasingly draw upon referents and techniques from other cultures, particularly Japan, where tattoo had a high status.[247] The "colonial" interest in Pasifika tattoo imagery emerged soon after, with the development and popularisation of tribal in the 1980s. While exploratory voyaging in the Pacific is likely to have accelerated patterns of tattoo consumption by exposing mariners to skilled practitioners who were

[242] Friedman Herhily (n 201) 205, footnote 33.
[243] DeMello, *Bodies of Inscription* (n 25) 45.
[244] Ibid 45–6.
[245] Dye, 'Early American Merchant Seafarers' (n 202) 354; Dye, 'The Tattoos of Early American Seafarers' (n 201) 527–8.
[246] See, eg, NMM LBK/38 'Letterbook of Captain Edward Rotheram, 1799–1808' <https://collections.rmg.co.uk/collections/objects/506434.html?_ga=1.200765550.1372681657.1468218254>; Dye, 'The Tattoos of Early American Seafarers' (n 201) 537; White, 'Marks of Transgression' (n 202) 77. For a sample of maritime-themed tattoos and flash see 'General Tattoo and Other', Images 107–11, xxix of this thesis.
[247] Daniel Rosenblatt, 'The Antisocial Skin: Structure, Resistance, and "Modern Primitive" Adornment in the United States' (1997) 12(3) *Cultural Anthropology* 287, 301–2. Note that Japanese-style dragon, serpent, and other oriental tattoo designs had entered into the western tattoo lexicon 70 years earlier, following Japanese tattoo master Hori Chyo practicing in the United States: see Sanders and Vail (n 60) 16.

open to intercultural contact, the Pacific encounters do not explain the particular social patterns that tattoo subsequently assumed in the west.[248]

Today, alleging cultural appropriation is a subversive activity that resists oppression, however the connection posited between oppression and colonial history presents only a partial account of constructions of cultural difference in the past, as they pertain to tattoo. Contemporary tribal tattoos might be read as an oppressive act of consumption and as a symbol of ongoing colonial injustice, but historically, the popularisation of the artform in maritime culture shared some cultural space with Pacific tattoo traditions.[249] Voyagers responded differently to tattoo when deciding to transact with Islander practitioners, than they did when they represented Pasifika tattoo practices and imagery in their journals and diaries. The colonial gaze reproduced in cultural appropriation claims and performed in conventional scholarship does not convey any of this complexity.

6.5 Conclusion

Looking back to historical ways of viewing cultural difference shows us that contemporary desire frameworks have their roots in a long tradition of marking, measuring, and consuming the Other's primitivity. This helps to reflect upon the oppressive hierarchies that cultural claimants resist when they object to cultural appropriation as part of a performative project. Appropriation can be understood as a form of control over representation, a self-referential practice, and a consumption of cultural difference that is authorised by the Other's "inferiority". However, while useful in identifying what subalternity has to do with allegations of appropriation, the desire framework that activates this inquiry, like reform discourse, reads the historical record very narrowly.

Throughout this chapter, I have used a series of local sites to show how lived experience can provide more nuanced insights into raced subject positions and, thereby, the relevance of colonial history to the reform demand. For example, in te hoko upoko, the fascination of colonisers with the macabre fed the demand for tattooed heads but it was the business acumen of Māori traders that resulted in the development of this product to support their military objectives in local conflicts. To survive and

[248] Fleming (n 97) 40.
[249] Gell (n 110) 11.

thrive, some Māori acquiesced to, and profited from, the binary established by the colonial. Similarly, Goldie's Māori portraits can be read as a sign of the colonial fantasy (and/or desire) for the demise of the Other but they are also part of a discourse that celebrates cultural difference and uses tattoo as a sign of cultural survival and pride. In the instance of intercultural tattoo practices themselves, the uptake of some tattooing that occurred in the Pacific seems to sit outside of the discourse of desire and oppression. Incorporating indicia of Otherness onto the body was a peripheral motivation of voyagers and later mariners for being tattooed, if it existed at all. During and following contact in the Pacific, western tattoo practices mostly accorded with extant practices, indicating the existence of a shared cultural space rather than a wholesale appropriative moment. Lived experience in the past, like lived experience in the present, can iterate identity and conceptualise injustice differently to the performative utterances of cultural claimants and conventional scholars,

Conceptualising appropriation as the "second wave of colonisation" re-enacts perceived original oppression, but in the process risks foreclosing a discussion of such historical nuances. This is problematic. It means that conventional scholarship does not, at present, bridge the gap between the material stakes of appropriation as identified by different constituents engaged or interested in cultural production. As subalternity is something that has been lived in the past as well as the present, a more refined understanding of the history of the cultural dynamics that law reform seeks to change is needed, if law reform is to be effective in reconstituting practices.

Chapter 7: Conclusion

In the literature dealing with the question of Indigenous rights and IP protection, there is a strong criticism of how the law operates and a now decades-long argument that there needs to be significant law reform so as to make IP law more inclusive of Indigenous people and their cultural productions. In earlier chapters, I have been critical of some of the assumptions that inform that critique.[1] However, this thesis as a whole seeks to promote a better understanding of the politics of the conventional progressive critique of IP. Law reform discourse in settler states sits at the crossroads of the formal legal sphere, cultural production, and Indigenous experiences of oppression. Yet, this discourse currently advances a very narrow inquiry into the relevance of each of these arenas and consequently inhibits a more nuanced understanding of the politics of cultural appropriation claims and law reform. A better understanding of what political claims do is needed – one which is attentive to cultural practices, the connectivity between the appropriation of cultural imagery and arts styles and settler colonialism, and our expectations of law in redressing previous and continuing injustice. There are problems with performing rights claims without necessarily recognising what is being asked of law and its relation to society and culture.

Throughout this thesis I have sought to redress these issues by engaging an interdisciplinary theoretical orientation, investigating the implications of reforming law and regulating artistic practice for different communities of creators, and interrogating the socio-historical construction of norms and intercultural practice that pertains to tattoo subculture. I will now outline my contribution to the literature in these areas in detail.

7.1 Contribution to the literature

The critical theories I deploy in the preceding chapters,[2] including theories of performativity, and psychoanalytical readings of desire and fascination with the Other, link discussions of postcoloniality and identity in political theory with the political claims of cultural appropriation being made in the domain of IP law. In chapters 4–6, I built an account of the relevance of subaltern identity and

[1] See particularly chapters 5 and 6 of this thesis.
[2] As outlined in chapter 2 of this thesis, particularly in sections 2.2 and 2.4.

experience for the subversive activity of rights claiming as a legal and extra-legal practice.[3] In conventional scholarship, there is an identity politics aspect to law reform discourse.[4] However, a deeper consideration of the way in which allegations of cultural appropriation are produced and politically informed, is not pursued. The political activity in the act of speaking appropriation extends far beyond concern with the formal legal sphere's responsiveness (or lack thereof) to cultural difference. The theoretical insights of scholars like Spivak, Zivi, and hooks[5] help draw this out. Cultural claiming extends political activity beyond the desire for legal recognition, going to the root of subaltern experience in settler states. A more social, political, and historically informed analysis of cultural appropriation claims helps to elucidate their nature as a possessive and identity claim and performative utterance that has an effect on the world, beyond reform agitation.

As guided by my law and society framework,[6] the socio-legal project and empirical research of this thesis was designed to bring to light the complexity of cultural practice, the normativity of creative activity, and the judgments that are exercised in everyday contexts in practitioner communities.[7] As conventional scholars typically assume the effectiveness of reform without looking into the social ordering that could complicate the introduction of new legal norms,[8] the aim was to add some sophistication to the understanding of how law reform could potentially operate to regulate the creative activity of artists. In chapter 5 it became clear that positive law can be reinscribed, reinterpreted, resisted, and ignored in spheres of cultural and subcultural production.[9] This has direct implications for the conventional assumption that desirable social outcomes can be achieved as a matter of course by implementing a different jurisprudence. Using site-specific studies in IP, and in particular those that focus on creators, can develop an understanding of the challenges facing legal regulation of cultural and subcultural practices in practice. Approaching law from below can provide insight into law's efficacy as a regulator, as applied from above onto the social realm.

[3] See particularly chapter 6 of this thesis.
[4] See section 2.1.2 and chapter 4 of this thesis.
[5] See sections 2.2 and 2.4 of this thesis.
[6] See section 2.3 of this thesis.
[7] See chapter 5 of this thesis.
[8] See section 2.1.2 of this thesis.
[9] See particularly section 5.3 of this thesis.

In interrogating the historical and social construction of norms and intercultural practices, the thesis also shows some of the relationship between cultural appropriation and colonial injustice that is asserted but not investigated in conventional scholarship.[10] In reform discourse, appropriation is understood as oppressive and perceived to re-enact colonial dynamics but why this is so is not explained.[11] In response, I analysed histories and trajectories of cultural practices over time, and from the perspective of different actors in chapter 6. This shed light on the historicity of the link between contemporary cultural appropriation and oppressive colonial dynamics.[12] My account also exposed contradictions unaccounted for in the performance of colonial history by conventional scholars.[13] The commercial dynamics of cultural trades and the agency of historical actors confirm the usefulness of lived experience as a means to identify the different political stakes of appropriation for different constituencies, in the past as well as the present.[14]

Once these diverse methodological perspectives are engaged, this thesis suggests that there is a need to reconnect the political project around respect for Indigenous rights in ICIP to a discussion of cultural practice. The standing law reform demand is not ill-conceived. However, the failure of conventional scholars to attend closely to multiple sites of meaning-making and political activity in their analyses, leads to its own set of problems and misunderstandings of law and culture.

7.2 Overview of this project

A key goal of this thesis was to consider how law reform "from above" (that is, tinkering with legal doctrine through the introduction of more or better rights, without engaging with how meaning is generated at local sites of artistic production, particularly those that are considered most problematic by the law's Indigenous critics) oversimplifies complex historical, philosophical, and intercultural dynamics. In chapter 1, I introduced the relevance of the *Whitmill* case to this task. This case was selected to open up Indigenous concerns with copyright's exclusionary operations and cultural

[10] See chapter 6 of this thesis.
[11] See section 6.1 of this thesis.
[12] See particularly sections 6.2.2 and 6.2.3 of this thesis.
[13] See particularly sections 6.3 and 6.4 of this thesis.
[14] Ibid.

appropriation, as informed by both academic and social commentary throughout this thesis.[15] In chapter 1, I also defined key terms such as "cultural appropriation" and "appropriation" and outlined the benefits of approaching cultural appropriation claims as performative claims as well as possessive claims and identity claims.[16] My approach to law and legality was also outlined, as was the rationale for focusing on both the formal legal sphere and informal forms of ordering such as social norms.[17] The usefulness of tattoo as the artform through which to frame inquiry was also explained, and background information provided on both moko and western tattoo.[18] The chapter concluded by introducing the thesis structure.[19]

In chapter 2, the analytical frameworks that directed my approach to analysing the nature of cultural appropriation claims and reform discourse (and, in particular, what this discourse does not see of law and culture), were developed. To provide a rationale for my theoretical approach, I firstly provided a literature review of the conventional progressive approach to cultural appropriation claims and IP.[20] Extant scholarship is characterised by the identification of the western bias of copyright law and reform proposals to redress the law's exclusion of Indigenous ways of knowing, owning, and creating art.[21] This approach holds value for understanding the identity politics that sits behind claims and the relationship between advocacy for property rights, the protection of cultural integrity and well-being, and justice in settler states. It nevertheless has some serious limitations. In chapter 2, these were identified as a failure to address the contestation that characterises cultural sites, the performativity of cultural appropriation allegations (including how the identity they iterate might be contested by other constituencies within a culture or relate to the colonial past), and the reliance on a narrow construction of the legal domain that excludes how legal meaning is made in everyday lives.[22] To critically supplement these limitations of the conventional approach, I then elaborated three analytical

[15] See chapter 1 of this thesis.
[16] See sections 1.1.1 and 1.1.2 of this thesis.
[17] See section 1.1.3 of this thesis.
[18] See section 1.2 of this thesis.
[19] See section 1.1.3 of this thesis.
[20] See section 2.1 of this thesis.
[21] See section 2.2.1 of this thesis.
[22] See section 2.1.2 of this thesis.

frameworks of performativity, law and society and desire for the Other.[23] Each framework was outlined, contributing to the positioning of this thesis as a socio-legal rejoinder to conventional scholarship.

Chapter 3 outlined how I went about investigating the performativity of cultural appropriation claims, the lived experience of law and appropriation, and the relationship between cultural appropriation claims and oppressive constructions of racialised difference. I outlined my methodology as defined by doctrinal analysis, fieldwork with tā moko artists and tattooists working in the North Island of New Zealand, and historical analysis of intercultural engagements and understandings of Pasifika tattoo during and after the South Seas voyages.[24] It was necessary to utilise a methodological framework that used, as well as looked outside of, the law's own methods to meet the breadth of these inquiries. Doctrinal analysis was selected to investigate the exclusionary operations of law, from the perspective of the law's critics.[25] Fieldwork was selected to better understand the legal consciousness of artists and their creative activity as stakeholders in culture.[26] Historical analysis was selected to respond to the gap between top-down and bottom-up understandings of law and appropriation of cultural claimants, conventional scholars, and artists, and investigate cultural appropriation as a form of colonial politics.[27] The three chapters that followed drew upon each of these three methods, in turn.

In chapter 4, I used doctrinal analysis to identify the limitations of the formal legal sphere for protecting cultural interests in imagery and arts styles, the perceived harms of law's complicity in appropriation, and the nature of law reform proposals to secure greater inclusion of Indigenous interests in law. This chapter used the tribal tattoo at the centre of the *Whitmill* case and the controversy that surrounds Whitmill's design inspiration, to identify the formal law's promises, limitations, and violence from the perspective of the law's critics. I examined the document filings and hearing transcripts of the *Whitmill* case in detail and identified the invisibility of Māori cultural

[23] See sections 2.2–2.4 of this thesis.
[24] See sections 3.1–3.3 of this thesis.
[25] See section 3.1 of this thesis.
[26] See section 3.2 of this thesis.
[27] See section 3.3 of this thesis.

interests in tā moko to the formal legal sphere.[28] The problematics of this invisibility from the perspective of conventional scholars was then analysed with close reference to the western bias of law, a loss of Māori control over culture, and cultural harms, such as distortion and dilution of culture, offence, and financial harm.[29] I concluded this chapter by considering Australian and New Zealand law reform proposals put forward to remedy these inadequacies, including the Waitangi Tribunal recommendations for better protecting taonga and taonga-derived works in the Wai 262 claim, Australian copyright and heritage reform proposals, and domestic sui generis TK proposals.[30] I identified the strengths and limitations of each reform model in protecting cultural imagery and arts styles from appropriation, in line with the concerns discussed above.

The next two chapters of the thesis focused on what conventional scholarship misses about the way in which appropriation is negotiated inside and outside of the formal legal sphere: cultural contestation, lived experience, and the relevance of the past to contemporary experiences of appropriation as an oppressive act.

In chapter 5, the fieldwork interviews I conducted with tattoo and tā moko practitioners were used to reflect upon the way in which legal meaning-making and cultural practices in local sites can disrupt the connections drawn by cultural claimants and conventional scholars around appropriation, law, harm, and creative practices. I identified a gap between the constative meaning of cultural appropriation allegations and artist experiences and understandings of appropriation and cultural harm.[31] When producing culture, artists can perform cultural identity differently to cultural claimants, which complicates the regulation of the artform of tā moko.[32] This challenges the solidity of the property at the heart of cultural claims. In chapter 5, I also considered how the lived experience of law – as refracted through the legal consciousness of artists and their daily practices – can present the nature of legality in a different light to conventional scholarship that assumes that the formal law is a

[28] See section 4.2 of this thesis.
[29] See section 4.3 of this thesis.
[30] See section 4.4 of this thesis.
[31] See section 5.1 of this thesis.
[32] See section 5.2 of this thesis.

powerful external regulator.[33] The moko industry and western tattoo subculture are ordered by a range of norms, ethics, and business considerations that have only a tangential relationship to copyright principles. Strong community preferences for self-governance have significant potential to disrupt the efficacy of law reform, were it to be introduced in the future.

In chapter 6, I looked behind the performance of colonial history in conventional scholarship to better understand how history figures in the contemporary enunciation of cultural appropriation claims. I drew out the complex dynamics that mark the historicity of alleging appropriation by examining the connection between oppression and historical representations of, and experiences of, tattoo in the Pacific region. Building an account of racialised subject positions and intercultural dealings in historical sites and trades during and after the South Seas voyages allowed me to show that the presumed superiority of the colonial Self over the colonised "primitive" is longstanding.[34] Appropriation can be understood as a distinctly "colonial" form of consumption today. However, my account also showed that historical intercultural exchanges are also capable of supporting more nuanced and different kinds of relationships than those advanced in the desire framework.[35] The assumptions of oppression that drive the activity of cultural claiming can be disrupted by lived experience and the agency of historical actors. This means that while cultural claiming is a historically contingent activity, the strategic deployment of historical justifications to bolster the case for law reform in contemporary IP discourse is also productive – and, the continuity of experience and practice that is advanced can be undermined by alternate readings of the historical record.

7.3 Final thoughts

When boxer Mike Tyson walked into a Las Vegas tattoo shop and requested that S Victor Whitmill create a design of hearts and diamonds, he set in motion a controversy that provides a unique opportunity to investigate the nexus of IP rights, cultural rights, and the activity of rights claiming in settler states. Throughout this work it has become clear that the politics of cultural appropriation and law reform discourse is far-ranging and has a direct and close relationship with what different

[33] See section 5.3 of this thesis.
[34] See particularly sections 6.2.2 and 6.2.3 of this thesis.
[35] See particularly sections 6.3 and 6.4 of this thesis.

constituencies expect from law. Moreover, that what the positive law can deliver is complicated by the relationship between law and social ordering, and what regulation means in the context of particular cultural and subcultural industries. Law reform scholars need to revise their assumptions about the relationship between cultural appropriation and law in light of this dynamism.

This is not to say that law reform should not be explored as a means to curb the cultural harms that can arise from western IP policies. But rather that we need to be cautious about reform and avoid, as much as possible, reifying law's power. A study of the cultural production of moko and subcultural tattoo practices throws this into relief. The types of arguments and assumptions that are naturalised in law reform strategy are disrupted in significant ways simply by scratching the surface of culture and of law and appreciating both as more complex phenomenon. Thinking about law from within the formal legal frame does not tell us enough about when law is powerful to effect behaviour change versus when it is not. Acknowledging the unpredictability of law over creative practices because of the generative nature of other legal forms is essential, if reform discourse is to have a positive impact in progressing the broader socio-political project of fostering Indigenous autonomy and control of artistic production.

If the contribution of cultural claiming to public discourse is to achieve its mobilising potential, scholars must seek a decentred legal analysis. A more flexible, interdisciplinary approach to cultural appropriation claims and the unwieldiness they exhibit through their multiple, at times conflicting, politics provides a useful starting point for revitalising reform discourse. To meet the expectations of Indigenous peoples disaffected by their persistent, oppressive subalternity, legislative strategies need to reconnect with what is happening on the ground in everyday life in specific, local sites. While formal inclusion in the law would provide a more palatable subject status, much more than subject status is needed for emancipation. *The subaltern must be heard.*

Nearly three decades after legal scholars first identified the western bias of IP law in settler states like Australia and New Zealand, it is time for our reform discourse to immerse itself in the social and confront head-on the very debates, priorities, and meaning-making that is needed to realise the

potential of legality. To do otherwise will continue to stifle the very vitality that is needed to harness law's potential to eradicate the subaltern's inferior subject position.

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Appendix

Appendix 1: Sample interview questions for artists (from 'Human Research Ethics Advisory' application form that provided sample interview questions, November 2011)

What is your background?

Where is your family from?

How long have you been painting/tattooing?

Where did you learn to paint/tattoo?

Did you need permission to start painting/tattooing?

Where do you get your artistic inspiration from?

What stories do you have the right to depict?

What responsibilities do you carry in relation to these stories?

What rules govern the way in which this image is created?

Who may paint/tattoo what?

How do you get the right to paint/tattoo?

Does anyone oversee the painting/tattooing?

Does anyone else contribute to your paintings/tattoos? If so, what is their contribution?

How important is the accurate transmission of the image?

What is the role of creativity in the creation of the work?

How similar is your work to others' who also have the right to paint/tattoo this image?

What happens if you misuse your right to paint/tattoo or misrepresent the underlying stories?

What do you think about people who do not follow the rules associated with the imagery you paint/tattoo?

Do you find this behaviour harmful? If so, how?

How do you feel when unauthorised people use your imagery in their works?

If the person who used your imagery was indigenous, would this make a difference than if the people who used your imagery was non-indigenous?

What effect does the unauthorised imagery have on you, your community, and the image itself?

What do you think the law does about unauthorised use of your imagery?

What would you like the law to do about unauthorised use of your imagery?

Do you think the law does enough to protect your imagery?

Appendix 2: Sample tā moko artist and tattoo artist questions (From 'Questions for Tattoo artists', Fieldwork preparation, February 2012)

Please tell me a little bit about your background, where you're from, how long you've been tattooing, why you got into tattooing, whether you move around or tattoo with a studio, that kind of thing?

Can you explain your typical consultation process?

What types of designs do you usually tattoo, and what types of designs do you like tattooing?

What are your artistic inspirations?

Is it important to you to be original?

Do you draw upon another culture's imagery in your tattoo works?

Do you tattoo tribal or tā moko designs?

Do you see a difference between tribal and tā moko?

Do you see a difference between tā moko and kirituhi designs?

How would you describe your own style of tattooing?

Is it important to you that your clients know the meanings of the works you tattoo on them? Would you still try and educate them if they were not interested in knowing the meaning behind the work (ie they like the design because it is pretty)?

Do you believe there should be restrictions on who should be able to tattoo tā moko or moko-inspired works? (ie on the basis of education, training, knowledge, cultural background) If so, why? If not, why not?

Do you see a place for intellectual property law in everyday tattooing?

Is law a consideration when clients come to you and ask you to reproduce designs (or a celebrity tattoo) for example? Or are any changes you make more about being an ethical and/or creative artist?

Have you heard about the Mike Tyson tattoo case? If so, do you have any opinions on Mike Tyson's tattoo, or about the idea of his tattoo artist having copyright over the image? Do you have any opinion on a non-Māori tattoo artist in the US tattooing a moko-inspired design on a non-Māori?

Do you think you would sue if one of your original designs was ripped off? Why/why not?

Would it make a difference if it was ripped off by another individual and tattooed on them, or whether the design was ripped off by a big company and put on t-shirts, for example, and made a lot of money?

In what circumstances would you expect/want the law to intervene?

Do you think tattooing should have more social regulations against copying because of the expensiveness of suing?

Do you see tattoo to tattoo rip-offs as different from, for example, if someone copied an identifiable whakairo?

Do you see tattoo design rip-offs as different from, from example, canvas artworks being ripped off?

Do you think the copyright infringement test, that is, if a substantial part of an original design is copied that amounts to infringement (this means that even something like 50% of a design copied could amount to infringement, or even something like 20% if the part copied was really important and noticeable in the original design), works for tattoos (where often designs are only changed a little bit, or changes just to suit the new person's body shape or the part on which it is tattooed)?

Where do you see the ownership of your designs as ending?

If this is when the client walks out the door, why do you see your ownership as ending?

If you see your ownership as continuing after the client walks out the door, do you and your client talk about the ramifications of your copyright (ie that they can't screenprint the design onto tshirts, for example, without your permission, or that you'd like to be consulted before they agree to have their picture taken for a tattoo book)?

Do you discuss ownership of the tattoo design at any time?

Do you ever talk about photographs of the tattoo process/ end tattoo with your client?

Do you discuss ownership of any photographs that are taken during or after the tattoo process?

Do you know of Robbie Williams and Ben Harper's tattoos? If so, do you have any opinions on the controversy surrounding their moko/the popularity of their moko?

Do you feel like there are any restrictions on the types of Māori patterns you may draw upon?

To your knowledge, are certain tā moko patterns only found in certain iwis, or are the patterns pretty much common across all iwis?

To your knowledge, are there any guardianship rights or guardians appointed over certain tā moko patterns?

Would it be possible to look at a tattoo and know which iwi/hapū/ whanau the person was from? Ie it is possible for an outsider to "read" moko if they had knowledge of Māori patterns?

If a client came to you and requested tā moko, would you ask them what their background is, or if Māori, if they had consulted with their whanau/hapū about their design? Do you see these types of questions as relevant?

Do many non-Māori clients come in and request tā moko?

If you have tattooed non-Māori clients, have you ever had any negative feedback about this from outsiders?

Do you see a difference between the moko designs you could potentially tattoo on a Māori as compared to a non-Māori?

Do you see any harm in non-Māori's wearing moko/moko-inspired designs?

Do you think Māori patterns should be owned by Māori or free for all to use?

Do you think the law does enough to protect Māori patterns?

How would you feel if you were walking down the road and saw someone else with your moko tattooed on their body?

Would you expect the law to stop this?

Appendix 3: Sample follow up questions (From 'Extra Questions for Tim Hunt', emailed to participant, March 2012)

In your opinion, is it possible for a pākehā tattoo artist to create and tattoo a traditional moko?

Would your answer be different if the artist had trained with a tā moko artist?

Is an artist's ethnicity central to whether a design is classified as "moko", "kirituhi", or "tribal"?

If a tattoo magazine featured one of your designs and you weren't attributed, would you do anything about this?

If you sketch the design before tattooing it, do you keep a sketch of the design after your client has been tattooed? If so, do you consider yourself or the client the owner of this design?

Given the lack of regulation of tattooing in NZ, would you like to see formal qualifications/training introduced for new and emerging tattooists?

Have you ever tattooed a client who was asking for a cover up from a backyard tattoo (/trade me-bought tattoo gun) job?

Have you noticed any effect on your business following the growth in tattoo machines being sold online?

Do you have a policy about the minimum age a client has to be before you'll tattoo them?

Appendix 4: Fieldwork notes (sample notes written directly after a fieldwork interview with a pākehā tattooist, February 2002)

Pip is a woman in her early 40s (?). She has a number of tattoos (but is far from fully covered). She has a tattoo behind her left ear, and a tribal bird down her right arm that finishes on her hand. These two are among her most recent tattoos. She thinks that you should think really closely about tattooing these areas (along with the neck, and chest for females) and has turned away clients who want these areas tattooed for their first tattoo.

Pip has been tattooing for 12 years. She did her apprenticeship with tā moko artists. She originally started out screen-printing tattoo designs onto clothing (she had these designs ripped off once that she knows about, but she felt sorry for the woman that did it. Also didn't mind too much because she knew she'd be able to come up with other designs). Pragmatic about appropriation.

She thinks that Whitmill was a sell-out for pursuing his court case against Warner Bros. She thinks it's stupid that he sued over *that* design in particular. She didn't see Tyson's tattoo as special or particularly artistic or good, it wasn't original and *art* in the same way that some really impressive custom work can be. It doesn't push boundaries. Whitmill did simply what lots of people such as herself has done, a tribal design. Tribal as non-original/not deserving of rights?

Pip disagrees that Tyson's tattoo is moko. She says that she's never seen moko on that part of a person's face in isolation, and as not coming from the centre of the face. She doesn't see the design as having *flow,* it has no life. The fact that it has koru's in the negative does not make it moko. It also has no shading, no intricacy. She firmly believes that it is a tribal work. She said she was quite confused when Ngahuia [Te Awekotuku] and other academics were protesting Mike Tyson's tattoo on grounds that it was Māori. Is this view the norm throughout the tattoo community?

She sees tribal as different to moko because it uses thick black lines and swirls, and lacks that intricacy – tribal as visually distinct, recognisable as non-Māori?

She doesn't agree with people wearing other people's ancestry on their bodies. She sees this as wrong. Sees her own tribal tattoos and the ones she designs for others as different though because she makes

them up (although she did admit to having used one particular Ngāpuhi design because it was pretty – this was only one element of the design and the tattoos are not wholly Ngāpuhi). She thinks that its ethical to change subtly the designs people bring in that they want tattooed (although whether these changes would defeat a copyright claim are unclear) when they are other people's tattoos. She thinks that other tattoo artists would know that her tattoos were done by a pākehā. She's very careful not to overstep the mark between tribal and moko.

Pip personally identifies with tribal tattoos. She likes that they are symbolic rather than graphic and that they tell a story, although some of her tribal tattoos have no overt meaning and she just thinks they're pretty. She says that she draws upon nature when creating her designs, and sees being inspired by the natural world as part of her journey as a fifth generation pākehā. And while some of her designs may have similar elements to tā moko due to their commonality in that both are inspired by nature, it is definitely not *moko*, she came up with it.

She says that she doesn't tattoo a lot of Māori, and the ones that she does tattoo are usually dislocated from their iwi/hapū etc. She gets a lot of tourists, such as French and Germans, especially during the World Cup, and says that she thinks that a lot of them get tribal tattoos when they come to NZ because they want something that has meaning (although a lot of them have no real interest in the underlying Māori symbology etc)

Thinks the idea of not being able to tattoo the koru is silly. Many other cultures have been using similar designs and tattoo images for centuries. It's Indigenous, not Māori in particular. She is quite anti-law in general – sees it as a lot of effort and bother to assert rights. She would definitely lobby against changes to the law such as if korus were locked up as Māori-only (and said she would be out of a job if that happened).

<u>Numerous examples of different rip-offs and controversies</u> –

- men wearing female moko on the chin
- Gordon Hatfield chastising Ben Harper for putting his backpiece onto t-shirts
- Facebook wars about an anchor design rip-off

- example of a woman from Wellington having a strip club logo tattooed on her bottom for $12,000 (auction done through Trade Me)

Assumptions/values

- Only *real* original works deserve protection (not standard tribal that could have been done by anyone ie designs that are not standouts)
- People who sue are ‘precious’ and should just get on with it
- Once her clients walk out the door what they do with their tattoo is their business
- Sees her own tattoos as different from the designs she tattoos. Would be more annoyed if she saw one of her special, custom tattoos on someone else than if one of her own designs was copied. Hierarchy of value.
- Tattoos are a personal journey.